

VIRGINIA:

**IN THE CIRCUIT COURT FOR THE CITY OF CHARLOTTESVILLE**

NATALIE JACOBSEN,

Petitioner,

v.

DEPARTMENT OF STATE POLICE

OFFICE OF THE SECRETARY OF  
PUBLIC SAFETY AND HOMELAND  
SECURITY,

Respondents.

Case No.: CL17-592

**PETITIONER'S RESPONSE TO RESPONDENTS' RESPONSE  
TO THE COURT'S LETTER OPINION**

Petitioner Natalie Jacobsen, by counsel, hereby submits this response to the response of the Respondents Virginia State Police (“VSP”) and the Office of the Secretary of Public Safety and Homeland Security (collectively, “Respondents”) to the Court’s letter opinion dated March 24, 2020.

**I. RELEVANT BACKGROUND**

Petitioner, a freelance journalist, filed her Petition for Writ of Mandamus on October 31, 2017, seeking disclosure of the Operations Plan for the August 12, 2017 “Unite the Right” rally pursuant to two public records requests filed by Petitioner under FOIA—one with VSP and one with the Office of the Secretary of Public Safety and Homeland Security.

On November 6, 2017, Respondents filed Demurrers and Motions to Dismiss Petitioners’ Amended Petition arguing that the Operations Plan was excluded from mandatory disclosure

under the Tactical Plans Exclusion—then found at Va. Code § 2.2–3706(A)(2)(e)<sup>1</sup>—and Va. Code § 52–48, which excludes from mandatory disclosure specified records “relative to criminal intelligence or any terrorism investigation in the possession of the Virginia Fusion Intelligence Center.” Respondents asserted no other exemptions or exclusions in their Demurrers and Motions to Dismiss. Respondents also argued that Va. Code § 2.2–3704.01, which creates a duty to redact only those portions of records that are excluded from mandatory disclosure, did not apply to the Tactical Plans Exclusion.

On November 21, 2017, Petitioner filed her First Amended Petition for Writ of Mandamus. On December 20, 2017, Respondents filed a Response to Petitioner’s Amended Petition for Writ of Mandamus stating that they continued to rely on their previously filed Demurrers and Motions to Dismiss.

Following an evidentiary hearing, the Court issued a letter opinion on March 30, 2018. The Court concluded that the Tactical Plans Exclusion applied in principle to the Operations Plan. However, the Court also held that Va. Code § 2.2–3704.01 requires Respondents to disclose those parts of the Operations Plan that are not exempt from disclosure under the Tactical Plans Exclusion or Va. Code § 52–48. The Court ordered Respondents to release to Petitioner all portions of the Operations Plan that do not constitute a risk to the safety or security of law enforcement personnel or the general public and do not contain Virginia Fusion Intelligence Center information subject to Va. Code § 52–48. The Court also ordered Respondents to file *in camera* those portions of the Operations Plan that Respondents believed were excluded from

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<sup>1</sup> In 2018, the General Assembly reorganized Va. Code §2.2–3706 and renumbered the Tactical Plans Exclusion previously found at § 2.2–3706(A)(2)(e) as § 2.2–3706(B)(5), while leaving the text of the provision unchanged. 2018 Va. Acts. ch. 48.

disclosure so the Court could review them and determine whether they may be withheld from disclosure pursuant to the Tactical Plans Exclusion or Va. Code § 52–48.

On April 30, 2018, the Court entered an Order incorporating by reference its March 30, 2018 letter opinion (the “April 30, 2018 Order”). Respondents appealed the Court’s ruling to the Virginia Supreme Court, and this Court entered an order staying its April 30, 2018 Order pending appeal. On November 26, 2018, the Supreme Court of Virginia dismissed Respondents’ petition for appeal.

