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

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PLAINTIFF'S BRIEF IN RESPONSE TO DEFENDANT'S 9/30/2022 MOTION FOR SUMMARY DISPOSITION

INTRODUCTION

Defendant has brought a summary disposition motion essentially arguing that teachers, even though they are employees of the school district, are exempt from having to provide materials that are responsive to a FOIA request.[1] "Records Created and Retained by Individual Teachers are not Public Records because Teachers are not Public Bodies." (Def. Br. at 5.) Additionally, Defendant makes a string of false or misleading statements regarding teachers and FOIA: "RSCD

[1] The second issue regarding copyrighted materials was resolved and the parties have stipulated to the dismissal of that issue without prejudice.

Teachers are not members of the administration. They are employees and members of a bargaining unit represented by the Michigan Education Association. The terms and conditions of their employment are governed by a collective bargaining agreement." (Def. Br. at 3.) As we will see, FOIA, when applied to a public body, applies to every employee within that public body, except for the Governor and certain other executive officers. Furthermore, contrary to Defendant's assertions, teachers are NOT employed by a bargaining unit. They are employees of the school district subject to FOIA. While a collective bargaining agreement may set many terms and conditions of employment, it cannot supersede state law in regards to FOIA or elsewhere.

FACTUAL BACKGROUND

On December 14, 2021. Plaintiff submitted a FOIA request to the District for the release of information relating to a "History of Ethnic and Gender Studies" course that had been taught by at least one of the District's member schools. The District responded to Plaintiff's request by partially granting it. Specifically, the District granted Plaintiff's request with respect to a unit plan, which was provided to Plaintiff as part of an earlier request, and a first-two-weeks course outline. The remainder of her request for curriculum materials and other records relating to the course was denied.

After receiving the District's response, Plaintiff filed an administrative appeal on January 19, 2022, in an attempt to obtain a response containing the remaining materials she had requested. In this appeal, Plaintiff specifically noted that, unless no materials had been distributed to students as part of the course, responsive records necessarily had to exist. Plaintiff further explained that, despite numerous attempts to obtain the requested records through FOIA and alternate means, she had been repeatedly rebuffed.

The District responded to Plaintiff's appeal on February 8, 2022 by denying it. In its denial, the District emphasized that it had provided those responsive records known to exist by the district, and denied the remainder of Plaintiff's appeal on the grounds that no responsive materials existed *in the possession of the administration*. The District failed to address any specific argument raised in Plaintiff's appeal, including the fact that the District's position would inherently mean that no classroom materials had been produced in a course that had been actively taught for over six months.

Plaintiff then filed this lawsuit.

Certain materials were withheld from copying due to the District's claim of these materials being copyright protected. That issue has been resolved at this time, and only the question of which materials the District is required to produce remains.

SUMMARY DISPOSITION LEGAL STANDARDS

Defendant has brought its summary disposition motion under MCR 2.116(C)(8) and (10). Summary disposition under MCR 2.116(C)(10) is proper only where there is no remaining factual issue, and the matter can be determined as a legal question on the pleadings and discovery responses.

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).

A motion under MCR 2.116(C)(8) challenges the legal sufficiency of a complaint. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). When considering a motion under this section, a court accepts all well-pleaded factual allegations as true and construes them in the light most favorable to the non-movant. *Id*., citing *Wade v Dept of Corr*, 439 Mich 158, 162; 483 NW2d 26 (1992). "The motion must be granted if no factual development could justify the plaintiff's claim for relief." *Bailey v Schaaf*, 494 Mich 595, 603; 835 NW2d 413 (2013).

ARGUMENT

FOIA requires the disclosure of all public bodies' documents, unless specifically exempt.

Michigan's FOIA statute 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).

"Public records" that must be disclosed under FOIA are defined: "'Public record' means a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function, from the time it is created." MCL 15.232(i).

"Public bodies" are defined as:

> (h) "Public body" means any of the following:
> ***
> (iii) A county, city, township, village, intercounty, intercity, or regional governing body, council, ***school district***, special district, or municipal corporation, or a board, department, commission, council, or agency thereof.
> (iv) Any other body that is created by state or local authority or is primarily funded by or through state or local authority, except that the judiciary, including the office of the county clerk and its employees when acting in the capacity of clerk to the circuit court, is not included in the definition of public body.

MCL 15.232(h) (emphasis added).

Schools are not specifically excluded from the definition of what constitutes a public body, and schools are indisputably part of the school districts. Nor are public-school teachers excluded from what constitutes a public employee. Teachers are "primarily funded by or through state or local authority" and are included under FOIA as responsive entities, even if the FOIA request must be submitted to the district's FOIA coordinator.

FOIA Provides An Exemption For Certain School Materials, But Not For What Was Requested Here.

The FOIA statutes exempt certain school information from disclosure. This makes sense. In the school setting, for example, the public shouldn't be able to obtain, through FOIA, the completed homework of a particular student. Nor should they be able to use FOIA to obtain previous tests assigned to a class. And for this reason, the statutes are fairly specific on what can and cannot be exempt. MCL 15.245(1)(q), for instance, exempts:

> (q) Academic transcripts of an institution of higher education established under section 5, 6, or 7 of article VIII of the state constitution of 1963, if the transcript pertains to a student who is delinquent in the payment of financial obligations to the institution.

But the most extensive part of the statute regarding education exemptions is in MCL 15.243(2), which incorporates the federal "Family Education and Privacy Act" (the "Privacy Act":

> (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. Before disclosing the directory information, a public body that is a local or intermediate school district or a public school academy may require the requester to execute an affidavit stating that directory information provided under this subsection will not be used, rented, or sold for the purpose of surveys, marketing, or solicitation.

MCL 15.243(2).

Neither MCL 15.243(2) nor the federal Privacy Act exempts information of the kind sought here. The federal Privacy Act conditions the receipt of federal funds on compliance with that Act. The federal Privacy Act's purpose and intent is to provide confidentiality of individual students' records, but also to ensure that the school cannot keep such information concealed from the

student's parents. The 20 USC 1232g provision referred to in MCL 15.243(2) is provided here and attached as Exhibit A in the Appendix. Nothing in this federal Privacy Act allows the District to exempt the information Plaintiff has requested – and Defendant has not claimed that it does. The primary purpose of the federal law is summed up in the federal statute here:

> (1) No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information, as defined in paragraph (5) of subsection (a)) of students without the written consent of their parents to any individual, agency, or organization, other than to the following-.

20 USC § 1232g(b)(1).

In sum, information is only exempt from FOIA disclosure if there is a specific exemption. It is the burden of the public body to prove an exemption exists and is applicable. Defendant has not cited to any relevant exemption, and none exist covering the information sought here.

A Collective Bargaining Agreement Cannot Supersede FOIA.

This simple and obvious point is that, contrary to Defendant's assertions, a collective bargaining agreement cannot supersede the FOIA law. A collective bargaining agreement is an agreement between the district and the employees' union. It can set certain terms and conditions of employment as allowed by statute. It cannot supersede FOIA. Our Supreme Court has stated the law on this very clearly:

> Separately, [the union] contends that the FOIA permits public bodies to exempt the deliberative process of their subordinates from public scrutiny. Both parties agreed in their collective bargaining agreement that the evaluation of school administrators would be conducted according to the appellee school district's Administrative Performance Review Handbook. The handbook's evaluation form declares that "[t]his evaluation document will be reviewed only by appropriate administrative personnel of the Lansing School District."
>
> We agree with the Court of Appeals that the defendant school district cannot "eliminate its statutory obligations to the public merely by contracting to do so with plaintiff [union]." The FOIA requires disclosure of all public records not within an

> exemption. ***No exemption provides for a public body to bargain away the requirements of the FOIA***.

Bradley v Saranac Community Schools Bd. Of Educ., 455 Mich 285, 303 (1997) (emphasis added).

While it does not control in this case, it is worth noting that the collective bargaining agreement that was in place on December 14, 2021, when the FOIA request was made, can be read to anticipate that teachers may have to provide documents in response to FOIA requests. The collective bargaining agreement stated:

> 23.10 Teacher, the teacher and/or Association will be made aware of the nature of the request and the materials requested prior to forwarding the materials to the person(s) making the request. If the teacher requests copies of the FOIA requested materials they will be provided.

A copy of this page from the 2013-2019 Collective Bargaining Agreement is attached as Exhibit B in the attached Appendix.[2] This provision would have little meaning if it was only meant to cover documents the administration already possessed.

The District Has A Duty To Collect Information Responsive To FOIA From All Employees.

[2] Although this collective bargaining agreement states that it expired in 2019; upon information and belief, a new collective bargaining agreement may not have been entered into until February 2022. The 2022 agreement can be accessed here: https://resources.finalsite.net/images/v1661782087/rochesterk12mius/nxvbgin0huat1zvzgain/2022-2024REAMasterAgreement82922.pdf The 2022 collective bargaining agreement appears to have the same language as the old one, and lists it in the index as "FOIA: Teacher rights." This again appears to acknowledge that teachers are subject to FOIA.

Under Michigan labor law, generally, the terms and conditions of a collective bargaining agreement remain in effect until a new agreement takes effect, or until good-faith negotiations have reached an impasse. "'Wages, hours, and other terms and conditions of employment' that are deemed to be 'mandatory subjects' of bargaining survive the expiration of an agreement by operation of law until an impasse in negotiation occurs." *Jackson Community College Classified and Technical Ass'n, Michigan Educational Support Personnel Ass'n v. Jackson Community College*, 187 Mich App 708, 711-712; 468 NW2d 61 (1991).

Therefore, although it does not control, the terms of the old collective bargaining agreement were the one still in effect at the time of the FOIA request.

