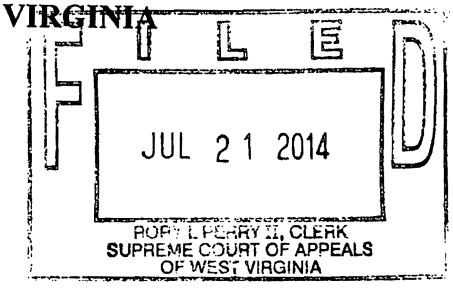
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



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 BRIEF

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III. ASSIGNMENTS OF ERROR.

A. The Circuit Court erred in applying the "deliberative process privilege" at W. Va. Code §29B-1-4(a)(8) to exempt information pertaining to scientific research articles from disclosure under the Freedom of Information Act, W.Va. Code §29B-1-1, et seq., et seq. ("FOIA").

B. The Circuit Court made a clearly erroneous factual finding in determining that articles authored by a Professor Michael Hendryx conveyed the policy positions of the Respondent West Virginia University ("WVU") regarding the subjects addressed.

C. The Circuit Court erred in determining that documents withheld by WVU were subject to the FOIA exemption for "information of a personal nature" at W. Va. Code §29B-1-4(a)(2) on the basis of "academic freedom."

D. The Circuit Court erred in finding that the Constitutional guarantee of a "through and efficient system of free schools" (W.Va. Const. Art. XII, §1) extends to institutions of higher education such as WVU, and in concluding that this Constitutional provision serves as the basis for an exemption from the FOIA in the form of an "academic freedom" privilege.

E. Assuming, *arguendo,* that the personal privacy exemption at W. Va. Code §29B-1-4(a)(2) applies to peer review comments, the Circuit Court erred by finding that peer reviewers' privacy expectations would be violated by the release of peer reviewers' anonymous comments.

F. The Circuit Court erred in imposing the burden of proof on Petitioner Highland Mining Company ("Highland") to disprove the applicability of the FOIA exemptions cited by WVU.

G. The Circuit Court erred 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.

H. The Circuit Court erred in reversing its previous ruling and finding that Highland's FOIA Requests were unduly burdensome.

I. The Circuit Court erred in declining to grant an award of attorneys fees and costs to Highland as a successful litigant under W. Va. Code §29B-1-7.

IV. STATEMENT OF THE CASE.

This action was instituted by Highland's filing of a Verified Complaint for Declaratory and Injunctive Relief under the FOIA, seeking disclosure of public records. Those records were originally requested by two (2) FOIA Requests submitted to WVU on February 1, 2012 (together, the "FOIA Requests"). Highland was forced to bring this action after WVU declined to release any information in response to either request.

A. The FOIA Requests.

The first FOIA request (the "Subpoena-Based FOIA Request") sought release of the same information that had been the subject of three (3) subpoenas previously served on WVU by Highland in December, 2011, in the case of Ohio Valley Environmental Coalition, Inc., et al. v. U.S. Army Corps of Engineers, Civil Action No. 3:11-cv- 0149, S.D.W.Va.; the "*Reylas 404 Permit Litigation*"). Appendix Record ("A..R") 53-105.[1] Those subpoenas focused on three (3) articles co-authored by then-WVU Professor Michael Hendryx, suggesting that there was a

[1] The Subpoenas were withdrawn on January 24, 2012, based on a ruling that made them unnecessary in the *Reylas 404 Permit Litigation.* At the time they were withdrawn, Highland advised WVU that a FOIA request would be filed seeking the same information. A.R. 142-143.

connection between surface coal mining and birth defects, cancer, and general quality of life. A.R.55-105.[2]

The second FOIA request (the "Communications FOIA Request") sought letters, e-mails and other communications sent to or from Prof. Hendryx pertaining to five (5) other articles that he co-authored (together with other articles referenced above, sometimes referred to herein as "the subject articles" or "the Hendryx articles"). In addition, the Communications FOIA Request sought peer review comments on drafts of those additional articles. A.R. 107-108.

B. WVU's Refusal to Release Documents.

1. The Subpoena-Based FOIA Request.

On March 2, 2012, WVU issued its "Final Response" to the the Subpoena-Based FOIA Request, denying it en toto, even refusing to release the documents that had already been compiled in response to the subpoenas. A.R. 148-151. In short, Highland was informed that all documents responsive to the Subpoena-Based FOIA Request were exempt from disclosure, but if there were any documents that could be released, there were too many for WVU to produce.

2. The Communications FOIA Request.

Highland fared no better with respect to the records it sought under the Communications FOIA Request. On March 2, 2012, WVU also provided its "Final Response" to the Communications FOIA Request, stating that it would likewise be releasing *no* documents to Highland. A.R. 159-162. In short, WVU asserted that although it did not understand exactly what

[2]These articles are: (1) Ahern, M.M., et al., "The Association Between Mountaintop Mining and Birth Defects Among Live Births in Central Appalachia, 1996-2003" Environ. Res. (2011); (2) Hendryx, et al., "Self-Reported Cancer Rates in Two Rural Areas of West Virginia with and without Mountaintop Coal Mining," J. of Community Health (July 2011); and (3) Zulig, et al., "Health-Related Quality of Life Among Central Appalachian Residents in Mountaintop Mining Counties," Am. J. Public Health 101(5): 848-853 (2011). *See* A.R. 55-105. These articles, and the involvement of Prof. Hendryx in the *Reylas 404 Permit Litigation*, are described in more detail in the Memorandum of Law in Support of Highland's Second Renewed Motion for Summary Judgment ("Highland's Cross-Motion Memorandum") at A.R. 726-728.

documents Highland wanted, it had already determined that any documents that Highland was seeking were exempt from disclosure for a variety of reasons.

C. Proceedings in the Circuit Court and Documents Provided After Filing of this FOIA Enforcement Action.

WVU filed a Motion to Dismiss on August 3, 2012, and Highland filed a Motion for Summary Judgment on September 11, 2012. Following hearing, the Circuit Court entered an Order on November 7, 2012 denying WVU's motion and deferring a ruling on Highland's Motion for Summary Judgment. A.R. 290-299.[3] That Order also required that WVU release any responsive information to Highland, and if any responsive documents were withheld from disclosure or redacted, that WVU provide a *Vaughn* index and affidavit indicating why. *Id.*, pp. 8-9.

WVU subsequently made five (5) productions of documents to Highland in response to the FOIA Requests, producing some 2,245 documents ("Provided Documents"). *See* A.R. 490.[4] Four of those document productions included a separate *Vaughn* Index and corresponding affidavit, attempting to justify WVU's decision to withhold a total of 772 documents. Although the first *Vaughn* Index listed 121 documents that had been withheld because there were not considered "public records" subject to the FOIA, WVU later withdrew that as a justification for withholding any documents. A.R. 304-317; 661.

D. The Sample *Vaughn* Index, Documents Submitted for *In Camera* Review, and Entry of the Final Order.

[3] This same order was also inadvertently entered on November 1, 2012. A.R. 280-289.

[4] The Provided Documents have been made a part of the record in this appeal and lodged in the form of five (5) DVDs. Among the Provided Documents were numerous copies of Annual "Coal Reports" published by the U.S. Department of Energy, comprising some 2,194 pages and constituting approximately 20% of the total number of document pages provided by WVU. *See* A.R. 490; *see also*, e.g., Document Nos. WVU000483-WVU002366 (DVD dated 12/6/12). Another 635 pages of the Provided Documents represented numerous copies of the same three articles that were attached to Highland's Subpoena-Based FOIA Request. A.R. 490.

