

VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF CHARLOTTESVILLE

INSIDER, INC., HANNAH BECKLER,
and IAN KALISH,

Petitioners,

v.

Case No. 540CL240000065-00

VIRGINIA DEPARTMENT OF
CORRECTIONS,

Respondent.

RESPONSE IN OPPOSITION TO PLAINTIFFS'
PETITION FOR A WRIT OF MANDAMUS

Petitioners allege that the Virginia Department of Corrections (VDOC) violated the Virginia Freedom of Information Act (FOIA) by withholding documents in response to a request seeking documents and videos associated with the use of canines at VDOC facilities. Petitioners have also filed a brief in support of their mandamus petition. Understanding that the Court is presently considering the arguments and testimony already presented, as well as documents that have been submitted for *in camera* review, VDOC submits this Response in Opposition to ensure that its arguments are fully before the Court for consideration. VDOC maintains that the records were properly withheld under the FOIA exemption for records of persons incarcerated within the Commonwealth, and that portions of the records are additionally exempt under other applicable exemptions. VDOC therefore requests that the petition for a writ of mandamus be denied and dismissed.

FILED
3/22/24 @ 10:30 AM
(Date & Time)
City of Charlottesville
Circuit Court Clerk's Office
Liezelle A. Dugger, Clerk
By [Signature]
Deputy Clerk

STATEMENT OF FACTS

1. In June 2022, Petitioners, through counsel, submitted a FOIA request to VDOC, seeking the following:

- “all video and audio recordings of all uses of force involving a canine at Red Onion State Prison [ROSP] from January 1, 2021 through December 31, 2021,” and
- All “bite reports” recorded in DINGO¹ from January 1, 2017 to the present.

See 6/17/22 Letter (attached as Exhibit A).

2. Several months after VDOC denied the requests, counsel for Petitioners served VDOC with an intended Petition for Writ of Mandamus, to be filed in the Circuit Court for the City of Richmond. *See* 12/29/22 Unfiled Petition (attached as Exhibit B).

3. The unfiled petition alleged, specifically, that VDOC violated FOIA by not producing records falling within those two categories—video and audio recordings from ROSP from 2021, and bite reports from 2017 through 2022. *See id.*

4. Following a series of negotiations, VDOC agreed to “release redacted records responsive to the ‘Bite Report Request,’” and that, “[i]n return,” Petitioners “will not proceed with the filing of [the] FOIA petition, and any claims relative to the [prior] FOIA requests will be deemed settled.” *See* 3/12/23 Letter from M. O’Shea to L. Weeks (attached as Exhibit C).

5. Redacted records were provided to Petitioners in accordance with that agreement. *See* 3/13/23 Letter from M. O’Shea to L. Weeks (attached as Exhibit D); 3/20/21 Email from M. O’Shea to L. Weeks (attached as Exhibit E).

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

6. Just over a month later, Petitioners submitted a new FOIA request, this time seeking

- “[a]ll video and audio recordings in which a VADOC canine bit or otherwise ‘engaged’ an inmate at Red Onion State Prison from January 1, 2017 to December 31, 2022,” as well as
- “[a]ll bite reports and internal incident reports of [] incidents” occurring at VDOC facilities on the following dates: 12/11/17, 12/25/18, 1/16/19, 9/20/19, 8/9/20, 11/10/20, 4/20/21, 5/7/21, 6/16/21, 9/24/21, 10/29/21, 11/6/21.

See 4/19/23 FOIA Request (attached to mandamus petition as Exhibit D).

7. There is some overlap between the prior FOIA requests that had been resolved via settlement, and the new request. Specifically, any “video and audio recordings” of a canine engagement from ROSP during 2021 were encompassed by that settlement; as were any bite reports pertaining to the listed incidents. Not encompassed were the requested recordings from 2017-2020 and 2022. Also not encompassed were internal incident reports corresponding to the cited dates.

8. By letter dated May 8, 2023, VDOC denied the FOIA request, citing the records of imprisonment exemption, Code § 2.2-3706(B)(4), the personnel information exemption, Code § 2.2-3705.1(1), and the building security exemption, Code § 2.2-3705.2(14). See 5/8/23 Letter from G. Fulmer (attached to mandamus petition as Exhibit E).

9. Following a hearing on February 14, 2024, where the Court heard testimony and admitted certain documents into evidence, the Court directed VDOC to submit responsive items to the Court for *in camera* review.

10. As relative to the request for “bite reports and internal incident reports,” VDOC submitted the following:

- 12/11/17: No bite report exists. Incident reports submitted (8 pages).
- 12/25/18: Bite report and incident reports submitted (4 pages).²
- 1/16/19: No bite report exists. Incident reports submitted (20 pages).
- 9/20/19: Bite report and incident reports submitted (15 pages).
- 8/9/20: No bite report exists. Incident reports submitted (13 pages).
- 11/10/20: No bite report exists. Incident reports submitted (16 pages).
- 4/20/21: No bite report exists. Incident report submitted (2 pages).
- 5/7/21: Bite report and incident reports submitted (5 pages).
- 6/16/21: Bite report and incident reports submitted (4 pages).
- 9/24/21: Bite report and incident reports submitted (9 pages).
- 10/29/21: No bite report exists. Incident report submitted (3 pages).
- 11/6/21: No bite report exists. Incident reports submitted (9 pages).

11. Each Bite Report contains information corresponding to the canine involved, the handler involved, the date and location of the incident, whether medical attention was required, and a description of the incident between the canine and a specific inmate, identified by name and inmate identification number in the narrative portion of the report.

² For the five submitted bite reports, VDOC maintains that redacted versions of these records were made available to Petitioners in March 2023. Specifically, counsel notes that the “Report Executed On” date at the top of each redacted bite report reflects a creation date of 3/14/2023. If Petitioners maintain that they are unable to locate these five bite reports in the documents previously provided, the undersigned counsel would be happy to provide redacted copies of these documents pursuant to the prior negotiated settlement between the parties.

12. The internal incident reports reflect a date and time of incident, location of incident, identification of reporting staff and other staff involved in the incident, identification of any inmates involved in the incident (by name and inmate identification number), and then a narrative description of the incident. Some of the reports include specific information about medical attention provided to the inmate and/or responding staff members.

13. For the requested recordings from ROSP, VDOC produced 65 surveillance video recordings corresponding to 42 separate incidents, dating from July 2019 through June 2022.³

14. The recordings were taken by surveillance cameras located in the secure areas of Red Onion State Prison (ROSP), including the A housing unit, the B housing unit, and the dining hall. Faces of inmates and officers are depicted in the videos. Each discrete video is taken from a single camera angle. There are no audio components.

15. As VDOC's representative testified at the February 14 hearing, releasing the surveillance video recordings creates a security concern because the camera views show the location of blind spots in the surveillance system at ROSP, in areas that are accessible to inmates and which—if known by those inmates—could be taken advantage of.

ARGUMENT

To the extent the records sought are encompassed by the prior negotiated settlement between the parties, VDOC maintains that Petitioners are barred from seeking those documents pursuant to the equitable doctrines of unclean hands and accord and satisfaction. That aside, because all of the records sought constitute records of persons incarcerated in the

³ As explained in the Second Certificate of Compliance submitted by counsel, the older surveillance video recordings had been placed on an external hard drive, and when investigators attempted to retrieve those videos so they could be submitted to the Court for *in camera* review, it was discovered that the hard drive had been corrupted. Efforts to restore the hard drive and retrieve the videos were unsuccessful.

Commonwealth, they are entirely exempt, and Petitioners are not entitled to mandamus relief. The video recordings are additionally exempt, in their entirety, under the security exemption codified at Code § 2.2-3705.2(14). If this Court were to find those exemptions inapplicable, VDOC maintains that portions of the records remain exempt under other applicable FOIA exceptions, such as the exemption for personnel information, Code § 2.2-3705.1(1); health records, Code § 2.2-3705.5(1), information regarding the identities of witnesses and victims, Code § 2.2-3706(B)(10), and identifying information of a personal or medical nature that would jeopardize the privacy of any person, Code § 2.2-3706(D).

I. Equitable Defenses: Unclean Hands and Accord and Satisfaction

The equitable doctrine of unclean hands is based on the “ancient maxim” that “[h]e who comes into equity must come with clean hands.” *Richards v. Musselman*, 221 Va. 181, 185 & n.1, 267 S.E.2d 164, 166 & n.1 (1980) (internal quotations omitted). A complainant “seeking equitable relief must not himself have been guilty of any inequitable or wrongful conduct with respect to the transaction or subject matter sued on.” *Id.* (internal quotations omitted); *see also Butler v. Hayes*, 254 Va. 38, 43, 487 S.E.2d 229, 232 (1997) (“[A] litigant who seeks to invoke an equitable remedy must have clean hands.”); *Firebaugh v. Hanback*, 247 Va. 519, 526, 443 S.E.2d 134, 138 (1994) (“He who asks equity must do equity, and he who comes into equity must come with clean hands.”); *McNeir v. McNeir*, 178 Va. 285, 290, 16 S.E.2d 632, 633 (1941) (“[A] plaintiff must come in with clean hands, that is, he must be free from reproach in his conduct.”).

To the extent the parties previously negotiated a settlement encompassing a portion of the records sought here—specifically, the five canine Bite Reports and the nine video recordings from 2021—Petitioners should be barred from seeking mandamus relief because they come

before the Court with unclean hands. Approximately one month after settling the prior FOIA complaint, Petitioners sought precisely the same records over which the parties had just struck a deal. It is apparent that Petitioners deliberately negotiated a settlement with VDOC, obtaining records that—in fact—exceeded the scope of the records initially requested, with the presumptive intent to re-request them and then sue to obtain the full body of documents.

FOIA mandates that public entities should “make reasonable efforts to reach an agreement with a requestor concerning the production of the records requested.” Code § 2.2-3700(B). And Code § 2.2-3713(C) provides for expedited hearings of FOIA petitions only if the requestor has provided the public body with an advance copy of the anticipated filing. Read together, these provisions evidence a clear legislative intent for public bodies and requestors to negotiate and resolve disputes over the scope of public records requests. Allowing a FOIA requestor to negotiate an agreement with a public body, and then later sidestep that agreement by renewing a prior settled request, would eviscerate this legislative purpose.

The common law defense of accord and satisfaction operates as an additional equitable bar under these circumstances. Although typically applied when there is a dispute over the amount of money owed under a contract, more broadly speaking, accord and satisfaction occurs “whereby the parties agree to give and accept something in settlement of the claim or demand of the one against the other, and perform such agreement, the accord being the agreement, and the satisfaction its execution or performance.” *Virginia-Carolina Elec. Works v. Cooper*, 192 Va. 78, 80, 63 S.E.2d 717, 718 (1951). Here, VDOC offered something (production of redacted bite reports and incident reports) in settlement of a demand by Petitioners (as embodied in their FOIA requests and unfiled mandamus petition). And, as Mr. Fulmer testified, VDOC performed its

obligations under that agreement. *See also* Ex. D & Ex. E. Petitioners should be barred from sidestepping this agreement by renewing and pursuing their earlier, settled requests.

For these reasons, VDOC maintains that Petitioners should be barred from seeking the five canine bite reports and the 2021 video recordings under the equitable doctrines of unclean hands and accord and satisfaction.

