

IN THE COURT OF APPEALS OF VIRGINIA

RECORD NO. 1626-24-2

VIRGINIA DEPARTMENT OF CORRECTIONS,
Appellant

v.

INSIDER, INC., HANNAH BECKLER, AND IAN KALISH,
Appellees

BRIEF OF APPELLEES

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STATEMENT OF THE CASE

Hannah Beckler is a senior editor on Business Insider’s investigations team. After two inmates in Virginia Department of Corrections (“VADOC”) facilities alleged that they had been mauled by that agency’s dogs while in custody,¹ Beckler began investigating and reporting on how dogs are used in prisons, both in the Commonwealth and nationwide.² As Beckler’s reporting detailed, among the small group of states that use attack-trained dogs in their prisons to break up fights, extract prisoners from their cells, or otherwise discipline inmates, Virginia had, by far, the highest rate of use—271 such deployments between 2017 and 2022, compared to 15 in the next highest state during those years.³

Prompted by public scrutiny, the General Assembly moved to limit that practice. In March 2024, the legislature signed new restrictions into law. *See* Va.

¹ Complaint, *Johnson v. McCowan*, 20-cv-582 (W.D. Va. Jan. 8, 2021); *Garrett v. Commonwealth*, 20-cv-986 (W.D. Va. Jan. 28, 2021).

² *See* Hannah Beckler, *Patrol Dogs are Terrorizing and Mauling Prisoners Inside the United States*, Business Insider (Jul. 23, 2023), <https://perma.cc/S38L-GNJP>; Hannah Beckler, *Corrections Officers Have Been Brutally Attacked by Their Own Patrol Dogs. Officials Say the Risk is Worth It*, Business Insider (Jul. 23, 2023), <https://perma.cc/GK6N-62TA>.

³ *See* Hannah Beckler, *Virginia Uses Attack Dogs in Prisons More Than Any Other State. Now Lawmakers Want to Crack Down*, Business Insider (Dec. 26, 2023, 6:18 AM), <https://www.businessinsider.com/legislation-curb-patrol-dogs-in-virginia-prisons-2023-12>.

Code § 53.1-39.3 (providing that dogs may be deployed only when “immediately necessary to protect any prisoner or any officer or employee from the threat of serious bodily injury or death,” and requiring the publication of all canine utilization incidents). Beckler and Business Insider’s work was cited by the legislators who proposed reform.⁴

This case involves Beckler and Business Insider’s effort to continue that investigation using the Virginia Freedom of Information Act (“VFOIA”), Va. Code §§ 2.2-3700–13. With Ian Kalish, an instructor at the University of Virginia School of Law First Amendment Clinic, Beckler and Insider, Inc. (collectively “Appellees,” or “Business Insider”) submitted a public records request for all video and audio recordings of instances in which a dog at Red Onion State Prison (“Red Onion”) bit or otherwise “engaged” an inmate from 2017–2022, as well as written reports of twelve specific bites that took place in VADOC facilities.

As set forth below, Appellees seek affirmance of the circuit court’s judgment that VADOC must produce the requested records, with redactions. To issue that judgment, the circuit court reviewed the contested public records *in camera*, received evidence from both parties, and determined that a specific set of

⁴ See Beckler, *Virginia Uses Attack Dogs in Prisons More Than Any Other State*, *supra* (quoting Virginia lawmakers discussing Appellees’ influence on the legislative reforms).

redactions were sufficient to exclude information subject to VFOIA's exemptions. In addition, Appellees respectfully submit that while the circuit court's holding was generally correct, it erred by allowing VADOC to over-redact certain information. Specifically, the law does not allow VADOC to redact the names and identification numbers of inmates, the names and faces of VADOC's dog handlers, and the names of VADOC's dogs. That information should be included in the records produced to Appellees.

Beckler's reporting is a paradigmatic example of government oversight facilitated by public records requests. Her investigation has already allowed the public—including the legislature—to grapple with difficult issues of governance. Still, Appellees do not claim a special right of access because of the importance of the public records sought in this case. Rather, VFOIA is clear that its exemptions must be read narrowly to permit the public to view the activities of its government. Here, where VADOC has not shown that its records are subject to an exemption, affirming the judgment of the circuit court as to the assignments of error raised by VADOC will facilitate oversight of that agency in accordance with VFOIA's text and purpose.

ASSIGNMENTS OF CROSS-ERROR

Business Insider responds herein to VADOC's assignments of error ("VADOC AOE"). Business Insider also submits argument regarding the following assignments of cross-error (hereinafter "BI AOE"):

1. The Circuit Court erred as a matter of law in construing the language of Va. Code §§ 2.2-3705.1(1), 2.2-3706(B)(4), or 2.2-3705.2(14) to apply to portions of the requested records reflecting the "names and identifying information of the K9s." (Preserved at R.8, 103–06, 109–123, 319, 336–38, 340–44, 414).
2. The Circuit Court erred as a matter of law in construing the language of Va. Code §§ 2.2-3705.1(1), 2.2-3706(B)(4), or 2.2-3705.2(14) to apply to portions of the requested records reflecting the "names of any VADOC staff involved in [an] incident," specifically with respect to VADOC's dog handlers. (Preserved at R.8, 104–06, 109–123, 319, 336–38, 340–44, 414).
3. The Circuit Court erred as a matter of law in construing the language of Va. Code §§ 2.2-3705.1(1), 2.2-3706(B)(4), or 2.2-3705.2(14) to apply to portions of the requested records depicting the "faces of people employed by VADOC," allowing VADOC to blur portions of responsive video recordings, specifically with respect to VADOC's dog handlers. (Preserved at R.7, 104–06, 109–123, 319, 336–38, 340–44).
4. The Circuit Court erred as a matter of law in construing the language of Va. Code §§ 2.2-3705.1(1), 2.2-3706(B)(4), or 2.2-3705.2(14) to apply to portions of the requested records reflecting the "names and inmate identification number[s] of any inmates." (Preserved at R.8, 120–23, 319, 336–38, 340–44).
5. The Circuit Court erred by denying Appellees' request for reasonable costs and attorney fees pursuant to Va. Code § 2.2-3713(D), after Appellees had substantially prevailed on the merits and Appellant did not contest the

reasonability of Appellees' fee request. (Preserved at R.10, 23, 246–59, 506–508).

6. The Circuit Court erred in failing to allow Appellees to inspect and/or copy the contents of an external hard drive containing responsive video records dated from January 2017 to July 2019 that Appellant claims was corrupted, thereby leaving Appellees without access to or recourse regarding potentially responsive records. (Preserved at R.319).
7. The Circuit Court erred in not affording Appellees the opportunity to contest the reasonability of Appellant's estimated costs for redacting and producing the requested records. (Preserved at R.319).

STATEMENT OF FACTS

A. The records of VADOC at issue in this case include bite reports, internal incident reports, and video recordings.

VADOC maintains a database called the Dog Information Governance & Operation System (DINGO), which catalogues the use of dogs within each prison in the Commonwealth. R.526. DINGO is “used by the DOC Canine Program to maintain informational files as well as training, performance evaluation, veterinarian, and utilization reports for canine teams.” *Id.*

According to the agency’s operating procedures, “[a]ny time the use of [a] canine results in a bite, a Bite Report shall be completed in DINGO before the end of shift or assignment.” R.545. Bite reports require VADOC’s dog handlers to provide certain administrative details, such as name and identification number of the canine, the canine’s rabies tag number, and the location of the incident. *E.g.*, R.582. The handler also provides a narrative of the circumstances of the bite. *Id.*

Unredacted bite reports have been filed as exhibits in federal lawsuits brought by inmates against VADOC. R.131; *see* R.582, 585, 586. For example, an August 7, 2020, bite report written by dog handler Joshua A. Robinson, says that during a fight between two inmates in River North Correctional Center, Robinson gave his dog Tom the “command to engage.” R.582. Tom immediately “engaged”—bit—one of the inmates, Thomas Rose. *Id.* Robinson writes that he then gave Tom the command to disengage, and “instructed responding staff to

escort [Rose] to medical to be assessed by medical staff.” *Id.* A June 25, 2015, bite report by handler William Barbetto says that Barbetto responded to a fight between two inmates, and “yelled three warnings,” after which his dog, Blitz, “engaged” one inmate’s right hip and another’s left arm. R.585. Barbetto also writes that after the bite, a nurse provided “antibiotic ointment to site,” gave a TD shot, and notes the “broken skin, small amount of blood noted to [the bite] site and boxers.” R.585–6.

VADOC’s operating procedures also require the completion of an incident report following canine utilization incidents. R.550–51, 99. Incident reports contain the name and position of employees involved, any verbal orders given, whether or not the incident was recorded, and a narrative of the incident. *Id.*; *see, e.g.*, R.88 (incident report by Barbetto for above-described June 25, 2015 bites).

VADOC also maintains video surveillance footage of its prisons, which may capture a dog’s deployment. R.163-64. VADOC’s cameras capture multiple perspectives of a given location simultaneously, potentially providing several angles of an incident. R.115-16, 430, 590. As with bite reports, unredacted incident reports and security footage was obtained by Business Insider on publicly accessible federal court dockets. R.131.

