

IN THE
SUPREME COURT OF VIRGINIA

RECORD No. 130934

AMERICAN TRADITION INSTITUTE, et al.,
Appellant-Petitioners,

v.

THE RECTOR AND VISITORS OF
THE UNIVERSITY OF VIRGINIA, et al.,
Appellees-Respondents.

BRIEF OF APPELLANT

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STATEMENT ON THE NATURE OF THE CASE AND MATERIAL PROCEEDINGS BELOW

On January 5, 2011, Petitioners American Tradition Institute and Robert Marshall (“ATI”) requested the Rector and Visitors of the University of Virginia (“the University” or “UVA”) to produce public records under the Virginia Freedom of Information Act (“FOIA”). J.A. 22. On May 16, 2011, ATI filed a verified petition for mandamus and injunctive relief (J.A. 1) seeking: (a) an order forcing UVA to release the documents; (b) permission to review UVA’s “exemplars” of records it intended to withhold; (c) costs and fees; and, (d) a ruling that the FOIA does not authorize collection of fees to review records to determine whether those records may be excluded from release. On May 24, 2011, the court ordered UVA to release 1,793 emails (5,649 pages) (J.A. 104) and allowed ATI to see the records UVA would present to the court for *in camera* review. J.A. 95. On June 15, 2011, the court issued an opinion letter denying ATI’s request to bar UVA from charging for exclusion review of its records (J.A. 106) and subsequently, on July 7, 2011, entered the associated order. J.A. 109.

On April 2, 2013, the trial court determined that all documents withheld under the research data exclusion Va. Code § 2.2-3705.4(4), including emails, contained data, records or information of a proprietary nature produced or collected by or for UVA faculty or staff in the conduct of, or

as a result of, study or research on scientific issues, regardless of any UVA involvement in the study or research, and that such data, records or information had not been publicly released. J.A. 670. ATI argues the trial court erred in both these decisions. If upheld, the decisions below would:

- allow UVA to withhold any email it possessed, effectively writing the Commonwealth's public universities out of a statute the Legislature expressly wrote them into, frustrating the purpose of the Virginia Freedom of Information Act; and,
- allow any government agency the ability to demand any payment they choose to pay for exclusion review of public records, creating a "pay-wall" that effectively denies citizens access to public records, frustrating the purpose of the Virginia Freedom of Information Act.

This Court should reverse and direct UVA to release all withheld public records not containing mandatorily excluded information, return the \$4,000 paid for exclusion review and order costs and fees to ATI.

ASSIGNMENTS OF ERROR

1. The trial court erred in holding "of a proprietary nature" as used in Va. Code § 2.2-3705.4(4) means "a thing or property owned or in the possession of one who manages and controls them." J.A 684, 690.

2. The trial court erred in allowing the University to demand payment for the cost of exclusion review of documents sought. J.A. 687, 690.

4. The trial court erred in finding UVA carried its burden of proof that the records withheld exclusively under Va. Code § 2.2-3705.4(4) meet each

of the requirements for exclusion. J.A. 686, 690.

QUESTIONS PRESENTED

1. Is the “proprietary nature” of research data, records and information the competitive advantage they offer to the university?

(Assignment of Error 1.)

2. Does FOIA’s “narrow interpretation” requirement, and the common law, limit interpretation of the word “information” in Va. Code § 2.2-3705.4(4) to analysis of data and records, and conclusions drawn from that analysis; and only if it is the product of conducting of the research project or study? (Assignments of Error 1 & 4.)

3. Are the data, records and information protected under Va. Code § 2.2-3705.4(4) limited to those arising out of the data collection, data analysis and research report preparation stages of the scientific process?

(Assignments of Error 1 & 4.)

4. Does the proprietary nature of research data, records and information expire upon publication of research results, abandonment of the research or by becoming stale through the passage of time?

(Assignment of Error 1.)

5. Does the research data exclusion apply only to UVA-sponsored or UVA co-sponsored research or study, and thus not to data, records or

information generated in support of service to non-university organizations such as the IPCC, or research to which UVA is not a sponsor or co-sponsor? (Assignment of Error 4.)

6. Did release of the withheld emails to Dr. Mann constitute public release of the public records? (Assignment of Error 4.)

7. When UVA transmits or receives an email, is the email publicly released when a courtesy copy (“cc”) recipient is not a member of the UVA research team? (Assignment of Error 4.)

8. Is unsolicited email received by UVA from a person not on a UVA sponsored or co-sponsored research team “produced or collected by or for the faculty” and thus subject to the research data exclusion? (Assignment of Error 4.)

9. Does every exemplar meet all criteria required under the research data exclusion? (Assignment of Error 4.)

10. Is review of public records to determine whether any must or may be withheld an element of “supplying” public records? (Assignment of Error 2.)

STATEMENT OF FACTS

On January 25, 2011, the University informed ATI that it required payment of \$8,500 to “process” ATI’s FOIA request and refused to take any

further action until it received this “deposit.” J.A. 39. On March 10, 2011, after extensive discussion between the parties as to whether the Act authorized the University to charge for “the necessary review of potentially responsive documents” ATI paid the University \$2,000.00. J.A. 54 & 58. On March 28, 2011, the University informed ATI that \$1,000 had been used exclusively to pay for searching for responsive records among the 34,062 records on the server. J.A. 60. On April 6, 2011, the University claimed to have identified 8,000 (a number eventually raised to more than 12,000) responsive emails and had begun review, but had exhausted the \$2,000 deposit and demanded additional funds or it would “undertake no further review” (J.A. 62), a payment ATI agreed to make on the following day (J.A. 64), and subsequently did. Forty days later, having never received a single document, ATI filed its Mandamus Petition. J.A. 1.

In order to allow the Court to evaluate whether UVA appropriately withheld about 12,000 public records, ATI and the University placed 31 emails before the court as “exemplars,” Petitioners’ Exemplars (“PE”) 1 through 17 and Respondents’ Exemplars (“RE”) 1 through 14. J.A. 218-293 & J.A. 691-745, respectively. Of the 31 exemplars, UVA identified 22 they argued were exclusively withheld under the research data exclusion.¹

¹ Respondents’ Joint Memorandum in Opposition to Petitioners’ Verified

These are PE-1, PE-3 through PE-12, and PE-15 through PE-17; and, RE-1, RE-2, and RE-4 through RE-9. Of the 22, only 6 involved research sponsored or co-sponsored by the University, RE-5 through RE-9. Of those six, only three contained data, records or information collected by or for faculty or staff in the conduct of or as a result of study or research, RE-7, RE-8 and RE-9. Of the three, two are peer reviews of UVA papers that were published, RE-7 & RE-8. The third, RE-9, was a communication proposing a UVA co-sponsored paper that was published. As discussed in Section III, not a single exemplar meets all requirements for withholding.

SUMMARY OF ARGUMENT

This case concerns the rights and opportunities of citizens, granted by the Virginia Freedom of Information Act, to have “ready access to public records in the custody of a public body;” and, the prohibition on government “conducted in an atmosphere of secrecy.” Va. Code § 2.2-3700. It also concerns how the General Assembly protects a public university’s competitive advantage within the marketplace of ideas.

The Circuit Court construed Va. Code § 2.2-3705.4(4) as allowing a university to withhold any email it owns or is in their possession. This is an exception to the statute that swallows the rule, violating the requirement to

interpret exemption to the statute narrowly. Va. Code § 2.2-3700.

The court also held that the information in the emails was neither published nor publicly released, either by publication in professional journals or by release to Michael Mann at a time when he had no authority to have it. Va. Code § 2.2-3705.4(4) specifically prohibits withholding public records once they have been published or publicly release and the selective release to one side of a public debate but not to another violates both the spirit and letter of Virginia's FOIA.

The Circuit Court also misinterpreted Va. Code § 2.2-3704 (F) by conflating the effort to find, collect, copy and send public records to ATI with the normal records management duty to prevent release of records the General Assembly has prohibited from release. In so doing, the court improperly allowed UVA to demand a large payment in direct violation of § 2.2-3704 (F) and granted UVA the power to favor one requestor over another.

