

TABLE OF CONTENTS

INDEX OF AUTHORITIES..... ii

INTRODUCTION 1

ARGUMENT 1

I. THE COURT OF APPEALS’ DECISION HAS SUFFICIENT PRACTICAL AND JURISPRUDENTIAL SIGNIFICANCE TO WARRANT REVIEW..... 2

II. THE COURT OF APPEALS’ DECISION IS WRONG..... 3

RELIEF SOUGHT 6

INDEX OF AUTHORITIES

CASES

Amberg v City of Dearborn, 497 Mich 28; 859 NW2d 674 (2014).....4, 5

Federated Publications, Inc v Board of Trustees of Michigan State University,
460 Mich 75; 594 NW2d 491 (1999).....2

People v Nyx, 479 Mich 112; 734 NW2d 548 (2007).....3

CONSTITUTIONAL PROVISIONS AND STATUTES

Const 1963, art VIII, § 52

MCL 15.231(2)3

MCL 15.232(i)(i)4

MCL 15.233(1)3

OTHER AUTHORITIES

MCR 7.305(B)(2).....1, 2

MCR 7.305(B)(3).....1, 2

MCR 7.305(B)(5)(a)1

INTRODUCTION

The Court of Appeals held that privately-created papers transform into “public records” under FOIA merely because the University of Michigan (“the University”) is storing them under lock and key. The Court of Appeals’ decision threatens to force the University to breach a gift agreement and infringes on the academic mission of the University and other public universities. Further, because the phrase “public record” defines the scope of FOIA with respect to all state agencies, the Court of Appeals’ decision will have wide ramifications across state government.

Ahmad does not dispute the jurisprudential and practical significance of the Court of Appeals’ decision. Instead, he merely argues that the decision is correct. But Ahmad does not meaningfully engage with the University’s arguments that the text and purpose of FOIA foreclose the Court of Appeals’ interpretation.

Because the Court of Appeals’ decision is wrong and will cause significant harm to public universities and other state agencies, this Court should grant review.

ARGUMENT

The University’s application explained that this case satisfies three statutory criteria for Supreme Court review. First, “the issue has significant public interest and the case is one ... against the state or one of its agencies or subdivisions.” MCR 7.305(B)(2). Second, “the issue involves a legal principle of major significance to the state’s jurisprudence.” MCR 7.305(B)(3). Third, “the decision is clearly erroneous and will cause material injustice.” MCR 7.305(B)(5)(a).

In his brief in opposition, Ahmad does not appear to dispute that the first two criteria are satisfied. Instead, he takes issue only with the third: he argues that the Court of Appeals’ decision is correct. As explained below, Ahmad’s arguments are wrong on their merits and provide no basis for denying review.

I. THE COURT OF APPEALS' DECISION HAS SUFFICIENT PRACTICAL AND JURISPRUDENTIAL SIGNIFICANCE TO WARRANT REVIEW.

As the Application explained, the issue in this case “has significant public interest and the case is one ... against the state or one of its agencies or subdivisions.” MCR 7.305(B)(2). The public interest is clear: the Court of Appeals’ decision, if left intact, will impede public access to knowledge. Donors frequently donate papers under the condition that they be closed to the public for a fixed period. For instance, Chief Justices Burger and Rehnquist and Justices Blackmun, Jackson, Scalia, and Souter have all donated their papers under such agreements. *See* App. 18-20. Such agreements are socially beneficial because without them, donors would not donate their papers at all; as such, enforcing such agreements promotes access to historically significant documents. Yet the Court of Appeals effectively prohibited public universities in Michigan from entering into such agreements: any public university that takes possession of a document must disclose it immediately under FOIA. If the Court of Appeals’ decision stands, no donor will donate papers to a public university in Michigan under such an agreement ever again.

As the Application also explained, “the issue involves a legal principle of major significance to the state’s jurisprudence.” MCR 7.305(B)(3). The Court of Appeals’ decision trenches on the University’s constitutional right of autonomy on a matter core to its academic mission. The Michigan Constitution vests the University’s Board with authority to manage the University and broadly protects it from legislative interference. Const 1963, art. VIII, § 5; *see Federated Publ’ns, Inc v Bd of Trs of Mich State Univ*, 460 Mich 75, 87; 594 NW2d 491 (1999); App. 17-18. Yet the Court of Appeals’ decision would intrude on the University’s power to make curatorial decisions regarding its libraries.

Moreover, the effect of the Court of Appeals’ decision will extend beyond public universities. The Court of Appeals construed the phrase “public record” in FOIA—the phrase that

defines the scope of FOIA as applied to all public bodies. *See* MCL 15.233(1). Thus, the Court of Appeals' decision implies that *any* privately-created document being physically held by an agency as part of its official duties will be deemed a public record subject to FOIA. Under the Court of Appeals' reasoning, even police departments temporarily holding onto lost or stolen property will be vulnerable to FOIA requests. That far-reaching ruling warrants Supreme Court review.

