VIRGINIA:

IN THE CIRCUIT COURT FOR THE 31ST JUDICIAL CIRCUIT

THE AMERICAN TRADITION INSTITUTE, and THE HONORABLE DELEGATE ROBERT MARSHALL Petitioners, v. RECTOR AND VISITORS OF THE UNIVERSITY OF VIRGINIA, Respondents; and, MICHAEL E. MANN, Intervenor.	Civil Docket No. CL 11-3236 *Petitioners' Memorandum of Facts and Law*

PETITIONERS' MEMORANDUM OF FACTS AND LAW

In compliance with the Court's Order of May 11, 2012, Petitioners submit this memorandum in support of our petition for *in camera* review to determine whether the Respondents have properly withheld emails sought under the Virginia Freedom of Information Act and our plea for release of improperly withheld emails.

The weighty nature of this case and the instruction of the Court to ensure the parties create a full and complete record for potential appeal require a comprehensive memorandum. We structure the discussion in eight sections. Parts I – V address issues rising under the VFOIA. Part VI addresses academic freedom and related issues associated with the First Amendment to the U.S. Constitution. Parts VII and VIII discuss collateral issues that we believe are not relevant to the Court's disposition of the issues but which, because they have been placed before the Court, require attention. Part VII discusses peer review and Part VIII addresses copyright concerns. A Table of Contents and Table of Authorities are also provided to assist the Court.

Table of Contents

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Treatises

Constitutional Provisions

STATEMENT OF THE CASE

On January 6, 2011, under authority of the Virginia Freedom of Information Act (VFOIA), the Petitioners requested the University of Virginia (UVA) produce information at issue in this matter (*hereinafter,* "the Request"). The Request specified that the information sought was that information residing on a "backup server". The Request identified thirty-nine (39) individuals by name, and five (5) grants cited in the requested records. These reside on a particular "backup server" UVA had identified in another proceeding. .

Seven and one-half months after receiving the Request, and only after this Court ordered it to comply with the Request, the University produced 1,793 emails and thereafter stated they would not produce approximately 12,000 additional responsive emails they argue are either not public records, or otherwise are exempt under the VFOIA or protected by the First Amendment to the U.S. Constitution under the ambit of "academic freedom."

On May 16, 2011, Petitioners filed this action asking the Court to "order UVA to provide the requested documents on a timely schedule" and to "order such necessary and proper injunctive relief or other injunctive relief as this Court deems just and proper." On February 3, 2012, Petitioners filed a motion to compel the University to disgorge all 12,000 documents sought under the Request, arguing several bases for the motion. After a hearing on that motion, on May 11, 2012, the Court ordered filings by the parties on the facts and the law regarding whether the University properly withheld the 12,000 emails. This is Petitioners' filing on Facts and Law.

The Court also allowed re-filing of a motion to have the University disgorge the emails based on the argument that they had already disseminated them by giving a copy of the 12,000 emails to the Intervenor. If they choose to do so, Petitioners will so move in a separate filing.

FACTS AND ARGUMENT

I. VIRGINIA FREEDOM OF INFORMATION ACT GENERALLY

Virginia's Freedom of Information Act was enacted in 1968 to ensure citizens ready access to public records where the "business of the people is being conducted," including "at any level of government." Va. Code § 2.2-3700 (2010). **V**FOIA provisions are to be:

> ***[L]iberally construed*** to promote an increased awareness by all persons of governmental activities and afford every opportunity to citizens to witness the operations of government. ***Any exemption*** from public access to records or meetings ***shall be narrowly construed*** and ***no record shall be withheld*** or meeting closed to the public ***unless specifically made exempt pursuant to [the Act] or other specific provision of law***.

Id. § 2.2-3700(B) (*emphasis added*); see also *City of Danville v. Laird*, 223 Va. 271, 276 (1982) ("The policy expressly stated in this section is that this chapter shall be liberally construed to enable citizens to observe the operations of government and that the exemptions shall be narrowly construed in order that nothing which should be public may be hidden from any person.").

VFOIA requires all public records to be open to inspection and copying by any Virginia citizens, subject to certain provisions excluding mandatory disclosure of records. See Va. Code § 2.2-3704(A) (2010); *id*. § 2.2-3705.1(1)-(13).

VFOIA defines "public records" as:

> all writings and recordings that consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing... mechanical or electronic recording or other form of data compilation, however stored, and regardless of physical form or characteristics, prepared or owned by, or in the possession of a public body or its officers, employees, or agents in the transaction of public business.

Id. § 2.2-3701. Among other entities, **V**FOIA defines "public body" as encompassing "boards of

visitors of public institutions of higher education." *Id*. The University of Virginia constitutes a public body.

Within five business days of receiving a request, a public body subject to **V**FOIA that possesses requested records must provide the records to the requestor or respond in writing to explain why the request cannot be partially or entirely granted. Va. Code § 2.2-3704(B) (1)-(4). A public body's failure to respond to a request for records is considered a denial of the request and constitutes a violation of FOIA. Va. Code § 2.2-3704(E).

Reimbursable costs in responding to such requests are subject to the following expense limits:

> A public body may make reasonable charges not to exceed its actual cost incurred in accessing, duplicating, supplying, or searching for the requested records. . . . Any duplicating fee charged by a public body shall not exceed the actual cost of duplication. . . . All charges for the supplying of requested records shall be estimated in advance at the request of the citizen.

Va. Code § 2.2-3704(F). For records maintained in an electronic database:

> Public bodies shall produce [such] nonexempt records ... in any tangible medium identified by the requester.... No public body shall be required to produce records from an electronic database in a format not regularly used by the public body. However, the public body shall make reasonable efforts to provide records in any format under such terms and conditions as agreed between the requester and public body, including [*457] the payment of reasonable costs. The excision of exempt fields of information from a database or the conversion of data from one available format to another shall not be deemed the creation, preparation, or compilation of a new public record.

Va. Code § 2.2-3704(G).

VFOIA provides for enforcement through "mandamus or injunction, supported by an affidavit showing good cause." Va. Code § 2.2-3713(A). The enforcement provision provides:

> A single instance of denial of the rights and privileges conferred by this chapter shall be sufficient to invoke the remedies granted herein. If the court finds the denial to be in violation of the provisions of this chapter, the petitioner shall be entitled to recover reasonable costs, including costs and reasonable fees for expert

> witnesses, and attorneys' fees from the public body if the petitioner substantially prevails on the merits of the case, unless special circumstances would make an award unjust. In making this determination, a court may consider, among other things, the reliance of a public body on ... a decision of a court that substantially supports the public body's position.

Va. Code § 2.2-3713(D).

Section 2.2-3705.1(4), upon which the University largely relies in refusing most of Petitioners' **V**FOIA request, allows but does not compel the University to withhold:

> 4. *Data, records or information* of a *proprietary* nature *produced or collected* by or for faculty or staff of public institutions of higher education, other than the institutions' financial or administrative records, *in the conduct of or as a result of study or research* on medical, scientific, technical or scholarly issues, whether sponsored by the institution alone or in conjunction with a governmental body or a private concern, *where such data, records or information has not been publicly released, published, copyrighted or patented*.

VA Code § 2.23705.4(4) (*emphasis added*) (*hereinafter* "Exemption 4").

This case focuses on whether the University liberally construed the definition as to what constitutes a record and narrowly construed any applicable exemptions.

II. STANDARD OF EVIDENCE AND BURDEN OF PROOF

A. Burden of proof is on UVA

Under the statute, the records custodian seeking to withhold documents has the burden to justify that withholding. Pursuant to Code § 2.2-3704(E), "[f]ailure to respond to a request for records shall be deemed a denial of the request and shall constitute a violation of [the Act]." With regard to enforcement of the Act, Va. Code § 2.2-3713(E) provides that "the public body shall bear the burden of proof to establish an exemption by a preponderance of the evidence. Any failure by a public body to follow the procedures established by [the Act] shall be presumed to be a violation of [the Act]." *See, Fenter v. Norfolk Airport Auth.*, 274 Va. 524, 529-530 (Va. 2007)

B. Exemptions are to be applied narrowly

In withholding documents under an exemption provided by the Act, the University must do so by narrowly construing the exemption. Specifically, The Act provides, in Code § 2.2-3704(A), that, "[e]xcept as otherwise specifically provided by law, all public records shall be open to inspection and copying" and that "[a]ccess to such records shall not be denied." The Act further provides, in Code § 2.2-3700(B), that its provisions shall be liberally construed to promote an increased awareness by all persons of governmental activities and afford every opportunity to citizens to witness the operations of government. Any exemption from public access to records or meetings shall be narrowly construed and no record shall be withheld or meeting closed to the public unless specifically made exempt pursuant to the Act or other specific provision of law. *Fenter*, 274 Va. at 530; *and see*, *Taylor v. Worrell Enterprises, Inc.*, 242 Va. 219, 231 (Va. 1991) ("we must narrowly construe the exemption and liberally construe the Act to enable citizens to observe the operations of government").

C. The Court reviews the emails *de novo*

The statute directs the court to determine whether the University denied the records in violation of the provisions of this chapter. Va. Code § 2.2-3713 (D); *and see*, *Browning-Ferris Industries v. Residents Involved in Saving the Environment, Inc.*, 254 Va. 278 (1997), ("on reviewing questions of law, the principles of presumption of official regularity and accounting for the experience and specialized competence of an administrative agency in reviewing agency appeals do not apply").

III. ALL WITHHELD EMAILS ARE RECORDS SUBJECT TO VFOIA

The VFOIA applies only to "public records." Va. Code § 2.2-3704. Because the University has argued that some of the withheld emails may not be public records, we now

address what are public records and what indicia the Court can use by which to evaluate whether the withheld emails fall within the definition of public records.

A. Definition of the term "Record"

Under Va. Code § 2.2-3701, as a writing in the possession of the University, any withheld email constitutes a public record if is "*prepared for or used in the transaction of public business*. Thus, the question before the Court is as to what constitutes "public business." We begin with *Burton* wherein the Court concluded:

> '[p]ublic business encompasses those matters over which the public governmental body has ***supervision, control, jurisdiction, or advisory power***.' There must be some nexus between the record produced and public trust imposed upon the official or governmental body.

Burton v. Mann, 74 Va. Cir. 471, 474 (Cir. Ct. Loudoun, 2008) (*internal citations omitted, emphasis added*) (*citing to Kansas City Star Co. v. Fulson,* 859 S.W.2d 934, 940 (Mo. App. W.D. 1993). The Annotated Code cites to *Burton* on this issue. Va. Code § 2.2-3700. Only five Virginia cases give a glimpse into what kind of activities fall within "the public business".[1] None involved university emails.

The *Burton* formulation points the Court toward seeking evidence that the emails reflect matters over which the University had "supervision, control, jurisdiction, or advisory power" thus reflecting the nexus between the email and the public trust imposed upon the official or governmental body, in this case, Michael Mann or the University.

The subsections below examine various indicia of "public business."

[1] *Tull v. Brown*, 255 Va. 177, 183 (Va. 1998) (considering whether a tape of a 911 call is prepared in the transaction of public business); *Wall v. Fairfax County Sch. Bd.*, 252 Va. 156, 157 (Va. 1996) (the total number of votes received by each candidate in a public high school student election is assumed to be prepared in the transaction of public business, although exempted as a scholastic student record.); *Stevens v. Lemmie*, 40 Va. Cir. 499, 502 (Va. Cir. Ct. 1996) (videotape and the incident reports are "in the possession" of the City pursuant to the transaction of its business of fire investigation.); *Times-World Corp. v. Wells*, 32 Va. Cir. 239, 241 (Va. Cir. Ct. 1993) (bank records of a public body are public records); *and, Associated Tax Service v. Fitzpatrick*, 236 Va. 181, 372 S.E.2d 625 (1988), (the Supreme Court of Virginia, without making a finding, treated records maintained by a constitutional officer as "official records" within the purview of the Act.).

B. Virginia personal email use policy

The Virginia Department of Human Resources requires every Virginia employee, including then-assistant professor Michael Mann, to sign a form indicating they agree to read, understand and abide by DHRM Policy 1.75 ("Use of Electronic Communications and Social Media") and that they understand "no user shall have any expectation of privacy in any message, file, image or data created, sent, retrieved, received, or posted in the use of the Commonwealth's equipment and/or access.). DHRM Policy 1.75 p. 8, http://www.dhrm.state.va.us/hrpolicy/pol175UseOfInternet.pdf (accessed June 15, 2012).

That policy established the firm requirement that:

> When using electronic communications and social media, users should:
>
> - ***Be clear that their communication or posting is personal and is not a communication of the agency or the Commonwealth*** when using electronic communications or social media for personal use, including personal use of social media outside of the work environment. For example:
>   - ***Users should use their personal email addresses and not those related to their positions with the Commonwealth when communicating or posting information for personal use.***
>   - Users may use a disclaimer when posting opinions or views for personal use such as, "The views expressed on this (website, blog, social media site) are my own and do not reflect the views of my employer or of the Commonwealth of Virginia." when appropriate to ensure these views are not viewed as official Commonwealth of Virginia communications.

Id. at p. 4 (*emphasis added*). The University endorsed this statewide policy, stating "Unless otherwise noted, the following policies apply to the entire University community," and thereafter linking to DHRM Policy 1.75. *See*, University of Virginia Information Technology Policies at http://its.virginia.edu/policy/ (accessed June 16, 2012). The University seeks to avoid adherence to this and other of its own policies.

As regards Intervenor Mann, this is not the only opportunity Michael Mann had to learn that he had a duty to mark his private emails as private or otherwise control them as he would a private email, if in fact they were not written in the conduct of his public/University duties. The university provided its faculty a card to be posted on or near each computer regarding how to manage email under the state's records management system. Titled, "UNIVERSITY OF VIRGINIA

EMAIL RETENTION CHECKLIST", this card states baldly:

> Evaluate your e-mail and determine whether it meets the legal definition of a record. If so, file it (in paper or electronically) and retain it in accordance with the type of record (the content of the email) as listed in the Library of Virginia Records Retention and Disposition Schedules (www.virginia.edu/recordsmanagement). Here are some guidelines:
>
> **FILE IT**
>
> Issues policy
> States decisions
> Outlines procedures
> Shows action
> Gives guidance
> Is unique
> You're not sure
>
> **TOSS IT**
>
> X Reservations for travel
> X Confirms appointments
> X Personal messages
> X Reference Copies
> X Broadcast Messages
> X Transmits documents w/out comment
> X Junk mail
>
> **REMEMBER**
>
> • Your email contains public records. See Virginia Public Records Act.
> • Utilize the records retention and disposition schedules online to determine how long to keep the records.
> • DO NOT use email to transmit confidential information.
> • Your email is part of your job. No expectation of privacy or confidentiality applies.

University of Virginia, "University of Virginia Email Retention Checklist" at http://www.virginia.edu/recordsmanagement/docs/EmailCheckList.pdf (accessed June 15, 2012).

In addition, the university faculty is expected to know and follow all of UVA's policies[2], thus Michael Mann should also have been aware of "IT Policies Monitoring and Review of Employee Electronic Communications or Files" which begins with the clear admonition that "No user should have any expectation of privacy in any message, file, image or data created, sent, retrieved or received by use of the Commonwealth's equipment and/or access." University of Virginia Technology Policies: IT Policy on Monitoring and Review of Employee Electronic Communications or Files (Effective Date is 10/03/01) (*citing to* Commonwealth of Virginia's Human Resource Policy 1.75) at http://www.its.virginia.edu/policy/filemonitoring.html (accessed June 15, 2012). One reason for finding these admonitions in several different University pronouncements is that these records are subject to VFOIA. The University repeats these policies and the need to comply with the state requirements in its faculty handbook on responsible computing.[3] Of particular note in that handbook is the following advice: "It is not advisable to use email for confidential information or when there would be concern if all or part of the email were forwarded to other parties," advice Dr. Mann failed to follow, for example, with regard to exemplar RE-14, as discussed below.

The exemplar emails before the Court demonstrate that Michael Mann did not mark any of them as private. Because the University had the opportunity to search and find one with such markings and did not include such an email in their exemplars, the Court has no basis for

[2] *See*, University of Virginia, "Responsible Computing Handbook for Faculty and Staff" ("University policies require you to protect University information. If you aren't already, you need to become familiar with these current policies.") at http://its.virginia.edu/pubs/docs/RespComp/resp-comp-facstf.html (accessed June 15, 2012).
[3] *Id*.

concluding that any of the 12,000 withheld emails contain such a marking and thus the Court has no basis for concluding any of the 12,000 can be excluded as private correspondence.

Somewhat less significant is that Mann did not personally place any of these emails in the "Toss it" category and erase them from the email system. Had Mann "tossed" the emails, they would not have been on the backup server, but would have been erased more than a decade ago. It is up to the Court to determine whether Mann's failure to discard the emails, and hence their existence on the backup server, is evidence that Mann considered the emails public records. Whether, today, the University considers them records is much more problematic.

On August 22, 2011, under court order, the University released to Petitioners approximately 1,366 consecutively numbered emails, number 00015 of which consisted of nothing other than a copy of an Ann Landers column. *See*, Pet. Ex. 2. Not only is the content of this email not responsive to Petitioners' information request, it has absolutely nothing to do with public business no matter how that might be defined. Yet the University produced it to Petitioners under VFOIA. That email constitutes evidence that the University has adopted the position that even these mundane forms of communication are records of public business, possibly because it reflects the kind of communication made and received by their Faculty. In contrast, today the University argues that substantive, obviously work-related correspondence are not records, apparently in order to withhold them from the public.

Finally, as of the preparation of this memorandum Respondents have offered no evidence on whether Michael Mann had no private email address or could not obtain one. Because the University policies clearly suggested he use his private email address for private emails, it is not unreasonable to expect that he had such an email address. Because the Court did not allow discovery in this case, Petitioners are unable to offer evidence as to whether or not he had one

during the period covered by Petitioners' Request. If he did, he was under a duty to use that system rather than the University email system for private emails. If he did not, he needed to mark every private email sent through the University system as "private." Absent evidence from the Respondent or the Intervenor that he had no personal email address, Petitioners argue the Court should presume he did have one, with all consequent significance under the University's policies.

Sloppy non-compliance with the "private email" policy does not excuse Dr. Mann. As discussed next, a document using "letterhead" of the University and not marked "private correspondence" can reasonably be expected to be perceived to be, and by policy is an official communication from a University employee in the course of the University's business and must be viewed as a public record subject to VFOIA.

C. UVA admissions on records

As a general matter, the University has already established various criteria it has historically used to determine when emails reflect "public business," criteria on which courts have relied and which apply equally to this case.

1. The *Bowers* "letterhead" rule

In the matter of *Bowers v. The Rector and Visitors of the University of Virginia*, 276 Fed. Appx. 278; 2008 U.S. App. LEXIS 9558 (4th Cir. 2008) the University defended its decision to fire Dena Bowers because she used her University email account to transmit personal communications without stating that the email was intended to be personal. Specifically, Ms. Bowers sent a single email message to a colleague using her University email account and bearing a signature stamp identifying her as a University Human Resources employee. Attached to the message were documents and charts that Bowers had received during a meeting of the

local chapter of the National Association for the Advancement of Colored People. That email was propagated by others through UVA email system causing University administrators to address the content issue in the email. The angst of those administrators eventually resulted in Ms. Bowers dismissal. It all began because the email contained a "letterhead" showing her title and affiliation with the University.

The University argued, and the Court noted, that "The Commonwealth of Virginia maintained an internet use policy that required employees to identify personal communications sent from Commonwealth systems as personal, to prevent them from being viewed as official communications." *Bowers* 276 Fed. Appx. at 280 n.1. Ms. Bowers argued that the email and attachments sent from her work computer constituted speech protected under the First Amendment. The Court held otherwise, finding that:

> Bowers violated a state policy limiting the sending of personal email from state accounts and computers. This policy bolstered the University's attempts to manage the dissemination of information from University accounts and computers, part of its broader attempt to provide "effective and efficient services to the public."

Bowers 276 Fed. Appx. at 282 (*citing to McVey v. Stacy*, 157 F.3d 271 (4th Cir. 1998)). Ms. Bowers made two mistakes. She failed to clearly mark the email as a personal communications and she sent the email out over her University title. *Id*. at n.3. This permitted those receiving the emails to "assume that the information came from Bowers in her capacity as a University . . . employee." *Id*.

The Fourth Circuit did not come to its conclusion in the face of opposition from the University of Virginia. Rather, the University argued vehemently that the trial court decision on this issue, with which the Fourth Circuit agreed, was firmly correct. *See*, Pet. Ex. No. 3, p. 16-18, Brief of Appellees in the matter of Bowers v. UVA (*citing to Bowers v. Rector & Visitors of*

the Univ. of Va., 478 F. Supp. 2d 874, 886 (W.D. Va. 2007) ("nobody would think to use University letterhead for personal messages, and email signatures like the one in this case resemble official letterhead closely enough that the two should be treated the same way.")).

Of the 31 exemplars before this Court, 16 were sent by Michael Mann and 15 received by him. Every "sent" and four of the 15 "received" emails included the following letterhead showing his official title and association with the University.

Professor Michael E. Mann
Department of Environmental Sciences, Clark Hall
University of Virginia
Charlottesville, VA 22903
e-mail: mann@virginia.edu
Phone: (804) 924-7770 FAX: (804) 982-2137

As discussed above, not one of the 31 exemplars contains a clear statement that the email is intended to be personal. Of the 20 containing the University letterhead, one (RE-14) contains evidence that the email was intended to be kept "confidential." Although in that email Michael Mann discusses his career plans, he does so as a University employee. Because the email involves whether he would continue to conduct the business of the government, the email involves a matter over which the University has supervision, control, jurisdiction, or advisory power. Indeed, because Dr. Mann had no expectation of privacy in his University emails, his use of the term "confidential" in the "subject" block of the email, and in text, does no more than signal that he wishes the recipient not share the email with others. This does not turn the email into a private communication.

For example, it is federal policy in applying its FOI law, EPA acknowledges, calling correspondence that is otherwise work-related "confidential" does not make it so for purposes of evading FOIA's reach. "Labeling materials 'personal,' 'private, or 'confidential' does not make

them personal papers. Documents marked with those or similar designations are federal records and not personal papers if they are used in the transaction of agency business."[4]

Notably, the recipient of the RE-14 email is not associated with UVA and thus it is not an email subject to the personnel and personal information exemption.

Under the rule in *Bowers*, each of these 20 emails must be viewed as reflecting official correspondence and thus are records subject to the VFOIA.

Of the remaining 11 emails, 9 contain letterhead from professional colleagues who normally do business with the University and Dr. Mann in his official capacity. The letterhead rule applies to those emails as well.

The two remaining emails (of the 11) have no letterhead. In one case (PE-8), the email discusses scientific matters associated with the business of the University and Michael Mann. As discussed in later sections this content is indicia of public business.

2. Ambiguity does not create a private email

The single remaining email (RE-12), one received by Dr. Mann, is peculiar in that it is entirely ambiguous. It discusses travel plans of one of Dr. Mann's professional colleagues but does not disclose whether the trip involves professional activities and is not marked as a private correspondence. It is from a federal employee who is also required to use unofficial accounts for unofficial communications instead of using the federal email system. Notably, the email is not responsive to Petitioners' information request. It should have been excluded as non-responsive at the initial screening. To the degree other non-responsive emails are contained in the withheld collection, they may or may not be records, but they are not within the ambit of this litigation.

Petitioners are concerned, however, that if the court agrees that RE-12 is not responsive, UVA will thenceforth argue that a large tranche of the 12,000 withheld emails are also non-

[4] See, e.g., Frequent Questions about Personal Papers, http://www.epa.gov/records/faqs/personal.htm.

responsive and thus not subject to Petitioners' request, despite having produced obviously non-responsive emails in their two earlier releases. Petitioners are concerned that the University will shift horses again and hide emails that involve public business from public scrutiny such that not even the court would have the opportunity to examine them *in camera*. Thus, if the Court agrees that RE-12 is not responsive, Petitioners ask that it do so with specificity and particularly with reference to Michael Mann's responsibilities as a professor. As discussed below, any email related to Mann's professional responsibilities as a member of the Faculty are records within the ambit of Petitioners' information request and subject to VFOIA.

3. Emails not marked "private" are records with no expectation of privacy

Setting aside the "letterhead rule" and the University's past policy of vigorously applying that rule, the University makes another general admission against interest in this case and in so doing has created an additional burden for itself if it attempts to argue that any of the exemplar emails are personal. To succeed, the University must explain why Michael Mann would, without labeling them as private, have any expectation of privacy in light of the University and statewide policy that employees should have no expectation of privacy of their emails. As shown above, in each of the DHRM and University policies on electronic communications employees are repeatedly informed, and agree as a condition of their employment, that emails are not personal or private but instead are subject to VFOIA. The statute's default position is that any email whose content is of the kind associated with the employee's work is subject to interpretation as a business record under VFOIA unless marked as private. The University itself made this argument in *Bowers* and the Court agreed with that standard of review. Thus, we argue this Court should consider every email not marked as private and dealing with any subject related to Dr. Mann's research, teaching and service a public record.

D. Evidence describing Michael Mann's Public Business

Absent discovery, Petitioners are left to rely on three sources by which to characterize Michael Mann's public business over which the University has supervision, control, jurisdiction, or advisory power. These are the Provost's policies, Dr. Mann's curriculum vita while at UVA and any statements or writings of Dr. Mann indicating the nature of his work as a professor.[5] This information provides a baseline against which to compare the email exemplars.

1. What professors do.

The University Provost has established a set of policies which define the public business that faculty members conduct. Specifically, Provost Policy No. 4 "Defines the typical roles and responsibilities expected of academic faculty." *See*, University of Virginia Policy PROV-004, "Policy: Academic Faculty Roles and Responsibilities" at https://policy.itc.virginia.edu/policy/policydisplay?id=PROV=004 (accessed June 16, 2012). Therein the University offers the following "Policy Statement:"

> A tenured or tenure-track faculty member's time is typically spent on:
> - Scheduled classroom instruction;
> - Directly on research and scholarship and individual direction of undergraduate, graduate, and professional students; and
> - Departmental and other professional activities, including contributing to the governance of the University.