II. Records of Incarcerated Persons⁴

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

The plain language of this statute is clear and unambiguous. “All” public records pertaining to individuals “imprisoned in penal institutions in the Commonwealth” are exempt from compelled disclosure, “provided such records relate to the imprisonment.” Code § 2.2-3706(B)(4). The only possible word requiring clarification in this exemption is the preposition “of,” which, in this context, “is straightforward enough.” *Jones v. Commonwealth*, 296 Va. 412, 415, 821 S.E.2d 540, 542 (2018). That is, “of” generally means “about,” “connected with,” or “as concerns.” THE MERRIAM-WEBSTER DICTIONARY 501 (7th ed. 2016). Although, as Petitioners argue, the word “of” can also have a possessive connotation, that interpretation would create an absurd result here.

⁴ VDOC notes that the scope of this exemption is presently being litigated on appeal to the Virginia Court of Appeals, and counsel respectfully suggests that it might be appropriate to await issuance of that opinion prior to ruling on the present petition, as that opinion should contain much-needed guidance—one way or another—interpreting and applying this statutory language.

Specifically, if the phrase “records of persons imprisoned” were interpreted, as urged by Petitioners, to encompass only private records of inmates—such as items of personal correspondence—the exemption would not apply to anything. FOIA only concerns access to public records. And “public records” are those “writings and recordings . . . prepared or owned by, or in the possession of a public body or its officers, employees, or agents in the transaction of public business.” Code § 2.2-3701. If limited, as Petitioners urge, to records created or controlled by inmates themselves, the exemption would not apply to *any* documents, for the private records of inmates are not public records at all, as they were not created “in the transaction of public business.” Code § 2.2-3701; *see also Am. Tradition Inst.*, 287 Va. at 340, 756 S.E.2d at 440 (“[A]ll private records are exempt.”).

The proposed construction of the statute set forward by Petitioners would therefore render Code § 2.2-3706(B)(4) entirely superfluous. Even when statutes must be strictly construed, “[t]he plain, obvious and rational meaning of a statute is always preferred to any curious, narrow or strained construction; a statute should never be construed so that it leads to absurd results.” *Newton v. Commonwealth*, 21 Va. App. 86, 89, 462 S.E.2d 117, 119 (1995) (quoting *Branch v. Commonwealth*, 14 Va. App. 836, 839, 419 S.E.2d 422, 424 (1992)). And “every part of a statute is presumed to have some effect and no part will be considered meaningless unless absolutely necessary.” *Sandidge v. Commonwealth*, 67 Va. App. 150, 159, 793 S.E.2d 836, 841 (2016).

This Court should therefore reject the construction offered by Petitioners, as it would create the absurd result of making the exemption apply to no public records at all. This limiting construction offered by Petitioners would have similar effect on the sister exemption for “[a]ll records of adult persons under . . . supervision by state probation and parole services.” Code §

2.2-3706(B)(6). Following the same logic, this provision would be limited to the records owned or created by private citizens who are on probation or parole supervision—documents that are also not “public records”—rendering this exemption just as meaningless.

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

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

apply pursuant to the Act's other provisions," and, thus, disclosure of the requested information "is explicitly committed by the language of the statute to [the sheriff's] discretion").

Second, the FOIA Advisory Council has opined that VDOC properly invoked this exemption in response to an inquiry seeking a "list of the names, state identification numbers, and facility location of all female inmates incarcerated at [VDOC] institutions." FOIA Council Advisory Opinion AO-02-11 (July 21, 2011) (copy attached as Exhibit G). Specifically, although "information concerning arrests and charges are public through law-enforcement agencies," and "information about trials and convictions are public through court records, [] information about persons held in state correctional facilities after conviction are exempt from mandatory disclosure." *Id.* "In other words, under Virginia law there are no secret arrests, there are no secret court proceedings, but once someone has been convicted and assigned to the custody of DOC, public access is curtailed." *Id.*⁵

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

⁵⁵ This advisory opinion was construing an identical exemption in a predecessor version of the statute, former Code § 2.2-3706(F)(6).

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

In light of the continued re-codification of identical statutory language throughout the history of Virginia’s FOIA statutes, it stands to reason that the General Assembly concurred with the long-standing interpretation of the records of incarceration exemption by the FOIA Advisory Council and the Office of the Attorney General: “Its acquiescence is deemed to be approval.” *Barson v. Commonwealth*, 286 Va. 67, 74, 726 S.E.2d 292, 296 (2012). As the Supreme Court has noted, “due consideration” should be provided to official opinions of the Office of the Attorney General, and “[t]his is particularly so when the General Assembly has known of the Attorney General’s Opinion [for years], and has done nothing to change it,” *Beck*, 267 Va. at 492, 593 S.E.2d at 200, for “[t]he legislature is presumed to have had knowledge of the

Attorney General’s interpretation of the statutes, and its failure to make corrective amendments evinces legislative acquiescence in the Attorney General’s view.” *Id.* (quoting *Browning-Ferris, Inc. v. Commonwealth*, 225 Va. 157, 161-62, 300 S.E.2d 603, 605-06 (1983)).

The language of Code § 2.2-3706(B)(4) is straightforward: “All records of persons imprisoned in penal institutions in the Commonwealth” are exempt from mandatory disclosure, “provided such records relate to the imprisonment.” This includes VDOC-created records describing specific inmates, inmate activities, and other circumstances relating to their confinement. *See, e.g.*, Ex. G, AO-02-11 (“DOC is correct that [the records of imprisonment exemption] allows it to withhold, in its discretion . . . information about persons held in state correctional facilities.”). This Court should reject Petitioners’ attempt to eviscerate this exemption by limiting it to personal records “created or controlled” by prisoners—which are not “public records” subject to FOIA in any event.

A. As Applied to Video Recordings

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

B. As Applied to Bite Reports and Internal Incident Reports

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

C. As records of incarcerated persons relating to their imprisonment, the records fall entirely within the scope of Code § 2.2-3706(B)(4), and no redaction is required.

Under Virginia’s FOIA, “[a] public record may be withheld from disclosure in its entirety only to the extent that an exclusion from disclosure . . . applies to the entire content of the public record.” Code § 2.2-3704.01. This does not mean, however, that state entities must go through exempt records and “un-exempt” them by removing the very information that brings them within the scope of a categorical exemption in the first place. For example, a health provider would not have to go through and redact out the name of a patient from a health record, so that the redacted health record could then be provided to a FOIA requestor. In determining whether an exclusion “applies to the entire content of the public record,” the wording and nature of the FOIA exemption are controlling.

Here, the records of incarceration exemption does not limit itself to only “portions of records,” records “to the extent” they might reveal certain information (such as the identity of an inmate), or “information” about certain topics, as do other FOIA exemptions in the same statute. *See, e.g.*, Code § 2.2-3706(B)(8) (exempting “[t]hose portions of any records containing information”); Code § 2.2-3706(B)(7) (exempting records “to the extent that they disclose” certain information); Code § 2.2-3706(B)(5) (exempting records “to the extent that such records contain” certain information). Rather, Code § 2.2-3706(B)(4) exempts “*all records*” of incarcerated persons, provided only that the record “relates” to the incarceration. Because these reports and videos are “records of” an incarcerated person, relating to the imprisonment, they are exempt in its entirety, and VDOC is under no obligation to go through and remove (for example) references to that incarcerated individual so as to “un-exempt” the records.

The FOIA Advisory Council recently addressed a similar question in the context of a request for scholastic records. Specifically, the issue was whether a public body had an obligation to redact the names of students from a scholastic record in order to provide anonymized, individual test scores to a FOIA requestor. The applicable FOIA exemption excluded from mandatory disclosure “[s]cholastic records containing information concerning identifiable individuals,” meaning “those records containing information directly related to a student.” Code § 2.2-3705.4(A)(1); Code § 2.2-3701. The FOIA Council noted, first, that the “test scores that are being requested are considered part of a scholastic record because the information is directly related to individual students.” Ex. I, FOIA Advisory Opinion AO-03-19 (Apr. 3, 2019). Although the “requesters seem to be under the impression that test scores would no longer be exempt under FOIA if the student’s name and other personally identifiable information were to be redacted,” the FOIA Council explained that this position misconstrues the

FOIA provisions regarding a duty to redact. *Id.* “Simply put, FOIA allows for the redaction or removal of exempt information from a record that would otherwise be nonexempt, if that information were not present.” *Id.* Thus, “[e]ven if student names and other personal information were to be redacted, the fact still remains that . . . these scholastic records themselves contain specific information about identifiable individuals; thus, the scholastic record and all information contained therein would still be exempt from mandatory disclosure under the provisions of FOIA.” *Id.*

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

In this respect, the records of incarceration exemption is substantially different than the exemption for “personnel information concerning identifiable individuals,” the FOIA exemption addressed and construed in *Hawkins v. Town of South Hill*, 301 Va. 416, 878 S.E.2d 408 (2022). *See* Code § 2.2-3705.1(1). In *Hawkins*, the Supreme Court interpreted the personnel information exemption, holding that it encompasses “content within a public record that references personnel and relates to specific persons.” 301 Va. at 426-27, 878 S.E.2d at 413. Although FOIA, in its original form, exempted “personnel records” from compelled disclosure, *id.* at 427, 878 S.E.2d at

413, *Hawkins* reasoned that recent legislative amendments—changing “personnel record containing information concerning identifiable individuals” to “personnel information concerning identifiable individuals”—demonstrated legislative intent “to narrow the exception and provide for partial disclosure.” *Id.* at 428, 878 S.E.2d at 414. *Hawkins* therefore remanded the case to the circuit court for further consideration, in light of the Court’s clarification of the language and scope of the personnel information exemption.

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

VDOC does not—and has never—taken the position that a public record is automatically exempt in its entirety simply because it mentions the name of an inmate. This was not VDOC’s position in *Surovell*, and it is not VDOC’s position now. *See, e.g., Va. Dep’t of Corr. v. Surovell*, 290 Va. 255, 268, 776 S.E.2d 579, 585-86 (2015) (“The question before us is whether an agency is required to redact an exempt document that may contain non-exempt material. We agree with the Commonwealth that an agency is not required to redact under these circumstances.”). Despite the rather misleading comments made within the legislature about the Supreme Court opinion, the subsequent amendments to FOIA simply codified the rule of decision in *Surovell*—those amendments didn’t actually overturn anything. *Compare Surovell*, 290 Va. at 268, 776 S.E.2d at 586 (where the “wording of the statute applies the exclusion to the entire [public record],” FOIA “creates no requirement of partial disclosure or redaction”); *with* Code § 2.2-

3704.01 (where “an exclusion from disclosure . . . applies to the entire content of the public record,” that record “may be withheld from disclosure in its entirety”).

But that aside, it would have been eminently reasonable for the General Assembly to conclude that records involving specific incarcerated persons should remain FOIA-exempt, in their entirety, for the purpose of shielding the inmates’ privacy and preventing forced dissemination of potentially personal information. This is precisely how the FOIA Advisory Council interpreted this exemption: “[U]nder Virginia law there are no secret arrests, there are no secret court proceedings, but once someone has been convicted and assigned to the custody of DOC, public access is curtailed.” Ex. G, FOIA Council Advisory Opinion AO-02-11 (July 21, 2011). Allowing the exemption to encompass the entire scope of an inmate record—as long as the record “relates” to the incarceration—would further this purpose, particularly considering that there are no remedies available to an inmate to protect his own privacy or assert his own personal safety as a reason for non-disclosure, such as by allowing him to intervene and object to the mandatory release of information about him to any and all comers.

The reports and video recordings are records of incarcerated persons that relate to their imprisonment. Because the nature of these records brings them entirely within the scope of this exemption, VDOC was not required to redact inmate names and images and provide the redacted records to Petitioners. Code § 2.2-3704.01 (where “an exclusion from disclosure . . . applies to the entire content of the public record,” that record “may be withheld from disclosure in its entirety”).

