A MACKINAC CENTER REPORT

Howell Education Association v. Howell Board of Education

An Amicus Curiae Brief to the Michigan Court of Appeals

Patrick J. Wright

A Mackinac Center "friend of the court" filing to the Michigan Court of Appeals in a case involving a violation of the state's Freedom of Information Act

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ABOUT THIS DOCUMENT: A BRIEF OF AMICUS CURIAE

On March 18, 2009, the Mackinac Center for Public Policy filed a brief of amicus curiae* with the Michigan Court of Appeals in *Howell Education Association v. Howell Board of Education.* The immediate issue is whether e-mails to and from public school employees on a school district e-mail system can be sought under the Freedom of Information Act (FOIA). But the case may be extremely important in determining whether FOIA continues to provide the public with a cheap and effective means of monitoring governmental action. In its amicus brief, the Mackinac Center sought a ruling that would maintain FOIA's usefulness.

The case arose in the context of negotiations for a new collective bargaining agreement for the Howell Public Schools. A political commentator filed a FOIA request for e-mails to and from three union officials who taught at the schools to see if tax-funded lobbying was occurring, to determine if the e-mail system was being used for legitimate educational purposes and to obtain more information about the bargaining dispute between the district and the union over health care benefits. The three union officials generated or received around 20,000 e-mails over a three-month period. The officials filed a "reverse-FOIA" suit seeking to prevent disclosure of the material.† The political commentator was allowed to intervene in the suit and was provided with the subject titles to these e-mails. He eliminated over 14,000 on that basis.

The crux of the officials' argument was that many of the e-mails were not "public records" under MCL 15.232(e),

* "Amicus curiae" means "friend of the court." Thus, the Mackinac Center is not a litigant in this case, but rather an interested observer supplying additional legal reasoning for the Michigan Court of Appeals to consider.

† Joining this lawsuit was a fourth union official who did not teach at the school but whose e-mails within the school's e-mail system were part of the FOIA request.

as they did not relate to an "official function." The trial court granted a temporary restraining order that prevented disclosure of the e-mails. A "discovery master" was appointed to review the e-mails, and eventually the trial court held that all of them could be disclosed under FOIA. The trial court nevertheless stayed its decision pending the school officials' appeal.

EXECUTIVE SUMMARY

The Freedom of Information Act (FOIA) is designed to help citizens keep track of the affairs of their government. The Legislature intended the law to be quick, easy and inexpensive for citizens to use. The Mackinac Center's brief asks the court to retain the plausible and consistent meaning of the terms "public record" and "official function" and thereby maintain FOIA's utility.

All public records not exempted by MCL 15.243 are subject to FOIA. The courts have consistently prevented attempts by public entities and their employees to narrow the focus of the law through provisions in collective bargaining agreements.

A political commentator filed a FOIA request for e-mails to and from three union officials who taught at the schools to see if tax-funded lobbying was occurring, to determine if the e-mail system was being used for legitimate educational purposes and to obtain more information about the bargaining dispute between the district and the union related over health care benefits. The e-mail account was provided by the school district and contained a sign-on page that informed the employee that the e-mail system was not private every time the employee used the account. The union officials/public school employees argued that if an individual e-mail did not discuss an "official function" of their job, then that particular e-mail should not be disclosed.

There is not much case law on the meaning of "official function," but the best reading looks broadly at the service provided — here, the creation of an e-mail system to facilitate communication between school employees and the public — versus viewing it narrowly, which would require that each individual communication be examined. The broader categorical approach is easier to apply and would allow discovery of records where employees were acting illegally or failing to perform their jobs. Under the union

officials'/public school employees' reading, an individual seeking copies of spent checks would not be entitled to records that showed embezzlement, since criminal activity is not an "official function" under the narrow reading of the term. A broad reading, on the other hand, would prevent public officials from having to make discretionary calls about the importance of certain content in documents and would prevent a flood of litigation over those discretionary determinations.

In support of the broad reading, the Mackinac Center's brief analogized the term "official function" to the term "under color of [state law]" in 42 U.S.C. § 1983, which allows for suits when state or local officials engage in activities that violate federal constitutional law or federal statutes. The federal courts construed the term "under color of [state law]" broadly, in order to capture the most improper conduct. That same consideration should apply here. FOIA was meant to facilitate citizens' oversight of their government, and the statute should be construed in that manner.