B. Appellees received public records from VADOC pursuant to a June 2022 VFOIA Request and expressly reserved the right to make future public records requests to VADOC.

The relevant procedural history of this case begins with Appellees' April 2023 VFOIA Request, which is discussed in Statement of Facts Section C, below. However, VADOC has argued that a separate, earlier, VFOIA request is relevant to its appeal. *See* Appellant's Br. 44–48. That request is discussed in this section.

In February and June 2022, Appellees submitted VFOIA requests to VADOC seeking all video and audio recordings of uses of force involving a canine at Red Onion in 2021, and all bite reports recorded in DINGO from January 1, 2017, to June 17, 2022. R.190. VADOC denied the requests. R.167. Following that denial, Appellees served VADOC with a notice that it intended to file a petition for writ of mandamus. R.193-202.

After discussion between the parties, on March 13, 2023, VADOC determined that it would exercise its discretion to release redacted bite reports. VADOC did not exercise its discretion to release the 2021 Red Onion recordings. R.203-04. The parties memorialized the discussions that led to VADOC's choice to exercise its discretion in a letter that stated in part:

Following a series of discussion and communications, the parties have agreed that, in its discretion, VDOC will release redacted records responsive to the "Bite Report Request" as identified in VDOC's letter of March 8, 2022. ... An initial production will be made as of March 13, 2022, with any remaining production to be completed by March 20, 2023. In return, your clients will not proceed with the

filing of this FOIA petition, and any claims relative to the February 18, 2022 and June 17, 2022 FOIA requests will be deemed settled. **This agreement does not bind or constrain the parties as to any other or future FOIA requests served upon VDOC.**

R.203 (emphasis added). The language allowing future VFOIA requests was expressly negotiated and agreed upon. R.82. Pursuant to the agreement, Appellees' December 2022 petition was not filed. *Id.*

Notably, VADOC did not perform its obligations under the parties' agreement. Specifically, VADOC failed to produce records related to twelve incidents that occurred during the relevant time period—their existence confirmed through public court filings—as contemplated by the agreement. R.79.

C. VADOC denied Business Insider's April 2023 VFOIA Request in full.

On April 19, 2023, Appellees submitted a new VFOIA request. R.68. Relevant here, Appellees sought bite and incident reports for the twelve incidents noted above, as well as “[a]ll video and audio recordings in which a VADOC canine bit or otherwise ‘engaged’ an inmate at Red Onion” between 2017 and 2022. R.68-69, 79 (the “April 2023 VFOIA Request”). The portion of Appellees' April 2023 VFOIA Request seeking recordings was broader than that in Appellees' February and June 2022 VFOIA Requests, which only sought recordings of canine force captured in 2021. R.190, 68.

On May 8, 2023, VADOC denied Business Insider’s request. R.71-73.

VADOC cited three VFOIA exemptions with respect to the requested video recordings:

- (i) Virginia Code § 2.2-3706(B)(4), which exempts from mandatory disclosure “all records of persons imprisoned in penal institutions in the Commonwealth provided such records relate to the imprisonment” (the “Records of Persons Imprisoned Exemption”);
- (ii) Virginia Code § 2.2-3705.2(14), which exempts from mandatory disclosure records that would reveal certain categories of information such as “security systems” whose disclosure would “jeopardize the safety or security of any person” (the “Safety of Government Buildings Exemption”); and
- (iii) Virginia Code § 2.2-3705.1(1), which exempts from mandatory disclosure “personnel information concerning identifiable individuals” (the “Personnel Information Exemption”).

R.71-72. As to the request for bite and incident reports, VADOC asserted both the Personnel Information Exemption and the Safety of Government Buildings Exemption. R.72.

D. Business Insider obtained a writ of mandamus from the circuit court.

On January 26, 2024, Business Insider provided VADOC with a copy of its petition for a writ of mandamus for the release of the requested records, and subsequently filed this lawsuit in the Circuit Court for the City of Charlottesville.

R.1-12.

On February 14, 2024, the circuit held a hearing on the merits of the petition. R.323 (the “February 2024 Merits Hearing”). There, VADOC attempted to satisfy its burden of proof as to the exemptions asserted in its May 8, 2023 denial, and also raised an argument under the equitable doctrine of “unclean hands” that the March 2023 agreement precluded Business Insider from seeking a portion of the records included in the April 2023 request. R.397-99. Both parties entered evidence into the fact record, R.354–63, and VADOC called one witness, its former FOIA officer Gabriel Fulmer. R. 363–77.

At the conclusion of the February 2024 Merits Hearing, the circuit court ordered VADOC to submit the requested records for *in camera* review. R.432–33. On February 29, 2024, VADOC filed an answer to Business Insider’s petition, asserting three additional VFOIA exemptions for the first time:

- (i) Virginia Code § 2.2-3705.5(1), which exempts from mandatory disclosure “[h]ealth records, except that such records may be personally reviewed by the individual who is the subject of such records” (the “Health Records Exemption”);
- (ii) Virginia Code § 2.2-3706(D), which exempts from mandatory disclosure certain “noncriminal records” held by public bodies engaged in emergency services or criminal law enforcement activities (the “Non-Criminal Records Exemption”); and
- (iii) Virginia Code § 2.2-3706(B)(10), which exempts from mandatory disclosure “[t]he identity of any victim, witness, or undercover officer, or investigative techniques or procedures” (the “Victim Identity Exemption”).

R.156. VADOC’s bases for those exemptions were not provided for several more weeks, until it filed a response brief on March 22, 2024. R.166-89. VADOC also argued, for the first time, that the doctrine of accord and satisfaction “operates as an additional equitable bar” to the requested records. R.172.

VADOC began its *in camera* production on March 13, 2024. R.159. It represented that its initial *in camera* production included incident reports for each of the twelve bites identified by Business Insider, as well as bite reports for some of those twelve incidents. R.159.⁵ On March 22, 2024, VADOC made a second *in camera* production; it represented that its second *in camera* production was comprised of 65 videos documenting 42 dog bites. VADOC stated that it did not produce video of bites before 2019, because “when investigators attempted to retrieve responsive videos from this time period for submission to the Court, they discovered that the external hard drive had been corrupted.” R.164.

On September 5, 2024, the circuit court granted Business Insider’s petition for mandamus, ordering the release of the requested records but permitting limited redactions. R.311-16. Specifically, the court found that VADOC could “exercise its discretion to redact” portions of the written records containing “the names and inmate identification number of any inmates, the names and identifying

⁵ VADOC represented that bite reports did not exist for some of the twelve incidents. R.161.

information of the K9s, and ... the names of any VADOC staff involved in the incident.” R.313. It held that these limited portions of the written records were exempt under the Records of Persons Imprisoned, Safety of Government Buildings, “and/or” the Personnel Information exemptions. *Id.* The court rejected the application of the Health Records, Victim Identity, and Non-Criminal Records Exemptions, finding that VADOC had “failed to demonstrate by a preponderance of evidence” that these exemptions applied. *Id.*

Similarly, the court ordered the release of the requested recordings but permitted VADOC to withhold “all but the single most direct camera angle” under the Safety of Government Buildings Exemption. R.314. The court permitted VADOC to blur the faces of certain individuals in the video. R.314. And the court also found that VADOC failed to carry its burden to prove the applicability of the Victim Identity and Non-Criminal Records Exemptions to the video footage. R.314-15. Finally, the court rejected VADOC’s arguments of unclean hands and accord and satisfaction, finding that any claim of accord and satisfaction had been waived and the doctrine of unclean hands was inapplicable. R.312-13.

E. The circuit court denied Business Insider’s motion to recover its reasonable costs and attorney fees after it prevailed.

Business Insider sought recovery of its reasonable costs and fees under Virginia Code § 2.2-3713(D). *See* R.10, 246–60 (May 15, 2024 application

arguing that Business Insider satisfied VFOIA's three-pronged standard for fee recovery and containing documentation supporting a recovery of \$28,603.90).

VADOC conceded that the amount sought by Business Insider was reasonable and that Business Insider would be entitled to fees if the judgment was left undisturbed; the agency asked for the fee determination to be stayed pending appeal. R.301-03. The circuit court nonetheless denied Business Insider's application to recover fees without analysis. R.315.

ARGUMENT

I. The video and written reports requested by Business Insider are not exempt under the Records of Persons Imprisoned Exemption. (VADOC AOE 1–2, 4–5).

The circuit court rejected VADOC's primary contention, namely, that Virginia Code § 2.2-3706(B)(4) permits the agency to withhold both sets of public records requested by Business Insider, in their entirety. R.313–14. VADOC's assignments of error with respect to this exemption ask this Court to either overturn the circuit court's fact-finding (VADOC AOE 1, 4) or depart from the General Assembly's clear instructions regarding redaction and statutory construction (VADOC AOE 2, 5). Neither outcome is warranted.

A. The circuit court engaged in fact-finding and correctly determined that the Records of Persons Imprisoned Exemption was largely inapplicable to the requested records. (VADOC AOE 1, 4).

