STATE OF MICHIGAN
IN THE SUPREME COURT

APPEAL FROM THE STATE OF MICHIGAN COURT OF APPEALS
CAMERON, PJ, RONAYNE KRAUSE AND TUKEL, JJ

	:	
	:	Supreme Court No. 160012
HASSAN M. AHMAD,	:	
Plaintiff-Appellee,	:	Court of Appeals Case No. 341299
v	:	
	:	Lower Court Case No. 17-000170-MZ
UNIVERSITY OF MICHIGAN,	:	Hon. Stephen L. Borrello
Defendant-Appellant.	:	

APPELLANT'S BRIEF ON APPEAL

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STATEMENT OF THE BASIS OF JURISDICTION

This is an appeal from a decision by the Michigan Court of Appeals, issued on June 20, 2019. Ct. App. Op. at 1 (18a). The Court of Appeals reversed the Court of Claims' November 20, 2017 order granting summary disposition in Plaintiff's FOIA suit in favor of the University. *Id*; Ct. Cl. Op. at 7 (17a). The Court of Appeals had jurisdiction pursuant to MCR 7.202(6)(a); MCR 7.203(A)(1); and MCL 600.6446(1) to entertain the appeal of the Court of Claims' final order. This Court has jurisdiction pursuant to MCL 600.212; MCL 600.215(3); and MCR 7.303(B)(1) to review by appeal a case after a decision by the Court of Appeals. Timely application for leave to appeal was filed within 42 days of the Court of Appeals' filing of the opinion appealed from pursuant to MCR 7.305(C)(2). Leave to appeal was granted on March 6, 2020.

STATEMENT OF THE QUESTION INVOLVED

Dr. John Tanton, a private citizen not affiliated with the University of Michigan or state government, donated papers to the Bentley Historical Library, an academic unit at the University of Michigan (the "University"). Dr. Tanton made the donation subject to the condition that a subset of those papers be closed to public access until 2035. Hassan Ahmad ("Plaintiff") filed a FOIA suit seeking immediate access to the closed documents (the "Tanton papers"). The Court of Claims dismissed Plaintiff's suit on the ground that the documents were not "public records" under FOIA. MCL 15.232(i). The Court of Appeals reversed, finding that the documents were "public records" under FOIA.

The question presented, as restated in the Court's order granting review, is:

Whether the documents sought by the plaintiff are within the definition of "public record" in § 2(i) of the Freedom of Information Act (FOIA), MCL 15.232(i).

The University's answer is:

No.

INTRODUCTION

The University of Michigan (the "University") maintains a library system that is the largest research library in Michigan and one of the largest in the United States. One of the crown jewels of that library system is the Bentley Historical Library, which contains records documenting Michigan's history. Like virtually all libraries, Bentley accepts gifts from private donors of historically significant documents. The University makes those documents available as part of its educational offerings to students and as a resource for the public.

Dr. John Tanton, a private citizen not affiliated with the University or state government, donated 25 boxes of papers to Bentley, subject to the condition that ten of those boxes remain sealed until 2035. Such conditions are ubiquitous in gift agreements, and for good reason: they ensure that the public can have access to important documents while mitigating any harm from the release of those documents to people still living. Bentley routinely enters into such gift agreements; for instance, Bentley's closed collections include the papers of television newsman Mike Wallace, businessman A. Alfred Taubman, and former Ann Arbor Mayor Elizabeth Brater. Numerous Supreme Court Justices, including Chief Justice Rehnquist and Justices Blackmun, Jackson, Scalia, and Souter, have donated their papers subject to similar conditions.

Plaintiff Hassan Ahmad filed a FOIA request seeking immediate access to the ten boxes of Dr. Tanton's papers that were sealed. The University denied the request in accordance with the terms of the gift agreement. Plaintiff then sued the University, seeking release of the documents under FOIA. The Court of Claims dismissed Plaintiff's claim, ruling that the Tanton papers—privately-created documents that the University was storing under lock and key—were not "public records" under FOIA.

The Court of Appeals reversed, holding that the Tanton papers *were* "public records." It reasoned that because the University was storing the Tanton papers for an official purpose—*i.e.*, to make them available to the public in 2035—those papers transformed into "public records" under FOIA that presumptively had to be made available to the public immediately. This Court granted the University's application for discretionary review.

This Court of Appeals' decision is incorrect and should be reversed. In *Amberg v City of Dearborn*, 497 Mich 28; 859 NW2d 674 (2014), this Court held that "mere possession" of privately-created records by the government "is not sufficient to make them public records." *Id.* at 31. Here, the University is doing nothing more than storing privately-created documents. They were not created by the University, they were never used by the University, and they cannot conceivably shed light on the University's operations. Case law construing the federal FOIA similarly holds that privately-created records being stored in a library are not "public records"—even if the library is a government agency.

In addition to conflicting with FOIA's text, the Court of Appeals' interpretation of the definition of "public record" undermines FOIA's purpose. FOIA was enacted to expand public access to knowledge, but the decision below would impede that purpose. Under the Court of Appeals' decision, FOIA effectively bars public universities from entering into gift agreements requiring delayed public access to the gifted documents. If that decision is allowed to stand, no one would donate records to a public library under such an agreement, and the public would lose access to records of invaluable historical significance. Not only would that outcome harm the public, but it would also interfere with the University's constitutionally-protected autonomy on a matter at the heart of the University's academic function.

The effect of the Court of Appeals' decision, moreover, extends beyond public universities. The Court of Appeals construed the phrase "public record"—the phrase defining the scope of FOIA with respect to virtually all state government entities. By expanding the scope of this definition, the Court of Appeals' decision subjects all state agencies to expanded disclosure obligations for a broad array of documents that shed no light on the workings of government.

This Court should reverse the Court of Appeals' misguided ruling.

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

The Bentley Historical Library is an academic unit at the University of Michigan. The University maintains the Library's Michigan Historical Collections "for the purpose of collecting, preserving, and making available to students manuscripts and other materials pertaining to the state, its institutions, and its social, economic, and intellectual development." Ct. App. Op. at 3 (20a) (quoting Board of Regents Bylaw 12.04). Dr. John Tanton, a private citizen not affiliated with the University or state government, donated 25 boxes of papers to Bentley. *Id.* at 1 (18a). In accordance with the terms of the gift, Boxes 15-25 were to remain closed for 25 years from the date of accession—*i.e.*, until April 2035. *Id.* at 1 & n 1 (18a). No one has access to the Tanton papers until 2035—not students, staff, or the public.