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JURISDICTIONAL STATEMENT

Amicus curiae does not contest jurisdiction. The trial court declared that numerous e-mails should be provided to Intervenor Chetly Zarko, who sought them pursuant to the Freedom of Information Act (FOIA). But the trial court stayed its order pending appeal. Thus, there is a live controversy in this case.

STATEMENT OF QUESTION INVOLVED

Are e-mails sent and received by public school teachers on a school-district provided e-mail system "public records" under the Freedom of Information Act?

Plaintiffs-Appellants say "No."

Defendants-Appellees say "Yes."

Intervenor-Appellee says "Yes."

Amicus Curiae says "Yes."

STATEMENT OF FACTS

In March 2007, Intervenor Chetly Zarko began filing a series of Freedom of Information Act requests seeking e-mails to and from three Howell Public School teachers that postdated January 1, 2007. The requests were made in the context of heated negotiations for a new collective bargaining agreement that was playing out in part in the local media market. The teachers all had ties to the local Michigan Education Association affiliate, the Howell Education Association: (1) Doug Norton – president of the HEA; (2) Jeff Hughey – vice president for bargaining; and (3) Johnson McDowell – vice president for grievances. Zarko also specifically sought any e-mails to and from Barbara Cameron, a MEA UniServ Director, and those three employees.[1]

The e-mails were all on the school district's computer system. In order to use this system, a school employee had to first view a sign-in screen that contained the following warning:

> This is a Howell Public Schools computer system. Use of this system is governed by the Acceptable Use Policy, which may be viewed at http://howellschools.com/aup.html.
>
> All data contained on any school computer system is owned by Howell Public Schools, and may be monitored, intercepted, recorded, read, copied, or captured in any manner by authorized school personnel. Evidence of unauthorized use may be used for administrative or criminal action.
>
> By logging onto this system, you acknowledge your consent to these terms and conditions of use.

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1 For ease of reference all of the parties that are either a union or affiliated with a union will be referred to as the union parties. Howell Board of Education and Howell Public Schools will be referred to as the school district parties. Finally, Chetley Zarko will be referred to as either Zarko or intervenor.

The acceptable use policy contained the following terms and conditions:

> 4. Users of District technology will be responsible for its use and misuse. Appropriate use of District technology is defined as use in furtherance of the instructional goals and mission of the District. Users should consider any use, which does not fall under this definition of appropriate use as being potential misuse for which a loss of technology use and disciplinary consequences may occur.
>
> . . .
>
> 10. E-mail is not considered private communication. It may be re-posted. It may be accessed by others and is subject to subpoena. School officials reserve the right to monitor any and all activity on the district's computer system and to inspect any user's e-mail files.

The four individuals, the HEA, and the MEA filed a "reverse-FOIA" suit seeking, in part, a declaration that the "personal e-mails to and from Plaintiffs are not 'public records'" and that the "e-mails to and from Plaintiffs and HEA members that pertain to union business are not 'public records.'" Complaint at ¶¶41-42.

The school district parties provided Zarko with subject titles to numerous e-mails. This allowed Zarko to eliminate around 75% of the list, but still left 5,500 e-mails. Intervenor-Appellee's Brief at 2. These e-mails underwent an arduous in-camera review by a special discovery master at the behest of the trial court, and on October 2, 2008, the trial court declared that those e-mails were "public records." On November 20, 2008, the trial court stayed that judgment pending this appeal.

ARGUMENT

I. The e-mail accounts provided by the school district are public records under MCL 15.232.

A. Standard of review

In *Herald Co Inc v Eastern Michigan University Board of Regents*, 475 Mich 463 (2006), the Michigan Supreme Court clarified the standard of review for FOIA cases:

> First, we continue to hold that legal determinations are reviewed under a de novo standard. Second, we also hold that the clear error standard of review is appropriate in FOIA cases where a party challenges the underlying facts that support the trial court's decision. In that case, the appellate court must defer to the trial court's view of the facts unless the appellate court is left with the definite and firm conviction that a mistake has been made by the trial court. Finally, when an appellate court reviews a decision committed to the trial court's discretion . . . we hold that the appellate court must review the discretionary determination for an abuse of discretion and cannot disturb the trial court's decision unless it falls outside the principled range of outcomes.

Id. at 471-72.

B. The FOIA is meant to maximize the public's access to information related to the functioning of government

MCL 15.231(2) sets forth the legislatively enacted purpose of the FOIA:

> It is the public policy of this state that all persons . . . are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials

> and public employees, consistent with this act. The people shall be informed so that they may fully participate in the democratic process.

