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

The circuit court erroneously ordered the Governor's Office to produce hundreds of pages of documents. The documents are exempt from disclosure under Virginia's Freedom of Information Act (FOIA) because they are the Governor's correspondence and working papers. The court's erroneous order unjustifiably interferes with the Governor's internal deliberations and the performance of his duties as the head of a co-equal branch of government. FOIA's express exemptions are intended to protect the operation of the executive branch from undue legislative interference. *Taylor v. Worrell Enterprises*, 242 Va. 219 (1991). The circuit court erred in refusing to apply the exemptions here.

The error is particularly glaring because the court ordered the Governor's Office to produce the documents at the demurrer stage, without any evidentiary basis for finding the exemptions inapplicable. The Virginia Supreme Court has explained that whether a record is correctly identified as "exempt" "can only be answered by an inspection of the [records] themselves" by the courts. See *Bland v. Virginia State University*, 272 Va. 198, 202 (2006). Here, the petitioner Heather Sawyer agreed that her requests on their face encompass exempt

documents. And the Governor's Office repeatedly proposed further evidentiary proceedings on the exemption question, including physically presenting the disputed documents to the court for *in camera* inspection. Instead, the circuit court flatly rejected all claims of exemptions and granted the petition in full, without reviewing the records or holding any other type of evidentiary proceeding to determine whether the documents were properly withheld. This baseless ruling should be reversed.

Moreover, this Court should reverse the circuit court's order overruling the demurrer because Sawyer failed to state a claim. At bottom, Sawyer's claim that the Governor's Office did not engage in an adequate search rests on her belief that it is "not credible" that there are "only" sixteen pages of records responsive to one of her requests. This speculation fails to overcome the well-established presumption that the government conducts searches in good faith. And Sawyer misconstrues the scope of the exemptions, wrongly contending that they are inapplicable whenever papers have any circulation outside a narrow list of high-ranking officials. The statute contains no such restriction, which would

all but eliminate the exemptions. The judgment below should be reversed.

STATEMENT

I. The Freedom of Information Act

Virginia's Freedom of Information Act generally provides for open "access to public records" on request. Code § 2.2-3700(B). Recognizing that this general policy must be balanced against the need for confidentiality of some records, however, FOIA contains numerous exemptions. *E.g.*, Code §§ 2.2-3705.1–2.2-3705.7. Two such exemptions cover the "[w]orking papers and correspondence of the Office of the Governor." Code § 2.2-3705.7(2).

The statute defines the Office of the Governor to "mean[] the Governor; the Governor's chief of staff, counsel, director of policy, and Cabinet Secretaries; the Assistant to the Governor for Intergovernmental Affairs; and those individuals to whom the Governor has delegated his authority pursuant to § 2.2-104." *Id.* "'Working papers' means those records prepared by or for a public official identified in this subdivision for his personal or deliberative use." *Id.* The statute does not define "correspondence," and the term's ordinary meaning of "the 'interchange of

written communications'" therefore applies. *Richmond Newspapers v. Casteen*, 42 Va. Cir. 505, 506 (Richmond City 1997) (quoting *Correspondence*, Black's Law Dictionary (6th ed. 1990))); see *Davenport v. Utility Trailer Manuf. Co.*, 74 Va. App. 181, 196 (2022). Personnel records, among other things, are also exempt from disclosure. Code § 2.2-3705.1. The statute provides that "[a]ny exemption from public access to records or meetings shall be narrowly construed." Code § 2.2-3700.

When making a FOIA request, the petitioner must "identify the requested records with reasonable specificity." Code § 2.2-3704(B). The public body must respond within "five working days of receiving a request." Code § 2.2-3704(B)(1). If the public body is withholding records, the public body must "identify with reasonable particularity the volume and subject matter of withheld records, and cite, as to each category of withheld records, the specific Code section that authorizes withholding." *Id.*; see also Advisory Opinion, AO-09-19 (Nov. 6, 2019).[1] The public body may "reference back to [the] initial request as the identification of

[1] The Virginia Freedom of Information Advisory Council is authorized to issue advisory opinions pursuant to Virginia Code § 30-179(1). The Supreme Court treats the Advisory Council's opinions as "instructive." *Transparent GMU v. George Mason Univ.*, 298 Va. 222, 243 (2019).

the subject matter." Advisory Opinion, AO-01-18 (Jan. 15, 2018). And, beyond stating which exemption authorizes the withholding, "FOIA does not require further explanation when a public body asserts an exemption." AO-09-19.

FOIA plaintiffs may petition trial courts for injunctive and mandamus relief for alleged violations of the statute. See *Suffolk City Sch. Bd. v. Wahlstrom*, ___ Va. ___, 886 S.E.2d 244, 256–57 (2023); Code § 2.2-3713(A), (D). "[T]he focus in a proceeding involving [that] statutory injunction is whether the authorizing 'statute or regulation,'" FOIA, "has been violated," including whether the statutory exemptions apply to the withheld documents. *Wahlstrom*, ___ Va. at ___, 886 S.E.2d at 256 (quoting *Virginia Beach SPCA, Inc. v. South Hampton Roads Veterinary Ass'n*, 229 Va. 349, 354 (1985)); see also, *e.g.*, Code §§ 2.2-3700(B), 2.2-3704(A), (G). "[T]he public body shall bear the burden of proof to establish an exclusion by a preponderance of the evidence." Code § 2.2-3700(E). Whether an exemption applies is a "mixed question of law and fact" for the court, which it generally resolves by reviewing the unredacted records in camera. *Hawkins v. Town of South*

Hill, __ Va. __, 878 S.E.2d 408, 411 (2022); *Bergano v. City of Va. Beach*, 296 Va. 403, 410–11 (2018).

