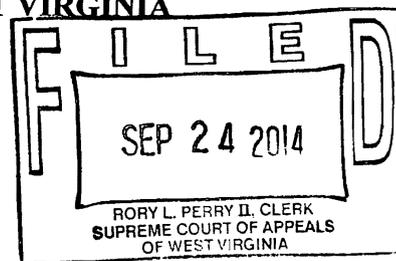


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Appeal No.: 14-0370
(Circuit Court Civil Action No. 12-C-275)



HIGHLAND MINING COMPANY,

Plaintiff Below/Petitioner,

v.

WEST VIRGINIA UNIVERSITY SCHOOL OF MEDICINE,

Defendant Below/Respondent.

*Appeal from a Final Order of the Circuit Court of
Monongalia County, West Virginia
Civil Action No. 12-C-275*

PETITIONER'S REPLY BRIEF

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III. ARGUMENT.

A. Because Professor Hendryx Was Not Engaged in Policy-Making on Behalf of WVU, the FOIA Deliberative Process Exemption Does Not Apply to the Documents Withheld by WVU.

The first – and primary – ground upon which the Circuit Court based its ruling granting summary judgment to Respondent West Virginia University (“WVU”) was its determination that the “deliberative process privilege” at W. Va. Code §29B-1-4(a)(8) (a part of the West Virginia Freedom of Information Act, W. Va. Code §29B-1-1, et seq. (“FOIA”)) applies to justify WVU’s withholding of almost all of the information that it withheld from Petitioner Highland Mining Company (“Highland”). A.R. 5-6 (Conclusions of Law Nos. 1-6); A.R. 7 – 21 (discussion of court’s conclusions regarding the deliberative process privilege). It is revealing that WVU’s Response Brief nearly omits any mention of this basis for the lower court’s decision.

As the lower court acknowledged, this exemption only supports the withholding of documents that were generated “before the adoption of an agency policy.” A.R. 8 (Final Order at 8, citing Coastal States Gas Corp. v. Dep’t of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980) (emphasis added)). In this case, there is no basis for any finding that the research articles prepared by Professor Hendryx had anything to do with making policy for WVU. In fact, WVU’s position is that “[t]he findings of any particular research project do not reflect, nor should they, any particular opinion or position of the University itself.” A.R. 517 (statement by WVU Director of Public Relations regarding research conducted at WVU) (emphasis added). Accordingly, the Circuit Court’s finding (A.R. 9) that because WVU “did not disavow” the papers published by Professor Hendryx, this showed WVU’s “acceptance [of them] as legitimate thought” and “solidif[ied] the attribution of the policy positions his work illuminated to [WVU],” is in error.

WVU attempts to offer some support for the lower court's decision by suggesting that because WVU's policy is to encourage faculty to undertake research, all research undertaken by its faculty constitutes WVU policy-making. Response Brief at 13-14. That, of course, makes no sense because WVU does not make policy. It is not an agency, it is a university. The purpose of the WVU Rural Health Research Center ("Center") (where Professor Hendryx worked) is to "conduct and disseminate environmental health research that improves the health of rural populations and communities." A.R. 9 (Final Order at 9, quoting Center website statement). The Center does not regulate any activity, promulgate rules or policies that govern any entity's conduct, or engage in any other type of governmental function. Therefore, any research paper published by a member of its faculty could not constitute "policy" within the meaning of the deliberative process exemption, even if WVU had not so carefully separated itself from such publications.

For all of these reasons, the Circuit Court's finding that in publishing the subject articles Professor Hendryx was advancing WVU's policy of "improv[ing] rural health through research" (A.R. 10) was clearly erroneous. Even if, as the Circuit Court posited, the question of the effects of coal mining operations on the health of surrounding communities is a question "that many have asked, and continue to ask" (*Id.*), this does not mean that research purporting to address that question constitutes State policy. As a result, draft articles, comments on the drafts, and communications with outside groups that were withheld by WVU are not "pre-decisional" within the meaning of the deliberative process exemption merely "because they were created prior to the completion of the article...." Final Order at 12 (A.R. 12). As explained at length in Highland's Opening Brief, to so qualify they would have to be drafts of documents that "bear on the formulation or exercise of *policy-oriented judgment.*" Ethyl Corp. v. Environmental

Protection Agency, 25 F.3d 1241, 1248 (4th Cir. 1994) (emphasis added). The subject articles plainly do not fall within that category.

