STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

CAROL BETH LITKOUHI,

Plaintiff,

v.

ROCHESTER COMMUNITY SCHOOL DISTRICT, a government entity,

Defendant.

Case No. 2022-193088-CZ

Hon. Jacob J. Cunningham

Derk A. Wilcox (P66177)
Stephen A. Delie (P80209)
Patrick J. Wright (P54052)
MACKINAC CENTER LEGAL FOUNDATION
Attorneys for Plaintiff
140 West Main Street
Midland, MI 48640
(989) 631-0900
wilcox@mackinac.org

Timothy J. Ryan (P40990)
Linda L. Ryan (P67686)
JACKSON LEWIS P.C.
Attorneys for Defendant
250 Monroe NW, Suite 400
Grand Rapids, MI 49503
(616) 940-0230
timothy.ryan@jacksonlewis.com
linda.ryan@jacksonlewis.com

PLAINTIFF'S COMBINED MOTION AND BRIEF TO QUASH DEPOSITION OF PLAINTIFF

For the reasons set forth in the Brief in Support below, Plaintiff requests that this Court quash Defendant's requested deposition of Plaintiff and order that such discovery not be had.

INTRODUCTION

The Plaintiff in this matter is a mother who lives within the Defendant school district. She has submitted a Freedom of Information Act ("FOIA") request to the Defendant school district. The request was granted in part and denied in part. She brought this suit to compel the district to fulfill its duties under FOIA.

Defendant here is seeking to depose Plaintiff. Deposing a FOIA requestor/plaintiff under similar conditions may be unprecedented. But more importantly, under the circumstances of this case, it is unnecessary, irrelevant, inappropriate, and done for the improper purpose of annoying, embarrassing, oppressing, and causing an undue burden. FOIA is a pro-disclosure statute which provides individuals with the ability to request documents and information from the various public bodies. It is meant to be an easy and relatively inexpensive way for citizens to monitor their government. There are very few exceptions to what a government can withhold from FOIA requestors, and the exemptions are explicitly listed in the statute. There is no applicable exemptions that allow a government to withhold materials based on the reason why the FOIA requestor wants this information, or based on whom she has communicated with. In fact, our courts have continuously held that such information is irrelevant to compliance with FOIA.

Despite that fact, Defendant seeks to depose the Plaintiff, even though her testimony would do nothing to help them establish the existence or exemption of such documents. Nor would deposing her provide relevant information regarding Defendant's burden of proving that they have an applicable exemption. Further, their discovery requests (which are unusual in itself) and Affirmative Defenses seem to indicate that their discovery focus is on the Plaintiff – why she wants the information, and whom she has spoken to about it. Our courts have said that all of this is irrelevant to complying with a FOIA request.

LEGAL STANDARDS

The Legal Standards for FOIA.

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.

MCL 15.231(2)

The only exception to the release of "full and complete information" is when a statutory exemption applies. See, generally, MCL 15.243 for a list of exemptions. "[T]he FOIA's exemptions must be narrowly construed and that the party seeking to invoke the exemption must prove that nondisclosure is in accord with the intent of the Legislature." *City of Warren v City of Detroit*, 261 Mich App 165, 169-170; 680 NW2d 57 (2004).

The public body has the burden of proof in applying an exemption. "The court shall determine the matter de novo and the burden is on the public body to sustain its denial." MCL 15.240(4). "The public body has the burden to 'sustain its denial.'" *MLive Media Group v City of Grand Rapids*, 321 Mich App 263, 271 (2017).

An important legal aspect that will be repeated throughout this brief, is that the identity of the FOIA requester and the reasons why they make their FOIA request, are irrelevant.[1] "[A] state agency should not consider the requester's identity or evaluate the purpose for which the information will be used." *State Employees Ass'n v Dept of Management and Budget*, 428 Mich 104, 121 (1987).[2]

Additionally, "The initial as well as future uses of the requested information are irrelevant." *Clerical-Technical Union of Michigan State University v Board of Trustees of Michigan State University*, 190 Mich App 300, 303 (1991).

