

IN THE
SUPREME COURT OF VIRGINIA

RECORD NO. 050242

JUDICIAL INQUIRY AND REVIEW COMMISSION,

Defendant-Appellant/Cross-Appellee,

v.

ALLAN D. ZALESKI,

Plaintiff-Appellee/Cross-Appellant.

**OPPOSITION TO PETITION FOR APPEAL AND
CROSS-PETITION FOR APPEAL**

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NATURE OF THE CASE

Allan D. Zaleski, a Norfolk attorney, brought this action under the Virginia Freedom of Information Act, Va. Code 2.2-3700 *et seq.* (FOIA), on October 6, 2003 in the Richmond Circuit Court. Mr. Zaleski sought an injunction or writ of mandamus to compel the Judicial Inquiry and Review Commission (JIRC) to produce an informal opinion given by JIRC counsel to the Honorable Charles D. Griffith, Jr. of the Norfolk Circuit Court. On November 3, 2004, the court ruled that JIRC had violated the FOIA and ordered JIRC to disclose the informal opinion, but denied Zaleski's requests for costs, attorney's fees and penalties. The court suspended execution of its judgment pending appeal by order of November 16, 2004. JIRC filed a notice of appeal on November 9, 2004; Zaleski filed his cross-notice of appeal on November 22, 2004, on the issue of attorney's fees..

STATEMENT OF FACTS

For purposes of this Brief in Opposition, Appellee does not dispute Appellant's statement of facts.

CROSS-ASSIGNMENT OF ERROR

The circuit court erred by declining to award attorneys fees and costs to Zaleski based on its finding that JIRC's violation of FOIA was not "willful and knowing," when the statute requires costs and fees to be awarded absent special circumstances.

QUESTIONS PRESENTED

1. Did the circuit court correctly determine that an informal opinion by JIRC counsel must be divulged under the FOIA because it is not a "paper filed with or

proceeding before” JIRC that is confidential by statute? (Relates to Appellant’s assignment of error.)

2. Did the circuit court err by declining to award attorneys fees and costs to Zaleski based on its finding that JIRC’s violation of FOIA was not “willful and knowing,” when the statute requires costs and fees to be awarded absent special circumstances?

PRINCIPLES OF LAW, ARGUMENT AND AUTHORITIES

The Freedom of Information Act provides that “[e]xcept as otherwise specifically provided by law,” all public records shall be available upon request to any citizen of the Commonwealth, subject to certain well-defined exemptions. Va. Code § 2.2-3704. The Freedom of Information Act is to be “liberally construed to promote an increased awareness by all persons of governmental activities,” and exemptions are to be “narrowly construed.” Va. Code. § 2.2-3700.

JIRC seeks to avoid compliance with FOIA by claiming that its informal opinions are confidential under Va. Code § 17.1-913, which prohibits disclosure of “[a]ll papers filed with and proceedings before [JIRC].” But, as the Circuit Court correctly found, informal opinions are neither “papers filed with” JIRC nor “proceedings before” JIRC. The broad interpretation that JIRC would give these terms contradicts their plain meaning.

I. THE COURT SHOULD NOT GRANT JIRC’S APPEAL BECAUSE THE CIRCUIT COURT CORRECTLY FOUND, BASED ON THE PLAIN LANGUAGE OF THE RELEVANT STATUTES, THAT JIRC’S INFORMAL OPINION MUST BE DISCLOSED UNDER THE VIRGINIA FREEDOM OF INFORMATION ACT.

The primary responsibility of the Judicial Inquiry and Review Commission, and the only one expressly designated in the Virginia Code, is “to investigate charges arising out of the present or any prior term of office which would be the basis for retirement, censure, or removal of a judge . . .” Va. Code 17.1-902. In addition to this statutory charge, this Court has also authorized counsel for JIRC to issue informal opinions upon request by a judge. Rules Governing the Judicial Ethics Advisory Committee (“JEAC Rules”), Rule 36. When an informal opinion is issued, counsel must keep a written record. JEAC Rule 37. That written record is a “public record” as defined by FOIA. *See* Va. Code § 2.2-3701 (defining “public records” as “all writings and recordings . . . prepared or owned by, or in the possession of a public body or its officers, employees or agents in the transaction of public business”).

In seeking to withhold its informal opinions, JIRC relies on Virginia statute providing that “[a]ll papers filed with and proceedings before the Commission . . . shall be confidential . . .” Va. Code § 17.1-913. But a plain reading of the confidentiality provision indicates that the phrase “papers filed with and proceedings before the Commission” does not refer to informal opinions, but rather to information related to a JIRC investigation about a judge.