This Court has provided direction regarding how the circuit courts should approach a claim that information must be withheld under the FOIA's deliberative process exemption. Specifically, a proper analysis of such a claim must begin with a factual presentation as to "the 'function and significance of the documents to the agency's decision-making process,' including an explanation of "the nature of the decision-making authority vested in the office or person issuing the disputed documents..." Daily Gazette Co., Inc. v. The West Virginia Dev. Office, 198 W.Va. 563, 569, 482 S.E.2d 180, 192 (1996) (internal citations omitted). No such analysis was undertaken in this case. If that had been done, the lower court would have been forced to acknowledge that there was no agency decision-making process involved, Professor Hendryx had no "decision-making authority" for any agency, and therefore WVU's invocation of the deliberative process exemption should have been refused.

B. There is No Exemption for "Academic Freedom" Under the FOIA.

The Circuit Court recognized an "Academic Freedom" exemption from disclosure of documents under the FOIA, encompassing "e-mail communications...regarding the articles, drafts of the articles, peer review comments and similar documents...." A.R. 23-24. Although WVU takes great umbrage at Highland's characterization of this ruling as unprecedented, the Circuit Court itself acknowledged this fact. *See, e.g.*, Final Order at 27 (A.R. 27) ("As previously stated, Highland is correct in that, to this Court's knowledge, no case with facts parallel to this one has applied the concept [of Academic Freedom] as a privilege to prevent FOIA disclosure.")

None of the rationale offered by the lower court for such an expansive interpretation of FOIA's exemptions finds support in the statute or relevant jurisprudence. As a result, that court's decision announcing a new "Academic Freedom" exemption from FOIA must be reversed.

1. E-Mails, Peer Review Comments, and Draft Articles Withheld by WVU Do Not Constitute "Personal Information" Within the Meaning of FOIA Exemption No. 2.

Even assuming, *arguendo*, that Academic Freedom can be properly recognized as a basis for exempting the cited documents from disclosure, that cannot be accomplished through the application of the "personal privacy" exemption set forth in W. Va. Code § 29B-1-4(a)(2). That exemption allows an agency to withhold "information of a *personal* nature such as that kept in a personal, medical or similar file....." *Id.* (emphasis added). It encompasses things such as psychiatric records, assessments of mental fitness for employment, and similar matters. Child Protection Group v. Cline, 177 W.Va. 29, 350 S.E.2d 541, 542, 545 (W.Va. 1986).

Greatly expanding that concept, the Circuit Court found that the documents withheld by WVU pursuant to an Academic Freedom privilege constitute "information of a personal nature" within the meaning of the privacy exemption at W. Va. Code § 29B-1-4(a)(2). A.R. 22, 24 (Final Order at 22, 24). In the lower court's view, e-mail communications among WVU employees, draft articles, comments on drafts, and other similar documents comprise "information of a personal nature" within the meaning of this provision because they may contain "subjective, candid commentary." A.R. 24 (Final Order at 24). The Circuit Court did not address how it is that these same documents could constitute materials prepared as a part of "policy-making" on behalf of an "agency" (here, purportedly, WVU). A.R. 8 – 12 (Final Order at 8 – 12). Thus, the Final Order treats the same documents as exempt from disclosure both

because they are part of the process of “a public body...developing responses to issues of public concern” (A.R. 10) and because they are “‘personal’ in nature, reflecting the author’s “thought process and conceptualization of [the] final work product.” A.R. 24. This inconsistency is yet further evidence that the FOIA does not contemplate an Academic Freedom exemption.

Although it is true, as WVU suggests, that the corresponding federal privacy exemption has been found to extend beyond personnel and medical records to include other types of information, to be covered by the exemption any withheld documents still must comprise “detailed Government records on an individual which can be identified as applying to that individual.” Cook v. Nat’l Archives & Records Admin., 13-1228-CV, 2014 WL 3056364, *12-13 (2nd Cir. July 8, 2014). Examples of these other types of covered records include passport office documents revealing citizenship status, letters to Guantanamo Bay detainees revealing names and addresses of family members, and records of interviews of deported aliens revealing their identities. *Cook*, at *14. There is no jurisprudence supporting the Circuit Court’s conclusion (A.R. 23) that peer review materials, e-mails with third parties, and similar communications tied to an individual’s regular employment duties fall within this exemption.

