STATE OF MICHIGAN

COURT OF CLAIMS

HASSAN M. AHMAD, ESQ.,

Plaintiff,

OPINION AND ORDER

v

Case No. 17-000170-MZ

THE UNIVERSITY OF MICHIGAN,

Hon. Elizabeth L Gleicher

Defendant.

_____/

Pending before the Court in this action filed under the Freedom of Information Act is defendant's motion for summary disposition under MCR 2.116(C)(10). The motion is DENIED.

I. BACKGROUND

Dr. John Tanton donated a large quantity of his personal papers to the University of Michigan Bentley Library's collection. *Ahmad v University of Michigan*, unpublished opinion of the Court of Appeals, issued June 20, 2019 (Docket No. 341299), unpub op at p. 1. The donation included 25 boxes of papers. Dr. Tanton's gift agreement dated April 6, 2020, instructed that certain boxes (boxes 18-25) were to remain closed for 10 years from the date of accession. A few weeks later, Dr. Tanton extended the closure time to 15 years. Later still, he told the University that he wanted the papers in that portion of his collection to remain closed for 25 years from the date of their accession.

Three other boxes of papers donated by Dr. Tanton are also at issue. Dr. Tanton donated Box 15 in 2000 and boxes 16 and 17 in 2005. At the time of those donations, Dr. Tanton did not place any access restrictions on the documents contained within these boxes, and they were freely

available to researchers for almost a decade. In 2013, Dr. Tanton instructed the University to restrict access to boxes 15-17 for 25 years, or until April 6, 2035.

In December 2016, plaintiff filed a Freedom of Information Act request seeking access to all of the Tanton papers. The University denied the request, claiming that the papers were not "public records" under the FOIA because they were not "utilized, possessed, or retained in the performance of any official University function." In 2017, plaintiff filed suit in this Court, which granted the University's motion for summary disposition under MCR 2.116(C)(8). The Court of Appeals reversed, holding that plaintiff's complaint "states a valid claim that the papers are public records." *Ahmad*, unpub op at p. 5.

The Supreme Court granted the University's application for leave to appeal and in a brief order affirmed the Court of Appeals by equal division. *Ahmad v Univ of Michigan*, __ Mich __; 956 NW2d 507 (2021). The case returned to this Court.

Plaintiff filed a motion to require a *Vaughn*[1] index before the University filed an amended answer to the complaint. Plaintiff's motion contended that a *Vaughn* index was required because "[t]he University did not list which exemptions it would be utilizing or its factual basis for doing so," and that the University failed to list "which records, if any the University was asserting was exempt."

[1] *Vaughn v Rosen*, 157 US App DC 340; 484 F2d 820 (1973).

The University opposed the motion, contending in part that this Court did not need a *Vaughn* index to determine whether statutory exemptions to the FOIA applied to preclude disclosure. This Court granted plaintiff's motion to compel a *Vaughn* index, finding as follows:

> The Court anticipates that a *Vaughn* Index will be helpful in evaluating the University's exemption arguments. In reviewing the University's denials, this Court must determine that the rationale(s) offered support the denials—a task that is impossible to perform in an information vacuum. A *Vaughn* index not only provides plaintiff with fundamental information needed to meaningfully challenge the University's claims, it will assist this Court in understanding the nature and validity of the objections to disclosure and in assessing the merits of the motions yet to come. The Court notes that a *Vaughn* index, standing alone, does not supplant further discovery but may serve as a helpful starting point for focused and fruitful discovery.

The University then filed a motion seeking to stay the effect of this Court's *Vaughn* index order, and also filed this motion for summary disposition. After conducting a hearing, the Court entered an order staying the effect of the *Vaughn* index order. The Court entered a stipulated order in which it agreed to address the University's legal arguments in support of summary disposition "based on the terms of the [Tanton] gift agreements, the Community Foundation Act, and the Library Privacy Act." The order continued:

> [T]he Court will only address the personal-privacy ... exemption in MCL 15.243(1)(a) to the extent it is based on Defendant's argument that the gift agreements preclude disclosure of the Closed Tanton Records as a whole and will not address any arguments regarding the applicability of the personal-privacy exemption to specific documents. The Court will revisit the *Vaughn* index issue, and the application of the personal-privacy exemption to specific documents, if the case survives the motion for summary disposition.

