VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF RICHMOND
JOHN MARSHALL COURTS BUILDING

CHIEF OF POLICE BRYAN NORWOOD and THE CITY OF RICHMOND,	)	
Plaintiffs,	)	
v.	)	Case No. CL11-61-5
MORIAH KARN,	)	
Defendant.	)	

DEMURRER TO COMPLAINT

The defendant, Moriah Karn ("Ms. Karn"), by counsel, hereby demurs to the Complaint. The grounds for this demurrer are as follows:

Plaintiffs Chief of Police Bryan Norwood and City of Richmond (the "City"), having produced certain documents to the defendant pursuant to a request under the Virginia Freedom of Information Act (FOIA), Va. Code § 2.2-3700, *et seq.*, now ask this Court for an order compelling the defendants to return the documents and enjoining them from disseminating them. An order such as the City requests is not authorized by FOIA or any other law, and would violate the First Amendment to the United States Constitution and Article I, § 12 of the Virginia Constitution.

BACKGROUND

As set forth in the Complaint, Ms. Karn requested "a copy of the protocol/rules manual and roster for the Richmond Police Department" pursuant to FOIA. Compl. ¶ 5. There followed an e-mail exchange between Ms. Karn and Associate General Counsel Angela C. Harrison, in the

course of which Ms. Karn narrowed her request to particular General Orders and Operating Manuals. Compl. ¶¶ 6-10. The City thereafter produced the requested documents to Ms. Karn, with sensitive information redacted. Compl. ¶¶ 11, 18. On or about December 26, 2010, Ms. Karn posted the documents on the website "The Wingnut." *See* http://wingnutrva.org/richmond-police-department-documents/.

The City now claims that Ms. Harrison was without authority to produce the documents, and that certain of the documents are exempt from disclosure under FOIA. Compl. ¶¶ 14-17. Without so much as contacting Ms. Karns to discuss its concerns about the documents, the City filed this action seeking an Order "(a) compelling the return of certain exempt information; (b) preventing the disclosure of this information to the general public; (c) enjoining the defendant from publicizing this information; and (d) granting such other relief as the Court deems appropriate." However, the City cites no legal authority giving it standing to make such a request, or giving the Court power to grant it. Nor does the City provide any evidence to support its prediction of dire consequences should the request be denied, or even submit the documents in question to the Court for review. In short, the City asks this Court to engage in the wholesale censorship of public documents, voluntarily provided to Ms. Karns, with no legal or factual basis and in contravention of the state and federal Constitutions.

ARGUMENT

I. THERE IS NO LEGAL BASIS FOR THE CITY'S REQUEST FOR THE CENSORSHIP OF LAWFULLY OBTAINED PUBLIC DOCUMENTS.

The City cites no statute or court decision authorizing it to seek the return and suppression of allegedly erroneously produced public documents. Certainly, FOIA itself provides no such authority. While FOIA affords court remedies to citizens who have wrongfully

been denied access to public records (Va. Code §§ 2.2-3713, 3714), it provides no analogous cause of action to government bodies seeking to recall such documents.

Indeed, there is nothing unlawful under FOIA about the City's disclosure of the documents. Even assuming that the documents are exempt from disclosure under FOIA (which Ms. Karn does not concede), the section cited by the City provides that the records "are excluded from the provisions of this chapter but *may* be disclosed by the custodian in his discretion, except where such disclosure is prohibited by law." Va. Code § 2.2-3705.2 (emphasis added). The City does not cite any statute prohibiting the disclosure of these documents, nor is defendant aware of any such statute. Thus, the disclosure of the documents was perfectly lawful.

