COPY

IN THE

SUPREME COURT OF VIRGINIA

Record No. _____

TRANSPARENT GMU and AUGUSTUS THOMSON,

Petitioners / Appellants;

v.

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

Respondents / Appellees.

PETITION FOR APPEAL

Evan D. Johns
(Virginia State Bar No. 89285)
APPALACHIAN MOUNTAIN ADVOCATES
415 Seventh Street Northeast
Charlottesville, Virginia 22902
Telephone: (434) 529 – 6787
Facsimile: (304) 645 – 9008
E-Mail: *ejohns@appalmad.org*

Counsel for the Petitioners

LANTAGNE LEGAL PRINTING 801 East Main Street Suite 100 Richmond, Virginia 23219 (804) 644-0477

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

ADVISORY OPINIONS

STATUTES

OTHER AUTHORITIES

Founding patriot George Mason recognized that "the good people of Virginia" enjoy a right to government "secured against the danger of maladministration." Virginia Declaration of Rights § 3 (1776). According to Mason's friend and rival James Madison, that danger was most acute when citizens lacked "information, or the means of acquiring it." Letter from James Madison to W.T. Barry (August 4, 1822). Nearly two centuries later, the General Assembly encoded a means for Virginians to observe their government in the Virginia Freedom of Information Act (the Act), Va. Code §§ 2.2-3700 – 2.2-3714—which, among other things, "ensures the people of the Commonwealth ready access to public records." Va. Code § 2.2-3700(B).

Yet, according to the public university that now bears Mason's name, a significant portion of its critical operations are beyond the ken of the Act. While it has not invoked any statutory exemption to the Act's general mandate for disclosure, George Mason University (the University) maintains the Act does not reach documentation of gifts to the University held by George Mason University Foundation, Inc. (the Foundation)—a corporation formed by University officials for the sole and express purpose of receiving, managing, and disbursing funds for the University.

Recognizing the Act is not so easily frustrated, University students requested gift agreements from both the University and Foundation itself.

When both bodies denied their requests, the students filed a mandamus petition asking the circuit court to order the Foundation produce those records as an agent, an alter ego, or as another "entity . . . created to perform . . . delegated functions" of the University. *See* Va. Code § 2.2-3701.

In declining to grant that petition, the court disregarded the Virginia Freedom of Information Advisory Council's long-held and well-reasoned construction of the Act. It also refused to entertain the approach this Court has taken when determining whether the Act applies to a corporate entity and rejected the unanimity of authority recognizing that receiving, administering, and applying funds for the sole benefit of a public university is a matter of "public business." The practical effect of those errors is to place countless documents deemed "public records" by the Act behind the very wall of secrecy the Act was meant to pierce. And if left uncorrected, the rulings below allow public bodies to altogether evade their disclosure obligations merely by outsourcing public functions to a private entity.

Because the plain language of the Act does not allow that scenario, Petitioners Transparent GMU and Augustus Thomson (collectively, Mr. Thomson) ask this Court grant their appeal, correct the circuit court's misreading of the Act, and remand for further proceedings.

STATEMENT OF FACTS

1. Gus Thomson is an undergraduate student seeking a degree in Integrative Studies at George Mason University. Amended Petition ¶ 5. While at GMU, Mr. Thomson began hearing reports that public universities in other states had agreed to give private donors influence over curriculum, hiring, and tenure decisions. *Id.* ¶ 2. Interested in knowing whether similar agreements could be influencing his own education, Mr. Thomson joined other University students to form Transparent GMU, an unincorporated association advocating for academic freedom and transparency. *Id.* ¶¶ 2, 6.

When University officials rebuffed his initial attempts to inquire into the nature of the school's gift agreements, *id.*, Mr. Thomson served the University with a request under the Virginia Freedom of Information Act. *Id.* ¶ 55. As relevant here, he requested copies of "any grants, cooperative agreements, gift agreements, contracts, or memoranda of understanding . . . involving a contribution or potential contribution to or for the University from" several entities he knew provided, or were affiliated with entities that provided, significant support to the University. *Id.*

The University claimed it possessed no such records. *Id.* ¶ 58. Its response nonetheless implied that the records did in fact exist—just beyond the University's "physical custody." *Id.* ¶ 59. For those familiar with

fundraising at the University, the implication was clear: if Mr. Thomson wanted the records, he would have to seek them from the George Mason University Foundation.

2. Organized in 1966 by three officials of then-George Mason College,[1] the George Mason University Foundation, Inc. is a nonstock corporation originally organized "exclusively to receive, hold, invest and administer property and to make expenditures to or for the benefit of" the University. Joint Exhibit 9 at 1. Although the Foundation's name has changed alongside that of its affiliated university, Joint Stipulation ¶¶ 12–23, its mission remains unchanged. *See* Joint Exhibit 3 at 1.

The Foundation's charter requires that, upon dissolution, all of its assets will transfer to the University. It also requires at least six University officers or employees serve *ex officio* as Foundation Trustees. Joint Exhibit 3 at 4–5. And the Foundation's day-to-day operations are guided by the University's own Vice President for University Development—who, according to the "mutual agreement" of the two entities, serves *ex officio* as

1 The three incorporators were all members of the George Mason College Advisory Committee, which advised the University of Virginia—then the College's parent entity—on issues pertinent to the College. *See* Joint Exhibit 9 at 6; Joint Stipulation ¶¶ 4–11; Petitioners' Exhibit 4 at 36 (listing Advisory Committee members in University of Virginia Record).

the Foundation's President and CEO. Joint Exhibit 19 at 3. The University is solely responsible for the Foundation President's salary. *Id.*

