V I R G I N I A :

IN THE CIRCUIT COURT FOR THE CITY OF RICHMOND

VIRGINIA STATE CONFERENCE NAACP, and its President ROBERT N. BARNETTE, JR., Petitioners, v. GOVERNOR GLENN A. YOUNGKIN, in his official capacity as Governor of Virginia, and and THE HONORABLE KELLY T. GEE, in her official capacity as Secretary of the Commonwealth, Respondents.	Case No. CL23004731-00

PETITIONERS' MEMORANDUM IN OPPOSITION TO RESPONDENTS' DEMURRER AND IN SUPPORT OF THEIR PETITION

Petitioners Virginia State Conference NAACP and Robert N. Barnette, Jr., by counsel, submit the following memorandum in opposition to the Demurrer filed by Respondents Governor Glenn A. Youngkin (the "Governor" or "Governor Youngkin"), in his official capacity as Governor of Virginia, and the Honorable Kelly T. Gee, in her official capacity as Secretary of the Commonwealth (together with the Governor, "Respondents"), and in supplemental support of their underlying claim for relief under the Virginia Freedom of Information Act ("VFOIA").

INTRODUCTION

When Petitioners submitted their VFOIA letter in May requesting certain records related to the Governor's new policies and processes for restoring the voting rights of Virginia citizens with past felony convictions, Respondents responded by asserting that all of the requested records were exempt from production on the basis that they were "working papers" of the Governor. Presumably recognizing that there was no way such an overbroad and unsubstantiated position was consistent with the statute—yet while continuing to nominally assert this position during negotiations with Petitioners—Respondents initially produced roughly 590 pages of the requested records. But gaps in the production, including clearly nonexempt records, remained. Following repeated attempts at further negotiation that went unanswered by Respondents, Petitioners were left with no recourse but to bring suit to enforce their rights under VFOIA. Having done so, and with a hearing before this Court looming on November 3, Respondents made further productions of 91 pages of records responsive to several of the categories identified by Petitioners in their Petition. Respondents also agreed to permit an in-person inspection of the database tracking restoration of rights applications, subject to limitations to be agreed upon by the parties. On December 6, Respondents produced another 477 pages of responsive records, comprising communications with rights restoration applicants.

As to the rights restoration application database, the parties have been unable to come to terms regarding the proffered inspection. Respondents continue to assert the database is wholly exempt from production as "working papers" of the Governor, but continue to fail to do so with specificity and substantiation as required by VFOIA. Petitioners thus seek an order directing Respondents to produce the nonexempt portions of the database, consistent with the requirements of VFOIA. In addition, because they were forced to bring suit to obtain clearly nonexempt records,

in order to ensure future compliance with the procedural requirements of VFOIA and to deter Respondents from making overbroad assertions of the working papers exemption in the future, Petitioners seek a declaratory judgment that Respondents violated VFOIA by withholding nonexempt records, by failing to produce partially redacted copies of partially exempt records, and by failing to assert applicable exemptions with specificity as to the subject matter withheld and the basis for the asserted exemption. Finally, because they substantially prevailed on their VFOIA claim by obtaining records they sought and were entitled to, Petitioners seek an order awarding their reasonable attorneys' fees and costs as provided by VFOIA.

BACKGROUND

A. Factual background

Because much of the factual background is described in detail in Petitioners' Memorandum in Support of Petition for Declaratory Judgement and Writ of Mandamus, Petitioners offer a short summary of the factual background. When the Governor upended the process for how voting rights are restored to Virginians with past felony convictions after more than a decade of bipartisan gubernatorial precedent and tradition, Petitioners initiated their attempt to gather more information about the new policy. *See* Pet'rs Mem. in Supp. of Pet. for Declaratory J. & Writ of Mandamus at 4–5. As part of that effort, Petitioners sent the Office of the Governor a letter requesting certain public records related to the new restoration of rights policy and process. *Id.* at 5.

