IN THE
COURT OF APPEALS OF VIRGINIA

Record No. 0414-23-4

CITIZENS FOR FAUQUIER COUNTY,
Appellant,

v.

TOWN OF WARRENTON, *et al.*,
Appellees.

BRIEF *AMICUS CURIAE* OF THE COMMONWEALTH OF VIRGINIA IN SUPPORT OF APPELLEES

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INTRODUCTION

The circuit court correctly rejected Citizens for Fauquier County's (CFFC's) strained reading of the Virginia Freedom of Information Act that would have all but eliminated the correspondence exemption. It also reasonably exercised its discretion by crafting evidentiary proceedings tailored to the specific records request at issue to determine whether a municipality correctly withheld those records. This Court should affirm.

VFOIA strikes a careful balance between its overall goal of transparency in government and the need to preserve the privacy of certain records. As part of that balance, VFOIA categorically exempts "[w]orking papers and correspondence of" certain persons and entities. Code § 2.2-3705.7(2). CFFC contends that this exemption applies only to correspondence that is "of a similar character to 'working papers.'" Opening Br. 45. But that interpretation is contrary to the plain meaning of the statutory text and would incorrectly render the correspondence exemption effectively superfluous. The circuit court correctly rejected this argument, giving correspondence its ordinary meaning.

The circuit court also acted within its discretion by reviewing some of the withheld documents *in camera*. The Supreme Court of Virginia has repeatedly held that *in camera* review is an appropriate method for circuit courts to determine whether withheld materials are exempt from disclosure under VFOIA while still preserving the confidentiality of those materials. *Bergano v. City of Virginia Beach*, 296 Va. 403, 410 (2018). At the same time, circuit courts manage heavy judicial workloads, and it may not be feasible for the court to review the entirety of the withheld materials, particularly where, as here, thousands of records are at issue. Circuit courts have discretion to fashion appropriate evidentiary procedures to resolve each dispute before them. This Court should therefore affirm.

Finally, if the Court were to determine that the evidentiary record is incomplete, then it should remand the case for further evidentiary proceedings. CFFC's request that the Court instead order the petition granted in its entirety is baseless in the absence of evidence that the withholding of all of the documents violated VFOIA.

INTEREST OF *AMICUS*

The Court requested that the Attorney General file this brief *amicus curiae* because the questions presented in this case affect the interests of the Commonwealth. VFOIA's correspondence exemption applies to high-ranking officials and entities of the Commonwealth, including the Office of the Governor, the Lieutenant Governor, the Attorney General, and members of the General Assembly. Code § 2.2-3705.7. Similar questions regarding appropriate evidentiary proceedings for reviewing withheld documents also arise in VFOIA litigation involving these Commonwealth officials and entities. See, *e.g.*, Opening Br. 15, *Commonwealth v. Sawyer*, No. 0330-23-4 (Va. Ct. App. Jun. 30, 2023) (arguing that a circuit court erred in ordering disclosure of records under VFOIA "without conducting in-camera review of the records or otherwise ordering further procedures" to determine whether the correspondence and working papers exemptions applied). The Commonwealth files this brief *amicus curiae* to offer its view of the correspondence exemption and the procedural issues presented.

BACKGROUND

Virginia's Freedom of Information Act generally provides for open "access to public records" on request. Code § 2.2-3700(B). Recognizing that this general policy must be balanced against the need for confidentiality of some records, however, VFOIA contains numerous exemptions. *E.g.*, Code §§ 2.2-3705.1 to 2.2-3705.7. Two of VFOIA's exemptions exclude from disclosure the "[w]orking papers" and "correspondence" of certain officials. Code § 2.2-3705.7(2). VFOIA defines working papers as "records prepared by or for a public official identified in this subdivision for his personal or deliberative use." *Id.* It does not define "correspondence." See *id.*

If a person seeking records believes that the government is withholding documents that do not fall under a VFOIA exemption, that person may file a petition for injunctive and mandamus relief. Code § 2.2-3713(A); *Suffolk City Sch. Bd. v. Wahlstrom*, 302 Va. 188, 209–12 (2023). In that posture, "the public body shall bear the burden of proof to establish an exclusion by a preponderance of the evidence." Code § 2.2-3713(E). Circuit courts typically resolve the question whether an

exemption applies by reviewing the disputed records *in camera*. *Hawkins v. Town of South Hill*, 301 Va. 416, 433 (2022).

