

VIRGINIA:

**IN THE CIRCUIT COURT FOR FAUQUIER COUNTY
TWENTIETH JUDICIAL CIRCUIT**

CITIZENS FOR FAUQUIER COUNTY,)
)
Petitioner,)
)
 v.)
)
 TOWN OF WARRENTON, VIRGINIA and)
 STEPHEN CLOUGH, Town Clerk to the)
 TOWN OF WARRENTON, VIRGINIA,)
in his official capacity,)
)
 Serve: Martin R. Crim, Esq.)
 Town Attorney)
 Vanderpool, Frostick and Nishanian, P.C.)
 9200 Church St, Suite 400)
 Manassas, Virginia 20110)
)
 Mr. Carter Nevill)
 Mayor, Town of Warrenton)
 21 Main Street)
 Warrenton, VA 20186)
)
Respondents.)

Case No. _____

**VERIFIED PETITION FOR WRIT OF MANDAMUS, INJUNCTIVE RELIEF AND
AWARD OF CIVIL PENALTIES**

COMES NOW Petitioner, Citizens for Fauquier County, a Virginia nonstock corporation (“CFFC”), by counsel, and for its Petition for Writ of Mandamus, Injunctive Relief and Award of Civil Penalties pursuant to Virginia Code §§ 2.2-3713 and -3714 states as follows:

Introduction

CFFC brings this action as part of an ongoing effort to obtain public records from the Town of Warrenton, Virginia (the “Town”) relating to the Town’s processing of a proposed special use permit sought by Amazon Data Services, Inc. (“Amazon”). The special use permit is being sought

by Amazon to allow it to erect a proposed 220,000 square foot data center at the gateway to the Town, where Blackwell Road and Lee Highway meet (the “Amazon Development”). CFFC is deeply concerned about the effect that the proposed Amazon Development would have on the social, cultural, and historical character of the Town of Warrenton, a picturesque hamlet nestled in Fauquier County that its members proudly call home. Immediately at issue here is CFFC’s major concerns with the approach the Town is taking to processing the special use permit for the Amazon Development, including with regard to public hearings and especially relative to public disclosure.

Zoning actions and the review of those actions are matters of great public importance. The power to regulate the use of land is a legislative power, residing in the state, which must be exercised in accordance with statutory and constitutional principles. *Board of Supervisors of Fairfax County v. Southland Corp.*, 224 Va. 514 (1982). A locality’s exercise of its land use powers, particularly the zoning power, implicates numerous constitutional principles: procedural due process, substantive due process, equal protection, and free speech, being just a few. The numerous constitutional principles implicated by local land use regulation inspired a United States Supreme Court justice to ask: “[I]f a policeman must know the Constitution, then why not a planner?” *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621, 661 n.26 (1981) (Brennan, J.) (dissenting).

In the land use context these constitutional principles seek to ensure: (1) a fair and informed procedure; (2) fair and informed regulations; (3) fair and informed implementation of the regulations; (4) protection of certain private property rights; and (5) freedom from certain arbitrary deprivations or impositions upon private land or its use. The real palladium of those constitutional protections, and the key to informed and fair governance, is a public process that both honors

Virginia's stated commitment to open proceedings and records and the public's right to know what its government is doing.

Seeking to inform the public of these facts as it bears on the proposed Amazon Development, CFFC submitted two different requests under the Virginia Freedom of Information Act, VA. CODE ANN. §§ 2.2-3700, *et seq.* ("VFOIA"), to the Town (collectively, the "VFOIA Requests"). The VFOIA Requests sought, among other public records within the meaning of VFOIA, documents and communications with the Town Mayor, Mr. Carter Nevill (the "Town Mayor"), or the then-Town Manager, Ms. Brandie Schaeffer ("Town Manager Schaeffer") or then-acting Town Manager Tommy Cureton ("Acting Town Manager Cureton," collectively with Town Manager Schaeffer, the "Town Managers"), pertaining to the proposed Amazon Development. The Town produced some public records in response. However, it has asserted that a VFOIA exemption covering the "working papers and correspondence" of "the mayor or chief executive officer" of the Town (the "CEO Exemption") shields from the public *all emails* (which total in the thousands) between the Town Mayor, the Town Managers and others, including Amazon, pertaining to the proposed Amazon Development (the "Withheld Records").

