

VIRGINIA:

IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

CHERI SMITH,

Complainant,

v.

WESLEY SMITH,

Respondent.

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IN CHANCERY NO. 53360

**FAIRFAX COUNTY SCHOOL BOARD'S MOTION TO QUASH  
SUBPOENA DUCES TECUM**

The Fairfax County School Board ("School Board"), by counsel and pursuant to Rule 4:9(c) of the Supreme Court of Virginia, moves this Court to quash the subpoena *duces tecum* served upon the Fairfax County Public Schools<sup>1</sup> by Respondent Wesley Smith ("Mr. Smith").

**INTRODUCTION AND STATEMENT OF PERTINENT FACTS**

1. This is a divorce case involving Mr. Smith and Complainant Cheri Smith ("Mrs. Smith"). The School Board is not a party.

2. On September 26, 2005, Mr. Smith caused the School Board to be served with a subpoena *duces tecum* directed to the "Custodian of Records – Fairfax County Public Schools." A copy of the Subpoena *Duces Tecum* is attached as Exhibit "A." The subpoena directed the documents to be served upon Mr. Smith on Saturday, October 1, 2005.

3. Exhibit 1 to Mr. Smith's Subpoena *Duces Tecum* states that Mr. Smith seeks documents in 12 separately described categories. With rare exception, the documents sought by Mr. Smith appear to relate not to this case, but rather, to Mr. Smith's pending criminal case in the

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<sup>1</sup> The Fairfax County Public Schools are operated by the School Board and are not an entity separate from the School Board itself.

Circuit Court of Fairfax County. On June 17, 2005, Mr. Smith was arrested on a charge of criminal trespass on the premises of Spring Hill Elementary School, where his son is a student. He was subsequently convicted on the charge in the General District Court of Fairfax County.

4. Mr. Smith has appealed his conviction to the Circuit Court of Fairfax County, Virginia. His case is set for trial on October 5, 2005. A copy of the docket sheet from the Circuit Court of Fairfax County's electronic CPAN system is attached as Exhibit "B." Mr. Smith already has summoned six School Board administrators and staff, including the Division Superintendent of the Fairfax County Public Schools to testify at his criminal trial.

### **ARGUMENT**

5. Under Rule 4:1(b)(1) of the Supreme Court of Virginia, parties may seek discovery only regarding matters that are "relevant to the subject matter of the pending action." Rule 4:1(b)(5)(1) further limits discovery in any proceeding for separate maintenance, divorce, or annulment of marriage "only to matters which are relevant to the issues in the proceeding."

6. In addition, regardless of the relevance of the material requested, Rule 4:9(c) permits a Court to quash or modify any subpoena that is "an unreasonable request in light of all the circumstances surrounding the subpoena" or "that produces an oppressive effect on the entity challenging the subpoena." *In re Subpoena Duces Tecum to America Online, Inc.*, 52 Va. Cir. 26, 29 (Fairfax Co. 2000).

7. Mr. Smith's subpoena *duces tecum* to the School Board largely seeks documents that bear no conceivable relevance to any divorce dispute. Indeed, they appear to relate only to the circumstances leading to Mr. Smith's trespassing arrest on school premises on June 17, 2005.

8. For example, Mr. Smith requests "all documents" regarding:

- "school policy and/or procedure concerning non-custodial parents, access to school events and/or trespassing;"

- "the 'Red Flag' policy/procedure referred to by Roger Vanderhye [principal of Spring Hill Elementary School], in his court testimony on August 8, 2005 including both school district wide policies as well as local cluster/school policy that apply to Spring Hill Elementary that were in place June 17, 2005;"
- "any school policy/procedure that indicates that a principal does not need to comply with school regulation 2240.3 and/or state law 22.1-4.3;"
- "any signs, fencing, or other steps taken to prevent the general public from using the field next to the school, or to make the public aware it is school property;" and
- "all training materials, electronic or otherwise, relating to school regulation 2240.1 and/or state law 22.1-4.3."

(Exhibit A, Request Nos. 1, 2, 3, 11, and 12.) The subpoena *duces tecum* also seeks documents pertaining to an individual who is not a party to this case, Igor Bakhir.

9. These documents have no imaginable relevance to this divorce case. Rather, it appears that Mr. Smith is using this civil case to obtain discovery relevant to his criminal case, in which he intends to mount a challenge to the validity of his arrest on school grounds on June 17, 2005. That is inappropriate under both Rules 4:1(b)(1) and 4:1(b)(5)(1).

10. To be clear, the School Board agrees that Mr. Smith is entitled to request from the School Board copies of his son's educational records. The subpoena *duces tecum* does request copies of the notifications of IEP meetings for Liam Smith (Exhibit A, Request No. 7), and the School Board is providing him copies of those records in tandem with this motion, without waiving the objections stated herein.

