STATE OF MICHIGAN
IN THE MICHIGAN COURT OF CLAIMS

THE MACKINAC CENTER FOR PUBLIC POLICY,

Plaintiff, Case No. 21-000011-MZ

v Hon. Elizabeth L. Gleicher

MICHIGAN STATE UNIVERSITY,

Defendant.
_____/

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DEFENDANT'S 11/03/2022 MOTION FOR RECONSIDERATION AND CLARIFICATION

Defendant, by and through counsel, seeks reconsideration and clarification regarding specific portions of the Court's Opinion and Order dated October 13, 2022 for the reasons articulated in the accompanying brief in support.

Pursuant to Local Rule 2.119(A)(2), the undersigned sought Plaintiff's counsel's concurrence via email on November 2, 2022. Concurrence was denied, thereby necessitating the filing of the motion.

Respectfully submitted,

Date: November 3, 2022

Elizabeth M. Watza

Attorney for Defendants

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BRIEF IN SUPPORT OF DEFENDANT'S 11/03/2022 MOTION FOR RECONSIDERATION AND CLARIFICATION

INTRODUCTION

Defendant seeks reconsideration and clarification regarding specific portions of the Court's Opinion and Order dated October 13, 2022. Specifically, Defendant seeks reconsideration of the Court's decision regarding Defendant's redactions pursuant to MCL 15.243(2) and the family educational rights and privacy act (FERPA). (See Opinion & Order, p 10.) Defendant also seeks reconsideration of the Court's decision regarding the applicability of

redactions on page 575 pursuant to MCL 15.243(1)(m) (frank communications). (See Opinion & Order, p 15.) Lastly, Defendant seeks clarification of the Court's order regarding the redactions on page 166. (See Opinion & Order, p 12.) Reconsideration and clarification are appropriate for the reasons articulated below.

STANDARD OF REVIEW

Defendant requests reconsideration pursuant to Local Rule 2.119(F)(3). Accordingly, Defendant must show "a palpable error by which the court and the parties have been misled" and "that a different disposition of the motion must result from correction of the error." Local Rule 2.119(F)(3). Importantly, "[a] court's decision to grant a motion for reconsideration is an exercise of discretion." *Kokx v Bylenga*, 241 Mich App 655, 658 (2000) (citations omitted); MCR 2.119(F)(3). So, "if a trial court wants to give a second chance to a motion it has previously denied, it has every right to do so, and this court rule [MCR 2.119(F)(3)] does nothing to prevent this exercise of discretion." *Id*. at 659 (quotation marks and citations omitted). "The rule allows the court considerable discretion in granting reconsideration to correct mistakes, to preserve judicial economy, and to minimize costs to the parties." *Id*. (citations omitted).

ARGUMENT

I. Defendant appropriately redacted information pursuant to MCL 15.243(2) and FERPA.

Defendant redacted "personally identifying information of [] student[s] connected to student activity," including student names, student email addresses, other information that can be used to identify a student, and student educational information, pursuant to MCL 15.243(2)[1], and

[1] See Pages 12, 53-54, 201, 204, 205-208, 210, 211, 212, 248, 254, 256-258, 260-263, 265, 266, 267, 268-27, 273-274, 275, 276, 277, 279-281, 283, 284, 285, 288, 289, 293, 296, 297, 303, 304,

FERPA. (Defendant's Index of In Camera Disclosure, pp 1-2, 4-12.) Regarding these redactions, the Court held that:

> [o]ther 'personal privacy' redactions include the names of students who were involved in a student-led effort petition drive seeking to remove Hsu from his administrative position. A counter-petition also circulated among MSU students. MSU redacted from the emails the names of the students involved in these efforts, relying in part on MCL 15.242(2). [Opinion & Order, p 9.]
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> ***
>
> By its terms, this exemption does not apply to MSU, a university. The students publicly supported Hsu or advocated for his removal. Their names were part of the public discourse. For the same reasons that the personal privacy exemption does not apply to the senders of the emails, it does not apply to the students who voluntarily injected themselves into the actual fray. [Opinion & Order, p 10.]

Based on the foregoing, it appears that the Court has been misled by palpable errors and a different result must be reached upon correction of the same.

MCL 15.243(2) states, in pertinent part, "[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." MCL 15.243(2) (emphasis added). The remainder of MCL 15.243(2) provides additional rules for public bodies that are "local or intermediate school district[s]" or "public school academ[ies]," but does not limit the definition of a public body. MCL 15.243(2). Defendant, a public university, is undoubtedly a public body. See MCL 15.232(h). Thus, MCL 15.243(2) applies to Defendant, and Defendant is prohibited from disclosing information in violation of FERPA. And, importantly, MCL 15.243(2) does not provide an exception allowing disclosure when disclosure would not constitute an invasion of privacy. Thus, to the extent the Court conflates MCL

306, 307, 310, 313, 380, 381, 382, 383, 434, 435, 461, 492, 497, 498, 538, and 558 produced for in camera review.

15.243(1)(a) (the privacy exemption) with MCL 15.243(2) (the FERPA exemption), it is in error.

An educational institution cannot disclose education records or personally identifiable information in a record (with the exception of directory information[2] and inapplicable FERPA exceptions) to third parties without the written consent of the postsecondary student. See 20 U.S.C. § 1232g(d); See also *Connoisseur Communication of Flint v University of Michigan*, 230 Mich App 732, 735 (1998).[3] Education records, absent inapplicable exceptions, are "those records, files, documents, and other materials" that "contain information directly related to a student" and "are maintained by an educational agency or institution. . . ." 20 USC § 1232g(a)(4)(A).