This breathtakingly broad interpretation of the CEO Exemption, one that has been rejected by the FOIA Council and other Virginia courts, also should be rejected by this Court. CFFC sent a letter to the Town by counsel explaining that the Town could not, *inter alia*, claim two chief executives and that the exemption cited was either inapplicable or had been waived with respect to the Withheld Records. To the extent the Town declined to produce the Withheld Records, CFFC's letter requested additional information be provided by November 15, 2022.

The Town, through Mr. Stephen Clough, the Town Clerk, promptly responded, standing by the exemptions it had asserted and refusing to produce the Withheld Records or provide further

information about the same. CFFC duly provided the Town a copy of this Petition prior to filing and, again, the Town refused to relent. Lacking any other recourse, CFFC now brings this action to vindicate its rights, and the public's right, to know what its government is doing.

Jurisdiction & Venue

1. This action is brought pursuant to VFOIA.
2. Virginia Code § 2.2-3713(A) authorizes the filing of a petition for mandamus and/or injunction for actions arising in connection with the VFOIA Requests filed with the Town, a public body under VFOIA, and gives this Court jurisdiction thereof.
3. Venue is proper in this Court pursuant to Virginia Code § 2.2-3713(A)(1), as the Town is a local public body elected or appointed to serve the residents of the Town, which is part of Fauquier County, Virginia.

Parties

4. Petitioner, Citizens for Fauquier County, is a non-partisan, non-profit, non-stock corporation incorporated in Fauquier County in 1968 with the mission to preserve the natural, historic and agricultural resources of Fauquier County, Virginia.
5. Respondent Town is a body politic and corporate, and a subdivision of the Commonwealth of Virginia located in Fauquier County, Virginia. Under VFOIA, the Town is a local public body.
6. Respondent Stephen Clough is the Town Clerk for the Town of Warrenton, an officer of the Town within the meaning of VFOIA.

The VFOIA Requests

The First VFOIA Request Relating to the Proposed Amazon Development

7. CFFC submitted a VFOIA request (the “First Request”) to the Town on July 12, 2022, requesting various public records. The public records requested included communications to or from Town Manager Shaeffer, Town Staff and Amazon and their representatives, those relating to various meeting, including those involving the Town Mayor and Town Manager and Amazon during the time frame of the Data Center Zoning Ordinance Text Amendment that was being made in connection with the special use permit sought by Amazon, and those involving the special use permit pre-application and application communications between the Town and Amazon and Amazon’s representatives. A copy of the First Request is attached as **Exhibit A**.

8. The Town withheld public records responsive to the First Request in reliance upon exemptions provided by Virginia Code §§ 2.2-3705.7(2), -3705.1(2), -3705.6(3).

9. The Town offered the following clarifications in response to CFFC’s inquiry: Mr. Martin Crim, the Town’s attorney, was the attorney associated with the documents for which attorney-client privilege was claimed, and that the proprietary exemption applied only to documents received from a private business, and not to documents prepared by the Town related to those businesses. No further clarification was forthcoming regarding the Town’s reliance upon Virginia Code § 2.2-3705.6(3) or what documents were being withheld on that basis.

10. No clarification was provided at all regarding the Town’s reliance upon Virginia Code § 2.2-3705.7(2) or what documents were being withheld on that basis.

11. Yet, thirteen (13) public records consisting of emails involving the Town Mayor were produced.

12. Also, more than fifty (50) emails between Town Manager Schaeffer and Amazon were produced, along with handwritten notes of Town Manager Schaeffer from various meetings she attended on behalf of the Town.

13. On September 21, 2022, CFFC submitted a follow-up request under the same public records request number and identified specific records requested that the Town did not produce.

14. The Town responded that any documents not produced in the previous set either did not exist or were exempt, except for new information consisting of two (2) pages of notes from Acting Town Manager Cureton.

15. Acting Town Manager Cureton was appointed to the position following Town Manager Schaeffer's departure from the post in July 2022 for employment with Amazon.

