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In The  
**Supreme Court of Virginia**

RECORD NO: \_\_\_\_\_

**THOMAS A. BLACKSTOCK, JR.,**

*Petitioner,*

**v.**

**VIRGINIA DEPARTMENT OF TRANSPORTATION,**

*Respondent.*

**ON APPEAL FROM THE COURT OF APPEALS OF VIRGINIA  
RECORD No.: 0343-24-2**

\_\_\_\_\_  
**PETITION FOR APPEAL**  
\_\_\_\_\_

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Appellant Thomas A. Blackstock, Jr., by counsel, pursuant to Rule 5:17 of the Rules of the Supreme Court of Virginia, hereby submits the following Petition for Appeal.

## INTRODUCTION

This case involves Blackstock’s continued – *and continuing* -- efforts to obtain a clean copy of an audit report (the “Report”) prepared by the Assurance and Compliance Office (“ACO”) of the Virginia Department of Transportation (“VDOT”). The subject matter of the Report involved the “extraordinary steps” taken by VDOT employees to secure employment for someone favored by a VDOT employee. R234. It concluded that one particular employee had created the appearance of impropriety as to this action and recommended that the subject employee “be counseled on actions . . . that can create the appearance of impropriety.” R224 (emphasis added). The clean copy of the Report is believed to identify the subject employee.

Despite making three agency requests and then filing a Petition for Mandamus below, Blackstock has yet to see a version of the Report that identifies the name of this subject employee. Indeed, at the Agency level, VDOT responded to each of Blackstock’s three separate requests by

giving him a copy of the Report that was redacted in one form or another.<sup>1</sup> At no time has Blackstock ever received a clean version of the Report that names the person for whom counseling was recommended. This violates the Virginia Freedom of Information Act (“VFOIA”), Va. Code § 2.2-3700, *et seq.* (“VFOIA” or the “Act”).

Below, the Circuit Court refused to order a copy of the Report with the unredacted name of the subject. R70-74.

First, even though VDOT did not invoke the “Investigative Notes” exemption under Va. Code § 2.2-3705.3(7) when it replied to Blackstock’s *third* independent VFOIA request for the Report<sup>2</sup>, the Circuit Court allowed VDOT to rely on it anyway. R72. The Circuit Court reasoned that Blackstock’s three VFOIA requests were “part of cumulative and ongoing correspondence regarding the same Report,” *id*, and, thus, concluded that since VDOT had previously invoked the exemption (i.e., in response to Blackstock’s *second* independent request for the Report -- a year before

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<sup>1</sup> In response to his first two requests, Blackstock received an almost totally redacted version of the report. *See* R231-235. In response to the third, he received a version that, while better, remained heavily redacted. R223-230.

<sup>2</sup> Instead, it invoked the “Personnel Information” exemption under Va. Code § 2.2-3705.1(1). *See* R249.

his third request was even made) in its VFOIA prior correspondence with Blackstock, it could still rely on it.

Second, applying the exemption, the Circuit Court held that the “Investigative Notes” exemption permitted VDOT to redact the name of the subject of the investigation from the Report. Specifically, even though the exemption ***requires*** that the subject’s name ***be disclosed*** if the investigation “lead to corrective action” against that person. Va. Code § 2.2-3705.3(7), the Circuit Court found that no corrective action had, in fact, occurred. In this regard, the Circuit Court credited the testimony of a VDOT witness, R74, even though she lacked any personal knowledge on the issue, and instead, based her “no corrective action” testimony on hearsay – namely, her conversation with the VDOT Commissioner (who did ***not*** testify below). R169, R174-176.

On appeal, the Court of Appeals (“COA”) affirmed the Circuit Court’s rulings, albeit with a twist. First, it held that, even assuming that VDOT had waived the “Investigative Notes” exemption, any waiver didn’t require the disclosure of the identity of the Report’s subject. The COA began by examining the statutory language at the beginning Va. Code § 2.2-3705.3 and held that under that language, even if a waiver occurred,

“a public body has no discretion to release information ‘where such disclosure is prohibited by law.’” *Blackstock v. VDOT*, 84 Va. App. 229, 239 (2025). Then, relying on specific language embedded in the text of the very exemption that Blackstock contends was waived in full, the COA concluded that unless the investigation led to a corrective action for the subject of the investigation, the disclosure of the identity of the subject was still “prohibited by law.” *Id.* at 240. In other words, the COA said that any waiver of the “Investigative Notes” exemption by VDOT did not – and could never actually -- mean a waiver of *all* of the language of the exemption.

