In The Matter Of:

THE AMERICAN TRADITION INSTITUTE v.
THE RECTOR AND VISITORS OF THE UNIVERSITY OF VIRGINIA

COURT
April 16, 2012

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V I R G I N I A:

IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

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THE AMERICAN TRADITION INSTITUTE,

Petitioner,

-vs- Case No. CL-11-3236

THE RECTOR AND VISITORS

OF THE UNIVERSITY OF VIRGINIA,

Respondent.

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Monday, April 16, 2012

Manassas, Virginia

Whereupon, a motion hearing was held at the Prince William County Courthouse, Courtroom 1, 9311 Lee Avenue, Manassas, Virginia, before THE HONORABLE PAUL F. SHERIDAN, at 10:02 a.m. in the above-entitled matter, taken stenographically by RANDY T. SANDEFER, RPR, when were present on behalf of the respective parties:

APPEARANCES:

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P R O C E E D I N G S

(Whereupon, the reporter was sworn.)

THE COURT: This case comes on for a series of motions. The law clerk had asked me in advance if the Court had a preference as to the order of motions, and I don't; I will leave it to counsel.

Have counsel reached an agreement as to the order of the motions?

DR. SCHNARE: We have, Your Honor.

THE COURT: Tell me the order in which you want to present them.

MR. KAST: Your Honor, we will be opening with our motions or our objections to the discovery requests made by the petitioners in this case. And then we will move to the argument that Dr. Schnare will make on behalf of his motion to disgorge. In my opening, I will go into a little bit more detail about how we propose to structure that.

THE COURT: What is your best guess as to the length of the arguments?

MR. KAST: Your Honor, as you know, we asked for a total of three hours. I would not anticipate it would take that long.

THE COURT: Well, it is difficult for all of us. Lawyers and trial judges are not particularly accurate in their estimates, but we will got the rest of the day. Whatever time that counsel needs, we will take.

MR. KAST: Thank you, Your Honor.

THE COURT: Is that agreed with how to proceed?

DR. SCHNARE: Yes, sir, Your Honor.

THE COURT: Thank you. Are there any preliminary matters?

With that, I welcome whoever wants to argue first.

MR. KAST: Good morning, Your Honor.

My name is Richard Kast; I am here on behalf of and representing the Rector and Visitors of the University of Virginia. And I will be opening argument in opposition to the discovery motions that have been made by the

petitioners.

Seated at counsel table to my left is Peter Fontaine, who represents Dr. Michael Mann. He will also be arguing in opposition to the discovery motions of petitioners; and Madelyn Wessel, my co-counsel, also representing the Rector and Visitors, also from our general counsel's office, who will be arguing in opposition to the motion to disgorge that has been filed by the petitioners.

THE COURT: Thank you.

MR. KAST: Your Honor, I want to open by saying something that may be counter-intuitive given the size of the record that has developed in this case. But it is our sincere belief that this is, and should be, a simple and straightforward case.

Everything in this case emanates from the verified petition for writ of mandamus and injunctive relief that was filed by the petitioners back in May of last year.

And, Your Honor, I have prepared a

chronology of what we think to be the significant events that have gotten us to this point, which I would be happy to share with the Court. I have shared it with Dr. Schnare.

I think he may have some issue with the wording of one aspect of this, but I will be happy to share this.

THE COURT: I would welcome that; thank you.

I'm going mark this as an exhibit for today. I don't designate it 1 or the other; I am putting the word "Exhibit" in the lower right corner of the first page, and my initials with today's date so it is in the record.

MR. KAST: Thank you, Your Honor.

Now, the original Freedom of Information Act request from which all of this controversy flows was actually filed -- as you will note, it is the first item on the chronology, understandably -- back on January 6 of last year. There have been all kinds of delays with this case that we would strongly

suggest to the Court are in many instances exclusively the responsibility of petitioners.

The first issue that we encountered in trying to deal with this Freedom of Information Act request was the fact that petitioners objected to our interpretation of the section of the Freedom of Information Act that deals with reimbursement of costs for accessing and producing documents in response to a request.

The policy of our office at the university that deals with these types of issues -- which, I think, is pretty routine and not unexceptional -- is that where it is an extensive request like this, and where there is a significant amount of time and effort that will be required to comply, that we do an estimate of how much it will cost.

We tell the requester what that will be, and then they make a decision as to whether or not they want to go forward or not. If they want to go forward, then we request payment of the amount; or at least a significant down

payment, if you will, on that amount.

And that was the process that we went through here. So that bear in mind the request was made on January 6 of 2011. It wasn't, in fact, until March 10 of that year that we got the first $2,000 payment of an estimated $8,500 amount for complying with this request.

And it wasn't, in fact, until June 15 of last year when Judge Finch definitely disposed of their argument that they shouldn't have to pay for aspects of our production of these documents by ruling in our favor.

Further delay was caused by petitioners' counsel when because of their conduct, quite frankly -- and it is clear in the record -- the university was forced to seek that the original protective order that was entered by Judge Finch back on May 24 of last year be revised, rescinded, and essentially supplanted by another order.

This issue was, in fact, not resolved until November 1 of last year when Judge Finch

granted the respondents' motion, rescinded the original protective order, and directed counsel for the parties to confer and agree on an alternative mechanism for selecting the exemplars for the Court's in camera review to determine whether the documents that had been withheld had been withheld legitimately and lawfully.

Counsel for the parties then agreed on a second protective order, and submitted it to this court for entry on December 19 of last year. Judge Finch entered that order on January 16. But no sooner had counsel agreed on the second protective order, and before Judge Finch had even entered it, petitioners filed their first discovery requests on December 26, the day after Christmas of last year.

I will deal with what we see to be the substantive lack of merit of these discovery requests in a moment; but I will note that this attempt to introduce discovery into this finite remedial scheme devised by the General Assembly

under the Freedom of Information Act, of course, necessarily created another delay, as witnessed by the fact that we are here today arguing about their discovery requests.

After filing their first discovery request, the petitioners' counsel told the respondents' counsel that they had concluded that they were premature, and they sought to withdraw them without prejudice. We opposed that because we felt sincerely that discovery was inappropriate and unnecessary in this case; and if they wanted to withdraw them without prejudice to refile, we object.

Shortly after that conversation, on February 3 of this year, petitioners filed their second discovery requests and their motion to disgorge. Now, I will refer, sort of, in passing to the motion to disgorge, although the substance of that argument will be handled subsequently when Dr. Schnare makes his argument on behalf of, and Ms. Wessel makes her argument in opposition to, that motion to disgorge.

But I would note that it essentially, in my mind, is simply another attempt to secure the documents that are at issue in this case by an end-run around the procedure that was developed with some effort to create a mechanism for this court's review to make a decision.

The motion to disgorge is essentially a production request for the same documents. So, Your Honor, this brings us, I think, essentially up to date and brings us before this court today on the discovery motions.

As I noted, this action emanates from one very specific and very clear statute, Section 2.2-3713 of the Freedom of Information Act. That section states in pertinent part, and I quote, "any person denied the rights and privileges conferred by this chapter may proceed to enforce such rights and privileges by filing a petition for mandamus or injunction supported by an affidavit shown in good cause."

Now, this section has been interpreted by the Virginia Supreme Court, including in part

Wright v. The Commonwealth Transportation Commissioner, 270 Va. 58 (2005), in which the issue was if mandamus -- as we know, mandamus is a limited and extraordinary remedy and ordinarily does not lie where there is an adequate remedy at law. That specific argument was made in that case and had been accepted by the lower court.

The Virginia Supreme Court said, no, because the remedy created by 2.2-3713 is a very specific limited remedial scheme. Even though it is characterized as a mandamus petition, it is a very specific type of mandamus petition.

The Court stated, and I quote, that it wished to "significantly distinguish this particular remedy from the common law right to mandamus" to "manifestly facilitate access to appropriate governmental records."

The Court continued: "Contrary to VDOT's contention --" VDOT was the public entity that had been requested to furnish the various documents in that case -- "we are of the opinion

that the lack of any reference to this statute to the common law requirements that the petition proved a lack of adequate remedy of law, if this is the intent of the General Assembly to eliminate that common law prerequisite to the issuance of a writ of mandamus."

I would submit to the Court, Your Honor, that a similar lack of any mention of a right to discovery under 2.2-3713 is significant, particularly given the fact that the statute contemplates an accelerated hearing and decision on whether or not requested documents will be furnished, or whether or not there has been a violation of the Freedom of Information Act. And, of course, it also deals with open meetings as well as documents.

As we noted in our memorandum filed in support of our first motion to quash on January 17 of this year, petitioners at least started out seeking the limited relief available to them pursuant to 2.2-3713. Specifically, in paragraph 71 of their mandamus petition, they

state that they only seek "the Court's assistance in creating a process by which to address whether the exclusions are proper while minimizing the burden on the Court and the respondent."

They then state that once that process has been created -- which it now has, of course; the exemplars have been agreed upon and submitted to the Court -- once that process had been created, and I quote further, "petitioners will return to this court and petition for mandamus to release those documents petitioners believe respondents have improperly excluded from relief."

What they essentially say is what has now been accomplished through an agreement of counsel -- through a long and laborious process, granted, but has been accomplished -- was what they were seeking; and all of the relief that they have sought pursuant to the original petition for mandamus that they filed, they have received. So how discovery could be appropriate

under those circumstances is difficult to comprehend.

On April 4, respondents and petitioners jointly filed in this court the exemplars, as I noted; and so this information is now agreed upon and in the record of this court.

THE COURT: Do you mean to say that the process of exchanging exemplars has been completed?

MR. KAST: Yes, sir, Your Honor. The exemplars have been agreed upon; they have been submitted to the Court for review.

And what I am saying is, according to the literal language of their petition for mandamus, they say that is what they were seeking, and that's all that they were seeking; and that they would then subsequently come back with another petition seeking the relief, the release of the documents that they claim they are entitled to see.

So for this reason alone, it seems

that discovery is inappropriate and unnecessary. But there are many other reasons which we have noted in our memorandum.

I refer to the fact that Section 2.2-3713 provides for a narrow and specific remedy in which discovery is neither expressly authorized, nor is it consistent with the relief available or the expedited timeframe in which it is contemplated by the General Assembly that it will be achieved.

The other thing that is, I think, highly significant is apparently this idea that discovery is somehow appropriate or necessary in seeking documents that have not been released by a public entity under the Freedom of Information Act is pretty unprecedented and novel.

There just is no case law in Virginia that comments very directly on that. There seems, however, to be an assumption that pervades a lot of the case law, that it is simply known that discovery is generally not necessary or appropriate.

Two cases that the petitioners have cited for the proposition of discovery is certainly possible under the Freedom of Information Act are Little v. The Virginia Retirement System, 28 Va. 411, a 1992 case, and ACLU of Virginia v. Andrews, 24 Va. Cir. 443 -- and I think they are both circuit cases, I'm sorry -- a 1991 case.

And both of those cases, however, are in apposite to this because, first of all, they didn't deal with documents at all. They dealt with the public meeting requirements and whether a particular meeting had to be open or could legitimately be closed. There are factual issues in those types of inquiries as to the size of the meeting, et cetera, that simply do not exist here.

The other thing that is interesting about these cases is that in each instance, it appears -- in one case explicitly and in the other by inference -- that essentially counsel for the parties agreed that discovery was

appropriate and necessary in those particular cases, went to the Court with that suggestion, and the Court understandably did not have any problem with that --

THE COURT: Would you agree that the total impact of either availability or non-availability of discovery seems to be, number one, it is not impossible or prohibitive as an absolute bar; number 2, that factual evolution or development may be appropriate in discovery?

MR. KAST: Your Honor, we don't believe there are any factual issues here.

THE COURT: No; I am talking theoretically.

MR. KAST: Oh, you are talking theoretically.

THE COURT: If there are fact developments necessary to decide the matters of law or mix the questions in facts of law, isn't discovery allowable?

MR. KAST: I think ordinarily as a general proposition, that is certainly -- if not

the prevailing, one of the prevailing theories upon which discovery would be allowed.

THE COURT: I am not asking you to concede that such facts exist here, but just --

MR. KAST: As a general proposition, I would agree --

THE COURT: Apparently, court ordered discovery seems to me, in specific appropriate cases, to exist.

MR. KAST: Your Honor, we have not taken the position that the Freedom of Information Act absolutely would bar discovery under every circumstance. These two cases that I have cited which deal with the open meeting requirements were cases where it did appear, that there were factual issues that needed to be resolved, discovery was appropriate, and everybody agreed.

THE COURT: I interrupted really because I heard the part of what you were saying to be that the parties in the cases that you read agreed to the discovery, and I am sitting

here -- as a judge who is obviously not going to get an agreement -- thinking about the power of the Court. But go ahead with your argument.

MR. KAST: And, Your Honor, as an aside, I think it is a factor in this case that the parties did agree that one case is clear, and the other seems to have been the case. But if there are legitimate factual issues, as it appears there were in that case, then I think the Court could have proceeded to order discovery.

But there are no such issues in this case. I will deal with that in a moment, but I would like to just deal with some of the cases in which it appears that the courts, even though the issue is not directly before them, are noting sort of in passing, well, of course, discovery is just ordinarily not anything that anybody would think necessary in an action brought pursuant to 2.2-3713.

And we cited these in our memorandum in support of our first motion to quash at pages

7 through 9. I will just briefly note in Burton v. Mann, a case out of the Loudoun Circuit Court in 2008, the Court noted proceeding under the Freedom of Information Act is "not an adversary proceeding."

In Parvin v. The Virginia Department of Transportation out of the Circuit Court for the City of Richmond in 1989, Judge Marco (Phonetic) noted the Freedom of Information Act is a statute designed to assure that government and the sunshine is a reality. However, it is not to be employed as a private discovery device.

In Wheeler v. Gabbay, a case out of Fairfax Circuit Court, the Court noted in 1994 the Virginia Freedom of Information Act is mutually exclusive from the rules of the Supreme Court of Virginia regarding discovery.

It is also interesting, and we have cited to these cases, that in cases in which discovery is appropriate and discovery is, in fact, underway -- because there are legitimate

factual disputes -- where there is an issue about particular documents and their confidentiality, the courts have been influenced by particular Freedom of Information Act exemptions, so that it may influence the Court in ruling on a privilege issue in a legitimate discovery dispute; that there are exemptions available under the Freedom of Information Act for the types of information that is being sought in discovery.

The other reason that we feel discovery would be entirely inappropriate, and destructive to the whole process that has been designed in this case to determine whether or not particular documents are legitimately exempt or otherwise not lawfully subject to disclosure, is that the discovery that the petitioners have sought would essentially result in the production of the very documents that are at issue in the case. So that on one track you have documents that have been withheld, exemplars that have been determined by counsel

to be representative of the categories of documents that have been withheld, that have been submitted to the Court for in camera review to make a substantive decision on the merits.

And on the other track you have this run-away train going down the road trying to get the same documents through discovery; which makes absolutely no sense, none whatsoever.

If this were the case, all a person would have to do to gain access to documents that he or she seeks pursuant to the Freedom of Information Act would be to file a petition for writ of mandamus and then file discovery. File a production request for the same things.

It makes no sense.

They have also, both petitioners have also sought to take depositions in which it seems unclear why, but they have; including what Dr. Schnare is estimating as much as a two-day deposition of Dr. Mann.

I will leave Dr. Mann's counsel to respond to that in more detail, but it is

illustrative of the type of things they are trying to do.

It is also important to note, I think, that allowing discovery in this case would frustrate the legislative purpose of the General Assembly, as clearly established in the Freedom of Information Act itself, because the Freedom of Information Act is a balancing act.

It is clearly stated public policy that open government is the desire, that disclosure is supposed to be the norm. But it also is clear that the General Assembly has created over 100 exemptions.

So I think in deciding, in doing this balancing act between open government and confidentiality, you have to be careful not to throw the baby out with the bath water.

As the Virginia Supreme Court cautioned in the Taylor v. Worrell Enterprises case, 242 Va. 219 (1991), these exceptions "reflect the General Assembly's determination that the policy of openness does not override

the need for confidentiality in every circumstance, and the best interests of the Commonwealth may require that certain governmental records and activities not be subject to compel disclosure."

This policy determination by the General Assembly would be worth precious little if the exemptions created were not subject to judicial scrutiny and interpretation, but could merely be subverted by production requests, motions to disgorge, or what have you.

As I noted in passing earlier, Your Honor, we have cited some cases where discovery was actually at issue, and the Court -- in ruling on a privilege argument -- thought that it was significant to actually look at the Freedom of Information Act.

I would just note that one of those cases is Bunch v. Artz, which was a Circuit Court case out of the Portsmouth Circuit Court. And another was actually out of this court, Decker v. Watson in 2001 where this court, in

considering the scope of contested discovery, noted that an exception in the Freedom of Information Act events "the apparent attention of the Virginia General Assembly simply to protect the types of files at issue from being disclosed."

