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VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF RICHMOND

CHRISTOPHER HORNER,
and
COMPETITIVE ENTERPRISE INSTITUTE,

Plaintiffs,

v. Case No. CL18-5666

MARK R. HERRING,
ATTORNEY GENERAL OF VIRGINIA,

Defendant.

HEARING PROCEEDINGS

BEFORE: THE HONORABLE T. J. MARKOW, JUDGE

January 28, 2019

Richmond, Virginia

HALASZ REPORTING & VIDEO
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Reported by: Mary L. Rosser, RPR

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APPEARANCES:

GRAVEN W. CRAIG, PLLC
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attorney, of counsel for the defendant

ALSO PRESENT:

CHRISTOPER HORNER, ESQ., pro hac vice

1 (The proceedings commenced at 10:52 a.m.)

2 (The court reporter was sworn.)

3

4 THE COURT: All right.

5 MS. MOORE: Hello, Judge Markow. I believe
6 Mr. Craig had asked for the opportunity to make a motion
7 first, but I will introduce myself. I'm Scott Moore from
8 the Office of the Attorney General.

9 MR. CRAIG: Judge, I'm Graven Craig, on behalf
10 of the plaintiffs, and Mr. Horner is a resident of
11 Virginia, but a member of the Washington, D.C. Bar, and
12 he has filed a pro hac vice motion. We have the check,
13 which the clerk had asked us to provide, and beyond that
14 we would -- I don't know if there's any objection from
15 the Attorney General's Office, but we'd ask that he be
16 qualified pro hac vice. We filled out all the
17 appropriate paperwork.

18 MS. MOORE: That is entirely the Court's
19 determination.

20 THE COURT: Do you have a sketch?

21 MR. CRAIG: We submitted it with the paperwork,
22 Judge, but I can resubmit it. I apologize

23 THE COURT: I guess we can get it later.

24 MR. CRAIG: Yes, sir.

25 THE COURT: Make sure you get this filed with

1 the --

2 MR. CRAIG: We'll take it to the clerk's office.

3 THE COURT: And have the clerk send me the
4 sketch.

5 MR. CRAIG: Yes. We'll do that.

6 THE COURT: But certainly your motion is
7 granted.

8 MR. CRAIG: Thank you, Judge.

9 MS. MOORE: Your Honor, again, I'm Scott Moore.
10 I'm here on behalf of Mark Herring, our Attorney General.

11 And just to recap, having reviewed the documents
12 in this matter, I believe that Mr. Horner is here today
13 following a FOIA request that was made to the Office of
14 the Attorney General about communications that were had
15 between the Office of the Attorney General and NYU Law
16 School about the potential for a fellowship candidate to
17 be placed with the Office of the Attorney General.

18 Legal fellows, in my personal experience, are
19 law school graduates who are in search of job
20 opportunities and are paid by their law schools to work
21 often for public entities until they're able to find more
22 permanent employment.

23 In the present matter, there were communications
24 between NYU Law School and the Office of the Attorney
25 General about the fellowship generally and about a

1 particular potential fellow. That placement was never
2 made. I have no idea why that is, whether he found a
3 full-time job, or she decided they didn't want to come to
4 Virginia. I don't know that part. But in any case, no
5 placement, no fellowship placement was ever made with the
6 Office of the Attorney General, as a conclusion to these
7 communications.

8 But Mr. Horner made several requests pursuant to
9 FOIA, four documents related to these communications
10 between NYU Law School and the Office of the Attorney
11 General. The Office of the Attorney General provided a
12 significant number of documents, inches of documents.

13 One area of inquiry was met with the response in
14 FOIA that there are no documents responsive to that
15 request, and that has been outlined by both of the
16 parties in the papers that they've filed, essentially
17 that there was a request for opinions, analyses,
18 determinations concluding that the Attorney General had
19 legal authority to hire this NYU fellow or
20 privately-funded assistant, that that hire would not
21 constitute an impermissible gift, and that the hirer
22 would not violate ethics. And further, he requested
23 legal memoranda in support of those conclusions.

