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Transcript of Hearing

Date: January 6, 2023

Case: Citizens for Fauquier County -v- Town of Warrenton

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1	3
1 VIRGINIA :	1 APPEARANCES
2 IN THE CIRCUIT COURT OF FAUQUIER COUNTY	2
3 TWENTIETH JUDICIAL CIRCUIT	3 ON BEHALF OF THE PETITIONER:
4 -----x	4 MICHAEL H. BRADY, ESQUIRE
5 CITIZENS FOR FAUQUIER COUNTY, :	5 MICHELLE E. HOFFER, ESQUIRE
6 Petitioner, :	6 WHITEFORD TAYLOR & PRESTON, LLP
7 v. :	7 1021 E. Cary St., Suite 1700
8 TOWN OF WARRENTON, VIRGINIA : Case No.:	8 Richmond, VA 23219
9 and STEPHEN CLOUGH, Town : CL22000551-00	9 (804) 977-3300
10 Clerk of the TOWN OF :	10
11 WARRENTON, VIRGINIA, in his :	11 ON BEHALF OF THE RESPONDENTS:
12 official capacity, :	12 MARTIN R. CRIM, ESQUIRE
13 Respondents. :	13 VANDERPOOL FROSTICK & NISHANIAN, PC
14 -----x	14 9200 Church St., Suite 400
15 HEARING	15 Manassas, VA 20110
16 BEFORE THE HONORABLE ALFRED D. SWERSKY	16 (703) 369-4738
17 Warrenton, Virginia	17
18 Friday, January 6, 2023	18 ALSO PRESENT:
19 1:00 p.m.	19 Kevin Ramundo
20 Job: 477061	20 Yak Lubowsky
21 Pages 1-94	21 Amy Trotto
22 Transcribed by: Jo Ann Pawela	22 Stephen Clough
2	4
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6 (540) 422-8100	6
7	7
8 Pursuant to Notice, before Donald E. Lane,	8 EXHIBITS
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<p style="text-align: right;">5</p> <p>1 PROCEEDINGS</p> <p>2 THE COURT: This is the matter of Citizens</p> <p>3 for Fauquier County versus Town of Warrenton and</p> <p>4 others. Parties ready?</p> <p>5 MR. BRADY: Yes, Your Honor.</p> <p>6 MR. CRIM: Yes, Your Honor.</p> <p>7 THE COURT: A couple questions before we</p> <p>8 begin. I noticed in the motion to get this</p> <p>9 hearing set, there was -- it was stated that</p> <p>10 there's -- the special use permit is to be heard</p> <p>11 at a meeting on Tuesday.</p> <p>12 MR. CRIM: That's correct, Your Honor.</p> <p>13 THE COURT: Is that still on the schedule?</p> <p>14 MR. CRIM: It is still on the schedule,</p> <p>15 Your Honor.</p> <p>16 THE COURT: I'm sorry?</p> <p>17 MR. CRIM: Yes, sir.</p> <p>18 THE COURT: What if we can't get this</p> <p>19 resolved today?</p> <p>20 MR. CRIM: Well, I don't think that the --</p> <p>21 I'm Martin Crim for --</p> <p>22 THE COURT: Yes, sir.</p>	<p style="text-align: right;">7</p> <p>1 and this is Mike Brady on behalf of --</p> <p>2 THE COURT: Yes, sir.</p> <p>3 MR. BRADY: -- Citizens for Fauquier County</p> <p>4 -- that we at least receive the exhibits</p> <p>5 officially as evidence. And I understand from</p> <p>6 Mr. Crim you've been generous, that we can do</p> <p>7 that. We can put that in without --</p> <p>8 THE COURT: Yeah, I thought that was the</p> <p>9 way we were going to proceed. I've read the</p> <p>10 materials that you all have submitted.</p> <p>11 MR. BRADY: Thank you, Your Honor.</p> <p>12 THE COURT: All right. Then I -- then we</p> <p>13 can hear argument. All right.</p> <p>14 MR. BRADY: Yes.</p> <p>15 THE COURT: Let's proceed.</p> <p>16 MR. BRADY: If I may be heard --</p> <p>17 THE COURT: Yes.</p> <p>18 MR. BRADY: -- just quickly on the first</p> <p>19 question --</p> <p>20 THE COURT: Sure.</p> <p>21 MR. BRADY: -- Your Honor. It does seem</p> <p>22 that there -- there certainly will be a public</p>
<p style="text-align: right;">6</p> <p>1 MR. CRIM: -- the Town. I don't think that</p> <p>2 the -- this has to be resolved before the public</p> <p>3 hearing. First of all, there's no -- do you</p> <p>4 want me to approach the podium, Your Honor?</p> <p>5 THE COURT: No, you're fine. You're fine</p> <p>6 right where you are. This is just preliminary.</p> <p>7 MR. CRIM: So, the issue that is raised in</p> <p>8 the public hearing on Tuesday has been going on</p> <p>9 for some time. The Council does not have to act</p> <p>10 on Tuesday, and so it may be decided then and</p> <p>11 may be continued. So, I don't -- I don't know.</p> <p>12 That's up to the Council. But, if -- depending</p> <p>13 on how the Court rules today, you know, we'll do</p> <p>14 whatever it is we need to do.</p> <p>15 THE COURT: If I can rule today. That's</p> <p>16 the --</p> <p>17 MR. CRIM: If you can rule.</p> <p>18 THE COURT: That's one of the questions.</p> <p>19 MR. CRIM: Yes, sir.</p> <p>20 THE COURT: Second question, is there</p> <p>21 evidence to be taken?</p> <p>22 MR. BRADY: Your Honor, we would request --</p>	<p style="text-align: right;">8</p> <p>1 hearing on Tuesday, and I think Mr. Crim's</p> <p>2 statement was to the effect -- and I want to</p> <p>3 emphasize it -- it may be voted on on Tuesday,</p> <p>4 right, and certainly members of the public will</p> <p>5 be making comments informed with what</p> <p>6 information they have on Tuesday. So, this is</p> <p>7 unfortunately compressed.</p> <p>8 THE COURT: Okay.</p> <p>9 MR. BRADY: I appreciate Your Honor giving</p> <p>10 us --</p> <p>11 THE COURT: All right.</p> <p>12 MR. BRADY: -- this hearing date.</p> <p>13 THE COURT: All right. Okay. Mr. Brady,</p> <p>14 let me hear you on your petition.</p> <p>15 ARGUMENT BY COUNSEL FOR THE PETITIONER</p> <p>16 MR. BRADY: Your Honor, I'm collecting the</p> <p>17 exhibits, and I will hand them around, make sure</p> <p>18 that we have one for admission into evidence,</p> <p>19 that everybody who needs one has a copy.</p> <p>20 Before I get too far in, I'll do a few</p> <p>21 preliminaries.</p> <p>22 Mike Brady on behalf of the Citizens for</p>

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<p style="text-align: right;">9</p> <p>1 Fauquier County, joined today by Michelle 2 Hoffer. We're both with the law firm of 3 Whiteford, Taylor & Preston in Richmond. 4 THE COURT: All right. 5 MR. BRADY: The Richmond office. We have a 6 few others. 7 And also joining me today are three members 8 of the Board of Directors. In fact, the whole 9 Executive Committee of the Citizens for Fauquier 10 County. President Kevin Ramundo on my left, or 11 on the far left here. Mr. Yak Lubowsky to his 12 left, further to the right. And then Ms. Amy 13 Trotto, who is the affiant -- 14 THE COURT: Yes, ma'am. 15 MR. BRADY: -- on this petition. 16 THE COURT: Nice to see you. All right. 17 Go ahead, Mr. Brady. 18 MR. BRADY: Thank you. So, Your Honor, I 19 have, as I indicated, the exhibits that were 20 filed to the petition. And being the, you know, 21 the party making the request, you sort of have 22 what they give you.</p>	<p style="text-align: right;">11</p> <p>1 (Exhibit B is admitted into evidence.) 2 MR. BRADY: And then I'll expedite the last 3 three if that's amenable to the Court, and it 4 appears that it is. C, D, and E to the 5 petition, I'll simply hand those up all together 6 to the bailiff, and also to counsel for the 7 Town. 8 And I appreciate the podium, but it is 9 small. 10 THE COURT: It is small. 11 MR. BRADY: So, if I move a little more 12 slowly or drop something, you'll forgive me I -- 13 thank you, sir. 14 And I'm handing up C, D, and E from the 15 petition, moving for admission. Is that right? 16 THE COURT: They're admitted without 17 objection. 18 (Exhibits C, D, and E are admitted into 19 evidence.) 20 MR. BRADY: So, we all have before us those 21 exhibits, and I appreciate Your Honor kind of 22 expediting this. We also have some authorities,</p>
<p style="text-align: right;">10</p> <p>1 So, what these are, are Exhibit A, and that 2 is the first FOIA request and the various 3 responses made by the Town of Warrenton. If I 4 could offer this to the bailiff. Thank you. If 5 you could take that to the judge. And I'd move 6 its admission into the record. And I will offer 7 a copy. 8 MR. CRIM: No objection. 9 THE COURT: All right. It's admitted. 10 (Exhibit A is admitted into evidence.) 11 MR. BRADY: And then just to go through the 12 same with Exhibit B, and that indicates it's 13 CFFC's follow-up request. It's on that same 14 FOIA request, and it's dated September 21st, 15 2022. And then there's a response from the Town 16 of Warrenton. That was Petitioner's Exhibit B. 17 Move that -- 18 THE COURT: All right. 19 MR. BRADY: -- exhibit into the record, as 20 well. 21 THE COURT: It's admitted with -- they're 22 admitted without objection.</p>	<p style="text-align: right;">12</p> <p>1 and then I'll hand those around in a moment, 2 knowing that we are on a compressed schedule and 3 getting this decided sooner rather than later is 4 important. 5 But before I do that, I just want to say 6 that we're here today for the reason that the 7 Town of Warrenton has made the affirmative 8 determination to withhold responsive public 9 records that it could disclose. So, it's not a 10 mandatory exemption; it's a discretionary 11 exemption. 12 It could -- it has, in other instances, 13 including with the CFFC, said, We're going to 14 give you the documents even though we think it's 15 subject to an exemption. And they've done that 16 in this case, and they've done it in many 17 others. 18 But, here, they have said, at least with 19 respect to we believe 3,142 emails or email 20 threads that are being -- that are mentioned in 21 Exhibit C -- and I can direct the Court's 22 attention to where that is stated -- they said,</p>

