

IN THE SUPREME COURT OF VIRGINIA

RECORD NO.

INSIDER, INC., HANNAH BECKLER,
AND IAN KALISH,
Appellants,

v.

VIRGINIA DEPARTMENT OF CORRECTIONS,
Appellee.

PETITION FOR APPEAL

Lin Weeks, VA Bar No. 97351
REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS
1156 15th Street NW, Suite 1020
Washington, D.C. 20005
Tel: (202) 800-3533
lweeks@rcfp.org

Counsel for Appellants

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ASSIGNMENTS OF ERROR

1. The Court of Appeals erred by finding that Code § 2.2-3706(B)(4) authorizes the Department of Corrections to withhold, in entirety, the incident reports and video requested by Business Insider that document or depict the Department of Corrections' dogs biting prisoners housed in its facilities. Preserved at Br. of Appellees at 17–35, *Virginia Department of Corrections v. Insider, Inc., et al.*, No. 1626-24-2 (Va. Ct. App. Mar. 19, 2025); R.006–09, R.120–125, R.341–44, R.417–19.

2. The Court of Appeals erred by holding that Business Insider “waived [its] right to request the bite reports and nine of the surveillance videos,” because neither the parties’ March 2023 agreement nor any equitable principal overrides Business Insider’s statutory right to inspect the Department of Corrections’ non-exempt public records. Preserved at Br. of Appellees at 45–47, *Virginia Department of Corrections v. Insider, Inc., et al.*, No. 1626-24-2 (Va. Ct. App. Mar. 19, 2025); R.005, R.374–75; R.415–16; *see also* R.078–79, R.128, R.130.

NATURE OF THE CASE

Introduction

The Department of Corrections trains and uses dogs in its facilities for “control of the offender population.” R.527. For example, in 2020, a Department of Corrections dog handler named Joshua A. Robinson wrote that during a fight between two inmates in River North Correctional Center, he gave his dog Tom the “command to engage.” R.582. Tom immediately “engaged”—bit—one of the inmates, Thomas Rose. *Id.* Robinson wrote that he then gave Tom the command to disengage, and “instructed responding staff to escort [Rose] to medical to be assessed by medical staff.” *Id.*

Hannah Beckler, a senior editor on Business Insider’s investigations team, has reported extensively on this practice.¹ Aided by public records and court documents, Beckler reported that corrections employees in the Commonwealth used dogs to break up fights, extract prisoners from their cells, or otherwise discipline inmates at a far higher rate than that of any other state—there were at

¹ *E.g.* Hannah Beckler, *Patrol Dogs are Terrorizing and Mauling Prisoners Inside the United States*, Business Insider (Jul. 23, 2023), <https://perma.cc/S38L-GNJP>; Hannah Beckler, *Corrections Officers Have Been Brutally Attacked by Their Own Patrol Dogs. Officials Say the Risk is Worth It*, Business Insider (Jul. 23, 2023), <https://perma.cc/GK6N-62TA>.

least 271 such deployments between 2017 and 2022 in Virginia, compared to 15 in the next highest state during those years.²

Beckler's reporting sparked legislative reform.³ In March 2024, the General Assembly enacted Code § 53.1-39.3, providing that "patrol" canines (as distinguished from contraband-detecting and man-trailing canines, R.526–27) may only be deployed when "immediately necessary to protect any prisoner or any officer or employee from the threat of serious bodily injury or death." Among other honors, Beckler was awarded the 2024 Hillman Prize in Newspaper Journalism for her work.⁴

Even following that enactment, however, the Department of Corrections' continued use of patrol dogs remains an issue of intense public concern.⁵ This case

² Hannah Beckler, *Virginia Uses Attack Dogs in Prisons More Than Any Other State. Now Lawmakers Want to Crack Down*, Business Insider (Dec. 26, 2023, 6:18 AM), <https://www.businessinsider.com/legislation-curb-patrol-dogs-in-virginia-prisons-2023-12>.

³ See Beckler, *Virginia Uses Attack Dogs in Prisons More Than Any Other State*, *supra* note 2 (quoting Virginia lawmakers discussing Appellees' influence).

⁴ 2024 Hillman Prize for Newspaper Journalism, *The Sidney Hillman Foundation*, <https://www.hillmanfoundation.org/hillman-prizes/2024-hillman-prize-newspaper-journalism> (last visited Jan. 7, 2026).

⁵ Ben Paviour, *Dog Attacks Persist in Virginia Prisons Despite 2024 Law Change*, Virginia Mercury (Dec. 11, 2025), <https://viriniamercury.com/2025/12/11/dog-attacks-persist-in-virginia-prisons-despite-2024-law-change/> ("Prison dogs have 'engaged' incarcerated people,

involves Beckler and Business Insider’s effort to continue their investigation using the Virginia Freedom of Information Act (“VFOIA”), Code §§ 2.2-3700–13. With Ian Kalish, an instructor at the University of Virginia School of Law First Amendment Clinic, Beckler and Insider, Inc. (collectively “Appellants,” or “Business Insider”) submitted a public records request for all video and audio recordings of instances in which a dog at Red Onion State Prison (“Red Onion”) bit or otherwise “engaged” an inmate from 2017–2022, as well as written reports of twelve specific bites that took place in VADOC facilities.

After its request was denied by the Department of Corrections, Business Insider filed a petition for writ of mandamus in the Circuit Court for the City of Charlottesville. The trial court granted Business Insider’s petition in part, ordering the Department of Corrections to provide the requested records, subject to some redactions. Thereafter, a panel of the Court of Appeals reversed the circuit court, holding that the Department of Corrections was permitted to withhold all of the records requested by Business Insider in their entirety.

prison employees and visitors in at least 33 incidents since the law went into effect on July 1, 2024. . . . Criminal justice advocates have called for Gov.-elect Abigail Spanberger to ban the use of patrol dogs entirely.”)

