

VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF CHARLOTTESVILLE

INSIDER INC., HANNAH BECKLER,
and IAN KALISH

Petitioners,

v.

VIRGINIA DEPARTMENT OF
CORRECTIONS

Respondent.

Case No. CL24-000065

ORDER

This matter comes before the Court on Petitioners' February 1, 2024, Petition for Writ of Mandamus. Upon consideration of the pleadings, the written and oral arguments presented by counsel for the parties, and for the reasons stated by the Court on the record, the Court finds as follows:

1. Through a request made pursuant to the Virginia Freedom of Information Act ("VFOIA") on April 19, 2023, Petitioners sought, in relevant part:
 - (a) All video and audio recordings in which a Virginia Department of Corrections (VADOC) canine engaged an inmate at Red Onion State Prison from January 1, 2017, to December 31, 2022.
 - (b) Records of certain specific incidents involving canine engagement enumerated in the April 19, 2023, request.
2. Petitioners filed a Petition for Writ of Mandamus on February 1, 2024, alleging that Respondent had violated VFOIA by failing to produce records responsive to Petitioners' April 19, 2023 requests.

3. On February 14, 2024, the Court received evidence and heard argument from both parties. Respondent asserted that the records requested on April 19, 2023 were exempt from VFOIA's mandatory disclosure requirement under the exemptions codified at sections 2.2-3706(B)(4), -3705.2(14), and -3705.1(1) of the Virginia Code. Respondent also asserted that the relief sought by Petitioners was barred under the doctrine of unclean hands.

4. At the conclusion of the February 14, 2024, hearing, the Court ordered Respondent to submit the records at issue in this case for *in camera* review.

5. On March 8, 2024, Respondent submitted a set of records, consisting of PDFs, to the Court, along with Respondent's proposed redactions for those records, which the Court reviewed *in camera*.

6. On March 9, 2024, Respondent filed an Answer to the Petition for Writ of Mandamus. In addition to the exemptions Respondent asserted at the February 14, 2024, hearing, Respondent asserted that the records requested on April 19, 2023, were exempt from VFOIA's mandatory disclosure requirement under the exemptions codified at sections 2.2-3705.5(1), -3706(B)(10), and -3706(D) of the Virginia Code. Respondent also asserted that laches barred the relief sought by Petitioners.

7. On March 22, 2024, Respondent filed a Response in Opposition to Plaintiffs' Petition for a Writ of Mandamus. In addition to the defenses and exemptions Respondent asserted at the February 14, 2024, hearing and in its March 9, 2024, answer, Respondent asserted that the relief sought by Petitioners was barred under the doctrine of accord and satisfaction.

8. The Court has considered Respondent's defense that the doctrine of unclean hands bars Petitioners from obtaining the relief sought through their Petition for Writ of Mandamus. The Court finds that the relief sought by Petitioners is not barred by that doctrine.

9. The Court finds that Respondent's defense that the doctrine of accord and satisfaction bars Petitioners from obtaining the relief sought through their Petition for Writ of Mandamus was waived.

10. Respondent represented to the Court in a filing on April 11, 2024, that it no longer asserted that the doctrine of laches barred Petitioners from obtaining the relief sought through their Petition for Writ of Mandamus.

11. The Petition for Writ of Mandamus is **GRANTED** as to the records submitted to the Court on March 8, 2024. Respondent shall produce all records submitted to the Court on March 8, 2024, to Petitioner within 10 days.

12. Respondent represented to Petitioner on April 22, 2024, that the redactions it proposed in its March 8, 2024, *in camera* submission were to "the names and inmate identification number of any inmates, the names and identifying information of the K9s, and . . . the names of any VADOC staff involved in the incident."

13. Respondent may exercise its discretion to redact the portions of the records it proposed be redacted in its March 8, 2024, *in camera* submission. The Court finds that these portions of the records are exempt from VFOIA's mandatory disclosure requirement under the exemptions codified at sections 2.2-3706(B)(4), -3705.2(14), and/or -3705.1(1) of the Virginia Code.