Plaintiff filed a FOIA request seeking copies of the sealed Tanton documents. Compl. ¶ 8 (30a). The University denied Plaintiff's request on the ground that the Tanton papers were not "public records" under FOIA. Ct. App. Op. at 2 (19a). The University explained: "As indicated on the Bentley Historical Library website, the restricted records are closed to research until April 2035. Thus, they are not utilized, possessed, or retained in the performance of any official University function." Compl. Ex. 7 (25a).

In later denying Plaintiff's administrative appeal, the University elaborated that "[t]hese Bentley Library records emanating from a private source are restricted and are not available to the

university community or the public at this time by a valid charitable gift agreement with a donor. As such, they are not public records subject to disclosure under the FOIA and the University does not currently have the right to disseminate them." Compl. Ex. 9 (28a). The University also explained that "violating the terms of the gift agreement in this manner would undermine the University's ability to fully achieve its educational mission, insofar as preserving the history of the state of Michigan is one important aspect of its academic mission and is directly related to the willingness of others (*e.g.*, legislators and judges) to donate their papers to the Bentley Library." *Id.* "Potential donors with key historical documents will be chilled by the University's failure to observe the limits expressly placed upon such gifts." *Id.*

Plaintiff sued the University in the Court of Claims. The University moved for summary disposition under MCR 2.116(C)(8), arguing that the Tanton papers did not meet the statutory definition of a "public record" under FOIA: 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).

The Court of Claims granted the University's motion. The court explained that "[t]he records are plainly possessed by the library, but this mere possession is not enough to render the records 'public' under FOIA." Ct. Cl. Op. at 4 (14a). Rather, "[t]he records must be utilized by the public body in the performance of an official function, and the Court finds that the records have not been so utilized in this case." *Id.* The court emphasized that "Library staff members do not even have access to view the materials," which "negat[ed] any assertion that the Library has applied the materials to an official function." *Id.* As a result, "[r]eleasing the documents would not reveal any information regarding the affairs of the Library; rather, it would only reveal information regarding the affairs of Tanton, who is not a public body." *Id.* (internal quotation marks omitted). The court followed federal case law similarly holding that materials possessed by

a public library are not "public records" under FOIA. *Id.* at 5-6 (15a-16a) (finding that case law "particularly convincing"). The court also concluded that Plaintiff's argument "contradicts the stated general purpose of FOIA statutes to inform citizens 'about what their government is up to.'" *Id*. at 6 (16a) (quoting *US Dep't of Justice v Reporters Comm for Freedom of the Press*, 489 US 749, 773; 109 S Ct 1468; 103 L Ed 2d 774 (1989)). Because the Tanton papers are incapable of informing people about what the Bentley Library is "up to," the court held that they are not public records. *Id*. at 7 (17a).

The Court of Appeals reversed and remanded, holding that the Tanton papers were "public records" under FOIA. The Court of Appeals reasoned that "[t]he University's bylaws provide that the Bentley Library's historical collection is 'maintained for the purpose of *collecting*, *preserving*, and *making available to students* manuscripts and other materials pertaining to the state, its institutions, and its social, economic, and intellectual development.'" Ct. App. Op. at 3 (20a) (citation omitted). It stated that "the Library's actions were done *with the intention* that all three aspects of its stated purpose were to be fulfilled." *Id.* at 4 (21a) (emphasis in original). Thus, "the act of presently collecting and acquiring papers that the Library intends to preserve and make available to students at a future date would be in the performance of its official function." *Id.* Here, because "the Tanton papers were 'closed' to research until April 2035," "the University was holding the papers with the intent to open them to research (and students) at that later time." *Id.* at 5 (22a). The Court of Appeals therefore concluded that the "University's acts of collecting and preserving the papers were in furtherance of its official purpose." *Id.* The Court of Appeals did not resolve the University's defense under the Michigan Community Foundation Act—a statute authorizing public libraries to accept gifts—and noted that the issue remained open on remand. *Id.* at 6 n 6 (23a). Nor did the Court address other defenses advanced by the University, including,

among others, the University's defense that the application of FOIA would violate the University's right to autonomy under Article VIII, § 5 of the Michigan Constitution, and the University's defense under FOIA's personal privacy exemption, MCL 15.243(1)(a).

This Court granted the University's application for leave to appeal, and ordered the parties to address whether the documents Plaintiff seeks are within FOIA's definition of "public record," MCL 15.232(i).

STANDARD OF REVIEW

As this case arises from a motion for summary disposition pursuant to MCR 2.116(C)(8), this Court considers the facts presented in Plaintiff's complaint and the documents referenced in it. See MCR 2.116(G)(5); *Dalley v Dykema Gossett*, 287 Mich App 296, 301 n 1; 788 NW2d 679, 684 (2010). The Court reviews *de novo* whether FOIA's definition of "public record," MCL 15.232(i), encompasses the documents Plaintiff seeks. *Whitman v City of Burton*, 493 Mich 303, 311; 831 NW2d 223 (2013); *Herald Co v Eastern Mich Univ Bd of Regents*, 475 Mich 463, 471-72; 719 NW2d 19 (2006).

SUMMARY OF ARGUMENT

The Tanton papers are not "public records" under FOIA. A public record is defined as "a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function, from the time it is created." MCL 15.232(i). That statutory definition appears in conjunction with a statutory "purpose clause": "It is the public policy of this state that 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. The people shall be informed so that they may fully participate in the democratic process." MCL 15.231(2).

The statutory definition of "public record" requires *both* that a writing be "prepared, owned, used, in the possession of, or retained by a public body," *and* that the public body be engaged "in the performance of an official function" distinct from the preparation, ownership, use, possession, or retention of the document. Further, when viewed in conjunction with the purpose clause, that statutory definition is naturally interpreted to require that the writing *shed light* on the performance of that distinct official function. Treating such documents as public records would advance the goal articulated in the purpose clause: providing "information regarding the affairs of government." MCL 15.231(2).

Under that interpretation, the Tanton papers do not qualify as public records. The University is not engaging in any "official function" related to the Tanton papers other than the storage of those documents. Moreover, the Tanton papers do not shed light on any "official function." Rather, they are privately-created documents that the University is merely storing.

Case law from this Court and the Court of Appeals confirms that the Tanton papers are not public records. This Court has made clear that "mere possession" of documents "is not sufficient to make them public records." *Amberg*, 497 Mich at 31. Rather, both this Court and the Court of Appeals have consistently required that documents shed light on the performance of some distinct official function to qualify as public records. See, e.g., *id.* at 32 (recordings were public records because they were "collected … to support th[e] decision" to issue a criminal misdemeanor citation). Because the Tanton papers do not meet that description, they are not public records.

