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 REPLY BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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INTRODUCTION

Dr. John Tanton, a private citizen not affiliated with the University of Michigan, donated 25 boxes of papers to the University, 10 of which are supposed to remain sealed until 2035. These documents were not created by the government, do not record any activity of the government, and shed no light on any aspect of the government. The University is merely storing them. Nevertheless, the Court of Appeals held that the sealed records qualify as "public records" under FOIA. That decision was gravely wrong. It contradicted FOIA's text, undermined FOIA's purpose, and violated the University's constitutionally-protected right to academic freedom.

Plaintiff barely defends the Court of Appeals' decision. Instead, Plaintiff primarily re-argues a contention that this Court has already rejected: that the Court should not hear this case because the gift agreement with Tanton is not in the record. But the Court does not need to see the gift agreement to resolve this case in the University's favor. It is not *the gift agreement* that renders the Tanton papers exempt from FOIA. Rather, the Tanton papers are exempt from FOIA because Tanton donated them to the University, which is merely storing them under seal—facts that are pleaded in the complaint. Therefore, taking all of the allegations in the complaint as true, the Tanton papers are not public records. Moreover, Plaintiff has already obtained a ruling from the Court of Appeals that the Tanton papers *are* public records. Plaintiff cannot now avoid this Court's review of that ruling by arguing that the record is insufficient to make that determination.

On the merits, Plaintiff merely asserts in conclusory fashion that because the University is preserving the Tanton papers for the purposes of displaying them in 2035, they are public records. Plaintiff does not even attempt to engage with any of the University's textual, practical, or constitutional arguments establishing that the Tanton papers are not public records. Those arguments still stand, so the Court of Appeals' judgment should be reversed.

ARGUMENT

I. THE COURT SHOULD NOT RECONSIDER ITS DECISION TO GRANT THE UNIVERSITY'S APPLICATION FOR LEAVE TO APPEAL.

Plaintiff primarily devotes his brief to an argument that this Court has already rejected: that the Court should not hear this case because the University's gift agreement with Tanton is not in the record. Plaintiff therefore asks the Court to "vacate its decision [to] grant leave … and remand to the trial court for usual case development." Ahmad Br. 2.

Plaintiff made the same argument in opposing the University's application for leave to appeal. *See* Ahmad Opp. to App. 12-13 ("This case comes to th[e] Court before any answer has been filed, affirmative defenses raised and tested, the donor agreement disclosed and placed in the court record ... This case needs to be properly presented [to] the trial court, developed on a full and proper record, and allow[ed] to raise any issues for resolution first before the trial court."). The Court nonetheless granted review. Plaintiff's argument is no more persuasive now than before.

The allegations in Plaintiff's complaint are sufficient to establish that, as a matter of law, the Tanton papers are not public records. Plaintiff pleaded as follows:

> 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").
>
> …
>
> 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 widely regarded as the grandfather of the anti-immigrant movements.

Compl. ¶¶ 8, 11-12 (30a-31a).

Thus, Plaintiff pleads that Tanton created the Tanton papers and donated them to the University, where they are currently sealed. Those facts—and those alone—are sufficient to establish that the Tanton papers are not public records. As the University's brief explains, documents created by a third party, that are merely being stored by the University under lock and key, do not satisfy the statutory definition of "public records." Univ. Br. 11-18.[1]

Plaintiff asserts that the gift agreement is not in the record and might be unenforceable. Ahmad Br. 1-2, 16-17. Although the University strongly believes that the gift agreement is enforceable, that issue is irrelevant. It is not the *gift agreement* that excludes the Tanton papers from FOIA's definition of "public record," but rather the facts that *Tanton donated them and they are sealed*. Those facts appear in Plaintiff's complaint.

Of course, the University's brief argues that FOIA does not render its gift agreements unenforceable. That is because the premise of Plaintiff's complaint is that the Tanton papers are public records *regardless of whether they are sealed pursuant to a gift agreement*.

