IN THE COURT OF APPEALS OF VIRGINIA

RECORD NO. 1669 – 23 – 2

NATIONAL PUBLIC RADIO, INC., CHIARA EISNER, AND IAN KALISH, *Appellants*

v.

VIRGINIA DEPARTMENT OF CORRECTIONS, Appellee

APPELLANTS' OPENING BRIEF

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January 25, 2024

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STATEMENT OF THE CASE

Exemptions to the Virginia Freedom of Information Act ("VFOIA") must "be narrowly construed" and records "presumed open," because "[t]he affairs of government are not intended to be conducted in an atmosphere of secrecy." Va. Code § 2.2-3700(B). Contrary to this command, the circuit court adopted a broad definition of an asserted exemption and rejected Appellants' petition to access public records. This result undermined VFOIA's fundamental purpose of ensuring the public is "afford[ed] every opportunity to witness the operations of government." *Id.* A government agency might prefer to decide when and whether its operations receive scrutiny—but "[o]ur government belongs to the people it serves." *Hawkins v. Town of South Hill*, 301 Va. 416, 421 (2022).

This case involves Appellants' attempts to access records about a subject of intense debate: the death penalty. Dating back to its time as a colony, Virginia has executed 1,390 people—more than any other state in the nation.¹ From 1976 to 2017, Virginia executed 73% of individuals who received death sentences, starkly higher than the national average of 16% over that same period.² The execution of

¹ Closing the Slaughterhouse: The Inside Story of Death Penalty Abolition in Virginia, Death Penalty Information Center (Nov. 7, 2022), https://perma.cc/KP3X-5MSE.

 $^{^{2}}$ Id.

William Morva in 2017 was the last to take place in the Commonwealth; Virginia legislatively abolished the death penalty in 2021.³

Despite this history, the public has long possessed little insight into what happened within the execution chamber. Recent reporting—spearheaded by Appellants Chiara Eisner and National Public Radio, Inc. ("NPR")—has finally illuminated this important area of criminal justice. Ms. Eisner's reporting focused on a series of audio recordings donated to the Library of Virginia in 2006, which documented four executions conducted from 1987 through 1990.⁴ NPR published Ms. Eisner's report about the recordings in January 2023; the story described and contextualized the recordings and presented the audio in full so the public could listen for themselves.⁵ The four tapes published by NPR, along with 19 similar execution tapes from Georgia, are the only "publicly available audio evidence from the more than 1,500 executions that have taken place across the U.S. during the past 50 years."⁶

⁴ Chiara Eisner, *NPR Uncovered Secret Execution Tapes from Virginia. More Remain Hidden*, NPR (Jan. 19, 2023), https://www.npr.org/2023/01/19/1149547193/secret-execution-tapes-virginia.

⁵ *Id*.

³ Whitney Evans, *Virginia Governor Signs Law Abolishing the Death Penalty, a 1st in the South*, NPR (Mar. 24, 2021, 2:50 PM), https://perma.cc/2JUA-JKW8.

⁶ *Id.* Unsurprisingly, other journalists have built on Ms. Eisner's work, including reporters for CBS News and the Associated Press. *E.g.*, Denise LaVoie & Sarah Rankin, *Virginia DOC Says Execution Audio Tapes Should Remain Secret*, AP

But additional tapes exist, hidden from public view. Appellants submitted multiple VFOIA requests to the Virginia Department of Corrections ("VADOC") seeking these recordings, but the requests were denied in full. A collection of 32 tapes concerning 27 executions remains inaccessible to the public.⁷ Appellants sued for their release in the Circuit Court for the City of Charlottesville, but that court held that the exemption codified at Va. Code § 2.2-3706(B)(4) (the "Records of Persons Imprisoned Exemption") applied to the requested recordings and allowed VADOC to withhold them in full. That exemption removes from mandatory disclosure "[a]ll records of persons imprisoned in penal institutions in the Commonwealth provided such records relate to the imprisonment." *Id*.

The circuit court misunderstood this exemption. The tapes are not truly records *of* inmates but are instead records of VADOC itself. The Records of Persons Imprisoned Exemption, properly construed narrowly, recognizes that VFOIA's goal of government accountability is not advanced by letting the public access a prisoner's personal records. Yet, VADOC is a government agency like

News (May 6, 2023), https://perma.cc/NUG2-QLQD; Secret Audio Tapes in Virginia Reveal 'The Only Window into a Live Execution that We've Ever Had,' CBS News (Mar. 7, 2023), https://perma.cc/NL34-GRZH.

⁷ VADOC, for the first time, identified and described the complete collection of tapes in its possession in its response to Appellant's Petition. R.85–86.

any other—the exemption does not shield records that VADOC itself makes to commemorate its own actions.

Accordingly, Appellants seek this Court's de novo interpretation, clarifying the narrow scope of the Records of Persons Imprisoned Exemption. No appellate court in the Commonwealth has yet construed the exemption, leaving records requesters, public bodies, and lower courts to operate without guidance. If VFOIA is to provide an avenue for public oversight of VADOC, the agency must not be permitted to shield its own records pursuant to an overbroad reading of this exemption. Indeed, even when the exemption applies to portions of records, VADOC must be required to produce the remainder of those records with redactions.

Appellants respectfully submit that the Records of Persons Imprisoned Exemption reaches only those records created by or belonging to an inmate. The requested recordings—which were created by VADOC and memorialize VADOC action—cannot satisfy this definition. Execution is the most severe and irreversible punishment the government can impose, and the importance of public oversight of that mechanism is undeniable. Disclosure of the requested records would achieve the goal at the very heart of VFOIA.

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STATEMENT OF ASSIGNMENTS OF ERROR

1. The Circuit Court erred as a matter of law in broadly construing the language of Va. Code § 2.2-3706(B)(4), which exempts from mandatory disclosure "[a]ll records of persons imprisoned in penal institutions in the Commonwealth provided such records relate to the imprisonment," to find that audio recordings created by Virginia Department of Corrections employees, and which contain narrations of executions, constitute records "of" an inmate that relate to that inmate's "imprisonment." (Preserved at R.8, 52–58, 133–138, 154, 186–191).

2. The Circuit Court erred in reaching the findings of fact in Paragraphs 3 and 5 of its Final Order about the contents of the records responsive to Appellants' VFOIA request, because those findings involved contested fact issues on which the Court did not hear evidence. (Preserved at R.142, 154, 169–173, 177–178, 187).

3. The Circuit Court erred in finding that VADOC was not required to redact and release any portion of the records responsive to Appellants' VFOIA request under Va. Code § 2.2-3704.01, which mandates that "a public record may be withheld from disclosure in its entirety only to the extent that an exclusion from disclosure . . . applies to the entire content of the public record." (Preserved at R.9–10, 70–71, 136–138, 154, 171–173, 175, 193–194, 198–199, 201–202).

