IN THE
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Appeal No. 19-0266

APPALACHIAN MOUNTAIN ADVOCATES,

Petitioner;

v.

WEST VIRGINIA UNIVERSITY,

Respondent.

On Appeal from the Seventeenth Judicial Circuit
for Monongalia County, West Virginia
(Case No. 18-C-267)

OPENING BRIEF OF THE PETITIONER

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West Virginia's Freedom of Information Act, West Virginia Code §§ 29B-1-1 — 29B-1-7, reflects the "fundamental philosophy" that citizens should not be resigned merely to take their government at its word, *id.* § 29B-1-1. To ensure access to "full and complete information regarding the affairs of government," the Act enlists the courts to conduct a rigorous, *de novo* review of any efforts to screen public records from scrutiny. *Id.* § 29B-1-5(2). The letter and spirit of the Act require courts bring a healthy dose of skepticism to that task, as "only one side to the controversy (the side opposing disclosure) is in a position confidently to make statements categorizing [the] information" it seeks to hide from view. *Vaughn v. Rosen*, 484 F.2d 820, 823 (D.C. Cir. 1973). To help correct the asymmetry that characterizes litigation under the Act, *id.*, this Court has mandated certain procedures—*Vaughn* indices, detailed affidavits, sometimes even *in camera* review—whenever an agency invokes one of the Act's narrow exemptions from disclosure. Syllabus Point 13, *Charleston Gazette v. Smithers*, 232 W. Va. 449, 752 S.E.2d 603 (2013). Without strict enforcement of those procedural safeguards, courts and requesters alike are at a "distinct disadvantage" to independently "determine the validity of the Government's claims." *Daily Gazette v. West Virginia Development Office*, 198 W. Va. 563, 573–74 & n.19, 482 S.E.2d 180, 190–91 & n.19 (1996) (*Daily Gazette I*).

In this action, Petitioner Appalachian Mountain Advocates (Appalachian) appeals the denial of those procedural safeguards relative to its request for records possessed by Respondent West Virginia University (University). Although the University claims those records are exempt from disclosure under the Act, it consistently refused to specify how the records fit within any of the Act's narrow statutory exemptions or why responding to Appalachian's request as written would paralyze necessary governmental functions. When Appalachian challenged the

University's denial in circuit court, the University moved under Rule 12(b)(6) to dismiss the complaint on the basis of unsworn allegations in its own legal memoranda. The circuit court granted that motion by written order devoid of any factual findings, legal analysis, or discussion of Appalachian's arguments in favor of disclosure. The circuit court's review fell well-short of the *de novo* standard the Act expressly requires. As such, Appalachian asks this Court to vacate the decision below and remand for further proceedings in accordance with the Act.

ASSIGNMENTS OF ERROR

1. The circuit court erred by granting West Virginia University's motion to dismiss under Rule 12(b)(6) of the West Virginia Rules of Civil Procedure based on a statutory exemption claim for which the University itself bore the evidentiary burden.
2. The circuit court erred by granting the University's motion to dismiss based on a statutory exemption claim that the University failed to substantiate by any competent evidence.
3. The circuit court erred by granting the University's motion to dismiss based on an undue burden claim for which the University itself bore the evidentiary burden.
4. The circuit court erred by granting the University's motion to dismiss based on an undue burden claim that the University failed to substantiate by any competent evidence.

STATEMENT OF THE CASE

I. Statutory Framework

In delegating authority to public servants, West Virginians "do not give [away] the right to decide what is good for the[m] to know and what is not." West Virginia Code § 29B-1-1. The West Virginia Freedom of Information Act is designed to ensure that the government remains "the servant of the people, and not the master of them." *Id.* To that end, the Act establishes as "the public policy of the [S]tate . . . that all persons are, unless otherwise expressly provided by law, entitled to full and complete information regarding the affairs of the government and the official acts of those who represent them as public officials and employees." *Id.*

The heart of the Act is its disclosure provision: Section 29B-1-3(a) guarantees "[e]very person . . . a right to inspect or copy any public record of a public body in th[e] state, except as otherwise expressly provided" by several narrowly-drawn, statutory exemptions. West Virginia Code § 29B-1-3(a). Any person may exercise that right by making a "request to inspect or copy any public record . . . directly to the custodian," § 29B-1-3(b)—the "elected or appointed official charged with administering a public body" that possesses the record, § 29B-1-2(1); *Hurlbert v. Matkovich*, 233 W. Va. 583, 590, 760 S.E.2d 152, 159 (2014). Within five days of receiving a request, the custodian must furnish the requested records, arrange for the requestor to inspect and copy them, or "deny the request, stating in writing the reasons for such denial." West Virginia Code § 29B-1-3(d).

A requestor aggrieved by a denial may seek injunctive or declaratory relief in circuit court. *Id.* Because the Act accords "a presumption of public accessibility to all public records," a requestor states a valid claim under the Act merely by alleging it was "denied access to public records which [it] requested be made available for examination." *Daily Gazette v. West Virginia Development Office*, 206 W. Va. 51, 58, 521 S.E.2d 543, 550 (1999) (*Daily Gazette II*). At that point, "the burden is on the public body to sustain its action." West Virginia Code § 29B-1-5(2).

To carry its burden, the public body must first prove that it "made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested." *Oglesby v. Department of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990).[1] Then, for any records withheld, the agency must present clear and convincing

1 This Court has traditionally "looked to federal FOIA cases for guidance in interpreting the West Virginia Freedom of Information Act"—particularly those "from the United States Court of Appeals for the District of Columbia Circuit . . . given that Circuit's substantial

evidence that the record—or information therein—falls within one of the Act's nineteen "categories of information . . . specifically exempt from disclosure." West Virginia Code § 29B-1-4; *AT & T Communications v. Public Service Commission*, 188 W. Va. 250, 253, 423 S.E.2d 859, 862 (1992) (recognizing clear and convincing evidence is required to sustain statutory exemption claim). Each of those statutory exemptions is "strictly construed" against the government and in favor of public disclosure. Syllabus Point 2, *West Virginia Regional Jail & Correction Facility Authority v. Marcum*, 239 W. Va. 109, 799 S.E.2d 540 (2017) (quoting Syllabus Point 4, *Hechler v. Casey*, 175 W. Va. 434, 333 S.E.2d 799 (1985)).

Because the evidentiary burden falls on the defendant, "[s]ummary judgment is the preferred method of resolving" disputes under the Act. *Farley v. Worley*, 215 W. Va. 412, 418, 599 S.E.2d 835, 841 (2004) (quoting *Evans v. Office of Personnel Management*, 276 F. Supp. 2d 34, 37 (D.D.C. 2003)). At that stage—unlike at the pleadings stage—the agency may present affirmative evidence "that it acted in accordance with the statute." *Farley*, 215 W. Va. at 418, 599 S.E.2d at 841 (quoting *Valencia-Lucena v. Coast Guard*, 180 F.3d 321, 326 (D.C. Cir. 1999)); *see also State ex rel. State Auto Property Insurance Companies v. Stucky*, 239 W. Va. 729, 732, 806 S.E.2d 160, 163 (2017) (noting that "matters of evidence [a]re not to be considered" at the pleading stage).

