IN THE COURT OF APPEALS OF VIRGINIA

RECORD NO. 1626-24-2

VIRGINIA DEPARTMENT OF CORRECTIONS,

Appellant,

v.

INSIDER, INC., *et al.*,

Appellees.

AMENDED OPENING BRIEF OF APPELLANT

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3. Because disclosure of the prison surveillance video recordings, either collectively or individually, would jeopardize the safety or security of "any person; governmental facility, building or structure or persons using such facility, building or structure," those video recordings are entirely exempt from mandatory disclosure under Code § 2.2-3705.2(14), and the trial court erred in ordering VDOC to produce those videos in response to a FOIA request. *(Preserved at R.183-85; R.317; R.388-89)* 4

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8. To the extent the canine bite reports and internal incident reports contain information describing medical treatment provided to an inmate or officer, that information is exempt from mandatory disclosure under Code § 2.2-3705.5(1), and the trial court erred in holding that this exemption did not apply to those portions of the records. *(Preserved at R.186-87; R.317)* 4

9. Because the canine bite reports and incident reports reveal the identities of victims and witnesses to the canine utilization incidents, those portions of the records are exempt from mandatory disclosure under Code § 2.2-3706(B)(10), and the trial court erred in holding that this exemption did not apply. *(Preserved at R.187; R.317)* 5

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NATURE OF THE CASE AND MATERIAL PROCEEDINGS BELOW

The Virginia Freedom of Information Act (FOIA) creates a presumption that all public records are open for inspection. But that presumption is not limitless. Through numerous carefully-crafted exemptions, FOIA vests state agencies with the discretion to withhold certain categories of records from compelled release. Records that are exempt from mandatory disclosure do not become subject to disclosure simply because they are of particular interest to the public or the press. Nor is the intent or purpose of the requestor of any relevance to disclosure. Either an exemption applies—or it doesn't.

Appellees are a news organization, journalist, and law student. Through a FOIA request originally submitted in 2022, Appellees sought video recordings, reports, and photographs corresponding to use of force incidents involving canines at Virginia prisons. Appellant Virginia Department of Corrections (VDOC) declined to provide records in response to that request. Several months later, Appellees sent VDOC a pre-filing copy of a FOIA mandamus petition seeking to compel the production of those records. The parties then negotiated a settlement agreement through which redacted copies of certain written records would be provided, but videos would not. VDOC sent those records, and Appellees did not file the anticipated lawsuit.

However, evidently unsatisfied with the documents provided pursuant to this earlier agreement, Appellees submitted another FOIA request, again seeking surveillance video recordings from Red Onion State Prison (ROSP), along with other records detailing incidents where inmates had been bitten by canines at Virginia prisons. Citing numerous FOIA exemptions—including the security exemption and the exemption for records of persons incarcerated within correctional facilities that relate to their imprisonment—VDOC withheld those records from disclosure.

Appellees then filed the underlying petition for mandamus relief. Following the presentation of testimony, briefing, and oral arguments, as well as *in camera* review of the responsive records, the trial court concluded that VDOC was required to disclose the bite reports and incident reports, but could exercise its discretion to remove the names of the officers and inmates in those written reports. The trial court further held that VDOC was required to disclose the surveillance videos, but could exercise its discretion to provide one camera angle per incident and to blur the images of all individuals depicted in that recording, save the identity of the inmate who was bitten. The trial court also declined to apply the equitable doctrine of unclean hands to bar the production of any records encompassed by the earlier, settled FOIA request, and held that VDOC had waived the defense of accord and satisfaction.

The present appeal challenges the trial court's ruling on several bases. Critically, the written reports and surveillance videos are records of persons incarcerated in the Commonwealth of Virginia, that relate to their imprisonment, and that are entirely exempt from compelled disclosure under Code § 2.2-3706(B)(4). Moreover, because compelled public disclosure of the surveillance videos, even if limited to a single camera angle, would jeopardize the safety and security of ROSP, those videos should have been deemed entirely exempt under Code § 2.2-3705.2(14). The trial court erred by ordering VDOC to produce redacted copies of these records.

For these reasons, and as discussed in further detail below, Appellant requests that this Court reverse the judgment below and enter final judgment in favor of Appellant.

ASSIGNMENTS OF ERROR

1. Because the prison surveillance video recordings are exempt from mandatory disclosure under Code § 2.2-3706(B)(4) as records of persons imprisoned in the Commonwealth that relate to the imprisonment, the trial court erred by ordering VDOC to produce these records in response to a FOIA request. *(Preserved at R.178; R.317; R.378, R.393-396)*

2. Because Code § 2.2-3706(B)(4) exempts from mandatory disclosure "all records" of persons incarcerated in the Commonwealth that relate to their imprisonment, and because the surveillance videos do not contain material that falls outside the scope of this exemption, the redaction rule of Code § 2.2-3704.01 does not apply, and the trial court erred in ordering VDOC to produce digitally altered copies of those videos in response to a FOIA request. *(Preserved at R.179-83; R.317)*

3. Because disclosure of the prison surveillance video recordings, either collectively or individually, would jeopardize the safety or security of "any person; governmental facility, building or structure or persons using such facility, building or structure," those video recordings are entirely exempt from mandatory disclosure under Code § 2.2-3705.2(14), and the trial court erred in ordering VDOC to produce those videos in response to a FOIA request.
(Preserved at R.183-85; R.317; R.388-89)

4. Because the canine bite reports and incident reports are exempt from mandatory disclosure under Code § 2.2-3706(B)(4) as records of persons imprisoned in the Commonwealth that relate to the imprisonment, the trial court erred in ordering VDOC to produce these records in response to a FOIA request. *(Preserved at R.179; R.317; R.378; R.393-396)*

5. Because Code § 2.2-3706(B)(4) exempts from mandatory disclosure "all records" of persons incarcerated in the Commonwealth that relate to their imprisonment, and because the canine bite reports and incident reports do not contain material that falls outside the scope of this exemption, the redaction rule of Code § 2.2-3704.01 does not apply, and the trial court erred in ordering VDOC to produce redacted copies of those records in response to a FOIA request. *(Preserved at R.179-83; R.317)*

6. Because the surveillance video recordings plainly depict the identities of victims and witnesses to the canine utilization incidents, those portions of the videos are exempt from mandatory disclosure under Code § 2.2-3706(B)(10), and the trial court erred in holding that this exemption did not apply. *(Preserved at R.187; R.317)*

7. Because the surveillance video recordings contain identifying information of a personal, medical, or financial nature, disclosure of which would jeopardize the safety or privacy of the individuals depicted in those recordings, those portions of the videos are exempt from mandatory disclosure under Code § 2.2-3706(D), and the trial court erred in holding that this exemption did not apply. *(Preserved at R.187; R.317)*

8. To the extent the canine bite reports and internal incident reports contain information describing medical treatment provided to an inmate or officer, that information is exempt from mandatory disclosure under Code § 2.2-3705.5(1), and the trial court erred in holding that this exemption did not apply to those portions of the records. *(Preserved at R.186-87; R.317)*

9. Because the canine bite reports and incident reports reveal the identities of victims and witnesses to the canine utilization incidents, those portions of the records are exempt from mandatory disclosure under Code § 2.2-3706(B)(10), and the trial court erred in holding that this exemption did not apply. *(Preserved at R.187; R.317)*

10. Because the canine bite reports and incident reports contain identifying information of a personal, medical, or financial nature, disclosure of which would jeopardize the safety or privacy of the individuals named in those records, those portions of the records are exempt from mandatory disclosure under Code § 2.2-3706(D), and the trial court erred in holding that this exemption did not apply. *(Preserved at R.187; R.317)*

11. Because the parties had previously signed a settlement agreement and release that encompassed the five bite reports and nine surveillance video recordings from 2021, the Plaintiff-Appellees are barred from obtaining a writ of mandamus compelling production of these records under the equitable doctrine of unclean hands, and the trial court erred in holding that this doctrine did not apply. *(Preserved at R.171-73; R.317; R.397-99)*

12. Plaintiff-Appellees are barred from obtaining a writ of mandamus compelling production of the five bite reports and nine surveillance video recordings from 2021 under the equitable doctrine of accord and satisfaction, and because VDOC raised this argument prior to a ruling on the merits and with sufficient opportunity to permit a response, the trial court erred in holding that VDOC had waived its right to assert this doctrine as a bar to the requested relief. *(Preserved at R.171-73; R.241-44; R.317)*

STATEMENT OF FACTS

In 2022, Appellees submitted twin FOIA requests to VDOC, seeking: (1) "all video and audio records of all uses of force involving a canine at Red Onion State Prison from January 1, 2021 to December 31, 2021," and (2) all "bite reports" recorded in DINGO[1] from January 1, 2017 to the present. R.190-92. In

[1] This acronym refers to the Dog Information Governance & Operation System (DINGO), an electronic database maintained by VDOC.