Standard of review. VADOC’s first and fourth assignments of error challenge the circuit court’s fact-finding. At the circuit court VADOC held the burden of proving by a preponderance of evidence that its asserted exemptions applied. Va. Code § 2.2-3713(E). This Court “give[s] deference to the trial court’s factual findings and view[s] the facts in the light most favorable to the prevailing part[y],” while reviewing “the trial court’s application of the law to those facts de novo.” *Hawkins v. Town of S. Hill*, 301 Va. 416, 424 (2022) (cleaned up). Findings of fact are to be given deference “unless ‘they are plainly wrong or without evidence to support [them].’” *Suffolk City Sch. Bd. v. Wahlstrom*, 302 Va. 188, 205 (2023) (quoting Va. Code § 8.01-680).

1. VADOC has offered no reason for this Court to disturb the circuit court’s fact-finding.

The circuit reviewed the requested video and written reports *in camera*, heard the testimony of VADOC’s own witness, received documentary evidence, and determined that only limited portions of the records could be redacted. R.313-14. VADOC has not shown that these findings were “plainly wrong or without evidence.” *Suffolk City Sch. Bd.*, 302 Va. at 205.

At the February 2024 Merits Hearing, the circuit court heard the testimony of Gabriel Fulmer, VADOC’s FOIA Officer in 2023. R.364–77. This testimony—which was the bulk of VADOC’s evidentiary showing—was of limited value. Fulmer stated that internal incident reports (as opposed to bite reports) are stored in an inmate database, R.371, but VADOC at no point argues that its storage practices should control the applicability of the Records of Persons Imprisoned Exemption, R.376–77; Appellant’s Br. 22. Fulmer also restated his initial determination that the requested records were encompassed by the exemption. R.368-69. VFOIA forecloses any probative value of that determination; it states explicitly that “[n]o court shall be required to accord any weight to the determination of a public body as to whether an exclusion applies.” Va. Code § 2.2-3713(E).

Importantly, after receiving party evidence at the February 2024 Merits Hearing, the circuit court reviewed the requested records *in camera*. Following that review, the circuit court concluded that neither the written reports nor the surveillance videos could be entirely withheld under § 2.2-3706(B)(4). R.496–97; R.313-14. VADOC repeatedly argues that the entirety of every requested video and written report can be withheld because they are “specific records pertaining to specific incidents involving specific inmates.” R.371, 378; *see also* Appellant’s Br. 19, 21-22. But this description ignores what the circuit court determined

through its careful consideration of evidence—that not all information within each responsive public record pertains to specific inmates at all. *See* R.582-89.

Beyond that, Fulmer’s testimony was counterbalanced by the documentary evidence offered by Business Insider at the February 2024 Merits Hearing. In fact, even a cursory glance at a sample bite report entered into evidence by Business Insider shows a greater focus on the dog than the inmate—relaying a dog’s name, identification number, discipline, status, location, handler name, handler rank, canine date of birth, rabies tag number and expiration and a narrative of the dog and VADOC employee’s action written by the VADOC employee. R.582, 355.

Similarly, incident reports like that entered into evidence by Business Insider document *VADOC’s* decision to use canine force. R.584, 355. These reports document officer observations (“I observed ... fighting”), officer responses (“I yelled three warnings”) and canine actions (“K-9 Blitz engaged [an inmate’s] right hip”). R.584. Inmate information is hardly as central as VADOC claims.

The same is true with respect to the requested videos. As demonstrated in the video footage entered into evidence by Business Insider, R.355–56, 590, prison surveillance is not created to document an individual inmate; rather the deployment of a dog is captured in general surveillance footage. R.430. As the circuit court correctly found, the footage requested by Business Insider relates primarily to VADOC’s use of dogs and the actions of its own employees. R.495–97, 500–501,

R.314. Accordingly, the circuit court’s finding that VADOC must provide access to most portions of the written reports, and some portions of the video was neither wrong nor without evidentiary support.

2. VADOC has not identified a legal error with the circuit court’s application of the Records of Persons Imprisoned Exemption that is at odds with its judgment.

a. Affirmance of the circuit court’s decision would be consistent with *National Public Radio v. Virginia Department of Corrections*.

In a recent unpublished opinion, *National Public Radio v. Virginia Department of Corrections*, No. 1669-23-2, 2025 WL 375902 (Va. Ct. App. Feb. 4, 2025), this Court affirmed a judgment finding that the Records of Persons Imprisoned Exemption permitted VADOC to withhold a different set of public records. That decision—affirming an earlier determination by the same circuit court judge—is not inconsistent with the circuit court’s judgment in this case, because the information sought in the two cases differs significantly.⁶

In *National Public Radio*, the Court found that VADOC was entitled to exercise its discretion to withhold audio recordings “made during executions

⁶ A notice of appeal seeking the Supreme Court’s review has been filed in *National Public Radio*. Notice of Appeal, *Nat’l Pub. Radio v. Va. Dep’t of Corr.*, No. 1669-23-2 (Va. Ct. App. Mar. 5, 2025). Business Insider does not argue or concede that the construction of the Records of Persons Imprisoned Exemption in *National Public Radio* was correct, only that the judgment in the instant matter is consistent with this Court’s affirmance of the *National Public Radio* judgment.

conducted in Virginia.” *Id.* at * 2. The Court noted that the records could “fairly be described as being ‘of’ an incarcerated person, as each recording is specific to one inmate, and the DOC created and maintains these recordings *solely to document that inmate’s execution.*” *Id.* (emphasis added). That key factual predicate—that the information sought in *National Public Radio* was made to document VADOC *carrying out a prisoner’s sentence*—is not present in, or analogous to, the information sought in this case. Indeed, this Court in *National Public Radio* deferred to the circuit court’s “express[] f[inding] that the entirety of each audio recording and narration related to the imprisonment of an inmate.” *Id.* at *3. In this case, however the same circuit court reviewed the requested records and reached the opposite conclusion. R.311–16. Its fact-finding is entitled to the same deference.

The information in the written reports requested here was created or compiled to track dog usage and VADOC action. R.545 (“The Canine Officers shall use DINGO to maintain daily and current records of each canine under their control, recording training, care of dogs, and significant events.”).⁷ The requested records reflect the lead-up and aftermath of VADOC’s discretionary decision-making. R.549 (Internal Incident Reports should include “[a] synopsis of incident

⁷ Bite reports are not even necessarily centered on inmates—they are completed when any person is bitten, including employees or visitors. R.545.

(i.e. the type of force used, control techniques employed, methods of restraint, areas of the body impacted, and when applicable, the type of weapon(s), devices, and/or canine used).”). The information contained in these records are centered on the canine and the canine officer. *See, e.g.*, R.586 (bite report by VADOC employee, stating, “I responded,” “I observed,” “I yelled” and “I advised.”), R.584 (incident report by VADOC employee, stating “I responded,” “I instructed,” “I remained.”). Similarly, surveillance recordings are generally maintained in a prison, and are not created to document a “specific inmate.” Indeed, this footage can depict multiple inmates,⁸ and the creation of the footage is not connected to any specific inmate. *See* R.430 (statement of VADOC counsel explaining to the circuit court that “the surveillance camera footage ... was a continuously recording system”).

Moreover, this case implicates a statutory clause not construed in *National Public Radio*. Specifically, the circuit court’s decision below involved its determination that the requested records did not “relate to the imprisonment” of an inmate. The circuit court reasoned that records related to an inmate’s imprisonment are those that specifically relate “directly to the imprisonment and

⁸ *See* R.496. (describing footage in which “an individual is on some stairs, and there’s another person on top of that”); R.116 (still from video footage of a canine biting a prisoner, featuring multiple inmates).

the carrying out of lawful orders inside the prison that [are] directly related to the sentence received.” R.387 (“[P]art of the reason that the Court ruled as it did with regard to the death penalty re[cordings] was because from the Court’s perspective they all related to ... the imprisonment and the carrying out of lawful orders inside the prison. ... Here, the Court has some difficulty in finding that these are related to the imprisonment because it doesn’t necessarily have any direct implication as it relates to the sentence received.”).

The circuit court’s construction comports with the plain meaning of “imprisonment,” which is “a penalty of violating a criminal law,” consisting of “confine[ment] or physical[] restrict[ion] [of] one’s personal liberty, usually in a jail or prison,”⁹ or, similarly, “[t]he act of confining a person in a penal institution such as a jail or prison *for the purpose of serving a sentence imposed by a court.*”¹⁰ The treatment of inmates memorialized in the requested records is not connected to the legal sentence itself, but rather VADOC’s discretionary exercise of force. *E.g.*, R.584 (relaying decision-making process to deploy a dog). This Court should

⁹ *Imprison*, Legal Info. Inst., <https://perma.cc/PN6N-CYXK> (last visited May 21, 2023).