<p style="text-align: right;">13</p> <p>1 No, we don't want to do that. We are going to 2 keep that from public. 3 They are free to give them to the public, 4 and these communications have, due to the nature 5 of the requests we've made, been of the sort 6 that would involve a member of the public. So, 7 in this case, Amazon. 8 And as Your Honor observed opening this 9 hearing in a preliminary matter, the background 10 of all of this is a proposed data center 11 development in the Town of Warrenton. 12 And I'm not from the Town, so I've been 13 through it a few times and I've seen it, but 14 I've seen enough to see, and I've gone to the 15 spots and looked, and what we're talking about 16 is putting, you know, a very large data center 17 -- 220,000 square feet -- at essentially an 18 intersection at the gateway to the Town, the 19 Town of Warrenton. 20 Having, you know, going -- gone up and down 21 the streets here and seeing the old brick, it's 22 a quaint town, it's a pretty town, and that's</p>	<p style="text-align: right;">15</p> <p>1 First, may the Town assert an exemption 2 from public disclosure, particularly under 2.2- 3 3705.7(2)? 4 And why they, the Code Commission, picks 5 these numberings, I will never know. Can't we 6 just do it in sequence? 7 But, 3705.7(2) -- and I'll call that the 8 CEO exemption because I think for our purposes, 9 that's what it is. But, there are a number of 10 pieces of 3705.7(2). 11 Can they assert that exemption as to both 12 the correspondence of the Mayor the Town of 13 Warrenton has and also its Town Manager; or, is 14 it more limited than that? Is it limited to one 15 or the other; or, one in particular, the one 16 who's in fact the Chief Executive Officer? 17 Right? Or, even another possible 18 interpretation: Is it limited to the Mayor 19 because you have one? Right? There's a couple 20 of different ways to look at this. 21 We have taken the position as was taken by 22 the Freedom of Information Act Advisory Council</p>
<p style="text-align: right;">14</p> <p>1 going to have an impact on the aesthetics. It's 2 also going to have impact on reverberation 3 potentially, sound, noises, character of the 4 area, sightlines, and a number of other things. 5 So, there are a number of people who are 6 concerned about that. And then, of course, you 7 have to consider the power lines that go to, and 8 the substations, the power, and everything that 9 goes into this. 10 All of these things concern the Citizens 11 for Fauquier County, some of whom live in the 12 Town of Warrenton, some of whom live immediately 13 outside the Town of Warrenton, and so they've 14 exercised their rights under the Virginia 15 Freedom of Information Act. 16 We have received a number of materials and 17 paid for those materials, but there are at 18 least, as I indicated, over 3,000 materials that 19 have been withheld under various exemptions 20 asserted by the Town. 21 As we understand it, the two primary 22 disputes are these:</p>	<p style="text-align: right;">16</p> <p>1 20 years ago. As far as we can tell, they 2 haven't changed their mind on the issue, that 3 you get one, you get the Chief Executive Officer 4 if you're a political subdivision of the 5 Commonwealth. And the position, as we 6 understand it under Town charter, that's the 7 Town Manager, and so that's the position that we 8 have primarily asserted in our papers. 9 So, one, are there two CEOs or one CEO? 10 That's the first issue. The Town has taken the 11 position there are two that can be the basis of 12 this exemption, of this withholding. 13 Two, does correspondence -- because this is 14 an exemption for working paper and 15 correspondence of. Of who? Well, we just 16 talked about that. 17 But, what is correspondence of? In 1968, 18 when the Virginia Freedom of Information Act was 19 adopted, correspondence didn't in almost 20 anyone's life include email, of course. It was 21 generally letters. 22 And counsel for the Town has indicated that</p>

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<p style="text-align: right;">17</p> <p>1 if you read Black's Law Dictionary of 1990, and 2 then I'll tell you that it says this to this day 3 as far as I can tell, it's talking about 4 letters, right, between one person and another 5 person, and that person's response thereto. And 6 from our understanding of correspond, that makes 7 sense, one to the other, right, that 8 interchange. 9 So, does correspondence of the Chief 10 Executive Officer cloak not only every email 11 sent by the Chief Executive Officer -- 12 generated, said this is what I want to say, and 13 I'm acting on behalf of the Town, utilizing my 14 authority as the Chief Executive Officer -- but 15 also every email that they receive, even if it's 16 not addressed to the officer and is simply 17 copied? Maybe they wouldn't even read it. We 18 don't know, right? 19 If one takes the position that, you know, 20 you're on the line, right, it's in your in-box. 21 If it's in your in-box, right? If that's the 22 rule, then it can get very broad, very quickly.</p>	<p style="text-align: right;">19</p> <p>1 your first Table of Contents tab, Virginia Code 2 Section 2.2-3700, we see short title and policy. 3 In A, they give us the short title; in B, they 4 give us the policy, and they continue on that 5 some. 6 I think I'll draw the Court's attention to 7 the language that says -- and many courts have 8 noted this language when interpreting other 9 provisions of the Code, including exemptions. 10 The General Assembly ensures the people of 11 the Commonwealth ready access to public records 12 in the custody of a public body or its officers 13 and employees, and free entry to meetings of 14 public bodies wherein the business of the people 15 is being conducted. 16 The affairs of government are not intended 17 to be conducted in an atmosphere of secrecy 18 since at all times the public is to be the 19 beneficiary of any action taken at any level of 20 government. 21 Unless a public body or its officers or 22 employees specifically elect to exercise an</p>
<p style="text-align: right;">18</p> <p>1 So, I've moved up Exhibits A through E, and 2 I'd like to now direct the Court's attention if 3 I may -- and just so that it's at your 4 fingertips -- to some authority, legal 5 authority. And I will offer one to my esteemed 6 counsel for the Town, and then one -- and 7 there's -- you will note to the bailiff here to 8 be reviewed. These are statutes, a couple of 9 advisory opinions, the Town charter, cases from 10 the Supreme Court of Virginia. 11 I'm not moving into evidence -- obviously 12 the Court can take judicial notice of the law, 13 but if it was helpful to the Court to keep or to 14 put into evidence -- in any case, I'm happy to 15 have that be kept. 16 And I think it's useful to go to first 17 principles when you're dealing with an issue 18 like this, where both parties agree we don't 19 have Supreme Court of Virginia authority 20 directly on point, right? It sure would be nice 21 if we did, but we don't. 22 So, we go to some first principles. On</p>	<p style="text-align: right;">20</p> <p>1 exemption provided by this statute or any other 2 -- by this chapter or any other statute, every 3 meeting shall be open to the public and all 4 public records shall be available for inspection 5 and copying upon request. 6 All public records -- and they didn't leave 7 any doubt here. All public records and meetings 8 shall be presumed open, unless an exemption is 9 properly invoked. 10 And, as I indicated, the courts have had 11 occasion to reflect on what this means, and I 12 direct the Court's attention to the case decided 13 so recently it hasn't yet appeared in the 14 Virginia Reports, but it has been picked up by 15 Southeast Reporter, and that is Hawkins vs. The 16 Town of South Hill. It was issued on October 17 20th, 2022, and the cite is 878 S.E. 2d 408. 18 On Page 3 of Tab 8 that's before you and in 19 that opinion -- if you find your tab, it's to 20 the top of the page on the left. I just offer 21 this quote and I -- because I think it's useful 22 summation.</p>

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21

1 The legislature has set forth clear
 2 statutory cannons of construction for the VFOIA.
 3 And so if I may pause the quote, they were
 4 faced -- the Court, Supreme Court of Virginia in
 5 October of 2022 -- with what do you do with
 6 personnel information. We haven't previously
 7 interpreted it. It's rather opaque and it isn't
 8 defined.
 9 So, when they made -- they undertook that
 10 task, they began here, returning to the quote:
 11 By its own terms, the statute puts the
 12 interpretive thumb on the scale in favor of
 13 disclosure.
 14 So, that's them quoting themselves back in
 15 2015.
 16 And then, them quoting themselves in 2015,
 17 quoting what I just quoted: The provisions of
 18 VFOIA shall be liberally construed to promote an
 19 increased awareness by all persons of
 20 governmental activities and afford every
 21 opportunity of citizens to witness the
 22 operations of government.

22

1 So, a little later in 2.2-3700(B), that's
 2 where we find that one.
 3 So, starting there on the first principles,
 4 what do we do with that? When we're faced with
 5 a new problem where it's not clear what the
 6 interpretive outcome should be, we're going to
 7 be looking very closely at intent, the statutory
 8 canons that the General Assembly has provided us
 9 as a court. They didn't have to give us canons;
 10 they decided to. So, we -- we're going to take
 11 those seriously as its direction.
 12 In response, and as indicated in
 13 particularly A, B, and C of the exhibits that
 14 were attached to the petition and now admitted
 15 into evidence and before Your Honor, the Town
 16 stated that it withheld materials on the basis
 17 of several exemptions.
 18 The three primary exemptions that were
 19 relied upon -- and I'll direct the Court's
 20 attention to those as needed here -- was the one
 21 for personnel information, the same thing
 22 addressed in Hawkins, the case we were just

23

1 looking at.
 2 So, they said -- and this was even before
 3 Hawkins was issued, so it didn't have the
 4 benefit of the guidance of Hawkins, but they
 5 said 2.2-3705.1(1), Personnel Information, that
 6 applies to at least some of these 4,100 and --
 7 excuse me, 3,142 emails or email threads. It
 8 didn't give additional clarity on that point,
 9 but we know that that's been invoked.
 10 Then they also invoked the attorney-client
 11 privileges to at least some, and that is under
 12 2.2-3705.1(2), so right after that. And I've
 13 provided that authority in the Table of
 14 Contents, 3705.1, that Code section is Tab 3.
 15 So, if Your Honor would like to look at those,
 16 it has it before it.
 17 And then, it also asserted under Virginia
 18 Code Section 2.2-3705.7(2) what I've been
 19 calling the CEO exemption, the right to withhold
 20 correspondence of the Town Manager and,
 21 initially at least, the Town Mayor.
 22 And I believe they remain -- they continue

