



Environmental Law Center
at the American Tradition Institute

VIRGINIA FREEDOM OF INFORMATION ACT REQUEST

January 6, 2011

The Rector and Visitors of the University of Virginia
John O. Wynne, Rector
University of Virginia
One Commercial Place, Suite 1420
Norfolk, VA 23510

transmitted via:

Carol Wood, VFOIA Contact
Assistant Vice President for Public Affairs
Fontaine Research Park
400 Ray C. Hunt Drive
Second Floor
P.O. Box 400229
Charlottesville, VA 22904

BY ELECTRONIC MAIL—

RE: Freedom of Information Act Request

Dear Rector Wynne:

We the undersigned citizens and residents of the Commonwealth of Virginia, in coordination with the Environmental Law Center of the American Tradition Institute, a 501c3 public policy institute also qualifying as a 'media organization' for open records purposes, and pursuant to the Virginia Freedom of Information Act (herein FOIA or VFOIA), Virginia Code § 2.2-3700 *et seq.*, request you please provide us within seven (7) working days copies of all documents in your possession as described below.

Subject Matter

We seek materials that Dr. Michael Mann produced and/or received while working for the University of Virginia and otherwise while using its facilities and resources, as specifically enumerated in the Attachment. We seek these records from a backup server identified already by the University as part of a related search, as detailed, below.

Fees

We request a waiver of fees for this request. In the event the University does not waive associated fees, we request a reduction in fees charged. Also, we request that all charges for the supplying of requested records be estimated in advance.

In any event, as discussed below we note prior University treatment of a request seeking some similar records under FOIA, and our understanding that, under Va. Code § 2.2-3704, **FOIA search fees must be “reasonable” and must “not exceed [the] actual cost incurred in accessing, duplicating, supplying, or searching for the requested records.”** (emphasis added) Moreover, charges may not include “any extraneous, intermediary or surplus fees or expenses to recoup the general costs associated with creating or maintaining records or transacting the general business of the public body. Any duplicating fee charged by a public body shall not exceed the actual cost of duplication.” We therefore also note the University having by its own statements having already conducted the search for the requested records.

We note also that attorneys fees awarded to a prevailing party in FOIA litigation should be “consistent with those generally charged for similar services,” (*In re Albright v. Woodfin*, 2005 WL 4694651 (Va. Cir. Ct. 2005), citing *Chawla v. Burgerbusters*, 255 Va. 616, 623-624 (1998)). If the University takes a different position, we request you elaborate.

Toward ensuring the appropriate search is conducted and any fees properly assessed we specifically direct the University to search the backup server(s) referenced by University Associate General Counsel Barry Meek, in his discussions with Deputy Attorney General Wesley Russell, apparently as part of this search already having been undertaken.¹

¹ We refer the University to the following excerpt from oral argument in *The Rectors and Visitors of the University of Virginia v. Cuccinelli*, found at transcript pages 51-53 (*emphasis added*):

THE COURT: So how was the scope limited?

MR. RUSSELL: The scope was limited when the University called and said, look, we don't have one e-mail server. They're department by departments. To check the e-mails as it's phrased, we which would have to check literally every server on campus because we don't have a central e-mail server. Specify the departments, would you do that? So we did. And we specified I think eight specific departments. We said, limit your servers to that. If you have a central e-mail server, just run the search terms like anybody would in any discovery. But as far as going to individual departments, these are the only individual departments you have to go to.

And, of course, this comes out in this case with this history. Prior to Attorney General Cuccinelli even being sworn in, various FOIA requests were made for both Mr. Mann's e-mails and e-mails of other scientists in the Climate Science Department. By the way, the University said to the responders that they raise no objection that the e-mails weren't discoverable under FOIA or available under FOIA. In fact, for some they said, yes, we have them. Pay this fee and we'll produce the e-mails to you.

Regarding Dr. Mann, specifically, they said, we have no e-mails. And, in fact, in our papers we have attached the response of the University's FOIA officer who said, we've had two IT engineers search exhaustively. There are no e-mails.

In my first conversation with Mr. Meek when a request for an extension was made I said, look, do you have any of these e-mails?

