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IN THE  
**SUPREME COURT OF VIRGINIA**

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RECORD NO. 141780

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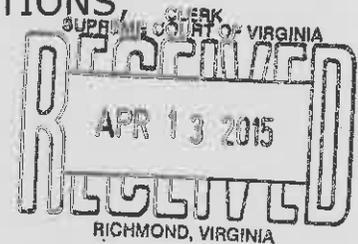
VIRGINIA DEPARTMENT OF CORRECTIONS,

*Appellant,*

v.

SCOTT A. SUROVELL,

*Appellee.*



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**BRIEF OF AMICUS CURIAE  
VIRGINIA COALITION FOR OPEN GOVERNMENT  
IN SUPPORT OF APPELLEE**

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Steven Rosenfield (VSB#16539)  
Attorney at Law  
913 East Jefferson Street  
Charlottesville, VA 22903  
(434) 984-0300  
attyrosen@aol.com

*Counsel for Amicus Curiae*

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## **STATEMENT OF CONSENT**

Pursuant to Va. Sup. Ct. R. 5:30, the Virginia Coalition for Open Government, through undersigned counsel, respectfully submit this brief as amicus curiae in support of Appellee Scott A. Surovell. Pursuant to Va. Sup. Ct. R. 5:30(b)(2), this brief is filed with the consent of all parties.

## **STATEMENT OF INTEREST**

Founded in 1996, the Virginia Coalition for Open Government ("VCOG") is a non-partisan, non-profit organization dedicated to protecting rights of Virginia citizens to open access to public records and proceedings. VCOG has more than 175 individual and institutional dues-paying members; membership is open to anyone.

The subject matter of this appeal concerns foundational components of the Virginia Freedom of Information Act ("VFOIA") as applied in two circumstances. First, the appeal asks whether individuals or agencies should be allowed to preclude access entirely to any record or document by inserting a single piece of information that is properly entitled to one of the exemptions

specified under current VFOIA provisions. This is the Virginia Department of Corrections' (VDOC) proposed "no redaction" or "all-or-nothing" rule. Second, the appeal asks whether a circuit court's careful consideration of all evidence and testimony presented in support of the application of an exemption to VFOIA—evidence consisting entirely of testimony of employees of the agency seeking the exemption—and the court's finding that the exemption applies to some matters and not to others, is deficient or otherwise in error, not for lack of process or review, but merely because the agency disagrees with the outcome on the record presented to the Circuit Court.<sup>1</sup>

The legal questions to be decided by this Court could eviscerate the effectiveness of current VFOIA law and profoundly affect the access all Virginians are statutorily entitled to have to information in the possession of their state and local governments. The VCOG is keenly aware of the critical role VFOIA

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<sup>1</sup> The circuit court applied the requested VFOIA exemption to portions of the information requested and not to other information relating to the execution of condemned prisoners in Virginia. VCOG does not and has never taken an organizational position on capital punishment.

plays and is intended to play in promoting an informed citizenry and open government, and this brief seeks to provide the Court with an understanding of the broad implications of this case on Virginia public records law.

## **SUMMARY OF THE ARGUMENT**

“A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.” 9 Writings of James Madison 103 (G. Hunt ed. 1910). Madison is known generally as the tribune of open government and the philosophical father of the Freedom of Information Act. His sentiments have guided the foundation and direction of Virginia government since its inception.

At issue here is whether the VDOC shall lead the Commonwealth away from its fundamental commitment to, and inherent trust in, an informed citizenry, and whether the Virginia Freedom of Information Act. Va. Code. § 2.2-3700, *et. seq.*

(VFOIA), should be interpreted to require this change of course. VCOG believes that this Court should answer a resounding “no” to each question, and that VDOC’s arguments find no support in the language, intent, or spirit of VFOIA or Virginia’s commitment to an informed citizenry.

As is made plain in the preamble to VFOIA, its intent is to “ensure[] the people of the Commonwealth ready access to public records in the custody of a public body or its officers and employees.” Va. Code. § 2.2-3700(B). The preamble continues:

The affairs of government are not intended to be conducted in an atmosphere of secrecy since at all times the public is to be the beneficiary of any action taken at any level of government. Unless a public body or its officers or employees specifically elect to exercise an exemption provided by this chapter or any other statute... all public records shall be available for inspection and copying upon request.

