

1 VIRGINIA: IN THE GENERAL DISTRICT COURT OF THE CITY
OF RICHMOND
2 JOHN MARSHALL COURTS BUILDING

3

4 DAVID WEBSTER, II

5 Plaintiff,

v.

Case Number GV20014728-00

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EILEEN FILLER-CORN, SPEAKER
7 OF THE HOUSE OF DELEGATES,

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Defendant.

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EXCERPT OF HEARING - COURT'S RULINGS

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Before: HONORABLE TRACY THORNE-BEGLAND, JUDGE

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October 9, 2020

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Richmond, Virginia

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HALASZ REPORTING

24

1011 E. Main Street
Richmond, Virginia 23219
(804) 708-0025

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Reported by: Marion G. Whitlow

1 **Appearances:**

2 **ANDERSON & ANDERSON**
3 **By: TIMOTHY ANDERSON, ESQ.**
4 **attorney, of counsel for Plaintiff**

5 **OFFICE OF THE ATTORNEY GENERAL**
6 **By: ROBERT B. MCENTEE, III, ESQ.**
7 **attorney, of counsel for Defendant**

8 **Also present:**

9 **David Webster, II**

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(The court reporter was sworn at the beginning of the hearing.)

THE COURT: All right. With regard to the issue of mandamus, in some respects I think mandamus is essentially moot at this point given the fact that Mr. Webster has already received the documents that he sought from another agency. So, I'm not going to enter an order of mandamus against the Speaker of the House because it's been rendered moot.

With regard to the provisions under 2.2-3714, the Court does conclude that there was a violation of the FOIA statute. And I conclude that because while there is a presumption of regularity in the operations of government -- and I'm referencing the WTAR Radio versus Virginia Beach case from the Supreme Court of Virginia. That case talks about the presumption that agencies are operating appropriately. There's just -- it just strains credulity here to conclude that the Speaker was unaware of the existence of these records and unaware of at least a starting point as to where they were. I would agree that she has no duty to make an expansive recommendation, but when she has directed an action that was complied with

1 by her clerk that specifically references the hiring
2 of a company, I think it's unreasonable to conclude
3 that she was unaware of the existence of a contract
4 and I think it's unreasonable to conclude that she
5 should not have made a bare-bones effort to locate the
6 government agency that had these documents.

7 So, the Court does find the violation
8 under 2.2-3714. The Court will issue -- it provides
9 for a civil penalty of not less than \$500, nor more
10 than \$2,000. The Court will issue a penalty in the
11 amount of \$500.

12 That takes us to the request for
13 attorney's fees. What are you relying on for attorney
14 fees?

15 MR. ANDERSON: Your Honor, the exhibit
16 that has been admitted of my time of record. I've
17 created and redacted --

18 THE COURT: Well, but Virginia like many
19 states is a creature of statute when it comes to
20 attorney's fees. What statutory provision are you
21 relying on?

22 MR. ANDERSON: I'm sorry, Judge. It is
23 included -- it is part of the FOIA request, the FOIA
24 statute.

25 THE COURT: I didn't see that under the

1 penalties provision.

2 MR. ANDERSON: 3713 Section D.

3 THE COURT: All right. Do you agree with
4 that, Mr. McEntee?

5 MR. MCENTEE: We agree that is the
6 applicable provision, yes.

7 THE COURT: That does appear to be the
8 controlling authority. Do you wish to be heard, Mr.
9 McEntee, with regard to the specifics contained in
10 Plaintiff's Exhibit Number 1, the list of time?

11 MR. MCENTEE: I'm going to comment on
12 that. This is a three-part analysis. So, we have to
13 determine whether the fees are reasonable. I would
14 like to comment on that in my argument.

