IN THE COURT OF APPEALS OF VIRGINIA

RECORD NO. 1669 – 23 – 2

NATIONAL PUBLIC RADIO, INC., CHIARA EISNER,
AND IAN KALISH,
Appellants

v.

VIRGINIA DEPARTMENT OF CORRECTIONS,
Appellee

APPELLANTS' REPLY BRIEF

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The Virginia Freedom of Information Act ("VFOIA") requires that "any exemption from public access to records . . . shall be narrowly construed." Va. Code § 2.2-3700(B). Despite this, Appellee ("VADOC") urges this Court to "broadly" construe Va. Code § 2.2-3706(B)(4) (the "Records of Persons Imprisoned Exemption"). Appellee Br. 7–8. And, despite VFOIA's explicit statutory instruction that "the affairs of government are not intended to be conducted in an atmosphere of secrecy," Va. Code § 2.2-3700(B), VADOC asserts that public access to its records should be "curtail[ed]." Appellee Br. 11–12. Appellants respectfully submit this argument in reply.

ARGUMENT

I. As a pure matter of statutory construction, the scope of the Records of Persons Imprisoned Exemption does not reach records responsive to Appellants' request (AOE-1).

Appellants' first assignment of error does not involve the fact record. Opening Br. 5, 12. The circuit court's overbroad construction of the Records of Persons Imprisoned Exemption is purely an issue of law—not a mixed question of law and fact as Appellee asserts. *See* Appellee Br. 6–7; *Hawkins v. Town of South Hill*, 301 Va. 416, 424 (2022); *Harris v. Commonwealth*, 274 Va. 409, 413 (2007).

The question is: Did the circuit court incorrectly subsume the narrow statutory term "records of persons imprisoned" within the separate, broader limitation that any withheld information must "relate to the imprisonment" of an

incarcerated individual? *See* Opening Br. 20; R.188:12–90:3. Put differently, is Va. Code § 2.2-3706(B)(4) "limited only by the clarification that the records should 'relate' to the imprisonment," as Appellee claims, *see* Appellee Br. 8, or does the term "records of person imprisoned" have independent meaning?[1]

Appellants' position is the latter. Specifically, the term "records of persons imprisoned" distinguishes information *generated, controlled, or possessed (but for incarceration) by prisoners* from other types of information possessed by VADOC, including the documentation of agency action *upon* prisoners. A record "of" a person imprisoned involves information that would typically otherwise belong to an inmate, but for their incarceration. In contrast, information about VADOC's actions, if possessed by VADOC, is a record "of" VADOC itself. Opening Br. 13–18.

VADOC misstates the scope and overall operation of VFOIA in an effort to escape this clear meaning. The agency claims, incorrectly, that Appellants' reading of the exemption would lead to an "absurd result" because information

[1] Elsewhere, VADOC argues that the phrase "of persons imprisoned" means "about," "connected with," or "as concerns" persons imprisoned. Appellee Br. at 8 (internal citations omitted). These terms are synonymous with "related to," which the General Assembly used *in the very same sentence*. Yet the rules of surplusage and consistent usage dictate that "of" and "relate to" must have distinct meaning in the statute. Opening Br. 19–20. VADOC concedes as much through its citations to *Newton v. Commonwealth*, 21 Va. App. 86, 89 (1995) and *Sandidge v. Commonwealth*, 67 Va. App. 150, 159 (2016). *See* Appellee Br. 9.

created, controlled, or possessed (but for incarceration) by inmates is not contemplated by VFOIA in the first place. Appellee Br. 8–9. Not so. VFOIA's definition of "public records" includes documents "*in the possession of*" a public body. Va. Code § 2.2-3701. Public entities *possess* many records that contain information they did not generate; often, this information is valuable to public oversight. *See, e.g.*, *Lee BHM Corp. v. Sch. Bd. of Richmond*, CL23-5464 at 3, 11–12 (Richmond Cir. Ct. Jan. 16, 2024) (ordering disclosure of report generated by law firm investigating mass shooting occurring after high school graduation ceremony).[2] Accordingly, these records are "presumed open, unless an exemption is properly invoked." Va. Code § 2.2-3700(B). The only way for information in a record possessed by an agency to escape public oversight is for an exemption to apply. *Id.*