The Circuit Court failed to apply long-standing interpretive canon and case law. ATI now asks this Court to reverse the decision below.

ARGUMENT

I. Standard of Review

The trial court's interpretation of the phrase "of a proprietary nature" and its decision to allow payment for the cost of exclusion review of documents (assignments of error 1 & 2) rest on statutory interpretations

which are pure questions of law and which the Court reviews *de novo*. *Conyers v. Martial Arts World of Richmond, Inc.*, 273 Va. 96, 104-105 (Va. 2007). The other (fourth) assignment of error requires review of whether the exemplar emails met all criteria for exclusion. It primarily presents questions of statutory interpretation but also requires review of fact determinations. The Court will review mixed questions of law and fact *de novo*. *Napper v. ABM Janitorial Servs. - Mid Atl.*, 284 Va. 55, 61 (Va. 2012).

II. The Research Data Exclusion protects a competitive advantage

In a dense 82 word sentence, the Virginia Freedom of Information Act offers UVA the discretion to withhold certain “proprietary” research data. Va. Code § 2.2-3705.4(4). In order to narrowly interpret this exclusion, and because the statute does not define any of these 82 words, the Court will look to the ordinary meaning of the words and the context they create.² Specifically, the exclusion focuses on research and studies, protecting only that sponsored or co-sponsored by UVA. Further, it only protects the product of the research – the “data, records or information” that is produced

² *Grant v. Commonwealth*, 223 Va. 680 (1982) (“In the absence of a statutory definition, words in statutes are to be given their ordinary meaning within the statutory context.”); *and see Protestant Episcopal Church v. Truro Church*, 280 Va. 6, 21 (2010) (the use of “plain and ordinary meaning” is, of course, a fundamental rule of statutory construction to be applied where a word or phrase is not otherwise defined by the Code, the rule also requires that the courts should be guided by “the context in which [the word or phrase] is used.”)

or collected by UVA and only that portion resulting from the “conduct” of the research or study. We begin with establishing the context of this exclusion and then discuss what, within that context, are proprietary.

A. The exclusion narrowly focuses on investigative results

The exclusion reads:

Data, records or information of a proprietary nature produced or collected by or for faculty or staff of public institutions of higher education, other than the institutions' financial or administrative records, in the conduct of or as a result of study or research on medical, scientific, technical or scholarly issues, whether sponsored by the institution alone or in conjunction with a governmental body or a private concern, where such data, records or information has not been publicly released, published, copyrighted or patented.³

Under FOIA, the exclusion must be narrowly interpreted. Va. Code § 2.2-3700 (B). And, “[a] statute must be construed with reference to its subject matter, the object sought to be attained, and the legislative purpose in enacting it; the provisions should receive a construction that will render it harmonious with that purpose rather than one which will defeat it.”⁴ Thus, this exclusion applies only to “data, records or information” and only those produced or collected “in the conduct of or as a result of study or research.” This is but a sliver of all public documents developed over the life of a scientific inquiry. It also implicates but a sliver of the emails at issue in this

³ Va. Code § 2.2-3705.4(4).

⁴ *Young v. Commonwealth*, 273 Va. 528, 537 (2007).

case. Of the 22 emails now before the Court, only one contains any data or records. To the degree any other exemplar contains “data, records or information,” it takes the form of “*information*,” placing great weight on the interpretation of that word.

The general term “information” is limited by the context of scientific research or study.⁵ The words “research” and “study” are not defined by FOIA and there is no relevant Virginia case law, but other states have given the two words their ordinary dictionary meaning:

"research" means "careful, systematic, patient study and investigation in some field of knowledge, undertaken to discover or establish facts or principles." The word "study" is defined in that dictionary as "careful attention to, and critical examination and investigation of, any subject [or] event...."

Haigley v. Department of Health & Mental Hygiene, 128 Md. App. 194, 212-213 (Md. Ct. Spec. App. 1999). In each case, the dictionary definition is grounded on the actual experimental act, consonant with the dictionary definition of “result” as “something obtained by calculation or investigation.” Merriam-Webster 2013. Thus, research and study are not planning activities but a experimental/observational activities.

Further, the statute associates “information” with the terms “data and

⁵ *Buonocore v. Chesapeake and Potomac Telephone Company*, 254 Va. 469 492 S.E.2d 439 (1997) (the Court “will construe the words and terms at issue in the context of the other language used in the statute”).

records.” This association has legal consequences. Under the rule of *ejusdem generis*, “when general and specific words are grouped, the general words are limited by the specific and will be construed to embrace only objects similar in nature to those things identified by the specific words.”⁶ Given this context, “information” can only be the analysis of data and records and conclusions drawn from that analysis because it must be collected or produced in the conduct of or as a result of a research investigation. Not during the consideration of possibly conducting the research. Not during design of the research. Not during proposal of the research. Only during conduct of or as a result of the experimental or observational act. To go beyond that meaning would violate the rule of *ejusdem generis* and violate the requirement to interpret the exclusion narrowly. Thus, interpretation of the word “information” in the context of its use also requires examination of what the General Assembly intended by the limiting words “in the conduct of or as a result of study or research.”

B. The statute protects scientific inquiry.

The public records at issue in this case limit the extent of legislative analysis necessary. The emails sought are those of a professor whose research was limited to a narrow area of scientific inquiry – reconstruction

⁶ *Wood v. Henry County Public Schools*, 255 Va. 85 (1998).

of global temperatures over the past millennium. J.A. 22, 28-32. Because this research is scientific, rather than medical, technical or otherwise scholarly, we examine the legislative intent in protecting data, records or information collected in the conduct of or as a result of scientific research.

i. The nature of scientific inquiry

The legislature viewed the research data exclusion within the context of universities' scientific research, placing it within a subsection of the law applying exclusively to "records of educational institutions."⁷ The legislative record, and the context and language of the exclusion, indicates it reflects three university-related public goals regarding science, and one FOIA goal: (i) to discover and disseminate new knowledge⁸; (ii) to ensure an adequate "return on investment associated with academic research;"⁹ (iii) to protect scientific inquiry within a competitive marketplace of ideas; and, (iv) to promote an increased awareness by all persons of governmental activities

⁷ Va. Code § 2.2-3705.4.

⁸ See, e.g., Statement of Purpose and Goals, adopted on March 19, 1985 by the Faculty Senate of the University of Virginia. <http://www.virginia.edu/statementofpurpose/purpose.html>; and 2001 Mission Statement adapted in 2006, by the Virginia Tech Board of Visitors, http://www.president.vt.edu/mission_vision/mission.html (accessed 10/21/2013).

⁹ See "A Defining and Differentiated Vision for UVA as a Unique and Preeminent Public Institution," Presidential Working Papers, p. 3, at: <http://apps.washingtonpost.com/g/documents/local/university-of-virginia-planning-group-report/565/> (accessed 10/21/2013).

and afford every opportunity to citizens to witness the operations of government (the FOIA purpose, Va. Code § 2.2-3700 (B)).

The first three goals, and the Legislature's purposes for the research data exclusion as they apply to scientific research, are reasonably and ordinarily understood in the context of the scientific inquiry process.

Inculcated into Virginians' values from grade school onward¹⁰, the scientific process generally follows ten basic steps.¹¹

1. Choice of a research topic
2. Literature review
3. Choice of a research question
4. Formal statement of testable hypotheses
5. Preparation of the research design
 - a. Data collection methods
 - b. Methods for the analysis of data
6. Formal Research Proposal
7. **Data Collection**
8. **Data Analysis**
9. **Research Report preparation**
10. Report Publication

As discussed below, through the research data exclusion the Legislature intended to protect the result of the experimental/observational act, which expressly commences at the "data collection" stage.

¹⁰ See, Virginia Mathematics and Science Coalition, "Scientific Inquiry and the Nature of Science Task Force Report, May 11, 2010 (describing the scientific process), <http://tinyurl.com/oz5nk64> (accessed 10/21/2013).

