

Circuit Court
OF THE
City Of Richmond

MELVIN R. HUGHES, JR.
JUDGE

JOHN MARSHALL COURTS BUILDING
400 NORTH 9TH STREET
RICHMOND, VIRGINIA 23219-1540

January 9, 2015

Fenlene H. Edrington, Esq.
Moreton & Edrington, PLC
297 Herndon Pkwy, Suite 302
Herndon, VA 20170

Wendell C. Roberts, Esq.
Office of the Attorney General of Virginia
900 E. Main St.
Richmond, VA 23219

Re: CL14-4321
Brian C. Davison
v.
Virginia Department of Education, et. al.

Dear Ms. Edrington & Mr. Roberts:

In this proceeding initiated by Brian C. Davison in a Petition for a Writ of Mandamus under the Virginia Freedom of Information Act (FOIA or the Act), the issue is whether the Virginia Department of Education (VDOE) should be required to provide English and Math SGP assessment score results for Loudoun County, by teacher and by school, for the last five years as well as the methodology used to calculate the assessment scores. SGP scores or Student Growth Percentile scores measure how much progress a student has made. VDOE makes SOL or Standard of Learning scores available but not SGP ones. SOL measures if a student has minimum proficiency in a given subject. A hearing was held on December 12, 2014, at which time

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witnesses testified, including petitioner, and employees of the Virginia Department of Education.

Generally FOIA affords access to government information. Va. Code § 2.2-3700(B). It provides (i) that all "public records ... shall be presumed open, unless an exemption is properly invoked"; (ii) its provisions are to be liberally construed to effectuate its purposes; (iii) its statutory exclusions exempting certain records from disclosure are to be narrowly construed; and (iv) no public record shall be withheld unless specifically made exempt. *Id.* Here, VDOE, in ultimately refusing to disclose the SGP scores, relies on a scholastic records exemption found in Va. Code § 2.2-3705.4.

Under FOIA, any citizen, like Davison, may make a request to inspect and copy public documents. Va. Code § 2.2-3704(A). Such documents must be provided unless an agency's obligation to disclose them is prevented either by the Act or by other laws. *Id.* Failure by the government to respond to a request for disclosure of documents is deemed a denial of that request. Va. Code § 2.2-3704(E). The General Assembly has declared in Va. Code §2.2-3713 (E) that the burden is upon the public body to prove by a preponderance of the evidence that an exemption to FOIA exists.

At the hearing, the court received evidence through the testimony of the petitioner, Susan Williams, VDOE's Information Officer and designee for receiving FOIA requests and Beth Ann Canada, VDOE's Director of Education Information Management. It is clear from the testimony that VDOE gathers the information on test results from Loudoun County to produce SGP scores and that this is accomplished, in part, under federal law for receipt of federal funds. It was also made clear the VDOE maintains the records of the kind in an electronic database.

As noted, the exemption that VDOE relies on is that of "scholastic records" found in Va. Code § 2.2-3705.4. This section covers a number of exemptions related to scholastic records. Here, the issue seems to be confined to whether the information sought contains "information concerning identifiable individuals" so as to fall within the exemption. VDOE also maintains that under federal law, namely The Family Educational

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Rights and Privacy Act (FERPA), 20 U.S.C. 12329, there is a requirement of confidentiality of education records and that disclosure is only permitted upon student's consent. Any violation may result in the termination of federal assistance.

Again, there is agreement that information sought is stored in a database. The Court understands this to be storage electronically rather than in hardcopy. FOIA speaks to "[p]ublic records maintained by a public body in an electronic data processing system. . ." in Va. Code §2.2-3704(G). Subsection (D) of this statute further provides that "[s]ubject to the provisions of subsection G, no public body shall be required to create a new record if the record does not already exist." Subsection (G), in relevant part, provides "[w]hen electronic or other databases are combined or contain exempt and non-exempt records, the public body may provide access to the exempt records if not otherwise prohibited by law, but shall provide access to the non-exempt records as provided in this chapter." The statute further provides that ". . .excision of exempt fields of information from a database or the conversion of data from one available format to another shall not be deemed the creation, preparation or compilation of new public record."

It is evident from the testimony and exhibits that the database can be called upon to produce various reports relative to SGP. One such exhibit, the Sample Virginia Student Growth Percentile Report, demonstrates such a producible report which can identify fields sufficient for "information concerning identifiable individuals." But, the testimony was that these identifiable fields can be removed ". . .from one available format to another. . ." without being "deemed the creation . . . of a new public record."

With the foregoing statute in mind, as well as the direction by the General Assembly that FOIA is to be liberally construed and exemptions narrowly construed, the writ shall issue. The compliance to be ordered shall be without identifying information and with appropriate safeguards for student confidentiality.

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Lastly, petitioner seeks to have Williams and Canada face a civil penalty of \$500-\$2000 pursuant to Va. Code §2.2-3714. This is available upon a finding of a violation of FOIA was willingly and knowingly made. From the evidence of the course of dealing between and after petitioner's continued request and VDOE's final decision to deny it, nothing about the agency's reaction to the request through Williams and Canada approaches a basis for a finding of willful and knowing conduct to violate FOIA. Thus, this request will be denied.

Ms. Edrington is directed to provide a suitable draft of order with exceptions noted.

Very truly yours,

A handwritten signature in blue ink, appearing to read "Melvin R. Hughes, Jr.", with a stylized flourish at the end.

Melvin R. Hughes, Jr.

slc