IN THE

# SUPREME COURT OF VIRGINIA

---

**Record No. 181375**

---

TRANSPARENT GMU and
AUGUSTUS THOMSON,

*Appellants,*

v.

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

*Appellees.*

---

## BRIEF OF APPELLEE GEORGE MASON UNIVERSITY FOUNDATION, INC.

---

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

---


E. Rebecca Gantt
(VSB No. 83180)
McGuireWoods LLP
World Trade Center
101 West Main St.
Suite 9000
Norfolk, Virginia 23510
T: (757) 640-3731
F: (757) 640-3940
rgantt@mcguirewoods.com

Matthew A. Fitzgerald
(VSB No. 76725)
McGuireWoods LLP
Gateway Plaza
800 East Canal St.
Richmond, Virginia 23219
T: (804) 775-4716
F: (804) 698-2251
mfitzgerald@mcguirewoods.com

Sean F. Murphy
(VSB No. 28415)
McGuireWoods LLP
1750 Tysons Blvd.
Suite 1800
Tysons, Virginia 22102
T: (703) 712-5487
F: (703) 712-5243
sfmurphy@mcguirewoods.com

***Counsel for Appellee George Mason University Foundation, Inc.***

## Table of Contents

## TABLE OF AUTHORITIES

**Cases**

**Statutes**



**Other Authorities**

## INTRODUCTION

The Virginia Freedom of Information Act ("VFOIA") draws a dividing line between the government and private parties. Public universities are "public bodies" subject to VFOIA. Private foundations, which accept and manage private philanthropic gifts for the benefit of those universities, are not. Longstanding opinions of the Attorney General and the VFOIA Advisory Council show that such foundations do not qualify as "public bodies" under VFOIA. Nor has any court, in VFOIA's 51-year history, ruled that such a foundation is subject to the statute.

In 2017, the General Assembly declined to amend VFOIA to bring foundations into the statute's scope. This case, filed just weeks after the proposed amendment to VFOIA failed, aims to achieve in the courts the same legal change the General Assembly declined to make.

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. After a trial, Judge Tran found that the Foundation is a separate corporation that operates at arm's length with the University. He considered the historical evidence of its formation, which showed that the Foundation was "privately-formed" and existed before the University itself. He also considered the Foundation's current operations, finding that it is not a "sub-entity" of the

University. Instead, the trial evidence showed it operates under the supervision of its Board of Trustees, nearly all whom have no formal affiliation with the University.

Judge Tran held that the Foundation is not publicly funded—a finding Petitioners do not challenge on appeal. He also held that the Foundation's acceptance and management of private gifts is not a public function. But he was careful to hold that once the private gifts and any corresponding records cross into the public domain—when the University accepts them through its Gift Acceptance Committee—the gifts and their terms as accepted by the University would be subject to VFOIA. JA266-67 (Letter Op.). Petitioners ignore this, but it significantly undermines the policy arguments filling the briefs on their side. VFOIA has and will continue to give Petitioners the ability to determine how the University spends the money it receives from the Foundation.

## STATEMENT OF THE FACTS

Respondent George Mason University Foundation, Inc. is an independent non-profit corporation registered under Virginia law. JA263-64 (Letter Op.); JA439 (1991 Certificate of Incorporation). It "operat[es] independently from George Mason University, and under its own bylaws, articles of incorporation, and statutes." JA264 (Letter Op.). Throughout its history, and in accord with the stated purpose in its Articles of Incorporation, the Foundation has accepted and managed

private gifts for the benefit of George Mason University in accordance with the intent of the Foundation's private donors. JA443-44 (1966 Articles); JA430-31 (1991 Articles).

The Foundation was "privately-formed" before the University even existed. JA263 (Letter Op.); JA250-52 (Stipulations). The Foundation's predecessor was formed through Articles of Incorporation three prominent individuals in the Northern Virginia community signed in 1966, when the University's predecessor, George Mason College, was still a division of the University of Virginia. JA 250-51 (Stipulations ¶¶ 9-10, 12-14). A corporate reorganization of that organization—not the University—created the current Foundation in 1991. JA252 (Stipulations ¶ 19).

The Foundation's President reports to its Board of Trustees, which has exclusive authority to "supervise and oversee the management of the Foundation." JA281 (Van Leunen testimony). The Foundation's Articles of Incorporation and Bylaws 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." JA434 (1991 Articles); JA 446-67 (1966 Articles); JA40 (2014 Bylaws). The Articles give the University no management role or decision making authority over the Foundation's affairs. *See generally* JA29-38 (2015 Articles); JA 443-49 (1966 Articles).

Only six of the 49 members of the Foundation's Board of Trustees have any formal affiliation with the University. JA32-34 (2015 Articles); JA281-84 (Van Leunen testimony). And over the Foundation's history, just over 10 percent of its Trustees have been University employees. JA287 (Van Leunen testimony). The Foundation has its own permanent staff to manage its day-to-day affairs. JA 277-80 (Van Leunen testimony).

Undisputedly, the Foundation is not publicly funded. Letter Op. 262-63. Of the Foundation's $92 million total support and revenue in fiscal year 2016, less than $14,000 (about one-tenth of 1%) came from public funding. JA295 (Van Leunen testimony). The Foundation funds its operations through a combination of investment income and fees imposed on gifts from private donors. *Id*. 293-94.

