VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF CHARLOTTESVILLE

NATALIE JACOBSEN and JACKSON LANDERS, Petitioners, v. CITY OF CHARLOTTESVILLE DEPARTMENT OF STATE POLICE OFFICE OF THE SECRETARY OF PUBLIC SAFETY AND HOMELAND SECURITY Respondents.	Case No.: CL17-592

PETITIONERS' OPPOSITION TO RESPONDENTS' DEMURRERS AND MOTIONS TO DISMISS

Petitioners Natalie Jacobsen and Jackson Landers (collectively, "Petitioners"), by and through their undersigned counsel, hereby move the Court to overrule the Demurrers and Motions to Dismiss filed by Respondents the City of Charlottesville (the "City"), Department of State Police ("VSP"), and Office of the Secretary of Public Safety and Homeland Security ("Office of Public Safety") (collectively, "Respondents"). In support Petitioners state as follows:

I. INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners are professional journalists. After the "Unite the Right" rally on August 12, 2017 in Charlottesville, Virginia—which left one counter-protestor, Heather Heyer, dead, and numerous other injured—Petitioners sought records under the Virginia Freedom of Information Act ("FOIA" or "the Act") of the safety or operation plans created by Respondents in preparation

for the rally. Petitioners filed a Petition for Writ of Mandamus in this Court after their three requests for those records to the City, VSP, and Office of Public Safety were denied in full.

Respondents' Demurrers and Motions to Dismiss all rest on the same arguments. *See* Respondent Dep't of State Police's Demurrer and Mot. to Dismiss the Pet. for Writ of Mandamus (filed Nov. 7, 2017) ("VSP Demurrer"); Respondent Office of the Sec'y of Pub. Safety and Homeland Sec. Demurrer and Mot. to Dismiss the Pet. for Writ of Mandamus (filed Nov. 7, 2017) ("Office of Public Safety Demurrer"); Respondent City of Charlottesville's Demurrer and Mot. to Dismiss the First Am. Pet. for a Writ of Mandamus (filed Dec. 18, 2017) ("City Demurrer"). Respondents contend that the requested records are excluded from mandatory disclosure under Virginia Code § 2.2–3706(A)(2)(e) (the "Tactical Plans Exclusion") and Virginia Code § 52-48(A) ("§ 52-48(A)"). VSP Demurrer at 7–10; Office of Public Safety Demurrer at 6–10; City Demurrer at 6–8. Respondents also argue that Virginia Code § 2.2–3704.01 ("§ 2.2–3704.01"), which creates a duty to redact only those portions of records that are excluded from mandatory disclosure, does not apply to the Tactical Plans Exclusion. VSP Demurrer at 6; Office of Public Safety Demurrer at 5–6; City Demurrer at 5.

As an initial matter, Respondents' arguments ignore the standard applicable to a demurrer. Petitioners' First Amended Petition for Writ of Mandamus (the "Amended Petition") sufficiently alleges that the records requested by Petitioners are not exempt from disclosure under the Tactical Plans Exclusion or § 52–48(A), and therefore it must survive Respondents' demurrers. In any event, the Tactical Plans Exclusion does not apply to the requested records. Disclosure of the requested records would not jeopardize the safety or security of law-enforcement personnel or the general public; indeed, significant portions of the operation plans used during the "Unite the Right" rally have already been publicly disclosed in reports ordered

by the Governor of Virginia or commissioned by the City. The requested records also are not excluded from mandatory disclosure under § 52-48(A). Respondents have not satisfied their burden to show that the requested records actually contain criminal intelligence information in the possession of the Virginia Fusion Intelligence Center, and information disclosed in public reports suggests that the records contain little or no such information.

Even if portions of the requested records are excluded from mandatory disclosure under the Tactical Plans Exclusion or § 52-48(A)—which they are not—FOIA specifically requires Respondents to withhold *only* those portions that are excluded from disclosure and release those portions that are not so excluded. Virginia Code § 2.2-3704.01. Respondents' argument to the contrary ignores the plain language of § 2.2–3704.01 and interprets the Tactical Plans Exclusion in an unjustifiably narrow manner that impedes disclosure of public records, contrary to the requirement that the Act be liberally construed to promote public awareness of government activities. *See* Virginia Code § 2.2–3700.

