

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

JILL DeMELLO HILL,

Petitioner,

v.

FAIRFAX COUNTY SCHOOL BOARD,

et al.,

Respondents.

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Case No. CL-2011-334

**VERIFIED ANSWER BY FAIRFAX COUNTY SCHOOL BOARD**

Under Rule 3:8 of the Supreme Court of Virginia, Respondent Fairfax County School Board answers the Verified Petition for Writ of Mandamus, filed by Petitioner Jill DeMello Hill, as follows:

Preliminary Statement

Ms. Hill is the mother of students at Clifton Elementary School in Fairfax County. She opposes the School Board’s decision on July 8, 2010, to close the school, rather than renovate it. But there were numerous reasons to close it: Clifton was the smallest school in the southwest portion of the County; it suffered from a declining enrollment; the cost to renovate it was higher than normal, and the renovation dollars could be more effectively spent elsewhere.

Other Clifton parents, but not Ms. Hill, appealed the School Board’s decision to this Court within the thirty days specified by Code § 22.1-87. *Armendaris, et al. v. Fairfax County School Board*, Case No. CL-2010-11240 (Fairfax County, filed Aug. 13, 2010). On December 1, 2010, Chief Judge Dennis Smith dismissed that complaint with prejudice, concluding that the School Board had legitimate grounds to close Clifton and that its decision was neither arbitrary

nor capricious. Those Clifton parents have appealed that decision to the Supreme Court of Virginia.

The same counsel who represented the *Armendaris* parents now seeks through this mandamus action to invalidate the same meetings at which the School Board discussed Clifton and voted to close it. This newest legal theory is based on a blunderbuss of assertions that the school system violated the Virginia Freedom of Information Act, and that certain School Board members supposedly communicated with each other improperly, in real time, during the public meetings involving Clifton.

But the exhibits attached to the Complaint (and the documents produced in response to Ms. Hill's FOIA requests), show the Petitioner's allegations to be utterly without merit. Indeed, the centerpiece offered as the smoking gun, Petitioner's Exhibit 8, fails to show any kind of "meeting within a meeting" or any improper actions under the Act. The report on wells at Clifton that Ms. Hill asserts was suppressed and concealed at the July 8 meeting was, in fact, discussed in front of the public, openly and candidly.

The Court should reject this second bite at the apple to undo the School Board's decision to close Clifton. Not only is the relief requested unavailable under the Act, but Ms. Hill cannot demonstrate *any* "secret meetings" between three or more School Board members; indeed, the very documents attached to the Complaint show that claim to be fanciful. The documentary evidence also shows that the school system worked diligently to respond to Ms. Hill's document requests, doing its level best to carry out its obligations under the Act.

So the Petition for Mandamus – an extraordinary remedy – should be denied.

### **ANSWER**

The School Board responds to Ms. Hill's numbered paragraphs as follows:

1. Paragraph 1 contains Ms. Hill's legal characterization of the Virginia Freedom of Information Act. The Act speaks for itself and does not need that gloss. To the extent she has mischaracterized the Act's requirements, paragraph 1 is denied.

2. The first sentence of Paragraph 2 contains Ms. Hill's legal characterization of the Act. The Act speaks for itself and does not need that gloss. To the extent she has mischaracterized the Act's requirements, the first sentence is denied. The second and third sentences are also denied.

3. The School Board admits that its Chief Operating Officer, Dean Tistadt, notified the Board during the July 8, 2010 meeting that the concerns about the well water at Clifton had been resolved, based on recent testing, and that the reliability and quality issue relating to the wells was not a necessary factor in whether to close or renovate the school. The School Board denies that this information was withheld from the public. To the contrary, Dean Tistadt discussed it in open session. The remaining allegations in paragraph 3 are denied.

4. The School Board denies the first and third sentences of paragraph 4. The second sentence contains a legal conclusion to which no response is required. To the extent Ms. Hill has mischaracterized the law, her allegations are denied.

5. Denied.

6. The School Board denies that its actions somehow "forced" Ms. Hill to file a FOIA request, as alleged in the first sentence of paragraph 6. The remaining allegations in paragraph 6 are denied.