Ahmad's sole response to these points is that the Legislature can change the law. Opp. 9-10. Of course, the Legislature does not have authority to abrogate the University's constitutionally-protected right of autonomy, and the Court of Appeals should not have adopted a construction of FOIA that created "grave doubts" as to whether that right was infringed. *People v Nyx*, 479 Mich 112, 124; 734 NW2d 548 (2007) (quotation marks omitted). In any event, Ahmad's argument, which could be made in every statutory-interpretation case, is no basis for denying review. Ahmad does not dispute the jurisprudential and practical significance of this case under current law.

II. THE COURT OF APPEALS' DECISION IS WRONG.

The Court of Appeals erred in holding that the Tanton papers are "public records" under FOIA. FOIA's purpose is to facilitate access 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," so as to ensure that the "people" can "fully participate in the democratic process." MCL 15.231(2). In light of that purpose, the term "public record" should be interpreted to cover records that shed light *on public activity*. Only those documents are conceivably capable of providing "information regarding the affairs of government" and facilitating "particip[ation] in the democratic process." *Id.* The Tanton papers do not shed light on the affairs of government;

they shed light on the affairs of Tanton. The University's storage of those papers under lock and key does not transform them into public records under FOIA. Ahmad's allegations that Tanton held controversial public policy views do not alter that reality. FOIA does not require disclosure of private citizens' records *about* government; it requires disclosure of records *of* government. Tanton's papers are not records of government.

Ahmad does not suggest that disclosure of the Tanton papers will provide "information regarding the affairs of government," or will advance any of the goals identified in FOIA's statutory preamble. Instead, his argument is premised entirely on the statutory definition of "public record": "a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function." MCL 15.232(i)(i). According to Ahmad, because the University possesses the Tanton papers "as a result of the performance of the University's official function of collecting, preserving, and making available the Library's materials," the Tanton papers must be public records. Opp. 8.

But as the University explained, a writing cannot be possessed "*in* the performance of a public function" unless there is a *relationship* between the possession of the document and the public function. App. 7-8 (quotation marks omitted). And FOIA's preamble establishes what that relationship must be: the writing must shed light on that public function. *Id.* Ahmad ignores this argument entirely.

Amberg v City of Dearborn, 497 Mich 28; 859 NW2d 674 (2014), confirms that the University's position is correct. In *Amberg*, this Court held that video surveillance recordings created by third parties, but received by government officials in the course of pending criminal misdemeanor proceedings, constitute "public records" under FOIA. *Id.* at 29-30. The Court made clear that "mere possession of the recordings by defendants is not sufficient to make them public

records.” *Id.* at 31. To the contrary, the recordings were public records because they shed light on the public function of issuing misdemeanor citations. *See id.* at 32 (emphasizing that the recordings were “collected as evidence” to “support [the] decision” to issue criminal misdemeanor citations). Ahmad asserts that *Amberg* supports his position because it holds that documents created by third parties can, in some circumstances, be public records. Opp. 8-9. But he fails to address the crucial distinction between this case and *Amberg*. In *Amberg*, the government officials were not merely storing the recordings; they were storing the recordings to inform the decision of whether to issue misdemeanor citations—a classic public function. Here, the Tanton papers are not informing or influencing any government decision.

Ahmad’s remaining arguments are makeweights. Ahmad asserts that his own subjective purpose for seeking the Tanton papers is irrelevant. Opp. 11. This misunderstands the University’s argument. The University’s point is not that *Ahmad himself* lacks an interest in what the University is doing. Indeed, in denying Ahmad’s FOIA request, the University never attempted to determine Ahmad’s intent. Rather, the University’s point is that *the Tanton papers themselves* are incapable of shedding light on anything the University is doing. This is so because Tanton created them, and the University is merely storing them until 2035.

Ahmad also states that the University “cannot contract [its] way out of FOIA.” Opp. 11-12. This is equally irrelevant. Of course the University cannot sign contracts to evade FOIA—if a document actually is a public record, then the University cannot avoid disclosure of that document merely by contracting with a third party not to disclose it. Here, however, the University *received* the Tanton papers via a gift agreement, and that gift agreement does not transform those private papers into “public records” under FOIA.

Finally, Ahmad observes in passing that the gift agreement is not in the record, and that this case reaches the Court before discovery. Opp. 12-13. That is no basis for denying review. At the Court of Appeals, Ahmad sought—and obtained—a ruling holding that the Tanton papers *are* public records. Ahmad cannot now seek to evade review of that ruling by arguing that the record is insufficiently developed.

In any event, the precise content of the gift agreement is irrelevant to the question of whether the Tanton papers are public records. It is undisputed that Tanton wrote the papers and then donated them to the University. Indeed, as Ahmad himself emphasizes, Ahmad seeks these documents precisely *because* they were written by Tanton rather than the University. *See* Opp. 2 (Tanton “created a network of organizations ... that have profoundly shaped the immigration debate in the United States”). The question of whether the documents are public records merely because the University is storing them is squarely before the Court.

RELIEF SOUGHT

The application for leave for appeal should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on the 8th day of October, he served a copy of Defendant-Appellant, University of Michigan's Reply Brief in Support of Application for Leave to Appeal upon Plaintiff-Appellee, Hasson M. Ahmad through his counsel, Philip L. Ellison, P.O. Box 107, Hemlock, MI 48626 (pellison@olcplc.com) via electronic mail.

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