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' PRESERVATION OF OBJECTIONS

At the April 2, 2013, hearing, the court authorized Petitioners to file no later than April 12, 2013, their preservation of objections to decisions of the court in the above titled matter in order to fully preserve the objections for appeal. Herein, Petitioners preserve their objections to and allege errors of rulings of the trial court.

I. Objection on failing to find the University violated the Virginia Freedom of Information Act

On January 5, 2011, the American Tradition Institute and Robert Marshall ("ATI") requested the Rector and Visitors of the University of Virginia ("the University" or "UVA") to produce public records over which it had custody. Four months and ten days later, (May 16, 2011) and 61 days after giving UVA thousands of dollars for document review; after having made three separate unsuccessful efforts to negotiate a production schedule for the documents;

after the University promised documents on a date certain, and then never meeting that commitment; ATI, as authorized under FOIA (Va. Code § 2.2-3713) filed a Verified Petition for Mandamus and Injunctive Relief ("Petition") for the express purpose of forcing the University to release all requested records that the University would not be allowed to withhold under an exclusion.

Under Va. Code § 2.2-3704(B), the University must "promptly, but in all cases within five working days of receiving a request, provide the requested records to the requester or make one of [four] responses in writing." The University did not provide the requested records with five working days. On January 13, 2011, the fifth day after receipt of the request, the University sent an email to Petitioners stating in its entirety:

> Dear Mr. Horner, Dr. Schnare, and Del. Marshall:
>
> I am responding to your request – pursuant to the Virginia Freedom of Information Act – for records relating to Professor Michael Mann.
>
> Due to the breadth of your request, the University will take the seven-work-day extension allowed under the Act. Va. Code § 2.2-3704 (B)(4).
>
> With kindest regards,
> Elizabeth Wilkerson

This response fails to meet the requirements of the Act. Under § 2.2-3704(B)(4), "Such response shall specify the conditions that make a response impossible." In fact, however, as documented in a January 25, 2011, letter, the University knew in October of 2010 that it had the subject documents, where they were stored, and what it would cost to supply them. If there was any reason not to provide the documents, it had to be because the University had a duty to review the records to ensure those required by law to be withheld were segregated from those that could be released. This the University did not state.

Even assuming the University had met its duty of specificity on what made a response

impossible, § 2.2-3704(B) does no more than provide an addition seven days to invoke one of the four reasons offered in § 2.2-3704(B) as to why the University could not respond promptly. The deadline for that writing was seven days after January 13th, specifically January 20, 2011. The University failed to provide Petitioners any written response until January 25, 2011. This, alone, is a clear violation of the Act and is sufficient to justify filing a petition under § 2.2-3713. Petitioners, instead, attempted to engage the University in an effort to reach agreement on when all appropriate records would be released. Petitioners were unsuccessful in those negotiations.

Next, on January 25, 2011, the University sent a letter refusing to release any records prior to receiving $8,500, ostensibly to underwrite the exclusion review of the records sought, pursuant to § 2.2-3704(F). Notably, neither § 2.2-3704(F) nor any other provision of the Virginia Freedom of Information Act authorizes the University to refuse to release records prior to receiving payment. The refusal to release records, or even to begin review of the records, prior to receipt of payment is a violation of the Act.

On February 18, 2011, the parties agreed to disagree on whether the University had authority to make its money demand and Petitioners agreed to pay but again demanded a production schedule stating at what time the University would complete its review and produce all appropriate documents. On this date, the University again refused to provide a production schedule.

On March 10, 2011, the University received $2,000, the amount they demanded to begin review of the documents, but did not begin accessing the records until March 16, 2011. On April 6, 2011, the University sent a letter to Petitioners stating that they had exhausted the initial $2,000 and stated "we will undertake no further review unless you wish to pay another installment." One day later Petitioners agreed to make a second payment of $2,000.

On May 2, 2011, the University contacted Petitioners "indicating he [University attorney Richard C. Kast] will send out the first copies of document in the rolling production by May 6th," a statement the University memorialized on its FOIA website. The University failed to send Petitioners records on May 6th. After waiting an addition ten days, and not having received a single page of records, Petitioners filed the Petition.

