



Virginia Association of Broadcasters Legal Review



Brooks, Pierce, McLendon, Humphrey & Leonard, LLP
Counsel to VAB • (919) 839-0300

250 West Main Street, Suite 100
Charlottesville, VA 22902 • (434) 977-3716

SPECIAL REPORT

SPECIAL REPORT

* * * * *

May 2, 2013

* * * * *

U.S. SUPREME COURT REJECTS CONSTITUTIONAL CHALLENGE TO VIRGINIA PUBLIC RECORDS LAW

In a unanimous decision authored by Justice Samuel Alito, the United States Supreme Court this week turned away a constitutional challenge to the residency requirement of the Virginia Freedom of Information Act (“FOIA”). The residency requirement limits Virginia public records requests to legal residents of the Commonwealth.

The case was brought by non-Virginians challenging that requirement under the Privileges and Immunities Clause and the dormant Commerce Clause of the U.S. Constitution. The Court’s decision affirmed a ruling by U.S. Court of Appeals for the Fourth Circuit in Richmond.

Under Section 2.2-3704(A) of the Virginia FOIA statute,

all public records shall be open to inspection and copying
by any citizens of the Commonwealth during the regular
office hours of the custodian of such records.

Citizens of other states therefore do not have a general statutory right under the statute to access public records in Virginia, a limitation shared by similar statutes in at least seven other states.

The case, *McBurney v. Young*, was brought by citizens of Rhode Island and California. One litigant sought documents relating to a state agency's delay in filing a child support petition on his behalf. His request was denied because he was not a Virginia citizen, though he later obtained most of the information he wanted from another agency. The other petitioner operates a business that collects real estate tax records. His request for tax records from a particular county in Virginia was likewise denied because of his location out of state.

The petitioners filed suit, contending that the residency requirement of the Virginia FOIA statute was unconstitutional. The Court ultimately rejected those challenges. With respect to the Privileges and Immunities Clause, the Court emphasized that its protection extends only to privileges and immunities that are "fundamental." It went on to hold that the opportunity to pursue a business, the ability to own and transfer property, and the ability to access courts, while fundamental, were not abridged by the FOIA provision at issue. As the Court held, "the [Privileges and Immunities] Clause does not require that a State tailor its every action to avoid any incidental effect on an out-of-state tradesman."

In response to petitioners' claim that the statute's residency limitation unconstitutionally limited access to court records, the Court noted that all persons have access to judicial records in Virginia, a right unaffected by the FOIA statute. In addition, the Court held, residents and non-residents alike have access to information about himself or herself compiled by a Virginia agency, either through other statutory provisions or through the litigation discovery process.

In addition, the Court held that access to public information, as a general matter, is not a fundamental matter protected by the Privileges and Immunities Clause. The Court observed that it "has repeatedly made clear that there is no constitutional right to obtain all the information provided by FOIA laws."

In the absence of a long-standing right to access government documents—a statutory right the Court pointed out is of fairly recent vintage—states are not required to place citizens and non-citizens on equal footing under their public records laws.

Finally, with respect to the petitioners' claim that the FOIA statute unconstitutionally burdened interstate commerce, the Court found that nothing about the residency requirement in the Virginia FOIA statute was driven by a desire for economic protectionism. Thus, the act did not regulate or burden interstate commerce in violation of the dormant Commerce Clause.

The upshot of this ruling is that government agencies in Virginia may continue to deny public records requests made by out-of-state persons or entities. This may be of particular importance to broadcasters with out-of-state parent companies. In those cases, broadcasters would be well-advised to submit any FOIA requests via an in-state affiliate.

* * * * *

If you should have any questions concerning the information discussed in this memorandum, please contact your communications counsel or any of the undersigned.

BROOKS, PIERCE, McLENDON,
HUMPHREY & LEONARD, L.L.P.

Wade H. Hargrove
Mark J. Prak
Marcus W. Trathen
David Kushner
Coe W. Ramsey
Charles E. Coble
Charles F. Marshall
Stephen Hartzell
J. Benjamin Davis
Julia C. Ambrose
Elizabeth E. Spainhour
Eric M. David
Mary F. Peña
Dorrian H. Horsey
Laura S. Chipman
Timothy G. Nelson

* * * * *

This Legal Review should in no way be construed as legal advice or a legal opinion on any specific set of facts or circumstances. Therefore, you should consult with legal counsel concerning any specific set of facts or circumstances.

* * * * *

© 2013 Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P.