

**IN THE CIRCUIT COURT OF THE CITY OF RICHMOND  
IN THE COMMONWEALTH OF VIRGINIA**

**THE HONORABLE DAVID LAROCK, )  
MEMBER OF THE VIRGINIA HOUSE )  
OF DELEGATES, )**

**Petitioner,**

**V. )**

**Case No. \_\_\_\_\_**

**THE HONORABLE MARK HERRING, )  
ATTORNEY GENERAL OF VIRGINIA, )**

**Respondent.**

**Serve at: )  
Office of the Attorney General )  
900 E Main St, )  
Richmond, VA 23219 )**

**VERIFIED PETITION FOR WRIT OF MANDAMUS**

Petitioner, THE HONORABLE DAVID LAROCK, MEMBER OF THE VIRGINIA HOUSE OF DELEGATES (“Delegate LaRock”), by and through his undersigned counsel, files this Verified Petition for Writ of Mandamus against Respondent, THE HONORABLE MARK HERRING, ATTORNEY GENERAL OF VIRGINIA (“Attorney General Herring”), and submits to this Court the following matters and facts:

**Parties**

1. Petitioner Delegate LaRock is an adult resident citizen of Loudoun County, Virginia. Since January 8, 2014, Delegate LaRock has been and is currently the duly elected, sworn, qualified, and active Delegate to the Virginia House of Delegates, representing the 33<sup>rd</sup> House District which includes portions of Loudoun County, Clarke County, and Frederick County. In that capacity, he has the right, upon written request, to the advice of and an official, written advisory opinion from the Attorney General of Virginia pursuant to Virginia Code § 2.2-505.

2. Respondent Attorney General Herring is an adult resident citizen of the Town of Leesburg, Virginia. Since January 11, 2014, Attorney General Herring has been and is currently the duly elected, sworn, qualified, and active Attorney General for the Commonwealth of Virginia. In that capacity, he has the obligation, pursuant to Virginia Code § 2.2-505, to provide advice to and render an official written advisory opinion to any member of the General Assembly who submits a written request.

### **Jurisdiction and Venue**

3. This Court has jurisdiction pursuant to Code § 17.1-513, as this is an action for a writ for mandamus.

4. The City of Richmond is the preferred venue for this action pursuant to Code § 8.01-261(2), as this action is against an officer of the Commonwealth in his official capacity, and the Respondent has his official office in the City of Richmond.

### **Law**

5. Pursuant to Code § 8.01-644 et seq., this Court shall issue writs of mandamus against public officials to compel the public official to perform a ministerial duty imposed upon him by law. The function of a writ is to “to enforce the performance of duties growing out of public relations, or imposed by statute, or in some respect involving a trust or official duty.” Carolina, C. & O. R. Co. v. Bd. of Supervisors, 109 Va. 34, 37, 63 S.E. 412, 413 (1909).

6. Where the law requires a public official to perform a duty, but the performance requires discretion or judgment, the Court can compel the performance without controlling the manner of the performance. Richmond Funeral Dirs.' Asso. v. Groth, 202 Va. 792, 797, 120 S.E.2d 467, 471 (1961).

7. Code § 2.2-505 requires the Attorney General of Virginia to “give his advice and

render official advisory opinions in writing . . . when requested in writing so to do by . . . a member of the General Assembly.”

8. When a statute is silent on the exact time period within which a prescribed activity must take place, a Court will infer a reasonable time. *See, e.g., Bd. of Sup’rs of King & Queen Cty. v. King Land Corp.*, 238 Va. 97, 104-05, 380 S.E.2d 895, 898 (1989) (“Where, as here, a public official is charged by statute to perform a duty, but the statute is silent as to the express time by which the duty must be performed, there is an implicit requirement that its mandate be fulfilled within a reasonable time.”).

9. A petition for a writ of mandamus shall state plainly and concisely the grounds of the application. Code § 8.01-645

#### **Grounds for the Writ of Mandamus**

10. On September 21, 2015, Delegate LaRock submitted via email, and then shortly after via U.S. mail, a formal request to Attorney General Herring for an official advisory opinion pursuant to Va. Code § 2.2-505 seeking clarification of various provisions in the Virginia Code related to the prohibition of discrimination. A copy of the request is attached as Exhibit A. Delegate LaRock’s September 21, 2015 request was acknowledged in an email from Opinions Counsel Timothy Oksman in Attorney General Herring’s office on September 23, 2015.

11. Delegate LaRock’s September 21, 2015 request asked Attorney General Herring to advise him on a two-part question, which Petitioner contends is relatively simple in nature. The two-part question was as follows: 1) Whether the term "sex" as used in § 2.2-3901 and other various discrimination provisions in the Virginia Code include gender identity or sexual orientation?; and 2) If the answer to this question is in the affirmative, an opinion as to how the terms "sexual orientation" and "gender identity" would be defined for the purposes of the

application of Virginia's various laws prohibiting sex discrimination?

12. As a Virginia state legislator, Delegate LaRock needed to possess a fair degree of legal clarity upon the meaning of the term “sex” as used in the Code of Virginia in order to effectively carry out his official duties as a legislator. Upon information and belief, the term “sex,” for the purposes of discrimination, is not expressly defined in the Code of Virginia. Recent events have caused doubt regarding the legal meaning of the term “sex” as used in the Code of Virginia, and therefore invite the need for clarification as to the term’s legal meaning. During the 2016 Virginia Legislative Session, which began on January 12 and ended March 11, there were eleven pieces of legislation introduced containing the terms “sexual orientation” or “gender identity.” During the 2016 Legislative Session, Delegate LaRock himself was the Chief Patron for two bills, HB 397 and HB 431, which directly implicated the meaning of the term “sex” as used in the Code of Virginia. Exhibit B.

13. Delegate LaRock made his formal request for an advisory opinion pursuant to Code § 2.2-505 nearly four months prior to the time the Virginia General Assembly was to convene for its annual legislative session. Delegate LaRock did so in order that Attorney General Herring would have sufficient time to answer Delegate LaRock’s request before the legislative session convened. However, at the time of this filing, nearly seven months after Delegate LaRock’s formal request, the Attorney General has yet to issue an opinion.

