

STATE OF MICHIGAN
IN THE COURT OF APPEALS

THE MACKINAC CENTER FOR PUBLIC POLICY,

Plaintiff-Appellee/Cross-Appellant,

v.

MICHIGAN STATE UNIVERSITY,

Defendant-Appellant/Cross-Appellee.

Court of Appeals No. 364244

Lower Court Case No: 21-000011

Derk A. Wilcox (P66177)
Mackinac Center for Public Policy
Attorney for Plaintiff-Appellee
140 West Main Street
Midland, MI 28640
(989) 631-0900

Elizabeth M. Watza (P81129)
MSU Office of General Counsel
Attorney for Defendant-Appellant
426 Auditorium Road, Room 494
East Lansing, MI 48823
(517) 884-9483
watzaeli@msu.edu

APPELLANT'S APPENDIX LIST

RECEIVED by MCOA 5/2/2023 4:53:08 PM

APPELLANT'S APPENDIX LIST

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2	A0322-A0324	Court of Claims Register of Actions

*The documents Appellant submitted to the Court of Claims pursuant to its Order for Production dated December 20, 2021, for *in camera* review are part of the lower court record and relevant and necessary to this appeal. See MCR 7.212(J)(3)(e). Thus, they are explicitly included in Appellant's appendix. It is Appellant's understanding that these records are available to the Court of Appeals; however, if that is not the case, MSU will submit them under seal. See MCR 2.711(C)(9)(a).

STATE OF MICHIGAN
COURT OF CLAIMS

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COURT OF CLAIMS

THE MACKINAC CENTER FOR PUBLIC
POLICY, a nonprofit Michigan Corporation

Case No.: 21- 000011 -MZ

Plaintiff,

v.

Hon. Kelly

MICHIGAN STATE UNIVERSITY, a state
public body.

Complaint

Defendant.

Patrick J. Wright (P54052)
Derk A. Wilcox (P66177)
Stephen A. Delie (P80209)
Mackinac Center for Public Policy
Attorneys for Plaintiff
140 West Main Street
Midland, MI 48640
(989) 631-0900 – voice
(989) 631-0964 – fax

PLAINTIFF'S COMPLAINT

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

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

INTRODUCTION

The plaintiff, Mackinac Center for Public Policy (the “Mackinac Center”) is a nonprofit organization “dedicated to improving the quality of life for all Michigan residents by promoting

sound solutions to state and local policy questions.” To that end, the Mackinac Center routinely uses the Freedom of Information Act (“FOIA”) to obtain relevant documents from state and local governments.

On June 26th, 2020, the Mackinac Center made a routine request to Michigan State University (“MSU”), seeking e-mail correspondence relating to Dr. Stephen Hsu. MSU responded on July 7, 2020, with a fee estimate of \$230.00. The Mackinac Center paid the required 50% deposit of \$115.00, which MSU received on July 20th, 2020. In its July 7th request, MSU estimated it would take six (6) weeks to process the Mackinac Center’s request, despite estimating only six (6) hours of labor would be necessary.

On August 31st, 2020, MSU wrote the Mackinac Center, informing the Center that the records it had requested had been located and gathered, but that the volume of the records were greater than anticipated. MSU, without legal authority, then revised its cost estimate to reflect an additional 11 hours of labor and additional costs of \$250.00. MSU also extended the date it anticipated being able to respond to the Mackinac Centers request by an additional eight (8) weeks.

On November 4th, MSU again wrote the Mackinac Center, partially granting and partially denying its request. MSU then, once again unilaterally extended its deadline to respond to December 4, 2020. Finally, on December 4th, MSU then once again issued a delay to December 23, 2020. Ultimately, records were released on December 23rd, following the filing of the Mackinac Center’s initial complaint.

Despite all requested deposits being paid, MSU took over five (5) months for records that, by MSU’s most-recent admission, should have taken no longer than seventeen (17) hours to produce. In addition, those records that were released were excessively redacted beyond the scope of what is permitted by the FOIA.

PARTIES, JURISDICTION, AND VENUE

1. Plaintiff, the Mackinac Center for Public Policy (the “Mackinac Center”), is a Michigan nonprofit corporation headquartered in Midland County, Michigan.
2. Defendant, Michigan State University (“MSU”), is a state university and public body which, upon information and belief, is headquartered in East Lansing, Ingham County, Michigan.
3. Venue is proper pursuant to MCL 15.240(1)(b).
4. Pursuant to MCL 15.240(5), this action should be “assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.”
5. Pursuant to MCL 600.6419(1)(a), the Court of Claims has jurisdiction over this claim.

VIOLATIONS OF THE FREEDOM OF INFORMATION ACT

6. The Plaintiff hereby incorporates the preceding paragraphs as if fully restated herein.
7. On June 26, 2020, Mackinac Center employee Jarrett Skorup submitted a FOIA request to LARA for the following records:

"Pursuant to the Michigan Compiled Laws Section 15.231 et seq., and any other relevant statutes or provisions of your agency's regulations I am making the following Freedom of Information Act request.

Any emails to or from the president of Michigan State University that mention “Hsu” from Feb. 1, 2020 to June 26, 2020.

Exhibit A, Mackinac Center FOIA Request.

8. On July 7, 2020, MSU responded to the Mackinac Center’s FOIA request by providing an estimate of the costs necessary to fulfill the request. **Exhibit B, MSU July Letter.** The requested estimate of total costs was \$230.00. MSU also estimated that it would take six (6) hours to fulfill the request.
9. The Mackinac Center paid 50% of the estimated fee as required by MCL 15.234(8).

10. On August 31, 2020, MSU sent correspondence indicating that the request was more burdensome to fulfill than initially anticipated. **Exhibit C, MSU August Letter.** MSU then proceeded to request an additional \$350.00 to fulfill the request. *Id.*
11. MSU also indicated that it would require an additional 8 weeks to complete the estimated additional 11 hours of work. *Id.*
12. The FOIA does not provide a process by which a public body may amend its original good-faith request for a deposit, nor does it permit a public body to extend the time it estimates will be necessary to fulfill the request. See generally, MCL 15.231 *et seq.* Instead, a public body would be permitted to charge any additional expenses as part of its final billing before releasing records. See generally, MCL 15.234.
13. MSU's August 31, 2020 letter was therefore an illegal extension and increase in fees.
14. Despite this, the Mackinac Center paid the requested deposit.
15. On November 4th, 2020, MSU sent the Mackinac Center correspondence indicating that it was granting the Center's request with respect to non-exempt information. **Exhibit D, MSU November Letter.** This partial-grant-partial denial was not accompanied by any records, and was sent a full ninety-three (93) business days after receipt of the Center's FOIA request. MSU also unilaterally extended its date to provide records to December 4th, 2020.
16. On December 4th, 2020, MSU again sent correspondence extending its estimated date of production. This new date is December 23rd, 2020, almost 6 months after the date the initial request was filed. **Exhibit E, MSU December Letter.**
17. MSU released heavily redacted records on December 23rd, 2020. **Exhibit F, MSU Final Response.**
18. MSU's redactions are far beyond the scope permitted by FOIA. Examples include:

- a. Redacting excessive personal information, including the mere names of those who sent e-mails that were contained in the responsive records;
- b. Redacting university signatures, e-mail addresses, netIDs, and telephone numbers pursuant to MCL 15.243(1)(u), (y), and (z), on the grounds of protecting the ongoing security of a public body;
- c. Redacting frank communications pursuant to MCL 15.243(1)(m), despite extraordinary public interest in accessing those communications;
- d. Redacting portions of records to the extent that it is impossible to identify what exemption is being applied, and whether that exemption is being applied properly.

19. 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.

20. MCL 15.234(8) indicates that a public body may respond to a FOIA request with a good faith estimate as to the cost of the FOIA request. However, the statute further states:

The response shall also contain a best efforts estimate by the public body regarding the time frame it will take the public body to comply with the law in providing the public records to the requestor. The time frame estimate is nonbinding upon the public body, but the public body shall provide the estimate in good faith and strive to be reasonably accurate and to provide the public records in a manner based on this state's policy under [MCL 15.231] and the nature of the request in the particular instance.

21. Our Attorney General, on December 12, 2017, issued Opinion No. 7300 interpreting the requirements of MCL 15.234(8):

It is my opinion, therefore, that a public body's "best efforts estimate" under subsection 4(8) of FOIA, as to the time it will take to fulfill a request for public records, must be a calculation that contemplates the public body working diligently to fulfill its obligation to produce records to the requestor. The estimate must be comparable to what a reasonable person in the same circumstances as the public body would provide for fulfilling a similar public records request. In addition, under subsection 4(8), the best efforts estimate must be made in "good

faith,” that is, it must be made honestly and without the intention to defraud or delay the requestor.

22. The requested materials were simply e-mails, and should have been easily reviewed and provided, even remotely.
23. MSU failed to provide the requested records for approximately 5 months, despite estimating the time required to process this request being originally 6 hours, and now 17 hours.
24. Had MSU devoted as little as 11 minutes of each business day from June 26th to November 13th, the Center would have received the requested records. MSU’s failure to do so constitutes an unreasonable delay, and demonstrates that MSU was not working diligently to fulfill the Center’s request.
25. An unreasonable delay in providing FOIA documents is a denial under MCL 15.235, MCL 15.240(1), and MCL 15.240(7).
26. MCL 15.234(9) indicates a public body that does not timely respond to a FOIA request under MCL 15.235(2) shall reduce the charges for any labor rate at a rate of 5% a day with a maximum of 50% if the late response was willful or if the request was clearly identified as a FOIA request.
27. MSU has recognized this, as demonstrated by its refund of the entirety of the Center’s processing fee. **Exhibit F**.
28. Despite this, MSU’s actions regarding this delay in providing the records responsive to the Mackinac Center’s request are arbitrary and capricious under MCL 15.240(7), thereby subjecting MSU to a civil fine of \$1,000.00 payable to the general treasury and a separate \$1,000.00 to the Mackinac Center.
29. In addition, MSU’s actions regarding this delay in providing the records responsive to the Mackinac Center’s request constitute willful and intentional failure to comply under MCL 15.240b, thereby subjecting it to a civil fine of \$2,500 to \$7,500 payable to the state treasury.

30. In addition to the aforementioned illegal delays, MSU's excessive redactions constitute an independent ground for appeal.
31. MSU's response to the Mackinac Center's appeal is contrary to law, as it misapplies the cited FOIA exemptions.
32. MCL 15.243(1)(m) permits a public body to exempt:
- Communications and notes within a public body or between public bodies of an advisory nature to the extent that they cover other than purely factual materials and are preliminary to a final agency determination of policy or action. This exemption does not apply unless the public body shows that in the particular instance the public interest in encouraging frank communication between officials and employees of public bodies clearly outweighs the public interest in disclosure.
33. MSU has the burden of showing that the frank communication exemption applies, including why the public's interest in non-disclosure clearly outweighs the public's right to receive records in the particular instance. *Bukowski v City of Detroit*, 478 Mich 268 (2007); *Hearld Co, Inc v Eastern Michigan University Bd of Regents*, 265 Mich App 185 (2005) (citations omitted).
34. Even assuming MSU correctly classified redacted and withheld e-mails as advisory communications preliminary to a final agency determination, MSU cannot show that the public interest in promoting frank communications clearly outweighs the public's interest in disclosure in this instance.
35. The communications sought, and the advisory communications contained therein, relate directly to University's response to a public controversy, including the reasoning intended to support that response.
36. The public interest in learning how the MSU makes decisions about its high-level officials is overwhelming on its face. This particular matter has garnered two Wall Street Journal articles,¹

¹ See, e.g., <https://www.wsj.com/articles/the-ideological-corruption-of-science-11594572501>; <https://www.wsj.com/articles/a-twitter-mob-takes-down-an-administrator-at-michigan-state-11593106102>.

and has resulted in what appear to be hundreds of e-mails being sent to MSU, both opposed and in favor of MSU's decision. See, e.g., **Exhibit G, Selected Responsive E-mails.**

37. In order to overcome this extreme public interest, the public's interest in non-disclosure must "clearly outweigh" the public's interest in disclosure.
38. MSU cannot demonstrate that the public's interest in non-disclosure clearly outweighs the public's interest in disclosure, particularly in light of the fact that the public is currently without meaningful information as to how decisions are being made by MSU officials.
39. Even if the Court were to conclude that the public's interest in non-disclosure clearly outweighs the public interest in disclosure, MSU nevertheless failed to follow the FOIA by redacting large portions of e-mail communications. Under the FOIA, MSU remains obligated to produce any purely factual material within advisory communications. *Bukowski v City of Detroit*, 478 Mich 268 (2007). Upon information and belief, it failed to do so.
40. MSU also exempted working group e-mail addresses pursuant to MCL 15.243(1) (u), (y), (z) stating, "University signatures, email addresses, netIDs, and a telephone number have been redacted under one or more of Sections 13(1)(u),(y), and (z), which allow for the withholding of information related to the ongoing security of a public body." **Exhibit F.**
41. The Center objects to these redactions as not genuinely relating to MSU's ongoing security, or the security or safety of persons or property.
42. It is MSU's burden to state the justifications for a FOIA denial with specificity. MCL 15.235(5)(a)-(c); *Peterson v Charter Township of Shelby*, 2018 WL 2024578 (Mich Ct App).
43. Both MCL 15.243(1)(u) and (y) directly relate to the security and safety of persons, property, and the public body. MCL 15.243(1)(z) similarly relates to identify a person that may be exposed to a cybersecurity incident, and plans and hardware related to preventing and responding to cybersecurity incidents.

44. Upon information and belief, no Michigan Court has addressed either of these exemptions, nor defined the meaning of “safety or security” in connection with them. The FOIA also does not define these terms. See generally, MCL 15.232.
45. When a statute fails to define a term, a court’s role is to “glean legislative intent from the plain meaning of statutory language.” *In re Estate of Erwin*, 503 Mich 1, 9 (2018) (citation omitted). To do so, a court’s first point of reference is the dictionary, with common understanding and traditional legal usage guiding the court’s interpretation. *Id.*, at p. 10 (citation omitted).
46. Webster’s online dictionary defines security as the “quality or state of being secure.”² “Secure” is defined as “free from danger.”³ “Danger” is defined as “exposure or liability to injury, pain, harm, or loss.”⁴
47. The Cambridge Dictionary similarly defines security as “protection of a person, building, organization, or country against threats such as crime or attacks by foreign countries.”⁵
48. MSU’s claim that the disclosure of e-mail addresses, signatures, netIDs, and telephone number would threaten the security of MSU, or of individual employees, cannot be justified under the above definitions. It strains credulity to contend that a person can be physically endangered by the exposure of any of the aforementioned information.
49. The same is true regarding MSU’s application of MCL 15.243(1)(z). MSU has offered no explanation as to how disclosing this information poses a cybersecurity risk, or otherwise exposes MSU’s cybersecurity-related practices.
50. MSU also redacted certain non-MSU e-mail addresses and names pursuant to MCL 15.243(1)(a), which states:

² <https://www.merriam-webster.com/dictionary/security?src=search-dict-hed>.

³ <https://www.merriam-webster.com/dictionary/secure>.

⁴ <https://www.merriam-webster.com/dictionary/danger>.

⁵ <https://dictionary.cambridge.org/us/dictionary/english/security>.

A public body may exempt from disclosure as a public record under this act any of the following... Information of a personal nature if public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy.

51. MSU cannot demonstrate that the public interest in full disclosure of records is clearly outweighed by privacy interests in this instance.
52. Michigan Courts have previously ruled that the release of the names and addresses of private security guard employees, the names of public employees who had been called before a grand jury or met with an FBI investigation, the names and home addresses of various public employees and candidates for public office, and the names of student-athletes identified in university incident reports do not constitute clearly unwarranted invasions of privacy. *International Union, United Plant Guard Workers of America (UPGWA) v Department of State Police*, 118 Mich App 2952 (1982); *Detroit Free Press v City of Warren*, 250 Mich App 164 (2002)(citation omitted); *Michigan State Employees Ass'n v Department of Management and Budget*, 135 Mich App 248 (1984)(citation omitted); *Tobin v Michigan Civil Service Com'n*, 416 Mich 661 (1982); *Hearld Co v City of Bay City*, 463 Mich 111 (2000); *ESPN, Inc v Michigan State University*, 311 Mich App 662 (2015) (citation omitted).
53. Disclosure of the e-mail addresses at issue in this particular instance are less invasive than the disclosure of the information described immediately above, thereby justifying their release.
54. The identity of those individuals contacting MSU regarding its response to this matter are likewise information that is of significant public interest, as it shows the positions of those individuals who either support or oppose MSU's response. This is relevant, as it will help the public understand how this matter is being viewed by students, other academics, and by the public. Similarities or differences in responses among these groups helps to inform the public regarding the potential logic underlying MSU's response.

55. Pursuant to MCL 15.240(6), the Center, if it prevails, is entitled to attorneys' fees and costs:

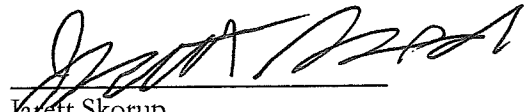
If a person asserting the right to inspect, copy, or receive a copy of all or a portion of a public record prevails in an action commenced under this section, the court shall award reasonable attorneys' fees, costs, and disbursements. If the person or public body prevails in part, the court may, in its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

RELIEF REQUESTED

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

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

Dated: Jan. 5, 2021



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

Subscribed and sworn to by Jarett Skorup before me on the 5th day of January, 2021.

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

Exhibit A

RECEIVED by MCOA 5/2/2023 4:53:08 PM

Delie, Steve

From: Skorup, Jarrett
Sent: Thursday, November 5, 2020 11:10 AM
To: Delie, Steve
Subject: Fw: Your FOIA Request to MSU

From: FOIA <foia@msu.edu>
Sent: Monday, July 27, 2020 5:38 PM
To: Skorup, Jarrett
Subject: Your FOIA Request to MSU

Communications
Policy

Dear Jarrett Skorup:

This is written in reply to the voicemail message that you left today at the MSU FOIA Office, as well as your July 20th email below.

Please be advised that check #39535 in the amount of \$115.00 from the Mackinac Center for Public Policy was received in this Office on July 20, 2020, for the processing of your FOIA request MSUF035320. Pursuant to the best efforts estimate provided to you in our July 7, 2020, FOIA Fee and Deposit Notice, we anticipate responding to your request on or before six weeks from the date the fee deposit was received, that being Monday, August 31, 2020.

Pursuant to Section 4(4) of the Michigan Freedom of Information Act (MIFOIA), the University's procedures and guidelines for processing MIFOIA requests can be found at <http://foia.msu.edu>.

Michigan State University
Freedom of Information Act Office
408 W. Circle Drive
Room 1 Olds Hall
East Lansing, MI 48824
517-353-3929/telephone
517-353-1794/fax
foia@msu.edu

MSUF035320

From: Skorup, Jarrett <Skorup@mackinac.org>
Sent: Monday, July 20, 2020 11:03 AM
To: FOIA <foia@msu.edu>
Subject: RE: FOIA - Stephen Hsu

I am following up on this request.

From: Skorup, Jarrett
Sent: Friday, June 26, 2020 2:50 PM
To: 'foia@msu.edu' <foia@msu.edu>
Subject: FOIA - Stephen Hsu

FOIA: Michigan State University

June 26, 2020

FOIA REQUEST FOR EMAILS ABOUT STEPHEN HSU

To Whom It May Concern:

Pursuant to the Michigan compiled Laws Section 15.231 et seq., and any other relevant statutes or provisions of your agency's regulations I am making the following Freedom of Information Act request.

- Any emails to or from the president of Michigan State University that mention "Hsu" from Feb. 1, 2020 to June 26, 2020.

Please send the materials requested to the attention of Jarrett Skorup at the following address, fax number, or via e-mail at skorup@mackinac.org<<mailto:skorup@mackinac.org>>.

Mackinac Center for Public Policy
P.O. Box 568
Midland, MI 48640
Fax: 989-631-0964
Phone: 989-631-0900
Jarrett Skorup
Mackinac Center

Jarrett Skorup
Director of Marketing and Communications
Mackinac Center for Public Policy
www.mackinac.org
989-631-0900

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Exhibit B

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MICHIGAN STATE
UNIVERSITY

DATE: July 7, 2020

TO: Jarrett Skorup
Director of Marketing and Communications
Mackinac Center for Public Policy
skorup@mackinac.org

FROM: Rebecca Nelson, Director and Freedom of Information Act (FOIA) Officer
Michigan State University FOIA Office *Rebecca Nelson*

SUBJECT: FOIA Fee and Deposit Notice

This is written with regard to the FOIA request that you emailed to this Office on June 26, 2020.

The processing of your request thus far has involved significant labor. We estimate that searching for, gathering, and reviewing records responsive to your request to determine if information exempt from public disclosure under the Michigan Freedom of Information Act (MIFOIA), must be separated from that which is not exempt, will require upwards of six (6) hours, incurring fees likely to exceed \$230.00. Fees will not be waived since failure to charge same would result in unreasonably high costs to the University. An itemization of this estimate accompanies this letter. This serves as an approximation only, and does not guarantee or limit the final, total fees which may be incurred and assessed. Therefore, pursuant to Section 4(2) of the MIFOIA, we require that you remit a deposit prior to our further processing your request. Should you remit the required deposit, we anticipate responding to your request on or before six (6) weeks from the date the deposit is received.



**FREEDOM OF
INFORMATION ACT
OFFICE**

**Michigan State
University**

408 West Circle Drive
Room 1 Olds Hall
East Lansing, MI 48824
517-353-3929
Fax: 517-353-1794
foia@msu.edu
<http://foia.msu.edu>

If you wish to pursue the processing of your request, and pay the fees incurred, please send a check made payable to "Michigan State University" in the amount of \$115.00 to the Freedom of Information Act Office, 408 West Circle Drive, Room 1 Olds Hall, or notify us in writing if you wish to modify or withdraw your request. The University will not process your request until a deposit is received by our Office. Moreover, Section 4(14) of the MIFOIA requires that the deposit be received no later than Monday, August 24, 2020, or your request will be considered abandoned, and processing of it no longer required. Should you have any questions regarding fees, please contact us. Pursuant to Section 4(4) of the MIFOIA, the University's procedures and guidelines for processing MIFOIA requests can be found at <http://foia.msu.edu>.

Attachment
MSUF035320

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MSU FOIA FEE ESTIMATE ITEMIZATION FORM -- July 7, 2020 -- Skorup FOIA Request MSUF035320

Category of Costs/Description	Hourly Wage	Benefits % Multiplier Used	Hourly Wage with Benefits	Estimated Time (Hours)	Amount
4 (1) (a) Searching for, locating and examining responsive records <i>[Shall not charge more than the hourly wage of lowest-paid employee capable of searching for, locating and examining the public records in the particular instance regardless of whether that person is available or who actually performs the labor; labor costs shall be estimated and charged in increments of 15 minutes or more, with all partial time increments rounded down.]</i>	\$28.95	40%	\$40.53	3	\$121.59
4 (1) (b) Review directly associated with the separating and deleting of exempt from nonexempt information <i>[For services performed by an employee of the public body, the public body shall not charge more than the hourly wage of its lowest-paid employee capable of separating and deleting exempt information from nonexempt information in the particular instance as provided in section 14, regardless of whether that person is available or who actually performs the labor. If a public body does not employ a person capable of separating and deleting exempt information from nonexempt information as determined by the public body's FOIA coordinator, it may treat necessary contracted labor costs used for the separating and deleting of exempt information from nonexempt information in the same manner as employee labor costs if it clearly notes the name of the contracted person or firm on this itemization. Total labor costs calculated under this subdivision for contracted labor costs shall not exceed an amount equal to 6 times the state minimum hourly wage rate. Labor costs under this subdivision shall be estimated and charged in increments of 15 minutes or more, with all partial time increments rounded down.]</i>	\$21.29	40%	\$29.81	3.75	\$111.79
4 (1) (c) Nonpaper physical media costs <i>[The actual and most reasonably economical cost of the computer discs, computer tapes, or other digital or similar media. The requestor may stipulate that public records be provided on nonpaper physical media, electronically mailed, or otherwise electronically provided in lieu of paper copies. This subdivision does not apply if public body lacks the technological capability necessary to provide records on the particular nonpaper physical media stipulated in the particular instance.]</i>					
4 (1) (d) Cost of paper copies <i>[Actual total incremental cost of necessary duplication or publication, not including labor. The cost of paper copies shall be calculated as a total cost per sheet of paper, itemized to show both cost per sheet and number of sheets provided. The fee shall not exceed 10 cents per sheet of paper for copies of public records made on 8-1/2- by 11-inch paper or 8-1/2- by 14-inch paper. A public body shall utilize the most economical means available, including double-sided printing, if cost saving and available.]</i>					
4 (1) (e) Duplication or publication, including making paper copies, making digital copies, or transferring digital public records to be given to the requestor on nonpaper physical media or through the internet or other electronic means as stipulated by the requestor <i>[Shall not charge more than the hourly wage of lowest-paid employee capable of necessary duplication or publication in the particular instance, regardless of whether that person is available or who actually performs the labor.; labor costs under this subdivision shall be estimated and charged in time increments of the public body's choosing, with all partial time increments rounded down.]</i>					
4 (1) (f) Cost of mailing <i>[Actual cost of mailing, for sending the public records in a reasonably economical and justifiable manner; shall not charge more for expedited shipping or insurance unless stipulated by requestor, but may charge for the least expensive form of postal delivery confirmation when mailing public records.]</i>					
ESTIMATE TOTAL					\$233.38
FEE DEPOSIT REQUIRED					\$115.00
<p><i>When calculating labor costs under (1) (a), (b) or (e), fee components shall be itemized in a manner that expresses both the hourly wage and the number of hours charged. The public body may also add up to 50% to the applicable labor charge amount to cover or partially cover the cost of fringe benefits if it clearly notes the percentage multiplier used. Subject to the 50% limitation, the public body shall not charge more than the actual cost of fringe benefits, and overtime wages shall not be used in calculating the cost of fringe benefits. Overtime wages shall not be included in the calculation of labor costs unless overtime is specifically stipulated by the requestor and clearly noted in this detailed itemization.</i></p>					

RECEIVED by MCOA 5/2/2023 4:53:08 PM

Exhibit C

RECEIVED by MCOA 5/2/2023 4:53:08 PM

**MICHIGAN STATE
UNIVERSITY**

DATE: August 31, 2020

TO: Jarrett Skorup
Director of Marketing and Communications
Mackinac Center for Public Policy
skorup@mackinac.org

FROM: Rebecca Nelson, Director and Freedom of Information Act (FOIA) Officer
Michigan State University FOIA Office *Rebecca Nelson*

SUBJECT: FOIA Fee and Deposit Notice Follow-up -- Record Volume Update

On June 26, 2020, you emailed a FOIA request to this Office for "Any emails to or from the president of Michigan State University that mention 'Hsu' from Feb. 1, 2020 to June 26, 2020." On July 20th, in response to our July 7th \$230.00 fee estimate, this Office received a \$115.00 fee deposit for the processing of your request.

The searching for and gathering of records responsive to your request has concluded, and the volume of those records is significantly greater than estimated. Record review to separate information exempt from public disclosure under the Michigan Freedom of Information Act (MIFOIA), from that which is not exempt, has begun. The foregoing processing has reached the initial six hour estimate, and hundreds of pages of emails have yet to be reviewed. Given that fees incurred have reached the initial \$230.00 estimate, we write to ask if you wish to proceed with the processing of your request, or halt the processing and receive only the records reviewed thus far. If you wish to halt the processing of your request, please advise us in writing, and we will finalize the records reviewed to date, and send them to you along with an invoice billing you for the balance of fees owed.



**FREEDOM OF
INFORMATION ACT
OFFICE**

**Michigan State
University**

408 West Circle Drive
Room 1 Olds Hall
East Lansing, MI 48824
517-353-3929
Fax: 517-353-1794
foia@msu.edu
<http://foia.msu.edu>

If, instead, you wish to pursue the processing of all of the remaining records you seek, the following estimate is provided. Completing the processing of your request will involve significant labor; we estimate upwards of eleven (11) hours will be required, incurring fees likely to exceed \$350.00; this is in addition to the initial \$230.00 fee estimate, and the fees incurred to date. In completing the processing of your request, fees will not be waived since failure to charge same would result in unreasonably high costs to the University. An itemization of this estimate accompanies this letter. This serves as an approximation only, and does not guarantee or limit the final, total fees which may be incurred and assessed. Therefore, pursuant to Section 4(2) of the MIFOIA, we require that you remit an additional deposit prior to our completing the processing of your request. Should you remit the required deposit, we anticipate responding on or before eight weeks (8) from the date the deposit is received.

If you wish to pursue the processing of all records responsive to your request, and pay the fees incurred, please send a check made payable to "Michigan State University" in the amount of \$175.00 to the Freedom of Information Act Office, 408 West Circle Drive, Room 1 Olds Hall. The University will not complete the processing of the remaining records you seek until a deposit is received by our Office. Moreover, Section 4(14) of the MIFOIA requires that the deposit be received no later than Monday, October 19, 2020, or your request pertaining to the remaining records will be considered abandoned, and processing of it no longer required. Should you have any questions regarding fees, please contact us. Pursuant to Section 4(4) of the MIFOIA, the University's procedures and guidelines for processing MIFOIA requests can be found at <http://foia.msu.edu>.

Attachment
MSUF035320

MSU FOIA FEE ESTIMATE ITEMIZATION FORM -- August 31, 2020 -- Skorup FOIA Request MSUF035320 – follow-up; additional fee estimate

Category of Costs/Description	Hourly Wage	Benefits % Multiplier Used	Hourly Wage with Benefits	Estimated Time (Hours)	Amount
4 (1) (a) Searching for, locating and examining responsive records <i>[Shall not charge more than the hourly wage of lowest-paid employee capable of searching for, locating and examining the public records in the particular instance regardless of whether that person is available or who actually performs the labor; labor costs shall be estimated and charged in increments of 15 minutes or more, with all partial time increments rounded down.]</i>					
4 (1) (b) Review directly associated with the separating and deleting of exempt from nonexempt information <i>[For services performed by an employee of the public body, the public body shall not charge more than the hourly wage of its lowest-paid employee capable of separating and deleting exempt information from nonexempt information in the particular instance as provided in section 14, regardless of whether that person is available or who actually performs the labor. If a public body does not employ a person capable of separating and deleting exempt information from nonexempt information as determined by the public body's FOIA coordinator, it may treat necessary contracted labor costs used for the separating and deleting of exempt information from nonexempt information in the same manner as employee labor costs if it clearly notes the name of the contracted person or firm on this itemization. Total labor costs calculated under this subdivision for contracted labor costs shall not exceed an amount equal to 6 times the state minimum hourly wage rate. Labor costs under this subdivision shall be estimated and charged in increments of 15 minutes or more, with all partial time increments rounded down.]</i>	\$21.29	40%	\$29.81	11.75	\$350.27
4 (1) (c) Nonpaper physical media costs <i>[The actual and most reasonably economical cost of the computer discs, computer tapes, or other digital or similar media. The requestor may stipulate that public records be provided on nonpaper physical media, electronically mailed, or otherwise electronically provided in lieu of paper copies. This subdivision does not apply if public body lacks the technological capability necessary to provide records on the particular nonpaper physical media stipulated in the particular instance.]</i>					
4 (1) (d) Cost of paper copies <i>[Actual total incremental cost of necessary duplication or publication, not including labor. The cost of paper copies shall be calculated as a total cost per sheet of paper, itemized to show both cost per sheet and number of sheets provided. The fee shall not exceed 10 cents per sheet of paper for copies of public records made on 8-1/2- by 11-inch paper or 8-1/2- by 14-inch paper. A public body shall utilize the most economical means available, including double-sided printing, if cost saving and available.]</i>					
4 (1) (e) Duplication or publication, including making paper copies, making digital copies, or transferring digital public records to be given to the requestor on nonpaper physical media or through the internet or other electronic means as stipulated by the requestor <i>[Shall not charge more than the hourly wage of lowest-paid employee capable of necessary duplication or publication in the particular instance, regardless of whether that person is available or who actually performs the labor.; labor costs under this subdivision shall be estimated and charged in time increments of the public body's choosing, with all partial time increments rounded down.]</i>					
4 (1) (f) Cost of mailing <i>[Actual cost of mailing, for sending the public records in a reasonably economical and justifiable manner; shall not charge more for expedited shipping or insurance unless stipulated by requestor, but may charge for the least expensive form of postal delivery confirmation when mailing public records.]</i>					

ESTIMATE TOTAL \$350.27

REQUIRED \$175.00

When calculating labor costs under (1) (a), (b) or (e), fee components shall be itemized in a manner that expresses both the hourly wage and the number of hours charged. The public body may also add up to 50% to the applicable labor charge amount to cover or partially cover the cost of fringe benefits if it clearly notes the percentage multiplier used. Subject to the 50% limitation, the public body shall not charge more than the actual cost of fringe benefits, and overtime wages shall not be used in calculating the cost of fringe benefits. Overtime wages shall not be included in the calculation of labor costs unless overtime is specifically stipulated by the requestor and clearly noted in this detailed itemization.

RECEIVED by MCOA 5/2/2023 4:53:08 PM

Exhibit D

RECEIVED by MCOA 5/2/2023 4:53:08 PM

MICHIGAN STATE
UNIVERSITY

DATE: November 4, 2020

TO: Jarrett Skorup
Director of Marketing and Communications
Mackinac Center for Public Policy
skorup@mackinac.org

FROM: Rebecca Nelson, Director and Freedom of Information Act (FOIA) Officer
Michigan State University FOIA Office *Rebecca Nelson*

SUBJECT: FOIA Response

This is written in response to the FOIA request that you emailed to this Office on June 26, 2020, and for the processing of which this Office received fee deposits on July 20, 2020, and September 9, 2020.



**FREEDOM OF
INFORMATION ACT
OFFICE**

**Michigan State
University**

408 West Circle Drive
Room 1 Olds Hall
East Lansing, MI 48824
517-353-3929
Fax: 517-353-1794
foia@msu.edu
<http://foia.msu.edu>

Your request is granted with regard to information that is not exempt from public disclosure under the Michigan Freedom of Information Act (MIFOIA). That said, given the University's current alternate working arrangements, necessitated by extraordinary community health concerns, record processing times are extending beyond typically anticipated dates. Nevertheless, please be assured that we are working diligently to process your request as quickly as possible, and expect to send to you records or another update on or before Friday, December 4, 2020. We apologize for any inconvenience this unavoidable delay may cause.

The MIFOIA provides that when a public body denies all or a portion of a request, the requester may do one of the following: (1) submit an appeal of the determination to the head of the public body; or (2) commence a civil action in the court of claims to compel the public body's disclosure of the records. If you wish to seek judicial review of any denial, you must do so within 180 days of the date of this letter. If the court of claims orders disclosure of all or a portion of the public record(s) to which you have been denied access, you may receive attorneys' fees and, in certain circumstances, damages under the MIFOIA. Should you choose to file an appeal with the University regarding this response to your request, you must submit a written communication to this Office expressly stating that it is an "appeal" of this response. In your appeal, please state what records you believe should have been disclosed to you. You must also state the reasons you believe any denial of your MIFOIA request should be reversed. This Office will arrange for the processing and review of your appeal. Pursuant to Section 4(4) of the MIFOIA, the University's procedures and guidelines for processing MIFOIA requests can be found at <http://foia.msu.edu>.

MSUF035320

RECEIVED by MCOA 5/2/2023 4:53:08 PM

Exhibit E

RECEIVED by MCOA 5/2/2023 4:53:08 PM

MICHIGAN STATE
U N I V E R S I T Y

DATE: December 4, 2020

TO: Jarrett Skorup
Director of Marketing and Communications
Mackinac Center for Public Policy
skorup@mackinac.org

FROM: Rebecca Nelson, Director and Freedom of Information Act (FOIA) Officer
Michigan State University FOIA Office *Rebecca Nelson*

SUBJECT: FOIA Response Status Notice

This is written as follow-up to our November 4, 2020, response to the FOIA request that you emailed to this Office on June 26, 2020, and for the processing of which this Office received fee deposits on July 20, 2020, and September 9, 2020.

As we previously advised, your request is granted with regard to information that is not exempt from public disclosure under the Michigan Freedom of Information Act (MIFOIA). Please know that we continue to process records responsive to your request as expeditiously as possible. Nevertheless, given the University's current alternate working arrangements, necessitated by extraordinary community health concerns, record processing times are extending beyond typically anticipated dates. At this time, we expect to send to you records or another update on or before Wednesday, December 23, 2020. We apologize for any inconvenience this unavoidably extended response time may cause; fees assessed will be adjusted in consideration of the delay.