[2] Of note, the directory exception (20 USC § 1232g(a)(5)(A)) is inapplicable here. See https://reg.msu.edu/read/NotificationandDirectoryInformationNotice.pdf, p 3 (last accessed 11/02/2022). By releasing personally identifying information of a student *connected to student activity*, Defendant would not simply be releasing student names.

[3] *Connoisseur Communication of Flint v University of Michigan*, 230 Mich App 732 (1998), dealt with a previous version of the FOIA FERPA exemption. The FOIA was amended in 2000. P.A.2000, No. 88, deleted subsection (1)(e). P.A.2000, No. 88, also redesignated former subsections, including (1)(e). Subsection (2) was inserted. P.A.2000, No. 88. Note 4 in *Doe v Unnamed School District*, unpublished per curiam opinion of the Court of Appeals, issued [March 21, 2019] (Docket No. 340234), p *3 (Plaintiff's 11/12/22 Motion, Exhibit J), also provides the following explanation:

> *Connoisseur Communication of Flint*, 230 Mich. App at 733-734, involved a former, permissive FOIA exemption for records governed by FERPA. See MCL 15.243(1)(e), as amended by 1996 PA 553. Under the current version of MCL 15.243(2), "[a] public body shall exempt from disclosure information that, if released, would prevent the public body from complying with 20 U.S.C. 1232g ...." (Emphasis added). Thus, apart from directory information (which may [be] disclosed under certain conditions), see *id*., the FERPA exemption now requires mandatory nondisclosure. See *Atchison v. Atchison*, 256 Mich. App. 531, 535; 664 N.W.2d 249 (2003) ("Under the plain-meaning rule, courts must give the ordinary and accepted meaning to the mandatory word 'shall' and the permissive word 'may' unless to do so would frustrate the legislative intent as evidenced by other statutory language or by reading the statute as a whole.")

The records Defendant redacted under MCL 15.243(2) and FERPA are education records because they contain information "directly related" to Defendant's students[4] and are "maintained" by Defendant (as evidenced by the fact that they were in Defendant's possession and produced under FOIA), an educational institution. And the students have not provided written consent for the release of the records (and other FERPA exceptions are not applicable). It is irrelevant under 15.243(2) whether the students' "names were part of the public discourse," or whether the students "voluntarily injected themselves into the actual fray." [Opinion & Order, p 10.]

Thus, Defendant was required to exempt the records from disclosure ("shall exempt"). MCL 15.243(2). Defendant properly did so and respectfully requests that the Court reconsider its decision.

II. Defendant appropriately applied redactions on page 575 pursuant to MCL 15.243(1)(m) (frank communications).

Regarding the redactions on page 575, the Court's Opinion and Order dated October 13, 2022 states: "p. 575: There does not appear to be any material on this page subject to the frank communication exemption." (Opinion & Order, p 15.) Defendant respectfully disagrees and asks the Court to reconsider. Page 575 contains an email from MSU's Senior Vice President for Government Relations to MSU's President and then Senior Vice President for Research and Innovation wherein she seeks guidance and provides her advice/opinion regarding next steps. This communication constitutes a frank communication because it is "of an advisory nature made within a public body," "covers other than purely factual material," and "is preliminary to a

[4] The records are "directly related" to Defendant's students, as opposed to indirectly related. See *Doe v Unnamed School District*, unpublished per curiam opinion of the Court of Appeals, issued [March 21, 2019] (Docket No. 340234), p *4 (Plaintiff's 11/12/22 Motion, Exhibit J).

final agency determination of . . . action." *Bukowski v Detroit*, 478 Mich 268, 274 (2007). And "the public interest in encouraging frank communication clearly outweighs the public interest in disclosure" here. *Id*. As can be seen by review of the redacted information provided to the Court, disclosure would not "contribut[e] *significantly* to the public understanding of the operations or activities of the government," and it is communication of the nature that would likely be chilled if it were subject to public disclosure. *Michigan Federation of Teachers & School Related Persons, AFT, AFL-CIO v University of Michigan*, 481 Mich 657, 673 (2008) (emphasis added); *Herald Co v Eastern Michigan University Board of Regents*, 475 Mich 463, 475 (2006).

Based on the foregoing, it appears that the Court has been misled by a palpable error and a different result must be reached upon correction of the same. Thus, Defendant respectfully requests that the Court reconsider its decision.

III. Defendant requests clarification regarding redactions on page 166.

Regarding page 166, the Court's Opinion and Order dated October 13, 2022 states: "p. 166: The redacted information appears to be factual and not opinion or of an advisory nature, and is not exempt from disclosure." (Opinion & Order, p 12.) For purposes of clarification only, an MSU email address and an employee cell phone number were redacted pursuant to (u), (y), and (z); the subject line, part of the attachments line, and part of the first sentence in the body of the email were redacted pursuant to (m); and the second sentence of the body of the email was redacted pursuant to (g), and (h) (attorney-client privilege). (See Defendant's Index of In Camera Disclosure, p 3.) Defendant believes that the Court intended to order Defendant to pull back the redactions pursuant to (m) only, but requests clarification from the Court. (See Opinion & Order, pp 8, 16, 17.)

CONCLUSION AND RELIEF REQUESTED

For the foregoing reasons, Defendant respectfully requests that the Court grant its motion and reconsider/clarify certain portions of its Opinion and Order Dated October 13, 2022.

Respectfully submitted,

Date: November 3, 2022

Elizabeth M. Watza
Attorney for Defendants