

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

DOCKET No. 14-0370

**HIGHLAND MINING COMPANY,**  
Petitioner,

V.

(Appeal from a final order  
of the Circuit Court of Monongalia  
County (12-C-275))

**WEST VIRGINIA UNIVERSITY**  
**SCHOOL OF MEDICINE,**  
Respondent.

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**Respondent's Brief**

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## II. STATEMENT OF THE CASE

On February 2, 2012, Petitioner Highland Mining Company (“Petitioner” or “Highland”) submitted two letters to the West Virginia University School of Medicine (“School of Medicine,” “School,” or “WVU”)<sup>1</sup> seeking certain documents pursuant to the Freedom of Information Act, West Virginia Code § 29B-1-1 *et seq.* (“FOIA” or the “Act”). The requests in the first letter were derived from subpoenas that Highland had previously served on non-party WVU during a federal civil action against Highland and other coal operators that involved the environmental effects of certain types of coal mining. *See generally Ohio Valley Env'tl. Coal., Inc. et al. v. United Army Corps of Eng'g, et al.*, (S.D.W. Va., No. 3:11-cv-00149). In that case, the plaintiffs had moved to amend their Complaint to add claims based upon scholarly publications authored by WVU professor Dr. Michael Hendryx and various colleagues. In response, and prior to the district court’s ruling on the motion for leave to amend, Highland served three subpoenas on WVU seeking information related to the preparation of Dr. Hendryx’s published work. After the district court denied the plaintiffs’ motion to amend, Highland withdrew the subpoenas, inasmuch as the matters sought in the subpoenas were no longer germane to that case.

Highland was not deterred by the irrelevancy of the information in the *Ohio Valley Environmental* case. It simply recast the withdrawn subpoenas as its first set of FOIA requests to the School of Medicine.

Indeed, in the letter making these first requests, Highland simply referred to the federal subpoenas and demanded documents responsive to the **hundreds of individual requests** contained in the subpoenas (Highland’s so-called “Subpoena Based FOIA Request”). (A.R. 53-

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<sup>1</sup> As WVU stated in its Motion to Dismiss, its School of Medicine is not an independent entity that can be sued pursuant to W. Va. Code § 18-11-1. Instead, the WVU Board of Governors was in fact the proper defendant. (A.R. 166 n.1.) Nevertheless, the Circuit Court ruled that WVU and its School of Medicine were public bodies within the meaning of W. Va. Code § 29B-1-2(3) (A.R. 285), and the School of Medicine proceeded accordingly.

105.) But even that was not enough to satisfy Highland's curiosity. In addition, by separate letter of the same date, Highland asked the School to provide all communications to or from Dr. Hendryx and others related to the publication of studies on the adverse health effects caused by surface coal mining, along with all peer review comments regarding the publications (its "Communications Based FOIA Request"). (A.R. 107-08.)

Having bestowed these labels on its two letters, Highland disingenuously (and repeatedly) refers to its "two" FOIA requests throughout its Brief. (*See* Petitioner's Brief 2-3, 35.) The Court should not be misled. Highland has made well over two hundred separate requests. The Requests' definition of "document" *alone* incorporates over seventy (70) different types of medium (A.R. 33, 57-58, 75-76, 90-91); similarly, in but a portion of a "single request," Highland seeks "[a]ny documents regarding communications from September 1, 2006 to the present relating to mining between Article authors" and at least nine different entities or groups. (A.R. 107-08.)

In short, Highland's demands did not fit the FOIA paradigm of a request for a manageable number of easily identified, non-exempt documents that could be compiled and provided to the requesting party without disruption to the primary missions of WVU and the School of Medicine. Accordingly, in its response, WVU advised Highland that the FOIA requests were overly broad, unduly burdensome, failed to state with reasonable specificity the information being sought, and would require such a devotion of resources as to paralyze the necessary functions of the school. (A.R. 148-51, 159-62.) Additionally, WVU advised Highland that the requests sought documents that were not public records as defined by the FOIA, exempt from disclosure under the Act, or otherwise privileged from disclosure as part of the academic freedom enjoyed by scholars like Dr. Hendryx. (*See* A.R. 148-51, 159-62.)

Declining to narrow its requests, Highland instead filed the instant action against the School of Medicine, seeking disclosure of all of the documents. The School of Medicine moved to dismiss, arguing, *inter alia*, that the 200+ FOIA requests were unreasonably burdensome and would generate an unmanageable mountain of documents. Based on the information before it at this preliminary juncture, the Circuit Court denied the motion. (A.R. 290-99.)

But subsequent events proved that the School of Medicine was right. After the motion to dismiss was denied, it identified over **a quarter million** documents<sup>2</sup> that might be responsive to Highland's requests. In fact, with respect to only two of the researchers involved (Drs. Hendryx and Zullig), WVU's file-gathering and electronic search identified over **forty-three thousand (43,000)** of these potentially responsive documents. (A.R. 779.)