An Affiliation Agreement with the University designates the Foundation as the "primary depository of private gifts on behalf of the University." Joint Exhibit 19 at 8. After the University solicits gifts, a formal University policy requires they be deposited directly with the Foundation. Joint Exhibit 17 at 1. The Foundation then acts as a "caretaker" of those funds, Transcript (April 24, 2018) at 77:11–13, before disbursing them in compliance with University policies, Joint Exhibit 19 at 8. The Foundation must also seek University authorization before accepting certain gifts, *id.* at 10; altogether refuse certain others, *id.* at 6; consult with the University regarding the Foundation's own internal management and acceptance policies, *id.*; seek the University's consent before removing its own president, *id.* at 11; and allow the University to audit its financial records, *id.*

The Foundation shares office space with the University's development office on the University's Fairfax campus. Transcript (April 24, 2018) at 75:1–17. It also shares a website on the University's web domain, Petitioners' Exhibit 5, and its employees all use *gmu.edu* e-mail addresses, Petitioners' Exhibit 11 at 9, which can be found on the University's "People

Finder" service: a self-described "online University Directory . . . of student, faculty and staff information," Petitioners' Exhibit 6.

3. Knowing that University policy requires all private gifts be routed through the Foundation, Joint Exhibit 17 at 1, Mr. Thomson submitted a materially identical request for records to the Foundation's office in Merten Hall. Joint Exhibit 1. The Foundation's response did not deny that it possessed records responsive to the request; it would later confirm that it did. Transcript (April 16, 2018) at 27:12–14. Nonetheless, the Foundation refused to process the request, arguing it was "not a public body within the meaning of" the Act, nor "an agent of [the] University with respect to the [records] in question." Joint Exhibit 2.

NATURE OF THE CASE AND THE MATERIAL PROCEEDINGS BELOW

Mr. Thomson filed a verified mandamus petition in the Fairfax Circuit Court, naming both the University and the Foundation as respondents. As amended, the petition pled five distinct claims relevant to this appeal—two against the University, two against the Foundation, and one against both entities. Those claims all shared the central allegation that the agreements Mr. Thomson requested are "public records" subject to the Act's general disclosure requirement. Original Petition ¶ 171; Amended Petition ¶¶ 71, 91, 101, 104, 131–33. From that premise, each claim

explained why the Act considered the University, the Foundation, or both to be a "custodian" tasked with responding to Mr. Thomson's request.

(1) Mr. Thomson's principal claims both alleged that the Foundation acted as the University's agent in receiving, administering, and disbursing private gifts for the school's sole benefit—a form of public business—and that any agreements prepared, owned, or possessed in the course of that business are "public records" under Va. Code § 2.2-3701. Amended Petition ¶¶ 69, 129.

   (a) Citing precedent from the Advisory Council, Count I alleged that the University was the custodian of those records and was therefore responsible for ensuring public access to the records held by its agent, the Foundation. *Id.* ¶¶ 66–81.

   (b) Alternatively, Count V alleged the Foundation was the custodian of any public records it physically possessed in transacting University business. *Id.* ¶¶ 126–136.

(2) In Count II, Mr. Thomson alleged that the records he requested were in the actual, physical, or constructive possession of Dr. Janet Bingham, who concurrently served as the University's Vice President of Development and the Foundation's President and CEO. *Id.* ¶¶ 82–96. Count II alleged that Dr. Bingham used the records in

both capacities, *id.* ¶¶ 87, 91, and that the University was therefore a custodian of those records, *id.* ¶¶ 92–93.

(3) Finally, Mr. Thomson pled two claims alleging the Foundation was a public body under the "delegated functions" clause of the Act. That clause expands the Act's definition of "public body" to include any "committee, subcommittee, or other entity, however designated, of [another] public body created to perform delegated functions of . . . or advise th[at] body." Va. Code § 2.2-3701.

(a) In his unnumbered[2] "alter ego claim," Mr. Thomson alleged the Foundation and University shared a unity of interest and identity sufficient to disregard the Foundation's corporate form and consider it a University committee for purposes of the Act. Original Petition ¶¶ 159–173 (citing *RF & P Corp. v. Little*, 247 Va. 309 (1994)).

(b) Mr. Thomson alleged in Count III that the Foundation was, if not a committee of the University, an "other entity . . . of

2 The circuit court dismissed the alter-ego claim with prejudice before Mr. Thomson filed his amended petition. In order to preserve his right to appeal that decision, he followed this Court's guidance in *Ayers v. Shaffer*, 286 Va. 212, 217 (2013), and referred to the claim in his amended petition. *See* Amended Petition at 2. Because the amended petition did not repeat the claim in its entirety, however, it does not follow the same numbering convention as his other claims.

the [University] created to perform delegated functions. Amended Petition ¶¶ 97–112 (quoting Va. Code § 2.2-3701).

The court dismissed four of Mr. Thomson's claims—Counts I, II, V, and the *alter ego* claim—on the pleadings alone. *See generally* Order (October 2, 2017); Memorandum Opinion (November 29, 2017). After further briefing and an evidentiary hearing, the circuit court issued an opinion letter dismissing Count III as well. *See generally* Opinion Letter (July 5, 2018). The court also concluded that the requested agreements were not "public records." *Id.* at 8–9.

Over Mr. Thomson's objection, the court entered a final order adopting the reasoning in its opinion letter. Mr. Thomson now appeals that order and the circuit court's prior rulings to this Court.

ASSIGNMENTS OF ERROR

1. The circuit court erred by concluding that accepting, administering, and disbursing funds for the sole benefit of a public university is not a form of "public business" under the Act.

   Preserved at: Amended Petition ¶ 70; Petitioners' Pre-Trial Brief at 16–18, 25–26; Transcript (April 24, 2018) at 19:20–20:4, 116:14–117:22, 119:5–119:19, 127:5–129:1; Final Order (July 26, 2018) at 3.

2. The circuit court erred by sustaining the University's plea and demurrer to Count I of the Amended Petition and concluding that the Act did not consider the University the custodian of records held by its agents in the transaction of public business.