24

1 to contend that they're entitled to withhold the
 2 Town Mayor and the Town Manager's
 3 correspondence. As I've indicated, they've
 4 sometimes given us some of it, but they haven't
 5 -- including most recently last night. Mr. Crim
 6 was kind enough to relay eight emails from the
 7 Town Mayor and said, We are not going to insist
 8 upon the exemption with these particular
 9 materials. This was last night. So, we have
 10 that.
 11 We know -- and I'll direct the Court's
 12 attention to Exhibit C as it was offered. We
 13 know from that exhibit in a number of places
 14 that the Town has taken a pretty broad
 15 interpretation of what it can withhold.
 16 So, not only we get two executives -- we
 17 get Town Manager and the Town Mayor, because we
 18 got both, so we're going to assert it as to
 19 both, but we also are going to assert it in the
 20 language of Mr. Clough in an October 28th email
 21 -- and that can be found on Page 9 of Exhibit C
 22 if I can pull up --

25

1 CFFC asked, trying to figure out the Town's
2 position, Is it the Town's position that, one,
3 any email exchange between Ms. Schaeffer and
4 Amazon and Amazon attorneys while she was Town
5 Manager are exempt under Virginia Code Section
6 2.2-3705.7, question mark.
7 Answer, Yes, that's the position.
8 Two, Any email exchange between Town staff
9 and Amazon and Amazon's attorneys that include
10 Ms. Schaeffer on the distribution list are
11 exempt under Virginia Code 2.2-3705.7?
12 The response was more equivocal, but it did
13 take the position, This is an item we need
14 clarification on. We would have to review these
15 emails to identify and separate the
16 correspondence of the Town Manager.
17 So, it would appear they're taking the
18 position, yes, as an initial matter, we have
19 withheld those as exempt. If you want us to
20 bear down on that, maybe we need to look at it
21 more. We're not sure, right? We're not sure
22 exactly which ones are which, but at least as an

26

1 initial matter, there's probably some in there,
2 right, because we're hold -- withholding, you
3 know, over 3,000 emails.
4 And then, Number 3, Any emails exchanged
5 between Town staff and Ms. Schaeffer while she
6 was Town Manager that relate to Amazon or
7 Amazon's attorneys are exempt.
8 And so the language is exchanged.
9 Are they exempt under Virginia Code 2.2-
10 3705.7?
11 And the answer there is very clearly yes.
12 So, this is fairly broad interpretation,
13 and the reason for our concern at least -- and
14 I'll direct the Court's attention to where we
15 get these numbers because I know they -- these
16 email threads are not that easy to follow.
17 At the bottom of Page 3, in response to
18 Number 7 -- again, looking at Exhibit C that's
19 been admitted here. In response of Mr. Clough
20 to Request 7. And the request is basically
21 communications between Town folks of any sort --
22 Town staff, Town Manager, Town other people --

27

1 and Amazon folks of any sort, you know, even
2 people who are consultants, attorneys, and
3 representatives and not just employees or what
4 have you.
5 It indicates documents have been released,
6 but then it also indicates that emails or email
7 chains are exempt, particularly under those
8 three exemptions I indicated, and that indicates
9 that 3,142 of them are exempt. So, I presume
10 there's some repository that you can quickly --
11 or hand-counted. Somebody knows, okay, yeah,
12 that's where they sit. Those are the exempt
13 ones.
14 So, we know there's a -- it's a fairly
15 broad statement that's been made by the Town
16 here, and it's a fairly broad withholding, quite
17 a few documents.
18 And what does that tell you? Well, it
19 tells you a couple things that aren't stated
20 that I think are useful.
21 You ask for them, so there's a proper
22 request.

28

1 They're responsive, right, so you could get
2 them.
3 They're public records, so the public
4 records of a public body conducting public
5 business.
6 So, you've already satisfied all of 3704,
7 right, that initial do you get these. And the
8 only reason the answer is no is, We can assert a
9 discretionary exemption that we here offer and
10 have asserted it as to these public records of a
11 public body conducting public business. I think
12 that's a point not to miss.
13 So, the key text here that the Court is
14 being asked to wrestle with, it's not an easy
15 one because other courts haven't wrestled with
16 it at any great length.
17 There is a good case out of City of
18 Fairfax, or County of Fairfax, that I think has
19 done a good job, from Judge Alden back in 2011,
20 in seeking to understand what correspondence
21 means. And that's the other nub of disagreement
22 here. So, correspondence to CEOs are kind of

29

1 the nubs of disagreement.
2 But, the key text for both is going to be
3 found and is found in 3705.7(2), and that is Tab
4 5. And when we look at that, we have to start
5 with -- start with the words. That's what the
6 Court's been telling us for a long time. Start
7 with the words.
8 Well, the words are working papers and
9 correspondence. Those are the first words in
10 (2).
11 It's worth perhaps before I get there
12 saying the following information -- information
13 -- the following information contained in a
14 public record -- two different things -- is
15 excluded from the mandatory disclosure
16 provisions of this chapter -- mandatory
17 disclosure -- but may be disclosed by the
18 custodian in his discretion, except where such
19 disclosure is prohibited by law.
20 There's no argument that this -- there's a
21 prohibition of law for the disclosure, so we can
22 set that little bit aside.

30

1 Information contained in a public record.
2 So, public record is broadly defined in 3701 as
3 basically any kind of static medium, electronic,
4 paper, or otherwise maintained by the recipient
5 as a custodian. And I'm not quoting there, but
6 I can get you that quote if you'd like, Your
7 Honor. That's -- it's broad.
8 Well, information that itself is working
9 papers and correspondence, that may be, under
10 (2), withheld. But, it's not just that
11 language. There's "of the..." So, we have "of
12 the..." so it's certain persons' working papers
13 and correspondence.
14 In the first line or phrase, we have the
15 Office of the Governor. Well, the Governor
16 changes; the officers isn't -- the Office of the
17 Governor doesn't, right? There's an ongoing
18 constitutional officer who fills that role under
19 the Virginia constitution.
20 There's a Lieutenant Governor that's also
21 -- while the person who occupies the office may
22 change, that's a proper noun, Lieutenant

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1 Governor of Virginia, or the Attorney General of
2 Virginia. And that's a -- there are not two of
3 them. It's very clear there's just one. We
4 know that.
5 Then we get to the next semi -- the first
6 semicolon and the next grouping. The Members of
7 the General Assembly, the Division of
8 Legislative Services, or the Clerks of the House
9 of Delegates or the Senate of Virginia. That's
10 our next clause.
11 And you'll see here we're identifying
12 officers elected to fill roles, and we're going
13 to find proper nouns. I mean, you either are or
14 you aren't the officer who holds that unique
15 position within the whole Commonwealth of
16 Virginia. You're a Member of the General
17 Assembly, one of the 140 we get at any one time,
18 give or take, right? The Division of
19 Legislative Services or the Clerks, and you get,
20 you know, one for each House.
21 Then we get to a new clause because now
22 we're doing something a little different. The

32

1 Mayor or Chief Executive Officer of any
2 political subdivision of the Commonwealth.
3 That's the clause.
4 So, we know we're distributing working
5 papers and correspondence, right? We know that
6 that first language needs to come down here
7 because, you know, we're not exempting the
8 people or the officers. We're exempting their
9 working papers and correspondence, and we're
10 exempting a not-proper title. It's not a one-
11 in-the-Commonwealth kind of deal or a hundred
12 delegates and 40 senators. It's one clerk in
13 each House.
14 Now we've got all of these political
15 subdivisions. You've got municipalities and
16 then you've got some things that are not --
17 they're quasi-municipalities. You've got a
18 range of different entities.
19 I'm going a little out of turn to get to
20 make the point here. Political subdivisions
21 are, and I've worked for a couple of them.
22 In the case of York County versus Peninsula

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1 Airport Commission. So, you had a county that's
2 clearly a locality fighting with an airport
3 commission, and the holding there was that the
4 Peninsula Airport Commission was a political
5 subdivision. So, there's many of them, and
6 they're not all towns and cities, right?
7 They're not municipalities.
8 So, you have quite an array of such things,
9 and some of them have mayors and some of them
10 don't; and some of them have strong mayors,
11 where the mayor really exercises a lot of
12 authority, and some of them don't, right?
13 Depends on the town charter.
14 Here, we have a town charter in the Town of
15 Warrenton that tells us we have a strong Town
16 Manager with all the executive authority under
17 the Town charter, and we have a fairly symbolic
18 Town Mayor under that charter.
19 Without getting too far ahead, so, we've
20 got political subdivisions of the Commonwealth,
21 and we're trying to figure out today, What does
22 that mean? I think when we're trying to figure

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1 out what that means, we can't ignore the
2 definite article "the." We have to distribute
3 it through the "or" -- the mayor or chief
4 executive officer. That's the natural reading.
5 And we have to recognize that this is not a
6 proper noun -- any political subdivision of the
7 Commonwealth, knowing full well they take many
8 different forms.
9 How do we interpret this thing? As I noted
10 at the outset, you can interpret it at least
11 three ways. You could say in the case of the
12 Town of Warrenton, you could say, well, you have
13 a mayor, so that's it. You get that mayor,
14 because the "or" was intended to kind of account
15 for the case where you don't have the mayor,
16 right? Certainly, the Peninsula Airport
17 Commission doesn't have the mayor.
18 Or, you could take the position that you
19 get the chief executive officer, and in your
20 case, it may be the mayor or it may not be. In
21 the Town of Warrenton's case, the town manager
22 is not the -- in fact the functional chief

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1 executive officer of the Town and is not
2 designated as such in the charter.
3 Or, you could take the position that is
4 being taken by the Town here, which is you get
5 both. The "or" is actually an "and" and you get
6 both of them. That's the interpretation that
7 gets you the most withholding and the least
8 disclosure, right? It's definitely the one if
9 you want to not give stuff, that's the
10 interpretation you take. That's the
11 interpretation that's been taken here.
12 I note that, you know, the General Assembly
13 did choose when it had the Office of the
14 Governor and had Members of the General Assembly
15 to expand what that meant to say, Hey, this is
16 the definition. It's not actually just the
17 members, it's not just the governor or maybe the
18 governor's most immediate aide; it means a bunch
19 of other folks, right? So we've got a little
20 bit more guidance there, but I think it's
21 somewhat instructive. We don't have that kind
22 of expansive take being offered here.

