VIRGINIA:

IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

THE AMERICAN TRADITION INSTITUTE, and
THE HONORABLE DELEGATE ROBERT MARSHALL

Petitioners,

v.

RECTOR AND VISITORS OF THE UNIVERSITY OF VIRGINIA,

Respondent.

Civil Action No. _____

Verified Petition for Mandamus and Injunctive relief.

VERIFIED PETITION FOR MANDAMUS AND INJUNCTIVE RELIEF

NATURE OF THE ACTION

1. The Honorable Robert Marshall and the Environmental Law Center of the American Tradition Institute (ATI) (jointly, the Petitioners), on behalf of Delegate Marshall, and the American Tradition Institute, as represented by Mr. Christopher Horner and Dr. David W. Schnare, the parties who, under authority of the Virginia Freedom of Information Act (Virginia Code § 2.2-3700 *et seq*.) (VFOIA), requested the University of Virginia (UVa) to provide certain documents, petition the court for relief as authorized under the Virginia Freedom of Information Act.

2. Pursuant to Virginia Code § 2.2-3713, the Petitioners, through counsel, ask the court to: (1) order UVa to provide the requested documents on a timely schedule; (2) bar UVa from demanding payment for any costs other than "accessing, duplicating, supplying, or searching for

the requested records"; (3) order the Parties to engage in a process that will minimize the number of excluded documents the Court will have to review *in camera*; (4) order payment of the Petitioners' reasonable costs associated with the instant matter; and, (5) order such necessary and proper injunctive relief or other injunctive relief as this Court deems just and proper.

PARTIES

3. Petitioner Robert Marshall is a resident of Prince William County, domiciled at 7930 Willow Pond Court, Manassas, VA 20111.

4. Petitioner ATI is a national public policy research and educational foundation dedicated to advancing responsible, economically sustainable environmental policy. ATI's programs include research, investigative journalism, and its Environmental Law Center, whose activities include a transparency initiative seeking records relating to environmental and particularly climate change science and policy. ATI has a national media presence, including in Virginia, which has joined the VFOIA request at issue in the present matter from the date it was issued. Dr. David W. Schnare, Esq. is Director of the ATI Environmental Law Center and Christopher Horner, Esq. is Senior Director for Litigation for the Law Center.

5. Dr. Schnare and Mr. Horner are also residents of Virginia.

6. The Respondent, Rector And Visitors Of The University Of Virginia, more commonly known as the University of Virginia (UVa), is a public body subject to VFOIA (*see*, § 2.2-3705.4) located in Charlottesville, Virginia.

7. In preceding transactions associated with this matter, UVa has been represented by its Office of General Counsel and specifically Richard C. Kast, Associate General Counsel, Madison Hall, P.O. Box 400225, 1827 University Avenue, Charlottesville, Virginia 22904-4225, direct telephone number: 434-924-6436, email: rck4p@eservices.virginia.edu.

JURISDICTION AND VENUE

8. This action arises under the Virginia Freedom of Information Act provision authorizing proceedings for enforcement of the act, codified at Va. Code § 2.2-3713(A). This Court has jurisdiction under Va. Code § 2.2-3713(A).

9. Venue is proper in this Court under Va. Code § 2.2-3713(A)(3) because Petitioner Marshall is a resident of Prince William County.

10. This Court is empowered to grant the Petitioners' prayers for relief pursuant to Va. Code §§ 2.2-3713(C) & (D) and § 8.01-620.

VIRGINIA FREEDOM OF INFORMATION ACT AUTHORITIES

11. The Virginia Freedom of Information Act (VFOIA or "the Act"), located at § 2.2-3700 *et seq.* of the Code of Virginia, guarantees citizens of the Commonwealth and representatives of the media access to public records held by public bodies, public officials, and public employees.

12. A public record is any writing or recording - regardless of whether it is a paper record, an electronic file, an audio or video recording, or any other format - that is prepared or owned by, or in the possession of a public body or its officers, employees, or agents in the transaction of public business. All public records are presumed to be open and may only be withheld if a specific, statutory exclusion applies.

