STATE OF MICHIGAN
IN THE COURT OF APPEALS

MACKINAC CENTER FOR PUBLIC POLICY,

Plaintiff-Appellee/Cross-Appellant,

v.

MICHIGAN STATE UNIVERSITY,

Defendant-Appellant/Cross-Appellee.

Court of Appeals No. 364244

Court of Claims Case No. 21-000011
Hon. Elizabeth Gleicher

PLAINTIFF-APPELLEE/CROSS APPELLANT'S
APPENDIX

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STATE OF MICHIGAN

COURT OF CLAIMS

THE MACKINAC CENTER FOR PUBLIC POLICY,

Plaintiff,

v

MICHIGAN STATE UNIVERSITY,

Defendant.

OPINION AND ORDER ON RECONSIDERATION

Case No. 21-000011-MZ

Hon. Elizabeth L. Gleicher

This action under the Freedom of Information Act (FOIA), MCL 15.231 *et seq*., arises from a request made by plaintiff Mackinac Center for Public Policy to defendant Michigan State University seeking: "Any emails to or from the president of Michigan State University (MSU) that mention 'Hsu' from Feb. 1, 2020 to June 26, 2020." The Court reviewed *in camera* approximately 592 pages of unredacted emails relevant to plaintiff's FOIA request and issued an opinion and order partially granting and partially denying the parties' cross-motions for summary disposition under MCR 2.116(C)(10). Relevant here, the Court concluded that the names of the Michigan State University students who had signed a petition seeking the removal of Professor Hsu from his administrative position at the University, and e-mails sent by students to MSU President Samuel L. Stanley, Jr., M.D., were not exempt from disclosure under MCL 15.243(2).

Defendant filed a motion for reconsideration or "clarification" challenging the Court's ruling regarding the disclosure of student names and urging the Court to reconsider whether the disclosure of the names would violate the Family Education Rights and Privacy Act (FERPA), 20

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USC 1232g(a)(2). Defendant also contended that the Court erred by determining that two redactions made pursuant to MCL 15.243(1)(m), addressing "frank communications," were subject to disclosure. The Court conducted a brief hearing by Zoom on November 22, 2022.

The Court GRANTS defendant's motion regarding the redactions on page 575 and 166, finding that these redactions qualify as protected frank communications. The Court DENIES defendant's motion regarding the students' names.

"Congress enacted the FERPA 'to protect [parents' and students'] rights to privacy by limiting the transferability of their records without their consent." *United States v Miami Univ*, 294 F3d 797, 806 (CA 6, 2002) (alteration in original). The FERPA defines "education records" as "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." 20 USC 1232g(a)(4)(A). The Court finds that the students' names are not "information directly related to a student," and that the names were not "maintained" in the manner the FERPA contemplates.

The United States Supreme Court observed that as used in the FERPA, "[t]he word "maintain" suggests FERPA records will be kept in a filing cabinet in a records room at the school or on a permanent secure database, perhaps even after the student is no longer enrolled." *Owasso Indep Sch Dist No I-011 v Falvo*, 534 US 426, 433; 122 S Ct 934; 151 L Ed 2d 896 (2002). Defendant has not presented any evidence supporting that the names of the students who signed the Hsu petition or sent e-mails to President Stanley regarding Professor Hsu are kept in a "database" directly related to the *student*, in contrast with the database kept regarding Dr. Hsu.

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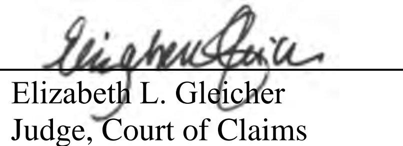
Further, the Court finds that the petitions and e-mails are not “education records” because they do not “directly relate[]” to the student signers or senders. Rather, the emails and the petition relate to Professor Hsu, and are “only tangentially related” to the students. See *Ellis v Cleveland Muni Sch Dist*, 309 F Supp 2d 1019, 1022 (ND Ohio, 2004) (explaining that “courts have held FERPA does not prevent the disclosure of records specifying reasons for teacher certificate revocations or the names of the victim and witnesses to an alleged incident of sexual harassment by a teacher,” and collecting cases). As also pointed out in *Ellis*, “FERPA is not a law which absolutely prohibits the disclosure of educational records; rather it is a provision which imposes a financial penalty for the unauthorized disclosure of educational records.” *Id. at* 1023. A disclosure made “to comply with a judicial order” is not prohibited under the FERPA. 34 CFR 99.31(a)(9)(*i*). For these reasons, the Court DENIES defendant’s motion for reconsideration regarding the redactions of the students’ names.

This is a final order the disposes of the final claim and closes the case.

Date: December 1, 2022



Elizabeth L. Gleicher
Judge, Court of Claims

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STATE OF MICHIGAN

COURT OF CLAIMS

THE MACKINAC CENTER FOR
PUBLIC POLICY,

Plaintiff,

v

MICHIGAN STATE UNIVERSITY,

Defendant.

________________________________/

OPINION AND ORDER

Case No. 21-000011-MZ

Hon. Elizabeth L. Gleicher

Pending before the Court in this action filed under the Freedom of Information Act (FOIA), MCL 15.231 *et seq.*, are defendant's motion for summary disposition under MCR 2.116(C)(10), and plaintiff's cross-motion for summary disposition under MCR 2.116(C)(10). The motions are GRANTED in part and DENIED in part.

I. BACKGROUND

On June 26, 2020, a representative of plaintiff Mackinac Center for Public Policy emailed a request under the FOIA to defendant Michigan State University seeking: "Any emails to or from the president of Michigan State University (MSU) that mention 'Hsu' from Feb. 1, 2020 to June 26, 2020."

"Hsu" refers to Dr. Stephen Hsu. Dr. Hsu joined the MSU faculty in 2012 as a tenured full-time professor of physics and as Vice President for Research and Graduate Studies. By 2020, he had attained the position of Senior Vice President of Research and Innovation. During that year, MSU's Graduate Employees Union accused Hsu of being a "scientific racist and eugenicist"

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based on blog posts Hsu had authored in 2018. Dr. Samuel L. Stanley, Jr., M.D., MSU's president, received a trove of emails from people within and without the MSU community expressing opinions about whether Hsu should be maintained as an MSU administrator. Additional emails to President Stanley containing the word "Hsu" concerned threats made against an MSU student who led the petition drive seeking Hsu's termination from employment and a faculty member who had publicly criticized Hsu.

MSU gathered approximately 592 pages of emails relevant to plaintiff's FOIA request, identified in this opinion as exhibit A. It produced these pages to plaintiff, but with multiple redactions.[1] MSU withheld from production a nine-page document identified in the record as exhibit D, a five-page document identified as exhibit E, and nine pages identified as exhibit F. Plaintiff filed this lawsuit in January 2021, challenging the legal bases for the redactions and seeking production of the withheld documents.[2] Both parties filed motions for summary disposition under MCR 2.116(C)(10).[3] In December 2021, the Court ordered MSU to produce the unredacted documents for in camera review along with a bill of particulars, setting forth the grounds for each redaction. MSU timely complied with the Court's order. The index it provided

[1] Plaintiff has withdrawn its request for unredacted versions of the material on pages 1-6, 18, and 19-20 of exhibit A, which reference "institutional grant support," a salary recommendation, and related subjects.

[2] Plaintiff's complaint also alleged that MSU's response to it FOIA request was delayed in bad faith. Plaintiff withdrew this claim in its 12/03/21 response to MSU's motion for summary disposition, and so the Court will not address it.