While the Respondents took the position that all of the requested records were subject to the VFOIA working papers exemption, Petitioners and the Office of the Attorney General ("OAG") nonetheless began a dialogue concerning the production of requested records. *Id.* When the OAG expressed concern that certain documents would need to be redacted, Petitioners made several proposals to reduce the burden on the Governor to produce the nonexempt portions of the

requested documents. *Id.* Eventually, the Governor's office voluntarily produced 590 pages of records to Petitioners. *Id.* After reviewing this initial production, Petitioners identified additional nonexempt records that were not produced. *Id.* at 6. Those documents included: (1) administration transition documents; (2) "documents 'that describe the types of categories of information about each restoration of rights applicant requested by the Director of Clemency and provided by other state agencies"; (3) "documents 'related to calendared meetings to discuss various aspects of the restoration of rights process"; (4) "[d]ocuments containing relevant information about applicants whose restoration of rights applications were ultimately denied"; (5) "[c]ommunications with applicants whose completed applications were ultimately denied." *Id.*

Respondents refused to address the deficiencies in the production, and instead tried to skirt the requirements of VFOIA by offering a meeting with then-Secretary of the Commonwealth Kay Coles James (Respondent Secretary Gee's immediate predecessor) to discuss the restoration process. *Id.* Petitioners declined the offer of a meeting as a substitute for the legally required production of nonexempt records. *Id.* The Secretary then wrote a public letter to Petitioners (sent to the media), which did not address Petitioners' follow-up requests for nonexempt records. *Id.* The letter offered another meeting rather than production of the requested records. *Id.* at 7. Subsequent communications to Respondents through their counsel about production of the remaining responsive records then went unanswered. *Id.*

B. Procedural background

After Respondents refused to provide the requested records, Petitioners brought suit, providing a copy of the Petition to the Respondents on October 17. In response, Respondents made a further production of roughly 30 pages of records on October 19. The parties then met and conferred regarding the outstanding records that had yet to be produced, and they agreed on a

November 3 hearing date before this Court. Through further negotiation, and with the November 3 hearing looming, the Governor's office made still further productions comprising another roughly 60 pages of additional records. The OAG represented that, despite prior statements regarding such a document, the Respondents had conducted a reasonable search for the administration transition documents and were unable to identify any additional records relating to the request beyond what was already provided to Petitioners. *Id.* Petitioners accepted this representation. Respondents produced requested exemplars of the communications with state agencies collecting information regarding individual applicants, although they have failed to produce any guidance document explicitly laying out the specific categories of information requested about each applicant from the various state agencies, representing that such guidance documents do not exist. Petitioners note that additional nonexempt records regarding the types of information captured from state agencies may be found in the restoration application database. Calendar invites for two meetings were withheld, then, after further discussion between counsel, were produced (one with redaction). Respondents initially produced some written communications with applicants, and then on December 6 produced another 477 pages of such communications.

The parties remain at odds over the restoration application database. Respondents offered an in-person inspection of the database, and on that basis, and given the other supplemental productions made and promised by Respondents, the Petitioners agreed to continue the November 3 hearing then before the Court. *See* Exhibit A, November 2 email communications. But the parties have since been unable to come to terms on the conditions for that inspection.[1] Petitioners therefore seek an order of mandamus directing the production of the nonexempt

[1] After the postponement of the November 3 hearing, Respondents proposed their conditions for the inspection as a settlement communication, so Petitioners are not at liberty to address their concerns with those proposed conditions unless Respondents agree to address them confidentially with the Court.

portions of the database, an order declaring that Respondents violated VFOIA by failing to produce nonexempt records and by their overbroad assertions of the working papers exemption without specificity as to the subject matter withheld and the basis for the assertion, and an award of their reasonable fees and costs as the prevailing parties.

LEGAL STANDARD

A demurrer does not test "the strength of proof" of the facts alleged in the pleadings. *Dunn, McCormack & MacPherson v. Connolly*, 281 Va. 553, 557, 708 S.E.2d 867, 869 (2011) (quoting *Abi-Najm v. Concord Condominium, LLC*, 280 Va. 350, 356–57, 699 S.E.2d 483, 486–87 (2010)). Instead, it tests "the legal sufficiency" of the facts alleged. *Id.* So, a court must "accept as true all properly plead facts and all inferences fairly drawn from those facts." *Id.* When a complaint, like here, is made "with sufficient definiteness to enable the court to find the existence of a legal basis for its judgment," a demurrer should be overruled. *Dunn, McCormack & MacPherson*, 281 Va. at 558, 708 S.E.2d at 870 (quoting *Hubbard v. Dresser, Inc.*, 271 Va. 117, 122–23, 624 S.E.2d 1, 4 (2006)). More succinctly, to get past demurrer, a complaint need only "state a cause of action." *Id.*