Defendant asserts that because the teachers themselves are not public bodies, their employer, which is a public body, is not required to obtain information that is in the teachers/employees' possession. It is Defendant's burden to show that this is the law, yet it offers no support for this other than an irrelevant discussion of why the FOIA statute names "employees" in the provision covering the definition of public bodies pertaining to the executive branch, and not in the provisions covering other public bodies:

> (i) A state officer, ***employee***, agency, department, division, bureau, board, commission, council, authority, or other body ***in the executive branch of the state government***, but does not include the governor or lieutenant governor, the executive office of the governor or lieutenant governor, or employees thereof.

MCL 15.232(h)(i) (emphasis added).

(Defendant errs when it says this provision naming employees covers all state government, Def. Br. at page 6. By its clear language this subsection only applies to the executive branch.) Defendant alleges that because such language about employees being public bodies is included in the one subsection, that its exclusion of the term in other subsections defining public bodies outside of the executive branch, means that employees are exempt from FOIA. Such a misinterpretation would gut FOIA, and ignores additional statutory language, as will be shown below.

As a starting point, FOIA specifically requires that documents are obtainable from "all employees," not just administrators: "It is the public policy of this state that all persons … are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and ***public employees***..." MCL 15.231(2) (emphasis added).

Teachers are indisputably public employees, notwithstanding Defendant's attempts to cast them as employees of their union or a bargaining unit, as we have seen above. Their positions are "primarily funded by or through state or local authority." MCL 15.232(h).

Defendant relies on the recent holding in *Bisio v City of Village of Clarkston*, 506 Mich 37; 954 NW2d 95 (2020). In *Bisio*, the city contracted out work to an attorney who acted as the city's attorney. *Id*. at 41-42. Rather than being paid a salary, the city attorney submitted his bills to the city. *Bisio v City of Village of Clarkston*, unpublished opinion per curiam of the Court of Appeals, issued July 3, 2018 (Docket No. 335422), slip copy at *1, overruled by *Bisio v City of Village of Clarkston*, 506 Mich 37 (2020). (A copy of this unpublished Court of Appeals' decision is attached as Exhibit C.)

The Court of Appeals erred where it found that the city attorney's documents were not subject to disclosure under FOIA. The Supreme Court reversed the Court of Appeals, holding that: "Consequently, we conclude that the documents at issue are 'public records' because they are comprised of 'writing[s] prepared, owned, used in the possession of, or retained by a public body in the performance of an official function, from the time [they were] created.'" *Bisio*, supra, 506 Mich at 55.

The holding of *Bisio* was that documents in the possession of an outside contractor where subject to FOIA if these were used in an official public function. How, then, can documents in the possession of a public *employee* that were used in conducting an official function be considered exempt or not public records if such documents held by an outside *contractor* are required to be disclosed?

The question of the scope of disclosure of *agents* of the public body was raised in *Bisio*, but not decided.[3] In its Order granting leave to appeal, the Court stated:

> The parties shall address: (1) whether the Court of Appeals erred in holding that the documents sought by the plaintiff were not within the definition of "public record"

[3] The question of an employer-agent relationship has not been raised before by Plaintiff. But should she not prevail in this motion, will seek to amend her complaint to raise the issue under MCR 2.116(I)(5).

> in § 2(i) of the Freedom of Information Act (FOIA), MCL 15.231 *et seq*.; and *(2) whether the defendant city's charter-appointed attorney was an agent of the city such that his correspondence with third parties, which were never shared with the city or in the city's possession, were public records subject to the FOIA*…
>
> *Bisio v Clarkston*, 504 Mich 966; 933 NW2d 36 (2019) (emphasis added).

Despite the *Bisio* court calling for the parties to address the agency question, the Court did not decide it. A concurrence by Chief Justice McCormack (and a dissent by Justice Viviano) noted the failure to address the very question the Court had ordered the parties to brief. Chief Justice McCormack addressed the question at length in her concurrence, and noted that the common law of agency still applies unless abrogated by statute. In doing so, she noted the absurdity of interpreting FOIA to exclude documents held by employees:

> Moreover, applying common-law agency principles is the only way that the FOIA works. The plaintiff submitted her FOIA request to the City, an artificial entity that can only act through others. That corporations act through agents is well settled. See *Fox v Spring Lake Iron Co*, 89 Mich 387, 399; 50 NW 872 (1891). If agency principles did not apply, how could citizens obtain public records from a municipal corporation? The FOIA's definition of a "public body" for local governmental units does not include employees. See MCL 15.232(h)(iii). Yet a city can only act through its agents and employees. Thus, if agency principles did not apply to the FOIA, no records from a municipal corporation would be subject to disclosure; it can't prepare, use, or retain records on its own.

Bisio, 506 Mich, at 57-59 (McCormack, CJ, concurring). (Footnotes omitted.)

Defendant is indisputably a public body. It is an artificial entity that can only act through its employees/agents. So, according to Defendant's logic, no public records can be obtained from any public body - except from the executive branch, and only then because that part of the statute specifically lists "employees."

Defendant also cites an unpublished court of appeals' opinion where a public official did not have to provide his *personal* records in response to FOIA requests. In *Blackwell v City of Livonia*, unpublished per curiam opinion of the Court of Appeals issued December 16, 2021

(Docket No. 357469) (cited by Defendant and attached as its exhibit), it was the mayor's private communications that came to his inbox that were exempt. "That the office of the mayor is a public body, however, is not the end of the analysis. The question presented in this case is whether the inbox messages sent to Mayor Brosnan's Facebook profile, which is not maintained or used by the office of the mayor, are also public records under FOIA. We hold that they are not." *Blackwell*, supra, attached as Defendant's Exhibit at page *6. This does not apply here as Plaintiff has not sought any private documents – only documents that were used and prepared in the performance of a public function, as FOIA requires.

Defendant Cannot Withhold Documents Simply Because These Were Not In The Possession Of The Administration At The Time Of Request.

As noted above, Defendant repeatedly tries to evade disclosure by claiming that documents in the hands of employees are beyond the reach of FOIA. No court has ever found this to be true. Documents in the possession of employees or officers are only beyond the reach of FOIA if they are the employee's personal documents (or if a statutory exemption applies). This evasion is the basis of the affidavits supplied by Defendant, and which makes these affidavits irrelevant. In the affidavit of Joshua Wrinkle, he states that: "Teachers at Rochester High School are not required to create, retain or copy any such documents ***to me or anyone else in the administration***. … Therefore, the Rochester High School ***administration*** is not and has not been in possession of any such documents." Wrinkle Affidavit at ¶ 4 (emphasis added). The affidavit of Pasquale Cusumano makes an identical statement. Cusumano Affidavit at ¶ 4.

Nowhere in the FOIA statute does it say that only documents held by the administrators themselves are subject to disclosure. Defendant would re-write the statute. Where it says "'Public record' means a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function, from the time it is created," Defendant's interpretation

would rewrite this to say 'a document prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function, from the time it is created, *but only if it is held by or kept in the possession of an administrator*.' This is not what the current statute says and it is clearly an incorrect interpretation of FOIA. No court has held any interpretation even remotely like this. If Defendant's interpretation where correct, imagine the inquiry every court would have to go through when interpreting FOIA: Was the document held by an administrator at the time of the request? Was it in the administrator's office? How far does the administrator's possession extend? What if it were held in a different building? Stored off site? In individual schools? Such an analysis would be absurd and would nullify FOIA. All a public body would have to do to evade FOIA is to store documents somewhere other than in an administrator's direct possession. This interpretation would rewrite decades of FOIA law.

But such an analysis is completely unnecessary. The statute has already answered it for us. "It is the public policy of this state that ***all persons … are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees***, consistent with this act." MCL 15.231(2) (emphasis added).

SUMMARY

For the reasons stated above, Defendant's motion for summary disposition under MCR 2.119(C)(8) and (C)(10) should be denied. Further, disposition on the legal question in favor of Plaintiff is warranted. Pursuant to MCR 2.116(I)(2), "If it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment in favor of the opposing party." There is no question of law that can be resolved in favor of Defendant on the question of whether or not documents held by or prepared by teachers as employees of the

district are subject to FOIA. (With the exception of documents protected by privacy exemptions, which do not apply here and has not been claimed.) As public employees, these documents are subject to FOIA and Defendant has not asserted any valid exemption found in the law.

As such, this case should continue into discovery, as has been acknowledged by the parties in their Stipulated Order Regarding Early Motions for Summary Disposition which was entered by this court on September 16, 2022.

Respectfully Submitted:

October 14, 2022

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APPENDIX

TO PLAINTIFF'S RESPONSE TO

DEFENDANT'S MOTION FOR SUMMARY DISPOSITION

EXHIBIT A

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20 USC 1232g: Family educational and privacy rights
Text contains those laws in effect on October 11, 2022

From Title 20-EDUCATION
CHAPTER 31-GENERAL PROVISIONS CONCERNING EDUCATION
SUBCHAPTER III-GENERAL REQUIREMENTS AND CONDITIONS CONCERNING OPERATION AND ADMINISTRATION OF EDUCATION PROGRAMS: GENERAL AUTHORITY OF SECRETARY
Part 4-Records; Privacy; Limitation on Withholding Federal Funds

Jump To:

§1232g. Family educational and privacy rights

(a) Conditions for availability of funds to educational agencies or institutions; inspection and review of education records; specific information to be made available; procedure for access to education records; reasonableness of time for such access; hearings; written explanations by parents; definitions

(1)(A) No funds shall be made available under any applicable program to any educational agency or institution which has a policy of denying, or which effectively prevents, the parents of students who are or have been in attendance at a school of such agency or at such institution, as the case may be, the right to inspect and review the education records of their children. If any material or document in the education record of a student includes information on more than one student, the parents of one of such students shall have the right to inspect and review only such part of such material or document as relates to such student or to be informed of the specific information contained in such part of such material. Each educational agency or institution shall establish appropriate procedures for the granting of a request by parents for access to the education records of their children within a reasonable period of time, but in no case more than forty-five days after the request has been made.

