

VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF RICHMOND

VPM NEWS and BEN PAVIOUR,

Petitioners,

v.

VIRGINIA DEPARTMENT OF
EDUCATION,

Respondent.

Case No. _____

BRIEF IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS

VPM News and its reporter Ben Paviour (collectively, “Petitioners”) submit this brief in support of their Petition for Writ of Mandamus (the “Petition”). For the reasons set forth in the Petition and herein, this Court should grant the Petition, issue a writ of mandamus ordering the Virginia Department of Education (“VDOE” or “Respondent”) to release the record sought by Petitioners, and grant Petitioners’ costs, including reasonable attorneys’ fees.

INTRODUCTION

When the Governor’s Office issues written instructions to an agency requiring it to take actions that will affect all students in Pre-K–12 public schools in the Commonwealth, those instructions are the public’s business, and the agency that receives them cannot plausibly—let alone lawfully—claim that those instructions must remain secret as “working papers” of the Governor’s Office. Yet that is precisely what occurred here.

Pursuant to Virginia’s Freedom of Information Act, Va. Code Ann. § 3700, *et seq.* (“VFOIA” or the “Act”), Petitioners, a journalist and news organization, requested from VDOE, *inter alia*, a memorandum from the Governor’s Office instructing VDOE how to carry out

already-issued Executive Orders from the Governor. In response, the agency invoked a narrow statutory exemption intended to permit the Governor’s Office to withhold working papers from public disclosure while individuals within the Governor’s Office deliberate, prior to reaching a decision. *See* Va. Code Ann. § 2.2-3705.7(2) (the “Working Papers Exemption”). VDOE’s assertion of that exemption here is meritless; the record at issue was disseminated to employees of VDOE and was described by one recipient as containing “a breakout of instructions” to VDOE for implementing several Executive Orders that were issued by Governor Glenn Youngkin on his first day in office.

The purpose of the VFOIA is to “promote an increased awareness by all persons of governmental activities and afford every opportunity to citizens to witness the operations of government.” Va. Code Ann. § 3700(B). As such, the Act requires that exemptions to its mandate of disclosure be narrowly construed, and it places the burden on an agency withholding a record to demonstrate by a preponderance of the evidence that the exemption was properly applied. Petitioners submit this brief to inform the Court that the facts pled in their Petition, the Exhibits submitted therewith (which are all public records), and an *in camera* review of the record in question will foreclose any possibility that VDOE can meet that burden.¹ Under the plain text of the Act and the legal guidance offered by both the Attorney General and Virginia Freedom of Information Council, the requested record must be disclosed.

FACTUAL BACKGROUND

On January 18, 2022, Mr. Paviour, in his role as a reporter for VPM News, submitted a VFOIA request to VDOE. Petition ¶ 18. Petitioners’ request sought:

¹ Petitioners also intend to call VDOE’s VFOIA Officer to provide testimony at the hearing required under Va. Code Ann. § 2.2-3731(C).

Copies of any emails in the accounts of both Jillian Balow or Elizabeth Schultz containing the phrase ‘Critical Race Theory’ or ‘divisive concepts’ from 1/13/22 to the date this request is fulfilled.

Exhibit C (the “VFOIA Request”);² Petition ¶ 18. Mr. Paviour received a response to the VFOIA Request on February 1, 2022, that attached a number of responsive records. Petition ¶ 21. However, some responsive records were withheld, purportedly under the Working Papers Exemption, which exempts from mandatory disclosure “[w]orking papers and correspondence of the Office of the Governor.” Va. Code Ann. § 2.2-3705.7(2); Petition ¶¶ 21.