I don't want to give you a 60-day extension and then at the end of the 60 days you say, we never had anything anyway.

Mr. Meek represented to me that a backup e-mail server had been found, which may have responsive data on it.

As regards that latter point, it is also our understanding that if records have already been compiled for purposes, such as in this case a request by the Attorney General, then only copying fees, and not staff search time, are appropriately billed to the subsequent requesting party. If we are mistaken in that understanding please inform us and elaborate as well.

We certify that all statements made herein are true and accurate to the best of our knowledge.

If you have any questions, please do not hesitate to contact us by the provided electronic mail addresses.

Sincerely,

Christopher C. Horner, Esq.²
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ATTACHMENT

INSTRUCTIONS

1. Unless otherwise indicated, each paragraph of this VFOIA request relates to the period from January 1, 1999 through the date the University satisfies its complete legal obligation to provide the entirety of the non-exempt records responsive to this request. Any documents prepared during this time period, or before this time period but which are referenced in responsive records and in the University's possession or subject to its control, are also to be produced as responsive.
2. If any responsive document requested was, but is no longer in the University's possession, subject to the University's control, or in existence, state for each such document:
 - (a) the type of document;
 - (b) whether it is missing, lost, has been destroyed, or has been transferred to the possession, custody, or control of other persons;
 - (c) the circumstances surrounding, and the authorization for, the disposition described in (b) above;
 - (d) the date or approximate date of the disposition described in (b) above;
 - (e) the identity of all persons having knowledge of the circumstances described in (c) above; and
 - (f) the identity of all persons having knowledge of the document's contents.
3. With respect to each document produced, identify the person producing the document and the paragraph number of the request in response to which such production is being made.
4. All uses of the conjunctive should be interpreted as including the disjunctive and vice versa in order to bring within the scope of this request any information or documents that might otherwise be construed to be outside of its scope.
5. Words in the singular should be read to include the plural and vice versa.
6. Each document request contemplates production of the entire document without redaction, abbreviation or deletion, except where authorized by law.
7. Please identify and inform us of all responsive or potentially responsive documents within the statutorily prescribed time, and the basis of any claimed exemptions or privilege and to which specific responsive of potentially responsive document each such objection applies. Further, please inform us of the basis of any partial denials or redactions.

8. Specifically, if your office takes the position that any portion of the requested records is exempt from disclosure, we request that you provide us with an index of those documents, with sufficient specificity to permit a reasoned judgment as to whether the material is actually exempt under Virginia's FOIA, and describing each document or portion thereof withheld, and for each withholding discuss the consequences of supplying the requested information.
9. In the event that you determine some portions of the requested records are properly exempt from disclosure under any of the Requests above, please disclose any reasonably segregable, non-exempt portions of the requested records. If it is your position that a document contains non-exempt segments and that those non-exempt segments are so dispersed throughout the documents as to make segregation impossible, please state what portion of the document is non-exempt and how the material is dispersed through the document. As you aware claims of non-segregability should be made with the same detail as required for claims of exemption in an index. If a request is denied in whole please state specifically that it is not reasonable to segregate portions of the records for release.
10. In the event the University seeks to invoke *Virginia Code § 2.2-3705.4* Exclusions to application of chapter; educational records and certain records of educational institutions, we note in advance that the records sought here overwhelmingly if not entirely avoid coverage by this exclusion for reason that they are not proprietary, and establishing otherwise for purposes of withholding the records is the University's burden.
11. In the event the University seeks to invoke *Virginia Code § 2.2-3705.3* Exclusions to application of chapter; records relating to administrative investigations, we note in advance that while these records are now also being sought as part of a pre-investigation by the Attorney General, this does not qualify them for this exemption for reasons including that FATA (§ 8.01-216 et seq.) is not implicated by this exemption, and the records at issue in this request were not prepared in relation to any such pre-investigation.
12. Satisfying this request contemplates the University providing copies of documents, in electronic format if you possess them as such, otherwise photocopies are acceptable.
13. To the extent that any of the documents or data are stored in an encrypted fashion, the documents and data should be produced in such a way that the public can decrypt and read such documents or data.
14. The scope of this request is intended to reach any of the described items which are stored for you by a third party organization, and/or stored at an offsite location.
15. The scope of this request is to reach any and all data, documents and things in your possession, including those stored or residing on any of the specified or referenced (see FN 1, supra) computers, hard drives, desktops, laptops, file servers, database servers, email servers or other systems where data was transmitted or stored on purpose or as a result of transient use of a system or application in the course of day to

day research or product processing work that is owned or contracted for by you or any of your officers, managers, employees, agents, board members, academic departments, divisions, programs, IT department, contractors and other representatives.

