

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

CAROL BETH LITKOUHI,

Plaintiff,

CASE NO. 2022-193088-CZ

v.

HON. JACOB J. CUNNINGHAM

ROCHESTER COMMUNITY SCHOOL
DISTRICT, a government entity,

Defendant.

MACKINAC CENTER LEGAL
FOUNDATION

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ANSWER TO FIRST AMENDED COMPLAINT AND AFFIRMATIVE DEFENSES

Defendant ROCHESTER COMMUNITY SCHOOL DISTRICT (hereinafter the “District”), through its attorneys, Jackson Lewis P.C., states as an initial matter, that it denies that any decisions, legal authority such as Attorney General Opinions, previously decided Court opinions, or secondary sources cited within the body of Plaintiff’s First Amended Complaint or in the footnotes therein are accurately summarized, binding, relevant, or otherwise comparable to the allegations and Counts Plaintiff has raised herein. The District for its Answer to Plaintiff’s First Amended Complaint and Affirmative Defenses, states as follows:

INTRODUCTION

The plaintiff, Carol Beth Litkouhi, is a parent within the Rochester Community School District (the “District”) who, despite repeated attempts, has been stymied in her attempts to lawfully obtain records relating to the District’s curriculum, training materials, and other related records. Having exhausted all reasonable attempts to obtain the records she seeks, this lawsuit follows.

The 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, its Mackinac Center Legal Foundation routinely provides legal representation to individuals, like Plaintiff, who use the Freedom of Information Act (“FOIA”) to obtain relevant documents from state and local governments.

This case deals with a matter of significant public interest, namely, the ability of parents to ensure schools are transparent about the lessons being taught to the children they serve. The need for transparency in this particular area is essential, as it affords parents the opportunity to understand what their children are learning, and to fully engage with local government officials about these lessons. Unfortunately, the District has rejected Plaintiff’s attempts to promote this transparency.

On December 14, 2021, Plaintiff submitted a FOIA request to the District for the release of information relating to a “History of Ethnic and Gender Studies” course that had been taught by at least one of the District’s member schools. The District responded to Plaintiff’s request by partially granting it. Specifically, the District granted Plaintiff’s request with respect to a unit plan, which was provided to Plaintiff as part of an earlier request. The remainder of her request for curriculum materials and other records relating to the course was denied.

After receiving the District’s response, Plaintiff filed an administrative appeal on January 19, 2022, in an attempt to obtain a response containing the remaining materials she had requested. In this appeal, Plaintiff specifically noted that, unless no materials had been distributed to students as part of the course, responsive records necessarily had to exist. Plaintiff further explained that, despite numerous attempts to obtain the requested records through FOIA and alternate means, she had been repeatedly rebuffed.

The District responded to Plaintiff’s appeal on February 8, 2022 by denying it. In its denial, the District emphasized that it had provided those responsive records known to exist by the district, and denied the remainder of Plaintiff’s appeal on the grounds that no responsive materials existed. The District failed to address any specific argument raised in Plaintiff’s appeal, including the fact that the District’s position would inherently mean that no classroom materials had been produced in a course that had been actively taught for over six months.

Plaintiff separately sought additional materials from the district via a FOIA request on December 27, 2021. On that date, Plaintiff sought access to materials relating to Diversity, Equity, and Inclusion trainings for the years 2020-2022. The District responded on January 21, 2022 by granting that request and requesting a deposit in the amount of \$418.45. Plaintiff paid that fee on January 24, 2022, and, after some additional correspondence, the District issued a final determination on February 11, 2022. Although the District's response was styled as a full grant, a number of unidentified materials were withheld on the basis of the fact they were copyrighted materials. Based on that fact, the District produced some teacher training materials, but refused to produce copies of those materials they claimed to be copyrighted, instead requiring Plaintiff to inspect them in person.

In light of Plaintiff's partial denial of Plaintiff's December 14th request (the "History Request") and the refusal to produce copies of records in response to Plaintiff's December 27th request (the "Training Materials Request"), Plaintiff brought this action against the District. Neither the District's refusal to release curriculum materials, nor its refusal to produce copies of allegedly copyrighted materials comport with Michigan law.

ANSWER: Defendant denies that Plaintiff's Introduction to her First Amended Complaint presents a full, complete and accurate description of the matters addressed therein. Defendant specifically denies as untrue that it has stymied Plaintiff in any way. Defendant denies as untrue any implication that it is not transparent about the lessons being taught, the children it serves, or that it has in anyway rejected Plaintiff's or anyone else's attempt to promote such transparency.

PARTIES, JURISDICTION, AND VENUE

1. Plaintiff, Carol Beth Litkouhi, is a natural person and resident and citizen of the State of Michigan, County of Oakland.

ANSWER: Admitted that Plaintiff is a natural person. The District is without information sufficient to form a belief as to the truth of the remainder of the allegations of Paragraph 1.

2. Defendant, the Rochester Community School District, is a government entity administered by the Board of Education and the Superintendent. Defendant is headquartered at 501 W. University Drive, Rochester, Oakland County, Michigan 48307.

ANSWER: Admitted.

3. Venue is proper pursuant to MCL 15.240(1)(b).

ANSWER: Admitted.

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.”

ANSWER: Admitted.

