VIRGINIA:

IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

THE AMERICAN TRADITION INSTITUTE, and HON. DELEGATE ROBERT MARSHALL,	)	
Petitioners,	)	
v.	)	**Civil Action No. CL-11-3236**
THE RECTOR AND VISITORS OF THE UNIVERSITY OF VIRGINIA, and MICHAEL E. MANN,	)	
Respondents.	)	

RESPONDENTS' JOINT MEMORANDUM IN OPPOSITION TO PETITIONERS' VERIFIED PETITION FOR MANDAMUS AND INJUNCTIVE RELIEF

I. INTRODUCTION

The present case is not about global warming, climate change, the unfortunate politicization of this vitally important area of science, or even academic dishonesty. It is about the integrity of the process of science. It is about whether scholars and the public colleges and universities of Virginia that employ them—regardless of their particular discipline or area of study—have a right to privacy and to freedom of private speech in the conduct of their research so that the progress of science and all the benefits it secures for Virginia's colleges, universities, and citizenry continue to flourish. Affidavit of Professor Michael Mann, ¶ 3. In developing the Virginia Freedom of Information Act, Va. Code §§ 2.2-3700 through 2.2-3714 ("Act" or "FOIA"), the General Assembly answered this question strongly in the affirmative. How this Court, in turn, answers this question will have profound implications for the pursuit of science in the Commonwealth and for the competitiveness of the public universities that conduct it. If public university faculty in Virginia no longer enjoy a zone of privacy around their scholarly

communications, the ability of the Commonwealth's schools to continue to attract and retain the best and brightest scholars from around the world—a creative engine that drives a huge and growing portion of Virginia's economy—will be damaged. Innovation and commercialization activities of Virginia's public institutions will be harmed. Without a zone of privacy around scientists' communications, a protection afforded under the Act, the United States Constitution, and federal regulations, the search for solutions to our most pressing needs will be compromised.

For the reasons that follow, Respondents University and Dr. Michael Mann respectfully request that this Court uphold the University's right afforded under the Act to exclude from disclosure Dr. Mann's electronic correspondence and dismiss Petitioners' Petition for Mandamus and Injunctive Relief, with prejudice.

II. PROCEDURAL BACKGROUND

On May 16, 2011, Petitioners filed the Verified Petition for Mandamus and Injunctive Relief ("Petition") currently pending before this Court. The Petition was filed against Respondent the Rector and Visitors of the University of Virginia ("University") pursuant to § 2.2-3713 of the Act.

The Petition derived from a request on January 6, 2011, which Petitioners had filed pursuant to the Act for "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" ("Request"). The Request was 11 pages long. The Attachment to the Request was 8 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 Petitioners on January 13, 2011, that it would need an extension of the time ordinarily required to respond because of "the breadth of [the] request." On January 25, 2011, the University further informed Petitioners that "after careful review," the Request did not meet the requirements of the Act because it did not "identify the requested records with reasonable specificity." The University explained why this was the case, including that it was not clear whether the Request was limited to the computer containing Michael Mann's records, or was "all-encompassing" and University wide. Finally, pursuant to §§ 2.2-3704(F) and (H), the University provided Petitioners with an estimate of $8,500 for accessing, duplicating, supplying, or searching for responsive records if the Request were limited to the computer.

On January 31, 2011, Petitioners filed what they characterized as an "appeal" of the University's "denial" of the Request.[1] Petitioners also asked what was the basis 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 "backup server" or computer and was not University wide. The basis for the $8,500 estimate was further explained and Petitioners were asked: "Please let me know how you wish to proceed."

On February 11, 2011, Petitioners committed to "remit $8,500" with the "return of unspent funds upon completion of the project."[2] Petitioners also sought further understandings and commitments from the University. The University responded on February 14, 2011, committing to commence work on accessing potentially responsive records from the computer

[1] The FOIA contains no appeal provision.

[2] Petitioners did this grudgingly because they continued to claim that the Act did not authorize charging for reviewing requested documents for possible exclusion. This issue was resolved by this Court on June 15, 2011, when Judge Finch ruled that "review and redaction is inherent in the process of accessing, duplicating, supplying, or searching for requested records" for which § 2.2-3704(F) authorized charging.

"within a week after receiving your check for $8,500." On February 15, 2011, Petitioners 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, Petitioners agreed to send, and the University agreed to accept, a partial payment of $2,000 toward the $8,500 estimate of reimbursement for costs. On March 6, 2011, Petitioners for the first time formally agreed that the Request sought "only those responsive documents held on a server the University previously identified as a repository of responsive emails and files."

On March 9, 2011, the University acknowledged receipt of Petitioners' letter of March 6, noted that there had been previous informal understanding that the Request was limited to the server, and urged Petitioners to narrow the Request 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. On May 17, 2011, the first group of responsive non-exempt documents was sent to Petitioners. Later, on August 22, 2011, the second group of responsive non-exempt documents was sent to Petitioners. This concluded the disclosures that the University intended to make pursuant to the Act as the University's analysis resulted in the conclusion that all of the remaining e-mails in the University's possession were exempt from disclosure, precluded from being disclosed by other provisions of law, or simply not public records as defined by the FOIA. [3]

[3] Petitioners and the University have been in general agreement that some of the documents sought (purely personal communications) are not public records under the Act. *See* Affidavit of Michael Mann ¶¶ 35-37.

