

V I R G I N I A :

IN THE NINETEENTH JUDICIAL CIRCUIT FOR FAIRFAX COUNTY

**TRANSPARENT GMU,
an unincorporated Virginia association,**

Petitioner,

v.

GEORGE MASON UNIVERSITY;

and

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

a Virginia corporation;

Respondents.

Case No. _____

VERIFIED PETITION FOR MANDAMUS AND INJUNCTIVE RELIEF

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

PARTIES

Transparent GMU

1. Transparent GMU is an unincorporated association, organized and principally operating in Fairfax, Virginia.

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

George Mason University

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

is therefore a “public body” subject to the Act. *See* Virginia Code § 2.2-3701 (definition of “Public body”).

George Mason University Foundation, Inc.

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

JURISDICTION AND VENUE

9. This Court has jurisdiction over this action under Virginia Code § 2.2-3713(A), which authorizes “any person . . . denied the rights and privileges conferred by th[e Act] to enforce such rights and privileges by filing a petition for mandamus or injunction.”
10. Furthermore, this Court has jurisdiction under Virginia Code § 2.2-3713(D) to award “reasonable costs, including costs and reasonable fees for expert witnesses, and attorneys’ fees from [a] public body” that has violated the Act if the petitioner “substantially prevails on the merits of the case” and “special circumstances would [not] make an award unjust.”

11. This Court also has jurisdiction under Virginia Code § 8.01-184 to issue declaratory judgments and “make binding adjudications of right” in “cases of actual controversy,” including those “involving the interpretation of . . . statutes.” Virginia Code § 8.01-184.
12. Venue is proper in this Court under Virginia Code § 2.2-3713(A)(3) because:
 - a. the University is a state agency;
 - b. the Foundation is an agent of a state entity, is an entity performing delegated functions of a state agency, is itself a state agency, and/or is an instrumentality and alter-ego of a state agency; and
 - c. Transparent GMU’s principal place of operations is within the territorial jurisdiction of this Court.

LEGAL FRAMEWORK

13. The Virginia Freedom of Information Act recognizes that the “affairs of government are not intended to be conducted in an atmosphere of secrecy since at all times the public is to be the beneficiary of any action taken at any level of government.” Virginia Code § 2.2-3700(B). To that end, the Act “ensures the people of the Commonwealth ready access to public records in the custody of a public body or its officers and employees.” Virginia Code § 2.2-3700(B).
14. The Act provides that, “[e]xcept where otherwise specifically provided by law, all public records shall be open to inspection and copying by any citizens of the Commonwealth during the regular office hours of the custodian of such records.” Virginia Code § 2.2-3704(A). The Act presumes that all public records shall be open, unless an exemption is properly invoked, and the Act requires its provisions “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.” Virginia Code § 2.2-3700(B). Accordingly, the Act requires that “[a]ny exemption from public access to records . . . shall be narrowly construed and no record shall be withheld . . . unless specifically made exempt pursuant to th[e Act] or other specific provision of law.” *Id.*

Scope of the Act

15. The Act defines a “public record” as, in relevant part, “all writings and recordings . . . prepared or owned by, or in the possession of a public body or its officers, employees or agents in the transaction of public business.” Virginia Code § 2.2-3701 (definition of “Public records”).
16. The Act defines a “public body” as, in relevant part, “any . . . agency of the Commonwealth or of any political subdivision of the Commonwealth, including . . . boards of visitors of public institutions of higher education; and other organizations, corporations or agencies in the Commonwealth supported wholly or principally by public funds.” Virginia Code § 2.2-3701 (definition of “Public body”). In addition, the Act defines “public body” so as to “include . . . any committee, subcommittee, or other entity, however designated, of [a] public body created to perform delegated functions of the public body or to advise the public body”—even if that “entity . . . has private sector or citizen members.” *Id.*
17. Furthermore, the Supreme Court of Virginia has applied the equitable veil-piercing doctrine in determining whether an entity’s identity as a private corporation can be disregarded due to its close relationship with a public body. *See RF & P Corp. v. Little*, 247 Va. 309, 316, 440 S.E. 2d 908, 913 (1994). *See also* Virginia Freedom of Information Advisory Council, Advisory Opinion No. AO-09-09 (2009). While that doctrine does not follow any “single rule or

criterion,” it generally applies where the “unity of interest and ownership” between two entities “is such that the separate personalities of the [entities] no longer exist and to adhere to that separateness would work an injustice.” *O’Hazza v. Executive Credit Corp.*, 246 Va. 111, 115, 431 S.E. 2d 318, 320–21 (1993) (citing *Lewis Trucking Corp. v. Commonwealth*, 207 Va. 23, 32, 147 S.E.2d 747, 753–54 (Va. 1966)). Although typically applied to parent-subsidary relationships, Virginia law recognizes veil piercing between affiliated entities. *See C.F. Trust v. First Flight Ltd.*, 111 F. Supp. 2d 734, 741 n.7 (E.D. Va. 2000) (citing, *inter alia*, *Lewis Trucking*, 207 Va. at 31, 147 S.E. 2d at 753–54).