   Preserved at: Amended Petition ¶¶ 66–81; Petitioners' Response to University's Plea of Immunity at 8–14; Transcript (September 22, 2017) at 28:4–16; Transcript (October 26, 2017) at 19:17–20:4, 25:8–26:19.

3. The circuit court erred by sustaining the Foundation's demurrer to Count V of the Amended Petition and concluding that the Act did not consider the Foundation the custodian of records it held as the University's agent in the transaction of public business.

   Preserved at: Amended Petition ¶¶ 126–136; Response to Foundation's Second Demurrer at 1–4; Transcript (October 26, 2017) at 39:8–40:16, 56:10–58:20.

4. The circuit court erred by sustaining the University's plea and demurrer to Count II of the Amended Petition and concluding that the University was not the custodian of records possessed by its Vice President for University Development in the transaction of public business.

   Preserved at: Amended Petition ¶¶ 82–96; Petitioners' Response to University's Plea of Immunity at 14–16; Transcript (October 26, 2017) at 20:5–25:7.

5. The circuit court erred by sustaining the Foundation's demurrer to the alter-ego claim in the Original Petition and concluding that the Act did not allow an alter-ego claim absent an allegation of "impermissible" conduct.

   Preserved at: Original Petition ¶¶ 159–173; Petitioners' Brief Opposing Demurrers at 4–9; Transcript (September 22, 2017) at 33:21–34:18; Order (October 2, 2017) at 3; Amended Petition at p. 2.

6. The circuit court erred by dismissing Count III of the Amended Petition and concluding that the Foundation was not an "other entity . . . of [a] public body created to perform delegated functions of the public body" under the Act.

Preserved at: Amended Petition ¶¶ 97–112; Petitioners' Pre-Trial Brief at 11–25; Transcript (April 24, 2018) at 18:7–20:4, 110:17–130:19, 158:5–166:23; Final Order at 3.

STANDARD OF REVIEW

Each assignment of error presents a question of law reviewable *de novo*. Assignments of Error 2–5 concern claims the circuit court dismissed on the pleadings alone; its decision to do so is reviewed *de novo*. *Bragg v. Rappahannock County Board of Supervisors*, 295 Va. 416, 423 (2018); *see also Daily Press v. Office of the Executive Secretary*, 293 Va. 551, 557 (2017) (custodianship of public records reviewed *de novo*). On appeal, as below, "all material facts alleged in the [petition], all facts impliedly alleged, and all reasonable inferences that may be drawn from such facts" are accepted as true. *Assurance Data v. Malyevac*, 286 Va. 137, 143 (2013).

Although the errors described in Assignments 1 and 6 followed an evidentiary hearing, the circuit court's ruling in both instances addressed "a matter of law" based on "stipulated and undisputed facts." Opinion Letter at 4, 11. On appeal, then, this Court "reviews *de novo* both the construction of the relevant statute and its application to th[ose] undisputed facts." *Neal v. Fairfax County Police Department*, 295 Va. 334, 343 (2018).

For all claims, this Court's "*de novo* review takes into account any informative views on the legal meaning of statutory terms offered by those authorized by law to provide advisory opinions"—here the Virginia Freedom of Information Advisory Council. *Fitzgerald v. Loudon County Sheriff's Office*, 289 Va. 499, 504–05 & n.2 (2015). And while this Court "shoulder[s] the duty of interpreting" the Act, the General Assembly instructs it to put the "interpretative thumb on the scale in favor of disclosure" and "liberally construe[ ]" each of the Act's provisions to "promote an increased awareness by all persons of governmental activities and afford every opportunity to citizens to witness the operations of government." *Id.* at 505 (quoting Va. Code § 2.2-3700(B)).

AUTHORITIES AND ARGUMENT

I. The circuit court's narrow conception of "public business" is inconsistent with the text of the Act and places Virginia at odds with a nationwide unanimity of authority.

A. *The decision below is inconsistent with the text of the Act and with Virginia common law.*

The Act defines "public records" to include all "writings and recordings . . . prepared or owned by, or in the possession of a public body or its offers, employees, or agents in the transaction of business." Va. Code § 2.2-3701. In each of his claims, Mr. Thomson contended that the Foundation's receipt, administration, and disbursement of funds for the

sole benefit of the University is "public business" for purposes of the Act. Original Petition ¶ 171; Amended Petition ¶¶ 71, 91, 101, 104, 131–33. In deciding otherwise, the circuit court acknowledged the weight of persuasive authority supporting Mr. Thomson's view, but nonetheless concluded the Foundation did not transact public business under Virginia law. The court reasoned it was bound to "rely on the plain statutory expressions" alone rather than "project any unspoken purpose behind the definition[ ] of what constitute[s] . . . a public function." Opinion Letter at 9.

Because the Act does not expressly define the term "public business," the circuit court's expectation for a "plain statutory expression" was error. An undefined term is the beginning—not the end—of a court's "duty . . . to say what the law is." *Fitzgerald*, 289 Va. at 505 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). As with any statute, "[w]hen the legislature leaves a term undefined, courts must give the term its ordinary meaning, taking into account the context in which it is used." *American Tradition Institute v. Rector & Visitors of University of Virginia*, 287 Va. 330, 341 (2014).

The Act's more-than-100 statutory exemptions illustrate the breadth of functions the General Assembly considers "public business" under the Act. Most relevant here is Section 2.2-3705.4(7), which allows the redaction

of certain particularly sensitive "[i]nformation maintained in connection with fundraising activities by or for a public institution of higher education." But by its own terms, the exemption does not protect "information relating to the amount, date, purpose, and terms of [a] pledge or donation," nor "the identity of the donor unless the donor has requested anonymity." *Id.*

That the General Assembly saw fit to include that exemption demonstrates its understanding that "public business" includes public university fundraising activities generally—and, more specifically, the negotiation of "terms and conditions" in gift and grant agreements. Otherwise, the exemption would be unnecessary: records of those activities would fall outside of the Act entirely. This Court cannot assume the General Assembly did "a vain and useless thing" by allowing only *limited* redaction of those records. *Commonwealth v. Williams*, 295 Va. 90, 101 (2018).