Following a hearing on May 22, 2019, by order dated June 10, 2019, the Court lifted the stay of its April 30, 2018 Order and ordered Respondents to “release to Petitioner, no later than June 21, 2019, all portions of the [Operations Plan] that do not constitute a risk to the safety or security of law-enforcement personnel or the general public and do not contain information from the Virginia Fusion Intelligence Center.” June 10, 2019 Order ¶ 2. The Court further ordered Respondents “to file *in camera*, no later than June 21, 2019, those portions of the [Operations Plan] that Respondents believe are excluded from disclosure” so that the Court can “determine whether they may be withheld from disclosure pursuant to Virginia Code § 2.2–3706(B)(5)—the Tactical Plans Exclusion—“or Virginia Code §52–48.” June 10, 2019 Order ¶ 3.

On June 24, 2019, three days after the Court-ordered deadline, Respondents released to Petitioner and submitted to the Court a redacted version of the Operations Plan accompanied by a submission identifying the “unredacted portions” as those “found in either the Governor’s Task Force Report or the Hunton & Williams Report.” Respondents’ Submission of Redacted Virginia State Police’s Operations Plan Pursuant to Court Order ¶ 2 (“Resp’ts’ Submission”). Respondents’ Submission also indicated that, in addition to the Tactical Plans Exclusion and Va. Code § 52–48, Respondents were asserting, for the first time, other exemptions “for redaction

purposes[,] includ[ing]” Va. Code §§ 2.2–3706(B)(7), –3706(B)(8), –3706(B)(10), and 2.2–3705.2(10), as a basis to withhold unspecified portions of the Operations Plan. *Id.* ¶ 4. On July 5, 2019, Petitioner filed her response to Respondents’ proposed redactions to the Operations Plan, challenging the redactions Respondents made, the method of redaction, and Respondents’ assertion of additional FOIA exemptions for the first time in June 2019. On July 30, 2019, Respondents submitted their reply.

On March 24, 2020, this Court issued a letter opinion (the “March 24, 2020 Letter Opinion” or “March 24, 2020 Letter Op.”). The Court held that Respondents could not raise new exemptions for the first time upon filing of the redacted Operations Plan. March 24, 2020 Letter Op. 3. The Court also held that “there clearly are some portions, parts, items, or information redacted from the [Operations Plan] that appear to the Court not to be tactical plans or that at least would not jeopardize the safety or security of law enforcement or the public, or that [the Court] cannot say for sure are such tactical plans that might endanger the safety of law enforcement or the general public.” *Id.* at 4. The Court then went through the redacted Operations Plan “page by page” and identified what information may be withheld and what must be disclosed on each numbered page. *Id.* at 5–9. After it completed its page-by-page analysis, the Court stated that it would entertain “any further response or argument from Respondents regarding any information that [the Court is] ordering disclosed, or which [the Court has] ruled is not specific tactical information or not causing a risk to safety or security, to the extent they wish

to without revealing the information itself.”<sup>2</sup> *Id.* at 10. Finally, the Court stated that Petitioner “would then have five days to file any response they deem necessary or advisable.”<sup>3</sup> *Id.*

On July 30, 2020, Respondents filed their Response to the Court’s Review of Proposed Operational Plan Redactions (“Resp’ts’ Resp.”). Respondents identify twenty portions of the Operations Plan that the Court ordered be disclosed that Respondents argue may be withheld under the Tactical Plans Exclusion, Va. Code § 52–48, or the “exemption for telephone numbers.” Resp’ts’ Resp. 3–5. In addition, Respondents argue that they did not waive the assertion of the new FOIA exemptions they raised for the first time in June 2019 when they disclosed the redacted version of the Operations Plan to Petitioner. *Id.* at 5–7.

## II. ARGUMENT

### I. The Court should reject the additional redactions Respondents propose.

Respondents argue that FOIA permits them to withhold twenty portions of the Operations Plan that this Court ordered disclosed. Though Petitioner does not object to the redaction of the “cellphone number of the supervisor” that Respondents identify on UR 36 and UR 37<sup>4</sup> and agree that the Court’s March 24, 2020 Letter Opinion permits Respondents to redact the acronym identified by Respondents on UR 144,<sup>5</sup> the Court should not allow Respondents to withhold any additional parts of the Operations Plan.