So in closing, Your Honor, I would say that for all of these reasons -- the fact that petitioners seem to have achieved the relief that they specifically sought in their petition -- and the other reasons that I have cited, that there really are no factual issues here.

What we have is an issue of specific exemptions and reasons for nondisclosure which will be articulated, applied by the Court in camera to the exemplars, and decisions made as to whether or not those exemptions seem to be appropriate and applicable.

The fact that discovery in a case like this would subvert the legislative process, both with respect to the narrow remedy and the expedited process of the General Assembly

created, and with respect to the fact that it would certainly create an unusual mechanism that would potentially subvert the entire legal process if you simply go around it to seek the same documents through production requests or motions to disgorge or whatever.

Thank you, Your Honor.

THE COURT: Thank you, sir.

MR. FONTAINE: Good morning, Your Honor. My name is Peter Fontaine; I am here to appear on behalf of Dr. Michael Mann, who is a respondent aligned with the University of Virginia in this matter, his former employer.

I would like to add some perspective to the timeline and the arguments by my co-counsel, Rick Kast here, to try to provide a little more human aspect of this case and to explain why the discovery propounded upon Dr. Mann is completely improper and, indeed, vexatious.

Briefly, Your Honor, both the timing and the scope of the petitioners' discovery in

this case, when you look back at the course of this case, is quite clearly calculated, in our view, to annoy and harass Dr. Mann; and really to punish him for exercising his right to petition this court to intervene as respondent in the case, to protect the documents at issue -- which comprise his e-mail correspondence both to and from, literally, tens, if not hundreds, of scientists across the world over the six-year period of his employment here at the university where he was a professor who taught classes in climate change and conducted groundbreaking research on issues such as paleoclimatology.

THE COURT: Let me interrupt you a second.

MR. FONTAINE: Yes, sir.

THE COURT: Modern American debate seems to require us to accuse adversaries of improper motives. We see that in the public forum all the time.

What if, for general purposes, all of those bad motives are true? How does it effect

the legal right to FOIA protection?

Are we -- do we have a purity of heart test before we apply FOIA's legislative acts?

MR. FONTAINE: No, Your Honor, the law on that is quite clear. It is not really the Court's function to try to weigh the motives.

THE COURT: Well, then, why are you arguing that to me?

MR. FONTAINE: I am arguing that, Your Honor, because it goes to the issue of Dr. Mann's intervention in this case where we articulated, and submitted for the Court's review, an affidavit which outlined his interests in being able --

THE COURT: I am distinguishing the existence of an interest from the impact on your client. And I hear it in various categories, like -- is he required under any court order in this process to do anything by way of production, or is it the university?

MR. FONTAINE: Your Honor, I was going to get to that.

THE COURT: All right. I will stop interrupting you and let you go then. Go ahead.

MR. FONTAINE: It is a good line of inquiry because the discovery is propounded not just upon the university, but on Dr. Mann individually. He is a professor at Penn State University. He lives in Pennsylvania.

His whole reason for being in this case was because under the terms of the first protective order, the e-mails from his entire body of work here at the university were to be disclosed to these two gentlemen, counsel for the petitioners and, in fact, members of the board of board of directors of ATI, for purposes of a protective order review.

And it was Dr. Mann's fervent belief that the disclosure of those e-mails -- even under the terms of a protective order -- which would have allowed people, these two individuals to review all of his e-mails, the people with whom he corresponded and associated, the ideas that he expressed, all of that information was

an improper invasion of his rights.

It was, in fact, a violation of the FOIA exemption that the university had posited, which is exemption 4, which essentially says that the scholarly writings and information developed by a professor is subject to an exemption provided that it has not been disclosed to the public.

So the disclosure of that information under the terms of the first protective order was, in his view -- and in the view of many scientists who submitted letters pleading with the university not to release those e-mails in terms of the protective order -- a violation of his rights under the statute, the FOIA statute, and his rights under the Constitution.

So he sought to intervene in the case. His sole purpose for doing so was to be in a position to participate in the matter such that a revised protective order could be negotiated amongst counsel that would better protect his interests, and the interests of others who were

implicated, while allowing the Court to review the documents in an efficient yet protective manner, and establish a record for reaching a decision on the merits.

Now, Judge Finch heard arguments on this in conjunction with the university's motion to open up the first protective order. And petitioners vehemently opposed his intervention in the matter claiming he was merely a bystander, that he had no interest in these events; that, therefore, he had no interests that could be sought to be protected as a respondent in the case.

The petitioners have, since he has entered this case, now served discovery on him barely a month after Judge Finch ordered that he could be a respondent. Petitioners sent an e-mail to me saying that they intended to take his deposition for at least two days of time, asking him to come down to Prince William County or Fairfax County to sit for at least two days of a deposition, without really articulating why

a deposition was necessary.

Following that, he received discovery which seeks highly personal information from him, information in his personal possession from his personal home computer, seeking e-mails that are well beyond the scope of their initial FOIA request on his home computer; seeking highly confidential employment records including his tenure, his hiring, his promotion, and his ultimate departure from the university to take the job at Penn State University.

All of this information goes well beyond the scope of their initial FOIA request. They ask him to reconstruct data from 2003, his work back almost 10 years ago. They ask him to provide all e-mails provided to him after the date of their January 6, 2011, FOIA request.

They seek attorney work product concerning documents on which he intends to rely at the ultimate hearing on the merits of this case, which is whether or not the withheld documents were properly withheld.

Finally, they seek, and I quote, "any and all statements or documents prepared by you or on your behalf involving any matter which might relate to the facts of this case."

In short, the petitioners are seeking from Dr. Mann personally an incredibly large amount of information that is not relevant to really the only issue in this case, which is whether the university has properly withheld the 12,000 documents under the terms of the applicable FOIA exemption.

In evaluating the outrageous nature of this discovery, in our view, it is important that the Court understand the history of the case and what transpired at the hearing on November 1; and Judge Finch's ruling, which essentially acknowledged that Dr. Mann had an interest, and that there was just cause to open up the protective order and to issue a new protective order that would better protect his interests.

Echoing what Mr. Kast has said, the

relief that has been afforded to petitioners in the form of the revised protective order, which was negotiated painstakingly by all counsel, and provided for what we viewed to be a reasonable, judicially efficient, and protective process for reaching a decision on the merits, provides the relief that petitioners sought in their mandamus petition and, essentially, what Judge Finch ordered at the hearing on November 1.

At that hearing, he granted for good cause the request to overturn the first protective order, and ordered the parties to develop a process and methodology to facilitate the Court's review.

I would like to quote, with Your Honor's permission, from the transcript from that hearing which I think is instructive:

"For the record," Judge Finch said, "I would like to make a few comments. In reviewing the memorandum submitted, and in hearing the arguments today, it appears that trust has broken down between the parties involved for

various reasons, and the most logical and practical solution would be to have the exempt documents reviewed and sampled by neutral parties. It appears that ATI is uncomfortable with UVA controlling the process.

"I would like to give the parties an opportunity to negotiate and, hopefully, to agree on the identity, cost, and methodology to review and sample the documents. This is a chance for the parties to control the process rather than by a direct order from the Court.

"In effect, this would be granting the University of Virginia's motion to revise the protective order, and the Court is inclined to continue the stay until December 19 at 9:00 o'clock when we agree to reconvene in this courthouse. If you agree, great; if not, the Court will hear arguments regarding the contents of the protective order. The Court does find good cause to modify the agreed protective order, to revise the agreed protective order."

So Judge Finch made it clear that he

wanted a process for the parties to ultimately resolve this case involving the negotiated protective order, which is now before the Court, along with all of the exemplars that framed the issues of the applicability of the exemptions of the FOIA statute. We would submit that these discovery requests eviscerate that process in contrary to the Court's order in this case and are, therefore, improper.

THE COURT: Thank you.

MR. FONTAINE: Thank you, Your Honor.

DR. SCHNARE: Good morning, Your Honor.

THE COURT: Good morning.

DR. SCHNARE: Judge Sheridan, I am David Schnare; I rise on behalf of the American Tradition Institute.

THE COURT: Nice to see you.

DR. SCHNARE: Good to see you again, Your Honor. Chris Horner, my co-counsel.

THE COURT: Good to see you.

DR. SCHNARE: Your Honor, in large

measure, we stand on our filings. We see no reason to repeat them here, but we would like to make brief argument. We expect to take about 10 minutes here on this, and we would like to reserve the balance of whatever time we have for use in our arguments on waiver which will be more extensive.

At this point, we address only two points, that discovery is allowed under law and it is timely. We begin with the latter.

As you already heard, on January 6 -- one year, three months, and 10 days ago -- we filed a request for documents under the Freedom of Information Act. For covered institutions -- and the university is certainly one of those -- the act provides for a limited period of time in which to respond; mere days.

That is not always possible, and it wasn't possible in this case; but the law does require for a timely response.

Having not received a single record for four months and 10 days, a period during

which the university emits a pattern of behavior leaving no doubt it did not intend to provide many of the requested records, we filed our verified petition for mandamus and injunctive relief.

Your Honor, I would like to point you to Respondents' Exhibit -- I'm sorry, respondents' exemplar number 4, which you can find in your own records.

This is a confidential document. It cannot be discussed in open court under the protective order. But I ask that you look at it because what you will find there amongst all of the Internet HTML code are words that explain an element of this case. It has to do -- one of the facts of this case has to do with what is Michael Mann's job.

You will find nothing in that e-mail, which is being withheld as exempt, that isn't already public; including either in the handbook, the faculty handbook or in press materials that, in fact, discuss the same

issues.

It is an example, Your Honor, of the unwillingness of the university to honor the duties under the Freedom of Information Act. It was clear to us early on this was going to be a problem, and it is part of the reason that we filed the petition.

Now, we sought in that petition, Your Honor, three forms of relief. We asked for production of nonexempt records on a date certain, and the Court granted that.

We asked the Court to enter a protective order, as you heard, that would allow selection of a relatively small number of exemplar documents that the parties could use to make arguments regarding whether the university improperly exempted the e-mails.

And, thirdly, we asked the Court to accept a briefing schedule by which the university would meet its duty to defend its exemptions and allow petitioners to rebut that defense. That, too, is in the petition.

Counsel for the university says that the totality of that petition was about development of the exemplars. That is not true.

At the initial hearing on this petition, the Court ordered production of records within 90 days, the nonexempt, and that was done. However, the university walked away from the protective order so that we were now then stuck without a means of developing exemplars.

On December 19, we agreed, the parties agreed to a new protective order. However, Your Honor, the university refused to include within that order -- as had been in the first order -- a full case management schedule. The order only established a schedule for selection of the exemplars.

In light of the exemplars' selection schedule, and with all parties recognizing that the parties would thereafter file briefs regarding the exemptions, we sought discovery needed for preparation of our briefs.

The discovery was timed so that it would be complete shortly after selection of the exemplars, and thus moving the case forward in a timely a conclusion as possible.

I would note, Your Honor, that in this chronology, the first -- I'm sorry, the last item on the first page, there is an implication here that we withdrew our discovery requests.

We never withdrew them. We had a telephone conversation about this issue. It was a relatively long conversation. It was by no means pleasant; and although my daughter claims that I am not entirely pure of heart, we certainly weren't in any purposes trying to do anything other than trying to reach agreements on how to deal with these matters.

As you heard, the university now argues that the discovery we sought was premature, because in December we had not specifically filed a motion challenging the exemptions.

Judge Sheridan, UVA has demanded that

you put the cart before the horse. We cannot file a brief challenging the exemptions until we have in hand evidence regarding the material facts at issue that we need to present to this Court.

However, in light of the motion to quash, on February 3 of this year, we filed a formal request for in camera review of the exemplars. Because the university refused to negotiate a briefing schedule, we also in that set of motions asked the Court to enter a case management schedule that would govern discovery, briefings, and hearings that would facilitate the Court's review.

We are now before the Court asking you to order the respondents and the intervener to now honor discovery and deposition requests.

So why do discovery, Your Honor?

It is beyond question this is a matter -- this is a civil action. We are here as a civil action, and a civil action is subject to the rules of the Supreme Court of Virginia. At

this point it involves not only the Freedom of Information Act, but a Constitutional question.

Now, in our briefings elsewhere, I have noted that there are actually three things going on here; not only the motion to quash but there is a -- let me put it another way.

There is the petition for mandamus with regard to the release of the FOIA records. Then the intervener -- not a respondent, Your Honor, but an intervener -- enters in. He specifically stated just a moment ago that his purpose was to protect his interests in these documents, whatever those might be; he never said what those interests were.

But, Your Honor, this is a well-known kind of intervention. It is known as a reverse FOIA case. He could have brought the case had UVA been willing to disgorge all of the documents at the get-go, and could have brought that case specifically to stop them from doing so. And he enters this case with that exact purpose now; that's what he just said.

So you have a situation in which we have multiple things going on here, and they are in the final call all going to be a function of what the facts are before the case.

Nothing prohibits, as Mr. Kast has admitted, nothing prohibits discovery when there are questions of fact at issue. So let me get to the two ultimate questions of fact, Your Honor, that you are going to have to address, the Court will have to decide; whether the e-mails are, in fact, records, and whether they contain proprietary information.

From commencement of this matter, the university has repeatedly told us that exempting the records -- they are attempting to exempt the records on the basis that they are proprietary.

And the university counsel directed the law students, who did the early part of the exemption review, to apply the exemption broadly. We note, Your Honor, that this is in direct contravention of the Freedom of Information Act.

THE COURT: Say that again.

DR. SCHNARE: Counsel for the university told their law students, who were doing the review for exemptions, to apply the exemption broadly. This is in direct contravention of the statute which says the exemptions are to be examined narrowly.

It is another reason why we have concern about this case.

Later the university claimed, in fact, that many of the e-mails were not records; instead they were, in fact, personal communications not subject to FOIA at all.

Your Honor, the term "record" is defined at law. Specifically, records including e-mails, written or received, they are -- let me restate that. Records include e-mails, written or received, "in the transaction of public business." This is Virginia Code 2.2-3701. That's the Virginia FOIA.

The statute continues stating "records that are not prepared for or used in the

transaction of public business are not public records."

In order to determine whether the e-mails are records, the Court will need to know what constituted the public business in which Michael Mann was engaged. Specifically, you only need to know what a professor does, and what was expected of him, and what were considered his duties, and what was related to his duties in particular as this applies to Michael Mann in his role as a professor.

As described in our filings, many of our production requests go to this question as to what his job was.

In contrast to the term "records," Your Honor, the word "proprietary" is undefined, and the Court will need to craft a working definition for use in this case.

The Court will have to decide the factual question as to whether any of the e-mails contain proprietary information. As described in our filings, many of our production

requests and depositions address this question.

Surely, I might add, in our deposition of the university's witnesses, we will ask them, for example, what in respondents' exemplar number 4 is proprietary.

Now, Your Honor, I would like to correct a couple points made by Mr. Fontaine.

If you examine our production requests, you will find that we did not inquire as to personal information. We don't want his personal information. We don't want his Social Security number. We don't want the content of evaluations made of him while he was faculty.

What we do want, Your Honor, are documents that explain what his job was, including what the tenure requirements are at the university and how he chose to meet them, because those are the elements that define his job. We have asked for no work product at all.

Our requests are very narrow.

Now, Your Honor he just mentioned we asked for any e-mails Dr. Mann had because those

e-mails might lead to evidence we could use to explain what is and isn't proprietary, and what is and isn't his job.

At the time we asked for them, we did not know for certain that he had the entire tranche of e-mails that we had sought. The fact that we asked for the e-mails that he had, and that this would indeed release to us all of the e-mails, is discernative and to be associated with the mistake that the university made in giving them to him at all.

Nevertheless, as we will discuss in the second part of our discussions today, they did release them to him, and they are now subject to use in a number of ways, and publicly, and surely in addition as part of discovery.

Judge Sheridan, because discovery is not prohibited under the Virginia FOIA, because discovery is permitted in civil actions, and because this is a civil action, because this is a case in which the Court must make findings of

fact and mix questions of finding of fact in law, discovery is proper under the rules of the Supreme Court.

Because we have moved the Court to conduct in camera review of the exemplars, now is the appropriate time to get discovery so we can prepare our briefs in assistance to the Court.

Thank you.

THE COURT: Thank you.

MR. KAST: Your Honor, I would like to note that with respect to the reference to one of the exemplars -- exemplar number 4, I believe it was -- it is important to understand the context that these exemplars were selected to be representative of categories of documents.

I think it is unfair for refer to them at this point in any context; and to refer to them out of context in supporting this argument about discovery --

THE COURT: You know I have not reviewed the exemplars; right?

MR. KAST: I would have assumed that was the case, Your Honor.

