



National Freedom of
Information Coalition

NFOIC joins nonprofits in amicus brief involving Virginia FOIA case

At issue are state public records laws that deny access to citizens from other states.

COLUMBIA, Mo. (September 7, 2012) -- Open government advocacy groups, including the National Freedom of Information Coalition (NFOIC), are asking the U.S. Supreme Court to rule unconstitutional those provisions of state public disclosure laws that allow only states' own residents access rights to public records.

Eight U.S. states have or previously had similar provisions in their public records disclosure laws, and those citizens-only provisions are being challenged as discriminatory violations of the Constitution's Privileges and Immunities Clause and the Dormant Commerce Clause.

The open government groups filed an amicus brief August 29, asking the Supreme Court to accept an appeal by Mark McBurney, a Rhode Island resident, and Roger Hurlbert, a Californian, who are challenging the citizens-only provisions of the Virginia Freedom of Information Act (VFOIA).

Both McBurney and Hurlbert had requests for Virginia records denied them because they are not Virginia citizens.

Should the Supreme Court accept the appeal, it will likely be resolving a difference of opinion between two federal appellate circuits. The U.S. Third Circuit of Appeals, ruling in a Delaware case in 2006, barred enforcement of the restriction regarding requests under the Delaware law, saying it was an unallowable limitation on noncitizens' right to "engage in the political process with regard to matters of national political and economic importance." The 4th Circuit, however, left intact in 2010 similar statutory provisions in Virginia.

"Virginia's law fails to realize that people's interest in localities and states does not end neatly at the geographical borders," said Megan Rhyne, executive director of Virginia Coalition for Open Government, a member of NFOIC.

She questioned why Virginia residents should enjoy access rights to public records in more than 40 other states, if the Commonwealth's laws "would then deny records to people from those same states?"

"It's not good public policy," Rhyne added.

NFOIC is a non-partisan network of state and regional open government groups and advocates. In addition to educational, advocacy and grant-making programs to promote transparency and accountability, NFOIC administers the Knight FOI Fund, a half-million dollar perpetual litigation fund as part of a three-year, \$2 million grant from the [John S. and James L. Knight Foundation](#).

Other organizations supporting the appeal are Citizens for Responsibility and Ethics in Washington, the Center for Media and Democracy, the Electronic Frontier Foundation, the Electronic Privacy Information Center, OpenTheGovernment.org, the Project on Government Oversight, and the Sunlight Foundation; NFOIC members joining the brief include the Tennessee Coalition for Open Government, the Washington Coalition for Open Government, and the Virginia Coalition for Open Government.

"I cannot predict the outcome of this case, but I also cannot come up with any obvious, good policy reasons for disclosure laws that discriminate against residents of other states," said Kenneth F. Bunting, executive director of NFOIC. "I would hope that the Supreme Court finds that the Constitution frowns on this, just as it frowns on other forms of discrimination."

Besides the constitutional questions, the groups supporting the challenge say enforcement of the citizen-only provisions is confusing and unevenly applied.

Deepak Gupta of Washington, D.C., lead Supreme Court counsel for the plaintiffs, said that the provisions create many opportunities for mischief.

"They allow government officials to selectively deny public records to out-of-state journalists or critics on a whim, simply because the officials don't like them or don't want certain facts uncovered," Gupta said. "There's no way to justify that as a policy matter, and it's entirely inconsistent with the Constitution."

Other states besides Virginia and Delaware that have or previously had provisions that attempt to limit access rights to public records to their own citizens include Arkansas, Georgia, New Jersey, New Hampshire, Pennsylvania and Tennessee.

The entirety of the amicus brief is linked from <http://bit.ly/SpVeuk> and the original petition from McBurney and Hurlbert is linked from <http://guptabeck.com/docket/>.

The **Virginia Coalition for Open Government** is a nonprofit alliance formed to promote expanded access to government records, meetings and other proceedings at the state and local level. Their efforts are focused solely on local/state information access. The Coalition was formed in 1996. The board of directors represents the state's access activists and friends of open government, including Virginia's librarians, genealogists, broadcasters, newspapers and the public at large. For more, see <http://www.opengovva.org/>.

The **National Freedom of Information Coalition** is a national network of state freedom of information advocates, citizen-driven nonprofit freedom of information organizations,

academic and First Amendment centers, journalistic societies and attorneys. NFOIC's primary mission is fostering government transparency at the state and local level. A unit of the Missouri School of Journalism, the NFOIC is an affiliate of the Donald W. Reynolds Journalism Institute, and is based at the University of Missouri, home to the nation's oldest FOI Center. For more, see <http://www.nfoic.org/>.

CONTACT:

Kenneth F. Bunting, Executive Director
NATIONAL FREEDOM OF INFORMATION COALITION
101E Reynolds Journalism Institute
Columbia, MO 65211
573.882.3075; buntingk@missouri.edu