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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 APPENDIX

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STATE OF MICHIGAN COURT OF CLAIMS	REGISTER OF ACTIONS	CASE ID 17-000170-MZ C/COC/MI	Public 7/6/2020 10:15:22 AM Page: 1 of 2

CASE

Judicial Officer	Date Filed	Adjudication	Status
BORRELLO, STEPHEN	6/12/17	SUMMARY DISPOSITION 11/20/17	CLOSED 11/20/17

PARTICIPANTS

PLAINTIFF 1	AHMAD, HASSAN M	FILED: 6/12/17
DEFENDANT 1	UNIVERSITY OF MICHIGAN	FILED: 6/12/17
	ATTY: BRIAN MARK SCHWARTZ # 69018 PRIMARY RETAINED	

RECEIVABLES/PAYMENTS

	Assessed	Paid/Adjusted	Balance
PTF 1 HASSAN M AHMAD	$200.00	$200.00	$0.00
	Assessed	**Paid/Adjusted**	**Balance**
DEF 1 UNIVERSITY OF MICHIGAN	$20.00	$20.00	$0.00

CHRONOLOGICAL LIST OF ACTIVITIES

Activity Date	Activity		User	Entry Date
6/12/17	SUMMONS AND COMPLAINT PTF 1 DEF 1	$175.00	mmla mmla	6/13/17 6/13/17
6/12/17	JUDICIAL OFFICER ASSIGNED TO BORRELLO, STEPHEN 37368		mmla	6/13/17
6/12/17	RECEIVABLE ELECTRONIC FILING SYSTEM FEE	$25.00	mmla	6/13/17
6/12/17	RECEIVABLE FILING FEE	$150.00	mmla	6/13/17
6/13/17	PAYMENT RECEIPT NUMBER: COC-LAN.0002077 METHOD: CHECK $175.00	$175.00	mmla	6/13/17
6/29/17	RETURN OF SERVICE - NONPERSONAL DEF 1		mmla	6/30/17
8/10/17	PROPOSED STIPULATED ORDER EXTENDING TIME FOR DEFENDANT TO ANSWER OR OTHERWISE RESPOND TO PLAINTIFF'S COMPLAINT PTF 1 DEF 1		mmla	8/11/17
8/14/17	ORDER EXTENDING TIME FOR DEFENDANT TO ANSWER OR OTHERWISE RESPOND TO PLAINTIFF'S COMPLAINT		mmla	8/14/17
8/16/17	MOTION TO DISMISS AND BRIEF IN SUPPORT (ORAL ARGUMENT REQUESTED) DEF 1	$20.00	mmla mmla	8/18/17 8/18/17
8/16/17	RECEIVABLE MOTION FEE	$20.00	mmla	8/18/17
8/18/17	PAYMENT RECEIPT NUMBER: COC-LAN.0002257 METHOD: CHECK $20.00	$20.00	mmla	8/18/17
9/15/17	PROPOSED STIPULATED ORDER EXTENDING TIME FOR PLAINTIFF TO RESPOND TO DEFENDANT'S MOTION TO DISMISS PTF 1 DEF 1		mmla	9/15/17

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STATE OF MICHIGAN COURT OF CLAIMS	REGISTER OF ACTIONS	CASE ID 17-000170-MZ C/COC/MI	Public 7/6/2020 10:15:22 AM Page: 2 of 2

Activity Date	Activity		User	Entry Date
9/15/17	ORDER EXTENDING TIME FOR PLAINTIFF TO RESPOND TO DEFENDANT'S MOTION TO DISMISS		mmla amd	9/15/17 10/16/17
10/6/17	RESPONSE TO DEFENDANT'S MOTION TO DISMISS WITH BRIEF IN SUPPORT PTF 1		amd	10/6/17
10/17/17	PROPOSED STIPULATED ORDER EXTENDING TIME FOR DEFENDANT'S REPLY BRIEF IN SUPPORT OF ITS MOTION TO DISMISS PTF 1 DEF 1		mmla	10/19/17
10/19/17	ORDER EXTENDING TIME FOR DEFENDANT'S REPLY BRIEF IN SUPPORT OF ITS MOTION TO DISMISS		mmla	10/19/17
11/3/17	REPLY IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS (ORAL ARGUMENT REQUESTED) DEF 1		mmla	11/7/17
11/20/17	OPINION AND ORDER DEF 1		mmla	11/20/17
11/20/17	CLOSE CASE STATUS		mmla	11/20/17
12/18/17	CLAIM OF APPEAL PTF 1	$25.00	mmla mmla	12/18/17 12/18/17
12/18/17	RECEIVABLE APPEALS FEE	$25.00	mmla	12/18/17
12/18/17	PAYMENT RECEIPT NUMBER: COC-LAN.0002486 METHOD: CHECK $25.00	$25.00	mmla	12/18/17
3/30/18	COMMENT Notification from the Court of Appeals requesting file within 21 days. COA #341299		amd amd	4/2/18 4/2/18
4/2/18	COMMENT Record perpared and sent electronically to the Court of Appeals.		amd	4/2/18
6/20/19	OPINION AND ORDER (FROM APPELLATE COURT) WE REVERSE THE JUDGMENT OF THE COURT OF CLAIIMS AND REMAND.		amd	6/20/19

Court of Appeals Case No. 341299
docket entries

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Case Search

Case Docket Number Search Results - 341299

Appellate Docket Sheet

COA Case Number: 341299

MSC Case Number: 160012

HASSAN M AHMAD V UNIVERSITY OF MICHIGAN

1	AHMAD HASSAN M Oral Argument: Y Timely: Y	PL-AT	RET	(74117) **ELLISON PHILIP L**
2	UNIVERSITY OF MICHIGAN Oral Argument: Y Timely: Y	DF-AE	RET	(69018) **SCHWARTZ BRIAN M**

COA Status: Case Concluded; File Open **MSC Status:** Pending on Application

Case Flags: Freedom of Information Act; Electronic Record

11/30/2017 1 Claim of Appeal - Civil
- Proof of Service Date: 11/30/2017
- Jurisdictional Checklist: Y
- Register of Actions: Y
- Fee Code: EPAY
- Attorney: 74117 - ELLISON PHILIP L

11/20/2017 2 Order Appealed From
- From: COURT OF CLAIMS
- Case Number: 17-000170-MZ
- Trial Court Judge: 37368 BORRELLO STEPHEN L
- Nature of Case:
  - Summary Disposition Granted

11/30/2017 3 No Transcript Will Be Filed
- Date: 11/30/2017
- Filed By Attorney: 74117 - ELLISON PHILIP L
- Comments: per juris checklist

12/14/2017 4 Docketing Statement MCR 7.204H
- For Party: 1 AHMAD HASSAN M PL-AT
- Proof of Service Date: 12/14/2017
- Filed By Attorney: 74117 - ELLISON PHILIP L

01/25/2018 5 Motion: Extend Time - Appellant
- Proof of Service Date: 01/25/2018
- Filed By Attorney: 74117 - ELLISON PHILIP L
- For Party: 1 AHMAD HASSAN M PL-AT
- Fee Code: EPAY
- Requested Extension: 02/22/2018
- Answer Due: 02/01/2018