16. In making this response, the Town was taking the position that the Town Mayor, not the Town Manager, enjoyed the exemption from mandatory disclosure provided by Virginia Code § 2.2-3705.7(2) for "working papers and correspondence of" the chief executive official.

17. A total of ten (10) public records responsive to the First Request and otherwise subject to disclosure under VFOIA were withheld by the Town on the grounds that the exemptions provided by Virginia Code §§ 2.2-3705.7(2), -3705.1(2), -3705.6(3) applied.

18. CFFC paid a total of \$2,878.00 for records responsive to the First Request.

The Second VFOIA Request Relating to the Amazon Development

19. On October 14, 2022, CFFC submitted another VFOIA request to the Town (the "Second Request"), seeking various public records. A copy of the Second Request is attached as **Exhibit B**.

20. In response to the Second Request, the Town, through Mr. Clough, asserted an exemption from disclosure covering eight (8) public records consisting of emails or email chains,

and one email or email chain involving the Town Mayor was released with redactions. Additionally, five (5) other public records involving the Town Mayor were produced in redacted form. All of these Withheld Records implicate a resolution to advance support for underground transmission lines to Dominion Energy's ("Dominion") future electrical substation on Amazon's Blackwell Road parcel. Amazon claims a new Dominion substation is required in order for it to operate at full capacity.

21. In response to the Second Request, the Town, through Mr. Clough, also asserted that the CEO Exemption shielded from disclosure all communications involving Town Manager Schaeffer while she served as town manager. The Withheld Records responsive to the Second Request and involving Town Manager Schaeffer alone totaled 3,142 separate emails or email chains.

22. Additionally, some of the public records produced involved Town Manager Schaeffer, but were redacted, apparently in reliance upon the CEO Exemption.

23. Explaining, Mr. Clough stated on October 26, 2022 that "any email exchanged between Ms. Schaeffer and Amazon's attorneys while she was Town Manager" and "any emails exchanged between Town Staff and Ms. Schaeffer while she was Town Manager that relate to Amazon or Amazon's attorney" were all considered exempt by the Town.

24. The Town, through Mr. Clough, confirmed its position on October 28, 2022: "Under Va. Code 2.2-3705.7 All communications with the Town Manager are exempt" including "any email exchanged between Town Staff and Amazon and Amazon's attorneys that include Ms. Schaeffer on the distribution list."

25. Despite withholding all such communications with Town Manager Schaeffer in its response to the Second Request, the Town, through Mr. Clough, also withheld the Town Mayor's emails under the same exemption provided by Virginia Code § 2.2-3705.7(2).

26. In total, 3,150 public records responsive to the Second Request and otherwise subject to disclosure under VFOIA were withheld by the Town, through Mr. Clough, under the exemptions provided by Virginia Code §§ 2.2-3705.7(2), -3705.1(1), -3705.1(2).

27. CFFC paid a total of \$1,387.00 for records responsive to the Second Request.

CFFC Apprised the Town of Its VFOIA Violations

28. By letter from counsel dated November 10, 2022, CFFC requested that the Town provide the Withheld Records responsive to the VFOIA Requests and withheld under the CEO Exemption by November 15, 2022, explaining that the grounds for withholding under that exemption were inapplicable.

29. CFFC's letter also requested that, should the Town decline to produce the records, the Town "provide a log of all materials withheld, in whole or in part, detailing the character of the specific information or document withheld, the exact exemption allegedly justifying application of such exemption, and such other information as is necessary to evaluate the applicability of the exemption." A copy of CFFC's letter is attached as **Exhibit C** and was provided to the Town via hand delivery during the afternoon of November 10, 2022.

The Town Refused to Disclose the Withheld Records or Otherwise Address CFFC's Concerns

30. By response email also dated November 10, 2022 and received on or about 4:13 p.m., Mr. Clough affirmed that the Town stood "by our determinations regarding your client's FOIA requests." A copy of the Mr. Clough's email response is attached as **Exhibit D**.