On April 3, 2013, Highland filed a Renewed Motion for Summary Judgment, arguing that the *Vaughn* Indices that WVU had provided were facially insufficient and that most if not all of the exemptions cited by WVU were inapplicable. Following briefing, the Circuit Court held a hearing on Highland's motion on April 17, 2013. As a result of discussions at that hearing, on May 30, 2013, the Court entered the "Agreed Order Regarding Preparation of Sample *Vaughn* Index" (the "Sample *Vaughn* Index Order"). A.R. 660-663.

Pursuant to the Sample *Vaughn* Index Order, WVU was required to provide a Sample *Vaughn* Index with respect to a limited number (or "sample") of withheld documents. Such an index was to include a more detailed explanation of each withheld document and how each cited exemption applied to justify that withholding, similar to and consistent with the level of detail that WVU had provided on the *Vaughn* Index provided to plaintiffs in the matter of *PG Publishing, d/b/a The Pittsburgh Post-Gazette v. West Virginia University,* Civil Action No. 08-C-276 (Monongalia County, West Virginia). A.R. 660, 662.

On July 17, 2013, WVU provided the Sample *Vaughn* Index and the Affidavit of WVU Associate General Counsel Kevin J. Cimino bearing the same date. As contemplated by the Sample *Vaughn* Index Order, the parties thereafter filed briefs in support of renewed motions for summary judgment, identifying (by reference number) those documents listed on the Sample *Vaughn* Index that each wished to have submitted for *in camera* review. A.R. 722-769; 770-784.

Finding that no further proceedings were necessary, on March 19, 2014, the Circuit Court entered an Order granting summary judgment to WVU, denying Highland's cross-motion, and ordering that the case be stricken from its docket ("Final Order"). The Final Order determined that WVU had properly refused to provide all withheld and redacted documents on the basis of: (1) the deliberative process privilege found at West Virginia Code §29B-1-4(a)(8); (2) an

"academic freedom" privilege; and/or (3) because the FOIA Requests were unduly burdensome. A.R. 1-37. The Circuit Court did not include any analysis of the documents that the parties had requested that it review *in camera*. It also did not address that part of Highland's motion that sought an award of fees and costs under West Virginia Code §29B-1-7.

V. SUMMARY OF THE ARGUMENT.

Highland filed proper FOIA Requests with WVU, seeking data, compilations, communications, peer review comments and other information regarding the subject articles authored by WVU Professor Michael Hendryx and others. After first claiming that it would be impossible to comply, WVU produced more than 2,200 documents when ordered to do so by the Circuit Court. WVU also withheld more than 770 documents, on the basis of various exemptions that were described in broadly worded, generic entries on the *Vaughn* indices that the lower court ordered it to file. Among those claimed exemptions was an unprecedented assertion that more than 90% of those documents were exempt from disclosure under a self-invented "academic freedom" privilege.

The Circuit Court refused WVU's attempts to evade its responsibilities under the FOIA for nearly two years, denying its motion to dismiss this action and requiring that it provide a more detailed "Sample *Vaughn* Index" so that its exemption claims could be more fully understood. By the Final Order entered on March 19, 2014, however, the Circuit Court did an about-face, positing that Professor Hendryx was actually engaged in WVU "policy-making" in publishing the subject articles, and holding that it was time to recognize an "academic freedom" exemption under the FOIA.

Neither of these rulings, nor the other findings and conclusions set forth in the Final Order, finds support in the record or established law. The Final Order should be reversed and this matter should be remanded for further proceedings as outlined below.

VI. STATEMENT REGARDING ORAL ARGUMENT.

The Circuit Court's Final Order of March 19, 2014, is based upon unprecedented interpretations of the West Virginia Freedom of Information Act, W.Va. Code §29B-1-1, et seq. Specifically, the Circuit Court found, *inter alia*, that the "deliberative process privilege" at W.Va. Code §29B-1-4(a)(8) applies to justify the withholding of information pertaining to scientific research articles from disclosure, and that the "personal privacy exemption" at W. Va. Code §29B-1-4(a)(2) applies to exempt from disclosure documents that fall within an "academic freedom" privilege recognized for the first time by the Circuit Court. Because this appeal involves both issues of first impression and issues of fundamental public importance, Highland respectfully requests that this matter be scheduled for oral argument pursuant to Rule 20 of the Rules of Appellate Procedure.

VII. ARGUMENT.

A. Standard of Review.

Summary judgment is proper where the moving party has shown that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law. W. Va. R. Civ. P. 56(c); Painter v. Peavy, 192 W.Va. 189, 192, 451 S.E.2d 755, 758 (1994). Rule 56 "plays an important role in litigation in this State," and is the "preferred method of resolving cases brought

under [the] FOIA." *Painter*, 451 S.E.2d at 758, n. 5; *Farley*, 599 S.E.2d at 841 (citing Evans v. Office of Personnel Mgt., 276 F.Supp. 2d 34, 37 (D.D.C. 2003)).

Ordinarily, a circuit court's role at the summary judgment stage is not to "weigh the evidence and determine the truth of the matter," but merely to determine whether there is a genuine issue for trial. *Painter*, 451 S.E.2d at 758 (internal citations omitted). However, the fact that cross-motions for summary judgment have been filed "'does not constitute a determination that there is no issue of fact to be tried, and if a genuine issue of material fact is involved both motions should be denied.'" Mt. Lodge Ass'n v. Crum & Forster, 210 W.Va. 536, 552, 558 S.E.2d 336, 344 (2001) (internal citations omitted).

Generally, in deciding such a motion the court draws any permissible inferences from the factual record "in the light most favorable to the party opposing the motion." *Id.* (citing Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986)). In a case such as this where cross-motions were presented to the lower court, for the purposes of appeal the prevailing movant (here, WVU) has the burden of showing entitlement to a summary judgment and is the party against whom permissible inferences are to be drawn. *Mt. Lodge Ass'n*, 558 S.E.2d at 344.

Furthermore, in a FOIA context, "summary judgment is viewed through the evidentiary burden placed upon the public body to justify the withholding of materials." *Farley*, 599 S.E.2d at 841. This means that in applying a *de novo* standard to the agency's interpretation of the FOIA, a reviewing court should be "mindful that the 'burden is on the [responding public entity]'" to show that the requested material falls within a FOIA exemption. *Id.* (citing Petroleum Info. Corp. v. United States Dep't of the Interior, 976 F.2d 1429, 1433 (D.C. Cir. 1992)). To the extent that the lower court makes factual determinations in evaluating whether such a

demonstration has been made, the "clearly erroneous" standard of review applies. *Mt. Lodge Ass'n*, 558 S.E.2d at 345; Burgess v. Porterfield, 196 W.Va. 178, 187, 469 S.E.2d 114, 123 (1996).

Finally, although the "standard of review for summary judgment remains *de novo*, a circuit court's order granting summary judgment must set out factual findings sufficient to permit meaningful appellate review." Grayiel v. Appalachian Energy Partners 2001–D, LLP, 230 W.Va. 91, 736 S.E.2d 91 (2012) (citing Fayette County National Bank v. Lilly, 199 W.Va. 349, 484 S.E.2d 232 (1997)). In other words, a lower court's order "must be sufficient to indicate the factual and legal basis for [its] ultimate conclusion so as to facilitate a meaningful review of the issues presented." Where the lower court "fail[s] to meet this standard--i.e. making only general, conclusory or inexact findings—[this Court] must vacate the judgment and remand the case for further findings and development." *Lilly*, 484 S.E.2d at 237 (citing of Province v. Province, 196 W.Va. 473, 483, 473 S.E.2d 894, 904 (1996)).

B. Reversible Errors by the Circuit Court.

1. The Deliberative Process Exemption under the FOIA Does Not Apply to Matters Involving Scientific Research and Publication of Articles by State University Professors.