A series of formal contractual arrangements govern the relationship between the Foundation and the University. One is the Affiliation Agreement, where the University and Foundation "acknowledge that each is an independent entity." JA65 (2013 Agreement); JA515 (2012 Agreement); JA525 (2007 Agreement). 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." JA59 (2013 Agreement); JA519 (2012 Agreement). The Affiliation Agreement confirms the Foundation's purpose as a caretaker and manager of funds from private donors intended to benefit the University, in

accordance with the intent of those donors. *Id.* The University acknowledges that the Foundation is free to reject donor gifts, and the Foundation controls that decision. JA65 (2013 Agreement); JA515 (2012 Agreement); JA525 (2007 Agreement).

The Foundation's offices are located in a building that it owns. JA296 (Van Leunen testimony). It leases this building to the University, and the University pays the Foundation $2.5 million in annual rent. *Id.* The Foundation essentially subleases its office space back from the University, with an agreement to pay the University for its share of telephone and IT support. *See* JA80 (Space Usage Agreement). The Foundation also leases other property to the University, and receives $14 million total from the University in annual rent. JA299 (Van Leunen testimony). When the Foundation sells property that it owns, it does not obtain permission from the University to do so. *Id.*

The Foundation pays the University nearly $80,000 annually for IT services under a contract. JA300-01 (Van Leunen testimony). While contact information for Foundation employees exists on the University's website, the site explains that those individuals are employees of the Foundation, not the University. JA306.

Petitioners are Transparent GMU, an unincorporated association, and Augustus Thomson, an undergraduate student at GMU. JA253 (Stipulations ¶¶ 25-26); Trial Tr. 24. 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 George Mason University from" several listed entities. JA95-99. The Foundation declined to produce records, stating that it was not a public body subject to VFOIA, not an agent of a public body, and that any responsive records were not prepared or used in the transaction of public business. JA2.

## STATEMENT OF THE CASE

Petitioners filed their Original Petition against the Foundation and the University on May 26, 2017 in the Fairfax County Circuit Court. JA1. After a partial demurrer, JA141-42, Petitioners filed an Amended Petition. JA144-87.

A summary of the counts follows:

| **Counts in Amended Petition** | | | |
|---|---|---|---|
| **Count** | **Claim** | **Asserted Against** | **Disposition** |
| 1 | University, as custodian, failed to provide public records held by the Foundation, its agent | University | Dismissed pretrial (11/29/17) |
| 2 | University, as custodian, failed to provide public records held by its officer/employee/agent Dr. Bingham | University | Dismissed pretrial (11/29/17) |
| 3 | Foundation is a public body as an entity created to perform delegated functions of and/or to advise the University | Foundation | Dismissed after trial (7/5/18) |
| 4 | Foundation is a public body as a corporation supported | Foundation | Dismissed as standalone count |

| | | | |
|---|---|---|---|
| | principally by public funds | | pretrial (11/29/17) |
| 5 | Foundation must provide access to public records as an agent of the University | Foundation | Dismissed as standalone count pretrial (11/29/17) |
| [raised only in Original Petition] | Foundation is an alter-ego of the University | Foundation | Dismissed pre-amended petition (10/2/17); *see also* JA238 (11/29/17) |

On November 29, 2017, the circuit court entered its Memorandum Opinion, granting dismissal of most counts but sending Count III to trial. The court first outlined its earlier dismissal with prejudice of the alter-ego claim against the Foundation. It reasoned that corporate veil piercing should not occur absent allegations of improper conduct, and that Petitioners had made no such allegations. JA238-40; *see also* JA141.

The circuit court also dismissed Counts IV and V "as standalone counts." JA243, 245. However, it found that the factual issues those counts presented were relevant to the public body determination that remained for trial under Count III. JA243-47. Accordingly, Petitioners were permitted to proceed to trial with evidence relevant to the dismissed counts.

In April 2018, Judge Tran presided over a bench trial. The two witnesses at trial were Petitioner Augustus Thomson and the Foundation's Chief Financial Officer, Mary Susan Van Leunen.

After the trial, the circuit court issued a Letter Opinion holding that the Foundation was not a public body and that it does not possess public records. JA258-69; JA270-71 (Final Order). It reasoned that "[i]t is more appropriate for the General Assembly, rather than the courts, to decide whether foundations created to support public universities are public bodies." JA263. However, the circuit court also held that gift conditions Petitioners sought would become subject to VFOIA when the University accepted funds with donor restrictions, as that would "convert private funds and private records into public funds and public records." JA267.

## STANDARD OF REVIEW

"[W]hile the circuit court's interpretation of the FOIA is subject to de novo review, its findings of fact to which it applies that interpretation can be overturned only if plainly wrong or without support in the evidence." *Hill v. Fairfax Cty. Sch. Bd.*, 284 Va. 306, 313 (2012).

Here, the counts dismissed at the demurrer stage receive de novo review. *Friends of the Rappahannock v. Caroline Cty. Bd. of Supervisors*, 286 Va. 38, 44 (2013). But there was also a trial—which Petitioners oddly label an "evidentiary hearing." Opening Br. 16. The trial court's view of the key facts taken after trial receives deferential review: "[w]e consider 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).

