IN THE

SUPREME COURT OF VIRGINIA

Record No. 181375

TRANSPARENT GMU and AUGUSTUS THOMSON,

Appellants;

v.

GEORGE MASON UNIVERSITY and GEORGE MASON UNIVERSITY FOUNDATION, INC.,

Appellees.

REPLY BRIEF OF APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

ADVISORY OPINIONS

STATUTES

OTHER AUTHORITIES

In their Opening Brief, Appellants Transparent GMU and Augustus Thomson (collectively, Mr. Thomson) explain why the records they requested from both George Mason University and the George Mason University Foundation qualify as "public records" that (1) are possessed or owned in the transaction of public business (2) by either (a) a public body's agent or (b) a public body itself. The University, the Foundation, and their allies fail to rebut the substance of Mr. Thomson's arguments on appeal or invoke any valid procedural reason to deny him the relief he requests. As such, this Court should reverse the decision below and remand this case.

ARGUMENT AND AUTHORITIES

A. As the parties now agree that "[t]he question" in this case is whether the Foundation is the University's agent, Mr. Thomson is entitled to appellate relief on his agency claims.

Despite a token effort to defend its position below regarding agency,[1] the University effectively concedes on appeal that "[t]he question" in this case is whether "the Foundation [is] the 'agent' of GMU." University Brief at 23. In apparent agreement, the Foundation argues for the first time that it

1 The University repeats the refrain that Section 2.2-3704(J) implies that a public body is not the custodian of records its agents hold on its behalf. University Brief at 29–30. The statutory history of the Act demonstrates, however, that the General Assembly's decision to subject records of a public body's agents to disclosure preceded and is therefore completely unrelated to Section 2.2-3704(J). Opening Brief at 31–33. The University and Business Council offer no response, nor do they justify extracting a negative implication from Section 2.2-3704(J). *Cf. id.* at 32.

is not, in fact, a University agent. Foundation Brief at 27–30.

The circuit court never reached that question. It dismissed both of Mr. Thomson's agency claims on demurrer. App. 240–41, 246. On appeal, this Court's review is limited to the grounds actually raised in the demurrers. *Sales v. Kecoughtan Housing*, 279 Va. 475, 481 n.* (2010). Neither demurrer below argued that Mr. Thomson failed to sufficiently allege an agency relationship, or that such a relationship did not actually exist. It is too late now for the Appellees to expand the issues on appeal to include a factual matter they failed to brief, argue, or even raise below.

Moreover, a litigant who properly alleges an agency claim "is entitled to prove it if he can." *Drake v. Livesay*, 231 Va. 117, 121 (1986). When a circuit court prematurely dismisses his claim on demurrer, the proper recourse is to remand the decision, permit the parties an opportunity to develop the factual record, and allow the circuit court to fulfill its duty as primary fact-finder. *Id.*; *Reistroffer v. Person*, 247 Va. 45 (1994).

The University and Foundation, however, argue that remand is inappropriate here because Mr. Thomson did not "prove agency" at a trial convened to determine whether the Foundation was a public body under another section of the Act. Foundation Brief 27–30; University Brief at 24. That trial was held *after* the circuit court dismissed both of Mr. Thomson's

agency claims and dismissed the University from the case entirely. Given those prior rulings, the parties did not tailor their evidence or argument to the legal standard of agency. Even accepting some degree of evidentiary overlap between the question of agency and the issues at trial,[2] Mr. Thomson was denied the benefit of conducting discovery on the University. As the alleged principal, the University certainly possesses evidence relevant to the agency question—evidence that is arguably more persuasive than that available from the Foundation. *See Drake*, 231 Va. at 188–89 ("The question whether agency exists cannot ordinarily be proved solely by the utterances of the purported agent."). At the very least, then, Mr. Thomson deserves an opportunity to develop his claim on remand.

Were this Court to instead rule on agency based on the "unambiguous written documents [and] undisputed facts" in the record, *Reistroffer*, 247 Va. at 48, it would be bound to rule that the Foundation acts as the University's agent in serving as the "primary depository of private gifts on behalf of the University." App. 63. The Affiliation Agreement between the

2 The Foundation represents that the demurrer ruling below "noted that evidence of agency could still matter at trial as relevant to the remaining count." Foundation Brief at 27–28 (citing App. 243). However, the relevant language refers only to "factual issues . . . [around the] *creation* of public records" as potentially relevant at trial. *Id.* (emphasis added). The entirety of the agency analysis is not encompassed within an inquiry into the "creation of public records" per the delegated function clause.

two entities proves their mutual consent that the Foundation will act on the University's behalf, and unambiguous language in the Agreement attests to the University's "right of control" over relevant operations. *Texas Co. v. Zeigler*, 177 Va. 557, 567 (1941). This is most obvious in the Foundation's explicit agreement to adhere to University policies regarding private donations, App. 63, but it also appears in agreements to develop its own gift acceptance policies "in consultation with the University," App. 61; to "coordinate [its] fundraising initiatives . . . with the University," *id.*; to account for the "University['s] priorities and long-term plans," App. 59; and to obtain University approval before accepting certain kinds of gifts, App. 61, 65. Also critical to the University's control over the Foundation's day-to-day operations is the agreement that only University officers may serve as the Foundation CEO, and the Foundation cannot remove them without seeking the University's consent. App. 58, 64.

