STATE OF MICHIGAN
COURT OF APPEALS

CAROL BETH LITKOUHI,

Plaintiff - Appellant,

v.

ROCHESTER COMMUNITY SCHOOL DISTRICT,

Defendant - Appellee.

Court of Appeals Case No. 364409

L/C Case No. 22-193088-CZ
Hon. Jacob J. Cunningham

APPELLANT'S BRIEF

ORAL ARGUMENT REQUESTED

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APPELLANT'S BRIEF

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BASIS OF JURISDICTION

This court has appellate jurisdiction under MCR 7.203(A)(1) to review the Order granting Defendant-Appellee's request for summary disposition and dismissing the matter, entered on December 15, 2022, in the Oakland County Circuit Court Case No. 22-193088-CZ.

Plaintiff-Appellant timely filed its Claim of Appeal on January 4, 2023.

STATEMENT OF QUESTION INVOLVED

1) When a school district responds to a FOIA request, does the district have a duty to obtain and provide relevant documents created or held by an employee of that public body?

   Appellant says: Yes.

   Appellee says: No.

   The Lower Court said: No.

I. STATEMENT OF FACTS AND PROCEEDINGS

The Plaintiff-Appellant, Carol Beth Litkouhi, is a parent within the Defendant-Appellee 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 sought, this lawsuit followed.

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 engage fully with local government officials about these lessons. Unfortunately, the Defendant-Appellee District has rejected Plaintiff-Appellant's attempts to obtain the transparency required by the Freedom of Information Act (FOIA), MCL 15.231 *et. seq*.

On December 14, 2021, Plaintiff-Appellant 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-Appellant's request with respect to a unit plan, which was provided to her 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-Appellant 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-Appellant specifically noted that, unless no materials had been distributed to students as part of the course, responsive records necessarily had to exist. Plaintiff-

Appellant 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-Appellant's administrative 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-Appellant's appeal on the grounds that no responsive materials existed. The District failed to address any specific argument raised in Plaintiff's administrative 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.

In light of Defendant-Appellee's partial denial of Plaintiff-Appellant's December 14th request, Plaintiff-Appellant brought this action against the District in the Oakland County Circuit Court.

After answering the complaint, the District sent a Request for Production of Documents to the Appellant-Plaintiff. Such a request is unusual because the reasons a requestor makes a FOIA request are generally irrelevant to the question of whether or not the request must be fulfilled. See, *Swickard v Wayne County Medical Examiner*, 184 Mich App 662, 666 (1990). The District also sought to depose the FOIA requestor. Plaintiff-Appellant moved to quash the noticed deposition. On that date of the hearing on the motion to quash, the parties engaged in a pre-motion discovery mediation. During the mediation the parties recognized that this case presented two purely legal issues, which, depending on how the court ruled on those issues, could have resolved the case and rendered discovery unnecessary.[1] Following this mediation, oral argument was held on August

[1] One of those issues, relating to copyrighted materials, was resolved by the parties and dismissed by stipulation of the parties and entered by the lower court on October 3, 2022. It is

31, 2022. At the time the lower court heard the parties on the issues and the the discovery disputes. This was the only oral argument or hearing at which the parties appeared before the lower court.

Following the August 31 hearing, the parties stipulated and the court entered an order that stated that the defendant District would file a motion for summary disposition on the question of whether it was "required to search for or produce records which may be in the possession of individual teachers." Stipulated Order of September 16, 2022, at page 2. Recognizing that a determination that the District did not have a duty to search for or produce records in the possession of individual teachers would be dispositive, the parties agreed that "Discovery will be stayed pending the Court's ruling on the summary disposition motions." *Id*., at page 3. The parties also waived the right to oral argument on the summary disposition motion in order to expedite the proceedings. *Id*. The parties submitted cross motions for summary disposition and briefed the issue of a school district's duty to search for and provide records in the possession of individual teachers, and on December 15, 2022, the lower court issued its final order in this matter, which the Plaintiff-Appellant timely appealed.

Plaintiff-Appellant did not conduct any discovery.

The lower court dismissed the matter on Defendant's motion for summary disposition pursuant to MCR 2.116(C)(8) deciding that "Plaintiff['s] complaint fails to state a claim on which relief sought can be granted." Opinion in the Appendix at page 6. The lower court found that school district employees are not subject to FOIA:

> MCL 15.232(h)(i) specifically provides employees of the executive branch state government are included in the definition of a "public body", but subsection (iii) specifically identifies "school district[s]" (notably not listing separately the district employees) as "public bodies." Because the Legislature specifically did not indicate individual employees of school districts are within the meaning of "public bodies,"

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not at issue in the lower court's final order or here on appeal. The remaining issue here is whether records created and held by employees of the school district must be produced.

