



VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL

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February 28, 2024

Will Lowrey
Glen Allen, Virginia
Request received via email

The staff of the Freedom of Information Advisory Council is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your email on July 15, 2023.

Dear Mr. Lowrey:

You have requested an advisory opinion on whether it was proper for the Virginia Department of Agriculture and Consumer Services (VDACS) to invoke exemptions contained in federal law to authorize the nondisclosure of records requested pursuant to the Virginia Freedom of Information Act (§ 2.2-3700 et seq. of the Code of Virginia) (FOIA).

Factual Background

As background information, you serve as legal counsel for Animal Partisan, a legal advocacy organization focused on alleviating the suffering of animals in agriculture and research, which is located in Glen Allen, Virginia. You submitted a FOIA request to VDACS, dated March 13, 2023, which stated the following:

I request an opportunity to inspect or obtain copies of public records dated or transmitted between January 16, 2023 and the date of fulfillment of this request related to the depopulation of a commercial turkey flock in Rockingham County, Virginia as a result of the detection of Highly Pathogenic Avian Influenza, including: [a]ny photographs or videos [and] [a]ny incident plans.

For purposes of transparency, you provided our office with an email chain between you and the VDACS Director of Office Policy, Planning, and Research (the Director) that was exchanged prior to your submission of a FOIA request on March 12, 2023. You initially emailed VDACS on January 20, 2023, with the above FOIA request. On January 27, 2023, the Director responded with the requested records. Then, on January 29, 2023, you emailed the Director asking, "Do you have any sense for when the investigation will

be closed? If not, or if you can't say, I am happy to resubmit in a few weeks." On January 30, 2023, the Director replied that:

I spoke with our Division of Animal and Food Industry Services. Staff advised me that the investigation and response to highly pathogenic avian influenza (HPAI) is conducted in compliance with the U.S. Department of Agriculture's HPAI response plan, which requires the application of a control area while the investigation is ongoing. The control area can be released if there are no positive diagnostics results for HPAI in the control area for 21 days after the initial cleaning and disinfection of the last infected farm. So, the completion of the active investigation depends, in part, on test results. We anticipate the investigation will no longer be active after all testing is negative for roughly three weeks.

Please feel free to contact me to check and see if the investigation is no longer active.

On March 12, 2023, you emailed the Director stating, "[p]lease find the attached request pursuant to our telephone conversation." On March 14, 2023, the Director emailed you that:

[VDACS] is in receipt of your request made pursuant to the [FOIA] for records that are or may be held by this agency. Subsection F of Va. Code § 2.2-3704 requires VDACS, prior to conducting a search for records, to notify you in writing that VDACS may make reasonable charges not to exceed its actual cost incurred in accessing, duplicating, supplying, or searching for requested records and inquire whether you would like to request a cost estimate in advance of VDACS supplying such requested records. VDACS will provide you with a cost estimate if requested. Any costs incurred by VDACS in estimating the cost of supplying the requested records will be applied toward the overall charges that you are required to pay VDACS to access, duplicate, supply, or search for your requested records.

On March 20, 2023, the Director emailed you: "Attached please find a letter and deposit agreement in response to your recent request for records pursuant to the Virginia Freedom of Information Act." At this point, there appears to have been no additional conversations or communications between you and the Director to note until the response letter discussed in the following paragraph was sent to you.

You provided a copy of the response letter from VDACS dated April 3, 2023, in which VDACS returned a number of responsive records; however, VDACS determined that "[s]ome portions of the records you have requested are exempt from disclosure under the Virginia Freedom of Information Act and will not be released." As part of its response, VDACS also provided a table of federal and state laws, with three categories of records, under which VDACS claimed that "the following records are disclosed in part with certain portions redacted pursuant to the sections of the Code of Virginia." VDACS also included an itemized invoice for charges pursuant to § 2.2-3704 of the Code of Virginia, for "the actual cost incurred in accessing, duplicating, supplying, or searching for the requested records," which totaled \$290.69. A deposit of \$250 had been paid to VDACS and recorded, which left a remaining balance owed of \$40.69.

In the following two quotes, it seems that VDACS intended to cite § 2.2-3704 of the Code of Virginia, which outlines public records open for inspection or copy.

In its response, VDACS provided the following legal justifications for withholding and redacting the requested information. Regarding "[r]ecords pertaining to producers' addresses and directions to their property," VDACS explained that "[§] 3.2-3704 [sic] of [FOIA] requires that all public records be open to the citizens of the Commonwealth[. . .] except as otherwise specifically provided by law." VDACS also stated in its response that:

The U. S. Department of Agriculture (USDA) has advised that pursuant to 7 U.S.C.[§] 8791(b)(2), also referred to as "Section 1619" of the Food, Conservation, and Energy Act of 2008, the Secretary of Agriculture, any officer or employee of USDA, or any contractor¹ or cooperator² of USDA, shall not disclose: (a) information provided by an agricultural producer or owner of agricultural land concerning the agricultural operation, farming or conservation practices, or the land itself, in order to participate in programs of USDA; or (b) geospatial information otherwise maintained by the Secretary about agricultural land or operations for which information described in subparagraph (a) is provided.

