STATE OF MICHIGAN
COURT OF APPEALS

CAROL BETH LITKOUHI,

Plaintiff,

Court of Appeals Case No. 364409

v.

ROCHESTER COMMUNITY SCHOOL DISTRICT, a government entity,

Lower Court Case No. 2022-193088-CZ
Hon. Jacob J. Cunningham

Defendant.

MACKINAC CENTER LEGAL FOUNDATION
Derk A. Wilcox (P66177)
Stephen A. Delie (P80209)
Patrick J. Wright (P54052)
Attorneys for Plaintiff
140 West Main Street
Midland, MI 48640
(989) 631-0900
wilcox@mackinac.org

JACKSON LEWIS P.C.
Timothy J. Ryan (P40990)
Attorneys for Defendant
250 Monroe NW, Suite 400
Grand Rapids, MI 49503
(616) 940-0230
timothy.ryan@jacksonlewis.com

APPELLEE'S BRIEF

ORAL ARGUMENT REQUESTED

RECEIVED by MCOA 8/3/2023 3:02:23 PM

TABLE OF CONTENTS

INDEX OF AUTHORITIES ii

BASIS OF JURISDICTION iv

COUNTER-STATEMENT OF QUESTIONS INVOVLED v

I. INTRODUCTION 1

II. COUNTER-STATEMENT OF FACTS 1

A. Procedural History 1

B. The History of Ethnic and Gender Studies Request 3

C. Facts presented in Appellant's Brief which Are not supported by the Record and Irrelevant to the Issue on Appeal 5

III. ARGUMENT 5

A. Records Created and Retained by Individual Teachers are not Public Records For Purposes of FOIA because Teachers are Not Public Bodies. 5

B. The Michigan Management and Budget Act is Irrelevant to Any Issue in the Appeal 9

C. Whether a FOIA Exemption Applies is Not an Issue in This Appeal. 11

D. The Court of Appeals Decision in Blackwell v City of Livonia is on Point and Controlling. 13

E. Applying FOIA as it is Written Does Not Lead to Absurd Results. 14

F. The Michigan Supreme Has Addressed the Issue of Whether Agency Principles Apply in FOIA Cases 15

IV. CONCLUSION 17

RECEIVED by MCOA 8/3/2023 3:02:23 PM

INDEX OF AUTHORITIES

Page(s)

Cases

Detroit v Redford Township,
253 Mich 453 ....7, 11, 12

Baker v General Motors Corp,
409 Mich 639 7

Bisio v City of Village of Clarkston,
506 Mich. 37 8

Blackwell v City of Livonia,
339 Mich App 495 ....7, 12, 13

Breighner v Michigan High Scholl Athletic Association,
471 Mich 217 ....13, 16

Cameron v Auto Club Insurance
476 Mich 55 14

Farm Products Co. v. *Jordan*,
229 Mich. 235 7

Howell Education Ass'n MEA/NEA v Howell Board of Education
287 Mich App 228 12

In re Merrill,
200 Mich 244 167 NW 30 (1918)....................7

People v. *Crucible Steel Co.*,
150 Mich. 563 7

People v McIntyre,
461 Mich 147 14

United States Fidelity and Insurance Guarantee Co. v Michigan Catastrophic Claims Ass'n,
274 Mich App 184 15

Statutes

Freedom of Information Act (FOIA) .... *passim*

MCL 15.223(1) 6

RECEIVED by MCOA 8/3/2023 3:02:23 PM

MCL 15.232 13

MCL 15.232(i) 6, 10

MCL 15.232(h) 6

MCL 15.232(h)(i) 7

MCL 15.232(h)(iii) 7

MCL 15.232 (h)(iv) 8

Michigan Management and Budget Act 8, 9

Other Authorities

MCR 2.116(C)(8) 2

MCR 2.116(C)(10) 2

MCR 7.215(J)(1) 13

RECEIVED by MCOA 8/3/2023 3:02:23 PM

BASIS OF JURISDICTION

Appellant's statement of the basis of jurisdiction is complete and accurate.

RECEIVED by MCOA 8/3/2023 3:02:23 PM

COUNTER-STATEMENT OF QUESTIONS INVOVLED

1. Are individual teachers employed by Michigan school districts "Public Bodies" as that term is defined by the Michigan Freedom of Information Act?