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<sup>2</sup> Due to the Declarations of Judicial Emergency entered by the Virginia Supreme Court in response to the coronavirus pandemic, all court deadlines were tolled from March 16, 2020 through July 19, 2020.

<sup>3</sup> On August 5, 2020, the Court entered an Agreed Order Extending Time extending the deadline for Petitioner’s response to August 14, 2020.

<sup>4</sup> As previously stated, Petitioner does not seek the disclosure of any (1) telephone numbers or (2) radio frequencies or channels used by law enforcement that may be included in the Operations Plan. Petitioner does not, however, concede that Respondents properly asserted the exemption in Va. Code § 2.2–3706(B)(7). *See infra* Section III.

<sup>5</sup> The Court held that “a few references to units (acronyms) may be redacted” on UR 144. March 24, 2020 Letter Op. 9.

FOIA places the burden of proof on Respondents to justify their withholdings. Va. Code § 2.2–3713(E). Respondents have not satisfied that burden with respect to the information they claim in their Response that FOIA permits them to withhold. Petitioner responds to each specific portion of the Operations Plan that Respondents argue they are permitted to withhold as follows:

**1. UR 5**

Respondents claim that the Court should permit them to withhold the third sentence in the second paragraph and the fourth paragraph on UR 5 because they contain information from the Virginia Fusion Intelligence Center. Resp'ts' Resp. 3. However, Respondents provide no evidence to support their assertion that this sentence and paragraph contain information from the Virginia Fusion Intelligence Center. An unsupported assertion by Respondents' counsel in their Response cannot justify withholding portions of the Operations Plan under Va. Code § 52–48. *See Catlett v. Catlett*, Nos. 3031-03-2 & 3057–03–2, 2004 WL 1876377, at \*6 (Va. Ct. App. Aug. 24, 2004) (“Statements of counsel are not evidence . . . and may not form the basis upon which the trial court can base its decision.” (citing *Bateman v. Commonwealth*, 183 Va. 253, 256–57 (1944); *Goin v. Commonwealth*, 182 Va. 307, 310 (1944))). In addition, First Sergeant Christopher Clark testified at the March 13, 2018 hearing that Virginia Fusion Intelligence Center information was contained in a single appendix to the Operations Plan. Attachment 1 (Tr. 119:1–10 (Mar. 13, 2018)).<sup>6</sup> Because there is no evidence in the record that the third sentence in the second paragraph and the fourth paragraph on UR 5 contain information from the Virginia Fusion Intelligence Center—and, indeed, evidence in the record to the contrary—the Court should require Respondents to release them.

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<sup>6</sup> For the Court's convenience, this page of the March 13, 2018 hearing is attached as Attachment 1.

In the alternative, even if the Court finds that the third sentence in the second paragraph and the fourth paragraph on UR 5 “contain” information from the Virginia Fusion Intelligence Center, the Court should permit Respondents to withhold only the specific information from the Virginia Fusion Intelligence Center, not the entirety of the sentence or paragraph. *See* Va. Code § 2.2–3704.01.

## **2. UR 9**

Respondents claim that the Tactical Plans Exclusion authorizes them to withhold “the last two phrases” under “Resources” on UR 9 because disclosure of this information “could identify specific tactical roles of a group, which could jeopardize the safety and security of those performing such roles[.]” Resp’ts’ Resp. 3. The Court previously determined that the “Resources” are not “specific tactics” and that their disclosure would not jeopardize safety and security. March 24, 2020 Letter Op. 6. Respondents do not explain how this information constitutes a “specific tactic” nor how its release could jeopardize the safety and security of law enforcement personnel. Respondents’ rote recitation of the elements of the Tactical Plans Exclusion is insufficient to justify redaction of the information identified on UR 9.