The Virginia Freedom of Information Act, Va. Code § 2.2-3700 *et seq.*, requires that copies of public records be produced upon written request made by a Virginia citizen. VFOIA explicitly states that it should 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," and 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." Va. Code § 2.2-3700(B). As the Supreme Court of Virginia recently stated in *Hawkins v. Town of South Hill*, "[b]y its own terms, the statute puts the interpretative thumb on the scale in

favor of disclosure." 301 Va. 416, 424, 878 S.E.2d 408, 412 (2022) (internal quotations and citations omitted). The responding office may invoke one or more statutorily prescribed exemptions to production of certain documents, but must provide partially redacted copies of documents which are only partially exempt. Va. Code § 2.2-3704.01. In invoking an exemption to either full or partial production of a particular record, the responding office must identify the specific subject matter of the withheld records or portions of records, and must cite the specific Code section that authorizes the withholding of the records. Va. Code § 2.2-3704(B)(1)-(2).

ARGUMENT

I. RESPONDENTS BEAR THE BURDEN OF SHOWING THAT AN EXEMPTION APPLIES, AND THEIR DEMURRER FAILS TO MEET THIS BURDEN AND SHOULD BE OVERRULED.

In their Demurrer, Respondents make failed arguments in a baseless attempt to shift the burden to Petitioners of showing that an exemption *does not apply*. Under the plain text of the statute, the burden falls squarely upon the Respondents to prove that an exemption *does* apply. Va. Code § 2.2-3713(E) (the public body has the burden of showing "by a preponderance of the evidence" that an exemption applies).

Respondents nonetheless argue that "the burden to negate an exemption is on the Petitioners." *See* Dem. ¶ 23. That's not how the VFOIA works. Nothing in the statute permits Respondents to make a conclusory statement that an exemption applies and simply withhold documents without making an evidentiary showing that the exemption applies. "[T]he VFOIA places the onus on the public body to point to the specific conflicting law offering shelter from a VOFIA request," *Christian v. State Corp. Comm'n*, 282 Va. 392, 399, 718 S.E.2d 767, 771 (2011), and then demonstrate that the asserted exemption applies "by a preponderance of the evidence." Va. Code § 2.2-3713(E). In evaluating whether the public body has met this burden, courts need not give any weight to the public body's own determination of whether an exclusion applies. *Id.*

Here, the Petition is supported by the Declaration of President Barnette, including referenced correspondence with the Respondents and the OAG. Respondents, on the other hand, have come forward with nothing other than their Demurrer—they have offered *no evidence* in support of their positions. The *VPM News* case cited by Respondents in their Demurrer (Dem. ¶ 24 and Ex. A) only serves to underscore this failure of proof. As the Court's order in *VPM News* makes clear, there the "Respondent presented *evidence* in support of its position" (emphasis added) that each of the documents at issue were subject to the working papers exemption. *VPM News v. Virginia Dept. of Educ.*, No. CL 23-536, March 9, 2023 Order at 1 (Richmond). Respondents have presented no such evidence here.

In their demurrer, Respondents appear to take the position that any governmental record related to the rights restoration process is exempt as a working paper simply because the Virginia Constitution vests the Governor with the sole power to restore voting rights. Dem. ¶¶ 7-12. This position is contrary to the plain text of VFOIA, which makes clear 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," Va. Code § 2.2-3700(B), and requires that the responding office identify the specific subject matter of the withheld records or portions of records. Va. Code § 2.2-3704(B)(1)-(2), which Respondents have failed to do both in their correspondence with Petitioners and again in their Demurrer submitted to this Court.

To get past Respondents' demurrer, Petitioners are required only to allege in their petition facts sufficient to show a cause of action. *Dunn, McCormack & MacPherson*, 281 Va. at 558, 708 S.E.2d at 870 (quoting *Hubbard.*, 271 Va. at 122–23, 624 S.E.2d at 4). Here, Petitioners have plainly stated a claim under VFOIA with respect to the records produced after they filed suit, and the additional records still sought, as discussed further below. Respondents' Demurrer should thus

be overruled. And because Respondents have not offered evidence—much less carried their burden of persuasion—on any asserted exemption, the Petitioners are entitled to their requested relief.

