

MACKINAC CENTER
LEGAL FOUNDATION

February 25, 2021

Clerk of the Court of Claims
Hall of Justice
925 W. Ottawa St.
Lansing, MI 48909

RE: Written Claim per MCL 600.6431 against the Board of Regents of the University of Michigan.

Dear Clerk:

This verified letter is to fulfill the requirements of MCL 600.6431(1) as a written notice against the Board of Regents of the University of Michigan by the Mackinac Center, by and through its employee, Jarrett Skorup. The nature of the claim is for delays and denials of a Freedom of Information Act ("FOIA") request which was filed by the Mackinac Center on January 12, 2021.

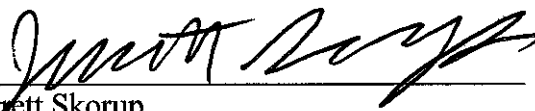
The Mackinac Center seeks complete fulfillment of this request, along with penalties, attorney fees, and other costs.

Sincerely,

Jarrett Skorup

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

Dated: February 25th, 2021


Jarrett Skorup

Subscribed and sworn to by Jarrett Skorup before me on the 25th day of February, 2021.

Signature 

Notary Public, State of Michigan

County of Ingham

My Commission Expires 07-29-2025

Acting in the County of Midland

MACKINAC CENTER
LEGAL FOUNDATION

**STATE OF MICHIGAN
COURT OF CLAIMS**

**THE MACKINAC CENTER FOR PUBLIC
POLICY, a nonprofit Michigan Corporation**

Case No.: 21-_____ -MZ

Plaintiff,

v.

Hon.

**THE BOARD OF REGENTS OF THE
UNIVERSITY OF MICHIGAN, a state
public body.**

Complaint

Defendant.

Derk A. Wilcox (P66177)
Stephen A. Delie (P80209)
Patrick J. Wright (P54052)
Mackinac Center for Public Policy
Attorneys for Plaintiff
140 West Main Street
Midland, MI 48640
(989) 631-0900 – voice
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COMPLAINT

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

NOW COMES Plaintiff, The Mackinac Center for Public Policy, and for its Complaint alleges and states as follows:

INTRODUCTION

The plaintiff, Mackinac Center for Public Policy (the “Mackinac Center”) is a nonprofit organization dedicated to improving the quality of life for all Michigan residents by promoting sound solutions to state and local policy questions. To that end, the Mackinac Center routinely uses the Freedom of Information Act (“FOIA”) to obtain relevant documents from state and local governments.

On January 12, 2021, the Mackinac Center made a routine request to the University of Michigan (the “University”), seeking the gross salaries of the University’s public employees. On January 20, 2021, the Mackinac Center clarified that this request was intended to include the names of employees in addition to their salaries.

On February 2, 2021, the Center received a portion of the information requested. Upon review, it became clear that the University had refused to release any information about employee compensation other than their base salaries. The University cited MCL 15.243(1)(a) (the “privacy exemption”) as its justification for withholding this information. This suit follows, as the law does not support the University’s redaction of public records.

PARTIES, JURISDICTION, AND VENUE

1. Plaintiff, the Mackinac Center for Public Policy (the “Mackinac Center”), is a Michigan nonprofit corporation headquartered in Midland County, Michigan.
2. Defendant, the Board of Regents of the University of Michigan, is a public body corporate under Article VIII, §5 of the Constitution of the State of Michigan, with its principal campus located in Ann Arbor, Michigan, County of Washtenaw. MCL 390.4.
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.

VIOLATIONS OF THE FREEDOM OF INFORMATION ACT

6. The Plaintiff hereby incorporates the preceding paragraphs as if fully restated herein.
7. On January 12, 2021 Mackinac Center employee Jarrett Skorup submitted a FOIA request to the University for the following records:

The total gross salaries (base salary, OT, bonuses, etc.) for every employee working in the U-M Office for Institutional Equity for the 2019 and 2020 calendar years.

Exhibit A, Mackinac Center's FOIA Request and University Response.

8. The Mackinac Center later clarified this request to include the names of employees, stating:

I should note: That should be the NAMES and total gross salaries (so we can make a comparison).

Id.