## **3. UR 17**

Respondents state:

The first and second paragraphs [on UR 17] refer to a specific VSP Orders [*sic*] of the State Police Manual (not in the public domain) which describe specific tactics/methods that VSP personnel are to use and have available for use under certain circumstances. Disclosure of this information would provide knowledge of such methods and information about VSP tactics, thereby jeopardizing the safety and security of VSP personnel . . . .

Resp’ts’ Resp. 4.

The entirety of UR 17 is redacted in the version of the Operations Plan provided to Petitioner. However, this Court previously determined that, with the exception of “b. and c.,” most of UR 17 consists of “policy and procedures”—not tactics. March 24, 2020 Letter Op. 7. The Court defined tactical plans as “any steps, actions, or tactics articulated that would be used, implemented, or followed to achieve or attain particular goals.” *Id.* at 4. Policy and procedures contained in the State Police Manual are not “specific tactical plans,” Va. Code 2.2–3706(B)(5), and therefore cannot be withheld under the Tactical Plans Exclusion.

In addition, to the extent that the information on UR 17 pertains to the “Use of Force/Rules of Engagement,” which appears as a header on UR 16, this information is of significant public interest and concern and should be released. *See, e.g.*, Attachment 2 at 4 (pg. 160)<sup>7</sup> (concluding that “law enforcement failed to intervene in violent encounters between attendees of the Unite The Right event”); *id.* at 2 (pg.148) (stating that, at an after-action meeting, CPD Lieutenants “were ordered to review body camera footage and specifically look for any evidence of a ‘stand down order’”); *id.* at 3 (pg. 150) (stating that “[a]ccording to [CPD Captain Victor] Mitchell, [VSP Lieutenant Jean-Paul] Kouschel said he understood why the public thought there was a stand-down order”).

#### **4. UR 27, UR 36, UR 37, UR 37–51**

Respondents claim that the Tactical Plans Exclusion permits them to withhold various information related to lodging. Specifically, Respondents argue that:

- **UR 27:** the “dates of lodging are tactical” and their release “would jeopardize the safety and security of personnel by revealing specific information about when VSP personnel arrived and were housed in relationship to the rally[.]” Resp’ts’ Resp. 4.

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<sup>7</sup> For the Court’s convenience, the pages of the Hunton & Williams Report cited herein are attached as Attachment 2.



- **UR 36:** “[t]he dates and times of lodging provide specific periods of time that VSP personnel will be assembled relative to an event and should remain redacted.”<sup>8</sup> *Id.*
- **UR 36:** “[t]he designations which identify groups of individuals and how they are grouped and assembled for lodging should remain redacted.”<sup>9</sup> *Id.*
- **UR 37:** the release of the “dates and times of lodging . . . would jeopardize the safety and security of the personnel by revealing when groups of personnel would be assembled relative to an event and therefore should remain redacted.” *Id.*
- **UR 37–51:** the release of “[i]dentifying information, such as including names would jeopardize the safety and security personnel, by revealing the number and types of personnel in each hotel, and the number of hotels utilized by the VSP[.]” *Id.*

The dates and times of lodging, number of hotels, number of personnel assigned to each hotel, and groupings of personnel assigned to each hotel are not “tactical plans” as defined by the Court in its March 24, 2020 Letter Opinion. This information is not a “step[], action[], or tactic[]” used to “achieve or attain particular goals.” *See* March 24, 2020 Letter Op. 4.

Accordingly, Respondents cannot withhold it under the Tactical Plans Exclusion.

Moreover, release of this information would not jeopardize the safety or security of law enforcement personnel. The Court has already held that Respondents may redact the “locations of the lodging” in the Operations Plan. *Id.* at 7. Respondents’ claim that public knowledge of even the “number of hotels utilized by the VSP,” Resp’ts’ Resp. 4, could jeopardize the safety and security of law enforcement personnel is absurd. In addition, the dates and times of lodging could reveal only when VSP personnel were lodged for the Unite the Right rally in 2017. It would not reveal specifically when personnel “assembled” nor provide any information about where those personnel were or what they were doing.