5. Pursuant to MCL 15.240(1)(b) and MCL 600.605, the circuit court has jurisdiction over this claim.

ANSWER: Admitted.

FACTUAL BACKGROUND

6. The Plaintiff hereby incorporates the preceding paragraphs as if fully restated herein.

ANSWER: The District incorporates its answers to the previous allegations.

7. On December 14, 2021, Plaintiff submitted a FOIA request to the District. The operative portion of this request read as follows:

Pursuant to the state open records law Mich. Comp. Laws. Secs. 15.231 to 15.246, I write to request access to and a copy of all teacher lesson plans, curriculum, readings given to students (such as articles, publications, case studies), viewings (such as video clips), and assignments given to students (such as writing or discussion prompts) used for the “History of Ethnic and Gender Studies” Course at Rochester High School during the time period from

August 30 – present. If material is electronic, I request access via email. If book(s) were given to be used, I request that the book(s) be made available for me to come and review.

Exhibit A, Plaintiff’s History Request (errors original).¹

ANSWER: The District admits that Plaintiff submitted a FOIA request on or about December 14, 2021, and that Exhibit A to Plaintiff’s First Amended Complaint is an accurate copy of that request. Defendant denies that the quoted portion is “operative”.

8. On January 11, 2022, the District responded to Plaintiff’s request by partially granting and partially denying Plaintiff’s request. The District’s response reads, in the relevant part, as follows:

Your request is granted in part and denied in part. The notifications section of the FOIA, MCL 15.235, requires the District to identify the reason for any partial denial of your request. Your request is granted to the extent that a unit plan document was provided to you in our response dated October 4, 2021. The remainder of your FOIA request is denied. Your request is denied in part as the District is not knowingly in possession of any records responsive to your request for “teacher lesson plans,” “readings given to students,” “viewings,” and “assignments used to evaluate students,” or teacher prompts made on Flipgrid and Google classroom during the time period from August 30, 2021 through present. This letter serves as the District’s certification that no responsive records are known to exist.

Exhibit B, District’s History Denial.

ANSWER: The District admits that it provided a written response on January 11, 2022, and that Exhibit B to Plaintiff’s First Amended Complaint is an accurate copy of that

¹ Plaintiff has submitted requests for similar requests relating to the “History of Ethnic and Gender Studies” course in the past, but for purposes of this lawsuit, Plaintiff’s complaint is limited to the violations of law arising from her December 14, 2021 request, as well as those arising from her December 27, 2021 request.

ANSWER: The District denies any allegation or inference that it violated the FOIA, or that it acted unlawfully. Thus, the District denies Plaintiff’s allegation, improperly contained in a footnote, that there were any “violations of law arising from [Plaintiff’s] December 14, 2021 request, as well as those arising from December 27, 2021 request.”

response. Defendant denies as untrue that the quoted portion is the only “relevant part” of the response.

9. Plaintiff appealed the District’s Denial on January 19, 2022. The relevant portion of Plaintiff’s appeal reads as follows:

Dear Dr. Shaner,

I would like to appeal this FOIA response I received from the District on January 12, 2022, regarding my request to access class curriculum for the History of Ethnic and Gender Studies. To date, Rochester Community Schools District (“District”) responded that no responsive documents exist. I have reason to believe that responsive documents do exist, since the class has, upon information and belief, been allowed to run uninterrupted for the last 6 months. Indeed, unless the District, school, or teacher, have not distributed any materials in the class since its inception (which, based on District admissions, I do not believe is the case), the District is in direct violation of its Freedom of Information Act (“FOIA”) obligations. I ask you to reconsider the District’s response.

As I have shared with you in a previous letter, I’ve tried reaching out to multiple district employees to request information informally, politely, respectfully. My requests were rebuffed by District administrators who told me and forced me to use the legal process of FOIA to obtain this information. With great disappointment, even my formal FOIA submissions failed to produce any response other than form letter denials of the existence of letters related to my requests—even for material that obviously exists and was distributed in the past according to other communications. The FOIA requests themselves were narrowly tailored, and were reasonable within their scope. Note, the District did not object to the scope or breadth of the requests themselves, but merely stated it was not in possession of such documents. Again, based on statements made by individuals in the District, as well as common sense, I do not believe that to be true.

For example, the document provided to me on October 4, which the FOIA Coordinator called, “Unit Plan”, does not appear to reasonably address topics supposedly covered in the course, and it only accounts for the first two weeks of school. This document is attached below. The fact that the District was willing to produce this document, without producing a single additional page (either the documents listed in the Unit Plan or any additional documents after it was drafted), additionally demonstrates the District’s bad faith denial of my FOIA request.

I appreciate your immediate attention to this matter. While I would prefer not to escalate this issue, if you plan to proceed consistent with your prior responses

and deny the requests, I plan to consider all of the legal options for obtaining these documents. I have requested this information for months, and have not received any substantive response. As I am sure you are aware, the applicable statutes allow me to collect reasonable fees and costs for my efforts to correct the wrongful denial. The District's continued attempts (now for many months) at stonewalling my legal right to obtain these documents is not only depriving the community access to information to which it is entitled, but will soon be costing taxpayer money.

