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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.

REPLY BRIEF OF APPELLANT

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

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INTRODUCTION

The circuit court's judgment below must be reversed because it committed two primary legal errors that strike at the heart of the Virginia Freedom of Information Act. First, despite VFOIA's broad public disclosure mandate and narrow construction of exemption rule, the judgment broadly read the exemption for "correspondence of . . . the mayor or chief executive officer of any political subdivision of the Commonwealth" to include all emails in the inbox of either.

Second, the judgment must be reversed because it accepted the Town's selection of a few such emails for *in camera* review alone, made without court guidance, evidentiary representation, or adversarial input, as an adequate factual foundation for holding that four (or maybe five) exemptions justified withholding "approximately 3,100 emails," perhaps more.[1] That the Town failed to prove its exemptions is confirmed by its lack of clarity, even on appeal, as to the exemptions asserted and the public records withheld, which it must know and disclose even when responding to a VFOIA request. Va. Code § 2.2-3704(B)(1), (2).

If the first primary error regarding the applicability of the exemption to both the mayor and the Town manager's emails is upheld, the legal result will be that the

[1] Town's Br. at 2 n.2. While on appeal the Town asserts only four (4) exemptions, Town's Br. at 2–3, 24, [redacted]

Capitalized terms shall bear the same meaning as in the Opening Brief of Appellant.

rule of narrow construction in favor of public disclosure becomes a mere makeweight. The practical result will be that local political subdivisions, those nearest to the people, will be subject to the least public scrutiny. Under the judgment below, nearly all of a political subdivisions' daily transaction of public business and informal legislative exchange, much of which is conducted or memorialized by email, may be withheld as exempt at the discretion of the public body by the simple expedient of copying the locality's town manager or mayor, for instance. That is what occurred here, as the Citizens' VFOIA requests sought communications between public officials, not just the Mayor or Town Manager, and the representatives of Amazon, the applicant for grant of a special use permit to develop a data center in the Town. R. 43–44. Thousands of documents shared with private parties were withheld from the public on the basis that "[a]ll communications with the Town Manager are exempt" under Code § 2.2-3705.7(2), R. 46, 49, 522, 525, whether the Town manager was the direct recipient or creator of the email, or merely copied on the email. And exchanges between the Mayor and other members of Town Council were withheld too and on the same theory. R. 41, 143–44. The Town's construction of the Political Subdivision Exemption would nullify the rule that the "affairs of government [are not to] be conducted in an atmosphere of secrecy" to ensure that "the public [is] the beneficiary of any action taken *at any level of government*." Va. Code § 2.2-3700(B) (emphasis added).

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The second primary error may be worse than the first. If the judgment below is permitted to stand, withholding of public records may occur virtually free from judicial scrutiny, even when a VFOIA case is brought. The circuit court below did not conduct even "an inspection of the [public records] themselves," *Bland v. Virginia State Univ.*, 272 Va. 198, 202 (2006), which itself is a "far from perfect substitute" for a "traditional adversarial" case, *Mead Data Cent., Inc. v. U.S. Dep't of Air Force*, 566 F.2d 242, 250 (D.C. Cir. 1977). In light of the circuit court's declination to review all of the records withheld, the Citizens proposed a substitute to relieve the court's burden and enable oversight (attorney's eyes-only-review), but the Town opposed and the circuit court rejected that expedient. R. 136, 138, 141. Nor did the circuit court otherwise insist that the Town bear its burden of proof on the exemptions. Rather, it accepted "the sweeping and conclusory citation of an exemption plus submission of [some of the] disputed material for in camera inspection," *Mead Data Center*, 566 F.3d at 251—the "sample" of which was selected and submitted solely by the Town—and nothing more. R. 145, 188. The court assumed there was no "bad faith" by the Town in the selection, while ignoring the lack of any representation from the Town as to the asserted exemption's scope or any evidence about the public records withheld, the withholding or sampling process, the *In Camera* Submission itself, or its representativeness of those public records withheld but not submitted. R. 141, 145, 188–89.

