August 10, 2011

VIA Fax & E-Mail To:

434-924-3792
president.sullivan@Virginia.EDU

Teresa A. Sullivan, President
University of Virginia
Madison Hall
P.O. Box 400224
Charlottesville, VA 22904

Dear Dr. Sullivan:

As you know, we are among many organizations and concerned citizens who have followed with great interest the University of Virginia's response to efforts by both Virginia Attorney General Kenneth Cuccinelli and the American Tradition Institute (ATI) to access personal email correspondence and other documents from Dr. Michael Mann and more than thirty other scientists. We appreciate the university's decision to challenge Mr. Cuccinelli's Civil Investigative Demands. We also appreciate the commitment you made in your April 21, 2011 letter to the American Association of University Professors (AAUP) and other organizations to utilize "all available exemptions" in responding to ATI's request under the Virginia Freedom of Information Act.

However, we are concerned that the May 24, 2011 agreement between the university and ATI gives ATI needless access to the requested documents. We believe the agreement is in conflict with the university's previous statements and actions on this issue and that it threatens the principles of academic freedom protecting scholarly research. Furthermore, the agreement cuts against accepted practice in Virginia for responding to open records requests. The university should seek to improve the agreement to better protect scientists from harassment and intimidation.

We fully embrace the university's responsibility to respond appropriately to open records requests. Freedom of information laws are critical for keeping public institutions and their employees accountable to the people who support them. We also support the university's equally important obligation to protect its employees' privacy and preserve researchers' ability to privately and freely correspond with one another.

Unfortunately, the university's agreement with ATI does not adequately balance these two responsibilities. We find it troubling that the agreement would allow ATI lawyers, including the very individuals who filed the open records request, to review all documents in the university's possession, including material which will ultimately be exempt from disclosure. While the agreement asserts that ATI representatives would be under a gag order regarding exempt documents, we are concerned that giving requesters this level of access sets an entirely new precedent and would create a chilling effect for current Virginia researchers.

The established practice in Virginia Freedom of Information Act cases which involve privacy rights is to prepare an indexed summary of potentially exempt documents and the specific exemption that applies. Then, if there remains a dispute over the basis for the exemption, the judge can review the contested records privately, or *in camera*, and make a ruling without harming any privacy interests. This is the favored practice recommended by the Virginia Supreme Court in *Paul C. Bland vs. Virginia State University*, 272 Va. 198, 630 S.E.2d 525 (2006).

Further, there is ample evidence that many if not all of the documents requested by ATI will ultimately be exempt from disclosure. The *Washington Post* in a May 29, 2011 editorial wrote that, "...a university spokesperson said that U-Va. anticipates that most of the documents at issue will be exempt under a statute that 'excludes from disclosure unpublished proprietary information produced or collected by faculty in the conduct of, or as a result of, study or research on scientific or scholarly issues.'"

Additionally, the Virginia Freedom of Information Advisory Council has issued guidance regarding the "working paper" exemption to records requests. This exemption protects from mandatory disclosure the working papers and correspondence of the presidents of Virginia's public universities and other public officials. Like the scientific research exemption, the working paper exemption is grounded in the interests of privacy and the notion that internal communications and deliberations of public employees are protected to facilitate creativity and the free exchange of ideas.

According to the Advisory Council, "the working papers exemption was designed to provide an unfettered zone of privacy for the deliberative process…a policy determination that protecting decision-making creativity with an ongoing zone of privacy ultimately benefits the public by encouraging the free-flow of ideas by government employees and officials" (AO-17-04). It would be strange, indeed, if your own email correspondence is protected against disclosure but Dr. Mann's emails are not.

Finally, the university should keep in mind that the agreement risks disclosing emails to ATI among Dr. Mann and his students. As you acknowledged in your letter to AAUP and other groups, the university has a commitment to protect certain correspondence under the Family Educational Rights and Privacy Act.

Moving forward with the agreement as it stands will send scientists at public institutions a message that communicating frankly with colleagues carries significant risk. Therefore, we hope the university will modify its agreement with ATI to adequately protect the privacy of scientists involved and uphold the principles of academic freedom which you have previously articulated.

We look forward to your timely response.

Sincerely yours,

American Association of University Professors
American Geophysical Union
Climate Science Watch
Union of Concerned Scientists

CC: Carol Wood, assistant vice president for public affairs
Richard Kast, associate general counsel
Susan Harris, secretary to the Board of Visitors

PAUL C. BLAND v. VIRGINIA STATE UNIVERSITY

Record No. 051882

SUPREME COURT OF VIRGINIA

272 Va. 198*; *630 S.E.2d 525*; *2006 Va. LEXIS 55

June 8, 2006, Decided

PRIOR HISTORY: [***1] FROM THE CIRCUIT COURT OF PRINCE GEORGE COUNTY. Samuel E. Campbell, Judge.

