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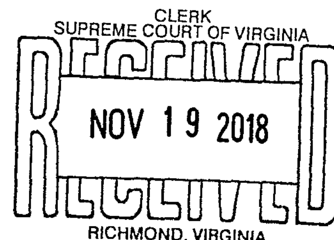

TRANSPARENT GMU and
AUGUSTUS THOMSON,

Petitioners,

v.

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

Respondents.

GEORGE MASON UNIVERSITY FOUNDATION'S BRIEF IN OPPOSITION TO THE PETITION FOR APPEAL

From the Circuit Court for Fairfax County
No. CL17-7484 (Tran, J.)

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INTRODUCTION

The George Mason University Foundation ("Foundation") is an independent Virginia corporation that accepts and manages private gifts for the benefit of George Mason University ("University") in accordance with the intent of the private donors.

At trial, Petitioners failed to prove that the Foundation is a "public body" under Virginia's Freedom of Information Act ("VFOIA"). To be a public body under VFOIA, the Foundation must be an "entity . . . of" the University, and it must also have been created to perform delegated functions of the University.

As Judge Tran correctly found, the Foundation is a separate corporation that operates at arm's length with the University. The Foundation is not an entity "of"—or as this Court has termed it, "within"—the University. Nor was the Foundation created to perform delegated public functions. Accepting private gifts is not a public function, and in this case, the Foundation existed before the University itself. There was no delegation from the University to the Foundation.

As they did below, Petitioners rely on borrowed precedent from other jurisdictions. But those jurisdictions have FOIA laws that differ from the Virginia statute at issue here. VFOIA does not apply to entities like the Foundation. In fact, just last year, the General Assembly considered, but ultimately declined, to bring public university-affiliated foundations within the scope of VFOIA. Because the

Circuit Court correctly declined to give Petitioners relief that is unavailable under existing law, there is no error meriting this Court's review.

In their Petition for Appeal, Petitioners fail to make argument as to a necessary element of their assignment of error regarding whether the Foundation is a public body. They have thus abandoned the claim that the Foundation is a public body. In several respects, Petitioners' arguments have undergone a dramatic shift since the Circuit Court, where they focused on a totality of the circumstances test borrowed from other jurisdictions to attempt to prove that the Foundation was a public body. As to whether donor records are public records within the meaning of VFOIA, Petitioners spent all of a few sentences on this issue at trial, but now devote pages of their brief to this issue. Their belated attempt to recast their case should be rejected.

STATEMENT OF THE FACTS

Respondent George Mason University Foundation, Inc. is a non-profit corporation that, in accord with the stated purpose in its Articles of Incorporation, accepts and manages private gifts for the benefit of George Mason University. Joint Exhibits ("J. Exs.") 7, 9. The Foundation antedates the University. The Foundation's predecessor was formed through Articles of Incorporation signed by three prominent individuals in the Northern Virginia community in 1966, when the University's predecessor, George Mason College, was still a division of the University of Virginia. Stipulations ¶¶ 9-10, 12-14.

The Foundation has its own permanent staff to manage its day-to-day affairs. Apart from the Foundation's President (who is also the University Vice President of University Advancement) and several student assistants, the Foundation staff have no formal affiliation with the University. Apr. 24, 2018 Transcript ("Trial Tr.") 41, 43-44, 78. The Foundation's own Board of Trustees governs it, and almost all of its 49 board members have no formal affiliation with the University. J. Exs. 3, 10; Trial Tr. 45-46. The Foundation's Articles of Incorporation give the Board of Trustees the sole authority to make investment decisions and manage the property of the Foundation, in such manner "as it may deem proper" or "necessary." J. Ex. 7 Art. V; J. Ex. 9 Art. IV. There is no reference in the Articles to the University having any management role or decision making authority over the Foundation's affairs. *See generally* J. Exs. 7 & 9.

The Foundation is not publicly funded. Letter Op. 5-6. Of the nearly $100 million in 2016 and 2017 that represents the Foundation's net support and revenue, less than $14,000 (about one-tenth of 1%) came from public funding. Trial Tr. 59. The Foundation funds its operations through a combination of fees imposed on gifts from private donors and investment income. *Id.* 57-58.