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Whatever the Town's motivation for withholding, a factual foundation to justify it must be produced, not only because VFOIA places the burden on the Town, but also because it is the only party with access to the information. Where no evidence about the withholding has been produced, finding the withholding justified because the objecting Citizens have not ferreted out "bad faith" reverses the burden of production and proof, however much the Town may deny it. Town's Br. at 19–20. Thus, the circuit court did not require, as does the General Assembly, that the "burden of proof" be borne by the Town, whose conclusory assertions carry none of that weight. *See* Va. Code § 2.2-3713(E). Instead of "resolving disputes under VFOIA [in] favor [of] open government in close cases," *Gloss v. Wheeler*, 887 S.E.2d 11, 26 (Va. 2023), the circuit court held that the arguments of the Town's attorney and his unfettered selection of [redacted]—drawn from some indeterminate sum of "3,100-plus"—alone will do. *See* Town's Br. at 23.

The Town had their day in court; now, this Court must hold the Town to its burdens. Because the *In Camera* Submission is insufficient as a matter of law to "establish an exclusion" applies to any, much less all, of the public records withheld, the Court should order disclosure, vindicating VFOIA's command that "all public records . . . be available . . . upon request." Va. Code § 2.2-3700(B).

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ARGUMENT IN REPLY

I. The Political Subdivision Exemption Must Be Read Disjunctively and Exclusively, as a Conjunctive and Inclusive Reading Is Both Unnecessary to Follow Obvious Legislative Intent and Contrary to VFOIA's Rule of Narrow Construction and Its Purpose of Public Transparency.

The Town treats the Court to a lengthy discursive on the usage of "or" in the English language, in legal writing, and in the various versions of Code § 2.2-3705.7(2), all apparently directed to determining, "in the absence of particularizing qualifiers, which meaning of 'or' did the legislature intend when it drafted" that statute. Town's Br. at 9, *see id.* at 8–13. It purports to find the answer for what the General Assembly meant by "or" in the Political Subdivision Exemption—a phrase of thirteen (13) words that has been completely unchanged since March 9, 2000—not from the word's plain meaning, any rule of construction, statutory context, statutory history at the time, or the purposes of the exemption specifically or VFOIA generally. No. What the General Assembly intended "when it drafted" these thirteen (13) words, we are told, may be discovered from an amendment made seventeen (17) years later, adding two (2) instances of "or" and changing some punctuation in two (2) other exemptions in Code § 2.2-3705.7(2). *See* Town's Br. at 13–14 (apparently referencing 2017 Va. Acts c. 778, § 1 (Apr. 5, 2017)).

The smorgasbord of cases the Town cites for its "inclusive" (read: expansive) interpretation of the Political Subdivision Exemption, Town's Br. at 12–13, come from wholly unrelated statutory formulations in unrelated contexts—statutory bars

to recovery of line of duty benefits and criminal prohibitions against doing an act while employing a list of items. The Town's confession that it views "this whole provision [a]s a grant of discretionary power to the custodian of records" says the quiet part aloud and reveals its misinterpretation of VFOIA. Town's Br. at 12.

Thus, the Court will search the Town's Brief in vain for any reference whatever to the controlling principles cited by the Citizens, Opening Br. at 22–33, much less any explanation on how the Town's reading fares in their light. Missing is any explanation from the Town as to how interpreting "or" to mean that the records of both the Mayor and Town Manager are exempt may be squared with the plain language rule that "or" should be read disjunctively except when "'necessary to effectuate the obvious intention of the legislature'" in adopting the Political Subdivision Exemption.[2] Or how the Town's interpretation is consistent with the General Assembly's mandated rules of construction: that "[a]ny exemption from public access to records . . . shall be narrowly construed" and that no records shall be "withheld . . . unless specifically made exempt." Va. Code § 2.2-3700(B). Or how the Town's interpretation "'will carry out the legislative intent behind the statute,'" *Hawkins v. Town of S. Hill*, 878 S.E.2d 408, 412 (Va. 2022)

[2] *Williams v.* Commonwealth, 61 Va. App. 1, 11 (2012) (emphasis in original) (quoting *S. E. Pub. Serv. Corp. of Va. v. Commonwealth ex rel. State Corp. Comm'n*, 165 Va. 116, 122 (1935)). Here, "[t]he disjunctive may not be omitted or replaced with the conjunctive without doing violence to the plain language." *TravCo Ins. Co. v. Ward*, 284 Va. 547, 554 (2012).