15 THE COURT: All right. I'm happy to hear
16 from you on that.

17 MR. MCENTEE: Determining whether or not
18 attorney's fees are applicable under 3713(d), the
19 Court first has to maintain that the petitioner has
20 substantially prevailed on the merits of the case
21 here. So, just to give the Court procedural history,
22 this is not just copies of contracts. This was four
23 specific Freedom of Information Act requests. And one
24 of them was moot because he pursued the alternative
25 legal remedy and he was denied the other three back in

1 August. So, I think whether or not he has
2 substantially prevailed on the merits of the case here
3 I think is out of the question. He's found a
4 technical violation here. He has not achieved the
5 principal purpose of what the mandamus was initially
6 filed for. Now, that section of the Code actually
7 authorizes this Court to consider a variety of factors
8 in determining whether or not he substantially
9 prevailed on the merits of the case. I had a case
10 from actually the Circuit Court of Richmond where
11 there was a technical violation found of the Freedom
12 of Information Act, yet even though there was a
13 technical violation there was no awarding of
14 attorney's fees because they found that he did not
15 substantially prevail on the merits of the case. This
16 case is significantly different. I will proffer it to
17 the Court though.

18 THE COURT: Thank you, Mr. McEntee. I'll
19 be happy to receive it. Thank you, Sheriff.

20 Anything else on that, Mr. McEntee?

21 MR. MCENTEE: Just the first element,
22 Your Honor. The Court did not compel the Speaker to
23 produce any records by way of mandamus. This is a
24 technical violation. The Court has already imposed a
25 civil penalty on the Speaker. I think to award

1 attorney's fees in this case goes beyond whether or
2 not he substantially prevailed on the merits of the
3 case.

4 The second element that the Court has to
5 consider if he has -- finds that he has prevailed on
6 the merits of the case, the Court has to find that do
7 special circumstances exist to make that award unjust.
8 I think in this case, from the Freedom Of Information
9 Act Advisory Council opinions I've proffered to the
10 Court, that's what the respondents relied on in this
11 case. They relied on the specific authority that they
12 could respond that documents do not exist would not be
13 interpreted as -- that they were conforming to the
14 requirements of the statute. So, I think that
15 reliance on the Freedom of Information Act Advisory
16 Council makes that special circumstances.

17 And to the last matter, are the fees
18 reasonable. Looking at Mr. Anderson's fee list, I
19 will note to the Court that almost all of these
20 transactions were entered after the requested
21 documents were found. This has mostly been pursued as
22 a technical violation. Most of it is email
23 communication. There's very little research being
24 done. The Court can also consider the complexity of
25 the case. There was no discovery in this case. There

1 were no depositions. There was no research performed
2 whatsoever. And lastly, that Mr. Anderson includes
3 court reporters. This is his forum of preference. He
4 sued in the General District Court. So, I don't
5 believe those fees should be included either.

6 THE COURT: All right. Mr. Anderson.

7 MR. ANDERSON: Your Honor, I think
8 there's a big difference between losing a case and a
9 case being declared moot when it comes to attorney's
10 fees. Your Honor just ruled -- found that the Speaker
11 should face a civil penalty for her violation of the
12 Freedom of Information Act. Reading the plain
13 language of 3713(d), if the Court finds the denial to
14 be in violation of provisions of the chapter, stop
15 there. You already found that. You've already
16 imposed a civil penalty. So, attorney's fees apply in
17 this case. Sure, we didn't win from a standpoint of
18 you issued mandamus, but that's because we got the
19 records from somebody other than the Speaker. Still
20 she has not done that. So, I think the plain reading
21 of the statutory language and what the Court's already
22 found by issuing civil penalty grants attorney's fees.
23 I will point out on October 9, which is today, those
24 are estimated fees. We're only going to be here for
25 one hour instead of two. And we brought a court

1 reporter and they brought a court reporter. So, I
2 sent my court reporter home. I don't expect we're
3 going to get a \$280 bill. It will be something, I
4 don't know, but I don't think it will be \$280. But,
5 the rest of this, Judge, I believe is recoverable to
6 the plaintiff.

