

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

APPELLEES' REPLY BRIEF IN SUPPORT OF CROSS-ERROR

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INTRODUCTION

While the circuit court correctly held that Appellant (“VADOC”) was obligated to produce responsive public records pursuant to the Virginia Freedom of Information Act (“VFOIA”), its decision to permit the agency to redact the names and images of VADOC’s dog handlers, the names of its dogs, and the names and identification numbers of the prisoners in its reports was in error. Appellee’s Br. 47–49. VADOC has not demonstrated that these redactions were consistent with the statutory text, nor did it did make a fact demonstration that could substantiate such a holding. *See* Appellant’s Reply Br. 8–15.

As to attorneys’ fees, the parties agree that the amount of fees sought by Appellees (collectively, “Business Insider”) was reasonable. The parties also agree that the circuit court erred by failing to set forth any justification for denying recovery of those fees. Here, fees should have been awarded; no special circumstances exist that can justify the circuit court’s denial under Virginia Code § 2.2-3713(D), VFOIA’s fee-shifting provision.

Business Insiders’ two remaining cross-assignments of error are straightforward. A hard drive that contains responsive records must be presented to Business Insider’s for “inspection” under Virginia Code § 2.2-3704(A), because VADOC did not even attempt to meet its burden of demonstrating that any record contained therein was exempt. And finally, the circuit court abdicated its statutory

responsibility to assess the “reasonable” cost that VADOC would incur, and charge to Business Insider, by complying with its order. Va. Code § 2.2-3704(F).

Whether this court affirms the circuit court or—as urged—finds that less redaction is warranted, the “actual cost incurred in accessing, duplicating, supplying, or searching for the requested records” is an issue that should be determined by the circuit court on remand. *Id.*

ARGUMENT

I. No exemption discussed by VADOC in its reply brief permits it to redact the information identified in Business Insider’s assignments of cross-error.

The circuit court incorrectly held that certain categories of information—the names and images of VADOC's dog handlers, the names of VADOC’s dogs, and the names and identification numbers of prisoners reported in VADOC’s incident reports and bite reports—could be withheld by VADOC in its discretion. Its statutory bases for those holdings were the following VFOIA exemptions:

- Va. Code § 2.2-3706(B)(4), the “Records of Persons Imprisoned Exemption,”
- Va. Code § 2.2-3705.1(1), the “Personnel Information Exemption,” and
- Va. Code § 2.2-3705.2(14), the “Security Exemption.”

R.313–14. VADOC’s brief waives argument as to the applicability of certain exemptions to certain categories of information, while also arguing for the applicability of other exemptions not identified in the circuit court’s order. For the

Court’s ease of reference, the chart below identifies the exemptions at issue with respect to Business Insider’s Cross-Assignments of Error (“BI AOE”) 1–4.

Category of Information (BI AOE __)	Exemptions relied upon by VADOC
Names and images of VADOC’s dog handlers (BI AOE 1,3)	Va. Code § 2.2-3705.1(1) Va. Code § 2.2-3705.2(14) Va. Code § 2.2-3706(B)(10) Va. Code § 2.2-3706(D)
Names of VADOC’s dogs (BI AOE 2)	Va. Code § 2.2-3705.1(1) Va. Code § 2.2-3705.2(14)
Names and identification numbers of prisoners (BI AOE 4)	Va. Code § 2.2-3706(B)(4) Va. Code § 2.2-3706(B)(10) Va. Code § 2.2-3706(D)

A. Names and images of dog handlers should not be redacted from written reports and surveillance video. (BI AOE 1, 3).

As a preliminary matter, the text of the statute is clear: “No provision of [VFOIA] . . . shall be construed as denying public access to . . . *records of the name . . . [of] any officer, official, or employee of a public body.*” Va. Code § 2.2-3705.1(1) (emphasis added). Despite this plain statutory mandate, VADOC still argues that it can withhold public access to the names of its employees. It cannot.

VADOC’s argument that § 2.2-3705.1(1)’s clear requirement of mandatory disclosure is contingent on the context in which an officer’s name appears is wholly without support. *See* Appellant’s Reply Br. 12. Indeed, this Court recently

rejected a similar argument in *Minium v. Hines*, in which a law enforcement agency sought to withhold a list of officer names by arguing that the context of a name’s presence on a staff roster could help identify undercover officers. 83 Va. App. 643 (2025).

