

VIRGINIA: IN THE SUPREME COURT

IN RE: HONORABLE ADRIANNE BENNETT

Record No. 210489

**MOTION TO UNSEAL RECORDS
AND MEMORANDUM OF LAW IN SUPPORT**

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VIRGINIA: IN THE SUPREME COURT

IN RE: HONORABLE ADRIANNE L. BENNETT

SCV Record No. 210489

MOTION TO UNSEAL RECORDS

NOW COMES the Commonwealth of Virginia, by the Attorney General, and moves this honorable Court to unseal and disclose the remaining sealed records in the instant case to the Office of the Attorney General. The Attorney General seeks to obtain the complete record of the instant case for the sole purpose of confidentially and internally reviewing the records during the investigation authorized by Executive Order 3 (2022).

I. Summary of the Argument

Governor Glenn Youngkin's Executive Order 3 (2022) charges the Attorney General to investigate the conduct of the Virginia Parole Board. With the assistance of the Virginia State Police Bureau of Criminal Investigation, the Attorney General has begun interviewing witnesses and gathering evidence in this investigation. An essential aspect of the Attorney General's inquiry into the conduct of the Virginia Parole Board is a thorough accounting of how various Chairpersons of the Virginia Parole Board directed and controlled the Board, including the degree to which the Chairperson caused the Board to comply with the Virginia Code and its own internal policies and procedures.

Prior to assuming a position as a Juvenile and Domestic Relations District Court Judge for the 2nd Judicial District, the Honorable Adrienne L. Bennett was the Chairperson of the Virginia Parole Board for three years in the administrations of Governors Terence L. McAuliffe and Ralph S. Northam. Judge Bennett's conduct as Chair of the Virginia Parole Board has been the subject of significant public interest and scrutiny.

The General Assembly elected Judge Bennett to the bench without recorded opposition on March 3, 2020, and she continued serving as Chair of the Virginia Parole Board until her investiture on April 16, 2020. During these six weeks, Judge Bennett was statutorily obligated to comply with Virginia's Canons of Judicial Conduct, and the Commission had jurisdiction over Judge Bennett's conduct. The Attorney General's investigation to date has revealed that during these 44 days, Judge Bennett took direct, and often personal, action with respect to the parole and early release from parole of many violent convicted felons. The Attorney General has determined that a full, transparent accounting of Judge Bennett's actions as Chair of the Board is necessary to restore public confidence in the Board.

On May 20, 2021, Judge Bennett filed a petition under Record No. 210489 requesting that this Court issue the extraordinary writs of mandamus and prohibition against the Judicial Inquiry and Review Commission [hereinafter "the Commission"]. The Court denied Judge Bennett's petition the next day, but the

record remained sealed until the Court's April 21, 2022 order.

On April 21, 2022, after application by the publisher of the Richmond Times-Dispatch, this Court issued *In re Bennett*, a published order unsealing all of Judge Bennett's filings except the Commission documents attached as exhibits. The previously sealed filings show that Judge Bennett made an unprecedented attempt to end the Commission's investigation into her conduct. In so doing, Judge Bennett accused the Commission of violating the Code and Constitution. Judge Bennett also sought to compel the Commission to immediately reinstate her to the bench.

Until the record in this case was unsealed, public reporting had indicated that Judge Bennett was on extended leave for an unspecified reason in May 2021. Once the record was unsealed, the public learned for the first time that the Commission had indefinitely suspended Judge Bennett from the bench. In issuing the suspension, the Commission found probable cause to believe that the continued performance of judicial duties by Judge Bennett constituted both a substantial and immediate threat to the public interest in the administration of justice.

Upon the unsealing of the record, the public also learned for the first time that the Commission was exclusively investigating Judge Bennett's conduct as the Chairperson of the Virginia Parole Board for the 44-day period between Judge Bennett's election and her judicial oath of office. The Commission was therefore

investigating the same subject matter contemplated by Executive Order 3.

The Court found in *In re Bennett* that Code § 17.1-913 barred the release of the Commission records that Judge Bennett had attached to her petition as exhibits. The Attorney General now argues that by the operation of Virginia's canons of statutory construction, a judge who is under investigation by the Commission (such as Judge Bennett) is not restrained by the confidentiality provisions of Code § 17.1-913, which proscribes only the conduct of Commission personnel and witnesses. The General Assembly has never contemplated, much less intended to ensure, the continued confidentiality of Commission records intentionally divulged by a suspended judge seeking to stop the Commission from investigating her.

The Attorney General further submits that in order to provide a full, transparent accounting of the conduct of the Virginia Parole Board and to restore public confidence in its operations, examination of Judge Bennett's attachments of Commission documents is material and necessary to ensure the integrity of the investigation authorized by the Governor. The Attorney General therefore moves this Court to order the disclosure of the full record of proceedings in record number 210489 and agrees to abide by a protective order or any other such measures the Court deems appropriate in its discretion.

II. Jurisdiction and Authority of the Office of the Attorney General and the Judicial Inquiry and Review Commission

A. Office of the Attorney General

1. The Office of the Attorney General is an independent, constitutionally created executive office whose jurisdiction is prescribed by the Code of Virginia. Va. Const. Art. V, § 15; Code § 2.2-500 *et seq.*

2. In Executive Order 3 (2022), Governor Glenn A. Youngkin ordered the Attorney General to investigate the lawfulness of the Virginia Parole Board's release of multiple violent convicted felons during 2020 and 2021 and to provide answers to the citizens of the Commonwealth.