The University violated the Act by failing to promptly release documents. Notably, the University could have avoided this violation had it agreed to a production schedule and met that schedule, something it repeatedly failed to do. Even in the event the University had been willing to reach a production agreement, which clearly it was not, but Petitioners were unwilling to agree, something Petitioners never had an opportunity to do, the University could still have avoided a violation of the Act by petitioning a court for additional time to respond.

> Any public body may petition the appropriate court for additional time to respond to a request for records when the request is for an extraordinary volume of records or requires an extraordinarily lengthy search, and a response by the public body within the time required by this chapter will prevent the public body from meeting its operational responsibilities. Before proceeding with the petition, however, the public body shall make reasonable efforts to reach an agreement with the requester concerning the production of the records requested.

Va. Code §2.2-3704(C). At any time over the four month and 10 day period between Petitioners' information request and the filing of the Mandamus Petition, the University could have obtained a court-approved schedule from their local court, and could have done so *ex parte*. The courthouse of the 16th Judicial Circuit of Virginia is 2.4 miles from the offices of the University's General Counsel, a 10 minute drive. The University did not agree to a production schedule with Plaintiffs and did not take the 10 minute drive to the 16th Circuit and seek any reasonable schedule it might have wanted.

Petitioners specifically cited to *Fenter v. Norfolk Airport Auth.*, 274 Va. 524, 649 S.E.2d

704 (2007), arguing that the trial court is not free to disregard binding precedent with regard to what constitutes a violation of the Virginia FOIA. In *Fenter*, the Supreme Court cited to Va. Code § 2.2-3704(E), explaining that failure to respond to a request for records shall be deemed a denial of the request and shall constitute a violation of the Act; and, thereafter held that failure to produce documents until after Fenter filed his petition for mandamus constituted a violation of the Act and that the trial court erred in finding otherwise. *Fenter v. Norfolk Airport Auth.*, 274 Va. at 532.

In the first prayer for relief, Petitioners asked the court to "find the Respondent in violation of the Virginia Freedom of Information Act" on the basis that the University did not promptly release documents. Petitioners object and allege that as a matter of law the Court erred by failing to find that the University violated the Act for failure to promptly release documents as required in § 2.2-3704(B).

II. Objection on Denial of Costs and Fees

Not until Petitioners filed did the University release a single record. Once having received notice of filing of the Petition, the University sent Petitioners 1,804 pages of records in paper form and not in electronic file form, as requested. Eventually, and only after being ordered by the Court to produce all records not covered by an exclusion, the University released an additional 3,845 pages of records. Release of these 5,649 pages of records was the principal purpose of the Petition.

The Petition establishes that the principal purpose of the petition was to obtain the 5,649 pages of records that the University had failed to supply in a timely and efficient manner. *See* Petition at ¶¶ 2, 78, 79, and 82. Petitioners also sought a procedure (a protective order) by which to reduce the burden on the court when it took up whether any records withheld by the

University should be included in those that should have been disclosed. *See* Petition at ¶¶ 2, 58 – 73 and 81.

That these two merits issues are the principal purposes of the petition is manifest on the face of the Petition. Fully 85 percent of the merits- related paragraphs in the petition address these two principal merits issues. Notably, the second paragraph of the Petition memorializes that these are the principal purposes of the petition:

> 2. Pursuant to Virginia Code § 2.2-3713, the Petitioners, through counsel, ask the court to: (1) order UVA to provide the requested documents on a timely schedule; (2) bar UVA from demanding payment for any costs other than "accessing, duplicating, supplying, or searching for the requested records"; (3) order the Parties to engage in a process that will minimize the number of excluded documents the Court will have to review in camera; (4) order payment of the Petitioners' reasonable costs associated with the instant matter; and, (5) order such necessary and proper injunctive relief or other injunctive relief as this Court deems just and proper.

Petition at ¶ 2. Further, the first prayer for relief in the Petition was a request that the court order the University to release documents on a timely schedule and in electronic format. Petition at ¶¶ 78 - 79. And the third prayer for relief was a request for entry of a protective order. Petition at ¶ 81.

