IN THE
COURT OF APPEALS OF VIRGINIA

Record No. 0330-23-4

COMMONWEALTH OF VIRGINIA, *et al.*,
Appellants

v.

HEATHER SAWYER,
Appellee

On Appeal from
The Circuit Court for the County of Arlington,
Case No. CL22-3027-007

APPELLEE'S RESPONSE BRIEF

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INTRODUCTION

In an effort to shroud the workings of Governor Glenn Youngkin's government in secrecy, the Governor's Office (alternatively, "the Office") argues for an interpretation of Virginia's Freedom of Information Act ("VFOIA") that would turn the statute on its head and render meaningless the public's right to access and hold elected officials accountable.

Petitioner Heather Sawyer seeks records about Governor Younkin's "Tip Line," created to allow parents and others to report on the teaching of so-called "inherently divisive concepts" in Virginia public schools. In response, the Governor's Office has claimed that VFOIA's Working Papers and Correspondence Exemption shields nearly everything from public disclosure, and has also refused to explain what it did to search for responsive records.

After Ms. Sawyer filed her VFOIA Petition challenging this response, the Governor's Office demurred, arguing that, as a matter of law, (1) the exemption is so broad that it necessarily encompasses nearly everything that passes through the Governor's Office, and (2) it has no obligation to explain its search methods. The court below convened a hearing on both the Office's Demurrer *and* on the merits of Ms. Sawyer's Petition, but the Office failed to present any meaningful evidence to meet its burden on either extreme position.

The circuit court properly overruled the Demurrer, rejecting the Office's overbroad interpretation of the exemption and its claim that it need not explain its search. And because the Governor's Office did virtually nothing to sustain its burden on the merits, the lower court granted the Petition.

Doubling down on appeal, the Governor's Office makes a series of arguments that, if accepted, would erode the foundation of VFOIA's entire statutory scheme. Specifically, it argues that:

- The Working Papers and Correspondence Exemption should be stripped of any meaningful limits—including those appearing on the face of the statute itself which restrict the number of individuals to whom the exemption applies and impose additional qualifying criteria—sweeping in any record that the Governor's Office wishes to withhold;
- The court should have no role in evaluating the reasonableness of records searches because (according to the Governor's Office) searches are presumptively adequate if the responding agency says they are;
- The Governor's Office should be absolved of its statutory burden to justify claimed VFOIA exemptions, and instead a petitioner should

effectively be required to plead and prove that an exemption does *not* apply;

- The circuit court should have reviewed 800 pages of records *in camera* even though the Governor's Office did nothing to catalogue or index those records or otherwise make any effort to meet its burden short of that drastic step; and
- After failing to meet its burden to justify its claim of exemption at the hearing on the merits, the Governor's Office should now be allowed a second chance to do so.

None of these arguments is consistent with how VFOIA is supposed to work. It is a statute designed to foster government openness and transparency, with "liberally construed" disclosure provisions, "narrowly construed" exemptions, and "ready access" to government records. Va. Code Ann. § 2.2-3700. It provides special procedures and burdens of proof that put the onus on the *government* to overcome VFOIA's "presumption" of openness, *id.* § 2.2-3700, and to show why secrecy is required, *id.* § 2.2-3713. And it provides for judicial oversight to ensure that the government meets its obligations. *Id*. The Office's arguments flout the letter and spirit of the law and should be summarily rejected. The circuit court decision overruling the Demurrer and granting the Petition should be affirmed.

COUNTER-STATEMENT OF FACTS AND THE CASE

The Governor's Tip Line

Almost immediately upon taking office, Governor Youngkin signed Executive Order Number One ("EO 1") purportedly to "end the use of inherently divisive concepts," including Critical Race Theory, in Virginia schools. R.7 at ¶ 20. Very shortly thereafter, his office created an email "Tip Line," helpeducation@governor.virginia.gov, which the Governor publicly encouraged parents to use to "send us any instances . . . where there are inherently divisive practices in their schools." R.159. He emphasized that his administration was "asking for folks to send us reports and observations that they have that will help us be aware of [divisive practices]"; stated his administration would "catalogue it all"; and underscored that parental reports and observations would help the administration "enforce" EO 1 and "root out" so-called "divisive practices." *Id.* The creation of the Tip Line, and the Governor's public statements about it, garnered significant public attention. R.8-9 at ¶¶ 24-26.

Petitioner's VFOIA Requests

Given the importance the Governor attached to the Tip Line, Petitioner Heather Sawyer—a Virginia citizen who is also the Executive Director of American Oversight, a non-partisan, non-profit organization "committed to promoting transparency in government," R.5 at ¶ 8—made a series of VFOIA

requests to the Office of the Governor for information concerning the creation, maintenance, and operation of the Tip Line. Specifically, as relevant to this appeal, she requested:

- **General Communications**: (a) Communications about the Tip Line between persons inside the Office of the Governor and (i) persons outside of government or (ii) Commonwealth employees outside of the Office of the Governor, and (b) records about the Tip Line made available to (i) persons outside of government or (ii) Commonwealth employees outside of the Office of the Governor. *See* R.14 at ¶ 50, R.26 at ¶ 20, R.73-75.

- **Specific Communications**: (a) Emails between specifically identified government officials and specifically identified non-governmental individuals/organizations, and (b) emails sent by (or at the request of) specifically identified individuals containing certain key terms. *See* R.15 at ¶ 53, R.27 at ¶ 24, R.84-88.[1]

In response to the General Communications Request, the Governor's Office produced four pages of records and indicated that it had withheld "approximate[ly] . . . twelve pages" pursuant to Va. Code Ann. § 2.2-3705.7(2), which exempts from disclosure the "[w]orking papers and correspondence of the Office of the Governor" (hereinafter referred to as the "Working Papers and Correspondence

[1] Examples of the types of records Petitioner sought through the Specific Communications Request would include: emails between policy analysts or advisors in the Office and the Heritage Foundation; emails between anyone serving as a "Special Advisor" and the group Moms for America; emails from policy analysts containing the term "Tip Line"; and emails from the Director of Constituent Services containing the term "Critical Race Theory." The full text of the Specific Communications Request is at R.84-88.

Exemption" or the "Exemption").[2] R.15 ¶ 51, R.26-27 at ¶ 22, R.80-82. In response to the "Specific Communications Request," the Governor's Office produced 144 pages of records and informed Petitioner that it had withheld approximately 700 more under the Exemption. R.15 at ¶ 54, R.27-28 at ¶¶ 27-28, R.101-106.

The Petition and Pre-Hearing Developments

The Petition was submitted on August 8, 2022, challenging (1) the adequacy of the Governor's Office's search for records responsive to the General Communications Request and (2) the broad application of the Exemption to both requests. R.16-17 at ¶¶ 57-58. The Governor's Office submitted its Demurrer on October 31, 2022, R.116-25, and provided Petitioner a Supplemental Response to her requests the following month, R.178-80.

