

**STATE OF MICHIGAN
COURT OF CLAIMS**

**THE MACKINAC CENTER FOR PUBLIC
POLICY, a nonprofit Michigan Corporation**

Case No.: 20-_____

Plaintiff,

v.

Hon.

**THE UNIVERSITY OF MICHIGAN, a
state public body.**

Complaint

Defendant.

Derk A. Wilcox (P66177)
Stephen A. Delie (P80209)
Patrick J. Wright (P54052)
Mackinac Center for Public Policy
Attorneys for Plaintiff
140 West Main Street
Midland, MI 48640
(989) 631-0900 – voice
(989) 631-0964 – fax

COMPLAINT

There is no other pending or resolved civil action arising out of the same transaction or occurrence alleged in the complaint.

NOW COMES Plaintiff, The Mackinac Center for Public Policy, and for its Complaint alleges and states as follows:

INTRODUCTION

The plaintiff, Mackinac Center for Public Policy (the “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 governments.

On May 13th, 2020, the Mackinac Center made a routine request to the University of Michigan (the “University”), seeking certain e-mail correspondence between Drs. Marisa Eisenberg, Vikas Parekh, or Emily Martin and government employees relating to the state’s response to the COVID-19 pandemic. The Mackinac Center later sent an additional FOIA request on May 27, 2020, seeking any e-mails between May 1, and May 27 that discussed either the “MI Safe Start Plan” or the “MI Safe Start map.”

The University responded on June 5, 2020, clarifying that both requests were limited to e-mails to or from the aforementioned professors. That same day, the University responded to the first request with a fee estimate of \$2,124.00. The University responded to the second request on June 15, 2020 with a cost estimate of \$170.00. The University estimated that it would require 35 business days to process the second request, despite estimating that less than four (4) hours of total work would be required to process the request. The Mackinac Center then elected to proceed with only the second request, and paid the required deposit.

On August 20th, 2020, the University informed the Center that it had finished processing the request, and that records would be produced upon payment of the remaining \$97.86 balance. The Mackinac Center paid that balance, but did not receive the requested records. After some follow up, it was discovered that the payment was directed incorrectly. After that issue was corrected, documents were finally produced on October 5, 2020.

Upon review, it became clear that the University had refused to release significant portions of e-mail communications, citing MCL 15.243(1)(m). As a result, the Mackinac Center appealed the

University's decision on October 9, 2020, and the University partially granted that appeal. On October 22, 2020, the University produced certain e-mail communications not initially provided, but those e-mails were heavily redacted.

This suit follows, as the law does not support the University's redaction of public records pursuant to either MCL 15.243(1)(m), nor any other cited exemption. In addition, despite the University's eventual production of records, the extreme delay before records were provided constitute a separate violation of the FOIA.

PARTIES, JURISDICTION, AND VENUE

1. Plaintiff, the Mackinac Center for Public Policy (the "Mackinac Center"), is a Michigan nonprofit corporation headquartered in Midland County, Michigan.
2. Defendant, the University of Michigan ("The University"), is a state university and public body which, upon information and belief, is headquartered in Ann Arbor, Washtenaw County, Michigan.
3. Venue is proper pursuant to MCL 15.240(1)(b).
4. Pursuant to MCL 15.240(5), this action should be "assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way."
5. Pursuant to MCL 600.6419(1)(a), the Court of Claims has jurisdiction over this claim.

VIOLATIONS OF THE FREEDOM OF INFORMATION ACT

6. The Plaintiff hereby incorporates the preceding paragraphs as if fully restated herein.
7. On May 13, 2020, Mackinac Center employee Jarrett Skorup submitted a FOIA request to the University for the following records:

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.

* Emails regarding COVID-19/Coronavirus and/or plans for re-opening Michigan's society/economy to or from any email addresses ending with "@michigan.gov<<http://michigan.gov>>".

* This is for the following employees: Marisa Eisenberg, Vikas Parekh and Emily Martin (epidemiology professor).

* This is for emails from March 1, 2020 to May 13, 2020.

Exhibit A, Mackinac Center's First FOIA Request.

8. On May 27, 2020, the Mackinac Center sent an additional FOIA request seeking: "Any emails from May 1 to current with terms 'MI Safe Start Plan' or 'MI Safe Start map.'" **Exhibit B,**

Mackinac Center's Second FOIA Request.