A series of formal contractual arrangements govern the relationship between the Foundation and the University. In the Affiliation Agreement, for instance, the University and Foundation "acknowledge that each is an independent entity." J. Ex.

19 at 10. Also, "[t]he University recognizes that the Foundation is a private corporation with the authority and obligations to keep all records and data confidential with the requirements of law." *Id.* at 4. The Affiliation Agreement confirms the Foundation's stated purpose in its Articles of Incorporation as a caretaker and manager of funds from private donors intended to benefit the University, in accordance with the intent of those donors. *Id.*

Petitioners are Transparent GMU, an unincorporated association, and Augustus Thomson, an undergraduate student at GMU. Stipulations ¶¶ 25-26, Trial Tr. 24. On April 5, 2017, counsel for the Petitioners submitted a VFOIA request for records to the Foundation seeking copies of "any grants, cooperative agreements, gift agreements, contracts, or memoranda of understanding (including any attachments thereto) involving a contribution or potential contribution to or for the University from" several listed entities. J. Ex. 1. The Foundation declined to produce records because it is not a public body subject to VFOIA. J. Ex. 2.

STATEMENT OF THE CASE

Petitioners filed their Original Petition for Mandamus, Injunctive and Declaratory Relief against the Foundation and the University on May 26, 2017. The Circuit Court sustained demurrers but permitted amendment of some claims. Petitioners then filed an Amended Petition, asserting Counts III, IV, and V against the Foundation. The Foundation again filed a partial demurrer.

On November 29, 2017, the Circuit Court entered its Memorandum Opinion.[1] The Court first memorialized its earlier dismissal of an alter-ego claim against the Foundation, reasoning that corporate veil piercing is inappropriate in the absence of allegations of unlawful conduct. Mem. Op. 9-11.

As to Amended Petition Counts IV and V, which alleged that the Foundation is a public body because it receives public funding and that the Foundation is a custodian of public records, respectively, the Circuit Court sustained the Foundation's demurrer. *Id.* at 18-19. As to Count III of the Amended Petition, which alleged that the Foundation is a public body because it performs delegated public functions of the University, the Court ruled it appropriate to go to trial. *Id.* at 14-16.

In April 2018, Fairfax County Circuit Court (Tran, J.) presided over a bench trial on Count III. The two witnesses at trial were Petitioner Augustus Thomson and the Foundation's Chief Financial Officer, Mary Susan Van Leunen.

On July 5, 2018, the Court issued a Letter Opinion holding that the Foundation was not a public body. Letter Op. 2-9. A Final Order followed on July 26, 2018.

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[1] The University also filed demurrers to the Original and Amended Petition. All counts against the University were dismissed at the demurrer stage.

STANDARD OF REVIEW

As to the assignments of error on rulings after the bench trial—which Petitioners call an "evidentiary hearing," Pet. for Appeal 9, 11—this Court "consider[s] the evidence and all reasonable inferences fairly deducible from it in the light most favorable to the prevailing party below." *Gov't Employees Ins. Co. v. United Servs. Auto. Ass'n*, 281 Va. 647, 655 (2011). This Court reviews the judgment "for clear error" and should not set it aside "unless it is plainly wrong or there is no evidence to support it." *Id.*

A decision to sustain a demurrer is reviewed *de novo*. *Friends of the Rappahannock v. Caroline Cty. Bd. of Supervisors*, 286 Va. 38, 44 (2013). "A demurrer accepts as true all facts properly pled" and reasonable inferences therefrom, but "does not admit 'inferences or conclusions from facts not stated.'" *Id.* (citations omitted).

AUTHORITIES AND ARGUMENT

To show that VFOIA obligated the Foundation to produce the requested records, Petitioners must prove both that (1) the Foundation is a "public body" and (2) that the records Petitioners seek are "public records." *See Am. Tradition Inst. v. Rector & Visitors of Univ. of Va.*, 287 Va. 330, 339 (2014) ("VFOIA only applies to 'public records in the custody of a public body.'" (citation omitted)). The Circuit Court found *neither* element satisfied here.