   Appellant says "Yes"

   Appellee says "No"

   The Lower Court said "No"

RECEIVED by MCOA 8/3/2023 3:02:23 PM

I. INTRODUCTION

This case arises out of Freedom of Information Act (FOIA) request which Plaintiff-Appellant, Carol Beth Litkouhi, submitted to the Defendant-Appellee, Rochester Community School District (RCSD). Plaintiff-Appellant's position is that FOIA requires RCSD to provide any responsive records prepared, owned, used, retained or possessed by individual teachers. RCSD's position is that it is not required to search for or provide such records but is required to disclose those records which it prepared, owned, used, retained or possessed. The Circuit Court agreed with RCSD and granted its motion for summary disposition. The basis for that decision is that FOIA only requires disclosure of "public records". The term "public record" is defined in the statute "as a writing prepared, owned, used, in the possession of, or retained **by a public body**". (Emphasis supplied) FOIA defines the term "public body" to include school districts but excludes employees of school districts. Therefore, the Circuit Court correctly concluded that since the undisputed facts are that RCSD did not prepare, own, use, retain or possess the records Plaintiff-Appellee requested it was not required to provide them, and it was not required to gather and disclose any such documents which might have been prepared, owned, used, retained, or possessed by its individual employees. (Appellant Appendix p. 6-7)

Plaintiff-Appellee Now appeals from the Circuit Court's dismissal of her Complaint on summary disposition. In this appeal she argues that despite the clear statutory language to the contrary, employees of RCSD should be considered "public bodies" and their records should be subject to disclosure under FOIA.

II. COUNTER-STATEMENT OF FACTS

A. Procedural History

The Plaintiff-Appellant's Complaint against Defendant, Rochester Community School District (RCSD), alleged violations of the Michigan Freedom of Information Act (FOIA). The

RECEIVED by MCOA 8/3/2023 3:02:23 PM

Complaint arose out of two separate FOIA requests she made. The first involved RCSD's response to a FOIA request dated December 14, 2021, which requested documents related to an Ethnic and Gender Studies course. (Appellee Appendix p 5, 9 Complaint) The second involved RCSD's response to a FOIA request dated December 27, 2021, and which requested staff training materials related to equity and inclusion. (Appellee Appendix p 4, Complaint)

On September 16, 2022, pursuant to the Parties' stipulation, the Circuit Court issued an order which stayed discovery pending the Court's resolution of two legal issues. (Appellee Appendix p 92-94, Order) Thus, the Order provided that RCSD would file a motion for summary disposition regarding Plaintiff-Appellant's December 14, 2021, request for documents related to ethnic and gender the studies course on the grounds "that it is not required to search for or produce records which may be in the possession of individual teachers". (Id) The Order further provided that the parties would file cross motions for summary disposition on the issue of whether RCSD was required to provide copies of copyrighted materials in response to the December 27, 2021 request for records related to training on equity and inclusion. (Id)

Ultimately the Parties entered into a stipulation to dismiss Plaintiff-Appellant's claims regarding the copyrighted equity and inclusion training materials because "these are all books and one lesson plan, and these books can be commonly purchased or borrowed from a library, that copying these books is unnecessary and expensive". (Appellee Appendix p 95-97, Order dismissing claim)

RCSD did file a motion for summary disposition on the ethnic and gender studies course request. The Circuit Court granted its motion under MCR 2.116(C)(8) holding that the Complaint failed to state a claim because "public school teachers, and their individual work product are [not] discoverable "public records of "public bodies" in accordance with FOIA. (Appellant Appendix p

RECEIVED by MCOA 8/3/2023 3:02:23 PM

6, Order granting summary disposition) The Circuit Court also held that dismissal was appropriate under MCR 2.116(C)(10) because the undisputed evidence established that "RCSD has not **prepared, owned, used, possessed or retained** the documents requested by Plaintiff's December 14, 2021, FOIA request" (Id) (Emphasis original)

B. The History of Ethnic and Gender Studies Request

The facts in this record are largely those established by the four affidavits RCSD filed in support of its motion for summary disposition. Since Plaintiff-Appellant did not submit counter affidavits, or any other evidentiary support, the facts set forth in those affidavits, and presented in this subsection ,are undisputed.