December 2022, after VDOC declined to produce records responsive to that request, Appellees sent VDOC an advance copy of a Petition for a Writ of Mandamus. R.193-202. Follow negotiations between counsel, VDOC agreed to release redacted copies of the written bite reports, removing "identifying information as to the officers who were involved in the cited incidents, as well as the identifying information of any inmates involved in those incidents." R.203. No videos were to be produced. In return, Appellees agreed that they "would not proceed with the filing of [the] FOIA petition, and any claims relative to the [2022] FOIA requests will be deemed settled." R.203. VDOC provided the responsive records. R.205-08.

In April 2023—one month after executing the settlement agreement encompassing the 2022 FOIA request—Appellees submitted a new FOIA request. As pertinent here, this request sought: (1) all video and audio recordings involving canine utilizations at ROSP, between January 1, 2017 and December 31, 2022, and (2) all bite reports and incident reports associated with twelve identified canine utilizations at various VDOC facilities, dated between 2017 and 2021.[2] R.577-78.

[2] The specific dates were 12/11/17, 12/25/18, 1/16/19, 9/20/19, 8/9/20, 11/10/20, 4/20/21, 5/7/21, 6/16/21, 9/24/21, 10/29/21, and 11/6/21,

There was, accordingly, some overlap between the settled 2022 FOIA request and the new 2023 FOIA request.[3]

In response, VDOC identified and withheld records responsive to the 2023 request. R.579-81. Specifically, VDOC noted that any responsive materials were being withheld under the records of imprisonment exemption, Code § 2.2-3706(B)(4), the security exemption, Code § 2.2-3705.2(14), and the personnel information exemption, Code § 2.2-3705.1(1). R.71-73; *see also* R.373.

On February 1, 2024, Appellees filed the underlying petition for a writ of mandamus, claiming entitlement to the withheld records. R.1-10. After service was effectuated, the case was immediately set for a hearing, and the parties appeared in the Charlottesville Circuit Court on February 14, 2024. R.323. Appellees presented documentary evidence and argument, but no witnesses. In response, Appellant called Gabriel Fulmer, VDOC's former FOIA officer, to testify. R.364.

Mr. Fulmer confirmed that he was aware of the negotiated agreement between the parties, resolving the 2022 FOIA request, and noted that he reviewed "hundreds of pages of records," including bite reports, in order to provide the

[3] Specifically, any "video and audio recordings" of a canine engagement from ROSP during 2021 were encompassed by that settlement, as were any bite reports pertaining to the listed incidents. Not encompassed were the requested recordings from 2017-2020 and 2022. Also not encompassed were internal incident reports corresponding to the cited dates.

redacted records contemplated by that agreement. R.366. He did not "withhold or set aside or delete or otherwise not provide any of those bite reports." R.367.

Mr. Fulmer also confirmed that he was the individual who provided the response to the 2023 FOIA request. R.367-69. He explained that incident reports are electronically maintained records that "reference a specific inmate" and a "specific incident within the prison." R.371. As to the surveillance videos, which Mr. Fulmer had watched, he explained that the security exemption was implicated because releasing those records would "indicate[] outwardly where our cameras are, probably more notably where our blind spots may be." R.372.

Following arguments of counsel, the trial court directed VDOC to submit the withheld documents for *in camera* review. R.432. In doing so, the trial court acknowledged that the record was not closed; the parties remained free to "submit [pleadings] or otherwise augment the record." R.435. VDOC subsequently filed an answer, raising various enumerated defenses. R.151-56.

As to the written records, VDOC submitted the following documents for in camera review:

- **12/11/17**: No bite report exists. Incident reports submitted (8 pages).
- **12/25/18**: Bite report and incident reports submitted (4 pages).
- **1/16/19**: No bite report exists. Incident reports submitted (20 pages).
- **9/20/19**: Bite report and incident reports submitted (15 pages).

- **8/9/20**: No bite report exists. Incident reports submitted (13 pages).
- **11/10/20**: No bite report exists. Incident reports submitted (16 pages).
- **4/20/21**: No bite report exists. Incident report submitted (2 pages).
- **5/7/21**: Bite report and incident reports submitted (5 pages).
- **6/16/21**: Bite report and incident reports submitted (4 pages).
- **9/24/21**: Bite report and incident reports submitted (9 pages).
- **10/29/21**: No bite report exists. Incident report submitted (3 pages).
- **11/6/21**: No bite report exists. Incident reports submitted (9 pages).

R.160-61.

The five Bite Reports[4] contain information corresponding to the canine involved, the handler involved, the date and location of the incident, whether medical attention was required, and a description of the incident between the canine and a specific inmate, identified by name and inmate identification number in the narrative portion of the report. *See, e.g.*, R.85-86.

The internal incident reports reflect a date and time of incident, location of incident, identification of reporting staff and other staff involved in the incident, identification of any inmates involved in the incident (by name and inmate

[4] For the five submitted bite reports, VDOC maintained that redacted versions of these records were made available to Petitioners in March 2023. Specifically, the "Report Executed On" date at the top of each redacted bite report reflects a creation date of 3/14/2023.

identification number), and then a narrative description of the incident. Some of the reports include specific information about medical attention provided to the inmate and/or responding staff members. *See, e.g.*, R.88, R.93.

As to the requested recordings from ROSP, VDOC produced 65 surveillance video recordings corresponding to 42 separate incidents, dating from July 2019 through June 2022. R.163. The recordings were taken by surveillance cameras located in the secure areas of Red Onion State Prison (ROSP), including the A housing unit, the B housing unit, and the dining hall. R.164. Faces of inmates and officers are depicted in the videos. Each discrete video is taken from a single camera angle, and there are no audio components.[5]

On March 21, 2024—prior to any additional rulings from the trial court—Appellant submitted a response in opposition, responding to arguments raised in the supporting brief Appellees had filed with their mandamus petition, and further addressing the applicability of the various FOIA exemptions and equitable defenses. R.166-89.

On April 11, 2024, the parties reconvened before the trial court for additional argument as to the contested records. R.476. As commemorated in the trial court's final order, the court found as follows:

[5] The videos are contained in a sealed exhibit submitted to the trial court and that is part of the record on appeal. R.606.

- **Surveillance videos**. As to the surveillance videos, the trial court ruled that those records fell within the scope of the security exemption, Code § 2.2-3705.2(14), but directed that VDOC should submit at least one camera angle corresponding to each incident. The Court further held that the faces of inmates and officers depicted on those videos fell within the scope of Code § 2.2-3706(B)(4) (records of imprisonment), Code § 2.2-3705.2(14) (security exemption), and Code § 2.2-3705.1(1) (personnel information exemption), but held that if VDOC wished to exercise its discretion to withhold those images from public dissemination, the agency could blur those faces. The court did not permit blurring the face of the inmate who was involved in the canine engagement. The court also ruled that the exemption protecting the identity of victims and witnesses (Code § 2.2-3706(B)(10)) did not apply, nor did the exemption for noncriminal reports containing identifying information of a personal, medical, or financial nature, disclosure of which would jeopardize an individual's safety or privacy (Code § 2.2-3706(D)). R.314-15.

