STATE OF MICHIGAN
IN THE SUPREME COURT

HASSAN M. AHMAD,
Plaintiff/Appellee

v.

THE UNIVERSITY OF MICHIGAN,
Defendant/Appellant
_____/

Supreme Court Case No.: 160012
Court of Appeals Case No.: 341299
Court of Claims Case No.: 17-000170-MZ

PHILIP L. ELLISON (P74117)
OUTSIDE LEGAL COUNSEL PLC
Attorney for Appellee
PO Box 107
Hemlock, MI 48626
(989) 642-0055
pellison@olcplc.com

TIMOTHY G. LYNCH (P77385)
DEBRA A. KOWICH (P43346)
Office of the VP and Gen Counsel
University of Michigan
503 Thompson Street
Ann Arbor, MI 48109
(734) 764-0305
timlynch@umich.edu

ADAM G. UNIKOWSKY
JENNER & BLOCK LLP
1099 New York Ave, NW
Washington, DC 20001
(202) 639-6041
aunikowsky@jenner.com

APPELLEE HASSAN M. AHMAD'S BRIEF ON APPEAL

*** ORAL ARGUMENT REQUESTED ***

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

COURT RULES

SECONDARY SOURCES

COUNTER STATEMENT OF JURISDICTION

Appellee Hassan M. Ahmad concurs with the jurisdictional statement provided by Appellant University of Michigan.

STATEMENT OF QUESTION(S) PRESENTED BY ORDER OF THE SUPREME COURT

I. 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).

Answer: Yes

INTRODUCTION

Recently, this Court admonished lowers courts to stop "erroneously conduct[ing] what amounted to analysis under MCR 2.116(C)(10) in deciding a motion under MCR 2.116(C)(8) by requiring evidentiary support for plaintiff's allegations rather than accepting them as true." *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159-160; 34 NW2d 665 (2019). Sometimes public universities need the same admonishment. The posture of the instant case comes to this Court on a pre-answer, pre-discovery motion for summary disposition pursuant to MCR 2.116(C)(8), i.e. solely on the pleadings. At such a procedural stage, courts "must accept all factual allegations as true, deciding the motion on the pleadings alone" and nothing more. The FOIA challenger, attorney Hassan Ahmad, has expressly pled that records he sought are "qualified as 'public records' within the meaning of the Michigan FOIA." **Ver Compl, ¶11** [Appendix #2b]. This is deemed as true.

Instead, Appellant University of Michigan asks this Court to determine sua sponte that the documents retained, possessed, and owned by the University and housed within a public library at the same public university, are per se exempt from disclosure due to the "donor agreement" between Dr. John Tanton and the University. What does the agreement provide? The University suggests, without evidence, that Dr. Tanton "donated 25 boxes of papers to Bentley, subject to the condition that ten of those boxes remain sealed until 2035." Univ Br at 3. We do not know if this is true because the Court has never been presented with a copy of it. Why? Because, again, the posture of the case and the basis for the motion under MCR 2.116(C)(8) precluded the University from attaching any such document to its motion. *El-Khalil*, 504 Mich at 154-155 ("We emphasize that a motion for summary disposition under MCR 2.116(C)(8) must be decided on the pleadings alone."). Maybe the donor agreement says what the University

suggests it does; maybe it does not. Maybe it does not even exist. The bottom line, however, is that it certainly is not part of this court record.

The Court of Appeals, realizing the procedural limits of its authority at the pre-answer posture of the case, correctly held Appellee Ahmad "adequately alleged that the University had 'possession of' or 'retained' the documents at issue" and thus had "alleged sufficient facts to establish a prima facie claim under the FOIA." [Appendix #20a]. This Court need not go any further; the Court of Appeals' outcome is correct. The Court of Appeals remanded for normal case development and proceedings. The University still has all of its defenses in its pocket. The University is not prejudiced as it can still oppose an ordered disclosure in the usual course of FOIA proceedings. This is simply nothing yet to fight about on the pleadings; Appellee Ahmad has pled enough to walk through the doors of the trial courthouse. As such, this Court is requested to vacate its decision grant leave on this question and remand to the trial court for usual case development.

