STATE OF MICHIGAN
IN THE SUPREME COURT

HASSAN M. AHMAD, Plaintiff-Appellee,	:	Court of Appeals Case No. 341299
v.	:	
	:	Lower Court Case No. 17-000170-MZ
UNIVERSITY OF MICHIGAN, Defendant-Appellant.	:	Hon. Stephen L. Borrello

APPLICATION FOR LEAVE TO APPEAL

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STATEMENT IDENTIFYING JUDGMENT OR ORDER APPEALED

This is an application for leave to appeal from a decision by the Michigan Court of Appeals, issued on June 20, 2019 (**Tab 1**). The Court of Appeals reversed the Court of Claims' November 20, 2017 order granting summary disposition in Plaintiff's FOIA suit in favor of the University (**Tab 2**). This Court has jurisdiction pursuant to MCL 600.212; MCL 600.215(3); and MCR 7.303(B)(1) to review by appeal a case after a decision by the Court of Appeals. This timely application is being filed within 42 days of the Court of Appeals' filing of the opinion appealed from pursuant to MCR 7.305(C)(2).

QUESTION PRESENTED FOR REVIEW

Dr. John Tanton, a private citizen not affiliated with the University of Michigan or state government, donated papers to the Bentley Historical Library, an academic unit at the University of Michigan. Dr. Tanton made the donation subject to the condition that a subset of those papers be closed to public access until 2035. Plaintiff filed a FOIA request seeking immediate access to these documents. The Court of Claims dismissed Plaintiff's suit on the ground that the documents were not "public records" under FOIA. MCL 15.233(1). The Court of Appeals reversed, finding that the documents were "public records" under FOIA.

The question presented is:

Whether a private citizen's personal papers, that are donated to a public library on the condition that they be temporarily kept closed to public access, are "public records" under FOIA.

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INTRODUCTION

The University of Michigan (the "University") maintains a library system that is the largest research library in Michigan, and one of the largest in the United States. One of the crown jewels of that library system is the Bentley Historical Library, which collects and preserves records related to Michigan's history. Like virtually all libraries, Bentley accepts gifts from private donors of historically significant documents and makes them available to the public.

Dr. John Tanton, a private citizen not affiliated with the University or state government, donated 25 boxes of papers to Bentley, subject to the condition that ten of those boxes remain closed to public access until 2035. Such conditions are ubiquitous in gift agreements, and for good reason: they ensure that the public can have access to important documents while mitigating any harm from the release of those documents to people still living. Numerous Supreme Court Justices, including Chief Justice Rehnquist and Justices Blackmun, Jackson, Scalia, and Souter, have donated their papers subject to similar conditions.

Plaintiff Hassan Ahmad filed a FOIA request seeking immediate access to all of the Tanton papers—including those still closed to public access. The University denied the request in accordance with the terms of the gift agreement. Plaintiff then sued the University, seeking release of the documents under FOIA. The Court of Claims dismissed Plaintiff's claim, ruling that the Tanton papers—privately-created papers that the University was storing under lock and key—were not "public records" under FOIA.

The Court of Appeals reversed, holding that the Tanton papers *were* "public records." It reasoned that because the University was storing the Tanton papers for an official purpose—*i.e.*, to make them available to the public in 2035—those papers transformed into "public records" under FOIA that presumptively had to be made available to the public *immediately*.

The Court of Appeals' decision is manifestly wrong. In *Amberg v City of Dearborn*, 497 Mich 28; 859 NW2d 674 (2014), this Court held that "mere possession" of privately-created records by the government "is not sufficient to make them public records." *Id.* at 31. Here, the University is doing nothing more than storing privately-created documents. They were not created by the University, they were never used by the University, and they cannot conceivably shed light on the University's operations. Case law construing the federal FOIA similarly holds that privately-created records being stored in a library are not "public records"—even if the library is a government agency.

The Court should grant leave to appeal and reverse the Court of Appeals' misguided ruling. This case satisfies three of the criteria for Supreme Court review under MCR 7.305(B). First, "the issue has significant public interest and the case is one … against the state or one of its agencies or subdivisions." MCR 7.305(B)(2). The public interest in this case is clear: the Court of Appeals' decision will have the paradoxical effect of impeding public access to knowledge. If gift agreements requiring any period of delayed public access are deemed unenforceable under FOIA, no one will donate records to a public library under such an agreement, and the public will lose access to records of invaluable historical significance.

Second, "the issue involves a legal principle of major significance to the state's jurisprudence." MCR 7.305(B)(3). Because the Court of Appeals construed the phrase "public record"—the phrase defining the scope of FOIA with respect to all state agencies—the Court of Appeals' ruling improperly expands the scope of FOIA across all of state government.

Third, "the decision is clearly erroneous and will cause material injustice." MCR 7.305(B)(5)(a). As explained above, the Court of Appeals' decision is wrong. And the Court's decision will cause material injustice to the University: it threatens to force the University to breach

a donor agreement, and it improperly interferes with the University's constitutionally-protected autonomy on a matter at the heart of its academic function.