- **Written Reports**. As to the written bite reports and incident reports, the trial court ruled that these records were also subject to compelled disclosure, but held that VDOC could exercise its discretion to redact identifying information as to the inmates and officers involved in the incident under Code § 2.2-3706(B)(4) (records of imprisonment), Code § 2.2-3705.2(14) (security exemption), and Code

§ 2.2-3705.1(1) (personnel information exemption). The court also ruled that the exemption protecting the identity of victims and witnesses (Code § 2.2-3706(B)(10)) did not apply, the health records exemption (Code § 2.2-3705.5(1)) did not apply, and the exemption for noncriminal reports containing identifying information of a personal, medical, or financial nature, disclosure of which would jeopardize an individual's safety or privacy (Code § 2.2-3706(D)), also did not apply. R.313.

- As to the asserted equitable defenses, the trial court found that the doctrine of unclean hands did not apply, and ruled that the defense of accord and satisfaction had been waived, presumably because it was not specifically addressed at the initial hearing on February 14, 2024. R.312-13.

Appellant timely noted this appeal. R.320.

ARGUMENT

Enacted in 1968, the Virginia Freedom of Information Act, Code §§ 2.2-3700 *et seq.*, "ensures the people of the Commonwealth ready access to public records in the custody of a public body or its officers and employees." Code § 2.2-3700(B). "Its primary purpose is to facilitate openness in the administration of government." *Am. Tradition Inst. v. Rectors and Visitors of the Univ. of Va.*, 287 Va. 330, 339, 756 S.E.2d 435, 440 (2014). To that end, "[a]ll public records and

meetings shall be presumed open, unless an exemption is properly invoked." Code § 2.2-3700(B).

In its original form, FOIA "listed only five categories of materials that were exempt from the provisions of the Act." Report of the Joint Subcommittee Studying Virginia's Freedom of Information Act, House Doc. No. 106, at 6 (2000). "As of 1998, there were 73 categories of exempt records," *id.*, and currently, FOIA specifies approximately 156 separate categories of exclusions, exceptions, and exemptions in the Act.

The exemptions at issue in this appeal are the records of incarcerated persons exemption (Code § 2.2-3706(B)(4)), the exemption for records whose disclosure would jeopardize the safety or security of a government building (Code § 2.2-3705.2(14)), an exemption protecting the identities of victims and witnesses (Code § 2.2-3706(B)(10)), the exemption for identifying information of a personal, medical, or financial statement, the disclosure of which would jeopardize the safety or privacy of those persons (Code § 2.2-3706(D)); and the health records exemption (Code § 2.2-3705.5(1)). This appeal further encompasses the intersection of the foregoing exemptions with Code § 2.2-3704.01, which requires the redaction and production of records that are only partially exempt from compelled disclosure. Finally, also presented for review is the effect of the prior

negotiated settlement between the parties, which covered—at least in a part—a subset of the records requested in this secondary request.

I. Code § 2.2-3706(B)(4): The Records of Incarcerated Persons Exemption *(Assignments of Error #1, #4)*

A. Standard of Review

Whether a document falls within the scope of a FOIA exemption is a mixed question of law and fact. *Am. Tradition Inst.*, 287 Va. at 338, 756 S.E.2d at 439. Thus, this Court should "'give deference to the trial court's factual findings and view the facts in the light most favorable to the prevailing par[y,] but [] review the trial court's application of the law to those facts *de novo*.'" *Id.* at 338-39, 756 S.E.2d at 439 (quoting *Tuttle v. Webb*, 284 Va. 319, 324, 731 S.E.2d 909, 911 (2012) (first alteration in original)).

B. Background

As pertinent here, FOIA exempts from mandatory disclosure "[a]ll records of persons imprisoned in penal institutions in the Commonwealth provided such records relate to the imprisonment." Code § 2.2-3706(B)(4). This exemption is phrased broadly—"***all*** records"—and is limited only by the clarification that the records should "relate" to the imprisonment.

The plain language of this statute is clear and unambiguous. "All" public records pertaining to individuals "imprisoned in penal institutions in the Commonwealth" are exempt from compelled disclosure, "provided such records

relate to the imprisonment." Code § 2.2-3706(B)(4). The only possible word requiring clarification in this exemption is the preposition "of," which, in this context, "is straightforward enough." *Jones v. Commonwealth*, 296 Va. 412, 415, 821 S.E.2d 540, 542 (2018). That is, "of" generally means "about," "connected with," or "as concerns." THE MERRIAM-WEBSTER DICTIONARY 501 (7th ed. 2016). It follows that the records of imprisonment applies to: (1) records created during an inmate's incarceration, (2) that involve an identifiable inmate, and (3) that relate to the imprisonment.

Although there are no reported Virginia Supreme Court decisions directly construing this exemption, persuasive authorities unanimously agree that the records of imprisonment exemption broadly applies to VDOC records concerning individuals who incarcerated within the Commonwealth. And these are appropriate sources to consider. *See Fitzgerald v. Loudoun Cnty. Sheriff's Office*, 289 Va. 499, 504-05, 771 S.E.2d 858 (2015) ("Our *de novo* review takes into account any informative views on the legal meaning of statutory terms offered by those authorized by law to provide advisory opinion."); *Beck v. Shelton*, 267 Va. 482, 492, 593 S.E.2d 195, 200 (2004) ("While it is not binding on this Court, an Opinion of the Attorney General is entitled to due consideration." (internal quotations omitted)).

First, there is at least one circuit court opinion holding that this exemption applied to records created by prison officials during an inmate's incarceration, finding that those records did not become "un-exempted" after the inmate died in custody. *Dallas v. Va. Dep't of Corr.*, No. CL21-5564 (Norfolk Cir. Ct. Nov. 29, 2021) (R.212-215). Similarly, a federal judge has noted that information relating to a deceased inmate could be withheld under this FOIA exemption, in the discretion of the sheriff, and, therefore, failure to provide that information could not serve as a basis for equitably tolling the statute of limitations. *Estate of Cuffee v. City of Chesapeake*, No. 2:08cv329, 2009 U.S. Dist. LEXIS 144786, at *24 (E.D. Va. Aug. 4, 2009) (reasoning "the Virginia Freedom of Information Act expressly provides that records of persons imprisoned in penal institutions in the Commonwealth, when 'such records relate to the imprisonment,' are excluded from the compulsory disclosure that would otherwise apply pursuant to the Act's other provisions," and, thus, disclosure of the requested information "is explicitly committed by the language of the statute to [the sheriff's] discretion").

Second, the FOIA Advisory Council has opined that VDOC properly invoked the records of incarceration exemption in response to an inquiry seeking a "list of the names, state identification numbers, and facility location of all female inmates incarcerated at [VDOC] institutions." FOIA Council Advisory Opinion AO-02-11 (July 21, 2011) (R.216-19). Specifically, although "information

concerning arrests and charges are public through law-enforcement agencies," and "information about trials and convictions are public through court records, [] information about persons held in state correctional facilities after conviction are exempt from mandatory disclosure." *Id.* "In other words, under Virginia law there are no secret arrests, there are no secret court proceedings, but once someone has been convicted and assigned to the custody of DOC, public access is curtailed." *Id.*[6]

Third, an advisory opinion from the Office of the Attorney General has opined that a "jail log" containing "general administrative information" such as "inmate requests, medical care, attorney visits, complaints, observations of inmate conduct, and disciplinary matters" was exempt from mandatory disclosure. 1987-88 Op. Att'y Gen. Va. 37 (R.220-22). Specifically, the advisory opinion reasoned that the "matters recorded" in the jail's "administrative record" involved "inmate activities or observations concerning inmates," which were exempt from disclosure under former Code § 2.1-342(b)(1) (exempting "all records of persons imprisoned in penal institutions in this Commonwealth provided such records relate to the said imprisonment"). *Id.*

[6] This advisory opinion was construing an identical exemption in a predecessor version of the statute, former Code § 2.2-3706(F)(6).

Also of note, the language of this exemption has been substantially unaltered since it was first adopted in 1975, as one of only five categories of records then-exempted under Virginia's FOIA statute. 1975 Va. Acts 527 ("[A]ll records of persons imprisoned in a penal institution in this State provided such records relate to the said imprisonment."). The General Assembly took no action to revise or modify the scope of the exemption after the Office of the Attorney General issued the 1987 advisory opinion, including in 1999, when former Code § 2.1-342(B)(1) was re-codified at § 2.1-342.2(F)(6) ("All records of persons imprisoned in penal institutions in the Commonwealth provided such records relate to the imprisonment."); or in 2001, when the exception was re-codified at § 2.2-3706(F)(6) (same). Nor did the General Assembly alter the language of the exemption after the reasoning of the 1987 Attorney General Opinion was joined by the 2011 opinion from the FOIA Advisory Council, including in 2016, when the exemption was re-codified, with no revisions, at § 2.2-3706(B)(2)(d), and in 2018, when it was again re-codified at § 2.2-3706(B)(4) (current statute).