During the same time frame as the first round of documents were sent to Petitioners in May, counsel for the University and counsel for Petitioners collaborated in drafting an agreed order to manage review and assessment of the voluminous documents sought by Petitioners that the University had withheld. The order ("First Protective Order") entered by this Court on May 24, 2011, allowed legal counsel for Petitioners to gain confidential access to the withheld documents for the exclusive purpose of selecting examples that would be provided to the Court. The Court would then evaluate the different categories of documents provided by the parties to determine whether some were not public records at all, and whether the University had properly applied the applicable exclusions under the FOIA to those documents that were.

Soon after the First Protective Order had been entered in May, counsel for the University became concerned that Petitioners' counsel were making public statements that called into question their intent to abide by the confidentiality provisions of that order. Because of this, and because of further issues the University had discovered casting doubt upon the credibility of Petitioners' counsel David Schnare, the University moved to revise the First Protective Order to deny Petitioners' counsel access to the withheld documents.

On November 1, 2011, this Court granted the University the relief it sought, finding that the University had established good cause to reopen the First Protective Order and denying Petitioners' counsel access to the withheld documents. The Court directed the parties to identify a neutral third party and process for review of the documents in question. Also on November 1, 2011, this Court granted a Motion for Leave to Intervene filed by Michael Mann and Dr. Mann became a party to this suit. Counsel for the University and for Dr. Mann have since that intervention referred to themselves as counsel for "Respondents" and will continue that nomenclature throughout this memorandum.

Pursuant to this Court's direction, counsel for the parties conferred about an alternative mechanism for review of the documents the University claimed had been lawfully withheld to select a representative set of exemplars for *in camera* review by this Court. In the midst of this process, counsel for Respondents were surprised to receive a letter on November 18, 2011, from Petitioners' counsel David Schnare in which Dr. Schnare stated that a neutral third party was "not necessary" because they already had "sufficient emails . . . to make [their] arguments." Dr. Schnare suggested that Petitioners could simply select exemplars from the e-mails they already possessed.[4] Petitioners would furnish these exemplars to the University to be verified as in the University's cache and the University would in turn, select exemplars from that cache and provide them to Petitioners.

After some discussion, counsel for Respondents agreed to this approach and an order agreed to by the parties was submitted to the Court on December 16, 2011. This Court entered the agreed order on January 16, 2012 ("Second Protective Order"). However, a mere ten days after the parties submitted the revised order on December 16, 2011, David Schnare filed Petitioners' First Request for Production of Documents and Notice of Deposition to the University and Petitioners' First Request for Production of Documents and Notice of Deposition to Michael Mann ("First Discovery Requests").

The First Discovery Requests, *inter alia*, sought the very documents at issue in this action, as if the recently negotiated Second Protective Order did not exist. Moreover, the Petitioners sought a vast amount of information wholly irrelevant to the limited legal issue before this Court pursuant to Va. Code § 2-2-3713, and contained a Notice of Deposition to Dr. Mann that David Schnare had previously noted would result in a deposition "that may require at

[4] Petitioners' source of these emails has not been disclosed; however, the assumption is that they were obtained from the public posting of thousands of confidential emails between Dr. Mann and scientists around the world resulting from the criminal data breach at the University of East Anglia.

least two days." On January 17, 2012, Respondents moved to quash the First Discovery Requests. Dr. Schnare then contacted counsel for the Respondents to ask whether counsel would agree to defer consideration of their motion to quash because he had concluded that the First Discovery Requests were premature.

Counsel for Respondents wrote to Dr. Schnare making clear that they would oppose any such action and put Dr. Schnare on notice of the possibility that they might file a motion for sanctions should he seek to withdraw the First Discovery Requests without prejudice to his ability to re-file them. On February 3, 2012, Dr. Schnare filed Petitioners' Motion to Compel the University of Virginia to Disgorge All Documents Sought Under Its Freedom of Information Act Request ("Motion to Disgorge") and Petitioners' First Interrogatory to the University and Petitioners' First Interrogatory to Michael Mann ("Second Discovery Requests"). Respondents moved on February 14, 2012 to quash the Second Discovery Requests and formally opposed the Motion to Disgorge.

On May 11, 2012, this Court ruled that discovery was "unnecessary in this matter," thus granting Respondents' motions to quash the First Discovery Requests and the Second Discovery Requests. This Court further established a briefing schedule for the remaining issues before the Court, *i.e.*, the Petition and the Motion to Disgorge. This memorandum is submitted pursuant to that schedule.

III. ARGUMENT

A. The E-Mails Sought by Petitioners Pursuant to the FOIA Have Been Lawfully withheld from Disclosure by the University.

Section 2.2-3701 of the FOIA defines "public records" as:

> all writings and recordings that consist of letters, words or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostatting, photography, magnetic

> impulse, optical or magneto-optical form, mechanical or electronic recording or other form of data compilation, however stored, and regardless of physical form or characteristics, prepared or owned by, or in the possession of a public body or its officers, employees or agents in the transaction of public business. Records that are not prepared for or used in the transaction of public business are not public records.

For purposes of the Request, the University believes that most, but not all, of the e-mails Petitioners seek fall within this definition of public records. Some do not because, as purely personal communications (allowed under University policy), they were "not prepared for or used in the transaction of public business." The remaining records that were originally withheld by the University are either exempt from disclosure or are subject to non-disclosure mandates emanating from other law.[5] As will be demonstrated, each of these reasons for non-disclosure is illustrated by the exemplars.