With no other practical alternative, WVU retained counsel and a document management company to electronically manage the mountain of documents and assist with the production process. But even the best and latest technology can go only so far: ultimately, the *only* method to fully and finally analyze the documents for responsiveness, privilege, privacy, or other exemption from disclosure was and is document-by-document, manual review. Moreover, given the scope and character of this review, WVU had to delegate this ultimate task to counsel.

In the School of Medicine's April 2013 Response to Highland's Renewed Motion for Summary Judgment, it detailed this laborious process. (A.R. 522-25.) *Every* document had to be reviewed and analyzed in its entirety to determine whether it was responsive to any of the 200+ requests. Then, the document had to be examined for any applicable statutory exemptions and privileges. If only a portion of the document was exempt, the document had to be redacted.

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<sup>2</sup> The exact number identified is 259,915 total documents: 43,733 of which have already been reviewed and 216,182 of which have yet to be reviewed, which is actually a reduced figure because the technology employed identified and eliminated documents that were 100% duplicative. (A.R. 476, 779.)

Finally, the reviewer had to describe the document in sufficient detail for the parties and the Court to assess a claim for exemption or redaction in one of the School's five *Vaughn* Indices.

Highland cavalierly suggests that counsel for the School of Medicine need not have gone to all that trouble: it posits that individual documents need not have been reviewed by trained human eyes before production. (Petitioner's Brief at 33-34.) Whatever Highland's view of the matter, neither it nor its counsel can fulfill the undersigned's professional and ethical obligations to his client. It was incumbent upon all counsel for the School of Medicine to perform their review and production responsibilities in a manner consistent with the Rules of Professional Conduct. *See e.g.*, W. Va. Rules of Professional Conduct 1.1 ("Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."). To take Highland's own example, counsel's review of several third-party reports revealed various handwritten, deliberative notes jotted down by Dr. Hendryx and his colleagues. Absent manual review, counsel would have failed to redact notes that the Circuit Court properly found were privileged or otherwise exempt from disclosure. *Compare* WVU000181 (on First Production DVD), *with* 01-0005 (on Confidential Sample *Vaughn* Index documents DVD); *compare* WVU000284 (on First Production DVD), *with* 01-0010 (on Confidential Sample *Vaughn* Index documents DVD).

Using this appropriate and necessary review and production process, the School of Medicine has reviewed 43,733 documents in a process that spanned the pendency of this case. The totals for the documents produced and withheld are as follows:

- 2,364 documents produced, totaling 11,090 pages;<sup>3</sup>

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<sup>3</sup> The burden imposed by Highland's requests is only underscored by Petitioner's misguided attempts to contest the precise number of documents produced by the School of Medicine, which, as the Circuit Court properly observed, missed the larger point: "These figures do not persuade this Court that Highland's requests are reasonable. Even after subtracting the percentage of documents that Highland has identified

- 119 redacted documents produced; 772 documents withheld;
  - 14 documents withheld or redacted because they contain handwritten or other deliberative notes;
  - 219 documents withheld because they are drafts;
  - 94 documents withheld because they contain confidential data;
  - 16 documents withheld because they contain confidential peer review comments; and
  - 548 e-mails withheld because they contain deliberative, research, editing and drafting comments.

These figures are all the more astonishing when one considers that **less than twenty percent (20%)** of the review has been completed. (A.R. 779.) To force the School of Medicine to dedicate additional years, personnel, and money to complete this process would undermine the policy objectives of the Act, at great expense to the School of Medicine, WVU in general, and the taxpayers who would wind up defraying the cost of Highland's immense curiosity.

## II. SUMMARY OF ARGUMENT

Highland made over two hundred separate FOIA requests of the School of Medicine. Although the School argued that Highland's requests were unreasonably overbroad and hence improper, the Circuit Court allowed the case to proceed until events proved that the School was right. The requests are, and always were, grossly overbroad and unduly burdensome.

At any rate, before the Circuit Court shut down further production and entered judgment for the School of Medicine, the School had produced several thousand documents and withheld over 750 under claims of exemption. These withheld documents were generated in the course of

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as clearly being public records or multiple copies, assuming it is *appropriate* to do so, WVU has *still* produced 1,749 documents." (A.R. 32.)

academic research and are clearly protected by FOIA's deliberative process and/or privacy exemptions. The importance of academic freedom – which is staunchly protected by the First Amendment – is recognized by and incorporated into these exemptions, and indeed should protect academic research from disclosure on a freestanding basis. Hence, the Circuit Court correctly found that the School of Medicine's claims of exemption were well taken. In any event, inasmuch as Highland's requests were unreasonably burdensome all along, the School should never have had to produce any documents to begin with.

The judgment of the Circuit Court should be affirmed.

### **III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

This case involves issues of fundamental public importance regarding the application of the West Virginia FOIA. Accordingly, the School of Medicine believes that this case is appropriate for Rule 20 argument.

