IN THE SUPREME COURT OF VIRGINIA

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Record No. 181375

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TRANSPARENT GMU and AUGUSTUS THOMSON,

Appellants,

v.

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

Appellees.

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# BRIEF OF APPELLEE GEORGE MASON UNIVERSITY

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## INTRODUCTION

More than 50 years ago, the General Assembly enacted the Virginia Freedom of Information Act (VFOIA). At that time, there were already a number of private foundations raising private funds for the ultimate benefit of public universities, including the foundation at issue in this case.[1] But even though the Commonwealth's public universities were themselves made subject to VFOIA, the General Assembly made no such decision with respect to foundations like the one at issue here.

Throughout VFOIA's existence, it has been understood that the statute does not extend to private foundations or the records of such foundations. Over the last half century (and against that baseline understanding) the number of private foundations has continued to grow and the General Assembly has amended VFOIA numerous times. None of these amendments, however, expanded VFOIA to cover records of private foundations that support public universities. The General Assembly has specifically considered bills that could have made such records subject to VFOIA. All such proposals have failed.

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[1] The parties have stipulated that the predecessor of the foundation at issue in this case "was formed . . . on February 10, 1966." JA 251. VFOIA was enacted two years later, in 1968.

In this case, petitioners seek to obtain through litigation what advocates have thus far been unable to accomplish through legislation. Petitioners' and amici's arguments about transparency and the public interest in understanding how the Commonwealth's public universities are being funded are weighty, important, and entitled to careful consideration. But the task of striking the proper balance between disclosure and privacy—as well as determining how any changes to longstanding and widespread understandings should be implemented going forward—belongs to the legislature, not the courts. The circuit court's decision properly respected that distinction, and its judgment should be affirmed.

## 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.

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.

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.

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.

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.

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.

## STATEMENT

1. During the 1999 legislative session, a bill was introduced to expand VFOIA's definition of "public body" to "[i]nclude[] foundations which exist for the primary purpose of supporting a public institution of higher education." That bill failed by a voice vote.[2] In 2007, the Virginia Freedom of Information Advisory Council (VFOIA Advisory Council or Council) acknowledged that "the issue about access to private foundations was settled 10 years ago in favor of not including them under FOIA." Report of the VFOIA Advisory Council to the Governor and the General Assembly of Virginia, House Document No. 42 (2007) at 19; *id.* at 17 ("in the late 1990's there had been an unsuccessful movement to open to public disclosure university foundation records").

In January 2017, a Senate bill was introduced seeking to "[e]xpand[] the definition of public body under [V]FOIA to include any foundation that exists for the primary purpose of supporting a public institution of higher education and that is exempt from taxation under

[2] Virginia's Legislative Information System, 1999 Session: HB 1659 Freedom of Information Act; higher education foundations, public; https://lis.virginia.gov/cgi-bin/legp604.exe?ses=991&typ=bil&val=HB1659.

§ 501(c)(3) of the Internal Revenue Code." JA 375–76 (reproducing bill).[3] That bill (SB 1436) was referred to the Senate Committee on General Laws and Technology and assigned to a subcommittee. JA 377. In February 2017, the bill was left in the subcommittee. JA 377.[4]

2. In April 2017, two months after SB 1436 failed, petitioners Transparent GMU and Augustus Thomson submitted separate VFOIA requests to George Mason University (GMU) and the George Mason University Foundation, Inc. (Foundation) requesting documents related to donations made or offered by certain donors or suspected donors. JA 91–94, 96–99, 254. GMU's FOIA Compliance Officer responded that

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[3] Virginia's Legislative Information System, 2017 Session: SB 1436 Virginia Freedom of Information Act; expands definition of public body, https://lis.virginia.gov/cgi-bin/legp604.exe?171+sum+SB1436.

[4] During the most recent legislative session, another bill was introduced to require more robust disclosure of information related to donations to public institutions of higher education. That bill would have "[r]equire[d] public institutions of higher education, when accepting a donation . . . that is conditioned upon the acceptance of certain terms and conditions . . . to provide the donor with a written document acknowledging the public institution of higher education's acceptance of such term of conditions" and "provide[d] that such document shall be subject to the provision of . . . [V]FOIA." Virginia's Legislative Information System, 2019 Session: HB 2386 Higher educational institutions, public; information relating to pledges and donations, https://lis.virginia.gov/cgi-bin/legp604.exe?191+cab+HC10114HB2386+BREF. That bill was referred to a House subcommittee, from which it did not reemerge. *Id.*

"[t]here are no public records in the possession of George Mason University which are responsive to your request." JA 164; see Va. Code Ann. § 2.2-3704.2(A) (requiring "[a]ll state public bodies . . . that are subject to the provisions of this chapter" to "designate and publicly identify one or more Freedom of Information Act officers"). In contrast, the Foundation's Chief Financial Officer responded that "[t]he Foundation is not a public body within the meaning of VFOIA, nor is it an agent of George Mason University with respect to the request in question." JA 424.

