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.

OPENING BRIEF OF APPELLANTS

From the Circuit Court of Fauquier County
Case No. CL22000551-00

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INTRODUCTION

This appeal under the Virginia Freedom of Information Act arises out of the Citizens for Fauquier County's efforts to inform the public about a special use permit ultimately granted to Amazon Web Services, Inc. for a data center in the Town of Warrenton, Virginia. Despite that legislative action being the subject of intense local debate,[1] the Town of Warrenton asserted that discretionary exemptions, found in the Virginia Freedom of Information Act, justified withholding thousands of public records, as the "correspondence" of the Town of Warrenton's mayor and manager. The Citizens challenged the Town of Warrenton's sweeping assertion that Virginia Code § 2.2-3705.7(2)'s exemption applied to both officials, and all their emails, but the trial court affirmed.

The issues on appeal are, first, whether the Virginia Freedom of Information Act's exemption for the "working papers and correspondence of" "the mayor *or* chief executive officer" of a political subdivision (the "**Political Subdivision Exemption**" or "**Exemption**") shields "correspondence" of both the Town of Warrenton's mayor *and* its chief executive officer. Second, whether the Town of Warrenton had carried its burden under Virginia Code § 2.2-3713(E) to establish the Exemption's application by proffering a few self-selected emails, from the

[1] *See* Teo Armus, *Warrenton Lawmakers Approve Plans for Controversial Amazon Data Center*, WASH. POST (Feb. 15, 2023), https://www.washingtonpost.com/dc-md-va/2023/02/15/warrenton-amazon-data-center-vote/.

thousands withheld, and offering no other evidence. Because these questions must be answered in the negative, the decision below must be reversed, and the right of the Citizens and "the people of the Commonwealth" to "ready access to public records" upheld. Code § 2.2-3700(B).

THE NATURE OF THE CASE & MATERIAL PROCEEDINGS BELOW

While an application for a special use permit ("**SUP**") to build a data center at the eastern gateway to the Town of Warrenton (the "**Town**" or "**Warrenton**") was pending, the Citizens for Fauquier County (the "**Citizens**") sought to inform the public debate on that process via public records requests under the Virginia Freedom of Information Act, Code § 2.2-3700 *et seq*. ("**VFOIA**"). R. 1–2, 5–6. Amazon Web Services, Inc. ("**Amazon**"), one of the world's wealthiest companies, was the applicant, the first to apply to build a data center under a recent zoning amendment that it had quietly instigated during the tenure and with the help of a Town manager who was later hired by Amazon (the "**Former Town Manager**"). R. 5, 539.

Believing sunlight the best disinfectant, the Citizens made two (2) requests under Virginia Code § 2.2-3704 (the "**Code**"), one dated July 12, 2022, assigned number T000148-071222 (the "**First VFOIA Request**"), and another dated October 14, 2022, and assigned number T0000177-101422 (the "**Second VFOIA Request**," together with the First VFOIA Request, the "**VFOIA Requests**"). The VFOIA Requests sought, among other public records, emails relating to the Town Mayor's

(the "**Mayor**") involvement in a resolution bearing on the proposed data center and the Former Town Manager's involvement in the SUP process, particularly her interactions with Town staff, Amazon, and others, and regarding the zoning amendment and proposed SUP.[2]

In response to the First VFOIA Request, the Town advised the Citizens that it was withholding a number of public records under three (3) exemptions, those covering proprietary information, "working papers and correspondence," and attorney-client privilege. R. 500–02 (citing Code §§ 2.2-3705.6(3), 2.2-3705.7(2), 2.2-3705.1(2)).

In response to the Second VFOIA Request, the Town took the position that that "[a]ll communications with the Town Manager are exempt" under Code § 2.2-3705.7(2). R. 46, 49, 522, 525. On November 4, 2022, the Town stated that "3,142 emails or email chains" "are exempt" because they were found in the Former Town Manager's inbox, and that it would be withholding them entirely, citing the exemptions for "working papers and correspondence," as well as personnel information and attorney-client privilege. R. 43, 519. In response to the same request, the Town stated it was producing one (1) redacted email, and withholding eight (8) others entirely, that involved the *Mayor*, citing the "working papers and

[2] *See* R. 22–59 (Exhibits A–C), R. 207–08 (admitting exhibits as evidence). These materials, although admitted in open court, have been sealed without a motion or court order addressing them. R. 498–535 (as admitted).

correspondence" and privileged materials exemptions that the Town also asserted with respect to the town manager's emails. R. 41, 44, 517, 520 (citing Code §§ 2.2-3705.7(2), 2.2-3705.1(2)).

Less than a week later, the Citizens wrote the Town, explaining that the Town's stated bases for withholding were inconsistent with longstanding Virginia Freedom of Information Advisory Council, an agency of the Commonwealth of Virginia (the "**VFOIA Council**"), opinions and the plain language of VFOIA and demanded production. *See* R. 60–66; R. 536–42. To the extent records were to be withheld under discretionary exemptions, the Citizens requested that the Town "provide a log of all materials withheld, in whole or in part, detailing the character of the specific information or document withheld, the exact exemption allegedly justifying application of such exemption, and such other information as is necessary to evaluate the applicability of the exemption." R. 66; R. 542. Within minutes after hand delivery of the letter, the Town rebuffed the Citizens, dismissing the VFOIA Council opinions cited and the Citizens' interpretation of VFOIA, and "stand[ing] by our determinations regarding your client's FOIA requests." R. 544, 208; *see* R. 8, ¶¶ 28–30; R. 90, ¶¶ 28–30. Despite the mandate of Code § 2.2-3700(B) and -3704(C) of "reasonable efforts to reach agreement," no information regarding the public records withheld or the grounds for withholding was provided.

Left with no other choice, the Citizens prepared to file suit. On December 13, 2022, the Town Council abruptly scheduled a January 10, 2023 public hearing on the SUP. After notice to the Town, R. 71, ¶ 9, the Citizens promptly filed a verified petition on December 22, 2022, contesting the withholdings (the "**Petition**"), R. 1–21, with exhibits and a good cause affidavit, R. 22–72, and sought expedited proceedings, as provided by statute, R. 73–75; *see also* R. 202:7–03:19.

At the initial hearing on January 6, 2023, the Citizens offered proof of their requests and what limited information about the withholding was disclosed by the Town, noting that as "the party making the request, you . . . have what they give you." R. 206–08. The Citizens argued that the plain language of Code § 2.2-3705.7(2) could not be read to apply to both the Mayor and, at the same time, the Town Manager, but only to one (1) chief executive officer, particularly in light of the statutory canons provided by the General Assembly. R. 208–32. Additionally, the Citizens urged that "correspondence" must be interpreted and applied narrowly, to documents of a similar character to "working papers," particularly those generated by or intended particularly for the officer in question, not others. *See* R. 225, 232–34, 251:15–55:9. Otherwise, a town could abuse the exemption simply by copying the official on all emails. R. 250:15–51:14.

Finally, the Citizens argued that the General Assembly has placed the burden of proving that such exemptions applied squarely on the withholding public body,

not the party seeking the records, and has directed courts not to give "any weight to the determination of a public body as to whether an exclusion applies." R. 235–36, 243–44 (citing, *inter alia*, Code § 2.2-3713(E)). To sum up the statutory command regarding public body withholding, "You can't take their word for it." R. 243:12. But that's just what the trial court did.

Although the Town argued in opposition to the Petition, R. 260:1–77:15, and filed a short brief the day before, R. 77–83, it called no witnesses, not even the Town Clerk, who was present at the hearing, and sponsored no testimony. *See* R. 200, 260:5–6. No exhibits or other materials were moved or admitted by the Town at that hearing (or any other). The Citizens repeatedly noted that there had been "only argument, not evidence, so we don't have anything to . . . carry the burden of the Town today to establish the exemption." R. 280:7–12; *see* R. 282:22–83:9. The Town implied that it deferred to the Former Town Manager on the decision to withhold that officer's "correspondence" and that it withheld materials on which the Former Town Manager was copied, or was on the distribution list more generally, and recognized that "the accepted process, is for documents to be produced *in camera* for the judge's inspection." R. 268:1–69:5, 271:10–20.

At the conclusion of the hearing, the Town offered to provide all of the materials for *in camera* review, the only way it proposed to carry its burden. Counsel for the Town, in fact, conceded that "it appears clear that there's going to need to be

in-camera [sic] review . . . the only way to determine whether the Town has violated FOIA for [sic] review of these documents that were exempted and determination *one by one* as to whether they meet the various exemptions . . . .” R. 276:16–77:11 (emphasis added).