7. Paragraph 7 lists the relief Ms. Hill seeks in this case. The School Board denies that she is entitled to it.

8. Admitted.

9. Denied. See the accompanying Demurrer to the claims against “Fairfax County Public Schools.”

10. Admitted.

11. The School Board denies that it deprived Ms. Hill of her rights under the Act, but it admits that jurisdiction is proper in this Court under Code § 2.2-3713.

12. The School Board denies that it deprived Ms. Hill of her rights under the Act, but it admits that venue is proper in this Court under Code § 2.2-3713.

13. The School Board admits that the quotation in paragraph 13 appears on its website.

14. The School Board admits that it has a Strategic Governance Manual and that the quotation in paragraph 14 appears on page 25.

15. The language of School Board Policy 1501.3 speaks for itself. To the extent Ms. Hill’s selective quotation alters its meaning, paragraph 15 is denied.

16. The language on page 49 of the Strategic Governance Manual speaks for itself. To the extent Ms. Hill’s selective quotation alters its meaning, paragraph 16 is denied.

17. The language on page 30 of the Strategic Governance Manual speaks for itself. To the extent Ms. Hill’s selective quotation alters its meaning, paragraph 17 is denied.

18. Paragraph 18 is largely the same as paragraph 18 of the *Armendaris* complaint. The School Board admits that its staff in 2009 conducted various analyses and solicited public input concerning the overcrowding problem in schools in the southwestern portion of Fairfax County, and that one of the key issues was whether to close or renovate Clifton Elementary School. The staff reports were made available to the public and speak for themselves.

19. The School Board admits that it formed the Southwestern Regional Planning Committee comprised of residents representing the affected schools and areas, that the school system solicited various public input on the problem, and that one of the proposals considered was closing Clifton and building a new elementary school on the Liberty site.

20. Admitted.

21. Admitted, except that the minutes attached as Exhibits 1 and 2 are not the executed approved minutes.

22. The staff report speaks for itself. The remaining allegations of paragraph 22 are denied.

23. The School Board admits that it held a public hearing on the Clifton issues on June 28, 2010, beginning at approximately 6 pm, that the hearing lasted for more than six hours and 25 minutes, and that Exhibit 3 is a copy of the agenda and speaker list.

24. The School Board admits that more than 150 speakers signed up to speak and that the vast majority of them favored keeping Clifton open. The remaining allegations of paragraph 24 are denied.

25. Admitted.

26. Admitted, except that the minutes attached as Exhibit 5 are not the executed approved minutes.

27. Paragraph 27 is largely the same as paragraph 11 of the *Armendaris* complaint. The School Board admits that whether to close or renovate Clifton was considered at the July 8, 2010 meeting, and that the motion to close Clifton did not tie the closure to the construction of a new facility on another site, nor did it set a specific closing date, but left the closing date open

for determination following a boundary study. Exhibit 6 is a copy of the email exchange it purports to be. The remaining allegations in paragraph 27 are denied.

28. Code § 2.2-3700(B), recited in paragraph 28, speaks for itself and needs no further characterization.

29. The School Board admits that it produced various emails to Ms. Hill in response to her FOIA request and that some of those emails reflected communications between members or between a member and staff during the July 8, 2010 meeting. The School Board denies that there was any violation of the Act and that any of those emails reflected a “meeting” between members within the meaning of the Act. The emails speak for themselves. The remaining allegations in paragraph 29 are denied.

30. The School Board admits that some members exchanged email or sent or received email from staff during the June 10 and June 28 meetings, but those emails, which have been produced to Ms. Hill (unless exempt under the Act), do not reflect any improper communications under the Act. The School Board denies that the presence of members on the bus to visit Clifton and the Liberty sites constituted a meeting under the Act. Notice of the actual site visit was provided to the public and reiterated at the June 10 meeting. The remaining allegations of paragraph 30 are denied.

31. The School Board admits that Exhibit 7 is a copy of the Agenda Item for its June 29, 2010 work session. The agenda item speaks for itself. The School Board denies the remaining allegations of paragraph 31.

