VIRGINIA:

IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

THE AMERICAN TRADITION INSTITUTE, and HON. DELEGATE ROBERT MARSHALL, **Petitioners,**	)	
v.	)	**Civil Action No. CL-11-3236**
THE RECTOR AND VISITORS OF THE UNIVERSITY OF VIRGINIA, **Respondent.**	)	

MEMORANDUM IN SUPPORT OF MOTION TO REVISE ORDER AND FOR A CONTINUED STAY

1. Introduction

Respondent University of Virginia ("University") respectfully requests a change in the Protective Order entered on May 24, 2011 (the "Order") governing review of the documents it believes to be exempt. The Order provided for release of these records to two of Petitioners' counsel, subject to specific protections and non-disclosure obligations from each of those individuals. Christopher Horner and David Schnare were named as legal counsel for Petitioners with the right to receive and review the records at issue.

Since the Court entered its Order, the University has developed increasing concerns about the reasonableness of its agreement to allow these two individuals access to the exempt records. The University has repeatedly sought to work collaboratively with Dr. Schnare who is the only attorney licensed to practice law in Virginia and is the lead counsel for the American Tradition Institute ("ATI") in the present case. The University's intent has been to suggest changes in the process of document access and review that would fairly accommodate the interests of the parties and this Court. Dr. Schnare and ATI have rejected such attempts, submitting an unacceptable

proposal by letter directly to the Court in a seeming attempt preemptively to address the matter. *See* Letter from David Schnare, Director, Environmental Law Center at American Tradition Institute, to this Court dated Oct. 7, 2011. Unfortunately, University counsel have received information in the last weeks that has shattered their confidence in the honesty and accuracy of the representations made to them by Dr. Schnare, making a change in the Order even more urgent and justified. The Affidavit of Richard C. Kast (and accompanying exhibits), attached to this Memorandum, documents in detail the very serious issues and concerns that have given rise to the present Motion.

The Virginia Freedom of Information Act ("Virginia FOIA") intentionally protects many categories of records including the confidential scholarly and scientific communications of University faculty such as Michael Mann that are at stake in the present case. Those protections reflect legislative judgments about the many limitations to public disclosure necessary to facilitate governmental functioning, the legislative interest in encouraging the development of science and scholarship in the Commonwealth, the legislative recognition that many governmental records contain personal and private information, and the need to ensure that the Virginia FOIA properly respects the mandates of the federal constitution and laws. The University has a right and a duty to steward records that go to its heart as an academic and research institution from falling into the hands of individuals who have not demonstrated they can be trusted to keep the records safe.

This memorandum addresses the legal standards governing requests for modifications of protective orders in Section 1. The reasons for the University's request for modification are addressed in Section 2 (and in the Affidavit of Mr. Kast). The University's general proposal for modification is discussed in Section 3.

2. Standards for Modification of Protective Orders

The protective order in this case explicitly reserves, in Section G, the right of the parties to apply to the Court "for any order modifying this Order in seeking further modifications against the use of protected information." Further, Virginia law is clear that a court has the authority under Va. Sup. Ct. R. 4:1(c) "'for good cause shown [to] . . . make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense'. Rule 4:1(c). We hold that the reasons assigned by the trial judge in his letter opinion constitute 'good cause' to enter the pre-judgment protective orders sealing the pretrial documents." *Shenandoah Pub. House, Inc. v. Fanning*, 368 S.E.2d 253, 257 (Va. 1988). *See also Wilson v. Norfolk & Portsmouth Belt Line R. Co.*, 69 Va. Cir. 153 (2005); *Abujaber v. Kawar*, 20 Va. Cir. 58 (1990) 990 WL 751032 *3 ("[U]nder Rule 4:1(c), the Court may enter a protective order 'for good cause shown.'").