2. The Circuit Court’s Reliance on the West Virginia Constitutional Guarantee of a “Thorough and Efficient System of Free Schools” as a Basis for Creating an “Academic Freedom” Exemption to the FOIA was in Error.

One of the key conclusions of law that the Circuit Court cited in support of its determination to incorporate a new Academic Freedom exemption into the FOIA was that “[t]he mandatory requirements of ‘a thorough and efficient system of free schools’ found in Article XII, Section 1 of the West Virginia Constitution” shows the importance of safeguarding such a right in the context of WVU (and, presumably, other State colleges and universities). *See* Final Order at 6-7 (Conclusions of Law Nos. 7 and 8), 22, 30; A.R. 6-7, 22, 30 (“Education is a

fundamental, constitutional right in our State, and academic freedom is necessary to enable our institutions to perform their societal obligation, as established by our Legislature.”) (emphasis in original). Indeed, though WVU did not address this in its Response Brief, given the extensive discussion of the functions of universities and their faculty as set forth in the Final Order, it is fair to say that the Circuit Court would not have concluded that an Academic Freedom exemption should be recognized if it had not first assumed that this Constitutional guarantee extends to WVU and other colleges.

The Constitutional mandate upon which the lower court relied, however, does not extend to institutions of higher learning such as WVU. See Randolph County Board of Education v. Adams, 196 W. Va. 9, 467 S.E.2d 150 (1995); Herold v. McQueen, 71 W. Va. 43, 75 S.E. 313 (1912). As a result, the Circuit Court’s conclusion that WVU should be permitted to invoke an Academic Freedom exemption in responding to Highland’s FOIA Requests must be reversed.

3. There is No “Common Law” Right to Academic Freedom, and the Enactment in Other States of Specific FOIA Exemptions for Faculty Research Does Not Support the Argument that Such an Exemption Exists in the West Virginia FOIA.

As the Circuit Court held, a fundamental principle to be applied in this case is that the FOIA’s disclosure provisions are to be liberally construed, and its exemptions must be strictly construed, to favor the maximum disclosure of responsive documents. Farley v. Worley, 215 W.Va. 412, 420, 599 S.E.2d 835, 843 (2004) (internal citations omitted). Final Order at 4 (Conclusions of Law Nos. 1 and 2) (A.R. 4). This follows from the plain words of the statute, which must be applied rather than construed:

...it is hereby declared to be the public policy of the state of West Virginia that all persons, unless otherwise *expressly* provided by law, are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and *employees*. The people...do not give their public

servants the right to decide what is good for the people to know and what is not good for them to know...To that end, the provisions of this article shall be liberally construed with the view of carrying out the above declaration of policy.

W. Va. Code § 29B-1-1 (emphasis added); Ashby v. City of Fairmont, 216 W.Va. 527, 531, 607 S.E.2d 856, 860 (2004) (holding that when addressing a statute, the court is “bound to apply, and not construe, the enactment’s plain language.”)

There are nineteen (19) specific exemptions from the FOIA’s disclosure obligations set forth in the statute. None of them establishes an exemption based upon Academic Freedom or comes even close to encompassing research activities of public university employees. Strictly construing those exemptions and placing the burden of proof on WVU to prove that such an exemption exists (as required by W. Va. Code § 29B-1-5(2) and *Farley*), it is clear that the lower court committed error in recognizing such an Academic Freedom exception to the FOIA.