The exemption from disclosure applicable to most of the e-mails being withheld is found in § 2.2-3705.4(4) of the Act, which states that the following documents meeting the definition of "public records" need not be disclosed:

> Data, records or information of a proprietary nature produced or collected by or for faculty or staff of public institutions of higher education, other than the institutions' financial or administrative records, 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, where such data, records or information has not been publicly released, published, copyrighted or patented.

Other reasons for non-disclosure include the fact that several of the e-mails sought by Petitioners contain student information which is exempt from disclosure under the "scholastic records"

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[5] The FOIA provides: "*Except as otherwise specifically provided by law*, all public records shall be open for inspection and copying. . . . " Va. Code § 2.2-3704(A) (emphasis added). "Although . . . the FOIA generally requires disclosure of public records on request, that requirement is overridden by specific statutes restricting or limiting such disclosure." 1993 Va. AG Op. 217, 219 (1993).

exemption and the federal Family Educational Rights and Privacy Act, 20 U.S.C. 1232g ("FERPA"), and that the e-mails may constitute "personnel records" under the Act.

Section 2.2-3705.4(1) of the Act states, in pertinent part, that "[s]cholastic records containing information concerning identifiable individuals" need not be disclosed except "to the person who is the subject thereof, or the parent or legal guardian of the student." The Act further defines "scholastic records" as "those records containing information directly related to a student or an applicant for admission and maintained by a public body that is an educational agency or institution or by a person acting for such agency or institution."

While the scholastic records exemption is permissive, the discretion to disclose is explicitly limited "where such disclosure is prohibited by law." Va. Code § 2.2-3705.4. *See also* § 2.2-3704(A). FERPA creates a non-disclosure mandate[6] for public records containing student information for institutions, such as the University, receiving federal funds. With some exceptions not pertinent here, FERPA conditions the continued availability federal funds on the University not furnishing students' "education records" without those students' consent. 20 U.S.C. § 1232g(b)(1). FERPA defines "education records" as "those records, files, documents, and other materials which—(i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting foe such agency or institution." 20 U.S.C. § 1232g(a)(4). Thus, even if those e-mails being exempted from disclosure because they contain student information could be produced under the FOIA,[7] doing so would violate the confidentiality constraints imposed by FERPA. To the extent Petitioners

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[6] "'[L]egislation enacted pursuant to the spending power [like FERPA], is much in the nature of a contract; in return for federal funds, the States agree to comply with federally imposed conditions.'" *United States v. Miami Univ.*, 294 F.3d 797, 808 (6th Cir. 2002), quoting *Pennhurst St. Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).

[7] Many of the e-mails containing student information that would be subject to the scholastic records exemption also constitute "records or information of a proprietary nature produced or collected by or for faculty" under § 2.2-3705.4(4) because the students in question were graduate students working with Dr. Mann or other scientists with whom he was corresponding on research.

would be willing to accept redacted documents, the FOIA does not require redaction where the scholastic records exemption is applicable. Rather, § 2.2-3705.4(1) allows for the entire record to be withheld. *Virginian-Pilot Media Cos. v. City of Norfolk Sch. Bd.*, 81 Va. Cir. 450, 464-465, 2010 Va. Cir. LEXIS 272, **35 (2010).

Section 2.2-3705.1(1) deals with personnel records and states that such records shall be excluded from the disclosure requirements of the Act "except that access shall not be denied to the person who is the subject thereof." As with the scholastic records exemption, § 2.2-3705.1(1) of the FOIA does not require redaction where the personnel records exemption is available; rather the whole record may be withheld. *Virginian-Pilot, id.*

The exclusions from the disclosure requirements of the FOIA found at § 2.2-3705.4(1) (scholastic records) and § 2.2-3705.1(1) (personnel records) are largely self-explanatory, the former because of its definitional breadth under the Act and enhanced clarity achieved through reading it in conjunction FERPA, the latter because what constitutes a personnel record is commonly understood. The exemption found at § 2.2-3705.4(4) dealing with "information of a proprietary nature produced or collected by or for faculty . . . in the conduct of or as a result of study or research" may be more subject to interpretation. The exemption has been little discussed in the case law or other interpretive material. There is no pertinent judicial precedent; the Virginia Freedom of Information Advisory Council[8] has not addressed or interpreted the exemption; and the Attorney General has only twice commented on the exemption. Those two opinions are, however, instructive.

In the Opinion of January 9, 1884, to Fred W. Walker, Director of the Department of Conservation and Economic Development, the Attorney General was of the opinion that travel statistics compiled by the Virginia Division of Tourism and received by a state university would

[8] *See* Va. Code §§ 30-178 through 30-181; 2.2-3704.1(B).

not be exempt from disclosure under Va. Code § 2.1-342(b)(16), the predecessor to § 2.2-3705.4(4). The Attorney General noted that the exemption was "designed to protect academic research" and would not protect a compilation of travel statistics. 83-84 Va. AG Op. 439 (attached hereto as Exhibit A).

In the Opinion of July 14, 1989, to Delegate Alan Diamonstein, part of the question before the Attorney General was whether bibliographies prepared by reference desk librarians in response to requests for library patron assistance at the library of Christopher Newport College were exempt from disclosure. In considering the applicable exclusions from the disclosure requirements of the Act, the Attorney General considered the applicability of § 2.1342(B)(17), at that time the predecessor section to § 2.2-3705.4(4). The Attorney General noted: "The bibliographies you describe also may be excepted from mandatory disclosure pursuant to § 2.1-342(B)(17), depending on the nature of the project for which the bibliography was requested and for whom the information was requested." 1989 Va. AG Op. 17 (attached hereto as Exhibit B). While the Attorney General does not elaborate, it seems clear that he means that if the bibliographies were produced for faculty as part of faculty research they would be excluded from the disclosure requirements of the Act under the exemption.