An injunction under FOIA is "an extraordinary remedy" that is "predicated on the probability that future violations will occur." *Wahlstrom*, ___ Va. ___, 886 S.E.2d at 257 (quoting *Marsh v. Richmond Newspapers, Inc.*, 223 Va. 245, 258 (1982)); see also Kent Sinclair, *Sinclair on Virginia Remedies*, § 51.1[A] (5th ed. 2016); *Levisa Coal Co. v. Consolidation Coal Co.*, 276 Va. 44, 60 (2008). Such an injunction "is not to be casually or perfunctorily ordered." *Wahlstrom*, ___ Va. ___, 886 S.E.2d at 257 (quoting *Nageotte v. Board of Sup.*, 223 Va. 259, 269 (1982)). An injunction under FOIA "must be tied to the actual violation of [ ]FOIA that gives rise to injunctive relief." *Id.* at 257 (quoting *Nageotte*, 223 Va. at 269).

II. The Governor's Executive Order and the Help Education Email Address

Shortly after his inauguration, Governor Youngkin signed Executive Order 1, *Ending the Use of Inherently Divisive Concepts, Including Critical Race Theory, and Restoring Excellence in K-12 Public Education in the Commonwealth* (2022), https://tinyurl.com/5cjhthjr (EO 1). The purpose of EO 1 is "to end the use of inherently divisive concepts,

including Critical Race Theory, and to raise academic standards," as well as "to ensure excellence in K-12 public education in the Commonwealth." *Id.* at 1–2. The executive order explained that education should focus on teaching students "how to think for themselves" and "teach our students the entirety of our history—both good *and* bad." *Id.* at 1; see also R. 7. EO 1 also prohibited "Executive Employees . . . from directing or otherwise compelling students to personally affirm, adopt, or adhere to inherently divisive concepts." *Id.* at 2.

The Governor created an e-mail address, helpeducation@governor.virginia.gov, which "allow[s] parents to send concerns about violations of students' fundamental rights and any other perceived divisive practices within Virginia schools." R. 4 (cleaned up), 7. The Help Education Email Address served[2] as "a resource for parents, teachers, and students to relay any questions . . . [about] divisive practices within Virginia schools." R. 8. Parents can use the same email to send any concerns or questions about the Governor's second Executive Order, which

[2] The Help Education Email Address has since been discontinued. See Ben Paviour, *Youngkin Administration Shut Down Education 'Tip Line' in September*, VPM (Nov. 3, 2022), https://tinyurl.com/mr9fc9bs.

addressed parents' right to opt their children out of school mask mandates. R. 7–8.

III. Petitioner's Requests

Petitioner Heather Sawyer submitted a series of requests for records under FOIA, Code § 2.2-3700 *et seq.* See R. 11–15. Two of those requests are at issue here.[3] First, she sought "all communications between or among" "employees who work within the Virginia Governor's office" and government employees or private individuals outside the Governor's office "that are related to the creation or operation of the" Help Education Email Address. R. 14 (cleaned up) (Request 758).

Second, Sawyer requested "all electronic communications" sent by certain "specified official[s]" in the Governor's Office, and communications between those officials and certain "non-governmental individuals and/or organizations" that contain "any of the listed key terms." The listed terms included, for instance, "CRT," "Critical Race Theory,"

[3] Sawyer made four other requests that the parties have resolved since she filed her petition. See R. 129, 159. Those requests are not now in dispute.

"helpeducation@governor.virginia.gov," and "inherently divisive practices." R. 16 (cleaned up) (Request 759).

In response to Request 758, the Governor's Office produced four pages of responsive documents and withheld approximately twelve pages of documents as "working papers exemption" under Code § 2.2-3705.7(2). R. 15. In response to Request 759, the Governor's Office produced 144 pages of responsive records, and withheld approximately 700 pages of records. R. 15. Again, the response explained that most of the withheld documents were exempt from disclosure under Code § 2.2-3705.7(2) as "correspondence and working papers of the Governor's Office." R. 28, 102, 131. A supplemental response further specified that 629 pages of documents consisted of "correspondence and working papers between and among the personnel of the Office of the Governor." R 161, 180, 185. The other exempt documents consisted of "correspondence and working papers from the Office of the Governor" to others, including "the Department of Education" and "members of the General Assembly and/or their aides." R. 161 (Opp. to Demurrer), 180 (Bernhardt email). In addition, "a few documents are personnel related" and thus exempt from disclosure under Code § 2.2-3704(B)(1). R. 102.

Sawyer then filed in the Circuit Court for the County of Arlington a petition for injunctive and mandamus relief against Respondents the Commonwealth of Virginia, the Office of the Governor, and Governor Glenn Youngkin (collectively, the Governor's Office) for failure to make public the requested records. R. 3. As to Request 758, the petition contended that the Governor's Office "fail[ed] to conduct a reasonable search for responsive records." R. 16. The petition asserted that it was "not credible" that only 16 pages of records were responsive to this request, given the importance of the Help Education Email Address to "constituent services." R. 16. As to Request 759, the petition contended that the Governor's Office "failed to justify the application of this exemption" for correspondence and working papers. R. 17.