RCSD is a public school district which operates elementary schools, middle schools, and high schools in Oakland County Michigan. Beginning in the fall semester of 2021, RCSD offered at its Rochester High School a course entitled "History of Ethnic and Gender Studies." (the Course) (Appellant Appendix p 74-75, Affidavit of Joshua Wrinkle) That same course was first offered for the second semester at RCSD's Adams High School beginning in January 2022. Appellant Appendix p 76-77, Affidavit of Pasquale Cusumano)

Early in the 2021 fall semester Plaintiff began communicating with Neil DeLuca, RCSD's Director of Secondary Education, about the course. (Appellee Appendix p 11-12, 14, Affidavit of Neil DeLuca) To respond to her request for information about the Course, Mr. DeLuca asked Chad Zowlinski, the teacher who taught the Course, to prepare a document describing the topics addressed in the Course. (Id). Mr. DeLuca emailed that document, which had been entitled "The History of Ethnic and Gender Studies: 2021-2022 Course Syllabus" to Plaintiff-Appellant. (Appellee Appendix p 9, 45-47 Complaint).

The formal FOIA request which is the subject of the complaint is dated December 14, 2021. By email of that date directed to Defendant's FOIA Coordinator, Elizabeth Davis, Plaintiff-

RECEIVED by MCOA 8/3/2023 3:02:23 PM

Appellant asked for copies of the following materials: "...teacher lesson plans, curriculum, readings given to students (such as articles, publications, case studies), viewings (such as video clips) and assignments given to students (such as writings or discussion prompts)"….teacher prompts made on Flipgrid and Google Classroom." (Appellee Appendix p 5, 24 Complaint). By correspondence from its FOIA coordinator, Elizabeth Davis, RSCD responded to that request as follows:

> Your request is granted in part and denied in part. The notifications section of the FOIA, MCL 15.235, requires the District to identify the reason for any partial denial of your request. Your request is granted to the extent that a unit plan document was provided to you in our response dated October 4, 2021. The remainder of your FOIA request is denied. Your request is denied in part as the District is not knowingly in possession of any records responsive to your request for "teacher lesson plans," "readings given to students," "viewings," and "assignments used to evaluate students," or teacher prompts made on Flipgrid and Google classroom during the time period from August 30, 2021 through present. This letter serves as the District's certification that no responsive records are known to exist.

(Appellee Appendix p 5, 26, Complaint)

Thus, the correspondence from Ms Davis informed Plaintiff-Appellant that the syllabus prepared by Chad Zowlinski was the only responsive record which was "knowingly in RCSD's possession". Even that document did not exist prior to Plaintiff's communication with Mr. DeLuca. Instead, it was created for Plaintiff, specifically to address to the questions she was asking Mr. DeLuca about the Course. (Appellee Appendix p 12-12, 14 Affidavit of Neal DeLuca)

RSDC does not require that teachers create, retain or provide the materials described in the December 14, 2021, request. (Appellant Appendix p 74-77, Affidavits of Joshua Wrinkle of Pasquale Cusumano) RCSD teachers are not members of the administration. (Id) They are employees and members of a bargaining unit represented by the Michigan Education Association. (Id) The terms and conditions of their employment are governed by a collective bargaining agreement. (Id) Except for the document that was provided to her, RCSD has never been in

RECEIVED by MCOA 8/3/2023 3:02:23 PM

possession of the of the documents itemized in the Plaintiff-Appellant's December 14, 2021, request (*Id.*)

C. Facts presented in Appellant's Brief which Are not supported by the Record and are Irrelevant to the Issue on Appeal

The "Statement of Facts and Proceedings" section of Ms. Litkouhi's is replete with unsupported assertions including the following:

1. That Ms. Litkhoui "has been stymied in her attempt to lawfully obtain records…"
2. That Ms. Litkhouhi has "exhausted all reasonable attempts to obtain records…"
3. The RCSD has "rejected plaintiff-Appellant's attempt to obtain the transparency required by the Freedom of Information Act…"

That these "facts" are not contained anywhere is confirmed by the fact that the brief provides no citation to the record to support them.

Plaintiff-Appellant's brief also includes a discussion of the discovery which had occurred in the lower court proceeding. At page 9 she states that "Plaintiff Appellant did not conduct any discovery". This is inaccurate. In fact, Plaintiff-Appellant served interrogatories and Requests for Production. RSDC fully responded to those. (Appellee Appendix p 98-100, discovery requests) Thus, the brief is critical of RCSD's limited discovery requests and then makes the false statement that "Plaintiff Appellant did not conduct any discovery".

III. <u>ARGUMENT</u>

A. Records Created and Retained by Individual Teachers are not Public Records for Purposes of FOIA because Teachers are Not Public Bodies.