3. On May 26, 2017, petitioners sought mandamus relief against GMU and the Foundation, arguing that both entities violated VFOIA. JA 1–27. GMU and the Foundation demurred. JA 135–40. The circuit court sustained the demurrers in part, JA 141–43, and petitioners filed an amended petition for a writ of mandamus in October 2017 (Amended Petition), JA 144–83.

The Amended Petition alleged two claims against GMU: that GMU (1) "denied the Petitioners their rights under [VFOIA] by refusing to search for and provide requested records as the legal custodian of records held by its agent, the Foundation, in the transaction of public

business," JA 166; and (2) "denied the Petitioners their rights under [VFOIA] by refusing to search for and provide requested records as the legal custodian of records possessed and/or used in the transaction of public business by Dr. Janet E. Bingham, an officer, employee, and/or agent of the University." JA 172.

GMU and the Foundation again demurred. GMU argued that it was entitled to sovereign immunity, and the Foundation demurred on the ground that it was not a public body subject to VFOIA. JA 219–29. The Foundation also filed an answer responding to petitioners' claim that the Foundation's performance of public functions of University rendered the Foundation a "public body." JA 188–218.

The circuit court sustained GMU's demurrer in its entirety and sustained the Foundation's demurrer in part. JA 230–48. The circuit court dismissed petitioners' request for a declaratory judgment against GMU because VFOIA's waiver of sovereign immunity extends only to suits for mandamus and injunctive relief. JA 236–37.[5] The circuit court also concluded that piercing the Foundation's corporate veil was inappropriate because there is nothing wrongful or fraudulent about the

[5] Petitioners do not assign error to that ruling and it is not before this Court. See Va. Sup. Ct. R. 5:21(7).

Foundation. JA 238–40. The circuit court further held that VFOIA did not require GMU to search through and produce records held by the Foundation, and it dismissed the claims that GMU violated VFOIA by failing to search for records held by the dual employee of GMU and the Foundation. JA 240–43. The court explained that GMU is not the custodian of Foundation records and the fact that GMU and Foundation share a common employee does not make GMU the custodian of those records. *Id.*

GMU having been dismissed, the circuit court next conducted a trial about whether the Foundation is a "public body" subject to VFOIA and specifically found that it was not. JA 258–69. In particular, the circuit court found that the Foundation "is not an agency of the Commonwealth or any of its political subdivisions," and "the fact that a privately-formed Foundation 'serves' a University, even if that is its sole purpose, is not sufficient for the Court to conclude that it is a sub-entity of the public body it serves." JA 259, 263. The court emphasized that "the University is a public body, and . . . the records generated by the [University's] Gift Acceptance Committee and records of the University's decision to accept conditional gifts and use remain subject

to VFOIA." JA 258–59. But "[w]here the Virginia General Assembly has determined that certain entities ought to be subject to VFOIA," the circuit court explained, "it has specifically named them." JA 263. For that reason, the circuit court concluded "[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," especially because doing so would "require[] an examination and reformulation of public policy." JA 263, 268.

## STANDARD OF REVIEW

Whether a circuit court has correctly interpreted a statute involves a question of law that is reviewed de novo. *McGrath v. Dockendorf*, 292 Va. 834, 837, 793 S.E.2d 336, 337 (2016). But "when the proper construction of a [V]FOIA provision establishes a legal standard governing a factfinding exercise, [this Court] give[s] deference to the circuit court's findings of fact and view[s] the facts on appeal in the light most favorable to the prevailing party." *Fitzgerald v. Loudoun Cty. Sheriff's Office*, 289 Va. 499, 505, 771 S.E.2d 858, 860 (2015) (internal quotation marks and citation omitted). "Where divergent or conflicting inferences reasonably might be drawn from established facts

their determination is exclusively for the fact-finding body." *Id.* (quoting *Hopson v. Hungerford Coal Co.*, 187 Va. 299, 308, 46 S.E.2d 392, 396 (1948)).