On May 24, 2011, the court issued an order requiring the University to produce the requested records within 90 days. Under this order, the University released 1,793 records, bringing the total pages of records released after filing of the Petition to 5,649.

In addition to an order forcing release of records, and also on May 24, 2011, the court entered a protective order that would minimize the number of excluded documents the Court would have to review in camera, but allow Petitioners the opportunity to examine these withheld documents so as to allow them to make any arguments they might choose regarding whether the University properly withheld the documents. As a result of these two orders, the Petitioners prevailed on the two principal merits issues they brought before the court.

Subsequent to Petitioners prevailing on the two principal merits issues of its petition, the University engaged in lengthy motions practice, not one motion of which addressed or otherwise altered the fact that Petitioners substantially prevailed on the two principal merits issues of its petition, an order forcing release of documents and a protective order. One of these subsequent motions asked for a revision of the protective order, as specifically authorized in the original order, and the parties negotiated amendments to the order which the court subsequently entered, but the amendments did no more than alter the means for selecting the records to be placed before the court and did not upset the fact that the court ordered a protective order for the purposes it granted the initial version of the order. In the last phase of the case, once the parties had applied the protective order and presented to the court 31 records that represented all the records the University had withheld, the parties were ordered by the court to brief whether the University properly withheld records it otherwise should have disclosed. The court held that the University did not improperly withhold any documents.

On the basis that the University had failed to supply in a timely and efficient manner the 5,649 pages of records the University should have and subsequently was forced to disclose, the Petition also sought reasonable costs and fees as authorized under VA Code § 2.2-3713(D). Because the court had deferred judgment on Petitioners' request for costs and fees, on March 7, 2013, Petitioners presented its arguments for costs and fees in a filing entitled "Renewal of Petition for Costs and Fees". At the April 2, 2013 hearing, the court ruled on the request for costs and fees, holding that the hourly rates sought were reasonable and the hours expended reasonably reflected the work necessary to Petitioners in this case. The court, however, held that Petitioners did not substantially prevail on the merits. The court did not state what it considered the merits issues in this case.

Petitioners object to the court holding that they did not substantially prevail on the merits of the petition. The Petition is the proper basis for determining the merits at issue in a case brought under VA Code §2.2-3713. Because the principal purpose of the petition was to obtain the 5,649 pages of records that the court ordered the University to release; because the University failed to release a single page of records prior to Petitioners' filing their Petition; and, because the court forced the University to release 3,845 pages of records it had not released prior to the order, the University cannot have been found to have supplied the requested records in a "prompt" or a timely and efficient manner, Petitioners object to the decision of the court.

Petitioners offered the court clear precedent that where the purpose of an action is to force compliance with the FOIA by requiring the public body to produce the requested documents and the court then forces their release through an order, the Petitioners have substantially prevailed on the merits. The undisputed facts in this case show that despite repeated requests for the records and for a schedule on which they might be produced, the University simply did not release the documents until Petitioners filed their suit.

Petitioners offered the court *Fenter v. Norfolk Airport Auth.*, 274 Va. 524, 649 S.E.2d 704 (2007) as authority for their argument that this failure to release the documents until after filing of a petition and becoming subject to a court order constitutes both a violation of the Act and evidence the Petitioners having substantially prevailed on the merits of their petition. Petitioners also cited to *Redinger v. Casteen*, 36 Va. Cir. 479, 483 (Va. Cir. Ct. 1995) which offers the rationale for the *Fenter* decision, to wit:

> The fact that the billings statements were provided the day before the hearing albeit in redacted form, does not deny the idea that this and the rest of the requested documents were first refused and it took a lawsuit to get them and some of the other requested documents. **The objective of access by voluntary disclosure behind the Act would be defeated if the state could first deny a request and then force a citizen to resort to court action to get them only to diffuse an attorney's fee request by giving over the**

> **requested things after court action is initiated.** * * * So what results is a combination of claims for disclosure which were clear and others not so clear where petitioner prevailed on some, not on others, and where there were valid legal bases for respondent's refusal to turn over some of the documents initially. The analysis should not be reduced to a score card or percentage of outcome but should be based on the petitioner making a showing that the materials sought are covered for disclosure by the Act given the access afforded by it.