The Supplemental Response informed Petitioner that, with respect to the General Communications Request, the 12 pages withheld "consist of emails between and among personnel of the Office of the Governor and/or cabinet secretaries, except for one email between and among personnel of the Office of the Governor and personnel associated with the General Assembly." R.180. With

[2] As explained *infra* at Part II.A, the Exemption protects the "working papers and correspondence" of a small class of high-ranking officials. Va. Code Ann. § 2.2-3705.7(2). Within the Governor's Office, this includes the Governor himself, his Chief of Staff, Cabinet Secretaries, and a small number of others. *Id.*

respect to the Specific Communications Request, the Governor's Office indicated that it had actually withheld approximately 800 pages (not the 700 previously asserted), and of those:

- 629 pages consisted of "correspondence and working papers between and among the personnel of the Office of the Governor";
- 35 pages consisted of "correspondence and working papers from the Office of the Governor to individuals in the Office of the Governor and individuals in the Department of Education";
- Two pages consisted of "correspondence from the Office of the Governor to an individual in the Department of Education";
- 71 pages consisted of "correspondence and working papers sent from the Office of the Governor to recipients in the Office of the Governor and members of the General Assembly and/or their aides, and/or other Virginia government officials";
- 57 pages consisted of "correspondence from external non-government individuals to the Office of the Governor";
- Two pages consisted of "correspondence from the Office of the Governor to external non-government individuals";
- Seven pages consisted of "correspondence from the Office of the Governor to personnel associated with the General Assembly"; and
- 11 pages consisted of "working papers of the Office of the Governor."

R.180.

In order to determine whether the Exemption validly applied to any of these withheld records, Petitioner asked the Governor's Office several follow-up questions. These questions were aimed at discovering who, specifically, within the Governor's Office and outside it, were party to the withheld communications, since

the Exemption covers only a narrow class of persons, *see supra* note 2. Petitioner asked:

- When you refer to "Office of the Governor," do you mean only "individuals included in the statutory definition of 'Office of the Governor' in Va. Code Ann. § 2.2-3705.7(2) (the 'working papers and correspondence' exemption)? Or are you referring more colloquially and applying the exemptions to anyone employed in the Office of the Governor?"

- The Specific Communications Request sought communications with "anyone serving in the role of[] policy advisor, senior policy advisor, policy analyst, senior policy analyst, policy assistant, senior policy assistant, deputy policy director, deputy chief of staff, legislative director, chief transformation officer, deputy counsel, special advisor, and/or director of constituent services." Thus, is it correct to "assume that . . . one or more of these individuals was included" in the withheld communications?

R.182. The Governor's Office never answered these questions, by email, in their later briefing, or otherwise. It also did not provide information regarding how the search was conducted. R.201-03.

The Trial Court Hearing and Decision

On January 25, 2023, the Court below held a hearing on the Office's Demurrer and the merits of the Petition. R.195. At no point during the hearing did counsel for the Governor's Office provide any additional information—in the form of a *Vaughn*-type index,[3] affidavits, testimony, or even representations of

[3] As noted in the Governor's Office's opening brief (cited herein as "App. Br."), a *Vaughn* Index is "a list describing the documents withheld . . . and giving detailed

counsel—regarding the senders and recipients, or even the general nature, of the withheld records. *See generally* R.195-240. To be sure, the Governor's Office did bring a Bankers Box full of records to the hearing and offered that the court could review these records *in camera* if it chose to, apparently expecting the Court to review more than 800 pages of uncategorized and unexplained records as a first step, as opposed to a last resort. R.230-34, R.236-37, R.239. Similarly, at no point during the hearing did the Governor's Office provide any information about its search methods or otherwise explain why its search for records was adequate under the law. *See generally* R.197-240. Instead, it took the position that no explanation was required and, in essence, that the Petitioner and the court simply had to accept its unexplained search. *E.g.*, R.213, R.217.

Because the Governor's Office failed to (1) establish that the VFOIA Petition was subject to demurrer, (2) meet its burden to show that the Exemption applied, and (3) explain why its search was adequate, the Court below overruled the Demurrer and granted the Petition, effectively ordering the Governor's Office to produce the withheld records and conduct demonstrably reasonable searches. R.187-88, R.17-18. The order was stayed pending appeal. R.187-88.

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information sufficient to enable a court to rule on whether the withholdings fall within a [federal] FOIA exemption." App. Br. at 13, n.4 (citations omitted).

PETITIONER'S COUNTER-STATEMENT OF THE "ASSIGNMENTS OF ERROR" ALLEGED BY THE GOVERNOR'S OFFICE

(1) **Search Inadequacy:** Did the circuit court err (a) in overruling the Office's Demurrer on Petitioner's claim of search inadequacy where Petitioner sufficiently pled allegations that the Office failed to meet its statutory obligation to perform a reasonable search in response to a VFOIA request, and (b) in granting the Petition where the Office failed to make any showing that its search was proper?

(2) **The "Working Papers and Correspondence" Exemption:** Did the circuit court err (a) in overruling the Office's Demurrer where Petitioner sufficiently pled that the Office's assertion of the Working Papers and Correspondence Exemption to VFOIA, to shield hundreds of pages of government records from public view, was overbroad and improper, and (b) in granting the Petition where the Office failed to meet its burden of proof to show that the Exemption actually applied to the withheld records?

(3) **"Further Evidentiary Procedures" and *In Camera* Review:** Did the circuit court err in granting the Petition (a) where the Office failed to present meaningful evidence despite having an opportunity to do so at the hearing and (b) without conducting *in camera* review of the withheld records or ordering further evidentiary proceedings, even though the Office failed to provide information about those records that would have reduced the court's burden?

The answer to each of these questions is no.

STANDARD OF REVIEW

A. Review of VFOIA Decisions

Appellate courts must review "issues of statutory interpretation . . . de novo." *Hawkins v. Town of South Hill*, 878 S.E.2d 408, 411 (Va. 2022). To the extent that a circuit court makes factual findings, those are entitled to "deference"

and to be viewed "in the light most favorable to the prevailing party." *Id.* (alteration omitted).

In interpreting the Virginia Freedom of Information Act in particular, the Virginia Supreme Court has emphasized that Virginia courts must "remain cognizant" of VFOIA's purpose to ensure that (1) citizens have "ready access to public records," and (2) "the affairs of government" are not "conducted in an atmosphere of secrecy." *Suffolk City Sch. Bd. v. Wahlstrom*, 886 S.E.2d 244, 253 (Va. 2023) (quoting Va. Code Ann. § 2.2-3700(B)). Accordingly, the text of the statute requires that "[t]he provisions of this chapter shall be *liberally construed* to promote an increased awareness by all persons of governmental activities." Va. Code Ann. § 2.2-3700 (emphasis added). This "VFOIA-specific rule of construction 'puts the interpretative thumb on the scale in favor of' open government and public access." *Wahlstrom*, 886 S.E.2d at 253 (quoting *Fitzgerald v. Loudoun Cnty. Sheriff's Off.*, 289 Va. 499, 505 (2015)). Finally, "[a]ny exemption from public access to records or meetings shall be *narrowly construed*." Va. Code Ann. § 2.2-3700 (emphasis added).

