

**STATE OF MICHIGAN  
IN THE SUPREME COURT**

HASSAN M. AHMAD,  
*Plaintiff/Appellee/  
Cross-Appellant*

Supreme Court Case No.: 169835  
Court of Appeals Case No.: 374801  
Court of Claims Case No.: 17-000170-MZ

v.

REGENTS OF THE UNIVERSITY OF  
MICHIGAN,  
*Defendant/Appellant/  
Cross-Appellee*

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**APPELLEE HASSAN M. AHMAD'S ANSWER TO THE  
UNIVERSITY REGENTS' APPLICATION FOR LEAVE TO APPEAL**

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## STATEMENT OF JURISDICTION

Appellee agrees this Court has jurisdiction to consider but should ultimately decline to grant the University Regents' *Application for Leave to Appeal* pursuant to MCR 7.303(B)(1).

## COUNTER STATEMENT OF QUESTION(S) PRESENTED ON APPEAL

1. Whether the Regents of the University of Michigan are constitutionally immune from law of general applicability statutes enacted by the Michigan Legislature given its constitutional duties at Article VIII, § 5 of the Michigan Constitution.
2. Whether papers donated to a public body consistent with its official taxpayer-funded functions of collecting and preserving publicly-significant materials can later be kept, via a private contract, from public disclosure.
3. Whether the lower courts correctly concluded that the University Regents failed to make its required particularized showing that any particular records within the Tanton Papers are exempt from disclosure under FOIA's personal-privacy exemption, the *Community Foundation Act*, or the *Library Privacy Act*.
4. Whether the University Regents have waived its ability to assert exemptions after the fact given the impropriety of the forty year raise-later doctrine from *Residential Ratepayer Consortium v Pub Serv Comm # 2*, 168 Mich App 476; 425 NW2d 98 (1987).

## INTRODUCTION

Nine-plus years ago, Hassan Ahmad asked the University of Michigan for eleven boxes of papers held within its Bentley Historical Library. The production should have been routine. Yet nearly a decade later, he has still not received them. What he has received is a litigation lesson in how a publicly funded institution will raise and rearrange every available legal argument — and now reach beyond the transparency statute to our state constitution — to keep public records out of public hands.

The University's arguments have shifted with each defeat. It first argued that the Tanton Papers were not "public records" because a private donor had donor remorse and wished it so. That position is foreclosed by this Court's clear command that public bodies cannot "bargain away the requirements of the FOIA." *Bradley v Saranac Comm Schs*, 455 Mich 285, 303; 565 NW2d 650 (1997). Later discovery revealed that what was labelled as a "gift agreement" was anything but. Next, the University asserted statutory exemptions — personal privacy, the *Michigan Community Foundation Act*, the *Library Privacy Act*. Across multiple *Vaughn* indices and a court-supervised sampling process, the University was afforded five separate opportunities over the course of years to identify the specific documents warranting withholding. Instead, five times it offered conclusions in place of evidence. After *in-camera* review, the Court of Claims found the sampled records "devoid of intimate, embarrassing, private, or confidential information" and ordered almost complete production. The University has not yet complied.

Outside of statutory arguments, the University Regents now invoke Const 1963, Article VIII, § 5. It asks this Court to declare them constitutionally immune from a generally applicable transparency statute enacted by the People's elected representatives. That is

not constitutional autonomy. That is demanding institutional immunity from public accountability falsely dressed in the language of academic freedom. No court has ever recognized such a doctrine. None should now. The Legislature declined to exempt the University from FOIA. It cannot fall to this Court to do what the Legislature would not.

The case is, at its core, straightforward. Eleven boxes of papers possessed, retained, owned, cataloged, and preserved by a public university at taxpayer expense are public records. An after-the-fact private contract cannot refashion that statutory designation. No claimed exemption has ever been particularly established as our FOIA precedents require. And no constitutional doctrine permits a public institution to enjoy the benefits of public status while disclaiming the burdens that accompany it. The *Application* should be denied and this decade-old FOIA matter should be concluded.<sup>1</sup>

### BACKGROUND

In December 2016, Hassan M. Ahmad, an immigration lawyer, made a *Freedom of Information Act* request for government-owned and possessed 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;**<sup>2</sup> see also **Appendix #10b-12b**. He submitted the FOIA request for boxes 15 through 25 because the records “qualified as ‘public records; within the meaning of Michigan FOIA, that there was no qualifying exemption, and that strong public interest trumped any conceivable privacy interest.” **Ver Compl, ¶11.**

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<sup>1</sup> However, should this Court grant the University Regents’ *Application*, it should also reach the question presented in the conditional cross-application. The 2014 amendments to MCL 15.240(7) replaced discretion with command — “the court shall award.” Yet panels of the Court of Appeals continue to apply *Local Area Watch* as though the Legislature never spoke. Statutes do not survive their own amendment. The text says what it says. It must be enforced as written.

<sup>2</sup> A copy of the Verified Complaint is attached at **Appendix #1b-9b**.

Dr. John Tanton was a well-known (and perhaps even notorious) public figure, who had founded and directed many organizations that shaped current U.S. immigration policies. His contentions and policies are also highly controversial. *Id.*, ¶¶12-17. The nature of his work's influence on the goings-on of the government 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 <http://olcplc.com/s/cPT5> (**Appendix #24b-30b**). This polarizing figure lived in Northern Michigan until his death in July 2019—two years after this lawsuit had started. Francis X. Donnelly, *Mich Man Who Lead Anti-Immigration Fight Nearly Forgotten*, THE DETROIT NEWS, Mar 15, 2017, available at <http://detne.ws/2mHwjVj>; Nicholas Kulish, *Dr. John Tanton, Quiet Catalyst in Anti-Immigration Drive, Dies at 85*, NY TIMES, July 28, 2019, available at <https://nyti.ms/2XNTF1i>.

The Tanton Papers documents are designated by "boxes." According to the University's online records Boxes 1-14 are "open without restriction" while boxes 15-25 are "closed for 25 years from the date of accession, or until April 6, 2035." **Appendix #45b**; see also **Ver Compl**, ¶8. It asserts that "the collection was the gift of Dr. Tanton (Donor No. 7087) in 1984." **Appendix #45b**. In the prior appeals of this case, the University asserted that certain "Tanton Papers" are totally closed (or what they improperly call "sealed"<sup>3</sup>) because there was supposedly a "donor gift agreement." But discovery later revealed the claimed gift agreements were not what they were originally portrayed to be by the University. **Appendix #47b-54b**.

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<sup>3</sup> The University has occasionally used the term 'sealed' during litigation, which is a phrase not applicable to FOIA or public records in this context.