One record withheld by VDOE, the record at issue in this case, was an email attachment titled “EA_Instructions.docx.” Exhibit D; Petition ¶ 22. (Hereinafter, the attachment is referred to as the “EA_Instructions Document”). The EA_Instructions Document was attached to an email received by Jillian Balow, the Superintendent of Public Instruction, a role in which she is the executive officer for VDOE. Exhibit D; Petition ¶¶ 12, 22. Ms. Balow received the EA_Instructions Document when she was blind copied on an email from Ali Ahmad, Director of Policy within the Office of the Governor. Exhibit E; Exhibit D; Petition ¶¶ 25–28. Mr. Ahmad’s email described the contents of the EA_Instructions Document as “a breakout of instructions included in the Governor’s Day One Executive Actions.” Exhibit D; Petition ¶ 28. Twelve minutes after receiving the EA_Instructions Document, Ms. Balow forwarded it as an attachment to two of her colleagues within VDOE, Dicky Shanor and Elizabeth Schultz. Exhibit D; Petition ¶ 22.

Mr. Ahmad’s email description and his blind copy of Ms. Balow make clear that the EA_Instructions Document contained instructions for VDOE to carry out the directives in two

² All “Exhibits” herein refer to those submitted with the Petition.

executive orders issued by Governor Youngkin on his first day in office.³ Petition ¶¶ 26, 28. Specifically, Governor Youngkin first signed an executive order directing Ms. Balow to take certain steps related to identifying and ending policies in Virginia’s public schools promoting or endorsing “[i]nherently divisive concepts like Critical Race Theory and its progeny.” Exhibit A; Petition ¶¶ 10–14. The Governor then signed a second executive order directing Ms. Balow to “rescind the Interim Guidance for COVID-19 Prevention in Virginia PreK-12 Schools . . . and issue new guidance for COVID-19 Prevention,” based on the Governor’s contention that “requiring virtually every child in Virginia wear masks virtually every moment they are in school have proven ineffective and impractical.” Exhibit B; Petition ¶¶ 16–17.

Though Mr. Paviour stated his objections to VDOE’s partial denial of his request, Exhibit C; Petition ¶¶ 30–31, VDOE maintained that the Working Papers Exemption shields the EA_Instructions Document from mandatory disclosure. Petitioners provided VDOE with notice of this lawsuit on Friday, April 8, and subsequently filed their Petition with this Court.

STANDARD OF LAW

VFOIA defines “public records” as “all writings and recordings that consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, . . . or electronic recording or other form of data compilation, however stored, and regardless of physical form or characteristics, prepared or owned by, or in the possession of a public body or its officers, employees or agents in the transaction of public business.” Va. Code Ann. § 2.2-3701. The statute provides that “[a]ll public records . . . shall be presumed open, unless an exemption is properly invoked,” Va. Code Ann. § 2.2-3700(B), and further requires that “all

³ Petitioners have not reviewed the EA_Instructions Document, as its withholding is the reason for this litigation. Petitioners respectfully request that the Court review that record *in camera* to confirm that it matches the description in Mr. Ahmad’s email.

public records shall be available for inspection and copying upon request” unless “a public body or its officers or employees specifically elect to exercise an exemption provided by this chapter or any other statute.” *Id.*

An agency attempting to invoke an exemption from VFOIA’s mandatory disclosure requirement bears the burden of demonstrating, by a preponderance of the evidence, that the exemption applies. Va. Code Ann. § 2.2-3713(E). This statutory provision overrides the common law requirement that a petitioner for writ of mandamus prove that he or she lacks an adequate remedy at law to prevail. *Cartwright v. Commonwealth Transp. Com’r of Virginia*, 270 Va. 58, 66 (2005).

ARGUMENT

I. VDOE cannot meet its burden to show that the Working Papers Exemption applies to the record at issue.

The Working Papers Exemption exempts from mandatory disclosure “[w]orking papers and correspondence of” certain executives, including the “Office of the Governor.” Va. Code Ann. § 2.2-3705.7(2). These statutory terms are interpreted in light of VFOIA’s broad disclosure mandate, which provides that “[a]ny exemption from public access to records . . . shall be narrowly construed and no record shall be withheld . . . unless specifically made exempt pursuant to this chapter or other specific provision of law.” Va. Code Ann. § 2.2-3700(B). While “correspondence” is not defined in the Act, the exemption itself expressly states that memoranda attached to correspondence are *not* exempt, unless the memoranda are themselves working papers. Va. Code Ann. § 2.2-3705.7(2) (“[N]o information that is otherwise open to inspection under [VFOIA] shall be deemed excluded by virtue of the fact that it has been attached to or incorporated within any working paper or correspondence.”).