The trial court declined. Instead, it asked counsel for the Town to simply “describe sort of generically, without going into detail, what these three thousand – 3,100 plus emails are about?” and “the reason why they were withheld.” R. 277:16–22. Having received a very generic and conclusory summary only from counsel for the Town, not even its VFOIA officer, R. 278:3–79:4, the trial court directed the Town “to get, say, five examples of those emails in the different categories that you claim exemption for and send them to me,” to “keep them under seal” “not reveal them to the Petitioner at this time, and then make a determination[.]” R. 279:5–13.

The Citizens objected immediately to this manner of proceeding, with which the Town was “[h]appy to” oblige, R. 279:14, noting that the Town would be selecting the evidence being reviewed, “entirely in the dark” from the Citizens, including their attorneys, and the trial court. R. 280:13–20. What’s worse, the Citizens noted, we don’t “really know from what they’re selecting”, as no detailed statement of the number of public records held by exemption or “category” was before the trial court. R. 280:17–18. Rather than taking any steps to ensure representativeness of the “sample” or provide oversight, the trial court decided

simply to increase the number to "10 of each category." R. 281:3–6. Judicial review of all the records withheld would not happen: "I will tell you all right now, and I don't care if the Supreme Court or the Court of Appeals hears this or not, I am not going to read 3,100-plus emails. I'm just not going to do it. I don't have the time to do it, nor the inclination to do it. So I trust Mr. Crim," counsel for the Town, "to get me examples. Make it 10, Mr. Crim." R. 281:8–14. Counsel for the Citizens repeatedly proposed an attorneys'-eyes-only review by which objectionable examples would be identified and particularized arguments made, but the Court declined. R. 281:21–82:21, 288:14–20.

On January 13, 2023 public records were submitted by the Town directly to the presiding judge for review, without any affidavit or representations (the "***In Camera* Submission**"). R. 86–87. The *In Camera* Submission was not disclosed to the Citizens, but ordered sealed by the Court. R. 142; Sealed R. 2 (Jan. 13, 2023 Ltr.). Neither the number of records, the specific exemptions claimed, the facts about the records that were part of *In Camera* Submission and that justified withholding, the number of records from which the *In Camera* Submission were selected, nor the principle of their selection were provided to the trial court with the *In Camera* Submission, much less disclosed to the Citizens. The Citizens' point was, and is, that even if the Court concludes that the *In Camera* Submission documents were properly withheld, although it should not, *see infra* at pages 45–49,

it can draw no conclusions about the propriety of the withholding of the remaining thousands of records.[3]

In anticipation of a further hearing on January 25, 2023 for the Court's ruling, the Citizens filed a brief in response to the Town's brief, disputing its arguments on the scope of the Exemption in Code § 2.2-3705.7, pointing out that additional public records responsive to the VFOIA Requests were untimely provided by the Town on January 13th and January 18th, R. 95, 108–25, and expanding upon its objection to the Court's manner of judicial review to the claims of exemption, R. 101–04.

At the January 25, 2023 hearing, the Court did not rule, but did raise its concern that "there's no standard in the statute as to how a judge would decide" "who gets to claim" the exemption, i.e. whether it is the mayor or the chief executive officer, or both. R. 325:17–26:19, 332:6–17. The Citizens urged that the exemption was aimed at the chief executive officer of the political subdivision, which is sometimes the mayor, although that is not the case in Warrenton.[4] Thus, the very

[3] R. 339:3–40:3 (allowing that there may be "10 actual pieces of correspondence form the town manager within 3,142 emails selected," but questioning "Are there 3000?" and urged that the withholding "be tested in some way, and the only way to test it is to have at least a representative sample, if not a complete review").

[4] Charter of the Town of Warrenton § 6.1 ("There shall be a Town Manager who shall be the chief executive officer of the Town and shall be responsible to the Council for the proper administration of the Town government."); § 6.3 (listing the Town Manager's "duties and powers"); *id.*, § 5.2, 1964 Acts of the Assembly, c. 47 (Feb. 19, 1964), as amended ("The Mayor shall preside over the meetings of the Council and shall have the same right to speak therein as Councilmen, however he shall not have the right to vote except in the case of a tie, in which event he shall be

text of the exemption not only authorized, but required, the Court to so construe and apply the language to the political subdivision before it, rather than permitting the subdivision to claim two (2) chief executive officers where others, including counties, authorities, commissions and the like would have only one (1). *See* R. 332:18–33:19. (No one asserted that political subdivisions without mayors can claim another officer instead.) Additionally, the Citizens urged that the *In Camera* Submission, what could be no more than fifty (50) public records from a pool of over 3,142, representing ten (10) or less of five (5) different exemptions, was an inadequate basis to determine "whether the whole withholding was appropriate," particularly given the Town's failure to submit other evidence. R. 334:16–41:8. The Town's decision to assert the exemption and then "make it hard on" the Court to review "doesn't mean you should say, fine; you get to withhold it all." R. 341:8–10. Rather, the Citizens argued, in such a case, "it's appropriate and necessary to just order disclosure." R. 341:8–42:2. The Court did not do that.

Instead, on February 7, 2023, the Court issued an informal opinion via email, denying the Petition entirely, concluding that "or" meant "and" with respect to the Town's mayor and town manager, and finding all of the withheld records exempt (the "**Informal Opinion**"). R. 141. Thereafter, an opinion letter issued, on February

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entitled to cast one vote. He shall be recognized as the head of the Town for all ceremonial purposes, the purposes of military law and the service of civil process.").

15, 2023, R. 143–45, the date the SUP was granted to Amazon (the "**Formal Opinion**"). Citing the "manifest absurdity rule," the use of "or" elsewhere in Code § 2.2-3705.7(2), and the lack of "any standard set forth for the determination . . . as to which officer is exempt," the Court adhered to the conclusions in the Informal Opinion regarding the scope of that exemption—the Town gets to exempt both the Mayor and the Town Manager's "correspondence." R. 144–45. From review of the few materials provided as part of the *In Camera* Submission, the Court concluded that "the withholding of the Town manager's correspondence and working papers is appropriate," as were the Town's "claims for other exemptions." R. 145. Despite recognizing "the small sample size," the Court explained that "there is no indication of bad faith on the part of the Town or its counsel" in the selection. R. 145.

The Citizens protectively noted their appeal of the Informal Opinion and Formal Opinion on March 9, 2023, R. 146–53, and also filed a motion for reconsideration, identifying the errors assigned herein. R. 154–86. This motion, too, was denied, and a final order entered on April 26, 2023, incorporating the Formal Opinion. R. 187–90. An amended notice of appeal was timely filed on May 10, 2023, R. 191–94, and a Statement of the Assignments of Error followed on August 8, 2023 and are reproduced below.

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.[5]

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.[6]

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.[7]

[5] Preserved at R. 12–14, 141, 144–45, 154–56, 161–70, 188–89.
[6] Preserved at R. 141, 145, 154, 156–60, 170–71, 188–89.
[7] Preserved at R. 141, 145, 156–60, 170–71, 188–89.

STATEMENT OF FACTS

The facts pertinent to this appeal are few. The Citizens for Fauquier County is a Virginia non-profit, nonstock corporation, founded in 1968, the same year VFOIA was adopted, with the mission to preserve the natural, historic, and agricultural resources of Fauquier County, Virginia. R. 4, ¶ 4; R. 88, ¶ 4. The Town is a local public body, subject to VFOIA, that is located in Fauquier County, Virginia, and is a political subdivision of the Commonwealth. R. 4, ¶ 5; R. 88, ¶ 5. Its chief executive officer is its town manager, not its mayor, who is mostly just the "head of the Town for all ceremonial purposes," even in the legislative process.[8]

The Citizens, through a representative, made the two (2) VFOIA Requests to the Town, requesting a range of public records. *See* R. 23–59. The Town acknowledged the Citizens' VFOIA rights and the Citizens paid several thousand dollars to exercise them. R. 6, ¶ 18; R. 8, ¶ 27; R. 89, ¶ 18; R. 90, ¶ 27; *see* R. 24; R. 44; R. 52–54; R. 71.