Many federal decisions discuss similar principles, speaking specifically to courts' "inherent power to modify protective orders, including protective orders arising from a stipulation by the parties." *SmithKline Beecham Corp. v. Synthon Pharmaceuticals, Ltd.*, 210 F.R.D. 163, 166 (M.D.N.C. 2002). *See also United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1427 (10th Cir. 1990), *cert. denied sub nom, American Special Risk Ins. Co. v. Rohm & Haas Co.*, 498 U.S. 1073 (1991). Moreover, a court may, grant relief from an "improvident" protective agreement, "especially when the agreement disserves public policy." *Parkway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House Group, Inc.*, 121 F.R.D. 264, 267 (M.D.N.C. 1988) (citing *In re Westinghouse Elec. Corp., etc.*, 570 F.2d 899, 902 (10th Cir. 1978)).

Should a court decide to entertain a party's request for modification, good cause typically serves as the proper standard for deciding whether to grant the request. *See Factory Mut. Ins. Co. v. Insteel Indus., Inc.*, 212 F.R.D. 301, 303 (M.D.N.C. 2002); *Volvo Penta of the Americas, Inc. v. Brunswick Corp.*, 187 F.R.D. 240, 242 (E.D. Va. 1999); *Longman v. Food Lion, Inc.*, 186 F.R.D. 331, 333 (M.D.N.C. 1999); *Bayer AG and Miles, Inc. v. Barr Labs., Inc.*, 162 F.R.D. 456, 463–64 (S.D.N.Y. 1995). In this regard, courts are attuned to special issues involving access by in-house counsel to confidential documents and have structured protective orders to prohibit such access when the corporate role served by in-house counsel renders their access to confidential materials inappropriate.

In *Brown Bag Software v. Symantec Corp.*, 960 F.2d 1465 (9th Cir. 1992), the parties to copyright infringement litigation over a computer program entered into a pre-discovery protective order to protect valuable trade secrets that might be divulged through discovery requests. *Id.* at 1468. The magistrate court had granted a protective order that prevented "Brown Bag's in-house counsel from directly viewing the documents. The order provided for Brown Bag's access only through an 'independent consultant, legal or otherwise.' Specifically, the protective order envisioned an outside consultant hired by Brown Bag who would review the [confidential] documents and advise Brown Bag regarding their relevance." *Id.* at 1469. Brown Bag appealed both the protective order and the magistrate court's grant of summary judgment to Symantec.

The Ninth Circuit, relying on *U.S. Steel Corp. v. United States*, 730 F.2d 1465 (Fed. Cir. 1984), discussed the proper standard for deciding when to exclude certain counsel from access to protected materials, and concluded that "proper review of protective orders in cases such as this requires the district court to examine factually all the risks and safeguards surrounding

inadvertent disclosure by *any* counsel, whether in-house or retained. Further, the nature of the claims and of a party's opportunity to develop its case through alternative discovery procedures factors into decisions on the propriety of such protective orders." *Brown Bag*, 960 F.2d at 1470. The *Brown Bag* court also noted that the "crucial factor in the *U.S. Steel* case was whether in-house counsel was involved in 'competitive decisionmaking'; that is, advising on decisions about pricing or design 'made in light of similar or corresponding information about a competitor.'" *Id.*

The *Brown Bag* found that the magistrate was correct in restricting Brown Bag's in-house counsel's access to the materials covered by the protective order. Specifically, the court noted:

> The magistrate in fact held a comprehensive evidentiary hearing prior to issuing the protective order. At the hearing, Symantec's counsel described the extreme sensitivity of the trade secrets at issue. Symantec's counsel further described the potential damage to Symantec should the trade secrets inadvertently become subject to misuse by Symantec's competitor, Brown Bag. Brown Bag's counsel did not dispute the dangers inadvertent disclosure posed to Symantec. Instead, Brown Bag's counsel reassured the magistrate that the professional integrity of in-house counsel and his promise to store the trade secret documents in a locked file cabinet in his Brown Bag office sufficiently protected Symantec from inadvertent disclosure. . . . ***The magistrate had to consider, however, not only whether the documents could be locked up in cabinets, but also whether Brown Bag's counsel could lock-up trade secrets in his mind, safe from inadvertent disclosure to his employer once he had read the documents.*** . . . Brown Bag's counsel agreed that he was responsible for advising his employer on a gamut of legal issues, including contracts, marketing, and employment.
>
> From this testimony, the magistrate reasonably concluded that Brown Bag's counsel's employment would necessarily entail advising his employer in areas relating to Symantec's trade secrets. Knowledge of Symantec's trade secrets would place in-house counsel in the "untenable position" of having to refuse his employer legal advice on a host of contract, employment, and competitive marketing decisions lest he improperly or indirectly reveal Symantec's trade secrets.