The Governor's Office filed a demurrer, R. 128–46 and supporting memorandum, R. 116–25, 128–46, to which Sawyer responded, R. 156–85. The circuit court held a hearing on the demurrer and the petition. R. 195–251. As to Request 758, the Governor's Office explained that public officials are" presumed" to "obey the law in carrying out their duties" and to do so "in good faith." Advisory Opinion, AO-04-10 (Nov. 19, 2010); see *WTAR Radio-TV Corp. v. City Council of Va. Beach*, 216 Va.

892, 895 (1976). Sawyer's assertion that it is "not credible" that there are no additional responsive records was therefore "insufficient to overcome the presumption." R. 134–35. And both requests "on their face [sought] protected correspondence of the Office of the Governor," because they request written communications to and from the Office. R. 135. The requests also "on their face, [sought] records covered by the working papers exemption," because they, for instance, cover "communications prepared by the Governor's policy advisors and analysts, counsel, and legislative director." R. 137.

To the extent that the circuit court found that the petition stated a FOIA claim, the Governor's Office requested further evidentiary proceedings to demonstrate that the search was adequate, and that the exemptions properly applied. Specifically, the Governor's Office offered "to produce the responsive records . . . to the Court for an *in camera* review." R. 132. The Governor's Office explained that this approach "[ha]s been repeatedly endorsed by the Supreme Court," and serves policy purposes such as "balanc[ing] the interest in disclosure that's in the FOIA law with the need to preserve as confidential and exempt records that . . . have [been] identified as exempt" from FOIA. R. 230–32.

In opposition, Sawyer acknowledged that Advisory Opinions have held that "a detailed explanation of how the search was conducted" is not required, but argued that standard applies only "in the pre-litigation context." R. 165 (citing AO-04-10). Once a request is in litigation, Sawyer argued, the court should look to precedents interpreting the federal FOIA, and require "adequate information" such as "an affidavit describing the search(es) they conducted." R. 166–67. Sawyer stated that "we understand that just because . . . only a few records were turned up . . . doesn't necessarily mean that a search was inadequate," but contended that the court should require the Governor's Office to "explain in reasonable detail the scope and method of their search." R. 211.

As to the correspondence exemption, Sawyer argued that a document must be from one of the listed high-ranking officials or "to—and *only to*—a person or persons covered by the Exemption." R. 170. She contended that if anyone other than the high-ranking officials listed in the statute received or was copied on the correspondence, the exemption does not apply. *Id.* Similarly, as to the working papers exemption, Sawyer argued that "[d]isclosure to others for reasons beyond a covered official's personal or deliberative use is disqualifying." R. 172 (cleaned up).

Even under her exceedingly restrictive interpretation, Sawyer acknowledged the possibility that the Governor's Office "could meet their burden for some of the records." R170–71. She argued, however, that the requests do not "*necessarily* involve[] communications of covered individuals." R. 170–71; see R. 173 (Sawyer arguing that "the fact that the request may generate some responsive records that were prepared for the Office's personal or deliberative use . . . does not mean that the request necessarily seeks *only* exempt records.").

Although Sawyer argued that the Governor's Office bore the burden of demonstrating its FOIA compliance, she also discussed further evidentiary procedures. She argued that an *in camera* review would be burdensome, and instead proposed "a much more reasonable solution and what the federal courts do is have the government create a *Vaughn* index[4] or produce redacted documents" showing information such as the date, senders, and recipients. R. 236. Sawyer stated that, following such evidentiary procedures, "we can probably get rid of a lot of documents

[4] A *Vaughn* index is "a list describing the documents withheld and information redacted and giving detailed information sufficient to enable a court to rule on whether the withholdings fall within a FOIA exemption." *Solers, Inc. v. IRS*, 827 F.3d 323, 326 (4th Cir. 2016); see also *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973).

because maybe we agree that they fall within the exemption," and the circuit court could then hear any remaining disputes. R. 237; see R. 209 (similar).

The circuit court overruled the demurrer without issuing an opinion and without stating its rationale for the record. The court did not order any further evidentiary procedures to determine whether the Governor's Officer properly invoked the correspondence and working papers exemptions. Instead, the court simply granted Sawyer's petition for injunctive and mandamus relief, ordering the Governor's Office to produce *all* of the withheld documents. Again, the court did not issue any opinion on this order or state its reasoning for the record. R. 187–88. After the court's initial ruling, the Governor's Office again proposed further evidentiary proceedings, offering "to produce the withheld documents under seal for in-camera review for the Court to assess the applicability of the exemptions asserted for the withheld records." R. 239. Indeed, counsel for the Governor's Office physically presented the disputed documents to the circuit court for *in camera* inspection, R. 230, but the circuit court "granted the petition without requesting to receive . . . the records under seal." R. 239–40. The circuit court then stayed its order

pending appeal, R. 187–88, and the Governor's Office filed this appeal, R. 189–93.

ASSIGNMENTS OF ERROR

1. The circuit court erred in granting the petition for injunctive and mandamus relief without conducting in-camera review of the records or otherwise ordering further procedures to ascertain whether the search for records was inadequate and the records were entitled to the claimed exemptions. (Preserved R. 132, 175 n.17, 230–32, 236, 239–40).
2. The circuit court erred in overruling the demurrer when searches for responsive records were entitled to a presumption of good faith, the correspondence and working papers exclusion set forth at Code § 2.2-3705.7(2) exclude the withheld records from disclosure, and the response complied with the identification requirements of Code § 2.2-3704(B)(1) regarding the withheld records. (Preserved at R. 116–20, 128–40, 212–30, 239).