For "[r]ecords containing information about certain individuals when the disclosure of such information would constitute a clearly unwarranted invasion of personal privacy," VDACS explained that "[§] 3.2-3704 [sic] of [FOIA] requires that all public records be open to the citizens of the Commonwealth[. . .] except as otherwise specifically provided by law." Moreover, VDACS stated that:

USDA has advised that, pursuant to Exemption 6 of [federal FOIA] (5 U.S.C. § 552(b)(6)), USDA is permitted to withhold from "personnel and medical files and similar files" information about individuals when the disclosure of such information "would constitute a clearly unwarranted invasion of personal privacy." USDA has determined that the individuals have more than a *de minimis* privacy interest in the protection of their identity because the identifying information could be used to make unwanted contact and harassment.

¹ Contractor means any individual or other legal entity that is awarded a federal government contract or subcontract under a federal government contract. The term contractor refers to both a prime contractor and all of its subcontractors of any tier on a contract with the federal government. The term contractor includes lessors and lessees as well as employers of workers performing on covered federal contracts whose wages are calculated pursuant to special certificates issued under 29 U.S.C. 214(c). The term employer is used interchangeably with the terms contractor and subcontractor in various sections of this part. The U.S. government, its agencies, and instrumentalities are not contractors, subcontractors, employers, or joint employers for purposes of compliance with the provisions of the Executive Order, as defined in 29 C.F.R. Subtitle A Part 10 Subpart A § 10.2 Definitions.

² Cooperator means an eligible entity, as defined in 7 U.S.C. 3318(b), who enters into a non-assistance cooperative agreement with a REE Agency* to further research, extension, or teaching programs in the food and agricultural sciences. (*REE Agency means the USDA, REE Mission Area agency (ARS, ERS, NASS, or NIFA) that enters into a non-assistance cooperative agreement). Published in the Federal Register / Vol. 81, No. 196 / Tuesday, October 11, 2016 / Rules and Regulations 70000.

For "[r]ecords containing a USDA account number," VDACS cited "[subdivision 13 of] § 2.2-3705.1 [of the Code of Virginia], which exempts from disclosure portions of records that contain account numbers or routing information for any credit card, debit card, or other account with a financial institution of any person or public body."

On April 12, 2023, you emailed the Director that you had received the response and records from VDACS in the mail. You also thanked him for the prompt response and stated that: "I will mail a check later today for the remainder of the invoice." You stated that you had one follow-up question, which was:

In the response letter (copy attached), VDACS invokes two federal FOIA exemptions as the "USDA has advised." Could you point me to the authority in the Virginia FOIA that indicates that exemptions in the federal FOIA apply within the Commonwealth? My request was to VDACS and not USDA and I'm not clear why VDACS is relying on federal exemptions.

On April 13, 2023, the Director emailed you the following message:

Thank you for your email. Section 2.2-3704 of [the Code of Virginia] requires that all public records be open to the citizens of the Commonwealth, representatives of newspapers and magazines with circulation in the Commonwealth, and representatives of radio and television stations broadcasting in or into the Commonwealth during the regular office hours of the custodian of such records *except as otherwise specifically provided by law* (emphasis added). As [USDA] has advised that federal law specifically provides exemptions that pertain to certain portions of those records responsive to your request to [VDACS] and that such portions of those records should be redacted pursuant to these exemptions, VDACS has redacted such information and cited in its response letter to you the exemptions USDA advised were specifically provided in federal law.

This was the last communication record provided to our office in regards to this matter. On July 15, 2023, you emailed our office with a request for an advisory opinion regarding the above interaction between Animal Partisan and VDACS. You stated in your email that "[b]oth the plain meaning interpretation of federal FOIA and the weight of federal case law indicate that the invocation of federal FOIA to withhold documents maintained by a state agency and requested pursuant to state law is improper." You also wrote that "[s]pecifically, the provision of federal FOIA which creates the legal duty to disclose requested documents states that 'each agency' shall make information available to the public at request."³ Moreover, you stated that "[t]he definitions provision of the same subchapter defines 'agency' as 'each authority of the Government of the United States.'"⁴ You stated that "[a]s VDACS is not an authority of the Government of the United States, it is not subject to federal FOIA and thus the provisions thereof do not exempt it from disclosure."

³ 5 U.S.C. § 552(a) (2023).

