STATE OF MICHIGAN
COURT OF CLAIMS

MACKINAC CENTER
FOR PUBLIC POLICY,
a Michigan nonprofit corporation,

Plaintiff,

v

UNIVERSITY OF MICHIGAN,
a Michigan state public body,

Defendant.

Case Number: 20-000253- MZ

Hon. Christopher M. Murray

Patrick J. Wright (P54052)
Derk A. Wilcox (P66177)
Stephen A. Delie (P80209)
Mackinac Center Legal Foundation
Attorneys for Plaintiff
140 West Main Street
Midland, MI 48640
Tel: (989) 631-0900
Fax: (989) 631-0964
Wilcox@Mackinac.org

Brian M. Schwartz (P69018)
Miller, Canfield, Paddock and Stone, P.L.C.
Attorneys for Defendant
150 West Jefferson, Suite 2500
Detroit, MI 48226
Tel: (313) 963-6420
schwartzb@millercanfield.com

PLAINTIFF'S AMENDED SEPTEMBER 21, 2021

MOTION FOR SUMMARY DISPOSITION

UNDER MCR 2.116(C)(10)

Oral argument requested

Now comes Plaintiff, Mackinac Center for Public Policy ("Mackinac"), by and through its attorneys, and states the following for its Amended Motion for Summary Disposition Under MCR 2.116(C)(10). The only amendment is the addition of the date of filing to the Motion's title.

1. On or about December 4, 2021, Mackinac filed its Complaint in this matter seeking documents that were sought through the Michigan Freedom of Information Act ("FOIA") from Defendant, University of Michigan ("the University"), but had been withheld or redacted by the University and were not provided.

2. As set forth in the accompanying Brief in Support, the University's claims for exempting the sought-after materials fail as a matter of law.

3. On September 20, 2021, Mackinac sought concurrence from the University for the relief sought, but was unsuccessful, making this motion necessary.

WHEREFORE, Mackinac, for the reasons set forth in the Brief in Support, requests that this Court grant its motion for summary disposition, and order Defendant to provide the complete and unredacted information requested.

In the alternative, Mackinac 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 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: September 27, 2021

Mackinac Center Legal Foundation
By: /s/ Derk A. Wilcox (P66177)
Plaintiff's Attorneys
140 West Main Street
Midland, MI 48640
(989) 631-0900
wilcox@mackinac.org

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Attorneys for Defendant
150 West Jefferson, Suite 2500
Detroit, MI 48226
Tel: (313) 963-6420
schwartzb@millercanfield.com

PLAINTIFF'S BRIEF IN SUPPORT OF ITS AMENDED SEPTEMBER 21, 2021 MOTION FOR SUMMARY DISPOSITION UNDER MCR 2.116(C)(10)

Oral argument requested

I. INTRODUCTION

The Plaintiff Mackinac Center ("Mackinac Center") submitted a request under the Freedom of Information Act ("FOIA") to the public body Defendant, University of Michigan ("University"). The initial request was made on May 13, 2020. The subject of the request was

email communications between Defendant's employees (Drs. Marisa Eisenberg, Vikas Parekh, or Emily Martin) and other government employees related to the state's response to the COVID-19 pandemic. A subsequent request was added on May 27, 2020 for emails sent/received between May 1 and May 27, 2020 that discussed either the "MI Safe Start Plan" or the "MI Safe Start map." After discussions between the parties, on June 5, 2020, the request was narrowed to emails by/from those named University employees that mentioned the Safe Start Plan or map.

Mackinac paid the estimated fee balance on or around August 20, 2020. After some misdirection of the payment, the documents were finally provided on October 5, 2020.

The documents produced by the University were heavily redacted. They refused to disclose the entire contents of some emails, as well as email addresses. The University cited three exemptions contained in FOIA. The University cited exemptions for frank communications that are advisory to a final government agency determination. MCL 15.243(1)(m). The University also cited two exemptions related to security measures and protection of the safety of persons or property, MCL 15.243(1)(u) and (y), respectively.[1]

Mackinac Center appealed the use of these claimed exemptions with the University. The University, on appeal, provided additional information. The University found that, although the exemptions had been correctly applied, it exercised its discretion to release some additional information. In its decision on appeal, the University additionally claimed the application of a FOIA exemption for privacy under MCL 15.243(1)(a).[2]

Mackinac Center then filed this lawsuit. An initial round of Discovery has taken place.