Thus, to show error in the decision below, Petitioners must prevail on two independent, sequential grounds. Petitioners cannot make either showing, and there is thus no error meriting this Court's review.

I. The Circuit Court Correctly Held that the Foundation is Not a Public Body (Assignments of Error 5 and 6)

In the Circuit Court, Petitioners put forth two theories for why the Foundation was a public body. First, they alleged that the Foundation was "an alter-ego" of the University, itself a public body under VFOIA. Original Pet. 42. The Circuit Court correctly sustained the Foundation's demurrer to this claim, ruling that the veil-piercing Petitioners sought was only available where certain improper conduct existed, and that Petitioners did not sufficiently allege such conduct. Mem. Op. 9-11. Nor could Petitioners have accurately alleged such conduct under applicable law, as the evidence at trial demonstrated.

Second, Petitioners claimed that the Foundation itself qualifies as a "public body" under VFOIA's statutory definition. Am. Pet. 32-38. The Circuit Court dismissed this claim after a bench trial, holding that the Foundation was neither an entity "of" the University nor created to perform delegated public functions of the University. Letter Op. 6-9. Both holdings are correct, and either is sufficient under VFOIA to find *no* "public body."

A. The Foundation is Not the University's Alter-Ego (Assignment of Error 5)

Petitioners' fifth assignment of error is that the Circuit Court erred in holding that VFOIA does "not allow an alter-ego claim absent an allegation of 'impermissible' conduct." Pet. for Appeal 10. Petitioners' alter-ego claim is not in the text of VFOIA; instead, Petitioners pointed to general veil-piercing principles and contended that "[r]eason, justice, and the policies embodied within [VFOIA] therefore require that the Foundation's separate corporate identity be disregarded." Original Pet. ¶ 170.

Under Virginia law, "only 'an extraordinary exception' justifies disregarding the corporate entity and piercing the veil." *C.F. Trust, Inc. v. First Flight L.P.*, 266 Va. 3, 10 (2003) (citation omitted). Thus, "[t]his Court has been very reluctant to permit veil piercing." *Id.* In their Petition, Petitioners alleged simply that the University and the Foundation "share a uniquely close relationship" and that the University "exercise[s] control over" the Foundation. Original Pet. 42, 45. But "[t]he mere showing that one corporation is owned by another or that they share common officers is not a sufficient justification for a court to disregard their separate corporate structure." *Richfood, Inc. v. Jennings*, 255 Va. 588, 592-93 (1998). Instead, Petitioners bear the burden of showing that "the corporation was a device or sham used to disguise wrongs, obscure fraud, or conceal crime." *Cheatle v. Rudd's Swimming Pool Supply Co.*, 234 Va. 207, 212 (1987).

As the Circuit Court correctly held, the Foundation is not a "sham" designed to conceal wrongdoing. First, the Petition lacks any allegations to support such a conclusion—such as the concealment of fraud or gross absence of corporate formalities. Second, the General Assembly has, by statute, encouraged and invited private foundations to exist alongside public universities to "reduce the hesitation of prospective donors to make contributions." *See* Va. Code §§ 23.1-101(1), 23.1-1010(3). There is no air of impropriety in the arrangement here between the University and the Foundation. The Circuit Court correctly sustained the Foundation's demurrer on this claim and no review is warranted.

B. The Foundation is Not an Entity of the University Created to Perform Delegated Functions (Assignment of Error 6)

Petitioners' sixth assignment of error concerns the Circuit Court's post-trial holding that the Foundation is not a public body under VFOIA's definition. Letter Op. 6-11. In the Circuit Court, Petitioners pursued several different theories in their attempt to show that the Foundation is a public body, focusing mainly on a "totality of the circumstances" test adopted in other jurisdictions. *E.g.*, Letter Op. 3-4.

On appeal, however, Petitioners argue solely that the Foundation is a "committee, subcommittee, or other entity however designated, of the public body created to perform delegated functions of the public body." Va. Code § 2.2-3701. This statutory language required Petitioners to prove *both* that the Foundation is an

"entity of" the University—itself a public body—*and* that the Foundation was "created to perform delegated functions of" the University.