## ARGUMENT

VFOIA provides that "[e]xcept as otherwise specifically provided by law, all public records shall be open to citizens of the Commonwealth." Va. Code Ann. § 2.2–3704(A). "Public records," in turn, are defined as (1) a specific kind of thing ("writings and recordings"), (2) "prepared or owned by, or in the possession of" (3) a certain type of entity ("a public body or its officers, employees, or agents") and (4) in a certain capacity ("in the transaction of public business"). Va. Code Ann. § 2.2–3701.[6]

It is common ground that the materials requested by petitioners constitute "writings" within the meaning of VFOIA. So, contrary to

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[6] The full definition reads:

> *"Public records"* means all writings and recordings that consist of letters, words or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostatting, photography, magnetic impulse, optical or magneto-optical form, mechanical or electronic recording or other form of data compilation, however stored, and regardless of physical form or characteristics, prepared or owned by, or in the possession of a public body or its officers, employees or agents in the transaction of public business.

petitioners' assertions (Pet. Br. 25), the "threshold question" is: What are the "public bod[ies]" at issue in this case? Only after that question is answered can a court determine the secondary questions of whether the requested writings are "prepared or owned by, or in the possession of" that public body or bodies "in the transaction of public business." Va Code. Ann. § 2.2-3701 (definition of "public records").[7]

Part I of this brief explains why there is only one "public body" at issue here (GMU) and why petitioners fail in their efforts to obscure

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[7] Section I of petitioners' brief takes a *limitation* within the definition of "public record"—that is, that the preparing, owning, or possession of the record must be done "in transaction in public business," Va. Code Ann. § 2.2-3701—and suggests that engaging in "public business" is, by itself, sufficient to create a "public record" subject to VFOIA. See Pet. Br. 21–22. That is incorrect. The "public business" question is irrelevant if the Foundation's "writings or recordings" were not "prepared or owned by, or in the possession of a public body or its officers, employees or agents." Va. Code Ann. § 2.2-3701; see also Foundation Br. 30–35 (arguing that the requested records do not address "the transaction of public business").

The distinction between records involving the "transaction of public business" and those "prepared or owned by, or in the possession of" a public body or bodies "in the transaction of public business," Va Code. Ann. § 2.2-3701, is evident when considering interactions between private citizens and public universities. For example, documents exchanged between a student and the university can be part of the transaction of "public business." But because the university is a "public body" while the student is not, a copy of that document in the university's files can be a "public record" but a copy of the same document in the student's home office cannot.

that fact by arguing that the Foundation is GMU's agent (Pet. Br. 25–35) or that it is an "entity" (*id.* at 39–44) or even an "alter ego" (*id.* at 46–49) of GMU. Part II then explains that, regardless of whether GMU and the Foundation share a common employee, Foundation records are not records "prepared or owned by, or in the possession of" *GMU* "in the transaction of public business." Va Code. Ann. § 2.2-3701. Part III explains why GMU has no obligations under VFOIA with respect to Foundation records not in GMU's possession.

## I. The only "public body" here is GMU, and the Foundation is not part of GMU

Like "public records," VFOIA provides a detailed definition of "public body." Va. Code Ann. § 2.2-3701.[8] There is no question that

[8] The full definition reads:

> *"Public body"* means any legislative body, authority, board, bureau, commission, district or agency of the Commonwealth or of any political subdivision of the Commonwealth, including cities, towns and counties, municipal councils, governing bodies of counties, school boards and planning commissions; governing boards of public institutions of higher education; and other organizations, corporations or agencies in the Commonwealth supported wholly or principally by public funds. It shall include (i) the Virginia Birth-Related Neurological Injury Compensation Program and its board of directors established pursuant to Chapter 50 (§ 38.2-5000 et seq.) of Title 38.2 and (ii) any committee, subcommittee, or other entity however designated, of the public body created to perform delegated functions of the

GMU satisfies that definition, which specifically references "governing boards of public institutions of higher education." Va. Code Ann. § 2.2-3701. That matters. Most notably, it means that GMU cannot, contrary to petitioners' suggestions, "shroud its essential activities in secrecy by outsourcing them to a private corporation subject to its control." Pet. Br. 49. Rather, as the circuit court recognized, "any agreement by the President of the University and any concurrence or support by the Gift Acceptance Committee is a public record," JA 268 n.2, and thus "[t]he University's acceptance of any condition or restriction on the use of donated funds necessarily produces a record that is subject to VFOIA," JA 267.[9]

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> public body or to advise the public body. It shall not exclude any such committee, subcommittee or entity because it has private sector or citizen members. Corporations organized by the Virginia Retirement System are "public bodies" for purposes of this chapter.
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> For the purposes of the provisions of this chapter applicable to access to public records, constitutional officers and private police departments as defined in § 9.1-101 shall be considered public bodies and, except as otherwise expressly provided by law, shall have the same obligations to disclose public records as other custodians of public records.