As to Boxes 15-17, these materials were originally fully donated (i.e. transferred ownership) to the University in the mid-1980s and Dr. Tanton had relinquished, with a small exception, the rights to the same. **Appendix #47b, #48b.** These documents provide that “[r]esearchers who meet requirements set by the Michigan Historical Collections” (whatever that means) “may have full access to this collection” with the exception of outgoing correspondence in 1982-1983. *Id.* In other words, except for outgoing correspondence in 1982-1983, Dr. Tanton specifically “relinquish[ed] any literary rights which [he] possess[ed] to the contents as well as to the contents of any of [his] letters or writings in other collections at the Michigan Historical Collections.” *Id.*

But the 1980s donations were not a one-off. In April 2010, Dr. Tanton donated even more documents to the University’s Bentley Library (which later became Boxes 18-25). This time, however, these new additions requested that a “limitation or condition of access” be imposed. **Appendix #49b.** In the first round of discovery, the University produced an unsigned draft letter from the former archivist of Bentley Library “changing the terms of the gift agreement signed April 7, 2010<sup>4</sup>” such that “*additions*” of the “collection received *beginning this year*” will be “closed for 15 years from date of accession.” **Appendix #50b.**<sup>5</sup> Then a *New York Times* article came out on April 17, 2011. **Appendix #24b-30b.** It was not flattering towards Dr. Tanton. It highlighted how his work and related organizations “doomed legalization plan four years ago by overwhelming Congress with protest calls.” *Id.* The article noted that Dr. Tanton had donated his papers

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<sup>4</sup> Dr. Tanton’s purported “agreement” was signed April 6, 2010. **Appendix #49b.** It is unclear if this is a typo on the part of the former archivist (**Appendix #50b**) when noting April 7.

<sup>5</sup> There is also a reference to the “papers” of “John Trevor Jr” with yet another closed-until date, but no indication if the John Trevor Jr papers are part of (or separate from) the Tanton Papers.

to the University to show the public that he and colleagues “are not the unsavory types sometimes alleged.” *Id.*

In September of that same year, Dr. Tanton wrote the University “after giving it some more thought” and requested “the additions” previously “acquired in April of 2010 to my collection of papers [be] closed for an additional 10 years, thus making it 25 years from the date of accession.” **Appendix #51b.** As outlined below, the University lacked a lawful basis to accede to that request under *Bradley*, i.e. taking publicly-owned documents and turning them non-FOIAable via a private contractual agreement. There is no evidence shown whether that 2011 request was formally granted.

Then two more years later, Dr. Tanton wrote a third time to request “to restrict access of some of [the] earlier acquisitions of my correspondence papers (Boxes 15-17) for 25 years from the accession date of the last set of papers, or until April 26, 2035” despite previously having already conveyed ownership to the University. **Appendix #52b.** The University further produced an unsigned letter from Mr. Coombs dated June 17, 2013 not specifically granting the request but suggesting it had been agreed upon when describing that the “paper finding aid and our restrictions file have been updated.” **Appendix #53b.** In other words, the University purports to have turned some already “public records” owned by the University into non-public records through the use of an after-the-fact private contract. From Ahmad’s position, there is no basis in law to do this. It was improper and illegal. *Bradley v Saranac Comm Schs*, 455 Mich 285, 303; 565 NW2d 650 (1997), affirming in relevant part, 216 Mich App 79, 93; 549 NW2d 15 (1996) (a public body “cannot ‘eliminate its statutory obligations to the public merely by contracting to do so [with others]” and “[n]o exemption provides for a public body to

bargain away the requirements of the FOIA.”). Moreover, calling these documents a “gift agreement”—as the University has done—is a doubtful stretch. They are little more than crude receipts. The resulting documents were not traditional gift agreements and but attempted post hoc restrictions on public access to already-transferred materials.

Going back to Ahmad’s FOIA request, the University acknowledged receipt of the December 15, 2016 FOIA request on December 22, 2016, and requested additional time to respond due—from its perspective—to the voluminous nature of the documents requested. **Appendix #13b**. Around the same time, the University also requested a narrowing of the scope of the FOIA request. **Ver Compl, ¶29**. Ahmad acquiesced after University officials assured him that his FOIA request would be fulfilled. **Appendix #31b**; see also **Ver Compl, ¶¶30-31**. 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. **Appendix #34b-35b**. Ahmad paid the total deposit demanded by check, which was cashed in late April 2017. **Appendix #37b**. Shortly thereafter on May 8, 2017, the University did an about-face and denied the FOIA request solely claiming the Tanton Papers in Boxes 15-25 were not “public records.” **Appendix #39b-40b**. No exemptions were asserted. *Id.* Ahmad immediately filed an administrative appeal. **Appendix #41b-43b**. Again, the head of the University (via special counsel to the President) affirmed the denial and did not apply any exemptions. **Appendix #44b**.

In June 2017— *nearly nine years ago*—Ahmad brought suit. **Ver Compl**. 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 the University’s Bentley Historical Library website.” *Id.*, ¶¶39-40. 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.

Without filing an answer, the University filed for and the Court of Claims (originally by Borrello, J.) granted summary disposition solely pursuant to MCR 2.116(C)(8). Ahmad appealed and the Court of Appeals reversed. *Ahmad v Univ of Mich*, No 341299, 2019 Mich App LEXIS 3221, at \*5 (Mich Ct App June 20, 2019) (*Ahmad I*). It concluded Ahmad had pled that the University’s Bentley Library was storing and maintaining the Tanton Papers, which is consistent with the stated purposes of the Library’s official functions of collecting, preserving, and making available the Library’s materials. *Id.*; see also **Ver Compl**, ¶25. The University sought leave with this Court, *Ahmad v Univ of Mich*, 505 Mich 997; 939 NW2d 279 (2020), who, by an even vote, affirmed the Court of Appeals’ decision, *Ahmad v Univ of Mich*, 507 Mich 917; 956 NW2d 507 (2021).

Upon return to the Court of Claims, the University answered, pled certain never-before-made exemptions as affirmative defenses, and sought summary disposition pursuant to MCR 2.116(C)(10). The Court of Claims (then by Gleicher, J.) allowed the University to argue for exemptions it thought applied against the entirety of the sought Tanton Papers. Following opposition briefing from Ahmad, the University’s motion was denied. **Appendix #55b**. An interlocutory application for leave to appeal was also later denied. *Ahmad v Univ of Mich*, unpublished decision of the Court of Appeals, issued Nov 9, 2021 (Docket No. 358997).

After additional opposed stays were no longer extended, the University then

generated what it purports is its first of what would be four *Vaughn* indices.<sup>6</sup> **Starting at Appendix #91b.** Missing from any of the indices is any specific assertion of how an available exemption—particularly the personal privacy exemption under MCL 15.243(1)(a)—applies. The University was given repeated opportunities to specifically explain its litigation position of *how* individual records contain exempt information when its first set of arguments—the donor gift agreement—fell apart. Yet, after *four* required and produced *Vaughn* indices revealed nothing specific (**starting respectively at Appendix #91b, #239b, #268b, and #326b**) and the trial court’s directed sampling process (held *in-camera*)<sup>7</sup> failed, the only thing that has arisen is a small number of medical records of third parties (which Ahmad did not even know existed within the Tanton Papers and never sought disclosure of such specifically).

