

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
Derk A. Wilcox (P66177)
Stephen A. Delie (P80209)
Patrick J. Wright (P54052)
Attorneys for Plaintiff
140 West Main Street
Midland, MI 48640
(989) 631-0900
wilcox@mackinac.org

JACKSON LEWIS P.C.
Timothy J. Ryan (P40990)
Linda L. Ryan (P67686)
Attorneys for Defendant
250 Monroe NW, Suite 400
Grand Rapids, MI 49503
(616) 940-0230
timothy.ryan@jacksonlewis.com
linda.ryan@jacksonlewis.com

**DEFENDANT, ROCHESTER COMMUNITY SCHOOL DISTRICT'S
REPLY BRIEF IN SUPPORT OF ITS MOTION FOR SUMMARY DISPOSITION**

Defendant, Rochester Community School District, by its attorneys, Jackson Lewis P.C., hereby submits its Reply Brief in Support of Its Motion for Summary Disposition.

I. Introduction

The Plaintiff in this case, Carol Beth Litkouhi, has now filed her Brief in Response to Defendant, Rochester Community School District's (RCSD) motion for Summary Disposition. After RCSD filed its initial brief the Court entered the parties' stipulated order dismissing Plaintiff's claims regarding her request for copyrighted training materials. Thus, the only issue left for decision is whether documents which are not prepared, owned, used or possessed by RSDC

are subject to disclosure if they are prepared owned used or possessed by non-administrative public school employees. Much of Plaintiff's brief is devoted to addressing arguments that RCSD never made on this issue. Thus, she includes argument about which party has the burden of proving a FOIA exemption. RCSD has never claimed a statutory exemption with regard to this issue. Plaintiff argues that the collective bargaining agreement covering RCSD's teachers cannot relieve RCSD of its FOIA obligations. RCSD has never claimed that it could. She claims that RCSD has attempted to "cast [teachers] as employees of their union or bargaining unit". RCSD has done no such thing. Since these are responses to arguments that were never made, they will not be further addressed. There are however, two arguments Plaintiff makes which warrant a reply.

II. The Definition of "Public Body" is the Controlling Section of the Statute.

On page nine of her brief Plaintiff makes the incredible statement that the language of the statute defining the term "public body" is irrelevant to the issue presented. She then tells the Court that MCL 15.231(2) is the controlling section, but only after she adds language that does not exist in that section. Specifically, Plaintiff claims that MCL 15.231(2) provides that "documents are **obtainable** from 'all employees'". (Plaintiff's Brief P. 9) (emphasis added). Here is the entirety of that section:

It is the public policy of this state that all persons, except those persons incarcerated in state or local correctional facilities, are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees, consistent with this act. The people shall be informed so that they may fully participate in the democratic process.

Thus, the section of the statute Plaintiff relies upon does not say that documents are **obtainable** from public employees. It does not say anything about what documents are obtainable or who they may be obtained from. It says that information **about** public employees may be obtained "**consistent with this Act.**" (emphasis added) Thus, the statutory section Plaintiff would

have the Court rely upon directs to other sections of FOIA to answer the substantive questions of which documents are obtainable, and who they may be obtained from.

As described in RCSD's initial brief, the structure of the definitional section of FOIA shows that documents created or possessed by public school teachers, but not the school district itself, are not public records subject to disclosure. Only "public records" are subject to disclosure. (MCL 15.233(1)) A public record is a document prepared or possessed by a "public body". (MCL 15.232(i)) The statute specifically includes the term "employees" in the section dealing with state employees, but does not include that term in the section dealing with school districts. (MCL 15.232(h)(i) and (iii)) While Plaintiff says this distinction is irrelevant, the Michigan Court of appeals has found it to be highly relevant:

While FOIA includes in the definition of "public body" officers and employees of state government, see MCL 15.232(h)(i), the definitional section does not also include officers and employees of municipalities such as cities or townships. The distinction between the state and local government officials demonstrates the Legislature's intent to exclude individual government officers and employees not working in state government from the definition of "public body." See *Breighner v Mich High Sch Athletic Ass'n, Inc*, 471 Mich 217, 233 n 6; 683 NW2d 639 (2004) ("[I]t would defy logic (as well as the plain language of § 232[d][iii]) to conclude that the Legislature intended that any person or entity qualifying as an "agent" of one of the enumerated governmental bodies would be considered a "public body" for purposes of the FOIA.") (alteration in original).