Because this is an appeal from a decision and order granting RCSD's motion for summary disposition, Plaintiff-Appellants' brief correctly states that the standard of review is "de novo". Plaintiff-Appellant' brief further, correctly acknowledges that where the issue is one of statutory

RECEIVED by MCOA 8/3/2023 3:02:23 PM

construction and the language is unambiguous, courts presume that the "Legislature intended the meaning clearly expressed" and that "no further construction is required or permitted, and the statute must be enforced as written" (citing *Tryc v Michigan Veteran's Facility* 451 Mich 126, 135; 545 NW2d 642 (1996). Because FOIA unambiguously excludes employees of public school districts from the definition of a "public body" any documents which public school teachers may personally prepare or possess, but which are not possessed by the school district, do not constitute "public records" and are therefore, not subject to disclosure under FOIA.

The Michigan Freedom of Information, Act, MCL 15.231 et. seq., generally permits persons to make written requests for "public records" and requires a "public body" to provide those records, unless exempted from disclosure.

MCL 15.223(1) provides in pertinent part as follows:

> Except as expressly provided in section 13, upon providing a **public body's** FOIA coordinator with a written request that describes a public record sufficiently to enable the public body to find the public record, a person has a right to inspect, copy, or receive copies of the requested **public record** of the **public body**. (emphasis added)

The term "public record" is defined at MCL 15.232(i) as "…a writing prepared, owned, used, in the possession of, or retained **by a public body** in the performance of an official function, from the time it is created…". (Emphasis added) The term "Public Body" is defined at MCL 15.232(h) as follows:

> (i) A state officer, **employee,** agency, department, division, bureau, board, commission, council, authority, or other body in the executive branch of the state government, but does not include the governor or lieutenant governor, the executive office of the governor or lieutenant governor, or employees thereof. (Emphasis added)
>
> (ii) An agency, board, commission, or council in the legislative branch of the state government.
>
> (iii) A county, city, township, village, intercounty, intercity, or regional governing body, council, **school district**, special district, or

RECEIVED by MCOA 8/3/2023 3:02:23 PM

> municipal corporation, or a board, department, commission, council, or agency thereof. (Emphasis added)
>
> (iv) Any other body that is created by state or local authority or is primarily funded by or through state or local authority, except that the judiciary, including the office of the county clerk and its employees when acting in the capacity of clerk to the circuit court, is not included in the definition of public body.

Thus, in subsection (h)(i) the statute specifically states that **employees** of state government are included in the definition of a "public body". However, in section (h)(iii), which identifies school districts as public bodies "employees" are not included.

The basic rules of statutory construction all lead to the conclusion reached by the Circuit Court in this case. Those rules are expressed by the courts as follows: "every word of a statute should be given meaning and no word should be treated as surplusage or rendered nugatory if at all possible". *Baker v General Motors Corp,* 409 Mich 639, 655; 297 NW2d 367 (1980); "[Where the the wording of the statute is unambiguous] there is no room for construction." *In re Merrill,* 200 Mich 244, 248 167 NW 30 (1918); *Farm Products Co.* v. *Jordan,* 229 Mich. 235, 239; 201 NW 198 (1924); it will not be assumed that the legislature "made a mistake and used one word where it intended to use another". *People* v. *Crucible Steel Co.,* 150 Mich. 563, 567. "Express mention in a statute of one thing implies the exclusion of other similar things, *expressio unius est exclusio alterius" Detroit v Redford Township,* 253 Mich 453; 235 NW 217 (1931)

To treat public school employees as "public bodies" under FOIA would violate every one of these rules. The inclusion of the word "employee" in MCL 15.232(h)(i) would be rendered mere surplusage and the legislature's unambiguous intent to leave employees out of MCL 15.232(h)(iii) would have to be ignored. To put it plainly, where the legislature intended to include employees

RECEIVED by MCOA 8/3/2023 3:02:23 PM

of governmental units as "public bodies" it said so. Because it did not state that individual employees of school districts are "public bodies" it did not intend that they be treated as such.

A case which well illustrates the point is *Blackwell v City of Livonia,* 339 Mich App 495; 984 NW2d 780 (2021). In that case the plaintiff had sought to obtain records which were in the possession of the mayor, but not in the possession of the mayor's office. The court held that the request had properly been denied because the mayor was not "public body" as defined by FOIA:

> While FOIA includes in the definition of "public body" officers and employees of state government, see MCL 15.232 (h)(i), the definitional section does not also include officers and employees of municipalities such as cities of townships. The distinction between the state and local government officials demonstrates the Legislature's intent to exclude individual government officers and employees not working in state government from the definition of "public body."