The University now seeks summary disposition on three grounds: that the material in boxes 15-25 is protected from disclosure under the personal-privacy exemption, MCL 15.243(1)(a); that the Michigan Community Foundation Act, MCL 123.905(3), prohibits disclosure of the

documents, and that the Library Privacy Act, MCL 397.605(1), exempts the documents from disclosure.

II. ANALYSIS

"Under the FOIA, a public body must disclose all public records that are not specifically exempt under the act. MCL § 15.233(1)." *Nicita v Detroit*, 194 Mich App 657, 661; 487 NW2d 814 (1992). Whether a public record is exempt from disclosure under the FOIA is generally a mixed question of fact and law. "However, when the facts are undisputed and reasonable minds could not differ, whether a public record is exempt under FOIA is a pure question of law for the court." *Rataj v City of Romulus*, 306 Mich App 735, 747-748; 858 NW2d 116 (2014).

The parties have stipulated that no facts are in dispute regarding the application of the Michigan Community Foundation Act, MCL 123.905(3), and the Library Privacy Act, MCL 397.605(1). At the parties' request, the Court has agreed to consider the application of the persona-privacy exemption, MCL 15.243(1)(a), based on the existing record, without prejudice to the University to renew its motion for summary disposition after the production of a *Vaughn* index.

The FOIA is a "prodisclosure statute," *Herald Co v Bay City*, 463 Mich 111, 119; 614 NW2d 873 (2000). The Legislature has described the policy purposes of the FOIA as follows:

> 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)]

The Court of Appeals has explained that given its purposes, the FOIA's disclosure provisions must be interpreted broadly to "allow public access." *Practical Political Consulting, Inc v Secretary of*

State, 287 Mich App 434, 465; 789 NW2d 178 (2010). "Conversely, we are to interpret its exemptions narrowly so that we do not undermine its disclosure provisions." *Id.*

Plaintiff contends that the University should not be permitted to raise an exemption for the first time in a trial court, having failed to invoke the exemption when the public body denied disclosure. The Court of Appeals rejected that argument in *Residential Ratepayer Consortium v Pub Serv Comm*, 168 Mich App 476, 480-481; 425 NW2d 98 (1987), holding that the trial court's de novo review of an agency's decision obviates the purpose of applying a waiver rule. The Court is bound by *Residential Ratepayer* and will proceed to consider each of the University's exemption arguments.

A. MCL 15.243(1)(a): The Personal-Privacy Exemption

MCL 15.243(1)(a) permits a public body to exempt from disclosure "[i]nformation of a personal nature if public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy." This exemption has two prongs. "First, the information must be 'of a personal nature.' 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 Federation of Teachers & Sch Related Personnel, AFT, AFL-CIO v Univ of Mich*, 481 Mich 657, 675; 753 NW2d 28 (2008).

Intimate, embarrassing, private, or confidential information is "of a personal nature." *Id.* at 676. Home addresses, birth dates, and telephone numbers generally qualify as information of a personal nature. See *id.* But the exemption analysis does not stop there. Only if an invasion of an individual's privacy is "clearly unwarranted" is a public body entitled to withhold information. An invasion of an individual's privacy is "clearly unwarranted" when the interest in disclosure

reveals "little or nothing about a governmental agency's conduct" or does not "further the stated public policy undergirding the Michigan FOIA." *Id.* at 682.