THE COURT: They were filed last week, weren't they?

MR. KAST: They were filed, I think, April 4.

THE COURT: Close enough to last week.

MR. KAST: So my assumption was that you had not.

THE COURT: I was frankly awaiting these arguments before I undertook the job.

MR. KAST: It is important to understand what those exemplars are supposed to achieve; which is to give this court the ability to review a representative, finite sample of the types of documents that are at issue that we feel are representative, that the parties agreed were representative.

But they need to be explained through the briefing sequence that will be established subsequently so that they are not out of context; and that they, I think, at this point

have really no legitimate context or no legitimate reason to be brought into this phase of this controversy.

Now, Dr. Schnare makes much of this case management schedule that he claims we have been adamantly opposed to. We have never been adamantly opposed to a case management schedule.

We have been highly conscious, as practicing trial lawyers tend to be, that the introduction of discovery into any case is going to make the schedule different. So we thought it was simply premature until there was a decision on the discovery issues to try to agree on a schedule.

And that was our objection, not that we were adamantly opposed to the concept; which would have been irresponsible and is simply untrue.

There was no implication in our chronology that anybody had withdrawn discovery requests. One would have to wonder what we are doing here today if they had withdrawn their

discovery requests. But Dr. Schnare did in a conversation --

THE COURT: Let me get this straight.

Do you oppose their motion to withdraw some of their discovery requests?

MR. KAST: Your Honor, we opposed their stated intent to withdraw their discovery requests without prejudice because we wanted the issue on its merits to be addressed, and not to have the discovery requests reintroduced at some point subsequently. So that was the subject of that discussion.

Dr. Schnare has basically said there are two reasons that he thinks discovery is required here, two reasons that he believes there are, in fact, material factual issues that discovery would be important to develop; one of which is whether the e-mails are records.

Well, Your Honor, the Freedom of Information Act has a very clear and comprehensive definition of what constitutes a public record, which this court can read and

interpret and apply.

There is no factual issue there.

THE COURT: Let me interrupt you.

MR. KAST: Yes, sir.

THE COURT: Doesn't he tie that to the concept of doing public business?

MR. KAST: Well, the other thing that he talks about is what is Michael Mann's job.

THE COURT: That's the way I am trying to shortcut the issue. It seems to me not just saying e-mails either are or are not defined; he is saying certain e-mails from the same person using the same system may be public business, and others may not.

MR. KAST: And that, I think, Your Honor, is a correct statement.

I think, again, that is something that this court can determine. It is not a factual issue that requires discovery. But you can look at an e-mail; and if the e-mail is an e-mail to a scientist at the University of East Anglia talking about tree rings, for instance, and how

they may have or not recorded climate change in the past, then that is one type of e-mail that we would claim falls within this research proprietary exemption.

If it is an e-mail about when we are at a conference in Albuquerque, let's get together for lunch, I think it is not too difficult, without a lot of deposition and production requests and motions to disgorge, to figure out that that's a personal communication that may have been made using a university computer, which is entirely consistent with university policy.

Dr. Schnare has pretty much from the get-go thought that there was some sort of astonishing admission that had been made by the fact that we allegedly told law students to interpret the exemptions broadly, and that was somehow inconsistent with public policy articulated in the Freedom of Information Act.

Public policy in the Freedom of Information Act is that the law itself should be

interpreted broadly in favor of disclosure. That is not inconsistent with the fact that the exemptions say what they say. If that exemption is very broad in its coverage, then that's the way it should be interpreted.

There is nothing outrageous or unusual about that, and it is not inconsistent with anything. It is entirely consistent with what I talked about earlier, the balancing act the General Assembly was involved with with open government; but at the same time certain interests have to be able to be maintained confidentially.

Finally, Your Honor, I would like to just mention there has been a lot of discussion about this proprietary faculty exemption. That is by no means the only types of records that are at issue. There may well be records that make reference to graduate students because these faculty members, of course, work very extensively with graduate students.

Those would be not only considered

scholastic records under the Freedom of Information Act, but they also would be covered by the Family Educational Rights and Privacy Act that is a Federal law that guarantees the confidentiality of those types of documents.

And the Freedom of Information Act is explicitly subject to other requirements of law. There may be employment records that are confidential as personnel records under the act. There may be other types of proprietary records. There are several proprietary exemptions; purely personal records we have talked about.

And, finally, Your Honor, I would just like to note I don't think it can be emphasized too strongly that to allow the discovery that the petitioners want in this case essentially moots the case. It shoots the case and leaves it beside the road.

THE COURT: That's your parallel railroad track.

MR. KAST: That's the parallel railroad track.

THE COURT: I heard that earlier.

MR. KAST: I won't proceed to further analogies, colorful or otherwise. But I think it is absolutely clear that it subverts the process that was designed for this court to decide.

THE COURT: Let me ask you a question. I invite all counsel, if they care to, to respond. To what extent has the discovery opportunity changed by the presence of the intervener?

MR. KAST: I don't think in any -- I will, of course, let Mr. Fontaine respond to that as counsel for Dr. Mann, but I don't think in any substantial way.

I think there are still no legitimate factual issues that discovery needs to be --

THE COURT: Go to the basis of what the statute is about.

Does FOIA anticipate the presence of an intervener on the face of the statute?

MR. KAST: Not to my knowledge, Your

Honor; I don't think so.

THE COURT: Does the discoverability of materials held by the intervener have a different legal screening, if you will, from that held by the university?

MR. KAST: Well, first of all, there is nothing held by the intervener.

As I am sure the Court has noted, what happened here was there were two phases of disclosure of what the university had determined to be nonexempt documents. At Dr. Mann's request, those were furnished directly to him, as they could have been furnished and would have been furnished to anybody asking them, because they were public documents that were nonexempt pursuant to our analysis.

THE COURT: Is it conceded that his request, and his opportunity to review through counsel or individually, occurred after he left employment with the University of Virginia?

MR. KAST: His review of --

THE COURT: No. His getting documents

from the university for purposes of this case; did that occur after he left employment with the University of Virginia?

MR. KAST: Yes, Your Honor. The nonexempt public records that were disclosed to the petitioners, and that would have been disclosed to anybody, were furnished to him after he left the university. The exempt documents were to his counsel.

THE COURT: Before or after he was allowed to be an intervener in the case?

MR. KAST: It was before the hearing, shortly before the hearing that Judge Finch held in which he allowed Dr. Mann to intervene.

THE COURT: So between the termination of his employment at UVA and the creation of his status as an intervener, he and/or his counsel were given contested documents by the university?

MR. KAST: Only his counsel.

THE COURT: Was there a protective order in place at that time that governed

counsel's demand?

MR. KAST: No, Your Honor. But his counsel --

THE COURT: Let me make it simpler.

Is that dissemination or publication?

MR. KAST: I don't think so, Your Honor.

THE COURT: All right. That's the answer I expected. I didn't concede that --

MR. KAST: It was sharing of information necessary for Mr. Fontaine to prepare for his argument upon behalf of his client to intervene.

And it was not furnished to any member of the public; it was furnished to counsel.

THE COURT: You are all experts in FOIA. I can tell you I am not as expert as anybody in this room, because you have all lived with the case and are scholars in the field.

To what extent does the Virginia FOIA statute allow that to happen without it being dissemination or publication?

MR. KAST: I think there is a distinction to be made, Your Honor, between disseminating documents to the public or to some other entity.

For instance, the American Tradition Institute is seeking these documents --

THE COURT: I am going to come to you.

MR. FONTAINE: Thank you.

MR. KAST: -- and we decide, well, no, we are not going to give them to the American Tradition Institute, but we will give them to Greenpeace. That is clearly illicit, and you clearly can't do that.

THE COURT: That's one of their arguments.

MR. KAST: That is clearly going to be the type of disclosure that waives any right with respect to our continuing not to produce them for ATI or anyone else that wants them.

That's not what happened here.

THE COURT: To put it in starkest reinterpretation by the judge over what they

wrote, they are alleging a discerning of whose favorable or disfavoring in terms of use of any such research material, and then making a decision to disclosure. That is an unfair, oversimplified argument, but you hear it.

MR. KAST: Yes. It is unfair, oversimplified, and it is false.

What happened here, Your Honor, is the university fully supported Dr. Mann's motion to intervene. We, in fact, made that clear in the briefing and argument that we fully supported his motion to intervene.

And we shared with his counsel the documents that were at issue to educate his counsel to be able to support his motion and argument on behalf of his client.

Dr. Mann was only furnished with the documents that we had determined were in the public record. Under those circumstances --

THE COURT: You are telling me the only documents given to Mann and/or his counsel were those that have been produced to the other

side?

MR. KAST: The only documents given directly to Dr. Mann were the documents that had been determined to be in the public record which were -- you can look at the chronology. They went out in two phases, one in May 17 and one in August; I believe August 24.

At Dr. Mann's request -- which was something we would honor from anyone because they were public records at that point; we had determined they were not exempt -- we furnished those to him. But we did not furnish to him the records that we claim are exempt or otherwise should not or cannot be disclosed.

THE COURT: Okay.

MR. FONTAINE: Your Honor, I would like to address your question about whether Dr. Mann's appearance as respondent in this case changes the scope of petitioners' rights to discovery, and the answer is clearly no.

His participation in this case does not change one iota the process for making a

decision on the exempt documents. The process that was outlined by Judge Finch and agreed to in the form of the second order would have occurred regardless of whether or not we became a party to this case, because the university moved to open up that protective order based upon information that suggested that they could not rely upon the first protective order to protect the documents.

THE COURT: On whose behalf? To protect the documents on whose behalf?

MR. FONTAINE: On behalf of the university, and their obligation to safeguard the rights of those persons who do have rights under the FOIA statute; which is my second point.

THE COURT: Exactly; let me concentrate on that for a second.

To what extent does FOIA expressly authorize the university to protect the rights of an individual?

MR. FONTAINE: The FOIA statute is

clear that there are more than 100 exemptions that have been engrafted on the statute.

THE COURT: If I chose not to agree and I wanted to ask the experts to answer this kind of question for me.

MR. FONTAINE: Yes, sir; and the case law is clear. The case law that Mr. Kast cited, the Worrell Enterprises v. Taylor case, which involved a Supreme Court decision, it involved a newspaper's request to get to the telephone logs of Governor Wilder. They were the telephone logs that were kept of calls made by his office and calls received by his office.

In that case, the mandamus petitioners contended the information was not disclosing confidential information, it wasn't the identity of any people, and, therefore, it was perfectly appropriate.

The Supreme Court did a balancing of the interests, the constitutional interests of separation of powers in that case between the executive right to have a zone of privacy around

the conduct of the governor's job.

The Court held that the disclosure, even of the telephone number logs themselves, would create a chilling effect on the ability of the governor to speak with people in the outside world, and the ability of people on the outside world to call the governor; because they would disclose telephone numbers, and you could use that as a basis to ferret out lots of information; and, therefore, that would chill the free exchange of information.

Now, the Court did a balancing test, and the Court basically held that that is violation of the separation of powers until legislative intrusion on the powers of the executive branch to conduct their operations --

THE COURT: That analysis then is being driven not by the expressed words of FOIA but by other legal issues.

MR. FONTAINE: Yes. And, Your Honor, the Court was quite clear in stating that the interpretation of the exemptions under FOIA is,

indeed, informed by the various state and Federal constitutional protections that apply to certain information that may be in possession of the government, but nevertheless should not be disclosed because it implicates those very interests.

And that's exactly the case we have here. We have records that were the writings of a professor, freely exchanged with other scientists across the world, that are subject to an exemption. And there is a balancing test that this court --

THE COURT: An exemption listed in FOIA.

MR. FONTAINE: Correct. I don't have it in front of me, but it basically says writings and information of a scholarly nature, that of a proprietary nature that are developed by or for the professor are considered exempt, and the university has wide discretion to decide what that is. Unless it has been copyrighted, formally copyrighted, or otherwise disseminated,

it is subject to being withheld; which is the case that we have here.

So I would say, Your Honor, that the FOIA statute contemplates that there are individuals that have rights that are implicated by FOIA requests. There are 29 separate proprietary information exemptions in FOIA.

There are 100 separate exemptions that have been engrafted on this statute by the legislature for the purpose of protecting those rights; rights of privacy and various other rights. So the FOIA statute -- I know Mr. Kast said the FOIA statute does not expressly give somebody the right to intervene, but I would respectfully disagree with that.

I would say that the provision that allows for any aggrieved person -- not a requester, which is a defined term as that person who submits the request -- but any person aggrieved under the statute has a right to file a mandamus or an injunction supported by an affidavit with good cause to assert their right.

And I would submit that the statute contemplated the very activity that Dr. Mann engaged in here to request that his e-mails, e-mails that he wrote, that he received over the six years of his employment, not be produced.

So you asked before, Your Honor, about the motivation of the requester is at issue in FOIA, and facially it is not. But when somebody asserts the right to participate in a case and claims that they have an interest that is germane to the proceeding, the extent to which they are be harmed by that disclosure I think is relevant. And we argue it is relevant in terms of forming their interest under the exemption in question.

THE COURT: You are talking about the good faith interpretation by that person that they are threatened for other reasons, and they want to step up into the litigation?

MR. FONTAINE: Yes; and be able to assert their rights under the expressed exemption that is granted by the legislature.

And I would submit that if every time someone who feels they are aggrieved by the unwarranted disclosure of documents under FOIA is somehow opened up to personal discovery, that that will have a tremendous chilling effect that is inconsistent with the statutory scheme.

THE COURT: You are anticipating exactly why I am asking the question -- if you are a volunteer, why haven't you volunteered to be discovered -- and you have answered the question for me. Thank you.

DR. SCHNARE: Your Honor, you have anticipated a large portion of the presentation I was going to make with regard to waiver.

THE COURT: It is because I have read multiple times your briefs on the subject, and it is intriguing.

DR. SCHNARE: Thank you, Your Honor.

With regard to whether or not Michael Mann is a party to this case, he is still subject to discovery. It is simply going to be more difficult since he is not a citizen of

Virginia. We would have to go through the procedures to get a deposition and other information from an out-of-state individual; but there is no reason to believe that he would not have been subject to discovery in any case.

And it is important to understand that discovery in these cases is fairly narrow. The purpose of it we have already explained to you.

The notion that we are going to open the door to the attack of anyone whose records may be in the public file cabinets is true only to the degree that those records are associated with some exemptions.

So this kind of discovery -- which is, by the way, Your Honor, extremely common in Federal practice under the Federal law, and as cited in our briefs it is not uncommon in Virginia with regard to determining the facts of the matter -- doesn't mean that we have opened the door to harassment. Nor, Your Honor, is there some intent for us to harass. We simply want to let the citizens own, and that is the

documents, the records at the University of Virginia.

Now, we know, and we think we should mention, that the protective order -- we want to re-emphasize this. The protective order that was in place at the time the university gave the records to Mr. Fontaine did not control Mr. Fontaine at all. He could have published them the next day. He could have done anything with them.

Notably, during the discussion as to the protective order, Mr. Fontaine famously said that the only person on the planet capable of understanding and reviewing the e-mails, to select a bunch of exemplars, the only person on the planet was Michael Mann.

Actually, Your Honor, it is important for you to note, as well, nothing in FOIA that protects people, per se, and the information of those people, is at issue in this case. FOIA allows an exemption to be waived for any record unless some other statute prohibits the release.

Nothing, no other statute prohibits the release of these records, these communications of a faculty member more than a decade ago. Nothing at law in Virginia does.

We have not sought personal information. We have not sought student data. We have repeatedly told opposing counsel we don't want that. We have not even offered an exemplar of that kind because we don't think it is at issue.

But we do know that we asked for e-mails of 39 academics involved here, any one of whom under their arguments could come in and file their reverse FOIA claim; any one of them who, apparently, they think should be allowed to have these documents even when they didn't need them.

With regard to the governor and the case involving Governor Wilder, it should be noted that the legislature took note of this. There is a specific exemption that provides protection of the governor's records, including

his phone books and the lieutenant governor's records, and several other individuals in the legislature. But it does not protect be academic materials.

More importantly, a careful review of the exemption for scholarly papers states specifically that those are exempted only if they are proprietary; not only contemplating that many of them are not proprietary, but contemplating that many of them would be released.

Now, Your Honor, I have to ask for your direction because I could either at this point begin on my 30-minute discussion on waiver, or we could take a break if someone wanted it, or I don't know what you want.

THE COURT: Well, counsel is working harder than the Judge, so I am going to yield to those who are doing the hard work and give you a break.

DR. SCHNARE: I wouldn't mind 10 minutes, Your Honor.

THE COURT: That's fine. Anytime anyone wants a break, let me know. Producing argument is harder than listening to it, so everybody take a break.

DR. SCHNARE: Thank you, Judge Sheridan.

