

*Freedom of Information—State Regulation***Virginia's In-State Only FOIA Upheld;
Out-of-Staters Out of Luck for FOIA Info**

Virginia may limit access to its public records to Virginia residents without running afoul of either the Privileges and Immunities Clause or the dormant Commerce Clause, the U.S. Supreme Court held April 29 (*McBurney v. Young*, U.S., No. 12-17, 04/29/13).

Writing for a unanimous court, Justice Samuel A. Alito Jr. rejected the petitioners' "sweeping" assertion that the right to access public records was a "fundamental" right protected by the P&I Clause. He also found that while the petitioners' asserted rights to pursue a common calling, own or transfer property, and access the state's courts were protected by the P&I Clause, Virginia's citizen-only Freedom of Information Act does not abridge those rights.

Finally, Alito said that the dormant Commerce Clause was not implicated by Virginia's FOIA because it "does not regulate commerce in any meaningful sense."

Justice Clarence Thomas filed a concurring opinion in which he "continue[d] to adhere to [his] view that '[t]he negative Commerce Clause has no basis in the text of the Constitution, makes little sense, and has proved virtually unworkable in application, and, consequently, cannot serve as a basis for striking down a state statute.'"

The dispute highlights the tension between ensuring citizen access to government information and the costs to the government of making that information available to those who request it.

Several legal experts disagreed about whether the decision would ultimately make more or less information available to the public.

Fundamental Rights Only. The case centered around Virginia's FOIA, Va. Code Ann. § 2.2-3700 et seq., which provides access to public records to Virginia residents, but not out-of-state citizens.

The petitioners Mark J. McBurney and Roger W. Hurlbert requested information from Virginia state agencies under the act. In particular, McBurney sought information relating to his petition for child support and Hurlbert sought real estate tax records on behalf of a client.

Because neither are citizens of Virginia, their requests were denied. Subsequently, they sued the state under 42 U.S.C. § 1983, claiming that the citizen-only limitation violated the P&I and dormant Commerce clauses.

The court first addressed the petitioner's claims under the P&I Clause, U.S. Const. art. IV, § 2, which states that "[t]he citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

While the clause is meant to put citizens of the states on equal footing, it does not mean that states may never distinguish between people based on their citizenship. Instead, the court said that the P&I Clause is intended to apply to only those rights that are essential for national unity—namely, "those privileges and immunities that are 'fundamental.'"

The court rejected the petitioners' assertion that the right to access public information was a fundamental right protected by the P&I Clause, saying that it "has repeatedly made clear that there is no constitutional right to obtain all the information provided by FOIA laws."

Noting that "FOIA laws are of relatively recent vintage"—Virginia's FOIA was passed in 1968—the court said that "[t]here is no contention that the Nation's unity foundered in their absence, or that it is suffering now because of the citizens-only FOIA provisions that several States have enacted."

Although acknowledging that other rights asserted by the petitioners were protected by the P&I Clause, the court said that these rights were not abridged by Virginia's FOIA.

In particular, while the P&I Clause protects the right to "'pursue a common calling,'" the court said that state laws infringing on this right are invalid only if they "were enacted for the protectionist purpose of burdening out-of-state citizens."

However, the court found that Virginia's FOIA was not passed for protectionist purposes, but merely to provide a "mechanism" by which Virginians may hold their public officials accountable.

It was inconsequential that the act prevented the petitioner's attempts to profit from the information because "the Clause does not require that a State tailor its every action to avoid any incidental effect on out-of-state tradesmen."

Moreover, the court noted that the information the petitioners sought was available through other avenues,

so that the petitioners' other asserted rights—to own and transfer property and to access the state's courts—were not actually impeded.

No Commerce Regulated. Next, the court determined that the dormant Commerce Clause did not apply to the petitioners' claims.

Although the Constitution implicitly limits the states' power to regulate interstate commerce, the court said that the “‘common thread’” among its dormant Commerce Clause jurisprudence was that invalid state laws either “‘prohibit[ed] access to an interstate market []or impose[d] burdensome regulation on that market.’”

But Virginia's FOIA did neither, the court said. It merely provided Virginia residents with a service.

Further, the court said that even if the petitioners' claims were “‘shoehorned into [the court's] dormant Commerce Clause framework,’” they would still fail.

Because the “‘market’” for Virginia's public records was created by Virginia itself, the court said that the state was free to “‘limit[] benefits generated by [that] state program to those who fund the state treasury and whom the State was created to serve.’”