### **IV. ARGUMENT**

#### **A. Standard of Review.**

A circuit court's grant of a motion for summary judgment is reviewed *de novo*. *Painter v. Peavy*, 192 W.Va. 189, 192, 451 S.E.2d 755, 758 (1994). Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. W. Va. R. Civ. P. 56(c). Moreover, because factual disputes rarely arise in such cases, “[s]ummary judgment is the preferred method of resolving cases brought under FOIA.” *Farley v. Worley*, 215 W.Va. 412, 418, 599 S.E.2d 835, 841 (2004). In this case, the Circuit Court properly applied the summary judgment standard and granted the School of Medicine's motion for summary judgment.

## **B. Highland's FOIA Requests were unduly burdensome.**

As noted, the School of Medicine initially moved to dismiss the Complaint, citing the sheer volume of documents (and the corresponding burden) implicated by Highland's requests. (A.R. 163-76.) The School's reasons for doing so were sound: the requests were so sweeping that efforts to respond would threaten to cripple other necessary government functions and reduce School of Medicine and other WVU personnel to full-time FOIA investigators on behalf of Highland. Although FOIA is designed to foster public transparency and accountability, the Act also reflects the Legislature's "concern that information requests not become mechanisms to paralyze other necessary government functions." *Farley*, 215 W.Va. at 422 n.14, 599 S.E.2d at 845 n.14; *see also* W. Va. Code § 29B-1-3(3) ("The custodian of the records may make reasonable rules and regulations necessary for the protection of the records and prevent interference with the regular discharge of his or her duties."). Accordingly, courts have long recognized that public record laws are not designed to "reduce government agencies to full-time investigators on behalf of requesters." *Assassination Archives & Research Ctr. v. C.I.A.*, 720 F. Supp. 217, 219 (D.D.C. 1989); *see also Nat'l Sec. Counselors v. C.I.A.*, 960 F. Supp. 2d 101, 157 (D.D.C. 2013) ("[P]roduction may be required only where the agency can identify that material with reasonable effort." (citing *Goland v. C.I.A.*, 607 F.2d 339, 353 (D.C. Cir. 1978) (internal quotation marks omitted))).

Following the Circuit Court's denial of this motion, document review and production proceeded until events proved WVU right. By the time summary judgment was entered, the School of Medicine had reviewed 43,733 documents,<sup>4</sup> which, again, is less than twenty percent of

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<sup>4</sup> Most of this Court's published FOIA cases have involved a relatively small group of easily identified and reviewed documents. *E.g., Associated Press v. Canterbury*, 224 W.Va. 708, 688 S.E.2d 317 (2009) (thirteen e-mail communications at issue); *Daily Gazette Co., Inc. v. W. Va. Dev. Office*, 198 W.Va. 563, 482 S.E.2d 180 (1996) (155 documents). *See also PG Publishing, d/b/a The Pittsburgh Post-Gazette v. W.*

the total number of conceivably responsive documents. Although it had initially been skeptical of the School's ability to demonstrate with particularity the unreasonableness of the burden associated with compiling and reviewing the responsive documents, at summary judgment the Circuit Court correctly found that the past two years of litigation and production had proved it in spades:

Though initially denying WVU's motion to dismiss, and the "undue burden" argument contained therein, WVU has now shown, with specificity, the true extent of Highland's requests. The figures representing the total numbers of potentially responsive documents, those reviewed, and the fees incurred, are only those *to date*. This Court is deeply concerned about the continued time and expense that would be required to complete the process, which has identified over 200,000, potentially responsive documents.

(A.R. 33.)

The Circuit Court properly balanced Highland's professed desire to examine the requested documents against all of the School of Medicine and WVU's public obligations, including those set forth in the Act. As noted in *Farley*, courts should remain mindful of the "limited resources public bodies have to not only respond to FOIA requests, but to provide other critical government services." *Farley*, 215 W.Va. at 424, 599 S.E.2d at 847. Indeed, this Court has long recognized that imposing years of work on a government agency to identify all non-exempt information would conflict with the "practical approach" that courts have taken in interpreting the FOIA. *Id.*; *see, e.g., People for Am. Way Found. v. U.S. Dep't of Justice*, 451 F. Supp. 2d 6, 13-14 (D.D.C. 2006) (holding that a manual search of 44,000 files, which constituted approximately ten times the files normally searched in response to a single FOIA request, was unreasonably burdensome); *Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 892 (D.C. Cir. 1995) (agreeing that a search that would require review of twenty-three years of unindexed files for files pertaining to a particular

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*Va. Univ.*, Civil Action No. 08-C-276 (Monongalia County, W. Va.) (forty-three documents at issue on the *Vaughn* Index, only thirty of which were withheld entirely).

individual would be unreasonably burdensome); *Wolf v. C.I.A.*, 569 F. Supp. 2d 1, 9 (D.D.C. 2008) (holding that search of microfilm files requiring frame-by-frame reel review that would take estimated 3,675 hours and \$147,000 constitutes unreasonably burdensome search).