Id. at 1470–71 (emphasis added).

As the *Brown Bag* court's thorough analysis shows, a particular attorney's placement within the client's organizational structure and specific job duties must be closely scrutinized in determining whether that attorney should be barred from access to confidential materials protected by a court order. *Brown Bag* and *U.S. Steel* remain the standard by which to judge these types of cases.

Adhering to the analytical framework established in *Brown Bag Software* and *U.S. Steel Corp. v. United States,* federal courts in Virginia have twice enabled in-house counsel to access confidential documents, but only because the courts were convinced that the lawyers in question did not play a "competitive decision-making" role within their respective companies that would cause their access to confidential information to create an untenable conflict between their roles as counsel and their roles as substantive decision-makers. In *Volvo Penta of the Americas, Inc. v. Brunswick Corp.*, 187 F.R.D. 240, 241 (E.D. Va. 1999), an unchallenged affidavit was submitted by the in-house attorney in question, stating that she played "no role whatsoever in Brunswick's competitive decisionmaking, and that Brunswick's outside counsel need[ed] her assistance in developing this litigation in [the] fast-paced [Eastern] District." In response to this affidavit, the court ruled that the attorney should not be barred from access to the confidential materials covered by the protective order. *Id.* at 243.

In *ActiveVideo Networks, Inc. v. Verizon Communications, Inc.*, 274 F.R.D. 576, 578 (E.D. Va. 2010), the question before the court was "whether a corporate party's [Verizon's] in-house counsel should be denied access to confidential information . . . pursuant to a protective order." *Id.* at 578–79. The district court went through an analysis under the standard provided by *Volvo Penta* and *U.S. Steel*, noting that "the question of access to confidential information must be resolved on a counsel-by-counsel basis." *Id* (internal quotations omitted). In the spirit

of individualized analysis, Verizon provided evidence specific to each counsel in question to show that he or she was not involved in "competitive decisionmaking," and ActiveVideo provided specific evidence for each individual rebutting these claims. *Id.* at 580–84. The court found ActiveVideo's objections unconvincing and held that Verizon's in-house counsel would not be barred from access to the materials provided under the protective order.

These cases collectively articulate clear guidance that a court can grant relief from an improvident protective agreement, "especially when the agreement disserves public policy." *Parkway*, 121 F.R.D. at 267. The burden on the party requesting a modification is good cause. *Factory Mut. Ins.*, 212 F.R.D. at 303; *Volvo Penta*, 187 F.R.D. at 241. In cases involving proposed limitations on a lawyer's access to confidential documents, counsel's role in his or her organization will be the prime factor that a court considers. Instrumental to such decisions is the opportunity or temptation in these cases for confidential information to be divulged by counsel. The University believes all these factors weigh in favor of a modification in the present case for the reasons documented below.

3. Profound Concerns about the Confidentiality and Security of the University's Exempt Records Are Warranted.

Since the Court entered its Order on May 24, 2011, the statements and actions of Christopher Horner and David Schnare have demonstrated their inability to demarcate their roles as founding members of the American Tradition Institute from their roles as attorneys. As Mr. Kast's affidavit demonstrates, Messieurs Horner and Schnare have repeatedly taken actions suggesting they will act inconsistently with the spirit and letter of their commitments expressed in the protective order, failing to separate their roles as lawyers from their roles as cheerleaders from the bully pulpit for ATI.