In reaching a contrary conclusion, the Court of Appeals reasoned that the University's storage of the Tanton papers simultaneously satisfied *both* the statutory "possession" requirement, *and* the statutory "performance of an official function" requirement. That reasoning is incorrect.

The Court of Appeals should instead have analyzed whether the University's storage of the Tanton papers shed light on the performance of a distinct "official function."

Case law interpreting federal FOIA supports the University's interpretation. Federal courts have uniformly rejected the proposition that documents stored by the National Archives or other similar entities are public records. Those courts have reasoned that documents cannot be deemed public records when they shed no light on the affairs of government—even if the government is storing them in an official library or archive. This Court has frequently found federal FOIA cases to be persuasive authority in interpreting Michigan's FOIA, and it should do the same here.

The Court of Appeals' decision would undermine FOIA's purpose as well. Donor agreements like the one at issue here are common—for instance, numerous U.S. Supreme Court Justices have donated their papers under similar agreements. The Court of Appeals' interpretation of FOIA would effectively preclude public universities from entering into such agreements. If allowed to stand, the Court of Appeals' decision would deter would-be donors from donating private records of historic significance to the University, to the detriment of donors, the University, and the public. That outcome would negate FOIA's purpose of enhancing public access to information.

The Court of Appeals' decision also encroaches on the University's academic freedom. Thus, it creates grave constitutional doubt under Article VIII, § 5 of Michigan's Constitution, which protects the University's autonomy from legislative interference. Further, the impact of the Court of Appeals' ruling cannot be confined to the University. FOIA's definition of "public records" applies across state government. If the Court adopts Plaintiff's interpretation, a broad range of privately-created documents and other objects would unexpectedly be deemed "public records" despite shedding no light on any government activity.

For these reasons, the judgment of the Court of Appeals should be reversed.

ARGUMENT

I. THE COURT OF APPEALS' DECISION CONFLICTS WITH FOIA'S TEXT AND CASE LAW CONSTRUING THAT TEXT.

A. Under FOIA's Plain Text, the Tanton Papers Are Not Public Records.

FOIA confers on members of the public the right to "inspect, copy, or receive" copies of "public records," unless a statutory exemption applies. MCL 15.233(1); see MCL 15.232(i)(*ii*) ("All public records that are not exempt from disclosure … are subject to disclosure under this act."). A "public record" is defined as "a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function, from the time it is created." MCL 15.232(i).

In addition, immediately before FOIA's definition of "public record," FOIA contains a provision setting forth the statute's purpose:

> It is the public policy of this state that all persons, except those persons incarcerated in state or local correctional facilities, 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. The people shall be informed so that they may fully participate in the democratic process.

MCL 15.231(2) (emphasis added). This provision has been termed FOIA's "purpose clause." *Bukowski v City of Detroit*, 478 Mich 268, 286; 732 NW2d 75 (2007) (Kelly, J., dissenting).

It is a "well established" principle of statutory interpretation that "to discern the Legislature's intent, statutory provisions are *not* to be read in isolation; rather, context matters, and thus statutory provisions are to be read as a whole." *Robinson v City of Lansing*, 486 Mich 1, 15; 782 NW2d 171 (2010). In FOIA, the Legislature took the unusual step of codifying the statutory purpose right into the statute itself. See *Breighner v Mich High Sch. Athletic Ass'n, Inc*, 255 Mich

App 567, 573; 662 NW2d 413 (2003) ("MCL 15.231(2) provides an express statement of the public policy, or legislative intent, behind the FOIA."). As such, this Court has recognized that FOIA provisions should be construed so as to be consistent with the purpose clause. See, e.g., *Mich Fed'n of Teachers & Sch Related Pers, AFT, AFL-CIO v Univ of Mich*, 481 Mich 657, 682 & n 65; 753 NW2d 28 (2008) (declining to construe FOIA in a manner that would not "further the stated public policy undergirding the Michigan FOIA," and citing the purpose provision); *Mager v Mich Dep't of State Police*, 460 Mich 134, 146; 595 NW2d 142 (1999) (explaining that "[t]he Legislature has stated the purpose of the Michigan FOIA" in MCL 15.231(2) and therefore rejecting "a request entirely unrelated to any inquiry regarding the inner working of government, or how well the Department of State Police is fulfilling its statutory functions"); *Kestenbaum v Mich State Univ*, 414 Mich 510, 522; 327 NW2d 783 (1982) (Fitzgerald, C.J., concurring in affirmance by equally divided court) ("[E]ach provision of the FOIA must be read so as to be consistent with the purpose announced in the preamble." (citing MCL 15.231(2))).

The statutory definition of "public records," construed against the background of the purpose clause, does not encompass the Tanton papers. That definition includes two requirements: that the writing be "prepared, owned, used, in the possession of, or retained by a public body," and that there be a "performance of an official function." As such, mere preparation, ownership, use, possession, or retention of the document is insufficient to establish that a document is a public record. Rather, there must be some "performance of an official function" distinct from the mere preparation, ownership, use, possession, or retention of the document. Otherwise, these two statutory requirements would collapse into one.

The statute further provides that the "writing" must be "prepared, owned, used, in the possession of, or retained by a public body ***in*** the performance of an official function." MCL

15.232(i) (emphasis added). The italicized term—"in"—means that a writing is a "public record" when there is a *relationship* between the preparation, ownership, use, possession or retention of the document, and the performance of the distinct official function. When viewed in light of the purpose clause, it is clear what that relationship must be. For a writing to be "***in*** the performance of an official function," MCL 15.232(i), the writing must record, or otherwise shed light on, that official function. Documents meeting that description—and only those documents—provide "information regarding the affairs of government." MCL 15.231(2). Those documents—and only those documents—allow the people to be "informed so that they may fully participate in the democratic process." *Id.*

Under that interpretation, the Tanton papers do not qualify as "public records." The University is not engaging in the "performance of an official function" distinct from the preparation, ownership, use, possession, or retention of the Tanton papers. Rather, all it is doing is storing those papers. Moreover, the Tanton papers do not shed light on any "official function" or on the "affairs of government." They provide information regarding the affairs of Tanton, a private citizen. Therefore, they are not "public records" under FOIA.