> the Court is left with a conviction that the Legislature did not intend for a public school district's employees to be included in the definition of "public bodies" relative to FOIA. A review of the provided case law and [sic] does not lead the Court to a conclusion that public school teachers, and their individual work product, are discoverable "public records" of "public bodies" in accordance with FOIA.

Opinion at Appendix page 6 (internal citation omitted).

Plaintiff-Appellant appeals this determination.

II. ARGUMENT

A. FOIA and public records.

1. FOIA requires the disclosure of all public bodies' records, unless specifically exempt.

This Court reviews questions of statutory construction *de novo*. *McAuley v General Motors Corp*, 457 Mich 513, 518; 578 NW2d 282 (1998). In doing so, the purpose is to discern and give effect to the Legislature's intent. *Murphy v Michigan Bell Telephone Co*, 447 Mich 93, 98; 523 NW2d 310 (1994). This inquiry begins by examining the plain language of the statute; where that language is unambiguous, the Court presumes that the Legislature intended the meaning clearly expressed—no further judicial construction is required or permitted, and the statute must be enforced as written. *Tryc v Michigan Veterans' Facility*, 451 Mich 129, 135; 545 NW2d 642 (1996). The Court must give the words of a statute their plain and ordinary meaning, and only where the statutory language is ambiguous may it look outside the statute to ascertain the Legislature's intent. *Turner v Auto Club Ins Ass'n*, 448 Mich 22, 27; 528 NW2d 681 (1995).

Michigan's FOIA statute states:

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

MCL 15.231(2)

The only exception to the release of "full and complete information" is when a statutory exemption applies. See, generally, MCL 15.243 for a list of exemptions. "[T]he FOIA's exemptions must be narrowly construed and that the party seeking to invoke the exemption must prove that nondisclosure is in accord with the intent of the Legislature." *City of Warren v City of Detroit*, 261 Mich App 165, 169-170; 680 NW2d 57 (2004).

The public body has the burden of proof in applying an exemption. "The court shall determine the matter de novo and the burden is on the public body to sustain its denial." MCL 15.240(4). "The public body has the burden to 'sustain its denial.'" *MLive Media Group v City of Grand Rapids*, 321 Mich App 263, 271 (2017).

"Public records" that must be disclosed under FOIA are defined: "'Public record' means 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." MCL 15.232(i).

"Public bodies" are defined as:

> (h) "Public body" means any of the following:
> ***
> (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.
> (iv) Any other body that is created by state or local authority or is primarily funded by or through state or local authority, except that the judiciary, including the office of the county clerk and its employees when acting in the capacity of clerk to the circuit court, is not included in the definition of public body.

MCL 15.232(h) (emphasis added).

Schools are not specifically excluded from the definition of what constitutes a public body, and schools are indisputably part of the "school districts." Nor are public-school teachers excluded from what constitutes a public employee. Teachers are "primarily funded by or through state or

local authority," *id*., and are included under FOIA as responsive entities, even if the FOIA request must be submitted to the district's FOIA coordinator.

2. School classroom documents are public documents.

Michigan, in conjunction with FOIA, has a legal requirement that public bodies retain the records they use for a certain amount of time. This requirement can be found in the Management and Budget Act, Act 431 of 1984, MCL 18.1284-1292. This Act states:

> Sec. 287. (1) The department shall maintain a records management program to provide for the development, implementation, and coordination of standards, procedures, and techniques for forms management, and for the creation, retention, maintenance, preservation, and disposition of the records of this state. All records of this state are and shall remain the property of this state and shall be preserved, stored, transferred, destroyed, disposed of, and otherwise managed pursuant to this act and other applicable provisions of law.

MCL 18.1287(1). Pursuant to the Act, "The department shall issue directives that provide for all of the following: *** (e) The disposal of records pursuant to retention and disposal schedules, or the transfer of records to the custody of the department of history, arts, and libraries." MCL 18.1287(3)(e).

The Act also defines what public records are:

> (b) "Record" or "records" means a document, paper, letter, or writing, including documents, papers, books, letters, or writings prepared by handwriting, typewriting, printing, photostating, or photocopying; or a photograph, film, map, magnetic or paper tape, microform, magnetic or punch card, disc, drum, sound or video recording, electronic data processing material, or other recording medium, and includes individual letters, words, pictures, sounds, impulses, or symbols, or combination thereof, regardless of physical form or characteristics. Record may also include a record series, if applicable.

MCL 18.1284(b).

Pursuant to this Act, the Department of Management and Budget produces guides stating what are public documents and how long different documents must be retained. One of these guides is the "General Retention Schedule #2 Michigan Public Schools." A copy of this Schedule

has been included in the Appendix at pages 11 to 59.[2] The Schedule clearly states that it applies to records created and used by the public bodies: "This General Retention and Disposal Schedule covers records commonly maintained by public and charter schools, school districts, and intermediate school districts." *Id*. Further, it directs that schools are to retain, as public documents, documents that include "Daily Lesson Plans and Objective Files: These records document class assignments related to each curriculum objective that are planned by teachers." These are to be retained for one year and then destroyed. *Id*. at 45. These are the exact sort of documents that Plaintiff-Appellant requested under FOIA.