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1 And not only do we not have that expansive
2 take being offered, we have some pretty
3 significant caveats, right? One begins,
4 However.
5 However, no information that is otherwise
6 open to inspection under this chapter shall be
7 deemed excluded by virtue of the fact that it's
8 been attached to or incorporated within any
9 working paper or correspondence.
10 So, it can be attached to or incorporated
11 in correspondence alone and it doesn't make it
12 exempt.
13 Further, information publically available
14 or not otherwise subject to an exclusion under
15 this chapter or other provision of law that has
16 been aggregated, combined, or changed in format
17 without substantive analysis or revision.
18 So, forwarding it on, copying and pasting
19 it in, that shall not be deemed working papers.
20 And I think we can gather some meaning
21 about what are working papers and correspondence
22 from what's talked about here. It does seem

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1 that just passing something on, just attaching
2 it to, we know that's not correspondence. That
3 doesn't make it exempt. We have that clear from
4 the "However" there. We have it also clear from
5 the "Further" there. We have some indication
6 from the working papers that they thought it was
7 something that was prepared by or for a public
8 official -- or not thought, they told us that's
9 what it is -- identified in a subdivision for
10 his personal or deliberative use. So, working
11 paper was fairly personal to the identified
12 officer.
13 I think it's fair to assume that
14 correspondence was supposed to function somewhat
15 the same way. It's working papers and
16 correspondence.
17 In 1968, it indicated that correspondence
18 wasn't just email, cc, and all around the world;
19 it was somebody sending a letter, signed
20 Governor, or Dear Governor, or something of that
21 character. We think that informs our
22 understanding of what correspondence should be.

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1 As we struggle through and, you know, try
2 to give the meaning intended by the General
3 Assembly, the General Assembly has not left us
4 without, as I indicated, some help. It said,
5 Look -- as I said -- and I'll ellipse some of
6 this information.
7 Unless a public body or its officers or
8 employees specifically elect to exercise an
9 exemption provided by this chapter or any other
10 statute, all public records shall be available
11 for inspection, copied upon request.
12 All public records shall be presumed open
13 unless an exemption is properly invoked.
14 So, it starts with that. Presumption goes
15 that way. That's not usually how it works.
16 I've been on the other side against localities
17 in tax cases. But, presumption of correctness
18 does a lot of work. Does the same thing in a
19 challenge to legislative action generally.
20 Doesn't do any work here. Goes the other way,
21 in fact, as we'll see.
22 The Town actually has the burden to prove

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1 that an exemption properly asserted applies to a
2 given public record. It's not my words. It's
3 Virginia Code Section 2.2-3713(E).
4 Quote, In any action to enforce the
5 provisions of this chapter, the public body
6 shall bear the burden of proof to establish an
7 exclusion by a preponderance of the evidence.
8 And that's Tab 6.
9 THE COURT: Let me interrupt you for a
10 minute. Let me just ask a sort of a practical,
11 hypothetical question here.
12 MR. BRADY: Sure.
13 THE COURT: Let's assume that I want some
14 information from the Executive Branch of
15 Government of the Commonwealth, so I send a FOIA
16 request to the Governor, the Lieutenant
17 Governor, and the Attorney General. Okay? Does
18 that mean that the Executive Branch of the
19 Government in Virginia gets to pick only one of
20 those three to claim the exemption for, or can
21 they claim the exemption for all three of them?
22 MR. BRADY: Excellent question, Your Honor,

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1 and I'd say the answer is clearly it can claim
2 as to all three.
3 THE COURT: Okay. Why is that different
4 than the phrase here, the Mayor or Chief
5 Executive Officer?
6 MR. BRADY: Because in that case, you're
7 identifying specific titles of the Commonwealth,
8 these folks, right? And so you're listing them
9 as here are the people that have the exemptions,
10 right, and he's not -- it's not a category of
11 things, all Governors of somewhere, right? It's
12 the Governor, right? And then the Lieutenant
13 Governor and the Attorney General, right? So
14 you've really -- you've -- you're identifying
15 all the people in that series who have the
16 exemption.
17 Here, you're talking about it in kind of an
18 open-ended, indefinite array of subdivisions.
19 Some have mayors, some don't. Some have both.
20 We're -- you know, we're left with a couple of
21 plausible interpretations, I would contend. And
22 when you're left with those plausible

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1 interpretations, at the end of the day, I think
 2 the canons do a lot of work for you. The policy
 3 does a lot of work for you. The legislative
 4 intent does a lot of work for you, and that
 5 intent is in favor of disclosure. Those rules
 6 of construction are narrowly interpreting.
 7 Those burdens are on the government to establish
 8 they apply. So, that's why I think you get a
 9 different outcome.
 10 Now, if it said -- taking your point
 11 further, if it said -- and it wouldn't here
 12 because they don't care that much about the Town
 13 of Warrenton, right? But, the Mayor of the Town
 14 of Warrenton and the Chief Executive Officer of
 15 the Town of Warrenton, right, or of each town.
 16 Then, I think that comparative parallel might
 17 still follow, right, because you're saying it's
 18 the same thing that you're doing here.
 19 I don't think you're doing the same thing
 20 when you're saying any political subdivision
 21 because you're trying to encapsulate a lot of
 22 different kinds of entities that have different

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1 kinds of officers. And here, we have two
 2 officers, one political subdivision. You're
 3 taking the most restrictive interpretation, one
 4 that was rejected by the advisory council in
 5 2002. It hasn't been changed.
 6 THE COURT: But I can't -- the problem I
 7 have, Mr. Brady, is that I'm having trouble
 8 ignoring the plain language of the statute that
 9 says the way it's set up -- and I have to
 10 interpret this statute in a way that makes
 11 sense. I can't do it so that we get a crazy
 12 result or an incongruent result, I think is the
 13 language in the cases, and I have to interpret
 14 it the same way.
 15 So, you're telling me I have to interpret
 16 the Office of the Governor, Lieutenant Governor
 17 or Attorney General differently than I have to
 18 interpret when it says the Mayor or Chief
 19 Executive Officer. I have to interpret those
 20 two phrases differently?
 21 MR. BRADY: I think you have to interpret
 22 it differently for this reason. What you're

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1 interpreting differently is the "or," right?
 2 THE COURT: Yes.
 3 MR. BRADY: That's really what you're
 4 interpreting.
 5 THE COURT: Yes.
 6 MR. BRADY: Right? They're saying it's an
 7 "and" effectively. And in the opening passages,
 8 it's a direction to -- you can withhold working
 9 papers and correspondence of this entity, this
 10 guy, this guy or gal, this guy or gal. Right?
 11 Here, it's not the Attorney General of the
 12 Commonwealth; it is of any political
 13 subdivision. So, it's much more open-ended,
 14 right, and therefore, it's intended to apply in
 15 a lot of different situations. And you have to
 16 then decide what does that mean in this
 17 situation. It's a bit more construction.
 18 There's almost no construction.
 19 THE COURT: If it was intended to be
 20 interpreted that way, wouldn't the legislature
 21 have said something in the statute that we mean
 22 this differently than we mean the preceding

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1 phrases? That's the problem I'm having with it
 2 quite frankly.
 3 MR. BRADY: And I would contend that you
 4 could say -- you could put different
 5 interpretations on this language. I'm willing
 6 to admit that. But, I think that cuts in our
 7 favor, not in favor of the Town, right?
 8 If a provision that's an exemption that's
 9 to be narrowly construed -- and it's broken off
 10 by semicolons. It's not the same provision,
 11 right? And it says, okay, what do we do with
 12 this one? It's different. It's unique. Well,
 13 you've got to give this one its meaning. It's
 14 not the same language as that one. It's
 15 different language.
 16 And, I contend the language is different in
 17 that significant respect because we're not
 18 dealing with the one governor, the one
 19 lieutenant governor, the one attorney general.
 20 We're dealing with a lot of different entity
 21 types. There's hundreds, in fact, in the
 22 Commonwealth.

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1 But that's not even the most pressing thing
2 here today. So, it's significant, but as I
3 indicated a few minutes ago, I've been told --
4 and I'll let Mr. Crim speak to this, he can have
5 an update -- that we've received in response to
6 these requests those materials that were
7 withheld on the ground of the Mayor's exemption.
8 Now, we received them yesterday, right? We
9 received after we filed suit and all of that.
10 And we didn't receive them within five working
11 days or an extension thereof, and so there's
12 still a violation, we would contend. They say,
13 no, there isn't a violation, but we've decided
14 to give them to you because we want to be
15 pleasant, I guess.
16 That's only one piece. The 3,142 are not,
17 as far as we know, that's not them, right? So,
18 even if you get both officers, it still has to
19 be correspondence, right, or working papers.
20 And what's interesting is that the
21 contention is made that they can withhold
22 working papers and correspondence, and that's

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1 conjunctive, but mayor and chief executive
2 officer is disjunctive. It's just -- it's an
3 interesting fact, right? Again, it only -- in
4 the extent that it expands withholding, that's
5 the consistency between those interpretations.
6 As I was indicating, there's no presumption
7 of regularity. On 2.2-3713(E), quote, No court
8 shall be required to afford any weight to the
9 determination of a public body as to whether an
10 exclusion applies.
11 That they don't -- not assumed to be
12 correct. You can't take their word for it.
13 And the Cartwright case, 270 Va. 58 -- I
14 did not include that into the pack of
15 authorities because there's really not anything
16 on point except this notation.
17 270 Va. 58, it's a 2005 case. Quote, This
18 is contrary to the rule in common law mandamus
19 proceedings which places the burden on the
20 petitioner to prove the violation of a right of
21 privilege and in which there is a presumption of
22 regularity in the conduct of government