STANDARD OF REVIEW

An appellate court reviews a circuit court's interpretation of a statute and its application of a statute to its factual findings de novo. *Jordan v. Commonwealth*, 286 Va. 153, 156 (2013); see also *Hawkins v. Town of South Hill*, __ Va. __, 878 S.E.2d 408, 411 (2022). "Whether documents should be excluded under [ ]FOIA is a mixed question of law and fact." *Hawkins*, __ Va. __, 878 S.E.2d at 411 (cleaned up) (quoting *Virginia Dep't of Corr. v. Surovell*, 290 Va. 255, 262 (2015)).

"A demurrer tests the legal sufficiency of a complaint, ensuring that the factual allegations set forth in the pleading are sufficient to state a cause of action." *La Bella Dona Skin Care, Inc. v. Belle Femme Enters.*, 294 Va. 243, 255 (2017). "[U]pon reviewing a demurrer, th[e] court will accept the facts alleged in the pleading as true to determine the legal sufficiency of the claim." *Sullivan v. Jones*, 42 Va. App. 794, 803 (2004).

ARGUMENT

I. The circuit court erred in overruling the demurrer

First, the circuit court erred in overruling the demurrer because the petition does not sufficiently allege a cause of action under FOIA. Sawyer's view of the correspondence and working papers exemptions is overly narrow; the specified high-ranking officials need not be the *sole* senders or recipients for documents to qualify as correspondence or working papers of the Governor's Office. And Sawyer's speculation fails to meet her burden of pleading that the search was inadequate.

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

First, the documents at issue are exempt from disclosure because they are correspondence and working papers of the Governor's Office.

The General Assembly recognized that, in some circumstances, FOIA's general policy of access to records can be harmful and counterproductive. It therefore excluded a number of categories of documents from disclosure. The correspondence and working papers exemptions protect the internal functioning and deliberations of high-level executive officials, including the Governor.

FOIA generally sets forth an "open government policy." *Taylor*, 242 Va. at 224. "The General Assembly does not consider the policy absolute, however, and currently has identified 44 instances in which certain information is exempt from mandatory disclosure." *Id.* These "exemptions reflect the General Assembly's determination that the policy of openness does not override the need for confidentiality in every circumstance, [and] that the best interests of the Commonwealth may require that certain governmental records and activities not be subject to compelled disclosure." *Id.*

Further, legislation compelling the Governor's Office to disclose its records risks violating the constitutional separation of powers doctrine. The correspondence and working papers exemptions "reflect[] the General Assembly's recognition of constitutional limits on its ability to

invade the confidentiality of the Governor's communications." *Taylor*, 242 Va. at 224 (quotation marks omitted). They recognize "essentially an executive privilege" against disclosure. Advisory Op. AO-01-00 (Sept. 29, 2000).

The correspondence and workings papers exemptions also protect the Governor's consultation and decision-making process by exempting from disclosure records that would interfere with his ability to execute the duties of his office. "[H]uman experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances . . . to the detriment of the decision making process." *Taylor*, 242 Va. at 223 (quoting *United States v. Nixon*, 418 U.S. 683, 705 (1974)). Requiring disclosure of such correspondence and deliberations could "impair . . . the ability of the executive to perform his constitutionally required duties." *Id.*

The Governor's Office properly invoked the correspondence and working papers exemptions here. Both of Sawyer's requests, by their terms, encompass exempt documents. Requests 758 and 759 seek written communications to and from the Governor's Office. *E.g.*, R. 14 (Request 758) (requesting communications between "one or more employees

who work within the [Office]" and "an employee of the Commonwealth outside of the Office related to the creation or operation of the" Help Education Email Address); R. 15 (Request 759) (seeking, for example, communications sent by the Legislative Director and Deputy Chief of Staff containing key terms related to the Help Education Email Address). Such documents are quintessential "correspondence." See *Richmond Newspapers*, 42 Va. Cir. at 506 (the ordinary meaning of "correspondence" is "the interchange of written communications" (quotation marks omitted) (quoting *Correspondence*, Black's Law Dictionary (6th ed. 1990))); *Redinger v. Casteen*, 35 Va. Cir. 380 (Richmond City 1995); *cf. American Trad'n Inst. v. Rector and Vis. of Univ. of Va.*, 287 Va. 330, 340–41 (2014) (looking to the "ordinary meaning of 'proprietary'" as defined by the Supreme Court in a case not involving FOIA to define the term as used in the FOIA exemption under Code § 2.2-3705.4(4)).

Sawyer cited a single unreported circuit court case to argue that documents do not qualify as correspondence under this exemption unless they "reflect the work of the [Office of the Governor]" and "were . . . intended *only* for the [Office of the Governor]." R. 170 (cleaned up) (quoting *Hill v. Fairfax County School Board*, 83 Va. Cir. 172, 177

(Fairfax Cnty. 2011)). That unreported lower court opinion is of course not binding on this Court. And the highly restrictive construction Sawyer proposes does not comport with the statutory text: the statute excludes *all* "correspondence of the Office of the Governor." Code § 2.2-3705.7(2). It contains no requirement that the documents must personally "reflect the work" of the specified high-ranking officials, nor does it state that the correspondence must be sent *only* from or to those officials. Rather, as the Advisory Council has opined, the "exemption uses the word 'of' and does not limit the exemption to correspondence sent 'to' or 'from' the Office of the Governor." R. 144. Thus, "the exemption would apply to all of the emails of the Office of the Governor." *Id.*

Even the *Hill* case that Sawyer relied upon does not support her position. There, the petitioner requested emails from a school board, which has no statutory exemption for its correspondence. The Board withheld documents "between Board members [where] the Superintendent was merely copied as a recipient," and the court rejected the argument that the documents were exempt as "correspondence" of the Superintendent. *Hill*, 83 Va. Cir. at 177. The case thus, at most, stands for the proposition that the non-exempt Board members could not insulate

their own correspondence from disclosure simply by copying the Superintendent. It does not hold that, to qualify as correspondence of the Governor's Office, the Governor or one of the other listed high-ranking officials must be the *only* senders or recipients.