Id.

The courts have recognized this public policy. For instance, the Michigan Supreme Court has stated that the FOIA is "a prodisclosure act." *Coblentz v Novi*, 475 Mich 558, 572 (2006). This Court stated:

> The FOIA protects a citizen's right to examine and to participate in the political process. *Booth Newspapers, Inc v Univ of Michigan Bd of Regents*, 444 Mich 211, 231 (1993). By requiring the public disclosure of information regarding the affairs of government and the official acts of public officials and employees, the act enhances the public's understanding of the operations or activities of the government.

Kocher v Dep't of Treasury, 241 Mich App 378, 380-81 (2000). The FOIA was described as "a manifestation of this state's public policy favoring public access to government information, recognizing the need that citizens be informed as they participate in democratic governance, and the need that public officials be held accountable for the manner in which they perform their duties." *Manning v East Tawas*, 234 Mich App 244, 248 (1999) (emphasis added); see also *Messenger v Ingham Co Prosecutor*, 232 Mich App 633, 641 (1998) (noting state's policy in holding public officials accountable for the way in which they carry out their jobs). The FOIA's intent "is to establish a philosophy of full disclosure by public agencies and to deter efforts of agency officials to prevent disclosure of mistakes and irregularities committed by them or the agency and to prevent needless denials of information." *Schinzel v Wilkerson*, 110 Mich App 600, 604 (1981) (emphasis added). The FOIA "is intended primarily as a prodisclosure statute and the exemptions

to disclosure are to be narrowly construed." *Swickard v Wayne Co Medical Examiner*, 438 Mich 536, 544 (1991).

The desire to provide easy access to governmental information is seen in the statutory structure of the FOIA. FOIA requests can be submitted by a traditional letter, an e-mail, or facsimile. MCL 15.235(1). The government is only given a short time, 5 business days, to respond to FOIA requests, MCL 15.235(2), and may only seek a single 10-business-day extension. MCL 15.235(2)(d). The public is given the right to "inspect, copy, or receive copies of the requested public record," MCL 15.233(1), or examine public records. MCL 15.233(3). FOIA allows the government to charge a minimal fee – at most the hourly wage of the lowest-paid individual who can capably retrieve the information and the marginal cost for making copies. MCL 15.234. If the requesting party needs to file a lawsuit, that suit can be filed where that party resides or where its principal place of business is located. MCL 15.240(4). Courts are required to grant reasonable attorney fees if a FOIA request was improperly denied. MCL 15.240(6). If a court determines that the public body arbitrarily and capriciously denied a FOIA request, a $500 fine is required. MCL 15.240(7). Finally, the statute indicates that the courts are supposed to take special care to expedite the hearings. MCL 15.240(5).

The entire structure of the statutes related to the FOIA indicates that the public should find this process easy and cheap.

C. Reverse FOIAs

Generally, a party filing a reverse-FOIA suit seeks to "enjoin rather than compel disclosure of pubic records." *Tobin v Michigan Civil Service Comm*, 416 Mich 661, 663 (1982). In *Bradley v Saranac Community Schools Board of Education*, 455 Mich 285 (1997), the Michigan Supreme Court discussed the courts' general course of analysis of reverse-FOIA suits:

> [I]n a reverse FOIA action, a determination whether the FOIA requires disclosure of the requested documents should be the first step in an action challenging an FOIA request. A finding that the documents are public records under the FOIA, and no exemptions apply, requires that the documents be disclosed. Additionally, a finding that the privacy exemption does not apply obviates the need for an analysis under the common law, because, irrespective of whether there was a common-law claim, the FOIA governs the resolution of the case. . . .
>
> Principles of common-law privacy do come into play when the court is determining whether information of a personal nature constitutes a "clearly unwarranted invasion of an individual's privacy."

Id. at 301-02 (footnotes omitted).

Bradley was a case wherein members of the public sought access to personnel files of school employees. One of the arguments presented against disclosure of those files was that it was contrary to the process set forth in a collective bargaining agreement. The Michigan Supreme Court held a school district could "not eliminate its statutory obligations to the public merely by contracting to do so" with another party. *Id*. at 303. The court stated: "The FOIA requires disclosure of all public records not with an exemption. No exemption provides for a public body to bargain away the requirements of the FOIA." *Id*. (footnote omitted); See also *Kent Co Deputy Sheriff's Ass'n v Kent Co Sheriff*, 463 Mich 353, 361 (2000) (quoting *Bradley*); and *Detroit Free Press v Detroit*, 480 Mich 1079 (2008) (citing *Kent County Sheriff's Ass'n*).

