

State of Michigan
In the Court of Claims

THE MACKINAC CENTER FOR PUBLIC
POLICY, a nonprofit Michigan Corporation

Plaintiff,

v.

Case No. 20-000253-MZ

Hon. Christopher M. Murray

THE UNIVERSITY OF MICHIGAN,

Defendant.

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DATE 10/20/2021
DEFENDANT’S COMBINED (1) MOTION FOR SUMMARY DISPOSITION AND
(2) RESPONSE TO PLAINTIFF’S MOTION FOR SUMMARY DISPOSITION

Oral Argument Requested

The Board of Regents of the University of Michigan (“University” or “Defendant”) through its counsel, Miller, Canfield, Paddock and Stone, PLC, and pursuant to MCR 2.116(C)(10), moves the Court for an Order dismissing Plaintiff’s complaint. In support of this Motion, as more fully explained in the attached Brief, the University states:

1. On December 9, 2020, Plaintiff filed a single-count complaint alleging that the University violated the Michigan Freedom of Information Act (“FOIA”) when it did not produce certain information that is exempt from disclosure.

2. On September 21, 2021, Plaintiff filed a Motion for Summary Disposition. Pursuant to the Court's October 5, 2021 Order, this filing serves as the University's response to Plaintiff's motion, as well as the University's motion.

3. As set forth in the attached Brief, the information Plaintiff seeks is exempt from disclosure pursuant to MCL 15.243(1)(a), (m), (u), (y) and/or (z), and therefore Plaintiff's complaint should be dismissed. Alternatively, there is a genuine issue of material fact, requiring the denial of Plaintiff's motion.

4. On October 8, 2021, the University unsuccessfully sought concurrence in the relief sought, thereby necessitating this Motion.

WHEREFORE, the University requests that the Court grant its motion and dismiss Plaintiff's lawsuit in its entirety, with prejudice.

Respectfully submitted,

MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.

By: 

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**BRIEF IN SUPPORT OF DATE 10/20/2021
DEFENDANT'S COMBINED (1) MOTION FOR SUMMARY DISPOSITION AND
(2) RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY DISPOSITION**

I. Introduction

The Freedom of Information Act (“FOIA”) does not require the production of every document in the possession of a governmental entity. Instead, a document must be produced only if it meets the statute’s definition of a “public record” and is not otherwise exempt from disclosure. Several exemptions exist in FOIA, which signal that the Legislature has made a determination that “the policy of offering the public full and complete information about government operations is overcome by a more significant policy interest favoring nondisclosure.” *Herald Co v E Michigan Univ Bd of Regents*, 475 Mich 463, 472; 719 NW2d 19 (2006).

Here, although the MI Safe Start plan regarding the reopening of Michigan during the COVID-19 pandemic was issued by the State of Michigan and not the University of Michigan (“University”), Jarret Skorup filed a FOIA request with the University seeking information related to the Safe Start Plan. The University responded by providing responsive documents while withholding a limited amount of information. Some information was withheld under the frank communication exemption because it consisted of information that was preliminary and advisory to the final decision made by the State of Michigan to issue the Safe Start Plan. Other information consisted of passwords, meeting links, and working group email addresses and was withheld under security exemptions designed to avoid cybersecurity events. Finally, a very limited amount of personal information of non-public employees was withheld as exempt under the personal privacy exemption. The University later produced additional documents and altogether has only surgically redacted a limited amount of information. As set forth below, because disclosure of the redacted information would not further the purposes of FOIA and is exempt, the Court should grant the University’s motion, deny Plaintiff’s motion and dismiss the complaint, with prejudice.

II. Statement of Facts

On May 13, 2020, Mr. Skorup emailed a FOIA request to the University of Michigan seeking various communications related to the State of Michigan's planning for "re-opening Michigan's society/economy" during the COVID-19 pandemic. (Ex 1, 5/13/20 email). Specially, in this "First FOIA Request," Mr. Skorup requested:

- * 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".
- * 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.

(*Id.*)

On May 27, 2020, Mr. Skorup sent a "Second FOIA Request," seeking "Any emails from May 1 to current with the terms "MI Safe Start Plan" or "MI Safe Start map." (Ex 2, 5/27/20 email). On June 5, 2020, the University responded to Mr. Skorup's request, seeking clarification as to whether he was "asking for emails containing the key terms specified to/from the three physicians identified in [his] earlier request." (Ex 3, 6/5/20 email.) Mr. Skorup responded that his request was limited to those physicians. (*Id.*)

On June 5, 2020, the University emailed Mr. Skorup, estimating that it would cost \$2,124 to respond to the First FOIA Request and requesting a deposit of \$1,062 if he wanted to proceed. (Ex 4, 6/5/20 email (deposit)). Mr. Skorup did not provide a deposit within the 48-day time period provided by statute, MCL 15.234(14). Accordingly, in accordance with the statute, the First FOIA Request was considered abandoned. (Ex 5, 7/28/20 email).

On June 15, 2020, the University emailed Mr. Skorup, estimating that it would cost \$170 to respond to the Second FOIA Request and requesting a deposit of \$85 in order to proceed. (Ex 6, 6/15/20 email). After the Mackinac Center paid the deposit on behalf of Mr. Skorup, on August

20, 2020, the University responded by stating that non-exempt responsive documents had been located, copied, and were prepared to be forwarded after a final payment of \$97.86 was received. (Ex 7, 8/20/20 email).

The Mackinac Center (not Mr. Skorup) later sent a check to the University for the \$97.86 balance. That check, which was sent by an entity that differed from the individual who had made the FOIA request, did not specify FOIA, did not refer to the FOIA request number assigned to the request that was prominently displayed in the University's emails ("FOIA SKO 0538-20"), and did not provide any information indicating that it related to any pending FOIA request. (Ex 8, 10/5/20 email re: payment at p. 2 (copy of check). *See also id.* at p. 1 ("because it did not specify FOIA the payment was accidentally misdirected to another department account")). At the time the payment was received, the University, as all other public and private employers in the State of Michigan, had the majority of its workers performing their duties remotely.

On October 5, 2020, after Mr. Skorup provided detail regarding the payment submitted by Plaintiff, the University confirmed that Plaintiff had submitted a check for the balance due and provided Mr. Skorup with access to nonexempt, responsive records in response to the May 27, 2020 FOIA request. (*Id.*; Ex 9, 10/5/20 email re: production). The University redacted and withheld limited information pursuant to several discrete exemptions:

First, a cell phone number was redacted pursuant to FOIA §13(1)(a), MCL 15.243(1)(a), which allows the University to refrain from disclosing information that would constitute an unwarranted invasion of an individual's privacy.¹ (Ex 9, 10/5/20 email re: production).

Second, "virtual meeting links and passwords, as well as some working group email

¹ Plaintiff does not challenge the redaction of the cell phone number, only challenging the limited redaction of email addresses. (*See* Pl's Br at 15).

addresses,” were redacted pursuant to FOIA §13(1)(u), MCL 15.243(1)(u) 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.” This information was also redacted pursuant to FOIA §13(1)(y), MCL 15.243(1)(y), which exempts “records or information of measures designed to protect the security or safety of persons or property.” (*Id.*)

Third, some email messages “containing preliminary and advisory material, including draft documents,” were withheld pursuant to FOIA §13(1)(m), MCL 243.13(1)(m), which allows the University to redact certain communications and notes of an advisory nature where the public interest in encouraging frank communication between public employees outweighs the public interest in disclosure. (*Id.*)

On October 9, 2020, Mr. Skorup submitted an appeal of the FOIA denial, and on November 5, 2020, the University granted in part and denied in part the appeal. (Ex 10, 11/5/20 letter). Although the University decided that the application of the frank communication privilege in §13(1)(m) was properly applied “and continued application of that exemption is appropriate, the University ... exercised its discretion” to provide additional emails and draft documents that fell within the scope of the request, while only redacting “limited portions of advisory communications.” (*Id.*)

The University denied the appeal as it related to working group email addresses under §13(1)(a), §13(1)(u), and §13(1)(y), explaining that “[w]orking 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 workspaces.” (*Id.*) The University

also redacted email addresses of members of the working group, which included mostly private business owners (not public employees) pursuant to §13(1)(a). (*Id.*; Ex 11, Redactions of Email Addresses).² In all, the University identified 379 pages of material responsive to the FOIA request. It produced those records, including 224 pages on appeal. Among the University’s 224-page voluntarily production in response to the appeal, only 19 pages contained partial redactions.

III. Argument

A. Standard of Review

A motion pursuant to MCR 2.116(C)(10) tests the factual support for a claim. *Radtko v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993). Summary disposition under this rule is appropriate when “[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law.” MCR 2.116(C)(10). In reviewing a motion under MCR 2.116(C)(10), a court views the admissible evidence in light most favorable to the nonmoving party. *Coblentz v City of Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006). “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.” *Id.* at 568 (citation omitted).

B. Governing Principles of Statutory Construction

When construing a statute, the goal is to discover and “give effect to the Legislature’s intent.” *Bisio v City of Village of Clarkston*, 506 Mich 37, 44; 954 NW2d 85 (2020). “[T]he most reliable evidence” of legislative intent is “the language of the statute itself.” *Whitman v City of Burton*, 493 Mich 303, 311-12; 831 NW2d 223 (2013). Therefore, “[i]f the language of a statute

² Some of the redacted email addresses were for non-University, governmental employees. While it is unclear if Plaintiff is seeking these email addresses in this case, the University is willing to exercise its discretion and unredact those email addresses where the University has determined that those addresses are already publicly visible on the internet.

is clear and unambiguous, the statute must be enforced as written and no further judicial construction is permitted.” *Id.* To determine whether language is clear and unambiguous, “the contested provision must be read in relation to the statute as a whole and work in mutual agreement.” *United States Fidelity Insurance & Guaranty Co v Mich Catastrophic Claims Association*, 484 Mich 1, 13; 795 NW2d 101 (2009) (citation omitted). “Effect should be given to every phrase, clause, and word in the statute and, whenever possible, no word should be treated as *surplusage* or rendered nugatory.” *Whitman*, 493 Mich at 311-12. “Individual words and phrases . . . should be read in the context of the entire legislative scheme.” *Michigan Properties, LLC v Meridian Township*, 491 Mich 518, 528; 817 NW2d 548 (2012); *see also* ANTONIN SCALIA AND BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 140 (Thomson/West 2012) (discussing the “Grammar Canon,” which provides, “Words are to be given the meaning that proper grammar and usage would assign them”). “[A] court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself.” *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002).

C. The Additional Information Sought By Plaintiff Is Exempt From Disclosure

FOIA provides for the disclosure of “public records” that are in the possession of a “public body.” MCL 15.233. “However, by expressly codifying exemptions to the FOIA, the Legislature shielded some ‘affairs of government’ from public view.” *Herald Co*, 475 Mich at 472. Accordingly, if a public body establishes that an exemption applies, then the records need not be produced. This is because the “exemptions signal particular instances where the policy of offering the public full and complete information about government operations is overcome by a more significant policy interest favoring nondisclosure.” *Id.* As recognized by the Supreme Court, with

these exemptions “the Legislature has made a policy determination that full disclosure of certain public records could prove harmful to the proper functioning of the public body.” *Id.* Thus, courts “should remain cognizant of the special consideration that the Legislature has accorded an exemptible class of records.” *Id.* at 473 (quotation omitted). As shown below, each category of redacted information is exempt from disclosure.

1. The University Properly Redacted Email Addresses Under The Personal-Privacy Exemption

MCL 15.243(1)(a) exempts from FOIA disclosure “[i]nformation of a personal nature if public disclosure of the information would constitute a clearly unwarranted invasion of an individual’s privacy.” This personal-privacy exemption “has two prongs that the information sought to be withheld from disclosure must satisfy. First, the information must be ‘of a personal nature.’ Second, it must be the case that the public disclosure of that information ‘would constitute a clearly unwarranted invasion of an individual's privacy....’” *Mich Fed of Teachers v Univ of Michigan*, 481 Mich 657, 675; 753 NW2d 28 (2008). The redaction of personal email addresses of non-governmental employees satisfies both prongs.³

In *Michigan Federation of Teachers*, the Supreme Court adopted an expansive understanding of the phrase “information of a personal nature.” The Court concluded that “‘intimate’ and ‘embarrassing’ do not exhaust the intended scope of that statutory phrase.” 481 Mich at 675. Instead, the phrase covers “intimate, embarrassing, private, *or* confidential information.” *Id.* (emphasis in original). “Thus, private or confidential information relating to a person, in addition to embarrassing or intimate details, is ‘information of a personal nature.’” *Id.*

Applying that standard, the Supreme Court concluded that *public employees’* home addresses and telephone numbers constituted “information of a personal nature.” *Id.* at 676. The

³ As discussed in note 1, *supra*, Plaintiff does not challenge the redaction of a cell phone number.

court emphasized that this “information offers private and even confidential details about that person’s life.” *Id.* The court acknowledged that this information “might be listed in the telephone book or available on an Internet website, but [the employee] might nevertheless understandably refuse to disclose this information, when asked, to a stranger, a co-worker, or even an acquaintance.” *Id.* at 680. It explained that “[t]he disclosure of information of a personal nature into the public sphere in certain instances does not automatically remove the protection of the privacy exemption and subject the information to disclosure in every other circumstance.” *Id.* Finally, the court held that “the fact that in this case certain university employees actively asserted control over their identifying information by withholding their home addresses and telephone numbers from publication in the university faculty and staff directory undoubtedly lends credence to that conclusion.” *Id.* “Particularly in this case, then, the argument that this information is not ‘of a personal nature’ reaches its nadir.” *Id.*

Under this legal standard, personal email addresses of private individuals, including business owners who participated in workgroup discussions constitutes “information of a personal nature,” particularly because one might “understandably refuse to disclose this information, when asked, to a stranger, a co-worker, or even an acquaintance.” *Id.* at 680. This is particularly so here, where public disclosure of those email addresses in the charged atmosphere related to COVID-19 restrictions will likely subject those private individuals to harassing communications regarding their role in the Safe Start plan.

To decide whether the second prong of the personal-privacy exception is satisfied, the Court applies the “‘core purpose test.’” *Id.* at 672. Under that test, a court must consider “the extent to which disclosure would serve the core purpose of the FOIA, which is contributing significantly to public understanding of the operations or activities of the government.” *Id.* at 673.

Applying that test, in *Mager v Department of State Police*, 460 Mich 134; 595 NW2d 142 (1999), the Court concluded that gun ownership information was exempt under the second prong because it was “entirely unrelated to any inquiry regarding the inner working of government, or how well the Department of State Police is fulfilling its statutory functions.” *Id.* at 146. *Michigan Federation of Teachers* reached the same result, concluding that “[d]isclosure of employees’ home addresses and telephone numbers would not shed light on whether the University of Michigan and its officials are satisfactorily fulfilling their statutory and constitutional obligations and their duties to the public.” 481 Mich at 681.

The same reasoning applies here. Disclosing personal email addresses of business owners who are not public employees would not reveal information about “the inner workings of government.” *Mager*, 460 Mich at 146. Nor would it “shed light on whether the University of Michigan and its officials are satisfactorily fulfilling their statutory and constitutional obligations and their duties to the public.” *Michigan Federation of Teachers*, 481 Mich at 681. As a result, courts have upheld the application of the privacy exemption to physical addresses of private citizens. *Detroit Free Press v Dep’t of Consumer & Indus Servs*, 246 Mich App 311, 320; 631 NW2d 769 (2001); *Stone St Cap v Bureau of State Lottery*, 263 Mich App 683, 693; 689 NW2d 541 (2004) (“as defendant points out, this Court has repeatedly followed the *Mager* Court in protecting the personal information of private individuals from disclosure”).

FOIA’s purpose, as stated by the Legislature, is to ensure the disclosure of “complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees,” so that people may “fully participate in the democratic process.” MCL 15.231(2). The Supreme Court has likewise stated that FOIA was enacted in response to “abuses in the operation of government.” *Swickard v Wayne Co Medical Examiner*,

438 Mich 536, 543; 475 NW2d 304 (1991). The Legislature’s objective was to “enhance[] the public’s understanding of the operations or activities of the government,” and FOIA serves this objective “[b]y requiring the public disclosure of information regarding the affairs of government and the official acts of public officials and employees.” *Bradley*, 455 Mich at 291. While a public employee’s email address might be subject to disclosure, an email address of a private citizen is not. Such private email addresses shed no light on the “affairs” of the University or the “official acts” of its employees.