Summary of the Argument

Business Insider's petition for appeal seeks review of two errors in the Court of Appeal's opinion, both of which will have far-reaching consequences if left uncorrected by this Court.

First, the Court of Appeals erroneously construed and applied several VFOIA provisions, including the exemption codified at Code § 2.2-3706(B)(4) and the redaction provision codified at Code § 2.2-3704.01, in a manner that risks gutting public oversight of corrections and law enforcement bodies under VFOIA. The Court of Appeals' opinion fails to effectuate the plain text of the statute and enables corrections and law enforcement agencies to ignore the mandatory redaction provision added to VFOIA in 2016. Statutory construction of Code § 2.2-3706(B)(4), including how it interacts with Code § 2.2-3704.01, would be an issue of first impression in this Court.

Second, the Court of Appeals held—without citation to any case or statute—that Business Insider was barred from obtaining some of the mandamus relief it sought because it had previously negotiated a resolution to a different but overlapping VFOIA request with the Department of Corrections. This holding runs contrary to text of the agreement, the text of VFOIA, and this Court's decision in *Cartwright v. Commonwealth Transp. Comm'r. of Va.*, 270 Va. 58 (2005). It also casts into doubt an essential tool that public records requesters use to resolve

disputed public records requests without judicial intervention.

Statutory Framework

Resolution of Business Insider's assignments of error will require the Court to apply several provisions of VFOIA. The statute's policy section, Code § 2.2-3700(B) states the intent of the General Assembly in enacting the statute and instructs agencies and courts on how its provisions, including its exemptions must be construed:

The 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 ... unless specifically made exempt pursuant to this chapter or other specific provision of law.

Code § 2.2-3700(B). VFOIA's statutory definitions are found in Code § 2.2-3701, and its mechanism for operation is provided in Code § 2.2-3704, including its underlying presumption that public records are to be provided upon request absent the applicability of a statutory exemption. When records contain both exempt and non-exempt information, Code § 2.2-3704.01 requires that public bodies redact the exempt information and provide the redacted record to the requester.

The exemption from VFOIA's disclosure mandate that the Court of Appeals relied upon, in part, to reverse the circuit court's decision is reproduced below:

§ 2.2-3706 Disclosure of law-enforcement and criminal records; limitations [. . .]

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

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

Code § 2.2-3706(B)(4). This provision was originally enacted in 1975 as an amendment to a predecessor statute, Code § 2.1-342(b)(1):

(b) The following records are excluded from the provisions of this chapter [. . .]

(1) Memoranda, correspondence, evidence and complaints related to criminal investigations, ~~and~~ reports submitted to the State and local police in confidence, *and all records of persons imprisoned in a penal institution in this State provided such records relate to the said imprisonment.*

1975 Va. Acts ch. 312.

Finally, VFOIA's enforcement provision, Code § 2.2-3713, contains the statute's standard of proof and standard of judicial review:

In any action to enforce the provisions of this chapter, the public body shall bear the burden of proof to establish an exclusion by a preponderance of the evidence. No court shall be required to accord any weight to the determination of a public body as to whether an exclusion applies. . . .

Code. § 2.2-3713(E).

MATERIAL PROCEEDINGS BELOW

On April 19, 2023, Business Insider submitted a public records request to the Department of Corrections that sought, in relevant part:

1. Video recordings in which a Department of Corrections dog bit an inmate at Red Onion between January 1, 2017 to December 31, 2022.
2. Bite reports and incident reports—similar but distinct written documents created by the Department of Corrections—for twelve enumerated occurrences in which a Department of Corrections dog bit an inmate.

R.577. The Department of Corrections denied Business Insider’s request, citing several statutory exemptions to VFOIA, including Code § 2.2-3706(B)(4). R.579.

On February 1, 2024, Business Insider filed the operative petition for writ of mandamus in the Circuit Court for the City of Charlottesville. R.001.

Business Insider requested an expedited hearing on the merits of its petition under Code § 2.2-3713(C). R.010. The circuit court held that hearing on February 14, 2024. R.149 (notice of hearing); R.322 (transcript of hearing). At the hearing, Business Insider and the Department of Corrections both entered documentary evidence into the record. R.353–61 (Business Insider’s documentary evidence); R.362 (Department of Corrections’ documentary evidence). The Department of Corrections also elicited the testimony of one witness, its public records officer who received and responded to Business Insider’s request. R.365–77. The circuit court then permitted the parties to present oral argument. R.377.

At the close of the merits hearing, the circuit court ordered the Department of Corrections to submit the public records requested by Business Insider for *in camera* review. R.432–438. The court reviewed the submitted records, R.159–64 (notices of *in camera* submissions), as part of its fact-finding, *see* R.312, R.314.

In addition to its arguments regarding the applicability of VFOIA exemptions, the Department of Corrections also asserted at the February 14, 2024 hearing that the circuit court could not equitably enter a writ of mandamus due to an agreement that Business Insider and the Department of Corrections reached about a previous public records request with some overlap with the one at issue in this case. R.397–98; R.156; R.171–73. After the Department of Corrections attempted to supplement its oral presentation on that point with several post-hearing filings, R.151 (affirmative defenses filed as part of February 29, 2024 answer); R.166 (response in opposition to Business Insider’s February 1 memorandum, filed March 22, 2024), Business Insider argued through two motions that the circuit court should consider only arguments made and evidence submitted by the Department of Corrections at or before the February 14, 2024 hearing, R.226 (motion to strike); R.233 (motion for clarification).⁶

⁶ In the alternative, Business Insider argued that, at minimum, the evidentiary record would have to be reopened for it to adequately respond to the Department of Corrections’ post-hearing arguments. R.238.

The circuit court heard Business Insider's motions on April 11, 2024. R.239 (notice of hearing); R.475 (transcript), and ultimately limited its consideration of the Department of Corrections' equitable defenses to the argument and evidence submitted at the February 2024 hearing. *Compare* R.313 (final order holding that the Department of Corrections waived defense of accord and satisfaction) *with* R.231 (Business Insider's motion to strike Department of Corrections' accord and satisfaction argument because it was not raised in the February 2024 hearing).

