

VIRGINIA:

IN THE DISTRICT COURT FOR ARLINGTON COUNTY, VIRGINIA

ELECTRONIC PRIVACY INFORMATION CENTER
1718 Connecticut Ave., NW, Suite 200
Washington, DC 20009

Plaintiff,

v.

CAPT. J. THOMAS MARTIN, in his official capacity as Captain of the Virginia Department of State Police
Administrative Headquarters
7700 Midlothian Turnpike
Richmond, Virginia 23235

and

THE VIRGINIA DEPARTMENT OF STATE POLICE
Administrative Headquarters
7700 Midlothian Turnpike
Richmond, Virginia 23235

Defendants.

CASE NO. _____

ATTACHMENT A

COMES NOW Plaintiff the Electronic Privacy Information Center, and for its Complaint against Defendants Capt. J. Thomas Martin, in his official capacity as Captain of the Virginia Department of State Police, and the Virginia Department of State Police, states as follows:

Introduction

1. This is an action under the Virginia Freedom of Information Act (“FOIA”), Va. Code Ann. § 2.2-3700 (2007), for mandamus relief, seeking the release of public records requested by the Electronic Privacy Information Center from the Virginia Department of State Police.

2. Plaintiff requests an expedited hearing, and asks that a hearing on this matter be set within seven days of this filing, consistent with Va. Code Ann. § 2.2-3713(C) (2007).

The Parties

3. Plaintiff Electronic Privacy Information Center (“EPIC”) is a public interest research organization incorporated as a not-for-profit corporation in Washington, D.C. EPIC’s activities include the review of federal and state government activities and policies to determine their possible impacts on civil liberties and privacy interests. Among its other activities, EPIC publishes books, reports, and a bi-weekly electronic newsletter. EPIC also maintains a heavily visited Internet site, <http://www.epic.org>, which contains extensive information regarding privacy issues, including information EPIC has obtained from government agencies under federal and state freedom of information laws. EPIC appears through Marc Rotenberg, President of EPIC, pursuant to Va. Code Ann. § 2.2-3713(B) (2007).

4. Defendant Capt. J. Thomas Martin is a Captain of the Virginia Department of State Police, and is sued in his official capacity.

5. Defendant the Virginia Department of State Police is a department of the Commonwealth of Virginia, and a public body within the meaning of Va. Code Ann. § 2.2-3701 (2007).

6. Defendants are collectively referenced herein as the “VSP.”

Jurisdiction and Venue

7. This Court's personal jurisdiction over the VSP is manifest.

8. This Court has subject matter jurisdiction over this matter, and venue is proper in this Court, pursuant to Va. Code Ann. § 2.2-3713(A) (2007).

Facts

The Virginia Fusion Intelligence Center

9. On March 20, 2005, the Virginia Fusion Intelligence Center (the "Virginia Fusion Center") was established pursuant to Va. Code Ann. § 52-47 (2007).

10. The Virginia Fusion Center's stated purpose is to "receive and integrate terrorist-related intelligence and information."

11. The VSP operates the Virginia Fusion Center.

12. The Virginia Fusion Center is one of several similar entities established by state governments throughout the United States.

13. The Virginia Fusion Center's operations involve contact with federal agencies, including the U.S. Department of Homeland Security and the U.S. Department of Justice, as well as other federal programs, including the National Criminal Intelligence Sharing Plan and the Criminal Intelligence Coordinating Council.

14. Federal guidelines state that the Virginia Fusion Center should accumulate and retain information about Virginia residents from a wide range of public and private sources.

15. Such information includes, but is not limited to: financial records, credit reports, medical records, internet and email data, video surveillance from retail stores and sporting facilities, data from preschools, and welfare records.

The Virginia General Assembly Proposed to Exempt the Virginia Fusion Center from Virginia Privacy Laws

16. On January 8, 2008, Virginia Delegate Dwight Clinton Jones introduced HB 1007 before the Virginia General Assembly.

17. The provisions set forth in HB 1007 would, among other things, limit Virginia's open government and privacy laws, including the Virginia Freedom of Information Act and the Virginia Collections and Disseminations Practices Act, for Virginia agencies connected to the Virginia Fusion Center.