31. As Mr. Clough and the Town's reliance on the working papers and correspondence exemption and act of withholding was erroneous, the Withheld Records must be produced and the Petitioner recompensed for its expense in obtaining these records and vindicating its rights.

32. Thereafter, a copy of this Petition was provided to the Town and Mr. Clough by CFFC at least three working days prior to filing.

33. The Town has not agreed to provide any of the Withheld Records to CFFC.

34. Subsequently, CFFC has learned that the Town, through Mr. Clough, has also withheld public records responsive to other citizen's requests under VFOIA on the ground that the CEO Exemption covers ***both*** the Town Mayor and the Interim Town Manager, Christopher E. Martino ("Interim Town Manager Martino").

Legal Background

35. The Virginia Freedom of Information Act was enacted to give "the people of the Commonwealth ready access to public records in the custody of a public body or its officers and employees. . . ." VA. CODE ANN. § 2.2-3700(A).

36. For this reason, the provisions of VFOIA are to 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 ANN. § 2.2-3700(B).

37. Virginia Code § 2.2-3704(A) provides in pertinent part that "all public records shall be open to citizens of the Commonwealth" Exceptions to the categorical rule of disclosure are solely those "specifically provided by law." VA. CODE ANN. § 2.2-3704(A).

38. To avoid any doubt, VFOIA provides that "[a]ny exemption from public access to records . . . shall be narrowly construed and no record shall be withheld . . . unless specifically

made exempt pursuant to this chapter or other specific provision of law.” VA. CODE ANN. § 2.2-3700(B).

39. Virginia Code § 2.2-3705.7(2) allows a public body to designate one, and only one, executive officer to enjoy certain exemptions from VFOIA disclosure, and only with respect to the executive officer’s “working papers and correspondence.”

40. Specifically, Virginia Code § 2.2-3705.7(2) states in relevant part, “The following information contained in a public record is excluded from the mandatory disclosure provisions of this chapter but may be disclosed by the custodian in his discretion, except where such disclosure is prohibited by law. . . . Working papers and correspondence of . . . *the mayor or chief executive officer* of any political subdivision of the Commonwealth . . .” VA. CODE ANN. § 2.2-3705.7(2) (emphasis added).

41. By using the definite article, the General Assembly’s meaning is plain: the public body may assert the privilege as to only one executive official, whether that executive official bears the title of “mayor” or “chief executive officer.”

42. This is the well-established construction. The Virginia Freedom of Information Advisory Council, an agency of the Commonwealth of Virginia (the “FOIA Council”), issued an opinion interpreting the meaning of this subsection on October 30, 2002. FOIA COUNCIL OP. AO-12-02. The FOIA Council found that because the disjunctive “or” is used in reference to “the mayor *or* chief executive officer” asserting the privilege, it can therefore only be claimed by one public official and “a locality may not switch back and forth as to which public official may exercise the exemption.” *Id.* (Emphasis added).

43. To determine which executive in a locality may enjoy this exemption, the FOIA Council advised that

[I]t is essential to adopt a functional approach and examine the various duties and responsibilities assigned to each public official. The individual that would most properly exercise the exemption would be delegated duties such as ensuring that laws and ordinances are faithfully executed in the locality, advising the governing body as to the affairs of the locality, hiring and overseeing employees of the locality, and acting as a contact between the heads of various local departments and the local governing body.

FOIA COUNCIL OP. AO-12-02.

44. Additionally, by making the exemption applicable only to the “working papers and correspondence of” the chief executive official, it is clear that the public records must be personal to the official’s status as the chief executive, and not merely something reviewed or received by that chief executive.

45. This conclusion is confirmed not only by the text of this provision, but by the text of a number of VFOIA provisions. One is the provision that “no information that is otherwise open to inspection under this chapter shall be deemed excluded by virtue of the fact that it has been attached to or incorporated within any working paper or correspondence.” VA. CODE ANN. § 2.2-3705.7(2).

46. Another is the definition of “working papers,” which must be understood to inform the related term “correspondence.” Virginia Code § 2.2-3705.7(2) states that ““Working papers’ means those records prepared by or for a public official identified in this subdivision for his personal or deliberative use.” VA. CODE ANN. § 2.2-3705.7(2).