Thus privacy concerns and negotiated agreements are typically insufficient to overcome the public's ability to get fast, cheap information from the government.

But as the instant case clearly exemplifies, reverse-FOIA suits impede rapid access to public documents. The initial request was filed in March 2007, and yet Zarko still has not seen most of the documents the trial court indicated he was entitled to. Reverse-FOIA suits also discourage citizens from using the FOIA, since a party seeking public documents may have to hire an attorney to intervene in the reverse-FOIA lawsuit and spend significant amounts litigating that case. Even if that person were to win the suit and receive attorney fees and court costs, he or she may find it difficult to raise the money to pay the lawyer while the case is being litigated. Such considerable expenditures stand in stark contrast to the simple copying costs and the minimal labor costs described in the FOIA.

D. All e-mails generated by school employees on public school computer systems are public records.

The union parties seek a declaration regarding the e-mails that have not been disclosed to date. They make the following arguments: (1) admissions of the school district parties at the trial court should guide this Court's decision; (2) "purely personal" e-mails are not public records; and (3) "internal union communications" are not public records.

1. Admissions

The first argument is somewhat difficult to comprehend. It seems that the union parties are using the legal arguments of the school district parties at the trial court both to show that there is a case and controversy and to make some sort of estoppel claim. Given that some of the e-mails still have not been disclosed, there does not appear to be a justiciability problem. As to any estoppel claim, there is no indication that Zarko, the party actually seeking the documents, ever agreed that the disputed documents should not be disclosed. Assuming that the district had made any important

admissions at the trial court, none of them would be binding on Zarko. Further, this case is likely to guide future actions between other public school districts and their teachers, most of who belong to teachers' unions. It should be decided on the merits, not a technicality.

2. "Purely personal" e-mails

The second argument is that "purely personal" e-mails are not public records. Thus, the union parties contend that the first step of the *Bradley* analysis is not met, and that the district is under no obligation to turn over these e-mails.

MCL 15.232(e) states:

> (e) "Public record" means a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function, from the time it is created. Public record does not include computer software. This act separates public records into the following 2 classes:
>
> > (i) Those that are exempt from disclosure under [MCL 15.243].
> >
> > (ii) All public records that are not exempt from disclosure under [MCL 15.243] and which are subject to disclosure under this act.

Id.

The union parties note that, "Under this definition, in order to constitute a 'public record' the writing must pertain to the 'official function' of a public body." Plaintiffs-Appellants' Brief on Appeal at 15. Oddly, it is not until their reply brief that the union parties make mention of the only Michigan Supreme Court wherein the official-function question is discussed: *Kestenbaum v Michigan State University*, 414 Mich 510 (1982).

In *Kestenbaum*, a student requested a magnetic tape that contained a list used to create a paperback directory

of students. The university denied the request on privacy grounds, and this Court affirmed. At the Michigan Supreme Court, the court divided 3-3, which led to this Court's decision being affirmed. Justice Fitzgerald wrote the lead opinion, and his opinion was a little unclear on whether the student directory was a public record. At first he wrote, "A list of students appears to be a public record, i.e., 'a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function.'" *Id.* at 521. Soon thereafter, he indicated, "Whether a list of students is the kind of information envisioned by the Legislature as appropriate for disclosure is debatable." *Id.* at 522. He then indicated that he would presume, without deciding, that the list was a public record and move on to the privacy question. *Id.*

Justice Ryan wrote the other opinion. He directly addressed the official-function question:

> The expression "in the performance of an official function" is not defined in the statute. Accordingly, the term must be construed according to its commonly accepted and generally understood meaning. The need to exclude unofficial writings belonging to private citizens from the definition of "public record" is apparent when one recognizes that a state employee is included within the definition of a "public body". M.C.L. § 15.232(b)(i). A public body may not thwart disclosure under the FOIA by the simple expedient of sending sensitive documents home with its employees. However, unofficial private writings belonging solely to an individual should not be subject to public disclosure merely because that individual is a state employee.
>
> We have no difficulty in concluding that the magnetic tape involved in this case was prepared, owned, used, possessed, and retained by the defendant public body "in the performance

> of an official function." As the circuit judge aptly noted in his opinion, "Indeed, it would be useless to argue [that] such an institution could function without such a list of students." The specific magnetic tape sought in this litigation was used in the preparation and publication of a student directory, a publication our brother describes as compiled "to ease communications within the campus community" and likely to prevent "a great deal of havoc." Facilitating communications among students, preventing a great deal of havoc, and simply operating the university in an efficient manner are all "official functions" of Michigan State University. Since the requested "writing" was prepared, owned, used, possessed, or retained by Michigan State University in the performance of these official functions, we hold that the magnetic tape is a "public record."