The state Department of Technology, Management, and Budget has created retention schedules applying not only to teachers and schools, but also to local governments and their subdivisions.[3] These include, among others entities, local health departments (GS7), local law enforcement (GS11), public libraries (GS17), fire and ambulance departments (GS18), and many others. It cannot be doubted that many if not most of the records are produced by employees, and many are held in their possession.

It might be objected that the public-record retention laws are not the same as FOIA, and what is a public record under the Management and Budget Act is not the same as under FOIA. And while it is true that not every public record under the Management and Budget Act is required to be disclosed under FOIA, that is not because they are not public records, but rather because FOIA provides exemptions for public records that are not required to be disclosed under FOIA.

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[2] The entire Guide for public schools can also be accessed here: https://www.michigan.gov/dtmb/-/media/Project/Websites/dtmb/Services/Records-Management/RMS_GS2.pdf?rev=3432edf66ff446d1aa878aee44217dfa&hash=45F6B987223F9A7193FB1E2F45AC99D5

[3] A list of these schedules for local governments has been provided in the Appendix at pages 60 to 64. The list itself and a link to each schedule can be found here: https://www.michigan.gov/dtmb/services/recordsmanagement/schedules/gslocal

See MCL 15.243. We will see that with certain education records in the next section. But when interpreting two statutes or acts on the same subject, the court is required to read the two statutes in conjunction with each other as much as possible, as though they were one law – *in pari materia*: "It is elementary that statutes *in pari materia* are to be taken together in ascertaining the intention of the legislature, and that courts will regard all statutes upon the same general subject matter as part of 1 system." *Dearborn Twp Clerk v Jones*, 335 Mich 658, 662; 57 NW 2d 40 (1953), cited in *Robinson v Lansing*, 486 Mich 1, 8; 782 NW2d 171 (2010).

3. FOIA provides an exemption for certain school materials, but not for what was requested here.

The FOIA statutes exempt certain school information from disclosure, but not the information sought here. Therefore, this information should be disclosed. That certain school-related information should be non-disclosable makes sense. In the school setting, for example, the public shouldn't be able to obtain, through FOIA, the completed homework of a particular student. Nor should they be able to use FOIA to obtain previous tests assigned to a class. And for this reason, the statutes are fairly specific on what can and cannot be exempt. MCL 15.245(1)(q), for instance, exempts:

> (q) Academic transcripts of an institution of higher education established under section 5, 6, or 7 of article VIII of the state constitution of 1963, if the transcript pertains to a student who is delinquent in the payment of financial obligations to the institution.

But the most extensive part of the statute regarding education exemptions is in MCL 15.243(2), which incorporates the federal "Family Education and Privacy Act" (the "Privacy Act"):

> (2) A public body shall exempt from disclosure information that, if released, would prevent the public body from complying with 20 USC 1232g, commonly referred to as the family educational rights and privacy act of 1974. A public body that is a local or intermediate school district or a public school academy shall exempt from

> disclosure directory information, as defined by 20 USC 1232g, commonly referred to as the family educational rights and privacy act of 1974, requested for the purpose of surveys, marketing, or solicitation, unless that public body determines that the use is consistent with the educational mission of the public body and beneficial to the affected students. A public body that is a local or intermediate school district or a public school academy may take steps to ensure that directory information disclosed under this subsection is not used, rented, or sold for the purpose of surveys, marketing, or solicitation. Before disclosing the directory information, a public body that is a local or intermediate school district or a public school academy may require the requester to execute an affidavit stating that directory information provided under this subsection will not be used, rented, or sold for the purpose of surveys, marketing, or solicitation.

MCL 15.243(2).

Note that this does not mean that academic records are not public records, only that these public records are exempt from FOIA disclosure. Michigan's public record laws make it clear that academic performance records are public records. "These records document the grades that students received from their teachers throughout the school year, and which are often entered into the student information system. These may include, but may not be limited to, student names, grades, and attendance." General Schedule, item #1400A-B, Appendix, at page 45. Again, although these are public records, they are exempt from FOIA disclosure.

Neither MCL 15.243(2) nor the federal Privacy Act exempts information of the kind sought here. The federal Privacy Act conditions the receipt of federal funds on compliance with that Act. The federal Privacy Act's purpose and intent is to provide confidentiality of individual students' records, but also to ensure that the school cannot keep such information concealed from the student's parents. The 20 USC 1232g provision referred to in MCL 15.243(2) is provided here and attached in the Appendix at pages 65 to 73. Nothing in this federal Privacy Act allows the District to exempt the information Plaintiff-Appellant has requested. The primary purpose of the federal law is summed up in the federal statute here:

> (1) No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information, as defined in paragraph (5) of subsection (a)) of students without the written consent of their parents to any individual, agency, or organization, other than to the following-.