2. The University Properly Redacted Preliminary and Advisory Communications Related to Draft Documents Because They Are Exempt from Disclosure

The “frank communication” or “deliberative process” privilege exempts from disclosure documents that are preliminary to a final determination. It states:

Communications and notes within a public body or between public bodies of *an advisory nature to the extent that they cover other than purely factual materials and are preliminary to a final agency determination* of policy or action. This exemption does not apply unless the public body shows that in the particular instance the public interest in encouraging frank communication between officials and employees of public bodies clearly outweighs the public interest in disclosure.

MCL 15.243(1)(m) (emphasis added). A document is a “frank communication” and covered by the exemption if it “(1) is a communication or note of an advisory nature made within a public body or between public bodies, (2) covers other than purely factual material, and (3) is preliminary to a final agency determination of policy or action.” *Herold*, 475 Mich at 475. If a document is a “frank communication,” the court then applies a balancing test to determine whether the public interest in encouraging frank communication clearly outweighs the public interest in disclosure. *Id.* at 474.

Interpreting this statutory language, the Supreme Court explained that it “is important to consider carefully other words and phrases in the statutory text.” *Id.* Courts must consider the

competing interests (public disclosure v. encouraging frank communications) “in the particular instance.” *Id.* Additionally, it is important to remember that “the Legislature decided that the public has an interest in *encouraging* frank communication so that public officials' *ongoing* and *future* willingness to communicate frankly in the course of reaching a final agency determination is an essential component in the balancing test.” *Id.* (emphasis in original). Accordingly, when applying the balancing test set forth in the statute, the court “must remember that there is a valid public interest that officials and employees of a public body aspire to communicate candidly when the public body considers an issue that is ‘preliminary to a final agency determination of policy or action.’” *Id.* at 474-75.

Here, the redacted portions of documents produced to Plaintiff are email exchanges that were part of the deliberative process related to the State of Michigan’s final implementation of its Safe Start plan. Initially, Plaintiff effectively waived any argument regarding the first two factors, stating “[i]t appears the first two conditions have been met.” (Pl’s Br at 10). But this concession aside, the documents are “advisory” because they contain the basis for the recommendation that eventually led to the issuance of the final Safe Start plan by the State of Michigan. *McCartney v Att’y Gen*, 231 Mich App 722, 733; 587 NW2d 824 (1998) (internal memoranda containing recommendations, opinions and strategies regarding gaming compacts are exempt); *Barbier v Basso*, 2000 WL 33521028 (Mich Ct App March 31, 2000) (memo exempt as frank communication where it was used to justify decision not to pursue formal complaints against real estate licensees) (Ex 15).⁴ The documents cover “other than purely factual material” because they

⁴ *Abteu v US Dept of Homeland Sec*, 808 F3d 895, 899 (DC Cir 2015) (“a recommendation to a supervisor on a matter pending before the supervisor is a classic example of a deliberative document”); *Providence Journal Co v US Dept of Army*, 981 F2d 552, 560 (1st Cir 1992) (“the appropriate judicial inquiry is whether the agency document was prepared to facilitate and inform a final decision or deliberative function entrusted to the agency”). Michigan courts “look to federal courts for guidance in deciphering the various sections and attendant judicial interpretations, since

include discussion about various courses of action. *Klunzinger v IRS*, 27 F Supp 2d 1015, 1026 (WD Mich 1998) (memoranda regarding possible courses of action to take during three-year period are exempt from disclosure by analogous federal FOIA exemption). Moreover, the redacted pages are “preliminary” because they contain recommendations for a final decision to be made by another public entity, the State of Michigan.⁵ “Predecisional memoranda prepared in order to assist an agency decisionmaker in arriving at his or her decision are exempt from disclosure. So are drafts, recommendations, or point papers written to formulate future agency policies.” *Id.* (citations omitted); *Favors v Dept of Corr*, 192 Mich App 131, 135; 480 NW2d 604 (1991) (“the goldenrod-colored copy is advisory in nature and ‘preliminary to a final agency determination of policy or action’ because it covers only the committee’s recommendation concerning an award of disciplinary credits to an inmate”); *Am Civil Liberties Union v United States Dept of Justice*, 844 F3d 126, 133 (CA 2 2016) (document containing suggested talking points concerning legal basis for drone strikes is pre-decisional); *Abtew v US Dept of Homeland Sec*, 808 F3d 895, 899 (DC Cir 2015) (immigration-related “Assessment to Refer” was pre-decisional because “it was merely a recommendation to a supervisor. The supervisor, not the official writing the Assessment, made the final decision. The Assessment was also deliberative; it was written as part of the process by which the supervisor came to the final decision. The Assessment itself had no ‘operational effect’”) (internal citations omitted). In other words, Plaintiff wants to know the reasoning behind the final decision by the State. By its very nature, however, such information is pre-decisional and

the federal FOIA, 5 USC §552, is so similar to the Michigan FOIA.” *Hoffman v Bay City Sch Dist*, 137 Mich App 333, 337; 357 NW2d 686 (1984).

⁵ As Plaintiff notes, the University’s discovery responses stated that “upon information and belief, the final action, determination, or policy related to COVID-19 policies related to the MI Safe Start Plan.” (Pl’s Br at 10 (quoting discovery responses)). This statement was made “upon information and belief” because the University was not the final decision maker. Instead, final decisions regarding the MI Safe Start Plan were made by the State of Michigan. At trial, an appropriate representative of the State would testify to that effect.

protected from disclosure. *See also Schell v US Dept of Health & Human Services*, 843 F2d 933, 939 (6th Cir 1988) (noting that “primary purpose” of the deliberative process privilege under the federal FOIA is “to protect against confusing the issues and misleading the public by dissemination of documents suggesting reasons and rationales for a course of action which were not in fact the ultimate reasons for the agency's action”).

As applicable to this “particular instance,” MCL 15.2431(1)(m), disclosure would not be in the public interest. Frank communications are necessary so that different participants from different private and governmental entities could provide their opinions and fully analyze the steps necessary to ensure a safe and effective relaxation of COVID-19 restrictions and reopening of Michigan. The public has an interest in ensuring that final policy decisions are fully vetted. *Herald Co v Ann Arbor Public Schools*, 224 Mich App 266, 274; 568 NW2d 411 (1997) (concluding that defendant “need[s] more than cold and dry data to do its job, it need[s] the unvarnished candid opinion of insiders to make policy judgments.”). Requiring disclosure of these documents would dissuade informed, frank communications by individuals involved in navigating a once-in-a-generation pandemic. It would inhibit an accurate assessment of the strategic pros and cons of policy decisions. *Favors*, 192 Mich at 135 (release of information would “discourage frank appraisals” and “inhibit an accurate assessment of an inmate’s merit or lack thereof”); *Renegotiation Bd v Grumman Aircraft Engg Corp*, 421 US 168, 186 (1975) (reports that included recommendations for final disposition of dispute are exempt from disclosure under federal FOIA).

Plaintiff’s arguments that these frank communications fall outside the exemption are misplaced. Initially, the fact that the information “has not been made public in any other source” does not, as Plaintiff misleadingly implies, require disclosure. Initially, Plaintiff’s factual premise here is wrong. In *Herald Co*, public interest favored nondisclosure because there was a final report

published. Here too, the complete, published Safe Start plan demonstrates that the information is exempt. *Herald Co.*, 475 Mich at 467-77 (publication of voluminous report “specifically address[es] the balance of interests favoring nondisclosure”). To the extent Plaintiff argues that the precise information that was redacted was not made public and therefore should be made public via FOIA, this bootstrap argument—which is not part of the holding in *Herald*, as Plaintiff suggests—is not a valid reason for disregarding an exemption that applies where, as here, there is a pre-decisional document that was relied upon by a public body to make a final decision. Asserting that one needs a frank communication to be disclosed because it has not been disclosed is circular.⁶ *Herald Co.*, 475 Mich at 481 (rejecting attempt to “transform the weighted balancing test ... into an irrebuttable presumption of disclosure”).

3. The University Properly Redacted Meeting Links And Passwords, And Working Group Email Addresses Under The Safety And Security Exemptions

FOIA contains several exemptions which reflect the Legislature’s intent that disclosure may be limited for safety and security reasons. This includes, §13(1)(u), which exempts from disclosure security passwords and codes:

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.

MCL 15.243(1)(u) (emphasis added).

Separately, §13(1)(y) exempts from disclosure records related to measures designed to protect the safety and security of persons and property, providing a non-exclusive list of exempt information:

⁶ Even if this was a relevant factor—it is not—Plaintiff has not established that the documents have “not been made public.” Plaintiff does not provide any information about its attempts to FOIA one or more divisions of the State of Michigan, such as the Department of Licensing and Regulatory Affairs or the Department of Health and Human Services.

Records or information of measures designed to protect the security or safety of persons or property, or the confidentiality, integrity, or availability of information systems, whether public or private, ***including, but not limited to***, building, public works, and public water supply designs to the extent that those designs relate to the ongoing security measures of a public body, capabilities and plans for responding to a violation of the Michigan anti-terrorism act, chapter LXXXIII-A of the Michigan penal code, 1931 PA 328, MCL 750.543a to 750.543z, emergency response plans, risk planning documents, threat assessments, domestic preparedness strategies, and ***cybersecurity plans***, assessments, or vulnerabilities, unless disclosure would not impair a public body's ability to protect the security or safety of persons or property or unless the public interest in disclosure outweighs the public interest in nondisclosure in the particular instance.

MCL 15.243(1)(y) (emphasis added).

And finally, §13(1)(z) exempts from disclosure:

Information that would identify or provide a means of identifying a person that may, as a result of disclosure of the information, become a victim of a cybersecurity incident or that would disclose a person's ***cybersecurity plans or cybersecurity-related practices***, procedures, methods, results, organizational information system infrastructure, hardware, or software.

MCL 15.243(1)(z) (emphasis added).⁷ There are no reported appellate decisions analyzing these provisions.⁸

Each of these provisions individually and collectively exempt from disclosure the virtual meeting links, passwords, and working group email addresses.⁹ Initially, common sense dictates that passwords, particularly passwords that allow an individual to access virtual meeting links, should be kept secure and not disseminated. Indeed, after a rash of “Zoom Bombing” events at the outset of the pandemic—when unauthorized and uninvited persons joined virtual meetings—

⁷ The University relied on the safety and security exemptions in partially denying Mr. Skorup's FOIA request. Although the University did not cite §13(1)(z), MCL 15.243(1)(z), “a public body may assert for the first time in the circuit court defenses not originally raised at the administrative level.” *Bitterman v Vill of Oakley*, 309 Mich App 53, 61; 868 NW2d 642 (2015) (citations omitted).

⁸ Although *Woodman v. Dep't of Corrections*, 2021 WL 2619705 (Mich Ct App 2021), cited §1(u), it did not analyze its applicability, focusing solely on the issue of attorney fees and damages.

⁹ With a working group email address, whenever an email is sent to that address, the email is sent to every individual in the group.

security advice from the FBI and professionals widely (if not uniformly) recommended that virtual meetings be password protected and virtual meeting links not shared with others. (*See, e.g.*, Ex 12, FBI Warns of Teleconference and Online Classroom Hijacking During COVID-19 Pandemic; Ex 13, Virtual Conferencing Platform Tips).

But beyond this commonsense approach to virtual meeting security, the security exemptions specifically prevent disclosure of information to avoid a “cybersecurity incident,” which is defined under FOIA to include “unauthorized access to programs.” MCL 15.232(b). Section 13(1)(z) authorizes public bodies to redact information that “may, as a result of disclosure of the information” lead to someone becoming “a victim of a cybersecurity incident.” MCL 15.243(1)(z). Since “Zoom Bombing” is indisputably a “cybersecurity incident,” and disclosing meeting links, passwords, and working group email addresses to a third-party would permit that third-party to access the meeting without consent, the information is exempt under the plain meaning of the statute.

The security concerns are not merely hypothetical, as Plaintiff assumes. Instead, events in Michigan around the time of the University’s response to Plaintiff’s FOIA request demonstrate that tensions around COVID-19 restrictions had reached a fever-pitch. For example, on October 6, 2020, six individuals were charged with conspiring to kidnap Governor Whitmer. (Ex 14, FBI Press Release, *available at* https://www.justice.gov/usao-wdmi/pr/2020_1008_Fox). While the University is not alleging that Plaintiff intends to use the redacted information to commit a similar crime, that incident demonstrates that security threats against people involved in discussing COVID-19 restrictions are real.

The University is not, as Plaintiff suggests, required to show that it received a “specific threat” before it is permitted to redact passwords and meeting links as exempt. None of the listed

exemptions include the existence of a specific threat as a prerequisite and requiring the University to identify such a threat here would improperly add words to the statute, in violation of well-established rules of statutory interpretation. *Roberts*, 466 Mich at 63; *Comerica v Dep't of Treasury*, 332 Mich App 155, 166; 955 NW2d 593 (2020) (“In other words, we must not judicially legislate by adding into a statute provisions that the Legislature did not include.”). Moreover, such a requirement would undermine the very purpose of the exemptions since it would require the public body to demonstrate the existence of an event that nondisclosure is designed to prevent. For example, accepting Plaintiff’s theory would require a public body to turn over all of the passwords to all of its employees’ email counts unless it could affirmatively provide evidence that someone intended to use those passwords for some nefarious means. The exemptions, however, do not require a public body to prove that a crime is imminent before it can rely on the exemptions. Regardless, as noted above, §13(1)(z) applies so long as the disclosure of the information “may” lead to a “cybersecurity incident.”

Next, Plaintiff’s assertion that the information redacted from production – meeting links, passwords, and working group addresses – do not fall within the scope of the exemptions under the canon of *ejusdem generis* is misplaced because §13(1)(u) applies to “passwords, keys, and security procedures,” MCL 15.243(1)(u), and §13(1)(y) applies to “cybersecurity plans, assessments, or vulnerabilities,” MCL 15.243(1)(y). While “meeting links” are not specifically listed, it cannot seriously be disputed that virtual meeting links provide the “key” to enter a secure virtual meeting and that the non-public disclosure of such links is a ubiquitous security measure. Likewise, working group email addresses provide a gateway for a third-party to access the working group, including by sending unwarranted messages and content to that address.

Finally, the public's interest in disclosure of the limited amount of redacted information is minimal, if not nonexistent. The contents of the emails containing the links have not been redacted and revealing password and meeting information would not "shed light" on the University's functions. *Michigan Federation of Teachers*, 481 Mich at 681. It also arguably goes beyond the scope of Plaintiff's FOIA request, which admittedly sought only "communications related to advice given to and from a public body related to COVID-19 policy making." (Pl's Br 15). With the exception of a limited amount of information redacted under the frank communication privilege, the University produced those communications. Thus, the University produced all responsive, non-exempt information.

IV. Conclusion

For the foregoing reasons, the University requests that the Court grant the University's Motion, deny Plaintiff's Motion, and dismiss the complaint, in its entirety, with prejudice. In the alternative, the University believes that an *in camera* inspection of the limited redactions would be appropriate.

Respectfully submitted,

MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.

By: 

Brian M. Schwartz (P69018)
Attorneys for Defendant
150 West Jefferson, Suite 2500
Detroit, MI 48226
(313) 963-6420
schwartzb@millercanfield.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 20, 2021 he electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to:

Derk A. Wilcox (P66177)
Stephen A. Delie (P80209)
Patrick J. Wright (P54052)
Mackinac Center for Public Policy
Attorneys for Plaintiff
140 W. Main Street
Midland, MI 48640

Respectfully submitted,

MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.

By:  _____

Brian M. Schwartz (P69018)
Attorneys for Defendant
150 West Jefferson, Suite 2500
Detroit, MI 48226
(313) 963-6420
schwartzb@millercanfield.com

Document received by the MI Court of Claims.