[3] A motion for summary disposition under MCR 2.116(C)(10) tests the factual support for the plaintiff's claims. See *White v Dep't of Transp*, 334 Mich App 98, 106; 964 NW2d 88 (2020). The Court views the evidence in the light most favorable to the nonmovant to determine whether a genuine issue of material fact exists for trial. *Id.* "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." *Id.* (quotation marks and citation omitted).

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(exhibit C) has been extremely helpful to the time-consuming process of reviewing the challenged emails and attachments. The Court apologizes to the parties for the time it has taken the Court to review the materials provided.

II. ANALYSIS

Whether a public record is exempt from disclosure under the FOIA is generally a mixed question of fact and law. "However, when the facts are undisputed and reasonable minds could not differ, whether a public record is exempt under FOIA is a pure question of law for the court." *Rataj v City of Romulus*, 306 Mich App 735, 747–748; 858 NW2d 116 (2014). The Court believes that no facts remain in dispute in this case, but as discussed in more detail below, invites the parties to file additional briefing if the Court is incorrect.

The FOIA was adopted to promote "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). The core objective of the FOIA "is to provide the people of this state with full and complete information regarding the government's affairs . . . ." *Practical Political Consulting, Inc v Secretary of State*, 287 Mich App 434, 462; 789 NW2d 178 (2010). "There is no question that Michigan State University is a public body[.]" *Kestenbaum v Mich State Univ*, 414 Mich 510, 521; 327 NW2d 783 (1982).

MCL 15.243 "sets forth several exemptions to" a public body's "duty to disclose." *Manning v East Tawas*, 234 Mich App 244, 248; 593 NW2d 649 (1999), overruled on other grounds by *Speicher v Columbia Twp Bd of Trustees*, 497 Mich 125; 860 NW2d 51 (2014). "However, these exemptions must be construed narrowly, and the burden of proof rests with the

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party asserting an exemption." *Id.* See also *Evening News Ass'n v City of Troy*, 417 Mich 481, 503; 339 NW2d 421 (1983). "Under the FOIA, a public body must disclose all public records that are not specifically exempt under the act. MCL 15.233(1) . . . ." *Nicita v Detroit*, 194 Mich App 657, 661; 487 NW2d 814 (1992).

A. THE EMAILS CONTAINED IN EXHIBIT A

Exhibit A contains 592 pages of documents produced to plaintiff. Within these pages are hundreds of emails sent to President Stanley by members of the public expressing their views about Hsu, and hundreds of emails sent to President Stanley by MSU students and employees regarding Hsu. Many of the emails include attachments. Invoking the "personal privacy" exemption to disclosure, MCL 15.243(1)(a), MSU redacted the names of all the senders and their email addresses, all printed signatures, and all telephone numbers. Additional redactions were made pursuant to four other FOIA exemptions, listed here:

> (m) Communications and notes within a public body or between public bodies of an advisory nature to the extent that they cover other than purely factual materials and are preliminary to a final agency determination of policy or action. This exemption does not apply unless the public body shows that in the particular instance the public interest in encouraging frank communication between officials and employees of public bodies clearly outweighs the public interest in disclosure. This exemption does not constitute an exemption under state law for purposes of section 8(h) of the open meetings act, 1976 PA 267, MCL 15.268. As used in this subdivision, "determination of policy or action" includes a determination relating to collective bargaining, unless the public record is otherwise required to be made available under 1947 PA 336, MCL 423.201 to 423.217.
>
> * * *
>
> (u) Records of a public body's security measures, including security plans, security codes and combinations, passwords, passes, keys, and security procedures, to the extent that the records relate to the ongoing security of the public body.
>
> * * *

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

(z) Information that would identify or provide a means of identifying a person that may, as a result of disclosure of the information, become a victim of a cybersecurity incident or that would disclose a person's cybersecurity plans or cybersecurity-related practices, procedures, methods, results, organizational information system infrastructure, hardware, or software. [MCL 15.243(1)(m), (u), (y), and (z)].

1. THE "PERSONAL PRIVACY" REDACTIONS, MCL 15.243(1)(a)

MCL 15.243(1)(a) permits a public body to exempt from disclosure "[i]nformation of a personal nature if public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy." This exemption has two prongs. "First, the information must be 'of a personal nature.' Second, it must be the case that the public disclosure of that information would constitute a clearly unwarranted invasion of an individual's privacy." *Mich Federation of Teachers & Sch Related Personnel, AFT, AFL-CIO v Univ of Mich*, 481 Mich 657, 675; 753 NW2d 28 (2008) (quotation marks omitted).

Intimate, embarrassing, private, or confidential information is "of a personal nature." *Id.* at 676. But the exemption analysis does not stop there. Only if an invasion of an individual's privacy is "clearly unwarranted" is a public body entitled to withhold information. *Id.* at 675. An invasion of an individual's privacy is "clearly unwarranted" when the interest in disclosure reveals

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"little or nothing about a governmental agency's conduct" or does not "further the stated public policy undergirding the Michigan FOIA." *Id.* at 682 (citations and quotation marks omitted).

In *Mich Federation of Teachers*, 481 Mich at 676, the Supreme Court considered whether the disclosure of the "home addresses and telephone numbers" of University of Michigan employees would reveal "embarrassing, intimate, private, or confidential details about those individuals." The Court held that it would, explaining: "Where a person lives and how that person may be contacted fits squarely within the plain meaning of this definition because that information offers private and even confidential details about that person's life." *Id.* The *names* of university employees unconnected to addresses, however, do not necessarily qualify as "intimate details" of a "highly personal nature." "In the absence of special circumstances . . . an individual's name is not '[i]nformation of a personal nature' within the meaning of MCL 15.243(1)(a)." *Rataj*, 306 Mich App at 753 (alteration in original). See also *Penokie v Mich Tech Univ*, 93 Mich App 650, 663; 287 NW2d 304 (1979) (same).

MSU has not identified any special circumstances that would bring the email authors' names within the realm of "intimate embarrassing, private, or confidential information." The individuals whose names MSU seeks to protect sent unsolicited emails to the president of a public university, expressing opinions about a topic of intense public interest. They displayed their names in their emails along with their sentiments. They had no reason to believe that President Stanley

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or anyone with whom he shared the emails would shield their names from public view, none of the emails appears to have been sent in confidence, and none are marked "confidential."[4]

The cases in which the appellate courts have applied to personal privacy exception to names differ significantly from this scenario. In *Mager v Dep't of State Police*, 460 Mich 134, 143-44; 595 NW2d 142 (1999), for example, the Supreme Court held that the names of gun permit applicants need not be disclosed because "[a] citizen's decision to purchase and maintain firearms is a personal decision of considerable importance" constituting "an intimate or, for some persons, potentially embarrassing detail of one's personal life." Similarly, the names of individuals filing consumer complaints have been held to be exempt from disclosure because the complaints may include "sensitive details pertaining to people's personal lives" such as "information regarding the existence and value of specific assets an individual owns . . . [or] information relating to an individual's private life, such as the denial of an insurance claim or allegations of fraud." *Detroit Free Press, Inc v Dep't of Consumer & Indus Servs*, 246 Mich App 311, 319; 631 NW2d 769 (2001).

Here, however, the emails sent to President Stanley contain expressions of opinion voluntarily sent to a public official. The emails reveal personal attitudes and beliefs, but the senders relinquished any privacy interests they may have had in their opinions by sending them to Stanley under their own names and without requesting anonymity. Under these circumstances the Court finds that the senders' names do not qualify as information of a personal nature and that

[4] Several of the parents' emails mention the names of their MSU student-children. The student's names must be redacted because their disclosure would not serve any of the purposes of the FOIA.