After five chances given to the University and still with its refusal to provide the records, the Court of Claims found, on September 15, 2023, that “the Tanton papers are ‘public records’ under the FOIA and “must be provided to plaintiff unless an applicable exemption bars disclosure.” **Appendix #76b.** And despite repeated attempts to invoke the privacy exemption *en masse*, the trial court correctly rejected the University’s oft-repeated and totally failed assertion. Further, it explained, “[e]ven were the Court to

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<sup>6</sup> In FOIA cases, the government is often times ordered to supply the requester and the trial court with detailed indexes itemizing each item withheld, the exemptions claimed for that item, and the reasons why the exemption applies to that item. It is commonly known as a “*Vaughn* index” based on its namesake, *Vaughn v Rosen*, 484 F2d 820 (CA DC, 1973).

<sup>7</sup> As noted on the September 15, 2023 Opinion and Order, the Court of Claims expressed frustration with the University’s repeated invocation of a boilerplate, generic exception (“personal privacy”) regarding the material contained in thousands of pages of documents. **Appendix #70b.** Judge Gleicher proposed that the parties agree to a representative sampling as described in *Lardner v Fed Bureau of Investigation*, 852 F Supp 2d 127 (DDC, 2012). “Representative sampling,” the Court hypothesized, “would allow for a more detailed and precise *Vaughn* Index by identifying the grounds underlying the University’s invocation of the ‘personal privacy’ exception with more specificity.” The process did not yield any better results for the University.

consider the personal privacy exemption applicable to the entire cache of documents, the Court would conclude that the University has failed to prove that Tanton's personal privacy interests would be compromised by their disclosure." **Appendix #78b.** Moreover, the "*in camera* review of the representatively sampled documents revealed that many of those documents contain Tanton's opinions, but are devoid of intimate, embarrassing, private, or confidential information." **Appendix #79b.** Thus, it ordered that, except for all healthcare-related information relative to Dr. Tanton's patients, friends, family, and correspondents, including the names and addresses of these individuals, Plaintiff's motion for disclosure "i[s] GRANTED in all other regards." **Appendix #87b.**

On February 7, 2024, Ahmad filed his motion regarding FOIA's civil fines and punitive damages. The trial court (Yates, J) denied the request for civil fines under MCL 15.240b, concluding the University did not willfully and intentionally breach the statute or otherwise act in bad faith. However, it awarded \$1,000 in punitive damages as required by the statute. A final judgment issued on February 21, 2025. The University then appealed.

On appeal, the Court of Appeals affirmed the order of disclosure of the eleven boxes of records sought by Plaintiff Ahmad. *Ahmad v Univ of Mich*, No 374801, 2026 LX 10958, at \*9 (Mich Ct App Feb 12, 2026) ("*Ahmad II*"). However, it found it was bound by *Local Area Watch*<sup>8</sup> and cited various unpublished decisions that claims to have "repeatedly rejected similar arguments by plaintiffs seeking punitive damages." *Id.* at \*14-15. (citing *McIntosh v Rockford*, unpublished per curiam opinion of the Court of Appeals, issued June 20, 2019 (Docket Nos. 343125 and 344169); *Ostaszewski v Lansing*,

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<sup>8</sup> *Local Area Watch v City of Grand Rapids*, 262 Mich App 136; 683 NW2d 745 (2004)

unpublished per curiam opinion of the Court of Appeals, issued November 15, 2018 (Docket No. 343537); *Petersen v Charter Twp of Shelby*, unpublished per curiam opinion of the Court of Appeals, issued November 15, 2016 (Docket No. 329545); *Katayama v Troy*, unpublished per curiam opinion of the Court of Appeals, issued December 10, 2015 (Docket No. 323459)).

On March 23, 2026, the University filed its second *Application for Leave to Appeal* to this Court. Plaintiff filed a conditional cross application. This Answer now follows.

### STANDARD OF REVIEW

Whether to grant a party's application for leave to appeal rests within the sound discretion of this Court. MCR 7.303(B). That discretion is not exercised merely because a disappointed litigant continues to disagree with the outcome below. Nor is Supreme Court review warranted simply because a public institution repackages arguments already considered and rejected through years of litigation. The Court's review limitations exist for the non-error-correcting circumstances identified in MCR 7.305(B), i.e., jurisprudential significance, precedential conflicts, or issues otherwise warranting the exercise of this Court's supervisory role.

Those standards are not satisfied here. The University Regents identify no conflict in Michigan law, no unsettled doctrinal fracture, and no manifest departure from established precedent by the lower courts. To the contrary, the courts below applied ordinary FOIA principles to an extraordinary amount of process: multiple appeals, repeated briefing, extensive discovery, four *Vaughn* indices, representative sampling, and *in-camera* review. Unlike the Regents' generalized assertions here, the Court of Claims

reviewed a University-selected representative sample of the records. The result was not rushed. It was tested. Repeatedly. And the University failed.

At bottom, the Regents seek further review because they disagree with where the law led. But disagreement is not a review criterion under MCR 7.305(B). This Court's discretionary docket is reserved for matters requiring critical intervention, not relitigation. The University Regents have not crossed that threshold.

## ARGUMENT

### I. The University Regents are Not Exempt from Michigan Law

The University Regents saved their most remarkable argument for last in their filing, but it critically must be addressed first. Beneath the guise of "constitutional autonomy" lies something far more sweeping and troubling, i.e., a request that this Court declare the Regents of the University of Michigan exempt from generally-applicable legislation enacted by the People's elected Legislature. The implication is profound. Under the Regents' theory, once the University invokes Article VIII, § 5, ordinary statutory obligations no longer apply to that public body. Because it believes itself constitutionally beyond the general statutes of the Legislature, the enactment of FOIA is beyond the government's reach. It is a claim of institutional immunity from public accountability laws.

But one has to ask: if FOIA does not apply because of Article VIII, § 5, what else does not apply? The Regents' theory supplies no workable constitutional stopping point. If Article VIII, § 5 permits the University to disregard generally applicable transparency statutes whenever disclosure touches institutional preference or archival judgment, then the same rationale could be invoked against countless statewide enactments governing general conduct or, more narrowly, public accountability. Constitutional autonomy is not constitutional exemption. The correct rule is clear: a strained suggestion of constitutional

autonomy does not render the University immune from legislative enactments. Rather, the inquiry is whether the statute impermissibly invades the Regents' educational management authority. FOIA does no such thing.

FOIA does not dictate curriculum, academic standards, faculty hiring, admissions criteria, scholarly conclusions, or internal pedagogical judgments. It merely requires most public institutions—including constitutionally created institutions who receive hundreds of millions of taxpayer dollars annually—to disclose nonexempt public records. That obligation of fidelity to state statutes is no different in principle from compliance with generally applicable laws governing contracts, torts, employment, civil procedure, taxation, or open government mandates. The Legislature's imposition of transparency obligations upon a taxpayer-funded public body does not become unconstitutional merely because the public body happens to be a university with college students being educated.