Requests for Records Under the Act

18. Section 2.2-3704 of the Act allows citizens of the Commonwealth to submit a request for copies of or an opportunity to inspect “all public records.” Virginia Code § 2.2-3704(A). In response to such a request, “[a]ny public body that is subject to th[e Act] and that is the custodian of the requested records shall promptly, but in all cases within five working days of receiving a request, provide the requested records” or offer one of the following four responses in writing:
 - a. a statement that the requested records are being entirely withheld, identifying “with reasonable particularity the volume and subject matter of withheld records” and citing “as to each category of withheld records, the specific Code section that authorizes the withholding of the records;”
 - b. a statement that the requested records are being provided in part and withheld in part, similarly identifying “with reasonable particularity the volume and subject matter of

withheld records” and citing “as to each category of withheld records, the specific Code section that authorizes the withholding of the records;”

- c. a statement that the requested records could not be found or do not exist and, where applicable, the contact information for the public body that does possess those records; or
- d. a statement that it is practically impossible to provide the requested records or determine whether they are available within the five-day period and that the public body will provide one of the preceding responses within an additional seven days.

Virginia Code § 2.2-3704(B).

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

21. Any “[f]ailure to respond to a request for records shall be deemed a denial of the request and shall constitute a violation of th[e Act].” Virginia Code § 2.2-3704(E).

Enforcement of the Act

22. The Act provides that “any person . . . denied the rights and privileges conferred by th[e Act] may proceed to enforce such rights and privileges by filing a petition for mandamus or injunction, supported by an affidavit showing good cause.” Virginia Code § 2.2-3713(A). A petition under Section 2.2-3713 of the Act “may be brought in the name of [a] person notwithstanding that a request for public records was made by the person’s attorney in his representative capacity.” Virginia Code § 2.2-3713(A).

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

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

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

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

University-Foundation Relations Generally

26. The Foundation is one of many nonprofit entities organized to support a particular public university. While often separately incorporated, these university foundations differ from other private charities and nonprofits in that they are created and maintained exclusively for the benefit of a state agency and carry out functions once managed by those agencies. Although the mission of these foundations is “irrevocably linked to the educational institution” they serve, they can often provide public universities with greater flexibility in fundraising, investing funds, and managing endowments and real estate holdings. *See* Council for Advancement and Support of Education, *Foundation FAQs* (July 2014), available at <http://bit.ly/2kNk4Wa>. In some contexts, these organizations are recognized as legally distinct from their affiliated institutions. In others, courts have concluded that university foundations operate as an “arm,” “agent,” “instrumentality,” “alter-ego,” or “part” of their affiliated university—or that the two entities “essentially act as one and the same” and are “not readily separable.” *See, respectively, State ex rel. Toledo Blade Co. v. University of Toledo Foundation*, 602 N.E.2d 1159, Syl. Pt. 1 (Ohio 1992); *Gannon v. Board of Regents*, 692 N.W.2d 31 (Iowa 2005); *In re Beachport Entertainment*, 2005 WL 6960182 (9th Cir. 2005); *Wells ex rel. Baker v. State*, 435 S.W.3d 734, 756 (Tenn. App. 2013); *United States v. Solinger*, 457 F.Supp.2d 743, 755 (W.D. Ky. 2006); *Cape Publications v. University of Louisville Foundation*, 260 S.W.3d 818, 822 (Ky. 2008); *Southern Illinois University Foundation v. Booker*, 425 N.E.2d 465, 471 (Ill. App. 1981).

27. The Virginia Code specifically authorizes public universities like George Mason to “[c]reate or continue the existence of one or more nonprofit entities for the purpose of soliciting, accepting, managing, and administering grants and gifts and bequests, including endowment gifts and bequests and gifts in bequests in trust.” Virginia Code § 23.1-1010(3).

