In The

Court of Appeals of Virginia

RECORD NO.: 0343-24-2

THOMAS A. BLACKSTOCK, JR.,

Appellant,

v.

VIRGNIA DEPARTMENT OF TRANSPORTATION,

Appellee.

BRIEF OF APPELLANT

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Appellant Thomas A. Blackstock, Jr., by counsel, pursuant to Rule 5A:19 of the Rules of the Supreme Court of Virginia, hereby submits the following Opening Brief.

INTRODUCTION

This case involves Blackstock's efforts to obtain a clean copy of an audit report (the "Report") prepared by the Assurance and Compliance Office ("ACO") of the Virginia Department of Transportation ("VDOT"). The Report involved the "extraordinary steps" taken by VDOT employees to secure employment for someone favored by a VDOT employee. R234. It concluded that one unnamed employee had created the appearance of impropriety as to this action and recommended that the subject employee "***be counseled*** on actions . . . that can create the appearance of impropriety." R224 (emphasis added).

Blackstock, however, has yet to obtain a copy of the Report that actually identifies the name of this person. He made **three separate** VFOIA requests for the Report, and each time[1], VDOT gave him a copy

[1] In response to his first two requests, Blackstock received an almost totally redacted version of the report. *See* R231-235. In response to the third, he received a version that, while better, remained heavily redacted. R223-230.

of the Report that was redacted in one form or another. At no time has Blackstock ever received a clean version of the Report that names the person for whom counseling was recommended. This violates the Virginia Freedom of Information Act ("VFOIA"), Va. Code § 2.2-3700, *et seq.* ("VFOIA" or the "Act").

Below, the Circuit Court refused to order a copy of the Report with the unredacted name of the subject. R70-74.

First, even though VDOT did **not** invoke the "Investigative Notes" exemption under Va. Code § 2.2-3705.3(7) when it replied to Blackstock's *third*, independent VFOIA request for the Report[2], the Circuit Court allowed VDOT to rely on this exemption below because it had previously invoked it in response to Blackstock's *second* independent request. R72. The Court said Blackstock's three requests were "part of cumulative and ongoing correspondence regarding the same Report," and thus, it allowed VDOT to rely on an exemption it contemporaneously claimed in response to Blackstock's *second* VFOIA request, but failed to claim in response to his *third* VFOIA request.

[2] Instead, it invoked the "Personnel Information" exemption under Va. Code § 2.2-3705.1(1). *See* R249.

Second, the Circuit Court held the "Investigative Notes" exemption permitted VDOT to redact from the Report the name of the subject of the investigation. Under the exemption, the subject's name must be disclosed unless the investigation did not "lead to corrective action" against that person. Va. Code § 2.2-3705.3(7). Here, the Circuit Court concluded that no corrective action had, in fact, occurred because VDOT proffered second-hand testimony from a witness who said so. R74. The witness, however, lacked any personal knowledge on the issue, and instead, based her conclusion on hearsay testimony – namely, her conversation with the VDOT Commissioner (who did ***not*** testify below). R169, R174-176.

Both of the Circuit Court's rulings were erroneous. On the first, VDOT failed to invoke the "Investigative Notes" exemption in accordance with the requirements of VFOIA and thus waived it. VFOIA says that "***[u]nless*** a public body or its officers or employees ***specifically elect to exercise an exemption*** provided by this chapter or any other statute, . . . all public records ***shall be available*** for inspection and copying upon request." Va. Code § 2.2-3700(B) (emphasis added). VDOT did not do this here – that is, it did not invoke the "Investigative Notes" exemption in replying to Blackstock's third request. Though the Court said VDOT's

prior invocation of the exemption was sufficient, this conclusion ignores that Blackstock made *three* separate requests for the documents, which, in turn, required *three* separate invocations of the exemption.

On the second, VDOT failed to prove by a preponderance of the evidence that the subject of the Report did not receive a corrective action. As explained herein, hearsay evidence is not sufficient for a public body to sustain its burden on claiming an exemption, and the Circuit Court erred in relying on such evidence to hold that VDOT met its burden.

The Circuit Court's decisions should be reversed.

