

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF ALBEMARLE

THE RECTOR AND VISITORS OF THE)
UNIVERSITY OF VIRGINIA,)

Petitioner,)

v.)

Case No. CL10000398-00

KENNETH T. CUCCINELLI, II,)
ATTORNEY GENERAL OF VIRGINIA,)

Respondent.)

FILED

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ANSWER

This day came Kenneth T. Cuccinelli, II, in his capacity as Attorney General of Virginia, by counsel, and filed this Answer to the Petition in this matter.

1. In response to the paragraph numbered¹ 1 of the Petition, the allegations of said paragraph are legal assertions, and therefore, do not require a response. To the extent a response is required, the same are denied. Respondent avers that neither academic freedom nor the First Amendment have ever been held to immunize a person, whether an academic or not, from civil or criminal actions for fraud, let alone immunized them from an otherwise authorized investigation. Further, Respondent avers that, based on past Freedom of Information practice, Petitioner has conceded that at least some of the documents sought by the CIDs are not privileged from dissemination.

¹ Not all of the paragraphs of the Petition are numbered. To make clear which response goes with which paragraph of the Petition, Respondent has numbered the paragraphs of the Petition and attached a copy of the Petition containing those numbers as Exhibit A.

2. In response to the paragraph numbered 2 of the Petition, the allegations of said paragraph are denied.

3. In response to the paragraph numbered 3 of the Petition, Respondent is without sufficient information and belief to admit the allegations pertaining to the University's knowledge, and therefore, the same are denied. Respondent admits that the CIDs relate to the applications for and work presented by Dr. Michael Mann for 5 grants that Dr. Mann has identified on his *curriculum vitae* (attached as Exhibit B) as being a "U.Va award," a "U.Va. subcontract," and/or a "U.Va. internal award." Respondent avers that, with regard to their specific content, the CIDs speak for themselves. Regarding the remaining allegations of said paragraph, Respondent denies any and all such allegations that are not consistent with the foregoing.

4. In response to the paragraph numbered 4 of the Petition, Respondent admits that the requirements for the issuance of a CID are set forth in the Virginia Fraud Against Taxpayers Act ("FATA"), Va. Code § 8.01-216.1, *et seq.* Respondent avers that the CIDs in this matter meet the requirements specified in FATA. Respondent denies any and all other allegations in said paragraph that are not consistent with the foregoing.

5. In response to the paragraph numbered 5 of the Petition, Respondent specifically denies that the CIDs fail to sufficiently state the nature of the conduct allegedly subject to FATA. Respondent avers that, based on Dr. Mann's own *curriculum vitae*, the grants referenced in the CIDs were all active after the passage of FATA and all involved "awards," "internal awards," or "subcontracts" through the University of Virginia, making any such awards potentially susceptible to a fraud action under FATA. Respondent, having been denied access to the grant materials despite the CIDs and

conversations with counsel, is unable to admit or deny the specifics of the Petitioner's allegations pertaining to the grants, and therefore, the same are denied. Respondent denies any and all other allegations in said paragraph that are not consistent with the foregoing.

6. In response to the paragraph numbered 6 of the Petition, the allegations of said paragraph are denied.

7. In response to the paragraph numbered 7 of the Petition, respondent admits that the Attorney General has authority under FATA to issue CIDs in order to investigate potential violations of FATA and avers that is all that has been done here. Respondent avers that the speculation about the use of the materials that would be uncovered by the CIDs contained in the remainder of the paragraph has no basis in fact, particularly given the restrictions on the use of such information under Va. Code § 8.01-216.17. Respondent further avers that neither academic freedom nor the First Amendment have ever been held to immunize a person, whether an academic or not, from civil or criminal actions for fraud, let alone immunized them from an otherwise authorized investigation, and thus, academic freedom is neither implicated nor threatened by the CIDs. Respondent denies any and all other allegations in said paragraph that are not consistent with the foregoing.

8. In response to the paragraph numbered 8 of the Petition, the allegations of said paragraph are denied.

9. In response to the paragraph numbered 9 of the Petition, Respondent admits that the requirements for the issuance of a CID are set forth in the Virginia Fraud Against Taxpayers Act ("FATA"), Va. Code § 8.01-216.1, *et seq.* Respondent avers that

the CIDs in this matter meet the requirements specified in FATA. Respondent denies any and all other allegations in said paragraph that are not consistent with the foregoing.

10. In response to the paragraph numbered 10 of the Petition, respondent admits that various e-mails and materials were released from the CRU in November 2009, including e-mails and data related to, written by, or referencing Dr. Mann. It is unknown whether the e-mails were "stolen" or released by someone at CRU who recognized that much of the material had been withheld in violation of the law from valid Freedom of Information requests in England. According to various reviews of the materials, various statements or methods have been attributed to Dr. Mann including the fact that he developed a "trick" in order to "hide the decline" and that he indicated to a research colleague in England that "[a]s we all know, this isn't about truth at all, its about plausibly deniable accusations." Respondent admits that, much like the FATA investigation at issue here, governmental bodies in England felt the revelations warranted a governmental investigation. Respondent avers that the other investigations, in terms of the evidence considered, the questions asked, and the conclusions reached, speak for themselves. However, it should be noted that it is unlikely that those investigations had access to the materials sought by the CIDs because, based upon the representations of prior counsel, prior to discovering a previously overlooked back-up e-mail server containing responsive documents as a result of the search put in motion by the CIDs, the University had previously maintained that it was not in possession of Dr. Mann's e-mails from the time he was at the University. Respondent denies any and all other allegations in said paragraph that are not consistent with the foregoing.