4. Given the above errors and Appellee's burden of establishing by a preponderance of evidence that records responsive to Appellants' request are subject to an asserted statutory exemption to VFOIA, Va. Code § 2.2-3713(E), the Circuit Court erred by denying Appellants' Petition and dismissing the case without finding that Appellants' rights under VFOIA had been violated, that the requested records must be provided to Appellants, and that Appellants are entitled to reasonable costs and attorneys' fees pursuant to Va. Code § 2.2-3713(D). (Preserved at R.9–10, 51, 71–72, 147, 154, 173, 175).

STATEMENT OF FACTS

In a file kept in the archives of the Library of Virginia, Ms. Eisner located and obtained four cassette tapes, recorded between 1987 and 1990, that document the actions of VADOC employees connected with the executions of four death row inmates. R.18, Ex. A–D; R.47. The four recordings published by NPR range from roughly 12 minutes to 22 minutes in length. *Id*.

These tapes outline what happened in the execution chamber as narrated by observing VADOC employees: the arrival and briefing of witnesses,⁸ the testing of the electric chair,⁹ the warden's announcement of the court order to an inmate,¹⁰ the carrying of an inmate from his cell to the chamber,¹¹ and the administration of lethal electric surges.¹² The recordings also contain conversations between VADOC employees regarding administrative issues, for instance, difficulties

⁸ R.18, Ex. A at 0:45–2:42. In the circuit court Appellants filed audio tapes of the four publicly-available execution tapes, which are referred to here by their Exhibit name in the lower court. The audio was transmitted on a USB drive to this Court as part of the record in the case, *see* R.18.

⁹ R.18, Ex. A at 3:10–5:40; Ex. B at 0:21.

¹⁰ R.18, Ex. A at 11:25–12:15; Ex. B at 0:35–1:22; Ex. C at 2:14; Ex. D at 4:10.

¹¹ R.18, Ex. A at 12:50; Ex. B at 1:48; Ex. C at 3:12; Ex. D at 6:10.

¹² R.18, Ex. A at 15:58–16:38; Ex. B at 5:55–7:00; Ex. C at 15:45–16:16; Ex. D at 10:15–11:01.

receiving communications from the Governor's Office about a potential pardon.¹³ At times, VADOC staff even commented on the process of making the tape recordings; they discussed the audio equipment used,¹⁴ the format to record time signatures,¹⁵ and whether employee witnesses, seeking not to cause disruption within the chamber, were speaking loudly enough to be captured by the microphone.¹⁶ In sum, the recordings overwhelmingly contain narration made by and about employees of the Commonwealth; the voices of inmates awaiting execution are rarely audible.¹⁷ Although Appellants do not seek the re-production of those four tapes, VADOC has conceded that the tapes obtained by NPR are, in fact, its records, and would otherwise be responsive to the requests at issue in this case. R.86.

After NPR published Ms. Eisner's initial story on the tapes, VADOC requested that the Library of Virginia return the recordings and associated materials to the agency. R.48.¹⁸ The library acquiesced to this request. *Id.*

¹³ R.18, Ex. C at 3:40–6:43; 7:30–7:42.

¹⁴ R.18, Ex. A at 0:24.

¹⁵ R.18, Ex. B at 0:28.

¹⁶ R.18, Ex. B at 5:05.

¹⁷ See generally R.18, Ex. A–D.

¹⁸ Accord Chiara Eisner, Virginia Hid Execution Files from the Public. Here's What They Don't Want You to See, NPR (May 11, 2023),

On October 17, 2022, pursuant to VFOIA, Ms. Eisner requested the following records from VADOC: "All tapes, audio and other media recorded by staff during executions conducted in Virginia that are stored with the Virginia Department of Corrections. The records should include, but not be limited to, narrations of the execution as it was happening." R.20. On November 2, 2022, VADOC denied the Request, stating that the agency possessed responsive records but refusing to disclose any. R.24–25.

On April 13, 2023, Ian Kalish, an instructor at the University of Virginia School of Law First Amendment Clinic, re-submitted Ms. Eisner's request. R.28. VADOC once again denied the request in full. R.34–35.

VADOC's denial was initially predicated on four exemptions to VFOIA; the agency ultimately cited an additional exemption for the first time in its response brief:

- Va. Code § 2.2-3706(B)(4), (the "Records of Persons Imprisoned Exemption");
- 2. Va. Code § 2.2-3705.2(14), (the "Safety and Security Exemption");
- Va. Code § 2.2-3705.1(1), (the "Personnel Information Exemption");
- 4. Va. Code § 2.2-3705.5(1),

https://www.npr.org/2023/05/11/1174343605/virginia-hid-execution-files-from-the-public-heres-what-they-dont-want-you-to-see.

(the "Health Records Exemption"); and

5. Va. Code § 2.2-3705.7(25), (the "Executioner Identity Exemption").¹⁹

R.34, 85.

Appellants filed a petition for writ of mandamus in the Circuit Court for the City of Charlottesville on July 14, 2023. R.1. This petition requested a hearing and sought a writ ordering VADOC to produce the requested tapes in full or, in the alternative, to show cause why any portion of a tape could be withheld under a VFOIA exemption. R.10. The petition also sought an award of costs including attorneys' fees under Va. § 2.2-3713(D). *Id*.

VADOC filed a response and a motion to dismiss the petition in light of the five VFOIA exemptions described above. R.84. In that response, VADOC identified, by name, 31 executed inmates; it represented that those 31 executions were captured on 36 audiotapes responsive to Appellants' requests, among them the four tapes obtained by Ms. Eisner and published by NPR. R.85–86.

The circuit held a hearing on August 3, 2023. R.154. At the conclusion of that hearing, the court denied the petition, citing the Records of Persons Imprisoned Exemption as justifying complete withholding of the requested tapes

¹⁹ This exemption was not included in VADOC's initial responses to Appellants' VFOIA requests.

without requiring any redaction. R.216. The court entered a final order to the same effect, dismissing the petition and denying any relief requested therein, on August 28, 2023. R.152–53. The lower court did not offer an analysis of the Records of Persons Imprisoned Exemption, did not take fact evidence regarding the application of this exemption to the requested records, and did not make any judgments regarding the four remaining exemptions claimed by VADOC, R.154 —including any finding of fact or conclusion of law that would justify deviation from VFOIA's presumption of disclosure under those exemptions. *See* Va. Code § 2.2-3700(B).

Appellants timely noticed their appeal on September 22, 2023. R.156; Va. Code § 8.01-675.3. The Court has jurisdiction to hear this appeal under Va. Code § 17.1-405(A)(3).

STANDARD OF REVIEW

Appellants' first assignment of error is the circuit court's misconstruction of the Records of Persons Imprisoned Exemption. Construction of a statute is a question of law and is reviewed de novo. *Hawkins*, 301 Va. at 424; *Harris v. Commonwealth*, 274 Va. 409, 413 (2007).

Appellants' second and third assignments of error—the circuit court's misinterpretation of VFOIA's redaction requirements and its apparent findings of fact about the contents of the withheld tapes—raise questions of law and fact.