The type of evidence required largely depends on the circumstances of the case. But if an agency claims a statutory exemption, blackletter West Virginia law requires it submit at least two forms of evidence:

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expertise and experience in dealing with FOIA." *Farley v. Worley*, 215 W. Va. 412, 420, 599 S.E.2d 835, 843 (2004).

> When a public body asserts that certain documents or portions of documents in its possession are exempt from disclosure under any of the exemptions contained in [Section] 29B-1-4, the public body *must* produce a *Vaughn* index named for *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973) . . . . The *Vaughn* index must provide a relatively detailed justification as to why each document is exempt, specifically identifying the reason(s) why an exemption . . . is relevant and correlating the claimed exemption with the particular part of the withheld document to which the claimed exemption applies . . . . The public body *must also* submit an affidavit, indicating why disclosure of the documents would be harmful and why such documents should be exempt.

Syllabus Point 13, *Smithers*, 232 W. Va. 449, 752 S.E.2d 603 (emphasis added). This Court has held that a *Vaughn* index is indispensable even where "the basis of the[ ] refusal to disclose is evident from the pleadings." *Hurlbert*, 233 W. Va. at 596 n.14, 760 S.E.2d at 165 n.14. But although a *Vaughn* index and an affidavit are necessary, they are not always sufficient to establish an exemption defense. The circuit court may also take oral testimony, review additional affidavits, or order *in camera* review of the records in question in order to ensure an adequate factual basis underlies the agency's denial. West Virginia Code § 29B-1-5(2); *Associated Press v. Canterbury*, 224 W. Va. 708, 714, 688 S.E.2d 317, 323 (2009).

After reviewing all of the evidence—including, if the agency meets its initial burden of production, any evidence submitted by the requestor—the circuit court may "enjoin the custodian or public body from withholding records and to order the production of any records improperly withheld." West Virginia Code § 29B-1-5(2). A requestor who prevails in an enforcement action is "entitled to recover his or her attorney fees and court costs from the public body that denied him or her access to the records." *Id.* § 29B-1-7.

II. Facts and Material Proceedings Below

A. Appalachian's Request for Records

In November 2017, Appalachian sent the University a request under the Act, seeking three kinds of documents "in the possession of the West Virginia University Energy Institute or any of its staff":

(1) any agreements West Virginia officials entered into with the China Energy Investment Corporation (China Energy) in 2017;

(2) any list of energy projects that West Virginia provided to China Energy in 2017; and

(3) any correspondences of Energy Institute staff sent or received in 2017 that include the words "China" and either "energy," "coal," or "gas."

Appendix at A-25.

In an e-mailed response, the University claimed that it was not itself a signatory to one responsive agreements between state officials and China Energy "and, as such, is not the custodian" of that specific agreement. *Id.* at A-28. While it did not deny it possessed that agreement, it lodged a hypothetical objection to the request, stating that, "to the extent such agreement and documents contain proprietary trade secrets and/or information relating to economic development such agreement and documents are exempt" from the Act. *Id.* Turning to Appalachian's request for correspondences, the University claimed that a "preliminary search using the provided parameters yielded more than 15,000 potentially responsive emails." *Id.* at A-29. "Reviewing each of th[ose] potentially responsive documents and, as necessary, redacting or segregating the responsive documents would," the University argued, "impose an unreasonably high burden or expense." *Id.*

B. Circuit Court Proceedings

Unsatisfied with the University's response, Appalachian filed a complaint for declaratory and injunctive relief under Section 29B-1-5 of the Act. *Id.* at A-02–29. Appalachian pled two claims for relief:

(1) Count I alleged that the University has a duty to produce copies of responsive agreements in its possession, regardless of whether the University is itself a signatory to those agreements. *Id.* at A-10. Count I also challenged the University's hypothetical invocation of the Act's trade secret and economic development exemptions. *Id.* at A-11.

(2) Count II alleged that the University failed to provide sufficient information for Appalachian to determine whether compliance with the request for correspondences would be unduly burdensome—particularly in light of the University's failure to identify the specific parameters it claims yielded the 15,000 responsive documents and its failure to explain why those records were merely "*potentially* responsive." *Id.* at A-11–12.

Appalachian prayed for a declaration that the University acted in violation of the Act, an injunction requiring the University provide all responsive public records, and an award of attorneys' fees and costs. *Id.* at A-12.

Instead of answering the complaint or submitting evidence in support of its denial, the University moved to dismiss the complaint under Rule 12(b)(6) of the West Virginia Rules of Civil Procedure. *Id.* at A-30. Abandoning its initial "non-signatory" argument, the University argued instead that the records Appalachian sought were exempt from disclosure under West Virginia Code § 5B-2-1, which exempts from disclosure any "writing[s] made or received by the West Virginia Development Office or other public body, whose primary responsibility is

economic development, for the purpose of furnishing assistance to a new or existing business"—unless the writing is an "agreement . . . which obligates public funds." *Id.* at A-38–40.

The University did not attach any affidavit, declaration, or *Vaughn* index to its motion. Rather, in unverified memoranda supporting its motion, the University argued that the following facts supported its defense to Count I:

- "On November 9, 2017, the West Virginia Department of Commerce announced that China Energy . . . planned to invest $83.7 billion in shale gas development and chemical manufacturing projects in West Virginia and signed a Memorandum of Understanding . . . between China Energy and the state of West Virginia." *Id.* at A-33.
- "[T]he investment and subsequent MOU were orchestrated by the West Virginia Development Office and signed by the Secretary of Commerce." *Id.* at A-39.
- "Dr. Quingyun Sun, of the University's Energy Institute, is the Associate Director of the US–China Energy Center and serves as the Governor's Assistant for China Affairs at the West Virginia Development Office," and performs "dual roles—one role within the economic development office and the other role outside of the agency." *Id.* at A-77.
- "Dr. Sun . . . is the contact person for China Energy's $83.7 billion investment." *Id.* at A-35.
- "[A]ny documents potentially responsive to [Appalachian's] FOIA request were obtained through Dr. Sun's work with the . . . Development Office." *Id.* at A-40.
- "[T]he MOU and any projects identified in it were made or received by the West Virginia Development Office for the express purpose of furnishing assistance to a new or existing business." *Id.* at A-39.

After reciting those facts—none of which appeared in Appalachian's complaint—the University summarily argued that the "plain and unambiguous language of Section[ ] 5B-2-1" required dismissal of Count I. *Id.* at A-74.