The circuit court's final order, entered September 5, 2024, granted Business Insider's petition in part, and addressed both (i) the statutory exemptions to VFOIA claimed by the Department of Corrections and (ii) the equitable defense, unclean hands, that the agency had raised at the February 2024 hearing. R.311. In relevant part, the circuit court granted Business Insider's petition but held that Code § 2.2-3706(B)(4), along with two other VFOIA exemptions not at issue in this petition for appeal, permitted the Department of Corrections to redact certain, limited portions of the requested bite reports and incident reports. R.313. Likewise, the circuit court held that the Department of Corrections was required to release the video footage that the Department of Corrections submitted for *in camera* review, but that the statutory exemptions it raised permitted it to withhold all but the most direct angle of the requested video footage and blur the faces of its employees and certain incarcerated individuals. R.314. Finally, the circuit court found that

Business Insider was not equitably barred from obtaining mandamus relief under the doctrine of unclean hands. R.312.

The parties each submitted written objections to the circuit court's final order, R.317 (Department of Corrections), R.319 (Business Insider), and the Department of Corrections appealed, R.320. Briefing on the Department of Corrections' assignments of error, and several cross-assignments raised by Business Insider, was completed on April 28, 2025. The parties conducted oral argument before a panel of the Court of Appeals on September 10, 2025.

The Court of Appeals issued an unpublished memorandum opinion on October 28, 2025 (the "CAV Opinion"), reversing the circuit court. In relevant part, two members of the three-judge panel held that the Department of Corrections was permitted to withhold all video footage and all incident reports requested by Business Insider pursuant to Code § 2.2-3706(B)(4). CAV Op. 5–8. The same two members of the panel also held Business Insider had been equitably barred from obtaining a writ of mandamus that required the Department of Corrections to produce any of requested the bite reports and nine of the requested videos. CAV Op. 8–9. The third member of the panel concurred in the judgment but wrote that the majority's opinion was not "the resolution affecting the least number of cases and with which the least number of jurists would disagree." CAV Op. 16 (Malveaux, J., concurring). This petition for appeal followed.

STATEMENT OF FACTS

- A. The requested incident reports and bite reports were created by the Department of Corrections and describe its employees' actions, including the use of force against inmates in its facilities.**

According to the Department of Corrections' operating procedures, bite reports are created by its employees "any time the use of a canine results in a bite."

R.545. Similarly, Department of Corrections employees are required to write incident reports in certain situations in which they engage in the use of force against inmates, R.550–51; R.566–67; *see also* Va. Dep't of Corrections, Operating Procedure 038.1: Reporting Serious or Unusual Incidents, available at <https://vadoc.virginia.gov/files/operating-procedures/030/vadoc-op-038-1.pdf> (last visited Dec. 30, 2025).

The incident reports and bite reports requested by Business Insider are part of the evidentiary record; the Department of Corrections submitted them pursuant to the circuit court's oral order, and the circuit court reviewed them *in camera*.

R.432 (oral order during February 2024 hearing); R.159; R.312 at ¶ 5.

Also in the evidentiary record are several examples of bite reports and incident reports that Business Insider obtained through public filings in court cases involving the Department of Corrections or its employees. R.582–89; R131. Business Insider included these documents in its pleadings as examples of the type of public records it had requested—since it did not (and still does not) have access

to the precise bite reports and incident reports in its request. R.084–93 (Petition Exhibits H–I). The Department of Corrections stipulated to their inclusion in evidence. R.355; *compare* R.084–93 (Petition Exhibits H–J) *with* R.582–89 (February 14, 2024 Hearing Exhibits H–J).

An incident report in the evidentiary record, R.589, is reproduced below as *Figure 1*. An incident report consists of a Department of Corrections header that identifies the employee that wrote it and the facility in which the incident took place, the names of the inmates and Department of Corrections staff involved, a narrative written by the employee that describes his or her self-reported perceptions and actions, and footers that identify which Department of Corrections employees have been notified about the incident and which approved the report. A second demonstrative incident report is also in evidence. R.584.



VIRGINIA DEPARTMENT OF CORRECTIONS

Internal Incident Report

038.1 A-4

DOC Location: KMCC Keen Mountain
Correctional Center

Report generated by Barbetto, W.J.

Report run on 10/09/2014 at 8:03 AM

| | | | |
|--|--|-----------------------------------|----------------|
| Internal Incident Number: | Date/Time of Incident: | DOC Location: | |
| IIR-KMCC-2014-000539 | October 07, 2014 @ 07:21 AM | Keen Mountain Correctional Center | |
| Reporting Staff: | Beavers, Claude J | Title/Shift: | Canine Officer |
| Date Reported: | 10/07/2014 | Time: | 10:00 AM |
| Offenders Involved: | 1185848 | Custis, Leonard D | B-2-222-T |
| | 1053072 | Underwood, Jeffrey L | B-2-230-T |
| Staff Involved: | Diperna, George S | Officer | |
| Visitors Involved: | Others Involved: | | |
| Type of Incident: | Fighting between incarcerated offenders Use of Force (physical) | | |
| Location of Incident: | N/A | | |
| Gang Related: | No | Confidential: | No |
| | | PREA: | No |
| Description of Incident: | | | |
| <p>On 7 October 2014 at 0721 hours I Canine Officer C. Beavers was escorting B-2 pod back from chow. While approximately 10' from gate 16 I witnessed inmate J. Underwood #1053072 hit inmate L. Custis #1185848 from behind in the facial area. Inmate L. Custis staggered off of the boulevard to the left, took his coat and toboggan off with his fist in the air as to strike back. I announced over the hand held radio 10-18 and gave a verbal warning to the inmates fighting, "State canine stop fighting or I will release the dog!" As I approached the situation inmate J. Underwood #1053072 was throwing punches towards inmate L. Custis #1185848 the inmates failed to comply with the verbal warning. Inmate J. Underwood #1053072 was the aggressor so I placed my assigned Canine on his left forearm. I then told all inmates around to get on the ground with arms out and palms up in which they complied. I then told inmate J. Underwood #1053072 to stand still and quit fighting with the canine and he complied. I gave orders for my assigned Canine to release and he did as instructed. Officer G. Diperna restrained Inmate J. Underwood and as he was being escorted inmate J. Underwood yelled "I'm the real gangster around here." he was then escorted to the Special Housing Unit. Captain Fields restrained inmate L. Custis and escorted him to the Special Housing Unit. End of report....CJB</p> | | | |
| Notifications: | | | |
| Name: | Title: | Date/Time Notified: | |
| | | | |
| Approved By: | Fields, Larry F | Title: | Captain |
| Action Taken: | Approved | Review Date: | 10/07/2014 |
| Investigation: | Yes | Assigned to: | Arms, Craig S |
| Comments: | | | |