The provisions of this chapter shall be liberally construed to promote an increased awareness by all persons of governmental activities and afford every opportunity to citizens to witness the operations of government. Any exemption from public access to records or meetings shall be narrowly construed and no record shall be withheld or meeting closed to the public

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

*Id.*

Here, Surovell requested records from VDOC under VFOIA. VDOC provided a subset of the records and withheld others pursuant to the "security exemption" contained in Va. Code § 2.2-3705.2(6). Surovell took his request to the Circuit Court, which, after a day-long hearing at which the VDOC was invited to present any and all evidence in support of application of an exemption, ruled that some—but not all—of the materials withheld by the VDOC were indeed protected under the security exemption. The Circuit Court was in the best position to consider the evidence and arguments of the parties, and its adjudication of the matter was appropriate and should not be disturbed.

Most troubling to VCOG is the VDOC's position that, in circumstances where some information in a document is covered by an exemption but other information indisputably is not covered, Virginia courts are *prohibited* from ordering government agencies to disclose redacted versions of records pursuant to the VFOIA and thereby provide citizens access to public records and

also protect information encompassed in an exemption. The Circuit Court in this case ordered that portions of the requested documents be provided to Plaintiff once exempt information had been redacted. According to the VDOC, a public record is exempt from VFOIA, and may therefore be withheld from public scrutiny, if *any portion* of that document—no matter how small—is exempt. Were this Court to adopt such a gross misinterpretation of the statute, it would present a significant blow to open government in Virginia.

## **ARGUMENT**

### **I. The Circuit Court's Adjudication of Surovell's VFOIA Request was Precisely as Contemplated by the Statute**

VCOG has significant experience with VFOIA issues and is well-positioned to evaluate the quality of the Circuit Court's adjudication of this matter. The record in this matter provides every indication that the Circuit Court adhered to the statutory requirements under Va. Code § 2.2-3713. No objection was made to venue or to the specificity or sufficiency of Surovell's petition. The court held the VDOC to its burden to establish an exemption,

Va. Code § 2.2-3713(E), but provided the VDOC with ample time well beyond that provided by statute to prepare for the hearing, then extended what was scheduled to be a three-hour hearing into a day-long proceeding. Indeed, the Circuit Court sided with the VDOC on several points regarding application of exemptions, but also recognized VFOIA's mandate that the public have access to non-exempt information.

The VDOC now protests that the Circuit Court should have reached a different decision on the record before it, but it asserts no procedural errors; it essentially asks this Court to give it a "second bite at the apple" and to rule differently than the court that actually heard all of the evidence the VDOC provided and assessed its sincerity, weight, and credibility. The Circuit Court was the court best situated to assess the evidence and arguments of the parties, and the VDOC has offered no basis for finding its determinations deficient. In the experience of Amicus, the Circuit Court was faithful to the process of review in every aspect. There simply is no basis for disturbing its Order.

## **II. The VDOC's Argument on Redaction Misinterprets the Statute and Presents a Serious Threat to Open Government in Virginia**

One of the matters at issue in the Circuit Court was Plaintiff's request for information contained in current and prior editions of VDOC's execution manual.<sup>2</sup> Based on testimony and evidence presented by the VDOC, the Circuit Court agreed with the VDOC that portions of the manual are subject to the security exemption and need not be disclosed. Therefore, the Circuit Court ordered the VDOC to redact the exempted portions of the manuals and provide to Plaintiff the redacted versions. The VDOC now appeals this ruling, taking the implausible position that the Circuit Court had no authority to order redaction and that the

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<sup>2</sup> Significant information contained in the manual has been released by the VDOC and published by courts in litigation in which the VDOC was a party. See, e.g., *Emmett v. Johnson*, 532 F.3d 291, 294 (4th Cir. 2008) (detailing dosage and sequence of each lethal injection chemical as described in execution manual, and other information about the execution process); *Walker v. Johnson*, 448 F. Supp. 2d 719, 720 (E.D. Va. 2006) (same). Some of the information was made public directly by the VDOC through press releases. See "Virginia Department of Corrections Adds Alternative Lethal Injection Chemical," VDOC Press Release, Feb. 20, 2014, available at: [http://vadoc.virginia.gov/news/press-releases/14feb20\\_finalLIdrugsrelease.shtm](http://vadoc.virginia.gov/news/press-releases/14feb20_finalLIdrugsrelease.shtm) (accessed Apr. 10, 2015).

