IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 050242

JUDICIAL INQUIRY AND REVIEW COMMISSION,

Appellant/Cross-Appellee,

v.

ALLAN D. ZALESKI,

Appellee/Cross-Appellant.

RESPONSE BRIEF OF APPELLEE

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STATEMENT OF THE CASE

Pursuant Virginia Freedom of Information Act, Va. Code 2.2-3700 *et seq.* (FOIA), Allan D. Zaleski, a Norfolk attorney, sought an informal opinion that counsel for the Judicial Inquiry and Review Commission (JIRC) may have rendered to the Honorable Charles D. Griffith, Jr., a Norfolk Circuit Court Judge. When JIRC refused to comply with his FOIA request, Zaleski brought this action in the Richmond Circuit Court, seeking an injunction or writ of mandamus to compel JIRC to produce the requested records. 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. By order of November 16, 2004, the court suspended execution of its judgment pending appeal. 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. This Court granted both appeals.

STATEMENT OF FACTS

The Judicial Inquiry and Review Commission

The Judicial Inquiry and Review Commission (JIRC) is the body vested by statute and the state Constitution with power to "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; Va. Const. Art. 6, § 10.

The present case, however, does not concern an investigation of charges against a judge, but an informal opinion purportedly issued by JIRC counsel to the Honorable Charles D. Griffith Jr. of the Norfolk Circuit Court. JIRC's authority to issue informal opinions does not derive from statute or by the Constitution, but by order of this Court:

> 36. Counsel for the Judicial Inquiry and Review Commission may issue informal opinions. . . .
>
> 37. If a request is made that requires only an informal opinion, Counsel may render an informal opinion at once or solicit the advice of the chair and other members before rendering an informal opinion. Informal opinions may be oral. A written record shall be maintained by Counsel and a copy of the memorandum shall be promptly forwarded to the chair.
>
> . . . .
>
> 39. Compliance with an informal opinion shall have the same effect as compliance with a formal opinion in judicial discipline proceedings.
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> 40. Informal opinions will not be distributed or published in the same manner as formal opinions.

Supreme Court of Virginia Order Creating the Judicial Ethics Advisory Committee, January 5, 1999.

Zaleski's FOIA Request to JIRC

In 2001, Judge Charles D. Griffith, Jr. presided over the probation revocation hearing of Kenneth L. Jackson. *See Jackson v. Commonwealth*, 40 Va. App. 343, 579 S.E.2d 375 (2003) *rev'd*, 267 Va. 226, 590 S.E.2d 518 (2004). Jackson's attorney asked Judge Griffith to recuse himself, on the grounds that Judge Griffith had been Commonwealth's Attorney at the time Jackson was originally convicted. In response to the recusal motion:

> Judge Griffith indicated he had obtained an advisory opinion from the Judicial Inquiry and Review Commission and needed to consider only whether he was the Commonwealth's attorney when the probation violation occurred, not whether he was the Commonwealth's Attorney at the time of the underlying conviction. On that basis, Judge Griffith denied Jackson's motion for recusal.

Id., 40 Va. App. at 345, 579 S.E.2d at 376.

Zaleski, a Norfolk attorney, sought a copy of the opinion that Judge Griffith had referenced in open court. Accordingly, he filed a request with JIRC under the Virginia

Freedom of Information Act, Va. Code § 2.2-3700 *et seq.*, requesting a copy of any opinion issued to Judge Griffith "regarding the propriety of his sitting as a Judge in a probation violation matter where prior to the hearing, and at the time of the original conviction, Judge Griffith acted as Commonwealth's attorney in the prosecution of the matter." (App. 10.) By letters dated May 12, 2003 and May 19, 2003, JIRC counsel denied the request, claiming that, pursuant to Va. Code § 17.1-913, JIRC documents were confidential and not subject to public disclosure. (App. 10-11.) Following JIRC's refusal to comply with his FOIA request, Zaleski filed the present action in the Circuit Court of Richmond.

ASSIGNMENT OF CROSS-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? (Relates to appellee's assignment of cross-error.)

SUMMARY OF ARGUMENT

The Virginia Freedom of Information Act (FOIA) 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 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. Furthermore, the recently enacted revisions to § 17.1-913 cannot be read retroactively to confer confidentiality on the requested records.

