STATE OF MICHIGAN
COURT OF CLAIMS

MACKINAC CENTER
FOR PUBLIC POLICY,
a Michigan nonprofit corporation,

Plaintiff,

v

UNIVERSITY OF MICHIGAN,
a Michigan state public body,

Defendant.

Case Number: 20-000253- MZ

Hon. Christopher M. Murray

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PLAINTIFF'S 11/5/2021 RESPONSE TO DEFENDANT'S 10/20/21 MOTION FOR SUMMARY DISPOSITION AND REPLY BRIEF FOR PLAINTIFF'S 9/21/2021 MOTION FOR SUMMARY DISPOSITION

Pursuant to the October 5, 2021 Briefing Schedule in this matter, Plaintiff, Mackinac Center, submits the following as its combined response to Defendant, University's, motion and reply in support of its motion:

1. Mackinac Center has not sought and does not seek passwords.

The University argues that passwords are exempt from FOIA under Section §13(1)(u). Mackinac Center concurs that the language of the statute specifically exempts such "codes, combinations, passwords, passes, keys." But the University's briefing is misplaced as Mackinac Center has not sought the disclosure of those redacted items. Mackinac Center's Complaint explicitly states, "the Center does not dispute the need to remove passwords." Complaint ¶ 36. Mackinac Center's motion and brief of September 21, 2021, makes no demand for passwords or pass codes and does not argue that such passwords are or should be disclosed.

So, if it was not clear before, Mackinac Center now clearly states that is does not seek passwords. But Mackinac does seek, and the University is required to provide, email addresses and identification of people within working groups. This is true for the reasons provided in Mackinac Center's September 21 motion and brief, and for the reasons stated below.

2. The University is wrong about the non-disclosure of employees' names and emails.

The University claims that the mere names and the public email addresses of public employees are exemptible on privacy and security grounds. This is not true, and the cases cited by the University do not say what the University claims they do. The University relies on *Michigan Federation of Teachers v University of Michigan*, 481 Mich 657; 753 NW2d 28 (2008). But *Michigan Federation of Teachers* was explicit in that public employees' ***home*** addresses and telephone numbers are "confidential details about those individuals." *Id*, at 676. Mackinac Center does not seek their home addresses or emails – unless that is the email address the employees were

using to conduct official duties. Michigan's policy, per Attorney General Nessel, is: "The State now has a policy that requires all state business to be conducted by state email."[1] The state's FOIA Handbook likewise indicates that a private account used for public business can make the private-account emails subject to FOIA.[2] If a public employees' personal email account is subject to FOIA if it is used to conduct public business, then certainly a public email account used to conduct public functions is subject to FOIA, contrary to what the University argues.[3]

The same would logically hold true for group email accounts, the so-called "workgroups" which the University claims are exempt. These are merely aggregations of public employees working together on certain projects. There is no logical reason why public employees' identities and activities which are to be disclosed under FOIA, would then become exempt simply because they work together within a group. The university has not cited to any statute or case law for the proposition that public-employees working groups get to keep the individual member employees' identities secret simply because they are part of such a group. This would defy the broad scope and purpose of FOIA, as briefed by Mackinac Center on September 21.

3. The identity of business owners is disclosable.

Apparently, some of the email communications include "private business owners." Because these businesses are not public employees, the University claims that it need not disclose

[1] https://www.michigan.gov/ag/0,4534,7-359--546040--s,00.html

[2] FOIA Handbook, at page 9.
https://www.michigan.gov/documents/ag/FOIA_Handbook_2019_644053_7.pdf

[3] The matter of using personal email accounts to conduct public business was recently the subject of litigation in *Progress Michigan v Attorney General*. See: 324 Mich App 659 (2018), 503 Mich 982 (2019), and 506 Mich 74 (2020). The merits of the case where never reached, as the matter was disposed of on procedural grounds. However, there was a settlement reached, and the Attorney General prohibited such use of private email accounts for public business. See footnote 1 above.

these under the personal privacy exemption. But the cases cited by the University for this proposition are not applicable. *Mager v Dept. of State Police*, 460 Mich 134; 595 NW2d 142 (1999) dealt with government-held lists of gun owners who had registered. *Detroit Free Press v Dep't of Consumer & Industrial Servs*, 246 Mich App 311; 631 NW2d 769 (2001) dealt with private citizens who submitted consumer complaints to the state's Division of Insurance, and sought their names and home addresses. *Stone Street Capital v Michigan Bureau of State Lottery*, 263 Mich App 683; 689 NW2d 541 (2004) sought winners of the state lottery. In all these cases, the private, protected, information was about private citizens whose interaction with the government was in a limited capacity. They essentially submitted personal information to the government because the government required them to. They were not public employees nor where they acting in a public capacity:

> Like in the present case, *Mager* dealt with the release of personal information belonging to private citizens as opposed to information belonging to individuals operating in a public office or in a quasi-official capacity. Using the analysis in *Mager*, we conclude that the information sought in the present case—the names, etc., of persons who have received lottery winnings by assignment or other judgment—is information of a personal nature.