Importantly, the Petition here fails to offer argument on the "delegated functions" element. Without argument on that point, Petitioners' case for "public body" has a fatal flaw. On this ground alone—the abandonment of a necessary component of their argument—the entire sixth assignment of error fails.

1. The Foundation is Not an Entity "Of" the University

The relevant portion of VFOIA's definition of a public body requires that the Foundation be an "entity . . . *of*" a public body—here, the University. Va. Code § 2.2-3701 (emphasis added). The meaning of the word "of" is to "express[] the relationship between a part and a whole." *Of*, Oxford English Dictionary 992 (12th ed. 2011). The Foundation, however, is not "part" of the University.

As the Circuit Court observed, trial evidence proved that the Foundation is "an independent non-stock corporation that coexists alongside the University it serves." Letter Op. 6. The Circuit Court found that the Foundation "operat[es] independently from George Mason University, and under its own bylaws, articles of incorporation, and statutes." *Id.* at 7. For these reasons, and also because the Foundation receives no significant public funding—as Petitioners now concede—the Circuit Court held that the Foundation is not an entity "of" the University. *Id.*

There was no error in the Circuit Court's holding. The Foundation has, since

its creation in 1966, been an independent and distinct corporate entity that operates at arm's length in its transactions with the University. The Foundation also respects all corporate formalities. By contrast, as this Court has held, the relevant portion of VFOIA's public body definition contemplates an entity that is "within" a public body. *Beck v. Shelton*, 267 Va. 482, 487 (2004) (holding that the "provision simply includes committees, subcommittees, or entities within the types of public bodies covered by FOIA"). For instance, in *RF&P Corp. v. Little*, this Court held that a corporation wholly owned by a public body, and over which the public body had the right to appoint all board members, was even so not "of" the public body because the two were "distinct legal entities." 247 Va. 309, 316 (1994). The Court noted that any other ruling would "completely disregard[] [the corporation]'s corporate identity." *Id.*[2]

The guidance of both the Virginia Freedom of Information Advisory Council ("Advisory Council") and the Office of the Attorney General agree with the Circuit

[2] At the time of *RF&P*, VFOIA lacked the language "or other entity however designated," referring only to a "committee or subcommittee of the public body." Va. Code § 2.1-341 (2000). The General Assembly added that language in 2001, 2001 Va. Acts, ch. 844 (Apr. 5, 2001). Petitioners suggest that the amendment aimed to respond to *RF&P*. Pet. for Appeal 30-33. Yet the statutory amendment occurred *seven years* after the *RF&P* decision, and the General Assembly amended VFOIA's definitional section four times after *RF&P* before the 2001 amendment, including two months after *RF&P*. *See* 1994 Va. Acts, chs. 845, 931 (Apr. 20, 1994); 1996 Va. Acts, ch. 609 (Apr. 5, 1996); 1997 Va. Acts, ch. 641 (Mar. 21, 1997); 1999 Va. Acts, chs. 703, 726 (Mar. 28, 1999).

Court's reading of the statute.[3] In 2009, the Advisory Council noted that VFOIA is not satisfied where an entity "once established, . . . is a corporate entity in its own right separate from the [public body]." Advisory Council Op. AO-09-09 (Oct. 23, 2009). Addressing a specific case, the Advisory Council opined that when a public-body museum, pursuant to a statutory mandate, established a foundation to receive and expend funds to support the museum the foundation was not a public body. As "a separate corporation" that performs a function set forth by statute rather than one delegated by the public body, and was not created to advise the public body—all facts equally present here—"the Foundation does not fall within the definition of *public body*." *Id.*

Similarly, in 1996, in a thorough analysis of the legal status of such corporations, the Attorney General opined that separate, non-profit foundations are not agencies or institutions "of the Commonwealth." 1996 Va. Op. Att'y Gen. 15, 1996 WL 658746, at *1 (Sept. 3, 1996). The opinion also said: "Other prior opinions of the Attorney General recognize that tax-exempt foundations organized for the purposes of administering endowments and providing other financial management arrangements for state universities are not part of the universities." *Id.*

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[3] Va. Code § 30-179(1) authorizes the Advisory Council to furnish advisory opinions under the VFOIA. The Supreme Court has consulted these opinions in applying the VFOIA. *See Fitzgerald v. Loudoun Cty. Sheriff's Office*, 289 Va. 499, 505 n.2 (2015). Similarly, opinions of the Attorney General "may be used as an aid in construing legislative intent." *Nejati v. Stageberg*, 286 Va. 197, 203 (2013).