24 As I say, the Office did provide quite a few
25 documents in response to the other requests that were

1 made at the same time as these requests, but as to these
2 specific requests, the Office said there are no documents
3 responsive to your -- give us everything from August 2017
4 to March 2018 related to these topics. We don't have
5 that.

6 And that request was made twice, and on two
7 occasions the Office of the Attorney General searched and
8 talked with various employees and responded there are no
9 documents responsive to this request. And my
10 understanding from the pleadings that have been filed is
11 that Mr. Horner received that communication, was informed
12 pursuant to Virginia Code Section 2.2-3704(B)(3). One of
13 the available responses in FOIA is, we don't have any
14 documents responsive to your request.

15 And, of course, FOIA is mindful of the notion
16 we're talking about documents. It doesn't mean no one
17 ever talked about it. It does mean there are no
18 documents responsive to the request.

19 And so having made that response, Mr. Horner has
20 filed a petition for writ of mandamus and, of course,
21 this Court is aware a mandamus is intended to direct a
22 government official to perform a ministerial act. The
23 ministerial act under FOIA is go look through your
24 documents, give us what you have. Well, we looked
25 through our documents, and we made a statutorily

1 contemplated response that there aren't any documents
2 responsive as to this facet of your request.

3 That's where it should end. The ministerial
4 obligation of the public official in this case, as
5 contemplated by a petition for writ of mandamus as
6 contemplated by FOIA, is go look for the documents and
7 tell us if you have any or not, and give them to us if
8 you do. That's what we did. We responded as
9 contemplated by FOIA.

10 And so a demurrer is appropriate because,
11 according to all the pleadings that have been filed,
12 Mr. Horner received a response as contemplated by the
13 statute, he was informed there was a search, there are no
14 documents, and that's what the statute obligates this
15 governmental official, the Office of the Attorney
16 General, specifically Mark Herring in this case, to do.

17 And while we think that's the end of it, we did
18 our search and we responded, I would also bring to the
19 Court's attention -- this is in the demurrer that was
20 filed -- pursuant to 2.2-3705.7, the Attorney General's
21 working papers aren't the subject of FOIA, nor are the
22 Governor's or certain other papers. They are explicitly
23 excluded from the Act, such that that request is not a
24 proper request under FOIA.

25 And so we believe that is a further reason why a

1 demurrer is appropriate in this case, because the Act
2 specifically excludes a request of the nature that
3 Mr. Horner has made as to what's here in dispute. The
4 Office has responded, and because we're responding
5 bluntly on everything else, we searched for these too,
6 and we responded as to these and said there aren't any.

7 THE COURT: There are no working papers?

8 MS. MOORE: There are no papers -- there are no
9 documents responsive to this request, as we have informed
10 him.

11 It is my opinion that the Office could have
12 taken the position they didn't have to answer that one at
13 all. They were doing the search anyway. They were
14 trying to be open. They were trying to disclose the
15 information so that Mr. Horner would have it, and we were
16 there anyway. We were at the party anyway; might as well
17 keep looking. But the fact is, nothing was found that is
18 responsive as to this particular facet of his request.
19 And it is important to know he received a number of other
20 documents that were responsive to his request. This just
21 wasn't something for which a document was produced.

22 THE COURT: Thank you.

23 MS. MOORE: Thank you.

24 THE COURT: Mr. Craig?

25 MR. CRAIG: Thank you, Your Honor, may it please

1 the Court.

2 So when the Court has to test the sufficiency of
3 the pleadings on demurrer, it has to take all the facts
4 pled in the petition or the complaint as true.

5 And I would draw first this Court's attention to
6 paragraphs 13 through 15 of the complaint because in
7 those paragraphs it is alleged very specifically by my
8 clients that there are records. We assert that there are
9 records, there should be records, and there need to be
10 records that are probative of this request from my
11 clients, Mr. Horner and Competitive Enterprise.

12 Same in 14. We allege that they probably have
13 not done a thorough or correct search of the documents,
14 and we think that's also a reason under FOIA to seek
15 remedy from the Court.