**INDEX OF EXHIBITS TO
DATE 10/20/2021
DEFENDANT’S COMBINED (1) MOTION FOR SUMMARY DISPOSITION AND
(2) RESPONSE TO PLAINTIFF’S MOTION FOR SUMMARY DISPOSITION**

Exhibit	Description
1.	5/13/20 email
2.	5/27/20 email
3.	6/5/20 email
4.	6/5/20 email (deposit)
5.	7/28/20 email
6.	6/15/20 email
7.	8/20/20 email
8.	10/5/20 email re: payment
9.	10/5/20 email re: production
10.	11/5/20 letter
11.	Redactions of Email Addresses
12.	FBI Warns of Teleconference and Online Classroom Hijacking During COVID-19 Pandemic
13.	Virtual Conferencing Platform Tips
14.	FBI Press Release, available at https://www.justice.gov/usao-wdmi/pr/2020_1008_Fox .
15.	<i>Barbier v Basso</i> , 2000 WL 33521028 (Mich Ct App March 31, 2000)
16.	<i>Woodman v. Dep’t of Corrections</i> , 2021 WL 2619705 (Mich Ct App 2021)

FOIA - COVID plans emails

1 message

Skorup, Jarrett <Skorup@mackinac.org>
To: "foia-email@umich.edu" <foia-email@umich.edu>

Wed, May 13, 2020 at 2:20 PM

FOIA: University of Michigan

May 13, 2020

FOIA REQUEST FOR COVID EMAILS

To Whom It May Concern:

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".
- * 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.

Please send the materials requested to the attention of Jarrett Skorup at the following address, fax number, or via e-mail at skorup@mackinac.org<mailto:skorup@mackinac.org>.

Mackinac Center for Public Policy
P.O. Box 568
Midland, MI 48640
Fax: 989-631-0964
Phone: 989-631-0900

Jarrett Skorup
Director of Marketing and Communications
Mackinac Center for Public Policy
www.mackinac.org<<https://gcc01.safelinks.protection.outlook.com/?url=http%3A%2F%2Fwww.mackinac.org%2F&data=02%7C01%7CDTMB-ORS-FOIA-Requests%40michigan.gov%7C0eba5a736a93401e30db08d7af29bcd9%7Cd5fb7087377742ad966a892ef47225d1%7C0%7C0%7C637170466117008562&sdata=Gg6N0qmiULbAFzG2Oe7IPVkB%2Ft0DO0EDf9Qt6oX4UMs%3D&reserved=0>>
989-631-0900

Second FOIA for COVID Emails

1 message

Skorup, Jarrett <Skorup@mackinac.org>
To: Carolyn Umbricht <caumbric@umich.edu>
Cc: "foia-email@umich.edu" <foia-email@umich.edu>

Wed, May 27, 2020 at 9:03 AM

FOIA: University of Michigan

May 27, 2020

FOIA REQUEST FOR COVID EMAILS II

To Whom It May Concern:

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.

* Any emails from May 1 to current with terms "MI Safe Start Plan" or "MI Safe Start map."

Please send the materials requested to the attention of Jarrett Skorup at the following address, fax number, or via e-mail at skorup@mackinac.org<mailto:skorup@mackinac.org>.

Mackinac Center for Public Policy
P.O. Box 568
Midland, MI 48640
Fax: 989-631-0964
Phone: 989-631-0900

Jarrett Skorup
Director of Marketing and Communications
Mackinac Center for Public Policy

From: Carolyn Umbricht <caumbric@umich.edu>
Sent: Thursday, May 21, 2020 2:08 PM
To: Skorup, Jarrett
Cc: foia-email@umich.edu
Subject: FOIA SKO 0505-20

Mr. Skorup,

I am writing in regard to your Freedom of Information Act request dated May 13, 2020, which was received on May 14, 2020.

Due to the large number of requests currently being processed by this office, it will not be possible to respond to your request within the five-day period accorded by the Michigan Freedom of Information Act. However, under Section 5 (2) (d) of the Act, the University is permitted to extend the deadline for not more than 10 business days beyond the initial due date.

The University will respond to your request on or before June 5, 2020.

Thank you,

Carolyn

Document received by the MI Court of Claims.

Carolyn Umbricht
Freedom of Information Act Office | University of Michigan

2025 Fleming Administration Building
503 Thompson Street
Ann Arbor, MI 48109-1340

(fax) 734.763.1399 | caumbric@umich.edu<mailto:caumbric@umich.edu>

On May 13, 2020, at 2:20 PM, Skorup, Jarrett <Skorup@mackinac.org<mailto:Skorup@mackinac.org>> wrote:

FOIA: University of Michigan

May 13, 2020

FOIA REQUEST FOR COVID EMAILS

To Whom It May Concern:

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Mackinac Center for Public Policy
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Midland, MI 48640
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Jarrett Skorup
Director of Marketing and Communications
Mackinac Center for Public Policy
www.mackinac.org<<http://www.mackinac.org>><<https://gcc01.safelinks.protection.outlook.com/?url=http%3A%2F%2Fwww.mackinac.org%2F&data=02%7C01%7CDTMB-ORS-FOIA-Requests%40michigan.gov%7C0eba5a736a93401e30db08d7af29bcd9%7Cd5fb7087377742ad966a892ef47225d1%7C0%7C0%7C637170466117008562&sdata=Gg6N0qmiULbAFzG2Oe7IPVkB%2Ft0DO0EDf9Qt6oX4UMs%3D&reserved=0>>
989-631-0900

Re: Second FOIA for COVID Emails

1 message

Skorup, Jarrett <Skorup@mackinac.org>
To: Patricia Sellinger <patsell@umich.edu>

Fri, Jun 5, 2020 at 10:45 AM

Correct. Those terms from those people.

On Jun 5, 2020 10:39 AM, Patricia Sellinger <patsell@umich.edu> wrote:
Good morning, Mr, Skorup. In your FOIA request below, are you asking for emails containing the key terms specified to/from the three physicians identified in your earlier request? We are unclear whose emails you are seeking.

Thank you,

Pat

Patricia J. Sellinger
Chief Freedom of Information Officer
University of Michigan
2019 Fleming Administration Building
Ann Arbor, Michigan 48109-1340
Phone 734-763-5082
Fax 734-763-1399
patsell@umich.edu<mailto:patsell@umich.edu>

On Wed, May 27, 2020 at 9:03 AM Skorup, Jarrett <Skorup@mackinac.org<mailto:Skorup@mackinac.org>> wrote:
FOIA: University of Michigan

May 27, 2020

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Mackinac Center for Public Policy
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Midland, MI 48640
Fax: 989-631-0964
Phone: 989-631-0900

Jarrett Skorup
Director of Marketing and Communications
Mackinac Center for Public Policy

From: Carolyn Umbricht <caumbric@umich.edu<mailto:caumbric@umich.edu>>
Sent: Thursday, May 21, 2020 2:08 PM
To: Skorup, Jarrett

Document received by the MI Court of Claims.

Cc: foia-email@umich.edu<<mailto:foia-email@umich.edu>>
Subject: FOIA SKO 0505-20

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Thank you,

Carolyn

Carolyn Umbricht
Freedom of Information Act Office | University of Michigan

2025 Fleming Administration Building
503 Thompson Street
Ann Arbor, MI 48109-1340

(fax) 734.763.1399 | caumbric@umich.edu<<mailto:caumbric@umich.edu>><<mailto:caumbric@umich.edu>>>

On May 13, 2020, at 2:20 PM, Skorup, Jarrett <Skorup@mackinac.org<<mailto:Skorup@mackinac.org>><<mailto:Skorup@mackinac.org>>>> wrote:

FOIA: University of Michigan

May 13, 2020

FOIA REQUEST FOR COVID EMAILS

To Whom It May Concern:

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)<<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.

Please send the materials requested to the attention of Jarrett Skorup at the following address, fax number, or via e-mail at skorup@mackinac.org<<mailto:skorup@mackinac.org>><<mailto:skorup@mackinac.org>><<mailto:skorup@mackinac.org>>>>.

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Jarrett Skorup
Director of Marketing and Communications
Mackinac Center for Public Policy

www.mackinac.org<<http://www.mackinac.org>><<http://www.mackinac.org>><<https://gcc01.safelinks.protection.outlook.com/?url=http%3A%2F%2Fwww.mackinac.org%2F&data=02%7C01%7CDTMB-ORS-FOIA-Requests%40michigan.gov%7C0eba5a736a93401e30db08d7af29bcd9%7Cd5fb7087377742ad966a892ef47225d1%7C0%7C0%7C637170466117008562&sdata=Gg6N0qmiULbAFzG2Oe7IPVkB%2Ft0DO0EDf9Qt6oX4UMs%3D&reserved=0>>
989-631-0900

FOIA SKO 0505-20

1 message

Patricia Sellinger <patzell@umich.edu>
To: "Skorup, Jarrett" <Skorup@mackinac.org>
Cc: "foia-email@umich.edu" <foia-email@umich.edu>

Fri, Jun 5, 2020 at 1:45 PM

Dear Mr. Skorup:

I am writing in response to your Freedom of Information Act request below dated May 13, 2020, which was received on May 14, 2020.

You requested:

- 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".
- 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.

Due to the amount of time estimated to search for, examine, copy, and review to separate exempt from nonexempt records within the scope of your request, production of responsive nonexempt records will result in unreasonably high costs for the University, therefore we will need to require a fee deposit as described below.

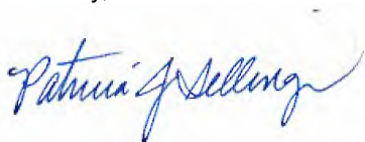
It is estimated that the cost to respond to your request is \$2,124, as detailed in the attached FOIA fee estimate itemization form. Pursuant to Section 4 (8) of the Michigan Freedom of Information Act, "the public body may require a good-faith deposit from the person requesting information before providing the public records to the requester if the entire fee estimate or charge authorized under this section exceeds \$50.00, based on a good-faith calculation of the total fee... [T]he deposit shall not exceed ½ of the total estimated fee."

If you would like us to proceed with the search for, examination, duplication, review, and deletion and separation of exempt from nonexempt material, please send a check or money order for \$1,062 made payable to the University of Michigan, to Margaret Gonzales, 2050 Fleming Administration Bldg., 503 Thompson, Ann Arbor, Michigan 48109-1340. Note that we are able to collect as a deposit only ½ of the estimated fee as requested above. If you send a deposit for a greater amount it will be returned to you with a request for a replacement check in the amount of \$1,062.

We estimate that we will complete the response to your request within 60 business days from the date of receipt of your deposit. This time frame estimate is provided pursuant to Section 4 (8) of the Act, and is a nonbinding good faith estimate. After we have completed the response, we will notify you of the balance due, and will provide the nonexempt records upon receipt of the balance.

Pursuant to Section 4 (14) of the Michigan Freedom of Information Act, if we do not receive your deposit within 45 days from receipt of this notice, your request shall be considered abandoned and the University is no longer required to fulfill the request. Notice of a deposit requirement is considered received 3 days after it is sent. Therefore, your deposit must be received by the University within 48 days of today's date, by July 23, 2020.

Sincerely,



Patricia J. Sellinger
Chief Freedom of Information Officer
University of Michigan
2019 Fleming Administration Building
Ann Arbor, Michigan 48109-1340
Phone 734-763-5082
Fax 734-763-1399
patzell@umich.edu

Document received by the MI Court of Claims.

FOIA FEE ESTIMATE ITEMIZATION FORM (SKO 0505-20)

Category of Costs/Description

4 (1) (a) Searching for, locating and examining responsive records

--Charged at hourly wage of lowest-paid employee capable of searching for, locating and examining the public record, regardless of whether that person is available or who performs the labor.

--Estimated and charged in increments of 15 minutes or more, with all partial time increments rounded down.

Time/amount estimated under this section:

Hourly Wage – various from \$38.46

Benefits % Multiplier Used* - various from 32%

Hourly Wage with Benefits - \$50.00**

Estimated Time (Hours) – 21.25

Amount - **\$1,062.50**

4 (1) (b) Review directly associated with the separating and deleting of exempt from nonexempt information

--Charged at hourly wage of lowest-paid employee capable of separating and deleting exempt from nonexempt information, regardless of whether that person is available or who actually performs the labor.

--Labor costs under this subdivision estimated and charged in increments of 15 minutes or more, with all partial time increments rounded down.

--Shall not charge for labor under this section if Public Body knows or has reason to know that it previously redacted the public record in question, and the public record is still in the Public Body's possession.

Time/amount estimated under this section:

1. Hourly Wage – \$54.10

Benefits % Multiplier Used* - 28%

Hourly Wage with Benefits - \$50.00**

Estimated Time (Hours) - 9

Amount – **\$450.00**

2. Hourly Wage - \$23.46

Benefits % Multiplier Used* - 41%

Hourly Wage with Benefits - \$33.07

Estimated Time (Hours) – 18.5

Amount - **\$611.79**

4 (1) (c) Nonpaper physical media costs:

--Actual and most reasonably economical cost of computer discs, computer tapes, or other digital or similar media.

--Requestor may stipulate that records be provided on nonpaper physical media, electronically mailed, or otherwise electronically provided in lieu of paper copies.

-- Does not apply if Public Body lacks the technological capability necessary to provide records on the particular nonpaper physical media stipulated.

Time/amount estimated under this section: None

4 (1) (d) Cost of paper copies (not including labor)

--Calculated as total cost per sheet of paper, itemized to show cost per sheet and number of sheets provided.

--Shall not exceed 10 cents per sheet of paper for copies of public records made on 8-1/2 by 11-inch paper or 8-1/2 by 14 inch paper.

--Shall utilize most economical means available, including double-sided printing, if cost saving and available.

Time/amount estimated under this section: None

4 (1) (e) Duplication or publication (Labor)

--Includes making paper copies, making digital copies, or transferring digital public records to be given to requestor on nonpaper media or electronically.

--Charged at hourly wage of lowest-paid employee capable of necessary duplication or publication, regardless of whether that person is available or who performs the labor.

--Estimated and charged in time increments of the Public Body's choosing, with all partial time increments rounded down.

Time/amount estimated under this section: None

4 (1) (f) Cost of mailing

--Actual cost of mailing, for sending records in a reasonably economical and justifiable manner.

--Shall not charge more for expedited shipping or insurance unless stipulated by requestor, may charge for least expensive form of postal delivery confirmation.

Time/amount estimated under this section: None

ESTIMATE TOTAL: \$2,124.29

50% Deposit Required: \$1,062.00

**The Public Body may add up to 50% to the applicable labor charge amount to cover or partially cover the cost of fringe benefits if it clearly notes the percentage multiplier used. The Public Body shall not charge more than the actual cost of fringe benefits, and overtime wages shall not be used in calculating the cost of fringe benefits. Overtime wages shall not be included in the calculation of labor costs unless overtime is specifically stipulated by the requestor and clearly noted in this detailed itemization.*

***The University of Michigan caps labor charges at \$50 per hour.*

On Wed, May 13, 2020 at 2:20 PM Skorup, Jarrett <Skorup@mackinac.org> wrote:

FOIA: University of Michigan

May 13, 2020

FOIA REQUEST FOR COVID EMAILS

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Mackinac Center for Public Policy
P.O. Box 568
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Fax: 989-631-0964
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Jarrett Skorup
Director of Marketing and Communications
Mackinac Center for Public Policy
www.mackinac.org<<https://gcc01.safelinks.protection.outlook.com/?url=http%3A%2F%2Fwww.mackinac.org%2F&data=02%7C01%7CDTMB-ORS-FOIA-Requests%40michigan.gov%7C0eba5a736a93401e30db08d7af29bcd9%7Cd5fb7087377742ad966a892ef47225d1%7C0%7C0%7C637170466117008562&sdata=Gg6N0qmIULbAFzG2Oe7IPVkB%2Ft0DO0EDf9Qt6oX4UMs%3D&reserved=0>>
989-631-0900

RE: FOIA SKO 0505-20

1 message

Skorup, Jarrett <Skorup@mackinac.org>
To: Patricia Sellinger <patsell@umich.edu>
Cc: "foia-email@umich.edu" <foia-email@umich.edu>

Tue, Jul 28, 2020 at 10:04 AM

Thanks you! For some reason, I did not save that in my records correctly.

From: Patricia Sellinger <patsell@umich.edu>
Sent: Tuesday, July 28, 2020 9:14 AM
To: Skorup, Jarrett <Skorup@mackinac.org>
Cc: foia-email@umich.edu
Subject: Re: FOIA SKO 0505-20

Dear Mr. Skorup:

As you know, on June 5, 2020, we sent you the cost estimate and fee deposit request attached to your message below. We did not receive the deposit within the 48-day time period required by the Michigan Freedom of Information Act as described in our email of June 5 (i.e., by July 23, 2020); therefore, we considered the request abandoned and closed our file on July 24, 2020.

