

VIRGINIA :

IN THE NINETEENTH JUDICIAL CIRCUIT FOR FAIRFAX, VIRGINIA

TRANSPARENT GMU,
an unincorporated Virginia association,

and

AUGUSTUS THOMSON,

Petitioners;

v.

GEORGE MASON UNIVERSITY,

and

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

a Virginia corporation,

Respondents.

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CLERK, CIRCUIT COURT
FAIRFAX, VA

2017 07484

Case No. _____

**VERIFIED PETITION FOR MANDAMUS,
INJUNCTIVE, AND DECLARATORY RELIEF**

This is an action under the Virginia Freedom of Information Act (the Act), Virginia Code §§ 2.2-3700—2.2-3714, seeking disclosure of public records held by George Mason University (the University), a public institution of higher education, and/or George Mason University Foundation, Inc. (the Foundation), an affiliated corporation. In support of this Petition, Transparent GMU and Augustus Thomson (collectively, the Petitioners) attach three affidavits for good cause as Exhibits A, B, and C to this Petition, and further state:

PARTIES

Transparent GMU

1. Transparent GMU is an unincorporated association, organized and principally operating in Fairfax, Virginia.
2. Transparent GMU's members are present and former George Mason University students—including citizens of the Commonwealth—who are concerned about the potential for large private donations to influence research, curricula, policies, and academic freedom at the University and other public colleges and universities. Although Transparent GMU was first organized in 2016, its members have been advocating for greater transparency between the public and the University and its affiliates since 2014, when they learned that public universities in other states had agreed to give private donors influence over curriculum development and faculty hiring decisions. Concerned that similar agreements may be in place at their own school, Transparent GMU's members have submitted *pro se* record requests under the Act and petitioned the University's President to meet with them and discuss their concerns.
3. As an association, Transparent GMU is considered a "person" under the Act. *See* Virginia Code §§ 1-202, 1-230.

Augustus Thomson

4. Augustus Thomson is a natural person and a citizen and resident of Virginia.
5. Mr. Thomson is currently an undergraduate student at George Mason University.
6. Although Mr. Thomson is a member of Transparent GMU, he also brings this Petition in his individual capacity.

George Mason University

7. George Mason University is a public institution of higher education incorporated and principally operating in Fairfax, Virginia.
8. The University is an agency of the Commonwealth and is thus a “public body” subject to the Act. *See* Virginia Code § 2.2-3701 (definition of “Public body”). *See also* George Mason University, “Responding to Virginia Freedom of Information Act (FOIA) Requests for Records,” University Policy No. 1117 (December 14, 2015), available at <http://bit.ly/2kaCWxY> (“As an agency of the Commonwealth, George Mason University is subject to the requirements of the Virginia Freedom of Information Act”).
9. In addition, the Board of Visitors of George Mason University, the governing body of George Mason University, is a “board of visitors of [a] public institution[] of higher education” and is therefore a “public body” subject to the Act. *See* Virginia Code § 2.2-3701 (definition of “Public body”).

George Mason University Foundation, Inc.

10. George Mason University Foundation, Inc., is a non-stock corporation organized under the laws of Virginia for the exclusive purpose of advancing and furthering the aims and purposes of the University.
11. The Foundation is organized and operated to receive, hold, invest, and administer property and to make expenditures to or for the benefit of the University. It assists the University in generating private support and manages, invests, and administers private gifts and resources conveyed to the University. It also manages real estate owned and/or used by the University.
12. The Foundation’s principal office is located in Merten Hall on the University’s campus in Fairfax, Virginia.

JURISDICTION AND VENUE

13. This Court has jurisdiction over this action under Virginia Code § 2.2-3713(A), which authorizes “any person . . . denied the rights and privileges conferred by th[e Act] to enforce such rights and privileges by filing a petition for mandamus or injunction.”
14. Furthermore, this Court has jurisdiction under Virginia Code § 2.2-3713(D) to award “reasonable costs, including costs and reasonable fees for expert witnesses, and attorneys’ fees from [a] public body” that has violated the Act if the petitioner “substantially prevails on the merits of the case” and “special circumstances would [not] make an award unjust.”
15. This Court also has jurisdiction under Virginia Code § 8.01-184 to issue declaratory judgments and “make binding adjudications of right” in “cases of actual controversy,” including those “involving the interpretation of . . . statutes.” Virginia Code § 8.01-184.
16. Venue is proper in this Court under Virginia Code § 2.2-3713(A)(3) because:
 - a. the University is a state agency;
 - b. the Foundation is an agent of a state entity, is an entity performing delegated functions of a state agency, is itself a state agency, and/or is an instrumentality and alter-ego of a state agency; and
 - c. Transparent GMU’s principal place of operations and Mr. Thomson’s residence are both within the territorial jurisdiction of this Court.

LEGAL FRAMEWORK

17. The Virginia Freedom of Information Act recognizes that the “affairs of government are not intended to be conducted in an atmosphere of secrecy since at all times the public is to be the beneficiary of any action taken at any level of government.” Virginia Code § 2.2-3700(B). To

that end, the Act “ensures the people of the Commonwealth ready access to public records in the custody of a public body or its officers and employees.” Virginia Code § 2.2-3700(B).

18. Consistent with that policy, the Act specifies that its provisions must “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,” and that “[a]ny exemption from public access to records . . . shall be narrowly construed and no record shall be withheld . . . unless specifically made exempt pursuant to th[e Act] or other specific provision of law.” Virginia Code § 2.2-3700(B).

19. At its heart, the Act requires that “all public records shall be open to inspection and copying by any citizens of the Commonwealth during the regular office hours of the custodian of such records”—except where “otherwise specifically provided by law.” Virginia Code § 2.2-3704(A). The Act includes several statutory exemptions authorizing public bodies to withhold certain information. *See* Virginia Code §§ 2.2-3705.1—2.2-3705.7. The Act does not, however, require the public body to withhold the exempted information; it only gives the custodian discretion to withhold the information. *See, e.g.,* § 2.2-3705.1. But where a public body opts to exercise its discretion to withhold exempted information, the Act requires it “*specifically elect* to exercise” the appropriate exemption. Virginia Code § 2.2-3700(B) (emphasis added). Stated otherwise, the Act presumes all records to be open unless and until “an exemption is *properly invoked.*” *Id.* (emphasis added).

Scope of the Act

20. The Act defines a “public record” so as to include, in relevant part, “all writings and 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.” Virginia Code § 2.2-3701 (definition of “Public records”).

21. The Act defines a “public body” as, in relevant part, “any . . . agency of the Commonwealth or of any political subdivision of the Commonwealth, including . . . boards of visitors of public institutions of higher education; and other organizations, corporations or agencies in the Commonwealth supported wholly or principally by public funds.” Virginia Code § 2.2-3701 (definition of “Public body”). In addition, the Act defines “public body” so as to “include . . . any committee, subcommittee, or other entity, however designated, of [a] public body created to perform delegated functions of the public body or to advise the public body”—even if that “entity . . . has private sector or citizen members.” *Id.*
22. Furthermore, the Supreme Court of Virginia has applied the equitable veil-piercing doctrine in determining whether an entity’s identity as a private corporation can be disregarded due to its close relationship with a public body. *See RF & P Corp. v. Little*, 247 Va. 309, 316, 440 S.E. 2d 908, 913 (1994). *See also* Virginia Freedom of Information Advisory Council, Advisory Opinion No. AO-09-09 (2009). While that doctrine does not follow any “single rule or criterion,” it generally applies where the “unity of interest and ownership” between two entities “is such that the separate personalities of the [entities] no longer exist and to adhere to that separateness would work an injustice.” *O’Hazza v. Executive Credit Corp.*, 246 Va. 111, 115, 431 S.E. 2d 318, 320–21 (1993) (citing *Lewis Trucking Corp. v. Commonwealth*, 207 Va. 23, 32, 147 S.E.2d 747, 753–54 (Va. 1966)). Although typically applied to parent-subsidiary relationships, Virginia law recognizes veil piercing between affiliated entities. *See C.F. Trust*

v. First Flight Ltd., 111 F. Supp. 2d 734, 741 n.7 (E.D. Va. 2000) (citing, *inter alia*, *Lewis Trucking*, 207 Va. at 31, 147 S.E. 2d at 753–54).