⁴ 5 U.S.C. § 551(1) (2023).

In your email, you also stated that "[s]imilarly, federal Courts of Appeals and other federal sources have stated clearly that federal FOIA does not apply to state agencies."⁵ You stated that "[a]s plainly stated by the Second Circuit Court of Appeals, '[I]t is beyond question that FOIA applies only to federal and not to state agencies.'"⁶ In your email, you further stated that:

For its nondisclosure, VDACS apparently relied on the portion of [subsection A of § 2.2-3704 of the Code of Virginia] stating that records are to be open to citizens "except as otherwise specifically provided by law," suggesting that federal FOIA Exemption 6 represents one such instance of nondisclosure being otherwise provided for by law. However, as state agencies are not subject to federal FOIA, federal FOIA Exemption 6 does not provide for the nondisclosure of records maintained by state agencies and requested pursuant to state law, and thus VDACS's nondisclosure was improper.

Analysis

An initial step in considering any question regarding a records request is to establish whether the records sought are public records subject to FOIA.⁷ Section 2.2-3701 of the Code of Virginia defines "public records" as:

[A]ll 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.

Generally, a "public record" is all writings and recordings in various classifications or forms that have been "prepared or owned by, or in the possession of a public body or its officers, employees, or agents in the transaction of public business." Therefore, pursuant to § 2.2-3701 of the Code of Virginia, VDACS's possession of the requested records used in the transaction of its public business would qualify as public records under FOIA.

Subsection A of § 2.2-3704 of the Code of Virginia, in relevant part, provides that:

Except as otherwise specifically provided by law, all public records shall be open to citizens of the Commonwealth, representatives of newspapers and magazines with circulation in the Commonwealth, and representatives of radio and television stations broadcasting in or into the Commonwealth during the regular office hours

⁵ See, e.g., *Grand Cent. P'ship, Inc. v. Cuomo*, 166 F.3d 473, 484 (2d Cir. 1999) ("[I]t is beyond question that FOIA applies only to federal and not to state agencies"); *Blankenship v. Claus*, 149 Fed. Appx. 897, 898-99 (11th Cir. 2005) ("Under the FOIA, 'agency' means each authority of the Government of the United States but expressly excludes the authorities of the states.") (internal quotations omitted); What Information is Not Available Under the FOIA?, U.S. DEP'T OF HEALTH AND HUM. SERVS., [https://www.hhs.gov/foia/faqs/what-information-is-not-available-under-the-foia/index.html#:~:text=The%20FOIA%20does%20not%20apply,their%20own%20FOIA%2Dtype%20states%20\(2015\)](https://www.hhs.gov/foia/faqs/what-information-is-not-available-under-the-foia/index.html#:~:text=The%20FOIA%20does%20not%20apply,their%20own%20FOIA%2Dtype%20states%20(2015)) ("The FOIA does not apply . . . to records in the custody of state or local governments.").

⁶ *Grand Cent. P'ship, Inc. v. Cuomo*, at 484.

⁷ Freedom of Information Advisory Opinions 01 (2011) and 08 (2009).

of the custodian of such records. Access to such records shall be provided by the custodian in accordance with this chapter by inspection or by providing copies of the requested records, at the option of the requester.

In addition, § 2.2-3704.01 of the Code of Virginia provides that:

No provision of this chapter is intended, nor shall it be construed or applied, to authorize a public body to withhold a public record in its entirety on the grounds that some portion of the public record is excluded from disclosure by this chapter or by any other provision of law. A public record may be withheld from disclosure in its entirety only to the extent that an exclusion from disclosure under this chapter or other provision of law applies to the entire content of the public record. Otherwise, only those portions of the public record containing information subject to an exclusion under this chapter or other provision of law may be withheld, and all portions of the public record that are not so excluded shall be disclosed.

The purpose of FOIA is to promote openness and the transparent operations by government officials and agencies in the discussion and transaction of public business.⁸ FOIA policy stated in subsection B of § 2.2-3700 of the Code of Virginia, provides that "[a]ny exemption from public access to records or meetings shall be narrowly construed." Moreover, "no record shall be withheld or meeting closed to the public unless specifically made exempt pursuant to this chapter or other specific provision of law." Our consideration of any exemption to FOIA as directed by the above-referenced policy must be given a narrow scope.