Please also be aware, given the likelihood this matter proceeds to litigation, you are also put on notice to reserve, not destroy, and not alter any documents that pertain to the History of Ethnic and Gender Studies class. Any effort made by the District, or its employees, to destroy or alter those documents violates the District's legal duties. Should you wish to resolve the matter without court intervention, please let me know if you're available to discuss.

Exhibit C, Plaintiff's History Appeal.

ANSWER: The District admits that Plaintiff submitted an Appeal on or about January 19, 2022, and that Exhibit C to Plaintiff's First Amended Complaint is an accurate copy of that Appeal. Defendant denies as untrue any implication that the factual allegations of the Appeal are accurate. The District further denies as untrue any implication that it violated FOIA or any other legal requirement.

10. The District responded to Plaintiff's appeal on February 8, 2022. The District denied that appeal on the following basis:

On January 11, 2022, the District's FOIA Coordinator provided you with a response that granted your request in part and denied your request in parts. You were provided the responsive materials known by the District to exist at the time. The remainder of your request was denied for the reason that additional responsive materials did not exist. I subsequently received an e-mail from you stating your desire to appeal the response you received from the District's FOIA coordinator.

I have reviewed the matter, and confirm the FOIA Coordinator's response was accurate. Therefore, I uphold the FOIA Coordinator's response to you, and your appeal is denied. Please also be advised, that while all District staff strive to be helpful and accommodating to requests, the FOIA Coordinator is obliged to follow the District's FOIA procedures, which are in accord with the law. The FOIA Coordinator is not obliged to engage in additional actions outside the scope of the District's FOIA procedures.

Exhibit D, District's History Appeal Denial.

ANSWER: The District admits that it provided a written response to Plaintiff's Appeal and that Exhibit D to Plaintiff's First Amended Complaint constitutes an accurate copy of that response.

11. Plaintiff separately sought additional materials from the district via a FOIA request on December 27, 2022. This request sought:

“access to all Diversity, Equity, and Inclusion training materials (including materials related to Implicit bias, Social Justice, Cultural Proficiency, Culturally Responsive Teacher) for the 2020/21, 2021/22, and any newly added materials in the coming school year. If material is electronic, I request access via e-mail.”

Exhibit E, Training Materials Request.

ANSWER: The District admits that Plaintiff made a written request dated December 27, 2021 and that Exhibit E to Plaintiff's First Amended Complaint constitutes an accurate copy of that request.

12. The District responded to Plaintiff's Training Materials request on January 21, 2022 by granting that request and seeking a deposit in the amount of \$418.45.

Exhibit F, Training Materials Cost Estimate.

ANSWER: Admitted.

13. Plaintiff paid that fee on January 24, 2022 and the District issued a final determination on February 11, 2022.

Exhibit G, Training Materials Final Determination.

ANSWER: The District denies any allegation or inference that Plaintiff paid the full FOIA fee; however, admits that Plaintiff paid a deposit, and that Exhibit G to Plaintiff's First Amended Complaint is an accurate copy of the email correspondence the District sent to Plaintiff on February 11, 2022. Stating further, the final

determination included the balance for the FOIA request, which Plaintiff had not paid as of the filing of this lawsuit.

14. Although the District's response was styled as a full grant, a number of unidentified materials were withheld on the basis of the fact they were copyrighted materials. *Id.* Based on that fact, the District refused to produce those materials, instead requiring Plaintiff to inspect them in person. *Id.* The District did, however, produce copies of teacher training materials it did not consider to be protected by copyright, and those materials are not as issue in this action.

ANSWER: The District admits that its response was a full grant and that it offered to allow Plaintiff to inspect copyrighted materials and that it provided certain training material. The District denies as untrue the remaining allegations of Paragraph 14.

COUNT I: VIOLATIONS OF THE FREEDOM OF INFORMATION ACT

A. The District's History Denial Adopts an Unlawfully Narrow Reading of the FOIA

ANSWER: The District denies the allegation in Count I A, that it adopted an "unlawfully narrow reading of the FOIA" or that it acted unlawfully, or that it engaged in any acts or omissions that would constitute a violation of the FOIA.

15. The Plaintiff hereby incorporates the preceding paragraphs as if fully restated herein.

ANSWER: The District incorporates its answers to the preceding paragraphs.

16. The Department's denial of Plaintiff's History Request indicates that no responsive records relating to that request, other than a unit plan, exists within the Department's position.

ANSWER: The District neither admits nor denies the allegation regarding "History Request" as that term is vague and undefined; therefore, the District lacks

information or knowledge sufficient to form a belief as to the allegations in Paragraph 16. The District further states that it that it provided all documents within its possession and which it was lawfully required to provide pursuant to Plaintiff's FOIA requests.

17. Upon information and belief, however, this statement is inaccurate.

ANSWER: If the "statement" referred to in Paragraph 17 is the allegation of Paragraph 16, the allegation is Paragraph 17 is denied as untrue because the District did not make the statement and because the District has not made any inaccurate statements to Plaintiff.