Here, the Circuit Court detailed the scope and the nature of the burden associated with compiling, reviewing, and producing responsive documents. Citing the School of Medicine's review of over 40,000 documents, its production of 11,000 pages of responsive documents, and its expenditure of \$23,000 for a document management company, and noting that this effort represented but a fraction of the work left to do, the Court concluded: "These staggering figures speak for themselves in terms of the capacious scope of Highland's request and its associated burden." (A.R. 32-33.)

The Circuit Court's unassailable holding that Highland's FOIA requests were unduly burdensome likewise eliminates its claim for attorneys' fees. Highland's only "victory" in the case was the denial of the School of Medicine's motion to dismiss. The Circuit Court's *final* (and only appealable) order held that Highland's requests – which remained unchanged – were unduly burdensome. (A.R. 31-34.) Accordingly, those requests were not proper and legal requests under the Act – *ever* – and the School of Medicine and WVU should never have been put to the considerable time, trouble, and cost of producing any documents in the first place. Surviving a motion to dismiss is not prevailing in litigation within the meaning of W. Va. Code § 29B-1-7. Yes, Highland possesses some documents. That possession is windfall enough. The School of Medicine ultimately won the case, and an award of a dollar of fees to Highland would be a travesty of justice.

**C. The Circuit Court correctly applied the “deliberative process privilege” of W. Va. Code § 29B-1-4(a)(8).**

i. Deliberative drafts and internal memoranda are exempt from disclosure.

FOIA exempts “[i]nternal memoranda or letters received or prepared by any public body” from disclosure. W. Va. Code § 29B-1-4(a)(8). The rationale for this exemption is easy to discern: to encourage government employees and officials to freely exchange ideas and information, and to frankly discuss issues, problems, and potential solutions. The Legislature quite rationally concluded that such free and frank talk and debate cannot occur in the limelight of never-ebbing public scrutiny. *Daily Gazette*, 198 W.Va. at 571, 482 S.E.2d at 188. “Although this privilege is most commonly encountered in Freedom of Information Act (“FOIA”) litigation, it originated as a common law privilege.” *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997). Like most states, West Virginia has codified this common-law privilege into its open records law.<sup>5</sup>

In the instant case, the withheld or redacted documents include preliminary drafts of articles that incorporate comments and revisions, handwritten notes reflecting researchers’ extemporaneous thoughts and ideas, e-mails among authors discussing how particular issues should be addressed in articles, and preliminary data still being analyzed. In short, these documents embody the predecisional and deliberative stages of Dr. Hendryx’s research. (A.R. 10-16.) Accordingly, they are precisely the type of documents intended to be protected by the provisions of § 29B-1-4(a)(8).

“Draft documents, by their very nature, are typically predecisional and deliberative.”

*Keeper of the Mountains Found. v. U.S. Dep’t of Justice*, 514 F. Supp. 2d 837, 854 (S.D.W. Va.

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<sup>5</sup> This Court has recognized that a number of common-law privileges are encompassed within the internal memorandum exemption of FOIA statutes. *Daily Gazette Co., Inc. v. W. Va. Dev. Office*, 198 W.Va. at 571, 482 S.E.2d at 188 (the federal internal memorandum exemption “preserves to government agencies ‘such recognized evidentiary privileges as the attorney-client privilege, the attorney work-product privilege, and the executive “deliberative process” privilege.’”).

2007) (citations omitted). Federal courts have consistently ruled that documents in draft form fall within the confines of the deliberative process exemption. *See, e.g., Krikorian v. Dep't of State*, 984 F.2d 461 (D.C. Cir. 1993) (draft letters proposing options for replies to public inquiries about an article on Armenian terrorism were predecisional and protected by deliberative process exemption because the letters reflected advisory opinions important to that process); *Town of Norfolk v. U.S. Army Corps of Engineers*, 968 F.2d 1438, 1458 (1st Cir. 1992) (draft letter reflecting only a preliminary, later-rejected agency position was properly withheld); *Sierra Club v. U.S. Dep't of Interior*, 384 F. Supp. 2d 1, 18–19 (D.D.C. 2004) (six Department of Interior draft letters to Senators and Representatives, containing suggested responses to inquiries regarding proposed petroleum exploration in the Arctic National Wildlife Refuge, were properly exempted under deliberative process exclusion, even if decision to undertake such exploration had already been made; draft letters constituted recommendations from staff as to how agency officials might handle congressional inquiries); *Van Aire Skyport Corp. v. FAA*, 733 F. Supp. 316, 322 (D. Colo. 1990) (draft of a Federal Aviation Administration letter to Denver and State of Colorado officials on the issues of the Denver airport was exempt); *Steyermark v. von Raab*, 682 F. Supp. 788, 790–91 (D. Del. 1988) (draft of letter from the United States Customs Service to a Delaware legislator regarding an investigation was exempt).