Mich at 505.

The Michigan Supreme Court's decision in *Bisio v City of Village of Clarkston,* 506 Mich. 37; 954 NW2d 95 (2020) is similarly instructive. In *Bisio* the plaintiff had requested copies of non-privileged communications between the City Attorney and third parties. The request was denied with the explanation that the city attorney did not constitute a public body. The Court held that the records were subject to FOIA because the City Attorney's office did constitute a "public body". The Court's decision was based on the fact that the City's charter created the office of City Attorney. Thus, according to the court, the City Attorney office was a public body as defined in MCL 15.232 (h)(iv) which includes "any other body that is created by state or local authority". The court expressly stated that the City Attorney individually did not constitute a "public body":

> But we do not conclude that the city attorney, individually is himself a "public body" under MCL 15.232 (h)(iv). Rather, we conclude that the entity, the "office of the city attorney," constitutes the pertinent "public body" under MCL 15.232(h)(iv).

Mich at 53 fn 10.

RECEIVED by MCOA 8/3/2023 3:02:23 PM

Thus, the Court's rationale in *Bisio* leads directly to the conclusion reached by the Circuit Court in this case- that individual teachers are not "public bodies" and their papers are therefore not "public records'.

There isn't any dispute about the status of RCSD as "public body". It clearly is. It is also undisputed that RSDC has not prepared, used, owned, possessed or retained the documents Plaintiff requested by her December 14, 2021, request. Because individual teachers are not "public bodies' whatever papers they may have produced or possess are not "public records". Therefore, The Circuit Court correctly granted RCSD's motion for summary disposition.

B. The Michigan Management and Budget Act is Irrelevant to Any Issue in the Appeal

At pages 12 through 14 of her brief, Plaintiff-Appellant provides a discussion of certain provisions of the Michigan Management and Budget Act, Act 431. That Act has no relevance to this case and the argument Plaintiff-Appellant makes based on that Act requires a stretch well beyond the limits of logic.

Plaintiff-Appellant's argument is the that the Michigan Department of Management and Budget has produced a retention schedule which provides a retention period for "daily lesson plans and objective files". Thus, the reasoning is apparently that because these documents are referred to in the retention schedule, they must exist, they must have been produced by teachers, and teachers, therefore must be "public bodies" for purpose of FOIA.

The first flaw in this this reasoning is the assumption that that reference to lesson plans and objective files in the retention schedule means these records exist. In fact, there is nothing in Act 431 which mandates these types of records be created. There is nothing in the retention schedules which mandate that the records be created. While Plaintiff-Appellant did not include it with her submission, the Michigan Record Management Services has also published a "Record Retention

RECEIVED by MCOA 8/3/2023 3:02:23 PM

Guide" which is prefaced with the following: "This guide accompanies the General Schedule for Michigan Public Schools that was approved 4-11-2023." That Record Retention Guide explicitly states *"General schedules do not mandate that any of the records listed on the schedule be created"* (Appellee Appendix p 102, Record Retention Guide) (emphasis in the original).

At page 13 of her brief Plaintiff-Appellant states that the "Daily Lesson Plans and Objective Files" referred to in the retention schedule are "the exact sort of documents that Plaintiff-Appellant requested under FOIA". In fact, the request went well beyond daily lesson plans and objective files as it requested "...teacher lesson plans, curriculum, readings given to students (such as articles, publications, case studies), viewings (such as video clips) and assignments given to students (such as writings or discussion prompts)"….teacher prompts made on Flipgrid and Google Classroom." Thus, only the first two items of the request arguably are referenced on the retention schedule. According to Plaintiff-Appellants logic, since the definition of a "public record" in FOIA is determined by the retention schedule rather than the definitions in the FOIA statute, the language of MCL 15.232(i) defining a "public record as "…a writing prepared, owned, used, in the possession of, or retained **by a public body** in the performance of an official function, from the time it is created…" (emphasis supplied) is entirely written out of the statute, and the only inquiry would be whether the document appears on list created by a state agency pursuant to authority granted by an unrelated statute.