18. In connection with prior FOIA requests, Plaintiff previously corresponded with the District's Executive Director of Secondary Education, Neil DeLuca. As part of this correspondence, Plaintiff obtained a course syllabus for the History of Ethnic and Gender Studies course, as well as a course description. These items were not produced to Plaintiff, however, in response to her subsequent History Request. **Exhibit H, 2021.08.31 Secondary Director Correspondence.**

ANSWER: The District admits that Plaintiff previously corresponded with the District's Executive Director of Secondary Education. The District denies that Plaintiff's correspondence was "in connection with prior FOIA requests" as Plaintiff did not so specify. The District admits that Mr. DeLuca provided her with a syllabus and course description. The District neither admits nor denies the allegation that the items were not produced to Plaintiff in response to her subsequent "History Request" as the term "History Request" is undefined; therefore, the District lacks information or knowledge sufficient to form a belief as to the matters asserted. The District

further states that it that it provided all documents within its possession and which it was lawfully required to provide pursuant to Plaintiff's FOIA requests.

19. Furthermore, in prior attempts to obtain information relating to the History of Ethics and Gender studies course, Plaintiff learned that a number of other documents relating to the course exist, but these documents were not produced in response to the History Request. These documents include such material as the daily question assignments presented to students, written and video materials relating to grant writing assignments, videos contained in a PowerPoint, and Google classroom assignments. **Exhibit I, Prior Correspondence re History of Ethics and Gender Course.** These records were not produced to Plaintiff, either after her initial correspondence, or in her subsequent History Request.

ANSWER: The District admits that such documents were not produced. The District is without information sufficient to form a belief as to whether such documents exist. The District denies as untrue that it was in possession of any such documents or that it was lawfully required to produce them.

20. Upon information and belief, these materials are housed either by individual schools within Rochester Community Schools, or within the records of individual teachers within those schools.

ANSWER: Denied as untrue.

21. Upon information and belief, Beth Davis, The District's FOIA coordinator, did not ask individual schools or teachers to locate and provide the records referenced in Paragraphs and 20.

ANSWER: Denied as untrue.

22. Upon information and belief, The District's FOIA coordinator only produced those records collected and retained by the District itself, without attempting to locate responsive records housed within the District's member schools or possessed by the District's teachers.

ANSWER: Denied as untrue.

23. In fact, in response to her initial inquiries, Plaintiff received only one lesson plan for the first two weeks of the History of Ethnic and Gender Studies course. Upon information and belief, more lesson plans for this course have been created. Plaintiff received no additional lesson plans in response to her History Request.

ANSWER: The District admits that it provided Plaintiff one document but denies that the document is accurately described as a 1 lesson plan. The District is without information sufficient to form a belief as to whether “more lesson plans have been created”. The District states that it is not in possession, nor does it have custody or control of any such lesson plan(s).

24. Upon information and belief, these additional records are owned, used, possessed, or retained by either individual schools within the District, or within the records of individual teachers within those schools.

ANSWER: The District denies the allegation as untrue with regard to ‘individual schools’. The District is without knowledge or information sufficient to form a belief as to the truth of the allegation with regard to individual teachers.

25. Upon information and belief, the District did not ask the individual schools where the course that was the subject of Plaintiff’s request was taught to determine whether records responsive to Plaintiff’s request existed, or to produce such records

ANSWER: Denied as untrue.

26. Upon information and belief, the District did not ask those teachers responsible for teaching the course that was the subject of Plaintiff’s request to determine whether records responsive to Plaintiff’s request existed, or to produce such records.

ANSWER: Denied as untrue.

27. In addition to correspondence with the District, Plaintiff corresponded with a curriculum consultant, who provided a PowerPoint to Plaintiff that had not been provided by the District itself. Id. at 16.

ANSWER: The District neither admits nor denies the allegations in Paragraph 27 as it is without information or knowledge sufficient to form a belief as to the truth of the allegations therein.

28. Upon information and belief, the District later instructed the curriculum consultant to not provide Plaintiff with additional course materials, and to direct her to submit a FOIA request directly to the District. Id.

ANSWER: Denied as untrue.

29. At that time, Plaintiff had already submitted multiple FOIA requests, all of which had failed to produce some material that was both relevant and responsive. See, e.g., Id.

ANSWER: Admitted that Plaintiff had submitted FOIA requests. The District denies as untrue the remainder of the allegations of Paragraph 29.

30. Further, when Plaintiff inquired as to whether she should be directing her request to individual schools within the District, she was informed that all FOIA requests must be presented to the District itself.

ANSWER: The District admits that it informed Plaintiff of the appropriate manner in which to make FOIA requests. The District is without information as to whether some other party did so and, therefore, neither admits nor denies the remaining allegations in Paragraph 30.

31. The District's position appears to be that the District must only produce those records it possesses as the District administration.

ANSWER: Denied as untrue. The District states further that its position is that it has and will comply fully with the requirements imposed by FOIA and any other legal requirements to which it is subject.

32. According to this line of thinking, those public records held by schools within the District, or by teachers within those schools, are not considered within the District's possession for purposes of FOIA regardless of whether they are owned, used, possessed, or maintained by either individual schools or teachers, even when in the performance of an official function

ANSWER: Defendant denies that paragraph 32 accurately states its "line of thinking."

33. Thus, Plaintiff is caught in a catch-22. The District refuses to acquire records from its schools and teachers in order to fulfill her requests, but also forbids members of the public from directly requesting those records from the parties the District considers to be in possession of those records. Practically speaking, this means that records held by a member school, but not by the District itself, are essentially unattainable through FOIA requests. This is contrary to both the purpose of FOIA and existing caselaw.

ANSWER: Denied as untrue.

34. 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.