NATURE OF THE CASE AND THE MATERIAL PROCEEDINGS BELOW

This action arises from a Petition for Mandamus under VFOIA. *See* R1-57. In the Petition, Blackstock asked the Circuit Court to issue a mandamus order requiring VDOT to produce an unredacted version of the Report. R11. The Petition sought attorney's fees and costs. *Id.*

VDOT responded with a Demurrer and a Motion to Dismiss. R58-64. However, at oral argument on these pleadings, VDOT's counsel conceded that the motion to dismiss was "basically . . .just [the Circuit Court] ruling in [VDOT's] favor in regard to the FOIA request." R136. As such, the Circuit Court took the motion to dismiss "under advisement"

and then proceeded to hear evidence from the parties as to the VFOIA Petition. R134-186. The evidence included exhibits, testimony from Blackstock, R136-157; R185-186, and testimony from Amanda Haley, the Assistant Division Administrator, R158-184.

After oral argument on the Petition, R187-205, where Blackstock's counsel disputed both VDOT's ability to invoke the "Investigative Notes" exemption *and* whether VDOT had met its burden of proving that the exemption actually applied, R193-197, R199, the Circuit Court denied the Petition. R70-74. In doing so, the Court ruled that VDOT had not waived its right to rely on the "Investigative Notes" exemption *and* that it had proven by a preponderance of the evidence that the subject of the Report's investigation had not received a corrective action. R72-74. [3]

Blackstock timely appealed the Order. R84-87.

ASSIGNMENT OF ERROR

1. The Circuit Court erred in its February 1, 2024 Letter Opinion And Order (R.70-74) when it held that there was no

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[3] VDOT also invoked – and relied upon in response to the Petition -- the "Personnel Information" exemption under Va. Code § 2.2-3705.1(1). The Circuit Court, however, concluded that the information at issue did not meet the definition of "personnel information" under *Hawkins v. Town of South Hill*, 301 Va. 416, 878 S.E.2d 408 (2022) and thus held that the information at issue could not be withheld under that exemption. R72-73. VDOT has not challenged that ruling as part of this appeal.

waiver by VDOT of the Investigative Notes exemption under Va. Code § 2.2-3705.3(7) of VFOIA when VDOT did not invoke this exemption with respect to Blackstock's third specific VFOIA request for the Report at issue. (Preserved on Pages 107-108, 110-113, 121, 149-150 and 194-197 of the Record), The Circuit Court's error led it to erroneously examine the alleged merits of whether the Investigative Notes exemption applied in this case.

2. The Circuit Court erred in its February 1, 2024 Letter Opinion And Order (R.70-74) when it held that VDOT had met its burden of proof in showing that the Investigative Notes exemption under Va. Code § 2.2-3705.3(7) of the Virginia Freedom of Information Act applied to the Report in this case. (Preserved on Pages 107-108, 121-123, 194, 196-197, and 199 of the Record).

3. The Circuit Court's two errors set forth above led it to err in denying Blackstock's Petition for Mandamus under the Virginia Freedom of Information Act and in denying him the relief he sought in the Petition. (Preserved on Pages 107-108, 121-123, 194, 196-197, and 199 of the Record).

STATEMENT OF FACTS

The facts of this case involve Blackstock's struggles to obtain a clean copy of the Report.[4] Part 1 discusses Blackstock's three separate VFOIA requests for the Report – and VDOT's responses to these requests. Part 2, in turn, discusses what the face of Report – in its final "light"

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[4] These facts are taken from the Petition for Mandamus filed below (R1-57), the witness testimony that was provided before the Circuit Court on January 29, 2024 (R46-97), and the exhibits that were submitted to, and admitted by, the Circuit Court on January 29, 2024 (R223-249).

redacted form -- objectively shows the reader and what VDOT's witness testified about the subject of the Report.

I. Part 1: Over The Course Of A Two-Year Period, Blackstock Made ***Three*** Separate And Independent Requests For A Clean Copy Of The Report.