32. The School Board admits that Exhibit 8 contains a copy of an email that Dean Tistadt sent to members of the School Board at approximately 7:12 p.m. on July 8, 2010, after the School Board had commenced its regular meeting. The email speaks for itself.

33. The School Board denies the allegations of paragraph 33 as phrased, which inaccurately describe the contents of Exhibit 8 to falsely suggest that three or more members communicated with one another contemporaneously. Exhibit 8 speaks for itself. The School Board also denies that it withheld from public disclosure the contents of Mr. Tistadt's communications; to the contrary, Mr. Tistadt explained the substance of his report during the same public meeting.

34. In response to paragraph 34 of the Complaint, the School Board states that member-to-member emails have been produced to Ms. Hill for all three public meetings requested. The emails speak for themselves. The School Board denies that those emails reflect any "meeting" under the Act. The remaining allegations of paragraph 34 are denied.

35. Denied. Members of the public, including Ms. Hill, requested copies of emails exchanged between members or between members and staff. Those documents were produced by the school system except to the extent withheld based on a statutory exemption.

36. The School Board denies the first sentence of paragraph 36 as phrased because it denies that any meetings under the Act were conducted by email. The second sentence is also denied.

### **Count One**

37. The School Board restates paragraphs 1-36 above.

38. Paragraph 38 contains legal argument to which no response is required.

39. Paragraph 39 contains legal argument to which no response is required.

40. Paragraph 40 contains legal argument to which no response is required.

41. Admitted.

42. Paragraph 41 contains legal argument to which no response is required.

43. The School Board admits that it conducted public meetings concerning Clifton Elementary School on June 10, June 28, and July 8, 2010, and that those meetings were open to the public. The School Board denies that it voted on the subject at the June 10 or June 28 meetings; it voted 9-2 to close Clifton at the July 8, 2010, meeting. Numerous members of the public attended each of these meetings; they were entitled to do so; and the School Board has never claimed that the public sessions were subject to any closed meeting exception under the Act.

44. The School Board admits that some members exchanged email or sent or received email from staff during the June 10, June 28, and July 8, meetings, but those emails, which have been produced to Ms. Hill (unless exempt under the Act), do not reflect any improper communications under the Act. The remaining allegations of paragraph 44 are denied.

45. The School Board denies the allegations of paragraph 45 as phrased, which inaccurately describe the contents of Exhibit 8 to falsely suggest that three or more members communicated with one another contemporaneously. Exhibit 8 speaks for itself. The School Board also denies that it withheld from public disclosure the contents of Mr. Tistadt's communications; to the contrary, Mr. Tistadt explained the substance of his report during the same public meeting. The remaining allegations of paragraph 45 are denied.

46. Denied.

47. The School Board denies that it conducted its meetings by email, as alleged in paragraph 47. The rest of paragraph 47 contains legal argument to which no response is required.



48. The School Board denies that it conducted its meetings by email, as alleged in paragraph 48. The rest of paragraph 48 contains legal argument to which no response is required.

49. The School Board denies that Patricia Reed participated in the July 8, 2010 meeting by email. The School Board admits that she was not present for the meeting; that she exchanged emails with Member Hone; one email with Member Evans during the meeting; and that she sent the email to the School Board Clerk that appears as part of Exhibit 8 to the Petition. Those emails have been produced to Ms. Hill. None of those emails reflects her participation in the meeting in a manner contrary to the Act. The remaining allegations of paragraph 49 are denied.

50. Paragraph 50 contains legal argument to which no response is required.

51. The School Board denies that Ms. Reed participated in the July 8, 2010 meeting under the Act, as alleged in paragraph 51. Because there was no “electronic communications meeting,” the School Board admits that it did not invoke the procedures of Code § 2.2-3708 to provide for such a meeting.

52. The School Board denies that Ms. Reed participated in the July 8, 2010 meeting under the Act, as alleged in paragraph 52. Because there was no “electronic communications meeting,” the School Board admits that it did not invoke the procedures of Code § 2.2-3708 to provide for such a meeting. The School Board denies that it concealed Ms. Reed’s emails; the emails were produced in response to Ms. Hill’s FOIA request.

