IN THE COURT OF APPEALS OF VIRGINIA

RECORD NO. 1626-24-2

VIRGINIA DEPARTMENT OF CORRECTIONS,

Appellant,

v.

INSIDER, INC., *et al.*,

Appellees.

REPLY BRIEF OF APPELLANT

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INTRODUCTION

One day after Appellant filed the Opening Brief in this appeal, a panel of this Court decided *National Public Radio v. Virginia Department of Corrections*, No. 1669-23-2, 2025 Va. App. LEXIS 49 (Feb. 4, 2025). Although not binding, *see* Rule 5A:1(f), that opinion illuminates several issues presented here.

National Public Radio addressed whether the records of imprisonment exemption, Code § 2.2-3706(B)(4), applied to audio recordings made during the execution of inmates within the custody of the Virginia Department of Corrections (VDOC). In holding that the records were properly withheld from compelled disclosure, this Court construed the phrase "records of persons imprisoned" as encompassing records "connected with" or "referring to" incarcerated individuals. *Nat'l Pub. Radio*, 2025 Va. App. LEXIS 49, at *5. Because the records were created to document the execution of an identified inmate, this Court agreed that the audio recordings logically fell within the scope of the records of imprisonment exemption. *Id.* at *6.

Similar reasoning applies here. Because the incident reports and bite reports were created to document a prison incident involving an identifiable inmate, the records of imprisonment exemption applies to those written records. And because the prison surveillance video footage was set aside and retained for that same purpose, the exemption logically encompasses those records, too. The trial court

therefore erred by ordering VDOC to produce redacted versions of these records, which should have been deemed exempt in their entirety.

As to the assignments of cross-error relating to the redactions authorized by the trial court, VDOC submits that this Court need not reach those issues, because the agency properly withheld the responsive records under exemptions that encompass the full content of those records. Nonetheless, because the information for which the trial court allowed redaction falls within the scope of multiple FOIA exemptions, that portion of the Court's order does not, on its own, constitute reversible error. As to the request for attorneys' fees, if this Court were either to affirm the judgment below or order a partial remand, VDOC agrees that the Court would need to better articulate its justification for denying an award of fees. Finally, the remaining assignments of cross-error do not advance sufficient grounds for reversal; FOIA does not provide a mechanism for compelling the review of a physical hard drive, and Appellees did not adequately present or preserve their argument regarding the negotiation of the costs of video redaction.

ARGUMENT

I. Appellees' Interpretation of the Records of Imprisonment Exemption Is at Odds with the Plain Language of the Statute.

Appellant is not, as Appellees repeatedly contend, asking this Court to usurp the fact-finding function of the trial court. The relevant facts, evident from the face of the records itself, are not in dispute: The written reports and canine bite

reports were prepared as a result of an incident involving a K9 and an inmate, within the secure perimeter of a prison. The reports identify, by name, the inmates involved. The reports describe the incident and its resolution. The related surveillance videos were saved and retained in permanent format. Those videos, which capture the K9 incidents, display the images of identifiable inmates. None of those facts are disputed. And their application is sufficient to bring these records within the scope of the records of imprisonment exemption, Code § 2.2-3706(B)(4).

The trial court evidently disagreed, reasoning that the withheld records did not relate to the "sentence" imposed on the incarcerated individuals. R.387. This reading of the statute—also urged by Appellees in this appeal[1]—ignores the plain language of the statute. Code § 2.2-3706(B)(4) exempts records that relate to the "imprisonment"—not records that relate to the "sentence." Those terms are not synonymous. Imprisonment—the state of being incarcerated—is a result of having received a criminal sentence, but those words cannot be used interchangeably in every context.

Nor, as evidently urged by Appellees, does Code § 2.2-3706(B)(4) impose some sort of balancing test, looking to whether the record is more about a K9 or more about an inmate. Resp. Br. at 16-17. Rather, the overarching question is

[1] Resp. Br. at 20-21.

whether the record is "connected with" or "referring to" an inmate, *Nat'l Pub. Radio*, 2025 Va. App. LEXIS 49, at *5, and these written records and surveillance videos easily pass that threshold.

