

**STATE OF MICHIGAN**  
**IN THE COURT OF APPEALS**

THE MACKINAC CENTER FOR PUBLIC POLICY,

Plaintiff-Appellee-Cross-Appellant,

v.

MICHIGAN STATE UNIVERSITY,

Defendant-Appellant-Cross-Appellee.

Court of Appeals No. 364244

Lower Court Case No: 21-000011

---

Derk A. Wilcox (P66177)  
Mackinac Center for Public Policy  
Attorney for Plaintiff-Appellee-Cross-  
Appellant  
140 West Main Street  
Midland, MI 28640  
(989) 631-0900

Elizabeth M. Watza (P81129)  
MSU Office of General Counsel  
Attorney for Defendant-Appellant-Cross-  
Appellee  
426 Auditorium Road, Room 494  
East Lansing, MI 48823  
(517) 884-9483  
watzaeli@msu.edu

---

**BRIEF OF DEFENDANT-APPELLANT**

**ORAL ARGUMENT REQUESTED**

RECEIVED by MCOA 5/2/2023 4:53:08 PM

**TABLE OF CONTENTS**

INDEX OF AUTHORITIES ..... iii

STATEMENT OF JURISDICTION ..... 1

STATEMENT OF QUESTIONS PRESENTED ..... 2

STATUTES INVOLVED ..... 3

INTRODUCTION ..... 4

STATEMENT OF RELEVANT FACTS AND PROCEEDINGS ..... 5

STANDARD OF REVIEW ..... 8

ARGUMENT ..... 8

    I.    The Court of Claims erred in holding MSU misapplied redactions  
          pursuant to MCL 15.243(2) and ordering production ..... 8

CONCLUSION AND RELIEF REQUESTED ..... 13

## INDEX OF AUTHORITIES

### Michigan Cases

<i>Coblentz v City of Novi</i> , 475 Mich 558 (2006) .....	8
<i>Connoisseur Communication of Flint v University of Michigan</i> , 230 Mich App 732 (1998) ...	9-12
<i>Doe v Unnamed School District</i> , unpublished per curiam opinion of the Court of Appeals, issued [March 21, 2019] (Docket No. 340234) .....	10-11
<i>Kalamazoo Transportation Association v Kalamazoo Public Schools</i> , unpublished per curiam opinion of the Court of Appeals, issued [December 17, 2019] (Docket No. 349031) .....	11
<i>Maiden v Rozwood</i> , 461 Mich 109 (1999).....	8

### Federal/Other Cases

<i>Ellis v Cleveland Muni Sch Dist</i> , 309 F Supp 2d 1019 (ND Ohio, 2004) .....	7, 12
<i>Owasso Indep Sch Dist No I-011 v Falvo</i> , 534 US 426; 122 S Ct 934; 151 L Ed 2d 896 (2002) .....	6, 12
<i>Rhea v Dist Bd of Trustees of Santa Fe Coll</i> , 109 So 3d 851 (Fla Dist Ct App 2013) .....	12

### Statutes

20 USC 1232g.....	8-10, 12
34 CFR 99.31 .....	7
MCL 15.232.....	9
MCL 15.242.....	6
MCL 15.243.....	5-6, 8-10, 12-13
MCL 600.309 .....	1

### Rules

MCR 2.116(C)(10).....	1, 5, 8
MCR 2.711(C)(9)(a) .....	5, 9
MCR 7.202.....	1
MCR 7.203.....	1
MCR 7.212.....	5, 9, 10

## STATEMENT OF JURISDICTION

The Court of Appeals has jurisdiction under MCR 7.203(A)(1), MCR 7.202(6)(a)(i), and MCL 600.309. In an opinion and order dated October 13, 2022, the Court of Claims granted in part and denied in part Defendant-Appellant's (MSU) motion for summary disposition and Plaintiff-Appellee's (Plaintiff) cross-motion for summary disposition, both pursuant to MCR 2.116(C)(10). On November 3, 2021, MSU filed a motion for reconsideration and clarification. Plaintiff responded to the same on November 14, 2022. A hearing was held on November 22, 2022. MSU filed a supplemental brief on November 28, 2022. In an opinion and order dated December 1, 2022, the Court of Claims granted in part and denied in part MSU's motion for reconsideration and clarification. MSU timely filed its claim of appeal on December 20, 2022.