¹¹ Starkweather, Jon, "How to Conduct Empirical Academic Research," Benchmarks RSS Matters, June 15, 2012, see, <http://web3.unt.edu/benchmarks/issues/2011/12/rss-matters> (accessed 10/19/2013).

ii. **The statute narrows the exclusion to investigative results.**

Taking the words of the exclusion in their ordinary meaning and applying them to the common understanding of scientific inquiry produces a facially simple, narrow interpretation of the exclusion. The Legislature did not intend the exclusion to apply to every stage of the scientific process.

Faculty routinely and publicly announce the first and third stages of scientific inquiry, often on their websites and when attempting to attract quality graduate students.¹² The second stage is, of course, no more or less than an examination of publicly released documents. The fourth through sixth elements are highly valuable to the University and, prior to final research publication, constitute a competitive advantage if withheld. Emails associated with those stages cannot, however, contain the result of research because they precede the data collection and analysis stages that constitute the “research” or “study.” They describe “how” to do the research. They are not the research. Therefore, these stages are not within the ambit of the exclusion and are not at issue in this case.

The maxim of statutory construction *expressio unius est exclusio alterius* is also applicable with regard to stages four, five and six of scientific inquiry. This maxim provides that where a statute speaks in

¹² See, e.g., <http://www.evsc.virginia.edu/faculty-staff/faculty/> and succeeding faculty pages.

specific terms, an implication arises that omitted terms were not intended to be included within the scope of the statute. *Commonwealth ex rel. Virginia Dep't of Corrections v. Brown*, 259 Va. 697, 704-705 (Va. 2000).

Finally, under other sections of the Act, a variety of proprietary information reflecting UVA's business proposals, including some research proposals, receive FOIA protection. See, Va. Code § 2.2-3705.4(5) and Va. Code § 2.2-3705.6 (17) & (23). The failure of the General Assembly to include all research proposals under the Act means they did not intend to protect all research proposals.¹³

Thus the statutory exclusion clearly addresses only the seventh through the ninth stages of the scientific process. These are the stages resulting in "Data, records or information . . . produced or collected by or for faculty or staff . . . in the conduct of or as a result of study or research."

¹³ While ATI recognizes the value in protecting these early stages of the scientific process, the text of the statute does not and thus the Court cannot. The Court "must determine the legislative intent by what the statute says and not by what we think it should have said." *Carter v. Nelms*, 204 Va. 338, 346, (1963), *cited in South v. Commonwealth*, 47 Va. App. 247 (2005); *and* "courts are not permitted to add language to a statute nor are they permitted to accomplish the same result by judicial interpretation." *Shackleford v. Commonwealth*, 262 Va. 196, 213 (2001); *and*, "A court may not 'second-guess the lawmakers on matters of economics, sociology and public policy. . . . Those considerations belong exclusively in the legislative domain.'" *Infants v. Virginia Hous. Dev. Auth.*, 221 Va. 659, 671 (1980). *Cited in Hutter v. Virginia Employment Commission*, 50 Va. App. 590 (2007).

UVA would have the Court unilaterally, and without legislative authority, expand this ordinary meaning of the exclusion in the commonly understood context of scientific inquiry to go far beyond stages seven through nine, and extend protection to the content of emails that reflect planning rather than the result of the experimental/observational act.

iii. The exclusion does not protect faculty service

The exclusion addresses only one of the three elements of faculty duties. Faculty mandatory duties at UVA include student instruction, research, and service.¹⁴ “Service to the University is an obligation of every regular faculty member. Service to one's professional discipline and, in a number of disciplines, to the broader public is important and sometimes essential in terms of job definition.” *Id.* There is no evidence whatever that the Legislature intended to include service, and emails associated therewith, under the research data exclusion.

In light of this, the ordinary meaning shown on the face of the statute applies to data collection, analysis and reporting steps within the scientific process and no more. We now turn to what, within stages seven through nine of the scientific process, is “of a proprietary nature.”

¹⁴ Office of the Provost, “Policy: Promotion and Tenure”, PROV-017 (10/05/2011) <https://policy.itc.virginia.edu/policy/policydisplay?id=PROV-017#Service> (accessed 10/22/2013).

C. The statute protects UVA's competitive advantage

i. Proprietary information creates a private advantage

The statute does not define the phrase “proprietary nature.” The basic rule of statutory construction presumes, however, that the General Assembly had full knowledge of existing law and previous decisions of the Court when enacting legislation, and thus intended the phrase be interpreted in the manner courts have construed it in the past. *Christian v. State Corp. Comm'n*, 282 Va. 392, 401 (Va. 2011); *Andrews v. Commonwealth*, 280 Va. 231, 286 (Va. 2010). The Legislature enacted the research data exclusion in 1982. Prior to 1982, no court had directly construed the use of the word in the context of Virginia's FOIA but had done so in many other cases with respect to governmental organizations, providing a definition entirely compatible with usage of the term in FOIA. “There are granted to a [governmental] corporation, in its corporate and proprietary character, privileges and powers to be exercised for its private advantage. In the performance of these duties the general public may derive a common benefit, but they are granted and assumed primarily for the benefit of the corporation.” *Hoggard v. Richmond*, 172 Va. 145, 148 (Va. 1939) (*emphasis added*). The *Hoggard* explanation remains the usage applied to governments in recent court decisions as well. See, *City of*

Chesapeake v. Cunningham, 268 Va. 624, 633-634 (2004) (“Proprietary functions are performed primarily for the benefit of the [governmental corporation]”).

UVA has relied on *Green v. Lewis*, 221 Va. 547, 555 (1980) for their argument that “of a proprietary nature” means “a thing or property owned or in the possession of one who manages and controls them.” J.A 673, ¶ 7. UVA conflates ownership with the benefits of having ownership. But, *Green* categorically explains “[a] proprietary right is a right customarily associated with ownership, title, and possession. It is an interest or a right of one who exercises dominion over a thing or property, of one who manages and controls.” *Id* (*emphasis added*). For example, it is one thing to own the secret recipe for Coke™ and entirely another to profit from that secret. UVA may have custody over any withheld emails containing data, records and information, but a proprietary interest must rise from the data itself and not merely because UVA owns or controls either the email or the data within it.

Thus, the FOIA exclusion protects data, records or information “of a proprietary nature” when that data confers a “private advantage” on a governmental corporation and more specifically, on UVA.

ii. **The structure of the statute**

Canon of statutory interpretation further supports a legislative intent to protect the competitive advantage inherent in the information. “Where a word is used in different sections of a statute and its meaning is clear in all but one instance, ‘the same meaning . . . will be attributed to it elsewhere unless there be something in the context which clearly indicates that the Legislature intended some other and different meaning.’”¹⁵

The legislative intent to protect a university’s competitive advantage in research data comfortably mirrors the protection of “proprietary business or research-related information produced or collected by the applicant in the conduct of or as a result of study or research on medical, rehabilitative, scientific, technical or scholarly issues” protected under Va. Code § 2.2-3705.5 (12) (“if disclosure of such information would be harmful to the competitive position”). See *also*, the FOIA protection of public records, the release of which would be “harmful to the competitive position of the applicant” under Va. Code § 2.2-3705.6 (11), (17), (19) & (23). These sections of FOIA demonstrate the Legislatures intent to protect research data in order to protect the competitive advantage inherent in the

¹⁵ *Weaver v. Commonwealth*, 25 Va. App. 95, 101 (Va. Ct. App. 1997) (*emphasis added*); and see, *Buonocore v. Chesapeake and Potomac Telephone Company*, 254 Va. 469 (1997) (“We will not construe a statute by singling out a particular term or phrase, but will construe the words and terms at issue in the context of the other language used in the statute.”).

proprietary information. The same purpose should apply to § 2.2-3705.4(4).