Although FOIA exemptions are narrowly construed, this guidance does not allow courts to ignore the plain language of the statute. Axiomatically, "[t]he plain, obvious, and rational meaning of a statute is to be preferred over any curious, narrow, or strained construction," *Meeks v. Commonwealth*, 274 Va. 798, 802 (2007), and a statute should never be construed in a way that leads to absurd results, *Washington v. Commonwealth*, 272 Va. 449, 455 (2006). The plain language of the records of imprisonment exemption applies to records created during an inmate's incarceration, involving an identifiable inmate, and that relate to some aspect of the inmate's imprisonment—meaning, some condition of confinement or privilege or proceeding or incident that occurred during that imprisonment. *Nat'l Pub. Radio*, 2025 Va. App. LEXIS 49, at *6 (holding that the exemption encompasses records that "describe and relate to" some facet of "the inmate's incarceration").

The circuit court erred by limiting the scope of the records of imprisonment exemption to only those records involving an inmate's "sentence." Because these written records and surveillance videos relate to an identifiable inmate and were created for the purpose of describing a specific occurrence that happened during

that inmate's incarceration, those records fall within the plain language of the exemption, and the circuit court erred in holding otherwise.

II. The Security Exemption Applies to the Surveillance Video Recordings.

Appellant presented testimony that releasing these surveillance recordings would jeopardize the security of the prison because it would potentially reveal blind spots and other weaknesses in the camera system. R.372. And frankly, this logic is self-evident. Although Appellees argue that some of this knowledge has already been disclosed to the public through YouTube videos and documentaries, Resp. Br. at 35, knowing the location of a surveillance video cameras is not the same as knowing what those cameras actually record. Being in front of the camera is not the same as being behind it.

Nor does the fact that some surveillance videos have been introduced as exhibits in court proceedings strip VDOC of its legitimate security interests in avoiding compelled disclosure of these recordings. An attorney's (or inmate's) decision to introduce an exhibit into the trial court record cannot operate as a waiver of the overarching interests of the non-party state agency. The contexts are different. And this conclusion aligns with the general principle that disclosing documents to third parties does not operate as a waiver of a public body's ability to withhold documents in response to a public records request. *See Stevens v. Lemmie*, 40 Va. Cir. 499, 509 (Petersburg Cir. Ct. 1996).

Finally, although FOIA provides that "[n]o court shall be required to accord any weight to the determination of a public body as to whether an exclusion applies," Code § 2.2-3713(E), deferring to a public body's legal determination is not the same as deferring to an agency's opinion that releasing records would jeopardize the security of a prison. It is well-recognized that the operation of a correctional facility is fraught with potential pitfalls. Maintaining safety and discipline at these institutions is "an inordinately difficult undertaking," requiring both expertise and constant vigilance. *Turner v. Safley*, 482 U.S. 78, 85 (1987); *Hudson v. Palmer,* 468 U.S. 517, 526-27 (1984). As a result, courts—including the United States Supreme Court—routinely give "substantial deference to the professional judgment of prison administrators," who must constantly assess and adjust for potential security weaknesses. *Overton v. Bazetta*, 539 U.S. 126, 132 (2003). It remains appropriate, then, to give due consideration to VDOC's assessment that *en masse* release of surveillance videos would threaten the safety and security of its prisons.

III. Because the Records Do Not Commingle Exempt and Non-Exempt Records, Redaction Is Not Required.

Under Appellees' interpretation of Code § 2.2-3704.01, "there are no categorical exemptions from public disclosure; agencies can withhold only the specific portions of a requested record an exemption reaches." Resp. Br. at 27. Under this interpretation, evidently, a public body could never withhold any

document in response to a public records request; redaction and production would always be required. But that is not what the statute says. The plain language of Code § 2.2-3704.01 requires redaction and production when only "some portion of the public record is excluded from disclosure"—as in a personnel record that commingles exempt and non-exempt personnel information. Where the entire content of the public record is made exempt, it may be withheld entirely. *See generally Blackstock v. Va. Dep't of Transp.*, No. 0343-24-2, 2025 Va. App. LEXIS 180, at *10 (Mar. 25, 2025).