Of course, the converse would be equally true, documents not on the list would not be subject to FOIA even if they were in the possession of a one of the "public bodies" clearly enumerated in FOIA. In this case, according to her logic, even if RCSD had created and retained every item Plaintiff-Appellant requested, it would not be required to provide most of them because they aren't on the retention schedule. That would be a ludicrous result. And it is equally ludicrous

RECEIVED by MCOA 8/3/2023 3:02:23 PM

to claim that teachers, who are not "public bodies" under FOIA become "public bodies" for purposes of FOIA when the documents at issue appear on list generated by a state agency in exercise of its functions under an entirely different statute.

C. Whether a FOIA Exemption Applies is Not an Issue in This Appeal.

At pages 14 through 17 of her brief, Plaintiff-Appellant argues that the items she requested regarding the gender and ethnic studies course are not exempt from disclosure under FOIA. That argument is entirely irrelevant to any issue in this case. The issue the Circuit Court decided was the one the Parties had stipulated to-whether individual teachers employed by public school districts are public bodies for purposes of FOIA. The issue of whether a statutory exemption applies was neither addressed no decided.

While the issue of an exemption is not germane to the issues on appeal, cases Plaintiff-Appellant cites in this portion of her brief are, and add further support to the Circuit Court's decision. The first of those cases is *Detroit v Redford Township,* 253 Mich 453; 235 NW 217 (1931). In that case the issue was whether the City of Detroit was entitled to a share of proceeds from the sale of real **and** personal property in the context of an annexation, or only the proceeds from the sale of real property. The court held that because the relevant part of the statute only referred to real property and in other sections of the statute both real and personal property were referenced, Detroit was only entitled to proceeds from the sale of real property.

> There is no ambiguity in the foregoing provision, and its plain meaning cannot be altered by application of rules of construction. The statute obviously and plainly provides for a division of real property and of real property only. As above stated, the legislature at the same session amended the 1883 act in which it provides in cases of annexation for a division of both real and personal property. It would be over presumptuous to assume that it was a mistake or an oversight on the part of the legislature that the home-rule act provides for apportionment of real property located in the annexed territory only. Especially is this so since in the same paragraph from which the above quotation is taken it is expressly provided that where by annexation the whole of another municipality is taken over, the city to

RECEIVED by MCOA 8/3/2023 3:02:23 PM

> which it is annexed succeeds "to the ownership of *all the property"* of the annexed territory. This latter provision plainly includes both the real and personal property; but in cases of partial annexation the right of property division is expressly confined to *real* property located in the annexed territory. We have no right to strike this limitation out of the statute.

Mich. 453, 456-457.

The rationale employed by the Supreme Court in *Detroit v Redford Township* supports the Circuit Court's decision in this in this case. Here FOIA expressly includes employees within the definition of a "public body" in reference to the executive branch of state government and excludes employees from that definition in reference to school districts. To accept the interpretation Plaintiff-Appellant urges, this Court would have to assume that that difference in the two definitions in the FOIA statue was mistake, and then strike a limitation which the legislature included.

Plaintiff also cites *Howell Education Ass'n MEA/NEA v Howell Board of Education* 287 Mich App 228; 789 NW2d 495 (2010). The specific issue the Court decided in that case has no application to the issue in this one. In *Howell,* the issue was whether personal emails which had been captured and stored on the school district's server were required to be disclosed under FOIA. Thus, the emails had undisputedly been "retained and possessed" by the school district. Ultimately, the court held that because of the personal nature of the emails they were not subject to disclosure. Here the undisputed fact is that RCSD did not create produce retain or possess the items Plaintiff-Appellant requested, and the Circuit Court's holding had nothing to do with the subject matter of any such documents.

While the specific issue decided in *Howell* is not the same one as in this case, some of the court's discussion does shed light on the issue here. The court points out that because the emails where stored on the school district's server that they were possessed by a public body: "…personal emails were not rendered public records solely because they were captured in a public body's email

RECEIVED by MCOA 8/3/2023 3:02:23 PM

system's digital memory" *Id* at 231. Of course, if the as Plaintiff-Appellant urges, the teachers themselves were included in the term "public body" then the fact that the emails were captured on the school district's server would have been irrelevant because any documents possessed solely by the teachers would be possessed by the public body.

D. The Court of Appeals Decision in Blackwell v City of Livonia is on Point and Controlling.

At pages 17 through 21 of her brief Plaintiff-Appellant argues that the decision in the *Blackwell v City of Livonia*, *supra*, should be disregarded. That case is a recently decided, published opinion, which addresses the very issue in this case. It should not be disregarded. In fact, this Court is bound to follow it. MCR 7.215(J)(1).