Indeed, the University's position would create a sweeping and dangerous constitutional exception unsupported by any Michigan precedent. Under the University's theory, the Regents could effectively immunize entire categories of government-owned records from FOIA simply by labeling them "academic" or "institutional." That is not constitutional autonomy but constitutional supremacy over legislative enactments. Michigan law has never recognized such a doctrine.

Nor is the Bentley Historical Library somehow outside the reach of FOIA because it exercises archival discretion. The Bentley Library is a unit funded and operated as part of the University itself. Its possession, retention, cataloging, and maintenance of donated historical materials are institutional functions undertaken by a public body. Once records are owned, possessed, and/or retained by the University in the performance of its

institutional functions,<sup>9</sup> FOIA applies unless a statutory exemption exists. The University cannot manufacture a constitutional exemption where neither the Constitution nor the Legislature created one. No court below is ordering the University to alter research priorities, suppress scholarship, modify instruction, or change scholastic methodology. The dispute instead concerns whether paper records possessed by a public institution fall within Michigan's disclosure laws. That is a quintessential question of public accountability properly governed by statute.

The University repeatedly invokes "academic freedom," but the Tanton Papers have little to do with any educational pursuit. Local school boards throughout Michigan also educate students, employ professionals, manage sensitive records, and make decisions carrying substantial public consequence. Yet no local school district could plausibly invoke "academic freedom" as a constitutional shield against generally applicable transparency laws enacted by the Legislature. A board of education in Ann Arbor cannot, for example, refuse compliance with statewide law merely because it believes disclosure might prove uncomfortable or controversial. Neither should the University. The Regents seek something far more sweeping here: not protection for scholarship, but *exemption from accountability*.

Even more telling, the University has operated for decades on the well-settled notion that FOIA applies to it. It maintains a dedicated FOIA office, promulgates FOIA procedures, invokes FOIA exemptions, and litigates FOIA claims on the merits. Only after

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<sup>9</sup> Even if — contrary to the Bentley Historical Library's own stated mission, decades of practice, and the University's repeated representations in this litigation — the curatorial activities of accepting, cataloging, preserving, restricting access to, and maintaining donated historical collections were somehow not part of the Library's official institutional functions, then the University's decision to engage in those exact activities with respect to the Tanton Papers would constitute ultra vires conduct beyond its lawful authority under Michigan law.

an adverse outcome in a near-decade long case does the University now strikingly suggest the FOIA statute itself is constitutionally suspect. That fails. Under fulfillment of public accountability, Michigan's public universities have long and routinely complied with FOIA without constitutional crisis. E.g., *Mich Fed'n of Teachers & Sch Related Pers v Univ of Mich*, 481 Mich 657; 753 NW2d 28 (2008); *Clerical-Technical Union v Mich State Univ Bd of Trustees*, 190 Mich App 300; 475 NW2d 373 (1991); *Penokie v Mich Technological Univ*, 93 Mich App 650; 287 NW2d 304 (1979); *Central Mich Univ Supervisory-Technical Ass'n MEA/NEA v Central Mich Univ Bd of Trustees*, 223 Mich App 727; 567 NW2d 696 (1997). The University of Michigan itself has a FOIA office.<sup>10</sup> It has enacted the required Procedures and Guidelines that the statute requires. MCL 15.234(4) ("A public body shall establish procedures and guidelines to implement this act..."); UNIVERSITY OF MICHIGAN: FREEDOM OF INFORMATION ACT PROCESSING, *available at* <https://foia.vpcomm.umich.edu/wp-content/uploads/sites/18/2024/05/FOIA-Procedures-and-Guidelines-May-2024.pdf>. The claimed existence of constitutional autonomy has never actually or practically exempted any university from those obligations, which this University itself has always fulfilled. The Regents cite no Michigan case holding otherwise because none correctly exists.

Moreover, the doctrine of constitutional avoidance cannot rescue the University's legal position to avoid compliance with production. Constitutional avoidance applies only where a statute is genuinely ambiguous and susceptible to competing reasonable constructions. *Clark v. Martinez*, 543 U.S. 371, 385 (2005) ("The canon of constitutional avoidance comes into play only when, after the application of ordinary textual analysis,

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<sup>10</sup> <https://foia.vpcomm.umich.edu/>.

the statute is found to be susceptible of more than one construction; and the canon functions as a means of choosing between them.”). Here, FOIA unambiguously applies to “any other body that is created by state [] authority,” which includes state universities created under the Michigan Constitution. MCL 15.232(h)(iv). If the Legislature intended to exclude them (like itself or the governor’s office), it knew and easily could have created a categorical exemption. See e.g., MCL 15.232(h)(i). It did not. Courts are not permitted to rewrite FOIA under the guise of constitutional interpretation to create exemptions the Legislature declined to enact.

Finally, the University Regents’ last-ditch theory also reaches too much. If accepted, Article VIII, § 5 would permit all public universities to disregard numerous generally applicable statutes whenever it asserted some institutional or political preference. That approach conflicts with longstanding Michigan authority recognizing that constitutional universities remain public entities subject to statewide law in the same way that local governments, citizens, and corporations do. Ultimately, the University accepted the Tanton Papers as a public institution operating under Michigan law. Dr. Tanton knew it too. *Oakland Press v Pontiac Stadium Bldg Auth’y*, 173 Mich App 41, 45-46; 433 NW2d 317 (1988). The Regents cannot simultaneously enjoy the benefits of public status while disclaiming the obligations that accompany it. Article VIII, § 5 protects the University’s educational independence. It does not authorize secrecy beyond the limits established by FOIA itself. Article VIII, § 5 protects educational governance, not institutional secrecy.

## II. Error Correcting

At the highest level, the University Regents’ arguments in its *Application* all ultimately reduce to a request for error correction. That is not the function of this Court. This Court “sits not to correct errors in individual cases, but to decide matters of larger

public import.” *Halbert v Michigan*, 545 US 605, 618 (2005); see also *Great Lakes Realty Corp v Peters*, 336 Mich 325, 328-329; 57 NW2d 901 (1953) (equating denial of an application with denial of a petition for writ of certiorari in the US Supreme Court). Our highest state court is not constituted to provide another layer of routine appellate review whenever a well-heeled litigant believes trial courts reached the wrong outcome on a heavily litigated case. MCR 7.305(B) confirms that reality. The Court’s discretionary jurisdiction exists to resolve jurisprudential conflicts, clarify unsettled law, address questions of major public significance, or correct decisions that fundamentally depart from controlling legal principles. It does not exist to reweigh already-examined records or relitigate fact-intensive exemption determinations after years of exhaustive proceedings.

