

VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF CHARLOTTESVILLE

INSIDER INC., HANNAH BECKLER,
and IAN KALISH

Petitioners,

v.

VIRGINIA DEPARTMENT OF
CORRECTIONS

Respondent.

Case No. CL 24-65

MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS

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FILED
2/1/24, 3:18 pm
(Date & Time)

City of Charlottesville
Circuit Court Clerk's Office
Llezelle A. Dugger, Clerk
By Amber Spivey
Deputy Clerk

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Insider Inc., Hannah Beckler, and Ian Kalish (collectively, “Petitioners”) submit this brief in support of their Petition for Writ of Mandamus (the “Petition”). As set forth below, this Court should grant the Petition, issue a writ of mandamus ordering the Virginia Department of Corrections (“VADOC” or “Respondent”) to release the records sought by Petitioners, and grant Petitioners’ costs, including reasonable attorneys’ fees.

BACKGROUND AND FACTS

The use of dogs in Virginia’s prisons is an issue of significant public concern that has received national attention over the past several years, stemming from two federal lawsuits brought by inmates who allege that they were mauled by dogs while incarcerated. *See Johnson v. McCowan*, 549 F. Supp. 3d 469 (W.D. Va. 2021) (brought by an inmate at Red Onion State Prison who asserts that he was mauled by a dog while lying prone on the floor); *Garrett v. Commonwealth of Virginia*, No. 3:20CV986, 2021 WL 3193176 (E.D. Va. July 28, 2021) (brought by a former inmate at Sussex I prison who claims that corrections officers ordered dogs to attack him while he stood in his cell and that his wounds became infected but were not sufficiently treated until he faked his own death). This petition arises from a journalist’s attempt to inform the public about VADOC’s decision-making in this area and the occurrences of dog-related injuries in both Red Onion State Prison and other VADOC facilities.

VADOC’s operating procedures require careful recordkeeping around uses of force and canine-inflicted injuries, enabling VADOC to locate any audio or video recordings in its possession that capture canine use of force.¹ Petition ¶¶ 3, 5. Specifically, VADOC maintains

¹ “Canine” is the term used by VADOC to refer to a dog under their control. The use of this Latin-derived term is common across law enforcement and has its roots in the U.S. Army’s designation of its War Dog Program as the “K-9 Corps” during World War II. *See* Arthur W.

the Dog Information Governance & Operation System database (“DINGO”), which it updates with information on the dogs under the agency’s control. Exhibit A (VADOC Operating Procedure (“OP”) 435.3) at 1.² VADOC’s operating procedures require that “[a]ny time the use of canine results in a bite, a Bite Report shall be completed in DINGO before the end of shift or assignment.” *Id.* at 20. The operating procedures also require that “[a]ll bites and abrasions will be photographed. Tears in the clothing attributed to the canine should also be photographed and all photographs should be treated as evidence.” *Id.* Incident reports must describe whether a dog was used and whether and how the incident was recorded. Exhibit B (VADOC OP 420.1) at 4-5; *see also* VADOC, *Reporting Serious or Unusual Incidents* (“VADOC OP 038.1”), Nov. 1, 2021, <https://perma.cc/8GZ4-SN2X> at 11-12 (requiring that incidents involving “[u]se of force; including physical force . . . and canines” be documented). VADOC maintains and preserves these records under both a protocol for public records preservation and a protocol for the preservation of evidence. *See* VADOC OP 038.1 at 7.

Pursuant to Virginia’s Freedom of Information Act, Va. Code Ann. § 3700, et seq. (“VFOIA” or the “Act”), Hannah Beckler, a journalist affiliated with Insider Inc. (“Insider”), along with Ian Kalish, a citizen of Charlottesville, requested audio and video recordings of incidents at Red Onion State Prison where a canine bit or otherwise “engaged” an inmate (the “**Red Onion Recordings Request**”). Exhibit D; Petition ¶¶ 6–7, 25. VADOC withheld those records in their entirety. Exhibit E; Petition ¶¶ 9, 10, 26, 34. Petitioners also requested bite

Bergeron, Jr., *War Dogs: The Birth of the K-9 Corp*, U.S. Army (last visited Nov. 18, 2022), <https://perma.cc/8FAS-CTPN>.

² Exhibits A–F herein are supported by the affidavits of Mr. Kalish and Ms. Beckler. Exhibits H–K herein are described in the declaration of undersigned counsel.

reports and internal incident reports for 12 specific bites that occurred in Red Onion and other facilities (the “**Bite Reports Request**”). Exhibit D; Petition ¶¶ 6, 8, 25. VADOC refused to confirm or deny whether those records existed, but likewise produced no records responsive to that request. Exhibit E; Petition ¶¶ 9, 12, 26, 43.

VADOC asserted that three VFOIA exemptions justify its complete denial of the Red Onion Recordings Request. Exhibit E; Petition ¶ 10. First, VADOC asserted the “**Personnel Information Exemption**,” which provides discretion for the release of “personnel information concerning identifiable individuals,” Va. Code Ann. § 2.2-3705.1, meaning “data facts or statements within a public record 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 (Va. 2022). Exhibit E; Petition ¶ 10, 35. Second, VADOC asserted the “**Public Safety Exemption**,” which provides discretion for the release of information such as architectural drawings or procedural manuals if their disclosure jeopardizes public safety and security, Va. Code Ann. § 2.2-3705.2(14). Exhibit E; Petition ¶ 10, 35. And third, VADOC asserted the “**Records of Persons Imprisoned Exemption**,” which provides discretion for the release of information comprising “records of persons imprisoned . . . provided such records relate to the imprisonment,” Va. Code Ann. § 2.2-3706(B)(4). Exhibit E; Petition ¶ 10, 35. As to the Bite Reports Request, VADOC asserted two of the above exemptions—the Public Safety Exemption and the Personnel Information Exemption—to withhold the responsive records in their entirety. Exhibit E at 2; Petition ¶¶ 12, 44. For the reasons set forth below, these exemptions do not apply to the records in question.

