

VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF CHARLOTTESVILLE

NATIONAL PUBLIC RADIO, INC.,
CHIARA EISNER, and IAN KALISH

Petitioners,

v.

VIRGINIA DEPARTMENT OF
CORRECTIONS

Respondent.

Case No. CL23-386

MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS

National Public Radio, Inc. (“NPR”), Chiara Eisner, and Ian Kalish (collectively, “Petitioners”) submit this brief in support of their Petition for Writ of Mandamus (the “Petition”). For the reasons set forth in the Petition and herein, this Court should grant the Petition, issue a writ of mandamus ordering the Virginia Department of Corrections (“VADOC” or “Respondent”) to release the recordings sought by Petitioners, and grant Petitioners’ costs, including reasonable attorneys’ fees.

BACKGROUND AND FACTS

The Commonwealth of Virginia has executed a total of 1,390 individuals dating back to its time as a colony—more than any other state in the nation. *Closing the Slaughterhouse: The Inside Story of Death Penalty Abolition in Virginia*, Death Penalty Information Center, <https://perma.cc/KP3X-5MSE> (last visited May 2, 2023). From 1976 to 2017, Virginia executed

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Circuit Court Clerk’s Office
Lizelle A. Dugger, Clerk

By [Signature]
Deputy Clerk

73% of individuals who received death sentences, starkly higher than the national average of 16% over this same period. *Id.* Indeed, Virginia enacted “draconian procedural rules” that facilitated the swift enactment of capital punishment. *Id.*

In recent years, Virginia has ended this practice, formally abolishing the death penalty in 2021. Whitney Evans, *Virginia Governor Signs Law Abolishing the Death Penalty, a 1st in the South*, NPR (Mar. 24, 2021), <https://perma.cc/2JUA-JKW8>. The execution of William Morva in 2017 was the last to take place in the Commonwealth. *Id.*

But despite Virginia’s significant history of capital punishment, the public has long possessed very little insight into what happened within the execution chamber. Recent reporting—spearheaded in large part by Petitioner Chiara Eisner—has finally shined light on this practice, allowing the public to grapple with important public issues surrounding criminal justice in an informed manner. Ms. Eisner’s reporting has largely focused on a series of audio recordings that were donated to the Library of Virginia in 2006, documenting four executions conducted from 1987 through 1990. See Chiara Eisner, *NPR Uncovered Secret Execution Tapes from Virginia. More Remain Hidden*, NPR, <https://www.npr.org/2023/01/19/1149547193/secret-execution-tapes-virginia> [hereinafter *Secret Execution Tapes*]. These recordings were donated by a former employee of VADOC and—before Ms. Eisner and NPR argued for and obtained their public release in 2022—were housed in the library’s collection but kept unavailable to the public for 16 years. *Id.* After obtaining access, NPR published a story about the recordings in January of 2023, discussing their contents and including links to the recordings so the public could listen for themselves. *Id.*

The four recordings published by NPR range from roughly 12 minutes to 23 minutes in length. *Id.* They outline what happened in the execution chamber as narrated by VADOC

employees: the arrival and briefing of witnesses,¹ the testing of the electric chair,² the warden's announcement of the court order to an inmate,³ the carrying of an inmate from his cell to the chamber,⁴ and the administration of lethal electric surges.⁵ The recordings also contain conversations between VADOC employees regarding administrative issues, for instance, difficulties receiving communications from the Governor's Office about a potential pardon.⁶ At times, VADOC staff even commented on the process of making the recordings themselves; they discussed the audio equipment used,⁷ the format to record time signatures,⁸ and the need to speak softly as to not cause disruption within the chamber.⁹ In sum, the recordings primarily contain narration made by and about VADOC employees; the voices of inmates awaiting execution are rarely audible.¹⁰

Following the publication of Ms. Eisner's initial story, VADOC requested that the Library of Virginia return the recordings and associated materials to the agency. Chiara Eisner, *Virginia Hid Execution Files from the Public. Here's What They Don't Want You to See*, NPR (May 11, 2023), <https://www.npr.org/2023/05/11/1174343605/virginia-hid-execution-files-from-the-public-heres-what-they-dont-want-you-to-sc>. The library acquiesced to this request. *Id.*

The four tapes published by NPR, and 19 other execution tapes from Georgia, are the only "publicly available audio evidence from the more than 1,500 executions that have taken place across the U.S. during the past 50 years." Eisner, *Secret Execution Tapes, supra*. They are

¹ Ex. A at 0:48-2:42.

² Ex. A at 3:10-5:40; Ex. B at 0:23.

³ Ex. A at 11:28-12:15; Ex. B at 0:35-1:22; Ex. C at 2:14; Ex. D at 4:10.

⁴ Ex. A at 12:50; Ex. B at 1:48; Ex. C at 3:12; Ex. D at 6:10.

⁵ Ex. A at 15:58-16:38; Ex. B at 5:58-7:00; Ex. C at 15:47-16:16; Ex. D at 10:15-11:01.

⁶ Ex. C at 3:40-6:43.

⁷ Ex. A at 0:24.

⁸ Ex. B at 0:28.

⁹ Ex. B at 5:05.

¹⁰ *See generally* Exhibits A, B, C, and D.

important records directly relating to issues of significant public concern, and many other members of the news media have shared and contributed to Ms. Eisner’s work, including CBS News and the Associated Press. *E.g.*, Denise Lavoire and Sarah Rankin, *Virginia DOC Says Execution Audio Tapes Should Remain Secret*, AP News (May 6, 2023), <https://perma.cc/NUG2-QLQD>; *Secret Audio Tapes in Virginia Reveal ‘The Only Window into a Live Execution that We’ve Ever Had,’* CBS News (Mar. 7, 2023) <https://perma.cc/NL34-GRZH>.