Such a restrictive construction is highly unreasonable, and all but eliminates the exemption from the statute. The Governor and other listed officials, such as the chief of staff, director of policy, and Cabinet Secretaries, are high-ranking officials with extensive and wide-ranging duties. Code § 2.2-3705.7(2). They cannot realistically be expected to write all of their own correspondence personally, or to review personally all of the correspondence directed to them without any involvement of their staff, administrative assistants, or others. *E.g.*, National Governors Association, *Governors' Office Functions* (last visited June 27, 2023), https://tinyurl.com/evxhx46m ("Most governors' offices have assigned staff members or units to manage the flow of correspondence . . . [and, for example, p]olicy-related correspondence may be referred to the governor's policy aids."). Interpreting the statute to deny the Governor the exemption unless he meets these impossible conditions would violate the separation of powers doctrine by impairing his ability to carry

out his constitutionally required duties. *Taylor*, 242 Va. at 223; *Yamaha Motor Corp., U.S.A. v. Quillian*, 264 Va. 656, 665 (2002); *Virginia Soc. for Human Life, Inc. v. Caldwell*, 256 Va. 151, 156–57 (1998). The Court should therefore reject Sawyer's unreasonable interpretation of the correspondence exemption. *American Trad'n Inst.*, 287 Va. at 341–42 (concluding that petitioner's "proposed construction of 'proprietary'" in VFOIA's exemption for "information of a proprietary nature" under Code § 2.3-3705.4(4) "is too narrow" (quotation marks omitted)).

Sawyer's interpretation of the working papers exemption fails for the same reasons. Her requests, on their face, seek records protected as working papers of the Governor's Office. Request 759, for example, demands communications prepared by the Governor's policy advisors, analysts, counsel, and legislative director. R. 84–85. That request unsurprisingly generated responsive records prepared for "personal or deliberative use" of the Governor's Office. The Governor's Office thus correctly withheld the documents as exempt working papers. Code § 2.2-3705.7(2).

Sawyer again argues that documents cannot be working papers unless they are directed "to—*and only to*—a person or persons covered

by the Exemption." R. 170. Again, that highly restrictive interpretation does not comport with the statutory text. Nothing in the statute states that a document cannot be a "working paper" if it is disseminated beyond the particular high-ranking officials named. Instead, while the statute provides that "information publicly available . . . without substantive analysis or revisions" is not a working paper, it does not prohibit a working paper from being shared with lower-ranking officials or staff. Code § 2.2-3705.7. Instead, the statutes define a working paper as any document "prepared by *or for*" the listed high-ranking officials for their "personal *or deliberative* use." Code § 2.2-3705.7 (emphasis added). Again, such deliberative documents will nearly always be shared with at least some lower-ranking officials or staff members. *E.g.*, *Montrose Chemical Corp. of California v. Train*, 491 F.2d 63, 65 (D.C. Cir. 1974) (reversing the district court's decision requiring disclosure under the federal FOIA of summaries created by agency staff and used by an agency administrators after finding those documents exempt as part of the administrator's deliberative process); see also National Governors Association, *supra* 21. Denying the exemption whenever the Governor's deliberations extend beyond a tiny number of high-ranking

officials is highly unreasonable and all but eliminates the exemption from the statute. And again, this unreasonably restrictive interpretation presents grave constitutional problems and should be rejected. *Taylor*, 242 Va. at 223; *Quillian*, 264 Va. at 665; *Caldwell*, 256 Va. at 156–57.

Further, even under her own unduly restrictive constructions, Sawyer did not dispute below that her FOIA requests necessarily sweep in records which squarely fall within the correspondence and working papers exemptions. Indeed, Sawyer agreed that "a lot of documents" withheld may "fall within the exemption." R. 237. Instead, Sawyer argued that she *also* requested records that should fall outside the exemption. *E.g.*, R. 170, 173. But the Governor's Office produced records in response to both FOIA requests, totaling around 150 pages of documents. *Supra* 8–9. And Sawyer did not plead facts showing that the withheld documents fall outside the correspondence and working papers exemptions. Her assertion that the exemption "does not apply to the requested records and thus they must be disclosed," R. 17, is a "mere conclusory statement . . . [that] does not satisfy the pleading requirement of

alleging facts upon which relief can be granted," *Dean v. Dearing*, 263 Va. 485, 490 (2002).