Subdivision B 1 of § 2.2-3704 of the Code of Virginia requires that if the custodian has exercised his discretion to withhold the records in their entirety, as in this instance, then the "response shall 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." Analogous language appears in subdivision B 2 of § 2.2-3704 concerning the exercise of discretion by the custodian to provide the requested records in part and withhold them in part. Our office has previously opined that "a custodian may choose to release records which are exempt from mandatory disclosure under FOIA, unless another law prohibits such release."⁹ However, "[i]f another law prohibits release, then the prohibition is controlling and there is no discretion to be exercised."¹⁰

Because your inquiry implicates both federal and state law, please keep in mind that our office maintains that the "the authority of this office is limited to FOIA matters."¹¹ The powers and responsibilities of the Freedom of Information Advisory Council (the Council) as set forth in subdivision 1 of § 30-179 of the Code of Virginia require the Council to "[f]urnish, upon request, advisory opinions or guidelines, and other appropriate information regarding [FOIA] to any person or public body, in an expeditious manner." As previously opined, "this office offers opinions and guidance only in regard

⁸ See Va. Code § 2.2-3700.

⁹ Freedom of Information Advisory Opinion 01 (2014).

¹⁰ *Id.*

¹¹ Freedom of Information Advisory Opinion 12 (2007).

to FOIA."¹² "Other laws will be considered as they directly relate and interact with FOIA, but this office does not and cannot offer opinions solely concerning laws outside of FOIA."¹³ In this matter, our office will consider whether federal laws, specifically 7 U.S.C. § 8791(b)(2) and 5 U.S.C. § 552(b)(6), qualify under subsection A of § 2.2-3704 of the Code of Virginia to prohibit the release of or exempt from disclosure certain information contained in public records possessed by VDACS. This office will not offer any interpretation of federal law or its terms, scope, or application outside the context of FOIA.¹⁴

7 U.S.C. § 8791(b)(2)

As VDACS specifically provided federal and state laws to support its determination to provide certain records in part and withhold certain records in part, our analysis will focus on those laws cited by VDACS in its response. VDACS stated that, in regards to your request for "[r]ecords pertaining to producers' addresses and directions to their property," the agency was disclosing the records in part with certain portions redacted pursuant to § 2.2-3704 of the Code of Virginia (which was incorrectly cited in the April 3, 2023, letter as "§ 3.2-3704") and pursuant to advice from the USDA concerning 7 U.S.C. § 8791(b)(2). Because subsection A of § 2.2-3704 provides that all public records shall be open to the citizens of the Commonwealth "[e]xcept as otherwise specifically provided by law," VDACS redacted portions of the requested records based on the provisions of 7 U.S.C. § 8791(b)(2)(A), which provides, in relevant part, that:

the Secretary [of Agriculture], any officer or employee of [the USDA], or any contractor or cooperator of [the USDA], shall not disclose— (A) information provided by an agricultural producer or owner of agricultural land concerning the agricultural operation, farming or conservation practices, or the land itself, in order to participate in programs of [the USDA.]

As our research did not reveal any opinions from the U.S. Court of Appeals for the Fourth Circuit or the U.S. Supreme Court applicable to these federal statutes, we have referenced persuasive authority of other federal jurisdictions in this matter. In the case *Zanoni v. USDA* from the U.S. District Court for the District of Columbia, the plaintiff requester, who was a journalist, sought information from the defendant government agency about the USDA's National Premises Information Repository (NPIR) and its National Animal Identification System (NAIS), databases maintained by the USDA that serve as a centralized registry system used to quickly identify and notify agricultural producers about animal disease outbreaks.¹⁵ The USDA provided the plaintiff with information it deemed to be responsive to the plaintiff's request but redacted documents under federal FOIA Exemptions 3 and 6.¹⁶ Federal FOIA Exemption 3 authorizes an agency to withhold records that are "specifically exempted from disclosure by another

¹² *Id.*

¹³ Freedom of Information Advisory Opinions 12 (2007) and 04 (2007).

¹⁴ *See id.*

¹⁵ *See Zanoni v. USDA*, 605 F. Supp. 2d 230, 2009 U.S. Dist. LEXIS 30313.

¹⁶ *Id.* at 236.

statute if that statute requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue."¹⁷

In granting the defendant's cross-motion for summary judgment, the district court held that because the plaintiff did not seek her own information from the USDA and had not suffered an injury in fact, she lacked standing to bring a third-party cause of action under the federal Privacy Act, 5 U.S.C. § 552a(g)(1)(D).¹⁸ The court also determined that federal FOIA Exemption 3 shielded the names, telephone numbers, and locations of agricultural producers included in the NPIR database because the Food, Conservation and Energy Act, 7 U.S.C. § 8791(b)(2)(A), "prohibits disclosure and gives little discretion to the agency as to how the provision should be applied."¹⁹ Since federal FOIA Exemption 3 applied in this instance, a discussion of the applicability of federal FOIA Exemption 6 was deemed "unnecessary."²⁰ Essentially, 7 U.S.C. § 8791(b)(2)(A) forbade the USDA from disclosing such information under the circumstances.²¹ However, it is unclear whether the prohibition in 7 U.S.C. § 8791(b)(2)(A) extends to a state agency like VDACS.

