Record No. 0414-23-4

IN THE
COURT OF APPEALS OF VIRGINIA

Citizens for Fauquier County,
Appellant,

v.

Town of Warrenton, Virginia, *et al.*,
Appellees.

BRIEF OF VIRGINIA COALITION FOR OPEN GOVERNMENT AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

Amicus Curiae Virginia Coalition for Open Government (the "Coalition") respectfully submits this brief supporting Appellant Citizens for Fauquier County. The Coalition is a non-partisan organization founded in 1996 and dedicated to promoting government transparency by making records and meetings of Virginia state and local government as open and accessible as possible. The Coalition has more than 150 individual and institutional dues-paying members, with membership open to anyone. The Coalition often submits *amicus* briefs in cases involving the Virginia Freedom of Information Act and other public records laws to provide the courts with a perspective on the legal, practical, and policy implications of cases concerning the public's right to access information about its government.[1]

NATURE OF THE CASE

This case is about more than a dispute over records involving a data center. It is about the fundamental principles embodied in the Virginia Freedom of Information Act ("VFOIA" or the "Act"), Va. Code § 2.2-3700, *et seq.*, how courts are supposed to apply the Act, and why fidelity to the Act matters.

The Act protects important democratic values by promoting transparency and openness in government. Relevant here, the Act creates a presumption that the

[1] No party or its counsel, or any person other than the Coalition and its counsel, contributed to the preparation or submission of this brief.

public will have access to every government record unless the government proves that an enumerated and "narrowly construed" exemption protects the information within a disputed record from disclosure. Va. Code § 2.2-3700(B).

The Act also provides a private right of action to enforce its requirements, *see* Va. Code § 2.2-3713(A), and alters the traditional rules of civil litigation to promote openness and level the playing field. Perhaps most importantly, the Act assigns the burden of proof to *the government* to establish that it may lawfully withhold public records, instead of requiring the petitioner to prove otherwise. Va. Code § 2.2-3713(E). This burden-shifting provision is an essential feature of VFOIA. Because the government has access to the disputed records and the public usually does not, the petitioner in VFOIA litigation would rarely prevail if the petitioner were required to prove that disputed records were *not* exempt from disclosure. This would flip the Act's pro-transparency purpose on its head.

Unfortunately, that is what happened below. The circuit court declined to construe VFOIA as the statute directs and re-assigned the burden of proof to the petitioner. This approach runs contrary to what VFOIA requires and threatens the integrity of the Act. This Court should reverse and remand.

ARGUMENT

I. VFOIA Protects Important Democratic Values By Promoting Openness And Transparency Through Enforceable Requirements.

Over 50 years ago, the General Assembly enacted VFOIA to effectuate the bedrock principle that Virginia's "government belongs to the people it serves." *Hawkins v. Town of South Hill*, 878 S.E.2d 408, 410 (Va. 2022); *see also* 1968 Va. Acts, ch. 479; Va. Const. art. I, § 2 ("[A]ll power is vested in, and consequently derived from, the people . . . ."). Public disclosure laws like VFOIA "ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). Recognizing that "the public is to be the beneficiary of any action taken at any level of government," Va. Code § 2.2-3700(B), the Act "evince[s] a strong preference for open government," *Gloss v. Wheeler*, 887 S.E.2d 11, 26 (Va. 2023), and guarantees "the people of the Commonwealth ready access to public records in the custody of a public body or its officers and employees," Va. Code § 2.2-3700(B).

The Act makes good on this promise through a "laudable statutory bias in favor of disclosure." *Fitzgerald v. Loudoun Cnty. Sheriff's Off.*, 289 Va. 499, 506 (2015). First, the Act creates a broad presumption that the public will have unobstructed access to government records except under limited exemptions enumerated in the statute. *See* Va. Code § 2.2-3700(B) ("[A]ll public

records . . . shall be presumed open, unless an exemption is properly invoked.”). Second, the Act “set[s] forth clear statutory canons of construction” for the courts. *Hawkins*, 878 S.E. 2d at 412. Specifically, the Act’s disclosure requirements “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.” Va. Code § 2.2-3700(B). Conversely, the limited statutory exemptions to the general presumption of disclosure “shall be narrowly construed.” *Id.* Taken together, these provisions “‘put[] the interpretative thumb on the scale in favor of’ open government, and require[] that courts resolving disputes under VFOIA favor open government in close cases.” *Gloss*, 887 S.E.2d at 26 (quoting *Fitzgerald*, 289 Va. at 505).

