VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

FAIRFAX COUNTY SCHOOL BOARD, Plaintiff, v. DEBRA TISLER and CALLIE OETTINGER, Defendants.	Case No. 2021-13491

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFF'S MOTION FOR INJUNCTION AND IN SUPPORT OF IMMEDIATE DISSOLUTION OF SEPTEMBER 30 ORDER

INTRODUCTION

Defendants Debra Tisler and Callie Oettinger hereby oppose Plaintiffs' motion for an injunction, and simultaneously move, pursuant to Virginia Code § 8.01-625, for the immediate dissolution of this Court's order dated September 30, 2021. As explained below, any injunction under these circumstances violates the First Amendment to the United States Constitution and Article I, Section 12 of the Virginia Constitution, and lacks lawful authority. Indeed, for reasons stated herein, this case should be immediately dismissed.

SUMMARY OF FACTS

Defendants are mothers, concerned citizens, and taxpayers in Fairfax County. Complaint ¶¶ 3–4. Defendant Callie Oettinger operates a website, specialeducationaction.com, which monitors news and information relating to special education in Fairfax County Public Schools, and publishes news and opinion on that topic. *Id.* ¶ 29. Pursuant to the Virginia Freedom of Information Act (VFOIA), Defendant Debra Tisler filed requests with the school board for

information relating to the school board's spending for legal representation services and the subjects of that representation. *Id.* ¶ 1. The board responded to that request by emailing electronic—*not* physical—copies of more than 1,000 pages of documents. *Id.* ¶¶ 12–13. Defendant Oettinger then posted some of this information, with redactions,[1] on specialeducationaction.com. *Id.* ¶ 29. The documents included images of billing invoices from the school board's attorneys, and other information that the board claims is covered by attorney-client privilege. *Id.* ¶ 14.

On or about September 14, the school board determined that some of the information provided to Ms. Tisler fell within the exceptions to the VFOIA, meaning (according to the board) that it had not been obligated to provide this information. *Id.* By then, Ms. Oettinger had already posted electronic images of these documents on specialeducationaction.com, along with commentary arguing that the school district was spending too much taxpayer money on legal representation, and was engaged (in her opinion) in improper and wasteful public policies. *Id.* ¶ 29.

The school board made various unsuccessful efforts to demand that Ms. Tisler not share the information, and that Ms. Oettinger remove the electronic files from her website. *Id.* ¶¶ 15–38. On September 27, the board filed this case, alleging two causes of action—detinue and constructive trust—along with a motion for a preliminary injunction. On September 30, this Court held a hearing after which it ordered Ms. Tisler and Ms. Oettinger not to "distribute the FOIA material … until further order of the Court," and setting a hearing date of October 22 on Plaintiff's.

[1] Because Ms. Oettinger did not want to include student names on any material, she chose to black out any such information before posting.

Virginia Code § 8.01-625 provides that this Court "may at any time" dissolve an injunction "after reasonable notice to the adverse party." The September 30 order constitutes an injunction, and for reasons stated herein, it should be dissolved. The Plaintiff's further motion for a preliminary inunction should likewise be denied. And because the remedies the Plaintiff seeks are unconstitutional, this case should be dismissed immediately.

ARGUMENT

I. Any injunction here violates the federal and state Constitutions.[2]

Defendants hereby move for immediate dissolution of this Court's September 30 no-dissemination order on the grounds that it, and the injunction Plaintiffs have moved for, are both prior restraints against speech that violate the First Amendment and the state Constitution.[3]

[2] Defendants understand that at the September 30 hearing, their temporary emergency counsel may have given the Court the impression that they were willing to permanently remove the documents from the website and/or to agree not to disseminate the information in the future. If that impression was given, Defendants take this opportunity to clarify: they have the constitutional right to publish and disseminate this information, and intend to exercise that right to the fullest extent of the law. At present, the information has been removed from the website pursuant to this Court's order. *See generally Walker v. City of Birmingham*, 388 U.S. 307, 317–19 (1967).

[3] The Virginia Constitution's protections for freedoms of speech and press are at least as broad as those in the federal Constitution. *Elliott v. Commonwealth*, 267 Va. 464, 473–74 (2004). The *Elliott* court appeared to hold that the Virginia Constitution does not protect these rights more broadly than the federal Constitution, but Article I Section 12's language is notably more expansive than that of the First Amendment: it declares that these freedoms "can never be restrained," and that "any citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right." The latter phrase is identical to provisions in other state constitutions where courts have held that such language *is* more protective than the First Amendment. *See, e.g., Brush & Nib Studio, LC v. City of Phoenix*, 448 P.3d 890, 902–03 ¶¶ 45–46 (Ariz. 2019); *Vail v. The Plain Dealer Publ'g Co*., 649 N.E.2d 182, 185 (Ohio 1995); *Davenport v. Garcia*, 834 S.W.2d 4, 8–9 (Tex. 1992). Defendants raise this point to preserve it for appellate review. In any event, the prohibitions against prior restraints discussed herein apply to both federal and state constitutions.