From August 10, 2005 to April 1, 2022, Blackstock worked in various HR management roles at VDOT. R70. At the time of his retirement in 2022, Blackstock worked as an Assistant Division Administrator in VDOT's HR Division, a position he had held for more than 14 years. *Id.*

One of Blackstock's many duties as an Assistant Division Administrator at VDOT was to review personnel actions, such as new hires, and ensure that they complied with various guidelines from VDOT and the Commonwealth of Virginia. *Id. See also* R137-138.

A. Blackstock Rejected An Irregular Hiring Request; Retaliation Ensued.

In early 2020, Blackstock reviewed a personnel action for a proposed hire that caused him concern. R138. Specifically, the proposed hire involved hiring either a friend or relative of VDOT's HR Director (Blackstock's immediate supervisor), yet the opening was not slated to be advertised or otherwise go through a standard competitive hiring

process. R138-140. It was just going to be a direct hire. *Id.* This was highly irregular. *Id.*

Although Blackstock's supervisor told him to approve the personnel action, Blackstock hesitated and raised the irregularities with the VDOT Commissioner, Stephen Brich. Upon doing so, Commissioner Brich held meetings with both Blackstock and Blackstock's supervisor and instructed Blackstock ***not*** to approve the hiring action. *Id.*

Blackstock's supervisor was furious with this outcome, and soon thereafter, she began retaliating against him. R141-142. Examples of this retaliation were taking away Blackstock's review authority and making false accusations against him about his work. *Id.*

B. Blackstock Grieved The Retaliation And, As Part Thereof, Requested A Review Of The Irregular Hiring Proposal.

In response to this retaliation, Blackstock filed a grievance against VDOT. R141. In doing so, he specifically requested -- as part of his grievance relief -- that VDOT review whether the proposed hiring action at issue (i.e., hiring the HR Director's friend or relative) was consistent with DHRM guidance, VDOT HR Division guidance, and standard agency practices. R142.

Subsequently, VDOT did just that – i.e., it conducted a review and audit of the hiring decision at issue. This was done by VDOT's ACO, which issued a Final Report on the matter on August 10, 2020. *See, e.g.,* R223-230.

In the meantime, as Blackstock's grievance moved forward, he learned of the existence of the ACO Report and requested it. R142. VDOT's counsel objected and refused to produce the ACO Final Report. R13-16. After examining the issue, the Hearing Officer for the grievance ordered that Blackstock be given a copy of the Final Report or that it be reviewed *in camera*. *Id.*

VDOT, however, again objected and requested an immediate review of the Hearing Officer's decision. *Id*. VDOT's effort to withhold the Final Report, however, was rejected.

Even then, VDOT, through counsel, continued to fight. After EDR returned the matter back to the Hearing Officer and he subsequently ordered the Final Report be produced directly to Blackstock, VDOT, through counsel, *again* sought EDR review of the Hearing Officer's ruling. R17-20. VDOT even asked that the Hearing Officer be removed

from the case based on his actions in ordering the production of the Final Report. *Id.*

As before, VDOT's request for a second review was rejected, and EDR ***again*** upheld the Hearing Officer's order for VDOT to produce the Final Report to Blackstock. *Id.*

But VDOT remained intransigent and obstructionist. Specifically, even when VDOT finally produced the Final Report to Blackstock, it produced a version that was so heavily redacted that it was utterly useless.

The VDOT redactions impacted every single page of the Final Report, and included such things as: (i) a COMPLETE REDACTION of the "Overall Conclusion" section of the report; (ii) an almost complete redaction of the "Overall Recommendation" section of the report; (iii) a redaction of the actual "issue" being reviewed by the ACO; (iv) a redaction of almost the entire factual background section of the report, including a redaction of MORE THAN HALF of page 3 of the report and a COMPLETE REDACTION of page 4; and (v) a COMPLETE redaction of one of the exhibits to the report. The redactions were made in black magic marker. *See* R231-237.

Upon receipt of the overly redacted Final Report, Blackstock withdrew his grievance. R144.

C. Even After His Grievance Ended, Blackstock Continued To Request An Unredacted Copy Of The Final Report And Continued To Be Rebuffed.

With the grievance closed and the irregular hiring matter seemingly in the rear-view mirror, Blackstock decided to make a new effort to receive an unredacted copy of the Final Report. R144-145.