This is apparent, first of all, from a careful reading of the entire statute. Under the doctrine of *noscitur a sociis*, “the meaning of doubtful words in a statute may be determined by reference to their association with related words and phrases. When

general words and specific words are grouped together, the general words are limited and qualified by the specific words and will be construed to embrace only objects similar in nature to those objects identified by the specific words.” *Andrews v. Ring*, 266 Va. 311, 319, 585 S.E.2d 780, 784 (2003), citing *Commonwealth v. United Airlines, Inc.*, 219 Va. 374, 389, 248 S.E.2d 124, 132-33 (1978). Here, the statute indicates that “papers and proceedings” “include[s] the identification of the subject judge as well as all testimony and other evidence and any transcript thereof made by a reporter.” Va. Code § 17.1-913. These are all terms that relate to an investigation into a particular judge. A “subject judge,” “testimony,” and “evidence” all come into play once an investigation has been commenced, not before. These illustrative examples demonstrate that the meaning of “papers filed with and proceedings before the Commission” refer to those papers and proceedings involving the investigation of a subject judge.

As the circuit court pointed out, this reading is further supported by the categories of persons who are prohibited from divulging the “papers and proceedings,” which are any person who:

- (i) either files a complaint with the Commission, or receives such complaint in an official capacity;
- (ii) investigates such complaint;
- (iii) is interviewed concerning such complaint by a member, employee or agent of the Commission; or
- (iv) participates in any proceeding of the Commission or in the official recording or transcription thereof.

Id. In other words, the individuals on whom the confidentiality requirement is imposed are defined by their relationship to the filing of a complaint or the investigation of a judge.

Moreover, the notion that an informal opinion is a “paper filed with” or a “proceeding” of JIRC does not make sense in view of the purposes of the confidentiality requirement, which this Court has described as follows:

[T]he requirement of confidentiality in Commission proceedings (1) protects the reputation of an individual judge by shielding him from publicity involving frivolous complaints, (2) protects public confidence in the judicial system by preventing disclosure of a complaint against a judge until the Commission has determined the charge is well-founded, and (3) protects complainants and witnesses from possible recrimination by prohibiting disclosure of their identity prior to a determination that the complaint is meritorious.

Landmark Communications, Inc. v. Virginia, 217 Va. 699, 712, 233 S.E.2d 120, 129 (1977) (“*Landmark I*”).¹ Applying the confidentiality requirement to informal opinions does not advance any of these objectives. Since no breach of ethical duty is implied by a request for, or the granting of, an informal opinion, such a disclosure would not sully the reputation of a judge. For the same reason, disclosure of informal opinions would not affect the public confidence in the judicial system. (To the contrary, it might be comforting for the public to know that judges seek guidance when they face ethical dilemmas.) Finally, there are no complainants or witnesses involved in the issuance of an informal opinion, and therefore no need to protect them from recrimination or retaliation.

JIRC erroneously claims that an informal opinion is a “paper filed with” JIRC because “JIRC Counsel . . . makes a written record of that informal opinion and places it in the official files of JIRC.” Pet. for Appeal at 8. Under this rationale, any paper in any file at JIRC’s offices is confidential. An invoice for paperclips would be confidential as long as someone “places it in the official files of JIRC.” So would a job description for a JIRC employee. JIRC’s argument would in effect exempt JIRC entirely from the

¹ Essentially the same purposes for the confidentiality requirement were noted by the United States Supreme Court in *Landmark Communications Inc. v. Virginia*, 435 U.S. 829, 835 (1978) (“*Landmark II*”), which reversed *Landmark I*.

Freedom of Information Act. The General Assembly has declined to make such an exemption, although it has done so for other public bodies. Va. Code § 2.2-3703.

Moreover, notwithstanding JIRC's claim to the contrary, the phrase "to file with" a court, commission, or other body almost invariably means that a person *outside* of that body causes a document to be put in the body's official files. For example, in the rules of this Court, "'file with the court' . . . means deliver to the clerk specified a paper, a copy of which has been mailed or delivered to opposing counsel, and appended to which is either acceptance of service or a certificate showing the date of mailing or delivery.'" Sup. Ct. Rule 5:1. The clerk himself, on the other hand, simply "files" a paper, he does not "file with" the court. *See, e.g.*, Sup. Ct. Rule 5A:6 (a) and (c) ("counsel *files with* the clerk of the trial court a notice of appeal" but "[t]he clerk of the Court of Appeals may *file* any notice of appeal") (emphasis added). JIRC has not cited any examples from the Code of Virginia or the rules of this Court in which the phrase "file with" has referred to a person within a court or commission filing a document with his own agency.