First Plaintiff-Appellant claims that *Blackwell's* holding does not reach the issue in the case. (Brief p. 18). Not only does the holding reach the issue, the rationale employed by the court requires the result reached by the Circuit Court here. The holding of *Blackwell* is that because employees of local units of government are excluded from the definition of a "public body", documents which they possess, but the public body does not, are not "public records":

> MCL 15.232(h)(i), the definitional section does not also include officers and employees of municipalities such as cities or townships. The distinction between the state and local government officials demonstrates the Legislature's intent to exclude individual government officers and employees not working in state government from the definition of "public body".

Blackwell v. City of Livonia, 339 Mich. App. 495, 505

Next Plaintiff-Appellant argues that the Court in Blackwell was wrong to the cite the Michigan Supreme Court's decision in *Breighner v Michigan High Scholl Athletic Association,* 471 Mich 217; 683 NW2d 639 (2004), and the Circuit Court was therefore wrong to cite *Blackwell.* The *Blackwell* court cited *Breighner* for the proposition that only those bodies enumerated in the definition of a "public body" in MCL 15.232 are "public bodies" for purposes of FOIA. That would

RECEIVED by MCOA 8/3/2023 3:02:23 PM

seem to be a noncontroversial proposition. While Plaintiff-Appellant might disagree with it, it is a Supreme Court decision and certainly the Court of Appeals can't be faulted for relying upon it.

E. Applying FOIA as it is Written Does Not Lead to Absurd Results.

At pages 21-27 of her brief Plaintiff-Appellant urges that the normal rules of statutory construction which obviously apply here, and which uniformly support the Circuit Court's decision should be ignored in favor the "absurd results" rule of construction. The 'absurd results" rule has no application here, and no absurd results flow from the express language of the statute.

As discussed above, the basic rules of statutory construction in Michigan which require the conclusion reached by the Circuit Court in this case. As Plaintiff-Appellant notes in her brief, the Michigan Supreme Court rejected use of the "absurd result" rule when the statutory language at issue is clear. *People v McIntyre,* 461 Mich 147; 599 NW2d 102 (1999). Plaintiff-Appellant claims that the rule has since been resurrected in *Cameron v Auto Club Insurance* 476 Mich 55; 718 NW2d 784 (2006). However, what Plaintiff-Appellant leaves out of her brief is that the language she relies upon as the basis for claiming the resurrection of the rule is not in the decision of the Court, rather it is in the dissent. *Id* at 110-12. The Supreme Court has not retreated from its holding in the *McIntyre* case that the absurd results rule is not employed as device to evade clear statutory language.

In 2007, the year after the dissent in *Cameron* was written, here is what the Court of Appeals had to say about the status of the absurd results rule:

> O]ur Supreme Court repudiated the use of the "absurd result" rule of statutory construction in a case such as this where the language of the statute is unambiguous. *People v McIntire*, 461 Mich. 147, 155-158; 599 N.W.2d 102 (1999). The Supreme Court's decision in McIntire precludes this Court from utilizing rules of statutory construction to impose policy choices different from those selected by the Legislature. *Id.* at 152. "'[I]n our democracy, a legislature is free to make inefficacious or even unwise policy choices. The correction of these policy choices is not a judicial function as long as the legislative choices do not offend the constitution.'" *Id.* at 159,

RECEIVED by MCOA 8/3/2023 3:02:23 PM

> adopting as its own the language of Judge Young's dissent in *People v McIntire*, 232 Mich. App. 71, 126; 591 N.W.2d 231 (1998). Clearly, it is not within our authority to second-guess the wisdom or reasonableness of unambiguous legislative enactments even where the literal interpretation of the statute leads to an absurd result. [*Id.* at 84.]
>
> As discussed earlier, MCL 500.3104 is clear and unambiguous with regard to the requirement that the MCCA reimburse an insurer for 100 percent of the actual loss amounts (above the statutory threshold) that the insurer is obligated to pay under PIP coverages. Accordingly, the statute must be enforced as written. We will not apply the absurd and unjust results doctrine to reach a result at odds with the plain language of the statute. Courts may not second-guess the wisdom of legislation. *Elezovic v Ford Motor Co*, 472 Mich. 408, 425; 697 N.W.2d 851 (2005).