Immediately following the entry of the protective order, Mr. Horner (in conjunction with Paul Chesser), issued a press release on behalf of ATI stating that "the University was hauled into court" and required to produce the documents sought by ATI "***so that ATI can make them available to all who wish to review***" them. Aff. ¶ 3; Exhibit 1 (emphasis added). These representations were obviously antithetical to the spirit, intent, and literal requirements of the protective order. The Press release goes on the state that: "In addition **ATI has won the right to look at all the documents** beginning no later than September 21, including those the University refuses to make public." Aff. Exhibit 1 (emphasis added). Of course, the protective order afforded ATI no such right.

On May 25, 2011, *The Washington Times* quoted Delegate Robert Marshall, one of the Petitioners in this lawsuit, as follows: "I want to look at what they've given us and examine what they've withheld and see why it's been withheld." Aff. ¶ 4; Exhibit 2. Delegate Marshall has no access to the exempt documents pursuant to the protective order. It was very disturbing to see him quoted suggesting he would gain access to these records.

On May 26, 2011, Petitioners Schnare, Horner and Marshall co-wrote an op-ed piece for *The Washington Examiner* entitled: "Yes, Virginia, you do have to produce those 'Global Warming' documents." In this piece Petitioners wrote that "[t]he university must also allow attorneys David Schnare and Chris Horner to view any [documents] it believes are exempt from release under FOIA," and noted that although "Schnare and Horner had to promise that they would not disclose the contents of any documents withheld until the court rules on whether UVA's FOIA exemptions are valid, . . . ***they do get to see all of them. That's a major breakthrough.***" Aff. ¶ 5; Exhibit 3 (emphasis added). It is unclear how this limited, confidential

viewing could possibly constitute a "major breakthrough" if Schnare and Horner plan to maintain the absolute confidentiality required by the Protective Order.

On May 26, 2011, an article appeared in *Commentary* entitled "Climate Scientist Ordered to Release Thousands of Documents." That article quoted Mr. Horner and stated that the University "must allow . . . David Schnare and Chris Horner to view any [documents] it believes are exempt from release under FOIA—with the burden of proof on UVA." The article further noted that even if the University were to attempt not to disclose exempt documents, those documents would "***still have to be shown to the two attorneys who filed the public information request***" Aff. ¶ 6; Exhibit 4 (emphasis added). Again, the fact that Schnare and Horner would see the documents the University believes to be exempt pursuant to the terms of the Protective Order is of absolutely no significance in and of itself with respect to the possibility of ultimate disclosure unless the terms of the Order are not observed.

These actions and others described in the Affidavit of Mr. Kast document Christopher Horner and David Schnare's pervasive pattern of making statements on behalf of ATI leading the public and press reasonably to conclude that their access to the highly confidential communications of scientists around the world would lead to disclosure of information in contravention of the Court's order. Given the actions of ATI and its counsel, the University's concerns about going forward with the mechanism of the protective order currently in place are well-founded and reasonable. Aff. ¶¶ 7-8.

These concerns derive not just from the very public zeal of ATI to attack Dr. Mann which used a close-up picture of Dr. Mann on its website (presumably without his permission) and described him as "discredited" and seeking to keep his University records "hidden from the taxpayer". Aff. ¶ 14; Exhibit 17. The concerns stem also from the fact that unlike most situations

in which attorneys are granted access to confidential information pursuant to a protective order, Dr. Schnare and Mr. Horner are not just counsel for the Petitioners in this case; they are two-thirds of Petitioners in this case. They not only engage directly in the business operations of ATI, they personally comprise key staff of ATI. *See Staff & Board of Directors*, AMERICAN TRADITION INSTITUTE, http://www.atinstitute.org/about/staff-board-of-directors (last visited Oct. 14, 2011). Given their roles within ATI and their conduct subsequent to the court's entry of the protective order, the risk that the University's confidential information will be divulged if Messieurs Horner and Schnare gain access to the records is great.

