VIRGINIA:

IN THE FAIRFAX CIRCUIT COURT

TRANSPARENT GMU *et. al.*,	)	
	)	
Petitioners,	)	
	)	
v.	)	**Case No. CL 2017-07484**
	)	
GEORGE MASON UNIVERSITY *et. al.*,	)	
	)	
Respondents.	)	

MEMORANDUM OPINION AND ORDER

THIS MATTER CAME BEFORE THE COURT upon Petitioners Transparent GMU and August Thomson's Verified First Amended Petition for Mandamus Relief ("Amended Petition") and Defendants George Mason University ("GMU" or "University") and George Mason University Foundation, Inc.'s ("Foundation") Plea in Bar and Demurrer to the Amended Petition. For reasons stated below, the Court SUSTAINS the Plea in Bar of the University to the Amended Petition, and SUSTAINS the Foundation's Demurrer to Counts IV and V of the Amended Petition. Although Counts IV and V are dismissed as standalone counts, the facts as alleged are relevant to the determination of whether the Foundation is a public body. Consequently, the dismissal of those separate counts are without prejudice to either party raising those facts in support of Count III.

The Foundation has filed an Answer as to Count III, and the parties are at issue. A two-day trial has been set, to commence on April 24, 2018.

Procedural Background and Material Facts

George Mason University is a public institution of higher education, a public body, and a state agency subject to the Virginia Freedom of Information Act ("VFOIA"), Va. Code § 2.2-3700, *et. seq.* As a public body, the University must conduct its business in a transparent manner, subject

OPINION LETTER

to defined exclusions, and consistent with VFOIA's policy of preventing the conducting of public business in an atmosphere of secrecy. As required by VFOIA, the University has appointed an officer whose duties include coordinating the University's compliance with VFOIA requests. A public body's VFOIA officer oversees the public's access to public records in the custody of the public body or its officers, employees, and agents, and prepared in the transaction of public business.

On April 5, 2017, the Petitioners requested records from the University and the Foundation relating to donations made or offered, directly and indirectly, to the University by certain private entities during the years 2008 through 2012. Although the request reflects a sincere desire to discover whether the University's curriculum development and faculty hiring are being influenced by such donors, the reason for the request is irrelevant under VFOIA. *Associated Tax Serv. Inc. v. Fitzpatrick,* 236 Va. 181 (1988). If public bodies possess responsive documents, those documents must be produced unless they fall within a statutory exclusion. In response to the request, the University stated that it did not have any of the requested records in its possession, and the Foundation stated that it was not a "public body" subject to VFOIA. Petitioners initially received none of the requested documents in response to their VFOIA request.[1]

On May 26, 2017 Petitioners filed a Verified Petition for Mandamus, Injunctive and Declaratory Relief ("Original Petition"). The Original Petition asserted five discreet claims against the University under Section I, summarized as follows:

[1] The University later produced some responsive documents, and the parties have since dismissed a claim under the original petition which sought copies of agreements between the University and the Foundation.

Section I. Claims against the University

Claim #1: The University failed to search for and provide requested records as the legal custodian of such records held by its agent, the Foundation.

Claim #2: Alternatively, the University frustrated VFOIA by creating an independent contractor rather than retaining custody of the records through a University agent.

Claim #3: The University failed to search for and provide records in the possession, custody, and control of Dr. Janet E. Bingham, the Vice-President for University Development and Alumni Affairs at the University and the President and CEO of the Foundation.

Claim #4: The University failed to provide a valid response to the April 5, 2017 request, and thereby waived the right to claim any statutory exclusions to the request.

Claims #5: The University failed to provide copies of agreements between the University and the Foundation.

On September 22, 2017, the Court considered the initial demurrers to the Original Petition after oral argument, and dismissed Claim #5 with prejudice by agreement of the parties.[2]

The Petition also asserted four claims against the Foundation under Section II, summarized as follows:

Section II. Claims against the Foundation

Claim #1: The Foundation is a public body subject to VFOIA because it performs the delegated functions of the University. The Foundation therefore violated VFOIA by declaring that it is not a public body and refusing to disclose responsive documents.