20 USC § 1232g(b)(1).

In interpreting statutes, our Courts use the canon of *expressio unius est exclusion alterius*. Under this canon of statutory construction, the express mention of one thing implies the exclusion of other similar things. *Detroit v Redford Twp*, 253 Mich 453, 456; 235 NW 217 (1931). This canon "properly applies only when the *unius* (or technically, *unum*, the thing specified) can reasonably be thought to be an expression of all that shares in the grant or prohibition involved." *Bronner v Detroit*, 507 Mich 158, 173; 968 NW2d 310 (2021), quoting Scalia & Garner, *Reading Law* (St. Paul: Thomson/West, 2012), p. 107.

From these very specific exemptions we can discern that the legislature intended to make other, non-performance-related, classroom information disclosable under FOIA. And the fact that they explicitly excluded very specific school-related items, but not all, shows that the legislature intended, in general, for all other District-related matters to be disclosed, unless another exemption, such as privacy, applies. There is a strong association between the school-related matters that are exempt from disclosure, and the matters that are being sought here. The Plaintiff-Appellant is seeking course materials which are public records, and for which there is no exemption.

This conclusion is buttressed by *Howell Education Ass'n, MEA/NEA v Howell Board of Ed*, 287 Mich App 228; 789 NW2d 495 (2010). *Howell* concluded that teachers' <u>private</u> emails stored on the school server were not subject to disclosure under FOIA. The court made it clear that the private nature of the communications was the reason these were not subject to FOIA:

> "In the present case, defendants can function without the personal e-mail. There is nothing about the personal e-mail, given that by their very definition they have nothing to do with the operation of the schools, which indicates that they are required for the operation of an educational institution. Thus, we decline to conclude that they are equivalent to the student information in *Kestenbaum* [*Kestenbaum v Michigan State Univ,* 414 Mich 510 (1982)]. Furthermore, "unofficial private writings belonging solely to an individual should not be subject to public disclosure merely because that individual is a state employee." *Id.* We believe the same is true for all public bodies."

Id. at 236.

By implication then, teachers' work-related emails were subject to FOIA. "Although the question is not before us, we note that an e-mail transmitted in performance of an official function would appear to be a public record under FOIA." *Id*. at 247, n 10.

If no documents created or held by district employees were subject to disclosure under FOIA, as the lower court has held, then there would be no need for such specific legislative exemptions as those found in MCL 15.243(2). If the lower court were correct, why have MCL 15.243(2) at all when all classroom documents would be exempt? Why would *Howell* have been so specific that only private communications were exempt? The express inclusion of these specific exemptions found in MCL 15.243(2) and caselaw implies the exclusion of all similar items from FOIA exemptions.

4. **The lower court erred when it misapplied an opinion of this court.**

The lower court cited *Blackwell v City of Livonia*, 339 Mich App 495; 984 NW 2d 780 (2021), leave to appeal denied, 509 Mich 977; 973 NW2d 139 (2022),[4] for the holding that "[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 bodies would be considered a 'public body' for the purposes of the FOIA." Opinion at Appendix page 6, quoting

[4] The lower court's opinion states that *Blackwell* was an unpublished opinion. This appears to be incorrect. The docket indicates that *Blackwell* was always issued for publication.

from *Blackwell*. From this the lower court concluded that public school teachers are not public bodies, and therefore "their papers and work product are not 'public records' under FOIA." *Id.*

Yet, as we have already seen, teachers' work products are considered public records by the state according to the Department of Technology, Management and Budget. And any determination in this regard based on *Blackwell* would, at best, be dicta. This is because *Blackwell* did not deal with the work product of public employees – instead, it dealt with a mayor's use of social media for his personal use. As that was the question before it, any holding about public employees' work product would be dicta. Furthermore, *Blackwell's* holding merely represents an application of *Howell Education Ass'n*, which, as cited above, recognized that records created in the performance of an official function would be subject to FOIA.

In *Blackwell*, a plaintiff used FOIA to try and obtain "production of inbox communications sent to a private social media account." *Blackwell* at 497. This court determined that these documents were not "prepared, owned, used, in the possession of, or retained by" the city. *Id*. *Blackwell* had no trouble determining that the mayor's office was a public body, and so the only question was whether the private messages in question qualified as public records under FOIA. *Id*. 503. "That the office of the mayor is a public body, however, is not the end of the analysis. The question presented in this case is whether the inbox messages sent to [the mayor's] Facebook profile, which is not maintained or used by the office of the mayor, are also public records under FOIA. We hold that they are not." *Id*. 505. Since that is the holding, that ends the application of *Blackwell*. It is not determinative of this case which deals with records used by a public employee in the commission of the public body's core public function.