Blackwell v. City of Livonia, 2021 Mich. App. LEXIS 7060 (copy provided with RCSD's initial brief).

Thus, the statute makes it perfectly clear that teachers are not public bodies for purposes of FOIA. As the affidavits submitted with RCSD's initial brief show, the documents which Plaintiff describes in her FOIA requests are not documents which the RCSD prepares uses or possesses. The possibility that individual teachers may (or may not) prepare or use documents meeting that

description in their day-to-day classroom instruction does not render them “public records” because teachers are not “public bodies.”

III. The Agency Theory Which Plaintiff Advances has Already been Rejected by the Michigan Courts.

At pages 11 and 12 of her brief Plaintiff cites to the concurrence in *Biso v Clarkston*, 540 Mich 966, 933 NW2d 36 (2019) to argue that whether documents are public records should be analyzed under a principle/agent theory. Michigan Courts have addressed and rejected this analysis. In *Breighner v. Mich. High Sch. Ath. Ass'n*, 471 Mich. 217, 683 N.W.2d 639, (2004) the plaintiff argued that the Michigan High School Athletic Association was an agent of the public schools and therefore subject to FOIA. The Supreme Court disagreed:

Finally, plaintiffs contend that the *MHSAA* acts as an "agent" for its member schools and that it is therefore a public body as defined by § 232(d)(iii):

A county, city, township, village, intercounty, intercity, or regional governing body, council, *school* district, special district, or municipal corporation, or a board, department, commission, council, *or agency thereof*. [Emphasis added.]

The Court of Appeals majority and the parties appear to have assumed that § 232(d)(iii) includes "agents" of enumerated governmental entities in the definition of "public body." We disagree and believe that there is a fundamental difference between the terms "agent" and "agency" as the latter term is used in the statute.

Although the noun "agency" may be used to describe a business or legal relationship between parties, it is wholly evident from the context of § 232(d)(iii) that this is not the sense in which that term is used. Section 232(d)(iii) designates several distinct governmental units as public bodies, and proceeds to include in this definition any "agency" of such a governmental unit. In this specific context, the word "agency" clearly refers to a *unit or division of government* and not to the *relationship* between a principal and an agent. Had the Legislature intended any "agent" of the enumerated governmental entities to qualify under § 232(d)(iii), it would have used that term rather than "*agency*." **6** Thus, we reject plaintiffs' argument that the *MHSAA* acts as an "agent" of its member schools and that it thus qualifies as an "agency" under § 232(d)(iii). **7**

Breighner v. Mich. High Sch. Ath. Ass'n, 471 Mich. 217, 231-233, 683 N.W.2d 639, 647-648 (2004).

At footnote 6 of its decision the *Breighner* Court stated

Indeed, it would defy logic (as well as the plain language of § 232[d][iii]) to conclude that the Legislature intended that any person or entity qualifying as an "agent" of one of the enumerated governmental bodies would be considered a "public body" for purposes of the FOIA.

Thus, the Supreme Court has made it clear that the question of who or what constitutes a public body for purposes of FOIA is answered by the detailed definitions provided in the statute. Public school teachers are not included in that definition.

IV. Conclusion

For the reasons stated herein, and in its initial brief, Defendant, Rochester Community School District requests that its motion be granted, that this case be dismissed in its entirety and that it be awarded its costs and attorney fees incurred in defense.

Respectfully submitted,
JACKSON LEWIS P.C.

/s/ Timothy J. Ryan
Timothy J. Ryan (P40990)
Linda L. Ryan (P67686)
Attorneys for Defendant
250 Monroe NW, Suite 400
Grand Rapids, MI 49503
(616) 940-0230
timothy.ryan@jacksonlewis.com
linda.ryan@jacksonlewis.com

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CERTIFICATE OF SERVICE

On this day October 24, 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)