

VIRGINIA:
IN THE CIRCUIT COURT OF FAIRFAX COUNTY

GAY GARDNER,

Petitioner,

v.

VIRGINIA DEPARTMENT OF
CORRECTIONS,

Defendant.

Case No. _____

VERIFIED PETITION FOR WRIT OF MANDAMUS

Petitioner Gay Gardner petitions this Court for the issuance of a writ of mandamus pursuant to Va. Code § 2.2–3713 to compel the Virginia Department of Corrections (“VADOC” or “Respondent”) to comply with the provisions of the Virginia Freedom of Information Act, Va. Code § 2.2–3700 *et seq.*, and in support thereof states:

1. This is an action under the Virginia Freedom of Information Act, Va. Code § 2.2–3700, *et seq.* (“VAFOIA”).

2. As described herein, Petitioner filed a records request with VADOC pursuant to VAFOIA for public records related to the treatment of Muslim inmates at Wallens Ridge State Prison (“Wallens Ridge”) in Big Stone Gap, Virginia (“the Request”). Respondent declined to release records pertaining to multiple parts of the Request, improperly claiming that the records sought were exempted from disclosure pursuant to Va. Code § 2.2–3706(B)(4) (“(B)(4) Exemption”).

3. However, the (B)(4) Exemption does not cover the withheld records. As such, Petitioner is entitled to the withheld records and requests that this Court grant her such relief.

JURISDICTION AND VENUE

4. This Court has personal jurisdiction over this matter pursuant to Va. Code § 2.2–3713(A), since VADOC is an agency of the state of Virginia.

5. This Court has subject matter jurisdiction over this matter pursuant to Va. Code § 2.2–3713(A), which grants jurisdiction over mandamus actions for the enforcement of VAFOIA to “the circuit court of the residence of the aggrieved party.”

6. This Court is the proper venue for this matter pursuant to Va. Code § 2.2–3713(A)(3), because petitions involving state agencies such as VADOC may be filed in “the circuit court of the residence of the aggrieved party.”

PARTIES

7. Petitioner Gay Gardner is a citizen of the Commonwealth of Virginia and resides in Fairfax County, Virginia. She is the Senior Advisor for Virginia for Interfaith Action for Human Rights, an interfaith human rights organization that seeks to counter bigotry against vulnerable populations in Virginia, the District of Columbia, and Maryland. Much of their work involves advocacy on behalf of inmates of the Virginia prison system.

8. Respondent VADOC is the Virginia government agency responsible for the operation of Virginia’s 41 state facilities that provide custody, care, and supervision of all people incarcerated therein, and for associated reentry services. VADOC incarcerates approximately 27,000 Virginians.¹ Respondent is thus a public body of the Commonwealth of Virginia and is

¹ Research Unit, Statistical Analysis & Forecast Unit, *Monthly Population Summary June 2020*, VA. DEP’T OF CORRECTIONS, <https://vadoc.virginia.gov/media/1574/vadoc-monthly-offender-population-report-2020-06.pdf> (last accessed Aug. 17, 2020).

governed by the disclosure requirements of VAFOIA. Va. Code §§ 2.2–3700, 2.2–3701. VADOC is the legal custodian of the public records Petitioner seeks.

THE VIRGINIA FREEDOM OF INFORMATION ACT

9. VAFOIA defines “public records” as “all writings and recordings that consist of letters, words or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photography, magnetic impulse, optical or magneto-optical form, mechanical 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 § 2.2– 3701.

10. VAFOIA provides that it “shall be liberally construed” to promote awareness of governmental actions and “afford every opportunity to citizens to witness the operations of government.” *Id.* § 2.2– 3700(B). It further mandates that any exemptions be construed “narrowly” and that no record be withheld unless that record is “specifically made exempt pursuant to [VAFOIA] or other specific provision of law.” *Id.* VAFOIA establishes that the statute cannot be construed to discourage “free discussion” between Virginia citizens and Virginia government officials and employees. *See id.*

11. Under the VAFOIA, a public agency can only withhold a public record in its entirety if “exclusion from disclosure under this chapter or other provision of law applies to the **entire content of the public record.**” *Id.* § 2.2–3704.01 (emphasis added). Otherwise, the agency may only withhold those portions of “the public record containing information subject to an exclusion under this chapter or other provision of law may be withheld.” *Id.* All other non-covered portions of the public record **must** be disclosed. *See id.* (emphasis added). VADOC’s VAFOIA guidelines further provide that “Staff may not withhold an entire record when only a portion is

exempt. Staff must release the requested records with the exempt information redacted.” Va. Dep’t of Corrections, Offender Records Management, Operating Procedure 025.1 (Feb. 1, 2019), <https://vadoc.virginia.gov/files/operating-procedures/020/vadoc-op-025-1.pdf>.