THE COURT: I will see you a quarter after on that clock. Excuse me; am I reading the second hand wrong back there?

DR. SCHNARE: You want us here at 11:45?

MR. FONTAINE: 11:22.

THE COURT: I thought the second hand was between 4 and 5. You are telling me it is a minute and a half; all right.

Tell me how long you want it to be.

Twenty minutes, 15 minutes?

What do you want?

DR. SCHNARE: Quarter to 12:00 okay, Your Honor?

THE COURT: That works. Everybody take a break.

(Recess.)

THE COURT: Counsel ready to proceed?

DR. SCHNARE: Yes, Your Honor.

THE COURT: Go ahead.

DR. SCHNARE: Your Honor, now we will speak to the matter of whether or not there was waiver, an issue we have already begun to enter.

Before I begin, I want to correct one fact, one suggestion made by opposing counsel, that Mr. Horner and I are on the American Tradition Institute's board of directors. We are not. I am the director of the American Tradition Institute's environmental loss center. Mr. Horner is the director of litigation at the center. So we have no responsibilities of a director.

THE COURT: Remember my remark about purity of heart?

DR. SCHNARE: Yes, sir.

THE COURT: Philosophical or other views on this don't help me decide what FOIA means under Virginia law.

So I hear it, I understand everybody's valid concerns and the differing views, but thank you for clarifying that.

DR. SCHNARE: Yes, Your Honor. Let me get directly to FOIA.

We argue on their waiver that the university has waived both its exemptions, both under FOIA and under the Constitution.

I would like to begin by setting these issues into a context, Your Honor, so I am going to tell you a story. It is a true story. I think it is instructive, and we hope you will find something useful in it.

It is a case where an author published a professor's e-mails obtained under the Freedom of Information Act of Virginia. This is, apparently, the horror that both the respondents and the intervener want to prevent.

Professor Edward Wegman of George Mason University was asked by the U.S. House of Representatives to file a report on the statistical validity of a 1998 paper published

by certain authors, including lead author, Michael Mann.

While he was preparing the report, a person qualified to seek the records under the Freedom of Information Act of Virginia sought Professor Wegman's e-mails. The professor responded correctly, we believe, that "it is not clear to me that before journal peer review process is complete that we have an academic obligation to disclose the details of our methods before publication."

Once the Wegman report was published, GMU received a new FOIA requesting Professor Wegman's e-mails. GMU responded by providing approximately 3,000 pages of responsive records to "USA Today" within 14 days; in electronic format without charge, litigation, or other delaying tactics as is appropriate under the statute.

In making their timely response, not only did GMU not credit concerns about copyright interests in the e-mails or any threat to

academic freedom, neither did anyone else.

We know this because we sent a Freedom of Information Act request to GMU asking for any records reflecting discussion of such concerns, and they responded that they had received none and they had none of their own.

Michael Mann did not rise in support of Wegman's copyright interests or his need for academic freedom. Neither did the Union of Concerned Scientists who was underwriting part of Mr. Mann's participation in this matter today. Nor did the university, nor even a single member of their faculty. Nor did the American Association of University Professors, who had already filed a letter to this court on this case, or any other group.

Then a publishing house, Columbia University Press, published a book that included, cited to, and quoted the Wegman e-mails, e-mails obtained under the Virginia FOIA. They showed no concern about a copyright interest in those e-mails, either.

And the author of the book showed no concern either about the copyright interest Wegman had or any threat to academic freedom that Wegman might suffer. He showed utterly no concern about publication of these e-mails and whether they would chill academic work in the correspondence of academicians during the research process.

And who, Your Honor, is this author? Michael Mann. This (indicating) is his recent book. These (indicating) are the tags showing where he referenced the Wegman e-mails, and where he cited them and where he quoted them; all of them received under the Virginia Freedom of Information Act, all of them received after Wegman published his work and it was open and passed peer review and open to public review.

Now, we tell you that story because it is important to understand the nature of this case and the nature of Mr. Mann whose e-mails we sought.

As you have already recognized, the

timing on which he received these was after he was faculty, but before he was entered in this case. At the time that he received the withheld e-mails, September 25 of 2011, Michael Mann was a professor at Penn State University; he was a citizen of Pennsylvania, not Virginia; he was not a party to this case.

He had already filed his motion to intervene and did not need the e-mails for that purpose. He didn't use them for that purpose. He didn't cite that he had obtained them in pursuing that intervention. He had no reason for them at all that bears on this court.

Indeed, according to the university, it had already, in response to an earlier request made by one of the co-requesters on our request, determined that the records should be destroyed and that it had, in fact, destroyed them.

In fact, Your Honor, although you have heard someone say the e-mails reflect his six years at the university, they do not. They

reflect a period from 1998 until -- approximately the end of 1998 until 2002, very early in the year.

Those e-mails, for whatever reason, ended up on a server that no one even knew about, was eventually found; and all of the e-mails after that point and before he left were, in fact, destroyed.

Mr. Mann has given no reason for needing them. The only party that suggested he needs them is UVA arguing that they provided these documents to Dr. Mann's legal counsel.

This is a quote: "The university provided these documents to Dr. Mann's legal counsel so he could assess and defend Mann's interests in the withheld documents."

But Michael Mann has never filed a paper indicating he personally used the e-mails in this way, nor that he needed them; nor does Michael Mann own the e-mails.

In fact, Your Honor, this is a very interesting point that needs to be clear and in

the forefront, we think. Like all other faculty at the university, Mann was required upon entry to the university to acknowledge that he didn't own the e-mails, that he had no right to privacy whatsoever.

As a matter of law, the Commonwealth owns the records; not even UVA owns the records. UVA's role is as the custodian of records.

Michael Mann is not the records' custodian. Michael Mann is not and cannot be a respondent in this matter even though he labels himself as such. He is not a custodian of the e-mails, and this court cannot under color of FOIA order him to release the e-mails for which he is not the custodian.

Under FOIA, you order UVA to release documents if you believe they have been improperly exempted. This does not go to discovery. You can order discovery as you wish, Your Honor; but with regard to being the owner and custodian, he is neither.

He is an intervener in this action.

And because of that, he is functionally adverse to UVA. His role here is to prevent UVA from releasing these documents. Indeed, we believe and he has argued that even the e-mails that have already been released should not have been.

In his motion to intervene, Michael Mann raised only two issues, and you haven't heard them today; his copyright interests and his claim that the Constitution's First Amendment of free speech rights give him personally a right to academic freedom.

Michael Mann has no copyright interest before this court of any kind. The copyright laws -- which we never hear in local court; it is for Federal court issues only -- provide a remedy if someone misuses Michael Mann's creative work. We know he does not view such publication of e-mails in such a manner because he already did it himself in this book.

THE COURT: Say that again.

DR. SCHNARE: We know that Michael Mann cannot credit a concern about copyright of

his own e-mails being used because he used another professor's e-mails he received under FOIA.

The publication of his documents is not illegal, even under the Copyright Act. There is a fair use doctrine under that act. The fair use doctrine allows for research and criticism in the use of someone else's creative work. And that's assuming there is any creative work in these e-mails at all.

This court could order the release of the e-mails today. UVA could post them on the Internet tomorrow. And under the fair use doctrine of the copyright laws, anyone could use them for research and for criticism.

And nothing of an interest to Michael Mann, no right of his under the copyright law would be compromised. If someone published his e-mails in a commercially published book -- exactly as he did with Professor Wegman's e-mails -- he would have a cause of action only if there was creative content that was not used

under the fair use doctrine.

For example, if he had a poem in his e-mails and someone else published the poem -- not to critique it and not to do research on it, but just because they wanted to say, hey, this guy had written this poem -- and they put it in a book for profit, then he would have a remedy available to him under the Copyright Act. But there is nothing of that kind available here.

In like measure, UVA has no copyright issue before this court, either. If either had one, 39 other people -- the ones whose e-mails he sent to and received from -- would also have a right. They would have a right to intervene, and they would have a right to be, to have discovery against.

That's not what has happened in this case. This case has been narrowly focused on whether or not these are records, and whether or not they are proprietary; but they are not related to copyright.

Nor, Your Honor, does Michael Mann

have any personal right to academic freedom at issue in this court. In Urofsky v. Gilmore, the Fourth Circuit extinguishes any much amendment. You will recall, Your Honor, the argument of academic freedom is a claim that under the First Amendment of the Constitution, there is some right to academic freedom.

It is a constitutional issue. It is properly dealt with by the Fourth Circuit. The Fourth Circuit opinion in Urofsky is extremely well regarded, has never been distinguished by any other case in any other circuit, and has never reached the Supreme Court.

It is a definitive statement because, in large measure, the Court provided a detailed treatment of the history of academic freedom, and the implication of the term with no apparent substantial backing. It wrote that "to the extent the Constitution recognizes any right of academic freedom, the right inheres in the university, not in individual professors."

I also point you to Stronach v.

Virginia State University, Eastern District of Virginia, 2008, citing Urofsky where the Court wrote "it is clear that any academic freedom that might exist is the university's right and not the professor's right."

Neither Michael Mann nor the university offer any evidence that Michael Mann has ownership of the file copies of the e-mails that are subject to this matter, one the university initially previously stated it had destroyed.

Your Honor, I want to draw a parallel of these records to handwritten or typed paper copies of letters, letters that I in my 30 years in the Federal Government, and you, in your long term on the bench is correspondence of an official kind, official business.

And we kept copies of those in correspondence files, in chronological files. They went in file cabinets. They got placed into a records management system. They may or may not have been kept. They may or may not

have been needed to be kept.

But they were always the property of the government; in this case, the Commonwealth. In this case, the people who wish to look at them under the Freedom of Information Act own them.

The Respondent UVA offers no evidence that it had or has a policy that former employees have any right to copies of any correspondence the university holds other than through the Freedom of Information Act.

Something, Your Honor, that is not available to Michael Mann; because under the Virginia Code it is only available, the Freedom of Information Act, to citizens of this state and bona fide news organizations of which he was neither.

Had Mann kept copies of e-mails he made while he was at UVA, copied them onto his own desk or his own personal computer, the University of Virginia would not have needed to have given him a new set; but he did not.

It is important and, we believe, on its own dispositive to their arguments that the Court recognize these decisions were, in fact, taken. Whether he would keep a copy, he chose not to. Whether they could or would destroy the records on a regular routine records schedule, which they did not; nor does UVA's copyrighted argument hold water.

Here I wish to clarify something, Your Honor. UVA conflicts an ownership interest in the copyright -- not that these have been copyrighted, but in a potential copyright -- from ownership of the records themselves.

Those are two different things.

It was the records that the university gave to Michael Mann when he was not an employee, when he was not a citizen of Virginia, when he was, indeed, an academic competitor.

Let us explore that point. Michael Mann, at the time he received the records, was -- and still is, to the best of our knowledge -- the University of Virginia's economic competitor

for academic accolades for standing within his academic community, for grant funds, most importantly; and as director of an academic center at Pennsylvania, he is also a competitor for quality students and faculty.

He is the last person whom the University of Virginia would want to give any proprietary information because he could use that information to limit the university's competitive advantage in the marketplace both of ideas and for grant funds.

Now, let us talk about the role of the University Virginia in its actions that constitute waiver, to understand to whom the university selectively released the records, what are the university's duties under the Freedom of Information Act, and in general.

As a matter of law, UVA is the custodian of the records, and under FOIA they have clear duties to the citizens. First of all, under FOIA and under the records act, they have a duty to preserve the records if they have

value. Notably, they already destroyed a rather large number of them from this period -- in fact, after the period at issue -- as is their right. These they did not destroy.

They have a duty to make them available to the citizens under FOIA. That is a flat duty. They have the duty, however, to withhold them if those records have greater value to the citizens by being withheld; hence, proprietary.

UVA claims the e-mails have greater value withheld than given up than they have for proprietary value, at least many of them they claim. If they have that value, they cannot give them to their competitors.

If they have value, but no one at UVA is using them, then UVA needs to give them to anyone who wants them so as not to lose the value by keeping them from people who wish to create knowledge.

I'm going to expand on that point.

UVA is committed to knowledge and to

increasing knowledge, and it operates within the marketplace of ideas. There is every indication that UVA cannot contribute to this marketplace by withholding the records.

First of all, the university has provided no evidence that anyone at the university is using these records, probably because they contain nothing of value. Indeed, soon before we filed this FOIA, they didn't even know they had them. They attested that they had diligently searched, and concluded that they had destroyed them.

Since UVA does not themselves use the records, the only way to benefit the marketplace of ideas is to release them to those who could use them.

Now, what are these records?

In large measure, these are what I call the detritus of research. They evidence wrong paths, blind alleys, missteps, mistakes, abandoned ideas, ideas and problems that accompany any kind of research. None of them

finds their way into final research papers because the final papers show the successes, not the mistakes.

Now, such detritus has no value to the correspondence in these records to Mr. Mann, Dr. Mann, or to the 39 other academicians. They already know about the mistakes. However, the next generation of scientists will find in them many lessons and many bits of information.

Let me point you, Your Honor, to petitioner's exemplar number 9. It is a document in the withheld records, but it is one that has been publicly made available.

I point to you that one, Your Honor, because it contains exactly the kind of mistakes and missteps that academicians can make; and knowing about those missteps means the next person need not waste their time on it.

Only individuals other than Michael Mann in his correspondence will want to use the information in these records. But there is more information in these records than merely a

discussion about climate change and related topics associated with the research on which Michael Mann was engaged; information that will be valuable to people who operate well outside of his area of academic expertise.

For example, Professor Wegman. Professor Wegman did a study on the tribalism of the climate alarmism and network of academics. These were people who engaged in what has been termed, instead of peer review, pal review.

Now, this concentration of e-mails gives the entire context of that period of time in which they were written and received. They are not hand selected. This is a wonderful resource for someone who wishes to understand even better who talks to who, when do they talk, what do they talk about. This is a whole area of academic interest which Michael Mann has no interest in. It is not his area of functionality; it is a social science.

In addition, we suspect professors of scientific ethics and legal ethics might want to

look at them, as well. There are things in there that we know are there because some of them have already ended up in the public domain.

By giving the records only to Michael Mann, UVA engages in selective disclosure. As we explained in our filings and citing to multiple cases, including North Dakota v. Andrus, such selective disclosure is: "Offensive to the purposes underlying FOIA and intolerable as a matter of policy. Preferential treatment of persons or interest groups fosters precisely the distrust of government that FOIA was intended to obviate."

Now, did the university waive by giving these e-mails to Michael Mann?

UVA makes two arguments, Mann has a right to his own correspondence and there is no waiver as evidenced by the clear intent to waive the exemptions and rights. In fact, they gave the e-mails to a nonresident, non-employee prior to entering this case at a time when he didn't need them to enter the case.

Now, UVA, in its arguments, suggests that they share with Michael Mann a copyright interest in scholarly and academic works such as, to quote, "scholarly and academic works such as journals, articles, books, and papers."

That is what the Freedom of Information Act exemption involves, but only if they are published works subject to copyright; and these are just e-mails.

Could there be a poem in there that is creative? You bet. I am sure that that could possibly happen. And it might never have been published, and it might be subject to copyright.

But even if it were, as we have explained, that doesn't alter its use in research or in criticism. Nor does it matter if UVA or Mann has a copyright interest because it is not an issue, as I made before and I won't repeat it. I only want to point out that the fair use doctrine applies, and that fair use allows for research just the way Michael Mann used it.

Nor does UVA cite to any university or Commonwealth policy that allows a former employee a right to his old records. What the university does is it says that a professor, while an employee, may manage his own e-mail account. Well, that is certainly true.

When given the records, however, Michael Mann was not a professor, and he had no right to manage anything associated with the Commonwealth of Virginia.

The fact is the employees of the Commonwealth of Virginia and the University of Virginia are informed repeatedly that there is no expectation of privacy in their e-mails. Our files have cited to four different policy statements to that effect, one of which Michael Mann was required to sign.

Next, the university implies, but never actually claims, that Michael Mann had a right to the exemplars as an intervener citing the fact that he has not objected to them.

They cite that he did not object to

the revised protective order. He is not a part of the protective order. His signature on the revised protective order only indicates that he didn't oppose it.

The protective order refers exclusively to Respondent UVA and never to the intervener. The word "intervener" doesn't even appear.

The agreement of the intervener for the protective order -- which, apparently, he claims he intervened just to make sure it was with him -- doesn't expand the order to include his participation in the selection of the exemplars.

Your Honor, keep in mind at the time we wrote this protective order, the revised version, we didn't even know he had the e-mails. Nothing in the protective order prevents Mr. Fontaine from doing anything he wants with those e-mails.

Now, we did try to find out if they had given him the e-mails. We repeatedly asked,

and the counsel for the respondent said they didn't have to tell us. Indeed, we filed an interrogatory that asked a single question with four parts: Did you give him the e-mails or his lawyer, when, under what conditions, and for what purposes. And they refused to answer; that's why we are here today.