Second, like the Circuit Court, the COA held that VDOT had met its burden to withhold the identity of the subject of the Report because its evidence purportedly showed that the subject of the Report had not, in fact, received a corrective action. Focusing on the one witness who testified at the Circuit Court level on this issue, the COA explained:

Haley testified that, **based on her role in VDOT working on disciplinary matters statewide and by confirming with the VDOT Commissioner**, she knew that the subject of the investigation did not receive corrective action, and she also knew that the subject did not consent to the release of his or her identity.

*Id.* at 240 (emphasis added)

The COA's rulings are erroneous.

First, although the COA did not directly address this issue, VDOT did fail to invoke the “Investigative Notes” exemption in accordance with the requirements of VFOIA, and thus it waived it. The Circuit Court’s unaddressed ruling on this issue is wrong. VFOIA says that “[u]nless a public body or its officers or employees ***specifically elect to exercise an exemption*** provided by this chapter or any other statute, . . . all public records ***shall be available*** for inspection and copying upon request.” Va. Code § 2.2-3700(B) (emphasis added). VDOT did not do this here – that is, it did not invoke the “Investigative Notes” exemption in replying to Blackstock’s third request. While the Circuit Court said VDOT’s prior invocation of the exemption was sufficient, this conclusion ignores that Blackstock made *three* separate independent requests for the documents, which, in turn, required *three* separate invocations of the exemption.

Second, *because* VDOT waived the right to invoke the exemption at issue, it waived the right to withhold the identity of the subject of the Report. The COA’s ruling to the contrary – based on the initial “where such disclosure is prohibited by law” language of the subsection at issue – is erroneous. The COA viewed the “prohibited by law” language too

broadly, out of context, and in a manner that is inconsistent with the liberal disclosure purposes underlying the Act.

Third, even if the “Investigative Notes” exemption does apply here, the COA was wrong to hold that VDOT met its burden of proving by a that the subject of the Report did not receive a corrective action. As explained herein, hearsay evidence is not sufficient for a public body to sustain its burden on claiming an exemption, and both the Circuit Court and the COA erred in relying on such evidence to hold that VDOT met its burden.

Blackstock now seeks Supreme Court review of these important statutory and evidentiary questions under VFOIA.

### **ASSIGNMENTS OF ERROR**

1. The Circuit Court erred in its February 1, 2024 Letter Opinion And Order (R.70-74) when it held that there was no waiver by VDOT of the “Investigative Notes” exemption under Va. Code § 2.2-3705.3(7) of VFOIA when VDOT did not invoke this exemption with respect to Blackstock’s third specific VFOIA request for the Report at issue. (Preserved on Pages 107-108, 110-113, 121, 149-150 and 194-197 of the Record), The Circuit Court’s error led it to erroneously examine the alleged merits of whether the “Investigative Notes” exemption applied in this case. The Court of Appeals erred by not deciding this issue directly.

2. The COA erred in its March 25, 2025 Opinion when it held that even assuming VDOT waived the “Investigative

Notes” exemption, the language of Va. Code § 2.2-3705.3(7) still prohibited the disclosure of the identity of the subject of the Report if the disclosure was otherwise “prohibited by law” (*Blackstock v. VDOT*, 84 Va. App. 229, 239-240 (Preserved during the COA oral argument)).

3. The Circuit Court erred in its February 1, 2024 Letter Opinion And Order (R.70-74) when it held that VDOT had met its burden of proof in showing that the “Investigative Notes” exemption under Va. Code § 2.2-3705.3(7) of the Virginia Freedom of Information Act applied to the Report in this case. (Preserved on Pages 107-108, 121-123, 194, 196-197, and 199 of the Record). The Court of Appeals erred in affirming the Circuit Court.

4. The Circuit Court’s two errors (in AE 1 and AE3) led it to err in denying Blackstock’s Petition for Mandamus under the Virginia Freedom of Information Act and in denying him the relief he sought in the Petition. (See record citations in Assignments 1 and 3 above). The Court of Appeals erred in affirming the Circuit Court and in denying Blackstock relief.

#### **STATEMENT OF THE CASE AND THE MATERIAL PROCEEDINGS BELOW**

This action arises from a Petition for Mandamus under VFOIA. *See* R. 1-57. In the Petition, Blackstock asked the Circuit Court to issue a mandamus order requiring VDOT to produce an unredacted version of the Report. R11. The Petition sought attorney’s fees and costs. *Id.*

VDOT responded with a Demurrer and a Motion to Dismiss. R58-64. However, at oral argument on these pleadings, VDOT’s counsel conceded that the motion to dismiss was “basically . . .just [the Circuit

Court] ruling in [VDOT's] favor in regard to the FOIA request.” R136. As such, the Circuit Court took the motion to dismiss “under advisement” and then proceeded to hear evidence from the parties as to the VFOIA Petition. R134-186. The evidence included exhibits, testimony from Blackstock, R136-157; R185-186, and testimony from Amanda Haley, the Assistant Division Administrator, R158-184.

