VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF RICHMOND

VIRGINIA INFORMATION TECHNOLOGIES AGENCY,	)	
Plaintiff,	)	
v.	)	Case No. CL17-5280-1
WILLIAM H. TURNER and OFFICE OF THE EXECUTIVE SECRETARY,	)	
Defendants.	)	

VIRGINIA PRESS ASSOCIATION'S REPLY MEMORANDUM IN SUPPORT OF PETITION FOR LEAVE TO INTERVENE

Virginia Press Association ("VPA") has moved for leave to intervene in this interpleader case, and submits this memorandum in reply to the *Opposition to Virginia Press Association's Petition for Leave to Intervene as a Party Defendant* ("OES Opposition") filed by the Office of the Executive Secretary of the Supreme Court of Virginia ("OES"). OES's Opposition addresses a number of matters without explaining why long practice, legal doctrine and common sense do not compel the dismissal of the case on the narrowest available grounds.

1. OES admits that it is seeking the entry of a final order adjudicating numerous legal issues without an effective adversary.[1] OES states that it was "unopposed" at the June 20 hearing on its motion. *See* OES Opposition at ¶ 4. "[D]espite having notice and an opportunity to be heard, Dr. Turner failed to lodge an effective opposition to the Executive Secretary's claims to the phone

[1] OES freely substitutes its Executive Director as the party in interest for some, but not all, purposes. Although some of its arguments on the merits appear to be dependent on the status of the Executive Director, the proposed final order makes findings concerning the OES itself, which indeed is the public body that would be the real party in interest and the custodian of records in response to a future request under the Virginia Freedom of Information Act ("VFOIA").

records." *Id.* According to OES, Dr. Turner's "litigation conduct . . . reflect his misunderstanding of the legal system and his willful refusal to respect the courts and the Rules of Court." *Id.* Rather than caution restraint because an inept adversary did not effectively oppose its constitutional and statutory arguments, OES demands precisely the opposite outcome: "this underscores the need for the Court to reach the merits of this action to reach the ends of justice." *Id.*

2. OES is plainly frustrated by the conduct of Dr. Turner, a *pro se* litigant. Paragraphs 5, 6, and 7 of its opposition brief allege various forms of litigation misconduct by Dr. Turner. VPA has no position on those matters; they are immaterial to VPA's motion. VPA is not, as OES suggests, "willing to litigate this matter" as to Dr. Turner's request for phone records. *Id.* at ¶ 9. VPA is not a stand-in for Dr. Turner, and by advocating that this action be dismissed, it is taking a position directly adverse to Dr. Turner's interests. Neither is VPA suggesting that the Court, if it determines that Dr. Turner has engaged in litigation misconduct, not enter injunctive relief or sanctions against Dr. Turner. VPA is entirely agnostic on those matters, and is focused solely on the content of the proposed final order, an order reciting legal conclusions of significant effect that would be achieved in the face of opposition that is by OES' own admission ineffective and inept – regardless of the reasons why.[2]

3. The consequences of OES facing no effective opposition are not theoretical. One example makes the point. Before this Court, OES has taken the position that it is not a "public body" as that term is defined under VFOIA. *See Memorandum In Support Of the Executive*

---

[2] OES' arguments concerning *ex parte* litigation misstate VPA's position. Clearly, Dr. Turner remains a party to this case. VPA's point concerned the effectiveness of the briefing and argument on the merits in opposition to significant statutory and constitutional arguments advanced by OES. Because, as OES admits, Dr. Turner abandoned briefing and oral argument on those points, that exercise was, effectively, *ex parte*. *See Virginia Press Association's Petition for Leave to Intervene as a Party Defendant* at ¶ 7.

Secretary's Motion To Construe, Motion To Dismiss, and Pleas In Bar, filed June 8, 2018, at 8-13.[3] On that basis, the proposed final order includes a finding that "VFOIA does not apply to the judiciary, including the Executive Secretary." This assertion was apparently unchallenged in this Court. Yet, in November 2016, OES submitted a brief to the Supreme Court of Virginia in an appeal styled *Daily Press, LLC v. Office of the Executive Secretary of the Supreme Court of Virginia*, Record No. 160889, in which OES acknowledged that it is a public body under VFOIA, but argued that it was not the proper custodian, asserting further that OES records requested by the newspaper were subject to a VFOIA exemption. *See* Exhibit A, *Brief of Appellee Office of the Executive Secretary of the Supreme Court of Virginia* at 14-15. The Supreme Court of Virginia took OES at its word and found that:

> It is undisputed that the Executive Secretary is a "public body" as that term is defined by VFOIA.

Daily Press, LLC v. Office of Exec. Sec'y of Supreme Court, 293 Va. 551, 557, 800 S.E.2d 822, 824 (2017). OES, without explanation, without addressing the above construct adopted by the Supreme Court of Virginia just last year, and without effective opposition, has now reversed its prior view of its status under VFOIA.

4. The proposed final order that OES urges this Court to enter has a direct and consequential effect on members of VPA. The clearly stated intention of OES is to use the proposed final order as "a precedential ruling not only as to the [phone records], but also [OES'] legal defenses regarding VFOIA." *See Memorandum in Support of the Executive Secretary's*

---

[3] *See also The Executive Secretary's Motion To Restrain Claimants From Instituting Or Prosecuting Other Proceedings*, filed Dec. 22, 2017, at ¶ 1 ("[T]he Executive Secretary is not a public body within the meaning of the Virginia Freedom of Information Act."). The effects of a "legislative" limitation on the definition of "public body" are significant, but that issue is beyond the scope of VPA's motion.

Motion to Construe, Notion to Dismiss, and Pleas in Bar at 6. Thus, OES's objective is to obtain favorable precedent that it can use as grounds to deny a request under VFOIA for administrative records in the custody of OES by someone other than Dr. Turner, including members of VPA. This foreseeable interest in avoiding the assertion of the proposed final order as a bar to public access is sufficient to confer standing on VPA to intervene.

5. The argument that VPA's proposed intervention is not timely is a red herring. OES offers no proof – because there is none – that VPA has been closely monitoring this case and elected not to intervene until after OES submitted its proposed final order. Moreover, VPA has no interest in litigating the merits of the case, or in revisiting any of the procedural incidents of the case, regardless of its views on them. Thus, VPA is not advocating further litigation, delay or expense. Its focus is narrow and specific, concerning only the form of order the Court should enter dismissing the case.[4] There is no prejudice to Dr. Turner in dismissing the case for his failure to timely comply with the Court's February 21, 2018, Interpleader Order, nor is there any prejudice to OES related to delay or expense, or to its ability to take steps addressing issues of litigation misconduct. The sole prejudice lies in the proposed removal of "precedential" findings and conclusions from the dismissal order.

6. OES's argument that VPA's intervention would undermine the purpose of the interpleader statutes is also a red herring. OES's proposed final order, if entered, would only

---

[4] Again, if the Court is disposed to enter an order or orders adjudicating the consequences of a party's litigation conduct, that is a matter entirely distinct from the scope of a final order that purports to adjudicate claims and defenses on the merits of the dispute when, by the admission of the party seeking the order, those claims and defenses were not ripened by a meaningful adversarial process. Simply stated, the Court need not address the merits of OES's defenses in order to protect OES from purportedly harassing litigation conduct.

constitute persuasive authority[5]; it would not be a precedent that binds any other court or other parties. *Accord Hiers v. Cave Hill Corp.*, 51 Va. Cir. 208, 2000 WL 145359, at *3 (Va. Cir. Ct. Jan. 6, 2000) (circuit court decisions are persuasive, not binding; rejecting prior circuit court decision). Thus, even if entered, OES's proposed order will not bar future actions against VITA under VFOIA for production of the very phone records at issue. Accordingly, OES's proposed final order does not protect VITA from multiple claims of liability any more than would VPA's more narrow grounds for dismissal.

7. Lastly, notwithstanding OES's assertions that the Court has ruled on the motion to dismiss, statements from the bench do not constitute rulings; a court speaks only through its orders. *See Temple v. Mary Washington Hosp., Inc.*, 288 Va. 134, 141, 762 S.E.2d 751, 754 (2014). Accordingly, OES's contention that VPA's petition is "effectively" a motion for reconsideration of the Court's June 20, 2018 "final rulings" from the bench is without merit. Having conferred with counsel for both OES and VITA, VPA represents that it is willing to have the Court consider this motion on the papers submitted by the parties, or with the benefit of oral argument should the Court desire to hear it.

CONCLUSION

VPA respectfully requests that this Court grant its motion for leave to intervene for the limited purpose of seeking entry of an order that dismisses the interpleader case on narrow grounds. OES is simply wrong when it claims that there is "no good reason" for doing so. *See* OES Opposition at ¶ 16. Adherence to the doctrines of judicial restraint and constitutional avoidance, mandated by the Supreme Court of Virginia, is a very good reason.

---

[5] For the reasons underlying VPA's petition, it is debatable how persuasive OES's proposed final order, if entered, would be if viewed by another court.

Date: July 10, 2018.