Relevant here, on January 1, 2022, Blackstock sent an e-mail to Holly Jones at VDOT that said:

> Hi Holly – Happy New Year! I'm optimistic that on Monday you will be able to provide me with an unredacted copy of the document identified in my December 10th FOIA request.

R246.

The deadline for VDOT to respond to the request was January 10, 2022. However, by that date, VDOT did ***not*** produce a clean unredacted copy of the ACO Report. Instead, on January 3, 2022, it sent Blackstock a copy of the Report that was redacted ***in exactly the same manner as before***. R145; R238-245; R246. The only difference between the two reports was that the redactions in the initially-produced report were done in magic marker whereas the redactions in the newly-produced report were done electronically with a computer.

VDOT explained its refusal to provide a clean copy of the Final Report as follows:

> Mr. Blackstock-
>
> This email is in response to your FOIA request to VDOT for a copy of a report produced by Internal Audit in 2020 relating to the recruitment for a specific position. Please be advised that portions of the record you have requested relate to ***personnel information and investigations*** and are exempt from disclosure pursuant to ***§§ 2.2-3705.1 (1)*** and ***2.2-3705.3 (7)*** of the Code of Virginia. Therefore, these portions have been redacted from the records being released to you.
>
> Thanks,

R246 (emphasis added) In short, VDOT specifically and expressly invoked two discrete exemptions to support its redactions.

Although Blackstock disagreed with this heavily redacted Report, he did not pursue it any further at that time. He retired on April 1, 2022. R70.

D. The Supreme Court of Virginia Issued Its Decision In *Hawkins v. Town of South Hill* And, In Doing So, Heralded A New Day For Public Record Openness Under VFOIA.

On October 20, 2022 – six months after Blackstock retired from VDOT – the Supreme Court of Virginia issued its decision in *Hawkins v. Town of South Hill*, 301 Va. 416, 878 S.E.2d 408 (2022). In that case,

the Supreme Court narrowly defined the "personnel exemption" under VFOIA, and, in turn, greatly expanded the information that public bodies must produce about their employees under VFOIA. Indeed, the Court emphasized that the words "personnel" and "content" under Va. Code § 2.2-3705.1(1) – the so-called "personnel exemption" – must be narrowly construed under the Act. *Hawkins*, 301 Va. at 430; 878 S.E.2d at 415.

Relevant here, the Supreme Court in *Hawkins* defined the term "personnel information" as used in the VFOIA exemption under Va. Code § 2.2-3705.1(1) to mean: "data, facts, or statements within a public record relating to a specific government employee, which are in the possession of the entity solely because of the individual's employment relationship with the entity, and are private, but for the individual's employment with the entity." *Id.* at 432; 878 S.E.2d at 416.

The Supreme Court then reversed the decision of the Circuit Court below which had refused to order the production of certain requested documents and remanded the case so that the Circuit Court could consider the VFOIA request at issue under the new definition.

On remand, the Circuit Court concluded that the new definition made it much more difficult for public bodies to withhold information

under this exemption and, in large part, ordered the production of the requested documents. *See Hawkins v. Town of South Hill*, May 26, 2023 Opinion (R36-46). In doing so, the Circuit Court expressly recognized that "[t]he Supreme Court's opinion in *Hawkins* ***heralded a new day*** for the processing of FOIA requests . . . [and] significantly limits the [personnel] exemption in favor of disclosure." R36 (emphasis added).

E. Armed With *Hawkins*, Blackstock Made One Last Attempt To Obtain A Clean Copy Of The Audit Report But Again Was Unsuccessful.

A few months after the Supreme Court issued *Hawkins*, Blackstock became aware of the decision and decided to make one last effort to obtain a clean copy of the ACO Report under VFOIA.

