

Case Brief: *American Tradition Institute v. Rector and Visitors of the University of Virginia*
Supreme Court of Virginia, decided April 17, 2014

Background

Dr. Michael Mann was a professor at the University of Virginia (UVA). The American Tradition Institute (ATI) and Delegate Robert Marshall requested certain of Dr. Mann's records from UVA, including emails concerning certain scientific research. It appears that UVA had thousands of potentially responsive records. There was negotiation back and forth to reach an agreement on the production of records. ATI filed a petition for mandamus or injunction when an agreed deadline for production was missed. The trial court ordered some records to be produced, and for the parties to further negotiate. UVA maintained that some records were exempt as proprietary records under § 2.2-3705.4(4).¹ ATI disputed the application of the exemption. UVA also sought to recoup its costs in reviewing and producing records. ATI disputed those costs. The trial court held that UVA could use appropriate exemptions, and could recoup its costs incurred in reviewing the records "to assure that the records are responsive, are not exempt from disclosure, and may be disclosed without violating other provisions of law" as an allowed charge under § 2.2-3704(F).²

Issues Presented

- 1) Whether UVA properly applied § 2.2-3705.4(4) to withhold the records in question.
- 2) Whether a public body may charge for "exclusion review" under FOIA.
- 3) Whether the term "proprietary" refers to a right of ownership, title, or possession, or must include an element of "competitive advantage" such as pecuniary harm.

Analysis and Holding

The Supreme Court upheld the decisions of the trial court in favor of UVA on all issues. The Court applied the narrow construction rule for exemptions in analyzing UVA's use of § 2.2-3705.4(4), noting that UVA was required to establish each of the seven elements of the exemption in order for the exemption to apply. In interpreting the term "proprietary" in the exemption, the Court observed that in the absence of a statutory definition, the rule of construction is to use the ordinary meaning. Citing prior decisions, the Court held that "proprietary" means "a right customarily associated with ownership, title, and possession. It is an

¹ § 2.2-3705.4 (4) provides a discretionary exemption for the following records: "Data, records or information of a proprietary nature produced or collected by or for faculty or staff of public institutions of higher education, other than the institutions' financial or administrative records, in the conduct of or as a result of study or research on medical, scientific, technical or scholarly issues, whether sponsored by the institution alone or in conjunction with a governmental body or a private concern, where such data, records or information has not been publicly released, published, copyrighted or patented."

² § 2.2-3704(F) provides in relevant part as follows: "A public body may make reasonable charges not to exceed its actual cost incurred in accessing, duplicating, supplying, or searching for the requested records. No 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. Any duplicating fee charged by a public body shall not exceed the actual cost of duplication."

interest or a right of one who exercises dominion over a thing or property, of one who manages and controls." The Court rejected the argument that "'information of a proprietary nature' is limited to that which gives the governmental body a commercial competitive advantage," or stated negatively, that which if disclosed would cause financial injury to the public body. In further consideration of the application of § 2.2-3705.4(4), the Court stated as follows:

In the context of the higher education research exclusion, competitive disadvantage implicates not only financial injury, but also harm to university-wide research efforts, damage to faculty recruitment and retention, undermining of faculty expectations of privacy and confidentiality, and impairment of free thought and expression. This broader notion of competitive disadvantage is the overarching principle guiding application of the exemption.

Due to the procedural posture of the case, the Court viewed the facts in the light most favorable to UVA, as the prevailing party below, and determined that UVA produced enough evidence to establish each of the seven elements necessary for the exemption to apply.

Regarding charges, the Court used the ordinary meaning of the word "search" and explicitly agreed with the statement of the trial court that a public body may charge

for review of public records sought pursuant to [FOIA] to assure that those records are responsive, are not exempt from disclosure, and may be disclosed without violating other provisions of law. Such review is inherent in the process of "assessing, duplicating, supplying, or searching for the requested records" explicitly authorized by [Code] § 2.2-3704(F).

Concurrence

Justice Mims concurred in the result, but wrote separately out of concern that the interpretation of the term "proprietary," while correct in regard to the exemption at issue, may be too broad if applied to the many other exemptions in FOIA that use the term "proprietary" in different contexts.

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