NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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July 5, 2018

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Re: *Transparent GMU v. George Mason University et. al*, Case No. CL 2017-7484

Dear Counsel:

This decision examines the question of whether the George Mason University Foundation, Inc. (the "Foundation"), a corporation established to raise funds and manage donations made to benefit the George Mason University (the "University"), is a public body subject to the Virginia Freedom of Information Act ("VFOIA"). The overarching issue is whether the Foundation's fundraising records are subject to VFOIA.

Upon consideration of the pleadings and arguments of counsel, the Court concludes that the Foundation is not a public body, and is persuaded by the arguments presented by the Foundation in its pre-trial memorandum of law dated April 18, 2018. Nonetheless, the University

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is a public body, and for reasons as stated below, the records generated by the Gift Acceptance Committee and records of the University's decisions to accept conditional gifts and use remain subject to VFOIA. The University was dismissed earlier in this case, upon its proffer that no responsive documents were found to be in its possession. Although the University supplemented its proffer, the parties should not read this decision as foreclosing the disclosure of responsive documents for reasons as stated under Section III of this opinion.

I. Virginia Code § 2.2-3701 Defines a Public Body as an Entity Wholly Or Principally Supported By Public Funds or an Entity of a Public Body Created to Perform a Government Function or Advise the Public Body.

The definition of a "public body" under Va Code § 2.2-3701 can be dissected into six distinct parts and, as dissected, provides as follows:

> "*Public body*" means
>
> [Part 1:] 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
>
> [Part 2:] other organizations, corporations or agencies in the Commonwealth supported wholly or principally by public funds.
>
> [Part 3:] It [a public body] 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
>
> [Part 4:] (ii) 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.
>
> [Part 5:] 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. (VFOIA)
>
> [Part 6:] 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.

The Foundation is not an agency of the Commonwealth or any of its political subdivisions. It is not associated with the Virginia Birth-Related Neurological Injury Compensation Program,

the Virginia Retirement System, a constitutional office, or a police department. Consequently, the Foundation does not fall under Parts 1, 3, 5 or 6.

The questions remain whether the Foundation is supported wholly or principally by public funds under Part 2, or whether it is an entity of a public body created to perform delegated functions of the public body or to advise the public body under Part 4.

The fact that the Foundation has private sector members does not eliminate it from consideration as a public body under Part 5. Consequently, the fact that the majority of the Foundation's Trustees are from the private sector does not exclude the Foundation from being considered a public body.

In answering Part 2 and Part 4, the Court considered adopting a functional equivalent test, for reasons as argued by Petitioner. The facts in this case do correspond to facts in other jurisdictions where courts have easily applied a functional equivalent test, whether driven by multi-factor tests or by other reasoning, to conclude that a private foundation's acceptance and management of donations to support a public body is a public function subjecting the entity to FOIA actions. Similar facts exist here, including:

- The University's right to audit the Foundation;

- the Foundation's obligation to comply with the University's gift management policies, gift acceptance policies, and execution of comprehensive fund-raising and donor acquisition programs. *See* Joint Ex. 16-21 (University Policy No. 1123 (the Gift Acceptance Policy), University Policy No. 4008, Affiliation Agreements (2007, 2012, 2013, 2016));

- the fact that the Foundation may disburse funds only in compliance with, among other requirements, University policies;

- the fact that the University can choose to reject any such gift agreement for the support of a new University program or activity;

- the fact that any gift agreements supporting new programs or activities within the University must be signed by the University's Senior Vice President and Provost;

- the fact that the Governmental Accounting Standards Board considers foundations to be component units of public universities to prepare accurate accounting statements (*Determining Whether Certain Organizations are Component Units* (May 2002) (statement no. 39 of the Governmental Accounting Standards Board), http://tinyurl.com/ocwovya);

- the overlap of University personnel and their corresponding roles in the Foundation; notably, the fact that the Foundation's President, Dr. Janet E. Bingham, is also the University's Vice President for Development (Advancement) & Alumni Affairs. Additionally, the Foundation pays her entire salary. Joint Exhibit 19 at 3;

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- the participation of Rector of the Board of Visitors and the President of the University in the activities and decisions of the Foundation. Joint Exhibit 19 at 4; Joint Exhibit 20 at B-31; Joint Exhibit 21 at 4; and

- the presence of University personnel in the Gift Acceptance Committee.

In considering the questions presented, the Court considered *amicus* briefs including the late pleading filed by the George Mason University Chapter of American Association of University Professors. As the Foundation argued, and as noted by the Court, some of the factual assertions contained in the pleading, while relevant to public policy concerns, were neither presented at trial nor relevant to the parties. The arguments raised in the pleading, including the amici briefs submitted previously, drew the Court's attention to the public policy concerns behind adopting a "functional equivalent" test as urged by Petitioner and as the Court previously suggested that it would do.