FOIA's structure also helps explain the legislative intent to protect UVA's competitive advantage. In 2004, the legislature restructured the exclusions within the Act, compiling all those associated with higher education into a distinct section - Va. Code § 2.2-3705.4.¹⁶ In so doing, and considering the limiting language of Va. Code § 2.2-3705.4(4) that distinguishes "the institutions' financial or administrative records" from those collected "in the conduct of or as a result of study or research," the exclusion focuses on the competitive advantage inherent in the academic scientific process, rather than financial or commercial interests the university might have. In other words, the research data exclusion protects the competitive advantage within the marketplace of ideas rather than the marketplace of goods and services. This distinction is not unknown.

[I]deas are a researcher's 'stock-in-trade. Their misappropriation, which, it is claimed, would be facilitated by premature disclosure, deprives him of the career advancement and attendant material rewards in which the academic and scientific market deals, in much the same way that misappropriation of trade information in the commercial world deprives one of a competitive advantage.

Washington Research Project, Inc. v. Department of Health, Education & Welfare, 504 F.2d 238, 244-245 (D.C. Cir. 1974). ATI cannot say whether

¹⁶ See, SB 352 "Freedom of Information Act: reorganization of record exemptions" Chapter 690, approved April 12, 2004 (available at <http://leg1.state.va.us/cgi-bin/legp504.exe?041+ful+CHAP0690>).

this federal case influenced the Virginia legislature, but eight years thereafter the General Assembly enacted a limited form of protection – one protecting the competitive advantage inherent in research data.

iii. The legislative history of the statute

There is some legislative history on the research data exclusion. The clear intent of the original bill and subsequent Committee action is that Senator Michie, the bill’s sponsor, wanted to prevent a “substantial loss” to the university, while generally making academic research information available to the public. See, J.A. at 564 (original bill). The Senate Committee rejected Michie’s bifurcation and would have exempted all academic research information. When the bill “crossed over,” the House of Delegates rejected the Senate approach and instead embraced Senator Michie’s original intent, amending the language to its final form. J.A. 565. This suggests that the intent of the General Assembly was to protect a limited portion of the research process, the research data and its competitive advantage, leaving other public documents associated with the research to be released to the public.

D. The statute requires a narrow interpretation.

The legislature firmly establishes principles that guide the interpretation of exemptions. Specifically, the General Assembly explains in

deliberate, sweeping language, that

“[t]he affairs of government are not intended to be conducted in an atmosphere of secrecy since at all times the public is to be the beneficiary of any action taken at any level of government.”

Va. Code § 2.2-3700 (B); and that

[t]he provisions of this chapter shall be liberally construed to promote an increased awareness by all persons of governmental activities and afford every opportunity to citizens to witness the operations of government.”

Id. In addition, they require that “Any exemption from public access to records or meetings shall be narrowly construed.” *Id.* Thus, by legislative mandate, application of the term proprietary must be “narrowly construed.”

UVA’s interpretation establishes an exclusion that consumes the rule, one the University admits is a broad, rather than narrow interpretation. J.A. 300. It would allow a university to withhold every record it owns or possesses, thoroughly defeating the intent and past implementation of the FOIA. Accepting UVA’s interpretation would write UVA out of a law into which the Legislature expressly wrote it. Indeed, it would allow UVA to withhold emails it has actually released. See, *e.g.*, J.A. 376. This is a manifest absurdity.

E. The competitive advantage expires after passage of time or in light of other academic purposes.

Because the research exclusion protects the competitive advantage

in research data, once the research effort is concluded, either through publication of the results or by simply moving on to other work, the competitive advantage expires and with it the research data exclusion. At that point, not only FOIA purposes, but fundamental purposes of university research compel release of public documents associated with the research.

Sometimes academics offer the research data upon which they rely at the time they publish their results. Often they do not. The failure to release research data, both that upon which the faculty relied and that they collected but upon which they did not rely, is a disservice to the research community. The failure to release research data makes it impossible to reproduce the science – a principal precept of scientific inquiry.¹⁷ FOIA offers the post-publication transparency necessary to validate and trust science in an environment where corrupt science has become “epidemic.”¹⁸

¹⁷ Amazingly, we have found that sometimes even peer-reviewers of the science at issue in this case were unable to obtain the data they needed in order to conduct a proper peer-review, making release of such data under FOIA particularly important. See J.A. 26, p. 498, 506, 508-514, 516-17, 526 528.

¹⁸ See, e.g., Jonathan Ionnidis, “An Epidemic of False Claims”, *Scientific American*, May 31, 2011, “False positives and exaggerated results in peer-reviewed scientific studies have reached epidemic proportions in recent years. The problem is rampant in economics, the social sciences and even the natural sciences, but it is particularly egregious in biomedicine. * * * Much research is conducted for reasons other than the pursuit of truth. Conflicts of interest abound, and they influence outcomes. * * * Even for academics, success often hinges on publishing positive findings. The

The utility and power of FOIA in uncovering “bad” science is manifest. Through a federal Freedom of Information Act request to the National Oceanic and Atmospheric Administration (NOAA), the public is now aware of a letter from NOAA employee Kevin Trenberth to Ben Santer, a climate researcher at Lawrence Livermore National. In 2003, Santer, et al., published a paper in the prestigious journal *Science*.¹⁹ It had undergone the normal peer review.

Six days after publication, Trenberth, who had co-authored articles with Santer, sent Santer a letter (J.A. 550) eviscerating the paper and its findings, referencing three previously published, peer-reviewed articles upon which he relies, and stating “your paper is seriously compromised with regard to detection and attribution as a result of these points and it should be heavily discounted.” The paper has been cited in 214 articles, including 42 scholarly articles, yet has never been retracted. Without a FOIA request, this bad science would never have been exposed.

Whatever competitive advantage that might exist in the Trenberth-

oligopoly of high-impact journals also has a distorting effect on funding, academic careers and market shares. * * * The crisis should not shake confidence in the scientific method. The ability to prove something false continues to be a hallmark of science.”

¹⁹ Santer, B.D., *et al.* “Contributions of Anthropogenic and Natural Forcing to Recent Tropopause Height Changes”, *Science* 25 July 2003: Vol. 301 no. 5632 pp. 479- 483 DOI: 10.1126/science.1084123

Santer communication is surely exhausted because of publication of the Santer paper and overwhelmed both by the FOIA purposes of promoting an increased awareness by all persons of governmental activities and affording every opportunity to citizens to witness the operations of government and to have public confidence in scientific publications.

In addition to “outing” bad science, release of all research data after publication of the research results advances the core university purpose of discovery and dissemination of new knowledge. The extent of this purpose goes well beyond releasing only that data supporting a researcher’s hypothesis, but all the data that does not and all the work that failed to advance the research. As Thomas Edison is claimed to have explained: “I have not failed. I've just found 10,000 ways that won't work.”²⁰ UVA recognizes the importance of making such “negative results” public.²¹

Similar to “negative results”, the university abandons the competitive advantage inherent in research data when it abandons a line of research, regardless as to whether it has ever published any results from that research. Abandoned research data should always be released, or the

²⁰ As quoted in an ad for GPU Nuclear Corporation, in *Black Enterprise* Vol. 16, No. 11 (June 1986), p. 79.

²¹ See J.A. 668-69 (“It is exciting when our findings survive our efforts to poke holes in them. And, when they don’t survive, we learn something new. Knowledge wins either way!”)

purpose and mission of a university to advance knowledge is frustrated.

Finally, the passage of time can extinguish the competitive advantage protected by the exclusion. Despite the exclusion's language, the University has argued that Va. Code § 2.2-3705.4(4) protects the earliest stages of scientific inquiry, from long before the first bit of data has been collected, the first research record created or the first of the new information rising from the data collection and analysis has come forth. As noted, this requires torturing the words of the exclusion. But even if the pre-experimental creative process were covered by the exclusion, in the case before this bench, any competitive advantage that might have existed in creative period communications has long-since disappeared and the 10 to 13 year-old (J.A. 691-743) emails are now no more than historical records.²²

The balance between the need to protect a competitive advantage and the need to validate the science underlying policy proposals is dynamic, but clearly must shift to release of documents upon use of the science in policy debates. Not only has the competitive advantage been extinguished by that time, but President Eisenhower's famous farewell-address concern about this balance becomes manifest:

²² See, *Africa Fund v. Mosbacher*, 1993 U.S. Dist. LEXIS 7044 (S.D.N.Y. May 26, 1993) (these exemptions area not permanent in nature).