However, *Blackwell* does cite another opinion of our Supreme Court on this matter, *Breighner v Mich High Sch Athletic Ass'n, Inc*, 471 Mich 217; 683 NW2d 639 (2004) which was

not necessary to determining its outcome. *Blackwell* cited *Breighner* for the proposition that "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.'" *Id*. at 505. But as we'll see next, *Blackwell* misstates the holding of *Breighner*.

5. *Blackwell* erred in its description of a holding of *Breighner*, which may have led the lower court into error.

As noted above, this discussion of *Blackwell*'s use of *Breighner* is not necessary, as it was not necessary to determine that the mayor's private communications, which were not about public business, were exempt from FOIA. But should this court want to understand how *Blackwell* misstated *Breighner*, which may have led to the lower court's error, Plaintiff-Appellant will discuss this. *Breighner*'s holding dealt with the question of whether non-governmental entities became the agents of a public body when these entities worked together, and is therefore not applicable to either *Blackwell* or the case at bar.

In *Breighner*, a FOIA plaintiff sought to obtain documents from the Michigan High School Athletic Association (MHSAA). MHSAA is a private nonprofit organization that "organizes and supervises interscholastic athletic events for its voluntary members." *Breighner* at 219. Although MHSAA had close ties to state and local governments, it was held not to be a public body for the purposes of FOIA. *Id*. In determining this question, the Court's primary analysis was devoted to where MHSAA received its funding, and therefore whether it qualified as a public body under MCL 15.232(h)(iv). Finding that MHSAA was not funded either "by" or "through" a government authority (it is funded by tickets to high school postseason championship tournaments), the high court concluded that it was "therefore not 'funded' by nor through a governmental authority." *Id*. at 226.

This has no application to either the present case or *Blackwell,* as it is undisputed that the records sought here were created by public school teachers who are employed by the school district. Similarly, in *Blackwell,* the matter involved the mayor, who was paid by his public office. In both cases, taxpayer dollars directly support the public officials at issue. Here, however, and unlike in *Blackwell,* the relevant records are directly related to the District's core activities.

Other factors in *Breighner* were that the MHSAA was not created by state or local authority, *Id*. at 230-231, and that MHSAA was not an agency of the schools, *Id*. at 231-233. The school district here is indisputably a public creation, and the teachers are its employees.[5]

The *Breighner* court was explicit that "Our holding today is limited to the specific question whether the mhsaa is a 'public body' within the meaning of foia." *Id*. at 228, fn 3 (lower case spelling of MHSAA and FOIA in the original). Therefore, it is an error for the *Blackwell* court to say that *Breighner* held that it was "the Legislature's intent to exclude individual government officers and employees not working in state government from the definition of 'public body.'" *Blackwell*, supra. *Breighner* had nothing to do with public employees. Further, for this proposition, *Blackwell* cited to footnote 6 of *Breighner*. Footnote 6 has no application to public employees, as it dealt only with potential agents – nonpublic entities who contracted with government agencies. Footnote 6 reads in its entirety:

> The Department of Labor and Economic Growth, for example, is a governmental "agency," but a real estate office hired to sell governmental property is not a governmental "agency." 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.

Breighner at 233 fn 6 (lower case spelling in the original).

[5] Additionally, Plaintiff-Appellant will later address the theory that teachers are agents of the district subject to FOIA as an alternative argument presented below.

The lower court was incorrect to cite *Blackwell* (citing *Breighner*) for the proposition that the work product of employees of school districts or other local government entities was not a public record subject to FOIA.

B. In the alternative, our courts have erred where they have held that public employees' work product records are exempt from FOIA.

The court cases cited above did not answer the question as to whether or not local public employees' work product was obtainable under FOIA. However, as noted by the lower court and Defendant-Appellee, there have been arguments (what are arguably dicta) suggesting that the work product of public employees of local governments are not obtainable under FOIA. Should this dicta be accepted as correct, it would contradict decades of FOIA jurisprudence and the Department of Technology Management and Budget's extensive rulemaking on the retention of certain public records. Such a holding would be inconsistent with the language and application of the FOIA.

1. The courts used canons of statutory interpretation incorrectly.

The distinction between local-government employees and state executive-branch employees has been made based on the statutory language of FOIA listing "employee" in the subsection dealing with the state executive agency branch, but not in the subsection dealing with local governments. It has been said that the inclusion of "employees" in the one subsection implies its exclusion from the other. This is incorrect, as developed below.

The statutes define "public records" and "public bodies" in the following way:

> (h) "Public body" means any of the following:
> (i) A state officer, *employee*, agency, department, division, bureau, board, commission, council, authority, *or other body in the executive branch of the state government*, but does not include the governor or lieutenant governor, the executive office of the governor or lieutenant governor, or employees thereof.
> (ii) An agency, board, commission, or council in the legislative branch of the state government.