The University's argument under the personal-privacy exemption is vague, likely because without considering the content of the documents an argument that their disclosure would unduly violate personal privacy is challenging, at best. The University insists that because the information consists of "Tanton's own documents," it is "private or confidential information relating to a person." Without knowing more about the information contained in the documents it is impossible for the Court to agree with this proposition. Likely the documents contain the names of people with whom Tanton corresponded. But "[i]n the absence of special circumstances ... an individual's name is not '[i]nformation of a personal nature' within the meaning of MCL 15.243(1)(a)." *Rataj*, 306 Mich App at 753. The University has not identified any special circumstances in this case that would bring other correspondents' names within the realm of "intimate, embarrassing, private, or confidential information." And it is entirely unknown whether the documents contain personal addresses, or any other form of private information. See also *Tobin v Michigan Civil Serv Comm*, 416 Mich 661, 672; 331 NW2d 184 (1982) ("Names and addresses are not ordinarily personal, intimate, or embarrassing pieces of information.").

Nor has the University explained why disclosure of the information would constitute an unwarranted invasion of personal privacy in 2021, but not in 2035, when the boxes would otherwise be opened. "Because the FOIA is a prodisclosure act, the public agency bears the burden of proving that an exemption applies." *Coblentz v Novi*, 475 Mich 558, 574; 719 NW2d 73 (2006). The University has provided no "particularized justification" for withholding any of the information in the boxes on privacy grounds, see *Detroit Free Press v Warren*, 250 Mich App 164, 167; 645 NW2d 71 (2002), and the Court cannot conceive of a reason that disclosure of names

within the boxed documents might reveal "intimate, embarrassing, private, or confidential information" without additional information.

Further, the Court rejects that the personal-privacy exemption could possibly apply to the documents contained in boxes 15, 16 and 17. If information within those boxes does fall within the personal-privacy exemption, the University has waived that claim by intentionally abandoning any right it may have had to hold the material in confidence between 2000 and 2013 as to box 15, and between 2005 and 2013 as to boxes 16 and 17. See *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).[2]

In sum, the University has failed to carry its burden of demonstrating that the personal-privacy exemption applies to the materials contained in any of the now-closed boxes.

B. MCL 15.243(1)(d) and The Michigan Community Foundation Act, MCL 123.905(3)

MCL 15.243(1)(d) exempts from disclosure "[r]ecords or information specifically described and exempted from disclosure by statute." When a public body relies on MCL 15.243(1)(d), a court must examine the language of the statute under which the public body claims that disclosure is prohibited. *Michigan Open Carry, Inc v Dept of State Police*, 330 Mich App 614, 625; 950 NW2d 484 (2019).

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[2] Citing *Mich Federation of Teachers*, 481 Mich at 676, the University argues that even if telephone numbers, for example, are readily available in a telephone book or on the internet, a person may not wish to voluntarily disclose the information to "a stranger, a co-worker, or even an acquaintance." While this is undoubtedly true, Tanton and the University freely opened boxes 15, 16 and 17 to researchers for a considerable time, thereby refuting that the documents contained information of a personal nature or that the revelation of which would "constitute a clearly unwarranted invasion of an individual's privacy."

According to the University, the Michigan Community Foundation Act, MCL 123.905(3), precludes disclosure of the documents within the boxes Tanton designated as closed. The statute was enacted in May 2017, and provides:

> A public library may receive and accept gifts and donations of real, personal, or intangible personal property, for the library, and shall hold, use, and apply the property received for the purposes, in accordance with the provisions, and subject to the conditions and limitations, if any, set forth in the instrument of gift.

Plaintiff asserts that the statute applies only prospectively to its enactment, and that because his FOIA request was made in 2016, it cannot be retroactively employed to prevent disclosure. The University points out, however, that MCL 123.905(3) was enacted as part of a "clean-up bill" that re-enacted various provisions including MCL 397.381(1), which was "substantively the same" as the later-enacted MCFA." *Ahmad v University of Michigan*, unpub op at p. 5, n 4.

