

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

CAROL BETH LITKOUHI,

Plaintiff,

v.

ROCHESTER COMMUNITY SCHOOL
DISTRICT, a government entity,

Defendant.

CASE NO. 2022-193088-CZ

HON. JACOB J. CUNNINGHAM

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**DEFENDANT’S RESPONSE TO PLAINTIFF’S MOTION
TO QUASH DEPOSITION OF PLAINTIFF**

INTRODUCTION

Plaintiff, Carol Beth Litkhoui, has taken the position that because she brought her lawsuit under the Freedom of Information Act she is exempt from being deposed. Without evidence she makes the accusation that her deposition was noticed in bad faith and only for the purpose of “annoying, embarrassing, oppressing and causing undue burden.” (**Plaintiff’s Brief P 2**) Without citing any authority to support the proposition she claims deposing her in this case would be unprecedented. Plaintiff falsely claims that the only issue in this case is whether certain statutory exemptions apply. In so doing, she misrepresents to the Court the allegations of her Complaint,

ignoring the myriad of fact issues it raises. Her argument that because Defendant has the burden of proving that an exemption applies it is precluded from taking her deposition ignores that fact that in virtually every litigated case one party or the other has the burden and both sides take depositions. It also ignores the fact that Plaintiff's defenses are not limited to exemptions. She makes the false claim that Defendant seeks to depose her only to discover her identity, motivation and for making FOIA requests and future use of the records but does not point the Court to anything to support that claim.

SUMMARY OF FACTS

A. Scheduling of Plaintiff's Deposition

Plaintiff's accusation that Defendant's purpose in taking her deposition is to annoy, oppress and cause her a burden is belied by Defendant's willingness to make it as convenient for her as possible. **Exhibit A** is the email correspondence between counsel regarding scheduling Plaintiff's deposition. The first communication is an email dated May 27, 2022 from the undersigned to the Plaintiff's attorney requesting dates in June to take Plaintiff's deposition. At that time Plaintiff made no claim that she should not be deposed. Instead, in an exchange dated June 6, the undersigned agreed to Plaintiff's request for an extension to respond to Defendant's written discovery and again asked for deposition dates, this time in August to accommodate Plaintiff's extension request. Again, Plaintiff made no objection to being deposed. Instead, the response was "Thanks Tim. Let me get together some dates and I'll run them by you". (*Id.*) By June 24, no dates had been provided. So again, the undersigned, by email, asked Plaintiff to propose dates. By email dated June 29, 2022, Plaintiff's lawyers proposed dates and made no objection to the deposition. (*Id.*) By email dated July 12, 2022, the undersigned communicated to Plaintiff's attorney that he would notice Plaintiff's deposition for August 12, 2022 (one of Plaintiff's proposed dates) and

proposed a location but also stated, “Let me know if you are ok with that.” (*Id.*) Only then, by letter dated July 19, 2022, did Plaintiff object to being deposed.

If Defendant’s purpose were to annoy and inconvenience Plaintiff, then a unilateral notice of deposition at a time and place of its choosing would have been the way to go. Instead, in a set of cordial email communications over a one month time period Defendant offered to accommodate Plaintiff’s schedule, preference for location, and request to extend the deadline to respond to written discovery.

B. Plaintiff’s Complaint is Replete with Allegations Raising Factual Issues Which Require Discovery

At pages 5 and 6 of her brief Plaintiff quotes two allegations from her 79 paragraph Amended Complaint and Defendant’s answers to those allegations. From those two allegations and answers she represents to the Court that the only issue in the case is the legal issue of whether FOIA required Defendant to search its employees for potentially responsive documents. Of course, that ignores the great many allegations of her 79-paragraph Amended Complaint which raise significant fact questions which beg for discovery. Here are just a few of those:

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.

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.

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.