DEFINITIONS

1. As used herein, the words "The Rector and Visitors of the University of Virginia," "you," and "your" mean the University of Virginia, including but not limited to the Department of Environmental Sciences (including whatever predecessor names the Department may have carried during the period in question in this request), and includes all of the officers, managers, employees, agents, board members, academic departments, divisions, programs, IT department, contractors and other representatives of the Rector and Visitors of the University of Virginia and/or the University of Virginia.
2. As used herein, the words "record", "records", "document" or "documents" mean the original and any copies of any written, printed, typed, electronic, or graphic matter of any kind or nature, however produced or reproduced, any book, pamphlet, brochure, periodical, newspaper, letter, correspondence, memoranda, notice, facsimile, e-mail, manual, press release, telegram, report, study, handwritten note, working paper, chart, paper, graph, index, tape, data sheet, data processing card, or any other written, recorded, transcribed, punched, taped, filmed or graphic matter now in your possession, custody or control.
3. As used herein, the words "identify," "identity," or "identification" when used in reference to a natural person mean to state his or her full name, present or last known address, telephone number, last known position and business affiliation, and each of his or her positions during the relevant time period. When used in reference to any other type of person, these words mean to state the name of the entity, its present or last known address, and its telephone number.
4. When used in reference to a document kept or prepared in the course of business the words "identify" or "identification" mean to state its date, author, the type of document (e.g., letter, memorandum, telegram, chart, photograph, sound reproduction, etc.) or, if the above information is not available, some other means of identifying it; its present location; and the name of each of its present custodians.
5. As used herein, the words "person" or "persons" include any individual, firm, partnership, association, trust, joint venture, corporation, limited liability company, or other legal or commercial entity.
6. As used herein, the word "relating" means to make a statement about, discuss, describe, reflect, identify, deal with, consist of, establish, comprise, list, or in any way pertain, in whole or in part, to the subject.

DOCUMENTS TO BE PRODUCED

1. All documents that constitute or are in any way related to correspondence, messages or e-mails sent by Dr. Michael Mann to, or received from, any of the following persons:
 - (a) Dr. Caspar Ammann,
 - (b) Dr. Raymond Bradley,
 - (c) Dr. Keith Briffa,
 - (d) Dr. John Christy,
 - (e) Dr. Edward Cook,
 - (f) Dr. Thomas Crowley,
 - (g) Dr. Roseanne D' Arrigo,
 - (h) Dr. Valerie Masson-Delmotte,
 - (i) Dr. David Douglass,
 - (j) Dr. Jan Esper,
 - (k) Dr. Melissa Free,
 - (l) Dr. Chris de Freitas,
 - (m) Dr. Vincent Grey,
 - (n) Dr. James Hack,
 - (o) Dr. Malcolm Hughes,
 - (p) Dr. Eystein Jansen,
 - (q) Dr. Phil Jones,
 - (r) Dr. Thomas Karl,
 - (s) Dr. Otto Kinne,
 - (t) Dr. A. T.J. de Laat,
 - (u) Dr. Murari Lal,
 - (v) Dr. Stephen Mackwell,
 - (w) Dr. Glenn McGregor,
 - (x) Stephen McIntyre,
 - (y) Dr. Ross McKittrick,
 - (z) Dr. Patrick Michaels,
 - (aa) Dr. Jonathan Overpeck,
 - (bb) Dr. Tim Osborn,
 - (cc) Dr. Roger Pielke, Jr.,
 - (dd) Dr. Benjamin Santer,
 - (ee) Dr. Gavin A. Schmidt,
 - (ff) Dr. Stephen Schneider,
 - (gg) Dr. Olga Solomina,
 - (hh) Dr. Susan Solomon,
 - (ii) Dr. Kevin Trenberth,
 - (jj) Dr. Eugene Wahl,
 - (kk) Dr. Edward Wegman,
 - (ll) Dr. Thomas Wigley,
 - (mm) Dr. Vincent Gray, and
 - (nn) All research assistants, secretaries or administrative staff with whom Dr. Mann worked while he was at the University of Virginia.