9. On January 20, 2021, the University extended their deadline to respond by 10 business days pursuant to MCL 15.235(d). **Exhibit B, University Extension.**
10. The University responded on February 2, 2021. **Exhibit A.** The University released salary information, but not the remainder of the requested information, such as overtime pay and bonuses, citing the privacy exemption.
11. On February 10, 2021, the Mackinac Center appeal the University's determination. *Id.* The University responded on February 23, 2021 by upholding its original determination. **Exhibit C, Appeal Determination.**
12. The University's determination stated, in the relevant part:

Your appeal has been carefully considered and is denied for the reasons stated in Ms. Sellinger's response of Tuesday, February 2, 2021, specifically, the records are exempt from disclosure pursuant to MCL 14.243(1)(a) (sic), which exempts from disclosure "[i]nformation of a personal nature if public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy." Additionally, MCL 15.243a requires an institution of higher education to make available to the public the "salary records" of an employee or other official of the institution of higher education. "Salary" has a plain English meaning that sets it apart from other forms of compensation. Well settled rules of statutory construction

support the conclusion that by expressly identifying “salary” as the form of compensation that must be disclosed by public universities, the legislature has defined the scope of information subject to disclosure as not including forms of compensation other than salary. Therefore, MCL 15.243a has set an expectation around what information will be made public and what information an individual can reasonably expect to be kept private.

Id.

13. The University’s response to the Mackinac Center’s appeal is contrary to law, as it misapplies the privacy exemption.
14. MCL 14.243(1)(a) provides no exemptions for purpose of FOIA. Upon information and belief, the University intended to apply MCL 15.243(1)(a), which states:
 - (1) A public body may exempt from disclosure as a public record under the Act any of the following:
 - a. Information of a personal nature if public disclosure of the information would constitute a clearly unwarranted invasion of an individual’s privacy.
15. 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 fully 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 participate in the democratic process.
16. The public body has the burden of proof in applying an exemption. MCL 15.235(5)(a)-(c); *Peterson v Charter Township of Shelby*, 2018 WL 2024578 (Mich Ct App).
17. The FOIA is a pro-disclosure statute, and as a result, “exemptions to disclosure are to be narrowly construed.” *Swickard v Wayne County Medical Examiner*, 438 Mich 536, 544 (1991).
18. In its final determination, the University attempts to apply an overly-narrow reading of the word “salary” in an effort to justify withholding the information requested by the Mackinac Center. Such a reading is not only based on an improper reading of MCL 15.243, but is also contrary to the purposes of FOIA as described in MCL 15.231 and MCL 15.233, as well as longstanding precedent.

19. The University has argued that the obligation to disclose “salary” information under FOIA indicates that other forms of compensation are not subject to disclosure. **Exhibit C.** In other words, the University is attempting to apply plain-language statutory construction to argue that the word “salary” exempts other forms of compensation from release under FOIA.
20. Contrary to the University’s contention, MCL 15.243(1)(a) does not expressly “require[] an institution of higher education to make available to the public the ‘salary records’” of public employees. **Exhibit C.** Instead, FOIA provides that all public records are to be made available upon request, absent an exemption. MCL 15.233.
21. The word “salary” is not mentioned in MCL 15.243. In fact, it appears that the University’s reference to the word “salary” is, in fact, a reference to the language of the Mackinac Center’s request. As such, the University’s argument regarding statutory construction is irrelevant. There is no use of “salary” in MCL 15.243, and as such, no statutory construction can apply. Instead, the University is bound by the Center’s description of the information being sought, which must be produced absent an exemption.
22. The Mackinac Center specifically described the information it sought as “salary” information, and defined that term as including overtime and bonus pay.
23. The University has argued that disclosure of the additional salary information would constitute an unwarranted invasion of privacy. **Exhibit C.**
24. The University cannot demonstrate that the withheld information would constitute a clearly unwarranted invasion of privacy.
25. When applying the privacy exemption, courts apply a two-prong test. The first prong is whether the information sought contains “private or confidential information relating to a person” or “intimate or embarrassing” details about an individual’s personal life. *ESPN Inc v Michigan State University*, 311 Mich App 662, 665 (2015) citing *Mich Federation of Teachers v Univ*

of *Mich*, 481 Mich 657, 675 (2008). The second factor is, if the information is found to be personal under prong one, whether disclosure of that information would be a clearly unwarranted invasion of individual privacy. *ESPN, Inc*, 311 Mich App at 669 (citation omitted). In evaluating the second prong, the court balances the public's interest in disclosure against the individual's interest in privacy. *Id.*

26. The disclosure of an individual's name is not generally considered to be information of a personal nature. *Id.* at 665 (citation omitted). The privacy exemption may apply, however, when names are associated with other personal information about the named person. *Id.* at 666.

27. Here, the additional information in question is the named individual's salary, including overtime and bonus pay.

28. The University bears the burden of demonstrating that its application of the privacy exemption is appropriate. *Herald Co v University of Bay University*, 463 Mich 111, 119 (2000).