II. PETITIONERS ARE ENTITLED TO AN ORDER FOR PRODUCTION OF THE NON-EXEMPT PORTIONS OF THE RESTORATION DATABASE.

Petitioners requested a copy of the database used to track rights restoration applications. Understanding all parties' commitment to protecting personal identifying information ("PII") and that redaction can be time-consuming, Petitioners initially suggested production of a summary spreadsheet containing nonexempt information as an alternative to a partially redacted version of the database itself, and later agreed to Respondents' offer of an in-person inspection of the database in postponing the hearing set for November 3. *See* Exhibit A. Unfortunately, the parties have not been able to agree on conditions for the proffered inspection. *See* fn. 1, *supra*.

In any event, the database itself is not subject to the working papers exemption. When information in a database does not "reflect the give-and-take of the consultative process," it is not deliberative. *Nat'l Ass'n for Advancement of Colored People v. Bureau of Census*, 401 F. Supp. 3d 608, 611 (D. Md. 2019). And, to date, Respondents have produced no evidence that information in the database reveals anything deliberative. Pet'rs Mem. in Supp. of Pet. for Declaratory J. & Writ of Mandamus at 13 (citing *Nat'l Ass'n for Advancement of Colored People*, 401 F. Supp 3d at 611, 615; *Petroleum Info. Corp. v. U.S. Dep't of Interior*, 976 F.2d 1429 (D.C. Cir. 1992)).

Moreover, even if the database contains both exempt and nonexempt information, the nonexempt information must be produced. Generally, Respondents cannot withhold any record in its entirety merely because it contains some exempt information; only those portions that are exempt may be withheld. *See* Va. Code § 2.2-3704.01 (a public body may not "withhold a public record in its entirety on the grounds that some portion of the public record is excluded from disclosure" and "all portions of the public record that are not so excluded shall be disclosed").

Specifically as to records stored in an electronic data processing system, "the public body may provide access to the exempt records if not otherwise prohibited by law, but *shall* provide access to the nonexempt records as provided by this chapter." *See* Va. Code § 2.2-3704(G) (emphasis added). Indeed, the Respondents are required to produce the nonexempt data in the medium identified by Petitioner, and to make reasonable efforts to provide the data in a format and under terms and conditions agreed by the parties. *Id.* While VFOIA does not require the government to create records that do not exist, Va. Code § 2.2-3704(D), the statute further makes clear that the excision of exempt fields from an existing database or the conversion of data available in one format to another format to facilitate the production of nonexempt electronically stored information is not the creation of a "new" record. Va. Code § 2.2-3704(G).

Respondents argue that information in the database "*could be used* for the Office of the Governor's deliberations regarding whether to grant that person's application in the future, or deliberations regarding how to operate the restoration of rights process in an efficient matter." Dem. ¶ 19 (emphasis added). But they have offered no *evidence* regarding how the database is used, and by whom, much less showing that all the information therein is exempt under the working papers exemption.[2] Nor is the argument that information therein "could be deliberative" sufficient to withhold it from Petitioners, as this blanket assertion could be used to exempt any public record from disclosure and defeat the core purpose of the VFOIA.

[2] Respondents' position is not supported by Virginia Freedom of Information Advisory Council's Opinion AO-01-16 (July 11, 2016). *See* Dem. ¶ 20. AO-01-16 concerned whether a list of felons whose rights were restored was exempt under the working papers provision of VFOIA. There the Council considered three factors with respect to the specific records at issue. *See* AO-01-16 ((1) "the purpose for which the record was created"; (2) "the person for whom the record was created"; and (3) "whether the official who holds the exemption has disclosed the record to others."). The Council found that because the list was disseminated to the Department of Elections, it was no longer a working paper. *Id.* Here, Respondents have not even addressed, much less offered evidence on, any of these three factors with respect to specific requested records.