B. Review of Decisions on Demurrers

Appellate courts review decisions on demurrers *de novo*. *See Bragg v. Bd. of Supervisors*, 295 Va. 416, 423 (2018). In so doing, they "accept the truth of all material facts that are . . . expressly alleged, impliedly alleged, and those that may

be fairly and justly inferred from the facts alleged." *Id.* (citation and internal quotation marks omitted) (reversing dismissal of VFOIA case). Under Virginia's notice pleading standard, a demurrer in a VFOIA case should be overruled as long as the petition "contain[s] sufficient allegations of material facts to inform" the public body of the "nature and character" of the claim. *Townes v. Va. State Bd. of Elections*, 299 Va. 34, 51 (2020) (citation omitted) (finding VFOIA allegations sufficient).

C. Review of Decisions to Conduct (or Not) *In Camera* Review

A circuit court's "determination of the question whether it should undertake the review of the disputed material is a discretionary matter." *Bowman v. Commonwealth*, 248 Va. 130, 135 (1994); *see also Brownfield v. Hodous*, 82 Va. Cir. 315, 319-20 (Cir. Ct. 2011) (relying on the United State Supreme Court's rationale that "the decision whether to engage in *in camera* review rests in the sound discretion" of the court (citation omitted)); *cf. Young v. C.I.A.*, 972 F.2d 536, 538 (4th Cir. 1992) (applying the"abuse of discretion" standard to review of trial court's decision not to conduct *in camera* review under federal FOIA).[4]

[4] Interpretations of the federal FOIA constitute persuasive authority in interpreting the Virginia FOIA. *See, e.g.*, *McChrystal v. Fairfax Cnty. Bd. of Supervisors*, 67 Va. Cir. 171, 178 (Fairfax Cnty. Cir. Ct. 2005).

ARGUMENT

I. The Circuit Court Correctly Overruled the Office's Demurrer and Granted the Petition on the Issue of Search Inadequacy

The Governor's Office contends that Petitioner failed to state a claim regarding the adequacy of the search, arguing essentially that the court has no role to play in reviewing this question because government employees are presumed to act in "good faith," and the Petition does not sufficiently overcome this presumption. App. Br. at 2, 10-11, 15; *see also id.* at 27-28. This argument is meritless: public bodies are required to conduct reasonable searches, and requestors are entitled to challenge the reasonableness of searches where, as here, they have alleged facts giving rise to an inference that the search failed to return expected records. The presumption of good faith owed the government does not prevent a petitioner from ever asking a court to review a public body's compliance with its search responsibilities, nor absolve the government of any obligation to explain how it did so.

Despite its failure to do just that, the Governor's Office also argues that the circuit court erred in granting the Petition on the merits with respect to search inadequacy. App. Br. at 15; *see also id.* at 36. But at no time, at or before the January 25 hearing, did the Office ever present any evidence or explanation of its search methods. Since the Governor's Office failed to meet its burden of proof, the

circuit court correctly found that an adequate search had not been conducted and ordered a new search.

A. Petitioner Sufficiently Pleaded that the Governor's Office Failed to Conduct an Adequate Search

Because VFOIA inherently requires public bodies to conduct adequate searches for the records requestors seek in order to meet their obligations under the law, pleading an inadequate search is tantamount to pleading a violation of a petitioner's VFOIA rights. Petitioner easily met the relatively low burden of pleading such a violation here.

1. VFOIA requires a public body to conduct an adequate search

That a VFOIA requestor is entitled to an adequate and reasonable search for responsive records is self-evident: requestors can only access the records to which they are entitled if public bodies make a meaningful effort to search for them. *See* Virginia Freedom of Information Advisory Council ("Va. FOIA Council") Advisory Opinion (AO)-04-10 (explaining that courts are empowered to decide whether VFOIA searches were "reasonable");[5] R.133 (Office's acknowledgment that "courts can determine the reasonableness of a public body's search"). The rights enshrined in VFOIA would be largely hollow if public bodies were not

[5] While a court is not bound by Va. FOIA Council Advisory Opinions, they can be "instructive." *Transparent GMU v. George Mason Univ.*, 298 Va. 222, 243 (2019).

required to conduct searches reasonably designed to retrieve the requested information.

As far as Petitioner is aware, Virginia courts have not directly addressed search adequacy under VFOIA. But decisions from other jurisdictions applying similar open records laws make clear that public bodies must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990) (cleaned up); *Neighborhood All. of Spokane Cnty. v. Spokane Cnty.*, 261 P.3d 119, 127-28 (Wash. 2011) (adopting federal FOIA "standards of reasonableness regarding an adequate search"); *City of San Jose v. Superior Ct.*, 389 P.3d 848, 860-61 (Cal. 2017) (public bodies required to conduct searches "reasonably calculated to locate responsive documents").[6]

Here, the Office denies that it has an obligation to demonstrate it conducted an adequate search. Citing Va. FOIA Council AO-04-10, it argues that VFOIA "does not require a public body to conduct a search in any particular manner" and "does not 'specify the extent to which a public body must search for records in response to a request.'" App. Br. at 27. But the Advisory Opinion addresses a

[6] Federal FOIA cases are persuasive authority in interpreting the Virginia FOIA. *See supra* note 4; *McChrystal*, 67 Va. Cir. at 178. Virginia courts have also looked to other states' interpretations of their records laws for guidance. *See, e.g.*, *Hawkins*, 878 S.E.2d at 414 ("we find a brief survey of other states' approaches useful").

public body's obligations in the pre-litigation context. Va. FOIA Council AO-04-10 (responding to requestor's concerns about administrative response to records request). It does not follow that the agency still need not demonstrate that the search was conducted in an adequate (not one particular) manner once a requester has invoked judicial review. Indeed, that same Advisory Opinion clearly envisions a role for the courts in determining search adequacy when a search is challenged in litigation. It explains that "[q]uestions of reasonableness are matters for the courts to decide," and that if "the extent of a search becomes an issue in litigation, it is within the powers of a court to order a public body to perform a search and to delineate the parameters of that search." *Id.*

The Office ignores this statement and proceeds to argue that there is no role for judicial review here because public officials are afforded a presumption of compliance with the law "in good faith." *See* App. Br. at 10-11 (quoting Va. FOIA Council AO-04-10; citing *WTAR Radio-TV Corp. v. City of Council of Va. Beach*, 216 Va. 892, 895 (1976)); *see also* App. Br. at 27-28. The citation to *WTAR Radio-TV* is misplaced here. In that case, petitioners sought an injunction to stop a city council from engaging in *future* violations of VFOIA's open meetings provisions. 216 Va. at 894. They did not, as here, challenge a specific action of a public body that had already occurred. In denying the injunction, the court in *WTAR Radio-TV* merely held that government actors can be expected to make a good faith effort to

comply with the law going forward, *not* (as the Office alleges here) that past government action cannot be questioned. *See id.* at 895.

Indeed, to apply such a presumption in the manner suggested by the Office would be wholly illogical. If the presumption of good faith compliance with the law were enough to defeat a petitioner's claims, there would be no need for judicial review as provided for in the statute. Instead, a court would essentially just be a rubber stamp on a public body's actions. That cannot be the case. *Cf.* Va. Code Ann. § 2.2-3713(E) (agency decisions not entitled to deference in VFOIA actions).

