IN THE
COURT OF APPEALS OF VIRGINIA

Record No. 0330-23-4

COMMONWEALTH OF VIRGINIA, *et al.*,
Appellants,

v.

HEATHER SAWYER,
Appellee.

BRIEF OF APPELLANT

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INTRODUCTION

Sawyer concedes that there is no evidence in the record showing that the Governor's Office violated FOIA, and she also admits that many of the documents the circuit court ordered the Governor's Office to disclose may well be exempt. Response Br. 34. Nonetheless, Sawyer argues that the circuit court correctly ordered the Governor's Office to turn over *all* the withheld documents without any evidence as to whether those documents were exempt from disclosure. That is so, Sawyer says, because the Governor's Office "declined" the "opportunity to present evidence" in the circuit court. Response Br. 36.

This argument is wrong. The Governor's Office did not "decline" to present evidence. Quite the opposite. The Governor's Office proffered substantial evidence: the withheld documents themselves for the court's in camera review, in line with Supreme Court precedent on the appropriate method to resolve exemption disputes. R. 230–31; see *Bergano v. City of Va. Beach*, 296 Va. 403, 410 (2018). But the circuit court refused to consider this evidence and held no other evidentiary proceedings.

Sawyer contends that the Governor's Office seeking to produce evidence at the hearing was "too little, too late." Response Br. 36. But the

circuit court held only a single hearing, at which it ruled on the Office's pending demurrer. It is plainly "improper to require the presentation of evidence prior to ruling on the demurrer." *Southern Ry. Co. v. Darnell*, 221 Va. 1026, 1033 (1981). And the circuit court gave no prior notice that the hearing would be the sole chance to present evidence, functioning as a demurrer hearing, summary judgment, and trial all rolled into one. Nor did the court give any prior notice that it would refuse to review documents in camera, and that the Governor's Office must present evidence in some alternate form. Indeed, one of the disputes between the parties when the hearing was convened was what form evidentiary proceedings should take. The circuit court erred in refusing to consider the documents or any other evidence before ordering the Governor's office to turn them over.

The circuit court also erred when it denied the demurrer. Sawyer's interpretation of the correspondence exemption, as limited to documents received *only* by the Governor or enumerated high-ranking officials, is contrary to the plain meaning of the statutory text and would gravely interfere with a co-equal branch of government. And Sawyer's complaint was based on her bare assertions that more documents

should have been produced, not facts supporting any such inference. The judgment below should be reversed.

ARGUMENT

I. The circuit court erred in granting the petition without any evidentiary basis

A. The court erred in granting the petition with no evidence of a FOIA violation

Sawyer argues that the court properly granted the petition because the Governor's Office "failed to meet its burden." Response Br. 25; see R. 175 n.17. This argument is erroneous. The circuit court erred in granting the petition, and ordering the Governor's Office to disclose all documents withheld as exempt without having considered a shred of evidence on the subject. The Governor's Office had no evidentiary burden before the court ruled on its demurrer. The court also had no basis to hold that the Governor's Office failed to meet its burden because it offered evidence at the hearing.

The circuit court could not determine whether there was any "actual violation of VFOIA," *Suffolk City Sch. Bd. v. Wahlstrom*, ___ Va. ___, 886 S.E.2d 244, 257 (2023), nor weigh "the need to preserve confidentiality of privileged materials," *Bergano*, 296 Va. at 410, without

evidence. Thus, the court could not grant the petition without considering evidence. Opening Br. 39.