Thus, the statutory meanings of “working papers” and “Office of the Governor” control this inquiry. “Working papers” is defined in the statute as “those records prepared by or for a public official identified in this subdivision *for his personal or deliberative use.*” *Id.* (italics added). “Office of the Governor” is defined in the statute as “the Governor, the Governor’s chief of staff, counsel, director of policy, and cabinet secretaries, the Assistant to the Governor for Intergovernmental Affairs, and those individuals to whom the Governor has delegated his authority pursuant to § 2.2-104.” *Id.*

The EA_Instructions Document does not fit these statutory definitions. Indeed, as detailed herein, the plain text of the Act, a series of persuasive opinions issued by the Attorney General and Virginia Freedom of Information Council (“VFOIA Council”),⁴ and analogous federal case law interpreting a similar exemption in the federal Freedom of Information Act, 5 U.S.C. § 552 (“Federal FOIA”) all make clear that VDOE cannot meet its burden of demonstrating that it did not violate VFOIA by improperly withholding the EA_Instructions Document. The Working Papers Exemption does not apply to the EA_Instructions Document for each of the following three reasons, any one of which, standing alone, provides a basis for this Court to order its disclosure.

A. The Working Papers Exemption does not apply to records that have been disseminated outside the Governor’s Office.

As Exhibits D and E—both public records provided to Mr. Paviour by VDOE—demonstrate, the EA_Instructions Document was distributed to *at least* six people (and likely far

⁴ The Attorney General is required by statute to give advice and render official opinions when requested to do so by certain governmental bodies or officials. Va. Code Ann. § 2.2-505. The VFOIA Council is an advisory council in the legislative branch created “to encourage and facilitate compliance with the Freedom of Information Act.” Va. Code Ann. § 30-178 *et seq.* Upon request, it provides advisory opinions or guidelines to requesters or public bodies. Va. Code Ann. § 30-179; Va. Code Ann. § 2.2-3704.1(C).

more): Ali Ahmad, Richard Cullen, Matt Moran, Jillian Balow, Elizabeth Schultz, and Dicky Shanor. Exhibits D, E. *At least* two of those people—Ms. Schultz and Mr. Shanor—are unquestionably outside of the statutory definition of “Office of the Governor.” This fact alone forecloses application of the Working Papers Exemption here.⁵

As noted above, “Office of the Governor” is a statutory term that must be narrowly construed because it informs the scope of a VFOIA exemption. Va. Code Ann. § 2.2-3705.7(2); *see* Va. Code Ann. § 2.2-3700(B). Neither Ms. Schultz, the Assistant Superintendent of Public Instruction, Petition ¶¶ 19, 20, nor Mr. Shanor, VDOE Deputy Superintendent and Chief of Staff, Petition ¶¶ 23, 24, hold any role that falls within the statutory definition of that term. As VDOE employees, Ms. Schultz and Mr. Shanor are self-evidently not “the Governor, the Governor’s chief of staff, counsel, director of policy, and cabinet secretaries, [or] the Assistant to the Governor for Intergovernmental Affairs.” Va. Code Ann. § 2.2-3705.7(2). Nor are they individuals to whom the Governor has delegated his authority pursuant to Va. Code Ann. § 2.2-104.⁶

Numerous advisory opinions, which may be viewed as persuasive authority, *see, e.g., Fitzgerald v. Loudoun Cnty. Sheriff’s Off.*, 289 Va. 499, 504–05 & n.2 (2015), make clear that because it was disseminated outside the Governor’s Office the EA_Instructions Document is not

⁵ Petitioners also do not believe VDOE can meet its burden to demonstrate that Ms. Balow and Mr. Moran (a Special Advisor to the Governor) fall within that statutory definition of “Office of the Governor.” Moreover, Petitioners do not believe VDOE can meet its burden to demonstrate that the EA_Instructions Document was not shared more widely still, both within VDOE and beyond. But the Court need not reach these questions, as the dissemination of the EA_Instructions Document to Ms. Schultz and Mr. Shanor, alone, is fatal to VDOE’s attempt to invoke the Working Papers Exemption.

