

**STATE OF MICHIGAN
COURT OF APPEALS**

CAROL BETH LITKOUHI,

Plaintiff - Appellant,

v.

ROCHESTER COMMUNITY SCHOOL
DISTRICT,

Defendant - Appellee.

Court of Appeals Case No. 364409

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

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

CAROL BETH LITKOUHI,

Plaintiff,

CASE NO. 2022-193088-CZ

v.

HON. JACOB J. CUNNINGHAM

ROCHESTER COMMUNITY SCHOOL
DISTRICT, a government entity,

Defendant.

MACKINAC CENTER LEGAL
FOUNDATION

Derk A. Wilcox (P66177)

Stephen A. Delie (P80209)

Patrick J. Wright (P54052)

Attorneys for Plaintiff

140 West Main Street

Midland, MI 48640

(989) 631-0900

wilcox@mackinac.org

JACKSON LEWIS P.C.

Timothy J. Ryan (P40990)

Linda L. Ryan (P67686)

Attorneys for Defendant

250 Monroe NW, Suite 400

Grand Rapids, MI 49503

(616) 940-0230

timothy.ryan@jacksonlewis.comlinda.ryan@jacksonlewis.com**DEFENDANT'S ANSWERS TO PLAINTIFF'S FIRST INTERROGATORIES,
AND REQUESTS FOR PRODUCTION OF DOCUMENTS**

Defendant, Rochester Community School District ("Defendant"), by and through its attorneys, Jackson Lewis P.C., hereby submits the following Answers to Plaintiff's First Interrogatories and Requests for Production of Documents. Defendant's counsel is prepared to meet with Plaintiff's counsel to discuss and, if possible, resolve any disputes that may arise concerning the meaning, scope, and relevance of these requests or the adequacy of these responses.

PRELIMINARY STATEMENT AND GENERAL OBJECTIONS

A. Defendant's answers and responses to these discovery requests have been prepared in accordance with the Michigan Court Rules and pursuant to a reasonably diligent search for the

information requested. Defendant does not, and could not possibly, represent that these responses would reflect or include “all” potentially responsive information. Rather, the scope of the investigation conducted to locate responsive information was limited to making inquiries to those areas in which information related to such matters would ordinarily be expected to be found.

B. Defendant reserves the right to supplement these responses as required by the Michigan Court Rules.

C. By submitting these responses, Defendant does not, in any way, adopt Plaintiff’s purported definitions of words and phrases contained in the discovery requests. Defendant objects to those definitions to the extent that they are inconsistent with the (a) ordinary and customary meaning of such words and phrases, (b) the rules governing the permissible scope of discovery, or (c) the definitions set forth by Defendant in its responses.

D. Defendant does not concede that any of the information it has produced (or will produce) is or will be admissible evidence at trial or any evidentiary hearing. Further, Defendant does not waive any objection, whether or not asserted herein, to the use of any such information at trial or any evidentiary hearing.

E. Defendant objects to these discovery requests to the extent they purport to require it to respond on behalf of other persons, or to provide information that is not in its possession, custody, or control. Specifically, Defendant can only be expected to respond to these discovery requests on its behalf and not on behalf of any subsidiaries, affiliates, or any other corporation or individual.

F. Any documents made available for inspection and copying in connection with this discovery set will be produced at a mutually agreeable time and place or, if no such agreement can be reached, at the offices of Jackson Lewis P.C. in Southfield, Michigan. Unless otherwise agreed, Defendant objects to providing copies of any such documents without prior arrangements being made

to reimburse Defendant for any copying expenses that may be incurred, and without entry of a suitable protective order for any sensitive, confidential and proprietary documents.