3. Governor Youngkin requested that the Attorney General "coordinate the prosecutorial and investigative efforts and [] bring such cases as he may deem appropriate in order to protect the citizens of the Commonwealth and hold accountable any individuals who have violated existing law or violated the rights of victims of crime." Comm. Exh. 1.

4. Governor Youngkin also activated the authority of the Office of the Attorney General under Code § 2.2-511 to "institute or conduct criminal prosecutions in the circuit courts of the Commonwealth." Governor Youngkin's request granted the Office of the Attorney General investigative and prosecutorial jurisdiction with respect to the conduct of the Virginia Parole Board and its employees.

5. The Office of the Attorney General, with the assistance of the Virginia State

Police Bureau of Criminal Investigations, has begun interviewing witnesses and gathering evidence pursuant to Executive Order 3.

6. The instant motion is filed pursuant to this Court’s original jurisdiction and inherent supervisory power to unseal its own records, which in this case are material to an ongoing investigation. *See In re Bennett*, __ Va. __, __, __ S.E.2d __, 2022 WL 1177924 (Apr. 21, 2022) (treating newspaper publisher’s motion to intervene as a motion to unseal court records because “[o]nce a court orders documents before it sealed, the court continues to have authority to enforce its order sealing those documents, as well as authority to loosen or eliminate any restrictions on the sealed documents”).

B. Judicial Inquiry and Review Commission

7. The Judicial Inquiry and Review Commission [hereinafter “the Commission”] is a part of the judicial branch of the government of the Commonwealth of Virginia. Code § 17.1-901.

8. The Commission is vested with the power and duty “to investigate charges arising out of the present or any prior term of office which would be the basis for retirement, censure, or removal of a judge under Article VI, Section 10 of the Constitution of Virginia and the provisions of [Title 17.1, Chapter 9 of the Code of Virginia].” *Id.* § 17.1-902.

9. The Commission may, “after such investigation as it deems

necessary . . . order and conduct hearings at such times and places in the Commonwealth as it shall determine.” *Id.* § 17.1-902.

10. The Commission may, if it “finds the charges [against a judge] to be well-founded, and sufficient to constitute the basis for retirement, censure, or removal of a judge . . . file a formal complaint before the Supreme Court.” *Id.* § 17.1-902.

11. The Commission may “order and otherwise provide for the inspection of books and records” and “issue subpoenas for the attendance of witnesses and the production of papers, books, accounts, documents, and other records or tangible evidence relevant to any such investigation or formal hearing.” *Id.* § 17.1-907.

12. The Commission may “petition any court of record in the Commonwealth for an order compelling such person to attend and testify or produce the writings or things required by the subpoena before the Commission.” *Id.* § 17.1-909.

13. The Commission may “order the deposition of a person residing within or without the Commonwealth to be taken in such form and subject to such limitations as may be prescribed in the order . . .” *Id.* § 17.1-910.

14. The Commission may “suspend a judge with pay if it finds that there is probable cause to believe that the continued performance of judicial duties by the judge constitutes both a substantial and immediate threat to the public interest in the administration of justice.” *Id.* § 17.1-911(A). In any such case, the suspended judge is prohibited from exercising judicial powers during their suspension but is still

bound by the Canons of Judicial Conduct. *Id.* § 17.1-911(C).

III. Procedural History and Factual Background

A. Adrienne L. Bennett's Tenure as Chair of the Virginia Parole Board and Subsequent Judgeship

15. The Honorable Adrienne L. Bennett was confirmed as Chair of the Virginia Parole Board under the administration of Governor Ralph S. Northam on January 22, 2018. S.J. Res. 100, Reg. Sess. (Va. 2018). Judge Bennett previously served as Chair of the Parole Board under Governor Terence L. McAuliffe beginning in 2017,¹ and was previously a member of the Virginia Parole Board.

16. As Chair of the Virginia Parole Board, the Honorable Adrienne L. Bennett is publicly alleged to have (1) “unilaterally released more than 100 parolees from Virginia Department of Corrections supervision in violation of long-standing rules;”² (2) allowed her personal opinions about inmates’ alleged innocence to affect parole and early release decisions, despite the fact that “the parole board is not authorized by policy or state law to consider an offender’s guilt or innocence in

¹ See Patrick Wilson, *McAuliffe Replaces Parole Board Chairwoman in Effort to Speed Reforms*, Richmond Times-Dispatch, Jan. 10, 2017, https://richmond.com/news/local/government-politics/mcauliffe-replaces-parole-board-chairwoman-in-effort-to-speed-reforms/article_c10dceb8-8549-55cb-9af8-a7c36f9a086c.html.

² See Mark Bowes & Patrick Wilson, *Former Parole Board Chair Violated Policy in Releasing Parolees from Supervision, Records Show*, Richmond Times-Dispatch, Mar. 26, 2021, https://richmond.com/news/local/crime-and-courts/former-parole-board-chair-violated-policy-in-releasing-parolees-from-supervision-records-show/article_4ca1e44b-a0b1-5fbf-8298-6f67892def6b.html

decisions regarding parole or discharge from supervision;”³ (3) presided over at least five failures to properly notify prosecutors and seven failures to properly notify victims of parole decisions, in violation of the Code of Virginia;⁴ and, (4) allowed her “zeal to release inmates and ignore requirements about victim and prosecutor notification” to extend to other cases.^{5 6}

17. Judge Bennett was nominated as Juvenile and Domestic Relations District Court judge for the 2nd Judicial District on February 28, 2020. H.R. 139, Reg. Sess. (Va. 2020). Judge Bennett’s term was designated to begin on April 16, 2020. *Id.*

18. Judge Bennett was elected as a judge of the Juvenile and Domestic Relations District Court for the 2nd Judicial District on March 3, 2020. *See* Minute Book, Senate of Virginia (Mar. 3, 2020), *available at* <https://lis.virginia.gov/cgi-bin/legp604.exe?201+min+SM0303&201+min+SM0303>.