The MCFA does not reference the FOIA and, significantly, it does not preclude disclosure by a public library of any documents or materials received as gifts, even those carrying "conditions and limitations." Accordingly, this case is readily distinguishable from *Michigan Open Carry*, in which the statute relied on by the public body to prohibit disclosure of firearms records—MCL 28.421b(1)—specifically stated that firearms records "are not subject to disclosure under the freedom of information act, … and shall not be disclosed to any person, except as provided under this section." *Michigan Open Carry*, 330 Mich App at 626. Another statute relevant in *Michigan Open Carry*, MCL 28.425e(4), provides that certain firearm data may only be accessed through the law enforcement information network or other official channels. These statutory disclosure exemptions "as applied to the FOIA exemption in MCL 15.243(1)(d) ultimately prohibit[] disclosure," the Court of Appeals held. *Id.* at 627.

In contrast with those highly specific statutes limiting public access to certain firearm information, the MCFA contains no language referencing the FOIA, prohibiting libraries from disclosing information, or directing libraries to place gift conditions ahead of laws such as the FOIA. No "specifically described" "information" in the MCFA is "exempted from disclosure," rendering the statute inapplicable. Cf. *King v Mich State Police Dep't*, 303 Mich App 162, 176-178; 841 NW2d 914 (2013) (finding that MCL 15.243(1)(d) exempted from disclosure records that were expressly identified and prohibited from being disclosed under the Forensic Polygraph Examiners Act). The University's invitation to find an exemption from disclosure in the MCFA and to extend the act to the FOIA is inconsistent with the Court's mandate to construe narrowly exemptions from disclosure under the FOIA.

C. MCL 15.243(1)(d) and The Library Privacy Act, MCL 397.605(1)

The University next argues that the Library Privacy Act, MCL 397.605(1), affords the Bentley Library with the exclusive authority to determine the "use" of library materials. The statute states:

> (1) Except as otherwise provided by statute or by a regulation adopted by the governing body of the library, the selection of library materials for inclusion in a library's collection shall be determined only by an employee of the library.
>
> (2) Except as otherwise provided by law or by a regulation adopted by the governing body of the library, the use of library materials shall be determined only by an employee of the library.

This statute, too, must yield to the FOIA ("Except as otherwise provided by statute …"). Further, the statute affords library employees with autonomy to select the materials offered by a library, and to place conditions on their use. It does not license librarians to disobey or disregard the FOIA.

D. "Constitutional Autonomy"

Finally, the University contends that under Article 8, §5 of the Michigan Constitution, "[l]egislative regulation that clearly infringes on the university's educational or financial autonomy must ... yield to the university's constitutional power." *Federated Publications v Mich State Univ Bd of Trustees*, 460 Mich 75, 87; 594 NW2d 491 (1999). In *Federated Publications* the Supreme Court determined that the law at issue (the Open Meetings Act, MCL 15.261 *et seq.*) "dictate[d] the manner in which the University operates on a day-to-day basis." *Id.* at 88. It therefore conflicted with Const 1963, art 8, §5, which conveys on the University the "constitutional power to supervise the institution." *Id.* No authority supports that application of the FOIA would similarly inhibit the University's ability to conduct its functions autonomously and in accordance with its constitutional role, and the University has failed to shed any light on that question here.[3]

III. CONCLUSION

The University's motion for summary disposition is DENIED. On its own motion, the Court hereby lifts the stay placed on the production of the *Vaughn* index, which must be provided within 28 days of the date of this order.

If the University needs more than 28 days to prepare an index, the Court anticipates that counsel will work cooperatively to stipulate to an extended date for the Court's approval. If this proves impossible, the Court will entertain a motion for an extension.

It is so ordered.

This is not a final order and it does not resolve the last pending claim or close the case.

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[3] The fact that the University of Michigan maintains a "Freedom of Information Act Office" also tends to discredit the University's constitutional argument.

Date: September 30, 2021

Elizabeth L. Gleicher
Judge, Court of Claims