VDOC may withhold documents *in their entirety* if any portions of them are covered by any VFOIA exemption. This Court should reject this misreading of the statute, because to adopt the VDOC's position would be to risk gutting VFOIA itself.

#### A. The VDOC Misinterprets the Statute

VFOIA was explicitly intended to be "liberally construed" in favor of disclosure of public information. Va. Code §2.2-3700 (B). Importantly, the statute specifically contemplates redaction. For example, the statute lays out the various responses a public body *shall* give in response to a VFOIA request, including notice that the records have been redacted:

The 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 or the custodian has exercised his discretion to withhold a portion of the records in accordance with this chapter. Such response shall identify with reasonable particularity the subject matter of withheld portions, and cite, as to each category of withheld records, the specific Code section that authorizes the withholding of the records. When a portion of a requested record is withheld, the public body may delete or excise only that portion of the record to which an exemption applies and shall release the remainder of the record.

Va. Code §2.2-3700 (B)(2). Similarly, Va. Code §2.2-3700 (G), which deals with a public body's provision of electronic records, unambiguously anticipates redaction. Section (G) creates an exception to the rule that "no public body shall be required to create a new record if the record does not already exist," Va. Code §2.2-3700 (D), allowing "the excision of exempt fields of information from a database" because such redaction "*shall not* be deemed the creation, preparation or compilation of a new public record." Thus, with this language the legislature took pains to *protect* and *ensure* a VFOIA requester's right to receive redacted documents, by preventing public bodies from reading Section (D) as a license not to redact.

Given that the statute expressly favors—indeed, mandates—redaction, it is unsurprising that the opinions of the Virginia Freedom of Information Advisory Council ("VFOIA Council" or "Council") likewise direct public bodies to redact when necessary. The Council was created by the General Assembly with its specific goal being "to encourage and facilitate compliance with the Freedom of Information Act." Va. Code § 30-178. In a 2002

opinion, Council asserted that “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 . . . . FOIA would *require* the release of [the non-exempt] part of the record, even if other information in the same record may be redacted.” Virginia Freedom of Information Advisory Opinion AO-13-02 (issued Oct. 31, 2002). Similarly, in a 2003 opinion, the Council stated that “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).

Thus the VDOC’s position is at odds with both the plain language of the statute itself and the FOIA Council’s learned interpretation of the statute.<sup>3</sup>

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<sup>3</sup> Indeed, the VDOC’s argument is supported by only a single Circuit Court opinion, *Virginian-Pilot Media Cos. v. City of Norfolk Sch. Bd.*, 81 Va. Cir. 450 (2010). For the reasons set out above, that case was wrongly decided, and this Court need not give it any weight.

B. The VDOC's Reading of the Statute Poses a Threat to Open Government that Extends Far Beyond This Case

This will be this Court's first opportunity to make law on the issue of redaction in the VFOIA context. Were this Court to accept the VDOC's misreading of the statute, it would be providing a blueprint to any government agency seeking to keep its operations secret from the citizens of Virginia. Any agency could make all of its records inaccessible to the public by simply including one small piece of exempted information in each document. This would effectively render VFOIA meaningless, and contravene the legislature's clear aim in adopting it, that "the people of the Commonwealth [have] ready access to public records" and; to that end, that VFOIA "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." Va. Code. § 2.2-3700(B).