The fact of the matter is he never, the university never explained why or when, and had no reason to give them. By giving them up, it disseminated it to a person in the public. Disseminating to one is to disseminate them to all.

Now, what standard do you need to use and should the Court examine when it asks the question that there was a waiver?

The university's argument is that this is all about an implied waiver. The university conflicts two kinds of releases of records making its arguments on one that is not the case here today.

The Freedom of Information Act allows

all records, any record to be released unless some other statute prohibits it.

So if, for example, one sought the records of a student, or someone's personal identification information -- Social Security numbers, birth date, maiden name of his mother -- nothing in FOIA prevents that from being released; but other statutes in Virginia do.

And because they do, then they cannot be released. From time to time, however, information such as medical records are released, particularly in cases at law. And the question becomes then was that an implied waiver of the exemption, or not?

And the Court has held correctly -- we don't question this at all -- that where a release is prohibited and a release of that kind, for example, to opposing counsel -- especially in a protective order -- is not a dissemination; and, therefore, to assume that the exemption is waived requires clear and convincing evidence of an intent to waive the

exemption.

But nothing in the Freedom of Information Act, and nothing in any other statute, prevents the release of proprietary academic papers. Thus, the question is not whether there is a need for clear and convincing evidence; the question is did they release them at all.

There is no statute barring release of these records; therefore, the correct standard is were they, in fact, given to someone who had no authority to have them.

Now I raise another issue. There is no joint defense agreement under which the parties could share the document. At least we have never been informed of one, and we have asked. Michael Mann was not a party at the time UVA gave him the records.

Neither the respondent or the interveners stated they had some cooperative defense agreement that would allow them to share working papers.

These e-mails are not attorney work product, Your Honor. These are not the mental impressions of cooperating counsel. These are not attorney-client privileged documents.

These are the records that were at issue that should have been held by the custodian until the Court resolved whether or not they have been properly exempted.

It was a remarkable breakdown in the duty of the University of Virginia to allow them out their door.

The fact is under the protective order, Mr. Fontaine, and because Mr. Mann is his client, Mr. Mann could release these documents at anytime. Nothing in the protective order controls his participation, and that's because he is an intervener.

The purpose of the protective order was to insure that Mr. Horner and I would not release them, and we have not. I have protected them carefully. UVA's release of the e-mail at the time when they had no reason to do so,

without any authority to do so, let alone selectively and to a competitor, signals a clear intent to waive their exemptions.

Because they gave these e-mails to Mr. Mann when he was not a citizen, was a competitor, was not a party to this case, without any form of restrictive covenant on the use of the e-mails, and because it was given to him by an official agent of the university who took this action knowing the university was the official custodian of records which belonged to the public, and knowing they were subject to request by several citizens, giving them up to Dr. Mann without restriction is a selective disclosure that is offensive to the purposes underlying FOIA and intolerable as a matter of policy.

Having done so, they waive all exemptions under FOIA and any rights to academic freedom they may have.

Thank you, Your Honor.

THE COURT: Thank you. Go ahead.

MS. WESSEL: Good afternoon, Your Honor. Madelyn Wessel for Respondent University of Virginia.

I would like to cover a few issues that were raised in the prior argument where your very astute questions began to dig into the legal question, and then respond to the specific waiver arguments made by Dr. Schnare.

I think you asked a very important question, which is whether the Virginia FOIA contemplates that third party interests would be part of the purpose of a governmental agency, and would be a valid concern of a governmental agency in responding to demands for records.

I think the important answer to that question is, yes, of course. There are, as counsel has already pointed out, something like 100 or over 100 specific exclusions or exemptions in the Virginia FOIA. They have been developed over time very much to respond to the important and legitimate rights to privacy or interests of citizens or businesses in business

records, in records of children, education records; which by the way, are present in the withheld documents, and are one of the exclusions on which the university will provide in argument to the Court.

There are employment records which clearly recognize and countenance the rights of state employees to maintain privacy and confidentiality with respect to their employment situations. There are many, many other exclusions in the statute which speak to the balance that government in exercising governmental functions will frequently come into contact with, collect, or make records that very much implicate the rights of Virginia citizens, and that government needs to steward and take into account in its decisions about release of those records.

Not all of those considerations are purely driven by some additional or alternative statute such as FERPA under Federal law, or HIPAA which deals with clinical records.

The persons whose records may be present in governmental hands clearly may also importantly have rights to see them. For example, parents of school age children whose education records are present in the school system may both have a right and interest to intervene if there is a threat of release of those records, and have a right to see those records.

An employee at the university or other state agency or entity has a right of access to their own employment records even though the agency would not release them without going through a very thorough and careful set of considerations and review under the FOIA.

So I do want to simply say that I think those are very important questions, and that our position as stewardship and our position as a university with respect to the records at issue here very much takes into account the rights of our students, the rights of our faculty and employees, the rights of our

administrators, and the academic freedom and scholarly research rights that are certainly a part of this case.

I do want to make another observation, which is that Dr. Schnare and ATI have begun to develop in court this morning, and have every right to develop, their own position on whether or not the records at issue in this case meet the specific exclusions of the Virginia FOIA.

We will, obviously, spend a considerable amount of time briefing and presenting Your Honor with our own view of this. But whether or not the particular exclusions that Dr. Schnare mentioned, and that we agree are at issue in this case, have been met is an issue on which we all need to energetically brief and prepare our own memoranda for this court.

That is not the issue today, which is whether the discovery that has been requested by petitioners is valid, and whether the university has waived its right to withhold those

particular records.

THE COURT: Say that again.

MS. WESSEL: I said the issue about whether these particular exclusions have been met, whether the exemplars that you have recently been given -- and we did not expect Your Honor to read in preparation for this argument, because it would not have been relevant or applicable to this argument -- whether these exemplars have been validated by the university because of the presence of various exclusions in the FOIA is the very issue that is the heart of this case, and it is the issue on which we hope at some point to be in a position to brief the Court.

That issue is not at issue here with respect to waiver or discovery. And as much as Dr. Schnare spent a considerable amount of time making arguments about whether or not an academic freedom interest is an interest of the university alone or the staff or faculty under Urofsky, or whether the types of records at

issue here need or don't need proprietary scientific and scholarly records exemption, those are important issues.

We disagree with ATI on those issues. Those are not the issues that are before the Court. They are the issues we hope to get to brief at some point soon if we get beyond what has been a flurry of motions by ATI that have delayed ultimate resolution of the matters in this case.

I also want to make another correction to how Dr. Schnare characterized the fundamental ownership interest here in this case, and then I will get into that a little bit more in a few minutes.

The Commonwealth of Virginia explicitly delegates the management of intellectual property of the Commonwealth to institutions of higher education.

An employee who works for the State Department of Transportation and is subject to the policies of the State Department of

Transportation is working for an entity of the Commonwealth that does not have the same explicit delegation that institutions of higher learning have as part of the structuring of institutions in the Commonwealth.

Pursuant to that explicit authority, UVA, GMU, and all off the other Commonwealth institutions of higher education have developed intellectual property policies addressing adding patents and copyrights, one of which I cited in the reply memorandum, and we discussed frequently in other pleadings, that specifically create a position of the university with respect to the copyrights of its research and academic faculty.

So it simply isn't correct to say that all state records are identical. There are records that are subject to particular policies, and those policies recognize the important and unique status of institutions of higher education which operate in a very different framework and environment than the State

Department of Transportation, for example.

Now, I do want to respond to a number of specific points made by Dr. Schnare. First of all, since the intervener's petition was granted, Dr. Mann and the university have been specifically referred to as respondents, plural.

Judge Finch's order, as we point out, named Dr. Mann an intervener respondent in this case. Counsel have developed a specific common interest relationship with each other which actually preceded his entry in the case.

The general counsel for the university invited Dr. Mann to get counsel and to participate in this case in a letter that was sent to Dr. Mann. And as Dr. Mann took up the university's invitation to get representation, we counsel have worked intimately and closely together as part of the common interest that both respondents share in addressing properly these records.

It is no different a position than we would take if ATI had come after clinical

records of our medical center, or education records of our students, and we had individuals whose records were at stake in those cases also concerned about how the university was developing its position, sought counsel, sought a right to intervene and entered into a case of that sort as a co-respondent.

THE COURT: Let me interrupt you a second. Are you telling me there is a pattern of the university as custodian advising parties who might be interested in FOIA disclosures of their right to participate?

MS. WESSEL: I can certainly speak to the case here, which is that specifically did occur in this case, Your Honor.

THE COURT: Does that help or hurt the university, that this might be a unique gesture?

MS. WESSEL: I think it neither cuts one way or the other. I can tell, I think, you with a great deal of confidence that if the university had a demand for the records of our students that we regarded as being subject to

FERPA protections or other important protections, that we would work with those students to make sure that they were aware of those demands that had been made.

THE COURT: That's prospective and aspirational. I am talking about past and done.

MS. WESSEL: Well, it might be better for you to ask that question of my co-counsel, Richard Kast, because he has a greater familiarity with the long term practice of FOIA at UVA. I can invite him up if you would like to ask him that question.

THE COURT: Not yet. I don't mean to interrupt you more than I have just done.

Thank you.

MS. WESSEL: What I can certainly say is that in this case, given the extreme importance of the issues and the fact that the university was deeply concerned about academic freedom and the rights of our faculty, and about our own management of these records, the invitation was made.

Dr. Mann did secure counsel. After that counsel filed his motion to intervene in this case, which the university filed its own motion in support of with this court, at that point in time the university did elect to share copies of records with counsel so that counsel could prepare for the argument in this case.

That is the only sharing of these withheld records that has occurred in this case. It was subject to the common interest agreement we had as co-counsel in this case, and these records have been meaningful and important.

I am sure that, again, Mr. Fontaine will speak to his need for those records in just a few moments.

I want to get to the repeated statement that Dr. Mann should be viewed as an academic competitor of the university. And, in fact, at various points Dr. Schnare refers to Dr. Mann as an adversary with the university.

I think this reflects a fundamental misunderstanding of the nature of today's

academic and research process. Dr. Mann is a researcher who collaborates with people all around the world.

Our researchers at the University of Virginia have research grants with scientists from all kinds of institutions.

I don't know today whether there is an active ongoing research grant between Dr. Mann and some former member of his department at UVA, but the fact is this is an absolutely common experience. The concept that it would somehow be inconsistent with the way universities conduct research, for scientists of one institution to have data and records and research and communications with scientists at other institutions, simply misunderstands the very nature of the grants and research process.

Multiple institutional grants are common. Conversations between scientists are critical. The conduct of research today could not occur without the ability for scientists from one institution to another to communicate

and to be in a position to communicate in confidence and confidentiality and confidentially with one another.

THE COURT: Let me ask you a rhetorical question. In the publicly disputed scientific area of global warming and the human causes, human activity causes of it, wouldn't you think -- or do you know -- that there are institutions and/or groups that really disagree?

And are not cooperating, but are opposing each other?

MS. WESSEL: Absolutely and certainly. That's the nature of the scientific process.

THE COURT: I, obviously, read the newspapers --

MS. WESSEL: Sure.

THE COURT: -- and it strikes me that these things are heavily debated, at least from my layman's knowledge of it all. So to my extent that this is a unified scientific community sharing openly, I think we can all understand our competitive disagreeing entities.

MS. WESSEL: There are clearly scientific disputes, and there are deeply embedded mechanisms for vetting and ferreting out the truth, and for reviewing and evaluating the validity of those disputes.

Those mechanisms, as we intend to brief this court on as part of the next phase of this process, very frequently rely on privacy and confidentiality. For example, someone who submits a grant to the National Science Foundation, and expects and receives a promise that the review of that grant by various reviewers -- who are typically required to be anonymous -- will not involve the sharing of data or information in this submitted grant externally.

The peer review process with respect to scholarly publications is absolutely predicated on a confidential, tough, rigorous review of submitted papers by other scientists.

The development and process of science clearly is both collaborative. As Your Honor

has pointed out, it can be full of disputes, and there are important mechanisms within disciplines and within the structure of institutions of higher education to address and manage and ferret out the truth behind those disputes.

Certainly, someone who publishes a scientific paper, today in particular, is expected to be in a position to release typically the data that supports the conclusions that they have referenced or articulated in a particular scientific paper. Many journals now actually require the deposit of the data set that is referenced and incorporated in a scientific paper of that sort.

So there are lots and lots of mechanisms for dealing with this. My fundamental point is to say that scientists do not live atomistically at just the same institution anymore. We have multi-institutional grants. We have interdisciplinary research enterprises.

We have a Federal Government that awards and, in fact, stipulates collaboration between institutions. To take the position that Michael Mann is an academic competitor and adversary of the university that he was a part of for seven years a priori simply because he went to Penn State University is simply not a correct statement of how faculty are viewed by institutions or view each other as parts of institutions.

I think I have already mentioned, Your Honor, that the release of these records was done pursuant to a common interest that counsel discussed specifically with one another, that we have filed all pleadings in this case in the joint name of respondents since Judge Finch allowed Dr. Mann's intervention.

The second, the revised order on selection of protection of documents refers to respondents, plural, throughout the order. It does not refer to Respondent University of Virginia alone; it refers to the collective

respondents.

And the captions on various documents issued in this case -- including, I believe, by the Supreme Court in which you are appointed to hear this case -- refers to Respondents Rector and Visitors and Dr. Mann.

From our position we are co-counsel. We are both representing respondents in this case, and we had a right and a duty upon the need of our co-counsel to provide him with records in this case; which, of course, is subject to the responsibility that they be kept private and confidential.

THE COURT: I am going to nitpick your last statement, "we are both representing respondents." You mean you are severally representing two respondents. To be correct, the respondents are unified; the representation is not unified.

MS. WESSEL: I stand corrected.

THE COURT: You are not corrected. You were using the everyday common sense thing,

and I'm nitpicking; but I want the record to say that.

MS. WESSEL: I can only defer to your judgment.

THE COURT: It is significant in my mind that you are not counsel to the intervener.

MR. KAST: I want to address the issue of whether Dr. Mann had a valid personal interest in these records quite apart from whether or not it was critically necessary for his attorney to be in a position to have access to them next, with the Court's permission.

Here, again, I need to, I think, stand a little bit in dissension with Dr. Schnare's characterization of copyright law in general, and the copyright matters and interests in this case and the specifics.

The university has a copyright policy. That copyright policy, which is published, which does not require discovery demands or depositions, states very clearly that the university, in reference to the 1976 Copyright

Act -- which came into effect in 1978, and which strongly strengthened the rights of employers to employee work under work for hire principles -- that the university both embraced that '76 Copyright Act statute, and also indicates research and academic faculty specifically return personal rights to their copyrights in scientific articles, books, scholarly writings written broadly.

It is only because UVA and, frankly, most institutions counsels like this, that it is possible for our faculty to publish at all, at least publish in the way that faculties typically do publish, which is sign a publication agreement as individuals with the publisher. If a university faculty member at UVA or GMU wants to publish a book, GMU doesn't sign a publication agreement with with Princeton University Press; a faculty member does.

How can a faculty member execute an agreement of that sort? Because there is a policy that gives to that faculty member the

personal rights to those particular materials.

This happens every day. It is a fundamental part to the peer review, promotion, and tenure process. So our policy gives to our faculty the personal right to copyrightable expression that is part of their scientific and scholarly output. And our approach is that faculty owns those materials.

THE COURT: As between UVA and the faculty member, that contractual promise, how does FOIA impact that contract?

MS. WESSEL: That's a wonderful question. The answer I would give is actually multi-facetted, and it is an issue currently at stake in another state -- I think in Wisconsin -- where the university's articulation about copyright interest in certain syllabi and other academic records is their basis for withholding records entirely under FOIA.

Now, a record can be subject potentially to FOIA, but not subject to public dissemination; which is a key component of what

copyright is looking at. Copyright is a bundle of rights that fundamentally speaks to the right of the owner of the copyright to control duplication of records, distribution of records, publication of records, or content of records; those kinds of issues.

It is conceivable that an individual would have a copyright interest in a record, and that the record could still be subject to a FOIA demand but not necessarily subject to redistribution by the recipient of that record.

In fact, in the present case, we think that it has been quite improper for petitioners to take the documents that were released as nonexempt and put them up on a website, and distributed worldwide without regard to whether or not the contents of those communications, even if they were exempt, were still subject to copyright interests of the university, or the various scholars and scientists and authors who actually wrote those records.

So there is a really important

distinction between whether a particular record may be still subject to copyright protection and whether some component of it or all of it as a physical artifact is still a public record as defined by the state.

I do want to respond to Dr. Schnare's comment -- and it is made repeatedly throughout memoranda, and also articulated today -- that somehow the e-mails in question are in the public domain.