In addressing this assignment of error, Petitioners mainly dispute the Circuit Court's construction of the statutory language, rather than pointing to error in its fact-finding that the Foundation and University are separate entities operating independently. Petitioners argue that the word "of" operates merely as a term of "identification and relation." Pet. for Appeal 32. But this expansive interpretation strips the word of nearly all meaning. When combined with their broad definition of "entity," *id.* at 31, Petitioners' flawed reading of the text could sweep in virtually any group with any type of relationship with the University, such as a contracted food vendor or even a student group that provides an advisory function to the University.

2. The Foundation Was Not Created to Perform Delegated Functions of the University – And This Point is Abandoned

To be a public body under VFOIA, the Foundation must not only be an "entity . . . of" the University, but *also* must have been "created to perform delegated functions of the public body" (the University). Va. Code § 2.2-3701.

As a preliminary matter, although Petitioners assign error to the Circuit Court's holding in this regard in their sixth assignment of error, they make no argument on this point. The relevant section of their brief exclusively argues the "entity" component of the definition just discussed. Pet. For Appeal, Arg. § IV. Other than asserting once that "the Foundation *was* created to perform delegated functions of the University," they provide no supporting argument for that assertion.

Pet. for Appeal 34. Thus, they have abandoned their claim of error.[4] *See Teleguz v. Commonwealth*, 273 Va. 458, 473 (2007) (finding an assignment of error abandoned where "[t]he only argument in support . . . is a single sentence that reiterates the assignment of error").

In any event, there was no error, let alone clear error, in the Circuit Court's post-trial fact-finding that the Foundation was not created to perform delegated public functions of the University. Letter Op. 4-5.

First, the then-College did not "create" the Foundation at all. The Foundation's predecessor was incorporated in 1966, before the founding of George Mason University. Stipulation of Facts ("Stip.") ¶ 12. At the time, George Mason College was still a division of the University of Virginia ("UVA"). Stip. ¶¶ 9-10. The Foundation's predecessor was established through Articles of Incorporation signed by three individuals who were prominent businessmen and served as the Foundation's initial Board of Trustees. Stip. ¶ 14. The individuals were all members of an "Advisory Committee" that advised UVA on issues pertinent to the College. Stip. ¶ 15. There was no evidence presented below that the three incorporators had

[4] Petitioners' argument about the "public business" component of the "public records" issue cannot also cover the delegated functions question, Pet. for Appeal 12-19. Whether certain records represent the "transaction of public business" is not the same as whether an entity was "created to perform delegated functions of the public body." The definitions use different language, appear in different statutory subsections, and are materially different on their face—the latter, for instance, including questions of historical analysis and delegation.

any known formal affiliation with the College. A corporate reorganization of the prior Foundation, rather than the University, created the current Foundation in 1991. Stip. ¶ 19.

Second, therefore, there was no evidence of any act of "delegation" from the College or University to the Foundation or its predecessor when they were formed. When an entity is "self-created and would only perform functions . . . as it chooses," it is not a public body under VFOIA. Advisory Council Op. AO-11-09 (Nov. 30, 2009). When it occurs, the actual delegation of public duties is a subject fraught with legal complexity. *See, e.g., Elizabeth River Crossings OpCo, LLC v. Meeks*, 286 Va. 286, 295, 311-21 (2013) (taxation). There is no evidence of any delegation whatsoever from the University or its predecessor institutions, let alone of any public function, that is, the "responsibility to conduct the business of the people," whether "by legislative or executive action" or otherwise. *Connell v. Kersey*, 262 Va. 154, 161 (2001).