To this end, on January 27, 2023, Blackstock reached out to VDOT yet again and, in relevant part, stated the following:

> … today I was directed to a recent Supreme Court of Virginia ruling that provides clarity regarding a broader and more practical definition of personnel records under Virginia's FOIA. Had this interpretation been in play during my grievance related FOIA request, I believe that I would have been more successful at that time.
>
> As a result of this ruling, I am contemplating additional options available to me in order to obtain an appropriately redacted copy of the audit report under FOIA and will probably be compelled in my appeal to include the context

> under which the document was originally requested and effectively denied by VDOT.
>
> My position (similar to that of plaintiff Richard Hawkins in the Supreme Court Case) is that agencies hide behind an overly broad definition of "personnel records" in order to deprive citizen access to documents which address the actions of government employees in the course of performing agency business.
>
> It seems to me that VDOT's denial of my request (ordered by DHRM) was less about protecting the personal info of the parties involved and more about denying me any sort of real or perceived tactical advantage in the grievance process that was simultaneously in play.
>
> My apologies for sharing this via personal text but I didn't want you to feel blindsided when I escalate this issue. I trust you and view you as an objective arbiter who may be able to suggest a less contentious route to satisfactorily resolve this matter.

R247. Blackstock also included a link to the Supreme Court's decision in *Hawkins*. *Id.*

Despite this new attempt, VDOT ***<u>yet again</u>*** refused to produce a clean copy of the Final Report. It did, however, produce a copy of the Report that was much less redacted on February 6, 2023 (R249). In an e-mail from Amanda Haley, it explained the production as follows:

> Good morning Mr. Blackstock,
>
> I am writing in response to your request, send January 27, 2023 and received via text message on January 30, 2023, for

> a copy of the audit report completed by VDOT's Assurance and Compliance Office in the matter of ACO Project 2020-218, with appropriate redactions in keeping with the definition of "personnel information" set forth in *Hawkins v. Town of South Hill*, Record No. 210848 (Va. 2022).
>
> Attached, please find the record you requested, which is provided with appropriate redaction of personnel information concerning identifiable persons pursuant to § 2.2-3705.1.

R249. The e-mail, however, made no mention of the "Investigative Notes" exemption.

II. Part 2: The Face Of The Report And The Testimony Below About It.

When the "lightly redacted"[5] version of the Report was finally produced in response to Blackstock's ***third request***, it made clear on its face that VDOT's ACO's investigation found that wrongdoing had been committed and that it recommended corrective action. R223. As the Report states on its very first page, "Based on the information reviewed and conclusions reached thereon, a corrective action recommended is included in this report." *Id.* The Report goes on to say "ACO recommends that [REDACTED] be counseled on actions involving related parties that

[5] These were the words used by VDOT's counsel below to describe the redactions, R95 (referring to "light redactions" in the Report) although Blackstock maintains that the Report is still heavily redacted.

can create the appearance of impropriety and opportunities for the public to question the transparency of VDOT recruitment and employment decisions." R224.

VDOT, however, said the subject of the investigation never received the recommended corrective action. According to Amanda Haley, the sole witness who testified on the issue, the subject had not, in fact, received a corrective action because she asked the VDOT Commissioner, and he told her so. R169. Haley, however, admitted that she was only aware of the lack of corrective action for the subject based on what she was told. R175. She also said that the employee in question was no longer employed with VDOT. R176.

STANDARD OF REVIEW

All of Blackstock's Assignments of Error turn on the specific facts of the case, namely (i) whether VDOT waived its right to rely on the "Investigative Notes" exemption by failing to invoke it in response to Blackstock's third VFOIA request and (ii) whether VDOT met its burden of proof for purposes of invoking the "Investigative Notes" exemption. Thus, this Court owes deference to the Circuit Court's findings unless

they are "plainly wrong or without evidence to support them." *Suffolk City School Bd. v. Wahlstrom*, 886 Va. 244, 253 (Va. 2023).

ARGUMENT AND AUTHORITIES

I. The Circuit Court Was Plainly Wrong In Ruling That VDOT Did Not Waive Its Right To Invoke, And Rely On, The "Investigative Notes" Exemption Because VDOT Did Not Contemporaneously Invoke It When It Should Have.

A. VFOIA General Principles.

We begin, as we must, with the basic principles that underlie and are codified into VFOIA.