The purpose of VFOIA is 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 Ann. § 3700(B). As such, the Act requires that exemptions to its mandate of disclosure be narrowly construed, and it places the burden on an agency withholding a record to demonstrate by a preponderance of the evidence that the exemption was properly applied. VADOC cannot satisfy this burden. Additionally, both VFOIA and VADOC’s own operating procedures require that even if a portion of a record is exempt from mandatory disclosure, the non-exempt portion must be released with exempt information redacted. *See* Va. Code Ann. § 2.2-3704.1; Va. Dep’t of Corrections, *Public Access to DOC Public Records*, Operating Procedure 025.1 at 6 (Jan. 1, 2022), <https://perma.cc/4386-CK7G>. Thus, even if this court finds that some portions of the requested records implicate the relevant exemptions, VADOC is required to redact and produce the remaining records.

STANDARD OF LAW

VFOIA defines “public records” as “all writings and recordings that consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, . . . or electronic recording or other form of data compilation, however stored, and regardless of physical form or characteristics, prepared or owned by, or in the possession of a public body or its officers, employees or agents in the transaction of public business.” Va. Code Ann. § 2.2-3701. The statute provides that “[a]ll public records . . . shall be presumed open, unless an exemption is properly invoked,” Va. Code Ann. § 2.2-3700(B), and further requires that “all public records shall be available for inspection and copying upon request” unless “a public body or its officers or employees specifically elect to exercise an exemption provided by this chapter or any other statute.” *Id.*

Issues of statutory interpretation, such as the scope of a VFOIA exemption in the abstract, are pure issues of law. *Conyers v. Martial Arts World of Richmond, Inc.*, 273 Va. 96, 104 (2007). An agency attempting to invoke an exemption from VFOIA's mandatory disclosure requirement, however, must demonstrate by a preponderance of factual evidence that the exemption applies. Va. Code Ann. § 2.2-3713(E). This statutory provision overrides the common law requirement that a petitioner for writ of mandamus prove that he or she lacks an adequate remedy at law to prevail. *Cartwright v. Commonwealth Transp. Com'r of Virginia*, 270 Va. 58, 66 (2005).

The purpose of VFOIA is 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 Ann. § 3700(B). As such, the Act requires that exemptions to its mandate of disclosure be narrowly construed, and it places the burden on an agency withholding a record to demonstrate by a preponderance of the evidence that the exemption was properly applied. Additionally VFOIA requires that even if a portion of a record is exempt from mandatory disclosure, the non-exempt portion must be released with exempt information redacted. *See* Va. Code Ann. § 2.2-3704.1; *Hawkins*, 301 Va. at 428. Thus, even if this court finds that some portions of the requested records implicate the relevant exemptions, VADOC is required to redact and produce the remaining records.

ARGUMENT

I. The Personnel Information Exemption is inapplicable to the requested records.

A. As a matter of statutory construction, the requested records are not "personnel information."

The requested records do not fall under the Personnel Information Exemption, which encompasses only "personnel information concerning identifiable individuals." Va. Code § 2.2-

3705.1(1). The Supreme Court of Virginia has addressed the contours of this exemption. In *Hawkins*, the Court held this phrase means “data, facts, or statements within a public record 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.” 301 Va. at 432 (emphasis added).³ However, because “the legislature has ‘put[] the interpretive thumb on the scale in favor of disclosure,’ *id.* (quoting *Fitzgerald v. Loudoun Cnty. Sheriff’s Off.*, 289 Va. 499, 505 (2015)), the Court noted that this exemption was not a balancing of interests between privacy rights and the need for governmental transparency since the Personnel Information must not be allowed to override the rule in favor of public disclosure.

Thus, the exemption “only [exempts] content . . . from disclosure . . . which is tied to the employment of the individual in some way, and which otherwise *would not be disclosed* to the employer.” *Id.* at 415 (emphasis added). This creates a clear distinction between, for instance, a social security number collected by a government employer for the purposes of payroll and a record produced in the course of an employee’s work. The former represents private information disclosed to a government employer, while the latter is a record of an action taken by a public employee. In order to be covered by the Personnel Information Exemption, the requested record must contain private information that an employee furnished to facilitate employment, *not* information that is a product of a public employee’s everyday duties and responsibilities.

³ The Virginia Supreme Court’s determination in *Hawkins* that the word “personnel” in the statute is defined as “a body of persons employed in some service” precludes the application of the Personnel Information Exemption to information related to a canine. *Id.* at 430.

The mere fact that an employed individual is described or depicted in a requested record does not mean that the record contains “data, facts, or statements” about that employee within the meaning of exemption.⁴ Allowing VADOC to withhold records merely because they identify an employee would thwart the central purpose of VFOIA. *See Hawkins*, 878 S.E.2d at 413 (stating that the primary purpose of VFOIA is “facilitating openness in the administration of government”). As a textual matter and as a matter of legislative intent, the words of the exemption should be given their plain meaning to limit the discretion to pretextually assert the privacy interests of public employees to shield agency decisions from public scrutiny.

B. Even under an inappropriately broad statutory construction, VADOC cannot show that disclosure of the requested records would constitute an “unwarranted invasion of personal privacy.”

Even under an impermissibly broad construction of the statutory text, the requested records do not implicate sufficient privacy interests to warrant application of the Personnel Information Exemption. *Hawkins*, 878 S.E.2d at 416 (characterizing the exemption as ““privacy based””) (quoting Virginia Freedom of Information Advisory Council, Advisory Op. AO-04-03 (Feb. 14, 2003)).

The text of the Personnel Information Exemption mandates an objective test of what constitutes private personnel information. Information is characterized as private when “[its] disclosure would constitute an ‘unwarranted invasion of personal privacy’ to a reasonable person under the circumstances.” *Hawkins*, 878 S.E.2d at 416 (quoting *Humane Society of U.S. v.*

⁴ Indeed, VADOC, per its operating procedures, would likely not house the requested records in a particular employee’s personnel file—defined by the agency as an “[o]fficial file for each employee which may include: application[s], reference letters, standard of conduct notices, performance appraisals, [or] letters of commendation” Va. Dep’t of Corrections, *Employee Records*, Operating Procedure 102.7 at 3, (Oct. 1, 2021), <https://perma.cc/XQ29-AJKU>.