As to Count II, the University's argument centered on two additional assertions of fact from its unverified memoranda:

- "[U]sing [Appalachian's] specified terms and date restrictions, the University identified more than 15,000 potentially responsive emails." *Id.* at A-41.
- "[T]o review and, as necessary, redact or segregate those 15,000 potentially responsive emails . . . would impose an unreasonably high burden and expense on the University." *Id.* at A-42.

Neither the motion nor the supporting memoranda attempted to estimate the time or expense needed to respond to the request; according to the University, the burden was simply "evident." *Id.* at A-41. Nor did the University explain why the "specified terms and date restrictions" identified only "potentially responsive"—rather than *actually* responsive—records or whether its search encompassed *only* Energy Institute staff or extended to other departments.[2]

Appalachian responded by explaining that, without the benefit of any factual development whatsoever, the University's motion was premature. *Id.* at A-56–57, A-66–69. The University could not, Appalachian argued, ask "to dismiss a claim on the pleadings alone, based on an

2 The University also argued that Appalachian's complaint was untimely based on the 120-day statute of limitations set forth in Section 6-9A-6 of the Open Governmental Proceedings Act—an entirely separate statute. Appendix at A-42–44. As explained in Appalachian's memorandum below, however, claims under the Act are governed by the residual one-year statute of limitations in West Virginia Code § 55-2-12(c). *Id.* at A-69–72. The University's reply in support of its motion did not revisit that argument, and the orders below make plain that it was not a basis for the circuit court's ruling.

affirmative defense [the University] bears the burden of establishing." *Id.* at A-56. Rather, "basic tenets of civil procedure" required the University instead raise statutory exemption and undue burden claims in an adequately supported motion for summary judgment. *Id.* at A-56, A-66.

After hearing oral argument on the motion, the circuit court took the University's statutory exemption claim under advisement. *Id.* at A-83. It also ordered the parties to "meet and confer" regarding the details of the University's search terms for purposes of the undue burden claim. *Id.*

While the parties were conferring—and before receiving any evidence substantiating the University's exemption claim—the circuit court entered a three-page order dismissing the complaint in its entirety. *Id.* at A-85–87. After reciting the standard for Rule 12(b)(6) motions and the operative statutory language, the entirety of the court's analysis was set forth in two sentences:

> Defendant argues that the request seeks documents that are statutorily protected by the economic development privilege and the request is unduly burdensome. The Court agrees.

Id. at A-87.

SUMMARY OF THE ARGUMENT

The circuit court below abdicated its statutory duty to conduct a *de novo* review of the University's denial. The University bore the burden of proving by clear and convincing evidence that a statutory exemption protected the records described in Appalachian's request. A Rule 12(b)(6) motion was therefore an improper vehicle for adjudicating the University's exemption claim. The circuit court demonstrated that fact by stretching well beyond the allegations in Appalachian's complaint to consider additional, unsworn allegations in the University's legal

memoranda. Those allegations, even taken on their own terms, were insufficient to invoke the statutory exemption in West Virginia Code § 5B-2-1 because the University failed to provide enough information to satisfy each essential element of the statutory exemption. The University's motion, then, was not only premature and unsupported—it was insufficient as well.

The University's undue burden claim was similarly unsound. The Act requires the University prove such a burden through affirmative evidence of the cost and time commitments entailed by fully answering the records request. Here again, the University relied only on unsworn allegations in its legal memoranda concerning the number of "potentially responsive" records it identified in a "preliminary search." Not only were those allegations formally insufficient, they failed to reflect the reasonable specificity required to sustain an undue burden claim. The University did not disclose the exact parameters of its "preliminary search," nor did it explain the steps the University could take to tailor a search yielding *actually* responsive (as opposed to "potentially responsive") documents. More importantly, the University made no attempt to estimate the time or cost required to answer Appalachian's request. Thus, even if the circuit court could be justified considering unsworn testimony in a Rule 12(b)(6) motion, the University nonetheless failed to establish its undue burden claim with the specificity the Act requires.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument would not significantly aid in the Court's decisional process because the facts and legal arguments can be adequately presented in the briefs and record on appeal. As such, oral argument is unnecessary under Rule 18(a)(4) of the West Virginia Rules of Appellate

Procedure. Because this case turns on narrow issues of settled law, disposition by memorandum decision under Rule 21 of the West Virginia Rules of Appellate Procedure is appropriate.

STANDARD OF REVIEW

This Court reviews *de novo* an order granting a motion to dismiss under West Virginia Rule of Civil Procedure 12(b)(6). Syllabus Point 1, *Barber v. Camden Clark Memorial Hospital*, 240 W. Va. 663, 815 S.E.2d 474 (2018). The Court can affirm the decision below only if "it appears beyond doubt . . . that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Vanderpool v. Hunt*, 241 W. Va. 254, 823 S.E.2d 526, 531 (2019) (quoting *Murphy v. Smallridge*, 196 W. Va. 35, 36, 468 S.E.2d 167, 168 (1996)). As below, the Court's inquiry "goes solely to the sufficiency of the claims as they are presented in the pleadings, and matters outside the pleadings . . . may not be used or considered." *Dunn v. Consolidation Coal*, 180 W. Va. 681, 683, 379 S.E.2d 485, 487 (1989).

The Court interprets the provisions of the West Virginia Freedom of Information Act *de novo*, *Smithers*, 232 W. Va. at 460, 752 S.E.2d at 614—all the while recognizing that the Act's disclosure provisions "are to be liberally construed, and the exemptions [there]to . . . strictly construed." Syllabus Point 3, *Queen v. West Virginia University Hospitals*, 179 W. Va. 95, 365 S.E.2d 375 (1987).

ARGUMENT

I. The circuit court erred by concluding that requested records were exempt from disclosure under Section 5B-2-1.

Section 29B-1-4(a) of the Act enumerates several narrowly construed categories of information exempt from the general disclosure requirement. As relevant here, the Act exempts

"[i]nformation specifically exempted from disclosure by [another] statute." West Virginia Code § 29B-1-4(a)(5). In its motion to dismiss, the University argued that one such statute, West Virginia Code § 5B-2-1, protected responsive documents in the University's possession. A Rule 12(b)(6) motion, however, was an improper vehicle to raise that claim, and the circuit court granted it only by extending beyond the allegations in the complaint to consider "facts" asserted in the University's legal memoranda, unsupported by affidavit or sworn testimony.

A. It was improper for the circuit court to adjudicate the University's exemption claim on the pleadings alone.[3]

1. Appalachian's complaint stated a valid claim for relief under the Act.

A motion to dismiss under Rule 12(b)(6) serves only one function: to "test the sufficiency of the complaint." *Cantley v. Lincoln County Commission*, 221 W. Va. 468, 470, 655 S.E.2d 490, 492 (2007). If a complaint "set[s] forth enough information to outline the elements of a claim or permit [the] inference[ ] . . . that these elements exist," dismissal under Rule 12(b)(6) is improper. *Burke v. Wetzel County Commission*, 240 W. Va. 709, 721, 815 S.E.2d 520, 532 (2018).