As these allegations and answers show, the legal issue of the extent of Defendant's obligation to search its employees for potentially responsive documents is not the only issue, and the Defendant's position on that legal issue is not its only defense. Plaintiff alleges that she has

information that Defendant made no such inquiries. Defendant says that it did. Plaintiff alleges that she has information that responsive documents exist and were not provided. Defendant denies that. In light of these allegations Defendant is entitled to discover what information Plaintiff has to make her believe that Defendant made no inquiries. It is entitled to discover what information she has indicating that additional responsive documents exist but were not provided. The identity of the curriculum consultant Plaintiff claims she corresponded with, the details of her communication with that consultant, and the basis for her claim that Defendant instructed the consultant not to send her materials are all legitimate subjects for discovery. These are but a few of the many fact issues raised by Plaintiff's complaint and which are legitimate subjects for discovery.

I. LAW AND ARGUMENT

A. **Discovery is Broad and Depositions are Routine.**

Despite Plaintiff's description of Defendant's desire to engage in discovery in this case as "unprecedented" and "unusual", there is nothing unusual in conducting discovery, including depositions, as part of litigation in Michigan Courts. As MCR 2.302(B)(1) expressly states "[p]arties may obtain discovery regarding *any matter, not privileged, which is relevant to the subject matter involved in the pending action*, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of another party[.]" (Emphasis added.) With respect to depositions, MCR 2.306, provides that "a party may take the testimony of a person, including a party, by deposition on oral examination." Where a party fails to attend his own deposition, the Court may order the deposition to be taken. MCR 2.313(D)(1); MCR 2.313(B)(2)(a).

Michigan's court rules permit broad discovery of unprivileged matters relevant to the subject matter of a pending case. *Reed Dairy Farm v Consumers Powers Co*, 227 Mich App 614, 616; 576 NW2d 709 (1998). Because "the purpose of discovery is to simplify and clarify issues,"

the court rules "should be construed in an effort to facilitate trial preparation and to further the ends of justice." (*Id.*) The Michigan Supreme Court has emphasized that the rules "should promote the discovery of the true facts and circumstances of a controversy, rather than aid in their concealment." *Domako v Rowe*, 438 Mich 347, 360; 475 NW2d 30 (1991) (quotation marks and citation omitted). Here, Plaintiff attempts to avoid her deposition to further develop the factual basis of her 79 paragraph Amended Complaint, in which she raises multiple factual issues. Defendant has the right to explore, through her deposition, the basis of her factual allegations.

B. When There are Disputed Issues of Material Fact Depositions are permitted In FOIA Cases.

Plaintiff's brief states at footnote 4 that her Westlaw search did identify any cases where a governmental body sought to use discovery in a FOIA case. (Pl.'s Br. P. 6, fn. 4.) In fact, *Cashel v Smith* 117 Mich App 405, 324 NW2d 336 (1982), which addresses the issue of discovery in FOIA cases is directly on point. The analysis employed by the court in that case leads to the inescapable conclusion that Plaintiff's deposition should be permitted in this case.

In *Cashel* the plaintiff made a FOIA request to the University of Michigan. The University denied the request for two reasons. The first was that it had promulgated an internal rule that it would not comply with FOIA requests if it determined that the request was made for "whim, fancy, or purpose to harass." (*Id.* at 409). The internal rule went on to say "the idly or maliciously curious need not be accommodated under the Act." (*Id.*) The second basis for denying the request was that the description of the records sought was insufficient. (*Id.* at 408.)

The plaintiff sought a protective order to avoid her deposition. She argued that because pursuant to MCL 15.204(3) FOIA cases are to be expedited, depositions may never be taken in FOIA cases. The court disagreed, holding:

...we are not prepared to announce a general rule precluding depositions in all FOIA actions. Under certain circumstances a deposition may be necessary and

appropriate even though it may delay proceedings. For example, where a request for information is denied on the ground that an invasion of privacy may occur, the requester's motive for requesting the information is a relevant consideration where the requester intends to use the information for commercial purposes. *Kestenbaum v Michigan State University*, 97 Mich App 5, 20; 294 NW2d 228 (1980), *lv gtd* 411 Mich 869 (1981). A public body might wish to discover this motive by way of deposition. (*Id.* at 408.)

Id. at Mich App 410; NW2d at 338.