Nor does FOIA support the City's claim that the documents were disclosed without authorization. The statute nowhere defines "custodian of records." In some places, the language of the statute indicates that the government body as a whole, rather than a particular person, is the custodian. *See* Va. Code § 2.2-3704 (B) ("Any public body that is subject to this chapter and that is the custodian of the requested records shall . . . provide the requested records . . . ."); Va. Code § 2.2-3704 (J) ("the public body initiating the transfer of such records shall remain the custodian of such records for purposes of responding to requests for public records . . . . the entity in possession of the public records shall be deemed the custodian of the records for purposes of compliance with this chapter . . . ."). While other sections of the statute appear to refer to the custodian as an individual (by stating that certain records "may be disclosed by the custodian in *his* discretion"), there is no suggestion that only one individual within a governmental body has the authority to make disclosures, or that "custodian" means anything more than the person or persons in possession of the records.

Most importantly, neither FOIA nor any other statute prohibits Ms. Karn from possessing or disseminating records disclosed, even inadvertently, by a government body. The lack of any unlawful conduct is crucial, because this Court lacks the authority to enjoin lawful, non-tortious conduct. For example, in *Tran v. Gwinn*, 262 Va. 572, 554 S.E.2d 63 (2001), the defendant violated a zoning ordinance by using a property as a "place of worship" without a special use permit. In addition to enjoining him from further use of the property as a place of worship, the trial court enjoined the defendant from using the property as a "meeting hall, or other place of assembly," and ordered him to remove all items related to its use as a place of worship. The Virginia Supreme Court held that the injunction exceeded the trial court's authority. "[T]he trial court effectively amended the ordinance by adding these uses to the uses permitted with a special permit" and by "order[ing] removal of objects that do not violate the ordinance by virtue of their location on the property." 262 Va. at 583-84, 554 S.E.2d at 69-70. The trial court thereby "assumed the legislative function and, in so doing, improperly breached the separation of powers." *Id.* at 584, 69. In this case, likewise, the City asks this Court to assume a legislative function by enjoining conduct that has not been prohibited by the legislature.

Because there is no cause of action for the return and suppression of FOIA documents, and because an injunction against lawful conduct would exceed this Court's authority, the Complaint fails to state a claim for which relief may be granted and should therefore be dismissed.

II. CENSORSHIP OF THE LAWFULLY OBTAINED PUBLIC RECORDS WOULD BE UNCONSITUTIONAL.

The City seeks a prior restraint on the publication of truthful, lawfully obtained, public records. The United States Supreme Court has repeatedly made clear that such restraints are at the core of what the First Amendment was designed to prohibit. Indeed, the Court has never upheld such an order. This Court should decline the City's request to engage in this most constitutionally offensive form of censorship.

"[S]tate action to punish the publication of truthful information seldom can satisfy constitutional standards." *Smith v. Daily Mail*, 443 U.S. 97, 102 (1979). In every case to address the issue, the Supreme Court has refused to allow government to sanction the publication of truthful information, lawfully obtained, on matters of public concern. *See, e.g.*, *Bartnicki v. Vopper*, 532 U.S. 514 (2001) (overruling damage award against radio commentator who broadcast contents of a private telephone call that had been unlawfully intercepted, where the tape was lawfully obtained by commentator); *The Florida Star v. B.J.F.*, 491 U.S. 524 (1989) (striking down damage award against newspaper that published the name of a rape victim obtained from an erroneously released police record); *Smith v. Daily Mail Pub. Co.*, 443 U.S. 97 (1979) (overturning newspaper's indictment for publishing the name of a juvenile offender); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978) (overturning newspaper's conviction for publishing information about judicial disciplinary inquiry); *Oklahoma Publ'g Co. v. District Court In and For Oklahoma County*, 430 U.S. 308 (1977) (overturning injunction against publication of juvenile delinquency proceedings, when the press had erroneously been allowed to be present during the proceedings); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976) (overturning injunction against publication of information prejudicial to criminal defendant); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) (striking down damages

award against reporter who broadcast the name of a rape victim); *New York Times Co. v. U.S.*, 403 U.S. 713 (1971) (denying injunction against publication of a classified study of the Vietnam War).

In *The Florida Star v. B.J.F.*, 491 U.S. 524, 541 (1989), the Court set forth the standard by which to evaluate such cases: "Where a newspaper[1] publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order."