Ultimately, however, the Court declines to adopt either a totality of the circumstances analysis or a functional equivalent test. Although the Court appreciates the submission of additional legal decisions from other jurisdictions, including the briefs and order in *Libit v. The University of New Mexico Foundation, Inc. et. al*, No. D-202-CV-2017-01620 (2d. Dist. N.M. June 26, 2018), the rationale found in such decisions outside of Virginia are not controlling authority on how a Virginia court should define entities subject to a VFOIA request.

The New Mexico Supreme Court, for example, has developed a totality of circumstances test to determine whether a private entity meets the definition of a public body. *Mem'l Med Ctr Inc v. Tatsch Const. Inc*, 12 P.3d 431, 440-41 (2000) (citing *Raton Pub. Serv. Co v. Hobbes,* 417 P.2d 32 (N.M. 1966)). This test has not been similarly adopted by the Virginia Supreme Court. Specifically, in *Raton*, the Court applied the canon of statutory interpretation that it should give credence to the intent behind a statute and not limit that intent by the words as written if the two appeared to be in conflict. *Mem'l Med Ctr.* observed this holding as one direceting substance over form.

While this Court appreciates the importance of reviewing legislative intent, where the language of the statute is clear, it is the province of the legislature to alter that language to effect any undisclosed intent, as was done in the wake of *RF&P Corp. v. Little.* 247 Va. 309, 314 (1994) (holding that a private corporation organized by the Virginia Retirement System was not a public body, which then prompted the legislature to define any such corporate entities organized by the Virginia Retirement System to be public bodies).

Adopting a functional equivalent or multi-factor test would create a new standard in Virginia, thus expanding the provisions of the VFOIA statute. Instead, the Court applies the plain language of the statute as written while giving due deference to what the VFOIA does not explicitly say.

Under a plain reading of VFOIA, the Court finds that the Foundation is not a public body because the stipulated and undisputed facts do not prove that the Foundation is either (1) wholly

or principally supported by public funds, or (2) an entity of a public body created to perform delegated functions of a public body or to advise a public body.

A. The Foundation is Not Supported Wholly or Principally by Public Funds

Public bodies are, by statute and by virtue of their office, "supported wholly or principally by public funds." Va. Code § 2.2-3701. The Foundation is not supported wholly or principally by public funds simply because it engages in fundraising for the University or because from such funds, investments, and earnings it supports the programs offered by the University.

While Petitioner argues that the contributions and donations received and expended by the Foundation must be public funds because of the Foundation's inextricable association with the University, and because the funds would have been held by the university in the absence of a foundation, the Court concurs with the West Virginia Supreme Court's reasoning in *4-H Rd Community Ass'n v West Va Univ. Found*, 182 W. Va. 434, 438 (1989) that until otherwise addressed by the General Assembly ". . . money donated to the Foundation is garnered from private individuals" and not from public funds.

The West Virginia statute echoes the language of VFOIA by identifying public bodies to include "any other body which is created by state or local authority or which is primarily funded by the state or local authority." W. Va. Code § 29B-1-2(3). Applying that statute, the West Virginia Supreme Court concluded that the management of private donations for the benefit of a public university was insufficient to confer public status on a private entity.

Public monies mostly derive from the government's power to tax and to spend. Therefore, public funds, unlike private donations, are by their very nature procured involuntarily; in return, the public is entitled to know how those funds are spent by public officials.

Consequently, this Court also found persuasive the rationale expressed in the Indiana case of *State Bd of Accounts v Indiana Univ. Found*, that private donations retain their private character if they are received by a private entity, even if that entity holds those funds for the benefit of a public body. 647 N.E.2d 342, 347-48 (1995). It is apparent when reviewing how courts from other states apply their respective FOIA law with regard to private foundations that the specific statutory guidelines and legislative enactments in those states weigh heavily in the courts' analysis.

Moreover, since the various state legislators have not adopted exactly the same language or standards in their FOIA statutes, certain facts are of greater import than others. For example, in *4-H Rd Community Ass'n*, the foundation held its own funds, while direct donations to the University were required by law to be deposited into the State Treasury. *Id* at 435. Here the funds similarly go directly to the Foundation at issue and are not part of the Virginia's Treasury. In the absence of clear legislative directive that entities such as the Foundation are to be considered public bodies, their right to exist as independent and privately formed entities overcomes the right of public inspection.

