

Clerk of the Court of Claims
Hall of Justice
925 W. Ottawa St.
Lansing, MI 48909

RE: Written Claim per MCL 600.6431 against the University of Michigan.

Dear Clerk:

This verified letter is to fulfill the requirements of MCL 600.6431(1) as a written notice against the University of Michigan by the American Council of Trustees and Alumni (ACTA), by and through its employee, Dr. Michael Poliakoff. The nature of the claim is for delays and denials of a Freedom of Information Act ("FOIA") request which was filed by ACTA on March 3, 2020.

ACTA seeks complete fulfillment of this request, along with penalties, attorney fees, and other costs.

Sincerely,

Michael Poliakoff, Ph.D.

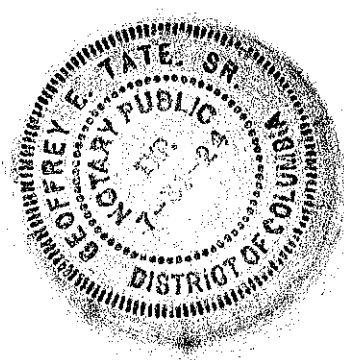
I declare that the statements above are true to the best of my information, knowledge, and belief.

Dated: 12/18, 2020

Michael B. Poliakoff
Michael Poliakoff, Ph.D.

Subscribed and sworn to by Dr. Michael Poliakoff before me on the

18th day of DECEMBER, 2020
Signature [Signature]
Notary Public, State of WASHINGTON DISTRICT OF COLUMBIA
County of WASHINGTON
My Commission Expires 7/31/2021
Acting in the County of WASHINGTON, DC



Subscribed and sworn to by 18 day of DECEMBER, 2020
MICHAEL POLIAKOFF
I solemnly declared before me and acknowledged the
re/she executed the foregoing instrument.
[Signature] Notary Public
My Commission Expires 7/31/2021

STATE OF MICHIGAN
COURT OF CLAIMS

AMERICAN COUNCIL OF TRUSTEES
AND ALUMNI,

Case No.: 20-_____ -MZ

Plaintiff,

v.

Hon.

THE UNIVERSITY OF MICHIGAN, a
state public body.

Complaint

Defendant.

Derk A. Wilcox (P66177)
Patrick J. Wright (P54052)
Stephen A. Delie (P80209)
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 American Council of Trustees and Alumni (ACTA), by and through its attorneys, The Mackinac Center Legal Foundation, and for its Complaint alleges and states as follows:

INTRODUCTION

The plaintiff, The American Council of Trustees and Alumni is an independent, nonprofit organization dedicated to promoting academic excellence, academic freedom, and accountability at America's colleges and universities. Plaintiff's attorneys, the 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 Legal Foundation routinely provides legal representation to individuals using the Freedom of Information Act ("FOIA") to obtain relevant documents from state and local governments.

On March 3rd, 2020, ACTA made a routine request to the University of Michigan ("the University"), seeking e-mail correspondence relating to the operation of the Lance J. Johnson Children and the Law Workshop at the University of Michigan Law School). The University responded on March 11th by taking a ten (10) business day extension. On March 30th, five (5) days after a response was required, the University issued a best-efforts estimate in connection with the request.

The University estimated that it would take six and one quarter (6.25) hours to complete the request, at an expense of \$259.12. The University also estimated it would require forty-five (45) days to produce responsive records. ACTA paid these fees via check in April, but the University did not acknowledge having received payment until June 18th, 2020. As such, the University suggested that its estimated deadline for producing records would be August 21st, 2020.

No documents were produced on August 21st. ACTA repeated followed up with the University, which responded on October 1, 2020. In this response, the University announced a new estimated deadline of October 30th.

On October 29th, ACTA requested a status update. In addition, ACTA pointed out that the request had remained outstanding one hundred and sixty-seven (167) business days, which was approximately ten (10) times the university required to respond on average. The University responded the following day by indicating that it would not be providing records, but that it would provide an update in the following business days.

ACTA followed up again on November 4th, indicating that it would be forced to litigate an appeal unless records were received by November 18th. On the 18th, the University responded by producing a “partial response” to ACTA’s request. It also indicated that it anticipated providing a complete response by December 9th, 2020.

Despite all requested deposits being paid, the University has yet to produce a complete response. ACTA has now waited over five (5) months for records that, by the University own admission, should have taken no longer than seven hours (7) hours to produce.

PARTIES, JURISDICTION, AND VENUE

1. Plaintiff, ACTA, is a 501(c)(3) organization headquartered at 1730 M. Street NW, No. 600, Washington D.C., 20036.
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 March 3rd, then ACTA-employee Christina Zack submitted a FOIA request to the University for the following records:

Pursuant to the state open records law D.C. Code Secs. 2-531 to 2-540, I write to request access to and a copy of financial statements, receipts, invoices and other deliverable/documents related to the operation of the Lance J. Johnson Children and the Law Workshop at University of Michigan Law from January 2007 to February 2020. If your agency does not maintain these public records, please let me know who does and include the proper custodian's name and address.

