

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

THE HONORABLE DAVID LAROCK,)	
MEMBER OF THE VIRGINIA HOUSE)	Petitioner,
OF DELEGATES,)	
)
V.)	
)
	Case. No. _____
)
THE HONORABLE MARK HERRING,)	Respondent.
ATTORNEY GENERAL OF VIRGINIA,))	
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 33rd 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: _____
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