Appellees' case against an agency relationship revolves largely around a 2009 Advisory Council opinion. University Brief at 19–20 (citing Freedom of Information Advisory Opinion No. AO-09-09 (October 23, 2009)). There, the Council writes that it was unable to "establish that an agency relationship . . . exists" between a particular public body and its affiliated foundation based on the specific "facts presented" to it by the

citizen requesting the opinion. An erstwhile critic of the Advisory Council, the University now argues the opinion deserves "great weight" as proof that foundations are not agents of the entities they serve. *Id.* at 19, 24.

As an initial matter, the University misunderstands the Advisory Council's charge. Its "views on the legal meaning of statutory terms" demand weight, not its fact-finding authority. *Fitzgerald v. Loudoun County Sheriff's Office*, 289 Va. 499, 504–05 (2015). In another opinion addressing private foundations, it expressly disclaims any authority as a "fact-finding body or trier of fact." Freedom of Information Advisory Opinion No. AO-09-05 (July 19, 2005). The existence of a principal–agent relationship, however, is a question of fact. *Drake*, 231 Va. at 121. Although the Council's views on how the Act applies to agents' records is instructive, a single determination that evidence fails to establish agency is not.

Moreover, any finding regarding the existence of an agency relationship must be "read in the light of the facts of the case [then] under discussion." *Jones v. Commonwealth*, 293 Va. 705, 721 (2017). The Advisory Council readily admits that "guidance provided in [its] advisory opinions is necessarily limited to the factual situations presented and is based solely on those facts" provided by requestors. Freedom of Information Advisory Opinion No. AO-07-05 (June 7, 2005). There is

simply no indication that the private citizen who requested Opinion No. A0-09-09 provided the Council with relevant information about the entities' relationship. *See* Advisory Opinion No. AO-09-09 ("[N]o evidence has been presented indicating that the Foundation advises the Board.").

But the more troubling flaw in the University's analysis is its failure to recognize that the relevant category governing this case is "agent," not "foundation." A 2009 opinion indicating that not *all* foundations fit the "agent" mold is of no value in determining whether the particularities of another relationship trigger the Act's general mandate for disclosure. *See Frankfort Publishing v. Kentucky State University Foundation*, 834 S.W.2d 681, 683 (Ky. 1992) (Lambert, J., concurring) (concluding that, although facts of the case were "sufficient to render [foundation] an agency of the university, not every university foundation should be so regarded").

Meanwhile, the Foundation argues against the existence of an agency relationship by representing to this Court that the decision below "f[ound] as a matter of fact that the Foundation 'operat[es] independently' and 'under its own bylaws, articles of incorporation, and statutes.'" Foundation Brief at 29 (citing App. 264). Even if it is appropriate to consider the quoted language a true "finding . . . of fact"—the circuit court made clear that its decision addressed only "a matter of law" based on "stipulated and

undisputed facts," App. 261, 268—it was not a finding relevant to the agency inquiry. The court's remarks about "independent operations" referred only to its legal conclusion that university foundations "are not sub-entities of" the universities they support. App. 264. An agent, by contrast, has a "distinct legal personality" and is not "merged into the principal," Restatement (Third) of Agency § 1.01, comment (e) (2006), and the inquiry instead focuses on actual or potential control over "the work to be done and the manner of performing it," *Whitfield v. Whittaker Memorial Hospital*, 210 Va. 176, 181 (1969). The circuit court's decision simply does not consider control-in-fact; it focuses only on whether the foundation is "a sub-entity of the public body it serves." App. 263.

B. The University continues to mischaracterize Mr. Thomson's claim regarding Dr. Bingham's possession of records.

The University and its allies once again characterize Count II of Mr. Thomson's mandamus petition as some novel "dual employment" theory. Business Council Brief at 22; University Brief at 25–28. In their telling, Mr. Thomson believes the University has obligations "regarding Foundation records *because* a single person served as both [a University] Vice President . . . and CEO of the Foundation." *Id.* at 25 (emphasis added).

