IN THE

COURT OF APPEALS OF VIRGINIA

Record No. 0414-23-4

CITIZENS FOR FAUQUIER COUNTY,

Appellant,

v.

TOWN OF WARRENTON, VIRGINIA and
STEPHEN CLOUGH, Town Clerk to the
TOWN OF WARRENTON, VIRGINIA,
in his official capacity,

Appellees.

ON APPEAL FROM THE
CIRCUIT COURT FOR FAUQUIER COUNTY

BRIEF OF APPELLEES

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STATEMENT OF THE CASE

There are two main issues in this case. The first is the meaning and scope of the exemption to disclosure in Code § 2.2-3705.7(2), which is part of the Virginia Freedom of Information Act (VFOIA). The second is whether the trial court abused its discretion in the way it handled its proceedings for in camera review of the disputed documents, which the Town withheld under that exemption and three others. The Town submits that the trial court correctly interpreted and applied the VFOIA exemptions and did not abuse its discretion in any way.

ASSIGNMENTS OF ERROR

Appellant designated three assignments of error:

> 1. The Circuit Court erred as a matter of law in broadly construing the plain language of the exemption in Virginia Code § 2.2-3705.7(2) for "[w]orking papers and correspondence of . . . the mayor ***or*** chief executive officer of any political subdivision" to afford exemptions to both the mayor ***and*** chief executive officer of the Town of Warrenton, and so also erred in denying the Petition and motion for reconsideration and dismissing the case without finding one instance of denial of VFOIA rights by the Town's withholding of the alleged "working papers and correspondence" of both the Town's mayor ***and*** of the Town's manager.
>
> 2. The Circuit Court erred as a matter of law in holding that the Town's withholding of public records, either as the Town Manager's correspondence and working papers or under other exemptions, was appropriate or that the Town had otherwise carried its burden under Virginia Code § 2.2-3713(E), as only a handful of documents, from among thousands withheld, were submitted for in camera review, no index of the public records withheld was provided, and all of the documents submitted were selected solely by counsel for the Town without any interpretation of the scope of Virginia Code

§ 2.2-3705.7(2)'s exemption, any input or oversight from the Citizens or the Court, or any evidence regarding the manner or principle of selection employed or the sample's representativeness of those public records not selected.

3. The Circuit Court erred as a matter of law in relying on the "lack of indication of bad faith on the part of the Town or its counsel" in selecting the public records submitted for *in camera* review when holding the Town's withholding to be appropriate and otherwise finding that the Town carried its burden under Virginia Code § 2.2-3713(E), as this ruling erroneously credits the Town's withholding, places an impossible burden of proof on the Citizens, contrary to statute, and also lacks any evidentiary basis, as the Town submitted no affidavit or testimony, only argument, regarding the withholding and sampling.

Opening Br. at 12.

STATEMENT OF THE FACTS AND PROCEDURE

Appellant Citizens For Fauquier County submitted two requests under VFOIA to appellee the Town of Warrenton ("the Town"), one dated July 12, 2022, and the other dated October 14, 2022. R. 509-10, 533-35. Appellant's VFOIA requests sought emails from the Town Mayor and former Town Manager regarding their involvement with the proposed data center for Amazon, among other public records. R. 509-10, 534. In response to these requests, the Town advised that it was withholding a number of public records, including approximately 3,100 emails,[1] under four exemptions—attorney-client privilege (Code § 2.2-3705.1(2)),

[1] This is an approximate number, not an exact one, particularly given that the number can vary depending on how one counts the documents (together in threads or separately). The exact number is likely slightly higher.

personnel information (Code § 2.2-3705.1(1)), proprietary information (Code § 2.2-3705.6(3)), and the privilege granted for "working papers and correspondence of . . . the mayor or chief executive officer" of a political subdivision (Code § 2.2-3705.7(2)). R. 502, 519. The Town decided to produce one redacted email from the Town Mayor, but withheld eight others under the "working papers and correspondence" exemption. R. 520. Appellant requested that the Town then log all of the withheld records, detailing the specific information or document withheld, the exemption justifying withholding, and other information necessary for Appellant to evaluate the applicability of the exemption. R. 66, 542. Given the significant amount of labor it would take to compile such a log, and given that VFOIA does not entitle any applicant to such a log, the Town refused.