## AUTHORITIES AND ARGUMENT

"VFOIA only applies to 'public records in the custody of a public body.'" *Am. Tradition Inst. v. Rector & Visitors of Univ. of Va.*, 287 Va. 330, 339 (2014). Thus, Petitioners had to prove *both* that (1) the Foundation is a "public body" and (2) that the records Petitioners seek are "public records." *Id.* Based on the evidence put forth at trial, the circuit court properly found *neither* element satisfied. Thus, to show error in the decision below, Petitioners now must prevail on two independent, sequential grounds. They cannot pass either hurdle.

### I. The circuit court correctly held that the Foundation is not a public body.

Petitioners make three separate arguments that the Foundation is a "public body" or otherwise a proper respondent under VFOIA. They say (1) that the Foundation is an entity "of" the University created to perform delegated public functions of the University; and (2) that the Foundation is an "alter-ego" of the University, which is itself a public body; and (3) that the Foundation is an "agent" of the University and can be sued as such under VFOIA. None of these arguments hold water.

### A. History and precedent show that private foundations are not public bodies in Virginia.

In the 53 years the Foundation has existed, no one has ever ruled it a "public body" subject to VFOIA. Neither the General Assembly, nor any court case, Attorney General opinion, or Virginia Freedom of Information Advisory Council ("Advisory Council") opinion has ever opined that the Foundation—or any other comparable organization operating alongside a Virginia public university—is a "public body."

In fact, the Attorney General and the Advisory Council[1] have stated the opposite. As the Advisory Council has recognized, 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. Advisory Council Op. AO-09-09 (Oct. 23, 2009). "[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).

Similarly, in 1996 the Attorney General opined that "nonprofit foundations organized for the benefit of state universities 'need only comply with the laws that

[1] 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).

govern such corporations.'" 1996 Va. Op. Att'y Gen. Va. 15, 1996 WL 658746, at *1 (Sept. 3, 1996). Cataloging prior Attorney General opinions, the opinion noted that "tax-exempt foundations organized for the purpose of administering endowments and providing other financial management arrangements for state universities are *not part* of the universities." *Id.* (emphasis added).

The Advisory Council and Attorney General have recognized that private foundations are not public bodies for good reason. Deeming the Foundation a public body could chill the willingness of donors to contribute and 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.*

For its part, the General Assembly likewise recently rejected efforts to amend VFOIA to make it reach Foundations like the one here. A proposed bill in 2017 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). After spending nearly a month in

committee, the bill did not pass the General Assembly. *See* Va. Legislative Info. Sys., 2017 Session, SB1436, http://lis.virginia.gov/cgi-bin/legp604.exe?171+sum+SB1436.

Petitioners argue vigorously that it is improper to use later legislative history to interpret the meaning of a statute. Opening Br. 45-46. But the circuit court did not commit that offense. *See* Letter Op., JA268 (noting that the 2017 history was "not a dispositive fact in this opinion" but adding that "such a statute remains a legislative solution"). Petitioners also suggest that maybe the General Assembly did not pass the bill because it thought foundations were already subject to VFOIA. Opening Br. 45-46. But no history exists in the Commonwealth that could have created such an impression. All Virginia precedent was to the contrary.

In short, a page of history may be worth a volume of logic on this point. The undisputed history is that for 50 years, no one held a foundation subject to VFOIA. An effort was made to amend VFOIA. It failed. Less than two months later, Petitioners filed this lawsuit asserting that VFOIA had applied all along.

### B. The Foundation is not an entity "of" the University created to perform delegated functions.

VFOIA defines "public body" as including "any 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.

As the circuit court ruled after the trial, Petitioners have proven neither element. JA263 ("the Foundation is not a Sub-Entity of the University and does not perform a government function").

**1. The Foundation is not an entity "of" the University.**

The relevant portion of VFOIA requires that the Foundation be an "entity . . . of" the University. Va. Code § 2.2-3701. As this Court has recognized, the word "of" has meaning: it references "committees, subcommittees, or entities *within* the types of public bodies covered by FOIA." *Beck v. Shelton*, 267 Va. 482, 487 (2004) (emphasis added). A common dictionary definition of the word "of" fits this understanding: to "express[] the relationship between a part and a whole." *Of*, Concise Oxford English Dictionary 992 (12th ed. 2011).

The Foundation, however, is neither "within" nor a "part" of the University. 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. As the circuit court observed, trial evidence proved that the Foundation is "an independent non-stock corporation that coexists alongside the University it serves." JA263. It found that the Foundation "operat[es] independently from George Mason University, and under its own bylaws, articles of incorporation, and

statutes." JA264. These findings are subject to clear error review on appeal. *Gov't Employees Ins. Co.*, 281 Va. at 655. 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.*

Petitioners argue that the word "of" operates merely as a term of "identification and relation." Opening Br. 41. But this expansive interpretation strips the word of nearly all meaning. When combined with their broad definition of "entity," *id.* at 39-40, Petitioners' flawed reading of what it means to be an entity of a public body could sweep in virtually any group with any type of relationship with the University, such as contracted cleaning crews or textbook suppliers.