VADOC is a public body that transacts public business; records that it possesses are contemplated under Va. Code § 2.2-3701. Nothing in the statute supports VADOC's apparent assertion that public records are only those "*created* in the transaction of public business." Appellee Br. 9 (emphasis added). The dicta VADOC quotes from *American Tradition Institute v. Rector and Visitors of the University of Virginia*, stands, at most, for the proposition that a public employee's

[2] Available at https://www.opengovva.org/lee-bhm-v-school-board-city-richmond-circuit-ct.

private email account is not subject to VFOIA because it is not "in the custody of a public body." 287 Va. 330, 339–40 (2014). But here, the reality of incarceration is that VADOC is "in the custody of" extensive information created or controlled by inmates, because VADOC is legislatively tasked with maintaining custody over thousands of individuals—this is the agency's "transaction of public business." Va. Code § 2.2-3701.

To name a few examples, VADOC holds "Educational and Vocational Records" and "Personal Property Inventories" within an inmate's file. Opening Br. 15 & n.23. VADOC would not possess the information in these records *but for* incarceration.[3] Similarly, VADOC retains copies of what it deems "unauthorized" correspondence to inmates,[4] and it "monitors and records" phone calls made by inmates.[5] Again, while *possessed* by VADOC in its transaction of public business,

[3] The same logic holds for the "records of" parolees exempted by Va. Code § 2.2-3706(B)(6). *See* Opening Br. 16 n.24; Appellee Br. 9. That exemption is not "superfluous," but rather excludes "probationer/parolee student records," and other information collected by VADOC from parolees from mandatory disclosure under VFOIA. *See* Va. Dep't of Corrections, *Inmate and Probationer/Parole Records Management*, Operating Procedure 050.1 (May 1, 2023), https://perma.cc/6KRJ-GPVX.

[4] Va. Dep't of Corrections, *Inmate and Probationer/Parolee Correspondence*, Operating Procedure 803.1 at 20 (Mar. 1, 2021), https://perma.cc/C2RT-R5AS.

[5] Va. Dep't of Corrections, *Inmate and CCAP Probationer/Parolee Telephone* Calls, Operating Procedure 803.3 at 7 (Mar. 1, 2023), https://perma.cc/CK66-WB98.

this information does not necessarily shed light on "action taken [by] any level of government," Va. Code § 2.2-3700(B). Accordingly, to the extent it "relate[s] to the imprisonment," Va. Code § 2.2-3706(B)(4), the General Assembly has seen fit to exclude it from mandatory disclosure.

Unsurprisingly, the Attorney General Opinion cited by VADOC largely comports with this view. 1987 Att'y Gen. Va. 37, R.121–2; *see* Appellee Br. 12. The requester sought a jail log—a record of inmate correspondence, visits, medical care, attorney visits, and discipline. *Id.*[6] For the most part, this is information generated or controlled by a private individual that a public body only possessed because of that person's incarceration. Likewise, the withheld records in *Zabala v. Okanogan County*, 5 App. 2d 517, 527 (Wash. Ct. App. 2018)—recordings of inmates' private telephone conversations—fit cleanly within Appellants' asserted construction of the exemption. *See* Appellee Br. 14.

In contrast, records that document agency action implicate VFOIA's fundamental purpose—they allow the public to scrutinize potentially controversial "affairs of government" taken in the public's name. Va. Code § 2.2-3700(B).[7] The

[6] This opinion, which involves an unrelated and dissimilar set of records, does not alter the *de novo* standard of review for statutory construction at issue in this case, despite Appellees' claim otherwise. *See* Appellee Br. 13.