Claim #2: The Foundation is a public body subject to VFOIA because it is supported by public funds. The Foundation therefore

[2] The demurrers were originally scheduled for September 15, 2017. The hearing had to be continued to September 22, 2017 as the undersigned judge was asked to preside over the hearing.

violated VFOIA by declaring that it is not a public body and refusing to disclose responsive documents.

Claim #3: Even if the Foundation is not a public body, it holds public records that are independently subject to VFOIA.

Claim #4: The Foundation failed to provide a valid response to the April 5, 2017 request, and thereby waived the right to claim any statutory exclusions to the request.

Under Section III, the Petition filed claims against both the University and Foundation on "alter-ego" and "veil-piercing" theories – arguing that the Foundation and the University are actually one in the same and that the records must therefore be produced by both. Essentially, under this argument, the University must produce records held by the Foundation because the Foundation's status as an independent entity is disregarded. Moreover, the Foundation must produce the records it holds because the Foundation under this theory functions merely as an agent or arm of the University and not as an autonomous institution. Section III included "Claim #6" against the University and "Claim #5" against the Foundation, summarized as follows:

Section III: Claims against both the University and the Foundation

Claim #6 Against the University: The Foundation is the University's alter-ego. The University violated VFOIA when it failed to produce records in the custody of the Foundation.

Claim #5 Against the Foundation: The Foundation is the University's alter-ego. The Foundation is therefore both an agent of the University and a "public body," and it violated VFOIA when it failed to produce the requested records.

The Court, in sustaining the demurrer on September 22, 2017 with leave to amend, asked Petitioners to group their causes of actions into separate "counts" and then seek approprite relief instead of grouping the complaint into "claims".

Consequently, the Amended Petition separated the causes of actions as follows:

Count I: Violation of VFOIA by the University due to its failure to search for and provide records held by the Foundation, which is an agent of the University.

Count II: Violation of VFOIA by the University due to its failure to search for and provide records possessed by, or in the custody, care and control of, Dr. Janet E. Birnham, who serves as President of the Foundation and who, in that capacity, possesses or has custody of and control over those documents at the Foundation.

Count III: Violation of VFOIA by the Foundation because the Foundation's performance of delegated public functions of the University renders the Foundation a "public body," and therefore due to its failure to respond correctly to the VFOIA request when it asserted that it was not a "public body" subject to VFOIA.

Count IV: Violation of VFOIA by the Foundation because the Foundation receives public funding, and therefore due to its failure to respond correctly to a VFOIA request when it asserted that it was not a public body despite being supported principally by public funds.

Count V: Violation of VFOIA by the Foundation because it is the custodian of public records which are open to inspection regardless of whether it is a public body, and therefore due to its failure to provide copies of public records upon request.

Separating the causes of action into these five counts clarified the issues presented and aligned the causes of actions with their respective oppositions. For purposes of considering the demurrers filed by the Foundation and the plea-in-bar and demurrers repeated by the University, the Court considered Exhibits A through J to the original Petition and Exhibit K to the Amended Petition (the affidavit for good cause).

The Court approved the filing of two Amicus Briefs, and in doing so considered arguments presented by the Virginia Business Higher Education Council and the Virginia Coalition for Open

Government. The Court thoroughly considered the well-presented written and oral arguments of the parties in coming to its conclusion.

LEGAL ANALYSIS

I. Preliminary Issues (Dismissal of Declaratory Judgment and Veil-Piercing Claims)

Before addressing the specific counts advanced under the Amended Petition, the Court addresses here the two claims it dismissed on demurrer for which the Petitioners were not granted leave to amend. Those two claims fell under Count III of the Original Petition and sought relief for Declaratory Judgment and Veil Piercing.

A. Relief under the Declaratory Judgment Act is unavailable with respect to a VFOIA request.

The University filed a demurrer raising the defense of Sovereign Immunity against Petitioner's claim seeking declaratory judgment. Sovereign Immunity prevents lawsuits against the Commonwealth; it is in effect unless expressly waived by the legislature. When the legislature abrogates sovereign immunity by statute, that waiver is to be read narrowly, and can only apply to the limited circumstances under which the Commonwealth has allowed itself to be subjected to suit. The University and Petitioner offer competing interpretations of how a Sovereign Immunity waiver is to be limited.