Nearly half of the Circuit Court's Final Order is comprised of a strained attempt to fit the routine process of preparing academic studies and research papers into the 'agency policy-making' mold. Although that effort is driven by WVU's deliberative process claim, neither the facts nor the law support it. Professor Hendryx and his co-authors do not make policy (either for WVU or for any other purpose). Their "decisions" to seek to publish research articles are not the type that fit within this FOIA exemption. Requiring the release of data, communications and comments on the draft Hendryx articles will *advance* the purposes of the FOIA, not frustrate the

use of its exemptions. For all of these reasons, the Circuit Court's conclusion that the "internal memoranda / deliberative process" exemption found at W. Va. Code §29B-1-4(8) ("deliberative process exemption") justifies WVU's withholding of some 760 documents[5] must be reversed.

a. Professor Hendryx Was Not Engaged in Policy-Making on Behalf of WVU in Preparing the Research Articles At Issue.

The Circuit Court decided that WVU properly withheld numerous documents under the deliberative process exemption based on its factual determination that Professor Michael Hendryx was engaged in "policy-making" on behalf of WVU. A.R. 8 (Final Order at 8). Specifically, the lower court found that in conducting the analyses reflected in the subject articles Professor Hendryx was "formulating a position on whether coal mining adversely affects the health of West Virginia citizens." A.R. 8-9 (Final Order at 8-9). This position, in turn, was not just Professor Hendyrx's opinion, but (according to the lower court) constituted *WVU*'s position with respect to this issue of "public concern." In the Circuit Court's view, by allowing Professor Hendryx to publish the resulting articles, WVU was thus advancing its policy of "improv[ing] rural health through research." A.R. 10 (Final Order at 10).

The Final Order offers no citation to any record support for these findings, which go beyond anything that WVU argued below. In fact, the only relevant evidence demonstrates that they are in error.

In 2011, WVU released a position statement that specifically noted 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 (emphasis added). Further, WVU asked those in the media who write about faculty research "to refrain from describing those [articles] as a 'WVU

[5] A.R. 490 (Summary of "Documents Produced, Documents Withheld, and Exemptions Cited by WVU").

study' or using other phrasing that would imply or could be interpreted as the institution taking a position on any particular issue." *Id.* In short, WVU has expressly *disclaimed* the notion that any research paper published by a WVU professor (including the Hendryx articles) represents WVU's position or policy. *Id.*[6]

The Circuit Court's findings that the views expressed in the Hendryx articles represented WVU "policy" or the school's "position" as to the matters addressed therein are thus clearly erroneous. As this determination was a key underpinning of the Circuit Court's entire analysis regarding the applicability of the deliberative process exemption, this error requires that the Final Order be reversed. *Lilly*, 484 S.E.2d at 237; *Burgess*, 469 S.E.2d at 123.

b. The Publication of the Articles Did Not Involve Policy-Making or a Deliberative Process Within the Meaning of the FOIA Exemption.

As the lower court acknowledged, the deliberative process exemption *only* allows for the withholding 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). Thus, in order to be "pre-decisional" within the meaning of W. Va. Code §29B-1-4(8), the exempt documents "must have been 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)). The work of Professor Hendryx and his co-authors on the subject articles plainly does not fall within this category.

To begin with, neither the WVU School of Medicine nor its Rural Health Research Center ("Center") is a State agency. The goal of the Center is to "conduct and disseminate environmental health research that improves the health of rural populations and communities."

[6] Some of the co-authors of the subject studies are not employed by WVU. *See* A.R. 64, 98. Under the Circuit Court's reasoning, these non-employees are presumably involved in determining WVU policy.

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.[7]

As a consequence, the work that Professor Hendryx completed in conducting the studies and publishing the subject articles had nothing to do with the crafting of policy. This fundamentally distinguishes the case *sub judice* from that presented in Cleary, Gottlieb, Steen & Hamilton v. Dep't of Health and Human Services, et al., 844 F.Supp. 770 (D.D.C. 1990), the primary authority upon which the Circuit Court relied in concluding that the deliberative process exemption applied. In *Cleary, Gottlieb*, plaintiffs sought certain records relating to studies conducted by the Food and Drug Administration ("FDA") and associated agencies that were completed as a part of the FDA's continuing role in regulating the manufacture and sales of certain medications (in that case, products containing L-tryptophan). *Cleary, Gottlieb*, 844 F.Supp. at 773-774. Because the FDA had discovered a possible link between those products and a rare medical syndrome, the FDA began an intensive review of products containing L-tryptophan to determine whether they also contained a contaminant leading to the adverse medical condition. *Id.*, at 773.

The point of that research effort was to consider whether additional regulatory steps should have been or would be taken with respect to plaintiffs' clients. Thus, the court described the plaintiffs' requests as seeking information from the FDA "regarding that agency's *regulatory history* of L-tryptophan...." *Cleary, Gottlieb*, 844 F.Supp. at 774 (emphasis added). By contrast, Highland's FOIA Requests have nothing to do with studies conducted in support of possible rule-making. That is because WVU is not involved in regulation.

[7] Professor Hendryx may have sought to *influence* the development of policy by federal and State agencies (such as those responsible for regulating surface coal mining), but he had no authority to directly develop or impose any such policies. *See* Highland's Cross-Motion Memorandum, at 5-6; A.R. 726-727.

The other decision upon which the Circuit Court heavily relied was Krikorian v. Department of State, 984 F.2d 461 (D.C. Cir. 1993). *Krikorian* centered on the U.S. State Department's invocation of the federal version of the deliberative process exemption to withhold documents that were drafted by that agency as a part of its efforts to develop a policy on how to respond to public inquiries concerning a specific article it had published, addressing Armenian terrorism. In affirming the use of the deliberative process exemption in *Krikorian*, the circuit court adopted the district court's description of the sought-after information as comprising "the *building blocks of policymaking:* ...proposed recommendations [on how to respond] on a sensitive foreign policy issue." *Krikorian*, 984 F.2d at 466 (emphasis added). Again, since it is not a policy-making agency, no such considerations apply to the information sought from WVU and *Krikorian* has no application to this case.

Indeed, the same fundamental distinction applies to every other case cited in the Final Order in support of this determination.[8] Daily Gazette Co., Inc. v. The West Virginia Dev. Office, 198 W.Va. 563, 569, 482 S.E.2d 180, 186 (1996) ("Daily Gazette I") involved deliberations by the West Virginia Development Office about whether to support a proposed industrial plant, potential tax considerations, and other issues associated with assisting a business in establishing a new location in West Virginia. *Daily Gazette I*, 482 S.E.2d at 183, 185. Affirming that internal memoranda addressing these matters were exempt, this Court remanded the case for consideration of the question of whether certain letters between the Development Office and the private company fell within the scope of "communications consisting of advice,

[88] Although the Circuit Court directed the parties' attention to certain of the withheld documents identified on the Sample *Vaughn* Index as support for its determination that WVU was engaged in policy-making (Final Order at 12, n. 12; A.R. 12), Highland has no means of reviewing those documents that were submitted confidentially for *in camera* review. Regardless, for the reasons described above, *any* documents that were generated as a part of the preparation of the articles in question could not have comprised policy-making materials.

opinions and recommendations" which reflected that office's decision-making process. *Daily Gazette I*, at 192.

In the course of discussing the deliberative process exemption, this Court observed in *Daily Gazette I* that 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 I* at 192 (internal citations omitted). Notably, WVU made no such factual presentation here, and hence the Circuit Court could make no such factual findings on the record presented below.