16 And No. 15, we believe the government is
17 improperly withholding some of these documents.

18 So we think those three paragraphs alone
19 sufficiently state a cause of action that allows us to go
20 forward. That's the sufficiency of a demurrer. You
21 don't take into consideration what the government is --
22 or the defendant in this case pleads as a response.
23 Those facts are not taken into consideration by the
24 Court. It's only the petition and those facts alleged in
25 the petition. That's all the Court can look at and the

1 Court has to take all those facts as true, and we clearly
2 allege there's improper conduct on the part of the
3 Attorney General's Office in searching for these
4 documents. That should end the discussion right there,
5 Judge.

6 But what we also think is important, when you
7 look at the petition we filed and when you look at
8 Exhibit 2 of the complaint -- and the Commonwealth
9 touched on this in the very beginning of the argument.
10 They said, hey, you know, we've normally only seen these
11 as like law student type things and, you know,
12 universities and this, that and the other.

13 This is a specific example of a request from my
14 client where an outside entity sponsored by Mayor
15 Bloomberg from New York is trying to privately pay for
16 Special Assistant Attorney Generals. And in the
17 application, which is made part of the petition, one of
18 these Assistant Attorney Generals here in Virginia wrote
19 in the application up to New York, he said, The addition
20 of an NYU fellow would provide a full-time attorney to
21 allow Attorney General Herring to participate much more
22 fully in cooperative efforts to advance the agenda
23 represented by the State Impact Center, which is a
24 private entity up in New York State, which is certainly
25 not necessarily in the best interest of upholding the

1 laws and dignity of the Commonwealth of Virginia, which
2 is one of the things that my client is very interested in
3 looking at. And we think that's important for the Court
4 to take --

5 THE COURT: Why do you think there's something
6 more that you haven't gotten?

7 MR. CRAIG: Because, basically, the government
8 should have -- when you read all of the pleadings and
9 especially when you read this email that's Exhibit 2 in
10 the petition, Mr. Anderson, Donald Anderson, who is the
11 Assistant Attorney General, clearly tells in the
12 application that he's looked into this and they believe
13 that they're fully within their rights to accept this
14 private money to hire an Assistant Attorney General,
15 which typically --

16 THE COURT: But they haven't answered we don't
17 have anything. They've given you a bunch of stuff, and
18 now they say we've got nothing else.

19 MR. CRAIG: They said they don't have anything
20 related to how they got to their decision that it was
21 allowed.

22 So that leads to the next point I want to make,
23 Judge. So let's say in this Court -- you've had me with
24 jury trials before, Judge, especially in negligence
25 claims. That would be the equivalent of having an

1 insurance company that I'm dealing with on a plaintiff's
2 case and I send them a demand letter and they send me a
3 response saying, well, we're not negligent so we're not
4 paying you anything, and I turn around and I file suit
5 and I allege negligence, and they say, well, we're filing
6 a demurrer because we've already told you we're not
7 negligent, you should trust us.

8 And so what we have here is the situation where
9 the government is saying, hey, we're the Attorney
10 General, we looked, we're telling you we don't have it,
11 trust us. And so we believe that that isn't sufficient
12 at this point for a demurrer. Them asserting that we've
13 looked isn't sufficient for the purposes of demurrer
14 because we have alleged factually that we believe the
15 documents are there or, in the alternative, that they
16 haven't made a proper look, or that they're improperly
17 withholding documents.

18 I believe Mr. Horner also wants to address the
19 issue -- flesh out your question to defense as well, if
20 he may.

21 THE COURT: Counsel, normally I only hear from
22 one on the same issue.

23 MR. CRAIG: Yes, sir.

24 THE COURT: Is he going to tell me something you
25 can't tell me?

1 MR. CRAIG: Well, if I could confer with him a
2 second.

3 THE COURT: Go ahead. All right, Mr. Horner.

4 MR. HORNER: Oh, okay. That you, Your Honor,
5 may it please the Court and counsel.

6 This is a classic factual dispute which may not
7 be heard at this stage, of course, but to the extent the
8 Court entertains it, the reason we believe that records
9 exist are severalfold.

10 First, the application itself. In respondent's
11 own words, they claim that they looked into the law --
12 this is counsel, looked into the law, looked into the
13 ethics, and have concluded there are no issues. There
14 are statutes that say their should be issues. So their
15 own words suggest records should exist.