Figure 1 (image of incident report, excerpted from R.589).



VIRGINIA DEPARTMENT OF CORRECTIONS
Canine Bite Report

Effective Date: March 1, 2011
Operating Procedure 420.3 Attachment 4

| | | |
|--|-----------------------|----------------------|
| <u>Barbetto, W.</u> | <u>Westren / KMCC</u> | |
| Handler's Name | Region/Facility | |
| <u>Blitz 888-01-0351</u> | <u>April 01, 2010</u> | <u>June 25, 2015</u> |
| Canine's Name and Number | Canine's DOB | Date of Report |
| Location of Incident (County, Street Address, City, State, Zip Code) | | |
| <u>Buchanan County, 3402 Kennel Gap Rd. Oakwood VA 24631</u> | | |
| Name & Address of Person Bitten: <u>Marlon Canady #1110773</u> | | |
| <u>Keen Mountain Correctional Center</u> | | |
| <u>3402 Kennel Gap Rd. Oakwood VA 24631</u> | | |
| Home Phone Number: <u>276-498-7411</u> Work Phone Number: <u>N/A</u> | | |
| Describe Circumstances of Bite: <u>On June 25, 2015 at approximately 08:51am, I K-9 Sgt. W. Barbetto with assigned K-9 Blitz #888-01-0351 was monitoring mass movement in front of A-Building when I heard announced over the radio, "10-18, two inmates fighting in B-2 pod." I responded with K-9 Blitz and, upon entering B-2 pod, I observed Inmates P. Ames #1076504 and M. Canady #1110773 on the pod floor fighting. I yelled three warnings, "State K-9 stop fighting or I will release the dog!" Inmates P. Ames and M. Canady continued to fight. Inmate M. Canady attempted to kick Inmate P. Ames and K-9 Blitz engaged Inmate M. Canady's right hip. I instructed Inmate M. Canady to stop resisting because Inmate Canady was swinging his left arm violently. K-9 Blitz released from the hip and engaged the threat, Inmate Canady's left arm. I advised Inmate M. Canady to roll over and be handcuffed. Inmate Canady complied with orders and K-9 Blitz released Inmate M. Canady's left arm. I remained in B-2 pod to provide security as involved inmates were escorted from the pod and B-2 pod was secured.</u> | | |
| What Medical Attention was Received?: <u>At KMCC, antibiotic ointment to site, TD shot given. Dog bite Right thigh, X3 areas noted with broken skin, small amount of blood noted to site and boxers.</u> | | |
| Name of Attending Physician: <u>Nurse A. Whited</u> | | |
| Canine's Medical Record Up To Date? <input checked="" type="checkbox"/> YES <input type="checkbox"/> NO | | |
| Rabies Tag Number: <u>1215383A</u> Expiration Date <u>January 16, 2018</u> | | |

Figure 2 (image of bite report, excerpted from R.585).⁷

⁷ The "home phone number" listed on the bite reports in evidence is a publicly available phone number for the prisons at which the bites occurred (*i.e.*, Keen Mountain Correctional Center in Figure 2).

A bite report in the evidentiary record, R.585, is reproduced above as *Figure*

2. Similarly, a bite report consists of a Department of Corrections header, the name of the dog handler who wrote the report, identifying information about the dog, the location and date of the incident, the name of the person bitten. It also has a narrative written by the dog handler that describes their self-reported perceptions and actions, a narrative written by the dog handler that describes any medical attention the bitten person received, and information about whether the dog is current on its rabies shots. Several additional demonstrative bite reports are also in evidence. R.582–83, R.586–87.

B. The requested video footage was created by the Department of Corrections and depicts its employees’ use of force against inmates in Red Onion State Prison.

Some of video footage requested by Business Insider is part of the evidentiary record and was reviewed by the circuit court *in camera*. R.432 (oral order requiring *in camera* submission); R.163; R.314 at ¶ 15.⁸ The Department of Corrections represented in a filing submitted after the parties’ evidentiary hearing

⁸ When the Department of Corrections submitted the requested video *in camera*, represented to the circuit court that some of the footage requested by Business Insider had become “corrupted” and was unviewable. R.164. The agency elected not to submit the files or hard drive containing that footage for the circuit court’s review on that basis.

that its *in camera* submission consisted of footage from 42 incidents involving dog bites at Red Onion State Prison that took place between July 2019 and June 2022.

R.163. It further represented that the footage had been preserved from surveillance footage captured by a MaxPro camera system in that facility. R.163–64.

Also in evidence is video footage from a camera system in use at Red Onion State Prison prior to the installation of the MaxPro system, which Business Insider obtained from public filings made in a lawsuit involving Department of Corrections employees. R.590 (USB drive containing video footage from *Alana v. Rose*, No. 7:18-cv-420). As with the bite reports and incident reports, Business Insider included this example footage as an exhibit to its petition, R.095, and the Department of Corrections stipulated to its admissibility. R.331, R.356–57. The footage submitted by Business Insider depicts a dog deployed by its Department of Corrections handler biting an inmate during an altercation between two inmates.