A. The board seeks a prior restraint and therefore bears an extraordinary burden of proof that it has failed to satisfy.

An injunction against publication is a prior restraint. *Near v. Minn.*, 283 U.S. 697 (1931); *see also Burfoot v. May4thCounts.com*, 80 Va. Cir. 306 (2010) (closing down a website "is, in effect, a prior restraint on publication, since it not only makes the information already on the site unavailable but also forecloses upon *future* publication on the site.").

Under the state and federal constitutions, a prior restraint cannot be granted except in the rarest of circumstances. *Id.; N.Y. Times v. United States,* 403 U.S. 713 (1971) (per curiam). A government plaintiff seeking such an injunction "bear[s] a heavy presumption against its constitutional validity." *Id.* at 714 (citations omitted). The board has come nowhere near meeting that burden here.

Only the most pressing government interest—such as the publication of troop movements during wartime—can justify the imposition of such a restraint. *Id.* at 726 (Brennan, J., concurring). But no such interest is identified in the board's Complaint or its motion for an injunction. On the contrary, the *sole* bases it asserts for blocking Ms. Oettinger and Ms. Tisler from disseminating the information are the fact that the board could have chosen to withhold some of this information under the VFOIA (though it did not do so), and that some of the documents could be covered by attorney-client privilege between the board and its attorneys. Complaint ¶¶ 40, 44. That is constitutionally insufficient and irrelevant.

In *Burfoot*, the plaintiff was a member of the Norfolk City Council. The defendants were the operators of a website criticizing the plaintiff and urging voters to vote against him. He sought a court order commanding the website taken down. The Circuit Court initially granted that order, but the next day reversed itself *sua sponte*, explaining that "a free press" is a "necessity" "for the preservation of democracy," and that "the Internet, just as radio and

television, are subsumed in the word 'press' as used in the Constitution." 80 Va. Cir. at 306. The injunction was "in effect, a prior restraint on publication," and was therefore unconstitutional. *Id.*

Ms. Tisler and Ms. Oettinger have an even stronger case than did the defendants in *Burfoot*, because here the documents are not alleged to be defamatory or untrue, as they were in that case. Instead, it is truthful, non-misleading information about government activities, which was lawfully given to them. As explained below, even if the information was exempt from the VFOIA or subject to privilege, Ms. Tisler and Ms. Oettinger still have a constitutional right to disseminate and/or publish it. For that reason alone, the Plaintiff's motion should be denied, this Court's September 30 order should be dissolved pursuant to Virginia Code § 8.01-625, and this case should be dismissed. *See Hagan v. Dungannon Lumber Co*., 145 Va. 568, 575 (1926) (case in equity may be dismissed at any time when court discovers that relief sought is improper).

B. Defendants have a constitutional right to publish this information.

Ms. Tisler and Ms. Oettinger have a constitutional right to publish information that was not unlawfully obtained. *Smith v. Daily Mail Publ'g Co*., 443 U.S. 97 (1979); *Bartnicki v. Vopper*, 532 U.S. 514 (2001). The board does not allege that Defendants illegally obtained the information, or that publishing it violates any law. On the contrary, Defendants undeniably obtained the information legally, even if the board disclosed more than it intended to.

In *New York Times,* two newspapers obtained documents relating to the Vietnam War from a government official who stole them from the Pentagon. When the government learned that the newspapers intended to publish them, it sought an injunction barring publication. The Supreme Court refused. It said such an injunction would constitute a prior restraint, and the government had not satisfied its "heavy burden" of justifying such a restraint. 403 U.S. at 714.

If publication in the nation's leading newspapers of stolen military documents in a time of war does not meet that high burden, then publication on a website of information *legally obtained* from a school board which includes no top secret or national-security related matters, and relates to a legitimate debate about the waste of taxpayer money cannot meet that burden.

In *Smith,* 443 U.S. at 98–100, some reporters published the name of a juvenile criminal suspect, which they learned lawfully, even though state law prohibited that. They were later indicted, but the Supreme Court held that prosecuting them would violate the First Amendment, because "if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order." *Id.* at 103.