Insofar as government actions are intended to benefit the public at large, VFOIA exists to promote openness in government actions and to eliminate the transacting of government business

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in secrecy. *Am Tradition Inst. v. Rector & Visitors of Univ. of Va.,* 287 Va. 330, 339 (2014). The doctrine of openness does not extend so far as make available for public inspection the records of a private entity. Where the Virginia General Assembly has determined that certain entities ought to be subjected to VFOIA, it has specifically named them. It is more appropriate for the General Assembly, rather than the courts, to decide whether foundations created to support public universities are public bodies; for the court to do so would place an impermissible judicial gloss over the existing statutory provisions.

B. The Foundation is not a Sub-Entity of the University and does not perform a government function.

1. The Foundation is not a sub-entity of the University despite its presence on Campus and its use of some of the University's personnel.

The Petitioner argues that the Foundation is an "entity" of George Mason University, a publicly funded institution of higher education in the Commonwealth.

The Foundation is, however, an independent non-stock corporation that coexists alongside the University it serves. The undisputed fact is that a private foundation supporting the University was first incorporated in 1966, and that in the 1970's a second private foundation was formed, which eventually acquired the assets of the first foundation. Joint Ex. 9; Stip. of Facts ¶¶ 12-24.

The first foundation later changed its name to the "George Mason University Instructional Foundation, Inc.," and is the sole shareholder of the later-formed foundation, holding the entirety of the 1000 authorized shares. The later-formed foundation then adopted the name "George Mason University Foundation, Inc." Why all of this was done is a curiosity, but answering that question is immaterial to addressing the issues presented here.

Importantly, 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.

In an October, 2009 Opinion, the Virginia Freedom of Information Council concluded that the American Frontier Culture Foundation, a fundraising entity serving the American Frontier Culture Museum, and mentioned alongside university foundations in Va. Code § 23.1-1010, was not a public body. Opinion of the Virginia Freedom of Information Advisory Council to Mr. Michael Lam (Oct. 23, 2009) (AO-09-09). In its opinion, the Council noted that the Foundation was a "corporate entity in its own right separate from the Museum and its Board" and its duties were governed by statute and not by the Museum or its Board. *Id.*

In an earlier opinion, the Attorney General of Virginia also advised that university foundations likewise are governed by the Non-Stock Corporation Act and not by the Boards of the

Universities with which they are affiliated.[1] They are separate from the Universities and are not sub-entities of them. Once established, they operate independently. The foundations' stated purposes of supporting public universities or other public institutions was not considered relevant to either the Attorney General in 1996 or the VFOIA Advisory Council in 2009.

On the discrete issue of whether or not the foundations were a part of their universities, which VFOIA independently requires in addition to a finding of public function, both advisory bodies found that they operate independently, in accordance with their bylaws, articles of incorporation, and statutes, and that they did not fall under the umbrella of their affiliated institutions. This Court likewise finds that the George Mason University Foundation, operating independently from George Mason University, and under its own bylaws, articles of incorporation, and statutes, is not a "committee, subcommittee, or other entity" of the University, and is therefore not a "public body" subject to VFOIA.

An exception may be made when private foundations receive public funds. For example, the Michigan Court of Appeals determined that a university foundation was a public body when Eastern Michigan University had transferred its entire $7,700,000 endowment to its foundation, thereby funding it. The Foundation's continued existence was by virtue of its power over that endowment fund, and it therefore fell under the definition of "any other body which is created by state or local authority or which is primarily funded by or through state or local authority," much like the WV and IN statutes. *Jackson v. Eastern Mich Univ. Found*, 215 Mich. App. 240 (1996).

Funds once accepted, transferred and used by a public body become public monies.

In another example when public funds can transform a private entity into a public body, the Supreme Court of South Carolina found that the University of South Carolina's Foundation, called the Carolina Research and Development Foundation, fell within the scope of this definition because it received public funds. *Weston v. Carolina Research & Dev. Found*, 401 S.E.2d 161, 163-64 (S.C. 1991).

In *Weston*, the court noted that (1) the University sold the Wade Hampton Hotel and gave the Foundation $2,000,000 of the roughly $5,000,000 received from the sale, (2) the Foundation accepted $16,300,000 in federal grant money related to the University's development of the Swearingen Engineering Center, after representing to the federal government that the University was "acting through" the Foundation, and (3) relating to the University's development of the Koger Center, the Foundation accepted $5,750,000 in cash grants from Richland County and the City of Columbia. These transactions were evidence of public funding sufficient to show that the Foundation was supported by and expending public funds; it was therefore a public body. *Id*

[1] This opinion concluded that foundations are not "agencies or institutions of the Commonwealth" for purposes of the Workforce Transition Act. Va. Code § 2.2-3200, *et seq*. That Act has no definition section; the opinion generally analyzed the nature of foundations and determined that they are not a part of the Commonwealth as sub-entities of universities; that reasoning is instructive here.