Sawyer primarily argued below that the demurrer should be denied because the Governor's Office has the burden of proving that the exemptions apply. But, on a demurrer, the question is whether the petitioner has met the burden of pleading, which is different from the burden of proof. See, *e.g.*, *Sweely Holdings, LLC v. SunTrust Bank*, 296 Va. 367, 382 (2018) (distinguishing between the burden of proof and the burden of pleading). "The burden of proof has to do with evidence and proof at trial, whereas a demurrer is directed at the pleading alone." *Appalachian Voices v. Air Pollution Control Bd.*, No. CL22-367, 2022 Va. Cir. LEXIS 265, *4–5 (City of Charlottesville Dec. 19, 2022); see, *e.g.*, *C. Porter Vaughan, Inc. v. DiLorenzo*, 279 Va. 449, 459 (2010) (explaining that although "the trial court erred when it sustained [the defendant's] demurrer," the plaintiff "will [still] bear the burden of proof . . . at trial"); *Fun v. Virginia Military Inst.*, 245 Va. 249, 252 (1993) ("A demurrer, unlike a motion for summary judgment, does not allow the court to evaluate and decide the merits of a claim; it only tests the sufficiency of factual allegations to determine whether the motion for

judgment states a cause of action."). Nothing in FOIA shifts the burden of *pleading* from the petitioner to the respondent. And "[i]f a pleading does not state a cause of action and sufficient facts to support such a cause of action, we do not get to the issue of burden of proof." *Appalachian Voices*, 2022 Va. Cir. LEXIS 265, at *4–5. To plead a FOIA claim, a petitioner must include factual allegations sufficient to support the conclusion that a public body has withheld public records that are not exempt from disclosure. *Cf. Cole v. Smyth Cnty. Bd. of Supervisors*, 298 Va. 625, 636–37 (2020) (finding a petitioner properly preserved her assignment of error because she pleaded, to the circuit court's satisfaction, that the defendant "violated [ ]FOIA [by] . . . discuss[ing] matters in the closed sessions that were beyond the scope of the claimed closed meeting exemption" such that the circuit court ruled on that claim). Sawyer failed to do so here, and the circuit court should therefore have granted the demurrer. At the very least, the circuit court erred in granting the petition and ordering the disclosure of *all* the withheld documents without further evidentiary proceedings to determine whether the exemptions were properly invoked. See 32–35, *infra*.

B. Sawyer's petition fails to overcome the presumption that the Governor's Office conducted an adequate search

The circuit court should also have granted the demurrer because Sawyer failed to state a claim that the Governor's Office conducted an inadequate search in response to Request 758. FOIA does not require a public body to conduct a search in any particular manner, and does not "specify the extent to which a public body must search for records in response to a request." AO-04-10. Nor does FOIA "require that a public body make a detailed explanation of how the search was conducted." *Id.* Instead, public officials are afforded the "ancient presumption . . . that [they] obey[ed] the law." *WTAR Radio-TV Corp.*, 216 Va. at 895; see also AO-04-10. The circuit court should have applied this presumption here, and dismissed the claim.

Sawyer's petition does not allege facts supporting her claim that the Governor's Office "fail[ed] to conduct a reasonable search for records in response" to her request and thus violated FOIA. R. 17–18. In the circuit court, Sawyer emphasized that FOIA places the burden of proof on respondents. R. 162, 164, 167–71. But the provision she cites states only that the public body bears "the burden of proof to establish an exclusion." Code § 2.2-3713(E). There is no such provision shifting the burden

of proving that a search was inadequate. *E.g.*, *Zinone v. Lee's Crossing Homeowners Ass'n*, 282 Va. 330, 337 (2011) ("We look to the plain meaning of the statutory language, and presume that the legislature chose, with care, the words it used when it enacted the relevant statute." (quoting *Addison v. Jurgelsky*, 281 Va. 205, 208 (2011))). And again, the question in ruling on a demurrer is the burden of pleading, which is distinct from the burden of proof. See 25–26, *supra*.

Sawyer also argued below that "Respondents' claim[] . . . that only 16 pages of responsive records exist with regard to [FOIA Request 758 is] not credible" given the Help Education Email Address's significance. R. 16. But such speculation cannot overcome the presumption that the Governor's Office conducted the search in compliance with FOIA. Sawyer's speculation is particularly thin given that Request 758 was only one of numerous requests she submitted for records concerning the Help Education Email Address; in response to other requests, including Request 759, the Governor's Office identified "hundreds of pages of records." R. 162.

Sawyer also contended that the Governor's Office failed to conduct a reasonable search because other media organizations made

similar FOIA requests, which the Governor's Office did not disclose in response to Sawyer's Request 758. R. 16. But Request 758 sought records concerning "the creation or operation of the" Help Education Email Address. *Supra* 8, 18–19. Third-party FOIA requests do not fall within the scope of the records Sawyer requested, and the Governor's Office therefore did not deem those third-party FOIA requests responsive. Thus, Sawyer failed to plead facts showing that the search for records was inadequate. The circuit court erred in overruling the demurrer.

II. The circuit court erred in granting the petition for injunctive and mandamus relief

Even if the petition stated a claim under FOIA sufficient to survive demurrer, the circuit court had no factual basis for holding that the Governor's Office violated FOIA. The court erred in granting the petition outright at the demurrer stage, and ordering the Governor's Office to produce all of the withheld documents in their entirety. Instead, the court should have held further evidentiary procedures to determine whether the Governor's Officer properly withheld the documents under the correspondence and working papers exemptions.