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disclosure of the names would not constitute a clearly unwarranted invasion of any individual's privacy. The Court grants summary disposition to plaintiff in this regard.

Disclosure of the senders' email addresses, telephone numbers, and printed signatures, however, presents a different privacy issue. MSU argues that the email addresses, printed signatures, and telephone numbers of the senders constitute private information falling within the personal privacy exemption, and that their disclosure might subject the senders (particularly those using the MSU email system) to cyberattacks or otherwise impair MSU's ability to defend against cyberattacks. See MCL 15.243(1)(u) and (z). The Court agrees that the email addresses, telephone numbers, and printed signatures constitute information of a personal nature, and that disclosure would constitute a clearly unwanted invasion of privacy.

Email addresses are akin to street addresses in the sense that they open a pathway to unwanted communication. Further, plaintiff has not identified any specific reasons that the addresses, telephone numbers, or printed signatures are revelatory of information related to the core purposes of the FOIA. In fact, plaintiff has conceded that it is not seeking the employee-authors' signatures. Even assuming the email addresses and telephone numbers might make it easier to follow up with questions directed at the email senders, any public interest in such inquiries is overshadowed by the potential for the invasion of the authors' privacy. Accordingly, based on the personal privacy exemption, MCL 15.243(1)(a), the Court grants summary disposition to MSU regarding the email addresses, telephone numbers and printed signatures of all senders.[5]

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[5] The Court's decision to shield the email addresses under MCL 15.243(1)(a) renders moot MSU's assertion of the other FOIA exemptions regarding the email addresses, telephone numbers and signatures.

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2. OTHER PERSONAL PRIVACY OBJECTIONS TO DISCLOSURE

The Court's review of the emails containing redactions based on the "personal privacy" exemption reveals that most of the redactions involve the names of the senders, their telephone numbers, and their signatures. But MSU also redacted information contained in the emails that would allow a reader to identify the senders even though their names were redacted. For example, in some cases, the emails reference the sender's academic or professional position. In others, the emails reference the sender's relationship to Hsu or others at MSU. Because the Court has ordered that the names of the senders are not redactable under MCL 15.243(1)(a), the Court orders that the redacted identification information also must be disclosed.

Other "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 15.243(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.

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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 intellectual fray.

MSU additionally invoked the personal privacy exemption five times regarding material it described as "unsubstantiated allegations of misconduct against [an] individual." All the "unsubstantiated allegations" concerned Hsu. The Court concludes that these allegations do not constitute "information of a personal nature" because they are merely allegations and not "information." Because these allegations were placed before President Stanley within emails expressing the senders' opinions regarding the Hsu controversy, and may or may not have been considered by Dr. Stanley or others, they should not have been redacted.

Finally, MSU redacted information provided by a student regarding a family member's health condition on page 381. The Court finds that the redacted material qualifies as private and confidential, and that its disclosure would not reveal anything about MSU's conduct regarding Hsu.

If the Court has missed any additional personal privacy exemption issues or redactions, the Court invites the parties to raise them in additional motions.

3. THE "FRANK COMMUNICATIONS" EXEMPTION, MCL 15.243(1)(m)

MSU made approximately 20 redactions under the "frank communications" exemption, which the Court reiterates in relevant part here:

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> Communications and notes within a public body or between public bodies of an advisory nature to the extent that they cover other than purely factual materials and are preliminary to a final agency determination of policy or action. This exemption does not apply unless the public body shows that in the particular instance the public interest in encouraging frank communication between officials and employees of public bodies clearly outweighs the public interest in disclosure. [MCL 15.243(1)(m).]

The Supreme Court has provided a framework for this Court's consideration of the redactions made under the frank communications exemption:

> First, the public body seeking to withhold the document bears the burden of establishing the exemption. Second, the public record sought to be withheld from disclosure must meet the three-part statutory definition of a "frank communication": (1) it is a communication or note of an advisory nature made within a public body or between public bodies, (2) it covers other than purely factual material, and (3) it is preliminary to a final agency determination of policy or action. Third, if the public record qualifies as a "frank communication," the trial court must engage in the balancing test and determine if the public interest in encouraging frank communication clearly outweighs the public interest in disclosure. Finally, if the trial court determines that the frank communication should not be disclosed, the FOIA still requires the trial court to redact the exempt material and disclose the purely factual material within the document. [*Bukowski v Detroit*, 478 Mich 268, 274–275; 732 NW2d 75 (2007).]

The Court has reviewed the frank communication redactions and finds as follows:

- p. 7: The redacted material in the first four paragraphs appears to be factual and not opinion or of an advisory nature, and is not exempt from disclosure. The redaction in the fifth and final paragraph of the email is a non-factual opinion regarding Hsu, which is of an advisory nature, a communication between officials or employees of MSU, and preliminary to a final determination of Hsu's status at the university. The public interest in disclosure does not outweigh the public's interest in encouraging frank communications and maintaining the quality of its deliberative and decision-making process.

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- p. 9: The redacted information appears to be factual and not opinion or of an advisory nature, and is not exempt from disclosure.

- p. 10: The redacted material is non-factual opinion regarding Hsu of an advisory nature, a communication between officials or employees of MSU, and preliminary to a final determination of Hsu's status at the university. The public interest in disclosure does not outweigh the public's interest in encouraging frank communications and maintaining the quality of its deliberative and decision-making process.

- p. 11: The redacted information appears to be factual and not opinion or of an advisory nature, and is not exempt from disclosure.

- p. 27: The redacted salary recommendation figure is a non-factual opinion of an advisory nature within a communication between officials or employees of MSU, and preliminary to a final determination. The public interest in disclosure does not outweigh the public's interest in encouraging frank communications and maintaining the quality of its deliberative and decision-making process.

- p. 166: The redacted information appears to be factual and not opinion or of an advisory nature, and is not exempt from disclosure.

- p. 167: The redacted material is non-factual advice provide to President Stanley, a communication between officials or employees of MSU, and qualifies as part of the preliminary discussion preceding a final determination of Hsu's status at the university. The public interest in disclosure does not outweigh the public's interest in encouraging

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frank communications and maintaining the quality of its deliberative and decision-making process.

- p. 175: The redacted information appears to be factual and not opinion or of an advisory nature, and is not exempt from disclosure.

- pp. 197-199: The redacted material is a non-factual opinion regarding Hsu of an advisory nature, a communication between officials or employees of MSU, and preliminary to a final determination of Hsu's status at the university. The public interest in disclosure does not outweigh the public's interest in encouraging frank communications and maintaining the quality of its deliberative and decision-making process.

- p. 235: The redacted material is non-factual advice provide to President Stanley, a communication between officials or employees of MSU, and qualifies as part of the preliminary discussion preceding a final determination of Hsu's status at the university. The public interest in disclosure does not outweigh the public's interest in encouraging frank communications and maintaining the quality of its deliberative and decision-making process.

- p. 300: The redacted information is contained in an email sent by Hsu and appears to be factual rather than an advisory communication intended to be preliminary to a determination of Hsu's status. The public interest favors disclosure.

- p. 313: The redacted material is non-factual advice provide to President Stanley, a communication between officials or employees of MSU, and qualifies as part of the preliminary discussion preceding a final determination of Hsu's status at the university.

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The public interest in disclosure does not outweigh the public's interest in encouraging frank communications and maintaining the quality of its deliberative and decision-making process.

- pp. 380, 382, and 383: The redacted portions appear to be part of the same email that appears on p 313, and are exempt as frank communications for the same reasons.