Because these drafts, proposed edits, peer review comments, and the like relate to the planning, preparation, and editing necessary to produce a final published article, they are by their very nature predecisional and deliberative; as a result, they are exempt from disclosure pursuant to W. Va. Code § 29B-1-4(a)(8). The Circuit Court, in examining the withheld and unredacted documents, held that the drafts, peer review comments, and author communications were indeed predecisional and deliberative. (A.R. 10-16.) Highland does not dispute that these documents are

predecisional and deliberative; instead, Highland argues that W. Va. Code § 29B-1-4(a)(8)'s exemption cannot apply *at all*, because Dr. Hendryx and his colleagues are not “policymakers” or “decision makers.” (Petitioner’s Brief 10-15.) As the Circuit Court recognized, Highland’s cramped interpretation of the exemption is wrong.

ii. Professor Hendryx and his colleagues are entitled to the Act’s protections.

If Dr. Hendryx had simply been a scientist conducting private research, or one ensconced in employment at a business or private educational institution, he could greet a letter from the public asking him to reveal his research, thought processes, and peer collaborations and criticism with a shrug, followed by a quick toss of the crumpled letter into the nearest round circular bin.

But, of course, Dr. Hendryx conducted his research as a professor employed at the School of Medicine. As a public employee, this fact made him subject to the FOIA. Highland would end the analysis there, without recognizing that Dr. Hendryx (and his colleagues) should be and are as equally entitled to the Act’s protections as they are subject to its obligations. Admittedly, the job duties of a publicly compensated scholar may differ from, say, a Board of Education member charged with the “decision” of hiring a new superintendent. However, as Highland acknowledges, these scholars are subject to FOIA precisely – and *only* – because they are employed by the State to research health issues. For these scholars, the public function that they are hired to perform is the research and publication of such scholarly articles, and the “deliberations” that they undertake, the “decisions” that they make, and the “actions” that they perform as State employees include the final publication of their research efforts. Can Dr. Hendryx unilaterally impose his will on the State, making “policy” for us all? No, he can’t, and neither can anyone else in our democratic system, be it the Governor, a leader of the Legislature, or a single member of this Court. Yet the deliberative process privilege must mean something, notwithstanding the fragmented distribution

of power among public servants. Simply put, if a research scientist at a public college or university is subject to FOIA at all, then he or she must be equally and congruently entitled to the protection of its exemptions. The deliberative processes of Dr. Hendryx and his colleagues should be as well protected as those of any public body.

In addition, even if one considered the purposes and goals of the School of Medicine, WVU, or other state-supported institutions of higher education, the result should and would be the same. The Legislature has clearly identified the fostering of high-quality academic research as a fundamental goal of our State:

To varying degrees, and depending upon their missions, these institutions serve the state in three major ways:

. . .

(C) *Research*. -- By conducting research at state institutions of higher education, particularly Marshall University and West Virginia University, to enhance the quality of life in West Virginia in the following ways:

- (i) Targeting cutting-edge research toward solving pressing societal problems;
- (ii) Promoting economic development by raising the level of education and specialization among the population; and
- (iii) Creating jobs through development of new products and services.

W. Va. Code § 18B-1-1a(e)(1)(C). WVU serves that function by encouraging faculty to conduct research consistent with its mission. *See* West Virginia University Faculty Handbook § 4.3.3 (Jan. 2011), *available at* <http://wvufaculty.wvu.edu/r/download/139120> (“Research . . . must be consistent with the broad educational, research, and scholarly goals of the University, colleges, and departments . . .”). In other words, a state university or college’s “policy” is to nurture, support, and publish academic research on areas of public concern. Hence, it is of no moment that WVU may not endorse the *findings* of a particular study; its mission is fulfilled when the study is *done*. If the deliberative processes of its researchers are open to the world, it cannot fulfill this mission.

The Circuit Court properly recognized that policymaking involves developing a response to issues of public concern, an activity in which WVU was engaged. (A.R 8-10.) The Legislature has clearly identified research as a fundamental public concern and has tasked WVU specifically with performing that task. Dr. Hendryx, in researching and publishing his articles, was effectuating that very task, and therefore, the deliberative process exemption protects his predecisional and deliberative materials.

**D. The First Amendment’s protection of academic freedom must inform this Court’s construction of the Act.**

i. Academic freedom is a core First Amendment value.

Whether in the context of FOIA or otherwise, academic freedom is a core First Amendment value. In *Sweezy v. New Hampshire*, 354 U.S. 234 (1957), the Supreme Court emphasized its key function in a progressive, democratic society:

The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made . . . Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.

354 U.S. at 250. *See also Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967) (“Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned.”).<sup>6</sup>

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<sup>6</sup> The rationale for this constitutional protection mirrors the justification for First Amendment protections afforded to journalists:

[S]cholars too are information gatherers and disseminators. If their research materials were freely subject to subpoena, their sources likely would refuse to confide in them. As with

The protection of academic freedom enables scholars to provide “[d]isinterested and expert thought,” which is “crucial for society as a whole because it provides a standard by which to gauge . . . public discussion of affairs. It is imperative to gain perspective on the mass of ‘information’ that pours from the print and electronic media.” J. Peter Byrne, *Academic Freedom: A “Special Concern of the First Amendment”*, 99 Yale L.J. 251, 334 (1989).