Relitigation of the record-intensive exemptions is precisely what the University Regents seek here. Its *Application* repeatedly attacks the lower courts’ conclusions that the asserted exemptions were left unsupported. And it was the University’s burden to support them. The Court of Claims conducted extensive proceedings spanning many years. The University was afforded repeated opportunities to justify nondisclosure through briefing, multiple *Vaughn* indices, representative sampling, and *in-camera* review. The matter was not decided in haste or abstraction. Multiple judges including Judges Gleicher and Yates evaluated the actual records themselves. The Court of Appeals then reviewed those determinations and affirmed. What the University Regents now seek is not clarification of an unsettled rule of law; they merely seek a different outcome.

The personal-privacy issue (briefed further below) illustrates the point. The University Regents do not identify any doctrinal confusion in Michigan FOIA jurisprudence regarding MCL 15.243(1)(a). The governing standards are already well established.

Instead, the University simply disagrees with how those settled standards were applied to the Tanton Papers after years of litigation and repeated judicial review at various levels. That is quintessential error-correction advocacy. The Regents ask this Court to revisit whether particular records were sufficiently “personal,” whether disclosure would be “clearly unwarranted,” and whether the lower courts weighed the public interest correctly. Those are ordinary appellate disputes over application of settled law to a developed factual record. They are not jurisprudential predicaments warranting this Court’s carefully-granted intervention. The University’s *Application* identifies no split of authority, no conflicting appellate doctrine, and no destabilizing uncertainty in Michigan law. They simply contend the lower courts reached the wrong outcome (which it did not). But disagreement is not itself a basis for leave here.

At bottom, the Regents simply seek more error-correcting review of exemption determinations even though they were already tested through extraordinary processes over the last nine years. This Court’s role is not to sit as a super error-correcting tribunal over every fact-intensive FOIA dispute involving a prominent public institution. The law governing exemptions is settled. The lower courts applied it. The Regents merely dislike the outcome. That is insufficient under MCR 7.305(B). On that basis alone, the *Application* should be denied.

### **III. The Tanton Papers Are Public Records**

FOIA’s structure and mandate are straightforward. Our transparency statute defines any “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” as a public record, MCL 15.232(i), and, absent a proven exemption, there is a “right to inspect, copy, or receive copies of the requested public record of the public body,” MCL 15.233(1).

Further, it “separates public records into the following 2 classes: those that are exempt from disclosure under section 13; and all public records that are not exempt from disclosure under section 13 and that are subject to disclosure under this act. *Id.* “If a public record contains material which is not exempt under section 13, as well as material which is exempt from disclosure under section 13, the public body shall separate the exempt and nonexempt material and make the nonexempt material available for examination and copying.” MCL 15.244(1). “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.” *Rataj v City of Romulus*, 306 Mich App 735, 748; 858 NW2d 116 (2014). Michigan FOIA is a “prodisclosure” statute. *Sole v Mich Economic Dev Corp*, 509 Mich 406, 413; 983 NW2d 733 (2022).

The University argues that eleven boxes of papers it possesses and owns within the Bentley Library are not public records. The lower courts correctly disagreed. Why? Because the University “owns,” has “possession of” or “retained” the documents at issue. Its own catalog confirm the same.

But, argues the University, Dr. Tanton purportedly entered into a contract with the University to preclude production until 2035. That is wrong. The University is barred from entering into such a contract under this Court’s own precedent. In *Bradley*, this Court confirmed that public bodies “cannot ‘eliminate [their] statutory obligations to the public merely by contracting to do so [with others]’” and cannot “bargain away the requirements of the FOIA.” *Bradley*, 455 Mich at 303; affirming in relevant part, 216 Mich App at 93. What the University proposes can happen—a private contract promising non-

disclosure—is the very thing *Bradley* confirmed cannot be executed or bargained away—whether for Dr. Tanton or anyone else.<sup>11</sup> The University does not ask this Court to ever overrule *Bradley*. Nor should this Court unsettle *Bradley* on the Regents’ behalf sua sponte.

The University’s recycling-truck analogy misses the mark. The Bentley Library is not a garbage hauler passively conveying discarded paper toward destruction. It is a publicly funded archival institution that affirmatively decides what to accept, accessions each item with a permanent record number, preserves materials under climate control, employs trained archivists, publishes finding aids, and commits — in writing, on its public website — to making the materials available at public expense. That is curation. That is an official function. A recycling truck performs none of it.

A more honest analogy sits closer at hand: a copy of this very brief now resting in the University’s Office of General Counsel. The brief originated as private work, authored and owned by undersigned counsel, paid for by a third-party client, and embodies undersigned counsel’s own analysis and labor. Yet once filed and served, the University possesses and retains it in the performance of its official function of defending this litigation despite it being the undersigned’s work product. The University cannot seriously claim, if someone requests a copy via FOIA, that this brief “remains Philip Ellison’s or Hassan M. Ahmad’s papers, not ours.” FOIA status does not turn on the document’s original origin or authorship. It turns on whether the public body owns, possesses, or

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<sup>11</sup> 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, 54-55; 672 NW2d 884 (2003). It is the clear “public policy” of this State that citizens “are entitled to full and complete information regarding the affairs *of government*... consistent with this act.” MCL 15.231(2) (emphasis added). Any provision which is contrary to public policy is not enforceable.

retains the writing in the performance of an official function. MCL 15.232(i). Furthermore, the undersigned cannot ask nor privately contract with the University's General Counsel to keep copies of brief from any FOIA production if someone asks for it — *Bradley* forbids it. What the law does not permit for a brief, it likewise does not permit for the Tanton Papers. Upon receipt, the University owns both of them, possesses both of them, retains both of them, catalogs both of them, and curates both in the appropriate University office in the performance of its official functions. That is enough. Of course, the University may yet wish to consign this very brief to its own recycling bin. Nevertheless, its recycling truck analogy fails. Neither curbside pickup nor a private contract can change what FOIA already commands.

Post-remand discovery has confirmed the Bentley Historical Library's ongoing possession, retention, preservation, and curatorial management of the Tanton Papers as part of its institutional mission. FOIA will shed further light on the University's deliberate policy decisions to accept, catalog, preserve, and safeguard controversial collections using publicly funded infrastructure and personnel. The Bentley Library is staffed, maintained, secured, and administered through public resources derived substantially from taxpayer support. The University cannot plausibly characterize the Library's conduct as mere "passive storage" divorced from governmental action when the very act of archival preservation reflects affirmative public-policy choices about what materials warrant public institutional protection, curation, and long-term stewardship at taxpayer expense. Preservation and curation itself is a governmental function. *Ahmad I*, 2019 Mich App LEXIS 3221, at \*5 ("the Bentley Library's historical collection is 'maintained for the purpose of collecting, preserving, and making available to students manuscripts and other

materials.”); see also *Howell Ed Ass’n, MEA/NEA v Howell Bd of Ed*, 287 Mich App 228, 243; 789 NW2d 495 (2010) (documents can become public documents based on how they are utilized by public bodies”). It is an intentional exercise of public authority carried out by a public institution using monies from the public fisc. And where a public institution chooses to preserve and maintain records as part of its official operations, FOIA’s core purpose—to illuminate the workings and decisions of public bodies—applies with full force. See *Amberg v City of Dearborn*, 497 Mich 28, 31-32; 859 NW2d 674 (2015).<sup>12</sup> At the bare minimum, the papers’ inclusion shed light on the Library’s curatorial decisions.