Finally, a good faith search is not necessarily the same thing as an adequate search. A search may be inadequate for reasons having nothing to do with a public official's motivation—for example, a public official may be unaware of a record's likely location or may have used search terms unlikely to recover responsive records. A court can only determine whether there has been an adequate or reasonable search if the government discloses how it was done. Indeed, federal employees are entitled to the same presumption of good faith compliance as Virginia employees, *see, e.g.*, *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991), but federal courts still require the government to demonstrate that its searches for records were adequate and reasonable, *see infra* at Part I.B. Holding the Governor's Office to that same standard is only logical and moreover, advances the underlying policy of VFOIA.

For these reasons, VFOIA's reliance on an adequate search means that pleading a denial of VFOIA rights due to an inadequate search is not superseded by any claimed presumption and the only remaining question is whether Petitioner satisfied her pleading burden.

2. The Petition stated a claim for search inadequacy

VFOIA sets a relatively light burden for what a petitioner must allege in her initial pleadings: "[t]he petition shall allege with *reasonable specificity* the circumstances of the denial of the rights and privileges conferred by this chapter." Va. Code Ann. § 2.2-3713(D) (emphasis added). The "reasonable specificity" standard is meaningful. A requestor inherently has limited access to all relevant facts, and so, in a VFOIA petition, a requestor can only allege what is *reasonable* for someone in that requestor's position to know. All a VFOIA petition must do is "contain[] sufficient allegations of material facts to inform" the agency of the "nature and character" of the claim. *Townes*, 299 Va. at 51 (citation omitted).

Here, the circuit court correctly found that Petitioner stated a claim for a denial of VFOIA rights as there can be little doubt that the Office understands the "nature and character" of Petitioner's claim that its search was inadequate and that it understands *why* Petitioner made this claim. As stated in the Petition, the Governor and his Office heavily promoted the Tip Line, indicated that the messages sent to it would be "catalogued," declared that it would be used to

"enforce" EO 1, and promised to use it to "root out" so-called divisive practices. R.7-10 at ¶¶ 21-28, R.16 at ¶ 57. Through these actions, it created a presumption that a substantial number of communications about the Tip Line likely would be exchanged with outside agencies or groups such as the Department of Education, individual school districts, enforcement agencies, lobbyists and media organizations, interest groups (*e.g.*, the American Enterprise Institute, *see* R.9 at ¶ 27), and others. *See* R.7-10 at ¶¶ 21-28, R.16 at ¶ 57. And yet the Office identified only sixteen responsive pages covering a time span of several months. *See* R.15 at ¶ 51, R.26-27 at ¶ 22, R.73-74, R.81.

The Governor's Office contends that these facts are insufficient to survive a claim for demurrer, attempting to put the burden on Petitioner to plead facts that definitely and affirmatively show the search was inadequate. *See* App. Br. at 27-28. However the kind of strict and detailed pleading requirement that the Governor's Office urges here is contrary to VFOIA's mandate that the statute be "liberally construed" to encourage access to public information, Va. Code. Ann. § 2.2-3700, to VFOIA's acknowledgment that a requestor need only plead what it is "reasonable" for her to know, *id.*, § 2.2-3713(D), and to Virginia's liberal notice pleading requirements more generally, *see Townes*, 299 Va. at 51.

The Governor's Office also suggests that, as a matter of law, the fact that it identified numerous records in response to the Specific Communications Request

necessarily means that the search for records responsive to the General Communications Request was valid. App. Br. at 28. But identifying many records responsive to a *different* request— particularly one where Petitioner provided the search terms—says nothing about the adequacy of *this* search. Petitioner has not alleged that the Governor's Office acted in bad faith, only that the search appears to have been inadequate under the circumstances. Given the reasonable specificity of those allegations, the circuit court was right to overrule the Demurrer.

B. The Governor's Office Failed to Establish that It Had Conducted an Adequate Search

Because the hearing was on the merits of the Petition as well as the Demurrer, the Governor's office was required to demonstrate compliance with VFOIA in the hearing in case the Demurrer was denied. Nonetheless, the Office did nothing to explain the adequacy of its search for records responsive to the General Communications Request, and so the circuit court correctly granted the Petition and found the search to be inadequate. Now, the Governor's Office argues that it did not bear the burden of proving search adequacy, but rather, the Petitioner bore the burden to prove its *inadequacy*. App. Br. at 27-28. The Governor's Office is wrong.

1. The burden on the merits rests on the Governor's Office, not the Petitioner

Numerous factors indicate that the burden to prove search adequacy rests with the government. First, the framework, purpose, and language of VFOIA all lead to this conclusion. VFOIA has a general "presumption" of openness, and it is to be "liberally construed" in favor of public access. Va. Code Ann. § 2.2-3700. Moreover, it makes clear that public bodies "shall bear the burden of proof to establish an exclusion" from disclosure, *id.* § 2.2-3713, and the failure to perform an adequate search obviously serves to "exclu[de]" responsive records from disclosure. There is *nothing* in VFOIA to suggest that petitioners should bear the burden of proof on this issue. *See Hawkins*, 878 S.E.2d at 412 (noting that where a "statute is subject to more than one interpretation," courts must apply the one "that will carry out the legislative intent behind the statute" and that VFOIA "puts the interpretive thumb on the scale" of interpretations that increase disclosure and government accountability (citations omitted)).

Second, requiring the respondent public body to bear the burden of proof on this issue is common sense. The public body is the party in sole possession of information about how it conducted the search. Flipping that burden of proof to the requestor would nonsensically require the requestor to prove a negative. Given the informational imbalance between the parties, the onus *must* be on the public body to explain how its search was done and that it was done correctly. Virginia

courts—which the legislature empowered to review alleged VFOIA violations, Va. Code Ann. § 2.2- 3713(A)—would be unable to determine the reasonableness of a search if the public body were not required to provide information on how that search was conducted. Shifting the burden in the manner suggested by the Governor's Office would make any challenge to a search virtually impossible, reducing the enforcement options the legislature created to practically nothing.

Third and finally, although Virginia case law has not directly addressed the issue, courts in other jurisdictions, recognizing this common sense conclusion, have held the government bears the burden. Federal courts, addressing search adequacy under the federal FOIA, have universally made clear that the burden rests with the public body to "show that it made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested." *Oglesby v. U.S. Dep't of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990); *see also, e.g.*, *Empower Oversight Whistleblowers & Rsch. v. United States SEC*, Civil Action No. 1:21-cv-1370 (RDA/WEF), 2023 WL 4353148, at *10 (E.D. Va. July 5, 2023). ("[T]he government bears the burden of showing its searches were reasonable in response to Plaintiff's FOIA requests."). And several state courts have also recognized that the burden rests on the government to demonstrate it has conducted a reasonable search. *See, e.g.*, *Better Gov't Ass'n. v. City of Chicago*, 169 N.E.3d 1066, 1076-77 (Ill. App. Ct. 2020);

Fraternal Order of Police v. District of Columbia, 79 A.3d 347, 360 (D.C. 2013); *Neighborhood All. of Spokane Cnty.*, 261 P.3d at 128**.**