B. Case Law Interpreting FOIA Demonstrates That the Tanton Papers Are Not Public Records.

This Court's precedents confirm that the Tanton papers are not "public records." In *Amberg v City of Dearborn*, 497 Mich 28; 859 NW2d 674 (2014), this Court held that video surveillance recordings received by government officials in the course of pending criminal misdemeanor proceedings constituted "public records" under FOIA. *Id.* at 29-30. Crucially, the Court explained that "mere possession of the recordings by defendants is not sufficient to make them public records." *Id.* at 31. Rather, the recordings were public records because they were "collected as evidence" to "support [the] decision" to issue a "criminal misdemeanor citation." *Id.*

at 32 (emphasis omitted). Thus, the officials were engaging in some "official function" distinct from the possession of the recordings—the "issuance of a criminal misdemeanor citation"—and the recordings were "public records" because they shed light on the performance of that distinct official function. *Id.*

Amberg is consistent with other cases from this Court stating that FOIA requires disclosure of documents shedding light on the performance of a distinct official function. See *Bradley v Saranac Cmty Schs Bd of Ed*, 455 Mich 285, 291; 565 NW 2d 650 (1997) ("By requiring public disclosure of information regarding the affairs of government and the official acts of public officials and employees, the act enhances the public's understanding of the operations or activities of the government."); *Booth Newspapers, Inc v Univ of Michigan Bd of Regents*, 444 Mich 211, 231; 507 NW2d 422 (1993) ("[FOIA] requires public disclosure of information regarding the formal acts of public officials and employees.").

Here, by contrast, the Tanton papers are not "public records" because they are incapable of shedding any light on any government activity. They are not documents "regarding the formal acts of public officials and employees," *Booth Newspapers*, 444 Mich at 231; they are the "writings, correspondence, and research" of a private individual. Compl. ¶ 12 (30a). They do not contain "information regarding the affairs of government and the official acts of public officials and employees," *Bradley*, 455 Mich at 291; they contain information regarding the affairs and acts of Dr. Tanton. For those reasons, they are not "public records" under FOIA.

Numerous decisions from the Court of Appeals also support the University's interpretation of FOIA. Prior to the decision below, cases from the Court of Appeals consistently held that documents are not public records unless they shed light on the performance of a distinct official function. For instance, in *Howell Education Association MEA/NEA v Howell Board of Education*,

the Court of Appeals held that teachers' personal emails being stored on a public body's computer back-up system were not "public records" under FOIA. 287 Mich App 228; 789 NW2d 495 (2010). The court reasoned that "[t]here is nothing about the personal e-mail … which indicates that they are required for the operation of an educational institution." *Id.* at 236-37. It concluded: "[A]bsent some showing that the retention of personal e-mail has some *official function other than the retention itself*, we decline to so drastically expand the scope of FOIA." *Id.* at 238 (emphasis added). Likewise, in *Hopkins v Duncan Township*, the Court of Appeals held that a township board member's handwritten notes "taken for his personal use" were not public records. 294 Mich App 401, 418; 812 NW2d 27 (2011). It reaffirmed that "[m]ere possession of a record by a public body does not, however, render it a public record;" the record must also be "used in the performance of an official function." *Id*. at 409-10. The court determined that the handwritten notes were not tied to "the performance of an official function" because they "were not for substantive decision-making or recordkeeping." *Id*. at 416.

In cases where the Court of Appeals *has* found a document to be a public record, it has always required that the document shed light on the performance of a distinct official function. In *Detroit News, Inc v City of Detroit*, 204 Mich App 720; 516 NW2d 151 (1994), for instance, the court held that certain telephone bills were "public records" because they "formed the basis of an official function—the use of public funds to pay telephone [bills]." *Id*. at 725. The Court clarified that "mere possession of a record by a public body" was not "sufficient to make it a public record." *Id*. at 724-25. Rather, the bills became public records because the city "acted on" them. *Id*. at 725. The Court of Appeals' decision in *Walloon Lake Water System, Inc v Melrose Township* follows suit. 163 Mich App 726; 415 NW2d 292 (1987). There, the court held that a letter "read aloud" at a township meeting and "incorporated into the minutes of the meeting where the township

conducted its business" satisfied FOIA's definition of a "public record." *Id.* at 730. The court emphasized that "not every communication received by a public body will be subject to disclosure." *Id.* Rather, in light of FOIA's purpose clause, the court interpreted the definition of "public records" as "records of public bodies . . . possessed *in their decisions to act*, as well as of similar records *pertaining to decisions of the body not to act*." *Id.* (emphasis added). In both of those cases, the court found the document to be a "public record" because it shed light on the performance of an official function distinct from the possession of the document itself.

The decision below appears to be the first Michigan case ever finding a document to be a "public record" even when it does not shed light on the performance of a distinct official function. This Court should reverse that departure from decades of case law.

C. The Court of Appeals' Reasoning Is Incorrect.

In reaching a contrary conclusion, the Court of Appeals reasoned that the Tanton papers were "public records" because "the act of presently collecting and acquiring papers that the Library intends to preserve and make available to students at a future date would be in the performance of its official function." Ct. App. Op. at 4 (21a). Thus, in the Court of Appeals' view, the "University's acts of collecting and preserving the papers were in furtherance of its official purpose." *Id.* at 5 (22a).

That reasoning is not persuasive. Even assuming that making the Tanton papers available to students is an official function, the University will not engage in that function until 2035. The University's intent to make the Tanton papers available *in the future* is insufficient to establish that the Tanton papers are *presently* "public records." The statute requires that the document be possessed *in the performance of* an "official function"—not in the anticipation of performing an official function at a later date.

The only thing the University is doing in the present is storing the Tanton papers under

lock and key. That storage is insufficient to render the Tanton papers "public records," for two reasons. First, the Court of Appeals erred in finding the Tanton papers to be "public records" even though they shed no light on any official function. The Court of Appeals concluded that the Tanton papers were public records merely because the University was "authorized" to store them. Ct. App. Op. at 3 (20a). As explained above, however, the definition of "public records" require that the documents be possessed "***in*** the performance of an official function." Thus, to be public records, documents must record, or otherwise shed light on, an official function. The Tanton papers do not satisfy that statutory requirement.

Second, the Court of Appeals erred in holding that a single act—storage of the Tanton papers—could simultaneously satisfy both the statutory requirement of "possession" of a writing, and the distinct statutory requirement of "performance of an official function." As stated above, "'[p]ublic record' means a writing . . . in the possession of . . . a public body . . . in the performance of an official function[.]" MCL 15.232(i). This definition cannot be satisfied by a public body "in possession of" documents "in the performance of" possessing those very documents. If the "performance of an official function" *is* the possession of the writing, then the following, garbled definition of "public record" would result: "a writing … in the possession of … a public body in *the possession of* [*the writing*]."