As Petitioners have explained, the database may be used for several different kinds of governmental purposes unrelated to the Governor's decision-making on individual applications, such as gathering information from applicants and state agencies, communicating with applicants, and communicating with the Department of Elections regarding those whose rights have been restored. Pet'rs Mem. in Supp. of Pet. for Declaratory J. & Writ of Mandamus at 14. Furthermore, if the database is used, disclosed or otherwise made available to government staff outside the Governor's Office, the working papers exemption would not apply. *See* Virginia Freedom of Information Advisory Council's Opinion AO-02-15 (March 27, 2015) ("records intended for use by others do not become exempt working papers merely because they are received by an official for whom the exemption is available."). Petitioners are certainly entitled to, at a minimum, information maintained by the Secretary as required by Va. Code § 53.1-231.1, including the dates of applications received, the dates when those applicants were notified that their applications were complete, the dates each application is either granted or denied by the Governor, and the town or zip code of each applicant. *See id.* ("[o]fficial records routinely generated elsewhere pursuant to law do not acquire special character because they come to be deposited in [an exempt official's] office in the ordinary course of business.") (quoting 1980-81 Op. Atty. Gen. Va. 395).

Among other concerns, Petitioners seek to shed public light on what they believe is a gross slowdown in the rights restoration process, compared to past gubernatorial administrations of both parties.[3] And they are concerned about the potential for racial and political bias in a restoration process with no stated criteria for why some applicants have their rights restored and others have

[3] Respondents admitted in a November 1, 2023 letter accompanying some of the documents produced (attached as Exhibit B) that there are currently more than 1,000 citizens in restoration purgatory, as their applications have yet to be processed or considered purportedly because their applications are somehow "incomplete." None of these citizens was able to cast a ballot in the 2023 elections. And the newly provided documents underscore the arbitrariness of the Governor's process, with no clear criteria or even basic instructions provided to the applicants or to the general public.

their applications denied. Respondents have denied intending any such improper bias, but have offered no explanation for how the Governor avoids unintentional bias in making his restoration decisions without clear criteria. With the reasons for the Governor's restoration decisions intentionally kept from public view, the public must at least be allowed to witness the operations and effects of the governmental processes for restoration of voting rights, and the information contained in this database is centrally important to this witness. Under VFOIA, it is unlawful for Respondents to attempt to govern in secret and keep nonexempt records from public view.

III. RESPONDENTS VIOLATED VFOIA BY FAILING TO PRODUCE RESPONSIVE NONEXEMPT RECORDS.

Under the statute, "a single instance of denial of the rights and privileges conferred by this chapter shall be sufficient to invoke the remedies granted herein." Va. Code § 2.2-3713(D). Likewise, "any failure by a public body to follow the procedures established by this chapter shall be presumed to be a violation of this chapter." Va. Code § 2.2-3713(E). Here, in addition to continuing to withhold the database, hundreds of other pages of responsive nonexempt records were initially improperly withheld and have only been produced after the filing of the Petition, further entitling Petitioners to declaratory judgment that Respondents violated VFOIA. None of the records that Petitioners requested and have since been produced were entitled to the working papers exemption. Respondents have not even attempted to meet—much less met—their burden to show that the working papers exemption applied to any of these records.

The exemption at issue is the "working papers and correspondence" exemption under Va. Code § 2.2-3705.7. While the "working papers and correspondence" of the "Office of the Governor" are "excluded from mandatory disclosure provisions," Va. Code § 2.2-3705.7, working papers must be "records prepared by or for a public official identified in this subdivision for his personal or deliberative use." *Id.* The "Office of the Governor" is defined as "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 pursue to § 2.2-104." Like the federal deliberative privilege, the purpose of the exemption is to protect the "deliberations comprising part of a process by which government decisions and policies are formulated." *Prop. of the People, Inc. v. Off. Of Mgmt. & Budget*, 330 F. Supp. 3d 373, 382 (D.D.C. 2018). This allows government decision makers to be candid and have "open and frank discussion." *Id.* The statute does not define "personal or deliberative use" or "correspondence." But when the "[w]hen the language of a statute is unambiguous, [courts] are bound by its plain meaning." *Taylor v. Commonwealth*, 298 Va. 336, 341, 837 S.E.2d 674, 676 (2020) (quoting *Conyers v. Martial Arts World of Richmond, Inc.*, 273 Va. 96, 104, 639 S.E.2d 174 (2007)). Moreover, VFOIA states that it should 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," and 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." Va. Code § 2.2-3700(B).