Petitioners have pled cognizable causes of action under FOIA for Respondents' denials of their records requests. The requested records are not excluded from mandatory disclosure under the Tactical Plans Exclusion or § 52–48(A) and, even if portions of the records are excluded, Respondents have a duty to release those portions that are not. For these reasons, Respondents' demurrers and motions to dismiss should be denied.

II. PROCEDURAL BACKGROUND

Following the denials of their FOIA requests by Respondents in August, September, and October 2017, on October 31, 2017, Petitioners filed a Petition for Writ of Mandamus in this Court seeking to compel release of the requested records. Prior to a hearing on Petitioners' Petition on November 7, 2017, the City filed a Demurrer, which this Court granted with leave to

amend on the ground that Petitioners had incorrectly named the Charlottesville Police Department as a party, instead of the City. VSP and the Office of Public Safety also filed Demurrers and Motions to Dismiss. Petitioners timely filed the operative Amended Petition on November 21, 2017, and the City again filed a Demurrer and Motion to Dismiss. VSP and the Office of Public Safety continue to rely on their previously-filed Demurrers and Motions to Dismiss. Petitioners now file this Opposition in response to all Respondents' pending Demurrers and Motions to Dismiss.

III. THE STANDARD ON DEMURRER

"'The purpose of a demurrer is to determine whether a motion for judgment states a cause of action upon which the requested relief may be granted.'" *Dunn, McCormack & MacPherson v. Connolly*, 281 Va. 553, 557 (2011) (quoting *Abi–Najm v. Concord Condominium, LLC,* 280 Va. 350, 356–57 (2010)). "In reviewing the sufficiency of a motion for judgment on demurrer, the trial court is required to consider as true all material facts that are properly pleaded, facts which are impliedly alleged, and facts which may be fairly and justly inferred from the facts alleged." *Luckett v. Jennings*, 246 Va. 303, 307 (1993). A demurrer tests only the legal sufficiency of a pleading, not matters of proof. *Id.* Thus, a demurrer "does not allow the court to evaluate and decide the merits of a claim; it only tests the sufficiency of factual allegations to determine whether the motion for judgment states a cause of action." *Fun v. Va. Military Inst.,* 245 Va. 249, 252 (1993); *see also Concerned Taxpayers v. Cty. of Brunswick,* 249 Va. 320, 327–28 (1995).

IV. ARGUMENT

A. The Tactical Plans Exclusion and § 52–48(A) do not exempt the requested records from disclosure.

1. Respondents' factual assertions that the Tactical Plans Exclusion and § 52–48(A) apply to the requested records are not appropriately resolved on demurrer.

Respondents argue that the requested records are exempt from disclosure under the Tactical Plans Exclusion and Code § 52–48(A). VSP Demurrer at 7–10; Office of Public Safety Demurrer at 6–10; City Demurrer at 6–8. The Tactical Plans Exclusion provides:

> 2. 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:
>
> * * * * *
>
> e. Records of law-enforcement agencies, to the extent that such records contain specific tactical plans, the disclosure of which would jeopardize the safety or security of law-enforcement personnel or the general public[.]

Code § 52–48(A) provides, in pertinent part:

> Papers, records, documents, reports, materials, databases, or other evidence or information relative to criminal intelligence or any terrorism investigation in the possession of the Virginia Fusion Intelligence Center shall be confidential and shall not be subject to the Virginia Freedom of Information Act . . . .

Whether the requested records are excluded from disclosure under the Tactical Plans Exclusion or Code § 52–48(A) is a mixed question of law and fact. *See Va. Dep't of Corr. v. Surovell*, 290 Va. 255, 262 (2015); *Am. Tradition Inst. v. Rector & Visitors of the Univ. of Va.*, 287 Va. 330, 338 (2014); *see also McChrystal v. Fairfax Cty. Bd. of Supervisors*, 67 Va. Cir. 171, 2005 WL 832242, at *3 (2005) (stating that "a party relying upon a statutory exemption bears the burden of proving *facts* necessary for assertion of that exemption" (emphasis added)).

