

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

FAIRFAX COUNTY SCHOOL BOARD,

Plaintiff,

v.

DEBRA TISLER and CALLIE OETTINGER,

Defendants.

Case No. 2021-13491

**FAIRFAX COUNTY SCHOOL BOARD'S MEMORANDUM IN SUPPORT OF
EMERGENCY MOTION FOR PRELIMINARY INJUNCTION**

Plaintiff Fairfax County School Board (the "School Board") files this memorandum in support of its request to enjoin Defendants Debra Tisler and Callie Oettinger from continuing to possess, access, or disseminate the School Board's confidential information, including private information regarding identifiable students and personnel, that was inadvertently and mistakenly released to Defendant Tisler in response to a request under the Virginia Freedom of Information Act. On information and belief, Defendant Tisler forwarded the records to Defendant Oettinger, who has posted portions of the records on the internet. The School Board has made timely and repeated efforts to secure the return of the confidential information from Defendants, to no avail.

I. FACTUAL BACKGROUND

The School Board incorporates by reference each of the allegations set forth in its Complaint. A brief summary of the key facts is as follows:

1. In August 2021, Defendant Tisler requested from School Board personnel certain records pursuant to the Virginia Freedom of Information Act. ("VFOIA"). Exhibit 1, Decl. of Ellen Kennedy ¶ 4.

2. The records responsive to Defendant Tisler's request consist of legal invoices submitted by outside counsel to the School Board over a period of fourteen months that contain, among other things, identifiable student and personnel information. *Id.* ¶ 5. The records contain confidential information exempt under VFOIA and protected from disclosure under Family Educational Rights and Privacy Act ("FERPA") (collectively, "Confidential Information"). *Id.*

3. On September 10, 2021 and September 13, 2021, School Board personnel provided Defendant Tisler with about 1,300 pages of records containing Confidential Information (the "FCPS Records"). *Id.* ¶ 6.

4. On or about September 15, 2021, School Board personnel learned that the FCPS Records contained Confidential Information. *Id.* ¶ 7. From that day through September 23, 2021, the School Board made at least eight attempts to contact Defendant Tisler to recover the FCPS Records. Defendant Tisler has not responded to any of these attempts. *Id.* ¶¶ 8–9.

5. On information and belief, Defendant Tisler has shared the FCPS Records with other persons, the identity of whom is currently unknown.

6. On September 24, 2021, FCPS provided Defendant Tisler with a corrected copy of the FCPS Records with all Confidential Information properly redacted. *Id.* ¶ 10.

7. On September 25, 2021, School Board personnel learned that a portion of the FCPS Records were posted on the internet, embedded in links contained within an article, which the website states was "Posted by Callie Oettinger" on September 24, 2021. *Id.* ¶ 11.

8. On September 25, 2021 and September 26, 2021, the School Board made at least four attempts to contact Defendant Oettinger to secure the return of the FCPS Records. *Id.* ¶ 12.

9. Defendant Oettinger has not responded to any of these attempts. *Id.* ¶ 13.

10. On information and belief, Defendant Oettinger continues to retain the FCPS Records, which includes Confidential Information.

II. LEGAL STANDARD

An injunction “rests on sound judicial discretion to be exercised upon consideration of the nature and circumstances of a particular case.” *Levisa Coal Co. v. Consolidation Coal Co.*, 276 Va. 44, 60 (2008). Although the Supreme Court of Virginia has not established a standard for preliminary injunctions, Virginia trial courts embrace the test set forth by the U.S. Supreme Court. *See Winter v. NRDC, Inc.*, 555 U.S. 7, 20 (2008). Four factors guide a court’s equitable power to issue a preliminary injunction under that test: (1) plaintiff’s likelihood of success on the merits; (2) risk of irreparable harm to plaintiff in the absence of an injunction; (3) balance of hardship between the parties; and (4) public interest. *See, e.g., Ducard Vineyards, Inc. v. Lazy Creek Vineyards & Winery*, 99 Va. Cir. 449, 452–54 (Madison County 2018) (granting preliminary injunction).

III. ARGUMENT

Each of the preliminary injunction factors, discussed below, favors entry of an injunction.

A. The School Board will likely succeed on the merits of its claims because it is entitled to recover its property that Defendants hold.

The School Board is likely to succeed on the merits of its claims of detinue and constructive trust. To prevail on a claim of detinue, the plaintiff must show: (1) a property interest in the object sought to be recovered; (2) a right to immediate possession of the object; (3) the ability to identify the object; (4) that the object has some value; and (5) that the defendant had possession of the object at some time prior to the institution of the action. *Vicars v. Atl. Disc. Co.*, 205 Va. 934, 938 (1965) (citation omitted). Here, the Confidential Information is contained within highly-sensitive legal invoices and is protected from disclosure under the law. Defendants have no independent

right to possess the Confidential Information. The Confidential Information is the personal property of the School Board, which collects and maintains the information for use in its operations and to satisfy its obligations under state and federal law. *See* 20 U.S.C. § 1232g; *see also* Va. Code § 18.2-152.8 (defining tangible and intangible electronic data as personal property). The School Board has the right to immediate possession of the Confidential Information. The School Board can, and has, identified the Confidential Information in the FCPS Records. The Confidential Information has value in enabling the efficient and proper operation of the school system.