More than recognizing university fundraising as a form of public business, Section 2.2-3705.4(7) also confirms that the function is no less so when performed by a third-party. By its plain language, the exemption applies to information "maintained in connection with fundraising activities by *or for* a public" university. Va. Code § 2.2-3705.4(7) (emphasis added). That qualifier is notably absent from the Act's only other fundraising exemption. *See id.* § 2.2-3705.7(28) (allowing redaction of

certain information "maintained in connection with fundraising activities *by* the Veterans Services Foundation") (emphasis added); *see also Williams*, 295 Va. at 101 ("[W]hen the General Assembly has used specific language in one instance, but omits that language or uses different language when addressing a similar subject elsewhere in the Code, we must presume that the difference in the choice of language was intentional.").

Section 2.2-3705.4(7) does not break new ground by designating fundraising for a public university as a form of "public business." In considering whether an activity is "public business" under the Act, this Court has looked to the traditional police power "to promote the health, peace, morals, education and good order of the people." *Tull v. Brown*, 255 Va. 177, 183 (1998). The Court uses a similar approach in distinguishing "governmental" from "proprietary functions" in sovereign immunity cases. *See Carter v. Chesterfield Health Commission*, 259 Va. 588, 594 (2000).

In that context, the Court has recognized that the test of "whether a particular act, function, or activity pertaining to . . . institutions of higher learning is governmental or proprietary" is simply "whether [that function] tends to promote the cause of public education." *Kellam v. Norfolk School Board*, 202 Va. 252, 257 (1960) (quoting 56 A.L.R.2d 1415, 1424 (1957)). More generally, this Court recognizes as public functions not only the

services that *directly* promote health, safety, or education, but also actions to secure the means of providing those services. Thus, entering into agreements to acquire property "for a valid governmental purpose" is an "[u]nquestionably" public function. *Virginia Beach v. Carmichael Development*, 259 Va. 493, 501 (2000).

The circuit court did not deny that the education the University provides is a matter of public business. *See* Opinion Letter at 8. ("The statutory objectives of [the] University are to educate students, approve programs, and confer degrees."). By entering into agreements for gifts and receiving, managing, and disbursing funds to further the University's educational objectives, the Foundation is no different from an entity that "acquires real estate for a valid governmental purpose." *Carmichael*, 259 Va. at 501. The circuit court's conclusion to the contrary cannot be squared with the text of the Act or with the general understanding of governmental functions under Virginia law.

B. *The circuit court's decision is at odds with the unanimity of authority holding that foundation support for a public university is public business under open records laws.*

Although the question is one of first impression in Virginia, appellate courts in several other states have considered whether private foundations that accept and manage gifts on behalf of a public university perform a

governmental function for purposes of their own open records laws. Those courts have unanimously held that they do.

In *State ex rel. Toledo Blade v. University of Toledo Foundation*, 602 N.E.2d 1159 (Ohio 1992), the Supreme Court of Ohio concluded that a private foundation organized to receive, manage, and spend funds on behalf of a public university exercised a "function of government." The "receipt and solicitation of gifts," the court wrote, "is an indispensable function of any institution of higher learning." *Id.* at 1162.

Iowa's high court reached the same conclusion in *Gannon v. Board of Regents*, 692 N.W.2d 31 (Iowa 2005), holding that the University of Iowa violated a provision of the state open record law prohibiting public bodies from frustrating disclosure by "contracting with a nongovernment body to perform any of its duties or functions," Iowa Code § 22.2(2). The *Gannon* court concluded the university had done just that by placing its affiliated foundation in charge of the solicitation and management of private gifts—a "very important, if not vital, function of the modern university and an integral part of its continuing viability." 692 N.W.2d at 40–41. □

Illinois's open record law requires disclosure of records possessed by any entity "with whom [an] agency has contracted to perform a governmental function on [the agency's] behalf." 5 Illinois Statutes

140/7(2). Like its Virginia counterpart, the law does not define "governmental function." In *Chicago Tribune v. College of Du Page*, 79 N.E.3d 694 (Ill. App. Ct. 2017), the Appellate Court of Illinois concluded that a private foundation "serv[ing] as the primary depository of private donations on behalf of" an affiliated public college performed a "governmental function" under the Act.

The decisions in Ohio, Iowa, and Illinois accord with those in still other states. *See, e.g., East Stroudsburg University Foundation v. Office of Open Records*, 995 A.2d 496, 502–505 (Pa. Commw. Ct. 2010) (foundation's fundraising activities "directly related to a governmental function" under open records law); *Jackson v. East Michigan University Foundation*, 544 N.W.2d 737, 741–42 (Mich. Ct. App. 1996) (foundation performed "essential public purpose and function" under open meetings law); *Libit v. University of New Mexico Foundation*, No. D-202-CV-2017-01620 (N.M. Dist. June 26, 2018) ("[T]he Foundation's fundraising efforts are inherently public in nature.").[3]

By contrast, the few cases holding that university foundations are not subject to open record laws do so based on their failure to satisfy other applicability criteria. *See, e.g., 4-H Road Community Association v. West*

3 A copy of the *Libit* decision is attached to a Notice of Supplemental Mr. Thomson filed below on July 2, 2018.

Virginia University Foundation, 388 S.E.2d 308 (W. Va. 1989) (foundation not body "created . . . or funded by the state or local authority" subject to open record law); *California State University v. Superior Court*, 108 Cal.Rptr.2d 870 (Cal. Ct. App. 2001) (foundation not "state agency" subject to open record law). The public or governmental nature of the foundation's activities was simply irrelevant under those laws.