However, we understand that delays may be occurring due to COVID-19 and remote work issues. If you wish to re-file your FOIA request, please let me know. We will open a new file and accept your deposit (should you wish to send it) under the new file number.

Thank you,

Patricia J. Sellinger
Chief Freedom of Information Officer
University of Michigan
2019 Fleming Administration Building
Ann Arbor, Michigan 48109-1340
Phone 734-763-5082
Fax 734-763-1399
patsell@umich.edu

Document received by the MI Court of Claims.

On Mon, Jul 27, 2020 at 8:25 AM Skorup, Jarrett <Skorup@mackinac.org> wrote:

Patricia, can you tell me where this request is at?

From: Patricia Sellinger <patzell@umich.edu>
Sent: Friday, June 5, 2020 1:45 PM
To: Skorup, Jarrett <Skorup@mackinac.org>
Cc: foia-email@umich.edu
Subject: FOIA SKO 0505-20

Dear Mr. Skorup:

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- 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.

Due to the amount of time estimated to search for, examine, copy, and review to separate exempt from nonexempt records within the scope of your request, production of responsive nonexempt records will result in unreasonably high costs for the University, therefore we will need to require a fee deposit as described below.

It is estimated that the cost to respond to your request is \$2,124, as detailed in the attached FOIA fee estimate itemization form. Pursuant to Section 4 (8) of the Michigan Freedom of Information Act, "the public body may require a good-faith deposit from the person requesting information before providing the public records to the requester if the entire fee estimate or charge authorized under this section exceeds \$50.00, based on a good-faith calculation of the total fee... [T]he deposit shall not exceed ½ of the total estimated fee."

If you would like us to proceed with the search for, examination, duplication, review, and deletion and separation of exempt from nonexempt material, please send a check or money order for \$1,062 made payable to the University of Michigan, to Margaret Gonzales, 2050 Fleming Administration Bldg., 503 Thompson, Ann Arbor, Michigan 48109-1340. Note that we are able to collect as a deposit only ½ of the estimated fee as requested above. If you send a deposit for a greater amount it will be returned to you with a request for a replacement check in the amount of \$1,062.

We estimate that we will complete the response to your request within 60 business days from the date of receipt of your deposit. This time frame estimate is provided pursuant to Section 4 (8) of the Act, and is a nonbinding good faith estimate. After we have completed the response, we will notify you of the balance due, and will provide the nonexempt records upon receipt of the balance.

Pursuant to Section 4 (14) of the Michigan Freedom of Information Act, if we do not receive your deposit within 45 days from receipt of this notice, your request shall be considered abandoned and the University is no longer required to fulfill the request. Notice of a deposit requirement is considered received 3 days after it is sent. Therefore, your deposit must be received by the University within 48 days of today's date, by July 23, 2020.

Document received by the MI Court of Claims.

Sincerely,



Patricia J. Sellinger
Chief Freedom of Information Officer
University of Michigan
2019 Fleming Administration Building
Ann Arbor, Michigan 48109-1340
Phone 734-763-5082
Fax 734-763-1399
patsell@umich.edu

FOIA FEE ESTIMATE ITEMIZATION FORM (SKO 0505-20)

Category of Costs/Description

4 (1) (a) Searching for, locating and examining responsive records

--Charged at hourly wage of lowest-paid employee capable of searching for, locating and examining the public record, regardless of whether that person is available or who performs the labor.

--Estimated and charged in increments of 15 minutes or more, with all partial time increments rounded down.

Time/amount estimated under this section:

Hourly Wage – various from \$38.46

Benefits % Multiplier Used* - various from 32%

Hourly Wage with Benefits - \$50.00**

Estimated Time (Hours) – 21.25

Amount - **\$1,062.50**

4 (1) (b) Review directly associated with the separating and deleting of exempt from nonexempt information

--Charged at hourly wage of lowest-paid employee capable of separating and deleting exempt from nonexempt information, regardless of whether that person is available or who actually performs the labor.

--Labor costs under this subdivision estimated and charged in increments of 15 minutes or more, with all partial time increments rounded down.

--Shall not charge for labor under this section if Public Body knows or has reason to know that it previously redacted the public record in question, and the public record is still in the Public Body's possession.

Time/amount estimated under this section:

1. Hourly Wage – \$54.10

Benefits % Multiplier Used* - 28%

Hourly Wage with Benefits - \$50.00**

Estimated Time (Hours) - 9

Amount – **\$450.00**

2. Hourly Wage - \$23.46

Benefits % Multiplier Used* - 41%

Hourly Wage with Benefits - \$33.07

Estimated Time (Hours) – 18.5

Amount - **\$611.79**

4 (1) (c) Nonpaper physical media costs:

- Actual and most reasonably economical cost of computer discs, computer tapes, or other digital or similar media.
- Requestor may stipulate that records be provided on nonpaper physical media, electronically mailed, or otherwise electronically provided in lieu of paper copies.
- Does not apply if Public Body lacks the technological capability necessary to provide records on the particular nonpaper physical media stipulated.

Time/amount estimated under this section: None

4 (1) (d) Cost of paper copies (not including labor)

- Calculated as total cost per sheet of paper, itemized to show cost per sheet and number of sheets provided.
- Shall not exceed 10 cents per sheet of paper for copies of public records made on 8-1/2 by 11-inch paper or 8-1/2 by 14 inch paper.
- Shall utilize most economical means available, including double-sided printing, if cost saving and available.

Time/amount estimated under this section: None

4 (1) (e) Duplication or publication (Labor)

- Includes making paper copies, making digital copies, or transferring digital public records to be given to requestor on nonpaper media or electronically.
- Charged at hourly wage of lowest-paid employee capable of necessary duplication or publication, regardless of whether that person is available or who performs the labor.
- Estimated and charged in time increments of the Public Body's choosing, with all partial time increments rounded down.

Time/amount estimated under this section: None

4(1)(f) Cost of mailing

--Actual cost of mailing, for sending records in a reasonably economical and justifiable manner.

--Shall not charge more for expedited shipping or insurance unless stipulated by requestor, may charge for least expensive form of postal delivery confirmation.

Time/amount estimated under this section: None

ESTIMATE TOTAL: \$2,124.29

50% Deposit Required: \$1,062.00

**The Public Body may add up to 50% to the applicable labor charge amount to cover or partially cover the cost of fringe benefits if it clearly notes the percentage multiplier used. The Public Body shall not charge more than the actual cost of fringe benefits, and overtime wages shall not be used in calculating the cost of fringe benefits. Overtime wages shall not be included in the calculation of labor costs unless overtime is specifically stipulated by the requestor and clearly noted in this detailed itemization.*

***The University of Michigan caps labor charges at \$50 per hour.*

On Wed, May 13, 2020 at 2:20 PM Skorup, Jarrett <Skorup@mackinac.org> wrote:

FOIA: University of Michigan

May 13, 2020

FOIA REQUEST FOR COVID EMAILS

To Whom It May Concern:

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".
- * 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.

Please send the materials requested to the attention of Jarrett Skorup at the following address, fax number, or via e-mail at skorup@mackinac.org<<mailto:skorup@mackinac.org>>.

Mackinac Center for Public Policy
P.O. Box 568
Midland, MI 48640
Fax: 989-631-0964
Phone: 989-631-0900

Jarrett Skorup
Director of Marketing and Communications
Mackinac Center for Public Policy
www.mackinac.org<<https://gcc01.safelinks.protection.outlook.com/?url=http%3A%2F%2Fwww.mackinac.org%2F&data=02%7C01%7CDTMB-ORS-FOIA-Requests%40michigan.gov%7C0eba5a736a93401e30db08d7af29bcd9%7Cd5fb7087377742ad966a892ef47225d1%7C0%7C0%7C637170466117008562&sdata=Gg6N0qmiULbAFzG2Oe7IPVkB%2Ft0DO0EDf9Qt6oX4UMs%3D&reserved=0>>
989-631-0900

FOIA SKO 0538-20

1 message

Patricia Sellinger <patzell@umich.edu>
To: "Skorup, Jarrett" <Skorup@mackinac.org>
Cc: Freedom of Information Act Office <foia-email@umich.edu>

Mon, Jun 15, 2020 at 3:23 PM

Dear Mr. Skorup:

I am writing in response to your Freedom of Information Act request below dated May 27, 2020, which was received on May 28, 2020, and which you clarified in your email dated June 5, 2020.

You requested:

- Any emails from May 1 to current with terms "MI Safe Start Plan" or "MI Safe Start map."

In your clarification of June 5, 2020, you indicated that you are seeking records containing the terms specified from Marisa Eisenberg, Vikas Parekh and Emily Martin.

Due to the amount of time estimated to search for, examine, copy, and review to separate exempt from nonexempt records within the scope of your request, production of responsive nonexempt records will result in unreasonably high costs for the University, therefore we will need to require a fee deposit as described below.

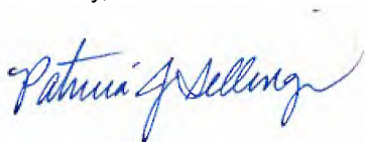
It is estimated that the cost to respond to your request is \$170, as detailed in the attached FOIA fee estimate itemization form. Pursuant to Section 4 (8) of the Michigan Freedom of Information Act, "the public body may require a good-faith deposit from the person requesting information before providing the public records to the requester if the entire fee estimate or charge authorized under this section exceeds \$50.00, based on a good-faith calculation of the total fee... [T]he deposit shall not exceed ½ of the total estimated fee."

If you would like us to proceed with the search for, examination, duplication, review, and deletion and separation of exempt from nonexempt material, please send a check or money order for \$85 made payable to the University of Michigan, to Margaret Gonzales, 2050 Fleming Administration Bldg., 503 Thompson, Ann Arbor, Michigan 48109-1340. Note that we are able to collect as a deposit only ½ of the estimated fee as requested above. If you send a deposit for a greater amount it will be returned to you with a request for a replacement check in the amount of \$85.

We estimate that we will complete the response to your request within 35 business days from the date of receipt of your deposit. This time frame estimate is provided pursuant to Section 4 (8) of the Act, and is a nonbinding good faith estimate. After we have completed the response, we will notify you of the balance due, and will provide the nonexempt records upon receipt of the balance.

Pursuant to Section 4 (14) of the Michigan Freedom of Information Act, if we do not receive your deposit within 45 days from receipt of this notice, your request shall be considered abandoned and the University is no longer required to fulfill the request. Notice of a deposit requirement is considered received 3 days after it is sent. Therefore, your deposit must be received by the University within 48 days of today's date, by August 3, 2020.

Sincerely,



Patricia J. Sellinger
Chief Freedom of Information Officer
University of Michigan
2019 Fleming Administration Building
Ann Arbor, Michigan 48109-1340
Phone 734-763-5082
Fax 734-763-1399
patzell@umich.edu

Document received by the MI Court of Claims.

FOIA FEE ESTIMATE ITEMIZATION FORM (SKO 0538-20)

Category of Costs/Description

4 (1) (a) Searching for, locating and examining responsive records

--Charged at hourly wage of lowest-paid employee capable of searching for, locating and examining the public record, regardless of whether that person is available or who performs the labor.

--Estimated and charged in increments of 15 minutes or more, with all partial time increments rounded down.

Time/amount estimated under this section:

1. Hourly Wage – various from \$38.46
Benefits % Multiplier Used* - various from 32%
Hourly Wage with Benefits - \$50.00**
Estimated Time (Hours) – .75
Amount - **\$37.50**

2. Hourly Wage - \$23.46
Benefits % Multiplier Used* - 41%
Hourly Wage with Benefits - \$33.07
Estimated Time (Hours) – .25
Amount - **\$8.26**

4 (1) (b) Review directly associated with the separating and deleting of exempt from nonexempt information

--Charged at hourly wage of lowest-paid employee capable of separating and deleting exempt from nonexempt information, regardless of whether that person is available or who actually performs the labor.

--Labor costs under this subdivision estimated and charged in increments of 15 minutes or more, with all partial time increments rounded down.

--Shall not charge for labor under this section if Public Body knows or has reason to know that it previously redacted the public record in question, and the public record is still in the Public Body's possession.

Time/amount estimated under this section:

1. Hourly Wage – \$54.10
Benefits % Multiplier Used* - 28%
Hourly Wage with Benefits - \$50.00**
Estimated Time (Hours) - 2
Amount – **\$100.00**

2. Hourly Wage - \$23.46
Benefits % Multiplier Used* - 41%
Hourly Wage with Benefits - \$33.07
Estimated Time (Hours) – .75
Amount - **\$24.80**

4 (1) (c) Nonpaper physical media costs:

--Actual and most reasonably economical cost of computer discs, computer tapes, or other digital or similar media.

--Requestor may stipulate that records be provided on nonpaper physical media, electronically mailed, or otherwise electronically provided in lieu of paper copies.

-- Does not apply if Public Body lacks the technological capability necessary to provide records on the particular nonpaper physical media stipulated.

Time/amount estimated under this section: None

4 (1) (d) Cost of paper copies (not including labor)

--Calculated as total cost per sheet of paper, itemized to show cost per sheet and number of sheets provided.

--Shall not exceed 10 cents per sheet of paper for copies of public records made on 8-1/2 by 11-inch paper or 8-1/2 by 14-inch paper.

--Shall utilize most economical means available, including double-sided printing, if cost saving and available.

Time/amount estimated under this section: None

4 (1) (e) Duplication or publication (Labor)

--Includes making paper copies, making digital copies, or transferring digital public records to be given to requestor on nonpaper media or electronically.

--Charged at hourly wage of lowest-paid employee capable of necessary duplication or publication, regardless of whether that person is available or who performs the labor.

--Estimated and charged in time increments of the Public Body's choosing, with all partial time increments rounded down.
Time/amount estimated under this section: None

4 (1) (f) Cost of mailing

--Actual cost of mailing, for sending records in a reasonably economical and justifiable manner.
--Shall not charge more for expedited shipping or insurance unless stipulated by requestor, may charge for least expensive form of postal delivery confirmation.
Time/amount estimated under this section: None

ESTIMATE TOTAL: \$170.56
50% Deposit Required: \$85.00

**The Public Body may add up to 50% to the applicable labor charge amount to cover or partially cover the cost of fringe benefits if it clearly notes the percentage multiplier used. The Public Body shall not charge more than the actual cost of fringe benefits, and overtime wages shall not be used in calculating the cost of fringe benefits. Overtime wages shall not be included in the calculation of labor costs unless overtime is specifically stipulated by the requestor and clearly noted in this detailed itemization.*

***The University of Michigan caps labor charges at \$50 per hour.*

On Fri, Jun 5, 2020 at 10:45 AM Skorup, Jarrett <Skorup@mackinac.org> wrote:

Correct. Those terms from those people.

On Jun 5, 2020 10:39 AM, Patricia Sellinger <patzell@umich.edu> wrote:

Good morning, Mr, Skorup. In your FOIA request below, are you asking for emails containing the key terms specified to/from the three physicians identified in your earlier request? We are unclear whose emails you are seeking.

Thank you,

Pat

Patricia J. Sellinger
Chief Freedom of Information Officer
University of Michigan
2019 Fleming Administration Building
Ann Arbor, Michigan 48109-1340
Phone 734-763-5082
Fax 734-763-1399
patzell@umich.edu<<mailto:patzell@umich.edu>>

On Wed, May 27, 2020 at 9:03 AM Skorup, Jarrett <Skorup@mackinac.org<<mailto:Skorup@mackinac.org>>> wrote:
FOIA: University of Michigan

May 27, 2020

FOIA REQUEST FOR COVID EMAILS II

To Whom It May Concern:

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.

* Any emails from May 1 to current with terms "MI Safe Start Plan" or "MI Safe Start map."

Please send the materials requested to the attention of Jarrett Skorup at the following address, fax number, or via e-mail at skorup@mackinac.org<<mailto:skorup@mackinac.org>><<mailto:skorup@mackinac.org><<mailto:skorup@mackinac.org>>>.