The Amended Petition alleges that the records requested are not exempt from disclosure under the Tactical Plans Exclusion or Code § 52–48. Amended Petition ¶¶ 51–52, 59. On demurrer, the Court is required to accept as true Petitioners' factual assertions with respect to Respondents' claimed exclusions. *See Moore v. Maroney*, 258 Va. 21, 28 n.* (1999) (stating that petitioner's assertion that the material sought is not a personnel record is a "mixed conclusion of fact and law" and that on demurrer, the Court is "required to accept conclusions that turn on the resolution of factual disputes"). In addition, "a demurrer may not introduce new facts in support of itself." *Davison v. Va. Dep't of Educ.*, 89 Va. Cir. 234, 2014 WL 10355506, at *2 (2014). Accordingly, Respondents' assertions that these exclusions apply—which necessarily require the Court to determine facts—are not appropriately resolved on demurrer. Because Petitioners have asserted a claim for which relief can be granted, Respondents' demurrers should be denied.

2. The Tactical Plans Exclusion does not apply to the requested records.

In any event, the requested records are not excluded from disclosure under the Tactical Plans Exclusion. Despite Respondents' claims that they are not required to "prove the contents of documents or make any . . . 'showing'" regarding the applicability of an exclusion, *see* VSP Demurrer at 8; Office of Public Safety Demurrer at 8; City Demurrer at 7, FOIA makes clear that the burden of proof is on the public body "to establish an exclusion by a preponderance of the evidence." Virginia Code § 2.2–3713(E). Respondents fail to demonstrate that the requested records are tactical plans the disclosure of which would jeopardize the safety or security of law-enforcement personnel or the general public. Respondents have not and cannot show by a preponderance of the evidence that release of the records would jeopardize the safety or security of law enforcement or the public for two reasons: (1) large portions of the City's and VSP's operation plans have already been released and (2) there is no reasonable expectation that the

City or Commonwealth will re-use the "Unite the Right" operation plans for future rallies. In addition, Respondents have not shown that the records contain "specific tactical plans."

In determining whether disclosure of records would jeopardize safety or security, the Court must consider "whether the potential danger is a *reasonable* expectation." *Surovell*, 290 Va. at 265 (emphasis added). Thus, mere speculation regarding potential danger will not suffice. In addition, Respondents' claim that this Court must defer to their determination of threatened harm with respect to security exemptions is wrong. *See* VSP Demurrer at 8–9; Office of Public Safety Demurrer at 8–9; City Demurrer at 7–8. Respondents rely on the Virginia Supreme Court's decision in *Surovell* in support of this proposition. *Id.* (citing *Surovell*, 290 Va. 55, 265–66). However, in 2016, the General Assembly amended the Act to provide that in a FOIA enforcement action, no court shall be required to accord *any* weight to the determination of a public body as to whether an exclusion applies, superseding *Surovell*'s holding regarding deference to public agencies. *See* Virginia Code § 2.2–3713(E); *see also* Va. Freedom of Information Advisory Council, *2016 FOIA Legislative Update* at 1–2, 5 (May 23, 2015), available at http://foiacouncil.dls.virginia.gov/2016updt.pdf (explaining that this amendment was intended to reverse *Surovell*). This Court is not, as Respondents' argue, required to defer to their determination that release of the requested records would jeopardize safety or security.

There is no reasonable expectation that release of the requested records in this case will jeopardize the safety or security of law-enforcement personnel or the general public because so many details about the City and VSP's operation plans for the "Unite the Right" rally have already been released. In December 2017, the Final Report and Recommendations of the Governor's Task Force on Public Safety Preparedness and Response to Civil Unrest (the "Governor's Task Force Report") and the Independent Review of the 2017 Protest Events in

Charlottesville, Virginia, commissioned by the City and prepared by former U.S. Attorney Timothy Heaphy, (the "Heaphy Report") were released.[1] Both contain detailed descriptions of the City's and VSP's operation plans for the "Unite the Right" rally, in some cases quoting or excerpting images directly from those operation plans.

For instance, the after-action report in the Governor's Task Force Report describes the VSP operation plan for the "Unite the Right" rally, specifying that:

- VSP dedicated approximately 600 sworn members to the "Unite the Right" rally;
- "One-hundred troopers were assigned to Emancipation Park, organized into four zones";
- "McIntire Park and the Downtown Mall were covered with 35 troopers each";
- "The Tactical Field Force comprised more than 200 personnel organized into four platoons"; and
- "The Tactical Team consisted of 29 troopers."