**STATEMENT OF QUESTIONS PRESENTED**

- I. MCL 15.243(2) states, in pertinent part, that “[a] public body shall exempt from disclosure information that, if released, would prevent the public body from complying with” the Family Educational Rights and Privacy Act (FERPA). MSU properly redacted education records protected by the FERPA pursuant to MCL 15.243(2), as it must have, prior to production. Did the Court of Claims err in holding MSU misapplied redactions pursuant to MCL 15.243(2) and ordering production?

Appellant’s answer: Yes.

Appellees’ answer: No.

Trial court’s answer: No.

## STATUTES INVOLVED

MCL 15.243(2) states:

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.

The Family Educational Rights and Privacy Act of 1974 20 U.S.C. § 1232g states, in pertinent part:

- (b)(1) No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information, as defined in paragraph (5) of subsection (a)) of students without the written consent of their parents to any individual, agency, or organization, other than to the following—
- (d) For the purposes of this section, whenever a student has attained eighteen years of age, or is attending an institution of postsecondary education, the permission or consent required of and the rights accorded to the parents of the student shall thereafter only be required of and accorded to the student.
- (a)(4)(A) For the purposes of this section, the term “education records” means, except as may be provided otherwise in subparagraph (B), those records, files, documents, and other materials which—
  - (i) contain information directly related to a student; and
  - (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.

## INTRODUCTION

This case involves an issue of vital importance: the protection of student privacy. Plaintiff submitted a FOIA request, which sought, in pertinent part, information protected by the FERPA (personally identifying student information, including names, email addresses, other information that can be used to identify a student, and student educational information contained in education records), and thereby MCL 15.243(2). MSU properly redacted the education records pursuant to MCL 15.243(2), as it was required to. The Court of Claims erred in holding MSU misapplied redactions pursuant to MCL 15.243(2) and ordering production. Thus, MSU respectfully requests this Court to reverse the Court of Claims in this limited appeal.

## STATEMENT OF RELEVANT FACTS AND PROCEEDINGS

Plaintiff submitted a FOIA request, which sought, in pertinent part, information protected by the FERPA (personally identifying student information, including names, email addresses, other information that can be used to identify a student, and student educational information contained in education records), and thereby MCL 15.243(2). (App p 176.) Specifically, the request sought “[a]ny emails to or from the president of Michigan State University that mention “HSU” from Feb. 1, 2020 to June 26, 2020.” (*Id.*) MSU properly redacted the education records pursuant to MCL 15.243(2), as required.<sup>1</sup> (App pp 198-199; Defendant’s Bill of Particulars,<sup>2</sup> pp 1-2, 4-12.)

On November 12, 2021, MSU filed a motion for summary disposition and Plaintiff filed a cross-motion for summary disposition, both pursuant to MCR 2.116(C)(10). (App pp 131-202, 56-130.) The Court of Claims ordered documents be produced for *in camera* review. (App pp 257-258.) Specifically, the Court of Claims requested the unredacted and redacted records at issue, as well as a bill of particulars explaining the exemptions. (*Id.*) After review, in an opinion and order dated October 13, 2022, the Court of Claims granted in part and denied in part the parties’

---

<sup>1</sup> See Pages 12, 53-54, 201, 204, 205-208, 210, 211, 212, 248, 254, 256-258, 260-263, 265, 266, 267, 268-271, 273-274, 275, 276, 277, 279-281, 283, 284, 285, 288, 289, 293, 296, 297, 303, 304, 306, 307, 310, 313, 324, 380, 381, 382, 383, 434, 435, 461, 492, 497, 498, 538, and 558 of the records produced to the Court of Claims for *in camera* review. These documents are part of the lower court record and relevant and necessary to this appeal. See MCR 7.212(J)(3)(e). Thus, they are explicitly included in MSU’s appendix. It is MSU’s understanding that these records are available to the Court of Appeals; however, if that is not the case, MSU will submit them under seal. See MCR 2.711(C)(9)(a).

