



Virginia Local Government Law

The Virginia Freedom of Information Act and its State Citizenship Requirement Upheld: *McBurney v. Young*

By: Andrew McRoberts. Tuesday, February 14th, 2012

The idea of state sovereignty is not dead. Rather, after the ***McBurney v. Young*** case, it appears that lawful distinctions between states and their respective citizens in our grand Republic — or at least in the Fourth Circuit — are alive and well. You can find the **opinion here**.

The **Virginia Freedom of Information Act** (VFOIA) grants “citizens of the Commonwealth” (and representatives of media in Virginia) access to public records. Non-Virginians who had ties to Virginia only through divorce, child custody and child support decrees (*McBurney*, a citizen of Rhode Island) and business gathering public information for sale to customers (*Hulbert*, a citizen of California) challenged the VFOIA “citizens only” provision on two grounds.

First the Appellant challengers argued that the “citizens-only” provision violated the **Privileges and Immunities Clause of Article IV of the United States Constitution**. The Fourth Circuit Court of Appeals disagreed, saying that the rights granted under the VFOIA are not “fundamental rights” sufficiently basic to the livelihood of the nation so to be protected under the Privileges and Immunities Clause.

The Court held that the rights asserted by Appellants which previously had been recognized as fundamental in this context — the right to access courts and the right to pursue a common calling — were not implicated by the “citizens only” provision of VFOIA. The Court held other rights asserted by the Appellants that were implicated by the VFOIA — “equal access to information” — were simply not fundamental within the meaning of the P&I Clause. In so doing, the Court distinguished a similar Third Circuit Court of Appeals case (***Lee v. Minner*, 458 F.3d 194 (3d Cir. 2006)**) by reasoning that the right asserted here (equal access to information) was simply not the same right asserted in *Lee* (engaging in the political process). The Court also reasoned that the right to information under VFOIA was not a right directly related to litigation, saying that the P&I Clause “is not a mechanism for pre-lawsuit discovery,” and access to information pre-lawsuit was no sufficiently basis to be a fundamental right under the P&I Clause.

Next, one of the Appellants (*Hulbert*) challenged the citizens-only provision of the VFOIA under the **Dormant Commerce Clause**, a “negative implication of the U.S. Constitution’s Commerce Clause. U.S. Constitution, art. I, section 8, cl. 3 empowers Congress “[t]o regulate Commerce ... among the several States.”

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This clause is intended to stop state from erecting barriers to interstate trade either intentionally or in effect. Thus, it has two tiers. The first tier strictly prohibits facial discrimination in its practical effect or in its purpose against interstate commerce. The second tier is less strict, but prohibits regulatory measures which “unjustifiably ... burden[s] the interstate flow of articles of commerce.” Under the second tier, the regulatory measure “will be upheld unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits.”

The Court held that the VFOIA is simply not the kind of statute to which the Dormant Commerce Clause applies. The VFOIA “is wholly silent as to commerce or economic interests, both in and out of Virginia. Therefore, the VFOIA does not facially, or in its effect, discriminate against inter-state commerce or out-of-state economic interests.” Moreover, the Court held that Hurlbert did not adequately preserve a challenge to the district court’s use of the second tier to analyze his challenge.

So, at least in the Fourth Circuit, and at least under these facts, the Virginia Freedom of Information Act’s “citizens only” provision does not violate the Privileges and Immunities Clause or the Dormant Commerce Clause. It is legal for the Commonwealth of Virginia to allow its citizens the right to access state and local government public documents while denying non-Virginia citizens that same right.

In *McBurney v. Young*, in a way, the Fourth Circuit Court of Appeals has reaffirmed the basic sovereignty of the several states of our grand Republic.

Tags: **Dormant Commerce Clause, Freedom of Information Act, Privileges and Immunities Clause, U.S. Constitution, Virginia Freedom of Information Act**

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