The written records and surveillance videos are in the record and before this Court. Appellees have not identified any "portion" of those records that they believe is non-exempt; their argument is that the records fail to qualify under the cited exemptions, period. Yet, as argued above, the written records were created and the surveillance videos were preserved to document an incident involving an identifiable inmate, and that related to that inmate's imprisonment. Examination of those records reveals no discrete or segregable portions that are non-exempt. As such, the entire content of these public records are exempt, and the trial court erred in ordering that those records be produced in a redacted format.

IV. Assignments of Cross-Error

Appellees raise several assignments of cross-error:

(1) whether the trial court erred in allowing the redaction of certain information from the records the court found were not otherwise exempt from compelled disclosure *(Assignments of Cross-Error #1 through #4)*;

(2) whether the trial court erred in refusing Appellees' request for an award of attorneys' fees *(Assignment of Cross-Error #5)*;

(3) whether the trial court erred in refusing to allow Appellees the opportunity to examine corrupted computer hardware *(Assignment of Cross-Error #6)*; and

(4) whether the trial court erred in failing to make a factual determination as to the reasonableness of anticipated costs of redaction *(Assignment of Cross-Error #7)*.

Because VDOC has requested that this Court reverse the judgment below, hold that the requested records are FOIA-exempt, and enter final judgment in its favor, VDOC submits that the Court need not reach these assignments of cross-error in the first instance. If, however, this Court either affirms or remands, VDOC agrees that the issue of attorneys' fees should be returned to the trial court for further consideration. None of the remaining arguments present reversible error.

A. Redaction of Information from the Responsive Records *(Assignments of Cross-Error #1, #2, #3, #4)*

The first four assignments of cross-error assert that the circuit court erred by finding that certain information in the responsive records could be redacted from any final production. Those categories of information include:

- inmate names and inmate identification numbers, as they appear in the written incident reports and bite reports *(Assignment of Cross-Error #1)*;
- the names of the K9s, as they appear in the written incident reports and bite reports *(Assignment of Cross-Error #2)*;

- the names of the K9 handlers, as they appear in the written incident reports and bite reports *(Assignment of Cross-Error #3)*, and
- the images of the K9 handlers, as they appear in the surveillance videos *(Assignment of Cross-Error #4)*

For the following reasons, if this Court were to determine that the written reports and the surveillance video were not exempt from compelled disclosure, these categories of information remain FOIA-exempt and could properly be redacted from the final production.

1. Inmate Names and Identification Numbers

Appellees argue, first, that the circuit court erred by allowing VDOC to redact the names and identification numbers of inmates who are identified in the written incident reports and bite reports, reasoning that "[a]n inmate's name is already a matter of public record," and inmate numbers are also published on VDOC's publicly-available website. Resp. Br. at 47.

The information Appellees sought, however, was not a simple list of inmate and their inmate identification numbers—information that, incidentally, the FOIA Council has opined falls squarely within the scope of the records of imprisonment exemption. FOIA Council Advisory Opinion AO-02-11 (July 11, 2011) (R.216-19) Rather, the names and identification numbers of these inmates appears in a specific context, identifying them as having been involved in a K9-related incident during their incarceration. It is somewhat disingenuous to argue that, just because

the public knows, in a general sense, the names of persons who have been incarcerated, that all records naming those individuals is subject to compelled disclosure, not just generally, but with that identifying information intact. This logic would functionally eviscerate the records of imprisonment exemption. Accordingly, even if this Court agrees that the written reports are subject to compelled disclosure, the inmate names and identification numbers remain exempt under Code § 2.2-3706(B)(4).

Additionally, as discussed in Appellant's Opening Brief, the names and identification numbers of inmates involved in K9-related incidents also falls within the scope of the exemption pertaining to identities of witnesses and victims, Code § 2.2-3706(B)(10), as well as the exemption for identifying information of a personal nature, disclosure of which would jeopardize the privacy of those individuals, Code § 2.2-3706(D). Opening Br. at 38, 42. These exemptions provide an independent basis for redacting the names and identification numbers of any inmates identified in the written reports.