14. During the month of December, approximately two months after Del. LaRock submitted his formal request, he asked in multiple phone conversations with Attorney General Herring’s staff for an indication as to whether there is an advisory opinion pending in response to his request. He was promised that he would be given a response from Attorney General Herring’s staff in a matter of days, indicating a timeframe for delivery of an advisory opinion;

that response never came.

15. To discern the process Attorney General Herring uses to draft and issue official advisory opinions, Delegate LaRock requested a copy of the Attorney General Herring's policies and procedures for handling advisory opinions. Delegate LaRock was informed by the Attorney General's Opinions Counsel, G. Timothy Oksman, that "There is no internal policy or manual for issuing opinions." Exhibit C.

16. Del. LaRock requested copies of communications relating to his opinion request pursuant to the Virginia Freedom of Information Act. The emails he received in response provided no clear indication that there is any ongoing effort or intention to respond to Delegate LaRock's request. Exhibit D.

17. On March 11, 2016, Delegate LaRock delivered a letter to Attorney General Herring's office further requesting that his questions be answered, and providing informal notice that if the Attorney General did not provide answers to his request within a reasonable time, that he intended to file a Petition for Writ of Mandamus to compel the Attorney General to carry out his official duty. Exhibit E.

18. On or about March 11, 2016, Delegate LaRock received an acknowledgement letter from Cynthia E. Hudson, Chief Deputy Attorney General, sent on behalf of Attorney General Herring, responding to Delegate LaRock's letter delivered earlier that day. The letter stated that "a response will be issued by [the Attorney General] in due course." However, the letter from Ms. Hudson provided no indication as to whether an official advisory opinion is forthcoming. Exhibit F.

19. To date, Attorney General Herring has failed to issue the required advisory opinion. He has therefore failed in his ministerial duty pursuant to Code § 2.2-505 to "give his

advice and render official advisory opinions in writing . . . when requested in writing so to do by . . . a member of the General Assembly” within a reasonable time.

20. The failure to provide the requested advisory opinion timely has already prejudiced Delegate LaRock in the discharge of his official duties, inasmuch as he has had to act in the 2016 legislative session without the benefit of knowing Attorney General Herring’s interpretation of the law on these issues.

21. While the Attorney General fails in his duty to advise Delegate LaRock on this particular question, it is worth noting that Attorney General Herring filed a brief in the United States Court of Appeals for the Fourth Circuit on April 11, 2014, focused on the terms “sexual orientation” and “gender”.

22. When performing his duty as a state legislator in the Virginia Senate, now Attorney General Herring was co-patron of numerous pieces of legislation seeking to insert the term “sexual orientation” in question into Virginia Code relating to discrimination policy, thus indicating, at a minimum, that the Attorney General is not unfamiliar with the uses and meanings of the terms in question.

23. In response to a request for a formal advisory opinion from Senator Adam Ebbin, Attorney General Herring produced an official advisory opinion dealing directly with “sexual orientation” and “gender identity.” Senator Ebbin’s request was made on Nov 10, 2014 and Attorney General Herring replied with an official advisory opinion three months and three weeks later. In Advisory Opinion 14-080, dated March 4, 2015, Attorney General Herring responded to Sen. Ebbin, concluding that, “... *Code of Virginia, Dillon Rule, does not prevent school boards from amending their antidiscrimination policies to prohibit discrimination on the basis of sexual orientation and gender identity.*” Exhibit G.

24. Delegate LaRock seeks a writ of mandamus to compel Attorney General Herring to perform his lawful obligation of issuing the requested advisory opinion, as Delegate LaRock has no adequate remedy at law.

25. The political views of Attorney General Herring on the matter, whatever they may be, are not a sufficient excuse for his failure to perform his duties as prescribed by law in stating his legal opinion on the questions put to him.

Wherefore, Petitioner requests the Court to grant and issue a Writ of Mandamus to Respondent commanding and compelling Mark Herring as the Attorney General of the Commonwealth of Virginia to "give his advice and render official advisory opinions in writing," as requested in Petitioner's September 21, 2015 request, and for all further and additional relief as may be appropriate.

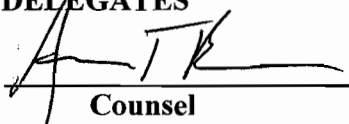
**VERIFICATION**

I verify under penalty of perjury that the factual allegations set forth in the foregoing Petition are true and correct to the best of my knowledge.

  
By: David LaRock

Dated: 4/18/2016

**Respectfully Requested,  
THE HONORABLE DAVID LAROCK,  
MEMBER OF THE VIRGINIA HOUSE  
OF DELEGATES**

By:   
Counsel

Thomas H. Roberts, Esquire, VSB # 26014  
[tom.roberts@robertslaw.org](mailto:tom.roberts@robertslaw.org)  
Andrew T. Bodoh, VSB #80143  
[andrew.bodoh@robertslaw.org](mailto:andrew.bodoh@robertslaw.org)

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[j.arthur@robertslaw.org](mailto:j.arthur@robertslaw.org)

**Thomas H. Roberts & Associates, P.C.**

105 S 1<sup>st</sup> Street

Richmond, Virginia 23219

(804) 783-2000

(804) 783-2105 fax

*Counsel for Petitioner*





DAVE LAROCK  
POST OFFICE BOX 6  
HAMILTON, VIRGINIA 20159

THIRTY-THIRD DISTRICT

COMMONWEALTH OF VIRGINIA

HOUSE OF DELEGATES  
RICHMOND

COMMITTEE ASSIGNMENTS:  
COURTS OF JUSTICE  
TRANSPORTATION  
SCIENCE AND TECHNOLOGY

September 21, 2015

Honorable Mark R. Herring  
Attorney General  
Pocahontas Building  
900 East Main St  
Richmond, VA, 23219

Dear Attorney General Herring,

I am requesting an official advisory opinion regarding various provisions in the Virginia Code prohibiting discrimination. Specifically, the Virginia Code prohibits discrimination on the basis of sex in several contexts, including (i) state employment under the State Grievance Procedure (Va. Code § 2.2-3004), the contracting of public business under the Fair Employment Contracting Act (Va. Code § 2.2-4201) and the Virginia Public Procurement Act (Va. Code §§ 2.2-4310 and 2.2-4311), housing under the Virginia Fair Housing Law (Va. Code § 36-96.1), and under the Virginia Human Rights Act (§ 2.2-3900). However, the Code does not define the term "sex" within the context of such statutory prohibitions.