But VADOC still possess additional tapes and is refusing to share them with members of the press and public. On October 17, 2022, pursuant to Virginia’s Freedom of Information Act, Va. Code Ann. §§ 3700–3714 (“VFOIA” or the “Act”), Ms. Eisner requested the following records from VADOC: “All tapes, audio and other media recorded by staff during executions conducted in Virginia that are stored with the Virginia Department of Corrections. The records should include, but not be limited to, narrations of the execution as it was happening.” Ex. E. On November 2, 2022, VADOC denied the Request, stating that the agency possessed additional responsive records but refusing to disclose any. Ex. F. The agency later clarified on January 19, 2023, that it possessed six recordings that had been created since 2010. Ex. I.

On April 13, 2023, Ian Kalish, an instructor at the UVA First Amendment Clinic, re-submitted Ms. Eisner’s request. Ex. G. VADOC once again denied the request in full, and this time indicated that the full set of records included recordings connected to 30 total execution files, consisting of 10 cassette tapes and 25 micro-cassette tapes. Ex. H.

VADOC cited four VFOIA exemptions as justifying its complete denial of the Request. First, the agency maintained that the recordings were exempt as “records of persons imprisoned in penal institutions in the Commonwealth provided such records relate to the imprisonment.” Va. Code § 2.2-3706(B)(4) (the “Records of Persons Imprisoned Exemption”). Ex. H. Second, the department claimed that the records were exempt as their release could reveal certain

categories of information like “critical infrastructure” or “personnel deployments,” which would “jeopardize the safety or security of any person; governmental facility, building, or structure or persons using such facility, building, or structure” if disclosed. Ex. H; Va. Code § 2.2-3705.2(14) (the “Safety and Security Exemption”). Third, the agency claimed that they constituted exempted “health records.” Ex. H; Va. Code § 2.2-3705.5(1) (the “Health Records Exemption”). And finally, VADOC stated the recordings contained “personnel information concerning identifiable individuals,” which is exempted under Va. Code § 2.2-3705.1(1) (the “Personnel Information Exemption”). Ex. H. As set forth below, these exemptions do not apply to the recordings in question.

The purpose of the VFOIA is to “promote an increased awareness by all persons of governmental activities and afford every opportunity to citizens to witness the operations of government.” Va. Code Ann. § 2.2-3700(B). As such, the Act requires that exemptions to its mandate of disclosure be narrowly construed, *id.*, and it places the burden on an agency withholding a record to demonstrate by a preponderance of the evidence that the exemption was properly applied, Va. Code Ann. § 2.2-3713(E). VADOC cannot satisfy this burden—under the plain text of the Act, the requested records must be disclosed.

Additionally, both VFOIA and VADOC’s own operating procedures require that even if a portion of a record is exempt from mandatory disclosure, the non-exempt portion must be released with exempt information redacted. *See* Va. Code Ann. § 2.2-3704.01; Va. Dep’t of Corrections, *Public Access to DOC Public Records*, Operating Procedure 025.1 at 6 (Jan. 1, 2022), <https://perma.cc/4386-CK7G>. Thus, even if this court finds that some portions of the requested records implicate the relevant exemptions, VADOC is required to redact and produce the remaining records.

STANDARD OF LAW

VFOIA defines “public records” as “all writings and recordings that consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, . . . or electronic recording or other form of data compilation, however stored, and regardless of physical form or characteristics, prepared or owned by, or in the possession of a public body or its officers, employees or agents in the transaction of public business.” Va. Code Ann. § 2.2-3701. The statute provides that “[a]ll public records . . . shall be presumed open, unless an exemption is properly invoked,” Va. Code Ann. § 2.2-3700(B), and further requires that “all public records shall be available for inspection and copying upon request” unless “a public body or its officers or employees specifically elect to exercise an exemption provided by this chapter or any other statute.” *Id.*

An agency attempting to invoke an exemption from VFOIA’s mandatory disclosure requirement bears the burden of demonstrating, by a preponderance of the evidence, that the exemption applies. Va. Code Ann. § 2.2-3713(E). This statutory provision overrides the common law requirement that a petitioner for writ of mandamus prove that he or she lacks an adequate remedy at law to prevail. *Cartwright v. Commonwealth Transp. Com’r of Virginia*, 270 Va. 58, 66 (2005).

ARGUMENT

I. VADOC cannot meet its burden to show that the claimed exemptions apply to the audio recordings of historical executions in Virginia.

A. The Records of Persons Imprisoned Exemption is inapplicable to the recordings responsive to Petitioners' request.

The plain text of VFOIA and the principles of statutory interpretation both contradict VADOC's claim that the recordings responsive to Petitioners' request can be withheld under the Records of Persons Imprisoned Exemption. The exemption reads:

B. Discretionary releases. The following records are excluded from the mandatory disclosure provisions of this chapter, but may be disclosed by the custodian, in his discretion, except where such disclosure is prohibited by law:

[. . .]

4. All records of persons imprisoned in penal institutions in the Commonwealth provided such records relate to the imprisonment[.]

Va. Code Ann. § 2.2-3706(B)(4). This exemption, like all VFOIA exemptions, must "be narrowly construed" in a manner that accords with the General Assembly's intent to provide "an increased awareness by all persons of governmental activities and afford every opportunity to citizens to witness the operations of government." Va. Code Ann. § 2.2-3700.

As a threshold matter, the plain text of this exemption excludes its application to recordings of executions. *See Brown v. Lukhard*, 229 Va. 316, 321 (1985) ("If language is clear and unambiguous, there is no need for construction by the court; the plain meaning and intent of the enactment will be given it."). In order for this exemption to reach a particular record, two conditions must be met: First, the record must be "of" a specific prisoner, and second, the record must specifically relate to that prisoner's imprisonment. Neither of these conditions can be satisfied with respect to the execution recordings.

First, while they were created to document the execution of a specific individual, the requested recordings are properly considered records of the prison administration and the Commonwealth, not those “of persons imprisoned.” Va. Code Ann. § 2.2-3706(B)(4). They were created by prison officials and document executions those officials carried out.