19. Judge Bennett continued in her position as Chair of the Virginia Parole Board from the date of her election as a judge on March 3, 2020 until taking the bench on

³ *See id.*

⁴ *See* Sarah Rankin, *Watchdog Redacts More Records Related to Parole Board Probe*, Associated Press, Oct. 7, 2020, <https://apnews.com/article/richmond-virginia-laws-f1729b3fc2717e3cf964f19f1484022b>

⁵ *See* Robert Zullo, *The Parole Board Scandal Raises Big Questions—About the State’s Watchdog Agency*, Apr. 22, 2021, <https://www.virginiamercury.com/2021/04/22/the-parole-board-scandal-exposes-a-big-problem-in-va-government/>

⁶ The investigation to date has revealed information consistent with these reports.

April 16, 2020. *See Verified Petition for Reinstatement of Judicial Officer* at 7, Record No. 210489 (May 20, 2021).

B. Judge Bennett Files the Instant Petition for Writ of Mandamus and Prohibition

20. On May 19, 2021, the Richmond Times-Dispatch reported that “Judge Adrienne Bennett of Virginia Beach, the former chairwoman of the Virginia Parole Board who is at the center of an ongoing scandal, went on “extended leave” in April and court clerks were instructed not to reach out to her with questions.” Patrick Wilson, *Records: Judge Adrienne Bennett, the former parole board chairwoman, on ‘extended leave,’* Richmond Times-Dispatch, May 19, 2021, https://richmond.com/news/state-and-regional/records-judge-adrienne-bennett-the-former-parole-board-chairwoman-on-extended-leave/article_fc6b0258-9df3-5594-89d7-2b40f5841365.html.

21. One day later, Judge Bennett filed a petition for mandamus and prohibition attempting to end the Commission’s inquiry into her conduct. *See Verified Petition for Reinstatement of Judicial Officer* at 7, Record No. 210489 (May 20, 2021).

22. One day later, this Court refused Judge Bennett’s petition. *See In re Bennett*, Record No. 210489 (May 21, 2021). In so doing, the Court sealed Judge Bennett’s filings and its own order dismissing the petition and sealing the record.

23. A reporter for the Richmond Times-Dispatch requested access to the sealed portion of the record in case number 210489 on June 21, 2021 and was denied by

the Clerk of Court on June 25, 2021. *See* Letter from P. Wilson, Record No. 210489 (June 21, 2021); Email from Clerk of Court, Record No. 210489 (June 25, 2021).

24. On July 8, 2021, the publisher of the Richmond Times-Dispatch, Lee BHM, filed a petition in this Court in which it moved the Court for leave to intervene on behalf of the public, and to unseal the sealing order in this case. *See* Lee BHM Corp.’s Petition for Leave to Intervene and Motion to Vacate Order Sealing a Sealing Order, *In re Bennett*, Record No. 210489 (Jul. 8, 2021).

25. By order dated December 16, 2021, this Court granted Lee BHM the discretionary relief of awarding oral argument on its motion to intervene and to unseal the sealing order. *See* Rules of the Supreme Court of Virginia 5:4(a)(3) (“No motion will be argued orally except by leave of this Court.”).

26. The parties presented oral argument during the Court’s March 2022 term.

IV. Judge Bennett’s Attachments of Commission Documents Should be Disclosed to the Office of the Attorney General for Investigative Review

A. The Commission has Jurisdiction over Judge Bennett’s Conduct as Chair of the Virginia Parole Board

27. By operation of the Virginia Code and Virginia’s Canons of Judicial Conduct, Judge Bennett’s post-election conduct as Virginia Parole Board Chair between March 3, 2020 and April 16, 2020 fell under the supervision of the Commission.

28. ““Judge” . . . includes (i) persons who have been elected or appointed to be

judges but have not taken the oath of office as judge as well as persons who have taken such oath . . .” Code § 17.1-900.

29. “A person selected for a full-time position subject to the provisions of these Canons who is not already a justice or judge, from . . . election by both houses of the General Assembly . . . until taking the oath of office as a justice or judge, is required to comply with [multiple Canons] . . .” *See* Virginia Canons of Judicial Conduct II (Exceptions to Applicability) at ¶ 5, *available at* https://www.vacourts.gov/courts/scv/canons_of_judicial_conduct.pdf.

30. The Commission had jurisdiction over whether then-Chair Bennett complied with the following relevant Canons between March 3, 2020 and April 16, 2020.

31. Canon 2A, “Public and Private Behavior,” states that “[j]udges, by virtue of their office, have been placed in a position of public trust. While judges should engage in public matters and serve their communities, they must govern their public and private behavior to ensure the greatest public confidence in the judge’s independence, impartiality, integrity, and competence.”