- p. 434: The partially redacted sentence at the beginning of the email is factual and not exempt as a frank communication.

- p. 435: There does not appear to be any material on this page subject to the frank communication exemption.

- p. 461: The redacted question at the top of the page is not a frank communication of anything; it is a question. The balance of the redacted material is within a student's email and does not qualify as a frank communication; there is no indication that the sender was an official of MSU.

- pp. 570 and 571: The redacted material is non-factual advice provide to President Stanley, a communication between officials or employees of MSU, and qualifies as part of the preliminary discussion preceding a final determination of Hsu's status at the university. The public interest in disclosure does not outweigh the public's interest in encouraging frank communications and maintaining the quality of its deliberative and decision-making process.

- p. 573: There does not appear to be any material on this page subject to the frank communication exemption.

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- p. 575: There does not appear to be any material on this page subject to the frank communication exemption.

- p. 577: The redacted material contains non-factual opinions between MSU officials or employees of an advisory nature regarding a project unrelated to Hsu's status at the university. The email is marked "confidential." The email reveals nothing about MSU's conduct regarding Hsu. The public interest in disclosure does not outweigh the public's interest in encouraging frank communications and maintaining the quality of its deliberative and decision-making process.

- pp. 579-580: The redacted material is non-factual opinion regarding Hsu of an advisory nature, a communication between officials or employees of MSU, and preliminary to a final determination of Hsu's status at the university. The public interest in disclosure does not outweigh the public's interest in encouraging frank communications and maintaining the quality of its deliberative and decision-making process.

If the Court has missed any additional frank communication exemption issues or redactions, or has misconstrued the nature of the material redacted, the Court invites the parties to raise their objections and concerns in additional motions.

B. EXHIBIT D

Exhibit D consists of two emails and attachments relaying information about a death threat made to a student, and containing other accusations. The Court agrees with MSU that disclosure of the information within these pages would constitute a clearly unwarranted invasion of the

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student's privacy. Further, the information on these pages reveals nothing about MSU's conduct regarding Hsu.

C. EXHIBIT E

Like exhibit D, exhibit E contains emails and attachments related to threats against a faculty member. The Court agrees with MSU that disclosure of the information within these pages would constitute a clearly unwarranted invasion of privacy. Additionally, the information on these pages reveals nothing about MSU's conduct regarding Hsu.

D. EXHIBIT F

Exhibit F contains letters to Hsu written in 2012 and 2017 by MSU's then-President Lou Anna K. Simon, relaying salary and related information. The Court agrees with MSU that disclosure of the information within these pages would constitute an unwarranted invasion of privacy. Further, the information on these pages reveals nothing about MSU's conduct regarding the Hsu controversy that began in 2020. Further, plaintiff has disclaimed interest in salary information.

E. ATTORNEY-CLIENT PRIVILEGE

Finally, MSU has redacted several documents as attorney-client privileged under MCL 15.243(1)(h), including pages 202 and 312 of exhibit A. Plaintiff does not challenge those identifications and accepts that the documents are exempt from disclosure.

III. CONCLUSION

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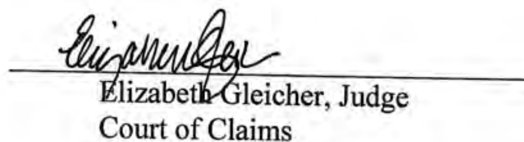
In summary, the Court concludes that the physical addresses, email addresses, and telephone numbers of the email authors are exempt from disclosure under the personal-privacy exemption. The attorney-client privileged documents and certain frank communications are also exempt from disclosure, as outlined above. Finally, the documents in exhibits D through F are exempt from disclosure for the reasons discussed.

But the names of the authors of the emails are *not* exempt from disclosure. Additionally, the anecdotal information about each individual's relationship with MSU or Hsu does not qualify as exempt under the personal-privacy exemption. Nor do the allegations of misconduct against Hsu. Finally, the names of the individual students who petitioned for Hsu's removal from a leadership role are not exempt from disclosure for the reasons discussed.

If the parties require clarification on any of these points, or if there are any outstanding issues for the Court to address, the Court invites the parties to raise their objections, concerns, or petitions in additional motions. Otherwise, if no additional motions are filed within 28 days, the Court will enter a final order closing the case.

This is not a final order and does not close the case.

Dated: October 13, 2022



Elizabeth Gleicher, Judge
Court of Claims

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FOIA: Michigan State University

June 26, 2020

FOIA REQUEST FOR EMAILS ABOUT STEPHEN HSU

To Whom It May Concern:

Pursuant to the Michigan compiled Laws Section 15.231 et seq., and any other relevant statutes or provisions of your agency's regulations I am making the following Freedom of Information Act request.

- Any emails to or from the president of Michigan State University that mention "Hsu" from Feb. 1, 2020 to June 26, 2020.

Please send the materials requested to the attention of Jarrett Skorup at the following address, fax number, or via e-mail at skorup@mackinac.org<mailto:skorup@mackinac.org>.

Mackinac Center for Public Policy
P.O. Box 568
Midland, MI 48640
Fax: 989-631-0964
Phone: 989-631-0900
Jarrett Skorup
Mackinac Center

Jarrett Skorup
Director of Marketing and Communications
Mackinac Center for Public Policy
www.mackinac.org
989-631-0900

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MICHIGAN STATE
UNIVERSITY

DATE: July 7, 2020

TO: Jarrett Skorup
Director of Marketing and Communications
Mackinac Center for Public Policy
skorup@mackinac.org

FROM: Rebecca Nelson, Director and Freedom of Information Act (FOIA) Officer
Michigan State University FOIA Office Rebecca Nelson

SUBJECT: FOIA Fee and Deposit Notice

This is written with regard to the FOIA request that you emailed to this Office on June 26, 2020.

The processing of your request thus far has involved significant labor. We estimate that searching for, gathering, and reviewing records responsive to your request to determine if information exempt from public disclosure under the Michigan Freedom of Information Act (MIFOIA), must be separated from that which is not exempt, will require upwards of six (6) hours, incurring fees likely to exceed $230.00. Fees will not be waived since failure to charge same would result in unreasonably high costs to the University. An itemization of this estimate accompanies this letter. This serves as an approximation only, and does not guarantee or limit the final, total fees which may be incurred and assessed. Therefore, pursuant to Section 4(2) of the MIFOIA, we require that you remit a deposit prior to our further processing your request. Should you remit the required deposit, we anticipate responding to your request on or before six (6) weeks from the date the deposit is received.

FREEDOM OF INFORMATION ACT OFFICE

Michigan State University

408 West Circle Drive
Room 1 Olds Hall
East Lansing, MI 48824
517-353-3929
Fax: 517-353-1794
foia@msu.edu
http://foia.msu.edu

If you wish to pursue the processing of your request, and pay the fees incurred, please send a check made payable to "Michigan State University" in the amount of $115.00 to the Freedom of Information Act Office, 408 West Circle Drive, Room 1 Olds Hall, or notify us in writing if you wish to modify or withdraw your request. The University will not process your request until a deposit is received by our Office. Moreover, Section 4(14) of the MIFOIA requires that the deposit be received no later than Monday, August 24, 2020, or your request will be considered abandoned, and processing of it no longer required. Should you have any questions regarding fees, please contact us. Pursuant to Section 4(4) of the MIFOIA, the University's procedures and guidelines for processing MIFOIA requests can be found at http://foia.msu.edu.