The Foundation’s Articles of Incorporation

28. The George Mason University Foundation’s purposes, as set forth in its April 1, 2015 Amended and Restated Articles of Incorporation, are to:

- a. “promote the advancement and further the aims and purposes of George Mason University, or its successor . . . , as an institution of higher education by the development and application of financial resources to the progress of such institution and through such other entities, including the University’s affiliated foundations described in section 501(c)(3) of the Internal Revenue Code, as may be suitable to accomplish such purposes;” and
- b. “accept, administer, apply, and use property acquired by gift, grant, devise, bequest, or otherwise.”

A copy of the Foundation’s Amended and Restated Articles of Incorporation is attached to this Petition as C.

29. In addition to the statement of purpose quoted above in paragraph 28, the Foundation’s Amended and Restated Articles of Incorporation provide, among other things, that:

- a. upon dissolution of the Foundation, all of the Foundation’s remaining assets shall be distributed to the University;

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

The Foundation's Bylaws

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

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

The Affiliation Agreement Between the University and the Foundation

31. The relationship between the University and the Foundation is further described in a March 22, 2013 Affiliation Agreement between the two entities, a copy of which is attached to this Petition as Exhibit E. That Affiliation Agreement provides, among other things, that:
- a. the University is responsible for the compensation of the Foundation’s President;
 - b. the University will provide the Foundation with fair and reasonable compensation or payment for services, including but not limited to private fund management, real estate management, intellectual property, prospect research, alumni data, gift processing, and donor stewardship;
 - c. the University must provide office space to support the activities of the Foundation according to a separately-negotiated Space Usage Agreement;
 - d. the Foundation may use the name “George Mason University” and the George Mason University logo;
 - e. the University will allow the Foundation’s employees to participate in the University’s employee benefit programs whenever permitted by law;
 - f. the Foundation must consult with the University regarding the Foundation’s gift management policies, the Foundation’s gift acceptance policies, and the Foundation’s execution of comprehensive fund-raising and donor-acquisition programs;
 - g. the Foundation must “promptly acknowledge and issue receipts for all gifts to the Foundation and the University and shall provide appropriate recognition and stewardship of gifts”;
 - h. the Foundation must coordinate with the University regarding fundraising initiatives and the identification, cultivation, and solicitation of donors;

- i. the Foundation is prohibited from accepting grants from federal agencies unless approved in writing by the University;
- j. the Foundation must “make a residence available to the University suitable for the University’s President to reside and entertain,” located near the University’s Fairfax campus;
- k. the Foundation may “serve as an instrument for entrepreneurial activities” of the University;
- l. the Foundation may purchase, develop, and manage real estate for the University’s needs;
- m. the Foundation may disburse funds only in compliance with, among other requirements, University policies;
- n. the Foundation must “provide to the University access to data and records on a need-to-know basis in accordance with applicable laws” and with any Foundation policies and guidelines;
- o. the University may object to a decision of the Foundation’s Executive Board to remove the Foundation’s President and Chief Executive Officer;
- p. the University must specifically authorize the Foundation’s acceptance of any gifts of real property that are subject to conditions or restrictions imposed by the donor;
- q. the University may choose to reject any such gift agreement for the support of a new University program or activity;
- r. any gift agreements supporting a new program or activity within the University must be signed by the University’s Senior Vice President and Provost; and

- s. the University may audit the Foundation's financial records.
- 32. The recitals to the Affiliation Agreement also state, among other things, that "in connection with [the Foundation's] fundraising and asset management activities, the Foundation retains personnel experienced in planning for and managing private contributions and works with the University to assist and advise in such activities."
- 33. Transparent GMU alleges, upon information and belief, that the relationship between the University and the Foundation has been governed at all relevant times by terms substantially similar to those contained in the March 22, 2013 Affiliation Agreement.

The University's Gift Acceptance Policy

- 34. The relationship between the University and the Foundation is further described in the University's May 8, 2008 Gift Acceptance Policy, University Policy No. 1123, a copy of which is attached to this Petition as Exhibit F.
- 35. By its own terms, the Gift Acceptance Policy "applies to all George Mason University and George Mason University Foundation staff."
- 36. The Gift Acceptance Policy establishes a Gift Acceptance Committee tasked with recommending and implementing gift acceptance policies that have been approved by the University's Board of Visitors, with periodically reviewing gifts and gift plans, and with reporting its actions to the University and the Foundation. The Committee is comprised of:
 - a. the Foundation's President,
 - b. the University's Vice President for Development & Alumni Affairs,
 - c. the University's Senior Vice President,
 - d. the Foundation's Chief Financial Officer,

- e. a representative from the University Controller's Office,
- f. the University's Director of Leadership Gifts and Planned Giving, and
- g. a dean of the University.