13. The policy of VFOIA states that the purpose of VFOIA is to promote an increased awareness by all persons of governmental activities. In furthering this policy, VFOIA requires that the law be interpreted liberally, in favor of access, and that any exclusion allowing public records to be withheld must be interpreted narrowly.

14. The Respondent admits to the previous three paragraphs, taken verbatim from UVa's VFOIA webpage at http://www.virginia.edu/foia/about.html. (*Emphasis added, webpage accessed* May 6, 2011.)

15. "Any public body that is subject to [the VFOIA] 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 to the requestor or make one of [four specified] responses in writing." Va. Code § 2.2-3704(B) (*emphasis added*).

16. The fourth allowed response to a request allows additional time to make a written response in the event the public body finds "conditions" that make a timely response "impossible." Va. Code § 2.2-3704(B)(4). This subsection of the Act does not, however, allow for an indeterminate or unending extension of time within which to supply the records.

17. A public body facing an "extraordinary volume of records", as might be argued in this case, is required to "make reasonable efforts to reach an agreement with the requester concerning the production of the records requested." If the public body is unable to reach such an agreement, it is authorized to petition the appropriate court for additional time to respond to the request. Va. Code § 2.2-3704(C).

18. In the event the charges for producing the requested records is expected to exceed $200, the public body may require a deposit prior to processing the request and the period within which the public body shall respond is tolled for the amount of time that elapses between notice of the expected charges and payment of the deposit. Va. Code § 2.2-3704(H).

19. "Failure to respond to a request for records shall be deemed a denial of the request and shall constitute a violation of [the VFOIA]." Va. Code § 2.2-3704(E).

20. "A public body may make reasonable charges not to exceed its actual cost incurred in accessing, duplicating, supplying, or searching for the requested records." Va. Code § 2.2-3704(F).

21. "Public bodies shall produce nonexempt records maintained in an electronic database in any tangible medium identified by the requester . . . ." Va. Code § 2.2-3704(G) (*emphasis added*).

22. The VFOIA does not require UVa to provide every responsive document it finds. The Act establishes exclusions potentially relevant to this matter at Va. Code § 2.2-3705.1 & 3705.4. Notably, however, VFOIA requires that the law be interpreted liberally, in favor of access, and that any exclusion allowing public records to be withheld must be interpreted narrowly.

FACTS SUPPORTING GOOD CAUSE FOR RELIEF

23. Through counsel, and under color of the requisite attorney affidavit, the Petitioners allege on knowledge, information and belief as presented in the paragraphs which follow.

24. Each communication between the Petitioners and UVa are included by reference into this petition, are listed by date as Attachment I, and are attached thereto.

25. On January 6, 2011, UVa received by electronic mail the initial request for information at issue in this matter (*hereinafter,* "the Request") (Attachment II). In its second paragraph, the Request specified that the information sought was that information residing on a "backup server". The Request identified thirty-nine (39) individuals by name, and five (5) grants that were the focus of the information sought.

26. The Request further identified the locus of the information sought as that "backup e-mail server" which UVa Associate General Counsel Barry Meek had then recently discussed with Virginia Deputy Attorney General Wesley Russell.

27. On January 13, 2011, the fifth day after receipt of the Request, UVa replied by email (Attachment III) that it would take an additional seven work days within which to provide the documents or otherwise determine whether they are available. That seven day period ended on January 24th. In fact, however, as documented in a January 25, 2011 letter (Attachment V), UVa knew in October of 2010 that it had the subject documents, where they were stored, and what it would cost to supply them. Thus, the Respondent's email was, at least, disingenuous, and likely a rote response intended to delay activity on the subject request.

28. In the January 25, 2011, letter, UVa stated that it would cost at least $8,500 to process the Request, made a demand for this sum and asked how the Petitioners would like to proceed. UVa also stated that it had provided this cost demand to Petitioner Marshall in October, 2010. Notably, On January 27, 2010 (Attachment XX), UVa responded to a similar request for electronically stored documents of Professors Michaels and Singer, citing the cost to Greenpeace would be only $3,500; that "the majority of costs will be the result of efforts to search for and access the records, while a smaller but still significant portion of the costs will be associated with duplicating them;" and, "We certainly are willing, as required by the Act, to provide our electronically stored documents to you in a digital format. Producing University records that already exist in an electronic format will be cheaper than producing those records to you in hard copy. "

29. On January 31, 2011 (Attachment XI), the Petitioners appealed the refusal to provide the documents, indicating that the Request clearly specified the backup server as the locus of the Request; sought supporting documentation for the fee request; and, again asked the fee be waived or reduced.