Even setting aside this mandatory disclosure provision, no exemption cited by the circuit court applies to dog handler names, nor to images of dog handlers in the requested surveillance footage. *First*, the Virginia Supreme Court’s recent interpretation of the Personnel Information Exemption, Va. Code § 2.2-3705.1(1), forecloses its application to information of that nature.¹ As the Court held, “personnel information” means “data, facts, or statements . . . relating to a specific government employee, which are in the possession of the entity solely because of the individual’s employment relationship with the entity, and are private, but for the individual’s employment with the entity.” *Hawkins v. Town of South Hill*, 301 Va. 416, 432 (2022). In other words, “the only content exempt from disclosure is that which is tied to the employment of the individual in some way, and which

¹ Indeed, it is this exemption that contains the mandatory disclosure requirement discussed *supra*. See Va. Code § 2.2-3705.1(1). The exemption’s plain language is thus explicitly contrary to VADOC’s argument that the Personnel Information Exemption can still apply. See *White Dog Publ’g, Inc. v. Culpeper Cnty. Bd. of Supervisors*, 272 Va. 377, 386 (2015) (“In construing statutory language, we are bound by the plain meaning of clear and unambiguous language.”).

otherwise would not be disclosed to the employer” because it is “private.” *Id.* at 431.

In establishing this framework, the Court was cognizant of two competing interests: the idea that “information retained by governmental entities . . . belongs to the people subject to legislatively mandated exceptions,” and the privacy interests of “individuals who, *only* by virtue of their public employment, are *required to divulge information which would otherwise be private.*” *Id.* at 421 (emphasis added). Accordingly, the exemption does not apply to information that is not *divulged* by individual employees, such as information directly connected to state action an employee takes in carrying out their duties, or information generated by the agency itself. *See id.* at 431 (limiting scope of the exemption to information that “otherwise *would not be disclosed* to the employer”); *Town of South Hill v. Hawkins*, 82 Va. App. 801, 813 (2024) (affirming circuit court’s rejection of the Personnel Information Exemption to “information [that] was known by the employer *because* of the employment relationship,” as this information was not of the kind that would “not otherwise be disclosed to the employer”) (internal quotations removed).

The public records requested by Business Insider directly describe government action. Bite and incident reports and the requested video footage reflect how handlers carried out their official duties and acted with the authority of

the Commonwealth. *See, e.g.*, R.582–89 (example bite and incident reports); R.163–64 (VADOC’s submission of surveillance footage for *in camera* review). The names and depictions of dog handlers are not sensitive information divulged to VADOC; instead, they are public-facing identifiers of government employees whose actions the public has an interest—and a statutory right—in overseeing.

Further, an employee’s name or depiction is not the type of private information the Personnel Information Exemption protects. *Hawkins* established “an objective test” to identify what information is “private,” holding that “data, facts, and statements are private if their disclosure would constitute an ‘unwarranted invasion of personal privacy’ to a reasonable person under the circumstances.” *Id.* at 432. The release of a government employee’s name or image would not invade the privacy of an individual—these disclosures are routine, and even statutorily mandated in some cases as described *supra*.

VADOC argues, without citation to the fact record, that records requested by Business Insider describe “use of force situation[s that] evidently bring[] out heightened emotions in certain sectors,” and that dog handlers may be subject to “possible embarrassment” if their involvement is revealed.² Appellant’s Reply Br.

² VADOC cites to a federal FOIA case in support of its argument regarding this potential embarrassment, but federal FOIA employs a different legal test to assess potential privacy-based withholdings. *Cameranesi v. United States Dep’t. of Defense*, 856 F.3d 626, 638 (9th Cir 2017).

12–13. But this is an argument about the unpopularity of an individual’s *official conduct*; it does not implicate private information that an individual *divulges* to their employer, such as sharing a medical condition to seek a workplace accommodation. *See Hawkins*, 82 Va. App. at 813 (requiring production of portions of a demand letter reflecting information about a dispute between employees because this information was “known to the employer *because* of the employment relationship” not something that was “disclosed” by an employee). This distinction is essential—while the public has no legitimate interest in truly private information, facilitating access to information about official conduct is the fundamental purpose of VFOIA. *Hawkins*, 301 Va. at 421–22 (acknowledging “tension between transparency and privacy”). Here, the requested public records simply do not implicate the limited privacy interests discussed in *Hawkins* and the Personnel Information Exemption does not apply.