However, to the extent that this Court desires to re-establish what the Michigan Legislature has already designated as a public record by statute, Appellee Ahmad will take up this Court's invitation.

FACTS / CASE POSTURE

Almost three years ago, Appellee Hassan M. Ahmad, a highly-respected immigration lawyer, made a *Freedom of Information Act* request for papers located in boxes 15-25 within the University of Michigan's Bentley Historical Library, which had been previously donated by Dr. John Tanton. **Ver Compl, ¶¶4, 8** [Appendix #2b]; **Ver Compl, Exhibit 1** [Appendix #10b-13b]. Dr. John Tanton is a well-known (and perhaps even notorious) public figure, who has founded and directed many organizations which helped shape current U.S. immigration policies. His contentions and proposed policies are also

highly controversial. **Ver Compl, ¶¶12-17** [Appendix #2b-3b]. According to the Southern Poverty Law Center, Tanton "is the racist architect of the modern anti-immigrant movement." *John Tanton*, SOUTHERN POVERTY LAW CENTER, *available at* https://goo.gl/wwE8N8. He created a network of organizations – the Federation for American Immigration Reform (FAIR), the Center for Immigration Studies (CIS) and NumbersUSA – that have profoundly shaped the immigration debate in the United States. *Id.* The nature of his work even caused President Reagan's administration to refer to Tanton as "the most influential unknown man in America." Jason DeParle, *The Anti-Immigration Crusader*, NY TIMES, Apr 17, 2011, *available at* https://goo.gl/nCFh9u. This polarizing figure lived in Northern Michigan and passed away during the pendency of this case. Francis X. Donnelly, *Mich Man Who Lead Anti-Immigration Fight Nearly Forgotten*, THE DETROIT NEWS, Mar 15, 2017, *available at* http://detne.ws/2mHwjVj; Niraj Warikoo, *Anti-Immigrant Leader Dr. John Tanton of Michigan Dies at 85*, DETROIT FREE PRESS, July 18, 2019, available at https://www.freep.com/story/news/local/michigan/2019/07/18/anti-immigrant-john-tanton-dies/1764377001/.

Typically, fulfillment of such a FOIA request is simple. However, the complication in this case derives from the fact that Dr. Tanton's papers from 1960 to 2007, stored in 25 boxes, were donated to the University with an alleged[1] contractual restriction dictating that boxes 15 - 25 are to be treated as non-public until April 6, 2035. *John Tanton Papers: 1960-2007*, Bentley Historical Library, accessible at https://goo.gl/aFKeJb. Boxes 1 - 14 are open without restriction. *Id.* However, the dispute in this case only involves those

[1] A copy of the donor agreement was never entered into the court record due to the posture of this case.

boxes numbered as 15 through 25 treated by the University as "closed."[2] These disputed documents are referred to hereinafter as the "Tanton Papers." Appellee Ahmad has expressly alleged and documented that the Tanton Papers are completely owned by the University. ***Id.***; *see also* **Ver Compl, ¶20** [Appendix #4b].

Initially, the University acknowledged receipt of the FOIA request on December 22, 2016, and requested additional time to respond due to the voluminous nature of the documents requested. **Ver Compl, Exhibit 2** [Appendix #15b]. Around the same time, the University also requested the narrowing of the scope of the FOIA request premised on the voluminous number of records sought. **Ver Compl, ¶29** [Appendix #6b]. Appellee Ahmad acquiesced after University officials expressly assured him that his FOIA request would be fulfilled. **Ver Compl, Exhibit 5** [Appendix #36b]; see also **Ver Compl, ¶¶30-31** [Appendix #6b]. After a revised and narrowed request was submitted, the University processed the same as an entirely new FOIA request, again requested more time for processing, and also requested a deposit of more than $6,000.00 on an estimated cost of over $12,000.00. **Ver Compl, Exhibit 6, p. 2** [Appendix #41b]. Appellee Ahmad paid the total deposit demanded by check, which was cashed in late April 2017. **Ver Compl, Exhibit 6, p. 1** [Appendix #40b]. Yet, shortly thereafter on May 8, 2017, the University denied the FOIA request now asserting the Tanton Papers were not "public records." **Ver Compl, Exhibit 7** [Appendix #46b]. Surprised by the about-face, Appellee Ahmad immediately filed an administrative appeal. **Ver Compl, Exhibit 8** [Appendix #49b-#51b].