(quoting *Conyers v. Martial Arts World of Richmond, Inc.*, 273 Va. 96, 104 (2007)), namely "ready access to public records in the custody of a public body or its officers and employees." Code § 2.2-3700(B); *see Gloss*, 887 S.E.2d at 19 (referring to this provision as "an express statement of the purpose of the statutory scheme").

The Town's silence on these key principles speaks volumes, particularly in light of what it *does* say. On brief, the Town all but concedes that the Political Subdivision Exemption "is subject to more than one interpretation," and engages not at all with the Citizen's reading, Citizens' Br. at 23, 26–33, only contending that its own interpretation "is the most natural reading" of the statute's current form. *See* Town's Br. at 8. As the text does not compel the Town's reading, and its reading obstructs the General Assembly's stated ends, it must be rejected.

The Supreme Court has recently cautioned lower courts when interpreting VFOIA that where public records are not "specifically made exempt [from disclosure]," any ambiguity is resolved in favor of disclosure, as that interpretation alone "will carry out the legislative intent behind the statute." *Hawkins*, 878 S.E.2d at 412 (quoting *White Dog Publishing*, 272 Va. at 386). As the Court concluded even more recently when construing a VFOIA exemption, "the requirement that all VFOIA exceptions be construed narrowly, Code § 2.2-3700, and VFOIA's heavy 'interpretative thumb on the scale in favor of' open and transparent government" compels the Court to interpret "every provision of VFOIA" so as "to promote an

increased awareness by all persons of governmental activities and afford every opportunity to citizens to witness the operations of government." *Gloss*, 887 S.E.2d at 25 (quoting *Fitzgerald v. Loudoun Cnty. Sheriff's Off.*, 289 Va. 499, 505 (2015)).

Thus, the use of the disjunctive "or" must be read *exclusively*, to use the Town's phraseology, that is, to limit withholding to the "working papers and correspondence of" one official for each political subdivision, even in the off-case, as here, that the political subdivision in question has both a mayor and a chief executive officer and both have putative "correspondence" that is responsive to a request. To do otherwise would be to, like the court below and the Town on appeal, disregard the "special rule of construction for interpreting VFOIA" that "'puts the interpretative thumb on the scale in favor of' open government,"[3] and to fail to "pay special attention to that choice and" give it "full effect."[4]

II. "Correspondence of" a Public Official Must Be Given Its Plain Reading in Context and Be Limited to Written Communications Prepared by or for the Public Official Personally, Lest the Political Subdivision Exemption Swallow the Rule of Public Transparency.

Of course, "correspondence of" the public official in question should not be "construed to mean nothing more than 'working papers,'" Town's Br. at 16, but that is not what the Citizens propose. Apparently unaware of the maxim of *noscitur a*

[3] *Gloss*, 887 S.E.2d at 19 (quoting *Fitzgerald*, 289 Va. at 505).

[4] *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) (internal citation omitted).

sociis, the Town faults the Citizens for suggesting that "correspondence" "should be limited to 'deliberative papers' like its *companion term* 'working papers.'" Town's Br. at 16 (emphasis added). Treating "companion terms" as carrying similar meanings is what that maxim counsels—"that a word is known by the company it keeps," *Cuccinelli v. Rector, Visitors of Univ. of Virginia*, 283 Va. 420, 432 (2012)—which maxim should be heeded in construing the meaning of the phrase "correspondence of . . . the mayor or chief executive officer of any political subdivision of the Commonwealth." None of the cases cited by the Town suggest otherwise. Town's Br. at 16–17. Rather, the text omitted by the Town's citations confirm that an undefined term must be given its "'ordinary meaning, *[taking into account] the context in which it is used*.'" *Am. Tradition Inst. v. Rector & Visitors of Univ. of Va.*, 287 Va. 330, 341 (2014) (omitted portion emphasized) (quoting *Dep't of Taxation v. Orange-Madison Coop. Farm Serv.*, 220 Va. 655, 658 (1980)).