Instead, the stated principal purpose of the Foundation in the Articles of Incorporation remained consistent between the 1966 and 1991 incorporations: "to receive, hold, invest and administer property and to make expenditures to or for the benefit of" the College (in 1966) and the University (in 1991). J. Exs. 7, 9, Art. II. In fulfilling that purpose, the Foundation was also "[t]o accept, administer, apply and to use property acquired by gift . . . *in accordance with any of the purposes and*

objects of this [c]orporation that may be specified by the donor of any such property." J. Ex. 7, Art. II(a)(2); J. Ex. 9, Art. II(c) (emphasis added).

Third, the receipt and management of private donations in accordance with the intent of a private party is not a function of the University. Nothing in the authorizing statutes for the University itself, *see* Va. Code § 23.1-1503, or for state universities generally, *see* Va. Code § 23.1-1301, mandates private fundraising as any part of the University's public functions, much less an essential part. Private support is not, in any legal sense, essential to a public institution. General Assembly enactments encourage, but do not require, institutions of higher learning to increase funding from private sources, and authorize them to create independent nonprofit entities to administer private gifts. Va. Code §§ 23.1-101(1), 23.1-1010(3).

The Foundation's activities involve private financial resources. Private support to public universities is not subject to state regulation or control. The Commonwealth, as the series of legal opinions catalogued in the 1996 Attorney General's opinion show, has consistently shunned any control over management of the privately-raised funds and endowments of state universities. 1996 Va. Op. Att'y Gen. 15, 1996 WL 658746, at *1 (Sept. 3, 1996). There is no statutory governmental power to audit private funds administered by independent foundations supporting public institutions of higher education. *Id.* (citing 1986-1987 Va. Op. Att'y Gen. 54, 55 (July 31, 1986)).

Likewise, there is no authority for the State to supervise the decision-making of such a foundation. *Id. See also id.* at *1 & n.5 (citing 1974-1975 Va. Op. Att'y Gen. 14 (Jan. 2, 1975)). Thus, while Petitioners cited the University's ability to audit the Foundation under the Affiliation Agreement as an indicia of control, Am. Pet. ¶ 33, the existence of that agreement in fact reflects the *lack* of any power in the University to do so absent a contractual undertaking. *See* 1996 Va. Op. Att'y Gen. 15, 1996 WL 658746, at *1 (citing 1986-1987 Va. Op. Att'y Gen. 54, 55 (July 31, 1986)).

As Advisory Opinion AO-09-09 recognizes, foundations collect private donations and gifts and pass them on to public entities. The donation is a transaction between the donor and the Foundation, both private entities. The Foundation is thus a financial intermediary that disburses funds in accordance with donor intent. But "a private entity does not become a public body solely because the private entity provides goods or services to a public body." Advisory Council Op. AO-01-15 (Mar. 17, 2015).

C. The General Assembly Has Recently Declined to Label Foundations "Public Bodies" by Statute

In the 50 years the Foundation has existed, neither the General Assembly, nor any court case, Attorney General opinion, or Advisory Council opinion has considered it—or any other similar nonprofit entity operating alongside public universities in the Commonwealth—a public body subject to VFOIA. In fact, the

General Assembly has rejected the application of VFOIA that Petitioners seek to achieve through this lawsuit. Last year, legislation was proposed that would have extended VFOIA to the Foundation and like entities. The proposed bill would have added "any foundation that exists for the primary purpose of supporting a public institution of higher education" to the definition of "public body." S.B. 1436, 2017 Sess. (Va. 2017). The bill did not pass the General Assembly.

Deeming the Foundation a public body could reduce the flexibility and independence that is critical for its effective operation. For example, public bodies are limited by statute in their ability to manage their investments—a critical function of the Foundation. Investment of Public Funds Act, Va. Code. §§ 2.2-4500 *et seq*. The Foundation also would generally be subject to the Public Procurement Act in the selection of auditors and financial and legal advisors, and possibly limitations on public entities in the disposition of property and incurrence of debt. Va. Code §§ 2.2-4300 *et seq.*

II. The Foundation Does Not Hold Public Records (Assignment of Error 1)

Petitioners' first assignment of error pertains to whether the records they seek are public records.[5] Even if the Foundation were a public body, which it is not for

