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.

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

Oral Argument Requested

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

I. INTRODUCTION

A. The background on this FOIA request.

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

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

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

> Before joining MSU in 2012, Stephen Hsu was director of the Institute for Theoretical Science and professor of physics at the University of Oregon. He also serves as scientific adviser to BGI (formerly the Beijing Genomics Institute) and as a member of its Cognitive Genomics Lab.
>
> Hsu's primary work has been in applications of quantum field theory, particularly in relation to problems in quantum chromodynamics, dark energy, black holes, entropy bounds, and particle physics beyond the standard model. He has also done work in genomics and bioinformatics, the theory of modern finance, and in encryption and information security.[1]

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

> The trouble began June 10, when MSU's Graduate Employees Union composed a lengthy Twitter thread denouncing Mr. Hsu as, among other things, "a vocal scientific racist and eugenicist." The union claimed Mr. Hsu believes "in innate biological differences between human populations, especially regarding intelligence."
>
> Mr. Hsu says these accusations "were made in bad faith." Take that 2018 blog post, which responded to New York Times articles that, in his words, linked "genetic science to racism and white supremacy." In it, he wrote: "All good people abhor racism. I believe that each person should be treated as an individual, independent of ancestry or ethnic background. . . . However, this ethical position is not predicated on the absence of average differences between groups. I believe that basic human rights and human dignity derive from our shared humanity, not from uniformity in ability or genetic makeup." Mr. Hsu doesn't work in this field but rejects the idea that scientists should categorically exclude the possibility of average genetic differences among groups.

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

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

B. The timeline of the FOIA request.

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

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

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

[2] https://www.wsj.com/articles/a-twitter-mob-takes-down-an-administrator-at-michigan-state-11593106102
Last accessed November 9, 2021.

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

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

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

C. The withholdings and redactions.

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

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

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

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

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

II. LEGAL STANDARDS AND STANDARD OF REVIEW

A. Summary disposition.

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

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

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

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

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

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

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

B. FOIA generally.

Michigan's FOIA statute, MCL 15.231(2) states:

> It is the public policy of this state that all persons, except those persons incarcerated in state or local correctional facilities, are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees, consistent with this act. The people shall be informed so that they may fully participate in the democratic process.

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

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

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

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

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

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

> Sec. 13.
> (1) A public body may exempt from disclosure as a public record under this act any of the following:
> (a) Information of a personal nature if public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy.

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

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

> **T**he names and salaries of the employees of defendant university are not "intimate details" of a "highly personal" nature. Disclosure of this information would not thwart the apparent purpose of the exemption to protect against the highly offensive public scrutiny of totally private personal details. The precise manner of expenditure of public funds is simply not a private fact. The heavy burden of justifying nondisclosure has not been met by the conclusory allegations of "ill will, hard feelings prejudice among employees" and "chill(ing of) the applications of further persons for positions similar to" those of intervening defendants.
> ***
> While we are not persuaded that salary information about individual public employees is "private" information for FOIA purposes, even assuming that disclosure would constitute an invasion of personal privacy, that invasion would not be "clearly unwarranted". The minor invasion occasioned by disclosure of information which a university employee might hitherto have considered private is outweighed by the public's right to know precisely how its tax dollars are spent.

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

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

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

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

> (b) Investigating records compiled for law enforcement purposes, but only to the extent that disclosure as a public record would do any of the following:
>
> (iii) Constitute an unwarranted invasion of personal privacy.

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

Our courts have provided criteria for interpreting this statute:

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

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

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

E. FOIA exemption for attorney-client privilege.

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

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

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

F. The "frank communications" exemption from FOIA.

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

> Sec. 13.
> (1) A public body may exempt from disclosure as a public record under this act any of the following:
>
> > (m) Communications and notes within a public body or between public bodies of an advisory nature to the extent that they cover other than purely factual materials and are preliminary to a final agency determination of policy or action. This exemption does not apply unless the public body shows that in the particular instance the public interest in encouraging frank communication between officials and employees of public bodies clearly outweighs the public interest in disclosure.

MCL 15.243(1)(m).

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

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

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

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

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

Herald Co., 475 Mich at 475.

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

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

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

Nicita, 216 Mich App at 755.

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

G. Security measures exempt under FOIA.

FOIA provides several possible exemptions for details of security measures and systems. The three subsections claimed by MSU are Section 13(1)(u), (y), and (z):

> Sec. 13.
> (1) A public body may exempt from disclosure as a public record under this act any of the following: ***
> (u) Records of a public body's security measures, including security plans, security codes and combinations, passwords, passes, keys, and security procedures, to the extent that the records relate to the ongoing security of the public body.

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

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

Id. And MCL 13.243(z) states:

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

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

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

H. The educational-privacy exemption.

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

The Act states:

> (2) A public body shall exempt from disclosure information that, if released, would prevent the public body from complying with 20 USC 1232g, commonly referred to as the family educational rights and privacy act of 1974. A public body that is a local or intermediate school district or a public school academy shall exempt from disclosure directory information, as defined by 20 USC 1232g, commonly referred to as the family educational rights and privacy act of 1974, requested for the purpose of surveys, marketing, or solicitation, unless that public body determines that the use is consistent with the educational mission of the public body and beneficial to the affected students. A public body that is a local or intermediate school district or a public school academy may take steps to ensure that directory information disclosed under this subsection is not used, rented, or sold for the purpose of surveys, marketing, or solicitation. …

MCL 15.243(2).

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

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

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

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

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

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

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

20 USC 1232g(a)(5).

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

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

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

Kalamazoo Transportation Association v Kalamazoo Public Schools, Unpublished per curiam

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

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

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

III. ARGUMENT

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

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

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

[3] For another, separate, Wall Street Journal article on the matter written by a noted physicist, see https://www.wsj.com/articles/the-ideological-corruption-of-science-11594572501.
Other state press coverage about the matter has included:
https://www.lansingstatejournal.com/story/news/2020/06/19/msu-vp-research-resigns-after-controversial-comments-research/3226785001/
https://www.detroitnews.com/story/news/local/michigan/2020/06/19/msu-research-vp-resigns-role-amid-controversy/3227716001/
National attention also shown by:
https://quillette.com/2020/07/01/on-steve-hsu-and-the-campaign-to-thwart-free-inquiry/
https://reason.com/volokh/2020/06/21/michigan-state-university-vp-of-research-ousted-because-of-his-past-scientific-statements/
https://www.thefire.org/linguists-campaign-against-pinker-flops-but-still-troubles/
(all last accessed November 11, 2021.)

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

B. The law-enforcement exemptions do not apply.

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

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

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

C. The frank-communications exemption does not apply.

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

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

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

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

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

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

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

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

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

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

IV. CONCLUSION AND RELIEF REQUESTED

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

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

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

Dated: November 12, 2021

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

Certificate of Service

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

Dated: November 12, 2021 /s/ Derk Wilcox