Respectfully submitted,

Craig T. Merritt (VSB #20281)
cmerritt@cblaw.com
David B. Lacy (VSB #71177)
dlacy@cblaw.com
CHRISTIAN & BARTON, L.L.P.
909 East Main Street, Suite 1200
Richmond, Virginia 23219
Telephone: (804) 697-4100
Facsimile: (804) 697-4112

Counsel for Virginia Press Association

CERTIFICATE OF SERVICE

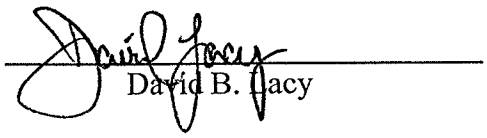
I hereby certify that a true copy of the foregoing was delivered by electronic and first class mail this 10th day of July, 2018, on:

Andrew R. McRoberts (VSB #31882)
Cullen D. Seltzer (VSB #35923)
Faith A. Alejandro (VSB #80076)
SANDS ANDERSON PC
1111 East Main Street. Suite 2400
Richmond, Virginia 23219
Telephone: (804) 648-1636
Facsimile: (804) 783-7291
Email: amcroberts@sandsanderson.com
cseltzer@sandsanderson.com
falejandro@sandsanderson.com

Counsel for the Office of the Executive Secretary

Dr. William H. Turner
27316 Lankford Highway
P.O. Box 128
Onley, Virginia 23418
gallery@turnersculpture.com
wht@turnersculpture.com

Defendant Pro Se



David B. Lacy

IN THE

SUPREME COURT OF VIRGINIA

Record No. 160889

DAILY PRESS, LLC, et al.,

Appellants,

v.

OFFICE OF THE EXECUTIVE SECRETARY
OF THE SUPREME COURT OF VIRGINIA, et al.,

Appellees.

BRIEF OF APPELLEE OFFICE OF THE EXECUTIVE SECRETARY OF THE SUPREME COURT OF VIRGINIA

MARK R. HERRING
Attorney General of Virginia

TREVOR S. COX (VSB NO. 78396)
Deputy Solicitor General

MATTHEW R. MCGUIRE (VSB NO. 84194)
Assistant Attorney General

STUART A. RAPHAEL (VSB No. 30380)
Solicitor General of Virginia

Office of the Attorney General
202 North Ninth Street
Richmond, Virginia 23219
sraphael@oag.state.va.us
(804) 786-7240
(804) 371-0200 (fax)

November 23, 2016

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

ADMINISTRATIVE MATERIALS

OPINIONS OF THE ATTORNEY GENERAL OF VIRGINIA

SECONDARY SOURCES

LEGISLATIVE MATERIALS

MISCELLANEOUS

STATEMENT OF THE CASE

The principal question presented here is whether the Office of the Executive Secretary (OES) of the Supreme Court of Virginia must produce, under the Virginia Freedom of Information Act (FOIA), electronic case-management records that OES hosts for circuit court clerks in OES's capacity as administrator of the circuit court system. The answer is no.

The electronic records at issue are "court records" under the exclusive custody of circuit clerks by virtue of Code § 17.1-242. Appellants may request those records directly from the clerks under Code § 17.1-208. Code § 2.2-3704(J) makes clear that hosting the database does not make OES the custodian of the clerks' records. And even if OES could be considered a custodian, FOIA specifically exempts those records under Code § 2.2-3703(A)(5), and Appellants failed to prove by clear and convincing evidence that the exemption was waived. Accordingly, the trial court correctly refused to command OES to disclose those records over the clerks' objection, and the judgment should be affirmed.

STATEMENT OF FACTS

This appeal comes to the Court after a bench trial in which OES and the clerks prevailed on all grounds argued by them at trial.[1] Accordingly,

[1] JA 59:4-7, 530:1-4 (bench ruling).

this Court must "view the evidence and all reasonable inferences arising therefrom in the light most favorable to" OES and the clerks.[2]

A. OES's role as court administrator.

OES serves as "the court administrator for the Commonwealth."[3] The Supreme Court appoints the Executive Secretary, who holds office "at the pleasure of the Court."[4] The current Executive Secretary is Karl Hade.[5] His job is to "assist the Chief Justice and the Supreme Court in the administration of the judicial branch of the government to the end that litigation may be expedited and the administration of justice improved in the courts of the Commonwealth."[6] He also performs "such other duties as may be required of him by the . . . Supreme Court in the performance of the administrative functions of" the Court.[7]

The Executive Secretary also serves as "the administrator of the circuit court system, which includes the operation and maintenance of a

---

[2] *Thorsen v. Richmond SPCA*, 292 Va. 257, 271, 786 S.E.2d 453, 466 (2016).

[3] Va. Code Ann. § 17.1-314 (2015) (JA 791).

[4] *Id.*

[5] JA 376:12-15 (Hade).

[6] Va. Code Ann. § 17.1-315(3) (2015) (JA 791).

[7] *Id.* § 17.1-315(4).

case management system and financial management system and related technology improvements."[8] By statute, "[a]ny circuit court clerk may establish and maintain his own case management system" and other technology systems.[9] But the Executive Secretary must permit any circuit court clerk to use OES's systems upon request.[10]

B. The current function of CCMS and OCIS.

The case management system that OES is required to operate is called "CCMS" (for Circuit Case Management System).[11] All but two of Virginia's 120 circuit court clerks currently use it.[12]

CCMS has become the nervous system for modern-day circuit courts. It enables clerks to manage their dockets and provide real-time information to judges and litigants. When a case is filed, clerks input case data into CCMS, populating the numerous fields shown in the computer display.[13] As a case proceeds, clerks update the data fields with new information.[14]

---

[8] *Id.* § 17.1-502(A) (2015) (JA 791).

[9] *Id.* § 17.1-502(B) (JA 791).

[10] *Id.* § 17.1-502(C) (JA 792).

[11] JA 43 (Stip. No. 6).

[12] JA 43 (Stip. No. 7).

[13] *See* JA 771 (case-entry screenshot); JA 361:13-362:10 (Fronfelter).

[14] JA 371:20-372:1 (Fronfelter).

CCMS enables clerks to generate multiple reports and dockets, including real-time video dockets.[15] Clerks also use CCMS to generate in excess of 90 different kinds of forms and orders, such as sentencing orders in criminal cases.[16]

Of critical significance to State government, CCMS also enables clerks to meet their demanding statutory reporting obligations.[17] For example, clerks must "make an electronic report to the Central Criminal Records Exchange," operated by the Virginia State Police, of convictions and other dispositions in criminal cases, as well as reports of convictions requiring registration on the Sex Offender and Crimes Against Minors Registry.[18] Convictions involving driving offenses and incapacity determinations must be reported to the Department of Motor Vehicles.[19] There are numerous other agencies that clerks must notify of particular

---

[15] JA 767-70 (menu/docket screenshots); JA 359:10-361:11 (Fronfelter).

[16] JA 782-87 (screenshots of sentencing data placed into sentencing order); JA 371:5-372:18 (Fronfelter).

[17] JA 886-87 (OES Resp. to Interrog. No. 8).

[18] Va. Code Ann. § 19.2-390(C) (2015).

[19] Va. Code Ann. § 46.2-383 (2016 Supp.), § 46.2-392 (2014), § 46.2-400 (2014); JA 358:19-25 (Fronfelter).

case dispositions; clerks use CCMS to meet those obligations too.[20]

CCMS also serves as the platform on which various other electronic systems are built.[21] For instance, CIS (Case Imaging System) allows the 78 courts currently using it to organize and maintain electronic versions of case documents.[22] Approximately 30 courts have used CIS to go entirely "paperless."[23] OCRA (the Officer of the Court Remote Access system) allows clerks to give access to electronic case documents to lawyers who pay the required subscription.[24] VJEFS (Virginia Judiciary E-Filing System) enables the 28-30 courts currently using it to operate as "e-filing" courts.[25] CCMS is also integrated with OES's Financial Management System (FMS), enabling clerks to manage and receive payments of fines and other fees.[26]

---

[20] JA 887 (OES Resp. to Interrog. No. 8) (collecting statutory citations); JA 389:14-25 (Hade).

[21] JA 390:18-21 (Hade).

[22] *See* JA 775 (CIS screenshot); JA 365:9-19 (Fronfelter). Clerks may also generate an electronic record in a case to transmit to an appellate court, such as the record in this case. OES also provides judges a similar system called JIS (Judicial Imaging System), giving them electronic access to case documents. JA 776 (JIS screenshot); JA 366:15-367:10 (Fronfelter).

[23] JA 366:5-12 (Fronfelter).

[24] JA 777 (OCRA screenshot); JA 367:11-19 (Fronfelter).

[25] JA 390:1-17 (Hade).

[26] JA 362:14-363:6 (Fronfelter).

CCMS serves as "the backbone to all those systems."[27] It is so integral to participating courts that when it unexpectedly shut down in the summer of 2015 due to an unforeseeable, "catastrophic" loss of both power grids feeding the servers at the Supreme Court building in Richmond, various circuit courts throughout Virginia had to close.[28]

Another feature integrated with CCMS is the Online Case Information System (OCIS). OCIS enables participating clerks to provide public access through the Internet to a portion of their case-management information. For security purposes—to avoid someone hacking directly into CCMS and tampering with the records—an identical, mirror-image copy of the CCMS database is replicated every 15 minutes on the OCIS server, writing over the previous version. Software is used to project data from a portion of those data fields to the Internet viewer, screening out sensitive data such as social security numbers, height, weight, eye color, and year of birth.[29]

OCIS's search features have always been limited. Statewide searches are not possible; users must select the participating circuit court and then search that court's records by party name, case number, or

---

[27] JA 390:18-21 (Hade).

[28] JA 392:2-393:5 (Hade); JA 372:23-374:4 (Fronfelter).