Id. at 539 (Ryan, J.) (emphasis added).

The union parties did cite three cases that they believe should guide this Court's analysis on whether the e-mails are public records.

In *Detroit News v Detroit*, 204 Mich App 720 (1994), a newspaper requested records of all calls to and from Detroit's mayor at either the mayor's office or at Manoogian Mansion, the mayor's city-provided residence. *Id*. at 721. The city found a number of telephone bills, but claimed that they were "not public records." *Id*. at 722. The trial court noted that the bills were paid by the city, but it held "the records were not used in the conduct of the city's official business." *Id*.

This Court held:

> The telephone bills requested by the News are expense records of public officials and employees. That they are prepared by a private entity dictating

> their form and content is of no moment. See OAG, 1979-1980, No. 5500, p. 266 ("a [public body] must release a report of the performance of its official functions in its files, regardless of who prepared it" [emphasis added]). The statute does not require that the record be created by the public body, or even created at its behest. Rather, it is ownership, use, possession, or retention in the performance of an official function that is determinative.

Id. at 724. But this Court stated, "This is not to say that mere possession of a record by a public body is sufficient to make it a public record." *Id*. at 724-25.

In *Walloon Lake Water System, Inc v Melrose Township*, 163 Mich App 726 (1987), a citizen submitted a letter about the water system to a township board of trustees, and the letter was read aloud. A second citizen sought a copy of the letter.

This Court first determined that the letter was a public record:

> At the township meeting, the letter was read to the board, which considered its contents to decide that the subject of the letter did not require township action. Without opining as to what extent an outside communication to an agency constitutes a public record, we believe that here, once the letter was read aloud and incorporated into the minutes of the meeting where the township conducted its business, it became a public record "used ... in the performance of an official function."

Id. at 729-30. To bolster its holding, this Court discussed the purpose of FOIA:

> To be fully aware of the affairs of government, interested citizens are entitled to know not only the basis for various decisions to act, but also for decisions not to act. To further this purpose, we must construe

> the FOIA in such a manner as to require disclosure of records of public bodies used or possessed in their decisions to act, as well as of similar records pertaining to decisions of the body not to act. Under this holding, not every communication received by a public body will be subject to disclosure. But where, as here, the content of a document is made part of the minutes of the body's meeting where it conducts its official affairs and the content of the document served as the basis for a decision to refrain from taking official affirmative action, that document must be considered a "public record," as defined by the FOIA.

Id. at 730-31.

Hess v Saline, unpublished opinion of the Court of Appeals decided May 12, 2005 (Docket No 260394),[2] concerned a FOIA request for a videotape of a city council meeting. The meetings had been filmed by a third party so that they could be broadcast over a local cable channel. When the council went into closed session in a separate room, the camera remained on and apparently captured a part of the closed-session conversation that was audible through the door. This unedited version was aired twice and was obtained by one council member.

A second member sought the unedited tape, and that request was denied. This Court's opinion does not explicitly indicate whether the public body ever received a copy of that tape. But the fact that the suit was filed and the fact that this Court did not focus on the possession question implicitly indicate that the public body must have obtained a copy of the tape.

This Court held that the closed-session portion of the unedited tape was not a public record because it was not created during an official function:

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2 2005 WL 1124063.

> We agree that the unedited videotape was not a public record. The unedited version of the videotape includes the segment where the city council had adjourned and was conducting its official business outside the chambers. Although the chambers remained open to the public during this period, no official city business was conducted during that time. Accordingly, that portion of the videotape does not meet the definition of a public record in MCL 15.232(e).

Slip opinion at 2.

