

**STATE OF MICHIGAN
IN THE COURT OF CLAIMS**

Mackinac Center for Public Policy,

Plaintiff,

v.

Michigan State University,

Defendant.

Case No. 21-00011-MZ

Hon. Elizabeth L. Gleicher

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**REPLY IN SUPPORT OF DEFENDANT'S 11/12/21
MOTION FOR SUMMARY DISPOSITION**

A. MSU properly applied the frank communication exemption.

The frank communication exemption requires a showing that the communication meets the definition of “frank communication” and that “the public interest in encouraging frank communication between officials and employees of public bodies clearly outweighs the public interest in disclosure.” MSU provided detailed information about each redaction made pursuant to the frank communication exemption and established these elements for each one.

Plaintiff argues that *Herald Co. v. Eastern Michigan* does not prevent the disclosure of all documents preliminary to an agency determination. MSU agrees. In its opening brief, MSU specifically recognized that frank communications are subject to a balancing test weighing MSU’s interest in frank communications against the extent to which the requested information would “contribute significantly to the public understanding of government operations.” MSU established that the balance tipped in favor of redaction in these specific circumstances. Plaintiff makes no argument to the contrary.

Plaintiff argues next that *Herald Co.* is distinguishable because factual information in the withheld report at issue in that case was available to the public elsewhere. This point is immaterial here. In *Herald Co.*, the document at issue was a memo drafted by the CFO of a university at the board’s request regarding potential financial misconduct of the president. *Herald Co.*, 475 Mich. at 478-82. It was uncontested that the memo would contribute significantly to the understanding regarding the use of public funds. *Id.* It was in that context that the Court recognized that the separate public disclosure of the underlying facts regarding the potential financial misconduct lessened the weight afforded the public interest in disclosure when balancing it against the universities’ interest in frank communications. *Id.* Here, the documents at issue are a handful of emails that contain the word “Hsu.” These emails provide little if any

understanding of governmental operations and the public interest is clearly and easily outweighed by MSU's interest in frank communications.

Plaintiff next argues that the frank communications exemption only applies to "privileged" communications or communications from individuals whose job duties "require" them to provide such communications or advice. This argument is wrong as a matter of law and irrelevant on the facts here. To begin with, Plaintiff's interpretation of FOIA is not correct. Neither FOIA nor any case interpreting it suggests that the frank communications exemption only applies to some subset of public employees. The language used in FOIA is "communications and notes within a public body." M.C.L. § 15.243(1)(m). The Supreme Court has held that all that needs to be shown to meet this burden is that "the communication was made between officials and employees of public bodies." *Herald Co.*, 475 Mich. at 475-76. This makes sense. For any organization to function well, employees with relevant information need to feel free to convey that information frankly to relevant decision makers regardless whether the information has been specifically requested or whether providing such information is "required" by their position. This is the interest that the frank communications exemption is meant to protect. *Id.*

Plaintiff argues that several Michigan cases support its argument because they consider memos and reports prepared specifically in response to specific issues of public concern.¹ None of the cases state anything that would support Plaintiff's argument. And Plaintiff is drawing the wrong inference from the context of these cases. Each of these cases considered a document that

¹ Plaintiff also cites a federal case interpreting an entirely different provision of the federal FOIA statute which applies only to certain privileged or confidential documents. *Abteu v U.S. Dept. of Homeland Security*, 808 F3d 895, 898 (2015). Michigan's FOIA statute has different provisions relating to information that is privileged or confidential for other reasons, so this case has no persuasive value. See MCL § 15.243(g), (h).

clearly contained information that would have significantly contributed to the public understanding of governmental operations but where the frank communications exemption still applied. Plaintiff here is seeking emails that, although frank communications under FOIA, would provide virtually no insight into governmental operations. In other words, these cases illustrate why the frank communications balancing test tips easily in favor of its application here.