A. Documents describing the types of information gathered from state agencies.

Petitioners requested exemplars of communications gathering information on applicants from state agencies. Respondents argue that any communications between the Director of Clemency and other agencies regarding restoration of rights applicants is "inherently a record created for the purpose of allowing the Governor to conduct his individualized assessment of applications." Dem. ¶ 16. Yet, Respondents provide no evidence of this, nor do they point to anything in the already produced records that show that they are working papers.[4] Nothing about

[4] Samples of the records gathering information on applicants from other state agencies are attached as Exhibit C.

the communications with state agencies that have been produced reveals anything about the Governor's deliberative process.[5]

Respondents again rely improperly on *VPM News* in support of their argument. Dem. ¶ 17. But there is no evidence that these documents are used in the Governor's deliberative process. Instead, Respondents argue that these documents "could include directives from the Office of the Governor about what types of records to collect, or records produced for the Office of the Governor describing the information being produced to that office." *Id.* What the documents "could include" is not the same as evidence of what the documents actually include. Absent *evidence* that these now-produced documents somehow reveal the Governor's deliberative process, Respondents cannot claim that they were exempt and cannot justify withholding them until Petitioners filed suit. On their face, these records do not reveal the Governor's deliberative process. Indeed, the records produced reveal little about the types of information actually gathered on applicants from state agencies, underscoring the need for production of the application database.

B. Documents related to calendared meetings regarding the restoration of rights process.

Petitioners also requested records related to certain meeting invites involving individuals who deal with the restoration of rights process (but not including the Governor himself).[6] Contrary to Respondents' assertion that any documents related to this request are working papers regardless

[5] Petitioners note that beyond a flow chart produced in the Respondents' first production, no actual details of the Governor's deliberative *process* have been detailed or revealed in any productions. Documents, materials, and items produced relate only to the substance of what could be considered, but any window into how or why an application is granted or denied remains opaque. Without clear criteria that are disclosed to the public—which the Petitioners have repeatedly called for—it is impossible for any citizen to know *how* the information gathered is weighed by the Governor and his staff. But the public is at least entitled by VFOIA to know *what* information is gathered from state agencies.

[6] The initially withheld invites eventually produced are attached as Exhibit D. Petitioners note that after production of the meeting invites, Respondents represented to Petitioners' counsel that the redacted email address for Richard Cullen is a personal Gmail address, not a government-related email account and that inclusion of the Gmail address on the invitation was inadvertent and not intended to circumvent any VFOIA laws.

of whether the Governor personally attended, Dem. ¶ 18, a meeting invitation is not a working paper under the statute and Respondents do not point to anything in the meeting invites produced showing that they are working papers. As Petitioners explained, *see* Pet'rs Mem. in Supp. of Pet. For Declaratory J. & Writ of Mandamus at 12, information revealing who attended a meeting does not chill or discourage candid discussion, nor do the invites reveal any suggestions, recommendations, or proposals to the Governor. *See Prop. of the People, Inc. v. Off. Of Mgmt. & Budget*, 330 F. Supp. 3d 373, 382–83 (D.D.C. 2018)).

In short, Respondents have presented no evidence showing that these invites were working papers. Petitioners were thus entitled to these records under VFOIA and should not have had to file suit to get them.

C. Correspondence with applicants.

Respondents assert that correspondence between government staff and applicants constitute records created exclusively for the Governor's deliberative use. Dem. ¶ 21. Respondents also claim these records are correspondence of the Office of the Governor. *Id.* ¶ 22. Respondents yet again fail to offer any evidence showing that the working papers exemption applies, and likewise fail to point to anything in the communications with applicants produced after the Petition was filed that reveals the Governor's deliberative process.[7] To the contrary, these are communications between Restoration of Rights staff in the office of the Secretary and individual restoration of rights applicants. Far from revealing anything about the Governor's deliberative process, these communications reveal the opposite—that applicants whose applications are denied *are not given any reason why the Governor declined to restore their rights*. Receiving a notice of denial without explanation earlier this year, one applicant replied:

[7] Samples of communications between the Restoration of Rights staff in the Secretary's office and applicants seeking to have their rights restored are attached as Exhibit E.

> Is there a reason why? After all I feel I deserve an explanation because I'm not a violent felon and I am trying to do something with my life. I wanted to start taking classes towards law enforcement to be on the right side of the law instead of the wrong. This is very discouraging.

