IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 141780

VIRGINIA DEPARTMENT OF CORRECTIONS,

Appellant,

v.

SCOTT A. SUROVELL,

Appellee.

BRIEF OF APPELLEE

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Table of Contents

Page

Table of Contents
(continued)

Page

Table of Authorities

Page(s)

Cases

Table of Authorities
(continued)

Page(s)

Statutes

Table of Authorities
(continued)

Page(s)

Other Authorities

Table of Authorities
(continued)

Page(s)

Appellee Scott A. Surovell, by counsel, respectfully submits this Brief of Appellee ("Brief") in response to the Brief of Appellant ("Opening Brief") of the Virginia Department of Corrections ("VDOC").

STATEMENT OF THE CASE

This case focuses on the right of a citizen to obtain records from a public body relating to arguably the most significant act with which a public body is entrusted by the legislature: carrying out a court-imposed sentence of death.

Mr. Surovell requested such records from VDOC under the Virginia Freedom of Information Act ("VFOIA"). VDOC reported that it had numerous responsive records in its possession. It produced substantially less than all of those records, withholding many by claiming various exemptions.

The circuit court granted VDOC an evidentiary hearing at which it could present evidence in support of its claimed exemptions. VDOC presented testimony from three VDOC employees; Mr. Surovell presented testimony from an attorney who had attended several executions. After hearing evidence

from these four witnesses and attorney argument, the circuit court determined that a first subset of documents was properly withheld. Those documents are not at issue here. The circuit court also held that VDOC had not established its exemption as to a second subset of records and that those records should be provided in their entirety. Finally, as to a third subset of records, the circuit court found that VDOC had only established that a portion of each of those documents merited an exemption and therefore ordered them to be provided in redacted form. The second and third subsets of documents are at issue in this appeal.

VDOC withheld the records at issue here under Virginia Code ("Code") § 2.2-3705.2(6) (the "Security Exemption"), which permits a public body to withhold certain records when evidence shows that disclosure "would jeopardize the security of any governmental facility, building or structure or the safety of persons using such facility, building or structure." It was VDOC's burden to establish the exemption by a preponderance of the evidence.

This Court has cautioned against giving VFOIA exemptions an expansive interpretation and has instead mandated that "*any exemption*" under VFOIA be "*narrowly construed*." *Am. Tradition Inst. v. Rector and Visitors of Univ. of Virginia*, 287 Va. 330, 339, 756 S.E.2d 435, 440 (2014) (quoting Code § 2.2-3700) (emphases supplied by Court). After all, the "primary purpose" of VFOIA is to "facilitate openness in the administration of government." *Id.*

After hearing all of the testimony from VDOC about the two subsets of documents at issue here, the circuit court, as the fact-finder, concluded that VDOC had failed to proffer facts sufficient to meet its burden on the Security Exemption for the material relevant to this appeal. As such, the circuit court was correct in ordering disclosure of the records at issue. *See* Code § 2.2-3713. The circuit court effectively rejected VDOC's attempt to justify the Security Exemption based on a contrived theory that disclosure of the documents *could* theoretically jeopardize security. This theory was undermined by VDOC's own witness and not supported by any rational explanation as to how public access to

these documents "would jeopardize … security" or what actual risks existed such that the disastrous consequences VDOC envisioned would occur—as required by the Code. Furthermore, the circuit court considered the parties' briefing and argument on the legal question of whether redaction is required under VFOIA.

The circuit court found that VDOC did not meet its burden as to the records at issue and ordered disclosure of the second subset of documents in their entirety and redacted versions of the third subset of documents. Because the circuit court's conclusions were supported by the record and the law, the Court should affirm the ruling.

Furthermore, the legislature—whose intent will guide the Court's interpretation of VFOIA—recently *rejected* a bill that would have shielded information related to executions (including the documents at issue in this appeal) from the reach of VFOIA requests.

STATEMENT OF FACTS

I. BACKGROUND

On June 13, 2014, Mr. Surovell submitted VFOIA requests pertaining to executions conducted by VDOC in the Commonwealth. On June 27, 2014, VDOC responded by providing some records, but withholding 106 others, including the current and five prior versions of the Execution Manual.

On July 31, 2014, Mr. Surovell filed his Verified Petition for Writ of Mandamus ("Petition") in the Circuit Court of Fairfax County, pursuant to Code § 2.2-3713. The thorough briefing included VDOC's motion to dismiss the Petition and Mr. Surovell's opposition thereto.

II. CIRCUIT COURT EVIDENTIARY HEARING

On September 11, 2014, the circuit court held a full-day evidentiary hearing.[1] Bearing the burden of proving its exemption, VDOC called three VDOC employees to testify about VDOC's review of the VFOIA requests, and VDOC's factual bases

[1] The hearing was only scheduled to last three hours, but the circuit court readily permitted the parties to take as much additional time as was needed. (J.A. at 365.)

for making its claim to the Security Exemption. These witnesses were extensively cross-examined and questioned by the court as well. VDOC did not call the Director of VDOC, who has sole and ultimate authority to decide whether to assert that the Security Exemption applies (J.A. at 249, 282), as a witness. Mr. Surovell called one witness, who testified about the security mechanisms at the Greensville Correctional Center ("Greensville") that are evident to a visitor, the portions of executions observed by witnesses, and information about execution processes disclosed by a former VDOC executioner.

Testimony about the records revealed the following:

Schematics ("7A" and "7B" in the Final Order): Two "schematics" or "diagrams," as they were described at the circuit court, are at issue.[2] The first, a schematic of the execution chamber (identified as "7A" in the September 11, 2014 Final Order ("Final Order")), was described as a "floorplan" (J.A. at 207, 244-45) of the execution chamber and "associated rooms"

[2] VDOC in its briefing now characterizes the documents as the "construction plan" and the "electrician's schematic."