32. Canon 2V, “Adherence to Law,” states that “[a] judge must respect and comply with the law. Deference to the judgments and rulings of courts depends upon public confidence in the integrity and independence of judges. The integrity and independence of judges depends in turn upon their acting without fear or favor. Although judges should be independent, they must comply with the law, including

the provisions of these Canons. Public confidence in the impartiality of the judiciary is maintained by the adherence of each judge to this responsibility. Conversely, violation of this Canon diminishes public confidence in the judiciary and thereby does injury to the system of government under law.”

B. The Attorney General Has Similar Investigative Jurisdiction as the Commission with Respect to Judge Bennett

33. The Governor has directed the Attorney General to investigate the Virginia Parole Board by “coordinat[ing] the prosecutorial and investigative efforts and to bring such cases as he may deem appropriate in order to protect the citizens of the Commonwealth and hold accountable any individuals who have violated existing law or violated the rights of victims of crime.” Executive Order 3 (2022).

34. In suspending Judge Bennett because she constituted “a substantial and immediate threat to the public interest in the administration of justice,” it is probable that the Commission at least preliminarily determined that Judge Bennett’s conduct as Parole Board Chair was not independent, impartial, and competent in accordance with the laws and Constitution of the Commonwealth, *see* Canon 2A, or that as Parole Board Chair, Judge Bennett failed to respect and comply with the laws and Constitution of the Commonwealth, *see* Canon 2V.

35. In directing the Attorney General to “hold accountable any individuals who have violated existing law or violated the rights of victims of crime,” the Governor has effectively ordered the Attorney General to assume concurrent jurisdiction with

the Commission over Judge Bennett's conduct as Parole Board Chair between March 3, 2020 and April 16, 2020.

C. Judge Bennett's Attempt to Compel or Restrain the Commission is Material to the Attorney General's Investigation

36. Any attempt by Judge Bennett to abridge or end the Commission's investigation into whether she acted with "independence, impartiality, integrity, and competence" and whether she "respect[ed] and compl[ied] with the law" as Chair of the Virginia Parole Board is material to the Attorney General's investigation.

37. The investigation authorized by Executive Order 3 (2022) has revealed that Judge Bennett took direct, personal action with respect to multiple questioned parole decisions between her election to the bench on March 3, 2020 and the assumption of her judgeship on April 16, 2020. Judge Bennett's petition to this Court to override and effectively end the Commission's investigation into her conduct as Chair of the Virginia Parole Board, which likely probed some of the same questioned parole decisions, is further relevant to the Attorney General's investigation.

D. The Constitutional and Statutory Scheme Governing Commission Confidentiality Provides No Basis for Judge Bennett's Attachments to Remain Confidential

i. Virginia Common Law Requires a Strict Construction of Virginia's Commission Confidentiality Provisions

38. The Virginia Constitution permits, but does not require, the General Assembly to provide for the confidentiality of Commission proceedings. Va. Const.

art. VI, § 10, Disabled and Unfit Judges (“Proceedings and documents before the Commission *may* be confidential as provided by the General Assembly in general law”) (emphasis added).

39. The Commission is part of Virginia’s judicial branch of government. Code § 17.1-901. And judicial records are presumed to be open to public examination, subject to limited exceptions. *See Shenandoah Publ’g House, Inc. v. Fanning*, 235 Va. 253, 258, 368 S.E.2d 253 (1988).

40. The Commission is a judicial branch agency, not an independent entity outside the reach of public oversight. The Commission confidentiality provisions in Code § 17.1-913 therefore stand in derogation of the common-law requirement of public access to judicial proceedings. *See In re Bennett*, __ Va. __, __, __ S.E.2d __, __, 2022 WL 1177924 (Apr. 21, 2022) (Kelsey, J., dissenting) (citing *Shenandoah Publ’g*, 235 Va. at 258, 368 S.E.2d 253 (1988)) (noting that to overcome the common-law presumption of open public access to judicial records, at a base level, the party seeking secrecy must prove a “compelling” interest in nondisclosure).

41. Judge Bennett has never stated a “compelling interest” in nondisclosure of the Commission records she attached to her filing. To the contrary, Judge Bennett’s attachment of Commission documents to her filing demonstrates her intent to subject those documents to the presumptively public judicial process.

42. To safeguard the presumption of openness of judicial records, Code § 17.1-

913 must be “strictly construed and not [] enlarged in [its] operation by construction beyond [its] express terms[.]” *See In re Bennett*, __ Va. __, __, __ S.E.2d __, 2022 WL 1177924 at *6 (Apr. 21, 2022) (Kelsey, J., dissenting) (quoting *Giordano v. McBar Indus., Inc.*, 284 Va. 259, 267 n.8, 729 S.E.2d 130 (2012)).

ii. Virginia’s Commission Confidentiality Provisions Primarily Exist to Protect the Commission

43. Title 17.1, Chapter 9 of the Code is titled “Judicial Inquiry and Review Commission.” It establishes the Commission’s authority and operating procedures.

44. The Supreme Court of the United States has noted several general interests served by state laws and constitutional provisions requiring confidentiality of judicial review commission documents:

The substantial uniformity of the existing state plans suggests that confidentiality is perceived as tending to insure the ultimate effectiveness of the judicial review commissions. First, confidentiality is thought to encourage the filing of complaints and the willing participation of relevant witnesses by providing protection against possible retaliation or recrimination. Second, at least until the time when the meritorious can be separated from the frivolous complaints, the confidentiality of the proceedings protects judges from the injury which might result from publication of unexamined and unwarranted complaints. And finally, it is argued, confidence in the judiciary as an institution is maintained by avoiding premature announcement of groundless claims of judicial misconduct or disability since it can be assumed that some frivolous complaints will be made against judicial officers who rarely can satisfy all contending litigants.