11. In response to the paragraph numbered 11 of the Petition, Respondent admits that the Commonwealth has filed a Motion for Reconsideration with the EPA regarding its Endangerment Finding, filed appeals in the United States Court of Appeals for the District of Columbia Circuit regarding the EPA's Endangerment Finding and related action and admits that it also filed a Motion to Remand the Endangerment Finding to the EPA. Those filings speak for themselves. Respondent denies any and all other allegations in said paragraph that are not consistent with the foregoing.

12. In response to the paragraph numbered 12 of the Petition, Respondent admits that the CIDs were issued and that they speak for themselves. Respondent denies any and all other allegations in said paragraph that are not consistent with the foregoing.

13. In response to the paragraph numbered 13 of the Petition, Respondent admits that the CIDs were issued and that they speak for themselves. Respondent further admits that the grants are awards, internal awards, and/or subcontracts that, based upon representations made in Dr. Mann's *curriculum vitae*, relate to the University of Virginia. Respondent admits that the dates for the grants also come from Dr. Mann's *curriculum vitae*, and that, assuming the dates are correct, all of the grants were active after the enactment of FATA. Respondent denies any and all other allegations in said paragraph that are not consistent with the foregoing.

14. In response to the paragraph numbered 14 of the Petition, Respondent admits that the CIDs were issued and that they speak for themselves. Respondent denies any and all other allegations in said paragraph that are not consistent with the foregoing.

15. In response to the paragraph numbered 15 of the Petition, Respondent admits that the University is typically represented by either the OAG or outside counsel and that, at the University's request, the OAG authorized the University to hire counsel of its choice for this matter. Respondent avers that granting the request was consistent with the OAG's practice or actions in this matter, including: (1) granting the University's request for an extension of time to respond to the CIDs, (2) granting the University's request for an extension of time to file a Petition regarding the CIDs to facilitate discussions of the matter with new counsel, and (3) granting the University's request to narrow the scope of the CIDs. Respondent denies any and all other allegations in said paragraph that are not consistent with the foregoing.

16. In response to the paragraph numbered 16 of the Petition (also numbered "1" under the heading "Grounds for Relief"), the allegations of said paragraph are denied.

17. In response to the paragraph numbered 17 of the Petition (also numbered "2" under the heading "Grounds for Relief"), the allegations of said paragraph are denied.

18. In response to the paragraph numbered 18 of the Petition (also numbered "3" under the heading "Grounds for Relief"), the allegations of said paragraph are denied.

19. In response to the paragraph numbered 19 of the Petition (also numbered "4" under the heading "Grounds for Relief"), the allegations of said paragraph are denied.

20. In response to the paragraph numbered 20 of the Petition (also numbered "5" under the heading "Grounds for Relief"), the allegations of said paragraph are denied.

21. In response to the paragraph numbered 21 of the Petition (also numbered "6" under the heading "Grounds for Relief"), the allegations of said paragraph are denied.

Further, Respondent avers that, on the one occasion prior to filing the Petition that the

University raised the issue of overbreadth with the OAG, the OAG granted the University's request to limit the scope of the CIDs to particular departments. *See* Exhibit C. Until the filing of the Petition, the University raised no other concerns regarding overbreadth.

22. In response to the paragraph numbered 22 of the Petition (also numbered "7" under the heading "Grounds for Relief"), the allegations of said paragraph are denied.

23. In response to the paragraph numbered 23 of the Petition (also numbered "8" under the heading "Grounds for Relief"), the allegations of said paragraph are denied.

24. In response to the paragraph numbered 24 of the Petition (also numbered "9" under the heading "Grounds for Relief"), the allegations of said paragraph are denied. Further, as the University has not specifically raised any legal or privilege protections and has not filed a privilege log, any such protections or privileges have been waived.

25. In response to the paragraph numbered 25 of the Petition, the allegations of said paragraph are legal assertions or conclusions not requiring a response. To the extent a response is required, the same are denied. Respondent avers that any arguments not raised by the University by the May 27, 2010 deadline (which represented an extension of the deadline imposed by statute that was granted by the OAG) have been waived.

26. Respondent denies any and all allegations contained in the Petition that are not expressly admitted above.

AFFIRMATIVE DEFENSES

1. Respondent asserts that Petitioner has waived any and all defenses, claims or privileges that were not specifically raised in the Petition in the time allowed under the relevant statute and pursuant to the agreement of the parties. Further, any claims of privilege were waived because of Petitioner's failure to provide a privilege log so that any such claims could be fairly evaluated.

KENNETH T. CUCCINELLI, II, in his
capacity as ATTORNEY GENERAL OF
VIRGINIA

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CERTIFICATE OF SERVICE

I hereby certify that, on June 11, 2010, a true and correct copy of the foregoing Answer was sent via e-mail and First Class United States mail, postage prepaid, to:

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