Public Records Withheld

While the Town identified and produced some responsive public records, it withheld many, citing various exemptions. *See* R. 5, ¶ 8; R. 6, ¶ 17; R. 7, ¶¶ 20, 21, R. 8, ¶ 26; R. 89, ¶¶ 8, 17; R. 90, ¶¶ 20–21. Often, these citations were asserted

[8] WARRENTON TOWN CHARTER, Art. V (mayor's duties), Art. VI, §§ 6-1–6-3 (town manager's duties).

without explanation, but in some cases were provided with the number of documents withheld that were responsive to a part of one (1) of the VFOIA Requests. *See, e.g.*, R. 24 (withholding ten (10) documents responsive to the First VFOIA Request); R. 41 (withholding eight (8) emails or email chains responsive to a portion of the Second VFOIA Request, and redacting another), R. 43 (withholding 3,142 emails or email chains responsive to a portion of the Second VFOIA Request). Even for those public record produced, dozens of attachments were omitted, in violation of Code § 2.2-3704.01. *See* R. 95, 109–25; R. 255:10–57:5.

Eleven (11) public records responsive to the First VFOIA Request were withheld by the Town, ten (10) in their entirety, primarily in reliance upon Code § 2.2-3705.7(2), the Political Subdivision Exemption. R. 6, ¶ 17; R. 89, ¶ 17; R. 24. Eight (8) public records response to the Second VFOIA Request were withheld in whole, and one (1) in part, based on their status as "correspondence" of the Mayor. *See* R. 7, ¶ 20; R. 41. Despite asserting that the Political Subdivision Exemption covered these materials, after suit was filed, the Town voluntarily produced public records it had previously withheld responsive to the Second VFOIA Request on the basis that they were the Mayor's "correspondence." R. 9, ¶ 33; R. 91 ¶ 33; R. 119; R. 220:17–21:10; R. 260:14–17.

At least 3,142 public records responsive to the Second VFOIA Request were withheld entirely by the Town as the "working papers and correspondence" of the

town manager, personnel information and attorney-client privileged material. R. 43, 519; *cf.* R. 186. How many materials were withheld under each exemption was left unsaid.

What is clear is that some substantial number of these were withheld on the theory that they were the "correspondence" of the Town's manager. When the Citizens pressed, the Town stated that all responsive emails that "include" the Former Town Manager "fall under the FOIA Exemption § 2.2-3705.7," and that "none will be released," regardless of whether other Town public record custodians wrote, were addressed in, or were included on the emails. R. 52, 528. The Citizens sought to clarify that the Town was refusing to disclose emails exchanged between the Former Town Manager "and Amazon and Amazon's attorneys," between "Town Staff and Amazon and Amazon's attorneys that include" the Former Town Manager "on the distribution list," and between "Town Staff" and the Former Town Manager, even those "that relate to Amazon or Amazon's attorney"? R. 50, 526. The Town affirmed. *See* R. 46, 49, 522, 525. The Town denied withholding any "working papers." R. 68; R. 82.

Doing the math, more than 3,160 public records responsive to the VFOIA Requests were withheld by the Town based on an asserted exemption under VFOIA.

Evidence Offered to Justify Withholding

Were the Citizens to limit themselves to what was proffered, there would be almost nothing to say. To be sure, on January 13th, the Town selected and submitted some materials, purportedly those "ordered by the court to be disclosed" solely for *in camera* review, R. 86, and this Court, unlike the Citizens below, has access to those materials. *See* Sealed Record 1–150. According to the Town, it grouped the documents by exemption, and provided examples.

What was not proffered, however, is far more striking. At no time was a statement provided of how many total public records were withheld, much less any number stated by exemption. Certainly, no "privilege log" or "*Vaughn* index" of documents withheld was provided; in fact, the Town stated that "VFOIA does not authorize . . . the production of a privilege log." R. 139. No explanation or argument, but only a generalized invocation of the exemption, was stated by the Town with respect to any exemption's application to any particular record or class of records.

In its Answer, the Town refused to disclose any information, even on the number of records disclosed, the amount paid, the total withheld, much less how many were withheld on what basis and why. *Compare* Petition: R. 5, ¶¶ 9, 11; R. 6, ¶¶ 12, 17, 18; R. 7, ¶¶ 20–24; R. 8, ¶¶ 25–27, *with* Answer: R. 89, ¶¶ 9, 11, 12, 17, 18; R. 90, ¶¶ 20–27; R. 91, ¶ 95. No further light on these points was shed by the Town's brief, which simply offers this: "The documents withheld under the

correspondence exemption in this case are correspondence via email." R. 82. Rather than cooperate, the Town's pleadings sought an award of attorney fees against the Citizens, without citing any basis in law. R. 83, 91, 139.

At the hearing, no testimony was adduced, no exhibits offered, no index of the documents withheld submitted, and no affidavit supporting the grounds for withholding was filed, not even from the Town Clerk who was named in the Petition, processed the VFOIA Requests, sent the Town's responses, and was personally present at the January 6th hearing. *See* R. 200, 260:5–6.

Even with the materials submitted under seal as part of the *In Camera* Submission, no indication was offered to the Court or to the Citizens as to how many for each were selected, or how many the selected examples were drawn from, that they were representative of those not presented, how the submitted materials were selected, or the principle under which the withheld records were exempt. No affidavit accompanied the *In Camera* Submission, which was not certified by any custodian or otherwise. Neither the Citizens nor their counsel were permitted to view the *In Camera* Submission, consulted on its selection, or even provided a summary thereof so they could argue an exemption's application.

In sum, the Court permitted an evaluation of withholding under VFOIA to be conducted, over the Citizens' objection, "in the dark." R. 280:13–20.

STANDARD OF REVIEW

The interpretation and construction of VFOIA's requirements presents a question of law, subject to *de novo* review. *American Tradition Inst. v. Rector & Visitors of Univ. of Virginia*, 287 Va. 330, 338 (2014); *accord Suffolk City Sch. Bd. v. Wahlstrom*, 886 S.E.2d 244, 253 (Va. 2023). A VFOIA exemption's application to a particular public record withheld, if the record is also before the Court on appeal, is a mixed question of law and fact. *American Tradition Institute*, 287 Va. at 338–39. Any factual findings made by the trial court based on the evaluation of testimony and pertinent to whether the public body carried its burden are reviewed to determine whether the trial court's finding "was plainly wrong or without evidence to support it." *Id.* at 344 & n.8; *see, e.g., RF & P Corp. v. Little*, 247 Va. 309, 319 (1994) ("Since the trial court has heard the evidence ore tenus, its findings based on an evaluation of the testimony are entitled to the same weight as those of a jury."). "Where," as here, "the judgment of the trial court is based upon its interpretation of written documents," the appellate courts "review the issue de novo," as they have equal opportunity to consider the documents. *Brizzolara v. Sherwood Mem'l Park, Inc.*, 274 Va. 164, 180 (2007). In all cases, a judgment that is "factually insupportable" for lack of sufficient evidence or a plain error in the review of that evidence may be reversed, even after a bench trial. *See* Code § 8.01-680; *see, e.g.*, *Wahlstrom*, 886 S.E.2d at 253 (citing *Grayson v. Westwood Buildings L.P.*, 300 Va.

25, 58 (2021) and applying Code § 8.01-680 to a VFOIA appeal); *CSE, Inc. v. Kibby Welding, LLC*, 77 Va. App. 795, 802 (2023). Additionally, the trial court's application of VFOIA's terms to the facts, including to those documents before the Court, is reviewed *de novo*. *American Tradition Institute*, 287 Va. at 338–39; *accord, e.g.*, *Hawkins v. Town of S. Hill*, 878 S.E.2d 408, 411 (Va. 2022); *see also, e.g.*, *Cole v. Smyth Cnty. Bd. of Supvrs.*, 298 Va. 625, 635 (2020).

Under this standard, the Court must decide for itself whether the evidence presented by the Town was sufficient to justify withholding of all the public records sought under the VFOIA exemptions asserted, i.e., whether such evidence was sufficient to allow a "rational factfinder" to conclude that exemptions applied such that there was not "[a] single instance of denial of the rights and privileges conferred by" VFOIA. Code § 2.2-3713(D); *see Wahlstrom*, 886 S.E.2d at 258; *American Tradition Institute*, 287 Va. at 344 (holding that the public body there "produced sufficient evidence to meet each of the higher education research exemption's seven requirements"); *RF & P Corp. v. Little*, 247 Va. 309, 319–22 (1994). This burden cannot be carried by the assertions of counsel, as "argument is not evidence." *Curtis v. Commonwealth*, 3 Va. App. 636, 642 (1987); *cf. Moore v. Maroney*, 258 Va. 21, 27 (1999) (distinguishing, in the VFOIA context, between an "evidentiary hearing" and one in which "counsel . . . merely made 'factual representations and argument'") (quoting *LeMond v. McElroy*, 239 Va. 515, 518 (1990)).