The four recordings that are publicly available demonstrate this point. Only two of these recordings contain what appears to be the voice of an inmate, and even so, these voices are distant and largely inaudible.¹¹ And while the last words of Alton Wayne were repeated by VADOC personnel,¹² the other three inmates did not make any final remarks that were captured or relayed on the tapes.¹³ Instead, the recordings primarily consist of VADOC employees describing the actions of their colleagues, many of which did not involve direct interaction with the inmate. For example, the recordings describe how lines of communication were opened with those outside the prison,¹⁴ with one employee noting that a colleague was waiting outside the governor’s office with a radio.¹⁵ The recordings also describe the preparation carried out before an inmate even entered the chamber, including the briefing of witnesses and testing of equipment.¹⁶ One recording even notes the presence of protesters outside of the facility.¹⁷ All of these things would have been outside of the prisoner’s observation or control—they are the actions and observations of VADOC.

¹¹ Ex. B at 3:25 (the apparent voice of Alton Wayne can be heard in the background as a VADOC employee repeats his last words); Ex. D at 4:19 (Wilber Lee Evans requests and is allowed to read the final court order himself, and a voice is heard in the background of the tape).

¹² Ex. B at 3:33-4:21.

¹³ Ex. A at 12:25 (indicating that Richard Whitley did not make any last remarks); Ex. C at 17:42 (indicating that Richard Boggs had no last remarks); Ex. D at 11:20 (stating that Wilbert Lee Evans provided his last words directly to his attorney while still in the holding cell).

¹⁴ Ex. B at 0:04.

¹⁵ Ex. A at 9:39.

¹⁶ Ex. A at 2:38-5:40; Exhibit B at 0:27.

¹⁷ Ex. B at 8:02.

Indeed, the recording of Richard Boggs' execution demonstrates that the process was paused as VADOC employees scrambled to address logistical problems. After Boggs was strapped to the electric chair, the prison was unable to receive an incoming call from the Governor's Office due to a tied-up phone line.¹⁸ For several minutes, prison employees tried to sort out which line to clear, and they ultimately informed staff within the execution chamber of the issue.¹⁹ Once the problem was resolved, some individuals are heard expressing their displeasure about how communications had been handled.²⁰ Incidents like this relate directly to operation of VADOC and the general administration of the execution—not the inmate.

Further, the fact that a recording merely contains some speech by, or otherwise describes, a prisoner is not enough to render it a record "of" that person. For instance, in *Thompson v. Northern Neck Regional Jail Bd.*, No. CL1700000-4, 2017 WL 11166100 (Va. Cir. Ct. Mar. 6, 2017), the estate of an inmate who died while incarcerated requested records that included all video taken of the inmate during the five days preceding her death. Pet. for Mandamus and Injunctive Relief, *Thompson*, 2017 WL 11180462 (Jan. 20, 2017). The jail board claimed the videos were "clearly records of jail prisoners relating to their incarceration" and therefore exempt from mandatory disclosure. Response to Pet. for Mandamus, *Thompson*, 2017 WL 11247827 (Feb. 3, 2017). But the Circuit Court of Richmond County rejected that argument, instead holding that the jail should release the video and "explore [the] possibility of redacting the video recording to blur the images of other prisoners." *Thompson*, 2017 WL 11166100 at *1. *Thompson* is comparable to the case at hand. Here, as described above, the requested records relate to the *process* of execution. They do not focus exclusively on an inmate, but instead

¹⁸ Ex. C at 3:40.

¹⁹ Ex. C at 3:55-6:42.

²⁰ Ex. C at 8:10.

convey the actions of public officials engaged in a penal action; the fact that the voice of an inmate may be captured in the recording should not render them entirely inaccessible by the public.

The second prong of this exemption also does not apply, as these recordings are not records related to imprisonment. Imprisonment and capital punishment are two distinct criminal penalties. Imprisonment is “a penalty of violating a criminal law,” consisting of “confine[ment] or physical[] restrict[ion] [of] one’s personal liberty, usually in a jail or prison.” *Imprison*, Legal Info. Inst., <https://perma.cc/PN6N-CYXK> (last visited May 21, 2023). Generally, an inmate is released after serving their imprisonment. See Va. Dep’t of Corrections, *Time Computation*, <https://perma.cc/4DZU-7C9R> (last visited June 13, 2023) (“The amount of time required to satisfy a sentence . . . depends on many variables,” including the original penalty imposed by a court and the inmate’s conduct while confined.). In contrast, “capital punishment” is a “criminal punishment that takes the defendant’s life as the punishment for the defendant’s crime . . . and the act of carrying out [this punishment] is called an execution.” *Capital Punishment*, Legal Info. Inst., <https://perma.cc/QP9R-KZZZ> (last visited May 21, 2023). The act of execution is not an aspect of confinement—it terminates confinement.

And even if confinement on death row is considered imprisonment, the recordings at issue do not chronicle that confinement. They do not document activities of a prisoner serving a prison sentence, but instead relay the process by which the Commonwealth carried out the most severe form of criminal punishment. The public has a significant interest in ensuring that government actors exercised this power responsibly. Indeed, courts in other jurisdictions have found that allowing the press and public to scrutinize the operation of capital punishment provides an important public benefit, and these decisions can be used to “aid[]” this Court’s interpretation of the Records of Persons Imprisoned Exemption. See *Hawkins v. South Hill*, 878

S.E.2d 408, 410 (Va. 2022) (explaining how the court “use[d] a commonsense and plain language paradigm, directed by precedent from this jurisdiction and *aided by the statutes and cases from other states*, to interpret and explain” the Personnel Records Exemption) (emphasis added). For example, the Ninth Circuit has held that “[i]ndependent public scrutiny . . . plays a significant role in the proper functioning of capital punishment.” *California First Amendment Coalition v. Woodford*, 299 F.3d 868, 876 (9th Cir. 2002); *see also Philadelphia Inquirer v. Wetzel*, 906 F. Supp. 2d 362, 271 (M.D. Pa. 2012) (“[A]llowing the press to report on the entire method of execution may promote a more informed discussion of the death penalty.”).