02/06/2018 6 Submitted on Administrative Motion Docket
- Event: 5 Extend Time - Appellant
- District: L

02/08/2018 7 Order: Extend Time - Appellee Brief - Grant
- View document in PDF format

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Event: 5 Extend Time - Appellant
Panel: MFG
Attorney: 74117 - ELLISON PHILIP L
Extension Date: 02/22/2018

02/21/2018 8 Brief: Appellant
Proof of Service Date: 02/21/2018
Oral Argument Requested: Y
Timely Filed: Y
Filed By Attorney: 74117 - ELLISON PHILIP L
For Party: 1 AHMAD HASSAN M PL-AT

03/18/2018 9 Motion: Expedite Appeal
Proof of Service Date: 03/18/2018
Filed By Attorney: 74117 - ELLISON PHILIP L
For Party: 1 AHMAD HASSAN M PL-AT
Fee Code: EPAY
Answer Due: 03/25/2018

03/20/2018 10 Answer - Motion
Proof of Service Date: 03/20/2018
Event No: 9 Expedite Appeal
For Party: 2 UNIVERSITY OF MICHIGAN DF-AE
Filed By Attorney: 69018 - SCHWARTZ BRIAN M

03/22/2018 11 Appearance - Appellee
Date: 03/22/2018
For Party: 2 UNIVERSITY OF MICHIGAN DF-AE
Attorney: 69018 - SCHWARTZ BRIAN M

03/27/2018 12 Submitted on Administrative Motion Docket
Event: 9 Expedite Appeal
District: L
Item #: 10

03/28/2018 14 Brief: Appellee
Proof of Service Date: 03/28/2018
Oral Argument Requested: Y
Timely Filed: Y
Filed By Attorney: 69018 - SCHWARTZ BRIAN M
For Party: 2 UNIVERSITY OF MICHIGAN DF-AE
Comments: Exhib's efiled, not printed for file

03/29/2018 13 Order: Expedite - Grant
View document in PDF format
Event: 9 Expedite Appeal
Panel: MFG
Attorney: 74117 - ELLISON PHILIP L
Comments: Grt to the extent following the filing of AE's bf the case is to be placed on the next call

03/29/2018 15 Correspondence Received
Comments: D Curlew Unavailable For Oral Argument From 6/23/2018 - 7/1/2018

03/29/2018 16 Noticed
Record: REQST
Mail Date: 03/30/2018

04/02/2018 17 Electronic Record Filed

04/05/2018 19 Other
Date: 04/05/2018
For Party: 2 UNIVERSITY OF MICHIGAN DF-AE
Attorney: 69018 - SCHWARTZ BRIAN M

Comments: AT's ltr re: unavailable dates for oral argument, mappis updated

04/18/2018 23 Brief: Reply
Proof of Service Date: 04/18/2018
Oral Argument Requested:
Timely Filed: Y
Filed By Attorney: 74117 - ELLISON PHILIP L
For Party: 1 AHMAD HASSAN M PL-AT

05/08/2018 29 Motion: Adjourn
Proof of Service Date: 05/08/2018
Filed By Attorney: 74117 - ELLISON PHILIP L
For Party: 1 AHMAD HASSAN M PL-AT
Fee Code: EPAY
Answer Due: 05/15/2018

05/09/2018 31 Answer - Motion
Proof of Service Date: 05/09/2018
Event No: 29 Adjourn
For Party: 2 UNIVERSITY OF MICHIGAN DF-AE
Filed By Attorney: 69018 - SCHWARTZ BRIAN M

05/17/2018 32 Order: Adjourn from Call - Place Next Call
View document in PDF format
Event: 29 Adjourn
Panel: PDO,KFK,MJR
Attorney: 74117 - ELLISON PHILIP L
Comments: Order issued before submittal date

05/17/2018 33 Taken off Case Call
Event: 28 Submitted on Case Call
Comments: Per Panel's Adjourn Order Issued 5/17/2018

05/22/2018 30 Submitted on Motion Docket Affecting Call
Event: 29 Adjourn
District: L
Item #: 1

06/05/2018 28 Submitted on Case Call
District: L
Item #: 8
Panel: PDO,KFK,MJR
Comments: Removed From June Call; See Adjourn Order Issued 5/17/2018

08/15/2018 34 Submitted on Case Call
District: D
Item #: 26
Panel: TCC,AK,JT

08/15/2018 35 Oral Argument Audio

09/04/2018 36 Copy Request Fulfilled
Date: 09/04/2018

10/29/2018 37 Order: Court`s Own Motion
View document in PDF format
Panel: TCC,AK,JT
Comments: Court orders parties to submit sup brfng; AT brf w/in 28d; AE brf w/in 14d of service of AT sup brf

10/29/2018 38 Verbal Order to Parties-Phone

10/29/2018 39 Email Contact
For Party: 1 AHMAD HASSAN M PL-AT
Attorney: 74117 - ELLISON PHILIP L

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Comments: Email of the 10/29/2018 order to pellison@olcplc.com

10/29/2018 40 Email Contact
For Party: 2 UNIVERSITY OF MICHIGAN DF-AE
Attorney: 69018 - SCHWARTZ BRIAN M
Comments: Email of the 10/29/2018 order to schwartzb@millercanfield.com

11/13/2018 41 Brief: Supplemental Brief - AT
Proof of Service Date: 11/13/2018
Oral Argument Requested:
Timely Filed: Y
Filed By Attorney: 74117 - ELLISON PHILIP L
For Party: 1 AHMAD HASSAN M PL-AT
Comments: Granted per 10/29/18-order

11/15/2018 42 Motion: Motion
Proof of Service Date: 11/15/2018
Filed By Attorney: 69018 - SCHWARTZ BRIAN M
For Party: 2 UNIVERSITY OF MICHIGAN DF-AE
Fee Code: EPAY
Requested Extension: 12/10/2018
Immediate Consideration: Y
Answer Due: 11/22/2018
Comments: Ext time to file supp brief, granted per 10/29/18-order

11/16/2018 43 Submitted on Motion Docket Affecting Call
Event: 42 Motion
District: L
Item #: 1

11/26/2018 44 Order: Grant - Generic
View document in PDF format
Event: 42 Motion
Panel: TCC,AK,JT
Attorney: 69018 - SCHWARTZ BRIAN M
Extension Date: 12/10/2018

11/26/2018 45 Verbal Order to Parties-Phone

12/07/2018 46 Brief: Supplemental Brief - AE
Proof of Service Date: 12/07/2019
Timely Filed: Y
Filed By Attorney: 69018 - SCHWARTZ BRIAN M
For Party: 2 UNIVERSITY OF MICHIGAN DF-AE
Comments: Granted per 11/26/18-order

04/30/2019 47 Correspondence Received
Date: 04/30/2019
For Party: 1 AHMAD HASSAN M PL-AT
Attorney: 74117 - ELLISON PHILIP L
Comments: Request for a status update

05/01/2019 48 Correspondence Sent
Date: 05/01/2019
For Party: 1 AHMAD HASSAN M PL-AT
Attorney: 74117 - ELLISON PHILIP L
Comments: Status update letter

06/20/2019 49 Opinion - Per Curiam - Unpublished
View document in PDF format
Pages: 6
Panel: TCC,AK,JT