III. Public Safety of Government Building

As applicable to the surveillance video recordings, Code § 2.2-3705.2(14) exempts “records” from public disclosure that would reveal (1) “the location or operation of security

equipment and systems of any public building,” (2) “[s]urveillance techniques,” or (3) “security systems or technologies,” if that disclosure “would jeopardize the safety or security of any person; governmental facility, building, or structure or persons using such facility, building, or structure.” Code § 2.2-3705.2(14)(a), (c).

As discussed during the Court hearing, mandated public disclosure of surveillance video footage from the secure areas of a prison would jeopardize the safety of individuals within that prison—inmates and officers alike—because it would reveal blindspots and other weaknesses within that security system. Once inmates are aware of areas within the prison that are not captured fully by the security cameras, those areas can become targeted for fights between inmates, attacks on correctional officers, distribution of contraband, and other activities that could jeopardize the safety of individuals in that building and the overall security of the building itself. Of note, as interpreted by the Virginia Supreme Court, the public safety exemption does not require a showing of actual and imminent harm, but rather, “expos[ure] to danger,” a “potential future harm.” *Surovell*, 290 Va. at 264-65. And in addressing this question, courts “must take into account that any agency statement of threatened harm . . . will always be speculative to some extent, in the sense that it describes a potential future harm rather than an actual harm.” *Id.* at 265. “The question placed before the court is only whether the potential danger is a reasonable expectation.” *Id.*

Because there is a “reasonable expectation” that revealing weaknesses in a prison surveillance system could lessen the security of that prison, thereby increasing a risk of harm to the inmates and officers in that prison, VDOC properly asserted the public safety exemption when withholding these video recordings. And because these video recordings are each taken from a single camera angle—and, as to some incidents, there is only a single camera angle

preserved—producing only some of the videos would not sufficiently ameliorate these concerns.⁶

In toto, these recordings show exactly what areas of the inside of secure areas of the prison are clearly captured by the surveillance cameras—and which are not. The video recordings are therefore exempt from disclosure under Code § 2.2-3705.2(14). *Cf. Pinson v. United States Dep't of Justice*, 199 F. Supp. 3d 203, 217 (D.D.C. 2016) (agreeing with argument that “disclosing inmates’ Central Files through FOIA could result in a threat to those inmates’ respective safety, the safety of other inmates, and to those BOP staff committed to their confinement and protection”).

IV. Other Applicable Exemptions

If the Court were to determine that some portions of the requested records are subject to compelled public disclosure, VDOC maintains that certain information within those records should remain exempt.

A. Personnel Information

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*, 878 S.E.2d at 413. It is “a privacy-based exemption, designed to protect the subject to the record from the dissemination of personal information.” *Id.*

⁶ There was discussion at the court hearing as to whether certain camera views could be “x-ed out” on the retained surveillance video, such that only certain angles would be displayed. The surveillance video submitted to the court as an exhibit by Petitioners, and that was being discussed on the record, is from the old RapidEye surveillance system, which was replaced by MaxPro cameras in the latter half of 2016. *See Whitten v. Johnson*, No. 7:19cv00728, 2023 U.S. Dist. LEXIS 42151, at *6-7 (W.D. Va. Mar. 13, 2023) (discussing ROSP’s transition from RapidEye cameras to the MaxPro system). This option is therefore not available for the actual videos responsive to this particular FOIA request.

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 “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”).

If this Court were to determine that a portion of these records should be released, VDOC maintains that the names and identities of the responding K9 officers should be redacted as protected personnel information.

B. Protected Health Information

Code § 2.2-3705.5(1) exempts “health records” from public disclosure, additionally providing that “information in the health records of a person [] confined [in a state or local correctional facility] shall continue to be confidential and shall not be disclosed . . . to any person except the subject or except as provided by law.” Code § 2.2-3705.5(1). Health records encompass “electronically recorded material” reflecting services provided by a “health care entity”—which includes a licensed physician. Code § 32.1-127.1:03(8).

Similarly, Code § 2.2-3706(D) exempts those portions of noncriminal records “that contain identifying information of a personal, medical, or financial nature where the release of such information would jeopardize the safety or privacy of any person.” Code § 2.2-3706(D).

To the extent that the bite reports and incident reports narrate or otherwise detail medical treatment provided by nurses or physicians, whether to an inmate or a responding officer, that information should be withheld as exempt under Code § 2.2-3705.5(1). Further, because releasing information about injuries and medical treatment provided to inmates and officers would “jeopardize” the “privacy” of those individuals, the information is additionally exempt under Code § 2.2-3706(D).

C. Identities of Witnesses and Victims

Finally, Code § 2.2-3706(B)(10) exempts from compelled disclosure records that would reveal “[t]he identity of any victim, witness, or undercover officer.” The records sought here all relate to specific incidents within VDOC facilities, involving inmates and responding officers, either of whom could be considered “victims” or “witnesses” (depending on your perspective). The records also reveal the names and identities of other inmates and officers who were present but not necessarily directly involved in that particular use-of-force incident, but who were “witnesses” to that event. Accordingly, the names and identities of inmates and officers present or otherwise involved in the canine bite incidents are additionally exempt under Code § 2.2-3706(B)(10).

CONCLUSION

As the Supreme Court has made clear, “the purpose or motivation behind a request is irrelevant to a citizen’s entitlement to the requested information.” *Associated Tax Serv., Inc. v. Fitzpatrick*, 236 Va. 181, 187, 372 S.E.2d 625, 629 (1988). The plain language of Code § 2.2-

3706(B)(4) exempts these records from compelled disclosure, as they are records of inmates, relating to their imprisonment, that are exempt in their entirety. Petitioners' desire to report on these incidents does not permit them to run roughshod over interests the General Assembly has long sought to protect.

For these reasons, and those discussed in more detail above, VDOC respectfully requests that the mandamus petition be denied and dismissed.

Respectfully submitted,

VIRGINIA DEPARTMENT OF
CORRECTIONS

By: 


Counsel

Margaret Hoehl O'Shea
Senior Assistant Attorney General
Criminal Justice & Public Safety Division
Office of the Attorney General
202 N. 9th Street
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Telephone: (804) 786-5226
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VSB #66611
(*Counsel for Respondent*)

CERTIFICATE OF SERVICE

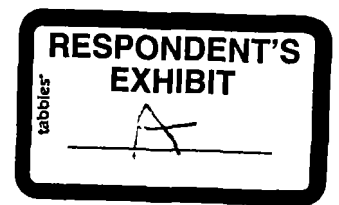
I certify that on March 21, 2024, I emailed a service copy of the foregoing document,
with exhibits, to:

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Counsel for Petitioners

By: 
Senior Assistant Attorney General



SCHOOL of LAW



Ian Kalish
UVA Law First Amendment Clinic

June 17, 2022

Via email: FOIA@vadoc.virginia.gov

Adam J. Dourafei, Esq.
FOIA Officer, Administrative Compliance Unit
Virginia Department of Corrections
P.O. Box 26963
Richmond, VA 23261

Dear Mr. Dourafei:

We represent Hannah Beckler, a journalist employed by Insider, Inc., in connection with two Virginia Freedom of Information Act requests Ms. Beckler submitted on February 18, 2022. These requests were as follows:

- (1) all video and audio recordings of all uses of force involving a canine at Red Onion State Prison from January 1, 2021 to December 31, 2021.
- (2) all “bite reports” recorded in DINGO from Jan 1, 2017 to date.

We write to resubmit these two requests (hereinafter, the “Requests”) as in-state filers. If there are fees associated with fulfilling the Requests, we ask that you please provide us an estimate of those charges, along with a breakdown of costs, before proceeding. We have also reviewed the letter you sent on March 8, 2022, denying Ms. Beckler’s requests. We respectfully ask that the Virginia Department of Corrections (“VADOC”) reconsider its rationale for these denials.

VADOC cited two VFOIA provisions as exempting the requested records from disclosure: Va. Code §§ 2.2-3706(B)(4) and 2.2-3705.2(14). Neither of these provisions justify the blanket withholding of records responsive to either request. We will address each provision in turn.

I. The Requests seek records involving the actions of VADOC employees; these records are not exempt from mandatory disclosure under Va. Code § 2.2-3706(B)(4).

One of the VFOIA provisions cited by VADOC, § 2.2-3706(B)(4), exempts by its terms records “of persons imprisoned in penal institutions in the Commonwealth provided such records relate to the imprisonment.” Neither the audio and video recording of a use of force by a dog nor a bite report chronicling this force is a record “of persons imprisoned.”

It is a prison officer's decision to use a dog, and it is this decision that prompts the need to record an interaction. These recordings thus chronicle the behavior of the dogs and the decision of VADOC employees. Though inmates may be depicted, these records are not "of persons imprisoned," but rather those of prison administrators. Indeed, these records could potentially reveal collateral injuries to guards or others who are not inmates.

Likewise, bite reports recorded in the DINGO system are reports of prison officials' use of force, not records of inmates. VADOC Operating Procedure 435.3 requires that a report be created for all uses of force by dogs, regardless of whether the force was against a guard or an inmate. Thus, by their nature these reports are administrative records of the prison, not those of persons imprisoned.

II. The Requests do not seek the disclosure of records that would jeopardize the safety or security of any person, government facility, building, or structure; as such, Va. Code § 2.2-3705.2(14) does not apply.

In its denial of Ms. Beckler's request, VADOC invoked § 2.2-3705.2(14) which exempts records "the disclosure of which would jeopardize the safety or security of any person; governmental facility, building, or structure or persons using such facility, building, or structure." But the audio and video recordings and bite reports do not fall within this exemption, which is typically invoked to withhold records containing sensitive internal information like architectural drawings or procedural manuals. Indeed, VFOIA explicitly limits this exemption to particular categories of records and does not speak to video recordings or reports of force. § 2.2-3705.2(14)(i - iv). While the statute does provide a catch-all for "other records" that may jeopardize safety and security, the plain text of the statute and canons of statutory interpretation preclude an overbroad reading of this catch-all that would implicate the records sought here.

First, releasing these records would pose no harm to prison security, rendering the catch-all provision inapplicable. In order to withhold records pursuant to this section, the records must "reveal" a particular type of sensitive information which is enumerated in the statute. § 2.2-3705.2(14)(iv). But the requested records do not relate to these enumerated categories. And even assuming that dogs can be said to be a "alarm or security...technology," release of the requested records would not reveal sensitive information relating to dogs that would pose a security threat. § 2.2-3705.2(14)(c). Records of separate, discrete incidents of dog bites don't reveal the characteristics or inner workings of the dogs in the same manner that "engineering, architectural, or construction" drawings do for a building. Nor do such records reveal how dogs are trained or typically deployed in a manner that would decrease the dogs' efficacy.

Moreover, VFOIA instructs that "[t]he provisions of [the statute] shall be liberally construed to promote an increased awareness by all persons of governmental activities and afford every opportunity to citizens to witness the operations of government." § 2.2-3700(B). And any statutory exemptions must be "narrowly construed" in favor of disclosure. *Id.* What is more, the canon of statutory construction *ejusdem generis* counsels for a narrow reading of § 2.2-3705.2(14)(iv). "[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). In this case, the general words "other records" follow "(i) engineering, architectural, or

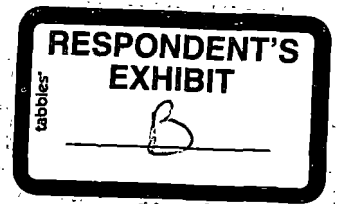
construction drawings; (ii) operational, procedural, tactical planning, or training manuals; (iii) staff meeting minutes.” § 2.2-3705.2(14). The meaning of all “other records,” must be restricted to a sense analogous to these more specific categories of records—documents which reveal internal thought processes and plans that might allow a prisoner or member of the public to bypass some instrument of prison security. Here, the requested records do not reveal internal information kept hidden from prisoners. Rather, by its nature, the planned use of force in question invariably occurs in the presence of prisoners.

