IN THE
Supreme Court of Virginia

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RECORD NO. _____

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THE AMERICAN TRADITION INSTITUTE, and THE HONORABLE DELEGATE ROBERT MARSHALL

Petitioners-Petitioners,

v.

RECTOR AND VISITORS OF THE UNIVERSITY OF VIRGINIA, et al

Respondents-Respondents,

_____

PETITION FOR REVIEW

_____

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ASSIGNMENTS OF ERROR

1. The trial court erred in holding "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." (Preserved at *id*. p. 9.)

2. The trial court erred in allowing the University to demand payment for the cost of exclusion review of documents sought. (Preserved in the record in "Petitioners' Preservation of Objections" at pp. 12-13, filed April 10, 2013.)

3. The trial court erred by finding ATI did not substantially prevail on the merits of their case. (Preserved at *id*. pp. 1 – 9.)

4. The trial court erred in finding UVA carried its burden of proof that the records withheld under § 2.2-3705.4(4) meet each of the requirements for exclusion. (Preserved at *id*. pp. 9 – 12.)

STATEMENT OF THE CASE

On January 5, 2011, Petitioners American Tradition Institute and Robert Marshall ("ATI") requested the Rector and Visitors of the University of Virginia ("the University" or "UVA") to produce public records under the Virginia Freedom of Information Act ("FOIA"). Four months and ten days later (May 16, 2011) ATI filed a verified petition for mandamus and injunctive relief ("Petition") seeking: (a) an order forcing UVA to release the documents; (b) permission to review UVA's "exemplars" of

records it intended to withhold from release; (c) costs and fees; and, (d) a ruling that the FOIA does not authorize collection of fees for review of records to determine whether those record may be excluded from release. On May 24, 2011, the court ordered UVA to release 1,793 emails (5,649 pages) and allowed ATI to see the records UVA would present to the court for *in camera* review. Order of Judge G.L. Finch. On July 7, 2011, the court denied ATI's request to bar UVA from charging for exclusion review of its records. Order of Judge G.L. Finch.

Almost two years later, on April 2, 2013, the trial court determined that all documents withheld under the academic exclusion to FOIA contained data, records or information ***of a proprietary nature*** produced or collected by or for UVA faculty or staff in the conduct of, or as a result of, study or research on medical, scientific, technical or scholarly issues, whether sponsored by the institution alone or in conjunction with a governmental body or a private concern, and that such data, records or information has not been publicly released. Order of Judge P.F. Sheridan, ¶¶ 4 & 6 (emphasis added). On the same day, disregarding *Fenter v.*

Norfolk Airport Auth., 274 Va. 524, 649 S.E.2d 704 (2007) and *Hill v. Fairfax Sch. Bd.*, 284 Va. 306, 727 S.E.2d 75 (2012), the trial court denied ATI's request for costs and fees finding that they did not substantially prevail on the merits of the case. Transcript 4/2/2013 pp. 39-43.

ATI seeks review on four issues, each of which presents a question of first impression and some significant to all government agencies. First, when applying the research data exclusion allowed under FOIA, Va. Code § 2.2-3705.4(4), the court interpreted the term "data, records or information of a proprietary nature" so broadly that the interpretation would allow a university to withhold every record within its custody, thereby obviating FOIA's public university-specific applicability. ATI seeks review of this question of first impression because the Act requires any exclusion from public access to records be narrowly construed and the circuit court's interpretation of the exclusion is so broad, the exception would swallow FOIA's mandate whole.

Second, there is a split in the circuit courts as to whether requiring payment for exclusion review is allowed under FOIA.

ATI seeks review because FOIA does not include payment for exclusion review in its list of allowed charges; does not allow a public body to impose any extraneous, intermediary or surplus fees or expenses; and, the maxim of statutory construction *expressio unius est exclusio alterius* is applicable here and as applied in conjunction with the Act, disallows the charges.

Thirdly, ATI seeks review of the court's holding that ATI did not substantially prevail on the merits because, as explained in *Fenter*, failure to respond to a request for records shall be deemed a denial of the request and shall constitute a violation of the Act (*Fenter v. Norfolk Airport Auth.,* 274 Va. at 530); and, failure to produce documents until after a Petitioner filed his petition for mandamus "constitutes a violation of the Act and a trial court errs in finding otherwise" (*Fenter v. Norfolk Airport Auth.,* 274 Va. at 532). Because the court issued an order to force release of non-exempt documents in order to cure these violations, Plaintiffs substantially prevailed on the merits of the case.