30. Five working days thereafter, on February 7th (Attachment VII), UVa acknowledged the locus of the Request, but refused to reduce or waive the $8,500 demand.

31. On February 11, 2011 (Attachment VIII), the Petitioners memorialized in an email to UVa the commencement of a negotiation over payment of the fee, conditioning payment on UVa providing a schedule indicating when it would begin and complete document production, and requiring "rolling" production during that period. Petitioners reminded UVa of its duty under VFOIA to timely provide the information sought.

32. Three days thereafter, on February 14th (Attachment IX), UVa offered a production schedule of eight and one-half weeks (340 hours) of one person's time, but refused to commit to this schedule. It refused to commit to a rolling production.

33. The following day (Attachment X), the Petitioners acknowledged that UVa had refused to offer a firm schedule for production and refused to commit to rolling production. Nevertheless, the Petitioners offered to make an initial deposit of $2,000, with an expectation of rolling production and the acknowledgement that UVa need not commit more than five persons to this task, in order to ensure that processing of the Request not interfere with the normal operations of the Respondent.

34. In this letter of February 15, 2011, the Petitioners also stated:

> "We offer this deposit or fee with the understanding that the University would begin rolling production on a weekly basis, and would ask that because the records are in electronic form, that they would be supplied in an electronic form that common word processing software can read and edit. We also ask that an index of records being withheld in whole or in part be provided within one month of the University accepting the funds, also on a rolling basis until the production is complete, but not to exceed three months which delay we believe to be unreasonable." (*emphasis added*).

35. Three days thereafter, on February 18th, Dr. Schnare and Mr. Kast, of the UVa Office of General Counsel, engaged in further negotiation in a telephone call (*see*, Attachment XI). As

memorialized in a March 6 letter from the Petitioners to Mr. Kast (Attachment XII), UVa refused to prepare an index of records withheld from the Petitioners, but admitted that failure to create a judicially reviewable record on UVa's exclusion decisions would be unhelpful and was not an approach it was willing to take. In place of an index, UVa agreed to segregate the documents so that those withheld could be readily available, if needed for further review.

36. Petitioners enclosed with the March 6, 2011, letter a check for $2,000, reiterating that they expected rolling production and, within two weeks, a schedule for completion of the task.

37. The letter also identified the question as to whether UVa could charge for exclusion review under the language of the Act.

38. In a March 9, 2011, letter (Attachment XIII), UVa reiterated its position that it is entitled to reimbursement for exclusion review, but would not charge for any redaction of documents it makes. The letter also indicated UVa would need to electronically search 34,062 documents, and would begin by limiting that search to an electronic search for documents associated with the 39 names and the five grants identified in the Request (the Narrowed Search). The letter remained silent with regard to a production schedule, simply indicating it would make a progress report within two weeks.

39. On March 10, 2011, UVa received the Requestor's first partial payment, according to UVa's FOIA website (*see*, Attachment XIV). This is the date that ends the tolled period and starts the clock for production of documents under Va. Code § 2.2-3704(H).

40. Six days later, UVa began accessing the emails, according to the UVa FOIA website (*see*, Attachment XV).

41. In a March 28, 2011, letter (Attachment XVI), UVa indicated that it had completed accessing and segregating the documents on the backup server that were responsive to the

Narrowed Search. The letter indicated UVa had spent 40 hours to conduct a keyword retrieval of the Narrowed Search, and had not begun exclusion review. Again, UVa did not offer a production schedule. It did, however, request that the scope of the response to the Requestors' initial letter be limited to the Narrowed Search.

42. In an April 6, 2011, letter (Attachment XVII), UVa states the Narrowed Search produced approximately 8,000 responsive documents, that they had conducted exclusion review on approximately 1,000 documents, but that they had exhausted the initial $2,000 payment and would stop work "unless you wish to pay another installment." Additionally, UVa indicated that the exclusion review was being conducted by three law students. As of the date of the letter, UVa had not supplied to the Petitioners any documents.