G. While Defendant has not conducted an investigation and analysis of the full amount of the electronic correspondence that may be responsive to some of the broad categories of information requested, it presently has a good faith belief that the number of electronic documents that may need to be reviewed to provide a response to certain, broad requests (that are not even limited to any specific custodians), in this discovery set is such that the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in this litigation and the importance of the proposed discovery in resolving the issues. Defendant has, however, produced electronic documents in good faith that it reasonably believes may be relevant to the instant lawsuit. Defendant further stands ready to continue to cooperate with Plaintiff to narrow the scope of any request for electronic discovery, as may be appropriate to meet the requirements of the Court Rules.

III. INTERROGATORIES AND DOCUMENT REQUESTS

1. In your Initial Disclosures and Answer, you assert that you have in fact tried to ascertain the requested documents from certain employees, but that, in response to a FOIA request, you are not required "to gather and provide copies or access to documents created or possessed by individual teachers employed by Defendant."
- 1(a) Identify all employees who you solicited for responsive documents as part of this request.

ANSWER: **Joshua Wrinkle, Principal, Rochester High School**
Chad Zwolinski, Teacher, Rochester High School
Allie Danielson, Teacher, Adams High School
Neil Deluca, Executive Director for Secondary Education
Pasquale Cusumano, Principal, Adams High School

- 1(b) Identify all employees, be they teachers, administrators, assistants, etc., who may have or are known to have responsive documents, but whom you did not solicit because you claim you are not required "to gather and provide

copies or access to documents created or possessed by individual teachers employed by Defendant.”

ANSWER: None

- 1(c) Identify all legal authority which you use to assert that you are not required “to gather and provide copies or access to documents created or possessed by individual teachers employed by Defendant.” Cite case opinions, statutes, etc.

ANSWER: Object because the interrogatory seeks a pure legal conclusion which is wholly unrelated to the facts of the case. See eg. *Patricia v Principal Life Ins Co*, 2010 US Dist Lexis 157060; *US v Shelly* 25 FRD 12, 14 (ND Ohio 1960)

2. In your Initial Disclosures, you provided the names of copyright holders who may have discoverable information. Regarding copyrighted information, please provide this additional information.
- 2(a) Provide a list of each copyrighted document and/or publication;

ANSWER: Echos & Reflections/Echos and Reflections Partnership – Teaching the Holocaust inspiring the Classroom - EchosandReflections.orgeries,

Hacking School Discipline, Hack Learning Series, Nathan Maynard, Brad Weinstein, c2020 Times 10 Publications

Culturally Responsive Teaching and the Brain, Zaretta Hammond, c2015 by Corwin

Culturally Proficient Leadership, The Personal Journey Begins Within, Ray D. Terrell, Randall B. Lindsey

Culturally Proficient Leadership, Edition 2, Raymond D. Terrell, Eloise K. Terrell, Randall B. Lindsey, Delores B. Lindsey, c2018 by Raymond D. Terrell, Eloise K. Terrell, Randall B. Lindsey, Delores B. Lindsey

White Fragility, Robin Diangelo, c2018 by R,obin Diangelo

Courageous Conversations About Race, Second Edition, A Field Guide for Achieving Equity in Schools, c2015 by Glenn E. Singleton

Guiding Teams to Excellence with Equity, John Krownapple, c2017 Corwin

Cultural Proficiency, A Manual for School Leaders, 4th Edition, Randall B. Lindsey, Kikanza Nuri-Robins, Raymond D. Terrell, Delores B. Lindsey, c2019 by Randall B. Lindsey, Kikanza Nuri-Robins, Raymond D. Terrell, Delores B. Lindsey

Grading for Equity, Joe Feldman, c2019 Corwin

Verbal Judo, George J. Thompson, Ph.D., and Jerry B. Jenkins, c1993, 2004, 2013 by George Thompson, Ph.D. and Jerry B. Jenkins

Cultivating Genius, Gholdy Muhammad, c2020 Gholdy Muhammad

Crucial Conversations Second Edition, Kerry Patterson, Joseph Grenny, Ron McMillan, Al Switzler, c 2012 by Patterson, Joseph Grenny, Ron McMillan, Al Switzler

Case Studies on Diversity and Social Justice Education 2nd Edition, Paul C. Gorski and Seema G. Pothini, c 2018 Taylor and Francis

2(b) Identify the title, author, and publisher;

ANSWER: See answer to 2(a)

2(c) If your use of this copyrighted material is subject to a license agreement, identify the licensor and licensee. Provide a copy of any contracts governing the use of these copyrighted materials.

