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

Derk A. Wilcox (P66177)
MACKINAC CENTER LEGAL FOUNDATION
140 West Main Street
Midland, MI 48640
(989) 631-0900
wilcox@mackinac.org
Attorney for Plaintiff-Appellee/Cross Appellant

Elizabeth M. Watza (P81129)
MSU OFFICE OF GENERAL COUNSEL
426 Auditorium Road, Room 494
East Lansing, MI 48823
(517) 884-9483
watzaeli@msu.edu
Attorney for Defendant-Appellant/Cross Appellee

PLAINTIFF-APPELLEE/CROSS-APPELLANT'S CROSS APPEAL BRIEF

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JURISDICTION

This court has appellate jurisdiction under MCR 7.203(A)(1) to review the Order granting Defendant-Appellant/Cross-Appellee's request for partial summary disposition and dismissing the matter, entered on October 13, 2022, in the Court of Claims Case No. 21-000011-MZ. This Order was explicitly not a final order and did not close the case. After the October 13 Order, the lower court invited additional briefing. The lower court issued a final order on December 1, 2022.

Cross-Appellant timely filed its Claim of Appeal on January 9, 2023.

QUESTION INVOLVED

1) When a public body claims a "frank communications" exemption to the Freedom of Information Act and refuses to provide the requested materials, does the public body need to produce more than platitudes and generalizations to carry its burden of showing that something should be exempt from FOIA disclosure.

Plaintiff/Cross Appellant says:	Yes.
Defendant/Cross Appellee says:	No.
The Court of Claims said:	No.

INTRODUCTION

Mackinac Center is a nonprofit organization dedicated to improving the quality of life for all Michigan residents by promoting sound solutions to state and local policy questions. To that end, the Mackinac Center routinely uses the Freedom of Information Act ("FOIA") to obtain relevant documents from state and local government bodies.

This matter involves a public controversy at Michigan State University ("MSU"). Non-party Dr. Stephen Hsu is a professor at MSU and has previously served as a Senior Vice President of Research. His current MSU biography states the following:

> Before joining MSU in 2012, Stephen Hsu was director of the Institute for Theoretical Science and professor of physics at the University of Oregon. He also serves as scientific adviser to BGI (formerly the Beijing Genomics Institute) and as a member of its Cognitive Genomics Lab.
>
> Hsu's primary work has been in applications of quantum field theory, particularly in relation to problems in quantum chromodynamics, dark energy, black holes, entropy bounds, and particle physics beyond the standard model. He has also done work in genomics and bioinformatics, the theory of modern finance, and in encryption and information security.[1]

Dr. Hsu became the center of controversy over statements he had made on his personal blog, and was pressured to leave his leadership position as Senior Vice President for Research and Innovation at MSU, although he remains a tenured member of the faculty. The Wall Street Journal aptly summarized the controversy as follows:

> The trouble began June 10, when MSU's Graduate Employees Union composed a lengthy Twitter thread denouncing Mr. Hsu as, among other things, "a vocal scientific racist and eugenicist." The union claimed Mr. Hsu believes "in innate biological differences between human populations, especially regarding intelligence."
>
> Mr. Hsu says these accusations "were made in bad faith." Take that 2018 blog post, which responded to New York Times articles that, in his words, linked "genetic science to racism and white supremacy." In it, he wrote: "All good people abhor

[1] https://directory.natsci.msu.edu/directory/Profiles/Person/102190 last accessed March 21, 2023.

