

VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF RICHMOND

Christopher Horner, et al.)	
)	
<i>Petitioners,</i>)	
)	
v.)	No. CL-2015-4712
)	
Rector and Visitors of George Mason)	
University)	
)	
<i>Respondent.</i>)	

**MEMORANDUM OF LAW IN SUPPORT OF INTERVENOR-RESPONDENT
EDWARD MAIBACH’S MOTION FOR LEAVE TO INTERVENE**

Intervenor-Respondent Edward Maibach, by and through his undersigned counsel, files this Memorandum of Law in support of his Motion for Leave to Intervene.

I. INTRODUCTION

Dr. Edward Maibach, a climate communications professor, seeks to intervene in this Virginia Freedom of Information Act (“VFOIA”) lawsuit to prevent the imminent and improper disclosure of thousands of pages of his personal and professional e-mail exchanges – the disclosure of which is scheduled to be made to the very petitioners who are on a mission to scapegoat him and his colleagues.

Dr. Maibach is a Professor in the Department of Communication at George Mason University (“GMU”) and Director of GMU’s Center for Climate Change Communication. His research is on how to communicate the risks of climate change, and how to educate the public of the importance of reducing greenhouse gas emissions.

The Petitioners in this litigation, Christopher Horner and the Competitive Enterprise Institute (“CEI”) (collectively, “Petitioners”), are activists who sued GMU pursuant to VFOIA, seeking to compel the disclosure of Dr. Maibach’s personal email correspondence regarding a group letter drafted and signed by 20 academics, including Dr. Maibach, and dated September 1, 2015 (the “September 1 Letter”). This letter was sent via first class mail to President Obama and other Administration officials to support legal action on climate change. Dr. Maibach participated in this letter as a private citizen, reflecting his personal interests in potential legal responses to climate change, and his participation is separate from his GMU work or research on how to communicate the scientific risks of climate change to the general public.

Due to the breadth of Petitioners’ request, Dr. Maibach’s professional emails have also been implicated. The September 1 Letter included reference to a federal racketeering law known as “RICO,” and Petitioners’ FOIA request sought, among other items, all of Dr. Maibach’s emails containing the term “RICO.” This has meant that a professional presentation of Dr. Maibach’s work in Puerto Rico, involving a paper in which he was a co-author, has also become subject to this litigation.

In response to Petitioners’ VFOIA request and litigation, GMU currently plans to provide Petitioners with thousands of pages of Dr. Maibach’s personal and professional emails.

Dr. Maibach has a clear interest in the subject matter of this litigation, and his interest is not currently being adequately protected. Thousands of pages of his emails containing his thoughts, ideas, discussions of personal matters, and scholarly materials are at risk of being disseminated to the public. This litigation, as it currently stands, simply does not protect Dr. Maibach’s privacy and personal interests. Dr. Maibach seeks to join this action so that he may seek to prohibit the improper production of his private email correspondence.

II. FACTUAL BACKGROUND

On November 13, 2015, Petitioners Christopher Horner and CEI filed a Verified Petition for Mandamus and Injunctive Relief (the “Petition”), seeking to compel Respondent GMU to produce documents pursuant to VFOIA. CEI and Mr. Horner are vocal opponents of climate science and action on climate change, and they have attacked Dr. Maibach and others in the climate science community as part of their fundraising efforts.

The central focus of Petitioners’ inquiry is, undeniably, Dr. Maibach. Indeed, the Petition in this case repeatedly refers to Dr. Maibach by name. The initial VFOIA request sought the records of several GMU professors, but the Petition stated that they have narrowed the request and now “seek only the Maibach records.” November 13, 2015 Petition at 2, n. 1.

On April 22, 2016, the Court entered an Order requiring GMU to produce all requested documents, finding that Dr. Maibach’s emails regarding the September 1 Letter were “made as public business related to the employment of Maibach as Professor of Climate Change Communication and Director of the Climate Center of George Mason University, a public university of the Commonwealth of Virginia.” On May 4, 2016, GMU filed a Motion for Stay Pending Appeal, in which it stated that GMU was pursuing an appeal.