(emphasis added). Petitioners also offered *Hill v. Fairfax County Sch. Bd.*, 284 Va. 306, 314-315, 727 S.E.2d 75, 80 (2012) (holding that an action to force FOIA compliance that results in forcing release of documents is sufficient to "substantially prevail on the merits" and that the petitioner need not prevail on every issue raised.).

Because the University did not produce a single page of the requested records until after Petitioners filed its Petition and because the court granted both of the requests for relief which constituted the principal objectives of the petition, Petitioners object to and allege that as a mixed matter of fact and law the Court erred in its the April 2, 2013, decision that Petitioners did not substantially prevail on the merits.

III. Objection on Definition of the term "of a proprietary nature"

Petitioners object to and allege that as a matter of law the Court erred in its April 2, 2013 Order when finding that the term "of a proprietary nature" as used in § 2.2-3705.4(4) means "a thing or property owned or in the possession of one who manages and controls them" because although the exclusion must be interpreted narrowly the Court used the broadest possible definition of "proprietary" even though Petitioners offered, and the Court could have used, any of several narrower definition of "proprietary" that protected the academic and economic interests of the University, as required by the statutory exemption.

IV. First Objection on Finding of No Public Release

Petitioners object to, and allege that as a matter of law, the Court erred in its April 2, 2013 Order when finding that the Respondent, the University of Virginia, (UVA) did not publicly release all the withheld documents and thus waived all exclusions allowed under the Virginia Freedom of Information Act (FOIA) when it released the requested documents to Dr. Michael Mann because Dr. Mann, a member of the public who, at the time was not, and should never have been, a Respondent, was not a UVA employee, was not a Virginia citizen, was an economic and academic competitor of UVA, and was about to become adverse at law to UVA. The fact that the University released the emails to Dr. Mann at a time when he was no more than a member of the public can only be viewed as the University having "publicly released" the documents at issue, thus waiving all exclusions under the Act, including the exclusion offered under § 2.2-3705.4(4). For this reason, the court erred in not finding the exclusions under the Act waived.

V. Second Objection on Finding of No Public Release

Among the records Petitioners sought were emails received by Dr. Mann, but which were neither produced by him nor collected for him. Some of these emails were "broadcast" emails sent to many others of which Mann was but one recipient, and reflect the kind of "open letter" published in a newspaper or magazine. Plaintiffs Exemplar 8 is such a record. Where an unsolicited email is received by a government employee, neither produced by the employee or collected for him, that email is not properly withheld from release under § 2.2-3704.4(4) because it was not produced by or collected for the University or its faculty in an academic pursuit.

A subset of these unsolicited emails has received considerable attention from law academia. Where a University employee receives an email as a "cc" (courtesy copy) addressee, and not as the "to" addressee, again, the record is not produced by or collected for the University

or its faculty, and thus not properly withheld from release under § 2.2-3704.4(4) because it was not produced by or collected for the University or its faculty. Plaintiffs Exemplar 4 is such a record.

Finally, even in the case where an email is sent from or to the University or its faculty and can be shown to have been sent for academic purposes of collecting data, records or information for the University or its Faculty, if the email is also sent to others, and in particular a large number of others who are not a part of the University's research project for which the information was collected, the email must be viewed as having been publicly released. Petitioners Exemplars 1 and 2 are such records.

Petitioners object to and allege that as a matter of law the Court erred in its April 2, 2013 Order when finding that none of the unsolicited email sent by or to Dr. Mann have been publicly released because the exemption the University asserts only applies to "data, records or information" . . . produced or collected by or for faculty" and does not apply to unsolicited email sent by or to the University and its faculty.