Surviving a demurrer and prevailing on a claim on the merits are very different matters. "To survive a challenge by demurrer" requires

no proof of the claim's elements; "a pleading must [instead] be made with sufficient definiteness to enable the court to find the existence of a legal basis for its judgment." *Doe by and Through Doe v. Baker*, 299 Va. 628, 644–45 (2021) (cleaned up) (quoting *Squire v. Virginia Hous. Dev. Auth.*, 287 Va. 507, 514 (2014)). "The sufficient definiteness requirement has long anchored [Virginia courts'] application of notice-pleading principles." *Id.* (same) (quotation marks omitted). Prevailing on the merits, on the other hand, requires *evidence* of the elements of the claim. See, *e.g.*, *Cohn v. Knowledge Connections, Inc.*, 266 Va. 362, 367 (2003).

Defendants moreover cannot be required to produce evidence before a court rules on the demurrer. See *Southern R. Co. v. Darnell*, 221 Va. 1026, 1033 (1981) (holding that "not only that it was improper to require the presentation of evidence prior to ruling on the demurrer, but that the trial court further erred in" ruling on the merits "without giving the Railways a hearing on the merits"). That is because a "demurrer tests the legal sufficiency of facts alleged in pleadings, not the strength of proof." *Assurance Data, Inc. v. Malyevac*, 286 Va. 137, 143 (2013). In this way, a demurrer differs from a motion for summary judgment. *Id.*

"[A] demurrer 'does not allow the court to evaluate and decide the merits of a claim.'" (quoting *Fun*, 245 Va. at 252, and citing *Concerned Taxpayers v. County of Brunswick*, 249 Va. 320, 327–28 (1995)); see also *Bozsik v. Bozsik*, Record No. 1468-14-1, 2015 Va. App. LEXIS 124, *17 (Apr. 14, 2015) (holding that "the circuit court erred when it 'decid[ed] the dispute without permitting the parties' to present their conflicting evidence at an evidentiary hearing 'on the merits'" (quoting *Renner v. Stafford*, 245 Va. 351, 352 (1993))).[5] Thus, simply stating a claim cannot provide a basis for granting a petition, because the court has not yet evaluated the merits.

The circuit court therefore erred in holding that the Governor's Office violated FOIA, and in ordering it to disclose all of the withheld records, while refusing to conduct any evidentiary proceeding to determine whether the documents were exempt from disclosure. Without examining the documents or ordering other evidentiary proceedings, the court had no factual basis for holding the Governor's Office violated FOIA. *E.g.*, *Darnell*, 221 Va. at 1033 (trial court erred in ruling on the merits

[5] Citation to unpublished cases from this Court is permitted as informative. Rule 5A:1(f).

without allowing a hearing on the merits); *Kingrey v. Hill*, 245 Va. 76, 78 (1993) (reversing a circuit court's decision to set aside a jury verdict on a negligence claim because "nothing in the record support[ed]" finding the defendant liable); *Weaver v. Roanoke Dept. of Human Res.*, 220 Va. 921, 929 (1980) (reversing a circuit court's orders terminating residual parental rights given "nothing in the record supports the court's conclusions"); *cf. Stocks v. Fauquier Cnty. Sch. Bd.*, 222 Va. 695, 698–99 (1981) (reversing the Industrial Commission's decision after "hold[ing] that the . . . decision is without evidence to support the factual finding upon which it rests"); *Barnes v. Commonwealth*, 72 Va. App. 160, 169–70 (2020) (finding that the circuit court's failure to "include . . . things in the record" in an appeal on the circuit court's bail determination "ma[de] it impossible for th[e] Court to determine . . . the factual support for the" basis of its ruling (cleaned up)).

Sawyer herself repeatedly admitted that there were numerous outstanding factual questions. For instance, while contending that some responsive records would not qualify for the exemptions, Sawyer agreed that "the request may generate some responsive records that were prepared for the Office's personal or deliberative use" as working papers. R.

173 (quotation marks omitted). Indeed, she stated that "a lot of documents" may "fall within the exemption." R. 237. And Sawyer recognized that to "decide" whether the Governor's Office violated FOIA would require "more information about the records" and that "[w]e don't know that until [Respondents] give us more information and *that's all we're looking for here*, Your Honor." R. 237. Similarly, as to her claim that the search was inadequate, Sawyer admitted that she "d[id]n't even have the information to be able to evaluate," for example, "who was searched, what searches were conducted, what custodians, what key terms were used, who was interviewed, et cetera." R. 211.

In the face of these numerous factual questions, the circuit court erred in granting Sawyer's petition at the demurrer stage without holding any evidentiary proceedings. Sawyer suggested that the court could grant the petition on the ground that the Governor's Office "failed to meet [its] burden" of proof. R. 169. But this argument is deeply mistaken. The Governor's Office did not have the burden of affirmatively proving that it complied with FOIA *in its demurrer*. See 25–26, 28, *supra*. Rather, the demurrer merely tested whether Sawyer stated any legally valid claim in the first instance. Put simply, it does not follow from

the denial of a demurrer that the petition should be granted. Indeed, the denial of a demurrer reveals nothing about the merits of the petition.