In light of the continued re-codification of identical statutory language throughout the history of Virginia's FOIA statutes, it stands to reason that the General Assembly concurred with the long-standing interpretation of the records of incarceration exemption by the FOIA Advisory Council and the Office of the Attorney General: "Its acquiescence is deemed to be approval." *Barson v.*

Commonwealth, 286 Va. 67, 74, 726 S.E.2d 292, 296 (2012). As the Supreme Court has noted, "due consideration" should be provided to official opinions of the Office of the Attorney General, and "[t]his is particularly so when the General Assembly has known of the Attorney General's Opinion [for years], and has done nothing to change it," *Beck*, 267 Va. at 492, 593 S.E.2d at 200, for "'[t]he legislature is presumed to have had knowledge of the Attorney General's interpretation of the statutes, and its failure to make corrective amendments evinces legislative acquiescence in the Attorney General's view.'" *Id.* (quoting *Browning-Ferris, Inc. v. Commonwealth*, 225 Va. 157, 161-62, 300 S.E.2d 603, 605-06 (1983)).

The language of Code § 2.2-3706(B)(4) is straightforward: "All records of persons imprisoned in penal institutions in the Commonwealth" are exempt from mandatory disclosure, "provided such records relate to the imprisonment." This includes VDOC-created records describing specific inmates, inmate activities, and other circumstances relating to their confinement. *See, e.g.*, AO-02-11 ("DOC is correct that [the records of imprisonment exemption] allows it to withhold, in its discretion . . . information about persons held in state correctional facilities."). Because, as discussed below, the records encompassed by this appeal fall within the plain language of this exemption, the trial court erred in ordering their compelled disclosure.

C. Surveillance Video Recordings Depicting Specific Inmates Are Exempt Under Code § 2.2-3706(B)(4) *(Assignment of Error #1)*

It is undisputed that each of these video recordings depicts inmates incarcerated within the Commonwealth, showing their actions, revealing their identities, and generally recording their actual movements within the prison walls. The recordings are, therefore, "of" an incarcerated person himself. By showing the movements and activities of the inmates inside the prison, those recordings are also "related" to the actual incarceration. Each recording is therefore a "record" involving a "person" incarcerated within the Commonwealth, "related" to that incarceration, that falls within the plain language of Code § 2.2-3706(B)(4). Although the precise contents of each recording vary from incident to incident, these undisputed facts are sufficient to bring each within the scope of this broad, categorical exemption.

VDOC recognizes, certainly, that not all prison surveillance videos necessarily fall within the scope of this exemption. Recordings that do not show identifiable inmates or that depict non-private areas of the prison may very well be considered non-exempt. But the specific recordings at issue here all involve secure areas of the prison, they all depict inmates incarcerated within that prison, and they all show specific incidents involving those identifiable inmates. Although VDOC has discretion to release these types of records if they so elect, the trial court erred

in compelling VDOC to exercise this discretion through issuance of a writ of mandamus.

D. Canine Bite Reports and Incident Reports Are Exempt Under Code § 2.2-3706(B)(4) *(Assignment of Error #4)*

Similarly, the requested written reports—canine bite reports and internal incident reports—are specific to a single incident involving specific inmate(s). They detail "observations of inmate conduct," 1987-88 Op. Att'y Gen. Va. 37, setting forth specific information regarding a specific incident that occurred during their incarceration. For this reason, the reports are records of "persons incarcerated," that "relate" to the incarceration, and that are exempt from mandatory disclosure under Code § 2.2-3706(B)(4). *See id.*; *see also* Advisory Opinion AO-02-11 ("[I]nformation about persons held in state correctional facilities after conviction [is] exempt from mandatory disclosure."); *Jordan v. United States Dep't of Justice*, No. 07-CV-02303, 2009 U.S. Dist. LEXIS 81081, at *66 (D. Colo. Aug. 14, 2009) (holding that prison log books and officer reports, which document the core law enforcement responsibility of protecting inmates, staff, and the community, were exempt from compelled disclosure).

In this context, too, VDOC recognizes that not all prison reports would fall within the scope of this exemption. Generalized records created in the ordinary course of business, not fairly traceable back to an identifiable inmate, would certainly not be considered a record involving a specific inmate's imprisonment.

But these records are different. They were created specifically to document an incident involving a specific inmate or inmates, they name those individuals, and they describe what happened during that incident. These records are encompassed by the records of imprisonment exemption, and the trial court erred by compelling VDOC to release these records—in any format—through the issuance of a writ of mandamus.

II. Code § 2.2-3705.2(14): Security of Government Buildings Exemption *(Assignment of Error #3)*

A. Standard of Review

Whether a document falls within the scope of a FOIA exemption is a mixed question of law and fact. *Am. Tradition Inst.*, 287 Va. at 338, 756 S.E.2d at 439. Thus, this Court should "'give deference to the trial court's factual findings and view the facts in the light most favorable to the prevailing par[y,] but [] review the trial court's application of the law to those facts *de novo*.'" *Id.* at 338-39, 756 S.E.2d at 439 (quoting *Tuttle*, 284 Va. at 324, 731 S.E.2d at 911 (first alteration in original)).

B. Background

Code § 2.2-3705.2(14) exempts "records" from public disclosure that would reveal (1) "the location or operation of security equipment and systems of any public building," (2) "[s]urveillance techniques," or (3) "security systems or technologies," if that disclosure "would jeopardize the safety or security of any

person; governmental facility, building, or structure or persons using such facility, building, or structure." Code § 2.2-3705.2(14)(a), (c).

As noted by the Virginia Supreme Court, the security exemption does not require proof "that release of the records would actually cause a security breach or harm to persons." *Va. Dep't of Corr. v. Surovell*, 290 Va. 255, 264 (2015).[7] Because "'jeopardize' simply means 'to expose to danger (as of imminent loss, defeat, or serious harm),'" records whose release "would expose a governmental facility to danger"—even if that danger is potential rather than actualized—fall within the scope of the security exemption. *Id.* at 264-65. That is, "VDOC need not 'prove conclusively that, if it responded, some [facility's security] would in fact be compromised or jeopardized.'" *Id.* at 265 (quoting *Gardels v. Central Intelligence Agency*, 689 F.2d 1100, 1106 (D.C. Cir. 1982) (alternation in original)). Rather, the circuit court "must take into account that any agency statement of threatened harm to security will always be speculative to some extent, in the sense that it describes a potential future harm rather than an actual harm. The question placed before the court is only whether the potential danger is a reasonable expectation." *Id.*

[7] *Surovell* interpreted a functionally identical predecessor statute to the current security exemption.

Moreover, considering that "'[t]he administration of a prison . . . is at best an extraordinarily difficult undertaking,'" courts must "give deference to the expert opinions of correctional officials charged with maintaining the safety and security of their employees, the inmates, and the public at large." *Id.* at 265-66 (quoting *Hudson v. Palmer*, 468 U.S. 517, 527 (1984)). Thus, although "the circuit court must make a *de novo* determination of the propriety of withholding the documents at issue," in doing so, "the circuit court must accord 'substantial weight' to VDOC's determinations." *Id.* at 266. And "[o]nce satisfied that proper procedures have been followed and that the information logically falls within the exemption clause, courts need go no further to test the expertise of the agency, or to question its veracity when nothing appears to raise the issue of good faith." *Id.* at 267.

C. Surveillance Video Recordings Depicting Restricted Areas of the Prison Are Exempt Under Code § 2.2-3705.2(14) *(Assignment of Error #3)*

Mandated public disclosure of surveillance video footage from the secure areas of a prison would jeopardize the safety of individuals within that prison—inmates and officers alike—because it would reveal blindspots and other weaknesses within that security system. Once inmates are aware of areas within the prison that are not captured fully by the security cameras, those areas can become targeted for fights between inmates, attacks on correctional officers,

distribution of contraband, and other activities that could jeopardize the safety of individuals in that building and the overall security of the building itself.