Requests for Records Under the Act

23. Section 2.2-3704 of the Act allows citizens of the Commonwealth to submit a request for copies of or an opportunity to inspect “all public records.” Virginia Code § 2.2-3704(A). In response to such a request, “[a]ny public body that is subject to th[e Act] and that is the custodian of the requested records shall promptly, but in all cases within five working days of receiving a request, provide the requested records” or offer one of the following four responses in writing:

- a. a statement that the requested records are being entirely withheld, identifying “with reasonable particularity the volume and subject matter of withheld records” and citing “as to each category of withheld records, the specific Code section that authorizes the withholding of the records”;
- b. a statement that the requested records are being provided in part and withheld in part, similarly identifying “with reasonable particularity the volume and subject matter of withheld records” and citing “as to each category of withheld records, the specific Code section that authorizes the withholding of the records”;
- c. a statement that the requested records could not be found or do not exist and, where applicable, the contact information for the public body that does possess those records; or

- d. a statement that it is practically impossible to provide the requested records or determine whether they are available within the five-day period and that the public body will provide one of the preceding responses within an additional seven days.

Virginia Code § 2.2-3704(B).

24. The Virginia Freedom of Information Advisory Council—a legislative agency authorized under Virginia Code §§ 30-178(A) and 30-179(1) to furnish advisory opinions and guidelines regarding the Act—has concluded that when a private entity creates or maintains records as an agent for a public body, the Act considers the public body to be the legal custodian of those records and that a request for records under Section 2.2-3704 should be directed to the principal public body. *See* Virginia Freedom of Information Advisory Council, Advisory Opinion No. AO-19-03 (2003).
25. The Act provides that “[i]n the event a public body has transferred possession of public records to any entity, including but not limited to any other public body, for storage, maintenance, or archiving, the public body initiating the transfer of such records shall remain the custodian of such records for purposes of responding to requests for public records made pursuant to th[e Act] and shall be responsible for retrieving and supplying such public records to the requester.” Virginia Code § 2.2-3704(J).
26. Any “[f]ailure to respond to a request for records shall be deemed a denial of the request and shall constitute a violation of th[e Act].” Virginia Code § 2.2-3704(E).

Enforcement of the Act

27. The Act provides that “any person . . . denied the rights and privileges conferred by th[e Act] may proceed to enforce such rights and privileges by filing a petition for mandamus or

injunction, supported by an affidavit showing good cause.” Virginia Code § 2.2-3713(A). A petition under Section 2.2-3713 of the Act “may be brought in the name of [a] person notwithstanding that a request for public records was made by the person’s attorney in his representative capacity.” Virginia Code § 2.2-3713(A).

28. In a proceeding under Section 2.2-3713 of the Act, “[a]ny failure by a public body to follow the procedures established by th[e Act] shall be presumed to be a violation” of the Act. Virginia Code § 2.2-3713(E).

29. In a proceeding under Section 2.2-3713 of the Act, a “single instance of denial of the rights and privileges conferred by th[e Act] shall be sufficient to invoke the remedies granted” by the Act. Virginia Code § 2.2-3713(D).

30. If a petitioner under Section 2.2-3713 prevails on the merits, the court must award “reasonable costs, including costs and reasonable fees for expert witnesses and attorneys’ fees from the public body,” unless the court determines that “special circumstances would make an award unjust.” Virginia Code § 2.2-3713(D).

**FACTUAL BACKGROUND:
THE RELATIONSHIP BETWEEN THE UNIVERSITY AND FOUNDATION**

University–Foundation Relations Generally

31. The Foundation is one of many nonprofit entities organized to support a particular public university. While often separately incorporated, these university foundations differ from other private charities and nonprofits in that they are created and maintained exclusively for the benefit of a state agency and carry out functions once managed by those agencies. Although the mission of these foundations is “irrevocably linked to the educational institution” they serve, they can often provide public universities with greater flexibility in

fundraising, investing funds, and managing endowments and real estate holdings. *See* Council for Advancement and Support of Education, “Foundation FAQs” (July 2014), available at <http://bit.ly/2kNk4Wa>. In some contexts, these organizations are recognized as legally distinct from their affiliated institutions. In others, courts have concluded that university foundations operate as an “arm,” “agent,” “instrumentality,” “alter-ego,” or “part” of their affiliated university—or that the two entities “essentially act as one and the same” and are “not readily separable.” *See, respectively, State ex rel. Toledo Blade Co. v. University of Toledo Foundation*, 602 N.E.2d 1159, Syl. Pt. 1 (Ohio 1992); *Gannon v. Board of Regents*, 692 N.W.2d 31 (Iowa 2005); *In re Beachport Entertainment*, 2005 WL 6960182 (9th Cir. 2005); *Wells ex rel. Baker v. State*, 435 S.W.3d 734, 756 (Tenn. App. 2013); *United States v. Solinger*, 457 F.Supp.2d 743, 755 (W.D. Ky. 2006); *Cape Publications v. University of Louisville Foundation*, 260 S.W.3d 818, 822 (Ky. 2008); *Southern Illinois University Foundation v. Booker*, 425 N.E.2d 465, 471 (Ill. App. 1981).

32. The Virginia Code specifically authorizes public universities like George Mason 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, including endowment gifts and bequests and gifts in bequests in trust.” Virginia Code § 23.1-1010(3).

The Foundation’s Articles of Incorporation

33. The George Mason University Foundation’s purposes, as set forth in its April 1, 2015 Amended and Restated Articles of Incorporation, are to:
 - a. “promote the advancement and further the aims and purposes of George Mason University, or its successor . . . , as an institution of higher education by the

development and application of financial resources to the progress of such institution and through such other entities, including the University's affiliated foundations described in section 501(c)(3) of the Internal Revenue Code, as may be suitable to accomplish such purposes"; and

- b. "accept, administer, apply, and use property acquired by gift, grant, devise, bequest, or otherwise."

A copy of the Foundation's Amended and Restated Articles of Incorporation is attached to this Petition as Exhibit D.

34. In addition to the statement of purpose quoted above in paragraph 33, the Foundation's Amended and Restated Articles of Incorporation provide, among other things, that:

- a. upon dissolution of the Foundation, all of the Foundation's remaining assets shall be distributed to the University;
- b. the Foundation's Board of Trustees shall be comprised of between fourteen and fifty-seven trustees;
- c. the University's President, the University's Vice President for Development and Alumni Affairs, and the Rector of the University's Board of Visitors shall sit on the Foundation's Board of Trustees as "Ex Officio Trustees" with full voting rights; and
- d. the President of the University shall appoint two additional "Appointed Trustees" with full voting rights to the Foundation's Board of Trustees, both of which shall be "either Deans or Academic Directors of the University."

The Foundation's Bylaws

35. The Foundation's operations are also governed by its October 7, 2014 Amended and Restated Bylaws, a copy of which is attached to this Petition as Exhibit E. Those Bylaws provide, among other things, that:

- a. the Foundation's President "shall be that individual who is serving as the Vice President for University Development and Alumni Affairs of the University or such other officer as designated by the President of the University," "shall be the Chief Executive Officer (CEO) of the Foundation," and shall "be responsible for communicating the University's fundraising priorities" to the Foundation's Board of Trustees; and
- b. the Chairman of the Foundation's Board of Trustees, the Chair of the Foundation's Development Committee, and the University's President will all contribute to an annual review of the Foundation President's performance.