(B) No funds under any applicable program shall be made available to any State educational agency (whether or not that agency is an educational agency or institution under this section) that has a policy of denying, or effectively prevents, the parents of students the right to inspect and review the education records maintained by the State educational agency on their children who are or have been in attendance at any school of an educational agency or institution that is subject to the provisions of this section.

(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.

(D) A student or a person applying for admission may waive his right of access to confidential statements described in clause (iii) of subparagraph (C), except that such waiver shall apply to recommendations only if (i) the student is, upon request, notified of the names of all persons making confidential recommendations and (ii) such recommendations are used solely for the purpose for which they were specifically intended. Such waivers may not be required as a condition for admission to, receipt of financial aid from, or receipt of any other services or benefits from such agency or institution.

(2) No funds shall be made available under any applicable program to any educational agency or institution unless the parents of students who are or have been in attendance at a school of such agency or at such institution are provided an opportunity for a hearing by such agency or institution, in accordance with regulations of the Secretary, to challenge the content of such student's education records, in order to insure that the records are not inaccurate, misleading, or otherwise in violation of the privacy rights of students, and to provide an opportunity for the correction or deletion of any such inaccurate, misleading or otherwise inappropriate data contained therein and to insert into such records a written explanation of the parents respecting the content of such records.

(3) For the purposes of this section the term "educational agency or institution" means any public or private agency or institution which is the recipient of funds under any applicable program.

(4)(A) For the purposes of this section, the term "education records" means, except as may be provided otherwise in subparagraph (B), those records, files, documents, and other materials which-

(i) contain information directly related to a student; and

(ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.

(B) The term "education records" does not include-

(i) records of instructional, supervisory, and administrative personnel and educational personnel ancillary thereto which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute;

(ii) records maintained by a law enforcement unit of the educational agency or institution that were created by that law enforcement unit for the purpose of law enforcement;

(iii) in the case of persons who are employed by an educational agency or institution but who are not in attendance at such agency or institution, records made and maintained in the normal course of business which relate exclusively to such person in that person's capacity as an employee and are not available for use for any other purpose; or

(iv) records on a student who is eighteen years of age or older, or is attending an institution of postsecondary education, which are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his professional or paraprofessional capacity, or assisting in that capacity, and which are made, maintained, or used only in connection with the provision of treatment to the student, and are not available to anyone other than persons providing such treatment, except that such records can be personally reviewed by a physician or other appropriate professional of the student's choice.

(5)(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.

(B) Any educational agency or institution making public directory information shall give public notice of the categories of information which it has designated as such information with respect to each student attending the institution or agency and shall allow a reasonable period of time after such notice has been given for a parent to inform the institution or agency that any or all of the information designated should not be released without the parent's prior consent.

(6) For the purposes of this section, the term "student" includes any person with respect to whom an educational agency or institution maintains education records or personally identifiable information, but does not include a person who has not been in attendance at such agency or institution.

(b) Release of education records; parental consent requirement; exceptions; compliance with judicial orders and subpoenas; audit and evaluation of federally-supported education programs; recordkeeping

(1) No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information, as defined in paragraph (5) of subsection (a)) of students without the written consent of their parents to any individual, agency, or organization, other than to the following-

(A) other school officials, including teachers within the educational institution or local educational agency, who have been determined by such agency or institution to have legitimate educational interests, including the educational interests of the child for whom consent would otherwise be required;

(B) officials of other schools or school systems in which the student seeks or intends to enroll, upon condition that the student's parents be notified of the transfer, receive a copy of the record if desired, and have an opportunity for a hearing to challenge the content of the record;

(C)(i) authorized representatives of (I) the Comptroller General of the United States, (II) the Secretary, or (III) State educational authorities, under the conditions set forth in paragraph (3), or (ii) authorized representatives of the Attorney General for law enforcement purposes under the same conditions as apply to the Secretary under paragraph (3);

(D) in connection with a student's application for, or receipt of, financial aid;

(E) State and local officials or authorities to whom such information is specifically allowed to be reported or disclosed pursuant to State statute adopted-

(i) before November 19, 1974, if the allowed reporting or disclosure concerns the juvenile justice system and such system's ability to effectively serve the student whose records are released, or

(ii) after November 19, 1974, if-

(I) the allowed reporting or disclosure concerns the juvenile justice system and such system's ability to effectively serve, prior to adjudication, the student whose records are released; and

(II) the officials and authorities to whom such information is disclosed certify in writing to the educational agency or institution that the information will not be disclosed to any other party except as provided under State law without the prior written consent of the parent of the student.[1]

(F) organizations conducting studies for, or on behalf of, educational agencies or institutions for the purpose of developing, validating, or administering predictive tests, administering student aid programs, and improving instruction, if such studies are conducted in such a manner as will not permit the personal identification of students and their parents by persons other than representatives of such organizations and such information will be destroyed when no longer needed for the purpose for which it is conducted;

(G) accrediting organizations in order to carry out their accrediting functions;

(H) parents of a dependent student of such parents, as defined in section 152 of title 26;

(I) subject to regulations of the Secretary, in connection with an emergency, appropriate persons if the knowledge of such information is necessary to protect the health or safety of the student or other persons;

(J)(i) the entity or persons designated in a Federal grand jury subpoena, in which case the court shall order, for good cause shown, the educational agency or institution (and any officer, director, employee, agent, or attorney for such agency or institution) on which the subpoena is served, to not disclose to any person the existence or contents of the subpoena or any information furnished to the grand jury in response to the subpoena; and

(ii) the entity or persons designated in any other subpoena issued for a law enforcement purpose, in which case the court or other issuing agency may order, for good cause shown, the educational agency or institution (and any officer, director, employee, agent, or attorney for such agency or institution) on which the subpoena is served, to not disclose to any person the existence or contents of the subpoena or any information furnished in response to the subpoena;

(K) the Secretary of Agriculture, or authorized representative from the Food and Nutrition Service or contractors acting on behalf of the Food and Nutrition Service, for the purposes of conducting program monitoring, evaluations, and performance measurements of State and local educational and other agencies and institutions receiving funding or providing benefits of 1 or more programs authorized under the Richard B. Russell National School Lunch Act (42 U.S.C. 1751 et seq.) or the Child Nutrition Act of 1966 (42 U.S.C. 1771 et seq.) for which the results will be reported in an aggregate form that does not identify any individual, on the conditions that-

(i) any data collected under this subparagraph shall be protected in a manner that will not permit the personal identification of students and their parents by other than the authorized representatives of the Secretary; and

(ii) any personally identifiable data shall be destroyed when the data are no longer needed for program monitoring, evaluations, and performance measurements; and

(L) an agency caseworker or other representative of a State or local child welfare agency, or tribal organization (as defined in section 5304 of title 25), who has the right to access a student's case plan, as defined and determined by the State or tribal organization, when such agency or organization is legally responsible, in accordance with State or tribal law, for the care and protection of the student, provided that the education records, or the personally identifiable information contained in such records, of the student will not be disclosed by such agency or organization, except to an individual or entity engaged in addressing the student's education needs and authorized by such agency or organization to receive such disclosure and such disclosure is consistent with the State or tribal laws applicable to protecting the confidentiality of a student's education records.

Nothing in subparagraph (E) of this paragraph shall prevent a State from further limiting the number or type of State or local officials who will continue to have access thereunder.

(2) No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of releasing, or providing access to, any personally identifiable information in education records other than directory information, or as is permitted under paragraph (1) of this subsection, unless-

(A) there is written consent from the student's parents specifying records to be released, the reasons for such release, and to whom, and with a copy of the records to be released to the student's parents and the student if desired by the parents, or

(B) except as provided in paragraph (1)(J), such information is furnished in compliance with judicial order, or pursuant to any lawfully issued subpoena, upon condition that parents and the students are notified of all such orders or subpoenas in advance of the compliance therewith by the educational institution or agency, except when a parent is a party to a court proceeding involving child abuse and neglect (as defined in section 3 of the Child Abuse Prevention and Treatment Act (42 U.S.C. 5101 note)) or dependency matters, and the order is issued in the context of that proceeding, additional notice to the parent by the educational agency or institution is not required.

(3) Nothing contained in this section shall preclude authorized representatives of (A) the Comptroller General of the United States, (B) the Secretary, or (C) State educational authorities from having access to student or other records which may be necessary in connection with the audit and evaluation of Federally-supported education programs, or in connection with the enforcement of the Federal legal requirements which relate to such programs: *Provided*, That except when collection of personally identifiable information is specifically authorized by Federal law, any data collected by such officials shall be protected in a manner which will not permit the personal identification of students and their parents by other than those officials, and such personally identifiable data shall be destroyed when no longer needed for such audit, evaluation, and enforcement of Federal legal requirements.

(4)(A) Each educational agency or institution shall maintain a record, kept with the education records of each student, which will indicate all individuals (other than those specified in paragraph (1)(A) of this subsection), agencies, or organizations which have requested or obtained access to a student's education records maintained by such

educational agency or institution, and which will indicate specifically the legitimate interest that each such person, agency, or organization has in obtaining this information. Such record of access shall be available only to parents, to the school official and his assistants who are responsible for the custody of such records, and to persons or organizations authorized in, and under the conditions of, clauses (A) and (C) of paragraph (1) as a means of auditing the operation of the system.

(B) With respect to this subsection, personal information shall only be transferred to a third party on the condition that such party will not permit any other party to have access to such information without the written consent of the parents of the student. If a third party outside the educational agency or institution permits access to information in violation of paragraph (2)(A), or fails to destroy information in violation of paragraph (1)(F), the educational agency or institution shall be prohibited from permitting access to information from education records to that third party for a period of not less than five years.

(5) Nothing in this section shall be construed to prohibit State and local educational officials from having access to student or other records which may be necessary in connection with the audit and evaluation of any federally or State supported education program or in connection with the enforcement of the Federal legal requirements which relate to any such program, subject to the conditions specified in the proviso in paragraph (3).