Interpretation of VFOIA's redaction requirement and "its application of [the] statute to its factual findings" are subject to de novo review. *Hawkins*, 301 Va. at 424 (2022). For fact-based inquiries, initially, "the public body shall bear the burden of proof to establish an exclusion by a preponderance of the evidence." Va. Code § 2.2-3713(E). While the circuit court's findings of fact regarding withheld records are generally subject to "deference," they will be set aside if "plainly wrong or without evidence to support them." *Suffolk City Sch. Bd. v. Wahlstrom*, 886 S.E.2d 244, 253 (Va. 2023) (cleaned up). Such evidence could include, but is not necessarily limited to, *in camera* review, which is "a proper method to balance the need to preserve confidentiality of privileged materials with the statutory duty of disclosure under VFOIA." *Bergano v. City of Virginia Beach*, 296 Va. 403, 410 (2018).

Appellants' fourth assignment of error involves the circuit court's failure to grant the Petition, order VADOC to produce the recordings, and award Appellants' fees and costs. To the extent the Court agrees with Appellants that the remaining exemptions asserted by VADOC are plainly inapplicable, it may reverse the circuit court's denial of Appellant's petition and order VADOC to produce the requested records. *See LeMond v. McElroy*, 239 Va. 515, 516, 521 (1990) (affirming order requiring public body to produce accounting records based on plain meaning of VFOIA exemption and record that included only petitioner's request, agency's

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denial, circuit court petition, a "transcript of a brief hearing at which no evidence was presented," and trial court's order). But, to the extent another exemption requires the resolution of fact issues, remand may be appropriate to determine whether VADOC can carry its burden to establish the exemption by a preponderance of evidence. Va. Code § 2.2-3713(E); *Hawkins*, 301 Va. at 433.

ARGUMENT

I. The circuit court erred in its construction of the Records of Persons Imprisoned Exemption.

The circuit court erred in holding that audio tapes made by government employees for governmental record-keeping purposes are "records of persons imprisoned" under Va. Code § 2.2-3706(B)(4).²⁰ Its holding contradicts the plain language of the exemption, VFOIA's construction provision that forecloses a broad definition of the word "of" and mandates that all exemptions "shall be narrowly construed," Va. Code § 2.2-3700(B), the accepted canons of statutory

²⁰ The Court took no fact evidence regarding the purpose of the requested recordings. However, VADOC has conceded that the tapes obtained by Ms. Eisner and published by NPR are part of the set that is responsive to the requests at issue. R.86. The vast majority of those four tapes, R.18, Ex. A–D, document the actions and conversations of government employees during the execution process. The voice or words of an inmate are rarely captured. Only one inmate provided a final statement, which was relayed by VADOC staff, R.18, Ex. B at 3:20–4:04, and at one point an inmate opted to read aloud the court's final order and his voice may be faintly audible, R.18, Ex. A at 12:08–12:15. Appellants argued below, and the government did not contest, that the tapes as a matter of fact feature a voice narrating events during the execution process. R.189.

interpretation, and the legislature's intent that VFOIA be a mechanism for government accountability and openness. This Court should reverse and provide clear guidance regarding the meaning and scope of the Records of Persons Imprisoned Exemption, ensuring that the public retains its ability to oversee the agency that staffs and runs prisons in the Commonwealth.

A. The plain meaning of the Records of Persons Imprisoned Exemption is clear, and the requested recordings are not records "of" an inmate.

On its face, the Records of Persons Imprisoned Exemption cannot apply to the audio tapes at issue. *See Brown v. Lukhard*, 229 Va. 316, 321 (1985) ("If language is clear and unambiguous, there is no need for construction by the court; the plain meaning and intent of the enactment will be given it."). The exemption, which was the sole basis for the trial court's order, R.152–53, applies to "[a]ll records *of persons imprisoned* in penal institutions in the Commonwealth provided such records *relate to the imprisonment*." Va. Code § 2.2-3706(B)(4) (emphasis added). VADOC's narrations of execution proceedings are not "records of" a prisoner but are instead VADOC administrative records that memorialize state action undertaken by the agency.

Virginia courts frequently turn to dictionaries to determine the plain meaning of a statutory phrase. *E.g., Tomlin v. Commonwealth*, 888 S.E.2d 748, 756 (Va. 2023) ("To discover the plain and ordinary meaning of everyday language, we consult general-purpose dictionaries."). Here, while the word "of" possesses several potential meanings, dictionaries reveal that it is best understood as "a function word to indicate belonging or a possessive relationship" in this context.²¹ Other dictionary definitions of the word "of" align with this understanding of close connection, including to mean "by" as an indication of authorship, as in the "plays *of* Shakespeare."²² All of these definitions mean something more than mere topical relation—they denote ownership, control, or creation. And importantly, as discussed *infra*, this limited understanding comports with VFOIA's clear requirement that this exemption "shall be narrowly construed." Va. Code § 2.2-3700(B).

The word "of" is used accordingly throughout VFOIA. For example, the statute houses exemptions for "educational records and certain *records of* educational institutions." Va. Code § 2.2-3705.4 (emphasis added). Similarly, it exempts certain "*[r]ecords of* local law-enforcement agencies." Va. Code § 2.2-3706(B)(3) (emphasis added). These exemptions cover records created or

²¹ Of, Merriam-Webster, https://www.merriam-webster.com/dictionary/of (last visited Jan. 24, 2024); *see also Of*, Cambridge Dictionary, https://dictionary.cambridge.org/us/dictionary/english/of (last visited Jan. 24, 2024) (defining of as a word "used to show possession, belonging, or origin").

²² *Of*, Merriam-Webster, https://www.merriam-webster.com/dictionary/of (last visited Jan. 24, 2024) (also defining "of" to "indicate origin or derivation").

controlled by a specific public body, not any record that merely relates to that public body.

Applying this definition, the Records of Persons Imprisoned Exemption is limited to a particular class of records—those created or controlled by inmates themselves. In contrast to other public bodies, VADOC is tasked with "supervision and control" of those in the department's custody. 6 Va. Admin. Code 16 (agency summary). Accordingly, the agency serves as custodian for personal records of inmates; many records of this type are, in fact, contained within an inmate's VADOC file, such as "Educational and Vocational Records" or "personal property inventories."²³ Records like those, though held by VADOC, do not convey "action taken [by] any level of government." Va. Code § 2.2-3700(B). They are "records of persons imprisoned." Id. at 2.2-3706(B)(4). When properly construed, the Records of Persons Imprisoned Exemption exists to separate these records, which the public has no legitimate interest in, from VADOC records that are essential to public oversight of that agency.