Thank you for your continued consideration of this matter.

Sincerely,

/s/ Ian Kalish

UNIVERSITY OF VIRGINIA SCHOOL OF LAW
FIRST AMENDMENT CLINIC



VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF RICHMOND

INSIDER INC., HANNAH BECKLER,
and IAN KALISH

Petitioners,

v.

VIRGINIA DEPARTMENT OF
CORRECTIONS

Serve:
Harold Clarke, Director
6900 Atmore Drive
Richmond, VA 23225

Respondent.

Case No. _____

PETITION FOR WRIT OF MANDAMUS

Petitioners Insider Inc., Hannah Beckler, and Ian Kalish (collectively, "Petitioners"), by and through their undersigned counsel, state as follows:

1. This case involves an improper attempt by the Virginia Department of Corrections ("VADOC" or "Respondent") to shield records from the public that are required to be disclosed under Virginia's public records law.
2. According to its internal Operating Procedures, VADOC maintains a "Canine Program." See Exhibit A ("OP 435.3").
3. When any person—inmate, employee, visitor, or otherwise—is bitten by a dog in the Canine Program, OP 435.3 requires that a "Bite Report" be completed in a database called the Dog Information Governance and Operation System ("DINGO"). Exhibit A at 20. As part

of a Bite Report, VADOC requires that all bites, abrasions, and tears in clothing caused by the dog be photographed and the photographs kept in DINGO. Exhibit A at 20.

4. According to VADOC's Operating Procedure 420.1 ("OP 420.1"), in at least some instances, a planned use of force will be recorded. Exhibit B at 3–4. The "Internal Incident Report" for such use of force must include an indication of "whether or not the incident was recorded." *Id.*

5. VADOC uses dogs in the canine program as a "force multiplier," as part of a category that includes canines, "chemical agents," and "impact weapons." Exhibit C ("OP 420.2").

6. On February 18, 2022, Hannah Beckler, a journalist employed by Insider Inc., submitted two requests to the Virginia Department of Corrections under the Virginia Freedom of Information Act, Va. Code Ann. § 2.2-3704 *et seq.* ("VFOIA"). Exhibit D, E.

7. Beckler's first request (the "Red Onion Recordings Request") sought "All video and audio recordings of all uses of force involving a canine at Red Onion State Prison from January 1, 2021 to December 31, 2021." Exhibit D.

8. Beckler's second request (the "Bite Report Request.") sought (1) "All 'bite reports' recorded in DINGO from Jan 1, 2017, to the date this request is processed in all Virginia Department of Correction facilities" and (2) "all photographs of all bites, abrasions, tears in clothing, or any and all other evidence collected for each dog bite occurrence from Jan 1, 2017, to the date this request is processed in all Virginia Department of Correction Facilities." Exhibit E.

9. Ian Kalish, a citizen of Virginia, re-submitted identical requests on June 17, 2022. Exhibit H.

10. VADOC denied the requests, citing two exceptions: Virginia Code §§ 2.2-3706(B)(4) and 2.2-3705.2(14), which, respectively, exempt from mandatory disclosure “records of persons imprisoned in penal institutions in the Commonwealth provided such records relate to the imprisonment” (the “Records of Persons Imprisoned Exemption”) and records that would reveal certain categories of information like “critical infrastructure” and “surveillance techniques,” whose disclosure would “jeopardize the safety or security of any person; governmental facility, building, or structure or persons using such facility, building, or structure” (the “Public Safety and Security Exemption”). *Id.* § 2.2-3705.2(14). Exhibits F, G, I.

11. As set forth below, neither exemption is applicable to the records sought through either of Petitioners’ requests.

12. Accordingly, Petitioners seek the issuance of a writ of mandamus and other relief pursuant to Virginia Code § 2.2-3713 to require the Virginia Department of Corrections to comply with the provisions of VFOIA.

JURISDICTION AND VENUE

13. This Court has jurisdiction over this matter pursuant to Virginia Code § 2.2-3713(A).

14. This Court is the proper venue for this motion pursuant to Virginia Code § 2.2-3713(A)(3) because VADOC is an agency of the Commonwealth’s government.

PARTIES

15. Petitioner Hannah Beckler is a journalist employed by Petitioner Insider Inc.

16. Petitioner Insider Inc. is an online media company and news organization focused on journalism in the public interest, with circulation in the Commonwealth.

17. Petitioner Ian Kalish is a citizen of Virginia with residence in Charlottesville, employed by the Reporters Committee for Freedom of the Press, which administers the First Amendment Clinic at the University of Virginia School of Law.

18. Respondent VADOC is the administrative agency for Virginia's correctional system.

19. Respondent is a "public body" of the Commonwealth of Virginia and is therefore governed by the disclosure requirements of VFOIA. Va. Code Ann §§ 2.2-3700, 2.2-3701.

FACTS

Petitioners' VFOIA requests and Respondent's denial of Petitioners' requests:

20. On February 18, 2022, Beckler sent the Red Onion Recordings Request and the Bite Report Request to VADOC. Exhibits D, E.

21. On March 8, 2022, Adam J. Dourafei sent Beckler two letters, which denied both VFOIA requests. Exhibits F, G.

22. Upon information and belief, Adam J. Dourafei was, at that time, employed as a FOIA Officer with the Administrative Compliance Unit at VADOC.

23. Durafei wrote, "VADOC has approximately 45 video records involving the use of canines responsive to [the Red Onion Recordings Request], including 24 videos with audio and 21 videos with no audio." Exhibit F.

24. Durafei wrote, "VADOC has approximately 167 pages of bite report records responsive to [the Bite Reports Request], including either bite reports or internal incident reports." Exhibit G.

25. VADOC denied each request in full pursuant to two VFOIA exemptions, stating: "[P]ursuant to § 2.2.-3706(B)(4) of the Code of Virginia, the records requested are exempt from

mandatory disclosure as ‘records of persons imprisoned in penal institutions in the Commonwealth provided such records relate to the imprisonment,’” and “[P]ursuant to § 2.2-3705.2(14) of the Code of Virginia as being records ‘the disclosure of which would jeopardize the safety or security of any person; governmental facility, building, or structure or persons using such facility, building, or structure.’” Exhibits F, G.

26. On June 17, 2022, Kalish sent an letter via email to Adam Dourafei resubmitting the two VFOIA requests. Exhibit H.

27. On July 7, 2022, Patrick S. Bolling sent a letter via email to Petitioner Ian Kalish again denying the VFOIA requests on the same grounds. Exhibit I.

28. Upon information and belief, Patrick S. Bolling is employed as the Legal Compliance Manager of the Administrative Compliance Unit at VADOC.

29. On December 30, undersigned counsel for Petitioners provided VADOC a copy of this petition as required under Virginia Code § 2.2-3713(C).

30. Pursuant to Virginia Code § 2.2-3713(C), this petition “shall be heard within seven days of when the same is made.”

FIRST CAUSE OF ACTION
RESPONDENT HAS VIOLATED VFOIA BY FAILING TO PRODUCE RECORDS
RESPONSIVE TO PETITIONERS’ RED ONION RECORDINGS REQUEST

31. Petitioners reassert and adopt by reference paragraphs 1–30.

32. 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.

33. VFOIA provides that “[a]ll public records . . . shall be presumed open, unless an exemption is properly invoked.” Va. Code Ann. § 2.2-3700(B).

34. VFOIA further provides 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.*

35. Video and audio recordings of uses of force involving canines are public records under VFOIA.

36. VADOC has denied Petitioners access to the audio and video recordings responsive to Petitioners’ Red Onion Recordings Request.

37. In denying Petitioners access to the records responsive to Petitioners’ Red Onion Recordings Request, VADOC relies on Virginia Code §§ 2.2-3706(B)(4) and 2.2-3705.2(14).

38. VADOC has asserted no other exemptions as a basis for denying Petitioners Red Onion Recordings Request.

39. Virginia Code § 2.2-3706(B)(4) is inapplicable to the records sought by the Red Onion Recordings Request. VADOC has failed to show that the Records of Persons Imprisoned Exemption applies to such recordings, which are administrative records of VADOC, not records of persons imprisoned relating to their imprisonment.

40. Virginia Code § 2.2-3705.2(14) is also inapplicable to the records sought by the Red Onion Recordings Request. VADOC has failed to show that such recordings contain information in the categories enumerated by the Safety or Security Exemption and that the release of such information would jeopardize the safety or security of any person or facility.

41. Because VADOC has asserted no applicable exemption justifying the withholding of records responsive to Petitioners' Red Onion Recordings Request, and because those recordings are public records under VFOIA, VADOC's withholding of those records in response to Petitioners' VFOIA Request violates Virginia Code §§ 2.2-3704(A) and 2.2-3700(B).

**SECOND CAUSE OF ACTION
RESPONDENT HAS VIOLATED VFOIA BY FAILING TO PRODUCE
RECORDS RESPONSIVE TO PETITIONERS' BITE REPORTS REQUEST**

42. Petitioners reassert and adopt by reference paragraphs 1–34.

43. Records of bite reports in DINGO and other internal incident reports, including “all photographs of all bites, abrasions, tears in clothing, or any and all other evidence collected for each dog bite occurrence” are public records under VFOIA.

44. VADOC has denied Petitioners access to the records responsive to Petitioners' Bite Reports Request.

45. In denying Petitioners access to records responsive to Petitioners' Bite Reports Request, VADOC relies on Virginia Code §§ 2.2-3706(B)(4) and 2.2-3705.2(14).

46. VADOC has asserted no other exemptions as a basis for denying Petitioners access records responsive to the Bite Reports Request.

47. Virginia Code § 2.2-3706(B)(4) is inapplicable to the records that are responsive to Petitioners' Bite Reports Request. VADOC has failed to show that the Records of Persons Imprisoned Exemption applies to the records sought by the Bite Reports Request, which are administrative records of VADOC.

48. Virginia Code § 2.2-3705.2(14) is inapplicable to the records that are responsive to Petitioners' Bite Reports Request. VADOC has failed to show that the records sought by the Bite Reports Request contain information in the categories enumerated by the Safety or Security

Exemption and that the release of such information would jeopardize the safety or security of any person or facility.

49. Because VADOC has asserted no applicable exemption justifying the withholding of records responsive to Petitioners' Bite Reports Request, and because those recordings are public records under VFOIA, VADOC's withholding of those records in response to Petitioners' VFOIA Request violates Virginia Code §§ 2.2-3704(A) and 2.2-3700(B).

**THIRD CAUSE OF ACTION
RESPONDENT HAS VIOLATED VFOIA BY FAILING TO PRODUCE REDACTED
RECORDS RESPONSIVE TO PETITIONERS' REQUESTS**

50. Petitioners reassert and adopt by reference paragraphs 1–34.

51. VFOIA prohibits a public body from “withhold[ing] a public record in its entirety on the grounds that some portion of the public record is excluded from disclosure by this chapter or by any other provision of law.” Va. Code Ann. § 2.2–3704.01. VFOIA provides that “[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 the entire content of the public record. Otherwise, only those portions of the public record containing information subject to an exclusion under this chapter or other provision of law may be withheld, and all portions of the public record that are not so excluded shall be disclosed.” Va. Code Ann. § 2.2-3704.01.