Moreover, there is no basis for WVU’s claim (Response Brief at 16-17) that such an exemption is rooted in the common law. The Virginia Supreme Court decision cited by WVU in support of that proposition never mentions any common law basis for its ruling. In Am. Tradition Inst. v. Rector & Visitors of Univ. of Va., 756 S.E.2d 435 (Va. 2014), the Supreme Court of Virginia merely affirmed that documents withheld by the university in that case fell within a specific statutory exemption created by the Virginia Legislature to protect “information of a proprietary nature produced or collected by or for faculty or staff of public institutions of higher education...” *Am. Tradition Inst.*, 756 S.E.2d at 441. That opinion set forth a detailed review and analysis of the statutory term “proprietary,” and was focused not on common law but on determining the Virginia General Assembly’s intention in enacting the relevant statute. WVU can find no support for the Circuit Court’s invocation of an Academic Freedom exemption to the FOIA in *Am. Tradition Inst.*

As WVU and the Circuit Court apparently believe, perhaps it would be good public policy for the West Virginia Legislature to enact some type of statutory exemption similar to the Virginia statute at issue in *Am. Tradition Inst.* After all, as WVU points out (Response Brief at 16), more than a dozen states have put some type of public university research exemption in place. However, the fact of the matter is that our Legislature (like the majority of other states) has not seen fit to do so. Because of that, the lower court exceeded its legal authority in crafting and applying its own such exemption in this case. Phillips v. Larry's Drive-In Pharmacy, Inc., 220 W.Va. 484, 491 647 S.E.2d 920, 927 (2007) ("Just as courts are not to eliminate through judicial interpretation words that were purposely included, we are obliged not to add to statutes something the Legislature purposely omitted."); Consumer Advocate Div. of Public Service Com'n of West Virginia v. Public Service Com'n of West Virginia, 182 W.Va. 152, 154, 386 S.E.2d 650, 652 (1989) ("[a] statute, or an administrative rule, may not, under the guise of 'interpretation,' be modified, revised, amended or rewritten.").

4. There is No First Amendment Right to Academic Freedom That Encompasses an Exemption from the FOIA for Materials Related to Published Faculty Research.

No court has ever recognized a First Amendment right to Academic Freedom on behalf of an individual professor as a basis for exempting responsive information from disclosure under a Freedom-of-Information law. Although the First Amendment has been held to apply to protect colleges and universities against undue interference by the government, the First Amendment jurisprudence cited in the Final Order simply does not support its application in the context of this case. *See* Opening Brief, at 20-23. Other than asserting that Academic Freedom is a "core First Amendment value," and baldly claiming that "Dr. Hendryx's academic freedom is a

constitutionally protected right” (Response Brief at 14, 18), WVU’s Response Brief offers no substantive response to this fundamental weakness in the Circuit Court’s Final Order.¹

For example, Sweezy v. New Hampshire, 354 U.S. 234 (1957), the primary case cited by the Circuit Court, was decided on Fourteenth Amendment due process grounds, not First Amendment principles. *Sweezy*, 354 U.S. at 254-255. Other than questions about membership in certain organizations, *Sweezy* involved efforts by the New Hampshire Attorney General to pose questions to a University professor as to the content of a single lecture given to a humanities class, apparently touching on the professor’s views on socialism, Marxism and related areas. *Sweezy*, 354 U.S. at 259-260. It did not involve publication of articles that were put forth as conveying the results of objective, scientific research into complex issues of community health and industrial externalities. Thus, in addition to the Court’s reliance upon due process rather than Academic Freedom principles, as a factual matter *Sweezy* has little if any application to this case.

As WVU notes, it is true that the *Sweezy* Court emphasized that teachers and students must “always remain free to inquire, to study and to evaluate....” *Sweezy*, 354 U.S. at 250 (Response Brief at 14). However, WVU never addresses how teachers, students and others will be capable of inquiring, or evaluating scholarly publications, if (as WVU has done here) those who publish academic articles refuse to disclose the raw data, compilations and communications

¹ As it did in briefing below, and as the Circuit Court incorporated in its Final Order (A.R. at 6, 29), WVU’s response repeated the error of citing the former regulation of the (now-defunct) WVU Board of Trustees (W.Va. C.S.R. 128-36-1, et seq.) as an expression of Legislative intent (Response Brief at 15) – even though the Legislature had nothing to do with it. That regulation was exempt from the rule-making process and therefore its promulgation was not a Legislative act. Further, even that rule emphasized that “the concept of academic freedom is accompanied by the equally important concept of academic responsibility,” which demands that a faculty member speak with accuracy. W.Va. C.S.R. 128-36-2.3. Highland’s FOIA Requests sought information that would be relevant to an evaluation of the accuracy of the Hendryx papers. This regulation therefore would have supported the position that WVU should fully respond to the FOIA Requests, not a wholesale refusal to provide any responsive information.