The union parties read these cases to mean that only those e-mails that were made "in the context of their capacity of public employees/teachers" can be obtained under the FOIA. Plaintiffs-Appellants' Brief on Appeal at 17. They contend that disclosure of the disputed e-mails "would not serve to inform the public regarding the *affairs of government or the official acts* of public employees." *Id.*

The Michigan Supreme Court recently discussed statutory interpretation:

> When interpreting a statute, our primary obligation is to ascertain and effectuate the intent of the Legislature. To do so, we begin with the language of the statute, ascertaining the intent that may reasonably be inferred from its language. In interpreting the statute at issue, we consider both the plain meaning of the critical word or phrase as well as its placement and purpose in the statutory scheme. As far as possible, effect should be given to every phrase, clause, and word in a statute.

United States Fidelity Ins & Guar Co v Michigan Catastrophic Claims Ass'n, 482 Mich 414, 423 (2008) (quotation marks and footnote omitted).

Hence, the current case requires a review of the language of the FOIA to determine the Legislature's intent.

The relevant sentence of MCL 15.232(e) states, "'Public record' means a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function, from the time it is created." The words "in the performance of an official function" constitute an adverbial prepositional phrase that modifies how a "public record" is "prepared, owned, used, [possessed], or retained by a public body." This phrase is relevant because it is the one to which the union parties' have appealed.

But given the close scrutiny we are giving this language, we should examine the statute in its entirety. The remainder of the sentence reads, "from the time it is created." This phrase is likewise a prepositional phrase that serves as an adverb. Determining its exact meaning, however, requires some care, since the pronoun "it" in the phrase could, at first blush, refer to three possible antecedent nouns in the sentence: (1) "writing"; (2) "body" (in the phrase "public body"); and (3) "function" (in the phrase "official function").[3] Only the first option causes any analytical complexity.

A moment's reflection shows that "it" cannot refer to "writing." True, there would be no problem if the sentence spoke only of "a writing *prepared*" by a public body, since the phrase "from the time it is created" would be construed to mean, " 'Public record' means a writing prepared …by a public body in the performance of an official function, from the time the writing is created." Such an interpretation would be consistent with the intent of the FOIA.

The idea that "it" refers to "writing" breaks down, however, when the remaining participles — "owned, used, [possessed], or retained by" — are considered. With these words, we would be forced to read, " 'Public record' means a writing … owned, used, [possessed], or retained by a public body in the performance of an official function, from

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3 Admittedly, because of this initial ambiguity, this sentence probably should not serve as a model of legislative draftsmanship.

the time the writing is created." While such a reading does not constitute a clear grammatical error, it is wrong, and it would undermine the intent of the FOIA.

For instance, a scientific study requested of a private research firm by the Legislature would not be subject to the FOIA under this construction of the language, since the testimony was created before it was "owned, used, [possessed], or retained by a public body in the performance of an official function." And consider the phone bills at issue in *Detroit News*. It would be hard to say that the documents were "owned, used, [possessed], or retained by" the city of Detroit from the moment the bills were created, since they were originally generated by the phone company.[4] In other words, to assume that "it" means "writing," this Court would be compelled to overturn *Detroit News*.

This reading could produce a cleavage in results depending on who sent the original e-mail. An e-mail that was sent from the UniServ Director to a teacher might not be a public document because it was created somewhere else, while an e-mail from that teacher to the UniServ Director would be. Now since most replies include the original message, there might not be that much realistic difference as most replies from the teachers, which would be created by a public body, would encapsulate the original message from the UniServ Director and would be a public document subject to a FOIA request. But it could be possible that a UniServ Director's missive to a teacher would not be responded to via e-mail, and this e-mail might not be subject to a FOIA request.

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4 It could conceivably be argued that "created" is used in the obscure sense of "investing with a new rank or function," and that a public record is therefore "created" from the moment the government entity uses it, possesses it, retains it, or obtains ownership. But this construction would render the phrase "from the time it is created" superfluous, because it could be dropped from the sentence without changing the sentence's meaning. A reading that renders statutory language nugatory is generally to be avoided.

If "it" does not refer to "writing," it must refer to "public body" or "official function." If "it" means "public body," then the analysis is simple. Any "writing prepared, owned, used, [possessed], or retained by a public body" is subject to a FOIA request from the moment of the public body's creation, and the document's point of origin is irrelevant. Under this reading, it would appear that the Legislature wanted to make certain that any public document that predated the enactment of the FOIA statute could be subject to a FOIA request. This is a logical reading that would not call into question the holding in *Detroit News*.