Title VII of the Civil Rights Act also prohibits workplace discrimination on the basis of sex. Like the Virginia Code, Title VII does not define the term "sex." See 42 U.S.C. §§ 2000e-1 and 2000e-2. The U.S. Equal Employment Opportunity Commission (EEOC) has recently ruled that the term "sex" includes sexual orientation. Please refer to *David Baldwin v. Dep't of Transportation*, EEOC Appeal No. 0120133080 (July 15, 2015) (<http://www.eeoc.gov/decisions/0120133080.pdf>). This ruling follows an earlier ruling that the term "sex" includes gender identity. Please refer to *Macy v. Department of Justice*, EEOC Appeal No. 0120120821 (April 20, 2012) (<http://www.eeoc.gov/decisions/0120120821%20Macy%20v%20DOJ%20ATF.txt>).

In light of the recent EEOC decisions that have found that the term "sex" in the context of Title VII of the Civil Rights Act includes both sexual orientation and gender identity, I request an official advisory opinion for the question of whether the term "sex" as used in § 2.2-3901 and other various discrimination provisions in the Virginia Code include gender identity or sexual orientation? If the answer to this question is in the affirmative, I also request an official advisory opinion as to how the terms "sexual orientation" and "gender identity" would be defined for the purposes of the application of Virginia's various laws prohibiting sex discrimination?

I appreciate your prompt consideration of this request, and am available should you require any clarification of this inquiry.

DISTRICT: (540) 751-8364 • RICHMOND: (804) 698-1033 • EMAIL: DELDLAROCK@HOUSE.VIRGINIA.GOV

EXHIBIT A  
1 of 1

## 2016 Virginia General Assembly House and Senate Bills Implicating Sex and Gender Identity

### Gender Identity

<b>HB179</b> (show hits) ..Virginia Human Rights Act; prohibits discrimination in employment... (4)
<b>HB300</b> (show hits) ..Virginia Fair Housing Law; unlawful discrimination, definition of sexual orientat.. (15)
<b>HB427</b> (show hits) ..Conversion therapy; prohibited, no state funds shall be expended for purpose of t.. (2)
<b>HB429</b> (show hits) ..Virginia Human Rights Act; public employment, prohibited discrimination... (5)
<b>HB913</b> (show hits) ..Discrimination; prohibited in employment and housing... (44)
<b>HB1005</b> (show hits) ..VA Human Rights Act; public employment, public accommodation, & housing, prohibit.. (21)
<b>SB12</b> (show hits) ..Public employment; prohibited discrimination based on sexual orientation or gende.. (12)
<b>SB12E</b> (show hits) ..Public employment; prohibited discrimination based on sexual orientation or gende.. (12)
<b>SB67</b> (show hits) ..Virginia Fair Housing Law; unlawful discriminatory housing practices, sexual orie.. (15)
<b>SB262</b> (show hits) ..Conversion therapy prohibited... (2)
<b>SB267</b> (show hits) ..Conversion therapy; prohibited... (2)

### Sexual orientation

<b>HB35</b> (show hits) ..Hate crimes; reporting to State Police... (2)
<b>HB179</b> (show hits) ..Virginia Human Rights Act; prohibits discrimination in employment... (20)
<b>HB300</b> (show hits) ..Virginia Fair Housing Law; unlawful discrimination, definition of sexual orientat.. (15)
<b>HB427</b> (show hits) ..Conversion therapy; prohibited, no state funds shall be expended for purpose of t.. (2)
<b>HB429</b> (show hits) ..Virginia Human Rights Act; public employment, prohibited discrimination... (23)
<b>HB913</b> (show hits) ..Discrimination; prohibited in employment and housing... (44)
<b>HB1005</b> (show hits) ..VA Human Rights Act; public employment, public accommodation, & housing, prohibit.. (46)
<b>SB12</b> (show hits) ..Public employment; prohibited discrimination based on sexual orientation or gende.. (12)
<b>SB12E</b> (show hits) ..Public employment; prohibited discrimination based on sexual orientation or gende.. (12)
<b>SB67</b> (show hits) ..Virginia Fair Housing Law; unlawful discriminatory housing practices, sexual orie.. (15)
<b>SB82</b> (show hits) ..Hate crimes; reporting to State Police... (3)
<b>SB262</b> (show hits) ..Conversion therapy prohibited... (2)
<b>SB267</b> (show hits) ..Conversion therapy; prohibited... (2)

### Discrimination

<b>HB77</b> (show hits) ..Sex or gender discrimination; applicable federal law... (5)
<b>HB111</b> (show hits) ..Virginia National Guard; extends reemployment & nondiscrimination rights... (2)
<b>CHAP0327</b> (show hits) ..Virginia National Guard; extends reemployment & nondiscrimination rights... (2)
<b>HB111ER</b> (show hits) ..Virginia National Guard; extends reemployment & nondiscrimination rights... (2)
<b>HB111H1</b> (show hits) ..Virginia National Guard; extends reemployment & nondiscrimination rights... (2)
<b>HB179</b> (show hits) ..Virginia Human Rights Act; prohibits discrimination in employment... (16)
<b>HB209</b> (show hits) ..Educational Institutions; revising and recodifying laws... (6)