[7] Appellee's non-binding cases do not override this statutory intent. Nor are they necessarily contrary. *Dallas v. Va. Dep't of Corrections*, No. CL21-5564 (Norfolk Cir. Ct. Nov. 29, 2021), available at R.111–14, held only that certain records of a

General Assembly has instructed that exemptions "shall be narrowly construed" because those affairs "are not intended to be conducted in an atmosphere of secrecy." Va. Code § 2.2-3700(B). Yet VADOC urges a "broad," construction, Appellee Br. 7, that would exempt any record that "relate[s] to the imprisonment" of any individual, *id.* at 7–8. This would undermine the legislature's explicit intent to "ensure[] the people of the Commonwealth ready access to public records in the custody of a public body." Va. Code § 2.2-3700(B). And it would allow VADOC to operate "in an atmosphere of secrecy" by rendering VFOIA toothless against the agency tasked with the care and custody of more than 23,500 Virginians. *Id*; Va. Dep't of Corrections, Population Summary January 2024.[8]

II. No record evidence supports the conclusions of fact in Paragraphs 3 and 5 of the circuit court's order (AOE-2).

VADOC misrepresents the trial court record. *See* Appellee Br. 17–19. The affidavits of Mr. Fulmer and Mr. Robinson were attached to VADOC's responsive

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deceased inmate may still be subject to Va. Code § 2.2-3706(B)(4). *See* Appellee Br. 10. Likewise, *Estate of Cuffee v. City of Chesapeake*, No. 2:08-cv-329, 2009 U.S. Dist. LEXIS 144789, at *24 (E.D. Va. Aug. 4, 2009) involved a request for inmate health records, not records of VADOC action. *See* Def's Mot. for Leave to File Early Discovery, Exhibit 1, *Estate of Cuffee v. City of Chesapeake*, No. 2:08-cv-329, ECF 12-1 (E.D. Va. Nov. 4, 2008).

[8] Available at https://vadoc.virginia.gov/media/1940/vadoc-monthly-population-report-2024-01.pdf.

brief. R.106–07, 125–28.[9] VADOC chose not to offer the affidavits into evidence at the August 2023 hearing, stating instead that it planned to call those witnesses to give oral testimony. R.168:5–11 ("I understand that they want to cross-examine [Mr. Robinson]. That's their right."), R.168:17–69:7 (informing court that Mr. Fulmer was present for hearing). But in the end, VADOC neither attempted to move its affidavits into evidence nor called any witness because the circuit court stated that it desired only legal argument from VADOC.

Indeed, this is the crux of Appellants' second assignment of error.[10] The circuit court incorrectly determined that it did not need a factual presentation from VADOC, yet later made findings of fact:

> THE COURT: We'll hear your argument now . . . with regard to the legal issues as to whether or not . . . the [Records of Persons Imprisoned Exemption] is applicable here and the degree that it is. And if we have to find another date, we'll find another date, but I'll hear you on [the legal issues] first.

[9] The affidavits are included in the appellate record because they are "documents and exhibits filed or lodged in the office of the clerk of the trial court," Va. R. S. Ct. 5A:7(a)(1), not as "exhibit[s] offered into evidence . . . and initialed by the trial judge," Va. R. S. Ct. 5A:7(a)(3). The suggestion that Appellants could have objected to the inclusion of part of a responsive brief in the appellate record is incorrect and unsupported. *See* Appellee Br. 19 n.3.

[10] As VADOC concedes, *see* Appellee Br. 17, this argument is set forth in Appellants' Section II.B, the heading of which echoes Appellants' Second Assignment of Error. *See* Opening Br. at 29–31. This complies with Va. Sup. Ct. R. 5A:20(e).