[9] As the circuit court explained, see JA 267, the fact that GMU records—including GMU records involving fundraising—are subject to VFOIA explains why the General Assembly specifically exempted from

Petitioners, however, would go one large step further and treat the Foundation as legally indistinguishable from (or even a part of) GMU.[10] As the circuit court correctly recognized, all of those efforts fail.

### A. The Foundation is not an alter ego of GMU

Petitioners have stipulated that "[t]he Foundation is a non-stock corporation organized under the laws of Virginia, registered and qualified to do business in Virginia and in good standing with the State Corporation Commission." JA 253. Petitioners nonetheless argue that the Foundation's separate legal identity should be "[d]isregard[ed]" because the Foundation is simply "an alter ego" of GMU. Pet. Br. 46; see *id.* at 46–49. The circuit court correctly rejected that argument. JA 238–40.

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disclosure certain "[i]nformation maintained in connection with fundraising activities by or for a public institution of higher education." Va. Code Ann. § 2.2-3705.4(7).

In contrast, petitioners overread Code § 2.2-3705.4(7) as proving that "the Act's statutory exceptions prove the rule." Pet. Br. 20. GMU does not dispute that Section 2.2-3705.4(7) can be relevant when assessing what information in *GMU* documents is subject to disclosure under VFOIA. But that exemption is relevant here only if VFOIA applies to Foundation records in the first place. And, for the reasons explained in part, it does not.

[10] The Foundation's brief explains why the Foundation is not itself a "public body" within the meaning of VFOIA. Foundation Br. 9–30.

1. "In Virginia, unlike in some states, the standards for veil piercing are very stringent, and piercing is an extraordinary measure that is permitted only in the most egregious circumstances." *C.F. Tr., Inc. v. First Flight L.P.*, 266 Va. 3, 12, 580 S.E.2d 806, 811 (2003). It is not enough to show that GMU and the Foundation have a close relationship. Rather, petitioners must establish that GMU and the Foundation have such "unity of interest and ownership" that their separate identities "no longer exist," and that the Foundation was used "to evade a personal obligation, to perpetrate a fraud or a crime, to commit an injustice, or to gain an unfair advantage." *Id.*; *Cheatle v. Rudd's Swimming Pool Supply Co.*, 234 Va. 207, 212, 360 S.E.2d 828, 831 (1987) (a party urging veil-piercing "must show that the corporate entity was the alter ego, alias, stooge, or dummy of the individuals sought to be charged personally").

2. The circuit court correctly found that petitioners fell far short of that required showing.

For one thing, "there was no evidence that [the Foundation] was created as a sham entity." JA 238; see *id.* (noting that petitioners "cannot assert that the corporate entity here, the Foundation, is a sham

entity"). As the circuit court correctly recognized, under this Court's decisions, that fact is "dispositive." JA 238 (discussing *RF & P Corp. v. Little*, 247 Va. 309, 316, 440 S.E.2d 908, 913 (1994)).

In addition, in Virginia, veil-piercing requires "undue domination and control" by the party to be held responsible (here, GMU) over the entity (here, the Foundation) whose separate existence is to be disregarded. See *Beale v. Kappa Alpha Order*, 192 Va. 382, 396, 64 S.E.2d 789, 797 (1951) (stating that before "the parent corporation held liable for the acts of its subsidiary . . . it must be shown . . . that undue domination and control was exercised by the parent corporation over the subsidiary") (quotation marks and citation omitted). Because petitioners do not argue that GMU has "undue domination" over the Foundation, their efforts to disregard the Foundation's separate legal existence fail for that reason alone.