16 The Virginia Code, Sections 2.2-507 and 510,
17 states that all work shall be -- all Attorney General
18 work shall be performed by the Office of the Attorney
19 General, with the exception of a special counsel. But it
20 prescribes how the special counsel may be engaged and
21 why, and it states that they must be paid by the
22 Treasury, not by an outside activist. But those suggest
23 the records must exist because it requires a written
24 determination first that it's uneconomical or infeasible
25 for the OAG to perform the work.

1 The Code of Professional Conduct suggests there
2 had better be records because of the obligation to
3 consult with the client and perform an analysis. And
4 it's respondent's position, in saying there are no
5 records, that it was just one lawyer, without
6 consultation with the client, without analysis, stating a
7 fairly breathtaking claim of legal authority to bring in
8 a privately-funded Special Assistant Attorney General.
9 There had better be records.

10 Finally of note, any benefit of the doubt is
11 going to be given the other party in a demurrer hearing,
12 but respondent does have a history with petitioners of
13 providing false "no records" responses. For example, in
14 February, we asked for certain records we knew existed.
15 We were told "no records." We responded with exemplars
16 asking, So these don't exist? So that was a false "no
17 records" response. The response to that follow-up was,
18 yes, those exist, but we didn't provide them everything
19 we had that was responsive. So when the Office of the
20 Attorney General said "no records," that was not true,
21 and it shows that there are flaws in the search process.

22 And that's the only violation we're alleging in
23 this matter. We believe they complied with the statutory
24 requirements, we believe they complied with the Office of
25 the Attorney General Special Counsel policy that requires

1 a written determination first, and we believe that they
2 complied with the Code of Professional Conduct, but they
3 have given us false "no records" responses in a past
4 unrelated matter; in fact, the same FOIA officer. And we
5 pressure-tested it with documents that were responsive.
6 They said, yes, those exist, but then they said that's
7 all the records, but it wasn't all the records. We have
8 more.

9 And we will show this at trial. This is a
10 classic fashion dispute, not appropriate for a demurrer
11 hearing, but we have every reason to believe the records
12 should exist and that they do.

13 The COURT: Thank you. Ms. Moore?

14 MS. MOORE: Your Honor, I feel like we're
15 jumping past the demurrer stage and arguing the merits of
16 the case. What we're asking this Court to do is look at
17 the petition for writ of mandamus, a extraordinary writ
18 that is intended to direct a public official to perform a
19 ministerial function, a function that has already been
20 accomplished, which is a response to FOIA.

21 The presumptions that are made in the statements
22 that have been argued by the petitioner would be, first,
23 that we never talked to each other. We're allowed to
24 have communication that's not written. There might have
25 been a requirement for a written finding if someone had

1 been hired, which they were not. No hire was ever made,
2 so --

3 THE COURT: Let me ask you this: Why are they
4 wrong when they say that we are -- we're at demurrer.

5 MS. MOORE: Yes, sir.

6 THE COURT: And a demurrer, what the Court has
7 to do is determine whether the pleadings have
8 sufficiently stated a cause of action.

9 MS. MOORE: Yes, sir.

10 THE COURT: Now, they say they have, and you
11 say, well, maybe they have in terms of stating a cause of
12 action, but we told them we don't have them.

13 MS. MOORE: I would dispute that --

14 THE COURT: How is that different from --

15 MS. MOORE: I would dispute that assessment.

16 THE COURT: As what?

17 MS. MOORE: Respectfully, sir, I would say that
18 the question here is -- the petition for a writ of
19 mandamus has a limited remedy available to it, and so
20 it's the -- the petition for a writ of mandamus can
21 direct the conduct of a ministerial function. By
22 analogy, if someone comes into the courthouse and files a
23 petition for writ of mandamus against a judge and says
24 the judge didn't grant me the relief I sought, they're
25 not entitled to that. They're entitled to a decision on

1 something that's been put before the court, but not to a
2 particular decision. They're entitled to a decision.
3 They're entitled to a yes or a no. They're entitled to a
4 grant of relief or not a grant of relief, but they're not
5 entitled to a particular outcome.