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Result: Reversed and Remanded

07/01/2019 50 Motion: Publication Request
Proof of Service Date: 07/01/2019
Filed By Attorney: 74117 - ELLISON PHILIP L
For Party: 1 AHMAD HASSAN M PL-AT
Answer Due: 07/15/2019

07/01/2019 51 Bill of Costs Filed
Date: 07/01/2019
For Party: 1 AHMAD HASSAN M PL-AT
Attorney: 74117 - ELLISON PHILIP L

07/16/2019 52 Submitted on Publication Docket
Event: 50 Publication Request
District: L

07/25/2019 53 Costs Taxed Per MCR 7.219
Fee: $825.00
For Party: 1 AHMAD HASSAN M PL-AT
Attorney: 74117 - ELLISON PHILIP L

07/31/2019 54 Publication Request - Denied
Event: 50 Publication Request
Panel: TCC,AK,JT
Attorney: 74117 - ELLISON PHILIP L
Comments: Judge Krause would have granted publication per MCR 7.215(B)(2)&(5)

07/31/2019 55 SCt: Application for Leave to SCt
Supreme Court No: 160012
Answer Due: 08/28/2019
Fee: E-Pay
For Party: 2
Attorney:

07/31/2019 56 SCt Case Caption
Proof Of Service Date: 07/31/2019

08/19/2019 57 SCt Motion: Housekeeping
Party: 1
Filed by Attorney: 74117 - ELLISON PHILIP L
Comments: Motion to extend time to 9-18-2019 to file Answer

08/23/2019 58 SCt Order: Chief Justice - Grant
View document in PDF format
Comments: Grant PLAE motion to extend the time for filing his answer to 9-18-19.

09/18/2019 59 SCt: Answer - SCt Application/Complaint
Filing Date: 09/18/2019
For Party: 1 AHMAD HASSAN M PL-AT
Filed By Attorney: 74117 - ELLISON PHILIP L

10/08/2019 60 SCt: Reply - SCt Application/Complaint
Filing Date: 10/08/2019
For Party: 2 UNIVERSITY OF MICHIGAN DF-AE
Filed By Attorney:

12/02/2019 61 Correspondence Sent
Proof Of Service Date: 12/02/2019
Comments: Disclosure stmt of CJ McCormack under MCR 2.003.

03/06/2020 62 SCt Order: Application - Grant
View document in PDF format
Comments: Invited AC=Interested persons or groups may move for permission. Justice Bernstein not participating.

06/02/2020 63 SCt Motion: Appear and Practice

Party: 2

Filed by Attorney:

Comments: Adam Unikowsky

06/15/2020 64 SCt Order: Appear & Practice

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Comments: Grant motion for the temporary admission of out-of-state atty Unikowsky to appear and practice.

Case Listing Complete

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STATE OF MICHIGAN

COURT OF CLAIMS

HASSAN A. AHMAD, Plaintiff, v THE UNIVERSITY OF MICHIGAN, Defendant.	**OPINION AND ORDER** Case No. 17-000170-MZ Hon. Stephen L. Borrello

Pending before the Court is defendant's motion for summary disposition under MCR 2.116(C)(8). For the reasons stated more fully in this Opinion and Order, defendant's motion for summary judgment is GRANTED. This matter is being decided without oral argument pursuant to LCR 2.119(A)(5).

I. BACKGROUND

In this FOIA action, plaintiff seeks records created and donated by a private individual, Dr. John Tanton, to the University of Michigan's Bentley Historical Library ("the Library"). Tanton's donation to the Library consisted of 25 boxes of papers. Boxes 1-14 were donated with no restrictions on their use. Boxes 15-25, however, are to be closed—meaning inaccessible to the public, students, or faculty—until approximately April 6, 2035.

In December 2016, plaintiff filed a FOIA request seeking the documents in Boxes 15-25, as well as any other "closed" materials. Plaintiff subsequently narrowed this request in January 2017, but still sought "closed" materials. Defendant denied the request on or about May 8, 2017,

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contending that the materials sought were not "public records" as defined by FOIA. As an alternative, defendant argued that, even assuming the materials were "public records," they were exempt from disclosure under MCL 15.243(1)(a), which exempts from disclosure materials of a personal nature.

II. ANALYSIS

MCL 15.233(1) permits the inspection, upon written request, of "public records" of a public body. The purpose of FOIA is to provide persons with 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, consistent with this act." MCL 15.233(2). In light of the statute's stated purpose, FOIA has often been described as a pro-disclosure statute, and any interpretation of its provisions must be made with that purpose in mind. *Hopkins v Duncan Twp*, 294 Mich App 401, 410; 812 NW2d 27 (2011).

FOIA defines "public record" to mean "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." There is no dispute that defendant is a public body or that the materials sought qualify as "writings" under FOIA. Although the records in this case were prepared by a private individual and thus were not public records at the time of their creation, the fact that a writing is not a public record at the time it is created does not control the outcome with regard to whether it is a "public record" under FOIA. In fact, "[a] writing can become a public record after its creation." *Detroit News, Inc v Detroit*, 204 Mich App 720, 725; 516 NW2d 151 (1994).

A writing can become a public record subject to FOIA depending on its use by the public body. *Hopkins*, 294 Mich App at 409-410. In order for a writing to become a public record, the

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public body must do more than merely possess the record. *Id.* "[W]hat ultimately determines whether records in the possession of the public body are public records within the meaning of FOIA is whether the public body prepared, owned, used, possessed, or retained them in the performance of an official function." *Amberg v Dearborn*, 497 Mich 28, 32; 859 NW2d 674 (2014). Thus, the Court's inquiry focuses on how or if the writings "are utilized by public bodies." *Howell Ed Ass'n*, 287 Mich App at 243.

In this case, the issue is whether materials possessed by a library are utilized by the public body in the performance of an official function. The parties have not identified any Michigan caselaw directly on point. Nonetheless, this state's appellate courts have, in answering the question of whether a writing is utilized in the performance of an official function, generally found such utilization in the context of a document that was *actively* used in a public body's decision-making process. For instance, in *Amberg*, 497 Mich at 32, a surveillance video that was found to have been used to help support the decision to issue a misdemeanor citation was used in the performance of an official function. In addition, in *Walloon Lake Water Sys, Inc v Melrose Twp*, 163 Mich App 726, 729-730; 415 NW2d 292 (1987), a letter became a public record when it was read aloud into the record at a public meeting and its contents were subsequently used by the township board in its decision-making process. The Court in *Walloon Lake* explained that its holding intended to capture within the definition of "public records" records or writings "used or possessed [by public bodies] in their decisions to act." *Id.* at 730.

Contrastingly, in *Hopkins*, 294 Mich App at 411-412, a public official's personal notes taken during a township board meeting—notes that were neither shared with anyone else nor utilized by the Board—the Court of Appeals held that the notes were not taken in the performance of an official function. In addition, in *Howell Ed Ass'n*, the Court of Appeals was

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tasked with deciding whether private e-mails that were "captured in a public body's e-mail system's digital memory" became public records. Although it was apparent that the e-mails were used or retained, the Court of Appeals held that the e-mails were not so used or retained in the performance of an official function. *Id.* at 436. Merely saving and retaining the e-mail messages was not enough. *Id.* at 243.

