

**IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA
Big Stone Gap Division**

<p>JOSEPH M. GIARRATANO,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">v.</p> <p>GENE JOHNSON, Director of the Virginia Department of Corrections, TRACY S. RAY, Warden of Red Onion State Prison.</p> <p style="text-align: center;">Defendants.</p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>Civil No. _____</p>
---	---	-------------------------------

COMPLAINT

Preliminary Statement and Jurisdiction

1. Plaintiff Joseph M. Giarratano is an inmate in the custody of the Virginia Department of Corrections (VDOC) who suffers from untreated Hepatitis C. He wishes to obtain a copy of VDOC’s policy regarding the treatment of Hepatitis C in order to determine whether he is being treated in accordance with the policy and to evaluate whether the policy itself meets constitutional standards, in preparation for a possible Eighth Amendment lawsuit. His request for a copy of the policy was denied because the Virginia Freedom of Information Act (VFOIA), which allows any other Virginia resident to obtain copies of public records, does not “afford any rights to any person incarcerated in a state, local or federal correctional facility.” Va. Code § 2.2-3703. Thus, anyone in Virginia can access the Hepatitis C policy except those whom it most affects – inmates infected by the disease. This lawsuit under 42 U.S.C. § 1983 seeks a declaration that Virginia’s exclusion of inmates from the VFOIA and VDOC’s refusal to

provide the requested policy violate the First and Fourteenth Amendments to the United States Constitution.

2. This action arises under the Constitution of the United States and 42 U.S.C. § 1983. This court has jurisdiction pursuant to 28 U.S.C. § 1331. Declaratory relief is authorized by 28 U.S.C. §§ 2201 and 2202.

Parties

3. Plaintiff Joseph M. Giarratano is an inmate in the custody of the Virginia Department of Corrections currently incarcerated at Red Onion State Prison.-

4. Defendant Gene Johnson is the director of VDOC and, as such, is responsible for the day-to-day operations of the department, including the implementation and compliance with the Virginia Freedom of Information Act. Defendant Johnson is sued in his official capacity.

5. Defendant Tracy F. Ray is the warden of Red Onion State Prison and, as such, is responsible for the day-to-day operations of the facility, including the implementation and compliance with the Virginia Freedom of Information Act. Defendant Ray is sued in his official capacity.

6. At all times relevant, defendants acted and continue to act under color of state law.

Factual Allegations

7. As an inmate in the Virginia prison system, Giarratano is not free to seek his own medical services, and is wholly dependent on his custodians for medical services and information relevant thereto.

8. In 1996, Giarratano was diagnosed with chronic Hepatitis C (“HCV”), a blood borne, potentially fatal virus that infects and damages the liver.

9. In 2005, in an effort to inform himself of the medical standards and treatment protocols employed by the Commonwealth to determine which prisoners are treated for HCV, Giarratano requested, at his expense, copies of the treatment protocols from the medical department at Red Onion State Prison. Giarratano sought the information so that he would be able to make informed decisions relevant to his health and to potential litigation arising from VDOC’s non-treatment of his HCV. The informal request (Tag No. 620-21831) was denied in or about June, 2005.

10. Following the denial of his informal request, Giarratano filed a formal request under the Virginia Freedom of Information Act seeking the same information. The request was denied based on Va. Code § 2.2-3703, which provides that VFOIA does not “afford any rights to any person incarcerated in a state, local or federal correctional facility.” From this denial, he filed a grievance with Defendant Ray requesting the medical and treatment protocols, His grievance was denied on June 30, 2005.

11 The documents requested by Giarratano are public records available under FOIA to any non-incarcerated citizen of Virginia. VDOC refused to provide the records to Giarratano based solely on his status as a prisoner. Upon information and belief, VDOC has provided the same records to similarly situated non-inmates.

12. The information sought is needed so that Giarratano may intelligently exercise his judgment in personal medical decisions, and make an informed decision as to whether litigation is warranted for the non-treatment of his serious medical need.

13. Disclosure of the requested information would not threaten the security or safe and orderly administration of any VDOC facility.

14. Giarratano has never filed a frivolous request for information, nor has he ever filed such a request in order to vex or harass a government official. He has at all times been willing to pay the costs of duplicating the requested records.

15. The exclusion of inmates from the protections of the Freedom of Information Act is not rationally related to any legitimate government interest.

16. VDOC's refusal to provide Giarratano with a copy of VDOC's policies regarding the treatment of HCV is not reasonably related to any legitimate penological interest.

17. Giarratano completed the institutional grievance process and was denied relief.

Causes of Action

COUNT I

Facial Challenge Under the Equal Protection Clause

18. Virginia Code § 2.2-3703, excluding inmates from the right to obtain documents under the Virginia Freedom of Information Act, violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

COUNT II

As-Applied Challenge Under the Equal Protection Clause

19. As applied to Giarratano's request for VDOC's HCV treatment policies, Virginia Code § 2.2-3703, excluding inmates from the right to obtain documents under the Virginia Freedom of Information Act, violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

COUNT III
As-Applied Challenge Under the First Amendment

20. As applied to Giarratano's request for VDOC's HCV treatment policies, Virginia Code § 2.2-3703, excluding inmates from the right to obtain documents under the Virginia Freedom of Information Act, violates Giarratano's right to access to the courts under the First Amendment to the United States Constitution, as applied to the states by the Fourteenth Amendment.

REQUEST FOR RELIEF

Plaintiff respectfully requests that the Court grant her the following relief:

- A. A declaration that Virginia Code § 2.2-3703, excluding inmates from the right to obtain documents under the Virginia Freedom of Information Act, violates the First and Fourteenth Amendments to the United States Constitution.
- B. An injunction requiring the defendant to provide VDOC's policies regarding treatment of HCV to the plaintiff, and prohibiting them from further enforcing Virginia Code § 2.2-3703, excluding inmates from the right to obtain documents under the Virginia Freedom of Information Act.
- C. Plaintiff's costs and attorney's fees pursuant to 42 U.S.C. § 1988; and
- D. Such other relief as the Court deems just.

Respectfully submitted,
JOSEPH M. GIARRATANO,
By counsel

Rebecca Glenberg, VSB #44099
American Civil Liberties Union of Virginia Foundation, Inc.
6 N. Sixth Street
Richmond, VA 23219
(804)644-8080

Steven D. Rosenfield, VSB #16539
913 East Jefferson Street
Charlottesville, VA 22902
(434) 984-0300
Cooperating Attorney for the
A.C.L.U. of Virginia, and,

R. Frazier Solsberry, VSB #31016
103 East Water Street, Suite 301
Charlottesville, VA 22902
(434) 296-2220
Participating Attorney for
The Rutherford Institute

Counsel for Plaintiff

Dated: January 17, 2006