Because there is a "reasonable expectation" that revealing weaknesses in a prison surveillance system could lessen the security of that prison, thereby increasing a risk of harm to the inmates and officers in that prison, VDOC properly asserted the public safety exemption when withholding these video recordings. These recordings show exactly what areas of the inside of secure areas of the prison are clearly captured by the surveillance cameras—and which are not. The video recordings are therefore exempt from disclosure under Code § 2.2-3705.2(14). *Cf. Pinson v. United States Dep't of Justice*, 199 F. Supp. 3d 203, 217 (D.D.C. 2016) (agreeing with argument that "disclosing inmates' Central Files through FOIA could result in a threat to those inmates' respective safety, the safety of other inmates, and to those BOP staff committed to their confinement and protection").

Further, because these video recordings are each taken from a single camera angle—and, as to some incidents, there is only a single camera angle preserved—selectively producing only some of the videos—as ordered by the trial court—does not sufficiently ameliorate these concerns. The surveillance videos correspond to the existing camera system—not a prior system—and blind spots corresponding to even one specific camera lessen the overall safety and security of that secure area

of the prison. Also of note, the video recordings are all from a single prison, ROSP, and are not spread throughout multiple prisons. By overriding the articulated concerns of VDOC senior officials, the trial court improperly usurped those security-related considerations and failed to give appropriate deference to the agency's positions. Because withholding these surveillance videos for security purposes does not "raise the issue of good faith," *Surovell*, 290 Va. at 267, the trial court erred in ordering that these videos be disclosed.

III. Code § 2.2-3704.01: Scope of the Statutory Redaction Requirement *(Assignments of Error #2, #5)*

A. Standard of Review

Whether the entire content of a public record falls within the scope of a FOIA exemption, such that the rule of redaction is not implicated, is a mixed question of law and fact. Thus, this Court should "'give deference to the trial court's factual findings and view the facts in the light most favorable to the prevailing par[y,] but [] review the trial court's application of the law to those facts *de novo*.'" *Am. Tradition Inst.*, 287 Va. at 338-89, 756 S.E.2d at 439 (quoting *Tuttle*, 284 Va. at 324, 731 S.E.2d at 911 (first alteration in original)).

B. Background

Under Virginia's FOIA, "[a] public record may be withheld from disclosure in its entirety only to the extent that an exclusion from disclosure . . . applies to the entire content of the public record." Code § 2.2-3704.01. This does not mean,

however, that state entities must go through exempt records and "un-exempt" them by removing the very information that brings them within the scope of a categorical exemption in the first place. For example, a health provider would not have to go through and redact out the name of a patient from a health record, so that the redacted health record could then be provided to a FOIA requestor. In determining whether an exclusion "applies to the entire content of the public record," the wording and nature of the FOIA exemption are controlling.

C. Because the Records of Imprisonment Exemption Encompasses the Entire Record, the Trial Court Erred By Ordering VDOC to Produce Redacted Versions of the Bite Reports and Incident Reports *(Assignment of Error #5)*

The records of incarceration exemption does not limit itself to only "portions of records," records "to the extent" they might reveal certain information (such as the identity of an inmate), or "information" about certain topics, as do other FOIA exemptions in the same statute. *See, e.g.*, Code § 2.2-3706(B)(8) (exempting "[t]hose portions of any records containing information"); Code § 2.2-3706(B)(7) (exempting records "to the extent that they disclose" certain information); Code § 2.2-3706(B)(5) (exempting records "to the extent that such records contain" certain information). Rather, Code § 2.2-3706(B)(4) exempts "***all records***" of incarcerated persons, provided only that the record "relates" to the incarceration. Because the incident reports and bite reports are "records of" an incarcerated person, relating to the imprisonment, the written reports are exempt in their

entirety, and VDOC is under no obligation to go through and remove (for example) references to incarcerated individuals so as to "un-exempt" the records.

The FOIA Advisory Council recently addressed a similar question in the context of a request for scholastic records. Specifically, the issue was whether a public body had an obligation to redact the names of students from a scholastic record in order to provide anonymized, individual test scores to a FOIA requestor. The applicable FOIA exemption excluded from mandatory disclosure "[s]cholastic records containing information concerning identifiable individuals," meaning "those records containing information directly related to a student." Code § 2.2-3705.4(A)(1); Code § 2.2-3701. The FOIA Council noted, first, that the "test scores that are being requested are considered part of a scholastic record because the information is directly related to individual students." FOIA Advisory Opinion AO-03-19 (Apr. 3, 2019) (R.223-25). Although the "requesters seem to be under the impression that test scores would no longer be exempt under FOIA if the student's name and other personally identifiable information were to be redacted," the FOIA Council explained that this position misconstrues the FOIA provisions regarding a duty to redact. *Id.* "Simply put, FOIA allows for the redaction or removal of exempt information from a record that would otherwise be nonexempt, if that information were not present." *Id.* Thus, "[e]ven if student names and other personal information were to be redacted, the fact still remains that . . . these

scholastic records themselves contain specific information about identifiable individuals; thus, the scholastic record and all information contained therein would still be exempt from mandatory disclosure under the provisions of FOIA." *Id.*

Similarly, the FOIA exemption at issue here excludes from mandatory disclosure "all records" of persons incarcerated in the Commonwealth that "relate to the imprisonment." Code § 2.2-3706(B)(4). Removing (for example) the name of the inmate in a report would not change the character or nature of that record, such as to make it non-exempt. It would still be a "record of" an incarcerated person, related to his imprisonment, that is exempt in its entirety. *Cf.* FOIA Advisory Opinion AO-03-19 (Apr. 3, 2019) ("Redacting or otherwise removing a student's name and other personal information does not make the scholastic record a nonexempt record that must be disclosed as the record would still contain information about specific individuals, whether identified by name or not.").

In this respect, the records of incarceration exemption is substantially different than the exemption for "personnel information concerning identifiable individuals," the FOIA exemption addressed and construed in *Hawkins v. Town of South Hill*, 301 Va. 416, 878 S.E.2d 408 (2022). *See* Code § 2.2-3705.1(1). In *Hawkins*, the Supreme Court interpreted the personnel information exemption, holding that it encompasses "content within a public record that references personnel and relates to specific persons." 301 Va. at 426-27, 878 S.E.2d at 413.

Although FOIA, in its original form, exempted "personnel records" from compelled disclosure, *id.* at 427, 878 S.E.2d at 413, *Hawkins* reasoned that recent legislative amendments—changing "personnel *record containing* information concerning identifiable individuals" to "personnel *information concerning* identifiable individuals"—demonstrated legislative intent "to narrow the exception and provide for partial disclosure." *Id.* at 428, 878 S.E.2d at 414. *Hawkins* therefore remanded the case to the circuit court for further consideration, in light of the Court's clarification of the language and scope of the personnel information exemption.

When amending FOIA in 2016, the General Assembly did not make corresponding changes to Code § 2.2-3706(B)(4). That exemption encompasses now—as it did then—"all records" of incarcerated persons that "relate" to their imprisonment. The written reports at issue here are "records" relating to a specific inmate's imprisonment, exempt in their entirety. VDOC was under no obligation to redact the identifying information of these inmates and provide the redacted inmate record in response to Appellees' FOIA requests.

VDOC does not—and has never—taken the position that a public record is automatically exempt in its entirety simply because it mentions the name of an inmate. This was not VDOC's position in *Surovell*, and it is not VDOC's position now. *See, e.g.*, *Surovell*, 290 Va. at 268, 776 S.E.2d at 585-86 ("The question

before us is whether an agency is required to redact an exempt document that may contain non-exempt material. We agree with the Commonwealth that an agency is not required to redact under these circumstances."). Despite the rather misleading comments made within the legislature about the Supreme Court opinion, the subsequent amendments to FOIA simply codified the rule of decision in *Surovell*—those amendments didn't actually overturn anything. *Compare Surovell*, 290 Va. at 268, 776 S.E.2d at 586 (where the "wording of the statute applies the exclusion to the entire [public record]," FOIA "creates no requirement of partial disclosure or redaction"); *with* Code § 2.2-3704.01 (where "an exclusion from disclosure . . . applies to the entire content of the public record," that record "may be withheld from disclosure in its entirety").