Id. The Provost reiterates and expands on this in the policy addressing promotion and tenure, specifying the duties of faculty as encompassing "teaching," "research," and "service" and offering the following evaluation criteria:

> - Quality of, and commitment to, student instruction (including teaching, course design, course material, interaction with students outside of formal instructional periods, and other mechanisms of enhancing student learning);
> - Quality of, and productivity in, scholarship, research, and/or creative activity; and

[5] Admissible as evidence under Virginia Rules of Evidence Rules 2:201, 203, 801 & 803(0) either as public records or admissions against interest.

- Service contributions to the University, ***the profession, and the public***.

University of Virginia Policy PROV-017, "Policy: Promotion and Tenure" at https://policy.itc.virginia.edu/policy/policydisplay?id=PROV-017 (accessed June 16, 2012) (*emphasis added*). Student instruction and research are self-defining terms deserving no further attention. Petitioners are concerned, however, that both the University and Intervenor Mann seek to exclude from VFOIA coverage some emails as not being associated with the business of the University/public employment by arguing that the subject of those emails do not fall within the "service" category. Anticipating an argument by the Respondent and the Intervenor that emails associated with peer reviews, journal editing and the Intergovernmental Panel on Climate Change (IPCC) Third Assessment Report are not public business, we offer the Provost's criteria for service:

> Service:
> Service to the University is an obligation of every regular faculty member. Service to one's professional discipline and, in a number of disciplines, to the broader public is important and sometimes essential in terms of job definition.

Id. Service to one's professional discipline takes multiple forms. This memorandum's next subsection identifies the activities Dr. Mann offered to his management as reflecting or constituting his service requirement, which include: contributing to the professional publication process, cooperative technical, intellectual, and public relations activities within the profession; participation in professional associations; and, emotional support to professional colleagues suffering from personal and professional crises. Petitioners request this Court accept and respect these representations by Intervenor Mann to the University as true.

2. Michael Mann's Curriculum Vitae identifies his public business

As a member of the University's faculty, UVA gave Michael Mann the opportunity to post on the University's official website information about himself and his public business as a

professor. Like most faculty, he posted a Curriculum Vitae (CV) listing his "research interests" and his "professional activities." Dr. Mann identified seven research interests, each reflecting his public business. *See* Pet. Ex. No. 4 (Curriculum Vitae of Michael E. Mann, December 30, 2002) at http://web.archive.org/web/20030803190102/http://www.people.virginia.edu/~mem6u/cv.doc (accessed June 16, 2012). Mirroring his curriculum vitae, on his 2002 webpage, he lists the following four research interests:

> R1 - Climatology paleoclimatology,
> R2 - Statistical climatology,
> R3 - Climate change detection,
> R4 - Climate modeling."

See,

http://web.archive.org/web/20000903052443/http://www.evsc.virginia.edu/faculty/people/mann.shtml (accessed June 16, 2012) (To distinguish these four in Pet. Ex. No. 1, we added "R" numbers to his list). In Pet. Ex. No. 1, Petitioners associate the exemplar emails to Mann's public business as reflected in these research interests and using these "R" numbers to index the relationship. This shorter list fully encompasses the seven item list from Mann's CV.

The 2002 Mann CV also lists a large number of "professional activities" that reflect his full-time professional employment with UVA and constitute his public business under the service requirement of his employment. Petitioners categorize these to document the relationship between these public business activities and the withheld emails, using "P" numbers to index the relationship. These are:

> P1 - Professional meeting organizer or convener.
> P2 - Member of a profession, professional association or work group
> P3 - Professional journal editor, reviewer or referee
> P4 - Author of an IPCC Assessment Report chapter
> P5 - News Media contact

See Pet. Ex. No. 4.

3. The 2002 Mann Faculty Accomplishments

To the degree the categories of research and public service miss some of Mann's professional activities, and with even stronger evidence available illustrating the relationship of the withheld emails to Mann's public business, Petitioners have identified 39 emails the University produced to Petitioners on August 22, 2011, in response to the VFOIA request at issue in this case that document Dr. Mann's public business. In passing we note that the fact of their release under VFOIA affirms that the University agrees that such emails are public records.

In the August 22, 2011, email release, the University identified each released email with a unique identifying number. These are serial numbers beginning with 00002 and ending with 01367. The 39 released emails consist of multiple copies of identical documents. In total, these 39 consist of only four unique emails documenting Michael Mann's actual performance and the email time stamped **24-06-2002_17:56:18** (serial number 00040, Pet. Ex. No. 5) contains all relevant content found in the entire set of 39. The following table identifies these 39 emails. Petitioners present email 00040 to the Court for purposes of analyzing the withheld emails.

Time Stamp	Email serial numbers
24-06-2002_17:56:18 24-06-2002_17:46:55	00040, 00041, 00449, 00450, 00724, 00725, 01335, 01336, 00044, 00453, 00728, 01339
24-06-2002_17:47:16	00042, 00043, 00451, 00452, 00726, 00727, 01337, 01338
24-06-2002_17:36:56 24-06-2002_17:21:57	00045, 00046, 00454, 00455, 00729, 00730, 01055, 01340, 01341, 00047, 00048, 00456, 00457, 00786, 00787, 01342, 01343
24-06-2002_16:21:47	01344, 01345

This is an opportune moment to note a critical fact: **Respondents' Exemplar No. 4, a withheld email time stamped "24 Jun 2002 13:56:18 -0400" is identical to the twelve emails time stamped 24-06-2002_17:56:18 and 24-06-2002_17:46:55 and represented by email 00040 (Pet. Ex. No. 5). The fact that the University made emails identical to RE-4 public on**

August 22, 2011, eliminates any need or argument to protect the content of RE-4 under the Court's protective order.

See, 1982-1983 Op. Atty Gen. Va. 724; 1983 Va. AG LEXIS 84 (February 15, 1983). (Under the VFOIA, where a public body disseminates any records they hold, "those records lose the exemption accorded by [VFOIA]"). Further, it reflects the University's inconsistent treatment of records at issue in this matter, and lack of coherent standards in its decision to withhold all unreleased responsive records, wholesale.

Petitioners have marked the following categories of items from these released emails as "accomplishments" and are given "A" numbers to facilitate showing the relationship between these public business activities and the withheld emails. This is not a complete list of Mann's accomplishments as he represented others as research and professional activities.

A1 - Academic Publications
A2 - National/International Service Activities:
A3 - Honors and Awards:
A4 - Grants

4. Governmental Correspondents

One other immediate indication that an email is public business, similar in nature to the use of a letterhead, is the identity of the email correspondents. U.S. federal employees may not use or permit the use of their government position or title, or any authority associated with their public office in a manner that could reasonably be construed to imply that their agency or the government sanctions or endorses their personal activities (5 CFR § 2635.702 (b)). Thus, any email received from a ".gov" address would normally be considered official federal correspondence and thus public business with the recipient, in this case Michael Mann. . In fact, under the federal FOIA process, Petitioners have obtained many of the allegedly "stolen",

"private" emails found in the infamous "ClimateGate" scandal involving, inter alia, Intervenor Mann, an act which excludes from its coverage purely personal information.

To overcome this presumption of official status, the University must demonstrate how the email is not related to Mann's public business. This is a universal principle in open government law and Petitioners are unable to find a nation without a similar policy. Because the burden falls to the University to explain how an email is not a record, unless it can show such a policy exists, any email from a governmental organization, including governmental universities both within and outside the United States, would reflect a business communication to Michael Mann. The same applies to any email sent by Mann to a governmental email address. For purposes of Exhibit 1, any such email is identified as a "G" email.

E. Evidence that Emails are Records

Exhibit I catalogs the content in the withheld email exemplars related to the indicia of public business identified above. Because some entries in Exhibit I contain confidential information sealed under the protective order, and because we don't wish to have any of this pleading sealed, we make reference to Exhibit I rather than quote the emails herein.

1. Official Government Correspondences are Records

The Virginia Public Records act defines the term public records with specific reference communications among government officials and others. Specifically, Va. Code § 42.1-77 states; "'Public record' or 'record' means recorded information that documents a transaction or activity by or with any public officer, agency or employee of an agency." (*emphasis added*). Each email sent by Michael Mann that uses the University letterhead and not marked as a personal, private communication, is plainly a public record under not only this statutory definition but also under the "letterhead rule" crafted by the University and adopted by the court

in the matter of *Bowers v. The Rector and Visitors of the University of Virginia*, 276 Fed. Appx. 278; 2008 U.S. App. LEXIS 9558 (4th Cir. 2008), as discussed above. Michael Mann "sent" 16 of the 31 exemplars. Four (4) of the remaining 15 exemplars he received include a chain of emails at least one of which Dr. Mann sent. Each of these 20, "sent" emails contains the University letterhead. Of the remaining 11 emails received by Michael Mann, nine (9) use letterheads from non-Virginia governmental organizations. Petitioners argue that every email with a federal, state or other FOI-covered entity's letterhead reflects governmental, or otherwise official, covered correspondence and thus is recorded information that documents a transaction or activity with Michael Mann, an employee of the Commonwealth of Virginia subject to the VFOIA. We argue that this applies regardless whether the letterhead is for UVA or reflects some other state university (of any nation) or a federal or state agency (of any nation). Petitioners assert the "letterhead" rule also extends to any the author of which represents himself as a government employee, typically by government title after their name.

2. Correspondence involving Research is a Public Record

As discussed above, any recorded information that documents a transaction or activity associated with a government employee is a public record. Michael Mann's duties as a government employee expressly required him to conduct research and address that of his peers. Of the 31 emails, only two do not cite to, reference or discuss research. Petitioners' exemplar (PE-9) is a review of a manuscript submitted for publication. It addresses research of the kind done by Dr. Mann, but not his own work. It falls within the "service" category we discuss next. Respondents' exemplar (RE-12) contains no outright discussion of research, but falls within the first category of email records, those from or to a government agency, in this case a federal

agency whose records also are subject to release under the federal FOI Act or state laws, or laws of other nations when corresponding with covered employees.

3. Correspondence involving Service is a Public Record

Like research, Michael Mann's governmental duties include a variety of service activities. Emails associated with that service are public records documenting a transaction or activity associated with a government employee. Of the 31 exemplars, 22 relate to one of the five kinds of service Michael Mann stated in his curriculum vita were his professional activities, the kind of services required of a professor. In addition, of the 31 exemplars, 13 relate to "National/International Service Activities" Dr. Mann lists as his accomplishments in Exemplar RE-4.

Peer review and journal editing are clear examples of "service to one's professional discipline." Emails discussing such service are work-related and therefore public records barring some express exemption applying. Four of the exemplars, PE-3, PE-12, RE-1 and RE-4 reflect this form of service. Notably, the University has already recognized emails associated with Michael Mann's authorship responsibilities are public records and disseminated them to the public through their August 22, 2011 release. Petitioners Exhibit No. 6, email 00163, is an example of peer review and journal editing by Michael Mann documented in email correspondence which the University has already made public – an email between Mann and other journal editors with regard to a manuscript prepared by Biondi. He names the other peer reviewers and indicates that the manuscript poses concerns.

Michael Mann's work on the IPCC report is another clear example of service "to the broader public." Notably, the IPCC does not pay its authors for their work.[6] Rather Dr. Mann's

[6] IPCC "How does the IPCC work?" at http://www.ipcc.ch/organization/organization_structure.shtml (accessed June 16, 2012).

contributions to the IPCC report reflect quintessential service to the broader public and many of the emails represent correspondence associated with that service. The IPCC cites his and other participants' professional positions as their affiliation relevant to service with IPCC. Exemplars PE-1 thru PE-5 and PE-15 thru PE-17 reflect this service and are thus public records

The University has also already recognized emails associated with Michael Mann's authorship responsibilities for Chapter 2 of the Third IPCC report as public records, having disseminated them to the Petitioners in the August 22, 2011, release. Petitioners Exhibit No. 7, email 00678, is an example of correspondence the University has made public – an email between Mann and other chapter authors, specifically where Michael Mann is characterized as an IPCC author and where he uses UVA letterhead.

F. Summary – All exemplars record "public business"

With the exception of the anomalous exemplar RE-12 (from a federal FOIA-covered email account ambiguously discussing travel plans that presumably are work- or service-related), the remaining exemplars each contain multiple indicia of being public records. Because the University had the opportunity to identify any exemplar it wished to represent the 12,000 emails it has withheld, and because every email exemplar contains at least one indicator of being a public record, the Petitioners ask the Court to declare them all public records subject to FOIA.

IV. NO EMAILS QUALIFY UNDER EXCLUSION FOUR (PROPRIETARY)

A. VFOIA Exclusion of proprietary data, records or information

The University has argued that it has withheld some of the emails because they include proprietary information. The statutory exclusion is:

> 4. *Data, records or information* of a *proprietary* nature *produced or collected* by or for faculty or staff of public institutions of higher education, other than the institutions' financial or administrative records, *in the conduct of or as a result of study or research* on medical, scientific, technical or scholarly issues, whether

> sponsored by the institution alone or in conjunction with a governmental body or a private concern, *where such data, records or information has not been publicly released, published, copyrighted or patented*.

VA Code §2.2-3705.4(4)(*emphasis added*) (*hereinafter* "Exemption 4"). This exclusion establishes a three prong test. Only those emails meeting all three prongs may be excluded.

First, the email must contain data, records or information produced or collected by or for faculty or staff in the conduct of or as a result of study or research on medical, scientific, technical or scholarly issues. Second, this exclusion does not reach "financial or administrative records or data, records or information that have been publicly released, published, copyrighted or patented. Third, any unpublished data, research records or information produced or collected by or for the faculty or staff must be of a "proprietary" nature. Pet. Ex. No. 1, Sections III and IV, offer the evidence associated with these prongs. Not a single exemplar email meets all three conditions. That is, the University has presented no indication that any such records are among those being withheld. As such, this exemption is not apparently relevant to the instant matter.

B. Prong 1 - The nature of excluded data, records or information

The Virginia Freedom of Information Act founds its Exemption 4 on the presumption that the public records contain "Data, records or information" and were "produced or collected . . . in the conduct of or as a result of study or research on medical, scientific, technical or scholarly issues." Textually, the word "records" in this exemption must be distinguished from the defined term "public records" in that it reflects experimental research records of the kind typically recorded in a research log. All but two of the 31 exemplars reference research in some manner, and of these 25 actually contain data, records or information produced or collected in the conduct of study or research. This group of 25 immediately narrows the exemplars subject to the remaining two prongs of Exemption 4.

C. Prong 2 – Research exemplars exempted from Exemption 4

Any record reflecting or containing data, any research record or information possibly covered by Exemption 4 loses its exempt status if it has been publicly released, published, copyrighted or patented. Twenty-five (25) exemplars contain such Exemption 4 data or information. In every case, the data or information was subsequently released through publication. Pet. Ex. No. 1 identifies these 25 exemplars and offers citations to the publications in which the information is publically released, or otherwise references the IPCC Third Assessment Report for which Michael Mann was one of the authors.

D. Prong 3 – Analysis for proprietary information is unnecessary

The University did not provide the Court any exemplars subject to the proprietary exemptions, leaving the Court nothing on which to rule or even to base a rule. Because six exemplars contain no data, research record or information produced or collected in the conduct of or as a result of study or research on medical, scientific, technical or scholarly issues, and because the remaining 25 exemplars only contain information that has subsequently been published, the Court need not reach the question as to the meaning of the word proprietary. We ask the Court to once again recall that the University had every opportunity to offer an exemplar that contained Exemption 4 material that had not subsequently been publicly released, published, copyrighted or patented and they have failed to do so. The only conclusion the Court can draw from that fact is that there simply are no such exemptible emails within the collection of withheld documents. On its face the University's submission makes Exemption 4 irrelevant to the instant matter.

Because, however, the Court wishes a full record and because the University may otherwise argue there is some proprietary information in the exemplars, Petitioners offer the following discussion as to what constitutes a proprietary record.

E. Definition of Proprietary

Although used repeatedly in the VFOIA, neither the statute nor the legislature provides a definition for the word "proprietary," much less when used as an adjective. According to statutory construction rules, in the absence of a statutory definition, a statutory term is considered to have its ordinary meaning, given the context in which it is used. *Commonwealth Department of Taxation v. Orange-Madison Coop. Farm Service*, 200 Va. 655 (1980).[7] To provide a working definition, we first examine authoritative dictionaries and then the context of Virginia code that uses the word, followed by other federal and state case law. We then offer an objective definition we believe the court could use effectively in this matter, despite no need to do so.

1. The ordinary meaning of the adjective "proprietary"

American English evolves continuously and there is no dictionary that defines words authoritatively. Modern English dictionaries, for the most part, are descriptive, although most do offer some degree of usage advice and notes. The Oxford English Dictionary (OED) is widely revered as the canonical collection of English words, providing deep historical context for each word. In contrast, Merriam-Webster tends to be highly descriptive, providing many usages criticized by others. We offer these two sources as reflecting the breadth of the etymology and the ordinary meaning of the adjective "proprieteary."

The OED defines the adjective "proprietary" as follows: "owned or held as property; held in private ownership." It continues: "In modern usage it is applied especially to medicines or

[7] *And see*, 1991 Op. Atty. Gen. Va. 140, 1988 Op. Atty. Gen. 413, 1986-1987 Op. Atty. Gen. Va. 174; *see generally*, Norman J. Singer, Statutes and Statutory Construction, 6th ed., § 46.01.

other preparations of which the manufacture or sale is, by patent or otherwise, restricted to a particular person or persons." The OED offers the following examples:

> 1900-They are now charging a shilling a pound more for certain well-known proprietary tobacco; 1930-The Economic Council was unable to agree as to whether the undertaking by retailers selling proprietary articles to charge the price fixed by the manufacturers should be prohibited; 1974-By the mid-18th century, more than 200 so-called 'proprietary medicines' were being sold in Britain and in the American colonies.

The Oxford English Dictionary, Vol. XII (2nd ed. 1989) .

Like the OED, Merriam-Webster (M-W) focuses on the ownership right:

> 1: of, relating to, or characteristic of an owner or title holder <proprietary rights>
> 2: used, made, or marketed by one having the exclusive legal right <a proprietary process> <proprietary software>
> 3: privately owned and managed and run as a profit-making organization <a proprietary clinic>

Merriam-Webster Dictionary at http://www.merriam-webster.com/dictionary/proprietary (accessed Jun 12, 2012). M-W offers these examples.

> The computer comes with the manufacturer's proprietary software.
>
> The journalist tried to get access to proprietary information.
>
> By allowing less favorable results to remain buried, the agency puts proprietary interests ahead of the public interest, and doctors and the public come to believe prescription drugs are better than they are. That should stop. —Marcia Angell, New York Review of Books, 8 June 2006.

Id.

2. Context used under VFOIA

Although VFOIA does not define "proprietary," its use of the term provides distinctions with regard to what a proprietary record is not. Section 2.2-3705.6 identifies exclusions to the act where they are proprietary records and trade secrets. The Act distinguishes proprietary information from that which is commercial or financial, from balance sheets, from trade secrets and from revenue and cost projections. Va. Code. §2.2-3705.6(9). The Act also reflects

legislative consideration of proprietary interests it sought to protect, exempting "confidential proprietary records" of a franchise "where, if such records were made public, the competitive advantage or financial interests of the franchisee would be adversely affected." Va. Code. §2.2-3705.6(13), *and see*, *University of Pennsylvania. v. EEOC*, 493 U.S. 182, 189 (U.S. 1990), discussed *infra*. Virginia Code also exempts:

> proprietary business or research-related information produced or collected by the applicant in the conduct of or as a result of study or research on medical, rehabilitative, scientific, technical, technological, or scholarly issues, when such information has not been publicly released, published, copyrighted, or patented, *if the disclosure of such information would be harmful to the competitive position of the applicant.*

Va. Code. §2.2-3705.6(17) (*emphasis added*). *See also*, Va. Code. §2.2-3705.6(18), (23). In each of these examples of legislative intent of the proprietary interests it decided, in its considered and clearly deliberate judgment, would be exempted from release under VFOIA, the consideration they set forth is as to whether there is a ***commercial competitive interest*** at stake.

3. No Virginia judicial precedent

Neither the Virginia Supreme Court nor the Appellate courts have specifically identified records they found proprietary. Virginia case law offers three instants of a Circuit Court identifying such records. None, however, involve the VFOIA. In *Blevin*, the court resolved a discovery dispute:

> (e) The following items will be privileged as a class as can be ascertained from the indices: any document or correspondence from any member of the defendant OCF pertaining to proposed patented or patentable products, including conversation concerning the content of those products, is privileged as proprietary information.
>
> (f) Any document from any member of the marketing staff to any other member of the marketing staff concerning competitive position and competitors (sic) position relative to their own with respect to any product concerning testing, marketing, advertising, etc., and developing strategy for competition is privileged as proprietary information.

Belvin v. H. K. Porter Co., 17 Va. Cir. 303, 305 (Va. Cir. Ct. 1989). The other two cases involved employee non-competition agreements. *See, Global One Communs., L.L.C. v. Ansaldi*, 2000 Va. Cir. LEXIS 181 (Va. Cir. Ct. May 5, 2000); *and, Int'l Paper Co. v. Gilliam*, 63 Va. Cir. 485, 486 (Va. Cir. Ct. 2003).

Other states' case law addressing proprietary information under their freedom of information acts also focuses on the potential harm to commercial competitive advantages. In *Pharmacy Associates*, the Arkansas courts held:

> The appellee Pharmacy Associates, Inc. sought disclosure of Medco's successful bid proposal from DF&A. When DF&A delivered the documents with certain proprietary information deleted, Pharmacy Associates filed suit under the FOIA to obtain disclosure of the deleted material. The trial court found that this information fell within the competitive-advantage exception as to Medco, but that the exception did not apply when the documents were "owned" by the State or when the State did not have a "proprietary interest" in the information.

Arkansas Dep't of Fin. & Admin. v. Pharmacy Assocs., 333 Ark. 451, 454-455 (Ark. 1998). Only five other state's courts have addressed this FOIA issue and they do so in the same manner, concentrating on the commercial competitive interest.[8] Federal law follows the same path as the various states, linking proprietary information to potential commercial competitive harm.[9] To that end, *Washington Research Project* is particularly instructive and we provide the central

[8] *See, Bluestar Energy Servs. v. Ill. Commerce Comm'n*, 374 Ill. App. 3d 990, 995 (Ill. App. Ct. 2007) (Exemption prevents competitive harm expected from release of the information.); *Detroit News v. Policemen & Firemen Ret. Sys.*, 252 Mich. App. 59, 72-73 (Mich. Ct. App. 2002) ("The relevant statute at issue in this case, MCL 38.1140, provides: "proprietary information" means information that has not been publicly disseminated or that is unavailable from other sources, the release of which might cause . . . significant competitive harm."); *Lagerkvist v. New Jersey Dep't of Envtl. Prot.*, 2011 N.J. Super. Unpub. LEXIS 1912 (Law. Div. Unpub. 2011) ("Release of the proprietary information could cause substantial injury to the competitive position of the enterprise."); *City of Newark v. Law Dep't of N.Y.*, 305 A.D.2d 28, 34 (N.Y. App. Div. 2003) ("exempt from disclosure . . . to the extent such documents contain trade secrets of D&T or other proprietary information whose disclosure would cause substantial injury to D&T's competitive position."); *Matter of Physicians Comm. for Responsible Medicine v. Hogan*, 29 Misc. 3d 1220A (N.Y. Misc. 2010) ("the Court concludes that neither the agency nor the Company have submitted any competent proof to establish that disclosure of the requested records would cause competitive harm to the Company.").

[9] *See, e.g., Wickwire Gavin, P.C. v. United States Postal Serv.*, 356 F.3d 588, 597 (4th Cir. Va. 2004) ("release of the data would provide USPS's competitors with 'valuable proprietary information.'"); *and, Watkins v. United States Bureau of Customs*, 643 F.3d 1189, 1195 (9th Cir. Wash. 2011) ("'trade secrets' exemption to FOIA. Competitive harm analysis 'is . . . limited to harm flowing from the affirmative use of proprietary information by competitors.'").

finding of the D.C. Circuit here:

> The essence of the argument that the research designs submitted in the expectation of confidentiality are trade secrets or commercial information is that "ideas are a researcher's 'stock-in-trade.'" Their misappropriation, which, it is claimed, would be facilitated by premature disclosure, deprives him of the career advancement and attendant material rewards in which the academic and scientific market deals, in much the same way that misappropriation of trade information in the commercial world deprives one of a competitive advantage. Indeed, the government has been at some pains to argue that biomedical researchers are really a mean-spirited lot who pursue self-interest as ruthlessly as the Barbary pirates did in their own chosen field. Whether this is the sad truth, or whether, as appellee suggests, "secrecy is antithetical to the philosophical values of science," is not, however, an issue in this case; **the reach of the exemption for "trade secrets or commercial or financial information" is not necessarily coextensive with the existence of competition in any form.**
>
> It is clear enough that a **non-commercial scientist's research design is not** literally a trade secret or item of commercial information, for **it defies common sense to pretend that the scientist is engaged in trade or commerce**. This is not to say that the scientist may not have a preference for or an interest in nondisclosure of his research design, but only that it is not a trade or commercial interest. To the extent that his interest is founded on professional recognition and reward, it is surely more the interest of an employee than of an enterprise, and we are far from persuaded that Congress intended in Exemption 4 to apply terms drawn from the business context to the employment market. **We cannot, consistently with the Act's recognized mandate to construe exemptions narrowly**, see Vaughn v. Rosen, 157 U.S. App. D.C. 340, 484 F.2d 820, 823 (1973), cert. denied, 415 U.S. 977, 94 S. Ct. 1564, 39 L. Ed. 2d 873, 42 U.S.L.W. 3523 (1974); Getman v. NLRB, 146 U.S. App. D.C. 209, 450 F.2d 670, 672 (D.C. Cir.), stay denied, 404 U.S. 1204, 92 S. Ct. 7, 30 L. Ed. 2d 8 (1971), **extend them by analogies that lead so far away from the plain meaning of Exemption 4**. Consequently, we hold that research designs submitted in grant applications are not exempt from disclosure under the Act. This holding extends to all types of applications -- initial, continuation, supplemental, and renewal -- and to progress reports made by grantees as part of the last three kinds of applications.