Lastly, the research exclusion allows UVA to withhold a record only if it meets each of the five requirements under the exception. The record must be (i) data, records or information; (ii) of a proprietary nature; (iii) produced or collected by or for faculty or staff of public institutions of higher education; (iv) in the conduct of or as a result of study or research sponsored or co-sponsored by the institution; and, (v) must not have been publicly released, published, copyrighted or patented.

Many of the exemplar emails withheld under the research data exclusion fail to meet all five requirements. ATI seeks review because this issue involves three questions of first impression significant to all government agencies; and because the trial court erred by not ensuring each exemplar actually met all five requirements, thus causing its factual findings to be plainly wrong or without evidence to support them.

QUESTIONS PRESENTED

1. Does the Virginia Freedom of Information Act's requirement to narrowly construe exclusions allow interpretation of the § 2.2-3705.4(4) phrase "of a proprietary nature," as "a thing or property owned or in the possession of one who manages and controls them?"

2. Does the Virginia Freedom of Information Act allow a government agency to charge for the cost of reviewing records to determine whether they fall within an exclusion to the Act?

3. Did the circuit court err in finding ATI did not substantially prevail on the merits of the case despite ATI demonstrating the University violated FOIA and the court issued an order granting ATI's relief based on those violations?

4. Was the circuit court's finding that the University met its burden in showing that all records withheld under the research data exclusion fully qualify for that exclusion plainly wrong as a matter of law or fact, or without evidence to support it?

STATEMENT OF FACTS AND PROCEEDINGS BELOW

Citing the Virginia Freedom of Information Act, ATI asked the University to release approximately 15,000 emails[1] sent and received on the university-provided account of Michael Mann, a former professor; and which, prior to ATI's FOIA request, the University had identified as stored on a particular backup server. Pet. Attach. II.

ATI made its request on January 5, 2011. Under Va. Code § 2.2-3704(B), the University must "promptly, but in all cases

[1] These emails are over 10 years old and the University could have destroyed them under its records policy, something the University claimed it had done. *See*, Memorandum in support of Petitioners' Motion to Compel UVA to Disgorge all documents, Exhibit E.

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 comply with the law. Instead, six days after receiving the request, it invoked § 2.2-3704(B)(4), claiming ATI's request was broad, and requesting an additional seven work days (until January 24st) in which to respond. Pet. Attach. III. Again, the University did not meet its own schedule. Instead, on January 25, 2011, the University informed ATI that it required payment of $8,500 to "process" the FOIA request and refused to take any further action until it received this "deposit." Pet. Attach. V.

On March 10, 2011, after extensive discussion between the parties as to whether the Act authorized the University to charge for "the necessary review of potentially responsive documents" (Pet. Attach. XIII), ATI paid the University $2,000.00 (Pet. Attach. XIV). The University did not commence work until March 16th. Pet. Attach. XV. On March 28, 2011, the University informed ATI that $1,000 had been used exclusively to pay for searching for responsive records among the 34,062 records on the server.

Pet. Attach. XVI. On April 6, 2011, the University claimed to have identified 8,000 responsive emails and had begun review, but had exhausted the $2,000 deposit and demanded additional funds or it would "undertake no further review." Pet. Attach. XVII. The University also stated that it had reviewed approximately 1,000 documents and "anticipate[d] that a first group of responsive, non-exempt documents which may be lawfully disclosed will be released to [ATI] shortly." *Id*. A month later, on May 5th, the University stated it would send out the first copies of documents on May 6th. Pet. Attach. XIX.

On May 16, 2011, four months and ten days after making its FOIA request, 61 days after giving UVA thousands of dollars for document review, 40 days after UVA promised to release documents "shortly" and ten days after the date certain on which UVA promised to send out documents, ATI had not received a single page of records. [2]

[2] The University did not avail itself of Va. Code §2.2-3704(C) which allows a public body to petition the appropriate court for additional time to respond to a request for records when the request is for an extraordinary volume of records.

Consequently, on May 16th, as authorized under Va. Code § 2.2-3713, ATI filed a Verified Petition for Mandamus and Injunctive Relief 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.