12. VAFOIA requires that a public body inform a requester in writing when public records are being entirely withheld. *See* Va. Code § 2.2–3704(B)(1). The public body must *first*, “identify with reasonable particularity the volume and subject matter of withheld records,” and *second*, “cite, as to each category of withheld records, the specific Code section that authorizes the withholding of the records.” *Id.* § 2.2–3704(B)(1). Moreover, VADOC’s own VAFOIA guidance mandates that “whenever a record is withheld, whether in whole or in part, the record being withheld must be described, and the specific exemption(s) justifying its withholding must be cited. The description must include, with reasonable particularity, the volume or amount of records being withheld and the subject of the record (e.g., 20 pages of incident reports, 3 DVDs of rapid eye footage, 1 hour of audio).” Va. Dep’t of Corrections, Offender Records Management, Operating Procedure 025.1.

13. Importantly, VAFOIA does not exclude all records related to imprisonment from disclosure. Rather, it specifically excludes only “records of persons imprisoned in penal institutions in the Commonwealth provided such records *relate to* the imprisonment” (emphasis added) from the mandatory disclosure provisions of VAFOIA. *Id.* § 2.2–3706(B)(4). Nor is this an absolute bar. Any such records excluded from the act may be released at the custodian’s discretion. *See id.* § 2.2–3706(B)(4). By VAFOIA’s terms, for the records to fall under the exemptions, the records must both belong to an individual and relate to the imprisonment.

14. Under VAFOIA, “[a] single instance of denial of the rights and privileges conferred by [VAFOIA] shall be sufficient to invoke the remedies granted herein.” Va. Code § 2.2–3713(D).

Petitioner is “not required to prove a lack of an adequate remedy at law, nor can the mandamus proceeding be barred on the ground that there may be some other remedy at law available.”

Cartwright v. Commonwealth Transp. Comm’r, 270 Va. 58, 66 (2005).

15. If a petitioner under Section 2.2-3713 prevails on the merits, the court must award “reasonable costs, including costs and reasonable fees for expert witnesses and attorneys’ fees from the public body,” unless the court determines that “special circumstances would make an award unjust.” Va. Code § 2.2-3713(D).

16. While the public body has the initial “burden of proof to establish an exclusion by a preponderance of the evidence,” § 2.2–3713(E), courts are not “required to accord *any* weight to the determination of a public body as to whether [the] exclusion applies.” § 2.2–3713(E).

FACTS GIVING RISE TO PETITIONER’S CAUSE OF ACTION

17. Wallens Ridge is a super-maximum security VADOC facility in Big Stone Gap, Virginia that houses approximately 1,000 inmates.²

18. Wallens Ridge has been a continued focus of civil rights advocacy and lawsuits due to a persistent pattern and practice of abuse and mistreatment of inmates in its care. *See, e.g.*, Elizabeth Weill-Greenberg, *Solitary Is A Tomb With No Escape Prisoners Allege*, *The Appeal* (May 6, 2019), <https://theappeal.org/path-out-of-solitary-is-an-endless-maze-for-virginia-prisoners-suit-alleges/>; Edward Fitzpatrick, State Inmates Call Virginia’s Wallens Ridge ‘Hell’, *The Hartford Courant* (June 19, 2000), <https://www.courant.com/news/connecticut/hc-xpm-2000-06-19-0006190028-story.html>.

19. During 2020, Petitioner Gardner received disturbing reports of abusive and unlawful treatment by Wallens Ridge staff toward Muslim inmates, including physical violence,

² *Id.*

retaliation, placing inmates in unhygienic conditions (including a Muslim inmate being deprived of access to a functioning toilet and shower), theft of religious books and articles, and the rampant use of derogatory and bigoted language by VADOC staff targeted at Muslim inmates. Ms. Gardner has also received accounts that Muslim inmates at Wallens Ridge improperly being barred from observing Ramadan.

20. These accounts were echoed in an April 2020 letter submitted by Muslim Advocates and two Virginia community organizations to Virginia Governor Ralph Northam, Attorney General Mark Herring, and VADOC Director, Harold Clarke. *See* Ex. 1, Letter from Muslim Advocates, Coalition for Justice, and ICNA Council for Social Justice to Hon. Ralph Northam, Hon. Mark R. Herring, Dir. Harold Clarke (Apr. 24, 2020). This letter outlined serious problems with the conduct of VADOC prison staff, including staff at Wallens Ridge, who prevented Muslim inmates from observing the holy month of Ramadan.³ VADOC staff blocked Muslim inmates from participating in Ramadan, allegedly due to “too many” Muslim inmates seeking to participate. Wallens Ridge staff told inmates, often improperly, that they had not been designated as Muslim or had not submitted requests for such designation and thereby, could not fast.