The Affiliation Agreement Between the University and the Foundation

36. The relationship between the University and the Foundation is further described in a March 22, 2013 Affiliation Agreement between the two entities, a copy of which is attached to this Petition as Exhibit F. That Affiliation Agreement provides, among other things, that:

- a. the University is responsible for the compensation of the Foundation's President;
- b. the University will provide the Foundation with fair and reasonable compensation or payment for services, including but not limited to private fund management, real estate management, intellectual property, prospect research, alumni data, gift processing, and donor stewardship;

- c. the University must provide office space to support the activities of the Foundation according to a separately-negotiated Space Usage Agreement;
- d. the Foundation may use the name “George Mason University” and the George Mason University logo;
- e. the University will allow the Foundation’s employees to participate in the University’s employee benefit programs whenever permitted by law;
- f. the Foundation must consult with the University regarding the Foundation’s gift management policies, the Foundation’s gift acceptance policies, and the Foundation’s execution of comprehensive fund-raising and donor-acquisition programs;
- g. the Foundation must “promptly acknowledge and issue receipts for all gifts to the Foundation and the University and shall provide appropriate recognition and stewardship of gifts”;
- h. the Foundation must coordinate with the University regarding fundraising initiatives and the identification, cultivation, and solicitation of donors;
- i. the Foundation is prohibited from accepting grants from federal agencies unless approved in writing by the University;
- j. the Foundation must “make a residence available to the University suitable for the University’s President to reside and entertain,” located near the University’s Fairfax campus;
- k. the Foundation may “serve as an instrument for entrepreneurial activities” of the University;

- l. the Foundation may purchase, develop, and manage real estate for the University's needs;
 - m. the Foundation may disburse funds only in compliance with, among other requirements, University policies;
 - n. the Foundation must "provide to the University access to data and records on a need-to-know basis in accordance with applicable laws" and with any Foundation policies and guidelines;
 - o. the University may object to a decision of the Foundation's Executive Board to remove the Foundation's President and Chief Executive Officer;
 - p. the University must specifically authorize the Foundation's acceptance of any gifts of real property that are subject to conditions or restrictions imposed by the donor;
 - q. the University may choose to reject any such gift agreement for the support of a new University program or activity;
 - r. any gift agreements supporting a new program or activity within the University must be signed by the University's Senior Vice President and Provost; and
 - s. the University may audit the Foundation's financial records.
37. The recitals to the Affiliation Agreement also state, among other things, that "in connection with [the Foundation's] fundraising and asset management activities, the Foundation retains personnel experienced in planning for and managing private contributions and works with the University to assist and advise in such activities."

38. The Petitioners allege, upon information and belief, that the relationship between the University and the Foundation has been governed at all relevant times by terms materially similar to those contained in the March 22, 2013 Affiliation Agreement.

The University's Gift Acceptance Policy

39. The relationship between the University and the Foundation is further described in the University's May 8, 2008 Gift Acceptance Policy, University Policy No. 1123, a copy of which is attached to this Petition as Exhibit G.

40. By its own terms, the Gift Acceptance Policy "applies to all George Mason University and George Mason University Foundation staff."

41. The Gift Acceptance Policy establishes a Gift Acceptance Committee tasked with recommending and implementing gift acceptance policies that have been approved by the University's Board of Visitors, with periodically reviewing gifts and gift plans, and with reporting its actions to the University and the Foundation. The Committee is comprised of:

- a. the Foundation's President,
- b. the University's Vice President for Development & Alumni Affairs,
- c. the University's Senior Vice President,
- d. the Foundation's Chief Financial Officer,
- e. a representative from the University Controller's Office,
- f. the University's Director of Leadership Gifts and Planned Giving, and
- g. a dean of the University.

42. The Gift Acceptance Policy provides, among other things, that:

- a. all gifts to the University's Office of Development must be made through the Foundation;
- b. the University must "maintain a pledge payment reminder system" to remind donors to honor their pledges to give to the Foundation;
- c. any bequests made to the University must be transferred to the Foundation "as funds held in custody for others and managed in accordance with" other provisions of the Gift Acceptance Policy;
- d. the Foundation must follow certain accounting and reporting standards, including:
 - i. those contained in the Council for Advancement and Support of Education's *Management Reporting Standards: Standards for Annual Giving and Campaigns in Educational Fundraising* and
 - ii. those established by the Financial Accounting Standards Board.
- e. the University is authorized to establish and implement campaign-specific policies and procedures for gift accounting and reporting of gifts connected with a comprehensive fundraising campaign; and
- f. the Foundation is required, in certain circumstances, to follow other University policies, including those related to asset capitalization.

43. In addition to the provisions detailed above in paragraph 42, the Gift Acceptance Policy imposes certain other restrictions on how the Foundation processes, reports, acknowledges, and disposes of gifts. The Policy also requires that certain kinds of gifts meet specified criteria—including, in many instances, approval by the University or by the Gift Acceptance Committee—before the Foundation accepts them.

44. The Petitioners allege, upon information and belief, that the relationship between the University and the Foundation has been governed at all relevant times by terms materially similar to those contained in the University's May 8, 2008 Gift Acceptance Policy.

The Space Usage Agreement Between the University and the Foundation

45. The Foundation's principal office is located in Merten Hall on the University's Fairfax, Virginia campus. The Foundation shares this building with the University's Advancement and Alumni Relations offices.

46. The University leases this office space to the Foundation according to an April 2016 Space Usage Agreement between the two entities, which provides, among other things, that:

- a. the Foundation shall pay the University one dollar per year in rent;
- b. the Foundation shall use the premises only to support the Foundation's activities "as set forth in the Affiliation Agreement and for no other purpose"; and
- c. the Foundation shall use the premises in accordance with "all GMU Policies and Procedures," which the lease incorporates by reference.

47. A copy of the April 2016 Space Usage Agreement is attached to this Petition as Exhibit H.

48. The Petitioners allege, upon information and belief, that the relationship between the University and the Foundation has been governed at all relevant times by terms materially similar to those contained in the April 2016 Space Usage Agreement.

Other Indicia of the Relationship Between the University and the Foundation

49. The Foundation is funded in part by a six-percent administrative fee it exacts from gifts accepted on behalf of the University and a 1.25-percent annual management fee it exacts on

endowments it manages on behalf of the University. *See* George Mason University Foundation, “Administrative Fee Policy” (2016), available at <http://bit.ly/2iXVft2>.

50. The Foundation also receives rental income under real property leases with the University.

See George Mason University Foundation, Consolidated Financial Statements, 40 (June 30, 2016), available at <http://bit.ly/2jPPwlG>.

51. The University has investments not registered in its own name and held by the Foundation, including:

- a. \$3,785,467 in corporate stocks;
- b. \$1,973,055 in corporate bonds; and
- c. \$20,828 in money market funds.

See George Mason University, Unaudited Financial Statements, 22 (June 30, 2016), available at <http://bit.ly/2kksALV>.

52. Due to its “close relationship with the University,” the Foundation is reported as a “component unit” on the University’s annual financial statements. *Id.* at 18.

53. The Foundation’s website is located on the University’s internet domain, <http://www.gmu.edu>. The footer section of the Foundation’s website includes the name and contact information for the University’s Office of Advancement and Alumni Relations alongside the University’s logo.

54. Employees of the Foundation are included in the University’s online directory, <http://peoplefinder.gmu.edu>, and photos of Foundation employees are displayed on the University’s “Admin-Staff Portraits” webpage, <http://photo.gmu.edu/Administration/Admin-Staff-Portraits/>.

