

Appendix to Petition for Mandamus

Mark Spooner v. Scott Braband and Fairfax County Public Schools

Petitioner seeks writ of mandamus, pursuant to the Virginia Freedom of Information Act, Va. Code §2.2-3700 *et seq.*, compelling defendants to produce a videotape of a moderated conversation between Ibram X. Kendi and personnel of Fairfax County Public Schools on or about August 6, 2020.

I. The Parties

1. Petitioner, Mark Spooner, is a resident of Fairfax County, Virginia.
2. Respondent Scott Braband is the Superintendent of Schools for Fairfax County Public Schools (“FCPS”). As such he is FCPS’ chief executive officer.
3. Respondent FCPS is the entity responsible for operating the public school system in Fairfax County, Virginia.

II. Jurisdiction and Venue

4. This Court has jurisdiction over this matter pursuant to Va. Code § 2.2-3713(A). Venue is appropriate in this Court pursuant to Va. Code § 2.2-3713(A)(1).

III. Facts Giving Rise to Petitioner’s Cause of Action

5. On August 3, 2020, FCPS, through respondent Braband, entered into a contract with Ibram X. Kendi (“Kendi”), whereby Kendi would participate in a one-hour “moderated conversation” that would be viewed by approximately 1,500 school principals and other personnel of FCPS on August 6, 2020, at the kick-off for the 2020-2021 school year. The topic was “Cultivating an Anti-Racist School Community.” The session, which was to be by videoconferencing, was to consist of a 45-minute moderated conversation, followed by a 15-minute question-and-answer period. Kendi was to be paid \$20,000 for the event.

6. The above-mentioned contract is a public record as defined in the Virginia Freedom of Information Act (“FOIA”). In the contract, the parties acknowledged that FOIA was applicable.

7. Kendi is a prominent proponent of opinions commonly known as Critical Race Theory. His controversial ideas, as expressed in his book *How to Be an Antiracist* (2019) and elsewhere, include the assertions that America’s white majority is inherently racist, that color-blind or race-neutral policies are racist policies, that the government must adopt policies producing equal outcomes for all races, not just equality of opportunity, that standardized tests are racist because they tend to produce unequal outcomes for different racial groups, that capitalism is a racist economic system because it produces income inequalities, and that integration and assimilation of African Americans into the majority culture is an improper goal.

8. Because Kendi is a controversial, divisive person on issues of race relations, the fact that he was hired by FCPS to give a \$20,000 presentation to FCPS personnel is a matter of public importance, and it attracted considerable attention in the press.

9. On November 17, 2021, petitioner made a FOIA request for a copy of the August 2020 videotaped presentation.

10. On December 8, 2021, FCPS refused the request, stating that although a video recording of the event did exist, it was subject to the FOIA exemption set forth in Va. Code §2.2-3705.6(10).

11. On December 8, 2021, petitioner responded, noting that §2.2-3705.6(10) was inapplicable. That exemption only applies to trade secrets or proprietary information provided to a government entity in connection with a bid for a procurement contract, such as where a company submits data that it legitimately needs to keep confidential from competitors. No such transaction was involved in the August 6, 2020 moderated conversation. Petitioner therefore asked FCPS to reconsider its refusal to provide a copy of the videotape.

12. On January 4, 2022, FCPS responded, stating that it no longer had a copy of the requested videotape.

13. On January 4, 2022, petitioner responded, questioning whether the videotape had been disposed of, and asking FCPS to conduct a further search.

14. On January 10, 2022, FCPS replied, stating that although it no longer had a physical copy of the videotape, it had determined after a further diligent search of electronic records that it still had a working link to it. However, FCPS stated that it was still refusing to provide a copy.

15. In its January 10 response, FCPS no longer relied on the exemption in §2.2-3705.6(10). The new grounds for withholding the videotape were as follows: “Under the terms of the FCPS Agreement with [Kendi’s agent], Penguin House LLC, Mr. Kendi retains all copyright and other intellectual property rights related to the requested video. FCPS holds the limited right to maintain an archival copy for its records, but not the right to copy or disseminate the proprietary content to a third party. In the absence of consent of the copyright owner, the act of copying and disclosing the video would violate the federal Copyright Act. Consequently, FCPS is withholding the requested record in its entirety in reliance upon Section 2.2-3501(A) of the Freedom of Information Act, which provides that all public records shall be open “[e]xcept as otherwise specifically provided by law.”

