

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

FAIRFAX COUNTY SCHOOL BOARD,

Plaintiff,

v.

DEBRA TISLER and CALLIE OETTINGER,

Defendants.

Case No. 2021-13491

**MOTION TO STRIKE TO DEFENDANTS’
RESPONSE TO OCTOBER 22, 2021 ORDER**

Plaintiff Fairfax County School Board (the “School Board”) moves to strike four filings made by Defendants Debra Tisler and Callie Oettinger on October 28 and 29, 2021—*i.e.*, Defendants’ “Response to October 22, 2021 Order” and their three supplemental responses—on the grounds that these filings totaling 304 pages include unauthorized arguments and are not responsive to the Court’s October 22, 2021 Order (the “Order”).

On October 22, 2021, the parties appeared before the Court on the School Board’s Emergency Motion for a Preliminary Injunction, which sought the return of its legal invoices that were produced to Defendant Tisler pursuant to a request under the Virginia Freedom of Information Act (“VFOIA”) but that were inadvertently under-redacted and, thus, contained confidential student and staff information protected under various federal and state laws, as well as information protected under the attorney-client privilege and work product doctrine. The School Board did not seek to restrict Defendants from possessing or disseminating a properly redacted version of those same invoices, which Defendants have possessed for over a month.

The School Board files this motion to strike for two reasons:

First, Defendants’ briefing exceeds the Court’s very specific request in the Order. Following oral argument, the Court ordered Defendants to “provide the court, as to each redaction, with their position why such redaction is not legally justified by Friday, October 29, 2021.” Order

(emphasis added). Despite the Court’s clear instruction, the first of Defendants’ four-part response includes 10 pages of legal arguments (citing eight additional cases not previously cited), trying to shore up the theory posited in Defendants’ previously-filed Opposition that any restriction constitutes an unconstitutional prior restraint. That theory was fully discussed at the October 22, 2021 hearing, and the Court did not invite or authorize any further argument. The first 10 pages of Defendants’ briefing constitute an unauthorized sur-reply in direct contravention of the Rules, and should be stricken as improper.¹

Second, nowhere in their 304 pages of filings have Defendants complied with the Court’s simple request to explain “why [each] such redaction is not legally justified” *See* Order. Instead, Defendants just parrot the argument already made to the Court by identifying the substance of the redaction and then stating the same objection, with small variation: “While there may be circumstances in which this information could be subjected to a prior restraint, the Board has not met its burden of justifying such a restraint.” *See generally* Defendants’ Response to October 22, 2021 Order (emphasis in original). In doing so, Defendants ignore the Court’s request for “why such redaction is not legally justified” and, despite the Court’s specific request, attempt to shift the burden back to the School Board.² Accordingly, the filings are non-responsive to the Court’s Order and should be stricken.

¹ If the Court declines to strike these arguments, then the School Board requests the opportunity to respond to them.

² VFOIA imposes a *mandatory* obligation on the School Board to make redactions in conjunction with production of educational records, which are simultaneously protected by the Family and Educational Rights Privacy Act, 20 U.S.C. § 1232g. Va. Code § 2.2-3705.4(A) (“Redaction of information excluded under this section from a public record ***shall be conducted*** in accordance with § 2.2-3704.01.” (emphasis added)); *see also* Va. Code § 2.2-3705.4(A)(1) (excluding “[s]cholastic records containing information concerning identifiable individuals” from disclosure requirements). Thus, with regard to student records, the School Board is not voluntarily electing to withhold certain information—it has a mandatory duty to do so. VFOIA allows an individual to enforce their rights by filing a petition for mandamus or injunction. Va. Code § 2.2-3713. If the Defendants believe the School Board redacted or withheld information

The School Board provides two such examples that are emblematic of Defendants' non-responsiveness. First, in their first filing at page 15, Defendants state: "The name [student name] has been deleted. Defendants do not know the Board's rationale for this prior restraint demand." Defendants' Response to October 22, 2021 Order at 15.³ But VFOIA itself mandates redaction of personally identifiable student information from educational records. *See* Va. Code § 2.2-3705.4(A)(1); 20 U.S.C. § 1232g(b)(1) & § 1232g(b)(2)(A); 34 C.F.R. § 99.30 (a school system may not provide "personally identifiable information from the student's education records" without written consent of a parent or legal guardian); *see also* 8 VAC 20-150-20 (requiring school boards "to manage the scholastic records of all students in compliance with applicable law...."). Nothing about this constitutes a prior restraint.