Understandably, counsel for the University have been increasingly concerned about this pattern and have sought and received repeated assurances from Messieurs Horner and Schnare that they understood and intended to comply with their responsibilities pursuant to the Order. Aff. ¶¶ 9-12, 15-17. Unfortunately, recent developments have made any further reliance on those assurances naïve and unwarranted.

Counsel for the University deeply regret that information they have received in recent weeks about Dr. Schnare has thoroughly undermined their trust in his honesty and integrity. As the Affidavit of Mr. Kast documents, Dr. Schnare misled counsel about his employment as a full-time attorney for the Federal Environmental Protection Agency from counsel's very first encounter with Dr. Schnare on May 24, 2011. Aff. ¶¶ 19–27. When confronted with counsel's concerns about this situation, Dr. Schnare proceeded to make other untrue or misleading statements, including to this Court. *Id.*

It is clear from the letter sent by the EPA's Senior Counsel for Ethics, *see* Aff. Exhibit 26 (EPA letter), that Dr. Schnare was a full-time attorney at the EPA throughout the course of this litigation until September 30, 2011, that he was required to obtain written authorization for any

outside legal activities, and that he failed to obtain such authorization. The EPA letter suggests Dr. Schnare may even have fabricated the memorandum attached to its letter. The EPA letter states the memorandum dated November 16, 2010 and sent by Dr. Schnare to his supervisor on September 29, 2011 requesting "Approval for Outside Employment" was "purportedly prepared" by him in 2010. *See* Aff. Exhibit 27 (Schnare memorandum). It is noteworthy that this memorandum repeatedly references Dr. Schnare's intended outside representation to be on behalf of "ATI." However, records from the Colorado Secretary of State Business Division confirm that "WTI" was not renamed "ATI" until December 18, 2010, after Dr. Schnare's memorandum was purportedly written on November 16, 2010. *See* Aff. ¶ 25; Exhibit 28, (Articles of Amendment dated December 18, 2010). It is no wonder that the EPA cover letter contains language suggesting this memorandum may have been prepared after the fact.[1]

Even if Dr. Schnare had received authorization on the terms he claims to have sought on November 16, 2010, he did not bother to comply with those terms. He frequently and consistently communicated with counsel for the University and its Public Records officer during regular weekday business hours, *see* Aff. ¶ 27; Exhibits 29-30, and he undertook representation of ATI in "matters of law," specifically including the present case. Given the apparent conduct of his partner at ATI, what an irony it is to see Mr. Horner target the "University's obligation to fulfill the public's right to know how taxpayer-funded employees use the taxpayer's resources" in an ATI press release. *See* Aff. Exhibit 1, page 2. In the same press release, Dr. Schnare states: "ATI pursues important public issues...This case is about whether government can put up a pay

[1] Oddly, Dr. Schnare himself notes in the email to his supervisor transmitting the memorandum that ATI was then operating under its predecessor name "WTI" perhaps in an effort to explain why the approval memorandum would describe WTI. *See* Aff. Exhibit 26 (email from Dr. Schnare to his supervisor Phillip A. Brooks dated September 29, 2011). But his memorandum in fact names ATI, not WTI, suggesting it was not prepared at that time, but only afterwards.

wall to frustrate the public's right to transparency. If it can, the public can't hold government employees to the high standards of conduct they should meet." *Id.*

When University counsel confronted Dr. Schnare about his misrepresentation of his employment status, he told counsel verbally that he had sought and obtained authorization for his activities throughout his long tenure at the EPA. He also sent counsel an email, *see* Aff. ¶21; Exhibit 23, in which he stated: "I have had authority from the agency to do pro bono public interest law for over 5 years now." As the EPA's letter, Aff. Exhibit 26, makes clear, this was untrue. Even assuming Dr. Schnare's memorandum requesting authorization was actually written on November 16, 2010, that memorandum is dated less than one year ago, not the five years he told University counsel was the period in which he had acted with proper authorization to represent outside entities.

