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by Fed Ex

October 19, 2017

Hon. John T. Frey, Clerk
Circuit Court of Fairfax County
4110 Chain Bridge Road
Fairfax, VA 22030

Re: Transparent GMU et al. v. George Mason University and George Mason University Foundation, Inc., Civil Case No. 2017-7484

Dear Sir or Madam:

Enclosed for filing in the above-captioned matter, on behalf of the the Virginia Coalition for Open Government is a motion for leave to file brief *amicus curiae*, and the brief itself.

Thank you for your assistance, and please do not hesitate to call with any questions your office may have about this filing.

Very truly yours,

Christopher Gatewood

Enclosures:
Motion, Brief *Amicus Curiae*

cc: Counsel of Record

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

TRANSPARENT GMU, an unincorporated Virginia association, and AUGUSTUS THOMSON, Petitioners; v. GEORGE MASON UNIVERSITY, and GEORGE MASON UNIVERSITY FOUNDATION, INC. a Virginia corporation, Respondents.	)	Civil Case No. 2017-7484

MOTION FOR LEAVE TO FILE
BRIEF *AMICUS CURIAE*

Now comes the Virginia Coalition for Open Government, Inc. (VCOG), by counsel, and moves this Court for leave to file its brief *amicus curiae* in this matter. The brief is submitted herewith. In support of its motion, VCOG states:

1. Founded in 1996, VCOG is a nonpartisan, nonprofit membership organization dedicated to protecting the rights of Virginia residents to open access to public records and proceedings. VCOG appears regularly as a friend-of-the-court in cases implicating the public's right-to-know.

2. This case, involving the public's right of access to records about how public money is spent by public agencies, goes to the core of the intent and function of the Virginia Freedom of Information Act. While VCOG typically appears as amicus at the appellate stage of cases, the position being advanced in this case presents such a threat to the continued vitality of the FOIA statute that VCOG seeks leave to appear at this earlier stage of the proceedings.

3. VCOG's brief is in support of the Petitioners.

4. VCOG certifies that it has sought to obtain consent of all parties.

5. The Petitioners have consented to this motion.

6. George Mason University has consented to this motion. VCOG has no objection to responsive briefing by George Mason University.

7. In the limited time between VCOG's request for consent and the filing of this motion, VCOG has not heard a response from the George Mason University Foundation.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I, Christopher E. Gatewood, certify that on October 19, 2017, I sent a true copy of the foregoing via electronic mail and United States mail, postage prepaid to:

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IN THE NINETEENTH JUDICIAL CIRCUIT, COUNTY OF FAIRFAX

TRANSPARENT GMU AND
AUGUST THOMSON,

Plaintiffs, Case No. CL 2017-7484

v.

GEORGE MASON UNIVERSITY AND
GEORGE MASON UNIVERSITY FOUNDATION, INC.,

Defendants.

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

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INTEREST OF AMICUS CURIAE

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

This case, involving the public's right of access to records about how public money is spent by public agencies, goes to the core of the intent and function of the Virginia Freedom of Information Act. While VCOG typically appears as amicus at the appellate stage of cases, the position being advanced in this case presents such an existential threat to the continued vitality of the FOIA statute that VCOG seeks leave to appear to ensure that the public's right of access is not clouded by the unsupportable extension of the doctrine of sovereign immunity that is being urged here.

I. ARGUMENT AND AUTHORITY

A. A narrow construction of the Freedom of Information Act is both dangerous and unsupported by law

Access to public records is the lifeblood of informed citizens and voters, and of investigative journalism. A very few recent examples make the case. Public records enabled Florida journalists to document that police officers were routinely driving at speeds as high as 130 mph even when not pursuing a suspect, at times with disastrous results.[1] Public records exposed massive cheating by Atlanta schoolteachers and administrators, 11 of whom ultimately were convicted of crimes, in falsifying standardized-test scores to inflate schools' performance.[2] *Chicago Tribune* reporters used public records to document rampant safety hazards in Illinois' group homes for the disabled, and to expose systematic under-reporting of abuse cases.[3] *The Los Angeles Times* mined a mountain of public records to document how a mismanaged community college district was swindled by developers and gave sweetheart construction contracts to insiders as part of a $5.7 billion building binge.[4] This kind of civic watchdog journalism demands meaningful access to government records, in whatever form they are kept, wherever they are held. To adopt the Defendants' bizarre and unprecedented construction of the Freedom of Information Act ("FOIA") would place at risk the public's ability to oversee the activities of powerful and well-funded government agencies, including state universities. This is a construction never recognized or even suggested in decades of judicial application of the Act.