52. Respondent is required by VFOIA to release the entirety of the requested records. Alternatively, to the extent that portions of records are appropriately withheld under the Public Safety and Security Exemption or the Records of Persons Imprisoned Exemption, the remainder of those records must be made available to Petitioners, with the withheld portions redacted. Va. Code Ann. § 2.2-3704.1.

53. Respondent's failure to disclose all non-exempt portions of the requested records violates Virginia Code § 2.2-3704.1.

PRAYER FOR RELIEF

Wherefore, Petitioners pray that this Court will:

A. Hold a hearing on this matter within seven days of the filing of this Petition, as required by VFOIA.

B. Issue a writ of mandamus ordering Respondent to release the records sought by the Red Onion Recordings Request and the Bite Reports Request in full request or, alternatively, to show cause why any portion of that record may not be produced pursuant to an applicable VFOIA exemption.

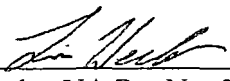
C. Order Respondent to pay Petitioners' costs, including attorneys' fees, as Petitioners have substantially prevailed on the merits of the case and no special circumstances make an award of fees unjust. Va. Code Ann. 2.2-3713(D).

D. Grant any further relief as this Court deems just and proper.

Respectfully submitted,

HANNAH BECKLER, INSIDER INC., and
IAN KALISH

By: _____


Lin Weeks, VA Bar No. 97351
UNIVERSITY OF VIRGINIA SCHOOL OF LAW
FIRST AMENDMENT CLINIC
1156 15th Street NW, Suite 1020
Washington, D.C. 20005
Tel: (202) 800-3533

Counsel for Petitioners

CERTIFICATE OF STATUTORY NOTICE

I hereby certify that, pursuant to Va. Code Ann. § 2.2-3713(C), a copy of this Petition for Writ of Mandamus was sent by FedEx on December 29, 2022 for delivery on December 30, 2022, to the following address:

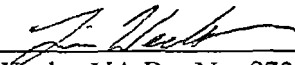
Harold Clarke, Director
Virginia Department of Corrections
6900 Atmore Drive
Richmond, VA

I further certify that a copy of this Petition for Writ of Mandamus was sent by email to the following email addresses on December 30, 2022.

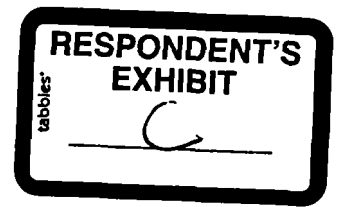
Harold Clarke, VADOC Director
Director.clarke@vadoc.virginia.gov

Patrick Bolling, VADOC FOIA Officer
FOIA@vadoc.virginia.gov

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service@oag.state.va.us



Lin Weeks, VA Bar No. 97351
Counsel for Petitioners



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Virginia Relay Services
800-828-1120

March 13, 2023

VIA E-MAIL

Lin Weeks, Esq. – lin.weeks@law.virginia.edu

Re: *Insider Inc. et al. v. Va. Dep't of Corr. – Circuit Court for the City of Richmond*

Dear Lin:

This communication is intended to memorialize the discussions between the parties relative to this potential litigation, arising out of a series of Freedom of Information Act (FOIA) requests submitted by your clients to the Virginia Department of Corrections (VDOC). Two requests were submitted by your client Hannah Beckler on February 18, 2022 (the “Red Onion Recordings Request” and the “Bite Report Request”), and identical requests were submitted by your client Ian Kalish on June 17, 2022. In response to each of these requests, VDOC identified but withheld any responsive materials under two cited FOIA exemptions, Va. Code §§ 2.2-3706(B)(4) and -33705.2(14).

In December 2022, you provided VDOC with an advance copy of a petition for a writ of mandamus arising out of these FOIA requests, in accordance with Va. Code § 2.2-3713(C). Following a series of discussions and communications, the parties have agreed that, in its discretion, VDOC will release redacted records responsive to the “Bite Report Request,” as identified in VDOC’s letter of March 8, 2022 (Exhibit G to the petition). The information redacted from these records would constitute identifying information as to the officers who were involved in the cited incidents, as well as the identifying information of any inmates involved in those incidents. Any medical records or photographs corresponding to those inmates would also be withheld. An initial production will be made as of March 13, 2023, with any remaining production to be completed by March 20, 2023. In return, your clients will not proceed with the filing of this FOIA petition, and any claims relative to the February 18, 2022 and June 17, 2022 FOIA requests will be deemed settled. This agreement does not bind or constrain the parties as to any other or future FOIA requests served upon VDOC.

Please sign where indicated below to indicate that this recitation also reflects your understanding of the agreement between the parties. Thank you, and please let me know if you have any additional questions or concerns about this matter.

Sincerely,



Margaret Hoehl O'Shea
Senior Assistant Attorney General

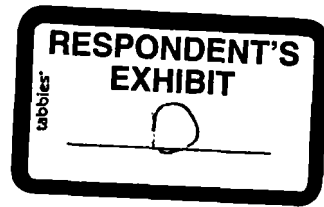
Agreed:



Margaret Hoehl O'Shea, VSB #66611
Senior Assistant Attorney General
Office of the Attorney General
202 N. 9th Street
Richmond, VA 23219
Counsel for Prospective Defendant (VDOC)



Lin Weeks, VSB #97351
University of Virginia School of Law
First Amendment Clinic
1156 15th Street NW, Suite 1020
Washington, D.C 20005
Counsel for Prospective Plaintiffs (Insider Inc., Hannah Beckler, and Ian Kalish)



COMMONWEALTH of VIRGINIA
Office of the Attorney General

Jason S. Miyares
Attorney General

202 North 9th Street
Richmond, Virginia 23219
804-786-2071
FAX 804-786-1991
Virginia Relay Services
800-828-1120

March 13, 2023

VIA E-MAIL

Lin Weeks, Esq. – lin.weeks@law.virginia.edu

Re: *Insider Inc. et al. v. Va. Dep't of Corr. – Circuit Court for the City of Richmond*

Dear Lin:

This letter accompanies the production of the following materials, in accordance with the settlement negotiations between the parties:

70 pages of incident reports and affiliated internal incident reports, as follows:

- **Incident Report ROSP-2021-00002 (1/3/21)**
 - IIR-ROSP-2021-000019
 - IIR-ROSP-2021-000020
 - IIR-ROSP-2021-000021
- **Incident Report ROSP-2021-00032 (2/11/21)**
 - IIR-ROSP-2021-000291
 - IIR-ROSP-2021-xxxxxx (unnumbered duplicate report)
 - IIR-ROSP-2021-000302
 - IIR-ROSP-2021-000303
 - IIR-ROSP-2021-000292
- **Incident Report ROSP-2021-00037 (2/20/21)**
 - IIR-ROSP-2021-000361
 - IIR-ROSP-2021-000363

- **Incident Report ROSP-2021-00072 (3/26/21)**
 - IIR-ROSP-2021-000780
 - IIR-ROSP-2021-000778
 - IIR-ROSP-2021-000779
 - IIR-ROSP-2021-000781
- **Incident Report ROSP-2021-00119 (5/31/21)**
 - IIR-ROSP-2021-001374
 - IIR-ROSP-2021-001373
 - IIR-ROSP-2021-001375
 - IIR-ROSP-2021-001376
 - IIR-ROSP-2021-001377
 - IIR-ROSP-2021-001378
 - IIR-ROSP-2021-001380
 - IIR-ROSP-2021-001381
- **Incident Report ROSP-2021-00144 (7/2/21)**
 - IIR-ROSP-2021-001645
 - IIR-ROSP-2021-001647
 - IIR-ROSP-2021-001646
- **Incident Report ROSP-2021-00210 (9/29/21)**
 - IIR-ROSP-2021-002309
 - IIR-ROSP-2021-002310
 - IIR-ROSP-2021-002297
 - IIR-ROSP-2021-002298
 - IIR-ROSP-2021-002300
 - IIR-ROSP-2021-002308
 - IIR-ROSP-2021-002296
- **Incident Report ROSP-2021-00271 (12/9/21)**
 - IIR-ROSP-2021-002972
 - IIR-ROSP-2021-002966
 - IIR-ROSP-2021-002965
 - IIR-ROSP-2021-002964
 - IIR-ROSP-2021-002968
 - IIR-ROSP-2021-002976
 - IIR-ROSP-2021-002977

Also being produced in this initial production are the following:

- Bite Report 2.11.21 (ROSP)
- Bite Report 3.26.21 (ROSP)
- Canine Utilization Report 2.11.21 (ROSP)
- Canine Utilization Report 2.11.21 (ROSP)

Finally, I am including approximately 227 pages of internal incident reports from ROSP reflecting occasions where a K9 was present, but not engaged, during a facility incident in 2021. Although not responsive to your original FOIA request regarding the bite reports, these internal incident reports are related to your clients' separate request for videos and are being produced, in the discretion of the agency, for purposes of providing a more complete picture of canine use at VDOC facilities.

The remainder of the responsive materials will be provided by the deadline agreed upon by the parties. In the meantime, please do not hesitate to contact me with any questions or concerns.

Sincerely,

A handwritten signature in black ink, appearing to read "Margaret Hoehl O'Shea".

Margaret Hoehl O'Shea
Senior Assistant Attorney General

O'Shea, Margaret A.

**RESPONDENT'S
EXHIBIT**

tabbies

E

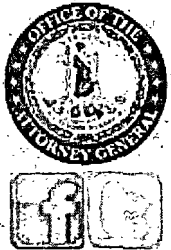
From: O'Shea, Margaret A.
Sent: Monday, March 20, 2023 4:30 PM
To: Lin Weeks
Subject: RE: Letter memorializing FOIA agreement

Lin -

The remaining canine bite reports have been uploaded to the same folder used previously, so you should be able to access them. (It is 5 separate PDF files, labeled "Bite Report 1," etc., through "Bite Report 5," and each containing multiple bite reports from the DINGO system.) I have not yet had the opportunity to thoroughly catalog them, but wanted to go ahead and provide you access with them. If you happen to see any instances where VDOC accidentally neglected to remove the name of an inmate or a canine, I would ask that you please keep that information confidential to protect the identity of the person(s) involved.

Thanks so much -
Margaret

Margaret A. O'Shea
Senior Assistant Attorney General
Office of the Attorney General
202 North 9th Street
Richmond, Virginia 23219
(804) 225-2206 Office
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MOShea@oag.state.va.us
<http://www.ag.virginia.gov>



From: O'Shea, Margaret A.
Sent: Monday, March 13, 2023 8:07 PM
To: Lin Weeks <lin.weeks@law.virginia.edu>
Subject: RE: Letter memorializing FOIA agreement

Attached is the counterpart settlement letter, as well as a letter detailing the materials that are being produced today, which I will send via separate sharefile link. I am hoping to have the rest of the responsive materials from the agency in the next couple of days, and will get those turned around ASAP.

Thanks so much -

Margaret

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From: Lin Weeks <lin.weeks@law.virginia.edu>
Sent: Monday, March 13, 2023 5:05 PM
To: O'Shea, Margaret A. <MOShea@oag.state.va.us>
Subject: Re: Letter memorializing FOIA agreement

Ok, great — signed version attached here. I'll look out for the countersigned version and initial production.

Lin

From: O'Shea, Margaret A. <MOShea@oag.state.va.us>
Date: Monday, March 13, 2023 at 5:01 PM
To: Lin Weeks <lin.weeks@law.virginia.edu>
Subject: RE: Letter memorializing FOIA agreement

No problem at all – change should be reflected on the attached -

Margaret A. O'Shea
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From: Lin Weeks <lin.weeks@law.virginia.edu>
Sent: Monday, March 13, 2023 4:28 PM
To: O'Shea, Margaret A. <MOShea@oag.state.va.us>
Subject: Re: Letter memorializing FOIA agreement

Margaret,

Thanks for sending this over — yes, I think we're on the same page. Can we agree to a very minor tweak to the last sentence of the last paragraph on page 1?