Sawyer concedes that the Governor's Office had no pre-litigation duty to provide evidence showing each document was exempt. Opening Br. 38–39. The Governor's Office likewise had no evidentiary burden prior to the court's ruling on the demurrer. *Darnell*, 221 Va. at 1033 (It is "improper to require the presentation of evidence prior to ruling on the demurrer."). Yet the circuit court here granted the petition immediately after denying the demurrer, with no evidentiary hearing at all. Thus, as in *Darnell*, the court erred in ruling on the petition "without giving the [Governor's Office] a hearing on the merits." *Darnell*, 221 Va. at 1033; Opening Br. 30–31. Indeed, Sawyer herself repeatedly notes the lack of any evidentiary record, and the court's resulting inability to determine whether there is any FOIA violation. See Response Br. 17 ("A court can only determine whether there has been an adequate or reasonable search if the government discloses how it was done."); see *id.* at 24 n. 8 (Sawyer will need to "determine how the searches were conducted" "on remand" in order to determine whether the search was

adequate). Because the court granted the petition with no evidentiary basis for finding a FOIA violation, this Court should reverse.

Sawyer argues that "[b]ecause the hearing was on the merits of the Petition as well as the Demurrer, the Governor's office was required to demonstrate compliance with VFOIA in the hearing." Response Br. 20. But the bare order stating the hearing would be "on the Petition and Demurrer," R. 126, did not give notice that it would constitute the *only* such hearing. In any event, the Governor's Office presented evidence at the hearing to demonstrate "that the exemptions apply": it repeatedly proffered all the withheld records for the court's in camera review. R. 231. Sawyer's contention that the Governor's Office "declined" to "present evidence," and "completely failed to offer *any* appropriate evidence that the Exemption applied to the withheld records" is thus entirely baseless. Response Br. 36, 39.

To the extent Sawyer argues that the records were not "appropriate evidence," any such argument fails. The Supreme Court has repeatedly held that "a court's in camera review of the records constitutes a proper method" to determine whether they are exempt from disclosure under FOIA. *Bergano*, 296 Va. at 410; see *Hawkins* ___ Va. at ___, 878

S.E.2d 408, 416 (2022); *Bland v. Virginia State University*, 272 Va. 198, 202 (2006). The cases Sawyer cites show only that courts may consider *additional* evidence; the cases in no way hold, or even suggest, that the records themselves do not constitute appropriate evidence. *Virginia Dept. of Corr. v. Surovell*, 290 Va. 255, 259 & n.2, 269–71 (2015) (reviewing in camera documents), and *LeMond v. McElroy*, 239 Va. 515, 520–21 (1990) (criticizing the lack of in camera review).[1] Indeed, such a rule would defy all logic.

Sawyer also contends that the circuit court had discretion to refuse to review the documents because their length would have made in camera review overly burdensome. Response Br. 41. But even if correct, that would not free the court from deciding the FOIA petition without *any* evidence at all. The court could have tailored the review to avoid any unnecessary burden. For instance, the court could have reviewed a

[1] Sawyer disputes that "in camera review in VFOIA cases is always required," but this argument attacks a straw man. Response Br. 41. The Governor's Office does not contend that in camera review is mandatory in every case; some FOIA cases, for instance, may not involve disputes over exemptions, or the parties may agree on other forms of evidence. But in camera review is "a proper method" to determine whether withheld documents are exempt. Opening Br. 34–35 (quoting *Bergano*, 296 Va. at 410). The circuit court erred in rejecting the Governor's Office appropriate proffer of evidence here.

sample or subset of the documents, then issued rulings clarifying the scope of the exemptions. Indeed, the Governor's Office explained at the hearing that the review could be of "some or all of the records," and it asked the court for a further hearing on the "proper procedure" for the review. R. 231–32. The court had no grounds to instead refuse to consider the evidence at all. See *Darnell*, 221 Va. at 1033; Code § 8.01-4.[2]

Sawyer attempts to create a new threshold burden before the government can seek in camera review, arguing that there must be a prior "showing of a factual basis" demonstrating a necessity for such review. Response Br. 36–37, 41 (citing Part III.B.). Not so. The Supreme Court has held that in camera review in FOIA cases is appropriate without imposing any such threshold showing. See *Bergano*, 296 Va. at 410; *Surovell*, 290 Va. at 259 & n.2, 269-71; *Hawkins*, ___ Va. ___, 878 S.E.2d at 416; *Bland*, 272 Va. at 202.