The Court ultimately held that under the particular circumstances of that case the deposition would not be allowed. The basis for the court's decision was not that there was a blanket prohibition against depositions in FOIA cases. Indeed, the court concluded precisely the opposite—that depositions and discovery are appropriate when there are disputed issues of material fact. The *Cashel* court concluded that the University's internal rule was unlawful on its face because it created an exemption that was not in the statute. Therefore, there was no point in conducting discovery on that issue. Because there was no dispute about the plaintiff's description of the documents she was seeking, the only question was whether that description was sufficient and there was nothing that discovery could add on that issue. It was only because there was no dispute of material fact **and** because the deposition would delay the proceeding that the court disallowed it.

Of course, the exact opposite circumstances are present here. Unlike *Cashel*, this is not a case where the issues are purely legal and the critical facts are undisputed. As shown above this case is filled with fact issues and they are highly disputed. Nor is this this a case where a deposition will delay anything. The Court's Scheduling Order keeps discovery open until October 17, 2022. Dispositive motions are not due until December 16, 2022. The trial is not scheduled until February 2, 2023. Plaintiff's deposition can easily be completed before the end of August and thus would not interfere with any deadline or cause any delay in this case.

The *Cashel* decision instructs when depositions should be allowed in FOIA cases and when they should not. Under the *Cashel* analysis Plaintiff's deposition should be allowed in this case.

C. Plaintiff's Arguments Regarding "Identity of the Requester" and Her Reasons for Making Her Request and Her Future are Themselves Irrelevant.

Plaintiff says that an "important aspect of her brief that will be repeated throughout is that the identity of the FOIA requester and the reasons why they make their FOIA request, are irrelevant" and that her future use of the requested information is irrelevant. (Pl.'s Br. P. 3-4, 9.) Those might be important to Plaintiff and her brief, but they have nothing to do with any issue here. Defendant never denied any of Plaintiff's FOIA request based on her identity, motivation or intended use of the documents. It has not raised any defense to this lawsuit based on her identity, reasons for making her requests or how she would use the records. There is no reason for Plaintiff to represent to the Court that the deposition would be about any of these things. Rather the deposition would be to discover facts related to the allegations of her complaint and facts which may bear on her credibility- both perfectly legitimate subjects of inquiry.

CONCLUSION

For the reasons stated herein, Defendant requests that Plaintiff's motion be denied.

Respectfully submitted,
JACKSON LEWIS P.C.

/s/ Timothy J. Ryan
Timothy J. Ryan (P40990)
Linda L. Ryan (P67686)
Attorneys for Defendant
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Dated: August 12, 2022

CERTIFICATE OF SERVICE

On this day August 12, 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)

4868-4874-7310, v. 1

EXHIBIT A

Subject: FW: Litkouhi v Rochester Community Schools

From: Ryan, Timothy J. (Grand Rapids) <Timothy.Ryan@jacksonlewis.com>
Sent: Wednesday, June 29, 2022 11:00 AM
To: Delie, Steve <Delie@mackinac.org>
Cc: Wilcox, Derk <Wilcox@mackinac.org>
Subject: RE: Litkouhi v Rochester Community Schools

Thanks Steve. I'll get back to you on the dates. Let me see your proposed amendment and then I'll let you know if I'll agree.



Timothy J. Ryan
Attorney at Law

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Mailing and Package Delivery Address:
Jackson Lewis P.C.
2000 Town Center
Suite 1650
Southfield, MI 48075
Timothy.Ryan@jacksonlewis.com | www.jacksonlewis.com

From: Delie, Steve <Delie@mackinac.org>
Sent: Wednesday, June 29, 2022 10:47 AM
To: Ryan, Timothy J. (Grand Rapids) <Timothy.Ryan@jacksonlewis.com>
Cc: Wilcox, Derk <Wilcox@mackinac.org>
Subject: RE: Litkouhi v Rochester Community Schools

[EXTERNAL SENDER]

Good Morning Tim,

Our client is generally available before August 29th, although she would like to avoid August 9th and 24th if possible. Is there a particular date that would work best for you?