Fanslau, 54 A.D.3d 537, 538 (N.Y. App. Div. 2008)). In articulating this reasonable person standard, the *Hawkins* Court drew upon the statutory regimes of Massachusetts and New York. 878 S.E.2d at 414–16. The exemption is *not* triggered when a disclosure might “result in personal embarrassment to an individual” but rather when a disclosure contains “intimate details of a highly personal nature” that would negatively affect the privacy interests of the personnel in question. *Attorney Gen. v. Collector of Lynn*, 377 Mass. 151, 157 (1979) (holding that publication of a list of tax delinquents did not rise to the level of an unwarranted invasion of personal privacy).

The name of a corrections officer cannot be classified as personnel information for the purposes of the Personnel Information Exemption. The text of the Personnel Information Exemption states unambiguously that “[n]o provision of this chapter or any provision of Chapter 38 (§ 2.2-3800 et seq.) shall be construed as denying public access to . . . (ii) 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 . . .” Va. Code § 2.2-3705.1(1). Aside from the clear statutory language prohibiting Respondent from withholding names under this exemption, the names of public employees do not constitute the “intimate details that would represent an unwarranted invasion of that individual’s personal privacy if disclosed.” *Pottle v. School Committee of Braintree*, 395 Mass 861, 865 (1985) (citing *Hastings & Sons Publishing Co. v. City Treasurer of Lynn*, 374 Mass. 812, 817 (1978)).

Moreover, when the contents of a record relate to the decision of the corrections officer who engaged in the use of force, “the public has a vital interest in ensuring transparency where the behavior of these public officials allegedly fails to comport with the heightened standards attendant to their office.” *Boston Globe Media Partners, LLC. v. Dep’t of Pub. Health*, 482

Mass. 279, 292 (2020). The names of corrections officers within these incident reports and recordings represents general information about their work as public employees rather than private information accessible “solely because of the individual’s employment relationship.” *Hawkins*, 878 S.E.2d at 416. Disclosure of this type of “general information that the public has a right to uncover” does not represent an unwarranted invasion of personal privacy. *See Humane Soc. of U.S. v. Fanslau*, 54 A.D.3d 537, 538 (N.Y. App. Div., 2008).⁵

Under the objective test of private personnel information described by the Supreme Court of Virginia, the identities of corrections officers in the recordings and incident reports do not fall within the exemption. However, even if this Court applied a balancing test, any privacy interest held by the corrections officers regarding the appearance of their names in the report is outweighed by the public’s interest in transparency as to the use of potentially lethal force by public employees. *See Hawkins v. South Hill*, No. CL20000144-00 (Va. Cir. May 26, 2023) (interpreting the Supreme Court’s decision as delineating a “balancing test” rather than an objective test of private personnel information).⁶

⁵ Moreover, in the past several years, VADOC has publicly filed unredacted versions of these reports in public court proceedings, including one report that falls within the date range of the Bite Reports Request. *See Exhibit H* (Plaintiff Exhibit 16, *Rose v. Adams*, No. 7:20-cv-00609, ECF No. 65-15 (W.D. Va. Oct. 13, 2020)); *see also Exhibit I* (Defendant’s Bostic/Barbetto Exhibit 6, *Canady v. Bostic*, No. 7:17-cv-00464, ECF No. 143-8 (W.D. Va. Oct. 2, 2017)); *Exhibit J* (Defense Exhibit 3, *Underwood v. Beavers*, No. 7:15-cv-00513, ECF No. 151-7 (W.D. Va. Jan. 23, 2017)). These past publication of unredacted internal incident reports undermine the claims that the records included in the Bite Reports Request represent an unwarranted invasion of the officers’ privacy.

⁶ Available at <https://www.opengovva.org/hawkins-v-south-hill-remand>. In this formulation, the government employee’s interest in privacy as to a specific piece of information is weighed against the public interest in disclosure and the stated statutory objective of “promot[ing] an increased awareness by all persons of governmental activities.” *Id.* (citing *Fitzgerald*, 289 Va. at 505).

The application of a balancing test would not support withholding the requested records under the Personnel Information Exemption. As the Circuit Court of Mecklenburg noted in applying its interpretation of the *Hawkins* test on remand, the possibility of a “legitimate privacy expectation” cannot impede attempts “to advance the goal of transparency required by the Act.” *Id.* Ms. Beckler’s reporting on canine use of force at VADOC facilities promotes the goal of ensuring transparency as to the government’s use of force. This reporting appraises citizens of Virginia of both the frequency of canine engagements and the severity of any injuries inflicted during these engagements. *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>.

Journalism on the use of canines in prisons also ensures that citizens have access to the information necessary to advocate for policy changes, if warranted. In 2019, the legislature of Oregon prohibited the use of canines during inmate extractions. Or. Rev. Stat. § 421.107 (2023). This legislative movement was a direct result of greater public awareness of these practices due to reporting by the Columbia County Spotlight on a 2017 canine engagement in the Columbia County Jail. *See* Anna Del Savio, *Governor Signs Bill Prohibiting Use of Canines for Jail Cell Extractions*, Columbia County Spotlight (June 4, 2019), <https://perma.cc/7THX-7GAV>. In this series of stories relating to canine cell extractions, the Columbia County Spotlight relied heavily upon the release of body camera footage documenting the 2017 incident. *See* Courtney Vaughn, *Sheriff Deems Dog Attack on Jail Inmate Justifiable*, Columbia County Spotlight (June 4, 2019), <https://perma.cc/RTU6-3RMH>.

The possibility of legislative reform in Virginia further demonstrates the weighty public interest in the requested records. In the six-year period of 2017 to 2022, public records document 271 instances where canines under the control of VADOC were deployed and bit an incarcerated person. *See Hannah Beckler, How Dogs are Trained to Attack US Prisoners*, Bus. Insider (Oct. 10, 2023), <https://www.insider.com/how-dogs-are-trained-to-attack-us-prisoners-history-2023-10>. Ms. Beckler’s recent reporting, published by Insider, has prompted two legislative proposals to limit the use of canines in Virginia prisons. Hannah Beckler, *Virginia Uses Attack Dogs in Prisons More Than Any Other State. Now Lawmakers Want to Crack Down*, Bus. Insider (Dec. 26, 2023), <https://www.businessinsider.com/legislation-curb-patrol-dogs-in-virginia-prisons-2023-12>. Michael Webert, the Republican whip of the Virginia House of Delegates, has described one of the bills as aiming to bring Virginia “in line with the best practices as we have learned from law enforcement canine handlers without sacrificing safety within the DOC.” *Id.* As the legislature confronts the complex issue of canines in prisons, Ms. Beckler’s reporting is a resource that can inform both legislators and the citizens who elect them. Moreover, if the requested records demonstrate misconduct relating to the use of potentially lethal force, this would weigh heavily in favor of disclosure. *Boston Globe Media Partners, LLC. v. Dep’t of Pub. Health*, 482 Mass. 279, 292 (2020).