9. On June 5, 2020, the University responded by questioning whether the Center's second request was intended to be limited to e-mails involving those individuals described by the first request. *Id.*

10. The University estimated its total costs to fulfill the first request was \$2,124.00. The University also estimated that it would take sixty (60) business days and approximately (48) hours to fulfill that request, including nine (9) hours of what appears to be review by in-house counsel.

11. The Mackinac Center then abandoned its first request.

12. On June 15, 2020, the University responded to the Mackinac Center's second request by estimating that it would cost \$170.00 to fulfill the request. The University also estimated that it would take thirty-five (35) business days and approximately four (4) hours to respond to the request.

13. The Mackinac Center then paid the deposit required to process the second request.

14. On August 20, 2020, the University informed the Mackinac Center that it had fully processed its request and that, upon payment of the remaining \$97.86 balance, those records would be provided. **Exhibit C, FOIA Cost Correspondence.**

15. On August 25, 2020, the Mackinac Center issued a check for that balance, which it then sent to the University. *Id.* The University cashed that check on September 8, 2020. *Id.*
16. On October 4, 2020, the Mackinac Center followed up to determine why it had not yet received records. *Id.* After some correspondence between the parties, it was determined that the check had been internally misdirected by the University, but that the University had received it and would provide a response on October 5, 2020. *Id.* The Mackinac Center is not alleging that this misdirection was a violation of FOIA at this time.
17. On October 5, 2020, over 4 months after the Mackinac Center's request had been sent, the University produced what it considered to be non-exempt, responsive records. **Exhibit D, Response and Related Records.**
18. The University's response withheld significant information, including the entirety of various communications between University and State of Michigan employees, e-mail addresses, and the contents of specific e-mails. *Id.*
19. In response, the Mackinac Center appealed the University's determination, challenging the application of the frank communications exemption (MCL 15.243(1)(m)) and security exemptions (MCL 15.243(1)(u),(y)).
20. The University received the appeal on October 9th, and proceeded to take a ten-business day extension under MCL 15.240(2)(d). **Exhibit E, Appeal Extension.**
21. On October 22, 2020, the University partially granted the Mackinac Center's appeal. **Exhibit F—Appeal Response.** The University concluded that, although exemptions had been correctly applied, it would exercise its discretion to release redacted portions of certain e-mail communications that had been previously withheld. *Id.* The University upheld its previous determinations regarding e-mail addresses under the security exemptions, and further

indicated that redaction of that information was also justified under MCL 15.243(1)(a), (the privacy exemption).

22. The University's response to the Mackinac Center's appeal is contrary to law, as it misapplies the cited FOIA exemptions.

23. 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 fully 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 participate in the democratic process.

24. MCL 15.243(1)(m) permits a public body to exempt:

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.

25. The University has the burden of showing that the frank communication exemption applies, including why the public's interest in non-disclosure clearly outweighs the public's right to receive records in the particular instance. *Bukowski v City of Detroit*, 478 Mich 268 (2007); *Hearld Co, Inc v Eastern Michigan University Bd of Regents*, 265 Mich App 185 (2005) (citations omitted).

26. Even assuming the University correctly classified redacted and withheld e-mails as advisory communications preliminary to a final agency determination, the University cannot show that the public interest in promoting frank communications clearly outweighs the public's interest in disclosure in this instance.

27. The communications sought, and the advisory communications contained therein, relate directly to the state's response to the COVID-19 pandemic, including the science and data alleged to support that response.

28. This data is not available from other public bodies, as the Governor is not subject to FOIA. MCL 15.232(i).
29. Thus, to the extent the University was involved in the creation of the state's COVID-19 response, it is one of, if not the only, public bodies where the data and science underlying the state's policy decisions can be located.
30. The public interest in learning how the state has developed its COVID-19 response is overwhelming on its face. This response has been the subject of multiple lawsuits, recall efforts, and overwhelming media coverage.
31. As recently as November, 15, 2020, the state's COVID-19 response has resulted in the closure of businesses, significant restrictions on gatherings, and other direct interference with the ordinary lives of Michiganders.¹
32. In order to overcome this extreme public interest, the public's interest in non-disclosure must "clearly outweigh" the public's interest in disclosure.
33. The University cannot demonstrate that the public's interest in non-disclosure clearly outweighs the public's interest in disclosure, particularly in light of the fact that the public is currently without information as to how policies are being unilaterally prepared by executive and administrative officials without the participation of the legislature.
34. Even if the Court were to conclude that the public's interest in non-disclosure clearly outweighs the public interest in disclosure, the University nevertheless failed to follow the FOIA by redacting entire e-mail communications. Under the FOIA, the University remains obligated to produce any purely factual material within advisory communications. *Bukowski v City of Detroit*, 478 Mich 268 (2007). It failed to do so.