43. Respondents April 6 letter provides the information necessary to determine that one person was processing 25 documents an hour. Three persons working 8 hours per day could thus process the remaining 7,000 documents in twelve days.

44. The next day by email, April 7, 2011, the Petitioners provided UVa a letter (Attachment XVIII) stating that the Petitioners did wish to pay another installment, thus meeting the UVa conditions to allow for continued work.

45. The letter also indicated that the Petitioners did not dismiss UVa's proposal to limit its response to the Narrowed Search, but wished to first see the fruit of the initial production.

46. Twenty-two days later, on April 29th, the Petitioners left a phone message with UVa asking that the University contact Dr. Schnare. The following work day, May 2nd, UVa returned the telephone call, indicating it had processed 1,000 of the 8,000 documents and "will send out the first copies of documents in the rolling production by May 6th" (*memorialized by UVa, see*, Attachment XIX). Notably, during the call, UVa admitted that an attorney needed to complete a

review of the law students' work before it could supply the first batch of documents. The Petitioners reiterated that they would like to have the documents in electronic form. UVa stated it would provide them in paper copy. UVa also volunteered the information that it had excluded a number of documents that "we would want."

47. As of close of business May 13, 2011, forty-six (46) work days after the clock started to run on the statutory five (5) work day production limit, the Petitioners had received no documents.

GOOD CAUSE ARGUMENT

I. The need for a production schedule

48. Over 4 months (127 days) after making their request, the Requestors had received no responsive documents. Under the VFOIA, UVa was to supply the requested documents with 5 days after it had received payment, or take one of two actions. It was to reach a reasonable agreement on production with the Requestors; or, if it "is unable to reach such an agreement, it is authorized to petition the appropriate court for additional time to respond to the request." Va. Code § 2.2-3704(C). UVa has done neither.

49. UVa did state that once it received payment, it would take one person eight and one-half weeks (42.5 work days) to produce **all** non-excluded responsive documents.

50. More than forty-six (46) work days after it had received payment to commence the response , applying the efforts of three individuals, not one responsive documents had yet to be supplied to the Petitioners, and UVa has still not offered any schedule on which to fully respond to the information request. Under VFOIA, this failure to timely supply the requested documents absent any reasonable agreement or Court Order constitutes a facial violation of the Act.

II. Good cause to limit Petitioners' costs

51. The parties disagree on the scope of costs the VFOI Act allows UVa to collect. The statute provides for recouping: "its actual cost incurred in accessing, duplicating, supplying, or searching for the requested records." Va. Code § 2.2-3704(F). UVa interprets the term "supplying" as including review of the documents to exclude those documents it believes are covered by the exclusions under the Act. (*See*, 2011-03-09 Kast to Schnare letter, Attachment XIII). The Petitioner's do not agree.

52. UVa rests it interpretation upon a 2007 advisory opinion (Attachment XXII), issued by the Virginia Freedom of Information Advisory Council, that addresses whether a public body can charge for the cost of redaction. The Advisory Council was asked about, and opines that a public body may charge the cost of redaction. It goes further, in dicta, suggesting that the review for exclusions, itself, is subject to cost recovery. The Council also reiterates one of its earlier opinions that a public body may not charge twice for an exclusion review.

53. UVa's reliance on this Opinion suffers from the fact that in their March 9, 2011, letter they reject the main finding of the opinion as regards recouping the cost of redaction, while relying on the dicta suggesting that a public body can collect the cost of exclusion review.

54. Petitioners' reject UVa's effort to rescue a defense from the dicta of an opinion letter that they otherwise eschew. Petitioners' rely instead on Albright v. Woodfin, 68 Va. Cir. 115, Va. Cir. LEXIS 104 (CL05-0006) (Va. Cir. Ct. (Nelson County), May 26, 2005). In this case, Judge Gamble equated the redaction process with the exclusion review process, finding that VFOIA does not allow recoup of costs for those actions:

> The Department asserted at trial that some of the expense charged to Mr. Albright included the time for law enforcement officers and supervisors with the Department to redact information concerning undercover operations from the records that were requested. I find that the time spent redacting the records by law

> enforcement personnel and their supervisors to remove protected information is not time for which the Department may charge for reimbursement under FOI. The statutory charges that a public body may make are the costs incurred in accessing, duplicating, supplying, or searching for the requested records. The statute does not grant any reimbursement for the cost of reviewing or redacting the records.