<sup>2</sup> This document is part of the lower court record and relevant and necessary to this appeal. See MCR 7.212(J)(3)(e). Thus, it is explicitly included in MSU’s appendix. It is MSU’s understanding that this document is available to the Court of Appeals; however, if that is not the case, MSU will submit it under seal. See MCR 2.711(C)(9)(a).



motions for summary disposition pursuant to MCR 2.116(C)(10). (App pp 259-275.) Pertinent to this appeal, the Court of Claims held that:

[o]ther ‘personal privacy’ redactions include the names of students who were involved in a student-led effort petition drive seeking to remove Hsu from his administrative position. A counter-petition also circulated among MSU students. MSU redacted from the emails the names of the students involved in these efforts, relying in part on MCL 15.242(2). [App p 267.]

\*\*\*

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. [App p 268.]

On November 3, 2021, MSU filed a motion for reconsideration and clarification. (App pp 285-292.) Specific to this appeal, MSU sought reconsideration of the Court of Claim’s decision regarding MSU’s redactions pursuant to MCL 15.243(2). (App pp 279-282.) Plaintiff responded to the same on November 14, 2022. (App pp 285-292.) A hearing was held on November 22, 2022. (App pp 293-316.) MSU filed a supplemental brief on November 28, 2022. (App pp 317-318.)

In an opinion and order dated December 1, 2022, the Court of Claims granted in part and denied in part MSU’s motion for reconsideration and clarification. (App pp 319-321.) Relevant to this appeal, the Court of Claims held, in pertinent part, that:

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.

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. [App pp 320-321.]

MSU timely filed its claim of appeal on December 20, 2022.

## STANDARD OF REVIEW

The Circuit Court's ruling on Defendants' motion for summary disposition is reviewed de novo. *Maiden v Rozwood*, 461 Mich 109, 228 (1999).

A motion for summary disposition pursuant to MCR 2.116(C)(10) "tests the factual sufficiency of the complaint." *Id.* at 120. "In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion." *Id.* Although the moving party has the initial burden of supporting its motions with affidavits or other documentary evidence, the burden shifts to the opposing party, who must prove through substantively admissible evidence that a genuine issue of disputed material fact exists. *Coblentz v City of Novi*, 475 Mich 558, 569 (2006); *Maiden*, 461 Mich at 121; see also MCR 2.116(G)(4). "Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law." *Maiden*, 461 Mich at 120. (citations omitted).

## ARGUMENT

### **I. The Court of Claims erred in holding MSU misapplied redactions pursuant to MCL 15.243(2) and ordering production.**

MCL 15.243(2) states, in pertinent part, "[a] public body<sup>3</sup> shall exempt from disclosure information that, if released, would prevent the public body from complying with 20 USC 1232g, commonly referred to as the family educational rights and privacy act of 1974." MCL 15.243(2) (emphasis added). MCL 15.243(2). MSU, a public university, is undoubtedly a public

---

<sup>3</sup> The remainder of MCL 15.243(2) provides additional rules for public bodies that are "local or intermediate school district[s]" or "public school academ[ies]," but does not limit the definition of a public body. As MSU is not a "local or intermediate school district" or "public school academy," these additional rules do not apply to it, and are not relevant here. MCL 15.243(2)

body (see MCL 15.232(h)); thus, MCL 15.243(2) applies to MSU, and MSU is prohibited from disclosing information in violation of the FERPA. The FERPA provides that an educational institution cannot disclose education records or personally identifiable information in a record (with the exception of directory information, which is not applicable, and inapplicable FERPA exceptions) to third parties without the written consent of the postsecondary student. See 20 U.S.C. § 1232g(d); See also *Connoisseur Communication of Flint v University of Michigan*, 230 Mich App 732, 735 (1998). Education records, absent inapplicable exceptions, are “those records, files, documents, and other materials” that “*contain*<sup>4</sup> information directly related to a student” and “are maintained by an educational agency or institution. . . .” 20 USC § 1232g(a)(4)(A) (emphasis added). Plaintiff’s FOIA request sought, in pertinent part, information protected by the FERPA (personally identifying student information, including names, email addresses, other information that can be used to identify a student, and student educational information contained in education records). MSU properly redacted the education records prior to production pursuant to MCL 15.243(2), as was required.<sup>5</sup> (App pp 198-199; Defendant’s Bill of Particulars,<sup>6</sup> pp 1-2, 4-12.)