In this case, however, whether the Foundation's role as the "primary depository of private gifts on behalf of the University" is a form of "public business" is a threshold question. If the circuit court's decision goes uncorrected, the Commonwealth will stand alone in holding that function—one the circuit court itself acknowledged is "a necessary part of the Commonwealth's higher-education system"—to be purely private in nature. This Court should grant this petition and usher Virginia into the growing consensus on the other side of that divide.

II. The circuit court opened a split in authority by erroneously concluding that records held by a public body's agent in the transaction of public business are generally not subject to the Act.

The Court should also grant this appeal to mend a split in authority opened up by the decision below. In holding that there is typically *no* custodian responsible for providing access to records held by a public body's agent in the transaction of public business, the circuit court

deliberately broke from the Advisory Council's long-held interpretation of the Act—an interpretation also espoused by the Attorney General and at least one other Virginia circuit court. Because the circuit court's contrary interpretation effectively nullifies a key 2001 amendment to the Act, the Court should reverse the decision below.

A. *The Advisory Council, the Attorney General, and another circuit court have all concluded that a public body is the custodian of public records held by its agents.*

In 2001, the General Assembly amended the Act's definition of "public record" to include documents prepared, owned, or possessed by a public body's agent in the transaction of public business. 2001 Va. Acts Ch. 844 [S 1098] (April 5, 2001). As a result of that amendment, the Act expressly provides that public "[a]ccess to such records shall be provided by the[ir] custodian." Va. Code § 2.2-3704(A).

For more than fifteen years, the Advisory Council has consistently interpreted Section 2.2-3704(A) to require that public-body-principals respond to requests as the custodian of records their agents hold in the transaction of public business. *See* Freedom of Information Advisory Council, Advisory Opinion Nos. AO-19-03 (July 10, 2003), available at *https://bit.ly/2wtroyC*; AO-10-08 (October 29, 2008), available at *https://bit.ly/2EHNEdC*; AO-13-08 (December 5, 2008), available at

https://bit.ly/2zoLwaD. In reaching that conclusion, the Council explained that the term "custodian" must be read alongside the Act's broad definition of "public records." Advisory Opinion No. AO-37-01 (August 6, 2001), available at *https://bit.ly/2xP3a22*. Read together, those provisions demand the term "custodian" embrace more than strict, physical possession. *Id.* And assigning responsibility to the principal, the Council noted, tracks the common law doctrine holding "the principal . . . generally liable for the actions of the agent." Advisory Opinion No. AO-19-03.

At least one Virginia circuit court has arrived at the same conclusion. In *Butcher v. Richmond City School Board*, No. CL08-553-1, 2008 WL 6928126 (Va. Cir. 2008), the Richmond Circuit Court ruled that the city's school board was responsible for turning over documents in the possession of its attorney. The court held that those records were in the board's "constructive possession as 'public records . . . in the possession . . . of . . . agents.'" *Id.* at ¶ 3 (quoting Va. Code § 2.2-3701) (alterations in original). Accordingly, it ordered that the board "immediately produce" responsive records that "were in its attorney's files at the time of [the] request." *Id.* at Ordering Paragraph A.

The Attorney General has also interpreted the Act to place responsibility with the public-body-principal. In a 2004 opinion, the

Attorney General concluded that records "prepared or owned by, or in the possession of . . . [a public body's] . . . agents" are, for purposes of the Act, "[r]ecords of" that public body. Virginia Attorney General Opinion No. 03-101, 2004 WL 440537, *2 (February 2, 2004). The opinion concludes that the Act requires the public-body-principal produce those records. *Id.*

B. *The circuit court erred by concluding that the University need not respond to requests for records held by its agents transacting public business.*

In dismissing Count I of Mr. Thompson's petition, the circuit court appeared to believe it could consider the University the custodian only if the Act "specifically provided for" that conclusion. Memorandum Order at 11. In deciding it did not, the court pointed to Section 2.2-3704(J), which states that a public body is the custodian of records it has "transferred possession of . . . to any [other] entity . . . for storage, maintenance, or archiving." The court reasoned that, because no similar provision addressed the precise circumstances before it, the Act did not require the University respond to requests for records its agents hold on its behalf. *Id.* at 11–12.

There is a reason why the Advisory Council, the Attorney General, and the Richmond Circuit Court all (apparently independently) arrived at a contrary interpretation. Courts have a "duty to interpret the several parts of a statute as a consistent and harmonious whole so as to effectuate the

legislative goal." *Chaffins v. Atlantic Coast Pipeline*, 293 Va. 564, 568 (2017). Given the inherent flexibility of the term "custodian," the Advisory Council's interpretation effectively harmonizes the definition of "public record" in Section 2.2-3701 with other neighboring provisions that assume the entity responding to records request will be a public body.[4]

The circuit court's reliance on Section 2.2-3704(J) was misplaced. Presumably, the court believed the express mention of non-possessory custodianship in that subsection precluded non-possessory custodianship in instances beyond those described in the subsection. Before resorting to canons of construction, the court had a duty to first consider and harmonize all parts of the statute. *See Chaffins*, 293 Va. at 568. And even if that analysis did not resolve its concerns, Section 2.2-3700 required it "liberally construe[ ]" the Act to promote access to public records. If the court believed the Act was ambiguous—that is, it could be "understood in more than one way," *Virginia–American Water v. Prince William County*

---

4 *See, e.g.*, Va. Code § 2.2-3704(B) (enumerating appropriate responses public body can make to request); *id.* § 2.2-3704(F) (allowing public body to make reasonable charges for supplying records); *id.* § 2.2-3704(G) (requiring public bodies produce nonexempt records by regularly-used electronic means if requested); *id.* § 2.2-3704.01 (requiring public bodies segregate exempt and nonexempt material); *id.* § 2.2-3713(D) (allowing for attorneys' fees from public body in enforcement action); *id.* § 2.2-3713(E) (public body bears the burden of proof for statutory exemption in enforcement actions).