When it comes to litigation, the Act is not like other statutes. To advance its “salutary statutory scheme to provide freedom of information consistent with open government,” the Act contains provisions that substantially modify the ordinary rules governing civil litigation. *Cartwright v. Commonwealth Transp. Comm’r of Va.*, 270 Va. 58, 64–66 (2005). For example, any person denied rights under VFOIA may file a petition for mandamus to enforce the Act without satisfying the common law elements of mandamus. *Id.* at 66 (citing Va. Code § 2.2-3713(A)). Perhaps most significantly, VFOIA provides that *the government* bears the burden of proof to demonstrate that a statutory exemption applies to prevent disclosure,

instead of requiring the petitioner to prove the contrary. *See* Va. Code § 2.2-3713(E) ("In any action to enforce the provisions of this chapter, the public body shall bear the burden of proof to establish an exclusion by a preponderance of the evidence."); *Cartwright*, 270 Va. at 65 (same).[2] The Act also directs that the government is due no deference on the question whether an exemption applies. *See* Va. Code § 2.2-3713(E) ("No court shall be required to accord any weight to the determination of a public body as to whether an exclusion applies."). These provisions flip the usual burden of proof and set aside the common law "presumption of regularity in the conduct of government business" that otherwise applies in mandamus actions. *Cartwright*, 270 Va. at 65.

The government cannot satisfy its burden in VFOIA litigation with a broad-brush approach. First, the government must provide specific information about each record withheld. This is because it is not possible for a reviewing court to decide "in a vacuum" whether a given document is exempt "without any idea of the precise nature of the document with which [the court is] dealing." *LeMond v. McElroy*, 239 Va. 515, 520 (1990); *see also, e.g.*, *Bergano v. City of Virginia Beach*, 296 Va. 403, 410–11 (2018) (reviewing individual documents to determine

[2] In the context of VFOIA, "there is no practical distinction between the use of the terms 'exemption' and 'exclusion.'" *Am. Tradition Inst. v. Rector & Visitors of Univ. of Va.*, 287 Va. 330, 334 n. 1 (2014). The Act and the Supreme Court use the two terms "interchangeably." *Id.*

whether VFOIA exemption applied); *Bland v. Va. State Univ.*, 272 Va. 198, 202 (2006) ("[T]he applicability of [a VFOIA exemption] to the reports in issue can only be answered by an inspection of the reports themselves."); *Moore v. Maroney*, 258 Va. 21, 26–27 (1999) (similar).

Second, because the Act's relevant exemptions apply only to "*information* contained in . . . public record[s]," as opposed to the records themselves, Va. Code § 2.2-3705.7 (emphasis added), the government must justify the scope of any claimed exemption within each disputed record. If the government wishes to withhold a record in its entirety, the government must prove that the entire content of the record is exempt from disclosure. Va. Code § 2.2-3704.01. "Otherwise, only those portions of the public record containing information [that is exempt] may be withheld, and all portions of the public record that are not [exempt] shall be disclosed" with redactions. *Id.*

The text of the Act is clear and the legislative history confirms what it commands. In 2015, the Supreme Court held that certain VFOIA exemptions allowed the government to withhold records wholesale even if only parts of those records were exempt. *See Va. Dep't of Corrs. v. Surovell*, 290 Va. 255, 268–69 (2015) (construing exemption "as a blanket exclusion"). Almost immediately thereafter, the General Assembly amended the Act to override *Surovell* and clarify that VFOIA requires the government to disclose with appropriate redactions any

portion of a record that is not exempt. *See* 2016 Va. Acts, ch. 620, at 1246–60 (codifying duty of partial disclosure and focusing exemptions on "information" rather than "records")); *id.* at 1264 (overriding *Surovell*); *see also Hawkins*, 878 S.E.2d at 414 (describing legislative history). Consequently, the government must fully justify its withholdings—not only on a document-by-document basis, but also within each document. *See Hawkins*, 878 S.E.2d at 416 (reversing order allowing town to withhold five documents in their entirety and remanding for determination of "precise contours" of exempt information within each document); *Bergano*, 296 Va. at 407, 410–11 (reversing order endorsing heavy redaction of attorney billing statement based on VFOIA's attorney-client privilege and work-product exemptions, and remanding for city to prove that each redacted fee entry was exempt).

Far from being a procedural idiosyncrasy, the burden of proof in VFOIA litigation is central to vindicating the Act's guarantees. The petitioner in a VFOIA action almost always starts at an information disadvantage because a person who has been unlawfully deprived of public records or excluded from a public meeting necessarily has little (if any) knowledge of what has transpired to that point. *See Bragg v. Bd. of Supervisors of Rappahannock Cnty.*, 295 Va. 416, 424 (2018) (allegations of VFOIA violations during closed meetings "were necessarily based

'on information and belief' because [the petitioner] was excluded from the meetings").

By contrast, the government, with full control over the relevant information, holds all the cards. When the government asserts that public records are exempt from disclosure under VFOIA, the petitioner is usually in no position to prove otherwise. After all, the petitioner does not have access to the records and is "comparatively helpless to controvert" the government's claims. *Vaughn v. Rosen*, 484 F.2d 820, 826 (D.C. Cir. 1973) (federal Freedom of Information Act).