ANSWER: None

2(d) If the copyrighted material is something that does not have an author and/or ISBN, such as software, provide sufficient information to identify it. Include the version.

ANSWER: See answer to 2(a)

3. In your Initial Disclosures, you allege that teachers are not covered by FOIA “because individual employees do not constitute public bodies as defined by MCL 15.232(h).” Provide all authorities you have or will rely on which support your claim that a public body, such as a school district, is not required to produce documents held or produced by teachers or any other employees. Your authority need not pertain specifically to schools. If you have authority for other public employment settings where the employer is subject to FOIA, but obtaining such materials from employees is not required, provide that.

ANSWER: Object because the interrogatory seeks a pure legal conclusion which is wholly unrelated to the facts of the case. See eg. *Patricia v Principal Life Ins Co*, 2010 US Dist Lexis 157060; *US v Shelly* 25 FRD 12, 14 (ND Ohio 1960).

4. In your Affirmative and Other Defenses, paragraph 1, you assert that Plaintiff's claims may be barred by "the doctrine of after-acquired evidence." Michigan, as other states, defines this doctrine in the following way: "The after-acquired-evidence doctrine is equitable in nature and is usually applied in a situation involving termination or another adverse employment action to ensure that an employee does not benefit from the employee's own misconduct or misrepresentation." *Grow v. WA Thomas Co.*, 236 Mich.App. 696, 710, 601 N.W.2d 426 (1999).

Please explain how this doctrine applies in this matter, and how it might bar Plaintiff's claims.

ANSWER: The doctrine does not apply and is hereby withdrawn.

5. In your Affirmative and Other Defenses, paragraph 3, you stated that "some or all of the District's records are exempt from access under the applicable provisions of the Freedom of Information Act." But in the District's denials, attached as Exhibits B, D, F, G, and I to the Amended Complaint, the District did not cite any exemption found within the FOIA statute.

Please identify all applicable exemptions from within the FOIA statute which you are now claiming. If you are claiming an exemption based on another law in conjunction with FOIA, please identify what that law is and the specific portion of that law which provides for an exemption.

ANSWER: Object because the interrogatory seeks a pure legal conclusion which is wholly unrelated to the facts of the case. See eg. *Patricia v Principal Life Ins Co*, 2010 US Dist Lexis 157060; *US v Shelly* 25 FRD 12, 14 (ND Ohio 1960).

6. In your Affirmative and Other Defenses, paragraph 4, you state that "The District has not created or obtained the records sought; therefore, the records sought are not 'agency records' within the meaning of FOIA." If you are maintaining that something is not an agency record for the reason that it has

not been obtained from an employee or school within the district, please cite all legal authority you rely upon for that claim.

ANSWER: Objects because the interrogatory seeks a pure legal conclusion which is wholly unrelated to the facts of the case. See eg. *Patricia v Principal Life Ins Co*, 2010 US Dist Lexis 157060; *US v Shelly* 25 FRD 12, 14 (ND Ohio 1960).

7. In your Initial Disclosures, you included certain individuals in “Individuals likely to have discoverable information.” Some of those individuals appear to be administrators. You did not include any teachers, nor did you appear to include any curriculum creators. This despite the fact that teachers and curriculum creators would be most likely to have information about the educational materials that were used in their schools and the classrooms.
- 7(a) Why are there no teachers or curriculum creators included in your Initial Disclosures?

ANSWER: Object because the interrogatory requests information protected by the attorney work product doctrine.