[2] In its brief to this Court, the University claims the records are "sealed." Univ Br at 3. No court has ever "sealed" them. That is an incorrect designation for these publicly-owned records.

Again, the head of the University (via special counsel to the President) affirmed the denial. **Ver Compl, Exhibit 9** [Appendix #53b].

In June 2017, Appellee Ahmad brought suit challenging the denial in the Court of Claims. [Appendix #1b-#9b]. He alleged that the University'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,'" and "[n]o such charitable gift agreement appears on Defendant [University]'s Bentley Historical Library website." **Ver Compl, ¶¶39-40** [Appendix #7b]. In short, "there is no provision in the Michigan FOIA, or elsewhere, that allows a public body to unilaterally shield records due to a private arrangement." ***Id.*, ¶41** [Appendix #7b].

Without filing any answer, the University filed for summary disposition solely pursuant to MCR 2.116(C)(8), offering various reasons why the suit should fail on the pleadings. Appellee Ahmad opposed. On November 20, 2017, the Court of Claims granted the University's motion and dismissed the case. **Opinion and Order, dated 11/20/2017** [Appendix #17a]. According to the Court of Claims, "[t]here is no dispute that defendant is a public body or that the materials sought qualify as 'writings' under FOIA." ***Id.*, at 2** [Appendix #12a]. That is correct. It also correctly concluded that "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." ***Id.*** [Appendix #12a]. However, concluded the trial court, the Tanton Papers are not public records because documents held by a public body must be "*actively* used" in the performance of an official function to constitute a public record. ***Id.*, at 3** (italics in original) [Appendix #13a]. Appellee Ahmad appealed.

The Court of Appeals reversed. **COA Opinion** [Appendix #18a]. Applying well-developed and long-applied rules of statutory interpretation, the panel concluded that Appellee Ahmad "sufficiently pled that [the University] was storing and maintaining the Tanton papers, which is consistent with the stated purposes of the Library's official functions," and thus was pled as a public record under the FOIA statute. [Appendix #18a] Realizing the limits of its authority at the pre-answer, pre-discovery posture of the case, the Ahmad panel held the complaint "adequately alleged that the University had 'possession of" or 'retained' the documents at issue" and thus had "alleged sufficient facts to establish a prima facie claim under the FOIA." ***Id.*** [Appendix #20a]. The panel reversed and remanded for normal and further proceedings. ***Id.*** [Appendix #23a]. This time the University appealed to this Court. This Court then granted leave on the question "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)." *Ahmad v Univ of Michigan*, __ Mich __; 939 NW2d 279 (2020). This briefing now follows.

STANDARD OF REVIEW

The interpretation and application of a statute is a question of law that is reviewed de novo. *Cardinal Mooney High Sch v Mich High Sch Athletic Ass'n*, 437 Mich 75, 80; 467 NW2d 21 (1991). FOIA causes an unusual twist for typical case procedures. As the defendant and public body, the University solely bears the burden of proving that the refusal/denial was properly justified under FOIA. MCL 15.240(4); *Federated Publications, Inc v City of Lansing*, 467 Mich 98, 109; 649 NW2d 383 (2002). Here, the University brought its motion solely pursuant to MCR 2.116(C)(8). A motion brought under MCR 2.116(C)(8) tests the ***legal***, *not factual*, sufficiency of plaintiff's claim. MCR 2.116(C)(8); *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). In reviewing the motion,

Michigan courts accept as true all well-pleaded allegations and construes them in a light most favorable to Appellee Ahmad. *Teel v Meredith*, 284 Mich App 660, 662; 774 NW2d 527 (2009). Additionally, all reasonable inferences and conclusions that may be drawn from the factual allegations are treated as true as well. *Averill v Dauterman*, 284 Mich App 18, 21; 772 NW2d 797 (2009). The (C)(8) motion may only be granted if no factual development could possibly justify recovery. *Beaudrie v Henderson*, 465 Mich 124, 129-130; 631 NW2d 308 (2001).