Similarly, Ethyl Corp. v. Environmental Protection Agency, 25 F.3d 1241, 1248 (4th Cir. 1994) addressed a request for information submitted to the U.S. Environmental Protection Agency ("EPA") regarding EPA's decision to deny plaintiff's request for a "fuel additive waiver" under a program established by the federal Clean Air Act. This is perhaps the classic situation in which the deliberative process exemption is properly applied: to protect agency decision-making from undue interference by an entity adversely affected by the very decision that formed the basis for the FOIA requests. Acknowledging that this exemption encompasses records withheld on the basis of attorney work product and attorney-client privileges, the court in *Ethly Corp* also held that other documents "prepared in order to assist an *agency decisonmaker* in arriving at his decision" may fall under the same exemption. *Ethly Corp,* 25 F.3d at 1248 (emphasis added). Because this appeal involves neither an agency like the EPA, nor an agency decisionmaker, *Ethly Corp* offers no support for WVU's claim of a deliberative process exemption.

Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854 (D.C.Cir.1980) involved an executive agency (the Department of Energy) and concerned the "premature disclosure of *proposed policies* [there, in the form of recommended interpretations of regulations] before they have been finally formulated or adopted...." *Coastal States*, 617 F.2d at 866 (emphasis added). Here, Highland seeks no policy documents, and in any event, cannot be seeking the "premature" disclosure of anything -- as all of the articles in question were published *before* Highland's FOIA Requests were filed. As with the attorney memoranda required to be released in *Coastal States*, in this case "no 'decision' [was] being made or policy was being considered;" hence, the deliberative process exemption does not apply. *Coastal States*, 617 F.2d at 869 (internal citations omitted).

c. There Is No Factual Basis for Finding that Raw Data, Compilations and Similar Information Are Exempt as Inextricably Linked to a Deliberative Process Within the Meaning of the FOIA Exemption.

Strangely, the Circuit Court found it was "not clear" whether Highland's FOIA Requests sought raw data, compilations and similar materials that were not already provided in the Hendryx articles, and stated that "Highland has not asserted that it is seeking new data...." A.R. 16 (Final Order at 16). Elsewhere, the Circuit Court agreed with WVU that the FOIA Requests "essentially ask[] WVU for *everything*." A.R. 31 (Final Order at 31, emphasis in original).

In fact, Highland asked that WVU provide the raw data, data compilations and other materials that were used to reach the conclusions set forth in the articles that are the subject of the Subpoena-Based FOIA Request, as that information was *not* provided as a part of the published articles and has not been otherwise made available to the public. A.R.77-80. As explained in its briefing below, Highland needs this information in order to evaluate the validity of the studies themselves and the conclusions reached in the Hendryx articles.

The Subpoena-Based FOIA Request asks for the curriculum vitae of the study authors; the "raw data files and datasets" that were used in the statistical analysis presented in the subject articles, including data discussed but not shown; documents and communications related to the selection or rejection of particular mining areas to be examined in the studies; communications with members of specifically-identified third party organizations in the course of preparing the articles; and (as to the Self-Reported Cancer Study) documents related to the door-to-door health interviews, including sample interview forms and the completed forms. A.R. 77-80; 92-97 (Complaint, Ex. A). These and the other categories of information requests made by Highland are not currently available to the public and are directly pertinent to an independent review of the studies.

Moreover, even assuming, *arguendo*, that the deliberative process exemption applied to some parts of the information sought by the FOIA Requests, there is no factual basis for the Circuit Court's summary finding that such raw data and similar information are so inextricably linked to Professor Hendry's preparation of the subject articles that the "consultative process" would be compromised by providing that information to Highland. A.R. 16 (Final Order at 16). Accordingly, the principles enunciated in Washington Research Project, Inc. v. Department of Health, Ed. and Welfare, 504 F.2d 238 (D.C. Cir., 1974), *cert. denied*, 421 U.S. 963 (1975) and Montrose Chemical Corp. of California v. Train, 491 F.2d 63 (D.C. Cir. 1974) -- regarding the need for shielding the "judgmental process" (*Montrose Chemical*, 491 F.2d at 68) as to data selection and analysis from disclosure in order to avoid revealing the deliberative process -- have no application here.

For two of the three articles at issue, Professor Hendryx and his staff gathered secondary data and analyzed it in some way to reach the conclusions set forth in the articles addressing

overall quality of life and birth defects. A.R. 64-72; 82-89. For the third article addressing self-reported cancer rates, the Center recruited others to conduct in-person surveys. A.R. 98-105. There are a myriad of issues attendant to these types of studies that are worthy of review. WVU has presented no basis for withholding from Highland the raw data and other materials that are needed in order to allow that to be done.

d. Requiring Disclosure of the Withheld Documents Would Advance the Purposes of the FOIA and Would Not Frustrate the Use of the Deliberative Process Exemption.

For all of the reasons described above, the Circuit Court's general conclusion that the deliberative process exemption applies to justify WVU's decision to withhold more than 700 documents is in error. In this regard, that court's separate discussion of how it believed the disclosure of the information sought by Highland would "run afoul of the privilege's intended purposes" (A.R. 19; Final Order at 19) is particularly illustrative of how the Circuit Court tried in vain to make the square peg of ordinary academic research fit into the round hole of agency decision-making.

Specifically, the Circuit Court chose to emphasize that the deliberative process exemption must be applied here so that Professor Hendryx will be "judged on what [he] decide[d], not [on] what [he] consider[ed]." *Id.*, at 20 (citing *Clearly Gottlieb*, 844 F.2d at 782). In the Circuit Court's view, to release peer reviewer comments on Professor Hendryx's drafts, and suggestions and comments that "he chose to either incorporate into his final product, or perhaps more importantly, discard," would risk "subject[ing] him to judgment on what he *considered* as opposed to *decided*." (A.R. 20; Final Order at 20; emphasis in original).

What the Circuit Court failed to recognize is that as a professor with WVU's School of Medicine, purporting to conduct credible scientific research on matters involving epidemiology and health effects of specific industrial activities, that is *precisely* what any evaluation of the

Hendryx articles *should* be based upon -- the quality and applicability of the data that was used (and data that was disregarded), and how it was obtained, manipulated and analyzed. In other words, what Professor Hendryx "considered" as he finalized the subject articles is quite important in determining the validity of the studies themselves and the conclusions he reached.[9]

In an *agency* setting, the final decision on a policy, regulation, or specific request for approval by a regulated entity should serve as the focal point for public scrutiny. In determining the validity of published scientific studies, however, that principle has no application.

2. There is No "Academic Freedom" Exemption Under the FOIA.

As a second major justification for granting WVU's motion, the Circuit Court concluded that WVU properly withheld 740 documents[10] on the basis of "academic freedom," as incorporated into the FOIA exemption set forth at 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....if the public disclosure thereof would constitute an unreasonable invasion of privacy." *Id.* (the "personal privacy exemption"). As the Circuit Court conceded, its ruling in this regard is unprecedented. A.R. 23, 27 (Final Order at 23, 27). No court in West Virginia, and no other state or federal court, has ever held that the personal privacy exemption encompasses "academic freedom."

The lower court's invocation of the academic freedom of Professor Hendryx (and presumably his co-authors) as a basis for upholding WVU's refusal to disclose information to

[9] The need for independent review of such articles is hardly lessened by the fact that they are labeled as "peer reviewed." The peer review process today is "no guarantee of 'scientific validity' but at best a very fallible indicator...." Susan Haack, *Peer Review and Publication: Lessons for Lawyers*, 36 Stetson Law Review 789, 818 (2007). "Many journals don't check the statistical calculations in accepted papers, and reviewers are in no position to repeat authors' experiments or studies...." In addition, a paper "may have been rejected by ten or twenty journals before it is finally accepted." *Id.*, at 800-801 (citations omitted).

[10] *See* A.R.490 (Summary of "Documents Produced, Documents Withheld, and Exemptions Cited by WVU").