The lower courts got it right and applied these principles to reach the correct outcome.<sup>13</sup> Nothing arising from the University’s *Application* materially alters that. The Tanton Papers are 1.) in the possession of, 2.) retained by, and 3.) owned by the University for the purpose of preservation, an official curatorial purpose, paid for taxpayer dollars. These statutorily-covered public records are subject to disclosure.

#### **IV. No Exemptions Apply**

The University next argues that if the Tanton Papers are “public records” subject to disclosure, they would still not be subject to disclosure because several exemptions apply. The University has tried three: personal privacy; the *Michigan Community*

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<sup>12</sup> *Amberg* affirms that possession for evidentiary or archival purposes suffices, without demanding ongoing active “use” tied to decision-making; the University at times conflates possession with active utilization and such risks shielding vast swaths of publicly held records and undermining transparency.

<sup>13</sup> Tugging at the public policy heartstrings for what is a desire to promote the social good of archives, the University offers a parade of horrors about how future donations of papers might be stymied. But this is the wrong branch of government to advance those arguments. If our Legislature wants to authorize an exemption based on a donor’s gift of personal papers, the Legislature can create an exemption. To date, it has refused to do so. The University’s desire for such an exemption “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).

*Foundation Act*; and the *Library Privacy Act*. All three were rejected by the courts below. There is no basis for this Court to intervene to find otherwise.

Under FOIA, “a public body must disclose all public records that are not specifically exempt under the act.” *Rataj*, 306 Mich App at 749. Any claimed exemptions are narrowly construed and against the public body. *Id.* at 748-749. There is a well understood presumption in favor of disclosure because FOIA is a “prodisclosure” statute. *Id.* at 747. The burden on proving an exemption is on the party asserting the exemption. *Id.* at 749.

#### **A. Personal Privacy**

MCL 15.243(1)(a) exempts “[i]nformation of a personal nature if public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy.” This privacy exemption has two required prongs: first, the information must be of a personal nature, meaning that the information is “intimate, embarrassing, private, or confidential,” and second, it must be the case that the public disclosure of that information would constitute a clearly unwarranted invasion of an individual's privacy. *Mich Fed'n*, 481 Mich at 675; *Bitterman v Village of Oakley*, 309 Mich App 53, 62; 868 NW2d 642 (2015). When a public body invokes this exemption, it must prove both prongs under the exemption and the applicable standard is “would,” not *could*. *King v Oakland Cnty Prosecutor*, 303 Mich App 222, 231; 842 NW2d 403 (2013) (“‘could’ and ‘would’ are ‘obviously not the same thing.’”). The University has the obligation to provide sufficient information to allow the courts to “make particularized findings of fact,” *Messenger v Dep't of Consumer & Indus Servs*, 238 Mich App 524, 532; 606 NW2d 38 (1999), as to how the two prongs are actually fulfilled. Moreover, MCL 15.243(1)(a) specifically has a heightened standard as disclosures must “clearly” amount, not mere ‘generally’ amount, to an “unwarranted invasion of an individual's privacy.” Compare MCL 15.243(1)(a) with

MCL 15.243(1)(b)(iii). Most often, the public's interest in disclosure outweighs the individual's expectation of privacy. *Bitterman*, 309 Mich App at 64.

The University argues that disclosure of portions of the Tanton Papers would constitute a clearly unwarranted invasion of personal privacy under Michigan FOIA because the collection contains private correspondence, personal identifying information, and sensitive communications involving living individuals and third parties. However, the University has failed its burden. Except for the medical information sua sponte redacted by the Court of Claims, the University failed to actually show that any document within the eleven boxes of relevant Tanton Papers particularly contains anything "personal" as they relate to Tanton's public advocacy. The Court of Claims' inquiry was guided by "the customs, mores, or ordinary views of the community," *Herald Co v City of Bay City*, 463 Mich 111; 123-124; 614 NW2d 873 (2000), and nothing in the cache has any "intimate" details that would shock the mores or ordinary views of the community. The Court of Claims expressly found that the Tanton Papers are, with one minor exception, "devoid of [any] intimate, embarrassing, private, or confidential information," **Appendix # 79b**, and the University has not shown to this Court how that determination (after extensive work with the record) was in error in any way.

The University's conclusory position is not new, and it has already been exhaustively litigated. Ahmad challenged the University's invocation of the personal-privacy exemption throughout the proceedings below, where the University was repeatedly afforded opportunities to actually justify withholding under the standards imposed by Michigan FOIA. Five separate times the University was given the chance by the Court of Claims to establish, via the *Vaughn* indices, random sampling process, and

any other method it could dream up, how any individual document within the Tanton Papers actually contained “intimate, embarrassing, private, or confidential” information. And all five times the University showed nothing. It has failed. Several Court of Claims judges and the two Court of Appeals panels below all rejected the University’s blanket privacy invocation, including through prior appellate review and post-remand proceedings providing the chance for *in camera* individualized analysis of the records and the claimed privacy interests. The repeated failure of the personal privacy exemption is telling. Michigan FOIA does not permit a public institution to invoke generalized discomfort, controversy, or speculative reputational concerns as a substitute for the concrete and particularized showing the FOIA statute requires. The University had ample and repeated opportunities to make that showing. It has simply not carried its burden because it could not.

What the University repeatedly proclaims in its *Application* is more of the same, i.e., because Dr. Tanton originally created the papers they must be per se personal. But the University runs up against the *Bradley* contractual bar rule after they were donated. Private contracts (even if labelled as gift agreements) cannot make or recast public records as contractually withheld. *Bradley*, 216 Mich App at 93, as affirmed, 455 Mich at 303. The University’s repeated claim that the papers are per se personal does not meet its burden to show that the information is actually ‘personal’ as the *Messenger* standard requires. The lower courts correctly concluded that the University, when seeking a designation *en masse* of the Tanton papers as being exempt, failed to meet its burden because it had provided no “particularized justification” for withholding any of the information in the boxes on privacy grounds. **Appendix #72b**. That “complete

particularized justification” is what is legally required. *Evening News Ass’n v City of Troy*, 417 Mich 481, 516; 339 NW2d 421 (1983). When the *Vaughn* indices were produced, the University simply parroted the exact same exemptions already rejected as a matter of law and failed in providing the required “particularized” justification. See **starting at Appendix #91b, #239b, #268b, and #326b**. By failing the required legal burden, disclosure must be ordered. MCL 15.240(4).