Appellant sued for review in the circuit court on December 22, 2022, contesting the Town's invocation of the exemptions. R. 1. Appellant focused mainly on the argument it raises here: that the exemption in Code § 2.2-3705.7(2) may cover only one chief executive officer, whether by the title of Mayor or another title, but not two. R. 10-17. Appellant also propounded its narrow interpretation of the term "correspondence." R. 10-17.

At the January 6, 2023 hearing, the Town requested that the contested documents be reviewed in camera, as confidentiality was a concern. R. 276-77. The trial court granted in camera review, but it constrained the volume of evidence

to be reviewed. Stating that it did not have the time to review over 3,100 emails, the court charged the Town's attorney with providing 10 samples of documents for each exemption claimed. R. 446. The court then reviewed these documents in camera, not disclosing them to Appellant's attorney. R. 447. Appellant's attorney objected, preferring an attorneys'-eyes-only review followed by argument on contested documents, presumably in open court. R. 447; Opening Br. at 38-39. Given the confidentiality concerns, the court rejected Appellant's request and opted instead for chambers-only review. R. 447, 453. The court ordered that the documents be sealed and remain sealed until further order of the court. R. 142.

The trial court held a second hearing on January 25, 2023. Appellant re-argued their points about the exemption in Code § 2.2-3705.7(2) and their objections to the court's in camera review process. R. 93-105, 334-37. Appellant pointed out that some localities in Virginia have both a mayor and a manager, while others have only a mayor. R. 98. In those localities with both, either the manager or the mayor performs most of the functions of a chief executive, and the other office is more ceremonial. R. 98. In those localities with only a mayor, the mayor performs the functions of a chief executive. R. 98. The Town has both a mayor and a manager, and the Town Manager performs the functions of the Town's chief executive. R. 98.

The trial court issued its decision on February 7, 2023, in an informal opinion to counsel. R. 141. It denied the Appellant's petition, concluding that the provision in Code § 2.2-3705.7(2) was an inclusive "or" and allowed the exemption to be claimed for both the mayor and manager, and finding that all the withheld records were exempt. R. 141. The court issued its formal opinion, stating the same decision, on February 15, 2023. R. 143-45. Appellant filed both an appeal and a motion for reconsideration on March 9, 2023. R. 146-73. The trial court denied the motion for reconsideration on April 26, 2023,[2] and Appellant filed an amended notice of appeal on May 10, 2023. R. 187, 188-90 (final opinion), 191-93.

STANDARD OF REVIEW

This Court "reviews issues of statutory interpretation and a circuit court's application of a statute to its factual findings, de novo." *Hawkins v. Town of South Hill*, ___ Va. ___ 878 S.E.2d 408, 411 (2022) (quoting *Cole v. Smyth Cnty. Bd. of Supervisors*, 298 Va. 625, 636 (2020)). But the Court "give[s] deference to the trial court's factual findings and view[s] the facts in the light most favorable to the prevailing part[y]." *Id.* (third alteration in original) (quoting *Va. Dep't of Corr. v.*

[2] It is likely any consideration of the motion for reconsideration would have been untimely anyway, given that the trial court would lose jurisdiction over the case on March 9, 2023. R. 490; Rule 1:1(a) (the trial court has jurisdiction over a matter only for 21 days after the date of entry of the final order and may not modify it thereafter). The motion for reconsideration procedure did not affect the timeliness of Appellant's appeal to this Court.

Surovell, 290 Va. 255, 262 (2015)). Whether a document "should be excluded under [VFOIA] is a mixed question of law and fact." *Id.* (alteration in original) (quoting *Surovell*, 290 Va. at 262).

A trial court's decision whether and how to conduct in camera review is reviewed for abuse of discretion. *Bowman v. Commonwealth*, 248 Va. 130, 135 (1994); *Garnett v. Commonwealth*, 275 Va. 397, 408-10 (2008).