Likewise, in *Bartnicki*, a radio talk show host obtained an audiocassette containing an *illegally* recorded conversation between public officials and union representatives. 532 U.S. at 518–19. He played the tape on his show, and other media companies played it or published transcripts. *Id.* The parties who had been illegally recorded sued the talk show host under federal and state wiretapping statutes. *Id.* at 519–20. The Supreme Court held that liability in such circumstances violated the First Amendment. Even assuming the talk show host "had reason to know" that the conversation had been illegally recorded, it said, he *still* had a constitutional right to broadcast it. *Id.* at 525, 528. Even though the recording was illegally made, talk show host obtained it legally—and punishing him for disseminating "lawfully obtained information of public interest" is unconstitutional. *Id.* at 529. *Accord, The Fla. Star v. B.J.F.*, 491 U.S. 524, 536–37 (1989) (enjoining publication of lawfully obtained confidential information was unconstitutional).

Notably, neither *Smith* nor *Bartnicki* involved a prior restraint. They involved only a potential punishment after publication. And in *Bartnicki,* the information had been illegally obtained in the first instance. Yet the Court *still* held that publication was constitutionally protected. This case, by contrast, is a classic prior restraint, because the board is seeking to make the information already published on specialeducationaction.com unavailable, and to foreclose future publication. *Burfoot, supra*. This case is also stronger than *Bartnicki* or even *New York Times*, because in both those cases, the information was illegally obtained—whereas here, the information was lawfully obtained. *See Barnicki,* 532 U.S. at 528 (noting that in *New York Times,* "the undisputed fact that the newspaper intended to publish information obtained from stolen documents was noted … neither the majority nor the dissenters placed any weight on that fact."). That alone is grounds for dissolving the September 30 order, denying this motion, and dismissing this case.

But in addition to that, the public has a legitimate interest in seeing these documents. Ms. Tisler and Ms. Oettinger believe the Fairfax County School Board spends too much money on lawyers, wastes taxpayer money, and requires more legal services than it should, due to poor decision-making by public officials. These are legitimate arguments in a democracy, and nothing substantiates such contentions better than showing the public the bills and invoices from the board's attorneys.

The state and federal Supreme Courts have repeatedly said that even *untrue* statements about public officials are constitutionally protected, absent "actual malice." *New York Times v. Sullivan*, 376 U.S. 254 (1964); *Gazette, Inc. v. Harris*, 229 Va. 1, 8–9 (1985). They have also repeatedly acknowledged that in a democracy, public debate must be "uninhibited, robust, and wide-open." *Sullivan*, 376 U.S. at 270; *accord, Crawford v. United Steelworkers, AFL-CIO*, 230

Va. 217, 231 (1985). Here, the statements are not untrue. They are government records, lawfully obtained, and Ms. Tisler and Ms. Oettinger have a right to disseminate them, as protected by the rule of *Smith, New York Times,* and *Bartnicki*. Even if the documents were inadvertently turned over, they have both a constitutional right and a legitimate democratic purpose for publishing them. For the government to demand that the documents be removed from publication—i.e., censored—is contrary to *all* constitutional precedent.

C. The existence, or waiver, of any privilege between the school board and its attorneys is irrelevant.

The board contends that some documents were exempt from VFOIA disclosure and were covered by attorney-client privilege. This contention is irrelevant. Even if it were true, Ms. Tisler and Ms. Oettinger would still have a constitutional right to publish and disseminate the information. But it is also *not* true, because the board has waived any privilege.

The VFOIA requires the government to turn over certain types of records upon request, with limited exceptions. *See, e.g.,* Va. Code §§ 2.2-3705.1, 3705.4. These exceptions, however, are just that: they exempt certain documents from the board's legal obligation to turn over information. That is all. They do not authorize the board to censor publication of information once it has been disclosed—even if wrongly or inadvertently disclosed.

The same is true of any alleged attorney-client privilege. Privilege is a shield against compulsory disclosure. *Commonwealth v. Edwards*, 235 Va. 499, 508–09 (1988). It is not a sword that empowers a party (or its attorneys) to forbid publication of information after disclosure. Even assuming the information here was privileged, that privilege would not entitle the board to bar publication of that lawfully obtained information, let alone censor it *after* publication.

In *In re Charlotte Observer*, 921 F.2d 47 (4th Cir. 1990) (per curiam), privileged information was inadvertently revealed in the presence of two reporters. *Id.* at 48. The district court enjoined them from publishing it. *Id.* The Fourth Circuit reversed. "'[T]he cat is out of the bag,'" it said. Once the disclosure was made, "the information lost its secret characteristic, an aspect that could not be restored by the issuance of an injunction." *Id.* at 50. To enjoin publication would be "the type of prior restraint" that violates "the First Amendment['s] protection of a free press." *Id*.