Albright v Woodfin, 68 Va. Cir. At 116 (*emphasis added*).

55. Petitioners' also challenge any costs associated with a second exclusion review by attorneys in the UVa Office of General Counsel. Richard C. Kast, a UVa Associate General Counsel, stated that one reason he delayed supply of the first portion of records was that he had to review the work of the law students who had already conducted an exclusion review. Petitioners reject this kind of double billing, noting that even the errant Advisory Council Opinion found the clear disposition of this issue, writing "Subsection F of § 2.2-3704 states that *[n]o public body shall impose any extraneous, intermediary or surplus fees or expenses to recoup the general costs associated with creating or maintaining records or transacting the general business of the public body*. It follows, therefore, that a public body may not charge to have an attorney review or double-check responses to FOIA requests" (*emphasis in the original Council opinion*).

56. In addition to the questions of scope, Petitioners' believe they are being charged in a different manner than UVa has charged others in the past. A nearly identical request for the emails and electronic documents of Professors Michaels and Singer, two individuals who question Mann's work and conclusions, was estimated to cost only 40% of the amount demanded in the instant matter. Further, UVa claimed that the "majority of costs" would be from the search for and access of the records, the complete opposite of the instant case. In addition, in the January 27, 2010, letter, the Respondent cited concerns with exemptions associated with student records and never mentioned potential "proprietary" exclusions, the centerpiece of UVa's refusal

to supply records in the instant matter. UVa has never explained why it has taken such significantly polar approaches.

57. Petitioners note that the exclusions at issue in this case reflect the Legislature's concern that the government protect governmental property in those instances where the interests of the government might be harmed by release of documents. For example, documents that would harm the competitive position of the government to bargain for goods or services, or would reduce the value of works subject to copyright or patent. In other words, the government has an interest in protecting its documents. Petitioners argue that <u>because</u> the government is choosing to protect the documents in its own interests, even though it could release them if it so chose, it is the government who should bear the costs of protecting those documents. The government has this duty in any situation that might compromise its assets, not only when requested under VFOIA to produce the documents. Petitioners see no valid reason for the government to shift the burden to protect the government's interest to a private citizen attempting to peer behind the curtains that shroud government workings.

III. Good Cause to enter a protective order to enable <u>Plaintiffs' counsel to review the excluded documents</u>

58. Petitioners are seeking emails and documents associated with former UVa academic Michael Mann and others involved in the science of climate change. Mann was the lead author of two papers which gained prominence in the "global warming" and related policy communities after their publication; the first was published in *Nature* in April 1998, the year he received his PhD, and the second in *Geophysical Research Letters* in March 1999.

59. These publications revised what had previously been accepted as the historical temperature record of the past approximately 1,000 years, dropping periods known as the Medieval Warm Period (or 'Climate Optimum') and 'Little Ice Age' from that record, and were

elevated by groups like the United Nations Intergovernmental Panel on Climate Change (IPCC) in its 2001 "Third Assessment Report". These papers were even hailed as the 'smoking gun' of the theory of catastrophic man-made global warming for purportedly affirming the need to adopt a particular policy agenda. This new take on the historical record became known immediately as the 'Hockey Stick', for its resemblance to a hockey stick placed on its side with recent temperatures the blade, pointing upward. It is no longer promoted in IPCC reports.

60. Without argument, Mann's published works, including the iconic global warming "hockey stick," have driven local, national and international policy decisions. Arguably, his work has measurably increased the cost of living without any return on the quality of life.

61. In addition to his academic activities, Mann has admitted to sending a request to another academic to erase emails in an effort to frustrate freedom of information requests, all to hide the basis for policy decisions by international and national bodies.

62. Mann also appears to be a party to efforts to stop the publication of scientific contributions from individuals and institutions who disagree with Mann's work.