The University asserts that a statute that waives Sovereign Immunity and the rights that arise under that statute are both to be applied narrowly. It further asserts that the Court should not broadly construe a right under a statute if the statute itself is identified as a narrow abrogation of Sovereign Immunity. What matters is the degree to which the Commonwealth has voluntarily subjected itself to suit, and to hold otherwise would be to hold that "once the legal remedy gate is

open, everyone and everything can enter the kingdom, just as long as the claim is characterized as the allowable form of relief." Respondent's Reply Brief, fn. 1.

Petitioner asserts that, while a waiver statute should be read narrowly, the rights that arise under that statute are not limited in that way. To bolster this proposition, Petitioner points to the language in VFOIA itself, which states that "[t]he provisions of this chapter shall be liberally construed to promote an increased awareness by all persons of governmental activities and afford every opportunity to citizens to witness the operations of government," which they argue means that the rights arising under VFOIA are broad even if the Sovereign Immunity waiver itself is not. Va. Code § 2.2-3700. Ultimately, the distinction is immaterial to the question of whether declaratory relief is available in a VFOIA suit; instead, the Court's consideration when addressing the two dismissed claims for relief is simply what remedies the legislature has provided for *in the event* that a citizen's VFOIA rights, however broadly (or narrowly) construed, are violated. The statute is clear on that front.

(1) Under VFOIA, the Commonwealth waived sovereign immunity only as to mandamus and injunctive relief. Declaratory Judgment is not an available remedy.

VFOIA provides for two remedies in the event that the rights guaranteed under the statute are violated. Specifically, aggreived citizens "may proceed to enforce such rights and privileges by filing a petition for *mandamus* or *injunction*." Va. Code § 2.2-3713 (emphasis added). This limited waiver provides the only two forms of relief available under the statute.

By contrast, the Virginia Declaratory Judgment Act allows for the circuit courts to adjudicate "cases of actual controversy" prior to an actual injury occurring. Va. Code § 8.01-184; *Reisen v. Aetna Life & Casualty Co.*, 225 Va. 327, 331 (1983). Although the Declaratory Judgment Act is a valuable tool in resolving legal disputes before an actually injury occurs, the Declaratory

Judgment Act does not broaden the Sovereign Immunity waiver specifically provided for under VFOIA. To the extent that the Amended Petition includes requests for declaratory relief, those requests will not be entertained by the Court because they seek a form of relief not permitted by the legislature, to which the University is immune.

(2) If the Foundation is a public body, it is entitled to Sovereign Immunity. If it is not a public body, the Court declines to consider a Declaratory Judgment action as Petitioners' rights, by their assertion, have already been invaded.

If the Foundation were a public body of the Commonwealth, as Petitioner argues, then the Foundation would also be cloaked in Sovereign Immunity, and a declaratory judgment would not be an appropriate form of relief against the Foundation either, for the reasons discussed above. Even assuming, however, the Foundation is not a public body, declaratory relief would still be innapropriate, because the controversy has already ripened and injury has already been inflicted.[3]

The Virginia Declaratory Judgment Act authorizes courts to render declaratory judgments where there are present facts ripe for adjudication before they mature into an actual injury. *Reisen,* 225 Va. at 331. If the injury has already occurred or rights have already been invaded, however, then a declaratory judgment is not an appropriate form of relief. Put plainly, "[d]eclaratory judgment 'will not as a rule be exercised where some other mode of proceeding is provided.'" *Miller v. Jenkins*, 54 Va. App. 282, 289 (2009) (citing *Liberty Mut. Ins. Co. v. Bishop*, 211 Va. 414, 421 (1970)). It was for those reasons that the Court sustained the demurrers as to the Declaratory Judgment claims.

[3] The Court will also not consider the question of whether or not the Foundation has waived its right to later claim an exclusion, as the inquiry is overly speculative and premature. That issue as it presently stands does not present facts ripe for adjucdication

B. Piercing the Foundation's Corporate Veil is inappropriate because the General Assembly authorizes universities to establish such foundations and they are therefore neither wrongful nor fraudulent.