ARGUMENT

The Town withheld a little over 3,100 emails and other records from the VFOIA response under four exemptions—attorney-client privilege (Code § 2.2-3705.1(2)), personnel information (Code § 2.2-3705.1(1)), proprietary information (Code § 2.2-3705.6(3)), and the privilege granted for "working papers and correspondence of . . . the mayor or chief executive officer" of a political subdivision (Code § 2.2-3705.7(2)). Appellant challenges the trial court's interpretation of the fourth exemption, arguing that the "or" in "the mayor or chief executive officer" should be an exclusive "or" rather than in inclusive "or." The Town submits that the most internally consistent reading of the statute is that the "or" is inclusive, and the trial court correctly interpreted and applied the provision.

Appellant further argues that the process the trial court employed in reviewing the exemptions was procedurally flawed. But whether and how to conduct an in camera review is well within the discretion of the trial court, and the

trial court did not abuse its discretion in choosing to review a sample of the emails rather than all 3,100-plus, as the court indicated it did not have the resources to review so many. Additionally, the trial court did not abuse its discretion in keeping the submitted documents within chambers rather than ordering their disclosure to Appellant's attorneys. Finally, even if the trial court did err in some way, Appellant's proposed remedy of immediate and full disclosure of all the withheld emails is not justified. The unchallenged exemptions still apply to some of those emails, and Code § 2.2-3705.7(2) would continue to apply to some of the emails, even if interpreted differently by this Court.

A. The working papers and correspondence of both the Town Mayor and Town Manager may be withheld under Code § 2.2-3705.7(2).

VFOIA grants the custodian of records the discretion to disclose or withhold the

> [w]orking papers and correspondence of the Office of the Governor, the Lieutenant Governor, or the Attorney General; the members of the General Assembly, the Division of Legislative Services, or the Clerks of the House of Delegates or the Senate of Virginia; the mayor or chief executive officer of any political subdivision of the Commonwealth; or the president or other chief executive officer of any public institution of higher education in the Commonwealth.

Code § 2.2-3705.7(2). This discretion is hemmed by the statute, but the basic decision whether to claim or waive the exemption as to any of the listed officers lies in the discretion of the custodian. Appellant's main challenge is that this provision does not give the custodian the discretion to withhold the working papers

and correspondence of both the Town Mayor and the Town Manager, but that the custodian must pick one or the other for all time and circumstances. There is nothing in the statute that would support that claim, and the most natural reading of the statute supports a contrary conclusion.

1. *The disjunctive is broader than Appellant characterizes, and it may allow one or both. It is limited to one only if other language, such as the use of "either" or "other," so indicates.*

Although both the trial court and Appellant frame the dispute over the reading of Code § 2.2-3705.7(2) as reading an "or" to mean "and," a more precise characterization of the issue is whether to construe the disjunctive as inclusive or exclusive. In other words, whether the word "or" limits the reader to only one of the options (the exclusive "or") or whether it may include all the options but permit the reader to leave out one or more options (the inclusive "or").

The word "or" naturally lends itself to this slight ambiguity. In general usage, there is a slight tendency toward the inclusive "or," where either one or both of the joined elements may be selected. Bryan Garner discusses the nature of "or" in his discussion of the reviled combination "and/or":

> *Or* alone usually suffices. If you are offered coffee or tea, you may pick either (or, in this case, neither), or you may for whatever reason order both. This is the ordinary sense of the word, understood by everyone and universally accommodated by the simple *or*.
>
> But in two situations this ordinary sense of *or* does not accomplish everything we need. Both involve the level of exclusivity between the elements on either side of *or*. One comes up in the

> standard statement of punishment, "a $1,000 fine or a year in jail *or both*." The other comes up when the choices are mutually exclusive. If that exclusivity is important to point out—if the judge must choose between a fine and jail, for instance—the writer may substitute *but not both* for *or both* in the previous example. But these situations generally arise only when linguistic rigor is imperative, as in legal drafting.

Bryan A. Garner, *Garner's Modern English Usage* 50 (4th ed. 2016). As he states, in the ordinary sense of the word, one usually tends toward the inclusive "or." But because of the inherent ambiguity, legal drafters often attempt to spell out the ambiguity by adding qualifiers such as "or both" or "but not both," or by using different constructions such as "either . . . or" or the dreaded "and/or."

The question in this case is, in the absence of particularizing qualifiers, which meaning of "or" did the legislature intend when it drafted Code § 2.2-3705.7(2)?