ATI's petition sought five forms of relief: (i) find the University violated the Virginia Freedom of Information Act; (ii) order them to provide the requested documents on a timely schedule in electronic form; (iii) issue a permanent injunction barring UVA from demanding payment for exclusion review; (iv) enter an order allowing ATI to reduce the number of documents placed before the Court for in camera review, and allowing ATI to review all excluded documents; and (v) order the University to pay ATI's reasonable costs and fees. Pet. At ¶¶ 78 – 82.

Only after the University was electronically served notice of ATI's lawsuit did UVA release copies of some emails it had cleared for release. On May 24, 2011, the court held its first hearing on ATI's petition. Immediately outside the courtroom and just prior to the hearing, UVA agreed to an order that would allow ATI

counsel to examine the withheld documents in order to select exemplars to place before the Court. The Court entered that order. In addition, the Court entered an order requiring UVA to complete its reviews and release all remaining non-exempt documents within 90 days.

On July 7, 2011, the Court denied ATI's request to prohibit charges for exclusion review of documents, but did disallow reimbursement for second or supervisory review of documents. It deferred a decision on violations of the Act and costs and fees.

On November 1, 2011, the University moved to stay and to revise the protective order. At the hearing the court continued the stay of the protective order, and granted the motion to revise. Under a revised protective order agreed to by the parties on December 19, 2011, ATI submitted seventeen (17) exemplar emails and, under seal, UVA submitted fourteen (14).

At an April 16, 2012, hearing on an unappealed matter, the University acknowledged to ATI that it had applied a broad interpretation of the research data exclusion, despite the Act's

clear instruction that all exclusions be narrowly interpreted. Transcript 4/16/2012 p. 57.

On May 11, 2012, the court ordered the parties to submit memoranda of facts and law with regard to whether UVA properly withheld the documents. Order of Judge Sheridan. In its memorandum, ATI demonstrated that the face of certain classes of withheld records, as represented by Petitioners' and/or Respondents' Exemplars, were not subject to FOIA exemption: Petitioners' Exemplars (PE) 7 & 12 and Respondents' Exemplar (RE) 6 contained no data, records or information collected by or for University-sponsored or co-sponsored study or research; RE 10 & 13 only contain information previously made public; PE 8 is an unsolicited email and was not produced by or collected or for University-sponsored or co-sponsored study or research; and PE 4, 5, 6, 10, 11, 14, 15, 16, 17 and RE 2 do not contain data, records or information associated with research sponsored or co-sponsored by the University. PE 4 is an email on which Dr. Mann was no more than a courtesy copy recipient and was not produced by or collected for University-sponsored or co-

sponsored study or research. PE 1 & 2 are emails sent by Dr. Mann to a large number of others who are not a part of the University's research project for which the information was collected.

On September 17, 2012, the court heard the arguments of the parties and rendered several decisions which were memorialized in an order entered April 2, 2013.

Because the court had deferred ATI's request for costs and fees, ATI renewed this request, a matter the court also heard on April 2nd, holding that ATI had not substantially prevailed. Finally, the court directed the parties to file supplemental objections no later than April 12, 2013. Transcript 4/2/2013 p. 55. On April 10, 2013, ATI filed supplemental objections from which the assignments of error arise, as well as Notice of Appeal.

ARGUMENT

This petition presents four (4) errors involving four (4) questions of law, fact and law or fact.

A. Standard of Review

The trial court's reading of the phrase "of a proprietary nature" and its decision to allow payment for the cost of exclusion review of documents (assignments of error 1 & 2) rest on statutory interpretations which are pure questions of law and which the court reviews *de novo*. *Conyers v. Martial Arts World of Richmond, Inc.*, 273 Va. 96, 104-105 (Va. 2007).

The third assignment of error asks whether by compelling production of covered records from the University through a petition and subsequent court order, ATI substantially prevailed on the merits of its case. This, too, is a mixed question of fact and law subject to *de novo* review under *Napper v. ABM Janitorial Servs. - Mid Atl.*, 284 Va. 55, 61 (Va. 2012).

The last assignment of error requires review of whether the exemplar emails met all criteria for exclusion. It primarily presents questions of statutory interpretations but also requires review of fact determinations. The Court will review mixed questions of law and fact *de novo* under *Napper*.