EPIC Submitted FOIA Requests to the VSP Regarding the Federal Government's Involvement with the Virginia Fusion Center and HB 1007

18. On February 12, 2008, EPIC transmitted written FOIA requests to the VSP for public records ("EPIC's FOIA Requests"). EPIC requested the following public records:

- a. all correspondence, communications, and records of meetings between the Virginia Department of State Police ("VSP") and the U.S. Department of Homeland Security concerning the Virginia Fusion Center, including funding, development, and impact on the Virginia Freedom of Information Act and the Virginia Collections and Disseminations Practices Act;
- b. all correspondence, communications, and records of meetings between the VSP and the U.S. Department of Justice concerning the Virginia Fusion Center, including funding, development, and impact on the Virginia Freedom of Information Act and the Virginia Collections and Disseminations Practices Act; and
- c. all correspondence, communications, and records of meetings between the VSP and the Institute for Intergovernmental Research concerning the Virginia Fusion Center, including funding, development, and impact on the Virginia Freedom of Information Act and the Virginia Collections and Disseminations Practices Act.

19. EPIC urged the VSP to provide the requested public records as soon as possible because of the public records' relevance to the Virginia General Assembly's consideration of pending legislation that impacts the rights of Virginia residents, *i.e.* HB 1007.

The VSP Failed to Produce Any Public Records in Response to EPIC's FOIA Requests

20. On February 19, 2008, the VSP responded to EPIC's FOIA Requests ("VSP Letter").
21. Defendant Capt. J. Thomas Martin is the signatory of the VSP Letter.
22. The VSP Letter acknowledges the VSP's receipt of EPIC's FOIA Requests, and indicates that the VSP will not disclose any documents in response to EPIC's FOIA Requests.
23. The VSP Letter indicates that the VSP does not intend to disclose records responsive to EPIC's FOIA Requests under the Virginia open government law.
24. Through the date of this pleading, the VSP has not produced any documents to EPIC in response to EPIC's FOIA Requests.

COUNT I

Violation of Va. Code Ann. § 2.2-3704(B)(1)

(Public records to be open to inspection; procedure for requesting records and responding to request; charges)

25. Paragraphs 1-24 above are hereby incorporated by reference as if set forth fully herein.
26. The VSP Letter indicates that, in response to EPIC's FOIA Requests, the VSP is withholding all requested public records.
27. Pursuant to the FOIA, Va. Code Ann. § 2.2-3704(B)(1) (2007), the VSP was therefore required to "identify with reasonable particularity the volume and subject matter of withheld records, and cite, as to each category of withheld records, the specific Code section that authorizes the withholding of the records."
28. The VSP was required to do so within five working days of receiving EPIC's FOIA Requests.

29. As of the date of this pleading, more than five days have elapsed since the VSP received EPIC's FOIA Requests.

30. The VSP violated Va. Code Ann. § 2.2-3704(B)(1) (2007) by not identifying with reasonable particularity the volume and subject matter of all withheld records.

31. The VSP violated Va. Code Ann. § 2.2-3704(B)(1) (2007) by not citing, as to each category of withheld records, the specific Code section that allegedly authorizes the withholding of the records.

COUNT II
Violation of Va. Code Ann. § 2.2-3704(B)
(Public records to be open to inspection; procedure for requesting records and responding to request; charges)

32. Paragraphs 1-31 above are hereby incorporated by reference as if set forth fully herein.

33. Pursuant to Va. Code Ann. § 2.2-3704(B) (2007), the VSP was required to provide the requested records to EPIC unless the requested records are excluded from mandatory disclosure under the FOIA.

34. The VSP was required to do so within five working days of receiving EPIC's FOIA Requests.

35. As of the date of this pleading, more than five days have elapsed since the VSP received EPIC's FOIA Requests.

36. The VSP violated Va. Code Ann. § 2.2-3704(B) (2007) by not providing the requested records to EPIC.

37. The VSP Letter alleges that all public records requested by EPIC are excluded from mandatory disclosure under the FOIA.

38. The VSP Letter alleges that some public records requested by EPIC are excluded pursuant to 28 CFR §§ 23.1 - 23.20 (2007) as incorporated through Va. Code Ann. § 2.2-3704(A) (2007) because they qualify for “[t]he federal protection enjoyed by criminal intelligence.”