Washington Research Project, Inc. v. Department of Health, Education & Welfare, 504 F.2d 238, 244-245 (D.C. Cir. 1974) (*emphasis added*).

Should the court determine there are any exemplars actually subject to the third prong of Exemption 4, we ask the court to interpret the phrase “data, records or information of a proprietary nature” to mean data, records or information in the custody of Virginia that, if released, would be harmful to the ***commercial competitive*** position of the owner(s) of the

information, which in this case would include the University and its faculty who serve in the interests of the actual owners – the citizens of Virginia.

V. NO RECORD QUALIFIES UNDER EXEMPTION ONE (PERSONNEL)

Although the University has not previously argued that some of the withheld emails contain personnel information subject to Exemption 1 of the VFOIA, we anticipate that possibility here. Under VFOIA, "*Personnel records* containing information concerning identifiable individuals" may be exempted from disclosure. Va. Code § 2.2-3705.1 (*emphasis added*).

Inspection of the exemplars identifies only one email that might be considered associated with personnel information, RE-4. However, because the University released that email 39 times already, it has waived any exemption it might claim on that document. Nevertheless, to ensure a complete record, Petitioners offer this brief statement regarding Exemption One.

Arguably, all information gathered about an employee's employment in a permanent form constitutes a personnel record. *See*, *McChrystal v. Fairfax County Bd. of Supervisors*, 67 Va. Cir. 171, 182 (Fairfax 2005). Other courts have narrowed this exemption considerably. *See*, *Virginian-Pilot Media Cos., L.L.C. v. City of Norfolk Sch. Bd.*, 81 Va. Cir. 450, 458 (Va. Cir. Ct. 2010) ("this Court considers "personnel records" as records of or pertaining to a specific, identifiable NPS employee and touching directly upon that individual's performance, discipline, attendance, income, social security number, tax-related matters, personal background, circumstances and education, and other information bearing upon the individual's employment relationship with NPS and for which either the employee or NPS may have a reasonable expectation of confidentiality.")

Even had RE-4 not been previously disseminated, it would still not rise to the level of a

protected personnel record because the entire purpose of the email is to provide information the University intended to release to the public. Indeed, all of the information in RE-4 appears on Michael Mann's current curriculum vitae.

Intervenor Mann may also seek to claim RE-14 as subject to exemption one. That email, however, is not a personnel record. It is an email to someone other than the University, or indeed any university. Although marked "Confidential", it was sent over the letterhead of the University and contains all the indicia of a public record. While it contains information Michael Mann may not have wanted to have become public at that time, today it is mere history of a path not taken.

VI. VFOIA MAY RESTRAIN ACADEMIC FREEDOM

The University is concerned that release of the emails we seek under FOIA will unlawfully chill future faculty email communications. The university includes such communication under the umbrella of "academic freedom." They argue that academic freedom is an aspect of free speech protected by the First Amendment. Thus, they consider any chilling effect of FOIA on an academic, if employed at a FOI-covered university, as an abrogation of a constitutional right. On this basis they argue they cannot release the emails without violating Michael Mann's constitutional right to free speech.

On its face, the idea that the First Amendment offers a professor a right to keep secret his free speech seems an oxymoron and, as we demonstrate below, it is. To get to this outcome the University must offer compelling evidence on four questions of fact and/or law: (1) they must show that the emails are the kind of speech protected by the First Amendment; (2) they must show the University email system is some kind of public forum within which the First Amendment protects speech; (3) they must show that academic freedom is protected under the

First Amendment; and (4) they must show that release of 10 year-old emails under the VFOIA, sent and received by a variety of persons including federal government employees, would credibly, unlawfully chill Michael Mann's use of emails for research. The facts and law offer the University no foothold for these arguments.

A. Public employees' business communications do not receive protection under the First Amendment.

As discussed above, at the time Michael Mann wrote and received the emails at issue in this case he served as a public employee. The question is whether the chilling effect of VFOIA on Mann's business email speech violates his First Amendment rights. This question is well settled at law. The court must balance "the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees" in order to determine the protection offered by the First Amendment to the public employee. *Urofsky v. Gilmore*, 216 F.3d 401,406 (4th Cir. 2000) (*quoting Connick v. Myers*, 461 U.S. 138,142 (1983)).

This balancing requirement produces a threshold inquiry (the *Pickering* rule) as to whether the speech by the state employee was made in their capacity as a citizen upon matters of public concern, or made primarily in the role of an employee. *Urofsky* 216 F.3d at 406 (*citing to Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968). On this count the University's own argument and that of its public defenders, that the communications reflect academic, scientific discourse, is self-defeating. If a public employee's speech is not made in his capacity as a private citizen or does not touch upon a matter of public concern, but instead is made as an employee conducting government business, the state, as employer, may regulate it without infringing any First Amendment protection. *Id*. (*citing to Connick*, 461 U.S. at 146). *And see, United States v. National Treasury Employees Union*, 513 U.S. 454, 465 (1995) (speech on an issue unrelated to

the speaker's employment duties is protected speech, but where the speech is by an employee in his capacity as an employee on an issue involving their duties, the speech does not meet the *Pickering* threshold test.); *and, Holland v. Rimmer*, 25 F.3d 1251, 1254-55 & n.11 (4th Cir. 1994).

The Fourth Circuit, following the principle established by the Supreme Court, explains that with regard to public employee speech, "the government is entitled to control the content of the speech because it has, in a meaningful sense, 'purchased' the speech at issue through a grant of funding or payment of a salary." [10]

As discussed in depth above, with the exception of the anomalous and non-relevant exemplar RE-12, all the exemplars address the business of the University, each representing fulfillment or pursuit of the duties of professor Michael Mann. Because the University had the opportunity to identify any exemplar it wished to represent the 12,000 emails it has withheld, and because every email responsive to Petitioners' VFOIA request contains multiple indications of involving Michael Mann's professorial duties, to the degree there is any chilling effect from VFOIA-based release of the emails, that chilling effect does not infringe his or the University's First Amendment protection.

[10] *See, Urofsky* 216 F.3d at 406, n. 6: "In this respect, restrictions on speech by public employees in their capacity as employees are analogous to restrictions on government funded speech. For example, in *Rust v. Sullivan, 500 U.S. 173, 114 L. Ed. 2d 233, 111 S. Ct. 1759 (1991)*, the Court rejected an argument that regulations prohibiting abortion counseling in a federally funded project violated the *First Amendment* rights of the staff of clinics accepting federal funds, reasoning that "**the employees' freedom of expression is limited during the time that they actually work for the project; but this limitation is a consequence of their decision to accept employment in a project, the scope of which is permissibly restricted by the funding authority**." *Rust, 500 U.S. at 199*. In both situations--public employee speech and government-funded speech-the government is entitled to control the content of the speech because it has, in a meaningful sense, "purchased" the speech at issue through a grant of funding or payment of a salary. The limits of government control are similar in both types of cases, as well: Just as the government as provider of funds cannot dictate the content of speech made outside the confines of the funded program, *see id. at 198*, the government as employer is restricted in its ability to regulate the speech of its employees when they speak not as public employees, but as private citizens on matters of public concern."

B. Freedom of Speech is only protected in a public forum and email is not a public forum

The traditional starting point for free speech litigation is a forum analysis. Free speech is only protected in a public forum. *Lehman v. Shaker Heights*, 418 U.S. 298, 302-303 (U.S. 1974) ("the nature of the forum and the conflicting interests involved have remained important in determining the degree of protection afforded") (*citations omitted*). In *Lehaman*, Justice Blackmun may have been describing the instant case when he famously exclaimed, "No First Amendment forum is here to be found." *Id. at 304*. Absent that forum, there is no right to free speech and the entirety of the University's First Amendment academic freedom argument fails.

The internet has created a new set of potential public forums. As Justice Kennedy observed, "[m]inds are not changed in streets and parks as they once were"; instead, "the more significant interchanges of ideas and shaping of public consciousness occur in mass and electronic media," especially online media. *Denver Area Education Telecommunications Consortium v. FCC*, 518 U.S. 727, 802–03 (1996). Scholarly analysis of First Amendment protections in use of internet systems explain that chat rooms, comment boards, list servers and other mechanisms intended to promote public discourse can be considered a limited public forum.[11] This list does not include email.

Email is not a public forum because it is not provided "for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects." *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985). Only one federal or state case has directly addressed whether email systems constitute public forums. In *Page*, the Fourth Circuit examined a school's website and its email system under the now familiar four-part government speech test established in *Sons of Confederate Veterans*, and the similar two-prong

[11] Ardia, D. "*Government Speech and Online Forums: First Amendment Limitations on Moderating Public Discourse on Government Websites*:, Brigham Young University Law Review p. 112 (2011).

test of *Johanns*. *See*, *Page v. Lexington County School District One*, 531 F.3d 275, 281 (4th Cir. 2008)[12] The determinative issues in these tests, as they relate to email, is as to whether "private viewers could express opinions or post information" or, more specifically, whether the public "had access to the email facility" to also participate expressively. *Page* 531 F.3d at 285. They did not and as a result the school did not create a limited public forum.

Because we are arguing that VFOIA allows us the opportunity to view the emails, we want to be clear that such access to records does not turn the UVA email system into a public forum, as a forum must be open to a participatory opportunity, not merely to view.

The *Page* holding is strictly in line with long-standing public forum law. *International Soc'y for Krishna Consciousness, Inc. v. Lee,* 505 U.S. 672, 678 (1992) (Designated public fora are places that the government "has opened for expressive activity by part or all of the public."); *United States v. Kokinda*, 497 U.S. 720, 730 (U.S. 1990) ("the government does not create a public forum by . . . permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." *citing to Cornelius*, 473 U.S. at 802); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 47 (1983) ("Selective access does not transform government property into a public forum.")

Because the University of Virginia does not allow the public to use its email system "for expressive activity by part or all of the public", that email system is not a public forum and thus

[12]*Page v. Lexington County School District One,* 531 F.3d 275, 281 (2008) "Whether speech is government speech depends on the government's ownership and control of the message, and the government's ownership and control of the message may be determined from consideration of various factors. We have identified factors such as (1) the purpose of the program in which the speech occurs; (2) the "editorial control exercised by the **[**13]** government" over the message; (3) the identity of the person actually delivering the message; and (4) the person "bear[ing] the ultimate responsibility for the content of the speech." *Planned Parenthood of S. C., Inc. v. Rose, 361 F.3d 786, 792-93 (4th Cir. 2004)* (quoting *Confederate Veterans, Inc. v. Comm'r of Va. Dep't of Motor Vehicles*, 288 F.3d 610, 618 (4th Cir. 2002)). After we identified these nonexclusive factors, the Supreme Court issued its decision in *Johanns*, which distilled them, particularly in cases involving the government's use of third-party messages, focusing on (1) the government's *establishment* of the message, and (2) its *effective control* over the content and dissemination of the message. *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550,560-62 (2005)."

the speech on it, and especially the speech associated with the duties of a professor, are not accorded the protections of the First Amendment. The VFOIA and release of the emails sought in this case might or might not chill the email speech of the faculty, but they have no First Amendment protections from that chilling effect. The government has a right to limit use of the email system in any manner necessary to ensure the proper working of the government. *Greer v. Spock*, 424 U.S. 828, 836 (1976) (quoting *Adderley v. Florida*, 385 U.S. 39, 47 (1966) ("The government, no less than a private property owner, '"has [the] power to preserve the property under its control for the use to which it is lawfully dedicated."').

C. The First Amendment does not protect academic freedom in a manner greater than protections available to any citizen

The University argues that the First Amendment offers their faculty protections greater than that available to the public at large, making their arguments under the banner of academic freedom. Petitioners agree with Georgetown University Law School professor J. Peter Byrne that "Lacking definition or guiding principle, the doctrine [of academic freedom] floats in the law, picking up decisions as a hull does barnacles." J. Peter Byrne, "Academic Freedom: A 'Special Concern of the First Amendment'", 99 Yale L.J. 251, 253 (1989).

The Fourth Circuit examined academic freedom and its relationship to the First Amendment in depth (6 pages of F.3d text), tracing the history of academic freedom and inspecting each of the legal barnacles picked up along the way. *See, Urofsky* 216 F.3d at 409-415, concluding: "Appellees' insistence that the Act violates their rights of academic freedom amounts to a claim that the academic freedom of professors is not only a professional norm, but also a constitutional right. We disagree." *Id*. at 412.

Because the University, and others, routinely cite to *Sweezy v. New Hampshire*, 354 U.S. 234 (1957), for the proposition that the First Amendment protects academic freedom, we point the Court to the *Urofsky* discussion of this case and offer the Court's conclusion:

> In light of this review of the actual holding and rationale in *Sweezy*, it is difficult to understand how that case can be viewed as clearly "adopting" any academic freedom right, much less a right of the type claimed by Appellees. At best, it can be said that six justices agreed that the First Amendment protects **values** of academic freedom. However, the justices were plainly of very different minds as to the nature of this "right." And, even if *Sweezy* could be read as creating an individual First Amendment right of academic freedom, such a holding would not advance Appellees' claim of a First Amendment right pertaining to their work as scholars and teachers because *Sweezy* involved only the right of an individual to speak in his capacity as a private citizen. See id. at 249 (explaining that "the sole basis for the inquiry was to scrutinize [Sweezy] as a person," not as a teacher).

Urofsky 216 F.3d at 413 (*emphasis added*).

In *Making Your Case: The Art of Persuading Judges*, Justice Scalia and Bryan Garner argue that block quotes within a filing often get less attention than they deserve. Thus, it is with heightened sensitivity that we urge the indulgence of the court to carefully read pages 409 to 415 of *Urofsky*, a thorough "nutshell" on this matter. In so doing, we do not include them here as a massive block quote, but instead include them by reference here.

For the moment, however, we offer the final conclusion from that opinion: "Significantly, the [Supreme] Court has never recognized that professors possess a First Amendment right of academic freedom to determine for themselves the content of their courses and scholarship, despite opportunities to do so." *Id*. at 414.

Careful review of applicable precedent reveals that, despite rhetorical license taken and often strenuously emotional appeals offered by many, as a matter of jurisprudence there simply is no right of professors to academic freedom recognized in the First Amendment, though not for lack of litigants asking many courts and the U.S. Supreme Court to discover one.

D. Release of Mann emails has not chilled his email communications

The University argues that release of emails will chill the use of email for communications amongst professionals. Whatever the possible merits of this as a relevant legal argument in interpreting VFOIA, however, the University offers no evidence of this chilling effect. Petitioners suggest that there is none and offer the following evidence to that effect.

In November 2009, an apparent whistleblower at the University of East Anglia (UEA), England, publically leaked a large number of emails that had been collected in response to Freedom of Information Act (UK) requests made to that university, but which requests had been stonewalled for several years. The stonewalling appears to have spurred the whistleblower to do so, combined with the often startling content of the records being denied to the public. Among these were several of Petitioners' Exemplars, including PE-4 (his co-authors on later papers rejecting Mann's hockey stick methodology); PE-6 (alleging Mann misrepresented data); PE-7, PE-10 & PE-12 (Mann's insulting and uncivil criticisms of his co-authors); PE-15 (debunking the hockey stick shape of actual temperatures over the past 1000 years); and PE-5 (pre-publication research results).

If release of any kind of emails would chill email communication, one would think it would be these kinds of emails. No one wants to be exposed as an insulting, hypercritical person. No one wants emails showing the weakness of their own work, often acknowledged by colleagues despite the same colleagues publicly defending the work, made public. No one wants to be publicly accused of misrepresenting scientific data or give fodder for such accusations. And, no one wants one's signature academic contribution (the hockey stick methodology) held up to ridicule. The Petitioners' Exemplars listed above do precisely that. If any chilling effect were expected from a public release, it should be manifest in Michael Mann's emails from the

post 2009 period. Notably, however, the UEA email release had no effect on his emailing habits whatever.

Freedom of Information requests from other universities have produced a number of emails from Michael Mann of the same character as the Petitioners' emails listed above. From his official Penn State email address, Michael Mann makes or endorses *ad hominem* attacks on his professional and lay critics and on the news media, calling other professors "rogues", alleging they have no scientific credibility and that their views are "bizarre", alleging a person's title is "fake", calling the media "lazy," likening scientists who disagree with him to holocaust deniers, and calling one "a pathological crank-case". (Pet. Ex. No. 8.) We do not comment on the appropriateness of the use of public resources as such or the level of civility shown in these emails by a publicly funded academic, one whose work served a major role in driving state and federal policy, as part of what he called in these emails "the cause." We present them as examples of the kind of blustery incivility that a "chilling effect" should have stopped. It did not and there is no basis to suggest release of the emails requested by Petitioners would do so either.

E. The Virginia FOIA does not protect a "Right" to Academic Freedom

Like the *Urofsky* court, we note that the Virginia Legislature has had many opportunities to craft an exclusion to VFOIA for purposes of protecting academic freedom. It never has. Rather, it has specifically applied VFOIA to the University. Va. Code § 2.2-3701.

F. The Virginia FOIA protects some Pre-Publication Research

Petitioners distinguish academic freedom from protection of proprietary research information, but argue that protection of proprietary research information protects academic freedom. As discussed above, prior to publication of a grant request, a research article or similar professional reports, the University and the professor may place themselves at a commercial

competitive disadvantage if they released their work to the public. Petitioners are prepared to accept that the University is in competition with other universities for grants, faculty and students.

We also admit, this is not in comport with the federal law, which rejects such as proprietary, and we believe it useful for the court to decide whether research is or is not a commercial enterprise, and thus is not or is proprietary prior to publication or abandonment. If the work would result in a patentable product, the University efforts would appear similar to commercial competition. To the degree the work is fundamentally associated with the creation of knowledge, there is no commercial competition – only academic competition. As discussed above, academic competition is not protected as proprietary work, while commercial competition is. *See*, Sec. IV E (3) *supra*, and *Washington Research Project* at 244-245.

The academic reputation of the University is a valuable asset in that competition and being the first to publish and the awardee of grants elevates the school's reputation. That, alone, does not qualify as protection of commercial competitiveness.

Petitioners recognize the benefit of the University being allowed to protect their academic, non-commercial work prior to it becoming public. Regardless, the legislature did not offered that protection but only protected commercial competitiveness (proprietary research data).

Whether academic work is commercial or not, once published, the need to be an academic competitor requires release of all research related information. The authority of a piece of research stems mostly from its ability to be not only "replicated" but "duplicated." Where another individual can produce the identical results as published by a University professor, the University and its professor are shown to be credible and trustworthy – an

admirable trait that improves and maintains their high reputation as a research institution. Indeed, the University's Research Policies recognize this value and require the faculty to maintain their Research Log for five years. University of Virginia "Policy: Laboratory Notebook and Recordkeeping" Policy ID: RES-002 (June 23, 2004).[13] It is widely argued and implicit in certain of the University's and Intervenor's arguments, if always incorrectly, that "peer review" means that work has been reproduced or at least is reproducible. Peer review means no such thing. Reminders of this and that often journals do not even ask for an author's data have come in high-profile embarrassments.[14]

Sometimes, despite best efforts, a University may not obtain a sought-after grant or a professor may not find a journal willing to accept a report on her research. We believe that, for many of the reasons the academic sought publication, the record of that research should be made public; but, for purposes of the protections under VFOIA, we note that the failure to get publication is usually a milestone marking abandonment of that particular research question. The academic simply moves on to the next idea.

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[13] *See*, https://policy.itc.virginia.edu/policy/policydisplay?id=%27RES-002%27 (accessed June 29, 2012) "Reason for Policy: This policy describes the University's position of the importance of recordkeeping in research to ensure that complete data is maintained in an accessible format to support verification of research processes undertaken and of the data obtained as an outcome of such processes." *And*, "Definition of terms: Laboratory Notebook: The logbook of all processes and procedures performed in the course of research which shall be kept in such a manner as to enable an investigator to reproduce the steps taken.")

[14] Consider Isabelle Chine et al., "Historical phenology: Grape ripening as a past climate indicator," *Nature*, 432, 289-290 (Nov 17, 2004), doi: 10.1038/432289a, a November 2004 paper published by *Nature* claiming to have developed a method of using grape harvest dates for estimating any individual year's summer temperature in Burgundy, France, back to 1370. It asserted that 2003 saw by far the warmest summer there in more than seven centuries. This is a very desirable outcome for certain activists but it is also apparently unsupportable. However, *Nature's* peer-review process didn't even go so far as to check basic facts. Mathematician and independent researcher John McLean was sent the paper by someone seeking comment from a mathematical perspective, and discovered among other problems that "the authors' estimate for the summer temperature of 2003 was higher than the actual temperature by 2.4 [Degrees] C (about 4.3 [Degrees] F)." John McLean, *Remarks about "Grape harvest dates are poor indicators of summer warmth"* (D.J. Keenan,Theor. Appl. Climatol. 87, 255–256 (2007) DOI 10.1007/s00704-006-0197-9, available at http://www.informath.org/pubs/TAC06a.pdf), http://www.informath.org/apprise/a3200.htm. In short, "the authors had developed a method that gave a falsely-high estimate of temperature in 2003 and falsely-low estimates of temperatures in other very warm years. They then used those false estimates to proclaim that 2003 was much hotter than other years." *Id*. This might be unremarkable but for one thing. When McLean asked Dr. Chuine what data was sent to *Nature* when submitting the paper, "Dr. Chuine replied, 'We never sent data to Nature.'" Id.

This abandonment of research is the second marker identifying when the University can no longer claim it needs to keep the information from the public as at that point there is no longer a competitive advantage to be kept by secrecy. When there is no longer an ongoing effort to publish or the likelihood of publishing in the peer-reviewed literature, the University can only gain competitive academic standing by offering up its information to others as a showing of comity within the research community. Thus, the University loses any pre-publication protections it may have at exactly the same time it gains competitive advantage through the release, regardless of the form of the publication, including release of emails under VFOIA.

G. VFOIA creates an incentive for civility and professionalism

FOIA does not mandate civility and/or professionalism. Openness to public inspection tends to produces that, although it is no guarantor. As a general observation, Petitioners argue that when incivility or lack of professionalism is exposed to public view, that incivility declines. In addition, where professionals know their pronouncements will be made public, they take steps to ensure their work is of the best quality. Again, this is no guarantee, as FOI laws are still regularly used to reveal impolitic, unseemly and even corrupt behavior; as they were intended to do.

Thus, as a general observation, the legislature expected that VFOIA would result in more civil and highly professional behavior among public servants and in public records, including emails. Petitioners believe this remains a reasonably expected outcome of making faculty emails public.

We may be wrong, however. When the "Climategate" emails became public, one would have thought that Michael Mann's incivility and lack of professional demeanor might become significantly muted. As discussed above and as has been widely aired in the public domain, that

did not happen. Despite this, Petitioners believe release of faculty emails would more often than not result in greater civility and professionalism. Petitioners' lead counsel is both a scientist and faculty member and has routine interaction with many more. ATI staff and associates do as well. We have been well informed by the release of the Climategate emails and reminded that any email can become public. In light of this, we take additional due care to be civil in our email correspondence, not only as a routine element of our professionalism, but in light of the harm to reputations that would result if the emails were released. We suggest Michael Mann's failure to do so as well is most likely representative of an outlier in this regard, at least with regard to civility. Regardless, his or someone else's having ignored or disregarded the possibility of exposure of, or fallout from, airing their own behavior cannot serve as a rationale for exempting him from a transparency law he agreed to as a condition of his employment in Virginia.

As President Obama instructed the federal government on his first day in office, "The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears. Nondisclosure should never be based on an effort to protect the personal interests of Government officials at the expense of those they are supposed to serve."[15] The Presidential directive merely reflects longstanding policy at the federal and state level on information dissemination and access and the laws' bias toward release.

VII. PEER REVIEW IS NOT AT RISK

During the April 16th hearing, this Court raised the point that peer review is not "the bedrock of open government," asking "Why should general citizens have to look at expert panels of peers to perceive that they are being properly ruled?"; "Why does the general public have to

[15] *Presidential Memorandum For Heads of Executive Departments and Agencies*, 75 F.R. § 4683, 4683 (Jan. 21, 2009).

trust scientists?"; "Why would we yield to peer review panels?". Pet. Ex. No. 9, R. at 166 - 167. Admitting that these are rhetorical questions (*id*. R. at 167), the court gave notice that "FOIA is the citizens have a right to see what government is doing." It then posed the thought that there might be a need to balance protection of peer review values against the VFOIA rights of openness (*id.* R. at 168), the two being imperfectly aligned.

A close look at the purpose, nature and practice of peer review suggests that any necessary balancing will weigh strongly in favor of VFOIA release, both as a matter of law and of policy.

A. VFOIA protects peer review that is covered by a confidentiality agreement.

As a matter of law, a record containing peer review comments remains a record subject to VFOIA. It can only be exempted from production if it properly falls within one of the exemptions listed under the Act. Peer reviews are not specifically listed under the statute.

Under Va. Code § 2.2-3705.6 (3), however, the statute allows exemption of "Confidential proprietary records, voluntarily provided by private business pursuant to a promise of confidentiality from a public body, used by the public body for business, trade and tourism development or retention."

Under this exemption, if the University can <u>document</u> that it has made a promise of confidentiality, including for what period that confidentiality runs, then the statute appears to provide an exemption for records covered by such an agreement. To date the University has not provided any evidence of such an agreement, nor has the Intervenor.

What is clear is that Exemption 4, the "proprietary research information" exemption does not apply. That exemption only applies to "research . . . sponsored by [UVA] alone or <u>in conjunction with</u> a governmental body or a private concern." Va. Code § 2.2-3705.6 (4)

(*emphasis added*). Peer reviews do not constitute research, nor do they involve research done at UVA or in conjunction with UVA, and thus are not subject to the exemption.

B. Peer review neither supplants nor is mutually exclusive with FOIA

Nature, the eminent science journal we cite, *supra*, for a particular example of peer review's failure, has recently examined the practice, going so far as to abandon the confidentiality requirements and open peer review to the public as an experiment.[16] The experiment concluded that the quality of peer review is no better and no worse if done openly and publicly than if done secretly.