COUNSEL: Paul C. Bland Pro se.

Roscoe C. Roberts, Assistant Attorney General and Special Counsel (Robert F. McDonnell, Attorney General, on brief), for appellee.

JUDGES: Present: Hassell, C.J., Lacy, Koontz, Kinser, Lemons, and Agee, JJ., and Russell, S.J. OPINION BY SENIOR JUSTICE CHARLES S. RUSSELL.

OPINION BY: CHARLES S. RUSSELL

OPINION

[**526] [*200] OPINION BY SENIOR JUSTICE CHARLES S. RUSSELL

This appeal involves the application of the Virginia Freedom of Information Act (FOIA), *Code § 2.2-3700 et seq*. There are no facts in dispute.

Facts and Proceedings

The Association to Advance Collegiate Schools of Business (AACSB) is an academic body to which business schools apply for accreditation. Seeking accreditation for its business school by the AACSB, Virginia State University (VSU), an agency of the Commonwealth, submitted annual reports to that body.

Paul C. Bland, a former member of the VSU faculty, by letter delivered January 31, 2005, requested VSU to provide him with copies of its annual reports to AACSB for the years 2003 and 2004, pursuant to FOIA. VSU responded on February 3, 2005, by providing Bland with copies from which information concerning faculty members identified by name, including Bland himself, had been redacted. The response did not invoke [***2] any statutory exemption to justify the redactions, as required by *Code § 2.2-3704(B)(3)*, but the custodian of the records at VSU sent an e-mail to Bland on February 7, 2005, referring to *Code § 2.2-3705.1*, which provides, in pertinent part:

> The following records are excluded from the provisions of this chapter . . . [p]ersonnel records containing information concerning identifiable individuals, except that access shall not be denied to the person who is the subject thereof.

Bland, pro se, filed a petition in the trial court alleging a willful violation of FOIA and requesting production of documents, mandamus, costs and civil penalties. The court heard the matter ore tenus. At the hearing, VSU produced the complete, unredacted AACSB reports for the years 2003 and 2004 for the court's inspection in camera. Counsel for VSU also offered to permit Bland to inspect the complete reports at the hearing, but did not furnish copies or offer them as

exhibits and they were not made a part of the record. [1] The hearing consisted only of the oral arguments of the parties and the [*201] court's inspection, in camera [***3] , of the reports. No other evidence was presented.

1 In oral argument on appeal, counsel for VSU stated that the reports were returned to him and not delivered to the clerk of the trial court.

At the conclusion of the hearing, the trial court held that VSU was entitled to invoke the personnel exemption as the basis for withholding information regarding its employees or former employees and that its failure to disclose that information was not willful. The court therefore denied Bland's claim for civil penalties. Although the court's final order was silent on the subject, the court ruled from the bench at the hearing that Bland was entitled to any personnel information regarding Bland himself that was contained in the reports. Counsel for VSU agreed to provide Bland with the originally redacted information that pertained to him.

Six weeks after the hearing, but before the entry of the final order, Bland made a motion in the trial court for the entry of an order requiring VSU to produce the complete 2003 and 2004 [***4] AACSB reports in order that they could be made a part of the record for the purpose of appeal. [2] The court denied the motion and entered a final order. Thus, the reports that the court had examined and relied upon to make its decision were not made a part of the record.

2 Bland also asserted in his motion that VSU had provided him with some, but not all, of the information in the reports that pertained to him personally. When the motion was argued, counsel for VSU provided Bland with additional information from the reports pertaining to Bland. Counsel for VSU stated that it had been omitted through oversight.

We awarded Bland an appeal. He assigned error (1) to the trial court's failure to find that VSU had violated the FOIA, (2) to the trial court's refusal to permit the record to be completed, and (3) to the denial of his constitutional due process rights. In the circumstances [**527] of this case, the issue raised by the second assignment of error is dispositive.