(J.A. at 245), which "also provides information on all the electrical connections between equipment" (J.A. at 245) and the "layout of all the wiring to the electric chair" (J.A. at 344). The second, a schematic of the electrical panel ("7B" in the Final Order), "shows all the connections and how they come in and where they go out." (J.A. at 246.) The only information that the schematics give regarding the wiring is "where they are on the inside of the room," which a VDOC witness presumed would give insight into where the wires connect to electricity outside of the building. (J.A. at 254.) However, the schematics do not show anything that happens outside of the execution chamber. (J.A. at 254.) The "electrician's schematic" is not marked confidential[3] (J.A. at 266) and may have been designed with the assistance of non-VDOC employees, such as engineers (J.A. at 397-99). Furthermore, the electrical system of the execution chamber is serviced by a non-VDOC-employee. (J.A. at 401-02.) VDOC's

[3] VDOC did not indicate that the "construction plan" was labeled confidential either, though there is no direct testimony.

witness was not aware of any confidentiality agreement with the third party who works on the electrical system. (J.A. at 403.)

Manufacturers' installation and instruction manuals for components of the electric chair ("8A-8F" in the Final Order): When asked about the risk posed by disclosure of these "manufacturers' manuals," VDOC's explanation was, "Well, if you wanted to interrupt the process . . . you certainly could, if you knew how the electric chair had been installed, where the lines ran out, because that power comes in from the outside . . . ." (J.A. at 248.)

As the circuit court clarified and VDOC agreed, these records pertain to "just component parts that are attached to the electric chair to make it work." (J.A. at 346.) VDOC's witness did not have reason to think that the relevant parts had been designed solely for use in electric chairs. (J.A. at 269.) The manufacturers' manuals do not describe *how* to use the equipment for carrying out an execution. (J.A. at 266-67, 269.) The manufacturers' manuals were not custom-designed for VDOC (J.A. at 267) and do not mention the "L Unit"—a maximum

security prison within Greensville where executions occur (J.A. at 266, 268-69, 272).[4] VDOC was not able to identify confidentiality restrictions that limit disclosure of these records. (J.A. at 268, 269.)

Execution Manuals ("9A-9F" in the Final Order): Six versions of the Execution Manual are at issue, but "there's not much difference in those manuals at all . . . ." (J.A. 357-58.) These records give the "step-by-step process that has to occur in an execution." (J.A. at 348.) The Execution Manuals address, *inter alia*, insertion of the intravenous line (J.A. at 388), the dosages and process for lethal injections (J.A. at 389), the process for electrocutions, including the voltage applied (J.A. at 389-90), and the process for determining death (J.A. at 390).

III. CIRCUIT COURT RULING

After both parties made closing arguments, including their positions on whether VFOIA requires redaction, the circuit court ruled from the bench. The circuit court found that VDOC did not

[4] Only one of these records (8C), a "summary bill of material," even mentions Greensville (and that is as the place to bill for the materials "sold . . . for the electric chair"). (J.A. at 270-71.)

establish a legitimate security concern that would warrant fully withholding the portions of the records at issue.

The circuit court found the Security Exemption entirely inapplicable to both schematics (7A-7B) (J.A. at 473) and the manufacturers' manuals (8A-8F) (J.A. at 473). The circuit court found that the Security Exemption did not apply to the portions of the Execution Manuals pertaining to the time when the inmate arrives at the L Unit through the execution. (J.A. at 473-74.)

VDOC filed a Motion to Reconsider, which the circuit court denied.[5]

RESPONSE TO ASSIGNMENTS OF ERROR

1. **Assignments of Error I, II, III, and IV**:[6] The circuit court did not err by ordering VDOC to produce (1) a schematic of the floor plan of the L-Unit, (2) a schematic of the electrical panel of the execution chamber, (3) manufacturers' installation and instruction manuals for

[5] In connection with its Motion to Reconsider, VDOC—for the first time—provided the schematics and manufacturers' manuals for *in camera* review.

[6] VDOC's first, second, third, and fourth Assignments of Error are functionally the same, except for the specific record to which each applies. Mr. Surovell's response to each is therefore very similar. To more efficiently respond to the Opening Brief, Mr. Surovell is grouping these Assignments of Error together.

components of the electric chair, and (4) portions of the current and former execution manuals covering the condemned inmate's arrival at the L Unit through the execution, in response to VFOIA Requests.

Question Presented: Did the circuit court err in ordering VDOC to produce the records at issue where, testimony failed to establish that disclosure would jeopardize security, and where VDOC failed to show any nexus between disclosure of these records and the speculated security risks?

2. **Assignment of Error V**: The circuit court did not err by ordering VDOC to produce redacted versions of the current and former execution manuals.

Question Presented: Where a public body subject to VFOIA disclosure requirements fails to show that it would be unduly burdensome for it to create a redacted copy of a document that contains non-exempt and exempt material, does VFOIA permit that public body to withhold the entire document without review of its decision to do so?

SUMMARY ARGUMENT

Regarding VDOC's first, second, third, and fourth assignments of error, the circuit court properly found that VDOC did not proffer facts sufficient to establish the Security Exemption. Put simply, VDOC did not meet its burden of showing by a preponderance of the evidence that disclosure of the records "would jeopardize" the security of its facilities. With regard to the schematics, manufacturers' manuals, and portions of the

Execution Manuals at issue, the circuit court found that the testimony did not establish a legitimate security concern. Therefore, based on the circuit court's fact-finding, the Security Exemption was not applicable.

The Court should find VDOC's statements to the contrary unpersuasive. The circuit court's decision was based on consideration of a full day of testimony from several VDOC witnesses and thorough briefing by both sides. VDOC presents here the same hypothetical parade of horribles that it presented to the circuit court. Those hypotheticals are highly improbable (if not impossible) scenarios. Irrespective of their probability, however, VDOC completely failed to establish a nexus between disclosure of the records at issue and those highly speculative security risks.

In an attempt to strengthen its appeal, VDOC introduces facts that are outside of the record, raises an argument not presented to the circuit court, injects inflammatory and irrelevant details of criminal cases, and speaks inaccurately of "unrebutted" evidence and expert opinion. VDOC's proffer here still falls short

of what is required to withhold records under a "narrowly construed" VFOIA exemption.

Furthermore, legislative developments support the circuit court's ruling. Subsequent to VDOC initiating its appeal, the legislature considered whether information about the execution process should be exempt from VFOIA but declined to provide such an exemption. Mr. Surovell respectfully submits that the Court should do the same.

Regarding VDOC's fifth assignment of error, VDOC's position that it is not required to redact records is contrary to both the Code and logic. Taken literally, VDOC's position would empower a public body to incorporate *one* line of exempt material into any *one* page of each record it maintains and be completely justified in *never* producing a document under VFOIA.