Because the Act "presum[es] public accessibility to all public records," the essential elements of Section 29B-1-5 claim are merely that a public body "denied access to public records" that the plaintiff "requested be made available for examination." *Daily Gazette II*, 206 W. Va. at 58, 521 S.E.2d at 550. A plaintiff who alleges as much has pled "a specific cause of action against the organization denying the request." *Id.*; *see also* West Virginia Code § 29B-1-3(d)(3) ("A denial . . . shall afford the person requesting [records] the opportunity to institute proceedings for injunctive or declaratory relief").

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3 Appalachian preserved this issue by arguing in its legal memorandum below that it adequately pled a claim for relief under the Act and that the University's motion to dismiss was procedurally improper. *See* Appendix at A-56–57.

Importantly, a plaintiff need not "allege that the records are *not* within the exemptions set forth" in the Act. *Television Wisconsin v. National Labor Relations Board*, 410 F. Supp. 999, 1001 (D. Wis. 1976) (emphasis added). The Act's statutory exemptions are affirmative defenses, and a plaintiff is therefore "not required to anticipate the[m] in his complaint." *See Hutchison v. City of Huntington*, 198 W. Va. 139, 150, 479 S.E.2d 649, 660 (1996); *see also Booth Newspapers v. Regents of University of Michigan*, 286 N.W.2d 55, 60 (Mich. Ct. App. 1979) (holding that FOIA plaintiffs are "not required to reply to [an] affirmative defense of exemption"); *Harwood v. McDonough*, 799 N.E.2d 859, 863 n.1 (Ill. App. Ct. 2003) (same).[4] Rather, a complainant is entitled to rely on the "presumption of public accessibility to all public records" until the agency successfully rebuts that presumption with evidence at a later stage. West Virginia Code § 29B-1-4(a).

Appalachian's complaint alleged each essential element of a claim under the Act: Appalachian sent the University "a request for records" and the University "refuse[ed] to provide any of the records described therein." Appendix at A-7. Whether those records fit within any of the Act's narrow exemptions was irrelevant in assessing the legal sufficiency of the complaint. As such, the circuit court erred in granting the University's motion on those grounds.

2. *Dismissal under Rule 12(b)(6) was inappropriate because the University bore the burden of proving its statutory exemption claim.*

The Act's statutory exemptions are affirmative defenses that a public body must prove by "clear and convincing evidence." *AT & T Communications*, 188 W. Va. at 253, 423 S.E.2d at 862;

4 In addition to "[r]ecognizing the close relationship between the federal and West Virginia FOIA," this Court has noted the Act also parallels "other state acts" governing the disclosure of government records. *Daily Gazette I*, 198 W. Va. at 573, 482 S.E.2d at 190 (quoting *Sattler v. Holliday*, 173 W. Va. 471, 473, 319 S.E.2d 50, 51 (1984)). As such, this Court has consulted the open records decisions of other states in interpreting West Virginia's own Act. *See*, *e.g.*, *Farley*, 215 W. Va. at 421, 423, 599 S.E.2d at 844, 846 (citing decisions from Louisiana, California, and Wisconsin).

West Virginia Code § 29B-1-4. As this Court has recognized, there is "an inherent problem in using a motion to dismiss" to raise an affirmative defense. *Sattler v. Bailey*, 184 W. Va. 212, 222 n.14, 400 S.E.2d 220, 230 n.14 (1990) (quoting *Richards v. Mileski*, 662 F.2d 65, 73 (D.C. Cir. 1981)). That is because affirmative defenses are "generally riddled with questions of fact which the *Defendants* must establish in order to bar Plaintiffs' claims." *E.K. v. Department of Health*, No. 16-0773, 2017 WL 5153221 at *6 (W. Va. Nov. 7, 2017) (memorandum decision) (quoting *Allen v. Dairy Farmers of America*, 748 F. Supp. 2d 323, 353–54 (D. Vt. 2010)). Rule 12(b)(6), by contrast, focuses on the sufficiency of a *plaintiff's* claims. The limited analysis permitted under Rule 12(b)(6) typically prevents a court from reaching the factual underpinnings of an affirmative defense. A litigant who requests that it do so usually succeeds only in "impos[ing] an undue burden on the trial court and imped[ing] the orderly administration of the lawsuit." *Bailey*, 184 W. Va. at 222 n.14, 400 S.E.2d at 230 n.14.

Suits under the Act are no exception. Exemption claims present "a *factual* dispute regarding whether the documents actually fit" within the statutory criteria. *Vaughn*, 484 F.2d at 824. Factual undertakings of that type "are inappropriate for a circuit court deciding a motion to dismiss." *Shaffer v. Division of Highways*, 208 W. Va. 673, 679, 542 S.E.2d 836, 842 (2000). That is why this Court has consistently recognized that "[s]ummary judgment is the preferred method of resolving cases brought under" the Act. *Farley*, 215 W. Va. 412 at 418, 599 S.E.2d at 841 (quoting *Evans*, 276 F. Supp. 2d at 37). At that stage—unlike at the pleading stage—the agency can submit affirmative evidence to sustain its statutory burden.

Accordingly, state and federal courts alike have rejected attempts to litigate statutory exemptions to disclosure on the pleadings alone. *See*, *e.g.*, *Bey v. Department of Justice*, 565

F. Supp. 2d 5, 9–10 (D.D.C. 2008) (denying motion to dismiss and directing agency to "file a proper dispositive motion, with supporting declarations or exhibits as appropriate"); *Green v. Unified Government of Wyandotte County*, 397 P.3d 1211, 1213 (Kan. Ct. App. 2017) (holding that, because "a public agency denying disclosure of a record has the burden of proof in court to show that its action was proper," a trial court cannot "properly dismiss [a requestor's] claim based just on the allegations of the petition"); *Hearst Corp. v. New York State Police*, 966 N.Y.S.2d 557, 560 (N.Y. App. Div. 2013) (reversing grant of a motion to dismiss open records claim because "the record [wa]s devoid of any affidavit or other evidence" substantiating agency's exemption claim); *Killam Ranch Properties v. Webb County*, 376 S.W.3d 146, 157 (Tex. App. 2012) (reversing grant of "no-evidence motion for summary judgment on an affirmative defense that [the government] has the burden to prove at trial").