"Piercing the Corporate Veil" is an action by which a party who is otherwise shielded from liability can nevertheless be brought into a lawsuit in the wake of fraud or gross misconduct. The elements of the action include (1) an impermissible control over a corporation or entity, (2) wrongful, misleading, or fraudulent action, and (3) injury caused to the plaintiff. All three elements must exist.

Veil piercing is most commonly found in lawsuits against corporate officers and shareholders by corporate creditors. However, the action has also been raised under VFOIA. In *RF&P Corp. v. Little*. 247 Va. 309 (1994), the Virginia Supreme Court examined the degree of similarity and corporate control between a public body and the private entity in question, but ultimately concluded that veil piercing was not an appropriate form of relief. That conclusion rested on two grounds. First, because the two entities had been established independently, common control was therefore insufficient to nullify their separate legal existence. *Id.* at 316 (citing *Appalachian Power Co. v. Greater Lynchburg Transit Co.,* 236 Va. 292, 296 (1988)). Important to this Court's consideration, there is no bright-line rule as to how much control over an entity is too much control, or how much control is impermissible as a matter of law. *O'Hazza v. Executive Credit Corp.*, 246 Va. 111, 115 (1993). Second, and dispositive here, there was no evidence that the corporate body was created as a sham entity. *Id.* at 316. Although the Virginia Supreme Court did not declare that veil piercing was unavailable as a cause of action under VFOIA, the holding that a veil-piercing claim requires a sham entity supports this Court's decision to sustain the University's demurrer, where Petitioners cannot assert that the corporate entity here, the Foundation, is a sham entity.

University's demurrer, where Petitioners cannot assert that the corporate entity here, the Foundation, is a sham entity.

The Amicus Brief filed by the Virginia Business Higher Education Council notes that the General Assembly has enacted laws highlighting university foundations as the preferred method of maintaining endowment funds. This is because, even though Virginia consistently ranks among the top states for higher education, it is supposedly 44th in terms of state funding for colleges and universities. University foundations are Virginia's solution to that issue, and they function as a necessary part of the Commonwealth's higher-education system, even being reflected in the higher education statutes themselves.[4]

Whatever the General Assembly's purpose may have been, a public institution setting up a private entity to engage in fund raising is not conduct that warrants the remedy of veil piercing when it has been expressly authorized by the General Assembly. While, on demurrer, the Court does not consider facts outside the pleadings, this is nevertheless pertinent to its consideration of the issues. Regardless of how many "indicia of control" there are between the University and the Foundation, it cannot be said to be *impermissible* control when it is exactly the sort of control envisioned by the General Assembly and prescribed by law.

Petitioners provide several federal cases and cases from other states suggesting that university foundations satisfy the "wrongful, misleading, or fraudulent" prong of the veil-piercing test, but Virginia law suggests a stricter application of the rule on veil piercing. *See C.F. Trust*,

[4] By statute, public universities are empowered to "[c]reate . . . one or more nonprofit entities for the purpose of soliciting, accepting, managing, and administering . . . gifts and bequests . . . ," and they are "encouraged in their attempts to increase their endowment funds and unrestricted gifts from private sources and reduce the hesitation of prospective donors to make contributions . . . , [and those donations] shall be used in accordance with the wishes of the donors . . . ." Va. Code § 23.1-1010(3); 101.

266 Va. 3, 10 (2003) ("This Court has been very reluctant to permit veil piercing. We have consistently held, and we do not depart from our precedent, that only 'an extraordinary exception' justifies disregarding the corporate entity and piercing the veil.") (citing *Greenberg v. Commonwealth ex rel. AG*, 255 Va. 594, 604)); *see also Cheatle v. Rudd's Swimming Pool Supply Co.*, 234 Va. 207 (1987) ("wrongful, misleading or fraudulent action" is only found if the entity in question is "a device or sham used to disguise wrongs, obscure fraud, or conceal crime," or a "stooge" or "dummy" corporation); *Beale v. Kappa Alpha Order* (192 Va. 382 (1951)).

As a matter of law, the Court concludes that a party that takes advantage of a right provided for by the General Assembly has engaged in lawful conduct and is not susceptible to a claim of veil piercing.