Additionally, the School Board is likely to prevail on its equitable claim for imposition of a constructive trust. “A constructive trust is a mechanism by which the person holding title to property is subjected to an equitable duty to convey the property to another because allowing the title holder to retain the property would be unjust.” *Buchanan v. Buchanan*, 266 Va. 207, 214 (2003). “Constructive trusts are imposed by courts of equity whenever necessary to prevent a failure of justice.” *Richardson v. Richardson*, 242 Va. 242, 245 (1991). A constructive trust “arises by operation of law and is independent of the intention of the parties.” *Buchanan*, 266 Va. at 214. They “may be established not only when property has been acquired by fraud or improper means, but also when it has been properly acquired but it is contrary to equitable principles that the property should be retained” *Crestar Bank v. Williams*, 250 Va. 198, 204 (1995). Here, for the reasons discussed above, the School Board is likely to prevail on its claim for imposition of a constructive trust because it would be “contrary to equitable principles” for Defendants to retain the Confidential Information which contains sensitive and private information. *See id.*

B. The School Board faces a high risk of irreparable harm if the injunction is not granted.

The Confidential Information includes, among other things, information that identifies specific students and staff members, information subject to attorney-client and work-product

privileges, and banking information. Defendants' continued access to, and dissemination of, the School Board's Confidential Information risks the privacy of this information and will damage the School Board's ability to safeguard its legal and governmental interests.

Defendants have already demonstrated a willingness to rapidly disseminate the Confidential Information and have refused to engage with School Board personnel seeking to recover the FCPS Records. Absent an injunction, the Confidential Information can continue to be disseminated to individuals whom it will be difficult, if not impossible, to identify.

C. Defendants will suffer no harm from entry of an injunction.

Defendants cannot suffer harm by returning property to which Defendants do not have the right to possess. The Confidential Information is expressly exempt from disclosure under the VFOIA. Further, the School Board already has provided Defendant Tisler with an updated version of the FCPS Records with the Confidential Information properly redacted.

D. The public interest favors entry of an injunction.

The public interest is best served by protecting confidential records in the possession of public schools, including privileged and private information contained in the FCPS Records. The public has a strong interest in protecting this type of confidential information as established by the General Assembly's enactment of exemptions to VFOIA, as well as the enactment of FERPA.

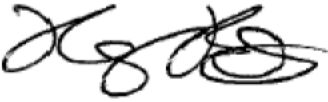
IV. CONCLUSION

Accordingly, the School Board respectfully requests that the Court issue a preliminary injunction attached to the Motion. The School Board's and the third parties' information should be protected. A preliminary injunction is just and equitable.

Dated: September 28, 2021

Respectfully submitted,

FAIRFAX COUNTY SCHOOL BOARD


By: 
_____ Counsel


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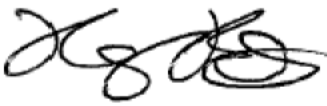
Counsel for Fairfax County School Board

CERTIFICATE OF SERVICE

I certify that on September 28, 2021, a true and accurate copy of this document was sent by email and private process server to:

Debra Tisler


Callie Oettinger




Ryan M. Bates (VSB No. 74661)

Exhibit 1

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DECLARATION OF ELLEN KENNEDY

My name is Ellen Kennedy, and I certify that the following information is true to the best of my knowledge, information, and belief.

1. I am over the age of 18 and make this declaration based on my own personal knowledge.
2. I am employed by Fairfax County Public Schools (“FCPS”) as the Deputy Division Counsel in the Office of the Division Counsel.
3. The Office of the Division Counsel regularly provides advice and assistance to FCPS’s FOIA Officer regarding compliance with the Virginia Freedom of Information Act, Virginia Code § 2.2-3700 *et seq.* (“VFOIA”).
4. In August 2021, Debra Tisler submitted a VFOIA request to FCPS seeking “[a]ll outsourced counsel legal services invoices and paid legal services invoices from June 1, 2020 to August 12, 2021.”
5. The records responsive to Ms. Tisler’s request include legal invoices containing, among other things, identifiable student and personnel information and other confidential

information that is subject to withholding under Virginia Code and protected from disclosure under FERPA (collectively, "Confidential Information").

6. On September 10, 2021 and September 13, 2021, FCPS provided Ms. Tisler with about 1,300 pages of records containing Confidential Information (the "FCPS Records").

7. On or about September 15, 2021, I learned that the FCPS Records released pursuant to Ms. Tisler's VFOIA request contained Confidential Information that had been left unredacted.

8. From that day through September 23, 2021, FCPS and its counsel made at least eight attempts over the phone, through e-mail, and in written correspondence to contact Ms. Tisler to secure the return of the FCPS Records.

9. Ms. Tisler has not responded to any of these attempts.

10. On September 24, 2021, FCPS provided Ms. Tisler with a corrected copy of the FCPS Records with all Confidential Information properly redacted.

11. On September 25, 2021, I learned that a portion of the FCPS Records were posted on the internet, embedded in links contained within an article, which the website states was "Posted by Callie Oettinger" on September 24, 2021.

12. On September 25, 2021 and September 26, 2021, FCPS and its counsel made at least four attempts over the phone, through e-mail, and in written correspondence to contact Ms. Oettinger to secure the return of the FCPS Records.

13. Ms. Oettinger has not responded to any of these attempts.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 27, 2021.


Ellen Kennedy