2. All documents that constitute or that are in any way related to correspondence, messages or emails sent by Dr. Michael Mann to, or received from, any of the following persons:
 - (a) Dr. Caspar Ammann,
 - (b) Dr. Raymond Bradley,
 - (c) Dr. Keith Briffa,
 - (d) Dr. John Christy,
 - (e) Dr. Edward Cook,
 - (f) Dr. Thomas Crowley,
 - (g) Dr. Roseanne D' Arrigo,
 - (h) Dr. Valerie Masson-Delmotte,
 - (i) Dr. David Douglass,
 - (j) Dr. Jan Esper,
 - (k) Dr. Melissa Free,
 - (l) Dr. Chris de Freitas,
 - (m) Dr. Vincent Grey,
 - (n) Dr. James Hack,
 - (o) Dr. Malcolm Hughes,
 - (p) Dr. Eystein Jansen,
 - (q) Dr. Phil Jones,
 - (r) Dr. Thomas Karl,
 - (s) Dr. Otto Kinne,
 - (t) Dr. A. T.J. de Laat,
 - (u) Dr. Murari Lal,
 - (v) Dr. Stephen Mackwell,
 - (w) Dr. Glenn McGregor,
 - (x) Stephen McIntyre,
 - (y) Dr. Ross McKittrick,
 - (z) Dr. Patrick Michaels,
 - (aa) Dr. Jonathan Overpeck,
 - (bb) Dr. Tim Osborn,
 - (cc) Dr. Roger Pielke, Jr.,
 - (dd) Dr. Benjamin Santer,
 - (ee) Dr. Gavin A. Schmidt,
 - (ff) Dr. Stephen Schneider,
 - (gg) Dr. Olga Solomina,
 - (hh) Dr. Susan Solomon,
 - (ii) Dr. Kevin Trenberth,
 - (jj) Dr. Eugene Wahl,
 - (kk) Dr. Edward Wegman,
 - (ll) Dr. Thomas Wigley,
 - (mm) Dr. Vincent Gray, and
 - (nn) All research assistants, secretaries or administrative staff with whom Dr. Mann worked while he was at the University of Virginia.

3. All documents that constitute or that are in any way related to correspondence, messages or emails sent or received by Dr. Michael Mann that reference the following people:

- (a) Dr. Caspar Ammann,
- (b) Dr. Raymond Bradley,
- (c) Dr. Keith Briffa,
- (d) Dr. John Christy,
- (e) Dr. Edward Cook,
- (f) Dr. Thomas Crowley,
- (g) Dr. Roseanne D' Arrigo,
- (h) Dr. Valerie Masson-Delmotte,
- (i) Dr. David Douglass,
- (j) Dr. Jan Esper,
- (k) Dr. Melissa Free,
- (l) Dr. Chris de Freitas,
- (m) Dr. Vincent Grey,
- (n) Dr. James Hack,
- (o) Dr. Malcolm Hughes,
- (p) Dr. Eystein Jansen,
- (q) Dr. Phil Jones,
- (r) Dr. Thomas Karl,
- (s) Dr. Otto Kinne,
- (t) Dr. A. T.J. de Laat,
- (u) Dr. Murari Lal,
- (v) Dr. Stephen Mackwell,
- (w) Dr. Glenn McGregor,
- (x) Stephen McIntyre,
- (y) Dr. Ross McKittrick,
- (z) Dr. Patrick Michaels,
- (aa) Dr. Jonathan Overpeck,
- (bb) Dr. Tim Osborn,
- (cc) Dr. Roger Pielke, Jr.,
- (dd) Dr. Benjamin Santer,
- (ee) Dr. Gavin A. Schmidt,
- (ff) Dr. Stephen Schneider,
- (gg) Dr. Olga Solomina,
- (hh) Dr. Susan Solomon,
- (ii) Dr. Kevin Trenberth,
- (jj) Dr. Eugene Wahl,
- (kk) Dr. Edward Wegman,
- (ll) Dr. Thomas Wigley,
- (mm) Dr. Vincent Gray, and
- (nn) All research assistants, secretaries or administrative staff with whom Dr. Mann worked while he was at the University of Virginia.