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<sup>8</sup> Respondents do not claim that this information is a tactical plan or that its release would jeopardize law enforcement or public safety; the Court should deny Respondents’ request to withhold this information on that basis alone.

<sup>9</sup> Respondents do not claim that this information is a tactical plan or that its release would jeopardize law enforcement or public safety; the Court should deny Respondents’ request to withhold the information identified on UR 36 on that basis alone.

## 5. UR 35

Respondents claim that “providing the names, ranks, and assignments” on UR 35 “would reveal specific information about the composition and size of the force assembled in response to the rally.” *Id.* at 4. Respondents do not argue that this information is tactical or that its release would jeopardize the safety and security of law enforcement personnel or the public. For that reason alone, the Court should not permit Respondents to withhold it.

In addition, the Governor’s Task Force Report already revealed the overall size of the force of sworn VSP personnel dedicated to the Unite the Right event. *See* Attachment 3 at 3 (pg. I-11)<sup>10</sup> (stating that VSP “dedicated approximately 600 sworn members to the event”). The Governor’s Task Force Report also revealed the composition of that force and number of VSP personnel assigned to various tasks during the Unite the Right Rally. *See id.* at 4 (pg. I-12) (stating that “[o]ne-hundred troopers were assigned to Emancipation Park . . .”; “McIntire Park and the Downtown Mall were covered with 35 troopers each”; “[t]he Tactical Field Force comprised more than 200 personnel . . .”; “[t]he Tactical Team consisted of 29 troopers”; “[t]he Bureau of Criminal Investigations (BCI) contributed more than 70 troopers.”). Accordingly, there is no basis to withhold the names, ranks, and assignments on UR 35.

## 6. The remaining portions of the Operations Plan identified by Respondents on UR 8, UR 12, UR 13, UR 57–58, UR 145, UR 148

Respondents claim that the Tactical Plans Exclusion authorizes them to withhold various information on the following pages:

- **UR 8:** Respondents claim that a “heading” on UR 8 “could identify specific tactical roles of a specific VSP group, which could jeopardize the safety and security of those performing such roles. . . .” Resp’ts’ Resp. 3.

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<sup>10</sup> For the Court’s convenience, the pages of the Governor’s Task Force Report cited herein are attached as Attachment 3.

- **UR 12:** Respondents claim that “[t]he phrase under 1.a. also identifies a specific tactical group the disclosure of which could jeopardize the safety and security of those performing specific tactical roles . . . .” *Id.*
- **UR 13:** Respondents claim that “[u]nder 1.c., the portion of the sixth sentence from ‘to return to...’ identifies a specific tactical group, the disclosure of which could jeopardize the safety and security of those performing specific tactical roles . . . .” *Id.*
- **UR 57–58:** Respondents claim that the “identifying information” on UR57–58 would reveal the “overall capacity” of personnel dedicated to “medical support and available to respond to medical issues” and that knowledge of this capacity would jeopardize the safety and security of personnel and those under medical care. *Id.* at 4.
- **UR 145:** Respondents assert that “[u]nder subsection c., the language at the end of the next to the last sentence which begins ‘to return...’ should be redacted as it identifies a specific tactical group, the disclosure of which could jeopardize the safety and security of those performing tactical roles.” *Id.*
- **UR 148:** Respondents claim that “[s]ubsection c. provides tactical information about the methods and procedures used by a specific personnel group. Disclosure of this information would provide knowledge of such methods and procedures which could jeopardize the safety and security of those performing tactical roles and should remain redacted.” *Id.* at 5. In addition, Respondents claim that “[t]he eighth word in subsection d. should remain redacted as it provides tactical information about prisoner transport. Such information is tactical, the disclosure of which could jeopardize the safety and security of VSP personnel and others.” *Id.*

Respondents provide no explanation as to how the release of this information would jeopardize the safety and security of law enforcement personnel. Respondents’ rote recitation of the elements of the Tactical Plans Exclusion is insufficient to justify redaction of the information identified on these pages.