Plaintiff's complaint attaches, as an exhibit, the University's denial of his FOIA request on the basis of the gift agreement. That exhibit states in relevant part:

> 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 … 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

[1] "Univ. Br." refers to the University's opening brief. "Ahmad Br." refers to the response brief. "Ahmad App. Br." refers to Ahmad's opening brief before the Court of Appeals.

> 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.

Compl. Ex. 9 (28a). Far from challenging the University's position that the Tanton papers are sealed pursuant to a gift agreement, the complaint goes out of its way to allege that the Tanton papers should be deemed public records notwithstanding the existence of a gift agreement:

> 27. Disclosure of records such as the Sealed Tanton Papers will not chill future donation of 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, DC, an established private institution.
>
> …
>
> 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.

Compl. ¶¶ 27-28, 47 (33a-34a, 36a). Given that Plaintiff explicitly pleads that documents sealed pursuant to gift agreements should be deemed "public records," it is hardly surprising that the University would argue that gift agreements should be respected.

Moreover, although Plaintiff now complains that the record is insufficiently developed for the Court to resolve whether the Tanton papers are public records, he took the opposite position in the Court of Appeals. *Compare* Ahmad App. Br. 7 ("The question this case presents is whether the Tanton Papers are public records under FOIA. The answer is clearly yes."), *with* Ahmad Br.

9 ("The question this case presents is whether the Tanton Papers were plausibly pled to be 'public records' under FOIA. The answer is clearly yes."). There, Plaintiff sought and obtained a ruling that the Tanton papers are public records. According to the Court of Appeals, "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." Ct. App. Op. 6 (23a). Although the Court of Appeals technically was evaluating only the sufficiency of the allegations in the complaint, there is no dispute that the University received the Tanton papers as a gift and is currently preserving them. Indeed, the University itself took that position in its correspondence with Plaintiff, which Plaintiff appended to the complaint. Crucially, the Court of Appeals made the *legal* determination that a university's storage of a donor's documents is sufficient to render them "public records." As this Court has already determined, that far-reaching legal ruling warrants Supreme Court review regardless of whether the parties have engaged in fact discovery.[2]

II. THE TANTON PAPERS ARE NOT PUBLIC RECORDS.

Plaintiff does not grapple with the University's textual, practical, and constitutional arguments in favor of finding that the Tanton papers are not public records.

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

Plaintiff's theory is that the University is storing the Tanton papers "in the performance of its official function as a document retaining public entity." Ahmad Br. 12. He claims that 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." Ahmad

[2] If the Court changes course and determines that the current record is insufficient to decide whether the Tanton papers are public records, it should not merely vacate its decision granting discretionary review. Rather, the Court should also vacate the Court of Appeals' far-reaching legal ruling, which *did* hold that the Tanton papers are public records, and allow the Court of Appeals to reconsider the issue with an expanded record.

Br. 12-13. Plaintiff ignores the University's textual argument that this is insufficient to satisfy the statutory definition of a "public record." Univ. Br. 11-18. As the University's brief explained, 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). The Tanton papers do not satisfy this statutory definition for two reasons.

First, to satisfy that definition, Plaintiff must establish some "performance of an official function" *distinct from* the mere possession of the document. If the "performance of an official function" *is* the possession of the writing, then the following, garbled definition of "public record" would result: "a writing … in the possession of … a public body in *the possession of* [*the writing*]." Here, the sole function the University is currently performing (and has performed to date) is storage of the documents. That storage is insufficient to render the Tanton papers public records, because Plaintiff cannot rely on the same act—storage of the documents—to satisfy *both* the statutory "possession" requirement, *and* the distinct "performance of an official function" requirement.