The release of the requested recordings would similarly facilitate “informed public debate” regarding whether Virginia’s execution procedures “comport[ed] with the evolving standards of decency which mark the progress of a maturing society.” *California First Amendment Coalition*, 299 F.3d at 876. Applying this oversight to past executions is important, as mistakes within the execution chamber were not uncommon. *See Eisner, Secret Execution Tapes, supra* (reporting that “in 2022, more than a third of the 20 executions that were attempted across the country were botched”). Some such mistakes even resulted in official coverups. *Id.*

The Records of Persons Imprisoned Exception must be read narrowly to preserve the ability of the public to engage in this valuable oversight. Because VADOC is specifically focused on the administration of prisons, nearly any record that agency generates could be creatively cast to relate to “persons imprisoned.” Thus, a broad interpretation of this exemption reaching such records would severely curtail the ability of the press and public to oversee VADOC. Not only would this result violate VFOIA’s construction provision, but it would also undermine the statute’s overall purpose. Va. Code Ann. § 2.2-3700 (requiring exemptions to “be narrowly construed” to promote “an increased awareness by all persons of governmental activities [that] afford[s] every opportunity to citizens to witness the operations of

government.”). This exemption should not be read to apply to records of the prison administration that directly convey its actions.

Finally, the statutory context of the Records of Persons Imprisoned Exemption cuts against its application to the execution recordings because it is part of a set of exemptions from mandatory disclosure that relate to *information that may be used in criminal investigations and prosecutions*—the disclosure of which could hinder law enforcement. Va. Code Ann. § 2.2-3706 (defining scope of mandatory “[d]isclosure of law-enforcement and criminal records.”). Beyond “records of persons imprisoned . . . provided such records relate to the imprisonment,” other information exempted includes “criminal investigative files” not otherwise covered by the mandatory disclosure requirements of Va. Code Ann. § 2.2-3706.1, “reports submitted in confidence” to certain law enforcement authorities, “records of . . . neighborhood watch groups” provided to law enforcement authorities under a promise of anonymity that have information that might identify those groups’ members, records with “tactical plans” of law enforcement that would jeopardize their safety, investigations of law enforcement members, the identity of witnesses, and several similar categories. *See generally* Va. Code Ann. § 2.2-3706(B). The Records of Persons Imprisoned Exemption should be interpreted in this context, as “the several parts of a statute [must be read] as a consistent and harmonious whole so as to effectuate [its] legislative goal.” *Colbert v. Commonwealth*, 47 Va. App. 390, 395, 624 S.E.2d 108, 111 (Va. Ct. App. 2006) (citing *Virginia Elec. and Power Co. v. Board of County Sup’rs of Prince William County*, 226 Va. 382, 388 (1983)). “[A] provision of a section of a statute ought not to receive a mere literal interpretation, when it would contravene the intention of the Legislature apparent from the other sections and provisions thereof.” *Id.* (citing *Pound v. Department of Game and Inland Fisheries*, 40 Va. App. 59, 68, 577 S.E.2d 533, 537 (Va. Ct. App. 2003)). While VADOC no doubt maintains certain prisoner records that serve an investigatory function,

the recordings requested do not. They are records of punishment enacted by VADOC— punishment that is only effectuated after any related investigations and trials had concluded. And, as the inmates captured in these recordings are dead, there is no risk that any information contained in these tapes would undermine future investigations. These records are simply outside the scope of VFOIA’s law enforcement exemptions.

The plain text of the Records of Persons Imprisoned Exception and its placement within the larger structure of VFOIA demonstrate that it is inapplicable to recordings of state-sanctioned and administered executions.

B. The Safety and Security Exemption is also inapplicable to the recordings responsive to Petitioners’ request.

The requested records do not fall under the Safety and Security Exemption, Va. Code § 2.2-3705.2(14). Specifically, this exemption applies to three categories of records:

(i) engineering, architectural, or construction drawings; (ii) operational, procedural, tactical planning, or training manuals; [and] (iii) staff meeting minutes.”

Va. Code § 2.2-3705.2(14)(i-iii). It is facially evident that the records sought by petitioners are not “engineering, architectural, or construction drawings,” “operational, procedural, tactical planning, or training manuals,” or “staff meeting minutes.” Va. Code Ann. § 2.2-3705.2(14)(i-iii). The statute then provides a catch-all exemption for:

(iv) other records that reveal any of the following, *the disclosure of which would jeopardize the safety or security* of any person; government facility, building, or structure or persons using such facility, building, or structure . . .

Id. (emphasis added). But this catch-all provision is limited, providing that an exempted record must jeopardize safety or security by revealing:

a. [c]ritical infrastructure information . . . b. [v]ulnerability assessments . . . c. [s]urveillance techniques, personnel deployments, alarm or security systems or technologies, or operational or transportation plans or protocols . . . [or] d. [i]nterconnectivity, network monitoring, network operation centers, master sites, or systems related to the Statewide Agencies Radio System (STARS).

Id. Here too it is facially evident that several of the categories do not apply to the requested records. Specifically, disclosure of the requested records would not reveal vulnerability assessments, the location of surveillance equipment or alarms, the details of surveillance techniques, or interconnectivity or network information. *Id.* § 2.2-3705.2(14)(iv)(b), (d). Beyond this, however, the requested records clearly fall outside the scope of the remaining categories of the catch-all provision. *Surovell v. Virginia Dep't of Corr.*, 92 Va. Cir. 358, 2016 WL 8231151, *9 (Va. Cir. Mar. 1, 2016) (stating that when analyzing withholdings made by an agency pursuant to the Public Safety Exception, this Court should first determine “whether the documents at issue even fit within [the Safety and Security Exemption],” i.e., whether the exemption’s language reaches the requested documents).