[1] See paragraph 19 of Plaintiff's Complaint and Defendant's Answer, and Plaintiff's Exhibit D attached to the Complaint.
[2] See paragraph 21 of Plaintiff's Complaint and Defendant's Answer, and Plaintiff's Exhibit F attached to the Complaint.

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 "Frank Communications" exemptions.

Although all government documents are presumptively available to the public, the statute does provide for a number of possible exemptions. Many 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). Defendants here have claimed that this exemption applies here. 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 the Act, 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 Defendant 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).

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:

> Before the trial court may apply the balancing test, the public body must demonstrate to the satisfaction of the trial court that the public record is a "frank communication." Drawing from the statutory language, the Court of Appeals has held that the public body must establish two things. First, the document must cover other than purely factual materials, and, second, the document must be preliminary to a final determination of policy or action. We agree with the Court of Appeals precedent, but we conclude that a third qualification is apparent in the statutory language: the document sought must also be a communication or note of an advisory nature within a public body or between public bodies.
>
> 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.)

In *Herald*, the Supreme Court also upheld what might be considered another factor – whether or not the sought after information was available from another source. There, the requested information had already been substantively made available to the public in another form. The matter involved a university president's house, and FOIA had been used to request an internal letter which might "shed light on the reasons why a highly respected public official resigned in the wake of EMU being caught misleading the public as to the true cost of the President's house." *Id* at 476. The Supreme Court upheld the Circuit Court's granting of the exemption, in part, because the information about the house purchase had already been disclosed in a public audit:

> The circuit court found that defendant had published and distributed to plaintiff a "voluminous and exhaustive report" of financial data related to the controversy. Defendant hired Deloitte & Touche to audit the expenditures related to the University House project and disseminated this audit to plaintiffs about the time plaintiffs filed suit to obtain the Doyle letter. In the circuit court's judgment, the wave of data related to the University House project flowing from this independent report lessened plaintiff's interest in disclosure of the Doyle letter and tipped the balance in defendant's favor such that the public interest in encouraging frank communication clearly outweighed the public interest in disclosure.

Herald Co., 475 Mich at 477.

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, intermediate urban renewal assistant for the Planning and Development Department, 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.

D. FOIA 'Safety and Security Protection' exemptions.

Defendant claims that the requested documents are exempt under certain security exemptions found in FOIA. Specifically, MCL 15.243(1)(u) and (y). MCL 15.243(1)(u) states:

> 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:

> Sec. 13.
> (1) A public body may exempt from disclosure as a public record under this act any of the following:
> ***
> (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.

Neither MCL 15.243(1)(u) nor (y), 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 in an Appendix, at pages 1 to 8. 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) and (y) are clear on their faces that these are meant to protect plans, processes, and procedures related to security.

E. FOIA "Privacy" exemptions.

Defendant 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.

Id.

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 private (*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 (*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 (*Tobin v Michigan Civil Service Com'n*, 416 Mich 661; 331 NW2d 184 (1982)), names of finalists for a fire chief position (*Herald Co v University of Bay Univ*, 463 Mich 111; 614 NW2d 873 (2000)), and the names of student athletes identified in incident reports were not exempt (*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:

> [t]he 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. Nor is there any support for the allegations of amicus curiae Oakland University that disclosure of the compensation of individual employees "would cause significant indignity, embarrassment, and humiliation and would disrupt existing relationships".
>
> 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. This important public purpose can best be accomplished only by disclosure of information such as that sought by plaintiffs. There has been no suggestion that disclosure would unduly burden defendant university.

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. The information sought by Mackinac is arguably less intimate and personal than the examples provided above, and therefore less likely to be given a privacy exemption.

III. ARGUMENT

COVID-19 and our government's response to it has been serious and ongoing. It shouldn't need to be stated that the actions taken have been extensive and often controversial. There has been immense public interest in the policies enacted, and in the science and reasoning behind those decisions. It would be difficult to overstate just how much public interest there has been in "full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees." MCL 15.231(2), *supra*. This FOIA request seeks communications between certain University of Michigan employees/agents and government agencies related to the government's decisions. The public's interest in the full disclosure of this information is very strong.