Second, the Security Exemption, Va. Code § 2.2-3705.2(14), is equally unavailing. This exemption requires a showing that disclosure would jeopardize safety, and there is simply no support in the evidentiary record that such risk exists. Appellees’ Br. 50. Unable to point to the evidentiary record to satisfy its burden by a preponderance of the evidence, Va. Code § 2.2-3713(E), VADOC continues to rely on attorney argument. *See Appellant’s Reply Br. 14*. This is insufficient to demonstrate applicability of the Security Exemption.

Finally, VADOC again invokes the Victim Identity Exemption, Va. Code § 2.2-3706(B)(10), and the Non-Criminal Records Exemption, Va. Code § 2.2-3706(D), to justify redaction of handler names and images. But VADOC has not offered any rebuttal to Business Insider’s arguments that neither exemption is applicable to the requested records as a matter of law. Properly construed, the Victim Identity Exemption is only relevant in a criminal investigatory context. *See* Appellee’s Br. 41. Similarly, the Non-Criminal Records Exemption only applies to “[p]ublic bodies ... engaged in criminal law-enforcement activities.” *See* Appellee’s Br. 43–44. VADOC, however, is not engaged in criminal law-enforcement activities because it is not “responsible for the prevention and detection of crime [or] the enforcement of the penal, traffic or highway laws of the Commonwealth.” Va. Code § 9.1-101. And even if this exemption *were* to apply to VADOC, it still has not demonstrated that the release of the information sought “would jeopardize the safety or privacy of any person.” Va. Code § 2.2-3706(D). The mere specter of “retribution” by “family members, friends, or associates of inmates,” in attorney argument on appeal, Appellant’s Reply Br. 14, is insufficient to meet VADOC’s evidentiary burden.

B. Names of dogs should not be redacted from written incident and bite reports. (BI AOE 2)

There is no statutory basis to exempt the names of deployed dogs from disclosure. As described in Business Insider’s opening brief, the Personnel

Information Exemption does not apply to this information as dogs are not “personnel.” Va. Code § 2.2-3705.1(1); Appellees’ Br. 48. VADOC now tries to circumvent the statutory text by claiming that releasing dog names would reveal their handler’s names by association. *See* Appellant’s Reply Br. 11. But as explained *supra*, the name of a dog handler cannot be exempted under any of VADOC’s proffered exemptions. Further, there is nothing in evidence, nor elsewhere in the circuit court record, to suggest the relationship between dogs and handlers that VADOC describes. Instead, for the first time in its Reply Brief, VADOC simply asserts that “canines are paired with specific officers,” presenting no evidence of such a relationship, nor any that this association would reveal the handlers’ identities. *Id.* VADOC has failed to satisfy the burden of proving by a preponderance of evidence that this exemption applies. Va. Code § 2.2-3713(E).

The Personnel Records Exemption also falls short of reaching dog names as a matter of law for a separate reason. *Hawkins v. Town of South Hill* limits the scope of that exemption to information “which is tied to the employment of the individual in some way, and which otherwise would not be disclosed to the employer.” 301 Va. 416, 431 (2022). VADOC’s dogs’ names are not disclosed to the agency by its employees. Moreover, the deployment of a particular dog constitutes government action rather than sensitive private information that an employee may need to divulge.

The Security Exemption similarly does not apply. *See* Va. Code § 2.2-3705.2(14). VADOC’s argument relies on a speculative situation whereby its handler’s identities would be revealed by the disclosure of dog names. *See* Appellant’s Reply Br. 14. *If* an individual were to determine a handler’s identity, VADOC argues, the safety of officers *might potentially* be threatened. *Id.* But this attorney argument falls far short of the fact showing needed to demonstrate a “reasonable expectation” of jeopardizing safety. *See Va. Dep’t of Corr. v. Surovell*, 290 Va. 255, 265 (2015). There is simply insufficient evidence in the factual record to support the application of the Security Exemption. Va. Code § 2.2-3713(E).

VADOC asks this Court to read more into VFOIA than the statutory text and case law permit. Dogs are not government employees whose personnel information is protected by the statute. The hypothetical possibilities described by VADOC, without supporting evidence, are not enough to deny the release of dog names. The Court should reverse the circuit court’s order permitting VADOC to redact the names of its dogs.

C. Inmate names and identification numbers should not be redacted from written incident and bite reports (BI AEO 4).

No exemption relied upon by VADOC justifies the redaction of inmate names and identification numbers from the requested reports, and the circuit court erred in finding otherwise.