The statute makes sense only if the "performance of an official function" is distinct from the possession of the writing itself. For instance, if the University possessed a document setting forth the University's policy on accepting gifts, that document would undoubtedly be a "public record." It would shed light on "the performance of an official function" distinct from the storage of the document itself: the "official function" of accepting gifts. MCL 15.232(i). By contrast, here, there is no distinction between the possession of the documents and the official function:

according to the Court of Appeals, the possession of the documents *is* the official function. The Court of Appeals incorrectly conflated these distinct statutory requirements.

II. THE COURT OF APPEALS' INTERPRETATION OF FOIA CONFLICTS WITH CASE LAW INTERPRETING THE FEDERAL FOIA.

Case law construing the federal FOIA confirms that the Court of Appeals' decision is wrong. This Court has held that case law interpreting the federal FOIA, while not binding, is instructive in interpreting Michigan's FOIA. See *Mich Fed'n of Teachers*, 481 Mich at 678-79 (construing Michigan FOIA in light of case law construing federal FOIA); *Evening News Ass'n v City of Troy*, 417 Mich 481, 495; 339 NW2d 421 (1983) ("[T]he similarity between the FOIA and the federal act invites analogy when deciphering the various sections and attendant judicial interpretations" (quotation marks omitted)); see also *Hopkins*, 294 Mich App at 414 ("Federal court decisions regarding whether an item is an 'agency record' under the federal freedom of information act . . . are persuasive in determining whether a record is a 'public record' under Michigan FOIA."). Yet, although the Court of Claims relied on this case law in ruling in the University's favor, the Court of Appeals ignored it altogether.

In *Cause of Action v National Archives & Records Administration*, 410 US App DC 87; 753 F3d 210 (2014), the Financial Crisis Inquiry Commission, an entity not subject to FOIA, turned over certain records to the National Archives, an entity that *is* subject to FOIA. 753 F3d at 211-12. The question before the D.C. Circuit was whether those records were "agency records" under FOIA. *Id.* at 212. The D.C. Circuit had previously construed that term to encompass documents that are in "the agency's possession in the legitimate conduct of its official duties," *id.* (quotation marks omitted)—a definition substantively on par with the definition of "public records" in Michigan's FOIA. The D.C. Circuit held that the Commission's documents did not qualify as the National Archives' "agency records." The court explained that although "archivists

review the documents and make preservation decisions," those "typical archival functions . . . do not suddenly convert the records of a defunct legislative commission into 'agency records' able to expose the operations of the Archives 'to the light of public scrutiny.'" *Id.* at 215 (citation omitted). The court stated that "[t]he main function of the Archives is to preserve documents of enduring value," either "from any of the three branches of government" or "from private parties as a donation." *Id.* at 215-16 & n 6. It observed that "[t]he Archives does not use documents created in the three branches in any operational way, or indeed in any way comparable to any other federal agency. It may control them in a sense, but its control consists in cataloguing, storing, and preserving, not unlike a 'warehouse.'" *Id.* at 216. The court concluded that as a matter of "statutory interpretation and congressional intent," "Congress did not intend to expose legislative branch material to FOIA simply because the material has been deposited with the Archives." *Id.*

Identical reasoning applies here. The Library is not using the Tanton papers "in any operational way." *Id.* It is merely "preserv[ing] documents of enduring value" that it received "from private parties as a donation." *Id.* at 215-16 & n 6. As such, they do not qualify as "public records" under Michigan's FOIA.

In *Cause of Action*, the D.C. Circuit relied heavily on *Katz v National Archives & Records Administration*, 314 US App DC 387; 68 F3d 1438 (1995)—a case that, like this one, involved a gift agreement. In *Katz*, President Kennedy's estate had transferred certain assassination photographs to the National Archives pursuant to a deed of gift. *Katz*, 68 F.3d at 1440-41. A FOIA requester argued that he should be entitled to see those photographs because the deed of gift was invalid. *Id.* at 1441. The D.C. Circuit held that regardless of "the validity of the deed of gift," the photographs were not agency records. *Id.* The Court explained that "the Attorney General accepted the Kennedy family's donation of the materials to the Archives subject to the terms of

the deed," and "the Archives has consistently obeyed the requirements of the deed." *Id.* at 1442. Thus, the Court held that the materials were "presidential papers and not agency records." *Id.* "In other words, the depositing of these materials with the Archives did not convert them into 'agency records' subject to FOIA." *Cause of Action*, 753 F3d at 214 (discussing *Katz*'s holding). Here, likewise, Dr. Tanton created the Tanton papers, and the University is storing them in accordance with the gift agreement. Therefore, they are not public records.

Judicial Watch, Inc v Federal Housing Finance Agency, 396 US App DC 200; 646 F3d 924 (2011), is instructive as well. In that case, the Federal Housing Finance Agency ("FHFA") stored certain records disclosing how much money Fannie Mae and Freddie Mac had donated to political campaigns. 646 F3d at 925. But "no one at the FHFA ha[d] ever read or relied upon any such documents." *Id.* The D.C. Circuit found that the documents were not agency records subject to FOIA: "The public cannot learn anything about agency decisionmaking from a document the agency neither created nor consulted, and requiring disclosure under these circumstances would do nothing to further FOIA's purpose of 'open[ing] agency action to the light of public scrutiny.'" *Id.* at 927 (quoting *Dep't of Air Force v Rose*, 425 US 352, 372, 96 S Ct 1592, 48 L Ed 2d 11 (1976)). It observed: "Although we appreciate Judicial Watch's interest in how much money Fannie and Freddie gave to which politicians in the years leading up to our current financial crisis, satisfying curiosity about the internal decisions of private companies is not the aim of FOIA, and there is no question that disclosure of the requested records would reveal nothing about decisionmaking at the FHFA." *Id.* at 928.

Those words could have been written for this case. Plaintiff may be interested in the content of Tanton's personal files, but they are not the University's "public records" because they reveal nothing about the University's decisionmaking.

The Ninth Circuit reached a similar conclusion in an opinion by then-Judge Anthony Kennedy in *SDC Development Corp. v Mathews*, 542 F2d 1116 (CA 9, 1976). In that case, the court held that medical writings in a reference library, stored in a computer data bank maintained by a federal agency, were not "agency records" under FOIA. *Id.* at 1117. The court explained that FOIA's purpose was to allow "the American people to obtain information about the internal workings of their government." *Id.* at 1119. It perceived "a qualitative difference between the types of records Congress sought to make available to the public by passing the Freedom of Information Act and the library reference system sought to be obtained here," because "[t]he library material does not directly reflect the structure, operation, or decision-making functions of the agency." *Id.* at 1120. The court also explained:

> Requiring the agency to make its delivery system available to the appellants at nominal charge would not enhance the information gathering and dissemination function of the agency, but rather would hamper it substantially. Contractual relationships with various organizations, designed to increase the agency's ability to acquire and catalog medical information, would be destroyed if the tapes could be obtained essentially for free.