21. The letter sought commitments from VADOC that it would ensure that Muslim inmates observing Ramadan be permitted to do so, be provided meals in a timely fashion, and be provided potable water at night. *See id.* The letter further requested that VADOC educate its staff on Ramadan traditions, train them by presenting best practices for protecting Muslim religious

³ Ramadan is the holiest month of the Islamic calendar during which observant Muslims abstain from food and drink from dawn until dusk and engage in acts of individual and communal worship.

practices during Ramadan, and increase oversight of facilities' meal delivery systems for Ramadan. *See id.*

22. In response, the organizations received no commitments to take those reasonable steps; rather, VADOC provided only a high-level regurgitation of its policies.

23. In light of this litany of issues at Wallens Ridge, on May 21, 2020, Petitioner and Muslim Advocates submitted a VAFOIA Request to VADOC seeking records from the past three years related to the treatment and free exercise rights of Muslim inmates at Wallens Ridge. *See Ex. 2.* These records are crucial in uncovering the extent of the abuse and mistreatment of Muslim inmates at Wallens Ridge by VADOC employees. Without these records, much of Petitioner and her partners' advocacy on behalf of Wallens Ridge inmates is hamstrung.

24. In particular, the Request sought:

1. Documents, including lists, reflecting the inmates at Wallens Ridge who requested the ability to participate in Ramadan in 2018, 2019, and 2020;
2. Documents, including lists, reflecting all inmates designated as Muslim (Sunni, Shia or any other sect), Nation of Islam, or Moorish Science Temple in 2018, 2019, and 2020;
3. All policies and memoranda related to Ramadan operative at Wallens Ridge in 2018, 2019, and 2020;
4. The Ramadan meal delivery schedule and the content of the meals, including caloric breakdown, at Wallens Ridge in 2018, 2019, and 2020;
5. All policies and memoranda related to religious practice and accommodation operative at Wallens Ridge in 2018, 2019, and 2020;

6. All grievances, complaints, letters, or any other document filed by Wallens Ridge inmates with VADOC staff pertaining to their ability to observe Ramadan in 2018, 2019, and 2020 at Wallens Ridge;
7. All grievances, complaints, letters, or any other document filed by Wallens Ridge inmates with VADOC staff pertaining to their ability to observe Islamic practices and/or seeking religious accommodations in 2018, 2019, and 2020 at Wallens Ridge; and
8. All grievances, complaints, letters, or any other document filed by Wallens Ridge inmates with VADOC staff pertaining to harassment or hostility they have experienced by Wallens Ridge staff allegedly due to their Islamic faith in 2018, 2019, and 2020. *See Ex. 2.*

25. On May 29, 2020, Petitioner received a response from VADOC, invoking a seven-working day extension of its response time, complaining that “it is practically impossible to provide the requested records or determine whether they are available within the five working days required by FOIA because of administrative difficulties.” *See Ex. 3*, Email from Adam Dourafei to Gay Gardner (May 29, 2020).

26. On June 9, 2020, VADOC Director of Administrative Compliance Dean W. Ricks responded to the Request. *Ex. 4*, Letter from Dean W. Ricks, VADOC Director of Administrative Compliance to Gay Gardner (June 9, 2020).

27. The only documents provided were high level policies maintained by VADOC responsive to Requests (3), (4), and (5). Further, although the Request sought documents specific to Wallens Ridge, VADOC failed to produce *any* such documents.

28. The agency provided no records or documents whatsoever related to the remaining Requests (1), (2), (6), (7), and (8). Instead, it claimed that “pursuant to § 2.2–3706(B)(4) of the Code of Virginia, the records requested are exempt from mandatory disclosure as records ‘of persons imprisoned in penal institutions in the Commonwealth provided such records relate to the imprisonment.’ Accordingly, the Virginia Department of Corrections is exercising its discretion to withhold these records in their entirety.” *Id.*

29. Although the VAFOIA law and VADOC’s guidelines require that VADOC identify with “reasonable particularity the volume and subject matter of the withheld records” and cite, for each category of withheld the specific section that authorized the withholding,” VADOC did no such thing. Rather, without identifying how many responsive documents there were and what the subject matter of each individual document was, VADOC broadly invoked the VAFOIA exemption as to the document requests—not the documents themselves.

30. A copy of this petition was provided to VADOC three days before the filing of this petition in court, in accordance with Va. Code § 2.2-3713(C).