In this case, CFFC submitted two VFOIA requests to the Town of Warrenton seeking communications from the town's manager and mayor regarding the Town's consideration of a special use permit for a proposed data center. R. 1, 5–6. The Town invoked the attorney-client privilege, personnel information, proprietary information, working papers, and correspondence exemptions. Response Br. 2–3 (citing R. 502, 519). In total, the Town withheld approximately 3,100 emails. Response Br. 2.

CFFC filed a petition for a writ of mandamus, injunctive relief, and civil penalties against the Town for alleged VFOIA violations in December 2022. R. 1, 19. It argued that the correspondence exemption applies only to "correspondence uniquely created by or for the 'personal or deliberative use' of the chief executive officer," not communications that the officer "receives . . . or sends" generally. R. 15. It also argued that the working papers and correspondence exemptions can only apply to the town manager or the mayor, not both. R. 12.

The circuit court held two hearings and, after the Town offered to submit all of the disputed records for *in camera* inspection, R. 277, the court determined that it did not "have the time" to review each of the "3,100-plus emails" at issue, R. 446. Instead, it directed the Town to produce sample documents from each category of exemption that the Town invoked. R. 444–46. After it reviewed the samples that it had ordered the Town to provide, the circuit court issued a letter opinion explaining that it had determined that the documents the Town withheld fell within the exemptions the Town had asserted, and it therefore denied CFFC's petition. R. 143–45.

This appeal followed.

ASSIGNMENTS OF ERROR

CFFC has presented three assignments of error, which are reproduced here verbatim:

1. The Circuit Court erred as a matter of law in broadly construing the plain language of the exemption in Virginia Code § 2.2-3705.7(2) for "[w]orking papers and correspondence of . . . the mayor ***or*** chief executive officer of any political subdivision" to afford exemptions to both the mayor ***and*** chief executive officer of the Town of Warrenton, and so also erred in denying the Petition and motion for reconsideration and dismissing the case without finding one instance of denial of VFOIA rights by the Town's withholding of the alleged

"working papers and correspondence" of both the Town's mayor ***and*** of the Town's manager.

2. The Circuit Court erred as a matter of law in holding that the Town's withholding of public records, either as the Town Manager's correspondence and working papers or under other exemptions, was appropriate or that the Town had otherwise carried its burden under Virginia Code § 2.2-3713(E), as only a handful of documents, from among thousands withheld, were submitted for *in camera* review, no index of the public records withheld was provided, and all of the documents submitted were selected solely by counsel for the Town without any interpretation of the scope of Virginia Code § 2.2-3705.7(2)'s exemption, any input or oversight from the Citizens or the Court, or any evidence regarding the manner or principle of selection employed or the sample's representativeness of those public records not selected.

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

Opening Br. 12. The Commonwealth's brief *amicus curiae* is limited to the second and third assignments of error.[1]

STANDARD OF REVIEW

Whether a document is exempt from disclosure under VFOIA is a mixed question of law and fact. *Hawkins*, 301 Va. at 424. This Court defers to the trial court's factual findings and views the facts in the light most favorable to the prevailing party. *Id.* It reviews matters of statutory interpretation and a circuit court's application of a statute to its factual findings de novo. *Id.*

A trial court's decisions regarding "evidentiary matters" are subject to the "deferential abuse-of-discretion standard of appellate review" given the "broad discretion" that trial courts enjoy. *Fields v. Common-*

[1] The Commonwealth takes no position on CFFC's first assignment of error, because it is limited to how the working papers and correspondence exemptions apply to the "mayor or chief executive officer of any political subdivision." Opening Br. 12 (citing Code § 2.2-3705.7(2)). Apart from the exemptions' application to those local officials and to certain officers of institutions of higher education, both CFFC and the Town agree that the other uses of "or" in Code § 2.2-3705.7 are conjunctive, such that the working papers and correspondence exemptions apply to, for example, all of the Office of the Governor, the Lieutenant Governor, and the Attorney General. Opening Br. 27; Response Br. 9–10. The Commonwealth agrees with that interpretation.

wealth, 73 Va. App. 652, 671–72 (2021) (quotations omitted). "Accordingly, 'when a decision is discretionary . . . the court has a range of choice, and . . . its decision will not be disturbed as long as it stays within that range and is not influenced by any mistake of law.'" *Lawlor v. Commonwealth*, 285 Va. 187, 212–13 (2013) (quoting *Landrum v. Chippenham & Johnston-Willis Hosps., Inc.*, 282 Va. 346, 352 (2011)).