The context for that term includes, first, that it is a discretionary exemption within VFOIA that is subject to a narrow construction in favor of public transparency. Va. Code § 2.2-3700(B). The more specific context is its use within an exemption attached to certain public officials identified in Code § 2.2-3705.7(2), who in the case of other identified officials are defined to include members of their staff. The terms "mayor or chief executive officer" are not so defined and so should not be read to extend the Political Subdivision Exemption to the "working papers

and correspondence of" their staff or others. Additional context is provided by Code § 2.2-3705.7(2)'s defining working papers as "those records prepared by or for a public official identified in this subdivision for his personal or deliberative use," and its provisions stating what that term, and the term "correspondence," does not cover:

> [N]o 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) (emphasis added).

As the Citizens interpret the two exempt categories, there is no identity of scope. Rather, "working papers of" an identified public official may embrace public records that are in the custody of another person subject to VFOIA, that were not prepared by the identified official, or even yet provided to that official, or that even list the official's name, provided they (1) are being prepared for the official's "personal or deliberative use" and (2) contain such non-public information or "substantive analysis" or interaction with public information. Additionally, working papers plainly can be intended for the consideration of many persons and still be "prepared by or for a public official['s] . . . deliberative use."

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On the other hand, "correspondence of" an identified public official need not have non-public information or "substantive analysis" or interaction with public information, but must be communications directed to persons, not memorandum generally, and must have been either addressed personally by the identified public official to another or, if not addressed to another by the official, must have been a communication addressed personally to that official as an official and for "personal or deliberative use." As in other VFOIA contexts, "'how the e-mail is used' is the dispositive consideration," *Beck v. Shelton*, 267 Va. 482, 489 (2004), although breadth of distribution can bear on that question and the propriety of the exemption. Otherwise, the "correspondence of" persons who are not the "mayor or chief executive officer" may be exempted by inattention or intentional evasion of VFOIA.

The line of demarcation drawn by the Citizens' proposed interpretation tracks the "bright line" and is consistent with the only published decision applying the correspondence exemption. In the case of *Hill v. Fairfax Cnty. Sch. Bd.*, 83 Va. Cir. 172 (2011), "many of the e-mails withheld were between Board members," whose correspondence was not exempt. *Id.* at 177. Moreover, "the Superintendent," who was the chief executive officer of the School Board, "was merely copied as a recipient." *Id.* The Court held that the mere fact "that the Superintendent received or read a copy of these e-mails does not qualify them as part of his working papers or correspondence," as "[s]uch e-mails do not reflect the work of the Superintendent,

nor do they evidence communications intended only for the Superintendent" and so held that the e-mails "should have been disclosed."[5]

The Town, however, takes a far different tact than *Hill*, both on brief and in the *In Camera* Submission: "If someone is sending information through a written medium, that is correspondence" and so exempt. Town's Br. at 18. There is little dispute that most, if not all, written communications personally addressed to others by the identified public official acting in an official capacity are the exempt "correspondence of" that official. The dispute arises over whether all e-mails that are sent to the identified public official's e-mail address are also the exempt "correspondence of" that official. According to the Town, "receiving an email *does* make that email one's correspondence, by definition," no matter if it is either responsive, solicited or not, who else receives it, to whose attention it was directed, who is in the salutation, if its contents implicate the official duties of the recipient, or "the level of engagement of the recipient" with the email—the "inbox rule," if you will. *See* Town's Br. at 18–19. Under the Town's approach, its employees, and members of the public too, can insulate their communications with the Town, council members, staff, and others (all non-exempt) by the expedient of copying the

[5] *Hill*, 83 Va. Cir. at 177, *aff'd*, 284 Va. 306 (2012). The School Board, represented on appeal by now-Judge Raphael, does not appear to have cross-appealed this decision ordering e-mail disclosure. *See Hill v. Fairfax Cnty. Sch. Bd.*, Rec. No. 111805, Br. of Appellee, 2012 WL 6838842 (Feb. 7, 2012).

Town's Mayor or Town Manager. The want of redacted e-mails from the Town strongly suggests, and review of the *In Camera* Submission confirms, that this occurred here, contrary to the general rule, Va. Code § 2.2-3704.1, and the specific "correspondence" command, Va. Code § 2.2-3705.7(2).