The MIFOIA provides that when a public body denies all or a portion of a request, the requester may do one of the following: (1) submit an appeal of the determination to the head of the public body; or (2) commence a civil action in the court of claims to compel the public body's disclosure of the records. If you wish to seek judicial review of any denial, you must do so within 180 days of the date of this letter. If the court of claims orders disclosure of all or a portion of the public record(s) to which you have been denied access, you may receive attorneys' fees and, in certain circumstances, damages under the MIFOIA. Should you choose to file an appeal with the University regarding this response to your request, you must submit a written communication to this Office expressly stating that it is an "appeal" of this response. In your appeal, please state what records you believe should have been disclosed to you. You must also state the reasons you believe any denial of your MIFOIA request should be reversed. This Office will arrange for the processing and review of your appeal. Pursuant to Section 4(4) of the MIFOIA, the University's procedures and guidelines for processing MIFOIA requests can be found at <http://foia.msu.edu>.

MSUF035320



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517-353-3929
Fax: 517-353-1794
foia@msu.edu
<http://foia.msu.edu>

Exhibit F

RECEIVED by MCOA 5/2/2023 4:53:08 PM

MICHIGAN STATE
UNIVERSITY

DATE: December 23, 2020

TO: Jarrett Skorup
Director of Marketing and Communications
Mackinac Center for Public Policy
skorup@mackinac.org

FROM: Rebecca Nelson, Director and Freedom of Information Act (FOIA) Officer
Michigan State University FOIA Office *Rebecca Nelson*

SUBJECT: FOIA Response

On June 26, 2020, you emailed to this Office your expansive FOIA request for "Any emails to or from the president of Michigan State University that mention 'Hsu' from Feb. 1, 2020 to June 26, 2020." On July 7th, we sent to you a notice advising that significant labor would be involved in processing your request, and that a fee deposit would be required to proceed. On July 20th, this Office received your request, and that a fee deposit would be required to proceed. On July 20th, this Office received your request, and that a fee deposit would be required to proceed. On August 31st, we sent to you a letter advising that records identified as responsive to your request were significantly greater in volume than originally anticipated; that significantly greater labor would be involved in processing those records; that an additional fee deposit would be required to proceed; and that we anticipated responding on or before eight weeks from the date the additional deposit was received. That response date was estimated in compliance with Section 4(8) of the Michigan Freedom of Information Act (MIFOIA), which provides that "The response must also contain a best efforts estimate by the public body regarding the time frame it will take the public body to comply with the law in providing the public records to the requestor. The time frame estimate is nonbinding upon the public body, but the public body shall provide the estimate in good faith and strive to be reasonably accurate and to provide the public records in a manner based on this state's public policy under section 1 and the nature of the request in the particular instance."

On September 9th, this Office received your additional fee deposit. On November 4th, eight weeks from the date we received your additional deposit, we wrote to you that while your request was granted to the extent information is not exempt from public disclosure, processing times were extending beyond typically anticipated dates due to current alternate working arrangements necessitated by extraordinary community health concerns. We also advised that we expected to respond to you with records on or before December 4th. On December 4th, we wrote to you that we were continuing to process your request as expeditiously as possible; that for the same reasons stated in our November 4th letter, additional time was required; that we expected to respond to you with records on or before December 23rd; and that in consideration of the unavoidable inconvenience the delay was causing, a fee adjustment would be made. Accordingly, we write to you the following response.



**FREEDOM OF
INFORMATION ACT
OFFICE**

**Michigan State
University**

408 West Circle Drive
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East Lansing, MI 48824
517-353-3929
Fax: 517-353-1794
foia@msu.edu
<http://foia.msu.edu>

Records responsive to your request accompany this letter. Identifying information pertaining to certain individuals, personal email addresses, personal cellular telephone numbers, and certain other personal data have been redacted, and five (5) pages of personal information have been withheld pursuant to one or both of Sections 13(1)(a) and 13(2) of the MIFOIA. Section 13(1)(a) provides for the withholding of "Information of a personal nature if public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy." Section 13(2) requires the withholding of information that, if released, would prevent the public body from complying with 20 U.S.C. 1232g, the Family Educational Rights and Privacy Act (FERPA). Nine (9) pages consisting of personal information pertaining to a student have been withheld under one or more of Sections 13(1)(a), (b)(iii), and 13(2). Section 13(1)(b) provides for the withholding of "Investigating records compiled for law enforcement purposes, but only to the extent that disclosure as a public record would do any of the following...(iii) Constitute an unwarranted invasion of personal privacy." University signatures, email addresses, netIDs, and a telephone number have been redacted under one or more of Sections 13(1)(u), (y), and (z), which allow for the withholding of information related to the ongoing security of a public body. Certain other information has been redacted under one or more of Sections 13(1)(g), (h), and (m). Sections 13(1)(g) and (h) provide for the withholding of information or records subject to the attorney-client privilege and attorney work-product doctrine, respectively. Section 13(1)(m) provides for the withholding of "Communications and notes within a public body or between public bodies of an advisory nature to the extent that they cover other than purely factual materials and are preliminary to a final agency determination of policy or action." Lastly, nine (9) pages have been withheld under Sections 13(1)(g) and/or (h).

The MIFOIA provides that when a public body denies all or a portion of a request, the requester may do one of the following: (1) submit an appeal of the determination to the head of the public body; or (2) commence a civil action in the court of claims to compel the public body's disclosure of the records. If you wish to seek judicial review of any denial, you must do so within 180 days of the date of this letter. If the court of claims orders disclosure of all or a portion of the public record(s) to which you have been denied access, you may receive attorneys' fees and, in certain circumstances, damages under the MIFOIA. Should you choose to file an appeal with the University regarding this response to your request, you must submit a written communication to this Office expressly stating that it is an "appeal" of this response. In your appeal, please state what records you believe should have been disclosed to you. You must also state the reasons you believe any denial of your MIFOIA request should be reversed. This Office will arrange for the processing and review of your appeal.

In processing your request, a significant amount of labor was required to search for, gather, and review the responsive records to separate information exempt from disclosure from that which is not exempt. Nevertheless, in consideration of the previously noted unavoidable delay in providing the attached records to you, fees for processing your request are hereby waived. Your fee deposit checks will be returned to you via U.S. first class mail. Pursuant to Section 4(4) of the MIFOIA, the University's procedures and guidelines for processing MIFOIA requests can be found at <http://foia.msu.edu>.

Attachments
MSUF035320

RECEIVED by MCOA 5/2/2023 4:53:08 PM

Exhibit G

RECEIVED by MCOA 5/2/2023 4:53:08 PM

From: Guerrant, Emily
Sent: Thursday, June 18, 2020 2:43 PM
To: Stanley, Samuel
Cc: Zelig, Michael; Bales, Merri-Jo; Quinn, Brian
Subject: [REDACTED]
Attachments: 061720.DRAFT, [REDACTED].docx

Per your texts, I added a sentence to [REDACTED]



Emily Gerkin Guerrant

Vice President and University Spokesperson

408 West Circle Dr., Room 401B | East Lansing, MI 48824

Office: 517.355.3843 | Cell: [REDACTED]

Email: [REDACTED]

SPARTANS WILL

[REDACTED]

[REDACTED] MAY 2020

[REDACTED]

[REDACTED]

[REDACTED]

RECEIVED by MCOA 5/2/2023 4:53:08 PM

From: [REDACTED]
Sent: Tuesday, June 16, 2020 1:58 PM
To: [REDACTED]
Cc: Samuel L. Stanley Jr., M.D., President, Office of the Provost, MSU; [REDACTED]

Subject: Re: Petition letter for keeping Dr. Stephen Hsu and supportive letters

Ok. I stand correct. I still find a term the thread uses to characterize Steve's view.

From: [REDACTED]
Date: Tuesday, June 16, 2020 at 1:57 PM
To: [REDACTED]
Cc: Samuel L. Stanley Jr., M.D., President, Office of the Provost, MSU; [REDACTED]

[REDACTED]

Subject: Re: Petition letter for keeping Dr. Stephen Hsu and supportive letters

Apologies to everyone in the thread for the flood of messages [REDACTED]

On Tue, Jun 16, 2020 at 1:49 PM [REDACTED] wrote:

I disagree. I believe it directly from the feed. If you can provide the entire feed in searchable form from the beginning we can resolve this issue.

From: [REDACTED]
Date: Tuesday, June 16, 2020 at 1:45 PM
To: [REDACTED]
Cc: Samuel L. Stanley Jr., M.D., [REDACTED]

RECEIVED by MCOA 5/2/2023 4:53:08 PM

President

"Office of the Provost, MSU"

Subject: Re: Position letter for keeping Dr. Stephen Hsu and supportive letters

Hi

I am well aware of Urz and stated

On Tue, Jun 16, 2020 at 1:37 PM

wrote:

Hi

If you look at my letter/s says

If you have a problem with it, take it up with them.

Best,

RECEIVED by MCOA 5/2/2023 4:53:08 PM

From: [REDACTED]

Date: Tuesday, June 16, 2020 at 1:20 PM

To: [REDACTED] Samuel L. Stanley Jr., M.D.,
President "Office of the Provost, MSU"

Cc: [REDACTED]

Subject: Re: Petition letter for keeping Dr. Stephen Hsu and supportive letters

[REDACTED]

I did not see your message this morning and I apologize for missing it. The first line of your section on [REDACTED]

As for the paragraph you somehow view as exculpatory I will point out this sentence:

[REDACTED]

In other words, [REDACTED]

RECEIVED by MCOA 5/2/2023 4:53:08 PM

And, since you refuse to click over the [REDACTED] let me spoon feed you

[REDACTED]

[REDACTED]

[REDACTED]

We don't know because Hsu has been completely silent on the issue.

For everyone else on this thread, I realize you may be annoyed by the clutter in your inbox caused by this conversation. On the other hand, I don't see how you can close your eyes to this, as [REDACTED] obviously has.

[REDACTED]

From: [REDACTED]

Sent: Tuesday, June 16, 2020 1:05 PM

To: [REDACTED] Samuel L. Stanley Jr., M.D., President

Office of the Provost, MSU

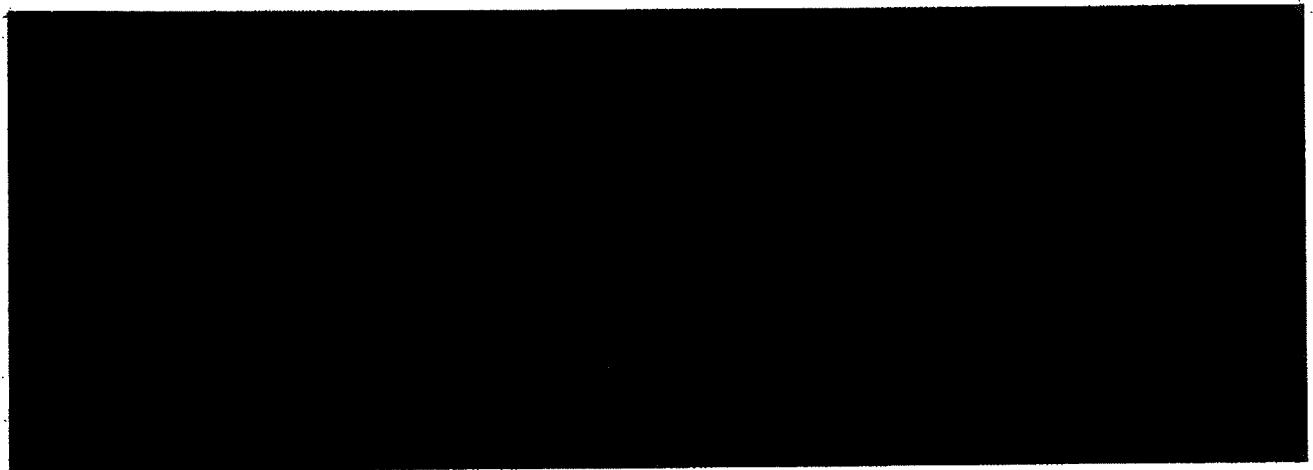
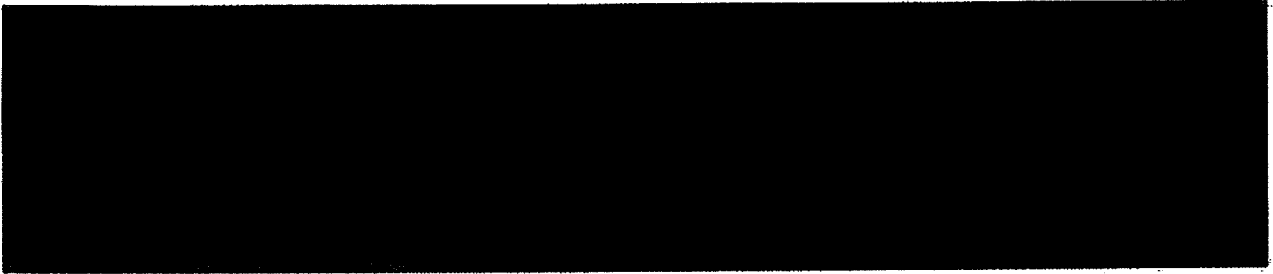
[REDACTED]

Subject: Re: Petition letter for keeping Dr. Stephen Hsu and supportive letters

RECEIVED by MCOA 5/2/2023 4:53:08 PM

Hi [REDACTED]

I wrote to you at 8:42 am this morning requesting a correction to your blog post. It is now 4 hours later and there has been no correction. In the meantime you have communicated about other issues. For the record, on your post you write:



My view statement characterizes the views of others. As I mentioned in second email to you this morning, the next sentences in my letter are logically inconsistent with my having any views on [REDACTED] position.

I hereby request again that you correct this immediately.

Best, [REDACTED]

RECEIVED by MCOA 5/2/2023 4:53:08 PM

From: [REDACTED]

Date: Tuesday, June 16, 2020 at 8:42 AM

To: [REDACTED] "Samuel L. Stanley Jr., M.D., President" [REDACTED]

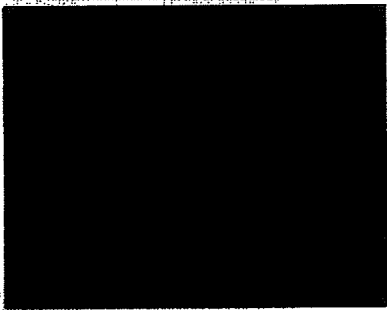
"Office of the Provost, MSU"

Cc: [REDACTED]

Subject: Re: Petition letter for keeping Dr. Stephen Hsu and supportive letters

I believe these letters misunderstand both the nature of the concerns about Dr. Hsu and what academic freedom entails.

<https://altrightorigins.com/2020/06/16/hsu-academic-freedom/>



From: [REDACTED]
Sent: Monday, June 15, 2020 12:55 PM

RECEIVED by MCOA 5/2/2023 4:53:08 PM

To: Samuel L. Stanley Jr., M.D., President [REDACTED] Office of the Provost, MSU

CC: [REDACTED]

Subject: Petition letter for keeping Dr. Stephen Hsu and supportive letters

Dear President Stanley and Interim Provost Sullivan:

Attached please find a petition to support Dr. Stephen Hsu, along with several supportive letters that you may have received from individual scholars.

Just a note, the petition was just launched approximately 12 hours ago. We will update you once the petition receives more letters and signatures.

Best Regards,

[REDACTED]

[REDACTED]

RECEIVED by MCOA 5/2/2023 4:53:08 PM



From: Wilbur, Kathleen
Sent: Friday, May 15, 2020 7:29 PM
To: Stanley, Samuel
Cc: Hsu, Stephen; Guarrant, Emily; Quinn, Brian
Subject: [REDACTED]

[REDACTED]

Sent from my iPhone

RECEIVED by MCOA 5/2/2023 4:53:08 PM

**STATE OF MICHIGAN
COURT OF CLAIMS**

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

Plaintiff,

v

MICHIGAN STATE UNIVERSITY,
a state public body,

Defendant.

Case No. 21-000011-MZ

Hon. Michael J. Kelly

Patrick J. Wright (P54052)
Derk A. Wilcox (P66177)
Stephen A. Delie (P80209)
Mackinac Center for Public Policy
Attorneys for Plaintiff
140 West Main Street
Midland, MI 48640
(989) 631-0900 - voice
(989) 631-0964 – fax

Uriel Abt (P84350)
Michigan State University
Office of the General Counsel
Attorney for Defendant
426 Auditorium Rd., Room 494
East Lansing, Michigan 48824
(517) 353.4934
abturiel@msu.edu

**DEFENDANT’S ANSWER TO PLAINTIFF’S COMPLAINT
AND AFFIRMATIVE DEFENSES**

Defendant Michigan State University (MSU), by its undersigned counsel, answers
Plaintiff’s complaint as follows:

Parties, Jurisdiction, and Venue

1. Plaintiff, the Mackinac Center for Public Policy (the “Mackinac Center”), is a
Michigan nonprofit corporation headquartered in Midland County, Michigan.

ANSWER: Admit.

RECEIVED by MCOA 5/2/2023 4:53:08 PM

2. Defendant, Michigan State University (“MSU”), is a state university and public body which, upon information and belief, is headquartered in East Lansing, Ingham County, Michigan.

ANSWER: Admit.

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

ANSWER: Admit.

4. Pursuant to MCL 15.240(5), this action should be “assigned for hearing an trial or for argument at the earliest practicable date and expedited in every way.”

ANSWER: Deny.

5. Pursuant to MCL 600.6419(1)(a), the Court of Claims has jurisdiction over this claim.

ANSWER: Admit.

Violations of the Freedom of Information Act

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

ANSWER: Defendant incorporates the proceeding responses as if fully restated herein.

7. On June 26, 2020, Mackinac Center employee Jarrett Skorup submitted a FOIA request to LARA for the following records:

“Pursuant to the Michigan Compiled Laws Section 15.231 et seq., and any other relevant statues or provisions of your agency's regulations I am making the following Freedom of Information Act request.

Any emails to or from the president of Michigan State University that mentioned “Hsu” from Feb. 1, 2020 to June 26, 2020.

Exhibit A, Mackinac Center FOIA Request.

ANSWER: Deny knowledge or information sufficient to form a belief as to the truth of the allegation concerning what was sent to “LARA.” Admit that Defendant received a FOIA request containing the quoted language on or about June 26, 2020.

8. On July 7, 2020, MSU responded to the Mackinac Center’s FOIA request by providing an estimate of the costs necessary to fulfill the request. **Exhibit B, MSU July Letter.** The requested estimate of total costs was \$230.00. MSU also estimated that it would take six (6) hours to fulfill the request.

ANSWER: Admit and refer the Court to the referenced document for a complete statement of its contents.

9. The Mackinac Center paid 50% of the estimated fee as required by MCL 15.234(8).

ANSWER: Admit that 50% of the estimated fee was paid and refer to the Court to the referenced law for a statement of its contents.

10. On August 31, 2020, MSU sent correspondence indicating that the request was more burdensome to fulfill than initially anticipated. **Exhibit C, MSU August Letter.**

MSU then proceeded to request an additional \$350.00 to fulfill the request. *Id.*

ANSWER: Admit and refer the Court to the referenced document for a complete statement of its contents.

11. MSU also indicated that it would require an additional 8 weeks to complete the estimated additional 11 hours of work period *Id.*

ANSWER: Denied and refer the Court to the referenced document for a complete statement of its contents.

12. The FOIA does not provide a process by which a public body may amend its original good faith request for a deposit, nor does it permit a public body to extend the time it

estimates will be necessary to fulfill the request. See generally, MCL 15.231 *et seq.* Instead, a public body would be permitted to change any additional expenses as part of its final billing before releasing records. See generally, MCL 15.234.

ANSWER: This paragraph contains only a conclusion of law to which no response is required.

13. MSU's August 31, 2020 letter was there for an illegal extension an increase in fees.

ANSWER: Denied.

14. Despite this, Mackinac Center paid the requested deposit.

ANSWER: Admit that Plaintiff paid the requested deposit.

15. On November 4th, 2020, MSU sent the MC correspondence indicating that it was granting the Center's request with respect to non-exempt information. **Exhibit D, MSU November Letter.** This partial-grant-partial-denial was not accompanied by any records, and was sent a full ninety-three (93) business days after receipt of the Center's FOIA request. MSU also unilaterally extended its dates to provide records to December 4th, 2020.

ANSWER: Defendant refers the Court to the referenced document for a complete statement of its contents. Answering further, admit that Defendant sent Plaintiff a letter on November 4, 2020 indicating that non-exempt records were being prepared for disclosure, that it stated either disclosure or another status update would be provided by December 4, 2020, that documents were not included in that correspondence, and that November 4, 2020 is approximately 93 days after the date Plaintiff's FOIA request was sent.

16. On December 4th, 2020, MSU again sent correspondence extending its estimated date of production. This new date is December 23rd, 2020, almost 6 months after the date the initial request was filed.

ANSWER: Defendant refers the Court to the referenced document for a complete statement of its contents. Answering further, admit that Defendant sent Plaintiff a letter on December 23, 2020 stating that either disclosure or another status update would be provided by December 23, 2020 and that December 23, 2020 is approximately six months after the date Plaintiff's FOIA request was sent.

17. MSU released heavily redacted records on December 23rd, 2020. **Exhibit F, MSU Final Response.**

ANSWER: Admit that Plaintiff released nearly 600 pages of documents on December 23, 2020 and that information exempt from disclosure under FOIA was properly redacted.

18. MSU's redactions are far beyond the scope permitted by FOIA. Examples include:
- a. Redacting excessive personal information, including the mere names of those who sent emails that were contained in the response of records;
 - b. Redacting University signatures, email addresses, net IDs, and telephone numbers pursuant to MCL 15.243(1)(u), (y) and (z), on the grounds of protecting the ongoing security of a public body;
 - c. Redacting frank communications pursuant to MCL 15.243(1)(m), despite extraordinary public interest in accessing those communications;

- d. Redacting portions of records to the extent that it is impossible to identify what exemption is being applied, and whether that exemption is being applied properly.

ANSWER: Deny.

19. MCL 15.231(2) states:

It is 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: This paragraph contains solely a statement of law to which no response is required. Defendant refers the Court to the referenced law for a statement of its contents.

20. MCL 15.234(8) indicates that a public body may respond to a FOIA request with a good faith estimate as to the cost of the FOIA request. However, the statute further states:

The response shall also contain a best efforts estimate by the public body regarding the time frame it will take the public body to comply with the law in providing the public records to the request or. The time frame estimate is non binding upon the public body, but the public body shall provide the estimate in good faith and strive to be reasonably accurate and to provide the public records in a manner based on this state's policy under [MCL 15.231] and the nature of the request in the particular instance.

ANSWER: This paragraph contains solely a statement of law to which no response is required. Defendant refers the Court to the referenced law for a statement of its contents.

21. Our Attorney General, on December 12, 2017, issued Opinion No.7300 interpreting the requirements of MCL 15.234(8):

It is my opinion, therefore, that a public body's "best efforts estimate" under subsection 4(8) of FOIA, as to the time it will take to fulfill a request for public records, must be a calculation that contemplates the public body working diligently to fulfill its obligation to produce records to the request store. The estimate must be comparable to what a reasonable person in the same circumstances as the public body would provide for fulfilling a similar public records request. In addition, under subsection 4(8), the best efforts estimate must be in "good faith," that is, it must be made honestly and without the intention to defraud or delay the requestor.

ANSWER: Defendant refers the Court to the referenced document for a statement of its contents and admit that the quoted portion appears to accurately represent a portion of the referenced document.

22. The requested materials were simply emails, and should have been easily reviewed and provided, even remotely.

ANSWER: Deny, except admit that the requested materials were emails.

23. MSU failed to provide the requested records for approximately 5 months, despite estimating the time required to process this request being originally 6 hours, and now 17 hours.

ANSWER: Deny, except admit that Defendant released documents in December 2020 and that Defendant provided fee estimates that estimated 6 hours and 11 hours of work.

24. Had MSU devoted as little as 11 minutes of each business day from June 26th to November 13th, the Center would have received the requested records. MSU's failure to do so constitute an unreasonable delay, and demonstrates that MSU was not working diligently to fulfill the Center's request.

ANSWER: Deny.

25. An unreasonable delay in providing FOIA documents is a denial under MCL 15.235, MCL 15.240(1), and MCL 15.240(7).

ANSWER: This paragraph contains solely a statement of law to which no response is required. Defendant refers the Court to the referenced law for a statement of its contents.

26. MCL 15.234(9) indicates a public body that does not timely respond to a FOIA request under MCL 15.235(2) shall reduce the charges for any labor rate at a rate of 5% a day with a maximum of 50% if the late response was willful or if the request was clearly identified as a FOIA request.

ANSWER: This paragraph contains solely a statement of law to which no response is required. Defendant refers the Court to the referenced law for a statement of its contents.

27. MSU has recognized this, as demonstrated by its refund of the entirety of the Center's processing fee. **Exhibit F.**

ANSWER: Deny.

28. Despite this, MSU's actions regarding this delay in providing the records responsive to the Mackinac Center's request are arbitrary and capricious under MCL 15.240(7), thereby subjecting MSU to a civil fine of \$1000.00 payable to the general treasury and a separate \$1000.00 to the Mackinac Center.

ANSWER: Deny.

29. In addition, MSU's actions regarding this delay in providing the records responsive to the Mackinac Center's request constitute willful an intentional failure to comply

under MCL 15.240b, thereby subjecting it to a civil fine of \$2500 to \$7500 payable to the state treasury.

ANSWER: Deny.

30. In addition to the aforementioned illegal delays, MSU's excessive redactions constitute an independent grounds for appeal.

ANSWER: Deny.

31. MSU's response to the Mackinac Center's appeal is contrary to law, as it misapplies the cited FOIA exemptions.

ANSWER: Deny.

32. MCL 15.243(1)(m) permits a public body to exempt:

Communications and notes within a public body or between public bodies of an advisory nature to the extent that they cover other than purely factual materials and are preliminary to a final agency determination of policy or action. This exemption does not apply unless the public body shows that in the particular instance the public interest is encouraging frank communication between officials and employees of public bodies clearly outweighs the public interest in disclosure.

ANSWER: This paragraph contains solely a statement of law to which no response is required. Defendant refers the Court to the referenced law for a statement of its contents.

33. MSU has the burden of showing that the frank communication exemption applies, including why the public's interest in non-disclosure clearly outweighs the public's right to receive records in the particular instance. *Bukowski v City of Detroit*, 478 Mich 268 (2007); *Herald Co, Inc v Eastern Michigan University Bd of Regents*, 265 Mich App 185 (2005) (citations omitted).

ANSWER: This paragraph contains solely a statement of law to which no response is required. Defendant refers the Court to the referenced authority for a statement of its contents.

34. Even assuming MSU correctly classified redacted and withheld emails as advisory communications preliminary to a final agency determination. MSU cannot show that the public interest in promoting frank communications clearly outweighs the public's interest in disclosure in this instance.

ANSWER: Deny.

35. The communications sought, and the advisory communication contained therein, relate directly to University's response to a public controversy, including the reasoning intended to support that response.

ANSWER: Deny.

36. The public interest in learning how the MSU makes decisions about its high-level officials is overwhelming on its face. This particular matter has garnered two Wall Street Journal articles,¹ and has resulted in what appears to be hundreds of emails being sent to MSU, both opposed and in favor of MSU's decision. **See, e.g., Exhibit G, Selected Responsive Emails.**

ANSWER: Deny, except admit that the two referenced opinion articles were published.

37. In order to overcome this extreme public interest, the public's interest in non-disclosure must "clearly outweigh" the public's interest in disclosure.

¹ See, e.g., <https://www.wsj.com/articles/the-ideological-corruption-of-science-11594572501>;
<https://www.wsj.com/articles/a-twitter-mob-takes-down-an-administrator-at-michigan-state-11593106102>.

ANSWER: This paragraph contains solely a statement of law to which no response is required.

38. MSU cannot demonstrate that the public's interest in non-disclosure clearly outweighs the public's interest in disclosure, particularly in light of the fact that the public is currently without meaningful information as to how decisions are being made by MSU officials.

ANSWER: Deny.

39. Even if the Court were to conclude that the public's interest in non-disclosure clearly outweighs the public's interest in disclosure, MSU nevertheless failed to follow the FOIA by redacting large portions of email communications. Under the FOIA, MSU remains obligated to produce any purely factual material within advisory communications. *Bukowski v City of Detroit*, 478 Mich 268 (2007). Upon information and belief, it failed to do so.

ANSWER: Deny. To the extent this paragraph contains solely a statement of law, no response is required, and Defendant refers the Court to the referenced authority for a statement of its contents.

40. MSU also exempted working group email addresses pursuant to MCL 15.243(1)(u), (y), (z) stating, "University signatures, email addresses, netIDs, and a telephone number have been redacted under one or more sections of Sections 13(1)(u), (y), and (z), which allow for the withholding of information related to the ongoing security of a public body." **Exhibit F.**

ANSWER: Deny knowledge or information sufficient to form a belief as to what is meant by "working group email addresses." Admit that information was properly

redacted in accordance with the referenced exemptions and refers the Court to the referenced document for a statement of its contents.

41. The Center objects to these redactions as not genuinely relating to MSU's ongoing security, or the security or safety of persons or property.

ANSWER: Admit that Plaintiff objects to redactions and otherwise denies the allegations in this paragraph.

42. It is MSU's burden to state the justifications for a FOIA denial with specificity. MCL 15.235(5)(a)-(c); *Peterson v Charter Township of Shelby*, 2018 WL 2024578 (Mich Ct App).

ANSWER: This paragraph contains solely a statement of law to which no response is required. Defendant refers the Court to the referenced authority for a statement of its contents.

43. Both MCL 15.243(1)(u) and (y) directly related to the security and safety of persons, property, and the public body. MCL 15.243(1)(z) similarly relates to identify a person that may be exposed to a cyber security incident, and plans and hardware related to preventing and responding to cyber security incidents.

ANSWER: This paragraph contains solely a statement of law to which no response is required. Defendant refers the Court to the referenced authority for a statement of its contents.

44. Upon information and belief, no Michigan Court has addressed either of these exemptions, nor defined the meaning of “safety or security” in connection with them. The FOIA also does not define these terms. She generally, MCL15.232.

ANSWER: This paragraph contains solely a statement of law to which no response is required. Defendant refers the Court to the referenced authority for a statement of its contents.

45. When a statute fails to define a term, a court's role is to “glean legislative intent from the plain meaning of statutory language.” *In re Estate of Erwin*, 503 Mich 1, 9 (2018) (citation omitted). To do so, a court's first point of reference is the dictionary, with common understanding and traditional legal usage guiding the court’s interpretation. *Id.*, at p. 10 (citation omitted).

ANSWER: This paragraph contains solely a statement of law to which no response is required. Defendant refers the Court to the referenced authority for a statement of its contents.

46. Webster’s online dictionary defines security as the “quality or state of being secure.”² “Secure” is defined as “free from danger.”³ “Danger” is defined as “exposure or liability to injury, pain, harm, or loss.”⁴

ANSWER: Admit that Plaintiff appears to accurately quote portions of the referenced documents.

47. The Cambridge Dictionary similarly defines security as “protection of a person, building, organization, or country against threats such as crime or attacks by foreign countries.”⁵

ANSWER: Admit that Plaintiff appears to accurately quote portions of the referenced documents.

² <https://www.merriam-webster.com/dictionary/security?src=search-dict-hed>.

³ <https://www.merriam-webster.com/dictionary/secure>.

⁴ <https://www.merriam-webster.com/dictionary/danger>.

⁵ <https://dictionary.cambridge.org/us/dictionary/english/security>.

48. MSU's claim that the disclosure of email addresses, signatures, netIDs, and telephone number would threaten the security of MSU, or of individual employees, cannot be justified under the above definitions. It strains credulity to contend that a person can be physically endangered by the exposure of any of the aforementioned information.

ANSWER: Deny.

49. The same is true regarding MSU's application of MCL 15.243(1)(z). MSU has offered no explanation as to how disclosing this information poses a cyber security risk, or otherwise exposes MSU's cyber security related practices.

ANSWER: Deny.

50. MSU also redacted certain non MSU email addresses and names pursuant to MCL 15.243(1)(a), which states:

A public body may exempt from disclosure as a public record under this act any of the following... information of a personal nature if public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy.

ANSWER: Admit that Defendant properly redacted certain personally identifying information under the identified exemption.

51. MSU cannot demonstrate that the public interest in full disclosure of records is clearly outweighed by privacy interests in this instance.

ANSWER: Deny.

52. Michigan Courts have previously ruled that they release of the names and addresses of private security guard employees, the names of public employees who had been called before a grand jury or met with an FBI investigation, the names and home addresses of various public employees and candidates for public office, and the names of student-athletes identified in university incident reports do not constitute

clearly unwarranted invasions of privacy. *International Union, United Plant Guard Workers of America (UPGWA) v Department of State Police*, 118 Mich App 2952 (1982); *Detroit Free Press v City of Warren*, 250 Mich App 164 (2002)(citation omitted); *Michigan State Employees Ass'n v Department of Management and Budget*, 135 Mich App 248 (1984)(citation omitted); *Tobin v Michigan Civil Service Com'n*, 416 Mich 661 (1982); *Hearld Co v City of Bay City*, 463 Mich 111 (2000); *ESPN, Inc v Michigan State University*, 311 Mich App 662 (2015) (citation omitted).

ANSWER: This paragraph contains solely a statement of law to which no response is required. Defendant refers the Court to the referenced authority for a statement of its contents.

53. Disclosure of the email addresses at issue in this particular instance are less invasive than the disclosure of the information described immediately above, thereby justifying their release.

ANSWER: Deny.

54. The identity of those individuals contacting MSU regarding its response to this matter are likewise information that is of significant public interest, as it shows those individuals who either support or oppose MSU's response. This is relevant, as it will help the public understand how this matter is being viewed by students, other academics, and by the public. Similarities or differences in responses among these groups helps to inform the public regarding the potential logic underlying MSU's response.

ANSWER: Deny.

55. Pursuant to MCL 15.240(6), the Center, if it prevails, is entitled to attorneys' fees and costs:

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

ANSWER: This paragraph contains solely a statement of law to which no response is required. Defendant refers the Court to the referenced authority for a statement of its contents.

AFFIRMATIVE DEFENSES

1. In support of its affirmative defenses, Defendant hereby incorporates its foregoing answers as if stated fully herein.
2. Plaintiff's claim should be dismissed to the extent it is premised on FOIA requests seeking documents exempt from disclosure under MCL 15.234. In particular, and without limitation, documents and information withheld from Plaintiff are exempt from disclosure under MCL 15.234(1)(a), (b), (c), (g), (h), (m), (u), (w), (y), (z), and 15.234(2).
3. Plaintiff's claim should be dismissed to the extent it is barred by the applicable statutes of limitations.

Respectfully submitted,



Uriel Abt
Attorney for Defendant

Dated: February 23, 2021

STATE OF MICHIGAN
COURT OF CLAIMS

THE MACKINAC CENTER
FOR PUBLIC POLICY,

Plaintiff,

Case No. 21-000011-MZ

v

Hon. Elizabeth Gleicher

MICHIGAN STATE UNIVERSITY,

Defendant.

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

Uriel Abt (P84350)
Office of the General Counsel
Michigan State University
Attorney for Defendant
426 Auditorium Road, Room 494
East Lansing, MI 48824
(517) 353-4934
abturiel@msu.edu

**PLAINTIFF'S 11/12/2021
COMBINED MOTION AND BRIEF FOR SUMMARY DISPOSITION
PURSUANT TO MCR 2.116(C)(10)**

Oral Argument Requested

Now comes Plaintiff, the Mackinac Center for Public Policy (“Mackinac Center”), by and through its attorneys and, for its Motion for Summary Disposition states the following:

I. INTRODUCTION

A. The background on this FOIA request.

Mackinac Center is a nonprofit organization “dedicated to improving the quality of life for all Michigan residents by promoting sound solutions to state and local policy questions.” To that

end, the Mackinac Center routinely uses the Freedom of Information Act (“FOIA”) to obtain relevant documents from state and local government bodies.