Second, on that same page, Defendants state: "The name [teacher name] has been deleted, and the Board appears to have attempted unsuccessfully to delete the words 'Teacher Termination.' Defendants do not know the Board's rationale for these prior restraint demands, but speculate that [teacher name] was a teacher who was terminated. The document, however, contains no information to confirm that." Defendants' Response to October 22, 2021 Order at 15. Again, Defendants overlook that VFOIA specifically exempts personnel information from disclosure. Va. Code § 2.2-3705.1(1); *see also* Va. Code § 22.1-295.1(C) (confidentiality of teacher personnel files); Va. Code § 22.1-311 (providing that any hearing on recommendation for dismissal of a

to which they are legally entitled, they should utilize the enforcement mechanism specifically outlined in VFOIA to contest the adequacy of the School Board's redactions.

³ Though Defendants repeatedly claim that they "do not know the Board's rationale" for a redaction, they ignore that the School Board has cited the bases for the redactions: this information was withheld pursuant to VFOIA exemptions codified at Va. Code §§ 2.2-3705.1(1), (2), (3), (13), and 3705.4(1). *See* Compl. ¶ 44.

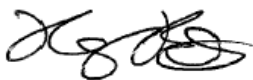
teacher shall be “private” unless the teacher requests a public hearing). Again, nothing about this constitutes a prior restraint.⁴

In sum, the School Board requests that the Court strike Defendants’ filings as they contain unauthorized legal arguments and systemically fail to respond to the Court’s clear request for Defendants to provide their position as to why “each” of the School Board’s redactions are “not legally justified.” Indeed, as set forth in the Complaint and herein, the redactions are specifically authorized by VFOIA. The School Board’s redaction of materials is not “a prior restraint demand”—its actions are in full compliance with VFOIA, the constitutionality of which is not at issue in this case.

Dated: November 3, 2021

Respectfully submitted,

FAIRFAX COUNTY SCHOOL BOARD

By:  _____
Counsel

⁴ Defendants are essentially claiming that every redaction—even those specifically authorized under VFOIA—constitutes a prior restraint unless the School Board establishes otherwise. In other words, Defendants claim that the mere compliance with mandatory statutory obligations of VFOIA constitutes a First Amendment violation. If this were true, then every governmental statute prohibiting the disclosure and/or publication of confidential information is an unconstitutional prior restraint. Defendants are incorrect. The U.S. Supreme Court “has repeatedly made clear that there is no constitutional right to obtain all the information provided by FOIA laws.” *McBurney v. Young*, 569 U.S. 221, 232 (2013) (rejecting constitutional challenge to VFOIA).

Sona Rewari (VSB No. 47327)
Ryan M. Bates (VSB No. 74661)
HUNTON ANDREWS KURTH LLP
2200 Pennsylvania Avenue, NW
Washington, DC 20037
Telephone: (202) 955-1500
Facsimile: (202) 778-2201

Counsel for Fairfax County School Board

CERTIFICATE OF SERVICE

I certify that on November 3, 2021, a true and accurate copy of this document was sent
by email and first-class mail to:

Ketan Bhirud, Esq.
TROUTMAN PEPPER
1001 Haxall Point 15th Floor
Richmond, VA 23219
Ketan.Bhirud@Troutman.com

Timothy Sandefur, Esq.
GOLDWATER INSTITUTE
500 East Coronado Road
Phoenix, AZ 85004
tsandefur@goldwaterinstitute.org



Ryan M. Bates (VSB No. 74661)