In addition to advancing these general interests, the confidentiality requirement can be said to facilitate the work of the commissions in several practical respects. When removal or retirement is justified by the charges, judges are more likely to resign voluntarily or retire

without the necessity of a formal proceeding if the publicity that would accompany such a proceeding can thereby be avoided. Of course, if the charges become public at an early stage of the investigation, little would be lost—at least from the judge's perspective—by the commencement of formal proceedings. In the more common situation, where the alleged misconduct is not of the magnitude to warrant removal or even censure, the confidentiality of the proceedings allows the judge to be made aware of minor complaints which may appropriately be called to his attention without public notice.

Landmark Commc'ns, Inc. v. Virginia, 435 U.S. 829, 835–36, 98 S.Ct. 1535, 56 L.Ed.2d 1 (1978) (cleaned up).

45. The Commission confidentiality provisions under Virginia law exist primarily to protect the integrity of the Commission and its investigations. They have the incidental yet important effect of shielding judges from premature disclosure of complaints before they are ripe for final adjudication. Indeed, one factor supporting confidentiality of judicial inquiry commission proceedings is to protect judges' reputational interest in the confidentiality of “frivolous” or “minor” complaints.

46. However, the instant matter was not a “frivolous” or “minor” complaint, the release of which would unjustly tarnish Judge Bennett's reputation. The complaints against Judge Bennett were serious enough to merit her indefinite suspension as a danger to the administration of justice. *Cf. In re Bennett*, __ Va. __, __, __ S.E.2d __, 2022 WL 1177924 at *6 (April 21, 2022) (Kelsey, J., dissenting) (citing *Shenandoah Publishing* for the rule that “[n]o compelling interest [in nondisclosure] exists merely because disclosure poses risks of damage to professional reputation,

emotional damage, or financial harm, stated in the abstract.”).

47. Had Judge Bennett simply allowed the Commission’s investigation to run its course, the public may have never learned that she was under investigation. Yet her filing indicates that she deemed the Commission’s actions to be so unlawful that they were required to be immediately enjoined by this Court.

48. Neither the plain language of the Code nor the general confidentiality interests articulated by the Supreme Court of the United States contemplate continued confidentiality of judicial review proceedings when the subject judge asks a state’s highest court to intervene to stop an investigation she alleges is unlawful. And neither of these authorities contemplate continued secrecy when a state’s governor has ordered an investigation mirroring the Commission’s inquiry into the same judge.

49. There is similarly no precedent, legislative history, or public policy standing for the proposition that judicial review proceedings should remain sealed when a judge who has been found to be a “substantial danger to the administration of justice” publicly questions the integrity of the process by which she was so labeled.

50. The Code and *Landmark Communications* implicitly contemplate judicial inquiry proceedings in which the subject judges accede to the judicial review commission’s authority. The instant case falls well outside that paradigm.

51. As the Supreme Court noted, “The operation of the Virginia Commission, no

less than the operation of the judicial system itself, is a matter of public interest . . .”
Landmark Commc'ns, Inc., 435 U.S. at 839. At no time in the publicly recorded history of the Commonwealth has a sitting judge publicly accused the Commission of conducting an illegal investigation. The Attorney General should be permitted to evaluate Judge Bennett’s unprecedented allegations against the Commission as part of the instant investigation.

- iii. Virginia’s Canons of Statutory Construction Require Public Disclosure of Commission Records Attached by Judge Bennett as Judicial Records
 - a. *Judge Bennett is Excluded from the Class of Persons Specifically Prohibited from Disclosing Confidential Commission Documents*

52. While Commission proceedings are presumed to be “confidential and shall not be divulged, other than to the Commission,” by any complainant, investigator, interviewee, or other participant in Commission proceedings, the list of individuals prohibited from divulging Commission proceedings does not include the judge under investigation. Code § 17.1-913(A).

53. Under the “time-honored” statutory construction maxim *expressio unius est exclusio alterius*, the absence of a prohibition against disclosure of Commission documents by the subject of the investigation means that Code § 17.1-913(A) cannot be read to require continuing confidentiality of Judge Bennett’s purposeful attachment of Commission documents to her filing. *See Miller & Rhoads Bldg.*,

L.L.C. v. City of Richmond, 292 Va. 537, 544, 790 S.E.2d 484 (2016).

54. The Code’s Commission confidentiality provisions do not protect or prevent the judge under investigation from divulging Commission documents. *Cf.* Code § 17.1-913(A) (permitting the subject judge to divulge Commission documents under certain circumstances). Even if the Code did specifically enjoin the actions of the judge under investigation, by attaching Commission documents to her filing, Judge Bennett intentionally waived all potentially available confidentiality.

b. The Commission Confidentiality Provisions Only Govern the List of Persons Specifically Prohibited from Making Such Disclosures

55. Code § 17.1-913(A) specifically enumerates four classes of persons who are prohibited from divulging Commission documents: complainants, Commission investigators, Commission interviewees, and any other participants in Commission proceedings.