On the other side of the balancing, any potential privacy interest in withheld records is minor. Taken together, these factors demonstrate that a balancing test does not support blanket redactions of officer names any more than the objective test articulated by the Supreme Court.

II. The Public Safety Exemption is inapplicable to the requested records.

A. As a matter of statutory construction, the scope of the Public Safety Exemption does not extend to the requested records.

The requested records also do not fall under Va. Code § 2.2-3705.2(14), the “Public Safety Exemption.” Specifically, this exemption applies to three categories of records:

(i) engineering, architectural, or construction drawings; (ii) operational, procedural, tactical planning, or training manuals; [and] (iii) staff meeting minutes.

Id. § 2.2-3705.2(14)(i-iii). It is facially evident that the records sought by petitioners are not “engineering, architectural, or construction drawings,” “operational, procedural, tactical planning, or training manuals,” or “staff meeting minutes.” Va. Code Ann. § 2.2-3705.2(14)(i-iii). The statute also provides discretion to withhold documents falling under a catch-all exemption for:

(iv) other records that reveal any of the following, the disclosure of which would jeopardize the safety or security of any person; government facility, building, or structure or persons using such facility, building, or structure . . .

Id. However, this general provision is limited, providing that an exempted record must jeopardize safety or security by revealing:

a. [c]ritical infrastructure information or the location or operation of security equipment and systems . . . b. [v]ulnerability assessments . . . c. [s]urveillance techniques, personnel deployments, alarm or security systems or technologies . . . [or] d. [i]nterconnectivity, network monitoring, network operation centers, master sites, or systems related to the Statewide Agencies Radio System (STARS).⁷

⁷ The canon of statutory construction *ejusdem generis* provides that “[w]hen a particular class of persons or things is enumerated in a statute and general words follow, the general words are to be restricted in their meaning to a sense analogous to the less general, particular words.” *Martin v. Commonwealth*, 224 Va. 298, 301 (1982). Here, the general term of the Public Safety Exemption is preceded by three specific exemptions; thus, it should be read to apply to records analogous to engineering drawings, operations manuals, and staff meeting minutes. Va. Code § 2.2-3705.2(14)(i-iii). In other words, the analogous category is documents describing *mechanisms or processes*. This strongly suggests the Public Safety Exemption does not apply to the requested records, which are records of *incidents*.

Id. Here too it is facially evident that several of these categories do not apply to the requested records. Specifically, disclosure of the requested records would not reveal vulnerability assessments or interconnectivity or network information. *Id.* § 2.2-3705.2(14)(iv)(b), (d). Beyond this and as explained below, however, the remaining categories cannot be construed under the statute to implicate any information that would be revealed by the requested recordings. Therefore, as neither the enumerated categories nor catch-all provision contained in this exemption apply, VADOC cannot rely on this exemption to deny the Red Onion Recordings Request or Bite Reports Request. *Surovell v. Va. Dep’t of Corr.*, 92 Va. Cir. 358, 2016 WL 8231151, *9 (Va. Cir. Mar. 1, 2016) (stating that when analyzing withholdings made by an agency pursuant to the Public Safety Exemption, this Court should first determine “whether the documents at issue even fit within [the Public Safety Exemption],” *i.e.*, whether the exemption’s language reaches the requested documents).

1. Disclosure of the records sought through Petitioner’s request will not reveal “critical infrastructure information” or “the location and operation of security systems and information.”

The statutory meanings of “critical infrastructure information” and “the location and operation of security systems and equipment” do not extend to fleeting depictions (if any) of the interiors of VADOC buildings or any other information responsive to Petitioners’ request.⁸

Under the Public Safety Exemption, “critical infrastructure information” means the same as that term is defined in 6 U.S.C. § 131,” a definitions provision within a subsection of the

⁸ It is facially evident that the records sought through the Bite Reports Request do not implicate “critical infrastructure information” or “the location and operation of security systems and equipment.” As such, Petitioners address this argument primarily to the Red Onion Recordings Request; however, the arguments in this section nonetheless apply equally to the Bite Reports Request.

Homeland Security Act. Va. Code Ann. § 2.2-3705.2(14). This federal statute was designed to address international terrorism, *see generally*, 6 U.S.C. ch. 1,⁹ and it tasks a Director of the Cybersecurity and Infrastructure Security Agency with identifying terrorist threats to the country. 6 U.S.C. § 652(e)(1)(B). The Public Safety Exemption, which was enacted in the years following the attacks of September 11, 2001, shares a similar legislative history. The four categories now enumerated in the catch-all provision were originally placed within a separate subsection specifically meant to remove “plans and information to prevent or respond to terrorist activity” from the mandatory disclosure requirements of VFOIA. 2003 Va. Acts 704; *see also* Va. Code Ann. § 2.2-3705(A)(57) (2004) (repealed and recodified under new numbering by 2004 Va. Acts 690).

The General Assembly chose the phrase “critical infrastructure information” and its associated statutory definition to replace existing statutory language (“critical infrastructure sector or structural components”) in April 2016. 2016 Va. Acts 717.¹⁰ Under the Homeland Security Act, “Critical infrastructure” is defined 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). The definition of “critical infrastructure information” thus identifies *a class of infrastructure*—systems and assets so vital that their destruction would risk national (or Commonwealth) security (including economic security and

⁹ This statute has since been transferred to 6 U.S.C. § 671.