(6)(A) Nothing in this section shall be construed to prohibit an institution of postsecondary education from disclosing, to an alleged victim of any crime of violence (as that term is defined in section 16 of title 18), or a nonforcible sex offense, the final results of any disciplinary proceeding conducted by such institution against the alleged perpetrator of such crime or offense with respect to such crime or offense.

(B) Nothing in this section shall be construed to prohibit an institution of postsecondary education from disclosing the final results of any disciplinary proceeding conducted by such institution against a student who is an alleged perpetrator of any crime of violence (as that term is defined in section 16 of title 18), or a nonforcible sex offense, if the institution determines as a result of that disciplinary proceeding that the student committed a violation of the institution's rules or policies with respect to such crime or offense.

(C) For the purpose of this paragraph, the final results of any disciplinary proceeding-

(i) shall include only the name of the student, the violation committed, and any sanction imposed by the institution on that student; and

(ii) may include the name of any other student, such as a victim or witness, only with the written consent of that other student.

(7)(A) Nothing in this section may be construed to prohibit an educational institution from disclosing information provided to the institution under section 14071 [2] of title 42 concerning registered sex offenders who are required to register under such section.

(B) The Secretary shall take appropriate steps to notify educational institutions that disclosure of information described in subparagraph (A) is permitted.

(c) Surveys or data-gathering activities; regulations

Not later than 240 days after October 20, 1994, the Secretary shall adopt appropriate regulations or procedures, or identify existing regulations or procedures, which protect the rights of privacy of students and their families in connection with any surveys or data-gathering activities conducted, assisted, or authorized by the Secretary or an administrative head of an education agency. Regulations established under this subsection shall include provisions controlling the use, dissemination, and protection of such data. No survey or data-gathering activities shall be conducted by the Secretary, or an administrative head of an education agency under an applicable program, unless such activities are authorized by law.

(d) Students' rather than parents' permission or consent

For the purposes of this section, whenever a student has attained eighteen years of age, or is attending an institution of postsecondary education, the permission or consent required of and the rights accorded to the parents of the student shall thereafter only be required of and accorded to the student.

(e) Informing parents or students of rights under this section

No funds shall be made available under any applicable program to any educational agency or institution unless such agency or institution effectively informs the parents of students, or the students, if they are eighteen years of age or older, or are attending an institution of postsecondary education, of the rights accorded them by this section.

(f) Enforcement; termination of assistance

The Secretary shall take appropriate actions to enforce this section and to deal with violations of this section, in accordance with this chapter, except that action to terminate assistance may be taken only if the Secretary finds there has been a failure to comply with this section, and he has determined that compliance cannot be secured by voluntary means.

(g) Office and review board; creation; functions

The Secretary shall establish or designate an office and review board within the Department for the purpose of investigating, processing, reviewing, and adjudicating violations of this section and complaints which may be filed concerning alleged violations of this section. Except for the conduct of hearings, none of the functions of the Secretary under this section shall be carried out in any of the regional offices of such Department.

(h) Disciplinary records; disclosure

Nothing in this section shall prohibit an educational agency or institution from-

(1) including appropriate information in the education record of any student concerning disciplinary action taken against such student for conduct that posed a significant risk to the safety or well-being of that student, other students, or other members of the school community; or

(2) disclosing such information to teachers and school officials, including teachers and school officials in other schools, who have legitimate educational interests in the behavior of the student.

(i) Drug and alcohol violation disclosures

(1) In general

Nothing in this Act or the Higher Education Act of 1965 [20 U.S.C. 1001 et seq.] shall be construed to prohibit an institution of higher education from disclosing, to a parent or legal guardian of a student, information regarding any violation of any Federal, State, or local law, or of any rule or policy of the institution, governing the use or possession of alcohol or a controlled substance, regardless of whether that information is contained in the student's education records, if-

(A) the student is under the age of 21; and

(B) the institution determines that the student has committed a disciplinary violation with respect to such use or possession.

(2) State law regarding disclosure

Nothing in paragraph (1) shall be construed to supersede any provision of State law that prohibits an institution of higher education from making the disclosure described in subsection (a).

(j) Investigation and prosecution of terrorism

(1) In general

Notwithstanding subsections (a) through (i) or any provision of State law, the Attorney General (or any Federal officer or employee, in a position not lower than an Assistant Attorney General, designated by the Attorney General) may submit a written application to a court of competent jurisdiction for an ex parte order requiring an educational agency or institution to permit the Attorney General (or his designee) to-

(A) collect education records in the possession of the educational agency or institution that are relevant to an authorized investigation or prosecution of an offense listed in section 2332b(g)(5)(B) of title 18, or an act of domestic or international terrorism as defined in section 2331 of that title; and

(B) for official purposes related to the investigation or prosecution of an offense described in paragraph (1)(A), retain, disseminate, and use (including as evidence at trial or in other administrative or judicial proceedings) such records, consistent with such guidelines as the Attorney General, after consultation with the Secretary, shall issue to protect confidentiality.

(2) Application and approval

(A) In general.-An application under paragraph (1) shall certify that there are specific and articulable facts giving reason to believe that the education records are likely to contain information described in paragraph (1)(A).

(B) The court shall issue an order described in paragraph (1) if the court finds that the application for the order includes the certification described in subparagraph (A).

(3) Protection of educational agency or institution

An educational agency or institution that, in good faith, produces education records in accordance with an order issued under this subsection shall not be liable to any person for that production.

(4) Record-keeping

Subsection (b)(4) does not apply to education records subject to a court order under this subsection.

(Pub. L. 90–247, title IV, §444, formerly §438, as added Pub. L. 93–380, title V, §513(a), Aug. 21, 1974, 88 Stat. 571 ; amended Pub. L. 93–568, §2(a), Dec. 31, 1974, 88 Stat. 1858 ; Pub. L. 96–46, §4(c), Aug. 6, 1979, 93 Stat. 342 ; Pub. L. 101–542, title II, §203, Nov. 8, 1990, 104 Stat. 2385 ; Pub. L. 102–325, title XV, §1555(a), July 23, 1992, 106 Stat. 840 ; renumbered §444 and amended Pub. L. 103–382, title II, §§212(b)(1), 249, 261(h), Oct. 20, 1994, 108 Stat. 3913 , 3924, 3928; Pub. L. 105–244, title IX, §§951, 952, Oct. 7, 1998, 112 Stat. 1835 , 1836; Pub. L. 106–386, div. B, title VI, §1601(d), Oct. 28, 2000, 114 Stat. 1538 ; Pub. L. 107–56, title V, §507, Oct. 26, 2001, 115 Stat. 367 ; Pub. L. 107–110, title X, §1062(3), Jan. 8, 2002, 115 Stat. 2088 ; Pub. L. 111–296, title I, §103(d), Dec. 13, 2010, 124 Stat. 3192 ; Pub. L. 112–278, §2, Jan. 14, 2013, 126 Stat. 2480 .)

Editorial Notes

References in Text

The Richard B. Russell National School Lunch Act, referred to in subsec. (b)(1)(K), is act June 4, 1946, ch. 281, 60 Stat. 230 , which is classified generally to chapter 13 (§1751 et seq.) of Title 42, The Public Health

and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 1751 of Title 42 and Tables.

The Child Nutrition Act of 1966, referred to in subsec. (b)(1)(K), is Pub. L. 89–642, Oct. 11, 1966, 80 Stat. 885 , which is classified generally to chapter 13A (§1771 et seq.) of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 1771 of Title 42 and Tables.

Section 3 of the Child Abuse Prevention and Treatment Act, referred to in subsec. (b)(2)(B), is section 3 of Pub. L. 93–247, which is set out as a note under section 5101 of Title 42, The Public Health and Welfare.

Section 14071 of title 42, referred to in subsec. (b)(7)(A), was repealed by Pub. L. 109–248, title I, §129(a), July 27, 2006, 120 Stat. 600 .

This Act, referred to in subsec. (i)(1), is Pub. L. 90–247, Jan. 2, 1968, 80 Stat. 783 , known as the Elementary and Secondary Education Amendments of 1967. Title IV of the Act, known as the General Education Provisions Act, is classified generally to this chapter. For complete classification of this Act to the Code, see Short Title of 1968 Amendment note set out under section 6301 of this title and Tables.

The Higher Education Act of 1965, referred to in subsec. (i)(1), is Pub. L. 89–329, Nov. 8, 1965, 79 Stat. 1219 , which is classified generally to chapter 28 (§1001 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 1001 of this title and Tables.

Prior Provisions

A prior section 444 of Pub. L. 90–247 was classified to section 1233c of this title prior to repeal by Pub. L. 103–382.

Amendments

2013-Subsec. (b)(1)(L). Pub. L. 112–278, §2(1), added subpar. (L).

Subsec. (b)(2)(B). Pub. L. 112–278, §2(2), inserted ", except when a parent is a party to a court proceeding involving child abuse and neglect (as defined in section 3 of the Child Abuse Prevention and Treatment Act (42 U.S.C. 5101 note)) or dependency matters, and the order is issued in the context of that proceeding, additional notice to the parent by the educational agency or institution is not required" after "educational institution or agency".

2010-Subsec. (b)(1)(K). Pub. L. 111–296, which directed that par. (1) be amended by adding subpar. (K) "at the end", was executed by adding subpar. (K) after subpar. (J), to reflect the probable intent of Congress.

2002-Subsec. (a)(1)(B). Pub. L. 107–110, §1062(3)(A), realigned margins.

Subsec. (b)(1). Pub. L. 107–110, §1062(3)(C), substituted "subparagraph (E)" for "clause (E)" in concluding provisions.

Subsec. (b)(1)(J). Pub. L. 107–110, §1062(3)(B), realigned margins.