In response to the district court's ruling in *Zanoni v. USDA*, the USDA issued Notice APP-70 on October 1, 2019, to all Farm Service Agency (FSA) employees and to state offices to relay to county offices. The notice provided guidance for determining when names and addresses of agricultural producers and owners of agricultural land are prohibited from release when responding to federal FOIA requests according to 7 U.S.C. § 8791(b)(2) and the decision made in *Zanoni*. The notice also identified and differentiated the types of FSA records that reflect or contain payment information from the types of FSA records that do not reflect or contain payment information. Finally, the notice provided FSA's definitions of "payment information" and "names and addresses of payment recipients" under federal FOIA.

As interpretation and application of federal law in this instance is outside the scope of this office's authority, we are unable to provide a definitive conclusion as to whether VDACS was authorized to utilize 7 U.S.C. § 8791(b)(2) when redacting portions of records pertaining to producers' addresses and directions to their property.²² A pronouncement by our office on whether this specific federal law prohibits VDACS from releasing the requested information would be beyond this office's statutory authority. In accordance with previously issued opinions by this office, factual disputes and determinations of fact cannot be made by this office but only by a court of law.²³

5 U.S.C. § 552(b)(6)

Conversely, VDACS cited § 2.2-3704 of the Code of Virginia (which was also incorrectly cited in the April 3, 2023, letter as "§ 3.2-3704") and on advice from USDA pursuant to 5 U.S.C. § 552(b)(6), it withheld "[r]ecords containing information about

¹⁷ 5 U.S.C. § 552(b)(3)(A)(i) (2023).

¹⁸ *Zanoni v. USDA*, 605 F. Supp. 2d at 236.

¹⁹ *Id.* at 236.

²⁰ *Id.* at 238.

²¹ *See id.*

²² *See* Freedom of Information Advisory Opinions 12 (2007) and 04 (2007).

²³ Freedom of Information Advisory Opinions 02 (2023) and 08 (2018).

certain individuals when the disclosure of such information would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6) (commonly referred to as "Exemption 6") provides, in relevant part, that "[t]his section [of federal FOIA] does not apply to matters that are— [. . .] (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." VDACS stated that "USDA is permitted to withhold from 'personnel and medical files and similar files' information about individuals when the disclosure of such information 'would constitute a clearly unwarranted invasion of personal privacy.'" Moreover, VDACS stated that the "USDA has determined that the individuals have more than a *de minimis* privacy interest in the protection of their identity because the identifying information could be used to make unwanted contact and harassment."

The issue in this instance is whether an exemption cited under federal FOIA applies to state agencies. There are several cases, mostly federal, that address this issue. In particular, *Grand Cent. P'ship., Inc. v. Cuomo*, a case from the U.S. Court of Appeals for the Second Circuit in which the plaintiff-partnership appealed a partial denial of a records request (wrongfully withholding certain records from disclosure) by the defendant-government agency, the U.S. Department of Housing and Urban Development (HUD), under the federal Freedom of Information Act, 5 U.S.C. § 552 et seq. (federal FOIA).²⁴ The plaintiff had requested documents from HUD, "which produced approximately 1000 pages of material, but withheld sixteen documents under various claims of exemption from FOIA's demands."²⁵ The plaintiff appealed the U.S. District Court for the Southern District of New York's order to HUD "to produce one of the sixteen withheld documents in its entirety and three in redacted form, but held that HUD had no obligation to produce the remaining twelve documents."²⁶ Ultimately, the appellate court affirmed the district court's order for HUD to disclose documents relating to an investigation of the plaintiff-partnership but reversed the denial of disclosure of other documents and ordered further review by the district court to determine whether the documents were personal rather than agency records.²⁷

In its analysis, the U.S. Court of Appeals for the Second Circuit determined that "[d]espite HUD's contention to the contrary, it is beyond question that [federal] FOIA applies only to federal and not to state agencies."²⁸ The appellate court's opinion in *Grand Cent. P'ship., Inc. v. Cuomo* acknowledged the outlier decision of the 1976 case, *Mobil Oil Corp. v. Fed. Trade Comm'n*, in which the U.S. District Court for the Southern District of New York found that federal "FOIA exemption 5 applies to state agencies."²⁹

²⁴ See *Grand Cent. P'ship., Inc. v. Cuomo*, 166 F.3d 473, 1999 U.S. App. LEXIS 1119.

²⁵ *Id.* at 476.

²⁶ *Id.* at 476-77.

²⁷ See *Grand Cent. P'ship., Inc. v. Cuomo*, 166 F.3d 473, 1999 U.S. App. LEXIS 1119.