¹⁰ United States Sentencing Commission, “Glossary of Federal Sentencing-Related Terms,” <https://www.ussc.gov/education/glossary> (last visited Feb. 26, 2025) (emphasis added).

defer to the circuit court's determination that the records requested by Business Insider in this case do not "relate to the imprisonment." Va. Code 2.2-3706(B)(4).

b. In the alternative, VADOC's statutory construction arguments fail because the terms "records of persons imprisoned" and "related to the imprisonment" must be narrowly understood.

Despite VADOC's contention that the Records of Persons Imprisoned Exemption is sufficiently "unambiguous," "broad," and "categorical" to fully apply to the requested records, Appellant's Br. 14, 18, 20, VFOIA itself and the canons of statutory construction mandate a narrow reading of this exemption as a matter of law. Va. Code §§ 2.2-3700(B), -3704.01. While the Court need not reach the below argument to affirm the circuit court's judgment, a narrower statutory interpretation than that adopted by this Court in *National Public Radio* can also explain, in the alternative, why the requested records cannot be withheld in full.

The meaning of statutory terms in VFOIA's exemptions must "be narrowly construed" and the statute as a whole must be construed in a manner to "to promote an increased awareness by all persons of governmental activities and afford every opportunity to citizens to witness the operations of government." Va. Code § 2.2-3700(B).

The term “records of persons imprisoned” is ambiguous because the word “of” may be “understood in more than one way.” *Brown v. Lukhard*, 229 Va. 316, 321 (1985); *see Nat’l Pub. Radio*, No. 1669-23-2, 2025 WL 375902, at *2 (recognizing that “[o]f” has many uses”). Virginia courts frequently turn to dictionaries to determine the plain meaning of a statutory phrase, *Tomlin v. Commonwealth*, 888 S.E.2d 748, 756 (Va. 2023), and several definitions could possibly apply here. For example, “of” can be used as “a function word to indicate belonging or a possessive relationship.”¹¹ Or it could mean “by” as an indication of authorship, as in the “plays of Shakespeare.”¹² These narrow meanings are consistent with how many FOIA exemptions use the phrase “records of”—such as delineating “*records of* educational institutions.” Va. Code § 2.2-3705.4 (emphasis added); *see also* Va. Code § 2.2-3706(B)(3) (“[*r*]ecords of local law-enforcement agencies.”) (emphasis added). Such language clearly refers to information authored or possessed by a specific agency, not to any record that is *about* that agency. *See, e.g., Bank of Am., N.A. v. Caulkett*, 575 U.S. 790, 796 (2015) (courts

¹¹ *Of*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/of> (last visited February 16, 2025); *see also Of*, Cambridge Dictionary, <https://dictionary.cambridge.org/us/dictionary/english/of> (February 16, 2025) (defining “of” as a word “used to show possession, belonging, or origin”).

¹² *Of*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/of> (last visited February 16, 2025) (also defining “of” to “indicate origin or derivation”).

“are generally reluctant to give the same words a different meaning when construing statutes”).

But as incarcerated individuals do not author or retain physical possession of records held by VADOC, a similar but more apt understanding of the term in this context is to indicate “origin or source,” “the thing, place, or person from which or whom something originates, comes, or is acquired or sought.”¹³ Under this meaning, the exemption would describe information derived from inmates themselves, as opposed to information drawn from agency action. While it is true that “of” could broadly mean “about,” “connected with,” or “as concerns,” *see* Appellant’s Br. 15, a reader must first bypass the narrower definitions Business Insider describes above to settle on this particularly broad meaning.¹⁴ And VFOIA provides clear instruction regarding how this tension should be resolved—acceptance of the narrower meaning. Va. Code § 2.2-3700(B).

¹³ *Of*, Oxford English Dictionary, <https://www.oed.com/dictionary/of> (last visited February 25, 2025)

¹⁴ *See Of*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/of> (last visited February 16, 2025) (listing “about” as definition “5(a)”, or the tenth possible meaning of “of”); *Of*, Cambridge Dictionary, <https://dictionary.cambridge.org/us/dictionary/english/of> (February 16, 2025) (listing “about” as definition “C1”, or the ninth possible meaning); *Of*, Oxford English Dictionary, <https://www.oed.com/dictionary/of> (last visited February 25, 2025) (listing “about” as the twenty-fifth possible meaning).

As such, the phrase “records of persons imprisoned” indicates information derived from an inmate’s exercise of personal autonomy.¹⁵ VFOIA is clear that the exempted records here are of *persons* rather than of *VADOC*. In contrast, the exemptions before and after the Records of Persons Imprisoned Exemption refer to records “of local law-enforcement agencies” and records “of law-enforcement agencies.” Va. Code §§ 2.2-3706(B)(3), 2.2-3706(B)(5). And in its role as custodian VADOC maintains physical possession of personal records reflecting autonomous actions of individual inmates, such as “Educational and Vocational Records” or “personal property inventories,” within an inmates’ VADOC file.¹⁶ VADOC also records inmate phone calls and copies certain types of incoming and outgoing mail. *See* Virginia Dep’t of Corr., Operating Procedure No. 803.1, at 14–15 (Apr. 1, 2024) (policy on records of prisoner correspondence);¹⁷ Virginia Dep’t of Corr., Operating Procedure No. 803.3, at 9–10 (Mar. 1, 2023) (policy on records

¹⁵ The Supreme Court has construed the Personnel Information Exemption along a similar line. *See Hawkins*, 301 Va. at 432 (“the only content exempt from disclosure is that which is tied to the employment of the individual in some way and which otherwise would not be disclosed to the employer” because it is “private.”).

¹⁶ *See* Va. Dep’t of Corr., Operating Procedure 050.1 at 6–9 (May 1, 2023), <https://perma.cc/6KRJ-GPVX>.

¹⁷ Available at <https://perma.cc/DYB9-5JYS>.

of inmate phone calls).¹⁸ These are the types of records contemplated by Virginia Code § 2.2-3706(B)(4). While this information is in VADOC’s possession, it does not reflect “action taken [by] any level of government.” Va. Code § 2.2-3700(B). In contrast, *records of VADOC*—meaning information derived from VADOC’s own actions—is key to public oversight and exist outside this exemption’s scope. The precise and narrow meaning articulated above would preserve that distinction.

B. The Records of Persons Imprisoned Exemption, like all other exemptions, is subject to VFOIA’s redaction requirement. (VADOC AOE 2, 5).

Standard of Review. Issues of statutory interpretation are reviewed *de novo*. *Hawkins*, 301 Va. at 424.

Argument. VADOC cannot side-step the circuit court’s fact-finding by arguing that the Records of Persons Imprisoned Exemption permits it to withhold, in full, every public record that contains *any* information subject to that exemption. *See* Appellant’s Br. 27–32. At the threshold, VADOC has no basis to assume that any specific record contains redactions subject to that exemption. *See* R.313–14, ¶¶ 13, 14, 20 (redactions ordered by the circuit court pursuant to any of three possible exemptions). Reversal is thus not possible on the grounds set forth in VADOC AOE 2 and 5.

¹⁸ Available at <https://perma.cc/5RE8-4Q2R>.

More substantively, VFOIA was amended in 2016 to foreclose precisely the argument VADOC makes here:

No provision of this chapter is intended, nor shall it be construed or applied, to authorize a public body to withhold a public record in its entirety on the grounds that some portion of the public record is excluded from disclosure by this chapter or by any other provision of law. ...

Va. Code § 2.2-3704.01 (emphasis added). This provision's emphasis on *portions of public records* makes clear that there are no categorical exemptions from public disclosure; agencies can withhold only the specific portions of a requested record an exemption reaches. *Id.*; see, e.g., *Citizens for Fauquier Cnty. v. Town of Warrenton*, 81 Va. App. 363, 375 (2024) (referencing the existence of both exempt and non-exempt information within one record).

The General Assembly enacted Va. Code § 2.2-3704.01 to override the Virginia Supreme Court's prior holding that VFOIA imposes no requirement of partial disclosure or redaction for documents containing information covered by one of the enumerated exemptions. *Hawkins*, 301 Va. at 428 ("In 2015, this Court decided *Virginia Dept. of Corrections v. Surovell*, holding that VFOIA contained no requirement of redaction or partial disclosure where only part of a document is exempt. 290 Va. 255, 268-69. In response the General Assembly enacted a right of redaction, intended to reverse this Court's decision."). While VADOC claims that the words "all records" within the exemption deviates from the redaction

requirement, it conflates the defined term “public records,” *see* Va. Code § 2.2-3701, with the term “records,” which is not defined. In view of section 2.2-3704.01, “records” is better understood to mean “portions of public records” or “information.” Moreover, section 2.2-3704.01 forecloses VADOC’s argument entirely, because it expressly modifies the meaning of *all other* exemptions.

The non-binding analysis in FOIA Council Advisory Opinion AO-03-19 (Apr. 3, 2019) (“FOI AO-03-19”) does not suggest otherwise. *See* Appellant’s Br. 28–29. That FOIA Council opinion concluded that even after removing a student’s name from a test score, as the remaining score still directly reflected an individual student’s academic work, it was independently exempted as scholastic information. FOI AO-03-19. This does not suggest that certain exemptions are not subject to redaction, only that redaction is sometimes insufficient; a test score itself—even if anonymized—is “information directly related to a student.” *Id.* Likewise, the other FOIA advisory opinion and the Attorney General opinion VADOC cites are unavailing.¹⁹ *See* Appellant’s Br. 17. Those opinions predate the enactment of Va.