Mackinac Center for Public Policy
P.O. Box 568
Midland, MI 48640
Fax: 989-631-0964
Phone: 989-631-0900

Jarrett Skorup
Director of Marketing and Communications
Mackinac Center for Public Policy

FOIA SKO 0538-20

1 message

Patricia Sellinger <patzell@umich.edu>
To: "Skorup, Jarrett" <Skorup@mackinac.org>
Cc: Freedom of Information Act Office <foia-email@umich.edu>

Thu, Aug 20, 2020 at 4:56 PM

Dear Mr. Skorup:

I am writing in further response to your Freedom of Information Act request SKO 0538-20.

You requested:

- Any emails from May 1 to current with terms "MI Safe Start Plan" or "MI Safe Start map."

In your clarification dated June 5, 2020, you indicated that you are seeking records containing the terms specified from Marisa Eisenberg, Vikas Parekh and Emily Martin.

Nonexempt documents responsive to your request have been located, copied and prepared to be forwarded to you. The cost to provide the documents is outlined in the attached final costs itemization form. Please prepare a check or money order payable to the University of Michigan in the amount of \$97.86 and forward it to Margaret Gonzales, 2050 Fleming Administration Bldg., 503 Thompson, Ann Arbor, Michigan 48109-1340. The responsive nonexempt materials will be provided to you after payment has been received.

Sincerely,



Patricia J. Sellinger
Chief Freedom of Information Officer
University of Michigan
2019 Fleming Administration Building
Ann Arbor, Michigan 48109-1340
Phone 734-763-5082
Fax 734-763-1399
patzell@umich.edu

FOIA FINAL COSTS ITEMIZATION FORM (Skorup 0538-20)

Category of Costs/Description

4 (1) (a) Searching for, locating and examining responsive records

--Charged at hourly wage of lowest-paid employee capable of searching for, locating and examining the public record, regardless of whether that person is available or who performs the labor.

--Estimated and charged in increments of 15 minutes or more, with all partial time increments rounded down.

Time/amount estimated under this section:

1. Hourly Wage - various from \$38.46
Benefits % Multiplier Used* - various from 32%
Hourly Wage with Benefits - \$50.00**
Estimated Time (Hours) - 1.5
Amount - **\$75.00**

2. Hourly Wage - \$23.46
Benefits % Multiplier Used* - 41%
Hourly Wage with Benefits - \$33.07
Estimated Time (Hours) - 1.25
Amount - **\$41.33**

4 (1) (b) Review directly associated with the separating and deleting of exempt from nonexempt information

--Charged at hourly wage of lowest-paid employee capable of separating and deleting exempt from nonexempt information, regardless of whether that person is available or who actually performs the labor.

--Labor costs under this subdivision estimated and charged in increments of 15 minutes or more, with all partial time increments rounded down.

--Shall not charge for labor under this section if Public Body knows or has reason to know that it previously redacted the public record in question, and the public record is still in the Public Body's possession.

Time/amount estimated under this section:

1. Hourly Wage - \$54.10
Benefits % Multiplier Used* - 28%
Hourly Wage with Benefits - \$50.00**
Estimated Time (Hours) - 1
Amount - **\$50.00**

2. Hourly Wage - \$23.46
Benefits % Multiplier Used* - 41%
Hourly Wage with Benefits - \$33.07
Estimated Time (Hours) - 0.5
Amount - **\$16.53**

4 (1) (c) Nonpaper physical media costs:

--Actual and most reasonably economical cost of computer discs, computer tapes, or other digital or similar media.

--Requestor may stipulate that records be provided on nonpaper physical media, electronically mailed, or otherwise electronically provided in lieu of paper copies.

-- Does not apply if Public Body lacks the technological capability necessary to provide records on the particular nonpaper physical media stipulated.

Time/amount estimated under this section: None

4 (1) (d) Cost of paper copies (not including labor)

--Calculated as total cost per sheet of paper, itemized to show cost per sheet and number of sheets provided.

--Shall not exceed 10 cents per sheet of paper for copies of public records made on 8-1/2 by 11-inch paper or 8-1/2 by 14 inch paper.

--Shall utilize most economical means available, including double-sided printing, if cost saving and available.

Time/amount estimated under this section: None

4 (1) (e) Duplication or publication (Labor)

--Includes making paper copies, making digital copies, or transferring digital public records to be given to requestor on nonpaper media or electronically.

--Charged at hourly wage of lowest-paid employee capable of necessary duplication or publication, regardless of whether that person is available or who performs the labor.

--Estimated and charged in time increments of the Public Body's choosing, with all partial time increments rounded down.

Time/amount estimated under this section: None

4 (1) (f) Cost of mailing

--Actual cost of mailing, for sending records in a reasonably economical and justifiable manner.

--Shall not charge more for expedited shipping or insurance unless stipulated by requestor, may charge for least expensive form of postal delivery confirmation.

Time/amount estimated under this section: None

TOTAL FINAL COSTS: \$182.86

LESS DEPOSIT RECEIVED: -\$85.00

BALANCE DUE: \$97.86

**The Public Body may add up to 50% to the applicable labor charge amount to cover or partially cover the cost of fringe benefits if it clearly notes the percentage multiplier used. The Public Body shall not charge more than the actual cost of fringe benefits, and overtime wages shall not be used in calculating the cost of fringe benefits. Overtime wages shall not be included in the calculation of labor costs unless overtime is specifically stipulated by the requestor and clearly noted in this detailed itemization.*

***The University of Michigan caps labor charges at \$50 per hour.*

Re: FOIA SKO 0538-20

1 message

Patricia Sellinger <patzell@umich.edu>
To: "Skorup, Jarrett" <Skorup@mackinac.org>
Cc: Freedom of Information Act Office <foia-email@umich.edu>

Mon, Oct 5, 2020 at 2:47 PM

I looked into this further and found out that the check was received, but because it did not specify FOIA the payment was accidentally misdirected to another departmental account. It has now been credited to your FOIA request. We will send you the response this afternoon.

Thank you,

Pat

Patricia J. Sellinger
Chief Freedom of Information Officer
University of Michigan
2019 Fleming Administration Building
Ann Arbor, Michigan 48109-1340
Phone 734-763-5082
Fax 734-763-1399
patzell@umich.edu

On Mon, Oct 5, 2020 at 9:41 AM Patricia Sellinger <patzell@umich.edu> wrote:
Thank you for sending us this, I will check again on this payment.

Pat

Patricia J. Sellinger
Chief Freedom of Information Officer
University of Michigan
2019 Fleming Administration Building
Ann Arbor, Michigan 48109-1340
Phone 734-763-5082
Fax 734-763-1399
patzell@umich.edu

On Mon, Oct 5, 2020 at 9:30 AM Skorup, Jarrett <Skorup@mackinac.org> wrote:

Our records show this was mailed on August 25 and cashed on September 8.



From: Patricia Sellinger <patsell@umich.edu>
Sent: Monday, October 5, 2020 8:56 AM
To: Skorup, Jarrett <Skorup@mackinac.org>
Cc: Freedom of Information Act Office <foia-email@umich.edu>
Subject: Re: FOIA SKO 0538-20

Hi Mr. Skorup. We had not been notified of your payment, so I just double-checked with the staff member who handles receipt of payments. I was advised that the University has not yet received your payment in the amount of \$97.86.

Thank you,

Pat

Patricia J. Sellinger
Chief Freedom of Information Officer
University of Michigan
2019 Fleming Administration Building
Ann Arbor, Michigan 48109-1340
Phone 734-763-5082
Fax 734-763-1399
patsell@umich.edu

On Sun, Oct 4, 2020 at 9:43 PM Skorup, Jarrett <Skorup@mackinac.org> wrote:

Patricia, I'm following up on this request. We are 5 weeks from me sending the check...

Jarrett Skorup

Mackinac Center

From: Patricia Sellinger <patsell@umich.edu>
Sent: Thursday, August 20, 2020 4:56:35 PM
To: Skorup, Jarrett
Cc: Freedom of Information Act Office
Subject: FOIA SKO 0538-20

Dear Mr. Skorup:

I am writing in further response to your Freedom of Information Act request SKO 0538-20.

You requested:

* Any emails from May 1 to current with terms "MI Safe Start Plan" or "MI Safe Start map."
In your clarification dated June 5, 2020, you indicated that you are seeking records containing the terms specified from Marisa Eisenberg, Vikas Parekh and Emily Martin.

Nonexempt documents responsive to your request have been located, copied and prepared to be forwarded to you. The cost to provide the documents is outlined in the attached final costs itemization form. Please prepare a check or money order payable to the University of Michigan in the amount of \$97.86 and forward it to Margaret Gonzales, 2050 Fleming Administration Bldg., 503 Thompson, Ann Arbor, Michigan 48109-1340. The responsive nonexempt materials will be provided to you after payment has been received.

Sincerely,
[Patricia Sellinger signature.png]
Patricia J. Sellinger
Chief Freedom of Information Officer
University of Michigan
2019 Fleming Administration Building
Ann Arbor, Michigan 48109-1340
Phone 734-763-5082
Fax 734-763-1399
patsell@umich.edu<<mailto:patsell@umich.edu>>

FOIA FINAL COSTS ITEMIZATION FORM (Skorup 0538-20)

Category of Costs/Description

4 (1) (a) Searching for, locating and examining responsive records

--Charged at hourly wage of lowest-paid employee capable of searching for, locating and examining the public record, regardless of whether that person is available or who performs the labor.

--Estimated and charged in increments of 15 minutes or more, with all partial time increments rounded down.

Time/amount estimated under this section:

1. Hourly Wage - various from \$38.46
Benefits % Multiplier Used* - various from 32%
Hourly Wage with Benefits - \$50.00**
Estimated Time (Hours) - 1.5
Amount - \$75.00

2. Hourly Wage - \$23.46
Benefits % Multiplier Used* - 41%
Hourly Wage with Benefits - \$33.07
Estimated Time (Hours) - 1.25
Amount - \$41.33

4 (1) (b) Review directly associated with the separating and deleting of exempt from nonexempt information

--Charged at hourly wage of lowest-paid employee capable of separating and deleting exempt from nonexempt information, regardless of whether that person is available or who actually performs the labor.

--Labor costs under this subdivision estimated and charged in increments of 15 minutes or more, with all partial

Document received by the MI Court of Claims.

time increments rounded down.

--Shall not charge for labor under this section if Public Body knows or has reason to know that it previously redacted the public record in question, and the public record is still in the Public Body's possession.

Time/amount estimated under this section:

1. Hourly Wage - \$54.10

Benefits % Multiplier Used* - 28%

Hourly Wage with Benefits - \$50.00**

Estimated Time (Hours) - 1

Amount - \$50.00

2. Hourly Wage - \$23.46

Benefits % Multiplier Used* - 41%

Hourly Wage with Benefits - \$33.07

Estimated Time (Hours) - 0.5

Amount - \$16.53

4 (1) (c) Nonpaper physical media costs:

--Actual and most reasonably economical cost of computer discs, computer tapes, or other digital or similar media.

--Requestor may stipulate that records be provided on nonpaper physical media, electronically mailed, or otherwise electronically provided in lieu of paper copies.

-- Does not apply if Public Body lacks the technological capability necessary to provide records on the particular nonpaper physical media stipulated.

Time/amount estimated under this section: None

4 (1) (d) Cost of paper copies (not including labor)

--Calculated as total cost per sheet of paper, itemized to show cost per sheet and number of sheets provided.

--Shall not exceed 10 cents per sheet of paper for copies of public records made on 8-1/2 by 11-inch paper or 8-1/2 by 14 inch paper.

--Shall utilize most economical means available, including double-sided printing, if cost saving and available.

Time/amount estimated under this section: None

4 (1) (e) Duplication or publication (Labor)

--Includes making paper copies, making digital copies, or transferring digital public records to be given to requestor on nonpaper media or electronically.

--Charged at hourly wage of lowest-paid employee capable of necessary duplication or publication, regardless of whether that person is available or who performs the labor.

--Estimated and charged in time increments of the Public Body's choosing, with all partial time increments rounded down.

Time/amount estimated under this section: None

4 (1) (f) Cost of mailing

--Actual cost of mailing, for sending records in a reasonably economical and justifiable manner.

--Shall not charge more for expedited shipping or insurance unless stipulated by requestor, may charge for least expensive form of postal delivery confirmation.

Time/amount estimated under this section: None

TOTAL FINAL COSTS: \$182.86

LESS DEPOSIT RECEIVED: -\$85.00

BALANCE DUE: \$97.86

*The Public Body may add up to 50% to the applicable labor charge amount to cover or partially cover the cost of fringe benefits if it clearly notes the percentage multiplier used. The Public Body shall not charge more than the actual cost of fringe benefits, and overtime wages shall not be used in calculating the cost of fringe benefits. Overtime wages shall not be included in the calculation of labor costs unless overtime is specifically stipulated by the requestor and clearly noted in this detailed itemization.

**The University of Michigan caps labor charges at \$50 per hour.

FOIA SKO 0538-20

1 message

Patricia Sellinger <patzell@umich.edu>
To: "Skorup, Jarrett" <Skorup@mackinac.org>
Cc: Freedom of Information Act Office <foia-email@umich.edu>

Mon, Oct 5, 2020 at 4:51 PM

Dear Mr. Skorup:

I am writing in further response to your Freedom of Information Act request SKO 0538-20.

Confirming our email messages earlier today, you inquired about your payment for the balance due and I advised you that this office had not been notified that payment was received. After you forwarded a copy of the check, I looked into the issue further and determined that the check was received, but because it did not specify FOIA the payment was accidentally misdirected to another departmental account. It has now been credited to your FOIA request.

You requested:

- Any emails from May 1 to current with terms "MI Safe Start Plan" or "MI Safe Start map."

In your clarification dated June 5, 2020, you indicated that you are seeking records containing the terms specified from Marisa Eisenberg, Vikas Parekh and Emily Martin.

Enclosed find nonexempt responsive records. A cell phone number was removed from the records pursuant to Section 13 (1) (a) of the Michigan Freedom of Information Act, which allows the University to refrain from disclosing information that would constitute an unwarranted invasion of an individual's privacy. 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..." Some email messages containing preliminary and advisory material, including draft documents, were withheld from disclosure pursuant to Section 13 (1) (m) of the Act, which allows the University to refrain from disclosing certain communications and notes of an advisory nature. We believe that in this particular instance, public interest in encouraging frank communication between University employees outweighs the public interest in disclosure. To provide a further description of the exempted records would reveal the contents of the exempt information and defeat the purpose of the exemption and thus, pursuant to Section 14 (2) of the Act, no further description is required. Therefore, your request is granted in part.

Please note that within 180 days from the date of this letter, you have the right to appeal the denial of information to the President of the University or seek judicial review in the Michigan court of claims to try to compel disclosure. If you elect to appeal and the President upholds the denial, you may still seek judicial review within the 180-day period.

An appeal to the President must be submitted in writing to: President's Office, c/o Liz Barry, The University of Michigan, 2080 Fleming Administration Building, 503 Thompson Street, Ann Arbor, MI 48109-1340 (or by email to: presoff@umich.edu). The statement must (1) identify the request and the final determination by the FOIA officer that is being appealed, (2) specifically state the word "appeal," and (3) identify the reason or reasons why the final determination should be reversed.

If you seek judicial review in the Michigan court of claims and prevail, you will be awarded reasonable attorney's fees, costs and disbursements incurred in maintaining the action. If you prevail in part, you may still be awarded complete or partial reimbursement for those expenses. In addition to actual and compensatory damages, you will be awarded punitive damages in the amount of \$1,000.00 if the court finds that the University was arbitrary and capricious in its denial.

A copy of Section 10 of the Michigan FOIA is available for your reference and review online at <http://foia.vpcomm.umich.edu/foia-right-to-appeal/>.

Sincerely,



Patricia J. Sellinger
Chief Freedom of Information Officer
University of Michigan
2019 Fleming Administration Building
Ann Arbor, Michigan 48109-1340
Phone 734-763-5082
Fax 734-763-1399
patzell@umich.edu

 [SKO 0538-20 records_Redacted.pdf](#)

M | OFFICE OF THE PRESIDENT
UNIVERSITY OF MICHIGAN

2074 FLEMING ADMINISTRATION BUILDING
503 THOMPSON STREET
ANN ARBOR, MICHIGAN 48109-1340
T: 734 764-6270 F: 734 936-3529

November 5, 2020

Jarrett Skorup
140 West Main Street
Midland, MI 48640
skorup@mackinac.org

RE: Appeal of FOIA, University File SKO 0538-20

Dear Mr. Skorup:

I am writing in response to your letter dated Friday, October 9, 2020 which was received in the President's Office on Friday, October 9, 2020 appealing the response dated Monday, October 5, 2020 from Ms. Patricia Sellinger, Chief Freedom of Information Officer, to the Freedom of Information Act (FOIA) inquiry referenced above. My original response to your appeal, dated Thursday, October 22, 2020 "extend[ed] for not more than 10 business days the period during which the head of the public body shall respond," pursuant to Section 10 (2) (d) of the Michigan Freedom of Information Act.