I do want to comment on the fact that the exemplars that were selected by petitioner, and many documents that are currently found on their website, were, in fact, the subject or today are the subject of a criminal investigative probe by institutions in the U.K. and by the U.S. Department of Justice because they are the product of a criminal hacking of records at the University of East Anglia.

THE COURT: Tell me again the relationship of that activity to this case.

MS. WESSEL: The relationship is that

it turns out that the petitioners had copies of vast numbers of the records in contest in this case without ever having to seek them from the university.

And that is evidenced by the fact that when push came to shove as we developed the second protective order -- the revised order on selection of protection of documents -- as we pointed out in our briefing, they were able to select all of the exemplars they currently needed from records they already had that, as far as anyone could tell, were the result of this breach at the University of East Anglia.

THE COURT: You mean the documents now in the custody of UVA were seized and/or produced from --

MS. WESSEL: Not from UVA.

THE COURT: -- from the East Anglia reference?

MS. WESSEL: Some of them. The fact that those records were breached, were stolen and were published does not put them in the

public domain. They may be improperly publicly accessible because they were taken from another university and put up online.

But the fact that a document has been stolen and put up online does not mean it is in the public domain from the perspective of copyright, or the ownership interest of the persons whose writings were at issue in that case. That's the important distinction I am trying to make here with respect to that aspect of Dr. Schnare's arguments.

THE COURT: What is the status of the criminal prosecution regarding the alleged hacking into East Anglia?

MS. WESSEL: My understanding is that is an ongoing investigation. It may be that Mr. Fontaine has more information about it.

THE COURT: In England, or in the United States?

MS. WESSEL: I believe there is a combined effort to investigate this. I think there is an exhibit that is attached --

THE COURT: Dr. Schnare is going to give me the answer, I think.

DR. SCHNARE: Your Honor, the local constabulary has closed the criminal investigation entirely. The only role of the U.S. Attorneys and the Department of Justice was to facilitate obtaining evidence from two sets of computers that were in the United States. It is our understanding the issue is closed.

THE COURT: Others can comment later.

I am interrupting you; you can proceed.

MS. WESSEL: The point is that the fact that those records were obtained and posted did not put them into the public domain, did not mean that the persons whose records were hacked did not have privacy interests or copyright interests or other interests that still should have been stewarded, and are still at issue in the present case.

The public domain has a particular and specific meaning in copyright law. As defined

by the U.S. Copyright Office -- and, again, this easily available information; there is a link in our reply brief to this guidance from the Copyright Office -- a work of authorship is in the public domain if it is no longer under copyright protection or it fails to meet the requirements for copyright protection in the first place.

The correspondence in Dr. Mann's account was authored by Dr. Mann and by other scientists and scholars after 1999. That's the content of the withheld records that we are talking about.

The Copyright Act, since 1978, has made clear that copyright is fixed at the moment that a particular work that does qualify -- and I would say all of the communications in this e-mail account qualify as part the definition of what can be copyrightable -- at the moment they are fixed. What that means is that the records we are talking about today were automatically provided with copyright protection under the

revisions to the Copyright Act that took place in 1978, and they are fixed at the moment that the work comes into being.

Copyright ownership is not lost and records do not enter the public domain because an author shares a document with another person.

Petitioners have argued that by including various scientists in scholarly and scientific conversation, which would be absolutely and less typical for anyone in Dr. Mann's position, that somehow this correspondence is no longer proprietary or protected by copyright; it was then public.

That is simply not an accurate representation of what copyright does. The right of a copyright holder -- or, for that matter, the holder of any other form of property, whether it is physical or intellectual -- includes the right to decide with whom to share that property.

By way of analogy, my house does not become public property because I invite

Dr. Schnare over for dinner. It is my right as the owner of that property to choose who I will invite in, and to exclude others who I do not wish to invite in.

My book chapter, my research results, or the drafts of my scientific papers -- or the draft of Dr. Mann's scientific papers -- do not enter the public domain because they are shared with trusted colleagues whose insight, commentary, or critique has been invited.

One of the arguments that the petitioners have advanced, although less --

THE COURT: Let me interrupt you for a second. Wouldn't that argument encircle trusted colleagues as other scientists?

MS. WESSEL: It certainly would encircle other scientists. And those other scientists, as a matter of copyright law, would have a duty not to disseminate those writings without permission from the copyright holder.

THE COURT: Would it include non-scientists with a public issue interest in the

subject?

MS. WESSEL: The right of the creator of a copyrighted work is strong with respect to all of the decisions about the persons with whom the work should be or can be shared.

THE COURT: So it is broader.

MS. WESSEL: My decision to share it with a colleague or my four-year-old child or someone at the supermarket is a right I have as the creator of intellectual property. And by sharing it with another individual, I don't give up my copyright interest if I decide I want to share it with others.

I mean, that's just a basic articulation of copyright. So the fact that in this particular instance we have an energetic, scientific, and scholarly community doing what scholars do -- which is share ideas and drafts and solicit each other's input on the development of research and scholarly writing in an active sense -- in that sense, from a copyright perspective it is illuminating, but it

is not necessary. It is not a necessary part of this argument.

THE COURT: In terms of copyright, then, it doesn't matter if the materials have been shared with non-scientists. By that I mean they aren't really in the evolution of scientific subject matter; but, frankly, in the political arena where you are a source for political speeches. Have you, by authorizing political usage of issues, surrendered your copyright status?

MS. WESSEL: Your Honor, I would have to say you certainly have not. The author of a writing has a right to control the dissemination or the distribution or the copying of that expression.

Now, Dr. Schnare pointed out an important exception to copyright interests, and that is the doctrine of fair use. That's Section 107 of the Copyright Act. Fair use is a critical and important component that actually helps to energize and enable the free exchange

of ideas of scholarly reporting type scientific research and commentary.

But fair use does not enable a commentator to take the entirety of the work and redistribute it. In fact, one of the critical factors -- I think it is the third factor -- is the amount that is used of an authored copyrighted work in relationship to the whole.

I haven't read Dr. Mann's recent book, to get back to another one of the points that was made by Dr. Schnare in his opening. I don't know whether Professor Wegman gave permission.

It appears that neither Professor Wegman or GMU had a concern about the release of those e-mails, and that's their good right. That may be an argument Dr. Schnare wishes to advance in support of the extreme nature of the University of Virginia's position in defense of our records and our policies with respect to the management of these communications.

I would say that is a matter for another day, but I can assure Your Honor that

Columbia University Press, which doubtless asked Dr. Mann to sign an author's agreement, required him to obtain information or to certify on payment indemnification that he had permission to use any content that he discussed in the book or asserted in the book, or that it was within the parameters of fair use; fair use as far as using excerpted materials for the purpose of scholarly, political, or other commentary.

So the fundamental argument here that somehow there has been waiver because these records have been shared, either at the time they were created by copying other scientists which is one of the points made in the petition to disgorge, or because the university elected upon request to share those records with counsel for Dr. Mann, we think has no merit.

I also want to point out that the university's policy and procedure, again, online -- not necessitating discovery or interrogatories -- makes very clear two things.

One, we do expect our employees to be

responsible citizens, to set up an e-mail account and to manage that account consistent with their responsibilities of an employee.

Second, we actually enable our faculty to redirect an account to a personal account and take the entirety of their e-mail records into personal space, which is very common for faculty because a faculty member does not give up the content of the science and the research and the conversations they may have at UVA, and move to Cornell or Harvard or MIT, and not need that material anymore.

As Your Honor will see on reviewing the exemplars, the very heart of the scientific process is partly communications scientists have with one another. That interest is not lost because I moved as a faculty member, a process that occurs for many faculty members, from one institution to another.

We anticipate and expect that our scientists, our faculty will need to have records of this sort. And we have a policy that

tells us how to ensure that they have access to their own records if they move, or even if they just want to have access to them in another e-mail space or another e-mail environment --

THE COURT: Outside of the litigation.

MS. WESSEL: -- outside of the litigation.

We expect a faculty member -- many of whom work morning, noon, and night, and on weekends -- to be thinking and using the records that are now ever more transmitted and contained in e-mail as part of their intellectual life, whether they are with us or they have moved into another academic environment; from which they may be collaborating with former employees, on or against former colleagues, or not.

Now I want to move to a few of the legal issues that were raised specifically by this issue of waiver. Our position certainly, Your Honor, is that neither one logic supports petitioners' argument on waiver.

The law of implied waiver we have

outlined in length in both our second motion to quash and the accompanying memo and the reply memo that was filed several weeks ago.

To constitute an implied waiver, there must be a clear, unequivocal, and decisive act of the defendant showing a purpose to abandon or relinquish its right, and the burden is on the plaintiff relying upon such waiver to prove the same. We have cited Cocoa Products v. Duche, 156 Va. 86, for this proposition, but there are many other cases.

In the absence of clear evidence to the contrary, it is presumed that one would not preclude himself from exercising a right granted by statute.

In this regard, I also want to take issue with Dr. Schnare's apparent position that somehow the issue of government exercising the right to use its discretion and to hold a record under the Virginia FOIA, and to not waive such a right, is lost if the records in question are not alternatively controlled by some other

statute that requires they not be disclosed.

He has essentially created a bifurcated argument, which is those records under the Virginia FOIA which cannot be disclosed, you cannot waive that particular process; but somehow that the other very large group of records for which government discretion is created and supported under Virginia FOIA, that somehow waiver principles that would routinely apply to Virginia governmental entities don't apply there. He has given you absolutely no authority for that proposition.

The only Virginia case cited by petitioners in support of their disclosure and waiver argument is Stevens v. Lemmie -- this is a 1996 case --

THE COURT: What case again?

MS. WESSEL: Stevens v. Lemmie, 40 Va. Cir. 499; it is from 1996.

Stevens, we think, actually supports our position here quite strongly. Stevens involved three petitions for mandamus under the

Virginia FOIA regarding records of a fire that took place at the South Side Regional Medical Center. The plaintiffs argue inter alia that the medical center had waived the protection of the claimed FOIA exemptions by sharing some of these very same records with state or local fire protection agencies.

Here is what the Court said. The Court first states clearly that the first question is whether the doctrine of waiver applies to the Commonwealth or a governmental agency. Citing both Virginia Supreme Court and Appeals Court precedent, the Stevens court articulates the general principle that an entity of the Commonwealth cannot waive the exercise of its governmental function.

Applying this principle to the FOIA context, the Court goes on to specifically find, and I quote, "this doctrine that the Commonwealth cannot be subject to waiver has been applied in the FOIA context in Appalachian Information, Inc., v. Boggs."

This is a 1997 case where Judge Cole disposed of very quickly the argument that any FOIA exemption could be waived by the division of minds and employees because in Virginia, the Commonwealth cannot waive or be estopped from exercising its governmental duties, this court finds that the hospital cannot be subject to waiver of FOIA exemptions or the protections of the statute.

Even if the hospital were subject to waiver, this court, relying on opinions interpreting the Federal FOIA, finds that no such waiver has been made.

And this is what the court proceeds to do. The Court analogizes to the way Federal courts treat waiver claims under the Federal FOIA finding that waiver applies only where disclosures are made voluntarily to "adversaries." Even though the medical center's disclosure of records to various investigative agencies in this case could have led to criminal or civil investigation of the hospital, no happy

prospect, the Court declined to find a waver.

The Court cited to a Fourth Circuit opinion In re: Doe for the proposition that a finding of waiver is specifically as to whether there was any intent to limit further disposition.

That petitioners actually well understand this principle and the fact that Stevens v. Lemmie does not, in fact, support their waiver argument seems to be reflected in their strenuous attempt to characterize Dr. Mann and the university as adversaries, something which we are not.

THE COURT: Are you arguing -- which prong of that opinion are you arguing, (1) that waiver is impossible, or (2) that waiver was factually not present?

MS. WESSEL: I am finding both.

THE COURT: Okay.

MS. WESSEL: The short 1993 Attorney General opinion, also cited by petitioners, similarly simply doesn't sit with their waiver

arguments. This very short opinion addressed one of the working paper exemptions in the Virginia FOIA, protected a draft memorandum held by a county chief executive.

The opinion finds that the draft would be exempt from mandatory disclosure until the chief executive had disseminated the records held by him causing them to lose their protective status.

Now, the Virginia FOIA doesn't define what dissemination means, so I think it is reasonable to turn -- as we often do in the law -- to dictionaries, a widely used dictionary, many dictionaries that one could refer to, confirm what would be the intuit understanding of this term.

To disseminate, according to the "American Heritage Dictionary," is to scatter wildly as in sewing seed, to spread abroad, to promulgate, to disseminate information.

This opinion articulates what should be obvious, an agency cannot claim protection

for documents that would otherwise be subject to mandatory disclosure if the agency has itself strewn them to the public whim.

The university has done nothing of the sort in the present case. I do think the opinion of the Attorney General can be read to stand for a related proposition, which is really what waiver might be about in this type of context. The point they are making is that a public agency, which is seeking to protect certain records -- as the university is for very important reasons, in our view -- cannot give those records to some members of the public and then attempts to withhold them from others.

If 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.

Finally, Your Honor, the Federal case cited by petitioners, North Dakota v. Andrus, we think also does not help them very much. It is an interesting case and interesting especially for reasons I will mention in just a moment.

But this is a case where the Federal Government was seeking and was fighting FOIA claims from two entities from the State of North Dakota which wanted certain records, and from the Audubon Society; so two separate lawsuits.

The government gave copies of the contested records to the attorney for the Audubon Society. It turns out, at least as reflected in this particular opinion, that the government gave those records to opposing counsel in that case. For example, we have exchanged with our opposing counsel in this case copies of the withheld documents for their confidential use in the present case.

And the Court said that by giving -- albeit by subject to confidentiality requirements -- the records to opposing counsel, the government could not also fail to give them to the State of North Dakota.

Now, that is an interesting outcome in the present case because I think using that case, as petitioners have sought to do, to make the argument that provision of documents with an expectation of confidentiality to opposing counsel somehow involves public disclosure and a waiver of the privilege would suggest that the very order that was entered into, first by Judge Finch and the parties, and then second with the revised order which gave confidential access to opposing counsel, somehow involved a waiver of the university's privileges here.

The logical outcome of that case really can't be countenanced here.

THE COURT: Why doesn't the logic have at least a chink in the armor?

Isn't that the disclosure that

precedes Judge Finch's authorization of confidentiality for the intervener?

MS. WESSEL: The position that we have, Your Honor, is that we were subject to a common interest between counsel at the point that the counsel agreed upon the establishment of that common interest and agreed to work collaboratively; and, in fact, filed pleadings in this case in support of one another, or at least what the university is articulating in strong support for Dr. Mann's intervention.

It was after that point in time that counsel, with a common interest in place, shared certain information.

In closing, Your Honor, all I can say is that the university, I believe, has demonstrated, and has invested extraordinary resources, to protect the withheld documents from public disclosure in this case.

It has not released them publicly. It has not released them selectively. It has not afforded access to one group that it might help

them but withheld them from the American Tradition Institute. The university has provided the withheld documents to legal counsel for its co-respondent in the present case for the purposes and use only in the present case.

We think none of the petitioners' claims support their waiver argument. Indeed, we believe the cited material strongly supports respondents' position in the present case.

THE COURT: Thank you.

MS. WESSEL: Thank you.

MR. FONTAINE: Your Honor, I will try not to take too much time, but I think it is important for the university's perspective to certainly share it and endorse everything that Madelyn has said and argued here.

I think that what I would like to do is address some of the issues that Dr. Schnare has raised concerning Dr. Mann's book.

I haven't seen the book. I don't think anyone has read the e-mails that he refers to. But suffice it to say it is a reputable

publishing house; and what Madelyn has said about the protocols for using information like that I'm quite confident were followed in this case of the.

We don't know whether Dr. Wegman consented to the disclosure. Certainly, it wasn't an issue raised by either Dr. Wegman or the university concerning the copyright.

I would like to also point out that there is no question here that Judge Finch ordered that Dr. Mann be accorded the status of a respondent. In fact, at the Court that day -- and, again, I am reading from the transcript of the hearing on page 75, he said: "The Court will grant Dr. Mann the motion to intervene thus making him a respondent in the case."

Indeed, every filing since that time, both filing by the judges of Prince William County requesting an appointment of a new judge, the order of the Virginia Supreme Court designating you to hear this case, referred to Dr. Mann as a respondent in the case.

I think the reason for that is it was quite clear all along in the very beginning of Dr. Mann's efforts to participate in this case that he was aligned with UVA.

They shared the same interest under the FOIA statute in protecting these scholarly writings from disclosure in the exemption in question here. So their interests in this regard were perfectly aligned.