Finally, the Circuit Court erred in declining to award attorney's fees and costs to Zaleski on the grounds that JIRC did not willfully or knowingly violate the FOIA statute. A willful or knowing violation is a prerequisite for *penalties*, but not for attorney's fees and costs, which are *always* to be awarded "if the petitioner substantially prevails on the merits, unless special circumstances would make an award unjust." Va. Code § 2.2-3713. Since Zaleski prevailed on the merits of his FOIA action, and no special circumstances exist, the Circuit Court should have awarded attorney's fees and costs.

PRINCIPLES OF LAW, ARGUMENT AND AUTHORITIES

I. THE CIRCUIT COURT CORRECTLY HELD THAT JIRC'S INFORMAL OPINIONS ARE SUBJECT TO FOIA BECAUSE THEY ARE NOT CONFIDENTIAL UNDER THE APPLICABLE STATUTE.

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 a judge's request. Supreme Court of Virginia Order Creating the Judicial Ethics Advisory Committee (January 5, 1999), para. 36. When an informal opinion is issued, counsel must keep a written record. *Id.*, para. 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.[1] 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 of a judge.

[1] In this Section, references to Va. Code § 17.1-913 do not include the 2005 amendment, 2005 Va. Acts ch. 508. As discussed in Section II, that amendment, which becomes effective July 1, 2005, is not retroactive and therefore does not bear on the present case.

First, as noted above, the statutes pertaining to JIRC make no reference whatsoever to informal opinions. That chapter of the Code discusses only such matters as the composition of the Commission and its powers respecting the investigation of judges. *See* Va. Code §§ 17.1-900 *et seq.* JIRC's authority to issue informal opinions comes exclusively from this Court. In the context of a statutory scheme dealing only with JIRC's investigatory role, the only reasonable reading of "papers filed with and proceedings before" the Commission is in reference to papers and proceedings related to a complaint or investigation.

Second, 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 states 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 further 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," namely, 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).[2] 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

[2] 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), which reversed the Virginia Supreme Court's decision.

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 "When JIRC Counsel gives a judge an informal opinion, he discharges his official duty by placing a written record of it in the official files of JIRC." (Appellant's Br. at 9.) But 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). *See also* Va. Code § 15.2-1603 ("The oath shall be *filed with* the clerk of the court in whose office the oath of his principal is filed, and such clerk shall properly label and *file* all such oaths in his office for preservation"). Similarly JIRC counsel does not file his informal opinions *with* JIRC; he simply files them.

Moreover, under JIRC's reading of "papers filed with" JIRC to include anything in JIRC's official files proves far too much. 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 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.[3]

Continuing to grasp at straws, JIRC 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." Appellant's Br. at 10. This argument also 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.

In fact, JIRC's disclosure of an informal opinion would not jeopardize the confidentiality of any investigatory *proceeding*. The fact that a judge asked for, and received, an informal opinion does not imply anything, one way or another, about whether JIRC has initiated any sort of investigation of the judge. This is true regardless of whether the investigation was initiated *sua sponte* by JIRC or by a complaint from a third party.

In sum, the plain language, structure, and purposes of Va. Code § 17.1-913 unambiguously indicate that informal opinions are not "papers filed with" or

[3] Indeed, not even the new amendment to § 17.1-913, discussed in Section II, *infra*, does not go as far as JIRC would in insisting that *all* papers in JIRC's official files are confidential.

"proceedings before" JIRC, and therefore are not confidential. Given that FOIA 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, there can be no doubt that the Circuit Court correctly ruled that the informal opinion requested by Zaleski must be disclosed.

II. THE RECENT AMENDMENTS TO THE FOIA STATUTE AND JIRC CONFIDENTIALITY STATUTE ARE NOT RETROACTIVE AND DO NOT APPLY TO THIS CASE.

During the 2005 session, the General Assembly added a paragraph to Va. Code. § 17-1-913 that provides, in part: "B. Advice on judicial ethics given by an attorney employed by the [Judicial Inquiry and Review] Commission to a judge and the records of such advice shall be confidential and not be divulged except as permitted in subsection A." 2005 Va. Acts ch. 508 (attached to Appellant's Br.). The same act amended the FOIA to state that "[r]ecords of the Judicial Inquiry and Review Commission made confidential by § 17.1-913" are exempt from disclosure.