7 THE COURT: All right. The Court in
8 looking at Plaintiff's Exhibit 1 sees billable hours
9 listed from the dates of August 10th through October
10 9th. The General Services Administration appears to
11 have responded on the issue of the FOIA request to
12 them on September 3rd. I will award the attorney's
13 fees up and through that date but not after that date.
14 I calculate that, including the court reporter
15 appearance for the initial hearing, at \$1995. The
16 Court will order attorney's fees in that amount.

17 I believe that should conclude
18 everything here. Anything else, gentlemen?

19 MR. ANDERSON: No, sir. As far as an
20 order, who's to prepare that? It's really not --

21 THE COURT: It's not a particularly
22 complex issue. I can just have the Clerk generate a
23 judgment sheet.

24 MR. ANDERSON: Okay. Thank you, Judge.

25 THE COURT: Thank you everybody.

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(The hearing was concluded at

REPORTER'S CERTIFICATE

I do hereby certify that the foregoing is a true and
correct transcript of my shorthand notes taken in this
matter.

Marion G. Whitlow

Marion G. Whitlow - Notary Public
Commonwealth of Virginia at Large

Notary Registration Number 223323

<hr/> <p style="text-align: center;">\$</p> <hr/> <p>\$1995 9:15 \$2,000 4:10 \$280 9:3,4 \$500 4:9,11</p> <hr/> <p style="text-align: center;">1</p> <hr/> <p>1 5:10 9:8 10th 9:9</p> <hr/> <p style="text-align: center;">2</p> <hr/> <p>2.2-3714 3:13 4:8</p> <hr/> <p style="text-align: center;">3</p> <hr/> <p>3713 5:2 3713(d) 5:18 8:13 3rd 9:12</p> <hr/> <p style="text-align: center;">9</p> <hr/> <p>9 8:23 9th 9:10</p> <hr/> <p style="text-align: center;">A</p> <hr/> <p>achieved 6:4 Act 5:23 6:12 7:9,15 8:12 action 3:25 Administration 9:10 admitted 4:16 Advisory 7:9,15 agencies 3:19 agency 3:9 4:6 agree 3:23 5:3,5 alternative 5:24 amount 4:11 9:16 analysis 5:12</p>	<p>Anderson 4:15,22 5:2 8:2,6,7 9:19,24 Anderson's 7:18 appearance 9:15 appears 9:10 applicable 5:6,18 apply 8:16 appropriately 3:19 argument 5:14 attorney 4:13 attorney's 4:13,20 5:18 6:14 7:1 8:9,16,22 9:12,16 August 6:1 9:9 authority 5:8 7:11 authorizes 6:7 award 6:25 7:7 9:12 awarding 6:13</p> <hr/> <p style="text-align: center;">B</p> <hr/> <p>back 5:25 bare-bones 4:5 Beach 3:17 beginning 3:3 big 8:8 bill 9:3 billable 9:8 brought 8:25 9:1</p> <hr/> <p style="text-align: center;">C</p> <hr/> <p>calculate 9:14 case 3:17,18 5:20 6:2,9,15,16 7:1,3,6,8,11,25 8:8,9,17 chapter 8:14 Circuit 6:10 circumstances 7:7,16 civil 4:9 6:25 8:11,16,22 clerk 4:1 9:22</p>	<p>Code 6:6 comment 5:11,14 communication 7:23 company 4:2 compel 6:22 complex 9:22 complexity 7:24 complied 3:25 conclude 3:13,14,21 4:2,4 9:17 conforming 7:13 contained 5:9 contract 4:3 contracts 5:22 controlling 5:8 copies 5:22 Council 7:9,16 court 3:3,5,13,18 4:7,8,10,18,25 5:3,7,15,19,21 6:7,10,17,18,22,24 7:4,6,10,19,24 8:3,4,6,13,25 9:1, 2,7,14,16,21,25 Court's 8:21 created 4:17 creature 4:19 credulity 3:20</p> <hr/> <p style="text-align: center;">D</p> <hr/> <p>date 9:13 dates 9:9 declared 8:9 denial 8:13 denied 5:25 depositions 8:1 determine 5:13 determining 5:17 6:8 difference 8:8 directed 3:25 discovery 7:25 District 8:4</p>
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