- 7(b) Please list all teachers, curriculum creators, and/or other district employees who would likely have knowledge about the materials that were requested in the FOIA request(s) that are the subject of this lawsuit.

ANSWER: See answer to 1(a) above

8. Please produce all of the classroom materials used in the subject class up to the date of the filing of this lawsuit.

ANSWER: Object because the term “classroom materials” is vague. Further, to the extent the term refers to materials used by teachers in day to day classroom instruction such documents are not within the possession custody or control of the Defendant.

9. Please produce any communications between Rochester Community Schools Board Members or employees of the District or any of its member

schools concerning the distribution and construction of curriculum documents relating to the History of Ethnic and Gender Studies course to teachers or other instructional personnel.

ANSWER: The documents will be made available for inspection and copying if discovery recommences after the court rules on the summary judgment motions which are the subject of the stipulated order.

10. Please produce any communications from Rochester Community School Board Members or Rochester Community Schools employees (whether employed by the district or any of its member schools) that reference Plaintiff or Plaintiff's FOIA requests, from August 2021 up to the date of the filing of Plaintiff's initial complaint.

ANSWER: The documents will be made available for inspection and copying if discovery recommences after the court rules on the summary judgment motions which are the subject of the stipulated order.

Respectfully submitted,
JACKSON LEWIS P.C.

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

Dated: September 16, 2022

PROOF OF SERVICE

The undersigned hereby certifies that the foregoing instrument was served upon all parties/attorneys in the above cause at their respective addresses disclosed on the pleadings on September 16, 2022 by:

- | | |
|---|---|
| <input type="checkbox"/> Hand Delivery | <input type="checkbox"/> U. S. Mail |
| <input type="checkbox"/> Overnight Delivery | <input type="checkbox"/> FAX |
| <input type="checkbox"/> ECF (E-filing) | <input checked="" type="checkbox"/> E-mail |

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

4873-5673-1443, v. 1

FOIA Bulletin Number: 21-01

Subject: Collecting Text Messages Responsive to Freedom of Information Act Requests

1. Purpose. This FOIA Bulletin outlines the methods records custodians may use to collect text messages that are responsive to Freedom of Information Act (FOIA) requests.

2. Effective Date. This policy is effective October 2, 2020.

3. Authorities.

- [Title 5 of the United States Code, Section 552](#)
- [National Archives Bulletin 2015-02, "Guidance on Managing Electronic Messages," issued July 29, 2015](#)
- [Secretary's Order No. 3378, "Improving the Department of the Interior Freedom of Information Act Program," issued January 7, 2020](#)
- [Secretary's Order No. 3371, "The Department of the Interior Freedom of Information Act Program," issued November 20, 2018](#)
- [Office of Information Policy FOIA Update, "'Agency Records' vs. 'Personal Records,'" issued January 1, 1984](#)

4. Coverage. This policy applies to all Department employees and supersedes any conflicting Departmental or bureau/office policies or procedures. Bureaus/offices may issue implementing procedures consistent with this policy after receiving written approval from the Departmental FOIA Office (DFO).

5. Policy. Text messages (including the contextual information such as the sender, recipient, date, and time) that are sent or received by Department employees with government-issued or personally-owned devices must be collected and processed for potential release under the FOIA if they pertain to agency business and are responsive to a pending FOIA request. The protocol for retention of text messages generally is addressed in the Office of the Chief Information Officer's "Guidance for Managing Text Messages under the Federal Records Act" ([see Attachment](#)). Record custodians (or their designees) may choose from the methods of collection and transmission outlined below, subject to any requirements or limitations prescribed by their bureau/office information technology (IT) office:

A. Screenshots

When utilizing the screenshot approach, the record custodian identifies the text messages that are responsive to the FOIA request; takes screenshots of those responsive text messages directly from the mobile device; and transmits the screenshots to the responsible FOIA office for processing, for example through email from the device itself.