HB209ER (show hits)	..Educational Institutions; revising and recodifying laws... (6)
HB209E (show hits)	..Educational Institutions; revising and recodifying laws... (6)
HB300 (show hits)	..Virginia Fair Housing Law; unlawful discrimination, definition of sexual orientat.. (6)
HB385 (show hits)	..Discrimination; ordinances or regulations prohibiting... (3)
HB397 (show hits)	..Discrimination; specification of certain terms relating to sex or gender... (9)
HB429 (show hits)	..Virginia Human Rights Act; public employment, prohibited discrimination... (16)
HB565H1 (show hits)	..Charter schools, public; changes to provisions for establishment and operation... (2)
HB565EH1 (show hits)	..Charter schools, public; changes to provisions for establishment and operation... (2)
HB565 (show hits)	..Charter schools, public; changes to provisions for establishment and operation... (2)
CHAP0334 (show hits)	..Real Estate Board; duties of real estate licensees, exemption, etc., of continuin.. (2)
HB567ER (show hits)	..Real Estate Board; duties of real estate licensees, exemption, etc., of continuin.. (2)
HB567H1 (show hits)	..Real Estate Board; duties of real estate licensees, exemption, etc., of continuin.. (2)
HB567 (show hits)	..Real Estate Board; duties of real estate licensees, exemption, etc., of continuin.. (2)
CHAP0027 (show hits)	..Federal Rehabilitation Act and Older Americans Act; amends certain language in Co.. (1)
HB740ER (show hits)	..Federal Rehabilitation Act and Older Americans Act; amends certain language in Co.. (1)
HB740H1 (show hits)	..Federal Rehabilitation Act and Older Americans Act; amends certain language in Co.. (1)
HB740 (show hits)	..Federal Rehabilitation Act and Older Americans Act; amends certain language in Co.. (1)
HB817 (show hits)	..Virginia Freedom of Information Act; record exclusions, rule of redaction, etc... (1)
HB817ER (show hits)	..Virginia Freedom of Information Act; record exclusions, rule of redaction, etc... (1)
HB817H1 (show hits)	..Virginia Freedom of Information Act; record exclusions, rule of redaction, etc... (1)
CHAP0292 (show hits)	..Fraud and Abuse Whistle Blower Protection Act; applicability to local governmenta.. (1)
HB821ER (show hits)	..Fraud and Abuse Whistle Blower Protection Act; applicability to local governmenta.. (1)
HB821 (show hits)	..Fraud and Abuse Whistle Blower Protection Act; applicability to local governmenta.. (1)
HB910ER (show hits)	..Appeal of tax assessments; prior to receipt of information, person to sign acknow.. (1)
HB910H1 (show hits)	..Appeal of tax assessments; prior to receipt of information, person to sign acknow.. (1)
HB910 (show hits)	..Appeal of tax assessments; prior to receipt of information, person to sign acknow.. (1)
HB913 (show hits)	..Discrimination; prohibited in employment and housing... (27)
HB921 (show hits)	..National Guard members of other states; employment protection... (1)
HB971H1 (show hits)	..Small businesses; implementation of certification programs, report... (2)
HB971 (show hits)	..Small businesses; implementation of certification programs, report... (2)
HB985 (show hits)	..Virginia Freedom of Information Act; record exclusions; rule of redaction; no wei.. (1)
HB994 (show hits)	..Attorney General; investigation of complaint of discrimination... (1)
HB1005 (show hits)	..VA Human Rights Act; public employment, public accommodation, & housing, prohibit.. (24)
HB1137 (show hits)	..Electric utilities; net energy metering, energy balancing devices... (1)
HB1286 (show hits)	..Distributed and renewable generation of electric energy; net energy metering... (1)
HB1288ER (show hits)	..Small Business and Supplier Diversity, Dept. of; certification of employment serv.. (2)
HB1288 (show hits)	..Small Business and Supplier Diversity, Dept. of; certification of employment serv.. (2)
HB1293 (show hits)	..Employee grievance procedure, local; impartial panel hearing, etc... (1)

<b>SB12</b> (show hits)	..Public employment; prohibited discrimination based on sexual orientation or gende..	(9)
<b>SB12E</b> (show hits)	..Public employment; prohibited discrimination based on sexual orientation or gende..	(9)
<b>SB32</b> (show hits)	..Virginia Casino Gaming Commission; regulation of casino gaming, penalties...	(1)
<b>SB33S1</b> (show hits)	..Virginia Casino Gaming Commission; regulation of casino gaming, penalties...	(1)
<b>SB33</b> (show hits)	..Virginia Casino Gaming Commission; regulation of casino gaming, penalties...	(1)
<b>SB67</b> (show hits)	..Virginia Fair Housing Law; unlawful discriminatory housing practices, sexual orie..	(5)
<b>SB119</b> (show hits)	..Small Business; changes in definition, regulation by U.S. Small Business Administr..	(2)
<b>SB139</b> (show hits)	..Electric utility regulation; agricultural net energy metering...	(1)
<b>SB139S1</b> (show hits)	..Electric utility regulation; agricultural net energy metering...	(1)
<b>SB140</b> (show hits)	..Electric utilities; net energy metering, standby charges...	(1)
<b>SB221</b> (show hits)	..Discrimination between employees on the basis of sex; payment of wages...	(1)
<b>SB494</b> (show hits)	..Virginia Freedom of Information Act; record exclusions, rule of redaction, etc...	(1)
<b>SB494ER</b> (show hits)	..Virginia Freedom of Information Act; record exclusions, rule of redaction, etc...	(1)
<b>SB494S1</b> (show hits)	..Virginia Freedom of Information Act; record exclusions, rule of redaction, etc...	(1)
<b>CHAP0272</b> (show hits)	..Virginia Freedom of Information Act; exclusions for school personnel licensure ap..	(1)
<b>SB564ER</b> (show hits)	..Virginia Freedom of Information Act; exclusions for school personnel licensure ap..	(1)
<b>SB564</b> (show hits)	..Virginia Freedom of Information Act; exclusions for school personnel licensure ap..	(1)
<b>SB597ER</b> (show hits)	..Appeal of tax assessments; prior to receipt of information, person to sign acknow..	(1)
<b>SB597S1</b> (show hits)	..Appeal of tax assessments; prior to receipt of information, person to sign acknow..	(1)
<b>SB597ES1</b> (show hits)	..Appeal of tax assessments; prior to receipt of information, person to sign acknow..	(1)
<b>SB597</b> (show hits)	..Appeal of tax assessments; prior to receipt of information, person to sign acknow..	(1)
<b>SB734ER</b> (show hits)	..Public charter schools...	(2)
<b>SB734H1</b> (show hits)	..Public charter schools...	(2)
<b>SB734S1</b> (show hits)	..Public charter schools...	(2)
<b>SB734</b> (show hits)	..Public charter schools...	(2)
<b>SB779S1</b> (show hits)	..Electric utility regulation; net energy metering...	(1)
<b>SB779</b> (show hits)	..Electric utility regulation; net energy metering...	(1)