The Court noted that because only "lawfully obtained" information is protected, "the government retains ample means of safeguarding significant interests upon which publication may impinge," especially when the information is in the government's own custody:

> The government may classify certain information, establish and enforce procedures ensuring its redacted release, and extend a damages remedy against the government or its officials where the government's mishandling of sensitive information leads to its dissemination. Where information is entrusted to the government, a less drastic means than punishing truthful publication almost always exists for guarding against the dissemination of private facts.

491 U.S. at 534. *See also Landmark Communications, supra,* 435 U.S. at 845 ("[M]uch of the risk can be eliminated through careful internal procedures to protect the confidentiality of Commission proceedings"); *Oklahoma Publ'g*, 430 U.S. at 311 (noting trial judge's failure to close juvenile hearing to the public, including members of the press, who later broadcast juvenile defendant's name); *Cox Broadcasting, supra,* 420 U.S. at 496 ("If there are privacy interests to be protected in judicial proceedings, the States must respond by means which avoid public documentation or other exposure of private information"). In other words, the onus is on the

[1] Although most of the Supreme Court cases in this area deal with newspapers, courts have applied the same constitutional standards to websites. *See Ostergren v. Cuccinelli*, 615 F.3d 263, 276 n. 11 (4th Cir. 2010) (citing *Sheehan v. Gregoire*, 272 F.Supp.2d 1135, 1145 (W.D. Wash. 2003)).

government, not the press, to ensure the confidentiality of material the government wishes to keep secret.

Second, "punishing the press for its dissemination of information which is already publicly available is relatively unlikely to advance the interests in the service of which the State seeks to act." *The Florida Star*, 491 U.S. at 535. That is, whatever harm is feared from making the information public already occurred when the *state* makes the information public. The Court observed that "where the government has made certain information publicly available, it is highly anomalous to sanction persons other than the source of its release." *Id.* Thus, "once the truthful information was 'publicly revealed' or 'in the public domain' the [government may] not constitutionally restrain its dissemination." *Id.* (quoting *Daily Mail*, 443 U.S. at 103) (alteration added).

Of special relevance here, *The Florida Star* makes clear that publication of information obtained by the government is constitutionally protected even when the information is disclosed *inadvertently*. In that case, state law prohibited the dissemination of a rape victim's name. The police department nonetheless placed a police report containing a victim's name in its pressroom, where it was available to anyone. *Id.* at 527. The Court held that the newspaper's republication of the information erroneously provided by the police was constitutionally protected.

The injunction requested here requires even greater scrutiny because rather than after-the-fact liability for a publication, the City seeks a prior restraint against speech. *See Alexander v. United States*, 509 U.S. 544, 550 (1993) (describing temporary and permanent injunctions that forbid speech activities as "classic examples of prior restraints"). Prior restraints are presumed unconstitutional, because "[p]rior restraints on speech and publication are the most serious and

the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976).

Consistent with the First Amendment's abhorrence of such measures, the U.S. Supreme Court "has *never* upheld a prior restraint, even faced with the competing interest of national security or the Sixth Amendment right to a fair trial." *Proctor & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 226-27 (6th Cir. 1996) (citation omitted) (emphasis added). *See, e.g., New York Times*, *supra*; *CBS v. Davis*, 510 U.S. 1315 (1994); *Sec'y of State of Md. V. Joseph H. Munson Co.*, 467 U.S. 947 (1984); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975); *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971); *Carroll v. President & Comm'rs of Princess Ann*, 393 U.S. 175 (1968); *Near v. Minnesota*, 283 U.S. 697 (1931).

The *New York Times* case is instructive. There, the United States government sought to enjoin publication of illegally leaked[2] documents pertaining to the Vietnam War known as the Pentagon Papers. The government submitted affidavits to the effect that some of the documents "could clearly result in great harm to the nation," including "the death of soldiers, the destruction of alliances, the greatly increased difficulty of negotiation with our enemies, the inability of our diplomats to negotiate . . . ." 403 U.S. at 762 (Blackmun, J., dissenting) (quoting dissent from lower court opinion). Nonetheless, a majority of the Court held that the government had not carried its "heavy burden of showing justification for the imposition of such a restraint." 403 U.S. at 714 (per curiam) (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963)).