After oral argument on the Petition, R187-205, where Blackstock's counsel disputed both VDOT's ability to invoke the “Investigative Notes” exemption *and* whether VDOT had met its burden of proving that the exemption actually applied, R193-197, R199, the Circuit Court denied the Petition. R70-74. In doing so, the Court ruled that VDOT had not waived its right to rely on the “Investigative Notes” exemption *and* that it had proven by a preponderance of the evidence that the subject of the Report's investigation had not received a corrective action. R72-74.<sup>3</sup>

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<sup>3</sup> VDOT also invoked – and relied upon in response to the Petition -- the “Personnel Information” exemption under Va. Code § 2.2-3705.1(1). The Circuit Court, however, concluded that the information at issue did not meet the definition of “personnel information” under *Hawkins v. Town of South Hill*, 301 Va. 416 (2022) and thus held that the information at issue could not be withheld under that exemption. R72-73. VDOT has not challenged that ruling as part of this appeal.

Blackstock timely appealed the Order, R84-87, and, after briefing and oral argument, the COA affirmed. Blackstock now timely files this Petition for Appeal.

### **STATEMENT OF FACTS**

The facts of this case involve Blackstock's struggles to obtain a clean copy of the Report.<sup>4</sup> Part 1 discusses Blackstock's three separate VFOIA requests for the Report – and VDOT's responses to these requests. Part 2, in turn, discusses what the face of Report – in its final "light" redacted form -- objectively shows the reader and what VDOT's witness testified about the subject of the Report.

#### **I. Part 1: Over The Course Of A Two-Year Period, Blackstock Made Three Separate And Independent Requests For A Clean Copy Of The Report.**

From August 10, 2005 to April 1, 2022, Blackstock worked in various HR management roles at VDOT. R70. At the time of his retirement in 2022, Blackstock worked as an Assistant Division

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<sup>4</sup> These facts are taken from the Petition for Mandamus filed below (R1-57), the witness testimony that was provided before the Circuit Court on January 29, 2024 (R46-97), and the exhibits that were submitted to, and admitted by, the Circuit Court on January 29, 2024 (R223-249).

Administrator in VDOT's HR Division, a position he had held for more than 14 years. *Id.*

One of Blackstock's many duties as an Assistant Division Administrator at VDOT was to review personnel actions, such as new hires, and ensure that they complied with various guidelines from VDOT and the Commonwealth of Virginia. *Id. See also* R137-138.

**A. Blackstock Rejected An Irregular Hiring Request; Retaliation Ensued.**

In early 2020, Blackstock reviewed a personnel action for a proposed hire that caused him concern. R138. Specifically, the proposed hire involved hiring either a friend or relative of VDOT's HR Director (Blackstock's immediate supervisor), yet the opening was not slated to be advertised or otherwise go through a standard competitive hiring process. R138-140. It was just going to be a direct hire. *Id.* This was highly irregular. *Id.*

Although Blackstock's supervisor told him to approve the personnel action, Blackstock hesitated and raised the irregularities with the VDOT Commissioner, Stephen Brich. Upon doing so, Commissioner Brich held meetings with both Blackstock and Blackstock's supervisor and instructed Blackstock ***not*** to approve the hiring action. *Id.*

Blackstock's supervisor was furious with this outcome, and soon thereafter, she began retaliating against him. R141-142. Examples of this retaliation were taking away Blackstock's review authority and making false accusations against him about his work. *Id.*

**B. Blackstock Grieved The Retaliation And, As Part Thereof, Requested A Review Of The Irregular Hiring Proposal.**

In response to this retaliation, Blackstock filed a grievance against VDOT. R141. In doing so, he specifically requested -- as part of his grievance relief -- that VDOT review whether the proposed hiring action at issue (i.e., hiring the HR Director's friend or relative) was consistent with DHRM guidance, VDOT HR Division guidance, and standard agency practices. R142.

Subsequently, VDOT did just that -- i.e., it conducted a review and audit of the hiring decision at issue. This was done by VDOT's ACO, which issued a Final Report on the matter on August 10, 2020. *See, e.g.*, R223-230.

In the meantime, as Blackstock's grievance moved forward, he learned of the existence of the ACO Report and requested it. R142. VDOT's counsel objected and refused to produce the ACO Final Report.

R13-16. After examining the issue, the Hearing Officer for the grievance ordered that Blackstock be given a copy of the Final Report or that it be reviewed *in camera*. *Id.*

VDOT, however, again objected and requested an immediate review of the Hearing Officer's decision. *Id.* VDOT's effort to withhold the Final Report, however, was rejected.