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C. The Foundation's Fundraising and Money Managing Activity are Not Public Functions under VFOIA.

The George Mason University is a public university. A university, whether public or private, is an "an institution for higher learning with teaching and research facilities constituting graduate and professional schools that award masters' degrees and doctorates and an undergraduate division that awards bachelor's degrees." *University*, THE AMERICAN HERITAGE COLLEGE DICTIONARY (3d ed. 1993).

The statutory objectives of George Mason University are to educate students, approve programs, and confer degrees. The General assembly has encouraged all public institutions to "increase their endowment funds and unrestricted gifts from private sources," but the purpose of such an endowment, and of the favorable way the Code treats gifts and endowments, is to "strengthen the services rendered by these institutions to the people of the Commonwealth." Va. Code § 23.1-101.

Fundraising strengthens the services rendered by the public university. The Virginia Code contemplates that fundraising is used (specifically in the form of university foundations) to advance the statutory objectives of the institutions. Fundraising is neither itself a service nor a statutory objective of the public institution in this Commonwealth. The legitimacy of the Foundation's efforts undertaken on behalf of a public entity are confirmed by several statutory provisions reflecting the General Assembly's approval of the work of the Foundation.

For example, under Va. Code § 23.1-1010(3), covered institutions of higher education are authorized to create or continue the existence of nonprofit entities for the purpose of soliciting, accepting, managing and administrating grants and gifts and bequests, including endowment gifts and bequests and gifts and bequests in trust. Additionally, under Va. Code § 23.1-101(2), in determining the extent of financing higher education through public funds, the Commonwealth will not take into consideration the availability of the endowment funds and unrestricted gifts from private sources. § 23.1-101 expressly states that it is the public policy of the Commonwealth to encourage fundraising from private donors and make use of the those funds in accordance with the wishes of the donors.

Advancing a statutory objective is not equivalent to transacting public business. Although the Court considered the rationale found in other jurisdiction that fundraising is an essential function of a public university that depends on the strength of its endowment, the adoption of those rationales is not provided for in VFOIA, and it would constitute a judicial declaration beyond a statutory grant.

In contrast, the Pennsylvania Supreme Court defining a "commonwealth agency" to include "[a]n organization established by the Constitution of Pennsylvania, a statute or an executive order which performs or is intended to perform an essential governmental function", concluded that the raising of monies is an essential government function. *Stroudsburg Univ. Found. v. Office of Open Records*, 995 A.2d 496.

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Joining Pennsylvania, the Supreme Court of Ohio determined that the University of Toledo Foundation was a public office, reasoning that public education is a governmental function and any solicitation and receipt of donations for the benefit of a public institution are likewise governmental functions. *State ex rel. Toledo Blade Co. v. Univ of Toledo Foundation*, 602 N.E.2d 1159, 1163 (1992). Further, the Supreme Court of Iowa determined that, because fundraising "[advanced] the statutory objectives of the institution," the foundation was performing a government function and that the disclosure of the records could not be prevented. *Gannon v. Bd. of Regents*, 692 N.W.2d 31, 40 (2005).

In those jurisdictions, the courts found that the services provided by the foundations equated to a public function or the transaction of a public business and folded the foundations into their FOIA laws.

Virginia courts, especially at the trial level, 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.

III. Donations restricted in their use become public records once a public body accepts and makes use of the funds in observance with their restrictions.

This decision does not mean that the University has unfettered right to keep secret its use of gifted funds to create programs in compliance with conditions and restrictions imposed upon those gifts. The prior dismissal of the University was premised upon its representation that no responsive records were held by the University. This response has been subsequently amended. However, that does not mean that the University may accept funds from the Foundation without having to disclose any restrictions or conditions that may accompany the use of such funds.

The stipulated record reveals that there is at least one entity of the University by which such records could be held. That entity is the Gift Acceptance Committee, which falls under the responsibility of the both University Advancement and Alumni Relations Office and the Foundation. (Joint Ex. 16, GMUF 00358). The Gift Acceptance Committee is comprised mostly of University Personnel. The members include:

- the President of the Foundation/Vice President for Advancement and Alumni Relations of the University (Dr. Bingham);
- the University Provost;
- the Senior Vice President for Administration and Finance for the University;
- the Controller of the University;
- the Chief Financial Officer of the Foundation;
- the Associate Vice President of Advancement and Executive Campaign Director of the University;

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- one of the deans currently serving as a representative on the Foundation' s Board of Trustees; and

- the faculty member currently serving as a representative on the foundation's Board of Trustee.