Stone Street Capital, at 690.

Here, apparently, the private businesses were involved in formulating policy. If the only reason private business emails were redacted is because they were the hosts of online forums, such as Zoom meetings, then Mackinac Center will make it explicit that it does not want those. But if these businesses were contributing advice in the formulation of policy, then that information must be provided unless an exemption applies. Again, no case law cited by the University says that when a contractor communicates with a government entity it can be exempted on privacy grounds. Making or contributing to government policy is a "core purpose" which makes it disclosable under FOIA. "[T]he core purpose of the FOIA, which is contributing significantly to public

understanding of the operations or activities of the government…" *Michigan Federation of Teachers, supra*, at 672-673. If a private business is involved in "the operations or activities of the government," then that is the information that FOIA was meant to provide to the public.

FOIA clearly allows for the disclosure of private business information, as it provides an exemption for certain information related to those businesses that is a trade secret or something similar:

> (1) A public body may exempt from disclosure as a public record under this act any of the following:
>
> (f) Trade secrets or commercial or financial information voluntarily provided to an agency for use in developing governmental policy if:
>
> (i) The information is submitted upon a promise of confidentiality by the public body.
>
> (ii) The promise of confidentiality is authorized by the chief administrative officer of the public body or by an elected official at the time the promise is made.
>
> (iii) A description of the information is recorded by the public body within a reasonable time after it has been submitted, maintained in a central place within the public body, and made available to a person upon request. This subdivision does not apply to information submitted as required by law or as a condition of receiving a governmental contract, license, or other benefit.

MCL 15.243(1)(f). This limited amount of information is only withheld if confidentiality had been promised and authorized – and even then, a summary must be made available for public scrutiny.

This fits within the interpretive canon of *expressio unious est exclusion alterius*:

> The United States Supreme Court has explained that "[w]hen a statute limits a thing to be done in a particular mode, it includes a negative of any other mode." This canon of construction, known as *expressio unius est exclusio alterius*, means that "the expression of one thing suggests the exclusion of all others."

In re Estate of von Greiff, 332 Mich App 251, 264; 956 NW2d 524 (2020) (internal citations omitted). Applied here, the express conditional exemption for certain information (trade secrets) implies that any other information is not exempt – such as the identification of the business. And logic dictates that if certain limited exemptions are available, that FOIA anticipates that more

general business information should always be available to the public when that business contributes to, or profits from, government activity.

Further, the public policy of FOIA is necessary when businesses work with government policy makers. This is true, even during COVID. There have been a number of examples where businesses contracting with government and/or providing services have found themselves subject to scrutiny.[4] Claiming that a business interacting with government officials should be exempt from identification under FOIA makes no sense in achieving the core purpose of FOIA – "full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees, consistent with this act. The people shall be informed so that they may fully participate in the democratic process." MCL 15.231(2).

4. The federal FOIA statute is inapplicable here.

The University urges us to look to federal case law regarding the exemption for deliberative-process, frank-communications documents. The University is wrong because, although the courts may look to federal courts for guidance in interpreting FOIA, it only does so when the language of the two acts are similar. In this particular regard, the federal statute is significantly different and our courts have said that federal law is not applicable to Michigan's FOIA, in this regard. In *Herald Co. v Eastern Michigan University Board of Regents*, 265 Mich App 185; 693 NW2d 850 (2005), aff'd, 475 Mich 463 (2006), our court was explicit:

> We note also that Michigan's frank communications exemption is narrower than the federal exemption. The federal exemption contains an implicit presumption that the value of promoting frank communications is such that it outweighs the public's right to know. However, the Michigan exemption is more limited: in order to prevent disclosure, the government must not only show that disclosure would

[4] See, for example https://insurancenewsnet.com/oarticle/after-receiving-a-no-bid-contract-fillakit-sent-322000-tubes-to-michigan-that-were-unusable-for-covid-19-testing
Where government contractor "Fillakit's testing supplies were unusable to test for COVID-19 when delivered to Michigan."

> inhibit frank communications, it must articulate why the promotion of frank communications, "in the particular instance," "clearly" outweighs the public's right to know.

Id, at 197-198.

To evaluate just how different the federal statute is, it is useful to consider the actual language of that statute:

> (5) inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency, provided that the deliberative process privilege shall not apply to records created 25 years or more before the date on which the records were requested;

5 USC §552(b)(5). This is considerably different from Michigan's FOIA counterpart:

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

MCL 15.243(1)(m). Again, the most noteworthy difference is that Michigan's statute favors disclosure unless the public's interest in encouraging frank communications "clearly outweighs" the public interest in disclosure. The federal statute has no such consideration, and is a blanket exemption.