However, the school board here asserts a privilege that has been *waived*. Virginia courts distinguish between *inadvertent* disclosures (as happened here) and *involuntary* disclosures of privileged documents. While involuntary disclosure does not waive the privilege, *inadvertent* disclosure *does*. *Walton v. Mid-Atl. Spine Specialists, P.C.,* 280 Va. 113, 125–26 (2010). "Involuntary" means another person accomplished the disclosure through criminal activity or bad faith without the consent of the proponent of the privilege. *Id.* "Inadvertent" includes a failure to exercise proper precautions to safeguard a privileged document and does not require that the disclosure be a result of criminal activity or bad faith. *Id.* For disclosure to be considered inadvertent, it is not required that an attorney or somebody on behalf of the client made a voluntary disclosure. *Id.* Here, the board acknowledges that the disclosure was inadvertent. Thus any privilege that may have existed no longer exists.[4]

The board also claims that the documents are protected under the federal Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g. Preliminarily, although it is

[4] Although Va. Code § 8.01-420.7 protects the privilege in inadvertent disclosures, it only does so if those inadvertent disclosures occur "in a proceeding"—and no proceeding was ongoing when the disclosures were made here—or where the disclosure is "to any public body." Here the disclosures were made *by* a public body *to* private citizens. Thus that statute does not apply.

constitutionally irrelevant under *Smith,* Oettinger can affirm to this Court that no private student information was published on her website, and the Complaint does not allege otherwise. But it is irrelevant whether FERPA protects the documents, anyway. As the Supreme Court has squarely held, "there is no question that FERPA's nondisclosure provisions fail to confer enforceable rights." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 287 (2002). FERPA tells schools what they may and may not do. Nothing in that statute authorizes the board to compel Ms. Tisler and Ms. Oettinger to return any information or un-publish information that has already been published. The only provision in that statute that approaches such a requirement is 20 U.S.C. § 1232g(b)4(B), but that provision only provides that if a school district discloses confidential information to a third party who permits public access, *the school* may be penalized. It does *not* say—and nothing in FERPA says—that the publishers of such information can be censored. That is for good reason: because it would violate the Constitution. In short, FERPA "imposes mandatory obligations and restrictions on educational institutions." *United States v. Miami Univ.*, 91 F. Supp.2d 1132, 1145 (S.D. Ohio 2000), *aff'd*, 294 F.3d 797 (6th Cir. 2002). It does not provide authority to censor.

The existing anti-dissemination order should be *immediately*[5] dismissed and the Plaintiff's motion denied.

II. The school board fails to state a cause of action or cite any basis for its injunction.

A case should be dismissed where, even if all the factual allegations are true, the plaintiff has failed to state a cause of action. *Sanchez v. Medicorp Health Sys*., 270 Va. 299, 303 (2005). "Whenever it is brought to the attention of a court of equity…that the bill does not state a case

[5] "The loss of First Amendment freedoms, *for even minimal periods of time*, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (emphasis added).

proper for relief in equity, it will dismiss it…. The want of equity is a want of jurisdiction." *Hagan v. Dungannon Lumber Co.*, 145 Va. 568, 575 (1926). Here, even laying aside the (dispositive) constitutional objections, the Complaint fails to state a cause of action or even cite any legal basis for the board's demands of censorship through for detinue or constructive trust.[6] For that reason, immediate dismissal is proper.

The only statutes cited in the Complaint or the board's motion for injunction are the VFOIA's exemptions (i.e., the provisions that say the school board was not required to turn over the information), along with reference to the crime of embezzlement, and the board's misleading and irrelevant citations to attorney-client privilege and FERPA. None of these authorize the implementation of a "constructive trust" over information, let alone a detinue case requiring the "return" of information—whatever that would mean in this context.

Because the board refers to the information as "records" and as "property" in their Complaint, it is worth emphasizing that *this case does not involve any physical documents*—only computer files. Thus it is not possible for anything to be "returned," as the board demands. Also, this case does not involve trade secrets, copyrights, patents, or allegations of unjust enrichment, so there can be no application of a "constructive trust." A constructive trust is imposed on wrongfully obtained property to prevent the holder from profiting from it. But the Complaint does not allege that Ms. Tisler or Ms. Oettinger are profiting from the information—and there is no way to "return" it. It is therefore inapposite for the board to characterize the information as "property." *Cf. Jaynes v. Commonwealth*, 276 Va. 443, 458 (2008) (court

[6] The Complaint is styled as a complaint for "damages" as well, but puts forth no demand for damages, and fails to specify any basis for them. Because the Complaint fails to make allegations necessary to sustain any damages award, that portion of the Complaint should be dismissed as well.

rejected government's argument that unsolicited emails were a form of "trespass" into recipient's computer servers, because the First Amendment prohibited that argument).