Non-party Dr. Stephen Hsu is a professor at defendant Michigan State University (“MSU”). His current MSU biography states the following:

Before joining MSU in 2012, Stephen Hsu was director of the Institute for Theoretical Science and professor of physics at the University of Oregon. He also serves as scientific adviser to BGI (formerly the Beijing Genomics Institute) and as a member of its Cognitive Genomics Lab.

Hsu’s primary work has been in applications of quantum field theory, particularly in relation to problems in quantum chromodynamics, dark energy, black holes, entropy bounds, and particle physics beyond the standard model. He has also done work in genomics and bioinformatics, the theory of modern finance, and in encryption and information security.¹

Dr. Hsu became the center of controversy over statements he had made, and was pressured to leave his leadership position as Senior Vice President for Research and Innovation at MSU, although he remains a tenured member of the faculty there. The Wall Street Journal summarized the controversy in this way:

The trouble began June 10, when MSU’s Graduate Employees Union composed a lengthy Twitter thread denouncing Mr. Hsu as, among other things, “a vocal scientific racist and eugenicist.” The union claimed Mr. Hsu believes “in innate biological differences between human populations, especially regarding intelligence.”

Mr. Hsu says these accusations “were made in bad faith.” Take that 2018 blog post, which responded to New York Times articles that, in his words, linked “genetic science to racism and white supremacy.” In it, he wrote: “All good people abhor racism. I believe that each person should be treated as an individual, independent of ancestry or ethnic background. . . . However, this ethical position is not predicated on the absence of average differences between groups. I believe that basic human rights and human dignity derive from our shared humanity, not from uniformity in ability or genetic makeup.” Mr. Hsu doesn’t work in this field but rejects the idea that scientists should categorically exclude the possibility of average genetic differences among groups.

¹ <https://pa.msu.edu/profile/hsu/> last accessed November 9, 2021.

Mr. Hsu says he felt compelled to step down because he served at the pleasure of the president. But he thinks Mr. Stanley handled the matter badly. “The first action of the university should be to investigate, find the truth, and defend the person if the claims are false.” Mr. Hsu says MSU undertook no such investigation.²

B. The timeline of the FOIA request.

On June 26, 2020, the Mackinac Center made a routine FOIA request to MSU, seeking certain e-mail correspondence relating to Dr. Stephen Hsu. (See Exhibit A attached to the Complaint, and included here in the Appendix at pages 1 to 3.) MSU responded on July 7, 2020, with a fee estimate of \$230.00. (See Exhibits B and C attached to the Complaint, and included here in the Appendix at pages 4 to 9.) The Mackinac Center paid the required 50% deposit of \$115.00, which MSU received on July 20, 2020. In its July 7th response, MSU estimated it would take six weeks to process the Mackinac Center’s request, despite estimating only six hours of labor would be necessary. (Exhibit B, *supra*.)

On August 31, 2020, MSU wrote to the Mackinac Center, informing the Center that the records it had requested had been located and gathered, but that the volume of the records were greater than anticipated. MSU, without legal authority, then revised its cost estimate to reflect an additional 11 hours of labor and additional costs of \$250.00. MSU also extended the date it anticipated being able to respond to the Mackinac Centers request by an additional eight weeks. (Exhibit C, *supra*.)

On November 4, MSU again wrote to the Mackinac Center, partially granting and partially denying its request. MSU once again unilaterally extended its deadline to respond until December

² <https://www.wsj.com/articles/a-twitter-mob-takes-down-an-administrator-at-michigan-state-11593106102>

Last accessed November 9, 2021.

4, 2020. (See Exhibit D attached to the Complaint, and included here in the Appendix at pages 10 to 11.) Finally, on December 4, MSU again issued a delay until December 23, 2020.

Despite all deposits requested by MSU having been paid by Mackinac Center, MSU took almost six months for records that, by MSU's most-recent admission, should have taken no longer than seventeen hours to produce. In addition, those records that were released were excessively redacted beyond the scope of what is permitted by the FOIA.

Mackinac Center filed this suit on or about January 5, 2021.

C. The withholdings and redactions.

MSU provided a letter dated December 23, 2020, which accompanied the redacted documents (a copy of which was attached as Exhibit F to the Complaint, and included here in the Appendix at pages 14 to 16). In that letter, MSU claimed that information had been withheld or redacted under the following sections of FOIA: (1) Information of a personal nature under Section 13(1)(a). (2) Information that would “prevent the public body from complying with 20 USC 1232g, commonly referred to as the family educational rights and privacy act of 1974” pursuant to Section 13(2). (3) Investigating records compiled for law enforcement that would constitute an “unwarranted invasion of personal privacy” pursuant to Section 13(1)(b)(iii). (4) Records of a public body's security measures, such as security plans, passwords, and security procedures, pursuant to Section 13(1)(u). (5) Records or information of measures designed to protect the security or safety of persons or property under Section 13(1)(y). (6) Records of information that would disclose cybersecurity plans or practices under Section 13(1)(z). (7) Information or records subject to attorney-client privilege pursuant to Section 13(1)(g). (8) Information or records subject to the physician-patient privilege, the psychologist-patient privilege, the minister, priest or Christian Science practitioner privilege pursuant to Section 13(1)(h). (9) Communications of an

advisory nature that are preliminary to an agency determination, the “frank communications” exemption pursuant to Section 13(1)(m).

Additionally, in its Affirmative Defenses filed on or about August 27, paragraph 2, MSU claimed an exemptions for “A record that if disclosed would prejudice a public body’s ability to maintain the physical security of custodial or penal institutions occupied by persons arrested or convicted of a crime” pursuant to Section 13(1)(c). The inclusion of this exemption seems to be a mistake, and is inapplicable here, but Mackinac Center did not ask for clarification during discovery.

Additionally, during discovery, Mackinac Center asked about the claim of exemption under Section 13(1)(h), the physician-patient/psychiatrist-patient/minister, etc. privilege. MSU answered, “Upon further review, no documents have been redacted or withheld under Section 13(1)(h).” (Mackinac Center’s Interrogatories and MSU’s Answers have been attached to this brief as Exhibit G in the Appendix at pages 17 to 28.)

Also during discovery, MSU withdrew its claim that Section 13(2) was “a basis to withhold these documents” related to “five (5) pages of personal information” related to “potential misconduct by one member of the MSU community against another...” (See Ex. G, *Id.*, at pages 6-7, Appendix pages 23-24.) MSU continues to maintain that Section 13(1)(a) applies to these five withheld pages, and that Section 13(2) applies to other redactions and withholdings.

II. LEGAL STANDARDS AND STANDARD OF REVIEW

A. Summary disposition.

Mackinac is making this motion as a request for summary disposition under MCR 2.116(C)(10), as it believes that there is no remaining factual issue, and the matter can be

determined as a legal question on the pleadings and discovery responses. Mackinac also believes that this is the only remaining issue in this matter.

As our Supreme Court articulated in *Bonner v City of Brighton*, 495 Mich 209; 848 NW2d 380 (2014), regarding summary disposition under MCR 2.116(C)(10):

Summary disposition is appropriate under MCR 2.116(C)(10) if, “[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law.” “A genuine issue of material fact exists when, viewing the evidence in a light most favorable to the nonmoving party, the record which might be developed ... would leave open an issue upon which reasonable minds might differ.” In deciding whether to grant a motion for summary disposition pursuant to MCR 2.116(C)(10), a court must consider “[t]he affidavits, together with the pleadings, depositions, admissions, and documentary evidence then filed in the action or submitted by the parties,” in the light most favorable to the nonmoving party.

Id at 220-1 (internal notes and citations omitted).

In addition, MCR 2.116(G)(4) requires that a motion under (C)(10) specifically identify and support the issues as to which the moving party believes there is no genuine issue as to any material fact. When this is done, “an adverse party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, judgment, if appropriate, shall be entered against him or her.”

Bernardoni v City of Saginaw, 499 Mich 470, 472–473; 886 NW2d 109 (2016).

B. FOIA generally.

Michigan’s FOIA statute, 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 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.

FOIA is a prodisclosure act, and exemptions are to be narrowly construed:

Therefore, all public records are subject to full disclosure under the act unless the material is specifically exempt under § 13. Also, when a public body refuses to disclose a requested document under the act, and the requester sues to compel disclosure, the public agency bears the burden of proving that the refusal was

justified under the act. In construing the provisions of the act, we keep in mind that the FOIA is intended primarily as a prodisclosure statute and the exemptions to disclosure are to be narrowly construed.

Swickard v Wayne County Medical Examiner, 438 Mich 536, 544; 475 NW2d 304 (1991) (internal citations and footnotes removed).

C. FOIA personal privacy exemption under Section 13(1)(a).

MSU claims certain information was redacted or withheld pursuant to the MCL 15.243(1)(a) privacy exemption. The statute says:

Sec. 13.

(1) A public body may exempt from disclosure as a public record under this act any of the following:

(a) Information of a personal nature if public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy.

Generally, FOIA favors the disclosure of identities. Michigan Courts have previously ruled that the release of the names and addresses of private security guard employees is not exempt. *International Union, United Plant Guard Workers of America v Dep't of State Police*, 118 Mich App 292 (1982), *aff'd and remanded* 422 Mich 432; 373 NW2d 713 (1985). Nor are the names of public employees who had been called before a grand jury or met with an FBI investigation. *Detroit Free Press v City of Warren*, 250 Mich App 164; 645 NW2d 71 (2002). The names and home addresses of various public employees and candidates for public office are not private. *Michigan State Employees Ass'n v Department of Management and Budget*, 135 Mich App 248; 353 NW2d 496 (1984). Names and addresses of public employees in the civil service are not private. *Tobin v Michigan Civil Service Com'n*, 416 Mich 661; 331 NW2d 184 (1982). Names of finalists for a fire chief position are not private. *Herald Co v University of Bay Univ*, 463 Mich 111; 614 NW2d 873 (2000). And the names of student athletes identified in crime incident reports were not exempt from FOIA. *ESPN, Inc v Michigan State University*, 311 Mich App 662; 876 NW2d 593 (2015).

Disclosure of public employees' names, email addresses, and positions has never been held to be an "unwarranted invasion of an individual's privacy," as defined by FOIA. The standard for privacy exemptions is information that has "intimate details" of a "highly personal" nature. Michigan courts have consistently held that the names and email addresses of university employees do not rise to the level of "highly personal" information. Even when combined with salary and compensation information, this is not exempt from disclosure on the grounds of privacy:

The names and salaries of the employees of defendant university are not "intimate details" of a "highly personal" nature. Disclosure of this information would not thwart the apparent purpose of the exemption to protect against the highly offensive public scrutiny of totally private personal details. The precise manner of expenditure of public funds is simply not a private fact. The heavy burden of justifying nondisclosure has not been met by the conclusory allegations of "ill will, hard feelings prejudice among employees" and "chill(ing of) the applications of further persons for positions similar to" those of intervening defendants.

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

Penokie v Michigan Technological University, 93 Mich App 650, 663-664; 287 NW2d 304 (1979). Michigan's Courts have applied these principles consistently. In *Detroit Free Press v University of Southfield*, 269 Mich App 275, 287; 269 Mich App 275 (2005), the court held that both the names of retired police officers and the amount of pension payment they were receiving were subject to disclosure based on the public's strong interest in knowing how its tax dollars were being spent.

D. FOIA law enforcement exemption under Section 13(1)(b)(iii).

Related to the personal privacy exemption detailed above, subsection (1)(b)(iii) states:

(1) A public body may exempt from disclosure as a public record under this act any of the following:

(b) Investigating records compiled for law enforcement purposes, but only to the extent that disclosure as a public record would do any of the following:

(iii) Constitute an unwarranted invasion of personal privacy.

MCL 15.243(1)(b)(iii).

Our courts have provided criteria for interpreting this statute:

The trial court should be aware that exemptions are to be construed narrowly and “must be supported by substantial justification and explanation, not merely by conclusory assertions”. The initial inquiry is whether disclosure of the investigative reports would constitute an invasion of privacy and, if so, how serious. Nondisclosure is limited to “intimate details of a highly personal nature”. Trial courts must also be guided by “Michigan's long standing policy of citizen accessibility to public records.”

Pennington v Washtenaw County Sheriff, 125 Mich App 556, 566-567; 336 NW2d 828 (1983) (internal citations omitted). Examples of “unwarranted invasion of personal privacy” and “intimate details of a highly personal nature” have include “past sexual history,” *Pennington, supra*, at 567, and a crime victim’s home address and phone number, and her parents’ home address and phone number. *Pennington, supra*, at 567.

Contrast that highly-personal information above with the fact that, even when the requested information reveals those who have been accused of a crime, the names of the accused and the nature of the offence was not considered exempt where this disclosure shed light on the policing decisions of a university. *ESPN, supra* at 597-598.

E. FOIA exemption for attorney-client privilege.

FOIA provides an exemption for documents subject to the attorney-client privilege. MCL 15.243(1)(g) states: “(1) A public body may exempt from disclosure as a public record under this act any of the following: (g) Information or records subject to the attorney-client privilege.”

MSU asserts in its interrogatory answers that it has redacted certain communications pursuant to this privilege. See Exhibit G, *supra*, at page 8, Appendix page 25.

The Mackinac Center has no basis to challenge these identifications, and accepts that these documents are exempt from disclosure.

F. The “frank communications” exemption from FOIA.

Although all government documents are presumptively available to the public, the statute does provide for a number of possible exemptions. Some of these exemptions can only be claimed by the governmental body if it can show that the public interest is better served by keeping the documents undisclosed. One such possible exemption is what is often called the “frank communications” exemption found in MCL 15.243(1)(m). MSU here has claimed that this exemption applies. The Act states:

Sec. 13.

(1) A public body may exempt from disclosure as a public record under this act any of the following:

(m) Communications and notes within a public body or between public bodies of an advisory nature to the extent that they cover other than purely factual materials and are preliminary to a final agency determination of policy or action. This exemption does not apply unless the public body shows that in the particular instance the public interest in encouraging frank communication between officials and employees of public bodies clearly outweighs the public interest in disclosure.

MCL 15.243(1)(m).

Per FOIA, the public body has the burden of showing that the public interest is better served by keeping matters confidential, rather than disclosing it. This is a high hurdle for MSU to overcome. Our Supreme Court has said:

Under the plain language of the provision, these competing interests are not equally situated, and the Legislature intended the balancing test to favor disclosure. The Legislature’s requirement that the public interest in disclosure must be clearly outweighed demonstrates the importance it has attached to disclosing frank communications absent significant, countervailing reasons to withhold the document. Hence, the public record is not exempt under the frank communication exemption unless the public body demonstrates that the public interest in encouraging frank communication between officials and employees of public bodies clearly outweighs the public interest in disclosure.

Herald Co. v Eastern Michigan University Bd. of Regents, 475 Mich 463, 473-474; 719 NW2d 19 (2006) (emphasis added).

To claim the exemption, the public body must, as a preliminary matter, show three things: First, that the document at issue covers more than purely factual matters. Second, that it involves something that is preliminary to a final agency determination. Third, they must show that it is advisory in nature:

Therefore, a document is a “frank communication” if the trial court finds that it (1) is a communication or note of an advisory nature made within a public body or between public bodies, (2) covers other than purely factual material, and (3) is preliminary to a final agency determination of policy or action. If, in the trial court’s judgment, the document fails any one of these threshold qualifications, then the frank communication exemption simply does not apply.

Herald Co., 475 Mich at 475.

Even if the public body can meet these three criteria, this does not mean that the material can be exempted. It must still be disclosed unless the public’s interest in keeping it secret clearly outweighs the public’s interest in open government. Additionally, as noted in dissent, this exemption is the only one where the public’s interest in keeping the materials secret must “clearly outweigh” (emphasis added) the public’s interest in complete and open information about the government’s workings: “Notably, the ‘frank communication’ exemption is the only FOIA provision that uses the term ‘clearly outweighs.’ Other provisions merely use the term ‘outweighs’ when providing for a balancing test.” *Herald Co.*, 475 Mich at 493 (Justice Cavanaugh dissenting.)

The public body must offer more than platitudes and generalizations to carry its burden of showing that something should be exempt from FOIA disclosure. It must show, in each specific instance, why the public’s interest in nondisclosure clearly outweighs the interest in open government. See, for example, *Nicita v City of Detroit*, 216 Mich App 746; 550 NW2d 269 (1996):

Defendant also produced Nancy Trecha, ... as a witness in support of its argument. Trecha testified that the documents were frank communications or evaluations made before a determination was made concerning the development project. However, Trecha's testimony did not illustrate why the public interest in encouraging frank communications between public employees clearly outweighed the public interest in their disclosure. Her testimony was only in general terms, indicating that disclosure of such communications would discourage employees from writing down their thoughts. Defendant did not make an offer of proof with regard to each specific document.

Nicita, 216 Mich App at 755.

MSU has disclosed, during discovery, a long list of redactions it made pursuant to claiming this exemption. See Exhibit G, *supra*, pages 8 to 10, Appendix at pages 25 to 27.

G. Security measures exempt under FOIA.

FOIA provides several possible exemptions for details of security measures and systems.

The three subsections claimed by MSU are Section 13(1)(u), (y), and (z):

Sec. 13.

(1) A public body may exempt from disclosure as a public record under this act any of the following: ***

(u) Records of a public body's security measures, including security plans, security codes and combinations, passwords, passes, keys, and security procedures, to the extent that the records relate to the ongoing security of the public body.

Id. And MCL 15.243(1)(y) states it may exempt:

(y) Records or information of measures designed to protect the security or safety of persons or property, or the confidentiality, integrity, or availability of information systems, whether public or private, including, but not limited to, building, public works, and public water supply designs to the extent that those designs relate to the ongoing security measures of a public body, capabilities and plans for responding to a violation of the Michigan anti-terrorism act, chapter LXXXIII-A of the Michigan penal code, 1931 PA 328, MCL 750.543a to 750.543z, emergency response plans, risk planning documents, threat assessments, domestic preparedness strategies, and cybersecurity plans, assessments, or vulnerabilities, unless disclosure would not impair a public body's ability to protect the security or safety of persons or property or unless the public interest in disclosure outweighs the public interest in nondisclosure in the particular instance.

Id. And MCL 13.243(z) states:

(z) Information that would identify or provide a means of identifying a person that may, as a result of disclosure of the information, become a victim of a cybersecurity incident or that would disclose a person's cybersecurity plans or cybersecurity-related practices, procedures, methods, results, organizational information system infrastructure, hardware, or software.

Neither MCL 15.243(1)(u), (y), nor (z), in their current forms, have been analyzed by our courts in binding opinions. Subsection (u) has been involved in an unpublished opinion of the Court of Appeals, *Woodman v Dept. of Corrections*, Unpublished per curiam Docket Nos. 353164 and 353165, 2021 WL 2619705. A copy of this opinion is attached as Exhibit H in the Appendix, at pages 29 to 37. In *Woodman*, this Court of Claims held that video tape of an altercation in the prison system was required to be produced. *Woodman* also held that merely asserting “blanket denials” was insufficient. *Id.* at page 2. The Court of Claims found that, because the video tapes did not “reveal the placement of security cameras, and “did not reveal any security concerns” (other than the identity of staff and inmates), the tapes had to be disclosed. *Id.* at page 3. The plaintiff prevailed and was awarded attorneys’ fees.

Despite the lack of interpretive opinions, the language of subsections (u), (y), and (z) state that these are meant to protect plans, processes, and procedures related to security.

H. The educational-privacy exemption.

MSU claims several pages were withheld under this exemption for certain information held by educational institutions. Per MSU’s discovery answers, they had originally claimed this exemption for five specific pages that were withheld; but after review, “Further review indicates that Section 13(2) is not a basis to withhold these documents. That independent basis for withholding these documents is therefore withdrawn.” (See Exhibit G, discovery answer to (1)(a), Appendix at pages 23 to 24.) However, the next answer asserts that “Nine pages were withheld pursuant to Section...13(2)...” (See Exhibit G, discovery answer to (1)(b), Appendix at page 24.)

The Act states:

(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. ...

MCL 15.243(2).

This statute refers to a federal statute, 20 USC 1232g, which gives parents and others the right to access information about students' education, while keeping other information undisclosed. The state statute covers both a wider set of public bodies, and also a smaller subset of intermediate school districts or public academies. What can be withheld is, per the federal statute, different for intermediate schools and postsecondary educational institutions. Failure to comply with this federal law endangers federal funding to a school. And so our state FOIA statute exempts from release any information that would endanger federal funding.

This federal statute states what universities or other institutions of postsecondary education are required to withhold:

- (C) The first sentence of subparagraph (A) shall not operate to make available to students in institutions of postsecondary education the following materials:
- (i) financial records of the parents of the student or any information contained therein;
 - (ii) confidential letters and statements of recommendation, which were placed in the education records prior to January 1, 1975, if such letters or statements are not used for purposes other than those for which they were specifically intended;
 - (iii) if the student has signed a waiver of the student's right of access under this subsection in accordance with subparagraph (D), confidential recommendations—

- (I) respecting admission to any educational agency or institution,
- (II) respecting an application for employment, and
- (III) respecting the receipt of an honor or honorary recognition.

20 USC 1232g(a)(1)(C).

Meanwhile, per Section 13(2), intermediate schools and the like that instruct minors have a different set of exempted documents:

(A) For the purposes of this section the term “directory information” relating to a student includes the following: the student’s name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student.

20 USC 1232g(a)(5).

Recall that FOIA, Section 13(2), only allows for the exemption of this “directory information” such as names or addresses, by local or intermediate school districts or a public school academies. *Id.* Universities and other postsecondary education institutions don’t have this exemption for directory information. And as we have seen in *ESPN, supra*, the mere names of students are not exempt unless another exemption applies, such as privacy of deeply personal information.

Michigan only has two opinions involving Section 13(2). Neither is a published opinion. Both involve minor students, and are not applicable to adult university students.

“The Act states that federal funds are to be withheld from school districts that have ‘a policy or practice of permitting the release of education records (or personally identifiable information contained therein ...) of students without the written consent of their parents.’ ” *Owasso Indep. Sch. Dist. No. I-011 v Falvo*, 534 US 426, 428-429; 122 SCt 934, 151 L Ed 2d 896 (2002), quoting 20 USC 1232g(b)(1) (alteration in original). In turn, our FOIA directs a public body to “exempt from disclosure information that, if released, would prevent the public body from complying with 20 USC 1232g” of FERPA. MCL 15.243(2).

Kalamazoo Transportation Association v Kalamazoo Public Schools, Unpublished per curiam

opinion of the Court of Appeals, No. 349031, 2019 WL 6888666, at *2. (A copy of this opinion is provided as Exhibit I in the Appendix at pages 38 to 43.)

Similarly, *Doe v Unnamed School District*, per curiam unpublished opinion of the Court of Appeals, No. 340234, 2019 WL 1302114 dealt with a minor student. (A copy of this opinion is provided as Exhibit J in the appendix at pages 44 to 53.)

There does not appear to be any opinions in Michigan applying this exemption to university students or employees.

III. ARGUMENT

The public interest at issue here is academic freedom and the treatment of faculty and staff based on their viewpoints. Was Prof. Hsu treated fairly, or was his case handled differently than other cases? To what extent did ‘Twitter mobs’ affect MSU’s actions? The public has a right to know how this matter was handled. And as seen earlier in the citation from the Wall Street Journal, the matter has garnered national attention.³

A. The personal privacy-exemption does not apply here.

As described above, mere names and identifications of public employees has never been

³ For another, separate, Wall Street Journal article on the matter written by a noted physicist, see <https://www.wsj.com/articles/the-ideological-corruption-of-science-11594572501>.

Other state press coverage about the matter has included:

<https://www.lansingstatejournal.com/story/news/2020/06/19/msu-vp-research-resigns-after-controversial-comments-research/3226785001/>

<https://www.detroitnews.com/story/news/local/michigan/2020/06/19/msu-research-vp-resigns-role-amid-controversy/3227716001/>

National attention also shown by:

<https://quillette.com/2020/07/01/on-steve-hsu-and-the-campaign-to-thwart-free-inquiry/>

<https://reason.com/volokh/2020/06/21/michigan-state-university-vp-of-research-ousted-because-of-his-past-scientific-statements/>

<https://www.thefire.org/linguists-campaign-against-pinker-flops-but-still-troubles/>

(all last accessed November 11, 2021.)

considered exempt from FOIA. Identification, by itself, is not an intimate detail of a highly personal nature. Even when you combine names with salaries, this still does not rise to that level. See for, example, *Penokie, supra*. Section 13(1)(a) has never been held by our courts to allow the exemption of names. Nor has Section 13(1)(a) alone been allowed to justify an exemption that withheld what a public employee did as part of their public duties. (Although this may have been allowed when coupled with other exemptions such as the ‘frank communications’ exemption that will be discussed shortly.)

B. The law-enforcement exemptions do not apply.

While the law enforcement exemption can be combined with the privacy exemption, it is still limited to only apply where it would “constitute an unwarranted invasion of personal privacy.” Section 13(1)(b)(iii), *supra*. But that has only been used to exempt very personal information, such as sexual history. *Pennington, supra*. Elsewhere, we have seen that the names of the accused and what they were accused of was considered information that must be disclosed because it showed the policing policies of a university. *ESPN, supra*. That is very similar to our situation here, where publicly available evidence seems to indicate that MSU violated the norms of academic freedom and due process in pressuring an official to leave his position. The public has a right to know what went into the decision-making process. The public shouldn’t have to just rely on MSU’s assurances that academic freedom and due process were satisfied. MSU is a public body with public governance, and the public has a right to know “full and complete information regarding...the official acts of those who represent them as public officials and public employees...” MCL 15.231(2), *supra*.

Per MSU’s discovery responses, “The withheld documents are a single email chain. The chain constitutes a report made by a MSU student of potential criminal conduct, including death

threats against MSU students, and the forwarding of that information to the MSU Police Department.” (Exhibit G, answer to (1)(b), Appendix at page 24.) Again, police reports are routinely accessed through FOIA. And Section 13(1)(b)(iii) only exempts “an unwarranted invasion of personal privacy.” “Nondisclosure is limited to “intimate details of a highly personal nature”. *Penokie, supra*, 93. Trial courts must also be guided by “Michigan's long standing policy of citizen accessibility to public records.” *Penokie, supra*, 662.” *Pennington, supra*.

C. The frank-communications exemption does not apply.

The bulk of MSU’s redactions and disclosures are related to this possible exemption. But even where such a document is preliminary to a final agency determination, that is not enough to justify its exemption. That shifts the inquiry to whether the public interest is better served by disclosure, or by keeping it secret. Our courts have said that it is MSU’s burden to show that the public is better served by keeping it secret, and that this is a very high hurdle. *Herald Co., supra*. In showing the public body’s interest in keeping documents secret, more than platitudes and generalizations are necessary to carrying this burden. *Nicita, supra*. It is not enough to simply say, as MSU has, that “were the information subject to public disclosure through FOIA, these exchanges of information and advice would be chilled.” (See MSU’s discovery answers, Exhibit G, answer to (1)(d), Appendix at page 25.)

As mentioned above, the public’s interest is in having academic freedom and due process in our public universities. The vague declaration that future communications would be chilled is not enough to show that the public’s interests are better served by MSU’s secrecy.

D. The security-measure exemptions do not apply here.

All of the security-measure exemptions claimed by MSU, Section 13(1)(u), (y), and (z), share a common feature in that these apply to systems, policies, and procedures that could be

exploited to the detriment of people and property. Passwords, security codes, locations of security cameras and the like. The mere disclosure of identities or email addresses do not qualify. MSU claims that these redactions were “internal MSU email addresses and signatures of MSU employees. These exemptions are not used to redact the identity of senders or recipients of otherwise non-exempt documents. Among other reasons for redaction, the broad public disclosure of internal MSU email addresses and signatures of MSU employees increases the risk of cybersecurity events like, without limitation, phishing attacks, identity theft, and online harassment or doxing.” (See MSU’s discovery answers, Exhibit G, answer to (1)(c), Appendix at page 24.)

Mackinac Center will state for the record that it does not seek employees’ signatures.

However, email addresses are required to be disclosed. The mere threat of receiving an unwanted email is not enough to keep public employee’s email addresses secret. During the Flint water crisis, numerous news organizations, as well as the Mackinac Center, submitted FOIA requests to government agencies requesting email communications.⁴ After an initial delay, the state released the requested emails. This settled the many FOIA lawsuits. Only the Governor’s email address was redacted, but it was still clear which communications were to and from him. All the other government employees involved were identified by name and their email address, without redaction. The only redactions were those that were subject to attorney-client privilege.

Compare that situation to this. The threat to public health in that instance was serious. Passions were high, and accusations of indifference and criminality by government officials were common. Nevertheless, the state produced the relevant communications and provided the names

⁴ The Mackinac Center’s case was here in the Court of Claims, No. 16-000164-MZ.

and email addresses of the responsible government decision makers.⁵ The matter here is not as heated – if it is are heated at all. While this Flint water matter is an example of government agreeing to settle a matter, and not a binding court precedent, it still shows that email addresses have not been considered to be something that can or should be kept secret.

IV. CONCLUSION AND RELIEF REQUESTED

For the reasons argued above, Mackinac Center requests that this court grant its motion for summary disposition, and order MSU to provide the complete and unredacted information requested.

In the alternative, Mackinac Center requests that it be allowed to view the documents *in camera* with the Court, so that the Court can determine whether the documents are properly subject to an exemption.

Mackinac Center additionally requests any attorney fees, costs, or other relief that this Court deems appropriate; as well as any penalties provided by FOIA in MCL 15.234(9), MCL 15.240(7), and MCL 15.240b.

Dated: November 12, 2021

/s/ Derk Wilcox
Derk Wilcox (P66177)
MACKINAC CENTER LEGAL FOUNDATION
140 West Main Street
Midland, MI 48640
(989) 631-0900
wilcox@mackinac.org

⁵ The email package that was released and settled the Mackinac Center and others' lawsuits can be viewed here. <http://flintwaterstudy.org/wp-content/uploads/2016/01/snyder-emails.pdf> last accessed November 5, 2021. Several press outlets reported on these events and the emails, such as:

<https://www.freep.com/story/news/local/michigan/flint-water-crisis/2016/02/19/flint-water-crisis-emails/80228582/>

and

<https://www.bridgemi.com/truth-squad-companion/email-trail-latest-workers-charged-flint-water-crisis>

Certificate of Service

The undersigned hereby certifies that he served a copy of Plaintiff's Combined Motion and Brief for Summary Disposition on Defendant via the MiFile TrueFiling system on November 12, 2021.

Dated: November 12, 2021

/s/ Derk Wilcox

**STATE OF MICHIGAN
COURT OF CLAIMS**

THE MACKINAC CENTER
FOR PUBLIC POLICY,

Plaintiff,

Case No. 21-000011-MZ

v

Hon. Elizabeth Gleicher

MICHIGAN STATE UNIVERSITY,

Defendant.

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

Uriel Abt (P84350)
Office of the General Counsel
Michigan State University
Attorney for Defendant
426 Auditorium Road, Room 494
East Lansing, MI 48824
(517) 353-4934
abturiel@msu.edu

**PLAINTIFF'S APPENDIX
FOR ITS BRIEF IN SUPPORT OF ITS 11/12/2021
MOTION FOR SUMMARY DISPOSITION
PURSUANT TO MCR 2.116(C)(10)**

Document received by the MI Court of Claims.
RECEIVED by MCOA 5/2/2023 4:53:08 PM

EXHIBIT A

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EXHIBIT A

Document received by the MI Court of Claims.
RECEIVED by MCOA 5/2/2023 4:53:08 PM

Delie, Steve

From: Skorup, Jarrett
Sent: Thursday, November 5, 2020 11:10 AM
To: Delie, Steve
Subject: Fw: Your FOIA Request to MSU

From: FOIA <foia@msu.edu>
Sent: Monday, July 27, 2020 5:38 PM
To: Skorup, Jarrett
Subject: Your FOIA Request to MSU

Communications
 Policy

Dear Jarrett Skorup:

This is written in reply to the voicemail message that you left today at the MSU FOIA Office, as well as your July 20th email below.

Please be advised that check #39535 in the amount of \$115.00 from the Mackinac Center for Public Policy was received in this Office on July 20, 2020, for the processing of your FOIA request MSUF035320. Pursuant to the best efforts estimate provided to you in our July 7, 2020, FOIA Fee and Deposit Notice, we anticipate responding to your request on or before six weeks from the date the fee deposit was received, that being Monday, August 31, 2020.

Pursuant to Section 4(4) of the Michigan Freedom of Information Act (MIFOIA), the University's procedures and guidelines for processing MIFOIA requests can be found at <http://foia.msu.edu>.

Michigan State University
 Freedom of Information Act Office
 408 W. Circle Drive
 Room 1 Olds Hall
 East Lansing, MI 48824
 517-353-3929/telephone
 517-353-1794/fax
 foia@msu.edu

MSUF035320

From: Skorup, Jarrett <Skorup@mackinac.org>
Sent: Monday, July 20, 2020 11:03 AM
To: FOIA <foia@msu.edu>
Subject: RE: FOIA - Stephen Hsu

I am following up on this request.

From: Skorup, Jarrett
Sent: Friday, June 26, 2020 2:50 PM
To: 'foia@msu.edu' <foia@msu.edu>
Subject: FOIA - Stephen Hsu

FOIA: Michigan State University

June 26, 2020

FOIA REQUEST FOR EMAILS ABOUT STEPHEN HSU

To Whom It May Concern:

Pursuant to the Michigan compiled Laws Section 15.231 et seq., and any other relevant statutes or provisions of your agency's regulations I am making the following Freedom of Information Act request.

- Any emails to or from the president of Michigan State University that mention "Hsu" from Feb. 1, 2020 to June 26, 2020.

Please send the materials requested to the attention of Jarrett Skorup at the following address, fax number, or via e-mail at skorup@mackinac.org<<mailto:skorup@mackinac.org>>.

Mackinac Center for Public Policy
P.O. Box 568
Midland, MI 48640
Fax: 989-631-0964
Phone: 989-631-0900
Jarrett Skorup
Mackinac Center

Jarrett Skorup
Director of Marketing and Communications
Mackinac Center for Public Policy
www.mackinac.org
989-631-0900

EXHIBIT B

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Document received by the MI Court of Claims.
RECEIVED by MCOA 5/2/2023 4:53:08 PM

MICHIGAN STATE
UNIVERSITY

DATE: July 7, 2020

TO: Jarrett Skorup
Director of Marketing and Communications
Mackinac Center for Public Policy
skorup@mackinac.org

FROM: Rebecca Nelson, Director and Freedom of Information Act (FOIA) Officer
Michigan State University FOIA Office *Rebecca Nelson*

SUBJECT: FOIA Fee and Deposit Notice

This is written with regard to the FOIA request that you emailed to this Office on June 26, 2020.

The processing of your request thus far has involved significant labor. We estimate that searching for, gathering, and reviewing records responsive to your request to determine if information exempt from public disclosure under the Michigan Freedom of Information Act (MIFOIA), must be separated from that which is not exempt, will require upwards of six (6) hours, incurring fees likely to exceed \$230.00. Fees will not be waived since failure to charge same would result in unreasonably high costs to the University. An itemization of this estimate accompanies this letter. This serves as an approximation only, and does not guarantee or limit the final, total fees which may be incurred and assessed. Therefore, pursuant to Section 4(2) of the MIFOIA, we require that you remit a deposit prior to our further processing your request. Should you remit the required deposit, we anticipate responding to your request on or before six (6) weeks from the date the deposit is received.

If you wish to pursue the processing of your request, and pay the fees incurred, please send a check made payable to "Michigan State University" in the amount of \$115.00 to the Freedom of Information Act Office, 408 West Circle Drive, Room 1 Olds Hall, or notify us in writing if you wish to modify or withdraw your request. The University will not process your request until a deposit is received by our Office. Moreover, Section 4(14) of the MIFOIA requires that the deposit be received no later than Monday, August 24, 2020, or your request will be considered abandoned, and processing of it no longer required. Should you have any questions regarding fees, please contact us. Pursuant to Section 4(4) of the MIFOIA, the University's procedures and guidelines for processing MIFOIA requests can be found at <http://foia.msu.edu>.