In view of the practical significance and harmful effect of the Court of Appeals' ruling, this Court's review is warranted.

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

The Bentley Historical Library is an academic unit at the University of Michigan. The University maintains the Michigan Historical Collections "for the purpose of collecting, preserving, and making available to students manuscripts and other materials pertaining to the state, its institutions, and its social, economic, and intellectual development." Ct. App. Op. **(Tab 1)** at 3 (quoting Board of Regents Bylaws, Sec. 12.04). Dr. John Tanton, a private citizen not affiliated with the University or state government, donated 25 boxes of papers to Bentley. *Id.* at 1. In accordance with the terms of the gift, Boxes 15-25 were to remain closed for 25 years from the date of accession—*i.e.*, until April 2035. *Id.* at 1 & n 1.

Plaintiff filed a FOIA request, seeking copies of the Tanton papers that were closed to public access. The University denied Plaintiff's request on the ground that the Tanton papers were not "public records" under FOIA. *Id.* at 2. The University explained: "As indicated on the Bentley Historical Library website, the restricted records are closed to research until April 2035. Thus, they are not utilized, possessed, or retained in the performance of any official University function." Compl. Ex. 7 **(Tab 3)**.

In later denying Plaintiff's administrative appeal, the University elaborated that "[t]hese Bentley Library records emanating from a private source are restricted and are not available to the university community or the public at this time by a valid charitable gift agreement with a donor. As such, they are not public records subject to disclosure under the FOIA and the University does not currently have the right to disseminate them." Compl. Ex. 9 **(Tab 4)**. The University also

explained that "violating the terms of the gift agreement in this manner would undermine the University's ability to fully achieve its educational mission, insofar as preserving the history of the state of Michigan is one important aspect of its academic mission and is directly related to the willingness of others (*e.g.*, legislators and judges) to donate their papers to the Bentley Library." *Id.* "Potential donors with key historical documents will be chilled by the University's failure to observe the limits expressly placed upon such gifts." *Id.*

Plaintiff sued the University in the Court of Claims. The University moved for summary disposition under MCR 2.116(C)(8), arguing that the Tanton papers did not meet the statutory definition of a "public record" under FOIA: a "writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function." MCL 15.232(i)(*i*). The Court of Claims granted the University's motion. The Court explained that "[t]he records are plainly possessed by the library, but this mere possession is not enough to render the records 'public' under FOIA." Ct. Cl. Op. (**Tab 2)** at 4. Rather, "[t]he records must be utilized by the public body in the performance of an official function, and the Court finds that the records have not been so utilized in this case." *Id.* The Court observed that "[r]eleasing the documents would not reveal any information regarding the affairs of the Library; rather, it would only reveal information regarding the affairs of Tanton, who is not a public body." *Id.* (internal quotation marks omitted). The court followed federal case law similarly holding that materials possessed by a public library are not "public records" under FOIA. *Id.* at 5-6.

The Court of Appeals reversed and remanded, holding that the Tanton papers were "public records" under FOIA. The Court of Appeals reasoned that "[t]he University's bylaws provide that the Bentley Library's historical collection is 'maintained for the purpose of *collecting*, *preserving*, and *making available to students* manuscripts and other materials pertaining to the state, its

institutions, and its social, economic, and intellectual development.'" Ct. App. Op. **(Tab 1)** at 3 (citation omitted). It stated that "the Library's actions were done *with the intention* that all three aspects of its stated purpose were to be fulfilled." *Id.* at 4. Thus, "the act of presently collecting and acquiring papers that the Library intends to preserve and make available to students at a future date would be in the performance of its official function." *Id.* Here, because "the Tanton papers were 'closed' to research until April 2035," "the University was holding the papers with the intent to open them to research (and students) at that later time." *Id.* at 5. The Court of Appeals concluded that the "University's acts of collecting and preserving the papers were in furtherance of its official purpose." *Id.* The Court of Appeals did not resolve the University's defense under the Michigan Community Foundation Act—a statute authorizing public libraries to accept gifts—and noted that the issue remained open on remand. *Id.* at 6 n 6. Nor did the Court address other defenses advanced by the University, including, among others, the University's defense that the application of FOIA would violate the University's right to autonomy under Article VIII, § 5 of the Michigan Constitution, and the University's defense under FOIA's personal privacy exemption, MCL 15.243(1)(a).

ARGUMENT

The Tanton papers are not "public records" merely because the University is storing them under lock and key. No one from the government has ever used them; nor do they shed light on anything the University (the relevant public body) has ever done.

This Court should grant review under MCR 7.305(B) because the Court of Appeals' decision will cause grave harm to public universities, other state agencies, and the public at large. If gifts like the Tanton Papers are deemed "public records" that must be disclosed under FOIA, then public universities will be forced to breach their agreements with donors to keep those papers

secret. As a result, public universities will be unable to enter into agreements with future donors—who will balk at giving gifts under terms that courts will refuse to honor. Preventing public universities from entering into gift agreements would infringe on their constitutionally-protected right to autonomy. And the Court of Appeals' decision would have the perverse effect of reducing public access to newsworthy documents—because if donors know that their gift agreements will not be enforced, they will not give gifts to public universities at all. Moreover, because the Court of Appeals interpreted the phrase "public record"—the phrase defining the scope of *all* state agencies' disclosure obligations under FOIA—the Court's decision will have wide ramifications across state government.