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1 business.
2 So, we have the burden on the government.
3 We have the obligation to disclose being
4 liberally construed and exemptions narrowly
5 construed all in favor of disclosure and against
6 secrecy.
7 The Hawkins case, 878 S.E. 2d 408, which is
8 Tab 8, points us back to this.
9 Quote, As an exemption to VFOIA, the terms
10 of Code Section 2.2-3705.1(1) are to be narrowly
11 construed to provide open access to public
12 records.
13 As I've indicated, I believe the Town has
14 in its responses taken a broad view of what
15 correspondence is. It's taken a broad view of
16 how many officers they get. It's taken a broad
17 view of correspondence. We believe that's
18 inconsistent with plain language of the statute,
19 canons of construction, interpretations of the
20 courts on how to approach a Virginia FOIA.
21 And I would direct the Court's attention on
22 the dual officer issue just to Tab 13 and say I

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1 believe it's clear that the Court has engaged on
2 this issue, the dual officer, for 20 years as of
3 October 30th, 2002 and to the present, Tab 13,
4 FOIA advisory opinion.
5 The group that has been given authority by
6 the General Assembly to provide advice to local
7 governments has taken a particular position on
8 this, and they said "or" should be disjunctive
9 in this context, and that's what you should do,
10 and you should look at it functionally. And
11 that's what a lot of courts have done.
12 THE COURT: Is that council just purely
13 advisory, or is it some sort of administrative
14 agency? Because there's a difference in how
15 judicial review occurs if you're dealing with an
16 administrative agency as opposed to what
17 appears, at least from the wording of the
18 statute, to be simply an advisory body.
19 MR. BRADY: Yes.
20 THE COURT: Is there a difference there?
21 MR. BRADY: There is a difference, Your
22 Honor. This is not, you know, APA appeal,

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1 right?
2 THE COURT: Right.
3 MR. BRADY: We don't get that kind of,
4 well, the regulations say, or their position
5 that's long been. We don't get that. I
6 understand that. And it's not an Attorney
7 General opinion either.
8 But, it's worth noting in Hawkins, which is
9 Tab 8, they reviewed it. They reviewed the
10 advisory opinions with regard to personnel
11 information. They reviewed them alongside the
12 Attorney General opinions as persuasive
13 authority to be considered by the Supreme Court
14 of Virginia. I'll --
15 THE COURT: It's not entitled to
16 necessarily the deference that you would give to
17 an administrative agency.
18 MR. BRADY: I am not contending deference.
19 That would be error, right. That would be
20 error. Deference is a special thing and I'm
21 familiar with that in the case law.
22 But, it is entitled to persuasive note, I

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1 would contend. And it has been noted, and it
2 hasn't been changed. And certainly, there have
3 been plenty of opportunities for the General
4 Assembly to say, That's not what we meant. Or,
5 for someone to go to the Office of the Attorney
6 General and say, Can we get an opinion that
7 actually says that that's actually not right?
8 Because if we did, that would give us some
9 authority on the other way.
10 I think it -- Hawkins is worth noting not
11 just because they do look at an advisory opinion
12 and give it some dignity, but because in
13 Hawkins, a person requested information that was
14 ultimately concluded some of it to be personnel
15 information and some of it not to be. So,
16 exempt under one of the exemptions that are
17 being contended for here, and then some of it
18 not exempt, and the Court sends it back.
19 And Justice Mann, relatively new to the
20 court, writing for the court, reviews what was
21 done by the Town of South Hill, kind of the
22 positions that were taken.

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1 And if you go to Tab 8, Page 2, right under
2 411, which would be the S.E. 2d cite, it notes
3 each document was withheld by the town pursuant
4 to the personnel information exemption.
5 And you kind of wonder, well, what are
6 these documents? The first document was a
7 demand letter from a town employee's attorney to
8 the town attorney, so it doesn't involve any of
9 our people here -- not town manager or town
10 mayor.
11 The second document was a one-page petition
12 to the town's personnel committee requesting a
13 meeting regarding the town manager, so not of
14 his correspondence, but involving him.
15 The third one, it was employee from -- it
16 was an email chain from a town employee to the
17 town mayor and city council regarding
18 discipline.
19 And the fourth one was an unsigned document
20 received by the town mayor, complaining about
21 the town manager.
22 Well, if this dual executive theory was

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1 generally accepted and applied in all cases, why
2 didn't they move to exempt on that basis?
3 Instead, they said, No, it's personnel
4 information.
5 It's not going -- and you may hear, Well,
6 everyone does this. If you get a manager and a
7 mayor, then, you know, if you think it's worth
8 it, you withhold on both. And I suspect we're
9 going to hear some of that from Mr. Crim.
10 Didn't do it here, and that's a published
11 decision where the Town of South Hill seemed to
12 have reason to fight. It fought all the way up
13 to the Supreme Court of Virginia. They didn't
14 take that position. I think that's somewhat
15 telling.
16 But, I don't want to focus all of the
17 Court's attention on that issue because, as I
18 indicated, I think there's a violation here. I
19 think we can establish a violation by
20 withholding of the materials of the Town Mayor
21 on the basis of this exemption. You don't get
22 two CEOs. It didn't work so well for the Roman

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1 Empire. I don't think that's what the General
2 Assembly intended. But, the -- now it's still
3 got to be working papers or correspondence.
4 And, you know, we are kind of in the dark
5 when it comes to looking at what documents
6 they're withholding -- I've got you there -- and
7 you are, too, Your Honor. And I -- it's -- and
8 certainly, it could be different, but it isn't.
9 We don't yet have those materials submitted to
10 you by the Town.
11 So, what do we do? Well, you know, as in
12 Hawkins, we're left with trying to define --
13 decide what this is. And the Town has taken the
14 position that you get both.
15 And as I quoted to you, if it's, you know,
16 exchanged with, it's on the distribution list,
17 it appears Town Manager gets to exempt it if
18 they want to.
19 So, I mean, think that through a little
20 bit. Just as an example, even if we have just
21 one CEO. We have a Town Manager. The Town
22 Manager says, I'd like to be copied on

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1 everything because I think it's important that
2 the business of the Town be under my direct
3 supervision. And we're not a big town, right,
4 so I can be kind of looped in. I'll get a big
5 in-box. You copy me on everything. And they
6 tell this to members of the public, and they
7 tell it to the staff. Well, then everything in
8 the in-box is correspondence of the CEO.
9 Is that really -- they only get it because
10 she chooses or he chooses to let you have it?
11 It's legislative -- it's the grace of the
12 locality to enjoy VFOIA? That's definitely a
13 plausible outcome here from taking an
14 interpretation of the type that's been stated.
15 And I don't think that that's an outcome that
16 jibes with the plain meaning of correspondence,
17 which is informed in the dictionary, among other
18 sources, or one that jibes with the goals and
19 the construction and public disclosure.
20 So, look into plain meaning. And Mr. Crim
21 helpfully quoted on Page 7 of his brief a bit
22 from Black's Law Dictionary. It's consistent

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1 with what we talked about.
2 Correspondence is, quote, the letters
3 written by a person and the answers written by
4 the one to whom they are addressed.
5 I think then at least -- probably the most
6 plausible, if not, at least a plausible
7 interpretation of correspondence is in the world
8 of email, you know, Dear Town Manager, Thank
9 you, you know, from Town Manager to sender.
10 Yes, I'm aware of your issue and I'm addressing
11 it in the following ways.
12 That could be correspondence. We're not
13 going to contend that that's not correspondence.
14 That's an awful lot like what you would have
15 seen in 1968, and certainly within the plain
16 meaning.
17 Now, when you get distribution lists, you
18 could get -- you get a lot further afield. It's
19 just everything that they get in their stinking
20 in-box. We were told in Exhibit C that
21 everything in the in-box from April 1st, 2022 to
22 July 12th of 2022 was over 8,000 emails. And

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1 we're also told that 3,400 were withheld. So,
2 I'm not that great at math. That's over 40
3 percent. That's a really big percentage.
4 You know, again, maybe the Town Manager
5 just emails all day long and that's -- and it's
6 all direct. But, I think that's something worth
7 checking here.
8 And that's our position, is that they've
9 said if it's on the distribution list, it's in.
10 That's not what correspondence means.
11 Again, that's not just the plain language.
12 It's Black's Law Dictionary. That's -- other
13 judges have looked at this issue and puzzled
14 over it and -- not many, but Judge Alden in
15 Fairfax County, 83 Virginia Circuit 172, and
16 that's at Tab 11. I've included it there for
17 you for ease of reference, and I think it's
18 worth noting a couple of points.
19 And really, the relevant language on this
20 -- because there was also a public meeting issue
21 that fortunately we don't have here -- is on
22 Page 4.