A little more background on the purpose behind the federal statute may be helpful. From the District of Columbia Circuit, Judge (now Justice) Kavanaugh wrote:

> FOIA Exemption 5 exempts from public disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). Exemption 5 incorporates the privileges that the Government may claim when litigating against a private party, including the governmental attorney-client and attorney work product privileges, the presidential communications privilege, the state secrets privilege, and the deliberative process privilege.

Abtew v U.S. Dept. of Homeland Security, 808 F3d 895, 898 (2015).

Michigan's statute is not similar in purpose or form.

5. The Michigan cases cited by the University for deliberative-process documents are not applicable.

The University, in addition to citing numerous federal cases that are not applicable, cites three Michigan opinions which they believe favors their position. However, two of those cases involved documents that, in addition to being part of a deliberative process, were legal advice and subject to attorney-client privilege. In *McCartney v Attorney General*, 231 Mich App 722; 587 NW2d 824 (1998), the requested documents (four letters) were prepared by the Attorney General for the Governor for the purpose of negotiating with Indian tribes. "Given that the Governor was acting within the scope of his authority in negotiating with the Indian tribes for a gaming compact and therefore had an attorney-client relationship with defendant, we next need to decide whether the four letters, which were forwarded to defendant for purposes of legal advice, were exempt from production under the FOIA." *Id*, at 729. Three of the four were clearly "for the specific purpose of obtaining legal advice." *Id*, at 732. The fourth was an internal memoranda prepared by an assistant attorney general for review by his superior. *Id*, at 733. The court found that, for the last document, there was insufficient evidence in the record to indicate whether or not it was subject to attorney-client privilege. But rather than remand it the lower court to find on the record whether or not it was subject to attorney client privilege, the court held that it was unnecessary to do so because it was exempt under the frank communications exemption. *Id*, at 735-736.

Nor does *McCartney* provide any insight into the weighing of the public's interest in the production of these records. The documents there were legal in nature and related to negotiations with Indian tribes over gaming operations. Even if not subject to attorney-client privilege, documents about tactics and negotiations are of less interest to the public than what we are faced

with here – the scientific and expert input into what is arguably the most important policy-making that has occurred in the state in recent history. These documents were not part of any negotiation. In negotiation there is a certain amount of gamesmanship or offers that were made with the presumption that they would be modified later. Such offers can be misleading without their context. E.g., The Governor there might make an offer, expecting to come down from that position, in the hope that a concession might be extracted. Those elements are not present here. These were the inputs that guided an administration on what it claimed was the best scientific evidence.[5] The public has a right to know what this scientific evidence and epidemiological counsel was. The heart of science is objectivity and reproducibility – that others can question, test, and verify findings. This maxim is often attributed to philosopher of science Karl Popper: "The goal is reproducibility, which is essential to advancing knowledge through experimental science. If these steps are followed diligently, Popper suggested, any reasonable second researcher should be able to follow the same steps to replicate the work."[6]

A second, unpublished, opinion of the Court of Appeals, is cited by the University. *Barbier v Basso*, Unpublished per curiam docket No. 212783 (2000 WL 33521028) (attached to the University's October 20 brief as exhibit 15), involved a request for documents related to

[5] "In an April 14 interview with National Public Radio, [Governor Whitmer] said, 'We're going to have to make decisions based on the best science, the best medical advice and what's in the best public health of the people of our individual states.'
And [Governor] Whitmer followed with an April 21 op-ed in The New York Times, writing, 'Each action has been informed by the best science and epidemiology counsel there is.'"
https://www.michigancapitolconfidential.com/whitmer-insists-travel-restriction-is-science-based-give-rationale-that-isnt Last accessed November 4, 2021.

[6] From the National Academies of Sciences, Engineering, and Medicine; Policy and Global Affairs; Committee on Science, Engineering, Medicine, and Public Policy; Committee on Responsible Science. "Fostering Integrity in Research."
https://www.ncbi.nlm.nih.gov/books/NBK475948/ Last assessed November 4, 2021.

complaints involving real estate license holders. *Id*, at *1. These documents were "two memoranda from the Department of the Attorney General to CIS's Director of enforcement in the Office of Commercial Services. *Id*, at *2. Not only where these memoranda preliminary to an agency determination, but these also contained legal determinations and recommendations. Again, the Attorney General's office was acting as counsel to a state office. The court appears to agree with the defendant there that, "[f]or the general welfare, the state must have thorough legal representation unhampered by disclosure of legal advice preliminary to official action."… *Id*, at *2. Those elements of effective legal representation are not implicated in our matter here.