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[5] As a preliminary matter, it is unclear whether Petitioners raise this assignment of error against the Foundation or the University. The Foundation nonetheless addresses this assignment of error out of an abundance of caution.

the reasons described above, it would only be obligated to produce responsive documents if those documents are "public records" under VFOIA. Under VFOIA's definition of public records, not all records in the custody of a public body are subject to disclosure, but only those records that are prepared or used "in the transaction of public business." *See* Va. Code § 2.2-3701; *Am. Tradition Inst.*, 287 Va. at 339 & n.5.[6]

The records Petitioners seek fail to meet this requirement, because they pertain to a private donor's intent about a donation of private funds. As the Circuit Court held, records about donations from private entities are not part of the transaction of public business, particularly when those records reflect transactions before the University has accepted and used funds consistent with a donor's restrictions on those funds. Letter Op. 8-10.

The records that Petitioners requested are agreements between a private donor and the Foundation, an independent corporation, made in connection with the private donor's philanthropic donation to the Foundation. Such records reflect no form of public business but simply the private donor's intent for the contribution to the Foundation. This conclusion is consistent with both the General Assembly's encouragement of private donations, Va. Code § 23.1-101(2) ("endowment funds

[6] Although this "public business" argument is now the focus of the Petition for Appeal, in their pretrial briefing Petitioners devoted all of a single short paragraph to this argument. Pet'rs' Pre-Trial Br. 25-26.

and unrestricted gifts from private sources . . . shall be used in accordance with the wishes of the donors of such funds"), and the Affiliation Agreement between the University and the Foundation, which obligates the Foundation to manage gifts "consistent with donor intent." J. Ex. 19, sec. 2(c).

"There is an important distinction to be made between what are matters of public business and what are matters of public interest." *Burton v. Mann*, 74 Va. Cir. 471, 474 (Loudoun 2008). To be subject to disclosure, "[t]here must be some nexus between the record produced and public trust imposed upon the official or governmental body." *Id.* Public business connotes "the performance of a public duty," and Petitioners have provided no argument for why an independent corporation's acceptance and management of voluntary private gifts, even gifts intended to help a public body, constitutes a public duty. *WDBJ Television, Inc. v. Roanoke Cty. Bd. of Supervisors*, 4 Va. Cir. 349, 351 (Roanoke Cty. 1985).

Petitioners contend that an exemption to VFOIA for certain "[i]nformation maintained in connection with fundraising activities by or for a public institution of higher education" demonstrates that fundraising is public business and thus a public record. Pet. for Appeal 13-14 (citing Va. Code § 2.2-3705.4(7)). But the statutory provision does not presume that such information is or is not itself a public record; rather, it says that such information is exempt from disclosure if it is "contained in a public record." *Id.* The confidential personal information the exemption protects—

like the other exemptions in the statutory provision—could be "contained" in documents that are or are not public records, depending on whether the records as a whole pertain to the transaction of public business.

III. If it is Not a Public Body, the Foundation is Not Obligated to Produce Any Records Under VFOIA (Assignment of Error 3)

Finally, Petitioners' third assignment of error relates to Count V of its Amended Petition against the Foundation. In this count, Petitioners claimed that the Foundation, even if not a public body, had to provide public records in its alleged capacity as an *agent* of the University. Am. Pet. 38-40. This argument flows from VFOIA's definition of "public records" as applying to materials "in the possession of a public body or its officers, employees or agents in the transaction of public business." Va. Code § 2.2-3701. The Circuit Court sustained the Foundation's demurrer to this claim. Mem. Op. 16-18.

This assignment of error is meritless for three reasons. First, this claim is not viable when pleaded against the alleged agent as opposed to an actual "public body." Am. Pet. 38. VFOIA imposes obligations solely on public bodies. *Am. Tradition Inst.*, 287 Va. at 339; Mem. Op. 17. Section 2.2-3704 of the Virginia Code, which governs Petitioners' records request, Am. Pet. 7, directs "[a]ny *public body* that is subject to this chapter and that is the custodian of the requested records" to respond to record requests. Va. Code § 2.2-3704(B) (emphasis added). *See* Advisory Op.