Your appeal has been carefully considered and is granted, in part. While the University of Michigan maintains that materials previously withheld pursuant to Section 13 (1) (m) of the Michigan Freedom of Information Act are of a preliminary and advisory nature and continued application of that exemption is appropriate, the University has exercised its discretion under the Act to provide emails that fall within the scope of your request, as well as various draft documents that were attachments to those emails. A small amount of material, consisting of limited portions of advisory communications, will continue to be withheld from the emails. Enclosed you will find the nonexempt responsive records.

Your appeal as it pertains to the email addresses of working groups is denied. The material has been withheld pursuant to Section 13 (1) (a) of the Michigan Freedom of Information Act, which allows the university to refrain from disclosing information that would constitute an unwarranted invasion of an individual's privacy; 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..." 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 workspaces. Additionally, email addresses of those members of working group participants on pages 33-36 of the attached materials is withheld pursuant to Section 13 (1) (a) of the Act.

Document received by the MI Court of Claims.

Please note that within 180 days from the date of the letter from the Freedom of Information Act Coordinator denying your request, you have the right to seek judicial review in the circuit court to try to compel disclosure. If you seek judicial review in the Michigan circuit court and prevail, you will be awarded reasonable attorney's fees, costs and disbursements incurred in maintaining the action. If you prevail in part, you may still be awarded complete or partial reimbursement for those expenses. In addition to actual and compensatory damages, you will be awarded punitive damages in the amount of \$500 if the court finds that the University was arbitrary and capricious in its denial.

Sincerely,

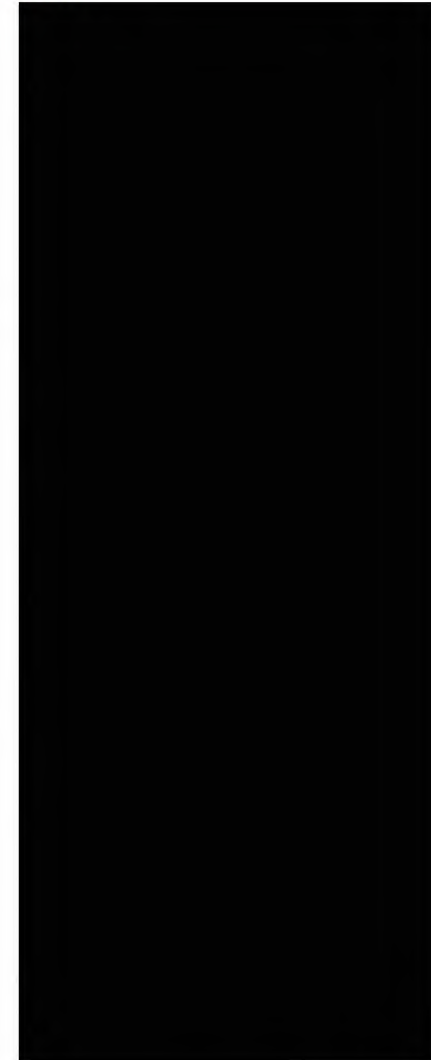


Liz Barry
Special Counsel to the President

Group 1

Institution	Name	Position
LEO	Evan Anderson	Chief Strategist
MiOSHA	Bart Pickelman	Director
MDARD	Tim Slawinski	Director - Food & Dairy
MLCC	Pat Gagliardi	Commissioner
MRLA	Justin Winslow	President / CEO
MRLA	Amanda Smith	EVP, Education
MLBA	Scott Ellis	Executive Director
Birmingham Shopping District	Ingrid Tighe	Executive Director
City of Detroit	Charity Dean	Civil Rights, Equity, Inclusion
Traverse City Tourism	Trevor Tkach	CEO
Senate - McMorrow	Mallory McMorrow	Senator
Senate - McMorrow	Molly Korn	Chief of Staff
DRI Restaurants - Bay City / Midland	Dave Dittenber	Owner
Outback Steakhouse	Jennifer Szewc	Joint Venture Partner
Aubree's Pizzeria / Grills	Andy French	Owner
Essence Restaurant Group	James Berg	CEO
Schostak Restaurants	Jake Schostak	Owner
National Coney Island	Dan Roma	CFO
Bavarian Inn - Frankenmuth	Amy Zehnder-Gros	General Manager
Barfly Ventures (HopCat)	Shawn Blonk	VP Food, Beverage, Innovation
Boyne Mountain	Brad Keen	SVP Food and Beverage
Airport Concessionaires	Tanya Allen	Partner / Vice President
Griffin Claw	Scott LePage	Owner
Griffin Claw	Norm LePage	Owner
Round Lake Group - UP	Rich Bergmann	Owner
Fenton Winery	Ginny Sherrow	Owner
McShane's - Corktown Business Assn	Bob Roberts	Owner
Traffic Jam & Snug	Scott Lowell	Owner
Gordon Food Services	John Kesterke	Director of Marketing

Email



Group 2

Institution	Name	Position	Email
LEO	Evan Anderson	Chief Strategist	
MiOSHA	Bart Pickelman	Director	
MDARD	Josh Neyhart	Executive Office	
BSBP	Tamela Meek	Business Enterprise Program Manager	
ExperienceGR	Janet Korn	Senior VP	
Saginaw Future	Tom Miller	VP	
Crystal Falls, MI	Mike McCarthy	Mayor	
MBWWA	Spencer Nevins	President	
MBWWA	Brett Visner	VP Government Affairs	
Michigan State University	Jeffery Elsworth	Associate Professor	
Blue Wave Campaigns - UNITEHERE!	Austin Clark	Founder / Principal	
Senate	Jeff Irwin	Senator - Irwin	
Senate	Desmond Miller	Senator - Irwin	
House of Reps	Kevin Hertel	Representative - Hertel	
House of Reps	Brigitte Smith	Representative - Hertel	
Acuitas	Andrea Cascarilla	Legislative Director	
Madison Heights	Corey Haines	Chief of Police	
SpareTime Lansing	Mike MacColeman	Owner	
Hidden Gem	Ernest Tisdale	Owner	
Sidetrack Bar & Grill	Linda French	Owner	
Sidetrack Bar & Grill	Jessica French	Managing Partner	
Ansara Restaurant Group - Red Robin franchisee	Victor Ansara	President / CEO	
JK&T Wings - Buffalo Wild Wings franchisee	Jean Lanfear	VP Human Resources	
CDKI Dining Group	Peter Krupp	Managing Partner	
Spartan Water and Coffee	Kelley Pierce	President	
University Club of MSU	Karen Grannemann	CEO & General Manager	
Ozone's Brewhouse - Lansing	Marc Wolbert	Director of Food Operations	
Gordon Food Services	Alisha Cieslak	Chief Legal & Risk Officer	
The Inn at St Johns - Detroit	Paul Wegert	Managing Director	
Zehnder's - Frankenmuth	Bill Parlberg	President	



Group 3

Institution	Name	Position	Email
LEO	Evan Anderson	Chief Strategist	
MiOSHA	Bart Pickelman	Director	
LARA	Adam Sandoval		
MLCC	Kerry Krone	Business Manager	
Michigan Spirits Association	Sam Adwish	President	
DowntownGR	Andy Guy	COO	
Southwest Michigan First	Brooke Corbin	Public Policy Director	
UAW	Tina Sarazin		
House of Reps	Terry Sabo	Representative - Sabo	
Senate	Stephanie Chang	Senator - Chang	
Senate	Ellen Heinitz	Senator - Chang	
Karoub	Shelly Stahl	Partner	
Grand Traverse Metro Fire	Stacey Bird	Human Resources	
BarFly Ventures (HopCat)	Ellen Winterburn	VP Human Resources	
Dzenowagis Group	Victor Dzenowagis	Owner	
Hofbrau Steakhouse	Brian McAllister	Owner	
Mission Restaurant Group	Greg Lobdell	Owner	
Boyne Mountain	Michael Doumanian	VP Food and Beverage	
Yankee Rebel & Horns Bar	Patti Ann Mowska	Owner	
Heirloom Hospitality Group	Jeremy Sasson	CEO	
Shanty Creek	Lynn Blanchard	Director Food and Beverage	
Equity Vest - Rick's	Tom Bramson	Owner	
Art's Tavern - Glen Arbor	Bonnie Nescot	Owner	
Bavarian Inn - Frankenmuth	Amy Zehnder-Gros	General Manager	
Tharp Group - Grand Trunk	Timothy Tharp	Owner	
Boyne Mountain	Brad Keen	SVP Food and Beverage	
Greektown Casino	Drew Lovell	Director Food and Beverage	
Airport Concessionaires	Tanya Allen	Partner / Vice President	
Chik-fil-A franchisee	Nick Biggee	Owner / Operator	
Halo Burger - Genessee	David Walters	CEO	
Halo Burger - Genessee	Rob Kulza	COO	



Group 4

Institution	Name	Position	Email
LEO	Evan Anderson	Chief Strategist	
MiOSHA	Bart Pickelman	Director	
Outback Steakhouse	Jennifer Szwec	Joint Venture Partner	
Pine Knob	Shawn Sprecksell	Chef	
Sysco	Ted Behen	President	
Snowsports Industry Association	Mickey MacWilliam	President / Executive Director	
Aubree's	Andrew French	President	
LARA	Courtney Adams		
Acuitas	Sarah Hubbard	Acuitas LLC	
Halo Burger - Genessee	Rob Kulza	COO	
Ilitch Holdings	Mike McLaughlan	VP Government Relations	
Paint Creek GC - Lake Orion	Steve Rochon	General Manager	
House of Reps	Cara Clemente	Representative - Clemente	
House of Reps	Mari Manoogian	Representative - Manoogian	
House of Reps	Blake Goodman	Representative - Manoogian	
Stafford's Hospitality - Northern MI	Brian Ewbank	Owner	
City of Canton	William Hayes	Emergency Management Coordinator	
First Street Holdings - Menominee	Timothy Murray	Managing Owner	
Avenue Café - Lansing	Loren Pudvay	Manager	
Silo Events	Samantha Christma	Executive Manager	
Coast236 - Saugatuck	Elizabeth Estes	Owner	
DEGC	Drew Lucco	Motor City Match Program Manager	

March 30, 2020

FBI Warns of Teleconferencing and Online Classroom Hijacking During COVID-19 Pandemic

As large numbers of people turn to video-teleconferencing (VTC) platforms to stay connected in the wake of the COVID-19 crisis, reports of VTC hijacking (also called “Zoom-bombing”) are emerging nationwide. The FBI has received multiple reports of conferences being disrupted by pornographic and/or hate images and threatening language.

Within the FBI Boston Division’s area of responsibility (AOR), which includes Maine, Massachusetts, New Hampshire, and Rhode Island, two schools in Massachusetts reported the following incidents:

- In late March 2020, a Massachusetts-based high school reported that while a teacher was conducting an online class using the teleconferencing software Zoom, an unidentified individual(s) dialed into the classroom. This individual yelled a profanity and then shouted the teacher’s home address in the middle of instructions.
- A second Massachusetts-based school reported a Zoom meeting being accessed by an unidentified individual. In this incident, the individual was visible on the video camera and displayed swastika tattoos.

As individuals continue the transition to online lessons and meetings, the FBI recommends exercising due diligence and caution in your cybersecurity efforts. The following steps can be taken to mitigate teleconference hijacking threats:

- Do not make meetings or classrooms public. In Zoom, there are two options to make a meeting private: require a meeting password or use the waiting room feature and control the admittance of guests.
- Do not share a link to a teleconference or classroom on an unrestricted publicly available social media post. Provide the link directly to specific people.
- Manage screensharing options. In Zoom, change screensharing to “Host Only.”
- Ensure users are using the updated version of remote access/meeting applications. In January 2020, Zoom updated their software. In their security update, the teleconference software provider added passwords by default for meetings and disabled the ability to randomly scan for meetings to join.
- Lastly, ensure that your organization’s telework policy or guide addresses requirements for physical and information security.

If you were a victim of a teleconference hijacking, or any cyber-crime for that matter, report it to the FBI’s Internet Crime Complaint Center at ic3.gov. Additionally, if you receive a specific threat during a teleconference, please report it to us at tips.fbi.gov or call the FBI Boston Division at (857) 386-2000.



Virtual Conferencing Platform Tips

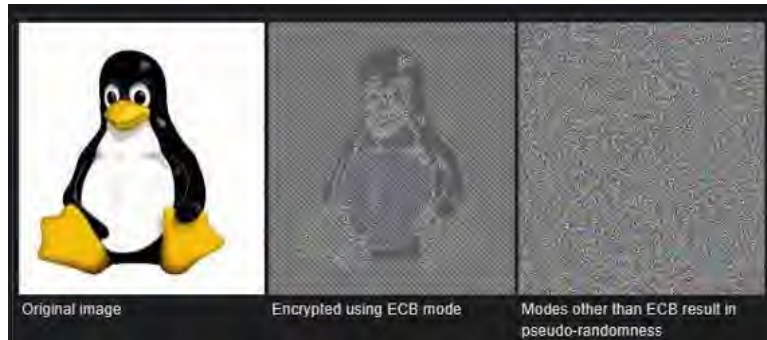
With the recent move for many to working from home, there are a lot of questions around virtual conferencing platforms. Much of the attention has focused on the security of some platforms compared to others. However, the majority of the security issues actually have a lot to do with the users' familiarity with these platforms and their proper usage.

The first thing to remember is this: If you are going to download a virtual conferencing application, be certain the download is from a reputable source. Most often the company will host the download themselves or have a link to the download on their website. It is advisable not to trust a download from third-party if you were not directed there by the official website.

Security concerns regarding virtual conferencing

1. Encryption may not be adequate to secure sensitive information or to protect the privacy of individuals.

- End-to-end encryption is not an easy task for real-time audio or video connections. In most use cases it takes special hardware or software. It is very important to remember that some topics should not be discussed over a virtual conference. This is especially true regarding sensitive data, personally identifiable information (PII), and regulated data such as the Health Insurance Portability and Accountability Act (HIPAA), Children's Online Privacy Protection Rule (COPPA), and Federal Tax Information (FTI).
- Consider where encryption key distribution servers are located when evaluating a company's offerings. Researchers have found that some companies' encryption key distribution servers for U.S.-based meeting sessions were located in Beijing, China. In such situations, companies may be obligated to disclose meeting encryption keys to the Chinese government.
- Just because a company advertises encryption, doesn't mean that the best version of encryption being utilized.



Document received by the MI Court of Claims.

Figure 1: Tux the Penguin Encrypted in ECB vs Pseudo-Random Encryption: Source github picocftf-2019-solutions/Cryptography/aes-abc/readme.md

2. Virtual conferencing applications are vulnerable to multiple attacks

- Malicious actors are creating fake installation files for multiple meeting platforms including Zoom Meetings, MS Teams, and Google Classroom.
- Some conferencing platforms have been “conference bombed.” This is when an uninvited guest gains access with the intention to disrupt or eavesdrop on the meeting.
- Virtual conference meeting users have been targeted to capture potentially sensitive data disclosed during meetings. As well, recorded meetings may not be stored by their meeting host in a secure manner. Attackers have accessed Zoom Meetings files stored on a computers and unsecured public cloud environments.

