UNIVERSITY of VIRGINIA
OFFICE of the GENERAL COUNSEL

July 1, 2013

Via Overnight Mail

Hon. Patricia L. Harrington, Clerk
Supreme Court of Virginia
P.O. Box 1315
100 North Ninth Street, 5th Floor
Richmond, VA 23219-1315

RE: The American Tradition Institute and Robert Marshall v. The Rector and Visitors of the University of Virginia
Record No. 130934

Dear Ms. Harrington:

Pursuant to Rule 5:18 of the Rules of Court, I enclose seven copies of the Brief in Opposition of the Respondent/Appellee, The Rector and Visitors of the University of Virginia, to be filed in the captioned case.

Sincerely,

R. C. Kast

Richard C. Kast
Associate General Counsel and
Special Assistant Attorney General

Enclosures

cc: David W. Schnare, Esq.
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IN THE
SUPREME COURT OF VIRGINIA

Record No. 130934

THE AMERICAN TRADITION INSTITUTE, and
HON. DELEGATE ROBERT MARSHALL,
Petitioners/Appellants,

v.

THE RECTOR AND VISITORS OF THE
UNIVERSITY OF VIRGINIA,
Respondent/Appellee, and
MICHAEL E. MANN,
Intervenor/Appellee.

BRIEF IN OPPOSITION TO PETITION FOR REVIEW

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STATEMENT OF FACTS AND OF THE CASE

On January 6, 2011, Christopher C. Horner and David W. Schnare on behalf of the American Tradition Institute ("ATI") and Delegate Robert Marshall (hereinafter, collectively, "Requesters") filed with the University of Virginia ("University") a request for records ("Request") pursuant to the Virginia Freedom of Information Act, Va. Code §§ 2.2-3700 through 2.2-3714 ("Act" or "FOIA"). The Request was for records of a former member of the faculty of the University, climate scientist Michael Mann. Professor Mann had not been a member of the University faculty since the conclusion of the spring semester in 2005.

The Request was extraordinarily broad, seeking all "materials" that Professor Mann had "produced and/or received while working for the University . . . while using its facilities and resources." The Request demanded all of Dr. Mann's communications with 39 named scientists from across the world, plus with his research assistants. The Request was 11 pages long,

contained three pages of "Instructions" and "Definitions," 10 numbered paragraphs of broadly worded requests, and 80 subsections of two of those numbered paragraphs (40 each) seeking information concerning identified individuals.

The University informed the Requesters on January 13, 2011, that it would need an extension of the time to respond because of "the breadth of your request." On January 25, 2011, the University further informed the Requesters that the Request did not meet the requirements of the Act because it did not "identify the requested records with reasonable specificity." The University explained that it was not clear whether the Request was limited to a single computer/server that had been discovered to contain potentially responsive records, or was a demand for an "all-encompassing" and essentially impossible search of all University computers and e-mail systems. The University provided the Requesters with an estimate of $8,500 for accessing, duplicating, supplying, or

searching for responsive records if the Request were limited to the single computer/server.

On January 31, 2011, the Requesters responded with what they characterized as an "appeal" of the University's "denial" of the Request. They also sought support for the $8,500 estimate. On February 7, 2011, the University responded noting "[y]our letter mischaracterizes our response. We did not deny access to requested documents; we rather sought clarification of a request that was ambiguous in its scope." The University noted that it was prepared to proceed based upon the assumption that the Request was limited to the computer/server. The basis for the $8,500 estimate was explained and the Requesters were asked how they wished the University to proceed.

On February 11, 2011, the Requesters stated that they would pay the $8,500. The University responded on February 14, 2011, committing to commencing work on accessing potentially responsive records from the computer "within a week after receiving your check for

$8,500." On February 15, 2011, the Requesters responded with a three-page letter mischaracterizing the University's commitment to proceed upon receiving payment for costs as making "no efforts whatever to address our concerns about its refusal to take those reasonable steps or move toward reaching any agreement that could result in a prompt production of documents sought."

In a subsequent conversation between counsel on February 18, 2011, the Requesters agreed to send, and the University agreed to accept, a partial payment of $2,000 toward the $8,500 estimate of reimbursement for costs. Subsequently, on March 6, 2011, the Requesters for the first time formally agreed that they sought only records in the computer/server. After the University determined that more than 10,000 potentially responsive documents comprising tens of thousands of pages of material were at issue, on March 9, 2011, it urged the Requesters to narrow the Request further to identified individuals and grant-related information.