47. The FOIA Council stated in its March 27, 2015 opinion that the focus of “personal or deliberative” should be on whether there was “value added” by the executive official *not* on whether he/she merely received the document.

**COUNT I - DENIAL OF RIGHT TO
DISCLOSURE OF WITHHELD PUBLIC RECORDS**

48. Paragraphs 1 through 47 are incorporated as though expressly re-alleged herein.

The Working Papers & Correspondence Exemption May Apply to Only One Executive Officer

49. Putatively pursuant to Virginia Code § 2.2-3705.7(2), the Town has improperly asserted the exemption as applying simultaneously to both the Town Managers *and* the Town Mayor.

50. This is not permitted by VFOIA.

51. Only one official's "working papers or correspondence" may enjoy the CEO Exemption, which is to be determined by who is *the* chief executive officer. *See* FOIA COUNCIL OP. AO-12-02.

52. Regarding the duties of the Town Manager, the Town Charter states that,

There shall be a Town Manager *who shall be the chief executive officer of the Town* and shall be responsible to the Council for the proper administration of the Town government. . . . The Town Manager shall appoint for an indefinite term the heads of all departments and all other officers and employees of the Town. The Manager shall have the power to remove any officer or employee appointed by him. The Town Manager shall also have the following duties and powers: (a) To see that all laws and ordinances are enforced. (b) To exercise supervision and control over all administrative departments and divisions. (c) To attend all regular meetings of the Council, with the right to take part in the discussion, but having no vote

TOWN CHARTER, Art. VI, §§ 6-1–6-3 (emphasis added).

53. Alternatively, Town Charter Art. V, § 5-2 describes the duties of the Town Mayor as, "the head of the Town for all ceremonial purposes, the purposes of military law and the service of civil process."

54. The Town Charter was last amended in 1987.

55. Accordingly, the foregoing provisions have remained unchanged at all times relevant to the VFOIA Requests.

56. The plain language of the Town Charter indicates that it is the “working papers and correspondence” of the Town Manager, not the Town Mayor, that are covered by the exemption from mandatory disclosure provided by Virginia Code § 2.2-3705.7(2).

57. The Town has erroneously asserted the “working papers and correspondence” exemption as covering public records of the Town Mayor in response to CFFC’s First Request, and produced working papers from Acting Town Manager Cureton.

58. Such withholding violates VFOIA.

59. Yet the Town has also withheld public records on the ground that they are the “working papers or correspondence of” Town Manager Schaeffer, allegedly exempt under Virginia Code § 2.2-3705.7(2).

60. There can only be one official whose “working papers and correspondence” enjoy the CEO Exemption, and the Town cannot switch as its interest or caprice dictates. *See* FOIA COUNCIL OP. AO-12-02 (“[I]t is important to note that a locality may not switch back and forth as to which public official may exercise the exemption. After determining who acts as the executive, the working papers exemption will stay with that public official unless the charter and duties of the local officials are changed.”).

61. Because the CEO Exemption rightly applies to the “working papers and correspondence” of the Town Manager, the Town cannot also assert the exemption as applying to the working papers and correspondence of the Town Mayor. *See* FOIA COUNCIL OP. AO-12-02.

62. Rather, the Court should hold the Town to claiming the “working papers and correspondence” exemption for only one Town official, the actual chief executive officer.

63. The public records of non-chief executive officers, even those that may constitute their “working papers and correspondence,” must be produced notwithstanding the exemption provided under Virginia Code § 2.2-3705.7(2).

64. Accordingly, all public records responsive to either of the VFOIA Requests withheld on the ground that they constitute the “working papers or correspondence” of the Town Mayor constitute independent violations of VFOIA, must be produced to CFFC, and subject the Respondents to liability for costs, attorneys’ fees and civil penalties associated with vindicating CFFC’s rights thereto.

The Withheld Records Are Not “Working Papers or Correspondence”

65. Moreover, even with respect to those public records that are associated with the Town Managers, it is plain that not all of those Withheld Records, which number in the thousands, are exempt from public disclosure under the working papers and correspondence exemption found in Virginia Code § 2.2-3705.7(2).