The only exception to this rule is where a plaintiff pleads himself out of court by alleging the very facts that "conclusively establish the affirmative defense." *Forshey v. Jackson*, 222 W. Va. 743, 747, 671 S.E.2d 748, 752 (2008). Consistent with its obligation under Rule 12(b)(6) to accept the allegations of a complaint as true, a court may resolve the exemption claim by considering those allegations to be established fact. For example, in *Swann v. Porterfield*, No. 04-C-264, 2004 WL 5362590 (W. Va. Cir. March 31, 2004)—the only case the University cited below in support of the propriety of its motion, Appendix at A-75—the court entertained a motion to dismiss a complaint that arose from a request to examine all records of a police department "involving or resulting from" a specific crime. A Rule 12(b)(6) motion was appropriate in that case because the underlying request *necessarily* sought law enforcement records that were exempt from disclosure under West Virginia Code § 29B-1-4(4)(A). In other words, the *Swann* requester's "allegations,

even if true, would not entitle h[im] to relief." *Adkins v. Civil Service Commission*, 160 W. Va. 720, 723, 241 S.E.2d 428, 430 (1977).

The same cannot be said, however, of Appalachian's complaint. As further explained below, sustaining the University's exemption claim required the circuit court to go beyond Appalachian's complaint and judicially noticeable facts. The University's Rule 12(b)(6) motion was therefore an inappropriate vehicle for raising its affirmative defense under West Virginia Code § 5B-2-1, and the circuit court erred by granting it.

3. *The circuit court reached beyond the allegations in Appalachian's complaint.*

In considering a motion under Rule 12(b)(6), a court "is essentially limited to the content of the complaint." *Camden-Clark Memorial Hospital v. Nguyen*, 240 W. Va. 76, 79, 807 S.E.2d 747, 750 (2017) (quoting *State v. Bayer Corp.*, 32 So.3d 496, 502 (Miss. 2010)). It may consider documents "fairly incorporated within" the pleadings and matters "susceptible to judicial notice," but any other "material extrinsic to the complaint [can]not be considered" without converting the motion into one for summary judgment. *Forshey*, 222 W. Va. at 747–48, 671 S.E.2d at 752–53. And when a court *does* convert a Rule 12(b)(6) motion into a motion for summary judgment under Rule 56, it must provide the parties with clear "notice of the changed status of the motion and a reasonable opportunity to present all material made pertinent to such a motion." Syllabus Point 4, *Riffle v. C.J. Hughes Construction*, 226 W. Va. 581, 703 S.E.2d 552 (2010).

Although the circuit court below made no factual findings and provided no analysis in support of its decision, it could not have resolved the University's exemption claim on its merits *without* looking beyond the four corners of the complaint. The University's claim was premised entirely on facts outside of the pleadings: that Dr. Sun performs "dual roles" as both a University employee and a member of the Development Office, Appendix at A-77; that the records

Appalachian requested were "obtained through [his] work with the . . . Development Office," *id.* at A-40; and that he "received [them] for the express purpose of furnishing assistance to a new or existing business," *id.* at A-35. Those are not facts subject to judicial notice,[5] and nothing fairly incorporated within Appalachian's complaint—including, even, the University's initial response to Appalachian's request—so much as hints at them. *Id.* at A-28–29.

The circuit court, then, could only account for those facts by transforming the motion to dismiss into an evidentiary motion for summary judgment.[6] It did not do so. The court's intent to decide the case under Rule 12(b)(6) is apparent on the face of its written order. *See State v. Allman*, 234 W. Va. 435, 438, 765 S.E.2d 591, 594 (2014) ("A circuit court speaks through its written orders"). Not only is that order styled as an "Order Granting [a] Motion to Dismiss," Appendix at A-85, it purports to apply the "well established" standard for Rule 12(b)(6) motions, *id.* at A-86 (citing Syllabus, *Flowers v. City of Morgantown*, 166 W. Va. 92, 272 S.E.2d 663 (1980)). Moreover, the court never provided the parties notice of its intent to consider external evidence, depriving Appalachian of any "reasonable opportunity to present all material made pertinent to such a motion." Syllabus Point 4, *Riffle*, 226 W. Va. 581, 703 S.E.2d 552.

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5 In a legal memorandum supporting its motion to dismiss, the University invited the court to take judicial notice of a Department of Commerce press release. Appendix at A-33, A-47–52. However, nothing in that document touches on the operative facts of the University's exemption claim.

6 The University's motion would have failed even under Rule 56. As explained below in Section I-B of this brief, the University failed to produce a scintilla of competent evidence on a claim it bore the burden of proving by clear and convincing evidence. *Cf. Jackson v. Putnam County Board of Education*, 221 W. Va. 170, 177, 653 S.E.2d 632, 639 (2007) ("[S]ummary judgment cannot be defeated on the basis of factual assertions contained in the brief[ing]," and parties must "make sure that *evidence* relevant to a judicial determination [is] placed in the record.") (emphasis added).

B. The circuit court lacked any evidentiary basis for finding that records described in Appalachian's request were exempt from disclosure under Section 5B-2-1.[7]

In a suit under the Act, the government bears "the burden of showing the express applicability of [an] exemption to the material requested." Syllabus Point 4, *Smithers*, 232 W. Va. 449, 752 S.E.2d 603. To carry that burden, it must present clear and convincing evidence that the record withheld—or information in that record—falls within one of the exemptions enumerated in West Virginia Code § 29B-1-4. *See AT & T Communications*, 188 W. Va. at 253, 423 S.E.2d at 862 (requiring clear and convincing evidence to sustain exemption claim).

If an agency invokes a statutory exemption, however, syllabus-point law requires it submit at least two forms of evidence: (1) a *Vaughn* index with "a relatively detailed justification as to why each document is exempt, specifically identifying the reason(s) why an exemption . . . is relevant" and that "correlat[es] the claimed exemption with the particular part of the withheld document to which the claimed exemption applies;" and (2) an "affidavit indicating why disclosure of the documents would be harmful and why such documents should be exempt." Syllabus Point 13, *Smithers*, 232 W. Va. 449, 752 S.E.2d 603. That evidence is required even where "the basis of the[ ] refusal to disclose is evident from the pleadings." *Hurlbert*, 233 W. Va. at 596 n.14, 760 S.E.2d at 165 n.14. In some instances, the index and affidavit may not alone provide an adequate factual basis for the exemption claim, and a circuit court may also take oral testimony, review additional affidavits, or order *in camera* review. West Virginia Code § 29B-1-5(2); *Canterbury*, 224 W. Va. at 714, 688 S.E.2d at 323.

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7 Appalachian preserved this issue by arguing in its legal memorandum below that the University had failed to present affirmative evidence to sustain its statutory exemption claim. *See* Appendix at A-56–57.