We emphasize to this Court the criteria *Nature* asks its reviewers to use: (1) "who will be interested in the new results and why;" and (2) "any technical failings that need to be addressed before the authors' case is established."[17] Neither of these criteria would necessarily demand confidentiality, as *Nature* determined in its open review experiment.

Indeed, with respect to emails of the kind at issue in this matter, and perhaps with them in mind, last month Geoffrey Boulton argued that "An open approach is the best way to maximize the benefits of research for both scientists and the public."[18] He continued:

> We also need to be open towards fellow citizens. The massive impact of science on our collective and individual lives has decreased the willingness of many to accept the pronouncements of scientists unless they can verify the strength of the underlying evidence for themselves. The furore surrounding 'Climategate' — rooted in the resistance of climate scientists to accede to requests from members of the public for data underlying some of the claims of climate science — was in part a motivation for the Royal Society's current report. It is vital that science is not seen to hide behind closed laboratory doors, but engages seriously with the public.

Id. Notably, Geoffrey Boulton is regius professor of geology emeritus at the University of

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[16] "Overview: Nature's peer review trial" Nature (2006) | doi:10.1038/nature05535, *see*, http://www.nature.com/nature/peerreview/debate/nature05535.html (*accessed* July 3, 2012).
[17] Nature, "For Authors – Getting Published in *Nature*: The Editorial Process", *see*: http://www.nature.com/nature/authors/get_published/#a1 (*accessed July 3, 2012*).
[18] Boulton, G. "Open your minds and share your results", Nature (June 27, 2012), see http://www.nature.com/news/open-your-minds-and-share-your-results-1.10895 (*accessed* June 28, 2012).

Edinburgh, UK and chaired a group that produced "Science as an Open Enterprise," a policy report from the Royal Society in London, published in June 2012.[19] The report lists six "key areas for action," the first of which is "Scientists need to be more open among themselves and with the public and media." *Id.*

Virginia courts have taken a similar view with regard to the limitations of peer review. *Hasson v. Commonwealth*, 2006 Va. App. LEXIS 225, 229-30 (Va. Ct. App. May 23, 2006) ("Publication (which is but one element of peer review) is not a sine qua non of admissibility; it does not necessarily correlate with reliability, see S. Jasanoff, The Fifth Branch: Science Advisors as Policymakers 61-76 (1990)").

If balanced, one against the other, the interests of VFOIA outweigh the need for secrecy in peer review.

C. Peer review is not privileged at law

During the April 16th hearing on this matter, the Court suggested that "Virginia has a public policy, for instance, in regular civil litigation of preventing the admissibility of peer reviews, usually." Pet. Ex. No. 9, R-168. This is true, but only in a narrow sense, because the term "peer review" has multiple settings in which it is used. Under statutory proscription, medical peer review committee proceedings, including the opinions of physicians consulted as reviewers, are strictly privileged in legal discovery proceedings. *See*, Va. Code § 65.2-1308. The prohibitions do not extend to academic publication peer reviews, nor is there a lengthy history of Virginia courts protecting academic peer review activities. Such reviews are subject to discovery and to VFOIA.

Courts have been reluctant to create a new peer review privilege. As the U.S. Supreme Court famously explained, "the public . . . has a right to every man's evidence." *United States v.*

[19] *See*, http://royalsociety.org/policy/projects/science-public-enterprise/report/ (*accessed* July 3, 2012).

Bryan, 339 U.S. 323, 331 (1950); *and see*, *Univ. of Pa. v. EEOC*, 493 U.S. 182, 189 (U.S. 1990) ("We are especially reluctant to recognize a privilege in an area where it appears that Congress has considered the relevant competing concerns but has not provided the privilege itself. *Cf. Branzburg v. Hayes*, 408 U.S. 665, 706 (1972). ("The balancing of conflicting interests of this type is particularly a legislative function."); *and, United States v. Nixon*, 418 U.S. 683, 710 (1974) ("whatever their origins [constitutional, statutory, or common law], these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth.").

Every man's evidence is the purpose of VFOIA and is the only means to expose errors, ignorance, bias or actual fraud that an insular peer review process can allow. We agree with the Third Circuit's recognition that "we have no choice but to trust that the honesty and integrity of the tenured reviewers in evaluation decisions will overcome feelings of discomfort and embarrassment and will outlast the demise of absolute confidentiality." *EEOC v. Franklin & Marshall College*, 775 F.2d 110, 113-115 (3d Cir. Pa. 1985). However, we also note that peer review has proved its failings, that it is no substitute for transparency of related public records, and is now the subject of scientific-establishment review and soul-searching after myriad scandals.

VIII. NO COPYRIGHT IS AT RISK

The parties have previously briefed this issue. Neither the University nor the Intervenor has offered a cogent basis in policy or law for arguing that any copyright interest is at risk by release of the sought emails.

In summary, the purpose of copyright is not so much to protect the interests of the authors/creators, but rather to promote the progress of science and the useful arts – that is –

knowledge. U.S. Const. art. I § 8 cl.8. For that reason, the U.S. Copyright Law expressly provides for fair use of copyrighted (and copyrightable) materials:

> the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified in that section [106 & 106A], for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.

17 U.S.C. §107.

The mere release of the emails at issue does not abridge the copyright interests of either Michael Mann or the University. If, after release, a person used them for personal gain, then their copyright interests would be placed at issue and both the University and Michael Mann could seek relief from a federal court. Until then, copyrights are not at issue and in every instance, they are not before this Court.

Finally, we note that the University of Virginia endorses Petitioners' position, applying fair use principles to what are clearly private, creative communications of at least one eminent individual associated with the institution – Thomas Jefferson. *See*, Jefferson, Thomas, 1743-1826. Letters, Electronic Text Center, University of Virginia Library http://etext.virginia.edu/toc/modeng/public/JefLett.html (accessed July 5, 2012).

CONCLUSION

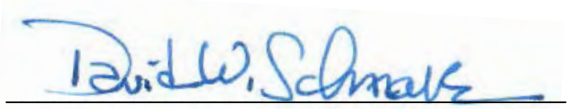
Petitioners' evidence demonstrates that all of the exemplars, and by extension all of the withheld documents, are records subject to the Virginia Freedom of Information Act; that none of them qualify for exemption under the Act; that full and proper implementation of the VFOIA does no harm to any First Amendment right or academic freedom; that neither peer review nor cognizable copyright interests are at risk; that Respondents Exemplar Number 4 has been previously disseminated and thus improperly withheld; and, that all the records Petitioners seek have been improperly withheld.

Petitioners renew their request that the Court order the University to fully comply with the Virginia Freedom of Information Act and release to your Petitioners the withheld documents.

Respectfully submitted,

THE AMERICAN TRADITION INSTITUTE and **THE HONORABLE ROBERT MARSHALL**

By Counsel:



David W. Schnare, Va. Bar No. 44522
SchnareATI@gmail.com
9033 Brook Ford Road
Burke, VA 22015

[SEALED] PETITIONERS' EXHIBIT I – TABLE OF EMAIL CHARACTERISTICS

PETITIONERS' EXHIBITS 2 - 9

From <>(S_F_____-000000000015) 01-12-1999_00:06:02_
From: "Caspar Ammann" <ammann@ucar.edu>
Sender: <ammann@cgd.ucar.edu>
To: <users@geo.umass.edu>
Subject: Long live the rockhounds
Date: Tue, 30 Nov 1999 20:04:44 -0400
Organization: NCAR
Message-ID: <3844661C.4A2F1940@ucar.edu>
MIME-Version: 1.0
Content-Type: text/plain;
charset="iso-8859-1"
Content-Transfer-Encoding: 7bit
X-Mailer: Microsoft Office Outlook 12.0
Thread-Index: Ab87j9pjTqFyIkaoQMKdq9j0evXWdQ==
X-OlkEid: BE84052075954F421903E34E91E6BD5B627D1BAD

from : paleonet@ucmp1.berkeley.edu

DEAR ANN LANDERS:
This letter, my first ever to an advice columnist, was sparked by your column about the geologist's wife who asked, "Are all geologists the very
embodiment of all the virtues and qualities that are universally admired in humankind? Have they alone, of all the professions, achieved a state of grace far beyond that ever speculated by history's most hopeful philosophers and theologians?" The answer is ABSOLUTELY! Geologists ARE
a different breed. They are wise, often strikingly handsome and beautiful, kind to small children and animals, sensitive to the subtleties of everything around them, and when it comes to relationships,
well, Mom, my three sisters-in-law and one-brother-in-law, and my two aunts and two uncles seemed always to have a serene, deeply satisfied look of complete contentment. If only I could have hitched up with one too. Signed, A Jealous and Bitterly Resentful Wife of an Engineer.

Ann Landers Replies: DEAR JEALOUS: I've been swamped with letters from the lucky spouses and relatives of geologists. They've given me a real education, and made me feel a little jealous too. Read on:

PORTLAND: Geologists ARE different. And I say "Vive la difference!" I thought maybe I was the luckiest person ever to have been born, but I have found that other geologist's spouses have similar experiences. My geologist husband has more sensitivity and consideration than 10 "normal"
men, selflessly making life safe, loving and meaningful for others. I am
so lucky to have this man in my life!

DENVER: Ann, the best piece of advice you could pass along to your readers is this: if you can't be one yourself, do whatever it takes to

Petitioners Exhibit No. 2

associate with as many geologists as you can. My life has been rich, so meaningful, since I divorced the egghead engineer I was married to for 12
years. If I weren't so ecstatic nearly all my waking hours, I would be in
despair over all that wasted time. But in retrospect, I would have traded fifty years with "Ms. Pocket-Protector" for just a few weeks of the blissful existence I have with my big lovable rockhound. She has shown me all the richness that life holds. I spend hours just basking in
the warmth of her vast knowledge of life, the universe, and everything. She has so much beauty
and understanding. And she's always ready to share that gift. She's able to explain the most incredibly complex concepts in a way that helps you understand, and makes you feel just plain good all over. And how can
anyone be so perfect, yet so warm and sensitive to the needs of others? Think of the world we would have if everyone were a geologist!

--
Caspar Ammann
NCAR CGD
Boulder, CO 80307
email: ammann@ucar.edu
tel: 303-497-1705

United States Court of Appeals, Fourth Circuit.

Dena BOWERS, Plaintiff-Appellant,
v.
THE RECTOR AND VISITORS OF THE UNIVERSITY OF VIRGINIA, Leonard Sandridge, Yoke San Reynolds, Nat Scurry, and Lucinda Childs-White, in their official and individual capacities, Defendants-Appellees.

No. 07-1382.

July 31, 2007.

On Appeal from the United States District Court for the Western District of Virginia, Charlottesville

Brief of Appellees

Paul J. Forch, General Counsel and Special Assistant Attorney General, Richard C. Kast, Margaret A. Browne, Barry T. Meek, Associates General Counsel and Special Assistants Attorney General, University of Virginia, Office of General Counsel, Post Office Box 400225, Charlottesville, VA 22904-4225, (434) 924-3586 Phone, Counsel for Appellees.

TABLE OF CONTENTS

Petitioners Exhibit No. 3

TABLE OF AUTHORITIES

Case

Other Authorities

I. *STATEMENT OF THE ISSUES*

1. Whether the termination of employment of University of Virginia employee Dena Bowers for using the University e-mail system and a University computer to send an e-mail to another University employee in violation of established state policy, and her refusal to cooperate with the University in responding to the disruption caused by that e-mail, violated Bowers' First Amendment right of freedom of speech.

2. Whether the individual Defendants were entitled to qualified immunity on Bowers' First Amendment right of freedom of association claim.

3. Whether the district court properly dismissed Defendants Sandridge and Reynolds because neither was the decision maker in the termination of Bowers' employment.

4. Whether the district court properly dismissed the University of Virginia because it is not a "person" under 42 U.S.C. § 1983.

5. Whether Bowers received the notice sufficient under the Due Process Clause of the United States Constitution before her employment was terminated.

II. *STATEMENT OF THE CASE*

Bowers filed this action in Virginia state court alleging denial of due process, violations of First Amendment rights of freedom of speech and association, breach of contract, and conspiracy. Defendants removed the case to the district court.

Defendants filed a motion to dismiss. The district court dismissed Bowers' breach of contract and conspiracy claims, and her claim that she had not received adequate notice before being fired. (JA 65, 45-64.) The University of Virginia ("University") and the individual Defendants in their official capacities were dismissed pursuant to Defendants' Motion for Judgment on the Pleadings. (JA 663-64.)[FN1]

FN1. Contrary to Bowers' assertion (Bowers Br. at 3), the University did not concede that it had waived its Eleventh Amendment immunity by removing the case to federal court.

The parties each filed summary judgment motions. (JA 81, 230.) Bowers' motion was accompanied by exhibits consisting of hundreds of pages of unauthenticated e-mails, affidavits containing hearsay and inappropriate comments against individual defendants, and voluminous deposition transcripts in violation of the district court's Pretrial Order. Defendants moved to strike a large number of these exhibits. The district court granted most of Defendant's motion, including striking the unauthenticated e-mails. (JA 668-673.) Contrary to Bowers' implication that these e-mails were authenticated because they were "verified by affidavit," (Bowers Br. at 3), the "verification" consisted only of a statement by Bowers' counsel that the e-mails had been furnished to her in discovery. (JA 506-07.)

The district court granted summary judgment to Defendants in their individual capacities on all of Bowers' remaining claims except her due process claim that she had no opportunity to be heard. The court denied Bowers' Motion for Summary Judgment in its entirety. (JA 707-08.) Contrary to Bowers' assertion (Bowers Br. at 4), the district court *did not* find that "Defendants had in fact violated Plaintiff's First Amendment rights" with respect to her freedom of association claim. Rather, the district court concluded that Bowers' allegations had "state[d] a claim" of such a violation before deciding that the Defendants were entitled to qualified immunity. (JA 701.)

Bowers declined to take to a jury her remaining claim that she had been denied an opportunity to be heard. Rather, after having argued that she had been denied an opportunity to be heard, she stipulated that "she could have managed an opportunity" to address the charges against her. (JA 715.) Based upon this stipulation, the district court then granted summary judgment on this issue. This appeal followed.

III. *STATEMENT OF FACTS*

A. *Factual Background to Bowers' E-Mail*

In the 2005 session, the Virginia General Assembly passed the Restructured Higher Education Financial and Administrative Operations Act, Va. Code §§ 23-38.88 through 23-38.121 (the "Act"). Pursuant to the Act, which took effect July 1, 2005, state-supported institutions of higher education such as the University were granted more financial and operational authority, contingent upon approval of management agreements by the Governor. Such additional authority included greater autonomy in the area of human resources. In October 2005, when Bowers sent the e-mail discussed below, it was known that the University would be seeking greater operational control in the area of human resources pursuant to a management agreement, but the

exact nature of this control was still uncertain because the management agreement had not yet been approved by the Governor.

B. *Bowers' E-Mail*

On October 11, 2005, Appellant Dena Bowers, who was then an employee of the University's Human Resources ("HR") division, sent an e-mail to Katherine ("Kobby") Hoffman, another University employee. (JA 82-83, 233, 235.) The e-mail contained four attachments which consisted of purported comparisons between the University Medical Center and the non-medical or "academic" side of the University. (JA 83, 108-115.) These attachments compared salary and benefits of University Medical Center classified staff (that is, University employees governed by the Virginia Personnel Act, Va. Code § 2.2-2900 through 2.2-2905) after decentralization[FN2] with academic side classified employees, and inferred anticipated changes affecting the University's academic side employees after changes pursuant to the Act. (JA 83.) Bowers sent the e-mail containing the attachments with the following identifying information, or "signature":

> FN2. This so-called "decentralization" (also referred to as "codified autonomy") had occurred pursuant to legislation passed by the Virginia General Assembly in 1996 which granted greater autonomy to the University Medical Center. *See* Va. Code § 23-77.4. Bowers apparently believed that the substantially different operation of the University's hospital was somehow instructive about what was likely to occur to classified personnel in the University's academic programs. This would have been questionable even if the information she had compiled and conveyed about the Medical Center had been accurate, which it was not.

Dena T. Bowers

UVA Human Resources Recruiter

Phone: 434-924-4358

FAX: 434-924-6911

Website: *http://www.hrs.virginia.edu*

(JA 85.)

The attachments to the e-mail consisted of four separate documents with the following file names: (1) charter benefits-before and after; (2) Richmond meeting 401A plan; (3) Richmond-Salaries; (4) CORPORATE SHAKE UPS. (JA 180; individual attachments more clearly reflected at JA 108.) The first attachment had a cover page stating: "Prepared by the Albemarle-Charlottesville NAACP." (JA 181.) There was no such cover page for any of the remaining three attachments. (JA 184-85, 186, 187.) In other words, anyone choosing to open one or all of those three attachments would not have seen any reference to the NAACP. Nor did the e-mail to which the attachments were appended make any reference to the NAACP. (JA 154, 180.)

C. *Further Distribution of Bowers' E-Mail*

Approximately two and a half hours after receiving the e-mail and attachments from Bowers, Hoffman sent an e-mail to Bowers in which she asked: "Are these for sharing with others? Or

not public yet?" Bowers responded: "Go for it." (JA 178, 188.) The next day, October 12, 2005, Hoffman further inquired of Bowers via e-mail: "Dena, this is exactly what I sent to a couple of people. Should I take your signature off?" Bowers responded: "Don't worry about it Kobby. Maybe it helped increase awareness. If the U's administration tries to get me for it, I'll tell the truth, that being, I didn't distribute this list under my UVA capacity, but, through my NAACP capacity." (JA 178-79, 191.)

At this point Bowers clearly established her violation of state policy, specifically Department of Human Resource Management Policy No. 1.75, Use of Internet and Electronic Communications Systems (the "Policy"), which states, in pertinent part:

NOTE: Users employing the Commonwealth's Internet or electronic communication systems for personal use must present their communications in such way as to be clear that the communication is personal and is not a communication of the agency or the Commonwealth.[FN3]

FN3. The University is, of course, a state institution and its employees are therefore subject to the Policy. *See* Va. Code §§ 23-62 through 23-91.23; *Phillips v. Rector and Visitors of Univ. of Va.*, 97 Va. 472, 34 S.E. 66 (1899).

(JA 635.)

One of the people to whom Hoffman had forwarded Bowers' e-mail was Gayla Goerge, a grants specialist in the University Department of Medicine. (JA 178, 189.) Goerge forwarded the e-mail to, among others, Neal Grandy in the Dean's Office of the University's College of Arts and Sciences (the "College"). (JA 105.) Grandy sent the e-mail to E. Howard Booker in the Graduate School of the College, with the following e-mail note: "You might want to pass this along, as it seems HR is circulating this (and Dena Bowers, who did the breakdown for HR, said it was okay to forward). This appears to be the compensation package we'll have with decentralization. It does not seem to be good news." (JA 106.) Grandy testified: "I did not know Ms. Bowers, but noted that from her original e-mail that she was an employee of the University's Human Resources, or 'HR' division, so I assumed that the information she had sent was HR information about restructuring." (JA 105.)

Booker, in addition to his duties as Budget Officer in the College, was an elected representative of the Provost Employee Communication Council (the "Council"), a University entity created "to facilitate communication between classified staff, Human Resources, and the Provost's Office; to address employee concerns and develop avenues for effective resolutions to issues concerning employees; and to help create a more pleasant and productive working environment." (JA 153-54.) Pursuant to his duties as a Council representative, Booker forwarded the e-mail to all of the classified staff of the College, more than 300 people. (JA 154.) Booker subsequently noted that he too, like Grandy, had assumed that the information Bowers had sent was official information from HR and "had there been no mention of HR's involvement," he "would not have forwarded it without further investigation." (JA 156.)

D. *Disruption Caused by Bowers' E-Mail*

The attachments to the e-mail contained much incorrect and misleading information about the Medical Center after decentralization. For example, the attachment entitled "Richmond-salaries"

(so titled because the information contained previously had been presented at a meeting in Richmond) falsely stated that Medical Center employees had received no raises for five straight years after decentralization and for seven out of ten years since the decentralization legislation had passed. (JA 122, 127-28, 182.) The attachments inferred that this would be the result for everyone within the University under a new HR system that would be enacted pursuant to the authority granted by the Act, which, as Grandy had noted, did "not seem to be good news." (JA 106, 118.) This and other incorrect information in the attachments created by Bowers caused much concern and disruption among those receiving it.[FN4] (JA 121, 128, 140-41, 154, 156.) As University Interim HR Director Nat Scurry testified, the information in the attachments generated "an awful lot of concern by an awful lot of people who were one month away from making family-based decisions about what kind of benefit programs they're going to ... have to buy into for themselves and for their families." (JA 249.)

FN4. There also were errors in the attachments concerning leave policies and retirement options at the Medical Center. As is subsequently noted, when asked about these errors Bowers simply responded that she had never said that the information in the attachments was accurate.

E. *Bowers' Response to the Disruption Caused by her E-Mail*

In response to questions he was receiving from recipients of Bowers' e-mail, Booker sent an e-mail to Bowers on October 11th asking her to whom employees should express their concerns. Rather than directing employees to knowledgeable sources of information within Bowers' own department-University HR-Bowers directed Booker to advise these concerned employees to write to three of the Governor's cabinet secretaries, whom she named. She further drafted suggested language to be used in communicating with these cabinet secretaries.[FN5] Finally she noted, for the first time: "Also, please do not associate me with this effort within my UVA capacity; rather, in my NAACP membership. In fact, I am writing and working on this effort only in my NAACP capacity." (JA 154-55, 167-68.) This "disclaimer" was made at 4:19 p.m. on October 11th more than 8 hours after Bowers' original transmission of the e-mail and attachments to Hoffman, after Bowers' directive to Hoffman to "Go for it," and after Booker had forwarded what appeared to be official HR documents to all classified staff in the College. (JA 167.)

FN5. Bowers' effort to divert employees to the cabinet secretaries was disingenuous. Booker used Bowers' draft as the source of an e-mail communication that he himself sent to Secretary of Administration Sandra Bowen, one of the three secretaries Bowers had suggested disgruntled University employees approach. Secretary Bowen responded to reassure Booker that current University employees would have the option of remaining in the classified system under restructuring. (JA 155.) When Booker forwarded Secretary Bowen's response to Bowers for her information, she responded: "I've met with Sandra Bowen and her reply to you is pure BS." (JA 155, 169.)

The next day, October 12th, Bowers sent an e-mail to Grandy claiming that she had prepared the documents sent above her University signature in her NAACP "capacity."[FN6] (JA 106.) Still, as previously noted, on the following day, in response to a specific question from Hoffman about whether she should remove Bowers' HR signature before further distributing the e-mail and attachments, Bowers responded: "Don't worry about it Kobby. Maybe it helped increase awareness." (JA 191.)

FN6. The issue, of course, is not in what "capacity" she had prepared the attachments, but rather in what capacity she was transmitting them. Information derived from another source, whether the NAACP or another organization or entity, could be disseminated to University employees by a representative of University HR as an official transmission of the University. Moreover, the whole "capacity" issue, smacking of nuanced legal arguments, was undoubtedly opaque to Bowers' intended audience, as she must have known it would be.

F. *The University's Response to Bowers' Conduct*

Bowers' conduct caused a great amount of disruption and concern among the classified employees in the College (JA 154), as well as the classified employees in the School of Medicine. (JA 265.) In response to this, Lucinda Childs-White, who was in Bowers' supervisory chain, initiated an inquiry to determine to whom the e-mail had been sent, and what were the sources of the information in the attachments. (JA 140-41.) As part of this inquiry, Childs-White needed to speak with Bowers. When she attempted to do so on October 20, 2005, however, she discovered that Bowers had left work. Childs-White then telephoned Bowers at home and left a message that it was very important that she speak with her and, if at all possible, would she please call back that afternoon. (JA 14.)

Bowers did call back. In addition to Childs-White and Scurry, Faculty and Staff Employee Relations Director at HR Alan Cohn, University Vice President and Chief Financial Officer Yoke San Reynolds,[FN7] and Reynolds' Executive Assistant Gary Nimax talked with Bowers. (JA 129, 142.) Reynolds stated that Bowers' e-mail had contained significant errors, and had caused confusion and workplace disruption. She asked Bowers to whom she had sent the materials and where they had come from. In response to the last question, Bowers told Reynolds it was "none of her business," (JA 129, 142) or words to that effect.[FN8] When asked whether she knew that the information she had sent was inaccurate, Bowers responded that she had never claimed that it was accurate. (JA 129-30, 274, 277.)[FN9] At some point in the conversation Bowers asked if her employment was at risk. Scurry replied that, yes, it was at risk. (JA 123.)

FN7. HR reports to Reynolds within the University organizational structure.

FN8. Bowers claims in her brief that her "exact wording is in dispute and ranges from polite refusal to a more blunt statement that it was none of Defendant Reynold's [*sic*] business." Bowers Br. at 13 n. 4. Reynolds was clear, however, that she was told the

answer to her question was “none of her business.” (JA 129, 142.) Scurry and Childs-White had the same recollection. (JA 123, 142.)

FN9. During the same time frame that Bowers was making this assertion to University administrators, she was claiming to classified staff that the information she had prepared was accurate. For example, on October 12, 2005, Bowers sent an e-mail to Grandy noting “as a NAACP representative, and as a Virginia taxpayer, I stand by these charts in conjunction with future employment situations of UVA staff employees if charter (Higher Education restructured bills), continue to include a two-tier workforce.” (JA 106, 116.) Bowers taking different positions with the classified staff than she did with University management was nothing new. Neither did she send her “disclaimer” to any member of management.

The next day, Bowers returned to work and met with Scurry and Childs-White. Childs-White told Bowers that the meeting was a predetermination hearing pursuant to state personnel policy and such a hearing was a mechanism for sharing information with her and giving her an opportunity to respond as part of the process of determining whether disciplinary action was warranted. (JA 124, 142-43.) Childs-White's script for the hearing, and contemporaneous notes,[FN10] reflect that Bowers was asked if she had known that she had sent the materials with her HR signature. Bowers said she hadn't thought about it. Bowers acknowledged that she had written the information that she had sent out on October 11th, and knew that it might not be accurate. Childs-White's contemporaneous notes further record that Bowers was “evasive and defiant,” “quite disrespectful” to Scurry, and was “animated” and “argumentative.” (JA 142-44, 149, 150.) Childs-White and Scurry told Bowers that they would take under advisement what action would be taken in response to her conduct and get back with her. (JA 124, 143.)