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

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

38. In addition to the provisions detailed above in paragraph 37, the Gift Acceptance Policy imposes certain other restrictions on how the Foundation processes, reports, acknowledges, and disposes of gifts. The Policy also requires that certain kinds of gifts meet specified

criteria—including, in many instances, approval by the University or by the Gift Acceptance Committee—before the Foundation accepts them.

39. Transparent GMU alleges, upon information and belief, that the relationship between the University and the Foundation has been governed at all relevant times by terms substantially similar to those contained in the University’s May 8, 2008 Gift Acceptance Policy.

The Space Usage Agreement Between the University and the Foundation

40. The Foundation’s principal office is located in Merten Hall on the University’s Fairfax, Virginia campus. The Foundation shares this building with the University’s Advancement and Alumni Relations offices.
41. The University leases this office space to the Foundation according to an April 2016 Space Usage Agreement between the two entities, a copy of which is attached to this Petition as Exhibit G. The Space Usage Agreement provides, among other things, that:
- a. the Foundation shall pay one dollar per year in rent;
 - b. the Foundation shall use the premises only to support the Foundation’s activities “as set forth in the Affiliation Agreement and for no other purpose”; and
 - c. the Foundation shall use the premises in accordance with “all GMU Policies and Procedures,” which the lease incorporates by reference.

Other Indicia of the Relationship Between the University and the Foundation

42. The Foundation is funded in part by a six-percent administrative fee it exacts from gifts accepted on behalf of the University. *See* George Mason University Foundation, “Administrative Fee Policy” (2016), available at <http://bit.ly/2iXVft2>.

43. The Foundation also receives rental income under real property leases with the University. *See* George Mason University Foundation, Consolidated Financial Statements, 40 (June 30, 2016), available at <http://bit.ly/2jPPwlG>.
44. The University has investments not registered in its own name and held by the Foundation, including:
- a. \$3,785,467 in corporate stocks;
 - b. \$1,973,055 in corporate bonds; and
 - c. \$20,828 in money market funds.
- See* George Mason University, Unaudited Financial Statements, 22 (June 30, 2016), available at <http://bit.ly/2kksALV>.
45. Due to its “close relationship with the University,” the Foundation is reported as a “component unit” on the University’s annual financial statements. *Id.* at 18.
46. The Foundation’s website is located on the University’s internet domain, <http://www.gmu.edu>. The footer section of the Foundation’s website includes the name and contact information for the University’s Office of Advancement and Alumni Relations alongside the University’s logo.
47. Employees of the Foundation are included in the University’s online directory, <http://peoplefinder.gmu.edu>, and photos of Foundation employees are displayed on the University’s “Admin-Staff Portraits” webpage, <http://photo.gmu.edu/Administration/Admin-Staff-Portraits/>.

48. In a public news release, the University appears to describe the Foundation's hiring of a former University Development Office employee as a "transfer." See George Mason University, "Transitions" (July 28, 2015), available at <https://www2.gmu.edu/news/1430>.
49. In addition to the Ex Officio Trustees and Appointed Trustees described above in paragraph 29, at least one other trustee on the Foundation's Board of Trustees is a University faculty member.

PROCEDURAL HISTORY

Transparent GMU's Record Request to the University

50. On January 9, 2017, Transparent GMU, by counsel, submitted to the University by electronic mail and United States mail, a request for records under Section 2.2-3704(A) of the Act, seeking copies of the following records, among others:

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

- (a) Charles Koch Foundation,
- (b) Charles Koch Charitable Foundation,
- (c) Charles G. Koch Foundation,
- (d) Charles G. Koch Charitable Foundation,
- (e) Claude R. Lambe Foundation,
- (f) Claude R. Lambe Charitable Foundation,
- (g) David H. Koch Charitable Foundation,
- (h) Donors Trust, or
- (i) any other person or entity the University and/or the Foundation believes to be affiliated with any of the entities above.

A copy of that request is attached to this Petition as Exhibit H.

51. On January 12, 2017, Ms. Elizabeth Woodley, FOIA Compliance Officer for George Mason University, responded to the request by electronic mail, stating that "there are no documents in the possession of George Mason University which are responsive to [the] request: 'For the

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

52. On January 13, 2017, counsel for Transparent GMU e-mailed Ms. Woodley to confirm whether the University’s “no responsive documents” response “include[d] any documents in the possession of the Foundation” and whether the scope of the University’s search for responsive records included documents held by the Foundation. Ms. Woodley responded by electronic mail later that day, explaining that since the Foundation “is a separate entity from” the University, her “response as the University’s FOIA Officer would not include records (if any) which are solely in the possession of the Foundation.”