Consistent with these principles, our State has long recognized the Constitutional underpinnings of academic freedom. “Academic freedom . . . is necessary to enable the institutions [of higher education] to perform their societal obligation as established by the Legislature.” W. Va. C.S.R. § 128-36-2.1; *see also* W. Va. C.S.R. § 128-36-2.1 (1983). “Through the exercise of academic freedom, members of the academic community **freely** study, discuss, investigate, teach, conduct research, and publish, depending upon their particular role at the institution.” *Id.* § 128-36-2.2 (emphasis added).

As the Circuit Court recognized, Highland’s demands to inspect peer review comments, draft articles, and the like pose a particularly significant risk of squelching debate and undermining many of the essential functions of WVU and its faculty. The forced disclosure of these documents could chill entire areas of academic inquiry and create an unstable environment for future research. Furthermore, to subject deliberative discussions among researchers and authors regarding the appropriate response to such peer reviewer comments would similarly threaten to stifle the free exploration of methods to improve and complete a scholarly work.

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reporters, a drying-up of sources would sharply curtail the information available to academic researchers and thus would restrict their output. Just as a journalist, stripped of sources, would write fewer, less incisive articles, an academician, stripped of sources, would be able to provide fewer, less cogent analyses. Such similarities of concern and function militate in favor of a similar level of protection for journalists and academic researchers.

*Cusumano v. Microsoft Corp.*, 162 F.3d 708, 714 (1st Cir. 1998).

In sum, whether or not “academic freedom” is viewed as a freestanding basis for exemption from FOIA, it most certainly is a bedrock Constitutional principle that properly guided the Circuit Court in construing the Act (A.R. 27 (“[W]hat this Court has done is to use the concept [of academic freedom] in its consideration . . . .”)) and should similarly inform this Court’s application of FOIA. *See In re FELA Asbestos Cases*, 222 W.Va. 512, 665 S.E.2d 687 (2008) (“The courts of this State are constrained to give a statute every reasonable construction in order to sustain constitutionality, and any doubt must be resolved in favor of the statute’s constitutionality.”).

- ii. Exempting academic research from FOIA is neither “unprecedented” nor “self-invented.”

Highland assails the School of Medicine’s position as somehow “unprecedented,” “self-invented,” “newly minted,” and as “work[ing] directly against the *true* academic freedom.” (Petitioner’s Brief 6, 21, 29.) To the contrary, the School of Medicine is simply citing a principle a number of states have already recognized in protecting academic research from FOIA requests. In fact, eighteen states have already created an explicit statutory exemption from FOIA for academic research.<sup>7</sup>

Indeed, a trial court in Virginia recently concluded that the *common-law* privilege of academic freedom protects drafts, data, and communications from disclosure under FOIA. *See Order, The Am. Tradition Inst. v. The Rector and Visitors of the Univ. of Va.*, CL-11-3236 (Cir. Ct. Prince William Co., Apr. 2, 2013). In that case, a think tank submitted a public records request seeking documents relating to a University of Virginia professor’s global warming research, including drafts, data, and communications with other scientists. *See id.* at 1. In protecting those documents from disclosure, the court held that:

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<sup>7</sup> The following states have enacted legislation that protects the types of documents withheld by the School of Medicine: Colorado, Delaware, Georgia, Illinois, Indiana, Kansas, Kentucky, Maryland, Michigan, Nebraska, New Jersey, North Dakota, Ohio, Oklahoma, South Carolina, Utah, Vermont, and Virginia.

[e]arly research is protected for a variety of reasons. The concept of the churn of intellectual debate, evolving research, suddenly going up a dead end in your paths of inquiry, having the ability to come back, all this is part of the intellectual ferment that is protected . . . .

*Id.* at 4.

To be sure, Virginia is one of the states that has a statutory FOIA exemption for certain academic research. *See* Va. Code § 2.2-2705.4 (4) (“Data, records or information of a proprietary nature produced or collected by or for faculty or staff of public institutions of higher education...”). Nevertheless, the court specifically acknowledged that the statutory exemption derives from a common-law principle: “I find that § 2.2-3705.4(4) does arise from the concept of *academic freedom and from the interest in protecting research.*” Order, *The American Tradition Institute* at 4 (emphasis added).

The Supreme Court of Virginia recently affirmed that decision.<sup>8</sup> *Am. Tradition Inst. v. Rector & Visitors of Univ. of Va.*, 756 S.E.2d 435, 442 (Va. 2014). The Court recognized that “recruitment of faculty to an institution like the University of Virginia will be deeply harmed if such faculty must fear that their unpublished communications with the scientific collaborators and scholarly colleagues are subject to involuntary public disclosure.” *Id.* (quoting affidavit of John Simon, Vice President and Provost of University of Virginia).