VI. Objection on Finding the University Carried its Burden of Proof

Petitioners object to and allege that as a matter of fact and law the Court erred in its April 2, 2013 Order when finding that UVA carried its burden of proof that the exemplars meet each of the requirements for exemption under § 2.2-3705.4(4) because exemplars PE 7, 12 and RE 6 contain no data, records and information; exemplars RE 10 & 13 only contains information previously made public; exemplar PE 8 was not produced or collected by or for the faculty; exemplars PE 4, 5, 6, 10, 11, 14, 15, 16, 17 and RE 2 were produced or collected as part of a faculty service commitment that was by government policy completely transparent to the public

and not in conduct of or as a result of study or research on proprietary academic or research efforts that could, if released, have any chilling effect or otherwise limit academic. The court erred in finding exemplars (PE 4, 5, 6, 10, 11, 14, 15, 16, 17 and RE 2) contain data, records or information associated with "research [ ] sponsored by the University alone or in conjunction with other government bodies or private concerns" because the work was being done exclusively for international organizations of which the University was not a member and with which the University had no relationship whatever, academic or otherwise, and on that basis object to the court's finding for these exemplars.

VII. Objection to Finding the Act allows Fees for the Cost of Exclusion Review

Petitioners object to and allege that as a matter of law, the Court erred in its June 15, 2011, letter and July 7, 2011, Order when finding that § 2.2-3704(F) allows collection of costs for exclusion review of documents because such review is not "accessing, duplicating, supplying, or searching for the requested records." Rather, exclusion review is a normal incidence of government work and is routinely done to ensure execution of several laws, including protection of student records under the Federal Family Educational Rights and Privacy Act and protection of personnel records. Further, where an agency withholds documents as a discretionary act, its review of the documents for purposes of withholding is also discretionary. Shifting costs incurred as a discretionary act has not been allowed for redaction (as opposed to withholding the entire document) and thus should not be allowed for the same review that lead to the discretionary act to withhold a document. Under § 2.2-3704.4(4).

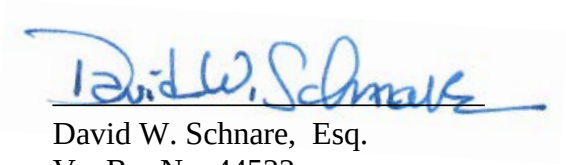
Further, as Petitioners have previously explained to the court, principles of statutory interpretation do not allow the court to expand a closed list as that would constitute a legislative act. Petitioners cited to controlling law in this regard:

> The maxim of statutory construction *expressio unius est exclusio alterius* is applicable here. This maxim provides that where a statute speaks in specific terms, an implication arises that omitted terms were not intended to be included within the scope of the statute. See, e.g., Turner v. Wexler, 244 Va. 124, 127, 418 S.E.2d 886, 887 (1992). Thus, by using this principle as an aid to construing a statute, we have held that "when a legislative enactment limits the manner in which something may be done, the enactment also evinces the intent that it shall not be done another way." *Grigg v. Commonwealth*, 224 Va. 356, 364, 297 S.E.2d 799, 803 (1982).

Commonwealth ex rel. Virginia Dep't of Corrections v. Brown, 259 Va. 697, 704-705 (Va. 2000). *And see*, *Cline v. Commonwealth*, 53 Va. App. 765, 768 (Va. Ct. App. 2009) ("the 'fundamental principle of statutory construction that *expressio unius est exclusio alterius*, or 'where a statute speaks in specific terms, an implication arises that omitted terms were not intended to be included within the scope of the statute.'' *South v. Commonwealth*, 47 Va. App. 247, 251, (quoting *Conkling v. Commonwealth*, 45 Va. App. 518, 522, 612 S.E.2d 235, 237 (2005)).

Respectfully submitted April 10, 2013.

The Environmental Law Center
at the American Tradition Institute



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CERTIFICATE OF SERVICE

I hereby certify that on the April 10, 2013, I served by electronic mail a true correct copy of

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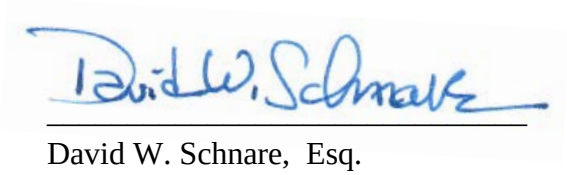

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