56. The admonition that “the record of any proceeding filed with the Supreme Court shall lose its confidential character” is a general provision that immediately follows the enumerated list of persons prohibited from disclosing Commission documents. *Id.* § 17.1-913(A). The list of persons prohibited from disclosing Commission documents is only separated from the confidentiality dissolution provision by a comma. *Id.* § 17.1-913(A)

57. “Under the rule of *ejusdem generis*, when a particular class of persons or

things is enumerated in a statute and general words follow, the general words are to be restricted in their meaning to a sense analogous to the less general, particular words.” *Martin v. Commonwealth*, 224 Va. 298, 301–02, 295 S.E.2d 890 (1982) (citing *East Coast Freight Lines v. City of Richmond*, 194 Va. 517, 525, 74 S.E.2d 283 (1953)); *Rockingham Bureau v. Harrisonburg*, 171 Va. 339, 344, 198 S.E. 908 (1938)).

58. *Ejusdem generis* therefore “restrict[s] the[] meaning” of the confidentiality dissolution provision “to a sense analogous to the less general, particular” enumeration of four classes of persons prohibited from disclosing Commission documents. *Cf. In re Bennett*, __ Va. at __, __ S.E.2d __, 2022 WL 1177924 at *3 (Apr. 21, 2022) (holding that “[a]ny ‘proceeding,’ in context, refers to disciplinary proceedings against a judge, not a mandamus proceeding like this one.”)

59. In context, the general confidentiality dissolution provision relates only to Commission-initiated proceedings. However, because the “any proceeding” language immediately follows the specifically enumerated identities of four classes of persons, *ejusdem generis* restricts the application of the “any proceeding” language to the conduct of the four classes of persons who may participate in Commission investigations.

60. Furthermore, the confidentiality dissolution provision applies only when a proceeding to retire, remove, or censure a judge is filed in this Court in context with

an investigation involving one of the four enumerated classes of persons who are privy to Commission documents.

61. The confidentiality dissolution language has no application, whether proscriptively or prescriptively, to the subject judge's attachment of Commission documents to a presumptively public court filing.

62. The judge under investigation is not only omitted from the list of persons restricted from disclosing Commission documents but is separated from the list by the word "however." Code § 17.1-913(A).

63. In contrast to the prohibition language enjoining the actions of Commission personnel, § 17.1-913(A) specifically permits the judge under investigation to "divulge information pertaining to a complaint filed against such judge as may be necessary for the judge to investigate the allegations in the complaint in preparation for the proceedings before the Commission." *Id.* § 17.1-913(A).

64. Judge Bennett's mandamus and prohibition filing went a step further than "investigat[ing] the allegations in the complaint in preparation for proceedings before the Commission." She sought to shut down the Commission's investigation entirely by invoking this Court's original jurisdiction.

65. Stated plainly, public disclosure of Commission documents by the judge under investigation for the purpose of halting the investigation is neither specifically proscribed nor prescribed, nor even contemplated by Code § 17.1-913(A). The

confidentiality provisions in Code § 17.1-913(A) govern only the conduct of the list of four enumerated classes of persons prohibited from divulging Commission documents. The only reference in the Code to the judge under investigation is to permit such judge to divulge Commission records under certain circumstances.

c. The Provision Requiring Records of Commission Proceedings to be Maintained in the Commission's Confidential Filings Relates Only to the Preceding List of Persons Specifically Prohibited from Making Such Disclosures

66. As previously mentioned, Code § 17.1-913(A) prevents complainants, Commission investigators, Commission interviewees, and any other participants in Commission proceedings from divulging Commission documents.

67. Following this enumerated list is the previously mentioned confidentiality dissolution provision, which governs only the conduct of persons involved with the Commission. The confidentiality dissolution provision is followed by language authorizing the Commission to initiate perjury proceedings against witnesses who testify falsely before the Commission. *Id.* § 17.1-913(A).

68. Immediately following the perjury authorization is one-sentence provision set off as a separate paragraph. The one-sentence provision is a general statement that “All records of proceedings before the Commission which are not filed with the Supreme Court in connection with a formal complaint filed with that tribunal, shall be kept in the confidential files of the Commission.” Code § 17.1-913(A).

69. The one-sentence confidential storage provision is the General Assembly's

directive to the Commission to keep its other investigative documents in one centralized file to maintain confidentiality. Neither the text nor the context of this provision bar the judge under investigation from divulging Commission documents.

70. Even if the one-sentence confidential storage provision could be read as a further limitation on the disclosure of Commission documents, *ejusdem generis* renders the provision applicable only to the previously enumerated list of persons prohibited from divulging Commission documents.

71. Because the one-sentence confidential storage provision follows a specifically enumerated list of prohibited disclosures, *ejusdem generis* prevents the application of the confidential storage provision to any persons other than those specifically prohibited from disclosing Commission documents.

72. The judge under investigation is not a member of the Commission with authority to “file[] [Commission records] with the Supreme Court in connection with a formal complaint” or to access confidential Commission investigative records. *Ejusdem generis* therefore limits the application of the one-sentence confidential storage provision to the conduct of the Commission participants enumerated earlier in § 17.1-913(A). *See also* Code § 17.1-918(B) (governing the Commission’s transmission of information about judicial misconduct to committees of the General Assembly without placing limitations on the judge under investigation).

73. The one-sentence confidential storage provision cannot be read as governing

the conduct of any person other than the four classes of enumerated Commission participants, much less the judge under investigation.