But that aside, it would have been eminently reasonable for the General Assembly to conclude that records involving specific incarcerated persons should remain FOIA-exempt, in their entirety, for the purpose of shielding the inmates' privacy and preventing forced dissemination of potentially personal information. This is precisely how the FOIA Advisory Council interpreted this exemption: "[U]nder Virginia law there are no secret arrests, there are no secret court proceedings, but once someone has been convicted and assigned to the custody of DOC, public access is curtailed." FOIA Council Advisory Opinion AO-02-11 (July 21, 2011). Allowing the exemption to encompass the entire scope of an

inmate record—as long as the record "relates" to the incarceration—would further this purpose, particularly considering that there are no remedies available to an inmate to protect his own privacy or assert his own personal safety as a reason for non-disclosure, such as by allowing him to intervene and object to the mandatory release of information about him to any and all comers.

The bite reports and incident reports at issue in this specific case are records of incarcerated persons that relate to their imprisonment. Because the nature of these records brings them entirely within the scope of this exemption, VDOC was not required to redact inmate names and provide the redacted records. Code § 2.2-3704.01 (where "an exclusion from disclosure . . . applies to the entire content of the public record," that record "may be withheld from disclosure in its entirety"). The trial court therefore erred in ordering the disclosure of redacted versions of these records.

D. The Trial Court Erred By Ordering VDOC to Produce Digitally Altered Copies of Surveillance Videos *(Assignment of Error #2)*

Similarly, the surveillance videos capturing the incidents involving inmates and canines fall not just within the scope of the security exemption, but also the exemption for records of incarcerated persons that relate to their confinement. These are not "mixed" records, containing both exempt and unexempt materials. Rather, the exemptions encompass the entire content of that record, and the trial

court erred by ordering that VDOC produce digitally altered versions of these videos.

Of note, the trial court's final order did not allow VDOC to blur the image of the inmate actually involved in the canine utilization incident. R.314. Rather, only "the faces employed by VADOC and incarcerated individuals that are not engaged by a canine who appear in the videos" were allowed to be digitally altered. Even applying the redactions endorsed by the trial court, then, these redactions would not change the character of these videos as records of incarcerated persons that relate to the imprisonment, which are exempt from compelled disclosure.

Even if expanded to also allow the blurring of the inmate involved in the canine utilization incident, for the reasons discussed above, blurring out the face of an inmate on a surveillance video does not change the character of the underlying record. It remains a record, involving a specific inmate, that relates to the imprisonment. The trial court's directive, essentially, compels VDOC to remove some of the information from the record in an attempt to remove the categorically exempt record from the scope of the applicable exemption. This goes far beyond the redaction requirement codified in Virginia's FOIA. Code § 2.2-3704.01 ("A public record may be withheld from disclosure in its entirety . . . [where] an exclusion from disclosure . . . applies to the entire content of the public record.").

Also of note, the trial court's directive essentially compels VDOC to produce an entirely new record in order to respond to a FOIA request—something that FOIA itself does not require. Code § 2.2-3704(D) ("[N]o public body shall be required to create a new record if the record does not already exist."). Digitally altering video footage is different in kind and scope than simply redacting content from a written document. By requiring VDOC to digitally alter video footage to compel its production, the trial court ignored this plain statutory directive. *See, e.g., Phillips v. United States Dep't of Homeland Security*, No. 1:19cv0928, at *5 (D.D.C. Mar. 24, 2024) (holding that the agency did not need to blur videos or impose voice modulation on surveillance videos depicting the interview of alien minors in government detention facilities, reasoning that imposing this requirement "would go well beyond reasonable efforts to segregated exempt portions of the videos from the non-exempt," and would "require creating an essentially new record at substantial effort and expense").

IV. Code § 2.2-3706(B)(10): Identities of Victims and Witnesses *(Assignments of Error #6, #9)*

A. Standard of Review

Whether a document falls within the scope of a FOIA exemption is a mixed question of law and fact. *Am. Tradition Inst.*, 287 Va. at 338, 756 S.E.2d at 439. Thus, this Court should "'give deference to the trial court's factual findings and view the facts in the light most favorable to the prevailing par[y,] but [] review the

trial court's application of the law to those facts *de novo*.'" *Id.* at 338-39, 756 S.E.2d at 439 (quoting *Tuttle*, 284 Va. at 324, 731 S.E.2d at 911 (first alteration in original)).

B. Background

Code § 2.2-3706(B)(10) excludes from compelled disclosure records that would reveal "[t]he identity of any victim, witness, or undercover officer." VDOC recognizes that—unlike the exemptions discussed above—this is not a categorical exemption that applies to the entire content of a public record and, therefore, redaction and production is contemplated. The question presented in this appeal, then, is not whether VDOC should produce a redacted record after removing information regarding victims and witnesses, but rather, whether the trial court erred by ordering VDOC to produce these records with that information intact.

VDOC is unaware of any reported caselaw construing this specific FOIA exemption and, therefore, its interpretation and applicability appears to be a question of first impression.

C. The Surveillance Video Recordings Reveal the Identities of Victims and Witnesses to Canine Utilization Incidents *(Assignment of Error #6)*

In its final order, the trial court directed that VDOC was allowed to obscure, in the produced surveillance records, "the faces of people employed by VADOC and incarcerated individuals that are *not* engaged by a canine who appear in the

videos." R.314 (emphasis added). If this Court were to determine that the trial court properly ordered VDOC to produce the surveillance videos in response to Appellees' FOIA requests, VDOC submits that it should be allowed to obscure the faces of all individuals depicted on those videos, including the inmate who was being engaged by the canine.

"Victim" is not otherwise defined within Code § 2.2-3706(B)(10), although there are varying statutory definitions of "victim" in the Virginia Code. *See, e.g.*, Code § 19.2-11.01(B) (defining "victim" as a "person who has suffered physical, psychological, or economic harm as a direct result of the commission of" a felony or specified misdemeanor). Generally speaking, though, a "victim" is "[a] person harmed by a crime, tort, or other wrong." BLACK'S LAW DICTIONARY 1561 (7th ed. 1999).

The inmates depicted in the surveillance videos are being subjected to a use of force in a prison setting. Although the use of force by a corrections officer is not a "crime," it is self-evident that the inmates have suffered some physical harm. Considering that Appellees, themselves, evidently consider these inmates to be "victims" in this context,[8] the identities of these inmates should be shielded by Code § 2.2-3706(B)(10).

[8] *See, e.g.*, Hannah Beckler, *Patrol dogs are terrorizing and mauling prisoners inside the United States*, BUSINESS INSIDER (July 2023) ("Over the past six years, hundreds of incarcerated people have been bitten or mauled. . . . For the hundreds

Even if this Court were to determine that the inmates who were bitten by the canine did not fall within the statutory definition of "victim," they should still be considered "witnesses" to the use of force incident. As with "victim," the term "witness" is not otherwise defined in Code § 2.2-3706(B)(10). The generally accepted legal definition of a "witness" is, simply, "[o]ne who sees, knows, or vouches for something." BLACK'S LAW DICTIONARY 1596 (7th ed. 1999). This definition is not limited to certain type of crimes, but rather, encompasses anyone who might be called upon to testify in a legal proceeding. *See id.* ("The term 'witness,' in its strict legal sense, means one who gives evidence in a cause before a court, and in its general sense includes all persons from whose lips testimony is extracted to be used in any judicial proceeding."). Because the inmates who were bitten by the canines might be called upon to testify in a legal proceeding—such as a civil rights action under 42 U.S.C. § 1983 or a claim under the Virginia Tort Claims Act—they are certainly "witnesses" to the use of force incident. Thus, if this Court were to hold that VDOC must produce the surveillance videos in

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of men who are bitten or mauled themselves, the physical and emotional impact can last for years. . . . The bites are severe, sometimes permanently disabling and disfiguring. Dozens of people said the terror of being attacked by a dog caused them acute distress, such as recurring nightmares or other symptoms of post-traumatic stress disorder."), *available at* https://www.businessinsider.com/guard-dogs-attack-prison-inmates-abu-ghraib-torture-trauma-2023-7 (last visited Feb. 3, 2025).

response to Appellees' FOIA request, VDOC should retain the discretion to blur out the identities of these inmates as well.