¹⁹ The scant case law VADOC cites assess only the application of the Records of Persons Imprisoned exemption to information of deceased inmates—an issue not relevant to this case. *See Estate of Cuffee v. City of Chesapeake*, No. 2:08-cv-329, 2009 U.S. Dist. LEXIS 144786 (E.D. Va. Aug. 4, 2009) (deciding whether withholding records under the exemption constituted “misconduct” to justify equitable tolling of statute of limitations); *Dallas v. Dep’t of Corr.*, No. CL21-5564 (Norfolk Cir. Ct. Nov. 29, 2021) (deciding that exemption includes public records

Code § 2.2-3704.01.²⁰ They are also not binding and are not cleanly applicable to the records at issue here.²¹ In fact, this Court rejected a similar statutory construction offered by VADOC in *National Public Radio*.²² Rather than acquiescence, the addition of Va. Code § 2.2-3704.01 to VFOIA indicates the legislature’s direct rejection of VADOC’s strained interpretation of the exemption.

Finally, VADOC’s argument that blurring faces of its employees in the video would constitute the creation of a new record is meritless and was not raised in the circuit court. *Compare* Appellant Br. 33–34 with R.497–98. “[V]ideo editing has become commonplace in [public records] litigation,” and “courts have required the government to edit videos to obscure identifying information in order to comply with [federal] FOIA.” *Stahl v. U.S. Dep’t of Justice*, No. 19-cv-4142, 2022 WL 742872, at *4 (E.D.N.Y. Mar. 11, 2022) (collecting cases); *see also Evans v. Fed. Bureau of Prisons*, 951 F.3d 578, 587 (D.C. Cir. 2020). And

created or maintained “during the pendency of an individual’s imprisonment,” regardless of whether inmate is now deceased). *See* Appellant’s Br. 16. s

²⁰ 1987-88 Op. Att’y Gen. Va. 37 (entered in 1988); FOIA Council Advisory Opinion AO-02-11 (July 21, 2011).

²¹ *See Beck v. Shelton*, 267 Va. 482, 492 (2004) (noting opinion of the Attorney General not binding on the Supreme Court of Virginia).

²² *Compare National Public Radio v. Virginia Department of Corrections*, No. 1669-23-2, 2025 WL 375902, at 7–8 (Va. Ct. App. Feb. 4, 2025), *with id.*, Br. of Appellees 27–28 (Feb. 26, 2024).

contrary to VADOC's framing, in the sole case it cites the government agency *provided* the plaintiff with three videos with blurred faces. *Phillips v. United States Dep't of Homeland Sec.*, No. 1:19-CV-0928 (CJN), 2024 WL 1239704, at *1 (D.D.C. Mar. 22, 2024).

II. The circuit court engaged in fact-finding and correctly concluded that the Safety of Government Buildings Exemption did not permit VADOC to withhold *all* camera angles of the video footage requested by Business Insider. (VADOC AOE 3).

Standard of review. The provision of VFOIA that VADOC terms the “Safety of Government Buildings Exemption” only applies to specific types of information, and such information can only be withheld if a showing of potential harm is made:

14. Information contained in ... other records *that reveal any of the following*, the disclosure of which *would jeopardize the safety or security* of any person; governmental facility, building, or structure or persons using such facility, building, or structure ... :

a. Critical infrastructure information or the location or operation of security equipment and systems of any public building ... ; ...

c. Surveillance techniques, personnel deployments, alarm or security systems or technologies, or operational or transportation plans or protocols ...

Va. Code § 2.2-3705.2(14) (emphasis added).²³ VFOIA's redaction requirement applies here, as it does to all exemptions. Va. Code § 2.2-3704.01. Thus,

²³ Only the categories of information in section 2.2-3705.2(14)(a) and (c) are potentially at issue. Appellant's Br. 22-23.

VADOC's burden was to demonstrate by a preponderance of evidence that *all* information in the video sought by Business Insider, if disclosed, would both (i) "jeopardize" safety, meaning that it would cause a "reasonable expectation" of potential danger, *Virginia Dep't of Corr. v. Surovell*, 290 Va. 255, 265 (2015) and (ii) "reveal" the information contemplated in sections 2.2-3705.2(14)(a) or (c). *See* Appellant's Br. 22–23 (identifying subsections 14(a) and (c)).

This Court "give[s] deference to the trial court's factual findings and view[s] the facts in the light most favorable to the prevailing part[y]," while reviewing "the trial court's application of the law to those facts de novo." *Hawkins*, 301 Va. at 424 (cleaned up). Findings of facts are to be given deference "unless 'they are plainly wrong or without evidence to support [them].'" *Suffolk City Sch. Bd.*, 302 Va. at 205.

Argument. The circuit court did not err in finding that VADOC failed to demonstrate a reasonable expectation of potential danger from the release of one camera angle per surveillance recording. R.313. Additionally, and in the alternative, VADOC failed to demonstrate that the information contemplated in Va. Code 2.2-3705.2(14)(a) or (c) would be "revealed."

A. VADOC failed to demonstrate that providing Business Insider with one camera angle per recording from the requested 2017–2022 security footage would “jeopardize” safety.

VADOC relies on attorney argument—devoid of citation to the fact record—that disclosing even one camera angle of each incident contemplated in Business Insider’s request would jeopardize safety by revealing blind spots in prison surveillance systems. Appellant’s Br. 24–26. It states, in conclusory fashion, that this knowledge could lead to violence or other activities that could jeopardize the safety of individuals in a building or the security of the building itself. Appellant’s Br. 24-25. The circuit court was well aware of VADOC’s position in that regard; it chose to review the records *in camera* to determine whether VADOC demonstrated that limiting video to one camera angle per incident would address that concern. *See, e.g.*, R.495-96.

At the February 2024 Merits Hearing, the circuit court considered if restricting production of videos to a single camera angle per incident would effectively mitigate any reasonable expectation of potential risk:

“THE COURT: [W]ouldn’t it be true that if you were to release the one view, not all of the views, that there would be very little learned about the capability on that [housing area] of recording all of it because there’s not enough information given by the one camera view?”

R.431. It answered this inquiry for itself through the ample other evidence in the case, including:

- The testimony of VADOC FOIA Officer Gabriel Fulmer. (R.372).
- *In camera* review of all preserved camera angles of the requested videos. (R.314, 429-31).
- Video surveillance footage, of the same kind as requested, previously released by VADOC in public court filings. (R.94-95, 115, 356).
- Video footage depicting the interior and operation of Red Onion in the HBO documentary *Solitary: Inside Red Onion State Prison* (2016). (R.360).
- Video footage depicting the interior and operation of Red Onion in the VADOC-produced YouTube video *Red Onion State Prison*. (R.117, 357).

In other words, the circuit court made the factual determination that VADOC had failed to carry its burden in demonstrating that producing certain limited footage would reveal information that would jeopardize safety or security. R.314.

Unable to point to any error in the circuit court’s fact-finding, VADOC argues that it was entitled to special deference that the court “usurped.”

Appellant’s Br. 26. But that is not the case. VFOIA was explicitly amended to repudiate any heightened deference articulated in *Surovell*. 2016 Va. Acts chs. 620, 716 (Va. Code § 2.2-3713(E)) (“No court shall be required to accord any weight to the determination of a public body as to whether an exclusion applies.”); *Citizens for Fauquier Cnty.*, 81 Va. App. at 376 (recognizing that the amendment “superseded” the approach in *Surovell*); *see also* Sen. Scott A. Surovell, 02/16/2016 Senate Proceedings, Richmond Sunlight (Feb. 16, 2016) at 1:30

(Statement by sponsor of bill: “The scales are justice are not weighed to the government’s side. It’s a balanced scale, they look at it evenly.”).²⁴ Appellant’s “deference” argument therefore misstates the law.

But even if the agency were entitled to heightened deference, VADOC would still have failed to satisfy its burden of establishing risk. Unlike in *Surovell*, VADOC offered no expert testimony in this case regarding prison security for the circuit court to consider. R.317 (sustaining objection to opinion testimony regarding prison security). In fact, VADOC’s only witness offered scant evidence of any risk at all. *Compare Surovell*, 290 Va. at 255 (agency’s Chief of Corrections Operations provided extensive opinion testimony as to the risks presented by disclosure), *with* R.372 (testimony of Fulmer regarding his secondhand understanding of “blind spots” and “staff deployments, things of that nature”).²⁵ Fulmer’s bare testimony was the only evidence VADOC provided with respect to a safety risk.²⁶ It simply failed to demonstrate a reasonable expectation of risk, even under a deferential standard.

²⁴ Available at <https://www.richmondsunlight.com/minutes/senate/2016/02/16/> (last visited Jan. 20, 2024).