39. 28 CFR § 23.3 (2007) defines “criminal intelligence information” as “data which has been evaluated to determine that it: (i) Is relevant to the identification of and the criminal activity engaged in by an individual who or organization which is reasonably suspected of involvement in criminal activity, and (ii) meets criminal intelligence system submission criteria.”

40. The public records requested by EPIC’s FOIA Requests are not “relevant to the identification of criminal activity.”

41. This alleged exclusion is particularly inapplicable to EPIC’s requests for “communications ... between the VSP and [federal agencies] concerning the ... funding and development” of the Virginia Fusion Center, as well as the “impact on the Virginia Freedom of Information Act and the Virginia Collections and Disseminations Practices Act.”

42. The VSP’s asserted “criminal intelligence information” exclusion is therefore facially inapplicable to EPIC’s FOIA Requests.

43. The VSP Letter further alleges that some public records requested by EPIC are excluded pursuant to Va. Code Ann. § 2.2-3705.2(4) (2007).

44. Va. Code Ann. § 2.2-3705.2(4) (2007) excludes from mandatory FOIA disclosure “[p]lans and information to prevent or respond to terrorist activity, the disclosure of which would jeopardize the safety of any person,” including but not limited to: “critical infrastructure sector or structural components;” “vulnerability assessments;” “tactical planning or training manuals;” and “engineering or architectural records.”

45. The public records requested by EPIC's FOIA Requests are not "plans and information to prevent or respond to terrorist activity, the disclosure of which would jeopardize the safety of any person."

46. This alleged exclusion is particularly inapplicable to EPIC's requests for "communications ... between the VSP and [federal agencies] concerning the ... funding and development" of the Virginia Fusion Center, as well as the "impact on the Virginia Freedom of Information Act and the Virginia Collections and Disseminations Practices Act."

47. The VSP's asserted Section 2.2-3705.2(4) (2007) exclusion is therefore facially inapplicable to EPIC's FOIA Requests.

48. The VSP Letter further alleges that some public records requested by EPIC are excluded pursuant to Va. Code Ann. § 2.2-3706(F)(1) (2007).

49. Va. Code Ann. § 2.2-3706(F)(1) (2007) excludes from mandatory FOIA disclosure "[c]omplaints, memoranda, correspondence, case files or reports, witness statements, and evidence relating to a criminal investigation or prosecution, other than criminal incident information."

50. The public records requested by EPIC's FOIA Requests are not "[c]omplaints, memoranda, correspondence, case files or reports, witness statements, and evidence relating to a criminal investigation or prosecution, other than criminal incident information."

51. This alleged exclusion is particularly inapplicable to EPIC's requests for "communications ... between the VSP and [federal agencies] concerning the ... funding and development" of the Virginia Fusion Center, as well as the "impact on the Virginia Freedom of Information Act and the Virginia Collections and Disseminations Practices Act."

52. The VSP's asserted Section 2.2-3706(F)(1) (2007) exclusion is therefore facially inapplicable to EPIC's FOIA Requests.

53. The VSP Letter further alleges that some public records requested by EPIC are excluded pursuant to Va. Code Ann. § 2.2-3802(7) (2007).

54. Va. Code Ann. § 2.2-3802(7) (2007) sets forth exclusions applicable to requests made under the Virginia Collections and Disseminations Practices Act.

55. EPIC's FOIA Requests were made under the FOIA, not the Virginia Collections and Disseminations Practices Act.

56. The VSP's asserted Section 2.2-3802(7) (2007) exclusion is therefore facially inapplicable to EPIC's FOIA Requests.

Requested Relief

WHEREFORE, plaintiff prays that this Court:

- A. set a hearing on this matter within seven days, pursuant to Va. Code Ann. § 2.2-3713(C) (2007).
- B. order defendant to make a complete response to EPIC's FOIA Requests within two working days of the date of the Court's Order in this matter;
- C. order defendant to provide all responsive public records to plaintiff within five working days of the Court's Order in this matter;
- D. award plaintiff its costs and reasonable attorneys' fees incurred in this action pursuant to Va. Code Ann. § 2.2-3713(D) (2007); and
- E. grant such other relief as the Court may deem just and proper.

Respectfully submitted,

By:



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*on behalf of plaintiff pursuant to
Va. Code Ann. § 2.2-3713(B) (2007)*

Dated: March 21, 2008