[29] JA 44-45 (Stip. Nos. 12-15); JA 195:24-25 (Hade) (CCMS and OCIS databases are "exactly the same"); JA 363:21-364:4 (Fronfelter).

hearing date.[30] Bulk-downloading of data has never been allowed.[31]

Appellants misstate the record in claiming that OES "prepared," "created," and "had the ability to 'modify'" the case-management data.[32] Appellants say, for instance, that "it was established at trial that OES has the ability to 'modify' the OCIS system *or database* that is used to create the case abstract public records at issue."[33] Appellants conflate OES's ability to modify the *computer system* that hosts the clerks' electronic records with modifying *the electronic records themselves*.[34] It would be like saying that OES modifies or edits the *text* of a judge's emails because OES operates and can modify the *server* through which judges' emails are sent.

In fact, the witnesses testified consistently that *only* the clerks and their deputies enter records into CCMS or change the data in those records.[35] Appellants offered nothing to show that OES has ever created

---

[30] JA 46 (Stip. No. 19); JA 394:2-8 (Hade); JA 403:2-14 (Hade).

[31] JA 403:16-23 (Hade).

[32] Opening Br. at 17, 25, 26, 28, 33.

[33] *Id.* at 26 (emphasis added).

[34] *See* JA 846 (PX-10) ("OES reserves the right to modify this system at any time.").

[35] JA 363:13-16 (Fronfelter); JA 331:12-23 (Ferguson); JA 391:15-18, 448:21-449:10 (Hade); JA 891-92 (PX-23) ("OES does not alter the data.").

or altered the content of the case-management records themselves.

C. The development of CCMS and OCIS.

CCMS was developed beginning in the 1980s for the benefit of circuit court clerks, and with their direct input. The process was overseen by the Judicial Systems Advisory Committee, which included judges and circuit clerks as members.[36] The JSAC also invited other circuit clerks to participate in its user group meetings "to provide input on changes or modifications they might like to the system."[37]

By 1996, 109 clerks were using CCMS to manage their caseloads and 10 were using it to satisfy at least one of their statutory reporting obligations.[38] By the time this lawsuit was filed in 2015, 118 of 120 circuit court clerks were using both CCMS and OCIS.[39] The clerks of Fairfax County and the City of Alexandria opted to use private vendors to host their electronic records.[40]

---

[36] JA 385:20-22, 398:17-399:20 (Hade).

[37] JA 399:1-4 (Hade).

[38] JA 386:21-387:20 (Hade); JA 587 (OES-X 10 at 4).

[39] JA 43 (Stip. No. 7).

[40] JA 332:15-20, 339:21-24 (Ferguson). The Virginia Beach Circuit Court Clerk at one time moved that court's electronic records from CCMS to a private vendor, but the Clerk opted back into CCMS when the vendor went out of business. JA 233:14-21 (Hade).

OCIS was developed beginning in April 2000, also "with the consent and approval of participating clerks," to permit access over the Internet to portions of the case-management data contained in CCMS.[41]

Appellants incorrectly suggest that the clerks gave a blanket consent for their records to be displayed on the Internet in whatever format OES might like.[42] In fact, when developing the system for the clerks, OES previewed the "screen formats" for the clerks so they could see exactly how the information would be displayed.[43] OES made clear at the outset that a clerk's information would be displayed *only* with each clerk's prior written consent.[44] The parties' stipulation echoed that limitation: "The Clerks who currently use CCMS have given OES authorization to display case data on the Internet *in the form viewable through* OCIS."[45] Each clerk's consent, therefore, was based on "the form" in which the data would be displayed.[46]

---

[41] JA 44 (Stip. No. 10).

[42] Opening Br. at 40 ("the Clerks Consented to Release of Information through Voluntar[y] Publication on OES' OCIS Website").

[43] JA 396:16-397:7, 402:17-22 (Hade).

[44] JA 397:8-398:10, 402:17-19 (Hade).

[45] JA 45-46 (Stip. No. 18) (emphasis added).

[46] JA 402:17-22 (Hade).

For many years, some clerks chose to use CCMS but not OCIS.[47] As elected officials, circuit clerks were sensitive to concerns that their constituents might have about the display of personal information.[48] Some clerks thought it inappropriate for *any* case data to be displayed on the Internet; some did not mind displaying *criminal*-case data but objected to displaying data about divorce cases; some did not have confidence in the accuracy of data entered under the authority of their predecessors.[49]

Over the years, OES tried to be responsive to those concerns in order to better serve the clerks. OES modified the program to allow clerks to choose the date range of information to be displayed, or to display criminal cases or civil cases but not both.[50] OES was a good servant in that regard. By the time this lawsuit was filed, every clerk using CCMS had also asked OES to display at least some case information through OCIS.

To this day, however, it is up to each clerk to decide whether to use OCIS and, if so, the type of information to display. Clerks may direct OES

---

[47] JA 208:18-209:1 (Hade).

[48] JA 339:25-340:2 (testimony by Clerk Ferguson that "I believe my job as an elected official is to do my best to represent and protect the people I'm elected to serve").

[49] JA 394:17-395:9 (Hade).

[50] JA 46 (Stip. No. 19); JA 439:18-440:7 (Hade); JA 730 (OES-X 65) (sample clerk request specifying OCIS-display limitations).

to turn off the OCIS feature at any time.[51]

D. Appellants' FOIA request.

On July 17, 2015, Daily Press reporter David Ress sent a FOIA request to OES seeking all publicly available information on OCIS for felony cases since January 1, 2004.[52] The Daily Press requested the information as part of its investigation into "racial disparities in plea deals involving felony charges."[53] OES responded that it could not produce the records without the consent of the circuit court clerks, who are the record custodians,[54] but OES agreed to coordinate the response of consenting clerks and to waive $4,000 in expenses that OES incurred in doing so.[55]

Of the 118 clerks using OCIS, 50 consented to allow OES to release their data; 68 refused.[56] The nonconsenting clerks gave various reasons:

- that disseminating bulk data could facilitate "identity theft" or be

---

[51] JA 395:10-13 (Hade).

[52] JA 827 (FOIA request).

[53] JA 4 (Am. Compl. ¶ 14).

[54] JA 46 (Stip. No. 25); JA 745-47 (OES response).

[55] JA 747.

[56] OES Mot. to Join Certain Circuit Court Clerks as Necessary-Party Respondents ¶ 8 (R. 34). OES originally moved to join 70 nonconsenting clerks, but two clerks agreed to produce their data and dropped out.

used to violate citizens' privacy;[57]

- that the request must be made directly to the clerks, pursuant to Code § 17.1-208, to ensure that clerks retain their immunity under Code § 17.1-293(G) for the disclosure of data that might contain errors;[58] or
- that the disclosure might set a precedent to circumvent the paywall restricting access to OCRA and to the Secure Remote Access System for land records—services hosted by OES for which the clerks charge user fees to their subscribers.[59]

Clerks were also concerned about the "expungement" problem. It is illegal to knowingly open, review, or disclose expunged criminal records.[60] Many clerks worried about producing expunged records that might not have been removed from the dataset, or that a record subject to an expungement order could not be removed from a bulk dataset once it was published on the Internet.[61] That was one reason why clerks wanted immunity-protection for records produced under the provisions of Title 17.1.[62] Indeed, Ress testified that the Daily Press itself was sufficiently

---

[57] JA 335:5-18 (Ferguson).

[58] JA 158:4-19 (Ress) (admitting that clerks' concern about preserving their immunity was "reasonable").

[59] JA 160:1-161:22 (Ress); JA 337:7-339:6 (Ferguson).

[60] Va. Code Ann. § 19.2-392.3 (2015).

[61] JA 152:19-153:17 (Ress); JA 336:3-337:6 (Ferguson).

[62] JA 158:4-19 (Ress).

concerned about the expungement problem that it decided not to post on the Internet the bulk-data records that it obtained from consenting clerks.[63]

E. The litigation.

In September 2015, Appellants filed an amended petition for mandamus in the Newport News Circuit Court seeking to compel OES to produce the nonconsenting clerks' case-management records.[64] OES demurred and moved to join the nonconsenting clerks as necessary parties.[65] Appellants consented to their joinder.[66] The trial court, the Hon. David F. Pugh presiding, overruled the demurrer and set the case for trial.[67]

At the conclusion of the one-day trial, the court denied Appellants' petition for mandamus.[68] The court found that OES was not the custodian of the records.[69] The court adopted all of OES's other arguments as well,[70] which included the defense that the records were exempt from FOIA under

---

[63] JA 157:7-11 (Ress).

[64] JA 1.

[65] R. 21 (motion to join clerks), R. 57 (demurrer).

[66] JA 36-37.

[67] R. 265-66.

[68] JA 49-60 (final order and bench ruling).

[69] JA 49-50, 56-58.

[70] JA 59:4-7, 530:1-4 (bench ruling).

Code § 2.2-3703(A)(5), and that that exemption had not been waived.[71]

The final order was entered on March 10, 2016, and Appellants noted a timely appeal on March 18.[72]

ARGUMENT

I. The three-step framework for analyzing Appellants' claims.

OES offered at trial a three-step framework for evaluating Appellants' claims; its logic-flow chart is reproduced as Attachment 1 to this brief.[73] The first step is to determine *who* serves as the custodian of the data. If the clerks are the custodians, then judgment is required for OES because: Appellants did not send their request to the clerks; FOIA makes clear in Code § 2.2-3704(J) that the custodian is responsible for responding to a FOIA request when, as here, the custodian (each clerk) simply transfers the records to another public body (OES) for storage, maintenance, and archiving; and the records may be obtained directly from the clerks under

---

[71] JA 506:5-512:10 (OES's closing argument and motion to strike Appellants' evidence); R. 389-91 (OES's written Motion to Strike). Although the trial judge found no evidence that OES or the clerks waived that exemption, he noted "I really don't have to get to that point" in light of finding that the clerks are the record custodians. JA 528:25-529:8 (bench ruling).