The check in the amount of $2,000 was received on March 10, 2011. The University commenced work on the Request on March 16, 2011, based upon the assumption that the Request had been narrowed as requested. The University hired staff and began a painstaking review of tens of thousands of pages of material.

On May 16, 2011, as the first batch of responsive non-exempt documents was literally being copied for delivery, ATI and Marshall ("Petitioners") abruptly filed a Verified Petition for Mandamus and Injunctive Relief ("Petition") against the University in the Prince William Circuit Court.

The Petition, which sought precisely the same records previously sought in the Request, was served on the University on May 17, 2011, the same day the first collection of documents was sent to the Requesters pursuant to the agreement between counsel. On August 22, 2011, a second and concluding group of responsive documents was mailed to the Requesters. This concluded the University's disclosures in response to the Request

because the University determined that the remaining records sought by the Requesters were either exempt from disclosure pursuant to the Act, otherwise precluded from disclosure by law, or simply not public records as defined by the FOIA.

Neither the May 17 release of records, which was in process long before the Petition was served, nor the August 22 release, was in response to any court order or was affected in any way by the gratuitous filing of the Petition. Rather, these were simply releases of public records pursuant to the Act that were under way when the Petition was filed, and were consistent with the agreement between counsel concerning their release. The effect of the filing of the Petition was to needlessly turn an ongoing collaborative process into an adversarial one.

On May 24, 2011, the trial court entered an order ("First Protective Order") which allowed counsel for Petitioners confidential access to documents the University told the circuit court it intended to

withhold for the exclusive purpose of selecting exemplars to be presented to the court for the court's *in camera* review. Soon after entry of the First Protective Order, counsel for Petitioners began making public statements that called into question their intent to abide by its confidentiality provisions. The University moved the circuit court to set aside the First Protective Order, relief that was granted on November 1, 2011 for "good cause." On the same date the court granted a motion filed by Professor Mann to intervene. Both motions were vehemently opposed by Petitioners.

The circuit court also ruled for the University on the issue of partial reimbursement, finding against Petitioners who had argued that the FOIA did not authorize reimbursement for costs of reviewing documents to determine if they were exempt, not public records, or otherwise precluded from disclosure. Specifically, the court relied on an Advisory Opinion of the Virginia Freedom of Information Advisory

Council, ruling that the FOIA did authorize such reimbursement.

Pursuant to the guidance of the court after the First Protective Order was set aside, counsel for Petitioners and the University also conferred about a mechanism for selecting exemplars for the court's review on the merits. In the midst of these discussions, counsel for Petitioners abruptly noted on November 18, 2011, that the selection of additional exemplars by a third party (which had been the method contemplated by the court) was not necessary because they already had "sufficient emails . . . to make [their] arguments."[1] After some discussion, the parties agreed to an approach using the e-mails already in Petitioners' possession, as augmented by some selected from those that had been withheld by the University, to create the exemplars for court review. This approach

[1]While it is not known how Petitioners came into possession of these e-mails, it has been established that they derived from the illegal hacking of the computers of the University of East Anglia in the UK.

was formalized in an order entered by the court on January 16, 2012 ("Second Protective Order").

Prior to the entry of the Second Protective Order, but ten days after it had been agreed to and signed by counsel and submitted to the court for entry on December 16, 2011, Petitioners filed discovery requests including a request for production of *the very documents that were the subject of their FOIA request and the production of which was currently before the court*, as well as a notice to take Professor Mann's deposition which Petitioners' counsel had previously noted "may require at least two days."

Counsel for the University and Professor Mann moved on January 17, 2012, to quash Petitioners' discovery requests. In response, Petitioner's counsel asked that consideration of the motion to quash be deferred because his discovery had been premature. Counsel for the University and Professor Mann refused. Petitioner's counsel then filed additional discovery, in the form of interrogatories to the University and

Professor Mann, and a motion to disgorge which *again sought the very documents at issue in the case the disclosure of which was the sole issue before the court*. On February 14, 2012, the University and Professor Mann moved to quash these additional discovery requests and to deny the motion to disgorge.

On May 11, 2012, the court ruled that discovery was "unnecessary in this matter" and granted the motions to quash. The court further established a briefing schedule on the issue of disclosure of the withheld documents and allowed Petitioners to resubmit their motion to disgorge consistent with that schedule. Petitioners did not resubmit the motion.