Highland rested upon three (3) distinct considerations: (1) that the First Amendment encompasses an "academic freedom" privilege that is "transcendental, applicable to both constitutional law and to FOIA [pursuant to the personal privacy exemption]"; (2) the guarantee set forth in the West Virginia Constitution that all citizens have a right to a thorough and efficient educational system; and (3) the determination that individual peer reviewers have an expectation of privacy that will be harmed by the release of their comments, even though such comments are submitted anonymously. A.R. 25-28 (Final Order at 25-28). The discussion in this part of Highland's brief addresses the first basis for the Circuit Court's ruling on this issue; the other two grounds are addressed in separate parts of this brief (Parts VII.B.3 and VII.B.4), set forth immediately below.

As an initial matter, the primary purpose of the personal privacy exemption is to "protect individuals from the injury and embarrassment which could result from the unnecessary disclosure of personal information." Hechler v. Casey, 333 S.E.2d 799, 809 (W.Va. 1985) (internal citations omitted). *See also* Robinson v. Merritt, 180 W.Va. 26, 375 S.E.2d 204 (W.Va. 1988); Child Protection Group v. Cline, 177 W.Va. 29, 350 S.E.2d 541 (W.Va. 1986). This exemption applies to "personal" information – an individual's medical records being the "classic example." *Cline*, 350 S.E.2d at 545. It applies to "detailed government records on an individual which can be identified as applying to that individual." Hurlbert v. Matkovich, No. 13-0217, 2014 W. Va. LEXIS 640, at *31 (W.Va. June 5, 2014) (*per curiam*) (internal citations omitted). Applying the plain meaning of the phrase, the information withheld by WVU (raw data, compilations, communications regarding drafts and with third parties, etc.) does not constitute "personal information" subject to this exemption. As a result, the lower court's unwarranted

"interpretation" of the statute cannot stand. State of West Virginia ex rel. the Honorable John R. Frazier v. Meadows, 193 W.Va. 20, 23-24; 454 S.E.2d 65, 68-69 (1994).

Likewise, the information sought by the FOIA Requests was not lodged in a "personal, medical, or similar file" as required in order to fall within the exemption. *Id.* The documents that are responsive to the requests were maintained in the working files of the Center, used by WVU professors and other employees as part of their routine work activities. Again, applying the legislative intent as expressed in the plain wording of the statute, such information does not fall within this exemption. *Meadows*, 454 S.E.2d at 68-69.

Even putting aside the lower court's untenable reliance on the personal privacy exemption, no court has ever recognized a First Amendment right to academic freedom on behalf of an individual professor. Although the First Amendment has been held to apply to protect *colleges* and *universities* against undue interference by the *government*, First Amendment jurisprudence does not support its application in the context of this case.

Sweezy v. New Hampshire, 354 U.S. 234 (1957), the primary case cited by the Circuit Court, does not recognize any right to "academic freedom" with respect to university professors. Rather, *Sweezy* was decided on the basis of a denial of *due process,* in the form of an open-ended, unlimited investigation of the personal conduct and affairs of a faculty member. That case dealt with a challenge to the use of a New Hampshire statute (the "New Hampshire Subversive Activities Act of 1951") to hold a university professor in contempt for failing to answer questions posed to him (by the New Hampshire Attorney General, on behalf of the Legislature) concerning his belief in Communism and involvement with the Progressive Party. *Sweezy,* 354 U.S. at 242-244, 245-246. It did not involve the federal FOIA or any similar statute, or research activities and scientific publications. *See also* Urofsky v. Gilmore, 216 F.3d 401, 413

(4th Cir. 2000) ("In light of the...actual holding and rationale of *Sweezy*, it is difficult to understand how that case can be viewed as clearly 'adopting' any academic freedom right....") To the extent that academic freedom was implicated, it was defined as "the institutional right belonging to *the University*" (*Urofsky*, 216 F.3d at 412) to determine "who may teach, what may be taught, how it shall be taught, and who may be admitted to study." *Sweezy*, 354 U.S. at 262 – 263

As to the matter of academic freedom, the opinion in *Sweezy* notes that a university such as WVU should be "characterized by a spirit of free inquiry, its ideal being the ideal of Socrates – 'to follow the argument where it leads.'" *Sweezy,* 354 U.S. at 264 (internal citations omitted). With regard to research into social science issues, "inquiries into [such] problems...must be left as unfettered as possible." *Id.* Although this requires the exclusion of *governmental* intervention in the intellectual life of a university (*Id.*), such an interest is *advanced* by the "unfettered" exchange of information with the public at large. WVU's refusal to disclose any information regarding the Hendryx articles thus works directly against the *true* academic freedom that should be its goal.[11]

Further, even "assuming that the right to academic freedom exists and that it can be asserted by an individual professor, its contours...are certainly similar to those of the right of free speech. Namely, the right can be invoked only to prevent a governmental effort to regulate the *content* of a professor's academic speech." Emergency Coal. to Defend Educ. Travel v. U.S. Dep't of the Treasury, 545 F.3d 4, 12 (D.C. Cir. 2008) (emphasis added) (citing Univ. of

[11] In this regard, the former regulation of the (now-defunct) Board of Trustees (W.Va. C.S.R. 128-36-1, et seq.) cited by the Circuit Court to demonstrate the Legislature's concern with academic freedom (A.R. at 29) does not support WVU's position. That regulation was exempt from the rule-making process and therefore was not a Legislative act. Further, the rule emphasizes 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. As the FOIA Requests seek information that would be relevant to an evaluation of the accuracy of the Hendryx papers, this regulation supports the position that WVU should fully respond to the FOIA Requests.

Pennsylvania v. EEOC, 493 U.S. 182, 197 (1990)). The Final Order, however, does not find that Professor Hendryx or any of the co-authors of the subject articles have been subjected to interference with their free speech rights.

Likewise, Keyishian v. Board of Regents, 385 U.S. 589 (1967), another opinion cited by the Circuit Court, is inapposite. *Keyishian* invalided state laws that required public employees (including college faculty) to make certifications regarding their membership in the Communist party. As the Supreme Court later described it, in *Keyishian*, when the Court spoke of "'academic freedom' and the right to determine on 'academic grounds who may teach,' the Court was speaking in reaction to content-based regulation." University of Pennsylvania v. EEOC, 493 U.S. 182, 197 (1990). Again, the Circuit Court did not find that Highland was attempting to impose content-based regulation by submission of the FOIA Requests, and therefore *Keyishian* has no relevance to Highland's FOIA claims.

Finally, the Circuit Court's repeated reliance on Dow Chemical Co. v. Allen, 672 F.2d 1262 (7th Cir. 1982) as being particularly "germane to this case" was misplaced. *Dow* addressed subpoenas issued in the context of a herbicide cancellation proceeding, seeking notes, reports, working papers and raw data regarding ongoing animal toxicity studies that were "nowhere near completion and which had *not* been subjected to peer review." *Dow,* 672 F.2d at 1268 (emphasis added). Thus, the "*principal* legitimate chilling effect on scientific research" addressed in *Dow* and its progeny "is the possibility that research results discovered *prior to their publication* would be vulnerable to preemptive or predatory publication by others." In the Matter of the American Tobacco Company, 880 F.2d 1520, 1529 (7th Cir. 1989) (emphasis added). Although the Circuit Court suggested that the differences between the factual background in *Dow* and the case *sub judice* were "of little consequence" (A.R. 18 (Final Order at 18)), the Seventh Circuit in

American Tobacco found that the premature timing of the release of the requested information was the "principal" issue addressed in *Dow*.

Likewise, the law review article cited in the Final Order in support of the Circuit Court's unprecedented recognition of an "academic freedom" privilege against disclosure under the FOIA advocated for such a result solely to protect the intellectual property rights of academic scientists from premature disclosure of ongoing research findings. Kenneth A. Weber, *State Public Records Acts: the Need to Exempt Scientific Research Belong to State Universities from Indiscriminate Public Disclosure*, 10 J.C. & U.L. 129, 144 (1984) ("Weber") (cited in Final Order at 30; A.R. 30) ("Preliminary research is not patentable.") No such consideration applies in this instance, both because WVU has not shown that the withheld information is related to any proprietary concern, and because the articles in question were already published.