29. Michigan Courts have consistently held that salary information is not exempt from disclosure, even when combined with public employees' names. In *Penokie v Michigan Technological University*, 93 Mich App 650, 663-64 (1979), the court found that:

[t]he names and salaries of the employees of defendant university are not "intimate details" of a "highly personal" nature. Disclosure of this information would not thwart the apparent purpose of the exemption to protect against the highly offensive public scrutiny of totally private personal details. **The precise manner of expenditure of public funds is simply not a private fact.** The heavy burden of justifying nondisclosure has not been met by the conclusory allegations of "ill will, hard feelings prejudice among employees" and "chill(ing of) the applications of further persons for positions similar to" those of intervening defendants. Nor is there any support for the allegations of amicus curiae Oakland University that disclosure of the compensation of individual employees "would cause significant indignity, embarrassment, and humiliation and would disrupt existing relationships".

(Emphasis added).

30. The Court further held that, even if salary information about public employees were to be considered personal for purposes of the privacy exemption, the public's right to know how tax dollars are being spent clearly outweighs any privacy interest. The Court stated:

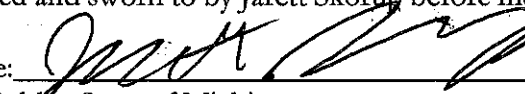
While we are not persuaded that salary information about individual public employees is "private" information for FOIA purposes, even assuming that disclosure would constitute an invasion of personal privacy, that invasion would not be "clearly unwarranted". **The minor invasion occasioned by disclosure of information which a university employee might hitherto have considered private is outweighed by the public's right to know precisely how its tax dollars are spent.**

(Emphasis added).

31. Michigan Courts have applied these principles consistently. In *Detroit Free Press v University of Southfield*, 269 Mich App 275, 287 (2005), the court held that the names of retired police officers, when combined with the amount of pension payment they were receiving, were subject to disclosure based on the public's strong interest in knowing how its tax dollars were being spent.

32. Michigan Courts have also previously ruled that the release of the names and addresses of private security guard employees, the names of public employees who had been called before a grand jury or met with an FBI investigation, the names and home addresses of various public employees and candidates for public office, and the names of student-athletes identified in incident reports do not constitute clearly unwarranted invasions of privacy. *International Union, United Plant Guard Workers of America (UPGWA) v Department of State Police*, 118 Mich App 2952 (1982); *Detroit Free Press v City of Warren*, 250 Mich App 164 (2002)(citation omitted); *Michigan State Employees Ass'n v Department of Management and Budget*, 135 Mich App 248 (1984)(citation omitted); *Tobin v Michigan Civil Service Com'n*, 416 Mich 661 (1982); *Hearld Co v University of Bay University*, 463 Mich 111 (2000); *ESPN, Inc v Michigan State University*, 311 Mich App 662 (2015) (citation omitted).

Subscribed and sworn to by Jarett Skorup before me on the Feb. 25 day of February, 2021.

Signature: 

Notary Public, State of Michigan
County of Ingham
My Commission Expires 07-29-2025
Acting in the County of Midland


33. Disclosure of the names and salary information at issue in this particular instance is less invasive than the disclosure of the information described immediately above, thereby justifying their release.
34. The University's improper redactions of the requested records are arbitrary and capricious under MCL 15.240(7), thereby subjecting the University to a civil fine of \$1,000.00 payable to the general treasury and a separate \$1,000.00 to the Mackinac Center.
35. The University's inappropriate application of MCL 15.243(1)(a) constitutes a 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.
36. Pursuant to MCL 15.240(6), the Center, if it prevails, is entitled to attorneys' fees and costs:

If a person asserting the right to inspect, copy, or receive a copy of all or a portion of a public record prevails in an action commenced under this section, the court shall award reasonable attorneys' fees, costs, and disbursements. If the person or public body prevails in part, the court may, in its discretion, award all or an appropriate portion of reasonable attorneys' fees, costs, and disbursements. The award shall be assessed against the public body liable for damages under subsection (7).

RELIEF REQUESTED

Plaintiff, Mackinac Center for Public Policy, respectfully requests that this Court order Defendant, the University of Michigan, to provide all documents sought in the FOIA request in unredacted form; apply the full penalties available under MCL 15.234(9), MCL 15.240(7), and MCL 15.240b; award attorneys' fees and costs under MCL 15.240(6); and award any other relief this Court determines to be just and equitable to remedy the University's improper exemption of the requested information and causing the need to bring this suit.

Dated: Feb. 25, 2021


Jarrett Skorup
Director of Marketing and Communications
Mackinac Center for Public Policy