With VFOIA, as with other statutes, the courts "are bound by the plain meaning of clear and unambiguous language"; "[h]owever, "[i]f a statute is subject to more than one interpretation, this Court must 'apply the interpretation that will carry out the legislative intent behind the statute.'" *Hawkins*, 878 S.E.2d at 412 (quoting *White Dog Pub., Inc. v. Culpeper Cnty. Bd. of Supvrs*, 272 Va. 377, 386 (2006)). For "[t]he purpose for which a statute is enacted is of primary importance in its interpretation or construction." *White Dog Publishing*, 272 Va. at 386 (applying this rule to a VFOIA appeal).

Unlike some other statutes, the purpose for which VFOIA was enacted, its legislative intent, was not left to conjecture, but was stated in the statute. By adopting VFOIA, "the General Assembly ensures the people of the Commonwealth ready access to public records in the custody of a public body or its officers and employees." Code § 2.2-3700(B); *see Gloss v. Wheeler*, 887 S.E.2d 11, 19 (Va. 2023) (referring to this provision as "an express statement of the purpose of the statutory scheme" by the General Assembly). VFOIA has "the primary purpose of facilitating "openness in the administration of government." *Fitzgerald v. Loudoun Cnty. Sheriff's Off.*, 289 Va. 499, 505 (2015).

"To help effectuate these purposes, the General Assembly adopted a special rule of construction for interpreting VFOIA." *Gloss*, 887 S.E.2d at 19. As numerous cases have noted, "the General Assembly has directed that VFOIA 'be liberally

construed' to promote public access to government activities and operations, and that any asserted exemption from public access 'shall be narrowly construed.' Code § 2.2-3700(B)." *Cole*, 298 Va. 625, 636 (2020). Thus, "the legislature has set forth clear statutory canons of construction for the VFOIA" to resolve questions of intent and ambiguity. *Hawkins*, 878 S.E.2d at 412.

Taken together, these provisions create a "bright line" that guides, and circumscribes, all interpretation, construction and application of VFOIA: "VFOIA's expressly stated presumption in favor of open government." *Gloss*, 887 S.E.2d at 25–26; *Virginia Dep't of Corrs. v. Surovell*, 290 Va. 255, 264 (2015) (concluding that the canons of construction "indicate[] there is a strong preference for disclosure"). Thus, "[e]very provision of VFOIA" receives a construction that "'puts the interpretative thumb on the scale in favor of' open government," and "courts resolving disputes under VFOIA favor open government in close cases," including in their application of a VFOIA exemption. *Gloss*, 887 S.E.2d at 25–26. This follows not only from the language of VFOIA, but also from the role of the judicial system in our form of government, and the recognition that "[t]he legislature seldom chooses to expressly direct the courts how to apply a statute. When it does so we must pay special attention to that choice and ensure that it is given full effect." *NC Fin. Sols. of Utah, LLC v. Commonwealth ex rel. Herring*, 299 Va. 452,

462, *cert. denied sub nom. NC Fin. Sols. of Utah, LLC v. Virginia*, 142 S. Ct. 582 (2021).

ARGUMENT

I. Construing the "Or" in the Political Subdivision Exemption to Mean "And" Violates the Plain Meaning Rule and Conflicts with Obvious Legislative Intent, Which Mandates a Narrow, Not Expansive, Interpretation of That Exemption. (Assignment of Error One)

The Political Subdivision Exemption sits within a larger set of exemptions, all aimed at protecting the "working papers and correspondence of" various key elected executive and legislative officials and their assistants. *See* Code § 2.2-3705.7(2). The covered sources of the "working papers and correspondence" are

> [T]he 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.

While "correspondence" is undefined—more on that later—the term "working papers" is limited to "those records prepared by or for a public official identified in this subdivision for his personal or deliberative use." Code § 2.2-3705.7. Thus, it is akin to a "deliberative process" exemption for certain public officials who are elected or appointed, and like all such privileges from disclosure, designed to protect "the quality of . . . decisionmaking by ensuring that it is not done in a fishbowl" so

"free-ranging discussion of alternatives" can occur without the "public confusion that might result from the premature release of such nonbinding deliberations" or the "chilling effect likely were officials to be judged not on the basis of their final decisions, but for matters they considered before making up their minds." *City of Virginia Beach, Va. v. U.S. Dep't of Com.*, 995 F.2d 1247, 1252–53 (4th Cir. 1993) (cleaned up) (addressing the deliberative process exemption created by the federal Freedom of Information Act, 5 U.S.C. § 552(b)(5)). In sum, Code § 2.2-3705.7 is a deliberative papers exemption, and must be construed in light of that purpose.

A. The Plain Language Compels the Disjunctive Interpretation.

The language of Code § 2.2-3705.7(2), authorizing discretionary withholding of "[w]orking papers and correspondence of . . . the mayor or chief executive officer of any political subdivision of the Commonwealth," is plain. This exemption means that the working papers and correspondence of the "mayor" of a political subdivision, if any, or of its "chief executive officer," whatever the title, may be withheld, but not both. That is, the "or" is disjunctive, meaning less withholding, not conjunctive, meaning more withholding. This disjunctive interpretation is reinforced by the listing of both a title, "mayor," and a role, "chief executive officer," that may (or may not) be filled by the officer with the title in any given political subdivision.

Without regard for the principle of "narrow construction" applicable here, courts in Virginia "naturally assume . . . that the draftsman intended the word 'or' to have its ordinary, literal and disjunctive meaning." *S. E. Pub. Serv. Corp. of Virginia v. Commonwealth ex rel. State Corp. Comm'n*, 165 Va. 116, 122 (1935). As this Court had occasion to state with regard to another statute, "the General Assembly chose to use the disjunctive 'or,' not the conjunctive 'and.' [T]he use of the disjunctive word 'or,' rather than the conjunctive 'and,' signifies the availability of alternative choices." *Williams v. Commonwealth*, 61 Va. App. 1, 8 (2012) (citations and quotations marks omitted). Here, the choice presented to the custodian subject to VFOIA, here the Town Clerk, is to assert a discretionary exemption over the working papers and correspondence of either the "mayor" or the "chief executive officer" of Warrenton, but not over both, as the Town did and the trial court approved.

Construing "or" to mean "and" may be done only "where from the context or other provisions of the statute, or from former laws relating to the same subject and indicating the policy of the State thereon, such *clearly appears to have been the legislative intent*." *S. E. Pub. Serv. Corp. of Virginia*, 165 Va. at 122 (emphasis added) (quotation marks and citation omitted). This qualification is similar, but unlike the rule for resolving ambiguity, *see Myers v. Commonwealth*, 299 Va. 671, 680 (2021) (holding that statutory ambiguity is resolved by resort to "the rules of

statutory construction, including the legislative history of the statute."), is not agnostic over which ambiguous interpretation is adopted. Rather, it strongly favors a disjunctive interpretation.

This Court recognized as much in *Williams v. Commonwealth*. There, the Court stated that "the Supreme Court of Virginia tempered that rule by stating that '[w]hen, *and only when,* necessary to effectuate the obvious intention of the legislature, conjunctive words may be construed as disjunctive, and *vice versa*.'" 61 Va. App. at 11 (emphasis in original) (quoting *S. E. Pub. Serv. Corp. of Virginia*, 165 Va. at 122). With that understanding, the *Williams* Court found no such "obvious intention," what one would expect. 61 Va. App. at 12. In fact, only two (2) reported decisions of the Supreme Court appear to have allowed the substitution of "and" for "or" or vice versa, and have done so only upon concluding that "[a]ny other construction would be counterproductive to the legislature's clear intent," *Barr v. Atl. Coast Pipeline, LLC*, 295 Va. 522, 530, 536 (2018) (quoting *South East Public Service Corporation*)), or the "legislative intent would be completely aborted if the conjunctive words in this statute are not construed as disjunctive." *Indus. Dev. Auth. of City of Richmond v. La France Cleaners & Laundry Corp.*, 216 Va. 277, 281 (1975). In fact, the Supreme Court recently refused to perform this transposition when the effect would be to enlarge the application of a VFOIA exemption. *See Berry v. Bd. of Supvrs. of Fairfax Cnty.*, 884 S.E.2d 515, 529 (Va. 2023).