Turning to the instant case, the Court concludes that the records sought by plaintiff are more akin to those sought in *Howell Ed Ass'n* and *Hopkins* and that the records are not used or maintained in the performance of an official function. The records are plainly possessed by the library, but this mere possession is not enough to render the records "public" under FOIA. The 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. Releasing 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. See *Howell Ed Ass'n*, 287 Mich App at 246. Indeed, as the parameters of the donation agreement attest, Library staff members do not even have access to view the materials, thereby rendering dubious the assertion that the Library has done more than merely possess the records, and negating any assertion that the Library has applied the materials to an official function. Moreover, releasing the papers would not only violate the terms pursuant to which they were given to the library, but it would also permit the use of FOIA to interfere with the Library's statutory authority to determine the use of its own materials. See MCL 397.605(2) ("Except as otherwise provide by law or a regulation adopted by the governing body of the library, the *use of library materials* shall be determined only by an employee of the library.") (Emphasis added).

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The Court agrees with defendant that this conclusion is in accord with federal authorities that have decided similar issues.[1] In general, materials that are purely reference materials or research materials do not fall within the ambit of "agency records" that are subject to disclosure under the federal FOIA. See, e.g., *Tax Analysts v United States Dep't of Justice*, 845 F2d 1060, 1069 (DC Cir, 1998). For instance, in *SDC Dev Corp v Matthews*, 542 F2d 1116, 117 (1976), then-Judge (now Justice) Anthony M. Kennedy wrote for the Ninth Circuit, which concluded that a reference library of medical writings and publications was not an "agency record" as contemplated by FOIA. The Ninth Circuit explained that "[t]he library reference material does not directly reflect the structure, operation, or decision-making functions of the agency . . . ." *Id.* at 1120. In *Baizer v United States Dep't of Air Force*, 887 F Supp 225, 228-229 (ND Cal, 1995), a case that relied heavily on *SDC Dev Corp*, the Northern District of California held that material maintained "solely for reference purposes or as a research tool" was not an "agency record" subject to FOIA. Such materials, like museum materials, are only used for reference and exhibition purposes, and do not serve the same purpose as the types of records to which Congress intended the federal FOIA to apply. *Id.* at 229. In so concluding, the *Baizer* Court noted that the information requested in that case was not withheld in order for the agency to protect its own information. *Id.*

The United States Court of Appeals for the D.C. Circuit has reached similar conclusions in cases involving materials held at the National Archives. For instance, in *Katz v Nat'l Archives & Records Admin*, 68 F3d 1438, 1441 (DC Cir, 1995), autopsy photographs of President John F.

[1] "Federal court decisions regarding whether an item is an 'agency record' under the federal freedom of information act, 5 USC 552, are persuasive in determining whether a record is a 'public record' under the Michigan FOIA." *Hopkins*, 294 Mich App at 414.

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Kennedy were not transformed into "agency records" by merely depositing the photographs with the Archives. See also *Cause of Action f Nat'l Archives & Records Admin*, 753 F3d 210, 215 (DC Cir, 2014), quoting *Dep't of Air Force v Rose*, 425 US 352, 361; 96 S Ct 1592; 48 L Ed 2d 11 (1976) ("[T]ypical archival functions—common to every record in the Archives—do not suddenly convert the records . . . into 'agency records' able to expose the operations of the Archives "to the light of public scrutiny.' ").

In light of the absence of Michigan caselaw directly on point, the Court finds these federal authorities particularly convincing. The records sought in this case are held by the Library as reference material, and therefore outside the scope of the records to which Michigan's FOIA was intended to apply. See MCL 15.232(e) (defining "public records.").[2] The Library's mere possession of the records in this archival fashion does not establish the requisite relationship between the records and the official function of the public body.

Plaintiff would have this Court find that defendant's mere possession is enough to satisfy the definition of "public records," because the Library's official function is to possess records. The Court declines to adopt such a view, and instead finds persuasive the views espoused in the federal authorities documented above. Additionally, the Court finds that plaintiff's argument contradicts the stated general purpose of FOIA statutes to inform citizens "about what their government is up to." *U.S. 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) (internal quotation marks and citation

[2] For the avoidance of doubt, this Court's opinion should not be construed as applying to material beyond reference material, nor should it be construed as giving public bodies license to withhold materials that would otherwise be within the scope of FOIA simply by referring to them as being "closed" from access for any period of time.

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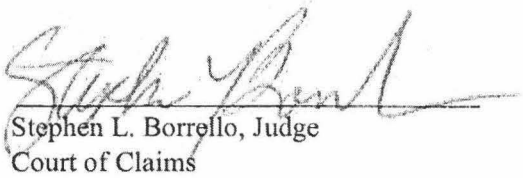
omitted). See also *Rataj v City of Romulus*, 306 Mich App 735, 748; 858 NW2d 116 (2014) (describing the purpose, in a similar fashion, of the Michigan FOIA statute). Simply paraphrasing, the library materials sought in this case plainly do not have the capacity to inform the citizenry about what the Library "is up to."

Because the Court concludes that the records are not public records within the meaning of FOIA, the Court need not decide defendant's conclusory assertion that the records meet the privacy exemption in MCL 15.243(1)(a).

IT IS HEREBY ORDERED that defendant's motion for summary disposition is GRANTED.

This order resolves the last pending claim and closes the case.

Dated: November 20, 2017,



Stephen L. Borrello, Judge
Court of Claims

If this opinion indicates that it is "FOR PUBLICATION," it is subject to revision until final publication in the Michigan Appeals Reports.

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STATE OF MICHIGAN

COURT OF APPEALS

HASSAN M. AHMAD,

Plaintiff-Appellant,

v

UNIVERSITY OF MICHIGAN,

Defendant-Appellee.

UNPUBLISHED
June 20, 2019

No. 341299
Court of Claims
LC No. 17-000170-MZ

Before: CAMERON, P.J., and RONAYNE KRAUSE and TUKEL, JJ.

PER CURIAM.

In this action brought under the Freedom of Information Act (FOIA), MCL 15.231 *et seq.*, plaintiff, Hassan M. Ahmad, appeals as of right the November 20, 2017 order of the Court of Claims granting summary disposition in favor of defendant, the University of Michigan ("the University"), pursuant to MCR 2.116(C)(8) (failure to state a claim). Because plaintiff alleged sufficient facts to establish a prima facie claim under the FOIA, we reverse the judgment of the Court of Claims and remand.

I. BASIC FACTS

Plaintiff challenges the University's denial of his FOIA request. Dr. John Tanton—"an ophthalmologist and conservationist," according to the University, and "a figure widely regarded as the grandfather of the anti-immigration movements," according to plaintiff—donated his personal writings, correspondence, and research (collectively, "the Tanton papers") to the Bentley Library's collection. His donation included 25 boxes of papers, but boxes 15-25 were to remain closed for 25 years from the date of accession, i.e., until April 2035, purportedly in accordance with the terms of the gift.[1]

[1] The University indicates that the restriction is memorialized in a charitable gift agreement, but that agreement is not contained in the lower court record. Regardless, plaintiff in his complaint has referenced the existence of the agreement and has acknowledged that the records were

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Plaintiff filed a FOIA request with the University, seeking all of the Tanton papers, including those found in boxes 15-25 and marked as "closed." The University eventually denied plaintiff's request, asserting that the Tanton papers were closed to research until April 2035 and were therefore not "public records" subject to FOIA disclosure because they were not "utilized, possessed, or retained in the performance of any official University function."