“Yet, in holding scientific research and discovery in respect, we must also be alert to the equal and opposite danger that public policy could itself become the captive of a scientific-technological elite.”²³

Regardless of how one defines research data, records and information, only by releasing them is it possible to validate not only the research findings, but the character of the research process. Absent such a release, undisclosed biases in the data or the research approach will necessarily corrupt public policy founded on such science.

III. None of the emails exclusively withheld under the research data exclusion qualify for that exclusion.

To qualify for the research data exclusion, each email must meet each of the criteria in the exclusion, to wit:

- (i) it must include data, records or information;
- (ii) the data, records or information must be produced or collected by or for faculty or staff;
- (iii) the production or collection must be in the conduct of or as a result of study or research;
- (iv) the research must be on medical, scientific, technical or scholarly issues;
- (v) the research must be sponsored by the institution alone or in conjunction with a governmental body or a private concern;
- (vi) the data, records or information must be of a proprietary nature; and,
- (vii) the data, records or information cannot have been publicly released, published, copyrighted or patented.

²³ Farewell address by President Dwight D. Eisenhower, January 17, 1961; Final TV Talk 1/17/61 (1), Box 38, Speech Series, Papers of Dwight D. Eisenhower as President, 1953-61, Eisenhower Library; National Archives and Records Administration.

Although the exemption applies to data, records or information, with one exception (PE-5) the emails contain no actual data or any laboratory or research records. Some of them contain the results of data analysis or conclusions resulting from the analysis of data which the Legislature would logically cover as “information,” as discussed immediately below.

A. The exclusion only applies to research sponsored or co-sponsored by the University.

To withhold an email, the research information *in* the email must have been produced or collected to support the University’s research. Six exemplars, *e.g.*, PE-1, PE-3, PE-4, PE-5, PE-15 and PE-16 reflect Dr. Mann’s involvement as a federal appointee to the United Nations Intergovernmental Panel on Climate Change (the IPCC). UVA is not a member of the UN and did not sponsor or co-sponsor the IPCC report. Because these emails reflect Dr. Mann’s service commitment as a faculty member, as opposed to research, they are public records but otherwise do not qualify as records of research or study of the University.²⁴

²⁴ Indeed the IPCC acknowledges, “[i]t does not conduct any research nor does it monitor climate related data or parameters,” (See, <http://www.ipcc.ch/organization/organization.shtml#.UYIpteB0Ha4>.) and the IPCC policy is for complete transparency in its processes (Principles Governing IPCC Work, “...to assess on a comprehensive, objective, open and *transparent basis* (<http://www.ipcc.ch/pdf/ipcc-principles/ipcc-principles.pdf>) leaving no external argument against releasing IPCC-related records.

In like measure, PE-6 involves preparation of a statement by the World Meteorological Organization (“WMO”). The statement is not research, is not a study and is not sponsored or co-sponsored by UVA. The same is true for RE-2 which deals with advice on how to organize a professional meeting not sponsored or co-sponsored by the University.

Exemplars PE-7, PE-9, PE-10, PE-11, PE-12, PE-17, and RE-1 are correspondence of a government employee unrelated to any research project sponsored or co-sponsored by the University.

PE-8 is an unsolicited email sent to a government employee and does not result from a UVA study or UVA research. It is of the kind of email all government employees receive on their government email accounts from interested citizens.

The remaining exemplars, RE-4 through RE-9 are the only emails associated with UVA research. In each case, the information in these six has been published or abandoned by UVA.

B. RE-5 contains no “data, records or information” and otherwise its content has been publicly released or abandoned.

RE-5 is an archetypical public record, an analysis of which sets the stage for disposition of RE-4, RE-6, RE-7, RE-8 and RE-9. The RE-5 email is an internal UVA communication proposing three new research topics. As such, it fails to meet the requirement of containing data, records or

information resulting from research. The proposed research topics fall within the first five stages of the scientific process. RE-5 is the kind of early communication on proposed work that is not covered by the exclusion.

If the Court interprets the exclusion narrowly, ATI argues RE-5 cannot meet the requirements of the exclusion because the proposed research topics are not data, records or information; and, even if they were, they did not result from research but instead preceded it.

Even if the Court holds that the preliminary research topics proposed in the email otherwise met the “in the conduct of or results from” requirement and were viewed as “information,” the need to protect these research topic proposals was extinguished for two of the topics because the final research results for those two topics were published in the professional literature. See J.A. 370. There can be no proprietary interest remaining in an email when the “information” has subsequently been discussed in a professional paper because the proposed research ideas have been released to the public through publication of those very research proposals’ results.

There was no publication on the third topic discussed in RE-5. There is no evidence UVA ever conducted research on the third topic. Nor has the University ever suggested that any faculty member intends to pursue this

topic. As such, all evidence before the Court suggests that this research topic has been abandoned. Although not publicly released, it is the kind of information that should be made public because it has no remaining value to UVA but might have value to other scientists.

C. The University has publicly released the information in the emails in multiple ways.

ATI argues there are several ways the “information” in the emails has been publicly released – through professional publications, through release to individuals not on the research team, and by release to Dr. Mann. The question before the Court is whether any of these releases constitutes being “publicly released [or] published.”

There is no Virginia case law regarding what constitutes public release or publication under FOIA. The ordinary meaning of the term would be where the government gave a member of the public a copy of the “information” or otherwise it was printed in a publication.

i. Public release by subsequent journal publication

UVA has argued that the emails, themselves, have not been publicly released. The research data exclusion, however, does not protect the emails. It protects the research data within an email. With one exception (PE-5) there are no research data or records in any of the exemplars, only research outcome information in the form of analytical results and

conclusions drawn from those results. That kind of information has been publicly released, specifically through publication in professional journals. Any information UVA suggests is in RE-1, RE-5, RE-7, RE-8 and RE-9 has been made public by publication of research findings.²⁵ The same is true for PE-1, PE-3, PE-4, PE-5, PE-9, PE-11, PE-15, PE-16 and PE-17, although none of these Plaintiffs' Exemplars involve UVA research. See, J.A. 369. Notably, PE-1, PE-3, PE-4, PE-5, PE-15, and PE-16 all involve editing of an IPCC report. While we also recall the transparency required by the IPCC, once that report was published, any actual data, records or information in the emails was published.

PE-5, the only email among the 22 now before the Court that contains actual data, provides estimates of global temperatures from 1402 through 1995. Of this data, the IPCC report includes all data through 1960 but fails to include data after 1960 as part of the "trick" the IPCC used to "hide the decline" in estimated temperature after 1960 which impeaches the conclusions of the report.²⁶ Thus, most of the data has been published, and the data that was not published is critically important to understanding the

²⁵ See, J.A. 370-71 and for RE-9, see Braganza, K., *et al*, "Simple indices of global climate variability and change: Part I – variability and correlation structure," *Climate Dynamics* 20: 491-502 (2003).

²⁶ See, PE-6 as an additional example of hiding data that fails to tell the "story" preferred by these "scientists."

biases in the IPCC report.

Of course, this particular data is not for or from a UVA research project and thus is not covered by the research data exclusion in the first place, but if it were UVA research, the partial release of the data would demand full release of all data, including that not used in a publication. To do otherwise would not merely “hide the decline,” it would hide data in the University’s possession that the Legislature intended to have made public so as to promote an increased awareness by all persons of governmental activities and afford every opportunity to citizens to witness the operations of government. On a highly charged political issue, with enormous public policy consequences, to publish some data and hide other data not only frustrates the purposes of the Freedom of Information Act, it violates the core principles of Virginia research universities and UVA in particular.