Attachment
MSUF035320



**FREEDOM OF
INFORMATION ACT
OFFICE**

**Michigan State
University**

408 West Circle Drive
Room 1 Olds Hall
East Lansing, MI 48824
517-353-3929
Fax: 517-353-1794
foia@msu.edu
<http://foia.msu.edu>

MSU FOIA FEE ESTIMATE ITEMIZATION FORM -- July 7, 2020 -- Skorup FOIA Request MSUF035320					
Category of Costs/Description	Hourly Wage	Benefits % Multiplier Used	Hourly Wage with Benefits	Estimated Time (Hours)	Amount
4 (1) (a) Searching for, locating and examining responsive records <i>[Shall not charge more than the hourly wage of lowest-paid employee capable of searching for, locating and examining the public records in the particular instance regardless of whether that person is available or who actually performs the labor; labor costs shall be estimated and charged in increments of 15 minutes or more, with all partial time increments rounded down.]</i>	\$28.95	40%	\$40.53	3	\$121.59
4 (1) (b) Review directly associated with the separating and deleting of exempt from nonexempt information <i>[For services performed by an employee of the public body, the public body shall not charge more than the hourly wage of its lowest-paid employee capable of separating and deleting exempt information from nonexempt information in the particular instance as provided in section 14, regardless of whether that person is available or who actually performs the labor. If a public body does not employ a person capable of separating and deleting exempt information from nonexempt information as determined by the public body's FOIA coordinator, it may treat necessary contracted labor costs used for the separating and deleting of exempt information from nonexempt information in the same manner as employee labor costs if it clearly notes the name of the contracted person or firm on this itemization. Total labor costs calculated under this subdivision for contracted labor costs shall not exceed an amount equal to 6 times the state minimum hourly wage rate. Labor costs under this subdivision shall be estimated and charged in increments of 15 minutes or more, with all partial time increments rounded down.]</i>	\$21.29	40%	\$29.81	3.75	\$111.79
4 (1) (c) Nonpaper physical media costs <i>[The actual and most reasonably economical cost of the computer discs, computer tapes, or other digital or similar media. The requestor may stipulate that public records be provided on nonpaper physical media, electronically mailed, or otherwise electronically provided in lieu of paper copies. This subdivision does not apply if public body lacks the technological capability necessary to provide records on the particular nonpaper physical media stipulated in the particular instance.]</i>					
4 (1) (d) Cost of paper copies <i>[Actual total incremental cost of necessary duplication or publication, not including labor. The cost of paper copies shall be calculated as a total cost per sheet of paper, itemized to show both cost per sheet and number of sheets provided. The fee shall not exceed 10 cents per sheet of paper for copies of public records made on 8-1/2- by 11-inch paper or 8-1/2- by 14-inch paper. A public body shall utilize the most economical means available, including double-sided printing, if cost saving and available.]</i>					
4 (1) (e) Duplication or publication, including making paper copies, making digital copies, or transferring digital public records to be given to the requestor on nonpaper physical media or through the internet or other electronic means as stipulated by the requestor <i>[Shall not charge more than the hourly wage of lowest-paid employee capable of necessary duplication or publication in the particular instance, regardless of whether that person is available or who actually performs the labor.; labor costs under this subdivision shall be estimated and charged in time increments of the public body's choosing, with all partial time increments rounded down.]</i>					
4 (1) (f) Cost of mailing <i>[Actual cost of mailing, for sending the public records in a reasonably economical and justifiable manner; shall not charge more for expedited shipping or insurance unless stipulated by requestor, but may charge for the least expensive form of postal delivery confirmation when mailing public records.]</i>					
ESTIMATE TOTAL					\$233.38
FEE DEPOSIT REQUIRED					\$115.00
<p><i>When calculating labor costs under (1) (a), (b) or (e), fee components shall be itemized in a manner that expresses both the hourly wage and the number of hours charged. The public body may also add up to 50% to the applicable labor charge amount to cover or partially cover the cost of fringe benefits if it clearly notes the percentage multiplier used. Subject to the 50% limitation, the public body shall not charge more than the actual cost of fringe benefits, and overtime wages shall not be used in calculating the cost of fringe benefits. Overtime wages shall not be included in the calculation of labor costs unless overtime is specifically stipulated by the requestor and clearly noted in this detailed itemization.</i></p>					

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MICHIGAN STATE
UNIVERSITY

DATE: August 31, 2020

TO: Jarrett Skorup
Director of Marketing and Communications
Mackinac Center for Public Policy
skorup@mackinac.org

FROM: Rebecca Nelson, Director and Freedom of Information Act (FOIA) Officer
Michigan State University FOIA Office *Rebecca Nelson*

SUBJECT: FOIA Fee and Deposit Notice Follow-up -- Record Volume Update

On June 26, 2020, you emailed a FOIA request to this Office for "Any emails to or from the president of Michigan State University that mention 'Hsu' from Feb. 1, 2020 to June 26, 2020." On July 20th, in response to our July 7th \$230.00 fee estimate, this Office received a \$115.00 fee deposit for the processing of your request.

The searching for and gathering of records responsive to your request has concluded, and the volume of those records is significantly greater than estimated. Record review to separate information exempt from public disclosure under the Michigan Freedom of Information Act (MIFOIA), from that which is not exempt, has begun. The foregoing processing has reached the initial six hour estimate, and hundreds of pages of emails have yet to be reviewed. Given that fees incurred have reached the initial \$230.00 estimate, we write to ask if you wish to proceed with the processing of your request, or halt the processing and receive only the records reviewed thus far. If you wish to halt the processing of your request, please advise us in writing, and we will finalize the records reviewed to date, and send them to you along with an invoice billing you for the balance of fees owed.



**FREEDOM OF
INFORMATION ACT
OFFICE**

**Michigan State
University**

408 West Circle Drive
Room 1 Olds Hall
East Lansing, MI 48824
517-353-3929
Fax: 517-353-1794
foia@msu.edu
<http://foia.msu.edu>

If, instead, you wish to pursue the processing of all of the remaining records you seek, the following estimate is provided. Completing the processing of your request will involve significant labor; we estimate upwards of eleven (11) hours will be required, incurring fees likely to exceed \$350.00; this is in addition to the initial \$230.00 fee estimate, and the fees incurred to date. In completing the processing of your request, fees will not be waived since failure to charge same would result in unreasonably high costs to the University. An itemization of this estimate accompanies this letter. This serves as an approximation only, and does not guarantee or limit the final, total fees which may be incurred and assessed. Therefore, pursuant to Section 4(2) of the MIFOIA, we require that you remit an additional deposit prior to our completing the processing of your request. Should you remit the required deposit, we anticipate responding on or before eight weeks (8) from the date the deposit is received.

If you wish to pursue the processing of all records responsive to your request, and pay the fees incurred, please send a check made payable to "Michigan State University" in the amount of \$175.00 to the Freedom of Information Act Office, 408 West Circle Drive, Room 1 Olds Hall. The University will not complete the processing of the remaining records you seek until a deposit is received by our Office. Moreover, Section 4(14) of the MIFOIA requires that the deposit be received no later than Monday, October 19, 2020, or your request pertaining to the remaining records will be considered abandoned, and processing of it no longer required. Should you have any questions regarding fees, please contact us. Pursuant to Section 4(4) of the MIFOIA, the University's procedures and guidelines for processing MIFOIA requests can be found at <http://foia.msu.edu>.

Attachment
MSUF035320

MSU FOIA FEE ESTIMATE ITEMIZATION FORM -- August 31, 2020 -- Skorup FOIA Request MSUF035320 -- follow-up; additional fee estimate

Category of Costs/Description	Hourly Wage	Benefits % Multiplier Used	Hourly Wage with Benefits	Estimated Time (Hours)	Amount
4 (1) (a) Searching for, locating and examining responsive records [Shall not charge more than the hourly wage of lowest-paid employee capable of searching for, locating and examining the public records in the particular instance regardless of whether that person is available or who actually performs the labor; labor costs shall be estimated and charged in increments of 15 minutes or more, with all partial time increments rounded down.]					
4 (1) (b) Review directly associated with the separating and deleting of exempt from nonexempt information [For services performed by an employee of the public body, the public body shall not charge more than the hourly wage of its lowest-paid employee capable of separating and deleting exempt information from nonexempt information in the particular instance as provided in section 14, regardless of whether that person is available or who actually performs the labor. If a public body does not employ a person capable of separating and deleting exempt information from nonexempt information as determined by the public body's FOIA coordinator, it may treat necessary contracted labor costs used for the separating and deleting of exempt information from nonexempt information in the same manner as employee labor costs if it clearly notes the name of the contracted person or firm on this itemization. Total labor costs calculated under this subdivision for contracted labor costs shall not exceed an amount equal to 6 times the state minimum hourly wage rate. Labor costs under this subdivision shall be estimated and charged in increments of 15 minutes or more, with all partial time increments rounded down.]	\$21.29	40%	\$29.81	11.75	\$350.27
4 (1) (c) Nonpaper physical media costs [The actual and most reasonably economical cost of the computer discs, computer tapes, or other digital or similar media. The requestor may stipulate that public records be provided on nonpaper physical media, electronically mailed, or otherwise electronically provided in lieu of paper copies. This subdivision does not apply if public body lacks the technological capability necessary to provide records on the particular nonpaper physical media stipulated in the particular instance.]					
4 (1) (d) Cost of paper copies [Actual total incremental cost of necessary duplication or publication, not including labor. The cost of paper copies shall be calculated as a total cost per sheet of paper, itemized to show both cost per sheet and number of sheets provided. The fee shall not exceed 10 cents per sheet of paper for copies of public records made on 8-1/2- by 11-inch paper or 8-1/2- by 14-inch paper. A public body shall utilize the most economical means available, including double-sided printing, if cost saving and available.]					
4 (1) (e) Duplication or publication, including making paper copies, making digital copies, or transferring digital public records to be given to the requestor on nonpaper physical media or through the internet or other electronic means as stipulated by the requestor [Shall not charge more than the hourly wage of lowest-paid employee capable of necessary duplication or publication in the particular instance, regardless of whether that person is available or who actually performs the labor.; labor costs under this subdivision shall be estimated and charged in time increments of the public body's choosing, with all partial time increments rounded down.]					
4 (1) (f) Cost of mailing [Actual cost of mailing, for sending the public records in a reasonably economical and justifiable manner; shall not charge more for expedited shipping or insurance unless stipulated by requestor, but may charge for the least expensive form of postal delivery confirmation when mailing public records.]					
ESTIMATE TOTAL					\$350.27
REQUIRED					\$175.00

When calculating labor costs under (1) (a), (b) or (e), fee components shall be itemized in a manner that expresses both the hourly wage and the number of hours charged. The public body may also add up to 50% to the applicable labor charge amount to cover or partially cover the cost of fringe benefits if it clearly notes the percentage multiplier used. Subject to the 50% limitation, the public body shall not charge more than the actual cost of fringe benefits, and overtime wages shall not be used in calculating the cost of fringe benefits. Overtime wages shall not be included in the calculation of labor costs unless overtime is specifically stipulated by the requestor and clearly noted in this detailed itemization.

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MICHIGAN STATE
UNIVERSITY

DATE: November 4, 2020

TO: Jarrett Skorup
Director of Marketing and Communications
Mackinac Center for Public Policy
skorup@mackinac.org

FROM: Rebecca Nelson, Director and Freedom of Information Act (FOIA) Officer
Michigan State University FOIA Office *Rebecca Nelson*

SUBJECT: FOIA Response

This is written in response to the FOIA request that you emailed to this Office on June 26, 2020, and for the processing of which this Office received fee deposits on July 20, 2020, and September 9, 2020.

Your request is granted with regard to information that is not exempt from public disclosure under the Michigan Freedom of Information Act (MIFOIA). That said, given the University's current alternate working arrangements, necessitated by extraordinary community health concerns, record processing times are extending beyond typically anticipated dates. Nevertheless, please be assured that we are working diligently to process your request as quickly as possible, and expect to send to you records or another update on or before Friday, December 4, 2020. We apologize for any inconvenience this unavoidable delay may cause.

The MIFOIA provides that when a public body denies all or a portion of a request, the requester may do one of the following: (1) submit an appeal of the determination to the head of the public body; or (2) commence a civil action in the court of claims to compel the public body's disclosure of the records. If you wish to seek judicial review of any denial, you must do so within 180 days of the date of this letter. If the court of claims orders disclosure of all or a portion of the public record(s) to which you have been denied access, you may receive attorneys' fees and, in certain circumstances, damages under the MIFOIA. Should you choose to file an appeal with the University regarding this response to your request, you must submit a written communication to this Office expressly stating that it is an "appeal" of this response. In your appeal, please state what records you believe should have been disclosed to you. You must also state the reasons you believe any denial of your MIFOIA request should be reversed. This Office will arrange for the processing and review of your appeal. Pursuant to Section 4(4) of the MIFOIA, the University's procedures and guidelines for processing MIFOIA requests can be found at <http://foia.msu.edu>.

MSUF035320



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INFORMATION ACT
OFFICE**

**Michigan State
University**

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**MICHIGAN STATE
UNIVERSITY**

DATE: December 4, 2020

TO: Jarrett Skorup
Director of Marketing and Communications
Mackinac Center for Public Policy
skorup@mackinac.org

FROM: Rebecca Nelson, Director and Freedom of Information Act (FOIA) Officer
Michigan State University FOIA Office *Rebecca Nelson*

SUBJECT: FOIA Response Status Notice

This is written as follow-up to our November 4, 2020, response to the FOIA request that you emailed to this Office on June 26, 2020, and for the processing of which this Office received fee deposits on July 20, 2020, and September 9, 2020.

As we previously advised, your request is granted with regard to information that is not exempt from public disclosure under the Michigan Freedom of Information Act (MIFOIA). Please know that we continue to process records responsive to your request as expeditiously as possible. Nevertheless, given the University's current alternate working arrangements, necessitated by extraordinary community health concerns, record processing times are extending beyond typically anticipated dates. At this time, we expect to send to you records or another update on or before Wednesday, December 23, 2020. We apologize for any inconvenience this unavoidably extended response time may cause; fees assessed will be adjusted in consideration of the delay.

The MIFOIA provides that when a public body denies all or a portion of a request, the requester may do one of the following: (1) submit an appeal of the determination to the head of the public body; or (2) commence a civil action in the court of claims to compel the public body's disclosure of the records. If you wish to seek judicial review of any denial, you must do so within 180 days of the date of this letter. If the court of claims orders disclosure of all or a portion of the public record(s) to which you have been denied access, you may receive attorneys' fees and, in certain circumstances, damages under the MIFOIA. Should you choose to file an appeal with the University regarding this response to your request, you must submit a written communication to this Office expressly stating that it is an "appeal" of this response. In your appeal, please state what records you believe should have been disclosed to you. You must also state the reasons you believe any denial of your MIFOIA request should be reversed. This Office will arrange for the processing and review of your appeal. Pursuant to Section 4(4) of the MIFOIA, the University's procedures and guidelines for processing MIFOIA requests can be found at <http://foia.msu.edu>.

MSUF035320



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MICHIGAN STATE
UNIVERSITY

DATE: December 23, 2020

TO: Jarrett Skorup
Director of Marketing and Communications
Mackinac Center for Public Policy
skorup@mackinac.org

FROM: Rebecca Nelson, Director and Freedom of Information Act (FOIA) Officer
Michigan State University FOIA Office *Rebecca Nelson*

SUBJECT: FOIA Response

On June 26, 2020, you emailed to this Office your expansive FOIA request for "Any emails to or from the president of Michigan State University that mention 'Hsu' from Feb. 1, 2020 to June 26, 2020." On July 7th, we sent to you a notice advising that significant labor would be involved in processing your request, and that a fee deposit would be required to proceed. On July 20th, this Office received your fee deposit. On August 31st, we sent to you a letter advising that records identified as responsive to your request were significantly greater in volume than originally anticipated; that significantly greater labor would be involved in processing those records; that an additional fee deposit would be required to proceed; and that we anticipated responding on or before eight weeks from the date the additional deposit was received. That response date was estimated in compliance with Section 4(8) of the Michigan Freedom of Information Act (MIFOIA), which provides that "The response must also contain a best efforts estimate by the public body regarding the time frame it will take the public body to comply with the law in providing the public records to the requestor. The time frame estimate is nonbinding upon the public body, but the public body shall provide the estimate in good faith and strive to be reasonably accurate and to provide the public records in a manner based on this state's public policy under section 1 and the nature of the request in the particular instance."

On September 9th, this Office received your additional fee deposit. On November 4th, eight weeks from the date we received your additional deposit, we wrote to you that while your request was granted to the extent information is not exempt from public disclosure, processing times were extending beyond typically anticipated dates due to current alternate working arrangements necessitated by extraordinary community health concerns. We also advised that we expected to respond to you with records on or before December 4th. On December 4th, we wrote to you that we were continuing to process your request as expeditiously as possible; that for the same reasons stated in our November 4th letter, additional time was required; that we expected to respond to you with records on or before December 23rd; and that in consideration of the unavoidable inconvenience the delay was causing, a fee adjustment would be made. Accordingly, we write to you the following response.



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Records responsive to your request accompany this letter. Identifying information pertaining to certain individuals, personal email addresses, personal cellular telephone numbers, and certain other personal data have been redacted, and five (5) pages of personal information have been withheld pursuant to one or both of Sections 13(1)(a) and 13(2) of the MIFOIA. Section 13(1)(a) provides for the withholding of "Information of a personal nature if public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy." Section 13(2) requires the withholding of information that, if released, would prevent the public body from complying with 20 U.S.C. 1232g, the Family Educational Rights and Privacy Act (FERPA). Nine (9) pages consisting of personal information pertaining to a student have been withheld under one or more of Sections 13(1)(a), (b)(iii), and 13(2). Section 13(1)(b) provides for the withholding of "Investigating records compiled for law enforcement purposes, but only to the extent that disclosure as a public record would do any of the following...(iii) Constitute an unwarranted invasion of personal privacy." University signatures, email addresses, netIDs, and a telephone number have been redacted under one or more of Sections 13(1)(u), (y), and (z), which allow for the withholding of information related to the ongoing security of a public body. Certain other information has been redacted under one or more of Sections 13(1)(g), (h), and (m). Sections 13(1)(g) and (h) provide for the withholding of information or records subject to the attorney-client privilege and attorney work-product doctrine, respectively. Section 13(1)(m) provides for the withholding of "Communications and notes within a public body or between public bodies of an advisory nature to the extent that they cover other than purely factual materials and are preliminary to a final agency determination of policy or action." Lastly, nine (9) pages have been withheld under Sections 13(1)(g) and/or (h).

The MIFOIA provides that when a public body denies all or a portion of a request, the requester may do one of the following: (1) submit an appeal of the determination to the head of the public body; or (2) commence a civil action in the court of claims to compel the public body's disclosure of the records. If you wish to seek judicial review of any denial, you must do so within 180 days of the date of this letter. If the court of claims orders disclosure of all or a portion of the public record(s) to which you have been denied access, you may receive attorneys' fees and, in certain circumstances, damages under the MIFOIA. Should you choose to file an appeal with the University regarding this response to your request, you must submit a written communication to this Office expressly stating that it is an "appeal" of this response. In your appeal, please state what records you believe should have been disclosed to you. You must also state the reasons you believe any denial of your MIFOIA request should be reversed. This Office will arrange for the processing and review of your appeal.

In processing your request, a significant amount of labor was required to search for, gather, and review the responsive records to separate information exempt from disclosure from that which is not exempt. Nevertheless, in consideration of the previously noted unavoidable delay in providing the attached records to you, fees for processing your request are hereby waived. Your fee deposit checks will be returned to you via U.S. first class mail. Pursuant to Section 4(4) of the MIFOIA, the University's procedures and guidelines for processing MIFOIA requests can be found at <http://foia.msu.edu>.

Attachments
MSUF035320

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**STATE OF MICHIGAN
COURT OF CLAIMS**

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

Plaintiff,

v

MICHIGAN STATE UNIVERSITY,
a state public body,

Defendant.

Case No. 21-000011-MZ

Hon. Michael J. Kelly

Patrick J. Wright (P54052)
Derk A. Wilcox (P66177)
Stephen A. Delie (P80209)
Mackinac Center for Public Policy
Attorneys for Plaintiff
140 West Main Street
Midland, MI 48640
(989) 631-0900 – voice
(989) 631-0964 – fax

Uriel Abt (P84350)
Michigan State University
Office of the General Counsel
426 Auditorium Rd, Room 494
East Lansing, MI 48824
Attorney for Defendant
(517) 353-4934
abturiel@msu.edu

**DEFENDANT MICHIGAN STATE UNIVERSITY’S ANSWERS TO
PLAINTIFF’S FIRST INTERROGATORIES**

Defendant Michigan State University (MSU) responds to Plaintiff’s First Interrogatories as follows.

GENERAL OBJECTIONS

1. Defendant objects to Plaintiff’s requests, definitions, and instructions, to the extent they purport to impose obligations greater or different than those permitted under applicable law or impose an undue burden or burden disproportionate to the issues in this case.

2. Defendant objects to the requests, definitions, and instructions to the extent they are vague or ambiguous.

3. Defendant's responses are premised on a reasonable reading of the requests, definitions, and instructions in the context of the claims in this matter.

4. Defendant's responses are based on information reasonably available at the time of the response. Defendant explicitly reserves the right to revise or supplement its responses if new information becomes available.

5. By asserting specific objections to Plaintiff's subpoena, Defendant does not waive any additional objections that may apply.

SPECIFIC OBJECTIONS AND ANSWERS

1. In your December 23, 2020 letter explaining the reasons for withholding certain information (Exhibit F of the Complaint, which is also attached to this request), you identified the number of pages and the reasons withheld. For each of the claimed exemptions, please provide the following information:

(a) You identified "five (5) pages of personal information have been withheld pursuant to one or both of Sections (13)(1)(a) and 13(20) of the MIFIOA." Please Identify which of the pages were withheld for these reasons. The disclosures were made in a 594-page PDF. Using the PDF and referring to those page numbers is recommended. For each page so identified, describe the following:

(i) Identify what was personal about the redacted information. E.g., name, address, phone number, etc.

(ii) Identify why this disclosure would be a "clearly unwarranted invasion of the individual's privacy?" Please cite the legal authority, such as statutory

wording or judicial opinion, which determines that this disclosure is an “unwarranted invasion of the individual’s privacy.”

(iii) For records withheld pursuant to Section 13(2): This exemption must involve records relevant to 20 USC 1232g, and that statute allows the release of “directory information” defined as: “the term ‘directory information’ relating to a student includes the following: the students name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student.” 20 USC 1232g(b)(1). For each of the records identified as withheld pursuant to Section 13(2), please provide the page number (or other sufficient identification) and describe how this information is different than directory information, where director information has been defined above citing 20 USC 1232g(b)(1). Further, describe how providing this information would prevent you from complying with 20 USC 1232g.

(b) You identified pages that were redacted pursuant to Section 13(1)(b)(iii). Please identify which pages contained these redactions, and provide the following information for each page:

(i) Please identify what law enforcement body compiled the investigating record. Or, please identify what law enforcement body the information was compiled for.

- (ii) Please describe the nature of the information. E.g., name, physical description, etc.
 - (iii) Please describe why such release would be an unwarranted invasion of personal privacy.
- (c) You identified information that was redacted under Section 13(l)(u), (y) and (z).

Please identify which pages contained these redactions, and provide the following information for each page:

- (i) For records redacted or withheld pursuant to Section 13(l)(u), please describe in sufficient detail how, for each page, the information relates to “security measures” and “ongoing security of the public body.”
- (ii) For records redacted or withheld pursuant to Section 13(l)(y), please describe in sufficient detail how, for each page, the information relates to the “security or safety of persons or property.”
- (iii) For records redacted or withheld pursuant to Section 13(l)(y), please describe in sufficient detail how, for each page, the information relates to the “confidentiality, integrity, or availability of information systems.”
- (iv) For records redacted or withheld pursuant to Section 13(l)(y), please describe in sufficient detail, for each page, “the public interest in non disclosure in the particular instance.”
- (v) For records redacted or withheld pursuant to Section 13(l)(z), please describe in sufficient detail how, for each page, the information would, if released, provide a means for enabling a “cybersecurity incident.”

(vi) For records redacted or withheld pursuant to Section 13(l)(z), please describe in sufficient detail how, for each page, the information would, if released, disclose cybersecurity plans or cyber security related practices, procedures, methods, results, organizational information system infrastructure, hardware or software.

(d) You identified information that was redacted under Sections 13(l)(g), (h), and (m).

Please identify which pages contained these redactions, and provide the following information for each page:

(i) For records redacted or withheld pursuant to Section 13(l)(g), please identify for each page; the attorney, and the client who holds the privilege.

(ii) For records redacted or withheld pursuant to Section 13(l)(h), please identify for each page; the physician, psychologist minister, or priest, and the patient who holds the privilege.

(iii) For records redacted or withheld pursuant to Section 13(l)(m), please identify for each page; the public bodies involved in the final agency determination. Identify the public body represented by both the sender(s) and the recipient(s).

(iv) For records redacted or withheld pursuant to Section 13(l)(m), please identify, for each page; the final agency determination of which the communication was a preliminary part of.

(v) For records redacted or withheld pursuant to Section 13(l)(m), please identify, for each page; any factual matters that were redacted.

(vi) For records redacted or withheld pursuant to Section 13(l)(h), please identify for each page; how the public interest in withholding the information outweighs the public interest in disclosing it.

ANSWER: Defendant objects to this interrogatory and its subparts to the extent it seeks information exempt from disclosure under FOIA, to the extent it seeks legal opinions and conclusions rather than facts, and to the extent the request is vague, ambiguous, overburdensome, and not proportional to the needs of the case. Defendant further objects to the extent this interrogatory seeks information protected from disclosure by the attorney-client privilege, the work product privilege, or any other applicable privilege against disclosure. Defendant further objects that this interrogatory and its subparts are actually multiple interrogatories for purposes of applicable discovery rules. Defendant further objects to the extent these interrogatories assume that a single exemption applies to any withheld or redacted information. Nothing in Defendant's response should be construed as admitting that information is properly exempt from disclosure under FOIA under only the exemptions discussed herein.

Subject to and without waiving these objections or the general objections, Defendant answers as follows.

- (a) Defendant cannot identify the "five (5) pages of personal information" withheld by pdf page number because they were withheld and are not included in the pdf. The withheld documents are a single email chain. The chain constitutes a report of potential misconduct by one member of the MSU community against another and reflects that report being forwarded to supervisors and ultimately to the appropriate MSU unit for investigation. The public disclosure of the report would be a clearly unwarranted invasion

of the privacy of both the complainant and respondent. Further review indicates that Section 13(2) is not a basis to withhold these documents. That independent basis for withholding these documents is therefore withdrawn.

(b) No pages were redacted pursuant to Section 13(1)(b)(iii). Nine pages were withheld pursuant to Section 13(1)(b)(iii), 13(2), and 13(1)(a). The withheld documents are a single email chain. The chain constitutes a report made by a MSU student of potential criminal conduct, including death threats against MSU students, and the forwarding of that information to the MSU Police Department. The public disclosure of the report would be a clearly unwarranted invasion of the privacy of the reporting and other affected students. Additionally, the document is protected from disclosure under Section 13(2) because they are “education records” under FERPA.

(c) The following pages contain redactions under Sections 13(1)(u), (y), and (z): 8, 9, 12, 13, 26, 28, 37, 47-49, 57, 58, 168, 177, 189-91, 193, 195, 201, 207-213, 237, 243-44, 262-65, 267-68, 270-73, 275-76, 278-79, 281-83, 286-87, 290-91, 298, 302, 305-06, 308-09, 311-12, 314-16, 382, 384, 430-32, 434, 436, 462, 469, 488-89, 505, 530-34, 540-42, 548, 549, 551, 566-570, 572-73, 583, 593.

These redactions are internal MSU email addresses and signatures of MSU employees.

These exemptions are not used to redact the identity of senders or recipients of otherwise non-exempt documents. Among other reasons for redaction, the broad public disclosure of internal MSU email addresses and signatures of MSU employees increases the risk of cybersecurity events like, without limitation, phishing attacks, identity theft, and online harassment or doxing.

(d) The following pages contain redactions under Sections 13(1)(g): 168, 204, and 314.

Pages 204 and 314 contain communications between Brain Quinn, MSU's Vice President of Legal Affairs and General Counsel, and Samuel L. Stanley, MSU's President, in which Quinn is providing legal advice. Page 168 reflects legal advice provided by Quinn to Stanley, Michael Zeig, the President's Chief of Staff, and MSU's Vice President-level communications staff. Additionally, nine pages were withheld pursuant to Section 13(1)(g). The withheld documents were attachments to an email from Quinn to Stanley in which Quinn provides legal advice and, as such, constitute attorney-client communications and the attorney work-product of Quinn. In each instance, the client that holds the privilege is MSU.

Upon further review, no documents have been redacted or withheld under Section 13(1)(h).

The following documents contain redactions under Section 13(1)(m): 8-9, 11-12, 13, 29, 169, 177, 199-200, 302, 315, 382, 463, 572-73, 577, 579, 581-82. The public body at issue in each of these communications is MSU. None of the redactions made pursuant to this exemption are of information of a purely factual nature. In each instance, the redacted information or advice is provided for the purpose of allowing decision-makers to make fully informed and well-advised decisions on behalf of MSU. In each instance, the nature of the redacted information is such that, were the information subject to public disclosure through FOIA, these exchanges of information and advice would be chilled.

- Pages 8-9, 11-12, and 13 contain information of an advisory nature concerning and preliminary to potential actions regarding specific grant funding.

- Page 29 contains information of an advisory nature concerning and preliminary to the determination of an employee's salary.
- Page 169 contains information of an advisory nature concerning and preliminary to official MSU communications.
- Page 177 contains information provided by an MSU administrator of an advisory nature regarding an MSU faculty member.
- Pages 199-200 reflects information provided by an MSU administrator of an advisory nature regarding an MSU faculty member and administrator.
- Page 302 contains information of an advisory nature concerning and preliminary to official MSU communications.
- Page 315 contains information provided by an MSU Trustee of an advisory nature regarding an MSU faculty member and administrator.
- Page 382 contains information provided by an MSU Trustee of an advisory nature regarding an MSU faculty member and administrator.
- Page 463 contains information of an advisory nature concerning and preliminary to official MSU communications.
- Pages 572-73 contains information of an advisory nature concerning and preliminary to official MSU communications.
- Page 577 contains information of an advisory nature concerning and preliminary to official MSU communications.
- Page 579 contains information of an advisory nature concerning and preliminary to MSU's agreement to a memorandum of understanding.

- Pages 581-82 contain information of an advisory nature concerning and preliminary to potential actions regarding specific grant funding.

Respectfully submitted,



Uri Abt
Attorney for Defendant MSU

Dated: August 27, 2021

PROOF OF SERVICE

I certify that a copy of this document was emailed to Plaintiff’s counsel in compliance with MCR 2.107(C)(4), on this 27th day of August, 2021.



Robin Stechschulte

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VERIFICATION

I declare under the penalties of perjury that Defendant Michigan State University's Answers to Plaintiff's First Interrogatories has been examined by me and that its contents are true to the best of my information, knowledge, and belief.

Date: August 27, 2021



Rebecca Nelson

Director and Freedom of Information
Act Officer

Michigan State University

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EXHIBIT H

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2021 WL 2619705

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

Spencer WOODMAN, Plaintiff-Appellant/Cross-Appellee,

v.

DEPARTMENT OF CORRECTIONS, Defendant-Appellee/Cross-Appellant.

George Joseph, Plaintiff-Appellant/Cross-Appellee,

v.

Department of Corrections, Defendant-Appellee/Cross-Appellant.

No. 353164, No. 353165

|
June 24, 2021

Court of Claims, LC No. 17-000082-MZ

Court of Claims, LC No. 17-000230-MZ

Before: [Gadola](#), P.J., and [Sawyer](#) and [Riordan](#), JJ.

Opinion

Per Curiam.

*1 In these consolidated cases brought under Michigan's Freedom of Information Act

(FOIA), [MCL 15.231 et seq.](#), plaintiffs, Spencer Woodman and George Joseph, appeal as of right the order of the trial court granting in part and denying in part their motion for attorney fees, costs, and punitive damages. Defendant, the Michigan Department of Corrections (MDOC), cross-appeals from the same order. We affirm in part, reverse in part, and remand for further proceedings.

I. FACTS

On September 27, 2016, MDOC inmate Dustin Szot died after a physical altercation with another prisoner at defendant's Ionia Bellamy Creek Correctional Facility. The parties do not dispute that corrections officers discharged Tasers on the inmates to stop the fight, and that it was determined that Szot died from blunt-force trauma.

Plaintiffs are journalists who separately submitted requests under Michigan's FOIA seeking video and audio recordings of the altercation from defendant. Woodman requested "a digital copy of video footage of the confrontation that led to the fatality of inmate Dustin Szot [including] footage from any and all available cameras that captured this incident as well as any available accompanying audio records." Defendant denied Woodman's request, asserting that the records were exempt from disclosure under [MCL 15.243\(1\)\(c\)](#).¹ Cheryl Groves, defendant's FOIA Coordinator, asserted that disclosure "could threaten the security of [the correctional facility] by revealing fixed

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camera placement as well as the scope and clarity of the facility's fixed camera and handheld recordings. Disclosure of these records could also reveal the policies and procedures used by staff for disturbance control and the management of disruptive prisoners." Woodman appealed the denial to defendant, which denied the appeal on the basis that disclosing the videos "would reveal the recording and security capabilities of [the correctional facility's] video monitoring system."

Joseph submitted a request to defendant under FOIA for "a digital copy of any and all footage of the September 27, 2016 confrontation that led to the death of inmate Dustin Szot [including] footage from any and all available cameras that captured any parts of the confrontation, including but not limited to cameras installed on tasers deployed [and] any audio records that accompany footage found to be responsive to this request." Defendant denied Joseph's request, stating that "[t]o the extent these records are [available], they are exempt from disclosure under [MCL 15.243(1)(c)]."

*2 Plaintiffs each filed complaints, arguing that defendant wrongfully denied their requests under the FOIA. Plaintiffs asserted that the video recordings were not exempt from disclosure, and requested that the trial court order defendant to provide "a complete, unredacted copy of the Video and any accompanying audio recordings[.]" The parties thereafter agreed to the consolidation of the two cases.

During her deposition, Groves explained that whenever defendant received a FOIA request, the Assistant FOIA Coordinator

would review the request, determine what information was exempt, redact information that was not going to be released, and provide Groves with the request and the proposed response. Groves testified that she would review the information and approve the response. Groves further testified that defendant never released video footage, however, denying any such request under the "custody and safety security exemption." Groves testified that no one from defendant's FOIA office reviewed the videos in this case before denying plaintiffs' FOIA requests for the recordings, but instead complied with the agency policy of not releasing internal video from a correctional facility.

Plaintiffs moved for summary disposition under MCR 2.116(C)(10), asserting that there was no genuine issue of material fact and plaintiffs were entitled to judgment as a matter of law because defendant had violated the FOIA by denying their requests for information. Defendant moved for summary disposition under MCR 2.116(C)(8) and (10) on the basis that the videos were exempt from disclosure under MCL 15.243(1)(a), (c), and (u), and supported the motion with an affidavit from the correctional facility inspector, who averred that the exemptions applied.

The trial court denied defendant's motion for summary disposition under MCR 2.116(C)(8) on the basis that the motion relied on documents outside the pleadings. The trial court also concluded that regardless of whether the exemptions applied, defendant's response to plaintiffs' requests violated FOIA because defendant merely issued blanket denials without reviewing the videos requested. The trial court ordered

defendant to produce the videos for an *in camera* review, and held in abeyance the parties' motions for summary disposition pending the review. The trial court permitted defendant to submit the video in a format that obscured the faces of the employees and prisoners in the videos to protect those individuals. Defendant provided the unredacted videos for *in camera* review, explaining that it did not have time to obscure the images of the individuals in the videos and requested that it be allowed to complete this task before disclosure of the videos.

The trial court determined that the videos did not reveal the placement of security cameras, but nonetheless appointed a Special Master to review the videos and report whether the recordings contained any security concerns. The Special Master reported that the videos did not reveal any security concerns except to the extent the videos made it possible to identify staff members and inmates. The trial court ordered that defendant disclose the videos to plaintiffs, but permitted defendant to redact the videos before disclosing them by obscuring the images of individuals in the videos. The trial court denied defendant's motion for reconsideration of its order.

Plaintiffs thereafter moved for attorney fees and costs in the amount of \$211,780.75, and \$2,000 in punitive damages. Plaintiffs asserted that as the prevailing party, they were entitled to reasonable attorneys' fees and costs under the FOIA, and that they were entitled to punitive damages because defendant's decision to deny their FOIA requests was arbitrary and capricious. Defendant argued that plaintiff had prevailed only in part because the trial court allowed defendant to redact the videos, and therefore

under the FOIA the award of attorney fees was discretionary with the trial court.