II. VFOIA requires a public body to produce records it actually possesses, and does not require the public body to search for records held by a third party. The University is not required to produce the Foundation's documents.

A. The University has two specific obligations under VFOIA for records not in its possession, neither of which applies here.

The General Assembly has specifically provided for two instances where a public body is required to act on VFOIA requests for records that it does not actually possess. Va. Code § 2.2-3704. The first is where the public body originally had possession of the records but later transferred them to another entity (public or private). There, the statute states that the public body will remain the custodian of the records. Va. Code § 2.2-3704(J). The second is where the public body does not possess the records but knows of another public body that does; their only obligation there is to provide the contact information for that other public body. Va. Code § 2.2-3704(B)(3).The General Assembly provided VFOIA rights in these limited circumstances where the public body does not actually possess the records. Here, the records, if they exist, were not

with the Foundation. The Plea in Bar and demurrer raised by the University are therefore sustained as to Count I.

B. The University is not required to produce the Foundation's documents merely because Dr. Bingham is a common employee.

VFOIA provides that a public body "custodian" of public records is required to produce those records or claim an exclusion within five working days. The parties have put forth various theories of how the word "custodian" should be interpreted, but the Virginia Supreme Court notes that "in the ordinary situation, a 'custodian' for VFOIA purposes is the public body in possession of [] a record." *Daily Press, LLC v. Office of the Exec. Sec'y*, 293 Va. 551, 560 (2017). The specific language of the act indicates that a public body is responsible *only* for those records of which it actually has possession.[4] This definition naturally extends to employee-agents of a public body "custodian," because the public body will have possession of the public records through its employee. In such a situation, an employment relationship is necessarily a condition precedent to a finding that a public body has custody over the records.

Here, the custodian of the records held by the Foundation is not the University. Following Petitioner's argument on this count, the custodian of the records in this scenario would be Dr. Bingham. Dr. Bingham, however, serves two roles, first as the Vice President of University Development and Alumni Relations at GMU, and second as the President and CEO of the Foundation. When acting in her role as a Vice President of GMU, the University has control and custody over her work product and those records over which she is a custodian at GMU.

---

[4] Va. Code § 2.2-3704 provides that "[a]ccess to such records shall be provided by the *custodian* in accordance with this chapter by inspection or by providing copies of the requested records, at the option of the requester." (emphasis added).

In her role as President of the Foundation, she is in the employ of the Foundation, and the Foundation has control and custody over her Foundation work records. In this sense, Dr. Bingham wears "two hats," and the functions she performs while wearing one are not imputed into her position under the other. As in the corporate world, it is not rare for board members or officers of one corporation to serve as board members or officers of other corporations. The presence of dual or multiple officers or board members does not expose the records of both corporations to search when an inquiry is directed to one corporation only. It is the *position* over which the corporation has control, not the *person*.

The University has authority and control over the position of "Vice President for University Advancement and Alumni Relations." When Dr. Bingham performs that function, the University has authority and control over Dr. Bingham as an employee acting in that capacity. To the extent that she conducts activities outside of her position at GMU, the University does not have authority and control over her, and she is not an agent of the University with respect to those activities. Therefore, *if* Dr. Bingham served as the custodian of the records on behalf of the Foundation, she did so *outside* of her position at GMU, and the University had no control over her in that respect.

Dr. Bingham was not therefore an agent of the University for the purposes of the VFOIA request to the extent that the request targeted records of the Foundation. The University had no duty to request the Foundation's documents from her merely by virtue of her dual employment with the Foundation. The University's demurrer is therefore sustained as to Count II, and the University is dismissed as a Defendant. The sustaining of this demurrer does not render Dr. Bingham's position irrelevant to the determination of whether the Foundation is a public body. The Court in sustaining the demurrer simply concludes that, as a matter of law, where an employee

of a public body serves in an official capacity for a third party, that service does not automatically subject documents held by that third party to VFOIA liability.

III. The Foundation's answer to Count III carries over to the Amended Petition and the issue of whether the Foundation is a public body subject to VFOIA will be decided at trial. Although dismissed as standalone counts, factual issues presented under the dismissed Counts IV and V alleging public funding and creation of public records remain relevant in deciding whether the Foundation is a public body at trial.