Although not directly on point, these two Opinions of the Attorney General clearly suggest that § 2.2-3705.4(4), and its predecessor sections which read identically, were "designed to protect academic research" and should be read to include any work done by or on behalf of faculty as part of their research. Clearly, Michael Mann's e-mails to and from scientific colleagues, discussing his research in detail, articulating future research plans, and conveying drafts of grants or scholarly papers, fit comfortably within the literal language of the exemption as interpreted by the Attorney General.

It is also instructive to look at the legislative history of § 2.2-3705.4(4). The statutory language which evolved to become the current statutory text was introduced as part of Senate Bill No. 162 on January 22, 1982. The original language to amend § 2.1-342(b)(15) was as follows:

> Data or records, other than financial or administrative, *having proprietary value,* produced or collected by faculty or staff of state institutions of higher education in the conduct of scientific, technical, medical or scholarly activities the results of which have not been released, published, copyrighted or patented, *when the disclosure of such data or records may result in a substantial loss to the individual or institution.* (Emphasis added)

Senate Bill 162 was amended on March 11, 1982. The amended language of § 2.1-342(b) (15) was as follows:

> Data, records, *or information of a proprietary nature*, other than financial or administrative, produced or collected by or for faculty or staff of state institutions of higher learning 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, where such data, records or information have not been publicly released, published, copyrighted or patented. (Emphasis added)

The provision then became law effective July 1, 1982, as Va. Code § 2.1-342(b) (16). *See* legislative history attached hereto as Exhibit C.

Clearly this legislative history indicates that the General Assembly intended an encompassing reach, supporting the Respondents' broad interpretation of § 2.2-3705.4(4) and refuting the narrow interpretation of Petitioners. In fact, the original language of Senate Bill 162, which was more consistent with Petitioners' narrow view, was rejected by the General Assembly in favor of a broader, more inclusive exclusion which was approved by all but one Senator voting on it including the original sponsor of the bill, Senator Michie. In particular, as enacted, the section eliminated the requirement that the "disclosure of such data or records may result in a

substantial loss to the individual or institution" and it eliminated the need for the data or records to have "proprietary value" in favor of a much broader concept of "proprietary nature."

Seventeen other states have exemptions in their public records laws comparable to § 2.2-3705.4(4).[9] Despite this relative proliferation of comparable statutory exemptions, however, the interpretive precedent in these other states is as sparse as in Virginia. There are, nonetheless, a few cases that bear mentioning.

In *Robinson v. Indiana Univ.*, 659 N.E. 2d 153 (Ind. Ct. App. 1995), Robinson requested, pursuant to Indiana's Public Records Act, documents associated with the care and use of animals in research. The university furnished generalized information about its use of animals in research but did not produce the specific requested records. The university claimed those records were exempt from disclosure under Ind. Code §§ 5-14-3-4(a)(6) which excluded from the disclosure requirements of the Indiana Public Records Act "[i]nformation concerning research, including actual research documents, conducted under the auspices of an institution of higher education, including information: (A) concerning any negotiations made with respect to the research; and (B) received from another party involved in the research." Like Virginia, the courts in Indiana have been clear that their state public records act is generally to be "liberally" construed and the stated exemptions narrowly interpreted in order to support the legislative intent to provide citizens access to governmental records.

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[9] *See* Colo. Rev. Stat. § 24-72-702 (Colorado); Del. Code Ann. Tit. 29, § 10002(g)(2) (Delaware); Ga. Code Ann. § 50-18-72(b)(1) (Georgia); 5 Ill. Comp. Stat. §§ 140/7(g), (v) (Illinois); Ind. Code §§ 5-14-3-4(a)(6) (Indiana); Kan. Stat. Ann. §45-221(a)(34) (Kansas); Ky. Rev. Stat. Ann. §§ 61.878(1)(b), (c) (Kentucky); Md. St. Gov. Code Ann. §§ 10-617(d), (h) (Maryland); Mich. Comp. Laws § 390.1551 (Michigan); Neb. Rev. Stat. § 84-712.05(3) (Nebraska); N.J. Stat. Ann. § 47:1A-1.1 (New Jersey); N.D. Cent. Code § 44-04-18-18.4 (North Dakota); Ohio Rev. Code Ann. § 149.43(A)(1)(m), (5) (Ohio); Okla. Stat. Tit. 51, § 24A.19 (Oklahoma); S.C. Code Ann. § 30-4-40(a)(14) (South Carolina); Utah Code Ann. § 63-2-304 (Utah); and Vt. Stat. Ann. Tit. 1, § 317(c)(23) (Vermont). *See also "Stuck in the Sunshine: The Implications of Public Records Statutes on State University Research and Technology Transfer,"* Franklin Pierce Law Center (Dec. 2004).

In response to Robinson's argument that the research exception quoted above had to be narrowly construed consistent with the legislative intent of the Indiana legislature, the court noted "[t]he difficulty we face is that the legislature has articulated a liberal construction policy, yet has enacted a myriad of broad exceptions," and further noted "liberal construction does not mean that the expressed exceptions specified by the legislature are to be contravened." *Id.* at 156. The court held that the records sought were exempt from disclosure because they were "information concerning research conducted by [or] under the auspices of Indiana University" and affirmed the non-disclosure decision made by the university.

