STATE OF MICHIGAN
COURT OF CLAIMS

THE MACKINAC CENTER
FOR PUBLIC POLICY,

Plaintiff,

Case No. 21-000011-MZ

v

Hon. Elizabeth Gleicher

MICHIGAN STATE UNIVERSITY,

Defendant.

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

Elizabeth M. Watza (P81129)
Office of the General Counsel
Michigan State University
Attorney for Defendant
426 Auditorium Road, Room 494
East Lansing, MI 48824
(517) 353-4934
watzaeli@msu.edu

PLAINTIFF'S 11/14/22 RESPONSE TO
DEFENDANT'S 11/03/21 MOTION FOR RECONSIDERATION

In response to Defendant's 11/3/22 Motion for Reconsideration, and this Court's Order of 11/4/22, Plaintiff makes the following Response.

Motions for Reconsideration

At the outset, Motions for Reconsideration are not supposed to re-litigate issues already decided by the Court absent "palpable" error. MCR 2.119(F)(3) states, "a motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted. The moving party must demonstrate a palpable

error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error." MCR 2.119(F)(3).

Here, Defendant claims palpable error, but does not identify the error that has misled the parties or the court. Defendant proceeds to claim that the court has misapplied the relevant statutes. In so doing, Defendant now argues the matter using arguments that were not presented in the briefing originally submitted to the Court.

Lastly, palpable error is not described by Defendant, which argues that the court erred in its interpretation of the law, rather than point to a clear and obvious matter that misled the court. "Palpable" is defined as '[e]asily perceptible, plain, obvious, readily visible, noticeable, patent, distinct, manifest.' *Stamp v Mill Street Inn*, 152 MichApp 290, 294; 393 NW2d 614 (1986), quoting Black's Law Dictionary (5th ed.), p. 1000." *Luckow v Luckow*, 291 Mich App 417; 805 NW2d 453 (2011). Defendant has shown no such error.

FERPA and MCL 15.243(2)

Defendant makes a new argument that was not previously briefed by the parties: That the federal privacy law, FERPA, which is substantively incorporated into FOIA, exempts the names of petition signers because these are "education records." Plaintiff briefed the application of FERPA and how it relates to the revelation of names in higher education in its Plaintiff's Brief of 11/21/2021 at pages 13-16. Defendant had not previously briefed or argued this matter.

Defendant alleges that "An educational institution cannot disclose education records or personally identifiable information in a record… without the written consent of the postsecondary student." (Defendant's 11/03/2022 Motion for Reconsideration at page 4.) Defendant then goes on to state the definition provided in the statute. "Education records, absent inapplicable exceptions, are 'those records, files, documents, and other materials' that 'contain information

directly related to a student' and 'are maintained by an educational agency or institution. . . .' 20 USC § 1232g(a)(4)(A)."

The definition, however, does not provide much guidance as to what an "education record" is, or what constitutes "directly related to a student." A school or university might keep various forms of information about a student that are either indirectly related or not related at all to that student's education. Michigan courts have not ruled authoritatively on these two areas. In *Doe v Unnamed School District*, unpublished per curiam opinion of the Court of Appeals, issued March 21, 2019 (Docket No., 34023) (attached as Plaintiff's 11/12/2022 Motion Exhibit J), the court found that student names there could be disclosed because the documents "do not 'contain information directly related to a student.' *Id*. Instead, the documents are letters directed to plaintiffs concerning their access to the elementary school attended by the Student with defendant's explanation regarding the same. … Plaintiffs are clearly the subject of the documents, which relate to the Student only in an indirect or incidental manner." *Doe* at page 4. In short, including the student's name was not directly related to the students.

Other jurisdictions that have examined this question have decided that "education records" fits into what is likely the commonly understood definition, and must relate specifically to matters regarding that student's education, not their non-education related activities while at college. The United States Supreme Court decided a related matter, but did not find it necessary to define an educational record. However, in that case, the United States participated and briefed the matter as amicus curiae, and argued that the definition in FERPA means this:

> Petitioners, supported by the United States as amicus curiae, contend the definition covers only institutional records—namely, those materials retained in a permanent file as a matter of course. ***They argue that records "maintained by an educational agency or institution" generally would include final course grades, student grade point averages, standardized test scores, attendance records, counseling records,***

> ***and records of disciplinary actions***—but not student homework or classroom work. Brief for Petitioners 17; Brief for United States as Amicus Curiae 14.