Transparent GMU’s Record Request to the Foundation

53. On January 17, 2017, Transparent GMU, by counsel, deposited into the United States Mail a request for records under Section 2.2-3704(A) of the Act, addressed to the Foundation and seeking copies of the same records described above in paragraph 50. A copy of the January 17, 2017 request to the Foundation is attached to this Petition as Exhibit I.
54. The Foundation responded to the request by letter dated January 31, 2017, and signed by Janet Bingham, President of the Foundation, stating that “George Mason University Foundation, Inc. is a private corporation, a 501 (c) 3 charitable organization, not a public body, as defined in the Code of Virginia. As such, the foundation is not subject to the Virginia Freedom of Information Act.”

CLAIMS FOR RELIEF

I. CLAIMS AGAINST THE UNIVERSITY

A. FIRST CLAIM OF RELIEF AGAINST THE UNIVERSITY:

The University denied Transparent GMU rights under the Act by refusing to search for and provide requested records as the legal custodian of records held by its agent, the Foundation, in the transaction of public business.

55. Transparent GMU incorporates by reference all allegations contained above in paragraphs 1 through 54.
56. The Act defines “public records” as including “all writings and recordings . . . prepared or owned by, or in the possession of a public body or its officers, employees or agents in the transaction of public business.” Virginia Code § 2.2-3701 (definition of “Public records”).
57. The University is an agency of the Commonwealth and is thus a “public body” subject to the Act. *See* Virginia Code § 2.2-3701 (definition of “Public body”).
58. The Foundation is and was, at all relevant times, an agent of the University insofar as:
 - a. the Foundation performed fundraising, endowment administration, and real estate management activities for the sole benefit of the University;
 - b. the Foundation performed these activities according to one or more mutual agreements with the University; and
 - c. the University exercised control or reserved the right to exercise control over those activities by, among other things:
 - i. requiring specific authorization from the University before the Foundation accepts property subject to any conditions or restrictions imposed by the donor;
 - ii. requiring that any gift agreements supporting a new program or activity within the University be signed by the University’s Senior Vice President and Provost and/or rejecting such a gift;

- iii. establishing policies governing the acceptance of gifts and the disbursement of Foundation funds;
- iv. selecting the Foundation's President and Chief Executive Officer;
- v. objecting to the removal of the Foundation's President by the Foundation's Executive Committee;
- vi. enjoying ex officio seats with full voting rights on the Foundation's Board of Trustees for the University's President, the University's Vice President for University Development and Alumni Affairs, and the Rector of the Board of Visitors of the University;
- vii. appointing additional University employees to the Foundation's Board of Trustees as non-ex officio trustees with full voting rights;
- viii. requiring the Foundation consult with the University regarding the Foundation's fund-raising and donor acquisition programs and the Foundation's gift management and gift acceptance policies;
- ix. conducting, alongside the Foundation's Chairman and Development Chair, annual reviews of the Foundation President's performance;
- x. requiring signed approval of any acceptance of federal grants;
- xi. requiring the Foundation "promptly acknowledge and issue receipts for all gifts to the Foundation and the University" and provide appropriate recognition and stewardship of gifts;
- xii. requiring the Foundation coordinate with the University regarding fundraising initiatives and the identification, cultivation, and solicitation of donors; and
- xiii. demanding an audit of the Foundation's financial records.

59. Fundraising for a public university, administration of a public university's endowment, and management of a public university's real estate are forms of "public business." *See, e.g.,* Virginia Code § 23.1-1304 (requiring new members of public university governing boards attend educational programs on "endowment management" and "fundraising initiatives"); Virginia Code § 23.1-1301(B)(1) (authorizing governing boards of universities, or their designees, to manage real property acquired by purchase, will, or deed). *C.f.* Virginia Code

§ 2.2-3705.4(7) (excluding certain sensitive information related to fundraising for public universities from disclosure under the Act, but clarifying that other information is not excluded).

60. To the extent records related to these activities have been prepared or are owned by the Foundation, they are therefore “writings and recordings . . . prepared or owned by, or in the possession of a public body[’s] . . . agents in the transaction of public business” and are “public records” under the Act. Virginia Code § 2.2-3701.
61. The records described in the January 9, 2017 records request to the University are therefore “public records” because they are in the possession of the Foundation—a “public body[’s] . . . agent[]”—and because they relate to the Foundation’s fundraising and endowment management activities for the University—both forms of “public business.” Virginia Code § 2.2-3701.
62. Because the Foundation has created and/or maintained the requested public records as an agent of the University, the University is the legal custodian of those records. *See* Virginia Freedom of Information Advisory Council, Advisory Opinion No. AO-19-03 (2003).
63. As the legal custodian of the requested records, the University is an entity to which a request for those records may be directed and is required to search for, obtain, and provide the records accordingly. *See* Virginia Freedom of Information Advisory Council, Advisory Opinion No. AO-19-03 (2003).
64. By failing to inquire as to, search for, request, obtain, or provide the requested public records held by the Foundation, the University denied Transparent GMU the rights and privileges conferred by the Act.