> (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.
> (iv) Any other body that is created by state or local authority or is primarily funded by or through state or local authority, except that the judiciary, including the office of the county clerk and its employees when acting in the capacity of clerk to the circuit court, is not included in the definition of public body.
>
> (i) "Public record" means 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.

MCL 15.232(h) and (i) (emphasis added).

Defendant-Appellee has argued, and the lower court agreed, based on the dicta of *Blackwell*, that the exclusion of "employees" from subsection (h)(iii) means that the work product of these employees is not a public record subject to FOIA, even if produced for the public body's official use. This theory was discussed by our high court in *Bisio v Clarkston*, 506 Mich 37; 954 NW 2d 95 (2020):

> "The parties here do not dispute that the documents at issue are 'writing[s]' or that the documents were 'prepared, owned, used, in the possession of, or retained' by the city attorney under MCL 15.232(i). The crux of the dispute is simply whether the documents may be deemed 'prepared, owned, used, in the possession of, or retained' by a '*public body*' for the purposes of MCL 15.232(i). To resolve this dispute, we must consider the definition of 'public body' set forth in MCL 15.232(h)."

Id., at 47.

But as with *Blackwell*, the *Bisio* discussion would be dicta as the as the case did not involve the question of who was indisputably a public employee of a local government. Rather, *Bisio* dealt with a private attorney who contracted with a city to perform the functions of a city attorney. The question posed dealt with agency relationships, and not undisputed public employees. Even then, it was held that the documents created by this attorney were subject to FOIA if they were created for public use:

> Accordingly, we conclude that the City Charter creates the 'office of the city attorney.' Such office is therefore a 'public body' because the office constitutes an 'other body that is created by…'local authority' under MCL 15.232(h)(iv). Furthermore, it cannot reasonably be disputed that the office, at minimum, 'retained' the documents at issue. MCL 15.232(i). Consequently, we conclude that the documents at issue are 'public records' because they are comprised of 'writing[s] prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function, from the time [they were] created."

Id., at 52-53.

The question of agency present in *Bisio* is inapplicable here.

The language in *Bisio* used to derive this conclusion that records are not subject to FOIA when retained by a private entity on behalf of a public body was the court's attempt to sift through the definition of "public bodies," which even the court admitted was defined "in a somewhat unorthodox fashion." *Id*. at 47. The *Bisio* court held that the inclusion of an entity from one definition meant its deliberate exclusion from other definitions. Although not named, we call this canon of statutory interpretation the "negative-implication canon," or by its Latin, "*expressio unius exclusion alterius*." Black's Law Dictionary, Abridged 9th Edition, defines this as "A canon of construction holding that to express or include one thing implies the exclusion of the other…"[6] This canon has been recognized by our courts. See, for example, *Luttrell v Dep't of Corrections*, 421 Mich 93; 365 N.W.2d 74 (1984).

Bisio stated:

> Under MCL 15.232(h)(iv), "public body" signifies "[a]ny other body that is created by state or local authority or is primarily funded by or through state or local authority," but "the judiciary, including the office of the county clerk and its employees when acting in the capacity of clerk to the circuit court, is not included in the definition of public body." (Emphasis added.) As with the express exclusion of the executive offices of the governor and lieutenant governor within MCL 15.232(h)(i), the express exclusion of "the office of the county clerk ... when acting in the capacity of clerk to the circuit court" in MCL 15.232(h)(iv) indicates that the office of the county clerk would be included within the definition of "public body" absent that exclusion.

[6] See also Scalia and Garner's "Reading Law: The Interpretation of Legal Texts," at page 107.

Bisio at 51. Note again that *Bisio* did not deal with employees who were directly and solely employed by local governments.

Blackwell cited *Bisio* and employed the same logic, without naming the canon of interpretation, stating in dicta that:

> 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."

Blackwell at 505.

However appealing that logic may be, the use of negative-implication doctrine has limitations and qualifications. *Luttrell*, supra. One qualification is that, when appropriate, it should be considered with other doctrines of statutory construction, including the "absurd-results doctrine." Black's Law Dictionary defines such "absurdity" as "an interpretation that would lead to an unconscionable result, esp. one that the parties or (esp. for a statute) the drafters could not have intended and probably never considered." *Supra*.

Our courts use the absurd-results doctrine. See for example, *Detroit International Bridge Co v Commodities Export Co*, 279 Mich App 662; 760 NW2d 565.[7]

Our courts have employed both of these canons together when it interprets statutes. See, for example, *Slater v Ann Arbor Public Schools Bd of Educ*, 250 Mich App 419; 648 NW2d 205

[7] "Historically, Michigan followed the absurd-results rule, which dictates that a statute "should be construed to avoid absurd results that are manifestly inconsistent with legislative intent...." See *Cameron v Auto Club Ins Ass'n*, 476 Mich 55, 110–112; 718 NW2d 784 (2006) (Kelly, J.). In *People v McIntire*, 461 Mich 147, 155–156 n. 2; 599 NW2d 102 (1999), the Michigan Supreme Court retreated from this doctrine and indicated that a statute must be applied literally even if the application leads to an absurd result. Several years later, however, a majority of Supreme Court justices repudiated that holding in *Cameron, supra.*…" *Detroit International Bridge Co*, at 674.