Following plaintiff's unsuccessful administrative appeal, he filed suit in the Court of Claims. The Court of Claims granted the University's motion for summary disposition, concluding that the Tanton papers are not "public records." This appeal followed.

II. STANDARD OF REVIEW

A trial court's ruling on a motion for summary disposition is reviewed de novo on appeal. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Summary disposition under MCR 2.116(C)(8) is appropriately granted if the plaintiff has failed to state a claim on which relief can be granted. "A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. . . . A motion under MCR 2.116(C)(8) may be granted only where the claims are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Maiden*, 461 Mich at 119 (quotations marks and citations omitted). In reviewing the sufficiency of a complaint, a court accepts as true and construes in a light most favorable to the nonmovant all well-pleaded factual allegations. *Id.* And when deciding a motion brought under this subrule, a court considers only the pleadings. *Id.* at 119-120.

The interpretation and application of a statute is a question of law that this Court reviews de novo. *Whitman v City of Burton*, 493 Mich 303, 311; 831 NW2d 223 (2013).

> When interpreting a statute, we follow the established rules of statutory construction, the foremost of which is to discern and give effect to the intent of the Legislature. To do so, we begin by examining the most reliable evidence of that intent, the language of the statute itself. If the language of a statute is clear and unambiguous, the statute must be enforced as written and no judicial construction is permitted. Effect should be given to every phrase, clause, and word in the statute and, whenever possible, no word should be treated as surplusage or rendered nugatory. [*Id.* at 311-312 (citations omitted).]

Finally, we also review legal determinations under the FOIA de novo. *Herald Co, Inc v Eastern Mich Univ Bd of Regents*, 475 Mich 463, 471-472; 719 NW2d 19 (2006).

III. WHAT CONSTITUTES A "PUBLIC RECORD" UNDER THE FOIA

"marked 'closed for 25 years from the date of accession, or until April 6, 2035.' " Further, attachments to plaintiff's complaint show that the records were "closed to research until April 2035."

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Unless an exception applies, a person who provides a proper written request for a public record is entitled to " 'inspect, copy, or receive copies of the requested public record of the public body.' " *Amberg v Dearborn*, 497 Mich 28, 30; 859 NW2d 674 (2014), quoting MCL 15.233(1). Defendant argues that the Tanton papers are not subject to disclosure under the FOIA because under the terms of the gift agreement, they never became public records, and only public records are subject to FOIA disclosure. See MCL 15.233(1).

Under the FOIA, a " '[p]ublic record' means 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).[2] Thus, the sole issue before us is whether plaintiff alleged facts sufficient to show that the Tanton papers constitute a public record under the FOIA. Here, there is no doubt that plaintiff adequately alleged that the University had "possession of" or "retained" the documents at issue. Accordingly, the only question remaining is whether said possession or retention was alleged to have been done "in the performance of an official function."

While the FOIA defines what constitutes a "public record," it does not define what constitutes an "official function." When a statute does not define a term, we are to give the term its plain and ordinary meaning. *Williams v Kennedy*, 316 Mich App 612, 616; 891 NW2d 907 (2016); see also *Kestenbaum v Mich State Univ*, 414 Mich 510, 538; 327 NW2d 783 (1982) (opinion by RYAN, J.) (noting that because "official function" is not defined in the FOIA, "the term must be construed according to its commonly accepted and generally understood meaning"). We may consult a dictionary in ascertaining plain meanings. *Williams*, 316 Mich App at 616. "Official" is defined, in pertinent part, as "AUTHORITATIVE, AUTHORIZED." *Merriam-Webster's Collegiate Dictionary* (11th ed). And "function" is defined as "the acts or operations expected of a person or thing." *Id.* Thus, an "official function" of the Bentley Library, as intended under the FOIA, includes those authorized acts or operations that are expected of the Library as it relates to its position as a public library. In order to help determine whether any given act or operation is authorized, we turn to the University's bylaws.

The 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."[3] Bylaws, § 12.04 (emphasis added). The University does not

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[2] The definition for "public record" can now be found in MCL 15.232(i), but the definition was located at MCL 15.232(e) prior to the June 17, 2018 effective date of 2018 PA 68.

[3] The bylaws of the Board of Regents comprise the rules concerning the more important matters of general University organization and policy rather than administrative details and specific technical requirements of the several fields of instruction. The bylaws are adopted directly by the Board of Regents in the exercise of the Board's legislative powers and thus are binding authority on the University. See University of Michigan Board of Regents, *Bylaws Preface* <http://regents.umich.edu/bylaws/bylaws_pref.html> (accessed June 4, 2019). Chapter XII of the Bylaws pertains the University's libraries, with § 12.04 pertaining specifically to the Bentley

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dispute that it had collected and possessed the Tanton papers but instead argues that because the papers had never been made available to anyone, let alone students, then the papers cannot constitute a public record. In making this argument, the University says that in order to qualify as a "public record" for FOIA purposes, all three aspects of the bylaws' stated purpose are required to have been accomplished. The University primarily relies on the conjunctive "and" in the list, "collecting, preserving, *and* making available to students." (Emphasis added.) However, we believe that the University is reading the conjunctive "and" in this context incorrectly.

We agree with the University that the purpose for the Library's existence is defined as having three distinct aspects, which are indeed provided for in the conjunctive, i.e., collecting, preserving, *and* making available to students the Library's materials. We generally are to read the conjunctive word "and" as a true conjunctive, see *Coalition Protecting Auto No-Fault v Mich Catastrophic Claims Ass'n (On Remand)*, 317 Mich App 1, 14; 894 NW2d 758 (2016); *People v Comella*, 296 Mich App 643, 649; 823 NW2d 138 (2012) (both cases explaining that the words "and" and "or" are not interchangeable and their strict meanings, including the conjunctive meaning of "and," should be followed unless legislative intent shows otherwise); *OfficeMax, Inc v United States*, 428 F3d 583, 589 (CA 6, 2005) ("[T]he Supreme Court has said that 'and' presumptively should be read in its 'ordinary' conjunctive sense unless the 'context' in which the term is used or 'other provisions of the statute' dictate a contrary interpretation."). However, as the cases above show, the meaning of "and" and "or" may be flexible depending on context. *Heckathorn v Heckathorn*, 284 Mich 677, 681-682; 280 NW 79 (1938). We do not read this list as requiring all three aspects *to have been completed* in order for the Library to have been acting in furtherance of its purpose, as described in the bylaws.

Because the Tanton papers have never been made available to students, if the University's construction of the statute were correct, then none of what it has done to date with respect to the papers has been in the performance of an official function. The flaw with the University's argument is that while all three aspects of the Library's purpose are relevant to the Library's purpose and mission, they do not each have to have been completed in order for the Library's acts to have been in furtherance of its purpose. Instead, from the context of the bylaws, all that is required is that the Library's actions were done *with the intention* that all three aspects of its stated purpose were to be fulfilled. This interpretation gives the conjunction "and" in the bylaws its proper meaning. For example, 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. But the act of acquiring writings or documents that the University has no intention of ever making available to students would not be in the performance of its official function. Therefore, the Library doing any act in furtherance of any single aspect

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Library. University of Michigan Board of Regents, *Chapter XII. The University Libraries* <http://regents.umich.edu/bylaws/bylaws12.html> (accessed June 4, 2019).