66. The Town has asserted the CEO Exemption over “[a]ll communications with the Town Manager,” including over “any email exchanged between Town Staff and Amazon and Amazon’s attorneys that include [Town Manager] Schaeffer on the distribution list.”

67. This scope of withholding is far broader than that permitted by the CEO Exemption.

68. Virginia Code § 2.2-3705.7(2) intentionally conjoins “working papers *and* correspondence.” (Emphasis added). Because the scope of “correspondence” under Virginia Code § 2.2-3705.7 is not clearly defined, the term must “be narrowly construed,” which construction must be informed by context and purpose. VA. CODE ANN. § 2.2-3700(B).

69. Attributing meaning to the conjunction of the terms “working papers” and “correspondence,” as well as the possessive preposition “of,” it should be understood that

“correspondence” exempt under this section is correspondence uniquely created by or for the “personal or deliberative use” of the chief executive officer, not merely whatever the chief executive officer receives, whether as an addressee or not, or sends, whether it is the chief executive officer’s work or not.

70. Confirming this view is the provision, previously quoted, that “no information that is otherwise open to inspection under this chapter shall be deemed excluded by virtue of the fact that it has been attached to or incorporated within any working paper or correspondence.” VA. CODE ANN. § 2.2-3705.7(2).

71. Indeed, courts have held that “[t]he fact that the [chief executive officer] received or read a copy of these e-mails does not qualify them as part of his working papers or correspondence within the meaning of the Act.” *Hill v. Fairfax County Sch. Bd.*, 83 Va. Cir. 172, 177 (Fairfax Cnty. 2011). If the emails “do not reflect the work” of the chief executive officer, they are not “correspondence” as contemplated by Virginia Code § 2.2-3705.7(2) and are therefore not exempt. *See id.*

72. On information and belief, the Withheld Records include public records withheld by the Town merely because either the Town Mayor or the Town Manager (or both) “received or read a copy.”

73. For example, the Town has taken the position that the Withheld Records are properly withheld under Virginia Code § 2.2-3705.7(2) if they are “emails exchanged between” Town Manager Schaeffer and Amazon’s agents, “between Town Staff and” Amazon’s agents if Town Manager Schaeffer was “on the distribution list,” and “between Town Staff and [Town Manager] Schaeffer.”

74. Obviously, such Withheld Records include public records that do not “reflect the work of” Town Manager Schaeffer nor were for her “personal or deliberative use.”

75. The scope of exempt correspondence advanced by the Town would include all correspondence whatsoever for both the Town Mayor and the Town Managers, regardless of their interaction with the communication, effectively making both individuals’ entire inbox exempt.

76. Given the volume of materials that are part of the Withheld Records, that appears to be precisely what has been done by Amazon and the Town Managers.

77. This result, flowing from the Town’s overbroad construction of the CEO Exemption, is flatly contrary to the purpose of VFOIA, which is to give “the people of the Commonwealth ready access to public records in the custody of a public body or its officers and employees. . . .” VA. CODE ANN. § 2.2-3700(A).

78. The Town’s construction of the CEO Exemption, if permitted to stand, would deprive the public of important information about the contemplated legislative actions of its own government entirely and for all time.

79. Perversely, the private market participant or individual seeking favorable or unfavorable public action for or against a project, such as Amazon here, could at any later point use or share the Withheld Records or the information contained therein that have been kept from the rest of the public and the remainder of market participants until that private actor, exercising its own self-interested judgment, chose to use or share that information.

80. Such a reading and result is not in keeping with the text or purposes of VFOIA nor with any concept of representative government.

81. Accordingly, the Town has withheld public records that are not, in fact, within the exemption for “working papers and correspondence of” the chief executive of the Town.

82. Absent a factual foundation for concluding that the Withheld Records are, in fact, the “working papers” of *the* chief executive officer of the Town or his/her “correspondence,” as narrowly construed, these public records cannot be withheld under the “working papers and correspondence” exemption found in Virginia Code § 2.2-3705.7(2).