**II. The Court should address whether FOIA permits Respondents to withhold the information redacted from the twenty-seven unnumbered pages in the redacted Operations Plan.**

The redacted version of the Operations Plan provided to Petitioner includes twenty-seven pages without page numbers that appear between UR51 and UR52.<sup>11</sup> The twenty-seven

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<sup>11</sup> For the Court’s convenience, pages UR 51, the twenty-seven unnumbered pages, and UR 52 of the Operations Plan are attached as Attachment 4.

unnumbered pages appear to be redacted either completely or almost completely. Thirteen of the unnumbered pages are entirely blank; fourteen of the unnumbered pages contain some words or numbers. For example, the first unnumbered page in the redacted Operations Plan contains the words and numbers “Total,” “9,” “BCI,” “Total,” “83” and “573.” *See* Attachment 4 at 4.

The March 24, 2020 Letter Opinion does not appear to address whether Respondents may continue to withhold the information they apparently redacted from the twenty-seven unnumbered pages. The Court’s Letter Opinion states that “many pages” in the redacted Operations Plan and in the unredacted Operations Plan “are not numbered” and that “when pages contain no number designation, particularly when one of the pages is completely blank, this makes actual comparison more difficult.” March 24, 2020 Letter Op. 3. The Court carefully analyzed the redacted Operations Plan “page by page,” beginning with pages UR3 and UR4 and concluding with pages UR 149 and 150, stating what information Respondents may continue to withhold or must disclose. *Id.* at 6–9. It did not, however, explicitly address the unnumbered pages or state whether Respondents may continue to withhold the information they redacted from those pages. *See id.*

Because the Court permitted Respondents to white out withheld portions of the Operations Plan, Petitioner cannot discern if the thirteen unnumbered pages that are entirely blank are, in fact, part of the Operations Plan. Likewise, while it appears likely that the fourteen unnumbered pages that contain letters and numbers are part of the Operations Plan, Petitioner cannot discern if they are duplicative of other numbered pages in the redacted Operations Plan that the Court addressed in the March 24, 2020 Letter Opinion. To the extent that the March 24, 2020 Letter Opinion did not address whether Respondents may continue to withhold the twenty-

seven unnumbered pages in whole or in part, Petitioner respectfully requests that the Court clarify its order to address those unnumbered pages.

**III. The Court correctly held that Respondents’ assertion of additional FOIA exemptions for the first time when they disclosed the redacted Operations Plan was improper.**

Respondents *again* attempt to assert *new* FOIA Exemptions—specifically, Va. Code §§ 2.2–3706(B)(7), –3706(B)(8), –3706(B)(10), and Va. Code § 2.2–3705.2(10)—as additional grounds for withholding portions of the Operations Plan. Resp’ts’ Resp. 6. The Court has already held that Respondents could not raise these new FOIA Exemptions when they disclosed the redacted Operations Plan to Petitioner in June 2019. March 24, 2020 Letter Op. 3. This holding was correct.

Respondents’ request that the Court reconsider this holding is improper. The Court permitted Respondents to file a response to its March 24, 2020 Letter Opinion to address the portions of the Operations Plan the Court held are “not specific tactical information or not causing a risk to safety or security[.]” March 24, 2020 Letter Op. 10. The Court did not invite Respondents to seek reconsideration of its holding that Respondents were not permitted to raise the new FOIA Exemptions.