A. The Frank Communications exemption.

The initial three criteria for claiming the exemption are that the information was (1) of an advisory nature between public bodies; (2) covers matters that are not purely factual; and (3) is preliminary to a final agency determination. It appears that the first two conditions are met. As to the third, Plaintiff specifically asked during discovery what agency determination was this preliminary too. And Defendant answered that "upon information and belief, the final action, determination, or policy related to COVID-19 policies related to the MI Safe Start Plan." See Plaintiff's interrogatories and Defendant's answers at paragraphs 1(d), included in the Appendix at pages 14 to 15. "Information and belief" is defined in Black's Law Dictionary, Abridged Ninth

Edition, as "based on secondhand information that the declarant believes to be true." In sum, Defendant cannot state with certainty that the withheld material even meets the third criteria for claiming the frank communications exemption. And if they are merely assuming that these communications were related to a particular government action, then it is difficult if not impossible to say that disclosure would chill future advice. All public documents could be withheld if the creator was just assuming that it was preliminary advice without knowing the clear purpose.

But even if the sought after communications are between public bodies and are preliminary to a final agency determination, Defendant has the burden of showing that "the public interest in encouraging frank communication between officials and employees of public bodies clearly outweighs the public interest in disclosure." *Herald Co.*, 475 Mich at 474. Defendant has not and cannot show that frank communications will be chilled in the future if these communications are made public. And as such – given the public's strong interest in knowing how these policies have been decided – they cannot say that the need to keep it secret outweighs the public's right to know.

The sought-after information has not been made public in any other source. Recall that this was additionally taken into account and weighed in *Herald Co.*, *supra*. Plaintiff asked if the redacted or withheld information had been made public elsewhere, and Defendant answered "Defendant is unaware of the existence of any documents that are responsive to this request." See Plaintiff's interrogatories and Defendant's answers at paragraphs 1(e), included in the Appendix at page 15. This weighs in favor of disclosure, as the public has not been provided with this information in any other form.

In carrying its burden, Defendant must offer more than mere platitudes. It cannot merely say that 'future advisory communications will be chilled if these are provided to the public.' Recall that where "[Defendant's employee's insufficient testimony] was only in general terms, indicating

that disclosure of such communications would discourage employees from writing down their thoughts." *Nicita*, 216 Mich App at 755. Similarly, here, when Plaintiff asked for any documents or tangible things that showed that production of the sought-after information "would have a negative effect on frank communications," Defendant answered that "Defendant is currently unaware of the existence of any documents that are responsive to this request." See Plaintiff's interrogatories and Defendant's answers at paragraph 1(i), included in the Appendix at page 16. Similarly, Plaintiff asked for "documents or tangible evidence that the production of that email or portion of an email would hinder the participant from adequately doing their job or offering recommendations." Defendant again answered that "Defendant is currently unaware of the existence of any documents that are responsive to this request." See Plaintiff's interrogatories and Defendant's answers at paragraphs 1(j), included in the Appendix at page 16.

So Defendant has no evidence other than platitudes, generalizations, and unsubstantiated opinions to show that future advice would be chilled or withheld. This is insufficient to carry its burden.

B. The 'Safety and Security Protection' exemptions.

As discussed above, these exemptions have not been dealt with in reported cases. But FOIA as a whole has several important hurdles that public bodies must overcome before they can claim an exemption and keep matters from being made public. As with other exemptions, it is incumbent on the public body, not the requestor, to show that public body has a reason it can claim the exemption. See *Herald Co.*, *supra*. The public body must offer more than platitudes and generalizations to carry its burden. See *Nicit*a, *supra*. Blanket denials do not suffice. *Woodman*, *supra*. And, of course, FOIA is prodisclosure and exemptions are to be narrowly construed. See *Swickard*, *supra*.

The language of the safety and security exemptions shows that these are not intended to cover the situation here. The language of the statute governs the intent.