B. SECOND CLAIM OF RELIEF AGAINST THE UNIVERSITY:

To the extent the Foundation is an independent contractor rather than an agent of the University, the University has violated the Act by frustrating its policy of ready access to records relating to the transaction of public business.

65. Transparent GMU incorporates by reference all allegations contained above in paragraphs 1 through 64.
66. Section 2.2-3700 of the Act “ensures the people of the Commonwealth ready access to public records . . . to promote an increased awareness by all persons of governmental activities and afford every opportunity to citizens to witness the operations of government.” Virginia Code § 2.2-3700(B).
67. The Act prohibits a public body from “frustrat[ing] this policy of ready access to records relating to the transaction of public business by contracting with an independent contractor” to perform tasks “relate[d] to the public business of the [public body]” and then “claiming that such records are out of [the public body’s] reach.” Virginia Freedom of Information Advisory Council, Advisory Opinion No. AO-19-03 (2003).
68. As detailed above in paragraph 57, the University is an agency of the Commonwealth and is thus a “public body” subject to the Act.
69. As detailed above in paragraph 59, fundraising for a public university is a form of “public business.”
70. To the extent that the University has contracted with the Foundation to perform fundraising activities as an independent contractor and is thereby unable or unwilling to search for or provide records related to these activities, it has frustrated the Act’s policy of ready access to records relating to the transaction of public business and has denied Transparent GMU the rights and privileges conferred by the Act.

II. CLAIMS AGAINST THE FOUNDATION

A. FIRST CLAIM OF RELIEF AGAINST THE FOUNDATION:

The Foundation is a public body under the Act as it is an entity created to perform delegated functions of the University and/or to advise the University.

71. Transparent GMU incorporates by reference all allegations contained above in paragraphs 1 through 70.
72. The Act defines a “public body” as, in relevant part, any “agency of the Commonwealth” or “any committee, subcommittee, or other entity however designated, of the public body created to perform delegated functions of the public body or to advise the public body”— even if such entity “has private sector or citizen members.” Virginia Code § 2.2-3701 (definition of “Public body”).
73. As detailed above in paragraph 57, the University is an agency of the Commonwealth and is thus a “public body” subject to the Act.
74. The Foundation’s Articles of Incorporation state that the Foundation was created to “(1) promote the advancement and further the aims and purposes of [the University]” by “develop[ing] and appl[y]ing financial resources . . . and “(2) accept, administer, apply, and use property acquired by gift, grant, devise, bequest, or otherwise for the purposes previously set forth.”
75. The development and application of financial resources and the acceptance, administration, and application of gifts, grants, devises, and bequests for the advancement and furtherance of a public university are essential functions of a public university and are forms of “public business.” *See, e.g.*, Virginia Code § 23.1-1304 (requiring new members of public university governing boards attend educational programs on “endowment management” and “fundraising initiatives”). *C.f.* Virginia Code § 2.2-3705.4(7) (excluding certain sensitive

information related to fundraising for public universities from disclosure under the Act, but clarifying that other information is not excluded).

76. The March 22, 2013 Affiliate Agreement between the University and the Foundation recites that the Foundation “works with the University to assist and advise” in “fundraising and asset management activities.” Based upon this recital, Transparent GMU alleges, upon information and belief, that the Foundation was also created to advise the University.
77. The Foundation is therefore an “entity . . . created to perform delegated functions of [a] public body or to advise [a] public body” and is itself a “public body” under the Act. Virginia Code § 2.2-3701 (definition of “Public body”).
78. As the Foundation is a “public body” under the Act, records related to the Foundation’s transaction of public business are “public records” under the Act. *See* Virginia Code § 2.2-3701 (definition of “Public records”).
79. As the records described in the January 17, 2017 records request were such “public records”, the Foundation denied Transparent GMU its rights and privileges under the Act by failing to provide one of the enumerated responses under Virginia Code § 2.2-3704(B) and by refusing to process the request.

B. SECOND CLAIM OF RELIEF AGAINST THE FOUNDATION:

The Foundation is a public body subject to the Act because it is supported principally by public funds.