While the *type* of evidence required may vary from case to case, the basic requirement that an agency submit competent evidence in support of its claim is steadfast: the government, like any other party to litigation, must adduce competent, admissible evidence to carry its burden. *See*, *e.g.*, *Smithers*, 232 W. Va. at 473, 752 S.E.2d at 627 (vacating circuit court's exemption finding "[b]ecause there was no evidence submitted below regarding th[e] exemption"). Unless confronted with concrete evidence, a requestor is denied "a full and concentrated opportunity to challenge and test comprehensively the agency's evidence regarding all claimed exemptions." *Senate of Puerto Rico ex rel. Judiciary Committee v. Department of Justice*, 823 F.2d 574, 580 (D.C. Cir. 1987). As such, a "fair arbitration requires a substantial quantum of information." *Ely v. Federal Bureau of Investigation*, 781 F.2d 1487, 1490 (D.C. Cir. 1986).

The University failed to present even a scintilla of competent evidence below. It proffered no *Vaughn* index, affidavit, declaration, or oral testimony. Nor, even, did it request *in camera* inspection to corroborate its exemption claim. Its entire case was premised on new facts within its unsworn legal memoranda. But an "assertion by a lawyer or *pro se* litigant, orally or in legal memorandums, is not evidence." *Rebuild America v. Davis*, 229 W. Va. 86, 95 n.15, 726 S.E.2d 396, 405 n.15 (2012); *Long v. Bureau of Economic Analysis*, 646 F.2d 1310, 1321 (9th Cir. 1981) (holding that "legal memoranda and oral argument are not evidence" capable of sustaining a FOIA exemption claim); *COMPTEL v. Federal Communications Commission*, 945 F. Supp. 2d 48, 60 (D.D.C. 2013) (holding that "[s]tatements made by counsel in briefs are not admissible evidence upon which" a FOIA exemption claim can be upheld).

Courts cannot merely take the government at its word when it claims an exemption applies. *See Bey*, 565 F. Supp. 2d at 9–10 (denying motion to dismiss open records claim given the

"absen[ce of] a declaration, affidavit, or index describing the records withheld and a showing that the[y] fall within the claimed exemptions"); *Mobil Oil v. Federal Trade Commission*, 406 F. Supp. 305, 312 (S.D.N.Y. 1976) (concluding that agency had "not remotely sustained [its] burden" where it "failed to present a single affidavit . . . concluding the documents in question are confidential or privileged"); *Booth Newspapers*, 286 N.W.2d 55 at 61 ("If the [agency] desired summary disposition of its affirmative defense, it was incumbent upon it to offer to the trial court affidavits or other materials sufficient to show that failure of its defense was factually impossible."). Nothing in the Act modifies the general rule that a trial court's findings must be "supported by competent evidence." *Rebuild America*, 229 W. Va. at 95 n.15, 726 S.E.2d at 405 n.15 (quoting Syllabus Point 4, *Boggs v. Settle*, 150 W. Va. 330, 145 S.E.2d 446 (1965)). Because the University's claim lacks any evidentiary support whatsoever, this Court is "compelled to reverse on the basis that there is no competent evidence in the record upon which the trial court could have made its findings." *Id.*

C. The unsworn allegations on which the circuit court based its decision are on their own terms insufficient to justify the decision below.

While a public body must present *some* affirmative evidence in support of its denial of a records request, not just *any* evidence will do. "Specificity is the defining requirement" of the government's burden, and its evidence must "strive to correct, however imperfectly, the asymmetrical distribution of knowledge that characterizes FOIA litigation." *King v. Department of Justice*, 830 F.2d 210, 218–19 (D.C. Cir. 1987).

To that end, the agency must first submit evidence of "a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested." *Oglesby*, 920 F.2d at 68. If the agency opts to invoke a statutory

exemption for any records uncovered in that search, it must submit evidence identifying and describing those records. *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981).[8] Finally, an agency must provide factual support for each "essential element of the claimed privilege or shield," *Puerto Rico Senate*, 823 F.2d at 585, tying the "specific characteristics of the [record] to all of the legal requirements of th[e] exemption," *Southern Alliance for Clean Energy v. Department of Energy*, 853 F. Supp. 2d 60, 74 (D.D.C. 2012); *see also*, *e.g.*, *Daily Gazette I*, 198 W. Va. at 573, 482 S.E.2d at 190 (detailing individual elements of a successful defense under the deliberative process exemption).

Even assuming the "facts" in the University's legal memoranda are true, the University *still* failed to provide an adequate factual basis on which to adjudicate its exemption claim. The University relies on West Virginia Code § 5B-2-1, which states, in relevant part:

> Any documentary material, data or other writing made or received by the West Virginia Development Office or other public body, whose primary responsibility is economic development, for the purpose of furnishing assistance to a new or existing business shall be exempt from the provisions of [the Act]: Provided, That any agreement entered into or signed by the Development Office or public body which obligates public funds shall be subject to inspection and copying pursuant to [the Act] as of the date the agreement is entered into, signed or otherwise made public.

The University has failed to provide information in support of each element of a defense under Section 5B-2-1. By way of illustration, below is a non-exhaustive list of factual issues that remain to be explored before the trial court can consider the University's defense.

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8 In certain situations—none of which are applicable here—a public body may alternatively submit an affidavit "explaining in as much detail as is possible the basis for its claim that it can be required neither to [publicly] confirm nor deny the existence of the requested records." *Ely*, 781 F.2d at 1493. This so-called "Glomar response" is named for the Hughes–Glomar Explorer, a massive submersible barge whose mission implicated grave matters of national security, preventing the CIA from either confirming or denying the existence of records describing it. *See generally Military Audit Project*, 656 F.2d 724.

(a) Did the University conduct an adequate search for records responsive to Appalachian's request? Before even reaching its justifications for withholding responsive records, an agency must assure the court and the requestor that it has fairly set the terms of the debate: "The government bears the initial burden of showing that it conducted an adequate search." *Moffat v. Department of Justice*, 716 F.3d 244, 254 (1st Cir. 2013). An agency can meet this requirement by submitting a "reasonably detailed affidavit, setting forth the search terms and the type of search performed, and averring that all files likely to contain responsive materials . . . were searched." *Oglesby*, 920 F.2d at 68. Neither the University's legal memoranda nor its initial denial of Appalachian's request explains the contours of the University's search—or, for that matter, whether it conducted a search for parts (1) and (2) of the request at all.

(b) Does the University actually possess records responsive to parts (1) and (2) of Appalachian's request? In order to provide "a relatively detailed justification as to why each document is exempt," *Smithers*, 232 W. Va. at 471, 752 S.E.2d at 625, an agency must first acknowledge the existence of each such document. *See Citizens for Responsibility and Ethics in Washington v. Department of Justice*, 746 F.3d 1082, 1100 (D.C. Cir. 2014) (concluding that agency's evidence in support of its exemption claim "lack[ed] the reasonably specific detail required to carry its burden" where it "never specifies how many responsive documents exist"); *Broward Bulldog v. Department of Justice*, No. 12-61735-CIV, 2014 WL 2999205, at *2 (S.D. Fla. April 4, 2014) ("[T]he Court cannot plausibly take an active role in determining whether specific exemptions apply until the Court has knowledge of the existence or non-existence of and access to the materials Plaintiffs are actually seeking."). This Court has similarly recognized that an undue

burden claim cannot be resolved until "the particular [information] upon which exemption will be claimed [is] identified." *Hurlbert*, 233 W. Va. at 596 n.15., 760 S.E.2d at 165 n.15.