In actuality, Mr. Thomson takes no issue with the proposition that public employees "can and do 'change hats'" while representing other,

private bodies. *Cf.* Business Council Brief at 22. Rather, Mr. Thomson appeals the circuit court's decision to step in and declare, without the benefit of *any* factual development whatsoever, that Mr. Thomson could not prove Dr. Bingham ever possessed the documents in question *while* wearing her University hat. That was not for the circuit court to decide, as the specific capacity in which a dual employee performs a given task is a highly fact-specific inquiry. *United States v. Bestfoods*, 524 U.S. 51, 72 (1998) (remanding for factual development on that question).

For the University, Mr. Thomson's purported failure to "allege that, *at the time of [his] request*, Dr. Bingham . . . possessed the records in her role as Vice President of Development" is a sticking point. *See* University Brief at 26 (emphasis added). The Act does not, however, require Mr. Thomson allege that Dr. Bingham happened to be perusing the records in question on University business at the precise moment his request arrived. Applicability determinations cannot turn on measures so capricious that "an entity may be subject to FOIA one month then exempt . . . the next." Advisory Opinion No. AO-09-05 (July 19, 2005).

If a document was subject to the Act only at the precise moment it is in the hands of a public servant for purposes exclusively related to her public duties, public bodies could engineer dual-employment scenarios like the

one here, ensuring their employees and officers may access and use on-site records while simultaneously holding those records beyond the public's reach. It simply cannot be the case that a public officer does not "possess" a document relevant to her official duties when she can access that document with the click of a mouse any time she decides it may prove useful in performing her public duties.

In addition to encouraging gamesmanship, the University's interpretation also narrows the concept of "possession" in violation of the clear mandate that the Act be "liberally construed." Code § 2.2-3700(B). By way of comparison, criminal statutes "are to be strictly construed against the Commonwealth and . . . may not be extended by implication." *Fullwood v. Commonwealth*, 279 Va. 531, 536 (2010). Nonetheless, in that context, the term "possession" encompasses various forms of constructive and concurrent possession. *Atkins v. Commonwealth*, 57 Va. App. 2, 22–23 (2010). The operative question is "whether the [accused] ha[s] the ability to use or direct the use of" the contraband. *Henderson v. United States*, 135 S. Ct. 1780, 1786 (2015). The General Assembly surely did not intend that courts would *further* narrow the concept of "possession" in this context.

In short, the question is not whether Dr. Bingham possesses Foundation documents *because* she is also the Foundation president. It is

whether she may *disclaim* possession over documents at her fingertips—documents that are relevant to and presumably used in performing her University duties—merely because she is *also* the president of the Foundation. The Advisory Council has concluded that the Act includes no such unwritten exception to disclosure. *See* Freedom of Information Advisory Opinion No. AO-11-09 at n.6 (November 30, 2009) (concluding that if a member of a public body is also a member of a private entity, his use of the private entity's records in conducting business on behalf of the public body subjects those records to disclosure). This Court should too.

C. The Foundation fails to justify its unprecedented theory that it does not transact public business as the "primary depository of private gifts on behalf of the University."

Confronted with a nationwide unanimity regarding the public nature of fundraising activities for the sole benefit of a state university, *see* Opening Brief at 24–25, the Foundation scrambles to argue that "cases from other jurisdictions point both ways" on that question. Foundation Brief at 31. It points to a single case, *State Board of Accounts v. Indiana University Foundation*, 647 N.E.2d 342 (Ind. Ct. App. 1995), which the circuit court cited below in considering whether the Foundation's holdings are "public funds." App. 262. The case is certainly germane to *that* question: it addressed whether a university foundation's holdings are "public funds,"

which an Indiana statute defines as funds "in the possession of any public officer." 647 N.E.2d at 347–48. The court acknowledged that the foundation was in fact an "agent" of its affiliated university, but found the definition of "public funds" unsatisfied because the foundation's directors were not, strictly speaking, "public officers." *Id.* at 346, 348–49.

The relevance of that decision is doubtful even as to the "public" status of a foundation's funds in Virginia. *See Citizens' Foundation of Richmond Professional Institute v. City of Richmond*, 207 Va. 174 (1966) (concluding that Commonwealth has "beneficial interest" in and "indirectly owns" funds owned by private foundation working on its behalf). But under Virginia's Act "public funds" and "public business" are distinct concepts, and neither one is defined with reference to the other. The Foundation and its allies fail to explain why Indiana's statutory definition of "public funds" is relevant to the "public business" issue here.

D. Mr. Thomson's legal arguments are unrelated to and predate the legislative initiatives cited in the response briefs.

Like the court below, Appellees point to instances in which the General Assembly declined to instate a *per se* rule subjecting all university foundations to the Act—regardless of how they interact with universities. Foundation Brief at 1; University Brief at 4–5. Noting that Mr. Thomson's petition appeared to coincide with the failure of one such proposal, the

University accuses him of seeking "through litigation what advocates have thus far been unable to accomplish through legislation" *Id.* at 2, 5.