---

<sup>4</sup> Of note, the FERPA only requires that the documents *contain* information directly related to a student, not that the entire record be directly related to the student.

<sup>5</sup> See Pages 12, 53-54, 201, 204, 205-208, 210, 211, 212, 248, 254, 256-258, 260-263, 265, 266, 267, 268-271, 273-274, 275, 276, 277, 279-281, 283, 284, 285, 288, 289, 293, 296, 297, 303, 304, 306, 307, 310, 313, 324, 380, 381, 382, 383, 434, 435, 461, 492, 497, 498, 538, and 558 of the records produced to the Court of Claims for *in camera* review. These documents are part of the lower court record and relevant and necessary to this appeal. See MCR 7.212(J)(3)(e). Thus, they are explicitly included in MSU’s appendix. It is MSU’s understanding that these records are available to the Court of Appeals; however, if that is not the case, MSU will submit them under seal. See MCR 2.711(C)(9)(a).

<sup>6</sup> This document is part of the lower court record and relevant and necessary to this appeal. See MCR 7.212(J)(3)(e). Thus, it is explicitly included in MSU’s appendix. It is MSU’s understanding that this document is available to the Court of Appeals; however, if that is not the case, MSU will submit it under seal. See MCR 2.711(C)(9)(a).

The records MSU redacted under MCL 15.243(2) are education records because they contain information “directly related” to MSU students and are “maintained” by MSU (as evidenced by the fact that they were in MSU’s possession (MSU email server) and produced under the FOIA), an educational institution. And the students at issue have not provided written consent for the release of the records (and other FERPA exceptions are not applicable).

In *Connoisseur Communication of Flint*, which dealt with a previous, permissive version of the FOIA FERPA exemption,<sup>7</sup> the document at issue was a car information sheet completed by a student athlete and maintained in the university’s files. 230 Mich App at 733. The Court held that the information sheet was a student record because it was “directly related to a university student and [was] maintained by the university in its files.” *Id.* at 736. Notably, the Court did not require that the information sheet be kept in a separate file directly related to the student for it to be deemed an education record. And, importantly, the Court held that “the provision within the FERPA allowing for disclosure of education records pursuant to a judicial order is not applicable under the circumstances presented by this case. 20 U.S.C. § 1232g(b)(2)(B).” *Id.*

In *Doe v Unnamed School District*, the documents at issue were letters to the plaintiffs (the involved student’s ‘legal decision makers’) regarding the parameters of the plaintiffs’ school access, which mentioned the student’s first name. *Doe v Unnamed School District*, unpublished per curiam opinion of the Court of Appeals, issued [March 21, 2019] (Docket No. 340234), p 1,

---

<sup>7</sup> The FOIA was amended in 2000. P.A.2000, No. 88, deleted subsection (1)(e). P.A.2000, No. 88, also redesignated former subsections, including (1)(e). Subsection (2) was inserted. P.A.2000, No. 88. “*Connoisseur Communication of Flint*, 230 Mich. App at 733-734, involved a former, permissive FOIA exemption for records governed by FERPA. See MCL 15.243(1)(e), as amended by 1996 PA 553.” *Doe v Unnamed School District*, unpublished per curiam opinion of the Court of Appeals, issued [March 21, 2019] (Docket No. 340234), p 3 n 4.

4. (App pp 122-130.) The *Doe* Court held that the letters were not education records because the plaintiffs were “. . . the subject of the documents, which relate[d] to the [s]tudent only in an indirect or incidental manner.” *Id.* at 4.