with outside third parties which formed the basis for the articles. Perhaps that information is something that Professor Hendryx would prefer to be free from review by others, but there is no First Amendment right that allows him (or WVU) to maintain that position in response to a proper FOIA request.²

Finally, WVU still is unable to explain how disclosure of data, compilations, anonymous peer review comments and communications with third parties will lead to the “chilling of research efforts” (Final Order at 27; A.R. 27) when the articles in question have previously been published. The Seventh Circuit’s decision in Dow Chemical Co. v. Allen, 672 F.2d 1262 (7th Cir. 1982), upon which the Circuit Court placed great weight (A.R. 17-18), focused on the possible adverse effects of disclosing notes, draft papers and raw data regarding ongoing animal toxicity studies prior to their publication. *Dow*, 672 F.2d at 1268; In the Matter of the American Tobacco Company, 880 F.2d 1520, 1529 (7th Cir. 1989). Other decisions and statutes creating such a privilege also stress the need for protection against premature disclosure of proprietary data as the key basis for doing so. *See* Kenneth A. Weber, *State Public Records Acts: the Need to Exempt Scientific Research Belonging to State Universities from Indiscriminate Public Disclosure*, 10 J.C. & U.L. 129, 142-143, 144 (1984) (discussing Virginia statutory exemption as having been enacted based on a concern for preservation of faculty’s proprietary interests in research work that could represent patentable material, and arguing that “[P]reliminary research... must be kept unpublished and secret if state universities are to ensure their proprietary

² In this regard, although there is no reason to believe that anything of the sort is involved in this case, it should be noted that WVU has recently experienced a situation in which a School of Public Health professor was involved in publishing academic articles while apparently relying on false statements in his resume’ for the credentials that allowed him to be involved in such an effort. *See* Exhibit A “Ex-WVU Professor Lied on Resume’, NBC News Says” (*The Charleston Gazette*, Sept. 12, 2014). As noted in that article, allowing others to undertake their own direct analysis of data cited in a study is one way of protecting against concerns that may arise when one author is found to have relied on false credentials.

interest.”) No such concern could possibly exist as to Highland’s FOIA Requests, which referenced only published articles.

Likewise, WVU wrongly contends that recognizing an Academic Freedom exemption from FOIA “mirrors the justification for First Amendment protections afforded to journalists,” replicating that part of the Final Order citing Cusumano v. Microsoft Corp., 162 F.3d 708 (7th Cir. 1998). Response Brief at 14-15, n. 6. The principles that support the extension of First Amendment protections to journalists and their confidential sources have no possible application here. For all but one of the articles that were referenced in Highland’s FOIA Requests, the authors merely gathered secondary data and analyzed or categorized it in some way to support the findings made in the article. In the sole article that was not based on secondary data, addressing “Self-Reported Cancer Rates in Two Rural Areas of West Virginia with and without Mountaintop Coal Mining” (A.R. 98-105), data was gathered through the use of door-to-door surveys in which no identifying information was obtained from those who were interviewed (A.R. 99). Notwithstanding WVU’s suggestion to the contrary, Professor Hendryx and his co-authors were not journalists using confidential sources, but university faculty presumably employing objective methods of scientific research and analysis to formulate the findings set forth in the subject articles.

C. The Circuit Court’s Initial Determination that Highland’s Two FOIA Requests Were Not Unduly Burdensome Was Correct, and Even If It Was Supported by the Evidentiary Record, the Circuit Court’s Subsequent Proclamation to the Contrary Could Only Have Prospective Effect.

As an additional ground for entry of summary judgment in its favor, the Circuit Court found that requiring WVU to further respond to Highland’s FOIA Requests would be unduly burdensome. Although the lower court expressed this as a determination that applied only to

excuse WVU from any further production of documents and not as a primary basis for its overall ruling, the “undue burden” defense is the centerpiece of WVU’s Response Brief. *See* Final Order at 31-34 (discussion of the “unduly burdensome” claim, starting on page 31 of the 37-page Final Order); Response Brief, pp. 1-9. Unfortunately, in pressing this argument WVU expands upon and mischaracterizes the Circuit Court’s limited findings on the issue, and attempts to fashion a factual basis for its expanded interpretation of the Final Order that is at variance with the record.