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



6/17/2016 7:24:17 PM RTZ (GMT05:00)

Figure 3 (excerpted from video enclosed at R.590 (arrow superimposed)).

- C. Business Insider negotiated an earlier agreement with the Department of Corrections under which the Department of Corrections provided Business Insider with a set of redacted bite reports and Business Insider remained free to request public records from the agency.**

The VFOIA request at issue in this case was not the first that Business Insider sent the Department of Corrections. Indeed, Beckler’s pivotal 2023 reporting, discussed above, relied in part on records received through an earlier set of requests (the “2022 Requests”).⁹ The 2022 Requests sought, in relevant part:

⁹ Beckler, *Patrol Dogs are Terrorizing and Mauling Prisoners Inside the United States*, *supra* note 1 (describing use of public records obtained from Department of Corrections).

1. Video recordings in which a Department of Corrections dog bit an inmate at Red Onion State Prison between January 1, 2021 to December 31, 2021.
2. All bite reports dated January 1, 2017 to June 17, 2022.

R.190. The requests at issue in this case differ from, but overlap with, the 2022 Requests. *Compare* R.190 *with* R.577. Specifically, the 2023 requests that are at issue in this case sought video recordings from 2017 through 2022 and sought bite reports and incident reports from 12 specific bites that Business Insider identified by date, facility, and participants. R.577–78.

Although Code § 2.2-3700(B) requires public bodies to “make reasonable efforts to reach an agreement with a requester concerning production of the records requested,” the Department of Corrections did not begin to discuss any production arising from the 2022 Requests until Business Insider informed the agency that it was prepared to file a petition to enforce its rights under VFOIA. *See* R.167 (Department of Correction’s description of its initial denial, and subsequent negotiation over, the 2022 Requests). Following Business Insider’s statutorily required notice of intent to file, *see* Code § 2.2-3713(C), the parties negotiated for several months. R.167. Ultimately, no lawsuit was filed. Business Insider agreed not to proceed with its filing, and the Department of Corrections agreed to exercise its discretion to release redacted records responsive to Business Insider’s request

for bite reports. R.601–02.¹⁰ The parties also agreed that “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.” R.601–02 (emphasis added).

AUTHORITIES AND ARGUMENT

- I. **This Court should review the Court of Appeals’ holding that VFOIA authorizes the Department of Corrections to withhold, in entirety, the requested incident reports and video footage of its dogs biting prisoners in its facilities. (AOE 1)**

Standard of Review

The application of a VFOIA exemption to a requested record is a mixed question of fact and law. *Hawkins v. Town of S. Hill*, 301 Va. 416, 424 (2022). The reviewing court must defer to the fact-finding of the circuit court unless the factual findings the circuit court made are “plainly wrong or without evidence to support them.” *Suffolk City Sch. Bd. v. Wahlstrom*, 302 Va. 188, 205 (2023) (cleaned up).

Statutory interpretation is an issue of law reviewed *de novo*. *Hawkins*, 301 Va. at 424. In interpreting statutes, the Court’s overarching goal is to “ascertain

¹⁰ The VFOIA exemptions asserted by the Department of Corrections over the 2022 Requests, including Code § 2.2-3706(B)(4), are exemptions from the mandatory disclosure required by Code § 2.2-3704. In other words, even if an exemption were to apply to certain information, the Department of Corrections can still choose to release that information to the public records requester.

and give effect to the intention of the legislature.” *Watkins v. Hall*, 161 Va. 924, 930 (1934) (cleaned up); *Hawkins*, 301 Va. at 425 (“Our function is to interpret the statute in a manner that reflects the legislative intent.”). To discern the legislative intent of a contested provision, the Court must consider the “entire statute” in order to understand its terms in context. *Cuccinelli v. Rector, Visitors of Univ. of Va.*, 283 Va. 420, 425 (2012) (cleaned up). Understanding the entirety of the statute is particularly important in interpreting “exceptions [and] exemptions” that seem “inherently inconsistent with the spirit” of a statute “designed to promote the public welfare.” *Va. Elec. And Power Co. v. Board of County Sup’rs of Prince William Cnty.*, 226 Va. 382, 388 (1983). For example, no provision of VFOIA can be construed without accounting for the General Assembly’s specific instruction regarding statutory construction in Code § 2.2-3700(B), which “puts the interpretative thumb on the scale in favor of disclosure” of public records. *Hawkins*, 301 Va. at 425 (cleaned up).

When possible, the General Assembly’s intent should be discerned from the words used in the Virginia Code itself. *Watkins*, 161 Va. at 930 (citing *Floyd v. Harding*, 69 Va. 401, 405 (1877)); *Hawkins*, 301 Va. at 425. This is sometimes called the “plain meaning” rule: If legislative intent is apparent (*i.e.*, “plain”) from a statute’s text, that meaning should be enforced by the Court. See Marco Basile, *Ordinary Meaning and Plain Meaning*, 110 Va. L. Rev. 137 & n.4 (2024). If

legislative intent is not plain on the face of the statute, the Court uses extrinsic sources—like legislative history, persuasive authority, policy considerations, and the law of other jurisdictions—to discern it. *E.g. Hawkins*, 301 Va. at 425–32; William Baude & Ryan D. Doerfler, *The (Not So) Plain Meaning Rule*, 84 Univ. Chi. L. Rev. 539, 542–45.

The plain meaning rule—concerned as it is with whether legislative intent is apparent within the four corners of the Virginia Code—leaves open the question of what the General Assembly intended the *words* within a statute to mean (unless those words are given statutory definitions). Basile, *supra*, at 150. This is the realm of what is sometimes called the “ordinary meaning” rule: In construing a statute, “words are to be given their ordinary meaning, unless it is apparent that the legislative intent is otherwise.” *Turner v. Commonwealth*, 295 Va. 104, 108 (2018) (cleaned up); Basile, *supra*, at 150.¹¹

Dictionary definitions are not binding on the Court as it attempts to ascertain the ordinary meaning of words in a statute, though they may be considered.

