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)

EXHIBIT A

EXHIBIT A

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EXHIBIT A

EXHIBIT A

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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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 *[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.]*	$28.95	40%	$40.53	3	$121.59
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	3.75	$111.79
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	**$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.

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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.

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

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.

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

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 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.

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

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

EXHIBIT F

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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.

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

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 G

EXHIBIT G

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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 MIFOIA." 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, overburden-some, 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,

Dated: August 27, 2021

Uri Abt
Attorney for Defendant MSU

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

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

Rebecca Nelson

Director and Freedom of Information Act Officer

Michigan State University

EXHIBIT H

EXHIBIT H

EXHIBIT H

EXHIBIT H

EXHIBIT H

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EXHIBIT H

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

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

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; humorsome.' "

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.

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
Only the Westlaw citation is currently available.

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 request[1] 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."

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 practice[3] 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).

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

All Citations

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
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'

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).

[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 to a FOIA request. We affirm.

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

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

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).]