

STATE OF MICHIGAN
COURT OF CLAIMS

MACKINAC CENTER
FOR PUBLIC POLICY,
a Michigan nonprofit corporation,

Case Number: 17 - - MZ

Plaintiff,

Hon.

v

UNIVERSITY OF MICHIGAN,
a Michigan state public body,

Defendant.

Patrick J. Wright (P54052)
Derk A. Wilcox (P66177)
MACKINAC CENTER LEGAL FOUNDATION
Attorneys for Plaintiff
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VERIFIED COMPLAINT

There is no other pending or resolved civil action arising out of the same transaction or occurrence as alleged in the complaint.

Now comes Plaintiff, MACKINAC CENTER FOR PUBLIC POLICY, and states the following:

BACKGROUND

The Plaintiff, MACKINAC CENTER FOR PUBLIC POLICY (“MCP”), is a 501(c)(3) corporation and public policy think tank that also operates a news source – Michigan Capitol Confidential. On November 16, 2016, pursuant to the Freedom of Information Act (“FOIA”), a

Capitol Confidential reporter sought the e-mails of the Defendant University of Michigan's President from July 1, 2016 to November 16, 2016, that mentioned the word "Trump." November 23, 2016, was five business days from the FOIA request, and Defendant did not respond by that date. Assuming Defendant had properly sought a 10-day extension under MCL 423.215(2)(d), its response would have been due on December 9, 2016. On December 12, 2016, Defendant responded with a fee estimation that indicated it would take 2 and ½ hours to reply and that further estimated it would cost the \$126.04 for the request. A good faith payment of \$63.00 was sent on December 15, 2016 and cashed on December 21, 2016. On February 9, 2017, Defendant indicated that it would provide four redacted emails upon receipt of another \$72.15. That second check was deposited on February 22, 2017. As of this filing, the documents still have not been provided. As of filing, it has been 106 days since the FOIA was filed and 72 days since the initial good faith deposit was cashed. Yet, Defendant still has not provided the documents it indicated it would only need 2 and ¾ hours to compile and review.

THE PARTIES, VENUE AND JURISDICTION

1. The Plaintiff, MACKINAC CENTER FOR PUBLIC POLICY, is a Michigan-based nonprofit 501(c)(3) corporation.
2. The Defendant, UNIVERSITY OF MICHIGAN, is a state agency.
3. Venue is proper pursuant to MCL 15.240(1)(b).
4. Pursuant to MCL 15.240(5), this action should be "assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way."
5. Pursuant to MCL 600.6419(1)(a), the Court of Claims has jurisdiction over this claim.

VIOLATION OF FREEDOM OF INFORMATION ACT

6. On November 16, 2016, the MCPP emailed the University of Michigan FOIA Coordinator a request for “Any emails from President Mark Schlissel which contain the word ‘Trump’ from July 1, 2016 to November 16, 2016.” Exhibit 1.
7. The University of Michigan did not file a response within 5 business days of the FOIA request nor did it seek a 10-business-day extension within 5 business days of the filing of the FOIA request.
8. On November 28, 2016, the University of Michigan sent an out-of-time email indicating it wanted a ten-business-day extension and would respond by December 12, 2016. Exhibit 2.
9. On December 12, 2016, the University of Michigan sent an out-of-time response with a cost estimate attached. Exhibit 3. It was estimated that fulfilling the FOIA request would cost \$126.04. That fee included one hour of searching (\$50), one and ½ hour of review (\$71.55), and ¼ hour of duplication (\$4.49). *Id.* The letter indicated: “If you would like us to proceed with the search for, examination, duplication, review, and deletion and separation of exempt material from nonexempt material, send a check for \$63 made payable to the University of Michigan.” *Id.* The letter also indicated: “We estimate that we will complete the response to your request within four weeks from the date of receipt of your deposit. This time frame is provided pursuant to Section 4(8) of the Act, and is a nonbinding good faith estimate.” *Id.*
10. On December 15, 2016, a check for \$63.00 was sent to the University of Michigan. Exhibit 4.
11. On December 20, 2016, that check was deposited. *Id.*

12. On January 10, 2017, emails were exchanged between the Mackinac Center and a University of Michigan FOIA official. Exhibit 5. Plaintiff stated: “Our check was cashed Dec. 21, but we haven’t received the FOIA results yet. Any idea why?” *Id.* The FOIA official responded:

We are processing your request.

In our letter of December 12, 2016, we estimated that we will complete the response to your request within four weeks from the date of the receipt of your deposit. Your deposit was received by the University on December 20, 2016. We estimate that we will complete the response by January 24, 2017 (the University was closed from December 24, 2016 – January 2, 2017, so that week is not included in the four-week calculation). This time frame estimate is provided pursuant to Section 4(8) of the Michigan Freedom of Information Act, and is a nonbinding good faith estimate.

Id.

13. On January 27, 2017, Plaintiff sent an email to University of Michigan’s spokesman stating:

Hope all is well. I sent a FOIA request on November 16, 2016 and still have yet to receive the requested documents. The University responded on December 12, 2016: the check we sent was cashed on Dec. 21. I followed up with the FOIA office around that time and they told me this: “We estimate that we will complete the response by January 24, 2017.” Can you look into this for me? We may do a story on the delay if the documents are not received early next week.