That position seems grossly at odds with what the legislature intended in creating a doctrine to facilitate access to the government, where it stressed that "[t]he affairs of government are not intended to be conducted in an atmosphere of secrecy." Code § 2.2-3700(B). Indeed, a close reading of the

Code bolsters Mr. Surovell's position and is inconsistent with VDOC's stance. Furthermore, the General Assembly created an advisory council—with the sole purpose of interpreting VFOIA—which has stated unequivocally that a public body *is required* to redact documents containing both exempt and non-exempt material. The Court should not disrupt the circuit court's implicit finding that VFOIA requires redaction.

ARGUMENT AND AUTHORITIES

IV. STANDARD OF REVIEW

Whether a VFOIA exemption is applicable to specific documents is a mixed question of law and fact. The Court will "give deference to the trial court's factual findings and view the facts in the light most favorable to the prevailing part[y,]" and "review the trial court's application of the law to those facts de novo." *Am. Tradition Inst.*, 287 Va. at 338-9, 756 S.E.2d at 439 (citation omitted). Thus, the Court should heed the circuit court's factual findings, rather than assessing whether the record could possibly establish the exemption.

Questions of statutory interpretation are reviewed *de novo*. *Id*.

V. VDOC IS LIMITED TO THE RECORD ON APPEAL

VDOC includes several factual assertions outside of the record in its Opening Brief. For example, VDOC goes outside the record when describing one of the schematics, stating that, "[d]etails displayed include the location of a service entrance, the location of the generator, a load analysis of the walls, electrical notes, a power line diagram, ceiling grid layouts, and existing duct banks." (Opening Brief at 9.)[7] Nowhere in the transcript or briefing before the circuit court do those details appear.

VDOC's brief also includes material that is at odds with the record. For example, VDOC speaks of "thousands of people cluster[ing] in and around the prison's perimeter [on the night of

[7] This was not the only incident of VDOC relying upon factual material outside of the record. *See* Opening Brief at 9 ("The diagram shows the specific location of transmitters, fuses, timers, switches, resistors, cables, and wires—including the voltage amounts that pass through the connections."); Opening Brief at 32-33 ("They include . . . wiring instructions, permissible temperature ranges, power supply specifications, insulation requirements, . . . and electrocution procedures.").

an execution]." *Id*. at 13. However, VDOC's witness testified that "depending on the notoriety of the event, it could be numerous people, into the hundreds." (J.A. at 315-16.) The Court should disregard inflated statements lacking support in the record.

This Court's review is limited to the record before the circuit court. *See Woodfin v. Commonwealth*, 236 Va. 89, 97–98, 372 S.E.2d 377, 382 (1988) ("[W]e are limited to the appellate record in this case in consideration of issues presented here. We are not permitted to supplement the record by referring to [evidence] not made a part of this record."). Thus, VDOC's extraneous factual assertions may not be considered when adjudging the circuit court's ruling, regardless of whether they are accurate. VDOC could have provided the disputed records to the circuit court at the evidentiary hearing, but did not. *See LeMond v. McElroy*, 239 Va. 515, 520, 391 S.E.2d 309, 312 (1990) ("Routinely, confidential records are filed for *in camera* inspection by a trial court and, if necessary, by an appellate court.").

To the extent VDOC argues that the material outside of the record is contained in sealed exhibits, such position is prejudicial to Mr. Surovell. VDOC has repeatedly avoided review of this information from the circuit court and Mr. Surovell's counsel. Though Mr. Surovell's counsel invited *in camera* review of the withheld records (Petition at 19, 23, 26, 28, 31, 33, 34), VDOC chose not to offer these documents to the circuit court prior to or during the evidentiary hearing. Only after the evidentiary record was closed and the circuit court had ruled against it did VDOC provide sealed copies of the schematics and manufacturers' manuals to the circuit court with its Motion to Reconsider. VDOC never offered the Execution Manuals for review by the circuit court.[8] VDOC has not permitted Mr. Surovell's counsel to review any of the disputed records, even subject to a protective order. For VDOC to now rely on any allegedly detailed substance of

[8] Under the Court's precedent, the failure to make a disputed document part of the record can limit the Court's ability to review a mandamus order. *See LeMond*, 239 Va. at 520-21, 391 S.E.2d at 312 (holding trial court's ruling granting FOIA mandamus was not subject to review where document at issue was not made part of the record).

these documents is prejudicial to Mr. Surovell, who had no opportunity to explore these assertions during circuit court proceedings or this appeal.

VI. THE COURT SHOULD REJECT VDOC'S NEW "DEFERENCE" ARGUMENT

A. VDOC May Not Raise New Arguments On Appeal

In its appeal, VDOC—for the first time—argues that "deference . . . should be given to the security assessment of correctional officials." (Opening Brief at 2; *see also id.* at 24-28.) VDOC did not raise this argument at the circuit court and should not be permitted to raise it now. *See Prince Seating Corp. v. Rabideau*, 275 Va. 468, 469-70, 659 S.E.2d 305, 306 (2008) (refusing to consider an argument on appeal that had not been made to the circuit court); *Commonwealth Transp. Comm'r v. Target Corp.*, 274 Va. 341, 352, 650 S.E.2d 92, 98 (2007) (stating that appellant "may not assert, for the first time on appeal, a new argument").

Tellingly, the words "defer" or "deference" appear only *once* in the transcript of the full-day evidentiary hearing—and in an unrelated context (the issue of whether redaction is required).

Similarly, VDOC did not use either word—not even once—in its motion to dismiss the Petition.

Moreover, VDOC now places paramount importance on the ultimate determinations purportedly made by its chief official, Director Clarke, yet elected not to call Director Clarke as a witness. *See* J.A. at 249 (stating that "[t]he Director" makes the final determination on the Security Exemption); J.A. at 282 (when asked whose decision it was to withhold the documents, responding "but finally, the decision is the Director's"). Then, going a step further even with no testimony from Director Clarke to point to, VDOC now asks the Court to rubber stamp his decisions.

VDOC had the opportunity to raise the deference issue before the circuit court and to provide testimony to support it from a witness it chose not to call. An appeal is not an opportunity for a do-over.