> racism. I believe that each person should be treated as an individual, independent of ancestry or ethnic background. . . . However, this ethical position is not predicated on the absence of average differences between groups. I believe that basic human rights and human dignity derive from our shared humanity, not from uniformity in ability or genetic makeup." Mr. Hsu doesn't work in this field but rejects the idea that scientists should categorically exclude the possibility of average genetic differences among groups.
>
> ***
>
> Mr. Hsu says he felt compelled to step down because he served at the pleasure of the president. But he thinks Mr. Stanley handled the matter badly. "The first action of the university should be to investigate, find the truth, and defend the person if the claims are false." Mr. Hsu says MSU undertook no such investigation.[2]

FACTUAL BACKGROUND AND PROCEEDINGS

On June 26, 2020, the Mackinac Center made a routine FOIA request to MSU, seeking certain e-mail correspondence relating to Dr. Stephen Hsu. (Appendix p 21.) MSU responded on July 7, 2020, with a fee estimate of $233.38. (Appendix p 23.) The Mackinac Center paid the required 50% deposit of $115.00, which MSU received on July 20, 2020. In its July 7th response, MSU estimated it would take six weeks to process the Mackinac Center's request, despite estimating only six hours of labor would be necessary. (Appendix p 22.)

On August 31, 2020, MSU informed the Mackinac Center that the records it had requested had been located and gathered, but that the volume of the records were greater than anticipated. MSU then revised its cost estimate to reflect an additional 11 hours of labor and additional costs of $250.00. MSU also extended the date it anticipated being able to respond to the Mackinac Centers request by an additional eight weeks. (Appendix p 24-25.)

On November 4, MSU again wrote to the Mackinac Center, partially granting and partially denying its request. MSU once again unilaterally extended its deadline to respond until December

[2] https://www.wsj.com/articles/a-twitter-mob-takes-down-an-administrator-at-michigan-state-11593106102
Last accessed November 9, 2021.

4, 2020. (Appendix p 26.) On December 4, MSU again issued a final extension expiring December 23, 2020.

Despite all deposits requested by MSU having been paid by Mackinac Center, MSU took almost six months for records that, by MSU's admission, should have taken no longer than seventeen hours to produce. In addition, those records that were released were excessively redacted beyond the scope of what is permitted by the FOIA.

Mackinac Center filed its lawsuit on or about January 5, 2021 in the Court of Claims.

The parties each filed motions and briefs for summary disposition on November 12, 2021. On December 20, 2021, the lower court ordered that the documents must be provided to the court for in camera review. After reviewing the documents, the lower court issued an opinion and order on October 13, 2022 – but this was not a final opinion and order. (Appendix p 4-20.) The October 13 Order invited the parties to submit briefs if clarification on that Order was needed. On November 3, 2022, MSU moved for reconsideration. The lower court allowed Plaintiff to respond. A hearing was held with oral argument on November 22, 2022. On December 1, 2022, the lower court entered its final order disposing of the claims and closing the case. (Appendix p 1-3.)

The lower court upheld many of MSU's claimed exemptions based on these communications' status as "frank communications." (Appendix, p 13-18.) In its briefing, MSU merely asserted that "as can be seen by the description of the redacted information provided by [affiant] Nelson, it is of the nature that it would likely be chilled if it were subject to public disclosure. … If the frank advisory communications of MSU officials and employees cannot be protected from disclosure in these circumstances, they will, as the Supreme Court recognized, dry up. This would significantly hamper MSU's ability to function." (MSU's November 12, 2021 Brief p 8-9.) There was no specific explanation as to why this would be true. MSU's brief included

an affidavit by Rebecca Nelson, MSU's Director and Freedom of Information Act officer, but this affidavit provided no factual statements providing specific harm. (*Id*., Exhibit A.) In order to prevail, MSU should have been required to demonstrate why the public interest in non-disclosure clearly outweighed the public interest in disclosure. MSU failed to provide evidence that would allow the lower court to reach this conclusion.

Despite the dearth of evidence, the lower court nevertheless found that for many of the claimed exemptions should be granted, stating, "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." (Oct 13 Order, Appendix p 13-18.) The lower court provided no rationale regarding how the balance of interests was weighed beyond these and similar conclusory statements.

On November 3, 2022, MSU sought rehearing, claiming that two additional pages that the lower court had initially ruled should be disclosed should instead be exempt. MSU, again, did not describe any specific threat or harm that MSU would suffer, nor how weighing the balancing of the interests favored nondisclosure:

> "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.
>
> MSU's November 3, 2022 Brief for Rehearing at page 6.