In this appeal, this Court is being asked to adopt that odd construction to enlarge the reach of a VFOIA exemption, what the *Berry* Court refused to do. "Thus" here, as in *Williams*, this Court's "inquiry is whether, in order to 'effectuate the obvious intent of the legislature,' [the Court] must substitute the conjunctive 'and' for the disjunctive 'or.'" 61 Va. App. at 11 (emphasis in original) (quoting *S. E. Pub. Serv. Corp. of Virginia*, 165 Va. at 122). The Citizens contend that because the conjunctive interpretation runs counter to the presumption in favor of open government, and the General Assembly-supplied rule of construction that "[a]ny exemption from public access to records . . . shall be *narrowly construed* and no record shall be withheld . . . unless *specifically made exempt*," it is foreclosed. (Emphasis added). If not foreclosed entirely, the showing of a conjunctive legislative intent must be overwhelming.

It is far from. The statutory context and history of this exemption evince no such "obvious intention" to make the Exemption operate conjunctively. Moreover, such an interpretation would operate in markedly different fashions across the Commonwealth's hundreds of political subdivisions, a relevant bit of context, and in a manner contrary to the paramount "presumption in favor of open government."

B. The Statutory Context Accords with a Disjunctive Interpretation.

The statutory context does not suggest that two (2) officers are intended, but rather evinces a purpose of shielding the deliberative materials of the officers

uniquely charged with superintending the branches and institutions of the Commonwealth. The other working papers and correspondence exemptions within Code § 2.2-3705.7(2) are generally at the state level, and refer to unique offices and titles. At present, there is a deliberative material exemption covering the "the Office of the Governor, the Lieutenant Governor, or the Attorney General" within one (1) semicolon, all being key actors within the Executive Branch, another covering "the members of the General Assembly, the Division of Legislative Services, or the Clerks of the House of Delegates or the Senate of Virginia" being within another, all central to the legislative process. In no case can any of those officers be mistaken for the other, as in the Political Subdivision Exemption, where the mayor may be the chief executive officer, or may not be, or there may not be a mayor at all. With the state-officer exemptions, the General Assembly's obvious intention is to authorize the withholding of all of the named officers' "working papers and correspondence." However, with the Political Subdivision Exemption, "chief executive officer" is not a title, but a larger category in which "mayor" may or may not fit, thus making it reasonable, if not compulsory, for "or" to be read as "signif[ying] the availability of alternative choices." *Williams*, 61 Va. App. at 8.

The only exemption in Code § 2.2-3705.7 with a similar structure is the exemption for the working papers and correspondence of "the president or other chief executive officer of any public institution of higher education in the

Commonwealth," and is plainly disjunctive. Code § 2.2-3705.7(2). The Town concedes that the "or" in this exemption is disjunctive, noting "that the CEO of a university might have a different title than 'president,'" and claiming that the word "other," present above, but not in the Political Subdivision Exemption, makes all the difference. R. 81 (citing Code § 23.1-100). The Town has a good point, it's just not the one it is trying to make. "[T]he president . . . of any public institution of higher education," unlike "the mayor . . . of any political subdivision," is statutorily defined to be within the term "chief executive officer," Code § 23.1-100, making the use of the term "other" perfectly sensible, to indicate the president's inclusion in the group. A different circumstance obtains with mayors, and explains the omission.

Some mayors are the chief executive of their political subdivisions,[9] although many mayors are not, but serve alongside a town or city "manager" or otherwise titled chief executive in a largely ceremonial role, as in Warrenton.[10] Thus, mayors

[9] *See, e.g.*, Charter of the Town of South Hill § 8, 1936 Acts of the Assembly c. 39 (Feb. 17, 1936), as amended ("The mayor shall be the chief executive of the town."); Charter of the Town of Madison § 3.5, 1976 Acts of the Assembly c. 629 (Apr. 9, 1976), as amended ("The mayor shall be the chief executive officer of the town.").

[10] *See, e.g.*, Charter of the City of Alexandria § 4.02, 1950 Acts of the Assembly c. 536 (Apr. 7, 1950), as amended ("The city manager shall be the chief executive officer of the city government"); Charter of the Town of Warrenton § 6.1 ("There shall be a Town Manager who shall be the chief executive officer of the Town and shall be responsible to the Council for the proper administration of the Town government."); § 6.3 (listing the Town Manager's "duties and powers"); *id.*, § 5.2, 1964 Acts of the Assembly, c. 47 (Feb. 19, 1964), as amended ("The Mayor shall preside over the meetings of the Council and shall have the same right to speak therein as Councilmen, however he shall not have the right to vote except in the case

are not, as a class, "other chief executive officers" of "any political subdivision of the Commonwealth."

Extending the dichotomy further, many political subdivisions of the Commonwealth, all of which are subject to VFOIA, *see* Code § 2.2-3701 ("Public body"), do not have mayors, but do have chief executive officers. Counties do not have mayors, but do have county administrators, county executives, county managers, and urban county executives. *See, e.g.*, Code §§ 15.2-407, -516, -614, -710, -811. And various commissions, authorities, and districts are political subdivisions of the Commonwealth of Virginia,[11] and do not have mayors, but do generally have a chief executive officer of some sort.[12] Thus, the term "mayor" will be a null set with many political subdivisions and, in others that do have mayors, may not designate the "chief executive officer." The General Assembly is presumed

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of a tie, in which event he shall be entitled to cast one vote. He shall be recognized as the head of the Town for all ceremonial purposes, the purposes of military law and the service of civil process.").

[11] *See, e.g.*, Capital Region Airport Commission Act § 4, 1980 Acts of the Assembly, c. 380 (Mar. 25, 1980); Code § 10.1-500 (Soil and Water Conservation Districts); Code § 15.2-5102(A) (Virginia Water and Waste Authorities Act).

[12] Capital Region Airport Commission Act § 7 ("The Commissioners shall appoint an airport administrator, who shall not be a Commissioner and whose title shall be president and chief executive officer."); Code § 10.1-503 (authorizing the Board of Soil and Water Conservation Districts to "create an executive committee and delegate to the chairman of the Board, or to the committee or to the Director, such powers and duties as it deems proper."); Code § 15.2-5113(E) (executive director).

to have been aware of these legal facts when it chose "or," not "and" and struck "other."[13]

In light of the differences between political subdivisions, a disjunctive interpretation alone preserves uniformity of withholding to only one (1) officer, while a conjunctive interpretation creates disuniformity, not only in the number of officers who may claim deliberative process exemption between political subdivisions (two (2) for some, one (1) in others), but also in the volume of materials exempt. This disuniformity cuts across political subdivisions of the same type. For example, the Town of South Hill would be limited to withholding the deliberative papers of one (1) officer, but Warrenton could withhold those of two (2), despite the mayor's role in Warrenton being largely "ceremonial." Although neither interpretation is "absurd,"[14] the conjunctive interpretation alone produces this awkward result, does not serve the purposes of a deliberative papers exemption, conflicts with the "presumption in favor of open government," and so should be rejected. *Gloss*, 887 S.E.2d at 25–26.

C. The Statutory History Supports the Disjunctive Interpretation.

In the pre-digital age, the exemption was tethered to particular custodians, and from then it received its initial shape, including its use of the term "or" to connect

[13] *See Philip Morris USA Inc. v. Chesapeake Bay Found., Inc.*, 273 Va. 564, 576 (2007).
[14] *See Tvardek v. Powhatan Vill. Homeowners Ass'n, Inc.*, 291 Va. 269, 280 (2016).

custodians, rather than those whose public records may be exempt.[15] At the turn of the last century, the relevant language thus read "the mayor *or other* chief executive officer of any political subdivision of the Commonwealth," and also exempted those of "the president or other chief executive officer of any state-supported institution of higher education."[16]

In 2000, the General Assembly restructured the exemptions and VFOIA wholesale, during which the custodian-centric approach, covering "Memoranda, working papers and correspondence (i) held by or requested from" certain named officials, was replaced with an information-centric approach. Notably, the word "other" was dropped from the relevant exemption, but the "or" remained.[17] Thereafter, various changes to connectors and punctuation have been made to

[15] *See* Former Code § 2.1-342(B)(4) (1999) (allowing withholding of "Memoranda, working papers and correspondence (i) held by or requested from members of the General Assembly or the Division of Legislative Services or (ii) held or requested by the Office of the Governor or Lieutenant Governor, Attorney General *or the mayor or other chief executive officer of any political subdivision of the Commonwealth* or the president or other chief executive officer of any state-supported institution of higher education." (Emphasis added)).