<p style="text-align: right;">57</p> <p>1 Roman Numeral Four, Compliance with Freedom 2 of Information Act Requests. The Court found 3 that the Board failed to comply in a timely 4 manner with some of Ms. Hill's document requests 5 pursuant to the Act. 6 That's the language that that begins with. 7 It relies in part on the language. 8 No record which is otherwise open to 9 inspection under the Act shall be deemed exempt 10 by virtue of the fact that it has been attached 11 to or incorporated within any working paper or 12 correspondence. 13 And the court interprets that some when it 14 continues, In the present case, many of the 15 emails were held -- withheld were between board 16 members and the superintendent was merely copied 17 as a recipient. 18 Superintendent was the chief executive 19 officer in that context. It's a superintendent 20 of the school board there. 21 Emails between board members are open to 22 inspection. The fact that the superintendent</p>	<p style="text-align: right;">59</p> <p>1 this section from a public record shall be 2 conducted in accordance with 2.2-3704.1. 3 And what does that tell us? It's the 4 section that the Supreme Court of Virginia was 5 humble enough in the Hawkins decision to say 6 they were reversing us. We made a decision 7 about withholding the entirety of a public 8 record that contained some information, and the 9 General Assembly said, No, you can't do that. 10 And, so, the Supreme Court humbly noted, or the 11 General Assembly corrected them. 12 No provision of this chapter is intended, 13 nor shall it be construed or implied, to 14 authorize a public body to withhold a public 15 record in its entirety on the grounds that some 16 portion of the public record is excluded from 17 disclosure by this chapter or by another 18 provision of law. A public record may be 19 withheld in its entirety only to the extent that 20 an exclusion from disclosure applies. 21 So, the entire content. 22 Otherwise, only those portions of the</p>
<p style="text-align: right;">58</p> <p>1 received or even read a copy of these emails 2 does not qualify them as part of his working 3 papers or correspondence within the meaning of 4 the Act. 5 And then explaining further, Such emails do 6 not reflect the work of the superintendent, nor 7 do they evidence communications intended only 8 for the superintendent. Those emails, 9 therefore, should have been disclosed. 10 I think it's also troubling on one caveat 11 as I used, or exemption point that I think is 12 worth noting is that we have a number of 13 materials provided to us, including some last 14 night, but we don't appear to have the 15 attachments. 16 So, 2.2-3705.7(2) directs the custodians of 17 these public records that redaction of 18 information -- and again, it's information, it's 19 not the whole record. It's very clear, 20 information versus record. That's a 21 distinction. 22 Redaction of information excluded under</p>	<p style="text-align: right;">60</p> <p>1 public record containing information subject to 2 an exclusion under this chapter... 3 So, certainly, if the email is not 4 excluded, what's the theory of excluding the 5 attachment? It comes with it. 6 Only those portions of the public record 7 containing information subject to an exclusion 8 under this chapter may be withheld, and all 9 portions of the public record that are not so 10 excluded shall be disclosed. 11 We've got some issues with redaction 12 withholding. You know, we've got 3,142 emails 13 or email threads. It's a tremendous volume of 14 material. We think given the position taken by 15 the County on correspondence on dual officers, 16 both being the most restrictive interpretation 17 as we can see it available under the statute, we 18 would request that the Court rule that they're 19 limited to one officer, the Chief -- usually 20 chiefs, but there's one -- and that you be 21 certainly limited to correspondence in the 22 traditional sense, in the plain meaning sense,</p>

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1 not in the it's in your in-box sense.
2 Otherwise, the interest of public
3 disclosure, information available to the public,
4 the workings of government, are capable of being
5 simply eroded by gamesmanship, by cc lines and
6 bcc lines, directions of that sort.
7 We made our requested relief fairly clear,
8 but we contend and think that the case law is
9 fully supportive of the notion of to the extent
10 there are documents being withheld in light of
11 this Court's ruling, whatever that may be, and
12 what the standard is on that, then an in-camera
13 review of some sort should be conducted in order
14 to ensure that that rule is being carried out.
15 And we ask that that be conducted; that
16 documents improperly withheld be produced; that
17 if there are violations -- and we think there
18 have been in the case of the withholding in
19 there, but we think there are additional
20 violations here -- that the Court would grant us
21 the relief provided.
22 When the Court finds the denial to be in

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1 violation of the provisions of this chapter --
2 under 2.2-3713(D). When the Court finds the
3 denial to be in violation of the provisions of
4 this chapter, the petitioner shall be entitled
5 to recover reasonable costs, including costs and
6 reasonable fees for expert witnesses and
7 attorney fees from the public body if the
8 petitioner substantially prevails.
9 And there's also the, you know, make an
10 award unjust and all that, and I think that's
11 something to be addressed under the Court's
12 determination.
13 And Mr. Crim and I have had a good
14 conversation about how this plays out, and I
15 think the Town is prepared to work with us as
16 best they can to try to get this information
17 forward.
18 But, we think now the Court needs to give
19 the parties guidance and make a ruling to
20 protect the interest in public disclosure that
21 are being abridged here by the Town.
22 Thank you, Your Honor.

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1 THE COURT: Thank you, Mr. Brady. Mr.
2 Crim?
3 ARGUMENT BY COUNSEL FOR THE RESPONDENT
4 MR. CRIM: Thank you, Your Honor.
5 First, I want to introduce Stephen Clough
6 with me at Counsel table. He's the Town Clerk.
7 A couple of quick updates for you, Your
8 Honor. As Mr. Brady mentioned, we did file a
9 brief yesterday and --
10 THE COURT: I've read it.
11 MR. CRIM: -- I understand you've had an
12 opportunity to review that, so I won't belabor
13 that.
14 Also, yesterday, as Mr. Brady indicated, we
15 did provide all of the Mayor's correspondence
16 that we had previously withheld under the
17 correspondence exemption.
18 The issues here are somewhat conflated with
19 the underlying land use action, but there's no
20 requirement for there to be any purpose or good
21 purpose for a FOIA request. Under the law, as
22 cases have interpreted it, if you have a good

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1 purpose, a bad purpose, or no purpose at all,
2 you can, as long as you're a citizen or
3 representative of news media, you can request
4 public records and the local government has to
5 respond to you.
6 So, in this situation, the purpose of the,
7 you know, the issue with -- regarding the SUP is
8 legally irrelevant. The substations and the
9 power line are irrelevant. They're not even
10 under the Town's control at this point because
11 there's not any substation proposed in the Town.
12 And this matter, Your Honor, to respond to
13 something you said early on in this hearing is
14 -- was if, you know, there is a hearing on
15 Tuesday. There's a public hearing on Tuesday,
16 but this case has been ongoing since July. So,
17 if there's any sense of urgency, it's due to
18 CFFC's decision to file its pleading last month.
19 So, let me touch on some of these issues
20 here that Counsel just raised. And I want to
21 say that the Town really has gone above and
22 beyond. I mean, the statute recommends, the

<p style="text-align: right;">65</p> <p>1 statute directs this public body to work with 2 the applicant, and we've done that multiple 3 times over multiple requests involving 4 thousands, literally thousands of documents. 5 Some of the requests have been a little bit 6 hard to parse, you know, so, you know, all 7 documents exchanged between or -- and this the 8 bottom of Page 3 of Exhibit C. All documents 9 exchanged between or relating or referring to 10 correspondence or communications and the so ons, 11 Paragraph 7 there, it's a long list of things 12 that is not entirely clear. It could be 13 interpreted a number of ways, and we've worked 14 with the applicant, with the requestor, to try 15 to address those and clarify those. 16 But, as I indicated in my brief, you can't 17 import the limits on working papers into the 18 correspondence exemption. Those are two 19 different categories of exemption. Working 20 papers are defined. They're further constrained 21 by the requirement that something simply 22 attached to a document can't be considered</p>	<p style="text-align: right;">67</p> <p>1 the people the most information they can 2 possibly get. It's got clearly carved out 3 exemptions that people, the elected and 4 appointed officials, have the right to rely on. 5 THE COURT: If the purpose of the statute 6 is to inform the public -- 7 MR. CRIM: Yes, sir. 8 THE COURT: -- that interpretation of that 9 phrase Mayor or Chief Executive Officer, 10 whatever the language is, runs afoul of that 11 purpose, doesn't it? 12 MR. CRIM: That's what the advisory council 13 decided, but I don't think they were right. 14 They were -- they had to rewrite the statute in 15 order to make their interpretation make any 16 sense. They added a provision that says they 17 would -- you know, their interp -- 18 Their council, their advisory opinion, 19 says, Well, you have to make a decision. You, 20 the local government, have to make a decision 21 and you can never change it without either the 22 mayor or the chief executive officer, and that's</p>
<p style="text-align: right;">66</p> <p>1 working papers. 2 And the argument -- and, you know, I don't 3 think I need to belabor this point because the 4 questions that you asked of opposing counsel got 5 to this issue. If you're going to interpret the 6 word "or" consistently through that subsection, 7 then it has to mean that the correspondence of 8 the Mayor or the correspondence of the Town 9 Manager is exempt at least in the discretion of 10 that individual. The Mayor of the Town of 11 Warrenton has now exercised that discretion to 12 release the eight emails that had previously 13 been withheld. 14 So, the word "the" and the word "or" have 15 to be interpreted consistently throughout that 16 subsection. 17 THE COURT: What happens, though, if that 18 interpretation, that consistency, leads to a 19 result that's not contemplated by this kind of 20 statute, which is just designed to give people 21 the most information that they can possibly get? 22 MR. CRIM: But it's not designed to give</p>	<p style="text-align: right;">68</p> <p>1 nowhere in the statute. So, you can't import 2 words into the statute. If your interpretation 3 means that you are adding language to the 4 statute, then that's a bad interpretation. 5 THE COURT: Give me that one again. They 6 added the word "or." 7 MR. CRIM: No, they add -- 8 THE COURT: That's one of the problems, 9 isn't it? 10 MR. CRIM: They added a whole provision 11 that the local government has to make an 12 election for all time between the mayor and the 13 chief executive officer. 14 THE COURT: Where is that? 15 MR. CRIM: That's in the advisory council's 16 opinion. 17 THE COURT: Oh. 18 MR. CRIM: Yeah. That's -- 19 THE COURT: I'm talking about amending the 20 statute. 21 MR. CRIM: No. Well, effectively, what 22 they're trying to do would be a --</p>

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1 THE COURT: I'm talking about the
 2 legislature amended the statute in 2017 --
 3 MR. CRIM: Yes, sir.
 4 THE COURT: -- and added all those "ors" in
 5 there.
 6 MR. CRIM: It did add a bunch.
 7 THE COURT: For some reason that nobody can
 8 fathom, I guess.
 9 MR. CRIM: Well, you know, they -- the
 10 words "or" there are meaning that this exempt --
 11 these two exemptions -- the working papers
 12 exemptions and the correspondence exemptions --
 13 apply to anybody in that list.
 14 It's like the case that was decided by the
 15 advisory council about making or uttering or
 16 passing a bad check. If you pass a bad check,
 17 you've run afoul of the law. If you make the
 18 bad check, you've run afoul of the law. If you
 19 utter the bad check, you've run afoul of the
 20 law. So, any of those would apply. Okay.
 21 THE COURT: Go ahead.
 22 MR. CRIM: That's our position, and I think