More recently, the courts have said:

> [A]s the Michigan Supreme Court has recently proclaimed, only the circumstances known to the public body at the time of the request are relevant to whether an

[1] With the exception where a requester is incarcerated, which does not apply here.
[2] The cited opinion dealt with the specific privacy exemption, but it is analogous here.

> exemption precludes disclosure. Because [plaintiff] did not reveal the purposes for its March 26, 2008, FOIA request, the Secretary could not have known those purposes at the time of her denial. And no matter what use [plaintiff] may make of the requested information—even if [plaintiff] intends to send unwanted mass mailings or a deluge of junk mail or make telephone solicitations or personal visits—such future use is irrelevant.

Practical Political Consulting v Secretary of State, 287 Mich App 434, 457-458 (2010).

The U.S. Supreme court has stated the same principle regarding the similar federal FOIA statute. "[T]he identity of the requesting party has no bearing on the merits of his or her FOIA request, …" *US Dept of Defense v Federal Labor Relations Authority*, 510 US 487, 496 (1994).[3]

The Legal Standard for Discovery.

"The purpose of discovery is to simplify and clarify the contested issues, which is necessarily accomplished by the open discovery of all relevant facts and circumstances related to the controversy." *Hamed v Wayne Co*, 271 Mich App 106, 109; 719 NW2d 612 (2006). "While Michigan is strongly committed to open and far-reaching discovery, a trial court must also protect the interests of the party opposing discovery so as not to subject that party to excessive, abusive, or irrelevant discovery requests." *Planet Bingo, LLC v VKGS, LLC*, 319 Mich App 308, 327; 900 NW2d 680 (2017). A court may limit discovery "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." MCR 2.302(C).

The cornerstone of discovery is relevance and proportionality:

> In General. Parties may obtain discovery regarding any non-privileged matter that is ***relevant to any party's claims or defenses and proportional to the needs of the case***, taking into account all pertinent factors, including whether the burden or expense of the proposed discovery outweighs its likely benefit, the complexity of

[3] The federal court's interpretations are useful when interpreting our state statute due to the similarities: "[W]e have noted that the Michigan exemptions created in the FOIA generally mirror the exemptions found in the federal FOIA, and we held that "[t]he similarity between the FOIA and the federal act invites analogy when deciphering the various sections and attendant judicial interpretations" *Evening News Ass'n v City of Troy*, 417 Mich 481, 494-5 (1983) (internal citations and footnotes omitted).

> the case, the importance of the issues at stake in the action, the amount in controversy, and the parties' resources and access to relevant information. Information within the scope of discovery need not be admissible in evidence to be discoverable.

MCR 2.302(B)(1) (emphasis added).

If the discovery sought is not relevant or proportional, this court has broad powers to limit it:

> (C) Protective Orders. On motion by a party or by the person from whom discovery is sought, and on reasonable notice and for good cause shown, the court in which the action is pending may issue any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following orders:
>
> (1) that the discovery not be had;
>
> (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place;
>
> (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;
>
> (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;
>
> …

MCR 2.302(C)(1)-(4).

RELEVANT FACTS

Plaintiff submitted a FOIA request to Defendant school district for documents and materials related to the District's curriculum and training. Among other things, the Defendant seems to be claiming that it has no duty under FOIA to locate the requested records from district schools or teachers under its authority. See the Defendant's Answers to paragraphs 49 and 50 of Plaintiff's Amended Complaint.

> 49. In light of the above the District is legally obligated to ask its members schools for any materials in their possession that are responsive to Plaintiff's History Request, regardless of whether the District itself is in possession of those materials.
>
> **ANSWER: Denied as untrue.**

> 50. For the same reasons, the District is legally obligated to ask the individual teachers responsible for teaching the courses that would contain material responsive to Plaintiff's History Request for any relevant materials, regardless of whether the District itself is in possession of those materials.
>
> **ANSWER: Denied as untrue.**

(The substance of this lawsuit will no doubt be briefed more fully in a subsequent summary disposition motion after Plaintiff has conducted discovery.)