FIRST CAUSE OF ACTION

Violation of the Virginia Freedom of Information Act by Failure to Produce Records Responsive to the Request Va. Code § 2.2–3706

31. Petitioner reasserts and adopts by reference paragraphs 1–27.

32. Respondent VADOC has failed to provide Petitioner with access to public records in response to the Request.

33. Respondent VADOC relied on the Va. Code § 2.2–3706(B)(4) exemption from mandatory disclosure in refusing to provide the requested records. However, this reliance is misplaced. VAFOIA exempts only “records of persons imprisoned” from disclosure; it

emphatically does not exempt all records related to the prison or VADOC . Va. Code § 2.2–3706(B)(4). Had the legislature wished to grant VADOC such a broad exemption from VAFOIA, it was perfectly capable of drafting language to that effect. For example, two exemptions in VAFOIA specify that they apply to “[r]ecords of a law enforcement agency” rather than “records of persons subject to investigation by a law enforcement agency,” clearly directing a wider scope for those exemptions than for the (B)(4) Exemption. *See id.* §§ 2.2-3706(B)(3), (B)(5). By discarding the qualifying language in the (B)(4) Exemption and adopting such a broad interpretation, VADOC flouts the statutory instruction that “[a]ny exemption from public access to records or meetings shall be narrowly construed.” *Id.* § 2.2–3700(B).

34. The records requested by Request Nos. (1), (2), (6), (7), and (8) are not documents covered by the (B)(4) Exemption. Request Nos. (1) and (2) are not records specific to an incarcerated person nor the type of document to be found in an individual inmate’s file. Rather, Request Nos. (1) and (2) seek lists entirely created and maintained by Wallens Ridge for purposes of their own logistics and food delivery systems. To that end, a February 20, 2020 VADOC Memorandum received through the VAFOIA shows that the Institutional Program Manager or other designated staff prepares and updates “a list of all offenders approved to participate in the Ramadan/Month of Fasting observance.” *See Ex. 5* at 1. Yet VADOC did not provide that institutional document to Petitioner. That same memorandum shows that each VADOC facility is required to create “TWO Master Pass Lists (in VACORIS Programs)” that show offenders who signed up for Ramadan/Eid-ul-Fitr and offenders who signed up for Month of Fasting/Eid-ul-Fitr. *See id.* at 2. Again, VADOC did not provide that institutional document to Petitioner. This type of summary document created and maintained by VADOC staff facially falls outside the (B)(4) Exemption. Similarly, that memorandum shows each inmate is required to complete and submit

an Offender Request Form to facility staff to participate in Ramadan. *See id.* at 1. Yet, VADOC did not provide those institutional documents to Petitioner.

35. Request Nos. (6), (7), and (8) are similarly outside the (B)(4) Exemption. Letters, complaints, and grievances of misconduct by Virginia state employees at Wallens Ridge sent to Wallens Ridge staff are not purely records of individual inmates. These documents attest to the conduct of state employees and their treatment of individuals in state care. Similarly, any responses to such letters, complaints, and grievances are records created by VADOC and relate to the conduct of VADOC employees. Likewise, any documents maintained by VADOC that collect and tabulate the grievances submitted by Wallens Ridge inmates would not be records of individual inmates. They would be summary documents created and maintained by VADOC staff and facially outside the (B)(4) Exemption.

36. Further, whether and how VADOC handles and responds to inmate grievances, particularly those related to constitutional rights, is information of the utmost public importance. It is the kind of information that VAFOIA is designed to release, for it implicates the operations of a Virginia agency as well as the core constitutional rights of its citizens. Other Virginia courts have recognized the importance of ensuring that VADOC properly handles and meaningfully responds to inmate grievances. For example, in the case *Scott v. Clarke*, the U.S. District Court for the Western District of Virginia entered an injunction ordering VADOC to require its employees to provide inmate grievants with “a meaningful response... addressing the substance of each grievance” and “a system of documenting that such a meaningful response is supplied” in a timely manner. Injunction Order, *Scott v. Clarke*, No. 3:12-cv-36, ECF No. 545, at *4 (W.D. Va. Jan. 2, 2019). VADOC’s responses to any inmate grievances are not individualized records of inmates; rather, they are records created and maintained by VADOC and its employees at Wallens Ridge

that reflect its operations. As such, these records are crucial in assessing whether VADOC is appropriately handling and responding to the grievances of inmates at Wallens Ridge.