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[1] Sally Kestin & John Maines, *Cops among Florida's worst speeders, Sun Sentinel investigation finds*, THE SUN-SENTINEL (Feb. 1, 2012).
[2] Valerie Strauss, *How and why convicted Atlanta teachers cheated on standardized tests*, THE WASHINGTON POST (April 1, 2015).
[3] Michael J. Berens & Patricia Callahan, *Illinois hides abuse and neglect of adults with disabilities*, CHICAGO TRIBUNE (Nov. 21, 2016).
[4] Gale Holland & Michael Finnegan, *Billions to Spend*, LOS ANGELES TIMES (Aug. 30, 2012).

To indulge Defendants' insistence on construing FOIA narrowly against state agencies would actively and aggressively alter the statute. Such an action would remove from the statute an unambiguous directive to the contrary. The General Assembly's intent that FOIA be construed broadly appears right on the face of the statute:

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

Va. Code § 2.2-3700(B) (emphasis added).

The statute requires liberal construction, and requires that any exemptions remain narrow. The statute exists solely to govern the sovereign. It is ridiculous to argue that a narrow interpretation is required to apply it to the sovereign. Over the nearly 50-year history of the statute, no court has ever adopted the sovereign immunity-based construction that Defendants urge. To the contrary, Virginia courts have consistently held state agencies to the standard that appears on the face of the statute: The right of access is broadly construed and exemptions to that right are, accordingly, to be narrowly construed.

As the Virginia Supreme Court recently reaffirmed:

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

Fitzgerald v. Loudoun Cnty. Sheriff's Office, 289 Va. 499, 505 (2015). This principle has been applied many, many times in cases involving state agency defendants such as the University here, without the slightest indication that Virginia courts view the right of access to information to be constrained by sovereign immunity. *See, e.g., American Tradition Inst. v. Rector and Visitors of*

Univ. of Va., 287 Va. 330 (2014) (applying VFOIA to state university); *Christian v. State Corp. Comm'n*, 282 Va. 392 (2011) (applying VFOIA to state executive branch agency).

Just recently, the Virginia Supreme Court entertained a mandamus action under VFOIA seeking records from a state agency, the Department of Transportation, and the Court invoked VFOIA's broad statutory right of access without the slightest indication that the right should apply in any diminished manner when a state agency is the defendant:

> The intent of the General Assembly in enacting the FOIA is clearly expressed in its provisions. As pertinent here, the General Assembly's intent is to ensure the people of the Commonwealth ready access to records in the custody of a public body or its officers and employees so as to promote an increased awareness by all persons of governmental activities and afford every opportunity to citizens to witness the operations of government. Code § 2.2-3700(B). To effectuate that intent, the General Assembly has expressly provided that the provisions of the FOIA are to be liberally construed.

Cartwright v. Commonwealth Trans. Com'r, 270 Va. 58 (2005) (internal quotes and brackets omitted). Defendant asks this Court to disregard both the language of the statute and Supreme Court precedent.

Defendant's novel and farfetched interpretation would upend a half-century's worth of established law. To accept this unprecedented interpretation, the Court would have to ignore Virginia's time-honored principle of statutory construction that statutes are to be read in accord with their plain wording so that no provision is rendered surplus or inoperative. *See Epps v. Virginia*, 46 Va. App. 161 (2006) ("The rules of statutory interpretation argue against reading any legislative enactment in a manner that will make a portion of it useless, repetitious, or absurd. On the contrary, it is well established that every act of the legislature should be read so as to give reasonable effect to every word.") (*quoting Jones v. Conwell*, 227 Va. 176, 181 (1984)). To narrow the FOI statute as Defendants ask would require assuming that the legislature did not mean what it said in Section 2.2-3700(B).

None of the policies or purposes underlying sovereign immunity is advanced by Defendant's distorted reading of the doctrine. As Virginia's Supreme Court has explained, sovereign immunity is intended to fulfill important government efficiency interests including "protecting the public purse, providing for smooth operation of government, eliminating public inconvenience and danger that might spring from officials being fearful to act, assuring that citizens will be willing to take public jobs, and preventing citizens from improperly influencing the conduct of governmental affairs through the threat or use of vexatious litigation." *Messina v. Burden*, 228 Va. 301 (1984). To make the public's clear entitlement to records from state agencies less clear does not fulfill any of these objectives and, to the contrary, undermines them. There will be more litigation, not less, if sovereign immunity is suddenly recognized as upending half a century of settled law so that categories of records once known to be publicly accessible now exist in an uncertain limbo state.