First, "[t]he General Assembly enacted VFOIA to 'ensure the people of the Commonwealth [have] ready access to public records in the custody of a public body or its officers and employees.'" *Hawkins*, 301 Va. at 424, 878 S.E.2d at 411 (quoting Va. Code § 2.2-3700(B)). As the Act makes clear, "[t]he affairs of government are not intended to be conducted in an atmosphere of secrecy," and "[a]ll public records . . . shall be presumed open, unless an exemption is properly invoked." *Id.* This aligns with Justice Brandeis's famous words: "Sunlight is said to be the best of disinfectants." L. Brandeis, *Other People's Money* 62 (National Home Library Foundation ed. 1933).

Second, where, as here, the dispute involves the application of one of the Act's exclusions, the provision at issue must be construed narrowly. The statute makes this clear, stating:

> The provisions of this chapter shall be ***liberally construed*** to promote an increased awareness by all persons of governmental activities and afford every opportunity to citizens to witness the operations of government. Any exemption from public access to records or meetings ***shall be narrowly construed*** and no record shall be withheld . . . ***unless specifically made exempt pursuant to this chapter or other specific provision of law*** . . .

Va. Code § 2.2-3700(B) (emphasis added).[6] In other words, "[b]y its own terms, the statute puts the interpretative thumb on the scale ***in favor of disclosure.***" *Fitzgerald v. Loudon Cnty. Sheriff's Office,* 289 Va. 499, 505, 771 S.E.2d 858 (2015) (emphasis added)

Third and finally, the VFOIA puts the burden of proving that an exclusion applies squarely on the public body at issue, which body must do so by a "preponderance of the evidence." Va. Code § 2.2-3713(E). The Act also expressly provides that "[n]o court shall be required to accord any weight to the determination of a public body as to whether an exclusion applies." *Id.*

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[6] In *Hawkins*, the Supreme Court called these "clear statutory canons of constructions for the VFOIA." 301 Va. at 424, 878 S.E.2d at 412.

B. The Circuit Court's Ruling That Blackstock's Separate VFOIA Requests Were "Part Of Cumulative And Ongoing Correspondence Regarding The Same Report" So As To Allow VDOT To Invoke The "Investigative Notes" Exemption Was Clearly Wrong And Without Evidence To Support It.

Even though VDOT did not specifically and contemporaneously invoke the "Investigative Notes" exemption in response to Blackstock's third separate VFOIA request for the Report, the Circuit Court allowed VDOT to rely on it in defending against Blackstock's Petition. In doing so, the Circuit Court said that VDOT did not waive the exemption because it had previously invoked it and Blackstock's third request was simply "part of cumulative and ongoing correspondence about the same Report." R72. This ruling was clearly wrong and without evidence to support it.

Fundamentally, the Circuit Court's ruling misunderstands the nature of making independent and separate VFOIA requests. To be sure, Blackstock requested the same report on three different occasions. But these were not requests that occurred one right after the other. Instead, they occurred – separately – over a two-year period. Indeed, Blackstock's final request – and the one that was the subject of his Petition – was

made *after he had already retired from VDOT*. To say that VDOT had no obligation to expressly announce *all of the* exemptions it was relying upon for the *third request* would be basically to neuter VFOIA's statutory command that "***[u]nless*** a public body or its officers or employees ***specifically elect to exercise an exemption*** provided by this chapter or any other statute, . . . all public records ***shall be available*** for inspection and copying upon request." Va. Code § 2.2-3700(B) (emphasis added).

VDOT is not an unsophisticated Agency. And it knows how to invoke exemptions – and *which* exemptions it intends to rely upon. In fact, it would have been very easy for VDOT to say in the third response – "These are new redactions based on our interpretation of *Hawkins* but we are also still relying on the 'Investigative Notes' exemption." But it did not do so. As such, it waived the exemption, and the Circuit Court was wrong to apply it below. *See, e.g., Madeiros v. New York State Educ. Dept.*, 86 N.E.2d 527, 532 (Ct. App. N.Y. 2017) (holding that public body could not rely on exemption that was not contemporaneously raised at the administrative level) ("Because the Department did not rely on subparagraph (iv) in its administrative denial, to allow it to do so now

would be contrary to our precedent, as well as the spirit and purpose of FOIL").