FOIA PRINCIPLES AND MEMORANDUM OF LAW

Michigan appellate courts have repeatedly and consistently described FOIA as a "pro-disclosure statute," e.g. *Herald Co v Bay City*, 463 Mich 111, 119; 614 NW2d 873 (2000); *Swickard v Wayne Co Med Examiner*, 438 Mich 536, 544; 475 NW2d 304 (1991), which must be interpreted broadly to ensure proper public access, e.g. *Practical Political Consulting, Inc v Sec'y of State*, 287 Mich App 434, 465; 789 NW2d 178 (2010). "FOIA is a manifestation of this state's public policy favoring public access to government information, recognizing the need that citizens be informed as they participate in democratic governance, and the need that public officials be held accountable for the manner in which they perform their duties." *Manning v East Tawas*, 234 Mich App 244, 248; 593 NW2d 649 (1999). The Michigan Legislature has categorically announced that:

> 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). FOIA provides "that 'a person' has a right to inspect, copy, or receive public records upon providing a written request to the FOIA coordinator of the public

body." *Detroit Free Press, Inc v City of Southfield*, 269 Mich App 275, 290; 713 NW2d 28 (2005). Under FOIA, a public body must disclose all public records that are not specifically exempt under the act. MCL 15.233(1). "Nothing in the FOIA prevents an agency from providing information it is willing to disclose," *Mager v Dep't of State Police*, 460 Mich 134, 138 fn8; 595 NW2d 142 (1999), but if it is going to withhold public documents, it has to meet its burden and it is a "heavy" one, *Penokie v Michigan Technological Univ*, 93 Mich App 650, 663; 287 NW2d 304 (1979); *Kincaid v Dep't of Corrections*, 180 Mich App 176, 182; 446 NW2d 604 (1989) ("The burden is a heavy one, and it is the duty of this Court to determine whether it has been met.").

A "public record" is a defined term. "Where a statute supplies its own glossary, courts may not import any other interpretation but must apply the meaning of the terms as expressly defined." *People v Schultz*, 246 Mich App 695, 703; 635 NW2d 491 (2001); *WS Butterfield Theatres, Inc v Dep't of Revenue*, 353 Mich 345, 350; 91 NW2d 269 (1958). 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).[3] A "writing," in turn, broadly encompasses "handwriting, typewriting, printing, photostating, photographing, photocopying, and every other means of recording, and includes letters, words, pictures, sounds, or symbols, or combinations thereof, and papers, maps, magnetic or paper tapes, photographic films or prints, microfilm, microfiche, magnetic or punched cards, discs, drums, or other means of recording or retaining meaningful content." MCL 15.232(l). Writings include records kept

[3] Prior to a recent statutory amendment to FOIA, what is today MCL 15.232(i) was previously MCL 15.232(e).

as "electronic" copies and on computer tapes. *Ellison v Dep't of State*, 320 Mich App 169, 176; 906 NW2d 221 (2017).

Additionally, a public body, when responding to a FOIA request, may not refer to the requester's proposed uses of the sought materials when determining whether to produce public records or not. Initial as well as future uses of information requested under FOIA are irrelevant in determining whether the information falls within exemption. *Taylor v Lansing Bd of Water & Light*, 272 Mich App 200, 205; 725 NW2d 84 (2006). A public body (and this Court) "should not consider the requester's identity or evaluate the purpose for which the information will be used." *State Employees Ass'n v Mich Dep't of Mgt & Budget*, 428 Mich 104, 121; 404 NW2d 606 (1987). Moreover, the FOIA statute "does not require the requester to reveal why it needs or wants the information." *Id.* A court that determines a public record is not exempt from disclosure ***shall*** order the public body to cease withholding or to produce all or a portion of a public record wrongfully withheld, regardless of the location of the public record. MCL 15.240(4).

ARGUMENT

The question this case presents is whether the Tanton Papers were plausibly pled to be "public records" under FOIA. The answer is clearly yes.