Subsec. (b)(7). Pub. L. 107–110, §1062(3)(D), realigned margins.

2001-Subsec. (j). Pub. L. 107–56 added subsec. (j).

2000-Subsec. (b)(7). Pub. L. 106–386 added par. (7).

1998-Subsec. (b)(1)(C). Pub. L. 105–244, §951(1), amended subpar. (C) generally. Prior to amendment, subpar. (C) read as follows: "authorized representatives of (i) the Comptroller General of the United States, (ii) the Secretary, or (iii) State educational authorities, under the conditions set forth in paragraph (3) of this subsection;".

Subsec. (b)(6). Pub. L. 105–244, §951(2), designated existing provisions as subpar. (A), substituted "or a nonforcible sex offense, the final results" for "the results", substituted "such crime or offense" for "such crime" in two places, and added subpars. (B) and (C).

Subsec. (i). Pub. L. 105–244, §952, added subsec. (i).

1994-Subsec. (a)(1)(B). Pub. L. 103–382, §249(1)(A)(ii), added subpar. (B). Former subpar. (B) redesignated (C).

Subsec. (a)(1)(C). Pub. L. 103–382, §249(1)(A)(i), (iii), redesignated subpar. (B) as (C) and substituted "subparagraph (D)" for "subparagraph (C)" in cl. (iii). Former subpar. (C) redesignated (D).

Subsec. (a)(1)(D). Pub. L. 103–382, §249(1)(A)(i), (iv), redesignated subpar. (C) as (D) and substituted "subparagraph (C)" for "subparagraph (B)".

Subsec. (a)(2). Pub. L. 103–382, §249(1)(B), substituted "privacy rights" for "privacy or other rights".

Subsec. (a)(4)(B)(ii). Pub. L. 103–382, §261(h)(1), substituted semicolon for period at end.

Subsec. (b)(1)(A). Pub. L. 103–382, §249(2)(A)(i), inserted before semicolon ", including the educational interests of the child for whom consent would otherwise be required".

Subsec. (b)(1)(C). Pub. L. 103–382, §261(h)(2)(A), substituted "or (iii)" for "(iii) an administrative head of an education agency (as defined in section 1221e–3(c) of this title), or (iv)".

Subsec. (b)(1)(E). Pub. L. 103–382, §249(2)(A)(ii), amended subpar. (E) generally. Prior to amendment, subpar. (E) read as follows: "State and local officials or authorities to whom such information is

specifically required to be reported or disclosed pursuant to State statute adopted prior to November 19, 1974;".

Subsec. (b)(1)(H). Pub. L. 103–382, §261(h)(2)(B), substituted "the Internal Revenue Code of 1986" for "the Internal Revenue Code of 1954", which for purposes of codification was translated as "title 26" thus requiring no change in text.

Subsec. (b)(1)(J). Pub. L. 103–382, §249(2)(A)(iii)–(v), added subpar. (J).

Subsec. (b)(2). Pub. L. 103–382, §249(2)(B)(i), which directed amendment of matter preceding subpar. (A) by substituting ", unless-" for the period, was executed by substituting a comma for the period before "unless-" to reflect the probable intent of Congress.

Subsec. (b)(2)(B). Pub. L. 103–382, §249(2)(B)(ii), inserted "except as provided in paragraph (1)(J)," before "such information".

Subsec. (b)(3). Pub. L. 103–382, §261(h)(2)(C), substituted "or (C)" for "(C) an administrative head of an education agency or (D)" and "education programs" for "education program".

Subsec. (b)(4). Pub. L. 103–382, §249(2)(C), inserted at end "If a third party outside the educational agency or institution permits access to information in violation of paragraph (2)(A), or fails to destroy information in violation of paragraph (1)(F), the educational agency or institution shall be prohibited from permitting access to information from education records to that third party for a period of not less than five years."

Subsec. (c). Pub. L. 103–382, §249(3), substituted "Not later than 240 days after October 20, 1994, the Secretary shall adopt appropriate regulations or procedures, or identify existing regulations or procedures, which" for "The Secretary shall adopt appropriate regulations to".

Subsec. (d). Pub. L. 103–382, §261(h)(3), inserted a comma after "education".

Subsec. (e). Pub. L. 103–382, §249(4), inserted "effectively" before "informs".

Subsec. (f). Pub. L. 103–382, §261(h)(4), struck out ", or an administrative head of an education agency," after "The Secretary" and substituted "enforce this section" for "enforce provisions of this section", "in accordance with" for "according to the provisions of", and "comply with this section" for "comply with the provisions of this section".

Subsec. (g). Pub. L. 103–382, §261(h)(5), struck out "of Health, Education, and Welfare" after "the Department" and "the provisions of" after "adjudicating violations of".

Subsec. (h). Pub. L. 103–382, §249(5), added subsec. (h).

1992-Subsec. (a)(4)(B)(ii). Pub. L. 102–325 amended cl. (ii) generally. Prior to amendment, cl. (ii) read as follows: "if the personnel of a law enforcement unit do not have access to education records under subsection (b)(1) of this section, the records and documents of such law enforcement unit which (I) are kept apart from records described in subparagraph (A), (II) are maintained solely for law enforcement purposes, and (III) are not made available to persons other than law enforcement officials of the same jurisdiction;".

1990-Subsec. (b)(6). Pub. L. 101–542 added par. (6).

1979-Subsec. (b)(5). Pub. L. 96–46 added par. (5).

1974-Subsec. (a)(1). Pub. L. 93–568, §2(a)(1)(A)–(C), (2)(A)–(C), (3), designated existing par. (1) as subpar. (A), substituted reference to educational agencies and institutions for reference to state or local educational agencies, institutions of higher education, community colleges, schools, agencies offering preschool programs, and other educational institutions, substituted the generic term education records for the enumeration of such records, and extended the right to inspect and review such records to parents of children who have been in attendance, and added subpars. (B) and (C).

Subsec. (a)(2). Pub. L. 93–568, §2(a)(4), substituted provisions making the availability of funds to educational agencies and institutions conditional on the granting of an opportunity for a hearing to parents of students who are or have been in attendance at such institution or agency to challenge the contents of the student's education records for provisions granting the parents an opportunity for such hearing, and inserted provisions authorizing insertion into the records a written explanation of the parents respecting the content of such records.

Subsec. (a)(3) to (6). Pub. L. 93–568, §2(a)(1)(G), (2)(F), (5), added pars. (3) to (6).

Subsec. (b)(1). Pub. L. 93–568, §2(a)(1)(D), (2)(D), (6), (8)(A)–(C), (10)(A), in provisions preceding subpar. (A), substituted "educational agency or institution which has a policy of permitting the release of education records (or personally identifiable information contained therein other than directory information, as defined in paragraph (5) of subsection (a))" for "state or local educational agency, any institution of higher education, any community college, any school, agency offering a preschool program, or any other educational institution which has a policy or practice of permitting the release of personally identifiable records or files (or personal information contained therein)", in subpar. (A), substituted "educational agency, who have been determined by such agency or institution to have" for "educational agency who have", in subpar. (B), substituted "the student seeks or intends to" for "the student intends to", in subpar. (C), substituted reference to "section 408(c)" for reference to "section 409 of this Act"

which for purposes of codification has been translated as "section 1221e–3(c) of this title", and added subpars. (E) to (I).

Subsec. (b)(2). Pub. L. 93–568, §2(a)(1)(E), (2)(E), substituted "educational agency or institution which has a policy or practice of releasing, or providing access to, any personally identifiable information in education records other than directory information, or as is permitted under paragraph (1) of this subsection" for "state or local educational agency, any institution of higher education, any community college, any school, agency offering a preschool program, or any other educational institution which has a policy or practice of furnishing, in any form, any personally identifiable information contained in personal school records, to any persons other than those listed in subsection (b)(1) of this section".

Subsec. (b)(3). Pub. L. 93–568, §2(a)(8)(D), substituted "information is specifically authorized by Federal law, any data collected by such officials shall be protected in a manner which will not permit the personal identification of students and their parents by other than those officials, and such personally identifiable data shall be destroyed when no longer needed for such audit, evaluation, and enforcement of Federal legal requirements" for "data is specifically authorized by Federal law, any data collected by such officials with respect to individual students shall not include information (including social security numbers) which would permit the personal identification of such students or their parents after the data so obtained has been collected".

Subsec. (b)(4). Pub. L. 93–568, §2(a)(9), substituted provisions that each educational agency or institution maintain a record, kept with the education records of each student, indicating individuals, agencies, or organizations who obtained access to the student's record and the legitimate interest in obtaining such information, that such record of access shall be available only to parents, school officials, and their assistants having responsibility for the custody of such records, and as a means of auditing the operation of the system, for provisions that with respect to subsecs. (c)(1), (c)(2), and (c)(3) of this section, all persons, agencies, or organizations desiring access to the records of a student shall be required to sign forms to be kept with the records of the student, but only for inspection by the parents or the student, indicating specifically the legitimate educational or other interest of the person seeking such information, and that the form shall be available to parents and school officials having responsibility for record maintenance as a means of auditing the operation of the system.

Subsec. (e). Pub. L. 93–568, §2(a)(1)(F), substituted "to any educational agency or institution unless such agency or institution" for "unless the recipient of such funds".

Subsec. (g). Pub. L. 93–568, §2(a)(7), (10)(B), struck out reference to sections 1232c and 1232f of this title and inserted provisions that except for the conduct of hearings, none of the functions of the Secretary under this section shall be carried out in any of the regional offices of such Department.

Statutory Notes and Related Subsidiaries

Effective Date of 2010 Amendment

Amendment by Pub. L. 111–296 effective Oct. 1, 2010, except as otherwise specifically provided, see section 445 of Pub. L. 111–296, set out as a note under section 1751 of Title 42, The Public Health and Welfare.