[16] Former Code § 2.1-342(B)(4) (1999).

[17] *See* Former Code § 2.1-342.01(A)(6) (2000) ("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." (Emphasis added)), https://lis.virginia.gov/cgi-bin/legp604.exe?001+ful+CHAP0237&001+ful+CHAP0237.

deliberative paper exemptions, but no textual changes have been made to the Political Subdivision Exemption since 2000.

To derive an "obvious intention" to use "or" conjunctively from the statutory history, one would have to invest the deletion of the word "other" in 2000, as part of a general restructuring and restyling of the VFOIA exemption sections, with decisive significance. This is too much. As the Supreme Court of the United States recently cautioned when rejecting an argument based on the omission of language from one (1) portion of statute that is included elsewhere: "[c]ontext counts, and it is sometimes difficult to read much into the absence of a word that is present elsewhere in a statute." *Bartenwerfer v. Buckley*, 598 U.S. 69, 143 S. Ct. 665, 674 (2023). Had the General Assembly intended to change what was a plainly disjunctive exemption to a conjunctive one, and expand the scope of a VFOIA exemption that applies only to public records "specifically made exempt," it is not plausible that they would have deleted "other," and left the "or," rather than replacing "or other" with a plainly conjunctive "and." An at least equally plausible interpretation for this slight change, deleting "other," is that the General Assembly recognized that mayors were not necessarily in the class of "chief executive officers," as reviewed above, and did not want to suggest that a mayor who was not a "chief executive officer," and so not

within the "other," could not have exempt "working papers and correspondence."[18] In all events, none of this statutory history suggests that it was the "'obvious intention of the legislature' that the word 'or' was intended to mean 'and.'"

D. The VFOIA Council Has Embraced the Disjunctive Interpretation.

The VFOIA Council, an agency of the Commonwealth, was created by the General Assembly "to encourage and facilitate compliance with" VFOIA. Code § 30-178(A). Among their duties are to provide advisory opinions or guidelines, and other appropriate information regarding the Virginia Freedom of Information Act," conduct training and educational programs, and publish other education materials about VFOIA. *See* Code § 30-179(1)–(3). The Supreme Court of Virginia has repeatedly and recently looked to the VFOIA Council's advisory opinions as "instructive" when interpreting provisions of VFOIA, *Transparent GMU v. George*

[18] *Cf. Tomlin v. Commonwealth*, 888 S.E.2d 748, 754 (Va. 2023) ("The rule of ejusdem generis helps explain statutes that list a series of words or phrases in a specific-to-general sequence, such as "This Act applies to Toyotas, Fords, Hondas, Nissans, and other vehicles." The "other vehicles" catch-all would only catch motor vehicles (like Chevrolet autos and trucks) but not golf carts, snowmobiles, or helicopters. *See generally* Henry Campbell Black, Construction and Interpretation of the Laws § 71, at 203-07 (2d ed. 1911) (listing examples). In natural conversation as well as legal writing, the linguistic range of the last, broad entry generally should not be understood as outside the categorical range of the preceding series of specific entries. The linear order of the objects listed—that is, the "when they follow" sequencing, *Rockingham Co-op. Farm Bureau*, 171 Va. at 344, 198 S.E. 908—is what makes the ejusdem generis rule sensible.").

Mason Univ., 298 Va. 222, 243 (2019), including the scope and application of exemptions. *See, e.g.*, *Wahlstrom*, 886 S.E.2d at 254; *Hawkins*, 878 S.E.2d at 415.

The VFOIA Council has issued an opinion that is thoroughly instructive here. On October 30, 2002, the VFOIA Council was asked "if both the mayor and the city manager in the same locality may claim the exemption" found in Code § 2.2-3705.7(2). VFOIA COUNCIL OP. AO-12-02, https://foiacouncil.dls.virginia.gov/ops/02/AO_12.htm. Reciting the rules of construction referenced above, the VFOIA Council concluded that "this provision must be interpreted to present an alternative as to who may exercise the exemption at a local level - either the mayor or the chief executive officer, but not both. The common usage of 'or' is clear, and there is nothing in the statute or context that indicates that the legislature meant to include both the mayor and the chief executive officer of the same locality under the exemption." *Id.* The VFOIA Council has adhered to this view for more than twenty (20) years, without change, and none has been made to the Political Subdivision Exemption in response.

This same opinion pointed out how the statutory context of the Political Subdivision Exemption, as part of a deliberative papers exemption interacting with the charters of numerous localities, and the purpose of such deliberative papers exemptions and of VFOIA, generally also favor construing this Political Subdivision Exemption to apply "[f]unctionally" to whoever is delegated the executive duties by

law and "acts as the executive, and who, therefore, may properly exercise the exemption." VFOIA COUNCIL OP. AO-12-02 (Oct. 30, 2002), https://foiacouncil.dls.virginia.gov/ops/02/AO_12.htm. This prevents not only the custodian from abusing the privilege, by switching back and forth between officials, but also is the only interpretation that advances the apparent purpose of the Exemption in light of the duties of a non-chief executive mayor, which generally "are closely aligned with those of the other council members," meaning "little is accomplished by protecting some of the mayor's records from public disclosure if the same type of records can be accessed from other members of council." *Id.*; *see, e.g.*, 1975–76 Va. Op. Att'y Gen. 415 (Mar. 17, 1976) (recognizing that public records of County supervisors are not exempt from VFOIA under the Political Subdivision Exemption).

Because a disjunctive (and functional) interpretation of the Political Subdivision Exemption serves the declared purposes of VFOIA and is not countermanded by either "the context or other provisions of the statute, or from former laws relating to the same subject and indicating the policy of the State thereon," a conjunctive interpretation, which would expand the exemption and create disuniformity, is not "necessary to effectuate the obvious intention of the legislature" and so must be rejected. *Barr*, 295 Va. at 530; *see Taylor v. Commonwealth*, 298 Va. 336, 341 (2020) ("The plain meaning alone controls 'unless the terms are

ambiguous or applying the plain language would lead to an absurd result.'" (Citations omitted)). Thus, the Town violated VFOIA by withholding the alleged "correspondence" of both its mayor and town manager.

II. The Town Failed to Offer Evidence Establishing That Exemptions Justified Withholding of the Public Records Withheld, Which Failure Requires Reversal, Blanket Production, and Award of Costs and Fees. (Assignments of Error Two and Three)

By statute, the Town "bear[s] the burden of proof to establish an exclusion by a preponderance of the evidence." *See* Code § 2.2-3713(E).

> The phrase 'burden of proof' refers to two related but distinct concepts: (1) The 'burden of production,' which is the obligation to come forward with evidence to make a prima facie case . . . , and (2) the 'burden of persuasion,' which is the obligation to introduce evidence that actually persuades the fact finder to the requisite degree of belief that a particular proposition of fact is true. Charles E. Friend & Kent Sinclair, The Law of Evidence in Virginia § 5–1[a], at 298 (7th ed. 2012).

Suntrust Bank v. PS Bus. Parks, L.P., 292 Va. 644, 652 (2016). The relevant proposition of fact is that an exemption or exclusion provided by VFOIA covers all of the public records withheld, some 3,160 plus. The Town must "establish an exclusion" applies to every public record, not just to some. Code § 2.2-3713(E). Courts may not "accord any weight to the determination of a public body as to whether an exclusion applies." Code § 2.2-3713(E). Even "[a] single instance of denial of the rights and privileges conferred by this chapter," a single public record

wrongly withheld, "shall be sufficient to invoke the remedies granted" by VFOIA. Code § 2.2-3713(D).

A. The Town Failed to Provide the Public Records and Other Evidence Essential for the Court to Evaluate the Propriety of Withholding.

Even setting aside the withholding of public records as alleged "correspondence" of both the mayor and town manager—a flagrant violation—the record in the present case is insufficient to permit a rational trier of fact to conclude no other VFOIA violation occurred. The Citizens showed that thousands of public records were withheld on the theory that because they "include" the Former Town Manager, they *ipso facto* are her "correspondence," and covered by the Political Subdivision Exemption. R. 52, 528. At the January 6th hearing, the Town did not walk back, but rather embraced, this assertion, refusing to limit it to only those emails the Former Town Manager wrote or requested for her own use, or to allow that emails where the Former Town Manager was simply copied were not exempt "correspondence of" the Former Town Manager. R. 268:9–269:5. In fact, the Town said that "if there was a distribution list from Amazon that included the [Former Town] Manager, those document were withheld." R. 269:6–8.