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[2] Sawyer further contends that in camera review would have been overly burdensome because the documents were "not organized, categorized, or indexed in any way." Response Br. 42–43; see Response Br. 9. This contention is entirely without support. Because the circuit court refused to review the documents, they are not part of the record. Sawyer therefore has never seen the documents and could not possibly have a factual basis on which to rest such a representation.

None of Sawyer's cases support her position. They are not FOIA cases where the government sought in camera review of its own documents to demonstrate that they fall within the claimed exemption. Rather, in all of the cases she cites, a party sought in camera review of the *opposing* party's documents, over an objection that the documents were shielded by the attorney-client privilege. In that context, courts have required a threshold showing that in camera review is necessary because even in camera review pierces the privilege to some degree. *Brownfield v. Hodous*, 82 Va. Cir. 315, 319 (2011) (plaintiff sought communications between the defendant law firm and the firm's client); *United States v. Zolin*, 491 U.S. 554, 571 (1989) (IRS sought in camera review of defendant's allegedly privileged records, under the crime-fraud exception). Any such concerns are absent here, where the government seeks in camera review of its own documents to establish a FOIA exemption.

The circuit court had no basis to refuse to consider the proffered records here. And the court certainly could not, after refusing to consider any evidence, then grant the petition on the ground that the Governor's Office did not meet its evidentiary burden. The judgment should be reversed.

B. Even if the circuit court had discretion to decline to review documents in camera, it nonetheless erred in granting the petition without holding evidentiary proceedings

Even if, as Sawyer argues, the circuit court had discretion to refuse to review the documents in camera, it nonetheless erred in granting the petition without holding any kind of evidentiary proceeding.

Again, Sawyer contends that there was no need for further evidentiary proceedings "[b]ecause the hearing was on the merits of the Petition as well as the Demurrer." Response Br. 20; see *id.* 36. But again, nothing in the order stated that the hearing would be the *sole* hearing on the petition, functioning as a demurrer hearing and trial in one. R. 126. Holding that no further evidentiary proceeding was necessary here is especially baseless because the parties were not only disputing whether the petition stated valid claims in the first instance, but also the scope of the exemptions at issue and the form that the evidentiary proceedings should take. See R. 236–37. Sawyer herself agreed that "a lot of documents" may "fall within the exemption" and that "more information" was necessary to decide whether the Governor's Office violated FOIA. R. 237; see also R. 173. And Sawyer argued—based solely on federal caselaw—that the factual disputes should be resolved through

affidavits and a *Vaughn* index, or production of redacted documents. R. 239; see also Response Br. 36. The Governor's Office argued that the court should instead conduct in camera review, as Supreme Court precedent instructs. R. 231.

Thus, there was no prior notice, much less agreement of the parties, that the demurrer hearing would also function as the sole evidentiary hearing in the case. It cannot be the case that the Governor's Office was required to produce affidavits and a *Vaughn* index that were themselves a subject of a live and unresolved dispute between the parties *before* the circuit court had even ruled whether Sawyer had validly pled claims. See *Darnell*, 221 Va. at 1033; *Bowers v. Bowers*, 4 Va. App. 610, 618 (1987) ("The court may not refuse or fail to give parties a reasonable opportunity to develop and present evidence [on the merits]."); Opening Br. 30–31.

Sawyer also appears to contend that there is a special rule for FOIA cases that courts shall hold only one hearing. See Response Br. 38. Any such argument is incorrect. Sawyer points to a provision stating that a court shall hold a hearing on a FOIA petition within seven days. *id.* at 38, citing Code § 2.2-3713(C). But nothing in the statute provides

that hearing must be the only hearing on the petition, or that the court must enter a final judgment at that time.