Even then, VDOT, through counsel, continued to fight. After EDR returned the matter back to the Hearing Officer and he subsequently ordered the Final Report be produced directly to Blackstock, VDOT, through counsel, *again* sought EDR review of the Hearing Officer's ruling. R17-20. VDOT even asked that the Hearing Officer be removed from the case based on his actions in ordering the production of the Final Report. *Id.*

As before, VDOT's request for a second review was rejected, and EDR **again** upheld the Hearing Officer's order for VDOT to produce the Final Report to Blackstock. *Id.*

But VDOT remained intransigent and obstructionist. Specifically, even when VDOT finally produced the Final Report to Blackstock, it

produced a version that was so heavily redacted that it was utterly useless.

The VDOT redactions impacted every single page of the Final Report, and included such things as: (i) a COMPLETE REDACTION of the “Overall Conclusion” section of the report; (ii) an almost complete redaction of the “Overall Recommendation” section of the report; (iii) a redaction of the actual “issue” being reviewed by the ACO; (iv) a redaction of almost the entire factual background section of the report, including a redaction of MORE THAN HALF of page 3 of the report and a COMPLETE REDACTION of page 4; and (v) a COMPLETE redaction of one of the exhibits to the report. The redactions were made in black magic marker. *See* R231-237.

Upon receipt of the overly redacted Final Report, Blackstock withdrew his grievance. R144.

**C. Even After His Grievance Ended, Blackstock Continued To Request An Unredacted Copy Of The Final Report And Continued To Be Rebuffed.**

With the grievance closed and the irregular hiring matter seemingly in the rear-view mirror, Blackstock decided to make a new effort to receive an unredacted copy of the Final Report. R144-145.

Relevant here, on January 1, 2022, Blackstock sent an e-mail to Holly Jones at VDOT that said:

Hi Holly – Happy New Year! I'm optimistic that on Monday you will be able to provide me with an unredacted copy of the document identified in my December 10th FOIA request.

R246.

The deadline for VDOT to respond to the request was January 10, 2022. However, by that date, VDOT did **not** produce a clean unredacted copy of the ACO Report. Instead, on January 3, 2022, it sent Blackstock a copy of the Report that was redacted **in exactly the same manner as before**. R145; R238-245; R246. The only difference between the two reports was that the redactions in the initially-produced report were done in magic marker whereas the redactions in the newly-produced report were done electronically with a computer.

VDOT explained its refusal to provide a clean copy of the Final Report as follows:

Mr. Blackstock-

This email is in response to your FOIA request to VDOT for a copy of a report produced by Internal Audit in 2020 relating to the recruitment for a specific position. Please be advised that portions of the record you have requested relate to **personnel information and investigations** and are exempt from disclosure pursuant to **§§ 2.2-3705.1 (1)** and **2.2-**

3705.3 (7) of the Code of Virginia. Therefore, these portions have been redacted from the records being released to you.

Thanks,

R246 (emphasis added) In short, VDOT specifically and expressly invoked two discrete exemptions to support its redactions.

Although Blackstock disagreed with this heavily redacted Report, he did not pursue it any further at that time. He retired on April 1, 2022.  
R70.

**D. The Supreme Court of Virginia Issued Its Decision In *Hawkins v. Town of South Hill* And, In Doing So, Heralded A New Day For Public Record Openness Under VFOIA.**

On October 20, 2022 – six months after Blackstock retired from VDOT – the Supreme Court of Virginia issued its decision in *Hawkins v. Town of South Hill*, 301 Va. 416, 878 S.E.2d 408 (2022). In that case, the Supreme Court narrowly defined the “personnel exemption” under VFOIA, and, in turn, greatly expanded the information that public bodies must produce about their employees under VFOIA. Indeed, the Court emphasized that the words “personnel” and “content” under Va. Code § 2.2-3705.1(1) – the so-called “personnel exemption” – must be narrowly construed under the Act. *Hawkins*, 301 Va. at 430; 878 S.E.2d at 415.

Relevant here, the Supreme Court in *Hawkins* defined the term “personnel information” as used in the VFOIA exemption under Va. Code § 2.2-3705.1(1) to mean: “data, facts, or statements within a public record relating to a specific government employee, which are in the possession of the entity solely because of the individual's employment relationship with the entity, and are private, but for the individual's employment with the entity.” *Id.* at 432; 878 S.E.2d at 416.

The Supreme Court then reversed the decision of the Circuit Court below which had refused to order the production of certain requested documents and remanded the case so that the Circuit Court could consider the VFOIA request at issue under the new definition.

On remand, the Circuit Court concluded that the new definition made it much more difficult for public bodies to withhold information under this exemption and, in large part, ordered the production of the requested documents. *See Hawkins v. Town of South Hill*, May 26, 2023 Opinion (R36-46). In doing so, the Circuit Court expressly recognized that “[t]he Supreme Court’s opinion in *Hawkins* **heralded a new day** for the processing of FOIA requests . . . [and] significantly limits the [personnel] exemption in favor of disclosure.” R36 (emphasis added).