The final possibility is that "it" refers to "the official function." In this case, FOIA could apply to any document that postdates the creation of an official function. Such a function could be the maintenance of a public school system or the creation of an e-mail system to facilitate school business. This reading would also not call *Detroit News* into question.

Ultimately, regardless of the meaning of the phrase "from the time it is created," this Court still must give meaning to the words "official function." The union parties' view would unnecessarily and improperly limit the reach of the FOIA. A couple of examples will prove the point. Say that a government official was in charge of a $100,000 account, and that this governmental official authorized a purchase of staples for $280.37, paid the amount, and then wrote himself a check for the rest of the money in the account. According to the union parties, the check used to pay for the staples would be subject to the FOIA, but the check that the official used to embezzle funds would not, because embezzlement is not an "official function."

A second example relates to the recent mayoral text-messaging scandal in Detroit. There, in the course of a lawsuit, text messages between the mayor and his chief of staff that were sent through the chief's city-provided cell phone were subpoenaed. These messages were not provided

until after the multi-million dollar verdict was returned in a wrongful termination trial related to the dismissal of two police officers. In the course of settling the request for attorney fees and the case itself (i.e., reaching a settlement and preventing an appeal), the text messages were disclosed and showed that the mayor and his chief of staff had committed perjury. A settlement was reached and local newspapers filed a FOIA request for that agreement and any pertinent documents related to it.

The Circuit Court held that the settlement agreement and the records related to it were public documents. This eventually led to the mayor's resignation and disbarment, a short term in jail, and a $1,000,000 restitution order. But under the union parties' test, none of this should have been disclosed. The original settlement in the wrongful termination trial was an unlawful attempt to hide perjury and was not the mayor's "official function." Further, according to the union parties, if a citizen had submitted a FOIA request for the text messages on the city-owned device, he or she would not have been entitled to them because their purpose — to further a wrongful termination of city personnel — is not an "official function" of city government. Under the union parties' argument, the text messages were therefore not "public records."

Clearly, people who wish to "fully participate in the democratic process" may want to determine whether public officials are acting improperly or illegally on the job. The union parties' construction of "official function" would prevent citizens from using the FOIA to do so.

The best way to read "official function" is to analogize it to the manner that "under color of state law" is read in 42 U.S.C. § 1983. The Fifth Circuit stated: "Action taken 'under color of' state law' is not limited only to that action taken by state officials pursuant to state law. Rather, it includes: 'Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed

with the authority of state law. . . .'" *Brown v Miller*, 631 F2d 408, 411 (5th Cir 1980) (citations omitted). Thus, federal § 1983 suits can be brought where a police officer beats a prisoner, despite the fact that such a beating is a violation of state law.

This reading is in line with Justice Ryan's opinion in *Kestenbaum*. There he indicated that facilitating communication, preventing havoc, and simply operating a school in an efficient manner are all "official functions." *Kestenbaum*, 414 Mich at 539 (Ryan, J.). In other words, it is the e-mail system in the general sense — not each specific e-mail — that must be subjected to the "official function" test, even if the individual e-mails involve activities that are not properly part of an official's prescribed duties.

If this Court were to determine that this statute is ambiguous, consideration must be given to the statutory scheme. The FOIA is meant to allow the citizens easy access to governmental information so that the citizens can fully participate in the democratic process. The union parties' proposed interpretation would require looking at each bit of information in isolation to determine if it dealt with an "official function." This discretionary review would increase the amount of time (and thereby costs) that a public body needs to respond to FOIA requests. These costs would be passed on to citizens making the requests. Further, the discretionary decisions could lead to more litigation. Remember that in this case, 5500 e-mails were reviewed in camera and that this number could have been many times larger if Zarko had not eliminated approximately 75% of the scope of his request based solely on a review of the subject lines of the e-mails. Currently, Zarko's request is about two years old, and he has not seen a majority of the documents that he requested. This situation has occurred despite a statutory limit of 15 business days for a response and a statutory promise that legal conflicts will be expedited.

The e-mails to and from the teachers on the school-district provided system were part of the official function of a public body and thus qualify as public documents that can be obtained under the FOIA.

3. "Internal union communications" e-mails

Most of the union parties' arguments related to "internal union communications" mirror those made for "purely personal" e-mails and are unavailing for the same reasons. The additional arguments provided in regard to "internal union communications" do not lead to a different result.

The union parties contend: (1) the current collective bargaining agreement between the school district and the HEA allows HEA to use the e-mail system to communicate with its members; (2) federal labor law makes employer communications systems a mandatory subject of collective bargaining.