**Oksman, G. Timothy**

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**From:** Oksman, G. Timothy  
**Sent:** Monday, December 28, 2015 9:42 AM  
**To:** 'Dave A LaRock'  
**Cc:** Anderson, Brittany A.  
**Subject:** FW: Procedure for issuing official advisory opinions

Delegate -

Brittany has referred your inquiry to me. There is no internal policy or manual for issuing opinions.

*G. Timothy Oksman  
Opinions Counsel  
Office of the Attorney General of Virginia  
900 E. Main Street  
Richmond, VA 23219  
804-786-1861*



**From:** Dave A LaRock [<mailto:DelDLaRock@house.virginia.gov>]  
**Sent:** Monday, December 21, 2015 2:09 PM  
**To:** Anderson, Brittany A.  
**Subject:** Procedure for issuing official advisory opinions

Brittany,  
Thank you for your time last week discussing my September 21 request for an official advisory opinion.  
Could you please email me a copy of any internal policy or manual that sets out the procedure for issuing opinions by the AG?  
Sincerely,

Dave

Delegate Dave LaRock  
Virginia House of Delegates, 33rd District  
District Office: (540) 751-8364  
Fax: (804) 698-6733  
[DelDLaRock@house.virginia.gov](mailto:DelDLaRock@house.virginia.gov)  
[www.VoteLaRock.us](http://www.VoteLaRock.us)  
<https://www.facebook.com/DelegateDaveLaRock>  
<https://twitter.com/LaRock4Delegate>



**DAVE LAROCK**  
POST OFFICE BOX 6  
HAMILTON, VIRGINIA 20159  
THIRTY-THIRD DISTRICT

COMMONWEALTH OF VIRGINIA  
**HOUSE OF DELEGATES**  
RICHMOND

COMMITTEE ASSIGNMENTS:  
TRANSPORTATION  
COURTS OF JUSTICE  
SCIENCE AND TECHNOLOGY

December 21, 2015

Freedom of Information Act request

Meaghan O'Brien  
900 East Main Street  
Richmond, Virginia 23219

Meaghan:

I submitted a request for an official advisory opinion dated and emailed to Mr. Timothy Oksman on September 21<sup>st</sup>. I have not yet received a response to that request, and had hoped to have an answer prior to the upcoming legislative session.

I am hereby requesting that you provide an electronic copy of any email or other correspondence which relates to my Sept. 21 request for an official advisory opinion. Further, I request an electronic copy of any Office of the Attorney General email or other correspondence in the 2015 calendar year which references "gender identity" or "sexual orientation".

Sincerely,



# COMMONWEALTH of VIRGINIA

Office of the Attorney General

Mark R. Herring  
Attorney General

900 East Main Street  
Richmond, Virginia 23219  
804-786-2071  
FAX 804-786-1991  
Virginia Relay Services  
800-828-1120  
7-1-1

January 11, 2015

## VIA ELECTRONIC MAIL & U.S. MAIL

Delegate David A. LaRock  
Virginia House of Delegates, 33rd District  
General Assembly Building  
P.O. Box 406  
Richmond, Virginia 23218  
[DelDLaRock@house.virginia.gov](mailto:DelDLaRock@house.virginia.gov)

**Re: Freedom of Information Act request – received December 21, 2015**

Dear Delegate LaRock:

The Office of the Attorney General for the Commonwealth of Virginia (hereinafter, "Office") acknowledges receipt of the above-referenced request in which you seek certain records pursuant to the Virginia Freedom of Information Act, Virginia Code Section 2.2-3700, *et seq.* (hereinafter, "FOIA"). Specifically, you request:

- "[A]n electronic copy of any email or other correspondence which relates to [your] Sept. 21 request for an official advisory opinion.
- ". . . an electronic copy of any Office of the Attorney General email or other correspondence in the 2015 calendar year which references 'gender identity' or 'sexual orientation.'"

Please find enclosed documents responsive to the first portion of your request. The Office respectfully invokes Virginia Code Section 2.2-3705.7(2) exempting from mandatory disclosure

approximately 25 documents responsive to this part of your request as working papers of the Attorney General.

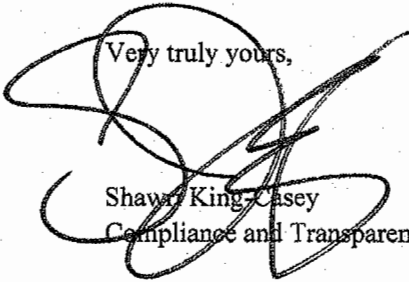
As to part two of your request, please note that the estimated actual costs to perform a global search of all 418 Office employees' individual email repositories exceeds \$1,000, based upon estimated staff time for retrieval and review of records for responsiveness and applicable exemptions.

Please be advised that this cost estimate has the caveat that, at this time, we do not know the number of potentially responsive documents and, accordingly, the actual amount of employee time expended in review may be greater than estimated. To reduce your costs and expend the least amount of taxpayer resources that will be exclusively devoted to fulfilling your request, you might wish to narrow the scope of the latter portion of your inquiry. If you wish to proceed with your request as submitted, kindly remit a deposit of \$1,000 by check payable to the Treasurer of Virginia. Once payment is received, this Office will commence with processing your request. Your payment may be sent to the address below:

Office of the Attorney General  
c/o Meaghan O' Brien  
900 East Main Street  
Richmond, Virginia 23219

I trust this information is helpful to your inquiry and look forward to working with you as we seek to comply with your request.