**E. Armed With *Hawkins*, Blackstock Made One Last Attempt To Obtain A Clean Copy Of The Audit Report But Again Was Unsuccessful.**

A few months after the Supreme Court issued *Hawkins*, Blackstock became aware of the decision and decided to make one last effort to obtain a clean copy of the ACO Report under VFOIA.

To this end, on January 27, 2023, Blackstock reached out to VDOT yet again and, in relevant part, stated the following:

... today I was directed to a recent Supreme Court of Virginia ruling that provides clarity regarding a broader and more practical definition of personnel records under Virginia's FOIA. Had this interpretation been in play during my grievance related FOIA request, I believe that I would have been more successful at that time.

As a result of this ruling, I am contemplating additional options available to me in order to obtain an appropriately redacted copy of the audit report under FOIA and will probably be compelled in my appeal to include the context under which the document was originally requested and effectively denied by VDOT.

My position (similar to that of plaintiff Richard Hawkins in the Supreme Court Case) is that agencies hide behind an overly broad definition of "personnel records" in order to deprive citizen access to documents which address the actions of government employees in the course of performing agency business.

It seems to me that VDOT's denial of my request (ordered by DHRM) was less about protecting the personal info of the parties involved and more about denying me any sort of real

or perceived tactical advantage in the grievance process that was simultaneously in play.

My apologies for sharing this via personal text but I didn't want you to feel blindsided when I escalate this issue. I trust you and view you as an objective arbiter who may be able to suggest a less contentious route to satisfactorily resolve this matter.

R247. Blackstock also included a link to the Supreme Court's decision in *Hawkins. Id.*

Despite this new attempt, VDOT yet again refused to produce a clean copy of the Final Report. It did, however, produce a copy of the Report that was much less redacted on February 6, 2023 (R249). In an e-mail from Amanda Haley, it explained the production as follows:

Good morning Mr. Blackstock,

I am writing in response to your request, send January 27, 2023 and received via text message on January 30, 2023, for a copy of the audit report completed by VDOT's Assurance and Compliance Office in the matter of ACO Project 2020-218, with appropriate redactions in keeping with the definition of "personnel information" set forth in *Hawkins v. Town of South Hill*, Record No. 210848 (Va. 2022).

Attached, please find the record you requested, which is provided with appropriate redaction of personnel information concerning identifiable persons pursuant to § 2.2-3705.1.

R249. The e-mail, however, made no mention of the "Investigative Notes" exemption.

## II. **Part 2: The Face Of The Report And The Testimony Below About It.**

When the “lightly redacted”<sup>5</sup> version of the Report was finally produced in response to Blackstock’s *third request*, it made clear on its face that VDOT’s ACO’s investigation found that wrongdoing had been committed and that it recommended corrective action. R223. As the Report states on its very first page, “Based on the information reviewed and conclusions reached thereon, a corrective action recommended is included in this report.” *Id.* The Report goes on to say “ACO recommends that [REDACTED] **be counseled** on actions involving related parties that can create the appearance of impropriety and opportunities for the public to question the transparency of VDOT recruitment and employment decisions.” R224 (emphasis added).

VDOT, however, said the subject of the investigation never received the recommended counseling corrective action. According to Amanda Haley, the sole witness who testified on the issue, the subject had not, in fact, received a corrective action because she asked the VDOT

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<sup>5</sup> These were the words used by VDOT’s counsel below to describe the redactions, R95 (referring to “light redactions” in the Report) although Blackstock maintains that the Report is still heavily redacted.

Commissioner, and he told her so. R169. Haley, however, admitted that she was only aware of the lack of corrective action for the subject based on what she was told. R175. She also said that the employee in question was no longer employed with VDOT. R176.

### **STANDARD OF REVIEW**

Blackstock's Assignments of Error ("AE") 1, 3, and 4 turn on the specific facts of the case, namely (i) whether VDOT waived its right to rely on the "Investigative Notes" exemption by failing to invoke it in response to Blackstock's third independent VFOIA request and (ii) whether VDOT met its burden of proof for purposes of invoking the "Investigative Notes" exemption. Thus, this Court owes deference to the Circuit Court's findings unless they are "plainly wrong or without evidence to support them." *Suffolk City School Bd. v. Wahlstrom*, 886 Va. 244, 253 (Va. 2023).

AE2 in this appeal, however, involves the interpretation and application of Va. Code § 2.2-3705.3(7). These are matters of statutory interpretation. As such, this Court reviews the COA's ruling on the interpretation of Va. Code § 2.2-3705.3(7) *de novo*. *Hawkins*, 301 Va. at

424 (“this Court ‘reviews issues of statutory interpretation and a circuit court's application of a statute to its factual findings, de novo.’”).