Also, thank you for your assistance regarding the materials on the flash drive. Having received and reviewed those materials, we would like to amend our complaint to reflect that fact. Would you be willing to grant permission to amend pursuant to MCR 2.118?

Sincerely,

Steve

From: Ryan, Timothy J. (Grand Rapids) <Timothy.Ryan@jacksonlewis.com>
Sent: Friday, June 24, 2022 9:56 AM
To: Delie, Steve <Delie@mackinac.org>
Cc: Wilcox, Derk <Wilcox@mackinac.org>
Subject: RE: Litkouhi v Rochester Community Schools

Good morning Steve. Any progress on getting me deposition dates? I would really to get it on my schedule. Thanks.



Timothy J. Ryan
Attorney at Law

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From: Delie, Steve <Delie@mackinac.org>
Sent: Monday, June 6, 2022 11:28 AM
To: Ryan, Timothy J. (Grand Rapids) <Timothy.Ryan@jacksonlewis.com>
Cc: Wilcox, Derk <Wilcox@mackinac.org>
Subject: RE: Litkouhi v Rochester Community Schools

[EXTERNAL SENDER]

Thanks Tim! Let me get some dates together and I'll run them by you.

From: Ryan, Timothy J. (Grand Rapids) <Timothy.Ryan@jacksonlewis.com>
Sent: Monday, June 6, 2022 11:27 AM
To: Delie, Steve <Delie@mackinac.org>
Subject: RE: Litkouhi v Rochester Community Schools

Hello Steve. The extension is ok with me. I would really like to get her deposition in in August. So if you can give me a few August lternatives and and make the written discovery answers due about a week before the dep. that would work.



Timothy J. Ryan

Attorney at Law

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From: Delie, Steve <Delie@mackinac.org>

Sent: Monday, June 6, 2022 11:08 AM

To: Ryan, Timothy J. (Grand Rapids) <Timothy.Ryan@jacksonlewis.com>

Cc: Wilcox, Derk <Wilcox@mackinac.org>

Subject: RE: Litkouhi v Rochester Community Schools

[EXTERNAL SENDER]

Good Morning Tim,

I notice that our interrogatories are due shortly, and I saw your request for a deposition. Given that we are still trying to work out the jump-drive issue, would you be willing to grant us a 30 day extension on both the interrogatories and the deposition? The drive may result in us needing to amend the complaint, and could even resolve some aspects of the dispute.

Thanks!

Steve

From: Delie, Steve

Sent: Wednesday, June 1, 2022 4:54 PM

To: Ryan, Timothy J. (Grand Rapids) <Timothy.Ryan@jacksonlewis.com>

Subject: RE: Litkouhi v Rochester Community Schools

Tim,

No worries, I completely understand. Thanks for following up!

Steve

From: Ryan, Timothy J. (Grand Rapids) <Timothy.Ryan@jacksonlewis.com>

Sent: Wednesday, June 1, 2022 4:53 PM

To: Delie, Steve <Delie@mackinac.org>

Subject: RE: Litkouhi v Rochester Community Schools

Hello Steve. Sorry I haven't gotten back to yet. I have been tied up. I'll do my best to get you an answer tomorrow.



Timothy J. Ryan

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From: Delie, Steve <Delie@mackinac.org>

Sent: Tuesday, May 31, 2022 12:30 PM

To: Ryan, Timothy J. (Grand Rapids) <Timothy.Ryan@jacksonlewis.com>

Cc: Wilcox, Derk <Wilcox@mackinac.org>

Subject: Litkouhi v Rochester Community Schools

[EXTERNAL SENDER]

Good morning Tim,

My name is Steve Delie, and I am one of the attorneys on the above-captioned case. I've also copied my co-counsel, Derk Wilcox, who I believe you have already corresponded with.

Based on the District's statements, it appears that for the portion of this case relating to teacher training materials, certain materials are available for production on a thumb drive, while others are in dispute on the copyright issue. As to the materials that are on the drive, would it be possible for us to receive those materials upon payment of the amount requested by the District in response to Ms. Litkouhi's request? It's my understanding those are not in dispute, other than for the issue of payment.