First, with respect to the Records of Persons Imprisoned Exemption, VADOC argument that the “specific context” of a records request is relevant to whether the exemption applies, Appellant’s Reply Br. 9, is entirely negated by the analysis of Virginia Code § 2.2-3706(B)(4) by Business Insider in its principal brief. The “context” of the redacted inmate names and identification numbers is (i) their placement within public records that were not made to document VADOC carrying out a prisoner’s sentence, *see* Appellee’s Br. 18–20, and/or (ii) their impersonal use as identifiers within VADOC’s administrative documentation, *see* Appellee’s Br. 22–25.

Second, as to the Victim Identity and the Non-Criminal Records Exemptions, VADOC has still failed to overcome the circuit court’s finding that VADOC “failed to demonstrate by a preponderance of the evidence that those exemptions are applicable” to the requested records. R.313. Independent of any legal construction of the exemptions, the circuit court rightly concluded that VADOC’s bare assertions are insufficient to meet its burden of evidentiary production. *Id.*; *see* Va. Code § 2.2-3713(E). In its briefing below, the only support VADOC advanced for the application of the Non-Criminal Records Exemption was a single sentence reciting the text of the exemption. *See* R.187. Likewise, the Victim Identity Exemption received a single paragraph without any citation aside from the exemption itself. *Id.*; *see also* Appellee’s Br. 38–40. The

circuit court reasonably concluded that the limited showing failed VFOIA's required burden of production.

Regardless, neither of these exemptions apply to the names and identification numbers of inmates as a matter of law. Because the Victim Identity Exemption incorporates Va. Code § 19.2-11.2, which applies only to criminal investigations and adjudications, the exemption is properly understood to reach only the identities of those connected to a criminal offence. By incorporating a provision from another statute, the exemption imputes the meaning of that incorporated provision, absent a clear statement of legislative intent to the contrary. *See* Appellee's Br. 41 (quoting *Tanner v. Commonwealth*, 72 Va. App. 86, 100 (2020)).

VADOC cannot avail itself of the Non-Criminal Records Exemption because, according to the very sources it cites, "[VA]DOC is not a law-enforcement agency." AO-02-11, Va. Freedom of Information Advisory Council (Jul. 21, 2011); Appellee's Br. 43–44. VADOC is similarly not encompassed by the three other types of public bodies described by the exemption, foreclosing the provision's application here. *See* Va. Code § 2.2-3706(D). The text of this exemption is clear; and VADOC records were simply not contemplated by the General Assembly in crafting this limitation to mandatory public disclosure.

Accordingly, the circuit court erred in allowing VADOC to redact the names of inmates reflected in the requested records. That portion of its judgment should be reversed.

II. The circuit court erred in denying Business Insider’s request for attorney fees and costs. (BI AOE 5).

Business Insider is “entitled to recover reasonable costs,” including attorney fees, so long as (i) a court finds “a single instance of denial of the rights and privileges conferred by VFOIA,” (ii) it “substantially prevails” on the merits of the case, and (iii) no “special circumstances would make an award unjust.” Va. Code § 2.2-3713(D); *see also Cole v. Smyth Cnty. Bd. of Supervisors*, 298 Va. 625, 644 (2020) (“[A] VFOIA plaintiff can recover attorney fees if a court finds (1) the public body committed a single VFOIA violation, and (2) the plaintiff “substantially prevails on the merits of the case.”). If this Court affirms the judgment below, Business Insider will have established that its rights and privileges under VFOIA were violated and that it substantially prevailed on the merits of its case. Indeed, VADOC concedes as much. *See* R.301; Appellant’s Reply Br. 16.

But the circuit court denied Business Insider’s request for fees without finding special circumstances making the fee award unjust. R.315 ¶ 23. The parties agree that such a finding was required for the circuit court to deny Business

Insiders fee request, but they disagree as to whether such a showing could be made at all based on the record below. Appellant’s Reply Br. 16.