In its initial response to Appalachian's request, the University acknowledged the existence of at least one responsive agreement. *See* Appendix at A-33 (construing parts (1) and (2) of the request as seeking "the memorandum of understanding between China Energy . . . and the West Virginia Department of Commerce"). Presumably, the University possesses a copy of that agreement. If it did not—for example, if Dr. Sun has *always and only* possessed a copy solely in his capacity as a Development Office official—the University could have stated as much. Instead, it denied Appalachian's request due to the fact that it was "not a signatory" to that agreement, and then moved to dismiss Appalachian's complaint on grounds that a statutory exemption applied to records it was otherwise responsible for disclosing. Nonetheless, the University has not unequivocally stated that it possesses the agreement it described in its initial response. *See*, *e.g.*, *id*. at A-76 (asserting only that "*to the extent* that the University's Energy Institute has any [such] documents . . . they exist because of Dr. Sun's work at the . . . Development Office") (emphasis added). Nor has the University explained whether it possesses *other* documents responsive to Appalachian's request for agreements and project lists.

(c) Is any record responsive to Appalachian's request an "agreement . . . which obligates public funds"? An agency must provide factual support for each "essential element of the claimed privilege or shield." *Puerto Rico Senate*, 823 F.2d at 585. By its express terms, the economic development exemption in Section 5B-2-1 does not extend to an "agreement entered into or signed by . . . [a] public body which obligates public funds." Proving that responsive records fall

within the exemption necessarily requires proof that they fall outside of that "public funds" carve-out.

(d) In what capacity—and for what purpose—did Dr. Sun receive records responsive to Appalachian's request? Individuals who hold dual positions with two employers "can and do 'change hats' to represent [those employers] separately." *United States v. Bestfoods*, 524 U.S. 51, 69 (1998). But whether an individual acted in one capacity or another at any given time is a factual question. *Kidd v. Mull*, 215 W. Va. 151, 161, 595 S.E.2d 308, 317 (2004). Therefore, merely identifying Dr. Sun as *both* a University and Development Office official fails to resolve the question of which "hat" he was wearing when he received (or continued to possess) the documents in question. Rather, successfully invoking the economic development exemption in Section 5B-2-1 requires evidence regarding "how and under what circumstances" Dr. Sun received the records at issue. *Jefferson v. Department of Justice*, 284 F.3d 172, 176–77 (D.C. Cir. 2002) (whether records were "compiled for law enforcement purposes" and therefore exempt from federal FOIA is a question that "focus[es] on how and under what circumstances the requested files were compiled"). The University failed to provide that necessary context below.

(e) Is Dr. Sun the only Energy Institute staff member who received records responsive to Appalachian's request? The University nowhere indicates that other Energy Institute staff members also serve in the Development Office. Presumably, then, if other staff members received records responsive to Appalachian's request, they did not do so as a representative of the Development Office. The records—as received by those other staff members—could not, therefore, qualify as records received by an agency "whose primary responsibility is economic development" and would be subject to disclosure.

* * *

The University's defense cannot hold water until it patches each of the factual holes identified above.[9] In other words, its allegations fail to meet the Act's demanding standard to show, by clear and convincing evidence, "that failure of its defense was factually impossible." *Booth Newspapers*, 286 N.W.2d at 61. This Court should reverse accordingly.

II. The circuit court erred by concluding that Appalachian's request imposed an undue burden on the University.

When responding to a request under the Act, an agency has a *sua sponte* duty to segregate exempt from non-exempt information in a responsive record so that it can provide a minimally redacted copy to the requester. *See generally Farley*, 215 W. Va. at 420–25, 599 S.E.2d at 843–46. That duty, however, does not require that "information requests . . . become mechanisms to paralyze other necessary government functions." *Id.* at 422 n.14, 599 S.E.2d at 845 n.14. When, for example, the "segregation process would take eight work years" to complete, or involve locating "every chronological office file and correspondent file, internal and external, for every branch office [and] staff office," an agency can invoke the Act's "undue burden" doctrine. *See*, *respectively*, *id.*, at 423, 599 S.E.2d at 846 (citing *Solar Sources v. United States*, 142 F.3d 1033,

9 In its legal memorandum below, Appalachian questioned whether the University can *ever* properly invoke Section 5B-2-1. *See* Appendix A-57–65. Because the circuit court's procedural errors require remand, however, the limits of the economic development exemption is not a "question[ ] that must be decided in order to resolve" this appeal. *McComas v. Fayette County Board of Education*, 197 W. Va. 188, 206, 475 S.E.2d 280, 299 (1996); *see also State ex rel. UMWA International Union v. Maynard*, 176 W. Va. 131, 137 n.6, 342 S.E.2d 96, 102 n.6 (1985) (refusing to reach disputed issue because reversal was warranted "on a more narrow ground"). Whether the undisputed facts that the University manages to produce establish an "entitle[ment] to judgment as a matter of law" is a question properly addressed below on summary judgment. *See* West Virginia Rule of Civil Procedure 56(a). Appalachian reserves its right to address the scope of the exemption at that time.

1039 (7th Cir. 1998)); *Highland Mining v. West Virginia University School of Medicine*, 235 W. Va. 370, 391, 774 S.E.2d 36, 57 (2015) (quoting *American Federation of Government Employees v. Department of Commerce*, 907 F.2d 203, 208–09 (D.C. Cir. 1990)). But as with a statutory exemption, a public body still bears the burden of justifying its action. Therefore, it must do more than "simply state in a conclusory or cursory manner that redaction would be unreasonably burdensome or costly." *Farley*, 215 W. Va. at 423, 599 S.E.2d at 846. Both the University's written response and its Rule 12(b)(6) motion failed to meet that standard.

A. The circuit court could not resolve the University's undue burden claim on the pleadings alone.[10]

The Act places "the burden . . . on the public body to sustain its action." West Virginia Code § 29B-1-5(2). By its plain language, that charge applies to *any* action an agency takes in response to a request for records. An agency that withholds responsive documents under a claim of undue burden therefore bears the burden of establishing that such a burden actually exists. *Farley*, 215 W. Va. at 423, 599 S.E.2d at 846. As with a statutory exemption claim, the existence of an undue burden is a factual question. *See*, *e.g.*, *Schrecker v. Department of Justice*, 254 F.3d 162, 165 (D.C. Cir. 2001) (holding that agency must point to evidence "in the record to suggest that the search actually required will be unduly burdensome"). And again, the limits of a Rule 12(b)(6) analysis generally prevent a court from reaching that question. The circuit court erred by

10 Appalachian preserved this issue below by arguing in its legal memorandum that the University's motion was procedurally improper because the University bore the burden of affirmatively establishing an undue burden. *See* Appendix at A-66, A-69.

overstepping those limits in order to consider the University's undue burden claim on its merits.[11] *Shaffer*, 208 W. Va. at 679, 542 S.E.2d at 842.