Publication of information in a book is also a public release of the information. Michael Mann’s self-defensive diatribe “The Hockey Stick and the Climate Wars”²⁷ contains a recitation of the first six steps of the research process as described above. Although not covered by the research data exemption, if they were, any competitive advantage that existed in the contemporaneous communications of that period (the emails

²⁷ Mann, M. *The Hockey Stick and the Climate Wars*, Columbia University Press, 2012; and see Chapter 1 – 4.

at issue in this case) has been extinguished by the passage of time and the discussion of that period of work by Dr. Mann's book.²⁸

ii. **UVA publicly released all 12,000 withheld emails**

This case is marked by a very unusual set of circumstances that may moot the remainder of the case. UVA admitted to the circuit court that after termination of Dr. Mann's employment at UVA and before he became an intervener, the University gave him the public records it withheld from ATI. J.A. 302. UVA admitted neither Dr. Mann nor his counsel were subject to the confidentiality agreement the circuit court had already ordered to prevent public release of the emails. J.A. 302-33. Dr. Mann eventually entered the case to prevent UVA from releasing any documents (J.A. 297-98), including the ones UVA gave ATI. He prosecuted litigation commonly called a "reverse-FOIA" case, after reading the UVA emails. As a result, ATI argued that this release constituted a waiver of the research data exclusion or otherwise constituted public release of the documents.²⁹ The

²⁸ In addition, balancing the fact of this publication against FOIA's purpose to afford every opportunity to citizens to witness the operations of government, release of the emails is the only way for citizens to determine whether Dr. Mann's history is indeed accurate or merely a distorted view of the operations of government during that scientific process. See fn 26, *supra*.

²⁹ See, ATI's "Memorandum in support of Petitioners' motion to compel the University of Virginia to disgorge all documents sought under its Freedom of Information Act Request" at p. 9.

court temporarily denied the waiver argument (“There is no final score posted.”) (J.A. 366-67), but did not address the question as to whether the release to Dr. Mann was a public release (*id* at JA. 303).

At the time he received the emails, Dr. Mann was not a Virginia citizen, he was not an employee of UVA or any other Virginia governmental body, he was not part of any research team working with UVA faculty on any study or research sponsored or co-sponsored by UVA, and he was not a party to the law suit. At the time he received the withheld emails, Dr. Mann was a Pennsylvania citizen and a professor at Penn State University, an academic competitor to UVA. Because both schools compete for grants, he was also an economic competitor. He was also being recruited by UVA to try and enter the case to stop UVA from releasing any emails, though his interests were in part antagonistic to UVA’s, specifically with regard to the emails UVA did subsequently release to ATI. He was, and continues to be a political activist, as evidenced by the subtitle of his book (“Dispatches from the front lines”),³⁰ and in his many public statements and extensive political campaigning with and on behalf of candidates since. In Chapter 9 of his book, he describes himself as either David or Goliath, it isn’t clear which, in a political fight about global warming, using the label of “climate

³⁰ Mann, *The Hockey Stick and the Climate Wars*.

villains” to describe those who disagreed with him on the science (*Id* at p. 126), including Chris Horner, one of the ATI members who signed the FOIA request at issue in this case. *Id* at p. 199.³¹ In brief, Dr. Mann was politically opposed to ATI and his legal interests were, at least in part, opposed to UVA’s interests.³² Dr. Mann’s climate change, global warming activism, and his adversarial relationship to ATI and UVA have legal consequences with regard to public release of documents.

UVA admitted that

“[i]f UVA had, in fact, been willing to give these contested records to some pro-climate change, pro-global warming environmental organization, it would have been objectively unreasonable for the university to withhold those very same records from the American Tradition Institute. That would be unreasonable. It would involve the very kinds of constraints and issues that I think we see reflected in that Attorney General opinion.”

J.A. 338-39. That “Attorney General opinion” states that under the FOIA, where a public body disseminates any records they hold, “those records lose the exemption accorded by [FOIA].” 1982-1983 Op. Atty Gen. Va. 724; 1983 Va. AG LEXIS 84 (February 15, 1983). This is the common legal precept routinely taken by state and federal courts.³³

³¹ Dr. Mann compared Mr. Horner to a holocaust denier, a vicious smear.

³² Mann’s interests are additionally antagonistic to UVA’s in his claim that none of the emails were public records – a position with which UVA firmly disagreed.

³³ Stating the obvious, “[w]here the government gave opposing counsel a

UVA counters these arguments by claiming they and Dr. Mann had a common interest in the case and under that rule they did not publicly release the documents. These emails do not fit within common interest law. “[A]s an exception to waiver, the joint defense or common interest rule presupposes the existence of an otherwise valid privilege, and the rule applies not only to communications subject to the attorney-client privilege, but also to communications protected by the work-product doctrine.” *In re Grand Jury Subpoenas, 89-3 & 89-4, John Doe 89-129 (Under Seal)*, 902 F.2d 244, 248-249 (4th Cir. Va. 1990). Counsel for UVA and Dr. Mann were free to discuss defense strategies and to share attorney-client privileged communications. The emails do not fall within those privileges and UVA

copy of the records, they were “publicly released” and “[n]o decision by this Court can transform disclosed records into nondisclosed records. *Federated Publ'Ns v. City of Lansing*, 467 Mich. 98, 112-113 (Mich. 2002). In like measure, “The selective disclosure exhibited by the government in this action is offensive to the purposes underlying the FOIA and intolerable as a matter of policy. Preferential treatment of persons or interest groups fosters precisely the distrust of government that the FOIA was intended to obviate. The problem is exacerbated in this action because Audubon's interests are antagonistic to the State of North Dakota.” *North Dakota v. Andrus*, 581 F.2d 177, 182 (1978). See also, *Florida House of Representatives v. United States Dep't of Commerce*, 961 F.2d 941, 946 (11th Cir. 1992), citing to *Shell Oil Co. v. IRS*, 772 F. Supp. 202, 211 (D.Del.1991) (where an authorized disclosure is voluntarily made to a non-[governmental] party, the information has been made public); and *Wolf v. CIA*, 473 F.3d 370, 379-380 (D.C. Cir. 2007) (information has been disclosed when an authoritative government official allowed the information to be made public.)

cannot identify any otherwise valid privilege that would apply to those documents.

Because UVA gave to Dr. Mann all 12,000 emails, none protected by a common law privilege; when he was not a party to the case; when he had no joint defense agreement; when he had no confidentiality agreement with UVA and was not a signatory to the court's protective order; when he had at least some legal interests antagonistic to UVA; when he was both an academic and economic competitor to UVA, and when he was (and is) a pro-climate change, pro-global warming political and environmental activist; all 12,000 emails have been publicly released and thus not one qualifies under the research data exclusion.

iii. Sending emails to courtesy copy addressees constitutes a public release of the emails.

There is a live question of first impression before the Court as to whether an email sent to or received by a government employee has been publicly released or otherwise is in the public domain if it was also sent to others, especially where those others are not, for example, members of a UVA research team.³⁴ Of the six emails (RE-5 thru 9) that involved UAV

³⁴ See, Snow, N. "A Copyright Conundrum: Protecting Email Privacy", 55 Kansas Law Review 501, 523 & 525 (July 2007) ("If the author were interested in keeping a letter private, the author would not provide a copy of the letter to the third party." and "where the content does not expressly

research, only RE-5 and RE-6 had “cc” addressees and in each case those addressees were on the UVA research team.

Although none of the other exemplars meet the “sponsored or co-sponsored” criterion, even if they had, many of them include “cc” addressees who are not directly involved in the research as a team member. A perfect example of an email that clearly was a public release as demonstrated by the 53 “cc” addressees and its content is PE-8.

Exemplars PE-11 & PE-12 offer another example where “cc” addressees are not part of the research team. Exemplars PE-15, PE-16, and RE-2 are emails “cc’d” to the federal government and clearly subject to the federal FOIA, making each a public release. Taking into account the lack of a research team relationship to either the sender or the recipient, the sender clearly had no expectation of privacy and implicitly if not explicitly intended his communications to be public. Thus, none of these exemplars may be withheld because they have been publicly released.