ARGUMENT

I. VFOIA excludes all correspondence of covered officials under the plain meaning of that term, not merely communications that would also be working papers

The correspondence exemption is not limited to correspondence written exclusively by or for a covered official or correspondence that resembles working papers. CFFC asks this Court to ignore the plain meaning of "correspondence" and instead read the correspondence exemption so narrowly that it would all but vanish from the statute. This Court should reject that misinterpretation.

CFFC suggests that the correspondence exemption does not apply to email correspondence. Opening Br. 44. It also construes the correspondence exemption to apply only to documents that would also qualify as working papers, by requiring exempt correspondence to be for the

"personal or deliberative use" of one of the named officials or entities. R. 15; see Opening Br. 45; Reply Br. 10–11. Both arguments are wrong.

CFFC's argument that the correspondence exemption does not apply to email correspondence is contrary to the plain meaning of the term. "Correspondence" means the "interchange of written communications." *Richmond Newspapers v. Casteen*, 42 Va. Cir. 505, 506 (Richmond City 1997) (quoting *Correspondence*, Black's Law Dictionary (6th ed. 1990)); see Opening Br. 44 (same). That meaning includes written communications exchanged electronically. *Beck v. Shelton*, 267 Va. 482, 491–92 (2004) (referring to emails as "keyboard-entered correspondence"); see, *e.g.*, *E-mail*, Merriam Webster's Collegiate Dictionary (10th ed. 1995) (defining email as "electronic mail").

Further, the General Assembly enacted the present correspondence exclusion in 1999, 1999 Acts ch. 726, https://tinyurl.com/38jb9wwf, decades after the invention of email and years after email became a widely used method of corresponding, see Samuel Gibbs, *How Did Email Grow from Messages Between Academics to a Global Epidemic?* The Guardian (Mar. 7, 2016), https://tinyurl.com/4mjjayxd. If the Gen-

eral Assembly intended to exclude this common method of correspondence from the term, it would have said so. See, *e.g.*, *Jenkins v. Mehra*, 281 Va. 37, 47 (2011) (explaining that "[i]f the General Assembly intend[s] to" accomplish an objective via statutory language, "it would . . . use[] a phrase" which does so); *City of Waynesboro Sheriff's Dep't v. Harter*, 1 Va. App. 265, 271 (1985) ("If the General Assembly intended for claims filed under Code § 65.1-47.1 to have no time limitation at all, they could have expressly said so.").

CFFC's argument that correspondence must resemble working papers is likewise incorrect. Again, "correspondence" simply means the "interchange of written communications." *Richmond Newspapers*, 42 Va. Cir. at 506 (quotation omitted). The categorical exemption for all "correspondence of" covered officials, Code § 2.2-3705.7(2), contains no requirement that the specified officials must personally draft the correspondence, nor does it state that the correspondence must be sent only from or to those officials. See *Beck*, 267 Va. at 491–92 (noting that email

"correspondence" "may be sent to several recipients at the same time" (quoting 1999 Op. Atty. Gen. 12)).[2]

CFFC's interpretation is also contrary to the presumption against surplusage. That the General Assembly included "working papers" as a separate, defined category of exempt records demonstrates that these terms cover separate types of documents. Because "every word of a statute must be given meaning," *McLean Bank v. Nelson*, 232 Va. 420, 427 (1986), "[w]ords in a statute should be interpreted, if possible, to avoid rendering words superfluous," *Cook v. Commonwealth*, 268 Va. 111, 114 (2004); see also *Ferrara v. Commonwealth*, 299 Va. 438, 445 (2021) ("We disfavor a construction of a statute that renders any part of the statute

[2] CFFC's reliance on a single unpublished circuit court case is misplaced. Reply Br. 11–12 (discussing *Hill v. Fairfax Cnty. School Bd.*, 83 Va. Cir. 172, 177 (Fairfax Cnty. 2011)). In *Hill*, the petitioner requested emails from a school board, which has no statutory exemption for its correspondence. The school board withheld documents "between Board members [where] the Superintendent was merely copied as a recipient," and the circuit court rejected the argument that the documents were exempt as "correspondence" of the superintendent. *Hill*, 83 Va. Cir. at 177. *Hill* thus, at most, stands for the proposition that the non-exempt school board members could not insulate their own correspondence from disclosure simply by copying the superintendent. That case does not hold that, to qualify for the correspondence exemption, a listed official must be the only sender or recipient, or that the correspondence must resemble a working paper.

useless or superfluous."); *Jackson v. Commonwealth*, 274 Va. 630, 634 (2007) ("This Court is not free to ignore language . . . ."). "Courts are not permitted to rewrite statutes," including by interpreting a statutory term so narrowly as to be effectively superfluous. *Chesapeake Hosp. Auth. v. State Health Comm'r*, 301 Va. 82, 95 (2022) (quotation omitted). Indeed, this canon of interpretation most often "prevents not the total disregard of a provision, but instead an interpretation that renders it pointless." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 176 (2012).