The Town's construction gives no meaning to the possessive, personal modifier "of" after correspondence, extends the exemption's reach to other official's correspondence, ignores the statutory context of the phrase, crosses the "bright line" governing these cases, "VFOIA's expressly stated presumption in favor of open government," and threatens to "swallow the rule" of "ready access" to political subdivisions' public records. *Gloss*, 887 S.E.2d at 19, 22 n.11. "Such an expansive interpretation of Code § 2.2–37[05.7(2)] would be inconsistent with the General Assembly's directive that an exemption to FOIA's requirement of [public access to records] be *narrowly construed*." *White Dog Publishing*, 272 Va. at 387. That being so, the Town's categorical "inbox rule" must be rejected in favor of a document-by-document "determination in the context of each case." *Hawkins*, 301 Va. at 432.

III. Sufficiency of the Evidence Is Not Reviewed for Abuse of Discretion, and the Want of a Preponderance of Evidence Establishing that an Exclusion Applies to All of the Records Withheld Compels Reversal and Judgment.

There is no dispute that circuit courts have discretion regarding the process for *in camera* inspections, as the Town notes, *see* Town's Br. at 21–22, and may not need to resort to *in camera* inspection of every document withheld if other detailed

evidence justifying the withholding is provided.[6] But the fact of discretion does not answer the question of whether the Town has satisfied its "burden of proof to establish an exclusion by a preponderance of the evidence," Va. Code § 2.2-3713(E), or that the judgment is not "plainly wrong or without evidence to support [them]." Va. Code § 8.01-680; *Suffolk City Sch. Bd. v. Wahlstrom*, 886 S.E.2d 244, 253 (Va. 2023) (citing *Grayson v. Westwood Buildings L.P.*, 300 Va. 25, 58 (2021) and applying Code § 8.01-680 to a VFOIA appeal).

To defend the judgment,[7] the Town is compelled to argue that a trial court need not actually review the documents withheld because the "court indicated that it lacked the resources," Town's Br. at 23, or, having declined that, permit attorney's-

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[6] *Ethyl Corp. v. U.S. E.P.A.*, 25 F.3d 1241, 1250 (4th Cir. 1994) (explaining that "*in camera* review [is] recognized to be available as a possible method of reviewing a[] [withholding] decision," but recognizing "that such a process can be cumbersome and overburdening for the judiciary," affirming in all cases the initial duty of the withholding party to provide "a detailed justification for its exemption and index the documents against the justification" and allowing that only "[i]f the index is so vague as to leave the district court with an inability to rule, then some other means of review must be undertaken, such as *in camera* review.").

[7] The Town implies that the final order is the February 15, 2023 Formal Opinion, R. 143–45, from their statement that "the trial court would lose jurisdiction over the case on March 9, 2023," Town's Br. at 5 n.2. The Formal Opinion did not purport to dispose of the case, but merely announced a ruling and expressly called for the preparation and execution of an order, later entered. *See* Rule 1:1(b); R. 143–45. Regardless, the Citizens timely appealed even if the earlier Informal Opinion was final, *see* Rule 5A:6(a); R. 141, 146–49, and any preservation of error argument by the Town has itself been waived by not being raised in their brief. *See Ghameshlouy v. Commonwealth*, 279 Va. 379, 394 (2010) (holding a procedural defect waived "when the issue was raised for the first time . . . after the appeal had been briefed").

eyes-only review, or without that, take any "evidence in open court" or otherwise about the materials not submitted. Town's Br. at 20, 22, 23. Instead, it may simply "rel[y] on the Town's attorney, as an officer of the court, to present the documents requested as a fair sampling of the exempted documents," without any guidance and with no other evidence or representation. Per the Town, a circuit court is free to give some "level of deference to a public body's determination" that an exception applies; the rule is just that "deference is not required." Town's Br. at 21.

"Deference" on matters of fact is the opposite of requiring the Town to meet their "burden of proof," and so contrary to law. Va. Code § 2.2-3713(E). Having the burden means the Town must "come forward with evidence to make a prima facie case . . . , and (2) . . . introduce evidence" proving "that a particular proposition of fact," the asserted exemptions apply to all of the public records withheld, "is true." *Suntrust Bank v. PS Bus. Parks, L.P.*, 292 Va. 644, 652 (2016).