FN10. Bowers states that Childs-White “admitted that the notations at the bottom of the page ... were written sometime later, not contemporaneously.” (Bowers Br. at 38-39.) In fact, Childs-White testified that the “sometime later” was “probably the same day, on the 21st,... following up on my thoughts as to what happened at that meeting.” (JA 332C.)

On November 17, 2005, a second predetermination hearing was convened. (JA 124, 143.) Again, Childs-White and Scurry were present to address Bowers' conduct and to give her an opportunity to respond before taking disciplinary action. Scurry had made the decision that Bowers' sending of the e-mail, collaboration in the further dissemination of the e-mail, and generally hostile and insubordinate responses to the University's attempts to investigate the situation potentially justified the termination of Bowers' employment, but he wanted to give Bowers another opportunity to change his mind. (JA 124.)

Childs-White's script of the November 17th hearing, and contemporaneous notes, reflect that Bowers was told yet again about the facts underlying what the University believed to constitute misconduct and that the University was contemplating “fairly severe disciplinary action (up to and including termination).” (JA 144, 151-52.) To give Bowers additional time to address the

matter, she was told that she was being placed on paid leave until November 22nd, at which time there would be a "follow up meeting" with Scurry and Childs-White "to ensure" that Bowers was "given the opportunity to respond or rebut any of the information" that had been shared with her. (JA 124, 144, 151.) Bowers asked if she was being fired, and was told that no final decision had been made on that, but that it depended on what she had to say at the November 22nd meeting. At this point Bowers became emotional, stating that she couldn't believe that she was "being fired over this," and that "you should just take a knife and stab me in my heart. You can shoot me." The meeting concluded with Bowers being told to take what she needed from her office to prepare for her statement on November 22nd. (JA 124-25, 144, 151-52.)

On November 22nd, Bowers met with Scurry and Childs-White as agreed. When she was asked what she had to say in response to the conduct that had been described to her on the two previous occasions as cause for concern and potential discipline, she stated that she had nothing to say. (JA 125, 144.) Scurry then presented Bowers with the two Group II disciplinary notices that resulted in the termination of her employment. (JA 25-29.) She refused to sign and was told that her employment was terminated. (JA 125, 144.)[FN11]

FN11. Bowers implies that no one has ever been fired by the University for doing what she did. (Bowers Br. at 6, 20.) This is misleading. Gary Nimax in fact testified that there had been numerous disciplinary actions by the University in the prior three years for violating the Policy, including two employees who had been fired, seven who had resigned in lieu of termination, two who were suspended in addition to receiving formal discipline, and one who was disciplined without suspension or termination. (JA 629.)

G. *Bowers' Lawsuit*

On June 19, 2006, Bowers filed suit in state court "pursuant to 42 U.S.C. §§ 1982 and 1988 and the laws of the Commonwealth of Virginia."[FN12] Defendants removed the case to the United States District Court for the Western District of Virginia, Charlottesville Division, where they obtained the judgment on appeal.

FN12. Although Bowers proceeded with her case as a § 1983 case, she never amended her Complaint to change the reference to § 1982.

IV. *SUMMARY OF ARGUMENT*

Bowers' employment with the University was not terminated because she exercised her constitutionally protected rights of freedom of speech or freedom of association, but rather because of her violation of state policy and her uncooperativeness and obstructive behavior in response to University attempts to respond to the false and misleading information she had sent using her University computer.

Bowers' First Amendment freedom of speech claim fails because, even if she were acting as a citizen and not an employee when she sent her e-mail, and the information she sent was a matter of public concern, her interest in sending that information, and collaborating in its further

distribution, is outweighed in the *McVey* balancing test by the University's interest in efficiently providing the services it performs through its employees. Moreover, Bowers' uncooperative conduct obstructed the University's First Amendment right to gets its message out and weakened its ability to respond to her speech. Even if Bowers can withstand these arguments, her freedom of speech claim must fail because it cannot survive the rigorous "but for" causation analysis required by the third prong of *McVey*. Finally, the uncertainty of evolving law in the wake of *Garcetti* would support a finding of qualified immunity for the individual Defendants on Bowers' speech claim.

Bowers' freedom of association claim fails because Defendants in their individual capacities were entitled to qualified immunity in this area of the law in which no case cited by either side or found by the district court found a First Amendment violation in factually similar circumstances. Merely citing cases that stand for the general proposition that courts have long recognized a right of freedom of association under the First Amendment does not deprive Defendants of the defense of qualified immunity. There must be a showing of a recognized right that the objectively reasonable employer would know. In the alternative, the lack of precedent supporting an associational claim in the facts of this case also supports a finding of no substantive violation of Bowers' associational rights.

The district court also was correct in its ruling that Defendants Sandridge and Reynolds were entitled to summary judgment because they were not decision-makers in the firing of Bowers. In arguing to the contrary, Bowers mistakes reporting relationships for decision-making. She also explicitly relies on a large number of unauthenticated e-mails that the district court properly struck. These e-mails were inadmissible and could not support allegations against Sandridge and Reynolds. Even if these e-mails were considered, the evidence is clear that Sandridge and Reynolds did not fire Bowers; Scurry made that decision.

The district court was also correct that the University and the remaining Defendants in their official capacities had to be dismissed because they are not "persons" under 42 U.S.C. § 1983. This result is mandated by *Will v. New York Dep't of St. Police*, 491 U.S. 58 (1989), and none of Bowers' arguments to the contrary detract from this fact. Bowers' reliance on *Bivens*, which relates exclusively to federal employees, is misplaced. Her remaining arguments ignore the statutory language of §1983 or rely on a misimpression that the University waived its Eleventh Amendment immunity.

Bowers' procedural due process claim that she did not receive notice of the charges against her before being fired was also properly dismissed by the district court. Bowers was fully informed her misconduct on at least two occasions before her employment was terminated. Bowers' argument that the dismissal of this claim was premature is without merit, both because the facts alleged supported that dismissal, and because the district court reiterated its decision at the summary judgment stage and explicitly noted that nothing adduced in discovery changed the propriety of the dismissal of Bowers' notice claim.

V. *ARGUMENT*

1. *The district court correctly held that the termination of Bowers' employment did not violate her First Amendment right of freedom of speech.*

As this Court has recently noted in *Ridpath v. Bd. of Governors of Marshall Univ.*, 447 F.3d 292, 316 (4th Cir. 2006), in order to prove that a retaliatory employment action violated a public employee's free speech rights, the employee must satisfy the three-prong test set forth in *McVey v. Stacy*, 157 F.3d 271 (4th Cir. 1998). The " *McVey*" test requires that: (1) the public employee must have spoken as a citizen, not as an employee, on a matter of public concern; (2) the employee's interest in the expression at issue must have outweighed the employer's interest in providing effective and efficient services to the public; and (3) there must have been a sufficient causal nexus between the protected speech and the retaliatory employment action. *McVey*, 157 F.3d at 277-78.

With reference to the first *McVey* prong, within days after this Court reiterated the *McVey* test in *Ridpath*, the Supreme Court decided *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006), in which the Court held "that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Id.* at 1960. Given the facts of this case, in which Bowers created and deliberately sustained confusion about her role in sending the information that caused so much concern and disruption, she has deprived herself of the right to argue that she was speaking as a citizen and not an employee under *McVey*. The district court, in fact, noted in supporting its decision that although Bowers "was not officially authorized to speak for the University, her email misled others into thinking she was." Under these circumstances, the court noted, "she must stick to the party line or face discipline." (JA 699.) This conclusion is consistent with *Garcetti* and supports dismissal of Bowers' freedom of speech claim under the first prong of *McVey*.

The other aspect of the first prong of the *McVey* test is whether the employee speech in question constitutes a matter of public concern. Whether speech involves a matter of public concern is a question of law for the court. *Connick v. Myers*, 461 U.S. 138, 148 n.7 (1983). In this case the district court held that Bowers "unquestionably spoke on a matter of public concern." (JA 696.) This conclusion is dubious. The court noted that "bills being debated by the General Assembly or considered for signature by the Governor's office are inherently matters of public concern." (JA 696.) There were no such bills here, however. Bowers sent her e-mail in October 2005. As previously noted, the Act had become effective July 1, 2005. While the management agreement required to implement the autonomy authorized by the Act had not yet been signed by the Governor, that was a matter of internal operational procedure, not legislative enactment. Such internal matters, which do not "relate to wrongdoing or a breach of trust," and are "ordinary matters of internal agency policy," are not matters of public concern. *Daniels v. Quinn*, 801 F.2d 687, 690 (4th Cir. 1986). *See also Jurgensen v. Fairfax County, Va.*, 745 F.2d 868, 871 (4th Cir. 1984) (a leaked internal report documenting low morale but which found "no illegal action" or "abuse of authority or power," and "referred to no evidence of corruption or waste" or "no discrimination among employees" not a matter of public concern); *Stroman v. Colleton County Sch. Dist.*, 981 F.2d 152, 157 (4th Cir. 1992) (complaints by a teacher about a change in the practice of paying teachers in a lump sum for summer work not a matter of public concern); *Dennison v. County of Frederick, Va.*, 921 F.2d 50, 54 (4th Cir. 1990) (allegations of discipline imposed on a building inspector because of his strict enforcement of the Building Code, even though such information may have been of "public interest," not a matter of public concern).

If Bowers' speech is entitled to protection under *McVey* and *Garcetti* and constituted a matter of public concern, *i.e.*, if she can pass both parts of the first *McVey* prong, she must then demonstrate that her interest in the expression at issue outweighed the University's "interest in providing effective and efficient services to the public." *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968); *Connick*, 461 U.S. at 154; *Ridpath*, 447 F.3d at 316; *McVey*, 157 F.3d at 277. "The weighing of this balance is a question of law for the court, not a question of fact for resolution by a fact finder." *Joyner v. Lancaster*, 815 F.2d 20, 23 (4th Cir. 1987).

On Bowers' side of the balance, her interest in the expression at issue is diminished at the outset because she was ambivalent about the truthfulness or accuracy of its content. She told Reynolds that "she had never claimed that it was accurate," (JA 129), and knew that it might not be accurate. (JA 142-44, 149, 150.) Bowers further testified that she had derived the information she sent by "scouring the internet" and "talking to people." (JA 600.) One of the people she claimed to have talked to was a University Medical Center employee Aretha Spears who, Bowers claimed, confirmed the information Bowers compiled about Medical Center salaries.[FN13] (JA 605.) Yet Spears testified that at no time did she furnish *any* information to Bowers from the payroll office of the University Medical Center. (JA 194.) The point here is not that speech of questionable veracity has no claim to First Amendment protection.[FN14] Rather, the point is that: "Because an employee has no First Amendment interest in making statements which are deliberately or recklessly false, such statements must be given little weight in the balancing inquiry." *Deschenie v. Bd. of Educ. of Central Consol. Sch. Dist.*, 473 F.3d 1271, 1280 (10th Cir. 2007).

FN13. This was the information that Medical Center employees had not had any salary increases 70 percent of the time over a ten-year period.

FN14. The Supreme Court has declined to decide whether speech that was "knowingly or recklessly false" would be entitled to First Amendment

Even if the information prepared and sent by Bowers was true, Bowers' interest in that expression would be far outbalanced by the University's interest in providing effective and efficient services to the public. Bowers' information, and the manner of its dissemination that protection. *Pickering*, 391 U.S. at 582 n.6. inferred that it was official, created almost immediate disruption as questions rained in to Booker (JA 154-55), and Grandy (JA 106), Reynolds (JA 126-27), Scurry (JA 121, 249), and Childs-White (JA 140-41), among many others, became aware of or involved with attempting to understand and respond to the disruption. The University's ability to provide efficient educational services to the public was disrupted not just by the investment of time required by University administrators to track down the sources of Bowers' information to understand how it had been derived, determine to whom it had been sent, and issue clarifications. It also was disrupted by the large number of University employees distracted from not devoting time to doing their jobs because they'd been told, apparently by HR, that they were likely to get no salary increases 70 percent of the time in the future. These factors decisively outweigh any interest Bowers had in her personal advocacy against the University.

Although Bowers' assertion that there is "no evidence in the record of any disruption to the University's educational function or any other disruption to University functions," (Bowers Br. at

10), is false, as demonstrated above, “it is not necessary for the agency to prove that morale and efficiency have actually been adversely affected by the publication; it is sufficient that such damage is reasonably to be apprehended. If the perception of potential harm or damage is present, that fact may outweigh any First Amendment rights involved.” *Jurgensen*, 745 F.2d at 879.

In fact, the decision in *Connick* has been construed by one Commentator as having “alter[ed] the balancing test [of *Pickering*] to the extent that the government's interest in efficiency of operations is now favored over the first amendment rights of public employees in three ways. First, constitutional protection is now extended to fewer subjects. Second, speech dealing only partially with matters of public concern is afforded only limited protection. Third, evidence that speech was actually disruptive is not required to justify an employee's dismissal.

Id.

Finally, even if Bowers could prove that she spoke as a citizen not an employee, and spoke on a matter of public concern, and had an interest in expression in the specific speech in question that outweighed the University's interest in orderly public service conducted with integrity, she still would have to meet the third *McVey* prong and demonstrate a causal nexus between the protected speech and the termination of her employment. This she cannot do. The burden is on the plaintiff to show that her speech was constitutionally protected, and that this speech was a “substantial factor” or a “motivating factor” in the challenged employment action. *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977). “The causation requirement is ‘rigorous' in that the protected expression must have been the 'but for’ cause of the adverse employment action alleged.” *Ridpath*, 447 F.3d at 318, *quoting* *Huang v. Bd. of Governors*, 902 F.2d 1134, 1140 (4th Cir. 1990).

Here Bowers cannot meet this rigorous “but for” test. Bowers sent her problematic e-mail on October 11th. Her employment was terminated on November 22nd. Although the content of her e-mail was known immediately, she wasn't fired until six weeks after she had sent it. This was because the content of the e-mail was not the cause of her being fired.[FN15] In fact, it was not even immediately decided that she would be fired. Rather, that decision was slowly made as the magnitude of Bowers' misconduct emerged from the University's inquiry, and Bowers fanned the flames and refused to cooperate as that inquiry went on. Quite simply, Bowers was fired for misconduct as set forth in the Group II Notices (JA 25-29), not any exercise of free speech.

> FN15. If, instead of sending out information that led employees to believe that they were going to get no raises 70 percent of the time, Bowers had sent out an e-mail leading those employees to believe that they were going to get 20 percent raises every year, the information would have been equally inaccurate and the University would have been just as concerned to correct the record. The fact that the information was inaccurate-not that it was negative-was the cause of the disruption.

The district court reached the conclusion that Defendants had not violated Bowers' First Amendment right of freedom of speech by a somewhat different analytic route than that outlined above. The court relied substantially on two cases: *Banks v. Sec'y of the Navy*, 705 F. Supp. 282 (E.D. Va. 1989), and *Deschenie*, 473 F.3d 1271. *Banks* involved a Naval reservist writing a

personal complaint to Congress on official Navy stationery in violation of Naval regulations. The district court distinguished *Banks,* yet still thought it instructive, noting:

Although the discipline and uniformity required in the military requires a far greater restriction of First Amendment freedoms that may not be appropriate in civilian life, the court's rationale is persuasive even for civilian employees when one considers the *Garcetti* rule that an employee must speak as a citizen to claim protection; use of official letterhead is inconsistent with that requirement.

(JA 697.) Bowers, like Banks, violated a clear regulation by sending her communication in the way she did.[FN16]

FN16. Bowers had worked for her entire 17-year career in the University's HR Department and her violation of Human Resource Management Policy No. 1.75 is therefore particularly indefensible. Moreover, mere days before Bowers sent her e-mail on October 11th, on September 29, 2005, the HR IT Director had sent a reminder about appropriate e-mail use to all HR personnel including Bowers stating that "work e-mail should not be used to send or forward non-work information." (JA 628.)

In *Deschenie,* the Bilingual Education Coordinator for a school district located predominately within the Navaho Indian Reservation, Quintina Deschenie, attended a school board meeting where she interpreted comments by the school board president to indicate an intent to eliminate the bilingual education program. She expressed concerns about this to the president in an e-mail, then subsequently attended a meeting where he stated that he had no intent to eliminate bilingual education.[FN17] She later sent an e-mail to the editor of the local paper responding to an editorial praising Native American education in which she wrote that teaching Navaho language and culture was a "lonely battle when the powers-that-be knock the job." 473 F.3d at 1274. Although she did not intend the e-mail to be published, it was published as a letter to the editor. Subsequently, Deschenie received a reprimand and her position was reclassified. Ultimately, her employment was terminated. She filed suit, claiming that the adverse employment actions against her were taken in retaliation for her exercise of protected speech.

FN17. Bowers, too, had been informed by University Chief Operating Officer Leonard Sandridge, at meetings she had attended and in response to her direct questions, that much of the information about projected salary and benefits of University classified staff that she subsequently sent out on October 11th was wrong. (JA 196-98.)

In weighing Deschenie's interest, the court noted that the bilingual education program had become a topic of great interest to the general public. However, the court found it significant that "Deschenie did not intend for the letter to be published. Thus, her motive was not to inform the public on the matter, but to engage in private speech with a friend." 473 F.3d at 1280. In weighing the school board's interest, the court quoted *Connick* to the effect that a government employer is not required "to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action." *Id.* at 1281. The court noted that the school board "had a strong interest in restricting Deschenie's speech because of the potential disruption which could arise from its apparent inconsistent positions regarding bilingual education." *Id.* The court also found it significant that the letter to the editor was signed

by Deschenie in her capacity as a school administrator. “It is irrelevant,” the court noted, “that Deschenie did not intend for this letter to be so published because the speech, as ultimately printed, included her title, thus connecting CCSD [Central Consolidated School District] to the letter.” *Id.*

Finally, the highly public nature of the issue and the public's confusion over the intent of the School Board weigh heavily in favor of the Board's interest in setting forth its position as clearly as possible. Deschenie herself admitted in a deposition there had been a public misconception the bilingual education program would be eliminated. An email from the head of the bilingual program stating “the powers-that-be” criticize the teaching of Navaho language and culture, whether intended to be published or not, would surely have the potential to fuel this misconception.

Id.. For all of these reasons, the court concluded that the school board's interest in avoiding disruption outweighed Deschenie's interest in speech.

In this case the district court concluded its analysis of *Banks* and *Deschenie* by stating:

The Court finds *Banks* and *Deschenie* persuasive. Although Plaintiff was not officially authorized to speak for the University, her email misled others into thinking that she was. For that reason, this Court will hold her to the standards of those who are actually permitted to speak for government agencies: she must stick to the party line or face discipline. Additionally, nobody would think to use University letterhead for personal messages, and email signatures like the one in this case resemble official letterhead closely enough that the two should be treated the same way.

(JA 699.) The district court's analysis was correct. The manner of the communication of Bowers' message, and her subsequent conduct concerning the removal of her HR signature, made the protection of Bowers' speech by the First Amendment questionable under *Garcetti*.[FN18]

> FN18. The district court concluded its analysis with a reference to qualified immunity in a footnote. (JA 700.) Although there is a brief reference to qualified immunity at the beginning of the court's analysis of Bowers' freedom of speech claim (JA 694), the court's conclusion is that her claim is not entitled to First Amendment protection. Where the speech in question is not protected by the First Amendment, of course, a defendant need not be entitled to qualified immunity to escape liability because no constitutional right was violated. It is here submitted that the thrust of the district court's analysis is correct: Bowers' speech had “lost the cloak of First Amendment protection” and “was not protected under the First Amendment.” (JA 700.) If, however, this Court should disagree, the Defendants would nonetheless be entitled to qualified immunity for the reasons set forth in the subsequent section of this argument.

Bowers' conduct also obstructed the First Amendment rights of the University. Clearly, the University had an independent First Amendment right to convey its institutional message. *Bd. of Regents of Univ. of Wisc. Sys. v. Southworth*, 529 U.S. 217, 229 (2000); *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 833 (1995); *Widmar v. Vincent*, 454 U.S. 263, 278 (1981) (Stevens, J., concurring, referring to the “academic freedom of public universities”); *Urofsky v. Gilmore*, 216 F.3d 401, 408-09 (4th Cir. 2000) (to the extent the Constitution recognizes any right of academic freedom in the First Amendment the right inheres in the

university). As a University employee, particularly an HR employee, Bowers had a responsibility and an obligation to further, not contradict or obstruct, the University in its right to communicate with its employees. Her responsibility was even greater here because she was responsible for the disruption and confusion the University needed to address.

Bowers' attempt to force her bad actions justifying termination of her employment into a free speech mold is undercut, ironically, by the First Amendment itself One of the most time-honored maxims of First Amendment jurisprudence is the statement of Justice Brandeis in his concurrence in *Whitney v. Cal.*, 274 U.S. 357, 377 (1927): "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence." The remedy for speech, it has been often stated since, is "more speech." Here the University sought only to furnish "more speech" to the people confused and concerned by Bowers' inaccurate information. Defendants did not seek to obstruct Bowers' speech, merely to discover the source of the information and respond to it. This is the essence of the dialogue the First Amendment seeks to protect, and what Bowers consistently resisted, contradicted, and obstructed in violation of her duty as a University employee.

2. *The district court correctly held that the Defendants were entitled to qualified immunity on Bowers' First Amendment freedom of association claim.*

Bowers First Amendment freedom of association claim derives wholly and entirely from Reynolds' telephone inquiry of her on October 20, 2005, about the source of the inaccurate information Bowers had sent on October 11th. This was the question to which Bowers responded that it was none of Reynolds' business, or words to that effect. The entire scope of Reynolds' question was basically limited to: "Where did you get this bogus stuff?" Reynolds was not trying to pry into the inner workings of the NAACP. Bowers initially asserted such a claim, but by the time the district court heard arguments on summary judgment, the court was able to determine that: "Although Plaintiff initially claimed that the University had asked her about private membership information, that claim has been withdrawn." (JA 700.)[FN19]

> FN19. Although the district court made some of curious observations about Defendants not being able to "demand that Plaintiff become a mole within a legitimate organization such as the NAACP" (JA 700), and the "members of the NAACP [having] a right to expect that their private conversations and activities will not be forced into public view by the demands of government employers" (JA 701), there is no evidence that Reynolds or anyone else ever sought any information about private conversations and activities of members of the NAACP. In fact, one of the Defendants, Scurry, has been a member of the NAACP since 1954. (JA 123-24.)

The district court concluded that Bowers "states a claim that defendants retaliated against her for having exercised a constitutional right." (JA 701.) Contrary to Bowers' repeated assertion, (Bowers Br. at 15, 17, 36), the court did *not* find that the Defendants had violated her right of freedom of association. Rather, the court noted that Bowers had stated a claim, but then went on to find that the Defendants were entitled to qualified immunity because her associational claim was not clearly established in the "more particularized" sense required (JA 701), citing *Gordon v. Kidd*, 971 F.2d 1087, 1096 (4th Cir. 1992) and *Anderson v. Creighton*, 483 U.S. 635, 640

(1987). The court noted: “It is obvious that the right to associate, in a broad, general sense, is protected by the Constitution. But here, neither Plaintiff nor Defendant has cited any cases that remotely resemble this one.” (JA 702.) Accordingly, the court held, “this right cannot be said to be ‘clearly established,’ and qualified immunity must attach.” *Id.*

In support of her contention that the district court was wrong, Bowers continues to cite cases that don't “remotely resemble this one” (Bowers Br. at 34-36). In *Cromer v. Brown*, 88 F.3d 1315 (4th Cir. 1996), this Court denied qualified immunity in circumstances where “any objectively reasonable person ... would have realized that he would violate Cromer's constitutional rights if he fired him for participating in the [black officers'] Association.” No such overt associational claim is made here, nor would the evidence support one, and *Cromer* therefore is inapposite. *N.A.A.C.P. v. Alabama*, 357 U.S. 449 (1958), is the seminal membership lists case, which is of course an inquiry neither Reynolds nor any of the other Defendants made, and an argument Bowers abandoned. *Bd. of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987) and *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), deal with associational rights and factual assertions that simply are not at issue in this case, as do *Adkins v. Bd. of Educ.*, 982 F.2d 952 (6th Cir. 1993) and *Melzer v. Bd. of Educ.*, 336 F.3d 185 (2d Cir. 2003). These cases all fail the “more particularized” test required to refute a claim of qualified immunity; rather, in the factual context of this case, they all simply stand for the broad proposition that a right of freedom of association under the First Amendment has long been recognized by the courts. The fact that an objectively reasonable university administrator would be expected to know this does not defeat a claim of qualified immunity in the “more particularized” sense necessary.

This Court has had no difficulty confirming that the complexities of implementing and balancing First Amendment rights of government employees with those of their employers create factual situations that are often compelling cases for conferring qualified immunity. *See, e.g.*, *Pike v. Osborne*, 301 F.3d 182, 185 (4th Cir. 2002) (given the “difficult-to-apply” *Pickering* balancing test Court could not conclude that a reasonable official would have determined that a First Amendment violation was “clearly established” and qualified immunity was appropriate); *DiMeglio v. Haines*, 4:5 F.3d 790, 806 (4th Cir. 1995) (“Indeed, only infrequently will it be ‘clearly established’ that a public employee's speech on a matter of public concern is constitutionally protected, because the relevant inquiry requires a ‘particularized balancing’ that is subtle, difficult to apply, and not yet well-defined.”) *Maciariello v. Sumner*, 973 F.2d 295, 298 (4th Cir. 1992) (“[T]here are two levels at which the immunity shield operates. First, the particular right must be clearly established in the law. Second, the manner in which this right applies to the actions of the official must also be apparent.”).