63. The documents Petitioners' seek could either exonerate or condemn Mann's actions. In like measure, the documents will open to public inspection the workings of a government employee, including the methods and means used to prepare scientific papers and reports that have been strongly criticized for technical errors.[1] The purpose of the VFOIA is to open to public view the inner workings of government employees, including those found within the University of Virginia. Petitioners have just cause to believe UVa has, refused to release

[1] The two papers which brought Mann to prominence and professional acclaim became the subject of criticism as outliers, the product of improper climate 'proxies', and unconventional statistical methods. These critiques included papers in refereed journals, and notably in Wegman, Scott & Said, "Ad Hoc Committee Report on the 'Hockey Stick' Global Climate Reconstruction", Commissioned by the Chairmen of the U.S. House of Representatives' Committee on Energy and Commerce, and its Subcommittee on Oversight and Investigations ("Wegman Report").

documents the Act would not exclude from public view, and which have the potential to display employee behavior that may not meet the high standards of the University and its honor code.

64. UVa has indicated that it is mainly using the "proprietary research" exclusion of § 2.2-3705.4(4) as the basis for not supplying the majority of the excluded records.

65. UVa's exclusions come at a time when it received a controversial and highly publicized letter about Petitioners' Request from twelve liberal policy groups asking UVa to replace the VFOIA with a "balancing test" that would hide government action behind the cloak of "academic freedom." (*See*, Attachment XXI).

66. In an earlier effort by the Virginia Attorney General to obtain the same records, a pressure campaign by these same groups caused UVa to change its position from being cooperative with the Attorney General to refusing to cooperate and to instead launch a $500,000 legal attack to prevent release of the records.

67. Notably, these same groups took absolutely no action in opposition or outrage when UVa responded positively to Greenpeace's request for similar records of Mann's former colleague in the Department of Environmental Sciences, Pat Michaels. They said nothing when Greenpeace demanded Professor David Legates's records from the University of Delaware; or Dr. Willie Soon's from Harvard; or Dr. Sallie Baliunas's, also from Harvard; or when pressure campaigns were initiated against climate scientist-academics in Oregon and Washington state.

68. Petitioners do not here accuse UVa Associate General Counsel Richard C. Kast of any form of malfeasance or personal failure to properly execute the University's VFOIA responsibilities. Petitioners simply note that he represents an institution that is subject to pressure politics.

69. UVa, like other academic institutions, is subject to extreme peer pressure, as observed in the successful effort to eject Professor Pat Michaels from the same department in which Mann worked, specifically because Michaels rejected the alarmism of those militating on global warming concerns. Further, the new UVa President comes directly from another University where political pressure tactics stymied information requests and successfully replaced law with political correctness.

70. In addition to the pressure tactics, UVa has not shared with Petitioners the criteria it used to exclude documents from release, and has continued to resist preparation of an index identifying the excluded documents and the document specific basis for the exclusion.

71. In this action, Petitioners do not raise any challenge to the exclusions UVa says they are making. Petitioners do not believe the issue is ripe for judicial attention and instead seek the Court's assistance in creating a process by which to address whether the exclusions are proper, while minimizing the burden on the Court and on the Respondent. Upon completion of the proposed process, Petitioners will return to this Court and petition for Mandamus to release those documents Petitioners believe Respondents have improperly excluded from release.

72. Petitioners suggest this Court apply the same procedure used in Virginia-Pilot v. City of Norfolk School Board, (CL10-2815) (Court Order) (Va. Cir. Ct. – Norfolk, Dec. 28, 2010) (Attachment XXIV to this petition) (which includes a letter opinion of the same date describing the process). In that case, The Court entered a protective order to enable Plaintiffs counsel to review the materials, and, in conjunction with counsels' schedules, set up a case timetable and briefing schedule. The total number of Norfolk School Board documents copied by Defendant and submitted to the Court for review approximated twelve-thousand pages, along with a computer "thumb" drive containing recordings of several NPS employee interviews and other

information. Plaintiff then narrowed the inquiry to approximately one-thousand specific pages of material and the accessible contents of the thumb drive. The parties prepared briefs with regard to the one-thousand pages and the Court reviewed this smaller collection *in camera*. Thereafter the Court held a hearing on the briefs and subsequently issued his order with regard to the exclusions. Petitioners believe this approach is appropriate to this case and seek a similar protective order and authority to examine the excluded documents for the sole purposes of reducing the burden on Respondents and the Court and so as to allow preparation of arguments regarding exclusion of the documents.