B. VDOC's "Deference" Argument Does Not Change The Result

Even if VDOC may raise its deference argument at this late juncture, the argument does not change the result. First of all,

VFOIA does not require deference. Although courts do give deference to prison officials' determinations on certain issues, that does not mean that courts will blindly defer on all issues. Rather, courts across the country have recognized that the deference has limits. *See Ambat v. City & Cnty. of San Francisco*, 757 F.3d 1017, 1025-26 (9th Cir. 2014) (deference to prison officials is not automatic); *Chance v. Texas Dep't of Criminal Justice*, 730 F.3d 404, 419 (5th Cir. 2013) (deference to prison administration "does have limits"); *accord Pittman v. Bledsoe*, 442 F. App'x 639, 641 (3d Cir. 2011); *Henry v. Milwaukee Cnty.*, 539 F.3d 573, 580–81 (7th Cir. 2008); *Anderson v. Coughlin*, 757 F.2d 33, 35 (2d Cir. 1985).

Furthermore, VDOC's cited cases are distinguishable. For example, in *Turner v. Safley*, 482 U.S. 78, 84-85 (1987), the Supreme Court emphasized that the difficult task of prison administration has been "committed to the responsibility of [the legislative and executive] branches . . . ." As explained further below, the legislative branch recently rejected a measure that

would have permitted withholding records like those at issue here from the public.

In *Overton v. Bazzetta*, 539 U.S. 126, 132 (2003), the Supreme Court deferred to prison officials, but where the party suing the prison official bore the burden of proof to disprove the validity of the prison regulation at issue. Here, in contrast, the burden is on *VDOC* to prove its exemption by a preponderance of the evidence. Code § 2.2-3713. The degree of deference to be applied in the two scenarios is therefore logically distinct.

Florence v. Bd. of Chosen Freeholders of Cnty. of Burlington, 132 S. Ct. 1510, 1517 (2012), likewise involved an inmate's constitutional challenge of a prison policy, not the request for records by a citizen about how prison officials perform certain important tasks on the public's behalf. Presumably it was the prisoner's burden of proof in *Florence* as well. Under these facts, the Court stated that deference was appropriate "in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response . . . ." *Id.* (quoting *Block v. Rutherford*, 468 U.S. 576, 584-85 (1984)). In line with *Florence*,

VDOC has "exaggerated" its response to the VFOIA requests by being unwilling to disclose anything that could even *possibly* create risk. *See* Section VII.B.1 *infra*.

VDOC misrepresents *Gardels v. C.I.A.*, which analyzed the availability of classified documents under the federal FOIA. To start, the standard for judging the exemption in *Gardels* was far more deferential to the public body than the Security Exemption, making the D.C. Circuit's analysis irrelevant. The exemption in *Gardels* required the public body to show only that a response "*can* reasonably be expected to lead to unauthorized disclosure of intelligence sources and methods." 689 F.2d 1100, 1103 (D.C. Cir. 1982) (emphasis added) (citation omitted). In contrast, the Security Exemption requires a showing that disclosure "*would* jeopardize" security. Code § 2.2-3705.2(6) (emphasis added).

Even putting aside the more deferential statutory exemption, the court's analysis in *Gardels* rested on evidence of a far different nature than the conclusory, vague, and implausible assertions VDOC relies upon: "[T]he issue is whether on the whole record the Agency's judgment objectively survives the test

of reasonableness, good faith, specificity, and plausibility . . . ." *Id.* at 1105. In finding that the agency established its exemption, the court stated, "[t]he CIA position, detailed in affidavits and depositions, is specific and fleshed out as much as it can be done publicly, and is far from being merely conclusory . . . . In one word, it makes good sense." *Id.*

In sharp contrast, and as explained below, VDOC proffers conclusory, vague, and implausible scenarios to establish its claim to the Security Exemption, which is insufficient even under the court's analysis in *Gardels*. *See* Section VII.B.1–VII.B.3 *infra*.

VII. ASSIGNMENTS OF ERROR 1-4: THE CIRCUIT COURT DID NOT ERR BY ORDERING VDOC TO PRODUCE THE SCHEMATICS, MANUFACTURERS' MANUALS, AND REDACTED EXECUTION MANUALS

After hearing a full-day of testimony, the circuit court determined that VDOC did not present evidence sufficient to establish a legitimate security concern that would arise from disclosure of the relevant records. Therefore, the Security Exemption was inapplicable. No matter how hard VDOC tries to amplify the potential for harm from hypothetical misuse of the records to this Court, its purported proof presented in the record

below was found to be wanting. Applying the appropriate burden of proof and giving deference to the circuit court's weighing of the facts presented to it, the Court should not disturb this finding.

A. VDOC's Position Is Contrary To The Intent Of The Legislature.

It is a longstanding principle that legislative intent should guide a court's interpretation of a statute: "Several important principles come into play when any court construes legislative enactments. First and foremost among these principles is that the primary objective of statutory construction is to ascertain and give effect to legislative intent." *Turner v. Commonwealth*, 226 Va. 456, 459, 309 S.E.2d 337, 338 (1983). Relevant here, legislative intent is pivotal in the Court's analysis of a VFOIA exemption. *See Nageotte v. Bd. of Supervisors of King George Cnty.*, 223 Va. 259, 267, 288 S.E.2d 423, 426 (1982) (considering legislative intent in finding no FOIA violation).

Just this year, the legislature reinforced its "intent" on the very issue relevant here: The General Assembly rejected Senate Bill No. 1393, which would have established a blanket shield to

information relating to the execution process from VFOIA requests.[9] *See* Legislative Information System, Virginia General Assembly, http://lis.virginia.gov/cgi-bin/legp604.exe?151+vot+HV2694+SB1393 (last visited Apr. 8, 2015).

B. VDOC Did Not Establish That Disclosure "Would" Jeopardize Security

1. VDOC Distorts the Applicability Threshold for the Security Exemption

To invoke the Security Exemption, it was VDOC's burden to show by a preponderance of the evidence that "disclosure *would* jeopardize the security of any governmental facility, building or structure or the safety of persons using such facility, building or structure." Code § 2.2-3705.2(6) (emphasis added). Yet throughout its briefing and testimony below, VDOC presented speculative adverse consequences that "could" arise.

[9] Mr. Surovell requests that Court take judicial notice of this legislative development, as it has done in the past. *See Crook v. Commonwealth*, 147 Va. 593, 601, 136 S.E. 565, 568 (1927) ("Using the knowledge it has of political and legislative history in this State, this court will take judicial notice of the fact that a bill introduced into the Senate of Virginia…failed of passage. This is an indication of the legislative policy in Virginia.").