The VDOC's argument that this Court should read a "no redaction" clause into VFOIA is not limited to any circumstances or information specific to this case. Nor is it restricted to the

“security exemption.” Rather, its proposed interpretation of the statute would thwart citizen attempts to obtain information from any agency affected by any exemption.<sup>4</sup>

Access to public records is crucial to citizens. It also affects citizens in a wide range of occupations, including academics and researchers, journalists, historians, sociologists, and epidemiologists, as well as genealogists, attorneys, land developers, architects, private investigators, and data brokers. The Virginia Freedom of Information Advisory Council (“VFOIA Council”) keeps statistics on who contacts their office with VFOIA issues. In 2014, the VFOIA Council fielded 1,494 inquiries. Of those, 517 came from citizens, 174 came from news media, and the rest (803) came from government employees. Report of the Virginia Freedom of Information Advisory Council to the Governor and the General Assembly of Virginia, House Document No. 19

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<sup>4</sup> In addition to the security exemption, VFOIA contains more than 150 other exemptions, including those for personnel records, legal advice, legal work product, test results, and educational records, and many more. Va. Code. § 2.2-3705.1, 3705.4.

(Dec. 2014), <http://foiacouncil.dls.virginia.gov/2014a4.pdf>, pp. E1-2.

In the absence of clear direction from this Court confirming responsibility for redaction where appropriate, government agencies in Virginia would be (and currently may consider themselves) authorized to circumvent VFOIA's design to "promote an increased awareness by all persons of governmental activities and afford every opportunity to citizens to witness the operations of government." Va. Code. § 2.2-3700(B). The consequence is that the public is deprived of the very information VFOIA intends to make accessible.

VCOG is uniquely qualified to provide information to this Court about the practical ways in which access to public information will be impeded if this Court accepts the VDOC's argument on redaction. VCOG is regularly contacted by citizens seeking assistance in obtaining public records, including those whose VFOIA requests have been entirely denied by various government agencies refusing to acknowledge the existence of

documents or provide redacted versions protecting exempted portions but providing public information.

For example, in December 2014, VCOG was contacted by a journalist working for the Franklin Center for Government and Public Integrity, a non-profit organization based in Alexandria, Virginia, promoting a well-informed electorate and a more transparent government. The journalist was investigating the administrative response of the University of Virginia (“UVA”) to recent allegations of sexual assault there, clearly a matter of significant interest and importance at a public university receiving taxpayer funding. UVA’s response was to withhold all of the requested records rather than redact the exempted portions, such as student names and other identifiable data.

In April of this year, VCOG received a query from the news editor at C-VILLE Weekly in Charlottesville, Virginia, who is investigating the possibility that a local high school is failing to follow its own policy on teacher evaluations. The editor wrote to VCOG that: “I requested under FOIA copies of all the observation forms from the last academic year—with personal identifying

information redacted, in order to attempt to avoid having the request get hung up on the personnel records exemption.” The only information the editor sought, in fact, was the date on which the evaluations took place. In response, the school district refused to redact and refused provide any records at all on grounds that the documents contain personnel information that is exempt pursuant to Va. Code. § 2.2-3705.1(1). In some instances, these blanket denials are issued only minutes after requests are made, suggesting documents are not thoroughly reviewed by the public entity from which information is requested.

If this Court sides with the VDOC, the application, fate, and effectiveness of Virginia’s public records law will be left in the hands of the agencies the same laws set out to make accountable for keeping the public informed about government activities.

These agencies could essentially eliminate the impact of VFOIA simply by creating documents that include a combination of public and exempt information. Indeed, the Commonwealth would be placed far out of step with other jurisdictions. VCOG is aware of no state or jurisdiction in the United States in which courts are

unable to order redaction to facilitate release of public information. Federal courts enforcing the federal Freedom of Information Act routinely order redaction. *See, e.g., Billington v. U.S. Dept. of Justice*, 301 F. Supp. 2d 15, 21–22 (D.D.C. 2004) (finding government’s redaction over-inclusive and ordering release of portions previously redacted together with portions that were properly redacted). Indeed, even when matters of national security are at stake, the records of federal agencies are subject to production with redaction. *See ACLU v. U.S. Dept. of Defense*, 628 F.3d 612, 625–26 (D.C. Cir. 2011) (upholding redaction of information exempted from FOIA on national security grounds); *Campbell v. U.S. Dept. of Justice*, 164 F.3d 20, 31 (D.C. Cir. 1998) (assessing adequacy of government’s justification for redaction on national security grounds); *King v. U.S. Dept. of Justice*, 830 F.2d 210, 223–24 (D.C. Cir. 1987) (holding that agency withholding information subject to FOIA request on national security grounds must describe each document *or portion thereof* withheld).