To the contrary, particularly in complex cases such as this one, further proceedings are often necessary and appropriate. Indeed, other FOIA cases—including those Sawyer relies upon—have held additional proceedings as necessary, rather than simply refusing to consider the evidence. See, *e.g.*, *Hawkins v. Town of S. Hill*, 107 Va. Cir. 212, 212 (2021) (holding multiple hearings and reviewing documents in camera); Brief of Appellee, *Hill v. Fairfax Cnty. Sch. Bd.*, 284 Va. 306, 2012 VA S. Ct. Briefs LEXIS 187, at *3 (similar).

Again, the court cannot grant the petition without finding an "actual violation of VFOIA," *Suffolk City Sch. Bd*, 886 S.E.2d at 257, and cannot find such a violation without an evidentiary basis. See Part I.A, *supra*. There was none here. Even if the court had discretion to reject the well-established procedure of reviewing the withheld documents in camera, but see Part I.A, *supra*, it could not then grant the petition without first resolving the disputes between the parties on what form the evidentiary proceedings should take, or before giving the Governor's Office an opportunity to present evidence in line with its resolution of

that evidentiary dispute. See *Darnell*, 221 Va. at 1033; *Bowers*, 4 Va. App. at 618 (1987); Opening Br. 30–31.

Sawyer's contention that the Governor's Office somehow waived any argument about evidentiary proceedings is likewise meritless. Response Br. 40–41. The preservation rules operate "to protect the trial court from appeals based upon undisclosed grounds" and "to enable the trial judge to rule intelligently." *Scialdone v. Commonwealth*, 279 Va. 422, 440 (2010) (quoting *Fisher v. Commonwealth*, 236 Va. 403, 414 (1988)); *Cox v. Commonwealth*, 65 Va. App. 506, 514–15 (2015) (same). Thus, the Supreme Court "has consistently focused on whether the trial court had the opportunity to rule intelligently on the issue." *Scialdone*, 279 Va. at 437.

Here, the question of whether there should be further evidentiary proceedings was squarely before the circuit court, and it had ample "opportunity to rule intelligently on the issue." *Id.* Both parties, in their briefing and argument, discussed the form that the evidentiary proceedings should take. Sawyer argued the issue at length, proposing multiple alternatives drawn from federal cases, including using a *Vaughn* index. R. 236; see R. 230. And the Governor's Office, in addition to physically

presenting the disputed documents to the court for in camera inspection, also discussed alternative options for evidentiary proceedings, noting that although federal courts have used *Vaughn* indexes, "[t]hat has not been the practice in Virginia." R. 230. Instead, in camera review has been "the approach that's been repeatedly endorsed by the Supreme Court and ha[s] been carried out by numerous circuit courts." R. 230–31. And the Governor's Office nowhere suggested that if the court rejected this typical approach, the appropriate procedure would be to order the withheld documents disclosed without considering evidence at all. To the contrary, the Governor's Office also proposed alternatives, such as reviewing "some" of the documents in camera after setting "proper procedures" for such a review. R. 231–32.

This case is therefore a far cry from the case Sawyer cites, *Martin v. Ziherl*, which involved a complete failure to raise the issue in the trial court. 269 Va. 35, 39 (2005). Here, by contrast, there was extensive discussion before circuit court regarding the need for evidentiary proceedings, and the various forms that such evidentiary proceedings could take. The court was plainly on notice of the issue.

II. The circuit court erred in overruling the demurrer because Sawyer failed to state a claim

In addition, the circuit court erred by overruling the demurrer because Sawyer failed to allege a cause of action under FOIA. Sawyer's argument concerning the scope of the exemption is contrary to the plain meaning of the statutory text. The petition also failed to state a claim that the search for records was inadequate.

A. The documents are exempt as the correspondence and working papers of the Governor's Office

The documents that Sawyer requested are exempt from disclosure. Sawyer contends that the "correspondence" exemption applies only if the communications are "*from* a covered official, or sent *to—and only to*—a covered official." Response Br. 26. This proposed interpretation of "correspondence" conflicts with the term's plain meaning.