6 Similarly, FOIA provides certain obligations for
7 a governmental body, and the question before this Court
8 is, has the Office satisfied that.

9 THE COURT: But isn't that a defense, as opposed
10 to a basis for a demurrer?

11 MS. MOORE: I don't believe so, Your Honor. I
12 believe it is appropriate for a demurrer because they
13 acknowledge that we have responded, that we have told
14 them there are no documents, that a number of documents,
15 including the one that -- I believe the one that
16 Mr. Craig just pointed to, the application, is a document
17 that was received through our office, from our office.

18 So a response was made, including to these
19 issues, and so the governmental body -- to do what they
20 say would be to say that every time a governmental body
21 offers a "there are no documents" response, which is a
22 response that's specifically contemplated by the code,
23 but every time a governmental body says there are no
24 records responsive to this, it has to go to trial.

25 THE COURT: Or there may be a special plea. I

1 don't know. You're the lawyer. I'm not going to give
2 you advice, legal advice because it's beyond my
3 competence level right now, but --

4 MS. MOORE: Well, many of the pleas would be
5 factual in nature --

6 THE COURT: Of course.

7 MS. MOORE: -- but the point of this argument --

8 THE COURT: I mean, what they say, this is
9 factual in nature, rather than --

10 MS. MOORE: I don't believe there are facts in
11 dispute that take it beyond the point of a demurrer
12 because the demurrer simply says the mandamus, the
13 direction of a ministerial act has been done. There's
14 nothing left to be done as to that ministerial act, and
15 to ask for more would be to say to the judge, you can't
16 deny the motion, you have to grant the relief sought.
17 That's not --

18 THE COURT: No --

19 MS. MOORE: -- that's not the same.

20 THE COURT: -- that's not true. You can
21 certainly respond in a defense and say we've given you
22 everything there is, period. So you're at issue then,
23 and that has to be proven or disproven. I don't know how
24 you make that an issue of law.

25 MS. MOORE: And Mr. Craig has said that it's his

1 belief and intention that he should go forward with
2 discovery in this case --

3 THE COURT: I guess he might have to.

4 MS. MOORE: -- has asked to do so. But that
5 would be inappropriate in this case where the ministerial
6 function that this Court should direct has been
7 accomplished. The statute contemplates --

8 THE COURT: From their perspective, that's the
9 issue; have you really complied.

10 MS. MOORE: The Office takes the position that
11 we have, that we have complied, and that there is nothing
12 that they have said --

13 THE COURT: Let me tell you --

14 MS. MOORE: -- they have shown that would be --

15 THE COURT: -- I hate the thought if I overrule
16 your motion, your demurrer, the precedent that sets in
17 FOIA cases, which dozens of them are filed all the time,
18 and every one of them we're going to have to do discovery
19 in all of that. It just seems like a terrible precedent.
20 But that's not before me. That's --

21 MS. MOORE: That is true. But as I say, I think
22 he has -- Mr. Craig, on behalf of Mr. Horner, has moved
23 into the merits of the case. And the point is not these
24 political issues as to Mr. Bloomberg or whatever. That's
25 not relevant to this case. The question is, did the

1 Office respond in a manner contemplated by the statute as
2 to the requests that were made, and they did.

3 The Office responded to each -- including to
4 this, and the pleadings in this matter acknowledge that a
5 response was received. This is not a situation where we
6 went to this agency, we asked them for information, they
7 stonewalled us, we never heard anything. This is not a
8 situation where they -- you know, I would even take the
9 position that the document they've offered, I've looked
10 into this and we can hire such a fellow, does not, does
11 not support the proposition they're asserting.

12 We are allowed to talk to each other. FOIA is
13 for documents, are there documents, not did anyone talk
14 about it, not was there ever any thought about it, not
15 did Mr. Anderson walk down the hall to his superior and
16 say I've gotten this inquiry, can I do this. There might
17 have been conversations. I wasn't privy to those, I
18 don't know, but there very well could have been, but they
19 would not have generated documents, and they would not
20 be -- there is nothing that is subject to FOIA. There's
21 no document to produce.