Owasso Independent School District v Falvo, 534 US 426, 432-433; 122 SCt 934 (2002) (emphasis added). Although this is the argument of the United States, and not the holding of the Court, it should nevertheless be persuasive, as it is the position of the federal government regarding the interpretation of FERPA, and was not contradicted by the Court.

Other states' high courts have considered this issue and found that records of students' extracurricular activities are not education records under FERPA, which is sometimes called the "Buckley Amendment," and therefore are not exempt from open-records statutes. The Supreme Court of Georgia held:

> [W]e do not believe the documents sought are 'education records' within the meaning of the Buckley Amendment. The documents at issue involve charges of violations of University rules and regulations—specifically, in this case, hazing charges—against social fraternities. While the records in question are similar to, they are not the same as, those 'maintained solely for law enforcement purposes,' which are expressly excluded from the Buckley Amendment's purview. Nevertheless, ***the records are not of the type the Buckley Amendment is intended to protect, i.e., those relating to individual student academic performance, financial aid, or scholastic probation***.

Red & Black Publishing Co., Inc. v Board of Regents, 262 Ga 848, 852; 427 SE2d 257 (1993). (Emphasis added, internal citations and footnote omitted.)

The Supreme Court of Ohio similarly held:

> At Miami University, the University Disciplinary Board adjudicates cases involving infractions of student rules and regulations, such as underage drinking, but may also hear criminal matters, including physical and sexual assault offenses, which may or may not be turned over to local law enforcement agencies. Thus, the UDB proceedings are nonacademic in nature. ***The UDB records, therefore, do not contain educationally related information, such as grades or other academic data, and are unrelated to academic performance, financial aid, or scholastic performance***. Consequently, we adopt the reasoning of the *Red & Black* decision, supra, and hold that university disciplinary records are not "education records" as defined in FERPA.

The Miami Student v Miami University, 79 Ohio St3d 168, 171-172; 680 NE2d 956 (1997) (emphasis added).

The United States District Court for the Western District of Missouri considered the matter and came to the same conclusion:

> It is reasonable to assume that criminal investigation and incident reports are not educational records because, although they may contain names and other personally identifiable information***, such records relate in no way whatsoever to the type of records which FERPA expressly protects; i.e., records relating to individual student academic performance, financial aid or scholastic probation which are kept in individual student files***. These records are quite appropriately required to be kept confidential.

Bauer v Kincaid, 759 F Supp 575, 591 (1991)[1] (emphasis added).

Lastly, the text of the FERPA itself indicates that "education records" are those limited to academic performance, financial aid, etc., because each student's education record shall have its own single file or similar source of record keeping that consolidates all of the student's education record:

> Each educational agency or institution shall maintain a record, kept with the education records of each student, which will indicate all individuals (other than those specified in paragraph (1)(A) of this subsection), agencies, or organizations which have requested or obtained access to a student's education records maintained by such educational agency or institution, and which will indicate specifically the legitimate interest that each such person, agency, or organization has in obtaining this information.

[1] *Bauer* and other such holdings have been called into question because of revisions to the statute regarding criminal investigation reports. But this does not affect their holdings regarding the definition of "education material." See *U.S. v Miami University*, 294 F3d 797 (2002), footnote 15. "The holding in *Bauer v. Kincaid*, 759 F.Supp. 575 (W.D.Mo.1991), does not affect this conclusion. Having closely reviewed *Bauer*, we believe that the records sought in that case … would likely fall within the current law enforcement unit records exception. In fact, the subsequent amendments to the FERPA and its regulations were likely designed to bring the *Bauer* documents clearly within the law enforcement unit records exception. See 20 U.S.C. § 1232g(a)(4)(B)(ii); 34 C.F.R. § 99.8(a)(1)(i),(ii)."

20 USC 1232g(b)(4)(A). In other words, "those materials retained in a permanent file as a matter of course," as the government argued in *Owasso*, supra. It follows from this that anything not kept in that student's file is not part of their "education record."

There has been no assertion made here that a student's signature on one of the subject petitions became part of the student's permanent file as a matter of course. (However, because this issue was not briefed, the matter was not investigated during discovery). If the signed petitions were not incorporated into the students' permanent files as a matter of course, then the petitions and signatures are not a part of the "education record" as it is defined by FERPA.