## ARGUMENT AND AUTHORITIES

### **I. The Circuit Court Was Plainly Wrong In Ruling That VDOT Did Not Waive Its Right To Invoke, And Rely On, The “Investigative Notes” Exemption Because VDOT Did Not Contemporaneously Invoke It When It Should Have. The Court of Appeals Erred By Not Addressing This Issue.**

#### **A. VFOIA General Principles.**

We begin, as we must, with the basic principles that underlie and are codified into VFOIA.

First, “[t]he General Assembly enacted VFOIA to ‘ensure the people of the Commonwealth [have] ready access to public records in the custody of a public body or its officers and employees.’” *Hawkins*, 301 Va. at 424, 878 S.E.2d at 411 (quoting Va. Code § 2.2-3700(B)). As the Act makes clear, “[t]he affairs of government are not intended to be conducted in an atmosphere of secrecy,” and “[a]ll public records . . . shall be presumed open, unless an exemption is properly invoked.” *Id.* This aligns with Justice Brandeis’s famous words: “Sunlight is said to be the best of disinfectants.” L. Brandeis, *Other People’s Money* 62 (National Home Library Foundation ed. 1933).

Second, where, as here, the dispute involves the application of one of the Act's exclusions, the provision at issue must be construed narrowly.

The statute makes this clear, stating:

The provisions of this chapter shall be **liberally construed** to promote an increased awareness by all persons of governmental activities and afford every opportunity to citizens to witness the operations of government. Any exemption from public access to records or meetings **shall be narrowly construed** and no record shall be withheld . . . **unless specifically made exempt pursuant to this chapter or other specific provision of law** . . .

Va. Code § 2.2-3700(B) (emphasis added).<sup>6</sup> In other words, “[b]y its own terms, the statute puts the interpretative thumb on the scale **in favor of disclosure**.” *Fitzgerald v. Loudon Cnty. Sheriff’s Office*, 289 Va. 499, 505, 771 S.E.2d 858 (2015) (emphasis added)

Third and finally, the VFOIA puts the burden of proving that an exclusion applies squarely on the public body at issue, which body must do so by a “preponderance of the evidence.” Va. Code § 2.2-3713(E). The Act also expressly provides that “[n]o court shall be required to accord any weight to the determination of a public body as to whether an exclusion applies.” *Id.*

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<sup>6</sup> In *Hawkins*, the Supreme Court called these “clear statutory canons of constructions for the VFOIA.” 301 Va. at 424, 878 S.E.2d at 412.

**B. The Circuit Court’s Ruling That Blackstock’s Separate VFOIA Requests Were “Part Of Cumulative And Ongoing Correspondence Regarding The Same Report” So As To Allow VDOT To Invoke The “Investigative Notes” Exemption Was Clearly Wrong And Without Evidence To Support It. The COA Erred By Not Addressing This Issue.**

Next, we must address the question of whether VDOT waived its right to invoke the “Investigative Notes” exemption. Below, the Circuit Court held it did not. It said that even though VDOT did not specifically and contemporaneously invoke the “Investigative Notes” exemption in response to Blackstock’s third separate VFOIA request for the Report, the agency could still rely on it in defending against Blackstock’s Petition. This was so, said the Circuit Court, because (i) Blackstock’s third request was “part of cumulative and ongoing correspondence about the same Report” and (ii) *during* this ongoing correspondence about the Report (although not contemporaneously for the third request at issue), VDOT had previously invoked the exemption. R72. Although the COA did not examine the merits of the lower court’s ruling, it was clearly wrong and without evidence to support it.

Fundamentally, the Circuit Court’s ruling misunderstands the nature of making independent and separate VFOIA requests. To be sure,

Blackstock requested the same report on three different occasions. But these were not requests that occurred one right after the other. Instead, they occurred – separately – over a two-year period. Indeed, Blackstock’s final request – and the one that was the subject of his Petition – was made *after he had already retired from VDOT*. To say that VDOT had no obligation to expressly announce *all of the* exemptions it was relying upon for the *third request* would be basically to neuter VFOIA’s statutory command that “[u]*nless* a public body or its officers or employees ***specifically elect to exercise an exemption*** provided by this chapter or any other statute, . . . all public records ***shall be available*** for inspection and copying upon request.” Va. Code § 2.2-3700(B) (emphasis added).

VDOT is not an unsophisticated Agency. And it knows how to invoke exemptions – and *which* exemptions it intends to rely upon. In fact, it would have been very easy for VDOT to say in the third response – “These are new redactions based on our interpretation of *Hawkins* but we are also still relying on the ‘Investigative Notes’ exemption.” But it did not do so. As such, it waived the exemption, and the Circuit Court was wrong to apply it below. *See, e.g., Madeiros v. New York State Educ.*

*Dept.*, 86 N.E.2d 527, 532 (Ct. App. N.Y. 2017) (holding that public body could not rely on exemption that was not contemporaneously raised at the administrative level) (“Because the Department did not rely on subparagraph (iv) in its administrative denial, to allow it to do so now would be contrary to our precedent, as well as the spirit and purpose of FOIL”).