For these reasons, if this Court reaches the first assignment of cross-error, the portion of the circuit court's ruling allowing redaction of names and identification numbers of inmates from the written records should be left undisturbed.

2. Names of the K9s Involved in the Incidents

Appellees argue, in their second assignment of cross-error, that VDOC should not be permitted to redact information that could be used to identify the K9s who were involved in the underlying incidents. As the circuit court found, however, at least two FOIA exemptions encompass this information: the security exemption, Code § 2.2-3705.2(14), and the personnel information exemption, Code § 2.2-3705.1(1). R.313

Both exemptions apply because releasing the names of the K9s involved in these incidents would, by proxy, identify their handlers as well. Generally speaking, the names of K9s and K9 handlers in VDOC facilities are subject to compelled disclosure, and that information is provided in response to routine FOIA inquiries. Because K9s are paired with specific officers, releasing the name of a K9 would allow a requestor, cross-referencing records, to easily determine which officer was involved in a specific incident. Accordingly, any exemption that authorizes the withholding of the name of the handler would logically also encompass the name of his assigned K9.

For the reasons discussed below, the identities of officers involved in K9 incidents are exempt from compelled disclosure under the security exemption, Code § 2.2-3705.2(14), and the personnel information exemption, Code § 2.2-3705.1(1). And for the reasons discussed in Appellant's Opening Brief, the

identity of officers involved in K9-related incidents also falls within the scope of the exemption pertaining to identities of witnesses and victims, Code § 2.2-3706(B)(10), as well as the exemption for identifying information of a personal nature, disclosure of which would jeopardize the privacy of those individuals, Code § 2.2-3706(D). Opening Br. at 38, 42.

Thus, if this Court were to reach the merits of the second assignment of cross-error, that portion of the Court's ruling allowing redaction of the K9 identifying information should be left intact.

3. Names and Images of the K9 Handlers

In their third and fourth assignments of cross-error, Appellees contend that the circuit court erred by ordering that VDOC could redact the names and images of VDOC officers involved in the K9 incidents. Appellees argue, first, that the names of all government employees are subject to mandatory disclosure. Resp. Br. at 49. Which is true to a point.[2] But again, context matters. What would be released here is not a simple list of names of government employees and their salaries, as in *Minium v. Hines*, 83 Va. App. 643 (2025), but rather, a targeted identification of officers involved in a very specific use of force situation, one that

[2] *See, e.g.*, Code § 2.2-3705.1(1)(ii) (mandating public access to "records of the name, position, job classification, official salary, or rate of pay of, and records of the allowances or reimbursements for expenses paid to, any officer, official, or employee of a public body," provided that the employee has an annual salary of at least $10,000).

evidently brings out heightened emotions in certain sectors. It is that disclosure which implicates the four cited FOIA exemptions.

First, Code § 2.2-3705.1(1) exempts "[p]ersonnel information concerning identifiable individuals" from mandatory public disclosure. As interpreted by the Supreme Court, "personnel information" in this context "means 'content within a public record that references personnel and relates to specific persons.'" *Hawkins v. Town of South Hill,* 878 S.E.2d 408, 413 (2022). It is "a privacy-based exemption, designed to protect the subject to the record from the dissemination of personal information." *Id.* at 416 (internal quotations omitted). And personnel information is considered "private" (and therefore not subject to disclosure) if revealing that information "would constitute an 'unwarranted invasion of personal privacy' to a reasonable person under the circumstances." *Id.*

The records at issue here actually reveal the identities of certain persons involved in canine bite incidents, both as to their written names in the bite reports and incident reports, and their faces on the surveillance video cameras. The private, personal "fact" being disclosed is that specific employee's participation in a canine bite incident. This constitutes private, "personnel information" that is exempted by Code § 2.2-3705.1(1). *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"). Because, under the reasonable person standard from *Hawkins*, disclosing the identities of these officers would intrude upon their privacy interests, that information remains exempt.