The Virginia General Assembly, like the Indiana legislature with its Public Records Law, has expressed as a matter of policy that the FOIA "shall be liberally construed" and "any exemption . . . shall be narrowly construed." Va. Code § 2.2-3700. Nonetheless, like the Indiana legislature, it has enacted "a myriad of" exemptions, 123 in the latest supplement to the Code of Virginia. As in Indiana, these 123 exemptions clearly indicate a public policy that should not be lost in applying the overall need for liberal construction. As the Virginia Supreme Court noted in *Taylor v. Worrell Enterprises*, 242 Va. 219, 224, 409 S.E.2d 136, 139 (1991), the policy of open government established by the FOIA is not "absolute." Rather, 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."

The exemption in the Indiana Public Records Law differs from Virginia's exemption in that it does not refer to "information of a proprietary nature." Others states which do have an either explicit or implicit proprietary limitation in their research exemptions include Georgia,

Kansas, Kentucky, Michigan, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina (which uses virtually the same language as Virginia in its exemption), and Vermont. Of these, only Ohio has precedent interpreting its exemption.

The Ohio exemption states that a "public record" under the Ohio Public Records Act does not include "intellectual property records." An intellectual property record is defined at Ohio Rev. Code § 149.43(A)(1)(m), (5) as:

> [A] record, other than a financial or administrative record, that is produced or collected by or for faculty or staff of a state institution of higher learning in the conduct of or as a result of study or research on an educational, commercial, scientific, artistic, technical, or scholarly issue, regardless of whether the study or research was sponsored by the institution alone or in conjunction with a governmental body or private concern, and that has not been publicly released, published, or patented.

While the word "proprietary" is not used, the affinity to Va. Code § 2.2-3705.4(4) is clear.

The appellate courts of Ohio have twice interpreted Ohio Rev. Code § 149.43(A)(1)(m), (5). In *State ex rel. Physicians Comm. for Responsible Medicine v. Bd. of Trs. of Ohio St. Univ.*, 108 Ohio St. 3d 288, 843 N.E.2d 174 (2006), the question before the Ohio Supreme Court was whether video records of mice and rats involved in spinal-cord research at Ohio State University ("OSU"), including records used by OSU in in a spinal-cord-injury-training program, and training videos used by OSU to develop and demonstrate techniques for assessing rodents' neurological recovery from spinal-cord injuries, were exempt from disclosure under Ohio Rev. Code § 149.43(A)(1)(m), (5). The court was cognizant of the fact that "[a]ny exceptions to disclosure . . . must be strictly construed against the public-records custodian, and a records custodian bears the burden of establishing the applicability of an exception." 843 N.E.2d at 180. Nonetheless, because the records sought had not been "publicly released, published, or

patented," they were exempt. The court held this to be the case even though the information in question had been shared with other scientists and researchers at other institutions. *Id.* at 181.

In the second case, *Walker v. Ohio St. Univ. Bd. of Trs.*, 2010 Ohio App. LEXIS 297 (2010), the Court of Appeals of Ohio reviewed a lower court decision that a public records request for 1,190 completed questionnaires used in a watershed development study were exempt from disclosure under the Ohio research exemption. The requester sought this information "[o]stensibly to verify the accuracy of the study's results." *Id.* at **4. OSU provided a copy of the questionnaire form in response to the request but informed the requester that the completed copies of the questionnaires had been destroyed. It was, however, in the record on appeal that the data in the completed questionnaires could be have been recreated electronically.

On appeal the parties were in agreement that the completed questionnaires met the definition of intellectual property records in § 149.43(A)(1)(m), (5), but the plaintiff claimed that they had been publicly released or published because cumulative tallies of the raw data in the completed questionnaires had been published in a written report and the research assistant of the faculty member who had directed the watershed study had used some of the raw data in her dissertation. After noting that exemptions had to be strictly construed against the records custodian, the court held that the raw data in the completed questionnaires had not been publicly released or published and the exemption from disclosure had therefore been properly invoked by OSU. The court held:

> Notably, the underlying data collected in the study was never published, released, or made available to members of the public or to other researchers or scientists. Indeed, not only were the participants in the study assured of the confidentiality of their responses, but the university presented uncontroverted evidence that the confidentiality of the data collected in the study is vital to its economic and academic value. The university explained that if the proprietary research data were publicly disclosed, Professor

> Napier and the university could suffer substantial harm, including loss of grants and potential liability for breaching the confidentiality of the participants.

Id. at **13.

While it does not concern e-mail correspondence between scientific research colleagues as does the instant case, *Walker* is nonetheless instructive of the concern for protecting raw data that animates Va. Code § 2.2-3705.4(4) and the research exemptions to public record laws that exist in seventeen other states. Clearly, this concern is a countervailing expression of public policy strong enough to allow for non-disclosure even where challenging the accuracy of the raw data underlying published study results is the avowed purpose for the public records request. While this Court has accurately noted that it is not necessary for a requester pursuant to the FOIA to state a purpose for the request, Petitioners have been clear from the outset about their avowed purpose. That purpose is to determine if the raw data used by Michael Mann that led to his publication of two papers that "brought Mann to prominence and professional acclaim [then] became the subject of criticism as outliers" support the conclusions stated in those papers. Petition ¶ 63, n. 1. *See generally* Petition ¶¶ 58-63.