The first clue must be from the use of "or" and accompanying limitations in the statute itself. The text reads, in relevant part:

> The following information contained in a public record is excluded from the mandatory disclosure provisions of this chapter but may be disclosed by the custodian in his discretion, except where such disclosure is prohibited by law.
> . . .
> 2. Working papers and correspondence of the Office of the Governor, the Lieutenant Governor, or the Attorney General; the members of the General Assembly, the Division of Legislative Services, or the Clerks of the House of Delegates or the Senate of Virginia; the mayor or chief executive officer of any political subdivision of the Commonwealth; or the president or other chief executive officer of any public institution of higher education in the Commonwealth.

Code § 2.2-3705.7. This provision lists out several groups joined by "or."

- The Office of the Governor, the Lieutenant Governor, *or* the Attorney General.
- The members of the General Assembly, the Division of Legislative Services, *or* the Clerks of the House of Delegates *or* the Senate of Virginia.
- The mayor *or* chief executive officer of any political subdivision of the Commonwealth.
- The president *or other* chief executive officer of any public institution of higher learning in the Commonwealth.

Furthermore, all these groups are themselves joined by an "or."

Appellant does not dispute that the first two groups should not be construed so as to find, for instance, that the Office of the Governor may claim the exemption but the Attorney General may not, or that the Clerks of the House of Delegates may claim the exemption but the Clerks of the Senate may not. Rather, Appellant acquiesces in a reading that would allow *all* of these listed parties to claim the exemption at the same time, despite the presence of "or." Of course, the statute allows the custodian to claim the exemption for some and not others, so he/she need not exempt all of them in order to exempt one of them. Hence, in the Town's view, the statute uses "or," not "and."

The Town also does not dispute that the fourth group is phrased in the alternative: the custodian can exempt either the president or some other chief executive officer of a public institution of higher learning. But the Town contends that this is due to the presence of the word "other," not the presence of the word "or." This group is the only one that is written differently from the other three and from the provision as a whole. All others are joined by the word "or" standing alone; this last group is joined by "or other."

The dispute lies in the meaning of "or" for "the mayor or chief executive officer of any political subdivision." The Town contends that the best reading, in light of the numerous other uses of "or" in the statute, is that this provision should be construed as an inclusive "or" rather than an exclusive "or." As already stated, the first two groups use an inclusive "or," and Appellant does not dispute that. Moreover, the provision as a whole uses an inclusive "or" to bind the groups together. Appellant would hardly claim that only one of the listed persons might claim the exemption to the detriment of all the others—for example, that the Lieutenant Governor could claim the exemption, but then the members of the General Assembly could not. Clearly, the "or" binding the groups together is to allow the custodian to pick and choose for which listed persons he/she may employ the exemption, as may be applicable to the documents in his/her custodianship.

Further supporting the Town's reading of "or" as an inclusive "or" is the fact that this whole provision is a grant of discretionary power to the custodian of records. Code § 2.2-3705.7. In essence, the statute states that the custodian may disclose, but does not have to disclose, the working papers and correspondence of certain officials. The custodian can consider each official separately, determining which disclosures or retentions are within his office and best for the situation (within the confines of the law). When "or" grants discretion or suggests that items in a list should be considered separately, the courts have often construed that "or" as inclusive, albeit disjunctive. *See Commonwealth v. Barker*, 275 Va. 529, 544 (2008) (holding that Code § 65.2-402(D) used "or" in the disjunctive and "indicate[d] the listed medical conditions [we]re to be considered separately," but not foreclosing the option that a doctor could find the patient free of multiple of the listed medical conditions and the provision still apply); *Williams v. Commonwealth*, 61 Va. App. 1, 6 (2012) (holding that "cartridge, projectile, primer, or propellant" in Code § 18.2-308.2(D) is disjunctive, and thus not requiring the Commonwealth to prove all four, but allowing conviction to stand where ammunition met three of the four descriptors); *Massie v. Commonwealth*, 74 Va. App. 309, 325-26 (2022) (upholding conviction where indictment was phrased in the disjunctive and the Commonwealth proved one of the listed methods of

abduction, but not foreclosing a conviction if the Commonwealth had proved both).

2. Appellant incorrectly assigns too much weight to the FOIA Council's opinion from more than twenty years ago. That opinion is not binding on this Court, nor does it address the current version of the statute.