R.179:3–11; *cf.* 152–53 (findings of fact at Paragraphs 3 and 5).[11] Appellants timely objected to VADOC's affidavits and were prepared to move to exclude them if offered, R.170:9–18; *see also* R.142 & n.10, R.154,[12] but the circuit court had no opportunity to admit or reject *any* evidence from VADOC because none was offered.[13]

This makes the near-verbatim recitation of these affidavits in VADOC's Statement of Facts (and elsewhere) inappropriate. *Compare* Appellee Br. 3–5 *with* R.106–107 *and* R.125–128. "[M]ere affidavits, taken . . . in the absence of the other party and without notice, have no weight as evidence, and ought not to be

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[11] *See also* R.168:12–16 ("Well, does it matter . . . whether these individuals are available or not?"); R.171:7–12 ("[F]rom the Court's point of view, as to most of the arguments made by . . . the Department, *they're all legal*. There isn't any factual basis for anything . . . ."") (emphasis added); R.172:19–73:6 ("I don't think that's a factual determination at all . . . . [It's] just a matter of applying the existing statute in the law.").

[12] VADOC's claim that the relevant error was actually the circuit court's "failure to strike" the affidavits from evidence, *see* Appellee Br. 19, is incorrect—the affidavits were never offered and thus could not be struck. Appellants did file a Motion to Strike pursuant to Va. Code § 8.01-274, R.149–51; 205:1–17, but contrary to VADOC's suggestion, that filing had nothing to with Appellants' (separate) objection to the affidavits.

[13] VADOC purports confusion about whether Appellants' second assignment of error involves only the lack of live oral testimony. *See* Appellee Br. 16. Obviously not. A court may "hear evidence" of many kinds—documentary evidence, oral testimony, stipulated or conceded facts, facts entered through judicial notice—at an aptly-named "hearing."

considered as testimony in the cause unless the parties consent to the use." *Ohlen v. Shively*, 16 Va. App. 419, 424-25 (1993); *see Scott v. Rutherfoord*, 30 Va. App. 176, 189 (1999) ("Under Virginia law, unless subject to a hearsay exception, affidavits are not generally admissible as evidence.").[14] The inquiry is not controlled by *Adjei v. Commonwealth*; there was no VADOC evidence to "determin[e] . . . the admissibility of." 63 Va. App. 727, 737 (2014). Likewise, *Moncrieffe v. Deno*, 76 Va. App. 488 (2023), and *Commonwealth v. White*, 293 Va. 411 (2017), are not helpful. *See* Appellee Br. 17–18, 21. Those cases involve errors in an evidentiary record—which, again, VADOC did not create, because the circuit court limited its presentation to issues of law. R.179:3–11; R.168:12–16; R.171:7–12; R.172:19–73:6.

The evidentiary record does, however, contain the four recordings obtained by Ms. Eisner. *See* R.18. VADOC concedes this, as it must, *see* Appellee Br. 21–22, because it confirmed their authenticity and responsiveness in its circuit court brief, R.86–87 & n.5, and because the circuit court considered the recordings at the hearing without objection from either party, *see, e.g.*, R.200–01.[15]

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[14] VADOC's acknowledgment that Mr. Fulmer was "present," Appellee Br. 20 n.4, only makes matters worse, given that the circuit court was required to find that VADOC carried its burden to prove "by a preponderance of the evidence" that the asserted exemption applied. Va. Code § 2.2-3713(E).

[15] Appellee's claim, just one page earlier, that Appellants did not offer evidence, Appellee Br. 20, is thus incorrect. *Moore v. Maroney*, 258 Va. 21 (1999) is not on

The parties agree that the applicable standard of review for this assignment of error is whether the circuit court was "plainly wrong or without evidence to support" its findings of fact. Opening Br. 10–11 (citing *Suffolk City Sch. Bd. v. Wahlstrom,* 302 Va. 188, 15–16 (2023)); Appellee Br. 16. The four recordings in evidence demonstrate that the circuit court was plainly wrong to find that "the entire contents of the audio recordings fall within the scope of [Va.] Code § 2.2-3 706(B)(4)." *See* R.168 ¶ 5. Instead, the recordings contain descriptions of government action both inside and outside of the execution chamber.[16] They also do not "begin[] when the witnesses enter the room adjoining the execution chamber, and end[] after time of death is announced."[17] *See* R.168 ¶ 3. These errant findings of fact cannot support withholding the records under the Records of Persons Imprisoned Exemption.