¹⁰ The operative definition in the federal statute at that time was substantively identical to that currently in place. *Compare* 6 U.S.C. § 131 (2016) with 6 U.S.C. § 671 (2022).

public health)—that could be put at risk by the mere disclosure of certain information. Under the federal statute this means **only information that could**: (A) interfere with critical infrastructure, (B) hinder the ability of critical infrastructure to resist an attack, or (C) expose a past problem or solution that could make critical infrastructure vulnerable to attack. 6 U.S.C. § 671(3) (emphasis added). Accordingly, though VADOC may erroneously describe (for example) fleeting depictions of the interiors of its facilities as the disclosure of “critical infrastructure information” the statutory definition of that term, which incorporates this backdrop of federal law, makes clear that this type of information is not present in the records responsive to Petitioners’ request.

Nor will disclosure of the requested records reveal “the location and operation of securities equipment and systems.” The statute provides several examples of the types of “securities equipment and systems” that it is meant to protect, specifically: “ventilation systems, fire protection equipment, mandatory building emergency equipment or systems, elevators, electrical systems, telecommunications equipment and systems, or utility equipment and systems.” As with “critical infrastructure information,” the General Assembly enacted this portion of the statute to protect information the disclosure of which might aid in terrorist activity or other similar threats to public safety. This is evident from the statute itself, which requires “[a]ny public body receiving a request for records excluded under [subsections (iv)(a) and (iv)(b) of the Public Safety Exemption] to notify the Secretary of Public Safety and Homeland Security or his designee of such request and the response made by the public body.” *See* Va. Code § 2.2-3705. It is also clear from the legislative history of the provision, which, as originally enacted, was directed to “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 Ann. § 2.2-3705(A)(39) (2004); *see generally* Lucy Daglish et al., State Open Government Law and Practice in a Post-9/11 World 82

(2007). This provision was later combined with the “critical infrastructure information” provision. *See 2017 Va. Acts 778.* Given the foregoing, the clear legislative intent of the General Assembly as to provide agencies discretion over the release of information that would pose a potential terrorist or public safety threat by revealing “securities equipment and systems.” This threat is not posed by the release of the records sought by Petitioners, which would reveal only infrastructure already in plain sight of prisoners and other visitors to VADOC facilities.

2. Disclosure of the requested records will not reveal surveillance techniques, personnel deployments, alarm or security systems or technologies, or operational plans or protocols.

VADOC’s own Operating Procedures foreclose any argument that the requested records would reveal a “personnel deployment,” “alarm or security system or technology,” or “surveillance technique.” Instead, the requested records will (at most) describe or depict VADOC’s use of force, through dogs, which VADOC itself have described as a “force multiplier” in a category that includes “chemical agents” like tear gas and “impact weapons” like batons or nightsticks. Exhibit C at 6 (“Force multipliers (chemical agents, impact weapons, *canines*, etc.) may be used on offenders with disabilities, if necessary to protect the staff, visitors, and other offenders or to control disruptive behavior.”) (emphasis added).

Further, the requested records would not reveal “operational plans or protocols.” Rather, the records sought by Petitioners relate to *specific, already-occurred incidents, see generally* Exhibit D, not operational plans or protocols which are, by their nature, abstract and forward-looking, *see Protocol, Oxford English Dictionary* (3d ed. 2007) (“[T]he accepted or established code of behaviour in any group, organization, or situation; an instance of this.”); Plan, *Oxford English Dictionary* (3d Ed. 2007) (“An organized (and usually detailed) proposal according to which something is to be done.”).

B. Even if portions of the requested records did implicate the Public Safety Exemption's catch-all provision, VADOC cannot possibly show that such a disclosure will "jeopardize safety and security" because it has made frequent disclosures of the same information for its own benefit.

VADOC has previously allowed security footage of Red Onion State Prison, as well as unredacted bite reports, into the public record in several ways. This is dispositive because, assuming, *arguendo*, that the language of the Public Safety Exemption even reaches the requested records, VADOC will bear the burden of demonstrating that safety or security would be "jeopardized." Va. Code Ann. § 2.2-3705.2(14). That term, under this subsection of VFOIA is understood to mean "to expose to danger (as of imminent loss, defeat, or serious harm)." *Va. Dep't of Corr. v. Surovell*, 290 Va. 255, 264 (2015). The test for whether the disclosure of information would jeopardize the safety or security of the prison is "whether on the whole record the VADOC's judgment objectively survives the test of reasonableness, good faith, specificity, and plausibility in this field of prison security." *Id.* at 585. Because of the nature of the records requested, there is no set of facts through which VADOC will be able to meet that burden. *See Surovell v. Va. Dep't of Corr.*, 92 Va. Cir. 358, 2016 WL 8231151, *11 (2016) (ordering release of records for which "there is not even a speculative claim as to how disclosure of these records would create a 'reasonable expectation' of 'potential danger.'").