The Virginia Freedom of Information Advisory Council (FOIA Council) is "an advisory council in the legislative branch to encourage and facilitate compliance with the Freedom of Information Act." Code § 30-178(A). It may issue "advisory opinions or guidelines" regarding VFOIA "upon request," but those opinions are not binding. Code § 30-179(1); *Transparent GMU v. George Mason Univ.*, 298 Va. 222, 243 (2019) ("Over the years, the Attorney General and the Advisory Council have issued opinions addressing the status of nonprofit fundraising foundations. These advisory opinions, while not binding on the Court, are instructive."). Courts give them "due consideration" and may find their reasoning persuasive, but the conclusions of the Attorney General or the FOIA Council are not dispositive. *Transparent GMU*, 298 Va. at 243, 248 (quoting *Beck v. Shelton*, 267 Va. 482, 492 (2004)).

The language that FOIA Council opinion AO-12-02 (Oct. 30, 2002), addressed was former Code § 2.2-3705(A)(6), which read:

> Working papers and correspondence of the Office of the Governor; Lieutenant Governor; the Attorney General; the members of the General Assembly or the Division of Legislative Services; the mayor

> or chief executive officer of any political subdivision of the Commonwealth; or the president or other chief executive officer of any public institution of higher education.

Since 2002, the statute has been amended several times. Notably, in 2017, the statute was amended to the current version, which inserts "or" several times. In 2002, it would have been more reasonable to read "or" in "the mayor or chief executive officer" as being an exclusive "or," given that of the three appearances of "or," one is an inclusive "or" (the one binding the whole series together), one is an exclusive "or" accompanied by the word "other," and the third is inconclusive. The use of "or" in the 2002 statute did not evince a strong preference for the inclusive "or" over the exclusive "or," or vice versa.

But the 2017 amendment presents the situation very differently. Given the pervasive use of the inclusive "or," as argued in subsection 1 above, it is far less reasonable to read "the mayor or chief executive officer" as being an exclusive "or." The modifier "other" expressly indicates the only use of the exclusive "or" in the statute, and all the other instances are inclusive. Thus, it is more reasonable to construe "the mayor or chief executive officer" as being an inclusive "or." With the amendments, the persuasiveness of the 2002 FOIA Council opinion has diminished.

Appellant exaggerates the importance of the FOIA Council's not having issued another opinion on the issue for twenty years. Opening Br. at 34. The FOIA

Council issues advisory opinions in response to requests. Code § 30-179(1); FOIA Council opinion AO-6-00 (Oct. 6, 2000), https://foiacouncil.dls.virginia.gov/ops/00/AO_6.htm ("The Freedom of Information Advisory Council, by statute, has the authority to: 1. Furnish, *upon request*, advisory opinions or guidelines." (emphasis added)). If the FOIA Council does not receive a request or query about a certain subject, it will not issue an opinion on it. So the lack of another opinion on this issue could be because the FOIA Council never changed its mind. Equally, it could be because no one asked the FOIA Council for an updated opinion. Silence is hardly persuasive evidence for either position, especially in light of the General Assembly's amendments.

Finally, there is no statutory basis for the FOIA Council's conclusion that the custodian may not "switch back and forth" between the two officers as to different VFOIA requests. Obviously, if the custodian must choose only one, it makes sense not to allow a custodian to switch between them within the same response to a request. But to say that the custodian must, for all time, elect which officer receives the exemption as to all VFOIA requests is to intrude on the custodian's discretion without basis. There is no authority given either to the FOIA Council or to a court to thus constrain the custodian's discretion.

B. The term "correspondence" is not the same as "working papers," and its definition from ordinary meaning and from court opinions is broader than Appellant contends.

Appellant argues that the term "correspondence" is undefined and thus should be limited to "deliberative papers" like its companion term "working papers." Opening Br. at 22-23. But this argument is not sound, either in terms of statutory construction or in terms of the case law.