Id. The same reasoning applies here. As part of a "library reference system," the Tanton papers do not reflect the "structure, operation, or decision-making functions" of the University. *Id.* And requiring the University to disclose the Tanton papers would hamper the University by destroying gift agreements that require the University to disclose documents on specific terms. See *id.*

The United States Supreme Court's decision in *Kissinger v Reporters Committee for Freedom of the Press*, 445 US 136; 100 S Ct 960; 63 L Ed 2d 267 (1980), also supports the University's position. In *Kissinger*, requesters argued that notes of Henry Kissinger's telephone conversations were "agency records" subject to FOIA. *Id.* at 155. Those notes were created while Kissinger worked the Office of the President, which is not subject to FOIA, but at the time of the FOIA request they were in the possession of the State Department, which is subject to FOIA. *Id.*

at 155-57. The Court held that the documents were not "agency records" because "[t]hey were not generated in the State Department," "[t]hey never entered the State Department's files, and they were not used by the Department for any purpose." *Id.* "If mere physical location of papers and materials could confer status as an 'agency record,'" the Court reasoned, then "Kissinger's personal books, speeches, and all other memorabilia stored in his office would have been agency records subject to disclosure under the FOIA." *Id.* at 157. Here, too, the Tanton papers are private materials that are "stored" in a University facility. *Id.* They were neither "generated" in the University nor "used" by the University as part of its "files" or for "any purpose" at all. *Id.* That their "physical location" is under the University's control is insufficient to render them public records. *Id.*

This Court should follow federal law and hold that the Tanton papers are not public records. *Hopkins*, 294 Mich App at 414.

III. THE COURT OF APPEALS' DECISION UNDERMINES FOIA'S PURPOSE.

As previously explained, the Court of Appeals' decision does not advance FOIA's goals of shedding light on the affairs of government. FOIA's purpose, as stated by the Legislature, is to ensure "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). This Court has likewise stated that FOIA was enacted in response to the Legislature's "concern over abuses in the operation of government." *Swickard v Wayne Co Medical Examiner*, 438 Mich 536, 543; 475 NW2d 304 (1991). The Legislature's policy 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. The Tanton papers shed no light on the "affairs" of the University or the "official acts" of its employees or any government official.

Instead, the Court of Appeals' decision undermines FOIA's goals. FOIA is intended to allow public access to information pertaining to the state and its institutions. See MCL 15.231(2). The University shares that goal. Indeed, a core purpose of the University's Bentley Library is to ensure public access to precisely this type of information. See University of Michigan Board of Regents, *Bylaws*, Sec. 12.04 (last updated Sept. 20, 2018), https://regents.umich.edu/uploads/bylawsrevised_09-18.pdf (describing the Bentley Historical Library's purpose as including "making available to students manuscripts and other materials pertaining to the state [and] its institutions").

The University's decision to honor gift agreements serves this purpose. Many donors understand that their papers will advance public knowledge, but they recognize that immediate public disclosure of those papers may harm themselves or others. They therefore donate to public libraries on the condition that their records be temporarily closed to public access. Libraries agree to such conditions because otherwise the donors would not donate their records at all.

If Plaintiff prevails in this case, however, any such gift agreement with a public university in Michigan will be unenforceable. The mere act of taking possession of private records will automatically transform those records into "public records" under FOIA, regardless of the terms of the gift agreement. This will ensure that privately held documents of public significance will never be donated to Michigan's public universities. Instead, donors will destroy their records, keep them in family possession indefinitely, or donate them to private entities that are not subject

to FOIA.[1] Alternatively, donors could donate them to a federal institution such as the Library of Congress, in view of the federal case law holding that such records are not public records under the federal FOIA. See Part I.B; see also Susan N. Gary, *The Problems with Donor Intent: Interpretation, Enforcement, and Doing the Right Thing*, 85 Chi-Kent L Rev 977, 1002 (2010) (recognizing that donors make contributions "if the donor is reasonably assured that the [recipient] will carry out its side of the contract" (internal quotation marks omitted)).[2] Universities, in turn, will decline to enter into such gift agreements rather than face inevitable litigation: FOIA lawsuits if they honor the agreements and breach-of-contract lawsuits if they do not. See, e.g., Dawn Rhodes, *Pearson Family Members Foundation Sues University of Chicago, Aiming to Revoke $100M Gift*, Chicago Trib. (Mar. 6, 2018), https://www.chicagotribune.com/news/breaking/ct-met-university-of-chicago-donation-lawsuit-20180305-story.html (describing a donor's suit against the University of Chicago for failing to follow the terms of a gift agreement). Thus, the Court of Appeals' decision effectively drives these important sources of public knowledge outside of Michigan's public sphere. The ultimate result is to make it more difficult for "[t]he people" of Michigan to "be informed [and] fully participate in the democratic process," MCL 15.231(2)—the opposite of what the Legislature intended.

The Court of Appeals' decision is especially troubling because many documents of great

[1] A well-known law professor, commenting on this case, reached the same conclusion. See Eugene Volokh, *Want to Donate Your Papers to a University, to Be Opened Some Years Later? Donate to a Private University, Not a Public One*, Reason (July 2, 2019), https://reason.com/2019/07/02/want-to-donate-your-papers-to-a-university-to-be-opened-some-years-later-donate-to-a-private-university-not-a-public-one/.