ANSWER: The District admits that Plaintiff has accurately quoted MCL 15.231(2)

35. The public body has the burden of proof in applying an exemption. MCL 15.235(5)(a)-(c); MLive Media Group v City of Grand Rapids, 321 Mich App 263, 271 (2017).

ANSWER: The District denies that the allegation constitutes a full and complete description of the burden of proof requirements or the cited statute and court decision.

36. 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).

ANSWER: The District denies that the allegation constitutes a full and complete description of the rule of construction or the cited court decision.

37. Here, rather than applying an exemption, the District has claimed that no responsive records exist in its possession.

ANSWER: Denied as untrue. Stated further, The District provided responsive records.

38. Upon information and belief, this is because the District itself does not possess responsive records, even if its individual member schools do possess that information.

ANSWER: Denied as untrue. Stated further, The District provided responsive records.

39. The District is expressly a public body pursuant to MCL 15.232(h)(iii).

ANSWER: Admitted.

40. The District’s member schools are also public bodies for purposes of MCL 15.232(h).

ANSWER: Denied as untrue.

41. Course materials, regardless of by whom they are prepared or retained, are prepared or retained in connection with the District’s, and its individual member schools’, public functions—public education.

ANSWER: Denied as untrue.

42. Based on the Plaintiff's conversations with employees of the District, it appears that these materials were prepared, owned, used, possessed, or retained by individual member schools or teachers, within the District.

ANSWER: The District is without information sufficient to form a belief as to what conversations Plaintiff has had with the Defendant's employees or what "appears" to her.

43. Thus, these records are public records as defined by MCL 15.232(i).

ANSWER: Denied on the basis that the "these records" is vague. The District denies as untrue any implication that it failed to provide any public records it was required to provide.

44. To the extent that schools within the District possess additional records that may be responsive to Plaintiff's request, it is the District's duty to locate and produce those records.

ANSWER: Denied as untrue.

45. To the extent that even individual teachers within the District possess additional records that may be responsive to Plaintiff's request, it is the District's duty to locate and produce those records.

ANSWER: Denied as untrue.

46. This issue was largely settled in the Supreme Court's *Bisio v City of Village of Clarkston* case, 506 Mich 37 (2020), in which the Court was asked to examine whether correspondence between a city attorney and an outside consultant was subject to FOIA. The Court answered in the affirmative, concluding:

Under MCL 15.232(i) of FOIA, a "public record" is 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." We reiterate that such "public records" must be "prepared, owned, used, in the possession of, or retained by a *public body*" and not by a private individual or entity. In the instant case, the office of the city attorney constitutes a "public body" because it is an "other body that is created by state or local authority" pursuant to MCL 15.231(h)(iv).

Furthermore, the documents at issue are “writing[s]...retained” by the public body “in the performance of an official function” under MCL 15.232(i).

Id. at 55.

ANSWER: Denied as untrue. Answering further, the District denies that the allegation of Paragraph 46 constitutes and full, complete and accurate description of the reasoning and holding of the cited court decision and that the facts of that case are materially distinguishable from the issues presented in this case.

47. Here, the District’s member schools are public bodies pursuant to MCL 15.231(h).

ANSWER: Denied as untrue.

48. As such, the District is obligated to produce responsive records owned, used, possessed, or retained by those schools, just as the City of Village of Clarkston was required to produce responsive records in the possession of its City Attorney.

ANSWER: Denied as untrue.

49. In light of the above the District is legally obligated to ask its members schools for any materials in their possession that are responsive to Plaintiff’s History Request, regardless of whether the District itself is in possession of those materials.

ANSWER: Denied as untrue.

50. For the same reasons, the District is legally obligated to ask the individual teachers responsible for teaching the courses that would contain material responsive to Plaintiff’s History Request for any relevant materials, regardless of whether the District itself is in possession of those materials.

ANSWER: Denied as untrue.

51. The Districts failure to do so violates Plaintiff’s rights under MCL 15.233(1).

ANSWER: Denied as untrue.

B. The Department’s Application of a “Copyright” Exemption was Neither Properly Identified, nor Lawful.

ANSWER: The District denies the allegation in Count I B, that it adopted an “unlawfully narrow reading of the FOIA” or that it acted unlawfully, or that it engaged in any acts or omissions that would constitute a violation of the FOIA.

52. The Plaintiff hereby incorporates the preceding paragraphs as if fully restated herein.

ANSWER: Defendant incorporates its answers to all preceding Paragraphs.

53. Under MCL 15.232(i), a public record is either exempt from disclosure under MCL 15.243, or it must be produced in response to a request.

ANSWER: Denied as untrue inasmuch as the allegation does not constitute a full and complete description of applicable legal requirements.

54. In responding to Plaintiff’s Training Request, the District’s withheld certain materials on the basis that providing copies of those materials would violate an unidentified party’s copyright rights. In doing so, the District failed to specifically identify a specifically applicable FOIA exemption.

ANSWER: Denied as untrue. In further answer, the District did not withhold any materials on the basis of copyright rights, but has remained ready and willing to produce such documents for Plaintiff’s inspection; however, Plaintiff has failed to avail herself of those documents.

55. By failing to specify the MCL 15.243 exemption justifying this withholding, the District violated MCL 15.235(5)(a).

ANSWER: Denied as untrue.