(2002), where the court used multiple doctrines of interpretation, and concluded that the result would be one which did not produce an absurd result. In *Slater*, the court was faced with the question of crediting work done by teachers in a district consortium when they sought tenure after transferring to another district. Id., at 421-422. This involved the interplay of both the Teacher Tenure Act (TTA), MCL 38.71 *et seq*., and the Intergovernmental Transfers of Functions and Responsibilities Act (ITFRA), MCL 124.531 *et seq*. *Id*.

The *Slater* court noted that "Where reasonable minds can differ regarding the meaning of a statute, judicial construction is appropriate. Id., at 428, citing *Adrian School Dist v Michigan Public School Employees' Retirement System*, 458 Mich 326, 332; 582 NW2d 767 (1998), and then employed several of the canons of interpretation discussed here. The *Slater* court concluded that it would not interpret the statutes in a way that would produce an absurd result:

> Plaintiffs' argument that M.C.L. § 38.91(3) applies only if a probationary teacher attains tenure is unavailing and would lead to the absurd situation where a tenured teacher could be in a worse position than a probationary teacher if both were hired by a district that is not the fiscal agent of a dissolving consortium. Even if we were to assume that an ambiguity may be created out of the plain language of the statute to support plaintiffs' position, we must avoid such an absurd result. *McAuley v General Motors Corp*, 457 Mich 513, 518; 578 NW2d 282 (1998).

Id., at 435.

Here, accepting an interpretation of FOIA in which local government employees' work product is exempt from FOIA would be absurd. If the interpretation of *Blackwell* and *Bisio* truly did apply to employees of local governments, then decades of opinions would have been overruled. Supreme Court opinions like *Howell Education Ass'n* would necessarily be the byproduct of the Court overlooking a fundamental and dispositive flaw in FOIA's language. The retention schedules created by the Department of Technology Management and Budget's would be largely nugatory. (Appendix pages 11 to 64.) It strains credulity that almost every Michigan court has

overlooked this potential argument for decades. This is particularly true when even *Bisio*, which Defendant-Appellee relied on, is not directly applicable.

The result of such a holding would also create significant doubt with respect to the application of FOIA to public bodies other than the state itself. Could a record created by an employee subdivision of the state be rendered non-disclosable simply because it never passes through the hands of the head of the public body? Are the public-function records of individual members of township boards, boards of education, or city councils exempt from FOIA unless brought before the entire board? Are the records a mayor or a city manager now exempt, simply because those offices are not considered the public body itself? Could public bodies avoid having to respond to FOIA simply by refusing to request materials possessed by key employees?

These results seem to be the natural result of what Defendant-Appellee argued, and the lower court accepted. But nowhere in the FOIA statute does it say that only documents held by the administrators are subject to disclosure. This interpretation would re-write the statute. FOIA defines "'public record' as meaning "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." But interpreting "public body" as excluding employees of local government would essentially re-write the definition of public record to mean 'a document 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, *but only if it is held by or kept in the possession of an administrator*.' This is not what the current statute says and it is clearly an incorrect interpretation of FOIA. Apart from the lower court, no Michigan court has reached an interpretation even remotely so extreme.

If the lower court's interpretation where correct, imagine the inquiry every court would have to go through when interpreting FOIA: Was the record produced by an employee or by an

administrator? Was the record in the personal possession of an administrator? Was it held by the administrator at the time of the request? Was it in the administrator's office? How far does the administrator's possession extend? What if it were held in a different building? Stored off site? In individual schools? Such an analysis would be absurd and would substantially nullify FOIA. All a public body would have to do to evade FOIA is to store documents somewhere other than in an administrator's direct possession. This interpretation would rewrite decades of FOIA law.

But such an analysis is completely unnecessary. The statute has already answered it for us. "It is the public policy of this state that ***all persons … 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." MCL 15.231(2) (emphasis added). To read the Act together as a coherent whole, and in conjunction with our other public records laws, we cannot read it to say that employees' work product is something that the school district does not need to obtain from the teacher or produce in response to a FOIA request.

2. The law of agency and FOIA should be revisited.

The question of the scope of disclosure of *agents* of the public body was raised in *Bisio*, but not decided. In its Order granting leave to appeal, the *Bisio* court stated:

> The parties shall address: (1) whether the Court of Appeals erred in holding that the documents sought by the plaintiff were not within the definition of "public record" in § 2(i) of the Freedom of Information Act (FOIA), MCL 15.231 *et seq*.; and *(2) whether the defendant city's charter-appointed attorney was an agent of the city such that his correspondence with third parties, which were never shared with the city or in the city's possession, were public records subject to the FOIA*…
>
> *Bisio v Clarkston*, 504 Mich 966; 933 NW2d 36 (2019) (emphasis added).