"Correspondence" is not defined in FOIA, and therefore carries its ordinary meaning. See Opening Br. 19. The ordinary meaning of "correspondence" is "the interchange of written communications." *Richmond Newspapers v. Casteen*, 42 Va. Cir. 505, 506 (Richmond City 1997) (quoting Correspondence, Black's Law Dictionary (6th ed. 1990)); *Redinger v. Casteen*, 35 Va. Cir. 380 (Richmond City 1995). Nothing in

this ordinary meaning limits correspondence to communications sent *only to* one person. See *Beck v. Shelton*, 267 Va. 482, 491–92 (2004) (referring to emails to "three or more other [people]" as "keyboard-entered correspondence" and noting that "[t]he message may be sent to several recipients at the same time" (quoting 1999 Op. Atty. Gen. 12)); R. 144. Such a restriction would baselessly exclude the vast majority of correspondence. The Governor's correspondence is no less his correspondence if a staff member or aide also receives it, or assists the Governor in preparing a response. See *Sawyers v. Prince William Cnty. Sch. Bd.*, No. CL20-8363-00 (Va. Cir. Ct. Oct. 2, 2020), https://tinyurl.com/CL20-8363-00; Opening Br. 21. Indeed, for the Commonwealth's chief magistrate with wide-ranging duties, it would be quite rare for the Governor to be the *sole* person who receives a communication. See Opening Br. 16.

Sawyer contends that her proposed interpretation "in no way tells members of the Governor's Office that they must 'write all of their own correspondence personally, or review personally all of the correspondence directed to them without any involvement of their staff, administrative assistants, or others.'" Response Br. 29, quoting Opening Br. 21. But she makes no attempt to reconcile that statement with her

proposed definition, which facially excludes correspondence if anyone but the Governor himself or an enumerated high-ranking official receives it or is involved in writing it. Sawyer's reference to the principle of narrowly interpreting exemptions cannot support a proposed interpretation that is contrary to the statute's plan meaning and highly unreasonable. See *American Trad'n Inst. v. Rector & Visitors of Univ. of Virginia*, 287 Va. 330, 341 (2014).[3]

As explained in the Opening Brief, the principle of constitutional avoidance further supports interpreting the term correspondence in line with its ordinary meaning. Opening Br. 18–19, discussing *Taylor v. Worrell Enterprises*, 242 Va. 219 (1991). Sawyer all but ignores the constitutional issue, mentioning it only in passing and stating that this Court should disregard any concerns about the separation of powers because *Taylor* was a plurality decision. See Response Br. 30–31 & n.11.

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[3] Sawyer concedes that the working papers exemption has no such limits, and "the Governor's Office may withhold otherwise deliberative information shared with lower-level officials not covered by the Exemption." Response Br. 32 n.12. But she fails to explain why the same principle does not apply equally to the correspondence exemption. And her agreement that documents need not be limited to the listed high-ranking officials only further demonstrates why many of the documents responsive to her requests are exempt. See Opening Br. 22–25.

But *Taylor*'s cogent analysis of the separation of powers is in line with other authorities and should guide the Court here. See, *e.g.*, *McMellon v. United States,* 387 F.3d 329, 341 (4th Cir. 2004); *Edwards v. Vesilind*, 292 Va. 510, 526 (2016); *Texas v. Brown*, 460 U.S. 730, 737 (1983) (noting that a plurality opinion, while not binding, "should obviously be the point of reference for further discussion of the issue"). And, contrary to Sawyer's argument, it amply explains how Sawyer's unreasonably restrictive interpretation would impair the functioning of the Governor's Office: requiring public disclosure of the Governor's correspondence would "compromise the executive's consultation and decision-making process" and have a "chilling effect" on communications, "to the detriment of the decision making process." *Taylor*, 242 Va. at 222–23. Indeed, that is the very reason the General Assembly included the exemptions in the statute. Opening Br. 16–17.