14. The Court has considered Respondent's argument that portions of the records in its March 8, 2024, *in camera* submission are exempt from VFOIA's mandatory disclosure requirement under the exemptions codified at sections 2.2-3705.5(1), -3706(B)(10), and -3706(D) of the Virginia Code. The Court finds that Respondent has failed to demonstrate by a preponderance of evidence that those exemptions are applicable to portions of these records.

15. On March 21, 2024, Respondent submitted a second set of records, consisting of video, to the Court, which the Court reviewed *in camera*.

16. The Petition for Writ of Mandamus is **GRANTED** as to the records submitted to the Court on March 21, 2024.

17. Respondent is required to determine a method by which to distort or blur the faces of individuals that appear on the videos submitted to the Court *in camera*. Respondent cannot maintain a system under which it insists it cannot comply with VFOIA because it is unable to make redaction to video. Records of Respondent's actions, which are undertaken for the public benefit, must be communicated to the public through VFOIA when they are requested, subject to any permissible withholding or redaction.

18. The videos submitted to the Court on March 21, 2024, are comprised of sets that contain multiple camera angles. Pursuant to section 2.2-3705.2(14)(iv)(a), Respondent may exercise its discretion to withhold all but the single most direct camera angle from each set.

19. Respondent may exercise its discretion to blur the faces of people employed by VADOC and incarcerated individuals that are not engaged by a canine who appear in the videos submitted to the Court on March 21, 2024.

20. The Court finds that these withholdings of portions of the videos submitted to the Court are exempt from VFOIA's mandatory disclosure requirement under the exemptions codified at sections 2.2-3706(B)(4), -3705.2(14), and/or -3705.1(1) of the Virginia Code.

21. The Court has considered Respondent's argument that portions of the video in its March 21, 2024, *in camera* submission are exempt from VFOIA's mandatory disclosure requirement under the exemptions codified at sections -3706(B)(10), and -3706(D) of the

Virginia Code. The Court finds that Respondent has failed to demonstrate by a preponderance of evidence that those exemptions are applicable to portions of these records.

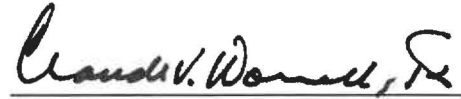
22. On April 25, 2024, Respondent provided Petitioners an estimate of the cost of such blurring on a per-video basis, by determining and providing to Petitioners the reasonable cost of redacting one representative video. The parties should discuss the Petitioners' willingness to pay the reasonable costs associated with the redaction of the videos submitted to the Court on March 21, 2024. To the extent Petitioner is willing to bear these costs, Respondent is ordered to produce the corresponding video, subject to the above.

23. On May 15, Petitioners filed an Application for the Recovery of Costs and Fees, which argued that Petitioners had substantially prevailed in this litigation and sought the recovery of \$28,603.90 in costs and fees from this proceeding. On August 19, 2024, Respondent submitted a Response to Petitioner's Application, which stated that "if this Court's decision is affirmed on appeal, without modification . . . petitioners will have substantially prevailed on the merits of the case," and that Respondent "does not dispute the reasonableness of the fees and costs expended to date." Respondent further stated that it intends to appeal the Court's decision and requested that "any final determination of fees and costs be stayed pending resolution of the anticipated appeal so that this Court and the parties will have the benefit of any appellate decisions when making any final determinations as to whether Petitioners have substantially prevailed on the merits of this case." Petitioner's Application for Recovery of Costs and Fees is denied.
[granted / denied / continued]

24. Given Respondent's representation that it anticipates noting an appeal, enforcement of this order is hereby stayed to allow Respondent to pursue its right of appeal. The stay will remain in effect until both parties' appeal rights have been exhausted.

25. The Clerk is **DIRECTED** to send an attested version of this Order to all counsel of record.

Entered this 5th day of September 2024



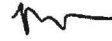
HON. CLAUDE V. WORRELL, II
CHIEF JUDGE, PRESIDING

Seen and endorsed pursuant to Rule 1:13. The parties have appended objections to this filing.