Attachment
MSUF035320

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MSU FOIA FEE ESTIMATE ITEMIZATION FORM -- July 7, 2020 -- Skorup FOIA Request MSUF035320					
Category of Costs/Description	***Hourly Wage***	***Benefits % Multiplier Used***	***Hourly Wage with Benefits***	***Estimated Time (Hours)***	***Amount***
4 (1) (a) Searching for, locating and examining responsive records *[Shall not charge more than the hourly wage of lowest-paid employee capable of searching for, locating and examining the public records in the particular instance regardless of whether that person is available or who actually performs the labor; labor costs shall be estimated and charged in increments of 15 minutes or more, with all partial time increments rounded down.]*	$28.95	40%	$40.53	3	$121.59
4 (1) (b) Review directly associated with the separating and deleting of exempt from nonexempt information *[For services performed by an employee of the public body, the public body shall not charge more than the hourly wage of its lowest-paid employee capable of separating and deleting exempt information from nonexempt information in the particular instance as provided in section 14, regardless of whether that person is available or who actually performs the labor. If a public body does not employ a person capable of separating and deleting exempt information from nonexempt information as determined by the public body's FOIA coordinator, it may treat necessary contracted labor costs used for the separating and deleting of exempt information from nonexempt information in the same manner as employee labor costs if it clearly notes the name of the contracted person or firm on this itemization. Total labor costs calculated under this subdivision for contracted labor costs shall not exceed an amount equal to 6 times the state minimum hourly wage rate. Labor costs under this subdivision shall be estimated and charged in increments of 15 minutes or more, with all partial time increments rounded down.]*	$21.29	40%	$29.81	3.75	$111.79
4 (1) (c) Nonpaper physical media costs *[The actual and most reasonably economical cost of the computer discs, computer tapes, or other digital or similar media. The requestor may stipulate that public records be provided on nonpaper physical media, electronically mailed, or otherwise electronically provided in lieu of paper copies. This subdivision does not apply if public body lacks the technological capability necessary to provide records on the particular nonpaper physical media stipulated in the particular instance.]*					
4 (1) (d) Cost of paper copies *[Actual total incremental cost of necessary duplication or publication, not including labor. The cost of paper copies shall be calculated as a total cost per sheet of paper, itemized to show both cost per sheet and number of sheets provided. The fee shall not exceed 10 cents per sheet of paper for copies of public records made on 8-1/2- by 11-inch paper or 8-1/2- by 14-inch paper. A public body shall utilize the most economical means available, including double-sided printing, if cost saving and available.]*					
4 (1) (e) Duplication or publication, including making paper copies, making digital copies, or transferring digital public records to be given to the requestor on nonpaper physical media or through the internet or other electronic means as stipulated by the requestor *[Shall not charge more than the hourly wage of lowest-paid employee capable of necessary duplication or publication in the particular instance, regardless of whether that person is available or who actually performs the labor.; labor costs under this subdivision shall be estimated and charged in time increments of the public body's choosing, with all partial time increments rounded down.]*					
4 (1) (f) Cost of mailing *[Actual cost of mailing, for sending the public records in a reasonably economical and justifiable manner; shall not charge more for expedited shipping or insurance unless stipulated by requestor, but may charge for the least expensive form of postal delivery confirmation when mailing public records.]*					
			ESTIMATE TOTAL		**$233.38**
			FEE DEPOSIT REQUIRED		$115.00

When calculating labor costs under (1) (a), (b) or (e), fee components shall be itemized in a manner that expresses both the hourly wage and the number of hours charged. The public body may also add up to 50% to the applicable labor charge amount to cover or partially cover the cost of fringe benefits if it clearly notes the percentage multiplier used. Subject to the 50% limitation, the public body shall not charge more than the actual cost of fringe benefits, and overtime wages shall not be used in calculating the cost of fringe benefits. Overtime wages shall not be included in the calculation of labor costs unless overtime is specifically stipulated by the requestor and clearly noted in this detailed itemization.

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MICHIGAN STATE
UNIVERSITY

DATE: August 31, 2020

TO: Jarrett Skorup
Director of Marketing and Communications
Mackinac Center for Public Policy
skorup@mackinac.org

FROM: Rebecca Nelson, Director and Freedom of Information Act (FOIA) Officer
Michigan State University FOIA Office Rebecca Nelson

SUBJECT: FOIA Fee and Deposit Notice Follow-up – Record Volume Update

On June 26, 2020, you emailed a FOIA request to this Office for "Any emails to or from the president of Michigan State University that mention 'Hsu' from Feb. 1, 2020 to June 26, 2020." On July 20th, in response to our July 7th $230.00 fee estimate, this Office received a $115.00 fee deposit for the processing of your request.

The searching for and gathering of records responsive to your request has concluded, and the volume of those records is significantly greater than estimated. Record review to separate information exempt from public disclosure under the Michigan Freedom of Information Act (MIFOIA), from that which is not exempt, has begun. The foregoing processing has reached the initial six hour estimate, and hundreds of pages of emails have yet to be reviewed. Given that fees incurred have reached the initial $230.00 estimate, we write to ask if you wish to proceed with the processing of your request, or halt the processing and receive only the records reviewed thus far. If you wish to halt the processing of your request, please advise us in writing, and we will finalize the records reviewed to date, and send them to you along with an invoice billing you for the balance of fees owed.

FREEDOM OF INFORMATION ACT OFFICE

Michigan State University

408 West Circle Drive
Room 1 Olds Hall
East Lansing, MI 48824
517-353-3929
Fax: 517-353-1794
foia@msu.edu
http://foia.msu.edu

If, instead, you wish to pursue the processing of all of the remaining records you seek, the following estimate is provided. Completing the processing of your request will involve significant labor; we estimate upwards of eleven (11) hours will be required, incurring fees likely to exceed $350.00; this is in addition to the initial $230.00 fee estimate, and the fees incurred to date. In completing the processing of your request, fees will not be waived since failure to charge same would result in unreasonably high costs to the University. An itemization of this estimate accompanies this letter. This serves as an approximation only, and does not guarantee or limit the final, total fees which may be incurred and assessed. Therefore, pursuant to Section 4(2) of the MIFOIA, we require that you remit an additional deposit prior to our completing the processing of your request. Should you remit the required deposit, we anticipate responding on or before eight weeks (8) from the date the deposit is received.

If you wish to pursue the processing of all records responsive to your request, and pay the fees incurred, please send a check made payable to "Michigan State University" in the amount of $175.00 to the Freedom of Information Act Office, 408 West Circle Drive, Room 1 Olds Hall. The University will not complete the processing of the remaining records you seek until a deposit is received by our Office. Moreover, Section 4(14) of the MIFOIA requires that the deposit be received no later than Monday, October 19, 2020, or your request pertaining to the remaining records will be considered abandoned, and processing of it no longer required. Should you have any questions regarding fees, please contact us. Pursuant to Section 4(4) of the MIFOIA, the University's procedures and guidelines for processing MIFOIA requests can be found at http://foia.msu.edu.