Numerous states also have public records law favoring redaction. *See, e.g., State ex rel. Welden v. Ohio State Med. Bd.*, 968 N.E.2d 1041, 1044–45 (Ohio App. 2011) (holding court must make an individualized scrutiny of records in question and that upon finding excepted information, this information must be redacted and any remaining information must be released); *Burnett v. County of Bergen*, 968 A.2d 1151, 1167 (N.J. 2009) (upholding order redacting personal information prior to release of records); *Farley v. Worley*, 599 S.E.2d 835, 847 (W.Va. 2004) (duty to redact or segregate exempt from non-exempt information and to disclose non-exempt information unless redaction or segregation unduly burdensome); *Matter of Laporte v. Morgenthau*, 11 A.3d 410 (N.Y. 2004) (upholding order that information be redacted prior to release of district attorney's records); *Carter v. Meek*, 750 N.E.2d 242, 246 (Ill. 2001) (sheriff's policy and procedure manual subject to disclosure to the extent exempt personnel information could be redacted); *Ottochian v. Freedom of Information Com'n*, 604 A.2d 351, 355 (Conn. 1992) (upholding order to redact records and release

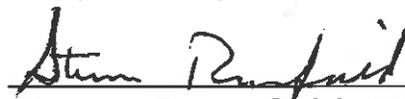
remaining portions); *Booth Newspapers, Inc. v. Kalamazoo School Dist.* (1989) 450 N.W.2d 286, 289 (Mich. App. 1989)(ordering disclosure of records, subject to redaction to exclude personal identities).

The VDOC's position finds no endorsement in the language, intent, or spirit of VFOIA. VDOC has not made a case for needlessly establishing Virginia as an outlier in its commitment to open government and a citizenry that is adequately informed of the activities of its government.

### **CONCLUSION**

For the reasons state above, this Court should deny the VDOC's appeal and remand this matter to the Circuit Court for enforcement of its ruling.

Respectfully Submitted,



Steven Rosenfield, VSB#16539

Attorney at Law

913 East Jefferson Street

Charlottesville, VA 22903

(434) 984-0300

attyrosen@aol.com

*Counsel for Amicus Curiae*

## **CERTIFICATE OF SERVICE**

I certify that in accordance with Rule 5:26(e) of the Supreme Court of Virginia, on the 13th day of April 2015, the required copies of this Brief of Amicus Curiae Virginia Coalition for Open Government in Support of Appellee were hand-delivered to the Clerk's Office of this Court for filing and copies were served via regular mail to the following recipients listed below:

Mark R. Herring, Attorney General of Virginia  
Margaret Hoehl O'Shea, Assistant Attorney General  
Kate E. Dwyre, Assistant Attorney General  
Office of the Attorney General  
900 East Main Street  
Richmond, Virginia 23219  
Email: MOShea@oag.state.va.us  
*Counsel for Virginia Department of Corrections*

Frank Pietrantonio (VSB #25473)  
Erik B. Milch (VSB #46375)  
MaryBeth W. Shreiner (VSB #75592)  
Michael J. Mortorano (VSB #86210)  
COOLEY LLP  
11951 Freedom Drive  
Reston, Virginia 20190-5656  
Tel: (703) 456-8000  
Fax: (703) 456-8100  
fpietrantonio@cooley.com  
emilch@cooley.com  
mshreiner@cooley.com  
mmortorano@cooley.com  
*Counsel for Scott A. Surovell*

Robert E. Lee (VSB #37410)  
VIRGINIA CAPITAL REPRESENTATION RESOURCE CENTER  
2421 Ivy Road, Suite 301  
Charlottesville, Virginia 22903  
Tel: (434) 817-2970  
Fax: (434) 817-2972  
roblee@vcrrc.org  
*Counsel for Scott A. Surovell*

A PDF version of the foregoing brief was also delivered to the Supreme Court of Virginia and to counsel via email.

By:   
Steven Rosenfield