But even if the requested information falls within this first prong of the personal privacy exemption, courts then proceed to a second prong where the public body must then establish that the purported invasion would be “clearly unwarranted.” MCL 15.243(1)(a); see also *Bitterman*, 309 Mich App at 62. When there is an interest in transparency, invasions of personal privacy will often be warranted. “In all but a limited number of circumstances, the public’s interest in governmental accountability prevails over an individual’s, or a group of individuals’, expectation of privacy.” *Practical Political Consulting, Inc v Sec’y of State*, 287 Mich App 434, 464; 789 NW2d 178 (2010). The “clearly unwarranted” standard presents a high bar for the government to overcome. Again, the University must carry its burden at each step of the analysis. The justifications for non-disclosure must be concrete and particularized, not based upon speculation and conjecture—which are often hurled in FOIA cases without sufficient support. The core purpose under prong two favors disclosure if it contributes to any understanding government operations. *Mich Fed’n*, 481 Mich at 673. The papers illuminate the Library’s role in preserving controversial materials and its execution of curatorial policies, thereby, advancing public understanding. *Swickard v Wayne Cnty Med Exam’r*, 438 Mich 536, 547; 475 NW2d 304 (1991). As such, the second prong is not fulfilled.

**B. Michigan Community Foundation Act**

“The denial of a FOIA request occurs at a definite point in time.” *State News v Mich State Univ*, 481 Mich 692, 703; 753 NW2d 20 (2008). Therefore, unless the FOIA provides otherwise, “the appropriate time to measure whether a public record is exempt under a particular FOIA exemption is the time when the public body asserts the exemption.” *Id.* Here, the decision to deny occurred on May 8, 2017. **Appendix #39b-40b.** The *Michigan Community Foundation Act* was not enacted and did not become effective until August 21, 2017, some four months later. 2017 PA 38. As such, the exemption simply cannot apply based on the non-existence of the law at the time of denial alone. While the Court of Appeals refused to apply the matter consistent with *State News*, the outcome would still be the same.

Nevertheless, the Court of Appeals still reached the proper outcome when finding MCL 15.243(1)(d) unambiguously provides an exemption for records that are “exempted from disclosure” by other statutes but that it “must expressly proscribe disclosure for the exemption to apply.” *Ahmad II*, 2026 LX 10958, at \*9; see also MCL 15.243(1)(d) (may exempt “records or information specifically described and exempted from disclosure by statute.”). The Court of Appeals found that Dr. Tanton, not the MCFA, was the one who forbade disclosing the Tanton papers. Thus, the MCL 15.243(1)(d) exception is inapplicable.

Further, the MCFA is totally silent about the *Freedom of Information Act’s* interaction with the MCFA. But that does not mean the University lacked any standard to guide it. *Mager v Dep’t of State Police*, 460 Mich 134, 143; 595 NW2d 142 (1999). Because the pass-through exception requires that an exemption outside Section 13 must be “specifically described” and “specifically exempted” from disclosure and exceptions to

disclosure of public records are narrowly applied, the MCFA neither describes nor exempts “specifically” any records involved with that statutory scheme. The Legislature’s additional use of the term “specifically” in MCL 15.243(1)(d) is direction not to improperly assume non-disclosure for statutes being used for other purposes. See *Verizon North, Inc v Pub Serv Comm’n*, 263 Mich App 567, 570; 689 NW2d 709 (2004) (“every word is used [by the Legislature] for a purpose”). FOIA was expressly designed to press back against the “natural tendency of bureaucracies to protect themselves by revealing no more information than they absolutely have to.” *Evening News*, 417 Mich at 512. The MCFA’s total silence on FOIA and without an awarded exemption provision or like-kind language actually posits disclosure. This should be of no surprise to anyone; Michigan courts have explained that “any individual contracting with a public entity should realize that the transaction may be subject to public scrutiny.” *Oakland Press*, 173 Mich App at 45-46.

**C. *Library Privacy Act***

The University finally argues—again attempting to use the pass-through exemption under MCL 15.243(1)(d)—that the *Library Privacy Act* exempts disclosure of the Tanton Papers. It is again wrong. The LPA, MCL 397.605(1), generally provides that “the selection of library materials for inclusion in a library’s collection shall be determined only by an employee of the library,” but this provision does not address disclosure obligations under FOIA. MCL 397.605(1). No one, including Ahmad, is challenging whether the Tanton Papers are part of Bentley Library’s collection; they certainly are. **Starting at Appendix #45b.**

However, while the LPA provides that “the use of library materials shall be determined only by an employee of the library,” the introductory clause contains a key

condition—"except as otherwise provided by law." MCL 397.605(1). FOIA is such a law; it commands that the Bentley Library must "disclose all public records not specifically exempt under the act." *Thomas v New Baltimore*, 254 Mich App 196, 201; 657 NW2d 530 (2002). As such, compliance with FOIA's disclosure obligations is compliance with MCL 397.605(2). Moreover, no one is challenging how Bentley Library is using the Tanton Papers when operating the library. MCL 397.605(2). The Tanton Papers have been reviewed, indexed, and fully catalogued into the Library's collection. **Starting at Appendix #45b.**

Properly understood, the question is whether FOIA provides a valid means, in light of the obligation of narrow construction of exemptions, to lawfully preclude inspection and copying of documents and papers "owned" or "used" or "in the possession of" or "retained" by the University in the performance of an official function. The *Library Privacy Act* provides no provision to deem the Tanton Papers, undisputedly held in the collection, to be "specifically described and exempted from disclosure" pursuant to MCL 15.243(1)(d). Ahmad is not seeking any relief which precludes their inclusion into the collection or directs how they are to be used as part of the library's collection. He just wants a copy of what a public body currently holds. Because the University has not met its heavy burden and the provisions of the *Library Privacy Act* are simply not applicable to these circumstances, the exemption fails.

#### **D. Exemption Waiver**

Even if the Court reaches the merits of the exemptions, Ahmad challenges whether the University has already waived its right to assert any exemptions. As part of its May 8, 2017 response, the University never asserted any exemptions (**Appendix #34b-35b; #39b-40b**) and for the first time, while in the trial court on review, did it seek to invoke

exemptions. The lower courts of Michigan have blessed this under *Residential Ratepayer Consortium v Pub Serv Comm # 2*, 168 Mich App 476; 425 NW2d 98 (1987).<sup>14</sup> The doctrine's continued existence is in error.