D. The Written Reports Reveal the Identities of Victims and Witnesses to Canine Utilization Incidents *(Assignment of Error #9)*

In its final order, and as to the incident reports and bite reports, the trial court permitted VDOC to withhold "the names and inmate identification number of any inmates, the names of identifying information of the K9s, and . . . the names of any VADOC staff involved in the incident." R.313. If this Court were to determine, however, that this information was not exempt under any of the other cited FOIA exemptions, then VDOC maintains that the trial court erred in holding Code § 2.2-3706(B) inapplicable to this information. R.313, ¶ 14.[9] Rather, for the reasons discussed above, the inmates involved in the canine incidents can be considered "victims," or at the very least, "witnesses" to the use of force incident. The officers engaged in that use of force are also "witnesses" to the event. Accordingly, this information remains exempt under Code § 2.2-3706(B)(10).

V. Code § 2.2-3706(D): Identifying Information of a Personal, Medical, or Financial Nature, Disclosure of Which Would Jeopardize the Safety or Privacy of those Persons *(Assignments of Error #7, #10)*

[9] If, of course, this Court were to hold that these records are exempt in their entirety, the Court would not need to reach this assignment of error.

A. Standard of Review

Whether a document falls within the scope of a FOIA exemption is a mixed question of law and fact. *Am. Tradition Inst.*, 287 Va. at 338, 756 S.E.2d at 439. Thus, this Court should "'give deference to the trial court's factual findings and view the facts in the light most favorable to the prevailing par[y,] but [] review the trial court's application of the law to those facts *de novo*.'" *Id.* at 338-39, 756 S.E.2d at 439 (quoting *Tuttle*, 284 Va. at 324, 731 S.E.2d at 911 (first alteration in original)).

B. Background

Code § 2.2-3706(D) exempts from mandatory disclosure "those portions of noncriminal incident or other noncriminal investigative reports or materials that contain identifying information of a personal, medical, or financial nature where the release of such information would jeopardize the safety or privacy of any person." VDOC recognizes that this exemption, too, is not a categorical exemption, but rather, only applies to portions of records. Redaction and production is therefore contemplated as to records not otherwise exempt from disclosure. And as with the exemption shielding the identities of victims and witnesses, this specific FOIA exemption does not appear to have been construed by the courts, and so its interpretation and applicability are also a question of first impression.

VDOC submits that the applicable standard for measuring whether disclosure of identifying information "would jeopardize the safety or privacy of any person" should be guided by the standard set forth in *Surovell*. That is, the agency need not show any concrete and specific risk of harm, but rather, establish only a reasonable, good faith basis as to why disclosure of the record would call the safety or privacy of that person into question.

C. Disclosing the Surveillance Video Recordings Would Jeopardize the Safety or Privacy of the Inmate and Officers Involved in the Use of Force Incident *(Assignment of Error #7)*

The surveillance video recordings at issue here all depict at least one corrections officer responding to a secure area in the prison, with a canine, and that canine subsequently biting an inmate. There are numerous intersecting privacy and safety considerations that counsel against compelled production of the identities of the individuals involved in these incidents.

As to the inmate being bitten, that inmate has a privacy interest in not having his identity revealed to the public. Although the inmate himself could certainly make his identity known if he so wished—whether by filing a lawsuit, speaking with reporters, or otherwise—VDOC should be allowed to protect the identities of those inmates who have not expressly authorized the release of that information. The inmates may very well not wish to have the fact of, and images relating to,

their injury made public, and FOIA vests VDOC with the discretion to withhold records on that basis.

As to the officers involved in the canine utilization incidents, those officers have both a privacy and a safety interest in preventing their identities from being subject to compelled public disclosure. If VDOC lacked any discretion to shield the identities of the responding officers, these officers could become subject to reprisal from other inmates or from the public at large. *See Cameranesi v. United States Dep't of Defense,* 856 F.3d 626, 638 (9th Cir. 2017) ("Disclosures that would subject individuals to possible embarrassment, harassment, or the risk of mistreatment constitute nontrivial intrusions into privacy," and this includes "the potential for harassment from third parties," such as "the media, curious neighbors, and [] [public interest groups]" that "might try to make unwanted contacts with the employees").

For these reasons, the identities of the responding officers and the inmate who was engaged by the canine are protected from compelled disclosure under Code § 2.2-3706(D), and the trial court erred in holding that this exemption was inapplicable to the surveillance video recordings. R.314-15 ¶ 21.

D. Disclosing the Written Reports Would Jeopardize the Safety or Privacy of the Inmate and Officers Involved in the Use of Force Incident *(Assignment of Error #10)*

In its final order, and as to the incident reports and bite reports, the trial court permitted the redaction of "the names and inmate identification number of any inmates, the names of identifying information of the K9s, and . . . the names of any VADOC staff involved in the incident." R.313. If this Court were to determine, however, that this information was not exempt under any of the other cited FOIA exemptions, then VDOC maintains that the trial court erred in holding Code § 2.2-3706(D) inapplicable to this information. R.313, ¶ 14.

Rather, for the reasons discussed above, the inmates involved in the canine utilization incident has a privacy interest in preventing compelled disclosure of their identities. The officers involved in the incidents have both privacy and safety interests in preventing compelled disclosure of their identities. Code § 2.2-3706(D) therefore applies, and the trial court erred in holding that this exemption did not shield the identities of these individuals.

VI: Code § 2.2-3705.5(A): Health Records *(Assignment of Error #8)*

A. Standard of Review

Whether a document falls within the scope of a FOIA exemption is a mixed question of law and fact. *Am. Tradition Inst.*, 287 Va. at 338, 756 S.E.2d at 439. Thus, this Court should "'give deference to the trial court's factual findings and view the facts in the light most favorable to the prevailing par[y,] but [] review the trial court's application of the law to those facts *de novo*.'" *Id.* at 338-39, 756

S.E.2d at 439 (quoting *Tuttle*, 284 Va. at 324, 731 S.E.2d at 911 (first alteration in original)).

B. Background

Code § 2.2-3705.5(1) exempts "health records" from public disclosure, additionally providing that "information in the health records of a person [] confined [in a state or local correctional facility] shall continue to be confidential and shall not be disclosed . . . to any person except the subject or except as provided by law." Code § 2.2-3705.5(1). Health records encompass "electronically recorded material" reflecting services provided by a "health care entity"—which includes a licensed physician. Code § 32.1-127.1:03(B).

As with many other FOIA exemptions, caselaw addressing the health care records exemption is sparse—likely because medical records are clearly protected from many types of compelled disclosure under Virginia's Health Records Privacy Act, Code § 32.1-127.1:03. One circuit court opinion, referencing a prior version of Code § 2.2-3705.5(1), simply holds that medical records are exempt. *Stevens v. Lemmie*, 40 Va. Cir. 499, 503 (Petersburg Cir. Ct. 1996) (construing former Code § 2.1-342(B)(3)). Left unaddressed is the extent to which medical information reflected in other records—such as these written bite reports and incident reports—are protected from compelled disclosure.

C. Information in the Written Reports that Reflects Care Provided by a Medical Professional Is Exempt under Code § 2.2-3705.5(1) *(Assignment of Error #8)*

"Health record" is broadly defined as "any written, printed or electronically recorded material maintained by a health care entity in the course of providing health services to an individual concerning the individual and the services provided," and also includes "the substance of any communication made by an individual to a health care entity in confidence during or in connection with the provision of health services or information otherwise acquired by the health care entity about an individual in confidence and in connection with the provision of health services to the individual." Code § 32.1-127.1:03(B). Nothing in this definition restricts itself to traditionally-maintained medical records or charts. *See id.* ("*any* written, printed or electronically recorded material" (emphasis added)).