VDOC's testimony before the circuit court came entirely from VDOC employees and was highly speculative or conclusory. For example, VDOC's Chief of Corrections Operations, David Robinson stated, "there's always concerns about external activities that *could* occur, that *could* prevent or harm staff or offenders . . . ." (J.A. at 324 (emphases added).) *See also* J.A. at 344 (speculating concern about disclosure showing "*potential* vulnerabilities in the building") (emphasis added).

Instead of identifying concrete concerns, VDOC seemingly takes the position, here and below, that it should be able to avail itself of the Security Exemption by simply saying that it believes there is risk that disclosure could pose some security concern no matter how improbable the risk or how speculative the security breach might be: "So you cannot take any chances that someone could not [sic] plan and do something to the system that could prevent an execution by electrocution and/or through lethal injection." (J.A. at 334.) During closing statements, VDOC's counsel summarized VDOC's stance on the scope of the Security Exemption: "And [VDOC's] position, Your Honor, is, the more

information, the more details that are released about the physical building itself, the more vulnerable that building becomes." (J.A. at 432.)

VDOC's Opening Brief continues this attempt to broaden the scope of the Security Exemption by listing a parade of horribles without presenting either a cause and effect relationship between the content of the disputed records and the stated concern, or an objective way to assess the alleged risk to security. The Opening Brief states that "[b]y putting this information into the public realm, the Department would be handing over technological specifications that, in turn, *could* be assessed for potential weaknesses." (Opening Brief at 33 (emphasis added).) *See also id.* at 18 ("If made public, that information *could* be used in a way to plan, stop, harm, or kill individuals . . ."") (emphasis added) (internal quotations omitted); *id.* ("Knowledge of the manual *could* also facilitate 'inmate escape' . . . as well as reveal[ ] potential security weaknesses that *might* make it easier to smuggle contraband into the L-Unit") (emphases added).

But the exemption does not have such an expansive reach, as the circuit court agreed. The Security Exemption cannot be invoked whenever a public body asserts that there is potential that some un-identified problem could occur as a result. The agency must be able to articulate the threat to security and provide evidence sufficient for the court to objectively assess the reasonableness of the assertion and determine whether that risk is establish by a preponderance of the evidence. Imagined but unidentified threats, or the potential for such threats do not establish the Security Exemption by a preponderance of the evidence. Rather, the Code requires appreciable risk that disclosure "would" in fact "jeopardize" the security of a facility or the people within. The Court should reject VDOC's attempt to establish the Security Exemption through unfounded speculation.

2. VDOC Did Not Provide A Nexus Between Its Perceived Security Concerns And Disclosure of the Relevant Records

During his testimony, Mr. Robinson expressed concern about potential security risks. For example, he theorized that "someone could try to crash into the facility in an effort to disrupt and to

prevent the execution through some vehicle lurch [sic] process, even from the air" or using "heavy weaponry." (J.A. at 333; *see also* Opening Brief at 15.)

Mr. Robinson's concerns ring hollow because he did not establish a nexus between any one of the records in question and such a hypothetical assault on the maximum security L Unit. Mr. Robinson did not attempt to articulate—much less provide evidence to establish by a preponderance—how *disclosure* of any of the records at issue would bring about the disastrous consequences he spoke of. He did not, for example, explain how or whether a person intending to attack the facility from air or with heavy artillery, would benefit from knowledge of what the components of the electric chair are and how they work, or other details of how an execution is conducted. Put simply, knowledge of the information in the records at issue would not aid the perpetrator in attacking the facility by air or with heavy weaponry.[10]

[10] The publicly-available aerial view on Google Earth would seem more beneficial to one planning such an attack than any record VDOC withheld.

In a similar vein, Mr. Robinson expressed concern that knowledge of the wiring of the execution chamber "gives you the opportunity and the avenue to establish plans. If you do not know where [the wiring is], then you can't establish plans." (J.A. at 345.) However, Mr. Robinson failed to explain how any person—even one trying to thwart an execution—would have *access* to the wiring. Without an ability to tamper with the wiring, knowledge of how the wires are connected is of no use.

VDOC also expresses concern about "infiltration by an individual 'who could have something on them [that they] could [use for an] assault inside the unit itself." (Opening Brief at 16, quoting J.A. at 333.) However, VDOC ignores that it has robust security mechanisms which would make it exceedingly unlikely—if not impossible— for such a concern to come to fruition.

Indeed, Mr. Robinson testified that VDOC has numerous security procedures and mechanisms in place, including but not limited to: searching people "thoroughly" before entering the L Unit (J.A. at 353); a 12-16 foot double perimeter fence around the L Unit (J.A. at 364, 376) and the greater Greensville facility

(J.A. at 376); six guard towers (J.A. at 371); a "secure gate" to control access for incoming and outgoing vehicles (J.A. at 316); and "six or more" secure doorways between the public entrance and the L Unit (J.A. at 378-79). Mr. Robinson further testified that no one had ever climbed over the perimeter fence around the L Unit (J.A. at 378), nor had outsiders ever gained unauthorized access to the execution chamber (J.A. at 379-81). Given this testimony, there is no evidence that there is a plausible scenario in which a person would be able to use the records at issue to jeopardize the security of VDOC facilities.

VDOC tries to camouflage the lack of nexus by using hyperbolic language, such as that VDOC should not have to "cross its fingers and hope no one gets close enough to act on the information." (Opening Brief at 32.) The Court should reject VDOC's baseless concerns and give deference to the circuit court's determination that VDOC did not establish evidence of legitimate security concerns.

3. VDOC Did Not Provide "Unrebutted Evidence" To Support the Security Exemption

VDOC erroneously claims that it established the Security Exemption through "unrebutted evidence" (Opening Brief at 1) and that "the trial court was not presented with conflicting testimony" (*id*. at 23). Neither statement is true. Rather, VDOC's own witness rebutted the claim that disclosure of the records "would" jeopardize the security of VDOC's facilities.[11]

For example, VDOC's Opening Brief now describes the L Unit as "a mere thirty feet away from other buildings in that facility." (Opening Brief at 3.) However, Mr. Robinson was not concerned about the close proximity during his testimony. When asked how many staff members monitor the space between the L Unit and the rest of the prison population, Mr. Robinson stated, "[m]ore than enough to be able to manage it." (J.A. at 365.) Mr.