At oral argument on May 13, 2016, over GMU’s opposition, the Court ruled that the protective order governing 140 pages of exemplars was dissolved. The Court also ruled that Dr. Maibach’s remaining emails must be produced. That same day, Petitioners posted all of the formerly-protected emails online via a series of blog posts, along with a press release that was picked up by other blogs and news outlets. Petitioner CEI’s blog post the next week compared Dr. Maibach and his colleagues to “quacks and snake oil salesmen” and suggested they were

guilty of fraud by dint of sharing personal views, in private emails, with which CEI disagreed. (See Exhibit C to the Motion to Intervene, a copy of a CEI blog post dated May 17, 2016.)

Dr. Maibach learned on May 19, 2016 that GMU planned to produce an additional 1,000 to 1,500 pages or so of his emails to Petitioners on May 23, 2016. Prior to this, he believed that GMU would adequately represent his interests. Upon learning that there were additional emails soon to be produced to Petitioners, Dr. Maibach concluded he must request an opportunity to intervene and assert his individual rights in the matter.

III. ARGUMENT

A. Legal Standard for Intervention

Virginia courts recognize that “[i]ntervention allows willing claimants to come into court and join a lawsuit already in progress so that their interest may be defended.” *Cluverius v. James McGraw Inc.*, No. HI0618-1, 1998 WL 972109, at *3 (Richmond Cir. Ct. Mar. 30, 1998).

Intervention in a pending lawsuit is at the discretion of the court. *Stephen v. Dickens*, No. 02-875, 2003 WL 22682964, at *1 (Norfolk Cir. Ct. Dec. 19, 2003).

Virginia Supreme Court Rule 3:14 provides that “[a] new party may by leave of court file a pleading to interfere as a plaintiff or defendant to assert any claim or defense germane to the subject matter of the proceeding.” The term “germane” has been defined as “relevant or closely allied.” *Stephen*, 2003 WL 22682964, at *1-2. An intervenor must thus “assert some right involved in the suit.” *Layton v. Seawall Enters., Inc.*, 231 Va. 402, 406 (1986); *see also Hudson v. Jarrett*, 269 Va. 24, 32 (2005) (stating that “an intervenor must be asserting an interest that is part of the subject matter of the litigation.”) Rule 3:14 requires that an intervenor intervene specifically as a plaintiff or defendant. *Hudson*, 269 Va. at 32. A professor whose emails are to be released by his university under VFOIA has an interest in the action, and may intervene in the

litigation in order to prevent disclosure. *Am. Tradition Inst. v. Rectors & Visitors of the Univ. of Va.*, 287 Va. 330, 336 (Va. 2014), discussed further *infra*.

Dr. Maibach's motion to intervene is timely, as it was made within days of learning that his interests diverged from GMU's and that GMU planned to release thousands of pages of his emails. Up until May 19, 2016, Dr. Maibach reasonably believed that GMU would adequately protect his interests.

Virginia courts permit post-decision motions to intervene, provided that proposed intervenors satisfy the other criteria necessary for intervention. *See, e.g., Norfolk Presbytery v. Bollinger*, 214 Va. 500, 501 (1974) (holding that trial court erred in denying proposed intervenor's post-judgment motion for intervention and stay pending appeal); *Bagwell v. Int'l Union, United Mine Workers of Am.*, 244 Va. 463, 473-74 (1992) (holding that the Court of Appeals should have granted intervention by an intervenor appearing in the first instance on appeal, and intervenor's participation in appeal was necessary "in order to protect his right, to interpose his claim, and to discharge successfully" his legal duties) (*case rev'd on other grounds*, 512 U.S. 821 (1994)).

B. The Court Should Permit Dr. Maibach to Intervene in this Action Because of His Strong Personal and Privacy Interests in Prohibiting the Disclosure of His Personal and Professional Emails that are the Subject of this Action

It is indisputable that Dr. Maibach has an interest in this litigation. Petitioners seek to compel the production of Dr. Maibach's personal and professional emails. Petitioners initiated this action against GMU simply because it happens to be the one in possession of these emails because they remain on GMU's computer server.