Plaintiff ignores this argument. Instead, Plaintiff doubles down on the position that the same act can simultaneously satisfy both prongs of the statute. Plaintiff contends that the University is retaining the Tanton papers, and is performing "its official function as a document retaining public entity." Ahmad Br. 12. In other words, Plaintiff's theory is that the University is retaining the Tanton papers "in the performance of" retaining the Tanton papers. Plaintiff does not address the University's argument that this is a strained application of the statutory text.

Second, to satisfy that statutory definition, a "writing" must be "prepared, owned, used, in the possession of, or retained by a public body ***in*** the performance of an official function." The italicized word—"***in*****"—**means that a writing is a "public record" when there is a *relationship* between the preparation, ownership, use, possession or retention of the document, and the

performance of the distinct official function. When viewed in light of the statement of FOIA's purpose expressly codified in FOIA, it is clear what that relationship must be: the writing must record, or otherwise shed light on, that official function. Documents meeting that description—and only those documents—provide "information regarding the affairs of government." MCL 15.231(2). Those documents—and only those documents—allow the people to be "informed so that they may fully participate in the democratic process." *Id.* Here, the Tanton papers do not record, or otherwise shed light on, any official function, because the University is merely storing documents created by a private citizen.

Notably, Plaintiff makes *no* arguments that his interpretation of FOIA can be reconciled with FOIA's purpose clause. Yet, this Court has recognized that FOIA provisions should be construed so as to be consistent with the purpose clause. See, e.g., *Mager v State, Dep't of State Police*, 460 Mich 134, 146; 595 NW2d 142 (1999). Plaintiff's interpretation of FOIA would violate that principle.

Contrary to Plaintiff's assertion, the University is not making "public policy points [for] why the Legislature might wish to consider creating a documents-donor exception." Ahmad Br. 13. Rather, the University is relying on FOIA's purpose clause—a provision which is just as much part of the statutory text as the statutory definition of "public record"—as a tool for interpreting that statutory definition. When the purpose clause and statutory definition are construed together, it is clear that the Tanton papers should not be deemed public records.

B. All Other Tools of Statutory Interpretation Support the University's Interpretation of FOIA.

The University's brief offered numerous additional reasons for holding that the Tanton papers are not public records. Plaintiff largely ignores these arguments.

Michigan case law. In *Amberg v City of Dearborn*, this Court held that video surveillance recordings received by government officials in the course of pending criminal proceedings constituted "public records" under FOIA. 497 Mich 28, 29-30; 859 NW2d 674 (2014). The Court explained that "mere possession of the recordings by defendants is not sufficient to make them public records." *Id.* at 31. Rather, the recordings were public records because they were "collected as evidence" to "support [the] decision" to issue a "criminal misdemeanor citation." *Id.* at 32 (emphasis omitted). Thus, the officials were engaging in some "official function" distinct from the possession of the recordings—the "issuance of a criminal misdemeanor citation"—and the recordings were "public records" because they shed light on the performance of that distinct official function. *Id*. *Amberg* is consistent with every other reported Michigan case addressing the definition of "public record," in which the writings being possessed shed light on the performance of an official function distinct from the possession itself. Univ. Br. 13-16. Plaintiff does not address this unbroken line of case law.

Federal case law. Federal courts have concluded that the National Archives' storage of documents does not transform those documents into agency records subject to FOIA. *Cause of Action v Nat'l Archives & Records Admin*, 410 US App DC 97; 753 F3d 210 (2014); *Katz v Nat'l Archives & Records Admin*, 314 US App DC 387; 68 F3d 1438 (1995). Federal courts have reached the same conclusions with respect to documents stored by public libraries and other public institutions. *Judicial Watch, Inc v Fed Housing Fin Agency*, 396 US App DC 200; 646 F3d 924 (2011); *SDC Dev Corp. v Mathews*, 542 F2d 1116 (CA 9, 1976); *Kissinger v Reporters Comm for Freedom of the Press*, 445 US 136; 100 S Ct 960; 63 L Ed 2d 267 (1980). Plaintiff deems this argument to be "flimflammery" because these cases were interpreting the federal FOIA rather than Michigan's FOIA. Ahmad Br. 15. However, this Court has held that case law interpreting the