AO-09-09 (as an agent, fund-raising foundation did not have to respond to VFOIA request).

Second, even if VFOIA somehow allowed document demands directly against any non-public bodies alleged to be agents of a public body, VFOIA only imposes obligations on "public records." Va. Code § 2.2-3701. The records Petitioners seek are not public records because they lack the requisite nexus to the transaction of "public business." *Supra* Pt. II.

Third, regardless of all of this, the Foundation is not an agent of the University. Petitioners repeatedly assert that the Foundation is an agent of the University, *e.g.*, Pet. for Appeal 25, but devote no argument to proving that it is. Nor did the Circuit Court find the Foundation an agent of the University.

The Foundation is not an agent of the University. "An agency relationship is never presumed; to the contrary, the law presumes that a person is acting for himself and not as another's agent." *State Farm Mut. Auto. Ins. Co. v. Weisman*, 247 Va. 199, 203 (1994). Agency exists where the principal manifests consent to the agent for the agent to act on the principal's behalf and subject to its control, and where the agent manifests its consent so to act. *Id.* The evidence at trial did not show that the University and the Foundation agreed that the Foundation would act subject to the University's control; nor did it reflect that the Foundation acts subject to GMU's control. Instead, in the Affiliation Agreement, the University recognizes that it is

the responsibility of the Foundation to manage gifts in accordance with donor intent. J. Ex. 19, sec. 2(c).

The University and the Foundation operate at arm's length. The Foundation is an independent corporate entity. It is the Foundation's purposes, its obligations to its donors, and the discretion of its trustees that govern its operations, not the commands of the University. *See, e.g.*, J. Ex. 3, Art. II; J. Ex. 10, Art. 1.1; J. Ex. 19, at 1 (Recitals)); *id.*, sec. 2(c), sec. 4(d)). As for the records at issue here, the Foundation is more accurately an agent of the donors whose donations it receives, as it must administer those donations in accordance with the donor's wishes. *See, e.g.*, Advisory Op. AO-09-09.

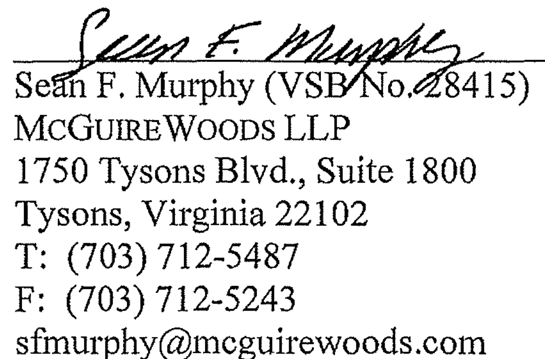
CONCLUSION

The Foundation respectfully asks this Court to refuse the Petition.

Dated: November 19, 2018

Respectfully submitted,

George Mason University Foundation, Inc.



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CERTIFICATE

The undersigned hereby certifies that on this 19th day of November, 2018, the foregoing Brief in Opposition to Petition for Appeal complies with Rule 5:18, as it does not exceed 25 pages excluding the portions of the brief exempted by Rule 5:6(a)(2). Counsel further certifies as follows:

(1) The Respondent filing this Brief in Opposition is George Mason University Foundation, Inc.

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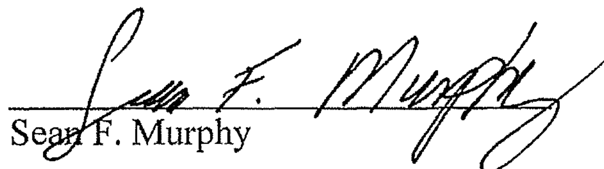
(8) On this 19th day of November 2018, seven copies of the foregoing Brief in Opposition to Petition for Appeal were hand delivered to the Clerk's Office of the Supreme Court of Virginia for filing, and one copy of the foregoing Brief in Opposition to Petition for Appeal was emailed to all counsel of record.

(6) Pursuant to Rule 5:17(j)(4), counsel for Respondent respectfully request notice of the date and time of the oral argument on Petitioner's Petition for Appeal.



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