B. The Virginia Freedom of Information Act's requirement to narrowly construe exclusions prohibits interpretation of the § 2.2-3705.4(4) phrase "of a proprietary nature," as "a thing or

property owned or in the possession of one who manages and controls them?"

The meaning of the term "of a proprietary nature" is a matter of first impression. In interpreting this phrase, the Court must give effect to the legislature's intention as expressed by the language used unless a literal interpretation of the language would result in a manifest absurdity. *Boynton v. Kilgore*, 271 Va. 220, 227, 623 S.E.2d 922, 925-26 (2006). If a phrase is subject to more than one interpretation, the Court must apply the interpretation that will carry out the legislative intent behind the statute (*Garrison v. First Federal Savings & Loan Ass'n.*, 241 Va. 335, 340, 402 S.E.2d 25, 28, 7 Va. Law Rep. 1763 (1991)) and in this case, a narrow interpretation. 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).[3]

[3] "Proprietary" has more than one definition and the court should have, but did not, use the narrowest rather than the broadest. *See*, *e.g.*, Black's Law Dictionary 6th ed. at p. 1219 ("Proprietary capacity. Used to describe functions of a [governmental agency]

The Act mandates that an exclusion must be interpreted narrowly. § 2.2-3700 (B). By adopting UVA's interpretation – one that the University admits is a broad, rather than narrow interpretation (Transcript 4/15/2012 p. 57) – the Court established an exclusion that consumes the rule. It would allow a university to withhold every record it owns or possesses, thoroughly defeating the intent and past implementation of the FOIA. Indeed, it would allow UVA to withhold emails it has actually released. *See*, e.g., Exhibit No. 6 from Petitioners' Memorandum of Facts and Law. This is a manifest absurdity.

The Court declined to borrow and apply the concept of competitive advantage used elsewhere in the FOIA, specifically § 2.2-3705.6, "Exclusions to application of chapter; proprietary records and trade secrets" which states:

> Proprietary business or research-related information produced or collected by the application in the conduct of or as a result of study or research [may be withheld] if the disclosure of such information would be harmful to the competitive position of the applicant.

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when it engages in a business-like venture as contrasted with a governmental function.")

Va. Code § 2.2-3705.6(17). Without explanation, the trial court rejected the ancient and still fresh statutory interpretive canon of *Postal Telegraph* that would have the court borrow the meaning of "proprietary" from elsewhere in the Act (specifically § 3705.6(17)) and apply it to § 3705.4(4). Not only would following canons of construction yield an appropriately narrow interpretation of the exclusion, doing so follows the law of this Court since 1899: "Where a word is used in different sections of a statute and its meaning is clear in all but one instance, 'the same meaning . . . will be attributed to it elsewhere unless there be something in the context which clearly indicates that the Legislature intended some other and different meaning.'" *Weaver v. Commonwealth*, 25 Va. App. 95, 101 (Va. Ct. App. 1997) (*emphasis added*) (citing to *Walthall v. Commonwealth*, 3 Va. App. 674, 680 (1987) (which quotes *Board of Supervisors of Albemarle County v. Marshall*, 215 Va. 756, 761-62 (1975), which quotes *Postal Telegraph Cable Co. v. Farmville & P. R. Co.*, 96 Va. 661, 664 (Va. 1899) for the foundational canon.

The trial court's interpretation frustrates the purpose of FOIA and its mandate that requires that it be interpreted liberally in

favor of access and that any exclusion allowing public records to be withheld be interpreted narrowly.[4]

C. The Virginia Freedom of Information Act does not allow a government agency to charge for the cost of reviewing records to determine whether they fall within an exclusion to the Act.

ATI asks the Court to review this issue because there is now a split in the Circuit Courts. Va. Code § 2.2-3704(F) states: "A public body may make reasonable charges not to exceed its actual cost incurred in accessing, duplicating, supplying, or searching for the requested records." In *Albright v. Woodfin*, 68 Va. Cir. 115; 2005 Va. Cir. LEXIS 103 (Va. Cir. Ct. 2005) the Nelson County Circuit Court held "Code § 2.2-3704(F) does not grant a public body the authority for charging for the costs of reviewing or redacting records. This simply is not in the statute nor is there any implication from the statute that this can be recovered."