2. The Office did not meet its burden to demonstrate that its search was adequate to meet its VFOIA responsibilities

To meet this burden to show search adequacy, the public body "may submit affidavits or declarations that explain in reasonable detail the scope and method of the agency's search." *Defenders of Wildlife v. U.S. Border Patrol*, 623 F. Supp. 2d 83, 91 (D.D.C. 2009) (citing *Judicial Watch, Inc. v. Dep't of Just.*, 185 F. Supp. 2d 54, 63 (D.D.C. 2002)). These supporting documents "must describe what records were searched, by whom, and through what processes . . . and must show that the search was reasonably calculated to uncover all relevant documents." *Id*. (citations and internal quotation marks omitted). Other jurisdictions have imposed similar requirements on government agencies to facilitate evaluation of a search for records. *See, e.g.*, *Better Gov't Ass'n.*, 169 N.E.3d at 1076-77 (adopting federal approach); *Fraternal Order of Police*, 79 A.3d at 360 (adopting federal approach); *ATV Watch v. N.H. Dep't of Transp.*, 20 A.3d 919, 926-27 (N.H. 2011) (endorsing federal approach or similar).[7]

[7] The Governor's Office objects to the use of evidentiary procedures modeled on those employed in federal FOIA cases, arguing that compared to VFOIA, the federal FOIA requires a requestor be provided with more information and that VFOIA allows for a government agency a longer response time. App. Br. at 36-38. Neither difference explains why it would be inappropriate to use similar evidentiary procedures once in *litigation*.

The Governor's Office did nothing of the sort here. At no time, either before or after the hearing on the merits of the Petition, did the Governor's Office present any information on how the search was conducted. *See* R. 201-03*; see generally* R.195-240. As such, the circuit court properly found that the search was inadequate.[8]

II. The Circuit Court Correctly Overruled the Demurrer and Granted the Petition on the Issue Application of the Working Papers and Correspondence Exemption

In addition to challenging the search conducted for records responsive to the General Communications Request, the Petition also challenged the Office's withholding in full of more than 800 pages of records under the Working Papers and Correspondence Exemption. While the Office largely conflates the two prongs of the Exemption—correspondence and working papers—in its argument, it is clear that the Office seeks to expand each prong well beyond its statutorily-limited scope, and continues the same burden shifting it attempted in response to Petitioner's search inadequacy claim. In its brief, the Governor's Office argues that the correspondence prong broadly covers essentially every communication that passes through the Office, App. Br. at 19-20, rendering the very narrow definition

[8] The Petition asked the court to order new searches be conducted as a remedy for the inadequate search. On remand, the Petitioner anticipates working with the Governor's Office to first determine how the searches were conducted, before determining whether such relief is necessary.

of who is included in the "Office of the Governor" in the Exemption practically meaningless. As for the working papers prong, the Office forgets that it bears the burden of proving that each record and portion thereof is in fact deliberative, as well as prepared for and kept within a relative zone of privacy of an official within that same statutorily-defined group. Overruling the Demurrer, the circuit court properly declined to accept the Office's overbroad interpretation of the Exemption and rejected the Office's effort to subject Petitioner to an improper pleading standard. It then correctly granted the Petition after the Governor's Office failed to meet its burden to show and explain how the withheld records and information within the records were each legitimately exempt.

A. The Exemption Is Narrowly Defined and Interpreted

The Exemption shields from disclosure the "working papers and correspondence" of a limited number of specified, high-ranking government officials, including designated persons in the Office of the Governor as well as mayors, heads of political subdivisions, and certain others. Va. Code Ann. § 2.2-3705.7(2). Those designated persons within the Governor's Office are limited to the following: "the Governor; the Governor's chief of staff, counsel, director of policy, and Cabinet Secretaries; the Assistant to the Governor for Intergovernmental Affairs; and those individuals to whom the Governor has delegated his authority pursuant to [Va. Code Ann.] § 2.2104." *Id.* The all-

encompassing interpretation pressed by the Governor's Office ignores the statute's text, as well as its directive that exemptions be "narrowly construed," and the circuit court was right to reject it.

1. The "Correspondence" portion of the Exemption applies to communications *from* a covered official, or sent *to—and only to*—a covered official

A narrow interpretation of "correspondence" is consistent with the statutory text and VFOIA's presumption in favor of openness. The term "correspondence" is not specifically defined in VFOIA, and the "correspondence" portion of the Exemption has not been the subject of reported appellate decisions in Virginia. But *Hill v. Fairfax County School Board*, 83 Va. Cir. 172, 177 (Fairfax Cnty. Cir. Ct. 2011), provides a well-reasoned interpretation. In *Hill*, the Court found that emails between Fairfax County School Board members were non-exempt records required to be released, even though these emails copied the Superintendent of Fairfax County—an individual whose correspondence is otherwise covered by the Exemption. *Id.* The court explained that "[t]he fact that the Superintendent received or read a copy of these e-mails does not qualify them" for the Exemption because the emails did "not reflect the work of the Superintendent" and were not "intended only for the Superintendent." *Id*. This conclusion makes clear that the mere fact that a record has been sent to one of the listed officials qualifying for the Exemption is not enough to establish the record as protected correspondence.

Applying the logic of *Hill*, to properly withhold a record under the Exemption, the agency must show that it is (a) from an official covered by the Exemption, or (b) to—and only to—a person or persons covered by the Exemption.

The *Hill* Court's analysis provides reasonable and logical limitations on how far the Exemption can extend in instances where the correspondence includes, but is not limited to, covered individuals. The Exemption will only apply if the correspondence is sent by a covered individual or if circulation is limited to that person, not a wide-ranging cast of characters within and outside of the Governor's Office. This interpretation respects VFOIA's requirement that exemptions to disclosure be "narrowly construed." Va. Code Ann. § 2.2-3700; *see also Hawkins*, 878 S.E.2d at 412 ("interpretive thumb" should be put "on the scale in favor of disclosure"). It gives meaning to the text of the statute limiting the scope to certain individuals. *See Zinone v. Lee's Crossing Homeowner's Ass'n*, 282 Va. 330, 337 (2011) ("We look to the plain meaning of the statutory language, and presume that the legislature chose, with care, the words it used when it enacted the relevant statute." (citation omitted)). And it prevents the Exemption from swallowing the rule of openness for records of the Governor's Office. *See, e.g.*, *Gloss v. Wheeler*, 887 S.E.2d 11, n.11 (Va. 2023) (rejecting interpretation of VFOIA exemption that would "swallow the rule").

The Governor's Office nevertheless argues that a broad interpretation of the Exemption should apply, one that would essentially allow it to withhold from disclosure any communications that may flow through the Office, regardless of whether they were sent from or to covered individuals. *See* App. Br. at 19-20. But this would expand the Exemption far beyond the letter and spirit of the statute and create an untenable loophole. If, for example, the Exemption covered any letter or email sent to a protected official regardless of whom else also received the correspondence, Government officials could easily evade VFOIA disclosure requirements by copying a covered individual in all circumstances. This cannot be a proper interpretation of the law.