80. Transparent GMU incorporates by reference all allegations contained above in paragraphs 1 through 79.
81. The Act defines a “public body” as, in relevant part, any corporation “supported wholly or principally by public funds.” Virginia Code § 2.2-3701 (definition of “Public body”).

82. The Foundation is funded in part by a six-percent administrative fee it exacts from all restricted/current use gifts accepted on behalf of the University. The funds upon which the Foundation exacts this six-percent administrative fee are public funds, as they:
- a. are received for, in the name of, and/or on account of the University;
 - b. are held by the Foundation only in its capacity as an agent, trustee, and/or fiduciary of the University;
 - c. are subject to University supervision and control by virtue of the University's rights under the March 22, 2013 Affiliation Agreement to set policies for the transfer of Foundation funds, to audit the Foundation's financial records, and to receive all Foundation assets and property upon dissolution of the Foundation; and
 - d. would, but for the Foundation's existence and the University's Gift Acceptance Policy, naturally flow to the University.
83. The Foundation also receives public funds under multiple real property leases with the University.
84. The Foundation is also supported by public funds from the University insofar as the University is solely responsible for the compensation of the Foundation's President and Chief Executive Officer.
85. In addition, the March 22, 2013 Affiliate Agreement between the University and the Foundation states that the University "will provide the Foundation with fair and reasonable compensation or payment" as "consideration for Foundation services." Based upon this provision, Transparent GMU alleges, upon information and belief, that the University also

provides the Foundation with public funds as fair and reasonable compensation or payment of services.

86. Transparent GMU alleges, upon information and belief, that the public funds identified above in paragraphs 82 through 85, are, alone or in the aggregate, a principal source of support for the Foundation.

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

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

89. As the records described in the January 17, 2017 request were “public records” under the Act, the Foundation denied Transparent GMU its rights and privileges under the Act by failing to provide one of the enumerated responses under Virginia Code § 2.2-3704(B) and refusing to process the request.

C. THIRD CLAIM OF RELIEF AGAINST THE FOUNDATION:

The requested records are public records, which the Foundation must ensure are open to inspection and copying regardless of its status as a public body.

90. Transparent GMU incorporates by reference all allegations contained above in paragraphs 1 through 89.

91. The Act defines “public records” as including “all writings and recordings . . . prepared or owned by, or in the possession of a public body or its officers, employees or agents in the transaction of public business.” Virginia Code § 2.2-3701 (definition of “Public records”).

92. As detailed above in paragraph 57, the University is an agency of the Commonwealth and is thus a “public body” subject to the Act.
93. As detailed above in paragraph 58, the Foundation is and was, at all relevant times, an agent of the University.
94. As detailed above in paragraph 59, fundraising for a public university, administration of a public university’s endowment, and management of a public utility’s real estate are all forms of “public business.”
95. To the extent records related to these activities have been prepared or are owned by the Foundation, they are therefore “writings and recordings . . . prepared or owned by, or in the possession of a public body[’s] . . . agents in the transaction of public business” and are “public records” under the Act. Virginia Code § 2.2-3701 (definition of “Public records”).
96. Regardless of the Foundation’s status as a “public body” under the Act, the Foundation denied Transparent GMU the rights and privileges conferred by the Act by failing to ensure that the records described in the January 17, 2017 records request were “open to inspection and copying by any citizens of the Commonwealth,” as required by Virginia Code § 2.2-3704(A).

III. CLAIMS AGAINST BOTH THE UNIVERSITY AND THE FOUNDATION

A. THIRD CLAIM OF RELIEF AGAINST THE UNIVERSITY AND FOURTH CLAIM OF RELIEF AGAINST THE FOUNDATION:

The Foundation is subject to the Act as an alter-ego of the University.

97. Transparent GMU incorporates by reference all allegations contained above in paragraphs 1 through 96.
98. As detailed above in paragraph 57, the University is an agency of the Commonwealth and is thus a “public body” subject to the Act.

99. At all relevant times, the Foundation has been operated as a mere agent, instrumentality, and alter-ego of the University.