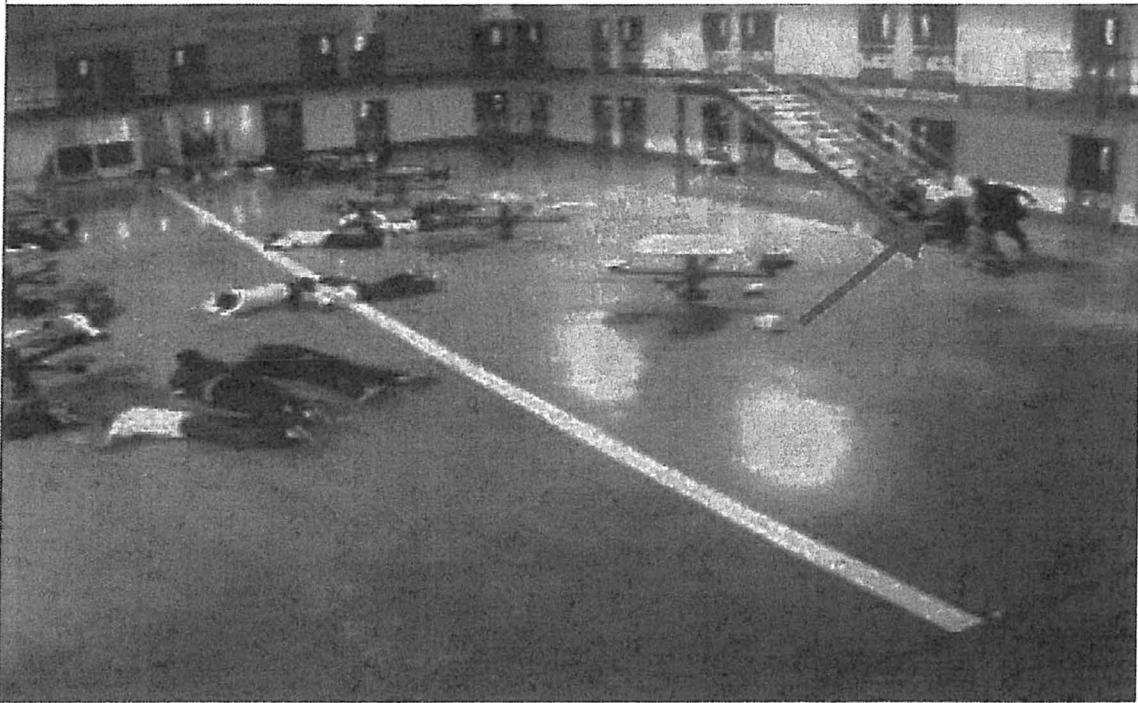
First, VADOC has submitted unredacted bite reports and security footage as evidence in cases with publicly accessible dockets or permitted such reports to be filed without seeking to have them sealed. *E.g.*, Weeks Affidavit ¶¶ 3-6; Exhibit H;; Exhibit I; Exhibit J. Therefore, the release of the requested records would not create any reasonable safety risk. The reports Petitioners seek to review cannot fall within the scope of the Public Safety Exemption because they are indistinguishable from unredacted bite reports available through PACER, the federal court system's public-facing electronic records database. These publicly available, unredacted

bite reports describe the names and identification numbers of all the inmates and officers involved in specific canine interactions. *E.g.*, Weeks Affidavit ¶ 5; Exhibit J. Additionally, the reports describe details such as officer testimony as to the commands given to the canine and where on the body the canine bit specific inmates. The publicly available, unredacted bite reports even describe the crowd management of other prisoners who were not involved, and the specific medical attention given to the bitten inmates. *Id.*

Moreover, these dockets also contain security camera footage that directly depicts the use of canines to restrain prisoners—the exact kind of footage Petitioners seek in the Red Onion Recordings Request. *See, e.g.*, Exhibit K (Defense Exhibit No. 64 and 65, *Alana v. Rose*, No. 7:18-cv-00420, ECF No. 71 (W.D. Va. Aug. 28, 2018)).¹¹ These recordings capture physical altercations between multiple inmates where security officers deployed canines as a method of de-escalation. *Id.* In one instance, they show an inmate being bitten by a canine, and accompanying unredacted reports describe the names of the inmates, the location and depth of the bite along with the medical treatment used by the prison doctors to treat the injury. *Id.* Additionally, the officer who deployed the canine is also named in the report. *Id.* The fact that these recordings already exist in the public record undercuts the possibility of any safety risk created by the release of records sought in the Red Onion Recordings Request.

¹¹ Exhibit K is provided to the Court on a USB drive. Rapid Eye video footage captures multiple perspectives simultaneously; the footage is stored by VADOC in a unique file format that can be played on the application also provided to the Court on the USB drive called “REMMCPlayer.exe.”

A1 Pod Right from clip Rapid Eye Video - Hines Alana fight (5).REM



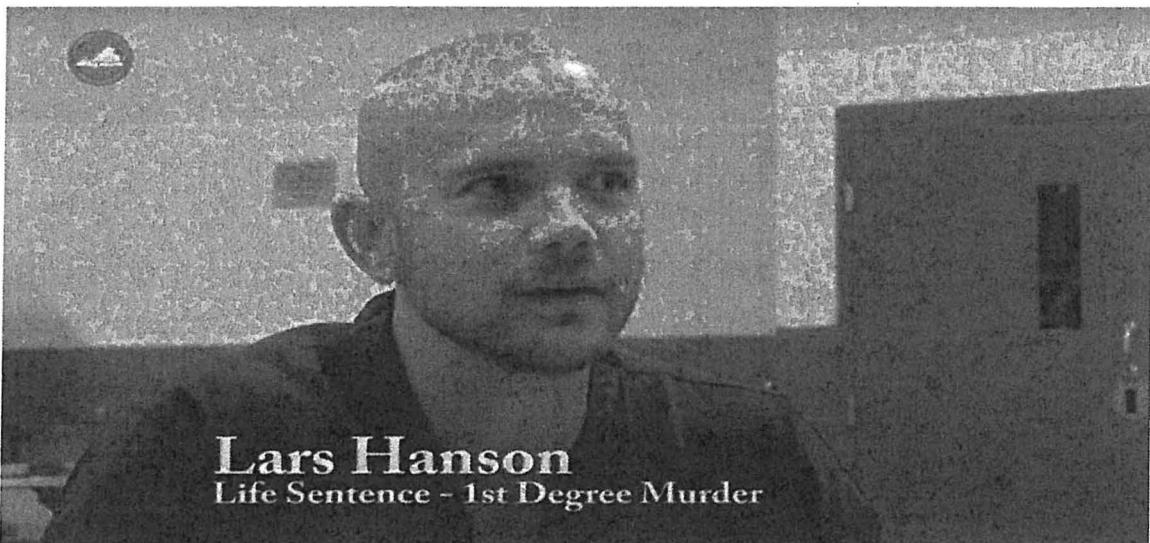
6/17/2016 7:24:17 PM RTZ (GMT-05:00)

Above: RapidEye video footage depicting a canine biting a prisoner. (Exhibit K)

Second, VADOC has permitted access to Red Onion State Prison by the media, including permitting a full-length documentary depicting much of the prison's interior and exterior structure, the placement of cameras and guards, and even (briefly) canines. *See Solitary: Inside Red Onion State Prison* (HBO 2016).¹² Within the first five minutes of the documentary, viewers are shown an interview of a prison inmate that conveys sensitive information such as the prisoner's identity and life story, the unobscured identity of the guards, and the security procedures and restraints used by the guards to escort inmates to and from solitary confinement. *Id.* at 3:05-4:15. Additionally, the documentary shares the specific locations of oversight mechanisms such as armed guards and cameras. *Id.* at 8:13-8:25.