D. Several exemplars contain no research information at all.

Under even the broadest interpretation of “data, records or information,” several emails contain nothing remotely related to any

indicate that the expression applies to the carbon-copy recipient, the fact that the sender has employed the carbon-copy feature should create at least a presumption of relinquishment.”)

research project, not even those sponsored by non-UVA organizations. Exemplar PE-8 is an unsolicited email from the late John Daly, a college professor of electronics and economics.³⁵ In that email, he attempts to school a host of university professors engaged in climate change research. He cites to no actual data, no actual research records, no research information whatever.

In like measure, RE-4 and RE-6 contain nothing protected under the research exclusion. RE-4 is a 2002 list of Dr. Mann's accomplishments over the previous year, all of which were also published works. RE-6 is a discussion about how to write a research proposal, not what to put into that proposal, much less actual research data or results. Finally, not one of the Petitioners' Exemplars involves research sponsored or co-sponsored by UVA, and thus none qualify under the research data exclusion.

IV. The Virginia Freedom of Information Act bars a government agency from charging for the cost of reviewing records to determine whether they fall within an exclusion to the Act.

UVA argues that "supplying" public records includes review of those records to determine whether they are subject to a FOIA exclusion. ATI disagrees.

A. The legislative history and plain language of the statute

³⁵ See, <http://www.lavoisier.com.au/articles/greenhouse-science/climate-change/evans-daly2004-2.php> (accessed 10/31/2013).

disallows charging for exclusion review.

The original language of Va. Code § 2.2-3704 (F) allowed “reasonable charges for the copying and search time expended in the supplying of such records; however, in no event shall such charges exceed the actual cost to the public body in supplying such records.” See *Addendum*, Excerpts from the Acts of Assembly (*emphasis added*). The ordinary meaning of the verb “supply” is “to provide someone or something with (something that is needed or wanted).” Merriam-Webster Dictionary 2013

In 1999, the Legislature replaced “copying” and “search” with “accessing, duplicating, supplying, or searching” See *Addendum*. This amendment makes a single substantive change. It adds to recoverable costs the cost of “accessing” records, which simply means retrieving records.³⁶ The definition of the verb “duplicate” is “to make an exact copy”³⁷ and thus no change in legislative intent by that word change. The word “search” was not changed. The word “supplying” was not changed. At the same time, however, the Legislature created a bar to recovery of costs associated with “any extraneous, intermediary or surplus fees or expenses

³⁶ Merriam-Webster Dictionary 2013 (access means “to be able to use, enter, or get near something; to open or load a computer file, an Internet site, etc.”).

³⁷ *Id.*

to recoup the general costs associated with creating or maintaining records or transacting the general business of the public body.” In light of the explicit bar on charging for extraneous costs, and in particular the costs of records management, there is no basis to suggest the ordinary meaning of the word “supplying” means anything other than packaging up and sending the records that had been sought, found and copied.

The ordinary meaning of the word “supply” does not include reviews done to determine if any exclusions apply.” That act is a normal part of records management,³⁸ the cost recovery of which is specifically disallowed in Va. Code § 2.2-3704 (F).

B. The statutory interpretive canon “*expressio unius est exclusio*” prohibits reimbursement for exclusion review.

The opinion ignores the principal of statutory interpretation *expressio unius est exclusio alterius* which specifically applies to closed lists such as the one set out in Va. Code § 2.2-3704(F). This maxim provides that where a statute speaks in specific terms, an implication arises that omitted terms were not intended to be included within the scope of the statute.

³⁸ See, Va. Code § 42.1-76: “The General Assembly intends by this chapter to establish a single body of law applicable to all public officers and employees on the subject of public records management and preservation and to ensure that the procedures used to manage and preserve public records will be uniform throughout the Commonwealth” and; § 42.1-78 “Any records made confidential by law shall be so treated.”

Commonwealth ex rel. Virginia Dep't of Corrections v. Brown, 259 Va. 697, 704-705 (2000). To expand a closed list, as the trial court's decision in this matter has done, is a legislative act and therefor prohibited. *Shackleford v. Commonwealth*, 262 Va at 213.

C. The lower court's ruling inappropriately displaced relevant case law with an advisory opinion.

In its June 15, 2011 letter opinion (J.A. 107) the lower Court examined Va. Code § 2.2-3704(F) acknowledging *Albright v. Woodfin*, 68 Va. Cir. 115; (Va. Cir. Ct. 2005) but rejected reliance on *Albright's* rationale, instead following Opinion No. AO-02-07 ("the Opinion") (J.A. 70) of the Virginia Freedom of Information Advisory Council. *Albright* held:

"Code § 2.2-3704(F) does not grant a public body the authority for charging for the costs of reviewing or redacting records. This simply is not in the statute nor is there any implication from the statute that this can be recovered."

Albright v. Woodfin, 68 Va. Cir. at 118. In contrast, the Opinion offers no rationale for its interpretation of the Act allowing reimbursement for exclusion review. Despite this lack of a rationale, the trial court found the Opinion "instructive and persuasive." (J.A. 107).

Albright, however, has more supporters than the Opinion, as it should. "Pure statutory interpretation is the prerogative of the judiciary."³⁹

³⁹ *Sims Wholesale Co. v. Brown-Forman Corp.*, 251 Va. 398, 404, (1996).

This axiom stems from the two-century old principle of separation of powers.⁴⁰ In particular, in its notes, Va. Code Ann. § 2.2-3704 specifically cites to *Albright* (cost to remove protected information “were not costs for which a department was allowed to charge for reimbursement”) and ignores the Advisory Council’s Opinion. As well, another circuit court cites favorably to *Albright* on the question of reimbursement. *Virginia-Pilot Media Cos. LLC v. City of Norfolk Sch. Bd.*, 81 Va. Cir. 450, 465 (City of Norfolk, 2010) (this case was decided two years after issue of the Advisory Council’s Opinion).

D. The Advisory Opinion is neither instructive nor persuasive.

The role of the Advisory Council is to offer an interpretation of FOIA but has no authority to overturn any judicial opinion. It is neither authoritative nor binding.⁴¹ At best, an opinion is entitled to no more than due consideration. *Twietmeyer v. City of Hampton*, 255 Va. at 393. In the absence of a rationale for its interpretation, the Opinion cannot persuade, is not instructive and is due no consideration.

In addition to offering no rationale, the Advisory Opinion is not

⁴⁰ *Marbury v. Madison*, 5 U.S. 137, 178, 1 Cranch 137, 178 (1803). “It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule.”

⁴¹ See *Twietmeyer v. City of Hampton*, 255 Va. 387, 393 (Va. 1998) (advisory opinions not binding).

consistent with FOIA itself. The Opinion assumes that “staff” will review the records and determine which should be withheld. Apparently because staff might likely search for, access, copy and then send responsive public records to a requester, the Opinion makes a leap to suggest staff are also the government employees responsible for records management. This might be true in some cases, but for Universities, only those directly involved in research can know the status of the research⁴² and whether it has reached and remains within the actual experimental/observational stage protected under the research data exclusion. Only those fully familiar with the public records can be responsible for records management. Under the Virginia Public Records Act (Va. Code § 42.1-78) and UVA records management policy, it is the faculty that have this duty to identify and manage records they create and for which various statutes prohibit release.⁴³

⁴² Indeed, Dr. Mann claimed only he is competent to properly review the documents. J.A. 184.

⁴³ University of Virginia “Records Management – Email: “It is the responsibility of the individual sender and/or receiver of such messages to determine which information should be retained. Records should be maintained within a record keeping system and should be either retained or deleted according to the provisions of a Library of Virginia Records Retention and Disposition Schedule. Records that are retained by an individual, even if they are retained on an electronic medium, are subject to the Virginia Freedom of Information Act and the Privacy Act.” <http://www.virginia.edu/recordsmanagement/email.html> (accessed

Because several statutes prohibit release of certain public records, exclusion review is a part of records management, a normal transaction of the general business of a public body. Such statutes include the Federal Family Educational Rights and Privacy Act and protection of personnel records under state code. These protections are enshrined, in part, in Va. Code §§ 2.2-3705.1-3705.8. Together they amount to several dozen exceptions, enforcement of which is routine records management.