JIRC next argues that when a complaint is filed against a judge, JIRC reviews all informal opinions issued to that judge. "For this reason, all informal opinions JIRC counsel gave to that judge become part of that proceeding." Pet. for Appeal at 9. This argument proves too much, for it means that any public document becomes confidential once JIRC considers it as evidence in a proceeding against a judge. For example, in investigating a complaint, JIRC may review transcripts of court proceedings. Under JIRC's analysis, those transcripts – previously available to anyone – suddenly become confidential. This is patently absurd. JIRC does not have the power to make any public document confidential merely by reviewing it as part of an investigation.

JIRC claims that to reveal an informal opinion requested by a judge who is a subject of investigation, “JIRC would violate the confidentiality statute by, at the very least, disclosing the identity of the judge who is the subject of a pending JIRC proceeding.” Pet. for Appeal at 12. This simply is not the case. JIRC would have to disclose the opinion, but *not* the fact that an investigation is in progress. The fact that a judge has asked for, and received, an informal opinion does not in any way imply that the judge is the subject of an investigation.

II. IF THE COURT GRANTS JIRC’S APPEAL, IT SHOULD ALSO GRANT MR. ZALESKI’S CROSS-APPEAL ON THE ISSUE OF ATTORNEY’S FEES.

Mr. Zaleski has cross-appealed the trial court’s denial of prevailing party fees and costs.² Should the Court grant JIRC’s appeal, Mr. Zaleski requests that the Court also grant his cross-appeal.

Until 1989, The Freedom of Information Act gave circuit judges nearly complete discretion in the awarding of attorney’s fees and costs. Former Code § 2.1-346 (1988) provided that if a violation of FOIA occurs, “the court *may* award costs and reasonable attorney's fees to the petitioning citizen.” (emphasis added). The General Assembly amended the fees provision in 1989 to its present language, that “the petitioner *shall* be entitled to recover reasonable costs and attorneys' fees from the public body if the petitioner substantially prevails on the merits of the case, *unless* special circumstances would make an award unjust.” Va. Code § 2.2-3713. The General Assembly thus made clear its intent that prevailing petitioners should nearly always receive fees; denial of fees is the very rare exception. *See RF & P Corp. v. Little*, 440 S.E.2d 908, 247 Va. 309 (1994) (allowing \$133,000 attorney’s fee award to successful FOIA petitioner).

² Mr. Zaleski does not appeal the circuit court’s refusal to assess penalties against JIRC.

In the present case, there can be no question that Mr. Zaleski wholly prevailed on the merits. The Circuit Court found that JIRC had violated FOIA and ordered JIRC to produce the requested records. Nor were there any “special circumstances” to justify a denial of fees. Nonetheless, the Circuit Court denied Mr. Zaleski’s request for fees on the grounds that “[t]he Commission’s violation was not willfully and knowingly made but rather based on a reasonable belief.” Order, November 3, 2004 at 5. But JIRC’s good faith belief that it was following the law is not a “special circumstance.” Presumably, it is nearly always the case that when a public body withholds a document, it has a good faith belief that it is entitled to do so.

The Circuit Court evidently conflated the standard for awarding fees to the petitioner with the standard for assessing penalties against a public body. The statute requires the court to impose a fine of up to \$1000 against a public body that “willfully and knowingly” violates the Freedom of Information Act. Va. Code § 2.2-3714. The General Assembly carefully crafted two separate standards for penalties, on the one hand, and attorney’s fees and costs, on the other. Attorney’s fees and costs should almost always be awarded when the petitioner prevails; penalties should almost never be assessed. The point of a penalty is to punish a wrongdoer, but the point of attorney’s fees is to encourage petitioners to bring meritorious suits under FOIA. The Circuit Court erred by denying costs and attorney’s fees to Mr. Zaleski based on JIRC’s good faith.

CONCLUSION

For the foregoing reasons, JIRC’s Petition for Appeal should be denied. In the alternative, should the Court grant JIRC’s Petition for Appeal, Mr. Zaleski respectfully requests that his Cross-Petition for Appeal also be granted.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing brief was served by
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