74. The Attorney General agrees with the Court’s statement that “[t]he General Assembly, as the policymaking branch of our government, has determined that [Commission documents] should be kept confidential.” *In re Bennett*, __ Va. at __, __ S.E.2d __, 2022 WL 1177924 at *3 (Apr. 21, 2022). But Virginia’s canons of statutory construction make it clear that Code § 17.1-913(A) proscribes only the conduct of Commission personnel and witnesses.

75. The principle is more fully stated as such: “the General Assembly, as the policymaking branch of our government, has determined that Commission documents should be kept confidential **by the Commission.**”

76. Code § 17.1-913(A) was only intended to govern the Commission’s filing of a formal complaint against a judge in this Court. The statute is silent as to what will occur when a party other than the Commission short-circuits the Commission’s investigation by publicly filing a proceeding in this Court related to the ongoing Commission investigation.

77. Code § 17.1-913(A) exists to benefit the Commission by ensuring the privacy and integrity of its proceedings. But § 17.1-913(A) provides a joint benefit to any judge under investigation by shielding their name and reputation from unwarranted public damage unless and until the Commission deems disclosure

appropriate. Judge Bennett apparently deemed the actions of the Commission to be so extralegal that she was willing to risk losing the protection of § 17.1-913(A).

78. Judge Bennett placed her name and reputation as a judge into public view by challenging the legality of a Commission proceeding and filing Commission documents with this Court. This extraordinary claim deviates far beyond the General Assembly's contemplation of Commission proceedings. Judge Bennett's unprecedented filing certainly was not contemplated by the General Assembly as one that should remain confidential.

E. Even if Commission Confidentiality Applies, the Commonwealth's Compelling Governmental Interest in the Integrity of Its Investigation Outweighs Judge Bennett's Illusory Privacy Interest

79. As Chair of the Virginia Parole Board, Judge Bennett is alleged to have violated the Virginia Code and Virginia Parole Board policies. *See supra* ¶ 16.

80. In issuing Executive Order 3, the Governor determined that it was in the public interest that an investigation should provide a full and transparent accounting of the Parole Board's actions.

81. The Commission apparently agreed that Judge Bennett's violations of law and procedure as Chair of the Parole Board were so severe as to render her continued service as a judge "a substantial and immediate threat to the public interest in the administration of justice." Code § 17.1-911(A).

82. The Commission's finding that Judge Bennett represented "a substantial and

immediate threat to the public interest in the administration of justice” strongly implies that the Commission found, at least preliminarily, that Judge Bennett may have violated Canon 2A (requiring judges to be independent, impartial, and competent in accordance with the laws and Constitution of the Commonwealth) or Canon 2V (requiring judges to respect and comply with the laws and Constitution of the Commonwealth).

83. Upon information and belief, until Judge Bennett’s filing, no sitting judge in the Commonwealth has ever challenged an interim suspension in like fashion.

84. As the representative of the Commonwealth of Virginia in the investigation authorized by Executive Order 3 (2022), the Attorney General has a compelling governmental interest ensuring the integrity of the investigation. This includes preserving the Attorney General’s ability to obtain all evidence indicating that the conduct of any employee of the Virginia Parole Board violated the laws of the Commonwealth, or that any employee of the Virginia Parole Board attempted to abridge or control other investigations into their conduct. *Cf. Americans for Prosperity Found. v. Bonta*, __U.S. __, 141 S. Ct. 2373, 2402, 210 L.Ed.2d 716 (2021) (“A State surely has a compelling interest in ensuring that the subject of an investigation does not destroy evidence or hide funds before investigators have an opportunity to find them.”); *Am. C.L. Union v. Holder*, 673 F.3d 245, 253 (4th Cir. 2011) (holding that the United States Government has “a compelling interest in

protecting the integrity of ongoing fraud investigations”); *Virginia Dep't of State Police v. Washington Post*, 386 F.3d 567, 579 (4th Cir. 2004) (noting the court’s “complete agreement with the general principle that a compelling governmental interest exists in protecting the integrity of an ongoing law enforcement investigation”).

85. The instant investigation has no predetermined outcome. It may well reveal that the Virginia Parole Board complied with the law and procedure in every questioned instance. However, citizens are entitled to inquire through their representatives into whether government officials obey the law and procedure while conducting secret parole proceedings that directly affect public safety. Such an inquiry is necessary for the maintenance of self-government.

86. The proceedings of the Virginia Parole Board have been ongoing for decades, but only in the last two years have complaints and concerns arisen that have exposed the Board’s inner workings to scrutiny. This exposure was of sufficient concern for the Governor to order the Attorney General to investigate.

87. In petitioning this Court for access to the sealed records in this case to ensure the integrity of its ongoing investigation, the Attorney General asserts a different and more limited interest than the public. *See Lee BHM Corp.’s Petition for Leave to Intervene and Motion to Vacate Order Sealing a Sealing Order, In re: Honorable Adrienne L. Bennett*, Record No. 210489 (Jul. 8, 2021) at 6, 8.

88. The Attorney General does not seek to exercise its compelling governmental interest in investigating the conduct of the Virginia Parole Board in a way that intrudes into Judge Bennett's personal property or private business. The Attorney General seeks only the disclosure of information Judge Bennett knowingly exposed to public view by filing it in a court of record.

89. Judge Bennett's interest, if any, in the continued sealing of the record of this case is inferior to the Attorney General's compelling governmental interest in ensuring the integrity of its ongoing law enforcement investigation.