Sincerely,

Steve

Subject: FW: Litkouhi Deposition

From: Ryan, Timothy J. (Grand Rapids) <Timothy.Ryan@jacksonlewis.com>
Sent: Tuesday, July 12, 2022 12:47 PM
To: Wilcox, Derk <Wilcox@mackinac.org>; Delie, Steve <Delie@mackinac.org>
Subject: Litkouhi Deposition

Good Morning Gentlemen. I plan to notice Ms. Litkouhi's deposition for August 12. I would like to do it in person. Because of the large number of documents involved I think it would be difficult to do it by Zoom. We can do it in the offices of Collins and Blaha in Farmington Hills. Let me know if you are ok with that. Thanks.



Timothy J. Ryan
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Subject: FW: Discovery in Litkouthi v Rochester Schools, 22-193088-CZ
Attachments: 2022 07 19 Letter to counsel re deposition.pdf

From: Wilcox, Derk <Wilcox@mackinac.org>
Sent: Tuesday, July 19, 2022 11:08 AM
To: Ryan, Timothy J. (Grand Rapids) <Timothy.Ryan@jacksonlewis.com>; Ryan, Linda L. (Grand Rapids) <Linda.Ryan@jacksonlewis.com>
Cc: Delie, Steve <Delie@mackinac.org>
Subject: Discovery in Litkouthi v Rochester Schools, 22-193088-CZ

[EXTERNAL SENDER]

July 19, 2022

Via email only

Timothy J. Ryan, Esq.
Linda L. Ryan, Esq.
JACKSON LEWIS, P.C.
250 Monroe NW, Suite 400
Grand Rapids, MI 49503

Re: Deposition of the plaintiff in *Litkouthi v. Rochester Community Schools*,
22-193088-CZ

Dear Timothy and Linda;

This letter is in response to our discussions regarding your request to schedule a deposition of our client, the plaintiff. As you are aware, a deposition is an expensive and intrusive form of discovery and is intimidating to laypeople, such as our client. Furthermore, a public body seeking a deposition, or even discovery in general, from a FOIA requestor is highly unusual and flies in the face of the FOIA statute – the purpose of which is to provide citizens an easy and affordable way to inspect government documents.

The touchstone of all discovery is relevance, and we are unable to determine how the deposition of our client is likely to lead to the discovery of relevant evidence in this case.. The courts have said:

1. It is the public body that has the burden of showing the application of statutory exemptions to FOIA disclosure. *M Live Media Group v City of Grand Rapids*, 321 Mich App 263, 271 (2017).
2. The identity and the motives of the FOIA requestor are irrelevant to the application of an exemption. *State Employees Ass'n v Department of Management and Budget*, 428 Mich 104, 122 (1987).

Per MCR 2.302, “Parties may obtain discovery regarding any non-privileged matter that is relevant to any party’s claims or defenses and proportional to the needs of the case, taking into account all pertinent factors, including whether the burden or expense of the proposed discovery outweighs its likely benefit, the complexity

of the case, the importance of the issues at stake in the action, the amount in controversy, and the parties' resources and access to relevant information.”

Based on that standard, we do not believe a deposition is necessary, appropriate, or proportional to the needs of this case. Instead of a deposition, we propose working cooperatively to provide you with the discovery you seek in this matter. We would be happy to have our client provide responses to written questions and interrogatories, and we are similarly willing to evaluate whether it would be possible to stipulate to facts you believe are relevant to your claims or defenses. We are equally open to discussing any other methods of discovery that are more proportional to the needs of this case than depositions.

To the extent these alternatives are not satisfactory, and given the irrelevance of the testimony of a FOIA requestor to determining whether a FOIA exemption applies, as well as the expense and burden associated with depositions, we will have to move to quash any subpoena for a deposition of our client.

Sincerely,

/s/ Derk Wilcox

Derk A. Wilcox
Senior Attorney
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