11. In addition to seeking documents not relevant to this divorce case, the subpoena *duces tecum* also is sufficiently broad as to seek documents protected by the attorney-client privilege and the attorney work-product doctrine. For example, the subpoena *duces tecum* seeks "all correspondence" that references Mr. Smith, Mrs. Smith, Liam Smith, or Igor Bakhir and "notes of any conversations, with any person, related to Cheri Smith, Liam Smith, or Wesley

Smith." The subpoena provides no limitation or exclusion for documents protected by the attorney-client privilege or the attorney work-product doctrine.


12. Moreover, the subpoena provides the School Board only five business days to respond to the request for documents.

13. As such, the subpoena *duces tecum* is an "unreasonable request" in light of all the circumstances of this case, and should be quashed. The School Board, therefore, requests the Court to quash the subpoena *duces tecum* to the extent that it seeks any documents other than the IEP meeting notices regarding Liam Smith that are sought in Request No. 7.

WHEREFORE, the Fairfax County School Board respectfully requests the Court to quash the subpoena *duces tecum* directed to it by Wesley Smith, and to award such other relief as this Court deems proper.

Respectfully submitted,

FAIRFAX COUNTY SCHOOL BOARD

By:   
Counsel

Thomas J. Cawley (VSB No. 04612)  
Sona Rewari (VSB No. 47327)  
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McLean, Virginia 22102  
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Facsimile: (703) 714-7410

*Counsel for the Fairfax County School Board*

**CERTIFICATE OF SERVICE**

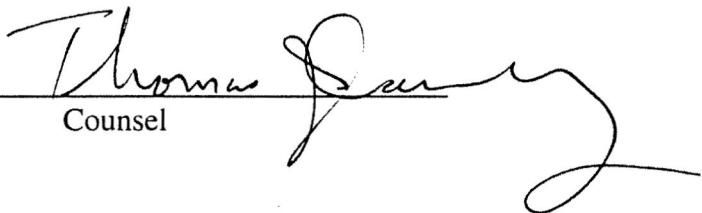
I hereby certify that, on October 3, 2005, a true and exact copy of the foregoing Fairfax County School Board's Motion to Quash Subpoena *Duces Tecum* was sent by first-class U.S. mail to:

Wesley Clay Smith  
5347 Landrum Road, Apartment 1  
Dublin, Virginia 24084-5603

*Respondent, pro se*

Loretta Vardy, Esq.  
12388 Silent Wolf Drive  
Manassas, Virginia 22112

*Counsel for Complainant Cheri Smith*

  
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Counsel

# **EXHIBIT A**

SUBPOENA DUCES TECUM (CIVIL CASE) SEP 26 2005

SUBPOENA DUCES TECUM (CIVIL CASE) Rule 4-9(c) Case No. Chancery 53360

Prince William County Circuit Court

9311 Lee Avenue, Manassas, VA 20110-5555 ADDRESS (703) 792-6029 TELEPHONE NUMBER

Cheri Smith CUSTODIAN: V. Wesley Smith REQUESTING PARTY:

Custodian of Records - Fairfax County Public Schools Wesley Smith

10700 Page Avenue

Fairfax, Virginia 22030

703-246-3646

TO: Sheriff of Prince William County or Fairfax County, VA or any authorized officer: You are commanded to serve this Subpoena Duces Tecum on the Custodian.

TO THE CUSTODIAN: You or someone acting in your behalf are commanded to produce the documents and tangible things designated and described in the attached request below for issuance of this Subpoena Duces Tecum as follows:

ITEMS TO BE PRODUCED:

Documents are to be delivered on: 5 pm. Oct 1, 2005 or before to: the Clerk's office of this court at the above address. Wesley Smith, 5347 Landrum Rd APT 1, Dublin, VA 24084-5603

Tangible things are to be: made available to the REQUESTING PARTY at to permit such party or someone acting in his behalf to inspect and copy, test or sample such tangible things in your possession, custody or control. delivered to this court at the above address on

OTHER TERMS: Contact me at liamsdad@liamsdad.org if you have questions about exactly which documents are needed or if the number of documents is large and you want to arrange to provide a subset of them.

You are further commanded to appear in person before this Court at the date and time shown above with the documents and/or tangible things subpoenaed by this Subpoena Duces Tecum and to be ready to testify in response to questions concerning these items.

WARNING: Failure to comply with the terms of this Subpoena Duces Tecum may result in your being fined or jailed for contempt of court.