The concurring Justices noted the Founders' particular loathing for prior restraints on publication. "No one can read the history of the adoption of the First Amendment without being convinced beyond any doubt that it was injunctions like those sought here that Madison and his

[2] In contrast to the present case, in which the government voluntarily handed over the documents.

collaborators intended to outlaw in this Nation for all time." 403 U.S. at 719 (Black, J., concurring). *See also Id.* at 724 (Douglas, J., concurring) ("It is common knowledge that the First Amendment was adopted against the widespread use of the common law of seditious libel to punish the dissemination of material that is embarrassing to the powers-that-be."); *Id.* at 726 (Brennan, J., concurring). Also disturbing to the Justices was the fact that, as in the present case, the executive branch claimed the right to halt publication of news in the absence of legislative authorization. *Id.* at 718 (Black, J., concurring); 719 (Douglas, J., concurring); 730 (Stewart, J., concurring); 731 (White, J., concurring); 741 (Marshall, J., concurring).

The City has not even begun to satisfy the "heavy burden" required to justify a prior restraint. The City merely offers the conclusory statement that "the dissemination of these documents in any form to the public jeopardizes and endangers Richmond's Police Officers and citizens. Specifically, this information includes tactical plans for what the police force would do in emergency situations." Compl. ¶ 19. The City does not in any way specify the actual information at issue or explain why such information is dangerous. As Justice Brenan explained in *New York Times*:

> [O]nly governmental allegation and proof that publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea can support even the issuance of an interim restraining order. In no event may mere conclusions be sufficient: for if the Executive Branch seeks judicial aid in preventing publication, it must inevitably submit the basis upon which that aid is sought to scrutiny by the judiciary.

403 U.S. at 726-27 (Brennan, J., concurring). The City has not only failed to provide such proof, it has not even provided the Court with copies of the documents so that it may determine for itself the merits of the City's concerns.

The appropriateness of an injunction is further called into question by the fact that the documents have already been available on the Internet since approximately December 26, 2010.

There is no putting the cat back in the bag. *See New York Times*, 403 U.S. at 733 (White, J., concurring) ("[P]ublication has already begun and a substantial part of the threatened damage has already occurred. The fact of a massive breakdown in security is known, access to the documents by many unauthorized people is undeniable, and the efficacy of equitable relief against these or other newspapers to avert anticipated damage is doubtful at best.")

For all of these reasons, the only court to consider a government body's request to block publication of documents erroneously released under a public records law concluded that such an injunction would be unconstitutional. *Council of City of New Orleans v. Washington*, 13 So.3d 662 (La. App. 2009), *vacated*, 9 So.3d 854 (La. 2009).[3] In that case, the city provided the defendant with the e-mails of council members without first checking them for privileged content. The trial court ordered the defendant to return all the documents and enjoined him from making them public. The Court of Appeals held that the city had not overcome the heavy constitutional presumption against prior restraints, and that the trial court abused its discretion in granting the injunction.

Because any injunction against publishing the documents would violate the First Amendment,[4] the case should be dismissed.

CONCLUSION

For the foregoing reasons, Ms. Karn respectfully requests that her demurrer be granted and that the case be dismissed.

[3] The Louisiana Supreme Court vacated the Court of Appeals decision because it concluded that the First Amendment issue had not been preserved in the trial court. As the only case directly on point, however, the Court of Appeals opinion retains considerable persuasive force.

[4] Because "Article I, § 12 of the Constitution of Virginia is coextensive with the free speech provisions of the federal First Amendment," *Elliott v. Commonwealth*, 267 Va. 464, 473-474, 593 S.E.2d 263, 269 (2004), an injunction would also violate the Virginia Constitution.

Respectfully submitted,

MORIAH KARN

By counsel:

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of January, 2011, I served a true and correct copy of the foregoing document by U.S. Mail, postage prepaid, to:

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