The third Michigan opinion cited by the University, *Favor v Department of Corrections*, 192 Mich App 131 (1992), contains another factor that makes the non-disclosure there inapplicable here. Although not discussed in the opinion of the Court of Appeals, it may have been part of the trial court's decision which was affirmed: This was an action by an inmate who sought information about his record used in disciplinary reviews. FOIA explicitly denies the right to this information: "It is the public policy of this state that all persons, ***except those persons incarcerated in state or local correctional facilities***, are entitled to full and complete information regarding the affairs of government…" MCL 15.231(2) (emphasis added).

6. The University's safety and security concerns lack merit.

In both weighing the public's interest in keeping this information undisclosed, and in arguing the security of the participants will be negatively affected, the University argues that the nature of the pandemic and the debates related to its response are such that secrecy is needed. The University argues that "Requiring disclosure of these documents would dissuade informed, frank communications by individuals involved in navigating a once-in-a-generation pandemic." The thrust of the University's argument is that the importance and the controversy over these decisions

is what makes the public interest in government secrecy predominant. That openness is for less-important events. FOIA does not make these distinctions. "It is the public policy of this state that all persons, except those persons incarcerated in state or local correctional facilities, are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees, consistent with this act. The people shall be informed so that they may fully participate in the democratic process." MCL 15.231(2).

As the University points out, the COVID lockdowns were controversial, and unique – "once-in-a-generation." But these factors favor disclosure, not secrecy. Blind trust is not what FOIA is about. This is especially true where scientific evidence is relied upon. It has to be questioned and evaluated. "Trust us" is an especially dangerous position at a time like this. If it truly is a "once-in-a-generation" event, then we shouldn't have to worry about chilling frank communications because the 'next time' will not come for another generation. Arguing that the chilling effect will last a whole generation is a tough sell. And if such events become more common place, then what is essentially being argued by the University is that our government should be able to operate in increasing secrecy. That is not what FOIA calls for, and Mackinac Center would argue that this should tip the balance even further towards disclosure when weighing the relative effects.

The same logic applies to the claim that revealing the participants would "likely" subject these government employees to harassment. To buttress this claim, the University can only cite to a high profile plot against the governor. But there has been no evidence of credible threats made to lower-level officials. The fact that it might lead to "harassing communications" is always true of government officials – regardless of whether it is road-building decisions, zoning decisions, tax assessments, or any other number of mundane government activities. And yet we have FOIA

anyway. To favor government secrecy now would be the wrong balancing of competing interests.

It might be instructive to recall another recent public health threat, and how the state dealt with it. During the Flint water crisis, numerous news organizations, as well as the Mackinac Center, submitted FOIA requests to government agencies requesting email communications.[7] After an initial delay, the Governor released the requested emails. This settled the many FOIA lawsuits. Only the Governor's email address was redacted, but it was still clear which communications were to and from him. All the other government employees involved were identified by name and their email address, without redaction. The only redactions were those that were subject to attorney-client privilege. The Governor stated that the serious nature of the matter required greater disclosure: "In the spirit of transparency and accountability, I am releasing my emails related to Flint from 2014 and 2015. The Flint water crisis is an extraordinary circumstance and therefore I'm taking this unprecedented step of releasing my emails to ensure that the people of Michigan know the truth."[8]

As here, the threat to public health was serious. Passions were high, and accusations of indifference and criminality were common. Nevertheless, the state produced the relevant communications and provided the names and email addresses of the responsible government

[7] The Mackinac Center's case was here in the Court of Claims, No. 16-000164-MZ.

[8] The email package that was released and settled the Mackinac Center and others' lawsuits can be viewed here. http://flintwaterstudy.org/wp-content/uploads/2016/01/snyder-emails.pdf last accessed November 5, 2021. Several press outlets reported on these events and the emails, such as:
https://www.freep.com/story/news/local/michigan/flint-water-crisis/2016/02/19/flint-water-crisis-emails/80228582/
and
https://www.bridgemi.com/truth-squad-companion/email-trail-latest-workers-charged-flint-water-crisis

decision makers.

FOIA is relied upon by the public, both as private individual citizens and through citizens' agents and institutions such as a free press. The proper functioning of government relies on these informing institutions and on having informed citizens. Increasing government secrecy in disregard of FOIA simply because the situation is out-of-the-ordinary is contrary to the public policy of the state, and would have a dangerous effect on peoples' trust in their government and institutions right when such trust is needed most.

CONCLUSION

For the reasons stated above and in the Mackinac Center's September 21 Motion and Brief, the Mackinac Center should be granted summary judgment in its favor, and the University's motion for summary judgement of October 20 should be denied.

Dated: November 5, 2021

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Certificate of Service

The undersigned hereby certifies that he served a copy of Plaintiff's Motion for Summary Disposition and the accompanying Brief in Support on Defendant via the MiFile TrueFiling system on November 5, 2021.

Dated: November 5, 2021

/s/ Derk Wilcox