Such a broad reading also conflicts with this Court's decision in *RF&P Corp. v. Little*, 247 Va. 309 (1994). In *RF&P*, the 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." *Id.* at 316. The Court noted that any other ruling would "completely disregard[] [the corporation]'s corporate identity." *Id.*

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) (§ 2.1-341 amended and recodified to Va. Code § 2.2-3701). Petitioners suggest that this statutory amendment aimed to respond to, and overturn, *RF&P*. Opening Br. 37-38. This is sheer speculation. The 2001 amendment occurred *seven years* after the *RF&P* decision. And the General Assembly had amended VFOIA's definition section four times after *RF&P* and before the 2001 amendment, including just two months after *RF&P*, without making any relevant change.[2] There is no support for Petitioners' suggestion that the amendment aimed to overrule *RF&P*'s core holding that one independent corporate form is not "of" another.

In fact, evidence exists that the change was not meant to be anything so far-reaching. The 2001 amendment was a recodification of VFOIA. Without clear evidence of a contrary legislative intent, language added to a statute during a recodification does not substantively change the statute. *See, e.g.*, *Waldrop v. Commonwealth*, 255 Va. 210, 214 (2000). The 2001 Code Commission report lacks any indication of intent to modify the statute's substance. It states that the recodification aimed to "(i) organize the laws in a more logical manner, (ii) delete obsolete and duplicative provisions, and (iii) improve the structure and clarity of [the recodified laws, including VFOIA]." Va. Code Comm'n, Recodification of

[2] *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).

Titles 2.1 and 9 of the Code of Virginia, H.D. No. 51, at 1 (2001). The drafting note associated with the changes that added "or other entity however designated," reads "Technical corrections only." *Id.* at 334. Given all this history, the most likely intent for the addition was, *at most*, to capture committee or subcommittee-like bodies that were not so labeled, such as a working group, panel, or council.

Petitioners also point to a single statement in two versions of the Foundation's historic By-Laws that it is "the main fund-raising organization of George Mason University" for the receipt and management of all private gifts. Opening Br. 41 (quoting JA 450 (2000 By-Laws), 466 (1991 By-Laws)).

This language cannot defeat the circuit court's fact-finding after trial that the Foundation "operat[es] independently from George Mason University." JA264; *see also Gov't Employees Ins. Co.*, 281 Va. at 655 (fact-findings entitled to deference). Nor does it show any part-of-the-whole relationship between the two. As Petitioners acknowledge, the meaning of the word "of" varies with context. Opening Br. 40. And in the context of the outdated bylaws Petitioners rely on, the word "of" could have been "for" or "affiliated with" or "to support" and it would have meant the same thing. That is not true in the statutory context of VFOIA.

Additionally, the language Petitioners cite was not used in either the original 1966 bylaws, nor the current 2014 version. That language is an irrelevant historical curiosity, written even before VFOIA itself contained the "entity . . . of"

phrase. In any event, isolated statements in bylaws are too thin a reed to encapsulate the entire relationship between the Foundation and the University. The circuit court's finding that the Foundation operates independently under its own articles and bylaws reflects this fact. JA263-64.

Finally, Petitioners note that other jurisdictions have described foundations as entities "of" associated universities. Opening Br. 41 n.14. But not one of those cases purported to interpret statutory language requiring that entity to be "of" the associated university. Petitioners also ignore years of authority from *this* jurisdiction. The guidance of both the Advisory Council and the Office of the Attorney General have long agreed with the circuit court's reading of the statute.

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. It opined that when a public-body museum, under 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. 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*.

**2. The Foundation was not created to perform delegated functions of the University.**

To be a public body under this section of VFOIA, the Foundation must have *also* been "created to perform delegated functions of the public body" (the University). Va. Code § 2.2-3701. Read together with the other element—that it must be a "committee, subcommittee, or other entity however designated, of the public body"—the reference is to a subpart of the University which the University created to perform a University function.

First, a public body's *creation* of the entity is central to this element. For instance, in *RF&P*, the Court found it probative that the entity in question—wholly owned by the Virginia Retirement System ("VRS")—"was created upon the filing of [its] articles of incorporation and the organizational meeting of its initial directors," which was three years before members of the VRS filled the entity's Board vacancies. 247 Va. at 316. The Court reversed the trial court's conclusion

that the entity was created to perform a function of VRS. *Id.* at 316-17.

Similarly, the Advisory Council has often held that an entity not created by the public body cannot itself be a public body. *See, e.g.*, Advisory Council Op. AO-11-09 (Nov. 30, 2009) (noting that if a governing body of a county appointed a working group, it would be a public body, but if an individual government employee created it, it would not be); Advisory Council Op. AO-03-18 (Mar. 27, 2018) ("[T]he task force was not created by the school board. It merely includes some members recommended by the school board."); Advisory Council Op. AO 12-04 (June 16, 2004) ("[N]either the Board of Supervisors nor the School Board caused a committee to be or brought a committee into existence; therefore, the gathering of the chairs and vice-chairs does not fall under the plain language of the definition of a public body in FOIA.").