To adopt the Circuit Court’s analysis would also contravene the spirit of the VFOIA and allow for ambush-like behavior by public bodies. For instance, if a public body could name a laundry list of exclusions in response to a first request for a document, subsequently *change* that list to only one exemption in response to a later request, and then *re-assert* its initial list in response to a formal mandamus Petition, it would unfairly deprive VFOIA petitioners of proper notice as to what issues to bring before the Court and would allow – as happened here – a public agency to pull a “bait and switch” when it comes to defending its actions in the Circuit Court. Indeed, for all practical purposes, VDOT “called an audible”<sup>7</sup> at the line of scrimmage when it walked into Circuit Court and

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<sup>7</sup>In American jargon, “to call an audible” means “to change one’s decision or course of action in response to changing or previously unforeseen

changed the rules of the game by relying on an exemption that Blackstock reasonably believed was off the table.

**II. The COA Erred In Holding As A Matter Of Law That Under The Language Of Va. Code § 2.2-3705.3(7), VDOT, Even If It Otherwise Waived The “Investigative Notes” Exemption, Was Still Prohibited From Disclosing The Identity Of the Subject Of The Report Because Such Disclosure Was Otherwise “Prohibited By Law.”**

Next, the COA held that, even assuming that VDOT had waived the “Investigative Notes” exemption, any waiver didn’t require the disclosure of the identity of the Report’s subject because such disclosure was “prohibited by law” under the terms of the exemption itself. In other words, the COA said that any waiver of the “Investigative Notes” exemption by VDOT did not – and could never actually -- mean a waiver of *all* of the language of the exemption. This was erroneous.

Most importantly, the COA too broadly interpreted the meaning of the words “prohibited by law.” Specifically, the COA believed that those words encompassed not only disclosures prohibited by the broader “law” (such as statutory prohibitions contained in other Virginia statutes) but also those prohibited *within the text of the language of the very exemption*

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factors.” <https://idioms.thefreedictionary.com/call+an+audible> (visited on May 27, 2025).

*claimed to have been waived.* This was erroneous, and, indeed, construes the language of the VFOIA that is inconsistent with VFOIA’s statutory rules of construction and its remedial purposes. *See, e.g.,* Va. Code § 2.2-3700(B). Properly construed – that is, construing the exemption language *narrowly* – “prohibited by law” in the preliminary language of Va. Code § 2.2-3705.3(7) necessarily means prohibitions that are set forth *outside* of the internal exemptions themselves. In other words, it means that if an Agency waives in full the application of an exemption, it necessarily waives any restrictions or conditions or qualifications contained therein – as goes one part of the exemption, as goes all.

VDOT, of course, will likely try to defend the COA’s ruling by saying it is simply not legally able to waive the disclosure prohibitions of Va. Code § 2.2-3705.3(7) because such prohibitions relate to the alleged rights of individuals, not those of the Agency. But this position has been rejected in similar “public records” contexts. As the Court of Appeals of Oregon explained in rejecting a similar argument (and also relying on the public policy favoring open government), “it is the district, **and not the affected individuals**, that has the right to withhold the disputed report under the public records inspection law. Consequently, **the district can**

*waive its right to do that.*” *Oregonian Publishing Company v. Portland School Dist. No. 1J*, 952 P.2d 66, 69 (Or. Ct. App. 1998) (emphasis added). The same is true here. The right to withhold the name of the subject of the Report lies solely with VDOT; thus, so too does its ability to waive that right, which it did here.

Nor does the case relied cited by the COA in its opinion undermine or negate Blackstock’s argument here. In that case, *Basey v. Dept. of Pub. Safety Div. of Alaska State Troopers, Bureau of Investigations*, 462 P.3d 529 (Alaska 2020),<sup>8</sup> the Alaska Supreme Court held that a public agency could not waive an affirmative statutory prohibition applicable to the disclosure of personnel records. In doing so, however, the court expressly rejected the adoption of a waiver rule that would have allowed for the disclosure. *Id.* at 533. It also focused – contrary to the Oregon decision discussed above – on the potential prejudice to *individuals* – rather than the rights (and the waiver of those rights) by an Agency. In other words, *Basey* should not guide this Court’s analysis of the waiver issue, nor

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<sup>8</sup>The COA cites to and relies on this opinion on pages 240 and 241 in its opinion. *See Blackstock*, 84 Va. App. at 240-241.

should it prevent this Court from holding that VDOT could and did waive its right to withhold a redacted version of the Report.