This dichotomy is not unique to VADOC records—other provisions of VFOIA similarly exclude certain records *owned or created by* private actors from

²³ See Va. Dep't of Corrections, Records and Information Management, Operating Procedure 050.1 at 6–9 (May 1, 2023), https://perma.cc/6KRJ-GPVX (identifying the types of records required to be uploaded to a prisoner's virtual file).

public view, even if they come to be held by a public body. For example, the Public Safety and Security Exemption contemplates "records *of any person* submitted to a public body for the purpose of antiterrorism response planning or cybersecurity planning or protection." Va. Code § 2.2-3705.2(14)(d) (emphasis added). Like the Records of Persons Imprisoned Exemption, this provision provides that such records can be exempted from public disclosure (at the request of the original submitter). *Id.* Similarly, the Health Records Exemption recognizes that public bodies may come to hold health records of incarcerated individuals, but provides that "the health records *of an individual so confined* shall continue to be confidential." Va. Code § 2.2-3705.5(1) (emphasis added).²⁴

The publicly accessible recordings make clear that the requested tapes cannot be considered records *of* inmates pursuant to the plain meaning of the Records of Persons Imprisoned Exemption. These recordings were neither created,

²⁴ VFOIA's exemption for "records of adult persons under (i) investigation or supervision by a local pretrial services agency . . . (ii) investigation, probation supervision, or monitoring by a local community-based probation services agency . . . or (iii) investigation or supervision by state probation and parole services" can be read similarly. Va. Code § 2.2-3706(B)(6). This exemption recognizes that these agencies receive, and create reports reflecting, the private and personal information of an individual under supervision, including "demographic information, diagnostic summaries, records of office visits, [and] medical, substance abuse, psychiatric or psychological records or information." Va. Code § 19.2-152.4:2(B); Va. Code § 9.1-177.1(B) (same). Much like an inmate's health records, the subject of supervision retains control over their private information, even though they are required to submit it to a public body.

controlled, nor possessed by an individual prisoner. While they do correspond with the execution of an individual, the tapes themselves were created by VADOC staff, contain the voices of VADOC staff,²⁵ and directly convey government action (both inside and outside the execution chamber).²⁶ When their voices are recorded at all, the words of an inmate are minimal—incidentally captured as VADOC personnel narrate the state action occurring within the chamber.²⁷ Inmates did not create the tapes; VADOC did.²⁸ Inmates did not control the tapes; they were largely passive participants in the state's execution of their death sentence carried, strapped down, and silenced by a death mask.²⁹ And inmates certainly never possessed these tapes, which were created outside of their observation and

²⁷ R.18, Ex. A at 12:24, Ex. B at 3:25–4:04 (repeating final words from the inmate) and Ex. A at 12:08–12:13 (faintly audible sound of inmate reading order aloud).

²⁸ See, e.g., R.18, Ex. A at 0:00–12:50 (all before the inmate enters the chamber).

²⁹ See, e.g., R.18, Ex. A at 15:39–21:29 (documenting entire execution process).

²⁵ See generally R.18, Ex. A–D.

²⁶ For government actions inside the chamber, *see*, *e.g.*, R.18, Ex. A at 15:39 (strapping inmate to chair), 15:59–16:07 (applying the first electric charge), 16:36 (applying the second electric charge applied), 17:46–17:53 (turning off the master control after completing the second charge), 20:57 (the examination of the inmate), and 21:29 (the announcement of an inmate's death). For actions outside the chamber, see for example, R.18, Ex. A at 0:00–5:44 (setting up recording, seating witnesses, and testing equipment) and 9:40–10:49 (discussing an employee outside the Governor's office with a radio in case telephone communication fails).

extend to capture action occurring after their death.³⁰ These tapes are simply not records *of* an executed individual, and the trial court erred in finding them such.

B. VFOIA's construction provision, the cannons of statutory interpretation, and the statute's legislative intent foreclose a broad reading of the Records of Persons Imprisoned Exemption that reaches the requested recordings.

Even if the plain text of the Records of Persons Imprisoned Exemption were ambiguous, it cannot be interpreted so broadly as to encompass the requested recordings. While the circuit court did not define the exemption in its order, it appears to have endorsed VADOC's argument that if a "record *involves* a specific inmate and relates to that inmate's imprisonment, it falls within this categorical exemption," R.91. In other words, the agency can withhold all "records *that relate to* specific individuals incarcerated within VDOC." *Id.* (emphasis added). Certainly, at times, "of" can mean "relating to" or "about,"³¹ but in context this is a remarkably broad construction at odds with the text and purpose of VFOIA, as well as long-standing principles of statutory interpretation.

As a preliminary matter, a broad definition of the word "of" is foreclosed by VFOIA's construction provision. To ensure meaningful governmental

³⁰ See, e.g., R.18, Ex. A at 17:53–21:31 and remainder of tape (time between end of electrocution and pronouncement of death).

³¹ *Of*, Merriam-Webster, https://www.merriam-webster.com/dictionary/of (last visited Jan. 24, 2023).

transparency, VFOIA mandates that all its "exemption[s] from public access to records . . . shall be narrowly construed." Va. Code § 2.2-3700(B). "The affairs of government are not intended to be conducted in an atmosphere of secrecy." *Id.* Thus, for the statute to operate as intended, courts must be wary of attempts by public bodies to rely on broad constructions that unduly expand an exemption's scope.

As described *supra*, the word "of" possesses several definitions that specifically convey a relationship of ownership or control. These definitions are appropriately narrow and limit the scope of the exemption only to records that VADOC possesses on an inmate's behalf. Widening that scope to records that merely relate to an inmate, *see* R.91, casts a significantly wider net that could catch many of the records VADOC creates in the normal course of business. In essence, the circuit court accepted VADOC's call for the broadest possible interpretation of the exemption, one that has the potential to remove a significant number of its records from public view. This is the precise outcome VFOIA's construction provision is meant to prevent. VFOIA commands that the word "of" must be given a narrow meaning, not a broad one. Va. Code § 2.2-3700(B).

In addition to VFOIA's own text, the canons of statutory interpretation also call for a narrow reading of this exemption. First, under the surplusage cannon, every word in a statutory phrase must be afforded effect and meaning. Antonin

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Scalia & Bryan Garner, Reading Law: The Interpretation of Legal Texts 150 (2012).³² Words may not be interpreted in a way which would make them duplicative to another provision or to have no consequence on the statutory provision as a whole. *Id.* Second, the presumption of consistent usage compliments this rule. *Id.* at 147. When a word or phrase appears throughout a statute, it should have a consistent meaning, and when a new word or phrase appears, the variation should be read as a meaningful one impacting the purpose of the statutory provision. *Id.* When combined, these canons instruct courts to read each word for a unique purpose and to recognize that different choices in language ought to be given different definitions and effects on the statutes.

The circuit court ignored these canons. There are two conditions that must be satisfied for the exemption to apply to a record: (1) the record must be "of [a] person[] imprisoned" and (2) the record must also "relate to the imprisonment" of that individual. The circuit court's order offers no insight into what these provisions mean or why they apply, R.153, but at the August 3, 2023, hearing, the court asked only one question aimed at the interpretation of this exemption. R. 189. After counsel for Appellants argued that the audio tapes document the

³² Texts like this may aid in matters of statutory interpretation. *E.g., Bland Henderson v. Commonwealth*, 77 Va. App. 250, 267 (Va. Ct. App. 2023) (explaining this Court's holding "also tracks the default rule recommended as a best practice by Justice Scalia and Professor Garner").

actions of government officials and are thus records of government action, the court asked: "But how are they not, then . . . records that relate to imprisonment specifically? I mean, if it's describing what the Department of Corrections is doing as to . . . that prisoner at that moment, how is that not related to prisoners?" R.189.