CFFC's interpretation would violate the surplusage canon. Under its reading, all or nearly all documents under the correspondence exemption would also be exempt as "working papers." CFFC argues that its interpretation leaves "no identity of scope" between working papers and correspondence. Reply Br. 10. But at bottom, CFFC's position appears to be that correspondence is only exempt if it is also a working paper, while working papers may be exempt even if they are not correspondence. Reply Br. 10–11. That construction renders "correspondence" superfluous. See *Ferrara*, 299 Va. at 445. This Court should reject it and give the exemption its plain meaning.

Further, the "correspondence" exemption primarily covers high-level executive and legislative officials, including the Office of the Governor, the Lieutenant Governor, the Attorney General, and members of the General Assembly. Code § 2.2-3705.7(2). These officials cannot realistically be expected to write all of their own correspondence personally, or to review personally all of the correspondence directed to them. *E.g.*, National Governors Association, Governors' Office Functions, https://tinyurl.com/evxhx46m (last visited May 28, 2024) ("Most governors' offices have assigned staff members or units to manage the flow of correspondence . . . [and, for example, p]olicy-related correspondence may be referred to the governor's policy aides."). Likewise, much of their correspondence will not consist of "working papers." Code § 2.2-3705.7(2).

And exempting the correspondence of these high-level executive officials from public disclosure under VFOIA is critical to the performance of their duties. "[H]uman experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances . . . to the detriment of the decision making process." *Taylor v. Worrell Enterprises*, 242 Va. 219, 223 (1991) (quoting *United States v. Nixon*, 418 U.S. 683, 705 (1974)); see Edward H.

Levi, *Some Aspects of Separation of Powers*, 76 Colum. L. Rev. 371, 388 (1976) ("[T]he requirement for some confidentiality . . . is a need which all advanced countries have recognized."). CFFC's overly narrow reading of the exemption could thus lead to "[a] lack of candor or an unwillingness to participate in the decision making process," *Taylor*, 242 Va. at 223, contrary to the General Assembly's intent.[3]

II. The circuit court did not abuse its discretion in conducting an *in camera* review of a subset of the withheld documents

A. The circuit court properly exercised its discretion in fashioning evidentiary procedures tailored to the dispute before it

The circuit court did not abuse its discretion by choosing to review a sample of the withheld documents *in camera* to assess whether the Town properly invoked the exemption.

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[3] As the *Taylor* plurality explained, an overly narrow reading of the correspondence exemption should also be rejected because it would violate the separation-of-powers doctrine, at least as applied to the Office of the Governor. 242 Va. at 222–24. VFOIA's correspondence and working papers exemptions "reflect[] the General Assembly's recognition of constitutional limits on its ability to invade the confidentiality of [executive officials'] communications." *Id.* at 224 (quotation marks omitted). The exemption should thus be interpreted to "resolve any reasonable doubt as to the statute's constitutionality in favor of its legality if possible." *Id.* at 221.

The Supreme Court has "encouraged the filing of allegedly confidential records for *in camera* inspection," *Bland v. Virginia State Univ.*, 272 Va. 198, 202 (2006), as "a proper method to balance the need to preserve confidentiality of privileged materials with the statutory duty of disclosure," *Bergano*, 296 Va. at 410. The Supreme Court has not, however, held that circuit courts must necessarily review the entirety of the withheld documents *in camera* in every VFOIA case. In cases involving a large volume of withheld documents, such a procedure could be burdensome for the circuit court, and the court has discretion to use instead an appropriate alternative method of assessing that the withheld documents fall within the claimed exemptions while also preserving their confidentiality, such as reviewing a sample of the documents *in camera*. See, *e.g.*, *Hawkins*, 301 Va. at 433; *Virginia Dep't of Corr. v. Surovell*, 290 Va. 255, 269 (2015); *LeMond v. McElroy*, 239 Va. 515, 518–21 (1990).