Wetlands Am. Tr., Inc. v. White Cloud Nine Ventures, L.P., 291 Va. 153, 167

¹¹ The Court sometimes describes this as a presumption that words have their *plain* meaning, where *plain* is a synonym for *ordinary* (as in “plain vanilla”). Regardless, it is a distinct interpretative principle from the Court’s effort to derive legislative intent from the enacted text of the Virginia Code unless there is ambiguity or absurdity in the statute.

(2016). However, dictionary definitions can also demonstrate ambiguity. *Blake v. Commonwealth*, 288 Va. 375, 382 (2014) (“[T]here can be little doubt that the statute is ambiguous. Among ten definitions provided by Webster's Dictionary, two would result in distinct interpretations. . . .”); see *Hawkins*, 301 Va. at 426 (examining legislative history and other extrinsic sources because two statutory terms in VFOIA had multiple plausible dictionary definitions); *Jones v. Phillips*, 299 Va. 285, 316 (2020) (Goodwyn, J., dissenting) (cautioning against selecting one dictionary definition among many, as “everything should be made as simple as possible, but not simpler”).

Ambiguity is the absence of discernable legislative intent, or susceptibility to several possible options. “A statute is considered ambiguous if the text can be understood in more than one way or refers to two or more things simultaneously or when the language is difficult to comprehend, is of doubtful import, or lacks clearness or definiteness.” *Morgan v. Commonwealth*, 301 Va. 476, 482 (2022) (quoting *Baker v. Commonwealth*, 284 Va. 572, 575 (2012)).

Argument

The Court of Appeals construed Code § 2.2-3706(B)(4) to mean that a public body may withhold the entirety of any public record “document[ing] the activities of inmates” if that public record contains any information that “can fairly be described as relating to the prisoners’ confinement or ‘quality, state, or

condition of being confined.’’ CAV Op. 5, 7, 10. Using that construction, the Court of Appeals held that the Department of Corrections was entitled to withhold the incident reports and video requested by Business Insider. CAV Op. 5, 7–8.

This Court should review the Court of Appeal’s construction and application of VFOIA, which fails to effectuate the plain meanings of VFOIA’s redaction provision, Code § 2.2-3704.01, and judicial review provision, Code § 2.2-3713(E), and fails to resolve ambiguity within Code § 2.2-3706(B)(4) in a manner consistent with the General Assembly’s stated intent, Code § 2.2-3700(B).

A. The Court of Appeals’ construction of Code § 2.2-3706(B)(4) ignores VFOIA’s redaction requirement, Code § 2.2-3704.01, and will have dire consequences for public oversight of law enforcement and corrections agencies.

The plain meaning of VFOIA’s redaction provision, Code § 2.2-3704.01, requires the term “all records” in Code § 2.2-3706 to mean all information found *within* a public record described by the exemption, *not* a public record in its entirety. As set forth below, the Court of Appeals’ holding that “the redaction rule [Code § 2.2-3704.01] does not apply” to Code § 2.2-3706(B)(4) is incorrect. Worse, its reasoning will stifle VFOIA’s intended public oversight of law enforcement and corrections agencies in the Commonwealth.

In 2016, the General Assembly amended VFOIA to include “a right of redaction, intended to reverse this Court’s decision” in *Va. Dep’t of Corr. v. Surovell*. See *Hawkins*, 301 Va. at 428 (discussing abrogation of *Surovell*). In

Surovell, the Court held in part that a VFOIA exemption that did not “speak[] to redaction . . . creates no requirement of partial disclosure or redaction.” 290 Va. 255, 268 (2015). But the General Assembly abrogated that holding through Virginia Code § 2.2-3704.01, which states:

No provision of this chapter is intended, nor shall it be construed or applied, to authorize a public body to withhold 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. 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. 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.

Code § 2.2-3704.01. In other words, section 2.2-3704.01 superseded *Surovell* by creating a rule that touches every VFOIA exemption and requires public bodies to segregate exempt information from nonexempt information in every public record. *Hawkins*, 301 Va. at 428.

The Court of Appeals held that Code § 2.2-3706(B)(4) automatically “applies to *the entire content of*” any public record containing exempt information because it includes the phrase “all records of persons imprisoned.” CAV Op. 10 (emphasis added). But “public records” is a defined term within VFOIA, Code § 2.2-3701, while “records” is not. The plain meaning of Code § 2.2-3704.01 is

that when a factfinding court determines that *any* VFOIA exemption does not apply to “the entire content of the public record,” but only to “some portion,” that public bodies be required to release the requested public record with appropriate redactions. Code § 2.2-3704.01; *see* R.313–14. If the General Assembly had intended for entire public records to be withheld when only a portion was described by the exemption in Code § 2.2-3706(B)(4) it would have amended that provision to use the defined term “public record” and modified the language of Code § 2.2-3706(B)(4)—which explicitly applies to all provisions of Title 2.2, Chapter 37—to be less categorical.

The Court of Appeals’ erroneous holding creates an urgent need for this Court to address the plain meaning of § 2.2-3704.01. The Court wrote that it reached its conclusion in part because “unlike some of the other exemptions under VFOIA, Code § 2.2-3706(B)(4) specifically states that the record is exempt, not just specific information sought within the record.” CAV Op. 10. Such a holding opens the door for public bodies to withhold entire public records whenever they assert any of the many exemptions that do not contain the word “information”—especially those exemptions located within Code § 2.2-3706, which primarily relate to public records held by law enforcement agencies. To give just one example, Code § 2.2-3706(B)(7) provides public bodies discretion to exempt “records of a law-enforcement agency to the extent that they disclose the telephone

numbers for [devices] . . . provided to its personnel for performance of their official duties.” The plain meaning of this exemption, given the redaction requirement in Code § 2.2-3704.01, is that the phone numbers of law enforcement officers may be redacted when they appear in requested public records. But the Court of Appeals’ erroneous holding and reasoning provide law enforcement agencies cover to withhold the entirety of any document on which an officer’s phone number appears. Even if public records requesters petition courts and manage to obtain writs ordering law enforcement agencies to produce redacted records that law enforcement agencies withhold on that basis, the General Assembly’s intent that VFOIA “ensure the people of the Commonwealth ready access to public records in the custody of a public body and employees,” will already have been subverted. Code § 2.2-3700.