United States Fidelity and Insurance Guarantee Co. v Michigan Catastrophic Claims Ass'n, 274 Mich App 184, 202; 731 NW2d 481 (2007)

Here, the legislature included the word in "employee" in the definition of "public body" when addressing state government and clearly excluded word employee from the definition when addressing school boards. The legislature made its intention clear and therefore the "absurd results" cannot apply.

Nor is there anything absurd about the legislature's choice to exclude employees of public schools from the definition, Plaintiff-Appellant's parade of horribles notwithstanding. In fact, the absurd result would be the one that flows from including "employees" within the definition of a "public body". In that case local units of government would be obliged to canvass each and every one of their employees each and every time a FOIA requeste were submitted to determine what responsive documents those employees might have in their pockets, notebooks, personal computers etc. Certainly, it would not be absurd for the legislature to seek to avoid that result.

F. The Michigan Supreme Has Addressed the Issue of Whether Agency Principles Apply in FOIA Cases

At pages 27 and 28 of her brief Plaintiff-Appellant urges the Court to "revisit" the law of agency. As suggested by the use of the term "revisit" the application of the law of agency in

RECEIVED by MCOA 8/3/2023 3:02:23 PM

analyzing the reach of the term "public body" has already been decided. In fact, it has been decided by the Michigan Supreme Court.

In *Breighner v. Mich. High Sch. Ath. Ass'n,* supra the plaintiff argued that the Michigan High School Athletic Association was an agent of the public schools and therefore subject to FOIA. The Supreme Court disagreed:

> Finally, plaintiffs contend that the *MHSAA* acts as an "agent" for its member schools and that it is therefore a public body as defined by § 232(d)(iii):
>
> A county, city, township, village, intercounty, intercity, or regional governing body, council, *school* district, special district, or municipal corporation, or a board, department, commission, council, *or agency thereof*. [Emphasis added.]
>
> The Court of Appeals majority and the parties appear to have assumed that § 232(d)(iii) includes "agents" of enumerated governmental entities in the definition of "public body." We disagree and believe that there is a fundamental difference between the terms "agent" and "agency" as the latter term is used in the statute.
>
> ***
>
> Although the noun "agency" may be used to describe a business or legal relationship between parties, it is wholly evident from the context of § 232(d)(iii) that this is not the sense in which that term is used. Section 232(d)(iii) designates several distinct governmental units as public bodies, and proceeds to include in this definition any "agency" of such a governmental unit. In this specific context, the word "agency" clearly refers to a *unit or division of government* and not to the *relationship* between a principal and an agent. Had the Legislature intended any "agent" of the enumerated governmental entities to qualify under § 232(d)(iii), it would have used that term rather than "*agency*." **6** Thus, we reject plaintiffs' argument that the *MHSAA* acts as an "agent" of its member schools and that it thus qualifies as an "agency" under § 232(d)(iii). **7**

Breighner v. Mich. High Sch. Ath. Ass'n, 471 Mich. 217, 231-233, 683 N.W.2d 639, 647-648 (2004).

At footnote 6 of its decision the *Breighner* Court stated "Indeed, it would defy logic (as well as the plain language of § 232[d][iii]) to conclude that the Legislature intended that any person

RECEIVED by MCOA 8/3/2023 3:02:23 PM

or entity qualifying as an "agent" of one of the enumerated governmental bodies would be considered a "public body" for purposes of the FOIA."

Thus, the Supreme Court made it clear that the question of who or what constitutes a public body for purposes of FOIA is answered by the detailed definitions provided in the statute and not the common law of agency. Public school teachers are not included in that definition.

IV. CONCLUSION

For the reasons stated herein, Defendant-Appellee requests that the decision of the Circuit Court granting its Motion for Summary Disposition be Affirmed.

Respectfully submitted,
JACKSON LEWIS P.C.

/s/ Timothy J. Ryan
Timothy J. Ryan (P40990)
Attorneys for Defendant
250 Monroe NW, Suite 400
Grand Rapids, MI 49503
(616) 940-0230
timothy.ryan@jacksonlewis.com

Dated: August 3, 2023

CERTIFICATE OF SERVICE

On this day August 3, 2023, the undersigned did cause to be filed the foregoing document with the Court using the CM/ECF system, which will send notice of its filing to all counsel of record.

/s/ Timothy J. Ryan
Timothy J. Ryan (P40990)

4873-1882-7637, v. 1

RECEIVED by MCOA 8/3/2023 3:02:23 PM