53. The School Board denies that it concealed Dean Tistadt’s well water report at the July 8, 2010 meeting. To the contrary, Dean Tistadt notified the Board during the meeting, in public, that the concerns about the well water at Clifton had been resolved, based on recent

testing, and that the reliability and quality issue relating to the wells was not a necessary factor in whether to close or renovate the school. The remaining factual allegations in paragraph 53 are denied. The rest of paragraph 53 contains legal argument to which no response is required.

54. Paragraph 54 recites the relief requested by Ms. Hill, contains various factual allegations, and discusses the requirements of the Act. The School Board denies that she is entitled to the relief she seeks and denies her factual allegations. The School Board denies that it has failed to produce all non-exempt records called for by Ms. Hill's requests under the Act. The rest of paragraph 54 contains legal argument to which no response is required.

55. The School Board denies that Petitioner can show any substantial violation of the Act that would entitle her to recover attorney's fees. The rest of paragraph 55 contains legal argument to which no response is required.

56. The School Board denies that Petitioner is entitled to the relief she seeks in paragraph 56 and denies her factual allegations. The rest of paragraph 56 contains legal argument to which no response is required.

### **COUNT TWO**

57. The School Board restates paragraphs 1-56.

58. Paragraph 58 contains legal argument to which no response is required.

59. The School Board admits that Ms. Hill submitted a request under the Act by email dated July 19, 2010, but not sent until 10:41 p.m. Exhibit 13 to the Petition is a copy of it. The request was not submitted until after the close of business hours on July 19, 2010. Accordingly, it was treated by the school system as having been received on July 20, 2010, the next working day. The School Board admits that Mr. Regnier is the Coordinator, Media Relations and Crisis Communications, Department of Communications and Community Outreach.

60. The School Board denies that it failed to respond within five working days. It responded within five working days of July 20, 2010, the first working day after the late evening of July 19, 2010, when Ms. Hill sent her request. The School Board admits that Exhibit 14 is a copy of Regulation 1501.4. The rest of paragraph 60 contains legal argument to which no response is required.

61. The School Board admits that Exhibit 15 is a copy of Ms. Hill's email of Sunday, August 1, 2010. The email speaks for itself. The School Board denies that it failed to respond to her FOIA request by that date; it sent its response by mail in a letter dated July 27, 2010, a copy of which is attached as Exhibit 17 to the Petition.

62. The School Board admits that Exhibit 16 is a copy of Mr. Regnier's email of August 2, 2010, but Exhibit 16 omits the copy of the July 27 letter that Mr. Regnier attached. The School Board denies that the email constituted an admission that the response was not served within five working days of receipt.

63. The School Board admits that Exhibit 17 is a copy of the letter from Pam Feikema to Ms. Hill dated July 27, 2010. The letter speaks for itself.

64. The School Board admits that Ms. Hill was not required by the Act to pay the \$178.36, an amount less than the \$200 mentioned in Code § 2.2-3704(H), as a condition of having the school system search for the records she requested. School staff subsequently corrected its mistake in this regard. The documents were also produced to Ms. Hill without first requiring receipt of the funds. Under the circumstances, this was not a substantial violation of the Act that would entitle Petitioner to the relief she currently seeks.

65. The School Board admits that Exhibit 18 is a copy of Ms. Hill's email of August 5, 2010. The email speaks for itself.

66. The School Board admits that Exhibit 19 is a copy of Mr. Regnier's email of August 5, 2010. The remaining allegations are denied.

67. The School Board admits that Exhibit 20 is a copy of Mr. Regnier's email of August 16, 2010. The email speaks for itself. The remaining allegations are denied.

68. Admitted.

69. Denied.

70. The School Board admits that 13 emails were withheld under Code § 2.2-3705.7(2). As a matter of law, the chief executive of the school system for purposes of this exception is the Division Superintendent. The rest of paragraph 70 contains erroneous legal argument that requires no factual response.