This approach elides the exemption's two conditions into a single meaning, effectively substituting the word "of" for the phrase "relating to." It also reads out half of the exemption, giving weight only to the second half, which describes records that "relate to the imprisonment" of an inmate, Va. Code § 2.2-3706(B)(4), because surely any record relating to the imprisonment of an inmate would also relate to that imprisoned person. If the General Assembly intended to exempt all records "relating to" or "about" an inmate, it could have done so in clear terms. Indeed, *the General Assembly used the phrase "relate to" later in the very same sentence*. Va. Code § 2.2-3706(B)(4). Under the surplusage cannon, the phrase "records of persons imprisoned" must mean something. And here, the General Assembly made a choice that the circuit court ignored.

Finally, the lower court's acceptance of VADOC's broad interpretation violates the fundamental purpose of VFOIA—to empower members of the public to oversee state action. *See* Va. Code § 2.2-3700(B) ("[t]he affairs of government are not intended to be conducted in an atmosphere of secrecy"). And to further this

purpose, "[b]y its own terms, the statute puts the interpretative thumb on the scale in favor of disclosure." *Fitzgerald v. Loundon Co. Sheriff's Office*, 289 Va. 499, 505 (2015). The statute imposes disclosure requirements on public bodies because they transact the affairs of state, and because in a democratic society the public possesses a powerful interest in overseeing those affairs. *See Cole v. Smyth County Board of Supervisors*, 298 Va. 625, 635 (2020) ("One of the purposes of VFOIA is to 'ensure[] the people of the Commonwealth . . . free entry to meetings of public bodies wherein the business of the people is being conducted."") (quoting Va. Code § 2.2-3700(B)).

The lower court's holding undercuts these principles, enabling VADOC to shield its actions from public scrutiny. Specifically, due to the absolute finality of an execution, the government's procedures—even historical ones—are a fundamentally appropriate subject of scrutiny, as "[w]hat is at stake . . . is the right of a condemned inmate not to be subjected to cruel and unusual punishment in violation of the Eighth Amendment." *See Dunn v. Price*, 139 S. Ct. 1312, 1315 (2019) (Breyer, J., dissenting).³³ Although Virginia has legislatively abolished capital punishment, debates about the death penalty's morality and

³³ Indeed, public oversight of Virginia's historical practices of execution is particularly important due to past incidents in the Commonwealth which several executions were reportedly botched. *See Botched Executions*, Death Penalty Information Center, https://perma.cc/R8VH-7RKV (last visited Jan. 20, 2024).

constitutionality endure. Indeed, Appellant NPR has reported on this debate extensively.³⁴ The public has a right to access records that inform this debate by directly demonstrating the process VADOC followed when taking a life.³⁵

³⁴ See, e.g., Frank Morris, A Court in Kansas is Reconsidering the Death Penalty, NPR (Feb. 6, 2023), https://www.npr.org/2023/02/06/1154739424/a-court-inkansas-is-reconsidering-the-death-penalty; Jaclyn Diaz, U.S. Inmates Condemned to Die Are Spending More Time on Death Row, NPR (May 12, 2022), https://www.npr.org/2022/05/12/1097184110/death-row-inmates-execution-time; Chiara Eisner, Carrying Out Executions Took a Secret Toll on Workers-then Changed Their Politics, NPR (Nov. 16, 2022), https://www.npr.org/2022/ 11/16/1136796857/death-penalty-executions-prison; Juliana Kim, More than a Third of Executions in 2022 Were 'botched,' a Report Finds, NPR (Dec. 21, 2022), https://www.npr.org/2022/12/21/1144188268/executions-2022-botched-lethalinjection; Bill Chappell, New Hampshire Abolishes Death Penalty as Lawmakers Override Governor's Veto, NPR (May 30, 2019), https://www.npr.org/ 2019/05/30/728288240/new-hampshire-abolishes-death-penalty-as-lawmakersoverride-governors-veto; Nina Totenberg, Supreme Court's Conservatives Defend their Handling of Death Penalty Cases, NPR (May 14, 2019), https://www.npr.org/2019/05/14/722868203/supreme-courts-conservatives-defendtheir-handling-of-death-penalty-cases; and Nina Totenberg, Supreme Court Closely Divides on 'Cruel and Unusual' Death Penalty Case, NPR (Apr. 1, 2019), https://www.npr.org/2019/04/01/708729884/supreme-court-rules-against-deathrow-inmate-who-appealed-execution.

³⁵ Indeed, VADOC's current leadership appears to recognize the critical importance of transparency in governance, especially when human lives are on the line. While employed at his previous post as the head of Virginia's parole board ("VPB"), the VADOC Director, Charles Dotson, emphasized the urgent need for transparency within the Board and the Department of Corrections in a report to Governor Glenn Youngkin. He touted that "[u]nder [his] leadership, VPB has publicly embraced an over-the-top level of transparency that far exceeds the typical standards for government agencies." Chadwick S. Dotson, *Press Release*, Virginia Parole Board (Jan. 6, 2023), https://vpb.virginia.gov/files/1232/vpb-press-release-2023-01-06-report-governor.pdf. He also advocated that agency "must embrace an over-the-top level of transparency, so the public can see what VPB is doing and Further, outside the context of execution, a broad construction of the Records of Persons Imprisoned Exemption provides VADOC with sweeping impunity to withhold *any* record *related to* an inmate. Given VADOC's remit, *see* 6 Va. Admin. Code 16, it is all but certain a significant portion of its records relate to inmates in some way. If that is enough to exempt a record, it is unclear how VADOC actions can be scrutinized at all. Because VADOC conducts the affairs of government, its records must remain presumptively accessible. Va. Code § 2.2-3700(B) ("The affairs of government are not intended to be conducted in an atmosphere of secrecy since at all times the public is to be the beneficiary of any action taken at any level of government.").

Informed by the foregoing factors, a proper interpretation of the phrase "records of persons imprisoned" aligns with the plain meaning described *supra*. The exemption covers records created or controlled by inmates themselves, like personal communications sent to or a from an inmate. Such records are clearly "of" persons imprisoned and would not facilitate governmental oversight if disclosed under VFOIA. But narrations made by prison officials that document VADOC carrying out the Commonwealth's most severe and permanent sanction are records "of" VADOC—not "of" a prisoner. They lie at the core of VFOIA's

trust that decisions are being made fairly, with full justification, and with proper consideration for public safety and the rights of victims." *Id.* at 3.

oversight purpose, and their exemption from disclosure under section 2.2-

3706(B)(4) violates the spirit and letter of the law.

II. Even if portions of the requested recordings were covered by the Records of Persons Imprisoned Exemption, the circuit court erred by failing to require redaction.