WVU first contends that Highland served “hundreds of individual” FOIA requests, or “200+ FOIA requests.” Response Brief at 1-3. The record, however, confirms that there were only two.

The primary thrust of WVU’s claim in this regard centers on Highland’s First FOIA request (referred to in previous briefing as the “Subpoena-Based FOIA Request”), which sought release of the same information that had been the subject of three (3) subpoenas previously served on WVU by Highland in December, 2011. A.R. 53. As to the Subpoena-Based FOIA Request, WVU contends that it has identified “over two hundred separate requests” for information. Response Brief at 2.

Although it is true that the subpoenas themselves include specific, uniform subparts of information sought as to each respective published article, there are not 200 such categories. To the contrary, the Subpoena-Based FOIA Request identifies 20 categories of documents that are sought as to the first subpoena, 18 categories as to the second, and 18 categories as to the third subpoena. A.R. 59-63; 77-81; 92-97. Further, WVU fails to acknowledge that the first question in each of the subpoenas contains a broad request, with the following questions serving as a ‘roadmap’ to addressing the first question. In short, the Subpoena-Based FOIA Request seeks

information falling within a collective total of 56 categories of information related to the three articles in question.

Highland's Second FOIA request (identified in previous briefing as the "Communications FOIA Request") sought only one category of information: letters, e-mails and other communications with certain identified third parties, sent to or from Prof. Hendryx pertaining to five (5) articles that he co-authored in 2010 or earlier. A. R. 107. WVU apparently does not contend that it will be an unreasonable burden to fully respond to that request, as it did not present any analysis in support of such a claim in its Response Brief.³

Next, WVU asserts that in order to fully respond to Highland's FOIA Requests it will be forced to "manually review" each and every one of the 216,182 remaining un-reviewed documents that have been identified as potentially responsive. Response Brief at 3. However, according to WVU's electronic documents consultant, after they have been subject to the "Equivio" de-duplication and organizational process only a "small percentage" of those remaining documents will have to be reviewed. A.R. 474-476 (Feb. 21, 2013 letter, E-Terra Consulting).⁴

Finally, WVU wrongly suggests that the Circuit Court ruled that Highland's FOIA Requests "were unreasonably burdensome all along," and therefore "were not proper and legal requests under [the FOIA] – ever...." Response Brief at 6, 9. The Circuit Court actually found precisely to the contrary.

³ Despite the minimal burden of responding, to date it does not appear that WVU has produced any documents in response to the Communications FOIA Request.

⁴ WVU also incorrectly states that Highland "declin[ed] to narrow its FOIA Requests" in response to WVU concerns about the potential burden of responding to the Subpoena-Based FOIA Request. Response Brief at 3. Highland specifically offered to have WVU provide its responses to the request in tiers, and offered to work with WVU to minimize the number of documents to be produced where possible. *See* A.R. 265-266 (Tr., 9/24/12, at 16-17).

After full briefing and a hearing on its Motion to Dismiss, the lower court flatly rejected WVU's claim of undue burden. In the words of the Court at that hearing, WVU was "stonewalling" Highland by refusing to provide any responsive documents (including documents that had already been gathered in response to service of the subpoenas in civil litigation), while failing to present any evidence of the burden purportedly presented in responding to different aspects of the FOIA Requests. A.R. 267 (Tr., 9/24/12, at 18). Thus, in the Final Order entered after that hearing the lower court ordered that WVU release "all responsive information that it [can] reasonably provide, including previously gathered documents" and provide an explanation (including a *Vaughn* Index) as to why other information could not be reasonably produced. A.R. 296 (November 7, 2012, Findings of Fact, Conclusions of Law and Amended Final Order Denying Defendant's Motion to Dismiss at 7, citing *Farley*, 599 S.E.2d at 846).

