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In The  
**Supreme Court of Virginia**

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RECORD NO. 181375

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**TRANSPARENT GMU and  
AUGUSTUS THOMPSON,**

*Appellants,*

v.

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

*Appellees.*

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**BRIEF *AMICUS CURIAE*  
OF THE VIRGINIA COALITION FOR OPEN GOVERNMENT  
IN SUPPORT OF APPELLANTS**

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## **INTEREST OF AMICUS CURIAE**

Founded in 1996, the Virginia Coalition for Open Government (“VCOG”) is a nonpartisan, nonprofit membership organization dedicated to protecting the rights of Virginia residents to open access to public records and proceedings. VCOG appears regularly as a friend-of-the-court in cases implicating the public’s right to know, to advise the courts of the importance of rigorous enforcement of open-government laws and the civic benefits of government transparency to the community at large.

This case, involving the public’s right of access to financial and donor records of a public university, demonstrates the reason for the existence and specifics of the Virginia Freedom of Information Act (“VFOIA”). VCOG seeks leave to appear, to ensure that the public’s right of access is not limited in violation of VFOIA.

## STATEMENT OF THE CASE

Appellant Thomson made five claims in his amended petition in the trial court. The main point of each of these claims was that the agreements he requested from the University and the Foundation were public records under VFOIA. Appx. at 144-87. Thomson alleged that

- under the Act, the University or the Foundation or both were custodians that were required to respond to a request under VFOIA. As to the Foundation, Thomson alleged that it was the University's agent in the public business of receiving, administering, and disbursing private gifts for the University's benefit, making its agreements public records under Va. Code § 2.2-3701.
- the University was the custodian of these gift agreements, and obligated to ensure public access to these records. Thomson also alleged that the Foundation was the custodian of any public records it possessed in transacting University business.
- the requested records were in the possession of Dr. Janet Bingham, who served as both the University's Vice President of Development and the Foundation's President and CEO, and that Dr. Bingham used the records in both capacities, making the University a custodian of those records.
- the Foundation was a public body under the "delegated functions" clause of VFOIA, which includes as a "public body" 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.

- 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.
- the Foundation was, if not a committee of the University, an “other entity ... of the [University] created to perform delegated functions. (quoting Va. Code § 2.2-3701).

The trial court dismissed four of Thomson’s claims on the pleadings. Appx. at 141, Appx. at 235-46. Following briefing and an evidentiary hearing, the trial court dismissed another count. Appx. at 258-68. The court concluded that the requested agreements were not “public records.” Id. At 265-66. Over Mr. Thomson’s objection, the court entered a final order.

On March 12, 2019, this Court granted an appeal.

## 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*: App. 167–68, 272.

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*: App. 166–72.

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*: App. 181-83.

4. The circuit court erred by sustaining the University’s plea and demurrer in 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*: App. 172-74.

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*: App. 21-26, 143, 145.

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*: App. 175-78, 272.



## STANDARD OF REVIEW

This Court normally views the facts in a light most favorable to the appellee and evaluates legal issues *de novo*. Dep't of Corrections v. Surovell, 290 Va. 255, 262 (2015). Assignments of error 1 and 6 were determined by the trial court “as a matter of law” based on stipulated facts. Opinion Letter, Appx. at 261, 268. Statutory construction, based on undisputed facts, does not involve a lower court’s determination of fact or this Court’s deference to it. Review of these matters is *de novo*. Neal v. Fairfax County Police Department, 295 Va. 334, 343 (2018).

The lower court’s errors in assignments 2 through 5 were committed on the basis of the pleadings alone, meaning that they must be reviewed *de novo*. Bragg v. Rappahannock County Board of Supervisors, 295 Va. 416, 423 (2018). Assignments 2, 3, and 4 are questions of custodianship of public records, questions that are also reviewed *de novo* by this Court. Daily Press v. Office of the Executive Secretary, 293 Va. 551, 557 (2017).