Analysis

The exclusion from the record of any [***5] evidence that the trial court has considered in reaching its decision, when the evidence has been properly tendered for the record by a litigant, impedes appellate review and constitutes an abuse of discretion. An exhibit offered in evidence, whether admitted or not, becomes a part of the record when initialed by the trial judge, and not before. Rule 5:10(a)(3). The duty of the trial judge to make up the record in this respect is a judicial function, and cannot be delegated. *Town of Falls Church v. Myers, 187 Va. 110, 119, 46 S.E.2d 31, 36 (1948)*. An appellate court cannot review the correctness of a trial court's decision unless [*202] the evidence upon which the trial court relied is included in the record on appeal. *Packer v. Hornsby, 221 Va. 117, 121, 267 S.E.2d 140, 142 (1980)*.

The lack of such a record precludes our consideration of Bland's first assignment of error. The question whether the trial court correctly ruled upon the applicability of the "personnel exemption" to the reports in issue can only be answered by an inspection of the reports themselves.

Bland's third assignment of error is subsumed by the second. His contention that his constitutional [***6] rights were violated is based only upon the trial court's refusal to complete the record by including the complete 2003 and 2004 AACSB reports. Our ruling on the second assignment of error makes consideration of the constitutional question unnecessary. See *Volkswagen of America v. Smit, 266 Va. 444, 454, 587 S.E.2d 526, 532 (2003)* (constitutional questions will not be decided if the case can be decided on other grounds); *Keller v. Denny, 232 Va. 512, 516, 352 S.E.2d 327, 329, 3 Va. Law Rep. 1704 (1987)* (same).

Conclusion

This appeal illustrates a problem seemingly endemic to FOIA cases. Following *LeMond v. McElroy, 239 Va. 515, 391 S.E.2d 309, 6 Va. Law Rep. 2070 (1990)*, and *Moore v. Maroney, 258 Va. 21, 516 S.E.2d 9 (1999)*, this is the third appeal of an FOIA decision in which appellate review has been obstructed by the absence of the essential record. As we pointed out in those cases, we cannot "decide the issue in a vacuum;" we encouraged the filing of allegedly confidential records for in camera inspection by the trial court and, if necessary, by an appellate court. *LeMond, 239 Va. at 520, 391 S.E.2d at 312*; *Moore, 258 Va. at 27, 516 S.E.2d at 12.* [***7] Concerns of confidentiality may be met by an order of the

trial court directing that the records be kept under seal, a course suggested by Bland in the present case.

In LeMond and Moore, the failure to preserve the essential record was the fault of the litigants. Because the responsibility for presenting an adequate appellate record was upon the appellants seeking reversal of the trial courts' decisions, we affirmed, without approving, the judgments of the trial courts in both cases. *LeMond, 239 Va. at 520-21, 391 S.E.2d at 312*; *Moore, 258 Va. at 27, 516 S.E.2d at 12-13*. Here, by contrast, Bland, the appellant, moved the trial court to include the essential reports in the record under seal, but VSU opposed the motion and the trial court denied it. That ruling [*203] effectively prevented appellate review and was an abuse of discretion requiring reversal.

Accordingly, we will reverse the judgment of the trial court and remand the case for further proceedings consistent with this opinion, limited to the issue raised by Bland's first assignment of error.

Reversed and remanded.

VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL
COMMONWEALTH OF VIRGINIA

AO-17-04

August 31 , 2004

Mr. Robert F. Nawrocki, CRM
Richmond, Virginia

The staff of the Freedom of Information Advisory Council is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your letter of April 30, 2004.

Dear Mr. Nawrocki:

You have asked a question concerning the application of the Governor's working papers exemption under the Virginia Freedom of Information Act (FOIA). Specifically, you ask whether the exemption expires for both the working papers prepared by the Governor as well as working papers prepared for the Governor by other agencies in the executive branch. You also ask if the working papers exemption expires, is the expiration event-based or time-based.

Subsection A of § 2.2-3704 states that [*e]xcept as otherwise specifically provided by law, all public records shall be open to inspection and copying by any citizens of the Commonwealth*. The policy of FOIA at subsection B of § 2.2-3700 states that the *provisions of [FOIA] shall be liberally construed to promote an increased awareness by all persons of governmental activities...[a]ny exemption from public access to records or meeting shall be narrowly construed*. Your question concerns the exemption set forth at subdivision 2 of § 2.2-3705.7, which allows *working papers and correspondence of the Officer of the Governor, Lieutenant Governor, Attorney General, members of the General Assembly or the Division of Legislative Services, the mayor or chief executive officer of a political subdivision, or the president or chief executive officer of a public institution of higher education* to be withheld from public disclosure. The exemption defines "working papers" to mean *those records prepared by or for an above-named public official for his personal or deliberative use*.