On September 17, 2012, counsel for the parties appeared before the court to argue their respective positions using the exemplars agreed to by the parties. On April 2, 2013, the court ruled for the University and Dr. Mann on every claimed exclusion. Contrary to Petitioners' statement that "all documents withheld" were found by the court to be exempt from disclosure

under the so-called "proprietary" exclusion, Va. Code § 2.2-3705.4(4)(Petition at 2), the court in fact also held that some of the withheld records were "scholastic records" under § 2.2-3705.4(1), "personnel records" under § 2.2-3705.1(1), or not public records at all. See Order at ¶ 4. The court also denied Petitioners' motion for fees and costs because they had not substantially prevailed on any issue. In fact, Petitioners had lost on every substantive issue that had been before the court, a finding the court specifically noted was a "question of fact."

Contrary to the Petition, the University promptly responded to the Request and was delayed in its response by the Requesters' undue dilatoriness in narrowing their request and their refusal, for a considerable period of time, to pay even a portion of the reasonable costs authorized by the Act. The University's response to the Request was entirely in compliance with the FOIA which requires that a request "identify the requested records with reasonable

specificity" § 2.2-3704(B); requires the entity receiving a request to "make reasonable efforts to reach an agreement with the requester concerning the production of the records requested" before going to court § 2.2-3704(C); and allows that entity to require payment prior to proceeding to process a request § 2.2-3704(H). The records disclosed were sent consistent with the understandings reached with Requesters' counsel and would have been released without the filing of the Petition. As noted, the first group of records had been assembled for release and the cover letter drafted when the Petition was filed, and were released on the day the Petition was served. The Petition was simply a distraction to the orderly process that had been agreed to between counsel.

Moreover, the Petitioners became their own worst enemies if they were truly seeking an expeditious decision about the records being withheld by the University. It was their conduct that necessitated the vacating of the First Protective Order and the entry of

the Second Protective Order. It was their efforts improperly to use the civil discovery processes as an end run around the orderly disposition of the issue before the circuit court that required lengthy briefing and argument over many months. Finally, it was their refusal to agree to the wording of the final order that ultimately required yet another appearance before Judge Sheridan and further delay in this case.

STANDARD OF REVIEW

"Absent clear evidence to the contrary in the record, the judgment of a trial court comes to an appellate court with a presumption that the law was correctly applied to the facts. And, the appellate court should view the facts in the light most favorable to the party prevailing before the trial court." *Bottoms v. Bottoms*, 249 Va. 410, 414, 457 S.E.2d 102, 105(1995)(citation omitted). Appeals from determinations made in cases brought under the FOIA are decided "according to settled principles of appellate

review." *Moore v. Maroney,* 258 Va. 21, 23, 516 S.E.2d 9, 10 (1999).

ARGUMENT

1. The Circuit Court Properly Construed Section 2.2-3705.4(4) of the FOIA.

Petitioners claim that the court applied the wrong definition to the term "proprietary," yet they offer no alternative definition or explanation as to why the plain meaning of the term should not apply. The circuit court properly determined that the records withheld by the University were subject to the exclusion protecting "data, records or information of a proprietary nature produced or collected by or for faculty or staff of public institutions of higher education...in the conduct of or as a result of study or research on medical, scientific, technical or scholarly issues." Va. Code § 2.2-3705.4(4). See Order at ¶¶ 4-8. Relying on the plain meaning of the exclusion—one of several protecting "education records and certain records of educational institutions"—Judge

Sheridan found that the term "information of a proprietary nature" within § 2.2-3705.4(4) "is capable and is interpreted to mean...a thing or property owned or in the possession of one who manages and controls them." See Order at ¶ 7. In reaching this conclusion, the circuit court interpreted the meaning of "proprietary nature" in the context of the overall provision, which clearly was designed to protect research information compiled by the Commonwealth's colleges and universities in the "conduct of or as a result of study or research on medical, scientific, technical or scholarly issues." *See* Order at ¶ 9 ("I find that § 2.2-3705.4(4) does arise... from the interest in protecting research...") The circuit court properly declined Petitioners' invitation to read into the provision a requirement of "commercial competitive advantage." The court correctly ruled that § 2.2-3705.6, which deals with exclusions related to "proprietary records and trade secrets," did not apply to a wholly separate provision protecting University