As the circuit court held after considering the historical evidence at trial, the Foundation is "privately-formed." JA263. In other words, it held that a public body did not create the Foundation. *See id.* (describing Foundation's history). The Foundation's predecessor was incorporated in 1966, before the founding of George Mason University. JA251 (Stipulations ¶ 12). At the time, George Mason College was still a division of the University of Virginia ("UVA"). *Id.* 250-51 (Stipulations ¶¶ 9-10). The Foundation's predecessor was established through Articles of Incorporation signed by three individuals who were prominent local businessmen

and served as the Foundation's initial Board of Trustees. JA251 (Stipulations ¶ 14). The individuals were all members of an "Advisory Committee" that advised UVA on issues pertinent to the College, but there was no evidence that they had any formal affiliation with the College. *Id.* (Stipulations ¶ 15). And a corporate reorganization by the prior Foundation, rather than the University, created the current Foundation in 1991. JA252 (Stipulations ¶ 19). Petitioners presented no evidence of any action by the University to "create" the Foundation in 1991, either.

Second, VFOIA's definition requires a delegation of public duties from the public body to the entity in question. But when it occurs, the actual delegation of public duties from a public body to an outside private entity 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); *Sinclair v. New Cingular Wireless PCS, LLC*, 283 Va. 567, 584 (2012) (zoning). "It is well settled that the delegation of authority to exercise a portion of the police power of the State . . . is not to be presumed, and that any language purporting to do so must be strictly construed." *City of Richmond v. Virginia Ry. & Power Co.*, 141 Va. 69, 86 (1925).

Petitioner presented no evidence of any delegation from the University or its predecessor institutions, either at the time of the Foundation's formation or otherwise. In their brief in this Court, they point to a single statement in the Affiliation Agreement between the Foundation and the University that describes

the Foundation's role as a depository of private gifts to the University. Opening Br. 44. But that is a contract to handle money eventually heading to the University—little different than an agreement with a bank. Contracting for such services is a far cry from delegating the "responsibility to conduct the business of the people." *Connell v. Kersey*, 262 Va. 154, 161 (2001).

Further, the Foundation's activities involve *private* financial resources. The Foundation's purpose is to "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." JA431 (1991 Articles, Art. II(a)(2)); JA443-44 (1966 Articles, Art. II(c)). But receiving and managing private donations in accordance with the intent of a private party is not a University function. 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. Instead, as the circuit court recognized, "[t]he statutory objectives of George Mason University are to educate students, approve programs, and confer degrees." JA265 (Letter Opinion). Private gifts are not, in any legal sense, essential to a public institution.

Statutes encourage, but do not require, institutions of higher learning to obtain funding from private sources. Rather than telling those institutions to

administer private gifts themselves, the law instead *encourages* independent nonprofit entities to do that work. Va. Code §§ 23.1-101(1), 23.1-1010(3). That the General Assembly has encouraged private organizations to handle a certain function shows that the General Assembly does not consider it a government function.

Private support to public universities is not subject to state regulation or control, unlike traditional governmental functions like taxation or zoning. The Commonwealth 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. There is no statutory government power to audit private funds that independent foundations supporting public institutions of higher education administered. *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*. at *1 n.8; *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, JA155 (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)).

Rather than grappling with this Virginia authority, Petitioners point only to a precedent from Iowa. Opening Br. 43. This has nothing to do with *Virginia*'s treatment of private donations to public institutions, which has consistently conveyed that such activity is not a public function under VFOIA. Even the Iowa court itself recognized this distinction that Petitioners ignore: it noted that Iowa's law "addresses concerns of delegation of government authority 'perhaps more directly' than the Virginia Freedom of Information Act." *Gannon v. Bd. of Regents*, 692 N.W.2d 31, 43 (Iowa 2005).

### C. The Foundation is not the University's alter-ego.

Next, Petitioners contend that the Foundation is an alter-ego of the University. Opening Br. 46-49. They rely on general veil-piercing principles to say that this Court should ignore the Foundation's separate structure. The circuit court properly dismissed this claim on demurrer. JA238-40.

The circuit court correctly held that the Foundation "is not susceptible to a claim of veil piercing." JA240. 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). Thus, "[t]his Court has been very reluctant to permit veil piercing." *Id.*

While acknowledging the Foundation's separate corporate form, Petitioners alleged that the University and the Foundation "share a uniquely close relationship" and have "acted as a single entity," and that the University "exercise[s] control over" the Foundation. JA21, 23, 24 (Original Pet.). 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 must show 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 held, the Foundation is not a "sham entity" designed to conceal wrongdoing. JA238-39 (Letter Op.). First, the Original Petition lacks any allegations to support such a conclusion—such as the concealment of fraud or gross absence of corporate formalities. JA21-26. Indeed, Petitioners alleged only that the University and Foundation comply with the formal agreements and governing documents attached to the Original Petition. JA29-89. 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); *see also* § 23.1-1010(3).

There is no air of impropriety in the arrangement here between the University and the Foundation.