I. The Legislature has defined public records.

A "public record" is a defined term and the courts must apply the definition given by the Legislature. *Schultz*, 246 Mich App at 70; *WS Butterfield Theatres*, 353 Mich at 350. The Legislature has decided that the University must disclose all non-exempt writings 1.) prepared *or* 2.) owned *or* 3.) used *or* 4.) in the possession of *or* 5.) retained by a public body in the performance of an official function, from the time it is created. MCL 15.232(i). At minimum, the University concedes it has physical possession of the

documents. See *John Tanton Papers: 1960-2007*, Bentley Historical Library, accessible at https://goo.gl/aFKeJb.

This Court has previously explained "what 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) (emphasis added). As such, the Tanton Papers are public records as being writings—

1. *owned* by the University in the performance of an official function;
2. *used* by the University in the performance of an official function;
3. *in the possession of* the University in the performance of an official function;
4. *retained* by the University in the performance of an official function.

Therefore, the Tanton Papers clearly are and within the definition of "public records" under MCL 15.232(i) via at least four of the five methods separately provided by the Legislature. The use of the term "or" by the Legislature means Appellee Ahmad need not prove that a record fits *all* of the criteria set forth in MCL 15.232(i), but must show that it meets *at least one* of the criteria as set forth therein. The use of the modifier "or" in this instance creates an inclusive list of alternative possibilities.

As for the "in the performance of an official function" provision, the official (and undisputed) governmental purpose of the Bentley Historical Library is for "collecting, preserving and making available… materials pertaining to the state, its institutions, and its social, economic and intellectual development." Univ of Mich Bylaws, §12.04, *available at* http://regents.umich.edu/bylaws/bylaws12.html#7. As the Court of Appeal explained, the University does not dispute that it has 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 rejecting that argument, the panel concluded "the University's acts of collecting and preserving the papers were in furtherance of its official purpose" of collecting, preserving, and making available the Library's materials. Recognizing the possible existence of a defense in the form of a donor agreement, "this fact relates to an affirmative defense the University may raise" 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).

The Court of Appeals was correct. Again, the stage of this litigation is critical to the resolution of the case as constituted. At this case's posture, Appellee Ahmad clearly has pled that the Tanton Papers are public records. **Ver Compl, ¶11** [Appendix #2b] ("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…"). Where the University errors is its misunderstanding of the role that a motion under MCR 2.116(C)(8) serves. In their brief to this Court, the University claims the Court of Appeals' panel held "that the Tanton papers *were* 'public records.'" Univ Br at 4 (emphasis in original). This is inaccurate. The panel simply held that Appellee Ahmad had *sufficiently pled* them to be public records and by pleading such the trial court was bound to accept, for purposes of the motion, that "all well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant. *Maiden,* 461 Mich at 119-120.

On the pleadings filed, the allegations are easily more than enough to defeat a motion pursuant to MCR 2.116(C)(8). This Court should not take up the University's

implicit invitation to "conduct what amounted to analysis under MCR 2.116(C)(10) in deciding a motion under MCR 2.116(C)(8) by requiring evidentiary support for plaintiff's allegations rather than accepting them as true" contrary to *El-Khalil*. 504 Mich at 159-160.

For its part, the University asserts, without an affidavit or supporting evidence, that it is not engaging in any official function related to the Tanton Papers other than the storage of the documents. But that is simply not true. It expressly owns them in full, possesses them, catalogs them, stores them, and most importantly it "preserve[s] and make[s] [them] available to students at a future date" in fulfillment and in the performance of its official function as a document retaining public entity. Preserving records is Bentley's official function and Tanton Papers are records "owned, used, in the possession of, or retained by a public body in the performance of an official function." Univ of Mich Bylaws, §12.04, *available at* http://regents.umich.edu/bylaws/bylaws12.html#7 (Bentley's function is for "collecting, preserving and making available…manuscripts and other materials pertaining to the state, its institutions, and its social, economic and intellectual development.").