[72] JA 49 (final order); R. 420 (notice of appeal).

[73] *See also* JA 804 (OES-X 90); JA 277:1-279:3 (OES motion to strike); JA 498:16-512:13 (OES closing).

Code §§ 17.2-208 and 17.1-275(A)(8).

If, however, OES is found to be the custodian, then step two is to determine if the records are exempt under § 2.2-3703(A)(5), which provides that FOIA does not apply to "records required by law to be maintained by the clerks of the courts of record." If the records are not exempt, then Appellants should prevail. But if the records are exempt, then step three is to determine if the exemption has been waived. If so, then Appellants should prevail; if not, then judgment is required for OES.

II. What this case is not about.

Before undertaking that analysis, it is important to establish what this case is *not* about. First, there is no dispute that the case-management records are "public records" available directly from the clerks under Code § 17.1-208. The question instead is whether OES must produce those records under FOIA over a clerk's objection. Appellants are wrong that there was "no dispute" that the records here are "public records *under FOIA*."[74] The "under FOIA" part is the heart of the controversy.[75]

Second, the issue is not the worthiness or importance of the Daily

---

[74] Opening Br. at 15 (emphasis added).

[75] Ress admitted that he was mistaken in claiming that OES had agreed that the documents are public records "under FOIA." JA 460:4-463:2 (Ress).

Press's inquiry. As Executive Secretary Hade testified, it is "a *very* worthy cause" to analyze whether racial disparities exist in the criminal justice system.[76] OES specifically recognized the worthiness of the request by waiving $4,000 in administrative costs that OES incurred in assisting the clerks in responding.[77] But as Hade made clear, the worthiness of "[t]he cause does not change the fact that [he] cannot release the data without the clerks' consent."[78] Releasing a judge's emails or electronic records in a particular case might be in the public interest too.[79] Yet OES cannot make that decision on behalf of those in the judicial branch who must trust and rely upon OES as "the court administrator for the Commonwealth."[80]

Finally, it is irrelevant *why* the clerks would not consent to OES's release of their records. Clerk Ferguson testified about why the

---

[76] JA 444:12-21 (Hade) (emphasis added). The Attorney General agreed the records "can help inform critical, on-going discussions about the equity of outcomes in the criminal justice system." JA 5 (Am. Pet. ¶ 19).

[77] JA 149:7-20 (Ress) (admitting that OES was "actually trying to help [him] get the records"); JA 747 (OES's response to FOIA request).

[78] JA 444:25-445:2 (Hade).

[79] JA 443:20-444:6 (testimony by Hade that OES may not release emails or electronic records without the judge's or clerk's permission); JA 513:15-514:10 (closing argument discussing scenario in which OES might be requested to release a judge's emails over his objection).

[80] Va. Code Ann. § 17.1-314 (JA 791).

nonconsenting clerks felt so strongly that the records should be requested directly from the clerks under Code § 17.1-208, not from OES under FOIA.[81] But even if the clerks' reasons are unpersuasive, it would not justify OES in disregarding the clerks' instructions if it does not have the legal right to release their records without their consent.

III. The trial court properly found that the clerks are the record custodians, not OES (Assignment of Error 1).

A. Standard of review.

Whether Code § 17.1-242 makes the clerks the custodian of case-management records is a question of law that this Court reviews de novo.[82] To the extent that course-of-conduct evidence bears on identifying the custodian, determining the custodian is a mixed question of law and fact, and the Court must "defer to the circuit court's factual findings and review de novo its application of the law to those facts."[83] The evidence and all reasonable inferences must be viewed in the light most favorable to OES and the clerks, the prevailing parties below.[84]

---

[81] JA 335:5-337:6 (Ferguson). *See also supra* at 12-13.

[82] *Thorsen*, 292 Va. at 264, 786 S.E.2d at 458.

[83] *William H. Gordon Assocs. v. Heritage Fellowship*, 291 Va. 122, 146, 784 S.E.2d 265, 276 (2016).

[84] *Thorsen*, 292 Va. at 271, 786 S.E.2d at 466.

B. As a matter of law, the clerks are the record custodians under Code § 17.1-242.

Code § 17.1-242 makes clerks the custodians of their case-management records as a matter of law. The statute provides that "[t]he circuit court clerks shall have custody of and shall keep *all court records*, including . . . records stored in *electronic format whether the storage media* for such electronic records *are on premises or elsewhere*."[85] The plain language thus covers electronically-stored case-management records hosted by OES on the clerks' behalf.

That conclusion is reinforced by two opinions of the Attorney General that have been ratified by the General Assembly. In April 2002, and again in 2013, the Attorney General opined that electronic case-management records are court records under a clerk's exclusive control.[86] Notably, by the time of that first opinion, in 2002, a majority of circuit clerks *already* were using CCMS, including the clerk who requested the opinion;[87] 81 were using OCIS;[88] 114 were using the system to comply with their

---

[85] Va. Code Ann. § 17.1-242 (2015) (JA 797) (emphasis added).

[86] *See* 2002 Op. Va. Att'y Gen. 62 (JA 630 (OES-X 30)); 2013 Op. Va. Att'y Gen. 142 (JA 703 (OES-X 56)). We refer to the "April 2002" opinion in order to distinguish it from the "December 2002" opinion discussed below.

[87] JA 406:4-407:20 (Hade).

[88] JA 635 (OES-X 31 at 3); JA 409:19-25 (Hade).

obligations to transmit case information to the Virginia State Police; and 80 were using it for their DMV-reporting obligations.[89]

The April 2002 opinion observed that "[a] majority of circuit court clerks' offices have opted to use the case management system developed by the Executive Secretary of the Supreme Court of Virginia."[90] The opinion then made clear that "automated case management systems maintained by the clerk of a circuit court, whether the storage media is on or off premises, are *records of the clerk's office under the custody of such clerk*. Access . . . lies within the sound discretion of the clerk."[91] The Attorney General concluded that not even a *circuit judge* could compel a clerk to give the judge the power to change the data stored in CCMS.[92]

The 2013 opinion reaffirmed and extended that conclusion. The Attorney General there concluded that a local governing body could not compel a circuit clerk to grant access to CCMS; indeed, access could not be granted to anyone "not approved by the clerk."[93]

---

[89] JA 635 (OES-X 31 at 3); JA 410:1-6 (Hade).

[90] 2002 Op. Va. Att'y Gen. at 63 n.7 (JA 631).

[91] *Id.* at 64 (JA 631) (emphasis added).

[92] *Id.*; JA 407:4-20 (Hade).

[93] 2013 Op. Va. Att'y Gen. 142, 142 (JA 703 (OES-X 56)).

The General Assembly ratified those opinions in 2014. Chapter 460 of the Virginia Acts of 2014—which addressed, inter alia, "automated systems; remote access to court records; electronic filing; information technology fees; posting of certain information on the Internet"—broadened Code § 17.1-242 by adding the term "court records" to the list of records over which clerks have custody.[94] The statute at that time already covered clerks' records "deposited in their offices" and "records stored in electronic format whether the storage media for such electronic records are on premises or elsewhere."[95] The 2014 amendment expanded that designation to include records "at such location otherwise designated by the clerk."[96]

The 2014 amendment did nothing to alter the Attorney General's April 2002 and 2013 views that electronic case-management records are court records over which clerks have exclusive custody under § 17.1-242. As this Court said in *Beck v. Shelton*, the "failure to make corrective amendments evinces legislative acquiescence in the Attorney General's

---

[94] 2014 Va. Acts ch. 460.

[95] *Id.*

[96] *Id.*

view."[97] Accordingly, the Court must reject Appellants' argument that such records are not court records under § 17.1-242.

C. The evidence overwhelmingly confirmed the clerks' sole custody over their case-management records.

Appellants take an inconsistent position on appeal. They first argue that the trial court should not have looked "to past-practices between OES and the Clerks" in determining that each clerk, and not OES, was the custodian of that clerk's case-management data.[98] But then Appellants explore those past practices at length, supposedly to show that OES has acted as the records custodian.[99]

Code § 17.1-242 is, in fact, dispositive on the custody question. As shown above, that section, particularly in light of the April 2002 and 2013 opinions of the Attorney General, makes clear that each clerk, not OES, is the custodian of his or her electronic case-management records.

But the evidence at trial also demonstrated overwhelmingly that the clerks are the custodians in actual practice. Appellants improperly attempt to spin the course-of-conduct evidence in a light favorable to them, contrary to the standard of review on appeal. We noted above Appellants'

---

[97] 267 Va. 482, 492, 593 S.E.2d 195, 200 (2004).

[98] Opening Br. at 29.

