

VIRGINIA:

IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY



THE AMERICAN TRADITION INSTITUTE
and THE HONORABLE DELEGATE
ROBERT MARSHALL,

Petitioners,

v.

Civil Docket No. CL 11-3236

RECTOR AND VISITORS OF THE
UNIVERSITY OF VIRGINIA,

Respondent.


NOTICE OF HEARING

Please place the case on the docket to be called on **September 16, 2011 at 10:00 a.m.**,
for the purpose of arguing the attached Motion to Intervene.

Respectfully Submitted,

MICHAEL MANN
By Counsel

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**INTERVENOR-RESPONDENT MICHAEL MANN'S MOTION FOR
LEAVE TO INTERVENE**

Pursuant to Virginia Superior Court Rule 3:14, Intervenor-Respondent Michael Mann, by and through his attorneys, respectfully moves the Court for leave to intervene in this action and file the Motion to Stay Production of Exempted Documents and in support thereof alleges as follows:

1. This is an action involving a demand by petitioners The American Tradition Institute (“ATI”) and The Honorable Delegate Robert Marshall (collectively, “**Petitioners**”) for documents from Rector and Visitors of the University of Virginia (the “**University**”) pursuant to the Virginia Freedom of Information Act (Virginia Code § 2.2-3700 *et. seq.*).

2. ATI is a vocal opponent of climate change science and has attacked Dr. Mann and others in the scientific community as part of its fundraising efforts.

3. Specifically, Petitioners seek “emails and documents associated with former UVa academic Michael Mann and others involved in the science of climate change.” (See Petition, ¶ 58.) Dr. Mann is a former University assistant professor.

4. These requested documents include thousands of Dr. Mann's personal e-mail exchanges with professional colleagues throughout the world regarding climate change and other scientific issues. (Attached hereto as Exhibit A is an Affidavit of Dr. Michael E. Mann ("**Mann Aff.**").)

5. On May 24, 2011, the Court entered an Order requiring the University to produce all requested documents within 90 days, or by August 22, 2011 (the "**Order**"). (A copy of the Order is attached hereto as Exhibit B.)

6. The Order, however, does not exclude – and therefore requires – the production of documents that are specifically exempted from production under VFOIA, including Dr. Mann's personal e-mails regarding climate change and other scientific issues that are "proprietary" in nature and thus exempted from disclosure.

7. The University has correctly acknowledged that these e-mails are exempted from disclosure under VFOIA. (See The University's Memorandum in Opposition to Verified Petition for Mandamus and Injunctive Relief, pp. 4-5 (stating that "in Va. Code. § 2.2-3705.4(4), the General Assembly has exempted from disclosure the very type of unpublished faculty debate and discussion, that has not been made public and not published, that Petitioners here seek")).

8. Also on May 24, 2011, Petitioners and the University executed an Order on Protection of Documents (the "**Protective Order**"), which was approved by the Court. (A copy of the Protective Order is attached hereto as Exhibit C.)

9. The Protective Order provides that, among other things, the exempted documents that are to be produced, including Dr. Mann's e-mails, may be reviewed by (i) the Court, (ii) any other court of competent jurisdiction pursuant to lawful process or order, and (iii) up to two of Petitioners' counsel, who were designated as David Schnare and Christopher Horner. (See Ex.

D, p. 3 and Appx. A thereto.) While Mr. Schnare and Mr. Horner may represent Petitioners, they are also employed by ATI, one of the two Petitioners. (See Petition, ¶ 4.)

10. Pursuant to the Order, on August 22, 2011 the University provided documents to Petitioners, including but not limited to Dr. Mann's non-exempted e-mails. The University is now scheduled to produce all exempted documents, including Dr. Mann's exempted e-mails, on September 21, 2011.

11. Dr. Mann was not provided with a copy of the Protective Order until after it was entered by this Court. (See Ex. B, Mann Aff.), ¶ 10.)

12. Upon learning that the Protective Order required disclosure of his confidential e-mails to Messrs. Schnare and Horner, Dr. Mann wanted to intervene in the pending litigation but was unable personally to fund the cost of legal representation to intervene. (See Ex. B, Mann Aff., ¶ 11.)

13. Nevertheless, Dr. Mann wrote to the University to object to the disclosure of his exempted e-mails to Mr. Horner, request that the University consider alternatives to disclosure, and consider the chilling effect of disclosure under the Protective Order:

Releasing materials that are exempt under VFOIA to ATI and Horner threatens not only my academic freedom and privacy, but that of literally dozens of scientists in the U.S. and around the world who had every reason to believe that the confidential nature of their frank and open correspondences, discussions, challenges, inquiries, and musings, carried out through private emails, would be respected. Allowing the indiscriminate release of these materials will cause damage to reputations and harm principles of academic freedom.