Even if the Court considers Respondents’ argument, it should reject it again. Respondents did not raise the new FOIA Exemptions in their Demurrers and Motions to Dismiss, at an initial hearing on Petitioner’s Petition on November 7, 2017, or at the evidentiary hearing before this Court on March 13, 2018. Even after March 30, 2018, when this Court ordered Respondents to redact the Operations Plan and release those portions which cannot be withheld under the Tactical Plans Exclusion or Va. Code § 52–48, Respondents still did not raise the new exemptions at a hearing on Petitioner’s Motion to Vacate the Stay on May 22, 2019. Only on

June 24, 2019 did Respondents—for the very first time—attempt to assert any of these new FOIA Exemptions when they released the redacted Operations Plan to Petitioner. The Court correctly held that Respondents’ are not permitted to raise new FOIA exemptions at the eleventh hour. *See* March 24, 2020 Letter Op. 3.

Respondents argue that the Court should excuse their failure to raise the new FOIA exemptions before June 24, 2019 because they claim they “have consistently argued that the entire Plan is exempt [from disclosure] under FOIA under Va. Code §§ 2.2–3706(B)(5) and 52–48[.]” Resp’ts’ Resp. 6. This claim is inaccurate. Respondents argued in their Demurrers and Motions to Dismiss that the entire Operations Plan is exempt from disclosure *only* under the Tactical Plans Exclusion (then Va. Code § 2.2–3706(A)(2)(e)). *See* Resp’t Dep’t of State Police’s Demurrer and Mot. to Dismiss the Pet. for a Writ of Mandamus 6 (“VSP Demurrer and Mot. to Dismiss”) (stating that “[t]he redaction statute, Va. Code § 2.2–3704.1 [*sic*], does not apply to § 2.2–3706” (emphasis added)); Resp’t Office of the Sec’y of Public Safety and Homeland Sec. Demurrer and Mot. to Dismiss the Pet. for a Writ of Mandamus 5 (“Office of the Sec’y Demurrer and Mot. to Dismiss”) (same). Respondents asserted Va. Code § 52–48 as an additional exemption that excluded *portions* of the Operations Plan from disclosure, *see* VSP Demurrer and Mot. to Dismiss 10 (stating that “[i]ncorporated in the Operation Plan is intelligence information derived from the Department of State Police’s Fusion Intelligence Center”); Office of the Sec’y Demurrer and Mot. to Dismiss 10 (same), just as they now attempt to do with the new FOIA Exemptions. The fact that Respondents asserted another exemption, Va. Code § 52–48, in their Demurrers and Motions to Dismiss belies Respondents’ claim that they failed to assert the new FOIA exemptions earlier because they had argued that the entire Operations Plan was exempt from disclosure.

In addition, *Lawrence v. Jenkins*, 258 Va. 598 (1999), upon which Respondents rely, is distinguishable. In *Lawrence*, the requester made a FOIA request to appellant Eric R. Lawrence, the zoning administrator for Frederick County, for “all documents with respect to any complaints made concerning [the requester’s] property[.]” 258 Va. at 600. In response to the FOIA request, Lawrence disclosed the requested records but withheld the identities of the complainants, and he did not identify the “specific Code section making the identity of the complainants exempt from disclosure.” *Id.* at 600–01. The requester filed a petition for a writ of mandamus, challenging Lawrence’s failure to “exercise a specific exemption under FOIA” in the response to his FOIA request. *Id.* at 601. “Shortly before a hearing on the petition, Lawrence advised [the requester] in writing” of the specific provision of FOIA under which Lawrence contended the redacted information was exempt from disclosure. *Id.* The circuit court concluded that Lawrence had violated FOIA by not timely invoking an exemption, but the Virginia Supreme Court reversed, holding that Lawrence had not waived his exercise of the FOIA exemption upon which he relied by failing to invoke it within five working days. *Id.* at 601, 603.

Unlike in *Lawrence*, Respondents not only failed to identify the new exemptions upon which they now rely in response to Petitioner’s FOIA request, but also they failed to identify them in their Demurrers and Motions to Dismiss and at multiple hearings before this Court. Respondents had ample opportunity to raise all of the FOIA exemptions upon which they wished to rely. Respondents failed to do so. This Court correctly held that Respondents waived the assertion of the new FOIA exemptions.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was sent via electronic mail on this 14th day of August 2020, to:

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