Regarding the sufficiency of the evidence, Virginia law supplies few examples of what a public body must show to prove an exclusion applies. Happily, the Court is not without persuasive authority, all of which supports the Citizens. Like VFOIA, the federal Freedom of Information Act too places the burden on the government to justify an exclusion, 5 U.S.C. § 552(a)(4)(B), although it expressly directs the court to "accord substantial weight" to the government's views, where VFOIA does not. Even under this less transparent regime, the federal courts have

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long held that the government's burden "cannot be satisfied by the sweeping and conclusory citation of an exemption," even when this is accompanied by a "submission of disputed material for in camera inspection," even submission of all of the material. *Mead*, 566 F.2d at 251. Rather, it must be supplemented with "a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply."[8] Virginia's sister states have followed suit when applying their open records laws.[9] Thus, detail sufficient to enable evaluation of the exemption's application must be disclosed, and provided both to the Court and to the requester, "so that factual assertions and legal claims can be adversarially tested"[10] and the judicial burden relieved. None of that happened here.

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[8] *Id* at 250–51; *see, e.g.*, *Rein v. U.S. Pat. & Trademark Off.*, 553 F.3d 353, 369–70 (4th Cir. 2009) (affirming that the withholding parties "bear the burden of providing sufficient factual information as to the document's nature or content from which the district court can independently assess the applicability of the claimed exemption" and holding the information provided there "inadequate as a matter of law").

[9] *See, e.g.*, *Amster v. Baker*, 453 Md. 68, 81–86 (2017); *City of Fort Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 851–52 (Ky. 2013) (affirming that in all cases "the court must hold the agency to its burden of proof by insisting that the agency make a sufficient factual showing—by affidavit; by oral testimony; or, if necessary to preserve the exemption, by *in camera* production—to justify the exemption. The agency should provide the requesting party and the court with sufficient information about the nature of the withheld record . . . ."); *Farley v. Worley*, 215 W. Va. 412, 425–27 (2004) (following *Mead Data Center*).

[10] *See City of Forth Thomas*, 406 S.W.3d at 851; *see also, e.g.*, *Ethyl Corporation.* 25 F.3d at 1250 (emphasizing "need for specificity and itemization to permit the adversary process to function").

Rather, all that was offered were conclusory assertions by the Town's attorney and a few records. The *In Camera* Submission does not include all of the disputed records, and the "little more detail" that the Town gave, Town's Br. at 19, consists simply of the arguments of counsel, not evidence,[11] and unsworn statements from the Town's counsel, made without personal knowledge, vaguely alluding to the "subject matter of [some of the] withheld records." Va. Code § 2.2-3704(B)(1), (2); R. 277:16–79:4. As this showing pales in comparison to even the "patently inadequate" indexes and affidavits, which gave some document-by-document detail, but were found inadequate in *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 861 (D.C. Cir. 1980), the Town has not carried its burdens as a matter of law.

For the same reasons, the circuit court's discretion was plainly abused. *See Landrum v. Chippenham & Johnston-Willis Hosps., Inc.*, 282 Va. 346, 352 (2011). There can be no reasonable dispute that many "relevant factor[s] should have been given significant weight," *id.*, including the lack of evidence about: (1) the standard of withholding employed; (2) the number and nature of the public records withheld; (3) the sampling methodology selected; (4) how the *In Camera* Submission satisfied the exemptions asserted; and (5) the representativeness of the *In Camera*

[11] *Curtis v. Commonwealth*, 3 Va. App. 636, 642 (1987); *cf. Moore v. Maroney*, 258 Va. 21, 27 (1999) (distinguishing between an "evidentiary hearing" and one in which "counsel . . . merely made 'factual representations and argument'" for purposes of VFOIA review) (quoting *LeMond v. McElroy*, 239 Va. 515, 518 (1990)).

