

# **Mark Spooner v. Fairfax County School Board**

## **Petitioner’s Statement of Grounds for Granting Writ of Mandamus**

Petitioner seeks a writ of mandamus, pursuant to the Virginia Freedom of Information Act, Va. Code §2.2-3700 *et seq.*, (FOIA”), compelling Respondent, Fairfax County School Board, to produce unredacted copies of documents that have been withheld and/or redacted on the basis of improper claims of statutory exemptions from FOIA disclosure.

### **I. The Parties**

1. Petitioner, Mark Spooner, is a resident of Fairfax County, Virginia.
2. Respondent, Fairfax County School Board, is responsible for the governance and operations of the Fairfax County, Virginia public school system (“FCPS”).

### **II. Jurisdiction and Venue**

3. 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**

4. In December 2022, an article appeared in the local press, reporting that administrators at Thomas Jefferson High School for Science and Technology (“TJ”) had failed to notify students or their parents in a timely manner of “commended student” achievements on the PSAT examination administered by the National Merit Scholarship Corporation. The article reported that when a parent inquired about the failure, the TJ administrators responded that they had delayed and/or downplayed the awards because they had not wanted to hurt the

feelings of other students who did not win the awards, and because the school's desire was to "recognize students for who they are as individuals, not focus on their achievements."

Thereafter, it was revealed that several other Fairfax County high schools had similarly failed to provide notice of the awards to students and their families.

5. In response to the ensuing controversy, FCPS' Division Superintendent, Dr. Michelle Reid, announced that an independent third party was being hired to investigate the facts regarding the failures. Dr. Reid promised that FCPS would be transparent with the findings of the investigation.

6. A law firm, Sands Anderson PC, was hired by FCPS to conduct the factual investigation. The retention agreement provided that Sands Anderson: "will conduct an independent investigation, which includes access to any and all documents and personnel that it requests to review or interview to fulfill the scope of the investigation. ... The Firm's investigation shall follow wherever facts it discovers may lead ...."

7. On March 29, 2023, FCPS issued a document entitled "Key Findings of Related External Investigation" ("Key Findings"). It purported to summarize the results of the Sands Anderson investigation, but it was written in a defensive, argumentative manner that left several questions unanswered. FCPS did not disclose the actual report rendered by the independent investigators.

8. On March 30, 2023, Petitioner requested documents from FCPS relating to the Sands

Anderson investigation. Specifically, Petitioner asked for the following:

1. Copies of all billing records from the Sands Anderson firm for its work on the National Merit investigation.
2. The retention agreement between FCPS and the Sands Anderson firm relating to a factual investigation of how National Merit awards were handled by FCPS.
3. The full report by Sands Anderson to FCPS concerning its investigation, including any appendices, exhibits and/or other materials relating to its work. (If "attorney-client privilege" is claimed for any portion of the foregoing, provide the report and materials with the allegedly privileged portion(s) blacked out.)
4. Names of the persons interviewed in the investigation, together with an identification of their relationship to the investigation (e.g., "principal of X high school," "parent who complained about FCPS conduct," etc.)
5. Recordings and summaries of all witness interviews.
6. Copies of all emails and other documentary materials reviewed by Sands Anderson in the investigation.

9. Respondent replied that it had no records responsive to specifications 4 or 5, and that it did not have custody of all records described in specification 6. Petitioner subsequently clarified specification 6 by requesting the records furnished by FCPS to Sands Anderson in connection with the investigation, and is awaiting a final response to that specification, but FCPS has indicated that it will likely claim that all such records are exempt from FOIA disclosure.

10. Regarding specification 3, FCPS is claiming that the Sands Anderson factual report, and any accompanying materials, are exempt in their entirety from FOIA disclosure. Two exemptions are claimed. First, FCPS asserts that the report is protected by Va. Code §2.2-3705.1(2) (attorney-client privilege). Second, FCPS asserts that the report is exempt under Va. Code §2.2-3705.1(3) ("legal memoranda and other work product compiled specifically for use in ... an active administrative investigation concerning a matter that is properly the subject of a closed meeting under § 2.2-3711".)

11. FCPS has produced documents requested in specifications 1 and 2, but with redactions, based on claims of attorney-client privilege.

#### **IV. Reasons for Granting a Writ of Mandamus**

A. The claimed exemption for the Sands Anderson report under Va. Code §2.2-3705.1(2) (attorney-client privilege) is invalid because:

1. The report does not contain legal advice; it is a summary of the findings of a factual investigation. The involvement of a law firm does not make the report exempt from disclosure. For the same reason, the factual materials reviewed by the law firm, and any factual appendices, exhibits, summaries, etc., are not privileged.

2. Any claim of privilege was waived by FCPS' voluntary decision to disclose Sands Anderson's findings in its "Key Findings" report and elsewhere.

3. If any legal advice was given by Sands Anderson, and if the claim of privilege was not waived, the proper remedy would be to redact the specific portion(s) containing the advice, not to withhold the entire report and related materials.

B. The attorney-client privilege claim regarding portions of the Sands Anderson billing records is invalid because the records merely describe in generic terms the work performed, which was a factual in nature. Likewise, FCPS' retention agreement with Sands Anderson is not privileged because it makes clear that the purpose of the retention was to conduct a factual investigation.

C. The claimed exemption for the Sands Anderson report under Va. Code §2.2-3705.1(3) is invalid because:

1. There is no evidence that the report was prepared “specifically for use” in an “active administrative investigation” concerning a matter “that is properly the subject of a closed meeting” under section 2.2-3711 of the Virginia Code.

2. Section 2.2-3711 of the Virginia Code contains numerous subsections that specify when a closed meeting is allowable, but Respondent has not specified any subsection applicable to this case.

3. Even if the claimed statutory exemption were applicable, it was waived by FCPS’ voluntary decision to disclose Sands Anderson’s findings in its “Key Findings” report and elsewhere.

#### **V. Request for Relief**

Respondent has violated its duties under the Virginia Freedom of Information Act by withholding records lawfully requested by Petitioner. Therefore, Petitioner asks the Court to:

1. Issue an order that the exemptions claimed by Respondent have been waived by its voluntary disclosure of the “key findings” of the Sands Anderson investigation, and order Respondent to provide unredacted copies of all the requested documents within five working days.

2. Issue an order that the exemption claimed by respondent under Section 2.2-3705.1(3) of the Virginia Code is not applicable to the requested documents.

3. If the Court decides that the claimed exemptions have not been waived, order Respondent to provide the Court, within five working days, unredacted copies of all the requested documents, specifying the particular documents, or portions thereof, that are claimed to be exempt, and the specific exemption claimed to be applicable to each document

or portion thereof. Petitioner further requests that the Court issue an order requiring Respondent to furnish, within five working days, copies of all documents, or portions thereof, that the Court finds to be non-exempt.

4. Award Petitioner its costs of vindicating its FOIA rights, including his costs of suit, and such additional and/or alternative relief as the Court determines to be appropriate and just in the circumstances.

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The facts stated in this Petition are true and correct to the best of my knowledge, information and belief.

Respectfully submitted,



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