University counsel can no longer defend their willingness to entrust tens of thousands of pages of personal, scholarly and research communications from Professor Mann and other scientists to two individuals who have regrettably provided far too many reasons to doubt that their words may be trusted.

4. Proposal for Modification

On September 21, counsel for the University followed up on an earlier email to Dr. Schnare, asking him to consider an alternative to the process contemplated in the Order:

> The key issues that have been raised center on the dual roles that you and Chris play as both lawyers and founding members of ATI, and the fact that the very documents we believe are not subject to disclosure will nonetheless be provided to you in their entirety in your role as lawyers. No one need contend that either of you would violate the order to comprehend the concern that the order affords you access to emails from members of our faculty and researchers around the world that under our view of the case are clearly entitled to be protected as confidential and private records under the Virginia FOIA. It is also worth noting that Michael Mann and many other scientists have communicated to us their belief that the disclosure of the exempt documents to you and Chris pursuant to the protective

order seriously undercuts the entire purpose of Va. Code § 2.2-3705.4 (4) and violates both his privacy interests and the privacy interests of all of the other scientists mentioned in those documents.

In our phone call and in my email, we asked you to consider a potential alternative that we think would be both fair and practical. I want to summarize that suggestion more fully, especially as our own process of review over the last three months has shown us the magnitude of the task that the present order will entail for both parties. Although there are many, many duplicates, the total number of documents we have identified as exempt are over twelve thousand. Most of these documents are multi-page. My rough estimate is that we are talking about 40,000+ "pages" of textual material.

Our proposal would be to allow us to work through these records and identify an example or two of each type/major topic of exchange found there that we believe to be exempt. We propose to remove personal identifying information from the message, but leave all other material intact to give you a robust understanding of the context and specific content. We would describe our understanding of the message categories (e.g. "email exchange relating to the drafting and planning of a grant proposal;" or, "email exchange relating to manuscript submitted to a scholarly journal;" or, "email exchange discussing response to climate science skeptics;" or "email exchange regarding topics to be debated at scientific meeting"). You could review the list of categories and the samples and suggest other topics or issues you wanted to see a sample exchange on if such exists. We would represent to you as attorneys that the examples were a fair and complete set enabling both parties to make vigorous arguments about the status of such exchanges under the Virginia FOIA.

It would also be possible to build into this process an independent review by a neutral person or magistrate appointed by the Court if you were concerned that Rick and I should not decide on our own whether the examples we offered were comprehensive. That individual could have access to the entire document pool, enabling them to verify (probably through random sampling) that the examples you had received and the categories described were appropriate. And of course, the Court would also be able to review anything it wanted to in camera. It is clear that the Virginia Supreme Court would expect a record containing all of the contested materials under the *Virginian-Pilot* and *Bland* decisions.

Aff. Exhibit 20, pages 1-2

The letter went on to suggest that a Federal Freedom of Information Act case involving similarly large document numbers, might provide a framework on which to proceed. *See Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973). Vaughn involves a protracted battle under the Federal

Freedom of Information Act in which the D.C. Circuit expressed considerable sympathy to the needs of plaintiffs in ATI's position:

> In light of this overwhelming emphasis upon disclosure, it is anomalous but obviously inevitable that the party with the greatest interest in obtaining disclosure is at a loss to argue with desirable legal precision for the revelation of the concealed information. Obviously the party seeking disclosure cannot know the precise contents of the documents sought; secret information is, by definition, unknown to the party seeking disclosure. In many, if not most, disputes under the FOIA, resolution centers around the factual nature, the statutory category, of the information sought.
>
> In a very real sense, only one side to the controversy (the side opposing disclosure) is in a position confidently to make statements categorizing information, and this case provides a classic example of such a situation. Here the Government contends that the documents contain information of a personal nature the disclosure of which would constitute an invasion of certain individuals' privacy. This factual characterization may or may not be accurate. It is clear, however, that appellant cannot state that, as a matter of his knowledge, this characterization is untrue. Neither can he determine if the personal items, assuming they exist, are so inextricably bound up in the bulk of the documents that they cannot be separated out. The best appellant can do is to argue that the exception is very narrow and plead that the general nature of the documents sought make it unlikely that they contain such personal information.