[99] *Id.* at 30-32.

misstatement that OES creates or modifies the clerks' data; it was undisputed that the clerks alone enter the data into CCMS and OES does not alter it in any way.[100]

Appellants also misstate the record in implying that OES foisted OCIS upon unwilling clerks.[101] To the contrary, Hade testified that the clerks wanted OCIS because they were "interested in reducing phone calls to their offices and providing basic information online that would allow the public and attorneys to look up cases, when they are scheduled, et cetera."[102] It is similarly incorrect for Appellants to say that OES "originated the idea to create the OCIS website."[103] Hade testified that the development of OCIS was "jointly done," though "[w]hose idea it was" he was "not sure."[104]

The rest of the course-of-conduct evidence followed a similarly lopsided pattern favoring OES, not Appellants. For instance, the trial testimony showed that the clerks and OES followed a "consistent policy"

---

[100] JA 363:13-16 (Fronfelter); JA 391:15-18, 404:6-9 (Hade).

[101] Opening Br. at 8 ("OES created . . . OCIS . . . to provide public online access to certain abstract case information.").

[102] JA 231:5-10 (Hade).

[103] Opening Br. at 30.

[104] JA 231:2-13 (Hade).

that records will not be displayed through OCIS without a clerk's express consent.[105] Indeed, the clerks can instruct OES to turn off OCIS at any time.[106] The trial testimony further showed that each time OES received a FOIA request for case-management records from the press or from members of the public, OES consistently advised the requester that it could not release the data without the clerk's express consent.[107] OES followed that policy with Appellants.[108] All of that evidence strongly corroborated the clerks' status as record custodians.

In an effort to marshal some course-of-conduct evidence to support their theory that OES acted as the custodian of case-management data, Appellants emphasized the legal disclaimer on the OCIS website. The disclaimer said that the case-management data was "compiled and made available for public use by [OES]."[109]

But the trial court properly found Appellants' claim unpersuasive. The

---

[105] JA 394:9-16 (Hade).

[106] JA 395:10-13 (Hade).

[107] *See, e.g.*, JA 427:23-429:13 (Hade) & JA 667-73 (OES-X 47-48); JA 430:13-432:2 (Hade) & JA 687-94 (OES-X 51-53); JA 432:16-433:15 (Hade) & JA 696-702 (OES-X 55); JA 434:21-438:2 (Hade) & JA 704-17 (OES-X 58-60); JA 439:2-16 (Hade) & JA 723-29 (OES-X 64).

[108] JA 439:9-13 (Hade).

[109] JA 846 (PX 10), cited at Opening Br. at 32.

statement in the disclaimer must be viewed in the context of OES acting as the clerks' agent—as "the administrator of the circuit court system"[110]—in making the information available through OCIS, at the clerks' direction and with their consent. It was undisputed that OES did not create or modify the case-management records itself and did not have the authority to release those records without the clerks' consent. The fact that OES acted on the clerks' behalf to provide access through OCIS does not show that OES displaced the clerks as the record custodian.

Appellants take umbrage that OES amended the OCIS disclaimer in July 2015 to make clear that "[t]he circuit court case information displayed on this System is case information entered by the respective circuit court clerks into the Circuit Case Management System," and that "[b]y law, the circuit court clerks are the custodians of the records."[111] But that revision simply conformed the disclaimer to actual practice.[112]

Indeed, Ress admitted at trial that OES's practice was no different *after* the disclaimer was revised than before: OES would not release any clerk's case-management data in response to a FOIA request without that

---

[110] Va. Code Ann. § 17.1-502 (2015) (JA 791).

[111] JA 754 (OES-X 83).

[112] JA 752 (OES-X 83).

clerk's express consent.[113] The Daily Press also admitted that the new disclaimer was accurate in stating that the information shown on OCIS was provided "with the clerks' consent" and was "current only to the extent the respective clerks have entered the most recent records into the CCMS."[114]

In short, the evidence overwhelmingly supported the trial court's conclusion that the clerks are the record-custodians of their case-management data, both as a matter of law under Code § 17.1-242, and as a matter of the parties' actual practice. The rules of appellate review do not permit Appellants' efforts to spin isolated pieces of the record in their favor. Taken in the light most favorable to Appellees, the evidence plainly showed that the clerks alone are the record custodians.

D. Code § 2.2-3704(J) gives the clerks alone the authority to produce their case-management records.

Because the clerks alone are the custodians of their case-management records, OES cannot be forced to produce those records over the clerks' objection.[115] FOIA makes clear in Code § 2.2-3704(J) that when one governmental entity (like OES) hosts computer records for the benefit

---

[113] JA 151:1-14 (Ress), 472:19-473:1 (Daily Press R. 4:5(b)(6) testimony).

[114] JA 474:21-476:2 (Daily Press R. 4:5(b)(6) testimony).

[115] Although they consented to the joinder of the nonconsenting clerks in this case, Appellants steadfastly maintained that "we only sued OES. We didn't sue the clerks." JA 86:16-17 (statement of Appellants' counsel).

of another governmental entity or governmental officials (like the clerks), the officials with legal custody of the records (the clerks) are solely responsible for responding to a records request:

> In the event a public body has transferred possession of public records to any entity, including but not limited to any other public body, for storage, maintenance, or archiving, *the public body initiating the transfer of such records shall remain the custodian of such records for purposes of responding to requests for public records* made pursuant to this chapter and shall be responsible for retrieving and supplying such public records to the requester.[116]

Taken in the light most favorable to OES, the evidence amply showed that the clerks transferred possession of their case-management data to OES "for storage, maintenance [and] archiving" under § 2.2-3704(J).[117] That is the very purpose of CCMS.

Appellants are wrong in claiming that OES "did not cite" Code § 2.2-3704(J) when responding to their FOIA request.[118] Even if OES had not cited that subsection, it would not constitute a waiver of OES's legal

---

[116] Va. Code Ann. § 2.2-3704(J) (2014) (JA 794) (emphasis added).

[117] *E.g.*, JA 231:14-232:3 (OES R. 4:5(b)(6) testimony that OES stores and archives the clerks' data); JA 891-92 (PX-23 (OES's interrogatory answer 14, explaining its electronic storage and archiving of CCMS data for clerks)).

[118] Opening Br. at 36.

argument.[119] But OES specifically referenced Code § 2.2-3704(J) when explaining that it could not respond without the clerks' express consent because they alone are the record custodians:

> When Va. Code § 17.1-242 is read together with § 2.2-3704(J) (A public body that transfers possession of public data to another public body, for storage, maintenance, or archiving, remains the custodian of such data for purposes of responding to requests), it is clear that the circuit court clerks are the custodians of the records.[120]

In short, as a matter of law, Code §§ 17.1-242 and 2.2-3704(J) make clear that OES cannot be compelled to produce the clerks' case-management records against their wishes.

E. Appellants' counterarguments are meritless.

None of Appellants' counterarguments has merit.

1. The OCIS disclaimer does not negate the records' status as "court records."

We discussed above Appellants' misuse of the OCIS disclaimer to claim that OES acted as the "custodian" of case-management records;

---

[119] *See Lawrence v. Jenkins*, 258 Va. 598, 603, 521 S.E.2d 523, 525 (1999) ("[The public official's] failure to refer to [the FOIA exemption] within five work days did not bring about a denial of any rights or privileges afforded . . . under the provisions of FOIA and did not operate as a waiver of [the official's] otherwise valid exercise of an applicable exemption.").

[120] *See* JA 833 (PX 8 at 3), incorporated by reference at JA 829 n.1 (PX 7 at n.1).

Appellants also misuse the disclaimer to argue that CCMS records are not "court records." They argue that OES said in the disclaimer that "the information on [OCIS] does not constitute the *official record* of judicial or administrative actions of the respective courts," and that "the official records . . . should be relied upon" in the event of a discrepancy.[121] But that does not negate the status of the electronic data as "court records" over which the clerks alone have custody. That part of the OCIS disclaimer was simply "intended to warn users that the electronic data . . . could vary in some way, as a result of human or technological error(s), from the hard copy files."[122] The Daily Press admitted that it understood the disclaimer in just that way.[123]

Not only does Code § 17.1-242 make clear that CCMS records are "court records"—a conclusion confirmed by the Attorney General's April 2002 and 2013 opinions—but the trial testimony conclusively proved it. Clerks transfer the electronic data, not paper records, to various State agencies to satisfy their statutory reporting duties, and clerks use the electronic data to generate dockets and to populate a host of summonses,

---

[121] Opening Br. at 10 (quoting JA 846 (PX 10 (June 2015 disclaimer))) (emphasis added).

[122] JA 848 (PX 11).

[123] JA 476:3-23 (Daily Press R. 4:5(b)(6) testimony).

forms, and orders.[124] CCMS has become so integral to the modern court system that circuit courts have had to shut down in the rare instance when the system stopped working.[125] The data in CCMS thus takes on a life of its own that is independent of any paper record from which the data has been derived. If, for example, a clerk types a mistaken detail into CCMS, that mistake will be transmitted to State agencies, not the paper record.[126] As OES's corporate designee testified, the clerks "treat the data in CCMS as their *official court record data*."[127]

2. OES's ownership of the computer hardware and software is irrelevant.

Appellants argue unpersuasively that OES's ownership of the computer servers on which the data is stored, and of the software and hardware, makes OES the "custodian" of any records that it stores for the clerks. As shown above, Code § 2.2-3704(J) makes clear that mere "possession" of records is not enough to make the governmental entity responsible for producing them when, as here, the records are maintained on behalf of other public bodies or officials having legal custody.

---

[124] *See supra* at 4.

[125] JA 392:2-393:5 (Hade); JA 372:23-374:4 (Fronfelter).

[126] JA 268:10-25 (OES R. 4:5(b)(6) testimony).

[127] JA 266:5-8 (OES R. 4:5(b)(6) testimony) (emphasis added).