Attachment
MSUF035320

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MSU FOIA FEE ESTIMATE ITEMIZATION FORM -- August 31, 2020 -- Skorup FOIA Request MSUF035320 -- follow-up; additional fee estimate					
Category of Costs/Description	***Hourly Wage***	***Benefits % Multiplier Used***	***Hourly Wage with Benefits***	***Estimated Time (Hours)***	***Amount***
4 (1) (a) Searching for, locating and examining responsive records *[Shall not charge more than the hourly wage of lowest-paid employee capable of searching for, locating and examining the public records in the particular instance regardless of whether that person is available or who actually performs the labor; labor costs shall be estimated and charged in increments of 15 minutes or more, with all partial time increments rounded down.]*					
4 (1) (b) Review directly associated with the separating and deleting of exempt from nonexempt information *[For services performed by an employee of the public body, the public body shall not charge more than the hourly wage of its lowest-paid employee capable of separating and deleting exempt information from nonexempt information in the particular instance as provided in section 14, regardless of whether that person is available or who actually performs the labor. If a public body does not employ a person capable of separating and deleting exempt information from nonexempt information as determined by the public body's FOIA coordinator, it may treat necessary contracted labor costs used for the separating and deleting of exempt information from nonexempt information in the same manner as employee labor costs if it clearly notes the name of the contracted person or firm on this itemization. Total labor costs calculated under this subdivision for contracted labor costs shall not exceed an amount equal to 6 times the state minimum hourly wage rate. Labor costs under this subdivision shall be estimated and charged in increments of 15 minutes or more, with all partial time increments rounded down.]*	$21.29	40%	$29.81	11.75	$350.27
4 (1) (c) Nonpaper physical media costs *[The actual and most reasonably economical cost of the computer discs, computer tapes, or other digital or similar media. The requestor may stipulate that public records be provided on nonpaper physical media, electronically mailed, or otherwise electronically provided in lieu of paper copies. This subdivision does not apply if public body lacks the technological capability necessary to provide records on the particular nonpaper physical media stipulated in the particular instance.]*					
4 (1) (d) Cost of paper copies *[Actual total incremental cost of necessary duplication or publication, not including labor. The cost of paper copies shall be calculated as a total cost per sheet of paper, itemized to show both cost per sheet and number of sheets provided. The fee shall not exceed 10 cents per sheet of paper for copies of public records made on 8-1/2- by 11-inch paper or 8-1/2- by 14-inch paper. A public body shall utilize the most economical means available, including double-sided printing, if cost saving and available.]*					
4 (1) (e) Duplication or publication, including making paper copies, making digital copies, or transferring digital public records to be given to the requestor on nonpaper physical media or through the internet or other electronic means as stipulated by the requestor *[Shall not charge more than the hourly wage of lowest-paid employee capable of necessary duplication or publication in the particular instance, regardless of whether that person is available or who actually performs the labor.; labor costs under this subdivision shall be estimated and charged in time increments of the public body's choosing, with all partial time increments rounded down.]*					
4 (1) (f) Cost of mailing *[Actual cost of mailing, for sending the public records in a reasonably economical and justifiable manner; shall not charge more for expedited shipping or insurance unless stipulated by requestor, but may charge for the least expensive form of postal delivery confirmation when mailing public records.]*					
				ESTIMATE TOTAL	**$350.27**
				REQUIRED	$175.00

When calculating labor costs under (1) (a), (b) or (e), fee components shall be itemized in a manner that expresses both the hourly wage and the number of hours charged. The public body may also add up to 50% to the applicable labor charge amount to cover or partially cover the cost of fringe benefits if it clearly notes the percentage multiplier used. Subject to the 50% limitation, the public body shall not charge more than the actual cost of fringe benefits, and overtime wages shall not be used in calculating the cost of fringe benefits. Overtime wages shall not be included in the calculation of labor costs unless overtime is specifically stipulated by the requestor and clearly noted in this detailed itemization.

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MICHIGAN STATE
UNIVERSITY

DATE: November 4, 2020

TO: Jarrett Skorup
Director of Marketing and Communications
Mackinac Center for Public Policy
skorup@mackinac.org

FROM: Rebecca Nelson, Director and Freedom of Information Act (FOIA) Officer
Michigan State University FOIA Office Rebecca Nelson

SUBJECT: FOIA Response

This is written in response to the FOIA request that you emailed to this Office on June 26, 2020, and for the processing of which this Office received fee deposits on July 20, 2020, and September 9, 2020.

Your request is granted with regard to information that is not exempt from public disclosure under the Michigan Freedom of Information Act (MIFOIA). That said, given the University's current alternate working arrangements, necessitated by extraordinary community health concerns, record processing times are extending beyond typically anticipated dates. Nevertheless, please be assured that we are working diligently to process your request as quickly as possible, and expect to send to you records or another update on or before Friday, December 4, 2020. We apologize for any inconvenience this unavoidable delay may cause.

FREEDOM OF INFORMATION ACT OFFICE

Michigan State University

408 West Circle Drive
Room 1 Olds Hall
East Lansing, MI 48824
517-353-3929
Fax: 517-353-1794
foia@msu.edu
http://foia.msu.edu

The MIFOIA provides that when a public body denies all or a portion of a request, the requester may do one of the following: (1) submit an appeal of the determination to the head of the public body; or (2) commence a civil action in the court of claims to compel the public body's disclosure of the records. If you wish to seek judicial review of any denial, you must do so within 180 days of the date of this letter. If the court of claims orders disclosure of all or a portion of the public record(s) to which you have been denied access, you may receive attorneys' fees and, in certain circumstances, damages under the MIFOIA. Should you choose to file an appeal with the University regarding this response to your request, you must submit a written communication to this Office expressly stating that it is an "appeal" of this response. In your appeal, please state what records you believe should have been disclosed to you. You must also state the reasons you believe any denial of your MIFOIA request should be reversed. This Office will arrange for the processing and review of your appeal. Pursuant to Section 4(4) of the MIFOIA, the University's procedures and guidelines for processing MIFOIA requests can be found at http://foia.msu.edu.

MSUF035320

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2022 WL 2902080
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

MICHIGAN RISING ACTION and Tori Sachs, Plaintiffs-Appellees,
v.
SECRETARY OF STATE and Department of State, Defendants-Appellants.

No. 359355
|
July 21, 2022

Court of Claims, LC No. 20-000157-MZ

Before: Markey, P.J., and Boonstra and Riordan, JJ.

Opinion

Per Curiam.

***1** Defendants appeal by right the order of the Court of Claims granting in part plaintiffs' and defendants' respective motions for summary disposition under MCR 2.116(C)(10) and ordering certain documents to be disclosed (or disclosed in unredacted form) to plaintiffs. We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Plaintiff Michigan Rising Action describes itself as a "Michigan nonprofit corporation that advances the principles of free markets and limited government." Plaintiff Tori Sachs is (or was at the time of the filing of plaintiffs' complaint) Michigan Rising Action's Executive Director. In 2019, plaintiffs filed a Freedom of Information Act (FOIA), MCL 15.231 *et seq.*, request with defendants, seeking documents relating to two campaign finance violation complaints and the subsequent administrative proceedings on those complaints. Defendants denied plaintiffs' request in part, contending that some of the requested documents were exempted under MCL 15.243(1)(h), the privilege exemption, and MCL 15.243(1)(m), the frank communications exemption.

Plaintiffs subsequently filed this action in the Court of Claims, requesting that the Court of Claims order defendants to produce the withheld documents. The parties filed cross-motions for summary disposition under MCR 2.116(C)(10), and the Court of Claims rendered its decision without oral argument after performing an *in camera* inspection of the documents. The Court of Claims ruled that some of the withheld documents were properly exempted while others were not, and ordered defendants to produce the documents it had found nonexempt. Defendants moved for reconsideration, which the Court of Claims denied.

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This appeal followed.

II. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision on a motion for summary disposition; we also review de novo questions of law, such as statutory interpretation and the construction and application of court rules. *Dextrom v Wexford Co*, 287 Mich App 406, 416; 789 NW2d 211 (2010). A motion is properly granted under MCR 2.116(C)(10) when "there is no genuine issue with respect to any material fact and the moving party is entitled to judgment as a matter of law." *Dextrom*, 287 Mich App at 415. This Court "must examine the documentary evidence presented and, drawing all reasonable inferences in favor of the nonmoving party, determine whether a genuine issue of material fact exists. A question of fact exists when reasonable minds could differ as to the conclusions to be drawn from the evidence." *Id.* at 415-416.

"When interpreting a statute, [this Court] must ascertain the Legislature's intent," which is accomplished "by giving the words selected by the Legislature their plain and ordinary meanings, and by enforcing the statute as written." *Griffin v Griffin*, 323 Mich App 110, 120; 916 NW2d 292 (2018) (quotation marks and citation omitted). If a statute is unambiguous, it must be applied as plainly written. *McQueer v Perfect Fence Co*, 502 Mich 276, 286; 971 NW2d 584 (2018). This Court may not read something into the statute "that is not within the manifest intent of the Legislature as derived from the words of the statute itself." *Id.* (quotation marks and citation omitted). Court rules are interpreted using the same principles that are used for statutory interpretation. *Lamkin v Engram*, 295 Mich App 701, 707; 815 NW2d 793 (2012).

***2** Additionally, "[t]his Court reviews de novo whether a public record is exempt from disclosure under the FOIA," but a trial court's "factual findings associated with its FOIA decision are reviewed for clear error." *Mich Open Carry, Inc v Dep't of State Police*, 330 Mich App 614, 625; 950 NW2d 484 (2019). Moreover, "certain FOIA provisions require the trial court to balance competing interests," and, "when an appellate court reviews a decision committed to the trial court's discretion ... the appellate court must review the discretionary determination for an abuse of discretion and cannot disturb the trial court's decision unless it falls outside the principled range of outcomes." *Herald Co, Inc v Eastern Mich Univ Bd of Regents*, 475 Mich 463, 470-472; 719 NW2d 19 (2006). Clear error occurs "when the appellate court 'is left with the definite and firm conviction that a mistake has been made.' " *Id.* at 471 (citation omitted).

III. ANALYSIS

Defendants argue that the Court of Claims erred by concluding that certain of the withheld records were not exempt from disclosure. We disagree.

"The FOIA requires public bodies to release certain information at a citizen's request."

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Warren v Detroit, 261 Mich App 165, 166; 680 NW2d 57 (2004). Except when expressly exempted, "a person has a right to inspect, copy, or receive copies of [a] requested public record of [a] public body." MCL 15.233(1). The purpose of the FOIA is for people to "be informed so that they may fully participate in the democratic process," MCL 15.231(2), and our "Legislature codified the FOIA to facilitate disclosure to the public of public records held by public bodies," *Herald Co, Inc*, 475 Mich at 472. However, our Legislature has created numerous exemptions to the general rule of disclosure. See MCL 15.243. Relevant to this appeal are MCL 15.243(1)(h) and (m):

> (1) A public body may exempt from disclosure as a public record under this act any of the following:
>
> * * *
>
> (h) Information or records subject to the physician-patient privilege, the psychologist-patient privilege, the minister, priest, or Christian Science practitioner privilege, *or other privilege recognized by statute or court rule.*
>
> * * *
>
> (m) Communications and notes within a public body or between public bodies of an *advisory nature* to the extent that they cover other than *purely factual materials* and are *preliminary to a final agency determination* of policy or action. This exemption does not apply unless the public body shows that *in the particular instance* the public interest in encouraging frank communication between officials and employees of public bodies *clearly outweighs* the public interest in disclosure. This exemption does not constitute an exemption under state law for purposes of section 8(h) of the open meetings act, 1976 PA 267, MCL 15.268. As used in this subdivision, "determination of policy or action" includes a determination relating to collective bargaining, unless the public record is otherwise required to be made available under 1947 PA 336, MCL 423.201 to 423.217. [Emphasis added.]

"[T]he FOIA must be broadly interpreted to allow public access to the records held by public bodies," and, in contrast, "the statutory exemptions must be narrowly construed to serve the policy of open access to public records." *Mich Open Carry, Inc*, 330 Mich App at 625. "The burden of proving that an exemption applies rests with the public body asserting the exemption." *Id.* "The FOIA exemptions signal particular instances where the policy of offering the public full and complete information about government operations is overcome by a more significant policy interest favoring nondisclosure." *Herald Co, Inc*, 475 Mich at 472. Our "Legislature has made a policy determination that full disclosure of certain public records could prove harmful to the proper functioning of the public body." *Id.* at 472-473.

A. PRIVILEGE EXEMPTION

***3** Defendants argue that MCL 15.243(1)(h), the privilege exemption, applied to those withheld documents that reflect settlement negotiations. We disagree.

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The parties agree that the only type of privilege that could be applicable is the "catch-all" phrase "other privilege recognized by statute or court rule." MCL 15.243(1)(h). "In Michigan, '[p]rivilege is governed by the common law, except as modified by statute or court rule.' " *Detroit News, Inc v Indep Citizens Redistricting Comm*, ––– Mich ––––, ––––; ––– NW2d ––– (2021) (Docket No. 163823); slip op. at 5, quoting MRE 501 (alteration in original). "The existence and scope of a statutory privilege ultimately turns on the language and meaning of the statute itself." *Howe v Detroit Free Press, Inc*, 440 Mich 203, 211; 487 NW2d 374 (1992). "Privileges are narrowly defined and their exceptions broadly construed." *People v Warren*, 462 Mich 415, 427; 615 NW2d 691 (2000).

Defendants rely on MRE 408 and MCL 169.215(10), which is part of the Campaign Finance Act, MCL 169.201 *et seq.*, to support their assertion that a settlement negotiation privilege exists for purposes of the FOIA. MRE 408 provides:

> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, *is not admissible to prove liability for or invalidity of the claim or its amount.* Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution. [Emphasis added.]

Defendants' position rests mainly on a single decision by the United States Court of Appeals for the Sixth Circuit: *Goodyear Tire & Rubber Co v Chiles Power Supply, Inc*, 332 F3d 976 (CA 6, 2003).[1] However, *Goodyear* does not support defendants' position. In *Goodyear*, the Sixth Circuit held that FRE 408, which contained similar language to MRE 408, created a "settlement privilege" that shielded "settlement communications" for *discovery* purposes. *Goodyear*, 332 F3d at 979-982. The Sixth Circuit did not recognize such a privilege as extending to settlement communications that are the subject of an otherwise-valid FOIA request. In fact, *Goodyear* did not involve the FOIA at all. Furthermore, as the Court of Claims recognized, the plain language of MRE 408 does not support defendants' position. The language of the rule provides that settlement communications and offers to compromise are "*not admissible* to prove liability for or invalidity of the claim or its amount." MRE 408 (emphasis added). In other words, MRE 408 relates to *admissibility at trial*; it does not speak to whether such evidence is exempt or nonexempt under the FOIA.