Some of the written bite reports and incident reports narrate or otherwise detail medical treatment provided by nurses or physicians, whether to an inmate or a responding officer. If this Court were to determine that these written reports are not otherwise excluded from compelled disclosure, VDOC should be permitted to also redact those portions of the records detailing the medical treatment, and the trial court erred in holding otherwise. R.313 ¶ 14.

VII: Equitable Doctrines of Unclean Hands and Accord and Satisfaction *(Assignments of Error #11, #12)*

A. Standard of Review

The appropriate standard of review as to the applicability of equitable defenses is not well-articulated. In keeping with similar issues presented on appeal, VDOC submits that the appropriate standard should be that of a mixed question of law and fact, where this Court gives "'deference to the trial court's factual findings and view the facts in the light most favorable to the prevailing par[y,] but [] review the trial court's application of the law to those facts *de novo*.'" *Am. Tradition Inst.*, 287 Va. at 338, 756 S.E.2d at 439 (quoting *Tuttle*, 284 Va. at 324, 731 S.E.2d at 911 (first alteration in original)). *See generally Harrell v. Allen*, 183 Va. 722, 730 (1945) (deferring to factual findings of the trial court but analyzing, *de novo*, whether those facts required application of the equitable doctrine of unclean hands); *Newport News Shipbuilding & Dry Dock Co. v. Wardell Orthopaedics, P.C.*, 67 Va. App. 404, 412 (2017) (in appeal involving applicability of various equitable defenses, identifying the appellate review standard as mixed question of law and fact).

B. Background

The equitable doctrine of unclean hands is based on the "ancient maxim" that "[h]e who comes into equity must come with clean hands." *Richards v. Musselman*, 221 Va. 181, 185 & n.1, 267 S.E.2d 164, 166 & n.1 (1980) (internal quotations omitted). A complainant "seeking equitable relief must not himself

have been guilty of any inequitable or wrongful conduct with respect to the transaction or subject matter sued on." *Id.* (internal quotations omitted); *see also Butler v. Hayes*, 254 Va. 38, 43, 487 S.E.2d 229, 232 (1997) ("[A] litigant who seeks to invoke an equitable remedy must have clean hands."); *Firebaugh v. Hanback*, 247 Va. 519, 526, 443 S.E.2d 134, 138 (1994) ("He who asks equity must do equity, and he who comes into equity must come with clean hands."); *McNeir v. McNeir*, 178 Va. 285, 290, 16 S.E.2d 632, 633 (1941) ("[A] plaintiff must come in with clean hands, that is, he must be free from reproach in his conduct.").

Similarly, under the common law defense of accord and satisfaction, accord and satisfaction occurs "whereby the parties agree to give and accept something in settlement of the claim or demand of the one against the other, and perform such agreement, the accord being the agreement, and the satisfaction its execution or performance." *Virginia-Carolina Elec. Works v. Cooper*, 192 Va. 78, 80, 63 S.E.2d 717, 718 (1951). Although typically applied when there is a dispute over the amount of money owed under a contract, more broadly speaking, this defense applies in any circumstance where there is a prior course of conduct between the parties that led to settlement of an active dispute. *See id.*; *see also Atkins v. Boatwright*, 2014 Va. 450, 454 (1963); *Owen v. Wade*, 185 Va. 118, 124 (1946);

Rorer Iron Co. v. Trout, 83 Va. 397 (1887) (addressing accord and satisfaction defense in context of a promise to dismiss a lawsuit).

C. Appellees Should Have Been Barred from Obtaining a Portion of the Records Sought Under the Doctrine of Unclean Hands *(Assignment of Error #11)*

It is undisputed that the parties previously negotiated a settlement encompassing a portion of the records sought here—specifically, the five canine Bite Reports and the nine video recordings from 2021. Following the negotiated settlement, VDOC produced certain redacted records, and Appellees refrained from filing their anticipated lawsuit. However, approximately one month after settling the prior FOIA complaint, Appellees again sought precisely the same records over which the parties had just struck a deal. It is apparent that Appellees deliberately negotiated a settlement with VDOC, obtaining records that—in fact—exceeded the scope of the records initially requested, with the presumptive intent to re-request them and then sue to obtain the full body of documents.

FOIA mandates that public entities should "make reasonable efforts to reach an agreement with a requestor concerning the production of the records requested." Code § 2.2-3700(B). And Code § 2.2-3713(C) provides for expedited hearings of FOIA petitions only if the requestor has provided the public body with an advance copy of the anticipated filing. Read together, these provisions evidence a clear legislative intent for public bodies and requestors to negotiate and resolve disputes

over the scope of public records requests. Allowing a FOIA requestor to negotiate an agreement with a public body, and then later sidestep that agreement by renewing a prior settled request, would eviscerate this legislative purpose.

VDOC therefore submits that the trial court erred in holding that the equitable defense of unclean hands did not apply here. R.312 ¶ 8. To obtain an equitable remedy such as a writ of mandamus, a petitioner must come before the court with clean hands. This, Appellees failed to do. The trial court erred in holding that this doctrine did not apply, and VDOC requests that this Court specifically hold that any records encompassed by the prior, settled FOIA request are therefore not subject to compelled disclosure.

D. Appellees Should Have Been Barred from Obtaining a Portion of the Records Sought Because the Parties Reached a Prior Accord and Satisfaction *(Assignment of Error #12)*

Similarly, the trial court erred by refusing the apply the doctrine of accord and satisfaction as to the portion of the records encompassed by the prior, settled FOIA request. It is undisputed that VDOC offered something (production of redacted bite reports and incident reports) in settlement of a demand by Petitioners (as embodied in their FOIA requests and unfiled mandamus petition). And, as Mr. Fulmer testified, VDOC performed its obligations under that agreement. R.367. Appellees should have been barred from sidestepping this agreement by renewing and pursuing their earlier, settled requests.

Nor, as the trial court held, did VDOC waive its assertion of this defense. R.313 ¶ 9. VDOC made clear to the trial court, from the inception of this litigation, that the parties had made a prior agreement relating to a portion of the records encompassed by this second FOIA request. R.397-99. VDOC expressly raised the defense in its briefing, prior to the second round of oral arguments, providing the trial court and Appellees ample time to consider and respond to this asserted defense. R.171-73. By holding that VDOC had waived its right to assert accord and satisfaction as a defense to the compelled disclosure of a portion of these records, the trial court therefore erred as a matter of law.

CONCLUSION

As the Supreme Court has made clear, "the purpose or motivation behind a request is irrelevant to a citizen's entitlement to the requested information." *Associated Tax Serv., Inc. v. Fitzpatrick*, 236 Va. 181, 187, 372 S.E.2d 625, 629 (1988). Any recitation of the important work Appellees believe they are doing simply does not matter; a desire to "inform the public" does not permit Appellees to run roughshod over interests the General Assembly has sought to protect.

Under longstanding precedent, the surveillance video and written reports are records of persons incarcerated in the Commonwealth that relate to their imprisonment, and these records are exempt in their entirety. The surveillance video is additionally exempt under the security exemption. By ordering the

compelled production of redacted versions of these records, the trial court erred as a matter of law. Accordingly, VDOC requests that this Court reverse the ruling below and enter final judgment on behalf of VDOC.

If this Court were to determine that certain portions of the records are subject to mandatory release, VDOC asserts that the identities of the individuals revealed by those records, as well as any information relating to medical treatment, should be redacted. In that event, VDOC submits that the appropriate remedy would be to remand to the trial court for further consideration in light of this Court's opinion.

Apart from the foregoing, VDOC maintains that the five canine Bite Reports and the nine video recordings from 2021, which were encompassed by the prior negotiated settlement between the parties, should be removed from the scope of this second FOIA request under the doctrines of unclean hands and accord and satisfaction. VDOC therefore requests that this Court expressly hold that Appellees are not entitled to obtain those records through this subsequent FOIA request.

Respectfully submitted,

VIRGINIA DEPARTMENT OF CORRECTIONS

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CERTIFICATE OF SERVICE

I certify that on February 3, 2025, I emailed a copy of the foregoing document to:

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CERTIFICATE OF COMPLIANCE

1. Appellant requests oral argument.

2. I hereby certify that this brief, exemption those portions not encompassed by Rule 5A:19(a), has 11,769 words and 50 pages, which complies with the limitations of that Rule.

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