This agreement does not otherwise bind or constrain the parties as to any other or future FOIA requests served upon VDOC.

Lin

From: O'Shea, Margaret A. <MOShea@oag.state.va.us>
Date: Monday, March 13, 2023 at 4:02 PM
To: Lin Weeks <lin.weeks@law.virginia.edu>
Subject: RE: Letter memorializing FOIA agreement

Just following up on this — I have an initial production of materials ready to send out today — just want to make sure we are on the same page.

Margaret A. O'Shea
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From: O'Shea, Margaret A.
Sent: Monday, March 13, 2023 1:11 PM
To: Lin Weeks <lin.weeks@law.virginia.edu>
Subject: Letter memorializing FOIA agreement

Lin —

Please see the attached – if there are any suggested changes or edits, please let me know. Otherwise, if you can sign (and I will do the same), I can go ahead and start sending you records.

Thanks so much!!

-Margaret

Margaret A. O'Shea
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MARY JANE HALL
JUDGE

FOURTH JUDICIAL CIRCUIT OF VIRGINIA
CIRCUIT COURT OF THE CITY OF NORFOLK

November 29, 2021

**RESPONDENT'S
EXHIBIT**
F

**CORRECTIONAL
DEC - 6 2021
LITIGATION**

150 ST. PAUL'S BOULEVARD
NORFOLK, VIRGINIA 23510

Edward A. Fiorella, Jr., Esq.
Christopher C. Schreyer, Esq.
Fram & Fiorella, P.C.
Town Point Center
150 Boush Street, Ste. 601
Norfolk, Virginia 23510

Margaret O'Shea, Esq.
Assistant Attorney General
Office of the Attorney General
202 North 9th Street
Richmond, Virginia 23219

**Re: Sharon Dallas v. Virginia Department of Corrections
Civil Docket No.: CL21-5564**

Dear Counsel:

This matter came before the Court on appeal *de novo* from the Norfolk General District Court Final Order dated April 14, 2021, which denied petitioner's writ of mandamus seeking the disclosure of certain records "pertaining to the care, treatment, and investigation of Charles Duynes and Charles Duynes's death" under the Virginia Freedom of Information Act ("VFOIA"). See Petitioner's Notice of Appeal at 2. On November 18, 2021, counsel for both parties appeared before the Court and presented oral argument. Each party agreed that the sole issue to be decided is whether the exemption contained in Virginia Code § 2.2-3706(B)(4) applies to the instant case. For the reasons stated herein, the Court holds that the exemption does apply and therefore DENIES the Petition.

Background

Charles Duynes died while incarcerated at Sussex I State Prison. Email from Ryan McCord to Edward Fiorella (Aug. 7, 2020), (Defendant's Exhibit 4). His mother, the administrator of his estate, submitted a FOIA request to the Virginia Department of Corrections seeking "documents held by Sussex I State Prison relating to the care, treatment, and investigation of Charles Duynes and Charles Duynes's passing while in custody of Sussex I State Prison." See Petitioner's Notice of Appeal at 2; *see also* Email from Edward Fiorella to Virginia

Department of Corrections (June 9, 2020), (Defendant's Exhibit 1). The Virginia Department of Corrections ("VDOC") denied this request, citing one of the VFOIA statutory exemptions to disclosure. See Email from Ryan McCord to Edward Fiorella (Nov. 9, 2020), (Defendant's Exhibit 6). Specifically, VDOC stated that the records sought by Petitioner were exempt from disclosure pursuant to Virginia Code § 2.2-3706(B)(4). Petitioner thereafter filed a writ of mandamus in the Norfolk General District Court under Virginia Code § 2.2-3713 seeking to compel VDOC to disclose the documents at issue. That court denied Petitioner's writ, and Petitioner appealed.

Analysis

The purpose of VFOIA is to ensure that "the people of the Commonwealth [have] ready access to public records in the custody of a public body." Virginia Code § 2.2-3700(B). Public records are subject to mandatory disclosure unless an exemption specifically applies. As the statute states:

Unless a public body or its officers or employees specifically elect to exercise an exemption provided by this chapter or any other statute . . . all public records shall be available for inspection and copying upon request. All public records and meetings shall be presumed open, unless an exemption is properly invoked.

Id. Further,

[t]he provisions of this chapter shall be liberally construed to promote an increased awareness by all persons of governmental activities and afford every opportunity to citizens to witness the operations of government. Any exemption from public access to records or meetings shall be narrowly construed, and no record shall be withheld or meeting closed to the public unless specifically made exempt pursuant to this chapter or other specific provision of law.

Id.

The exemption at issue in this case appears in Virginia Code § 2.2-3706(B)(4): "All records of persons imprisoned in penal institutions in the Commonwealth[,] provided such records relate to the imprisonment[.]" 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." VDOC has the right to withhold from disclosure any record falling within this code provision.

Petitioner argues that Virginia Code § 2.2-3706(B)(4) does not apply to the requested documents because Duynes, now deceased, is not a "person imprisoned in a penal institution." VDOC contends that the statute should be understood to pertain to records that were created or maintained *during the pendency of an individual's imprisonment*. It argues that the exemption should not depend on whether the subject remains incarcerated at the time of the request, so long as the records relate to the imprisonment.

“Under well-established principles, an issue of statutory interpretation is a pure question of law.” *Fitzgerald v. Loudoun County Sheriff’s Office*, 289 Va. 499, 504 (2015) (quoting *Conyers v. Martial Arts World of Richmond, Inc.*, 273 Va. 96, 104, (2007)). “[P]ure statutory interpretation is the prerogative of the judiciary.” *Id.* at 505 (quoting *Sims Wholesale Co. v. Brown-Forman Corp.*, 251 Va. 398, 404 (1996)). The Court must give effect to the plain meaning of a statutory provision. *City of Charlottesville v. Payne*, 299 Va. 515, 527 (2021) (“We consider the language of [the] statute at issue to determine the General Assembly’s intent from the plain and natural meaning of the words used.”) (quoting *Hoffman Fam., L.L.C. v. City of Alexandria*, 272 Va. 274, 284 (2006)).

The statute could fairly be given either of the competing interpretations. The parties asserted, and the Court agrees, that the interpretation of the exemption relating to imprisoned persons seems to be an issue of first impression. The Virginia Supreme Court, however, addressed a similar issue in *Fitzgerald*, 289 Va. at 499, involving a request for a copy of a suicide note recovered by law enforcement during its investigation of a suspected homicide. The petitioner argued that the cited exemption for criminal investigative files in Virginia Code § 2.2-3706(A)(2)(a) no longer applied because the criminal investigation was closed. *Id.* The Supreme Court rejected that argument, stating:

Suffice it to say, the point of a criminal investigation is to investigate—to determine whether a crime occurred and, if so, who perpetrated it. A criminal investigation may or may not lead to a prosecution. But that does not mean that the application of FOIA disclosure requirements is dependent upon the outcome of the investigation. In this case, investigators discovered the suicide note during an ongoing criminal investigation. That the investigation was later closed is inconsequential for purposes of FOIA disclosure principles.

Id. Though not squarely on point, the reasoning of *Fitzgerald* suggests that FOIA disclosure principles should not depend on the custodial status of the person who was imprisoned when VDOC created the record.

Although analogous FOIA statutes from other states do not control this Court’s interpretation of the Virginia statute, the Court does note that the Texas Freedom of Information Act (“TFOIA”), contains an exemption similar to Virginia’s relating to inmate records:

Except as provided by Subsection (b) or by Section 552.029, information obtained or maintained by the Texas Department of Criminal Justice is excepted from the requirements of Section 552.021 if it is information about an inmate who is confined in a facility operated by or under a contract with the department.

Tex. Gov’t Code § 552.134(a). The Texas Office of the Attorney General has treated this exception as applying to records of former inmates as well as current inmates. *See* Tex. Atty. Gen. Op. 2021-06090, 2021 WL 1411280 (Mar. 11, 2021) (“Upon review, we find the information at issue pertains to a former inmate who was confined in a facility operated by the TDCJ and is subject to section 552.134. Accordingly, the TCCO must withhold the submitted

information under section 552.134(a) of the Government Code.”). The Court has located no authority from sister states adopting the position urged by Petitioner in the case at bar.

The Court concludes that the sounder interpretation of the exemption contained in Virginia Code § 2.2-3706(B)(4) requires that it applies to records created or maintained during the pendency of the individual's imprisonment; it does not turn on whether the inmate is imprisoned when the request is made. Therefore, the documents that Petitioner sought are subject to disclosure only in the discretion of the custodian.¹

For the reasons stated above, Petitioner's request for a writ of mandamus is DENIED.

Counsel for Respondent is directed to submit a fully-endorsed order incorporating this letter ruling within 21 days.

Sincerely,



Mary Jane Hall
Judge

MJH/jja

¹ The parties did not argue, so the Court does not reach, the related question of whether VDOC abused its discretion in relying upon this discretionary exemption to withhold records from the family of a deceased inmate who seek answers about their loved one's death.



VIRGINIA FREEDOM OF INFORMATION ADVISORY
COUNCIL

COMMONWEALTH OF VIRGINIA

AO-02-11

July 21, 2011

Katherine Greenier, Director
Patricia M. Arnold Women's Rights Project
ACLU of Virginia
Richmond, Virginia

The staff of the Freedom of Information Advisory Council is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your letter received June 7, 2011.

Dear Ms. Greenier:

You have asked whether certain records you requested from the Department of Corrections (DOC) are exempt from disclosure under the Virginia Freedom of Information Act (FOIA). You stated that you requested from DOC a "list containing the names, state identification numbers, and facility location of all female inmates incarcerated at [DOC] institutions." The response from DOC denied this request, citing subdivision F 6 of § 2.2-3706, which allows the records custodian to withhold *all records of persons imprisoned in penal institutions in the Commonwealth provided such records relate to the imprisonment.*¹ As further background, you stated that the DOC itself treats this information as a matter of public record by making it available on the DOC website² through a public search page. That page may be searched either by first and last name of an inmate, or by the inmate's state identification number. The search results returned include the inmate's full name, state identification number, facility location, race, gender, and projected release date. Among other information, the web page states that "[t]he information found here contains public record information on offenders sentenced to the Department of Corrections." You contend that the records you sought do not fall within the exemption cited by DOC because subdivision C of § 2.2-3706 requires that *[i]nformation in the custody of law-enforcement agencies relative to the identity of any individual, other than a juvenile, who is arrested and charged, and the status of the charge or arrest shall be released, and considering DOC's own statement that the information on the search page is "public record information."*

In considering this matter, first note that as an agency of the Commonwealth, there is no question that DOC is a *public body* subject to FOIA, as that term is defined in § 2.2-3701. Turning next to the definition of public record in the same section, it includes *all writings and recordings...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. Records that are not prepared for or used in the transaction of public business are not public records.* As records prepared, owned, or possessed by DOC in the transaction of DOC's public business, any records DOC has showing the names, identification numbers, and facilities in which inmates are incarcerated would be considered *public records*. The fact that DOC on its website calls these records *public records* is merely stating a truism under the law. The question then turns upon whether those *public records* are exempt from disclosure. The general policy of FOIA expressed in § 2.2-3700 is that *[a]ll public records and meetings shall be presumed open, unless an exemption is properly invoked.* Giving effect to this policy, subsection A of § 2.2-3704 states that *[e]xcept as otherwise specifically provided by law, all public records shall be open to inspection and copying by any citizens of the Commonwealth during the regular office hours of the custodian of such records.* Therefore, the records you requested would be *public records* subject to disclosure upon request unless some exemption applies which allows them to be withheld as *otherwise specifically provided by law*. It appears from the facts you have presented that DOC did respond in a timely fashion, and did cite a statutory exemption, thus complying with the procedural requirements of FOIA in responding to your request.³

