



NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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April 10, 2017

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Re: *Carmen E. Flores v. Ardent Company, LLC, et al.*
Case No. CL-2015-08048

Dear Counsel:

This matter came before the Court on March 10, 2017, on Plaintiff's Motion to Compel Production against non-party Arlington County. For the reasons set forth below, the Motion is granted. Arlington County shall provide an unredacted copy of the Vehicle Incident Report Form ("VIRF") within seven days.

OPINION LETTER

Background

Plaintiff alleges that she sustained personal injuries while walking in a crosswalk when she was struck by a vehicle that was owned by Arlington County and driven by an Arlington County employee. While Arlington County is not a party to this lawsuit, the driver is one of the named defendants. After the incident, Arlington County conducted a review and prepared the VIRF. Arlington County provided the VIRF to Plaintiff in redacted form, pursuant to a subpoena *duces tecum*. Based on oral argument, the Court understands that the redaction involves a statement by an agent of the County who investigated the incident.

The Motion to Compel Production concerns the redacted portion of the VIRF. Plaintiff contends the redaction was impermissible. Arlington County asserts executive privilege as the basis for the redaction, synonymously referring to executive privilege as “self-critical analysis,” “deliberative process,” and “self-evaluative” privilege. After oral argument on March 10, 2017, the Court took the matter under advisement.

Analysis

In resolving this discovery dispute, the central issue before the Court is whether Virginia recognizes an executive privilege for municipal employees when responding to discovery. The Court holds that Virginia does not recognize an executive privilege in this context.

Privileges under Virginia law derive from constitutional requirements, state statutes, the Virginia Rules of Evidence, and Virginia common law. Va. Sup. Ct. R. 2:501. There is no apparent constitutional or codified evidentiary provision directly establishing an executive privilege for municipal employees regarding discovery obligations. As to state statutes, while the Virginia General Assembly has specifically enacted laws that protect certain types of assessment reports from disclosure,¹ there is no applicable statutory privilege that protects the content of vehicle incident reports from disclosure during discovery.

With respect to Virginia common law, both Plaintiff and Arlington County reference *Taylor v. Worrell Enterprises*, 242 Va. 219, 409 S.E.2d 136 (1991). In *Taylor*, the Supreme Court of Virginia ruled that the phone logs of the Governor of Virginia were not subject to disclosure under Virginia’s Freedom of Information Act (“FOIA”). 242 Va. at 224. Although this was a 4-3 decision of the Court, Justice Lacy’s opinion was joined by only two other Justices. Chief Justice Carrico authored a concurrence. The plurality opinion concluded that constitutional limitations arising from the separation of powers doctrine require the Governor’s phone logs to be exempt from disclosure under FOIA. *Id.* at 224. While separation of powers was the rationale for the result, a footnote in this opinion made the following reference to executive privilege:

¹ *E.g.*, Va. Code § 6.2-948 (protecting self-assessment reports of banks); Va. Code § 8.01-581.17 (protecting medical utilization review committee reports); Va. Code § 46.2-379 (curtailing the admissibility of crash reports at trial).

[T]he distinction between executive privilege and separation of powers is not always clear. Executive privilege reflects the need of the executive to withhold information requested pursuant to a legitimate exercise of governmental authority. *See Nixon v Administrator of Gen. Servs.*, 433 U.S. 425, 447 (1977). A violation of the separation of powers doctrine—the improper invasion by one branch of government into the province of another—is not a prerequisite for the assertion of the executive privilege doctrine. 242 Va. at 222.

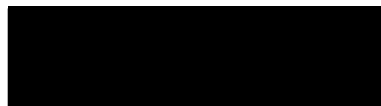
Chief Justice Carrico concurred in the result based upon the plain meaning of FOIA’s statutory language, yet he disagreed with relying upon separation of powers to reach the result. 242 Va. at 225 (Carrico, J., concurring). He also argued that neither separation of powers nor executive privilege were properly raised on appeal and therefore should not be addressed. *Id.* The dissenting Justices agreed with this assessment regarding separation of powers and executive privilege. *Id.* at 229.

In sum, *Taylor* does not expressly stand for the proposition that executive privilege is recognized under Virginia law. Moreover, even if the footnote in the plurality opinion was meant to intimate that it did exist, a majority of the Justices disagreed with the plurality raising the issue of executive privilege. Finally, it is worth noting that this reference to executive privilege involved the Governor of Virginia, as opposed to an invocation of executive privilege involving a non-elected municipal employee.

At least one other Circuit Court analyzing *Taylor* has reached a similar conclusion regarding executive privilege. *Griffin v. Virginia VDOT*, 46 Va. Cir. 399 (1998), involved an alleged violation of the Fair Labor Standards Act. The discovery dispute focused on whether state transportation officials could assert executive privilege as a basis for refusing to answer questions at a deposition. The Court concluded that “there is no authority in Virginia that executive privilege applies to state government officials,” and ultimately ruled against the government’s invocation of the privilege. 46 Va. Cir. at 400, 402.

Arlington County argues that not recognizing executive privilege for municipal employees would have a chilling effect on local governments conducting accident investigations. While I am not unsympathetic to this position, trial courts have no authority to create a privilege where no such privilege otherwise exists. The proper recourse is to petition the Virginia General Assembly to enact a statutory privilege that protects the content of vehicle incident reports from disclosure.

Sincerely,



Stephen C. Shannon
Circuit Court Judge

OPINION LETTER