Contrary to JIRC's assertion, this enactment is not retroactive and does not cancel JIRC's responsibility to provide records requested before the amendment. The "fundamental principles of statutory construction" provide that "retroactive laws are not favored, and that a statute is always construed to operate prospectively unless a contrary legislative intent is manifest." *Berner v. Mills*, 265 Va. 408, 413, 579 S.E.2d 159, 161 (2003). These basic principles have been codified by the General Assembly:

> Whenever the word "*reenacted*" is used in the title or enactment of a bill or act of assembly, it shall mean that the changes enacted to a section of the Code of Virginia or an act of assembly are in addition to the existing substantive provisions in that section or act, and are effective prospectively unless the bill expressly provides that such changes are effective retroactively on a specific date.

Va. Code § 1-13.39:3.[4] This provision applies conclusively to Chapter 508. That act specifically provides "[t]hat §§ 2.2-3705.7 and 17.1-913 of the Code of Virginia re amended and *reenacted* as follows: . . ." (emphasis added) and does not expressly provide that the "changes are effective retroactively on a specific date." The changes to the statutes therefore *must* be construed as substantive changes with no retroactive effect.

This Court has specifically rejected JIRC's contention that the language "the provisions of this act are declaratory of existing law" is "a statement of retroactive intent." *Berner*, 265 Va. at 414, 569 S.E.2d at 161-62. The Court explained that such an argument:

> would effectively nullify the requirement in Code § 1-13.39.3 that "reenacted" statutes apply prospectively unless the bills enacting them contain certain specified language. Moreover, any construction of the phrase "declaratory of existing law" as a statement of retroactive intent would render the language of Code § 1-13.39:3 self-contradictory and meaningless.

Id. The analysis is precisely the same here. Absent express language making the amendment retroactive, it can only be read prospectively.[5]

The language of the amendment itself also supports the conclusion that a substantive change to the statute was intended. Notably, the new statute does *not* indicate that informal opinions are "papers filed with" or "proceedings before" the Commission, by, for example defining those terms to include informal opinions. Rather, it leaves the "papers filed with and proceedings before the Commission" language intact, and adds a

[4] As of October 1, 2005, this Code section will be recodified as § 1-238. The substance of the law will not change. *See*2005 Va. Acts ch. 839.

[5] JIRC's reliance on *Horner v. Dep't of Mental Health*, 268 Va. 187, 597 S.E.2d 202 (2004) is inapposite. In that case as well this Court rejected the contention that a statutory amendment applied retroactively. Among other things, the Court noted that "[n]othing in the amendment, such as the words 'declaratory of existing law,' indicates that the General Assembly enacted the amendment as a clarification of existing law." 268 Va. at 193, 597 S.E.2d at 205. That is a far cry from the proposition for which JIRC cites *Horner*, that "the presence of words such as 'declaratory of existing law' . . . clearly indicate" an intent not to make substantive changes of law. Appellant's Br. at 14. As explained above, such an interpretation would directly contradict this Court's ruling in *Berner* as well as § 1-13.39:3.

new paragraph that *separately* ensures the confidentiality of informal opinions. The language and structure of the opinion therefore indicates that informal opinions are distinct from "papers filed with and proceedings before the Commission." If anything, the amendment supports the Circuit Court's conclusion that an informal opinion is *not* a "paper filed with" or "proceeding before" JIRC, and therefore is not confidential under the statutes in effect now and at the time this suit was filed.

III. ZALESKI IS ENTITLED TO ATTORNEY'S FEES AND COSTS UNDER FOIA.

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).

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. 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." (App. 62.) 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 attorney's fees 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. Thus, the Circuit Court's finding that JIRC did not "willfully and knowingly" violate the statute justifies its denial of *penalties*, but not its denial of fees. The Circuit Court nonetheless denied "[c]osts, attorney's fees, and penalties," *all* "on the basis that the Commission's violation was not willfully and knowingly made." (App. 62.)

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. This distinction makes sense: A penalty is meant to punish a wrongdoer, and therefore should be assessed only when there is willing or knowing misconduct. But attorney's fees and costs are meant to encourage petitioners to bring meritorious suits under FOIA, a purpose that is unlikely to be accomplished unless fees and costs are regularly awarded. The Circuit Court erred by denying costs and attorney's fees to Zaleski based only on JIRC's good faith.

CONCLUSION

For the foregoing reasons, the appellee respectfully requests that this Court affirm the Circuit Court judgment ordering JIRC to produce the requested informal opinion, and reverse the Circuit Court judgment denying attorney's fees and costs.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 5:26(d)

I hereby certify that on this 14th day of June, 2005, 20 copies of the foregoing brief were filed in the office of the clerk, and three copies were served by U.S. Mail, postage pre-paid, addressed as follows:

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