Petitioners contend the circuit court's ruling is flawed in two respects. First, they say that the wrongful conduct needed to pierce a corporate veil need not be criminal or fraudulent. Opening Br. 47. But their cite for that proposition—a case involving a "paper corporation" set up to avoid tax obligations—still ruled that at least "constructive fraud" must exist. *Lewis Trucking Corp. v. Commonwealth*, 207 Va. 23, 31-32 (1966). Petitioners alleged nothing of the sort here.

Second, Petitioners argue the circuit court's ruling contradicts *RF&P Corp. v. Little*, 247 Va. 309 (1994). In rejecting a claim that a separate corporate entity wholly owned by a public body was itself a public body, *RF&P* emphasized that veil-piercing requires "that the corporation was a device or sham used to disguise wrongs, obscure fraud, or conceal crime." *Id.* at 316. As in *RF&P*, "[t]he record here contains no evidence that [the Foundation] occupied such a status." *Id.*

The circuit court correctly sustained the Foundation's demurrer to the alter-ego claim. Regardless, the evidence at trial showed that Petitioners could not have accurately alleged the requisite conduct, as the Foundation and the University operate at arm's length in a proper manner and observe all corporate formalities. JA263.

### D. The Foundation cannot be sued as an "agent" of the University.

Petitioners also contend that the Foundation had to respond to their VFOIA request as an agent of the University. Opening Br. 33-35; JA181-83.

VFOIA defines "public records" as 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. From this text, Petitioners assert that they can sue any "agent" of a public body to access public records in its possession. That is not true—and even if it were, the Foundation is not an "agent" of the University. The evidence at trial showed that the Foundation operates independently from the University and is not subject to its control as an agent.

#### 1. Agents are not public bodies subject to VFOIA.

The circuit court properly sustained the Foundation's demurrer to this claim as a "standalone count" because a valid VFOIA claim "requires both (1) a public body and (2) public records, before any action under VFOIA is required or any rights under VFOIA arise." JA246. In other words, a VFOIA petitioner cannot sue an alleged "agent" as opposed to an actual "public body." JA181-82.

This Court has held that VFOIA imposes obligations *solely* on public bodies. *Am. Tradition Inst.*, 287 Va. at 339 & n.5 (noting that "VFOIA only applies to 'public records in the custody of a public body'"). Petitioners have cited no precedent to the contrary. The Advisory Council has likewise held that as an agent, a fund-raising foundation did not have to respond to VFOIA request. *See*

Advisory Op. AO-09-09. Instead, the public body had to provide the records its agent possessed.

Even Petitioners acknowledge that "many of [FOIA]'s provisions assume the responsible party will be a public body." Opening Br. 33-34. In fact, there is no other way to read these provisions. For instance, Section 2.2-3704 of the Virginia Code, which governs Petitioners' records request, JA150, directs only "[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). VFOIA's enforcement provision states that "[i]n any action to enforce the provisions of this chapter, *the public body* shall bear the burden of proof to establish an exclusion by a preponderance of the evidence. . . . Any failure *by a public body* to follow the procedures established by this chapter shall be presumed to be a violation of this chapter. *Id.* § 2.2-3713(E) (emphases added). Petitioners would have this Court ignore this plain text and rely on VFOIA's "central mandate" instead, Opening Br. 34, but "the plain, obvious, and rational meaning of a statute is to be preferred over any curious, narrow, or strained construction." *Evans v. Evans*, 280 Va. 76, 82 (2010).

**2. The Foundation is not the University's "agent" under VFOIA.**

The circuit court properly sustained the Foundation's demurrer to the "agency" claim. JA248. But the circuit court also noted that evidence of agency

could still matter at trial as relevant to the remaining count. JA243 ("Although dismissed as standalone counts, factual issues presented under the dismissed Counts IV and V alleging public funding and creation of public records remain relevant in deciding whether the Foundation is a public body at trial."). Thus, Petitioners properly lost this claim at the demurrer stage, but in effect had a chance to prove agency anyway at trial.[3] They failed to do so.

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 power of control is an important factor in determining whether an agency relationship exists." *Reistroffer v. Person*, 247 Va. 45, 48 (1994).

The evidence Petitioners put forth at trial showed that the Foundation is not the University's agent. Petitioners failed to show that the University and the

[3] At the time, the circuit court was considering whether to apply Petitioners' suggested "totality of the circumstances" test for "public body." Petitioners thus had every incentive and opportunity to prove that the University controls the Foundation as part of that analysis. Petitioners submitted evidence and argument directly on the agency point. *E.g.*, JA363-65 (Real Estate Gift Acceptance Procedures), JA366-74 (Disbursement Procedures), JA319-24 (cross-examination of Van Leunen); Pet'rs' Pre-Trial Br. 18-20.

Foundation ever agreed that the Foundation would act subject to the University's control, or that the Foundation does act under the University's control. The University and the Foundation operate at arm's length. JA264 (finding as a matter of fact that the Foundation "operat[es] independently" and "under its own bylaws, articles of incorporation, and statutes"). The Foundation's purposes, obligations to its donors, and the discretion of its trustees govern its operations, not the commands of the University. *See, e.g.*, JA30 (2015 Articles, Art. II); JA40 (2014 ByLaws, Art. 1.1); JA56-57, 59, 63 (2013 Affiliation Agreement, at 1 (Recitals)); *id.*, sec. 2(c), sec. 4(d)).