1. Release of the requested records would not reveal “critical infrastructure information.”

The statutory meanings of “critical infrastructure information” does not encompass audio recordings narrating the execution of a prisoner. As the Commonwealth of Virginia no longer allows the death penalty, any defunct infrastructure related to execution no longer falls within the scope of that term, if it ever did.

Under the Public Safety and Security Exemption, ““critical infrastructure information” means the same as that term is defined in 6 U.S.C. § 671,” a definitions provision within the Homeland Security Act. Va. Code Ann. 2.2-3705.2(14). This federal statute was designed to address international terrorism, *see generally*, 6 U.S.C. ch. 1, and it tasks the federal Secretary of Homeland Security with identifying potential terroristic threats. 6 U.S.C. § 652(e)(1)(B). In furtherance of this responsibility, the Secretary produces “comprehensive assessments of the vulnerabilities of the key resources and *critical infrastructure* of the United States.” *Id.* (emphasis added).

The Public Safety and Security Exemption—enacted in the years following the attacks of September 11, 2001—shares a similar legislative history. The four categories now enumerated in the catch-all provision were originally housed in a subsection specifically meant to remove “plans and information [used] to prevent or respond to terrorist activity” from the mandatory disclosure requirements of VFOIA. 2003 Va. Acts 704; *see also* Va. Code Ann. § 2.2-3705(A)(57) (2004) (repealed and recodified under new numbering by 2004 Va. Acts 690). Furthermore, VFOIA requires “[a]ny public body receiving a request for records excluded under [the critical infrastructure prong of the catch-all provision] to notify the Secretary of Public Safety and Homeland Security or his designee of such request and the response made by the public body.” *See* Va. Code § 2.2-3705.2(14).

Under the Homeland Security Act, “critical infrastructure” is defined as:

systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems would have a debilitating impact on security, national economic security, national public health or safety, or any combination of those matters.

42 U.S.C. § 5195c(e); *accord* 6 U.S.C. § 101(4). This definition thus identifies a *class of infrastructure*—systems and assets so vital that their destruction would risk national (or Commonwealth) security—that could be put at risk by the mere disclosure of certain information.

There are no set of facts through which VADOC can demonstrate that information contained in the requested audio recordings could pose a threat to “critical infrastructure.” As the Commonwealth no longer tolerates capital punishment, the spaces formerly designated for these purposes are no longer in use, and it is these spaces that these recordings describe.²¹ A facility no longer in operation cannot constitute *vital* “critical infrastructure” under that term’s

²¹ *See generally* Ex. A, B, C, and D.

statutory definition—there is simply no publicly essential system or asset capable of being disrupted here, let alone by a terrorist attack as contemplated by this statutory framework. Public oversight of the historical practice of capital punishment cannot be foreclosed on this basis.

2. Release of the requested records would not reveal “personnel deployments” or “operational or transportation plans or protocols.”

Nor would the requested records reveal “personnel deployments” or “operational or transportation plans or protocols.” While the statute does not specifically define what these terms mean, the rest of the provision provides the necessary context: these terms refer to *forward-looking plans* that could be undermined if their written or recorded details were public.

The terms “personnel deployments” and “operational or transportation plans or protocols” are listed in the same sentence as “surveillance techniques” and “alarm or security systems technologies,” Va. Code Ann. 2.2-3705.2(14), both of which refer to public safety- or security-related systems that would in certain circumstances be undermined through public disclosure. For instance, surveillance techniques and alarm systems might be circumvented if prisoners knew specific details about their operation, allowing inmates to act outside of law enforcement control. Accordingly, pursuant to the canon of statutory construction *ejusdem generis*, a “personnel deployment” or “operational or transportation plan[] or protocol” should be read to similarly mean a specific tactical plan capable of being undermined, such as where particular officers will be stationed, what specific locations they will be responsible for monitoring, or (in the corrections context) specific details governing future inmate transport.²²

²² This restrictive definition is contemplated in the DOC’s own operating procedures. The agency states that a “[f]unctional [e]xercise,” which is a training simulation “designed to evaluate capabilities and multiple functions using a simulated response,” can include “simulated deployment of resources and personnel, rapid problem solving, and a highly stressful environment.” Va. Dep’t of Corrections, *Critical Incident Management Exercises*, Operating Procedure 075.6 at 3 (Nov. 1, 2022), <https://perma.cc/Y9B5-EXDQ>. This simulated deployment clearly refers to a specific plan triggered in response to a security threat.

See Martin v. Commonwealth, 224 Va. 298, 301 (1982) (“When a particular class of persons or things is enumerated in a statute and general words follow, the general words are to be restricted in their meaning to a sense analogous to the less general, particular words.”). Indeed, the Supreme Court found in *Surovell* that detailed diagrams or specific protocols regarding the transportation of inmates to the execution chamber could fall under this exemption, as their details could be exploited to “stop [a future] execution.” *Virginia Dep’t of Corr. v. Surovell*, 290 Va. 255, 261 (2015).

But, as demonstrated by the publicly available tapes, the requested records do not contain sensitive details with implications for future events. High-level descriptions of past events in the execution chamber, including the fact that particular employees were in attendance, do not constitute “personnel deployments” or “operational or transportation plans” that can be withheld under this exemption. It is obvious that VADOC employees attended and participated in executions. The recordings simply demonstrate this truth—they describe some steps in a given execution, but they do not contain sensitive tactical information that presents a public safety risk going forward. For the most part, the actions of employees are described generally without revealing who was responsible for what, with speakers frequently using phrases like “the team” to describe individuals in direct contact with an inmate.²³ In contrast to records containing highly detailed layouts or specific forward-looking plans or procedures, such general descriptions simply lack any information capable of being exploited by a potential bad actor.