Because the lower court here wholly failed to explain how these potential harms would result from the release of data and related information regarding the *previously published, peer-reviewed* Hendryx articles, the *Dow* decision does not support the conclusions reached in the Final Order. "Academic freedom" does not justify a wholesale avoidance of the plain language of the FOIA for the purpose of shielding professors at State universities from proper information requests and scrutiny of their work. To hold otherwise would serve to hamper the development of the "best and brightest academicians" (Final Order at 29; A.R. 29) rather than discourage them.[12]

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[12]Such scrutiny is certainly a reasonable here, given the apparent bias shown by some of the communications that were produced to Highland. *See, e.g.,* Document Nos.WVU003063, WVU003064, and WVU003719 (DVD dated 12/21/12) (e-mails from Professor Hendryx to Bo Webb (co-author of the "Self-Reported Cancer Rates" article and member, Coal River Mountain Watch), regarding "mock" interviews of Boone County residents being arranged for a visit by CNN, and Professor Hendryx's desire to have CNN visit Twilight, West Virginia "so they can see and film the destruction there."

3. The Guarantee of a "Thorough and Efficient System of Free Schools" under the West Virginia Constitution Does Not Extend to Institutions of Higher Education such as WVU, and Cannot Serve as the Basis for an "Academic Freedom" Exemption under the FOIA.

The Circuit Court observed 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, make education a fundamental, constitutional right in this State[,]" citing *Pendleton Citizens for County. Schools v. Marockie*, 203 W. Va. 310, 507 S.E.2d 673 (1998) (citing Syl. Pt. 3, *Pauley v. Kelly*, 162 W. Va. 672, 255 S.E.2d 859 (1979)). A.R. 7 (Final Order at 7). This Court has made it clear, however, that such a right does not extend beyond elementary and secondary education. Randolph County Board of Education v. Adams, 196 W. Va. 9, 467 S.E.2d 150 (1995) (hereinafter "*Adams*"); Herold v. McQueen, 71 W. Va. 43, 75 S.E. 313 (1912) (hereinafter "*Herold*").

In *Adams*, the Randolph County Board of Education (the "Board") established a book user fee for non-needy school children. Parents of the "non-needy" children argued that the book fee essentially amounted to tuition, because the fee was mandatory regardless of what type of books and materials were given to the "non-needy" children and regardless of whether the parents purchased textbooks through private vendors. This Court agreed that such a fee was unconstitutional, finding that:

> Whatever items are deemed necessary to accomplish the goals of a school system and are in fact an integral fundamental part of the *elementary and secondary education* must be provided free of charge to all students in order to comply with the constitutional mandate of a free school system pursuant to Section 1 of Article XII of the West Virginia Constitution.

Adams at Syl. pt. 7 (emphasis added).

In *Herold,* a group of taxpayers sued to enjoin the collection of a tax that had been levied for the purpose of raising funds to build a new county high school. The taxpayers alleged that

the special Legislative Act authorizing the tax was unconstitutional because it violated Section 1, Article XII of the West Virginia Constitution. This Court disagreed, and in the course of that opinion noted as follows:

> The Legislature has, by general law, provided a system of free schools throughout the state. But it will be noted that it is not prohibited from augmenting, and making more efficient, the general system of free schools, by the establishment of special high schools, and graded schools, in any locality where it may think it wise to do so. *The Constitution does not provide for the establishment of the state university, or the state normal school at Huntington, or their respective branch schools.* These are established and maintained by special legislation; and while the people of their respective locations are in a position to receive a greater benefit from them than people in other parts of the state, yet the right and power of the legislature to create them, and to provide for their maintenance by taxing the people of the whole state, has not been questioned. We think the legislature can, with equal right, tax the county as a unit to support a county high school.

Herold, 71 W. Va. at 49, 75 S.E. at 315-316 (emphasis added).

As noted in *Herold*, WVU was established by statute. *See* W. Va. Code §18-11-1, et seq. While WVU is a public entity and its governance is heavily controlled by the State (*see W. Va. Univ. Bd. of Governors v. W. Va. Higher Educ. Policy Comm'n*, 221 W. Va. 187, 653 S.E.2d 649 (2007)), the West Virginia Constitution does not establish a right to a higher education.

Nevertheless, the Circuit Court relied upon such a purported Constitutional right in reaching the conclusion that the concept of "academic freedom" renders Highland's FOIA Requests "unreasonable invasions of privacy[.]" Specifically, the Circuit Court stated:

> ...there is no on-point case law, with facts parallel to the case at bar, that speaks to the concept of 'academic freedom' in the manner in which it is being asserted here. However, this Court believes that the 'academic freedom' principles embodied in our First Amendment jurisprudence are applicable and thus transferrable to that of the FOIA, especially because the right to education in our State is *fundamental.*

A.R. 22 (Final Order at 22 (emphasis in original)).

As set forth above, despite the lower court's finding to the contrary, there is no fundamental right to a higher (post-secondary) education. Thus, the Circuit Court's reliance on the West Virginia Constitution's guarantee of a thorough and efficient system of free education as somehow enhancing the First Amendment rights of professors employed at State universities such as WVU was misplaced. There is nothing in the West Virginia Constitution that supports the application of First Amendment jurisprudence to the FOIA, and the lower court's determination in this regard must be reversed.

4. The Personal Privacy Exemption from the Disclosure of Documents Under the FOIA Cannot Be Applied When No Personal or Identifying Information is Sought or Threatened to Be Released.

The personal privacy exemption allows an agency to withhold from disclosure under FOIA "information of a personal nature such as that kept in a personal, medical or similar file...." W. Va. Code §29B-1-4(a)(2). The Circuit Court's treatment of a claimed "academic freedom" privilege as falling within the personal privacy exemption is discussed above. However, there is an additional aspect of the lower court's application of this exemption that was improper, and that formed at least part of the basis for its Final Order.

In particular, the lower court found that the request for peer review comments as to the subject articles fell within the personal privacy exemption *on behalf of the peer reviewers*, because this would "stifle candid commentary" -- *even though the identities of those reviewers would not be revealed.* A.R. 21, 24, 36 (Final Order at 21, 24, 36) (finding that peer review comments are "personal" because [T]hey reflect the individualized critiques, and personal opinions, of the reviewers..."). In other words, adopting WVU's position, the lower court agreed

that "[t]o subject a reviewer's comments, even while keeping the identity of the person hidden, to public scrutiny" would be a violation this exemption. *Id.* at 21.

This, of course, stands the notion of "personal" information on its ear. The lower court did not even attempt to explain how it could be that a document in which the "identity of the *person*" is kept confidential could constitute "information of a personal nature" within the meaning of this exemption. Applying the plain meaning of the word "personal," this exemption cannot apply to peer review comments, submitted anonymously to an academic or scientific journal, that are not kept in a "personal, medical, or similar file" pertaining to the person who prepared them. *Id.; Meadows*, 454 S.E.2d at 68-69. The Circuit Court stretched this exemption beyond its limits in concluding otherwise.

5. The Circuit Court Wrongly Failed to Impose the Burden of Proof on WVU To Establish the Applicability of the FOIA Exemptions It Asserted.

"The general policy of the [FOIA] is to allow as many public records as possible to be made available to the public." *Daily Gazette I,* 482 S.E.2d at 186 (internal quotations omitted). The FOIA's disclosure provisions are liberally construed, and its exemptions are 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). Therefore, when a public entity is challenged regarding its refusal to provide information in response to a FOIA request, the burden of proof is on the public body to sustain its action. W. Va. Code §29B-1-5(2); *Farley*, 599 S.E.2d at 841.