The board appears to be arguing that there is an implicit "claw-back" provision in VFOIA. Claw-back is the principle whereby if documents are erroneously disclosed under the federal Freedom of Information Act, they must be returned to the government agency that delivered them. *See generally Club v. United States EPA*, 505 F. Supp.3d 982, 988-91 (N.D. Cal. 2020). But no Virginia court has ever adopted a "claw-back" theory under the VFOIA, so this is not a principle recognized by state law. And even following the *federal* rules, no such claw-back would be appropriate. In *Club*, the court refused to authorize claw-back of documents where the Environmental Protection Agency "could have invoked a statutory exemption [to FOIA] but inadvertently failed to do so." *Id.* at 991. The court explained that claw-back would only be appropriate if the private party's possession of the documents might "undermine" the court's ability to resolve the dispute, *id.*, which was not the case there or here.

Also, it was not appropriate because the claw-back "would not prevent disclosure of the information at issue," which "ha[d] already been disseminated to multiple people." *Id.* Here, the information in question was already published on specialeducationaction.com for weeks, and has already been archived at the "Wayback Machine," an independent website that archives deleted websites.[7] It has also already been the subject of media comment. *See, e.g.,* Luke Rosiak, *Fairfax Schools Sues Special-Ed Parents, Demanding "Damages" for Publicizing Embarrassing Records the Schools Gave Them,* Daily Wire, Sept. 29, 2021.[8] Defendants are also informed and

[7] https://web.archive.org/web/20210930030542/https://specialeducationaction.com/fairfax-county-public-schools-leaked-its-own-legal-invoices/
[8] https://stoplcpscrt.com/2021/09/29/fairfax-schools-sues-special-ed-parents-demanding-damages-for-publicizing-embarrassing-records-the-schools-gave-them%EF%BF%BC/

believe that a reporter for the *Washington Post* has the information. So even if the federal claw-back rule applied, claw-back would be improper and ineffective here.

Additionally, no court has ever found that claw-back may be permitted in a manner that would constitute a prior restraint. In *Ground Zero Center for Non-Violent Action v. United States Department of Navy*, 860 F.3d 1244, 1261–62 (9th Cir. 2017), the government inadvertently disclosed confidential information, and upon learning of the fact, asked the court to bar the recipients from disseminating it. The court said this could be authorized only where the government provided "a compelling reason [to impose the restriction] and articulate the factual basis for its ruling, without relying on hypothesis or conjecture," *id*. at 1261, which the government failed to do. Suffice to say, the school board has failed to satisfy even that standard here,[9] since this case does not involve secret military documents.

Moreover, even where "claw-back" is permitted, it is only permitted for *documents*, not with respect to *information* that has *already* been published. There is simply no law at the federal level or in any state that allows the government, in the event of inadvertent disclosure of (non-secret) information, to compel a publisher to withdraw it from a publication or delete it from a website. *Cf. Burfoot, supra* (order taking down a website is a prior restraint).

As for embezzlement, no embezzlement has occurred here. Embezzlement is the "wrongful[] and fraudulent[] use" of property which a person receives "for another." Va. Code § 18.2-111. Here, the information was not received "for another." The board gave it to Ms. Tisler herself pursuant to VFOIA. The board never required her to make any agreement, written or

[9] The court declined to apply the even more stringent rule for prior restraints in the *Ground Zero* case because the parties were already engaged in a lawsuit when the disclosure was made. *See id.* at 1262. Here, the parties were not engaged in a lawsuit when the disclosure was made, so the prior restraint analogy is apt. As the *Ground Zero* court said, prior restraints "are almost never acceptable." *Id.*

unwritten, not to disclose the information to any third person, and Plaintiff's Complaint does not allege otherwise. Nor does the board allege any kind of enrichment or private benefit by the Defendants.

CONCLUSION

The September 30 order should be dissolved and the Plaintiff's motion for injunction should be denied because the board has failed to substantiate its high burden of justifying a prior restraint of speech and press. In addition, because the school board has failed to allege a cause of action or cite any legal authority warranting the relief sought, this case should be immediately dismissed.

[Date]

Respectfully submitted,

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