3. Even if the recordings did fall under the scope of the Safety and Security Exemption, VADOC cannot demonstrate that their release would create any risk of harm.

²³ *See, e.g.*, Ex. D at 6:10.

Even if the records responsive to the Request could be said to “reveal” infrastructure information, personnel deployments, or operational or transportation plans or protocols—which they do not—there is no set of facts upon which VADOC will be able to demonstrate a reasonable expectation of danger as a result of the disclosure of those records, as required to withhold them under this exemption. *See id.* § 2.2-3705.2(14)(iv)(a), (c).

While, as mentioned, the Virginia Supreme Court previously found in *Surovell* that several records relating to the execution chamber, including a detailed floorplan and a diagram of an electric chair, could pose a potential security risk, this decision was entered during a time when the Commonwealth still allowed capital punishment. *Surovell*, 290 Va. at 258, 259, 267. The Court credited evidence regarding past escape attempts by inmates being transported to the execution chamber, as well as other threats specific to execution day, *id.* at 260, with VADOC personnel testifying that revealing such detailed records could allow individuals to “stop [a future] execution.” *Id.* at 261. The Court ultimately concluded that “[p]rior to and on the day of an execution, VDOC faces concerns about internal and external threats that could *disrupt the execution* as well as maintaining the orderly operation and safety of” the prison. *Id.* at 267 (emphasis added). Here, in addition to lacking sensitive details as described above, VADOC cannot show that the records pose any analogous concern, as capital punishment is no longer carried out in the Commonwealth. The Safety and Security Exemption cannot be applied to accounts of this historical practice.

Prisoners are no longer being carried to the execution chamber, nor are they being strapped to the electric chair.²⁴ The VADOC employees in these recordings are no longer engaged in the execution-related tasks they were previously charged with. Simply put, the

²⁴ *See, e.g.*, Ex. B at 1:48-2:25.

requested records are no longer connected to a current practice. Their distribution would not create a risk because the infrastructure described, and any related “deployments” or “operation or transportation plans,” are no longer in use.

C. The Health Records Exemption is inapplicable to the recordings responsive to Petitioners’ request.

The requested recordings also do not fall under the Health Records Exemption that exempts by its terms “health records, except that such records may be personally reviewed by the individual who is the subject of such records, as provided in subsection F of § 32.1-127.1:03.” Va. Code § 2.2-3705.5(1).

Any argument that the execution of an inmate is a form of healthcare is patently absurd. Health care consists of “efforts made to maintain or restore physical, mental, or emotional well-being especially by trained and licensed professionals.” *Health Care*, Merriam-Webster, <https://perma.cc/7X2B-W7K3> (last visited May 21, 2023). A health record, therefore, contains records relating to medical treatment seeking beneficial patient outcomes. VADOC itself recognizes as much, and it has explicitly defined “health record” to mean “[a] file that contains information relative to the offender’s . . . medical, dental, and mental health *condition, and treatment.*” Va. Dep’t of Corrections, *Offender Access to Record Information*, Operating Procedure 050 at 3 (Nov. 1, 2022), <https://perma.cc/4TUT-KT6U> (emphasis added). An execution is an action taken to achieve an opposite goal—“putting [an individual] to death.” *Execution*, Merriam-Webster, <https://perma.cc/36TV-QWR3> (last visited May 21, 2023).

The Virginia legislature has recognized this distinction; the plain meaning of VFOIA and related laws forecloses the application of the Health Records Exemption to the requested records. The Health Record Exemption directly references subsection F of Va. Code § 32.1-127.1:03, a statute that establishes rules preserving the privacy of health records—there defined as “any

written, printed or electronically recorded material maintained *by a health care entity* in the course of *providing health services*,” as well as “the substance of any communication made by an individual *to a health care entity in confidence*” or “information otherwise acquired *by the health care entity* about an individual *in confidence* . . . in connection with the *provision of health services*.” Va. Code § 32.1-127.1:03(B) (emphasis added).

First, VADOC is not a “health care entity,” and the records it has created regarding executions therefore cannot be considered health records. Va. Code § 32.1-127.1:03 states that a “health care entity” means any “health care provider,” and it incorporates a definition of a “health care provider” from a third statute which governs medical malpractice claims:

(i) a person, corporation, facility or institution licensed by this Commonwealth to provide health care or professional services *as a physician or hospital*, dentist, pharmacist, registered nurse or licensed practical nurse or a person who holds a multistate privilege to practice such nursing under the Nurse Licensure Compact, nurse practitioner, optometrist, podiatrist, physician assistant, chiropractor, physical therapist, physical therapy assistant, clinical psychologist, clinical social worker, professional counselor, licensed marriage and family therapist, licensed dental hygienist, health maintenance organization, or emergency medical care attendant or technician who provides services on a fee basis; . . . [or]

(vi) a corporation, partnership, limited liability company or *any other entity* . . . which employs or engages a licensed health care provider and which *primarily renders health care services*.

Va. Code § 8.01-581.1 (emphasis added).²⁵ VADOC is clearly not an institution that provides services as “a hospital.”²⁶ *Id.*; see also *Shumate v. City of Martinsville*, 2016 WL 5327477, at *2

²⁵ While Va. Code § 8.01-581.1 excludes “state-operated facilit[ies]” from its definition of health care provider, Plaintiffs acknowledge that this does not end the inquiry because, incorporating that definition, Va. Code § 32.1-127.1:03 provides that “state-operated facilities shall also be considered health care providers for the purposes of this section.”

²⁶ Va. Code § 8.01-581.1 incorporates a definition of “hospital” to mean “any facility . . . in which the *primary* function is the provision of diagnosis, of treatment, and of medical and nursing services, surgical or nonsurgical, for two or more nonrelated individuals.” Va. Code § 32.1-123 (emphasis added).

