

## Supreme Court Upholds Limitations on Non-Residents' Access to Public Information

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On April 29, 2013, the Supreme Court of the United States issued a unanimous decision upholding citizen-specific limitations in the State of Virginia's Freedom of Information Act (the "Act").<sup>1</sup> The Act provides that "all public records shall be open to inspection and copying by any citizens of [Virginia]," but grants no such rights to non-Virginians.<sup>2</sup>

Petitioners, who were citizens of Rhode Island and California, unsuccessfully sought information under the Act and challenged the Act under the Privileges and Immunities Clause and the dormant Commerce Clause of the United States Constitution.<sup>3</sup> Of note, Petitioner Mark McBurney was a former Virginia resident who, after his ex-wife defaulted on her child support obligations, sought records regarding the Virginia Division of Child Support Enforcement's handling of his own child support petition and other claims like his. Despite his former residency in the state of Virginia, the Court still found that he was not entitled to seek information under the Act.

The Petitioners' Privileges and Immunities challenge hinged on the Act's abridgement of Petitioners' rights to earn a living obtaining property records from state and local governments on behalf of clients, the Act's abridgement of Petitioners' rights to own and transfer property in Virginia, the Act's burdening of Petitioners' access to public proceedings, and the Act's denial of equal rights to access public information on the same terms as the citizens of Virginia.

The Court rejected each of these arguments. First, the Court found no evidence to support the contention that "the Virginia FOIA was enacted in order to provide a competitive economic advantage for Virginia citizens," nor did the Act "prevent citizens of other States from obtaining such documents" necessary to transfer real property. The Court further found that "the challenged provision of the Virginia FOIA clearly does not deprive noncitizens of 'reasonable and adequate' access to the Commonwealth's courts." In reaching these determinations, the Court reasoned that the Privileges and Immunities Clause is not so broad as to encompass "the right to access public information on equal terms with citizens of the Commonwealth [of Virginia]."

The Court similarly dismissed the Petitioners' challenge under the dormant Commerce Clause. The Court found that "Virginia's FOIA law neither 'regulates' nor 'burdens' interstate commerce; rather

it merely provides a service to local citizens that would not otherwise be available at all.” The Court explained that “[i]nsofar as there is a ‘market’ for public documents in Virginia, it is a market for a product that the Commonwealth has created and of which the Commonwealth is the sole manufacturer,” and, thus, the Act was not susceptible to dormant Commerce Clause scrutiny.

This holding is of critical importance for individuals seeking public information from foreign states and for entities doing business in those states. In fact, several other states, such as Tennessee, Alabama, Arkansas, Missouri, New Hampshire, and New Jersey, have enacted similar limitations on noncitizens’ access to public information.<sup>4</sup>In seeking public information from such states, noncitizens should be aware that their efforts may be unsuccessful unless they engage citizens of those states to submit a FOIA request on their behalf.

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<sup>1</sup> *McBurney v. Young*, No. 12-17, 2013 U.S. LEXIS 3317 (Apr. 29, 2013).

<sup>2</sup> Virginia Freedom of Information Act (the “Virginia FOIA” or “Act”), Va. Code Ann. §2.2-3700 *et seq.* at §2.2-3704(A) (2011).

<sup>3</sup> U.S. Const., Art. IV, § 2, cl. 1; U.S. Const., Art. I, § 8, cl. 3.

<sup>4</sup> See Jesse J. Holland, *Court: State Can Block Out of State Use of FOIA*, Associated Press, Apr. 29, 2013 (available at <http://news.yahoo.com/court-state-block-state-foia-141957853.html>) (last visited May 7, 2013).

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