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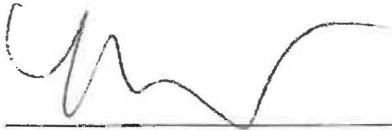
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Without waiving any other properly-preserved objections to the Court's ruling, counsel for Respondent Virginia Department of Corrections (VDOC) states the following specific objections to the Court's final order:

1. VDOC objects to the Court's order to produce the five "bite reports," corresponding to the incidents on 12/25/18, 9/20/19, 5/7/21, 6/16/21, and 9/24/21 because those reports constitute records of persons imprisoned in penal institutions in the Commonwealth that relate to the imprisonment, and they are therefore exempt under Code § 2.2-3706(B)(4).
2. VDOC objects to the Court's finding that the "bite reports" for the five identified incidents are not entirely exempted from disclosure under Code § 2.2-3706(B)(4).
3. VDOC objects to the Court's order to produce the incident reports corresponding to the twelve identified incidents on 12/11/16, 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, and 11/6/21, because those reports constitute records of persons imprisoned in penal institutions in the Commonwealth that relate to the imprisonment, and they are therefore exempt under Code § 2.2-3706(B)(4).
4. VDOC objects to the Court's finding that the incident reports for the twelve identified incidents are not entirely exempted from disclosure under Code § 2.2-3706(B)(4).
5. VDOC objects to the Court's order to produce the five canine bite reports and the nine video recordings from 2021 because that request is barred under the equitable doctrine of unclean hands.
6. VDOC objects to the Court's order to produce the five canine bite reports and the nine video recordings from 2021 because that request is barred under the equitable doctrine of accord and satisfaction.
7. VDOC objects to the Court's order to produce the surveillance video recordings because those recordings constitute records of persons imprisoned in penal institutions in the Commonwealth that relate to the imprisonment, and they are therefore exempt under Code § 2.2-3706(B)(4).
8. VDOC objects to the Court's order to produce the surveillance video recordings because public disclosure of those videos would jeopardize the safety or security of a government facility, and those recordings are therefore exempted under Code § 2.2-3705.2(14).
9. VDOC objects to the Court's finding that the surveillance video recordings are not entirely exempted from disclosure under Code § 2.2-3706(B)(4).
10. VDOC objects to the Court's finding that the surveillance video recordings are not entirely exempted from disclosure under Code § 2.2-3705.2(14).
11. In the event that VDOC prevails, in whole or in part, on appeal of this order, VDOC objects to any award of attorneys' fees and costs on the grounds that Petitioners did not

substantially prevail on the merits of their petition within the meaning of Code § 2.2-3713(D).



Margaret Hoehl O'Shea, VSB #6611
Senior Assistant Attorney General
Counsel for Respondent

Dated: August 19th, 2024

Petitioners' Objections: Given Respondent's representations that it anticipates noting an appeal of the Court's final order, Petitioners preserve the objections made in all pleadings, memoranda, motion for clarification, motion to strike, during Mr. Fulmer's testimony and at argument on February 14, 2024, and at argument on April 11, 2024. In addition:

Petitioners object to the Court's order that VADOC may exercise its discretion to redact the names and inmate identification numbers of any inmates, the names and identifying information of the dogs, and the names of VADOC dog handlers from the records submitted to the Court on March 8, 2024. Petitioners also object to the Court's order that VADOC may exercise its discretion to blur or distort the faces of VADOC dog handlers who appear in the videos submitted to the Court on March 21, 2024.

Petitioners' request for video recordings encompassed a date range of January 1, 2017 to December 31, 2022. Respondent has represented, through counsel and post-hearing, that it possesses an "external hard drive" containing responsive video records dated January 1, 2017 to July 2019, but that the hard drive has become "corrupted." *See* Resp.'s Second Certificate of Compliance ¶ 6 (Mar. 22, 2024). Accordingly, Petitioners object that this Order does not permit Petitioners to inspect and/or copy the contents of that hard drive.

To the extent Respondent assigns error to the Court's findings on accord and satisfaction and unclean hands, Petitioners preserve their objection that they did not have sufficient notice of those defenses such that they could enter evidence at the February 14, 2024, hearing.

To the extent that the Court of Appeals affirms the redactions ordered by this Court, Petitioners reserve the right to contest the reasonability of the costs estimated by Respondent of applying those redactions.



Lin Weeks, *counsel for Petitioners*