(Va. Sept. 22, 2016) (“[T]he application of Code § 32.1-127.1:03 is expressly limited to entities licensed by the Board of Health (i.e., hospitals and nursing homes).”). And while it may employ “physician[s] . . . registered nurse[s,]” or other professionals to provide health treatments to inmates, this is not enough to render VADOC itself a health care entity. Va. Code § 8.01-581.1. In order to qualify as such, VADOC must employ or engage those individuals *and* “primarily render[] health care services.” *Id.* The primary function of VADOC is to ensure that those sentenced to criminal penalties experience those penalties, not to provide health care services.

Second, records of executions are not health records because executions are not “health services.” Such services include “examination, diagnosis, evaluation, treatment, pharmaceuticals, aftercare, habilitation or rehabilitation and mental health therapy of any kind,” Va. Code § 32.1-127.1:03(B), all of which are actions taken by healthcare professionals to improve the health of a patient—not kill them.²⁷

Importantly, VADOC itself recognizes that health services are focused on achieving beneficial health care outcomes. It lists the health care services it provides to inmates on its website, which include: “nurse and doctor sick calls,” “chronic care visits,” “dental visits,” and “other specialty appointments,” in addition to “mental health and wellness services [like] crisis management,” “group therapy,” and “solution-focused sessions.” Va. Dep’t of Corrections, *Health Services*, <https://perma.cc/QKZ2-8KFU> (last visited May 22, 2023). And, in its operating procedures, the agency defines “health record” to mean “[a] file that contains information relative to the offender’s medical, dental, and mental health *condition and treatment.*” Va. Dep’t

²⁷ Other sources define “health services” along these lines as well, recognizing that they are provided to improve a patient’s health or prevent negative health outcomes. For example, Title 42 of the U.S. Code states that health services are “any services provided by a health care professional, or by any individual working under the supervision of a health care professional, that relate to—(A) the diagnosis, prevention, or treatment of any human disease or impairment; or (B) the assessment or care of the health of human beings.” 42 U.S.C. § 234.

of Corrections, *Offender Access to Record Information*, Operating Procedure 050.6 at 3, (Nov. 1, 2022), <https://perma.cc/VAW6-MTVL> (emphasis added). An execution cannot be considered a health care service, even if it involves the administration of pharmaceuticals and the presence of doctors or nurses—it is an action taken to harm not to heal.

Third, no information contained in the requested records was shared “in confidence.” Outside observers attended executions within the Commonwealth.²⁸ Indeed, the Code of Virginia previously required that at least six private citizens without affiliation to VADOC be present to witness an execution. Va. Code Ann. § 53.1-234. The requested recordings thus can only contain information to which these observers would have also had access; they do not memorialize private communications between an inmate and a physician.

The execution recordings that NPR requested do not fall under the statute’s narrow classification of “health records,” and they cannot be withheld pursuant to Va. Code § 2.2-3705.5(1).

D. The Personnel Information Exemption is inapplicable to the recordings responsive to Petitioners’ request.

1. The recordings do not contain “personnel information.”

The requested recordings also do not fall under the Personnel Information Exemption, which encompasses records containing “personnel information concerning identifiable individuals.” Va. Code § 2.2-3705.1(1).

The Supreme Court of Virginia has recently interpreted this exemption, adopting a narrow definition of “personnel information” according to the term’s clear and unambiguous meaning. *See Hawkins v. South Hill*, 878 S.E.2d 408 (Va. 2022). In *Hawkins*, the Court held that this phrase means “data, facts, or statements within a public record relating to a specific

²⁸ *See, e.g.*, Ex. A at 0:50-2:40.

government employee, which are in the possession of the entity solely because of the individual's employment relationship with the entity, and are *private*, but for the individual's employment with the entity." *Id.* at 416 (emphasis added). In construing this definition, the Court recognized that this is a "privacy-based exemption, designed to protect the subject of the record from the dissemination of personal information." *Id.*

In essence, VFOIA recognizes that a public body operates as both a government entity and an employer. Government employees, like those in the private sector, often need to disclose private personal information to their bosses, but this sort of personal information should not become publicly accessible simply because an individual has accepted employment with a public body. The Personnel Information Exemption, therefore, "only [exempts] content . . . from disclosure . . . which is tied to the employment of the individual in some way, and which otherwise *would not be disclosed to the employer.*" *Id.* at 415 (emphasis added). In order to be covered, a record must contain something private that an employee furnished to the public body, for example, a medical diagnosis shared to secure a workplace accommodation.

While this exemption could potentially reach certain communications between employer and employee, like a resignation letter as was at issue in *Hawkins*, *id.* at 411, it does not extend to reach records like the execution recordings that simply relay actions taken by government employees while conducting government business. The Court in *Hawkins* recognized that exemptible personnel information must be possessed by an employer "solely" because it entered into an employment relationship with an individual. *Id.* at 416. The executions do not contain such information—they exist not because of a particular hiring decision or disclosure from employee to employer, but instead because VADOC directed its employees to carry out an execution. To put it differently, the words and descriptions of agency employees on the

requested recordings represent the actions of the agency, not the “dissemination of private information.”

The mere fact that an employed individual was involved in an execution, does not mean these records contain “data, facts, or statements” specifically *about* that employee.²⁹ To find otherwise would allow the government to shield all employees from public oversight. Allowing a law enforcement entity to withhold records merely because they identify an employee involved in state action—even if this action was embarrassing or regrettable—would thwart the entire purpose of VFOIA. *See id.* at 413 (stating that the primary purpose of VFOIA is “facilitating openness in the administration of government”). State action is necessarily carried out by individuals—as the legislature was well aware when it drafted VFOIA to prevent unwarranted and unlawful government secrecy.

Nor are the recordings “private,” as required by *Hawkins*. These recordings document an event attended by outside observers, many of whom have no affiliation with VADOC.³⁰ Therefore, even if the involvement of a particular employee in an execution is not widely known, it would not be *private*, as others inside and outside VADOC would possess knowledge of that involvement.