B. Plaintiff's claim relies on plain, vanilla FOIA principles

The Defendants' suggestions in this case require a great leap of judicial activism and the rewriting of a clear statute, contrary to decades of Supreme Court precedent. The Plaintiff seeks routine application of established law. Plaintiff simply asks that FOIA be enforced according to its terms, and according to the directions of the Supreme Court.

Defendant's contention that FOIA applies only to records in the immediate physical possession of an agency does not read the statute "narrowly" – it reads the statute out of existence. If it were possible for agencies to evade compliance with their public accountability obligations simply by "parking" records with an agent or intermediary, VFOIA would be "interpreted" out of existence. The absurd result of the rule that Defendants urge is self-evident. An agency could put its records beyond the reach of a freedom-of-information request by contracting with a private

storage warehouse, by handing off its most unflattering records to a law firm or auditor, or by creating any type of off-shot or related entity that is not the agency itself.

This scenario has been litigated many times over, and it is well-established that records do not cease to become "public" merely because they are held by an agent or intermediary. For example, when Florida State University denied journalists' request for records created by the NCAA (a private entity) and "parked" in an online workspace for FSU officials to review, the Florida courts readily saw through the artifice: "It makes no difference that the records in question are in the hands of a private party. If they are public records, they are subject to compelled disclosure under the law." *NCAA v. Associated Press*, 18 So. 3d 1201, 1210 (Fla. 1st DCA 2009). Similarly, when an Ohio county commission resisted a journalist's request to inspect records regarding cost overruns in the construction of a county stadium by arguing that the records were in the possession of a private construction company, the Ohio Supreme Court found the physical custody of the records to be immaterial, so long as the public agency had a right to access the records: "[G]overnmental entities cannot conceal information concerning public duties by delegating these duties to a private entity." *State ex rel. Cincinnati Enquirer v. Krings*, 93 Ohio St.3d 654, 659 (Ohio 2001).

More to the point, the Foundation is *not* a law firm or auditor or construction contractor – it is, in every meaningful way, an interchangeable alter ego with the University itself. The identity of interests between the Defendants is detailed in Plaintiff's Verified Petition for Mandamus, Injunctive, and Declaratory Relief. The indicators are unmistakable that the Foundation is, in every meaningful legal sense, a part of the University.[5] Consider these factors:

[5] Many court rulings and attorney general's interpretations across the country, applying statutes functionally equivalent to Virginia FOIA, have granted the public access to the records of

- The Foundation's stated purpose for existing is to advance the objectives of the University
- The Foundation's board, officers and staff intertwine with the University's
- The Foundation enjoys unique access to the University's marks and logos
- The Foundation has responsibility not only for acknowledging gifts to the Foundation, but for acknowledging gifts made directly to the University itself
- The Foundation's grant acceptance policies are subject to approval by the University
- The Foundation is obligated to provide the University access to its records on request
- The Foundation occupies rent-free space on the University campus
- The Foundation's website utilizes the .edu internet domain of the University
- The Foundation's employees are listed in the University employee directory

Defendant's contention that ordering disclosure of the Foundation's records requires a broad or expansive reading of the Freedom of Information Act is simply an argument that what is in one's left pocket might be subject to FOIA disclosure, but when moved to one's right pocket it should somehow be beyond the reach of the law. This machination should be rejected.

Thus, Defendants' "narrow construction" argument avails nothing, as granting Plaintiff's FOI request does not require a broad application of the statute. It simply requires applying FOIA in the only legally cognizable way, according to the text of the statute and Supreme Court precedent. To do otherwise would create an absurd result, rendering the statute a nullity.

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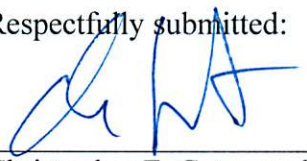
university foundations regardless of separate incorporation. *See, e.g., East Stroudsburg Univ. Found. v. Office of Open Records*, 995 A.2d 496 (Pa. Commw. Ct. 2010); *Gannon v. Board of Regents*, 692 N.W.2d 31 (Iowa 2005); *Jackson v. Eastern Mich. Univ. Found.*, 215 Mich. App. 240 (1996).

CONCLUSION

For the foregoing reasons, this Court should deny Defendant's plea of sovereign immunity and grant the relief sought by the Petitoners.

Respectfully submitted:



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I, Christopher E. Gatewood, certify that on October 19, 2017, I sent a true copy of the foregoing via electronic mail and United States mail, postage prepaid to:

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