[2] Notably, the Library of Congress has a strict policy of enforcing such gift agreements. As the Librarian of Congress has explained at a congressional hearing on the matter: "[I]t is for the donor to decide when the collection is to be made available, and for us to carry out that determination. We have consistently, rigorously, scrupulously adhered to that principle." *Public Papers of Supreme Court Justices: Assuring Preservation and Access: Hearing Before the Subcomm on Regulation and Gov't Info of the S Comm on Governmental Affairs*, 103d Cong. 1, 7 (1993).

public significance are donated pursuant to gift agreements requiring delayed public access. For instance, Bentley's closed collections include papers of television newsman Mike Wallace, businessman A. Alfred Taubman, and former Ann Arbor Mayor Elizabeth Brater.[3] Other major American figures have donated their papers to other institutions pursuant to similar agreements. For instance, the Gerald R. Ford Presidential Library contains numerous items that are temporarily closed to public view.[4] Likewise, several Supreme Court Justices have donated records pursuant to the same type of gift agreement that governs the University's disclosure of the Tanton papers. Justice Blackmun donated his papers to the Library of Congress in May 1997 on the condition that they would not be opened until five years after his death, while Justice Jackson similarly required that his papers be closed to public access for 30 years. Kathryn A. Watts, *Judges and their Papers*, 88 NYU L Rev 1665, 1671 n 27, 1684 (2013). Those papers are now publicly available and are an unparalleled resource in understanding the deliberations underlying *Brown v Board of Education*, 347 US 483; 74 S Ct 686; 98 L Ed 873 (1954), *Roe v Wade*, 410 US 113; 93 S Ct 705; 35 L Ed 2d 147 (1973), and other seminal decisions. Watts, 88 NYU L Rev at 1697-98, 1701. Other Justices have made their papers available for future scholars on similar terms. For instance, Chief Justice Burger's son donated his father's papers to the College of William & Mary on the condition that they remain closed until 2026. *Id.* at 1684. Chief Justice Rehnquist donated his

[3] See *Mike Wallace CBS/60 Minutes Papers: 1922-2007*, Bentley Historical Library, https://quod.lib.umich.edu/b/bhlead/umich-bhl-03171?byte=11814635;focusrgn=admininfo;subview=standard;view=reslist (accessed July 14, 2020); *A. Alfred Taubman Papers: 1942-2014*, Bentley Historical Library, https://quod.lib.umich.edu/b/bhlead/umich-bhl-2011097?byte=69218188;focusrgn=admininfo;subview=standard;view=reslist (accessed July 14, 2020); *Elizabeth S. Brater Papers: 1989-2010*, Bentley Historical Library; https://quod.lib.umich.edu/b/bhlead/umich-bhl-2011133?byte=275393235;focusrgn=admininfo;subview=standard;view=reslist (accessed July 14, 2020).

[4] See *Research Procedures, Frequently Asked Questions*, Gerald R. Ford Presidential Library & Museum, https://www.fordlibrarymuseum.gov/library/guideintro.asp (accessed July 14, 2020).

papers to Stanford University on the condition that they be kept closed during the lifetime of any Justice who served with him. *Id.* Justice O'Connor has similarly restricted access to her papers until the retirement of the Justices who served with her. *Id.* at 1682 n 92. Justice Scalia's family donated his papers to Harvard Law School, on the condition that they "will be made available for research on a schedule agreed upon by the Scalia family and the Harvard Law School library." *Scalia Family Donates Late Justice's Papers to Harvard Law School Library*, Harv. Law Today (Mar. 6, 2017), https://today.law.harvard.edu/scalia-family-donates-late-justices-papers-harvard-law-library. Justice Souter donated his papers to a historical society on the condition that they be kept closed until fifty years after his retirement. Watts, 88 NYU L Rev at 1671 & n 27.

If Michigan political or judicial officials or other prominent citizens wish to donate their private records, they should not be forced to donate those records to non-public institutions or to a federal agency in order for their wishes to be carried out. Michigan's public universities are recognized in the Michigan Constitution. They have a public mission and public responsibilities. The Bentley Historical Library is a public institution specifically devoted to preserving historical records about Michigan and its people. Bentley is the natural place for such records to be stored, and Michigan public figures should be able to donate their records to Bentley without the threat of FOIA litigation.

IV. PRINCIPLES OF CONSTITUTIONAL AVOIDANCE REQUIRE REJECTING THE COURT OF APPEALS' EXPANSIVE INTERPRETATION OF FOIA.

The Court of Appeals' interpretation of FOIA is inconsistent with Article VIII, section 5 of the Michigan Constitution, which protects the University's right to carry out its affairs free from legislative interference. The court should adopt the University's narrower interpretation of FOIA, which avoids that constitutional conflict.

"A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." *People v Nyx*, 479 Mich 112, 124, 734 NW2d 548 (2007) (quotation marks and brackets omitted). This rule of statutory construction has been firmly established in this Court's jurisprudence for more than a century. See, e.g., *Osborn v Charlevoix Circuit Judge*, 114 Mich 655, 660; 72 NW 982 (1897); *Sears v Cottrell*, 5 Mich 251, 259 (1858). Where, as here, "there are two possible interpretations of a statute, by one of which it would be constitutional and by the other it would be constitutionally suspect," a court must adopt the interpretation that avoids the constitutional tension. *Nyx*, 479 Mich at 124.

Here, the Court of Appeals' interpretation is, at a minimum, constitutionally suspect. Article VIII, section 5 of the Michigan Constitution recognizes the University of Michigan and provides that its board "shall have general supervision of its institution and the control and direction of all expenditures form the institution's funds." Const 1963, art. VIII, § 5. This provision operates to "limit the Legislature's power." *Federated Publ'ns, Inc v Bd of Trs of Mich State Univ*, 460 Mich 75, 87; 594 NW2d 491 (1999). Under it, "'[t]he Legislature may not interfere with the management and control" of the University. *Id.* (quoting *Regents of the Univ of Mich v State*, 395 Mich 52, 65; 235 NW2d 1 (1975)); see also *Bd of Control of E Mich Univ v Labor Mediation Bd*, 384 Mich 561, 565; 184 NW2d 921 (1971) (citing a "series of opinions running as far back as 1856" which "reflect the holdings of this court" that universities recognized in the Michigan Constitution have "'the entire control and management of [their] affairs and property" (internal quotation marks omitted)); *State Bd of Agriculture v State Admin Bd*, 226 Mich 417, 427, 429; 197 NW 160 (1924) (explaining that the "Legislature cannot interfere" with "the affairs of" "the University of Michigan" because it "has no control over them. . . . The Constitution forbids it."); *Bd of Regents of Univ of Mich v Auditor General*, 167 Mich 444, 450-51; 132 NW 1037

(1911) (recognizing that the Constitution makes the University's Board "the highest form of juristic person known to the law, a constitutional corporation of independent authority, which, within the scope of its functions, is co-ordinate with and equal to that of the Legislature," and that its "independent control of the affairs of the University by authority of these constitutional provisions is well settled by former decisions of this court").