In *Kalamazoo Transportation Association v Kalamazoo Public Schools*, the plaintiffs, via a FOIA request, sought forms detailing student misconduct on school buses that were sent to school administrators for disciplinary purposes. *Kalamazoo Transportation Association v Kalamazoo Public Schools*, unpublished per curiam opinion of the Court of Appeals, issued [December 17, 2019] (Docket No. 349031), p 1. (App pp 116-120). The Court held that the forms “qualified as education records under FERPA” because they “relate[d] to student discipline” and “[b]ecause the subject of the forms . . . [was] an individual student, there [could] be no question that the forms directly relate[d] to individual students.”<sup>8</sup> *Id.* at 3. The Court further held that the school district was required to separate the exempt information (personally identifiable information) from the nonexempt and produce the records. *Id.* (Citation omitted).

In the case at bar, in line with the Court’s opinions in *Connoisseur Communication of Flint, Doe, and Kalamazoo Transportation Association*, MSU appropriately redacted the personally identifying student information contained in the education records (records that contained information directly related to a student (or students) and were maintained by MSU (email server)) at issue prior to production. The records are education records because they contain information directly related to a student/multiple students (their involvement in and opinions regarding efforts for or against the resignation of an MSU administrator) and were maintained by MSU (email server). The FERPA only requires that education records *contain*

---

<sup>8</sup> The *Kalamazoo Transportation Association* Court noted that education records are not limited to records pertaining to student education. *Kalamazoo Transportation Association*, unpub op at 4 n 2.

information directly related to a student; the FERPA does not require the entire record be directly related to a student. Nor does it dictate that an education record can only contain information directly related to one person.<sup>9</sup> And there is no authority requiring records be kept in a separate file directly related to a student in order for the record to be considered “maintained” by the educational institution. In the digital age, it is archaic<sup>10</sup> to define education records as only those records kept in a folder labeled with a student’s name in a dusty filing cabinet or a single computer file kept on an individual student. That narrow view would greatly undermine the protections afforded to students by the FERPA.

---

<sup>9</sup>The non-binding case the Court of Claims relied on in support of its finding that the records at issue were not education records because they were not directly related to the students, but rather directly related to Hsu, *Ellis v Cleveland Muni Sch Dist*, is not persuasive because it did not involve records containing information of student involvement in and opinions regarding efforts for or against the resignation of a university administrator, nor did it deal with a FOIA request, but rather discovery pursuant to the Federal Rules of Civil Procedure. 309 F Supp 2d 1019, 1021-1023 (ND Ohio, 2004). Further, the reasoning applied in *Ellis* has been rejected by other courts. See *Rhea v Dist Bd of Trustees of Santa Fe Coll*, 109 So 3d 851, 858 (Fla Dist Ct App 2013) (“We reject any suggestion advanced by [plaintiff] that a record cannot relate directly both to a student and to a teacher. If a record contains information directly related to a student, then it is irrelevant under the plain language in FERPA that the record may also contain information directly related to a teacher or another person.”) And, importantly, the *Connoisseur Communication of Flint* Court held that “the provision within the FERPA allowing for disclosure of education records pursuant to a judicial order is not applicable under the circumstances presented by this case. 20 U.S.C. § 1232g(b)(2)(B).” 230 Mich App at 736. The same is true here.

<sup>10</sup> The case the Court of Claims cited in support of its position that the records at issue are not education records because they were not maintained by MSU, *Owasso Indep Sch Dist No I-011 v Falvo*, 534 US 426, 432, 433 (2002), is non-binding and not persuasive, as it is over twenty years old, and is factually dissimilar (holding that student-graded assignments in pre-secondary schools are not education records because they are not maintained by the school). Further, the case did not hold that records have to be kept in a separate file directly related to a student for them to be deemed education records. *Id.* at 433, 434.


MSU was required to redact the personally identifying student information from the education records at issue prior to production pursuant to MCL 15.243(2). MSU properly did so. Thus, the Court of Claims erred in holding that MSU misapplied redactions pursuant to MCL 15.243(2) and ordering production.

**CONCLUSION AND RELIEF REQUESTED**

For the reasons set forth above, MSU respectfully requests this Court to reverse the Court of Claims in this limited appeal.

Respectfully submitted,

Date: May 2, 2023



---

Elizabeth M. Watza  
Attorney for Defendant-Appellant

**CERTIFICATE OF COMPLIANCE**

This brief is in conformance with the requirements of MCR 7.212(B) and contains 3,014 words.