²⁵ Business Insider reasserts its objection to this testimony, which is outside of Fulmer’s personal knowledge. *See* R.372.

²⁶ VADOC’s attorney statement that “as to some incidents, there is only a single camera angle *preserved*,” Appellant’s Br. 25 (emphasis added), is irrelevant. Even if true, the circuit court made a determination on the fact record before it that

B. Producing only a single camera angle from each video would not “reveal” any information contemplated by the Safety of Government Buildings Exemption.

Additionally, and in the alternative, production of the records sought would not “reveal” any information within the scope of the Safety of Government Buildings Exemption. Va. Code § 2.2-3705.2(14) (exempting “information contained” in records “that reveal[s]” an enumerated type of sensitive information).

First, the requested records would not *reveal* anything. VADOC has itself published videos that depict its surveillance system on YouTube, R.118 (screenshot of YouTube footage depicting Red Onion security cameras), 357–61, 390 (discussion of YouTube footage at February 2024 Merits Hearing); allowed an HBO documentary to depict the video surveillance system, R.360 (entering *Solitary: Inside Red Onion State Prison* (HBO 2016) into evidence); and filed footage from the video surveillance system itself in multiple dockets accessible by the general public, R.116 (still image from public docket), 590 (exhibit consisting of video surveillance obtained from public docket). Releasing the requested records would therefore not “reveal” anything new.²⁷

Virginia Code § 2.2-3705.2(14) is not implicated by the release of a single camera angle per incident.

²⁷ “To make (something *secret or hidden*) publicly or generally known.” *Reveal*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/reveal> (last visited March 6, 2025) (emphasis added).

Even if new information would be revealed, it would not fall under the ambit of this exemption. The Safety of Government Buildings Exemption was originally enacted in the years following the September 11, 2001, terrorist attacks and addressed “the safety of ... [a] building or its occupants in the event of terrorism or other threat to public safety.” 2003 Va. Acts 891; Va. Code § 2.2-3705(A)(39) (2004). The four categories now enumerated in the exemption—and again, VADOC has waived argument as to all but two, Va. Code § 2.2-3705.2(14)(a) and (c)—were originally placed within a subsection targeting “plans and information to prevent or respond to terrorist activity.” 2003 Va. Acts 704; *see also* Va. Code § 2.2-3705(A)(57) (2004) (repealed and recodified under new numbering by 2004 Va. Acts 690).

Within section 3705.2(14)(a), the statutory meaning of “critical infrastructure information” is coextensive with 6 U.S.C. § 671, a definitions provision of the Homeland Security Act. Va. Code § 2.2-3705.2(14). This federal statute was designed to address international terrorism, *see generally*, 6 U.S.C. § 111(b), and defines “critical infrastructure” as

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

42 U.S.C. § 5195c(e); *accord* 6 U.S.C. § 101(4). By its own terms, “critical infrastructure information” identifies a *class of infrastructure*—systems and assets

so vital that their disclosure would risk national (or Commonwealth) security.

Release of footage from a single camera angle poses no such risk.

Where general terms like “security equipment and systems” and “surveillance techniques” are grouped alongside more specific terms, the canon *noscitur a sociis* instructs that the “general words are limited by the specific and will be construed to embrace only objects *similar in nature* to those things identified by the specific words.” *See Tomlin v. Commonwealth*, 302 Va. 356, 369 (2023) (emphasis in original). All the specific examples named in the exemption, from “fire protection equipment” to “security plans and measures” to “transportation plans or protocols” describe frameworks which, if substantially exposed, could be exploited in a terrorist attack. Va. Code. § 2.2-3705.2(14). Thus, the terms “security equipment” and “surveillance techniques” are best understood to refer to the overall networks of surveillance equipment and techniques.

Although this Court can and should affirm the circuit court’s finding on the grounds that VADOC failed to show a reasonable expectation of potential harm, it can reach the same conclusion, in the alternative, by recognizing that the Building Security Exemption has a specific reach. Revelation of a single camera angle would not “reveal” a framework vulnerable to terrorism, and so does not implicate information contemplated by the exemption.

III. VADOC failed to carry its burden in demonstrating the applicability of the Victim Identity, Health Records, and Non-criminal Records Exemptions.

A. VADOC made no fact showing for the exemptions that it asserted after the February 2024 Merits Hearing. (VADOC AOE 6, 7, 8, 9, 10).

Standard of Review. VADOC’s sixth, seventh, eighth, ninth, and tenth assignments of error contend that the circuit court erred in holding that the agency failed to meet its burden to prove the application of the Victim Identity (Va. Code § 2.2-3706(B)(10)), Health Records (Va. Code § 2.2-3705.5(1)), and Non-Criminal Records (Va. Code § 2.2-3706(D)) Exemptions. Appellant’s Br. 3-5. The circuit court found that VADOC had “failed to demonstrate by a preponderance of the evidence” that the exemption applied. R.313-15. Such factual determinations are only erroneous if “plainly wrong or without support in the evidence.” *Hill v. Fairfax Cnty. Sch. Bd.*, 284 Va. 306, 313 (2012).

Argument. Appellant cannot establish error by the circuit court regarding the Victim Identity, Health Records, or Non-Criminal Records Exemptions because it did not make any factual demonstration—other than its *in camera* production—at all. VADOC attempted to substantiate these exemptions in its response brief to the petition for mandamus—which it filed *six weeks after* the February 2024 Merits Hearing. *Compare* R.323 (Feb. 14, 2024 Hearing Tr.) *with*

R.166-89 (Mar. 22, 2024 Response Br.).²⁸ In that brief, the only support for VADOC’s assertion that portions of the records in question could be withheld subject to the Victim Identity Exemption was a single paragraph of bare assertions and boilerplate recitations, lacking even a single citation apart from the exemption itself. *See* R.187. Argument as to the Health Records Exemption was similarly sparse. *Id.* And the Non-Criminal Records Exemption was addressed in just two sentences of briefing. *Id.* One of those sentences was nothing more than a recitation of the statute; in the other, VADOC asserted without elaboration, that disclosing “information about injuries and medical treatment” would jeopardize the privacy of inmates and officers.²⁹ *Id.*

As such, VADOC failed to meet its “burden of production.” *White v. Llewellyn*, 857 S.E.2d 388, 391 (Va. 2021) (“The burden of production ‘is the obligation to come forward with evidence to make a prima facie case.’”); Va. Code § 2.2-3713(E); Va. Sup. Ct. R. 2:301; *see, e.g., Citizens for Fauquier Cnty.*, 81 Va. App. at 386-87 (reversing for abuse of discretion the trial court’s application of an

²⁸ Even VADOC’s answer, where it asserted these exemptions for the first time, was filed well after the February 2024 Merits Hearing. R.151 (Feb. 29, 2024 Answer).

²⁹ The case VADOC cites construes a different statute, federal FOIA, and the government in that case proffered evidence in the form of multiple “affidavits and the testimony of two United States generals.” *See Cameranesi v. U.S. Dep’t of Def.*, 856 F.3d 626, 642 (9th Cir. 2017).

exemption when “there was no evidence in the record” that it applied, regardless of the trial court’s interpretation of the exemption); *see also Westmoreland Coal Co. v. Campbell*, 7 Va. App. 217, 222 (1988) (only after “the party with the burden of production meets this standard, he or she is entitled to have the finder of fact then determine whether he or she has met the applicable burden of persuasion.”).

B. The circuit court did not err by rejecting the exemptions VADOC asserted after the February 2024 Merits Hearing. (VADOC AOE 6, 7, 8, 9, 10).

Standard of Review. This court “give[s] deference to the trial court’s factual findings and view[s] the facts in the light most favorable to the prevailing part[y],” while reviewing “the trial court’s application of the law to those facts de novo.” *Hawkins*, 301 Va. at 424 (cleaned up).

Argument. Even assuming that VADOC had satisfied its burden of production, these exemptions do not apply to the requested records.

1. The Victim Identity Exemption does not apply to the requested records. (VADOC AOE 6, 9).

The Victim Identity Exemption applies to “[t]he identity of any victim, witness, or undercover officer, or investigative techniques or procedures.” VADOC argues that all individuals involved in bite incidents can be classified as either a “witness” or a “victim.” Va. Code § 2.2-3706(D); *see Appellant’s Br.* 35-38.

The “plain and ordinary meaning” of this exemption limits its application to a criminal investigatory context. *See Hawkins*, 301 Va. at 424-26. The exemption applies to “undercover officers” and “investigatory techniques,” and incorporates another statutory provision that applies to criminal investigations. *See* Va. Code § 19.2-11.2 (providing “any witness in a criminal prosecution ... or any crime victim” the ability to request nondisclosure of certain identifying information). “[W]hen one statute adopts a provision of another statute by specific reference, the effect is the same as if the adopting statute had itself spelled out the terms of the adopted provision.” *Tanner v. Commonwealth*, 72 Va. App. 86, 100 (2020) (cleaned up). VADOC’s use of dogs was permitted under Virginia law—and still is, in some circumstances. *See* Va. Code § 53.1-39.3. The agency cannot be permitted to imply that it was violating the law just to withhold public records reflecting its own actions.