Guidelines for Virtual Conferencing

Below are some helpful recommendations to improve the privacy and security of web based virtual meetings:

- a. If possible, NEVER share sensitive or regulated data during virtual conference meetings.
- b. Become familiar with who may record your meeting. Be aware that individuals may choose to record a meeting using audio or video recording tools outside of the meeting software.
- c. Download virtual conferencing clients directly from the manufacturer or your service provider.
- d. Always run the newest version of the conferencing client (if required to download and install a client).
- e. Password protect each meeting with a unique and complex password using letters, numbers and special characters.
- f. Password protect recordings of meetings with a unique and complex password using letters, numbers and special characters.
- g. Do not share your meeting link in public forums or on social media. In the event you must advertise your meeting publicly, remove the password embedded in the link and ask attendees to contact the organizer for the password.
- h. Use a meeting ID rather than the personal ID associated with a virtual conferencing account. This way the meeting ID should change for each meeting.
- i. Disable sharing for all attendees except for the meeting host.
- j. Use the waiting room/lobby feature when it is available. This requires the organizers to admit people singly (for small meetings) or all at once (for larger meetings). If an attendee seems suspicious, the waiting room feature allows organizers to prevent them from joining the meeting.
- k. Remove and block anyone from meeting rooms with an unrecognizable or unverifiable identity. Once removed, the person or people cannot come back in.

Taking the above steps will help ensure your organization's virtual meetings will remain secure while employees connect and collaborate through these platforms.



critical if employees access their work network from their home computer. Organizations have permission and are encouraged to brand and redistribute this newsletter in whole for educational, non-commercial purposes.

Disclaimer: These links are provided because they have information that may be useful. The Center for Internet Security (CIS) does not warrant the accuracy of any information contained in the links and neither endorses nor intends to promote the advertising of the resources listed herein. The opinions and statements contained in such resources are those of the author(s) and do not necessarily represent the opinions of CIS.

THE UNITED STATES ATTORNEY'S OFFICE
WESTERN DISTRICT *of* MICHIGAN

[U.S. Attorneys](#) » [Western District of Michigan](#) » [News](#)

Department of Justice
U.S. Attorney's Office
Western District of Michigan

FOR IMMEDIATE RELEASE

Thursday, October 8, 2020

Six Arrested On Federal Charge Of Conspiracy To Kidnap The Governor Of Michigan

The Michigan Attorney General Charged Seven Additional Individuals Following a Coordinated Disruption of the Plan

GRAND RAPIDS, MICHIGAN — United States Attorney Andrew Birge announced today that six men have been arrested and charged federally with conspiring to kidnap the Governor of Michigan, Gretchen Whitmer. According to a **complaint** filed Tuesday, October 6, 2020, Adam Fox, Barry Croft, Ty Garbin, Kaleb Franks, Daniel Harris and Brandon Caserta conspired to kidnap the Governor from her vacation home in the Western District of Michigan. Under federal law, each faces any term of years up to life in prison if convicted. Fox, Garbin, Franks, Harris, and Caserta are residents of Michigan. Croft is a resident of Delaware.

U.S. Attorney Birge said that “Federal and state law enforcement are committed to working together to make sure violent extremists never succeed with their plans, particularly when they target our duly elected leaders.”

The federal **complaint** in this case alleges that the FBI began an investigation earlier this year after becoming aware through social media that a group of individuals was discussing the violent overthrow of certain government and law enforcement components. Through confidential sources, undercover agents, and clandestine recordings, law enforcement learned particular individuals were planning to kidnap the Governor and acting in furtherance of that plan. This group used operational security measures, including communicating by encrypted messaging platforms and used code words and phrases in an attempt to avoid detection by law enforcement. On two occasions, members of the alleged conspiracy conducted coordinated surveillance on the Governor’s vacation home. Fox and Croft discussed detonating explosive devices to divert police from the area of the vacation home and Fox even inspected the underside of an M-31 highway bridge for places to seat an explosive, according to the complaint. Among other activities, the **complaint** alleges Fox purchased a taser for use in the kidnapping and that the group successfully detonated an improvised explosive device wrapped with shrapnel to test its anti-personnel capabilities. The FBI and Michigan State Police executed arrests as multiple conspirators met to pool funds for explosives and exchange tactical gear.

Document received by the MI Court of Claims.

“All of us can disagree about politics, but those disagreements should never, ever result in violence,” stated U.S. Attorney Matthew Schneider, Eastern District of Michigan. “The allegations in this **complaint** are deeply disturbing. We owe our thanks to the men and women of law enforcement who uncovered this plot and have worked so hard to protect Governor Whitmer.”

“These alleged extremists undertook a plot to kidnap a sitting governor,” said Assistant Special Agent in Charge Josh P. Hauxhurst. “Whenever extremists move into the realm of actually planning violent acts, the FBI Joint Terrorism Task Force stands ready to identify, disrupt and dismantle their operations, preventing them from following through on those plans.”

The investigation is ongoing. Agents of the Detroit Field Office of the FBI and other members of their Joint Terrorism Task Force, including the Michigan State Police, are conducting the investigation. FBI Agents and JTTF members in the Baltimore Field Office of the FBI, which covers Delaware, are also involved. The U.S. Attorney’s Office for the Western District of Michigan is prosecuting the federal charges. U.S. Attorney’s Offices in the Eastern District of Michigan and Delaware have assisted.

This case falls within the purview of the Attorney General’s Task Force to Combat Violent Anti-Government Extremism. Launched in June 2020, the Task Force is dedicated to supporting the investigation and prosecution of any person or group who commits violence in the name of an anti-government ideology.

Based on information developed in the investigation, State of Michigan Attorney General Dana Nessel announced the simultaneous arrest of seven other individuals on state charges of providing material support of terroristic activities and of possessing a firearm in the course of that offense.

The charges in a **complaint** are merely accusations, and a defendant is presumed innocent until and unless proven guilty in a court of law.

###

Component(s):
USAO - Michigan, Western

Updated October 14, 2020

Document received by the MI Court of Claims.

2000 WL 33521028

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK
COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

Ralph W. BARBIER, Jr. and Marina
S. Barbier, Plaintiff-Appellant,

v.

Ronald M. BASSO, Deputy Director
of the Department of Consumer and
Industry Services, Defendant-Appellee.

No. 212783.

|
March 31, 2000.

Before: CAVANAGH, P.J., and WHITE and TALBOT, JJ.

Opinion

PER CURIAM.

*1 Plaintiff appeals as of right the order denying his motion for summary disposition pursuant to MCR 2.116(C)(10) and granting summary disposition in favor of defendant, Ronald M. Basso, the Deputy Director of the Department of Consumer and Industry Services (CIS) pursuant to MCR 2.116(I)(2).¹ We affirm.

¹ Plaintiff Marina S. Barbier was dismissed from the suit and is not a party to this appeal.

This case arises from a series of complaints plaintiff submitted to CIS, claiming that various real estate licensees had committed statutory and administrative rule violations relating to a 1989 real estate transaction. At plaintiff's behest, CIS eventually issued formal complaints against certain licensees for misrepresenting material facts in relation to the size of the residence plaintiff purchased in 1989. Several months later, CIS notified plaintiff that the files CIS had sent to the Department of the Attorney General, the agency which represents CIS, had been returned advising that there was insufficient evidence to pursue the formal complaints against the real estate licensees. Thereafter, an administrative

order was entered dismissing the complaints and canceling a scheduled administrative hearing.

Subsequently, plaintiff requested documents relating to the complaints from defendant under the Freedom of Information Act, (FOIA), M.C.L. § 15.231 et seq.; MSA 4.1801(1) et seq. CIS provided the majority of documents requested, but withheld others, asserting that they were exempt from disclosure under the FOIA. In response to CIS's written responses purporting to justify the exemptions, plaintiff filed a complaint to compel disclosure of the documents and a motion for summary disposition. The trial court denied plaintiff's motion and granted defendant's request for summary disposition pursuant to MCR 2.116(I)(2), finding that the documents were exempt from disclosure under the FOIA.

Plaintiff argues that the trial court erred in denying his motion and granting defendant's motion for summary disposition on the ground that defendant satisfied the burden of proving that the documents at issue were exempt from disclosure under § 13(1)(n) of the FOIA. We disagree.

This court reviews a motion for summary disposition de novo. *Smith v. Globe Life Ins Co*, 460 Mich. 446, 454; 597 NW2d 28 (1999). In reviewing a motion brought pursuant to MCR 2.116(C)(10), the court considers the documentary evidence in the light most favorable to the nonmoving party. *Id.*, quoting *Quinto v. Cross & Peters Co*, 451 Mich. 358, 362; 547 NW2d 314 (1996). Summary disposition is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* at 454-455, quoting *Quinto, supra* at 362. Summary disposition pursuant to MCR 2.116(I)(2) is properly granted to the opposing party if it appears to the court that that party, rather than the moving party, is entitled to judgment. *Sharper Image Corp v. Dep't of Treasury*, 216 Mich.App 698, 701; 550 NW2d 596 (1996). Additionally, whether requested information qualifies for exemption from disclosure under the FOIA is a mixed question of fact and law. *Messenger v. Ingham Co Prosecutor*, 232 Mich.App 633, 637; 591 NW2d 393 (1998). We review the trial court's factual determinations for clear error and its legal conclusions de novo. *Id.*

*2 Under the FOIA, a public body must disclose all public records that are not specifically exempt under the Act. M.C.L. § 15.233(1); MSA 4.1801(3)(1); *State Defender Union Employees v Legal Aid and Defender Ass'n of Detroit*, 230 Mich.App 426, 430; 584 NW2d 359 (1998). Because

Document received by the MI Court of Claims.

the FOIA is intended primarily as a full-disclosure statute, the exemptions must be narrowly construed. *Connoisseur Communication of Flint, LP v University of Michigan*, 230 Mich.App 732, 734; 584 NW2d 647 (1998). When a public body refuses to disclose a requested document under the FOIA, the public body bears the burden of proving that the refusal was justified. *Id.* Claimed exemptions must be supported by substantial justification and explanation, not merely by conclusory assertions. *Booth Newspapers, Inc v Bd of Regents of the University of Michigan*, 192 Mich.App 574, 586; 481 NW2d 778 (1992), rev'd on other grounds 444 Mich. 211; 507 NW2d 422 (1993).

Similarly, when ruling whether exemptions within the FOIA prevent disclosure of documents, a trial court may not make conclusory or generic determinations, but must specifically find that particular parts of the information would be exempt for particular reasons. *Post-Newsweek Stations v. Detroit*, 179 Mich.App 331, 335; 445 NW2d 529 (1989). In making this determination, the court should (1) receive a complete particularized justification for the exemption, or (2) conduct a hearing in camera to determine whether justification exists, or (3) consider allowing the plaintiff's counsel access to the information in camera under a special agreement whenever possible. *Id.* at 337.

Defendant claimed, and the trial court ruled, that the documents were exempt from disclosure under § 13(1)(n), which provides in pertinent part:

(1) A public body may exempt from disclosure as a public record under this act:

(n) 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 communications between officials and employees of public bodies clearly outweighs the public interest in disclosure.... [MCL 15.243(1)(n); MSA 4.1801(13)(1)(n).]

To claim exemption and prevent disclosure under § 13(1)(n), the public body must establish that (1) the documents cover other than purely factual materials, and (2) the documents are preliminary to a final determination of policy or action. *Herald Co, Inc v Ann Arbor Public Schools*, 224 Mich.App

266, 274; 568 NW2d 411 (1997), citing *Milford v. Gilb*, 148 Mich.App 778, 782-783; 384 NW2d 786 (1985). If these substantive conditions are met, the public body must then establish that the public interest in encouraging frank communications within the public body or between public bodies clearly outweighs the public interest in disclosure. *Id.*

*3 In this case, the information sought by plaintiff consisted of two memoranda from the Department of the Attorney General to CIS's Director of Enforcement in the Office of Commercial Services. In addition to its written responses to plaintiff justifying exemption and an affidavit from its FOIA coordinator, defendant provided the trial court with copies of the memoranda for in camera inspection. *Post-Newsweek Stations, supra* at 337. After review, the trial court noted that the memoranda concerned whether the attorney general was prepared to present testimony on CIS's behalf at the hearing relative to the formal complaints that were filed at plaintiff's behest. The court determined that both memoranda contained substantially more opinion than fact, noting that the "overwhelming majority" of the documents were either opinions or recommendations by the attorney general to CIS regarding the "manner of presentation" of the formal complaints. The court further concluded that the documents were "preliminary to a final determination of policy or action" because they involved the attorney general's ultimate decision regarding the extent of its participation in the potential proceeding and whether a hearing would be granted on the complaint. Plaintiff does not appear to challenge the trial court's findings pertaining to defendant's satisfaction of the exemption's substantive conditions, and we cannot conclude that they are clearly erroneous. *Messenger, supra* at 637.

The court also concluded, and we agree, that defendant sustained the burden of proving that the public interest in encouraging frank communications between the officials and employees of the two public bodies at issue clearly outweighed the public interest in disclosure in this case. In support of its determination, the court found that the memoranda were "brutally frank" and were designed to cause "substantial reflection" regarding the nature of the complaints at issue and the attorney general's recommendations regarding CIS's method of processing cases in general. Defendant maintained below that "[f]or the general welfare, the state must have thorough legal representation unhampered by disclosure of legal advice preliminary to official action" and provided a supporting affidavit. Like the trial court, we are not persuaded that plaintiff's specific need for the

memoranda, apparently to show that CIS was conspiring with the real estate industry it was designed to police, or the public's general interest in disclosure, was outweighed by CIS's interest in keeping its deliberative analyses confidential. Indeed, "the release to the public of the internal memoranda [] at issue would discourage the preparation of such memoranda and would impact negatively on the quality of defendant's decisionmaking process with detrimental effect on the legal services provided to state agencies as well as on the public's interest." See *McCartney v. Attorney General*, 231 Mich.App 734-735; 587 NW2d 824 (1998). After reviewing the memoranda at issue, which were provided

under seal to this Court, we are persuaded that the trial court did not err in its findings or in concluding that defendant satisfied the burden of proving that the memoranda fell within the exemption provided by § 13(1)(n). Therefore, it was not necessary for defendant to produce them pursuant to plaintiff's FOIA request.

*4 Affirmed.

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UNPUBLISHED OPINION. CHECK
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UNPUBLISHED
Court of Appeals of Michigan.

Spencer WOODMAN, Plaintiff-
Appellant/Cross-Appellee,

v.

DEPARTMENT OF CORRECTIONS,
Defendant-Appellee/Cross-Appellant.

George Joseph, Plaintiff-
Appellant/Cross-Appellee,

v.

Department of Corrections,
Defendant-Appellee/Cross-Appellant.

No. 353164, No. 353165

|
June 24, 2021

Court of Claims, LC No. 17-000082-MZ

Court of Claims, LC No. 17-000230-MZ

Before: [Gadola](#), P.J., and [Sawyer](#) and [Riordan](#), JJ.

Opinion

Per Curiam.

*1 In these consolidated cases brought under Michigan's Freedom of Information Act (FOIA), [MCL 15.231 et seq.](#), plaintiffs, Spencer Woodman and George Joseph, appeal as of right the order of the trial court granting in part and denying in part their motion for attorney fees, costs, and punitive damages. Defendant, the Michigan Department of Corrections (MDOC), cross-appeals from the same order. We affirm in part, reverse in part, and remand for further proceedings.

I. FACTS

On September 27, 2016, MDOC inmate Dustin Szot died after a physical altercation with another prisoner at defendant's Ionia Bellamy Creek Correctional Facility. The parties do not dispute that corrections officers discharged Tasers on the inmates to stop the fight, and that it was determined that Szot died from blunt-force trauma.

Plaintiffs are journalists who separately submitted requests under Michigan's FOIA seeking video and audio recordings of the altercation from defendant. Woodman requested “a digital copy of video footage of the confrontation that led to the fatality of inmate Dustin Szot [including] footage from any and all available cameras that captured this incident as well as any available accompanying audio records.” Defendant denied Woodman's request, asserting that the records were exempt from disclosure under [MCL 15.243\(1\)\(c\)](#).¹ Cheryl Groves, defendant's FOIA Coordinator, asserted that disclosure “could threaten the security of [the correctional facility] by revealing fixed camera placement as well as the scope and clarity of the facility's fixed camera and handheld recordings. Disclosure of these records could also reveal the policies and procedures used by staff for disturbance control and the management of disruptive prisoners.” Woodman appealed the denial to defendant, which denied the appeal on the basis that disclosing the videos “would reveal the recording and security capabilities of [the correctional facility's] video monitoring system.”

¹ [MCL 15.243\(1\)\(c\)](#) provides that “[a] public body may exempt from disclosure as a public record under this act ... [a] public record that if disclosed would prejudice a public body's ability to maintain the physical security of custodial or penal institutions occupied by persons arrested or convicted of a crime or admitted because of a [mental disability](#), unless the public interest in disclosure under this act outweighs the public interest in nondisclosure.”