**III. The Circuit Court Was Plainly Wrong In Ruling That VDOT Met Its Burden Of Proving That The Subject Of The Report Did Not Receive Any Corrective Action, And The Court of Appeals Erred In Affirming The Circuit Court's Ruling.**

Third, as previously noted, in a proceeding to enforce a VFOIA request, the Act specifically and expressly places the *evidentiary burden* for invoking an exemption on the withholding party – here, VDOT. Section 2.2–3713(E) states, “in any action to enforce the provisions of [the Freedom of Information Act], the public body shall bear the burden of proof to establish an exemption by a preponderance of the evidence.” In doing so, “[t]he burden of establishing the applicability of an exemption ... requires the claimant ... to provide more than conclusory language, generalized allegations or mere arguments of counsel. Rather, a sufficiently detailed record must reflect the reasons why an exemption applies to the materials requested.” *New Haven v. Freedom of Information Commission*, 535 A.2d 1297, 1301 (Conn. 1988) (emphasis added).

Here, the Circuit Court's conclusion, as affirmed by the COA, that VDOT met its burden of proof to establish that, *contrary to the face of the*

*Report itself*, the subject of the Report did not receive a corrective action was plainly wrong and without evidence to support it. To be sure, VDOT employee Amanda Haley testified below that the subject did not receive a corrective action. However, her testimony was not, and is not, legally capable of sustaining VDOT's burden. Specifically, it was not based on any personal knowledge that she had. For example, *she* was not involved in any decision-making as to whether or not to give a corrective action and, instead, all she knew was what the VDOT Commissioner – **which did not testify below** -- allegedly told her. R175. She also testified – again, as a matter of pure hearsay --- that none of the individuals named in the Report (**none of whom testified or submitted any testimony below**) had consented to having their names disclosed to the public. R170. This apparently included the subject of the Report itself – although Haley conspicuously did **not** testify that the subject told her that he or she did not receive any corrective action.

None of this second-hand, hearsay, evidence is sufficient to sustain VDOT's burden, and the Circuit Court therefore erred in ruling that it was. *See, e.g., McChrystal v. Fairfax Cnty Bd. of Supervisors*, 67 Va. Cir. 171, 2005 WL 832242 at \*4-5 (Fairfax Cnty. 2005) (holding that public

body failed to sustain its evidentiary burden for purposes of applying a VFOIA exclusion where its evidence was not based testimony from persons with personal knowledge applicable to the exemption).

For its part, the COA rejected the “purely hearsay” argument because it believed that the VDOT employee (Haley), based on the *nature* of her position, had direct knowledge of the *lack* of discipline for the subject employee. But, as she explained on cross examination before the Circuit Court, her “direct” awareness was still only “based on whatever [she] was told.” *See* R.175. In short, no matter how VDOT or the COA (or the Circuit Court) dresses up Haley’s testimony, it is still necessarily (and improperly) based on hearsay evidence. As such, it could not have formed a competent basis for VDOT to meet its burden of proof on the “Investigative Notes” exemption.

#### **IV. The Circuit Court And The COA Erred In Denying Blackstock’s VFOIA Mandamus Petition Based On The “Investigative Notes” Exemption.**

Based on the above, the Circuit Court erred in denying Blackstock’s VFOIA mandamus petition based on the application of the “Investigative Notes” exemption and the COA erred in affirming this result. The Petition for Mandamus should have been granted, the Circuit Court

should have ordered either (i) that the entire clean unredacted Report should have been produced; or (ii) that the Report should have been produced in a fashion that identifies the subject of the Report's investigation. The COA should have reversed the Circuit Court's failure to make these orders. We now ask this Court to reverse the COA's affirmance of the Circuit Court's rulings and to otherwise order the relief requested by Blackstock.

### **CONCLUSION**

In conclusion, for all of the above reasons, this Court should grant the Petition for Appeal, should hold that the Circuit Court erred in denying Blackstock's VFOIA Petition for Mandamus, should hold that the COA erred in affirming the Circuit Court's rulings, and should order that the Report be produced, either in wholly unredacted fashion or in a manner that, at a minimum, identifies the subject of the investigation. It should also grant Blackstock his attorney's fees for this appeal (to both the COA and this Court). This Court should then remand the case back to the Circuit Court or the COA to allow Blackstock to proceed forward with requests for relief (and attorney's fees and costs) in this case.

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## CERTIFICATE

I hereby certify that on this 27th day of May 2025, a true and exact copy of the foregoing was filed with the Office of the Clerk of the Supreme Court of Virginia via VACES and, on the same date, sent by e-mail to:

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The foregoing complies with the page limit, containing 32 pages, excluding the cover page, table of contents, table of authorities, and certificate.

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