100. The University has delegated important public functions to the Foundation, including fundraising, endowment administration, and real estate management for the sole benefit of the University. The University continues to exercise control over these functions by, among other things:

- a. establishing policies governing the Foundation's acceptance of gifts, the disbursement of Foundation funds, and the Foundation's use of its premises;
- b. requiring specific authorization from the University before the Foundation accepts property subject to any conditions or restrictions imposed by the donor;
- c. requiring that any gift agreements intended to support a new program or activity within the University be signed by the University's Senior Vice President and Provost;
- d. selecting the Foundation's President and Chief Executive Officer;
- e. maintaining the University's Vice President for University Development and Alumni Affairs as President and Chief Executive Officer of the Foundation;
- f. providing the salary of the Foundation's President and Chief Executive Officer;
- g. reserving the right to object to the removal of the Foundation's President by the Foundation's Executive Committee;
- h. enjoying ex officio seats with full voting rights on the Foundation's Board of Trustees for the University's President, the University's Vice President for University

Development and Alumni Affairs, and the Rector of the Board of Visitors of the University;

- i. appointing University deans or academic directors to the Foundation's Board of Trustees as appointed trustees with full voting rights;
- j. requiring the Foundation consult with the University regarding the Foundation's fund-raising and donor acquisition programs and the Foundation's gift management and gift acceptance policies;
- k. conducting, alongside the Foundation's Chairman and Development Chair, annual reviews of the Foundation President's performance;
- l. requiring signed approval of any acceptance of federal grants;
- m. requiring the Foundation "promptly acknowledge and issue receipts for all gifts to the Foundation and the University" and provide appropriate recognition and stewardship of gifts;
- n. requiring the Foundation coordinate with the University regarding fundraising initiatives and the identification, cultivation, and solicitation of donors; and
- o. reserving the right to demand audits of the Foundation's financial records.

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

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

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

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

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

- a. the University's Gift Acceptance Policy requiring all gifts be made to the Foundation;
- b. the Foundation's authority to use the University's name and logo;
- c. maintaining Foundation offices on the University's campus and in a University building;
- d. the location of the Foundation's website on the University's internet domain;
- e. the inclusion of Foundation staff on the University's online directory and in the University's "Admin-Staff Portraits" webpage;

- f. the University's description of the movement of a University employee to employment with the Foundation as a "transfer" in an online news release; and
- g. the University's maintenance of a "pledge payment reminder system" to remind individuals to honor their pledges to donate to the Foundation.

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

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

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

106. At all relevant times, the University's employment of the Foundation as a mere agent, instrumentality, and alter-ego has resulted in a breach of the University's legal and equitable duties as a state agency and public body to allow the public access to records related to its operations and thereby violating public and private confidence and injuring the public interest.

107. At all relevant times, the University's employment of the Foundation as a mere agent, instrumentality, and alter-ego has denied Transparent GMU the rights and privileges conferred by the Act by denying it access to the public records described in its requests for records.
108. Reason, justice, and the policies embodied within the Act therefore require that the Foundation's separate corporate identity be disregarded and that the Foundation be treated as a public body and/or a constituent body of the University for purposes of the disclosure of public records under the Act.
109. As a "public body" under the Act, records related to the Foundation's performance of public business are "public records" under the Act. Virginia Code § 2.2-3701 (definition of "Public records").
110. As the records described in the January 17, 2017 request to the Foundation were "public records" under the Act, the Foundation denied Transparent GMU its rights and privileges under the Act by failing to provide one of the enumerated responses under Virginia Code § 2.2-3704(B) and by refusing to process the request.

RELIEF REQUESTED

Based on the facts and authorities discussed above, Transparent GMU asks this Court to:

- (a) issue a writ of mandamus to George Mason University and George Mason University Foundation, Inc., compelling them to perform their ministerial duty under the Act to produce the requested records;
- (b) declare that George Mason University and/or George Mason University Foundation, Inc., unlawfully and unreasonably withheld public records from citizens of the Commonwealth

in violation of the Virginia Freedom of Information Act, Virginia Code §§ 2.2-3700—
2.2-3714;

- (c) declare that George Mason University Foundation, Inc., is a public body under the Act and/or is subject to a duty to provide access to any records relating to its activities as George Mason University's agent in the transaction of public business;
- (d) order that George Mason University and/or George Mason University Foundation, Inc., provide Transparent GMU with all records responsive to its January 9, 2017 and January 17, 2017 requests for records within five business days, or, in the alternative, provide Transparent GMU with one of the four alternative responses enumerated in Virginia Code § 2.2-3704(B) within five business days;
- (e) award Transparent GMU “reasonable costs, including costs and reasonable fees for expert witnesses, and attorneys’ fees” under Virginia Code § 2.2-3713(D); and
- (f) grant any other relief the Court deems appropriate.

Respectfully submitted,

EVAN D. JOHNS (Virginia State Bar No. 89285)
APPALACHIAN MOUNTAIN ADVOCATES
415 Seventh Street Northeast
Charlottesville, Virginia 22902
Telephone: (434) 529-6787
Facsimile: (304) 645-9008
Email: ejohns@appalmad.org

Counsel for Transparent GMU