Very truly yours,

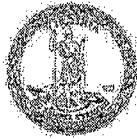


Shawn King Casey  
Compliance and Transparency Counsel

Enclosures

cc: G. Timothy Oksman, Opinions Counsel





DAVE LAROCK  
POST OFFICE BOX 6  
HAMILTON, VIRGINIA 20159  
THIRTY-THIRD DISTRICT

COMMONWEALTH OF VIRGINIA  
HOUSE OF DELEGATES  
RICHMOND

COMMITTEE ASSIGNMENTS:  
EDUCATION  
TRANSPORTATION  
SCIENCE AND TECHNOLOGY

March 10, 2016

Honorable Mark R. Herring  
Attorney General  
Pocahontas Building  
900 East Main St  
Richmond, VA, 23219

Attorney General Herring:

On September 21, 2015, I made the request to your office via email and then shortly after via U.S. mail asking that an official advisory opinion be provided to me as a member of the Virginia House of Delegates. This request was made pursuant to the Code of Virginia 2.2-505 (Official Opinions of Attorney General) and was received and acknowledged by your office in an email from Opinions Counsel Timothy Oksman dated September 23, 2015.

I have made numerous inquiries as to the status of that request and have not been given any meaningful reply. The 2016 session will conclude in a few days. I have operated without the benefit of advice from your office.

Be advised that I will be forwarding to you a copy of a Writ of Mandamus asking a court to compel you to perform your duty in regard to this request.

If you or your representative do not provide a satisfactory reply to this notification indicating the advisory opinion I have requested is complete or will be completed in a reasonable time frame, I will proceed with filing.

I can be reached any time during normal business hours if you have any questions.

Delegate Dave LaRock

RECEIVED  
MAR 11 2016  
Office of the Attorney General



# COMMONWEALTH of VIRGINIA

Office of the Attorney General

Mark R. Herring  
Attorney General

March 11, 2016

900 East Main Street  
Richmond, Virginia 23219  
804-786-2071  
FAX 804-786-1991  
Virginia Relay Services  
800-828-1120  
7-1-1

By Email to [DelDLaRock@house.virginia.gov](mailto:DelDLaRock@house.virginia.gov)

The Honorable Dave A. LaRock  
Member, Virginia House of Delegates  
P.O. Box 406  
Richmond, VA 23218

Dear Delegate LaRock:

On behalf of Attorney General Mark Herring, I acknowledge receipt today of your letter dated March 10, 2016 inquiring about the status of a response to your September 15, 2015 request for an official opinion of the Attorney General. Please be advised that your request was assigned for necessary research and preparation; a response will be completed; and following appropriate levels of review and revision for presentment to the Attorney General for his consideration and approval, a response will be issued by him in due course.

I trust this information is helpful.

Sincerely,

A handwritten signature in black ink, appearing to read "Cynthia E. Hudson".

Cynthia E. Hudson  
Chief Deputy Attorney General

G. Timothy Oksman, Opinions Counsel



# COMMONWEALTH of VIRGINIA

Office of the Attorney General

Mark R. Herring  
Attorney General

March 4, 2015

900 East Main Street  
Richmond, Virginia 23219  
804-786-2071  
FAX 804-786-1991  
Virginia Relay Services  
800-828-1120  
7-1-1

The Honorable Adam P. Ebbin  
Member, Senate of Virginia  
Post Office Box 26415  
Alexandria, Virginia 22313

Dear Senator Ebbin:

I am responding to your request for an official advisory Opinion in accordance with § 2.2-505 of the *Code of Virginia*.

## Issue Presented

You ask whether a 2002 Opinion of this Office,<sup>1</sup> concluding that a school board does not have the legal authority to amend its nondiscrimination policy to prohibit sexual-orientation and gender-identity discrimination, is valid in light of Article VIII, § 7 of the Constitution of Virginia, this Office's 2006 Opinion concerning concealed weapons on college campuses,<sup>2</sup> and the Fourth Circuit's recent decision in *Bostic v. Schaefer*.<sup>3</sup> Your question implicates nondiscrimination policies with respect to both students and school employees.

## Applicable Law and Discussion

School boards are "public quasi corporations that exercise limited powers and functions of a public nature granted to them expressly or by necessary implication."<sup>4</sup> Virginia follows the Dillon Rule of strict construction, which "provides that municipal corporations have only those powers that are expressly granted, those necessarily or fairly implied from expressly granted powers, and those that are essential and indispensable."<sup>5</sup> A corollary to the Dillon Rule applies these constraints to local school boards.<sup>6</sup> Because the General Assembly has never specifically authorized school boards to prohibit discrimination on the basis of sexual orientation or gender identity, school boards only have the authority to do so if that authority is fairly or necessarily implied from an express grant of power.

The Constitution of Virginia confers expansive power on local school boards. Article VIII, § 7 of the Constitution of Virginia provides that "the supervision of schools in each school division shall be

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<sup>1</sup> 2002 Op. Va. Att'y Gen. 105.

<sup>2</sup> 2006 Op. Va. Att'y Gen. 116.

<sup>3</sup> *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014), *cert denied*, Nos. 14-153, 14-225, 14-251, 2014 U.S. LEXIS 6053, 6316, 6504 (U.S. Oct. 6, 2014).

<sup>4</sup> *Kellam v. Sch. Bd.*, 202 Va. 252, 254 (1961).

<sup>5</sup> *Bd. of Zoning Appeals v. Bd. of Supvrs.*, 276 Va. 550, 553-54 (2008).