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point, *see* Appellee Br. at 20, because the Court *was* able to review four recordings that were responsive to Appellants' request. Still, review of a subset of the requested records still does not enable the court to make findings of fact regarding "each" of the remaining recordings. *See* R.152 ¶ 3.

[16] *See* Opening Br. 17 n.26 (listing examples).

[17] *See*, *e.g.*, R.18, Ex. A at 0:00–12:50 (all before the inmate enters the chamber); R.18, Ex. A at 17:53–22:29 (reflecting the end of electrocution, the pronouncement of death, and concluding with the departure of the witnesses).

III. VADOC is required to produce non-exempt portions of the requested records under any construction of the statute (AOE-3).

VADOC's bald assertion that the General Assembly's FOIA amendments "didn't actually overturn anything," Appellee Br. 28, clashes with the amendment's text. 2016 Va. Acts ch. 620, 1264 ("[T]he provisions of this act are declaratory of the law as[] existed prior to the September 17, 2015 decision of the Supreme Court of Virginia in [*Surovell*]."). It is also at odds with the view of the Virginia Supreme Court. *Hawkins v. Town of South Hill*, 301 Va. 416, 428 (2022) ("[T]he General Assembly enacted a right of redaction, intended to reverse this Court's [*Surovell*] decision."). It is true that the General Assembly did not amend § 2.2-3706(B)(4) in 2016—it did not need to. Instead, the General Assembly created a blanket rule that touched every VFOIA exemption and allowed for partial redaction and release of public records.

Here, that rule requires VADOC to release any portions of the audio tapes that are (i) not "records of persons imprisoned" and/or (ii) not "related to the imprisonment." VADOC recognizes as much, conceding that if portions of the recordings do not "relate to" an inmate's imprisonment, those portions would be subject to redaction and release. *See* Appellee Br. 24, n.6. But contrary to VADOC's assertion, Appellants have not abandoned any argument with respect to redaction. *Id*. While Appellants do not press their prior textual argument that execution is distinct from imprisonment *as a matter of law*, R.55, to the extent an

exemption applies, the lower court must still take evidence to determine what portions of the tapes can be properly exempted. This includes a determination of which portions relate to imprisonment and which do not. That process has not happened yet because, as explained *supra*, the circuit court directed VADOC to only present legal argument.

The FOIA Advisory Council did not opine that exemptions may be "categorical" in the sense meant by VADOC. *See* Appellee Br. 25. Rather, that body's nonbinding opinion about school records suggests that wholesale withholding is *only* appropriate if even near-total redaction would still lead to the disclosure of exempt portions of a record. FOIA Advisory Opinion AO-03-19 (Apr. 3, 2019) ("FOIA allows for the redaction or removal of exempt information from a record that would *otherwise be nonexempt, if that information were not present*.") (emphasis added). In the case of student test scores, redaction was not sufficient; even without a name attached, a score remained specific scholastic information regarding a particular student's academic work. *Id.*[18]

But in this case, even under VADOC's asserted statutory construction, a factfinding court would reach the opposite result. The recordings obtained by Ms. Eisner, R.18, show that VADOC's recordings contain ample information not *about*

[18] Notably, the exemption at issue in that Advisory Opinion involved "records . . . *concerning* identifiable individuals," not "records *of* students." *Id.*

an inmate at all, nor that inmate's imprisonment. Opening Br. 6–7, 12, 17. Rather, they contain information about VADOC and the actions it took. *Id*.[19] In sum, it is clear that "entire content" of the requested recordings cannot be exempted by the Records of Persons Imprisoned Exemption. Va. Code § 2.2-3704.01.

IV. None of the other exemptions relied upon by VADOC justify the complete withholding of the requested records (AOE-4).

The parties agree that if this Court does not find that the other exemptions relied on by VADOC are inapplicable as a matter of law, it must remand for determination of the extent that those exemptions apply. *See* Appellee Br. 31. But VADOC's cases do not demonstrate that these exemptions would apply, even with a full fact record.