The trial court was not provided, and thus could not have conducted an *in camera* review of, all of the records withheld, which is the method consistently counseled in the Supreme Court's cases, even for privileged documents. *See Bergano v. City of Virginia Beach*, 296 Va. 403, 410 (2018) ("In resolving whether

the billing records before us are protected from disclosure under either of these exceptions, we note as a threshold matter that 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."); *see, e.g.*, *Hawkins v. Town of S. Hill*, 878 S.E.2d 408, 411 n.1 (Va. 2022); *Gloucester Cnty. Dep't of Social Servs. v. Kennedy*, 256 Va. 400, 403 (1998) (following a hearing, at which only argument of counsel was presented, the trial court ordered the department, over its objection, to submit the file related to the complaint for the court's *in camera* review); *Commonwealth v. Edwards*, 235 Va. 499, 507 (1988) (recounting *in camera* review of all of the records). As the Supreme Court reasoned in *Bland*, "whether the trial court correctly ruled upon the applicability of [an exemption] to the [public records] in issue can only be answered by an inspection of the [public records] themselves," which the trial court did not have. *Bland v. Virginia State Univ.*, 272 Va. 198, 202 (2006).

The two (2) cases where the Supreme Court has approved less than all of the materials being submitted for *in camera* review both involved far more than what was done here, and predate a relevant statutory change that heightens the public body's burden. In the first, *American Tradition Institute*, all of the parties got to see all of the records, submit "exemplars" each side wanted the Court to review *in camera* and under seal, and then argue, in light of the materials, "whether the

documents should be classified as exempt." *See American Tradition Institute*, 287 Va. at 335–37. On that record, the trial court conducted a review and the Supreme Court agreed "that [the public body] produced sufficient evidence to meet each of the higher education research exemption's seven requirements." *Id.* at 344. Obviously, a similar process for party review and submission, judicial inspection, and argument did not occur here, although it was requested by the Citizens both at the hearings and in the papers. *See* R. 104 & n.3; R. 158–61; R. 281:21–82:21, 288:14–20; R. 339:6–42:2.

The second case, *Surovell*, involved a request for documents bearing on the layout of prison facilities used for executions and the primary issue was whether "disclosure would jeopardize security." 290 Va. at 263–65. In that 2015 decision, the Supreme Court approved the sufficiency of the record where "several of the documents [were] submitted under seal and others described in considerable detail" to the trial court. *Id.* at 259 n.2, 270–71. The evidence supporting withholding of the records, however, was not limited to this, but was supported by testimony from both the custodian of the records and expert testimony regarding prison security and referencing the materials contents. *Id.* at 259–61, 267. Most significantly, in that case the Supreme Court expressly adopted a now-superseded standard of review to document withholding. *See id.* (holding "that the circuit court must make a de novo determination of the propriety of withholding the documents at issue, but in doing

so, the circuit court must accord 'substantial weight' to VDOC's determinations" about applicability of the exemption). *Surovell* stated that "[o]nce satisfied that proper procedures have been followed and that the information logically falls within the exemption clause, courts need go no further to test the expertise of the agency, or to question its veracity when nothing appears to raise the issue of good faith." *Id.* at 267.

The trial court adopted a similar approach as *Surovell* here, despite being outside the context of prison security, by giving weight to the withholding decision by the Town, and citing that there was "no indication of bad faith on the part of the Town or its counsel." R. 145, 187. This conclusion was reached over the arguments of the Citizens, who expressly urged to the trial court, to no avail, the statutory language that was explicitly adopted to reverse *Surovell*. *See* R. 408:6–12 (citing Code § 2.2-3713(E)). In 2016, just months after *Surovell* was issued, the General Assembly passed 2016 Acts of Assembly Chapter 620, which stated that "the provisions of this act are declaratory of the law as is it existed prior to the September 17, 2015 decision of the Supreme Court of Virginia in the case of the *Department of Corrections v. Surovell*," and added, among other provisions, the following sentence, "*No court shall be required to accord any weight to the determination of a public body as to whether an exclusion applies.*" 2016 Acts of the Assembly, c. 620, § 1 (Apr. 1, 2016) (amending Code § 2.2-3713(E) (emphasis added)). There

can be no doubt now that trial courts cannot simply accept that an exclusion applies because "the information logically falls within the exemption clause," without checking, as it did here, but must go on to "test the expertise of the" public body, and "question its veracity," even if "nothing appears to raise the issue of good faith."

The trial court refused to do this, or to otherwise hold the Town to its burden.[19] Not all of the materials were submitted for *in camera* review. Those few that were, apparently one (1%) to two percent (2%) of all those withheld, were not shared with counsel for the Citizens at any time prior to the transmission of the sealed court

[19] The Citizens are not arguing that the trial court must, in all circumstances, review each and every record withheld. The Citizens are arguing that the burden remains on the withholding public body to justify withholding done in each case in light of the exemption claimed. Here, the Town was obliged to "do something more to assure [the trial court] of the factual basis and bona fides of the . . . claim of exemption" than offer mere assertion and cherry-picked documents. *See Batton v. Evers*, 598 F.3d 169, 175–76 (5th Cir. 2010). In some cases, the Courts have required an index and court examination of sample reports stipulated by both parties to be representative, see, *e.g. Vaughn v. Rosen*, 523 F.2d 1126, 1139–40 (D.C. Cir. 1975), in others they have permitted use of detailed justifications alone where indexing would be inappropriate, see, *e.g.*, *Pacific Architects & Engineers, Inc. v. Renegotiation Board*, 505 F.2d 383, 385 (D.C. Cir. 1974), and in others they have required a random sample inspection of documents listed and described in an affidavit, see, *e.g.*, *Ash Grove Cement Co. v. F. T. C.*, 511 F.2d 815, 816 (D.C. Cir. 1975). *See Stephenson v. I.R.S.*, 629 F.2d 1140, 1145 (5th Cir. 1980); *see also, Lead Industries Ass'n v. OSHA*, 610 F.2d 70, 88 (2d Cir. 1979) (affidavit and index without *in camera* inspection). The Citizens contend that the statutory obligation to work with the requester should be held to apply to VFOIA enforcement proceedings, particularly to the selection of methods for evaluation of withholding, which did not occur here. *See* Code § 2.2-3704(C) (directing that the "public body shall make reasonable efforts to reach an agreement with the requester concerning the production of the records requested.").

record. In fact, the Town strenuously opposed such sharing, claiming that there would be no "adequate remedy for an illegal leak of protected documents," ignoring that the trial court could impose a protective order limiting dissemination and enforceable by its contempt powers. *See Winters v. Winters*, 73 Va. App. 581, 589–91 (2021). Also, no principle of selection of those materials produced, much less any assurances of representativeness, was required by the Court or offered by the Town, nor was any detailed statement of the Town's approach to application of the exemptions asserted, despite the Citizens' objections that any such sample must be statistically and categorically representative.

No index of the few public records that were submitted, or the thousands of public records withheld, was provided to the Citizens or the trial court. No testimony or affidavit was offered to explain the same, to describe any of the documents, in detail or otherwise, or to provide any reasonable substitute for actual review. No representations were made regarding the number of documents it was withholding, or under which exemption, the scope of those exemptions, or why the public records fell within the stated scope. Worse than taking the Town's word for it, the trial court did not even insist that the Town speak to it.

By following *Surovell*'s superseded approach, requiring no evidence, and engaging in effectively no judicial review, the trial court did not hold the Town to its "burden of proof," but improperly gave "weight to the determination of a public

body as to whether an exclusion applies." Code § 2.2-3713(E). On this record, the trial court could not rationally determine that the requirements of VFOIA had been observed, nor can this Court confirm the trial court's holding that such withholding was "appropriate." R. 145, 187. Because the burden of proof was not met, at least with regard to those materials not submitted *in camera*, the Court should reverse now and order wholesale disclosure. *See Suntrust Bank*, 292 Va. at 652 ("The burden of persuasion is sometimes referred to as the 'risk of non-persuasion,' because the party that bears the burden of persuasion must lose the case if the evidence leaves the factfinder in doubt."). In that case, the Citizens would certainly have "substantially prevail[ed] on the merits of the case" and so be entitled to an award of reasonable costs, including attorneys' fees. Code § 2.2-3713(E); *see White Dog Publishing*, 272 Va. at 387–88 & n.4.

