

**VIRGINIA:  
IN THE CIRCUIT COURT OF THE CITY OF RICHMOND**

TYLER PIERON,  
Petitioner,

v.

CASE NO.: \_\_\_\_\_

COMMONWEALTH OF VIRGINIA,

AND

DENISE LUNSFORD, COMMONWEALTH'S ATTORNEY FOR ALBEMARLE  
COUNTY  
Respondent.

SERVE:

Denise Lunsford  
Commonwealth Attorney  
County of Albemarle  
410 East High Street,  
Charlottesville, Virginia 22902

Attorney General Mark Herring  
Attorney General's Office  
900 East Main Street  
Richmond, Virginia 23219

**PETITION FOR WRIT OF MANDAMUS AND INJUNCTIVE RELIEF**

NOW COMES, Tyler Pieron, by counsel, and alleges the following:

- 1) This matter is brought under the Virginia Freedom of Information Act (FOIA) Virginia Code § 2.2-3713(A) which authorizes this Writ and gives this Court jurisdiction. Venue is proper in this Court pursuant to Va. Code § 2.2-3713(A)(3).
- 2) On October 14, 2015, pursuant to Virginia Code § 2.2-3700 *et. seq.*, counsel for Tyler Pierson sent on his behalf a Virginia Freedom of Information Act request by fax to Denise Lunsford, the Commonwealth Attorney for the County of Albemarle seeking documents and records. *See* Exhibit A. The request specifically sought:

“...copies of all records held by the Albemarle County Commonwealth’s Attorney’s Office, including records held in personal email accounts, and records sent in the form of text messages, which records meet, or contain information meeting, the following descriptions:

1) All credit card billing statements received by the Albemarle County Commonwealth’s Attorney’s Office, whether received directly from a credit card company or indirectly from an employee of the Commonwealth’s Attorney’s office during the period January 2012 through December 2013, inclusive, or covering any expense or billing in that same period, for credit cards issued to, or paid/reimbursed in whole or in part by the Albemarle County Commonwealth’s Attorney Office.

2) All documents reflecting reimbursements paid to the Albemarle County Commonwealth Attorney for any expenses, which expenses were incurred, or the documents were submitted, between January 2012 until December 2013.

3) All emails or text messages the Commonwealth’s Attorney sent (whether on personal or official email accounts, while conducting the “business of the Commonwealth”), which include BOTH the phrase “press” and either the word “Jim” or the word “Larkin.”

4) All emails or text messages the Commonwealth’s Attorney sent (whether on personal or official email accounts, while conducting the “business of the Commonwealth”), during the period January 2012 to December 2013 to or received from the attorney representing James Larkin or which refer to the attorney representing James Larkin.

5) All emails or text messages the Commonwealth’s Attorney sent (whether on personal or official email accounts, while conducting the “business of the Commonwealth”), to or received from Chris Dumler.

6) All emails, or texts, the Commonwealth’s Attorney sent or received (whether on personal or official email accounts, while conducting the “business of the Commonwealth”), to or from Michael Ducette, which contain the word “Dumler”, or the word “Chris”.

7) All emails or text messages sent or received (whether on personal or official email accounts, while conducting the “business of the Commonwealth”) by Denise Lunsford between January 1, 2012 and May 20, 2012, which discuss work-related travel plans.

8) All emails, sent or received by Denise Lunsford (whether on personal or official email accounts, while conducting the “business of the Commonwealth”), which include the word “drone.”

9) All correspondence, including emails, texts, memoranda, etc., sent to or from Courtney Stewart by anyone in the Commonwealth Attorney’s Office.

10) All emails or text messages the Commonwealth’s Attorney sent or received (whether on personal or official email accounts, while conducting the “business of the Commonwealth”), which reference the Weiner prosecution, particularly, but not limited to, all communications referencing Mark Belew, or which reference Weiner and missing girls.

11) All documents and information which set forth the policies of the Commonwealth’s Offices, and the policies of the County of Albermarle regarding the use of work provide computer, work provided cell phones, work provided office phones and all policies and procedures which discuss the personal use of any work provided resources.”

3) The next day, on October 15, 2015, counsel for Tyler Pierson clarified by letter that point nine of the request referred to “Courtney Stuart” not and that the use of “Stewart” was in error.

4) On October 21, 2015 Denise Lunsford sent by postal mail a response to the FOIA request made by Tyler Pieron. *See Exhibit B.* The response claimed that a fee of \$3199 was the minimum that would be required to process the request. Ms. Lunsford claimed this amount was necessary despite not offering any basis for how this amount was calculated, or why such a large sum would be necessary to review electronic records.

5) The response also noted that Denise Lunsford, the Commonwealth's Attorney, would be the only one to review the records to locate and review responsive material, and consequently the processing of the request would take at least five weeks.

6) Requester immediately responded to the communiqué from the Commonwealth Attorney's Office. *See Exhibit C.* Requester worked diligently and swiftly to answer queries posed by the Commonwealth Attorney's Office. Requester also noted that it was inappropriate to demand fees without offering any basis for how this figure was calculated, nor to claim such an extensive period would be needed without offering any explanation as to why it would be necessary to delay the request for so long.

7) The Commonwealth Attorney's Office responded to this on October 26, 2015 by again insisting, without any basis, that only Denise Lunsford, could review the public records in order to locate responsive material. It claimed that requester would have to pay her hourly salary in order to have the request processed. It also demanded additional information from requester. *See Exhibit D.*

8) Following this second communiqué from the Commonwealth Attorney's Office, requester worked diligently and swiftly to narrow the request and time frames of the materials being sought in order to accommodate the Commonwealth Attorney's Office. On October 27, 2015, requester sent a letter to the Commonwealth Attorney's Office providing the requested information and narrowing of the request, and also noted again that the Virginia FOIA law

required that all charges for processing of the request be reasonable, questioned whether the work needed to be done by the Commonwealth Attorney, as opposed to lower level staff. *See* Exhibit E.