Joseph submitted a request to defendant under FOIA for “a digital copy of any and all footage of the September 27, 2016 confrontation that led to the death of inmate Dustin Szot [including] footage from any and all available cameras that captured any parts of the confrontation, including but not limited to cameras installed on tasers deployed [and] any audio records that accompany footage found to be responsive to this request.” Defendant denied Joseph's request, stating that “[t]o the extent these records are [available], they are exempt from disclosure under [\[MCL 15.243\(1\)\(c\)\]](#).”

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*2 Plaintiffs each filed complaints, arguing that defendant wrongfully denied their requests under the FOIA. Plaintiffs asserted that the video recordings were not exempt from disclosure, and requested that the trial court order defendant to provide “a complete, unredacted copy of the Video and any accompanying audio recordings[.]” The parties thereafter agreed to the consolidation of the two cases.

During her deposition, Groves explained that whenever defendant received a FOIA request, the Assistant FOIA Coordinator would review the request, determine what information was exempt, redact information that was not going to be released, and provide Groves with the request and the proposed response. Groves testified that she would review the information and approve the response. Groves further testified that defendant never released video footage, however, denying any such request under the “custody and safety security exemption.” Groves testified that no one from defendant's FOIA office reviewed the videos in this case before denying plaintiffs' FOIA requests for the recordings, but instead complied with the agency policy of not releasing internal video from a correctional facility.

Plaintiffs moved for summary disposition under [MCR 2.116\(C\)\(10\)](#), asserting that there was no genuine issue of material fact and plaintiffs were entitled to judgment as a matter of law because defendant had violated the FOIA by denying their requests for information. Defendant moved for summary disposition under [MCR 2.116\(C\)\(8\) and \(10\)](#) on the basis that the videos were exempt from disclosure under [MCL 15.243\(1\)\(a\), \(c\), and \(u\)](#), and supported the motion with an affidavit from the correctional facility inspector, who averred that the exemptions applied.

The trial court denied defendant's motion for summary disposition under [MCR 2.116\(C\)\(8\)](#) on the basis that the motion relied on documents outside the pleadings. The trial court also concluded that regardless of whether the exemptions applied, defendant's response to plaintiffs' requests violated FOIA because defendant merely issued blanket denials without reviewing the videos requested. The trial court ordered defendant to produce the videos for an *in camera* review, and held in abeyance the parties' motions for summary disposition pending the review. The trial court permitted defendant to submit the video in a format that obscured the faces of the employees and prisoners in the videos to protect those individuals. Defendant provided the unredacted videos for *in camera* review, explaining that it did not have time to obscure the images of the individuals in the

videos and requested that it be allowed to complete this task before disclosure of the videos.

The trial court determined that the videos did not reveal the placement of security cameras, but nonetheless appointed a Special Master to review the videos and report whether the recordings contained any security concerns. The Special Master reported that the videos did not reveal any security concerns except to the extent the videos made it possible to identify staff members and inmates. The trial court ordered that defendant disclose the videos to plaintiffs, but permitted defendant to redact the videos before disclosing them by obscuring the images of individuals in the videos. The trial court denied defendant's motion for reconsideration of its order.

Plaintiffs thereafter moved for attorney fees and costs in the amount of \$211,780.75, and \$2,000 in punitive damages. Plaintiffs asserted that as the prevailing party, they were entitled to reasonable attorneys' fees and costs under the FOIA, and that they were entitled to punitive damages because defendant's decision to deny their FOIA requests was arbitrary and capricious. Defendant argued that plaintiff had prevailed only in part because the trial court allowed defendant to redact the videos, and therefore under the FOIA the award of attorney fees was discretionary with the trial court.

*3 The trial court held that plaintiffs had prevailed in full and accordingly were statutorily entitled to reasonable attorney fees and costs under the FOIA. The trial court found that the attorney fees requested were billed at a reasonable hourly rate and that the number of hours worked was not unreasonable. The trial court observed, however, that plaintiffs had been represented jointly by the law firm of Honigman LLP in a pro bono capacity and the American Civil Liberties Union Fund of Michigan (ACLU). The trial court awarded the ACLU its requested attorney fees of \$14,200, but awarded Honigman only ten percent of its requested attorney fees in the amount of \$19,218.63. The trial court reasoned that it was awarding partial fees because “in this case, dollars have not been necessarily spent except for those dollars that are attributable to counsel for the ACLU. Instead those were pro bono dollars.” The trial court denied plaintiffs' request for punitive damages.

Plaintiffs appeal from the trial court's order, challenging the trial court's award of the reduced amount of attorney fees and the trial court's denial of punitive damages. Defendant cross-

appeals from the same order, challenging the trial court's determination that plaintiffs prevailed in full and thus are entitled to attorney fees and costs under the FOIA.

II. DISCUSSION

A. STANDARD OF REVIEW

We review de novo a trial court's interpretation and application of the FOIA. *Mich. Open Carry, Inc. v. Mich. State Police*, 330 Mich. App. 614, 621; 950 N.W.2d 484 (2019). We review for clear error the trial court's factual determinations in a FOIA action. *King v. Mich. State Police Dep't*, 303 Mich. App. 162, 174; 841 N.W.2d 914 (2013). Whether a defendant acted arbitrarily and capriciously within the meaning of the FOIA is a factual finding that we review for clear error. See *Meredith Corp. v. Flint*, 256 Mich. App. 703, 717; 671 N.W.2d 101 (2003). A finding is clearly erroneous if, after reviewing the entire record, we are left with a definite and firm conviction that a mistake was made. *Nash Estate v. Grand Haven*, 321 Mich. App. 587, 605; 909 N.W.2d 862 (2017). We review a trial court's award of attorney fees under the FOIA for an abuse of discretion. *Id.* A trial court abuses its discretion when its decision is outside the range of reasonable and principled outcomes. *Id.*

B. ATTORNEY FEES UNDER FOIA

Defendant contends that the trial court erred by concluding that plaintiffs prevailed in full on their FOIA claims and therefore are statutorily entitled to attorney fees and costs under the act. Defendant argues that because it was permitted to respond to plaintiffs' FOIA requests by providing redacted videos, plaintiffs prevailed only in part in their FOIA claims, and as a result the statute does not mandate the award of attorney fees. By contrast, plaintiffs contend that the trial court correctly determined that they prevailed in full, but abused its discretion by limiting the amount of attorney fees awarded due to the pro bono fee arrangement.

Under Michigan's FOIA, "all persons ... are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees, consistent with this act." MCL 15.231(2); see also *Amberg v. Dearborn*, 497 Mich. 28, 30; 859 N.W.2d 674 (2014). Michigan's FOIA therefore

generally mandates the full disclosure of public records in the possession of a public body, *Ellison v. Dep't of State*, 320 Mich. App. 169, 176; 906 N.W.2d 221 (2017), and is described as a pro-disclosure statute. *Thomas v. New Baltimore*, 254 Mich. App. 196, 201; 657 N.W.2d 530 (2003). When a request for records is made under the FOIA, a public body has a duty to provide access to the records, or to copies of the requested records, unless those records are exempt from disclosure. *Arabo v. Mich. Gaming Control Bd.*, 310 Mich. App. 370, 380; 872 N.W.2d 223 (2015).

If a public body denies all or part of a request for records, the requesting person may commence a civil action in circuit court. MCL 15.240(1)(b). If the requesting person thereafter "prevails" in that action, MCL 15.240(6) provides for the award of attorney fees, costs, and disbursements as follows:

*4 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).

Thus, if a plaintiff prevails completely in a FOIA action, the award of attorney fees by the trial court is mandatory; if a party prevails partially in the FOIA action, the decision to award attorney fees is discretionary with the trial court. *Nash Estate*, 321 Mich. App. at 606. One "prevails" under MCL 15.240(6) if "the action was reasonably necessary to compel the disclosure [of public records], and ... the action had a substantial causative effect on the delivery of the information to the plaintiff." *Amberg*, 497 Mich. at 34. "[A]ttorney fees and costs *must* be awarded under the first sentence of MCL 15.240(6) only when a party prevails *completely*." *Local Area Watch v. Grand Rapids*, 262 Mich. App. 136, 150; 683 N.W.2d 745 (2004).

In this case, plaintiffs prevailed because their actions were reasonably necessary to obtain the requested videos from defendant. However, plaintiffs demanded in their complaints the production of "a complete, unredacted copy of the Video" Defendant was permitted to redact certain information from the videos, and thus plaintiffs were determined to be entitled to only a portion of the records requested. We therefore conclude that under MCL 15.240(6), plaintiffs prevailed in part. Because plaintiffs prevailed in part

in their FOIA claims, whether to award plaintiffs all or an appropriate portion of reasonable attorney fees, costs, and disbursements is discretionary with the trial court. See *Nash Estate*, 321 Mich. App. at 606; see also *Local Area Watch*, 262 Mich. App. at 150-151. We therefore vacate the trial court's award of attorney fees and costs to plaintiffs and remand this matter to the trial court for determination whether, in the trial court's discretion, plaintiffs are entitled to an award of all or an appropriate portion of reasonable attorney fees, costs, and disbursements.

If the trial court determines in its discretion that plaintiffs are entitled to an award of attorney fees in this case, we observe that “[t]he touchstone in determining the amount of attorney fees to be awarded to a prevailing party in a FOIA case is *reasonableness*,” *Prins v. Mich. State Police*, 299 Mich. App. 634, 642; 831 N.W.2d 867 (2013), and thus the amount of any attorney fees awarded under FOIA must be *reasonable* fees, regardless of the *actual* fees. See *Smith v. Khouri*, 481 Mich. 519, 528 n. 12; 751 N.W.2d 472 (2008). That is, the question is one of the reasonableness of the attorney fees sought, not the price actually agreed to or paid by the party to his or her attorney, or, in this case, the actual hourly rates and total amounts billed by the law firm to the party. If the trial court determines that plaintiffs are entitled to attorney fees in this case, the trial court should also determine whether the pro bono nature of the representation is a legitimate consideration in the determination of the reasonableness of the fees.

When determining the reasonableness of an attorney fee, the court should first determine the fee customarily charged in the locality for similar legal services, which can be established “by testimony or empirical data found in surveys and other reliable reports.” *Id.* at 530-532. “This number should be multiplied by the reasonable number of hours expended in the case....” *Id.* at 531. The trial court should then consider the following nonexhaustive factors:

- *5 (1) the experience, reputation, and ability of the lawyer or lawyers performing the services,
- (2) the difficulty of the case, i.e., the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly,
- (3) the amount in question and the results obtained,
- (4) the expenses incurred,
- (5) the nature and length of the professional relationship with the client,

(6) the likelihood, if apparent to the client, that acceptance of the particular employment will preclude other employment by the lawyer,

(7) the time limitations imposed by the client or by the circumstances, and

(8) whether the fee is fixed or contingent. [*Pirgu v. United Servs. Auto. Ass'n*, 499 Mich. 269, 282; 884 N.W.2d 257 (2016).]

Building on the Court's decision in *Smith*, our Supreme Court in *Pirgu* combined the six factors cited in *Wood v. Detroit Auto. Inter-Ins. Exch.*, 413 Mich. 573, 588; 321 N.W.2d 653 (1982), and the eight factors listed in listed in Rule 1.5(a) of the Michigan Rules of Professional Conduct.² See *Pirgu*, 499 Mich. at 281. To facilitate appellate review, the trial court “should briefly discuss its view of each of the factors above on the record and justify the relevance and use of any additional factors.” *Id.* at 282.

² In *Prins*, 299 Mich. App. at 645, this Court stated, “although *Smith* is not a FOIA case, it controls for purposes of determining reasonable attorney fees in FOIA cases” We conclude that *Pirgu*, which was released after *Prins*, is also applicable in FOIA cases.

C. PUNITIVE DAMAGES

Plaintiffs also contend that the trial court erred by declining to award plaintiffs punitive damages. We disagree. MCL 15.240(7) provides, in pertinent part:

If the court determines in an action commenced under this section that the public body has arbitrarily and capriciously violated this act by refusal or delay in disclosing or providing copies of a public record, the court shall order the public body to pay a civil fine of \$1,000.00, which shall be deposited into the general fund of the state treasury. The court shall award, in addition to any actual or compensatory damages, punitive damages in the amount of \$1,000.00 to the person seeking the right to inspect or receive a copy of a public record....

A plaintiff is entitled to punitive damages under MCL 15.240(7) only if the defendant arbitrarily and capriciously refused to provide the requested information, and the court ordered disclosure of an improperly withheld document. *Local Area Watch*, 262 Mich. App. at 153. Here, only the first

element, being whether defendant's refusal was arbitrary and capricious, is in dispute. The term "arbitrary and capricious" is not defined by the FOIA. *Prins*, 299 Mich. App. at 647. In *Laracey v. Fin. Institutions Bureau*, 163 Mich. App. 437, 440; 414 N.W.2d 909 (1987), this Court stated:

Although the terms "arbitrarily" and "capriciously" are not defined in the [FOIA] statute, they have generally accepted meanings. As noted in *Bundo v. City of Walled Lake*, 395 Mich. 679, 703, n. 17; 238 N.W.2d 154 (1976), citing *United States v. Carmack*, 329 U.S. 230, 243; 67 S. Ct. 252; 91 L. Ed. 209 (1946), the United States Supreme Court has defined these terms as follows:

*6 Arbitrary is: " '[W]ithout adequate determining principle Fixed or arrived at through an exercise of will or by caprice, without consideration or adjustment with reference to principles, circumstances, or significance, ... decisive but unreasoned.' "

Capricious is: " '[A]pt to change suddenly; freakish; whimsical; humorsome.' "

This Court has held that even when a defendant's refusal to disclose records violated the FOIA, the defendant's actions were not necessarily arbitrary or capricious if the defendant's decision was based on "consideration of principles or circumstances and was reasonable, rather than whimsical." *Meredith Corp.*, 256 Mich. App. at 717 (quotation marks and citations omitted). This Court also has found that a denial by the MDOC of a FOIA request based upon the desire to protect employee-witnesses from potential retribution and upon a reasoned belief that internal memoranda were exempt from disclosure under the FOIA was not arbitrary or capricious. *Yarbrough v. Dep't of Corrections*, 199 Mich. App. 180, 185-186; 501 N.W.2d 207 (1993).

In denying plaintiffs' request for punitive damages in this case, the trial court noted that defendant's response to plaintiffs' FOIA requests was based on legitimate security concerns, and was insufficient not because the security concerns were not legitimate but because defendant had a policy of denying all requests for video footage regardless of the content of the video. MCL 15.243(1) provides, in relevant part:

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

* * *

(c) A public record that if disclosed would prejudice a public body's ability to maintain the physical security of custodial or penal institutions occupied by persons arrested or convicted of a crime or admitted because of a [mental disability](#), unless the public interest in disclosure under this act outweighs the public interest in nondisclosure.

* * *

(u) 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.

In this case, defendant's inspector averred that disclosure of the requested videos would present an increased danger to the unnamed prisoner in the video and to the facility, particularly in light of recent threats against the facility, would reveal the layout of the premises and prisoner movement plans, and reveal the technical capabilities, equipment, and the tactics and procedures defendant's officers use in responding to confrontations. Defendant's denials of plaintiffs' FOIA requests thus were not arbitrary because they were not arrived at "[w]ithout adequate determining principle" or "without consideration or adjustment with reference to principles, circumstances, or significance" *Laracey*, 163 Mich. App. at 440 (quotation marks and citations omitted). Further, defendant's denials of plaintiffs' FOIA requests were not capricious. Although the record indicates that defendant's routine denial of requests for video footage was an inadequate response under the FOIA, the denials of plaintiffs' FOIA requests were uniform and consistent, and not subject to sudden change. See *id.* Accordingly, the trial court did not err by declining to award punitive damages. See *Local Area Watch*, 262 Mich. App. at 153.

*7 The trial court's order denying plaintiffs punitive damages is affirmed. The trial court's order determining that plaintiffs prevailed in full and therefore are statutorily entitled to attorney fees, costs, and disbursements under the FOIA is reversed, and this matter is remanded to the trial court for determination within the trial court's discretion whether plaintiffs, having partially prevailed, are awarded any, all, or a portion of reasonable attorney fees, costs, and disbursements. We do not retain jurisdiction.

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