*3 The trial court held that plaintiffs had prevailed in full and accordingly were statutorily entitled to reasonable attorney fees and costs under the FOIA. The trial court found that the attorney fees requested were billed at a reasonable hourly rate and that the number of hours worked was not unreasonable. The trial court observed, however, that plaintiffs had been represented jointly by the law firm of Honigman LLP in a pro bono capacity and the American Civil Liberties Union Fund of Michigan (ACLU). The trial court awarded the ACLU its requested attorney fees of \$14,200, but awarded Honigman only ten percent of its requested attorney fees in the amount of \$19,218.63. The trial court reasoned that it was awarding partial fees because "in this case, dollars have not been necessarily spent except for those dollars that are attributable to counsel for the ACLU. Instead those were pro bono dollars." The trial court denied plaintiffs' request for punitive damages.

Plaintiffs appeal from the trial court's order, challenging the trial court's award of the reduced amount of attorney fees and the trial court's denial of punitive damages. Defendant cross-appeals from the same order, challenging the trial court's determination that plaintiffs prevailed in full and thus are entitled to attorney fees and costs under the FOIA.

II. DISCUSSION

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A. STANDARD OF REVIEW

We review de novo a trial court's interpretation and application of the FOIA. *Mich. Open Carry, Inc. v. Mich. State Police*, 330 Mich. App. 614, 621; 950 N.W.2d 484 (2019). We review for clear error the trial court's factual determinations in a FOIA action. *King v. Mich. State Police Dep't*, 303 Mich. App. 162, 174; 841 N.W.2d 914 (2013). Whether a defendant acted arbitrarily and capriciously within the meaning of the FOIA is a factual finding that we review for clear error. See *Meredith Corp. v. Flint*, 256 Mich. App. 703, 717; 671 N.W.2d 101 (2003). A finding is clearly erroneous if, after reviewing the entire record, we are left with a definite and firm conviction that a mistake was made. *Nash Estate v. Grand Haven*, 321 Mich. App. 587, 605; 909 N.W.2d 862 (2017). We review a trial court's award of attorney fees under the FOIA for an abuse of discretion. *Id.* A trial court abuses its discretion when its decision is outside the range of reasonable and principled outcomes. *Id.*

B. ATTORNEY FEES UNDER FOIA

Defendant contends that the trial court erred by concluding that plaintiffs prevailed in full on their FOIA claims and therefore are statutorily entitled to attorney fees and costs under the act. Defendant argues that because it was permitted to respond to plaintiffs' FOIA requests by providing redacted videos, plaintiffs prevailed only in part in their FOIA claims, and as a result the statute does not mandate the award of attorney fees. By

contrast, plaintiffs contend that the trial court correctly determined that they prevailed in full, but abused its discretion by limiting the amount of attorney fees awarded due to the pro bono fee arrangement.

Under Michigan's FOIA, "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); see also *Amberg v. Dearborn*, 497 Mich. 28, 30; 859 N.W.2d 674 (2014). Michigan's FOIA therefore generally mandates the full disclosure of public records in the possession of a public body, *Ellison v. Dep't of State*, 320 Mich. App. 169, 176; 906 N.W.2d 221 (2017), and is described as a pro-disclosure statute. *Thomas v. New Baltimore*, 254 Mich. App. 196, 201; 657 N.W.2d 530 (2003). When a request for records is made under the FOIA, a public body has a duty to provide access to the records, or to copies of the requested records, unless those records are exempt from disclosure. *Arabo v. Mich. Gaming Control Bd.*, 310 Mich. App. 370, 380; 872 N.W.2d 223 (2015).

If a public body denies all or part of a request for records, the requesting person may commence a civil action in circuit court. MCL 15.240(1)(b). If the requesting person thereafter "prevails" in that action, MCL 15.240(6) provides for the award of attorney fees, costs, and disbursements as follows:

*4 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).

Thus, if a plaintiff prevails completely in a FOIA action, the award of attorney fees by the trial court is mandatory; if a party prevails partially in the FOIA action, the decision to award attorney fees is discretionary with the trial court. *Nash Estate*, 321 Mich. App. at 606. One “prevails” under MCL 15.240(6) if “the action was reasonably necessary to compel the disclosure [of public records], and ... the action had a substantial causative effect on the delivery of the information to the plaintiff.” *Amberg*, 497 Mich. at 34. “[A]ttorney fees and costs *must* be awarded under the first sentence of MCL 15.240(6) only when a party prevails *completely*.” *Local Area Watch v. Grand Rapids*, 262 Mich. App. 136, 150; 683 N.W.2d 745 (2004).

In this case, plaintiffs prevailed because their actions were reasonably necessary to obtain the requested videos from defendant. However, plaintiffs demanded in their complaints the production of “a complete, unredacted copy of the Video ...” Defendant was permitted to redact certain information from the videos, and thus plaintiffs were determined to be entitled to only a portion of the records requested. We therefore conclude that under MCL 15.240(6), plaintiffs prevailed in part. Because plaintiffs prevailed in part in their FOIA claims, whether to award plaintiffs all or an appropriate portion

of reasonable attorney fees, costs, and disbursements is discretionary with the trial court. See *Nash Estate*, 321 Mich. App. at 606; see also *Local Area Watch*, 262 Mich. App. at 150-151. We therefore vacate the trial court’s award of attorney fees and costs to plaintiffs and remand this matter to the trial court for determination whether, in the trial court’s discretion, plaintiffs are entitled to an award of all or an appropriate portion of reasonable attorney fees, costs, and disbursements.

If the trial court determines in its discretion that plaintiffs are entitled to an award of attorney fees in this case, we observe that “[t]he touchstone in determining the amount of attorney fees to be awarded to a prevailing party in a FOIA case is *reasonableness*,” *Prins v. Mich. State Police*, 299 Mich. App. 634, 642; 831 N.W.2d 867 (2013), and thus the amount of any attorney fees awarded under FOIA must be *reasonable* fees, regardless of the *actual* fees. See *Smith v. Khouri*, 481 Mich. 519, 528 n. 12; 751 N.W.2d 472 (2008). That is, the question is one of the reasonableness of the attorney fees sought, not the price actually agreed to or paid by the party to his or her attorney, or, in this case, the actual hourly rates and total amounts billed by the law firm to the party. If the trial court determines that plaintiffs are entitled to attorney fees in this case, the trial court should also determine whether the pro bono nature of the representation is a legitimate consideration in the determination of the reasonableness of the fees.

When determining the reasonableness of an attorney fee, the court should first determine the fee customarily charged in the locality for similar legal services, which can be

established “by testimony or empirical data found in surveys and other reliable reports.” *Id.* at 530-532. “This number should be multiplied by the reasonable number of hours expended in the case....” *Id.* at 531. The trial court should then consider the following nonexhaustive factors:

- *5 (1) the experience, reputation, and ability of the lawyer or lawyers performing the services,
- (2) the difficulty of the case, i.e., the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly,
- (3) the amount in question and the results obtained,
- (4) the expenses incurred,
- (5) the nature and length of the professional relationship with the client,
- (6) the likelihood, if apparent to the client, that acceptance of the particular employment will preclude other employment by the lawyer,
- (7) the time limitations imposed by the client or by the circumstances, and
- (8) whether the fee is fixed or contingent. [*Pirgu v. United Servs. Auto. Ass’n*, 499 Mich. 269, 282; 884 N.W.2d 257 (2016).]

Building on the Court’s decision in *Smith*, our Supreme Court in *Pirgu* combined the six factors cited in *Wood v. Detroit Auto. Inter-Ins. Exch.*, 413 Mich. 573, 588; 321 N.W.2d 653 (1982), and the eight factors listed in listed in Rule 1.5(a) of the Michigan Rules of

Professional Conduct.² See *Pirgu*, 499 Mich. at 281. To facilitate appellate review, the trial court “should briefly discuss its view of each of the factors above on the record and justify the relevance and use of any additional factors.” *Id.* at 282.

C. PUNITIVE DAMAGES

Plaintiffs also contend that the trial court erred by declining to award plaintiffs punitive damages. We disagree. MCL 15.240(7) provides, in pertinent part:

If the court determines in an action commenced under this section that the public body has arbitrarily and capriciously violated this act by refusal or delay in disclosing or providing copies of a public record, the court shall order the public body to pay a civil fine of \$1,000.00, which shall be deposited into the general fund of the state treasury. The court shall award, in addition to any actual or compensatory damages, punitive damages in the amount of \$1,000.00 to the person seeking the right to inspect or receive a copy of a public record....

A plaintiff is entitled to punitive damages under MCL 15.240(7) only if the defendant arbitrarily and capriciously refused to provide the requested information, and the court ordered disclosure of an improperly withheld document. *Local Area Watch*, 262 Mich. App. at 153. Here, only the first element, being whether defendant’s refusal was arbitrary and capricious, is in dispute. The term “arbitrary and capricious” is not

defined by the FOIA. *Prins*, 299 Mich. App. at 647. In *Laracey v. Fin. Institutions Bureau*, 163 Mich. App. 437, 440; 414 N.W.2d 909 (1987), this Court stated:

Although the terms “arbitrarily” and “capriciously” are not defined in the [FOIA] statute, they have generally accepted meanings. As noted in *Bundo v. City of Walled Lake*, 395 Mich. 679, 703, n. 17; 238 N.W.2d 154 (1976), citing *United States v. Carmack*, 329 U.S. 230, 243; 67 S. Ct. 252; 91 L. Ed. 209 (1946), the United States Supreme Court has defined these terms as follows:

*6 Arbitrary is: “ ‘[W]ithout adequate determining principle Fixed or arrived at through an exercise of will or by caprice, without consideration or adjustment with reference to principles, circumstances, or significance, ... decisive but unreasoned.’ ”

Capricious is: “ ‘[A]pt to change suddenly; freakish; whimsical; humorous.’ ”

This Court has held that even when a defendant’s refusal to disclose records violated the FOIA, the defendant’s actions were not necessarily arbitrary or capricious if the defendant’s decision was based on “consideration of principles or circumstances and was reasonable, rather than whimsical.” *Meredith Corp.*, 256 Mich. App. at 717 (quotation marks and citations omitted). This Court also has found that a denial by the MDOC of a FOIA request based upon the desire to protect employee-witnesses from potential retribution and upon a reasoned belief that internal memoranda were exempt

from disclosure under the FOIA was not arbitrary or capricious. *Yarbrough v. Dep’t of Corrections*, 199 Mich. App. 180, 185-186; 501 N.W.2d 207 (1993).

In denying plaintiffs’ request for punitive damages in this case, the trial court noted that defendant’s response to plaintiffs’ FOIA requests was based on legitimate security concerns, and was insufficient not because the security concerns were not legitimate but because defendant had a policy of denying all requests for video footage regardless of the content of the video. MCL 15.243(1) provides, in relevant part:

(1) A public body may exempt from disclosure as a public record under this act any of the following:

* * *

(c) A public record that if disclosed would prejudice a public body’s ability to maintain the physical security of custodial or penal institutions occupied by persons arrested or convicted of a crime or admitted because of a **mental disability**, unless the public interest in disclosure under this act outweighs the public interest in nondisclosure.

* * *

(u) Records of a public body’s security measures, including security plans, security codes and combinations, passwords, passes, keys, and security procedures, to the extent that the records relate to the ongoing security of the public body.

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In this case, defendant’s inspector averred that disclosure of the requested videos would present an increased danger to the unnamed prisoner in the video and to the facility, particularly in light of recent threats against the facility, would reveal the layout of the premises and prisoner movement plans, and reveal the technical capabilities, equipment, and the tactics and procedures defendant’s officers use in responding to confrontations. Defendant’s denials of plaintiffs’ FOIA requests thus were not arbitrary because they were not arrived at “[w]ithout adequate determining principle” or “without consideration or adjustment with reference to principles, circumstances, or significance” *Laracey*, 163 Mich. App. at 440 (quotation marks and citations omitted). Further, defendant’s denials of plaintiffs’ FOIA requests were not capricious. Although the record indicates that defendant’s routine denial of requests for video footage was an inadequate response under the FOIA, the denials of plaintiffs’ FOIA requests were uniform and consistent, and not subject to

sudden change. See *id.* Accordingly, the trial court did not err by declining to award punitive damages. See *Local Area Watch*, 262 Mich. App. at 153.

*7 The trial court’s order denying plaintiffs punitive damages is affirmed. The trial court’s order determining that plaintiffs prevailed in full and therefore are statutorily entitled to attorney fees, costs, and disbursements under the FOIA is reversed, and this matter is remanded to the trial court for determination within the trial court’s discretion whether plaintiffs, having partially prevailed, are awarded any, all, or a portion of reasonable attorney fees, costs, and disbursements. We do not retain jurisdiction.

All Citations

Not Reported in N.W. Rptr., 2021 WL 2619705

Footnotes

- 1 MCL 15.243(1)(c) provides that “[a] public body may exempt from disclosure as a public record under this act ... [a] public record that if disclosed would prejudice a public body’s ability to maintain the physical security of custodial or penal institutions occupied by persons arrested or convicted of a crime or admitted because of a *mental disability*, unless the public interest in disclosure under this act outweighs the public interest in nondisclosure.”
- 2 In *Prins*, 299 Mich. App. at 645, this Court stated, “although *Smith* is not a FOIA case, it controls for purposes of determining reasonable attorney fees in FOIA cases” We conclude that *Pirgu*, which was released after *Prins*, is also applicable in FOIA cases.

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2019 WL 6888666

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

KALAMAZOO TRANSPORTATION ASSOCIATION, MEA/NEA, and Tim Russ, Plaintiffs-Appellants,
v.
KALAMAZOO PUBLIC SCHOOLS, Defendant-Appellee.

No. 349031

December 17, 2019

Kalamazoo Circuit Court, LC No. 2018-000530-CZ

Before: [Meter](#), P.J., and [O'Brien](#) and [Tukel](#), JJ.

Opinion

Per Curiam.

*1 In this action brought pursuant to Michigan's Freedom of Information Act (FOIA), [MCL 15.231 et seq.](#), plaintiffs Tim Russ and Kalamazoo Transportation Association, MEA/NEA (the requestors), appeal as of right from the trial court's order granting summary disposition to defendant

Kalamazoo Public Schools (the school district). We remand for further proceedings consistent with this opinion.

I. BACKGROUND

The requestors represent an association of bus drivers. For the purposes of engaging in collective bargaining with the school district, the requestors submitted a FOIA request¹ to the school district seeking certain completed bus discipline-referral forms. The referral forms are completed by bus drivers to document student misconduct on the bus and sent to school administrators to issue discipline as needed. The requestors alleged that the discipline-referral forms could be used as evidence of the drivers' job responsibilities and working conditions and stated that they would accept the school district's redaction of any personally identifying information included on the forms. The school district denied the request, concluding that it was precluded from disclosing the discipline-referral forms under the Family Educational Rights and Privacy Act of 1974 (FERPA), [20 USC 1232g](#), because the forms constituted the private educational records of individual students. The school district refused to release redacted versions of the documents, averring that the entire document was protected from release by [MCL 15.243\(2\)](#) as an educational record under FERPA and that, in any event, the requestors "would know the identity of the student to whom the education record relates."

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After the school district's superintendent denied the requestors' administrative appeal, the requestors filed the instant action, seeking an order compelling the school district to disclose the records. Eventually, the parties filed cross motions for summary disposition under [MCR 2.116\(C\)\(8\) and \(10\)](#). In an oral decision, the trial court held that the requested records constituted "educational records" under FERPA, which were exempted from disclosure under [MCL 15.243\(2\)](#). The trial court concluded that [MCL 15.243\(2\)](#) contained a strict, mandatory exemption that applied to the "entire document," and that redaction could not render the requested documents disclosable. Accordingly, the trial court granted the school district's motion for summary disposition. This appeal followed.

II. ANALYSIS

*2 On appeal, the requestors argue that the trial court erred in both its conclusion that the bus discipline-referral forms were educational records under FERPA, and its conclusion that [MCL 15.243\(2\)](#) exempted the entire document from disclosure, regardless of redaction. "We review de novo a trial court's grant or denial of summary disposition." *Tomra of North America, Inc. v. Dep't. of Treasury*, 325 Mich. App. 289, 293-294, 926 N.W.2d 259 (2018). "Summary disposition pursuant to [MCR 2.116\(C\)\(8\)](#) tests the legal basis of the claim and is granted if, considering the pleadings alone, the claim is so manifestly unenforceable as a matter of law that no factual progression could possibly support recovery." *PIC Maint,*

Inc. v. Dep't. of Treasury, 293 Mich. App. 403, 407, 809 N.W.2d 669 (2011) (internal quotation marks and citation omitted). "A motion for summary disposition under [MCR 2.116\(C\)\(10\)](#) tests the factual sufficiency of a claim, and is appropriately granted when, except as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law." *Tomra*, 325 Mich. App. at 294, 926 N.W.2d 259.

"[T]he proper interpretation and application of FOIA is a question of law that we review de novo." *Rataj v. Romulus*, 306 Mich. App. 735, 747, 858 N.W.2d 116 (2014). "In construing the provisions of the act, we keep in mind that the FOIA is intended primarily as a prodisclosure statute and the exemptions to disclosure are to be narrowly construed." *Swickard v. Wayne Co. Med. Examiner*, 438 Mich. 536, 544, 475 N.W.2d 304 (1991). "Simply put, the core purpose of FOIA is disclosure of public records in order to ensure the accountability of public officials." *Practical Political Consulting v. Secretary of State*, 287 Mich. App. 434, 465, 789 N.W.2d 178 (2010). "A FOIA request must be fulfilled unless [MCL 15.243](#) lists an applicable specific exemption." *Coblentz v. Novi*, 475 Mich. 558, 573, 719 N.W.2d 73 (2006). "Because FOIA is a prodisclosure act, the public agency bears the burden of proving that an exemption applies." *Id.* at 574, 719 N.W.2d 73; [MCL 15.240\(4\)](#).

"Congress enacted FERPA under its spending power to condition the receipt of federal funds on certain requirements relating to the access and disclosure of student educational records." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 278, 122 S. Ct. 2268, 153 L.

Ed. 2d 309 (2002). “The Act directs the Secretary of Education to withhold federal funds from any public or private ‘educational agency or institution’ that fails to comply with these conditions.” *Id.* “The Act states that federal funds are to be withheld from school districts that have ‘a policy or practice of permitting the release of education records (or personally identifiable information contained therein ...) of students without the written consent of their parents.’ ” *Owasso Indep. Sch. Dist. No. I-011 v. Falvo*, 534 U.S. 426, 428-429, 122 S. Ct. 934, 151 L. Ed. 2d 896 (2002), quoting 20 USC 1232g(b)(1) (alteration in original). In turn, our FOIA directs a public body to “exempt from disclosure information that, if released, would prevent the public body from complying with 20 USC 1232g” of FERPA. MCL 15.243(2).

“The phrase ‘education records’ is defined, under [FERPA], as ‘records, files, documents, and other materials’ containing information directly related to a student, which ‘are maintained by an educational agency or institution or by a person acting for such agency or institution.’ ” *Owasso Independent School Dist.*, 534 U.S. at 429, 122 S.Ct. 934, quoting 20 USC 1232g(a)(4)(A). The requestors argue that the requested records are not educational records because they “merely involve” and do not “directly relate” to students. We disagree. “When interpreting a federal statute, our task is to give effect to the will of Congress.” *Walters v. Nadell*, 481 Mich. 377, 381, 751 N.W.2d 431 (2008) (quotation marks, citation, and alterations omitted). “[U]nless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning.” *Id.* (quotation marks and

citation omitted). The Merriam-Webster’s Collegiate Dictionary defines “direct” as “characterized by close logical, causal, or consequential relationship,” and “relate” as “connected by reason of an established or discoverable relation.” *Merriam-Webster’s Collegiate Dictionary* (11th ed).

*3 In support of its position, the requestors cite two unpublished cases from other jurisdictions in which the court concluded that disciplinary records did not directly relate to a student: *Wallace v. Cranbrook Ed. Community*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued September 27, 2006 (Docket No. 05-73446), 2006 WL 2796135, and *Boston Sch. Comm. v. Boston Teachers’ Union*, unpublished opinion of the Superior Court of Massachusetts, issued November 30, 2006 (Docket No. 05-3525-H). These cases, however, relate to records of discipline against teachers, in which the students were merely witnesses to impropriety. Accordingly the teachers, not the students, were the subject of the records and any mention of the students was only incidental. Here, however, the bus discipline-referral forms relate to *student* discipline. The forms document a student’s discipline-warranting behavior and the school district’s corresponding action. Because the subject of the forms at issue is an individual student, there can be no question that the forms directly relate to individual students. Accordingly, the trial court correctly concluded that the discipline-referral forms qualified as education records under FERPA, which are generally exempt from disclosure under MCL 15.243(2).²

The trial court erred, however, by concluding

that the exemption in MCL 15.243(2) applied to the entire record as opposed to only those parts containing sensitive educational information directly related to a student. “If a public record contains material which is not exempt under [MCL 15.243], as well as material which is exempt from disclosure under [MCL 15.243], the public body shall separate the exempt and nonexempt material and make the nonexempt material available for examination and copying.” MCL 15.244(1). Our Supreme Court has held that MCL 15.244 “applies without exception to every public record.” *Herald Co., Inc. v. Eastern Mich. Univ. Bd. of Regents*, 475 Mich. 463, 482, 719 N.W.2d 19 (2006). Indeed, by its unambiguous terms, the stated exemption purports only to exempt “information that, if released, would prevent the public body from complying with” FERPA, not the entire record. MCL 15.243(2) (emphasis added). Accordingly, the school district was “assigned the responsibility, ‘to the extent practicable, [to] facilitate a separation of exempt from nonexempt information.’ ” *Herald Co.*, 475 Mich. at 482, 719 N.W.2d 19, quoting MCL 15.244 (alteration in original).

As recognized by the United States Supreme Court, FERPA only threatens the withholding of federal funds from school districts that have “a policy or practice³ of permitting the release of education records (or personally identifiable information contained therein ...) of students without the written consent of their parents.” *Owasso Indep. Sch. Dist.*, 534 U.S. at 428-429, 122 S.Ct. 934, quoting 20 USC 1232g(b)(1) (ellipsis in original). Again, FERPA defines “education records” as “ ‘records, files, documents, and other materials’ containing

information directly related to a student, which ‘are maintained by an educational agency or institution or by a person acting for such agency or institution.’ ” *Id.* at 429, 122 S. Ct. 934, quoting 20 USC 1232g(a)(4)(A). Nothing in FERPA requires nondisclosure once the public agency redacts all “information directly related to a student” from a particular record. *Id.* At that point, the record no longer satisfies the definition of an education record under FERPA. See *Osborn v. Bd. of Regents of Univ. of Wisconsin Sys.*, 254 Wis 2d 266, 286 n 11, 2002 WI 83, 647 N.W.2d 158 (2002) (stating that “once personally identifiable information is deleted, by definition, a record is no longer an education record since it is no longer directly related to a student”). In turn, the release of an adequately redacted record would not bring the school district out of compliance with FERPA.⁴

*4 The school district argues that, even after redaction, the requestors would still likely be able to know or identify the students about whom the records relate. See 34 CFR 99.3(g) (2011) (defining “Personally Identifiable Information” in pertinent part as that “[i]nformation requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates.”). This argument, however, was not addressed by the trial court and we decline to address it for the first time on appeal. Accordingly, we remand this case for the trial court to consider the possibility of redaction in the first instance. If necessary, the trial court may conduct an *in camera* review of the records to determine if redaction consistent with MCL 15.243(2) is possible. See *Evening News Ass’n. v. Troy*, 417 Mich. 481, 513-516, 339 N.W.2d 421

(1983).

All Citations

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

Not Reported in N.W. Rptr., 2019 WL 6888666

Footnotes

- 1 The request referred to both the FOIA and the Public Employee Relations Act (PERA), [MCL 423.201 et seq.](#) In the trial court, the parties treated the request simply as a FOIA request, rather than as a request to remedy an unfair labor practice. Allegations of unfair labor practices are the sole jurisdiction of the Michigan Employee Relations Commission (MERC), not the trial court. See [Kent Co. Deputy Sheriff's Ass'n. v. Kent Co. Sheriff](#), 463 Mich. 353, 359, 616 N.W.2d 677 (2000). We consider this case solely as a FOIA dispute.
- 2 Before the trial court, the requestors also argued that the discipline-referral forms did not qualify as education records under FERPA because they did not pertain to the student's education. Under FERPA, however, the fact that a record does not pertain to education is not dispositive. Rather, a record is made "educational" when an educational institution holds it, and there is no doubt in this case that the holder of the requested records, the school district, is an educational institution. [20 USC 1232g\(a\)\(4\)\(A\)](#). The information itself need only "directly relate" to a student, not necessarily a student's education. [Owasso Indep. Sch. Dist.](#), 534 U.S. at 429, 122 S.Ct. 934.
- 3 Although neither party discusses it, we note that "FERPA's nondisclosure provisions further speak only in terms of institutional policy and practice, not individual instances of disclosure." See [Gonzaga Univ.](#), 536 U.S. at 288, 122 S.Ct. 2268. Institutions receiving federal funds can avoid termination so long as they "comply substantially" with FERPA. See *id.*
- 4 Our conclusion that a public body remains compliant with FERPA when it redacts personally identifiable information pursuant to an open records law is consistent with a vast number of other well-reasoned federal and state law decisions. See, e.g., [United States v. Miami Univ.](#), 294 F.3d 797, 824 (CA 6, 2002) ("Nothing in the FERPA would prevent the Universities from releasing properly redacted records."); [Bryner v. Canyons Sch. Dis.](#), 351 P.3d 852, 860, 2015 UT App 131 (2015); [Unincorporated Operating Div. of Indiana Newspapers, Inc. v. Trustees of Indiana Univ.](#), 787 N.E.2d 893, 908 (Ind App, 2003) ("Therefore, if a public record contains some information which qualifies under an exception to public disclosure, instead of denying access to the record as a whole, public agencies must redact or otherwise separate those portions of the record which would otherwise render it non-disclosable."); [State ex rel. ESPN v. Ohio State Univ.](#), 132 Ohio St 3d 212, 220, 2012-Ohio-2690, 970 N.E.2d 939 (2012) ("With the personally identifiable information concerning the names of the student-athlete, parents, parents' addresses, and the other person involved redacted, FERPA would not protect the remainder of these records."); [Kernel Press, Inc v. Univ of Kentucky](#), — SW3d —, — (Ky App, May 17, 2019) (Docket Nos. 2017-CA-000394-MR and 2017-CA-0001347-MR); slip op. at 7 ("Even those records in the investigation file that directly relate to a student are not prohibited from disclosure if properly redacted.").

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2019 WL 1302114

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

Jane DOE and Jane Roe, Plaintiffs-Appellants,

v.

UNNAMED SCHOOL DISTRICT,
Defendant-Appellee.

No. 340234

|
March 21, 2019

Synopsis

Background: Petitioner submitted Freedom of Information Act (FOIA) request to school district, seeking information pertaining to access to school district property granted to caretakers of elementary school student, and district identified relevant documents but denied request, citing provision of Act exempting from disclosure documents the disclosure of which would violate Family Educational Rights and Privacy Act (FERPA). Petitioner appealed, and after district's board of education determined that redacted versions of documents could be disclosed, caretakers filed emergency motion for temporary restraining order (TRO). The Circuit Court, Oakland County, granted initial TRO and then dissolved it and ordered district to disclose redacted documents.

Caretakers appealed.

Holdings: The Court of Appeals held that:

[1] trial court's order dissolving TRO was a final judgment;

[2] provision of FERPA preventing educational institutions from disclosing educational records or any personally identifiable information contained therein did not apply;

[3] provision of FOIA exempting from disclosure records "of a personal nature" that would be "unwarranted invasion of privacy" if disclosed did not apply; and

[4] redaction of caretakers' names and addresses and student's name from requested documents was warranted.

Affirmed.

West Headnotes (4)

[1] **Records** → Decisions subject to further review

Trial court's order dissolving temporary restraining order (TRO) granted to caretakers in action brought by petitioner, seeking documents related to caretakers'

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access to school district property pursuant to Freedom of Information Act (FOIA), and ordering district to disclose redacted documents was a final judgment, and thus Court of Appeals had jurisdiction over appeal brought by caretakers; caretakers initiated action by filing emergency motion for TRO, which trial court treated as a complaint, and presented alternative theories to support denial of disclosure, and although trial court did not explicitly rule on each theory, it could be inferred from court's dissolution of TRO that each was rejected. *Mich. Comp. Laws Ann.* §§ 15.231 et seq., 600.308(1); *Mich. Ct. R.* 7.203(A)(1).

[2] Records—Education-related information

Provision of Family Educational Rights and Privacy Act (FERPA) preventing educational institutions from disclosing educational records or any personally identifiable information contained therein about a student without first obtaining consent of either student or parents did not apply to documents requested by petitioner, pursuant to Freedom of Information Act (FOIA) request, pertaining to access to school district property of caretakers of elementary school student, and thus such documents were not exempted from

disclosure; although caretakers argued that requested documents contained personally identifiable information, relevant documents were letters addressed to caretakers that did not contain information directly related to student, and thus were not educational records. 20 U.S.C.A. §§ 1232g(a)(4)(A), 1232g(b)(1), 1232g(d); *Mich. Comp. Laws Ann.* §§ 15.231 et seq., 15.243(2); 34 C.F.R. § 99.3.

[3] Records—Personal Interests and Privacy Considerations in General

Provision of Freedom of Information Act (FOIA) exempting from disclosure records “of a personal nature” that would be “unwarranted invasion of privacy” if disclosed did not apply to letters requested by petitioner, which pertained to access of student's caretakers to school district property; although caretakers argued that letters contained false and egregious accusations and unsubstantiated threats, disclosure of letters would serve core purpose of FOIA by facilitating public understanding of school district's operations and policies, and thus such disclosure was not clearly unwarranted. *Mich. Comp. Laws Ann.* §§ 15.231 et seq., 15.243(1)(a).

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to a FOIA request. We affirm.

[4] **Records**—Grounds and justification; factors considered

Redaction of caretakers’ names and addresses and student’s name from documents requested by petitioner, pursuant to Freedom of Information Act (FOIA), pertaining to access to school district property granted to caretakers of student was warranted; identities of parties involved in documents did little to further public understanding of district’s operations and activities. *Mich. Comp. Laws Ann. § 15.231 et seq.*

Oakland Circuit Court, LC No. 2017-160106-CZ

Before: *Gleicher*, P.J., and *K. F. Kelly* and *Letica*, JJ.

Opinion

Per Curiam.

*1 In this reverse Freedom of Information Act (FOIA), *MCL 15.231 et seq.*, dispute, plaintiffs appeal the trial court’s order conditionally dissolving its temporary restraining order and permitting defendant to release two redacted documents in response

I. BACKGROUND

Plaintiffs allege that they are the “legal decision makers” for a minor student (the Student) who attended an elementary school operated by defendant school district.¹ On or about February 28, 2017, nonparty Bethany Dannewitz submitted a FOIA request to defendant seeking “any and all information pertaining to [Jane Roe] and/or [Jane Doe]’s access or lack thereof to school district property, specifically * * * * * Elementary.” Defendant identified two responsive documents—identical letters addressed to each plaintiff—but denied the FOIA request, citing *MCL 15.243(2)*, which exempts from disclosure “information that, if released, would prevent the public body from complying with *20 U.S.C. 1232g*, commonly referred to as the family educational rights and privacy act of 1974 [FERPA].” Dannewitz appealed the denial to defendant’s board of education, and the board determined that redacted versions of the responsive documents should be disclosed. The redactions removed instances in which the Student’s name was mentioned.

Plaintiffs initiated this action by filing an emergency motion for a temporary restraining order (TRO), order to show cause, and order for permanent injunctive relief. In pertinent part, plaintiffs alleged that defendant’s planned disclosure of the responsive documents would violate FERPA, the Persons with Disabilities Civil Rights Act, *MCL 37.1101 et seq.*, the Americans

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with Disabilities Act, 42 U.S.C. 12101 *et seq.*, and § 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794. Plaintiffs requested various relief, primarily a TRO enjoining release of the responsive documents and an order to show cause why disclosure should not be permanently enjoined. The trial court granted plaintiffs’ motion and issued a TRO and show cause order as requested.

Following a hearing and *in camera* review of the responsive documents, the trial court dissolved the TRO, finding no basis to continue it. The trial court further ordered that, in addition to the Student’s name, defendant should redact plaintiffs’ names and addresses from the documents before releasing them to Dannewitz. However, the trial court stayed its order “to permit Plaintiffs, if they wish, to seek relief in the Court of Appeals.” The trial court denied plaintiffs’ subsequent motion for reconsideration, and this appeal followed.

II. JURISDICTION

*2 Plaintiffs filed their claim of appeal as an appeal of right pursuant to MCR 7.203(A)(1). Defendant contends that the trial court’s order dissolving the TRO was not a final order and correctly observes that the time in which plaintiffs could have filed a timely application for leave to appeal under MCR 7.205 has long since expired. Nonetheless, defendant implies that it would prefer to have this Court issue a definitive ruling on the substantive merits of plaintiffs’ claim of error.

MCR 7.203(A)(1) provides that this Court has jurisdiction over a final judgment or order entered by a circuit court. *Chen v. Wayne State Univ.*, 284 Mich. App. 172, 192; 771 N.W.2d 820 (2009). See also MCL 600.308(1) (“The court of appeals has jurisdiction on appeals from all final judgments and final orders from the circuit court, court of claims, and probate court, as those terms are defined by law and supreme court rule”). Relevant to this appeal, a final judgment or final order is “the first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties, including such an order entered after reversal of an earlier final judgment or order[.]” MCR 7.202(6)(a)(i).

^[1]As already noted, plaintiffs’ initiated this action by filing an emergency motion, which the trial court opted to treat as a complaint. As a result of this procedural irregularity, the precise nature of plaintiffs’ claim or claims is somewhat unclear. What can be discerned is that each of plaintiffs’ arguments is presented for the purpose of preventing disclosure of the public records at issue. Thus, plaintiffs’ various arguments can be characterized as alternative theories to support their reverse FOIA cause of action. See *Bradley v. Saranac Community Sch. Bd. of Ed.*, 455 Mich. 285, 290; 565 N.W.2d 650 (1997) (describing a reverse FOIA action as seeking to prevent disclosure of public records under FOIA), mod by *Mich. Federation of Teachers & Sch. Related Personnel v. Univ. of Mich.*, 481 Mich. 657, 660; 753 N.W.2d 28 (2008) (*Mich. Federation*). Although the trial court did not explicitly rule on each of plaintiffs’ theories, we infer from the court’s conclusion that there was no basis to continue the TRO that it rejected each theory.² As

such, despite the absence of final judgment or final order language mandated by [MCR 2.602\(A\)\(3\)](#), we construe the trial court's order as final judgment that disposed of all the parties' claims. Consequently, plaintiffs properly invoked this Court's jurisdiction by filing a timely claim of appeal pursuant to [MCR 7.203\(A\)\(1\)](#).³

III. STANDARD OF REVIEW

"A trial court's decision to grant or deny injunctive relief is reviewed for an abuse of discretion," *Janet Travis, Inc. v. Preka Holdings, LLC*, 306 Mich. App. 266, 274; 856 N.W.2d 206 (2014), which "occurs when the trial court's decision is outside the range of reasonable and principled outcomes" or premised upon legal error, *Ronnisch Constr. Group, Inc. v. Lofts on the Nine, LLC*, 499 Mich. 544, 552; 886 N.W.2d 113 (2016). "The application and interpretation of statutes, as well as the application and interpretation of administrative rules and regulations, present questions of law that are reviewed de novo." *In re Estate of Klein*, 316 Mich. App. 329, 333; 891 N.W.2d 544 (2016). The rules of statutory construction are well settled:

*3 The foremost rule, and our primary task in construing a statute, is to discern and give effect to the intent of the Legislature. This task begins by examining the language of the statute itself. The words of a statute provide the most reliable evidence of its intent If the language of the statute is unambiguous, the Legislature must have intended the meaning clearly expressed,

and the statute must be enforced as written. No further judicial construction is required or permitted. Only where the statutory language is ambiguous may a court properly go beyond the words of the statute to ascertain legislative intent.