83. Moreover, even if the Town could substantiate, *ex post*, the applicability of Virginia Code § 2.2-3705.7 exemption to some of the Withheld Records, the Town previously waived the CEO Exemption by producing papers and correspondence by, from, or to the Town Managers and the Town Mayor.

84. The FOIA Council found in its March 27, 2015 opinion that previous Council opinions had determined that a document “loses its working papers status when disseminated” by the chief executive official.

85. The Council determined that “disseminated” means that “a record is widely made available to others.” FOIA COUNCIL OP. AO-02-15.

86. The Town has disseminated correspondence involving both Town Manager Schaeffer and the Town Mayor relating to the proposed Amazon Development to various non-governmental, non-exempt, third parties who enjoy a First Amendment right to republish such materials as they see fit.

87. Therefore, the Town cannot now claim that those documents are exempt from disclosure in response to CFFC’s VFOIA Requests.

88. Given the Withheld Records responsiveness to the VFOIA Requests, and the lack of an applicable VFOIA exemption, and/or the waiver of the same, a writ of mandamus should issue, compelling the Town to produce the Withheld Records to CFFC.

The Town's Violation of VFOIA Was Willful and Knowing

89. Under Virginia Code § 2.2-3714(A), the Court “shall impose” upon an “officer, employee, or member of a public body” “a civil penalty of not less than \$500 nor more than \$2,000” for a violation of VFOIA that was “willfully and knowingly made” involving, among others, the CEO Exemption under Code § 2.2-3705.7.

90. Notwithstanding the plain language of VFOIA and the controlling authorities, the Town, by and through Mr. Clough, willfully and knowingly refused to produce the Withheld Records in reliance upon the exemption from disclosure found in Virginia Code § 2.2-3705.7(2).

91. In fact, Mr. Clough went so far as to recognize the direct applicability of FOIA COUNCIL OP. AO-12-02 and yet refused to follow it.

92. Express repudiation of “published opinions of the Freedom of Information Advisory Council” plainly demonstrates the willful and knowing violation and that civil penalties are appropriate. *Cf.* VA. CODE ANN. § 2.2-3714(C).

93. For all of the reasons stated above, the Town, by and through Mr. Clough, wrongfully withheld public records under Virginia Code § 2.2-3705.7, and so violated VFOIA, exposing Mr. Clough to civil penalties.

94. As such wrongful withholding occurred with respect to multiple public records, and on multiple occasions, the Town, particularly Mr. Clough, exposed himself to repeat offender penalties.

* * *

PRAYER FOR RELIEF

WHEREFORE, the Petitioner, Citizens for Fauquier County, by counsel, respectfully requests that this Court:

- (A) Afford the Petitioner an expeditious hearing pursuant to Virginia Code § 2.2-3713;
- (B) Order the Town to produce the Withheld Records, and all public records within its possession, custody and control responsive to the VFOIA Requests that the Town does not demonstrate to be statutorily exempted from disclosure, including under Virginia Code § 2.2-3705.7(2);
- (C) Order the Town to refrain from assessing fees for the production of all such Withheld Records;
- (D) Impose a civil penalty pursuant to Virginia Code § 2.2-3713 on Mr. Clough, as an officer of the Town of Warrenton, of \$2,000 for each public record found to have been withheld in violation of VFOIA;
- (E) Order the Town to pay Petitioner’s reasonable costs and fees, including attorney’s fees, associated with prosecuting this matter; and
- (F) Grant such other and further legal and equitable relief as justice may require and to equity may seem fit.

Dated: December 19, 2022

CITIZENS FOR FAUQUIER COUNTY

Counsel

Dale G. Mullen (Va. Bar No. 48596)
Michael H. Brady (Va. Bar No. 78309)
Michelle E. Hoffer (Va. Bar No. 97029)

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Counsel for Citizens for Fauquier County

VERIFICATION

I declare under penalty of perjury that I have read the foregoing Petition for Writ of Mandamus, Injunctive Relief and Award of Civil Penalties and believe it to be true and correct to the best of my knowledge, information and belief.

CITIZENS FOR FAUQUIER COUNTY

Dated: _____

By: _____

Its: _____