The Governor's Office argues that *Hill* is distinguishable because that case involved emails between school board members, and this case involves emails involving employees of the Governor's Office. App. Br. at 20-21. But this is a distinction without a difference. The import of the *Hill* decision is that, consistent with VFOIA's purpose and policy, the Exemption has a limited scope. It does not automatically cover any record that crosses the desk of an exempt individual, which is exactly what the Governor's Office is trying to argue here. Rather, the Exemption is restricted to communications between specifically designated officials. Just as the correspondence in *Hill* was not exempt because it was not sent *from* the Superintendent himself nor *to* him alone, any correspondence at issue here

that was not sent *from* a covered individual or *to* only covered individuals is likewise not exempt.[9]

The Governor's Office also argues that the *Hill* interpretation is a "restrictive construction" that is "highly unreasonable" because it "all but eliminates the exemption from the statute." App. Br. at 21. In short, it is not and does not. The *Hill* interpretation in no way tells members of the Governor's Office that they must "write all of their own correspondence personally, or [] review personally all of the correspondence directed to them without any involvement of their staff, administrative assistants, or others." App. Br. at 21. It does not impose any requirement on how members of the Governor's Office choose to organize their operations. Instead, it simply subjects the communications of most employees in the Governor's Office (who are specifically *not* exempted in the statute) to the same disclosure requirements as other state employees.

Further, the Governor's Office claims its wider definition is supported by an informal email from the Va. FOIA Council, remarking with limited analysis on a *different* VFOIA request. *See* App. Br. at 20; R.144. This email consists of just a few sentences, is not a formal advisory opinion, and appears to have been dashed

[9] To the extent the Governor's Office argues that *Hill* is distinguishable because only the Superintendent, not the school board generally, is subject to the Exemption, whereas the Governor's Office is itself covered, that proposition entirely ignores—yet again—the plain language of the statute, which defines the Office of the Governor to include only a select few individuals.

off just 70 minutes after the Office requested guidance. Yet the Governor's Office relies on it for the wildly overbroad claim that any correspondence in possession of the Office is exempt regardless of who sent or received it. *See* App. Br. at 20. This interpretation is inconsistent with the plain language of the statute, flies in the face of the requirement that exemptions be interpreted narrowly, and does not address the court's treatment of the issue in *Hill*. This nonbinding, unpersuasive source is not worthy of any weight by this Court.[10]

Finally, the Governor's Office claims that subjecting it to these disclosure requirements "would violate the separation of powers doctrine by impairing [the Governor's] ability to carry out his constitutionally required duties." App. Br. at 21-22. But Legislative restrictions on executive functions are not automatic violations of separation of powers, and the Governor's Office here has done nothing to explain, as a matter of law or fact, how its "duties" would supposedly be "impair[ed]" by the reasonable interpretation of the correspondence exemption implicitly adopted by the circuit court.[11] *See id.*

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[10] As explained at note 5, *supra*, Va. FOIA Council Advisory Opinions are not "binding," *Transparent GMU*, 298 Va. at 243, and the Judiciary "alone shoulder[s] the duty of interpreting statutes because 'pure statutory interpretation is the prerogative of the judiciary,'" *Fitzgerald v. Loudoun County Sheriff's Office*, 289 Va. 499, 504 (2015) (citation omitted).

[11] The Governor's Office cites three cases, without explanation, in supposed support of this argument, but none of them does so. The first, *Taylor v. Worrell Enterprises*, 242 Va. 219 (1991), considered the issue of whether, in certain

2. The "Working Papers" portion of the Exemption also only covers the material of certain individuals, and only if that material is "deliberative"

The Governor's Office again disregards the statute's plain language to argue in favor of an overbroad interpretation of the working papers portion of the Exemption as well. "Working papers" are "those records prepared by or for a public official [covered by the exemption] for his personal or deliberative use." Va. Code Ann. § 2.2-3705.7(2). Thus, "working papers" under the Exemption have two components. First, the record must be "personal or deliberative." § 2.2-3705.7(2). To be sufficiently "deliberative" to qualify as a "working paper," the record must contain "substantive analysis or revision." *Id.* A record is not "deliberative" (and therefore not exempt) if it contains only raw data or factual material that government agents might review; absent material reflecting government actors' pre-decisional deliberations about those records, the Exemption cannot apply. *Id.*

Second, "working papers" must be prepared by or for a person covered by the Exemption or that otherwise remained within a protected zone. The purpose of

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circumstances, a VFOIA provision may violate the separation of powers doctrine, but split 3-3 on the question, with the seventh justice concurring on separate grounds. Neither of the other two cases involves VFOIA or the separation of powers doctrine. *See Yamaha Motor Corp., U.S.A. v. Quillian*, 264 Va. 656, 665 (2002) and *Virginia Soc. for Human Life, Inc. v. Caldwell*, 256 Va. 151, 156-57 (1998).

this Exemption is to allow certain deliberations to operate within a "zone of privacy"—comprising "those involved in the decision-making process"—that may be necessary "to protect creativity and the free-flow of ideas." Va. FOIA Council, AO-17-04 (Aug. 31, 2004). If the records are disseminated to others outside that zone, then they lose the benefit of the Exemption and must be released to a requestor. *See id*.[12] This principle has been affirmed in numerous advisory opinions interpreting the Exemption. *See, e.g.*, Va. FOIA Council, AO-01-16 (July 11, 2016) ("[E]ven if [a record] was originally a working paper prepared for the Office of the Governor's personal or deliberative use," if it "has subsequently been disseminated beyond that original personal or deliberative use" it is "no longer excluded from mandatory disclosure as a working paper"); Va. FOIA Council,

[12] The Governor's Office misrepresents Petitioner's explanation of the "working papers" portion of the Exemption. *See* App. Br. at 22-23. Petitioner does not assert that records can only be *working papers* if they are directed "to—*and only to*—a person or persons covered by the Exemption." *Id.* (citing Petitioner's argument concerning the *correspondence* portion of the Exemption). With respect to the *working papers* portion, the Governor's Office may withhold otherwise deliberative information shared with lower-level officials not covered by the Exemption so long as it demonstrates that the information remained in the zone of privacy of a covered official. For example, if the Director of Policy in the Governor's Office intentionally shared with a policy staffer not otherwise covered by the Exemption a draft of an Executive Order for their input, that draft would not need to be disclosed as it would still be within the protected zone. *See* Va. FOIA Council, AO-17-04 (Aug. 31, 2004) (zone of privacy limited to covered officials and "those involved in the decision making process"). However, if the same Executive Order was provided to a member of the General Assembly for their awareness, it would not be exempt. *See id*.

AO-02-15 (Mar. 27, 2015) ("[A]ctual distribution of the record itself—including allowing outside parties to view the record—would constitute dissemination and prevent further application of the exemption"); Va. FOIA Council, AO-08-00 (Nov. 8, 2000) ("[O]nce the chief executive disseminates any records held by him, those records lose the exemption" for "working papers.").