Finally, "[r]egardless of how many 'indicia of control' there are between [GMU] and the Foundation, it cannot be said to be *impermissible* control when it is exactly the sort of control envisioned by the General Assembly and prescribed by law." JA 239. As the circuit court explained, the General Assembly has specifically authorized

public universities to "[c]reate or continue the existence of one or more nonprofit entities for the purpose of soliciting, accepting, managing, and administering grants and gifts and bequests." JA 239 n.4 (quoting Va. Code Ann. § 23.1-1010(3)). These provisions underscore the "General Assembly's intent to protect public universities and colleges from being placed at a competitive disadvantage in relation to private universities and colleges." *American Tradition Inst. v. Rector & Visitors of Univ. of Virginia*, 287 Va. 330, 342, 756 S.E.2d 435, 442 (2014). And in this context—as in the "higher education research" context at issue in *American Tradition Institute*—"competitive disadvantage" includes rules that would "undermin[e] . . . expectations of privacy and confidentiality." *Id.*; see Va. Code Ann. § 23.1-101(1) (2016) ("It is the public policy of the Commonwealth that" public colleges and universities "shall be encouraged in their attempts to increase their endowment funds and unrestricted gifts from private sources and reduce the hesitation of prospective donors to make contributions and unrestricted gifts.").

Petitioners' attack a straw man in arguing that veil-piercing does not "require[] explicitly unlawful conduct." Pet. Br. 47. Petitioners

concede, as they must, that treating one entity as an alter ego of another "is an equitable remedy." Pet. Br. 46. And petitioners identify no evidence that GMU's relationship to the Foundation was in any way improper or inconsistent with the General Assembly's specific blessing of such relationships in Code § 23.1-1010(3).

As the circuit court aptly reasoned, the sort of relationship that exists between GMU and the University "is not conduct that warrants the remedy of veil piercing when it has been expressly authorized by the General Assembly." JA 239. The circuit court's decision is thus consistent with this Court's instruction that "only an extraordinary exception justifies disregarding the corporate entity and piercing the veil." *C.F. Tr.*, 266 Va. at 10, 580 S.E.2d at 809 (internal quotation marks and citation omitted).

### B. The Foundation is not a committee, subcommittee, or other entity designed to perform GMU's delegated function

VFOIA's definition of "public body" includes "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." Va. Code Ann. § 2.2-3701. Petitioners argue that the Foundation is an "entity of" GMU that was "created to perform

delegated functions of the public body" within the meaning of that provision. Pet. Br. 39–44. As the circuit court correctly concluded, JA 263–64, that argument fails as well.

1. According to petitioners, the views of the VFOIA Advisory Council are "'entitled to great weight' by this Court." Pet. Br. 31 (quoting *Almond v. Gilmer*, 188 Va. 822, 845, 51 S.E.2d 272, 281 (1949)); see Va Code Ann. § 30-179(1) (authorizing the Council to "[f]urnish . . . advisory opinions or guidelines" about "the Freedom of Information Act"); *Fitzgerald*, 289 Va. at 504–05 & n.2, 771 S.E.2d at 860 & n.2 (stating that Court's review "takes into account any informative views on the legal meaning of statutory terms offered by those authorized by law to provide advisory opinions" and that the Court had "reviewed the advisory opinions of" the Council in case involving FOIA). Given that, it is surely significant that the Council has repeatedly *rejected* the view that private organizations like the Foundation should be treated as "entit[ies] . . . of" the public bodies for which they raise money.

For example, in 2009, the Council advised that the American Frontier Culture Foundation—which raised money for the Virginia

Frontier Culture Museum, a public entity—was not subject to VFOIA. In reaching this conclusion, the Council reasoned that, "[a]s a separate corporation, the Foundation is not a committee, subcommittee, *or other entity* however designated, of the Museum." Staff Opinion, VFOIA Advisory Council, No. AO-09-09 & n.2 (Oct. 23, 2009) (emphasis added); accord Staff Opinion, VFOIA Advisory Council, No. AO-10-06 (Oct. 25, 2006) (advising that a nonprofit foundation was "is not a committee, subcommittee, or other entity of any public body").

The same is true of Virginia's Attorney General. In fact, no fewer than four Attorney General opinions—issued by three different Attorneys General over the course of more than two decades—have concluded that "tax-exempt foundations organized for the purposes of administering endowments and providing other financial management arrangements for state universities *are not a part of the universities*" and therefore "need only comply with the laws that govern such corporations." 1996 Va. Op. Att'y Gen. 15 & n.5 (emphasis added) (citing previous opinions). Here, as in other cases, "[t]he General Assembly has taken no corrective action to dispel the Attorney General's conclusion."