Nor have trial courts within this Circuit had difficulty recognizing that the complexity of balancing the First Amendment interests of public employees with the interests of their employers make the granting of qualified immunity appropriate. *See, e.g.*, *Conley v. Town of Elkton*, 381 F. Supp. 2d 514, 524 (W.D. Va. 2005) (“Since the defendants cannot be held liable for what would amount to ‘bad guesses in gray areas,’ the court concludes that they are entitled to qualified immunity.”); *Echtenkamp v. Loudon County Pub. Sch.*, 263 F. Supp. 2d 1043, 1065 n.13 (E.D. Va. 2003) (Although “[t]he fact that a threat of termination can constitute actionable First Amendment retaliation is clearly established,... the determination that plaintiff's speech is constitutionally protected requires a sophisticated balancing of interests, and thus will ‘only infrequently’ be clearly established.”).[FN20]

FN20. While the cases cited above are speech, not association, cases, "[t]he right to associate in order to express one's views is 'inseparable' from the right to speak." *Cromer v. Brown*, 88 F.3d 1315, 1331 (4th Cir. 1996), quoting *Thomas v. Collins*, 323 U.S. 516, 530 (1945). As the district court correctly noted, Bowers has cited no cases with facts similar to this one. (JA 702.)

The district court's resolution of the First Amendment issues in this case illustrates the complexity of the analysis in cases where government employees are asserting First Amendment claims against their employers. With the freedom of speech claim, the court made reference to qualified immunity, commenced its analysis as if it were going to determine the availability of that defense, then ultimately concluded that Bowers' speech was simply not protected by the First Amendment. With the freedom of association claim, the court concluded that Bowers had stated a claim, but the facts underlying that claim did not support a First Amendment deprivation that was clearly established in law, and therefore the Defendants in their personal capacities were entitled to qualified immunity.[FN21]

FN21. The district court had previously dismissed the University and the individual Defendants in their official capacities. *See* JA 663-64, 674-83.

The way in which the court's analysis shifts from immunity to substantive violation and back again, and concludes that there was no substantive violation in one instance and the Defendants were immune in the other despite a colorable claim, supports a determination that there was no substantive violation in either instance, or, even if there were sufficient claims in each case, qualified immunity was available to the Defendants. Fundamental to a qualified immunity defense is the fact that the state of the law not be "clearly established." *See, e.g.*, *S.P. v. City of Tacoma Park*, 134 F.3d 260, 265 (4th Cir. 1998), quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). If courts themselves are not in agreement, the facts of a case may support either a finding of no violation of law, or a finding of a sufficient assertion of a violation by a plaintiff in a "gray area." Either obviously supports entry of summary judgment for Defendants: the former because no violation occurred; the latter because the law is not yet clear and no objectively reasonable employer could fairly be expected to know what it requires. Thus, the district court's entry of summary judgment on Bowers' First Amendment claims should be affirmed for both claims by this Court on either theory. This is particularly true where the whole environment of what First Amendment protections are available to government employees was set spinning by *Garcetti,* a case the implications of which are still being digested by the courts, let alone government employers, and a case that had not even been decided when the University was dealing with Bowers' misconduct.

3. *The district court correctly held that Defendants Sandridge and Reynolds were not decision-makers and should be dismissed.*

While Bowers does not specifically state that the district court's entry of summary judgment for Defendants Sandridge and Reynolds is an issue on appeal, she does pervasively pepper her argument with the assertion that this was error because they were "key players," (Bowers Br. at 17), or that they, "especially Reynolds," were "calling the shots" and "making the decisions." (Bowers Br. at 26.) She attempts to bolster this argument by advancing another argument not

specifically reserved in her "Statement of the Issues," that the district court erred in striking the overwhelming majority of the unauthenticated e-mails she filed with her motion for summary judgment. These arguments are addressed below.

Because Bowers' argument for error in the dismissals of Sandridge and Reynolds is so dependent on her argument that her unauthenticated e-mails should have not been stricken by the district court, the latter argument will be addressed first. On January 28, 2007, Bowers filed a motion for summary judgment. (JA 230.) The motion was accompanied by 74 exhibits, including unauthenticated e-mail correspondence of non-parties, affidavits made without personal knowledge and containing impermissible character attacks on Defendants and counsel, and more than 750 pages of deposition transcripts. (Some, but by no means all, of these exhibits are contained at JA 232-500. In addition, some of the exhibits in the Joint Appendix do not contain the text filed with Bowers' motion, but rather consist of the amended text subsequently filed to comply with the district court's directions.) (JA viii.) In response, Defendants filed a Motion to Strike and for Sanctions seeking to have the unauthenticated and improper exhibits struck from the record. The district court substantially granted Defendant's motion, striking 6:2 of Bowers' 74 exhibits, including 54 of her unauthenticated e-mail exhibits, the affidavits containing the improper personal attacks, and all of the deposition transcripts. The Defendants' motion for sanctions was taken under advisement and remains pending. (JA 668-73.)

Bowers now claims that the district court should not have stricken the e-mails because they were produced in response to her discovery request and this was sufficient authentication. (JA 23-25.) This is, of course, nonsense.

It is well established that unsworn, unauthenticated documents cannot be considered on a motion for summary judgment. To be admissible at the summary judgment stage, "documents must be authenticated by and attached to an affidavit that meets the requirements of Rule 56(e)." In particular, a letter "must be attached to an affidavit and authenticated by its author in the affidavit or a deposition."

Orsi v. Kirkwood, 999 F.2d 86, 92 (4th Cir. 1993) (internal citations omitted). *See also* *Tinsley v. First Union Nat'l Bank*, 155 F.3d 435, 443 (4th Cir. 1998) (a document in which the alleged statements supporting a retaliation claim occurred was an unsworn statement and therefore inadmissible for summary judgment purposes); *Jones v. Navix Line, Ltd.*, 944 F. Supp. 468, 470 (E.D. Va. 1996) (a document that had not been authenticated was unverified hearsay which could not constitute admissible evidence and could not "assist the plaintiff in avoiding summary judgment").

Bowers attempts to avoid the fallacy underlying her argument by claiming that what she did was fine because the Defendants did it too when they attached exhibits to their memorandum supporting their motion to dismiss. (Bowers Br. at 25-26.) She further claims that "one of these very attachments submitted by Defendants with no authentication was the identical exhibit which was among those the court subsequently struck when it was submitted by Plaintiff." (Bowers Br. at 25.) Addressing this latter specific claim first, it is immediately apparent that the two exhibits, found at JA 24 and 434, are copies of entirely different documents. As for the exhibits attached to the Defendants' 12(b)(6) motion, Defendants attached them consistent with precedent allowing for this, without converting a 12(b)(6) motion to a motion for summary judgment, where a plaintiff fails to introduce a pertinent document as part of his complaint, *Gasner v. County of Dinwiddie*, 162 F.R.D. 280 (E.D. Va. 1995), *aff'd on other grounds*, 103 F.3d 351 (4th Cir.

1996), or because they were matters of which the district court could properly take judicial notice. This is a far cry from hundreds of pages of unauthenticated documents and hearsay. More importantly, the district court did not consider any of Defendants' exhibits in ruling on their 12(b)(6) motion. (JA 51 n.5, 53 n.6.)

Bowers' argument that Sandridge and Reynolds should not have been dismissed is equally without merit. It is clear from the record that Bowers' allegations against them are simply not cognizable under § 1983 because liability under that section "cannot attach if a defendant merely failed to act to prevent a constitutional deprivation." *Cobb v. Rector and Visitors of Univ. of Va.*, 69 F. Supp. 2d 815, 834 n.21 (W.D. Va. 1999). *See also Rizzo v. Goode*, 423 U.S. 362, 377 (1975); *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 692 (1978) ("the fact that Congress did specifically provide that A's tort became B's liability if B 'caused' A to subject another to a tort suggests that Congress did not intend § 1983 liability to attach where such causation was absent"); *Leach v. Shelby County Sheriff*, 891 F.2d 1241, 1246 (6th Cir. 1989).

Although § 1983 must be "read against the background of tort liability that makes a man responsible for the natural consequences of his actions," ... "[l]iability will only lie where it is affirmatively shown that the official charged acted personally in the deprivation of the plaintiff's rights.

Vinnedge v. Gibbs, 550 F.2d 926, 928 (4th Cir. 1977) (citations omitted). These cases clearly support the granting of summary judgment to Defendants Sandridge and Reynolds as persons who did not act to cause the injury Bowers alleges. As Reynolds testified, Scurry fired Bowers. (JA 266.) She did not, nor did Sandridge, although each was in the supervisory chain. Bowers' complaint makes no substantive allegation concerning either Sandridge or Reynolds, and other than that her case against each relies almost completely on inadmissible evidence that was properly struck by the district court.

4. *The district court correctly held that the University of Virginia is not a "person" under 42 U.S.C. § 1983.*

Bowers contends that the district court erred in dismissing the University and the individual Defendants in their official capacities. (Bowers Br. at 29-34.) The court reached this conclusion because a "mountain of case law supports the proposition that the University is not a person under § 1983" and the individual defendants in their official capacities, as "alter egos of the state," were not "persons" within the meaning of § 1983 either. (JA 679-80.) The "mountain of case law" is correct and the district court's holding should be affirmed.

Bowers claims there are two reasons why the district court should be overturned: (1) her claims were remediable under *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), whether or not a state entity such as the University is a "person" under § 1983; and (2) because the "case involves a rare waiver of Eleventh Amendment immunity" she should be able to proceed under 28 U.S.C. § 1331 without regard to any limitations imposed by § 1983. (Bowers Br. at 30-31.) These arguments are both without merit.

Bivens was a Fourth Amendment case against individual defendants who were employees of the federal government where there was no available cause of action against them. This case concerns First Amendment and due process claims against a state institution and state employees where causes of action exist. *Bivens* therefore is inapposite. No case interpreting *Bivens* helps

Bowers. The Supreme Court has been wary of extending *Bivens* much beyond its original narrow parameters.

In 30 years of *Bivens* jurisprudence we have extended its holding only twice, to provide an otherwise nonexistent cause of action against *individual officers* alleged to have acted unconstitutionally, or to provide a cause of action for a plaintiff who lacked *any alternative remedy* for harms caused by an individual officer's unconstitutional conduct. Where such circumstances are not present, we have consistently rejected invitations to extend *Bivens.*

Corr. *Serv. Corp. v. Malesko*, 534 U.S. 61, 70 (2001) (emphasis in the original). Defendants did not seek a judgment on the pleadings on the allegations against them individually. Bowers' plea for a remedy against them in their individual capacities was separately decided by the district court on other grounds. Moreover, as the *Malesko* Court noted, the "purpose of *Bivens* is to deter individual federal officers from committing constitutional violations." *Id.* That purpose would in no way be advanced here in this suit against state officers. For all of these reasons, the district court correctly concluded that there was no *Bivens* cause of action here.

Bowers' second reason for seeking to overturn the district court's ruling also is without merit. Contrary to Bowers' assertion (Bowers Br. at 31), this case does not involve a waiver of Eleventh Amendment immunity. In this Circuit it is clear that removal of a case to federal court only effects a waiver of Eleventh Amendment immunity to the extent that the state's sovereign immunity has been waived in state court. *Stewart v. N. C.*, 393 F.3d 484, 488-90 (4th Cir. 2005). There was no such waiver here; rather, Defendants elected not to raise the immunity defense because it was unnecessary to do so given the clear statutory language of 42 U.S.C. § 1983. Moreover, such waiver, even if it had occurred, would have had no effect on the correct reading of § 1983 to exclude from its statutory language state entities such as the University and the individual defendants in their official capacities. Bowers' reliance on *Mt. Healthy* to seek a contrary result is misplaced. *Mt. Healthy* expressly declined to decide whether a state was a "person" under § 1983. That was definitively determined later in *Will v. New York Dep't of St. Police*, 491 U.S. 58 (1989). In addition, school boards such as were at issue in *Mt. Healthy* are very different from states for purposes of § 1983 analysis, as was also subsequently determined by the Supreme Court. *Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658 (1978).

5. *The district court correctly held that Bowers' procedural due process right to receive adequate notice was not violated.*

Bowers initially claimed that she was denied notice and an opportunity to be heard (JA 17 at ¶¶ 38, 41). The district court held that she had received adequate notice in ruling on the Defendants' Motion to Dismiss. (JA 50-52.) She continued to argue vehemently at the summary judgment stage that she had not received an opportunity to be heard prior to the termination of her employment. (JA 239.) She even claimed that she had been fired on November 17, five days before her employment was actually terminated (JA 703), even though she had previously admitted that she was fired on November 22. (JA 92, RFA # 41.)[FN22] The sole issue upon which the district court declined to grant summary judgment for Defendants was whether Bowers had received a sufficient opportunity to be heard. (JA 705.) After receiving this ruling, Bowers abruptly shifted position and, rather than taking this claim to a jury, stipulated that "she could have managed an opportunity, whether on November 22, 2005, or on some other occasion, to address those charges against her." (JA 715.) Her notice claim is no more credible than her erstwhile opportunity-to-be-heard claim.

FN22. This identical claim had been advanced by Bowers' counsel, and rejected, in an earlier lawsuit counsel had filed. *Mansoor v. County of Albemarle*, 124 F. Supp. 2d 367, 380 (W.D. Va. 2000).

The district court reaffirmed its rejection of Bowers' notice claim in ruling on the parties' motions for summary judgment, noting that "there can be no doubt that she [Bowers] was provided adequate notice," (JA 704) and that there was "simply no question that Plaintiff was aware of the conduct giving rise to her dismissal." (JA 705.) Thus, Bowers' argument that the district's court's ruling at the 12(b)(6) stage was premature (Bowers Br. at 38),[FN23] even if it were otherwise colorable, is foreclosed because the district court once again addressed the notice issue at the summary judgment stage and concluded that there was "nothing before the Court that changes that finding." (JA 704.)

FN23. In criticizing the district court's ruling on the due process issue in response to Defendants' 12(b)(6) motion, Bowers relies extensively on *Conley v. Gibson*, 355 U.S. 41 (1955), for the proposition that such a motion should not be granted unless "no set of facts" supports a claim (Bowers Br. at 18, 38). However, on May 21, 2007, more than a month before Bowers filed her opening brief in this Court, the Supreme Court pointedly stated of *Conley:* "The 'no set of facts' language has been questioned, criticized, and explained away long enough by courts and commentators, and is best forgotten as an incomplete, negative gloss on an accepted pleading standard." *Bell Atlantic Corp. v. Twombly*, 550 U.S. ____, slip op. III (2007). Where, as here, Bowers admitted that she received notice before the hearing that resulted in the termination of her employment, no set of facts can save her claim.

The district court was correct at both stages of this litigation. In ruling on Defendants' Motion to Dismiss the court noted that Bowers admitted "she received a notice ... before the day and time set for the hearing." The court correctly noted that the validity of notice is not affected by the fact that it left but a limited time to respond. (JA 51-52.) "While the time for response was short,... and may be a factor in considering whether the pretermination process was adequate, the quantity of time alone does not provide the measure of adequacy." *Linton v. Frederick County*, 964 F.2d 1436, 1440 (4th Cir. 1992). The court also was correct that Bowers stated in her own Complaint that she received information "concerning at least the nature of the alleged charges being leveled against her" the day before the hearing that resulted in the termination of her employment.[FN24] (JA 17 at ¶ 40.) "Due process clearly requires notice of the charges against an individual, but not on any particular form." *Holland v. Rimmer*, 25 F.3d 1251, 1257 (4th Cir. 1994). "The Fourteenth Amendment does not require ... elaborate or hyper-technical procedures before firing an employee ...." *Mills v. Steger*, 179 F. Supp. 2d 637, 645 (W.D. Va. 2002). While Bowers complained about the specificity of the notice she received, "[d]ue process does not mandate that all evidence on a charge or even the documentary evidence be provided, only that such descriptive explanation be afforded as to permit [the plaintiff] to identify the conduct giving rise to the dismissal and thereby to enable him to make a response." *Linton*, 964 F.2d at 1440.

FN24. The information communicated to Bowers' counsel before Bowers' final predetermination hearing is found at JA 24.

The propriety of the district court's 12(b)(6) ruling was confirmed at the summary judgment stage. Filings with Defendants' Motion for Summary Judgment more firmly established that Bowers had received adequate notice. Specifically, the scripts and contemporaneous notes of Childs-White confirm that Bowers was told in great detail on October 21st and November 17th what misconduct she was being charged with. (JA 147-52.) Bowers' protestations that she was in the dark about these things lacks evidential support and credibility. The district court so found, and should be affirmed.

VI. *CONCLUSION*

For the reasons stated above, the district court's dismissal of Bowers' due process claim, granting of summary judgment for Defendants on her First Amendment claims, and granting of Defendants' Motion for Judgment on the Pleadings should be affirmed. The district court's denial of Bowers' Motion for Summary Judgment also should be affirmed.

Dena BOWERS, Plaintiff-Appellant, v. THE RECTOR AND VISITORS OF THE UNIVERSITY OF VIRGINIA, Leonard Sandridge, Yoke San Reynolds, Nat Scurry, and Lucinda Childs-White, in their official and individual capacities, Defendants-Appellees.
2007 WL 2406588 (C.A.4) (Appellate Brief)

Briefs and Other Related Documents (Back to top)

• 2007 WL 2680301 (Appellate Brief) Reply Brief of Appellant Dena Bowers (Aug. 17, 2007)
• 2007 WL 2183247 (Appellate Brief) Brief of Appellant Dena Bowers (Jun. 28, 2007)
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Curriculum Vitae

http://web.archive.org/web/20030803190102/http://www.people.virginia.edu/~mem6u/cv.doc
updated Dec 30, 2002

Michael E. Mann

University of Virginia, Department of Environmental Sciences, Charlottesville, VA 22903
Tel: (804) 924-7770; FAX (804) 982-2137; email: mann@virginia.edu
homepage: www.evsc.virginia.edu/faculty/people/mann.shtml

Personal

Date of Birth: 28 December 1965
Place of Birth: Amherst, Massachusetts

Education

1998 Ph.D. Yale University, Department of Geology & Geophysics
1993 M.Phil.Yale University, Department of Geology & Geophysics
1991 M.Phil.Yale University, Department of Physics
1991 M.S. Yale University, Department of Physics
1989 A.B. (double), University of California-Berkeley, Applied Math, Physics (Honors)

Honors and Awards

1998 Council of Graduate Schools' Distinguished Dissertation Award, nominated
1997 Phillip M. Orville Prize for outstanding dissertation in the earth sciences, Yale University
1996 Alexander Hollaender Distinguished Postdoctoral Fellowship (DOE)
1989 Josiah Willard Gibbs Prize for outstanding research and scholarship in Physics, Yale University

Professional Experience (1996-present)

8/99- *Assistant Professor*, University of Virginia, Department of Environmental Sciences
1998-99 *Research Assistant Professor*, University of Massachusetts, Department of Geosciences
1997-98 *Adjunct Assistant Professor*, University of Massachusetts, Department of Geosciences
1996-98 *Alexander Hollaender Distinguished Postdoctoral Research Fellow* (DOE)

Courses Taught

EVSC 181 *Climate Change: Past and Future*
EVSC 350 *Introduction to the Atmosphere and Weather*
EVSC 494 *Climate and the History of Human Culture*
EVAT 554 *Ocean-Atmosphere Dynamics*
EVAT 793 *Statistical Climatology*

Students Advised

Julian Adams, M.S. candidate: adviser, University of Virginia, 2000-
Zhihua Zhang, M.S. candidate: adviser, University of Virginia, 2000-
Kevin Jones, M.S. candidate: masters thesis committee, University of Virginia, 2001-
Kaycie Billmark, M.S. candidate: masters thesis committee, University of Virginia, 1999-

Dan Druckenbrod, M.S. candidate: masters thesis committee, University of Virginia, 1999-
Anne Waple, Ph.D. candidate: co-adviser and committee member, University of Massachusetts, 1997-
Caspar Ammann, Ph.D. candidate: co-adviser, University of Massachusetts, 1998-99
Bo-Min Sun, Ph.D. candidate: committee member, University of Massachusetts, 1998-99.

Research Interests

(1) Climate signal detection and climate change attribution; (2) Statistical and time series analysis methods in the physical sciences; (3) High-resolution paleoclimate reconstruction; (4) Study of internal variability in coupled ocean-atmosphere models; (5) Climate model/data intercomparison; (6) Climate forecasting; (7) Simplified coupled ocean-atmosphere modeling

Funded Proposals

2001-2002	*Advancing predictive models of marine sediment transport, Office of Naval Research* (Principal Investigator: P. Wiberg, Affiliated Investigator: M.E. Mann)
1999-2002	*Multiproxy Climate Reconstruction: Extension in Space and Time, and Model/Data Intercomparison*, NOAA-Earth Systems History (Principal Investigator: M.E. Mann, Affiliated Investigators: R.S. Bradley, M.K. Hughes)
1998-2000	*Validation of Decadal-to-Multi-century climate predictions*, DOE (Principal Investigator: R.S. Bradley; Affiliated Investigators: H.F. Diaz,, M.E. Mann)
1998-2000	*The changing seasons? Detecting and understanding climatic change*, NSF-Hydrological Science (Principal Investigators: U. Lall, M.E. Mann, B. Rajagopalan, M. Cane)
1996-1999	*Patterns of Organised Climatic Variability: Spatio-Temporal Analysis of Globally Distributed Climate Proxy Records and Long-term Model Integrations*, NSF-Earth Systems History (Principal Investigator: R.S. Bradley; Affiliated Investigators: M.E. Mann, M.K. Hughes)
1996-1998	*Investigation of Patterns of Organized Large-Scale Climatic Variability During the Last Millennium*, DOE, Alexander Hollaender Postdoctoral Fellowship (M.E. Mann)

Professional Activities

2001	Organizer and Host, *PAGES/CLIVAR workshop on Reconstructing Late Holocene Climate*, Charlottesville, Virginia, April 17-20, 2001.
2001	Co-convener (w/ J. Jouzel, P.Jones), special session `` Climate of the past millennium", 26th General Assembly, *European Geophysical Society*
2001	Co-convener/organizer, *NASA /IPRC/ CLIVAR workshop on Decadal Climate Variability*, Manoa, Hawaii, Jan 8-12, 2001.
2000-	Member of Working Group, *International PAGES/CLIVAR*
2000-	Panel member, *NOAA Climate Change Data and Detection Program*
2000-	Editor, *Journal of Climate*
2000	Co-convener (w/ J. Jouzel, P.Jones), special session `` Climate of the past millennium", 25th General Assembly, *European Geophysical Society*
1999-	Scientific adviser to U.S. Government (White House OSTP) on climate change
1999	Co-convener (w/ J. Jouzel), special session ``Data and model studies of climate changes over the last millennium", 24th General Assembly, *European Geophysical Society*
1999	Invited adviser, *NOAA Global Change and Climate Panel*, Boulder, CO
1999	Guest editor, special issue of *Climatic Change*, in review
1999	Co-convener (w/ J. Overpeck), PAGES/CLIVAR workshop on multiproxy climate reconstruction, Boulder, CO
1998-	Lead author, Chapter 2, *Intergovernmental Panel on Climate Change (IPCC)*, Third Assessment Report

1998- Contributing author, Chapters 7,8,12, *Intergovernmental Panel on Climate Change (IPCC)*, Third Assessment Report

1997 Co-convener (w/ E. Cook, H. Pollack, D. Chapman) , theme session ``Multiproxy Climate Reconstruction…", Annual Fall meeting, *American Geophysical Union*

- Memberships: *American Meteorological Society*; *American Geophysical Union*; *European Geophysical Society*; *Geological Society of America*; *American Physical Society; American Association for the Advancement of Science; Sigma Xi*
- Referee for: *Nature, Science, Climatic Change, Geophysical Research Letters, Journal of Climate, JGR-Oceans, JGR-Atmospheres, Paleoceanography, Eos, Int. J. Climatol.*, NSF, NOAA, DOE grant programs
- Popular media exposure: *CBS, NBC, ABC, CNN, CNN headline news, BBC, NPR, PBS (NOVA/FRONTLINE),WCBS, Time, Newsweek, Life, US News & World Report, Economist, Scientific American, Science News, Science, Rolling Stone, Popular Science, USA Today, New York Times, New York Times "Science Times", Washington Post, Boston Globe, London Times, Irish Times, AP, UPI, Reuters,* and numerous other television/print media

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- M.K.Hughes, **Mann, M.E.,** Bradley, R.S., 1000 years of Northern Hemisphere temperature from natural archives. *Abstracts of PAGES Workshop on South Asian Paleoenvironments, Pune, India, February 4-5,* pp 11-15, 2000.
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- **Mann, M.E.,** Bradley, R.S., Hughes, M.K., Large-Scale Surface Temperature Changes During the Past Millennium, *Abstracts of AMQUA annual meeting,, Fayetteville, Arkansas, May 22-24,* pp 17-12, 2000.