9) Under Virginia Code § 2.2-3704(F) a public body may charge a request fees for a Freedom of Information Act request. However the public body may only “make reasonable charges not to exceed its actual cost incurred in accessing, duplicating, supplying, or searching for the requested records.” Further the public body may not “impose any extraneous, intermediary or surplus fees or expenses to recoup the general costs associated with creating or maintaining records or transacting the general business of the public body.”

10) The Virginia Freedom of Information Act Advisory Council has held that the FOIA law presumes the searching for and locating responsive records is a ministerial act when assessing charges. The charges should be based on the hourly rate of salary for administrative/support staff. *See* (Advisory Opinion) AO-05-02, AO-49-01, AO-06-05, AO-03-12.

11) It is unreasonable for a public body to insist that only the highest ranking staff member can undertake a search of a workplace email account to find records responsive to a FOIA request. This is particularly true when the public body employs lower level staff workers, who are capable of engaging in the task.

12) This is particularly true when, as in the present case, the employer provides the email, and has a central server on which the emails are stored.

13) It is thus unreasonable for the Commonwealth Attorney’s Office to claim that only Denise Lunsford can undertake a search of emails to locate records responsive to this request, or that the requester should have to pay her hourly salary for the search to occur.

14) Further the request asked for materials focused on Denise Lunsford, in her role as Commonwealth's Attorney. For her to exclusively review the public records of the Commonwealth in order to determine if material was responsive, and if it was to be withheld would create an unavoidable conflict of interest. The Commonwealth has an obligation to engage in a good-faith, non-conflicted search of its records to locate responsive material. The claim by the Commonwealth that only Denise Lunsford will review the public records violates this obligation.

15) The Advisory Council has further held that it is for the courts to determine whether the fees sought by a public body are reasonable. See AO-01-00, AO-25-01, AO-314-02, AO-23-04, AO-06-09.

16) The Virginia Freedom of Information Act gives public bodies five working days to respond to a request. § 2.2-3704(B)(4) further permits the public body to take an additional seven working days when necessary. § 2.2-3704(C) permits a public body to petition a court for additional time beyond that only when specific conditions are met, such as the request seeking “an **extraordinary** volume of records or requires an **extraordinarily** lengthy search, **and** a response by the public body within the time required by this chapter will prevent the public body from meeting its operational responsibilities” (emphasis added).

17) Where there is not an extraordinary volume of records being sought, and all records are being sought in electronic format, which is easy to search, and the requester, as here, has provided keywords to aid in the search, it is not reasonable for a public body to preemptively claim it will require time beyond what the Virginia Legislature has allotted in order to provide responsive records.

18) The demand for fees far in excess of the reasonable charge for the accessing, duplicating, supplying, or searching for the requested records creates a nearly impenetrable

barrier to access that thwarts the transparency which lies at the heart of the Virginia Freedom of Information Act.

19) The demand for such excessive fees works as a *de facto* denial of the request, by making it impossible for requester to comply with the condition the public body has imposed.

Requester has thus effectively been denied the rights and privileges conferred by the Virginia Freedom of Information Act. Pursuant to Code of Virginia § 2.2-3713(A), requester may therefore bring this action to enforce his rights under the Act.

### **Prayer for Relief**

WHEREFORE, the Petitioner respectfully prays, through counsel, that this Court,

a) Hold a hearing on this matter expeditiously in the interests of justice and to ensure the public's speedy access to public records;

b) Order the Office of the Commonwealth's Attorney for the County of Albemarle to conduct a good faith search of all public records within its possession, done by parties without any conflict of interest in the search, for any records responsive to Petitioner's request;

c) Order the Office of the Commonwealth Attorney for the County of Albemarle to recalculate its request for fees associated with the search and review of responsive records and only make a reasonable assessment of fees;

d) Order the Office of the Commonwealth Attorney for the County of Albemarle to provide to requester the records sought with the time allotted to all public bodies by the Virginia Legislature, as outlined in the Virginia Freedom of Information Act § 2.2-3704;

d) Order the Office of the Commonwealth Attorney for the County of Albemarle, pursuant to § 2.2-3713 (D) to pay Petitioner's reasonable costs and fees associated with this instant matter; and,

e) Order such necessary and proper injunctive relief or any other relief as this Court deems just and proper.

Respectfully submitted this 29th day of October, 2015,

By: \_\_\_\_\_  
COUNSEL for **TYLER PIERON**

**By Counsel:**

**Matthew D. Hardin**

Virginia State Bar No. 87482

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## CERTIFICATE OF SERVICE

I hereby certify that, pursuant to Va. Code § 2.2-3713(C), a copy of this Petition for Writ of Mandamus and Injunctive Relief was mailed by postal mail on October 29, 2015 to Denise Lunsford, Commonwealth Attorney for the County of Albemarle. I further certify that the copy of this Petition sent by electronic mail to Denise Lunsford, Commonwealth Attorney for the County of Albemarle was sent to her email address [dlunsford@albemarle.org](mailto:dlunsford@albemarle.org), and the postal copy was sent to Denise Lunsford, Commonwealth Attorney for the County of Albemarle, 410 East High Street, Charlottesville, Virginia 22902.

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Counsel for Tyler Pieron