55. In addition to the Ex Officio Trustees and Appointed Trustees described above in paragraph 34, at least one other trustee on the Foundation’s Board of Trustees is a University faculty member.
56. Consistent with the Foundation’s bylaw described above in paragraph 35, the Foundation’s President and Chief Executive Officer is Dr. Janet E. Bingham, who concurrently serves as the University’s Vice President for Advancement and Alumni Relations—a position that has replaced the position of Vice President for University Development and Alumni Affairs. *See* George Mason University, “University Advancement & Alumni Relations Staff” (2016), available at <http://bit.ly/2qsEY2N>; George Mason University, “Janet Bingham Named Vice President for University Development and Alumni Affairs” (August 27, 2013), available at <http://bit.ly/2q9Pl8z>.
57. In the context of higher education, the terms “advancement” and “development” describe efforts to secure financial support from private donors. *See* Council for Advancement and Support of Education, *About Advancement* (2017), available at <http://bit.ly/TeeBsn>; Council for Advancement and Support of Education, *About the Disciplines* (2017), available at <http://bit.ly/lig3tXJ> (identifying core disciplines of advancement as Fundraising, Communications and Marketing, and Alumni Relations). *See also, e.g., Carter v. George Washington University*, 180 F. Supp. 2d 97, 101 (D.D.C. 2001) (reciting the “basic functions” of university’s Director of Development position: “identification, cultivation, and solicitation of major gifts for programs of the school”). As such, Dr. Bingham’s position as Vice President for University Development and Alumni Affairs and her position as Foundation President and Chief Executive Officer share the same subject matter and duties. *See, e.g.,*

Exhibit E at 11 (outlining Foundation President’s duties regarding “communicating the University’s fundraising priorities”); Exhibit F at 1 (“[T]he Foundation assists the University in generating private support”); *id.* at 2 (“[I]n connection with its fundraising and asset management activities, the Foundation retains personnel experienced in planning for and managing private contributions and works with the University to assist and advise in such activities”); *id.* at 6 (Foundation President “shall work in conjunction with the University’s President and senior leadership to identify, cultivate, and solicit prospects for private gifts”); Exhibit G at 3 (requiring University’s Gift Acceptance Committee include both the Foundation’s President and the University’s Vice President for University Development and Alumni Affairs).

**FACTUAL BACKGROUND:
RELEVANT PROCEDURAL HISTORY**

The Petitioners’ Record Request to the University

58. On April 5, 2017, counsel for the Petitioners submitted to the University by electronic mail and certified United States Mail a request for records under Section 2.2-3704(A) of the Act, seeking copies of the following records:

For the years of 2008 through 2012, any grants, cooperative agreements, gift agreements, contracts, or memoranda of understanding (including any attachments thereto) involving a contribution or potential contribution to or for the University from any of the following entities:

- (a) Charles Koch Foundation,
- (b) Charles Koch Charitable Foundation,
- (c) Charles G. Koch Foundation,
- (d) Charles G. Koch Charitable Foundation,
- (e) Claude R. Lambe Foundation,
- (f) Claude R. Lambe Charitable Foundation,
- (g) David H. Koch Charitable Foundation,
- (h) Donors Trust, or

- (i) any other person or entity the University believes to be affiliated with any of the entities above.

59. The Petitioners' April 5, 2017 records request to the University also asked for copies of the following records:

Any agreements or memoranda of understanding between George Mason University and the George Mason University Foundation, Inc., that:

- (a) were in effect, in whole or in part, at any time between January 1, 2008 and December 31, 2012; and
- (b) either relate to the same subject matter as, were modified or superseded by, or were otherwise precursors of the following agreements:
 - (i) the March 22, 2013 Affiliation Agreement between George Mason University and George Mason University Foundation, Inc.; or
 - (ii) the April 2016 Space Usage Agreement By and Between George Mason University Foundation, Inc, and George Mason University.

60. A copy of the April 5, 2017 request to the University is attached to this Petition as Exhibit I.

61. The April 5, 2017 request to the University disclosed that counsel for the Petitioners made the request in his representative capacity and on behalf of Transparent GMU and Mr. Thomson.

62. On April 13, 2017, Ms. Elizabeth Woodley, FOIA Compliance Officer for the University, responded by electronic mail to the April 5, 2017 request, stating that:

There are no public records in the possession of George Mason University which are responsive to your request: "For the years of 2008 through 2012, any grants, cooperative agreements, gift agreements, contracts, or memoranda of understanding (including any attachments thereto) involving a contribution or potential contribution to or for George Mason University from any of" the listed entities.

63. Ms. Woodley's April 13, 2017 e-mail also stated:

In the event that a court orders the production of any records through the University under FOIA that we don't currently have physical custody over,

we reserve the right to review the records and exercise exemptions under the statute if they apply.

64. Based upon Ms. Woodley's statement quoted above in paragraph 62 and upon Ms. Woodley's prior statements to the Petitioners and their counsel, the Petitioners allege, upon information and belief, that, in the course of processing and responding to the April 5, 2017 request for records, the University did not inquire as to, search for, request, or obtain any records that were within the physical custody of the Foundation or any other entity.
65. Ms. Woodley's April 13, 2017 e-mail did not respond to the Petitioners' request for certain agreements or memoranda of understanding between the University and Foundation, quoted above in paragraph 59.
66. Neither the Petitioners nor their counsel has received a response to the April 5, 2017 request for certain agreements or memoranda of understanding between the University and Foundation, quoted above in paragraph 59.

The Petitioners' Record Request to the Foundation

67. On April 5, 2017, counsel for the Petitioners submitted to the Foundation by certified United States Mail a request for records under Section 2.2-3704(A) of the Act, seeking copies of the following records:

For the years of 2008 through 2012, any grants, cooperative agreements, gift agreements, contracts, or memoranda of understanding (including any attachments thereto) involving a contribution or potential contribution to or for the University from any of the following entities:

- (a) Charles Koch Foundation,
- (b) Charles Koch Charitable Foundation,
- (c) Charles G. Koch Foundation,
- (d) Charles G. Koch Charitable Foundation,
- (e) Claude R. Lambe Foundation,
- (f) Claude R. Lambe Charitable Foundation,
- (g) David H. Koch Charitable Foundation,

- (h) Donors Trust, or
- (i) any other person or entity the Foundation believes to be affiliated with any of the entities above.

68. A copy of the April 5, 2017 request to the Foundation is attached to this Petition as Exhibit J.
69. The April 5, 2017 request to the Foundation disclosed that the Petitioners' counsel made the request in his representative capacity and on behalf of Transparent GMU and Mr. Thomson.
70. Susan Van Leunen, the Chief Financial Officer of the Foundation, responded to the April 5, 2017 records request by letter dated April 13, 2017, refusing to process the request and stating, in relevant part:

The 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. Any records that the Foundation may have were not prepared or used in the transaction of public business, and for this additional reason are not public records under the VFOIA.

71. Ms. Van Leunen's April 13, 2017 letter also stated:

If a court were to hold that the Foundation is subject to the VFOIA and that the records described in the request were public records under the VFOIA, the Foundation reserves the right to review potentially responsive records and assert appropriate statutory exemptions from disclosure.

CLAIMS FOR RELIEF

I. CLAIMS AGAINST THE UNIVERSITY

A. FIRST CLAIM FOR RELIEF AGAINST THE UNIVERSITY:

The University denied the Petitioners their rights under the Act 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.

72. The Petitioners incorporate by reference all allegations contained above in paragraphs 1 through 71.

73. The Act defines “public records” as including “all writings and 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.” Virginia Code § 2.2-3701 (definition of “Public records”).
74. The University is an agency of the Commonwealth and is thus a “public body” subject to the Act. *See* Virginia Code § 2.2-3701 (definition of “Public body”).
75. The Foundation is and was, at all relevant times, an agent of the University insofar as:
- a. the Foundation performed fundraising, endowment administration, and real estate management activities for the sole benefit of the University;
 - b. the Foundation performed these activities according to one or more mutual agreements with the University; and
 - c. the University exercised control or reserved the right to exercise control over those activities by, among other things:
 - i. requiring specific authorization from the University before the Foundation accepts property subject to any conditions or restrictions imposed by the donor;
 - ii. requiring that any gift agreements supporting a new program or activity within the University be signed by the University’s Senior Vice President and Provost and/or rejecting such a gift;
 - iii. establishing policies governing the acceptance of gifts and the disbursement of Foundation funds;
 - iv. selecting the Foundation’s President and Chief Executive Officer;
 - v. objecting to the removal of the Foundation’s President by the Foundation’s Executive Committee;
 - vi. enjoying ex officio seats with full voting rights on the Foundation’s Board of Trustees for the University’s President, the University’s Vice President for University Development and Alumni Affairs, and the Rector of the Board of Visitors of the University;

- vii. appointing additional University employees to the Foundation's Board of Trustees as non-ex officio trustees with full voting rights;
- viii. requiring the Foundation consult with the University regarding the Foundation's fund-raising and donor acquisition programs and the Foundation's gift management and gift acceptance policies;
- ix. conducting, alongside the Foundation's Chairman and Development Chair, annual reviews of the Foundation President's performance;
- x. requiring signed approval of any acceptance of federal grants;
- xi. requiring the Foundation "promptly acknowledge and issue receipts for all gifts to the Foundation and the University" and provide appropriate recognition and stewardship of gifts;
- xii. requiring the Foundation coordinate with the University regarding fundraising initiatives and the identification, cultivation, and solicitation of donors; and
- xiii. demanding an audit of the Foundation's financial records.