B. The Court of Appeals’ construction and application of Code § 2.2-3706(B)(4) departs from the General Assembly’s intent, ignores § 2.2-3713(E), and improperly discards the circuit court’s factfinding.

In addition to its erroneous holding regarding how Code § 2.2-3706(B)(4) and Code § 2.2-3704.01 interact, the Court of Appeals also erred in its analysis of the meaning of words within the statute, usurped the circuit court’s role as fact finder, and failed to read the provision in the context of the rest of VFOIA.

First, the Court of Appeals itself acknowledged that the statutory term “imprisonment” in § 2.2-3706(B)(4) has several possible meanings in modern

usage, among them “(1) the act of confining a person, esp. in a prison; (2) the quality, state or condition of being confined; or (3) the period during which a person is not at liberty.” CAV Op. 5 (quoting *Imprisonment, Black’s Law Dictionary* (12th Ed. 2024)). Without explanation, however, the Court of Appeals selected the second definition, CAV Op. 5, 7, and rejected Business Insider’s argument for the first definition—the issuance or carrying out of a prison sentence—as one that would require “supplant[ing] unambiguous terms within a code section with limiting or qualifying language for the purpose of narrowing the scope of the code section,” CAV Op. 6. This Court need not even look outside VFOIA to see the error in this reasoning—contrary to the Court of Appeals’ assertion regarding that it cannot “narrow[] the scope” of a VFOIA exemption, Code § 2.2-3700(B) *requires* that “any exemption from public access to records shall be narrowly construed.”

To the extent this Court does look to Black’s Law Dictionary to ascertain the ordinary meaning of “imprisonment,” a more illuminating datapoint would be the definition in use in 1975, when the predecessor statute to Code § 2.2-3706(B)(4) was enacted, *see* 1975 Va. Acts. ch. 312. The 1968 edition of Black’s Law dictionary *does* list the meaning urged by Business Insider but does *not* list any definition that would encompass information about an inmate’s conditions of confinement. *Imprisonment, Black’s Law Dictionary* (4th rev. ed. 1968) (“The act

of putting or confining a man in prison; the restraint of a man's personal liberty; coercion exercised upon a person to prevent the free exercise of his powers of locomotion.”).

Second, because the Court of Appeals was bound by the circuit court’s factfinding, its construction of Code § 2.2-3706(B)(4) cannot actually support its holding that the exemption applies to the video footage requested by Business Insider. That circuit court found that the video footage that it reviewed *in camera* consisted of “records of *Respondent’s* [the Department of Corrections] actions,” R.314—not “the activities of inmates,” *contra* CAV Op. 5, 7. Similarly, the circuit court made *no* findings of fact that the requested incident reports consisted of “the activities of inmates.” R.311–14. Nor should it have; a review of an actual incident report shows that it contains the *self-reported perceptions and actions* of a Department of Corrections employee who wrote the report. *See, e.g., Figure 1* (R.589).

Third, along the same lines, the Court of Appeals’ holding that the Department of Corrections was permitted to withhold records that “*can fairly be described* as relating to the prisoners’ confinement” CAV Op. 5 (emphasis added), also fails to defer the circuit court’s role as factfinder. The circuit court is the body empowered to make an assessment as to how requested records can “fairly be described,” in light of any evidence submitted by the parties and subject

to the standard of review set forth in Code § 2.2-3713(E). Accordingly, the Court of Appeals either (i) ignored VFOIA’s standard of judicial review, Code § 2.2-3713(E) (“No court shall be required to accord any weight to the determination of a public body as to whether an exclusion applies”),¹² and deferred to how the agency might “fairly describe[]” its own records, or (ii) impermissibly substituted its own factfinding—how the *Court of Appeals* might “fairly describe[]” the requested records—without finding the circuit court’s attempt to be “plainly wrong or without evidence.” *Suffolk City Sch. Bd.*, 302 Va. at 205.

To illustrate, the Court of Appeals found that “[t]he bite reports here are distinct from the surveillance videos and incident reports because they are records created and maintained to document the VADOC canine’s action, rather than inmates’ action.” CAV Op. 8. Yet, this distinction was not one made by the circuit court. The two types of documents are similar in most regards, *compare Figure 1* (R.589) *with Figure 2* (R.585), and were treated as such by the circuit court. R.311–14.

As for the video footage, the Court of Appeals acknowledged that the Red Onion cameras are “constantly recording,” CAV Op. 5 n.3, but nonetheless issued

¹² In same legislative enactment in which it added VFOIA’s redaction provision, the General Assembly repudiated the idea that a factfinding court would need to defer to an agency’s own description of its public records. 2016 Va. Acts ch. 716.

its own finding of fact that they “were specially trimmed and saved to document the inmates’ interactions with the VADOC canine.” *Id.* Here again, the Court of Appeals usurped the circuit court’s role as factfinder; the circuit court set forth no findings of fact as to *why* any piece of footage was captured or preserved on video, other than its statement that the footage consists of “records of [the Department of Corrections’] actions.”

By reaching beyond the construction and application of VFOIA into factfinding, the Court of Appeals committed reversible error. Given that, and given the statutory construction issues described above, its holding permitting the Department of Corrections to withhold the requested incident reports and video footage deserves review by this Court.