On rehearing, the lower court exempted these two additional pages as protected frank communications. "The Court GRANTS defendant's motion regarding the redactions on pages 575 and 166, finding that these redactions qualify as protected communications." (December 1, 2022

Order, Appendix p 2). The lower court once again provided no rationale, nor how the balance of interests was weighed.

The frank-communication exempted documents were in the possession of MSU and reviewed *in camera* by the lower court. Plaintiff/Cross Appellant has never reviewed the unredacted contents of these emails.

ARGUMENT

1. Standard of review.

A lower court's decision to grant the frank communications exemption after weighing the competing interests is reviewed for abuse of discretion. "[W]here the parties do not dispute the underlying facts but rather challenge the trial court's exercise of discretion, we hold that an appellate court must review that determination for an abuse of discretion, which this Court now defines as a determination that is outside the principled range of outcomes." *Herald Co, Inc v Eastern Michigan Univ Bd of Regents*, 475 Mich 463, 467; 719 NW2d 19 (2006). "An abuse of discretion occurs when an unprejudiced person considering the facts upon which the decision was made would say that there was no justification or excuse for the decision." *City of Novi v Robert Adell Children's Funded Trust*, 473 Mich 242, 254; 701 NW2d 144 (2005). "An appellate court cannot review a decision for abuse of discretion unless it knows how and why the discretionary decision was made." *Houston v Southwest Detroit Hosp*, 166 Mich App 623, 631; 420 NW2d 835 (1987).

Our courts have found that an abuse of discretion occurs when a court issues a ruling without finding facts on the matter or offering reasons for its use of discretion that would support such a decision. As an example, courts have overturned the issuance of an injunction where the lower court failed to address all of the necessary factors in deciding whether an injunction should

be issued. *Johnson v Michigan Minority Purchasing Council*, __ NW2d __, COA No. 357979, 2022 WL 627021 (2022), fn 4. Similarly, our courts have found abuses of discretion where divorce settlements were made without sufficient findings of fact. *Ripley v Ripley*, 112 Mich App 219; 315 NW2d 576 (1982).

This Court reviews a lower court's decision on a motion for summary disposition de novo. *Dextrom v Wexford Co*, 287 Mich App 406, 416; 789 NW2d 211 (2010).

2. The lower court abused its discretion by applying the frank communications exemption without sufficient evidence.

Michigan's FOIA law is a broadly pro-disclosure act. Michigan's FOIA statute, MCL 15.231(2) states:

> It is the public policy of this state that all persons, except those persons incarcerated in state or local correctional facilities, are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees, consistent with this act. The people shall be informed so that they may fully participate in the democratic process.

Exemptions are to be narrowly construed:

> Therefore, all public records are subject to full disclosure under the act unless the material is specifically exempt under § 13. Also, when a public body refuses to disclose a requested document under the act, and the requester sues to compel disclosure, the public agency bears the burden of proving that the refusal was justified under the act. In construing the provisions of the act, we keep in mind that the FOIA is intended primarily as a prodisclosure statute and the exemptions to disclosure are to be narrowly construed.

Swickard v Wayne County Medical Examiner, 438 Mich 536, 544; 475 NW2d 304 (1991) (internal citations and footnotes removed).

Although all government documents are presumptively available to the public, the statute does provide for a number of possible exemptions. Some of these exemptions can only be claimed if a public body can show that the public interest is better served by withholding the documents or portions of records. One such possible exemption is what is often called the "frank

communications" exemption. MCL 15.243(1)(m). MSU claimed, and the lower court agreed, that this exemption applied here. FOIA states:

> Sec. 13.
> (1) A public body may exempt from disclosure as a public record under this act any of the following:
>
> ….
>
> (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.

MCL 15.243(1)(m).

A public body has the burden of showing that the public interest is better served by keeping matters confidential, rather than disclosing it. This is a high hurdle for MSU to overcome. Our Supreme Court has said:

> ***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.