56. Nevertheless, it can be presumed that the District’s intent was to apply MCL 15.243(1)(d), which permits the withholding of materials if they are

exempted by another statute. It can further be presumed that the District's citation to "Title 17 of the US Code" was intended to indicate the statute on which the District relied.

ANSWER: Admitted that that was the District's clearly stated intent with regard to the legal basis for its response. The District denies as untrue that it withheld any materials.

57. 17 USC 101 et seq. is the federal law which governs copyright and copyright actions.

ANSWER: Admitted.

58. Thus, for the District to be able to withhold the requested records, it necessarily must be claiming that federal copyright law prevents the copying and production of copyrighted materials in response to a FOIA request.

ANSWER: The District denies that it withheld any records, but admits that the federal copyright laws prevent the copying and distribution of copyrighted materials.

59. Upon information and belief, no Michigan Court has evaluated the interaction between the Michigan FOIA and federal copyright law. The Michigan Attorney General, however, has opined on this issue twice.

ANSWER: The District is without information sufficient to form a belief as to the truth of the allegation in as much as the phrase "interaction" is vague and cases which address copyright law and Michigan's FOIA separately may provide guidance on the legal issues presented here.

60. In 1979, the Attorney General was asked to evaluate a wide variety of issues associated with the FOIA, including copyright. In addressing the issue, the Attorney General stated:

Section 3(1) provides that a person has a right to receive copies of a public record of a public body. However, the Constitution of the United States provides:

‘The Congress shall have Power...To promote the Progress of Science and useful Arts by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.’ US Const, art 1, § 8

Pursuant to that constitutional mandate, Congress has enacted 90 Stat 2546 (1976); 17 USC 106 and 109, which state:

‘§ 106 ... the owner of a copyright ... has the exclusive rights to do and to authorize any of the following:

‘(3) to distribute copies ... of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;’

§ 109. (a) Notwithstanding the provisions of section 106(3), the owner of a particular copy or phonorecord lawfully made under this title, of any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.’

Copyright laws may not be encroached upon by the state. As stated in *Roebuck & Co v Stiffel Co*, 376 US 225, 228-229 (1964):

‘Pursuant to this constitutional authority, Congress in 1790 enacted the first federal patent and copyright law, 1 Stat 109, and ever since that time has fixed the conditions upon which patents and copyrights shall be granted ... These laws, like other laws of the United States enacted pursuant to constitutional authority, are the supreme law of the land.’

It is my opinion, therefore, that copyrighted materials may not be copied and distributed in violation of the Copyright Act.

1979-1980 Mich Op Atty Gen 255 (Mich AG), 1979 WL 36558 (July 29, 1979) (cleaned up) (emphasis added)².

ANSWER: The District admits that Plaintiff has accurately quoted portions of the Attorney General’s Opinion. The District denies any allegation or inference that the issues presented in the applicable Attorney General’s Opinion are determinative of the issues

² The full text of this opinion is 43 pages. For the Court’s convenience, the relevant portion is attached as Appendix A.

presented by this lawsuit and further notes that the facts of that case are materially distinguishable from the issues presented in this case.

61. The Attorney General again opined on the interaction between the FOIA and copyright in 1998. In this matter, the relevant question was whether the state insurance bureau, in response to a FOIA request, must provide “copies of insurance manuals of rules and rates which are in its possession and are required by law to be filed by insurers with the bureau, without first obtaining the permission of the copyright holder.” 1997-1998 Mich Op Atty Gen 93 (Mich AG), 1998 Mich OAG No 6965 (January 16, 1998).³

ANSWER: The District denies that the allegation constitutes a full and complete description of the holding or reasoning of the cited Attorney General’s Opinion.

62. This later opinion acknowledged the prior Attorney General opinion’s holding, but ultimately rejected it as improper due to changed circumstance. Id. at 3.

ANSWER: The District denies that the allegation constitutes a full and complete description of the holding or reasoning of the cited Attorney General’s Opinion.

63. The Attorney General first noted that interpreting the Michigan FOIA consistently with the federal FOIA was appropriate where analogous. Id., citing Capitol Information Association v Ann Arbor Police, 138 Mich App 655, 658 (1984).

ANSWER: The District denies that the allegation constitutes a full and complete description of the holding or reasoning of the cited Attorney General’s Opinion.

64. The Attorney General then stated:

OAG, 1979-1980, No 5500, *supra*, was issued by the U.S. Court of Appeals, D.C. Circuit, in *Weisberg v United States*, 203 US App DC 242 (1980), decided the issue of whether copyrighted materials are exempt from disclosure under the federal FOIA. In *Weisberg*, the plaintiff brought a federal FOIA action to compel disclosure of photographs in the government’s possession that were

³ Attached as Appendix B.

taken at the scene of Dr. Martin Luther King, Jr.'s assassination. Some of the requested file photos were taken and copyrighted by Life Magazine. *Id.* at 825. The government argued that, based on federal FOIA exemptions, copyrighted materials should never be subject to mandatory disclosure. *Id.* at 828. The court, however, rejected the government's argument and held as follows:

We hold that mere existence of copyright, by itself, does not automatically render FOIA inapplicable to materials that are clearly agency records.

Id. at 825.