<sup>6</sup> *Payne v. Fairfax Cnty. Sch. Bd.*, No. 140145 (Va. Oct. 31, 2014); *Bd. of Zoning Appeals*, 276 Va. at 553-54.

vested in a school board.”<sup>7</sup> The Supreme Court of Virginia has made clear that the express supervisory power contained in Article VIII, § 7 necessarily includes a broad range of implied powers. For example, the Supreme Court has found that school boards’ supervisory power necessarily includes derivative powers to regulate “the safety and welfare of students,”<sup>8</sup> “to supervise personnel,”<sup>9</sup> and to apply “local policies, rules, and regulations adopted for the day-to-day management of a teaching staff.”<sup>10</sup> No other local or state entity may encroach on the far-reaching scope of school boards’ supervisory authority.<sup>11</sup>

Regulating how a school system, students, and employees interact with and treat one another is a fundamental component of supervising a school system. A policy that allows some students or some employees to be treated differently from others necessarily implicates the welfare of students and supervision of personnel. These are areas that the Constitution of Virginia unquestionably empowers school boards to regulate.<sup>12</sup> Thus, the authority to prohibit discrimination, including discrimination based on sexual orientation or gender identity, is a power fairly or necessarily implied from the constitutional duty to supervise the schools.

A 2002 Opinion of this Office concluded that school boards do not have the authority to prohibit discrimination because the General Assembly has not enacted legislation that would make explicit school boards’ authority to do so.<sup>13</sup> That Opinion, however, did not examine the powers of local school boards under Article VIII, § 7 of the Constitution of Virginia, the corresponding broad grant of statutory authority in § 22.1-28 of the *Code of Virginia*, other enumerated powers set forth in Title 22.1, or those that may be fairly implied from them.<sup>14</sup> The Opinion also mistakenly analogized a school board’s broad supervisory authority to a county’s specific grant of authority under § 15.2-853 of the *Code of Virginia*.<sup>15</sup>

In addition to the authority granted by the Constitution, school boards enjoy broad statutory powers. There is a broad grant of authority corresponding to the constitutional grant.<sup>16</sup> The General Assembly has further authorized school boards to “adopt bylaws and regulations . . . for the management of its official business and for the supervision of schools.”<sup>17</sup> The General Assembly also has found that

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<sup>7</sup> VA. CONST. art. VIII, § 7.

<sup>8</sup> *Commonwealth v. Doe*, 278 Va. 223, 230 (2009).

<sup>9</sup> *Riddick v. Sch. Bd.*, 238 F.3d 518, 523 (4th Cir. 2000) (citing *Sch. Bd. v. Parham*, 218 Va. 950, 956 (1978)).

<sup>10</sup> *Parham*, 218 Va. at 957.

<sup>11</sup> *Doe*, 278 Va. at 230; *Russell Cnty. Sch. Bd. v. Anderson*, 238 Va. 372, 383 (1989); *Howard v. Cnty. Sch. Bd.*, 203 Va. 55, 58-59 (1961); *Cnty. Sch. Bd. v. Farrar*, 199 Va. 427, 433 (1957); *Bd. of Supvrs. v. Chesterfield Cnty. Sch. Bd.*, 182 Va. 266, 270 (1944).

<sup>12</sup> *Doe*, 278 Va. at 230; *Parham*, 218 Va. at 957-58; *Bradley v. Sch. Bd.*, 462 F.2d 1058, 1067 (4th Cir. 1972), *aff’d*, 412 U.S. 92 (1973).

<sup>13</sup> See 2002 Op. Va. Att’y Gen. 105.

<sup>14</sup> No legislation is necessary to effectuate a school board’s authority to do what the Constitution of Virginia already authorizes it to do. Cf. *Purdham v. Fairfax Cnty. Sch. Bd.*, Civ. Action No.1:09-CV-50, 2009 WL 4730713, at \*4 (E.D. Va. Dec. 9, 2009) (“The power to operate, maintain and supervise public schools in Virginia is, and always has been, within the exclusive jurisdiction of the local school boards.”) (quoting *Bradley*, 462 F.2d at 1067)), *aff’d*, 637 F.3d 421 (4th Cir. 2011); *Russell Cnty. Sch. Bd.*, 238 Va. at 383 (finding that a statutorily created panel cannot infringe on a school board’s constitutional power to supervise its schools by discharging unsatisfactory employees).

<sup>15</sup> 2002 Op. Va. Att’y Gen. 105.

<sup>16</sup> VA. CODE ANN. § 22.1-28 (2011).

<sup>17</sup> Section 22.1-78 (2011).

“quality of education is dependent upon the provision of . . . the appropriate working environment [and] the appropriate learning environment,”<sup>18</sup> and school boards are tasked with promulgating standards of conduct to “provide that public education be conducted in an atmosphere free of disruption and threat to persons or property and *supportive of individual rights*.”<sup>19</sup> It is well within the discretion of a school board to determine that prohibiting discrimination on various bases, including on the basis of sexual orientation or gender identity, is necessary to attain those goals.

The 2006 Opinion you reference in your opinion request supports this conclusion. In that Opinion, this Office concluded that the General Assembly’s statutory grant of authority to the University of Virginia to regulate the conduct of students and employees gave the University the power to prohibit them from carrying concealed weapons on University grounds.<sup>20</sup> That authority stems not from a specific enabling act of the General Assembly allowing universities to regulate weapons, but rather is an implied power “reasonably necessary to effectuate the powers expressly granted” to the University to “establish rules and regulations for the conduct” of its students and employees.<sup>21</sup> That the General Assembly omitted university campuses from the list of places where a permitted-concealed weapon was barred did not prevent the University of Virginia from determining that the safety of its students and employees warranted prohibiting them from carrying such weapons.<sup>22</sup> I similarly conclude that, like the authority of universities to regulate the conduct of their students and employees, the authority of school boards to protect students and employees from discrimination is a “reasonably necessary” derivative of the supervisory powers conferred upon school boards.<sup>23</sup>

Finally, you ask about the impact of *Bostic v. Schaefer* on school boards’ authority to prohibit sexual-orientation and gender-identity discrimination.<sup>24</sup> Under the Fourth Circuit’s decision in *Bostic*, same-sex couples must be afforded all the “rights and privileges of marriage” granted to opposite-sex couples.<sup>25</sup> School boards therefore may not discriminate in the provision of benefits to employees who are married according to whether the employee’s spouse is of the same or opposite gender. For example, if a school board provides health-insurance benefits to the spouse of an employee, the school board may not treat same-sex spouses differently from opposite-sex spouses.