In interpreting the statute at issue, we consider both the plain meaning of the critical word or phrase as well as its placement and purpose in the statutory scheme. As far as possible, effect should be given to every phrase, clause, and word in the statute. [*Sun Valley Foods Co. v. Ward*, 460 Mich. 230, 236-237; 596 N.W.2d 119 (1999) (quotation marks and citations omitted).]

"FOIA is intended primarily as a prodisclosure statute and the exemptions to disclosure are to be narrowly construed." *Swickard v. Wayne Co. Med. Examiner*, 438 Mich. 536, 544; 475 N.W.2d 304 (1991).

IV. ANALYSIS

A. FERPA EXEMPTION

Plaintiffs first argue that the trial court erred by dissolving the TRO and permitting disclosure of the redacted documents because the documents were protected by FERPA and, therefore, exempt from disclosure under FOIA. We disagree.

In response to a FOIA request, "a public body must disclose all public records that are not specifically exempt under the act." *King v. Mich. State Police Dep't.*, 303 Mich. App.

162, 176; 841 N.W.2d 914 (2013) (quotation marks and citation omitted). For purposes of the FOIA, the statutory definition of the term “public body” includes school districts like the one involved here. See [MCL 15.232\(h\)\(iii\)](#)). The responsive documents at issue in this case were prepared by defendant in the performance of an official function and, thus, were public records for purposes of FOIA. [MCL 15.232\(i\)](#). The dispositive question is whether the responsive documents fell within the scope of the FERPA exemption set forth in [MCL 15.243\(2\)](#).

“Congress enacted FERPA under its spending power to condition the receipt of federal funds on certain requirements relating to the access and disclosure of student educational records.” *Gonzaga Univ. v. Doe*, 536 U.S. 273, 278; 122 S.Ct. 2268; 153 L.Ed.2d 309 (2002). Subject to exceptions that are inapplicable to the matter at hand, FERPA provides that

an educational institution may not disclose the education records or any personally identifiable information contained in the record other than directory information to any third parties without the written consent of the student’s parents, [20 U.S.C. 1232g\(b\)\(1\)](#), or the written consent of the student where the student attends an institution of postsecondary education, [20 U.S.C. 1232g\(d\)](#). [*Connoisseur Communication of Flint v. Univ. of Mich.*, 230 Mich. App. 732, 735; 584 N.W.2d 647 (1998).⁴]

Consistent with the requirements of FERPA, FOIA includes the following mandatory exemption: “A public body shall exempt from disclosure information that, if released, would prevent the public body from

complying with [20 U.S.C. 1232g](#), commonly referred to as the [FERPA].” [MCL 15.243\(2\)](#).

*4 ^[2]Plaintiffs argue at length that FERPA prohibits disclosure of the responsive documents because they contain “personally identifiable information,” as that term is defined by [34 CFR 99.3 \(2018\)](#).⁵ Plaintiffs’ position puts the cart before the horse by failing to recognize that FERPA protects against the release of education records “or personally identifiable information *contained therein*.” [20 U.S.C. 1232g\(b\)\(1\)](#) (emphasis added). In other words, pursuant to the plain and unambiguous meaning of the statutory language, the personally identifiable information must be contained in an education record before it is protected under FERPA.

FERPA defines education records as “those records, files, documents, and other materials which—(i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.” [20 U.S.C. 1232g\(a\)\(4\)\(A\)](#). Having reviewed the responsive documents, both in their complete and redacted forms, we cannot agree with plaintiffs’ assumption that the documents constitute education records because they do not “contain information *directly* related to a student.” *Id.* (emphasis added). Instead, the documents are letters directed to plaintiffs concerning their access to the elementary school attended by the Student with defendant’s explanation regarding the same. The letters refer to the Student by first name, but only in the context of establishing parameters for plaintiffs’ presence on the elementary school property. Plaintiffs are clearly the subject of the

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documents, which relate to the Student only in an indirect or incidental manner. Accordingly, because the responsive documents do not consist of education records, the FERPA exemption does not preclude their disclosure under FOIA. Therefore, to the extent that the trial court determined that the FERPA exemption did not present a basis for continuing the TRO or granting permanent injunctive relief, it did not err in doing so.

Furthermore, we are highly skeptical of plaintiffs' standing to assert this exemption under the circumstances at hand. "To have standing, a party must have a legally protected interest that is in jeopardy of being adversely affected." *Barclae v. Zarb*, 300 Mich. App. 455, 483; 834 N.W.2d 100 (2013). That interest must belong to the plaintiff; the plaintiff's claim to relief cannot rest on the legal rights or interests of a third-party. *Id.* In their emergency motion for a TRO, plaintiffs refer to their "stake in the action" as "the preservation of their privacy rights and the privacy rights of the [S]tudent" Thus, plaintiffs' entitlement to relief rests, at least in part, on an assertion of a third-party's rights. We recognize that defendant has accepted plaintiffs' role as one of an advocate for the Student and that plaintiffs have purportedly secured a power of attorney from the Student's parents, but it does not follow that plaintiffs are free to assert the Student's rights on her behalf in a court of law. In any event, because the parties' did not raise or brief the issue of standing, we need not resolve our concern as to plaintiffs' standing. *Detroit City Council v. Mayor of Detroit*, 449 Mich. 670, 678 n. 10; 537 N.W.2d 177 (1995).

B. PRIVACY EXEMPTION

*5 Plaintiffs also argue that the documents were exempt from disclosure under FOIA's privacy exemption, MCL 15.243(1)(a). We disagree.

In order to qualify for exemption under this provision, the record must involve information "of a personal nature" which, if disclosed, would be a "clearly unwarranted invasion of privacy." *Mich. Federation*, 481 Mich. at 671 (quotation marks omitted). With respect to the first prong, information is of a personal nature if it reveals "embarrassing, intimate, private, or confidential details" about an individual. *Id.* at 676. To determine if a disclosure would result in a clearly unwarranted invasion of privacy under the second prong of the privacy exemption, Michigan courts employ the core purpose test. *Id.* at 672-673. Under the core purpose test, the court balances the public interest in disclosure against the interest the Legislature intended to protect by way of the exemption. *Id.* at 673. "[T]he only relevant public interest in disclosure to be weighed in this balance is the extent to which disclosure would serve the core purpose of the FOIA, which is contributing significantly to public understanding of the operations or activities of the government." *Id.* (quotation marks and citation omitted). "Requests for information on private citizens accumulated in government files that reveal little to nothing about the inner working of government will fail this balancing test." *ESPN, Inc. v. Mich. State Univ.*, 311 Mich. App. 662, 669; 876 N.W.2d 593 (2015).

^[3]According to plaintiffs, the subject documents contain information of a personal nature because they include “false [and] egregious” accusations, as well as “unsubstantiated threats.” Assuming, without deciding, that the documents do indeed reveal embarrassing, intimate, private, or confidential details regarding plaintiffs’ lives, we conclude that the privacy exemption is inapplicable because disclosure of the documents does not constitute a clearly unwarranted invasion of privacy under the core purpose test. “In all but a limited number of circumstances, the public’s interest in governmental accountability prevails over an individual’s, or a group of individuals’, expectation of privacy.” *Bitterman v. Village of Oakley*, 309 Mich. App. 53, 64; 868 N.W.2d 642 (2015) (quotation marks and citation omitted). Here, disclosure of the responsive documents serves the core purpose of FOIA by facilitating public understanding of defendant school district’s operations and policies, particularly with respect to the security and public accessibility of school property. Consequently, even if disclosure of the documents reveals information of a personal nature, the disclosure is not clearly unwarranted. Compare *ESPN, Inc.*, 311 Mich. App. at 669-670 (finding that identity of university athletes identified as suspects in incident reports was not exemptible because information concerned university police operations and allowed FOIA requester to assess whether university treated athletes differently than general student population) with *Mich. Federation*, 481 Mich. at 682 (reasoning that disclosure of university employees’ home addresses and telephone numbers would reveal little or nothing about

government operations) and *Mager v. Dep’t. of State Police*, 460 Mich. 134, 135, 144-146; 595 N.W.2d 142 (1999) (finding that disclosure of individuals who owned registered handguns was “entirely unrelated to any inquiry regarding the inner workings of government, or how well the Department of State Police is fulfilling its statutory functions”).

C. REDACTIONS

*6 ^[4]Although the parties did not specifically challenge the trial court’s determination that defendant should redact plaintiffs’ names and addresses and the Student’s name from the documents, we agree with the trial court’s decision concerning the redactions. When a document must be disclosed under FOIA but contains information that falls within a discretionary exemption, redaction is appropriate. *Bradley*, 455 Mich. at 304. Thus, in *Bradley*, the Michigan Supreme Court determined that “the names of the individual students and other persons not employed by the public body” should be redacted before the personnel records of various public servants were released. *Id.* at 304-305. The same holds true in this case, as the identities of the parties involved in the documents do little to further the public understanding of defendant’s operations and activities.

Affirmed.

All Citations

Not Reported in N.W. Rptr., 2019 WL

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Footnotes

- 1 The Student purportedly resides with plaintiff Jane Roe and Jane Doe acts as a secondary advocate for the child when Roe is unavailable. Plaintiffs allege that the Student's parents are "in the picture," but "cognitively impaired." Plaintiffs refer to a power of attorney that was not produced throughout these proceedings, but do not claim to be the Student's legal guardians.
- 2 On appeal, plaintiffs only challenge the trial court's ruling with respect to the FOIA exemptions set forth in [MCL 15.243\(1\)\(a\)](#) (privacy) and (2) (FERPA). To the extent that plaintiffs raised alternative grounds for exemption flowing from other statutory rights, they have not presented those issues for appellate review.
- 3 Even if we were to conclude that the trial court's order did not constitute a final judgment or order, in the interest of judicial efficiency we would exercise our discretion to treat plaintiffs' claim of appeal as a granted application for leave to appeal. *Detroit v. Michigan*, 262 Mich. App. 542, 545-546; 686 N.W.2d 514 (2004).
- 4 *Connoisseur Communication of Flint*, 230 Mich. App. at 733-734, involved a former, permissive FOIA exemption for records governed by FERPA. See [MCL 15.243\(1\)\(e\)](#), as amended by 1996 PA 553. Under the current version of [MCL 15.243\(2\)](#), "[a] public body shall exempt from disclosure information that, if released, would prevent the public body from complying with 20 U.S.C. 1232g" (Emphasis added). Thus, apart from directory information (which may disclosed under certain conditions), see *id.*, the FERPA exemption now requires mandatory nondisclosure. See *Atchison v. Atchison*, 256 Mich. App. 531, 535; 664 N.W.2d 249 (2003) ("Under the plain-meaning rule, courts must give the ordinary and accepted meaning to the mandatory word 'shall' and the permissive word 'may' unless to do so would frustrate the legislative intent as evidenced by other statutory language or by reading the statute as a whole.").
- 5 For purposes of the United States Department of Education's enforcement of the FERPA, federal regulations define "personally identifiable information" rather broadly:
The term includes, but is not limited to—
 - (a) The student's name;
 - (b) The name of the student's parent or other family members;
 - (c) The address of the student or student's family;
 - (d) A personal identifier, such as the student's social security number, student number, or biometric record;
 - (e) Other indirect identifiers, such as the student's date of birth, place of birth, and mother's maiden name;
 - (f) Other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty; or
 - (g) Information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates. [[34 CFR 99.3 \(2018\)](#).]

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**STATE OF MICHIGAN
IN THE COURT OF CLAIMS**

Mackinac Center for Public Policy,

Plaintiff,

v.

Michigan State University,

Defendant.

Case No. 21-00011-MZ

Hon. Elizabeth L. Gleicher

Patrick J. Wright (P54052)
Derk A. Wilcox (P66177)
Stephen A. Delie (P80209)
Mackinac Center for Public Policy
Attorneys for Plaintiff
140 West Main Street
Midland, MI 28640
(989) 631-0900

Uriel Abt (P84350)
MSU Office of General Counsel
Attorney for Defendants
426 Auditorium Rd, Room 494
East Lansing, MI 48824
(517) 353-4934
abturiel@msu.edu

**DEFENDANT'S 11/12/21
MOTION FOR SUMMARY DISPOSITION**

Defendant Michigan State University moves for summary disposition under MCR 2.116(C)(10), for the reasons set forth in the accompanying brief. The undersigned communicated with Plaintiff regarding this motion on November 11, 2021 and did not obtain concurrence.

Respectfully submitted,



Dated: November 12, 2021

Uriel Abt
Attorney for Defendant

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**STATE OF MICHIGAN
IN THE COURT OF CLAIMS**

Mackinac Center for Public Policy,

Plaintiff,

v.

Michigan State University,

Defendant.

Case No. 21-00011-MZ

Hon. Elizabeth L. Gleicher

Patrick J. Wright (P54052)
Derk A. Wilcox (P66177)
Stephen A. Delie (P80209)
Mackinac Center for Public Policy
Attorneys for Plaintiff
140 West Main Street
Midland, MI 28640
(989) 631-0900

Uriel Abt (P84350)
MSU Office of General Counsel
Attorney for Defendants
426 Auditorium Rd, Room 494
East Lansing, MI 48824
(517) 353-4934
abturiel@msu.edu

**BRIEF IN SUPPORT OF DEFENDANT’S 11/12/21
MOTION FOR SUMMARY DISPOSITION**

Defendant Michigan State University moves for summary disposition under MCR 2.116(C)(10).

INTRODUCTION

This is an action under FOIA. In June 2020, Plaintiff sought all emails sent to the President of MSU containing the search term “Hsu” for a defined period of time. MSU produced nearly 600 pages of responsive documents. Plaintiff claims that MSU violated FOIA because the production of the responsive documents was delayed. Plaintiff also claims that certain categories of redactions made in the production pursuant to FOIA exemptions are not proper. Plaintiff

sought and obtained discovery. Discovery is now closed. Judgement should be entered in favor of MSU for the following reasons.

First, FOIA only requires that MSU provide Plaintiff with a “good faith” estimate of how long a production will take and explicitly states that its estimate is “nonbinding.” The uncontested facts establish that MSU satisfied FOIA by providing good faith time estimate and ultimately making the production.

Second, the exemptions MSU asserted are proper and properly established by the uncontested affidavits of Rebecca Nelson, MSU’s Director and Freedom of Information Act Officer and Tom Siu, MSU’s Chief Information Security Officer.

UNCONTESTED FACTS

A. MSU’s FOIA Office

MSU receives between approximately 700 to 1200 FOIA requests a year, or approximately 3 per day on average. (Exhibit A at ¶ 3.) MSU maintains a dedicated office for the purpose of responding to these FOIA requests. (*Id.* at ¶ 4.) The office consists of the Director and Freedom of Information Act Officer, Rebecca Nelson, and, until the beginning of 2020, three assistant FOIA Officers who collect documents, review them, and prepare them for disclosure. (*Id.* at ¶ 5.) One employee retired at the beginning of 2020, leaving the office with only two employees in addition to Nelson. (*Id.* at ¶ 6.)

Typically, when a FOIA request is received, the FOIA office immediately contacts the department or individuals likely to have responsive documents for the purpose of collecting those documents. (*Id.* at ¶ 7.) If the production is going to require significant time to prepare, the requestor is sent a fee deposit notice in accordance with MCL 15.234. (*Id.* at ¶ 8.) Once both the documents and the fee deposit are received, an assistant FOIA officer will review the documents

in hard copy first for the purpose of separating non-responsive and duplicative documents, and then again for the purpose of identifying and redacting or separating information that is exempt from disclosure under FOIA. (*Id.* at ¶ 9.) Nelson then conducts a quality control review to ensure FOIA compliance after which the documents are disclosed. (*Id.* at ¶ 10.)

At the time of the fee deposit notice, the requesting party is provided an estimated timeframe for disclosure based on the number of documents being reviewed. (*Id.* at ¶ 11.) The FOIA office's estimates are generally accurate. In 2020, despite the pandemic, all disclosures except the one at issue in this case were made within the timeframe estimated by the FOIA office. (*Id.* at ¶ 12.)

In March 2020, MSU switched to mostly remote working environment due to the pandemic. (*Id.* at ¶ 13.) The FOIA office employees were directed to work from home. (*Id.*) Nelson comes to the office once or twice a week to collect hard copy documents for review. (*Id.* at ¶ 14.) Because of the pandemic, Governor Whitmer issued a temporary executive order relaxing FOIA's statutory initial five- and ten-day response deadlines.

https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-524359--,00.html (last visited November 11, 2021.) MSU, however, continued to meet these deadlines throughout the pandemic, including in this case. (Exhibit A at ¶ 15.)

B. Plaintiff's FOIA request

On June 26, 2020, Plaintiff sent MSU a request for "Any emails to or from the president of Michigan State University that mention 'Hsu' from Feb. 1, 2020 to June 26, 2020." (Exhibit C.) The Office of the President was immediately directed to begin collecting responsive documents. (Ex. A at ¶ 17.) The Office of the President informed the FOIA office that it estimated that there were at least 150 pages of responsive documents. (*Id.* at ¶ 18.) Based on this

estimate, the FOIA office sent Plaintiff a fee and deposit notice July 7, 2020, stating that the anticipated disclosure date would be six weeks from the receipt of the fee deposit. (*Id.* at ¶ 18; Ex. D.) Plaintiff paid the fee deposit on July 20, 2020. (Ex. A at ¶ 18.)

When the FOIA office received the responsive documents from the Office of the President, there were more than 1000 pages, including non-responsive and duplicate documents. (*Id.* at ¶ 19.) Because the documents were going to take longer than anticipated to review, Nelson took on the initial review herself to expedite the process. (*Id.* at ¶ 20.) After her initial review, there were 620 responsive, non-duplicative documents to be reviewed for exemptions. (*Id.*) On August 31, 2020, MSU sent Plaintiff a revised time and cost estimate and provided the option of accepting the documents reviewed under the prior estimate at that time or paying the additional fee for the full disclosure in which case the anticipated disclosure date would be eight weeks from the receipt of the additional deposit. (*Id.* at ¶ 21; Ex. E.) Plaintiff paid the additional deposit on September 9, 2020. (Ex. A at ¶ 21.)

In early October 2020, a serious health issue arose in Nelson's household. (*Id.* at ¶ 22.) This significantly impacted FOIA office operations and required Nelson to prioritize initial responses to incoming FOIA requests, the timelines for which are statutorily set at five- and ten-days. (*Id.*) As a result, the review of Plaintiff's request was delayed and then ultimately transferred to another employee—Susan Green—in early November 2020. (*Id.* at ¶¶ 22, 23.) MSU provided Plaintiff updates of the review status in November and December and disclosed the requested documents on December 23, 2020. (*Id.* at ¶ 23; Ex. F, G, and H.) Because of the unanticipated delay, MSU refunded the entire processing fee as a courtesy. (Ex. A at ¶ 24.)

C. Threats to MSU community members

In June 2020, the MSU graduate student union circulated a petition seeking the resignation of then-Senior Vice President of Research and Innovation Stephen Hsu from his administrative position with MSU. (*Id.* at ¶ 26.) A counter petition also circulated. (*Id.*) (Collectively, the “Hsu Petitions.”) As Plaintiff alleges, the Hsu Petitions received media coverage. Many individuals, including MSU students, faculty, alumni, and the public at large, sent unsolicited emails to the President of MSU regarding these issues. (*Id.* at ¶ 27.) These emails constitute the bulk of the production at issue here. (*Id.*) Several MSU students, who had been publicly identified as involved in the petitions received threats, including death threats. (*Id.* at ¶¶ 28, 29.) Those threats were referred to the MSU Police Department for investigation. (*Id.*)

ARGUMENT

D. MSU’s estimated time frame for producing documents in response to Plaintiff’s request was made in good faith.

FOIA requires public bodies to respond to all FOIA requests with a grant, denial, or a fee deposit request within five days (or 15 days with an automatic extension). MCL 15.235. MSU met that requirement here and Plaintiff does not argue otherwise. FOIA does not mandate any timeframe for the disclosure of documents. Rather, it requires the public body to provide the requestor with “a best efforts estimate . . . regarding the time frame it will take the public body to comply with the law in providing the public records.” MCL 15.234(8). FOIA is explicit that this estimate is “nonbinding on the public body” but shall be provided “in good faith.” *Id. Forner v. Dep’t of Licensing & Regul. Affs.*, No. 336742, 2017 WL 3044106, at *5 (Mich. Ct. App. July 18, 2017) (failure to meet estimated timeframe for disclosure does not violate FOIA) (Ex. H).

Plaintiff claims that MSU’s time estimate was not made in good faith. In order to make this showing, Plaintiff would have come forward with evidence that MSU’s time estimates were

based on something other than an honest exercise of judgment. *Premier Ctr. of Canton, L.L.C. v. N. Am. Specialty Ins. Co.*, No. 297799, 2011 WL 5964611, at *4-5 (Mich. Ct. App. Nov. 29, 2011) (granting summary disposition where there was no evidence that insurance company's decision to settle was not made in good faith). Plaintiff cannot do that here. As established by the uncontested affidavit of Rebecca Nelson, every time estimate made to Plaintiff was based on an honest judgment based on the best information available to her at the time. (Ex. A at ¶¶ 16-24.) That intervening circumstances require a revision of her estimate or a delay does not show that MSU did not act in good faith. To the contrary, the evidence shows that MSU did act in good faith. This claim should be dismissed.

E. MSU's asserted exemptions are proper.

Plaintiff does not identify any specific document or information that it claims was improperly withheld or redacted. Rather, Plaintiff makes general claims that MSU improperly applied three categories of exemptions as a matter of law. First, Plaintiff claims that any assertion of the frank communications exemption under MCL 15.243(1)(m) in this case would be improper because the information relates to a high-ranking MSU official. (Compl. at ¶¶ 32-39.) Second, Plaintiff claims that MSU improperly redacted the email addresses of MSU employees under MCL 15.243(1)(u), (y), and (z). (*Id.* at ¶¶ 40-49.) Third, Plaintiff claims that MSU improperly redacted non-MSU email addresses and names of individuals who sent unsolicited emails to the President of MSU under MCL 15.243(1)(a). (*Id.* at ¶¶ 50-54.) In each case, Plaintiff is wrong.

1. MSU properly applied the frank communication exemption under MCL 15.243(1)(m).

FOIA generally requires disclosure of public records. In codifying exemptions, however, the Michigan legislature has made the determination that, in certain circumstances, "full

disclosure of certain public records could prove harmful to the proper functioning of the public body.” *Herald Co. v. E. Michigan Univ. Bd. of Regents*, 475 Mich. 463, 472-73 (2006). The “frank communication” exemption, set forth in MCL 15.243(1)(m), is a prime example. This exemption recognizes that good governance requires public officials and employees to communicate candidly in advance of final decisions or actions and that public disclosure of those communications would chill such communications and hamper effective governmental operations. *Id.* at 473, 478, 479.

The exemption states:

Communications and notes within a public body or between public bodies of an advisory nature to the extent that they cover other than purely factual materials and are preliminary to a final agency determination of policy or action. This exemption does not apply unless the public body shows that in the particular instance the public interest in encouraging frank communication between officials and employees of public bodies clearly outweighs the public interest in disclosure.

MCL 15.243(m)(1).

Application of this exemption requires a showing that: (1) the communication or note is of an advisory nature within or between public bodies; (2) it covers other than purely factual material; and (3) it is preliminary to a final agency determination of policy or action. *Herald Co.*, 475 Mich. at 475. If the document meets this test, the Court must determine whether public body’s interest in frank communication clearly outweighs the public interest in disclosure. In applying this balancing test: “the only relevant public interest in disclosure . . . is the extent to which disclosure would serve the core purpose of FOIA, which is contributing significantly to the public understanding of the operations or activities of the government.” *Michigan Fed’n of Tchrs. & Sch. Related Pers., AFT, AFL-CIO v. Univ. of Michigan*, 481 Mich. 657, 673 (2008). The Court’s balancing of these interests must be made based on the particular circumstances of the case and with eye towards how the Court’s ruling could affect “public officials’ ongoing and

future willingness to communicate frankly.” *Herald Co.*, 475 Mich. at 475. The Court’s factual determinations are reviewed for clear error and the balancing of interests is reviewed for abuse of discretion. *Id.* at 471, 72.

Here, the test is met. Of the 592 pages of documents MSU provided Plaintiff, 20 pages contain redactions pursuant to the frank communications exemption. As set forth with specificity in the affidavit of Rebecca Nelson, each redaction represents communications or notes of an advisory nature between MSU officials or employees that are other than purely factual material and preliminary to a final determination or action by MSU. (Ex. A at ¶ 25); *King v. Oakland Cty. Prosecutor*, 303 Mich. App. 222, 228 (2013) (public body can establish application of exemption with particularized justification set forth in affidavit).¹ And as can be seen by reviewing the documents as they were provided to Plaintiff (they are attached as Exhibit B) the redactions are limited to exempt information leaving, in most cases, significant information available for the public to see the context of the communication without revealing advisory, not-purely-factual information. And as can be seen by the description of the redacted information provided by Nelson, it is of the nature that it would likely be chilled if it were subject to public disclosure.

Plaintiff’s claim is that, regardless whether these redactions are properly classified as frank communications, the public interest in viewing the redacted material cannot, as a matter of law, be outweighed by MSU’s interest in frank communication because the communications relate to how “MSU makes decisions about its high-level officials” and because the matter garnered public attention. (Compl. at ¶¶ 34-38.) This argument fails for two reasons.

¹ MSU will provide unredacted documents for the Court’s *in camera* review if the Court requests.

First, the Michigan Supreme Court has already rejected this argument. In *Harold Co. v. Eastern Michigan University*, several newspapers sought a memorandum drafted by Eastern Michigan University's chief financial officer to a board member concerning possible financial misconduct by the president of the university. *Herald Co.*, 475 Mich. 463, at 469. It was withheld pursuant to the frank communication exemption. *Id.* The news organizations argued that there was a strong public interest in potential official misconduct and the investigation of a high-level official. *Id.* at 478. The Supreme Court agreed that there was a public interest in the memorandum but upheld the application of the exemption because disclosure of the communication "would foster a fear among university officials that they could no longer communicate candidly about a sensitive topic without their written communications being disclosed to the public. This would create a chilling effect that would surely dry up future frank communications." *Id.* at 480. In reaching its holding, the Court rejected the argument that communications relating to high-ranking officials could not be exempt from disclosure holding that "were we to adopt such a rule, we would eviscerate the frank communication exemption. We doubt that officials within a public body would offer candid, written feedback, or that they would do so for very long, if that feedback would invariably find its way into the public sphere." *Id.* at 478-79.

So too here. As Plaintiff alleges, the Hsu Petitions garnered significant media coverage and public attention. In such circumstances, MSU always receives numerous FOIA requests from news organizations, advocacy groups, and others. If the frank advisory communications of MSU officials and employees cannot be protected from disclosure in these circumstances, they will, as the Supreme Court recognized, dry up. This would significantly hamper MSU's ability to function.

Second, Plaintiff's argument is based on a false assumption about what has been redacted. Plaintiff assumes that the redactions contain information that would contribute significantly to the public understanding of "how [] MSU makes decisions about its high-level officials." It would not. Only nine of the pages redacted pursuant to the frank communication exemption can fairly be said to relate to the Hsu Petitions. (Ex. A at ¶ 25; Ex. B at Pages 7, 9-16) The others relate to employees other than Hsu, grant funding, or predate the petitions entirely.

Of the nine, seven documents reflect advisory information relating to the public communications and inquiries MSU was receiving regarding the Hsu Petitions and the final two are a single unsolicited letter sent to the President from a faculty member who also held an administrative position in one of MSU's colleges providing not-purely factual information regarding Hsu. (Ex. B at 9-10.) As can be seen by reviewing the documents as they were disclosed to Plaintiff, all of the redactions in communications of senior MSU administrators are drafts public statements or lines in short emails. The disclosure of the redacted information would make public incomplete and contextless comments that are, at best, tangentially related to the Hsu petitions. They would not "contribute significantly to the public understanding of the operations of government." But the disclosure of these types of communications would undoubtedly cause public officials and employees to stop putting candid advice in writing, particularly in high-profile or controversial circumstances where frank communication is often needed the most. Under the particular circumstances here, MSU's interest in protecting the frank communications of its employees and administrators clearly outweighs the public interest in the disclosure of those communications.

2. MSU properly redacted MSU email addresses under MCL 15.243(1)(u), (y), and (z).

Plaintiff objects to MSU's redaction of the email addresses of MSU employees. (Compl. at ¶¶ 40-49.) It is difficult to understand why. To the extent the senders or recipients are MSU officials or administrators, their names have been left unredacted, (Ex. A at ¶ 29), so it is not clear what legitimate purpose would be served by the public disclosure of employee contact information. In any event, the redaction of this information is appropriate under MCL 15.243(1)(u), (y), and (z).

MCL 15.243(1)(u) exempts from disclosure "Records of a public body's security measures, including security plans, security codes and combinations, passwords, passes, keys, and security procedures, to the extent that the records relate to the ongoing security of the public body."

MCL 15.243(1)(y) exempts from disclosure "Records or information of measures designed to protect the security or safety of persons or property, or the confidentiality, integrity, or availability of information systems . . . unless disclosure would not impair a public body's ability to protect the security or safety of persons or property or unless the public interest in disclosure outweighs the public interest in nondisclosure in the particular instance."

MCL 15.243(1)(z) exempts from disclosure "Information that would identify or provide a means of identifying a person that may, as a result of disclosure of the information, become a victim of a cybersecurity incident or that would disclose a person's cybersecurity plans or cybersecurity-related practices, procedures, methods, results, organizational information system infrastructure, hardware, or software."

As set forth in the affidavit of MSU Chief Information Security Officer Tom Siu, MSU maintains its own information systems and technology resources which can be accessed through

the public internet. (Ex. I at ¶ 3.) This puts MSU at risk of cyber-attack. (*Id.*) Two key attack methods include attempts to access IT services through compromised accounts and malicious email messages sent to MSU email accounts. (*Id.* at ¶¶ 4, 5.) MSU email addresses also serve as the userIDs MSU community members use to access certain IT functions. (*Id.* at ¶ 6.) For these reasons, it is a core practice of MSU’s operational security to restrict its email address directory to MSU users. (*Id.* at ¶ 7.) While MSU users may choose to disclose their email addresses, eliminating unnecessary dissemination of MSU emails addresses reduces the risk of cyber-attack. (*Id.* at ¶ 8.)

For these reasons, the redaction of MSU email addresses serves the security purposes identified in MCL 15.243(1)(u), (y), and (z) and would not serve the public interest in any way if disclosed. They are properly exempt.

3. MSU properly redacted non-MSU email addresses and names under MCL 15.243(1)(a).

Plaintiff objects to the redaction of the names and email address of individuals who sent unsolicited emails to the President of MSU concerning Hsu. MSU has provided Plaintiff with the content of those emails and redacted the identities of the senders. (Ex. A at ¶¶ 26-29.)

MCL 15.243(1)(a) permits exemption of “information of a personal nature if public disclosure of the information would constitute a clearly unwarranted invasion of an individual’s privacy.” The Court must apply a two-prong test to determine whether the privacy exemption applies. *Michigan Fed'n of Tchrs. & Sch. Related Pers., AFT, AFL-CIO v. Univ. of Michigan*, 481 Mich. 657, 675-76 (2008). First, it must determine whether the information sought is of an “embarrassing, intimate, private, or confidential nature.” *Id.* Second, it must determine whether the disclosure of the information sought would reveal information that would “contribute

significantly to the public understanding of the operations or activities of the government.” *Id.* at 673, 82.

Michigan Courts have held that personal contact information is “private” information that can be exempt from disclosure. *Id.* at 679. Similarly, the Michigan Supreme Court has held that the identities of individuals can be private and exempt from disclosure where the disclosure could reveal something controversial about the individual or subject the individual to harm. In *Mager v. State, Dep’t of State Police*, for example, Michigan Supreme Court held that the names of individuals who had registered for gun ownership could be exempt under the privacy exemption because gun ownership is controversial and subject to strong partisan views, and disclosure could potentially allow those on the list to be targeted for gun theft or other harm. 460 Mich. 134, 142-44 (1999).

The facts here lead to the same result. As Plaintiff acknowledges, the Hsu petitions were a controversial subject over which individuals held strong partisan views. Moreover, at the time of MSU’s disclosure, MSU was aware of several threats against students or other members of the MSU community arising from their perceived involvement in the petitions. (Ex. A at ¶ 28.) These included threats of retaliation and at least one death threat that was referred for criminal investigation. (*Id.*) In other words, there is a real threat of harm to the individuals Plaintiff is seeking to identify. It follows that the names and emails of these senders are private and satisfy the first prong of the test.

Under the second prong, the Court must evaluate whether the disclosure of the names and addresses would “contribute significantly to the public understanding of the operations or activities of the government.” *Michigan Fed’n of Tchrs.*, at 673, 82. It would not. The only possible contribution to the public understanding of the operation of government that these

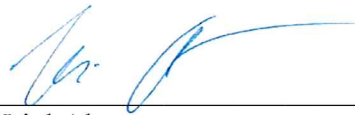
emails provide is to show that MSU's President received a large volume of diverse, unsolicited opinions regarding Hsu. This has already been achieved by providing the content of the emails. Disclosing the names and emails addresses of the senders would contribute nothing additional to the public understanding of the operations of government but could subject the senders to harm. The privacy exemption was therefore properly applied.

CONCLUSION

For the foregoing reasons, MSU requests that judgment be entered in its favor, that the complaint be dismissed in its entirety with prejudice, and for all other relief proper under the circumstances.

Respectfully submitted,

Dated: November 12, 2021



Uriel Abt
Attorney for Defendant

PROOF OF SERVICE

I certify that a copy of this document was served upon plaintiff's counsel of record by electronic mail in compliance with MCR 2.107(C)(4), on November 12, 2021.



Robin Stechschulte

EXHIBIT A

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**STATE OF MICHIGAN
IN THE COURT OF CLAIMS**

Mackinac Center for Public Policy,

Plaintiff,

v.

Michigan State University,

Defendant.

Case No. 21-00011-MZ

Hon. Elizabeth L. Gleicher

AFFIDAVIT OF REBECCA NELSON

1. I make this affidavit based on my personal knowledge. I am competent to testify under oath to the facts stated in this affidavit if called upon to do so.

2. I am currently the Director of Michigan State University's Freedom of Information Act (FOIA) Office. In that capacity, I oversee the intake of FOIA requests and the preparation of FOIA responses, including the collection, review, and, where necessary, the redaction and withholding, of requested documents. I have held my current position since 2018.

A. MSU's FOIA Office

3. In 2018, MSU received 1162 FOIA requests. In 2019, MSU received 866 FOIA requests. In 2020, MSU received 681 FOIA requests.

4. MSU maintains a dedicated office for the purpose of responding to FOIA requests.

5. Until the beginning of 2020, the FOIA consisted of me and three assistant FOIA Officers who collect documents, review them, and prepare them for disclosures.

6. In early 2020, one of the assistant FOIA officers retired. I expect to fill that position but have not done so yet due to the pandemic.

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7. Typically, when a FOIA request is received, the FOIA office immediately contacts the department or individuals likely to have responsive documents for the purpose of collecting those documents.

8. If the production is going to require significant time to prepare, the requestor is sent a fee deposit notice in accordance with MCL 15.234(8).

9. Once both the documents and the fee deposit are received, an assistant FOIA officer will review the collected documents and separating duplicates and non-responsive documents. Once the responsive, non-duplicative documents are identified, they are reviewed in hard copy for the purpose of identifying and redacting or separating information that is exempt from disclosure under FOIA.

10. After these initial reviews, I will conduct a quality control review to ensure FOIA compliance after which the documents are disclosed.

11. When a fee deposit notice is issued, the requesting party is provided an estimated timeframe for disclosure based on the number of documents being reviewed.

12. In 2020, with the exception of the disclosure at issue in this case, the FOIA office met all of its time estimates.

13. In March 2020, due to the pandemic, the FOIA office employees, including myself, were directed to work from home.

14. Throughout the pandemic, I have come into the office once to two times a week to collect hard copy documents for review and would distribute them to the assistant FOIA officers.

15. The FOIA office continued to provide initial five and ten-day FOIA response with the statutory timeframes throughout the pandemic.

B. Plaintiff's FOIA request

16. I am familiar with the FOIA request made by Mackinac Institute for Public Policy on or about June 26, 2020 ("Mackinac Request"). MSU produce 592 documents in response to this request.