The Foundation's CFO testified that the University does not control the Foundation, that the University President cannot direct the Foundation on what to do or how to do it, and that no University employee can direct the Foundation or tell its employees what to do. JA284. She also testified that the Foundation sometimes rejects University requests. JA336. At least twice in the last few years, the University has asked the Foundation to fund real estate projects, and the Foundation has refused. JA336-37. No witness refuted any of this testimony.

Petitioners emphasize that the University's financial statements identify the Foundation as a "component unit" under relevant accounting principles. Opening Br. 6. These statements also identify the Foundation as a private independent entity. JA302 (Van Leunen testimony). Ms. Van Leunen, who is an experienced

accountant and licensed CPA, JA277, testified that being a component unit is not an indication of ownership or control. JA303. And the independent third-party accounting firm that audited the Foundation has made clear that "the Foundation is independent of the University," and is "not directly or indirectly controlled by the University." JA387.

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. As the Foundation's CFO testified, it is "[t]he donors' intentions, the donors' wishes [that] determine how donor funds are spent." JA310 (Van Leunen testimony). In the Affiliation Agreement, the University recognizes that it is the responsibility of the Foundation to manage gifts in accordance with donor intent. JA59 (2013 Affiliation Agreement sec. 2(c)).

## II. The requested Foundation records do not address "the transaction of public business."

Even imagining the Foundation were subject to VFOIA as a public body or an agent, VFOIA obligates only production of documents that are "prepared or owned . . . in the transaction of public business." Va. Code § 2.2-3701. Not all records are subject to disclosure, but only those records that pertain to "the transaction of public business." *Id.*; *Am. Tradition Inst.*, 287 Va. at 339 & n.5.

### A. Private funds are not "public business."

The records that Petitioners requested are agreements between a private donor and the Foundation, made with the private donor's voluntary philanthropic donation. JA96 (requesting "grants, cooperative agreements, gift agreements, contracts, or memoranda of understanding . . . involving a contribution" from various Koch entities). Those records reflect no form of public business, but simply the private donor's intent. Petitioners cite no precedent from any Virginia court establishing that how private parties intend to donate their money is "public business." Although they reference cases from other jurisdictions, as the circuit court noted, cases from other jurisdictions point both ways. JA262; *see also State Bd. of Accounts v. Indiana Univ. Found.*, 647 N.E.2d 342, 349 (Ind. Ct. App. 1995) (holding that "gifts, bequests and devises made by private donors [into a Foundation] for the use or benefit of Indiana University are private, not public funds").

"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." *WDBJ Television, Inc. v. Roanoke Cty. Bd. of Supervisors*, 4 Va. Cir. 349, 351 (Roanoke Cty. 1985). An independent corporation's acceptance and

management of voluntary private gifts, even gifts intended to help a public body, cannot constitute a public duty. Advisory Council Op. 04-12 (Oct. 17, 2012) (addressing a member of a public university's board of visitors who used his cell phone to conduct both public and private business, and concluding that his phone bills were not "public records" under VFOIA because they were not "prepared for or used in the transaction of public business").

VFOIA does not define the term "public business," but in confining its application to records prepared, owned or possessed only by public bodies or their agents, Va. Code § 2.2-3701, the General Assembly has conveyed that public business means matters over which there is governmental control.

Yet it is undisputed that these monies are not public funds over which the government has control. JA262-63. *See also* Advisory Council Op. 03-04 (Feb. 10, 2004) (opinion that "discussion of public business would include discussion of . . . the use of public funds" but not "private fundraising efforts"). As the evidence at trial showed, "the assets of the Foundation are exclusively the property of the Foundation," "[t]he University is not accountable for, and has no ownership of, any of the financial and capital resources of the Foundation," and "[t]he University has no authority to mortgage, pledge, or encumber the assets of the Foundation." JA387. The Affiliation Agreement between the University and the Foundation

obligates the Foundation to manage gifts "consistent with donor intent." JA59 (2013 Affiliation Agreement sec. 2(c)).

By focusing on whether certain funds are "vital" or "integral" to a government function instead of the government's authority or control, Opening Br. 18-19, Petitioners would apparently consider the bank records of students or parents paying tuition to the University or of citizens paying taxes to the Commonwealth to concern the "public business." But as the circuit court recognized, "[a]dvancing a statutory objective is not equivalent to transacting public business." JA265. Although the General Assembly has encouraged private donations to public institutions of higher education, in so doing it has been careful to emphasize the distinction between those institutions themselves and private entities. Private donations "shall be used in accordance with the wishes of the donors of such funds," Va. Code § 23.1-101(2), and the General Assembly has encouraged distinct nonprofit entities to manage these private donations, rather than public universities and colleges themselves. *Id.* § 23.1-1010(3).

Petitioners also try to analogize to precedent distinguishing between proprietary and governmental functions for purposes of sovereign immunity. Opening Br. 22-23. But they cite no precedent finding the sovereign immunity doctrine relevant or at all related to legislative intent for VFOIA. There is no reason to conclude that one would have anything to say about the other: sovereign

immunity is a doctrine that concerns when the state is shielded from financial liability, while VFOIA is a carefully crafted statute governing the scope of public access to government records. *Cf. MacDougall v. Levick*, 65 Va. App. 223, 243 (2015) ("We generally reject the application of equitable doctrines in modern divorce suits because this body of law is now chiefly statutory in character.").