OES has possession of the servers containing the emails and electronic records of Virginia's judges and Justices too. But that obviously does not give OES any right to read or publicly disclose those records without permission.[128] Ress conceded that possession does not show legal custody; one must "look at either the law or the agreement between the parties to determine what . . . level of authority . . . OES has."[129]

Both Code § 17.1-242 and the parties' conduct showed conclusively that the clerks are the record custodians.[130] As summed up by the trial judge: "All throughout the course of this trial, I've heard nothing that would make me believe that OES ever assumed the responsibility of being custodian of the [clerks'] records."[131]

3. That OCIS is a mirror-image copy of CCMS is irrelevant.

Appellants also cannot draw a meaningful distinction between the electronic records in CCMS and the "separate" mirror-image copy used to display a subset of those records in OCIS. It was undisputed that the reason the records are copied onto the OCIS server is to protect the case-

---

[128] JA 382:18-25, 383:10-25 (Hade).

[129] JA 479:1-18 (Ress).

[130] JA 527:16-528:8 (bench ruling).

[131] JA 527:16-19 (bench ruling).

management records from outside tampering.[132]

As a matter of law, Code § 2.2-3704(G) makes clear that "the conversion of data from one available format to another *shall not be deemed the creation, preparation or compilation of a new public record.*"[133] Thus, copying the clerks' data from the CCMS server to the OCIS server does not create a new public record. Under Appellants' theory, OES would become the owner and custodian of a new public record every night, when it makes a disaster-recovery backup of the systems it hosts for clerks, judges, and Justices. That theory is unpersuasive and untenable.

4. OES and the clerks are not "joint" custodians of case-management records.

As an alternative claim, Appellants argued in the trial court that OES and the clerks could be "joint custodians" of the case-management data,[134] but Appellants dropped that argument in their petition for appeal. They have now attempted to revive it in a single line of their Opening Brief, arguing that "OES is the custodian, *or at least a joint custodian*, of the

---

[132] JA 45 (Stip. No. 13).

[133] Va. Code Ann. § 2.2-3704(G) (2014) (JA 793) (emphasis added).

[134] JA 298:7-8, 300:13 (argument of counsel for Daily Press).

public records."[135] Because that argument was not addressed or developed in the opening brief, however, it has been waived.[136]

If the Court reaches the question, it should hold that FOIA does not recognize a "joint custodian" of a circuit court clerk's case-management records. As discussed above, Code § 17.1-242 and the prior opinions of the Attorney General make clear that each clerk alone is the sole custodian of his or her case-management records.[137] The fact that OES hosts those records on the computer system it operates for the clerks does not make OES a "joint" custodian of those records.

Moreover, nothing in FOIA supports the idea of "joint" or "dual" custodians for the same record. FOIA repeatedly uses the single phrase "*the* custodian" in referring to the person responsible for answering a records request and for determining whether to invoke a particular exemption.[138] At trial, OES submitted a demonstrative exhibit to make that

---

[135] Opening Br. at 6 (emphasis added).

[136] *E.g.*, *Estate of Parfitt v. Parfitt*, 277 Va. 333, 344, 672 S.E.2d 827, 831 (2009).

[137] *See supra* at 18-19.

[138] *See* Va. Code Ann. §§ 2.2-3704, 2.2-3705.1, 2.2-3705.2, 2.2-3705.3, 2.2-3705.4, 2.2-3705.5, 2.2-3705.6, 2.2-3705.7, 2.2-3706(A)(2) (2014 & Supp. 2015). Various provisions of FOIA were amended in 2016, effective July 1, 2016. *See* 2016 Va. Acts chs. 620, 716. But those amendments have no material effect on the provisions at issue in this case.

point, highlighting in green the many times that the phrase "the custodian" appears throughout FOIA.[139] Having a single custodial decision-maker makes sense; the person charged with the document's custody is responsible not only for responding to the request but for exercising the judgment whether to withhold the record as exempt. Having two "custodians" act as decision-makers for the same record would be unworkable. That problem no doubt explains why Code § 2.2-3704(J) makes clear that a public body that merely hosts records for another public body is not responsible for responding to a FOIA request, despite that it has "possession" of the record.[140]

F. Non-Virginia precedent does not support Appellants.

Appellants rely on two non-Virginia cases, but neither supports them. In *Hurlbert v. Matkovich*, West Virginia's Supreme Court held under that State's FOIA that the State Tax Commissioner was required to produce a computer database of local real-estate-assessment information.[141] Similar to CCMS here, the data in *Hurlbert* was submitted to the database by local officials, and the contents could not be altered by the Tax Commissioner.

---

[139] JA 793-94 (OES-X 89).

[140] Va. Code Ann. § 2.2-3704(J) (JA 794).

[141] 760 S.E.2d 152 (W. Va. 2014). *See* Opening Br. at 24 n.10.

But unlike CCMS, which is used by the clerks for their own operations, the database in *Hurlbert* was created for the use of the Tax Commissioner to issue statewide property-tax assessments.[142] The court in *Hurlbert* based its ruling on the fact that West Virginia's FOIA made the obligation to produce records depend on "possession" of the record, and the database was in the Tax Commissioner's possession.[143] By contrast, Virginia Code § 2.2-3704(J) makes clear that "possession" is not the test when, as here, the record is hosted by another public body for "storage, maintenance or archiving." In that instance, the public body that created the data, not the public body that hosts it, is "the custodian" for purposes of responding to any FOIA request.

Appellants' other case, *U.S. Department of Justice v. Tax Analysts*,[144] is similarly distinguishable. The media requester there made a federal FOIA request to the Department of Justice (DOJ) for copies of court opinions in tax matters that DOJ regularly received from various federal courts. The Supreme Court rejected DOJ's argument that it did not have to produce court opinions that DOJ had not authored, finding no such

---

[142] 760 S.E.2d at 159.

[143] *Id.* at 158 (noting that West Virginia law defined "public record" to include any writing "in the possession of a public body").

[144] 492 U.S. 136 (1989).

authorship requirement in the federal Freedom of Information Act.[145]

To be sure, Virginia's FOIA would likewise require a Virginia agency to produce a copy of a court opinion or similar non-exempt record that it received from another entity. But this case involves a dynamic database that OES hosts for circuit clerks to enable them to automate their courts. The federal analogue would be court databases hosted by the Administrative Office of the United States Courts, which are *not* subject to federal FOIA.[146] Code §§ 2.2-3704(J) and 17.1-242 similarly make clear that the clerks, as custodians of case-management records, are the ones responsible for answering a request for those records, not OES.

Appellants also overlook last year's decision by the Supreme Court of North Carolina denying LexisNexis access to that State's case-management database of criminal-case information ("ACIS") maintained by the North Carolina Administrative Office of the Courts ("AOC").[147] Just as OES

---

[145] *Id.* at 147.

[146] *See Wayne Seminoff Co. v. Mecham*, No. 02cv2445, 2003 U.S. Dist. LEXIS 5829, at *20 (E.D.N.Y. Apr. 10, 2003) (denying legal-research firm access to Court Registry Investment System reports of the Administrative Office of Courts), *aff'd*, 82 F. App'x 740 (2d Cir. 2003); 5 U.S.C. § 551(1)(B) (excluding "the courts of the United States" from the definition of an "agency" covered by FOIA).

[147] *LexisNexis Risk Data Mgmt. Inc. v. N.C. Admin. Office of the Courts*, 775 S.E.2d 651 (N.C. 2015).

administers CCMS for the benefit of Virginia's circuit clerks, AOC administers ACIS for North Carolina's superior-court clerks.[148] The court in *LexisNexis* held that North Carolina's public-records law did not apply to that database because the legislature created more specific provisions providing for public access directly from the clerks.[149]

Access to a circuit court clerk's CCMS records is likewise governed specifically by provisions in Title 17.1. This Court observed in *Christian v. State Corporation Commission* that the presence of comprehensive records-disclosure provisions in *other* statutes (such as those governing the records of the Commission) provides a very strong signal that the legislature did not intend for FOIA to apply.[150] Code §§ 17.1-208 and 17.1-275(A)(8) provide precisely that type of specificity.

G. Accepting Appellants' reading of FOIA would violate the separation of powers.

Finally, the principle of constitutional avoidance counsels rejecting Appellants' interpretation of FOIA.[151] In *Taylor v. Worrell Enterprises, Inc.*,

---

[148] *Id.* at 651.

[149] *Id.* at 654.

[150] 282 Va. 392, 399-400, 718 S.E.2d 767, 770-71 (2011).

[151] *See L.F. v. Breit*, 285 Va. 163, 180, 736 S.E.2d 711, 720 (2013) ("[W]e are bound to construe statutes in a manner that 'avoid[s] any conflict with the Constitution.'") (quoting *Commonwealth v. Doe*, 278 Va. 223, 229, 682

this Court held that FOIA should not be construed to violate the separation of powers by disrupting the operations of a co-equal branch of State government.[152] The Court avoided that problem by construing the working-papers exemption to cover the Governor's telephone logs. Although that stretched somewhat the plain language of the exemption, requiring the logs' disclosure would have violated separation-of-powers principles by chilling the Governor's telephone communications.[153]

An even graver breach of the separation of powers would occur here if FOIA were construed to make entities like OES the custodian of electronic records hosted for other government agencies and public officials. Clerk Ferguson testified that he may well stop using CCMS and OCIS if the price of relying on OES is losing control over his records.[154] Appellants' theory would also jeopardize the clerks' use of other electronic systems hosted by OES. Why would anyone pay clerks to subscribe to OCRA or to the Secure Remote Access System if the same records could

---

S.E.2d 906, 908 (2009)); Antonin Scalia & Bryan Garner, *Reading Law: the Interpretation of Legal Texts* 247 (2012) ("A statute should be interpreted in a way that avoids placing its constitutionality in doubt.").