Effective Date of 2002 Amendment

Amendment by Pub. L. 107–110 effective Jan. 8, 2002, except with respect to certain noncompetitive programs and competitive programs, see section 5 of Pub. L. 107–110, set out as an Effective Date note under section 6301 of this title.

Effective Date of 1998 Amendment

Amendment by Pub. L. 105–244 effective Oct. 1, 1998, except as otherwise provided in Pub. L. 105–244, see section 3 of Pub. L. 105–244, set out as a note under section 1001 of this title.

Effective Date of 1992 Amendment

Pub. L. 102–325, title XV, §1555(b), July 23, 1992, 106 Stat. 840 , provided that: "The amendment made by this section [amending this section] shall take effect on the date of enactment of this Act [July 23, 1992]."

Effective Date of 1979 Amendment

Amendment by Pub. L. 96–46 effective Oct. 1, 1978, see section 8 of Pub. L. 96–46, set out as a note under section 930 of this title.

Effective Date of 1974 Amendment

Pub. L. 93–568, §2(b), Dec. 31, 1974, 88 Stat. 1862 , provided that: "The amendments made by subsection (a) [amending this section] shall be effective, and retroactive to, November 19, 1974."

Effective Date

Pub. L. 93–380, title V, §513(b)(1), Aug. 21, 1974, 88 Stat. 574 , provided that: "The provisions of this section [enacting this section and provisions set out as a note under section 1221 of this title] shall become effective ninety days after the date of enactment [Aug. 21, 1974] of section 438 [now 444] of the General Education Provisions Act [this section]."

[1] *So in original. The period probably should be a semicolon.*

[2] *See References in Text note below.*

EXHIBIT B

EXHIBIT B

EXHIBIT B

his/her rights and obligations with respect to such assault and will render all reasonable and proper assistance to the teacher in connection with handling of the incident by law enforcement and judicial authorities.

23.05 If a teacher is sued as a result of any reasonable and prudent action taken by the teacher while in pursuit of his/her employment, the Board will provide legal counsel to advise the Board and the teacher. The Board may at its discretion then provide legal counsel and render all reasonable and proper assistance to the teacher in his/her defense.

23.06 Teachers will be expected to exercise reasonable care with respect to the safety of pupils and property, and will not be individually liable for any damage or loss to person or property, except in cases of gross negligence and/or gross neglect of duty.

23.07 Any reasonable length of time lost by a teacher in connection with any incident mentioned in this Article will not be charged against the teacher unless he/she is judged guilty by a court of competent jurisdiction.

23.08 When a complaint regarding child abuse and neglect is lodged against a teacher, the administration will notify the teacher and/or the Association as soon as possible unless directed otherwise by the Protective Services and/or the police. The teacher will be provided an opportunity for Association representation as per the **Teacher Protection** Article when the complaint is brought to the teacher's attention. The Association representative will normally be the Executive Director or president.

23.09 The Board and Association recognize and support the right of parents or legal guardians to observe instruction in their child's classes. It is important for parents to be interested and involved in their child's education. In order to protect the rights of all children in the classroom the following guidelines have been established to assist parents who may wish to observe classroom instruction.

A. Requests to observe classroom instruction are to be submitted in writing, to the building principal, five (5) school days in advance of the requested date.
B. Parents or legal guardians are permitted to observe in their own child's class only.
C. Recording devices are prohibited, unless prior arrangements have been made and permission is granted in writing.
D. Placement or seating of the parent/guardian will be at the discretion of the teacher.
E. Observers will not challenge the lesson or any portion of it during class or in front of other students.
F. Questions/comments should be directed to the classroom teacher at a time convenient to the teacher. Parents must not interrupt instruction.
G. No personal questions about students will be answered.
H. Disclosures (if applicable) must remain confidential.

23.10 Teacher, the teacher and/or Association will be made aware of the nature of the request and the materials requested prior to forwarding the materials to the person(s) making the request. If the teacher requests copies of the FOIA requested materials they will be provided.

23.11 The Board and the Association recognize the right of teachers to work in a non-threatening environment. To that end, the Administration will continue to lend all support to any teacher who is being harassed or threatened by a parent/student.

ARTICLE -24 - BASIC SALARIES

EXHIBIT C

EXHIBIT C

EXHIBIT C

2018 WL 3244117
Only the Westlaw citation is currently available.

UNPUBLISHED
Court of Appeals of Michigan.

Susan BISIO, Plaintiff-Appellant,
v.
The CITY OF the VILLAGE OF CLARKSTON, Defendant-Appellee.

No. 335422
|
July 3, 2018

Oakland Circuit Court, LC No. 2015-150462-CZ

Before: Beckering, P.J., and M. J. Kelly and O'Brien, JJ.

Opinion

Per Curiam.

***1** Plaintiff, Susan Bisio, appeals as of right from an order granting summary disposition of her claim under Michigan's Freedom of Information Act (FOIA), MCL 15.231 *et seq.*, to defendant, City of the Village of Clarkston, and deeming moot her cross-motion for summary disposition on defendant's defenses.[1] Plaintiff also challenges the trial court's June 8, 2016 order denying her motion in limine to exclude evidence of her motive for requesting the records at issue and her intended use of them. For the reasons stated below, we affirm the trial court's grant of summary disposition to defendant on plaintiff's FOIA claim.

I. STATEMENT OF PERTINENT FACTS AND PROCEDURAL HISTORY

On June 7, 2015, plaintiff submitted a FOIA request to defendant requesting, among other things, correspondence referenced in certain monthly billing invoices submitted to the city by the city attorney, Thomas Ryan, and by engineering consultants Hubbell, Roth, & Clark (HRC). The documents requested pertained primarily to a development project at 148 N. Main Street and the cleanup of vacant property located at Walden Road and M-15. Plaintiff also requested any other correspondence "pertaining to the conditional rezoning of 148 N. Main and storm water collection, retention, or detention at the proposed redevelopment at 148 N. Main from January 1, 2014 to the present." Plaintiff received most of the records she requested, but a letter from the city attorney informed her that 18 of the items referenced in his invoices were not public records. Subsequent communications brought the release of a few more records and corrections of some of the deficiencies in disclosures already made. Defendant maintained, however, that certain items in the city attorney's files and the files of the HRC were

not public records because the city had never received the records and neither the city attorney nor HRC was a "public body" for purposes of FOIA.

On December 4, 2015, plaintiff filed a FOIA complaint asking the court to order defendant to produce all of the records she had requested, regardless of where they were located. In its answer, defendant denied having violated FOIA by refusing to disclose public records and asserted affirmative defenses under MCR 2.116(C)(8) (failure to state a claim), (C)(5) (plaintiff is not the party in interest), and (C)(6) (prior action asserting the same claims). Defendant contended that the purpose of plaintiff's FOIA request was to obtain documents for use by her husband, Richard Bisio, in a complaint he had previously filed against defendant alleging violation of the Open Meetings Act, MCL 15.261 *et seq* (OMA).[2] Accordingly, defendant asserted that the requested documents were exempt under MCL 15.243(1)(v) because they related "to a civil action in which the requesting party and the public body are parties."

***2** Along with her FOIA complaint, plaintiff filed a motion for partial summary disposition. Relying on agency principles, plaintiff argued that the city attorney was defendant's agent and stood in defendant's shoes such that the documents the city attorney possessed that pertained to city business belong to defendant. Therefore, the requested documents are public records because they are "in the possession" of defendant and because the city attorney, as an agent for defendant, "used" them to conduct city business and "retained" them. Plaintiff further argued that neither the physical location of the records in the city attorney's office nor the fact that the city attorney is not a "public body" changes the character of the records as "public records." Defendant filed a response to plaintiff's motion for partial summary disposition and a cross-motion for summary disposition pursuant to MCR 2.116(C)(6), asserting that Richard Bisio was the real party in interest and that plaintiff's FOIA complaint was in service of his OMA complaint. With these motions still pending, plaintiff filed a motion for summary disposition on defendant's affirmative defenses, contending that they were "based on the erroneous premise that Susan Bisio is not a person separate from her husband and that the 'real' plaintiff here is Richard Bisio."

Subsequent to oral argument, the trial court denied both of plaintiff's motions, finding that a genuine issue of material fact existed as to whether the records were public records and that facts could be developed to support defendant's affirmative defenses. Prior to oral argument, defendant and Richard had entered into a consent judgment in Richard's OMA claim that preserved plaintiff's FOIA claim. Consequently, the trial court also denied as moot defendant's motion for summary disposition pursuant to MCR 2.116(C)(6).

Plaintiff next filed a motion in limine to exclude evidence of her motive for requesting records and for her intended use of the records. She asserted that defendant based its defenses primarily on the erroneous assumption that she is just a "front" for her husband and that she filed her FOIA request at his behest "to obtain records for use in his now-dismissed lawsuit against the city." Denying this assumption as untrue, plaintiff

argued that a requester's motive and intended use of the documents requested is nevertheless irrelevant, and irrelevant evidence is inadmissible under MRE 402. Defendant responded by indicating that granting plaintiff's motion would be premature, as discovery had not yet closed, and further discovery might produce evidence that plaintiff intended by her FOIA action to obtain documents relevant to her husband's now-dismissed OMA case. The trial court denied plaintiff's motion.

After discovery closed, defendant filed a motion for summary disposition primarily on the ground that the records sought were not public records for purposes of FOIA because they were not "prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function." Plaintiff responded with a cross-motion for summary disposition on the defendant's asserted exemptions from disclosure as well as on the exemptions defendant did not formally assert. In addition, plaintiff sought summary disposition on her request for imposition of a civil fine and award of punitive damage as provided for under FOIA, citing MCL 15.240(7) and MCL 15.240a(7).