⁶ That statute limits the individuals to whom the Governor may delegate powers to those secretaries and officers in the executive branch “required to be confirmed by the General Assembly or either house thereof.” Va. Code Ann. § 2.2-104. Neither Ms. Schultz nor Mr. Shanor fit that description. Petition ¶¶ 19, 20, 23, 24.

covered by the Working Papers Exemption. Opinions of the Virginia Attorney General interpreting Va. Code Ann. § 2.1-342(b)(4) (1950), the predecessor statute to Va. Code Ann. § 2.2-3705.7(2), conclude that the Working Papers Exemption does not apply to records disseminated or distributed beyond the executive officer identified in that exemption. *See* 1982-83 Va. Op. Att’y Gen. 724 (1983), 1983 WL 164837 (opining that if a record “is held by the chief executive officer . . . it would be exempt from mandatory disclosure . . . [but i]f, however, the letter has been disseminated, it would lose the exemption and would be subject to mandatory disclosure under the act”); 1981–82 Op. Atty. Gen. 438, 1982 WL 175876; 1976–77 Op. Atty. Gen. 315, 1977 WL 27388.

The VFOIA Council has concluded the same. Freedom of Information Advisory Op. AO-08-00 (Nov. 8, 2000), <https://perma.cc/QVW2-A53G> (“[O]nce the chief executive disseminates any records held by him, those records lose the exemption authorized by [the Working Papers Exemption].”); Freedom of Information Advisory Op. AO-12-00 (Dec. 12, 2000), <https://perma.cc/Y5B2-SWFH> (opining that permitting outsiders to inspect a record constitutes dissemination); *see also* Freedom of Information Advisory Op. AO-01-16 (July 11, 2016), <https://perma.cc/6Z7L-CYRC> (“[E]ven if the [record] was originally a working paper prepared for the Office of the Governor’s personal or deliberative use, it has subsequently been disseminated beyond that original personal or deliberative use and therefore is no longer excluded from mandatory disclosure as a working paper.”).

It is irrelevant to the analysis that Ali Ahmad and Richard Cullen also may have reviewed the record in question (if, indeed, they did so). As the above advisory opinions make clear, and as the Circuit Court of Virginia, Fairfax County, has held, the Working Papers Exemption does not apply to public records merely because they are received or read by a public official

identified in Va. Code Ann. § 2.2–3705.7(2). *Hill v. Fairfax Cnty. Sch. Bd.*, 83 Va. Cir. 172 (2011). Because the record was disseminated beyond the officials covered by the exemption, the Working Papers Exemption cannot be invoked.

B. The Working Papers Exemption does not apply to post-decisional memoranda.

Even if the EA_Instructions Document had never been disseminated beyond those individuals listed in the statutory definition of “Office of the Governor,” the nature of the record nonetheless makes it subject to mandatory disclosure. In order to qualify as a “working paper,” a record must have been prepared “for the personal or deliberative use” of an official named in the statute. Va. Code Ann. § 2.2-3705.7(2).