It is a "settled principle of statutory construction that every part of a statute is presumed to have some effect and no part will be considered meaningless unless absolutely necessary." *Hubbard v. Henrico Ltd. P'ship*, 255 Va. 335, 340 (1998). If "correspondence" is construed to mean nothing more than "working papers," then there is little reason for both terms to be in the statute; one or the other is rendered meaningless. Appellant gets the characterization of "deliberative papers," Opening Br. at 23, from the definition of "working papers" in the statute: "those records prepared by or for a public official identified in this subdivision for his personal or deliberative use." Code § 2.2-3705.7(2). But the statute does not apply this definition to "correspondence," nor does it give any indication that "correspondence" should be similarly limited.

Furthermore, it is another canon of statutory construction that "[w]hen the legislature leaves a term undefined, courts must 'give [the term] its ordinary meaning.'" *Am. Trad. Inst. v. Rector & Visitors of the Univ. of Va.*, 287 Va. 330,

341 (2014) (second alteration in original) (quoting *Dep't of Taxation v. Orange-Madison Coop. Farm Serv.*, 220 Va. 655, 658 (1980)). Following this canon, some courts have already defined "correspondence" as it appears in VFOIA, taking the definition from Black's Law Dictionary and dictionaries of ordinary usage. "This word has a common meaning. It is unnecessary to resort to principles of statutory construction to determine what is meant." *Richmond Newspapers v. Casteen*, 42 Va. Cir. 505, 506 (Richmond City Cnty. 1997). "It is defined as the 'Interchange of written communications. The letters written by a person and the answers written by the one to whom they are addressed.'" *Id.* (quoting *Correspondence*, *Black's Law Dictionary* (6th ed. 1990)).[3] Another definition is "communications by exchange of letters; letter writing." *Id.* at 506-07 (quoting *Correspondence*, *Webster's New Twentieth Century Dictionary*, unabridged (2d ed. 1983)). Also, it is generally accepted that emails are correspondence. *See Beck v. Shelton*, 267 Va. 482, 491 (2004) (approving Attorney General's description that "Electronic mail is commonly understood to be the electronic transmission of keyboard-entered correspondence over communication networks" (quoting 1999 Op. Va. Att'y Gen. 12, 13)).

[3] *Black's Law Dictionary* does not define the word "correspondence" in its newer editions (9th and 10th). The Sixth Edition is the latest edition to define the word, as far as counsel could confirm.

Communication by exchange of emails, then, is correspondence, regardless of whether the emails are "deliberative" in character. *See* Opening Br. at 23. Their nature as correspondence does not change even if sent to multiple recipients or if not engaged with by the recipients. *See Beck*, 267 Va. at 491 (noting that email may be sent to multiple recipients); *Richmond Newspapers*, 42 Va. Cir. at 505 (stating that the report in question was transmitted to the university president as part of an affiliated but independent entity's self-audit, and that he forwarded it to certain staff but otherwise did not engage with the report). Appellant attempts to argue otherwise, that merely receiving emails as part of a group message makes those emails not the correspondence of the recipient. Opening Br. at 37. But receiving an email *does* make that email one's correspondence, by definition. There is no basis in law or language to construe it otherwise. If someone is sending information through a written medium, that is correspondence. *Cf. Correspondence*, *Black's Law Dictionary* (6th ed. 1990) (defining "correspondence" in part as "[t]he letters written by a person"). The level of engagement of the recipient does not diminish the sender's communication as correspondence.

In short, Appellant's definition of correspondence is too narrow and does not align with existing case law or common English usage. All written communications by and to the exempted officials are contemplated by the term

correspondence, no matter whether they are deliberative in character or whether they are sent to a few recipients or many.

C. The trial court did not abuse its discretion in reviewing the Town's VFOIA exemptions.

Appellant's second and third assignments of error relate to the trial court's procedure in handling the judicial review of the Town's VFOIA withholdings. Appellant challenges that the trial court improperly shifted the burden from the Town to Appellant with its reliance on a small number of produced documents and invocation of a bad-faith standard as to that production. Appellant also disagrees with the court's factual findings that the documents produced in camera were subject to VFOIA exemptions.

1. The trial court did not incorrectly shift the burden of proof from the Town to Appellant. The burden of proof remained with the Town at all times.

The trial court did not incorrectly shift the burden to establish the applicability of a VFOIA exemption. There are 3,100-plus emails at issue for which the Town claimed exemptions. The Town agreed that it would submit the documents for in camera review so the trial court could review its invocation of the VFOIA exemptions. R. 441-42.