2. The Health Records Exemption does not apply to the requested records. (VADOC AOE 8).

The Health Records Exemption exempts “health records” from public disclosure, Va. Code § 2.2-3705.5(1), and incorporates the definition of that term from another law. *See id.* (incorporating Va. Code § 32.1-127.1:03(B) (Health records means “any ... material maintained *by a health care entity* in the course of providing health services ... [and] 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.”) (emphasis added)).

The Health Records Exemption is inapplicable to the requested records because VADOC is not a healthcare entity, and so the requested records are not “maintained by a health care entity.” Va. Code § 32.1-127.1:03(B) (“‘Health care entity’ means any health care provider, health plan or health care clearinghouse”). Nor are the records maintained “in the course of providing health services.” *Id.* Rather, the records are maintained by a corrections agency in the course of prison administration. *See* R.33, 39-40 (VADOC Operating Procedures setting out protocols for maintaining bite and incident reports).

Indeed, because they are intended to memorialize dog deployment, the reports largely do not discuss medical treatment at all. *See, e.g.*, R.582–84, 588–89 (examples of incident and bite reports detailing the circumstances surrounding specific uses of canines but containing no mention of medical treatment). And to the extent that a specific report “narrates” medical treatment, Appellant’s Br. 44, that information is written *not* by a physician, and *not* in confidence, but by VADOC’s dog handlers. *See, e.g.*, R.585–87 (examples of bite reports describing “Circumstances of [the] Bite” from the perspective of the canine handler, followed by a description of “What Medical Attention was Received” as well as the name of a nurse or doctor that addressed the bite). The records therefore do not contain

information “acquired by [a] health care entity about an individual in confidence and in connection with the provision of health services,” Va. Code § 32.1-127.1:03(B), and fall outside the Health Records Exemption.

3. The Non-Criminal Records Exemption does not apply to the requested records. (VADOC AOE 7, 10).

The Non-Criminal Records Exemption, Va. Code 2.2-3706(D), allows “[p]ublic bodies ... engaged in criminal law-enforcement activities” to “withhold 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.” Va. Code § 2.2-3706(D). VADOC again argues that *Surovell* should be understood to impose heightened deference to the agency’s invocation of this exemption, Appellant’s Br. 40, but VADOC can point to no precedent for the imposition of that higher standard in this context, and as discussed *supra*, the General Assembly pointedly abrogated the deference contemplated in *Surovell*. See Va. Code § 2.2-3713(E); *Citizens for Fauquier Cnty.*, 81 Va. App. at 376.

In any event, the Non-criminal Records Exemption is inapplicable because VADOC is not “engaged in criminal law-enforcement activities” under Virginia Code § 2.2-3706(D). See AO-02-11, Virginia Freedom of Information Advisory Council (July 21, 2011) (“[VADOC] is not a law-enforcement agency ...

[VADOC] and corrections personnel are treated separately and often distinguished from law-enforcement agencies and officers [in Virginia statutes].”). Virginia statutes make clear that “law-enforcement officers” are “employee[s] of a police department or sheriff’s office ... who [are] responsible for the *prevention and detection* of crime and the enforcement of the penal, traffic or highway laws of the Commonwealth.” Va. Code § 9.1-101 (indicating that only VADOC employees “with internal investigations authority” satisfy this definition). *Id.* Elsewhere, VADOC is excluded from the list of agencies whose employees may be considered “law-enforcement officers.” *See* Va. Code. § 9.1-500. Indeed, Virginia law draws an explicit distinction between “law-enforcement officers” and “correctional officers.” *See* Va. Code § 19.2-81.2 (allowing correctional officers to “detain” someone suspected of violating a narrow class of crimes “for the purpose of summoning a law-enforcement officer”). Fundamentally, agencies engaged in “law-enforcement activities” work to prevent and investigate crimes. VADOC is more properly classified as a “criminal justice agency” with a “principal function” as the “administration of criminal justice.” Va. Code § 9.1-101 (defining “administration of criminal justice” as the “performance of any activity directly involving the ... correctional supervision, or rehabilitation of accused persons or criminal offenders”). Thus, the records VADOC makes and keeps, such as the records requested here, fall outside this exemption’s scope.

IV. VADOC’s equitable defenses fail because they do not reflect the content of the agreement between the parties and are not supported by the law and facts of the case. (VADOC AOE 11, 12).

Standard of review. VADOC’s eleventh and twelfth assignments of error present mixed questions of law and fact. *See Jessee v. Jessee*, 74 Va. App. 40, 50 (2021) (equitable doctrines have both “both legal and factual components”).

Appellate courts “give deference to the trial court’s factual findings and view[s] the facts in the light most favorable to the prevailing part[y],” while reviewing “the trial court’s application of the law to those facts de novo.” *Hawkins*, 301 Va. at 424 (cleaned up).

Argument. As a preliminary matter, the circuit court correctly found that VADOC’s defense of accord and satisfaction was waived because it was not raised at or prior to the February 2024 Merits Hearing. R.313 ¶ 9. Instead, accord and satisfaction was raised *after* the Merits Hearing. R.172-73. While the circuit court had allowed VADOC “an opportunity to submit or otherwise augment the record noting your objections” to any future ruling, it did not go so far as allowing the agency to raise wholly new equitable defenses. R.435.

That said, neither the doctrine of unclean hands nor that of accord and satisfaction would apply here:

First, the parties’ March 13, 2023, agreement expressly reserved Business Insider’s statutory right to submit future VFOIA requests. R.601–02. This

language was specifically negotiated by the parties. R.203; R.82. The request at issue in this case is exactly the type of “other or future FOIA requests” contemplated by the agreement. R.168. There is simply no inequitable conduct to justify application of Appellant’s defenses.

Second, VADOC overstates its case when it claims that accord and satisfaction “applies in any circumstance where there is a prior course of conduct between the parties that led to settlement of an active dispute.” Appellant’s Br. 46. VADOC’s cases on this defense do not demonstrate that it can apply to revoke a statutory right granted by government to its citizens; indeed, VADOC fails to cite a single case extending the doctrine of accord and satisfaction outside of the context of contract and tort. *See* Appellant’s Br. 46-47 (citing *Atkins v. Boatwright*, 204 Va. 450, 451 (1963) (claim predicated on a payment of \$600.00); *Owen v. Wade*, 185 Va. 118, 123-24 (1946) (claim regarding a \$4,250 deed); *Rorer Iron Co. v. Trout*, 83 Va. 397, 400 (1887) (claim predicated on \$50 payment to settle a lawsuit)).

But even if accord and satisfaction were to apply, “[a]n accord is a bar to subsequent actions only if performed.” *In re Koushel*, 6 Bankr. 315 (Bankr. E.D. Va. 1980). VADOC did not fully perform its obligations under the parties’ agreement. Specifically, it failed to produce numerous bite reports and internal incident reports contemplated by the parties’ agreement, necessitating submission

of the request at issue here. R.5, 78–80. Moreover, for accord and satisfaction to apply, there must be clear intent by both parties that the issue in question should be resolved by agreement. *See, e.g., John Grier Const. Co. v. Jones Welding & Repair, Inc.*, 238 Va. 270, 272 (1989) (“[A]n accord and satisfaction does not result unless ... such intention is clearly made known ... and accepted.”) (cleaned up). VADOC’s argument fails to account for that principle; the agreement here explicitly contemplates future VFOIA requests to VADOC from Appellees.

R.601–02.

V. Though the circuit court correctly held that VADOC was obligated to produce responsive records, it misconstrued the scope of several VFOIA exemptions in allowing the redaction of certain discrete information. (BI AOE 1, 2, 3, 4).

Standard of review. Business Insider’s first, second, third, and fourth assignments of error involve the application of law to fact, which is reviewed *de novo*. *Hawkins*, 301 Va. at 424.

A. The circuit court erred by permitting VADOC to redact the names and identification numbers of prisoners from its written reports. (BI AOE 4).

An inmate’s name is already matter of public record that does not convey any particular action by that individual. Likewise, inmate numbers are a VADOC record-keeping tool. As such, neither are “records of persons imprisoned ... relate[d] to the imprisonment,” Va. Code § 2.2-3706(B)(4). Moreover, *all* inmate names and numbers are published by VADOC itself. *See Inmate Locator*, Va.

Dep't of Corr., <https://vadoc.virginia.gov/general-public/inmate-locator/> (updated daily). The release of information that is already public will not jeopardize their safety and security, nor will it “reveal” any information contemplated in Virginia Code § 2.2-3705.2(14). And inmates are not government personnel; the personnel information exemption therefore does not apply. *See* Va. Code § 2.2-3705.1(1).³⁰

B. The circuit court erred by permitting VADOC to redact the names of dogs from its written reports. (BI AOE 2).

The Personnel Information Exemption cannot apply to portions of the requested records containing “the names and identifying information of the K9s ... involved in the incident.” R.313. This exemption does not cover non-human animals, but only “identifiable individuals” employed by the Commonwealth. *See* Va. Code § 2.2-3705.1(1). It applies to “persons employed by the government, or independent contractors, or volunteers in a government-run activity,” and a dog clearly falls outside this scope. *Hawkins*, 301 Va. at 426, 430 (defining personnel as “a body of persons employed in some service or government employees.”). Likewise, by the plain text of the statute, the names of dogs are not “records of persons imprisoned,” nor does their release implicate any safety or security concern in Virginia Code § 2.2-3705.2(14) by the plain text of that provision.