With this instructive precedent in mind, it is worth looking closely at the pertinent language of § 2.2-3705.4(4). The first thing notable is the breadth of the exemption which covers all "[d]ata, records or information." "Data," the dictionary tells us, is "factual information (as measurements or statistics) used as a basis for reasoning, discussion, or calculation;" "records" are "something that recalls or relates past events;" "information" is "knowledge obtained from investigation, study, or instruction."[10] These data or records or information must be of a "proprietary nature." "A proprietary right is a right customarily associated with

[10] All definitions are from the Merriam-Webster online dictionary found at: http://www.merriam-webster.com/dictionary/information.

ownership, title, and possession. It is an interest or a right of one who exercises dominion over a thing or property, of one who manages and controls." *Green v. Lewis*, 221 Va. 547, 555, 271 S.E.2d 181, 186 (1980). These data, records or information of a proprietary nature must have been "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." There is no controversy about this part of the definition here: the e-mails in question were collected by or for Michael Mann while he was a member of the faculty at the University and were in the conduct of study or research on scientific or scholarly issues. Finally, "such data, records or information has not been publicly released, published, copyrighted or patented." Here, too, there is no controversy: the e-mails had not been publicly released, published, copyrighted or patented.[11]

The application of the above analysis to the e-mails sought here by Petitioners makes clear that they are exempt from disclosure. The General Assembly has established as matter of public policy that public records that contain factual information used as a basis for reasoning, discussion, or calculation, that recall former scientific discussions, or contain knowledge obtained from investigation, study, or instruction need not be disclosed in response to a FOIA request if they are of a proprietary nature, *i.e.*, if the University and/or Michael Mann exercised dominion over, managed and controlled those e-mails. Examination of the exemplars for which exemption is being claimed pursuant to § 2.2-3705.4(4), which is more specifically addressed below, reveals that they are uniformly and without exception discussions that fall within these definitional parameters. Clearly they contain factual information used as a basis for reasoning,

[11] There has been discussion and briefing of copyright issues earlier in this case but there is no question that the e-mails in question here were never published as copyrighted entities; the unauthorized distribution of some of the emails in question as a result of the criminal data breach at the University of East Anglia in Great Britain, does not constitute publication under US copyright law.

discussion, or calculation, or recall former scientific discussions, or contain knowledge obtained from investigation, study, or instruction.

These records are also clearly of a proprietary nature and the University's determination that they are so is entitled to significant deference. The Code of Virginia, Section 23-4.3, explicitly directs the boards of visitors of state-supported institutions of higher education to "adopt policies regarding the ownership, protection, assignment, and use of intellectual property." This provision specifically defines "intellectual property" to include: "(i) a potentially patentable machine, article of manufacture, composition of matter, process, or improvement in any of those; (ii) an issued patent; (iii) a legal right that inheres in a patent; or (iv) anything that is copyrightable." Section 23-4.3 D. The University has implemented this authority by adopting policies governing ownership and use of patents,[12] copyrights,[13] data,[14] and other University business records. By policy the University makes its official records subject to disclosure except where otherwise allowed or required by law.

With reference to records subject to exemption under § 2.2-3705.4(4), such as the e-mails at issue in the instant case, the University makes clear that a faculty member such as Dr. Mann has access to those records even if the University claims the exemption as to third-party disclosure. University policy specifically provides that: "Data, records, or information of a proprietary nature (non-financial, non-administrative) gathered for or from medical, scientific, technical, or scholarly study or research, regardless of sponsorship, if not publicly released, published, copyrighted, or patented" are to be released to the "subject person," and released to the general public if they have been "released." *See* "Disclosure of University Records,"

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[12] http://www.virginia.edu/polproc/pol/xve2.html
[13] https://policy.itc.virginia.edu/policy/policydisplay?id=RES-001
[14] https://policy.itc.virginia.edu/policy/policydisplay?id=%27RES-002

http://www.virginia.edu/polproc/pol/xvc1.html#Definitions, ¶ 2.3. Thus, these are records "of a proprietary nature" created by Dr. Mann.[15] The same policy makes clear, to the extent there could be any uncertainty, that all of these records such as the e-mails Petitioners here seek are University records. "This policy notifies University faculty and administrative staff having custody of records of their responsibilities in releasing *University records or information.*" *Id.* at ¶ 1.0 (emphasis added). They are therefore "proprietary" to the University.

Applying this analysis to the individual exemplars results in the following exemplars being exempt from disclosure pursuant to § 2.2-3705.4(4): all of Petitioners' Exemplars (PE-1 through PE-17, as well as Respondents' Exemplars 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, and 13. *See also* Mann Affidavit ¶ 42, 43. In addition, Petitioners' Exemplars PE-2, PE-13, and PE-14, as well as Respondents' Exemplars 10 and 13, contain elements that are not properly part of a public record at all, including references to the medical condition of a colleague and personal communications about travel plans and arrangements and holiday greetings. Respondents' Exemplar 3 contains scholastic information and information part of a student education record making it exempt pursuant to § 2.2-3705.4(1) and barred from disclosure under FERPA. Respondents' Exemplar 14 is exempt pursuant to the personnel records exemption found in § 2.2-3705.1(1) and also contains personal information not properly part of a public record. Finally, Respondents' Exemplars 11 and 12 exclusively contain personal information not properly part of a public record.