B. Petitioner Adequately Pleaded that the Exemption Does Not Validly Apply to the Withheld Records

Again misunderstanding the proper allocation of burdens in a VFOIA case, the Governor's Office complains that its Demurrer should have been sustained because Petitioner "did not plead facts showing that the withheld documents fall outside the correspondence and working papers exemption." App. Br. at 24. But once again, it is the *public body* that bears the burden of justifying VFOIA exemptions, and a petitioner is obligated only to plead allegations with "reasonable specificity" sufficient to give the Governor's Office notice of the "nature and character" of the claim. *See supra* at 18. Once that is done, unless the public body can show that the requests themselves, on their face, seek only records that are *necessarily* all exempt from disclosure as a matter of law, demurrer is not appropriate.[13]

[13] Petitioner is not aware of any instance in which a Virginia court properly sustained (or affirmed the sustaining of) a demurrer in a VFOIA action based solely on grounds of inadequate factual allegations. *See, e.g.*, *Hawkins*, 878 S.E.2d 408 (reversing demurrer; issue over statutory interpretation, not pleading

It is clear that the requests in this case do not seek records that are necessarily exempt correspondence or working papers as a matter of law, as both the General Communications Request and the Specific Communications Request asked for records that circulated among individuals not covered by the Exemption. As the Petition and supporting materials explained, these requests targeted communications exchanged among persons who are *not* included in VFOIA's definition of "Office of the Governor." The General Communications Request sought, *inter alia*, communications made available to persons *outside* the Office of the Governor. R.73-74. The Specific Communications Request was likewise directed at records belonging to a specific list of identified persons who are *not* part of the "Office of the Governor" under VFOIA. *See* R. 15 at ¶ 53, R.27 at ¶ 24; R.84-86. While Petitioner agrees it is *possible* some of records requested may be exempt, it is also quite *plausible* (even likely) that many, if not most, of the requested records do not fall within the narrow confines of the Exemption. Petitioner's allegations giving rise to this plausible inference meet her pleading burden. *See* Va. Code Ann. § 2.2-3713.

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sufficiency); *Wahlstrom*, 886 S.E.2d 244 (demurrer overruled in part and sustained in part based on merits, not pleading sufficiency); *Connell v. Kersey*, 262 Va. 154, 156 (2001) (issue on demurrer was statutory construction).

The Petition, through the language of the requests, also plausibly alleged facts supporting an inference that at least some portions of the 800 fully withheld pages of records were not "working papers" because they could contain factual, non-deliberative information. *See* Va. Code Ann. § 2.2-3705.7(2) (specifying that raw data and factual information are not exempt). A record prepared by, for example, a policy analyst may well include significant non-exempt factual information. A summary of the current state of an issue or relevant statistics may precede a policy recommendation based on those facts. Such information can and must be segregated from legitimately deliberative, exempt material and released to Petitioner. *See id.* (exempting particular "information contained in a public record" from mandatory disclosure, as opposed to exempting the record itself); *see also Hawkins,* 878 S.E.2d at 412 ("[O]nly portions of the public record containing information subject to an exclusion . . . may be withheld and the entirety of a record may be withheld only to the extent . . . that an exclusion . . . applies to the entire content of the public record") (internal quotation marks omitted)). The Governor's Office failed to explain why the records it is withholding as "working papers" are all *necessarily* exempt, in full, as a matter of law. Nor could it. Accordingly, the circuit court correctly overruled the Demurrer.

C. The Governor's Office Failed to Establish that the Documents Fell Within the Exemption

Once again, because the hearing was on the merits of the Petition as well as the Demurrer, the Governor's Office was required to meet its burden to demonstrate compliance with VFOIA in the hearing in case the Demurrer was denied. *See infra* at Part III.A. The Office was obligated to establish, by a preponderance of the evidence, that the claimed exemption applies. Va. Code Ann. § 2.2-3713. The Governor's Office here completely failed to offer *any* appropriate evidence that the Exemption applied to the withheld records.

Despite Petitioner's repeated requests before the hearing that the Governor's Office provide the information necessary to determine whether and how the withheld records supposedly fell fully within the confines of the Exemption—such as, for example, an affidavit or *Vaughn*-type index indicating the specific senders and recipients, or general nature of the records—the Governor's Office refused to cooperate. *See supra* at 8-9. Likewise, at the hearing, the Governor's Office continued to abdicate its responsibility to demonstrate that the records qualified as protected correspondence or working papers. *See generally* R.195-240. It did come to the hearing with a Bankers Box of hundreds of pages of records, seeking to pass its burden off onto the court by way of *in camera* review. *See* R.230-31, R.239-40. That was too little, too late. Public bodies must make some showing that an exemption likely applies before asking the court to tackle the burden of document

review. *See infra* at Part III.B. Here, the issues could have been resolved, or at least significantly narrowed, if the Governor's Office had merely explained the recipients and senders of the records and provided a description of their contents. Because the Office completely failed to do so, or otherwise meet its burden of proof in any meaningful way, the circuit court properly granted the Petition.

III. The Trial Court Did Not Abuse its Discretion in Declining to Order Further Evidentiary Procedures or Evaluate the Withheld Records *In Camera* After the Governor's Office Failed to Present Meaningful Evidence at the Appropriate Time

The Governor's Office argues that the circuit court should not have granted the Petition without reviewing the records *in camera* or otherwise ordering further evidentiary procedures. App. Br. at 29, 33-39. But the hearing was the time for evidentiary procedures, and given that the Governor's Office failed then or beforehand to provide any evidence or other information about the nature of the withheld records to show that *in camera* review or further procedures would be warranted, the circuit court properly exercised its discretion to decline that task. The Governor's Office is not now entitled to a second bite at the apple.

A. The Governor's Office Was Required to Present Evidence Justifying the Claimed Exemption at or Before the Hearing

The Governor's Office claims that it should not "be required to produce evidence before a court rules on the demurrer." App. Br. at 30. But this argument ignores VFOIA's unique procedural requirements and the procedural history of

this case. VFOIA's statutory framework allows requestors to invoke a special procedure requiring a substantive hearing on a petition for mandamus or injunction within seven days of filing. *See* Va. Code Ann. § 2.2-3713(C). That is, under VFOIA, public bodies are called upon to put forward their evidence and justify their claimed exemptions promptly, and requestors are not to be subject to prolonged litigation. In this way (among others), VFOIA cases are very different from ordinary civil cases, and the court below properly exercised its discretion to address both the Demurrer and the Petition at once. The Governor's Office was fully aware that the January 25, 2023, hearing would follow this procedure. *See* R.126 (consent order entered into by Governor's Office noting "[o]n January 25, 2023 . . . this Court will hold a one-hour hearing on Petitioner's Petition for Injunctive and Mandamus Relief and the Respondents' Demurrer"); *see also* R.156-85 ("Petitioner's Memorandum in Opposition to Respondents' Demurrer and in Support of her FOIA Petition," requesting that the Demurrer be overruled and the Petition granted).