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[4] Although a matter of first impression before this court, six other states and the federal courts have addressed this issue, each of them interpreting the term "proprietary interest" as applying only to information that, if released, would cause the loss of a commercial competitive interest to the University. *See*, e.g., *Arkansas Dep't of Fin. & Admin. v. Pharmacy Assocs.*, 333 Ark. 451, 454-455 (Ark. 1998); *and see* extensive citations in Petitioners' Memorandum of Facts and Law at pp. 30 – 31.

In contrast, holding against ATI, Judge Finch concluded that "review and redaction is inherent in the process of accessing, duplicating, supplying, or searching for the requested records." Letter Opinion June 15, 2011, p. 3.

Exclusion review is a normal transaction of the general business of a public body 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 under state code. Va. Code § 2.2-3704(F) does not grant permission for such charges.

Further, the maxim of statutory construction *expressio unius est exclusio alterius* is applicable. 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. *Commonwealth ex rel. Virginia Dep't of Corrections v. Brown*, 259 Va. 697, 704-705 (Va. 2000). To expand a closed list, as the trial court's decision in this matter has done, is a legislative act and therefor prohibited. *Shackleford v. Commonwealth*, 262 Va. 196, 213, 547 S.E.2d 899, 909

(2001) ("Courts are not permitted to add language to a statute nor are they permitted to accomplish the same result by judicial interpretation.")

Finally, the research data exclusion is a discretionary exclusion. When an agency withholds documents as a discretionary act, its review of the documents for purposes of withholding is also discretionary. Notably, the University does not charge costs for redaction, a two-step process that begins with a review for exclusion. Transcript 05/24/2011 p. 26.

D. The circuit court's finding that the University met its burden to show that all exemplars, representing 12,000 records and withheld under the research data exclusion, fully qualify for that exclusion is plainly wrong or without evidence to support it.

The trial court erred when finding that several classes of responsive records, represented by exemplar emails, fully qualified for exclusion under the research data exclusion. To qualify, an email must meet each of the five criteria in § 2.2-3705.4(4). Fundamental among these is the requirement that the record be produced or collected by or for the faculty in the conduct of or as a result of study or research sponsored or co-

sponsored by the institution. At issue is the meaning of the words "in the conduct of or as a result of" and the meaning of "produced or collected by or for faculty" in the context of the first phrase. The factual issues require analysis as to whether the emails arise from the conduct of or as a result of study or research sponsored or co-sponsored by UVA and were produced or collected by or for faculty as part of their engagement in such studies or research.

A large number of exemplars, *e.g.*, PE 4, 5, 6, 11, 15 and 16 reflect Dr. Mann's involvement as a federal appointee to the United Nations Intergovernmental Panel on Climate Change (the IPCC). UVA is not a member of the UN and did not sponsor or co-sponsor the IPCC report. Because these emails reflect Dr. Mann's service commitment as a faculty member, as opposed to research, they are public records but otherwise do not qualify as records of research or study of the University. Indeed the IPCC acknowledges, "[i]t does not conduct any research nor does it monitor climate related data or parameters." http://www.ipcc.ch/organization/organization.shtml#.UYlpteB0Ha

4. The IPCC further claims complete transparency in its processes,[5] and thus there is no interest to either the IPCC nor to any state, nation or international body at issue, let alone one that the University is able to claim.

All of the same is true of Respondents' Exemplar 2 which involves Dr. Mann's advice to a federal employee on how to organize a meeting sponsored by the National Academy of Science, not UVA.

Respondents' Exemplars 10, 14 and 17 are representative of a class of responsive records, emails sent to Dr. Mann, evincing the *sturm und drang* of Mann and his associates as they discuss issues not rising from, involving, directed at or otherwise related to the conduct of any study or research sponsored or co-sponsored by UVA.

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[5] *See, e.g.*, "the IPCC's role is also, as defined in Principles Governing IPCC Work, "...to assess on a comprehensive, objective, open and transparent basis the scientific, technical and socio-economic information relevant to understanding the scientific basis of risk of human-induced climate change, its potential impacts and options for adaptation and mitigation. IPCC reports should be neutral with respect to policy, although they may need to deal objectively with scientific, technical and socio-economic factors relevant to the application of particular policies."