If the Court does not conclude that the Town simply failed to meet its burden and hold all records subject to disclosure, it should either evaluate the *In Camera* Submission and remand the matter for further review of the other public records, or simply remand reconsideration of all of them in light of the Court's opinion. In all cases, the Court should provide clarity on the scope of the word "correspondence."[20]

[20] *See, e.g.*, *Hawkins*, 878 S.E.2d at 410, 416 ("Because the circuit court applied a definition of 'personnel information' different from the definition outlined below, we reverse and remand for the court to review and, if necessary, redact and release the documents at issue."); *Bergano*, 296 Va. at 410–11 ("The circuit court allowed the City to withhold some entries from disclosure when these records plainly do not

The Citizens contend that the term should be given its plain meaning, informed by the statutory context and purposes, and the presumption in favor of open government, as has been done in other recent cases addressing the scope of exemptions. *See, e.g.*, *Wahlstrom*, 886 S.E.2d at 254; *Berry*, 884 S.E.2d at 525; *Hawkins*, 878 S.E.2d at 412, 413, 415; *Fitzgerald*, 289 Va. at 508 n.4. Specifically, the word "correspondence" is defined in Black's Law Dictionary as the "Interchange of written communications. The letters written by a person and the answers written by the one to whom they are addressed," and in Webster's Dictionary as "Communications by exchange of letters; letter writing." *Correspondence*, BLACK'S LAW DICTIONARY (6th ed. 1990); *Correspondence*, WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY, unabridged (2d ed. 1983); *see also Richmond Newspapers, Inc. v. Casteen*, 42 Va. Cir. 505, 506–07 (Richmond City 1997) (following Black's Law Dictionary when applying exemption); *Redinger v. Casteen*, 35 Va. Cir. 380, 385 (Richmond City 1995) (same).

Even assuming, *arguendo*, that the exemption applies to emails too, although "correspondence" did not so apply at the time it was adopted, it must be limited to those communications "of" the officer in question, not merely in the officer's custody by virtue of its having been transmitted to the officer's email address. And

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fall within the VFOIA exceptions for work-product and attorney-client privilege. We therefore remand for a further *in camera* review and for disclosure of unredacted billing records consistent with this opinion.").

these public records must thus be of a similar character to "working papers," the other public record that may be withheld, and so particularly be those generated by or intended for the officer in question, not others, for that officer's consideration and action. *See* Code § 2.2-3705.7(2) (defining "working papers" as "those records prepared by or for a public official identified in this subdivision for his personal or deliberative use"). This conclusion follows from the statutory context, informed by the maxim of *noscitur a sociis*, *see Suhay v. Commonwealth*, 75 Va. App. 143, 155 (2022) ("The legal maxim, *noscitur a sociis*, instructs that a word takes color and expression from the purport of the entire phrase of which it is a part, and . . . must be read in harmony with its context." (quotation marks and citations omitted)), from the purposes of Code § 2.2-3705.7(2)'s deliberative papers exemptions, and from the "presumption in favor of open government." *Gloss*, 887 S.E.2d at 25.

B. The In Camera *Submission Was Not Only an Inadequate Substitute for a Full Review, but Also Contains Improperly Withheld Records.*

Assignments Two and Three do not turn on the particular contents of the *In Camera* Submission, but on the trial court's errors of law with respect to the burden of proof and evaluation of the record and the patent inadequacy of the evidence offered. However, review of these records does illustrate the problem identified by counsel for the Citizens in their objections before the trial court, made long before gaining access to these records on July 24, 2023, when the circuit court clerk's office transmitted them to this Court. In short, it is apparent that the approach to the

Political Subdivision Exemption, and to VFOIA generally, contended for above was not followed by the Town, nor was a good faith submission made.

[redacted]

Additionally, and by way of example only, not limitation, some of even these few records, specifically selected by counsel for the Town and submitted to the Court to demonstrate the Town's compliance with VFOIA show just the opposite. [redacted] *See* Code §§ 2.2-3705.7 ("Redaction of information excluded under this section from a public record shall be conducted in accordance with § 2.2-3704.01."); Code § 2.2-3704.01 (allowing "only those portions of the

public record containing information subject to an exclusion under this chapter or other provision of law [to] be withheld").

[redacted] To the extent there should be any withholding on the ground of the exemption covering confidential tax information, which Citizens do not concede, *see* Code § 2.2-3705.7(1), that limited information should have been redacted, rather than used to shield other, non-exempt information. *See* Code § 2.2-3705.7 ("Redaction of information excluded under this section from a public record shall be conducted in accordance with § 2.2-3704.01."); Code § 2.2-3704.01 (allowing "only those portions of the public record containing information subject to an exclusion under this chapter or other provision of law [to] be withheld").

[redacted] In addition to the general rule on withholding only portions of records, the deliberative papers exemption is very clear that "no information that is otherwise open to inspection under this chapter shall be deemed excluded by virtue

of the fact that it has been attached to or incorporated within any working paper or correspondence. Further, information publicly available or not otherwise subject to an exclusion under this chapter or other provision of law that has been aggregated, combined, or changed in format without substantive analysis or revision shall not be deemed working papers." Code § 2.2-3705.7(2).

Additionally, a number of materials [redacted] are withheld under Code § 2.2-3705.6(3), which covers certain "proprietary information." Neither the public records themselves, anything in the *In Camera* Submission nor any other evidence submitted demonstrates that the information actually meets that exemption. There is no evidence in the public records or otherwise indicating that the information in question was provided [redacted] "pursuant to a promise of confidentiality from a public body," or was "used by the public body for business, trade, and tourism development or retention." To the extent the Town proposes them to be exempt as "memoranda, working papers, or other information related to businesses that are considering locating or expanding in Virginia," they are not "memoranda, working papers or other information" of a like character. Nor is there any evidence as to what portion, if any, of these materials were "prepared by a public body," that "competition or bargaining is involved," or that "disclosure of such information would adversely affect the financial interest of the public body," which also must be shown for the exemption for "memoranda, working papers, or other

information" to apply. *See* Code § 2.2-3705.6(3); *cf. Am. Tradition Institute*, 287 Va. at 344 (upholding a claim for exemption of "proprietary information", but only after finding that the public body "produced sufficient evidence to meet each of the higher education research exemption's seven requirements").

Finally, Page 117 of the sealed record discloses [redacted], and indicates it is being withheld as "personnel information." This public record does not satisfy the exclusion, as it contains no "data, facts, [or] statements" the "disclosure" of which "would constitute an 'unwarranted invasion of personal privacy' to a reasonable person under the circumstances," and so is not "private" "personnel information" or otherwise exempt. *See Hawkins*, 878 S.E.2d at 416.

* * *

Given these examples of duplication and improper withholding just in the few materials selected by the Town, which were not the "10 of each category" ordered, R. 281:3–6, it is not clear that judicial review of the *In Camera* Submission occurred. Rather, the trial court appears to have approved the Town's withholding based not on evidence, but on its "trust" in the Town's counsel, R. 145, 281:8–14, which is not "appropriate." Code § 2.2-3713(D), (E). The trial court's affirming of the Town's withholding of thousands of public records, with only the deficient *In Camera* Submission before it, should be reversed as a denial of the Citizens' VFOIA rights.

CONCLUSION

WHEREFORE, the Final Order should be reversed, multiple denials of VFOIA rights found as a matter of law, the Town held to have failed to meet its burden of proof with respect to the public records withheld, all withheld responsive public records ordered produced and, the Citizens having substantially prevailed in this matter, the case remanded to determine an award of "reasonable costs, including . . . attorney fees," both at trial and on appeal, under Code § 2.2-3713(D). *See, e.g.*, *Wahlstrom*, 886 S.E.2d at 264 n.21; *White Dog Publishing*, 272 Va. at 388.

Date: September 1, 2023

Respectfully submitted,

CITIZENS FOR FAUQUIER COUNTY

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CERTIFICATE

In accordance with Rule 5A:20(h), I hereby certify that on this, the 1st day of September, 2023, a true and correct copy of the foregoing **OPENING BRIEF OF APPELLANTS**, was served via electronic mail, with agreement, and mailed, postage pre-paid, upon opposing counsel at the following addresses:

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Counsel desires to state orally to a panel of this Court the reasons why the judgment below should be reversed and remanded. This brief contains 12,971 words and complies with Rule 5A:19(a) by not exceeding 50 pages.

/s/ Michael H. Brady