The trial court asked the Town to give a little more detail about what the documents were and why they were withheld, which the Town did. R. 442-44. The court then requested the Town to produce ten samples from each claimed

exemption for its review, stating, "I am not going to read 3,100-plus emails. . . . I don't have the time to do it." R. 446. Rather, the court relied on the Town's attorney, as an officer of the court, to present the documents requested as a fair sampling of the exempted documents. R. 446.

At all times, the burden was on the Town to demonstrate why it claimed its exemptions. The Town had to defend its decisions in argument and produce documents for review to the court. It did as required, by a "preponderance of the evidence," as required by law. Code § 2.2-3713(E).

Appellant contests this, stating that the Town did not provide evidence or testimony from witnesses in open court. Opening Br. at 16-17. But the evidence before the trial court included the evidence presented in camera, and there is no requirement in the law that the Town have provided further evidence in open court, when it presented the disputed documents in camera. *Cf. Hawkins v. Town of South Hill*, __ Va. __, 878 S.E.2d 408, 411 (2022) (stating that the trial court decided the VFOIA issues after in camera review, with no indication of argument or other evidence in open court (particularly given that the previous court hearing was on a demurrer, where no evidence is taken)).

Appellant further frames the trial court's decision as having rested on deference to the Town. However, this argument presumes that the trial court perfunctorily approved the application of the VFOIA exemptions and conducted no

meaningful review in the in camera review process. As far as the trial court's reliance on the Town's attorney's good-faith selection of the sample, the trial court relied on his duty as an officer of the court not to deceive the court with the documents presented. Finally, the law does not state that the trial court cannot defer in any amount to a public body or its attorney. Rather, it states that "[n]o court shall be *required* to accord any weight to the determination of a public body as to whether an exclusion applies." 2016 Va. Acts cc. 620 & 716 (cl. 2) (emphasis added) (amending Code § 2.2-3713(E)). This amendment was in reaction to the Supreme Court's decision in *Va. Dep't of Corr. v. Surovell*, 290 Va. 255 (2015), where the Court ruled that the trial court *must* defer to the VDOC's determination that the disputed documents would undermine prison security if disclosed. But the statute does not foreclose any level of deference to a public body's determinations; it states only that deference is not required.

2. The trial court did not abuse its discretion in conducting its in camera review. It properly kept the documents from disclosure outside of chambers and acted within its discretion in ordering a sample for review.

What Appellant truly disputes is the court's decision to limit the evidence before it and to exclude Appellant from the in camera review. But both decisions were squarely within the court's discretion.

Whether and how to conduct in camera review is well within the trial court's discretion. *Bowman v. Commonwealth*, 248 Va. 130, 135 (1994); *Garnett v.*

Commonwealth, 275 Va. 397, 408-10 (2008). Conducting an in camera review is a proper method to resolve VFOIA disputes while still preserving confidentiality, so the court did not err in ordering in camera review. *Hawkins*, 878 S.E.2d at 416. An opposing party is not automatically entitled to access to the materials submitted for in camera review. *See id.* at 411 (stating that the court "review[ed] the documents in chambers" and not indicating that the requester had access to the documents); *Garnett*, 275 Va. at 402-03, 415 (The facts indicate that defendant likely did not have access to the undisclosed material until after the trial.); *Peterson v. Fairfax Hosp. Sys.*, 32 Va. Cir. 294, 296 (Fairfax Cnty. 1993) ("The Court may make an in camera review of alleged privileged material prior to making it available to requesting party."); *In Camera Inspection*, *Black's Law Dictionary* (10th ed. 2014) ("A trial judge's private consideration of evidence."). Furthermore, nothing in VFOIA authorizes or commands an "attorneys' eyes only" review of the records.

The court ordered in camera review of the records precisely because preserving confidentiality is an important consideration. *See Hawkins*, 878 S.E.2d at 416. "The trial court is in the best position to assess the 'precise contours' of what is private in the context of [a] case," *id.*, and thus an appellate court will defer to the trial court's decision regarding the review process. A review in open court would completely defeat the purpose of the exemptions, since the exempted records would be disclosed in the court proceedings despite the claim. The court's

decision to order in camera review, with the documents accessible only to chambers, was not an abuse of discretion.