So the sharing, providing the e-mails to me -- and Mr. Kast has an affidavit in evidence; I think it was on or about September 26, 2011 -- was perfectly consistent with that common interest in making sure that the parties could work together and put in place a revised protective order that would vindicate the interests that were addressed in our motion to intervene in the case.

And that is the concern that the disclosure of the e-mails to counsel under the first protective order would be a violation of Dr. Mann's -- and, frankly, other scientists' --

interest in those e-mails and the confidentiality of the e-mails and the overall process of developing science.

So the very purpose of Dr. Mann's intervention in the case was to modify that order. Now, in order for me to advocate for my client zealously, I needed to know precisely what was in the e-mails. The e-mails, we have already heard, belonged both to the university and to Dr. Mann from a copyright standpoint.

The mere fact that the university was the custodian of record doesn't mean that Dr. Mann did not have a property interest in those e-mails under the copyright law as Madelyn has so eloquently explained.

So Dr. Schnare makes the point that, well, I didn't use the e-mails during argumentation at the hearing on November 1. The fact that I may or may not have used or made reference to any specific e-mail is really not material to the question of whether or not it was proper for the university to share my

client's e-mails that he wrote and in which he had a property interest with his counsel to facilitate the preparation of the case, especially given the fact that we had consistently maintained throughout that our purpose in intervening in the case was to facilitate the modification of the order and, indeed, to participate in the process for selecting a system for the Court's review of the e-mails in a way that was efficient, but also protective of my client's interests.

THE COURT: Let me ask you a question.

MR. FONTAINE: Yes, sir.

THE COURT: Why couldn't you and your client have advised UVA's counsel that there were issues involving Mann's personal rights that should be involved in the formulation of any protective order? Why did you have to be an intervener to do that?

MR. FONTAINE: I suppose, Your Honor, that we did not necessarily have to be an intervener in order for us to have advised the

university that there was a need to have a revised order in place.

I suppose we could have sought an independent judicial task, filed an injunction which would have had to have been venued in some other court. That certainly was not the efficient process for getting that.

We thought that it was important for all to understand that Dr. Mann felt very strongly that he had an interest in protecting the e-mails under the FOIA exemption.

And appearing and requesting an opportunity to participate as a respondent was important for all; for Judge Finch, and, frankly, we are happy that we are here today to participate in this.

Dr. Schnare said that they would have been entitled to conduct discovery of Dr. Mann regardless; but, certainly, being a respondent in this case makes it easier for us to advocate on behalf of Dr. Mann's interests.

I would like to address a couple other

points that Dr. Schnare has raised. The point that Dr. Mann was functionally adverse to UVA, I think, can be dispensed with. I think it is pretty clear that the interests were perfectly aligned on the e-mails and the documents; and, therefore, sharing those with Dr. Mann was not sharing them with an adverse party, which is really the core test of whether a waiver has occurred.

Dr. Schnare contended that Dr. Mann only made a few legal arguments as to why the e-mails in question should not be disclosed. I would refer the Court to Dr. Mann's affidavit, which was included with the motion for leave to intervene in the case and motion in support of the stay of production of the exempt documents under the first protective order.

The affidavit goes into a fair amount of detail which attempted to describe how the disclosure of the e-mails in question would violate his FOIA interests and his other interests under existing university policies

which govern the disclosure of records of faculty members. I will refer the Court to Exhibit 1 of Dr. Mann's affidavit where the university's policy on disclosure of university records is provided.

It makes clear that the exemption in question regarding the proprietary scholarly records can be subject to public access, but it is up to the discretion of the university, and only if it is released.

The other thing I would like to point out is the question of whether or not the records were subject to the person's access, the person who has an interest in that. I will refer the Court to that document, which says that -- it has two columns, one for subject person access and one for public access.

It says quite clearly that the subject person -- i.e., the person who has an interest in the records, who may have a copyright interest in the records or what have you -- does have access. Which I think is a very important

point, and certainly consistent with the whole notion of the ceding of the copyright to the author.

THE COURT: I dealt with it in questions today. I wanted everybody to argue that, too, Mann's access rights.

MR. FONTAINE: Well, clearly, under the university's policy on disclosure, he had a right to access it. The mere fact that UVA is the custodian of records is really immaterial to that.

And, as Madelyn pointed out, the university is not in the same footing as, for example, VDOT or some other state agency. We are talking about very weighty interests of copyright and creative endeavor here. It really deserves a separate analysis because the law is different in this area. That's why there is a policy on disclosure here that gives the subject person access.

The other point we made in Dr. Mann's affidavit is, really, we were told that we are

talking about 12,000 separate e-mails between Dr. Mann and literally hundreds of other people, scientists from around the world, and others.

So releasing the entire body of that e-mail correspondence from the period of late 1998 to 2002-2003 would have certainly disclosed personal information; which, as defined in the university's policy on disclosure of university records, includes -- and I will quote -- "any record that affords a basis for inferring personal characteristics such as finger and voice prints, photographs, or things done by or to such individual."

It is very broad. But being able to disclose the entire volume of someone's e-mail correspondence over a four- or five-year period certainly puts somebody in a position to learn a great deal of personal information when you look at it in its entirety, who they associated with, where they traveled to; all kinds of different personal information that is really a private matter and should not be subject to disclosure,

and qualifies as a personal record in its entirety.

Now, Dr. Schnare makes a point about the value to citizens to be able to probe into the musings of scientists which he referred to as, I believe, the detritus of research.

I would submit that really is an issue that goes to the merits of this case. But I would say that the interests of the citizens of the Commonwealth is to have preeminent universities that attract the best people; universities that allow free exchange of ideas without the fear that your e-mail correspondence will be subject of a FOIA request and published on the "World Wild Web" for all the world to see.

And I would say that the value to the citizens of the Commonwealth to respect the sanctity and the private nature of those academic correspondences is, in fact, to protect them from disclosure; to actually protect the academic process, the marketplace of ideas.

Which is lost to the extent that every comment or critique that one scientist or academic may share with another about a paper or what have you is subject for all the world to see. It goes back to this principle that was articulated by the Supreme Court in the Worrell Enterprises v. Taylor case.

The notion that one who knows that their communication concerning any important matter is likely to be disclosed to the outside world is much less likely to be candid, to be honest in their critique or whatever the topic may be. That goes back to the United States Supreme Court decision in U.S. v. Nixon.

The chilling effect of allowing that information to be exposed to the outside world is incredibly damaging, and fundamentally an altering event, that really does throw the baby out with the bath water, I would say, on this whole issue of what is in the best interests of the citizens of the Commonwealth.

Now, on the East Anglia e-mails, I had

not heard that the investigation by the Norfolk constabulary was closed. But there is no question that an investigation, or a crime, a potential crime was committed there.

For Your Honor's benefit, I will just elaborate a little bit more on that. The petitioners' exemplars were among the several thousand e-mails that someone improperly obtained, stole, purloined from the University of East Anglia through a hacking incident.

Those e-mails were posted just a few days before an international treaty negotiation was to occur in Copenhagen, Denmark, back in 2009. Your Honor may have read some of the press about that.

Of the thousands of e-mails that were taken, there were probably half a dozen to 10 or so that were cherry-picked out and were made out to create this notion of a global conspiracy amongst scientists to hide data, to somehow prevent the publication of valid research by Cindy Hughes.

Now, that disclosure, that crime resulted in a flurry of other FOIA requests and investigations; not only by the government of the United Kingdom and Parliament, but also by Pennsylvania State University where Dr. Mann is a professor. Some of his e-mails were stolen and some of the allegations about this --

THE COURT: Stolen in East Anglia?

MR. FONTAINE: Yes, sir. Because -- I should clarify that. He corresponds --

THE COURT: Not at Penn State.

MR. FONTAINE: Correct. But people said, well, if Dr. Mann acted improperly after the e-mails were stolen, the e-mails were taken out of context, the meaning was distorted.

And thus ensued literally several years of investigations that I can tell you were extremely stressful mentally; not only to Dr. Mann, but some of the other scientists involved. Not a single investigation concluded there was wrongful conduct.

This including an investigation by

Pennsylvania State University --

THE COURT: Let me ask you the flip side of that coin.

MR. FONTAINE: Yes, sir.

THE COURT: What if the investigations had revealed misconduct by Mann?

Would that affect the FOIA ruling here?

MR. FONTAINE: No, it wouldn't, Your Honor. That's because the peer review process is the mechanism that science has chosen to ferret out good research and bad research.

To the extent that FOIA is allowed to reach back even before the actual peer review process and to probe into the frustrations, criticisms, musings of scientists, that perverts the entire peer review process.

Because it allows someone to attack science; not on the grounds of the science, but on the personal exchanges and e-mails of the scientists themselves. So I would submit that the peer review process as, I think, Madelyn

touched upon, has adequate safeguards to protect the sanctity of the scientific process.

Because data has to be shared at the peer review stage. The exchange of information that goes into finished science is basically torn down by peer review panels. They get an opportunity to probe into the conclusions, and it is that peer review process which is really the fundamental bedrock of science.

THE COURT: Is it a bedrock of open government? Why should general citizens have to look at expert panels of peers to perceive that they are being properly ruled?

You hear that argument?

MR. FONTAINE: Yes, I hear the argument; but I would say that the peer review process is a process that basically represents the interests of all.

THE COURT: Aspirationally; that's our wish.

MR. FONTAINE: Yes, and I think that is the considered judgment of science.

THE COURT: Why? Why does the general public have to trust scientists?

I am being -- for once others will laugh when do I this. That is a populist view, isn't it? Why do we know what government is thinking and doing?

They may be smarter than us, and they may know more about expert subjects and all of the rest of it, but why do we have access to the process? Why would we yield to peer review panels? It is rhetorical; you don't need --

MR. FONTAINE: Certainly, that's the point that others have made.

But I think the counterpoint to that is once you get rid of the peer review process, or you essentially start to erode that process by making it more difficult for people to be candid, then somehow you have lost something about the process itself; because you sacrifice the conflict and the willingness of people to share what in many cases are scathing criticisms of a proposed paper or what have you from being

candid.

And so the notion is that the process itself, it is no different than the telephone logs of Governor Wilder. The notion is that the process of candor and the zone of privacy, if you will, that is created by that process is damaged when those communications are not able to be kept confidential.

THE COURT: Well, Virginia has a public policy, for instance, in regular civil litigation of preventing the admissibility of peer reviews, usually; which is a protection and a respect for the peer review process and its values, none of which I mean to denigrate.

But FOIA is a different philosophy. FOIA is the citizens have a right to see what government is doing. So I am not disagreeing with you; I am posing the concept of we have a got a balancing act here. FOIA is about government ought to be open to the public.

MR. FONTAINE: It ought to, but I think we also need to not classify government as

a monolithic entity. There are different types of government agencies. And, certainly, the business of the DOT in spending the public moneys on road building or bridge building, who gets contracts and stuff like that, is certainly a valid inquiry for the public.

THE COURT: It is clear that the university has a totally different set of problems in terms of its duties and obligations under FOIA than the Department of Transportation.

MR. FONTAINE: Yes.

THE COURT: I got it; it is utterly clear.

MR. FONTAINE: I'm sorry to be repetitive.

THE COURT: That's okay. We are wasting your time on this peer review thing.

I am just trying to talk about the philosophy of FOIA versus the values of protecting peer review.

MR. FONTAINE: And another thing that

I think is important to note -- as, I think, Madelyn and Rick both made the point -- FOIA was never intended to be an investigatory tool, a tool to conduct discovery. It was intended to open up government.

The decisions of government primarily, but also the records of government dealing with issues of the public business; which is something that the Worrell Enterprises notes, that the decision in Worrell Enterprises v. Taylor.

And I think that this notion of the public having a right to know is certainly an important public policy, but it is bound by certain restrictions. It is not an unfetterred right. And, as we talked about at length today, it has to be balanced by other civil liberties and interests that are protected.

I would also say that we hopefully will have an opportunity to get into this in greater detail at the merit stage of the case, Judge.

Now I would like to get to this point about the basis for my needing the e-mails in question. I made the point repeatedly during the hearing before Judge Finch, and I think that it is important to note that Dr. Mann's efforts to intervene in the case were primarily directed to getting a new order in place.

In order for me to zealously represent him, I needed to know what the documents showed; what was in the documents, how would we select exemplars for the Court's reviews, how are we going to manage this overall process with such a voluminous cache of categories, what were the appropriate categories for trying to split it up so that the Court would have exemplars to review.

It is clear that Judge Finch, when he made us respondent, fully anticipated -- and, indeed, I think the parties, all of the parties in this case contemplated -- that the university and Dr. Mann, as respondents, would work together to develop a set of exemplars from the

exempt documents.

And the fact that those documents were shared with me a month or two prior to that, after we had filed our petitions to intervene, doesn't really change the analysis at all that we needed the documents to prepare for the case.

Whether we talked about the documents at the hearing or not also was not material. It was part and parcel of my representing Dr. Mann, to being in a position to advocate for his interests in connection with a revised order.

Finally, I would like to make mention of this issue of the joint defense privilege. We cited it in our brief. And specifically I refer the Court to the Hicks v. Commonwealth decision, 17 Va. App. 535, which makes clear that the Commonwealth interest rule is alive and well in the Commonwealth.

There is a particularly instructive quotation in here that I think we also included in our brief, but I think it bears mentioning now; which basically says this privilege -- that

is, the common interest privilege -- has not been overruled or discarded. On the contrary, it has been reaffirmed.

In a recent case arising, the Virginia Fourth Circuit recognized the continued vitality of the common interest rule. And they go on to quote, the Court said whether an action is civil or criminal, potential or actual, whether the commonly interested are plaintiffs or defendants, "persons who share a common interest in litigation should be able to communicate with their respective attorneys and with each other to more effectively prosecute or defend their claims."

This is a broad acknowledgement that those who share a common interest, whether it is actual parties to a case, before one becomes a respondent, or after have an ability to communicate under attorney-client privilege and work product. And the sharing of the cache of e-mails, Dr. Mann's e-mails in which he had a copyright interest is fully consistent with

that.

Thank you, Your Honor.

THE COURT: Thank you, sir.

DR. SCHNARE: Your Honor, I would like to say that I have an extremely clear, well laid out set of responses to all of these, but I may stumble here, and I hope not to repeat myself.

THE COURT: Take your time.

DR. SCHNARE: Let me begin just to get it out of the way with this repeated drumbeat that somehow someone has stolen and created --

THE COURT: You are not being accused of stealing anything in East Anglia.

DR. SCHNARE: Thank you, Your Honor. I am going to write that down to make sure that is in the record.

THE COURT: Or Mr. Fontaine being introduced as impropriety as he entered the common relationship with UVA here.

DR. SCHNARE: What is important to note though, Your Honor, is those e-mails -- whether they came from a whistleblower -- and it

appears as they though did -- or not has no bearing on that case. The fact is they are generally and widely available, and there is no secret left to keep about the fact.

The problem with them and the problem that arises from them is that it lays out a set of behaviors that calls into question the behavior of a great many people, including Michael Mann. And that's part of the reason why citizens want to see these e-mails that were not released. That is, as you pointed out, the purpose of FOIA, to allow citizens to examine the activities of government and their employees.

I want to go, first, to the question you raised on the university's historical track record with regard to inviting people to participate in FOIA cases.

When the university received a FOIA from Professor Pat Michaels' e-mails, Dr. Michaels has informed us that he was never given the opportunity or asked to participate in

that matter in any way. The same is true for Professor Emeritus Fred Singer, both of whom were in the same department as Michael Mann when they were at the University of Virginia.

This notion of a common interest agreement is based exclusively on a notion that somehow or another Mr. Mann, Dr. Mann, is a respondent. With all due respect to Judge Finch, Judge Finch ruled from the bench, and he may have been imperfect in his use of the word "respondent." He also used the term "intervener/respondent." I think it is worthy of noting that we objected to his decision in that case, and he never offered a basis for why Michael Mann should be an intervener in this case.

THE COURT: Let me ask you a question.

Mr. Fontaine's argument talks about common interest; so does part of the university's argument. Do they have to be parties to have a common interest?

DR. SCHNARE: Not only -- well, under

the common interest doctrine, the presumption is that what would be shared would be attorney-client privilege or attorney-client work product. And with regard to this case, Your Honor, these e-mails, these records are not either of those.

We are not arguing that they couldn't work together on a common issue. But, Your Honor, we recognize that they stand in a position that is adverse to the university. Michael Mann is adverse to the university in that his purpose for entering this case is to prevent the university from releasing the documents.

THE COURT: And/or to change what the university already agreed to.

DR. SCHNARE: Correct; either one.

And the point is that it may be a friendly suit. There are plenty of those that happen, but it is still an adverse relationship.

That's only significant to the degree that if you apply the Federal rule with regard

to FOIA and waiver, and the notion it has to be to an adverse party.

Let me take up the adverse party point as long as I just raised it.