²⁸ *Id.* at 484, See *Philip Morris, Inc. v. Harshbarger*, 122 F.3d 58, 83 (1st Cir. 1997) ("FOIA . . . applies only to federal executive branch agencies"); *Day v. Shalala*, 23 F.3d 1052, 1064 (6th Cir. 1994) (APA "pertains to federal agencies"); *Brown v. Kelly*, 1994 U.S. App. LEXIS 9964, No. 93-5222, 1994 WL 36144, at *1 (D.C. Cir. January 27, 1994) (per curiam) (FOIA does not apply to state agencies); *St. Michael's Convalescent Hosp. v. State of California*, 643 F.2d 1369, 1373 (9th Cir. 1981) (definition of "agency" under FOIA "does not encompass state agencies or bodies"); *Johnson v. Wells*, 566 F.2d 1016, 1018 (5th Cir. 1978) [**30] (state board of parole not agency within meaning of FOIA).

²⁹ *Mobil Oil Corp. v. Federal Trade Com.*, 406 F. Supp. 305, 1976 U.S. Dist. LEXIS 17235.

5 U.S.C. § 552(b)(5) (commonly referred to as "Exemption 5") provides, in relevant part, that "[t]his section [of federal FOIA] does not apply to matters that are— [. . .] (5) inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency, provided that the deliberative process privilege shall not apply to records created 25 years or more before the date on which the records were requested." In this case, the plaintiff, Mobile Oil, filed suit under [federal] FOIA to compel disclosure of all communications regarding petroleum use between the defendant Federal Trade Commission (FTC), and governmental officials.³⁰ The FTC had disclosed correspondence with U.S. Congress and state governments, except for identifying details and names of individual correspondents, but denied access to staff opinions or theory and communications with other federal agencies.³¹ The district court held that the Federal Trade Commission Act (15 U.S.C. § 41 et seq.) mandated deletion of names and identifying details of FTC complainants but not government officials and that [federal FOIA] prevented disclosing FTC policy or opinion.³² The district court deferred deciding whether disclosures would "interfere with enforcement proceedings" or release confidential or privileged information.³³

The U.S. Court of Appeals for the Second Circuit stated that the decision in *Mobil Oil Corp. v. Fed. Trade Comm'n* "is against the overwhelming weight of the authority on this issue, and is contrary to what we believe was Congress' intent with respect to the purpose and applicability of Exemption 5, to wit, to promote the full and frank discussion of issues within and among federal agencies."³⁴ The appellate court acknowledged that it has yet to address this issue directly, but "other district courts within the Circuit have concluded that FOIA does not apply to state agencies."³⁵ Thus, the appellate court adopted "the view espoused by the other circuits and most district courts of this Circuit that have addressed the issue and hold that [federal] FOIA Exemption 5 applies to federal agencies only."³⁶ Although *Grand Cent. P'ship., Inc. v. Cuomo* directly applies to Exemption 5, it is reasonable to support the position that federal FOIA does not apply to state agencies in regards to other exceptions in federal FOIA.

In *Grand Cent. P'ship., Inc. v. Cuomo*, the U.S. Court of Appeals for the Second Circuit referenced *Philip Morris, Inc. v. Harshbarger*, a case from the U.S. Court of Appeals for the First Circuit. In that case, appellant tobacco products manufacturers were seeking to enjoin enforcement of the Massachusetts Disclosure Act, Mass. Gen. Laws ch. 94 § 307B, which required the tobacco products manufacturers to disclose their products' additives and nicotine-yield ratings to the state health department.³⁷ In *Philip Morris, Inc. v. Harshbarger*, the First Circuit determined that "employees [of the U.S. Department of Health and Human Services] and other federal employees need not make publicly

³⁰ *See id.*

³¹ *See id.*

³² *See id.*

³³ *Id.* at 317.

³⁴ *Grand Cent. P'ship., Inc. v. Cuomo*, 166 F.3d at 484.

³⁵ *Id.* at 484, *See Thomas v. Office of the United States Attorney*, 928 F. Supp. 245, 251 (E.D.N.Y. 1996) ("the FOIA is only directed to the conduct of federal agencies"); *Mamarella v. County of Westchester*, 898 F. Supp. 236, 237 (S.D.N.Y. 1995) ("FOIA does not apply to state agencies").

³⁶ *Id.* at 484.

³⁷ *See Philip Morris, Inc. v. Harshbarger*, 122 F.3d 58 (1st Cir. 1997).

available the collected information under [federal] FOIA, but [Exemption 4] would not inhibit the conduct of state agencies possessing such information, which are not governed by [federal] FOIA."³⁸ 5 U.S.C. § 552(b)(4) (commonly referred to as "Exemption 4") provides, in relevant part, that "[t]his section [of federal FOIA] does not apply to matters that are— [. . .] (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential . . ."