(See Ex. B, Mann Aff., ¶ 12.) A copy of the August 5, 2011 Letter is attached hereto as Exhibit D.

14. Recently, through a fundraising effort by the scientific community, Dr. Mann was able to raise sufficient funds to retain counsel to request an opportunity to intervene and assert his individual rights in this matter. (See Ex. B, Mann Aff., ¶ 13.)

15. The University consents to Dr. Mann's intervention in this matter. (See Ex. B, Mann Aff., ¶ 35.)

LEGAL ARGUMENT

16. Virginia courts recognize that "[i]ntervention allows willing claimants to come into court and join a lawsuit already in progress so that their interests may be defended." Cluverius v. James McGraw, Inc., No. HI-618-1, 1998 WL 972109, at *3 (Richmond Cir. Ct. Mar. 30, 1998). Intervention in a pending lawsuit is at the discretion of the trial court. Stephen v. Dickens, No. 02-875, 2003 Va. Cir. LEXIS 348, at *2 (Norfolk Dec. 19, 2003).

17. Virginia Superior Court Rule 3:14 provides that "[a] new party may by leave of court file a pleading to interfere as a plaintiff or defendant to assert any claim or defense germane to the subject matter of the proceeding." The term "germane" has been defined as "relevant to or closely allied." Stephen, 2003 Va. Cir. LEXIS 348, at *2-3. An intervenor must thus "assert some right involved in the suit." Id. at *3; see also Hudson v. Jarrett, 606 S.E.2d 827, 831 (Va. 2005) (stating that "an intervenor must be asserting an interest that is part of the subject matter of the litigation"). Rule 3:14 requires that an intervenor intervene specifically as a plaintiff or defendant. Hudson, 606 S.E.2d at 831.

18. Dr. Mann unquestionably has an interest in this litigation because Petitioners seek to compel the production of Dr. Mann's personal e-mail communications with professional colleagues throughout the world regarding climate change and other scientific issues.

19. Petitioners initiated this action against the University simply because it happens to be the one in possession of these e-mails because they remain on its computer server.

Nonetheless, the Petition leaves no doubt that the thrust of Petitioners' attack is directed against Dr. Mann and his e-mail communications.

20. Dr. Mann's First Amendment constitutional right to academic freedom is at severe risk in this case. See Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957) ("To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation Teachers and students must always remain free to inquire, to study and to evaluate . . .").

21. Dr. Mann's interests are not adequately protected because, among other reasons, the Protective Order permits Mr. Schnare and Mr. Horner – both directors of ATI – to review all of his exempted e-mails. The mere fact that Mr. Schnare and Mr. Horner can review the exempted e-mails is a violation of Dr. Mann's privacy interests.

22. Moreover, Petitioners' attempt to obtain Dr. Mann's personal e-mails through a VFOIA request threatens to override another Virginia state court's recent ruling. On or around April 23, 2010, the Virginia Attorney General issued civil investigative demands to the University under the Virginia Fraud Against Taxpayers Act, seeking to obtain, among other things, the very same Dr. Mann personal e-mails that are the subject of this action. The University filed a Petition to Set Aside Civil Investigative Demands, which was granted, such that the Attorney General was denied access to Mr. Mann's e-mails. (See Letter Opinion dated August 30, 2010, in The Rectors and Visitors of the University of Virginia v. Kenneth T. Cuccinelli, Attorney General of Virginia, CL10-398 (Albemarle Cir. Ct.), attached hereto as Exhibit E.) The Attorney General appealed the ruling, which appeal is currently pending.

23. Now, Petitioners seek the very same e-mails that the Circuit Court of Albemarle County already determined did not have to be produced, which ruling may be affirmed on appeal, confirming that Dr. Mann's emails are not subject to production. Because the Virginia-

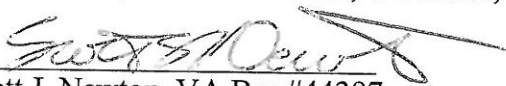
Fraud-Against-Taxpayers-Act avenue failed, the VFOIA avenue is now being pursued despite the clear constitutionally-protected status of the products of scholarly debate and exchange.

WHEREFORE, Intervenor-Respondent Michael Mann respectfully requests this Court's leave to intervene in this matter and grant such further and other relief as the Court deems necessary and proper.

Respectfully Submitted,

MICHAEL MANN
By Counsel

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Dated: September 2, 2011