This is why the Act assigns the burden of proof to the government and directs courts to construe exemptions narrowly. Va. Code § 2.2-3713(E) (burden of proof); Va. Code § 2.2-3700(B) (narrow construction). Were the rules otherwise, the deck would be stacked against the petitioner in all but the most egregious instances of government misconduct, countermanding the purpose of the Act.

II. The Circuit Court Altered VFOIA's Burden Of Proof, Undermining An Essential Component Of The Act.

This case started when Appellee Town of Warrenton (the "Town") withheld thousands of public records as exempt from disclosure under VFOIA, and Appellant Citizens for Fauquier County ("Citizens") filed a petition for mandamus to compel their release. *See* R. 143–44. In the ensuing litigation, rather than hold the Town to its burden of proof for each record, the circuit court inspected a few dozen records *in camera* that the Town curated for the court's review. *See* R. 281

(directing the Town's counsel to "get me . . . [t]en examples of each category that you claim these emails are exempt—the reason why they're exempt"). The circuit court acknowledged the "small sample size," but nevertheless allowed the Town to withhold *all* the disputed records in their entirety because "there [was] no indication of bad faith on the part of the Town or its counsel." R. 145.

This approach strayed from the Act's clear mandate. The Act required the Town to prove "by a preponderance of evidence" that each record it withheld is exempt. Va. Code § 2.2-3713(E). But the only evidence before the court was the "small sample" of records the Town provided for *in camera* review. R. 145. Without an evidentiary basis to conclude that the remaining thousands of records were exempt, the circuit court could not lawfully allow the Town to withhold them all.[3] Compounding the problem, the circuit court essentially rewrote the Act's judicial review provisions by putting the burden on Citizens to come forward with evidence of bad faith. *Id.* But bad faith is not a predicate to disclosure under VFOIA and erects an impossibly high standard that has no foundation in the Act. *See Suffolk City Sch. Bd. v. Wahlstrom*, 886 S.E.2d 244, 258 (Va. 2023) ("[T]he

[3] The circuit court also embraced an overbroad interpretation of the Act's exemption for information within the "[w]orking papers and correspondence of . . . the mayor or chief executive officer of any political subdivision of the Commonwealth." Va. Code § 2.2-3705.7(2). The Coalition focuses on the circuit court's mistaken approach to VFOIA's burden of proof because that error risks infecting other cases regardless of which exemption is at issue.

text of VFOIA contains no indication that a violation of VFOIA must be willful and knowing before an injunction may issue.").

The record reveals that the circuit court went awry because it was concerned about the burden of reviewing all the disputed records individually. *See* R. 281 ("I am not going to read 3,100-plus emails. . . . I don't have the time to do it, nor the inclination to do it."). But the Act does not demand that reviewing courts sift through reams of emails. To be sure, *in camera* review of each disputed record is "*a* proper method to balance the need to preserve confidentiality of privileged materials with the statutory duty of disclosure under VFOIA," *Bergano*, 296 Va. at 410 (emphasis added), but it is certainly not the only proper method.

A reviewing court has myriad other options. For example, the court could require the government to provide "a precise description of [each] document that would not reveal its terms verbatim." *LeMond*, 239 Va. at 520. The court could enter a protective order authorizing attorneys-eyes-only review of the disputed records and directing each party to submit representative exemplars for the court to review. *See Am. Tradition Inst. v. Rector & Visitors of Univ. of Va.*, 287 Va. 330, 334–37 (2014). The court could hold an evidentiary hearing and take testimony. Or the court could borrow from litigation under the Act's federal counterpart and require the government to produce a so-called *Vaughn* index that itemizes the

disputed records and details why the government maintains each record is exempt. *See Vaughn*, 484 F.2d at 827.

Courts have wide latitude to select from these options or devise others based on the circumstances of particular cases. But the Act's burden of proof imposes a hard limit in all cases: no matter which option a court decides to employ, the court must determine whether the government has provided competent evidence establishing an exemption for each record the government has withheld. That did not happen here.

The Act places the ultimate burden on the government in a bid to encourage transparency and discourage gamesmanship. In disregarding that burden, the circuit court replaced the Act with a scheme that is vulnerable to manipulation. The court allowed the Town to select its *in camera* submissions but imposed no guardrails on how those selections should be made. The result is that the Town was given an opportunity to referee its own withholdings. If this Court affirms and this approach proliferates, nothing will stop the government in future VFOIA cases from cherry-picking its submissions to create a more favorable—but potentially misleading—portrayal of the records in dispute. This Court should stop that mischief before it starts.

CONCLUSION

For the foregoing reasons, the Coalition respectfully requests that this Court reverse and remand.

DATED: September 8, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

I certify that on this 8th day of September, 2023, I served true and correct copies of the foregoing brief on all parties through their counsel of record via electronic mail at the addresses listed below.

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I further certify that this brief contains 2,622 words excluding the items identified in Rule 5A:1(c)(4).

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