The court recognized that under the government's interpretation of the federal FOIA, an agency would be permitted to mask its processes or functions from public scrutiny by merely asserting a third party's copyright. *Id.* at 828.

Id. at 3 (emphasis added).⁴

ANSWER: The District admits that the allegation accurately quotes portions of the cited Attorney General Opinion. The District denies that the allegation constitutes an full and complete description of the holding or reasoning of the cited Attorney General's Opinion, that the facts underlying the Attorney General's Opinion are materially similar to the facts presented in this litigation, and that the holding or rationale contained within this Opinion support any conclusion that it has committed any violation of the FOIA.

65. The Attorney General concluded by stating: "Under the *Weisberg* decision, *supra*, a government agency's public records, even if copyrighted, are subject to disclosure under the federal FOIA. A similar result should prevail under the Michigan FOIA." *Id.*

ANSWER: The District admits that the allegation accurately quotes portions of the cited Attorney General Opinion. The District denies that the allegation constitutes a full and complete description of the holding or reasoning of the cited Attorney General's Opinion, that the facts underlying the Attorney General's Opinion are materially similar to the facts

⁴ The *Weisberg* decision referenced by the Attorney General is attached as Appendix C.

presented in this litigation, and that the holding or rationale contained within this Opinion support any conclusion that it has committed any violation of the FOIA.

66. Subsequent cases relating to the Weisberg case (hereinafter Weisberg I) are consistent with this result. In *Weisberg v US Dept of Justice*, (Weisberg II) the District Court for the District of Columbia noted that while the Weisberg I decision had not explicitly reached a determination of whether copyright prevented the requested records from being disclosed, it was unlikely the documents at issue would have ever been disclosed absent the FOIA request, despite the fact they were made available for public inspection. *Weisberg v US Dept of Justice* (Weisberg II), 745 F.2d 1476, 1481, n. 7 (DC Cir 1984).⁵

ANSWER: The District denies that the allegation constitutes a full and complete description of the holding or reasoning of the cited court decisions or that their holdings or rationale apply to this case. The District denies that the allegation constitutes a full and complete description of the holding or reasoning of the cited decisions, that the facts underlying those decisions are materially similar to the facts presented in this litigation, and that the holding or rationale contained within this Opinion support any conclusion that it has committed any violation of the FOIA.

67. The situation presented in the Weisberg cases is largely analogous to this matter with respect to Plaintiff's Training Materials Request. In both instances, the government has attempted to prevent the copying and production of allegedly copyrighted materials on behalf of a third-party copyright holder, but has indicated a willingness to permit those records to be inspected. Yet, as in Weisberg II, it is unlikely the relevant records will be meaningfully disclosed to the public absent the copying of the records sought by Plaintiff's Training Materials Request.

ANSWER: Denied as untrue.

⁵ The *Weisberg II* decision is attached as Appendix D.

68. Similarly, the release of the requested records in both Weisberg II and in this matter relate to subjects of great public important. In the Weisberg cases, the public interest was gaining a greater understanding of the events surrounding the assassination of Dr. Martin Luther King Jr., a matter that is axiomatically a matter of public interest. Here, the relevant records Plaintiff seeks relate to diversity, equity, and inclusion, implicit bias, and social justice, along with any training methods related to these subjects. This subject matter and/or the implementation thereof is a matter of great public import at this time.

ANSWER: The District admits only that the requests Plaintiff has made relate to important subjects.

69. The recent public interest in these types of records can hardly escape notice. In Michigan alone, multiple records requests relating to training and education materials have received media attention.⁶ The public interest is so high that bills have been introduced in the Michigan Legislature that would specifically address the disclosure of records by public schools.⁷ School transparency is now a matter of national public import,⁸ with 19 states having introduced school transparency bills as of February 23, 2022.⁹ Disclosure of records such as those Plaintiff has requested would help to contribute to this public and political discourse.

ANSWER: The District admits only that the requests Plaintiff has made relate to subjects which are of interest to some members of the public.

⁶ See, e.g., Kieffer, Amanda, *Parents Need a Say on Education Curricula*, Washington Examiner (October 29, 2021).

⁷ See, e.g., Senate Bill No 868 of 2022, available at: <https://www.legislature.mi.gov/documents/2021-2022/billintroduced/Senate/pdf/2022-SIB-0868.pdf>.

⁸ See, e.g., Cromwell, Rich, *Will A 'Parental Bill Of Rights' Finally Enforce Government School Transparency?*, The Federalist (February 10, 2022), available at:

<https://thefederalist.com/2022/02/10/will-parental-bill-of-rights-finally-enforce-government-school-transparency/>; Poff, Jeremiah, *Minnesota Republicans Introduce School Transparency Bills*, Washington Examiner (February 15, 2022), available at: <https://www.washingtonexaminer.com/restoring-america/community-family/minnesota-republicans-introduce-school-transparency-bills>.

⁹ Rufo, Christopher F., *The Fight for Curriculum Transparency*, City Journal (February 23, 2022), available at: <https://www.city-journal.org/he-fight-for-curriculum-transparency>.

70. In light of the Attorney General’s most-recent opinion on this matter, and FOIA’s clear public policy goal of providing all persons with “full and complete information regarding the affairs of government,” Michigan law requires the District to make the relevant records available for copying.

ANSWER: Denied as untrue.