I agree to pay any reasonable copying and postage fees of not more than \$. If the cost would be greater than this amount, please notify me. Please provide a receipt indicating the charges for each document. As provided by the Freedom of Information Act, I would request your response within fifteen (15) business days. See D.C. Code Sec. 2-532(c).

If you choose to deny this request, please provide a written explanation for the denial including a reference to the specific statutory exemption(s) upon which you rely. Also, please provide all segregable portions of otherwise exempt material.

I would note that willful violation of the open records law can result in the award of reasonable attorney fees and other costs of litigation. See D.C. Code Sec. 2-537(c).

Exhibit A, ACTA FOIA Request.

8. On March 11th, the University responded to ACTA's FOIA request by taking a 10-business day extension, indicating it would respond further on March 25, 2020. **Exhibit B, March Extension Letter.**
9. The University did not respond by March 25th, as initially promised. Instead, the University responded on March 30th. The University estimated that fulfilling the request would take six and a quarter (6.25) hours, at a cost of \$304.84. **Exhibit C, Initial Cost Estimate.** Due to the lateness of the response, the University reduced the total cost of the request by 15%, resulting in a final estimated cost of \$259.12. *Id.* The University stated that it anticipated being able to respond in forty-five (45) business days. *Id.*

10. ACTA paid 50% of the estimated fee as required by MCL 15.234(8). Although that payment was sent in April, the University indicated it received payment on June 18th. **Exhibit D, Fee Receipt Acknowledgment.**
11. ACTA made repeated efforts to contact the University for status updates. Initially, the University indicated it would respond by August 21, 2020. *Id.* Production of documents did not occur. Instead, on October 1, 2020, the University sent correspondence indicating that records would be provided by October 30th. **Exhibit E, October Extension Letter.**
12. On October 29, 2020, ACTA contacted the University for a status update. **Exhibit F, October Follow Up.** In this letter, ACTA pointed out that not only was the outstanding after one hundred and sixty-seven (167) business days, but that this delay was roughly ten (10) times longer than the University typically required to respond to a request. *Id.*
13. On October 30th, the University responded by indicating they were still working on the request, but they anticipated providing a new anticipated completion date within “the next few business days.” **Exhibit G, Additional October Response and Follow Up.**
14. On November 4th, ACTA indicated that, unless records were provided by November 18th, it would be pursuing an appeal on the basis of a constructive denial. *Id.*
15. On November 18th, the University responded by producing a “partial response” to ACTA’s requests. **Exhibit H, Partial Response.** The University further indicated that it anticipated completely responding to the request by December 9th, 2020.
16. A complete response is still outstanding at the time of this complaint. Even assuming the University produces a complete response on December 9th, it will have taken the University 202 business days to respond to a request that was estimated to take less than seven (7) hours to complete.

17. The FOIA does not provide a process by which a public body may amend its original good-faith request for a deposit, nor does it permit a public body to extend the time it estimates will be necessary to fulfill the request. See generally, MCL 15.231 *et seq.* Instead, a public body would be permitted to charge any additional expenses as part of its final billing before releasing records. See generally, MCL 15.234.

18. The University's multiple extension were therefore illegal extensions under the FOIA.

19. 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.

20. MCL 15.234(8) indicates that a public body may respond to a FOIA request with a good faith estimate as to the cost of the FOIA request. 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.

21. 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.

22. The requested materials were financial records for an endowed workshop program, and should have been easily reviewed and provided, even remotely.

23. Had the University devoted as little as two (2) minutes of each business day from March 3rd to December 4th, the ACTA would have received the requested records. The University's continuing failure to do so constitutes an unreasonable delay, and demonstrates that the University is not working diligently to fulfill the Center's request.
24. An unreasonable delay in providing FOIA documents is a denial under MCL 15.235, MCL 15.240(1), and MCL 15.240(7).
25. 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.
26. The FOIA request was clearly identified and should have been provided in a reasonable time. To date, over 5 months later, only highly limited records have been produced. Under MCL 15.234(9), Plaintiff is entitled to the statutory maximum 50% reduction in labor costs.
27. The University's actions regarding this delay in providing the records responsive to ACTA's request 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 ACTA.
28. The University's actions regarding this delay in providing the records responsive to ACTA's request constitute 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.
29. Pursuant to MCL 15.240(6), ACTA, 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, ACTA, 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 the University'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: 12/18, 2020 Michael B. Poliakov
Michael Poliakov, Ph.D.

Subscribed and sworn to by Dr. Michael Poliakov before me on the 18th day of December, 2020
Signature [Signature]
Notary Public, State of DISTRICT OF COLUMBIA
County of WASHINGTON
My Commission Expires 7/31/2024
Acting in the County of WASHINGTON, DC

On this 18 day of DECEMBER, 2020
MICHAEL POLIAKOFF
personally appeared before me and acknowledged the
contents of the foregoing instrument.
[Signature] Notary Public
Commission Expires 7/31/2024