The Circuit Court’s words in this case echo the same principle: “subjecting a public university professor’s draft articles, peer review commentary, etc. to FOIA disclosure would send the message that upon accepting employment with a public university, a professor consequently

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<sup>8</sup> Virginia common law should be particularly persuasive to West Virginia courts. *See* W. VA. CONST., art. 11, § 8 (1863); *see also State ex rel. Knight v. Pub. Serv. Comm’n*, 161 W.Va. 447, 456 n.4, 245 S.E.2d 144, 149 n.4 (1978) (recognizing that West Virginia derived its common law from Virginia).

forfeits certain rights to her/his research work, namely the ability to determine what is to be made public, and when.” (A.R. 21.)

While West Virginia does not have a separately enumerated statutory exemption for academic research, the Circuit Court did not self-fabricate this exemption or exaggerate its deep constitutional and common-law bases. Because Dr. Hendryx’s academic freedom is a constitutionally protected right, his research ought to be exempt from disclosure under FOIA even in the absence of a separate statutory exemption addressed strictly to such research. And in any event, as was discussed above and will be continued below, academic freedom appropriately informed the Circuit Court’s construction of the deliberative process and privacy exemptions.<sup>9</sup>

**E. Academic Freedom protects the documents from disclosure under the privacy exemption.**

- i. The Circuit Court did not err in determining that withheld documents were subject to the FOIA exemption for “information of a personal nature” at W. Va. Code § 29B-1-4(a)(2).

FOIA exempts “[i]nformation of a personal nature such as that kept in a personal, medical or similar file, if the public disclosure thereof would constitute an unreasonable invasion of privacy[.]” W. Va. Code § 29B-1-4(a)(2). The similar federal exemption has been broadly interpreted by courts, which have rejected “the notion that only files containing ‘intimate details’ and ‘highly personal’ information could qualify as ‘similar files.’” *Cook v. Nat’l Archives & Records Admin.*, 13-1228-CV, 2014 WL 3056364, \*4-5 (2d Cir. July 8, 2014).

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<sup>9</sup> Highland belabors the Circuit’s Court reference to the West Virginia Constitution’s guarantee of a thorough and efficient system of free schools. (Petitioner’s Brief 24-26.) However, the Circuit Court was citing the provision to further demonstrate the value that our State’s founders placed upon education and maintaining the academic freedom necessary to encourage the growth of West Virginia’s students. (See A.R. 30.) Regardless of whether this particular provision extends of its own force to students at institutions of higher education, this reference simply underscores the deeply rooted constitutional and common law principles implicated by this case.

For example, less than two months ago, the United States Court of Appeals for the Second Circuit recognized that the privacy exemption could be extended to protect an individual's research and thoughts. *Id.* at \*6-9. The court held that specific research requests to the National Archives were protected from FOIA requests. *Id.* The court reasoned that “[t]here are compelling reasons to include within the privacy protection established by Exemption 6 the subjects of a person's research and intellectual inquiry, lest such activity be chilled.” *See id.* at \*6 (quoting *United States v. Rumely*, 345 U.S. 41, 57 (1953) (“When the light of publicity may reach any student, any teacher, inquiry will be discouraged.”) (Douglas, J., concurring)). Thus, the Second Circuit recognized the broad reach of the privacy exemption to protect research and intellectual inquiry.

Accordingly, the Circuit Court did not err in this case when it applied similar reasoning to hold that the privacy exemption – as well as the deliberative process exemption already discussed – protected all of the withheld documents from compelled disclosure here.<sup>10</sup>

ii. Peer reviewers' privacy expectations would be violated by the release of their anonymous, confidential comments.

Confidentiality is absolutely essential to the peer review process, as individuals and authors must be free to exchange ideas, critiques, suggestions, and thoughts. The identity of peer reviewers is traditionally kept confidential in order to facilitate a candid exchange regarding a proposed article and its research. But to subject a reviewer's comments, even while keeping the identity of the reviewer hidden, to public scrutiny can only render the reviewer more reluctant to challenge traditional ideas and propose unconventional concepts. The Circuit Court recognized this important privacy concern when it reasoned that “the reviewers undoubtedly believed, absent

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<sup>10</sup> The Circuit Court recognized that the “academic freedom” privilege exists independently of the statutory exemption. (A.R. 22 n.21.)

contrary indication, that their commentary would remain between themselves and the email recipient, as opposed to being disclosed to the general public,” and held accordingly. (A.R. 24.)

**F. Highland’s remaining assignments of error are similarly baseless.**

i. The Circuit Court did not impose the burden of proof on Highland.

The Circuit Court did not place the burden of proof on Highland. The Circuit Court explicitly recognized that it must “draw any permissible inference from the underlying facts in the light most favorable to the party opposing the motion.” (A.R. 2 (internal citations omitted).) However, the Circuit Court also fully understood that “self-serving assertions without factual support in the record will not defeat a motion for summary judgment.” (A.R. 3 (internal citations omitted).)