Furthermore, the Governor's Office expressly and repeatedly requested that the court hold evidentiary proceedings to determine its compliance with FOIA if its demurrer were not granted. In particular, the Governor's Office physically presented the disputes records to the court and offered to submit them for *in camera* review "for the Court to assess the applicability of the exemptions asserted for the withheld records." See R. 230–32, 239. This proposal was fully in line with Supreme Court precedent. As the Supreme Court has explained, whether a record is "exempt" "can only be answered by an inspection of the [records] themselves" by the court. *Bland v. Virginia State University*, 272 Va. 198, 202 (2006). Therefore, the Supreme Court has "encouraged the filing of allegedly confidential records for *in camera* inspection by the trial court and, if necessary, by an appellate court." *Id.*; see also *Surovell*, 290 Va. at 269; *LeMond v. McElroy*, 239 Va. 515, 518–21 (1990). Doing so "constitutes a proper method to balance the need to preserve confidentiality of privileged materials with the statutory duty of disclosure under

VFOIA." *Bergano*, 296 Va. at 410; see also *Hawkins*, __ Va. at __, 878 S.E.2d at 416. And it prevents appellate courts from having to "decide the issue in a vacuum," with no factual record. *Bland*, 272 Va. at 202. Sawyer herself did "not object" to *in camera* review, R. 175, and the court erred by instead granting the petition without even deigning to inspect a single disputed record.

Even if the court could lawfully conclude that an *in camera* review would be overly burdensome, it nonetheless had no basis to order the Governor's Office to produce all the disputed records without any evidentiary proceeding whatsoever. Sawyer herself proposed two alternative proceedings as "reasonable solution[s]" based on federal FOIA precedents: that the Governor's Office "produce redacted documents" with information such as the dates, senders, and recipients, or "provide[] what's colloquially known as a *Vaughn* index." R 209, R 236. A *Vaughn* index is "designed to enable the district court to rule on a privilege without having to review the document itself" because it "functions as 'a surrogate for the production of documents for in camera review.'" *Solers, Inc.*, 827 F.3d at 328; *supra* 13 n.4

Similarly, on her claim that the search was inadequate, Sawyer proposed that the court order "the Governor's Office . . . to [] explain[] what it did," so Sawyer could evaluate whether "what it did . . . was an adequate search." R. 212 (stating that "if it explains what it did and it was an adequate search, then that's the end and we go home [but] if it wasn't an adequate search, then we talk about having to do a new search"). The circuit court had no basis to conclude the search was unreasonable without conducting *any* factual inquiry.

Sawyer's proposal that the circuit court imitate federal procedures was at best problematic. Any contention that the Governor's Office must provide a justification for withholding each individual record is inconsistent with the statutory text, which requires it to provide only the volume, subject matter, and applicable exemption for "each category" of withheld records. See Code § 2.2-3704(B). The Governor's Office fully complied with those requirements in responding to Sawyer's request. See *supra* 8–9. "FOIA does not require further explanation when a public body asserts an exemption beyond . . . citing the specific Code section that authorizes withholding." AO-09-19; see Advisory Opinion, AO-01-14 (Jan. 29, 2014) (Once a records custodian informs a requester than

an exemption applies to a requested document, "no further justification or explanation is required.")

The federal statute is quite different. It requires the government to provide the "determination and the reasons therefor" when denying a request. See 5 U.S.C. § 552(a)(6), (b). Section 552(b) also requires that, "[i]f technically feasible, the amount of the information deleted, and the exemption under which the deletion is made, shall be indicated at the place in the record where such deletion is made." And the federal statute, in conjunction with requiring a far more detailed response, provides the government far longer to prepare it. Virginia's FOIA requires public bodies to respond to a request within five business days; the federal FOIA provides the government twenty days to respond. Code § 2.2-3704(B); 5 U.S.C. § 552(b)(6)(A)(i). And federal agencies' initial response may simply acknowledge the requests, and explain that the agency cannot produce records within the statutory timeline. 5 U.S.C. § 552(a)(6)(B)(iii). It often takes months or years before federal agencies actually produce the requested documents. *E.g.*, *Miccosukee Tribe of Indians of Florida v. United States*, 516 F.3d 1235, 1257 (2008) (holding that "the district court did not err when it failed to draw any adverse

interest against the [agency] due to its" disclosure of documents requested under FOIA over 16 months and about 24 months after the initial request). Given the far tighter deadlines set by Virginia's FOIA, the federal-style detailed, document-by-document response Sawyer proposes is not feasible.

Indeed, Sawyer apparently did not contest below that "the Office did not have to justify their use" of exemptions "in their initial response to Petitioner's FOIA requests." R. 168. Rather, Sawyer argued that the differences between the federal and Virginia FOIA statutes related to the "public bodies' obligations only in the pre-litigation context," R. 165, and that federal precedent should inform the "obligation of the public body once you get to litigation" R. 235; see also R. 236 (Sawyer arguing that "[t]here's a difference between what the government is required to do now that we're in litigation and what maybe it was required to do at the outset").

Sawyer's concession that the Governor's Office had no pre-litigation requirement to provide record-by-record information detailing the basis for the exemption simply clarifies that the circuit court had no basis for holding—at the demurrer stage and without any evidentiary

proceedings—that the Governor's Office violated FOIA. On the record before it, the circuit court had no evidentiary basis whatsoever to decide the FOIA question, and thus failed to "tie[] [the injunction] to [an] actual violation of [ ]FOIA." *Wahlstrom*, ___ Va. at ___, 886 S.E.2d at 257. The court's order granting Sawyer's petition for mandamus and injunctive relief also failed to give any weight to "the need to preserve confidentiality of privileged materials." *Bergano*, 296 Va. at 410. If the petition could proceed past the demurrer stage, some further evidentiary proceeding or *in camera* review was clearly necessary. *Supra* 32–35. The order granting the petition should be reversed.

CONCLUSION

For the foregoing reasons, this Court should reverse.

Respectfully submitted,

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2. This brief complies with Rule 5A:19(a) because the portion subject to that Rule contains 7,676 words.

3. The Appellant desires to present oral argument.

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