Exhibit 6. That same day, the spokesperson responded: “Happy to check on this for you.”

Id.

14. Later on January 27, 2017, the University of Michigan FOIA official emailed Plaintiff and stated: “Due to the large number of Freedom of Information Act requests the University has had pending, we are still processing your request DRA 0593-16. We

anticipate that we will complete the response within the next week to ten days.” Exhibit 5.

15. On January 30, 2017, the Mackinac Center sent another email to the University of Michigan’s spokesperson. It stated: “[We] would like a story on the delay. Our check was cashed Dec. 21 by UM and over a month later still nothing. Can you send me a quote?” Exhibit 6.

16. On January 31, 2017, the University of Michigan spokesperson responded:

As you may know know [sic], I am out of the office this week. I understand the FOIA office has given you an update on your request.

I have great confidence in the FOIA office to follow through on their good-faith estimates of when the material will be provided. I know the office it [sic] taking your request seriously.

Id.

17. On February 2, 2017, Michigan Capitol Confidential ran a story on the delay. Exhibit 7.

18. On February 9, 2017, fifty one days after the depositing of the check, the University of Michigan sent a second letter. In this letter, it indicated that there were four emails responsive to the request, although it claimed some exemptions under MCL 15.243 (Section 13 of FOIA) applied. Exhibit 8. The University of Michigan attached a revised cost itemization that now claimed 2 and ¼ hours were necessary for the records search (\$110.15) and ½ an hour for review (\$25) for a total of \$135.15. *Id.* Less the \$63.00 previously paid, the University of Michigan sought the remaining \$72.15. *Id.* The letter indicated: “The nonexempt responsive records will be provided to you after payment has been received.” *Id.*

19. Pursuant to MCL 15.234(4), the University of Michigan has established procedures and guidelines to implement the FOIA. The procedures and guidelines are online at: <https://foia.vpcomm.umich.edu/procedures-and-guidelines/> A copy is attached as Exhibit 9.
20. Part 4(b) of the University of Michigan FOIA Procedures and Guidelines indicates that: “When the University completes the response to the FOIA request, the final fees will be itemized and the balance due requested.” *Id.*
21. Part 4(c) of the University of Michigan FOIA Procedures and Guidelines indicates that: “The University will deliver responsive, nonexempt records upon receipt of the balance due.” *Id.*
22. A check for the remaining \$72.15 was sent on February 14, 2017. Exhibit 10.
23. That second check was deposited on February 22, 2017. *Id.*
24. To date, the documents have not been received by Plaintiff.
25. MCL 15.231(2) states:

It is the public policy of this state that all persons, except those persons incarcerated in state or local correctional facilities, 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.
26. MCL 15.234(9) indicates a public body that does not timely respond to a FOIA request under MCL 15.235(2) shall reduce the charges for any labor at a rate of 5% a day with a maximum of 50% if the late response was willful or if the request was clearly identified as a FOIA request.
27. The November 16, 2016 FOIA request was clearly identified and should have been responded to by November 23, 2016 (five business days later).

28. It was not responded to until December 9, 2016. Under MCL 15.234(9), Plaintiff is entitled to the statutory maximum 50% reduction in labor costs.
29. The minimum time increments that can be billed for searching public records and separating exempt material are 15 minutes long. MCL 15.234(a)-(b). The University of Michigan has not shown that charging a fee is necessary here to prevent “unreasonably high costs to the public body” under MCL 15.234(3), where the request only takes eleven 15-minute units of time.
30. MCL 15.234(8) indicates that a public body may respond to a FOIA request with a good faith estimate as to the cost of the FOIA request. The statute further states:
- The response shall also contain a best efforts estimate by the public body regarding the time frame it will take the public body to comply with the law in providing the public records to the requestor. The time frame estimate is nonbinding upon the public body, but the public body shall provide the estimate in good faith and strive to be reasonably accurate and to provide the public records in a manner based on this state’s public policy under [MCL 15.231] and the nature of the request in the particular instance.
31. An unreasonable delay in providing FOIA documents is a denial under MCL 15.235, MCL 15.240(1) and MCL 15.240(7).
32. The University of Michigan’s actions regarding this delay are arbitrary and capricious under MCL 15.240(7) thereby subjecting the University of Michigan to a civil fine of \$1,000 payable to the general treasury and a separate \$1,000 to Plaintiff.
33. The University of Michigan’s actions regarding this delay constitute willful and intentional failure to comply under MCL 15.240b, thereby subjecting it to a civil fine of \$2,500 to \$7,500 payable to the state treasury.

34. Pursuant to MCL 15.240(4), the burden of proof for FOIA exemptions is on Defendant University of Michigan, and this Court may view the public record(s) in camera before reaching a decision.

RELIEF REQUESTED

Plaintiff respectfully seeks the full penalties available under MCL 15.240(7) and MCL 15.240b, costs, and another other relief this Court determines is just and equitable for the delays in providing the requested information and the need to bring this suit.

I declare that the statements above are true to the best of my information, knowledge, and belief.

Dated: March 2, 2017

Patrick Wright (P54052)
Vice President for Legal Affairs, Mackinac Center
For Public Policy

Subscribed and sworn to by _____ before me on the
_____ day of _____, _____ .
Signature _____