22 As this Court well knows, we're not required to
23 go write it down after the fact. We're not required to
24 create a document. Our obligation is to give them what
25 exists. And in this case, no fellow was ever hired. All

1 that was said in the document that Mr. Craig just read
2 is, looked into it, we can do it. Would there have been
3 a document created if a decision was made to hire this
4 fellow that was discussed? Quite possibly so. It never
5 happened. That event, and everyone agrees, that never
6 happened. That didn't occur. He or she was not hired.

7 THE COURT: Thank you.

8 I'm of the opinion that this is -- that your
9 defense is not something that can be reached on demurrer,
10 so I'm going to overrule the motion, the demurrer. What
11 you do after that, whether a defense is there, that's up
12 to the good lawyers at the Attorney General's Office to
13 figure out.

14 MR. CRAIG: I have a sketch order which I can
15 hand to counsel, Your Honor.

16 THE COURT: All right. Yes.

17 THE BAILIFF: (Handing.)

18 THE COURT: Thank you.

19 All right. Do you-all want to get that filed
20 with the clerk?

21 MR. CRAIG: Thank you.

22 THE COURT: Thank you.

23 MR. CRAIG: Judge, we also have noticed -- I
24 filed previously an order for discovery, and we both
25 agreed to hear that after this motion, so we think it's

1 appropriate now to bring that up.

2 THE COURT: What is this?

3 MR. CRAIG: We have a standard discovery order,
4 the Uniform Pretrial Order. I know we don't have a trial
5 date set, but we would at least ask the Court to allow us
6 to go ahead and proceed on discovery so we can try to
7 figure out and flesh out some of these issues. It
8 probably will help, to the extent we need to
9 short-circuit anything, at least let us get to that.

10 MS. MOORE: And, Your Honor, we would object to
11 broad discovery in this case. As we just argued, we
12 don't believe that this is a case that should go forward.
13 I appreciate the Court's decision, and I understand --

14 THE COURT: I think the easy way to address
15 that, though, is you've requested discovery or you will
16 discover?

17 MR. CRAIG: We filed a pretrial order, which I
18 know typically is done for a jury trial.

19 THE COURT: Just one that says if you're going
20 to do discovery, it's got to be completed by such and
21 such a date?

22 MR. CRAIG: Absolutely. That's it. We can just
23 go ahead and send the interrogatories and requests for
24 production of documents and --

25 THE COURT: Yeah. And if they think there's

1 something that's inappropriate, you can bring them up.

2 MR. CRAIG: Yes, sir.

3 MS. MOORE: I think that an order at this point
4 is premature. To grant the authority to do blanket
5 discovery --

6 THE COURT: Well, they haven't even answered
7 yet.

8 MS. MOORE: Right. And I think discovery prior
9 to an answer is unusual, to say the least.

10 THE COURT: Well, I don't know about that.

11 MS. MOORE: But that's my understanding, is
12 they're prepared to send discovery when we get back to
13 the office today. I don't think that the case is at
14 issue yet.

15 THE COURT: Let them send it. You can have,
16 what, 21 days in which to answer?

17 MR. CRAIG: That's correct.

18 MS. MOORE: I still have 21 days to answer this
19 petition for writ.

20 THE COURT: Well, I would agree with that. You
21 ought to wait until the answer has been filed.

22 MR. CRAIG: I understand.

23 THE COURT: I think you should do that. All
24 right.

25 MR. CRAIG: We'll just ask the Court then --

1 we'll withdraw our motion. Moving forward on that
2 pretrial order, we'll just keep it where it is, and we
3 can just come back.

4 THE COURT: Very good. Thank you-all.

5 MR. CRAIG: Thank you, Judge.

6

7 (The hearing adjourned at 11:19 a.m.)

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CERTIFICATE OF REPORTER

I, Mary L. Rosser, shorthand reporter, do certify that the foregoing 24 pages is a full, true and correct transcript of my stenographic notes taken on January 28, 2019, in the Circuit Court of the City of Richmond, in the matter captioned Christopher Horner, et al. versus Mark R. Herring, Attorney General of Virginia.

Given under my hand this 7th day of February, 2019.

Mary L. Rosser, Notary Public
Certification No.: 224344
Commonwealth of Virginia

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