Service Authority, 246 Va. 509, 514 (1993)—Section 2.2-3700 required it resolve that ambiguity in Mr. Thomson's favor rather than extract implications from legislative silence. *See Appalachian Regional Healthcare v. Cunningham*, 294 Va. 363, 375 n.10 (2017) (rule of liberal construction controls "where there is doubt as to the meaning of [applicable] provisions and two contrary constructions are equally possible").

In any case, the circuit court's reading offends the "well established rule of construction that *full* force and effect must be given to each provision of statutory law"—even if a later-enacted provision *appears* to limit its predecessor. *Lillard v. Fairfax County Airport Authority*, 208 Va. 8, 13 (1967) (emphasis added). The General Assembly added Section 2.2-3704(J) in 2010, nearly a decade *after* it expanded the Act's definition of "public records." *See* 2010 Va. Acts Ch. 627 [H 518] (April 11, 2010). The General Assembly did not have Section 2.2-3704(J) in mind when it amended the Act to ensure public access to records held by public bodies' agents. Had it intended Section 2.2-3704(J) to narrow the breadth of its prior amendment, it would not have done so by implication. *Sexton v. Cornett*, 271 Va. 251, 257 (2006) ("The courts assume that a legislative body, when acting new legislation, was aware of existing laws pertaining to the same subject matter and intended to leave them undisturbed.").

Given the Council's expertise in this area, its interpretation is the sort of long-standing, administrative construction "entitled to great weight" by this Court. *Almond v. Gilmer*, 188 Va. 822, 844–45 (1949). That is especially true in light of the General Assembly's apparent disinterest in amending the statute to "correct" the prevailing interpretation.

C. *Alternatively, the circuit court erred by holding that the Foundation need not respond to requests for records it holds as a University agent.*

Even as it dismissed Mr. Thomson's claims against the University, the circuit court rejected Mr. Thomson's alternate claim that the Foundation was responsible for responding to requests for public records it holds as the University's agent. The court's two-sentence treatment of Count V began by quoting Section 2.2-3704(B), which describes the appropriate responses a "public body that is subject to th[e Act] and . . . is the custodian of the requested records" can provide to a records request. Memorandum Opinion at 17. Based on that formulation, the circuit court concluded that "the statue requires both (1) a public body and (2) public records, before any action under [the Act] is required or any rights . . . arise." *Id.*

Assuming, as the circuit court did, that a public body is *not* the custodian of public records held by its agents, that obligation necessarily falls on the agents themselves. By amending the definition of "public

records" to include records held by a public body's agents in the transaction of public business, the General Assembly's manifest intent was to make those records—like all public records—"open to the citizens of the Commonwealth." Va. Code § 2.2-3704(A).

Although many of its provisions are framed in terms of a public body's obligations, the Act's central mandate is not so narrowly drawn. *Id.* § 2.2-3704(A) ("Except as otherwise specifically provided by law, all public records shall be open to citizens" and "[a]ccess to [those] records shall be provided by the custodian in accordance with th[e Act]."). Similarly, the Act's enforcement provision does not explicitly require the involvement of a public body. *Id.* § 2.2-3713(A) ("Any person . . . denied the rights and privileges conferred by th[e Act] may proceed to enforce such rights and privileges by filing a petition for mandamus or injunction.").

Given the General Assembly's clear intent to bring public records held by agents into the Act, it is unreasonable to assume it intended no means of accessing those documents. The circuit court's conclusion that *no* party is responsible therefore does far more "violence to the clear intent and purpose of the enactment" than either alternative. *City of Richmond v. Grand Lodge of Virginia*, 162 Va. 471, 476 (1934). This Court should correct the circuit court's rogue interpretation.

III. The circuit court erred by either inventing a new exception to the Act's definition of "public record," or by failing to view Count II in the most favorable light.

By agreement of the University and Foundation, the University's Vice President of Development serves *ex officio* as the Foundation President and CEO. Amended Petition ¶ 32. Count II of Mr. Thomson's petition alleged the University was the custodian of the agreements at issue because its Vice President of Development, Dr. Janet Bingham, possessed and used the agreements in *both* her capacity as a University officer *and* her capacity as Foundation President. *Id.* ¶¶ 87–88, 91.

In sustaining the University's demurrer, the circuit court did not appear to consider whether Dr. Bingham *in fact* used or possessed the requested agreements in performing her duties as a University officer. Rather, it reasoned the University was the custodian of only those documents its officers control *as* its officers, and concluded that, "to the extent [Mr. Thomson's] request targeted records of the Foundation," Dr. Bingham "was not therefore an agent of the University for purposes of th[at] request." Memorandum Opinion at 13.

The court's opinion seems to imply that records held by a public body's officer or agent are exempt from the Act if either (1) the officer or agent also holds them in *another* capacity or (2) another entity owns the

records. If that was the court's holding, it erred. The Foundation's ownership of the documents is not determinative: the Act's definition of "public record" plainly includes documents that a public body does not itself own. Va. Code § 2.2-3701. Likewise, nothing in the Act suggests a record is public *only* if the employee or officer who prepared or possessed it did so *only* in their capacity as a government employee or officer. Government business does not lose its public character simply because it coincides with another, private function. *See Carmichael*, 259 Va. at 499.

Moreover, the court's analysis too easily dismissed the particularities of this case. By agreement between the University and Foundation, Dr. Bingham's position as a University Vice President *entailed* serving as the Foundation President, and the University was solely responsible for the salary of that position. Amended Petition ¶ 33. Moreover, according to formal University policy, Dr. Bingham periodically reviewed gifts and gift plans in *both* her University and Foundation capacities. *Id.* ¶ 38.