76. Fundraising for a public university, administration of a public university's endowment, and management of a public university's real estate are forms of "public business." *See, e.g.,* Exhibit F at 6 (acknowledging that "the University bears major responsibility for fund-raising"); Virginia Code § 23.1-1304 (requiring new members of public university governing boards attend educational programs on "endowment management" and "fundraising initiatives"); Virginia Code § 23.1-1301(B)(1) (authorizing governing boards of universities, or their designees, to manage real property acquired by purchase, will, or deed). *C.f.* Virginia Code § 2.2-3705.4(7) (excluding certain sensitive information related to fundraising for public universities from disclosure under the Act, but clarifying that other information is not excluded). *Compare* Virginia Code § 23.1-1010(3) (authorizing public universities like George Mason 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,

including endowment gifts and bequests and gifts in bequests in trust”), *with* Virginia Freedom of Information Advisory Council, Advisory Opinion No. AO-03-04 (2004) (concluding that private non-profit was “agent” of locality for purposes of the Act when locality appointed the company as animal control officer under a Virginia Code provision authorizing, but not requiring, the locality to appoint such an officer). *See also, e.g., Gannon*, 692 N.W.2d at 41; *Toledo Blade*, 602 N.E.2d at 1162–63; *East Stroudsburg University v. Office of Open Records*, 995 A.2d 496, 504–505 (Pa. Comm. 2010); *Chicago Tribune v. College of Du Page*, ___ N.E.3d ___, 2017 Ill. App. 2d 160274 (May 9, 2017) (all holding that solicitation and receipt of donations for public educational institutions is a governmental function).

77. To the extent records related to these activities have been prepared or are owned by the Foundation, they are therefore “writings and recordings . . . prepared or owned by, or in the possession of a public body[’s] . . . agents in the transaction of public business” and are “public records” under the Act. Virginia Code § 2.2-3701.
78. The records described in the April 5, 2017 records request to the University are therefore “public records” because they are in the possession of the Foundation, which is a “public body[’s] . . . agent,” and because they relate to the Foundation’s fundraising and endowment management activities for the University, both of which are forms of “public business.” Virginia Code § 2.2-3701.
79. Because the Foundation has created and/or maintained the requested public records as an agent of the University, the Act considers the University to be the legal custodian of those records. *See* Virginia Freedom of Information Advisory Council, Advisory Opinion No. AO-19-03 (2003).

80. As the legal custodian of the requested records, the University is an entity to which a request for those records may be directed and is required to search for, obtain, and provide the records accordingly. *See* Virginia Freedom of Information Advisory Council, Advisory Opinion No. AO-19-03 (2003).
81. By failing to inquire as to, search for, request, obtain, or provide the requested public records held by the Foundation, the University denied the Petitioners their rights and privileges under the Act to review the records described above in paragraph 58.

B. SECOND CLAIM FOR RELIEF AGAINST THE UNIVERSITY:

To the extent the Foundation is an independent contractor rather than an agent of the University, the University has denied the Petitioners their rights under the Act by frustrating the Act’s policy of ready access to records relating to the transaction of public business.

82. The Petitioners incorporate by reference all allegations contained above in paragraphs 1 through 81.
83. Section 2.2-3700 of the Act “ensures the people of the Commonwealth ready access to public records . . . to promote an increased awareness by all persons of governmental activities and afford every opportunity to citizens to witness the operations of government.” Virginia Code § 2.2-3700(B).
84. The Act prohibits a public body from “frustrat[ing] this policy of ready access to records relating to the transaction of public business by contracting with an independent contractor” to perform tasks “relate[d] to the public business of the [public body]” and thereafter “claiming that such records are out of [the public body’s] reach” for purposes of responding to requests under the Act. Virginia Freedom of Information Advisory Council, Advisory Opinion No. AO-19-03 (2003).

85. Furthermore, Section 2.2-3704(A) of the Act provides that “*all public records* shall be open to inspection and copying by any citizens of the Commonwealth.” (Emphasis added).
86. As detailed above in paragraph 8, the University is an agency of the Commonwealth and is thus a “public body” subject to the Act.
87. As detailed above in paragraph 76, fundraising for a public university is a form of “public business.”
88. To the extent that the University has contracted with the Foundation to perform fundraising activities as an independent contractor and is thereby unable or unwilling to search for or provide records related to these activities, it has frustrated the Act’s policy of ready access to records relating to the transaction of public business and has denied the Petitioners their rights and privileges under the Act to review the records described above in paragraph 58.

C. THIRD CLAIM FOR RELIEF AGAINST THE UNIVERSITY:

The University denied the Petitioners their rights under the Act 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.

89. The Petitioners incorporate by reference all allegations contained above in paragraphs 1 through 88.
90. The Act defines “public records” as including “all writings and 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.” Virginia Code § 2.2-3701 (definition of “Public records”).
91. As detailed above in paragraph 8, the University is an agency of the Commonwealth and is thus a “public body” subject to the Act.

92. As discussed above in paragraph 56, Dr. Janet E. Bingham currently serves both as the University's Vice President for University Advancement and Alumni Relations and as the Foundation's President and Chief Executive Officer.
93. As the University's Vice President for University Advancement and Alumni Relations, Dr. Bingham is an officer, employee, and/or agent of the University and, therefore, an officer, employee, and/or agent of a public body.
94. As discussed above in paragraph 57, Dr. Bingham's duties as a University officer concern the same subject matter and are directed toward the same goals as her duties as President and Chief Executive Officer of the Foundation.
95. In her dual role as an officer for the University and as President of the Foundation, Dr. Bingham has actual, physical, and/or constructive possession of documents that are owned by the Foundation and that relate to fundraising and endowment management for the benefit of the University.
96. As discussed above in paragraph 76, fundraising and endowment management for a public university are both forms of "public business."
97. To the extent records related to fundraising and endowment management for the benefit of the University are used by or are in the possession of Dr. Bingham, they are therefore "writings and recordings . . . prepared or owned by, or in the possession of a public body[']s] officers, employees, or agents in the transaction of public business" and are "public records" under the Act. Virginia Code § 2.2-3701.
98. The records described in the April 5, 2017 records request to the University are therefore "public records" because they in the possession of and/or are used by Dr. Bingham, a

“public body[’s] officer[], employee[], or agent” in her performance of fundraising and endowment management activities—both of which are forms of “public business”—for the benefit of the University.

99. As discussed above in paragraph 79, the Act considers the University to be the legal custodian of records “prepared or owned by, or in the possession of [its] officers, employees or agents in the transaction of public business.” *See* Virginia Freedom of Information Advisory Council, Advisory Opinion No. AO-19-03 (2003).
100. As the legal custodian of the requested records, the University is an entity to which a request for those records may be directed and is required to search for, obtain, and provide the records accordingly. *See* Virginia Freedom of Information Advisory Council, Advisory Opinion No. AO-19-03 (2003).
101. By failing to inquire as to, search for, request, obtain, or provide the requested public records possessed and/or used by Dr. Bingham in the transaction of public business, the University denied the Petitioners their rights and privileges under the Act to review the records described above in paragraph 58.