Accordingly, the Governor's Office was on notice to come prepared to present evidence and explanations to demonstrate the validity of its withholdings and search. For example, to justify that the documents fell within the working papers and correspondence exemption, it could have provided descriptions of the records, including the identities of the senders and recipients. *See Virginia Dept. of*

Corrections v. Surovell, 290 Va. 255, 269-71 (2015) (stating that an appellate court can review the "precise description of the confidential records" to evaluate whether an invoked exemption was appropriate); *LeMond v. McElroy*, 239 Va. 515, 520-21 (1990) (explaining that, "[a]t the very least, a precise description of the document that would not reveal its terms verbatim should be made a part of the record"). To demonstrate its searches were adequate, it could have come prepared with affidavits or a witness to explain how that search was conducted. *Cf. Defenders of Wildlife*, 623 F. Supp. 2d at 91. But the Office declined to produce affidavits, testimony, a *Vaughn*-type index, or any other similar evidence at that hearing. It cannot complain now that the circuit court did not provide it with another opportunity to do so.

The Office's arguments to the contrary miss the mark. First, the cases it cites to suggest that a hearing on the Petition was inappropriate here, *see* App. Br. at 30-32, are inapposite. None are VFOIA cases and none involved circumstances where the non-moving party had an opportunity to present evidence and declined to do so.[14] Second, the fact that Petitioner "admitted that there were numerous

[14] *See Southern Ry. Co. v. Darnell*, 221 Va. 1026, 1033 (1981) (finding that the party not carrying the burden of proof should have had the chance to refute evidence presented); *Bozsik v. Bozsik*, Record No. 1468-14-1, 2015 WL 1642168, at *6 (Va. Ct. App. Apr. 14, 2015) (concerning circumstance where, unlike here, circuit court did not "permit[] the parties to present their conflicting evidence" (internal quotation marks omitted)); *Renner v. Stafford*, 245 Va. 351, 355 (1993) (finding lower court should not have ruled on summary judgment when facts

outstanding factual questions," App. Br. at 32-33 (citing Petitioner's brief below), is also beside the point. The issue on a VFOIA petition is whether the public body has met its burden to show that all of the requested records fall within the claimed exemption. Where the public body fails to meet its burden, a petition should be granted, regardless of any questions a petitioner might have. That is precisely what happened here, and the Office's attempt at a do-over should be rejected.

B. Courts Are Not Required to Order Further Evidentiary Proceedings or Undertake *In Camera* Review in VFOIA Actions, and the Government Made No Showing that Either Was Appropriate Here

Finally, the Governor's Office argues that the circuit court should have ordered "further evidentiary proceeding[s]" on Petitioner's Petition or else reviewed the withheld records *in camera.* App. Br. at 34-37, 39. With respect to "further evidentiary proceedings," the Governor's Office did not ever ask for this at the hearing or otherwise below. R.230-232, 239-40. It has thus waived its right to ask for them now. Va. Sup. Ct. R. 5A:18 ("No ruling of the trial court . . . will

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remained in dispute); *Kingrey v. Hill*, 245 Va. 76, 78 (1993) (reversing lower court ruling on negligent entrustment unsupported by evidence on the record); *Weaver v. Roanoke Dept. of Human Resources*, 220 Va. 921, 928-29 (1980) (finding that evidence presented "was insufficient to justify the termination of [a parent's] residual parental rights"); *Stocks v. Fauquier County School Bd.*, 222 Va. 695, 698-99 (finding government agency's finding was unsupported by the evidence and therefore overturning it); *Barnes v. Commonwealth*, 72 Va. App. 160, 172 (2020) (affirming trial court's ruling to deny defendant's motion for bond based on evidence in the record).

be considered as a basis for reversal unless an objection was stated with reasonable certainty at the time of the ruling."); *Martin v. Ziherl*, 269 Va. 35, 39 (2005) ("A basic principle of appellate review is that, with few exceptions . . . arguments made for the first time on appeal will not be considered.").[15]

With respect to "*in camera* review," a circuit court does not abuse its discretion, *see supra* at 12, by declining to order it where the party seeking it has done no preliminary work to show that such review was warranted or that the issues cannot be resolved through means that are less burdensome to the court. As one Virginia court explained in a related context, "before engaging in *in camera* review," courts "should require a showing of a factual basis adequate to" demonstrate that such a review is necessary. *Brownfield*, 82 Va. Cir. at 319-20 (Cir. Ct. 2011) (quoting *United States v. Zolin*, 491 U.S. 554, 560 (1989)).

The Governor's Office mischaracterizes the case law, claiming, incredibly, that *in camera* review in VFOIA cases is always required. Not so. Although many cases encourage the use of *in camera* review under certain circumstances, none *mandate* it. The Governor's Office cites *Bland v. Virginia State Univ.*, 272 Va. 198, 202 (2006) as holding that claims of exemption "'can only be answered by an

[15] In addition, the Governor's Office failed to make clear what it envisioned for these "further evidentiary proceeding[s]." *See* App. Br. at 35-39. It criticized the evidentiary procedures employed by federal courts, and did not suggest other alternatives. *See id.*

inspection of the records themselves' by the court." App. Br. at 34 (cleaned up). But *Bland* imposes no obligation on the trial court to conduct *in camera* review in the first instance. It found that a lower court's decision to decline to make documents actually reviewed in camera part of the appellate record was an abuse of discretion, as that decision made it impossible for the appellate court to inspect them. *Bland*, 272 Va. at 201-02. Neither of the next two cases cited by the Office purports to require *in camera* review under all situations, and in fact allows the agency to provide "precise descriptions" of the records instead. App. Br. at 34 (citing *Virginia Department of Corrections v. Surovell*, 290 Va. at 269 and *LeMond v. McElroy*, 239 Va. at 518-21). And the final two cases merely acknowledge that *in camera* review can be *a* "proper method" for a court to evaluate whether exemptions are valid, but they do not state that it is *the only* method, App. Br. at 34–35 (citing *Bergano v. City of Virginia Beach*, 296 Va. 403 (2018) and *Hawkins v. Town of South Hill*, 878 S.E.2d 408 (Va. 2022)), or that a court cannot "require a showing of a factual basis adequate" to establish that *in camera* review is necessary, *Brownfield*, 82 Va. Cir. at 319-20.

Here, the circuit court correctly concluded that *in camera* review was not warranted. It was not required to take upon itself the review of approximately 800 pages of withheld records, which were not organized, categorized, or indexed in any way, when the Governor's Office could have taken other, less burdensome,

measures to resolve or narrow the issues in dispute. Holding otherwise is not only inconsistent with the case law, but would also discourage public bodies from meaningfully working with requestors to alleviate the burden on the courts. *See* Va. Code Ann. § 2.2-3700 ("All public bodies and their officers and employees shall make reasonable efforts to reach an agreement with a requester concerning the production of the records requested."). Public bodies should not be allowed to abdicate their responsibilities to the public by passing them to the justice system. In the absence of any real effort by the Governor's Office, *on its own part*, to establish the applicability of the exemptions, the Petition was properly granted.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed, and the matter remanded for further proceedings consistent with the circuit court's order and a determination on the issue of attorneys' fees and costs pursuant to Va. Code Ann. § 2.2-3713(D).

Dated: July 31, 2023

Respectfully submitted,

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CERTIFICATE

1. I certify that on July 31, 2023, this document was filed electronically with the Court through VACES. Copies were transmitted by email to:

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2. This brief complies with Rule 5A:19(a) because the portion subject to that Rule contains 10,410 words.

3. The Appellee desires to present oral argument.

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