It is unclear if the court endorsed VADOC's contention that the Records of Persons Imprisoned Exemption is categorical in nature and not subject to VFOIA's clear redaction requirements, *see* R.98, or if it made a factual determination that every second of the requested tapes constitute records of a person imprisoned related to their imprisonment.³⁶ Either conclusion was in error.

First, as set forth below, VFOIA explicitly commands public bodies to release redacted records when possible. Second, the publicly accessible tapes clearly demonstrate that significant portions of these records do not directly relate to an inmate at all. Indeed, any factual determination that the unreleased tapes were entirely covered by the Records of Persons Imprisoned Exemption was "plainly wrong [and] without evidence to support" it, even under a deferential standard of review. *Suffolk City Sch. Bd*, 886 S.E.2d at 253. The circuit court's

 $^{^{36}}$ The circuit court, without analysis, concluded that "the entire contents of the audio recordings fall within the scope of § 2.2-3706(B)(4), and, therefore, VADOC was not required to redact and release any of [the] records under § 2.2-3704.01." R.153.

decision to deny the petition without hearing fact evidence regarding the unreleased tapes was "a clear error of judgment." *Lambert v. Sea Oats Condominium Association*, 293 Va. 245 (1997).

A. Agencies must produce non-exempt portions of records.

VFOIA requires that "all portions of the public record that are not . . . excluded [by an exemption] shall be disclosed." Va. Code § 2.2-3704.01. Like all VFOIA exemptions, the Records of Persons Imprisoned Exemption is subject to this blanket requirement—the only time VFOIA permits carte blanche withholding of an entire record is when an exemption covers *all the record's content*. *Id.* ("A public record may be withheld from disclosure in its entirety only to the extent that an exclusion from disclosure . . . applies to the entire content of the public record.").³⁷

The circuit court failed to require VADOC to comply with VFOIA's duty to redact. Before the lower court, VADOC argued that the Records of Persons Imprisoned Exemption rendered the requested recordings "categorically exempt" from any redaction requirement, R.98, because "[t]he records of incarceration

³⁷ VADOC recognizes this requirement in its own operating procedures, which state that "[s]taff may not withhold an entire record when only a portion is exempt [and] must release the requested records with the exempt information redacted." Va. Dep't of Corrections, Public Access to DOC Public Records, Operating Procedure 025.1 at 6 (Jan. 1, 2022), available at https://perma.cc/4386-CK7G.

exemption does not limit itself to only 'portions of any records' or records 'to the extent' they might reveal certain information . . . as do other FOIA exemptions." R.98–99. This argument attempts to resuscitate an abrogated holding from *Department of Corrections v. Surovell*, in which the Virginia Supreme Court concluded that "[h]ad the General Assembly intended to require redaction of documents . . . it would have included the phrase 'those portions' or 'portions thereof." 290 Va. 255, 268–69 (2015).

But the General Assembly explicitly *rejected* the Virginia Supreme Court's analysis in *Surovell*, and amended VFOIA to clarify that the redaction requirement applies no matter how an exemption is worded. Va. Code § 2.2-3704.01. As the General Assembly has explained, this clarifying legislation simply reinstated the law as it "existed prior to the September 17, 2015, decision of the Supreme Court of Virginia." 2016 Va. Acts ch. 620, 1264. And in 2022, the Virginia Supreme Court itself recognized that its prior decision has been rendered obsolete, holding that the 2016 legislative clarifications "allow[ed] for redactions to partially exempt documents." *Hawkins*, 301 Va. at 432 (2022).

The duty to redact imposed by Va. Code § 2.2-3704.01 reflects a legislative judgment that "redaction is the preferred method of production," rather than complete withholding. Senator Scott A. Surovell, *02/16/2016 Senate Proceedings*,

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Richmond Sunlight (Feb. 16, 2016) at 1:30:40–43.³⁸ During the Virginia Senate floor debate on the duty to redact legislation, the sponsor of the bill, 2016 S.B. 494, explained:

[T]he Supreme Court said because we used "portions" in some of the 120 exemptions and we didn't use "portions" in others, that meant that for some exemptions we meant to say, "the entire document goes out," but in other exemptions we meant to say, "you can redact."

And most people who understood FOIA didn't think that we were thinking in our committees all that precisely when we threw the word "portions" in an exemption here or there, and so that's why everybody was so alarmed by the decision.

And that's why we introduced this clarifying language to make it clear that redaction is the preferred policy.

Senator Scott A. Surovell, 02/16/2016 Senate Proceedings, Richmond Sunlight

(Feb. 16, 2016) at 1:36:01–34.³⁹ After this speech, the Virginia Senate

overwhelmingly passed the bill thirty-eight to one. Senate of Va. 2016 Sess.,

Minute Book Tuesday, February 16, 2016, Virginia's Legislative Information

System.40

³⁸ Available at https://www.richmondsunlight.com/minutes/senate/2016/02/16/ (last visited Jan. 20, 2024).

³⁹ Available at https://www.richmondsunlight.com/minutes/senate/2016/02/16/ (last visited Jan. 20, 2024).

⁴⁰ Available at https://perma.cc/95DH-V5GL (last visited Jan. 21, 2024). The bill then passed the House 98-2 and was approved by the Governor on April 6, 2016.

The message of the General Assembly could not be clearer: every VFOIA exemption should be subject to a duty to redact regardless of whether an exemption uses the phrase "portions," "to the extent," or "records." The circuit court's failure to hold VADOC to this standard was in direct opposition to the text and purpose of section 2.2-3704.01.

B. The circuit court erred by making findings on contested fact issues on which it did not hear evidence.

Even if the circuit court's order is not read to endorse a view that the Records of Persons Imprisoned Exemption is entirely free from VFOIA's redaction requirement, at the very least it contains findings of fact that cannot stand up to appellate scrutiny. The court's order appears to imply that every second of the requested tapes would fall under the exemption; it states in paragraph 5 that "the entire contents of the audio recordings fall within the scope" of the Records of Persons Imprisoned Exemption, "and, therefore, VDOC was not required to redact and release any of these records." R.153.

First, this conclusion is directly contradicted by the record. The publicly available recordings generally reveal capital punishment procedures within the

²⁰¹⁶ Session: SB 494, Virginia's Legislative Information System, https://perma.cc/8SY6-L48A (last visited Jan. 20, 2024).

prison,⁴¹ conversations between prison employees about stages of the execution process,⁴² descriptions of the conduct of the executioners and attending physicians,⁴³ and last-minute questions about whether the Virginia governor might intervene to spare the condemned person.⁴⁴ There is no reason that portions of the tapes containing information of this nature should be excluded from mandatory disclosure.

Not only do the publicly accessible tapes virtually foreclose this conclusion, but more fundamentally, ignoring protest by Appellants' counsel, R.171–72, the lower court failed to require that VADOC make any evidentiary showing at all. R.154.⁴⁵ This was reversible error. If the Court was not going to rely on the best

⁴² R.18, Ex. A at 5:44, 9:48; Ex. B at 3:58–4:22, 6:48, 8:28–9:20; Ex. D at 11:17.