9-15-05 DATE DAVID C. MABIE CLERK Deputy Clerk

## ITEMS TO BE PRODUCED:

1. All documents, electronic or otherwise, that detail school policy and/or procedures concerning non-custodial parents, access to school events and/or trespassing, including both school district wide policies as well as local cluster/school policy that apply to Spring Hill Elementary that were in place June 17, 2005.
2. All documents, electronic or otherwise, that document the "Red Flag" policy/procedure referred to by Roger Vanderhye, in his court testimony on Aug 8, 2005 including both school district wide policies as well as local cluster/school policy that apply to Spring Hill Elementary that were in place June 17, 2005.
3. All documents, electronic or otherwise, of any school policy/procedure that indicates a principal does not need to comply with school regulation 2240.3 and/or state law 22.1-4.3.
4. All documents, electronic or otherwise sent to Wesley Smith advising him he would be charged with trespassing if he attended any events at school.
5. All court orders, electronic or otherwise, the school believes prevent Wesley Smith from having contact with his son Liam or preventing him from attending school activities.
6. All correspondence, electronic or otherwise where any school employee or board member claimed that orders in item 5 above exist.
7. All documents, electronic or otherwise concerning scheduling of IEP and/or parent/teacher meetings and notifications of such meetings for Liam Smith.
8. All correspondence, electronic or otherwise, that references any of the following:  
Cheri Smith, Liam Smith, Wesley Smith, or Igor Bakhir
9. Notes of any incidents or observations related to Cheri Smith, Liam Smith, or Wesley Smith.
10. Notes of any conversations, with any person, related to Cheri Smith, Liam Smith, Wesley Smith, or Igor Bakhir.
11. All documents, electronic or otherwise that describe any signs, fencing or other steps taken to prevent the general public from using the field next to the school, or to make the public aware it is school property.
12. All training materials, electronic or otherwise, relating to school regulation 2240.3 and/or state law 22.1-4.3.

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RETURN OF SERVICE



# **EXHIBIT B**



Commonwealth of Virginia - Wesley Clay Smith			
CASE: MI2005-0001659		FILED: 08/18/2005	STATUS: Pending
RETURN TO MAIN SEARCH			
PLAINTIFF(S): Commonwealth of Virginia			
DEFENDANT(S): Smith, Wesley Clay			
CHARGES: Statute			
18.2-119: Trespassing			
ATTORNEY(S): Commonwealth Attorney, McClain, Robert D.			
REGISTER OF ACTION(S):			
09/29/2005	SUBISS	Witness: Dearden, DennySubpoena Issued	
09/29/2005	SUBISS	Witness: Summerfield, JudySubpoena Issued	
09/29/2005	SUBISS	Witness: Dale, JackSubpoena Issued	
09/29/2005	SUBISS	Witness: Abdelmoumin, GhadaSubpoena Issued	
09/29/2005	SUBISS	Witness: Abbott, RebeccaSubpoena Issued	
09/29/2005	SUBISS	Witness: Richards, ChrissySubpoena Issued	
09/29/2005	SUBISS	Witness: Vanderhye, Roger DSubpoena Issued defense	
09/12/2005	SUBRETN	Witness: Vanderhye, Roger DSubpoena Returned, No Service	
09/12/2005	ORDER	Order entered setting trial for 10/5/05	
09/12/2005	SUBSERV	Officer: Colwell #3457, S A, FCPDSubpoena Served	
09/12/2005	SUBSERV	Officer: Beyer #2963, C P, FCPDSubpoena Served	
09/08/2005	SUBISS	Witness: Vanderhye, Roger DSubpoena Issued	
09/08/2005	SUBISS	Officer: Beyer #2963, C P, FCPDSubpoena Issued	
09/08/2005	SUBISS	Officer: Colwell #3457, S A, FCPDSubpoena Issued	
09/06/2005	HEAR	Hearing Scheduled (Appeal - Traffic/Misd - Jury 10/05/2005 10:00 AM)	
PLEA		FINDING	
		None	

	09/06/2005	HRHD	Hearing result for Term - Misdemeanor held on 09/06/2005 09:00 AM: Hearing H
	08/19/2005	SBOND	Surety Bond Posted (Amount 1000.00 )
	08/19/2005	ATTY	Defendant: Smith, Wesley Clay Entry of Appearance/Attorney Retained Dawn Bui
	08/19/2005	HEAR	Hearing Scheduled (Term - Misdemeanor 09/06/2005 09:00 AM)
	08/18/2005	GDCNEW	GDC Appeal Filed
	06/17/2005	AWARR	Arrest Warrant Issued Bond amount: .00 Defendant: Smith, Wesley Clay
In compliance with the Code of Virginia, no Adoption or Juvenile Appeals cases are available on CPAN			