II. The Court should review the Court of Appeals’ holding that Business Insider “waived” its statutory right to request certain public records. (AOE 2)

Standard of Review

The decision of a circuit court to award or deny relief on the basis of an equitable defense is reviewed for abuse of discretion. *De Benveniste v. Aaron Christensen Fam., LP*, 278 Va. 317, 325 (2009).

Argument

A. The Court of Appeals’ legally unsupported decision to ignore a contractual provision that preserved Business Insider’s ability to make future VFOIA requests will disincentivize compromise and waste judicial resources going forward.

The circuit court did not abuse its discretion in finding that Business Insider was permitted to make and litigate the FOIA request at issue in this case, because Business Insider specifically preserved that right through an agreement signed with the Department of Corrections. R.601. It simply does not matter what happened to the public records that Business Insider requested from the Department of Corrections in 2022, because the parties’ agreement was clear: Business Insider reserved the right to make future VFOIA requests. *Id.* (“This agreement does not bind or constrain the parties as to any other or future FOIA requests served upon VDOC.”).

But, without citing a single case, the Court of Appeals held that Business Insider was barred in equity from obtaining a writ of mandamus with respect to all of its requested bite reports and nine of its requested videos. CAV Op. 8–9. Instead of conducting a review for abuse of discretion, the Court of Appeals reassessed the credibility of the testimony of the Department of Corrections’ FOIA Officer to issue its own finding of fact as to whether Business Insider had received

certain bite reports it requested in 2022. CAV Op. 9.¹³ In support of this approach, the Court of Appeals asserted, incorrectly, that Business Insider had the burden to prove that the Department of Corrections had failed to fulfill its contractual obligation. CAV Op. 8–9.¹⁴ VFOIA, however, functions the opposite way. Code § 2.2-3713(E). *Cartwright*, 270 Va. at 65 (noting that while a common law writ of mandamus “places the burden on the petitioner to prove the violation of a right or privilege in which there is a presumption of regularity in the conduct of government business,” VFOIA “shift[s] the burden to the public body”).

The Court of Appeals’ disregard for the plain terms of the parties’ agreement will waste judicial resources and cause needless litigation. If public records requesters are barred from submitting follow-up VFOIA requests—even when they specifically reserve the right to do so through an agreement with a public body—they will have little incentive to seek a compromise with a public body before

¹³ The Court of Appeals misread the transcript. The VFOIA officer did not testify that he sent bite reports to Insider, but *to the Office of the Attorney General*. Compare R.367 with CAV Op. 9. He did not testify, nor could he, about what OAG did thereafter.

¹⁴ Both Beckler and Kalish submitted affidavits stating that VADOC had previously not produced the records sought in this case. R.128, R.130. Undersigned counsel also informed the agency that it had failed to produce numerous bite reports contemplated by the parties’ March 13, 2023 agreement, R.601–02, before Beckler and Kalish submitted the requests at issue here. Compare R.78–79 (email dated Apr. 4, 2023) with R.577–78 (request dated April 19, 2023).

filing a petition for writ of mandamus. This will undermine the General Assembly’s intent in enacting Code § 2.2-3700(B) (“All public bodies and their officers and employees shall make reasonable efforts to reach an agreement with a requester concerning the production of the records requested.”) and Code § 2.2-3713(C) (incentivizing records requesters to give notice to a public body before filing a petition for writ of mandamus). Accordingly, the Court should grant the petition for appeal to review Business Insider’s second assignment of error.

B. This Court’s decision in *Cartwright* requires reversal of the Court of Appeals’ holding that Business Insider’s only remedy was in contract.

The Court of Appeals was also incorrect in asserting that Insider was required to “pursue its own action requesting relief for any alleged breach of contract claim” before it could again exercise its rights under VFOIA. CAV Op. 9. Unlike other situations in which equitable relief is sought, relief under VFOIA does not require the petitioner to demonstrate that it lacks adequate remedy at law.

Cartwright v. Commonwealth Transportation Commissioner of Virginia controls this question. In *Cartwright*, the petitioner sought the same public record from the same public body through both (i) a VFOIA request and (ii) a document request in a separate litigation against the same public body. 270 Va. at 61–62. As in this case, the public body argued that the petitioner was barred from obtaining mandamus relief under VFOIA because he an adequate remedy at law—a motion

to compel—that he had not utilized. *Id.* The Court unequivocally rejected that theory, holding that “[a] citizen alleging a violation of the rights and privileges afforded by the FOIA and seeking relief by mandamus petition pursuant to Code § 2.2-3713(A) is not required to prove a lack of adequate remedy at law, nor can the mandamus proceeding be barred on the grounds that there may be some other remedy at law available.” *Id.* at 66. As the Court held in *Cartwright*, the difference between common law mandamus and VFOIA is “consistent with the express purpose of FOIA and manifestly facilitate access to appropriate governmental records.” *Id.* at 66 (citing Code § 2.2-3713). The Court of Appeals’ decision to the contrary should be reviewed and reversed by this Court.

CONCLUSION

The Court should grant this petition for appeal and order briefing on Business Insider’s assignments of error.

Dated: January 15, 2026

/s/ Lin Weeks
Lin Weeks, VA Bar No. 97351
REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS
1156 15th Street NW, Suite 1020
Washington, D.C. 20005
Tel: (202) 800-3533
lweeks@rcfp.org

Counsel for Appellants

CERTIFICATE

1. I certify that on January 15, 2026, this document was filed electronically with the Court through VACES, and transmitted by email to:

Caitlyn Switzer
Office of the Attorney General
202 North Ninth Street
Richmond, VA 23219
CSwitzer@oag.state.va.us

Counsel for Appellee

2. Appellants request to state in person to a panel of this Court why the petition should be granted.

3. This document has 7,363 words and 35 pages, which complies with the requirement in Rule 5A:17(a) that it may not exceed the longer of 6,125 words or 35 pages.

/s/ Lin Weeks
Lin Weeks, VA Bar No. 97351
REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS

Counsel for Appellants