73. In the alternative, Petitioners seek injunctive relief in the form or an order requiring Respondents to identify each excluded document by author, recipient, date, subject and document-specific facts justifying the exclusion used by the Respondents.

IV. Recovery of reasonable costs

74. To date, Petitioners' counsel attests to expending 30.2 hours in preparation of this petition, an amount that does not include negotiations with the Respondent on the Request. Petitioners are responsible for attorneys' fees at the "non-profit client" rate of $200 per hour.

75. In addition to Court costs, Plaintiffs have otherwise expended $170 for process of service and $ 27.20 for copying and preparation of its filing, as well as $125 in consultation fees regarding VFOIA practice.

76. At this time, Petitions seek $322.20, plus court costs, plus $6,040 in attorneys' fees.

PRAYER FOR RELIEF

77. The Petitioners incorporate by reference paragraphs 1 – 76 above.

78. Because the Respondent knew in October of 2010 that it had the subject documents, where they were stored, and what it would cost to supply them, but improperly took an additional

seven days to make its initial refusal to supply the documents on the basis of cost; and, because the Respondent failed to supply the requested documents within five days of payment of a deposit against anticipated fees, failed to reach an agreement with the Petitioners concerning a schedule for production of the records requested, and failed to petition an appropriate court for additional time to respond to a request for an extraordinary volume of records; and pursuant to Va. Code § 2.2-3704(B) & (E), Petitioners ask the Court to: (i) find the Respondent in violation of the Virginia Freedom of Information Act and (ii) order the Respondent to provide the requested documents on a timely schedule not to exceed 15 working days.

79. Because Petitioners requested the Respondents to supply the documents in electronic form, and the Act requires such an accommodation upon request, Petitioners ask the Court to order all documents be supplied in a commonly useable electronic form that will permit standard content searching within the documents, *e.g.* in a rich text format.

80. Because Respondent improperly includes exclusion review within the definition of "supplying" documents, Petitions ask the Court to issue a permanent injunction barring the Respondent from demanding payment for exclusion review; and, to either apply overpayments used by UVa to cover exclusion review to future allowed costs, or return payments not needed to cover allowed costs.

81. Because Petitioners will challenge exclusions of responsive documents made by the Respondent, Petitioners ask the Court to enter a protective order that will allow Plaintiffs to reduce the number of documents placed before the Court for *in camera* review, and otherwise order the Respondent to engage in a process that will allow Petitioners to view all excluded documents under the protective order; or in the alternative, Petitioners ask the Court to order Respondents to prepare an index identifying each excluded document by author, recipient, date,

subject and document-specific facts justifying the exclusion used by the Respondents, an index subject to seal by the court, if appropriate.

82. Because the Respondent violated the Virginia Freedom of Information Act, Petitioners ask the court to order payment of the Petitioners' reasonable costs associated with the instant matter in the amount of $6,362.20.

83. Finally, in light of the highly public pressure being placed on the Respondents, Petitioners ask the Court to order such necessary and proper injunctive relief or other injunctive relief as this Court deems just and proper, including production of the criteria and associated guidance provided to the staff who conducted exclusion review, to include rendering of verbal guidance to a writing for deliver to Petitioners.

WHEREFORE, in light of the above, Petitioners request the relief sought herein.

The Environmental Law Center
at the American Tradition Institute

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David W. Schnare, Va. Bar No. 44522
David.S@ATInstitute.org
9033 Brook Ford Road
Burke, VA 22015

Attorney for Petitioners
THE AMERICAN TRADITION INSTITUTE and **THE HONORABLE ROBERT MARSHALL**

Service to:

Rector and Visitors of the University of Virginia
c/o Richard C. Kast,
Associate General Counsel,
Madison Hall
P.O. Box 400225,
1827 University Avenue,
Charlottesville, Virginia 22904-4225
434-924-6436, email: rck4p@eservices.virginia.edu