But even assuming Dr. Bingham's professional duties can and should be sorted into discrete categories, Mr. Thomson's petition, read "in the light most favorable" to him, still states a valid claim for relief under the Act. *McDermott v. Reynolds*, 260 Va. 98, 100 (2000). Had the court given Mr. Thomson's petition the "most favorable" reading the law requires, it would

have seen his claim did not, as the University argued, depend on some novel "dual employee" theory. He simply alleged: (1) that Dr. Bingham was both a University officer and the Foundation President, Amended Petition at ¶ 85; (2) that she performed fundraising and endowment management activities in her capacity as a University officer *as well* as in her capacity as a Foundation officer, *id.* at ¶ 87; and (3) that she possessed or used the requested documents in performing those activities, *id.* at ¶ 91. Accepting those allegations as true, Dr. Bingham used (and therefore necessarily possessed) the documents at issue in performing her duties *as* a University officer, and Mr. Thomson stated a valid claim for relief under the Act.

Whether its error was in construing the Act or in interpreting Mr. Thomson's petition, the circuit court's dismissal of Count II was improper. Mr. Thomson pled a sound claim for relief under the Act, and the law affords him an opportunity to conduct discovery and litigate that claim on its merits. Because the circuit court short-circuited that right, this Court should grant his petition and reverse the decision below.

IV. The circuit court erroneously narrowed the Act's "delegated functions" clause in violation of its text, its context, and this Court's precedent.

Mr. Thomson's remaining claims alleged the Foundation was a public body under the "delegated functions" clause of the Act's "public body"

definition. Under that clause, a "public body" is defined to include "any committee, subcommittee, or other entity however designated, of [a] public body created to perform delegated functions of th[at] body or to advise th[at] body." Va. Code § 2.2-3701.

It was not always so. Until 2001, the clause included only "committees and subcommittees." *See* 2001 Va. Acts Ch. 844 [S 1098] (April 5, 2011). This Court considered that earlier formulation in *RF & P Corp. v. Little*, 247 Va. 309 (1994), holding that a "distinct legal entit[y]" cannot be considered a "committee" under the Act unless the equities allow disregarding its separate legal identity. *Id.* at 316. That required "prov[ing] the corporation is the alter ego, alias, stooge, or dummy of" its parent and "was a device or shame used to disguise wrongs, obscure fraud, or conceal crime." *Id.* (quoting *Cheatle v. Rudd's Swimming Pool Supply*, 234 Va. 207, 212 (1987)). Absent that showing, a court must treat the owner and corporation as "distinct legal entities." *Id.*

After the *RF & P* decision, the General Assembly amended the "delegated functions" clause to include not only "committees [and] subcommittees" but also "any other entity, however designated, of a public body created to perform delegated functions of th[at] body." Count III of Mr. Thomson's petition alleged that the Foundation qualified as a public

body under that amended definition. Amended Petition ¶¶ 97–112. In the alternative, Mr. Thomson's petitioned the court to disregard the Foundation's separate identity and consider it an effective committee of the University for purposes of the Act. Original Petition ¶¶ 159–173.

The circuit court dismissed both counts. It first held that it could not disregard the Foundation's corporate identity unless it found the University's relationship with the Foundation to be "impermissible." Memorandum Opinion at 9. It could not do that, it concluded, because the General Assembly had enacted a statute empowering public universities to create non-profit entities like the Foundation. *Id.* at 10 & n.3 (quoting Va. Code § 23.1-1010(3)). Turning to Count III, the court concluded that a separately-incorporated foundation cannot be considered "a sub-entity of the public [university] it serves," because it operates "under its own bylaws, articles of incorporation, and statutes." Opinion Letter at 6–7.

To determine whether the Foundation was an "entity of" the University for purposes of the Act, the court should have started with the "known legal definition" of the term "entity." *Chappell v. Perkins*, 266 Va. 413, 420 (2003). The defining characteristic of an "entity" is its "legal identity apart from its members or owners." *Entity*, Black's Law Dictionary (10th ed. 2014). That is what sets "entities" apart from "committees" and

"subcommittees"—both of which, this Court held in *RF & P*, exist within the formal structure of a public body. 247 Va. at 316. In fact, *RF & P* expressly distinguished between committees and subcommittees on the one hand, and "distinct legal entities" like corporations on the other. *Id.* When it added the term "entity" to the "delegated functions" clause, the General Assembly presumably "used th[at] language . . . in its judicially established meaning." *McDaniel v. Commonwealth*, 199 Va. 287, 294 (1957).

The fact that the statute requires the entity be "of" a public body does not change that result. The preposition "of" draws meaning from the surrounding context. *Pacific Gas & Electric v. Hart High-Voltage Apparatus Repair*, 226 Cal.Rptr.3d 631, 644–47 (Cal. Ct. App. 2017). Although sometimes a word of "proprietorship or possession," *id.* at 643, "of" can also mean "associated with or connected with." *Shaw v. Dawson Geophysical*, 657 F.Supp.2d 740, 748 (S.D. W. Va. 2009).

In the context of the "delegated functions" clause, the preposition is best understood as a term of "identification and relation," reflecting the relationship between the "entity" and the "public body" that it functions on behalf of. That construction respects the import of the term "entity" in this context. It also comports with the Foundation's own materials describing it as an entity "of" the University: the Foundation's official bylaws have

historically identified it as "the main fund-raising organization *of* George Mason University." Joint Exhibits 11, 12 (emphasis added).

While the Act's demand for liberal construction is not a license to rewrite the statute, *Daily Press*, 293 Va. at 563, it does require courts give the Act the most comprehensive application its language allows. That the Foundation has described itself as an "organization *of* [the] University" demonstrates that applying the "delegated function" clause to the Foundation does no violence to its language. Conversely, to interpret the clause as requiring a delegated entity be also a "sub-entity" or "part of" another public body, *see* Opinion Letter at 6–7, is to *narrow* that language—and in the process violate the directive to "put the interpretative thumb on the scale in favor of disclosure." *Fitzgerald*, 289 Va. at 505.