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1 that's the only rational and consistent
 2 interpretation.
 3 So, let me address Counsel's, opposing
 4 counsel's, discussion about correspondence. The
 5 Town Manager, previous Town Manager, like a lot
 6 of town managers, does -- did send a lot of
 7 emails, yeah. That is for sure.
 8 The Town has released a lot of those
 9 documents that were issued by the previous Town
 10 Manager, Ms. Schaeffer. And those are the ones
 11 that -- the ones that we released really didn't
 12 require her expertise or input. For example,
 13 there were squad reports from the police
 14 department that were within the scope of the
 15 request. We released all those.
 16 So, the argument that we -- well, CFFC
 17 wants to kind of have it both ways. They want
 18 to say that we waived the exemption by releasing
 19 some of these documents, and then they also want
 20 to say that we're violating the law by
 21 withholding documents that are not exempt
 22 because she wasn't the only person on the To

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1 line. There's nothing that says that she has to
 2 be the only person on the To line -- that's just
 3 not the law -- in an email.
 4 So -- and it's a discretionary exemption,
 5 so the person holding the exemption -- the Mayor
 6 or the Manager -- has a right to release some,
 7 all, or none of documents that are lawfully
 8 covered by the exemption.
 9 So, what happened when we got CFFC's
 10 request was we made a good faith effort. We
 11 worked with the applicant to -- with the
 12 requestor to clarify what they wanted. And
 13 then, we had to determine what correspondence
 14 is. So, that's more than just saying who's on
 15 the To line, or it is -- it's a process of
 16 looking at the email and deciding whether this
 17 is, you know, part of our correspondence.
 18 Now, I want to make sure I'm clear on this
 19 next point with regard to distribution lists
 20 because to me, that could mean a number of
 21 things. If I get a distribution -- if I'm on a
 22 distribution list of a hundred people in a --

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1 it's not directed to me. If I'm on a
 2 distribution list of five people, it may very
 3 well be directed to me. So, I'm not sure that
 4 the word "distribution list," that phrase,
 5 really gets us anywhere.
 6 The Town said that we -- if there was a
 7 distribution list from Amazon that included the
 8 Manager, those documents were withheld, and we
 9 asked for -- they asked us if that was the case
 10 and we said we really want to clarify this with
 11 you, and we never really got that clarity from
 12 them about what they meant.
 13 There's several sections in the pleadings,
 14 Your Honor, that I'm still not clear what CFFC
 15 is quoting in Paragraphs 66, 72, and 73.
 16 They're quoting something, but there's no
 17 citation given, so I really don't know what they
 18 are referring to, and I didn't hear it in their
 19 opening argument.
 20 So, let me talk, if I may --
 21 THE COURT: Go ahead.
 22 MR. CRIM: -- about the willful and knowing

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1 violation accusation. That's been
 2 unsubstantiated. The -- you know, we
 3 acknowledge that there is a FOIA Advisory
 4 Council opinion that is counter to our
 5 understanding of the law. We said, Yes, that
 6 exists, but it's wrong, and if it's wrong, we
 7 don't have to follow it.
 8 The FOIA Advisory Council, the Court asked,
 9 you know, what's the status of those opinions.
 10 They are by law allowed to be used as a shield.
 11 If the Court finds that you violate -- that a
 12 local government violated the FOIA, but the
 13 local government can point to an advisory
 14 opinion that says do it this way, and they did
 15 it that way, then that's a shield.
 16 But, there's nowhere in the statute that
 17 says it can be used as a sword. You can't turn
 18 around and say failure to follow an advisory
 19 opinion subjects you to liability under the
 20 statute.
 21 And the repeat offender penalties clearly
 22 do not apply to a first offense, and there's

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1 been no allegation that there's been any prior
 2 offenses.
 3 I also need to talk about some of the parts
 4 of the Prayer for Relief that go beyond the
 5 power of the Court, beyond what the statute has
 6 provided to the Court.
 7 Prayer for Relief subsection B requests
 8 production of documents that the Town does not
 9 demonstrate to be statutorily exempted, but it's
 10 unclear what they mean by demonstrate. The
 11 typical process, the accepted process, is for
 12 documents to be produced in camera for the
 13 judge's inspection.
 14 Well, we had -- your eyebrows tell me the
 15 story that -- counsel and I had a conversation
 16 the last couple of days, which is, you know, all
 17 3,142, or is there some way to narrow that down?
 18 And if there's a -- if the judge -- Judge, if
 19 you tell us there's a way to narrow that down,
 20 we will do that, but it is the accepted process.
 21 Another problem with the Prayer for Relief,
 22 subsection C, said -- it requests an order that

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1 the Town refrain from assessing fees, but
 2 there's no citation to any authority for the
 3 Town to -- for the Court to require the Town to
 4 do that. I submit that there is no authority
 5 for the Court to prohibit assessing fees.
 6 Subsection D of the Request for Relief
 7 requests a civil penalty of \$2,000 per public
 8 record withheld in violation of FOIA. So, let
 9 me cite to that. Let me speak to that in a
 10 number of ways. I've got four points on that.
 11 First point, there's no authority cited for
 12 it being per document.
 13 Number two, the language of the statute
 14 provides for \$2,000 per violation, not per
 15 document.
 16 Number three, CFFC has verbally indicated
 17 that they don't seek millions of dollars in
 18 civil penalties, but they haven't put that in
 19 writing. The millions of dollars is, if you do
 20 the math, \$2,000 times 3,142 documents is \$6
 21 million and some change. So, we're still --
 22 that's what it says on paper right now.

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1 And the fourth point I want to make, Your
 2 Honor, is when the General Assembly wants to
 3 impose a fine per document, it knows how to do
 4 that.
 5 If you look at Section 2.2-3714(B), as in
 6 boy, it says that there's a \$100 fine for any
 7 document altered or destroyed, and that's per
 8 record. So, they know what it means to say per
 9 record, how to say that.
 10 Prayer for Relief, subsection E requests
 11 attorney's fees, but that only applies if the
 12 petitioner substantially prevails, and that's
 13 premature at best at this point. Much of the
 14 relief can't be granted. So, if you ask for
 15 relief and don't get it, then you haven't
 16 substantially prevailed.
 17 And the attorney's fees don't -- can't --
 18 shouldn't be awarded if special circumstances
 19 make an award unjust. Amongst other things, you
 20 can point to reliance on court opinions, which
 21 I've done in my brief, that support the Town's
 22 position. The --

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1 Another reason why the attorney's fees
2 shouldn't be awarded -- and I may be getting
3 ahead of myself, but the first three pages of
4 the petition are an introduction, and then it
5 continues in the body within the numbered
6 paragraphs, as well, about the SUP for the data
7 center and so on. And that was written for the
8 newspaper. That wasn't written for the Court.
9 It's got nothing to do with what the Court is
10 asked to do here today.
11 If the -- the CFFC petition also asks about
12 third parties' FOIA requests. That's
13 irrelevant.
14 So, let me go back to the issue of the
15 interpretation of the word "or" if I might. I
16 stand by everything that I wrote in the brief,
17 but let me just expand on that, which is that
18 the consistent reading of that is that -- and
19 the General Assembly went back and added those
20 ors in 2017 to make sure that each one of these
21 is a separate category.
22 They also added the word "the" before

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1 Lieutenant Governor, but I'm not sure that
2 that's significant or not. The --
3 You know, if you were writing, if you were
4 taking notes on that, you would want to write
5 out, you know, Column A and Column B, and that
6 Column A would be What, and Column B is Who.
7 Column A is Correspondence and Working Papers.
8 The "and" there means that it's -- the exemption
9 applies to both categories, but they are two
10 separate categories. You don't have to have a
11 working paper that's also correspondence or vice
12 versa. They're -- the courts have held -- and I
13 cited this in my brief -- different things.
14 And then the "Who," it's Office of the
15 Governor -- that's defined; the Lieutenant
16 Governor; the Attorney General; the Clerks of
17 the House and Clerks of the Senate; and then the
18 Mayor or Chief Executive Officer of the
19 political subdivision.
20 And then also, and I think this is key and
21 it didn't come up in the discussion Mr. Brady
22 had with you, is that it says the President or

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1 Other -- I don't have the language in front of
2 me -- Chief Executive or Chief Officer of a
3 university. And I cited in my brief to the
4 statute that provides that some chief executives
5 of Virginia State universities aren't called the
6 President. They're -- one's the Supervisor,
7 Chancellor, or, you know, there's different
8 terms.
9 So, when the General Assembly means to say
10 one or the other but not both, they can say
11 President or other chief executive like they did
12 in the very next phrase after Mayor or Town
13 Manager -- or Chief Executive Officer, sorry.
14 So, I think that's pretty clear that -- in the
15 statute.
16 So, in conclusion, Your Honor, with regard
17 to what comes next, in discussion with opposing
18 counsel, it appears clear that there's going to
19 need to be in-camera review if you decide that
20 the Town is -- might have violated the FOIA; or,
21 that the only way to determine whether the Town
22 has violated FOIA for review of these documents

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1 that were exempted and determination one by one
2 as to whether they meet the various exemptions
3 -- personnel, correspondence, attorney-client
4 privilege, trade secret, personnel.
5 And, so, that is the next step that would
6 have to take place. And there are thousands of
7 emails. We're happy to make them available to
8 you electronically or in hard copy, whatever the
9 Court prefers. But, any other -- any
10 determination or -- of ordered releases at this
11 point, or other relief, is premature.
12 And, any sense of urgency for a case that's
13 been -- for a request that's been going on since
14 July is due to CFFC's decision about when to
15 file suit.
16 THE COURT: Could you describe sort of
17 generically, without going into detail, what
18 these three thousand -- 3,100-plus emails are
19 about?
20 MR. CRIM: Yes, sir.
21 THE COURT: And the reason why they were
22 withheld? Can you do that?