Because the Agency already had an obligation to protect these records, independent from the Requestor; and, because that protection is a normal transaction of the general business of a public body, FOIA specifically prohibits cost compensation for the exclusion review.

E. The purpose of FOIA and the public interest mandate UVA not charge for exclusion review.

The purpose of Virginia's FOIA statute is succinctly stated: "[t]he provisions of this chapter shall be liberally construed to promote an increased awareness by all persons of governmental activities and afford every opportunity to citizens to witness the operations of government." Va. Code §2.2-3700. Thus, Virginia's strong public policy is in favor of openness except in certain limited cases. The discretion to withhold documents is to be very limited, subject to the requirement to interpret

exclusions narrowly. The power of the purse enables the Agency to determine whether, and to whom, it will produce documents simply by setting the pace it uses to produce the documents. This is especially problematic in light of Va. Code § 2.2-3704 (C) which allows the government to obtain a court order scheduling the pace of record review and release through an *ex parte* proceeding, leaving the requestor without means to obtain a timely review and open to an exorbitant payment demand.

Allowing the government to manipulate the cost-reimbursement authority through demands for exclusion review costs frustrates the purpose of the Virginia Freedom of Information Act by creating arbitrary and capricious barriers to implementation of the act, barriers created at the sole discretion of the Agency. UVA offers no rationale for this authority and FOIA offers no basis for erection of such barriers.

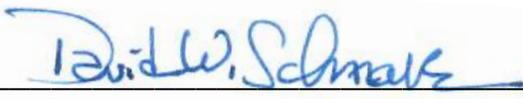
CONCLUSION

The General Assembly crafted a narrow exclusion to the Virginia Freedom of Information Act allowing universities to withhold the product of experimental and observational activity to protect a competitive advantage in the marketplace of ideas. Because not one of the decade-old exemplars placed before the Court still provides UVA any competitive advantage in

the marketplaces of ideas or goods and services, and because each has been publicly released, the Court should reverse the trial court's ruling and order UVA to release all emails withheld under the research data exclusion. Because the ordinary meaning of the phrase "accessing, duplicating, supplying, or searching" does not include record maintenance or transacting the general business of the public body to prevent release of certain records prohibited from public release, the Court should reverse the trial court's ruling and order UVA to return all funds collected exclusively for exemption review of records. In light of these holdings, the Court should declare that ATI substantially prevailed on the merits of the case and remand the remainder of the case to the trial court for further proceedings on reimbursement for costs and fees under Va. Code § 2.2-3713 (D).

Respectfully submitted,

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and
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CERTIFICATE

Pursuant to Va. Sup. Ct. Rules 5:26 & 5:27, I hereby certify that on November 14, 2013:

Fifteen printed copies of this brief and of the accompanying Joint Appendix, and one electronic copy in PDF format on CD, have been transmitted by hand for filing in the office of the Clerk of this Court.

This Opening Brief of Appellant complies with Rule 5:26 and the portion subject to Rule 5:26(b) does not exceed 50 pages.

By Agreement with counsel for the appellees, named below, the number of copies of this brief and of the accompanying Joint appendix set forth below have been mailed to them:

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ADDENDUM
LEGISLATIVE ACTS ON VA. CODE § 2.2-3704 (F)

Acts of Assembly

April 11, 1982 Ch. 452

The public body may make reasonable charges for the copying and search time expended in the supplying of such records; however, in no event shall such charges exceed the actual cost to the public body in supplying such records.

April 8, 1994 Ch. 485

The public body may make reasonable charges for the copying, and search time *and computer time* expended in the supplying of such records; however, such charges shall not exceed the actual cost to the public body in supplying such records

March 16, 1995 Ch. 299

The public body may make reasonable charges for the copying, search time and computer time expended in the supplying of such records; however, . *The public body may also make a reasonable charge for preparing documents produced from a geographic information system at the request of anyone other than the owner of the land that is the subject of the request. However, such charges shall not exceed the actual cost to the public body in supplying such records or documents*

March 28, 1999 Ch. 703

~~The~~ A public body may make reasonable charges for the copying, search time and computer time expended in the supplying of such records *its actual cost incurred in accessing, duplicating, supplying, or searching for the requested records. No public body shall impose any extraneous, intermediary or surplus fees or expenses to recoup the general costs associated with creating or maintaining records or transacting the general business of the public body. Any duplicating fee charged by a public body shall not exceed the actual cost of duplication.* The public body may also make a reasonable charge for ~~preparing documents~~ *the cost incurred in supplying records* produced from a geographic information system at the request of anyone other than the owner of the land that is the subject of the request. However, such charges shall not exceed the actual cost to the

public body in supplying such records or documents, except that the public body may charge, on a pro rata per acre basis, for the cost of creating topographical maps developed by the public body, for such maps or portions thereof, which encompass a contiguous area greater than fifty acres. ~~Such~~ All charges for the supplying of requested records shall be estimated in advance at the request of the citizen. ~~The public body may require the advance payment of charges which are subject to advance determination.~~

In any case where a public body determines in advance that ~~search and copying charges~~ for producing the requested documents-records are likely to exceed \$200, the public body may, before continuing to process the request, require the ~~citizen requesting the information requester~~ to agree to payment of an amount not to exceed the advance determination by five percent *a deposit not to exceed the amount of the advance determination. The deposit shall be credited toward the final cost of supplying the requested records.* The period within which the public body ~~must~~ shall respond under this section shall be tolled for the amount of time that elapses between notice of the advance determination and the response of the ~~citizen requesting the information requester~~.

March 28, 1999 Ch. 726

The A public body may make reasonable charges for the ~~copying, search time and computer time expended in the supplying of such records~~ *its actual cost incurred in accessing, duplicating, supplying, or searching for the requested records. No public body shall impose any extraneous, intermediary or surplus fees or expenses to recoup the general costs associated with creating or maintaining records or transacting the general business of the public body. Any duplicating fee charged by a public body shall not exceed the actual cost of duplication.* The public body may also make a reasonable charge for ~~preparing documents~~ *the cost incurred in supplying records* produced from a geographic information system at the request of anyone other than the owner of the land that is the subject of the request. However, such charges shall not exceed the actual cost to the public body in supplying such records or documents, except that the public body may charge, on a pro rata per acre basis, for the cost of creating topographical maps developed by the public body, for such maps or portions thereof, which encompass a contiguous area greater than fifty acres.

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March 16, 2003 CH. 275

A public body may make reasonable charges for *not to exceed* its actual cost incurred in accessing, duplicating, supplying, or searching for the requested records. No public body shall impose any extraneous, intermediary or surplus fees or expenses to recoup the general costs associated with creating or maintaining records or transacting the general business of the public body. Any duplicating fee charged by a public body shall not exceed the actual cost of duplication. The public body may also make a reasonable charge for the cost incurred in supplying records produced from a geographic information system at the request of anyone other than the owner of the land that is the subject of the request. However, such charges shall not exceed the actual cost to the public body in supplying such records, except that the public body may charge, on a pro rata per acre basis, for the cost of creating topographical maps developed by the public body, for such maps or portions thereof, which encompass a contiguous area greater than fifty50 acres. All charges for the supplying of requested records shall be estimated in advance at the request of the citizen.

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VA. CODE § 2.2-3704 (F) (current)

A public body may make reasonable charges not to exceed its actual cost incurred in accessing, duplicating, supplying, or searching for the requested records. No public body shall impose any extraneous, intermediary or surplus fees or expenses to recoup the general costs associated with creating or maintaining records or transacting the general business of the public body. Any duplicating fee charged by a public body shall not exceed the actual cost of duplication. The public body may also make a reasonable charge for the cost incurred in supplying records produced from a geographic information system at the request of anyone other than the owner of the land that is the subject of the request. However, such charges shall not exceed the actual cost to the public body in supplying such records, except that the public body may charge, on a pro rata per acre basis, for the cost of creating topographical maps developed by the public body, for such maps or portions thereof, which encompass a contiguous area greater than 50 acres. All charges for the supplying of requested records shall be estimated in advance at the request of the citizen.