Governor's Task Force Report at I-11 to I-12. In several instances, the after-action report also quotes directly from the VSP operation plan; for example, it quotes the VSP use of force policy in effect at the "Unite the Right" rally. *See* Governor's Task Force Report at I-14 (quoting the VSP operations plan as stating that "the 'Department's Use of Force Policy set forth in General Order OPR 05.01 of the State Police Manual will remain in effect for the duration of this event.

[1] Petitioners ask this Court to take judicial notice of the release of the Governor's Task Force Report and the Heaphy Report, as both a matter of common knowledge and a factual matter capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Va. Sup. Ct. R. 2:201. The Governor's Task Force Report is available on the Office of Public Safety's website at https://pshs.virginia.gov/media/9737/task-force-on-public-safety-preparedness-and-response-to-civil-unrest-final-report.pdf. The Heaphy Report is available on the City of Charlottesville website at http://www.charlottesville.org/home/showdocument?id=59615. Copies of both reports are appended to this Opposition.

The response to unlawful behavior will be in accordance with this policy.'").[2] The after-action review also includes an appendix illustrating the organizational chart of VSP personnel in response to the "Unite the Right" Rally, including assigned officers' ranks and names. Governor's Task Force Report at I-12, I-26.

The Heaphy Report also details the VSP operation plan for the "Unite the Right" rally.[3] It describes VSP's plans for its 600 officers in Charlottesville on August 12, including:

- Stationing of more than 100 officers in the various zones in Emancipation Park, plain clothes officers to circulate within the crowd, a squad of thirty-five troopers in McIntire Park, and an additional thirty-five troopers on the Downtown Mall, Heaphy Report at 103;
- Staging of four mobile field forces, each with over fifty troopers equipped with riot gear and trained to move crowds, *id.*;
- Using a VSP tactical team of approximately thirty troopers to stand ready and other VSP personnel for other duties, including "K-9 units, arrest processing, medical units, and communications oversight," *id.*;

[2] *See also* Governor's Task Force Report at I-12 (quoting the VSP operation plan as stating that the state police mission was "'to assist the Charlottesville Police Department and to provide general security and safety of persons and protection of property in and around Emancipation Park (formerly Lee Park) and McIntire Park in the City of Charlottesville […] Our primary objective is to provide support to the Charlottesville Police Department, prevent any acts of violence, and to prevent any group or individual from disrupting the scheduled and permitted rally.'"); *id.* (quoting the VSP and Charlottesville Police Department plans as acknowledging that "'both alt-right/affiliates and groups in opposition have made it known that violence is an option for self-defense. Many individuals (on both sides) have indicated they will be openly carrying firearms.'").

[3] According to the Heaphy Report, investigators working on behalf of the independent review obtained a copy of the VSP operation plan that was "left behind in a field force staging area." Heaphy Report at 16.

- Deploying two aviation teams to fly helicopters over the event and provide surveillance, *id.*; and
- Staging of tactical field forces and other assets, including the number of VSP mobile field force units called for, the number of troopers in each unit, the training and equipping of the troopers, the exact locations where each field force was staged, and the plans for where precisely the field force units would be deployed if needed, Heaphy Report at 99–101.

The Heaphy Report also details the Charlottesville Police Department's operation plan for the "Unite the Right" rally. It provides the plans for:

- Traffic control and street closures, including what streets would be blocked off and how, which specific officers would man which posts, and a picture of the "Traffic Plan Map" showing staffed and unmanned barriers in the downtown area, Heaphy Report at 89-91;
- Stationing of law enforcement officers near the Downtown Mall and Emancipation Park, including the number of officers assigned to patrol the Downtown Mall, Heaphy Report at 92–96;
- The "five-zone layout" (including a picture of the layout from the Charlottesville Police Department operation plan) in which to station officers around Emancipation Park and establish areas for processing, media staging, ground command, and other functions, Heaphy Report at 95;
- The specific number of Charlottesville Police Department and VSP officers that would staff each zone, Heaphy Report at 95;
- Ingress and egress of crowds and the arrival of speakers to the "Unite the Right" rally, Heaphy Report at 96–97;