In this case, after concluding that a record-by-record review of the "3,100-plus emails" at issue would be overly burdensome, the circuit court ordered the Town to produce representative sample records from each of the "different categories that [the Town] claim[ed] exemption

for." R. 444, 446. Based on its review of those sample records, the circuit court rejected CFFC's petition, holding that the Town had properly invoked the exemptions. R. 145. This was a proper exercise of the court's discretion to resolve "evidentiary matters" according to the circumstances of the particular case. *Fields*, 73 Va. App. at 671–72 (quotation omitted); see *Brown v. Commonwealth*, 68 Va. App. 746, 770 (2018) (observing that "trial management decisions" lie "in the sound discretion of the trial court.").

CFFC's arguments to the contrary lack merit. First, CFFC argues that the Town did not meet its burden to demonstrate that the withheld documents fell within the exemption. Opening Br. 36–43. But although the Town bears the burden of proof to establish an exclusion, Code § 2.2-3713(E), it satisfied that burden when it offered to produce every withheld document to the court for its *in camera* review, and then produced all of the sample records as ordered by the circuit court, see R. 277 ("We're happy to make [the disputed records] available to [the court] electronically or in hard copy."); R. 145; *Bergano*, 296 Va. at 410.

Second, CFFC invokes the General Assembly's post-*Surovell* VFOIA amendment to argue that the circuit court could not credit the

representations of the Town's counsel. Opening Br. 40–41. But the amendment does not *prohibit* courts from deferring to the government; it merely states that a court is not "*required* to accord any weight to the determination of a public body." Code § 2.2-3713(E) (emphasis added). This provision also does not apply to the government's determination of whether a set of samples are representative, but rather its determination "as to whether an exclusion applies." *Id.* Because the circuit court did not consider itself required to defer to the Town, and because its deference—if any existed—applied to the Town's selection of representative samples, not to its determination of whether an exclusion applied, this provision is inapposite.

Third, CFFC faults the circuit court for not requiring the Town to turn over documents *to CFFC* for review, but it provides no support for any such requirement. Reply Br. 3, 14–15. To the contrary, *in camera* review, which the Supreme Court has repeatedly approved in the VFOIA context, is *ex parte* by nature. See *Bland*, 272 Va. at 202; *Bergano*, 296 Va. at 410. The court itself reviews the documents and determines whether they were properly withheld, without disclosure of the documents to the VFOIA petitioner. *Bergano*, 296 Va. at 410. Such *ex*

parte proceedings "balance the need to preserve confidentiality of privileged materials with the statutory duty of disclosure under VFOIA." *Id.* By contrast, requiring the government to disclose the documents to the petitioner before determining whether the exemption applied would not properly protect their confidentiality and would risk making the court's ultimate ruling on the exemption irrelevant.

Moreover, CFFC errs in asserting that *federal* standards apply and require the Town to provide a "detailed justification" for each withheld document. Reply Br. 16; see Reply Br. 14 n.6, 15–16. Federal law on this issue is fundamentally different than that of the Commonwealth. VFOIA requires only that the government provide the volume, subject matter, and applicable exemption for "each category" of withheld records. See Code § 2.2-3704(B). "[V]FOIA does not require further explanation when a public body asserts an exemption beyond . . . citing the specific Code section that authorizes withholding." FOIA Advisory Council Op. AO-09-19 (Nov. 6, 2019); see FOIA Advisory Council Op. AO-01-14 (Jan. 29, 2014) (explaining that once a records custodian informs a requester than an exemption applies to a requested document, "no further justification or explanation is required").

Federal law, by contrast, requires the government to provide the "determination and the reasons therefor" when denying a request. See 5 U.S.C. § 552(a)(6), (b). Section 552(b) also requires that, "[i]f technically feasible, the amount of the information deleted, and the exemption under which the deletion is made, shall be indicated at the place in the record where such deletion is made." 5 U.S.C. § 552(b).

The federal statute, in conjunction with requiring a far more detailed response, also provides the government far longer to prepare it. VFOIA requires public bodies to respond to a request within five business days; the federal FOIA provides the government twenty days to respond. Code § 2.2-3704(B); 5 U.S.C. § 552(b)(6)(A)(i).