The EA_Instructions Document was not prepared for either reason. To the contrary, according to Mr. Ahmad’s email, the record was a “breakout of instructions” included in Executive Order Nos. 1 and 2. In other words—and as Petitioners believe an *in camera* review of the EA_Instructions Document will confirm—the EA_Instructions Document contains the Governor’s Office’s *instructions* to VDOE for implementing the Governor’s already-issued executive orders. Exhibit D; Petition ¶¶ 22, 28; *see* Exhibit A; Exhibit B. And, even if the EA_Instructions Document were somehow created prior to the executive orders, the issuance of those executive orders would nonetheless require disclosure now, according to an opinion of the VFOIA Council, because “the deliberative process, upon which the working papers exemption is based, end[s] once . . . a particular course of action [is] taken.” Freedom of Information Advisory Op. AO-12-00 (Dec. 12, 2000), <https://perma.cc/Y5B2-SWFH>.

Federal FOIA contains a similar exemption. Under 5 U.S.C. § 552(b)(5) (“Exemption 5”), portions of records containing “deliberations comprising part of a process by which governmental decisions and policies are formulated” are exempt from Federal FOIA’s disclosure

mandate—this is known commonly as the “deliberative process privilege.” *N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975). Though Federal FOIA decisions are not binding upon Commonwealth courts interpreting VFOIA, they may be considered persuasive. *E.g. McChrystal v. Fairfax Cnty. Bd. of Supervisors*, 67 Va. Cir. 171, 2005 WL 832242, at *4 (2005). As such, the below discussion of Exemption 5 is offered to inform the Court’s analysis.

Records or portions thereof do not fall under Federal FOIA’s deliberative process privilege unless they are both “predecisional and deliberative.” *See Mapother v. Dep’t of Justice*, 3 F.3d 1533, 1537 (D.C. Cir. 1993). In determining whether a record meets this criteria, federal courts “ask themselves whether the document is so candid or personal in nature that public disclosure is likely in the future to stifle honest and frank communication within the agency.” *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). In addition, “[t]he identity of the parties to the memorandum is important; a document from a subordinate to a superior official is more likely to be predecisional, while a document moving in the opposite direction is more likely to contain instructions to staff explaining the reasons for a decision already made.” *Id.* at 868.

Here, based upon the description of the EA_Instructions Document contained in Mr. Ahmad’s email, Exhibit D, the record is not deliberative, candid, or personal in nature, but rather contains a set of instructions for VDOE to carry out orders of the Governor. *Id.*; Petition ¶ 28. The record was sent to Ms. Balow, the executive officer of VDOE, who then disseminated it to Ms. Schultz and Mr. Shanor, her subordinates within that agency. Petition ¶¶ 19, 22–23, 25–26, 28. Moreover, the record followed the issuance of Governor Youngkin’s executive orders—necessarily so, as those orders were issued on the Governor’s first day in office. Exhibits A, B; Petition ¶¶ 9, 15. As such, the record was not predecisional. Thus, to the extent this Court looks

to Federal FOIA to guide its inquiry, the relevant caselaw also supports a finding the Working Paper Exemption does not apply to the EA_Instructions Document.

C. Under the VFOIA Council’s recent guidance on the Working Papers Exemption, the EA_Instructions Document must be disclosed.

The dissemination of the EA_Instructions Document beyond the Office of the Governor and the nature of that record are each, standing alone, enough for this Court to determine that VDOE has not properly invoked the Working Papers Exemption. Beyond that, recent guidance from the VFOIA Council also provides a framework for the Court to determine—in view of the Petition and its Exhibits, the publicly known roles of certain governmental officials, and the Court’s *in camera* review of the instant record—that VDOE improperly invoked the purported exemption.

In 2015 and 2016, the VFOIA Council developed a conceptual framework that it concluded should guide the applicability of the Working Papers Exemption. *See* Freedom of Information Advisory Op. AO-01-16 (July 11, 2016), <https://perma.cc/6Z7L-CYRC>; Freedom of Information Advisory Op. AO-02-15 (Mar. 27, 2015), <https://perma.cc/LU8G-2SWZ>. The VFOIA Council summarized its framework by setting forth three factors for consideration:

1. The purpose for which the record was created;
2. The person for whom the record was created;
3. Whether the official who holds the exemption has disclosed the record to others, and if so, whether that disclosure was (i) necessary or desirable to further the official’s own deliberative process, or (ii) dissemination beyond the personal or deliberative use of the official who holds the exemption.