- "[G]uidance on potential criminal offenses and arrest procedures," including a list of criminal offenses that might occur, instructions to officers about crowd observation and arrests, plans for designated arrest and cover teams in each zone, and steps by which an unlawful assembly could be declared and the crowd dispersed, Heaphy Report at 97–98; and
- Storage and use of riot gear by officers, which called for "officers stationed in zones in and around Emancipation Park to pack their riot gear into bags, which were then stowed in a trailer in Zone 4 – north of the park on Jefferson Street," Heaphy Report at 99;

Indeed, the Heaphy Report goes beyond detailing the actual operation plan used by the Charlottesville Police Department during the "Unite the Right" rally; it discusses potential plans that were considered and rejected by the department, providing significant insight into tactics and strategies for controlling public protests. *See, e.g.*, Heaphy Report at 89 (discussing initial and preliminary recommendations for traffic control in the downtown area that were rejected), 92–93 (discussing consideration of plans to block off the entirety of Emancipation Park for the "Unite The Right group" and different numbers and configurations of "zones" in which officers were to be stationed), 98–99 (discussing rejection of plans to have officers arrive already wearing riot gear and the reasons for the rejection); 99 (discussing plans to use air-conditioned buses stationed near Emancipation Park to stage mobile field force units that was not used because the City would not make its transit buses available); 103 (discussing contingency plans if the rally were to be held in McIntire Park).

Given the substantial amount of detailed information that has already been publicly revealed about the City and VSP operation plans in the Governor's Task Force Report and Heaphy Report, Respondents cannot plausibly claim that release of the plans themselves would

jeopardize the safety or security of law enforcement or the public. The contents of the operation plans are already well-known and available to the public, including potential participants in future protests or counter-protests. There is no reasonable expectation that release of plans whose contents are already largely public would contribute to any risk to safety or security.

This Court should also reject Respondents' argument that release of the requested records would jeopardize safety or security because the operation plans used for the "Unite the Right" rally may be used in the future. Respondents cannot say with certainty that the operation plans will be used again in the future, *see* City Demurrer at 8 (stating that the operation plan "*may be* adapted and utilized in the future" (emphasis added)); VSP Demurrer at 9 (stating that the operation plan "*may* need to be utilized again in Charlottesville or elsewhere in the Commonwealth, as groups plan more demonstrations" (emphasis added); Office of Public Safety Demurrer at 9 (same). It belies common sense to conclude that the City and Commonwealth will use the same operation plans again in the future. Even if there are future rallies that require operation plans, the plans will necessarily be different because the circumstances of future rallies will be different. Rallies that are held at a different time, date, and location than the "Unite the Right" rally, with different numbers of anticipated protesters and counter-protesters, will necessarily require a different plan. For example, plans for traffic control around the Downtown Mall, the stationing of police officers and equipment in zones surrounding Emancipation Park, and the ingress and egress of crowds and speakers at Emancipation Park would not be applicable to future rallies held in a different location, such as McIntire Park.

Furthermore, given the tragic events of August 12, 2017 and the ineffectiveness of the operation plans that were used to prevent those events from occurring, the City and Commonwealth are publicly considering recommended changes to permitting procedures and

operation plans for future rallies, based on the lessons learned from the "Unite the Right" rally. In fact, the purpose of both the Governor's Task Force Report and Heaphy Report was, in part, to identify recommended changes to the City and Commonwealth's plans for and responses to future protests. *See* Executive Order 68 (Aug. 24, 2017) (establishing the Governor's Task Force to conduct "a thorough review of the events that took place before, during and after the incident in Charlottesville and identify any existing gaps or issues that need to be addressed, including our permitting process" and calling upon government to "take swift and immediate action to implement any necessary changes that will protect public safety and prevent further loss of life, while protecting constitutional rights"); Heaphy Report at ix (stating that one of its purposes was to "make specific recommendations to guide preparation for and response to future events in Charlottesville and elsewhere").