In applying the same rationale that the Foundation is neither a public body nor engaged in a public function, any such independence or exclusion from VFOIA does not extend to the Gift Acceptance Committee. 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 official, produces public records. *See RF&P Corp.*, 247 Va. at 314 (holding that a private corporation was not a public body, but only so holding in the absence of evidence that a public body exercised control over its operations). Here, the University through its personnel dictates the operations of the Gift Acceptance Committee. The University's acceptance of any condition or restriction on the use of donated funds necessarily produces a record that is subject to VFOIA.

The Virginia legislature has meaningfully enacted a statute that provides for exemption from VFOIA for some of the information sought under Petitioner's requests. Va. Code § 2.2-3705.4(7) exempts from disclosure:

> Information maintained in connection with fundraising activities by or for a public institution of higher education that would reveal (i) personal fundraising strategies relating to identifiable donors or prospective donors or (ii) wealth assessments; estate, financial, or tax planning information; health-related information; employment, familial, or marital status information; electronic mail addresses, facsimile or telephone numbers; birth dates of social security numbers of identifiable donors or prospective donors. Nothing in this subdivision, however, shall be construed to prevent the disclosure of information relating to the amount, date, purpose, and terms of the pledge or donation or the identity of the donor unless the donor has requested anonymity in connection with or as a condition of making a pledge or donation. The exclusion provided by this subdivision shall not apply to protect from disclosure (i) the identifies of sponsors providing grants to or contracting with the institution for the performance of research services or other work or (ii) the terms and conditions of such grants or contracts.

Therefore, the University's acceptance and use of funds consistent with the restrictions and conditions impose on those funds convert private funds and private records into public funds and public records. While it is possible that University officials may strive to conduct their business orally and avoid all written records of its agreements, secreting all such records within the Foundation, the Court declines to presume such intentional and evasive manipulation of such public transactions by University officials.

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At the same time if such concerns were proven, the Virginia General Assembly ultimately retains the authority to remove the veils of such secrecy by defining the Foundation as a public body with the responsibility of raising and managing donations and endowments as a public function.

CONCLUSION

A decision to treat the Foundation as a public entity requires an examination and reformulation of public policy. As the Virginia Supreme Court recently observed, charting new public policy issues, especially those affecting VFOIA, fall within the purview of the General Assembly and not of the courts. *Daily Press, LLC v. Office of the Exec. Sec'y,* 293 Va. 551, 557 (2017). The Court also notes that, while it was not a dispositive fact in this opinion, the General Assembly proposed and declined to pass a bill last session that would have expanded the VFOIA definition of "public body" to expressly include any tax-exempt foundation "that exists for the primary purpose of supporting a public institution of higher education." Senate Bill No. 1436 (Jan. 13, 2017). While the Petitioner argues that such actions may be equally interpreted such that the legislature merely concluded that there was no need for such an amendment because the foundation was already a public body holding public records, the actions or inactions of the legislature is a relevant fact to be considered with all the other stipulated facts, and such a statute remains a legislative solution.

As a matter of law, the Foundation is not a public body under VFOIA as it is presently situated. This decision does not absolve the University of the Responsibility, as a public body, to maintain records of the use of funds and programs it decides to develop. This also does not alter the conclusion on demurrer that, pursuant to Va. Code § 2.2-3704(B)(3)(j), records originating with the University and subsequently transferred elsewhere remain public records in the custody of the University.[2] Beyond that, until the legislature sees fit to supplement VFOIA, the public will have to trust in the *bona fides* of the school administration that they will not surrender their obligations of transparency despite the Foundation being able to retain its private status.

The Court extends its sincere appreciation to all parties for allowing it the time to review these issues of first impression. The Court requests that the attorneys for the Foundation prepare an Order reflecting this decision. This matter shall be set on the Court's Friday, July 27, 2018 docket at 10:00 a.m. for entry of an Order. This date is simply a placeholder.

Sincerely,

John M. Tran
Judge, Fairfax Circuit Court

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[2] Therefore, any agreement by the President of the University and any concurrence or support by the Gift Acceptance Committee is a public record. It appears an open question whether the University searched for records relating to the Gift Acceptance Committee. *See, Elizabeth Woodley's* April 23, 2018 letter to Evan Johns, Esq. This decision leaves the parties in the position of voluntarily complying with their respective obligations as had been done before.

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