Finally, to the extent that the "delegated functions" clause continues to call for the veil-piercing analysis this Court employed in *RF & P*, the circuit court erred by denying Mr. Thomson the opportunity to assert that claim. According to the court, another Code provision empowering public universities to create non-profit entities like the Foundation necessarily precluded the claim. Memorandum Opinion at 10 & n.3 (citing Va. Code § 23.1-1010(3)). But the court's reasoning was flawed in two respects.

First, authority to create a nonprofit foundation is not a license to use that entity in any way it pleases. As Mr. Thomson explained below, university–foundation relations are a diverse lot. Petitioners' Pre-Trial Brief at 27. And contrary to the opinion below, nothing in Section 23.1-1010 actually "prescribes" the "sort of control" exercised in this case. *Cf.* Memorandum Opinion at 10.

Second, the court's reasoning cannot be squared with the actual facts in *RF & P*. The public-body-parent in that case acquired the corporation at issue under its statutory authority to "acquire and retain every kind of property and . . . investment." 247 Va. at 312 (quoting Va. Code § 51.1-116). That did not stop this Court from considering the equities of the case. The fact that the parent-entity acted under broad, statutory authority was simply not a determinative factor—or even one mentioned in the analysis.

Importantly, the factors this Court *did* consider in *RF & P* all militate in favor of Mr. Thomson's claim. Unlike the corporation in *RF & P*, the Foundation *was* created to perform delegated functions of the University; it *does* work alongside, under the control of, and for the sole benefit of the University; it *does* receive instruction and advice from its parent; and its board *does* include members affiliated with the University. *Compare id.* at 316 *with* Original Petition ¶¶ 126, 162–63. Those were all relevant

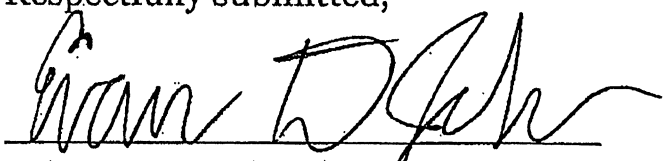
considerations in *RF & P*, and they represent only a few of the more-than thirty indicia of control Mr. Thomson alleged in his petition. Original Petition ¶¶ 161–66. The circuit court erred by disregarding those facts in favor of a categorical rule inconsistent with this Court's precedent. As such, the Court should grant this appeal and correct that error.

CONCLUSION

Transparent GMU and Mr. Thomson respectfully ask this Court to grant their appeal, reverse the rulings below, and remand the case for further proceedings.

Dated: October 24, 2018

Respectfully submitted,



EVAN D. JOHNS
(Virginia State Bar No. 89285)
APPALACHIAN MOUNTAIN ADVOCATES
415 Seventh Street Northeast
Charlottesville, Virginia 22902
Telephone: (434) 529 – 6787
Facsimile: (304) 645 – 9008
E-Mail: *ejohns@appalmad.org*

Counsel for Petitioners

RULE 5:17(i) CERTIFICATE

In accordance with Rule 5:17(i) of the Rules of the Supreme Court of Virginia, I certify the following:

1. Petitioners / Appellants Transparent GMU and Augustus Thomson are represented by:

Evan D. Johns (Virginia State Bar No. 89285)
APPALACHIAN MOUNTAIN ADVOCATES
415 Seventh Street Northeast
Charlottesville, Virginia 22902
Telephone: (434) 529 – 6787
Facsimile: (304) 645 – 9008
E-Mail: *ejohns@appalmad.org*

2. Respondent / Appellee George Mason University is represented by:

David Garnett Drummey (Virginia State Bar No. 44838)
Brian Eugene Walther (Virginia State Bar No. 37166)
GEORGE MASON UNIVERSITY
4400 University Drive, MS2A
Fairfax, Virginia 22030
Telephone: (703) 993 – 2619
Facsimile: (703) 993 – 2340
E-Mail: *ddrummey@gmu.edu*
bwalther@gmu.edu

3. Respondent / Appellee George Mason University Foundation, Inc., is represented by:

Sean F. Murphy (Virginia State Bar No. 28415)
MCGUIREWOODS
1750 Tysons Boulevard, Suite 1800
Tysons Corner, Virginia 22102-4215
Telephone: (703) 712 – 5000
Facsimile: (703) 712 – 5280
E-Mail: *sfmurphy@mcguirewoods.com*

E. Rebecca Gantt (Virginia State Bar No. 83180)
McGuireWoods
World Trade Center
101 West Main Street, Suite 9000
Norfolk, Virginia 23510-1655
Telephone: (757) 640 – 3731
Facsimile: (757) 6640 – 3940
E-Mail: *rgantt@mcguirewoods.com*

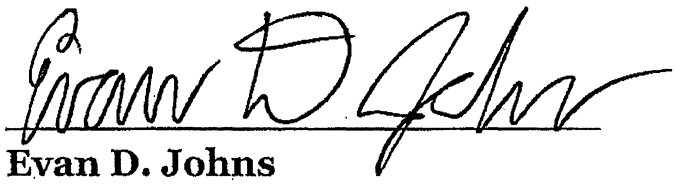
4. This Petition for Appeal does not exceed 35 pages in length, excepting the Cover Page, Table of Contents, Table of Authorities, and this Certificate.

5. On October 24, 2018, I mailed a true copy of the attached Petition for Appeal by First-Class United States Mail to counsel for each of the parties at the addresses listed above.

6. The Petitioners desire to state orally and in person to a panel of this Court the reasons why this Petition for Appeal should be granted.

Dated: October 24, 2018

Respectfully submitted,



Evan D. Johns
(Virginia State Bar No. 89285)
Appalachian Mountain Advocates
415 Seventh Street Northeast
Charlottesville, Virginia 22902
Telephone: (434) 529 – 6787
Facsimile: (304) 645 – 9008
E-Mail: *ejohns@appalmad.org*

Counsel for Petitioners