It has been previously well-established by both the Office of the Attorney General of Virginia as well as this office that the working paper exemption no longer applies after a document has been disseminated beyond the office of the chief executive.[1] Therefore, any document labeled as a working paper would no longer be afforded the protection of the exemption once it was shared with an outside party. The question remains, however, as to whether any other event, aside from dissemination, triggers a loss of the working papers exemption.

Application of the exemption inherently involves the consideration of two competing policies -- the need for a zone of privacy in the deliberative process to protect creativity and the free-flow of ideas, and the policy of FOIA at subsection B of § 2.2-3700 that *the affairs of government are not intended to be conducted in an atmosphere of secrecy*. Certainly one can appreciate that when a particular course of action or public policy is being explored by government, those involved in the decision-making process should be encouraged to put all ideas and perspectives on the table, even if some of those ideas might later be discounted as unworkable or impractical. If the chief executive were required to make all such ideas and suggestions public, those who report to the chief executive might be hesitant to speak up to

brainstorm or make suggestions for fear of public scrutiny or ridicule. This would result in a chilling effect on the unfettered and free flow of ideas, which ultimately could lead to something less than full and open discourse concerning a particular policy or decision. Conversely, once a decision has been reached to pursue a particular project or course of action, one could argue that it is in the public interest to allow working papers to become public so that the thought process that led to that particular decision might be revealed. Arguably, the actual decision is only a part of the decision-making process, and keeping that process hidden leaves the public out of that process.

In resolving these competing policies by giving reasonable effect to the intent of the law, I must conclude that the working papers exemption was designed to provide an unfettered zone of privacy for the deliberative process. The definition of a working paper defines it as one prepared for personal or deliberative use. Such a definition causes one to examine the intent of the creation of the record. Even after a decision is made, the records supporting the deliberation of the decision do not lose the quality of having been created to aid in the deliberative process. The language set forth in the exemption supports this conclusion. The language indicates a policy determination that protecting decision-making creativity with an ongoing zone of privacy ultimately benefits the public by encouraging the free-flow of ideas by government employees and officials. A different conclusion would require clear language of intent from the General Assembly that the exemption no longer applies after a certain number of years after the creation of a record or that it expires once the deliberative process ends. Such limitations can be seen
in other exemptions. For example, the exemption for records relating to the negotiation and award of contracts at subdivision 12 of § 2.2-3705.1 states that the exemption no longer applies after the public body has made a decision to award or not to award the contract to which the records related.

This conclusion is further supported by an analysis of legislative changes made to the working papers exemption by the 1999 Session of the General Assembly.[2] Prior to 1999, the exemption applied to memoranda, working papers and correspondence held by certain named officials. As can be seen by this language, the exemption focused not on why the record was created, but on who possessed the record. As a result, the Office of the Attorney General of Virginia opined that the working paper exemption no longer applied once a working paper was disseminated to a third party.[3] This is a logical conclusion, given that once a document was disseminated to a third party, it was held by someone other than the officials listed in the exemption. Possession, then, was the key to the working papers exemption, and the exemption expired when someone besides the named official obtained the record. In 1999, however, further clarification of the working papers exemption was made. As noted above, the current language forces one to examine not only who possesses the record, but also why the record was created. The definition of a working paper includes records prepared by or for one of the named officials' personal or deliberative use. The apparent intent of the General Assembly in 1999 was to limit further the working papers exemption by emphasizing the intent behind the creation of the record. The characterization of why the record was created never changes, despite what decisions may be made based upon that record or who comes to posses a given record. In light of the foregoing, therefore, it appears that if the record was not prepared by or for a named official's personal or deliberative use, or if the official to whom the privilege applies elects to disseminate it or otherwise makes it public by essentially releasing it from his protected zone of privacy, the exemption can no longer be invoked.

In conclusion, the working papers exemption does not expire unless the working papers are disseminated or otherwise made public by the official to whom the exemption applies. Absent such a release, a record created by or for one of the named officials for his personal or deliberative use retains the characterization of a working paper. To the extent that this opinion reaches a different conclusion from previous opinions of this office, this opinion will guide future policy and application.

Thank you for contacting this office. I hope that I have been of assistance.

Sincerely,

Maria J.K. Everett
Executive Director

[1]See 1982-83 Op. Atty. Gen. Va. 724. See also Virginia Freedom of Information Advisory Opinions 08 (2000), 12 (2000).

[2]See 1999 Acts of Assembly, cc. 703, 726.

[3]See 1982-83 Op. Atty. Gen. Va. 724.