*Daily Press, LLC v. Office of Exec. Sec'y of Supreme Court*, 293 Va. 551, 559, 800 S.E.2d 822, 825 (2017).

2. As with the museum foundation at issue in the VFOIA Advisory Council's 2009 opinion, petitioners may "feel that a fundraising entity" that raises funds to benefit "a government agency . . . should itself be treated as a government agency for FOIA purposes." Staff Opinion, VFOIA Advisory Council, No. AO-09-09 (Oct. 23, 2009). "However, that is not the case under the current state of the law." *Id.* In fact, despite petitioners' claims that "the 2001 amendment" to Code § 3701 (which added the phrase "other entity" to the definition of public body) "must be read to cover entities, including nonstock corporations that, despite their separate legal identity, were nonetheless created to perform delegated functions of a public body" Pet. Br. 40, petitioners fail to cite a single instance in the 18 years since the 2001 amendment to VFOIA interpreting "other entity" to include a nonprofit foundation.

### C. The Foundation is not GMU's "agent" for VFOIA purposes

VFOIA's definition of "public records" includes documents "prepared or owned by, or in the possession of a public body or *its*

officers, employees or *agents* in the transaction of public business." Va. Code Ann. § 2.2-3701 (emphasis added). As relevant here, petitioners argue that GMU "is a *custodian* of public records that the Foundation holds *as an agent of*" GMU. Pet. Br. 25 (emphasis added); see *id.* at 25–35.

1. Petitioners' argument on this point creates unnecessary confusion because the term "custodian" is not part of the definition of "public record." Petitioners conflate two separate questions: (a) Is a particular item a public record?; and (b) If so, who is required to produce or permit access to it? Contrary to petitioners' arguments, VFOIA prescribes no freestanding "who is the custodian?" analysis for determining whether a given document is covered by VFOIA in the first place. Instead, that question arises only after the statute's requirements for "public record" are met and solely for the purpose of determining the identity of the person who is responsible for permitting access to a given public record. See Va. Code Ann. § 2.2-3704(A) (stating that, "[e]xcept as otherwise specifically provided by law, all public records shall be open [to proper parties] during the regular office hours of the custodian of such records"); see *id.* (stating that "[a]ccess . . . .

shall be provided by the custodian," who "may require the requestor to provide his name and legal address" and "shall take all necessary precautions for their preservation and safekeeping").

2. The question, instead, is more straightforward: With respect to Foundation records, is the Foundation the "agent" of GMU? Va. Code Ann. § 2.2-3701 (definition of "public records"). The answer is no.

"Agency is a fiduciary relationship resulting from one person's manifestation of consent to another person that the other shall act on his behalf and subject to his control, and the other person's manifestation of consent so to act." *Reistroffer v. Person*, 247 Va. 45, 48, 439 S.E.2d 376, 378 (1994). "[A]n agency relationship is never presumed," and "the party alleging an agency relationship bears the burden of proving it." *State Farm Mut. Auto. Ins. Co. v. Weisman*, 247 Va. 199, 203, 441 S.E.2d 16, 19 (1994).

The only support petitioners cite for their assertion that the Foundation is an "agent" of GMU is *Acordia of Virginia Ins. Agency, Inc. v. Genito Glenn, L.P.*, 263 Va. 377, 384, 560 S.E.2d 246, 249 (2002). But, contrary to petitioners' representation, *Acordia* does not support the broad proposition that VFOIA's reach "extends to records held by an

entity that has agreed to act on a public body's behalf and subject to its control." Pet. Br. 26. *Acordia* merely addresses general principles of agency law; it does not address VFOIA at all nor does it address public bodies. Petitioners do not cite a single case holding that a university foundation (or any foundation for that matter) is an agent of the "public body" it supports.

What is more, the VFOIA Advisory Council has squarely rejected the view that a foundation supporting a public institution is that public institution's "agent." In a 2009 advisory opinion, for example, the Council concluded that no "agency relationship . . . exist[ed]," even though a foundation supporting a public museum was described on a museum's website as "a tax-exempt, 501(c)(3) organization, founded . . . to support the . . . Museum's educational mission." Staff Opinion, VFOIA Advisory Council, No. AO-09-09 & n.2 (Oct. 23, 2009); see also Pet. Br. 31 (stating that, "[g]iven the Council's expertise and familiarity with the Act, its interpretation is the sort of long-standing administrative construction 'entitled to great weight' by this Court.").[11]

[11] In addition, as the Foundation explains in its brief, petitioners "in effect had the chance to prove agency anyway at trial" but "failed to do so." Foundation Br. 28.