Accordingly, both the Governor's Task Force Report and the Heaphy Report recommended significant changes to operation plans for future rallies. *See* Governor's Task Force Report at 9–11 (listing 16 recommended changes to permitting, preparedness, and response); Heaphy Report at 167–78 (recommending changes to the City and Commonwealth's response to civil disturbances and protest events in 5 categories and 11 subcategories). For example, both the after-action report in the Governor's Task Force Report and the Heaphy Report recommended that future operation plans adhere to the National Incident Management System Incident Command System standards, be consolidated into a single incident action plan, and adopt a unified command structure. Governor's Task Force Report at I-13 to I-16; Heaphy Report at 167, 172–73. The after-action report in the Governor's Task Force Report also recommended several additional changes to the Commonwealth's operation plans, such as:

- implementation of a "single Incident Command post";

- greater coordination among executive leadership from all entities;
- further exploration of the Commonwealth's role in local events; and
- at least seven changes to the equipping of VSP personnel for future responses.

Governor's Task Force Report at I-13 to I-23. The Heaphy Report made several additional recommendations for the City and Commonwealth's operation plans, as well, such as:

- adoption of a different perimeter control approach;
- adoption certain "central principles" to guide law enforcement response to disorders, including clear use of force policies, guidance on deployment of less lethal devices, education of officers, and other steps; and
- integrating responses to unexpected contingencies into future operation plans.

Heaphy Report at 167–78.

In short, in light of the extensive recommendations made in both the Governor's Task Force Report and Heaphy Report, it is expected that the City's and Commonwealth's operation plans for future events will be significantly changed. Thus, since the plans used for the "Unite the Right" rally will not be re-used in the future, there is no reasonable likelihood of risk to safety or security if the requested records are released.

In addition to failing to show by a preponderance of the evidence that release of the records would jeopardize safety or security, Respondents also have not shown that all portions of the requested records are "specific tactical plans." Respondents offer only their bare assertions that the requested records contain specific tactical plans. And while FOIA does not define "specific tactical plans," the Governor's Task Force Report and Heaphy Report suggest that large parts of the requested records have nothing to do with tactics or strategy, as they are ordinarily defined. *See* Governor's Task Force Report at I-13 (describing the VSP operations plan as

containing, *inter alia*, "an administrative section covering topics like conduct, appearance, lodging, and compensation"); Heaphy Report at 103 (stating that "[m]uch of the information contained in the VSP plan focused on general administrative guidance for troopers, such as uniform requirements, meals, lodging, overtime compensation, and so on").

Respondents' own arguments also indicate that, at a minimum, not all of the requested records can be characterized as "specific" plans. Respondents claim that their operation plans are "ever evolving living document[s] . . . which can be strategically altered to apply to a host of" situations, City Demurrer at 7; VSP Demurrer at 8, Office of Public Safety Demurrer at 7. They equate them to "a law enforcement 'playbook' that is continually tailored to apply to new situations where tactical plans are required." City Demurrer at 7; VSP Demurrer at 8; Office of Public Safety Demurrer at 7. Plans that do not relate to a particular event or operation are, by definition, not "specific" and therefore do not fall under the Tactical Plans Exclusion. *See* SPECIFIC, Black's Law Dictionary (10th ed. 2014) (defining "specific" as "[o]f, relating to, or designating a particular or defined thing; explicit."). Thus, the Tactical Plans Exclusion does not apply—at a minimum—to those parts of the requested records that consist of a general "playbook" setting forth general procedures.[4]

3. Respondents have not shown that § 52-48(A) applies to the requested records.

Finally, Petitioners recognize that § 52–48(A) makes confidential "[p]apers, records, documents, reports, materials, databases or other evidence or information relative to criminal intelligence or any terrorism investigation in the possession of the Virginia Fusion Intelligence Center . . ." However, the burden is on Respondents to show that § 52–48(A) applies to the

[4] For example, according to the Heaphy Report, the VSP operation plan "outlined VSP's *general procedures* for the use of force." Heaphy Report at 103 (emphasis added).

records at issue here. *See* Va. Code § 2.2–3713(E). Respondents' bare assertion is not enough. And, indeed, information in the Governor's Task Force Report indicates that the requested records may not in fact include information subject to Code § 52–48. *See* Governor's Task Force Report at I-20 (stating that the Virginia Fusion Intelligence Center developed and shared information regarding potential threats but that "[d]etails on known potentially violent participants, including their criminal backgrounds and photographs, were not evident in the Operational Plans or other documents supporting this event").