> The paramount rule of statutory interpretation is that we are to effect the intent of the Legislature. *Tryc v Michigan Veterans' Facility*, 451 Mich 129, 135; 545 NW2d 642 (1996). To do so, we begin with the statute's language. If the statute's language is clear and unambiguous, we assume that the Legislature intended its plain meaning, and we enforce the statute as written. *People v Stone*, 463 Mich 558, 562; 621 NW2d 702 (2001). In reviewing the statute's language, every word should be given meaning, and we should avoid a construction that would render any part of the statute surplusage or nugatory. *Altman v Meridian Twp*, 439 Mich 623, 635; 487 NW2d 155 (1992).

Wickens v. Oakwood Healthcare System, 465 Mich 53, 60; 631 NW2d 686 (2001).

In these safety and security exemptions, the intent is to exempt procedures – plans, strategies, and the like. Sec. 13(1)(u) is specific that it protects "a public body's security measure." It then provides a list of things that this exemption includes: "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." *Supra*. It is clear that this presents a list of things that are alike. Therefore, although the list may not be exclusive, it is presumed that even if it covers other items, those other items that are like those listed. It may exempt other "security measures," but these must be of the same kinds as those enumerated. This called the canon of *ejusdem generis* by our courts. "This is a rule whereby in a statute in which general words follow a designation of particular subjects, the meaning of the general words will ordinarily be presumed to be and construed as restricted by the particular designation and as including only things of the same kind, class, character or nature as those specifically enumerated." *People v Jacques*, 456 Mich 352, 356; 572 NW2d 195 (1998).

The interpretation of Sec. 13(1)(y) should be made in the same way. "Records or information of measures designed to protect the security or safety of persons or property" may be

general, but the subsequent list shows that it is only meant to designate additional items that are substantially similar to those enumerated. Those specifics are: "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, … emergency response plans, risk planning documents, threat assessments, domestic preparedness strategies, and cybersecurity plans, assessments, or vulnerabilities." *Supra*.

Defendant has not claimed this exemption for anything that is akin to those items listed. While it is unclear exactly which redactions are based on this security exemption, Defendant did say, in their initial communications, that it was withholding "working group email addresses." See Defendant's email of October 5, 2020, attached as Exhibit D to Plaintiff's Complaint.

Defendant has not claimed that there are any specific threats. Rather, Defendant claims that the documents were withheld in order for any specific threat from arising, and that redacting and withholding information is what prevented any security threats from developing. "Defendant states that the documents were withheld because they relate to security measures decided to prevent specific threats from occurring. Upon information and belief, redacting the information prevented specific threats from developing, demonstrating the effectiveness and appropriateness of this exemption." See Defendant's Answer to Plaintiff's interrogatory paragraph (1)(f), attached here as page 15 in the Appendix.

This is an amazing claim and would create an alarming precedent. A public body could withhold information by claiming a non-specific threat and then, when asked what that threat is, answer 'there was no threat, but only because we withheld the information.' FOIA cannot be based on such circular reasoning. When asked for any tangible evidence of a threat, Defendant answered "Defendant is currently unaware of the existence of any documents that are responsive to this

request." See Defendant's Answer to Plaintiff's interrogatory paragraph (1)(g), attached here as page 15 of the Appendix.

Plaintiff requested communications related to advice given to and from a public body related to COVID-19 policy making. It strains credulity to claim that the redacted and withheld information contained anything like the plans or procedures exempted by Sec. 13(1)(u) and (y) – blueprints, codes, passwords, etc. In short, there is almost certainly no such covered material contained therein, and Defendant has not alleged that any threat actually exists.

C. Privacy Exemptions.

It is difficult to imagine what could be in these communications that would qualify as intimate details of a highly personal nature. These were communications regarding the (presumably) scientific basis for creating policy related to COVID-19. Names, email addresses, and positions of public employees have never been included in this category.

IV. SUMMARY AND RELIEF REQUESTED

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

In the alternative, Plaintiff 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.

Plaintiff 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: September 27, 2021

Mackinac Center Legal Foundation
By: /s/ Derk A. Wilcox (P66177)
Plaintiff's Attorneys
140 West Main Street
Midland, MI 48640
(989) 631-0900
wilcox@mackinac.org

Certificate of Service

The undersigned hereby certifies that he served a copy of Plaintiff's Motion for Summary Disposition and the accompanying Brief in Support on Defendant via the MiFile TrueFiling system on September 27, 2021.

Dated: September 27, 2021

/s/ Derk Wilcox