D. FOURTH CLAIM FOR RELIEF AGAINST THE UNIVERSITY:

By failing to provide a valid response under Virginia Code § 2.2-3704(B) to Petitioners’ April 5, 2017 request, the University has denied Petitioners’ their rights under the Act and waived any statutory exemption to discretionary disclosure of the records described in that request.

102. The Petitioners incorporate by reference all allegations contained above in paragraphs 1 through 101.
103. As detailed above in paragraph 8, the University is an agency of the Commonwealth and is thus a “public body” subject to the Act.

104. As detailed above in paragraphs 73 through 78 and/or paragraphs 90 through 98, the documents requested in the Petitioners' April 5, 2017 request to the University are "public records" under the Act.
105. The Act presumes all public records to be open, and only a "properly invoked" exemption rebuts this presumption. Virginia Code § 2.2-3700(B). Therefore, in order to withhold public records under the Act's statutory exemptions, a public body must "*specifically elect* to exercise an exemption" under the Act. *Id.* (emphasis added).
106. After receiving a request for records under the Act, a public body must, within five working days, provide the requester with either the requested records or one of the four responses enumerated in Virginia Code § 2.2-3704(B) and described above in paragraph 23.
107. In response to the Petitioners' April 5, 2017 records request seeking certain grants and similar instruments, quoted above in paragraph 58, Ms. Elizabeth Woodley, FOIA Compliance Officer for the University, responded that "[t]here are no public records in the possession of George Mason University which are responsive to [the] request." Ms. Woodley then stated that "[i]n the event that a court orders the production of any records through the University under FOIA that we don't currently have physical custody over, we reserve the right to review the records and exercise exemptions under the statute if they apply."
108. Section 2.2-3704(B) does not allow a public body to claim that requested records are not within its custody while simultaneously reserving the right to "review the records and exercise exemptions under the statute if they apply" should a court determine that the records are indeed in the public body's custody. The statute instead requires a public body invoke any statutory exceptions in its response to the request within five working days of

receiving the request, and that such response must “cite, as to each category of withheld records, the specific Code section that authorizes the withholding of the records.” Virginia Code § 2.2-3704(B)(1)–(2). Furthermore, a response properly invoking any statutory exemptions must “identify with reasonable particularity the volume and subject matter of withheld records.” *Id.*

109. The University has not provided the Petitioners or their counsel with any explanation of the statutory exemption or exemptions that would authorize the withholding of the records described in the Petitioners’ April 5, 2017 request to the University. Nor has the University provided the Petitioners or their counsel with any statement “identify[ing] with reasonable particularity the volume and subject matter of withheld records.”

110. More than five days have passed since the University received the April 5, 2017 request for records.

111. Because the University’s response reserving the right to exercise statutory exemptions at a later date does not comply with Section 2.2-3704(B), and because the University failed to, within five working days, identify any statutory exemption that would authorize the withholding of records described in Petitioners’ April 5, 2017 records request or any statement “identify[ing] with reasonable particularity the volume and subject matter of withheld records,” the University has denied Petitioners their rights under the Act and waived its right to invoke any statutory exemptions that would authorize the discretionary withholding of those records.

E. FIFTH CLAIM FOR RELIEF AGAINST THE UNIVERSITY:

The University denied the Petitioners their rights under the Act by failing to respond to their April 5, 2017 request for certain agreements or memoranda of understanding between the University and the Foundation.

112. The Petitioners incorporate by reference all allegations contained above in paragraphs 1 through 111.
113. As detailed above in paragraph 8, the University is an agency of the Commonwealth and is thus a “public body” subject to the Act.
114. After receiving a request for records under the Act, a public body must, within five working days, provide the requester with either the requested records or one of the four responses enumerated in Virginia Code § 2.2-3704(B) and described above in paragraph 23.
115. The University did not provide the Petitioners or their counsel with any records responsive to the April 5, 2017 request for certain agreements or memoranda of understanding between the University and the Foundation, quoted above in paragraph 59.
116. The University did not provide the Petitioners or their counsel with any of the four responses enumerated in Virginia Code § 2.2-3704(B) in response to the April 5, 2017 request for certain agreements or memoranda of understanding between the University and the Foundation, quoted above in paragraph 59. The University’s response to the April 5, 2017 request concerned only to Petitioners’ request for certain gift agreements and other similar instruments, quoted above in paragraph 58.
117. More than five days have passed since the University received the April 5, 2017 request seeking certain agreements or memoranda of understanding between the University and the Foundation, quoted above in paragraph 59.

118. A public body's "[f]ailure to respond to a request for records shall be deemed a denial of the request and shall constitute a violation of th[e Act]." Virginia Code § 2.2-3704(E).
119. The University therefore denied the Petitioners their rights and privileges under the Act by failing to respond to the April 5, 2017 request for certain agreements or memoranda of understanding between the University and the Foundation, described above in paragraph 59.

II. CLAIMS AGAINST THE FOUNDATION

A. FIRST CLAIM FOR RELIEF AGAINST THE FOUNDATION:

As an entity created to perform delegated functions of the University and/or to advise the University, the Foundation is a public body subject to the Act and therefore denied the Petitioners their rights under the Act by failing to respond to their records request.

120. The Petitioners incorporate by reference all allegations contained above in paragraphs 1 through 119.
121. The Act defines a "public body" as, in relevant part, any "agency of the Commonwealth" or "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"—even if such entity "has private sector or citizen members." Virginia Code § 2.2-3701 (definition of "Public body").
122. As detailed above in paragraph 8, the University is an agency of the Commonwealth and is therefore a "public body" subject to the Act.
123. The Foundation's Articles of Incorporation state that the Foundation was created to "(1) promote the advancement and further the aims and purposes of [the University]" by "develop[ing] and appl[y]ing financial resources . . . and "(2) accept, administer, apply, and use property acquired by gift, grant, devise, bequest, or otherwise for the purposes previously set forth."

124. The development and application of financial resources and the acceptance, administration, and application of gifts, grants, devises, and bequests for the advancement and furtherance of a public university are essential functions of a public university and are forms of “public business.” *See, e.g.*, Virginia Code § 23.1-1304 (requiring new members of public university governing boards attend educational programs on “endowment management” and “fundraising initiatives”). *C.f.* Virginia Code § 2.2-3705.4(7) (excluding certain sensitive information related to fundraising for public universities from disclosure under the Act, but clarifying that other information is not excluded).
125. The March 22, 2013 Affiliate Agreement between the University and the Foundation recites that the Foundation “works with the University to assist and advise” in “fundraising and asset management activities.” Based upon this recital, Transparent GMU and Mr. Thomson allege, upon information and belief, that the Foundation was also created to advise the University.
126. The Foundation is therefore an “entity . . . created to perform delegated functions of [a] public body or to advise [a] public body” and is itself a “public body” under the Act. Virginia Code § 2.2-3701 (definition of “Public body”).
127. As the Foundation is a “public body” under the Act, records related to the Foundation’s transaction of public business are “public records” under the Act. *See* Virginia Code § 2.2-3701 (definition of “Public records”).
128. As the records described in the April 5, 2017 records request to the Foundation were such “public records,” the Foundation denied the Petitioners their rights and privileges under the

Act by failing to provide one of the enumerated responses under Virginia Code § 2.2-3704(B) and by refusing to process the request.

B. SECOND CLAIM FOR RELIEF AGAINST THE FOUNDATION:

As a corporation supported principally by public funds, the Foundation is a public body subject to the Act and therefore denied the Petitioners their rights under the Act by failing to respond to their records request.