The University suggests, by hints, that the official function prong requires a review into ***the content*** of the documents to determine if they are public records, or in their words the Tanton Papers "are incapable of shedding any light on any government activity." Univ Br at 14. But that confuses the structural scheme created by the Legislature. The definition of public records is broad and wide to capture all documents "prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function." Here, the Tanton Papers are easily owned, used, possessed, and retained by the library under its public directive to collect, preserve, and make available (either now or later)

certain materials. They are public records. Whether *the content* within public records should be precluded from public purview, the Legislature provides a second step by expressly creating two classes of public records, i.e. "those that are exempt from disclosure under section 13" and those that "are not exempt from disclosure under section 13 and that are subject to disclosure under this act." MCL 15.232(i)(i)-(ii). The challenge being made is the University trying preclude the disclosure of ***the content*** on the Tanton Papers, i.e. creating a new exemption.

A. If the University wants to create a new exemption from disclosure, its remedy is not in the courts, but with the Legislature.

Boil to the core, the University must realize that it is incorrectly arguing the Tanton Papers are not public records but rather an exemption should be created for what unmistakably are public records by the Legislature's definition under MCL 15.232(i). In furtherance of the desire for such an exemption, the University does bring up various good public policy points why the Legislature might wish to consider creating a documents-donor exemption. But, to date, the Legislature has not. When the Legislature wants to allow a public body to withhold public records, it generally creates (and knows how to create) a disclosure exemption under Section 13(1)-(2). For example, the hotly debated "Emily" FOIA requests for copies of ballots led legislators to pursue immediate reform legislation which narrowed access to records. Jonathan Oosting and Beth LeBlanc, *'Emily' Document Request Spurs House Plan for Public Records*, THE DETROIT NEWS, Dec 13, 2018, *available at* https://www.detroitnews.com/story/news/local/michigan/2018/12/13/emily-freedom-information-request-public-records-michigan-legislation/2291123002/. Despite clearly knowing how to easily and quickly amend the FOIA statute when desired, the Legislature has silently rejected the University's

insistence for a new exemption for document donors' papers. This Court cannot itself created one from whole cloth.

"[E]ach FOIA exemption, by its plain language, advances a separate ***legislative*** policy choice." *Mich Federation of Teachers & Sch Related Personnel v Univ of Mich*, 481 Mich 657, 680 fn63; 753 NW2d 28 (2008). Courts do not create new exemptions and the ones that have been created by the Legislature are "narrowly construed" with "the burden of proving its applicability on the public body asserting it." *Southfield*, 269 Mich App at 281. Here, there is no applicable exemption. There certainly is no donor gift exemption in today's current version of FOIA (see MCL 15.243), and thus any individual contracting with a public entity should realize that the transaction will be subject to public scrutiny. *Oakland Press v Pontiac Stadium Building Auth'y*, 173 Mich App 41, 45; 433 NW2d 317 (1988). It is possible that disclosure could breach the donor's gift agreement.[4] However, the University's remedy here is with the Legislature and for that policy-making branch to decide whether (and to the scope of which) such secrecy agreements are in the best interests of the Michigan citizenry. Until then, this Court cannot assume the Legislature would do so. E.g. *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999). Additionally, the judiciary is not permitted to pass on the wisdom or fairness of a legislative enactment or, in essence, to enact correcting legislation to rectify a perceived inequity. The University's arguments "should be raised to their state representative or senator for debate within the halls of our Legislature, not to the Judiciary." *Curry v Meijer, Inc*, 286 Mich App 586, 587-588; 780 NW2d 603 (2009). "Our role as members of the

[4] As noted above, the donor agreement between Dr. Tanton and the University has not been produced for this court record and this Court does not know what it actually says.

judiciary is not... to engage in judicial legislation, but is rather to determine the way that was in fact chosen by the Legislature." *Tyler v Livonia Pub Schs*, 459 Mich 382, 392 fn10; 590 NW2d 560 (1999). "It is the Legislature, not we, who are the people's representatives and authorized to decide public policy matters such as this." *Id.*

Finally, the University points to the federal FOIA statute arguing that "case law interpreting federal FOIA supports the University's interpretation." Appellee Ahmad disagrees but the argument is a non-starter and is similar to comparing apples and oranges. It makes little sense to engage in such flimflammery. As this Court already explained (and not noted by the University), the federal FOIA statute is worded differently than corresponding state provisions and thus federal decisions concerning the same are of "limited applicability" in Michigan. *Mager*, 460 Mich at 144. Their only reasonable applicability of federal FOIA policies is for convincing state legislators of the needed propriety of a new exemption under the FOIA statute, not begging this Court to act as a super legislator to create new FOIA exemptions for the University's projects.