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1 MR. CRIM: Yes, sir.
2 THE COURT: Sort of generically?
3 MR. CRIM: Generically, what I would say is
4 that they -- there were a number of
5 correspondence, exchange of information,
6 discussions about next steps between the
7 previous town manager and Amazon with regard to
8 the proposed data center and the SUP, the
9 Special Use Permit, that they were requesting to
10 build the data center. So, tons of technical
11 issues.
12 An SUP has to be -- meet a number of
13 criteria that are set out in the ordinance.
14 There are, you know, any number of issues that
15 have to be addressed.
16 At one point, there was a substation
17 proposed on part of the land. So, just tons of
18 technical issues.
19 And some of them related to the tax issue,
20 how much tax revenue might this generate.
21 That's where the -- where Amazon is requesting
22 that that information be considered confidential

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1 tax information under Virginia Code Section
2 58.1-3.
3 And similarly, most or all of that would
4 also constitute trade secrets.
5 THE COURT: Would it be possible for you to
6 get, say, five examples of those emails in the
7 different categories that you claim exemption
8 for and send them to me, and I will keep them
9 under seal?
10 MR. CRIM: Yes, sir.
11 THE COURT: And not reveal them to the
12 Petitioner at this time, and then make a
13 determination?
14 MR. CRIM: Happy to.
15 THE COURT: I think that's probably what's
16 going to have to happen here.
17 MR. CRIM: Okay.
18 THE COURT: All right?
19 MR. CRIM: Thank you, sir.
20 THE COURT: Thank you, sir. I'll tell you
21 how to get it -- get them to me in just a
22 minute.

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1 MR. CRIM: Yes, sir.
2 THE COURT: All right. Mr. Brady, brief
3 response?
4 FURTHER ARGUMENT BY COUNSEL FOR THE PETITIONER
5 MR. BRADY: Thank you, Your Honor, and I
6 will keep it brief.
7 I know that Mr. Crim has made some
8 statements about this is how these things are
9 done, but, I mean, what we've heard today is
10 only argument, not evidence, so we don't have
11 anything to bear -- carry the burden of the Town
12 today to establish the exemption.
13 So, what I'm hearing is, well, we'll curate
14 some examples for you -- five of maybe 3,142 --
15 we contend fit into these categories, entirely
16 in the dark from CFFC, entirely in dark from the
17 judge. You don't really know from what they're
18 selecting. And then you're going to look at
19 those five. We're not, even as attorneys, going
20 to look at them.
21 THE COURT: Five of each category.
22 MR. BRADY: Five of each category, okay.

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1 So, depending upon how many categories he comes
2 up with, there may be 15, maybe 20, maybe --
3 THE COURT: Okay. How about 10 of each
4 category, Mr. Brady, if that makes you feel any
5 better? That's the only way I know of that I
6 can do this without making them turn them over,
7 and I'm not --
8 And I will tell you all right now, and I
9 don't care if the Supreme Court or the Court of
10 Appeals hears this or not, I am not going to
11 read 3,100-plus emails. I'm just not going to
12 do it. I don't have the time to do it, nor the
13 inclination to do it. So, I trust Mr. Crim to
14 get me examples. Make it 10, Mr. Crim.
15 MR. CRIM: Yes, sir.
16 THE COURT: Ten examples of each category
17 that you claim these emails are exempt -- the
18 reason why they're exempt.
19 MR. CRIM: Yes, sir.
20 THE COURT: All right?
21 MR. BRADY: Your Honor, may I suggest --
22 and I understand that you don't want to read

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1 3,142. We frankly don't either.
2 THE COURT: I don't -- I didn't think you
3 did, but that's okay. Go ahead.
4 MR. BRADY: I'd be willing to suffer
5 through it as Attorneys' Eyes Only if the Court
6 would permit. And I know I'm offering, not in
7 the sacrificial --
8 THE COURT: Let me look at them first and
9 then I'll decide.
10 MR. BRADY: Because the -- Your Honor, what
11 I'm suggesting is if we looked at them and said
12 these are objectionable, we don't think that
13 these ones should have been withheld under the
14 explanation we're getting, we would then bring
15 them to your attention, and that's what I'm
16 offering.
17 THE COURT: I'll look at them first and
18 then decide whether to -- whether they're going
19 to be revealed or whether all of them are going
20 to be revealed after I have a chance to review
21 them.
22 MR. BRADY: Thank you, Your Honor. Again,

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1 I -- yeah. I just want -- I think it's worth
2 noting that we're at the stage now where, you
3 know, the Town is to establish that their
4 exemption applies.
5 What we've heard is Mr. Crim -- and Mr.
6 Crim did not actually do the review of the 3,142
7 himself, so I hope that -- I want the Court to
8 know that. And we haven't heard from anyone who
9 did.
10 THE COURT: All right.
11 MR. BRADY: I would turn the Court's
12 attention very briefly to Exhibit C where it was
13 claimed that, well, you know, they don't know so
14 much about distribution lists because they've
15 never followed up on clarification.
16 And the clarification question was offered
17 on Page 9. And unfortunately, the system
18 actually reversed chronological order, right, so
19 the newest thing is in the front and the oldest
20 thing is in the back.
21 So, on Page 9, we say -- they say, in
22 response to the question, an mail -- any email

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1 exchanged between Town staff and Amazon and
2 Amazon's attorneys that include Ms. Schaeffer on
3 the distribution list are exempt. This is an
4 item we need clarification on. Review of these
5 emails would require staff time and attorney
6 time to identify and separate the
7 correspondence.
8 So, we might be able to pull those out.
9 They might be in there in that sense, but we --
10 if you'd like us to proceed, let us know.
11 Then we provide on Page 6 also -- with
12 regard to our latest communication, we provide
13 an -- you know, a clarification.
14 The Town is claiming exemption for
15 documents exchanged between Town staff and
16 Amazon and Amazon's representatives that include
17 Brandie Schaeffer, while Town Manager, on the
18 distribution, as well as the other documents for
19 which an exemption is claimed. Please indicate
20 the number of documents that applies to each and
21 whether the documents are being redacted in
22 whole or in part.

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1 And then the answer we received was, Under
2 Virginia Code 22-3705.7, all communications with
3 the Town Manager are exempt. Staff must review
4 the communications to see if they need to be
5 fully exempt or released with redactions.
6 Well, they were held fully exempt. Fully
7 exempt email threads.
8 When we release the documents, staff will
9 let you know the number of emails that have been
10 fully exempted and the exemption that it falls
11 under. They haven't, but...
12 We are undergoing this process currently
13 and as such do not have the final number
14 available at this time.
15 Well, don't have the final number available
16 at this time either. And it's concerning that
17 we don't know if they have a way to identify
18 exactly what they withheld and why they withheld
19 it. They said they have.
20 And with regard to the willful violation,
21 we're trying to establish to this Court that
22 there is a violation because of what the law is.

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1 Once the Court gets to look at that, then they
2 can start thinking about is it willful.
3 With regard to repeater penalties, I don't
4 think we have to spend a lot of time on that.
5 But, I think that it's at least the case that if
6 you violate the FOIA with respect to one
7 request, violate the FIOA with respect to
8 another request but only get sued after the
9 second one and the Court finds violations in
10 them, too, it might be more than one violation.
11 I don't think you have to lose two court cases
12 to get repeater penalty.
13 So, I'm not contending that all 3,142 are
14 separate violations in this context that need to
15 be the source of \$2,000 a pop, or as low as 500.
16 On the substantially prevailed, I just
17 would say that's rewriting the statute. Saying
18 if you ask for something and don't get it, you
19 haven't substantially prevailed, well, that's
20 totally prevailed; that's not substantially.
21 So, that's silly.
22 And then we were told another reason why we

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1 don't get attorney's fees is because we have an
2 introduction written for the papers. We have a
3 judicial proceedings privilege. This is a
4 matter of public interest. We're talking about
5 VFOIA. This Court is a human. Everyone else
6 wants to know what's this about. I think the
7 idea that, well, you had a couple of pages
8 telling you what this is about, can't have that.
9 And with regard to when we filed suit, we
10 filed suit in December. The last communications
11 with the Town about what they're withholding are
12 late October, early November just with the Town
13 itself. Then we send the letter and we get a --
14 and I'll give it to him. We gave them a prompt
15 response. They told us, No, we stand by it, go
16 away. That was in November.
17 Then we have an obligation to write the
18 thing and send it to them, prepare a
19 verification, affidavit, offer it to them and
20 say, Do you still have the same position?
21 And they, to their credit, promptly said,
22 No, go away.

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1 That's why it was filed in December,
2 because that's when the process concluded. And
3 it was quick as we could put it in front of Your
4 Honor. It is not our desire to not have this
5 information when the Town is moving with all
6 expedition to a determination on this SUP.
7 So, with that, I would request the Court
8 take the steps it's discussed. If the Court in
9 its discretion and judgment thinks that -- well,
10 I would simply ask, if the Court would prevent
11 us the opportunity to review to object, we would
12 appreciate --
13 THE COURT: Okay. Say that again.
14 MR. BRADY: If the Court would permit
15 counsel alone the opportunity to review, we
16 would appreciate that.
17 THE COURT: All right. Soon as I get a
18 chance to have a look at them, I'll let you --
19 I'll let counsel know.
20 MR. BRADY: Thank you, Your Honor.
21 THE COURT: Mr. Crim, I think probably the
22 easiest way to get these to me is to mail hard

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1 copies to my -- to me personally. File them
2 with the -- don't file them with the clerk.
3 Send them to me at Post Office Box 1863,
4 Alexandria, Virginia, 22313, and I will --
5 MR. CRIM: Can I read that back, Your
6 Honor?
7 THE COURT: Yes.
8 MR. CRIM: P.O. Box 1863, Alexandria,
9 Virginia, 22313.
10 THE COURT: That's correct. And I will
11 take a quick look at them, and then let counsel
12 know whether they're going to be available, and
13 I will get to this just as quickly as I can. I
14 recognize the importance of it. Let me put it
15 that way.
16 Thank you, counsel.
17 MR. CRIM: Thank you, Your Honor.
18 MR. BRADY: Thank you.
19 BAILIFF: All rise.
20 THE COURT: All right. We'll stand
21 adjourned.
22 (The hearing concluded at 2:29 p.m.)

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1 CERTIFICATE OF COURT REPORTER

2

3 I, Donald E. Lane, II, the officer before
4 whom the foregoing proceedings were held, do
5 hereby certify that said proceedings were
6 electronically recorded by me; and that I am
7 neither counsel for, related to, nor employed by
8 any of the parties to this case and have no
9 interest, financial or otherwise, in its
10 outcome.

11 IN WITNESS WHEREOF, I have hereunto set my
12 hand this 12th day of January, 2023.

13

14 Certificate No.: 7727988

15

16 Expiration Date: 6/30/2025

17

18 

19 _____
20 Donald E. Lane, II, Court Reporter

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