129. The Petitioners incorporate by reference all allegations contained above in paragraphs 1 through 128.
130. As detailed above in paragraph 8, the University is an agency of the Commonwealth and is thus a “public body” subject to the Act.
131. The Act also defines a “public body” as, in relevant part, any corporation “supported wholly or principally by public funds.” Virginia Code § 2.2-3701 (definition of “Public body”).
132. The Foundation is funded in part by a six-percent administrative fee it exacts from gifts accepted on behalf of the University and a 1.25-percent annual management fee it exacts on endowments it manages on behalf of the University. The funds upon which the Foundation exacts those administrative and annual management fees are public funds, as they:
 - a. are received for, in the name of, and/or on account of the University;
 - b. are held by the Foundation only in its capacity as an agent, trustee, and/or fiduciary of the University;
 - c. are subject to University supervision and control by virtue of the University’s rights under the March 22, 2013 Affiliation Agreement to set policies for the transfer of Foundation funds, to audit the Foundation’s financial records, and to receive all Foundation assets and property upon dissolution of the Foundation; and

d. would, but for the Foundation's existence and the University's Gift Acceptance Policy, naturally flow to the University.

133. The Foundation also receives public funds under multiple real property leases with the University.

134. The Foundation is also supported by public funds from the University insofar as the University is solely responsible for the compensation of the Foundation's President and Chief Executive Officer.

135. In addition, the March 22, 2013 Affiliate Agreement between the University and the Foundation states that the University "will provide the Foundation with fair and reasonable compensation or payment" as "consideration for Foundation services." Based upon this provision, the Petitioners allege, upon information and belief, that the University also provides the Foundation with public funds as fair and reasonable compensation or payment of services.

136. The Petitioners allege, upon information and belief, that the public funds identified above in paragraphs 132 through 135 are, alone or in the aggregate, a principal source of support for the Foundation.

137. The Foundation is therefore a "corporation . . . supported wholly or principally by public funds" and a "public body" under the Act. Virginia Code § 2.2-3701 (definition of "Public body").

138. As a "public body" under the Act, records related to the Foundation's performance of public business are "public records" under the Act. Virginia Code § 2.2-3701 (definition of "Public records").

139. As the records described in the April 5, 2017 request to the Foundation were “public records” under the Act, the Foundation denied the Petitioners their rights and privileges under the Act by failing to provide one of the enumerated responses under Virginia Code § 2.2-3704(B) and by refusing to process the request.

C. THIRD CLAIM FOR RELIEF AGAINST THE FOUNDATION:

The Foundation denied the Petitioners their rights under the Act because the requested records are public records, which the Foundation must ensure are open to inspection and copying regardless of its status as a public body.

140. The Petitioners incorporate by reference all allegations contained above in paragraphs 1 through 139.

141. The Act defines “public records” so as to include “all writings and 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.” Virginia Code § 2.2-3701 (definition of “Public records”).

142. As detailed above in paragraph 8, the University is an agency of the Commonwealth and is thus a “public body” subject to the Act.

143. As detailed above in paragraph 75, the Foundation is and was, at all relevant times, an agent of the University.

144. As detailed above in paragraph 93, Dr. Bingham is and was, at all relevant times, an officer, employee, and/or agent of the University.

145. As detailed above in paragraph 76, fundraising for a public university, administration of a public university’s endowment, and management of a public utility’s real estate are all forms of “public business.”

146. To the extent records described in the Petitioners’ April 5, 2017 records request to the Foundation have been prepared by, are owned by, or are in the possession of the Foundation,

they are “writings and recordings . . . prepared or owned by, or in the possession of a public body[’s] . . . agents in the transaction of public business” and therefore “public records” under the Act. Virginia Code § 2.2-3701 (definition of “Public records”).

147. Furthermore, to the extent the records described in the Petitioners’ April 5, 2017 request to the Foundation have been prepared by, are in the possession of, or are used by Dr. Bingham in her transaction of public business—including activities related to fundraising, endowment administration, and real estate management for the University’s benefit—they are “writings and recordings . . . prepared or owned by, or in the possession of a public body[’s] . . . officer[], employee[], or agent[] in the transaction of public business” and therefore “public records” under the Act. Virginia Code § 2.2-3701 (definition of “Public records”).

148. Regardless of the Foundation’s status as a “public body” under the Act, the Foundation denied the Petitioners their rights and privileges under the Act by failing to ensure that the records described in the April 5, 2017 records request to the Foundation were “open to inspection and copying by any citizens of the Commonwealth,” as required by Virginia Code § 2.2-3704(A).

D. FOURTH CLAIM FOR RELIEF AGAINST THE FOUNDATION:

By failing to provide a valid response under Virginia Code § 2.2-3704(B) to the Petitioners’ April 5, 2017 request, the Foundation has denied Petitioners’ their rights under the Act and waived any statutory exemption to discretionary disclosure of the records described in that request.

149. The Petitioners incorporate by reference all allegations contained above in paragraphs 1 through 148.

150. As detailed above in paragraphs 120 through 126 and/or paragraphs 129 through 137, the Foundation is a “public body” subject to the Act.

151. As detailed above in paragraph 127, paragraph 138, paragraph 146 and/or paragraph 147, the documents requested in the Petitioners' April 5, 2017 request to the Foundation are "public records" under the Act.
152. The Act presumes all public records to be open, and only a "properly invoked" exemption rebuts this presumption. Virginia Code § 2.2-3700(B). Therefore, in order to withhold public records under the Act's statutory exemptions, a public body must "*specifically elect* to exercise an exemption" under the Act. *Id.* (emphasis added).
153. After receiving a request for records under the Act, a public body must, within five working days, provide the requester with either the requested records or one of the four responses enumerated in Virginia Code § 2.2-3704(B) and described above in paragraph 23.
154. In response to the Petitioners' April 5, 2017 request to the Foundation, Ms. Susan Van Leunen, the Foundation's Chief Financial Officer, wrote that the Foundation was refusing the request but that it "reserves the right to review potentially responsive records and assert appropriate statutory exemptions from disclosure" should a court "hold that the Foundation is subject to the [Act] and that the records described in the request were public records under the [Act]."
155. A public body's refusal to process a request and simultaneous reservation of the right to "review the records and exercise exemptions under the statute if they apply" is not a valid response to a records request under Section 2.2-3704(B). The statute instead requires that a public body must invoke any statutory exemptions in its response to the request within five working days of receiving the request, and that such response must "cite, as to each category of withheld records, the specific Code section that authorizes the withholding of the

records.” Virginia Code § 2.2-3704(B)(1)–(2). Furthermore, a response properly invoking any statutory exemptions must “identify with reasonable particularity the volume and subject matter of withheld records.” *Id.*

156. The Foundation has not provided the Petitioners or their counsel with any indication of the statutory exemption or exemptions that would authorize the withholding of the records described in Petitioners’ April 5, 2017 request to the Foundation. Nor has the Foundation provided the Petitioners or their counsel with any statement “identify[ing] with reasonable particularity the volume and subject matter of withheld records.” *Cf.* Virginia Code § 2.2-3704(B)(1)–(2).

157. More than five days have passed since the Foundation received the April 5, 2017 request.

158. Because the Foundation’s response reserving the right to exercise statutory exemptions at a later date does not comply with Section 2.2-3704(B), and because the University failed to provide within five working days any explanation of any statutory exemption that would authorize the withholding of records described in Petitioners’ April 5, 2017 records request or any statement “identify[ing] with reasonable particularity the volume and subject matter of withheld records,” the Foundation has denied Petitioners their rights under the Act and waived any statutory exemptions that would authorize the discretionary withholding of those records.

III. CLAIMS AGAINST BOTH THE UNIVERSITY AND THE FOUNDATION

A. SIXTH CLAIM FOR RELIEF AGAINST THE UNIVERSITY AND FIFTH CLAIM FOR RELIEF AGAINST THE FOUNDATION:

As an alter-ego of the University, the Foundation must be considered a public body subject to the Act, and the Foundation and/or the University therefore denied the Petitioners their rights under the Act by failing to adequately process their request.