In another case referenced by the U.S. Court of Appeals for the Second Circuit, *St. Michael's Convalescent Hospital v. State of California*, the U.S. Court of Appeals for the Ninth Circuit reviewed appellant health care providers' challenge of an order of the United States District Court for the Northern District of California, which dismissed their complaint seeking to enjoin defendant government agencies from releasing to the public certain cost information pertaining to their services.³⁹ The Ninth Circuit determined that "[federal] FOIA and the [federal] Privacy Act [5 U.S.C. § 552a] apply only to 'agencies' as that term is defined under 5 U.S.C. § 551(1) and 5 U.S.C. § 552[(f)(1)]" and that "[u]nder these definitions, 'agency' does not encompass state agencies or bodies."⁴⁰

5 U.S.C. § 551(1) provides that:

For the purposes of this subchapter [5 U.S.C. § 551 et seq.]—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

or except as to the requirements of section 552 of this title [5 U.S.C. § 552]—

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory;
or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; subchapter II of chapter 471 of title 49 [49 U.S.C. § 47151 et seq.]; or sections 1884, 1891–1902, and former section 1641(b)(2), of title 50, appendix[.]

Additionally, 5 U.S.C. § 552(f)(1) provides that:

For purposes of this section, the term—

³⁸ *Id.* at 83.

³⁹ See *St. Michael's Convalescent Hosp. v. State of California*, 643 F.2d 1369 (9th Cir. 1981).

⁴⁰ *Id.* at 1373.

(1) "agency" as defined in section 551(1) of this title [5 U.S.C. § 551(1)] includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency[.]

The U.S. Court of Appeals for the Second Circuit also referenced *Mamarella v. County of Westchester*, a case from the U.S. District Court for the Southern District of New York, regarding a petitioner's request for the District Attorney to produce certain information under federal FOIA. The District Attorney had denied the petitioner's request asserting that "[federal] FOIA does not apply to state agencies."⁴¹ The district court agreed when it granted summary judgment against the petitioner, thereby dismissing the petitioner's claims because "[t]he claims against the state agencies under [federal] FOIA are legally insufficient because [federal] FOIA does not apply to state agencies."⁴² "[Federal] FOIA applies to agencies which are defined as 'each authority of the government of the United States.'"⁴³ "Thus, the plain language of [federal] FOIA precludes its application to state or local agencies."⁴⁴

Therefore, Exception 6 under 5 U.S.C. § 552(b)(6), which was cited by VDACS in its response to withhold certain information from disclosure would appear not to apply to state agencies.⁴⁵ In light of the provided case law above, federal FOIA would authorize the USDA to withhold the requested information from release; however, this authorization would likely not extend to state agencies or bodies, such as VDACS, or allow them to utilize the exemptions provided by federal law. In general, state agencies would be required to comply with freedom of information laws enacted by their respective state assemblies and legislatures. Even though VDACS relied on guidance from the USDA regarding 5 U.S.C. § 552(b)(6) as part of its basis to withhold certain information from disclosure, existing case law would seem to exclude such an interpretation of federal FOIA. Moreover, federal FOIA would appear not to apply to state agencies because they are not included in the definition of "agency" as defined above in 5 U.S.C. §§ 551(1) and 552(f)(1).

Subdivision 13 of § 2.2-3705.1 of the Code of Virginia

For "[r]ecords containing a USDA account number," VDACS stated that subdivision 13 of § 2.2-3705.1 of the Code of Virginia exempts from disclosure portions of records that contain "account numbers or routing information for any credit card, debit card, or other

⁴¹ *Mamarella v. County of Westchester*, 898 F. Supp. 236, 1995 U.S. Dist. LEXIS 13995.

⁴² *Id.* at 237.

⁴³ *Id.* at 237 citing 5 U.S.C. § 551(1).

⁴⁴ *See, e.g., St. Michael's Convalescent Hosp. v. State of California*, 643 F.2d 1369, 1372-74 (9th Cir. 1981) (refusing to apply FOIA to state agencies receiving federal funding and regulation); *Washington v. Police Dep't*, 1994 U.S. Dist. LEXIS 11717, 1994 WL 455512 at *1 (Aug. 22, 1994) (S.D.N.Y.) (refusing to apply FOIA to NYC Police Department); *Rankel v. Town of Greenburgh*, 117 F.R.D. 50, 54 (S.D.N.Y. 1987) (refusing to apply FOIA to municipal corporations); *Ciccione v. Waterfront Comm'n of New York*, 438 F. Supp. 55, 57 (S.D.N.Y. 1977) (refusing to apply FOIA to City Waterfront Commission); *c.f., Gale v. Andrus*, 207 U.S. App. D.C. 76, 643 F.2d 826, 832 (D.C. Cir. 1980) (refusing to apply FOIA to U.S. trust territories).