Submission. These factors were plainly "not considered." *See id.* To the extent these were considered, it was "a clear error of judgment" to permit the Town to withhold the entirety of thousands of emails on the strength of the slap-dash *In Camera* submission, filled with duplicates, unexplained, and supported with no other evidence. *See id.* There can also be no reasonable dispute that an "irrelevant or improper factor," the absence of a showing of bad faith by the Town, was "considered and given significant weight," as a justification for insisting on none of the foregoing evidence. R. 145, 188. Given the Town's burden, holding the lack of evidence about the Town's handling of the exemption process against the Citizens is an error of law, which is always an abuse of discretion. *See Davenport v. Util. Trailer Mfg. Co.*, 74 Va. App. 181, 206 (2022).

On appeal, the Town declines to defend any of the records withheld in their Brief of Appellee, instead both faulting the Citizens for arguing the sealed records at all and for not arguing all of them. *See* Town's Br. at 23–24 & n.4. It particularly trumpets that the Opening Brief did not expressly contest the applicability of the attorney-client privilege to any particular document within the *In Camera* Submission. Town's Br. at 23–24. Here, as elsewhere, the Town simply failed to provide a basis to evaluate the claim meaningfully, although some materials do not appear to be appropriate candidates for privilege, [redacted]. To withhold as privileged under Code § 2.2-3705.7(1), "[t]he proponent of the privilege

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has the burden to establish that the attorney-client relationship existed, that the communication under consideration is privileged, and that the privilege was not waived." *Walton v. Mid-Atl. Spine Specialists, P.C.*, 280 Va. 113, 122–23 (2010). For this exemption, as all for all others, the evidence before the circuit court below, and now before this Court on appeal "leaves the court without the ability to determine whether []any of the documents fall within the claimed privilege, and absent sufficient information, the [Town] fails to carry its burden of satisfying the requirements of demonstrating an exemption." *Ethyl Corporation*, 25 F.3d at 1250.

* * *

What is to be done? The Town allows, but does not include in its "statement of the precise relief sought," that there could be remand "for a more-searching in camera review." Town's Br. at 25. But the Town had its day in court and invited the error by thumbing its nose at the burden of proof placed on it by the General Assembly. Under no interpretation of VFOIA could the *In Camera* Submission alone satisfy the Town's burden. Thus, there was no mere failure by the circuit court to place the "interpretative thumb on the scale in favor of open government," but a ham-handed, voluntary refusal by the public body to put on a case, even withholding evidence given to the press. *See* R. 183, 186. Thus, unlike in *Hawkins*, where remand was appropriate given the lack of "clear guidance" to the trial court, 301 Va. at 433, here remand is inappropriate given the lack of evidence from the Town. The

Town, as the bearer of the burden who chose to forego proof, should also bear the risk of its litigation decisions, as do other litigants who do not carry their burden.[12]

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 solely to determine an award of "reasonable costs, including . . . attorney fees," both at trial and on appeal, under Code § 2.2-3713(D).

Date: October 16, 2023

Respectfully submitted,

CITIZENS FOR FAUQUIER COUNTY

/s/ Michael H. Brady
By Counsel

[12] *See, e.g.*, *Atrium Unit Owners Ass'n v. King*, 266 Va. 288 (2003) (holding that there was a failure of proof as a matter of law and reversing and entering final judgment for the party without the burden); *CSE, Inc. v. Kibby Welding, LLC*, 77 Va. App. 795, 802 (2023) (same). Political subdivisions get no special dispensation. *See Cnty. of Isle of Wight v. Int'l Paper Co.*, 301 Va. 486, 502 (2022) (affirming refund to a taxpayer of "$5,485,481.81, the entirety of the M&T tax it paid in 2017, plus interest" and refusing an alternative remedy not advanced at trial, explaining that "[t]he rules of this Court should be consistently applied, and the County must now live with the choices it made during this litigation"). The Citizens note that theirs is not the only appeal pending before this Court about the "correspondence" exemptions provided by VFOIA or the proper discharge of the public body's burden of proof. *See Commonwealth of Virginia, et al. v. Sawyer*, Case No. 0330-23-4.

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SEALED

CERTIFICATE

In accordance with Rule 5A:22(h), I hereby certify that on this, the 16th day of October, 2023, a true and correct copy of the foregoing **REPLY BRIEF OF APPELLANT**, was served both via electronic mail, with agreement, and via the U.S. Mail, 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 5,493 words and complies with Rule 5A19(a) by not exceeding 20 pages.

/s/ Michael H. Brady