research. *See* Order at ¶ 7. As it should, the circuit court construed the statute as a whole to reject Petitioners' argument that a section of the statute dealing generally with information *submitted to* Commonwealth agencies by the private sector (§ 2.2-3705.6) should apply to information *developed by* the University in the course of its research. *See e.g.* §§ 2.2-3705.6(6) ("Confidential financial statements, balance sheets, trade secrets, and revenue and cost projections provided to the Department of Rail and Public Transportation"); -3705.6(7) ("Confidential proprietary records related to inventory and sales, voluntarily provided by private energy suppliers to the Department of Mines, Minerals and Energy"); -3705.6(8) ("Confidential proprietary information furnished to the Board of Medical Assistance Services"); -3705.6(9) ("Proprietary, commercial or financial information, balance sheets, trade secrets, and revenue and cost projections provided by a private transportation business to the Virginia Department of

Transportation"); and -3705.6(12)("Confidential proprietary information or trade secrets, not publicly available, provided by a private person or entity to the Virginia Resources Authority").[2]

While there is no relevant judicial precedent or Virginia Freedom of Information Advisory Council interpretation addressing this exemption, the Attorney General has provided two opinions on the exemption, neither of which suggests that the exemption is limited to commercial proprietary information. See Opinion to Fred W. Walker, Director of the Department of Conservation and Economic Development, 1983-1984 Va. AG

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[2]The legislative history for the "proprietary" exemption also strongly supported the court's interpretation and Petitioners make no attempt to rebut it. The originally proposed language of the academic research exclusion required the Commonwealth's colleges and universities to show that disclosure would result in a "substantial loss to the individual or institution," and required the public records to have a "proprietary value." *See* Senate Bill No. 162 (January 22, 1982). The removal of these requirements in the final provision is powerful evidence that Petitioner's argument was considered and rejected by the legislature.

Op. 439 (Jan. 9, 1884); Opinion to Delegate Alan Diamonstein, 1989 Va. AG Op. 17 (July 14, 1989).

While FOIA's exclusions are to be narrowly construed, Va. Code § 2.2-3700(B), this is not an invitation to ignore the plain meaning of the statute. The policy of open government under the Act is not "absolute," as over one hundred exemptions clearly indicate a public policy to protect certain information from disclosure. In *Taylor v. Worrell Enterprises*, 242 Va. 219, 224, 409 S.E.2d 136, 139 (1991), this Court reasoned that the General Assembly, by identifying "instances in which certain information is exempt from mandatory disclosure" has reflected a determination "that the policy of openness does not override the need for confidentiality in every circumstance, and that the best interests of the Commonwealth may require that certain governmental records not be subject to compelled disclosure." *Id; see also Robinson v. Indiana Univ.*, 659 N.E.2d 153, 156 (Ind. Ct. App. 1995)(interpreting Indiana's Public Records Act to find

that "liberal construction does not mean that the expressed exceptions specified by the legislature are to be contravened"). For these reasons, Judge Sheridan correctly held that a plain reading of the "proprietary" exemption supported the University's withholding of the records under § 2.2-3705.4(4).

2. **The FOIA Allows for the Reimbursement of Costs for the Review of Potentially Responsive Records.**

As Petitioners note, Judge Finch rejected the reasoning of the Circuit Court of Nelson County in *Albright v. Woodfin*, 68 Va. Cir. 115, 2005 Va. Cir. LEXIS 103 (Va. Cir. Ct. 2005), that the FOIA did not authorize reimbursement of costs to include reviewing or redacting records. In so doing, the court relied upon an advisory opinion of the Virginia Freedom of Information Advisory Council ("FOIA Council") that rejected the rationale of *Woodfin*, noting that "review and redaction is part of supplying the records to the requester, and the public body may charge for the

actual staff time involved."[3] The FOIA Council was created as an advisory body in the legislative branch by the General Assembly "to encourage and facilitate compliance" with the FOIA and interpret its provisions. Va. Code § 30-178. Judge Finch's reliance on the advisory opinion of the FOIA Council, issued after the *Woodfin* decision, was reasonable and consistent with the intent of the General Assembly in creating the FOIA Council. This fact, in conjunction with this Court's presumption that the law was correctly applied to the facts, clearly results in the conclusion that there is no reversible error here.