[152] 242 Va. 219, 409 S.E.2d 136 (1991).

[153] *Id.* at 224, 409 S.E.2d at 139.

[154] JA 339:15-340:4 (Ferguson).

be obtained by FOIA-ing OES? And since CCMS is the "backbone" of the judicial branch's various electronic systems,[155] if clerks stop using CCMS, it would jeopardize the functionality of the other interconnected systems that OES has so carefully developed over the years, interfering with OES's mission to serve as the "court administrator for the Commonwealth."[156]

The problems would not end there. OES hosts the email and electronic records of Virginia's judges and Justices. Under Appellants' theory, OES would be the "custodian" of those records too, giving OES the authority to read and produce those records. If judges could no longer trust the Executive Secretary to respect their authority over electronic records, it would undermine his mission to "assist the Chief Justice and the Supreme Court in the administration of the judicial branch to the end that litigation may be expedited and the administration of justice improved in the courts of the Commonwealth."[157] The North Carolina Supreme Court in *LexisNexis* noted similar separation-of-powers concerns respecting the "judiciary as a separate branch of the government."[158]

---

[155] JA 390:18-21 (Hade).

[156] Va. Code Ann. § 17.1-314 (JA 791).

[157] Va. Code Ann. § 17.1-315(3) (JA 791).

[158] 775 S.E.2d at 655 & n.3.

Appellants' interpretation of FOIA would also disrupt the operations of *Executive Branch* agencies whose email and electronic records are hosted by the Virginia Information Technologies Agency (VITA).[159] The General Assembly created VITA to "provide for the consolidation of the procurement and operational functions of information technology, including but not limited to servers and networks, for state agencies in a single agency."[160] By 2008, 86 agencies were using VITA for their IT services, and 370 additional entities (including State and local entities and private companies) had contracted with VITA to provide certain IT services.[161] VITA routinely relies on Code § 2.2-3704(J) to avoid the crippling burden of responding to FOIA requests for the records of its many client agencies:

> VITA is not custodian of the records of other agencies, even if those agencies store their records on IT infrastructure maintained by VITA or its IT vendors. *See* Va. Code § 42.1-85(B); Va. Code § 2.2-3704(J).
>
> For example, Agency A uses the central executive branch email system maintained by a vendor managed by VITA. Requests for email records from Agency A must be directed to Agency A, not to

---

[159] *See* 2003 Va. Acts ch. 1021, §§ 4, 6-8; Sen. Doc. No. 17, JLARC, *Interim Review of the Virginia Information Technologies Agency* 75, 77 (2008), *available at* http://jlarc.virginia.gov/pdfs/reports/Rpt381.pdf.

[160] *See* 2003 Va. Acts ch. 1021, § 4.

[161] Sen. Doc. No. 17, at 75-77 (agency listing).

> VITA, because VITA does not become responsible for Agency A's email even though that email is stored on a central system.[162]

VITA would be overwhelmed it if had to respond to FOIA requests on behalf of scores of its client agencies. VITA has no subject-matter expertise in the contents of the electronic records that it hosts for other entities. Having VITA and the client agency both responsible for deciding whether to assert a FOIA exemption would make no sense, injecting confusion and costly inefficiencies into government operations.

Because accepting Appellants' theory would disrupt the operations of other branches of government to a far greater extent than the chilling of the Governor's telephone calls in *Taylor*, their theory must be rejected.

H. The FOIA Council staff opinion is unpersuasive.

Appellants also rely (at least in part) on an April 2015 opinion that they requested from the FOIA Advisory Council staff, who told them that the case-management records at issue here are covered by FOIA.[163] Notably, the staff concluded that Code § 17.1-242 "makes clear that the clerks . . . are still custodians of such records even if they are stored

---

[162] *See* VITA, Virginia Freedom of Information Act (FOIA), https://www.vita.virginia.gov/default.aspx?id=311.

[163] R. 1797-1809 (PX 40); Opinion No. AO-03-15 (Apr. 23, 2015), *available at* http://foiacouncil.dls.virginia.gov/ops/15/AO_03_15.htm.

elsewhere, which would appear to include records stored in OES' case management system."[164] The staff also concluded that the clerks "retain custody and responsibility for the integrity of these records," even when stored in CCMS.[165] The staff nonetheless determined that OES was required to produce the records because it was a dual or joint custodian with the clerks, and "FOIA does not say anything about there being only one custodian for any given public record."[166]

Assuming that Appellants have not waived the joint-custody argument,[167] and assuming further that the staff opinion is considered an opinion of the FOIA Advisory Council itself,[168] the opinion is not entitled to any deference. This Court made clear in *Fitzgerald v. Loudoun County Sheriff's Office* that courts engage in "*de novo* review" of the legal meaning of FOIA's provisions even when a litigant has obtained a FOIA Advisory

---

[164] R. 1804 (PX 40).

[165] R. 1807 (PX 40).

[166] R. 1804 (PX 40).

[167] *See supra* at 32 & n.136.

[168] While the FOIA Council is authorized to issue advisory opinions about the application of FOIA, Va. Code Ann. § 30-179(1) (2015), it is not clear that a staff opinion that is neither approved nor ratified by the Council itself has the status of a Council opinion.

Council opinion.[169] While a court "takes into account any informative views on the legal meaning of statutory terms offered by those authorized by law to provide advisory opinions," the court "alone [must] shoulder the duty of interpreting" the statute.[170]

In any case, the staff's conclusion was incorrect. The staff did not have the benefit of the trial record developed below, and it erred in concluding that OES shares joint custody with the clerks over their case-management records. As shown above, FOIA does not provide for joint custody, something the opinion did not address. Moreover, Code § 2.2-3704(J) makes clear that the originating custodian is responsible for responding to a FOIA request for records transmitted to another public body "for storage, maintenance, or archiving."[171] The staff believed that the term "transfer" in subsection J makes more sense in the context of "physical" records, rather than electronic records. But that gloss contradicts FOIA's definition of "public records," which includes "electronic" records and any "other form of data compilation."[172]

---

[169] 289 Va. 499, 504-05 & n.2, 771 S.E.2d 858, 860 & n.2 (2015).

[170] *Id.* at 504-05, 771 S.E.2d at 860.

[171] Va. Code Ann. § 2.2-3704(J) (JA 794).

[172] Va. Code Ann. § 2.2-3701 (Supp. 2015).

The staff opinion also did not adequately account for the *other* provisions in Title 17.1—such as Code §§ 17.1-208, 17.1-275(A)(8), and 17.1-293(H)—that show that the records over which each clerk is admittedly the custodian are subject to extensive rules governing public access. In that regard, the opinion also overlooked *Christian*, which found in an analogous context that the extensive disclosure rules governing the SCC, in other parts of the Code, showed that FOIA was inapplicable. The staff also departed from its normal practice of abstaining from opining about statutes outside of FOIA.[173] In venturing into territory outside of FOIA, the staff opinion failed to account for *all* of the relevant provisions in Title 17.1.

Finally, the staff did not apply the doctrine of constitutional avoidance in light of the constitutional problems that would arise by making OES a dual custodian of the records of circuit clerks, judges, and Justices. Indeed, the staff could not do so, as it is not authorized to address

---

[173] *E.g.*, Opinion No. AO-04-12 (Oct. 17, 2012) ("[T]his office cannot opine on matters outside of FOIA, including constitutional issues . . . ."), *available at* http://foiacouncil.dls.virginia.gov/ops/12/AO_04_12.htm; Opinion No. AO-04-09 (May 5, 2009) ("[A]n interpretation of the interaction of two statutes in Title 15.2 would fall well beyond the scope of authority granted to this office, which is limited to FOIA matters."), *available at* http://foiacouncil.dls.virginia.gov/ops/09/AO_04_09.htm.

constitutional restrictions on the scope of FOIA either.[174]

In short, while the staff opinion may have been well intended, its conclusion was unsound and should not be followed.

IV. Assuming for argument's sake that OES is the custodian, the records are exempt under Code § 2.2-3703(A)(5) (Assignment of Error 2).

Because the clerks alone are the record custodians, the trial court properly found that OES could not be compelled to produce the records without the clerks' consent. But even assuming OES to be the custodian (or even a joint custodian), the case-management records are "required by law to be maintained by the clerks," and are therefore exempt from FOIA under Code § 2.2-3703(A)(5).

A. Standard of Review.

Whether Code § 2.2-3703(A)(5) exempts the records is a question of law reviewed here de novo.[175] Whether the exemption was waived is a mixed question of law and fact; the Court defers to the trial court's factual

---

[174] *E.g.*, Opinion No. AO-06-06 (May 25, 2006) ("[T]he Council does not have the power or duty to interpret the federal constitution or the application of constitutional law to specific legislative actions of the General Assembly of Virginia. To offer an opinion regarding the constitutionality of subsection C of § 2.2-3703 would be beyond the authority of the Council."), *available at* http://foiacouncil.dls.virginia.gov/ops/06/AO_06_06.htm.