While section 2.2-3713(D) contemplates that reliance on Attorney General opinions and court decisions can support a finding of special circumstances, such a finding is not warranted here. In context, “‘special’ means ‘distinguished by some unusual quality: uncommon, noteworthy, extraordinary[.]’” *Suffolk City Sch. Bd. v. Wahlstrom*, 302 Va. 188, 217 n.15 (2023) (quoting Webster's Third New International Dictionary 2186 (2002)). “Thus, a VFOIA plaintiff who substantially prevails on the merits of the case is entitled to an award of attorney fees and costs unless unusual, uncommon, noteworthy, or extraordinary circumstances make such an award unjust.” *Id.*

The Virginia Supreme Court has twice rejected theories that a public official’s belief that they were complying with VFOIA constituted a “special circumstance” that warranted deviation from the presumptive cost and fee recovery. *See Suffolk City School Bd.*, 302 Va. at 217; *White Dog Publishing, Inc. v. Culpeper County Board of Supervisors*, 272 Va. 377, 388 (2006). Indeed, in the latter case, the Court rejected both the assertion that “the violation was not willful and knowing” and that “extensive research on FOIA and its requirements” by the agency were sufficient to meet that burden. *Id.* Likewise, a contrary decision by a lower court, and an agency’s general practices that it typically follows without

complaint do not rise to the level of “special circumstances” contemplated by the statute. *Id.*

The nature of VADOC’s reliance on prior guidance and court decisions was not “uncommon, noteworthy, [or] extraordinary” in this case; indeed, prior guidance relating to many of the cited exemptions was quite sparse. On this record, the General Assembly’s intent that “a VFOIA plaintiff prevailing on the merits of the case will justify the award in the ordinary case” should be left undisturbed. *Suffolk City School Bd.*, 302 Va. at 217 n.15.

Accordingly, there is no need to remand the question of attorney fees to the circuit court for reconsidering in light of this Court’s opinion. VADOC did not contest the reasonableness of Business Insider’s fee request; instead, 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. Business Insider respectfully requests that the Court overturn the circuit court’s denial of fees and permit it to supplement the amount sought with additional reasonable costs and fees incurred through this appeal.

III. The circuit court erred by failing to order that Business Insider is allowed to inspect a computer hard drive containing responsive records. (BI AOE 6).

VADOC admits that it possesses a hard drive that contains “public records” under Va. Code § 2.2-3701 that are responsive to Business Insider’s VFOIA

request.³ Contrary to VADOC’s assertion, VFOIA explicitly allows for the “inspection” of such public records. Va. Code § 2.2-3700(B); Va. Code § 2.2-3704(A) (“[a]ccess to such records shall be provided by the custodian in accordance with this chapter *by inspection* or by providing copies of the requested records, at the option of the requester.”). The circuit court erred in ignoring these responsive records in its final order.

The public records on VADOC’s hard drive are not exempt. VADOC did not submit that hard drive for the circuit court’s *in camera* review. Nor did it enter evidence regarding any portion of any file on the purportedly corrupted hard drive. Thus, VADOC has failed to meet its burden of demonstrating that any VFOIA exemption permits it to withhold the hard drive from Business Insider. Va. Code § 2.2-3713(E).

VADOC’s contention that Business Insider did not adequately preserve this assignment of cross-error is without merit. But Business Insider’s FOIA request for video recordings encompassed a date range of January 1, 2017 through December 31, 2022. R.319. The hard drive falls squarely within that time period—by VADOC’s own admission, it contains public records dated January 1, 2017 through July 2019. R.319. Business Insider was not required to file a

³ “‘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[.]”

duplicative motion to (again) argue that it was entitled to records responsive to the request that underlies this case. In short, Business Insider is entitled to responsive public records absent the application of an exemption, VADOC's hard drive contains responsive public records, and VADOC made no demonstration that an exemption applies. Accordingly, the circuit court erred by failing to order VADOC to permit Business Insider to inspect that hard drive.

IV. The reasonableness of VADOC's estimated costs of production remains an open question. (BI AOE 7).

It appears both parties agree that if this Court were to remand this matter for further proceedings including the additional production of public records, Business Insider could raise the reasonableness of any costs associated with that production. Appellant's Reply Br. 20. Assuming this Court affirms or affirms in part the circuit court's grant of Business Insider's petition, it should instruct the circuit court to determine that question, as the ultimate determination of reasonableness of fees is made by the court, not the public body. *See* FOIA Advisory Council Opinion AO-14-02 (Nov. 12, 2002); *see also* FOIA Advisory Council Opinion AO-25-01 (May 8, 2001) (reasonableness of cost for time incurred in responding to FOIA request "is a question for the courts").

CONCLUSION

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

The requested records should be produced to Business Insider without the over-redaction described in its appellate briefing. 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: April 28, 2025

Respectfully submitted,

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CERTIFICATE

1. I certify that on April 28, 2025, this document was filed electronically with the Court through VACES, and transmitted by email to:

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2. Appellees request oral argument.

3. This brief has 3,988 words and 18 pages, which complies with the requirements of Rule 5A:19(a).

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