### B. The University's later acceptance of gifts and corresponding restrictions transforms private records into public business.

The circuit court correctly recognized that there is a line between matters of public and private business. As it held, records about donations from private entities are not 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. JA265-67. "Funds once accepted, transferred and used by a public body become public monies," and only then is "the public is entitled to know how those funds are spent by public officials." JA262, 264.

Thus, the circuit court held that once University personnel have accepted gifts through the Gift Acceptance Committee, those gifts and how they are spent becomes a matter of public business. JA267 ("The work of the Gift Acceptance Committee cannot be conducted in secrecy, and the acceptance of every gift or endowment, with terms that are approved by the Committee and the President of the University, or otherwise signed off by the appropriate University officials,

produces public records."). The Gift Acceptance Committee is a group comprised of both Foundation and University personnel that reviews and approves non-standard gifts. JA266 (Letter Op.); JA307 (Van Leunen testimony).

Although Petitioners do not mention or assign error to the circuit court's decision with respect to the Gift Acceptance Committee, it provides a vivid example of why Petitioners are wrong that the circuit court's ruling would render one of FOIA's exemptions superfluous. Opening Br. 20-22. That exemption excludes from FOIA's coverage certain personal information that is "maintained in connection with fundraising activities by or for a public institution of higher education." Va. Code § 2.2-3705.4(A)(7). Under the circuit court's ruling, the Gift Acceptance Committee maintains records "for" the University as part of fundraising activities. The exemption ensures that certain personal information in those records will be excluded from disclosure under VFOIA.

That exemption also does not presume that such personal information is or is not a public record. It instead exempts such information from disclosure only if it is "contained in a public record." Va. Code § 2.2-3705.4(A). The confidential personal information the exemption protects 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.

## CONCLUSION

The Foundation respectfully asks this Court to affirm.

Dated: May 13, 2019

Respectfully submitted,

*George Mason University Foundation, Inc.*

*/s/ Matthew A. Fitzgerald*

Matthew A. Fitzgerald (VSB No. 76725)
McGuireWoods LLP
Gateway Plaza
800 East Canal Street
Richmond, Virginia 23219
Telephone: (804) 775-4716
Facsimile: (804) 775-2251
mfitzgerald@mcguirewoods.com

E. Rebecca Gantt (VSB No. 83180)
McGuireWoods LLP
World Trade Center
101 West Main Street, Suite 9000
Telephone: (757) 640-3731
Facsimile: (757) 640-3940
rgantt@mcguirewoods.com

Sean F. Murphy (VSB No. 28415)
McGuireWoods LLP
1750 Tysons Blvd., Suite 1800
Tysons, Virginia 22102
Telephone: (703) 712-5487
Facsimile: (703) 712-5243
sfmurphy@mcguirewoods.com

## CERTIFICATE

The undersigned hereby certifies that on this 13th day of May, 2019, the foregoing Brief complies with Rule 5:26, as it does not exceed 50 pages excluding the portions of the brief exempted by Rule 5:6(a)(2). Counsel also certifies:

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

(2) Counsel for Respondent George Mason University Foundation, Inc. are:

Matthew A. Fitzgerald
McGUIREWOODS LLP
Gateway Plaza
800 East Canal Street
Richmond, Virginia 23219
Telephone: (804) 775-4716
mfitzgerald@mcguirewoods.com

E. Rebecca Gantt
McGUIREWOODS LLP
World Trade Center
101 West Main Street, Suite 9000
Norfolk, Virginia 23510
Telephone: (757) 640-3731
rgantt@mcguirewoods.com

Sean F. Murphy
McGUIREWOODS LLP
1750 Tysons Blvd.
Suite 1800
Tysons, Virginia 22102
Telephone: (703) 712-5487
sfmurphy@mcguirewoods.com

(3) The other Respondent in this case is George Mason University. Counsel for Respondent George Mason University are:

Toby J. Heytens
Michelle S. Kallen
OFFICE OF THE VIRGINIA ATTORNEY GENERAL
202 North Ninth St.
Richmond, VA 23219
Telephone: (804) 786-7240
solicitorgeneral@oag.state.va.us

David G. Drummey
Brian E. Walther
GEORGE MASON UNIVERSITY
Office of University Counsel
4400 University Drive
Fairfax, Virginia 22030
Telephone: (703) 993-2619
ddrummey@gmu.edu
bwalther@gmu.edu

(4) The Petitioners are Transparent GMU and Augustus Thomson. Counsel for the Petitioners is:

Evan D. Johns
APPALACHIAN MOUNTAIN ADVOCATES
415 Seventh St. NE
Charlottesville, Virginia 22902
Telephone: (434) 529-6787
ejohns@appalmad.org

(8) On this 13th day of May 2019, three copies of the foregoing Brief were hand delivered to the Clerk's Office of the Supreme Court of Virginia for filing, and electronic copy was filed through VACES, and one copy of the foregoing Brief was emailed to all counsel of record.

*/s/ Matthew A. Fitzgerald*