17. Immediately after receiving the Mackinac Request, in accordance with our standard practice, the FOIA office contact the Office of the President to collect responsive documents.

18. I was informed by the Office the President that it estimated "at least 150 pages" of responsive documents. I used this estimate in calculating the estimated fee and timeframe disclosure provided to Plaintiff on July 7, 2020. Plaintiff paid the deposit on July 20, 2020.

19. On or about July 26, 2020, I received the documents collected by the Office of the President. There were over 1000 pages of potentially responsive documents, including duplicates.

20. Given the unexpected volume, I began the initial review and separation of non-responsive and duplicative documents myself rather than delegate it to an assistant FOIA officer to expedite the process. After this initial review, there 620 pages of non-duplicative, responsive documents to be reviewed for purposes of redacting or separating exempt information.

21. On August 31, 2020, I informed Plaintiff that the volume of documents was significantly more than originally estimated, provided a revised fee and timeframe estimate, and gave Plaintiff the option of obtaining what had been reviewed under the prior estimate or paying the additional deposit for the review of the additional documents. Plaintiff paid the additional deposit on September 9, 2020.

22. In early October 2020, a serious health issue arose in my household. This significantly impacted the amount of time I was able to devote to professional responsibilities and ultimately required me to prioritize initial FOIA responses, which have statutorily set five- and ten-day timelines, and delegate work to assistant FOIA officers, including the review of the documents responsive to the Mackinac Request.

23. On or about early November, 2020, I transferred the review of Plaintiff's documents to assistant FOIA officer Susan Green. Green completed the review and I conducted a quality control review. Plaintiff was provided periodic updates on the status of the review in November and December. The documents were disclosed on December 23, 2020.

24. MSU refunded Plaintiff the processing fees as a courtesy due to the unexpected delay in the production.

C. Frank Communications Exemptions

25. MSU redacted information on 20 pages of the 592 pages provided to Plaintiff pursuant to MCL 15.243(1)(m) (the "Frank Communications Exemption"). No documents were withheld pursuant to the Frank Communications Exemption. Exhibit B accurately reflects the pages containing Frank Communications Exemption redactions. The information redacted pursuant to the Frank Communications Exemptions on these pages is as follows:¹

- Pages 1-5 (8-9, 11-12, 13): not-purely-factual information of a preliminary and advisory nature provided by the administrative leaders of an MSU unit to Samuel Stanley, the President of MSU, and by Douglas Gage, the then-Interim Senior Vice President of Research and Innovation to Stanley, regarding institutional grant support for that unit.

¹ Set forth in parathesis are the pdf page numbers of MSU's December 23, 2020, production to Plaintiff that correspond to the pages in Exhibit B. They are provided for Plaintiff's convenience in coordinating these pages with the documents already in its possession.

- Page 6 (29): not-purely-factual information of a preliminary and advisory nature provided by MSU administrative staff to Stanley regarding the recommended salary for the Interim Senior Vice President of Research and Innovation position.
- Page 7 (169): draft public statements regarding Stephen Hsu's resignation as Senior Vice President of Research and Innovation provided by Emily Guerrant, Vice President and University Spokesperson, to Stanley and MSU's Vice President of Legal Affairs and General Counsel Brian Quinn, for review and approval.
- Page 8 (177): not-purely-factual information of a preliminary and advisory nature provided by Melanie Jacobs, then acting-Dean of the MSU College of Law, to Stanley regarding a faculty member other than Hsu.
- Page 9-10 (199-200): not-purely-factual information of a preliminary and advisory nature provided by Eric Torng, Associate Dean of the Graduate School in the College of Engineering and Associate Chair for Research and Faculty Development for the Department of Computer Science and Engineering, to Stanley regarding Hsu.
- Page 11 (302): draft public statements provided by then-Senior Vice President of Research and Innovation Hsu to President Stanley and Vice President and University Spokesperson Guerrant, for review and approval.
- Page 12 (315): not-purely-factual information of a preliminary and advisory nature provided by MSU Trustee Renee Knake to President Stanley regarding communications received by MSU's Trustees regarding Hsu.
- Page 13 (382): not-purely-factual information of a preliminary and advisory nature provided by MSU Trustee Brian Mosallam to President Stanley regarding communications received by MSU's Trustees regarding Hsu.

- Page 14 (463): not-purely-factual information of a preliminary and advisory nature provided by Special Assistant to the MSU Board of Trustees Jacqueline Vanderbosch to Vice President and University Spokesperson Guerrant regarding communications received by MSU's Trustees regarding Hsu.
- Pages 15-16 (572-73): not-purely factual information of a preliminary and advisory nature set forth in an email chain between President Stanley and Vice President and University Spokesperson Guerrant regarding media inquiries regarding Hsu.
- Page 17 (577): not-purely-factual information of a preliminary and advisory nature provided by MSU's Senior Vice President for Government Relations Kathleen Wilbur to President Stanley and then Senior Vice President for Research and Innovation Hsu regarding an executive order.
- Page 18 (579): not-purely factual information of a preliminary and advisory nature provided by then-Senior Associate Vice President of Research and Innovation, Paul Hunt, to President Stanley and then-Senior Vice President of Research and Innovation Hsu regarding MSU's agreement to a memorandum of understanding.
- Pages 19-20 (581-82) not-purely-factual information of a preliminary and advisory nature provided by the administrative leaders of an MSU unit to then-Provost, Teresa Sullivan, and copying President Stanley, regarding institutional grant support for that unit.

D. Privacy Exemption

26. I am familiar with the petitions circulated regarding Stephen Hsu in or about June 2020 (the "Hsu Petitions").

27. Many individuals, including MSU students, faculty, alumni, and the public at large, sent unsolicited emails to the President of MSU regarding the Hsu Petitions. These emails constitute much of the production at issue here.

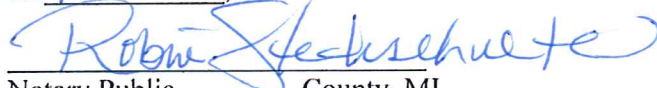
28. In my role as Director and Freedom of Information Act Officer, I am aware that several MSU community members received threats as a result of their involvement in the Hsu Petitions, including threats of retaliation and at least one death threat against a student that was forwarded to the MSU Police Department for investigation.

29. As a result of these threats, the FOIA Office redacted the identities and contact information of individuals who sent unsolicited opinions or information regarding Hsu or the Hsu Petitions to President Stanley in the FOIA Response. The FOIA Office did not redact the identities of MSU officials or administrators whose job duties could include providing or addressing such opinions or information.



Rebecca Nelson

Subscribed and sworn to before me
on Nov. 11, 2021



Notary Public, _____ County, MI

My Commission Expires: _____

ROBIN STECHSCHULTE
NOTARY PUBLIC - STATE OF MICHIGAN
COUNTY OF SHIAWASSEE
My Commission Expires August 28, 2027
Acting in the County of Ingham

EXHIBIT B

RECEIVED by MCOA 5/2/2023 4:53:08 PM

From: Gage, Douglas
Sent: Friday, June 26, 2020 10:55 AM
To: Stanley, Samuel
Subject: RE: Action needed on MSU commitment to NSF re: The BEACON Center

Yes, I can do that.

From: Stanley, Samuel [REDACTED]
Sent: Friday, June 26, 2020 10:51 AM
To: Gage, Douglas [REDACTED]
Subject: Re: Action needed on MSU commitment to NSF re: The BEACON Center

Ok, thank you. Do we have the number of indirect cost dollars from the grants generated by the center (that are not part of its direct funding)? Can give me those data when we meet. Sam.

From: "Gage, Douglas" [REDACTED]
Date: Friday, June 26, 2020 at 10:45 AM
To: "Stanley, Samuel" [REDACTED]
Subject: RE: Action needed on MSU commitment to NSF re: The BEACON Center

Hi Sam,

I am familiar with this issue. [REDACTED]
[REDACTED] The BEACON folks interpret this to mean grants already funded and Steve's interpretation was that this referred to new post-BEACON grants. The letter [REDACTED] We can discuss this in more detail at our Monday meeting.

Thanks,

Doug

From: Stanley, Samuel [REDACTED]
Sent: Friday, June 26, 2020 10:38 AM
To: Gage, Douglas [REDACTED]
Subject: FW: Action needed on MSU commitment to NSF re: The BEACON Center

Let's talk about this. Sam.

From: "Samuel L. Stanley Jr., M.D., President" [REDACTED]
Date: Friday, June 26, 2020 at 10:23 AM
To: "Stanley, Samuel" [REDACTED] "Gage, Douglas" [REDACTED]
Subject: FW: Action needed on MSU commitment to NSF re: The BEACON Center

From: Charles Ofria [REDACTED]
Sent: Tuesday, June 23, 2020 2:00 PM

To: Samuel L. Stanley Jr., M.D., President [REDACTED]
Cc: Lenski, Richard [REDACTED] Goodman, Erik [REDACTED] Holecamp, Kay
[REDACTED] Pennock, Robert [REDACTED]
Subject: Action needed on MSU commitment to NSF re: The BEACON Center

Dear President Stanley,

We write with regard to an impasse we have reached with VP Hsu, now further complicated by his resignation and the university's deepening financial crisis. Dr. Hsu committed to the NSF (and to us) that MSU would continue funding the BEACON Center for the Study of Evolution in Action when its NSF Science & Technology Center grant concluded. Specifically, he pledged nearly \$1 million per year for at least two years to sustain and transition BEACON research after the 10 years and nearly \$50 million of NSF funding. This past November, Hsu assured us that the funding was still on track. However, in January he disclosed that he had never arranged a cost distribution with the relevant colleges or Provost's office, and [REDACTED] to a federal agency on behalf of, and with the authority of, MSU. Now, as BEACON approaches its transition to an MSU Center at the end of July, Hsu has refused to release most of the research funds, and he has pushed the colleges to provide most of the much smaller funds for staff support.

The committed funds are essential to support BEACON graduate students and postdocs, all of whom are engaged in interdisciplinary research and education. Moreover, these projects are targeted to yield new external funding. In Hsu's commitment (attached), \$224K/yr was earmarked for basic staffing and our (reduced) core operations. The remaining \$750K/yr was to support this research, and the amount was based on a projected \$7.5 million in additional BEACON-related external funding in 2018-20 (beyond the NDSF Center support), a goal that we have exceeded. BEACON faculty have made plans with these funds in mind. After months of fruitless discussion with Hsu and the relevant colleges, we remain in limbo, unable to confirm positions for our students and postdocs for this coming academic year.

This agreement with the VP Hsu was originally negotiated by Erik Goodman, BEACON's Director at the time of our Center's renewal application to the NSF in 2014. Hsu's letter of commitment was provided as critical evidence of MSU's support to assure BEACON's sustainability after NSF funding ended. Moreover, Hsu reiterated that commitment in person during several BEACON site visits by NSF since 2015, and to Charles Ofria (BEACON's current director) in a November 2019 meeting. Hsu made this commitment to the dozens of BEACON-affiliated MSU faculty and to the NSF in his official capacity as VPRI on behalf of the university. Therefore, MSU cannot and must not ignore this agreement, as if it never existed.

We must also emphasize that VP Hsu [REDACTED] before the onset of COVID-19. We realize that the pandemic has put new financial burdens on MSU, and that all units have to share in budgetary reductions, so we have no objection to receiving a correspondingly reduced share of that commitment. However, we object most strongly and forcefully to MSU either ignoring this agreement or acting as though it was meaningless.

We have not gone to the NSF with a formal complaint, and we would prefer not to be forced to do so by MSU's refusal to honor its agreement with our NSF-funded Center. However, we have tried to resolve this issue with VP Hsu for several months, without success. Even before the new public controversy about Hsu's fitness for his office, it seemed that [REDACTED] Now that he has been removed, we are concerned about starting over with the new, interim VP of Research.

We request that you intervene immediately on behalf of the University to fulfill this agreement and avoid the potential embarrassment over the misrepresentation of university commitments to a federal agency.

Sincerely,

Dr. Charles Ofria
PI and Director of the BEACON Center for the Study of Evolution in Action
President, International Society for Artificial Life
Department of Computer Science & Engineering

Dr. Richard Lenski
Co-PI of the BEACON Center for the Study of Evolution in Action
John Hannah Distinguished Professor
Department of Microbiology & Molecular Genetics
Department of Plant, Soil & Microbial Sciences

**MICHIGAN STATE
UNIVERSITY**

June 23, 2020

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**Center for the Study of
Evolution in Action**

**An NSF Science and
Technology Center**

Michigan State University
Biomedical Physical Sciences
Building
967 Wilson Road Room 1441
East Lansing, MI
48824

517-284-2888
Fax: 517-353-7268

<http://beacon-center.org>

*MSU is an affirmative action,
equal opportunity employer.*

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MSU0003
A0157

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We request that you intervene immediately on behalf of the University to fulfill this agreement and avoid the potential embarrassment over the misrepresentation of university commitments to a federal agency.

Sincerely,

[REDACTED]

Dr. Charles Ofria
PI and Director of the BEACON Center for the Study of Evolution in Action
President, International Society for Artificial Life
Department of Computer Science & Engineering.

Dr. Richard Lenski
Co-PI of the BEACON Center for the Study of Evolution in Action
John Hannah Distinguished Professor
Department of Microbiology & Molecular Genetics
Department of Plant, Soil & Microbial Sciences
Department of Integrative Biology

Dr. Erik Goodman
Co-PI and Founding Director of the BEACON Center for the Study of Evolution in Action
Department of Electrical and Computer Engineering

Dr. Kay Holekamp
Co-PI of the BEACON Center for the Study of Evolution in Action
University Distinguished Professor
Director, Graduate Program for Ecology, Evolutionary Biology, and Behavior
Department of Integrative Biology

Dr. Robert Pennock
Co-PI of the BEACON Center for the Study of Evolution in Action
University Distinguished Professor
Lyman Briggs College
Department of Philosophy
Department of Computer Science & Engineering

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**MICHIGAN STATE
UNIVERSITY**

MEMORANDUM

To: Prof. Erik Goodman, Director, BEACON Center for the Study of Evolution in Action
From: Stephen D. Hsu, Vice President for Research and Graduate Studies [REDACTED]
Re: BEACON STC Renewal Proposal
Date: May 20, 2014

Michigan State University strongly supports the renewal of the BEACON Center for the Study of Evolution in Action. During its first four years, BEACON has demonstrated exemplary value to the university and to the fields of evolutionary biology and evolutionary applications. So long as BEACON is renewed, the university will provide substantial resources to meet its needs for space, student support, faculty hires, flexible funding, and to sustain it beyond the period of NSF support.

First, in recognition of BEACON's surpassing its expected growth in membership, productivity, and leveraging of resources, the university is exploring the possibility of [REDACTED]



Office of the
**VICE PRESIDENT
FOR RESEARCH
AND GRADUATE
STUDIES**

Stephen Hsu
Vice President

Harnish Administration Bldg.
426 Auditorium Rd., Rm 249
East Lansing, MI 48824

517/335-0306
Fax: 517/432-1171

vp@msu.edu

Second, in addition to senior faculty already recruited to the Colleges of Natural Science and Engineering at BEACON's request, the university will target junior faculty lines and additional senior lines in these and other colleges to strengthen BEACON. Furthermore, Michigan State University will provide \$2,575,000 in cash cost-share direct costs through contributions from the Office of the Provost, Office of the Vice President for Research and Graduate Studies, Dean of the Graduate School, and the participating colleges and departments. These funds will be used to support fellowships, research assistants, postdoctoral researchers, sabbatical visitors, and BEACON staff during the transition to sustainability mode.

Michigan State University intends to support BEACON beyond its 10-year STC funding. Beginning in 2020, MSU will sustain BEACON's staffing and core operations with \$224,000/year for at least two years, and an additional \$750,000/year to seed fund research projects. This latter amount, based on projected BEACON-related funding of \$7.5 million in 2019-20, will scale commensurate with BEACON's performance in externally funded research at MSU in the post-STC period. Both commitments are extendable to at least 2025 so long as BEACON's external funding continues at a level near \$10 million/year. The seed funds can be used to support the MSU portion of new seed research projects undertaken jointly with the partner universities.

All of BEACON's partners have also submitted letters to Michigan State University indicating their continuing support of BEACON for five more years, including a sizeable new commitment at University of Texas Austin. Continuing cooperation with the partners will be encouraged after 2020. Some partners are already installing mechanisms to facilitate the formation of new joint seed projects in addition to continuing work on research areas already established during BEACON's STC funding.

Michigan State University is firmly committed to BEACON's continuing success.

From: Goll, Amanda
Sent: Tuesday, June 23, 2020 11:13 AM
To: Stanley, Samuel
Cc: Goodwin, Mami; Nelson, Jesselyn; Zeig, Michael
Subject: Gage interim salary
Attachments: CORE Salaries - updated 6-22-20.xlsx; SVPRI Big Ten-AAU Salary comps FY19.jpg

Sam,

Below and attached are salary comps for the SVP for Research and Innovation position. The Big Ten and AAU salary data is a year old because we're still in FY20. We don't receive updated numbers until August.

Gage (Assistant VP)

Current Salary = \$220,000 without EM paycut

Current Salary = \$214,000 after EM paycut

Hsu (Senior VP)

Current Salary = \$378,134 without EM paycut

Current Salary = \$363,009 after EM paycut

We recommend an interim salary of [REDACTED] before the executive management base paycut.

Thanks,
Amanda

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[REDACTED]

[REDACTED] DRAFT, 2020

[REDACTED]

[REDACTED]

[REDACTED]

RECEIVED by MCOA 5/2/2023 4:53:08 PM

From: Jacobs, Melanie
Sent: Thursday, June 18, 2020 9:09 AM
To: Stanley, Samuel; Jeitschko, Thomas
Cc: Russell, Paulette
Subject: FW: Stephen Hsu controversy

Good morning, Sam and Thomas.

[REDACTED]

I've copied Paulette because she has kindly been advising me on the matter. I think [REDACTED] but [REDACTED] I thought it important you have this additional information.

Best,

Melanie

Melanie B. Jacobs
Interim Dean
Professor of Law
Michigan State University College of Law
517-432-6993
[REDACTED]

From: [REDACTED]
Sent: Wednesday, June 17, 2020 9:29 PM
To: Samuel L. Stanley Jr., M.D., President <[REDACTED]>
Cc: Jeitschko, Thomas <[REDACTED]>; Jacobs, Melanie <[REDACTED]>
Subject: Stephen Hsu controversy

Dear President Stanley,

My name is [REDACTED] I have not had the pleasure of meeting you. I'm [REDACTED] but have just started [REDACTED]

RECEIVED by MCOA 5/2/2023 4:53:08 PM

**MICHIGAN STATE
UNIVERSITY**

June 17, 2020

Office of the President
Michigan State University
426 Auditorium Road
Hannah Administration Building, Room 450
East Lansing, MI 48824-1046

Dear President Stanley,

I am writing to express my thoughts regarding the suitability of Dr. Stephen Hsu to continue in his role as MSU's Senior Vice President for Research and Innovation. It is

Dr. Hsu



[Redacted]

The fundamental issues underlying this controversy are the following:

1. What are the core values of MSU, particularly with respect to diversity, equity, and inclusion?
2. What are the expectations of leaders at MSU to embody these values?
3. How should leaders at MSU engage with those who disagree with them and respond when they make mistakes?

1. Paraphrasing your powerful messaging from the past few weeks, one of the core values at MSU is building a safe, welcoming, and inclusive environment that respects people of all backgrounds and experiences. Going further, we must acknowledge that racism and systemic bias exist in society at large as well as within higher education including MSU itself, and MSU must not only address these issues internally but also should be a leader in the national and international fight against racism and systemic bias.

2. With respect to expectations of leaders at MSU such as the Senior Vice President for Research and Innovation, these leaders must adhere to a higher standard of conduct beyond those of regular faculty and staff because their actions reflect not only their own personal beliefs and values but those of MSU as well. Specifically, Dr. Hsu not only has broad authority and oversight for the entire research enterprise at MSU but also is its de facto representative. In this leadership role, he should be an exemplar of MSU's fight against racism and systemic bias.

[Redacted]

**THE GRADUATE
SCHOOL**

Eric Tomg
Associate Dean

Michigan State University
230H Chittenden Hall
East Lansing, Michigan
48824-1226

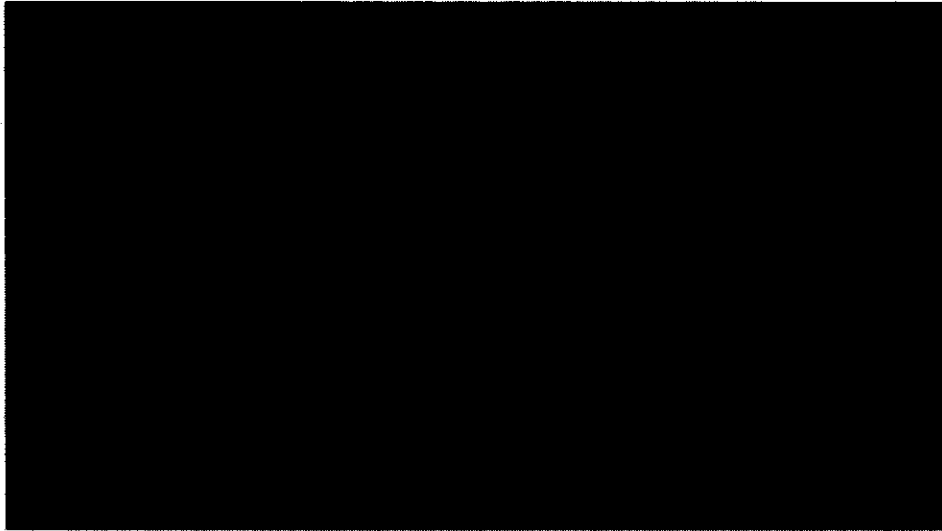
**COLLEGE OF
ENGINEERING**

Department of
Computer Science
and Engineering

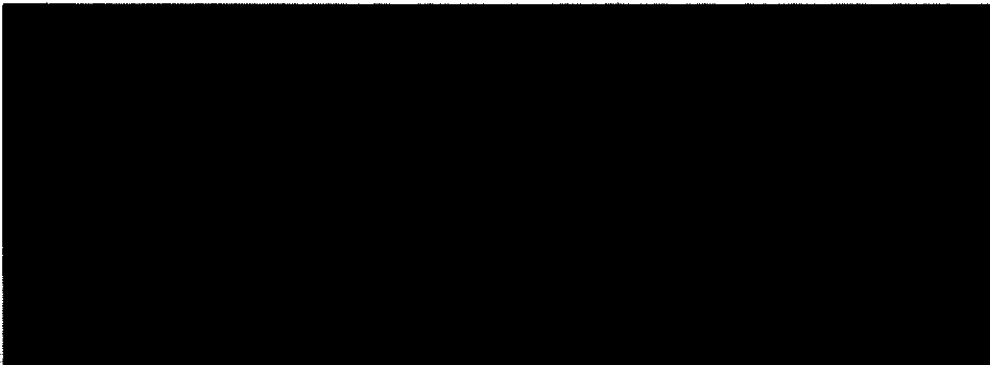
Eric Tomg
Associate Professor
and Associate Chair
for Research and
Faculty Development

Michigan State University
3115 Engineering Building
East Lansing, Michigan
48824-1226

(517) 353-8543
FAX: (517) 432-1061



3. The most effective leaders are ones that can engage with those who disagree with them in a professional manner trying to understand the issues and concerns that others might have, and, if necessary, own up to any mistakes they may have made.



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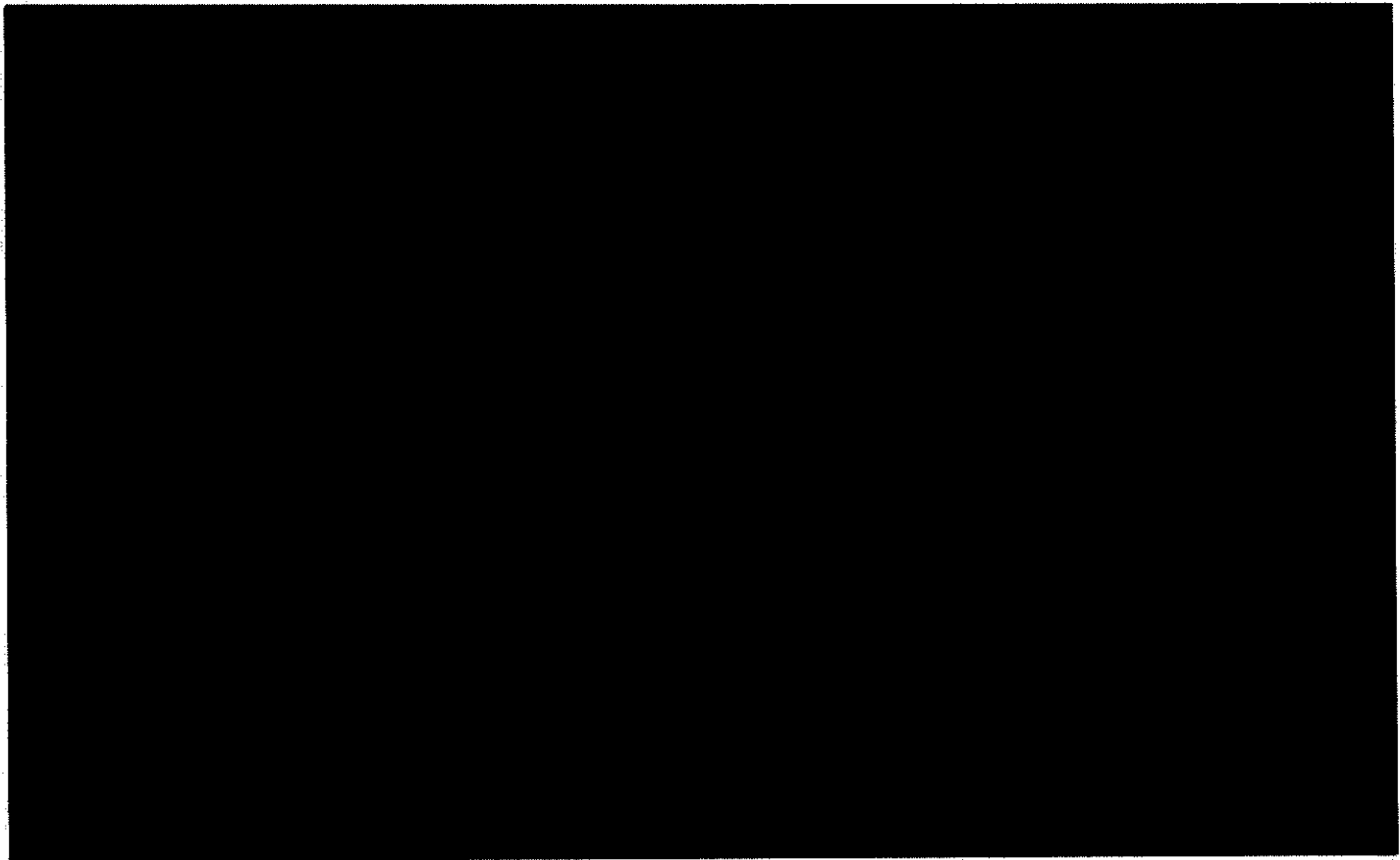
From: Stephen Hsu [REDACTED]
Sent: Tuesday, June 16, 2020 9:47 AM
To: Guerrant, Emily; Stanley, Samuel
Cc: Zeig, Michael; Woo, Melissa; Sullivan, Teresa
Subject: correction to LSJ article

Hi Emily and Sam,

I would like to send this important correction to the LSJ regarding their article of 6/15. But I wanted to check with you before sending it – perhaps it would be [REDACTED]

Steve

#####



Senior Vice President for Research and Innovation
Professor of Theoretical Physics
Michigan State University

Appointments: [REDACTED]

RECEIVED by MCOA 5/2/2023 4:53:08 PM

From: Zeig, Michael
Sent: Tuesday, June 16, 2020 7:46 AM
To: Stanley, Samuel
Subject: RE: Stephen Hsu concerns

Free right now or looks like after morning meeting works too.

From: Stanley, Samuel [REDACTED]
Sent: Tuesday, June 16, 2020 2:59 AM
To: Zeig, Michael [REDACTED]
Subject: Fwd: Stephen Hsu concerns

Let's discuss today. Sam

Sent from my iPhone

Begin forwarded message:

From: "Kriake, Renee" [REDACTED]
Date: June 15, 2020 at 12:42:05 AM EDT
To: "Stanley, Samuel" [REDACTED]
Cc: "Byrum, Dianne" [REDACTED]; "Foster, Melanie" [REDACTED]; "Mosallam, Brian" [REDACTED]; "Kelly, Dan" [REDACTED]; "Scott, Brianna" [REDACTED]; "Ferguson, Joel" [REDACTED]; "Tebay, Kelly" [REDACTED]; "Barr, Nakia" [REDACTED]; "Quinn, Brian" [REDACTED]
Subject: Fw: Stephen Hsu concerns

Dear President Stanley,

The information contained in the email below, along with that from another [REDACTED] who wrote to us this evening, includes additional content that [REDACTED] I think [REDACTED]

Best,
Renee

Renee Kriake
Trustee, Michigan State University

From: [REDACTED]
Sent: Monday, June 15, 2020 8:28 PM
To: Samuel L. Stanley Jr., M.D., President [REDACTED]; Byrum, Dianne [REDACTED]; Foster, Melanie [REDACTED]; Kriake, Renee [REDACTED]; Scott, [REDACTED]

RECEIVED by MCOA 5/2/2023 4:53:08 PM

From: Mosallam, Brian
Sent: Tuesday, June 16, 2020 5:03 AM
To: Knake, Renee
CC: Stanley, Samuel; Byrum, Dianne; Foster, Melanie; Kelly, Dan; Scott, Brianna; Ferguson, Joel; Tebay, Kelly; Barr, Nakia; Quinn, Brian
Subject: Re: Stephen Hsu concerns

Good morning,
[REDACTED]

Brian Mosallam
Trustee
Michigan State University

On Jun 16, 2020, at 12:42 AM, Knake, Renee [REDACTED] wrote:

Dear President Stanley,

The information contained in the email below, along with that from [REDACTED] who wrote to us this evening, includes additional content that [REDACTED]

[REDACTED] think [REDACTED]

Best,
Renee

Renee Knake
Trustee, Michigan State University

From: [REDACTED]
Sent: Monday, June 15, 2020 8:28 PM
To: Samuel L. Stanley Jr., M.D., President [REDACTED]; Byrum, Dianne [REDACTED]; Foster, Melanie [REDACTED]; Knake, Renee [REDACTED]; Scott, Brianna [REDACTED]; Ferguson, Joel [REDACTED]; Kelly, Dan [REDACTED]; Mosallam, Brian [REDACTED]; Tebay, Kelly [REDACTED]; Barr, Nakia [REDACTED]; Chesney, Meredith [REDACTED]
Subject: Stephen Hsu concerns

Hi everyone,

I am an [REDACTED] at MSU and I am writing to you because of my concerns of having Stephen Hsu working in this university. If someone who thinks that a person of color, or a woman is less intelligent, I am pretty sure that is called racism and sexism. If you have not seen what the Graduate

From: Guerrant, Emily
Sent: Monday, June 15, 2020 12:52 PM
To: Stanley, Samuel
Subject: Fwd: Remove Steve Hsu Immediately
Attachments: Hsu and leadership

Get Outlook for IOS

From: Board Of Trustees <trustees@msu.edu>
Sent: Monday, June 15, 2020 11:54 AM
To: Guerrant, Emily
Cc: Vandebosch, Jacqueline
Subject: FW: Remove Steve Hsu Immediately

Hi Emily,

[REDACTED]

Thanks.
Jackie

From: [REDACTED]
Sent: Friday, June 12, 2020 3:13 PM
To: Board Of Trustees <trustees@msu.edu>
Subject: Remove Steve Hsu Immediately

Dear MSU Board of Trustees,

My name is [REDACTED] and I am [REDACTED] here at MSU. I have recently become aware of a very damaging individual named Steve (or Steven) Hsu who was appointed to the position of Senior Vice President for Research and Graduate studies by the board of trustees. Mr. Hsu is a proponent of racially and sexually derived differences in test scores, human intellect, and brain morphology, all of which are epithets of historic scientific racism and sexism that any first-year STEM student is educated about here at MSU. He is also a proponent of "intellect" based eugenics based on testing and supposed genetic traits. None of these views are supported by the scientific community and are, in fact, largely condemned as antiquated, racist conclusions based on misinterpretations of scientific data and poor methodologies.

If you doubt my claims above, please see the *numerous* resources provided by MSU's Graduate Employee Union via this twitter link which cites his public studies, interviews, and blog posts: <https://twitter.com/GradEmpUnion/status/1270829003130261504>. What is the larger scientific community to think of the status of MSU's research when the man largely in charge of its oversight and funding has [REDACTED]

[REDACTED] Finally, please also see the open letter to Michigan State University which has been signed by 272

From: Stanley, Samuel
Sent: Thursday, June 11, 2020 1:55 PM
To: Guerrant, Emily
Subject: Re: [REDACTED]

[REDACTED]

[Get Outlook for iOS](#)

From: Guerrant, Emily <[REDACTED]>
Sent: Thursday, June 11, 2020 1:53:56 PM
To: Stanley, Samuel <[REDACTED]>
Subject: RE: [REDACTED]

No, [REDACTED]

[REDACTED]

From: Stanley, Samuel <[REDACTED]>
Sent: Thursday, June 11, 2020 1:42 PM
To: Guerrant, Emily <emilyg@msu.edu>
Subject: Re: [REDACTED]

[REDACTED]

Sent from my iPhone

On Jun 11, 2020, at 1:33 PM, Guerrant, Emily <[REDACTED]> wrote:

I have two media inquiries today on the GEU tweets and calls for his removal. The social media chatter is continuing on this topic and growing since last night.

[REDACTED] but we never had any media outreach and [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

RECEIVED by MCOA 5/2/2023 4:53:08 PM



<image001.png>

Emily Gerkin Guerrant

Vice President and University Spokesperson

408 West Circle Dr., Room 401B | East Lansing, MI 48824

Office: 517.355.3843 | Cell: [REDACTED]

Email: [REDACTED]

<image002.png>

RECEIVED by MCOA 5/2/2023 4:53:08 PM

From: Wilbur, Kathleen
Sent: Friday, May 15, 2020 7:29 PM
To: Stanley, Samuel
Cc: Hsu, Stephen; Guerrant, Emily; Quinn, Brian
Subject: [REDACTED]

[REDACTED]

Sent from my iPhone

RECEIVED by MCOA 5/2/2023 4:53:08 PM

From: Hunt, Paul
Sent: Tuesday, May 5, 2020 4:04 PM
To: Stanley, Samuel; Hsu, Stephen
Cc: Bauer, Wolfgang; Kempel, Leo; Kriser, Lynn; Quinn, Brian; Udpa, Satish; VanAntwerp Shaw, Melanie; Verboncoeur, John
Subject: Confidential / Review of [REDACTED] Project & MoU

President Stanley & Senior Vice President Hsu,

Attached, please find an enhanced version of an MoU draft between Michigan State University and [REDACTED]

[http://www.\[REDACTED\].com](http://www.[REDACTED].com),

The MoU envisions a proposed pilot project to [REDACTED] as suggested by [REDACTED] and the leadership of the MSU College of Engineering. The revised MoU has been reviewed by [REDACTED] leadership, and is acceptable to them. The enhanced MoU has also been reviewed by Ms. Lynn Kriser, Esq. and Ms. Melanie VanAntwerp Shaw, Esq., in the Office of the General Counsel, and reflects their comments as well as my own. (The principal enhancements to the MoU may be found in the final three bullet points in Section II, plus the penultimate bullet point in Section III.)

[REDACTED] Within the Export Controls & Trade Sanctions (ECTS) Office, Ms. Jamie Haberichter, Esq., has checked Lexis-Nexus and other databases, and she reports having found no litigation involving the firm. Additionally, Mr. Rhett Butler of ECTS has checked the names of [REDACTED] officers in Federal restricted parties screening databases, and he too reports having found no matches.

[REDACTED] Please do not hesitate to contact me if you desire additional information.