The Foundation answered Count III of the original Petition, and reaffirms that Answer under the Amended Petition. The Answer filed by the Foundation shall therefore be deemed an Answer to the Amended Petition. The issue of whether or not the Foundation's performance of designated public functions on behalf of the University as its agent renders the Foundation a public body within meaning of VFOIA remains to be decided at trial. Additionally, even though the Court sustains the demurrers at to Counts IV and V, the factual issues of whether the Foundation is supported principally by public funds and whether it is in possession of public records continue to be relevant factors to be later considered at trial.

Petitioner cites several cases for the proposition that a foundation created for the purpose of fundraising for a public body is performing a governmental function and is therefore an agent of the public body it seeks to fund and subject to VFOIA. While these cases are insightful as to the law in other jurisdictions, they are distinguishable based upon the difference between VFOIA and Freedom of Information laws in other states.

For example, in *Chicago Tribune v. College Of Du Page*, the Second District Appellate Court of Illinois held that the College of Du Page Foundation was engaged in fundraising on behalf of the College and that, because of the close coordination between the two entities and the fact that, "if the Foundation did not undertake these responsibilities, the College would necessarily do so itself," the Foundation was engaged in a governmental function "*on behalf of the College*." *Id.*

(emphasis added). In *Chicago Tribune,* the College of Du Page Foundation was subject to a FOIA request.

At first blush, this argument seems compelling, but Illinois law differs from Virginia law. In Illinois, "a public record that . . . is in the possession of a party with whom the agency has contracted to perform a governmental function on behalf of the public body . . . shall be considered a public record *of the public body*" (5 ILCS 140/7) (emphasis added). Under Illinois law, a public entity retains custody of public records, even for functions outsourced to third parties, and once engaged in a public function, those third-party agents are subject to FOIA requests with respect to that public function. Under Virginia law, however, there has to be a showing of both public records *and* public bodies, and Virginia does not automatically consider public records to be in the custody of a public body merely because that public body contracted with an outside agent to perform a governmental function.

Coordination and governmental purpose are relevant factors under Virginia law as well, but they are not dispositive, as was expressed by the Virginia Freedom of Information Advisory Council in an October, 2009 opinion regarding the American Frontier Culture Foundation ("AFCF"). There, the Council advised that the AFCF was not a public body even though it might possess public records of donations to the American Frontier Culture Museum ("the Museum"), a public body, for which the AFCF conducted fundraising. The AFCF was in possession of public records and coordinating with a public body, but that alone did not make the AFCF a public body subject to VFOIA. The Council noted that the AFCF was not itself a public body even if it raised funds for a public body, but that it might be acting as an agent of the Museum. *See* Opinion of the Virginia Freedom of Information Advisory Council to Mr. Michael Lam (Oct. 23, 2009) (AO-09-09). But this agency status was not dispositive, and even as an agent, the AFCF did not have to

respond to a VFOIA request. The difference under the Illinois decision and what this Court finds to be persuasive characterization of Virginia law is found where the laws under the two jurisdictions differ. Unlike in Illinois and other jurisdictions, Virginia law references both public records *and* public bodies, and does not automatically consider public records to be in the custody of a public body merely because that public body contracts with an outside source to perform a governmental function. Virginia courts, rather, look directly to the statute.

The Virginia statutory definition of a "public body" includes "any legislative body, authority, board, bureau, commission, district or agency of the Commonwealth or of any political subdivision of the Commonwealth . . . and other organizations, corporations or agencies in the Commonwealth supported wholly or principally by public funds." Va. Code § 2.2-3701. This does not include every governmental body, but only those bodies that have a responsibility to conduct the business of the people based on authority delegated by the legislature or the executive. *See Christian v. State Corp. Comm'n*, 282 Va. 392, 400 (2011) (holding that the State Corporation Commission was not a public body subject to VFOIA because it derived its authority from the Constitution and not from the legislature); *see also, Connell v. Kersey*, 262 Va. 154, 156 (2001). It is then the totality of the factors present in the relationship between the Foundation and the University that need to be considered before determining whether the Foundation should be regarded as a public body subject to VFOIA.