But the Petition, and Petitioners' subsequent actions, leave no doubt that the thrust of Petitioners' attack is direct against Dr. Maibach and his emails. Indeed, when the protective

order was dissolved in this case on May 13, 2016 – removing the protection for 140 pages of emails GMU had shared under the protective order for the purpose of litigation – Petitioners immediately published all 140 pages and have followed up with subsequent pieces, including press releases, impugning Dr. Maibach and fellow academics.

GMU’s recent decision to produce the rest of his emails shows, without a doubt, that Dr. Maibach’s interest are no longer being adequately protected in this action. To allow an additional 1,000 to 1,500 or so pages of emails – ten times what has been produced so far – to be released to Petitioners will clearly violate Dr. Maibach’s personal and privacy interests.

C. Dr. Maibach’s Emails Should Not Be Disclosed Under VFOIA

As GMU has argued, Dr. Maibach’s email correspondence regarding the September 1 Letter relates to Dr. Maibach’s personal interests in legal responses to climate change, and is separate from his GMU work and research on how to communicate the risks of climate change to the general public. “The fact that e-mail messages go through a government agency’s e-mail database does not, by itself, make them public records. It is also the *subject* of those e-mails that determines their status as public records. . . . not all writings and recordings, etc., are public records.” VFOIA Advisory Council (A0–1–00, September 29, 2000).

Dr. Maibach’s First Amendment constitutional right to academic freedom is at severe risk in this case. *See Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (“To impose any strait jacket upon the intellectual leaders in our colleges and university would imperil the future of our Nation. . . . Teachers and students must always remain free to inquire, to study and to evaluate. . . .”) Dr. Maibach’s First Amendment constitutional right to petition his government is also imperiled in this case.

In the alternative, considering Dr. Maibach’s emails to be part of his “public business” still does not make them available under VFOIA. VFOIA is clear that “[d]ata, records or information of a proprietary nature produced or collected by or for faculty or staff of public institutions of higher education” is exempt from VFOIA. Virginia Code § 2.2-3705.4. In *American Tradition Institute v. Rectors & Visitors of the University of Virginia*, the Virginia Supreme Court ruled that public university researchers’ email correspondence about their work is clearly exempted under this VFOIA protection for “proprietary interest.” 287 Va. 330, 338-39 (Va. 2014).

In *American Tradition Institute*, the Supreme Court explained that protecting public university researchers’ professional email correspondence was critical for preventing “harm to university-wide research efforts, damage to faculty recruitment and retention, undermining of faculty expectations of privacy and confidentiality, and impairment of free thought and expression.” *Id.* at 342-43. The Supreme Court refused a narrow interpretation of “proprietary interest” because of “the General Assembly’s intent to protect public universities and colleges from being placed at a competitive disadvantage in relation to private universities and colleges.” *Id.* at 343.

Notably, in *American Tradition Institute*, the climate scientist targeted was granted leave to intervene in the VFOIA litigation once he learned that the University of Virginia planned to release his emails to a group attacking him. His intervention was necessary as the University of Virginia “could not sufficiently protect his interests in privacy, academic freedom, and free speech.” *Id.* at 336.

Thus, even if Dr. Maibach’s emails regarding the September 1 Letter are – as this Court determined in its April 22 Order – part of his “public business” as a GMU professor, they are

still exempt from VFOIA as per Virginia's protections for proprietary information belonging to a faculty member of a Virginia institute of higher education. Dr. Maibach's professional emails regarding his paper that was presented in Puerto Rico are also protected under this exemption.

Petitioners are aware of the precedent in *American Tradition Institute* and yet have provided no justification disregarding its holding. Christopher Horner, one of the Petitioners in this case, was and is an attorney with that plaintiff, the American Tradition Institute.

IV. CONCLUSION

For the foregoing reasons, Intervenor-Respondent Edward Maibach respectfully request this Court's leave to intervene in this matter and granting such further and other relief as the Court deems necessary and proper.

Respectfully Submitted,

EDWARD MAIBACH

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