B. Respondents may withhold only those portions of the records that are excluded from disclosure and must disclose all portions that are not so excluded.

Even if portions of the requested records are excluded from disclosure under the Tactical Plans Exclusion or § 52–48(A), Respondents must redact the records to withhold only those portions that contain information subject to an exclusion and disclose the remainder. Section 2.2–3704.01 imposes a "duty to redact" on a public body. It provides:

> 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.

Virginia Code § 2.2–3704.01. The General Assembly enacted § 2.2–3704.01 to reverse the part of the Virginia Supreme Court's decision in *Surovell* which held that the Virginia Department of Corrections was not required to redact records that contained information excluded from disclosure under what was then Virginia Code § 2.2–3705.2(6). *Surovell*, 290 Va. at 269–70; *2016 FOIA Legislative Update*, *supra*, at 1.

"[C]ourts must apply the plain language of a statute unless the terms are ambiguous or applying the plain language would lead to an absurdity." *Va. Cellular LLC v. Va. Dep't of Taxation*, 276 Va. 486, 490 (2008). The language of § 2.2–3704.01 could not be clearer. It states that ***no*** provision of FOIA is intended to authorize a public body to withhold a public record in its entirety on the grounds that some portion of the record is excluded from disclosure. In addition, the second sentence of § 2.2–3704.01 provides that "a public record" generally—not particular or certain public records—can be entirely withheld from disclosure only to the extent that an exclusion under the Act or any other provision of law applies to the entire content of the public record. Accordingly, by its plain and explicit terms, the duty to redact established in § 2.2–3704.01 applies to all provisions of FOIA, include the Tactical Plans Exclusion. To the extent Respondents contend that the duty to redact does not apply to "information relative to criminal intelligence" excluded from disclosure by § 52–48, this argument also fails.[5] Section 2.2-3704.01 explicitly states that the duty to redact applies to records excluded from disclosure under "other provision of law," and § 52–48 does not exempt the entirety of a record containing information relative to criminal intelligence from disclosure. *See* Virginia Code § 2.2-3704.01.

Because the meaning of § 2.2–3704.01 is plain, it is not necessary for the Court to look beyond the plain language of the statute or to "resort to rules of construction, legislative history, [or] extrinsic evidence." *Town of Blackstone v. Southside Elec. Co-op.*, 256 Va. 527, 533 (1998). Thus, the Court should not consider Respondents' argument that, unlike Virginia Code §§ 2.2–3705.1 to –3705.7, Virginia Code § 2.2–3706 does not state that "[r]edaction of information excluded under this section from a public record shall be conducted in accordance

[5] Respondents' Demurrers and Motions to Dismiss do not address their duty to redact records containing criminal intelligence information in the possession of the Virginia Fusion Intelligence Center and excluded from disclosure by § 52–48.

with § 2.2-3704.01." *See* City Demurer at 5; VSP Demurrer at 6; Office of Public Safety Demurrer at 5–6. However, even if the Court considers this argument, the fact that General Assembly chose to emphasize the duty to redact in certain provisions of FOIA and not in others does not negate the general admonition in § 2.2–3704.01 that "[n]o provision" of the Act shall 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.[6]

Respondents also argue that the duty to redact does not apply to the requested records because the Tactical Plans Exclusion permits withholding of the entire content of a public record and that, under Virginia Code § 2.2–3706(D), if the Tactical Plans Exclusion conflicts with § 2.2–3704.01, the Tactical Plans Exclusion controls. Respondents' interpretation of the Tactical Plans Exclusion narrowly construes that provision to inhibit disclosure of public records, contrary to the requirements of FOIA. FOIA provides that "[t]he provisions of this chapter shall be liberally construed to promote an increased awareness by all persons of governmental activities . . . . Any exemption from public access to records or meetings shall be narrowly construed . . . ." Virginia Code § 2.2–3700(B). Thus, both Code § 2.2–3704.01 and the Tactical Plans Exclusion must be construed in favor of disclosure.