Subsequent to oral argument, the trial court granted defendant's motion for summary disposition and deemed plaintiff's cross-motion moot. The trial court found no documentary evidence establishing that the city attorney shared the contested records with defendant, that defendant used the contested records to make a decision related to the subject matter of the records, or that defendant retained the contested records in performance of an official function. Thus, the trial court concluded that the contested records were not public records. Accordingly, the trial court granted defendant summary disposition of plaintiff's complaint pursuant to MCR 2.116(C)(10) and denied as moot plaintiff's cross motion for summary disposition. This appeal followed.

II. ANALYSIS

A. STANDARDS OF REVIEW

We review a trial court's summary disposition decision de novo. *Thomas v. City of New Baltimore*, 254 Mich. App. 196, 200; 657 N.W.2d 530 (2002). Summary disposition under MCR 2.116(C)(10) is proper if the documentary evidence filed by the parties and viewed in the light most favorable to the party opposing the motion fails to show a genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *Quinto v. Cross & Peters Co.*, 451 Mich. 358, 362; 547 N.W.2d 314 (1996). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v. Gen. Motors Corp.*, 469 Mich. 177, 183; 665 N.W.2d 468 (2003).

***3** We also review de novo questions of statutory interpretation. *Ellison v. Dep't of State*, 320 Mich. App. 169, 175; 906 N.W.2d 221 (2017). "If the language of a statute is clear and unambiguous, the plain meaning of the statute reflects the legislative intent and

judicial construction is not permitted." *Id.* quoting *Herald Co. v. City of Bay City*, 463 Mich. 111, 117-118; 614 N.W.2d 873 (2000).

We review a trial court's decision on a motion in limine for an abuse of discretion. See *Lockridge v. Oakwood Hosp.*, 285 Mich. App. 678, 693; 777 N.W.2d 511 (2009). An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes. *Arabo v. Michigan Gaming Control Bd.*, 310 Mich. App. 370, 397-398; 872 N.W.2d 223 (2015). "A court by definition abuses its discretion when it makes an error of law." *In re Waters Drain Drainage Dist*, 296 Mich. App. 214, 220; 818 N.W.2d 478 (2012).

B. PUBLIC RECORDS

Plaintiff first contends that the trial court erred in granting defendant summary disposition based on its conclusion that the records at issue are not public records. We disagree.

The purpose of FOIA is to allow the public to "examine and review the workings of government and its executive officials." *Thomas*, 254 Mich. App. at 201. Unless public records are exempt from disclosure under MCL 15.243, they are subject to disclosure under FOIA. MCL 15.232(e)(i) and (ii). A "public record" means "a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function, from the time it is created." MCL 15.232(e). A "public body" includes "[a] county, city, township, village, intercounty, intercity, or regional governing body, council, school district, special district, or municipal corporation, or a board, department, commission, council, or agency thereof." MCL 15.232(d)(iii). Public records are not insulated from FOIA by their location or the fact that a private entity created them originally for its own use. See, e.g., *Amberg v. City of Dearborn*, 497 Mich. 28; 859 N.W.2d 674 (2014) (private businesses' surveillance videos collected as evidence by law enforcement personnel were public records because they were used to support the defendant's decision to issue a citation).

Plaintiff contends that the city attorney is defendant's agent and that the documents that the city attorney creates, possesses, retains, and uses in the conduct of his work for defendant belong to defendant, the city attorney's principal. For this reason, the letters at issue are records "prepared, owned, used, in the possession of, or retained" by defendant. Plaintiff also contends that the city attorney performed an "official function" for defendant when he sent or received each letter in his capacity as city attorney, and each letter involved city business. According to plaintiff, limiting "official business" to formal decisions of the type reflected in meeting minutes reads the FOIA statute too narrowly and gives defendant too much discretion in deciding what constitutes a public record.

Plaintiff's use of agency principles to argue that the contested documents the city attorney sent and received while negotiating for the city are public records subject to disclosure under FOIA is seductive, but it is unsupported by the plain language of the

relevant statutes, by Michigan caselaw, and by the foreign caselaw relied upon by plaintiff.

***4** Absent an ambiguity, the Court may presume that MCL 15.232(e) expresses the Legislature's intent that in order for a record to be subject to FOIA, a public body must have prepared, owned, used, possessed or retained the record in the performance of an official function. See *Ellison*, 320 Mich. App. at 175 ("If the language of a statute is clear and unambiguous, the plain meaning of the statute reflects the legislative intent and judicial construction is not permitted.") The definition of "public body" provided by MCL 15.232(d)(iii) does not include officers or employees acting on behalf of cities, townships, and villages. By contrast, MCL 15.232(d)(i), which provides the definition of "public body" relevant to the executive branch of state government, does include officers and employees acting on behalf of the public body. Had the Legislature so intended, it could have included officers or employees, or agents, in the definition of public body that pertains to cities, townships, and villages. That it did not indicates the Legislature's intent to limit "public body" in § 232(d)(iii) to the governing bodies of the entities listed. This interpretation finds support in the Michigan Supreme Court's decision in *Breighner v. Mich. High Sch. Athletic Ass'n*, 471 Mich. 217; 683 N.W.2d 639 (2004).

At issue in *Breighner* was whether the Michigan High School Athletic Association (MHSAA) was a "public body" as defined at MCL 15.232(d). *Breighner*, 471 Mich. at 219. The plaintiffs argued that the MHSAA was a public body as defined by § 232(d)(iii) because "it acts as an 'agent' for its member schools[.]" *Id.* at 232. The trial court ruled for the plaintiff on other grounds, but this Court reversed in a split decision, with the majority rejecting the plaintiffs' argument that the MHSAA is an 'agent' of the state and therefore subject to FOIA under § 232(d)(iii). *Breighner*, 471 Mich. at 224.

Affirming this Court's decision, the Michigan Supreme Court observed that the majority and the parties "appear to have assumed that § 232(d)(iii) includes 'agents' of enumerated governmental entities in the definition of 'public body.' " *Id.* at 232. Disagreeing, the *Breighner* Court stated that "agent" and "agency" were not the same thing, and that "[h]ad the Legislature intended any 'agent' of the enumerated governmental entities to qualify under § 232(d)(iii), it would have used that term instead of 'agency.' " *Id.* at 232-233. The Court further noted in a footnote that it would "defy logic to conclude that any person or entity qualifying as an 'agent' of one of the enumerated governmental bodies would be considered a 'public body' for purposes of FOIA. *Id.* at 233 n 6. These observations are arguably nonbinding dicta, but we find the reasoning of the Supreme Court persuasive and consistent with the plain language of § 232(d)(iii) and with Michigan caselaw. See *Eyde Bros Dev. Co. v. Eaton Co. Drain Comm'r*, 427 Mich. 271, 286; 398 N.W.2d 297 (1986); *Dye v. St. John Hosp. and Med. Ctr.*, 230 Mich. App. 661, 669; 584 N.W.2d 747 (1998).

Plaintiff argues that the *Breighner* Court's holding is irrelevant to the case at bar because she has never claimed that the city attorney was a public body. Rather, she argues that,

because an agent's records are the principal's records, the city attorney's records are defendant's records; thus, to the extent that the city attorney possesses them in the conduct of city business, defendant possesses them in the performance of an official function. Plaintiff's argument is unavailing because it does not circumvent the requirement of § 232(e) that public records are those prepared, owned, used, possessed or retained in the performance of an official function by the "public body" and *Breighner*'s indication that "public body" does not include agents of the public body. Plaintiff's argument is also unsupported by caselaw suggesting that for a record to become a public record subject to FOIA, the record has to be adopted by the public body itself in one of the ways stated in § 232(e), not simply used, possessed, or retained by someone acting on behalf of the public body. In *Hoffman v. Bay City Sch. Dist.*, 137 Mich. App. 333; 357 N.W.2d 686 (1984), this Court held that records created by the school district's attorney during his investigation of the district's finance department were not public records because the attorney reported his findings orally, without at any time sharing the documents in his investigatory file with the district. Like *Hoffman*, the records at issue in this case have remained in possession of the city attorney. There is no evidence suggesting that he has shown them to the city council, that council members have used them for the basis of a decision, or even that the letters sent and received have resulted in an agreed-upon proposal that the city attorney could submit for the council's consideration.

***5** Plaintiff and his amici contend that *Hoffman* was wrongly decided. The amici argue that the Court should have concluded that the attorney's investigation records were public records, but that they were exempt under MCL 15.243(g) as attorney-client privilege, subsection (h) as work product, or subsection (m) as frank communication. Plaintiff contends that *Hoffman* should be limited to its facts and that the work of the charter-appointed city attorney on behalf of the defendant city is qualitatively different from "an internal investigation by a retained attorney on which no action was taken." Plaintiff further contends that *Hoffman* has been superseded by cases such as *MacKenzie v. Wales Twp.*, 247 Mich. App. 124, 129; 635 N.W.2d 335 (2001). Plaintiff relies on *MacKenzie* for the proposition that "FOIA applies to records in the 'control' of a public body, not just those in its possession" and that "it is the content of the record, not its location, that determines whether it is a public record."

We do not believe that *MacKenzie* has superseded *Hoffman*; in fact, this Court distinguished its holding in *MacKenzie* from that in *Hoffman*. At issue in *MacKenzie* was whether magnetic computer tapes created from tax information provided by two townships and possessed by a third party at the behest of the defendant townships were public records subject to disclosure under FOIA. *MacKenzie*, 247 Mich. App. at 125-126. The townships used the magnetic computer tapes created by the third party to generate tax notifications to their respective property owners. The third party kept the tapes after creating them, but sent the documents from which it created the tapes back to the townships. When the plaintiff requested a copy of the tapes pursuant to FOIA, both townships argued essentially that

the tapes were not subject to release under FOIA because the townships did not possess the tapes. The trial court granted summary disposition to the defendants, finding that the tapes "were not 'records' as defined by FOIA because defendants did not create or possess the tapes." *Id.*

On appeal, this Court determined that the magnetic computer tapes were public records because defendants used them to perform the official function of preparing tax notices for property owners. *Id.* at 129. Distinguishing the case from *Hoffman*, the Court observed that the attorney in *Hoffman* created and retained information and reported only his opinion of the results of his investigation to the school board, not the information actually obtained during his investigation. In *MacKenzie*, however, the townships had access to the information from which the computer tapes were created, had provided that information to the third party so it could create the tapes at issue, used the tapes to send tax notifications to their property owners, and maintained a measure of control over the tapes. *Id.* at 130-131. Thus, although in both *Hoffman* and *MacKenzie*, the alleged public records were not in the possession of the relevant public bodies, the determining factor was not the location of the records at issue, but whether they were "prepared, owned, used, or retained" by the public bodies in the performance of an official function. In *Hoffman* they were not, but in *MacKenzie* they were.