In any event, Plaintiff's argument is irrelevant because MSU only applied the frank communications exemption to communications by and between relevant MSU administrators. The Nelson Affidavit provides the identity and position of the parties to each communication. (Ex. A at ¶ 25.) The only individual Plaintiff takes issue with is Dr. Eric Torng. Dr. Torng is the Associate Chair for Research and Faculty Development for the Department of Computer Science and Engineering and the Associate Dean of the Graduate School in the College of Engineering. (*Id.*) This is an administrative leadership position in an area closely tied to the Office of the Vice President of Research and Innovation—the position held by Dr. Hsu at the time. As an administrative leader in a related area, his input regarding a senior administrator would be considered by the President. Were there any question that he provided information to the President of MSU in his capacity as an administrative leader, he put the letter on his MSU letterhead. (Ex. B.)

To the extent that Plaintiff is arguing that the frank communications exemption does not apply to MSU employees who send letters to the President in their personal, rather than professional capacity, MSU agrees. And that is how the exemption has been applied here. MSU has not asserted the frank communication exemption over information provided by non-MSU employees or MSU employees who communicated in their personal capacities.

B. MSU properly redacted the identities of private individuals.

Defendants established that the privacy exemption applies if the information sought is of an “embarrassing, intimate, private, or confidential nature” and disclosure would not “contribute significantly to the public understanding of the operations or activities of the government.” Plaintiff argues that the identities of private individuals are not private information. Plaintiff does not argue that the disclosure of this information would contribute to the public understanding to the operations of government.

If the disclosure of a private individual’s name could reveal something controversial about the individual or subject the individual to harm, it is private. See *Mager*, 460 Mich. at 142-44. Plaintiff argues that this only applies where the individuals are required to provide information to government, not where they provide the information voluntarily. Not true. In *Detroit Free Press, Inc. v. Dep’t of Consumer & Indus. Servs.*, the appellate court considered whether it was appropriate to redact the names of individuals who filed consumer complaints with a state agency. 246 Mich. App. 311, 315-18 (2001). Filing a consumer complaint is voluntary. The Court held that whether someone filed such a complaint is of a personal nature and that providing the content of the complaints while redacting the names and addresses of the complainants struck the proper balance between allowing public review of the agency’s work and protecting individual privacy. *Id.* That is exactly what MSU has done here.

Plaintiff next argues that the identities of anyone who provides information to the President or Board cannot be private because their names are disclosed if they speak at the Board’s public meetings. This makes no sense. The public nature of MSU’s Board meetings is mandated by statute. See generally, M.C.L. § 15.263. By statute, the public is

permitted to address the Board at these public meetings in accordance with rules promulgated by the Board. *Id.* at §15.263(5). Individuals who contact the President or Board members outside of this context are not availing themselves of that public forum and are not subject to the rules applicable to it.

To be sure, the public has interest in what information the President receives from the public at large. Plaintiff has been provided that information. But, in this instance, the disclosure of the identities of the individuals who sent that information would add nothing to the public understanding of governmental operations. Plaintiff makes no argument otherwise. For that reason, the privacy exemption applies.

C. MSU properly redacted MSU email addresses.

To the extent the documents Plaintiff has requested consist of emails by or between MSU employees performing public duties, their identities have been disclosed. This is uncontested. Plaintiff insists on obtaining their email addresses as well. Plaintiff has never articulated how this information serves the purpose of FOIA. In any event, MSU established through the Siu Affidavit that limiting the dissemination of MSU email addresses serves a legitimate security purpose under FOIA.

Plaintiff argues that the risk must be to MSU's network, not individual email accounts. Whatever the legal merits of this argument, that is the risk Siu identified in his affidavit. (Ex. I at ¶¶ 4, 5.) Plaintiff also argues that some MSU employees disclose their email addresses. Of course. Dissemination of email addresses is necessary for them to serve their purpose. But limiting unnecessary dissemination serves a real security purpose. (Ex. I.) Plaintiff submits no evidence suggesting otherwise.

CONCLUSION

For the foregoing reasons, MSU requests that judgment be entered in its favor, that the complaint be dismissed in its entirety with prejudice, and for all other relief proper under the circumstances.

Respectfully submitted,



Dated: December 10, 2021

Uriel Abt
Attorney for Defendant