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of its stated purpose, while intending to accomplish the other aspects, is doing the act "in the performance of an official function."[4]

Here, plaintiff sufficiently pled that defendant was storing and maintaining the Tanton papers, which is consistent with the stated purposes of the Library's official functions. The fact that those materials were not subject to disclosure to students or research does not detract from the fact that the act of keeping those materials is part of the Library's purpose. Importantly, plaintiff's complaint can be read to allege that the Tanton papers were "closed" to research until April 2035. The clear implication is that the University was holding the papers with the intent to open them to research (and students) at that later time. Thus, the University's acts of collecting and preserving the papers were in furtherance of its official purpose. Accordingly, we read the complaint as alleging that defendant "maintained the records" in the performance of an official function, which, under FOIA's definitions, renders them "public records." Therefore, contrary to the ruling of the Court of Claims, the complaint states a valid claim that the papers are public records.

Further, the Michigan Community Foundation Act (MCFA), MCL 123.901 *et seq.*, and its predecessor act, 1921 PA 136, support our conclusion that the Library's act of holding onto the Tanton papers was an official or "authorized" function. MCL 123.905(3) of the MCFA states:

> A public library may receive and accept gifts and donations of real, personal, or intangible personal property, for the library, and shall hold, use, and

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[4] To the extent the University argues that disclosure "would likely dissuade other similarly situated individuals from donating private papers of historical significance to public institutions," or more generally frustrate public policy, we note that any such public policy consideration is for the Legislature to make. We do no more here than construe the public policy choice which the Legislature has enshrined in current law; it remains free to change that public policy as it sees fit, although we are not free to make such public policy choices. See *Robinson v Detroit*, 462 Mich 439, 474; 613 NW2d 307 (2000) (CORRIGAN, J., concurring) ("[A] Court exceeds the limit of its constitutional authority when it substitutes its policy choice for that of the Legislature."). Indeed, the Legislature appears to have provided a method that protects such donors through its enactment of MCL 397.381, 1921 PA 136, and, more recently, the Michigan Community Foundation Act (MCFA), MCL 123.901 *et seq*. See discussion, *infra*, in this opinion.

In addition to any protections afforded by the Legislature through its passage of acts such as the MCFA, future donors could ensure the privacy of their papers during their lifetimes, as Dr. Tanton apparently sought to do, by donating them to a public university through a will. Dr. Tanton donated his papers during his lifetime, transferring the title and the copyright at that time. Had he instead maintained ownership and control during his lifetime and only left the papers to the University by way of a will, the papers could not have become public records during his lifetime, as they would not have been "prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function," MCL 15.232(i), until after his death.

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> apply the property received for the purposes, in accordance with the provisions, and subject to the conditions and limitations, if any, set forth in the instrument of gift.[5]

Thus, a public library receiving a gift is authorized by statute to "hold, use, and apply" the gift for the purposes set forth in the donor's agreement, subject to any conditions or limitations expressly made. Therefore, the Bentley Library carries out an "official function" as it relates to its gifts and donations when it holds onto such gifts and donations in accordance with the donation agreement.[6]

Reversed and remanded for proceedings not inconsistent with this opinion. We do not retain jurisdiction.

/s/ Thomas C. Cameron
/s/ Amy Ronayne Krause
/s/ Jonathan Tukel

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[5] We note that at the time plaintiff made his FOIA request to the University, MCL 397.381(1) was in effect and was substantively the same as the later-enacted MCFA, which became effective before the Court of Claims issued its ruling and which also repealed MCL 397.381(1). See 2017 PA 38.

[6] We had asked the parties to file supplemental briefing in regard to the applicability of the MCL 123.905(3) and how its application may support granting defendant's motion for summary disposition under MCR 2.116(C)(8). However, after reviewing the briefing, we have determined that the University cannot rely on MCL 123.905(3), or its predecessor, MCL 397.381(1), to dismiss plaintiff's action under MCR 2.116(C)(8). That is because, assuming the University is required to not disclose the Tanton papers under the terms of the gift instrument, this fact relates to an affirmative defense the University may raise. See MCL 15.243(d); *Messenger v Consumer & Ind Serv*, 238 Mich App 524, 536; 606 NW2d 38 (1999); *Detroit News, Inc v Detroit*, 185 Mich App 296, 300; 460 NW2d 312 (1990). And affirmative defenses generally are not implicated in a motion brought under MCR 2.116(C)(8). See *Booth Newspapers, Inc v Regents of the Univ of Mich*, 93 Mich App 100, 109; 286 NW2d 55 (1979). We offer no opinion on how either MCL 123.905(3) or its predecessor, MCL 397.381(1), might affect an analysis under MCR 2.116(C)(10) or at trial.

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EXHIBIT 7

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FREEDOM OF INFORMATION ACT OFFICE
UNIVERSITY OF MICHIGAN

May 8, 2017

Hassan M. Ahmad
The HMA Law Firm
7926 Jones Branch Dr. Suite 600
McLean, VA 22102
hma@hmalegal.com

Re: AHM 0633-16

Dear Mr. Ahmad:

I am writing in further response to your revised Freedom of Information Act request dated January 5, 2017, which was received on January 6, 2017, and to which we initially responded on January 27, 2017.

You requested voluminous records from the John Tanton papers archived at the University of Michigan Bentley Historical Library, which are currently restricted and closed to research.

Your request is denied. Subsequent to receiving your fee deposit, we have determined that the restricted records are not public records of the University of Michigan pursuant to Section 2 (e) of the Michigan Freedom of Information Act, which defines a "public record" as "a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function..." 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.

We are refunding your deposit in the amount of $6,417 under separate cover.

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

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

2025 Fleming Administration Building, 503 Thompson St.
Ann Arbor Michigan 48109-1340
T: 734 763-5292 F: 734 763-1389

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

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

Sincerely,

Patricia J. Sellinger
Chief Freedom of Information Officer

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EXHIBIT 9

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OFFICE OF THE PRESIDENT

UNIVERSITY OF MICHIGAN

2074 FLEMING ADMINISTRATION BUILDING
503 THOMPSON STREET
ANN ARBOR, MI 48109-1340
734 764-6270 FAX 734 936-3529

May 30, 2017

Hassan M. Ahmad
The HMA Law Firm
7926 Jones Branch Dr. Suite 600
McLean, VA 22102
hma@hmalegal.com

Dear Mr. Ahmad:

RE: Appeal of FOIA final determination, University File AHM 0633-16.

I am writing in response to your email dated May 16, 2017 which was received in the President's Office on May 16, 2017 appealing the response dated May 8, 2017 by Ms. Patricia Sellinger, the University's Freedom of Information Coordinator, to your Freedom of Information Act (FOIA) inquiry referenced above.