Moreover, unlike Virginia record custodians, federal agencies' initial response may simply acknowledge the requests, explaining that the agency cannot produce records within the statutory timeline. 5 U.S.C. § 552(a)(6)(B)(iii). It often takes months or years before federal agencies produce the requested documents. See *Miccosukee Tribe of Indians of Florida v. United States*, 516 F.3d 1235, 1257 (2008) (holding that "the district court did not err when it failed to draw any adverse interest against the [agency] due to its" disclosure of documents requested under

FOIA about 24 months after the initial request). Given the deadlines set by VFOIA, the federal-style detailed, document-by-document response CFFC seeks is infeasible. Reply Br. 16.

B. If this Court finds the evidentiary record to be inadequate, the proper remedy would be a remand for further evidentiary procedures

If this Court were to conclude that the circuit court lacked a sufficient evidentiary record to hold that the documents were properly withheld, then it should remand the case for further evidentiary proceedings. CFFC's request that this Court simply grant the petition and order the Town to produce all of the withheld documents is improper. Opening Br. 50.

Entry of a VFOIA injunction is only permissible upon finding an "actual violation of VFOIA that gives rise to injunctive relief." *Suffolk City Sch. Bd. v. Wahlstrom*, 302 Va. 188, 211 (2023). The circuit court never made such a finding here. See R. 143–45. Nor does CFFC contend that the appellate record is adequate to demonstrate that all withheld documents are outside the scope of the claimed exemptions—even if this Court were inclined to depart from the "general rule, [that it] serve[s] as

'a court of review, not of first view.'" *Burkholder v. Palisades Park Owners Ass'n, Inc.*, 76 Va. App. 577, 591 (2023) (quoting *California Condo. Ass'n v. Peterson*, 301 Va. 14, 23 (2022)) (citation omitted). Rather, CFFC argues at length that the record is *not* adequate, due to the circuit court's decision to review a sample of the withheld documents, without requiring an affidavit or other evidence of the representativeness of the sample. See Opening Br. 37–45; Reply Br. 13–20. Thus, if this Court were to determine that further evidence is necessary, the appropriate course would be to vacate and remand for further evidentiary proceedings. See *Bland*, 272 Va. at 202–03.

CFFC argues that the Court should order all withheld documents produced because "the Town had its day in court" and "thumb[ed] its nose at the burden of proof." Reply Br. 19. This argument is erroneous. The Town satisfied its burden of proof by proffering the entirety of the withheld records to the circuit court for *in camera* review. R. 277. The Supreme Court has repeatedly held that the withheld records are appropriate evidence in a VFOIA case to determine whether an exemption applies. See *Bergano*, 296 Va. at 410; *Bland*, 272 Va. 202. The Town thus did not fail to meet its burden of proof, much less "thumb[] its

nose" at it. Reply Br. 19. Rather, the circuit court refused to review the majority of the proffered records, instead requesting a sample. R. 444–46.

That decision was within the circuit court's discretion. See Part II.A, *supra*. But if this Court were to find otherwise, then the inadequacy of the record arose from the circuit court's error in refusing the proffered evidence and choosing an inadequate alternative. In these circumstances, the appropriate remedy would be to remand for further evidentiary proceedings. *Bland*, 272 Va. at 202–03 (remanding for further proceedings where the trial court's error, not a party's, resulted in failure to admit "the essential reports in the record under seal"). Ordering that all withheld records be produced would deny the Town an adequate opportunity to demonstrate that the records are exempt under VFOIA. See, *e.g.*, *Southern Ry. Co. v. Darnell*, 221 Va. 1026, 1033 (1981) (holding that trial court erred in ruling on the merits without allowing a hearing on the merits); *Bowers v. Bowers*, 4 Va. App. 610, 618 (1987) ("The court may not refuse or fail to give parties a reasonable opportunity to develop and present evidence [on the merits]."); *cf.* Opening

Br. 14, *Commonwealth v. Sawyer*, No. 0330-23-4 (Va. Ct. App. Jun. 30, 2023).

CONCLUSION

For the foregoing reasons, this Court should affirm the circuit court's judgment dismissing the petition.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA

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May 28, 2024

CERTIFICATE

I certify that on May 28, 2024, in accordance this Court's April 26, 2024 order and with Rules 5A:1(c) and 5A:23(b)(2), this brief *amicus curiae* of right was filed electronically with the Court through VACES. Copies were electronically mailed to:

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I further certify that this brief complies with Rules 5A:19, 5A:21, and 5A:23 because the portion subject to that Rule contains 4,620 words, and because this brief contains the signature of at least one counsel of record as well as counsel's Virginia State Bar number, address, telephone number, facsimile number, and email address.

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