As they clearly fall outside of the Virginia Supreme Court’s narrow interpretation in *Hawkins*, the requested recordings cannot be withheld under the Personnel Information Exemption.

²⁹ Indeed, VADOC, per its operating procedures, would not house these recordings in a particular employee’s personnel record—defined by the agency as an “[o]fficial file for each employee which may include: application[s], reference letters, standard of conduct notices, performance appraisals, letters of commendation.” Va. Dep’t of Corrections, *Employee Records*, Operating Procedure 102.7 at 3, (Oct. 1, 2021), <https://perma.cc/XQ29-AJKU>.

³⁰ *See, e.g.*, Ex. A at 0:48-2:41; *see also The Americans Volunteering to Watch Executions*, BBC.com (Apr. 11, 2017) <https://perma.cc/SQQ3-HPJE> (describing how a couple who ran a chimney sweeping business volunteered to witness several executions).

2. Even if the recordings could be said to contain personnel information, withholding would not be required to protect the privacy interests of VADOC employees.

Even if found to contain personnel information, VADOC can point to no set of facts to demonstrate that the withholding of the requested recordings would not be necessary to “protect the subject of the record from the dissemination of personal information.” *Hawkins*, 878 S.E.2d at 416.

As shown by the publicly available recordings, significant portions of the records do not relate to any individual employee at all. They contain narrations of what is generally occurring in the execution chambers, such as the testing of the execution equipment, commenting that witnesses are filing in, that the Warden is coming to read the order of execution, and other various procedural information.³¹ Moreover, large portions of the recordings are static or inaudible voices.³² Simply put, the requested recordings do not contain sensitive personal information that should be withheld to “protect” particular VADOC employees. *Hawkins*, 878 S.E.2d at 416.

II. Even if this Court disagrees with Petitioner’s statutory interpretation, redaction, not wholesale withholding, is warranted.

VADOC is required to release the requested recordings. In the alternative, however, VFOIA requires VADOC to redact portions of the recordings not subject to the Records of Persons Imprisoned, Public Safety and Security, Health Records, or Personnel Information Exemptions. Va. Code § 2.2-3701; *see also* Va. Code § 2.2-3704.01 (“A public record may be withheld from disclosure in its entirety only to the extent that an exclusion from disclosure under this chapter or other provision of law applies to the entire content of the public record.”).

³¹ *See, e.g.*, Ex. A at 0:48; 11:28.

³² *See, e.g.*, Ex. C at 10:00.

VFOIA Section 2.2-3704.01 was adopted by the General Assembly to make clear that agencies have an obligation to release partially responsive records, following a holding to the contrary by the Virginia Supreme Court in *Surovell. Accord Hawkins*, 878 S.E.2d at 414. In *Hawkins*, the Court acknowledged this legislative change and walked-back its prior holding that “VFOIA contained no requirement of redaction . . . where only part of a document is exempt.” *Id.* Instead, VFOIA now provides that “all portions of the public record that are not . . . excluded [by an exemption] shall be disclosed.” Va. Code § 2.2-3704.01. This Amendment better meets the goal of VFOIA to “facilitate openness in the administration of government.” *See Am. Tradition Inst. v. Rector & Visitors of Univ. of Virginia*, 287 Va. 330, 339 (2014); Va. Code § 2.2-3700(B). And VADOC’s own Operating Procedures also reflect this requirement, stating that “Staff may not withhold an entire record when only a portion is exempt. Staff must release the requested records with the exempt information redacted.” Va. Dep’t of Corrections, *Public Access to DOC Public Records*, Operating Procedure 025.1 at 6 (Jan. 1, 2022), <https://perma.cc/4386-CK7G>.

As VADOC has not asserted an exemption which applies to the requested recordings, these records must be released in their entirety. Alternatively, even if portions of the requested recordings are found to be subject to the Records of Persons Imprisoned, Safety and Security, Health Records, or Personnel Information Exemptions, VADOC must release the remaining portions to Petitioners. Accordingly, Petitioners may seek discovery targeted to determine which, if any, portions of the recordings may be appropriately withheld.

CONCLUSION

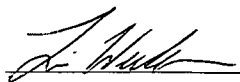
For the foregoing reasons, Petitioners respectfully request that the Court issue a writ of mandamus ordering Respondent to release the requested recordings in full or, alternatively, to show cause why any portion of the recordings may not be produced pursuant to an applicable

VFOIA exemption and to release all remaining records. Petitioners also respectfully request that the Court award Petitioners' reasonable costs, including attorneys' fees.

Dated: July 14, 2023

Respectfully submitted,

NATIONAL PUBLIC RADIO, INC.,
CHIARA EISNER, and IAN KALISH

By: 

Lin Weeks, VA Bar No. 97351

Gabriel Rottman*

UNIVERSITY OF VIRGINIA SCHOOL OF LAW

FIRST AMENDMENT CLINIC

1156 15th Street NW, Suite 1020

Washington, D.C. 20005

Tel: (202) 800-3533

**pro hac vice* admission pending

Counsel for Petitioners

CERTIFICATE OF SERVICE

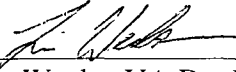
I certify that on or before July 14, a copy of the foregoing and any attachments thereto will be served by email upon the following addresses:

Harold Clarke, VADOC Director
Director.clarke@vadoc.virginia.gov

Gabriel Fulmer, VADOC VFOIA Officer
FOIA@vadoc.virginia.gov

If additional service is not waived by counsel for respondent, a copy will also be served thereafter by private process server upon:

Office of the Attorney General of Virginia
Barbara Johns Building
202 North Ninth Street
Richmond, VA 23219



Lin Weeks, VA Bar No. 97351
UNIVERSITY OF VIRGINIA SCHOOL OF LAW
FIRST AMENDMENT CLINIC
1156 15th Street NW, Suite 1020
Washington, D.C. 20005
Tel: (202) 800-3533

Counsel for Petitioners