II. The University never proved that an actual restrictive donor gift agreement exists between it and Dr. Tanton.

To state it once again, instead of filing an answer or providing the documents, the University brought a motion ***solely*** pursuant to MCR 2.116(C)(***8***) When reviewing a (C)(8) motion, pled allegations and all reasonable inferences therefrom must be deemed true for purposes of analyzing the motion. *Teel,* 284 Mich App at 662. In its response, the University has ***suggested*** (but did not prove or provide) that a contract in the form of a donor gift agreement exists between the University and Dr. Tanton to keep these papers

private.[5] To date, no such donor gift agreement was ever produced, made part of the record, or had its provisions scrutinized.[6] Thus, needed factual development and legal arguments remain on whether the alleged contract between Dr. Tanton and the University, in the form of a donor gift agreement, 1.) actually exists and 2.) actually provides for the restrictions the University suggests exist, and 3.) whether such an agreement is void for public policy reasons. We simply cannot assume the University's conclusions. The record is simply not developed enough to make this determination.

A. The University/Tanton donor gift agreement is likely void and unenforceable as being in violation of public policy.

Even if such a donor gift agreement exists, Appellee Ahmad notes he has argued it is void and unenforceable. It has never been tested in the trial court. Under Michigan law, a contract is valid "only if the contract performance requirements are not contrary to public policy." *Morris & Doherty, PC v Lockwood*, 259 Mich App 38, 54; 672 NW2d 884 (2003). The Legislature could not be clearer that a contract to withhold public records violates the public policy of Michigan—

> 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.

MCL 15.231(2). In other words, a public body may not thwart FOIA disclosure by entering into a void contract, made in contravention of the public policy of this state, when the goal of the contracting parties is to circumvent the legislatively-mandated transparency

---

[5] Apparently, there are other similar agreements (again not produced). See Univ Br at 3 ("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.")

[6] If the University had attached the alleged donor agreement, the University's motion would have been converted from a (C)(8) to a (C)(10) motion, the latter of such is inappropriate to grant before discovery is complete. E.g. *Hasselbach v TG Canton, Inc*, 209 Mich App 475, 481-482; 531 NW2d 715 (1995).

requirements of this state. Prior binding precedent teaches that public bodies cannot use alternative arrangements or hide-the-ball techniques to turn public records into nonpublic records. See *Kestenbaum v MSU*, 414 Mich 510, 539; 327 NW2d 783 (1982) ("a public body may not thwart disclosure under the FOIA by the simple expedient of sending sensitive documents home with its employees"); *MacKenzie v Wales Twp*, 247 Mich App 124; 635 NW2d 335 (2001) (public bodies "may not avoid their obligations under the FOIA by contracting for a clerical service that allows them to more efficiently perform an official function"). At this procedural posture (i.e. without a full lower court record), allowing public bodies, as a matter of law, to self-contract out of the Legislature's express requirement disclosure would directly contravene the public policy that the state of Michigan has enacted.

RELIEF REQUESTED

This Court is requested to affirm the outcome of the decision of the Court of Appeals and remand for the filing of an answer, undertaking appropriate discovery (including disclosure of the alleged donor agreement), and a trial court decision by trial or summary disposition pursuant to MCR 2.116(C)(10).

Date: September 9, 2020

RESPECTFULLY SUBMITTED:

OUTSIDE LEGAL COUNSEL PLC
BY PHILIP L. ELLISON (P74117)
Attorney for Appellee
PO Box 107 · Hemlock, MI 48626
(989) 642-0055
(888) 398-7003 - fax
pellison@olcplc.com