⁴³ R.18, Ex. A at 15:39–17:53, 20:57–21:29; Ex. B at 4:22, 5:20–5:50, 6:50–7:45, 10:50–11:07; Ex. C at 7:01, 15:17–16:51, 20:04–20:33; Ex. D at 7:20–9:05, 10:17–11:40, 14:35–14:52.

⁴⁴ R.18, Ex. C at 3:48–5:53, 6:09–6:43.

⁴¹ R.18, Ex. A at 02:38, 3:12–5:44, 11:28, 12:50–13:10, 21:54; Ex. B at 0:08–1:22, 11:12–11:20, 11:23–11:36; Ex. C at 2:15–2:43, 3:08, 17:34–17:43; Ex. D at 3:11–4:10, 5:40.

⁴⁵ In addition to the paragraph finding that the entire contents of the recordings were covered by the exemption, the circuit court also made more general factual findings regarding the contents of the tapes in paragraph 3 of the Final Order, stating that "[e]ach audio recording corresponds to the execution of one inmate. The narrations detail the execution as it is happening, beginning when the witnesses enter the room adjoining the execution chamber, and ending after time of death is announced." R.152. Again, this finding of fact was reached without the

available evidence—the publicly available tapes—it should have instead required VADOC to submit evidence of its own. For instance, as the Virginia Supreme Court has explained, "a court's *in camera* review of the records constitutes a proper method to balance the need to preserve confidentiality of privileged materials with the statutory duty of disclosure under VFOIA." *Hawkins*, 301 Va. at 433 (quoting *Bergano*, 296 Va. at 410). But the lower Court did not conduct such a review to determine if certain portions of the remaining tapes fell outside of this exemption—which they clearly do—or hear any other evidence from VADOC about the contents of those tapes.

There is no evidentiary basis for the conclusion that VADOC has established, by a preponderance of the evidence, that an exemption applies in full. Va. Code § 2.2-3713(E). Because that apparent conclusion was "plainly wrong" and "without evidence," *see Suffolk City Sch. Bd*, 886 S.E.2d at 253, it must be set aside.

C. The circuit court's failure to require redaction throttles the public's ability to oversee VADOC.

As explained *supra*, the lower court's interpretation of the Records of Persons Imprisoned Exemption's scope impedes the public's ability to access

court requiring any evidentiary showing regarding the contents of the unreleased tapes.

VADOC records moving forward. This risk is further exacerbated by the court's failure to require appropriate redaction of the requested recordings.

This is the exact situation that the General Assembly sought to avoid when it enacted Va. Code § 2.2-3704.01. The legislative reaction to the *Surovell* ruling was driven by frustration that:

[I]f there is a single sentence in a public record that has been requested . . . that fits in an exemption in FOIA [the Virginia Supreme Court said] that the government is allowed to withhold the entire document from being produced to the public instead of redacting the sentence and then producing the document.

People didn't think that's what FOIA said and were very concerned about it.

Senator Scott A. Surovell, 02/16/2016 Senate Proceedings, Richmond Sunlight

(Feb. 16, 2016) at 1:28:49–1:29:11.46 Section 2.2-3704.01 was the General

Assembly's fix to a problem the circuit court's order revives.

Moving forward, it is unclear how VADOC's discretion can be restricted when responding to future VFOIA requests. Should the agency be free to withhold a report in full because the name of an inmate is included somewhere in the document? As the circuit court observed, the public's view into the actions of VADOC are already significantly limited, because while most mechanisms of the

⁴⁶ Available at https://www.richmondsunlight.com/minutes/senate/2016/02/16/ (last visited Jan. 20, 2024).

criminal justice system operate in the open—including the legal proceeding in which an inmate is sentenced—the public generally cannot directly observe what happens behind the prison gate.⁴⁷ Instead, the public relies on VFOIA to facilitate its ability to observe and bring accountability to VADOC. This ability must be preserved.

III. The circuit court erred in denying Appellants' petition.

While the circuit court limited its holding to the Records of Persons Imprisoned Exemption, no other exemption asserted by VADOC justifies its complete withholding of the requested records. As set forth below, the plain text of these exemptions precludes their application to the requested records. *See, e.g.*, *LeMond*, 239 Va. at 516 (holding that "plain meaning" of exemption did not apply and thus affirming order for public body to produce records). Similarly, as VFOIA provides that a petitioner who prevails on the merits "shall be entitled to recover reasonable costs, including . . . attorney fees," the lower court's failure to award such costs should also be overturned. Va. Code § 2.2-3713(D); *Cole*, 298 Va. at 643–644 (remanding case "to the circuit court for it to determine if [requester was] entitled to an award of attorney's fees and costs" after it had determined VFOIA

⁴⁷ R.212 ("[A]ll of what we do in the criminal justice system, everything is public. Everything is public, the trials are public, the sentencings are public. The only thing that's not public is what happens at the Department of Corrections.").

had been violated). However, even if this Court finds that an alternative exemption could potentially apply, it should remand the case for the circuit court to make legal and factual determinations regarding the application of such exemption.

A. The execution audiotapes are not "health records."

The Health Records Exemption, which covers "health records, except that such records may be personally reviewed by the individual who is the subject of such records, as provided in subsection F of § 32.1-127.1:03," Va. Code § 2.2-3705.5(1), plainly does not apply to the requested records. Indeed, the suggestion that it could is entirely absurd.

Health care involves "efforts made to maintain or restore physical, mental, or emotional well-being especially by trained and licensed professionals."⁴⁸ Virginia statutes define "health services" to include "examination, diagnosis, evaluation, treatment, pharmaceuticals, aftercare, habilitation or rehabilitation and mental health therapy of any kind." Va. Code § 32.1-127.1:03(B). To qualify as a health record, a document must relate to efforts to *advance* positive health outcomes. There is a clear distinction between health care and capital punishment.

Further, VADOC is categorically unable to rely on the Health Records Exemption to withhold its own administrative records because it is not a "health

⁴⁸ *Health Care*, Merriam-Webster, https://www.merriam-webster.com/ dictionary/health%20care, (last visited Jan. 24, 2024).

care entity," which is a statutory term incorporated by reference into the exemption by way of the definition of "health records" in section 32.1-127.1:03.⁴⁹ VADOC manages prisons; it is not a health care entity and does not itself produce health records. A health care entity is "any healthcare provider," *id.*, which includes individuals and organizations "licensed to provide health care" and which "*primarily* render[] health care services." Va. Code § 8.01-581.1 (emphasis added). Although some VADOC employees may work to treat the medical conditions of inmates, the agency's *primary* purpose is clearly incarceration; it cannot be considered a health care provider. Accordingly, VADOC cannot rely on § 2.2-3705.5(1) to frustrate disclosure of records conveying its administrative actions.⁵⁰ The narrations at issue here are not "health records."