CONCLUSION

WHEREFORE, for the reasons stated and on the authorities cited, the Attorney General moves this Court to unseal and disclose to it the complete, unredacted record of case number 210489, and for any other relief the Court deems appropriate in its discretion.

/s/ Brandon T. Wrobleski
By: _____
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CERTIFICATE

On May 18, 2022, a copy of the foregoing Motion to Unseal Records and Memorandum of Law in Support was emailed to counsel for the Honorable Adrienne L. Bennett, Diane Toscano, Esq., at diane@toscanolawgroup.com, and Lee Adair Floyd, Esq., at Lee.Floyd@butlersnow.com, and counsel for the Judicial Inquiry and Review Commission, Raymond F. Morrogh, Esq., at rmorrogh@vacourts.gov. I further certify that the foregoing Motion to Unseal Records and Memorandum of Law in Support was contemporaneously filed with the Clerk of this Court using VACES.

Counsel for movant has conferred with counsel for the Honorable Adrienne L. Bennett and counsel for the Judicial Inquiry and Review Commission. Counsel for the Honorable Adrienne L. Bennett and counsel for the Judicial Inquiry and Review Commission take no position as to the relief requested herein.

/s/ Brandon T. Wrobleski

Brandon T. Wrobleski
Special Assistant to the Attorney General
for Investigations



Commonwealth of Virginia
Office of the Governor

Executive Order

NUMBER THREE (2022)

RESTORING INTEGRITY AND CONFIDENCE IN THE VIRGINIA PAROLE BOARD AND THE COMMONWEALTH'S SYSTEM OF CRIMINAL JUSTICE

By virtue of the authority vested in me as Governor, I hereby issue this Executive Order to restore integrity and confidence in the Commonwealth's System of Criminal Justice by terminating the current Virginia Parole Board, naming five highly qualified individuals to the Parole Board, directing the Secretary of Public Safety to perform a programmatic review of the Parole Board's procedures, and requesting the Attorney General conduct a full investigation.

Importance of the Initiative

Article I, Section 8-A of the Constitution of Virginia affords certain rights to victims of crime in the Commonwealth, including the right to reasonable and appropriate notice, information, and protection. Virginia law further requires the Virginia Parole Board provide notice of its decision to grant discretionary parole or the conditional release of an inmate. Virginia law and internal policy and procedure manuals govern the Virginia Parole Board's decisions.

The Virginia Office of the State Inspector General ("OSIG") recently conducted an independent investigation into allegations involving the Virginia Parole Board. These allegations were brought forward by citizens, crime victims and their relatives, and elected Commonwealth's Attorneys. The OSIG investigation revealed some of the inmates released by the Virginia Parole Board had been recently denied parole or otherwise deemed ineligible for parole, raising questions about the lawfulness of the abrupt reversals of these decisions. The Virginia Parole Board also violated victims' rights and broke Virginia law by releasing multiple violent offenders without complying with the legally required notification to the victim or the prosecutor.

To this day, the family members and victims have no answers as to how or why the Virginia Parole Board failed to abide by the laws governing its operations, and no one has been held accountable.

We therefore must ensure confidence and integrity in our criminal justice system. Too often, victims of violent crime are ignored, silenced, and overlooked. Victims deserve to know their voices matter. In order to ensure that these mistakes never happen again, we must fully understand the decisions that led to them.

The Parole Board's failure to uphold the laws enacted by the General Assembly has damaged the integrity of the Commonwealth's System of Criminal Justice and undermined the confidence of our citizens. We therefore must reform the Virginia Parole Board and replace the current members with qualified and committed public safety experts who will uphold the law, properly apply the policies of the Board, and restore confidence and integrity in our system of criminal justice.

Directive

Accordingly, pursuant to the authority vested in me as Chief Executive of the Commonwealth and pursuant to § 53.1-134 of the *Code of Virginia*, I hereby terminate the current parole board, and hereby appoint:

- The Honorable Chadwick Dotson of Wise County, Chairman
- Tracy Banks of the City of Charlottesville
- Cheryl Nici-O'Connell of Chesterfield County
- The Honorable Hank Partin, Sheriff, of Montgomery County
- Carmen Williams of Chesterfield County

Further, the Secretary of Public Safety and Homeland Security is directed to perform a programmatic review of the Parole Board's duties, procedures, and administration. The review shall include, but not be limited to, increasing the transparency of Parole Board votes, recording reasons for granting parole, and reviewing the management, personnel, and operations of the Parole Board.

This review shall provide recommendations for legislative, administrative, and policy changes that will improve the administration of the agency in fulfilling its solemn public safety mission.

This review shall be submitted to me no later than September 1, 2022.

Attorney General Authorization

By virtue of the authority vested in me by § 2.2-511 of the *Code of Virginia*, I hereby request the Attorney General to coordinate the prosecutorial and investigative efforts and to bring such cases as he may deem appropriate in order to protect the citizens of the Commonwealth and hold accountable any individuals who have violated existing law or violated the rights of victims of crime.

Effective Date

This Executive Directive shall be effective upon its signing and shall remain in force and effect unless amended or rescinded by future executive order or directive.

Given under my hand and under the Seal of the Commonwealth of Virginia, this 15th day of January, 2022.



A handwritten signature in black ink, reading "Glenn Youngkin".

Glenn Youngkin, Governor

Attest:

A handwritten signature in black ink, reading "Kelly Thomasson".

Kelly Thomasson, Secretary of the Commonwealth