After careful review and consideration, your appeal is denied for the reasons stated in Ms. Sellinger's May 8 response, which will not be repeated herein. These 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. Further, disclosure of these records in contravention of the gift agreement would not only violate the terms by which a private citizen donated his property to the University, but would constitute an unwarranted invasion of the donor's privacy and, potentially, that of unrelated and unknowing third parties. Moreover, 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. Potential donors with key historical documents will be chilled by the University's failure to observe the limits expressly placed upon such gifts.

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

Sincerely,

Liz Barry
Special Counsel to the President

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COURT OF CLAIMS
JEROME W ZIMMER JR. CLERK

STATE OF MICHIGAN
IN THE COURT OF CLAIMS

HASSAN M. AHMAD, ESQ.	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No: 17-000170-MZ Borrello
	)	
THE UNIVERSITY OF MICHIGAN,	)	
	)	
Defendant	)	

Hassan M. Ahmad, Esq., *Pro Se*
The HMA Law Firm, PLLC
7926 Jones Branch Dr., Suite 600
McLean VA 22102
Tel: 703.964.0245
Fax: 703.997.8556
hma@hmalegal.com

VERIFIED COMPLAINT

NOW COMES Plaintiff, Hassan M. Ahmad, Esq., *pro se*, and brings this action against Defendant, the University of Michigan, a public body, to compel disclosure of certain records are herein defined. In support of this action, Plaintiff states as follows:

RECITALS

1. This is an action brought under the Michigan Freedom of Information Act (FOIA), MCL §15.231 *et seq*, to compel disclosure of certain records currently in the possession of Defendant.
2. The records sought are "public records" within the meaning of MCL §15.232(e).
3. There is no other pending or resolved civil action arising out of the same transaction or occurrence as alleged in the complaint.

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PARTIES, VENUE, JURISDICTION

4. Plaintiff is an attorney engaged in the full-time practice of law, and is a member in good standing of the bars of Maryland and Virginia. Plaintiff focuses the bulk of his practice on matters of US immigration and naturalization.

5. Defendant University of Michigan is a public body within the meaning of MCL §15.232(d).

6. Venue is proper in this jurisdiction pursuant to MCL §15.240(1)(b).

7. The Court of Claims has original, exclusive jurisdiction over this claim under MCL §600.6419(1)(a).

FACTS

8. On December 15, 2016 Plaintiff properly filed a FOIA request with Defendant University of Michigan ("the University") seeking "all documents donated by Dr. John Tanton, Donor #7087, located in Boxes 15 – 25, and any others marked 'closed' at the Bentley Historical Archive (BHA) [sic] at the University of Michigan." (hereinafter, "the Sealed Tanton Papers") *See* **Exhibit 1 (Original FOIA request)**

9. Defendants acknowledged receipt of Plaintiff's FOIA request and assigned it reference number AHM 0633-16.

10. Defendant requested additional time to respond to the FOIA request on December 22, 2017. *See* **Exhibit 2 (Email Requesting Additional Time)**

11. Plaintiff was aware that his request sought records marked "closed for 25 years from the date of accession, or until April 6, 2035," but had submitted in the FOIA that the records still qualified as "public records" within the meaning of the Michigan FOIA, that there was no qualifying exemption, and that strong public interest trumped any conceivable privacy interest.

12. Specifically, the documents sought are the writings, correspondence, and research of Dr. John Tanton, the founder of the Federation for American Immigration Reform (FAIR), and a figure

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widely regarded as the grandfather of the anti-immigrant movements. The contents of the Tanton Papers are referenced in detail on Defendant's public website. *See* http://quod.lib.umich.edu/b/bhlead/umich-bhl-861056 (last accessed June 3, 2017).

13. For decades, FAIR and its sister organizations have played a major role in affecting and shaping US immigration policy, and its personnel have obtained high-ranking and influential positions within the US government.

14. Dr. John Tanton is a conservationist who saw immigration as an environmental threat, and later embraced much harsher positions calling for sharp restrictions on immigration.

15. In 1993, Dr. Tanton stated his preference for the United States to have a "European-American majority, and a clear one at that."

16. The organizations founded and nurtured by Dr. Tanton currently inform the White House and US immigration policy. For example, Section 9(b) of Executive Order 13768 signed by President Trump in January 2017 mandated a weekly report from US Immigration & Customs Enforcement (ICE) listing jails that allegedly failed to honor detainers (requests by ICE to hold over detainees for up to 48 hours until they could be picked up to begin the deportation process.) But at least as early as July of 2015, the Center for Immigration Studies (a thinktank that began as an offshoot of FAIR, and also itself nurtured by Tanton) had urged Congress to mandate local cooperation with ICE detainers, and urging publication of the exact same type of "declined detainer outcome report" later seen in the Executive Order. *See* Center for Immigration Studies, *Rejecting Detainers, Endangering Communities* (available at http://cis.org/sites/cis.org/files/vaughan-detainers_0.pdf (last accessed June 3, 2017)).

17. Dr. Tanton still sits on the National Board of Advisors of FAIR, even after serving on the Board of Directors of FAIR for 32 years, only stepping down a few days after the *New York Times* published a piece critical of Tanton. *See* http://www.fairus.org/about/board-of-directors (last

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accessed June 3, 2017.)

18. Defendant's Bentley Historical Library specifically asked for Dr. Tanton's papers as early as 1989, and on their website list the entirety of the "John Tanton Collection" detailing 25 boxes worth of documents, identifying them by categories such as "Federation for American Immigration Reform," "Immigration Reform Law Institute," "Center for Immigration Studies," and the like. *See* **Exhibit 3 (BHL Letter from Nov 1989)**

19. On the BHL website detailing access to the Tanton papers, Defendant notes "Donor(s) have transferred any applicable copyright to the Regents of the University of Michigan but the collection may contain third-party materials for which copyright was not transferred. Patrons are responsible for determining the appropriate use or reuse of materials."

20. To the extent that any of the records requested herein may contain non-transferred copyright, Plaintiff's intended use of the Sealed Tanton Papers is non-commercial, in the public interest, and falling squarely within the commentary, criticism, scholarship, and research exceptions detailed in 17 U.S.C. §107.

21. In an interview with the *New York Times* in 2011, Dr. Tanton stated that he donated his papers to Defendant University of Michigan "to show that he and colleagues 'are not the unsavory types sometimes alleged.'" Linda Chavez, former aide to President Reagan, called him "the most influential unknown man in America." *See* **Exhibit 4** ***(The Anti-Immigrant Crusader, NY Times,*** **April 17, 2011)**

22. In December 2016, current FAIR President Dan Stein said, "FAIR began working with [Counselor to the President] Kellyanne Conway as far back as 1996, and we have used her for polling virtually every year since then. We take it as a certain amount of personal pride, is that when she became the campaign manager for Donald Trump...she was possessed of intimate professional knowledge of the immigration issue as it related to the voter concerns. And we saw

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that influence helping to shape Donald Trump's positions and statements once she came on board."

23. Kansas Secretary of State Kris Kobach has a long and established career working to restrict immigration. Mr. Kobach was one of the architects of the National Security Entry-Exit Registration System (which required certain nonimmigrant males from majority Muslim countries to undergo special registration), wrote Arizona's law, S.B. 1070, which was largely struck down by the US Supreme Court in *Arizona v. United States*, 132 S. Ct. 2492, 567 US ____, (2012), and more recently was photographed advising then President-Elect Trump on a strategic immigration plan for the first 365 days of the new administration. Mr. Kobach maintains ties to FAIR, serving of counsel to its legal wing, the Immigration Reform Law Institute (IRLI.) The Sealed Tanton Papers include a volume labeled "IRLI."