71. The School Board admits the first sentence of paragraph 71. It denies the second and fourth sentences. The third sentence contains legal argument to which no response is required. Any remaining factual allegations are denied.

72. The School Board admits the first sentence of paragraph 72. It denies that its justification was insufficient and denies the remaining allegations in paragraph 72.

73. The School Board denies that Ms. Hill's first request asked for emails *between School Board members* during the relevant period. The school system properly interpreted the request as calling for communications between School Board members and Staff. Accordingly, Member-to-Member emails were not produced. The remaining allegations of paragraph 73 are denied.

74. The School Board admits that Exhibit 21 is a copy of Ms. Hill's letter dated September 13, 2010. The letter speaks for itself.

75. The first sentence of paragraph 75 mischaracterizes the text of Exhibit 21. The exhibit speaks for itself. The School Board admits that the quoted bullet points in paragraph 75 appear in Exhibit 21.

76. The School Board admits that Exhibit 22 is a copy of Ms. Hill's email dated September 13, 2010. The email speaks for itself.

77. The School Board admits that Exhibit 23 is a copy of Mr. Regnier's email dated September 20, 2010. The email speaks for itself.

78. The legal argument in paragraph 78 requires no response. The School Board denies that it failed to adequately invoke the attorney-client privilege with regard to the documents at issue.

79. The School Board admits that Exhibit 24 is a copy of Ms. Hill's email of October 20, 2010. The email speaks for itself. The School Board does not know whether Ms. Hill's delay in sending the email was occasioned by an illness.

80. The School Board admits that Exhibit 9 contains a copy of the email from Mr. Regnier dated October 25, 2010. The email speaks for itself. The remaining allegations in paragraph 80 are denied.

81. Admitted.

82. The School Board admits that Exhibit 10 is a copy of Ms. Kolb's email dated October 29, 2010. The email speaks for itself.

83. The School Board admits that Exhibit 25 is a copy of Mr. Regnier's email dated November 5, 2010. The email speaks for itself. The School Board denies that the response was untimely under the Act, as Ms. Hill did not confirm the scope of her follow-up request until November 1, 2010.

84. The School Board admits that Exhibit 11 is a copy of the email Ms. Kolb sent on Mr. Regnier's behalf on November 11, 2010, although the attachments were not included by Petitioner. The email speaks for itself.

85. The School Board admits the first sentence of paragraph 85. The remaining allegations contain legal argument that require no response.

86. The School Board admits that Exhibit 12 is a copy of the email Ms. Kolb sent on Mr. Regnier's behalf on November 11, 2010. The email speaks for itself. The remaining allegations are denied.

87. The School Board admits that, because the Act's exemptions authorized the withholding of the documents in question, it has not produced those documents to Ms. Hill. The remaining allegations of paragraph 87 are denied.

88. The School Board admits that, in re-reviewing the public records requested by Ms. Hill, two email exchanges and a single email were discovered that were not previously produced. The records were promptly produced to Ms. Hill's counsel on January 13, 2011. Ms. Hill has not identified the "attachments" to emails that she contends were not produced; if responsive, and if they have not been produced, the School Board would immediately produce them. The School Board is unaware of any other responsive records that have not been either produced or identified to Ms. Hill as exempt under the Act. The remaining allegations of paragraph 88 are denied.

89. The School Board denies that Ms. Hill is entitled to the relief requested in paragraph 89.

90. The School Board agrees to submit for *in camera* inspection the documents redacted or withheld as exempt under Act. The School Board further agrees that these

documents may be filed under seal for purposes of any appellate review. The rest of paragraph 90 contains legal argument that requires no response.

91. The School Board denies that Petitioner is entitled to attorney's fees and costs under the Act.

92. The School Board denies that its members or staff engaged in willful or knowing violations of the Act and denies that Ms. Hill is entitled to the remedy requested in paragraph 92.

### **COUNT III**

93. The School Board restates paragraphs 1-92.

94. The School Board admits that various of its members have sent emails to one another but denies that that is prohibited by the Act. The remaining allegations of paragraph 94 are denied.