4. Any and all documents, things or data that were submitted as part of the award/grant process for the following awards/grants (hereinafter the "Grants"):

Decadal Variability in the Tropical Indo-Pacific: Integrating Paleo & Coupled ~Model Results, NOAA-Climate Change Data & Detection (CCDD) [Program Principal Investigators: M.E. Mann (U.Va), J. Cole (U. Arizona), V. Mehta (CRCES)] U. Va award (M.E. Mann): \$102,000;

Remote Observations of Ice Sheet Surface Temperature: Toward Multi-Proxy Reconstruction of Antarctic Climate Variability, NSF-Office of Polar Programs, Antarctic Oceans and Climate System [Principal Investigators: M.E. Mann (U. Va), E. Steig (U. Wash.), D. Weinbrenner (U. Wash)] U. Va award (M.E. Mann): \$133,000;

Paleoclimatic Reconstructions of the Arctic Oscillation, NOAA-Cooperative Institute for Arctic Research (CIFAR) Program [Principal Investigators: Rosanne D' Arrigo, Ed Cook (Lamont/Columbia); Co-Investigator: M.E. Mann] U. Va subcontract (M.E. Mann): \$14,400;

Global Multidecadal-to-Century-Scale Oscillations During the Last 1000 Years, NOAA Climate Change Data & Detection (CCDD) Program [Principal Investigator: Malcolm Hughes (Univ. of Arizona); Co-Investigators: M.E. Mann; J. Park (Yale University)] U. Va subcontract (M.E. Mann): \$20,775; and

Resolving the Scale-wise Sensitivities in the Dynamical Coupling Between Climate and the Biosphere, University of Virginia-Fund for Excellence in Science and Technology (FEST) [Principal Investigator: J.D. Albertson; Co-Investigators: H. Epstein, M.E. Mann] U. Va internal award: \$214,700.

5. Any and all documents, drafts, things or data that were generated as a result of any activities conducted pursuant to the Grants.
6. Any checks, purchase orders, agreements, documents or other things that evidence any amounts paid under the Grants.
7. Any and all policies, procedures, manuals, documents or other things that describe or regulate the retention or destruction of any of the above-referenced documents/things from January 1, 1998 until the present day.
8. Any and all e-mails or pieces of correspondence from or to Dr. Michael Mann since he left the University of Virginia that are in your possession, including but not limited to, those stored on any of the specified or referenced (see FN 1, *supra*) computers, hard drives, floppy drives, tape drives, optical drives, desktops, laptops, file servers, database servers, email servers or any other systems, and all backup copies used for archive, continuity or disaster recovery purposes, where data was transmitted or stored on purpose, or captured as a result of transient use of a system or application in the course of day to day research or to produce any work product or result. Include messages that may have been kept by individuals who interacted on the Grants.
9. Any and all computer algorithms, programs, source code or the like created or edited by Dr. Michael Mann, in the time period from January 1, 1999, to the present that are in your possession, including but not limited to, those stored on any of the specified or referenced (see FN 1, *supra*) computers, hard drives, floppy drives, tape drives,

optical drives, desktops, laptops, file servers, database servers, email servers or any other systems, and all backup copies used for archive, continuity or disaster recovery purposes, where data was transmitted or stored on purpose, or captured as a result of transient use of a system or application in the course of day to day research or to produce any work product or result. Include messages that may have been kept by individuals who interacted on the Grants.

10. Any data, information or databases, structured or unstructured information, source code and formulas that may be stored in any format or media type, including but not limited to, back-up copies used for archive, continuity or disaster recovery purposes that was used in any way in connection with the application for or as a result of any of the Grants.