Second, Code § 2.2-3705.2(14) allows the redaction of information relating to personnel deployments, where release of that information would jeopardize "the safety or security of any person." As with the personnel information exemption, publicly disclosing the identity of officers involved in K9 incidents would jeopardize their safety, both within the prison and without. If this information were made subject to compelled disclosure, family members, friends, or associates of inmates involved in these incidents could ascertain the identity of these officers and potentially exact retribution. Corrections officers operate in a risky enough environment, as is. That risk should not be heightened through the improvident release of information tying a specific officer to an incident where an inmate was potentially injured.

Third, the identities of officers involved in K9 incidents is exempted from compelled disclosure under Code § 2.2-3706(B)(10), which protects the identities of witnesses to a specific incident. *See* Opening Br. at 38.

And fourth, the identities of these officers is exempted under Code § 2.2-3706(D), which exempts those portions of noncriminal records "where the release of such information would jeopardize the safety or privacy of any person." As argued in Appellant's Opening Brief, those officers have both a safety and a privacy interest in preventing their identities from being publicly disclosed. Opening Br. at 41.

For these reasons, if this Court were to reach the third and fourth assignments of cross-error, the circuit court properly determined that information which could be used to identify the officers involved in the K9 incidents is exempt from compelled disclosure.

B. Whether the Circuit Court Erred by Denying Appellees' Request for Attorneys' Fees and Costs. *(Assignment of Cross-Error #5)*

If a trial court determines that a public body has violated FOIA, the individual who brought an enforcement action "shall be entitled to recover reasonable costs . . . and attorney fees from the public body if the petitioner substantially prevails on the merits of the case, unless special circumstances would make an award unjust." Code § 2.2-3713(D). When determining whether fees are warranted, the court "may consider, among other things, the reliance of a public body on an opinion of the Attorney General or a decision of a court that substantially supports the public body's position." *Id.*

It appears evident that, if this Court affirms the judgment below, Appellees have substantially prevailed on the merits of their case. *See Hill v. Fairfax Cnty. Sch. Bd.*, 284 Va. 306, 314-15 (2012) ("[A] finding by the trial court that some documents were wrongfully withheld may satisfy the statute's requirement that the party 'substantially prevails on the merits.'"). Appellant has already conceded this point. R.301. Nevertheless, without articulating a basis for its decision, the trial court denied Appellees' uncontested motion for recovery of fees and costs. R.315.

Under the language of Code § 2.2-3713(D), the trial court could only have denied the request for fees if—notwithstanding VDOC's concession—the court independently determined that "special circumstances would make an award unjust." Although the trial court did not make an explicit finding of special circumstances, the record could potentially support that conclusion. For example, the record contains citation to multiple cases and official Attorney General opinions that would have supported VDOC's decision to withhold the responsive records. *See*, *e.g.*, R.173-187; *cf. White Dog Publ., Inc. v. Culpepper Cnty. Bd. of Supervisors*, 272 Va. 377, 388 (2006) (discussing "special circumstances" exception to the fee entitlement statute).

That said, the trial court did not make any specific finding of "special circumstances" to justify its decision to deny the fee petition. Accordingly, if this Court were to affirm the judgment below, either in whole or in part, Appellant

submits that the appropriate action would be to remand the question of attorneys' fees to the circuit court for reconsideration in light of this Court's opinion.

C. Whether the Circuit Court Erred by Declining to Order that Appellees Should be Allowed to Inspect a Computer Hard Drive. *(Assignment of Cross Error #6)*

Appellees contend that the circuit court erred by failing to issue any order allowing them to "inspect and/or copy the contents" of a corrupted external hard drive that had previously contained retained copies of prison surveillance video. Resp. Br. at 53.