federal FOIA, while not binding, is instructive in interpreting Michigan's FOIA. See *Mich Fed'n of Teachers & Sch Related Pers, AFT, AFL-CIO v Univ of Mich*, 481 Mich 657, 678-79; 753 NW2d 28 (2008); *Evening News Ass'n v City of Troy*, 417 Mich 481, 495; 339 NW2d 421 (1983). Nothing in Michigan's FOIA indicates any divergence in views between Michigan's legislature and the federal legislature on the issue presented by this case.

Statutory purpose. Plaintiff's interpretation would undermine FOIA's purpose. The Legislature's policy objective was to "enhance[] the public's understanding of the operations or activities of the government," and FOIA serves this objective "[b]y requiring the public disclosure of information regarding the affairs of government and the official acts of public officials and employees." *Bradley v Saranac Community Sch Bd of Ed*, 455 Mich 285, 291; 565 NW2d 650 (1997). Contrary to this purpose, Plaintiff's interpretation would inhibit access to knowledge by deterring prominent citizens from donating their papers to public libraries pursuant to gift agreements. Plaintiff offers no public policy defense of his position, and instead says that the University should direct its arguments to the Legislature. But in interpreting statutes, courts routinely consider whether a proposed interpretation would advance the statute's purpose—especially where, as here, the statute's purpose is expressly codified in the statute. See *Mich Fed'n of Teachers*, 481 Mich at 682 & n 65. The Court should reject Plaintiff's proposed interpretation, which would do nothing to shed light on the affairs of government and would deprive Michigan's public libraries of historically significant documents.

Constitutional avoidance. "A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." *People v Nyx*, 479 Mich 112, 124, 734 NW2d 548 (2007) (quotation marks and brackets omitted). Michigan's Constitution recognizes the University of Michigan and provides that its board "shall

have general supervision of its institution and the control and direction of all expenditures form the institution's funds." Const 1963, art. VIII, § 5. Under this provision, "[l]egislative regulation that clearly infringes on the university's educational or financial autonomy must . . . yield to the university's constitutional power." *Federated Publ'ns, Inc v Bd of Trs of Mich State Univ*, 460 Mich 75, 87; 594 NW2d 491 (1999). Plaintiff's interpretation of FOIA would prevent the University from obtaining donations of invaluable educational resources—an important exercise of the University's constitutionally-protected autonomy. Thus, if his interpretation prevails, FOIA's encroachment on the University's academic prerogative would create grave constitutional doubt. Plaintiff ignores this argument as well.

Absurd results. If the Court of Appeals' decision stands, *any* privately-created document being stored by a public institution for a reason related to that institution's operations would be a public record. The implications of that position are staggering. Public institutions routinely store privately-created writings. For example, police stations store stolen property, including myriad items that could meet the broad statutory definition of a "writing." Prisons store prisoner mail in the mail room. Schools store student work. All of those documents would be public records under Plaintiff's interpretation. Again, Plaintiff ignores this argument altogether. He does not even attempt to cabin his proposed interpretation of "public record" or suggest any limiting principle. The absurd results engendered by Plaintiff's interpretation counsel in favor of rejecting it.

RELIEF SOUGHT

The Court of Appeals' decision should be reversed.

Respectfully submitted,

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Dated: September 30, 2020

CERTIFICATE OF SERVICE

The undersigned certifies that on the 30th day of September 2020, he served a copy of Defendant-Appellant, University of Michigan's Reply Brief on Appeal upon Plaintiff-Appellee, Hassan M. Ahmad, through his counsel, Philip L. Ellison, P.O. Box 107, Hemlock, MI 48626 (pellison@olcplc.com) via electronic mail.

/s/ Timothy G. Lynch
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