Nothing in the Final Order changes these rulings. Indeed, in the Final Order entered on March 19, 2014, the Circuit Court specifically found that "*at this point*, WVU has demonstrated that the FOIA requests are unduly burdensome," and noted that it was concerned about the time and expense that "*would be required* to complete the process...." A.R. 33 (Final Order at 33) (emphasis added). It did not overrule or alter any of its previous rulings on this issue, including in particular the November 7, 2012 Amended Final Order in which the Circuit Court found that Highland's FOIA Requests were not unduly burdensome.

D. The Circuit Court Erred in Neglecting to Address Highland's Request for Attorneys Fees and Costs Pursuant to W. Va. Code § 29B-1-7.

W. Va. Code § 29B-1-7 provides that any person who is a successful FOIA litigant must be awarded attorney fees and court costs from the public body that denied the requestor access to records. *Id.* To be a successful litigant under the FOIA, the court must find only that the party requesting fees "has obtained the disclosure, in full or in part, of the public records that had been

withheld from it...either voluntarily or by court order....” Daily Gazette Co. v. Development Office, 206 W.Va. 51, 521 S.E.2d 543, 560 (1999).

Here, more than 2,200 documents were turned over by WVU in compliance with the Circuit Court’s November 7, 2012 Order. If no such order had been entered, WVU would not have produced any information to Highland. Therefore, Highland is a successful FOIA litigant – regardless of how the Court rules on the other issues presented by this appeal.

In its Response Brief WVU opposes Highland’s request for statutory fees and costs because, in its view, it should never have been required to provide any documents to Highland. Id. at 9. WVU takes this position even though the Circuit Court previously determined that its failure to provide any documents to Highland was wholly unjustified; even though WVU persisted in asserting that some of the documents Highland had requested were not public records, only to drop that defense at hearing; even though WVU persisted in asserting that some of the documents Highland had requested were exempt under the trade secrets exemption found at W. Va. Code §29B-1-4(a)(1), only to fail to support that claim in the final briefing; and even though WVU describes the Academic Freedom exemption that the Circuit Court ultimately relied upon to rule in its favor as a “novel” one.

WVU’s stance on this issue, as with its position on the substantive issues addressed above, is without merit. There is no doubt that Highland is a successful FOIA litigant, and the Circuit Court erred in neglecting to address Highland’s request for attorney fees and costs under W. Va. Code § 29B-1-7.

IV. CONCLUSION.

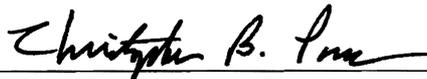
The Final Order should be reversed and vacated. It is based upon an unprecedented and unjustified expansion of the FOIA exemptions, unsupportable factual findings, and faulty legal rulings. This matter should be remanded so that the Circuit Court may enter an order requiring that WVU fully respond to Highland's FOIA Requests, and for other and further relief consistent with the Court's determination of this appeal.

In fully complying with the FOIA, WVU should be required to provide all raw data used in preparing the subject articles; compilations of data; draft reports; peer review comments and responses; and e-mails amongst WVU employees and third-parties regarding the development and publication of the subject articles, how the articles would be publicized, and how Professor Hendryx and others working in concert with him would address media questions pertaining to the articles. Highland should also be granted its reasonable attorney fees and costs incurred to prosecute this action, pursuant to W. Va. Code § 29B-1-7.

Respectfully Submitted,

HIGHLAND MINING COMPANY

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Exhibit A

Ex-WVU professor lied on r sum , NBC News says

The Charleston Gazette, Sept. 12, 2014

By Ken Ward Jr.

By Mackenzie Mays

West Virginia University officials are not releasing details about allegations that a former professor in the university's School of Public Health was hired with false credentials.

According to a report by NBC News, Anoop Shankar, former chairman of WVU's Epidemiology Department, lied about several aspects of his r sum  — including that he had a Ph.D and was a member of the prestigious Royal College of Physicians. He also allegedly lied about which medical school he attended in India, plagiarized scholarly publications and forged references.

Shankar was forced out at WVU in 2012, after a professor in the School of Public Health found dozens of fraudulent claims in his r sum , according to NBC.

“As soon as anything came into question about [Shankar's] credentials, investigations began,” WVU spokesman John Bolt said Wednesday. “We informed folks internally and externally as soon as it became clear there were problems. That's why he's not here anymore.”