95. The School Board admits that various of its members have sent emails to one another but denies the first sentence of paragraph 95. The rest of paragraph 95 contains legal argument to which no response is required.

96. Paragraph 96 contains legal argument to which no response is required.

97. The School Board admits that various of its members have sent emails to one another but denies the remaining allegations in paragraph 97.

98. The School Board admits that various of its members have sent emails to one another when not assembled in a meeting but denies that this violated the Act. The School Board admits that Exhibit 26 contains copies of such emails but the exhibit has been altered by adding Petitioner's commentary; the School Board denies, therefore, that Exhibit 26 is an accurate or authentic copy. Moreover, Petitioner's statement in note 3 that the School Board failed to produce these documents in response to her request is false and misleading; the documents are

not within the time and date range of the documents she requested. The School Board denies the remaining allegations in paragraph 98.

99. The School Board denies the first sentence of paragraph 99. The rest of paragraph 99 contains legal argument to which no response is required.

100. The School Board denies that it conducted electronic communications meetings under the Act or violated any of the other provisions of the Act mentioned in paragraph 100. The rest of paragraph 100 contains legal argument to which no response is required.

101. The School Board denies that Ms. Hill is entitled to the relief she requests in paragraph 101.

102. The School Board denies that Ms. Hill is entitled to recover her attorney's fees under the statute cited.

103. The School Board denies that its members or staff engaged in willful or knowing violations of the Act and denies that Ms. Hill is entitled to the remedy requested in paragraph 103.

104. The School Board denies that Ms. Hill is entitled to the relief she requests at pages 35-36 of the Petition for Mandamus.

105. The School Board denies any remaining factual allegations in the Petition for Writ of Mandamus not expressly admitted above.

106. The Complaint fails to state a claim for invalidating the prior public meetings of the School Board or its July 8, 2010 vote to close Clifton Elementary School.

107. Ms. Hill's request to invalidate the prior public meetings of the School Board and its July 8, 2010 vote to close Clifton Elementary School is time barred because she failed to seek judicial review within the 30 days required by Code § 22.1-87.



108. Mandamus does not lie where, as here, it purports to substitute for an appeal under Code § 22.1-87.

109. Mandamus does not lie because Petitioner has failed to demonstrate that the School Board failed to perform a non-discretionary, ministerial act.

110. Mandamus does not lie because Petitioner has failed to demonstrate that she lacks an adequate remedy at law.

111. Mandamus does not lie because Petitioner seeks to undo an act that has already been done.

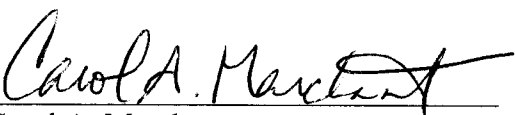
112. Petitioner has failed to join necessary parties.

113. The allegations of misconduct in the Petition that are based on “information and belief” are not verified by Petitioner based on her personal knowledge.

#### VERIFICATION

Under Code § 8.01-4.3, I declare under penalty of perjury that the facts contained in this Verified Answer are true and correct to the best of my knowledge, information and belief.

Executed on: Jan 14, 2011

  
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Carol A. Marchant  
Assistant Division Counsel

Respectfully submitted,

FAIRFAX COUNTY SCHOOL BOARD

By:   
Counsel

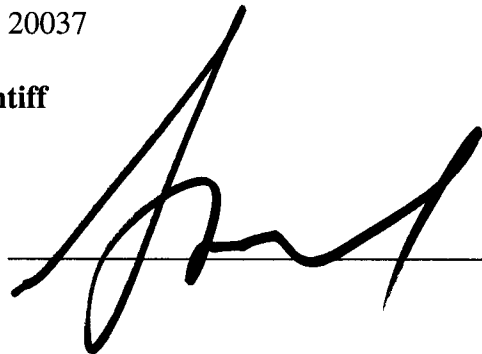
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**CERTIFICATE OF SERVICE**

I certify that on January 14, 2011, a true and accurate copy of this Answer was sent by U.S. mail and by electronic mail to the offices of:

Benjamin G. Chew, Esq.  
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**Counsel for Plaintiff**

  
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