When the Legislature has enacted laws that encroach on a university's constitutionally-protected autonomy, this Court has intervened to "jealously guard[]" the university's "powers from legislative interference." *Federated Publ'ns, Inc*, 460 Mich at 87 (internal quotation marks and citations omitted). It has done so by interpreting legislative enactments to avoid a potential conflict with the Constitution. See, e.g., *id.* at 89-90 (interpreting the Open Meetings Act as inapplicable to Michigan State University's presidential search committee); *Regents of the Univ of Mich v Mich Employment Relations Comm*, 389 Mich 96, 107-09; 204 NW2d 218 (1973) (interpreting the Michigan Employees Relations Act to have "limited" force as applied to certain employees because of the Court's "duty to protect the autonomy" of the University). These conflicts must be avoided because "[l]egislative regulation that clearly infringes on the university's educational or financial autonomy must . . . yield to the university's constitutional power." *Federated Publ'ns, Inc*, 460 Mich at 87. This Court's decisions are in line with decisions of the U.S. Supreme Court, which have similarly been reluctant to interfere with academic freedom. See *Regents of the Univ of Mich v Ewing*, 474 US 214, 226; 106 S Ct 507; 88 L Ed 2d 523 (1985) (noting the Court's "reluctance to trench on the prerogatives of state and local educational institutions and [its] responsibility to safeguard their academic freedom, a special concern of the First Amendment" (quotation marks omitted)).

Here, too, this Court should reject the Court of Appeals' interpretation of FOIA because it would infringe on the University's constitutionally-protected autonomy. The University maintains the Michigan Historical Collections "for the purpose of collecting, preserving, and making available to students manuscripts and other materials pertaining to the state, its institutions, and its social, economic, and intellectual development." Ct. App. Op. at 3 (20a) (quoting Board of Regents Bylaw 12.04). Donor agreements have played a crucial role in expanding the University's collection: Since 1935, the University has chosen to obtain materials for the Bentley Historical Library through gift agreements with more than eleven thousand donors. See *Donate Your Archives*, Bentley Historical Library, https://bentley.umich.edu/giving/donate-your-archives (accessed July 14, 2020). The Library's curatorial decisions—its decisions on what documents to preserve, and on what terms—are fundamentally *academic* decisions. A university's decisions on what writings to preserve, like its decisions on what courses to teach or what research to fund, lie at the heart of its academic mission to promote knowledge. Likewise, when the University enters into a gift agreement on particular terms, the university balances donors' interests in privacy with students' interests in access to historical materials—again, the sort of discretionary academic decision that should be the University's decision alone. Yet if the Court of Appeals' decision is allowed to stand, FOIA would have the effect of rendering gift agreements like the one at issue here unenforceable. That legislative encroachment on the University's academic prerogative would create significant constitutional doubt.

The Court of Appeals' decision, moreover, would hamper the University's ability to educate its students. Not only do faculty members and students make use of Bentley's records for their academic research, but faculty members also use those records in the classroom. For example, these materials support a course called "Education 118: Schooling in a Multicultural

Society," in which "[u]p to 75 students visit the Bentley to examine local high school yearbooks from the 1910s through the 1950s" to "identify how yearbooks reflect changes in schools . . . in terms of demographics and educational priorities. Bentley Historical Library, *Teaching*, https://bentley.umich.edu/teaching (accessed July 14, 2020). They also form the basis of "English 221: Literature and Writing Outside of the Classroom," where students examine letters housed in the library and choose one "to respond to for their class assignment." *Id*. Under the Court of Appeals' interpretation, the statute would prevent the University from obtaining the materials that make it possible to offer courses like those to students, again inhibiting the University's academic freedom and autonomy.

For those reasons, the Court of Appeals' unduly expansive interpretation of FOIA creates grave constitutional doubt under Article VIII, section 5 of the Michigan Constitution. The Court should reject that "constitutionally suspect" interpretation, *Nyx*, 479 Mich at 124, in favor of the University's interpretation, which poses no constitutional concern.

V. THE COURT OF APPEALS' DECISION WOULD HAVE NEGATIVE RAMIFICATIONS ACROSS STATE GOVERNMENT.

The harmful effects of the Court of Appeals' ruling are not limited to the University. The statutory definition of "public records" applies to all FOIA requests across state government. Moreover, that general definition is broadly worded. A public record is any "*writing* prepared, owned, used, in the possession of, or retained by a *public body* in the performance of an official function" except for computer software. MCL 15.232(i) (emphasis added). A "[w]riting" is defined as any "means of recording or retaining meaningful content," including pictures, sounds, and hard drives. MCL 15.232(*l*). A "[p]ublic body" includes all executive branch entities and employees outside of the governor and lieutenant governor's offices; any "agency, board, commission or council in the legislative branch"; all city and municipal bodies, including school

districts; and any "other body that is created by state or local authority or is primarily funded by or through state or local authority" except the judiciary. MCL 15.232(h). Any request for materials falling within that broad definition of "writing," from any entity falling within that broad definition of "public body," will be governed by the Court's interpretation of "public records" in this case.

Plaintiff asks this Court to hold that mere storage of a privately-created document is sufficient to render that document a "public record," even if the document sheds no light on the affairs of government. According to Plaintiff, the mere fact that the University is storing the Tanton papers for an official *reason—i.e.*, for purposes of displaying them later on—is sufficient to render the Tanton papers "public records." If that position prevails, a broad range of documents across state government that shed no light on any government activity would be deemed "public records." This is because it is very common for government entities to store privately-created documents for official reasons. For instance, police stations store evidence of crime and stolen property, including myriad items that could meet the broad statutory definition of a "writing." Post offices store private mail in post office boxes or mail trucks. Prisons store prisoner mail in the mail room. Schools store student work.

No one would think those documents are "public records." They are privately-created records, shedding no light on the affairs of government, which the government is merely storing. Yet under the Court of Appeals' interpretation of FOIA, the documents *would* be public records. In each one of those cases, public bodies' "authorized acts" include the storage of private documents. For instance, police stations are authorized to store stolen property until it is retrieved. Thus, under the Court of Appeals' theory, those documents would be "possessed" by the

government "in the performance of an official function"—*i.e.*, the official function of storing those very documents—thus transforming them into public records.

This Court should reject an interpretation of FOIA that would yield such broad and unexpected results directly at odds with the stated statutory purpose of shedding light on the affairs of government. See *Mich Fed'n of Teachers*, 481 Mich at 682 (declining to construe FOIA to require disclosure of personal information that would reveal "little or nothing about a governmental agency's conduct" (quotation marks omitted)). Instead, it should hold that a "public record" must shed light on the performance of an identifiable official function distinct from the storage of the record. Under that interpretation, the Tanton papers are not "public records" under FOIA.

RELIEF SOUGHT

The Court of Appeals' decision should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on the 16th day of July 2020, he served a copy of Defendant-Appellant, University of Michigan's Brief on Appeal upon Plaintiff-Appellee, Hassan 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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