Plaintiff relies on a number of cases from foreign jurisdictions to contend that records prepared on behalf of a public body and held remotely are public records subject to FOIA requests. See *In re Jajuga Estate*, 312 Mich. App. 706, 723 n 7; 881 N.W.2d 487 (2015) (noting, "[c]ases from other jurisdictions, although not binding, may be persuasive"). Having reviewed these cases, we do not find them applicable to the case at bar.

Plaintiff first relies on *Nissen v. Pierce Co.*, 183 Wash 2d 863, ¶ 17; 357 P3d 45 (2015). However, *Nissen* is inapplicable because it addresses whether work product prepared by an agency employee is necessarily a record of a state or local agency subject to disclosure under Washington law. The city attorney in the case at bar is not employed by defendant, and defendant is not a state agency. Plaintiff also relies on *Knightstown Banner, LLC v. Town of Knightstown*, 838 NE2d 1127 (Ind App, 2005), and *State ex rel Findlay Publishing Co. v. Hancock Co. Bd. of Comm'rs*, 80 Ohio St 3d 134; 684 NE2d 1222 (1997), to argue that a public body's documents filed in an attorney's law office are public records subject to disclosure. But, these cases are distinguishable from the case at bar because the documents involved in *Knightstown Banner* and *State ex re Findlay Publishing* were settlement agreements drafted, adopted, and used by the public bodies to obtain release from liability during the course of their respective attorneys' representation. *Knightstown Banner, LLC*, 838 NE2d at 1133; *State ex re Findlay Publishing Co*, 80 Ohio St 3d at 137. As the trial court noted in the instant case, there is no evidence that defendant used the letters prepared by its city attorney. Plaintiff's reliance on *Forum Publishing Co. v. City of Fargo*, 391 N.W.2d 169 (ND, 1986), is misplaced because the breadth of North Dakota's statute guaranteeing public access to records far exceeds that of Michigan. Under North Dakota law, *all* records of a

public body are public records, without regard to whether the public body prepared, owned, used, possessed, or retained them in the performance of an official function.[3] This is not the law in Michigan.

***6** Finally, *Creative Restaurants, Inc. v. Memphis*, 795 SW2d 672 (Tenn App, 2014), addresses whether subleases of real property owned by the city in its Beale Street Historic District and held in the office of the city's part-time attorney were public records. *Creative Restaurants, Inc.*, 795 SW2d at 673-674. The city had leased the property to the Beale Street Development Corporation, which sublet it to a private concern that changed its name to Beale Street Management, which, in turn, sublet properties to tenants. The subleases benefitted the city's development of the property and listed the city as landlord as long as it was not in default. *Id.* Under these circumstances, and considering that the city had "financial, cultural, historical and political interests" in the property, the court held that the subleases qualified as public records under Tennessee's Open Records Act. *Id.* at 678. The court determined that the city's integral involvement in the Beale Street property and in the subleasing scheme is what made the subleases public records. In the present case, plaintiff presented no evidence that defendant is similarly involved in the two properties that are the subject of the disputed correspondence.

Plaintiff's foreign cases support her proposition that public records held remotely are subject to disclosure under FOIA. But they are not instructive on the issue of whether records prepared, used, and obtained by a city attorney during the course of negotiating issues relevant to the city's environmental concerns but not submitted to the city, and with no evidence of the city having acted on them, are public records under MCL 15.232(e). All of the relevant foreign cases involve records that the public bodies had somehow used in the performance of an official function, regardless of whether the public body ultimately possessed the records. Likewise, the plain language of the relevant statutes defining public record and public body, as well as relevant Michigan caselaw, do not support plaintiff's contention that the city attorney's possession and use of records in his role as city attorney is tantamount to the public body's use and possession of the records in the performance of an official function. Plaintiff's argument, though appealing, is ultimately unsuccessful because it represents an expansion of the definition of "public body" and of "public record" that is unsupported by Michigan law. For these reasons, we affirm the trial court's grant of summary disposition to defendant on plaintiff's FOIA claims. Given our disposition of this issue, we need not address plaintiff's argument regarding the inapplicability of the exceptions to disclosure provided in MCL 15.243.

B. MOTIVE AND INTENDED USE

Plaintiff argues that the trial court abused its discretion by denying her motion to exclude evidence of her motive and intended use of the requested records. We agree, but conclude that the error is harmless.

The seminal case addressing the relevance of

a party's intended use of documents requested under FOIA is *Taylor v. Lansing Bd. of Water and Light*, 272 Mich. App. 200 (2006). At issue in *Taylor* was whether MCL 15.243(1)(v) exempted records requested from the Lansing Board of Water and Light ("BWL") by the plaintiff on behalf of her best friend, Virginia Cluley, who was involved in litigation against the BWL. The plaintiff filed a FOIA request for records that were relevant to Cluley's case against the BWL, but were unavailable to Cluley pursuant to MCL 15.243(1)(v).[4] See *Taylor*, 272 Mich. App. at 202. The defendant denied the request, claiming exemption under MCL 15.243(1)(v) and arguing that plaintiff was acting as Cluley's agent to obtain documents to assist her in her case against the BWL. *Id.* The trial court disagreed, denied the defendant's motion for summary disposition, and ordered the defendant to produce the requested documents. Defendant appealed.

***7** On appeal, this Court noted that "exemptions must be narrowly construed, and the party seeking to invoke an exemption must prove that nondisclosure is in accord with the intent of the Legislature. *Id.* at 205. The public body asserting the exemption in MCL 15.243(1)(v) has the burden to prove that it is a party to a civil action involving the requesting party." *Id.* Otherwise, "the public body is afforded no exemption from disclosure based solely on the status of one of the parties as litigants." *Id.* "[I]nitial as well as future uses of information requested under FOIA are irrelevant in determining whether the information falls within the exemption." *Id.* Because the plaintiff was not a party to the Cluley lawsuit with the BWL, MCL 15.243(1)(v) did not operate to exempt her request for documents related to the lawsuit. See also *Rataj v. City of Romulus*, 306 Mich. App. 735, 752-753; 858 N.W.2d 116 (2014) (whether the attorney seeking disclosure of records sought to obtain evidence for another lawsuit was irrelevant); *Clerical-Technical Union of Michigan State Univ. v. Bd. of Trustees of Michigan State Univ.*, 190 Mich. App. 300, 303; 475 N.W.2d 373 (1991) (deeming irrelevant "[t]he initial as well as the future use of the requested information").

Although the trial court erred in denying plaintiff's motion in limine, the error was harmless with regard to the court's ultimate decision on plaintiff's FOIA claim. "An error in the admission or the exclusion of evidence, [or] an error in a ruling ... is not ground for ... vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice." MCR 2.613(A). The trial court's ruling that the records at issue are not public records subject to disclosure under FOIA, and this Court's affirmation of that ruling, renders harmless the trial court's denial of plaintiff's motion in limine.[5]

Affirmed.

All Citations

Not Reported in N.W. Rptr., 2018 WL 3244117

Footnotes

1 We permitted the Michigan Press Association and Detroit Free Press to file a joint amicus brief on behalf of plaintiff. *Susan Bisio v. The City of the Village of Clarkston*, unpublished order of the Court of Appeals, entered June 21, 2017 (Docket No. 335422). We also permitted the Michigan Municipal League and the Michigan Townships Association to file a joint amicus brief on behalf of defendant. *Susan Bisio v. The City of the Village of Clarkston*, unpublished order of the Court of Appeals, entered July 26, 2017 (Docket No. 335422). We also granted plaintiff's motion for leave to reply to the joint amicus brief of the Michigan Press Association and Detroit Free Press. *Susan Bisio v. The City of the Village of Clarkston*, unpublished order of the Court of Appeals, entered September 6, 2017 (Docket No. 335422).

2 Five days before plaintiff filed the underlying FOIA complaint, her attorney and husband, Richard Bisio, filed a complaint alleging that defendant violated the OMA. After defendant denied plaintiff's request in part, Richard amended his OMA complaint to add a count asking for a declaratory judgment that written documents to and from the city attorney, in his capacity as city attorney, were public records under FOIA, regardless of their being kept in his private files. Defendant has maintained throughout the instant action that plaintiff, as a proxy for her husband, submitted her FOIA request to obtain for Richard's use in his OMA case documents otherwise not available to him.

3 NDCC 44-04-18(1) provides:

> Except as otherwise specifically provided by law, all records of public or governmental bodies, boards, bureaus, commissions or agencies of the state or any political subdivision of the state, or organizations or agencies supported in whole or in part by public funds, or expending public funds, shall be public records, open and accessible for inspection during reasonable office hours.

4 MCL 15.243(1)(v) provides that "[a] public body may exempt from disclosure as a public record ... [r]ecords or information relating to a civil action in which the requesting party and the public body are parties."

5 Although plaintiff's claim that the trial court erred in not granting her motion in limine is effectively a moot point given our conclusion that the records sought are not public records under FOIA, plaintiff contends that this issue is relevant to defendant's motion for fees, which the trial court took under advisement pending our decision on appeal.

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