B. The circuit court's undue burden finding lacked any evidentiary basis.[12]

Like a statutory exemption claim, a claim of undue burden presents a factual question answerable only by competent evidence. *Linder v. Department of Defense*, 133 F.3d 17, 24 (D.C. Cir. 1998) (vacating trial court's undue burden finding made "[w]ithout evidence from the [agency] describing the precise nature of its burden"); *Hinton v. Department of Justice*, 844 F.2d 126, 130 n.1, 132 (3d Cir. 1988) (affirming trial court's rejection of "*unsupported* and conclusory claims of burden") (emphasis added); *Hites v. Waubonsee Community College*, 117 N.E.3d 408, 422 (Ill. App. Ct. 2018) (holding that trial court in open records case erred by sustaining undue burden claim without making factual findings supported by the evidence). And as in other contexts, "self-serving assertions without factual support in the record" simply will not do. *Williams v. Precision Coil*, 194 W. Va. 52, 61 n.14, 459 S.E.2d 329, 338 n.14 (1995).

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11 Although the University's undue burden argument revolves solely on the number of "potentially responsive" documents identified in its "preliminary search," it also argued below that Appalachian's request "failed to provide reasonable specificity." *See* Appendix at A-40. Even when pressed on this argument, *id.* at A-69, the University failed to point to any actual ambiguity in the request, *id.* at A-78–79. Indeed, the very fact that it was able to conduct a search for responsive documents proves that Appalachian's request met the Act's "reasonable specificity" requirement. *See Ruotolo v. Department of Justice*, 53 F.3d 4, 10 (2d Cir. 1995) ("[A] reasonable description of records [i]s one that enables 'a professional employee of the agency who is familiar with the subject area of the request to locate the record with a reasonable amount of effort.") (quoting House Report No. 93-876, 93rd Congress 2d Session 6 (1974)).

12 Appalachian preserved this issue by arguing in its legal memorandum below that the University failed to support its undue burden claim with any affirmative evidence. *See* Appendix at A-66, A-68–69.

The University submitted no evidence in support of its undue burden claim. It merely pointed to unsworn factual allegations in its legal memorandum. Those allegations, however, are not evidence. *Rebuild America*, 229 W. Va. at 95 n.15, 726 S.E.2d at 405 n.15; *Long*, 646 F.2d at 1321; *COMPTEL*, 945 F. Supp. 2d at 60. This Court is therefore "compelled to reverse on the basis that there is no competent evidence in the record upon which the trial court could have made its findings." *Rebuild America*, 229 W. Va. at 95 n.15, 726 S.E.2d at 405 n.15.

C. Even the University's unsworn allegations failed to establish that Appalachian's request entailed an undue burden.[13]

As with a statutory exemption defense, an agency must produce specific evidence detailing the "undue burden" entailed by a request for records. It is not enough for an agency to "simply state in a conclusory or cursory manner that redaction would be unreasonably burdensome or costly." *Hurlbert*, 233 W. Va. at 596, 760 S.E.2d at 165. Instead, an "agency should describe what proportion of the information in a document is non-exempt and how that material is dispersed throughout the document." *Farley*, 215 W. Va. at 424, 599 S.E.2d at 847 (quoting *Mead Data Central v. United States*, 566 F.2d 242, 261 (D.C. Cir. 1977)). At the very least, it must provide "specific information on the cost to redact information," *Hurlbert*, 233 W. Va. at 596, 760 S.E.2d at 165, such that "litigants and judges will be better positioned to test the validity of the agency's claim," *Farley*, 215 W. Va. at 424, 599 S.E.2d at 847 (quoting *Mead Data*, 566 F.2d at 261).

The University premised its undue burden claim on the unsworn assertion that a "preliminary search using the provided parameters yielded more than 15,000 potentially

13 Appalachian preserved this issue by arguing in its legal memorandum below that the University's allegations failed to provide the specificity required of an undue burden claim. *See* Appendix at A-66–67.

responsive e-mails." Appendix at A-36. Even if that allegation were reduced to a formal affidavit, it would still lack the "reasonable specificity" the Act requires. *Farley*, 215 W. Va. at 424, 599 S.E.2d at 847 (quoting *Billington v. Department of Justice*, 301 F. Supp. 2d 15, 23 (D.D.C. 2004)). Most notably, the University failed to explain what it meant by "*potentially* responsive" e-mails. Presumably, if the University performed an electronic search of Energy Institute e-mails in accordance with the parameters described in Appalachian's request, the search would have yielded *responsive* records—full stop. Although Appalachian raised this point—both in its complaint and in its response to the University's motion, Appendix at A-11, A-66–67—the University failed to explain why its search was so untargeted as to yield only "*potentially* responsive" records.

The University also refused to provide any estimate of the cost of fulfilling Appalachian's request. Appalachian similarly pointed out this fact in responding to the University's motion to dismiss. *Id.* at A-68. The University responded only by reiterating its conclusory allegation that Appalachian's request was "overly broad and unduly burdensome" on its face. *Id.* at A-78.

This Court has cited with approval a decision "rejecting [a] claim of undue burden when [the] defendants merely claim[ed] that manually searching 25,000 paper files would be costly and take many hours to complete." *Highland Mining*, 235 W. Va. at 391, 774 S.E.2d at 57 (citing *Public Citizen v. Department of Education*, 292 F. Supp. 2d 1, 6 (D.D.C. 2003)). Given that undue burden claims are particularly suspect where "the information is electronically stored and susceptible to sorting and searching," *Hurlbert*, 233 W. Va. at 596 n.15, 760 S.E.2d at 165 n.15, the University failed to establish an undue burden claim merely by alleging its "preliminary

search" identified some 15,000 "potentially responsive" e-mails. The circuit court erred by sustaining the University's undue burden claim based only on such threadbare conclusions.

CONCLUSION

The circuit court abdicated its duty under the Act to conduct a *de novo* review of the University's denial. As such, Appalachian Mountain Advocates respectfully requests that this Court reverse the decision below and remand for further proceedings in accordance with the Act.

Dated: June 24, 2019

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CERTIFICATE OF SERVICE

I certify that on June 24, 2019, I served an accurate copy of the attached Opening Brief of the Petitioner upon the following by First-Class, United States Mail and by electronic mail:

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