VDOC submits, first, that this assignment of cross-error was not adequately preserved for review. Although Appellees objected to this Court's final order on the grounds that that Order "does not permit Petitioners' to inspect and/or copy the contents of that hard drive," R.319, the record does not show that Appellees ever presented that request to the circuit court. The circuit court could not grant or deny a motion that was never made. Because Appellees did not ask for this relief in any format other than in their endorsed objections to the final order, they have not adequately preserved this objection for appeal. *See Falah v. Falah*, No. 1415-20-4, 2021 Va. App. LEXIS 113 (July 6, 2021) (holding that an assignment of error was waived under Rule 5A:18 where litigant attached an objection to a final decree "and filed a motion to stay entry of the decree on those grounds," but the trial court never ruled on that motion, reasoning that "there is no ruling for [this Court] to

review on appeal" (internal quotations omitted)); *see also Brandon v. Cox*, 284 Va. 251, 256 (2012) (submitting a motion to reconsider does not adequately preserve an objection for appeal if there is no record that the trial court was made aware of and had an opportunity to rule upon that motion); *accord Westlake Legal Grp. v. Flynn*, 293 Va. 344, 352 (2017).

Regardless, this assignment of cross-error lacks substantive merit. FOIA provides a right of access to public records—it does not provide a right to forensically inspect corrupted hard drives. Code § 2.2-3700(B). As verified in a signed pleading presented to the circuit court, VDOC attempted to restore the corrupted external hard drive and retrieve the pre-July 2019 surveillance videos, to no avail. R.164; *see also* Code § 8.01-271.1 (attorney's signature on a pleading verifies that the representations in that pleading are well-grounded in fact, and attorney subject to sanctions for pleadings signed in violation of that rule). Those records no longer exist, and FOIA does not provide requestors with any right to independently mine through an agency's computer systems and hard drives in an attempt to find and retrieve lost public records. Accordingly, this assignment of cross-error does not articulate any reversible error.

D. Whether the Circuit Court Erred by Failing to Determine the Reasonableness of VDOC's Estimated Costs of Redaction/Production *(Assignment of Cross Error #7)*

In their last assignment of cross-error, Appellees contend that the trial court erred by directing the parties to discuss the costs associated with redacting images on the surveillance video. Resp. Br. at 54. As with the assignment of error relating to inspection of the corrupted computer hard-drive, Appellees submit that this assignment of cross-error is procedurally defaulted or, at best, premature.

The circuit court's final order directed, simply, that "[t]he parties should discuss the Petitioners' willingness to pay the reasonable costs associated with the redaction of the videos submitted to the Court," and, "[t]o the extent Petitioner is willing to bear those costs, Respondent is ordered to produce the corresponding video." R.315.[3]

When endorsing the final order, Appellees noted that they "reserve the right to contest the reasonability of the costs estimated by [VDOC] of applying those redactions." R.319. Appellees did not object to portion of the final order directing that the parties confer regarding those redaction costs, Appellees did not otherwise specifically object to the estimated cost of redaction, and the Court did expressly find that those estimated costs were otherwise reasonable. Accordingly, to the extent Appellees now claim that this portion of the final order was in error, they are barred from raising that argument for the first time on appeal. Rule 5A:18.

[3] In a status report submitted to the circuit court, VDOC estimated the costs of redaction at approximately $110 per video, for a total cost of $4620. It is not clear why this status report was omitted in the record provided to this Court on appeal.

As to the merits of this assignment of cross-error, FOIA allows a public body to "make reasonable charges not to exceed its actual cost incurred" when providing records in response to a FOIA inquiry, and the statute further directs that the public body "shall make all reasonable efforts to supply the requested records at the lowest possible cost." Code § 2.2-3704(F). Appellees have not been billed or otherwise asked to pay a deposit towards the actual cost of redacting the surveillance videos so, at present, there are no "reasonable charges" to evaluate.

If this Court were to remand this matter for further proceedings, to include the production of redacted surveillance video, Appellees could raise the reasonableness of any costs associated with that production at that time. But at this procedural juncture, their assignment of cross-error—even if properly preserved—is simply premature.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that the judgment of the circuit court be REVERSED and final judgment entered in favor of Appellant.

Respectfully submitted,

VIRGINIA DEPARTMENT OF CORRECTIONS

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Reply Brief complies with the requirements of Rule 5A:19(a) because it is not longer than 20 pages in length, exempting those portions of the filing not encompassed by that Rule.

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