Invited Lectures & Workshops

- Invited lecture, Dept. of Chemistry, University of Utah, July 14, 1989
- Invited lecture, Geology Dept., Brown University, Providence, Rhode Island, March 10, 1993
- Invited lecture, United States Geological Survey, *USGS Global Change seminar series,* Reston Virginia, April 12, 1993
- Invited participant, *Application of Statistics to Modeling the Earth's Climate System*, National Center for Atmospheric Research, Boulder, Colorado. July 6-19, 1994
- Invited presentation, *Links between Variations in Solar Activity, Atmospheric Conductivity, and Clouds: An Informal Workshop*, Los Alamos National Laboratory, Los Alamos, New Mexico, June 20-21, 1996
- Invited lecture, Department of Physics, University of Bern, Bern Switzerland, Oct 26, 1996
- Invited lecture, Lamont Doherty Earth Observatory, Columbia University, December 4, 1996
- Invited presentation, *SST reconstruction from Proxy data and Optimal Network Design Strategy For Corals and other Annual Records from Tropical Systems (ARTS)* , Lamont Doherty Earth Observatory, Columbia University, Jan 15-16, 1997
- Invited lecture, Department of Atmospheric Sciences, University of California Los Angeles, Feb 14, 1997
- Invited lecture, Geophysical Fluid Dynamics Laboratory, Princeton University, Princeton, New Jersey, March 4, 1997
- Invited presentation, *The Cross-Validation of Proxy Climate Data and the Instrumental Record*, Joint Institute for the Study of Atmosphere and Ocean, University of Washington, Seattle, June 23-25, 1997
- Invited lecture, Hadley Centre of the United Kingdom Meteorological office, Bracknell, UK, Oct 14, 1997
- Invited talk, conference on *Transformations of Middle Eastern Natural Environments: Legacies and Lessons*, Council on Middle East Studies, Yale Center for International and Area Studies, Yale University, New Haven, Oct 30-Nov 1, 1997
- Invited lecture, Geology Department, West Virginia University, Morgantown, West Virginia, Nov 14, 1997
- Invited lecture, Oceanography Department, Texas A&M university, College Station, Texas, Dec 4, 1997
- Invited lecture, Graduate School of Oceanography, University of Rhode Island, Narragansett, Rhode Island, March 6, 1998
- Invited lecture, NOAA-CDC/ERL/CIRES, Boulder, Colorado, May 13, 1998
- Invited presentation, *AGU Spring meeting*: "Low-frequency Variations in Midwestern U.S Precipitation: Diagnosing ENSO and Anthropogenic effects", Boston, MA, May 1998

- Invited presentation, *US Global Change Research Program Seminar Series*, Dirksen Senate Office Building, Capitol Hill, Washington DC, July 20, 1998
- Invited presentation, *NASA workshop on Decadal Climate Variability*, Williamsburg, VA, Sep 22-25, 1998
- Invited lecture, Department of Mathematics & Statistics, University of Massachusetts, Amherst, MA, Nov 2, 1998.
- Invited lecture, School of Marine and Atmospheric Science, University of Miami, Coral Gables, FL, Nov 13, 1998.
- Invited lecture, Department of Environmental Sciences, University of Virginia, Charlottesville, VA, Feb 18, 1999.
- Invited lecture, Physical Oceanography Seminar Series, Woods Hole Oceanographic Institute, Woods Hole, MA, March 2, 1999.
- Invited presentation, *US Global Change Research Program Seminar Series*, Dirksen Senate Office Building, Capitol Hill, Washington DC, May 17, 1999.
- Invited lecture, Colloquium on Regional Modeling and Detection, International Center for Theoretical Physics (ICTP), Trieste, Italy, June 9, 1999.
- Invited lecture, NASA Goddard Institute for Space Studies, New York, NY, October 15, 1999.
- Invited lecture, Geophysical Fluid Dynamics Laboratory, Princeton, NJ, October, 21, 1999.
- Invited participant and speaker, *PAGES/CLIVAR workshop on Climate of the Last Millennium*, Venice Italy, November 8 - 12, 1999
- Invited guest introductions, *US Global Change Research Program Seminar Series*, Dirksen Senate Office Building, Capitol Hill, Washington DC, November 23, 1999.
- Invited participant and speaker, workshop on *El Niño: Past Present and Future*, Seabrook Island South Carolina, Feb 28-Mar 2, 2000.
- Invited public lecture, Smithsonian Environmental Research Center (SERC), Edgewater Maryland, March 15, 2000.
- Invited presentation, *EGS Spring meeting*: "Seasonal Proxy-Reconstructed Surface Temperature Patterns in Past Centuries", Nice, France, April 22, 2000
- Invited presentation, AMQUA annual meeting, Fayetteville Arkansas, May 22, 2000.
- Invited presentation, 5th *EPA NHEERL symposium on Indicators in Health and Ecological Risk Assessment*, June 7, 2000.
- Invited presentation, *CLIVAR Decadal Climate Predictability Workshop*, La Jolla, California, October 4, 2000.
- Invited presentation, *AGU Fall meeting*: "Use of Proxy Climate Data in Climate Change Detection", San Francisco, CA, Dec 16, 2000.
- Invited presentation, *NASA/CLIVAR/IPRC workshop on Decadal Climate Variability*, Honolulu, Hawaii, January 8, 2001.
- Invited lecture, Turner Lecture Series, Department of Geological Sciences, University of Michigan, Ann Arbor, MI, March 16, 2001.
- Invited presentation, *EGS Spring meeting*: "Comparison of Large-Scale Proxy-Based Temperature Reconstructions over the Past Few Centuries" (co-authors: S. Rutherford, T. Osborn), Nice, France, March 29, 2001.
- Invited lecture, Courant Institute, New York University, New York, NY, April 4, 2001.
- Invited lecture, Quaternary Research Center, University of Washington, Seattle, WA, May 3, 2001.

Abstracts

- Wille, L.T.. **Mann, M.E.**, Burmester, C.P., and de Fontaine, D., Oxygen Ordering in YBa2Cu3Oz, *Proceedings of the Materials Research Society*, 1988.
- **Mann, M.E.**, Park, J., Spatial correlation of interdecadal temperature variations, AGU Fall meeting, San Francisco, CA, December 1992.

- Marshall, S., **Mann, M.E.**, Oglesby, R.J., Saltzman, Barry, A comparison of the CCM1-simulated climates for pre-industrial and present-day CO2 levels, AGU Fall meeting, San Francisco, CA, December, 1993.
- Lall, U., **Mann, M.E.**, Low frequency climate variability: Inferences from the Great Salt Lake, AGU Fall Meeting, San Francisco, CA, December, 1993.
- Lall, U., **Mann, M.E.**, The Ups and Downs of the Great Salt Lake: Relation to Long term climatic variability, *Meeting of the Utah Academy of Arts and Sciences*, Salt Lake City, UT, 1994.
- **Mann, M.E.**, Lall, U., Low frequency climate variability and the Great Salt Lake, *Annual meeting of the Geological Society of America*, Abstracts with programs, Vol. 26, No. 7, p. 229, Seattle, WA, October 1994.
- **Mann, M.E.**, Park, J., Bradley, R., Global modes of decadal-to-century scale climate variability: the application of evolutive SVD spectral analysis to globally distributed high resolution temperature proxy records, AGU Fall meeting, San Francisco, CA, December, 1994.
- Bradley, R., **Mann, M.E.**, Park, J., A spatiotemporal analysis of ENSO variability based on globally distributed instrumental and proxy temperature data, AGU Fall meeting, San Francisco, CA, December, 1994.
- Koch, D., **Mann, M.E.**, Spatial and temporal variability of 7Be surface concentration, AGU Fall meeting, San Francisco, CA, December 1994.
- Park, J., **Mann, M.E.**, Lilly, J., Spatial Patterns of Historical Temperature Variability: Global Correlations using Spectral and Wavelet Techniques, *AAAS meeting*, Atlanta, GA,February, 1995.
- **Mann, M.E.**, Lall, U., Extremes of the Great Salt Lake and quasiperiodic modes of climate variability, *Annales Geophysicae, Supplement II*, EGS, 13, 1995.
- Lall, U., Saltzman, B., **Mann, M.E.**, How does the Great Salt Lake "see" low frequency climate signals? *Annales Geophysicae, Supplement II*, EGS, 13, 1995.
- **Mann, M.E.**, Lees, J., Signal detection in climate time series: robust red-noise confidence level determination in multitaper spectral analysis, AGU Spring meeting, Baltimore MD, May 1995.
- **Mann, M.E.**, Bradley, R., Spatio-temporal patterns of interdecadal and century-scale climate oscillations during the last half millenium, *IUGG* annual meeting, Boulder, CO, July 1995.
- **Mann, M.E.**, Park, J., Joint spatio-temporal modes of surface temperature and sea level pressure variability in the northern hemisphere during the last century, *IUGG* annual meeting, Boulder, CO, July 1995.
- **Mann, M.E.**, Rajagopalan, B., Moon, Y.I., Lall, U., Forecasting multivariate climate timeseries: adaptive, space-time filtering and nonlinear prediction, *Annales Geophysicae, Supplement II*, EGS, 14, Hamburg, Germany, April 1996.
- Lall, U., Rajagopalan, B., Moon, Y.I., **Mann, M.E.**, Forecasting nonlinear time series: locally weighted polynomials with local parameter choice and local error estimate, *Annales Geophysicae, Supplement II*, EGS, 14, Hamburg, Germany, April 1996.
- **Mann, M.E.**, Spatiotemporal Modes of Low-Frequency Climatic Variability: Observation vs. Simplified Coupled Ocean-Atmosphere Model Simulations, AGU Spring meeting, May, 1996.
- Jain, S., Lall, U., **Mann, M.E.**, Trends in century long records of N. hemisphere equator-to-pole temperature gradient and land-ocean temperature contrast, *GEWEX Second International Conference on Global Energy and Water Cycle*, Washington, D.C., June 1996.
- **Mann, M.E.**, Bradley, R.S., The detection of spatiotemporal signals in long-term proxy climate data: prospects for improved climate model validation, *Workshop on High Resolution Climate Modeling*, Wengen, Switzerland, September 23-26, 1996.
- **Mann, M.E.**, A comparison of Observed and Modeled Climate Variability on Interdecadal and Century Timescales, AGU Fall meeting, San Francisco, CA December1996.
- Jain, S., Lall, U., **Mann, M.E.**, Trends in N. Hemisphere Surface Temperature Gradients (Equator-to-Pole and Land-Ocean Constrast):Volcanic Effects and Secular Variations, AGU Fall meeting, San Francisco, CA, December 1996.
- **Mann, M.E.**, Multi-Proxy based reconstructions of large-scale surface temperature patterns during the past several centuries, AGU Spring meeting, Baltimore MD, May 1997.

- **Mann, M.E.**, Bradley, R.S., Hughes, M.K, Northern Hemisphere Temperature During the Past Half-Millenium: Implications for External Forcing and Natural Variability of the Climate, AGU Fall meeting, San Francisco, CA, December, 1997.
- Park, J, **Mann, M.E.**, ENSO Episodes and Shifts in Global Temperature: A Wavelet Correlation Approach, AGU Fall meeting, San Francisco, CA, December 1997.
- Jain, S., Lall, U., **Mann, M.E.**, Rajagopalan, B., Changes in the Midwestern U.S. Precipitation: Observations and Modeled Greenhouse Warming Scenarios, *7th International Meeting on Statistical Climatology*, Whistler, BC, May, 1998.
- Jain, S., Lall, U., **Mann, M.**, Rajagopalan, B., Interannual to Secular Trends in Midwestern Precipitation: Insights on Greenhouse Gas and ENSO Forcing from a Coupled Ocean-Atmosphere Model, *GCIP* conference, St Louis, Mississippi, June, 1998.
- Lall, U., Rajagopalan, B., **Mann, M.**, Cook,E., Explaining Upper Mississippi River Droughts and Wet Spells in Terms of Hemispheric Changes in Atmospheric Circulation, *GCIP* conference, St Louis, Mississippi, June, 1998.
- Waple, A.M., **Mann, M.E**., Bradley, R.S., Proxy and Model-Based Analysis of Patterns of Temperature Associated with Solar Irradiance From 1650 to 1850, AGU Fall meeting, San Francisco, CA, December, 1998.
- **Mann, M.E**., Northern Hemisphere temperatures during the past millennium, *Annales Geophysicae, Supplement II*, EGS, 17, Den Haag, Netherlands, April 1999.
- Folland, C.K., Allan, R.J., **Mann, M.E.**, Power, S.B., Patterns of large-scale climatic variability in the instrumental era, *IUGG* annual meeting, Birmingham, UK, July, 1999.
- D'Arrigo, R., Cook, E., Cullen, H., **Mann, M.E**., Reconstructions of North Atlantic Oscillation Indices, *IUGG* annual meeting, Birmingham, UK, July, 1999.
- Waple, A.M., **Mann, M.E**., Bradley, R.S., Proxy and model-based analysis of patterns of temperature associated with solar irradiance over the last several centuries, *IUGG* annual meeting, Birmingham, UK July, 1999.
- Ammann, C.M., **Mann, M.E.**, Bradley, R.S., Explosive Volcanism and ENSO: Search for a Relationship in a Multicentury Global Climate Reconstruction, AGU Fall meeting, San Francisco, CA, December, 1999.
- **Mann, M.E**., Variability in El Nino And the Global ENSO Phenomenon in Past Centuries, AGU Fall meeting, San Francisco, CA, December, 1999.
- Rittennour, T.M., Brigham-Grette, J., **Mann, M.E**., El Nino-like Climate Teleconnections in New England During the Late Pleistocene: Insights from a 4000-year Glacial Varve Chronology, AGU Fall meeting, San Francisco, CA, December, 1999.
- Rutherford, C.M., **Mann, M.E.**, Schneider, T., Delworth, T., Stouffer, R., Climate Field Reconstruction Under Stationary and Non-Stationary Forcing, AGU Fall meeting, San Francisco, CA, December, 2000.

From <>(S_____-000000000040) 24-06-2002_17:56:18_
From: "Michael E. Mann" <mann@virginia.edu>
To: "Cynthia B. Allen" <cba4a@cms.mail.virginia.edu>
Cc: <bph@virginia.edu>, <mann@multiproxy.evsc.virginia.edu>
References:
In-Reply-To: <2471290428.1024673506@allenpc>
Subject: Re: Request for Info ASAP
Date: Mon, 24 Jun 2002 13:56:18 -0400
Message-ID:
<5.0.2.1.0.20020624154920.02592ec0@multiproxy.evsc.virginia.edu>
MIME-Version: 1.0
Content-Type: text/plain;
charset="iso-8859-1"
Content-Transfer-Encoding: 8bit
X-Mailer: Microsoft Office Outlook 12.0
Thread-Index: AcIbqHDBtJ7AnMZMTrKSIUqBxUN4nA==
X-OlkEid: BE049421CCF679838B316548805AFA95E164963C

Dear Cindy (and Bruce),

The requested information is provided below. Please let me know if I can provide any further information to help. Thanks,

mike

PUBLICATIONS:

Waple, A., Mann, M.E., Bradley, R.S., Long-term Patterns of Solar Irradiance Forcing in Model Experiments and Proxy-based Surface Temperature Reconstructions, *Climate Dynamics*, 18, 563-578, 2002.

Mann, M.E., Hughes, M.K., Tree-Ring Chronologies and Climate Variability, *Science*, 296, 848, 2002.

Ribera, P., Mann, M.E., Interannual variability in the NCEP Reanalysis 1948-1999, *Geophysical Research Letters*, 29, 132-1-132-4, 2002.

Mann, M.E., Rutherford, S., Climate Reconstruction Using 'Pseudoproxies', *Geophysical Research Letters*, 29, 139-1-139-4, 2002.

Ghil, M., Allen, M.R., Dettinger, M.D., Ide, K., Kondrashov, D., Mann, M.E., Robertson, A.W., Tian, Y., Varadi, F., Yiou, P., Advanced Spectral Methods for Climatic Time Series, *Reviews in Geophysics*, in press, 2002.

Petitioners Exhibit No. 5

Covey, C., AchutaRao, K.M., Cubasch, U., Jones, P.D., Lambert, S.J., Mann, M.E., Philips, T.J., Taylor, K.E., An Overview of Results from the Coupled Model Intercomparison Project (CMIP), *Global and Planetary Change*, in press, 2002.

Mann, M.E., Large-scale climate variability and connections with the Middle East in past centuries, *Climatic Change*, in press, 2002.

Cook, E.R., D'Arrigo, R.D., Mann, M.E., A Well-Verified, Multi-Proxy Reconstruction of the Winter North Atlantic Oscillation Since AD 1400, J. Climate, in press, 2002.

Braganza, K., Karoly, D., Hirst, T., Mann, M.E., Stott, P., Stouffer, R.J., Tett, S., Indices of Global Climate Variability and Change: Part I - Variability and Correlation Structure, *Climate Dynamics*, in press, 2002.

Druckenbrod, D.L., Mann, M.E., Stahle, D.W., Cleaveland, M.K., Therrell, M.D., Shugart, H.H., Century Precipitation Reconstructions from James Madison's Montpelier
Plantation using Dendroclimatic and Meteorological Diary Data, *Bull. Am. Met. Soc.*, in press, 2002.

Rutherford, S., Mann, M.E., Delworth, T.L., Stouffer, R., The Performance of Covariance-Based Methods of Climate Field Reconstruction Under Stationary and Nonstationary Forcing, *J. Climate*, accepted, 2002.

Gerber, S., Joos, F., Bruegger, P.P., Stocker, T.F., Mann, M.E., Sitch, S., Constraining Temperature Variations over the last Millennium by Comparing Simulated and Observed Atmospheric CO2, *Climate Dynamics*, accepted, 2002.

NATIONAL/INTERNATIONAL SERVICE ACTIVITIES:

Organizing committee, National Academy of Science *Frontiers of Sciences* symposium

Co-convener/organizer (w/ H. Von Storch, R. Brazdil), theme session "Understanding the Late Maunder Minimum climate anomaly", Annual Spring meeting, American Geophysical Union

Co-convener/organizer (w/ J. Jouzel, P. Jones, W. Dullo), special session "Climate of the past millennium", 27th General Assembly, European Geophysical Society

Member, advisory board, *Earth Interactions* (American Geophysical Union)

Member of Working Group, International PAGES/CLIVAR

Panel member, NOAA Climate Change Data and Detection Program

Editor, *Journal of Climate*

Media exposure:

Explorations (U.Va Research Highlights), Winter 2002, U.Va "Finding Meaningful Patterns in Climate" by Charles Feigenoff;

U.Va Top News Daily Jan 28 2002 "Michael Mann explores weather patterns of the last 1000 years

Inside U.Va Feb 15,2002 "Finding meaningful patterns in climate" and "Climate Change can occur Regionally" by Charles Feigenoff;

New York Times Mar 26, 2002 "Tree Rings Show a Period of Widespread Warming in Medieval Age" by Kenneth Chang;

National Public Radio, "Talk of the Nation" (Friday, March 29th);

HONORS AND AWARDS:

Article [Mann et al, "Global-scale temperature patterns and climate forcing over the past six centuries", *Nature*, 392, 779-787, 1998] selected by Institute for Scientific Information (ISI) a one of the top cited papers in the area of Northern Hemisphere temperatures [interview to appear on ISI site in "Fast Moving Fronts"; section, July 2002]

NEW GRANTS (2002):

Paleoclimatic Reconstructions of the Arctic Oscillation, NOAA-Cooperative Institute for Arctic Research (CIFAR) Program [Principal Investigators: Rosanne D'Arrigo, Ed Cook (Lamont/Columbia); Co-Investigator: M.E. Mann] [14.4 K sub-contract to U.Va. from Columbia University]

2002-2003 *Global Multidecadal-to-Century-Scale Oscillations During the Last 1000 years*, *NOAA-Climate Change Data & Detection (CCDD) Program*, [Principal Investigator: Malcolm Hughes (Univ. of Arizona); Co-Investigators: M.E. Mann; J. Park (Yale University)] [22.8K sub-contract to U.Va from Univ. of Arizona]

2002-2005 *Reconstruction and Analysis of Patterns of Climate Variability Over the Last One to Two Millennia*, NOAA-Earth Systems History Program [Principal Investigator: M.E. Mann] [315K contract to U.Va over 3 years]

At 03:31 PM 6/21/02 -0400, you wrote:

TO: Faculty

FROM: Bruce Hayden

Bruce is preparing the Department's annual report for the Dean's office. One item to be included in the report is “outstanding faculty accomplishments in the past academic year, including research, service, national recognition, grants, fellowships, or awards.”;

Please report to Bruce or Cindy ASAP any such awards or honors you have received since January 2002. (Bruce has your 2001 information from your annual report).

Many thanks. Cindy

Cynthia B. Allen
Administrative Assistant
Department of Environmental Sciences
University of Virginia
Box 400123
Charlottesville VA 22904-4123
Tel: 434-924-0561
Fax: 434-982-2137

Professor Michael E. Mann
Department of
Environmental Sciences, Clark Hall
University of Virginia
Charlottesville, VA 22903

---

e-mail: mann@virginia.edu Phone: (434) 924-7770 FAX: (434) 982-2137

http://www.evsc.virginia.edu/faculty/people/mann.shtml
http://www.evsc.virginia.edu/faculty/people/mann
http://www.evsc.virginia.edu/faculty/people/mann.shtml

From <>(S_____-000000000163) 06-07-2000_23:20:23_
From: "Michael E. Mann" <mann@virginia.edu>
To: <randall@redfish.atmos.colostate.edu>
Cc: "Francis Zwiers" <Francis.Zwiers@ec.gc.ca>
Subject: Biondi et al review
Date: Thu, 6 Jul 2000 19:20:23 -0400
Message-ID: <029701cc2634$1c363050$54a290f0$@edu>
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X-OlkEid: BE4468219F246CABC1AE2C4DBF65BA0526855E7E

Dear David and Francis,

While I realize this isn't standard procedure, I wanted to provide you both
w/ my letter of decision for the Biondi et al manuscript before I send it
off to the author, given the (appropriate) concerns that Francis expressed
with the manuscript when we decided to send it out for review.

The two reviewers (reviews attached) were Malcolm Hughes (reviewer A) and
Jeffrey Park (reviewer B). A third review was promised by Ed Cook but
never received, even upon repeated requests--a bit annoying. Given the two
reviews combined with my own assessment, this was a really close call.
I'll be interested in any comments you have. If you have any comments,
please let me know by tomorrow afternoon (say, by 4pm EDT). I hope to send
the decision off to the authors by the end of the day.

Thanks in advance,

mike

Petitioners Exhibit No. 6

From <>(S_F_____-0000000**00678**) 22-12-2000_16:42:41_
From: "Michael E. Mann" <mann@multiproxy.evsc.virginia.edu>
Sender: <owner-tar2@meto.gov.uk>
To: "Dai, Xiaosu" <xdai@meto.gov.uk>,
"'Folland, Chris'" <ckfolland@meto.gov.uk>,
<tkarl@ncdc.noaa.gov>
Cc: "'TAR Chapter 2'" <tar02@meto.gov.uk>
In-Reply-To:
<596BE2E97AC1D4119E6A0008C70D0306612B30@mailhq01.meto.gov.u k>
Subject: Re: References of Chapter 2
Date: Fri, 22 Dec 2000 12:43:32 -0400
Message-ID:
<3.0.6.32.20001222114332.00f604a0@multiproxy.evsc.virginia.edu>
MIME-Version: 1.0
Content-Type: text/plain;
charset="iso-8859-1"
Content-Transfer-Encoding: 8bit
X-Mailer: Microsoft Office Outlook 12.0
Thread-Index: AcBsNjM8SMf8S4B1T3OLpiy1jSBCtA==
X-OlkEid: BE842F222896E4FF7FD0AE4AA98E0D96CA3269A8

I've made corrections below.

First, please update the following:

Mann, M.E., Park, J., Oscillatory Spatiotemporal Signal Detection in Climate Studies: A Multiple-Taper Spectral Domain Approach, Advances in
Geophysics, 41, 1-131, 1999.

Delworth, T.L., Mann, M.E., Observed and Simulated Multidecadal Variability
in the Northern Hemisphere, Climate Dynamics, 16, 661-676, 2000.

Mann, M.E., Bradley, R.S., Hughes, M.K., Long-term variability in the El
Nino Southern Oscillation and associated teleconnections, Diaz, H.F. & Markgraf, V. (eds) El Nino and the Southern Oscillation: Multiscale Variability and its Impacts on Natural Ecosystems and Society, Cambridge
University Press, Cambridge, UK, 357-412, 2000.

Mann, M.E., Gille, E., Bradley, R.S., Hughes, M.K., Overpeck, J.T., Keimig,
F.T., Gross, W., Global Temperature Patterns in Past Centuries: An interactive presentation, Earth Interactions, 4-4, 1-29, 2000.