Deepak Gupta, the founding principal of Gupta Beck PLLC, Washington, D.C., argued for the petitioners. Virginia Solicitor General E. Duncan Getchell Jr., Richmond, Va., argued for the state defendants.

'Win for Taxpayers.' Virginia Attorney General Ken Cuccinelli, Richmond, Va., acknowledged that “‘FOIA is an important tool to ensure open government.’” But he said April 29 that “‘responding to FOIA requests is a financial burden on Virginia taxpayers, because while state employees are looking through documents to respond to requests, they can't do the normal work for the citizens of the commonwealth they are paid to do.’”

Calling it “‘a win for Virginia's taxpayers,’” Cuccinelli said that the court's decision confirms “‘that Virginia taxpayers should not be required to subsidize FOIA requests from nonresidents.’”

Stuart A. Raphael, a partner Hunton & Williams, McLean, Va., who filed an amicus brief in support of Virginia on behalf of the National Conference of State Legislatures and similar organizations, echoed that sentiment, telling BNA April 29 that the “‘untold story of FOIA laws’” are the burdens they impose.

He said that the organizations he represents got involved in the case to ensure that the court's decision did not actually result in less information being available to the public.

Raphael explained that there is a distinction between judicial records—which are typically available to the public through other statutes—and nonjudicial records, including legislative and policy documents, which states make available under FOIAs.

He noted that all parties agreed that there is no constitutional right to nonjudicial documents. So if the court had decided that once a state makes these nonjudicial records available to its own citizens, it has to open it up to all individuals, states might decide to limit their

FOIA laws to avoid the “‘significant burdens’” imposed by such laws.

But Tom Fitton, the President of Judicial Watch Inc., Washington, D.C., whose organization filed an amicus brief in support of the petitioners, appeared to disagree with Raphael's suggestion that the decision ensured more access to information (or at least, not less). Categorizing the court's decisions relating to open records laws as a “‘love/hate relationship,’” he told BNA April 29 that the court's decision today represented a “‘crimped view’” of the right to access to information.

However, he said that the practical implications of the court's decisions would probably be limited, in that only a handful of states have citizen-only limitations in their FOIA laws.

Gupta agreed that the repercussions of the court's decisions could be narrow. But he told BNA April 29 that there is already a trend away from citizen-only provisions—including in Virginia itself—and he expects that the trend will continue.

Surprise Decision. While the impact of the decision may not be all that shocking, the court's reasoning and unanimity were to some observers.

Kevin Goldberg, a member at Fletcher, Heald & Hildreth PLC, Arlington, Va., whose expertise includes Freedom of Information Act law, expressed “‘outright shock’” to BNA April 29 over the decision—“‘[n]ot necessarily because the Court upheld the law rather than striking it, but because there was nothing [he] saw during oral argument that would indicate a unanimous decision.’”

Similarly, Gupta said that while it is always “‘hazardous’” to make predictions based on oral arguments, the court's decision here was “‘downright mystifying.’” In particular, he was disappointed by the “‘perfunctory’” manner in which the court dealt with the “‘hard issues’” discussed during oral arguments (81 U.S.L.W. 3463).

Both Goldberg—who filed an amicus brief in support of the petitioners in the Fourth Circuit litigation—and Gupta said that Justices Sonia M. Sotomayor and Elena Kagan seemed to be sympathetic to the petitioners' arguments during oral arguments.

Moreover, the two-and-a-half pages that the court dedicated to the discussion of the dormant Commerce Clause did not reflect the interest given that issue during oral arguments. Gupta noted that the justices kept “‘bringing back’” the argument to the dormant Commerce Clause, such that it really seemed the that was “‘where the interest was.’”

Goldberg agreed, saying that he “‘sensed significantly more interest in this issue—to the point that [he] thought it would be the turning point of the case—than the opinion would indicate.’”

Regarding the substance of that analysis, Gupta said that the court's interpretation of the dormant Commerce Clause was a “‘cramped’” one.

He noted that the court's prior decisions have always said that a protectionist purpose was not necessary to find a violation of the dormant Commerce Clause, and

To request permission to reuse or share this document, please contact permissions@bna.com. In your request, be sure to include the following information: (1) your name, company, mailing address, email and telephone number; (2) name of the document and/or a link to the document PDF; (3) reason for request (what you want to do with the document); and (4) the approximate number of copies to be made or URL address (if posting to a website).

that an inquiry into the purpose of a particular law was irrelevant. The court failed to “reconcile” that previous caselaw with today’s decisions, he said.

BY KIMBERLY ROBINSON

Full text at <http://pub.bna.com/lw/1217US.pdf> and 81 U.S.L.W. 4276.