Here, the Circuit Court improperly failed to apply the burden of proof on WVU to sustain its position as to the applicability of the FOIA exemptions upon which it relied. The lower court did so by making assumptions with respect to key factual issues that are unsupported in the

record, and by drawing inferences in WVU's favor without any apparent basis for doing so. When the burden of proof is properly placed on WVU as to such matters, it is unable to sustain that burden and prove that these exemptions apply.

As noted above, one of the Circuit Court's key rulings was that the "internal memoranda / deliberative process" exemption found at W. Va. Code §29B-1-4(8) justified WVU's decision to withhold some 760 documents. A.R. 7; 11; 13-14; 490. As a prerequisite to such a ruling, the Circuit Court had to determine that all of those documents were a part of the development of WVU *policy*. See A.R. 8 (Final Order, at 8) (To apply the deliberative process exemption, the documents "must have been generated before the adoption of an agency position.")

In order to satisfy that policy element, the Circuit Court found that "[I]n the case at bar, the decision-making process is *implicated* because Dr. Hendryx, and by *extension*, the West Virginia Rural Health Sciences Center and WVU, was formulating a position on whether coal mining adversely affects the health of West Virginia citizens." A.R. 8-9 (Final Order at 8-9) (emphasis added). Thus, the lower court's ruling as to the deliberative process exemption was expressly premised upon its determination that in authoring the articles at issue, Professor Hendryx was *speaking for* WVU, "by extension." *Id.* As evidence of that, the court observed:

> Importantly, WVU did not *disavow* Dr. Hendryx's research, thus accepting it as legitimate thought and solidifying the attribution of this policy position his work illuminated to it.

A.R. 9 (Final Order at 9) (emphasis in original).

As a factual matter, other evidence in the record shows that this finding is plainly erroneous. Beyond that, however, this determination also shows that instead of requiring WVU to satisfy its burden of showing "the express applicability of [the claimed] exemption to the material requested" (*Daily Gazette I,* 482 S.E.2d at 187 (internal citations omitted)), the Circuit

Court treated WVU's *failure* to make a statement as a sufficient basis for deciding that the articles authored by Professor Hendryx constituted WVU policy. This unfounded assumption as to the meaning of WVU's failure to "disavow" the Hendryx articles removed *any* burden from WVU to prove that those articles fall within the FOIA deliberative process exemption.

Similarly, in addressing whether raw data and compilations used by Professor Hendryx in preparing his articles were properly withheld by WVU as part of the "deliberative process," the Circuit Court noted as follows:

> This Court cannot definitively say that calculations, formulations, and notes that Highland may be seeking do *not* involve some type of judgmental process on behalf of Dr. Hendryx, or his colleagues, that factored into his final research product. Importantly, the Court cannot say with certainty that the consultative process would *not* be compromised should Dr. Hendryx be required to disclose the data he gathered....

A.R. 16 (Final Order at 16) (emphasis in original). In short, since *Highland* did not affirmatively demonstrate that the raw data and compilations (that were never made available to Highland) did *not* involve the exercise of policy-making judgment by Professor Hendryx, the Circuit Court ruled that WVU was entitled to withhold that information as part of the "deliberative process." *Id.* Again, contrary to well established law, this finding had the effect of placing the burden on *Highland* -- not WVU -- to prove the non-applicability of the exemption.

Finally, the general approach of the Circuit Court in adopting the newly-minted "academic freedom" exemption under the FOIA shows that in issuing its decision, it placed the burden of proving entitlement to the requested documents on Highland, rather than requiring that WVU meet its burden of proving the applicability of any exemption. In particular, the Circuit Court candidly admitted that in denying Highland's motion, it was concerned "not only with the effect of its ruling in the case at bar, but with the *precedent* it would set in subjecting entire research studies to disclosure...." A.R. 18 (Final Order at 18) (emphasis in original). In other

words, Highland was forced to convince the lower court not only that the FOIA required disclosure of the documents Highland sought in the case *sub judice*, but was subject to the additional burden of demonstrating that a proper decision in this case would not create adverse precedent for future FOIA actions. This is the exact opposite of the liberal construction of the FOIA, and strict construction of its exemptions, that are required by the statute and this Court's application of it. *See* W. Va. Code §29B-1-1; Hechler v. Casey, 175 W.Va. 434, 443, 333 S.E.2d 799, 808 (1985).

6. WVU Either Waived Its Reliance on the "Trade Secret" Exemption under the FOIA or Failed to Establish It.

Exempt "trade secrets" under the FOIA are defined to include:

> any formula, plan, pattern, process, tool, mechanism, compound, procedure, production data or compilation of information which is not patented which is known only to certain individuals within a commercial concern who are using it to fabricate, produce or compound an article or trade or a service or to locate minerals or other substances, having commercial value, and which gives its users an opportunity to obtain business advantage over competitors[.]

W. Va. Code §29B-1-4(a)(1). From the initial denials of the FOIA Requests in March, 2012 through the submission of its Sample *Vaughn* Index on July 17, 2013, WVU claimed that this exemption applied to justify the withholding 115 documents from disclosure to Highland. A.R. 490. Because this claim was included in the Sample *Vaughn* Index Order, Highland was required to address it as a part of its final briefing on the parties' cross-motions. A.R. 662 (Sample *Vaughn* Index Order, ¶ 4).

In its last brief filed with the Circuit Court (on December 13, 2013), WVU stated that although this exemption had been asserted in good faith, it no longer believed the Circuit Court needed to address it because the same documents covered by this exemption were subject to

other exemptions asserted by WVU. A.R. 778 (WVU Cross-Motion Memorandum, p. 9, n.2). Because WVU completely failed to establish its application, Highland asked that the Circuit Court grant summary judgment in its favor as to WVU's defense based upon the trade secrets exemption. The Circuit Court declined to do so.

This Court may determine that one or more of the other FOIA exemptions do not apply to the documents withheld by WVU. Therefore, because WVU did not expressly *withdraw* its reliance upon this exemption (but, rather, merely suggested that the lower court "need not even consider" it), for the reasons stated in Highland's earlier briefing on the issue,[13] the Circuit Court should have entered judgment in Highland's favor on this claim.

7. The Circuit Court Erred in Reversing Its Earlier Ruling and Finding -- Nearly Two Years After this Action was Filed -- that Highland's FOIA Requests Were Unduly Burdensome.

WVU argued in its Motion to Dismiss and supporting memorandum filed on June 19, 2012, that it was unable to respond to the FOIA Requests because it would be unreasonably burdensome to do so. A.R. 171-172. After briefing and a full hearing on that motion, the Circuit Court denied it, specifically noting that "[A] public body may not simply state in a conclusory or cursory manner that redaction would be unreasonably burdensome or costly." A.R. 296 (November 7, 2012, Findings of Fact, Conclusions of Law and Amended Final Order Denying Defendant's Motion to Dismiss ("Order Denying Dismissal") at 7, citing *Farley*, 599 S.E.2d at 846).

Accordingly, in the Order Denying Dismissal, the Court required that WVU provide "all responsive information that it [could] reasonably provide, including previously gathered

[13] See A.R. 513-514 (Highland's Renewed Motion for Summary Judgment, at 15-16) and A.R.743-744 (Highland's Cross-Motion Memorandum, at 22-23).

documents and other information"; provide Highland with an explanation of the steps that WVU would be taking to review any additional potentially responsive information that had not been reviewed; and propose a timetable for conducting the review of other information. A.R. 297-298 (Order, at 8-9).[14] In response, WVU provided the First Production of Documents on November 16, 2012, and indicated that it anticipated being able to provide all responsive documents by December 21, 2012. A.R. 335-336 (November 16, 2012 Affidavit, Kevin J. Cimino, Esq., WVU Associate General Counsel). As noted, WVU later provided four (4) additional sets of responsive documents, the last on March 29, 2013.