To be clear, the Tactical Plans Exclusion does not exclude a record in its entirety from mandatory disclosure if only part of that record contains specific tactical plans, the disclosure of which would jeopardize safety or security. Rather, the Tactical Plans Exclusion excludes from mandatory disclosure "[r]ecords of law-enforcement agencies, ***to the extent that*** such records

[6] The General Assembly may have emphasized the duty to redact in Virginia Code § 2.2–3705.1 to –3705.7 because those provisions concern only information that is excluded from mandatory disclosure. In contrast, Virginia Code 2.2–3706 discusses records that must be released, records that are excluded from mandatory disclosure, and records that are prohibited from release.

contain specific tactical plans, the disclosure of which would jeopardize the safety or security of law-enforcement personnel or the general public." Virginia Code § 2.2–3706(A)(2)(e) (emphasis added). The inclusion of the words "to the extent that" in the Tactical Plans Exclusion demonstrates that the General Assembly intended to exempt from mandatory disclosure only those portions of law enforcement records that contain tactical plans whose disclosure would jeopardize safety or security, and not the entire record if any portion of it is subject to the exclusion. If the General Assembly had intended to exclude from mandatory disclosure the entirety of a record that contained any part subject to the Tactical Plans Exclusion, it would have excluded "records of law enforcement agencies ***if*** such records contain specific tactical plans, the disclosure of which would jeopardize the safety or security of law-enforcement personnel or the general public." Respondents' argument would render inoperative and superfluous the words "to the extent that" in the Tactical Plans Exclusion. *Cook v. Commonwealth*, 268 Va. 111, 114, (2004) ("Words in a statute should be interpreted, if possible, to avoid rendering words superfluous.").

The import and meaning of the words "to the extent that" in the Tactical Plans Exclusion is all the more apparent when another FOIA exclusion is considered. Virginia Code § 2.2–3706(A)(2)(g) excludes from mandatory disclosure "[r]ecords of a law-enforcement agency ***to the extent that*** they disclose the telephone numbers for cellular telephones, pagers, or comparable portable communication devices provided to its personnel for use in the performance of their official duties[.]" (Emphasis added). Under Respondents' interpretation, Virginia Code § 2.2–3706(A)(2)(g) would exclude from mandatory disclosure the *entirety* of a record that contains a single cellphone number of a law enforcement officer. Such an interpretation would be absurd, irrational, and contrary to FOIA's admonition that the Act be interpreted liberally and

exclusions narrowly construed to promote increased awareness of government activities. Virginia Code § 2.2–3700; *see also Eastlack v. Commonwealth*, 282 Va. 120, 126 (2011) (stating that "statutes are to be construed so as to avoid an absurd result").

V. CONCLUSION

For the reasons stated above, Petitioners Natalie Jacobsen and Jackson Landers respectfully request that this Court overrule Respondents' Demurrers and Motions to Dismiss.

Respectfully submitted,

NATALIE JACOBSEN and
JACKSON LANDERS

By: 

Caitlin Vogus (VSB # 81054)
REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS
1156 15th St. NW, Suite 1250
Washington, DC 20005
Tel: (202) 795-9300
Fax: (202) 795-9310
cvogus@rcfp.org

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Petitioners' Opposition to Respondents' Demurrers and Motions to Dismiss was sent by U.S. Mail on January 12, 2018 to the following addressees as follows:

Victoria N. Pearson
Criminal Justice & Public Safety Division
Office of the Attorney General
202 North Ninth Street
Richmond, VA 23219
vpearson@oag.state.va.us
(*Counsel for Respondents Department of State Police and Office of the Secretary of Public Safety and Homeland Security*)

Lisa A. Robertson
Charlottesville City Attorney's Office
P.O. Box 911
605 E. Main Street, 2nd Floor (City Hall)
Charlottesville, VA 22902
robertsonl@charlottesville.org
(*Counsel for Respondent City of Charlottesville*)

Richard H. Milnor
Zunka, Milnor & Carter, Ltd.
P.O. Box 1567
414 Park Street
Charlottesville, Virginia 22902
RMilnor@zmc-law.com
(*Counsel for Respondent City of Charlottesville*)

I further certify that a copy of Petitioners' Opposition to Respondents' Demurrers and Motions to Dismiss was sent by email to the email addresses listed above on January 12, 2018.

Caitlin Vogus (VSB #81054)
Counsel for Petitioners Natalie Jacobsen and Jackson Landers