Rather than addressing the separation of powers concerns or the plain meaning of "correspondence," Sawyer focuses on the circuit court's decision in *Hill v. Fairfax County School Board*, 83 Va. Cir. 172, 177 (Fairfax Cnty. Cir. Ct. 2011). But *Hill* is an unpublished circuit court decision and carries no precedential weight. Further, *Hill* never even

addressed the ordinary meaning of correspondence. See *Hill*, 83 Va. Cir. 172, 177. This Court should apply the statute's plain meaning. See *supra* at 14–16.

Moreover, *Hill* stands only for a much narrower proposition than Sawyer argues. *Hill* observed that for many of the withheld emails "the [exempt person] was merely copied as a recipient" on communications between two non-exempt individuals. *Hill*, 83 Va. Cir. at 177. *Hill* held that simply copying an exempt person on correspondence does not insulate it from disclosure. The case at most stands for that simple proposition, not a broad pronouncement that the Governor or other listed high-ranking officials must be the *only* senders or recipients. See Opening Br. 20–21. And reading *Hill* for this simple proposition fully answers Sawyer's concern about creating an "untenable loophole" whereby "Government officials could easily evade VFOIA disclosure requirements by copying a covered individual in all circumstances." Response Br. 28.

The situation here is very different: Sawyer's FOIA requests targeted the Governor's staff in an attempt to obtain communications of the Governor's Office. Opening Br. 8–9; R. 225 It is thus unsurprising that many documents responsive to the requests are exempt.

The demurrer should have been granted. At the very least, the court should have ordered further evidentiary proceedings rather than ordering the Governor's Office to turn over all withheld documents without determining whether the exemption applied.

B. Sawyer failed to plead facts sufficient to state a claim and overcome the presumption of a good faith search

Finally, the circuit court should have granted the demurrer on Sawyer's claim that the Governor's Office performed an inadequate search in response to Request 758. Sawyer failed to state a claim and overcome the presumption that the search was in good faith. Indeed, FOIA does not "specify the extent to which a public body must search for records in response to a request." AO-04-10. Nor does it "require that a public body make a detailed explanation of how the search was conducted." AO-04-10. And while Sawyer strenuously asserts that the government bears the burden of demonstrating a search was reasonable, no statutory language and no Virginia precedent supports this argument. Rather, the statute states that "the public body shall bear the burden of proof *to establish an exclusion*." Code § 2.2-3713(E) (emphasis added). Sawyer's contention that the same requirement should be inferred for searches is contrary to the basic principle that "when the General

Assembly has used specific language in one instance, but omits that language or uses different language when addressing a similar subject elsewhere in the Code, [a court] must presume that the difference in the choice of language was intentional." *City of Richmond v. VEPCO*, 292 Va. 70, 75 (2016) (quoting *Zinone v. Lee's Crossing Homeowners Ass'n*, 282 Va. 330, 337 (2011)).

Sawyer points to AO-04-10's statement that if "the extent of a search becomes an issue in litigation, it is within the powers of a court to order a public body to perform a search and to delineate the parameters of that search." AO-04-10. That a court can assess reasonableness does not mean that the petitioner bears no pleading burden on this issue. Reasonableness is frequently a "matter[] for the courts to decide," but that does not reverse the pleading burden. And public officials are entitled to the "ancient presumption . . . that [they] obey[ed] the law." *WTAR Radio-TV Corp. v. City Council of Va. Beach*, 216 Va. 892, 895 (1976); see AO-04-10. The circuit court should have dismissed the claim.

CONCLUSION

For the foregoing reasons, this Court should reverse.

Respectfully submitted,

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CERTIFICATE

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2. This brief complies with Rule 5A:19(a) because the portion subject to that Rule contains 20 pages.

3. The Appellant desires to present oral argument.

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