There is no need to reconsider and the Court ruled correctly where it stated:

> The students publicly supported Hsu or advocated for his removal. Their names were part of the public discourse. For the same reasons that the personal privacy exemption does not apply to the senders of the emails, it does not apply to the students who voluntarily injected themselves into the actual fray.

10/13/2022 Opinion and Order of the Court, at page 9.

Lastly, Plaintiff would reiterate what it said about the personal privacy exemption, and apply it here:

> [I]n related areas of law, including the governing of MSU, it is required that when members of the public seek to affect its policies, their names and opinions be provided, which are in turn published to the public. When seeking to influence the governance of MSU, individuals, both those affiliated with MSU and those who are not, are required to provide their names, relationship to the university, street address, phone number, and email, and the subject of their opinion to the trustees. See Guidelines for Board Policy 01-01-02; Board of Trustees – Addressing. A copy is attached as Exhibit K to this Brief. These names are then published in the minutes and provided in the recordings that are made publicly available, along with their opinion on the matter at issue.
>
> Anyone who cares to can listen to the identified person and hear their opinion. A copy of a relevant page from the minutes is attached as Exhibit L here. There is no presumption of anonymity.
>
> The same is true for the governance of municipalities throughout Michigan, including the City of East Lansing. Those who wish to address the City Council provide their names (and addresses) and the topic of their concern. This is then

> published in the minutes. A copy of a relevant page of pre-COVID minutes is attached as Exhibit M here.
>
> What MSU is urging here is that the public can address the trustees and/or officers of MSU for the purpose of effecting their decision making via email, and bypass the requirement to identify oneself to the public. In short, MSU is alleging that the Freedom of Information Act can be used as a way to work around MSU's own rules regarding addressing trustees and the president.

Plaintiff's 12/3/21 Response Brief at pages 7-8.

There is no palpable error.

The frank communications exemption.

Plaintiff is at an obvious disadvantage here because, unlike Defendant and the Court, Plaintiff has not seen the unredacted page 575. Nevertheless, Plaintiff disagrees with Defendant's contention that an email from a "Senior Vice President for Government Relations" would not contribute to the public understanding of the operations or activities of the *governing* body. This, more than anything else, is likely to contribute to such an understanding of how the public body functions.

Plaintiff restates the standard from its 11/12/2021 Brief in this matter:

> It must still be disclosed unless the public's interest in keeping it secret clearly outweighs the public's interest in open government. Additionally, as noted in dissent, this exemption is the only one where the public's interest in keeping the materials secret must "clearly outweigh" (emphasis added) the public's interest in complete and open information about the government's workings: "Notably, the 'frank communication' exemption is the only FOIA provision that uses the term 'clearly outweighs.' Other provisions merely use the term 'outweighs' when providing for a balancing test." *Herald Co.*, 475 Mich at 493 (Justice Cavanaugh dissenting.)
>
> The public body must offer more than platitudes and generalizations to carry its burden of showing that something should be exempt from FOIA disclosure. It must show, in each specific instance, why the public's interest in nondisclosure clearly outweighs the interest in open government. See, for example, *Nicita v City of Detroit*, 216 Mich App 746; 550 NW2d 269 (1996).

Plaintiff's 11/12/21 Brief at page 11.

Defendant has not offered any specifics and has relied on platitudes and generalizations. Those cannot serve as the basis for allowing such exemptions/redactions. The Court has not made a palpable error.

Clarification of page 166 redactions.

Plaintiff, again, has not seen the text that was redacted, and cannot be certain of what it contains. But Plaintiff will reiterate that it agrees that cell phone numbers need not be revealed, and attorney-client privileged materials need not be revealed.

Conclusion and relief requested.

Plaintiff does not believe that the Court made any palpable error in its Order and would request that Defendant's 11/03/2022 Motion for Reconsideration be denied, with the possible exception of clarifying page 166. Plaintiff further requests that this Court enter a final order requiring the disclosure of the materials it has ruled are non-exempt by a date certain determined to be appropriate by the Court.

Respectfully submitted:

November 13, 2022

/s/ Derk A. Wilcox
Derk A. Wilcox
Attorney for Plaintiff