According to letters from WVU's counsel, it has identified a total of 270,649 potentially responsive documents.[15] Of that total, 43,773 have reportedly been reviewed, yielding 2,364[16] documents that were provided to Highland. A.R. 781 (WVU's Cross-Motion Memorandum, at 12).

In order to release any further information to Highland, WVU claims that it will be forced to have its counsel undertake a "**manual** review of every single [one]" of the more than 200,000 documents that are within the universe of remaining compiled materials. *Id.* On the basis of these unverified representations, the Circuit Court effectively reversed its earlier Order Denying Dismissal, held that WVU had now demonstrated that the FOIA Requests were "unduly burdensome," and cited this as an alternative basis for granting summary judgment to WVU.

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[14] This ruling was consistent with a January 12, 2012 ruling made by U.S. District Court Judge Frederick P. Stamp, Jr., in the context of the subpoenas issued as a part of the *Reylas 404 Permit Litigation.* In that order, Judge Stamp denied WVU's motion to quash the subpoenas because WVU had "failed to provide any corroborating specific evidence" to support its claim that responding to the subpoenas would require undue burden. A.R.132-140 (January 12, 2012 Memorandum Opinion and Order, at 7, Case No. 1:11-MC-35, N.D.W.Va.))

[15] WVU's electronic document consultant indicated that there are 216, 182 documents remaining to be reviewed, after deducting the number of duplicate documents. A.R.474-476 (Feb. 21, 2013 letter, E-Terra Consulting, "Detailed Breakdown of New Data-WVU").

[16] This is WVU's number. By Highland's count, WVU produced 2,245 separate documents, omitting double counting of duplicates. *See* A.R. 490 (Summary of "Documents Produced, Documents Withheld, and Exemptions Cited by WVU").

A.R. 33, 37 (Final Order at 33, 37). That ruling is in error and should be set aside, for several reasons.

First, the lower court never made any specific findings of fact as to the extent of the burden that WVU faces. Although WVU claims that "each" document released thus far had to be "reviewed and analyzed" by its counsel (A.R. 781), twenty percent (20%) of the Provided Documents were U.S. Department of Energy "Annual Coal Reports"– documents that were clearly public records. This certainly creates some doubt as to WVU's claim that each and every page of those documents had to be reviewed before they were released. The lower court noted this discrepancy but made no finding with respect to it. A.R. 32 (Final Order at 32).

In addition, according to WVU's electronic documents consultant, *only a "small percentage" of the remaining 216,182 documents would have to be reviewed*, after those documents have been subject to the "Equivio" de-duplication and organizing process. A.R. 474-476 (Feb. 21, 2013 letter, E-Terra Consulting). This also raises a substantial question as to WVU's assertion that its counsel would have to review "each and every one" of the remaining 216,182 documents before any further production is made.

The Final Order strongly suggests that the Circuit Court accepted WVU's contentions in this regard at face value. *See* Final Order at 33 ("WVU has now shown, with specificity, the true extent of Highland's requests."), A.R. 33. However, no specific factual findings were made as to this disputed issue, and because of that the Final Order may not be amenable to appellate review. *Lilly*, 484 S.E.2d at 237. In the alternative, to the extent that the lower court did accept WVU's representations with respect to this matter, it acted in a clearly erroneous manner, given the undisputed evidence showing that those claims were greatly exaggerated.

Second, Highland has never demanded that WVU complete its response to the FOIA Requests by producing any of the remaining 216,182 documents that have been compiled. In response to a letter from WVU's counsel pointing out the likely cost ($7,500) to process that information, Highland's counsel agreed that WVU could defer processing of those documents pending further rulings. A.R. 477-478 (Feb. 26, 2013 letter to counsel for WVU). In addition, Highland noted that if the documents that have thus far been withheld are provided to it, Highland may decide that it does not wish to receive *any* of the remaining documents. *Id.* In accordance with this, in its Cross-Motion Memorandum, Highland only requested the release of previously withheld documents as listed on the *Vaughn* indices and that WVU be required to confer with Highland as to any additional documents. A.R. 745.

In determining that the burden of producing any additional documents was so unreasonable that WVU was entitled to summary judgment, the Circuit Court inexplicably failed to address Highland's voluntary offer to limit or potentially eliminate the need for further document processing. Further, the lower court did not acknowledge that the purported burden that WVU claims as to the production of *additional* documents does not affect whether WVU should be required to produce already-processed documents that have been withheld on the basis of improperly claimed exemptions. To the extent that the Circuit Court's determination of "undue burden" was intended to serve as a basis for excusing WVU from responding to the FOIA Requests at all – including with respect to documents that have already been processed – that is in error, as a determination of "unreasonable burden" can only be applied prospectively. *See Farley*, 599 S.E.2d at 846-847 (internal citations omitted); Town of Burnsville v. Cline, 188 W.Va. 510, 515, 425 S.E.2d 186, 191 (1992) (framing question as to whether compiling responsive information "will be" overly burdensome or costly).

8. Highland Is Entitled to An Award of Attorneys Fees and Costs as a Successful FOIA Litigant Under W. Va. Code §29B-1-7.

W. Va. Code § 29B-1-7 provides that any person who is denied access to public records under the FOIA and successfully brings an enforcement action must be awarded attorney fees and court costs from the public body that denied access to the records. *Id.* To be a successful litigant under the FOIA, the party requesting fees need not have won every argument advanced during the course of the FOIA proceedings. A finding of successfulness requires 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 and that the FOIA litigation has significantly contributed to the defendant's ultimate disclosure, either voluntary or by court order, of the requested documents." Daily Gazette Co. v. Development Office, 206 W.Va. 51, 521 S.E.2d 543, 560 (1999) ("Daily Gazette II"). *See also* Smith v. Bradley, 223 W.Va. 286, 293-294, 673 S.E.2d 500, 507-508 (2007) (awarding costs to *pro se* litigant who successfully obtained a court order requiring that redacted faculty evaluations be disclosed by Fairmont State University).

Highland served two FOIA Requests. WVU refused to provide any documents in response to either of them. After this action was filed, and pursuant to the Circuit Court's November 7, 2012 Order Denying Defendant's Motion to Dismiss, WVU made five (5) productions of documents to Highland in response to the FOIA Requests, producing some 2,245 documents. Accordingly, regardless of the outcome of this appeal on the merits, Highland is obviously a successful litigant under the FOIA. The Circuit Court erred by neglecting to grant Highland an award of attorney's fees and costs pursuant to W. Va. Code § 29B-1-7, and this aspect of the Final Order should also be reversed. *Daily Gazette II*, 521 S.E.2d 560.

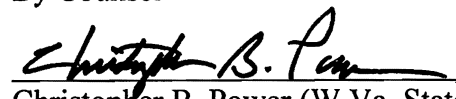
VIII. CONCLUSION.

For the reasons described above, Highland asks that this Honorable Court reverse the Circuit Court's Final Order of March 19, 2014; find and declare that the exemptions cited by the Circuit Court do not apply to the documents withheld by WVU; require that WVU produce all documents withheld on the basis of these non-applicable exemptions, as identified on the *Vaughn* indices submitted to the Circuit Court; and require that WVU thereafter confer with Highland as to the release of any of the remaining compiled documents. Highland also asks that regardless of whether WVU is ordered to produce additional documents, Highland be granted its attorneys fees and costs incurred in prosecuting this action, pursuant to West Virginia Code § 29B-1-7.

Respectfully Submitted,

HIGHLAND MINING COMPANY

By Counsel



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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 Brief** and **Joint Appendix (Vols I and II)** have been served upon counsel of record this 21st day of July, 2014, via hand-delivery, addressed as follows:

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