37. Even where VADOC *did* provide records, its responses were deficient. For example, Request No. (4) sought the Ramadan meal delivery schedule and the contents of the meals provided to Muslim inmates fasting at Wallens Ridge. VADOC regulations require that VADOC employees log the delivery schedule of when they provide the morning and evening Ramadan meals for each housing unit and when the last inmate had been served the day's Ramadan meal. *See* Ex. 5 at 4. Although these are documents created and maintained by Wallens Ridge and not the documents of individual inmates, VADOC failed to produce them. Moreover, VADOC regulations require that the Food Service Director of each institution daily submit to the "Business Office" a Meal Cost Log FSM_F21 that includes a list of all prisoners who fast during Ramadan so that VADOC can assess the cost of Ramadan meals, the meals received, the number of meals for each prisoner, and the total cost per prisoner per day. *See id* at 3. Once more, these are documents created and maintained by Wallens Ridge regarding its operations, not files related to the imprisonment of individual inmates. Yet VADOC failed to produce them. While VADOC produced general food menus for Ramadan applicable to all institutions, it did not provide the menus specific to Wallens Ridge, nor did it provide the meal delivery schedule that Wallens Ridge utilized. In fact, VADOC failed to produce any documents specific to Wallens Ridge at all. Thus, even for the Requests where VADOC invoked no exemptions, VADOC failed to fulfill its obligation under VAFOIA by producing all responsive records.

SECOND CAUSE OF ACTION

Violation of the Virginia Freedom of Information Act by Failure to Redact Va. Code § 2.2-3704.1

38. Petitioner reasserts and adopts by reference paragraphs 1-27.

39. Respondent VADOC withheld public records in their entirety in response to Petitioner's Request.

40. However, Va. Code § 2.2-3704.1 imposes a duty to redact upon public bodies and forbids such bodies from "withhold[ing] a public record in its entirety on the grounds that some portion of the public record is excluded from disclosure." Rather, "only those portions of the public record containing information subject to an exclusion . . . may be withheld, and all portions of the public record that are not so excluded shall be disclosed." Va. Code § 2.2-3704.1

41. Even if the (B)(4) Exemption covers discrete parts of the requested, VADOC must nonetheless redact that covered information and produce the remainder of the record to Petitioner. For example, any grievances submitted to VADOC could be redacted to remove the names and numbers of inmates who submitted particular complaints or grievances so that they no longer identify individual inmates. Rather, these records would show only the manner in which Wallens Ridge and VADOC handle inmate grievances and whether and how the prison substantively responds to grievances, a matter of grave public concern. Clearly, such records would not count as "records of persons imprisoned" under the (B)(4) Exemption.

42. By refusing to redact any information covered by the (B)(4) Exemption and disclose the remaining segregable and non-exempted portions to Petitioner, Respondent violated VAFOIA.

THIRD CAUSE OF ACTION

Violation of the Virginia Freedom of Information Act by Failure to Identify Withheld Records

Va. Code § 2.2-3704(B)

43. Petitioner reasserts and adopts by reference paragraphs 1-27.

44. Va. Code § 2.2-3704(B) requires that if an agency withholds records in whole or in part, its response must "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.”

45. Similarly, VADOC’s guidelines require that VADOC identify with “reasonable particularity the volume and subject matter of the withheld records” and cite, for each category of withheld records the specific section that authorized the withholding.

46. In its response to the Request, Respondent only broadly invoked the (B)(4) Exemption for its responses to Request Nos. (1), (2), (6), (7), and (8). Despite its clear obligations, VADOC did not identify the volume of documents responsive to each request, the subject matter of such documents, or with specific regard to each document, which exemption justified their withholding.

47. By doing so, VADOC violated its mandatory obligations under Virginia law as well as its own guidelines.

PRAYER FOR RELIEF

Wherefore, Petitioner prays that this Court will:

1. Hold a hearing on this matter within seven days of the date of filing of this Petition, as required by VAFOIA. Va. Code § 2.2–3713(C).
2. Issue a writ of mandamus compelling Respondent to produce for Petitioner all records responsive to Petitioner’s Request, redacted as may be necessary.
3. Issue a writ of mandamus to identify for Petitioner with reasonable particularity the volume and subject matter of each record withheld in its entirety.
4. Order Respondent to pay Petitioner’s costs, including costs and reasonable fees for expert witnesses, if any, and attorneys’ fees. Va. Code § 2.2–3713(D).
5. Grant any such relief as this Court deems just and proper.

Dated this 6th day of April, 2021.

Respectfully submitted,

By:  _____

Mary Bauer (VSB 31388)

Matthew Callahan (*pro hac vice* application filed concurrently)

Muslim Advocates

P.O. Box 34440

Washington, DC 20043

Phone: (202) 897-1892

Fax: (202) 508-1007