B. The release of the requested recordings would not create a public safety or security risk.

The requested recordings are not exempt under the Safety and Security Exemption, which VADOC also relied on below. Va. Code § 2.2-3705.2(14); *see* R.93–95. This exemption applies to three main types of records: "(i)

⁴⁹ Specifically, "Health records" include certain communications to, and information kept by, a "health care entity." Va. Code § 32.1-127.1:03(B).

⁵⁰ In contrast, the records created by a VADOC contracted physician in the course of providing treatment could be considered a health record, as that physician could independently be considered a licensed health care provider. But the requested recordings here were not so created.

engineering, architectural, or construction drawings; (ii) operational, procedural, tactical planning, or training manuals; [and] (iii) staff meeting minutes." *Id.* It is facially evident that the records at issue do not fall into any of these categories. The statute then provides a catch-all exemption for "other records that reveal any of the following, *the disclosure of which would jeopardize the safety or security* of any person; government facility, building, or structure or persons using such facility, building, or structure." *Id.* (emphasis added). But this catch-all provision is limited, providing that an exempted record must jeopardize safety or security by revealing:

a. [c]ritical infrastructure information . . .

b. [v]ulnerability assessments . . .

c. [s]urveillance techniques, personnel deployments, alarm or security systems or technologies, or operational or transportation plans or protocols . . . [or]

d. [i]nterconnectivity, network monitoring, network operation centers, master sites, or systems related to the Statewide Agencies Radio System (STARS).

Id. Here, too, it is facially evident that several of the categories do not apply to the requested records—the requested recordings would not reveal vulnerability assessments, surveillance techniques or technologies, or interconnectivity or network information. *Id.*

The requested records also clearly fall outside the scope of the remaining

categories of the catch-all provision. First, the release of the requested records would not reveal "critical infrastructure information." Since Virginia abolished the death penalty in 2021, any information in the requested recordings relating to execution protocols or facilities is now defunct, and would no longer constitute "critical infrastructure."

Second, the release of the requested audio tapes would not reveal "personnel deployments" or "operational or transport plans or protocols." The provisions relate to *forward-facing* plans that could be thwarted through the public release of government records. Such concerns are not in play in the context of the requested records, as capital punishment no longer takes place in Virginia and any historical details revealed in the tapes are not at risk of being undermined.⁵¹ As such, section 2.2-3705.2(14) does not apply.

C. The requested recordings do not contain personnel information.

VADOC also cited the Personnel Records Exemption below, *see* R.95–96, which removes from mandatory disclosure "personnel information concerning identifiable individuals." Va. Code § 2.2-3705.1(1). The Virginia Supreme Court has construed this exemption narrowly, holding that it

⁵¹ Even if the recordings did fall under the scope of the "safety and security" exemption—which they do not—the record contains no evidence demonstrating that their release would create any risk of harm, an element required by the exemption. Va. Code § 2.2-3705.2(14)(iv)(a), (c).

encompasses "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." *See Hawkins*, 301 Va. at 432 (emphasis added). The Court recognized that this is a "privacy-based exemption, designed to protect the subject of the record from the dissemination of personal information." *Id.* This exemption seeks to protect personal information that government employees share with their employers—for example, the medical diagnosis of an employee seeking a workplace accommodation—and is limited to information that *"would not be disclosed to* the employer" absent the employment relationship. *Id.* at 415 (emphasis added).

This protection does not extend to recordings of employees conducting government business simply because an individual employee is featured in the record. Such records commemorate government action; they do not contain private information an employee disclosed to their employer. Allowing a public body to withhold records merely because they identify an employee involved in state action, even if embarrassing or regrettable, would thwart the entire purpose of VFOIA. *See id.* at 413 (stating VFOIA's primary purpose is

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"facilitating openness in the administration of government").⁵²

D. Release of the requested recordings would not reveal the identifies of individuals who conducted executions.

Finally, VADOC claimed that Va. Code § 2.2-3705.7(25) precludes the requested recordings from mandatory disclosure, *see* R.93–95, but it does not. This provision exempts "[i]nformation held by the Department of Corrections made confidential by former § 53.1-233," a since-repealed statute that protected the "identities of persons *designated by the director to conduct an execution*, and any information reasonably calculated to lead to the identities of such persons, including, but not limited to, their names" from disclosure. Va. Code § 53.1-233 (2020) (emphasis added).⁵³ But the publicly available recordings demonstrate that the VADOC employees are not those who *conducted* executions.

To "conduct" means "to direct or take part in the operation or management of [something]," "to direct the performance of [something]," or "to lead from a position of command."⁵⁴ First, the Court made no findings of fact on the activity of anyone on any of the withheld tapes. R.152. Second, the VADOC employees

⁵² Even if the recordings contained personnel information—which they do not any covered information could be redacted from the record.

⁵³ The statute was operative from 2007–2021.

⁵⁴ *Conduct,* Merriam-Webster, https://www.merriam-webster.com/ dictionary/conduct (last visited Jan. 24, 2023).

heard on the tapes published by NPR were not engaged in such activity. They did not actively participate in the execution but instead simply observed and relayed what occurred around them.⁵⁵ Indeed, a related statutory provision drew a clear distinction between the individuals designated to assist with an execution, and other VADOC personnel who may attend the event. Va. Code § 53.1-234 (2020) (In addition to the "assistants appointed by" the Director to "cause the prisoner under sentence of death to be electrocuted or injected with a lethal substance," "[a]t the execution there shall be present . . . *such other employees of the Department* as may be required by the Director.") (emphasis added). The staff heard in the tapes are clearly the latter.

There is no evidence in the record that the withheld recordings contain identifying information of those who actually *conducted* an execution; thus, the plain text of section 2.2-3705.7(25) does not apply to the records responsive to Appellants' request. The narrators of the publicly accessible tapes took pains to refrain from naming members of the execution team directly.⁵⁶ And even if a

⁵⁵ See generally R.18, Ex. A–D.

⁵⁶ R.18, Ex. C at 20:06 (referring to employee who opens the inmate's shirt as "team member"); Ex. D at 6:10 (referring to the "team" who escorts the inmate into the chamber) and at 14:35 (referring to the "team member" who opens the inmate's shirt). Names of individuals serving more administrative roles are occasionally spoken, R.200 (discussing R.18 Ex. A–D), but the identities of the execution team are not revealed.

withheld tape did contain such information, the records could be redacted and release in partial form, as VFOIA requires. Va. Code § 2.2-3704.01.

CONCLUSION

In light of the above, the undersigned respectfully asks this Court to reverse the court below and order VADOC to disclose the relevant tapes in its possession as open records under VFOIA. In the alternative, to the extent necessary, the Court should vacate the circuit court's order and remand for further fact-finding.

Dated: January 25, 2024

Respectfully submitted,

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CERTIFICATE

1. I certify that on January 25, 2024, this document was filed

electronically with the Court through VACES, and transmitted by email to:

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- 2. Appellants request oral argument.
- 3. This brief has 9,413 words and 41 pages, which complies with the

requirements of Rule 5A:19(a).

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