## ARGUMENT AND CITATION TO AUTHORITY

### I. Custody by the Foundation is Custody by the University.

The Appellants argue correctly that the University is the custodian of records held by its agents (Assign. Error 1), and that the Foundation is the University's agent (Assign. Error 2).

“An agent is one who represents another, called the principal, in dealings with third persons.” Johnston v. Kincheloe, 164 Va. 370, 180 S.E. 540 (1935). It is not disputed that the Foundation was created by the University, to do the work of the University. The University formed the Foundation “exclusively to receive, hold, invest and administer property and to make expenditures to or for the benefit of the University.” Appx. at 440, Cert. of Incorp. The Foundation's bylaws require that at least six of its trustees be taken from among University officers or employees, with full voting rights. Appx. at 451. The Foundation is operated by University's Vice President for Development, who runs the Foundation as its *ex officio* (because she is the University's Vice President for Development) Chief Executive Officer. Appx. at 456, Bylaws, para 15.

In other cases, this Court has found agency relationships in circumstances much less intertwined than the braided rope of exclusive purpose, exclusive services, and common leadership that exists between the University and the Foundation. In one example, a limited scope, arms-length contract for account management services

established an agency relationship. Where a bank engaged an unrelated third party to “manage and collect” loans, and to administer the bank’s “problem” loans, this Court found it “clear that the [servicing company] was the bank’s agent.” Charles E. Brauer Co., Inc. v. NationsBank of Virginia, N.A., 251 Va. 28, 36 (1996).

Reference to the statute makes the required result clear. “Public records” are defined to include “all writings and recordings ... in the possession of a public body or its officers, employees or agents.” Va. Code § 2.2-3701 (definition of “Public record,” emphasis added). Records possessed by the Foundation must be disclosed.

## **II. Custody by a Vice President is Custody by the University.**

The University is the custodian of records possessed by its vice president (Assign. Error 3). Public records that must be disclosed are defined to include “all writings and recordings ... in the possession of a public body or its officers, employees or agents.” Va. Code § 2.2-3701 (definition of “Public record,” emphasis added). The same individual who serves as the University’s Vice President of Development also serves, *ex officio* (because of one office, she holds the other) as the Foundation’s Chief Executive Officer. That person, an officer and employee of the University, has possession of the Foundation’s records, as its chief executive officer. The University’s officer has possession, therefore the University has possession. The records must be produced.

### **III. The Foundation is an “Other Entity” Under VFOIA, to Which the University has Delegated Public Functions.**

The Foundation is also included as part of the University itself, for purposes of VFOIA. This Court need look no further than the statute and the undisputed facts of this case to establish that identity of the Appellees. The Foundation is included in the statutory language of “any committee, subcommittee, or other entity however designated, of the public body created to perform delegated functions of the public body or to advise the public body.” under Va. Code § 2.2-3701, which defines “public body” (Assign. Error 5).

The Foundation is not formed as a committee or subcommittee. It is, however, an “other entity,” and the intentional breadth of the General Assembly’s language “however designated” does not allow for evasive corporate forms or the attempted construction of false divisions among entities. The lower court erred in reading the “other entity” provision out of the statute. The Foundation is exclusively and precisely an entity “created to perform delegated functions of the public body or to advise the public body.” The delegated functions are “to receive, hold, invest and administer property and to make expenditures to or for the benefit of the University.” Appx. at 440.

This kind of delegation is not new, and the Court need not work from a blank slate. 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.” Fitzgerald v. Loudon County Sheriff’s Office, 289 Va. 499, 504-05 & n.2 (2015). Here, this Court takes into account the opinions of the Virginia Freedom of Information Council (the “Council”). The Council (the “Council”), an agency of the Commonwealth, has addressed this practice multiple times. Each time, disclosure wins.

A private chamber of commerce that was not itself a public body was the custodian of records and subject to the disclosure requirements of VFOIA for its delegated function of promoting tourism for a public body, the City of Waynesboro. FOI Advisory Council Opinion AO-41-01.<sup>1</sup> The records of a private, local Society for the Prevention of Cruelty to Animals (SPCA) is subject to VFOIA due to the extent of its animal control work under contract for various localities,<sup>2</sup> but not for its work following the termination of those agreements.<sup>3</sup>

#### **IV. VFOIA Requires Transparency and Disclosure**

The Appellees are withholding public records, in violation of Virginia law. The statute is clear, and the Appellees are in continuing violation of it.