The court's decision to order only a sample of the withheld documents was also not an abuse of its discretion. The court indicated that it lacked the resources to go through 3,100-plus emails and review every one of them. Thus, it asked the Town to provide a sampling for each claimed exemption. Appellant contests that this sample size was not big enough, but it does not point to any source that states that a sample must be a certain size as a matter of law. Rather, this issue is one within the trial court's discretion. The Town contends that the court did not abuse its discretion in ordering the proceedings that it did, but if this Court finds otherwise, the solution is to remand for further proceedings (see section D below).

D. Even if the trial court abused its discretion, the Court should remand the case for another hearing. Appellant's arguments on appeal do not justify mandatory disclosure of everything.

On appeal, Appellant challenges only the construction of the VFOIA exemption regarding the work product and correspondence of "the mayor or chief executive officer of any political subdivision of the Commonwealth." Code § 2.2-3705.7(2). Appellant briefly addresses the application of the proprietary information exception under Code § 2.2-3705.6(3) and the personnel information exemption under Code § 2.2-3705.1(1) to several of the documents submitted for

in camera review. Opening Br. at 48-49.[4] But Appellant never addresses the attorney-client exemption under Code § 2.2-3705.1(2) and never addresses the application of the personnel exemption to the other documents.

The Town claimed all four of these exemptions when it withheld the disputed emails. Even if this Court finds that Appellant's interpretation of Code § 2.2-3705.7(2) is correct, or finds that Appellant's interpretation is incorrect but the trial court abused its discretion in conducting its in camera review, that conclusion would not justify immediate and full disclosure of all 3,100-plus documents. The attorney-client privilege, personnel-information, and propriety-information exemptions would still apply to at least some of those documents. Moreover, if the Court determines that Appellant's interpretation of Code § 2.2-3705.7(2) is correct, the Town would still be able to claim the exemption for one of the officials, either the Town Mayor or the Town Manager. But it would not be

[4] Appellant's challenge of the applications of these exemptions on pages 46-49 of its brief fail for several reasons, particularly because Appellant continues to construe the term "correspondence" too narrowly (see section B above). Opening Br. at 46-48.

To the extent that Appellant's arguments rest on the contents of the sealed documents that were presented in camera, this portion of Appellant's brief should be stricken in its entirety. The Town will address this issue further in its opposition to Appellant's motion for unsealing, but Appellant has improperly handled these materials in direct violation of the circuit court's sealing order. R. 142. The clerk of the court mistakenly disclosed these materials to Appellant's counsel. Appellant should have immediately alerted the court and Appellees' counsel and destroyed the documents within its possession. Instead, Appellant has sought to gain an improper advantage and further disclose to this Court, and possibly the public, materials that were never to be in its possession.

required to disclose the documents of *both* upon such a determination. Therefore, the exemption under Code § 2.2-3705.7(2) would still apply to some of the withheld documents.

If the trial court was wrong in any way in its decision or process, the remedy should be a remand for further proceedings, perhaps for a more-searching in camera review. *Cf. Hawkins*, 878 S.E.2d at 417 (remanding for further review because the trial court "erred in its interpretation and application" of the VFOIA exemption at issue). But full and complete disclosure is not appropriate at this time.

Furthermore, Appellant would not yet "substantially prevail on the merits of the case" even by winning its appeal, because the actual application of the exemptions to the documents would not be resolved on appeal. Thus, it is premature for Appellant to claim entitlement to costs or attorney fees.

CONCLUSION

The trial court correctly interpreted and applied the law when it held that the Town could withhold the challenged documents under VFOIA. This Court should affirm the ruling of the trial court.

Respectfully submitted,

TOWN OF WARRENTON, VIRGINIA
STEPHEN CLOUGH, Town Clerk,
in his official capacity
By Counsel

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CERTIFICATE

I certify that this Brief of the Appellees was electronically filed with the clerk of the Court of Appeals through VACES on this 2nd day of October 2023, and that a true copy was served electronically to the following counsel on the same day:

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This brief contains 25 pages and 6298 words, excluding the cover page, Table of Contents, Table of Authorities, signatures, and certification, in compliance with Rule 5A:19.

The appellees do not desire to waive oral argument in this matter.

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