Defendant has taken the unusual step, for a FOIA matter, of sending discovery requests to the Plaintiff/FOIA requestor.[4] Mackinac responded. (See Exhibit A, Defendant's Request for Documents with Plaintiff's Responses, attached to the Appendix.) Although those requests are not the subject of this motion, these seem to show what sort of information Defendant will seek from the Plaintiff in deposition. None the questions asked seem to go to the legal questions of whether or not the District has a duty to ask its employees for information relevant to a FOIA request, or whether an applicable FOIA exemption applies. Instead, Defendant has sought to find out, in each and every request, whom Plaintiff has communicated with and the substance of that communication. (Exhibit A, supra.)[5]

Defendant seeks to depose the Plaintiff in this FOIA matter. The two parties had discussed this matter as Defendant sought to secure dates. On July 19, 2022, Plaintiff sent a letter to Defendant stating that it would oppose depositions as it would not produce anything relevant, and it was expensive, intrusive, and intimidating:

> This letter is in response to our discussions regarding your request to schedule a deposition of our client, the plaintiff. As you are aware, a deposition is an expensive and intrusive form of discovery and is intimidating to laypeople, such

[4] Plaintiff's search on Westlaw for opinions including "FOIA" and "MCR 2.302" or "MCR 2.306" found no opinions where the governmental body sought to use discovery to inquire about the FOIA requestor.

[5] The substance of these requests is not at issue here in this motion – Plaintiff has responded with its objections and answers. But it does tend to show the kind of information Defendant is trying to use for its defense.

> as our client. Furthermore, a public body seeking a deposition, or even discovery in general, from a FOIA requestor is highly unusual and flies in the face of the FOIA statute – the purpose of which is to provide citizens an easy and affordable way to inspect government documents.
>
> The touchstone of all discovery is relevance, and we are unable to determine how the deposition of our client is likely to lead to the discovery of relevant evidence in this case. The courts have said:
>
> 1) It is the public body that has the burden of showing the application of statutory exemptions to FOIA disclosure. *MLive Media Group v City of Grand Rapids*, 321 Mich App 263, 271 (2017).
>
> 2) The identity and the motives of the FOIA requestor are irrelevant to the application of an exemption. *State Employees Ass'n v Department of Management and Budget*, 428 Mich 104, 122 (1987).
>
> Per MCR 2.302, "Parties may obtain discovery regarding any non-privileged matter that is relevant to any party's claims or defenses and proportional to the needs of the case, taking into account all pertinent factors, including whether the burden or expense of the proposed discovery outweighs its likely benefit, the complexity of the case, the importance of the issues at stake in the action, the amount in controversy, and the parties' resources and access to relevant information."
>
> Based on that standard, we do not believe a deposition is necessary, appropriate, or proportional to the needs of this case. Instead of a deposition, we propose working cooperatively to provide you with the discovery you seek in this matter. We would be happy to have our client provide responses to written questions and interrogatories, and we are similarly willing to evaluate whether it would be possible to stipulate to facts you believe are relevant to you claims or defenses. We are equally open to discussing any other methods of discovery that are more proportional to the needs of this case than depositions.
>
> To the extent these alternatives are not satisfactory, and given the irrelevance of the testimony of a FOIA requestor to determining whether a FOIA exemption applies, as well as the expense and burden associated with depositions, we will have to move to quash any subpoena for a deposition of our client.

See a copy of this July 19 letter attached as Exhibit B in the Appendix.

Defendants replied by letter that same day, stating: "Needless to say, we disagree with your position that plaintiffs in FOIA cases are exempted from being deposed. Accordingly, please find a notice for your client's deposition enclosed with this letter." (See Defendant's July 19 Letter, attached as Exhibit C in the Appendix.) Note that Defendant's letter misstates Plaintiff's position. Plaintiff never stated that FOIA plaintiffs are always exempt from being deposed. What Plaintiff said was that, in this case, there was nothing Plaintiff could say in a deposition that was relevant

to Defendant's burden of proving that there is an applicable exemption that would allow to Defendant to withhold the requested information, or that would show what Defendant's duty is in collecting public documents. Therefore her testimony is irrelevant.