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<sup>18</sup> Section 22.1-253.13:1(a) (Supp. 2014).

<sup>19</sup> Section 22.1-253.13:7(c)(3) (Supp. 2014) (emphasis added).

<sup>20</sup> 2006 Op. Va. Att’y Gen. 116.

<sup>21</sup> *Id.* at 118 (citing VA. CODE ANN. § 23-9.2:3(A)(2), (A)(5) (Supp. 2005)); *see also* §§ 22.1-208.01(A) (Supp. 2014) (requiring school boards to establish character education programs that address the inappropriateness of bullying); 22.1-276.01 (Supp. 2014) (defining “bullying”); 22.1-279.6(D) (Supp. 2014) (requiring school boards to include prohibitions against bullying in their codes of student conduct); 22.1-291.4 (Supp. 2014) (requiring school boards to educate their employees about the need to prevent bullying).

<sup>22</sup> 2006 Op. Va. Att’y Gen. 116.

<sup>23</sup> This conclusion is in accord with decisions of the Supreme Court of Virginia and prior opinions of this Office that recognize occasions when a mechanical application of the Dillon Rule is inappropriate. *See, e.g.*, 1994 Op. Va. Att’y Gen. 40 (concluding, despite absence of specific legislation, that localities have power to allow charitable contributions by payroll deduction as part of its general authority as an employer) (citing *Scott v. Sylvester*, 220 Va. 182 (1979), *cert. denied*, 464 U.S. 961 (1983); *Nexsen v. Bd. of Spvrs.*, 142 Va. 313 (1925); 1982-83 Op. Va. Att’y Gen. 151).

<sup>24</sup> *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014), *cert. denied sub nom.*, *Rainey v. Bostic*, 135 S. Ct. 286 (2014), *Schaefer v. Bostic*, 135 S. Ct. 308 (2014), *McQuigg v. Bostic*, 135 S. Ct. 314 (2014).

<sup>25</sup> Judgment at 2, *Bostic v. Rainey*, Case No. 2:13-cv-00395-ALWA (E.D. Va. Feb. 24, 2014), ECF No. 139.

Honorable Adam P. Ebbin  
March 4, 2015  
Page 4

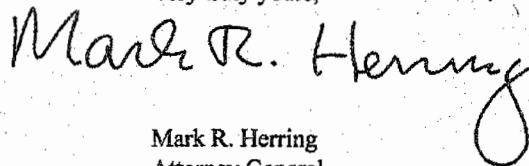
Given the broad scope of the supervisory power granted to school boards by the Constitution of Virginia and the explicit statutory grants of authority to school boards, I conclude that school boards have authority to expand their antidiscrimination policies to encompass sexual orientation and gender identity. To the extent that the 2002 opinion previously mentioned is inconsistent with this Opinion, it is overruled.<sup>26</sup>

#### Conclusion

Accordingly, it is my opinion that, because the power to protect students and employees from discrimination in the public school system is a power fairly implied from the express grant of authority to school boards under Article VIII, § 7 of the Constitution of Virginia and from the specific authority granted to boards by the General Assembly in §§ 22.1-28, 22.1-78 and 22.1-253.13:7(c)(3) of the *Code of Virginia*, the Dillon Rule does not prevent school boards from amending their antidiscrimination policies to prohibit discrimination on the basis of sexual orientation and gender identity. To the extent that the 2002 Opinion of this Office discussed above is inconsistent with this Opinion, it is overruled.

With kindest regards, I am

Very truly yours,



Mark R. Herring  
Attorney General

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<sup>26</sup> I further note that, in determining that the Fairfax County School Board and Fairfax County have no authority to include sexual orientation in their nondiscrimination policies, the 2002 Opinion states that sexual orientation discrimination "cannot be either 'fairly or necessarily implied' from discrimination based on sex," 2002 Op. Va. Att'y Gen. 105, 106, but this remains an open question under Title IX. See U.S. DEP'T OF ED., OFFICE FOR CIVIL RIGHTS, Questions & Answers on Title IX & Sexual Violence 5 (2014), available at <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>; compare *Riccio v. New Haven Bd. of Educ.*, 467 F. Supp. 2d 219, 226 (D. Conn. 2006), with *Montgomery v. Indep. Sch. Dist. No. 709*, 109 F. Supp. 2d 1081, 1090 (D. Minn. 2000).

[Print](#)**Circuit Court Civil Filing Fee Calculation**

<b>Case Type:</b>	Mandamus
<b>Levy/FiFA:</b>	No
<b>Court:</b>	Richmond Circuit
<b>Suit Amount:</b>	\$ 0
<b>Date:</b>	4/11/2016

<b>Fee</b>	<b>Amount</b>
Writ Tax(049)	\$ 5.00
State Police Fee(104)	0.00
Technology Trust Fund(106)	5.00
Legal Aid Fee(123)	9.00
Court Technology Fund(170)	10.00
Clerk Fee(304)	50.00
Docket Fee(307)	0.00
Bond Fee(315)	0.00
Indigent Defense Fund(147)	1.00
Registry Fee(157)	0.00
Law Library Fee(219)	4.00
Courthouse Maintenance Fee(229)	2.00
Courthouse Construction Fee(228)	0.00
CHP Background VCIN Fee(237)	0.00
E-Filing Fee (426)	0.00
* Sheriff Services	
0 In State(206)	0.00
<b>Total:</b>	<b>\$ 86.00</b>

\*Garnishments and Interrogatories with a new levy and/or Fifa include additional sheriff service fees.

\*\*Attachments and Ejectments include an additional \$25 levy fee.

\*\*\*For Conservator of the Peace filings, the \$3 bond fee may not apply. Please call your local circuit court for instructions.