[11] VDOC notes "the absence of any contrary expert testimony." (Opening Brief at 28.) It is difficult to conceive of how Mr. Surovell could obtain *expert* testimony regarding VDOC facilities and processes that are largely hidden from the public view. However, Mr. Surovell called attorney Jon Sheldon who, though not an expert, testified to the security mechanisms in place and what is viewed by witnesses during executions.

Robinson described the L Unit as "a maximum security prison inside of Greensville . . . ." (J.A. at 362.) VDOC's counsel echoed that "the L Unit is within a very secure compound, it's maintained and operated in a very secure manner." (J.A. at 471.)

Mr. Robinson likewise expressed confidence that VDOC was prepared to handle potential problems relating to the greater Greensville facility: "We're prepared in the event that there's an external force or an internal force, in the event of individuals coming into or outside of the facility to, for lack of words, attack the facility. Internal and external." (J.A. at 333.) Mr. Robinson further explained that VDOC "ha[s] contingencies in place to deal with matters that could occur on the external of the facility or the internal of the facility." (J.A. at 318.) Regarding staffing, Mr. Robinson testified that VDOC "beef[s] up" security "during the events of an execution" by bringing in additional staff and "other law enforcement agencies." (J.A. at 318.)

Thus, Mr. Robinson's own testimony rebuts VDOC's evidence that disclosure of the records "would" with any probability cause the devastating consequences that VDOC claims to fear.

4. VDOC Did Not Establish Its Exemption Through Expert Testimony

VDOC states inaccurately that it established the Security Exemption through expert testimony. (Opening Brief at 28.) It did not. VDOC called Mr. Robinson to testify to issues of fact. VDOC then qualified Mr. Robinson as an "expert in the field of corrections operations." (J.A. at 307.) However, the circuit court sustained Mr. Surovell's objection to Mr. Robinson giving any expert opinion on whether the Security Exemption was properly invoked. (J.A. at 341-42.) Thus, Mr. Robinson did *not* provide expert testimony on the propriety of invoking the Security Exemption. Nor did he provide an expert opinion on how any of the material within the relevant documents would create some security issue.[12] In fact, as indicated above, his testimony failed to provide a nexus between the content of the documents and any security issue at all.

[12] Far from holding a position through which he could provide objective expert testimony, Mr. Robinson, as an assistant to the Director of VDOC, is essentially a party to this suit.

The circuit court's exclusion of expert opinion will only be disturbed if the record shows an abuse of discretion. *See Smith v. Irving*, 268 Va. 496, 501, 604 S.E.2d 62, 65 (2004) ("A court's decision regarding the admission or exclusion of evidence is discretionary in nature and, thus, will not be overturned on appeal unless the record shows an abuse of that discretion."). VDOC has not appealed the circuit court's exclusion of Mr. Robinson's expert opinion.

5. VDOC Relies On Facts With Little Relevance

In trying to establish risk sufficient to warrant the Security Exemption, VDOC points to a host of facts with limited—if any—relevance to the issues before the Court. For example, VDOC devotes nearly a page of its brief to a footnote detailing the crimes committed by death row inmates. (Opening Brief at 25-26 n.2.) Those crimes, however abhorrent, are completely irrelevant to this case. The instant appeal is about the right of the public to access records pertaining to executions conducted in the name of the Commonwealth; it is not, in any way, about the individuals

sentenced to death.[13] The Court should disregard this inflammatory injection of irrelevant facts into the appeal.

Likewise, VDOC points to events from decades ago in attempting to substantiate the risk it currently fears from disclosure. For example, VDOC refers to a death row inmate escape. (Opening Brief at 13.) However, that incident occurred in 1984—more than thirty years ago. (J.A. at 311-12.) Similarly, VDOC refers to a riot. (Opening Brief at 14.) However, according to Mr. Robinson's testimony, that incident occurred in the late 1970s or 1980s. (J.A. at 319.)

As an additional example of irrelevant material relied upon by VDOC, Mr. Robinson testified about an official witness trying to thwart an execution by withdrawing as a witness at the last minute. (J.A. at 328-29; Opening Brief at 15.) As the circuit court observed, the withdrawal of the official witness—at most—would have delayed the execution. (J.A. at 394.) Yet, Mr.

[13] VDOC's claim that this material is relevant to show the security risk posed by these individuals is undercut by the fact that the inmate will be significantly outnumbered by VDOC employees. *See* J.A. at 415 (describing as many as eight or nine VDOC officials and correctional officers present during an execution).

Robinson continued to characterize this situation as a potential security issue. (J.A. at 394.)

VDOC's characterization of this occurrence is entirely speculative. *See* J.A. at 328 ("[W]e had an individual at the last minute, which *we believe* was anti-death penalty, decided [sic] not to be part of it and leave [sic]."). However, a witness account makes it seem more likely that the individual was shaken by the details he learned about electrocutions than that he was trying to thwart an execution:

> [The VDOC official] explained the possible physical ramifications of having 1800 volts at 7.5 amps flow through the human body for 30 seconds followed by 60 seconds of 240 volts at 1.5 amps. That cycle is repeated once. Mike Sarahan, of Richmond, a citizen witness who asked numerous questions about the procedure and seemed alarmed by much of it, opted out of witnessing the execution at the last moment. 'It seems grotesque and barbaric,' Sarahan said, visibly shaken.

Josh White, *In Virginia's death chamber, a rare death by electrocution*, The Washington Post (Nov. 18, 2009, 1:20 PM), http://voices.washingtonpost.com/crime-scene/josh-white/larry-

bill-elliott-60-was.html (attached hereto as Attachment "A" and previously attached to Petition as Exhibit 14).

C. Portions Of The Material In The Execution Manual Are Already Publicly-Available

VDOC seemingly takes the stance that *no* details of the execution process—though a process conducted by the Commonwealth and intended to be a public process[14]—may be released. However, at least some of this information that VDOC tries to shield with the Security Exemption is already accessible to the public. For example, a published Fourth Circuit opinion specifies the dosages of lethal injection drugs used. *See Emmett v. Johnson*, 532 F.3d 291, 294 (4th Cir. 2008); *see also Walker v. Johnson*, 448 F. Supp. 2d 719, 720-21 (E.D. Va. 2006) (explaining the process for a lethal injection).