See Ex. E at ROR 00623. The staff's response was only that "[t]he Governor has final decision in rights restoration and has the discretion to grant or deny individuals after the review period has been completed." *Id.* This applicant was told they could reapply in a year, without any explanation as to whether the Governor might then deem them "eligible." *Id.*

These communications also reveal that the restoration process under this administration has been extraordinarily lengthy—in many instances beyond the three to four months that Respondents have asserted. *Id.* at ROR 00966 ("We have been experiencing an extended timeline under this administration."). And the applicants express their frustration with waiting sometimes nearly a year for a response. *Id.* at ROR 1030, 01007. These communications do not reveal anything about the Governor's deliberative process. What they show is Respondents' unreasonably slow response to applicants.

Such communications between government staff and applicants are plainly not the type of records covered by the working papers exemption. Nor are they "correspondence" among the Governor or his staff used only for the "personal" or "deliberative" use of the Governor. Moreover, there is no chance that production of such communications will chill the deliberative process, where the individual applicants can at any point share the correspondence with the public.

The OAG has represented that the additional 477 pages of records produced on December 6 are all the remaining records of communications with applicants whose completed applications were denied, which the Court should order Respondents to confirm is the complete production.

And because these communications should not have been withheld in the first place, Respondents have violated VFOIA.

IV. PETITIONERS ARE ENTITLED TO THEIR REASONABLE ATTORNEYS' FEES AND COSTS.

Petitioners request an award for their reasonable attorney fees and costs under § 2.2-3713(D). Again, under the statute, "a single instance of denial of the rights and privileges conferred shall be sufficient to invoke the remedies granted herein." Va. Code § 2.2-3713(D). And "if the Court finds the denial to be in violation of the provisions of this chapter, the petitioner shall be entitled to recover reasonable costs . . . and attorney fees from the public body if the petitioner substantially prevails on the merits of the case, unless special circumstances would make an award unjust." *Id.* As discussed above, Petitioners' rights and privileges under VFOIA were wrongly denied by Respondents, and they were left with no recourse but to bring suit to vindicate those rights. Despite Respondents' protestations, they ultimately did provide nearly all of the records that Petitioners have requested, directly in response to Petitioners' lawsuit alleging violations of VFOIA. Petitioners have thus substantially prevailed on the merits of the case, even before considering that Petitioners are entitled to the additional relief requested herein.

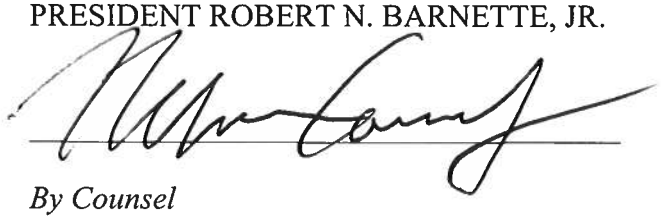
Respondents have offered no reason why an award of fees and costs would be "unjust" here—and there is none. Petitioners champion the interests of Black citizens of Virginia, who are significantly and disproportionately affected by the Commonwealth's felony disenfranchisement law, a provision expanded in the 1902 Virginia Constitution with the express purpose to prevent Black citizens from voting. Petitioners' efforts to use the VFOIA to shed public light on the Governor's policies and processes regarding the restoration of voting rights is entirely consistent with the purpose of the statute and its fee-shifting provision. "The affairs of government are not intended to be conducted in an atmosphere of secrecy since at all times the public is to be the

beneficiary of an action taken at any level of government." Va. Code § 2.2-3700(B). As the substantially prevailing parties, Petitioners are entitled under the statute to an award of their reasonable attorneys' fees and costs.

CONCLUSION

For the foregoing reasons, Petitioners are entitled to a declaration that Respondents violated VFOIA by failing to produce responsive nonexempt records; a writ of mandamus that requires full compliance with VFOIA and the production of all remaining responsive nonexempt records, including a partially redacted version of the database; and an award of their reasonable attorneys' fees and costs.

VIRGINIA STATE CONFERENCE NAACP,
and its
PRESIDENT ROBERT N. BARNETTE, JR.



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Memorandum in Support of Petition For Declaratory Judgment and Writ of Mandamus was served this 8th day of December, 2023 by electronic mail and regular U.S. Mail on the below counsel for Respondents:

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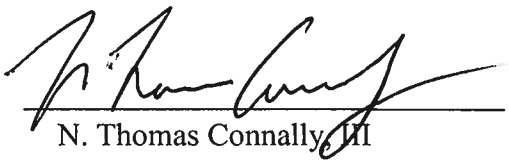

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