Petitioners' Exemplars 7, 12 and Respondents' Exemplar 6 are representative of a class of responsive records containing no data, records and information arising from or collected for a study or research sponsored or co-sponsored by UVA; exemplars RE 10 & 13 only contain information manifested in a final peer-reviewed publication, and the exclusionary content has been published.

None of these thirteen exemplars meet all the criteria under § 2.2-3705.4(4) and none should have been withheld.[6]

E. A petitioner substantially prevails on the merits of the case, and thus shall recoup costs and fees, when its petition's primary object is to force a governmental agency to supply records in a timely and efficient manner and the circuit court so orders.

[6] In addition to these thirteen, other exemplars raise questions involving whether the emails had been "publicly released". Petitioners' Exemplars 1, 2 and 4 are emails sent as cc addressees to parties who are not members of a research team conducting a study or research sponsored or co-sponsored by UVA. Petitioners' Exemplar 8 is an unsolicited email received by the university and sent to a long list of individuals, nearly all without any relationship to UVA or its research activities. This exemplar has been publicly released and was not collected by or for UVA faculty or staff in the conduct of or as a result of study or research. The "publicly released" final criterion also posits the question as whether when a government agency gives records to a former employee, is this a public release of records that waives the exemption?

Judge Sheridan held that ATI did not substantially prevail on the merits of the case, (Transcript April 2, 2013, pp. 39 – 44). His sole analysis on this issue is that ATI was not “forced” to file its petition. This is not the correct basis for the decision and his finding of fact that ATI did not substantially prevail on the merits is clearly erroneous.

Va. Code § 2.2-3713(D) provides for an award of reasonable costs and attorneys' fees when a party substantially prevails on the merits of the case, unless special circumstances would make an award unjust.

In *Fenter*, this Court held 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 held that failure to produce documents until after the Petitioner filed his petition for mandamus constitutes a violation of the Act and “a trial court [errs] in finding otherwise.” *Fenter v. Norfolk Airport Auth.*, 274 Va. at 532 (2007).

This Court added gloss to this rule in *Hill*, citing to *Fenter*:

> As used in Code § 2.2-3713(D), "the merits of the case" plainly refers to the object of the action in which a claim that

> the FOIA has been violated is made, and that the party has prevailed in proving that there was some violation of the FOIA by the public body.

Hill v. Fairfax County Sch. Bd., 284 Va. 306, 314, 727 S.E.2d 75, 80 (2012). In *Hill*, this Court averred that if the object of a mandamus petition is to obtain a large number of documents that the court subsequently finds should have been disclosed or is to establish that the agency had failed to supply these documents in a timely and efficient manner, as is the case in the instant matter, then a petitioner would have prevailed on that issue and must be awarded costs and fees.

The reason for this is explained in *Redinger*:

> 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.

Redinger v. Casteen, 36 Va. Cir. 479, 483 (Va. Cir. Ct. 1995).

It is uncontested that UVA did not release a single page of requested documents until ATI filed its petition. It did not release documents when it said it would. Even when it did first produce documents, after ATI filed its petition, it produced them in paper

form rather than in the efficient and less costly electronic form as requested. The failure of the University to release documents for over four months after it received ATI's request, 61 days after ATI provided UVA thousands of dollars which it demanded before even beginning its document review, 40 days after UVA promised to release documents "shortly" and ten days after the date certain on which UVA promised to send out documents, together all demonstrate UVA's response was neither timely nor in an efficient manner.

It is also clear and uncontroverted that Judge Finch ordered UVA to complete release of documents.

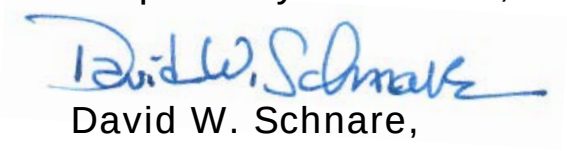
The clear gravamen of ATI's petition, its primary purpose, was to force UVA to release the responsive, non-exempt records sought under FOIA and to do so in a timely and efficient manner. The University violated the Act multiple times as describe above, and principally because UVA failed to produce documents until after ATI filed its petition for mandamus. UVA was ordered to produce those documents. Under *Fenter* and *Hill*, these facts

demonstrate ATI substantially prevailed on the merits and the Act requires the Court to order payment of costs and fees.

CONCLUSION

The Court should grant review.

Respectfully submitted,



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