## II. The fact that GMU and the Foundation share a common employee does not mean that GMU "prepared," "own[s]," or "possess[es]" Foundation records

As the previous Part explained, VFOIA only covers records "prepared or owned by, or in the possession of a public body," and the only "public body" at issue here is GMU. Although the bulk of petitioners' arguments fail at the "public body" stage of the analysis, petitioners also argue that GMU has VFOIA obligations regarding Foundation records because a single person served as both Vice-President for University Development and Alumni Affairs and CEO of the Foundation. See Pet. Br. 35–37. The circuit court properly rejected that claim as well. JA 241–43.

A. The Amended Petition summarily asserts that the requested documents "are in the possession of *and/or are used* by Dr. Bingham . . . in the performance of fundraising and endowment management activities—both of which are forms of 'public business'—for the benefit of the University." JA 173 (emphasis added). Petitioners criticize the circuit court for "not consider[ing] whether Dr. Bingham *in fact* used or possessed the requested agreements in performing her duties as a University officer." Pet. Br. 36.

B. The definition of "public record," however, does not hinge on how the records at issue are used or who may have access to those records. Instead, "public records" are writings or recordings "*prepared* or *owned* by, or *in the possession of* a public body or its officers, employees or agents in the transaction of public business." Va. Code Ann. § 2.2-3701 (emphases added). Even accepting that Dr. Bingham, at some point, accessed or used certain records "in the performance of fundraising and endowment management activities," that alone would not be sufficient to make those "public records" subject to VFOIA. The Amended Petition does not allege that, at the time of the VFOIA request, Dr. Bingham prepared, owned, or possessed the records in her role as Vice President of Development at GMU.[12]

As the circuit court correctly explained, "Dr. Bingham wears 'two hats,' and the functions she performs while wearing one are not imputed into her position under the other." JA 242. The reason is

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[12] What is more, petitioners' raw assertion that that the requested documents were in the possession of *and/or* are used by Dr. Bingham in her capacity as a University employee is conclusory and need not be accepted as true for purposes of a demurrer. *Terry v. Irish Fleet, Inc.*, 296 Va. 129, 133, 818 S.E.2d 788, 790 (2018) (this Court is "not bound . . . by the conclusory allegations set forth in the amended complaint") (internal quotation marks and citations omitted).

simple: "It is the *position* over which [a] corporation has control, not the *person*." *Id.* (emphasis added); accord *United States v. Bestfoods*, 524 U.S. 51, 69 (1998) (noting the "well established principle [of corporate law] that directors and officers holding positions with a parent and its subsidiary can and do 'change hats' to represent the two corporations separately, despite their common ownership") (internal quotation marks and citation omitted). Because GMU and the Foundation are "distinct legal entities," the fact that they share certain employees "does not alter the separate character of the two" entities. *RF & P Corp.*, 247 Va. at 316, 440 S.E.2d at 913.

"To the extent that" Dr. Bingham—like any other University employee—"conducts activities outside of her position at GMU, the University does not have authority and control over her, and she is not an agent of the University with respect to those activities." JA 242. Indeed, public entities have relationships with all kinds of individuals. For example, the Commonwealth's public universities have boards of visitors. While records created or possessed in their capacity as board

members are subject to VFOIA, the statute does not reach records those board members create or possess in connection with their day jobs.[13]

In short, Dr. Bingham's dual roles with GMU and the Foundation do not impose on GMU an obligation to disregard the Foundation's corporate structure and search for and produce Foundation records. See *Washington & Old Dominion Users Ass'n v. Washington & Old Dominion R. R.*, 208 Va. 1, 6, 155 S.E.2d 322, 325 (1967) (refusing to disregard separate corporate existence of wholly owned subsidiary even though "most of the officers and directors" of the subsidiary "have also been officers and directors" of the parent).[14]

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[13] This idea is not unique to universities. As the VFOIA Advisory Council has explained, "[t]hat two members of a public body also serve as members of the board of a private entity does not by itself transform that private entity into a public body subject to FOIA." Staff Opinion, VFOIA Advisory Council, No. AO-09-05 (July 19, 2005).

[14] Additional fact-finding on this issue would not be appropriate. Petitioners chose not to call Dr. Bingham to testify at trial. Moreover, although petitioners called the Foundation's Chief Financial Officer, JA 276, and asked her questions about Dr. Bingham's roles, JA 311–12, they elected not to ask about Dr. Bingham's interactions with the records at issue in this case.