The Circuit Court properly held that the School of Medicine met its burden. (A.R. 37.) Indeed, in its painstaking efforts to meet this burden, the School produced multiple *Vaughn* Indices (A.R. 304-17, 399-412, 419-70; *Vaughn* Index on Fifth Production DVD), an extremely detailed Sample *Vaughn* Index (A.R. 670-713), filed numerous briefs on the merits of its claimed exemptions, participated in oral arguments, and submitted documents for *in camera* review. Essentially, Highland argues that because the Circuit Court did not rule in its favor, the court must have placed the burden on Highland. Instead, the Circuit Court properly held that the School of Medicine met its burden and that Highland’s self-serving assertions could not defeat its motion for summary judgment. *Painter*, 192 W.Va. at 192-93, 451 S.E.2d at 758-59.

Additionally, Highland criticizes the Circuit Court’s simple awareness that it was exploring analytical waters not already clearly charted by this Court’s decisions. (Petitioner’s Brief 29-30.) This criticism misses the mark. A court that is aware of the novelty of an issue or the impact of a decision is being conscientious and careful. Those attributes merit no criticism. In fact, the highest

court in our land repeatedly places considerable importance on the practical impact its decisions will have and demonstrates awareness of the effect its precedent will have on the parties and future, similarly situated individuals. *See generally Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2760 (2014) (“The effect of the HHS-created accommodation on the women employed by Hobby Lobby and the other companies involved in these cases would be precisely zero. Under that accommodation, these women would still be entitled to all FDA-approved contraceptives without cost sharing.”); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416-17 (2003) (“[P]unitive damages serve a broader function; they are aimed at deterrence and retribution. . . . This increases our concerns over the imprecise manner in which punitive damages systems are administered.” (internal citations omitted)). Similarly, the Circuit Court recognized that its decision would have an impact on researchers situated similarly to Dr. Hendryx and his colleagues. (A.R. 18, 36.)

- ii. The Circuit Court did not err in failing to either declare that WVU had waived its reliance on the "trade secret" exemption provided at W. Va. Code § 29B-1-4(a)(1) or rule that such an exemption does not apply to the withheld documents.

Courts are at liberty to render judgment on issues as they see fit. It is not unusual for a court to determine that one issue is dispositive of the matter and to decline to unnecessarily address other issues. In fact, it is common, and avoiding *dicta* is a hallmark of judicial restraint. *See generally State ex rel. United Mine Workers of Am., Local Union 1938 v. Waters*, 200 W.Va. 289, 297 n.9, 489 S.E.2d 266, 274 n.9 (1997) (“We decline to decide this issue, as it is not necessary to our ruling.”); *State ex rel. Herald Mail Co. v. Hamilton*, 165 W.Va. 103, 105-06, 267 S.E.2d 544, 546 (1980) (“We decline to decide this latter point, since the issue in this case can be resolved on the first constitutional ground.”).

This is precisely what the Circuit Court did when it recognized that, because all of the documents withheld were also withheld on the basis of deliberative process/internal memoranda and academic freedom, it did not need to further consider the arguments related to the trade secret exemption. The Circuit Court properly exercised its discretion in deciding the issues and rendering its decision.

## V. CONCLUSION

Among the vital public missions of West Virginia University in general, and its School of Medicine in particular, is to sponsor important academic research and to create and maintain an atmosphere where such research can flourish and to which talented researchers will be attracted and retained.

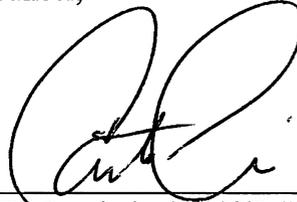
Petitioner Highland no doubt disagrees with some or many of the conclusions of Dr. Hendryx's research into the health effects of surface coal mining. To that end, Highland is certainly capable of employing its own research to address these conclusions. But to permit it to use Dr. Hendryx's mere status as a state employee as a springboard to invade his privacy and his deliberative processes – and further to make its invasion on such a broad front as to greatly burden WVU and virtually turn it into Highland's free, full-time research assistant – would be to ignore the letter and spirit of FOIA.

The Circuit Court ignored neither. In its careful and lengthy opinion, the Circuit Court showed that WVU had met its burden of proof regarding the undue burden posed by Highland's requests, and further that its claims of exemption for certain documents were well taken.

The judgment of the Circuit Court should be affirmed.

**WEST VIRGINIA UNIVERSITY  
SCHOOL OF MEDICINE,**

By Counsel,

A handwritten signature in black ink, appearing to be 'C. Goodwin', written over a horizontal line.

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**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**  
DOCKET No. 14-0370

**HIGHLAND MINING COMPANY,**  
Petitioner,

V.

(Appeal from a final order  
of the Circuit Court of Monongalia  
County (12-C-275))

**WEST VIRGINIA UNIVERSITY**  
**SCHOOL OF MEDICINE,**  
Respondent.

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**Certificate of Service**

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I, Carte P. Goodwin, hereby certify that I served a copy of the foregoing **Respondent's**  
**Brief** on this 3rd day of September, 2014, by hand delivery, to the following:

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