For all of these reasons, the e-mails Petitioners seek have properly been withheld from disclosure by the University. Important constraints on the disclosure requirements of the FOIA

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[15] Respondents previously briefed the issues of the University's Copyright Policy which cedes ownership of scholarly works to faculty, as well as the University's protocol for handling employee management of their email accounts. *See* Respondents' REPLY MEMORANDUM ON PETITIONERS' DISCOVERY MOTIONS PAGES 5-7.

adopted by the General Assembly to protect necessary interests of the Commonwealth and preserve confidentiality have been properly invoked. Most significantly, the protections in § 2.2-3705.4(4) that the Attorney General has recognized were "designed to protect academic research" have been scrupulously observed. A plain reading of § 2.2-3705.4(4) demonstrates that this Court should deny Petitioners the relief they seek for all of the above reasons.

B. The Protections for Scientific and Scholarly Records Afforded Under Section 2.2-3705.4(4) Support the Commonwealth's Interest in Science and Innovation.

Research and scholarship in the United States is based on the core concept of rigorous peer review, a process which itself includes explicit norms of privacy and confidentiality. Faculty at public institutions, like other scholars and creative professionals, conduct research in many areas and pursue diverse theories, some of which inevitably turn out to be false or misguided. They communicate their hypotheses with colleagues, share ideas, critique each other, and generally engage in the "creative" process of generating and testing ideas. When a faculty member is comfortable enough with his or her research to compile it in a publishable format, the work is put through the rigorous peer review process, during which the scholar's research, data, assumptions, and conclusions are subject to scrutiny and criticism. The scientific community collectively assesses whether the scholar's conclusions rest on solid ground.

Virtually every body, society, and institution of higher education in this country has endorsed the peer review process as the most fair, comprehensive, and scientifically valid system of testing and critiquing academic research and publication. Additionally, the "[p]eer review of grant applications is the cornerstone of the U.S. research enterprise." Laura Bonetta, *How to Be a Member of an R01 NIH Study Section, in* MAKING THE RIGHT MOVES: A PRACTICAL GUIDE TO SCIENTIFIC MANAGEMENT FOR POSTDOCS AND NEW FACULTY 1 (2d ed. 2009).[16] The American

[16] *available at* http://www.hhmi.org/resources/labmanagement/downloads/study_section.pdf

Council of Learned Societies (ACLS), a respected collective of academic and scholarly organizations, describes peer review thusly:

> Peer review is a process by which experts in a given discipline or group of disciplines confirm the value of another scholar's research and attest to its having met the field's standards. Through peer review, scholars collectively help establish a reliable body of knowledge. ACLS fellows and grantees are selected through this process. In this way, ACLS contributes to academic self-governance and establishes standards of excellence in scholarship, two goals that help define our endeavors and those of our societies.

American Council of Learned Societies, *Frequently Asked Questions.*[17]

The National Institutes of Health (NIH) "invests over $30.9[18] billion annually in medical research for the American people. More than 80% of the NIH's funding is awarded through almost 50,000 competitive grants to more than 300,000 researchers at more than 2,500 universities, medical schools, and other research institutions in every state and around the world."[19] In its research guidelines, this "largest funder of academic research" in the United States, Bonetta, *supra*, at 1, emphasizes both the importance of peer review and the weighty responsibilities placed on peer reviewers:

> Peer review is an essential component of the conduct of science. Decisions on the funding of research proposals and on the publication of experimental results must be based on thorough, fair and objective evaluations by recognized experts. . . . Peer review requires that the reviewer be expert in the subject under review. The reviewer should avoid any real or perceived conflict

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[17] http://www.acls.org/info/Default.aspx?id=198 (last visited 7.18.12).
[18] "This amount reflects the sum of discretionary budget authority received by NIH in FY 2012 under The Consolidated Appropriations Act of 2012, Public Law (P.L.) 112-74, as well as a mandatory $150 million for special type 1 diabetes research authorized per P.L. 111-309, The Medicare and Medicaid Extenders Act of 2010. Details regarding current appropriations are available at http://officeofbudget.od.nih.gov/cy.html." *See* http://www.nih.gov/about/budget.htm
[19] http://www.nih.gov/about/budget.htm

> of interest that might arise because of a direct competitive, collaborative or other close relationship with one or more of the authors of the material under review. . . . The review must be objective.

NATIONAL INSTITUTES OF HEALTH, GUIDELINES FOR THE CONDUCT OF RESEARCH IN THE INTRAMURAL RESEARCH PROGRAM AT NIH 11 (4th ed., May 2007); Exhibit D hereto.[20] Further, the NIH guidelines place special emphasis on the necessity of confidentiality and discretion in the peer review process:

> *All material under review is privileged information.* It should not be used to the benefit of the reviewer unless it previously has been made public. It should not be shared with anyone unless necessary to the review process, in which case the names of those with whom the information was shared should be made known to those managing the review process. Material under review should not be copied and retained or used in any manner by the reviewer unless specifically permitted by the journal or reviewing organization and the author.

Id. (emphasis added).

The confidentiality expectation of peer reviewers is considered a key element of the peer review process's ethical code. NIH Reviewer Orientation guidelines, which are reflective of the norms of science, make clear that violating confidentiality can have serious professional and academic consequences for the reviewer:

> Ethical Conduct of Reviewers – Confidentiality
>
> Respect for the privacy of the investigators' ideas is important; all applications and related materials are privileged communications that cannot be shown to or discussed with unauthorized individuals. In signing the pre-review and post-review certification forms, each reviewer certifies that he/she fully understands the confidential nature of the review process and agrees to confidentiality and non-disclosure.