AO-01-16, *supra*; AO-02-15, *supra*.

The first factor, “the purpose for which the record was created,” considers “whether the record at issue meets the statutory definition as a record prepared by or for an above-named public official for his personal or deliberative use.” AO-01-16, *supra*. This inquiry is guided by consideration of “whether the executive merely received the document on behalf of [the]

executive body, or whether it required his review, deliberation, or other subjective evaluation, and thus became part of his work product.” AO-01-16, *supra*. The EA_Instructions Document was not subject to “review, deliberation, or other subjective evaluation,” when the Governor’s Office sent it to VDOE. Indeed, Ms. Balow did not provide “review, deliberation or other subjective evaluation” of the record; instead, she almost immediately forwarded it to other members of VDOE, only 12 minutes after receiving it, with the short message, “[j]ust received.” Exhibit D; Petition ¶ 25.

The second factor, “the person for whom the record was created,” looks to whether the record was prepared for an executive covered by the Working Papers Exemption or whether it was prepared for departmental use by persons falling outside the exemption. AO-01-16, *supra*; AO-02-15, *supra*. Here, the “breakout of instructions” in the Governor’s Day One executive orders was created for agencies outside of the Governor’s Office, including, at least, VDOE. Accordingly, this factor also weighs against the applicability of the Working Papers Exemption.

The third factor, “whether the official who holds the exemption has disclosed the record to others,” considers whether any such dissemination was “(i) necessary or desirable to further the official’s own deliberative process,” or whether it was rather “(ii) . . . beyond the personal or deliberative use of the official who holds the exemption.” AO-01-16, *supra*. The EA_Instructions Document was disseminated to persons outside the Governor’s Office, *see* Exhibit D, and that dissemination was not necessary to further any deliberative process. Not only was the record post-decisional and nondeliberative, as set forth above, but Ms. Balow forwarded the EA_Instructions Document within minutes of receiving it. Exhibit D. This factor too weighs decisively against application of the exemption here.

II. If the Court deems any additional facts that may be asserted by Respondent relevant to its analysis, Petitioners may require limited fact discovery.

The Court's review of the Exhibits submitted in support of the Petition (all of which are public records maintained by VDOE or, in the case of the Executive Orders, the Governor), and its *in camera* review of the EA_Instructions Document, should be sufficient for this Court to determine decisively that the Working Papers Exemption does not apply. In addition, Petitioners intend to serve a summons with their Petition to elicit limited hearing testimony from Rebecca Askew—the FOIA Officer who processed Petitioners' VFOIA Request and denied Petitioners access to the EA_Instructions Document—in the event the Court deems her testimony necessary to resolve this matter.

If the Court determines that still additional facts are relevant to its analysis, Petitioners may seek limited fact discovery as to issues solely within the knowledge of VDOE. As the burden is on VDOE to demonstrate by a preponderance of the evidence that the EA_Instructions Document was appropriately withheld under the Working Papers Exemption, Va. Code Ann. § 2.2-3713(E); *see also Cartwright*, 270 Va. at 66, Petitioners' discovery, if any, will be targeted toward facts demonstrating that Respondent's burden cannot be met.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Court order VDOE to immediately produce the EA_Instructions Document for *in camera* review and issue a writ of mandamus ordering Respondent to release the EA_Instructions Document in full to Petitioners. Petitioners also respectfully request that the Court award Petitioners' reasonable costs, including attorneys' fees.

Respectfully submitted,

April 13, 2022

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CERTIFICATE OF SERVICE

I certify that on or before the 14th day of April, 2022, a copy of the foregoing will be served by email upon the following addresses:

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If additional service is not waived by counsel for respondent, a copy will also be served by private process server upon:

Virginia Department of Education, *Respondent*
c/o Barbara Johnson, Department Secretary
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