Bolt would not comment further, calling the issue a personnel matter, but he said WVU “followed all applicable law” when questions were raised about Shankar's credentials, and officials reached out to law enforcement and appropriate research-funding agencies. “Dr. Shankar no longer works at WVU. However, many of the specific issues raised at this stage remain confidential personnel matters, and the university is not at liberty to discuss them,” Bolt said. “When it is possible, and all facts are clear and known, the university may have more to say.”

While at WVU, Shankar was among the researchers who worked on the C8 Health Project, a group effort to analyze data from thousands of Mid-Ohio Valley residents to determine if they had been made sick by drinking water that DuPont Co.'s Parkersburg plant had contaminated with the chemical C8, which is used to make nonstick and stain-resistant products.

The NBC report did not directly discuss the C8 research, and did not specifically question the findings of any of Shankar's published studies.

WVU studies were among the scientific evidence examined by the C8 Science Panel, a three-scientist group that was created as a result of a class-action lawsuit settlement between DuPont and area residents. Under the terms of the settlement, DuPont became obligated to fund a new, \$235 million medical monitoring program for residents when the C8 Science Panel determined that there were “probable links” between C8 exposure and a variety of illnesses, including certain cancers, thyroid disease, high blood pressure and high cholesterol. Medical monitoring under that program began last week.

C8 Science Panel member Tony Fletcher, professor at the London School of Hygiene and Tropical Medicine, said Wednesday that the panel is “checking everything,” in light of the allegations about Shankar. DuPont spokesman Dan Turner said the company had no comment on the matter.

In 2011 and 2012, Shankar was listed as the lead author in studies that linked C8 exposure to chronic kidney disease and to cardiovascular disease. However, when the C8 Science Panel released its findings, panel members found that, contrary to Shankar’s work, there was no “probable link” between C8 exposure and those diseases.

Harry Deitzler, a lawyer for the residents, said, “The professional concerns which currently surround Anoop Shankar are unrelated and irrelevant to the probable-link findings of the C8 Science Panel in this litigation. “The WVU studies were only one piece of the pie,” Deitzler said. “The Science Panel’s conclusions were based on a broad examination of all available scientific evidence. That examination also included the Science Panel’s own direct analysis of raw data from the C8 Health Project and the Science Panel’s prospective follow-up with a large portion of the affected population.”

Court documents also show Shankar allegedly framed fellow WVU Public Health professor Ian Rockett — who initially discovered the falsehoods — by persuading two students to stage a fake story of sexual assault, according to NBC. WVU later concluded there was no evidence against Rockett to support claims that he made unwanted sexual advances toward a student, and Rockett successfully sued for defamation.

Shankar never admitted to wrongdoing in the case, but paid Rockett \$45,000 in an out-of-court settlement, according to the report.

Shankar has a masters degree in epidemiology from the University of North Carolina and an Indian medical degree, and went on to work at Virginia Commonwealth University after WVU, but he is no longer employed there, either, according to NBC.

Jim Clements — WVU’s president at the time of the Shankar investigation — left WVU last year and is now president of Clemson University. Clemson officials did not return phone calls Wednesday.

In 2007, WVU also came under fire when it was discovered that Heather Bresch, daughter of then-governor and current U.S. Senator Joe Manchin, was awarded a degree despite not completing requirements. An independent panel found then that top WVU officials created grades for Bresch to grant her an Executive MBA degree even though she had completed only 22 of the 48 required credit hours.

Then-WVU president Mike Garrison was forced to resign.

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Appeal No.: 14-0370

(Circuit Court Civil Action No. 12-C-275)

HIGHLAND MINING COMPANY,

Plaintiff Below/Petitioner,

v.

WEST VIRGINIA UNIVERSITY SCHOOL OF MEDICINE,

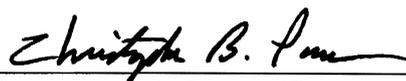
Defendant Below/Respondent.

*Appeal from a Final Order of the Circuit Court of
Monongalia County, West Virginia
Civil Action No. 12-C-275*

CERTIFICATE OF SERVICE

I, Christopher B. Power, counsel for Petitioner, do hereby certify that the foregoing **Petitioner's Reply Brief** has been served upon counsel of record this 24th day of September, 2014, via hand-delivery, addressed as follows:

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