Note also that Plaintiff offered to work with Defendant to obtain relevant information in a less onerous way: "We would be happy to have our client provide responses to written questions and interrogatories, and we are similarly willing to evaluate whether it would be possible to stipulate to facts you believe are relevant to you claims or defenses. We are equally open to discussing any other methods of discovery that are more proportional to the needs of this case than depositions." (Exhibit B, supra.)

Defendant then filed a Notice of Taking Deposition. (See the Notice of Taking Depositions attached as Exhibit D in the Appendix.)

ARGUMENT

The FOIA process is meant to provide to the citizens of the state information about how their government is operating. It is uncontested that the school districts are subject to FOIA. The process is meant to be a quick, easy, and relatively inexpensive. What Defendant is doing here is making it difficult and expensive. FOIA fails at its purpose if a government body can deny the request, and then force the requestor into the expense and intrusive process of being deposed.

As detailed above, citizens are *entitled* to this information, regardless of their purpose, their background, or what they intend to do with the information. All those things are irrelevant to the FOIA request. A public body must produce the documents. The only time when the public body does not need to produce documents in its possession is when there is a statutory exemption. In that instance where there is an applicable statutory exemption, the public body has the burden of proof of showing that it is entitled to make use of this exemption – the FOIA requestor/plaintiff

does not have to prove that they can overcome that exemption. FOIA public-body defendants cannot shift the burden of proof like that.

Even when there is a statutory exemption, it is usually not automatic. The public body still has to generally prove that the balance of interests favors non-disclosure. "As the statute indicates, a record that falls within one of these categories is not automatically exempt from disclosure. Rather, the record is exemptible and exempt only if the public-interest balancing test is also satisfied." *Detroit Free Press, Inc v City of Southfield*, 269 Mich App 275, 285-286; 713 NW2d 28 (2005).

Under these conditions, it is almost impossible to conceive of when subjecting the FOIA requestor/plaintiff to a deposition would be appropriate. These exemptions are generally a question of law, not fact. And when there is a factual question involved, it is not the FOIA requestor/plaintiff who is going to be able to provide information. For example, MCL 15.243(1)(a) provides an exemption for "Information of a personal nature if public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy." Because the information is only exempt if it is "a clearly unwarranted invasion," factual development is necessary in this instance. But even then, it is not the FOIA requestor/plaintiff's burden to prove this. Nor is it the FOIA requestor/plaintiff's *specific* interest that governs. It is public's *general* interest. "The only relevant public interest is the extent to which disclosure would serve the core purpose of the FOIA, which is to facilitate citizens' ability to be informed about the decisions and priorities of their government." *Detroit Free Press*, supra, at 282. So, again, there is no reason to depose the FOIA requestor/plaintiff. Her personal interest is irrelevant. It is the public's interest.

Here, it is the public's interest in knowing what materials the schools are using. There is no exemption for this, and there is no balancing of interest here. It is very simple. Does someone

under the Defendant's authority have these materials? If so, the Defendant has a duty to find and locate. Is there a statutory exemption that would allow Defendant to withhold or redact these materials? If so, the Defendant has a duty to assert the exemption, and prove that it applies. None of this implicates any knowledge that Plaintiff has.

Defendant has offered to work with Defendant to obtain any such information through written requests, stipulations, etc. These should be more than sufficient. But a contested FOIA matter cannot be allowed to become an expensive process that intimidates citizens. Such a process, besides being onerous and unnecessary, would 'chill' citizens and deter them from making such requests. This would destroy the purpose of FOIA.

For these reasons, the request to depose Plaintiff is improper because there is no relevance; and, further, it is unreasonable and designed to annoy, embarrass or oppress the Plaintiff.

REQUEST FOR RELIEF

For the reasons cited above, Plaintiff requests that the Notice of Deposition be quashed. In the alternative, Plaintiff requests a protective order pursuant to MCR 2.302(C)(1)-(4).

Dated: August 3, 2022

MACKINAC CENTER LEGAL FOUNDATION

By: /s/ Derk Wilcox
Attorneys for Plaintiff
140 W. Main Street
Midland, MI 48640
(989) 631-0900
wilcox@mackinac.org