¹² The use of dogs is not a focus of the documentary, although in the closing moments of the documentary, an officer can be seen leading a large canine around the prison yard on a leash.

Third, VADOC has *itself* published video footage of Red Onion as a publicity tool. VADOC operates a YouTube page that presents online videos about several aspects of the prison system in Virginia. *See* Virginia Department of Corrections, YouTube, <https://www.youtube.com/user/virginiacorrections> (last visited Dec. 21, 2023). In 2016, VADOC posted a documentary-style video profiling Red Onion State Prison to the VADOC YouTube page. *See* Virginia Department of Corrections, *Red Onion State Prison*, YouTube (Oct 12, 2016), <https://www.youtube.com/watch?v=H-nnDf88zmE>. Through this video, VADOC presents numerous depictions of the prison, which permit the viewer a broad understanding of the prison population, security personnel, layout, and security strategy. *Id.* Specifically, the names and unobscured identities of several guards and prison administrators are shown throughout the documentary. *E.g., id.* at 2:45-12:26. Additionally, several maximum-security inmates—their identities, voices, and general cell locations—are featured. *Id.* at 19:51-22:54.



Above: VADOC YouTube video shows the identity and imprisonment information of an inmate.



Above: VADOC YouTube video shows cells of two prisoners taking rehabilitation classes.



Above: VADOC YouTube video shows the location of security cameras in Red Onion.

Given VADOC's willingness to disclose such information through a publicly accessible media outlet such as YouTube, VADOC's judgment regarding the potential security risk of records responsive to the Red Onion Recordings cannot "objectively survive[] the test of

reasonableness, good faith, specificity, and plausibility.”

Separately, but importantly, the requested records will show that VADOC employs use of force through dogs in its administration of the prison system—already public knowledge—and will depict or describe actual canine encounters that have already occurred. Petition ¶¶ 7, 8. Indeed, the requested records will reveal little more about the dogs than is already known by the prisoner on whom the dogs were deployed (in the case of the Recordings Request) or the person who suffered a bite (in the case of the Bite Reports Request). *Id.* The same holds true for any fleeting or inadvertent depiction of VADOC facilities in the requested records. Whatever surrounding infrastructure elements are shown in the Recordings Request will necessarily be those visible to both guards and prisoners. Indeed, it defies common sense that the disclosure of self-evident infrastructure information within the requested records could pose a reasonable danger when such information exists in plain view of inmates.

Persuasive authority suggests that a limited relationship to security is insufficient to exempt a record under the Public Safety Exemption. The statutory provision “does not exempt all procedural records or manuals solely because they may be related to security issues. Instead, the exemption only applies to those records whose disclosure would jeopardize the security of the building or the safety of the persons using the building.” Virginia Freedom of Information Advisory Council, Advisory Op. AO-02-13 (Oct. 31, 2-22).¹³ The requested records, which relate to past canine encounters, have at most an insufficient, tangential “relat[ion] to security

¹³ Available at <https://perma.cc/7RUN-3PQM>. The VFOIA Council is an advisory council in the legislative branch created “to encourage and facilitate compliance with the Freedom of Information Act.” Va. Code Ann. § 30-178 *et seq.* Upon request, it provides advisory opinions or guidelines to requesters or public bodies. Va. Code Ann. § 30-179.

issues.” Any claim by VADOC that such records will jeopardize safety and security will be “merely conclusory,” at best. *See Surovell*, 2016 WL 8231151, at *5 n.5.

* * *

The purpose of the Public Safety Exemption is to allow agencies to forgo disclosure of extremely sensitive information, such as confidential engineering schematics, operational plans, or internal security mechanisms, that could weaken public safety or security (for instance, by providing a roadmap for terrorists) just through their public disclosure. As a matter of law, this exemption cannot apply to the information contained within the requested records. Additionally, the information contained within the requested records is of the same character as that already in the public record. As such, the disclosure of those records cannot possibly pose the level of reasonable potential danger, the burden that VADOC must satisfy under the Public Safety Exemption.

III. The Records of Persons Imprisoned Exemption is inapplicable to the Red Onion Recordings Request.

Both the plain text of VFOIA and the principles of statutory interpretation contradict VADOC’s claim that video and audio recordings of dog bites in Red Onion State Prison can be withheld under the Records of Persons Imprisoned Exemption.¹⁴ The exemption reads:

B. Discretionary releases. The following records are excluded from the mandatory disclosure provisions of this chapter, but may be disclosed by the custodian, in his discretion, except where such disclosure is prohibited by law:

[. . .]

4. All records of persons imprisoned in penal institutions in the Commonwealth provided such records relate to the imprisonment[.]

¹⁴ VADOC does not assert that this exemption applies to the records responsive to the Bite Reports Request. Exhibit E at 2.

Va. Code Ann. § 2.2-3706(B)(4). This exemption, like all VFOIA exemptions, must “be narrowly construed” in a manner that accords with the General Assembly’s intent to provide “an increased awareness by all persons of governmental activities and afford every opportunity to citizens to witness the operations of government.” Va. Code Ann. § 2.2-3700.

It is apparent from the plain text of this exemption that the scope of this statute does not extend to the requested records. *See Brown v. Lukhard*, 229 Va. 316, 321 (1985) (“If language is clear and unambiguous, there is no need for construction by the court; the plain meaning and intent of the enactment will be given it.”). In order for this exemption to reach a particular record, two conditions must be met: (1) the record must be “of” a specific prisoner, and (2) the record must specifically relate to that prisoner’s imprisonment. Neither of these conditions can be satisfied with respect to the recordings of dog bites.