B. Full Data Back-Up

When utilizing the full data back-up approach, the record custodian coordinates with their bureau/office IT office to physically collect the relevant mobile device. The IT office performs a

full data back-up, isolates all text message files, converts them to a portable document format (PDF), and provides the PDF of the messages to the responsible FOIA office for processing.

C. Print-to-File

Print-to-File means printing physical copies of only the relevant text messages. Record custodians may coordinate with their bureau/office IT office to transfer copies of the text messages on their mobile device to a computer; identify the text messages that are responsive to the FOIA request; print the messages to paper; and transmit them to the responsible FOIA office for processing, either in hard copy, or after scanning to an electronic format. The print-to-file approach may also be accomplished via an application on the custodians' mobile device, provided any such application has been approved in advance by the Department's Chief Information and Security Officer.

6. Responsibilities. Record custodians are responsible for collecting text messages in response to search requests from their FOIA offices by coordinating, as necessary, with the FOIA office and bureau/office IT office to implement the appropriate method of collection.

7. Distribution. This policy will be distributed to all FOIA personnel upon issuance. Bureau FOIA Officers are responsible for distributing it to all FOIA personnel new to the Department as part of their orientation materials. This policy will also be made available to all FOIA personnel on the Department's FOIA website accessible at <https://www.doi.gov/foia/news/guidance/>, which provides additional FOIA resources.

8. Rights and Benefits. This policy is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its departments, agencies, instrumentalities or entities, its officers or FOIA personnel, or any other person.

Guidance for Managing Text Messages under the Federal Records Act

Text message created or received in the course of agency business may be Federal records and if so, agencies must manage them in accordance with Federal records management laws, regulations, and policies. The Frequently Asked Questions (FAQs) below provide general guidance for managing your text messages. Please consult with your [Bureau Records Officer](#) on specific questions and Federal record retention guidelines for your bureau.

FAQs

Q1. Can I conduct government business using text messages on a mobile device?

A. Yes. However, unlike emails, it is important to note that text messages are not automatically archived. **Accordingly, as employees, we are responsible for retaining and archiving text messages and conversations that are evidence of the conducting of government business pursuant to the requirements of the Federal Records Act (44 USC § 3301).** Therefore, it is recommended that text messaging be used only for brief notifications or non-substantive communications. When engaging in more comprehensive and substantive communications it is STRONGLY recommended that employees rely on email since all email sent and received from DOI.GOV email addresses is automatically archived, ensuring both retention and accessibility to meet the Department's legal and operational requirements.

Q2. Do I have to retain text messages that are Federal records?

A. Yes. Text messages, like anything else that meets the definition of a Federal Record, need to be retained according to an approved records schedule. Most text messages that meet this definition are likely to be classified as transitory records, which have limited retention periods. For additional information regarding Transitory Records, see Q3 below.

Federal Records (44 USC § 3301) are defined as follows:

(A) includes all recorded information, regardless of form or characteristics, made or received by a Federal agency under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the United States Government or because of the informational value of data in them; and

(B) does not include—

Prepared by David Alspach, Departmental Records Officer, Office of the Chief Information Officer, August 7, 2020.

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(i) library and museum material made or acquired and preserved solely for reference or exhibition purposes; or

(ii) duplicate copies of records preserved only for convenience.

Recorded Information: includes all traditional forms of records, regardless of physical form or characteristics, including information created, manipulated, communicated, or stored in digital or electronic form.

Q3. Can I remove any text messages or conversations from my mobile devices?

- A. Yes, you may remove text messages and conversations that are not federal records or are federal records that are authorized for disposition, unless they are subject to an independent preservation obligation (such as a litigation hold or an active unfulfilled FOIA request). If an independent preservation obligation applies, then the message should be retained, regardless of its status as a federal record, until the preservation obligation no longer applies.