Notably, citizen witnesses attend each and every execution conducted by the Commonwealth. In fact, the Code *mandates* that non-VDOC witnesses attend executions. *See* Code § 53.1-234 (requiring witnesses for executions). These witnesses may

[14] During the hearing, the circuit court reminded one VDOC witness that executions are public procedures. (J.A. at 340.)

take notes, and VDOC's witness at the hearing was not aware of any confidentiality agreements for execution witnesses. (J.A. at 412-13.)

As described in Mr. Surovell's briefing to the circuit court, witnesses have been able to observe much of what occurs during executions, and some have even published the details of what they observed. *See* Attachment "A" (describing the process of electrocution); Candace Rondeaux, *Witnessing Execution a Matter of Duty, Choice*, The Washington Post (Dec. 10, 2006), http://www.washingtonpost.com/wp-dyn/content/article/2006/12/09/AR2006120900923.html (attached hereto as Attachment "B" and previously attached to Petition as Exhibit 15); Catie Beck, *'I watched a woman die': Eye-Witness reveals haunting first-hand account of the execution of Teresa Lewis*, Daily Mail (Sept. 25, 2010, 7:58 AM EST), http://www.dailymail.co.uk/news/article-1314993/Teresa-Lewis-execution-I-watched-woman-die-One-witness-hand-account.html (attached hereto as Attachment "C" and previously attached to Petition as Exhibit 16)

(describing the death chamber and the process of a lethal injection).

Furthermore, Jon Sheldon testified in detail about his observations as a witness at three executions, specifically: the layout of the execution chamber, including the locations of doors (J.A. at 413-14); the location of the condemned inmate's holding cell (J.A. at 417); the condemned inmate's entrance into the execution chamber (J.A. at 417); and the restraints used on an inmate during an execution (J.A. at 418-19).

Mr. Sheldon also testified that he has had conversations with a former member of the execution team who had completed more than 60 executions. (J.A. at 421.) Mr. Sheldon testified that this individual spoke freely about preparing for and conducting executions: "And there didn't seem to be any confidentiality issues at all."[15] (J.A. at 422.)

[15] Mr. Sheldon likewise spoke with a doctor who has attended executions, without any indication that the individual was subject to confidentiality restrictions. (J.A. at 421-22.)

Thus, numerous pieces of information presumably contained in the Execution Manuals are already pubic and therefore do not warrant protection under the Security Exemption.

VIII. ASSIGNMENT OF ERROR 5: THE CIRCUIT COURT DID NOT ERR BY ORDERING VDOC TO PRODUCE REDACTED VERSIONS OF THE EXECUTION MANUALS

VDOC theorizes that if a document contains both exempt and non-exempt information, then the public body can elect—in its complete discretion—to either produce a redacted copy of the record *or* withhold the *entire* document. In ordering VDOC to produce non-exempt portions of the Execution Manuals, the circuit court implicitly rejected VDOC's redaction argument. The Court should not disturb this finding.

When considering the potential ramifications of VDOC's position on redaction, it becomes inconceivable that the General Assembly intended for a public body to have the option to withhold entire documents where only some content is found to be exempt from disclosure. Taken to its logical conclusion, a public body could incorporate *one* line of exempt material—from any one of the many categories of VFOIA exemptions—into each

record it maintains. For example, attaching a one-line page that identifies the Commonwealth's executioner to each VDOC record would permit VDOC to withhold *all* of its records from VFOIA requestors, without question or review by this or any other court.[16]

Simply put, this result cannot be what the legislature intended in crafting a doctrine to facilitate open access to government. *See* Code § 2.2-3700(B) ("By enacting this chapter, the General Assembly ensures the people of the Commonwealth ready access to public records in the custody of a public body. . . . The affairs of government are not intended to be conducted in an atmosphere of secrecy. . . .").

[16] Though this approach may seem extreme, Mr. Robinson's comments make it plausible that VDOC would consider creative ways to avoid producing documents. When asked why prior versions of the Execution Manuals were kept, despite the concern about the consequences of release, Mr. Robinson stated, "Those manuals were maintained at Greensville in the Warden's office, and I would have to say, after today, I would question that myself." (J.A. at 358.) In response, the circuit court commented, "That's one way to respond to a FOIA request, shred the stuff and then say it doesn't exist; right?" (J.A. at 358.)

In fact, a close reading of the relevant statute, in connection with Freedom of Information Act Advisory Council ("Council") opinions, makes it clear that the circuit court properly required VDOC to provide redacted Execution Manuals.

A. The Code Supports Mr. Surovell's Argument

Contrary to VDOC's assertions, the relevant Code sections are actually most consistent with Mr. Surovell's interpretation. To the extent that it is unclear whether the Code requires redaction, the ambiguity should be resolved in Mr. Surovell's favor. *See* Code § 2.2-3700(B) ("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.").

Section 2.2-3704(B) addresses the permitted responses to a VFOIA request. Sections 2.2-3704(B)(1) and (2) seemingly cover two different scenarios: subsection (B)(1) addresses documents that are entirely exempt, and subsection (B)(2) covers documents that are partially exempt, but also contain non-exempt material ("mixed documents"). *See* Code § 2.2-3704(B).

Subsection (B)(2) states that "[t]he requested records are being provided in part and are being withheld in part because the release of part of the records is prohibited by law . . . ." *Id.* (emphasis added). However, subsection (B)(1) omits the word "part:" "The requested records are being entirely withheld because their release is prohibited by law . . . ." *Id.* If the legislature intended, as VDOC posits, that a public body could withhold an entire document where only a portion of it contains exempt material, then it would have stated so explicitly in subsection (B)(1)—as it did in subsection (B)(2).