[20] http://sourcebook.od.nih.gov/ethic-conduct/Conduct%20Research%206-11-07.pdf

NIH Center for Scientific Review, *NIH Reviewer Orientation* (July 28, 2011) at 5.[21]

The National Science Foundation (NSF), created by Congress in 1950 "to promote the progress of science; to advance the national health, prosperity, and welfare; to secure the national defense..." has an annual budget of about $6.9 billion (FY 2010).[22] The NSF provides funding for "approximately 20 percent of all federally supported basic research conducted by America's colleges and universities. In many fields such as mathematics, computer science and the social sciences, NSF is the major source of federal backing."[23] In its *Conflict-of-Interests and Confidentiality Statement for NSF Panelists*, Exhibit E hereto[24] the NSF also imposes a strict duty to "Maintain the Confidentiality of Proposal and Applicants:"

> The Foundation receives proposals in confidence and protects the confidentiality of their contents. For this reason, you must not copy, quote, or otherwise use or disclose to anyone, including your graduate students or post-doctoral or research associates, any material from any proposal you are asked to review. If you believe a colleague can make a substantial contribution to the review, please obtain permission from the NSF program officer *before* disclosing either the contents of the proposal or the name of any applicant or principal investigator.

The statement also imposes a clear duty to protect the "Confidentiality of the Review Process and Reviewer Names:"

> NSF keeps reviews and your identity as a reviewer of specific proposals confidential to the maximum extent possible, except that we routinely send to principal investigators (PI's) reviews of their own proposals without your name, affiliation, or other identifying information. Please respect the confidentiality of all principal investigators and of other reviewers. Do not disclose their identities, the relative assessments or rankings of proposals by a peer review panel, or other details about the peer review of proposals.

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[21] http://grants.nih.gov/grants/peer/guidelines_general/reviewer_orientation.pdf
[22] http://www.nsf.gov/about/
[23] *Id.*
[24] http://www.nsf.gov/pubs/2002/form1230p/form1230p.pdf

> Unauthorized disclosure of any confidential information could subject you to sanctions.[25]

The expectations of rigorous and confidential peer review imposed by the two federal agencies which provide the bulk of basic research funding to institutions of higher education is similarly embedded in the culture and tradition of academic disciplines. As University of Virginia Provost John Simon explains:

> Research and scholarly activities in American institutions of higher education are subject to important mechanisms of peer review, governmental and grants compliance, and public accountability. However, these existing mechanisms critically afford protections of privacy and security to the unpublished communications, data, and informal observations of scientists and other scholars. This zone of privacy enables science and research to flourish for the many reasons that follow.

Simon Affidavit ¶ 8. As described by University of Virginia Professor Michael Kubovy:

> The wide–spread use of peer–review has been a key contributor to the greatness of American science, because it maximizes the likelihood that bad research will be weeded out. It is notable that this mechanism of self–correction adheres to strict rules of confidentiality to insure that ideas in a scholar's grant applications or scholarly manuscripts are not misused. Confidentiality in this transition is so important that the rules of confidentiality and anonymity are constantly being re-examined by the governing bodies of granting agencies and professional societies. For example, all scholarly journals maintain the confidentiality of their peer-reviewers; some (*Personality & Social Psychology Bulletin, Psychological Review*) even offer authors the option of *masked reviews*: the authors' names, institutions, and other identifying information are removed from the reviewers' copies (to mitigate the halo–effect of individual or institutional prestige). When I am invited to review a grant application or an article as a peer of a scholar, I do so in part because I am then privy to the new ideas budding in my discipline. And yet, even though this activity satisfies my curiosity, I may not use any of this knowledge to advance my own work. Indeed confidentiality is so important that such knowledge has on occasion made me change the course of my own work to avoid even an *appearance* of influence. The point of

[25] *Id.*

> all this is to foster trust. Science cannot flourish in an atmosphere of distrust or defensiveness.
>
> University professors are expected by their employers to contribute to their discipline by engaging in peer–review. Nevertheless, universities never demand that researchers submit their reviews of the work of others, or others' reviews of their research in order to facilitate the evaluation of their work. *A fortiori*, if such disclosure were ever compelled by a non–academic body, the institution of science would be mortally wounded.

Kubovy Affidavit ¶¶ 6, 7.

Hunter Rawlings, President of the Association of American Universities (and former President of the University of Iowa and Cornell University) explains the role of peer review in the ever-more collaborative process of American science:

> Throughout the research process, researchers often collaborate and deliberate with one another, often as part of the peer review process. The peer review process allows researchers to gain insight and perspectives from other experts in the field. Collaboration and deliberation throughout the process allow research and analysis to be refined resulting in more reliable and valid results. The effectiveness of this process depends on the ability of researchers to have confidential conversations with one another where they can freely critique each other's work. However, this process is threatened by forced disclosure of informal, unpublished scholarly exchanges. The potential to have a comment made during such an exchange exposed or used to discredit a researcher will stifle the willingness and ability of scientists to undertake such frank exchanges and will ultimately adversely affect the quality of resulting research.

Rawlings Affidavit ¶ 2; *see also* Simon Affidavit ¶16.

The General Assembly adopted protections for "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," *see* Section 2.2-3705.4(4). By doing so, state law provides a strong and necessary basis to ensure that faculty at Virginia's public institutions of higher education are able