Mamarella v. County of Westchester, 898 F. Supp. 236, 237, 1995 U.S. Dist. LEXIS 13995, *4

⁴⁵ *See* 5 U.S.C. § 552(b)(6) (2023).

account with a financial institution of any person or public body." A determining factor regarding whether the cited exemption, which was based solely on FOIA and not federal law, was lawful may rest on whether the USDA can be considered a financial institution under FOIA.

The USDA has several financial assistance programs for farmers and ranchers that are used to support American agriculture in various manners. One agency within the USDA is the Farm Service Agency (FSA), which offers many types of loans that may be used to purchase land, livestock, equipment, feed, seed, or supplies or construct buildings or make farm improvements.⁴⁶ FSA's Farm Loan Programs consist of: (i) the Guaranteed Loan Program, in which the FSA assists borrowers who have received a loan from a commercial lender, such as a bank, the Farm Credit System, or a credit union, who obtained a loan guarantee from FSA and (ii) the Direct Loan Program, in which the FSA directly provides loans to borrowers who are unable to obtain loans directly from a commercial lender.⁴⁷ FSA's goal is to help borrowers progress and move to a commercial lender, and once a borrower obtains credit from a commercial lender, FSA's mission of providing temporary, supervised credit is complete. FSA's mission in making farm loans is to give farmers and ranchers the best opportunity to achieve financial success on their farms, pay back their FSA loan, and move to a commercial lender.⁴⁸

"Financial institution" as defined in § 6.2-100 of the Code of Virginia means "any bank, trust company, savings institution, industrial loan association, consumer finance company, or credit union." Subsection a of § 8.1A-201 of the Code of Virginia provides that "[u]nless the context otherwise requires, words or phrases defined in this section, or in the additional definitions contained in other titles of the Uniform Commercial Code [UCC] that apply to particular titles or parts thereof, have the meanings stated." Subdivision (b)(4) of § 8.1A-201 provides that "[s]ubject to definitions contained in other titles of the [UCC] that apply to particular titles or parts thereof: [. . .] (4) '[b]ank' means a person engaged in the business of banking and includes a savings bank, savings and loan association, credit union, and trust company[.]" Additionally, subdivision (b)(27) of § 8.1A-201 provides that "(27) '[p]erson' means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision, agency, or instrumentality, public corporation, or any other legal or commercial entity." Moreover, subdivision 1 of § 8.4-105 of the Code of Virginia provides that "[i]n this title: [. . .] (1) '[b]ank' means a person engaged in the business of banking, including a savings institution, credit union or trust company[.]"

Hence, the definition for "financial institutions" under Virginia law would appear to include "a government or agency engaged in the business of banking" (summarizing this term as defined and adopted from the UCC). Because the information provided to our office does not include any financial records or references to a specific USDA loan program, we are unable to issue a definitive determination on whether VDACS was correct in citing the exemption for financial institution information under subdivision 13 of § 2.2-3705.1 of the Code of Virginia. However, we acknowledge that there are

⁴⁶ <https://www.fsa.usda.gov/about-fsa/structure-and-organization/farm-loans/index>

⁴⁷ *Id.*

⁴⁸ *Id.*

agencies of the USDA that appear to engage "in the business of banking," and if the exemption was correctly applied, withholding financial account information from disclosure would appear to be lawful under FOIA.

Conclusion

Our office is unable to determine whether VDACS was authorized to utilize 7 U.S.C. § 8791(b)(2) when redacting portions of records pertaining to producers' addresses and directions to their property. In reviewing the information provided and applicable federal statutes, it is beyond our office's purview to make a determination on laws outside the scope of FOIA. Federal FOIA, specifically 5 U.S.C. § 552(b)(6), authorizes the USDA to withhold personnel and medical files and similar files about individuals from release when the disclosure of such information would constitute a clearly unwarranted invasion of personal privacy. Existing case law as cited above limits the authority under federal FOIA to withhold only to federal agencies. This authority does not extend to state agencies because they are not included in the definition of "agency" as defined in 5 U.S.C. §§ 551(1) and 552(f)(1). Even though VDACS relied on guidance from the USDA regarding application of 5 U.S.C. § 552(b)(6), VDACS is likely not authorized under applicable case law to withhold this information from disclosure under FOIA. However, VDACS appears to have properly applied the FOIA exclusion in subdivision 13 of § 2.2-3705.1 of the Code of Virginia to withhold from release records containing account numbers or routing information for any credit card, debit card, or other account with a financial institution of any person or public body.

Thank you for contacting this office. We hope that this opinion is of assistance.

Sincerely,

Joseph Underwood
Senior Attorney

Alan Gernhardt
Executive Director