In addition, the last sentence of subsection (B)(2), which limits the public body's redaction to "only that portion of the record to which an exemption applies" (*id.*), would not make sense if the public body could withhold the entire document at its election. If the legislature was truly authorizing a public body to withhold *all* of the non-exempt content in a mixed document, then it is difficult to understand why the legislature would also restrict the degree to which a public body could redact that same document. The most logical interpretation of the interplay

between subsections (B)(1) and (B)(2) is that subsection (B)(1) applies only to entirely exempt documents and subsection (B)(2) applies to mixed documents. Therefore, subsection (B)(2) applies to the Execution Manuals.[17]

Furthermore, later provisions of § 2.2-3704 make sense only if the legislature is requiring public bodies to redact mixed documents. For example, § 2.2-3704(G) states, "[w]hen electronic or other databases are combined or contain exempt and nonexempt records, the public body *may* provide access to the exempt records if not otherwise prohibited by law, but *shall* provide access to the nonexempt records as provided by this chapter." *Id*. (emphases added). The legislature's mandatory requirement to provide access to non-exempt portions of mixed electronic documents is entirely consistent with Mr. Surovell's interpretation—and inconsistent with VDOC's.

[17] The Execution Manuals provide certain information that is in the public record, so cannot be deemed entirely exempt. See Section VII.C *supra*.

B. FOIA Advisory Council Opinions Bolster Mr. Surovell's Interpretation

Further undercutting VDOC's position on redaction, Council opinions state explicitly that redaction is *required*. The General Assembly created the Council as a legislative agency "to encourage and facilitate compliance with the Freedom of Information Act."[18] Code § 30-178(A). The Council has "the expertise to help resolve disputes over Freedom of Information issues." Services of the Council, Virginia Freedom of Information Advisory Council, http://foiacouncil.dls.virginia.gov/Services/welcome.htm (last visited Apr. 8, 2015).

Though its opinions are not binding on the Court, the Court has relied upon a Council opinion in construing VFOIA. In *Fenter v. Norfolk Airport Auth.*, 274 Va. 524, 528-29 & n.1, 649 S.E.2d 704, 707 & n.1 (2007), the Court acknowledged that the Council was created by the legislature and relied upon the Council's opinion in finding that a VFOIA violation had occurred.

[18] The Attorney General, or his designee, is one of the members of the Council. Code § 30-178.

Relevant here, two Council opinions show that a public body *is expected* to redact mixed documents.[19] First, a 2002 opinion concerning VDOC disclosures leaves no question that a public body must redact and produce mixed documents:

> As noted above, if a record contains both exempt and non-exempt information, the public body may redact only the exempt information and must produce the remainder of the document . . . . However, information that does not affect the security or safety of the building or individuals . . . does not rise to the level of jeopardy set forth in the exemption. FOIA would *require* the release of this part of the record, even if other information in the same record may be redacted.

J.A. at 56 (Virginia Freedom of Information Advisory Opinion AO-13-02 (issued Oct. 31, 2002)(emphasis added)).

A Council opinion issued the following year further supports Mr. Surovell's position. In that opinion, a party sought clarification on VDOC's obligation to disclose a copy of its execution procedures, in whole or in part. In addressing the issue of whether VDOC is required to redact, the Council states

[19] The circuit court case cited by VDOC (*see* Opening Brief at 36 n.4) did not appear to have the benefit of these Council opinions.

that redaction *is* required unless the *entire* document is exempt: "The law contemplates that it is possible to have exempt and non-exempt information co-mingled in a single record, in which case the non-exempt portion of the record *must* still be provided to the requester." Virginia Freedom of Information Advisory Opinion AO-24-03 (issued Oct. 23, 2003) (emphasis added) (*see* Attachment "D").[20]

C. VDOC's Statutory Interpretation Of § 3705.2 Is Inconclusive At Best

VDOC alleges that the General Assembly made another exemption (Code § 3705.2(2)) relevant to only a "portion" of records, but omitted the word "portion" in the Security Exemption, thus showing that the public body is free to withhold

[20] The Council had not seen the execution procedures, so relied on VDOC's assertion that the entire document was subject to an exemption in finding that the issue of redaction was "not relevant in the instant case." *Id.*

an entire mixed document pursuant to the Security Exemption.[21] (Opening Brief at 37-38.)

An equally plausible interpretation of § 3705.2(2) is that it is simply silent on the issue of redaction. Instead, that section exempts the "portion" of all drawings "submitted" to obtain a building permit "that contain trade secrets," and this "portion" is just a subset of the individual records submitted. So, if some drawings were submitted but do not contain trade secrets, then the exemption is inapplicable to those submissions.

For example, if 100 drawings had been submitted to obtain building permits, but only 15 contain trade secrets, then the exemption under § 3705.5(2) only applies to a "portion" of the 100 drawings submitted—and that "portion" is those 15 drawings containing trade secrets. The language is decidedly not saying—

[21] The Code provision reads, "The following records are excluded from the provisions of this chapter but may be disclosed by the custodian in his discretion, except where such disclosure is prohibited by law: . . . Those portions of engineering and construction drawings and plans submitted for the sole purpose of complying with the Building Code in obtaining a building permit that would identify specific trade secrets or other information, the disclosure of which would be harmful to the competitive position of the owner or lessee." Code at § 2.2-3705.2(2).

as VDOC suggests—that only portions of *those* 15 documents may be withheld. Under this alternative interpretation of the Code, the legislature is not specifying whether all or part of any individual document may be withheld. It's silent on the issue. At best, VDOC has pointed out an ambiguity in the Code.

In summary, VDOC's interpretation of VFOIA is refuted by the Code itself, and Council opinions interpreting it. The most logical interpretation of the Code is that a public body must redact records unless it establishes that it cannot reasonably do so. The Court should not disrupt the circuit court's implicit finding to this effect. Furthermore, since VDOC presented no evidence on why it could not reasonably redact the execution manuals in the manner ordered by the circuit court, this Court should not overturn the order requiring redaction.

CONCLUSION

For the foregoing reasons, Mr. Surovell respectfully requests that this Court affirm the decision of the circuit court.

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Respectfully submitted,

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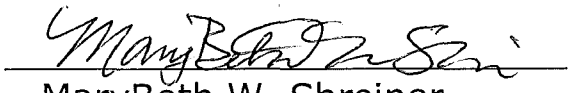
(2) On April 13, 2015, the required copies of this brief and attachments were hand-delivered to the Clerk's Office of this Court for filing, and copies were mailed to Mark R. Herring, Margaret Hoehl O'Shea and Kate E. Dwyre, **Office of the Attorney General**, 900 East Main Street, Richmond, Virginia 23219.

(3) In compliance with Rule 5:26(e), an electronic version of this brief and attachments were submitted to the Clerk of this Court and transmitted to opposing counsel via email delivery.

By: 
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