[175] *Thorsen*, 292 Va. at 264, 786 S.E.2d at 458.

findings and reviews de novo the application of law to the facts.[176]

B. Section 2.2-3703(A)(5) exempts circuit-court case-management records because they are "required by law to be maintained by the clerks."

The case-management records here are "records required by law to be maintained by the clerks" under Code § 2.2-3703(A)(5). Significantly, the General Assembly added that exemption to FOIA in 2007 in the same bill that clarified the method by which circuit clerks' electronic records may be requested directly from the clerks under the provisions of Title 17.1.[177]

To understand the significance of the 2007 amendment, one must start with the opinion issued by the Attorney General in December 2002.[178] That opinion concluded that circuit clerks, when requested, must produce their electronic case-management records *both* under the provisions of Code § 17.1-208, *as well as under* FOIA.[179] But that opinion did not stand.

The Virginia Court Clerks Association sought the 2007 amendment to make case-management records producible only under § 17.1-208, not

---

[176] *William H. Gordon Assocs.*, 291 Va. at 146, 784 S.E.2d at 276.

[177] *See* 2007 Va. Acts ch. 548 (JA 640).

[178] 2002 Op. Va. Att'y Gen. 9 (JA 637).

[179] *Id.* at 11-12 (JA 638).

FOIA.[180] Thus, the 2007 amendment exempted from FOIA, in § 2.2-3703(A)(5), "records required by law to be maintained by the clerks."[181] The bill then expanded the provisions of Title 17.1 to allow "any" records "that are maintained by the clerk" to be obtained directly from the clerk under § 17.1-208, for a fee of 50 cents per electronic image, as specified in § 17.1-275(A)(8).[182]

The 2007 Amendment negated the Attorney General's 2002 opinion to the extent it ruled that CCMS records must be produced under *both* FOIA and § 17.1-208. Since that amendment, such records have been exempt from FOIA and are subject to production *only* under § 17.1-208.

Appellants are wrong in claiming that case-management records are not "required by law to be maintained by the clerks" under § 2.2-3703(A)(5). While it is true that clerks are not legally compelled to use a case-management system, once they start using one, the clerks alone are "required by law" to maintain the records. As shown above, Code § 17.1-242 mandates that clerks "shall have custody and shall keep all court records, including . . . records stored in electronic format." That duty

---

[180] JA 414:17-415:12.

[181] 2007 Va. Acts ch. 548 (JA 640). By contrast, "other records maintained by the clerks" are subject to production under FOIA. *Id.*

[182] *Id.* (JA 641).

specifically applies to case-management records, as found by the Attorney General in his April 2002 and 2013 opinions. And Code § 17.1-213(C) also imposes on circuit clerks a duty to keep all criminal-case records, a directive that plainly covers case-management records as well.[183]

What is more, the General Assembly's 2016 Appropriations Act now independently confirms that circuit clerks are the custodians of case-management records and that those records are exempt under FOIA. The Act requires each clerk to provide the Virginia Criminal Sentencing Commission with "case data in an electronic format from its own case management system or the statewide Circuit Case Management System."[184] "Upon transfer," however, "such data shall not be subject to [FOIA]."[185] That language would have been unnecessary if, as Appellants contend, FOIA already covered the clerks' case-management data.

C. The FOIA exemption was not waived.

Code § 2.2-3703(A)(5) does not operate as a typical exemption that the document custodian can waive in his discretion. When a typical

---

[183] *See* Va. Code Ann. § 17.1-213(C) (Supp. 2016) (JA 788) ("[a]ll other records" in specified civil and criminal matters after January 1, 1913).

[184] 2016 Va. Acts ch. 780 (Item 50.C), *available at* http://budget.lis.virginia.gov/item/2016/1/HB30/Chapter/1/50/.

[185] *Id.*

exemption is involved, FOIA applies to the record but gives the custodian discretion to withhold it.[186] By contrast, § 2.2-3703(A)(5) makes FOIA *inapplicable* in the first place—FOIA "shall not apply"—to records required by law to be maintained by the clerks. It is hard to see how that exemption could ever be waived, causing FOIA to apply when it does not.

Assuming for argument's sake that that exemption is waivable, Appellants failed to prove that the clerks "implicitly" waived it by allowing their case-management data to be viewed through OCIS.[187] Waiver requires "clear and unmistakable" proof both of (1) the knowledge of the facts needed to exercise the right and (2) the intention to waive the right.[188] Thus, in *Tull v. Brown*, this Court held that the sheriff did not waive a FOIA exemption covering a 911 audio tape when he voluntarily released a written transcript of the tape to the Daily Press.[189]

Just as in *Tull*, Appellants failed to prove the elements of waiver here. The evidence was undisputed that the clerks' consent to permit their data to be viewed in OCIS was premised on the limited functionality of that

---

[186] *See* Va. Code Ann. §§ 2.2-3705.1, 2.2-3705.2, 2.2-3705.3, 2.2-3705.4, 2.2-3705.5, 2.2-3705.6, 2.2-3705.7, 2.2-3706(A)(2).

[187] Opening Br. at 2 (Assignment of Error 2(b)).

[188] *See Cashion v. Smith*, 286 Va. 327, 334, 749 S.E.2d 526, 530 (2013).

[189] 255 Va. 177, 181 & n.3, 184-85, 494 S.E.2d 855, 857 & n.3, 859 (1998).

system.[190] OCIS has never allowed statewide searching or bulk-downloading of data.[191] Clerk Ferguson testified, for instance, that he never would have agreed to permit bulk-downloading of data if that had been an option.[192] Indeed, the clerks' individualized consent was based specifically on the "screen formats" of the display, so each could see exactly how the information would be shown.[193] And Hade testified that OES never thought that the clerks' participation in OCIS amounted to any consent for bulk-downloading of data, something that OCIS did not permit.[194] Thus, Appellants did not come close to proving the elements of waiver, let alone proving them by clear and convincing evidence.

V. Attorney's fees were properly denied (Assignment of Error 3).

FOIA permits a successful plaintiff to recover "attorneys' fees from the public body if the petitioner substantially prevails on the merits of the case, unless special circumstances would make an award unjust."[195] Special circumstances may include "the reliance of a public body on an

---

[190] JA 45-46 (Stip. No. 18); JA 402:17-19 (Hade).

[191] JA 46 (Stip. No. 19).

[192] JA 335:23-336:2 (Ferguson).

[193] JA 396:16-397:7, 402:17-22 (Hade).

[194] JA 444:7-11 (Hade).

[195] Va. Code Ann. § 2.2-3713(D) (Supp. 2016).

opinion of the Attorney General,"[196] such as OES's reliance on the 2013 and April 2002 opinions that circuit clerks alone are the record custodians of their case-management records.

But because the trial court properly found that FOIA did not require OES to produce the clerks' case-management records, it likewise correctly rejected Appellants' attorney's fees claim.

CONCLUSION

The issue here is not whether the Daily Press can obtain the records it seeks; it can obtain them directly from the clerks under the provisions of Title 17.1. But holding that FOIA makes document custodians out of government agencies that merely host electronic records for other agencies not only would read Code § 2.2-3704(J) out of the statute—it would cripple the efficient provision of government IT services. It would also prevent members of the Judicial and Executive Branches from trusting that their administrators will respect their control over their own records.

The judgment should be affirmed.

Respectfully submitted,

OFFICE OF THE EXECUTIVE SECRETARY
OF THE SUPREME COURT OF VIRGINIA

---

[196] *Id.*

By: *Stuart A. Raphael*

STUART A. RAPHAEL (VSB NO. 30380)
Solicitor General of Virginia

MARK R. HERRING
Attorney General of Virginia

TREVOR S. COX (VSB NO. 78396)
Deputy Solicitor General

MATTHEW R. MCGUIRE (VSB No. 84194) Assistant Attorney General

Office of the Attorney General
202 North Ninth Street
Richmond, Virginia 23219
sraphael@oag.state.va.us
(804) 786-7240
(804) 371-0200 (fax)

CERTIFICATE OF SERVICE AND FILING

I certify that, on November 23, 2016, this brief was filed electronically with the Court, in Portable Document Format, and ten printed copies were hand-delivered to the Clerk's Office in compliance with Rule 5:26(e). This brief complies with Rule 5:26(b) because the portion subject to that rule does not exceed 50 pages. A copy was also electronically mailed to:

Hunter W. Sims, Jr.
R. Johan Conrod, Jr.
Lauren Tallent Rogers
Kaufman & Canoles, P.C.
150 West Main Street, Suite 2100
Norfolk, VA 23510
(757) 624-3000 (office)
(888) 360-9092 (fax)
hwsims@kaufcan.com
rjconrod@kaufcan.com
ltrogers@kaufcan.com

Counsel for Appellants The Daily Press, LLC and David Ress

William W. Tunner
William D. Prince, IV
ThompsonMcMullan
100 Shockoe Slip, Third Floor
Richmond, VA 23219
(804) 698-6205 (office)
(804) 780-1813 (fax)
wtunner@t-mlaw.com
wprince@t-mlaw.com

Counsel for Appeellees/Necessary-Party Defendants Samuel H. Cooper, Jr., et al.

Craig Thomas Merritt
David B. Lacy
Christian & Barton LLP
909 East Main Street, Suite 1200
Richmond, VA 23219
(804) 697-4128 (office)
(804) 697-6128 (fax)
cmerritt@cblaw.com

Counsel for Amici Virginia Press Association et al.

Stuart A. Raphael

Exhibit 1: OES Exhibit No. 90 (JA 804)