³⁰ VADOC has waived any argument that the Personnel Records Exemption applies to any information the circuit court ordered the agency to produce, as it failed to raise any such argument on appeal. Va. Sup. Ct. R. 5A:20(c)(1).

C. The circuit court erred by permitting VADOC to redact the names of VADOC’s dog handlers from its written reports. (BI AOE 1).

The Personnel Information Exemption also cannot apply to portions of the requested records containing “the names of [] VADOC staff involved in [an] incident.” R.313. The legislature has expressed in clear and unequivocal terms that the exemption does not apply to names of government employees. Va. Code § 2.2-3705.1(1) (no exemption “shall be construed as denying public access to ... records of the *name* ... [of] any officer, official, or employee of a public body”) (emphasis added). Indeed, this Court recently rejected an attempt to withhold a list of names of police officers, partially in recognition of the clear instruction in section 2.2-3705.1(1). *See Minium v. Hines*, No. 0157-24-2, 2025 WL 595786, at *3 (Va. Ct. App. Feb. 25, 2025). Likewise, by the plain text of the statute, the names of VADOC’s dog handlers are not “records of persons imprisoned,” Va. Code § 2.2-3706(B)(4), nor does that information fall into any category contemplated in Va. Code § 2.2-3705.2(14).

D. The circuit court erred by permitting VADOC to blur the faces of its dog handlers from the requested video. (BI AOE 3).

Finally, the Personnel Information Exemption cannot be read to exempt portions of the requested video records depicting “the faces of people employed by VADOC.” R.314. These recordings reflect actions of government employees within the scope of their employment, and thus actions of the government itself.

Cf. Patterson v. City of Danville, 301 Va. 181, 189-90 (2022). Depictions of VADOC personnel performing their job duties does not constitute private personnel information as a matter of law, as it is not disclosed by an employee. *See Hawkins*, 301 Va. at 432. By its plain text, the Records of Persons Imprisoned Exemption does not apply, because the dog handlers are not “persons imprisoned.” Va. Code § 2.2-3706(B)(4). And VADOC made no showing that the Safety of Government Buildings Exemption would apply to cover un-blurred images of its employees’ faces.

VI. The circuit court erred in denying Business Insider’s request for reasonable costs and attorney fees pursuant to Va. Code § 2.2-3713(D), because it substantially prevailed on the merits of its petition and VADOC did not contest the reasonability of its fee request. (BI AOE 5).

Standard of review. Business Insider’s fifth assignment of error presents a question of law, which appellate courts review de novo. Pursuant to Virginia Code § 2.2-3713(D), substantially prevailing petitioners “shall be entitled to recover reasonable costs ... unless special circumstances would make an award unjust.”

Argument. The circuit court failed to apply the law of VFOIA and the Virginia Supreme Court, which required it to (1) award reasonable fees absent any special circumstances, and (2) determine a reasonable fee amount. “To substantially prevail, a litigant need not have achieved all of his or her objectives in the litigation, but rather, must have been successful regarding the main object of his or her suit.” *Suffolk City Sch. Bd.*, 302 Va. at 215. When “the purpose of the

action is merely to force compliance with [VFOIA] by requiring the public body to produce the requested documents, then a finding by the circuit court that some documents were wrongfully withheld may satisfy [VFOIA's] requirement that the party 'substantially prevails on the merits.'" *Hill*, 284 Va. at 314-15.

Business Insider substantially prevailed on the merits of its mandamus petition. It brought the present action to force VADOC's compliance with VFOIA, and successfully obtained a writ of mandamus requiring VADOC to produce the records requested. R.311-16. This is uncontested by VADOC. R.301 ("If [the trial court's] decision is affirmed on appeal, without modification, VADOC recognizes that petitioners will have 'substantially prevailed on the merits of the case,' and will therefore be statutorily entitled to recover their reasonable costs and fees."). The circuit court found no special circumstances making the fee award unjust. R.315 ¶ 23.

The determination to award fees is mandatory when, as here, no special circumstances are present. The word "shall" "creates an obligation impervious to judicial discretion." *Smith v. Spizzirri*, 601 U.S. 472, 476 (2024). VFOIA authorizes recovery of reasonable fees and expenses, and when "a statute authorizes recovery of attorney fees and expenses, the fact finder is *required* to determine from the evidence the amount of the reasonable fees under the facts and

circumstances of each particular case.” *Tazewell Oil Co. v. United Va. Bank/Crestar Bank*, 243 Va. 94, 111 (1992) (emphasis added).

Moreover, VADOC did not contest the reasonability of Business Insider’s fee request. Per VADOC’s Response to Petitioners’ Application for Recovery of Costs and Fees, VADOC “reviewed the fee petition and supporting material provided by [Business Insider], and VADOC does not dispute the reasonableness of the fees and costs expended to date.” R.301.

Accordingly, the circuit court erred in denying Business Insider’s request for recovery of its reasonable costs and attorney fees. Business Insider also respectfully requests that the Court permit it to supplement that request for recovery with its reasonable costs and fees incurred through this appeal.

VII. The circuit court erred in its treatment of an external hard drive containing responsive video records that VADOC claims was “corrupted.” (BI AOE 6).

Standard of review. Business Insider’s sixth assignment of error presents a question of statutory construction, which appellate courts review *de novo*. *Hawkins*, 301 Va. at 424.

Argument. VADOC represented to the circuit court that it possessed a series of responsive video records from January 2017 to July 2019. R.164 ¶ 6. However, it further represented that when investigators attempted to retrieve this video for the circuit court, they discovered that the hard drive on which they were stored had

been corrupted. R.164 ¶ 6. The hard drive was not submitted for the circuit court's *in camera* review, meaning that VADOC entered no evidence that any portion of any file on the purportedly corrupted hard drive was subject to any VFOIA exemption. However, this external hard drive nonetheless contains "public records." *See* Va. Code § 2.2-3701 ("Public records' means all writings and recordings ... set down by ... electronic recording, or other form of data compilation, however stored ... prepared or owned by, or in the possession of a public body[.]"). Because VADOC failed to carry its burden of proof with respect to those files, *see* Va. Code § 2.2-3713(E), by the plain text of the statute, Business Insider must be permitted to inspect and/or copy the contents of the hard drive, Va. Code § 2.2-3704(A).

VIII. The circuit court erred in failing to determine whether VADOC's costs of redacting the records were "reasonable," and VADOC should be required to substantiate its estimated costs on remand. (BI AOE 7).

Standard of review. Business Insider's seventh assignment of error involves the circuit court's failure to determine whether VADOC's estimated costs of redaction and production were reasonable. This Court "give[s] deference to the trial court's factual findings and view[s] the facts in the light most favorable to the prevailing part[y]," while reviewing "the trial court's application of the law to those facts de novo." *Hawkins*, 301 Va. at 424 (cleaned up).

Argument. Business Insider must be afforded the opportunity to contest the reasonability of VADOC’s estimated costs of redacting and producing the responsive video records. The circuit court directed the parties to “discuss the Petitioners’ willingness to pay the reasonable costs associated with the redaction of the videos submitted to the Court on March 21, 2024.” R.315 ¶ 22. This abdicated its statutory responsibility under Va. Code § 2.2-3704(F), because the ultimate determination of reasonableness of fees is made by the court. *See* FOI Advisory Council Opinion AO-14-02; *see also* AO-25-01 (reasonableness of time incurred in responding to FOIA request “is a question for the courts[.]”). Accordingly, the circuit court erred by not making a determination on the reasonableness of VADOC’s estimated cost of redaction. This Court should instruct the circuit court to permit briefing and conduct fact-finding, if necessary, on this issue on remand.

CONCLUSION

Appellees respectfully ask this Court to affirm the judgment of the circuit court with respect to VADOC’s assignments error and to reverse the judgment of the court as to Business Insider’s assignments of error.

The requested records should be produced to Business Insider without the over-redaction identified in this brief, Business Insider should be afforded recovery of its costs and fees in the amount sought at the circuit court, and the case should be remanded for fact-finding under Va. Code 2.2-3704(F) regarding the

reasonableness of the cost to VADOC for any remaining redaction. Pursuant to Va. Code § 2.2-3713(D), Business Insider also respectfully requests that the Court grant reasonable costs incurred during this appeal, including attorney fees.

Dated: March 19, 2025

Respectfully submitted,

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CERTIFICATE

1. I certify that on March 19, 2025, this document was filed electronically with the Court through VACES, and transmitted by email to:

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2. Appellants request oral argument.

3. This brief has 12,289 words and 55 pages, which complies with the requirements of Rule 5A:19(a).

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