Herald Co v Eastern Michigan Univ Bd of Regents, 475 Mich 463, 473-474; 719 NW2d 19 (2006) (emphasis added).

To claim the exemption, the public body must, as a preliminary matter, show three things: First, that the document at issue covers more than purely factual matters. Second, that it involves something that is preliminary to a final agency determination. Third, they must show that it is advisory in nature:

> Therefore, a document is a "frank communication" if the trial court finds that 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. If, in the trial court's judgment, the document fails any one of these threshold qualifications, then the frank communication exemption simply does not apply.

Herald Co, 475 Mich at 475.

The lower court found that these three criteria applied here. However, even if the public body can meet these three criteria, this does not mean that the material can be exempted. It must still be disclosed unless the public's interest in keeping it secret clearly outweighs the public's interest in knowing how its public bodies operate. Additionally, as noted in a dissenting opinion in *Herald Co*, this exemption is the only one where the public's interest in keeping the materials secret must "clearly outweigh" (emphasis added) the public's interest in complete and open information about the government's workings: "Notably, the 'frank communication' exemption is the only FOIA provision that uses the term 'clearly outweighs.' Other provisions merely use the term 'outweighs' when providing for a balancing test." *Herald Co*, 475 Mich at 493 (Justice Cavanaugh dissenting.)

The public body must offer more than platitudes and generalizations to carry its burden of showing that frank communications should be exempt from FOIA disclosure. It must show, in each specific instance, why the public's interest in nondisclosure clearly outweighs the interest in open government. See, for example, *Nicita v City of Detroit*, 216 Mich App 746; 550 NW2d 269 (1996):

> Defendant also produced Nancy Trecha, … as a witness in support of its argument. Trecha testified that the documents were frank communications or evaluations made before a determination was made concerning the development project. However, Trecha's testimony did not illustrate why the public interest in encouraging frank communications between public employees clearly outweighed the public interest in their disclosure. Her testimony was only in general terms, indicating that disclosure of such communications would discourage employees

> from writing down their thoughts. Defendant did not make an offer of proof with regard to each specific document.

Nicita, 216 Mich App at 755.

More recently, this court, in an unpublished opinion, has again found the use of this exemption without specific support to be improper. "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." *Michigan Rising v Secretary of State*, unpublished per curiam opinion, Case No. 359355 (2022 WL 2902080) (July 21, 2022). (A copy of this opinion is attached in the Appendix p 27-34.)

Here, MSU did not present any testimony or affidavit citing reasons, and the lower court did not cite any reasons, as to how the public interest in disclosure was overcome. It was merely stated that it had been. Nor was there a weighing of the factors. This is not enough. General terms and non-specific allegations are not enough. It was clearly erroneous to find that it was sufficient.

RELIEF REQUESTED

Plaintiff/Cross Appellant requests that this Court reverse the lower court and order that the documents identified by the lower court as exempt under the frank communications exemption be disclosed.

In the alternative, Plaintiff/Cross Appellant requests that this matter be remanded to the lower court to either order disclosure or require MSU to provide proof demonstrating the specific threat and harms that would be posed to MSU for each redaction, and the specific reasoning for why exempting each instance of withheld information clearly outweighs the public's interest in having that information disclosed.

Dated: March 30, 2023

By: /s/ Derk Wilcox
MACKINAC CENTER LEGAL FOUNDATION
140 West Main Street
Midland, MI 48640
(989) 631-0900
wilcox@mackinac.org
Attorney for Plaintiff-Appellee/Cross Appellant

WORD COUNT STATEMENT

This document complies with the type-volume limitation of Michigan Court Rule 7.212(B)(1)(3) because, excluding the part of the document exempted, this merits brief contains no more than 16,000 words. This document contains 3,342 words.

Dated: March 30, 2023

By: /s/ Derk Wilcox
MACKINAC CENTER LEGAL FOUNDATION
140 West Main Street
Midland, MI 48640
(989) 631-0900
wilcox@mackinac.org
Attorney for Plaintiff-Appellee/Cross Appellant