As previously stated, the response from DOC asserted that the requested records are exempt pursuant to subdivision F 6 of § 2.2-3706, which allows the records custodian to withhold all records of persons imprisoned in penal institutions in the Commonwealth provided such records relate to the imprisonment. However, you contend that the records must be released pursuant to subdivision C of § 2.2-3706, which requires that *[i]nformation in the custody of law-enforcement agencies relative to the identity of any individual, other than a juvenile, who is arrested and charged, and the status of the charge or arrest shall be released*. The Office of the Attorney General (OAG) has published an opinion addressing a similar issue dealing with a sheriff's jail log.⁴ The OAG first observed that prior opinions, also concerning sheriffs' records of persons held in jail, concluded that *a list of those persons incarcerated is subject to disclosure under FOIA*.⁵ The OAG then considered both the exemption cited by DOC and the provision you cited as requiring release, which at that time were both contained in the same subdivision. Specifically, when that opinion was issued, then subdivision b 1 of § 2.1-342 exempted

*all records of persons imprisoned in penal institutions in this Commonwealth provided such records relate to the said imprisonment. Information in the custody of law-enforcement officials relative to the identify of any individual other than a juvenile who is arrested and charged, and the status of the charge or arrest, shall not be excluded from the provisions of [FOIA].*⁶

While this language is divided into subsection C and subdivision F 6 of § 2.2-3706 in the current law, it is clear that the substance of the law at issue is the same now as it was then. The OAG concluded that *matters recorded in the Jail Log must be disclosed to the extent that such matters related to the identity of an individual arrested or charged and the status of the arrest or charge*. Noting that the jail log at issue contained additional matters related to the administrative record of inmate activities, the OAG went on to opine that *other matters recorded in the Jail Log concerning inmate activities or observations concerning inmates may be deleted from the Jail Log...prior to disclosure*.⁷

Consider the OAG opinion in concert with your assertion that DOC must release the records you requested pursuant to the requirement to release information about persons arrested and charged, and the status of the charge and arrest. It could be argued by analogy that if the part of a sheriff's jail log containing a list of persons incarcerated must be disclosed, then the DOC records you sought must similarly be subject to mandatory disclosure under FOIA because a list of inmates' identities and facility locations is analogous to the jail log. However, this argument fails because DOC is not a law-enforcement agency. As quoted previously, subsection C of § 2.2-3706 mandates that *[i]nformation in the custody of law-enforcement agencies relative to the identity of any individual, other than a juvenile, who is arrested and charged, and the status of the charge or arrest shall be released*. The phrase *law-enforcement agency* is not defined in FOIA. Looking outside of FOIA for guidance, the phrase is used extensively throughout various Code sections.⁸ In looking through the various usages of the phrase, it becomes clear that *law-enforcement* generally refers to police, sheriffs, and others who investigate crimes and make arrests. DOC and corrections personnel are treated separately and often distinguished from law-enforcement agencies and officers. Note, for example, that the definition of *law-enforcement officer* in § 9.1-101 does not include correctional officers who work for DOC.⁹ Instead, § 53.1-1 defines *correctional officer* to mean *a duly sworn employee of the Department of Corrections whose normal duties relate to maintaining immediate control, supervision and custody of prisoners confined in any state correctional facility*. Note also that the same § 53.1-1 sets forth different definitions for the terms *deputy sheriff* and *jail officer*. In similar fashion, facilities where prisoners and arrestees might be held are given separate definitions.¹⁰ Given this context, it is clear that while subsection C of § 2.2-3706 requires the release of information about arrests and charges from police, sheriffs, and other law-enforcement agencies, it does not require DOC to release information about inmates in its custody who are already convicted.¹¹

Next, turning to DOC's assertion that the records are exempt, DOC is correct that subdivision F 6 of § 2.2-3706 allows it to withhold, in its discretion, *[a]ll records of persons imprisoned in penal institutions in the Commonwealth provided such records relate to the imprisonment*. A plain reading of this exemption would indicate that DOC may, in its discretion, withhold the records you seek in their entirety.¹² However, we must also consider that DOC has chosen to make certain information about inmates publicly available on its website through the search function previously described. It appears that DOC has made it possible for anyone to look up

the information you seek and more, so long as the person uses the DOC website search engine to look up inmates on a one-by-one basis using either the inmate's name or identification number. In theory, it would be possible for someone to check court records for the names of persons convicted, look up inmates one-by-one on the DOC website using the information gleaned from the court records, and then to compile the list you seek. Generally speaking, as a practical matter it does not make sense to assert simultaneously that information which has already been voluntarily placed into the public domain remains exempt from disclosure. In this instance, it appears DOC only seeks to assert the exemption when the information sought is larger in scope (i.e. the list of all female inmates you sought, as opposed to looking up each inmate individually).

The question is then whether DOC may provide this information to the public through its website search feature on a one-by-one basis about individual inmates, while at the same time denying a request for the larger, underlying database showing the same information for a larger group of inmates as you requested. As previously stated, it appears DOC could withhold the records you seek in their entirety pursuant to subdivision F 6 of § 2.2-3706, as *records of persons imprisoned in penal institutions in the Commonwealth ... relate[d] to the imprisonment*. This exemption is prefaced with the following language, which appears repeatedly throughout FOIA: *The following records are excluded from the provisions of this chapter, but may be disclosed by the custodian, in his discretion, except where such disclosure is prohibited by law*. Read together with the language of the exemption, it is clear that while DOC can withhold these records, it may also choose to release them, in its discretion. Neither FOIA itself nor the courts have given specific direction on how a public body is to exercise that discretion.¹³ Considering the search engine on the DOC website, it appears that DOC has chosen to provide limited access to information about individual inmates to those persons who already know either the inmate's name or identification number. This grant of limited access to otherwise exempt records would appear to be an exercise of the discretion granted by the statute. However, DOC has not chosen to voluntarily and affirmatively post on its website the entire list of inmates' names, identification numbers, gender, and facility location (i.e., the records you seek). Had DOC done so, then it would make no sense to deny your request since the records you seek would already be in the public domain. Since DOC has not posted such a list, however, it appears to be within the scope of the cited exemption, subdivision F 6 of § 2.2-3706, to deny your request as DOC has done.

Additionally, while it is outside of FOIA, note that § 9.1-101 defines the phrase *correctional status information* to mean *records and data concerning each condition of a convicted person's custodial status, including probation, confinement, work release, study release, escape, or termination of custody through expiration of sentence, parole, pardon, or court decision*.¹⁴ As a general rule, § 19.2-389 prohibits the public dissemination of criminal history information, and § 9.1-136 provides criminal misdemeanor penalties for certain instances of improper release of such information.¹⁵ However, subsection C of § 9.1-126 states as follows:

Nothing contained in this article shall be construed as prohibiting a criminal justice agency from disclosing to the public factual information concerning the status of an investigation, the apprehension, arrest, release, or prosecution of an individual, the adjudication of charges, or the correctional status of an individual, which is related to the offense for which the individual is currently within the criminal justice system.

Reading these provisions together with the discretionary exemption set forth in subdivision F 6 of § 2.2-3706 in FOIA, it appears that records related to the imprisonment of persons in penal institutions in the Commonwealth are exempted from mandatory disclosure, certain criminal history information is prohibited from release, but DOC may release correctional status information on individuals currently incarcerated, in its discretion.

Having examined this issue, there appears to be a statutory scheme that information concerning arrests and charges are public through law-enforcement agencies, information about trials and convictions are public through court records, but information about persons held in state correctional facilities after conviction are exempt from mandatory disclosure as described above. In other words, under Virginia law there are no secret arrests, there are no secret court proceedings, but once someone has been convicted and assigned to the custody of DOC, public access is curtailed except as previously noted.¹⁶

Thank you for contacting this office. I hope that I have been of assistance.

Sincerely,

Maria J.K. Everett
Executive Director

¹I note that your original request letter contained a second request which was also denied. As you did not inquire about that second request and denial, it will not be addressed in this opinion.

²Available at <http://www.vadoc.virginia.gov/offenders/locator/> (last visited July 7, 2011).

³See generally § 2.2-3704 (setting forth the procedure for making and responding to a request for public records)..

⁴1987-1988 Op. Atty. Gen. Va. 37.

⁵*Id.* citing 1983-1984 Op. Atty. Gen. Va. 446; 1974-1975 Op. Atty. Gen. Va. 583.

⁶*Id.*, n.3

⁷Note that this opinion relied in part on former Code § 15.1-135.1, which also excluded from disclosure certain records maintained by sheriffs and chiefs of police. The corresponding law in the current Code would be subsection G of § 2.2-3706, which refers out to § 15.2-1722, concerning noncriminal incident reports maintained by sheriffs and chiefs of police. Note that the current exemption allows the redaction of certain personal, medical, and financial information, but does not entirely exempt the records to which it applies. In any case, as these provisions are limited to sheriffs' offices and police departments; they would not apply to DOC.

⁸A search of the Code on the Legislative Information System for "law-enforcement agency" returned 376 references in 158 documents (<http://leg1.state.va.us/000/ls/L5635003.HTM>, last accessed July 15, 2011).

⁹In full, § 9.1-101 provides as follows: "Law-enforcement officer" means any full-time or part-time employee of a police department or sheriff's office which is a part of or administered by the Commonwealth or any political subdivision thereof, and who is responsible for the prevention and detection of crime and the enforcement of the penal, traffic or highway laws of the Commonwealth, and shall include any (i) special agent of the Department of Alcoholic Beverage Control; (ii) police agent appointed under the provisions of § 56-353; (iii) officer of the Virginia Marine Police; (iv) conservation police officer who is a full-time sworn member of the enforcement division of the Department of Game and Inland Fisheries; (v) investigator who is a full-time sworn member of the security division of the State Lottery Department; (vi) conservation officer of the Department of Conservation and Recreation commissioned pursuant to § 10.1-115; (vii) full-time sworn member of the enforcement division of the Department of Motor Vehicles appointed pursuant to § 46.2-217; or (viii) animal protection police officers employed under § 15.2-632. Part-time employees are those compensated officers who are not full-time employees as defined by the employing police department or sheriff's office.

¹⁰See § 53.1-1 (separate definitions for community correctional facility, local correctional facility, lock-up, and state correctional facility; only the definition of state correctional facility would apply to DOC). Note also § 53.1-16 (repealed effective July 1, 2012), which explicitly grants the powers of law-enforcement officers to DOC's internal investigators; unstated is the premise that other DOC personnel are not law-enforcement officers.

¹¹Note that one definition of law-enforcement agency, in § 32.1-48.06, does include any...adult or youth correctional officer. However, by its own terms, the definitions are limited to use in that article of the Code, which concerns public health threats and quarantines. It does not affect the general conclusion that DOC is not a law-enforcement agency for purposes of the disclosures required under subsection C of § 2.2-3706.