FOIA is a legislatively-defined process. The trial court "begin[s] by examining the plain language of the statute; where that language is unambiguous, [it] presume[s] that the Legislature intended the meaning clearly expressed—no further judicial construction is required or permitted, *and the statute must be enforced as written*. *Tryc v Michigan Veterans' Facility*, 451 Mich 129, 135; 545 NW2d 642 (1996) (emphasis added). When a public body is served with a FOIA request, it has limited responsive options. First, only "the FOIA coordinator...shall be responsible for approving a denial under section 5(4) and (5)." MCL 15.236(1). The University's coordinator can "grant" the request, "issu[e] a written notice to the requesting person denying the request" or "grant[] the request in part and issu[e] a written notice to the requesting person denying the request in part." MCL 15.235(2). The FOIA Coordinator's "written notice denying a request for a public record in whole or in part is a public body's final determination to deny the request or portion of that request." MCL 15.235(5). When denying the FOIA request, the "written notice" must provide "an explanation of the basis under this act or other statute for the determination that the public record, or portion of that public record, is exempt from disclosure, if that is the reason for denying all or a portion of the request." MCL 15.235(5)(a). Here, the sole basis for the University's denial by the FOIA Coordinator was that the Tanton Papers were not "public records" as defined by the FOIA statute. **Appendix #39b-40b**. The University's

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<sup>14</sup> The Court of Appeals has since blindly followed *Residential Ratepayer*. See e.g., *Stone Street Capital, Inc v Bureau of State Lottery*, 263 Mich App 683, 688 fn2; 689 NW2d 541 (2004); *Bitterman*, 309 Mich App at 60.

formal “written response” did not assert any Section 13 exemptions or provided any required “explanation” of one or more exemptions under MCL 15.235(5)(a). By trying to assert new exemptions after the fact, the University undoubtedly violated its obligations under MCL 15.235(5)(a). But what is the remedy? Ahmad asserts that by not asserting any exemptions and violating the clear directive of MCL 15.235(5)(a), any ability to assert an exemption should be deemed waived/forfeited. See *Napier v Jacobs*, 429 Mich 222; 414 NW2d 862 (1987) (Michigan applies the raise-or-waive standard).

However, prior Michigan case law has created a gross perversion to the clear legislative mandate—it allows public bodies to raise exemptions for the first time in the trial court—after expressly violating MCL 15.235(5)(a)—based upon a doctrine first outlined in *Residential Ratepayer*. See *Mich Open Carry, Inc v Dep't of State Police*, 330 Mich App 614, 623-624; 950 NW2d 484 (2019). Being the functional equivalent of a legal mulligan, this doctrine is contrary to the structure, operation, and plain language of the FOIA statute. Whether characterized as waiver, forfeiture, or statutory preclusion, the Legislature required exemptions to be asserted in the public body’s final written determination. But Michigan case law has not been faithful.

In *Residential Ratepayer*, the public body was requested to produce various coal contracts but intentionally hid the records by dispossessing itself of the contracts before the request was to be fulfilled. After that strategy failed, the public body asserted new exemptions for the first time in the trial court when the challenger sued for release of the records. The panel concluded:

If a government agency fails to respond to a request or denies it without reason, but can raise a defense in a circuit court action, it would be illogical to hold that an agency that gives some reason for the denial is barred from raising other defenses in the circuit court action.

168 Mich App at 481. This conclusion was never based on any language from the statute, or from any prior authority; it was created from the thin air and untethered to any statutory text. Moreover, such a doctrine is at direct odds with other portions of the statutory structures and processes. It violates numerous statutory standards of construction.

*First*, this doctrine unfairly rewards a public body when failing its statutory duty to correctly respond to FOIA requests pursuant to MCL 15.235(5)(a) with the hopes that the requester will not actually force the issue via an expensive lawsuit.

*Second*, it wrongly places the decision of whether to invoke a discretionary exemption in the hands of trial counsel rather than FOIA Coordinator contrary to MCL 15.236(1). Section 6(1) is abundantly clear: the FOIA coordinator... shall be responsible for approving a denial under section 5(4) and (5).” Courts act as a reviewer of the FOIA Coordinator’s decision, not its savior. *MLive Media Group v City of Grand Rapids*, 321 Mich App 263, 271; 909 NW2d 282 (2017) (“A court only becomes involved in a FOIA request if a public body denies the request and the requester appeals...”). By allowing the University’s trial attorneys instead of its FOIA Coordinator assert exemptions, *Residential Ratepayer* improperly transfers the legal decision-making authority from the FOIA Coordinator to others. The FOIA statute does not permit this.

*Third*, the practical effect of *Residential Ratepayer* is that it unfairly encourages public bodies not to issue correct or complete responses and otherwise issue deficient, blanket, irrelevant, or wholly inadequate denials only to have a public body’s later-assembled legal team create new or trial-appropriate ones after a requester has undertaken the expense (and risk) of a lawsuit. Citizen requesters, with more highly-limited resources than its public body legal adversaries, are later blindsided by the new

exemptions never before raised, presented, or prepared for prior to a FOIA review in the trial court. These new exemptions are costly and unfair additions to a requester's legal challenge being mounted by a requester, usually an average citizen, who is without the expansive resources of governmental agencies (and their big-firm counsel). Then, many times, a public body simply abandons needless and inapplicable excuses and then argues new previously-unmade exemptions for the first time in the trial court.

Such gamesmanship was undertaken by the University in this case and it is wrong. The plain language and clear intent of the Legislature provides that the time to assert any and all exemptions should be at the time of the "final determination" by the public body, not for the first time in the trial court on review pursuant to MCL 15.240(4). Otherwise a final determination is not actually "final." By Michigan law acquiescing to the 'late-invoked' exemptions, it improperly renders Section 5's command of an actual final determination (together with its mandated explanations) as surplusage. Of course, a reviewing court should not interpret a statute in such a manner. *Hoste v Shanty Creek Management, Inc*, 459 Mich 561, 574; 592 NW2d 360 (1999). As such, this Court is requested reject the long-overdue and improper use of the can-raise-later doctrine in *Residential Ratepayer*. The University has waived its FOIA exemptions.

### CONCLUSION

This case began with a simple proposition: when a public university owns, possesses, and preserves records in the performance of an official and public curatorial function, those records are subject to Michigan's *Freedom of Information Act* unless a statutory exemption specifically applies. Nine years later, after multiple appeals, repeated remands, four *Vaughn* indices, *in-camera* review, and the rejection of exemption after

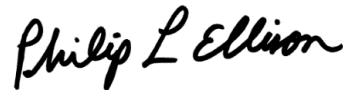
exemption, the University still advances the same essential theory—that public records may be transformed into secret documents through private agreements and institutional preference. That violates *Bradley’s* private contract bar. And FOIA does not yield to whatever embarrassment the University seems to have in fulfilling this straightforward no-viable-exemptions FOIA request. The Regents cannot further ask this Court to recognize something Michigan law has never allowed, i.e., a constitutional power of governmental secrecy resting not in statute, but in status. Our law provides no such immunity. The records are public. The exemptions failed. The lower courts got it functionally right. The *Application* should be declined.

**RELIEF REQUESTED**

WHEREFORE, the Court is requested to deny the University Regents’ *Application for Leave to Appeal*.

Date: May 8, 2026

RESPECTFULLY SUBMITTED:



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**WORD COUNT STATEMENT**

The body of the filing consists of 9,666 words as determined by the Word Count feature in the Microsoft Word computer program.