71. Indeed, absent such a requirement, the people’s ability to “fully participate in the democratic process” would be significantly hindered, as citizens would lack meaningful information about a matter of high public interest.

ANSWER: Denied as untrue.

72. Even if the Michigan FOIA does not require the copying and disclosure of requested records as a matter of Michigan law, the Weisburg decisions would suggest the alternate remedy would be for the third-party copyright holder to be impleaded in this action to ensure an adequate adjudication of the copyright issue.

ANSWER: Denied as untrue.

73. Should the Court adopt this approach in the previous paragraph, Plaintiff’s anticipated use of the records for purposes of commentary and/or criticism in further of political discourse on an issue of public importance clearly falls within the fair use exception to copyright as outlined in 17 USC §107.

ANSWER: Denied as untrue.

74. Thus, under both Michigan law and the framework established by the *Weisberg* cases, Plaintiff is entitled to receive copies of the records she requested in her Training Materials Request.

ANSWER: Denied as untrue.

75. The District’s failure to produce those records violated Plaintiff’s rights as established by MCL 15.233(1).

ANSWER: Denied as untrue.

C. Statutory Damages

ANSWER: The District denies any allegation in Count I C, that Plaintiff is entitled to any relief, equitable, or otherwise as a matter of fact or law.

76. The Plaintiff hereby incorporates the preceding paragraphs as if fully restated herein.

ANSWER: The District incorporates is answers to the preceding paragraphs.

77. In light of the above, the Department's improper withholding of the requested records is arbitrary and capricious under MCL 15.240(7), thereby subjecting the Department to a civil fine of \$1,000.00 payable to the general treasury and a separate \$1,000.00 to Plaintiff.

ANSWER: The District denies the allegations in Paragraph 77 and further denies that it is liable to Plaintiff for any legally cognizable damages in any amount whatsoever, and denies that Plaintiff is entitled to any relief, equitable or otherwise, as a matter of fac and law. The District denies any allegation or inference that it violated the FOIA or that it engaged in any act or omission that would constitute a violation of the FOIA.

78. The Department's inappropriate application of the aforementioned exemptions constitutes a willful and intentional failure to comply under MCL 15.240b, thereby subjecting it to a civil fine of \$2,500.00 to \$7,500.00 payable to the state treasury.

ANSWER: The District denies the allegations in Paragraph 78 and further denies that it is liable to Plaintiff for any legally cognizable damages in any amount whatsoever, and denies that Plaintiff is entitled to any relief, equitable or otherwise, as a matter of fac and law. The District denies any allegation or inference that it violated the FOIA or that it engaged in any act or omission that would constitute a violation of the FOIA.

79. Pursuant to MCL 15.240(6), Plaintiff, if she 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).

ANSWER: The District denies the allegations in Paragraph 79 and further denies that it is liable to Plaintiff for any legally cognizable damages in any amount whatsoever, and denies that Plaintiff is entitled to any relief, equitable or otherwise, as a matter of fact and law. The District denies any allegation or inference that it violated the FOIA or that it engaged in any act or omission that would constitute a violation of the FOIA.

GENERAL DENIAL

Except as expressly admitted herein, the District expressly denies any allegations in Plaintiff's First Amended Complaint which require a responsive pleading.

DENIAL REGARDING PLAINTIFF'S AUTHORITY CITED WITHIN FIRST AMENDED COMPLAINT

The District denies that any decisions, legal authority such as Attorney General Opinions, previously decided Court opinions, or secondary sources cited within the body of Plaintiff's First Amended Complaint or in the footnotes therein are accurately summarized, binding, relevant, or otherwise comparable to the allegations and Counts Plaintiff has raised herein.

AFFIRMATIVE AND OTHER DEFENSES

1. To the extent discovery may disclose such information, Plaintiff's First Amended Complaint may be barred in whole or in part by the doctrine of after-acquired evidence, or such doctrine may limit or eliminate Plaintiff's alleged damages, or otherwise preclude her claims.

2. The First Amended Complaint fails to state a claim for which relief can be granted.
 3. Some or all of the District's records are exempt from access under the applicable provisions of the Freedom of Information Act.
 4. The District has not created or obtained the records sought; therefore, the records sought are not "agency records" within the meaning of FOIA.
 5. The District does not have, nor has ever had, possession and control of the requested records; therefore, has not improperly withheld documents.
 6. The District has properly applied exemptions to Plaintiff's requests, where applicable.
 7. The District has produced all responsive records, to the extent they exist to Plaintiff.
- Defendant reserves the right to assert additional affirmative or other defenses as they become known through the course of discovery.

RELIEF REQUESTED

Defendant respectfully requests that this Court deny Plaintiff the relief requested, dismiss this First Amended Complaint in its entirety with prejudice, and award Defendant its costs and attorneys' fees incurred in defending this frivolous action, plus any other relief, legal or equitable, this Court deems appropriate.

Respectfully submitted,
JACKSON LEWIS P.C.

/s/ Timothy J. Ryan _____
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Dated: July 19, 2022

CERTIFICATE OF SERVICE

On this day July 19, 2022, the undersigned did cause to be filed the foregoing document with the Court using the CM/ECF system, which will send notice of its filing to all counsel of record.

/s/ Timothy J. Ryan
Timothy J. Ryan (P40990)

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