## III. Because GMU and the Foundation are separate entities, GMU is not required to produce records it does not actually possess

Virginia law sets forth two situations where a public body must produce records it does not actually possess. This case involves neither of them.

For example, VFOIA provides that "a public body [that] has transferred possession of public records to any entity . . . for storage, maintenance, and archiving . . . shall remain the custodian of such records for purposes of responding to requests for public records made pursuant to this chapter." Va. Code Ann. § 2.2-3704(J) (2017). That provision does not apply here. Petitioners do not allege that the requested records originated with GMU, much less that they were "transferred" to the Foundation[15]

The other instance wherein a public body must respond to VFOIA requests for public records that public body does not possess arises when the public body cannot find the records but "knows that another public body has the requested records." Va Code Ann. § 2.2-3074(B)(3).

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[15] Contrary to petitioners' representation, the circuit court did not refer to this provision "to narrow the breadth of" VFOIA. Pet. Br. 33. Instead, as explained in the text, this provision establishes out one of two situations where a public body has responsibilities with respect to records not in the public body's custody.

In that situation, the public body that received the VFOIA request must respond with "contact information for the . . . public body" that has the requested documents. *Id.* That provision is inapplicable for two reasons. First, because it does not apply unless the requested records are, in fact, "public records." Va. Code Ann. § 2.2-3704(B). Second, here—for reasons that have already been explained—there is not "*another public body* [that] has the requested records." *Id.* § 2.2-3074(B)(3) (emphasis added).

* * *

Petitioners and their amici emphasize the overarching purposes of VFOIA and argue that those purposes would be better served by applying VFOIA to private foundations that raise funds for the benefit of public universities. See, *e.g.*, Pet. Br. 17, 23; Virginia Coalition for Open Government Amicus Br. 9–11; Brechner Center Amicus Br. (Brechner Br.) 5–14. They also appeal to cases from other jurisdictions interpreting other statutes, see Pet. Br. 24–25; Brechner Br. 14–18, and repeatedly emphasize the General Assembly's directive that VFOIA "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." Va. Code Ann. § 2.2-3700; Pet. Br. 17, 32, 34, 42.

As this Court has recently and unanimously reaffirmed, however: "[L]iberal construction of a statute is one thing. Substituting [the Court's] judgment for what the General Assembly has expressed would be another." *Daily Press, LLC*, 293 Va. at 563, 800 S.E.2d at 827. For that reason, the Court has specifically rejected the argument that FOIA's "liberal construction" language "invit[es] the judiciary . . . to rewrite the provisions of FOIA as [it] deem[s] proper or advisable." *Beck v. Shelton*, 267 Va. 482, 488, 593 S.E.2d 195, 198 (2004). The circuit court properly followed these principles, noting that "Virginia courts . . . rely on the plain statutory expressions by the General Assembly rather than seeking to project any unspoken purpose behind the definitions of what constitute a public body or a public function." JA 266.

The VFOIA Advisory Council has aptly explained that "[a]ny change to current law that might bring such entities [as foundations] within the ambit of FOIA would require a policy decision and action by the General Assembly." Staff Opinion, VFOIA Advisory Council, No. AO-09-09 (Oct. 23, 2009); accord JA 268 (circuit court stating that "[a]

decision to treat the Foundation as a public entity requires an examination and reformulation of public policy . . . charting new public policy issues, especially those affecting VFOIA, fall within the purview of the General Assembly and not of the courts"). The General Assembly has considered such bills in the past and may do so again in the future. But under our "regime of separated powers" "[p]ublic policy questions concerning where to draw the line with respect to VFOIA fall within the purview of the General Assembly" and this Court's "function is limited to adjudicating a question of law" as VFOIA currently exists, not as litigants may wish it were. *Daily Press, LLC*, 293 Va. at 557, 800 S.E.2d at 824. The circuit court properly respected that distinction and its decision should be affirmed.

## CONCLUSION

The judgment of the circuit court should be affirmed.

Respectfully submitted,

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## CERTIFICATE OF SERVICE AND FILING

I certify that, on May 17, 2019, this brief was filed electronically with the Court, in Portable Document Format, and three printed copies were hand-delivered to the Clerk's Office in compliance with Rule 5:26(e). This brief complies with Rule 5:26(b) because the portion subject to that rule does not exceed 50 pages. A copy was also electronically mailed to:


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