Under the Federal Records Act, personal messages that do not deal with the transaction of government business can be deleted. In addition, text messages that constitute transitory or intermediary records can also be deleted if you are confident the information in the text messages is no longer required. If you are unsure, consult your [Bureau Records Officer](#) before deleting.

Transitory Records: Records required to be preserved only for a short time (generally less than 180 days) and that are not required to meet legal or fiscal obligations, or to initiate, sustain, evaluate, or provide evidence of decision-making, which may be dispositioned when no longer needed for business use. Transitory Records include, but are not limited to:

- messages coordinating schedules, appointments, and events
- transmittal documents such as e-mail, letters, cover memos, and facsimile cover sheets that do not provide evidence of approval, concurrence, or decision-making, or include substantive comments
- received copies of circulated internal information such as agency instructions, notifications, circulars, newsletters, and email blasts to employees
- messages received from agency distribution lists or listservs
- “to-do” or task lists and assignments

Intermediary Records: Records of an intermediary nature, meaning that they are created or used in the process of creating a subsequent record. To qualify as an

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intermediary record, the record must also not be required to meet legal or fiscal obligations, or to initiate, sustain, evaluate, or provide evidence of decision-making.

Records include:

- non-substantive working files: collected and created materials not coordinated or disseminated outside the unit of origin that do not contain information documenting significant policy development, action, or decision making. These working papers do not result directly in a final product or an approved finished report. Included are such materials as rough notes and calculations and preliminary drafts produced solely for proof reading or internal discussion, reference, or consultation, and associated transmittals, notes, reference, and background materials.
- audio and video recordings of meetings that have been fully transcribed or that were created explicitly for the purpose of creating detailed meeting minutes (once the minutes are created)
- input or source records, which agencies create in the routine process of creating, maintaining, updating, or using electronic information systems and which have no value beyond the input or output transaction: hardcopy input source documents where all information on the document is incorporated in an electronic system
- ad hoc reports, including queries on electronic systems, whether used for one-time reference or to create a subsequent report
- data files output from electronic systems, created for the purpose of information sharing or reference

Q4. Do I only have to produce those items that qualify as Federal Records for FOIA and/other information or document requests?

- A. No. Under the FOIA you must produce any "agency records" that are responsive to the request, regardless of whether they are officially considered a Federal record or not and regardless of whether they could have been dispositioned. Courts generally consider recorded information to be an agency record if it is (1) either created or obtained by an agency, and (2) under agency control at the time of the FOIA request.

The legal basis for other valid requests for information or documents, such as in the discovery process in litigation, Congressional oversight, or OIG investigations, similarly do not rely on the Federal Records Act to define the scope of what may be requested or must be produced.

Prepared by David Alspach, Departmental Records Officer, Office of the Chief Information Officer, August 7, 2020.

Please consult your FOIA Officer, the Office of the Solicitor, or the Office of Congressional and Legislative Affairs for additional information regarding any specific requests.

Q5. What messaging applications are approved for use on my Government issued mobile device?

Currently only the native IOS or Android messaging applications that come factory installed on your device, and messaging applications like Microsoft Outlook and Teams mobile applications which are deployed in conjunction with the implementation of Office 365, are authorized for use within DOI. No other messaging applications, such as "Snapchat" or "WhatsApp," are authorized for use on a DOI-issued mobile device.

Q6. Can I send government business related messages and other information using my personal mobile device?

- A. It is STRONGLY recommended to avoid doing any government related business on your personal computer or personal mobile devices. This is not only a Federal record keeping best practice but can also help prevent discovery being performed on personal devices in the event an action goes to litigation. Rare exceptions can be made as necessary for continuity of operations or other emergency needs. Any business conducted on a personal device must be forwarded back to government account as indicated in [OCIO Directive 2015-003: Notice of Disclosure Requirements for Official Business Conducted Using Non-Official Electronic Messaging Accounts](#)

Prepared by David Alspach, Departmental Records Officer, Office of the Chief Information Officer, August 7, 2020.