Sincerely,

MSU0018
A0172

RECEIVED by MCOA 5/2/2023 4:53:08 PM

From: Charles Ofria [REDACTED]
Sent: Wednesday, March 4, 2020 10:26 AM
To: Office of the Provost, MSU; Sullivan, Teresa
Cc: Lenski, Richard; Goodman, Erik; Pennock, Robert; Holekamp, Kay; Samuel L. Stanley Jr., M.D., President
Subject: Funding concern / disagreement with VP Hsu
Attachments: Signed Commitment from VP Hsu- Memorandum 5_20_14BEACON STC Renewal Proposal scanned2014_05_28_14_18_57.pdf; BEACON-Related funding - March 2020.xlsx; Year11FundingRequestSolicitation.pdf

Provost Sullivan,

I am the director and lead PI of the BEACON Center for the Study of Evolution in Action (a \$48 million NSF STC). The co-PI's on this project are CC'd, as is President Stanley.

I provide more information below, but the basic issue is that VP Hsu is [REDACTED] regarding promised internal funding to BEACON that he made as an MSU commitment to the NSF. We would like to speak with you about this matter. I am concerned that these actions [REDACTED] among the 68 MSU faculty that are active participants in BEACON. Moreover, I am worried about [REDACTED]

Here are the details:

We are currently in year ten of the BEACON project and are supposed to shift over to internal MSU funding as of this summer. During the renewal of BEACON five years ago, a major component was the sustainability of the Center post-NSF funding. To support this effort, VP Hsu wrote an MSU commitment letter that I've attached. Now that it is time for MSU to provide the funding, Dr. Hsu [REDACTED]

Here is the relevant paragraph from the commitment letter:

Beginning in 2020, MSU will sustain BEACON's staffing and core operations with \$224,000/year for at least two years, and an additional \$750,000/year to seed fund research projects. This latter amount, based on projected BEACON-related funding of \$7.5 million in 2019-20, will scale commensurate with BEACON's performance in externally funded research at MSU in the post-STC period. Both commitments are extendable to at least 2025 so long as BEACON's external funding continues at a level near \$10 million/year.

BEACON has helped generate over \$32 million in currently-active funding at MSU (over \$9 million/year - spreadsheet attached), plus an addition \$12.7 million in gifts or bequests to support the center. Dr. Hsu claims that none of this funding should count; he wants to only count money that starts after BEACON ends, and thus claims we have \$0 in BEACON-related funding at this time. This position is [REDACTED] including what was presented to the NSF, both verbally and in writing. Deans Kempel and Duxbury have tried to argue on our behalf, and seem to [REDACTED]

I am especially frustrated because I had a meeting with Dr Hsu on November 26, 2019 to ensure that everything was going fine with the internal support, see if he had any specific requests for how the money was given out, and make sure that I could make commitments to staff and put out the call for internal funding requests. He assured me everything was fine and said that we'd have a better idea on how to most effectively give out the money to continue to promote

successful grant activity. At that point we assembled and sent out the call for proposals (which have since been submitted and we are supposed to soon provide funding results). I've also attached that call.

On December 9th, Dr. Hsu's office asked us how the internal funding commitment was supposed to be split up between parties. We were never privy to such information and assumed his office had taken care of such details before signing the commitment letter to the NSF. We didn't hear anything else over the holidays, but then on January 22nd the VP's office requested a meeting to talk about the BEACON commitment. Since he wanted Deans Kempel and Duxbury at this meeting it took a while to schedule and we finally had it last week (Feb 26th). It was only the day before the meeting that I was finally able to even get an agenda about the topics and found out that Dr. Hsu was trying to cut our funding so substantially.

When the meeting time arose, I came with two of my co-PIs (Drs. Richard Lenski and Kay Holekamp) and was told that the VP wanted to speak with me and the deans privately. I insisted that they stay and was glad that I did, since the meeting was basically VP Hsu [REDACTED] a substantially reduced amount of funding. He also insisted that the conversation he had with Erik Goodman (the BEACON director at the time of the renewal) fully reflected his view on the process and that since I wasn't there I couldn't argue otherwise. At the time I pushed back that I was at the meeting where this agreement was presented to the NSF, which DID reflect our view on the matter. When I finally did talk with Dr. Goodman after the meeting he very clearly confirmed that the first two years of funding were supposed to be at \$750k of research funds per year (plus \$224k for operating costs), with any adjustments occurring after that based on BEACON-related research productivity.

This issue has become [REDACTED] As I've talked with others in the BEACON leadership about the current situation, several people [REDACTED]

[REDACTED] I've convinced everyone to hold off until we talk with you, but funding decisions need to be made for our internal BEACON awards on March 24th, so we're pressed up against a deadline. [REDACTED]

In any case, we would very much appreciate being able to have a meeting with you in the near future to figure out the best way to proceed. We need your assistance in getting this commitment honored as soon as possible.

Thank you,

Dr. Charles Ofria
Professor of Computer Science & Engineering
President, International Society for Artificial Life
Director, BEACON Center for the Study of Evolution in Action
Michigan State University
<http://www.cse.msu.edu/~ofria/> (517 884-2562)

EXHIBIT C

RECEIVED by MCOA 5/2/2023 4:53:08 PM

FOIA

From: Skorup, Jarrett <Skorup@mackinac.org>
Sent: Friday, June 26, 2020 2:50 PM
To: FOIA
Subject: FOIA - Stephen Hsu

FOIA: Michigan State University

June 26, 2020

FOIA REQUEST FOR EMAILS ABOUT STEPHEN HSU

To Whom It May Concern:

Pursuant to the Michigan compiled Laws Section 15.231 et seq., and any other relevant statutes or provisions of your agency's regulations I am making the following Freedom of Information Act request.

- Any emails to or from the president of Michigan State University that mention "Hsu" from Feb. 1, 2020 to June 26, 2020.

Please send the materials requested to the attention of Jarrett Skorup at the following address, fax number, or via e-mail at skorup@mackinac.org<<mailto:skorup@mackinac.org>>.

Mackinac Center for Public Policy
P.O. Box 568
Midland, MI 48640
Fax: 989-631-0964
Phone: 989-631-0900
Jarrett Skorup
Mackinac Center

Jarrett Skorup
Director of Marketing and Communications
Mackinac Center for Public Policy
www.mackinac.org
989-631-0900

RECEIVED by MCOA 5/2/2023 4:53:08 PM

EXHIBIT D

RECEIVED by MCOA 5/2/2023 4:53:08 PM

FOIA

From: FOIA
Sent: Tuesday, July 7, 2020 12:34 PM
To: skorup@mackinac.org
Subject: Your FOIA Request to MSU
Attachments: FOIA fee and deposit notice skorup MSUF035320.pdf

Michigan State University
Freedom of Information Act Office
408 W. Circle Drive
Room 1, Olds Hall
East Lansing, MI 48824
517-353-3929/telephone
517-353-1794/fax
foia@msu.edu

RECEIVED by MCOA 5/2/2023 4:53:08 PM

FOIA

From: FOIA
Sent: Tuesday, July 7, 2020 12:38 PM
To: Goll, Amanda; Guerrant, Emily; Kindraka, Melody; Olsen, Daniel; Zeig, Michael
Cc: Nelson, Rebecca
Subject: FYI FOIA Fee & Deposit Notice -- MSUF035320/SKORUP Mackinac Center for Public Policy
Attachments: FOIA fee and deposit notice skorup MSUF035320.pdf; FOIA request skorup MSUF035320.pdf

The attached FOIA fee and deposit notice was sent to the requester today via email.

Michigan State University
Freedom of Information Act Office
408 W. Circle Drive
Room 1, Olds Hall
East Lansing, MI 48824
517-353-3929/telephone
517-353-1794/fax
foia@msu.edu

RECEIVED by MCOA 5/2/2023 4:53:08 PM

MICHIGAN STATE
UNIVERSITY

DATE: July 7, 2020

TO: Jarrett Skorup
Director of Marketing and Communications
Mackinac Center for Public Policy
skorup@mackinac.org

FROM: Rebecca Nelson, Director and Freedom of Information Act (FOIA) Officer
Michigan State University FOIA Office *Rebecca Nelson*

SUBJECT: FOIA Fee and Deposit Notice

This is written with regard to the FOIA request that you emailed to this Office on June 26, 2020.

The processing of your request thus far has involved significant labor. We estimate that searching for, gathering, and reviewing records responsive to your request to determine if information exempt from public disclosure under the Michigan Freedom of Information Act (MIFOIA), must be separated from that which is not exempt, will require upwards of six (6) hours, incurring fees likely to exceed \$230.00. Fees will not be waived since failure to charge same would result in unreasonably high costs to the University. An itemization of this estimate accompanies this letter. This serves as an approximation only, and does not guarantee or limit the final, total fees which may be incurred and assessed. Therefore, pursuant to Section 4(2) of the MIFOIA, we require that you remit a deposit prior to our further processing your request. Should you remit the required deposit, we anticipate responding to your request on or before six (6) weeks from the date the deposit is received.

If you wish to pursue the processing of your request, and pay the fees incurred, please send a check made payable to "Michigan State University" in the amount of \$115.00 to the Freedom of Information Act Office, 408 West Circle Drive, Room 1 Olds Hall, or notify us in writing if you wish to modify or withdraw your request. The University will not process your request until a deposit is received by our Office. Moreover, Section 4(14) of the MIFOIA requires that the deposit be received no later than Monday, August 24, 2020, or your request will be considered abandoned, and processing of it no longer required. Should you have any questions regarding fees, please contact us. Pursuant to Section 4(4) of the MIFOIA, the University's procedures and guidelines for processing MIFOIA requests can be found at <http://foia.msu.edu>.

Attachment
MSUF035320



**FREEDOM OF
INFORMATION ACT
OFFICE**

**Michigan State
University**

408 West Circle Drive
Room 1 Olds Hall
East Lansing, MI 48824
517-353-3929
Fax: 517-353-1794
foia@msu.edu
<http://foia.msu.edu>

RECEIVED by MCOA 5/2/2023 4:53:08 PM

MSU FOIA FEE ESTIMATE ITEMIZATION FORM -- July 7, 2020 -- Skorup FOIA Request MSUF035320

Category of Costs/Description	Hourly Wage	Benefits % Multiplier Used	Hourly Wage with Benefits	Estimated Time (Hours)	Amount
4 (1) (a) Searching for, locating and examining responsive records <i>[Shall not charge more than the hourly wage of lowest-paid employee capable of searching for, locating and examining the public records in the particular instance regardless of whether that person is available or who actually performs the labor; labor costs shall be estimated and charged in increments of 15 minutes or more, with all partial time increments rounded down.]</i>	\$28.95	40%	\$40.53	3	\$121.59
4 (1) (b) Review directly associated with the separating and deleting of exempt from nonexempt information <i>[For services performed by an employee of the public body, the public body shall not charge more than the hourly wage of its lowest-paid employee capable of separating and deleting exempt information from nonexempt information in the particular instance as provided in section 14, regardless of whether that person is available or who actually performs the labor. If a public body does not employ a person capable of separating and deleting exempt information from nonexempt information as determined by the public body's FOIA coordinator, it may treat necessary contracted labor costs used for the separating and deleting of exempt information from nonexempt information in the same manner as employee labor costs if it clearly notes the name of the contracted person or firm on this itemization. Total labor costs calculated under this subdivision for contracted labor costs shall not exceed an amount equal to 6 times the state minimum hourly wage rate. Labor costs under this subdivision shall be estimated and charged in increments of 15 minutes or more, with all partial time increments rounded down.]</i>	\$21.29	40%	\$29.81	3.75	\$111.79
4 (1) (c) Nonpaper physical media costs <i>[The actual and most reasonably economical cost of the computer discs, computer tapes, or other digital or similar media. The requestor may stipulate that public records be provided on nonpaper physical media, electronically mailed, or otherwise electronically provided in lieu of paper copies. This subdivision does not apply if public body lacks the technological capability necessary to provide records on the particular nonpaper physical media stipulated in the particular instance.]</i>					
4 (1) (d) Cost of paper copies <i>[Actual total incremental cost of necessary duplication or publication, not including labor. The cost of paper copies shall be calculated as a total cost per sheet of paper, itemized to show both cost per sheet and number of sheets provided. The fee shall not exceed 10 cents per sheet of paper for copies of public records made on 8-1/2- by 11-inch paper or 8-1/2- by 14-inch paper. A public body shall utilize the most economical means available, including double-sided printing, if cost saving and available.]</i>					
4 (1) (e) Duplication or publication, including making paper copies, making digital copies, or transferring digital public records to be given to the requestor on nonpaper physical media or through the internet or other electronic means as stipulated by the requestor <i>[Shall not charge more than the hourly wage of lowest-paid employee capable of necessary duplication or publication in the particular instance, regardless of whether that person is available or who actually performs the labor.; labor costs under this subdivision shall be estimated and charged in time increments of the public body's choosing, with all partial time increments rounded down.]</i>					
4 (1) (f) Cost of mailing <i>[Actual cost of mailing, for sending the public records in a reasonably economical and justifiable manner; shall not charge more for expedited shipping or insurance unless stipulated by requestor, but may charge for the least expensive form of postal delivery confirmation when mailing public records.]</i>					
ESTIMATE TOTAL					\$233.38
FEE DEPOSIT REQUIRED					\$115.00

When calculating labor costs under (1) (a), (b) or (e), fee components shall be itemized in a manner that expresses both the hourly wage and the number of hours charged. The public body may also add up to 50% to the applicable labor charge amount to cover or partially cover the cost of fringe benefits if it clearly notes the percentage multiplier used. Subject to the 50% limitation, the public body shall not charge more than the actual cost of fringe benefits, and overtime wages shall not be used in calculating the cost of fringe benefits. Overtime wages shall not be included in the calculation of labor costs unless overtime is specifically stipulated by the requestor and clearly noted in this detailed itemization.

RECEIVED by MCOA 5/2/2023 4:53:08 PM

EXHIBIT E

RECEIVED by MCOA 5/2/2023 4:53:08 PM

FOIA

From: FOIA
Sent: Monday, August 31, 2020 7:58 PM
To: skorup@mackinac.org
Subject: Your FOIA Request to MSU
Attachments: FOIA fee and deposit notice skorup MSUF035320 follow-up.pdf

Michigan State University
Freedom of Information Act Office
408 W. Circle Drive
Room 1, Olds Hall
East Lansing, MI 48824
517-353-3929/telephone
517-353-1794/fax
foia@msu.edu

RECEIVED by MCOA 5/2/2023 4:53:08 PM

FOIA

From: FOIA
Sent: Monday, August 31, 2020 8:04 PM
To: Guerrant, Emily; Kindraka, Melody; Olsen, Daniel; Zeig, Michael
Cc: Nelson, Rebecca
Subject: FYI FOIA Fee & Deposit Notice Follow-up -- MSUF035320/SKORUP Mackinac Center for Public Policy
Attachments: FOIA fee and deposit notice skorup MSUF035320 follow-up.pdf; FOIA request skorup MSUF035320.pdf

The attached FOIA fee and deposit notice follow-up was sent to the requester today via email.

Michigan State University
Freedom of Information Act Office
408 W. Circle Drive
Room 1, Olds Hall
East Lansing, MI 48824
517-353-3929/telephone
517-353-1794/fax
foia@msu.edu

RECEIVED by MCOA 5/2/2023 4:53:08 PM

MICHIGAN STATE
UNIVERSITY

DATE: August 31, 2020

TO: Jarrett Skorup
Director of Marketing and Communications
Mackinac Center for Public Policy
skorup@mackinac.org

FROM: Rebecca Nelson, Director and Freedom of Information Act (FOIA) Officer
Michigan State University FOIA Office

Rebecca Nelson

SUBJECT: FOIA Fee and Deposit Notice Follow-up -- Record Volume Update

On June 26, 2020, you emailed a FOIA request to this Office for "Any emails to or from the president of Michigan State University that mention 'Hsu' from Feb. 1, 2020 to June 26, 2020." On July 20th, in response to our July 7th \$230.00 fee estimate, this Office received a \$115.00 fee deposit for the processing of your request.

The searching for and gathering of records responsive to your request has concluded, and the volume of those records is significantly greater than estimated. Record review to separate information exempt from public disclosure under the Michigan Freedom of Information Act (MIFOIA), from that which is not exempt, has begun. The foregoing processing has reached the initial six hour estimate, and hundreds of pages of emails have yet to be reviewed. Given that fees incurred have reached the initial \$230.00 estimate, we write to ask if you wish to proceed with the processing of your request, or halt the processing and receive only the records reviewed thus far. If you wish to halt the processing of your request, please advise us in writing, and we will finalize the records reviewed to date, and send them to you along with an invoice billing you for the balance of fees owed.

If, instead, you wish to pursue the processing of all of the remaining records you seek, the following estimate is provided. Completing the processing of your request will involve significant labor; we estimate upwards of eleven (11) hours will be required, incurring fees likely to exceed \$350.00; this is in addition to the initial \$230.00 fee estimate, and the fees incurred to date. In completing the processing of your request, fees will not be waived since failure to charge same would result in unreasonably high costs to the University. An itemization of this estimate accompanies this letter. This serves as an approximation only, and does not guarantee or limit the final, total fees which may be incurred and assessed. Therefore, pursuant to Section 4(2) of the MIFOIA, we require that you remit an additional deposit prior to our completing the processing of your request. Should you remit the required deposit, we anticipate responding on or before eight weeks (8) from the date the deposit is received.

If you wish to pursue the processing of all records responsive to your request, and pay the fees incurred, please send a check made payable to "Michigan State University" in the amount of \$175.00 to the Freedom of Information Act Office, 408 West Circle Drive, Room 1 Olds Hall. The University will not complete the processing of the remaining records you seek until a deposit is received by our Office. Moreover, Section 4(14) of the MIFOIA requires that the deposit be received no later than Monday, October 19, 2020, or your request pertaining to the remaining records will be considered abandoned, and processing of it no longer required. Should you have any questions regarding fees, please contact us. Pursuant to Section 4(4) of the MIFOIA, the University's procedures and guidelines for processing MIFOIA requests can be found at <http://foia.msu.edu>.

Attachment
MSUF035320



**FREEDOM OF
INFORMATION ACT
OFFICE**

**Michigan State
University**

408 West Circle Drive
Room 1 Olds Hall
East Lansing, MI 48824
517-353-3929
Fax: 517-353-1794
foia@msu.edu
<http://foia.msu.edu>

RECEIVED by MCOA 5/2/2023 4:53:08 PM

MSU FOIA FEE ESTIMATE ITEMIZATION FORM -- August 31, 2020 -- Skorup FOIA Request MSUF035320 -- follow-up; additional fee estimate

Category of Costs/Description	Hourly Wage	Benefits % Multiplier Used	Hourly Wage with Benefits	Estimated Time (Hours)	Amount
4 (1) (a) Searching for, locating and examining responsive records <i>[Shall not charge more than the hourly wage of lowest-paid employee capable of searching for, locating and examining the public records in the particular instance regardless of whether that person is available or who actually performs the labor; labor costs shall be estimated and charged in increments of 15 minutes or more, with all partial time increments rounded down.]</i>					
4 (1) (b) Review directly associated with the separating and deleting of exempt from nonexempt information <i>[For services performed by an employee of the public body, the public body shall not charge more than the hourly wage of its lowest-paid employee capable of separating and deleting exempt information from nonexempt information in the particular instance as provided in section 14, regardless of whether that person is available or who actually performs the labor. If a public body does not employ a person capable of separating and deleting exempt information from nonexempt information as determined by the public body's FOIA coordinator, it may treat necessary contracted labor costs used for the separating and deleting of exempt information from nonexempt information in the same manner as employee labor costs if it clearly notes the name of the contracted person or firm on this itemization. Total labor costs calculated under this subdivision for contracted labor costs shall not exceed an amount equal to 6 times the state minimum hourly wage rate. Labor costs under this subdivision shall be estimated and charged in increments of 15 minutes or more, with all partial time increments rounded down.]</i>	\$21.29	40%	\$29.81	11.75	\$350.27
4 (1) (c) Nonpaper physical media costs <i>[The actual and most reasonably economical cost of the computer discs, computer tapes, or other digital or similar media. The requestor may stipulate that public records be provided on nonpaper physical media, electronically mailed, or otherwise electronically provided in lieu of paper copies. This subdivision does not apply if public body lacks the technological capability necessary to provide records on the particular nonpaper physical media stipulated in the particular instance.]</i>					
4 (1) (d) Cost of paper copies <i>[Actual total incremental cost of necessary duplication or publication, not including labor. The cost of paper copies shall be calculated as a total cost per sheet of paper, itemized to show both cost per sheet and number of sheets provided. The fee shall not exceed 10 cents per sheet of paper for copies of public records made on 8-1/2- by 11-inch paper or 8-1/2- by 14-inch paper. A public body shall utilize the most economical means available, including double-sided printing, if cost saving and available.]</i>					
4 (1) (e) Duplication or publication, including making paper copies, making digital copies, or transferring digital public records to be given to the requestor on nonpaper physical media or through the internet or other electronic means as stipulated by the requestor <i>[Shall not charge more than the hourly wage of lowest-paid employee capable of necessary duplication or publication in the particular instance, regardless of whether that person is available or who actually performs the labor.; labor costs under this subdivision shall be estimated and charged in time increments of the public body's choosing, with all partial time increments rounded down.]</i>					
4 (1) (f) Cost of mailing <i>[Actual cost of mailing, for sending the public records in a reasonably economical and justifiable manner; shall not charge more for expedited shipping or insurance unless stipulated by requestor, but may charge for the least expensive form of postal delivery confirmation when mailing public records.]</i>					
ESTIMATE TOTAL					\$350.27
REQUIRED					\$175.00
<p><i>When calculating labor costs under (1) (a), (b) or (e), fee components shall be itemized in a manner that expresses both the hourly wage and the number of hours charged. The public body may also add up to 50% to the applicable labor charge amount to cover or partially cover the cost of fringe benefits if it clearly notes the percentage multiplier used. Subject to the 50% limitation, the public body shall not charge more than the actual cost of fringe benefits, and overtime wages shall not be used in calculating the cost of fringe benefits. Overtime wages shall not be included in the calculation of labor costs unless overtime is specifically stipulated by the requestor and clearly noted in this detailed itemization.</i></p>					

RECEIVED by MCOA 5/2/2023 4:53:08 PM

EXHIBIT F

RECEIVED by MCOA 5/2/2023 4:53:08 PM

FOIA

From: FOIA
Sent: Wednesday, November 4, 2020 6:22 PM
To: skorup@mackinac.org
Subject: Your FOIA Request to MSU
Attachments: FOIA response skorup MSUF035320.pdf

Michigan State University
Freedom of Information Act Office
408 W. Circle Drive
Room 1, Olds Hall
East Lansing, MI 48824
517-353-3929/telephone
517-353-1794/fax
foia@msu.edu

RECEIVED by MCOA 5/2/2023 4:53:08 PM

FOIA

From: FOIA
Sent: Wednesday, November 4, 2020 6:25 PM
To: Zeig, Michael
Cc: Nelson, Rebecca
Subject: FYI FOIA Response -- MSUF035320/SKORUP Mackinac Center for Public Policy
Attachments: FOIA response skorup MSUF035320.pdf; FOIA request skorup MSUF035320.pdf

The attached FOIA response was sent to the requester today via email.

Michigan State University
Freedom of Information Act Office
408 W. Circle Drive
Room 1, Olds Hall
East Lansing, MI 48824
517-353-3929/telephone
517-353-1794/fax
foia@msu.edu

RECEIVED by MCOA 5/2/2023 4:53:08 PM

MICHIGAN STATE
UNIVERSITY

DATE: November 4, 2020

TO: Jarrett Skorup
Director of Marketing and Communications
Mackinac Center for Public Policy
skorup@mackinac.org

FROM: Rebecca Nelson, Director and Freedom of Information Act (FOIA) Officer
Michigan State University FOIA Office *Rebecca Nelson*

SUBJECT: FOIA Response

This is written in response to the FOIA request that you emailed to this Office on June 26, 2020, and for the processing of which this Office received fee deposits on July 20, 2020, and September 9, 2020.

Your request is granted with regard to information that is not exempt from public disclosure under the Michigan Freedom of Information Act (MIFOIA). That said, given the University's current alternate working arrangements, necessitated by extraordinary community health concerns, record processing times are extending beyond typically anticipated dates. Nevertheless, please be assured that we are working diligently to process your request as quickly as possible, and expect to send to you records or another update on or before Friday, December 4, 2020. We apologize for any inconvenience this unavoidable delay may cause.

The MIFOIA provides that when a public body denies all or a portion of a request, the requester may do one of the following: (1) submit an appeal of the determination to the head of the public body; or (2) commence a civil action in the court of claims to compel the public body's disclosure of the records. If you wish to seek judicial review of any denial, you must do so within 180 days of the date of this letter. If the court of claims orders disclosure of all or a portion of the public record(s) to which you have been denied access, you may receive attorneys' fees and, in certain circumstances, damages under the MIFOIA. Should you choose to file an appeal with the University regarding this response to your request, you must submit a written communication to this Office expressly stating that it is an "appeal" of this response. In your appeal, please state what records you believe should have been disclosed to you. You must also state the reasons you believe any denial of your MIFOIA request should be reversed. This Office will arrange for the processing and review of your appeal. Pursuant to Section 4(4) of the MIFOIA, the University's procedures and guidelines for processing MIFOIA requests can be found at <http://foia.msu.edu>.

MSUF035320



**FREEDOM OF
INFORMATION ACT
OFFICE**

**Michigan State
University**

408 West Circle Drive
Room 1 Olds Hall
East Lansing, MI 48824
517-353-3929
Fax: 517-353-1794
foia@msu.edu
<http://foia.msu.edu>

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EXHIBIT G

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FOIA

From: FOIA
Sent: Friday, December 4, 2020 11:52 AM
To: skorup@mackinac.org
Subject: Your FOIA Request to MSU
Attachments: FOIA response skorup MSUF035320 status notice.pdf

Michigan State University
Freedom of Information Act Office
408 W. Circle Drive
Room 1, Olds Hall
East Lansing, MI 48824
517-353-3929/telephone
517-353-1794/fax
foia@msu.edu

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FOIA

From: FOIA
Sent: Friday, December 4, 2020 11:53 AM
To: Guerrant, Emily; Kindraka, Melody; Olsen, Daniel; Zeig, Michael
Cc: Nelson, Rebecca
Subject: FYI FOIA Response -- MSUF035320/SKORUP Mackinac Center for Public Policy
Attachments: FOIA response skorup MSUF035320 status notice.pdf; FOIA request skorup MSUF035320.pdf

The attached FOIA response was sent to the requester today via email.

Michigan State University
Freedom of Information Act Office
408 W. Circle Drive
Room 1, Olds Hall
East Lansing, MI 48824
517-353-3929/telephone
517-353-1794/fax
foia@msu.edu

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MICHIGAN STATE
UNIVERSITY

DATE: December 4, 2020

TO: Jarrett Skorup
Director of Marketing and Communications
Mackinac Center for Public Policy
skorup@mackinac.org

FROM: Rebecca Nelson, Director and Freedom of Information Act (FOIA) Officer
Michigan State University FOIA Office *Rebecca Nelson*

SUBJECT: FOIA Response Status Notice

This is written as follow-up to our November 4, 2020, response to the FOIA request that you emailed to this Office on June 26, 2020, and for the processing of which this Office received fee deposits on July 20, 2020, and September 9, 2020.

As we previously advised, your request is granted with regard to information that is not exempt from public disclosure under the Michigan Freedom of Information Act (MIFOIA). Please know that we continue to process records responsive to your request as expeditiously as possible. Nevertheless, given the University's current alternate working arrangements, necessitated by extraordinary community health concerns, record processing times are extending beyond typically anticipated dates. At this time, we expect to send to you records or another update on or before Wednesday, December 23, 2020. We apologize for any inconvenience this unavoidably extended response time may cause; fees assessed will be adjusted in consideration of the delay.

The MIFOIA provides that when a public body denies all or a portion of a request, the requester may do one of the following: (1) submit an appeal of the determination to the head of the public body; or (2) commence a civil action in the court of claims to compel the public body's disclosure of the records. If you wish to seek judicial review of any denial, you must do so within 180 days of the date of this letter. If the court of claims orders disclosure of all or a portion of the public record(s) to which you have been denied access, you may receive attorneys' fees and, in certain circumstances, damages under the MIFOIA. Should you choose to file an appeal with the University regarding this response to your request, you must submit a written communication to this Office expressly stating that it is an "appeal" of this response. In your appeal, please state what records you believe should have been disclosed to you. You must also state the reasons you believe any denial of your MIFOIA request should be reversed. This Office will arrange for the processing and review of your appeal. Pursuant to Section 4(4) of the MIFOIA, the University's procedures and guidelines for processing MIFOIA requests can be found at <http://foia.msu.edu>.

MSUF035320



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University**

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foia@msu.edu
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EXHIBIT H

RECEIVED by MCOA 5/2/2023 4:53:08 PM

FOIA

From: FOIA
Sent: Wednesday, December 23, 2020 2:10 PM
To: skorup@mackinac.org
Subject: Your FOIA Request to MSU
Attachments: FOIA response skorup MSUF035320.pdf

Michigan State University
Freedom of Information Act Office
408 W. Circle Drive
Room 1, Olds Hall
East Lansing, MI 48824
517-353-3929/telephone
517-353-1794/fax
foia@msu.edu

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FOIA

From: FOIA
Sent: Wednesday, December 23, 2020 2:13 PM
To: Abt, Uriel; Guerrant, Emily; Kindraka, Melody; Olsen, Daniel; Zeig, Michael
Cc: Nelson, Rebecca; Kittel, Jacquelynn
Subject: FYI FOIA Response -- MSUF035320/SKORUP Mackinac Center for Public Policy
Attachments: FOIA response skorup MSUF035320.pdf; FOIA request skorup MSUF035320.pdf

The attached FOIA response was sent to the requester today via email.

Michigan State University
Freedom of Information Act Office
408 W. Circle Drive
Room 1, Olds Hall
East Lansing, MI 48824
517-353-3929/telephone
517-353-1794/fax
foia@msu.edu

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MICHIGAN STATE
UNIVERSITY

DATE: December 23, 2020

TO: Jarrett Skorup
Director of Marketing and Communications
Mackinac Center for Public Policy
skorup@mackinac.org

FROM: Rebecca Nelson, Director and Freedom of Information Act (FOIA) Officer
Michigan State University FOIA Office *Rebecca Nelson*

SUBJECT: FOIA Response

On June 26, 2020, you emailed to this Office your expansive FOIA request for "Any emails to or from the president of Michigan State University that mention 'Hsu' from Feb. 1, 2020 to June 26, 2020." On July 7th, we sent to you a notice advising that significant labor would be involved in processing your request, and that a fee deposit would be required to proceed. On July 20th, this Office received your fee deposit. On August 31st, we sent to you a letter advising that records identified as responsive to your request were significantly greater in volume than originally anticipated; that significantly greater labor would be involved in processing those records; that an additional fee deposit would be required to proceed; and that we anticipated responding on or before eight weeks from the date the additional deposit was received. That response date was estimated in compliance with Section 4(8) of the Michigan Freedom of Information Act (MIFOIA), which provides that "The response must also contain a best efforts estimate by the public body regarding the time frame it will take the public body to comply with the law in providing the public records to the requestor. The time frame estimate is nonbinding upon the public body, but the public body shall provide the estimate in good faith and strive to be reasonably accurate and to provide the public records in a manner based on this state's public policy under section 1 and the nature of the request in the particular instance."

On September 9th, this Office received your additional fee deposit. On November 4th, eight weeks from the date we received your additional deposit, we wrote to you that while your request was granted to the extent information is not exempt from public disclosure, processing times were extending beyond typically anticipated dates due to current alternate working arrangements necessitated by extraordinary community health concerns. We also advised that we expected to respond to you with records on or before December 4th. On December 4th, we wrote to you that we were continuing to process your request as expeditiously as possible; that for the same reasons stated in our November 4th letter, additional time was required; that we expected to respond to you with records on or before December 23rd; and that in consideration of the unavoidable inconvenience the delay was causing, a fee adjustment would be made. Accordingly, we write to you the following response.



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Records responsive to your request accompany this letter. Identifying information pertaining to certain individuals, personal email addresses, personal cellular telephone numbers, and certain other personal data have been redacted, and five (5) pages of personal information have been withheld pursuant to one or both of Sections 13(1)(a) and 13(2) of the MIFOIA. Section 13(1)(a) provides for the withholding of "Information of a personal nature if public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy." Section 13(2) requires the withholding of information that, if released, would prevent the public body from complying with 20 U.S.C. 1232g, the Family Educational Rights and Privacy Act (FERPA). Nine (9) pages consisting of personal information pertaining to a student have been withheld under one or more of Sections 13(1)(a), (b)(iii), and 13(2). Section 13(1)(b) provides for the withholding of "Investigating records compiled for law enforcement purposes, but only to the extent that disclosure as a public record would do any of the following...(iii) Constitute an unwarranted invasion of personal privacy." University signatures, email addresses, netIDs, and a telephone number have been redacted under one or more of Sections 13(1)(u), (y), and (z), which allow for the withholding of information related to the ongoing security of a public body. Certain other information has been redacted under one or more of Sections 13(1)(g), (h), and (m). Sections 13(1)(g) and (h) provide for the withholding of information or records subject to the attorney-client privilege and attorney work-product doctrine, respectively. Section 13(1)(m) provides for the withholding of "Communications and notes within a public body or between public bodies of an advisory nature to the extent that they cover other than purely factual materials and are preliminary to a final agency determination of policy or action." Lastly, nine (9) pages have been withheld under Sections 13(1)(g) and/or (h).

The MIFOIA provides that when a public body denies all or a portion of a request, the requester may do one of the following: (1) submit an appeal of the determination to the head of the public body; or (2) commence a civil action in the court of claims to compel the public body's disclosure of the records. If you wish to seek judicial review of any denial, you must do so within 180 days of the date of this letter. If the court of claims orders disclosure of all or a portion of the public record(s) to which you have been denied access, you may receive attorneys' fees and, in certain circumstances, damages under the MIFOIA. Should you choose to file an appeal with the University regarding this response to your request, you must submit a written communication to this Office expressly stating that it is an "appeal" of this response. In your appeal, please state what records you believe should have been disclosed to you. You must also state the reasons you believe any denial of your MIFOIA request should be reversed. This Office will arrange for the processing and review of your appeal.

In processing your request, a significant amount of labor was required to search for, gather, and review the responsive records to separate information exempt from disclosure from that which is not exempt. Nevertheless, in consideration of the previously noted unavoidable delay in providing the attached records to you, fees for processing your request are hereby waived. Your fee deposit checks will be returned to you via U.S. first class mail. Pursuant to Section 4(4) of the MIFOIA, the University's procedures and guidelines for processing MIFOIA requests can be found at <http://foia.msu.edu>.

Attachments
MSUF035320

EXHIBIT I

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**STATE OF MICHIGAN
IN THE COURT OF CLAIMS**

Mackinac Center for Public Policy,

Case No. 21-00011-MZ

Plaintiff,

Hon. Elizabeth L. Gleicher

v.

Michigan State University,

Defendant.

AFFIDAVIT OF TOM SIU

1. I make this affidavit based on my personal knowledge. I am competent to testify under oath to the facts stated in this affidavit if called upon to do so.

2. I am currently the Chief Information Security Officer for Michigan State University. In that capacity, I am responsible for MSU's university-wide information security strategy and oversee MSU's Security Engineering, Security Operations, Incident Response, and Governance, Risk and Compliance teams with MSU's Information Security department.

3. MSU owns and operates information systems and information technology resources that accessible through the public internet. This puts MSU at risk of cyber-attack through the public internet.

4. Two key attack methods include attempts to access IT services through compromised accounts, and by malicious email messages sent to MSU email accounts.

5. MSU has observed pre-ransomware attacks using the initial vector of a "targeted email" campaign.

6. MSU email addresses also serve as the userIDs MSU community members use to access certain IT functions.

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7. For these reasons, it is a core practice of MSU's operational security to restrict its email address directory to MSU users.

8. Although individual MSU users may choose to disclose their own MSU email addresses, eliminating unnecessary dissemination of MSU emails addresses reduces the risk of cyber-attack.

Thomas
Siu

Digitally signed by
Thomas Siu
Date: 2021.11.12
11:27:38 -05'00'



Tom Siu

Subscribed and sworn to before me
on Nov. 12, 2021



Notary Public, _____ County, MI
My Commission Expires: _____

ROBIN STECHSCHULTE
NOTARY PUBLIC - STATE OF MICHIGAN
COUNTY OF SHIAWASSEE
My Commission Expires August 28, 2027
Acting in the County of Ingham

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