The affairs of government are not intended to be conducted in an atmosphere of secrecy since at all times the public is to be the beneficiary of any action taken at any level of government.

Virginia Freedom of Information Act (“VFOIA”), Va. Code § 2.2-3700.

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<sup>1</sup> Available at <https://www.opengovva.org/foi-opinions/ao-41-01>

<sup>2</sup> Available at <https://www.opengovva.org/foi-opinions/ao-03-04>

<sup>3</sup> Available at <https://www.opengovva.org/foi-opinions/ao-28-04>

If allowed to stand, the holdings of the lower court would encourage illegal secrecy through creative outsourcing and secret subsidiaries of Virginia's public agencies and institutions. VFOIA must be enforced in a broad and robust fashion.

The requirement that VFOIA be construed broadly is in the text of the statute:

The provisions of this chapter shall be liberally construed to promote an increased awareness by all persons of governmental activities and afford every opportunity to citizens to witness the operations of government. Any exemption from public access to records or meetings shall be narrowly construed and no record shall be withheld or meeting closed to the public unless specifically made exempt pursuant to this chapter or other specific provision of law.

Va. Code § 2.2-3700(B) (emphasis added). This breadth in the statute is purposeful.

It is not simply a matter of “a tie goes to the runner.” It is a mandate that in the actions of the sovereign, in this case a public university, transparency wins.

This Court calls VFOIA's transparency mandate a thumb on the scale.

By its own terms, the statute puts the interpretative thumb on the scale in favor of disclosure: ‘The provisions of [VFOIA] shall be liberally construed to promote an increased awareness by all persons of governmental activities and afford every opportunity to citizens to witness the operations of government.’ Code § 2.2–3700(B). Disclosure exemptions must be ‘narrowly construed’ in favor of disclosure.

Fitzgerald, 289 Va. at 505 (2015).

Disclosure exemptions under VFOIA are comprehensive in scope, spanning the legitimate reasons for protecting privacy and confidentiality. See Va. Code §§ 2.2-3705.1 -3705.6. The University and therefore its Foundation are protected

by many exemptions to VFOIA. The presidential working papers exemption (Code of Va. § 2.2-3705.7(2)), the personnel matters exemption (Code of Va. § 2.2-3705.1(1)), the scholastic records exemption (Code of Va. § 2.2-3705.4(1)), the exemption for faculty research (Code of Virginia § 2.2-3705.4(4)), and others protect the University and its Foundation from records requests that might be disruptive to the University's legitimate interests.

The Appellees are withholding records that have no exemption from VFOIA. The Appellees instead rely on variations of an “out of scope” argument that is out of touch with Virginia law. The lower court got it wrong. If the University is allowed to sidestep the legal requirements of VFOIA in this fashion, any public body would escape that statute by subcontracting functions to a private entity. In this case, hiding behind such delegation is even more problematic, because the purported private entity exists only to serve the public body, and is managed by the same public officials who manage the University.

The Foundation's work for the University has impact across the school's instruction, hiring, curriculum, facilities, tuition rates, sports programs, and requests for General Assembly funding. This Court should not allow the University and its Foundation to hide the facts and circumstances surrounding this major funding engine of a public institution. There is no justification for such secrecy. VFOIA requires disclosure.

## CONCLUSION

For the foregoing reasons, this Court should reverse the lower court's judgment and remand the case, causing the lower court to direct the University and the Foundation to produce all documents responsive to the Appellant's VFOIA requests.

Respectfully Submitted,



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## CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of April, 2019, pursuant to Rule 5:26, three paper copies of the Brief *Amici Curiae* have been hand-filed with the Clerk of the Supreme Court of Virginia and an electronic copy of the Brief was filed, via VACES. On this same day, an electronic copy of this Brief was served, via email, upon:

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