Further specific corrections indicated below:

At 02:20 PM 12/14/00 +0000, Dai, Xiaosu wrote:
>Dear Colleagues,
>

Petitioners Exhibit No. 7

>I am now reading through the final draft of Chapter 2 for editorial check. I
>found lots of problems related to references. I'll summarise them as >follows. I hope related authors can help me sort out them.
>
>
>A. The following references are in the References list but not raised in
the
>text. Do you want to delete them?
>
>Page 69, lines 52-54: Bond et al., 1992
>Page 72, lines 8-9: Christy et al., 1997
>Page 72, lines 42-43: Cook et al., 1992
DELETE
>Page 72, lines 49-51: Cook et al., 1996
DELETE
>Page 73, lines 13-14: Crowley and Lowery, 1999
CORRECT REFERENCE is Crowley and Lowery, 2000 (already listed!)
>Page 74, line 2: Dickson, 1999
>Page 74, lines 21-22: Dunbar et al., 1994
DELETE
>Page 75, lines 19-20: Folland and Brown, 1999
>Page 76, lines 22-23: Gagan et al., 1999
>Page 76, lines 31-32: Gallo and Owen, 1999
>Page 76, lines 33-34: Gallo et al., 1999
>Page 77, lines 11-12: Graham, 1994b
>Page 77, lines 13-15: Graham et al., 1994
>Page 77, lines 16-17: Graumlich, 1993
>Page 77, lines 39-40: Groisman et al., 1994
>Page 78, lines 1-3: Haeberli and Hoelzle, 1995
>Page 78, lines 26-27: Hansen et al., 1995
>Page 78, lines 30-31: Hansen et al., 1998b
>Page 79, lines 41: Hulme, 1995
>Page 80, lines 1-2: Hurrell and Trenberth, 1997
>Page 80, line 54: Jones, 1987
>Page 81, lines 29-32: Jouzel et al., 1992
>Page 83, lines 13-14: Kunkel et al., 1999
>Page 83, lines 29-30: Lamb, 1965
>Page 83, lines 49-50: Latif and Barnett, 1996
>Page 83, lines 53-54: Latif et al., 1997
>Page 84, line 54-Page 85, line 1: Mann and Park, 1999
>Page 85, lines 2-3: Mann and Park, 1993
>Page 85, lines 12-13: Mann et al., 1998b
>Page 85, lines 28-29: Maslanik et al., 1999
>Page 85, line 54-Page 86, line 1: Meehl and Arblaster, 1998
>Page 86, lines 36-37: NCDC, 1997
>Page 87, lines 3-5: Neumann et al., 1993
>Page 87, lines 23-24: Norris and Leovy, 1994
>Page 87, lines 42-43: Osterkamp et al., 1994
>Page 88, lines 6-8: Overpeck, 1998
DELETE

>Page 88, lines 11-13: Owen et al., 1998
>Page 89, line 11: Peterson et al., 1995
>Page 89, lines 39-40: Pielke and Landsea, 1998
>Page 89, lines 45-46: Pielke et al., 1999
>Page 90, lines 13-14: Randel et al., 1996
>Page 90, lines 51-53: Ritchie and Harrison, 1993
>Page 91, lines 7-8: Robinson, 1997 (different from lines 3-4:
Robinson,
>1997)
>Page 92, lines 35-36: Salingo, 1999
>Page 94, lines 1-3: Thompson et al., 1997
>Page 94, line 11: Torrence and Webster, 1998b
>Page 94, lines 52-53: Villalba et al., 1998
>Page 97, lines 23-24: Zhai and Eskridge, 1996
>
>
>B. The following references are referred to in the text but don't
appear
in
>the Reference list. Can you give me their detailed information in
order
to
>add them to the Reference list?
>
>Page 14, line 16: Smith et al., 1996
>Page 17, line 1: Shen et al., 1998
>Page 19, line 29: Levitus et al., 1997
>Page 22, line 34: Prabhakara et al., 1998
>Page 23, line 16: Fiorino et al., 1999 (Is it possibly Fiorino, 1999?
See
>page 75, lines 1-2)
>Page 26, line 41: Maslanik et al., 1997 (Is it possibly Maslanik et
al.,
>1999? See page 85, lines 28-29.)
>Page 28, lines 35-36: Romanovsky et al., 1998
>Page 30, lines 37-38: Schindler et al., 1990; Robertson et al., 1992;
Assel
>and Robertson, 1995; Anderson et al., 1996; Wynne et al., 1998
>Page 33, line 34: Crowley et al., 2000 (Is it possibly Crowley, 2000?
See
>page 73, line 15.)
SHOULD BE CROWLEY AND LOWERY (2000)
>Page 34, line 16: Clausen et al., 1998 (Is it possibly Clausen et
al.,
1995?
>See page 72, lines 18-21.)
YES, CLAUSEN ET AL 1995
>Page 35, line 53: Salinger, 1996 (Is it possibly Salinger et al.,
1996?
See
>page 91, lines 31-34.)
YES, SALINGER ET AL 1996

>Page 39, lines 4-5: Dansgaard et al., 1989
>Page 39, line 14: Martinson et al., 1987
>Page 40, line 30: Meese et al., 1994
>Page 40, line 34: deMenocol, 1998
>Page 40, lines 43-44: Barber et al., 1989 (Is it possibly Barber et al.,
>1999? See page 68, lines 53-54 to page 69, line 1.)
>Page 40, line 45: Wick and Tinner, 1997 (Is it possibly Wick and Tinner,
>1999? See page 96, lines 40-41.)
>Page 40, line 49: Stager and Mayewski, 1997
>Page 40, line 50: Hu et al., 1999
>Page 41, line 2: Harrison et al., 1994
>Page 41, line 4: Bradbury and Dean, 1993; Clark et al., in prep.
>Page 41, line 4: Kershaw, 1991 (Is it possibly Kershaw et al., 1991? See
>page 82, lines 35-36.)
>Page 41, line 11: Ritchie et al., 1989
>Page 41, line 14: Thompson et al., 1989
>Page 41, line 15: Haynes et al., 1989; Pachur and Hoelzmann, 1991
>Page 41, line 22: COHMAP Members, 1988; Huntley and Prentice, 1993
>Page 41, line 31: Fagan, 1999
>Page 42, line 7: Hammer, 1997 (Is it possibly Hammer et al., 1997? See
page
>78, lines 18-19.)
>Page 42, lines 19-20: Jouzel et al., 1987
>Page 42, line 28: Severinghaus et al., 1999
>Page 42, line 32: Shuman et al., 1998
>Page 44, line 13: Hughen et al., submitted (Is it possibly Hughen et al.,
>1999? See page 79, lines 24-25.)
>Page 44, line 52: Forland and Hanssen-Bauer, 1998 (Is it possibly Forland
>and Hanssen-Bauer, 1999? See page 75, lines 44-45)
>Page 45, lines 36-37: Lins and Michaels, 1994
>Page 45, line 43: Arkinremi et al., 2000
>Page 46, line 3: Piervitali et al., 1998; Romero et al., 1998
>Page 46, line 8: Bogdanova and Mescherskaya, 1998
>Page 46, line 11: Georgievsky et al., 1999 (Is it possibly Georgievsky et
>al., 1996? See page 76, lines 45-47.)
>Page 46, line 20: Haylock and Nicholls, 1999 (Is it possibly Haylock and
>Nicholls, 2000? See page 78, lines 43-44.)
>Page 46, line 51: Garcia and Vargas, 1997 (Is it possibly Garcia and Bargas,
>1998? See page 76, lines 35-36.)
>Page 47, lines 20-21: Swetnam and Betancourt, 1998
>Page 47, line 41: Spencer, 1993 (Is it possibly Spencer and Christy, 1993?
>See page 93, lines 1-2.)

>Page 50, line 43: Lawrimore and Peterson, 2000
>Page 51, line 26: Tuomenvirta et al., 2000
>Page 53, line 36: Kestin et al., 1998 (Is it possibly Kestin et al., 1999?
>See page 82, lines 37-38.)
>Page 53, line 44: Trenberth and Hoar, 1997
>Page 53, line 54: Allan et al., 1999 (Is it possibly Allan, 1999 or Allan
>and D'Arrigo, 1999? See page 68, lines 10-14.)
>Page 56, line 2: Thompson et al., 1999
>Page 56, line 11: Hagen, 1995 (Is it possibly Hagen et al., 1995? See page
>78, lines 9-12.)
>Page 56, line 11: Siggurdsson and Lonsson, 1995
>Page 56, line 43: Smith et al., 1999b
>Page 59, line 39: Plummer et al., 1999
>Page 59, line 41: Michaels, 2000 (Is it possibly Michaels et al., 2000?
See
>page 86, lines 11-12.)
>Page 61, lines 4-5: Stone et al., 1999
>Page 61, line 25: Shinoda et al., 1999
>Page 62, line 51: Landsea, 1999 (Is it possibly Landsea et al., 1999? See
>page 83, lines 43-44.)
>Page 63, line 29: Graham and Diaz, 2000
>Page 63, line 53: Kushnir et al., 1997
>Page 65, line 10: Changnon and Changnon, 1999 (Is it possibly Changnon
and
>Changnon, 2000? See page 71, lines 34-35.)
>Page 102, Figure 2.5, line 8: Smith et al., 1996
>Page 106, Figure 2.8, line 4: Jones, 1997b (Is it possibly Jones et al.,
>1997b? See page 81, lines 20-21.)
>Page 111, Figure 2.13, line 14: Robinson et al., 1993
>Page 112, Figure 2.14, lines 7-8 & Page 114, Figure 2.16, line 8: Grumbine,
>1996
>Page 121, Figure 2.23, lines 3-4: de Beaulieu et al., 1995 (Is it possibly
>de Beaulieu and Reille, 1995? See page 73, lines 40-41.)
>Page 121, Figure 2.23, line 4: MacManus et al., 1998 (Is it possibly
>MacManus et al., 1999? See page 84, lines 36-37.)
>Page 121, Figure 2.23, line 4: Budziak et al., submitted
>Page 127, Figure 2.28, line 8 & Page 128, Figure 2.29, line 7: Rayner et
>al., 1999
>Page 129, Figure 2.30, line 4: Thompson et al., 2000a
>Page 130, Figure 2.31, line 6: Kiladis and Mo, 1998 (Is it possibly Kiladis
>and Mo, 1999? See page 82, lines 44-45.)

>Page 133, Figure 2.34, line 3 & Page 134, Figure 2.35, line 7:
Groisman
et
>al., 1999b (Is it possibly Groisman et al., 1999? See page 77, lines
36-38.)
>Page 136, Figure 2.37, line 7: Landsea, 1999 (Is it possibly Landsea
et
al.,
>1999? See page 83, lines 43-44.)
>Page 136, Figure 2.37, line 8: Karl et al., 1996
>
>
>C. There are some confusions in the following references. Would you
like
to
>change them?
>
>1. There are two Karl et al., 1995 in the Reference list (see page
82,
lines
>15-16 & 19-20). So in the following situations, which reference do
you
>exactly refer to (you may need assign one of them 1995a and the other
1995b)
>?
>Page 9, line 18: Karl et al., 1995a
>Page 59, line 15: Kar et al., 1995
>Page 64, lines 16-17: Karl et al., 1995
>
>2. There are two Kumar et al., 1994 (although they are different
person)
in
>the Reference list (see page 83, lines 1-2 & 7-8). However in the
text,
you
>only raised once. So which reference do you exactly refer to
(accordingly
>another one has to be deleted)?
>Page 13, lines 22-23: Kumar et al., 1994
>
>3. There are two Rayner et al., 1998 in the Reference list (see page
90,
>lines 25-26 & 30-31). However in the text, you only raised once. So
which
>reference do you exactly refer to (accordingly another one has to be
>deleted)?
>Page 15, line 42: Rayner et al., 1998
>
>4. There are two White et al., 1998 in the Reference list (see page
96,
>lines 29-31 & 32-33). So in the following situations, which reference
do

you
>exactly refer to (you may need assign one of them 1998a and the other
1998b)
>?
>Page 19, line 34: White et al., 1998a
>Page 32, line 20: White et al., 1998
>Page 34, line 11: White et al., 1998
>
>5. There are two Gaffen et al., 2000 in the Reference list (see page
76,
>lines 18-19 & 20-21). So in the following situations, which reference
do
you
>exactly refer to (you may need assign one of them 2000a and the other
>2000b)?
>Page 21, lines 22-23: Gaffen et al., 2000b
>Page 21, line 39: Gaffen et al., 2000b
>Page 21, line 52: Gaffen et al., 2000b
>Page 24, line 24: Gaffen et al., 2000a; Gaffen et al., 2000
>Page 25, lines 30-31: Gaffen et al., 2000a
>Page 25, line 32: Gaffen et al., 2000a
>
>6. There are only two references Santer et al., 1999 and Santer et
al.,
2000
>in the Reference list (see page 91, lines 43-45 & 46-48). So in the
>following situations, which reference do you exactly refer to (should
you
>add some extra references)?
>Page 21, lines 28-29: Santer et al., 1999a
>Page 23, line 16: Santer et al., 1999a, 1999b
>Page 23, line 21: Santer et al., 1999a
>Page 25, line 12: Santer et al., 2000b
>Page 25, line 14: Santer et al., 2000b
>Page 25, line 21: Santer et al., 2000b
>Page 25, line 34: Santer et al., 2000
>Page 31, line 37: Santer et al., 2000
>
>7. There are two Vinnikov et al., 1999 in the Reference list (see
page
95,
>lines 6-7 & 8-9). So in the following situations, which reference do
you
>exactly refer to (you may need assign one of them 1999a and the other
>1999b)?
>Page 26, line 47: Vinnikov et al., 1999
>Page 113, Figure 2.15: Vinnikov et al., 1999
>
>8. There are Stahle et al., 1998 (page 93, lines 3-4) and Stahle et
al.,
>1998b (page 93, lines 5-8) in the Reference list. I suppose Stahle et
al.,

>1998 shoule be deleted while Stahle et al., 1998 wherever is raised in
the
>text should be Stahle et al., 1998b.
>Page 33, line 15: Stahle et al., 1998 - should be Stahle et al., 1998b
>Page 53, lines 10-11: Stahle et al., 1998 - should be Stahle et al., 1998b
ALL OF THE ABOVE CITATIONS REFER TO WHAT IS NOW INDICATED AS "STAHLE ET AL
1998B". IF THERE IS NO INCIDENCE OF A REFERENCE TO WHAT IS INDICATED AS
"STAHLE ET AL 1998" I SUGGEST WE SIMPLY REPLACE ALL CITATIONS AS "STAHLE
ET
AL 1998"
WITH THE REFERENCE INDICATED AS:

Stahle, D.W., R.D. D'Arrigo, P.J. Krusic, M.K. Cleaveland, E.R. Cook, R.J.
Allan, J.E. Cole, R.B. Dunbar, M.D. Therrell, D.A. Gay, M.D. Moore, M.A.
Stokes, B.T. Burns, J. Villanueva-Diaz, and L.G. Thompson, Experimental
Dendroclimatic Reconstruction of the Southern Oscillation, Bulletin of the
American Meteorological Society, 79 (10), 2137-2152, 1998.

>
>9. There are two Yiou et al., 1997 in the Reference list (see page 97,
lines
>10-12 & 13-14). So in the following situations, which reference do you
>exactly refer to (you may need assign one of them 1997a and the other
>1997b)?
>Page 40, line 30: Yiou et al., 1997
>Page 43, line 27: Yiou et al., 1997
>
>10. There are Groisman et al., 2000a (see page 77, lines 30-31) and
Groisman
>et al., 2000b (see page 77, lines 34-35) in the Reference list. So in the
>following situations, which reference do you exactly refer to?
>Page 45, line 35: Groisman et al., 2000 - 2000a or 2000b?
>Page 45, line 38: Groisman et al., 2000 - 2000a or 2000b?
>Page 62, line 1: Groisman et al., 2000 - 2000a or 2000b?
>Page 62, line 3: Groisman et al., 2000 - 2000a or 2000b?
>
>11. There are Kumar et al., 1999a (see page 83, lines 3-4) and Kumar et

al.,
>1999b (see page 83, lines 5-6) in the Reference list. So in the
following
>situation, which reference do you exactly refer to?
>Page 46, line 40: Kumar et al., 1999 - 1999a or 1999b?
>
>12. There are Cook et al., 1999a (see page 72, lines 52-53) and Cook
et
al.,
>1999b (see page 72, lines 44-46) in the Reference list. So in the
following
>situation, which reference do you exactly refer to?
>Page 47, line 15: Cook et al., 1999 - 1999a or 1999b?
COOK ET AL 1999a
>
>13. There are Sun et al., 2000a (see page 93, lines 25-26) and Sun et
al.,
>2000b (see page 93, lines 27-28) in the Reference list. So in the
following
>situation, which reference do you exactly refer to (you only raised
this
>reference once, so accordingly another one has to be deleted)?
>Page 48, line 31: Sun et al., 2000 - 2000a or 2000b?
>
>14. There are two Wang and Gaffen, 2000 in the Reference list (see
page
95,
>lines 43-44 & 45-47). So in the following situations, which reference
do
you
>exactly refer to (you may need assign one of them 2000a and the other
>2000b)?
>Page 48, line 33: Wang and Gaffen, 2000
>Page 59, line 46: Wang and Gaffen, 2000
>
>15. There are two Smith et al., 2000a (although they are different
person)
>in the Reference list (see page 92, lines 40-41 & 46-47). So in the
>following situation, which reference do you exactly refer to (you
only
>raised this reference once, so accordingly another one has to be
deleted)?
>Page 49, line 34: Smith et al., 2000a
>
>16. There are Bajuk and Leovy, 1998a (see page 68, lines 47-48) and
Bajuk
>and Leovy, 1998b (see page 68, lines 49-50) in the Reference list. So
in
the
>following situation, which reference do you exactly refer to?
>Page 51, line 47: Bajuk and Leovy, 1998 - 1998a or 1998b?
>

>17. There are Dai et al., 1997a (see page 73, line 22) and Dai et al.,
1997b
>(see page 73, lines 23-24) in the Reference list. So in the following
>situation, which reference do you exactly refer to?
>Page 56, line 10: Dai et al., 1997 - 1997a or 1997b?
>
>18. There are Zhai et al., 1999a (see page 97, lines 28-29) and Zhai et
al.,
>1999b (see page 97, lines 30-31) in the Reference list. So in the
following
>situation, which reference do you exactly refer to?
>Page 59, line 46: Zhai et al., 1999 - 1999a or 1999b?
>
>19. There are Jones et al., 1999a (see page 81, lines 18-19) and
Jones et
>al., 1999b (see page 81, lines 25-26) and Jones et al., 1999c (see
page
81,
>lines 12-13) in the Reference list. So in the following situations,
which
>reference do you exactly refer to?
>Page 59, line 51: Jones et al., 1999 - 1999a or 1999b or 1999c?
>Page 63, line 24: Jones et al., 1999 - 1999a or 1999b or 1999c?
>Page 63, lines 36-37: Jones et al., 1999 - 1999a or 1999b or 1999c?
>
>
>D. Also I assumed there were some typing mistakes that should be
changed
>although I am not very sure. Would you like to confirm them?
>
>Page 21, line 6: Bindoff and McDougall, 1999 must be Bindoff and
McDougall,
>2000 (see page 69, lines 37-38);
>Page 35, line 36: Pfister et al., 1999a should be Pfister and
Brazdil,
1999a
>(see page 89, lines 28-30);
YES. CHANGE IS CORRECT.
>Page 56, lines 23 & 27: Deser et al., 1999 must be Deser et al., 2000
(see
>page 73, lines 50-51).
>
>
>E. For the IPCC report, we only accept published references. Although
we
may
>accept references that are "in press" or "accepted", we don't accept
>references that are only "submitted" or "in preparation" (those would
be
>eventually deleted before publication if we don't get any updated

>information). I have tried to find some information from the library
of
UK
>Met Office. The following references are those I didn't get
information
>through the library. Could you please let me know any updated
information
>about them?
>
>References "in press":
>Page 68, lines 10-12: Allan,1999
>Page 73, lines 18-19, Cullen et al., 2000
>Page 77, lines 30-31: Groisman et al., 2000a
>Page 79, lines 1-2: Higgins et al., 2000
>Page 79, lines 39-40: Hughes et al., 2000
>Page 82, lines 39-40: Kley et al., 2000
>Page 85, lines 6-9: Mann et al., 2000a
PUBLISHED. SEE TOP OF THIS MESSAGE
>Page 85, lines 14-15: Mann et al., 2000b
PUBLISHED. SEE TOP OF THIS MESSAGE
>Page 85, line 19: Manton, 2000 (also no title)
>Page 88, line 33: Parkinson, 2000
>Page 90, lines 15-17: Randel et al., 2000
>Page 93, line 20: Stocker, 1999
>Page 95, lines 35-36: Wang and Gong, 1999
>
>References "accepted":
>Page 72, lines 32-33: Collins et al., 2000
>Page 77, lines 41-42: Groisman et al., 2000
>Page 78, lines 32-33: Hanssen-Bauer and Førland, 2000
>Page 92, lines 46-47: Smith et al., 2000a
>Page 96, lines 4-5: Waple et al., 2000
>
>References "submitted":
>Page 69, line 10: Bates and Jackson, 2000
>Page 69, lines 11-12: Bates et al., 2000
>Page 70, lines 7-8: Bonsal et al., 2000
>Page 72, lines 14-15: Christy et al., 2000
>Page 76, lines 53-54: Golubev et al., 2000
>Page 79, lines 3-4: Higgins et al., 2000
>Page 80, line 48: Jones, 2000
>Page 81, lines 8-9: Jones et al., 2000
>Page 81, lines 40-42: Jouzel et al.
>Page 84, lines 46-47: Maloney and Hartmann, 2000
>Page 85, lines 22-23: Marengo, 1999
>Page 85, lines 36-38: Masson et al., 2000
>Page 91, lines 21-22: Ross and Elliott, 2000
>Page 91, lines 37-38: Salinger et al.
>Page 94, lines 19-20: Trenberth et al., 2000
>Page 95, lines 21-22: Wadhams and Davis, 2000
>Page 95, lines 43-44: Wang and Gaffen, 2000
>Page 96, lines 47-48: Williams et al., 1999

>
>Reference "in preparation"
>Page 75, lines 1-2: Fiorino, 1999
>
>Reference "unpublished"
>Page 90, lines 25-26: Rayner et al., 1998
>
>
>F. In addition, Sylvia sent a email (15 Nov.) with some changes about
>references in Chapter 2. I have a couple of questions about them.
>
>1. You added a reference Folland et al., 2000. However, in the
Reference
>list, there is already a Folland et al., 2000 (see page 75, lines 29-
30).
So
>in the text when you raised Folland et al., 2000, which one do you
refer
to?
>Page 14, line 26: Folland et al., 2000
>Page 17, Table 2.2: Folland et al., 2000
>Page 58, line 41: Folland et al., 2000
>Page 101, Figure 2.4: Folland et al., 2000
>
>2. You asked to delete two references Kagen (I suppose correct
spelling
is
>Kagan), 1997 and Kekhut (I suppose correct spelling is Keckhut) et
al.,
>1998. But they are still raised in the text. Why delete them?
>Page 17, line 2: Kagan, 1997
>Page 22, line 47: Keckhut et al., 1998
>
>
>I would appreciate your any help. Any response before next March
would be
>very helpful. After that we'll have to make any necessary changes
(e.g.,
>deleting all unpublished references).
>
>Best Regards,
>
>Su
>
>----------
>Dr. Xiaosu Dai
>IPCC WG I TSU
>Hadley Centre, Met Office
>London Road, Bracknell
>RG12 2SY, UK
>
>Phone: +44-1344-856695

>Fax: +44-1344-856912
>email: xdai@meto.gov.uk
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Professor Michael E. Mann
Department of Environmental Sciences, Clark Hall
University of Virginia
Charlottesville, VA 22903

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e-mail: mann@virginia.edu Phone: (804) 924-7770 FAX: (804) 982-2137
http://www.evsc.virginia.edu/faculty/people/mann.html

From: Michael Mann
To: Ben Santer
Cc: Abraham, John P.; Dessler; mandias@sunysuffolk.edu Mandia;
Weymann; gs210@columbia.edu Schmidt; trenbert@ucar.edu Trenberth; carl mears; Frank Wentz;
s.sherwood@unsw.edu.au Sherwood; Karl Taylor; Tom Wigley; Naomi Oreskes
Subject: Re: Serious accusations made by Roy Spencer against Andrew Dessler
Date: Friday, December 10, 2010 12:41:57 PM

Ben et al,
I've taken the liberty of copying Naomi in on this message. Her book w/ Eric Conway ("Merchants of Doubt") i required reading for any of us. It provides the further historical context essential to understand this latest incident. This incident hardly represents the rogue behavior of a single contrarian scientist. Rather, Spencer lending his scientific credibility (well-what, if any, is left of it) to a coordinated, longterm, industry-funded smear and disinformation campaign. Spencer couldn't have pulled this off on his own. Rather, he had the full resources of the fossil fuel front group known as "CFACT" (http://www.sourcewatch.org/index.php/Committee_for_a_Constructive_Tomorrow) behind him. They are the ones who organized the press conference, rolled out their fake "Lord" Monckton for further theater, etc. we ignore this larger context at our peril.

Mike

From: Michael Mann
To: Abraham, John P.
Cc: Scott Mandia; trenbert@ucar.edu Trenberth; Dessler;
Weymann; gs210@columbia.edu Schmidt; Ben Santer
Subject: Re: Serious accusations made by Roy Spencer against Andrew Dessler
Date: Friday, December 10, 2010 9:11:53 AM

yes, no question. we've got a rolodex. we need to use it,
m

On Dec 10, 2010, at 10:08 AM, Abraham, John P. wrote:
Mike,
We can provide the quotes from experts but we need a media person to run with the story □c..
Scott, this is really for Eli to do □c. Can he write a story about this,
--□]John

From: Michael Mann [mailto:mann@meteo.psu.edu]
Sent: Friday, December 10, 2010 9:05 AM
To: Abraham, John P.
Cc: Scott Mandia; trenbert@ucar.edu Trenberth; Dessler;
Weymann; gs210@columbia.edu Schmidt; Ben Santer
Subject: Re: Serious accusations made by Roy Spencer against Andrew Dessler

folks, Joe Romm's comments on this might be of some interest:

> Because they are lazy and/or uninformed, even most of the 'sophisticated' media is either unwilling or incapable of adjudicating between two disagreeing scientists. Unless one of those scientists can be clearly shown to be truly fringe, whereas the other is in the mainstream (has many who support him or her). You must do the media's homework for them.

Petitioners Exhibit No. 8

The right wing and deniers are very good at repeating over and over again attacks on our best spokespeople and scientists in order to delegitimize them.

The fact is Spencer should have been delegitimize on the basis of 1) his being obstinately dead wrong about the satellite data, 2) his creationism, and 3) his generally bizarre views: □gI predict that the proposed cure for global warming . reducing greenhouse gas emissions . will someday seem as outdated as using leeches to cure human illnesses. □h

http://climateprogress.org/2010/04/20/the-great-global-warmingblunder-roy-spencer-marc-morano-cure-global-warming-reducinggreenhouse-gas-emissions-leeches/

Folks need to repeat these over and over again. That's what I did in my post -- but the Spencer stuff was buried at the end of a long post.

Now, on the specific inanity of clouds causing El Nino -- you need to round up a bunch of the country's leading experts on climate modeling and/or El Nino to just mock him for that.

This is a busy day for me, but I really can't emphasize this enough. Get a half dozen quotes from leading experts in the field, post them, and repeat them over and over again.

I don't know what it takes to discredit a pathological crank-case like Spencer, but the alternative is that he keeps doing this over and over again.

From: Michael Mann [mailto:mann@meteo.psu.edu]
Sent: Friday, December 10, 2010 8:45 AM
To: Scott Mandia
Cc: trenbert@ucar.edu Trenberth; Abraham, John P.; Dessler;
Weymann; gs210@columbia.edu Schmidt; Ben Santer
Subject: Re: Serious accusations made by Roy Spencer against Andrew Dessler

well put Scott, Specer's actions are an affront to the scientific profession. reminds me of Pons and Fleischman holding a press conference back in the 1980s to announce they had achieved cold fusion. only this is worse, because Spencer doesn't even have any results of his to announce, he's simply slandering others.

this needs to be called out, publicy and loudly. we ought to be able to get some journalists interested in this.

Scott/John--you guys ought to have quite a rolodex of names now--I suggest we use it, perhaps we need to use the CCRRN in an even more pro-active mode for situations like this?
mike

--
Michael E. Mann
Professor
Director, Earth System Science Center (ESSC)
Department of Meteorology Phone: (814) 863-4075
503 Walker Building FAX: (814) 865-3663
The Pennsylvania State University email: mann@psu.edu
University Park, PA 16802-5013
website: http://www.meteo.psu.edu/~mann/Mann/index.html
"Dire Predictions" book site:
http://www.essc.psu.edu/essc_web/news/DirePredictions/index.htm

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

Petitioners Exhibit No. 9

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