Ms. Wessel said that if the university had given these out to the Sierra Club or to Environmental Defense or to any one of the other groups that is active in their alarmism with regard to climate change, that release would also be effectively a waiver, and that we would then be permitted the documents.

I think it is important to understand that Dr. Mann isn't simply a professor. As his book will show, and as his behavior has shown in e-mails that are already in the public, are available to the public, Mr. Mann has joined a variety of activities that are both political and the kind of advocacy activism that is the same as the Sierra Club.

Mann, for example, joined in a successful attempt to have a journal editor fired because that editor accepted articles that

were opposed to Mann's own.

He went on to do a number of activities intended to enlist the aid of journalists. He was participating not, per se, as an academic doing research; he is an activist. He has long been an activist.

And it is for that reason that giving these documents to him is no different than giving them to the Sierra Club.

But does he have a right to see those documents? And in that regard, we don't think so. Let me give you an example that I think would clarify this. Let me start out with a person who does have a right to see them, a student who has student records.

That student has a right to see his own records. All right; we don't disagree with that. But what about a professor that has left?

Let me give you this example. A professor is working in the pharmacology area. That professor, Professor Theresa, has come up with three different ways that she has written

about with her colleagues in e-mails about how to cure a specific kind of cancer.

And she pursues one of them, publishes papers on it, gains academic standing. But then she decides to start a family and she leaves the university. After the children are grown, she decides to go back to the academy. Mother Theresa now becomes Professor Theresa.

She wishes to reengage in the research she had started. But that research she had done is in a record that is in a search log that is, in its official name, owned by the university, the University of Virginia. The University of Virginia's policy on that research record is that it is owned by the university, not by the faculty member. And it contains extremely valuable information that could lead to patents on drugs that could make a great deal of wealth to the university. But Professor Theresa is now at some other university.

Does she have a right to come back and find the material she failed to take with her,

and use it to create a new avenue of research in which she would profit, but the University of Virginia and the citizens of the Commonwealth would be poorer, even though all of mankind may benefit?

Now, under that condition, the university would no doubt -- thinking that if its own people weren't doing this work, perhaps someone else should -- enter into an agreement with the professor and say, yes, we will give you that; but let's work out an arrangement so if this leads to a patent, we can recover some of our benefit and the profits of that work.

But does the university have the right to simply give them to her? Only if it chooses under the Freedom of Information Act, assuming she was actually still a citizen of the Commonwealth, only if they chose to. But they have the right to waive, to exempt those documents because they have true proprietary value.

So she is not simply allowed to walk

back in and say give me my stuff. Indeed, if she wanted to take her research record, her research log with her, the vice president, one of the vice presidents -- and I will get the title wrong, but vice president of research or something else -- must sign a letter saying that she has the right, that she can take her research log with her, and then must maintain it for at least five years.

She didn't do that. Michael Mann didn't do that, either. In fact, our investigations into Michael Mann is that it doesn't appear he even kept the research log which was required under the policy of the university. All that is left are these e-mails.

Does he have a right to come back and look at this? Not when the university says they are proprietary.

Not to a competitor, Your Honor.

I note, as well, that if these e-mails belonged to Professor Mann and he didn't have copies of them, let's keep in mind the

university could -- and, in fact, did -- destroy many of them.

If he had an ownership interest in them, then the university would have to have gotten his permission to destroy them; but they did not.

Now, let me take up this continuing argument that in this common defense regime, this common interest, that Mr. Fontaine had a need for the e-mails at all.

Well, he didn't need them to file his motion to intervene, and he didn't use them for that purpose. More significantly, Your Honor, he doesn't have any need for them now, either.

The agreement on which the parties, specifically with regard to the petitioners and respondents, was that we would make our arguments based on the exemplars, which he would be expected to get, even though he has no duty or obligation or liability if he wishes to take those 13 confidential exemplars and paste them on the walls of the public forum.

That is what he will base his argument on and, presumably, anything else that is publicly available. But not, in fact, on the collection of e-mails that he was given fortuitously by the university.

Let me -- I want to return -- I missed a point, the historical perspective with the university.

THE COURT: Let me stop you a second; you have got your notes, so I won't break your train of thought.

You said that Mann doesn't need them now. What is if he is worrying about other people with whom he corresponded? Why wouldn't he have that need at least to say who am I exposing to some problem here?

DR. SCHNARE: We have already -- in the original Freedom of Information request, we named all of the individuals whose e-mails we were interested.

THE COURT: Thirty-nine people.

DR. SCHNARE: Plus Mann. So he

already knows. Furthermore, he was the one involved in the correspondence. He knows what is involved. He knows so well who is involved that he has written to them asking for their support.

THE COURT: I don't know who I wrote to in 1999. We write, we issue, we publish all the time. If you told me that I had some parallel status to Mann when the university dug up this thing, and you are talking about 1999 things I wrote? I have a need for recall.

DR. SCHNARE: I ask you the wonderful question you have asked so many students over the years: So what?

If, Your Honor, they had an interest in this case, apparently the university should have contacted them and said, gee, we are getting ready to release those e-mails.

By the way, e-mails that those people wrote to Mann, e-mails in which neither Michael Mann nor the university has any copyright interest in at all; indeed, their whole notion

of protecting copyright interest doesn't apply to the majority of the e-mails because the majority of the e-mails didn't come from Michael Mann. They came to Michael Mann.

And so if, in fact, Michael Mann has a concern about those people, whatever concern that is, it is not at issue in this case.

And, Your Honor, for what it is worth, this case has received international attention. It is widely known amongst this community; and if any of those individuals wanted to intervene in this case, they certainly were free to do so, apparently, since Mr. Mann did.

So I am not concerned. I don't believe the Court needs to be concerned, and certainly Michael Mann has no concern about the potential impact on others.

THE COURT: I wasn't broadening; I was just taking your words, he has no present need, he has no need now. But go ahead.

DR. SCHNARE: What need would he have?

THE COURT: You have covered it. I

didn't mean to break your train of thought.

DR. SCHNARE: Not a problem, Your Honor. Let me see where I had my finger stuck.

Whatever that thought is, I think we have covered it.

I want to get back to Stevens v. Lemmie. It is important in this two-pronged analysis to ask the question what is possible and what wasn't present.

I return to the argument. And if you look at these carefully, you need to recognize that these deal with where waiver is not allowed, where release is not allowed.

We are talking about statutes that specifically prohibit the release of student records, of medical records, of personal private information. There is no such law that prevents that in this case with regard to this information. We have repeatedly made it clear we don't want personal information.

If Michael Mann had written to a colleague and said I am going to stay at your

house for three days and bringing this and bringing that, and I need access to a computer or something like that, see you then; if that trip involved his professional work, and it is just how he does his travel, that's certainly public business. We should be allowed to know how faculty do their job.

And make no mistake, we have enormous respect for faculty and how hard it is to do their job. If that's how they do it, we have a right to know it. It may be that we ought to look at it and say, gee, faculty ought to have a larger travel budget; we could encourage our representatives to pass more for them.

So the mere fact that it seems as though some of these kinds of things are not related directly to position doesn't mean they are not. And when this court asks what kind of protections should be required -- in other words, information that is prohibited to be given and, therefore, for which no waiver is allowed -- it doesn't even apply to this, kind

of, what appears to be personal information when, in fact, it is related to their job.

Now, you won't know that until you look at those. But the point remains the release, mere release of these to Michael Mann -- not a citizen, not an employee, adverse at law, a competitor, and a person who has been an activist in this area -- is evidence that the university has waived these documents and these records, and any exemption thereto.

Let me make one brief other comment, Your Honor, with regard to the online policies that Ms. Wessel mentioned we concede and for which we need no discovery.

We, in fact, limited our discovery to say that we only wished for those documents, we only wished them to produce the documents themselves unless they -- let me restate this.

If the documents we sought were available on the Internet, all we asked for was a link to them. And we inquired after those documents because we had already recognized that

some of the documents, some of the policies of the university on the Internet are new and, apparently -- and are dated well after when Professor Mann left the university; and, therefore, we wanted to know whether or not those documents, those policies were the same as the policies that applied when Professor Mann was employed by the university and conducted business.

A small point to end on, Your Honor, but that's my point.

THE COURT: Thank you. Any other argument?

I thank you -- all counsel -- for an attempt to educate the Judge.

In terms of what procedurally should happen next, it seems to me -- and I invite counsels' comment -- that I have to read the exemplars. I have to go through that which is the product of the process designed by Judge Finch that was largely agreed to, and reach certain decisions in regards to those exemplars;

which may or may not ender moot some of our other arguments.

The stages after that are ones that I invite comment on. For instance, today I think it is inappropriate to attempt to make a definitive ruling on waiver. I think it is premature.

The concept of discovery in terms of first request, second request, or the limited interrogatories seeking when the university gave the co-respondent the documents and under what circumstances is sort of answered in the record, but may or may not sometime require a more formal answer to interrogatories.

Part of what we are doing here is trying to get me educated to make a correct decision. The secondary goal is that this case has clear potential for appeal, and I want the full record, everybody's record of every issue going. If the Virginia Supreme Court is going to get a chance to decide all of the issues in this case, I want it to be done on a complete

record regardless of who prevails in this court.

I invite any suggestion you want, but my intent is to tell you I am not ruling on any of this until I do the exemplars and then decide what is next. Comments?

MS. WESSEL: Your Honor, for just a moment, I do hope that it is very clear as a part of your intended process that I think both parties' position would be we haven't briefed yet the issue of the applicability of the various exclusions to those exemplars.

The order that was --

THE COURT: That's exactly what I am inviting.

MS. WESSEL: So the point is that I would argue that your view of the exemplars is, frankly, premature in ruling on all of the motions that are before the Court today.

THE COURT: Good; because I am working every day this week.

MS. WESSEL: Certainly, Dr. Schnare may disagree, but we believe that you can fully

decide the motions that are before the Court today and issue rulings on those various motions without moving to the exemplars.

And I think your point about the preservation of a complete and full record is very well warranted. Your own questions and the debate that we had this morning and this afternoon make clear this is a very important case.

THE COURT: Well, understand that the Supreme Court will only have seven people with their own individual questions that counsel sometimes thinks why is that question coming up.

But bear with this judge and someday the seven justices who raise points as you go.

MS. WESSEL: Absolutely. So we think it is quite important that in reviewing the exemplars at some point soon, both parties brief --

THE COURT: You suggest a process.

MS. WESSEL: Well, my suggestion, Your Honor, would be that you issue rulings on the

motions that are before the Court today; i.e., is discovery appropriate or not.

We have filed two motions to quash on the respondents' side. Dr. Schnare, ATI, have filed requests for discovery which we have sought to quash, and a motion to disgorge which, as has been pointed out, really revolves around the waiver issue.

THE COURT: Stop. What is your response to her suggestion that I rule today on certain things?

MS. WESSEL: Your Honor --

THE COURT: You have already --

MS. WESSEL: It may not be today.

THE COURT: I will never be more focused than I am right now.

Let me hear from Dr. Schnare.

DR. SCHNARE: Well, Your Honor, we expect that you take the matter under consideration and would write an opinion, because we suspect that this would be appealed.

We believe -- I agree with Ms. Wessel.

We think that you can rule on discovery issues and on the waiver issues, but we thought you would want to take some time to think about what you wanted to come out.

You asked a lot of very interesting questions, and there is a lot to think about.

We do believe it is appropriate to resolve the questions, both of these questions in a timely fashion, but they are different questions. If this matter -- if, in fact -- and I suggest you do it in this order.

If, in fact, they waived their exemptions because they released these documents, then this case goes a different direction. It means that you would then order the release of the documents. One presumes you would be prepared to stay that order pending appeal, and we would all go down the appellant track on that issue.

Alternatively, you could choose to agree that they have waived, but permit the case to go forward over the objection on waiver by

the other parties, and complete the rest of the record so that if an appellate court chose not to agree to a motion that was waived, they would have the rest of the record over the period of time. That's possible; we could do that.

But that also means you would decide on discovery. Absent discovery -- the discovery issue takes you down two tracks. If you allow the discovery, including limited discovery -- and we have provided a draft motion for use that your clerk could quickly fill that in -- then that discovery happens.

We set up a schedule for briefing on the exemplars and on the exemptions themselves, and we move that to its conclusion. It allows you to write the entire case at one time.

Alternatively, if you don't allow for discovery, you are in the position of saying, all right, that's it, I am done, all I need are some briefs from the parties with regard to the exemplars and the exemptions.

So what I suggest is not that you rule

from the bench today -- although, if you have your mind made up and you know what you want to do, that is certainly appropriate.

But, regardless, you should find on these before we take our next steps on behalf of our clients because it, too, is time consuming and resource intensive.

THE COURT: The steps taken towards a more definitive resolution, in part or in whole, are all dependent on how I react to the exemplars. So if you want a ruling today on waiver, discovery, and all of that, they would be without prejudice to reconsideration.

So I would just be kicking the can down the road. That's not fair; it would raise the hopes of too many people in different directions.

What I will do today is discovery is stayed. I neither grant nor authorize discovery, those discovery items that are out there. The strongest appeal in the discovery collection for a ruling today, frankly, was the

interrogatory to Mann as to when and under what conditions he received the documents.

That's all been answered in the record. Questions I had about that gap between prior to Judge Finch's ruling sometimes, when the documents were in the possession of counsel for Professor Mann; we have got that in the record factually. So I stay the discovery issue. I don't grant or deny it.

In terms of waiver, I deny it without prejudice. That isn't very satisfying, doesn't give anybody a clear sense of victory or loss; but, procedurally, that is the controlled way in which I want to go read the exemplars.

DR. SCHNARE: Your Honor, I would like to say, perhaps, a bit more about what you say when you say "without prejudice."

Is that to say that you will reconsider the waiver at some later time, or that we will be required to raise this as an issue to you?

THE COURT: The ball is in the court

of counsel. "It is denied without prejudice" in my mind means I have denied it, but I will hear you again if and when necessary.

There is no final score posted.

DR. SCHNARE: Your Honor, so my presumption is as we depart the courtroom today, we will await further direction from you on when you want to hear from us again.

THE COURT: Yes. It is up to me to get my review of the exemplar.

I just told you I am working every day this week. I don't know how long it is going to take. The judge can't hire people to do it for him, so I have got to read that.

All I can promise you is that I will get to it as expeditiously as I can.

Tell me the volume of pages I am looking at. Am I looking at 12,000 pages, or am I looking at a more digestible number?

DR. SCHNARE: You are looking at 17, I believe 17 of respondents' exemplars and 14 from petitioners. Less the dividers, it is that much

(indicating) material.

THE COURT: That is not overpowering in terms of time expected.

DR. SCHNARE: Our attempt was to try to produce something for you that was --

THE COURT: I thank all counsel for that.

DR. SCHNARE: If I may, Your Honor, having read the exemplars, it is not clear to me what position you put yourself.

Because we would not have briefed the exemptions issue yet, you are not in a position to take into account any arguments that the parties have in regard to that.

THE COURT: There is a rare agreement between the two of you.

MS. WESSEL: Rare agreement.

THE COURT: I am compelled to follow the agreement. I agree with you, but I am going to at least tentatively tell you reactions to that, and then decide what you need to do to brief it further.

DR. SCHNARE: Thank you, Your Honor.

MS. WESSEL: Thank you.

THE COURT: I have to educate myself on content. You are way ahead of me thinking about legal interpretations and legal result.

I am the first-grader here in terms of the facts of these, the contents of these exemplars. That's got to be my factual basis for which I hear and/or read your further briefing.

Anything else for today?

DR. SCHNARE: No, Your Honor.

THE COURT: Sorry I don't have a more definitive ruling for you. I came here today really wondering what oral argument would produce in my mind by way of certainty or comfort level of making you have clear rulings.

Your oral arguments have not taken me there. They have educated me on how sophisticated and how complex the problem was.

I wish it was a snap of the finger, the clarity in my mind; it is not.

Thank you for your help. I will let you know as quickly as I can get those back together or set other scheduling.

With that, everybody is free to go.

DR. SCHNARE: Thank you, Your Honor.

(Whereupon, the hearing in the above-entitled matter adjourned at 2:08 p.m.)

* * * * *

CERTIFICATE OF STENOTYPE REPORTER

I, RANDY T. SANDEFER, RPR, certify that the proceedings in the above-entitled matter were taken by me in stenotype and thereafter reduced to typewriting under my direction and control; that said transcription is a true record of the proceedings; that I am neither counsel for, related to, nor employed by any of the parties to the action in which this proceeding was taken; and, further, that I am not a relative or employee of any attorney or counsel employed by the parties hereto, nor financially or otherwise interested in the outcome of the action.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal this 30th day of April, 2012.

_____

RANDY T. SANDEFER, RPR

Stenotype Reporter

Notary Registration Number: 246221