Despite the *Bisio* court calling for the parties to address the agency question, the Court did not decide it. A concurrence by Chief Justice McCormack (and a dissent by Justice Viviano) noted the failure to address the very question the Court had ordered the parties to brief. Chief Justice

McCormack addressed the question at length in her concurrence, and noted that the common law of agency still applies unless abrogated by statute. In doing so, she noted the absurdity of interpreting FOIA to exclude documents held by agents *and* employees:

> Moreover, applying common-law agency principles is the only way that the FOIA works. The plaintiff submitted her FOIA request to the City, an artificial entity that can only act through others. That corporations act through agents is well settled. See *Fox v Spring Lake Iron Co*, 89 Mich 387, 399; 50 NW 872 (1891). If agency principles did not apply, how could citizens obtain public records from a municipal corporation? The FOIA's definition of a "public body" for local governmental units does not include employees. See MCL 15.232(h)(iii). Yet a city can only act through its agents and employees. Thus, if agency principles did not apply to the FOIA, no records from a municipal corporation would be subject to disclosure; it can't prepare, use, or retain records on its own.

Bisio, 506 Mich, at 57-59 (McCormack, CJ, concurring). (Footnotes omitted.)

Defendant-Appellee is indisputably a public body. It is an artificial entity that can only act through its employees/agents. So, according to Defendant-Appellee's logic, no public records can be obtained from any public body - except from the executive branch, and only then because that part of the statute specifically lists "employees." This is yet another absurd result, and should be revisited if this court agrees with the lower court that the subject employees' work product is not covered by FOIA.

C. **The lower court's alternate reason for dismissal is premature**.

The lower court also found, alternatively, that dismissal under MCR 2.116(C)(10) was appropriate:

> Even assuming, arguendo, that public-school teachers are "public bodies" for the purpose of FOIA requests, a review of the court file, pleadings, briefs, and evidence offered show RCSD has **not prepared, owned, used, possessed, or retained** the documents requested by Plaintiffs. … As such, the Court finds summary disposition is also and alternatively appropriate under MCR 2.116(C)(10)…

Opinion, Appendix page 6.

It is not clear what the lower court was saying here. If it is saying that the teacher produced no classroom records during the entire term of the class, this defies belief. This would also run counter to the Department of Technology and Budget's standard practice that "Daily lesson Plans and Objective Files" which have been produced must be retained for one year. See Appendix at page 45.

"As a general rule, summary disposition is premature if granted before discovery on a disputed issue is complete." *Dep't of Social Services v Aetna Casualty & Surety Co*, 177 Mich App 440, 446; 443 NW2d 420 (1989). Here, Plaintiff-Appellant had conducted no discovery.[8] During motions for summary disposition, the District provided affidavits. However, these affidavits were based on the evasive claim that only documents in the possession of, presumably, administrative offices, needed to be produced. These qualifications make those affidavits irrelevant. In the affidavit of Joshua Wrinkle, he states that: "Teachers at Rochester High School are not required to create, retain or copy any such documents ***to me or anyone else in the administration***. … Therefore, ***the Rochester High School administration is not and has not been in possession of any such documents***." Wrinkle Affidavit at ¶ 4 (emphasis added) attached to Appendix as pages 74-75. The affidavit of Pasquale Cusumano makes an identical statement. Cusumano Affidavit at ¶ 4, *Id*., attached to the Appendix as pages 76-77.

But such affidavits presume the answer to the question of whether the District, when responding to FOIA, has to provide records produced and held by employees. The affidavits presume that if the administration does not have the documents in the possession of an administrator, it does not have a duty to obtain these from whatever source they may be within the

[8] Recall that, in response to the FOIA request, the District had provided a unit plan, and nothing more as far as class assignments, daily lesson plans, curriculum objectives, etc.

District. Therefore, the lower court erred when it stated, as an alternative, that the lack of such documents in the hands of the administrator was grounds for dismissing. At the very least, the matter should be remanded so that Plaintiff-Appellant can use discovery to find out how a class was conducted for a whole semester without ever producing any classroom records, such as those which are required to be retained by the Department of Technology, Management and Budget.

III. CONCLUSION AND REQUEST FOR RELIEF

For the reasons stated above, this court should reverse and remand the lower court with instructions that public records that are produced and held by the teacher should be provided under FOIA by the school district (unless these records are covered under an applicable FOIA exemption).

Dated: June 1, 2023

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CERTIFICATE OF WORD COUNT

Pursuant to MCR 7.212(B)(3), Plaintiff-Appellant hereby certifies that the word count of this brief is 8,496, as counted by Microsoft Word, this being less than the 16,000 words allowed.

Dated: June 1, 2023 Signed: /s/ Derk A. Wilcox