Id. at 823–24.

The court then observed:

> [T]he trial court, as the trier of fact, may and often does examine the document in camera to determine whether the Government has properly characterized the information as exempt. Such an examination, however, may be very burdensome, and is necessarily conducted without benefit of criticism and illumination by a party with the actual interest in forcing disclosure. In theory, it is possible that a trial court could examine a document in sufficient depth to test the accuracy of a government characterization, particularly where the information is not extensive. But where the documents in issue constitute hundreds or even thousands of pages, it is unreasonable to expect a trial judge to do as thorough a job of illumination and characterization as would a party interested in the case.

Id. at 825.

The court went on to order a "system of itemizing and indexing" of all the documents and remanded the case to the district court for the government to implement the process set forth in

to allow them to select samples without additional review. However, a careful and comprehensive identification by University counsel of email examples from all the different types of communications found in the records, backed by objective sampling, is a reasonable approach. This would also ensure that documents that do not meet the definition of public records under the Virginia FOIA are not mistakenly and inappropriately disclosed to petitioners[2].

Fundamentally, this case involves dramatically disparate views about the nature of the protections afforded to the personal, scholarly and scientific communications of university faculty under the Virginia FOIA and the constitution. It is not necessary for the petitioners to gain personal access to 40,000 pages of such records for them to make vigorous and complete arguments in support of their view that such records are entitled to only nominal protection. To ensure that a complete record is available to this Court and for future appellate review, the complete records should be deposited with and available to the Court for *in camera* inspection. *See Virginian-Pilot Media Cos. v. City of Norfolk Sch. Bd.*, 4 Cir. CL102815, 81 Va. Cir. 450 (2010); *Bland v Virginia State University*, 272 Va. 198, 630 S.E.2d 525 (2006);

5. Conclusion

Records containing the personal and often very private thoughts and communications of scientists from around the world are contained in the documents records the University believes to be exempt. It is essential that the necessary review and selection of samples from these confidential and personal records in the University's possession include the following

[2] The Virginia Public Records Act, Va Code §42.1-76 et seq., defines a "public record" as recorded information "produced, collected, received or retained in pursuance of law or in connection with the *transaction of public business,*" VPRA §42.1-77. The Virginia FOIA explicitly references this same definition. *See* Va Code 2.2-3701. The magnitude of the sorting process undertaken by the University over the spring and summer to cull records thought to be responsive to petitioners' request included some emails that were purely personal to Professor Mann or others, and were not undertaken in the "transaction of public business." Petitioners themselves have commented on this as they have reviewed the non-exempt records released earlier this year. Some, perhaps many of the records contained in the exempt group, are also personal or otherwise not included within the above definition of public records and should not be disclosed to petitioners.

protections: (1) The records must be kept in the University's sole custody and the Court's until final appellate resolution of this dispute occurs. (2) The samples that are provided to Petitioners for the purposes of this litigation must securely delete specific personal identifying information to protect the privacy of faculty like Michael Mann and the other scientists with whom he communicated. The University respectfully asks this Court to reopen the protective order to allow modifications consistent with these principles to be drafted by University counsel.

THE RECTOR AND VISITORS OF
THE UNIVERSITY OF VIRGINIA

By: Madelyn F. Wessel
Counsel

Madelyn F. Wessel (VSB No. 48984)
Richard C. Kast (VSB No. 13381)
Associates General Counsel
and Special Assistants Attorney General
Office of the General Counsel
Madison Hall
University of Virginia
P.O. Box 400225
Charlottesville, Virginia 22904-4225
(434) 924-3586; (434 982-3070 (facsimile)
mfw2y@virginia.edu; rck4p@virginia.edu