IV. While it is relevant that an entity is supported principally by public funds or holds public records, those facts standing alone do not define the entity as a public body subject to VFOIA. Counts IV and V are therefore dismissed as standalone counts under the Amended Petition.

While it is a requirement that an entity be supported principally by public funds in order to be considered a public body, support alone does not suffice. Instead, the approximate percentage

of public support and funding is an issue of fact to be considered along with other facts and weighed accordingly. *See, Wigand v. Wilkes,* 65 Va. Cir. 437, 438 (Norfolk Cir. Ct. 2004)

Considering Count IV, the statute requires that an entity be a part of the Commonwealth, as opposed to a private organization that contracts with or performs services on behalf of the Commonwealth. Private non-profit organizations that are supported by public funds do not become a part of the Commonwealth merely because they receive such funding. *See* Opinion of Attorney General to Mr. David W. Rowan, Town Attorney for the Town of Onancock (Mar. 27, 2002) (01-094) (advising that a local Business and Civic Association was "not [a] 'public body' under [the] Act," and that "documents of [the] Association [were] not subject to [the] Act's public records disclosure requirements").

Considering Count V, under VFOIA, "[a]ny public body that is subject to this chapter 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 [public records] to the requester or [claim an exclusion.]" Va. Code § 2.2-3704. Importantly, the statute requires both (1) a public body and (2) public records, before any action under VFOIA is required or any rights under VFOIA arise.

Va. Code § 23.1-1010 empowers GMU to create the GMU Foundation for the purpose of collecting private donations on behalf of the University. The Foundation's possession of those records and performance of that function are not dispositive factors towards the Foundation's status as a public body. As discussed above, they are simply factors for the Court to consider in reaching that conclusion. The demurrer is therefore sustained as to Counts IV and V.

CONCLUSION

The University is entitled to Sovereign Immunity against Petitioner's claims under the Amended Petition. Sovereign Immunity can only be waived voluntarily, and when it is, the waiver

is to be read narrowly and the Commonwealth is only subjected to suit in the limited areas it has allowed for. Here, VFOIA presents such a waiver, but VFOIA only allows suit for mandamus and injunctive relief, and not declaratory judgments. Further, the rights and cause of action in this suit accrued prior to the Original Petition being filed, so a declaratory judgment is also an innapropriate action as against the Foundation. Count I is accordingly Dismissed.

The University is not the custodian of the records possessed by the Foundation, by virtue of the fact that VFOIA itself declares a public body to be the custodian of records not in its physical possession in two very limited circumstances, both inapplicable here. Any deficiency is not remedied by the fact that both the University and the Foundation retained a common employee, Dr. Bingham. Count II is accordingly dismissed, and the University is dismissed as a Defendant.

The Foundation has answered Count III, which will be considered at trial. In reviewing Count III, this Court is mindful of the fact that Virginia law differs from the law of other jurisdictions; whereas elsewhere in the United States the mere existence of a delegated public function will impose upon an entity FOIA duties, Virginia regards a delegated public function as but one of several factors to prove before imposing VFOIA obligations under a totality of the circumstances analysis.

Consequently, other factors, including the existence of public funding for the entity, the holding of public records, and the coordination between the subject entity and the public body that it serves, are also relevant to the issues at hand. Count III remains for adjudication on the merits. Counts IV and V are accordingly dismissed.

AND FOR REASONS STATED HEREIN, it is hereby ORDERED that:

Defendant George Mason University's Plea in Bar is SUSTAINED as to Counts I and II of the Amended Complaint:

Defendant George Mason University's' Demurrer is SUSTAINED as to Counts I and II.

Defendant George Mason University is DISMISSED as a Party Defendant; and

Defendant George Mason University Foundation Inc.'s Demurrer is SUSTAINED as to Counts IV and V, and those counts are dismissed, but they are dismissed without prejudice to raise the facts asserted at trial.

AND THIS MATTER IS CONTINUED.

ENTERED this 29 day of, November, 2017.

[redacted]

JUDGE, Fairfax Circuit Court

Endorsement of the parties is waived pursuant to Va Sup. Ct. Rule 1:13.

OPINION LETTER