3. The University Met Its Burden of Proving That the Records It Had Not Produced Were Exempt from Disclosure Under the Claimed Exclusions.

The circuit court found that the exemplars all represented examples of e-mails exempt from disclosure pursuant to §§ 2.2-3705.4(4), 2.2-3705.4(1), or 2.2-3705.1(1) of the Act, or because they were simply not

[3] The advisory opinion is available at: http://foiacouncil.dls.virginia.gov/ops/07/AO_02_07.htm

public records at all. Petitioners make no reference to any exclusion other than the so-called "proprietary" exclusion found in § 2.2-3705.4(4). They therefore apparently concur that Judge Sheridan's ruling with respect to scholastic records (§ 2.2-3705.4(1)), personnel records (§ 2.2-3705.1(1)), and e-mails not constituting public records is correct.[4]

Regarding the "proprietary" exclusion itself, § 2.2-3705.4(4) includes, in pertinent part, all "[d]ata, records or information of a proprietary nature produced or collected by or for faculty or staff of public institutions of higher education . . . in the conduct of or as a result of study or research on medical, scientific, technical or scholarly issues." Moreover, the exclusion applies whether the study or research is "sponsored by the institution alone or in conjunction

[4] Petitioners and the University jointly furnished 31 exemplars. Of these, one was an example of e-mails for which the University claimed the personnel exclusion; one was an example of e-mails for which the scholastic records exclusion was claimed; and 8 were examples of purely personal e-mails that did not constitute public records at all. In some instances, more than one reason for the non-disclosure was claimed.

with a governmental body or private concern," as long as the subject information has "not been publicly released, published, copyrighted or patented." The exemplars put before Judge Sheridan for *in camera* review clearly fell within this definition. The language of the exclusion is broad and is to be interpreted consistent with its meaning. The fact that the FOIA is to be narrowly construed does not detract from this fact. Moreover, some of the exemplars Petitioners specifically reference in their argument for the inapplicability of the "proprietary" exclusion, (*e.g.*, PE 4, Respondents' 10 and 14; Petition at 21, 22) were submitted as representative of more than one exclusion.

Judge Sheridan's application of the language of § 2.2-3705.4(4) and the other cited provisions is entirely consistent with their language and does not constitute reversible error.

4. Petitioners Prevailed on No Substantive Issue in this Case and Are Not Entitled to Costs and Fees.

Petitioners filed their Petition to gain access to over 10,000 e-mails the University refused to give them. They got none of them. Judge Sheridan ruled the University had properly interpreted the FOIA in withholding them. At prior stages of the litigation Petitioners sought to deny the University the right to be reimbursed for the cost of reviewing documents to determine if they should be disclosed, and lost; sought to prevent the court from vacating the First Protective Order and substituting the Second Protective Order, and lost; sought to prevent Professor Mann from intervening, and lost; sought to initiate extensive discovery into their mandamus proceeding, including requests for production of documents, interrogatories, and depositions, and lost; and sought to obtain through a "motion to disgorge" what they were concurrently seeking through their mandamus proceeding, an effort they ultimately abandoned and did not renew after their

petition for mandamus was denied. A more sustained record of failure would be difficult to imagine.

Virginia adheres to the "American rule" which stands for the proposition that each litigant must pay his own attorneys' fees and costs in the absence of a statute or contractual provision to the contrary. *Piney Meeting House Investments v. Hart*, 284 Va. 187, 726 S.E.2d 319 (2012). The statutory provision pertinent here is Va. Code § 2.2-3713(D). The section is plainly and explicitly grounded on a finding of a violation of the FOIA as a necessary predicate to an entitlement to fees and costs. No such finding exists here. Judge Sheridan's ruling on Petitioners' lack of entitlement to fees and costs not only does not constitute reversible error, any other ruling would have been inexplicable with the record in this case.

CONCLUSION

There being no reversible error in the record below, this Court should decline to grant the Petition for Review.

Respectfully submitted,

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CERTIFICATE

I hereby certify that on July 1, 2013, I served a true copy of the foregoing Brief in Opposition to Petition for Review via electronic and First-Class Mail on counsel for ATI and Robert Marshall, David W. Schnare, 9033 Brook Ford Road, Burke, Virginia 22015, and D.Z. Kaufman, 8000 Towers Crescent Drive, Suite 1350, Vienna, Virginia 22182.

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