16. The provision cited by FCPS in its January 10 response – §2.2-3501(A) – does not exist. When petitioner pointed this out, FCPS clarified its response on January 11, 2022, stating that it should have cited Va. Code §2.2-3704(A), which provides: “Except as otherwise specifically provided by law, all public records shall be open”

17. In a telephone call on January 11, 2022 between petitioner and FCPS’ chief FOIA officer, plaintiff was informed that no further administrative appeals were available and that, if plaintiff desired to pursue the matter further, he should pursue his judicial remedies under FOIA.

Consequently, petitioner has no legal remedy for his claim, other than this mandamus proceeding.

IV. Reasons for Issuing a Writ of Mandamus

Respondents' refusal to provide a copy of the videotaped presentation of Ibram X. Kendi is improper for the following reasons:

1. FCPS has no authority to avoid the requirements of FOIA by entering into a contract in which it agrees to keep secret a training session for its employees.

2. Kendi's presentation was not a copyrightable, scripted work. It was a "moderated conversation" in a live event in which there was give-and-take involving participation by FCPS personnel. Nor was it confidential – it was viewed by an estimated audience of 1,500 public employees.

3. Even if the videotape were otherwise copyrightable by Kendi, it is superseded by the terms of the contract with FCPS. In paragraph 11 of the agreement, Kendi acknowledged that FCPS "is a public body pursuant to the Virginia Freedom of Information Act" Kendi further agreed in paragraph 11 that the confidentiality provisions did not apply to disclosures "required by applicable law" FOIA is an applicable law.

4. Even aside from the terms of the contract, and even if the presentation was copyrightable by Kendi, it is not exempt from disclosure and copying under FOIA, because:

a. The videotape is a public record as defined in FOIA §2.2-3701.

b. There is no exemption in FOIA for copyrighted records. Copyrighted records are only exempt if they fall within one of the statutory exemptions in FOIA, such as when the records contain trade secrets and when trade-secret protection is properly claimed by the copyright holder. *See, e.g.*, Va. Code §§2.2-3705.1(6), 2.2-3705.6.

5. Even aside from FOIA, petitioner is entitled to obtain a copy of the videotape under the "fair use" doctrine of the federal Copyright Act, as embodied in 17 U.S.C. §107, which permits the making of copies of copyrighted works "for purposes such as criticism, comment, news reporting, teaching ..., scholarship, or research"

Under §107, the factors determining "fair use" in any particular case include "(1) the purpose and character of the use, including whether such use is of commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work."

In this case, the "fair use" doctrine is clearly applicable. Petitioner has no intent in using the videotape for commercial purposes; rather, his sole intended use is for nonprofit educational purposes. Moreover, the videotape embodies content of public importance to citizens of Fairfax County in that it relates to the educational philosophy of FCPS' leaders. The nature of the videotape also supports disclosure, as it is not a work of art or scholarship; rather, it is merely a

recording of a moderated conversation in which the Kendi expressed his opinions to an estimated group of 1,500 public employees. Likewise, disclosure to petitioner will have little or no effect on the potential market for or value of the videotape, given that Kendi's apparent purpose in demanding confidentiality was to keep the substance of his remarks secret from the public rather than to publish them to the public for profit. Therefore, even if Kendi holds a valid copyright to the videotape, its disclosure to petitioner is proper under the "fair use" doctrine.

V. Prayer for Relief

For all of the reasons stated above, petitioner asks this Court for the following relief:

1. issuance of a writ of mandamus requiring the respondents to provide a copy of the requested videotape to petitioner within five business days;
2. awarding petitioner his costs of this proceeding; and
3. such further relief as the Court deems appropriate.

Respectfully submitted,

Mark Spooner, Petitioner