159. The Petitioners incorporate by reference all allegations contained above in paragraphs 1 through 158.
160. As detailed above in paragraph 8, the University is an agency of the Commonwealth and is thus a “public body” subject to the Act.
161. At all relevant times, the Foundation has been operated as a mere agent, instrumentality, and alter-ego of the University.
162. The University has delegated important public functions to the Foundation, including fundraising, endowment administration, and real estate management for the sole benefit of the University. The University continues to exercise control over these functions by, among other things:
- a. establishing policies governing the Foundation’s acceptance of gifts, the disbursement of Foundation funds, and the Foundation’s use of its premises;
 - b. requiring specific authorization from the University before the Foundation accepts property subject to any conditions or restrictions imposed by the donor;
 - c. requiring that any gift agreements intended to support a new program or activity within the University be signed by the University’s Senior Vice President and Provost;
 - d. selecting the Foundation’s President and Chief Executive Officer;

- e. maintaining the University's Vice President for University Development and Alumni Affairs as President and Chief Executive Officer of the Foundation;
- f. providing the salary of the Foundation's President and Chief Executive Officer;
- g. reserving the right to object to the removal of the Foundation's President by the Foundation's Executive Committee;
- h. enjoying ex officio seats with full voting rights on the Foundation's Board of Trustees for the University's President, the University's Vice President for University Development and Alumni Affairs, and the Rector of the Board of Visitors of the University;
- i. appointing University deans or academic directors to the Foundation's Board of Trustees as appointed trustees with full voting rights;
- j. requiring the Foundation consult with the University regarding the Foundation's fund-raising and donor acquisition programs and the Foundation's gift management and gift acceptance policies;
- k. conducting, alongside the Foundation's Chairman and Development Chair, annual reviews of the Foundation President's performance;
- l. requiring signed approval of any acceptance of federal grants;
- m. requiring the Foundation "promptly acknowledge and issue receipts for all gifts to the Foundation and the University" and provide appropriate recognition and stewardship of gifts;
- n. requiring the Foundation coordinate with the University regarding fundraising initiatives and the identification, cultivation, and solicitation of donors; and

- o. reserving the right to demand audits of the Foundation's financial records.

163. At all relevant times the University and Foundation have shared a unity of interest, as the Foundation:

- a. is operated for the sole benefit of the University;
- b. would not exist but for the University; and
- c. has named the University as the sole recipient, either directly or indirectly, of the Foundation's remaining assets should the Foundation cease to exist.

164. At all relevant times, the University and Foundation have shared a substantial unity of identity due to, among other things:

- a. the placement of the University's Vice President for Development and Alumni Affairs as President and Chief Executive Officer of the Foundation;
- b. the placement of the University President, the Vice President for University Development and Alumni Affairs, and the Rector of the Board of Visitors of the University as ex officio members of the Foundation's Board of Trustees with full voting rights; and
- c. the placement of at least two University deans or academic directors, appointed by the University President, as appointed members of the Foundation's Board of Trustees with full voting rights.

165. At all relevant times, the University and the Foundation have acted as a single entity, have held themselves out as a single entity, and/or have treated the Foundation as an office or department of the University by virtue of, among other things:

- a. the University's Gift Acceptance Policy requiring all gifts be made to the Foundation;

- b. the Foundation's authority to use the University's name and logo;
- c. maintaining Foundation offices on the University's campus and in a University building;
- d. the location of the Foundation's website on the University's internet domain;
- e. the inclusion of Foundation staff on the University's online directory and in the University's "Admin-Staff Portraits" webpage; and
- f. the University's maintenance of a "pledge payment reminder system" to remind individuals to honor their pledges to donate to the Foundation.

166. The University and the Foundation share a uniquely close relationship, as further evinced by:

- a. participation of Foundation staff in the University's employee benefit programs;
- b. the Foundation's provision of a residence for the University's President;
- c. the Foundation's authority, as set forth in the March 22, 2013 Affiliation Agreement, to "serve as an instrument for entrepreneurial activities for the University;"
- d. the University's inclusion of the Foundation as a "component unit" in its annual financial statements; and
- e. the Foundation's holding of University investments.

167. At all relevant times, the University's employment of the Foundation as a mere agent, instrumentality, and alter-ego has worked to defeat public convenience by denying the public's right to access records related to the operations of the University, a state agency and public body.

168. At all relevant times, the University's employment of the Foundation as a mere agent, instrumentality, and alter-ego has resulted in a breach of the University's legal and equitable

duties as a state agency and public body to allow the public access to records related to its public business, thereby violating public and private confidence and injuring the public interest.

169. At all relevant times, the University's employment of the Foundation as a mere agent, instrumentality, and alter-ego has denied the Petitioners their rights and privileges under the Act by denying them access to the public records described in its April 5, 2017 requests for records, which are quoted above in paragraphs 58 through 59 and paragraph 67.
170. Reason, justice, and the policies embodied within the Act therefore require that the Foundation's separate corporate identity be disregarded and that the Foundation be treated as a public body and/or a constituent body of the University for purposes of the disclosure of public records under the Act.
171. As a "public body" under the Act, records related to the Foundation's performance of public business are "public records" under the Act. Virginia Code § 2.2-3701 (definition of "Public records").
172. Because the records described in the April 5, 2017 request to the Foundation were "public records" under the Act, the Foundation denied the Petitioners their rights and privileges under the Act by failing to respond to that request with one of the enumerated responses under Virginia Code § 2.2-3704(B) and by refusing to process the request.
173. In addition or in the alternative, because the records described in the April 5, 2017 request to the University were "public records" under the Act, the University denied the Petitioners their rights and privileges under the Act by failing to inquire as to, search for, request, obtain,

or provide the requested public records held by its mere agent, instrumentality, and alter-ego—the Foundation.

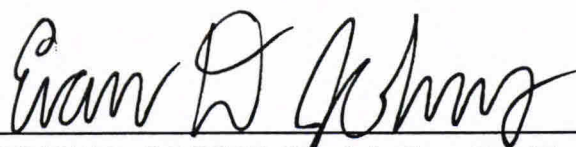
RELIEF REQUESTED

Based on the facts and authorities discussed above, Transparent GMU and Mr. Thomson ask this Court:

- (a) issue a writ of mandamus to George Mason University and/or George Mason University Foundation, Inc., compelling them to perform their ministerial duty under the Virginia Freedom of Information Act to produce the records requested in Transparent GMU and Mr. Thomson’s April 5, 2017 requests;
- (b) declare that George Mason University and/or George Mason University Foundation, Inc., has unlawfully and unreasonably withheld public records from citizens of the Commonwealth in violation of the Virginia Freedom of Information Act;
- (c) declare that George Mason University Foundation, Inc., is a public body under the Virginia Freedom of Information Act and/or is subject to a duty to provide access to any records relating to its activities as George Mason University’s agent in the transaction of public business;
- (d) order that George Mason University and/or George Mason University Foundation, Inc., provide Transparent GMU and Mr. Thomson with all records responsive to their April 5, 2017 requests for records within five business days, or, in the alternative, provide Transparent GMU and Mr. Thomson with a response consistent with Virginia Code § 2.2-3704(B)(3)-(4) within five business days;

- (e) declare that by failing to invoke any statutory exemptions that would authorize the withholding of the records described in Transparent GMU and Mr. Thompson's April 5, 2017 requests for records in accordance with Virginia Code § 2.2-3704(B)(1)-(2), George Mason University and George Mason University Foundation, Inc., have waived any statutory exemptions that would authorize the discretionary withholding of those records;
- (f) order that George Mason University and/or George Mason University Foundation, Inc., respond to any and all future requests for records from Transparent GMU or from Mr. Thomson in accordance with the Virginia Freedom of Information Act, Virginia Code §§ 2.2-3700—2.2-3714;
- (g) award Transparent GMU and Mr. Thomson their reasonable costs, including costs and reasonable fees for expert witnesses, and attorneys' fees under Virginia Code § 2.2-3713(D); and
- (h) grant any other relief the Court deems appropriate.

Respectfully submitted,



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