That argument is both wrong and irrelevant. Petitioners have been asking to review gift agreements like those at issue here since 2014, App. 146—long before legislators conceived Senate Bill 1436, *id.* at 377 (bill presented January 13, 2017). The University, in fact, *knows* that Mr. Thomson's legal arguments are unrelated to Senate Bill 1436, because he first explained them in writing to the University *before* Senate Bill 1436 was presented. *See* Verified Petition for Mandamus & Injunctive Relief at Exhibit H, *Transparent GMU v. George Mason University*, No. 2017 01973 (Va. Cir. Fairfax February 9, 2017) (letter dated January 6, 2017).

More importantly, legislative proposals like Senate Bill 1436 would, if enacted, have a different effect than would applying the existing law as requested here. Given the diversity in university–foundation relationships, hesitation to instate a rule subjecting *all* foundation records to disclosure is understandable—especially when the Act *already* ensures (and the courts, the Advisory Council, and the Attorney General have *already* recognized) the right to access records held by true agents. *See* Opening Brief at 29–31.

In light of that general rule, legislative inaction represents, at most, a refusal to extend the Act to foundations that are *not* subject to a public

body's ability to control. It certainly does not imply some unwritten "fundraising foundation exception" to the general rule for records held by public bodies' agents. Because Mr. Thomson alleges that the specifics of the University–Foundation relationship trigger that rule, this case turns on the terms the General Assembly *has* chosen rather than those it has not.

E. The University's assurances of transparency are based on a false assumption and are belied by its conduct in this case.

The University wants to assure this Court that its restrictive interpretation of the Act does not allow it to "shroud its essential activities in secrecy by outsourcing them" to the Foundation. University Brief at 13. It cites to dicta in the circuit court's opinion assuming that the "University's acceptance of any condition or restriction on the use of donated funds necessarily produces a record that is subject to" the Act. App. 268. The circuit court, however, provided no factual or legal basis for that assumption. It did not take evidence on the University's internal procedures for creating, reviewing, or retaining documentation of gift restrictions, nor did it point to facts otherwise on the record suggesting that any University division creates (let alone retains) such a document. The court did not cite any specific legal requirement that the University "produce a record that is subject to" the Act when accepting gifts. App. 267.

While it is comforting to believe that records of the type imagined by

the circuit court exist and that the University retains them for public disclosure, the facts of this case indicate that the opposite is true. Mr. Thomson requested the exact same category of gift agreements from both the University and the Foundation. App. 91, 96. While the Foundation admitted that it possessed multiple documents responsive to that request, the University claimed it had none. *Id.* at 164; Transcript (April 16, 2018) at 27:12–14.[3] Neither the University nor the Foundation suggests that the yet-undisclosed Foundation records represent donations ultimately rejected by the University.[4] Nor do they contend that those records document unrestricted donations, which the Foundation CFO admits are "few and far between." App. 328. Importantly, Mr. Thomson's request to the University specifically asked for documents in the possession of "entit[ies], however designated, performing delegated functions on behalf of the University," *id.* at 92—which, as the circuit court recognized below, includes the

3 The University eventually admitted that it *did* in fact have responsive documents in its possession. App. 259. Importantly, though, the documents it eventually produced were *not* the same responsive records in the Foundation's possession. Transcript (April 24, 2017) at 20:5–17.

4 This alone undercuts the argument that fundraising records document public business only when the University ultimately accepts a gift. *Cf.* Foundation Brief at 34–35. Moreover, if the University performed the solicitation and negotiations that precede formal approval in-house, there would be no question that it was performing a public function. There is no legitimate reason why that essential aspect of acquiring support from the public loses its public character when outsourced to a private entity subject to University control.

University's Gift Acceptance Committee, *id.* at 266.

By advising Mr. Thomson it had no records responsive to his request, the University established its Committee did *not* possess the circuit court's theoretical "public records." The prospect that a public body will "shroud its essential activities in secrecy by outsourcing them to" an agent like the Foundation is therefore not only *possible* but by all accounts *imminent*.

CONCLUSION

This Court should reverse the decision below and remand.

Dated: May 31, 2019

Respectfully submitted,

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RULE 5:26 CERTIFICATE

In accordance with Rule 5:26(e) and Rule 5:26(h) of the Rules of the Supreme Court of Virginia, I certify that:

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8. This Reply Brief does not exceed 15 pages in length, excepting the Cover Page, Table of Contents, Table of Authorities, and this Certificate.

9. This Reply Brief complies with all other requirements of Rules 5:6, 5:26, and 5:27 of the Rules of the Supreme Court of Virginia.

10. On the date of this filing, I sent an accurate copy of this Reply Brief by electronic mail to counsel for each of the parties at the addresses listed above.

Dated: May 31, 2019

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