It is unclear if the union parties mean to rely on *Traverse City Record Eagle v Traverse City Area Public Schools*, 184 Mich App 609 (1990), a case that was cited but not discussed in their brief here. That case was discussed by the union parties while seeking the temporary restraining order at the trial court. To the extent that it is relied upon, it is largely inapplicable.

That case arose when a newspaper sought a copy of a tentative collective bargaining agreement between a union and school district. The newspaper had received a copy of the agreement, which by then had been ratified by the two sides, and this Court noted that the conflict was moot. *Id*. at 610. Despite this fact, this Court analyzed the trial court's decision to prevent disclosure of the tentative agreement.

This Court applied a standard of review – "clear error" – that the Michigan Supreme Court has since clarified is inappropriate for legal determinations, which are supposed to receive de novo review. This Court ratified the trial court's

determination that release of a tentative collective bargaining agreement might hamper the negotiating process. *Id.* at 612-13. It held that the trial court had committed no clear error in ruling that the "frank-communication" exemption of MCL 15.243(1)(m)[5] allowed the school district to shield the agreement from disclosure.[6]

Here, the union parties are not seeking to prevent release of a tentative collective bargaining agreement, and even if they were, this should not prevent disclosure. Contracts between public employers and public employees necessarily involve the spending of public tax dollars. Education spending is by far the largest portion of the state budget. Collective bargaining agreements are principally about salaries, benefits and working conditions. The FOIA explicitly allows for the disclosure of school district employees' salaries. MCL 15.243a. Pension information of public employees can also be properly sought under the FOIA. *Detroit Free Press, Inc v Southfield*, 269 Mich App 275 (2005). This Court has clarified: "[W]e note that a public official has no reasonable expectation of privacy in an expense the public bears to pay for income or any other benefit. We have consistently upheld the disclosure of publicly funded incomes and other benefits for more than 25 years." *Id.* at 285.[7] Further, the Michigan

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5 At the time of the *Traverse City Record Eagle* case, the exemption was located at MCL 15.243(1)(n).

6 It is likely that the union parties do not seek a ruling that MCL 15.243(1)(m) applies because that would give the school district parties the discretionary right to disclose the disputed documents: "It is worth observing that the FOIA does not prevent disclosure of public records that are covered by § 13 exemptions. Rather, it requires the public body to disclose records unless they are exempt, in which case the FOIA authorizes nondisclosure at the agency's discretion." *Herald Co v Bay City*, 463 Mich 111, 119 n. 6 (2000).

7 While perhaps not directly applicable, it should be noted that the Michigan Constitution indicates that public expenditures are supposed to be disclosed to the public:

> All financial records, accountings, audit reports and other reports of public moneys shall be public records and open to inspection. A statement of all revenues and expenditures of public moneys shall be published and distributed annually, as provided by law.

Supreme Court has rejected any contention that there is something inherent in the Public Employment Relations Act, MCL 423.201 et. seq., that supersedes the FOIA. *Kent Co Deputy Sheriff's Ass'n v Kent Co Sheriff*, 463 Mich 353 (2000). Thus, to the extent that *Traverse City Record Eagle* is relied upon, it is inapposite.

As noted above, the union parties' argument that a collective bargaining agreement can contract away a public body's obligations under FOIA has been rejected on three separate occasions by the Michigan Supreme Court.[8] The union parties' mandatory bargaining argument might have some validity if this case were related to a claim of an unfair bargaining practice under PERA, but this is a FOIA case. If, in an appropriate case, the Michigan Supreme Court were to hold that teachers' unions' use of school districts' e-mail systems was a mandatory subject of collective bargaining and must be allowed in certain circumstances, then that court might have to reconcile that holding with its prior rulings that FOIA obligations can not be contracted away. But right now, the law is clear that collective bargaining agreements cannot obviate FOIA obligations.

Const 1963 Art 9 § 23.

8 *Bradley*, 455 Mich at 303; *Kent Co Deputy Sheriff's Ass'n*, 463 Mich at 361 (quoting *Bradley*); and *Detroit Free Press*, 480 Mich 1079 (citing *Kent County Sheriff's Ass'n*).

RELIEF REQUESTED

For the reasons stated above, this Court should hold that all of the requested e-mails are public documents that can properly be sought under the FOIA.

Dated: March 26, 2009

Respectfully Submitted,

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