First, the records sought by Petitioners are not records *of* prisoners that relate to their imprisonment, but instead are records of how the prison itself is administered—they were created by the prison administration and convey the actions of prison officials. Records responsive to the Red Onion Recordings Request reflect a prison officer’s decision to use a dog; it is this decision which prompts the recording of an interaction. Far from being records “of prisoners,” categorically, the requested records could potentially reveal collateral injuries to guards or others who are not inmates, or injuries to the dogs themselves. *See Exhibit A at 20.*

Even to the extent the requested records contain depictions of inmates, video and audio recordings that depict prisoners do not automatically fall within the scope of the Records of Persons Imprisoned Exemption. Notably, the presence of an identifiable inmate in a specific correctional facility does not constitute confidential information. In Virginia, a person’s incarceration status is public information; VADOC acknowledges that “custody or parole status

and facility location” specific to an individual inmate to be released to the public. Va. Dep’t of Corrections, *Public Access to DOC Public Records*, Operating Procedure 050.01 at 16–17 (May 1, 2023). The requested recordings do not expose any intimate information about inmates to the public that is not already publicly accessible.¹⁵

The Records of Persons Imprisoned Exemption must be read narrowly to preserve the ability of the public to engage in this valuable oversight. Because VADOC is specifically focused on the administration of prisons, nearly any record that the agency generates could be creatively cast to relate to “persons imprisoned.” Thus, a broad interpretation of this exemption reaching such records would severely curtail the ability of the press and public to oversee VADOC. Not only would this result violate VFOIA’s rule of construction, it would also undermine the statute’s overall purpose. Va. Code Ann. § 2.2-3700 (requiring exemptions to “be narrowly construed” to promote “an increased awareness by all persons of governmental activities [that] afford[s] every opportunity to citizens to witness the operations of government.”). This exemption should not be read to apply to records of the prison administration that directly convey its actions.

Nor do these recordings “relate to the imprisonment” of an inmate. Imprisonment 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.” *Imprison*, Legal Info. Inst., <https://perma.cc/PN6N-CYXK> (last visited May 21, 2023); *see also* Imprisonment, *Black’s Law Dictionary* (11th ed. 2019) (“The act of confining a person, esp. in a prison.”). Recordings of canines biting or otherwise “engaging” a person in a VADOC facility—even if that person is a

¹⁵ In the alternative, to the extent the court disagrees, the identities of inmates could easily be obscured via blurring.

prisoner—do not fall within the exemption because they do not relate to “imprisonment,” but rather to VADOC’s deliberate use of force.

The nature of the requested recordings differs significantly from those records at issue in *National Public Radio v. Virginia Department of Corrections*. In that case, the Court found that VADOC was entitled to exercise its discretion to withhold audio recordings “made during executions conducted in Virginia.” Order, *National Public Radio v. Virginia Department of Corrections*, Cir. Ct. for the City of Charlottesville, No. CL23-386 (Aug. 28, 2023) (internal quotation marks omitted). The Red Onion Recordings Request implicate spontaneous actions and decision-making of VADOC; the requested records directly reflect and primarily focus on the use of canines within VADOC facilities.¹⁶ The records at issue are not records *of* persons imprisoned and do not concern imprisonment; rather, they depict or reflect VADOC’s decision to use canines in certain situations.

Public oversight is particularly important for VADOC—an agency that, by necessity, operates largely behind locked doors. If the Records of Persons Imprisoned Exemption applies to *all* records that reference inmates in any context, VFOIA would be rendered almost inoperative against this agency. Because the requested recordings are not “records of persons imprisoned . . . relate[d] to the imprisonment,” they are not exempt from mandatory disclosure and must be produced.

¹⁶ Mr. Kalish is a party to both this matter and *National Public Radio et al. v. Virginia Department of Corrections*. That case is presently before the Virginia Court of Appeals (CAV Record No. 1669-23-2); Mr. Kalish waives no argument in that case through the above description, which is meant only to distinguish the records at issue in the two matters.

IV. VADOC must release all portions of the requested records not subject to the claimed exemptions.

VADOC is required to release all information contained within the requested records. Even if the Court determines that certain information within a record falls under one of the claimed exemptions, VFOIA requires VADOC to release other portions of that record. Va. Code § 2.2-3701; *see also* Va. Code § 2.2-3704.1 (“A public record may be withheld from disclosure in its entirety only to the extent that an exclusion from disclosure under this chapter or other provision of law applies to the entire content of the public record.”).

The General Assembly enacted Va. Code § 2.2-3704.1 to clarify that government agencies had an obligation to release responsive records even when portions of these records fell under an exemption and required redaction. *Hawkins*, 878 S.E.2d at 414. The legislature made this change to override the Virginia Supreme Court’s prior holding that the language of VFOIA “creates no requirement of partial disclosure or redaction” for documents containing information covered by one of the enumerated exemptions. *Virginia Dept. of Corrections v. Surovell*, 776 S.E.2d 579, 587 (Va. 2015). In response to the *Surovell* holding, the General Assembly enacted § 2.2-3704.1 requiring that “all portions of the public record that are not so excluded shall be disclosed.” 2016 Va. Acts ch. 620. This amendment creates a system that “facilitate[s] openness in the administration of government” regarding requests that tangentially implicate one of the exemptions enumerated in the statute. *See Am. Tradition Inst. v. Rector & Visitors of Univ. of Virginia*, 287 Va. 330, 339 (2014); Va. Code § 2.2-3700(B). VADOC’s own operating procedures also reflect this requirement, stating that “[s]taff may not withhold an entire record when only a portion is exempt” and that VADOC “must release the requested records with [] exempt information redacted.” Va. Dep’t of Corrections, *Public Access to DOC Public Records*, Operating Procedure 025.1 at 6 (Jan. 1, 2022), <https://perma.cc/4386-CK7G>.

As demonstrated above, VADOC cannot assert any exemption that validly applies to the requested records. But at minimum, the law requires VADOC to release portions of the requested records that are not subject to its asserted exemptions.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Court issue a writ of mandamus ordering Respondent to release the requested records in full or, alternatively, to show cause why any portion of that record may not be produced pursuant to an applicable VFOIA exemption and to release all remaining records or portions of records. Petitioners also respectfully request that the Court award Petitioners' reasonable costs, including attorneys' fees.

Dated: February 1, 2024

Respectfully submitted,

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Counsel for Petitioners

CERTIFICATE OF SERVICE

I certify that on or before February 2, 2024, a copy of the foregoing and any attachments thereto will be served by email upon the following addresses:

docmail@vadoc.virginia.gov
FOIA@VADOC.virginia.gov

If additional service is not waived by counsel for Respondent, a copy will also be served by private process server upon:

Chadwick Dotson
Department of Corrections
6900 Atmore Drive
Richmond, VA 23225

/s/ Lin Weeks

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