***4** Similarly, MCL 169.215(10) does not support defendants' argument. It states:

> No later than 45 business days after receipt of a rebuttal statement submitted under subsection (5), or if no response or rebuttal is received under subsection (5), the

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secretary of state shall post on the secretary of state's Internet website whether or not there may be reason to believe that a violation of this act has occurred. When the secretary of state determines whether there may be reason to believe that a violation of this act occurred or did not occur or determines to terminate its proceedings, the secretary of state shall, within 30 days of that determination, post on the secretary of state's Internet website any complaint, response, or rebuttal statement received under subsection (5) regarding that violation or alleged violation and any correspondence that is dispositive of that violation or alleged violation between the secretary of state and the complainant or the person against whom the complaint was filed. If the secretary of state determines that there may be reason to believe that a violation of this act occurred, the secretary of state shall endeavor to correct the violation or prevent a further violation by using informal methods such as a conference, conciliation, or persuasion, and may enter into a conciliation agreement with the person involved. Unless violated, a conciliation agreement is a complete bar to any further civil or criminal action with respect to matters covered in the conciliation agreement. The secretary of state shall, within 30 days after a conciliation agreement is signed, post that agreement on the secretary of state's Internet website. If, after 90 business days, the secretary of state is unable to correct or prevent further violation by these informal methods, the secretary of state shall do either of the following:

(a) Refer the matter to the attorney general for the enforcement of any criminal penalty provided by this act.

(b) Commence a hearing as provided in subsection (11) for enforcement of any civil violation.

This provision says nothing about a privilege for settlement negotiations. Defendants argue that such a privilege is "implied." But defendants would have this Court impermissibly read language into the statute that does not exist, and we decline to do so. See *McQueer*, 502 Mich at 286.

B. FRANK COMMUNICATIONS EXEMPTION

Defendants also argue that certain documents were "frank communications" and therefore exempt from disclosure under MCL 15.243(1)(m). We disagree.

A party asserting this exemption must first establish that the document is a "frank communication." *Herald Co, Inc*, 475 Mich at 475 (quotation marks omitted). Our Supreme Court has stated that a frank communication involves three elements: "it (1) is a communication or note of an advisory nature made within a public body or between public bodies, (2) covers other than purely factual material, and (3) is preliminary to a final agency determination of policy or action." *Id.* If any one of these three elements is not met, the document is not a frank communication. *Id.*

***5** A party asserting this exemption must next satisfy a weighted balancing test. Our

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Supreme Court has discussed the framework for this test and how it carries a high burden to avoid disclosure:

> The frank communication exemption ultimately calls for the application of a weighted balancing test where the circuit court must weigh the public interest in disclosure versus the public interest in encouraging frank communication. Under the plain language of the provision, these competing interests are not equally situated, and the Legislature intended the balancing test to favor disclosure. The Legislature's requirement that the public interest in disclosure must be clearly outweighed demonstrates the importance it has attached to disclosing frank communications absent significant, countervailing reasons to withhold the document. Hence, the public record is not exempt under the frank communication exemption *unless* the public body demonstrates that the public interest in encouraging frank communication between officials and employees of public bodies *clearly outweighs* the public interest in disclosure. [*Id.* at 473-474.]

The party asserting this exemption must show why, in that particular instance, the interests favoring the withholding of a document clearly outweigh the interests favoring disclosure; the party may not "speak in platitudes and generalities" but must show how "the unique circumstances of the 'particular instance' affect the public interest in disclosure versus the public interest in encouraging frank communication." *Id.* at 474. However, the Supreme Court has also recognized that "the Legislature decided that the public has an interest in *encouraging* frank communication so that public officials' *ongoing* and *future* willingness to communicate frankly in the course of reaching a final agency determination is an essential component in the balancing test." *Id.* As a result, "when a court interprets the 'particular instance' in the frank communication exemption, it must remember that there is a valid public interest that officials and employees of a public body aspire to communicate candidly when the public body considers an issue that is 'preliminary to a final agency determination of policy or action.' " *Id.* at 474-475.

The Court of Claims generally described the withheld documents as falling into three categories. The first category was "draft conciliation agreements that contain no writings, comments or other information." This category contained documents 0457-0462, 0478-0485, 0494-0502, and 0513-0529.[2] The Court of Claims ruled that these documents were not frank communications because they "contain no indicia of any communications between public bodies or persons within a public body, let alone frank communications," and because "there is nothing on these drafts that show who prepared them or why one was different from another." We agree. These documents are drafts of a conciliation agreement. Some have no comments or edits at all; others reflect "track changes" using Microsoft Word. There is no indication as to the identity of the author(s), and there are no advisory statements contained within them. Such documents are not communications or notes of an advisory nature that cover something other than factual material; they are merely draft agreements. This is in contrast to the second category of documents, i.e., draft agreements that contained comments from

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various agency personnel, which the Court of Claims found to be frank communications not subject to disclosure; these are documents 0486-0493. Defendants would have us construe the exemption in an improperly broad manner so as to exempt most documents simply because they came from within a public body and contained proposed edits. We decline to do so. *Mich Open Carry, Inc*, 330 Mich App at 625.

***6** The third category was comprised of "emails between Secretary of State staff and counsel for Build a Better Michigan regarding draft conciliation agreements." This category contained documents 0463-0466, 0472-0477, 0503-0512, 0530-0533, as well as portions of 0538-0541. The Court of Claims ruled that these documents were not frank communications because, as "communications between the law firm representing Build a Better Michigan and certain department personnel," "they are not communications between or within public bodies, and thus do not fall within the frank communication exemption contained in MCL 15.243(1)(m)." We agree. These documents are e-mails between the Michigan Department of State and the retained counsel for Build a Better Michigan; therefore, they are not between or within public bodies, but rather are the communications of a public body with the retained counsel of a non-state entity.

The Court of Claims characterized certain miscellaneous documents as falling outside these three categories; these included documents 0469-0471, 0535-0537, and 0543. The Court of Claims ruled that these documents were not frank communications because they were merely "checklists or meeting topics, i.e., factual matters, and do not appear to contain 'frank communications' between members of a public body." We agree, and, to the extent that any of those documents do contain more than factual information, we agree with the Court of Claims that defendants have failed to show how the balancing test clearly weighs in favor of nondisclosure. Although defendants make generalized claims about the need *in general* to have internal communications kept private, they fail to show how in *this particular instance* disclosure would have a chilling effect on internal communications. See *Herald Co, Inc*, 475 Mich at 474.

The Court of Claims also considered various redactions made to documents that were disclosed by defendants, as described in redaction logs. It concluded that while certain of those redactions were proper, others were not proper, thus requiring that those documents be produced in unredacted form. The court ruled that documents 009-014, 0271, 0280, 0282, 0293, 0295-0298, 0335, 0345, and 0347-0348 were not frank communications because they were merely "communications with an outside law firm for a non-state entity ...." We agree. These documents appear to be more communications between defendants and Build a Better Michigan and, therefore, are not between or within a public body or bodies. The Court of Claims further ruled that documents 0114, 0134, 0143, 0149, and 0155 "were simply draft documents presented without commentary or strategy," and that documents 0223, 0247, and 0261-0262 "contained only factual material, and not the type of communications that can be withheld under the exemption." Again, we agree. Documents 0114, 0134, 0143, 0149, and

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0155 appear to involve multiple drafts of the same document, and there is no commentary, indicia of an author, or anything of an advisory nature. Documents 0223, 0247, and 0261-0262 contain purely factual matters, and they are not frank communications. Furthermore, for those same reasons previously discussed, defendants failed to show how in this particular instance disclosure would have a chilling effect on internal communications. See *Herald Co, Inc*, 475 Mich at 474.

Affirmed.

All Citations

Not Reported in N.W. Rptr., 2022 WL 2902080

Footnotes

1 Federal courts of appeals decisions are not binding but may be considered persuasive authority. *Abela v Gen Motors Corp*, 469 Mich 603, 607; 677 NW2d 325 (2004).

2 Defendants assigned a "Bates-Number" to each document. The Court of Claims used these numbers to refer to the withheld documents, and we will do the same.

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