To adopt the Circuit Court's analysis would also contravene the spirit of the VFOIA and allow for ambush-like behavior by public bodies. If a public body could name a laundry list of exclusions in response to a first request for a document, subsequently *change* that list to only one exemption in response to a later request, and then *re-assert* its initial list in response to a mandamus Petition, it would unfairly deprive petitioners of proper notice as to what issues to bring before the Court and would allow – as happened here – VDOT to pull a "bait and switch" when it came to defending its actions in the Circuit Court.

II. The Circuit Court Was Plainly Wrong In Ruling That VDOT Met Its Burden Of Proving That The Subject Of The Report Did Not Receive Any Corrective Action.

As previously noted, in a proceeding to enforce a VFOIA request, the Act specifically and expressly places the *evidentiary burden* for invoking an exemption on the withholding party – here, VDOT. Section 2.2–3713(E) states, "in any action to enforce the provisions of [the Freedom of Information Act], the public body shall bear the burden of proof to establish an exemption by a preponderance of the evidence." In

doing so, "[t]he burden of establishing the applicability of an exemption ... requires the claimant ... to provide more than ***conclusory language, generalized allegations or mere arguments of counsel.*** Rather, a sufficiently detailed record must reflect the reasons why an exemption applies to the materials requested." *New Haven v. Freedom of Information Commission*, 535 A.2d 1297, 1301 (Conn. 1988) (emphasis added).

Here, the Circuit Court's conclusion that VDOT met its burden of proof to establish that, *contrary to the face of the Report itself*, the subject of the Report did not receive a corrective action was plainly wrong and without evidence to support it. To be sure, VDOT employee Amanda Haley testified below that the subject did not receive a corrective action. However, her testimony was not, and is not, legally capable of sustaining VDOT's burden. Specifically, it was not based on any personal knowledge that she had. For example, *she* was not involved in any decision-making as to whether or not to give a corrective action and, instead, all she knew was what the VDOT Commissioner – **which did not testify below --** allegedly told her. R175. She also testified – again, as a matter of pure hearsay --- that none of the individuals named in the Report (**none of**

whom testified or submitted any testimony below) had consented to having their names disclosed to the public. R170. This apparently included the subject of the Report itself – although Haley conspicuously did **not** testify that the subject told her that he or she did not receive any corrective action.

None of this second-hand, hearsay, evidence is sufficient to sustain VDOT's burden, and the Circuit Court therefore erred in ruling that it was. *See, e.g., McChrystal v. Fairfax Cnty Bd. of Supervisors*, 67 Va. Cir. 171, 2005 WL 832242 at *4-5 (Fairfax Cnty. 2005) (holding that public body failed to sustain its evidentiary burden for purposes of applying a VFOIA exclusion where its evidence was not based testimony from persons with personal knowledge applicable to the exemption).

III. The Circuit Court Erred In Denying Blackstock's VFOIA Mandamus Petition Based On The "Investigative Notes" Exemption.

Based on the above, the Circuit Court erred in denying Blackstock's VFOIA mandamus petition based on the application of the "Investigative Notes" exemption. As has been explained, the exemption should never have been considered in the first place, and, even if it could be considered, VDOT failed to meet its burden of proof to show that the exemption

applied in this case. As such, the Petition for Mandamus should have been granted and the Circuit Court should have ordered either (i) that the entire clean unredacted Report should have been produced; or (ii) that the Report should have been produced in a fashion that identifies the subject of the Report's investigation.

CONCLUSION

In conclusion, for all of the above reasons, this Court should hold that the Circuit Court erred in denying Blackstock's VFOIA Petition for Mandamus and should order that the Report be produced, either in wholly unredacted fashion or in a manner that identifies the subject of the investigation. It should also grant Blackstock his attorney's fees for this appeal. This Court should then remand the case back to the Circuit Court to allow Blackstock to proceed forward with his request for attorney's fees in this case.

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Certificate

I, the undersigned, do hereby certify that on this 8th day of July 2024, I have filed the foregoing with the Court of Appeals of Virginia via VACES, and I further certify that a copy of the same has been e-mailed to the following counsel as listed below:

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Counsel does not wish to waive oral argument.

The foregoing complies with the word limit and contains 5,105 words, excluding the cover page, table of contents, table of authorities, and certificate

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