First, Appellees discuss a purported historical tradition of concealing executioners' identities to help them avoid retaliation. Opening Br. 33–34 (citing *Owens v. Hill,* 295 Ga. 302 (2014)). The Plaintiffs in *Owens* advanced a claim that concealing the identities of executioners was itself unconstitutional; they sought

[19] Moreover, decisions involving withholding of information to protect inmate safety are not relevant here. *See* Appellee Br. 29 n.7 (citing *Pinson v. U.S. Dep't of Justice*, 199 F. Supp. 3d 203 (D.D.C. 2016) and *Jordan v. U.S. Dep't of Justice*, No. 07-cv-02303, 2009 U.S. Dist. LEXIS 81081 (D. Colo. Aug. 14, 2009)). To the extent a former death-row inmate can be heard on a recording, that person's safety is no longer in jeopardy. These cases are also unpersuasive, because *Pinson* and *Jordan* involved application of a federal FOIA exemption, 5 U.S.C. § 552(b)(7)(F), that is not analogous to any asserted by VADOC. And the records sought in those cases—prison logs and inmate's Central Files—are not like those sought in this case.

the identities of certain manufacturers of lethal injection drugs. *Owens*, 295 Ga. at 309. This case is different. There is no evidence to suggest that any tape reveals the identity of an executioner, even if the names of administrative VADOC employees are occasionally spoken. R.200. But if, on remand, VADOC can demonstrate by a preponderance of evidence that an executioner is named in an unreleased tape, Appellants have already agreed that name can be redacted. R.42:16–20.

Second, Appellants' demonstration that *Hawkins*, 301 Va. 416, precludes application of Va. Code § 2.2-3705.1(1) (the "Personnel Information Exemption") is not impacted by *ACLU v. Federal Bureau of Prisons*, No. 20-2320, 2022 U.S. Dist. LEXIS 213748 (D.D.C. Nov. 28, 2022), or *Cameranesi v. U.S. Department of Defense*, 856 F.3d 626, 638 (9th Cir. 2017). *See* Appellee Br. 37. These cases involved application of federal FOIA exemptions 5 U.S.C. § 552(b)(6) and (b)(7), which are different in substance, subject to different binding appellate authority, and require a less substantial evidentiary showing than VFOIA's Personnel Information Exemption. *Compare Hawkins*, 301 Va. at 432 (*accord* Va. Code §§ 2.2-3705.1(1)) *and* 2.2-3713(E)) (agency must demonstrate by preponderance of evidence that certain individual's information is "in the possession of the [public] entity solely because of the individual's employment relationship with the entity, and . . . are private, but for the individual's employment with the entity") *with*

Cameranesi, 856 F.3d at 637 (court may rely on agency's assessment of "the potential" for "possible embarrassment and retaliatory action").

Finally, HIPAA and federal regulations involving health records have no relevance here. *See* Appellee Br. 38 n.10. Appellants do not argue that legitimate health records become "un-exempt" after an individual's death. Rather, Va. Code § 2.2-3705.5(1) (the "Health Records Exemption") is inapplicable to the records sought because they are simply not "health records," and, in any event, VADOC is not a "health care entity," and thus cannot claim the exemption. Opening Br. 34–35.

CONCLUSION

Appellants respectfully ask this Court to reverse the circuit court and order VADOC to produce the requested records and pay Appellants' costs. In the alternative, to the extent necessary, the Court should vacate and remand for factfinding.

Dated: March 11, 2024

Respectfully submitted,
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CERTIFICATE

1. I certify that on March 11, 2024, this document was filed electronically with the Court through VACES, and transmitted by email to:

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2. Appellants request oral argument.

3. This brief has 3,705 words and 16 pages, which complies with the requirement in Rule 5A:19(a) that a reply brief may not exceed the longer of 3,500 words or 20 pages.

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