¹ See, e.g., <https://www.michigan.gov/coronavirus/0,9753,7-406-98163-545138--,00.html>.

35. The University also exempted working group e-mail addresses pursuant to MCL 15.243(1) (u), (y), stating:

Some virtual meeting links and passwords, as well as some working group email addresses, were removed from the records pursuant to Section 13 (1) (u) of the Act, which exempts from disclosure “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” and Section 13 (1) (y) of the Act, which exempts “[r]ecords or information of measures designed to protect the security or safety of persons or property...”

Exhibit D.

36. Although the Center does not dispute the need to remove passwords, the Center does challenge the conclusion that meeting links or working group e-mail addresses relate to the University’s ongoing security, or the security or safety of persons or property.

37. It is the University’s burden to state the justifications for a FOIA denial with specificity. MCL 15.235(5)(a)-(c); *Peterson v Charter Township of Shelby*, 2018 WL 2024578 (Mich Ct App).

38. In its response to the Center’s appeal, the University justified the security-based exemptions as follows:

Working group email addresses are established to allow members of a work group to collaborate freely within a secure environment. As such, they are tantamount to providing access to a secure workroom, and public dissemination of such addresses would impact the security of these virtual workplaces.

Exhibit F.

39. Both MCL 15.243(1)(u) and (y) directly relate to the security and safety of persons, property, and the public body.

40. Upon information and belief, no Michigan Court has addressed either of these exemptions, nor defined the meaning of “safety or security” in connection with them. The FOIA also does not define these terms. See generally, MCL 15.232.

41. When a statute fails to define a term, a court’s role is to “glean legislative intent from the plain meaning of statutory language.” *In re Estate of Erwin*, 503 Mich 1, 9 (2018) (citation omitted).

To do so, a court's first point of reference is the dictionary, with common understanding and traditional legal usage guiding the court's interpretation. *Id.*, at p. 10 (citation omitted).

42. Webster's online dictionary defines security as the "quality or state of being secure."² "Secure" is defined as "free from danger."³ "Danger" is defined as "exposure or liability to injury, pain, harm, or loss."⁴
43. The Cambridge Dictionary similarly defines security as "protection of a person, building, organization, or country against threats such as crime or attacks by foreign countries."⁵
44. The University's claim that e-mail addresses threaten the security of the University, or of individual working group members, cannot be justified under the above definitions. It strains credulity to contend that a person can be physically endangered by the exposure of a mere e-mail address. This is particularly true in the context of a working group's e-mail address, which presumably does not even identify the individual members of that group.
45. Similarly, the University's contention that the working group functions as a "secure meeting space" is unfounded; while it is questionable whether exposing the location of even a physical working space would result in danger to the University or members of the working group, the release of that group's purely digital e-mail address certainly does not.
46. The University also redacted certain e-mail addresses pursuant to MCL 15.243(1)(a), which states:

A public body may exempt from disclosure as a public record under this act any of the following... Information of a personal nature if public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy.

² <https://www.merriam-webster.com/dictionary/security?src=search-dict-hed>.

³ <https://www.merriam-webster.com/dictionary/secure>.

⁴ <https://www.merriam-webster.com/dictionary/danger>.

⁵ <https://dictionary.cambridge.org/us/dictionary/english/security>.

47. The University cannot demonstrate that the public interest in full disclosure of records is clearly outweighed by privacy interest in this instance.
48. Michigan Courts have previously ruled that the release of the names and addresses of private security guard employees, the names of public employees who had been called before a grand jury or met with an FBI investigation, the names and home addresses of various public employees and candidates for public office, and the names of student-athletes identified in university incident reports do not constitute clearly unwarranted invasions of privacy. *International Union, United Plant Guard Workers of America (UPGWA) v Department of State Police*, 118 Mich App 2952 (1982); *Detroit Free Press v City of Warren*, 250 Mich App 164 (2002)(citation omitted); *Michigan State Employees Ass'n v Department of Management and Budget*, 135 Mich App 248 (1984)(citation omitted); *Tobin v Michigan Civil Service Com'n*, 416 Mich 661 (1982); *Hearld Co v City of Bay City*, 463 Mich 111 (2000); *ESPN, Inc v Michigan State University*, 311 Mich App 662 (2015) (citation omitted).
49. Disclosure of the e-mail addresses at issue in this particular instance are less invasive than the disclosure of the information described immediately above, thereby justifying their release.
50. Leaving aside the issue improper redactions, the University has also violated FOIA by failing to respond to the Mackinac Center's request in a timely and appropriate manner.
51. MCL 15.234(8) indicates that a public body may respond to a FOIA request with a best efforts estimate as to the cost of the FOIA request and the time required to complete it. However, the statute further states:

The response shall also contain a best efforts estimate by the public body regarding the time frame it will take the public body to comply with the law in providing the public records to the requestor. The time frame estimate is nonbinding upon the public body, but the public body shall provide the estimate in good faith and strive to be reasonably accurate and to provide the public records in a manner based on this state's policy under [MCL 15.231] and the nature of the request in the particular instance.

52. Our Attorney General, on December 12, 2017, issued Opinion No. 7300 interpreting the requirements of MCL 15.234(8):

It is my opinion, therefore, that a public body's "best efforts estimate" under subsection 4(8) of FOIA, as to the time it will take to fulfill a request for public records, must be a calculation that contemplates the public body working diligently to fulfill its obligation to produce records to the requestor. The estimate must be comparable to what a reasonable person in the same circumstances as the public body would provide for fulfilling a similar public records request. In addition, under subsection 4(8), the best efforts estimate must be made in "good faith," that is, it must be made honestly and without the intention to defraud or delay the requestor.

53. The requested materials were simply e-mails, and should have been easily reviewed and provided, even remotely.

54. Although the University eventually produced some records, it took over four (4) months for it to do so.

55. This is despite the fact that the University estimated only four (4) hours would be required to completely process the request.

56. Thus, given the extensive delay, and despite the University's eventual production of documents, the University nevertheless created an unreasonable delay by failing to respond in a timely manner, thus preventing the Mackinac Center from being able to make timely use of the requested information.

57. An unreasonable delay in providing FOIA documents is a denial under MCL 15.235, MCL 15.240(1), and MCL 15.240(7).

58. MCL 15.234(9) indicates a public body that does not timely respond to a FOIA request under MCL 15.235(2) shall reduce the charges for any labor rate at a rate of 5% a day with a maximum of 50% if the late response was willful or if the request was clearly identified as a FOIA request.

59. The FOIA request was clearly identified and should have been provided in a reasonable time. Nevertheless, the University took one hundred and thirty-one (131) days to produce records.

Under MCL 15.234(9), Plaintiff is entitled to the statutory maximum 50% reduction in labor costs.

60. The University's actions regarding this delay in providing the records responsive are arbitrary and capricious under MCL 15.240(7), thereby subjecting the University to a civil fine of \$1,000.00 payable to the general treasury and a separate \$1,000.00 to the Mackinac Center.
61. The University's inappropriate implication of MCL 15.243(1)(m) constitutes a willful and intentional failure to comply under MCL 15.240b, thereby subjecting it to a civil fine of \$2,500 to \$7,500 payable to the state treasury.
62. Pursuant to MCL 15.240(6), the Center, if it prevails, is entitled to attorneys' fees and costs:

If a person asserting the right to inspect, copy, or receive a copy of all or a portion of a public record prevails in an action commenced under this section, the court shall award reasonable attorneys' fees, costs, and disbursements. If the person or public body prevails in part, the court may, in its discretion, award all or an appropriate portion of reasonable attorneys' fees, costs, and disbursements. The award shall be assessed against the public body liable for damages under subsection (7).

RELIEF REQUESTED

Plaintiff, Mackinac Center for Public Policy, respectfully requests that this Court order Defendant, the University of Michigan, to provide all documents sought in the FOIA request; apply the full penalties available under MCL 15.234(9), MCL 15.240(7), and MCL 15.240b; award attorneys' fees and costs under MCL 15.240(6); and award any other relief this Court determines to be just and equitable to remedy MSU's delays in providing the requested information and causing the need to bring this suit.

I declare that the statements above are true to the best of my information, knowledge, and belief.

Dated: _____, 2020

Jarett Skorup
Director of Marketing and Communications

Mackinac Center for Public Policy

Subscribed and sworn to by Jarett Skorup before me on the _____ day of _____, _____.

Signature _____

Notary Public, State of Michigan

County of Ingham

My Commission Expires 07-29-2025

Acting in the County of Midland