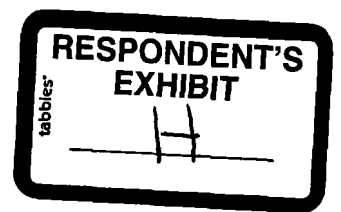
¹²Note that while there are certain affirmative requirements to release information about prisoners outside of FOIA, such as the information posted to the Virginia Statewide VINE (Victim Information and Notification Everyday) System (see Code §§ 19.2-11.01, 53.1-133.02, and 53.1-160), the Sex Offender and Crimes Against Minors Registry (see Chapter 9 (§ 9.1-900 et seq.) of Title 9.1), and other required notices under Title 53.1, it appears that the exemption cited by DOC generally allows information about state prisoners to be withheld if requested under FOIA.

¹³See Freedom of Information Advisory Opinion 09 (2008).

¹⁴Reference to this definition reinforces the concept that the information you seek is in fact correctional status information, not arrest and charging information that would have to be released pursuant to subsection C of § 2.2-3706.

¹⁵In full, § 9.1-136 states that Any person who willfully and intentionally requests, obtains, or seeks to obtain criminal history record information under false pretenses, or who willfully and intentionally disseminates or seeks to disseminate criminal history record information to any agency or person in violation of this article or Chapter 23 (§ 19.2-387 et seq.) of Title 19.2, shall be guilty of a Class 2 misdemeanor.

¹⁶See n.12, *supra*.



1988 Va. AG LEXIS 40

Office of the Attorney General of the State of Virginia
1987-1988 Op. Atty Gen. Va. 37

VA Attorney General Opinions

Reporter

1988 Va. AG LEXIS 40 *; 1987-1988 Op. Atty Gen. Va. 37

May 19, 1988

Core Terms

log, jail, dispatch, arrest, inmate, disclosure

Request By: [*1] Honorable Warren G. Lineberry

Commonwealth's Attorney for Floyd County

P.O. Box 122

Floyd, Virginia 24091

Opinion By: Mary Sue Terry, Attorney General

Opinion

You ask whether the sheriff of Floyd County is required to permit access to certain records under the Virginia Freedom of Information Act, §§ 2.1-340 through 2.1-346.1 of the Code of Virginia (the "Act").

I. Facts

The sheriff maintains two continuous logs in his office, one referred to as a "Dispatch Log" and one referred to as a "Jail Log." The Dispatch Log contains information concerning calls to various government agencies for assistance, services, or complaints, including fire and rescue calls, assistance requests for disabled vehicles, traffic complaints, automobile accident calls, and civil and criminal complaints. Calls recorded in the Dispatch Log may contain the names of the persons calling, the specific requests, specific actions and abuses, and may include the names of suspects and alleged perpetrators. The Dispatch Log also records the specific actions taken by the dispatcher and the advice or information given in response to the call.

The Jail Log contains general administrative information concerning inmates, including [*2] the transportation of inmates, visits and communications, inmate requests, medical care, attorney visits, complaints, observations of inmate conduct, and disciplinary matters. The Jail Log is used as a routine daily log relating to matters involving inmates' confinement. The information is recorded so that the correctional officer next on duty will have access to it and the chief correctional officer will receive an overall view of jail activities.

II. Applicable Statutes

Section 2.1-342(a) provides that, except as specifically provided by law, "all official records shall be open to inspection and copying by any citizens of this Commonwealth during the regular office hours of the custodian of such records." The term "official records" is defined in § 2.1-341(b).

Certain statutory exceptions to the mandatory disclosure requirement of § 2.1-342(a) are enumerated in § 2.1-342(b)(1):

Memoranda, correspondence, evidence and complaints related to criminal investigations, reports submitted to the state and local police and the campus police departments of public institutions of higher education as established by Chapter 17 (§ 23-232 et seq.) of Title 23 in confidence, and all [*3] records of persons imprisoned in penal institutions in this Commonwealth provided such records relate to the said imprisonment. Information in the custody of law-enforcement officials relative to the identity of any individual other than a juvenile who is arrested and charged, and the status of the charge or arrest, shall not be excluded from the provisions of [the Act]. [Emphasis added.]

Section 15.1-135.1 requires that sheriffs maintain specified records necessary for the efficient operation of a law-enforcement agency. Records related to investigations, reportable incidents and noncriminal incidents are among those records required to be maintained. The terms "arrest records," "investigative records," "reportable incidents records," and "noncriminal incidents records" are defined in § 15.1-135.1(B). Section 15.1-135.1(A) provides, in part, as follows:

Except for information in the custody of law-enforcement officials relative to the identity of any individual other than a juvenile who is arrested and charged, and the status of the charge of arrest, the records required to be maintained by this section shall be exempt from the provisions of [the Act].

III. Prior [*4] Opinions Conclude that "Jail Register" Must Be Disclosed

Prior Opinions of this Office have reviewed the application of the Act to records maintained by sheriffs' departments. Records maintained by a sheriff's department, as a general rule, are "official records" and must be made available under the Act. See 1976-1977 Att'y Gen. Ann. Rep. 250. A prior Opinion of this Office concludes that a jail register or list of those persons incarcerated is subject to disclosure under §§ 2.1-342(a) and 2.1-342(b)(1). See Att'y Gen. Ann. Rep.: 1983-1984 at 446; 1974-1975 at 583.

The Dispatch Log and the Jail Log about which you inquire, however, contain information other than a mere list of persons incarcerated in the jail.

IV. Some Matters Recorded in Dispatch Log Excepted from Mandatory Disclosure Under §§ 2.1-342(b)(1) and 15.1-135.1

The information contained in the Dispatch Log appears to be the record of all calls which may require a response by the sheriff's department. Some of the calls recorded will result in criminal charges and will entail criminal investigations. The record of such calls, in my opinion, is related to criminal investigations within the meaning [*5] of § 2.1-342(b)(1) and is an "investigative record," "noncriminal incidents record," and "reportable incidents record" within the meaning of § 15.1-135.1(A) and as defined in § 15.1-135.1(B). It is my opinion, therefore, that the Dispatch Log should be reviewed, and notations with respect to calls within the meaning of the exceptions provided in §§ 2.1-342(b)(1) and 15.1-135.1(A) may be deleted prior to the grant of access to other portions of the Dispatch Log pursuant to § 2.1-342(a).

V. Some Matters in Jail Log Excepted from Mandatory Disclosure Under §§ 2.1-342(b)(1) and 15.1-135.1

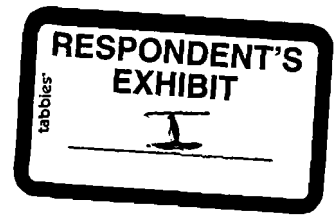
The matters recorded in the Jail Log relate to the administrative record of inmate activities. Sections 2.1-342(a), 2.1-342(b)(1), and 15.1-135.1 require the disclosure of information related to the identity of an individual, other than a juvenile, who is arrested or charged and the status of the arrest or charge. Under §§ 2.1-342(b)(1) and 15.1-135.1, however, other records of inmates are excepted from the mandatory disclosure requirement of § 2.1-342(a). It is my opinion, therefore, that matters recorded in the Jail Log must be disclosed to the extent that such

matters relate to the identity [*6] of an individual arrested or charged and the status of the arrest or charge. It is further my opinion, however, that other matters recorded in the Jail Log concerning inmate activities or observations concerning inmates may be deleted from the Jail Log, pursuant to the exceptions in §§ 2.1-342(b)(1) and 15.1-135.1, prior to disclosure.

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VA Attorney General Opinions

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VIRGINIA FREEDOM OF INFORMATION ADVISORY
COUNCIL
COMMONWEALTH OF VIRGINIA

AO-03-19

April 3, 2019

John F. Cafferky
Fairfax, Virginia

The staff of the Freedom of Information Advisory Council is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your electronic mail message dated February 25, 2019.

Dear Mr. Cafferky:

You have asked whether individual educational test scores that are part of a student's scholastic record would still be exempt from disclosure under subdivision A 1 of § 2.2-3705.4 of the Code of Virginia,¹ even if the student's name and other personal information are redacted.

Factual Background

You stated that from time to time, your public school board clients receive requests, pursuant to the Virginia Freedom of Information Act (FOIA), for school records containing individual test scores for all students in a particular segment of a school or school division. The requester has asked for individual scores and not an aggregate, statistical, or combined score, and they typically direct the school board to redact individual student names and other personally identifiable information.

Applicable Law and Analysis - FOIA

As a general matter, FOIA allows for the inspection of public records by the public, except as otherwise specifically provided by law.² Under the provisions of FOIA, "public records" is defined to include:

all writings and recordings that consist of letters, words or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photography, magnetic impulse, optical or magneto-optical form, mechanical 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.³

"Public body," as defined, means:

any legislative body, authority, board, bureau, commission, district or agency of the Commonwealth or of any political subdivision of the Commonwealth, including cities, towns and counties, municipal councils, governing bodies of counties, school boards and planning commissions; governing boards of public

institutions of higher education; and other organizations, corporations or agencies in the Commonwealth supported wholly or principally by public funds.⁴

Local school boards fall within the definition of public body, thus any records in their possession or in the possession of their officers, employees, or agents in the transaction of public business are considered public records, and are required to "be open to citizens of the Commonwealth, representatives of newspapers and magazines with circulation in the Commonwealth, and representatives of radio and television stations broadcasting in or into the Commonwealth," except as otherwise specifically provided by law.⁵

There is an exception in FOIA for educational records that excludes from mandatory disclosure "[s]cholastic records containing information concerning identifiable individuals, except that such access shall not be denied to the person who is the subject thereof, or the parent or legal guardian of the student."⁶ The term "scholastic records" is defined to mean "those records containing information directly related to a student or an applicant for admission and maintained by a public body that is an educational agency or institution or by a person acting for such agency or institution."⁷ Although scholastic records are excluded from mandatory disclosure under the provisions of FOIA, the records may be disclosed in the custodian's discretion, except where such disclosure is otherwise prohibited by law.

The test scores that are being requested are considered part of a scholastic record because the information is directly related to individual students. Therefore, the test scores, as part of a scholastic record, are excluded from mandatory disclosure under FOIA, unless the information is being requested by the student or the parent or legal guardian of the student who is the subject of such records. Based on the given facts, that does not seem to be the case.

Based on the facts given, requesters seem to be under the impression that the test scores would no longer be exempt under FOIA if the student's name and other personally identifiable information were to be redacted. FOIA provides that "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."⁸ Simply put, FOIA allows for the redaction or removal of exempt information from a record that would otherwise be nonexempt, if that information were not present. In this particular situation, the test scores that the requesters seek are a part of the students' scholastic record, which contains a collection of information about identifiable individuals. Even if student names and other personal information were to be redacted, the fact still remains that, as you have described them, these scholastic records themselves contain specific information about identifiable individuals; thus, the scholastic record and all information contained therein would still be exempt from mandatory disclosure under the provisions of FOIA.

Conclusion

Although student test scores are considered public records that are held by the local school board, which is a public body that is subject to the provisions of FOIA, the test scores fall within an exception as they are a part of a student's scholastic records that are exempt from mandatory disclosure under FOIA. Redacting or otherwise removing a student's name and other personal information does not make the scholastic record a nonexempt record that must be disclosed as the record would still contain information about specific individuals, whether identified by name or not.

Thank you for contacting this office. We hope that we have been of assistance.

Sincerely,

Ashley Binns
Staff Attorney

Alan Gernhardt
Executive Director

¹ All section numbers provided are from the Code of Virginia.

² See § 2.2-3704(A).

³ § 2.2-3701.

⁴ § 2.2-3701.

⁵ § 2.2-3704(A).

⁶ § 2.2-3705.4(A)(1).

⁷ § 2.2-3701.

⁸ § 2.2-3704.01.

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