24. On May 2, 2017, former FAIR Executive Director Julie Kirchner was named ombudsman of the US Citizenship & Immigration Services. *See DHS Announces New CIS Ombudsman Julie Kirchner*, available at https://www.dhs.gov/news/2017/05/02/dhs-announces-new-cis-ombudsman-julie-kirchner (last accessed June 3, 2017).

25. The Tanton papers – including the Sealed Tanton Papers at issue herein – were retained by Defendant in performance of an official function from the time they were created, to-wit: preserving the history of the State of Michigan.

26. As Dr. Tanton's writings form, upon information and belief, the conceptual foundation and strategic plans of the organizations currently informing US immigration policy affecting millions of people in the US and around the world, they are decidedly within the public interest. Moreover, the intensity of the public interest outweighs any conceivable privacy interest in Dr. Tanton or any third party.

27. Disclosure of records such as the Sealed Tanton Papers will not chill future donation of

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historical records, as not all such records grow in importance and influence so as to lose their privacy interest to the public.

28. Moreover, there is no law or procedure stopping such potential donors from donating key historical documents to established non-public bodies. For example, another co-founder of FAIR, Dr. Otis Graham, donated his papers to The George Washington University in Washington, D.C., an established private institution.

29. On January 5, 2017 Patricia Sellinger, Defendant's chief FOIA officer, called Plaintiff to inquire whether the scope of the FOIA request might be narrowed in any way, claiming it was "voluminous."

30. During that conversation, Plaintiff specifically asked Ms. Sellinger whether the University would simply deny the FOIA request, given that they were marked closed until April 2035. Ms. Sellinger responded, "We would not be having this conversation if we weren't going to process it."

31. Plaintiff relied in good faith on Defendant's representation that the records would be produced.

32. On the same day, Plaintiff complied with the request in good faith and narrowed the scope of the request by excluding some of the named records as listed on the Bentley Historical Library (BHL) website. *See* **Exhibit 5 (Email with attached spreadsheet of narrowed FOIA request)**

33. The University treated the narrowed request as an amended FOIA request and, after asking for additional time, responded with a cost estimate on January 27, 2017.

34. Plaintiff obtained the required deposit of $6,417 and sent the funds to the University, which were received and cashed on April 25, 2017. *See* **Exhibit 6 (Jan 27 response, check, copy of cancelled check)**

35. On May 8, 2017, the University denied the FOIA request, finding the requested records not to be "public records" within the meaning of the Michigan FOIA because they were marked

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closed, and thus not utilized, possessed, or retained in the performance of any official University function. In its denial, the University claimed that this determination was made *subsequent* to receiving the fee deposit. *See* **Exhibit 7 (FOIA Denial)**

36. On May 15, 2017 Plaintiff filed an appeal with the President of the University of Michigan, pursuant to MCL §15.240(1)(a) indicating that the instant action would be filed after 20 business days or the President's decision upholding the denial of the FOIA request, whichever was sooner. *See* **Exhibit 8 (Appeal of FOIA Denial)**

37. On May 30, 2017 the President of the University of Michigan upheld the denial of the FOIA for the reasons stated in the denial of May 8. *See* **Exhibit 9 (Denial of Appeal)**

38. Despite Dr. Tanton's own statements regarding his intent in donating his papers, and the fact that it was Defendant that began requesting Dr. Tanton's papers as far back as 1989, counsel for the President stated that Defendant did not have the right to disseminate the Sealed Tanton Papers due to a "valid charitable gift agreement."

39. Defendant's actions unlawfully and unilaterally shield public records from the Michigan FOIA by declaring donated papers sealed pursuant to an unknown, undisclosed "charitable gift agreement."

40. No such charitable gift agreement appears on Defendant's Bentley Historical Library website.

41. There is no provision in the Michigan FOIA, or elsewhere, that allows a public body to unilaterally shield records due to a private arrangement.

42. Whether a private arrangement existed at any point during the years Dr. Tanton continued to donate his papers does not impact that fact that the entirety of the Tanton papers were retained by a public body in furtherance of an official purpose.

43. On May 8, Plaintiff has filed another FOIA with Defendant seeking copies of "all communications between Dr. John Tanton (Donor #7087), the University of Michigan, and/or

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any third parties related in any way to the acquisition of the Tanton papers donated to the Bentley Historical Library." That request was acknowledged by Defendant, assigned reference number AHM 0239-17, and remains pending.

44. The burden of proof for FOIA exemptions is on Defendant University of Michigan, and this Court may view the public record(s) in camera before reaching a decision pursuant to MCL §15.240(4).

45. The actions of Defendant in denying Plaintiff's FOIA request are arbitrary, capricious, not in accordance with Michigan law, and the stated purpose of the Michigan FOIA in MCL §15.231.

46. There is no exemption under MCL §15.243 that would permit Defendant to deny Plaintiff's FOIA request, and Defendant cannot create a new one.

47. Holding a charitable gift agreement as a shield against FOIA does not mean the records cease to become "public records" within the meaning of the Michigan FOIA, but only creates an exemption that does not exist as a matter of law.

WHEREFORE, the above grounds considered, Plaintiff prays this Honorable Court:

1. To find that the entirety of the documents responsive to FOIA request labeled AHM 0633-16 (the Sealed Tanton Papers) by Defendant to be "public records" within the meaning of the Michigan FOIA, MCL §15.231 *et seq*, and
2. To find that no exemption exists under MCL §15.243 permitting Defendant to Plaintiff's request, and that the strong public interest outweighs any privacy interest or other applicable exemption under the Michigan FOIA, and
3. To issue an Order compelling complete production of the FOIA response no later than 30 days from the date of this Order, and

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4. To find that Defendant's denial of Plaintiff's FOIA request was arbitrary and capricious, and ordering payment of all penalties and costs available under MCL §15.240(7) or other provision of law, and

5. To award any such other and further relief as this Court may deem just or proper.

Respectfully Submitted,

THE HMA LAW FIRM, PLLC

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Pursuant to MCL §600.6431(1), Plaintiff signs and verifies this Complaint before an officer authorized to administer oaths.

Hassan M. Ahmad, Esq.

COMMONWEALTH OF VIRGINIA)
CITY OF MCLEAN) ss.
COUNTY OF FAIRFAX)

I HEREBY CERTIFY that on this 5th day of June, 2017, before a Notary Public in and for the jurisdiction aforesaid, personally appeared before me, HASSAN M. AHMAD, whose name is subscribed to the foregoing Complaint, who, after being sworn, made oath in due form of law under the penalties of perjury that the matters and facts set forth in the foregoing Agreement are true and correct as therein stated and acknowledged said Agreement to be his voluntary act and deed.

My Commission Expires:
4/30/2020

NOTARY PUBLIC

VALERIA FERNANDA PRUDENCIO
NOTARY PUBLIC
REG. # 7669997
COMMISSION EXPIRES 4/30/2020
COMMONWEALTH OF VIRGINIA