In view of the gravity of the Court of Appeals' error and the practical importance of the question presented, this Court should grant leave to appeal and reverse.

I. THE COURT OF APPEALS' DECISION IS WRONG.

The Court of Appeals erred in holding that the Tanton papers are "public records" under FOIA. The University did not create them, and it has never used or relied upon them. Nothing in those papers could conceivably shed light on the *University*'s operations. Put simply, they are not public records because they do not "record" any information that is "public." *See infra* Part I.A. The Court of Appeals' case law also conflicts with case law construing the federal FOIA. *See infra* Part I.B. The Court of Appeals' novel justification for its holding—that the University's possession of the Tanton papers for purposes of making them available *in the future* triggers an obligation under FOIA to make them available *immediately*—conflicts with FOIA's text and purpose. *See infra* Part I.C.

A. The Court of Appeals' Interpretation of "Public Record" Conflicts with the Text and Purpose of FOIA.

FOIA confers on members of the public the right to "inspect, copy, or receive" copies of "public records," unless a statutory exemption applies. MCL 15.233(1); *see* MCL 15.232(i)(*ii*) ("All public records that are not exempt from disclosure … are subject to disclosure under this act."). 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." MCL 15.232(i)(*i*).

FOIA also contains a preamble setting forth the statute's purpose:

> 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) (emphasis added). As this Court has recognized, FOIA should be construed in view of legislature's intent as expressed in the preamble. *See, e.g.*, *Mich Fed'n of Teachers & Sch Related Pers, AFT, AFL-CIO v Univ of Mich*, 481 Mich 657, 682 & n 65; 753 NW2d 28 (2008) (declining to construe FOIA in a manner that would not "further the state public policy undergirding the Michigan FOIA," and citing FOIA's preamble); *Kestenbaum v Mich State Univ*, 414 Mich 510, 522; 327 NW2d 783 (1982) (Fitzgerald, C.J., concurring in affirmance by equally divided court) ("[E]ach provision of the FOIA must be read so as to be consistent with the purpose announced in the preamble.").

When viewed in light of FOIA's preamble, the correct interpretation of "public record" is straightforward. A document is a "public record" if it records, or otherwise sheds light on, public activity. 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.*

The statutory definition of a "public record" is consistent with that intuitive analysis. According to that definition, an agency must engage in "the performance of an official function," *id.*—*i.e.*, public activity. MCL 15.232(i)(*i*). And the "writing" must be "prepared, owned, used, in the possession of, or retained by a public body *in* the performance of an official function." *Id.* (emphasis added). The italicized term—"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 official function. And in light of FOIA's purposes, it is clear what that relationship must be. The writing must record, or otherwise shed light on, public, governmental activity.

Under that definition, the Tanton papers are not public records. They do not record, or otherwise shed light on, anything the University is doing. True, the University is storing them pursuant to the terms of a gift agreement; but the mere storage of privately-created documents does not transform those documents into records of public activity. The Tanton papers are akin to documents in a time capsule, which are stored purely for the purpose of being displayed later on. No one would deem documents in a time capsule to be "public records" merely because a state agency buried the capsule. By the same token, the Tanton papers are not public records.

This Court's decision in *Amberg v City of Dearborn*, 497 Mich 28; 859 NW2d 674 (2014), confirms that the Tanton papers are not public records. In *Amberg*, the Court held that video surveillance recordings created by third parties, but received by government officials in the course of pending criminal misdemeanor proceedings, constitute "public records" under FOIA. *Id.* at 29-30. Crucially, the Court explained that "*mere possession* of the recordings by defendants is not

sufficient to make them public records." *Id.* at 31 (emphasis added). Rather, the recordings were public records because they were "collected as evidence" to "support [the] decision" to issue criminal misdemeanor citations. *Id.* at 32 (emphasis omitted). In other words, the recordings shed light on the "performance of a public function"—the issuance of misdemeanor citations. Here, the University is not using the Tanton papers to support or inform any official action. It is merely storing them. Therefore, they are not public records.

B. Federal Case Law Confirms that the Court of Appeals' Decision is Wrong.

Case law construing the federal FOIA is persuasive authority that the Court of Appeals' decision is wrong. 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*, 481 Mich at 678-79 (construing Michigan FOIA in light of case law construing federal FOIA); *Evening News Ass'n v City of Troy*, 417 Mich 481, 495; 339 NW2d 421 (1983) ("[T]he similarity between the FOIA and the federal act invites analogy when deciphering the various sections and attendant judicial interpretations" (quotation marks omitted)). Yet, although the University relied on this case law in the Court of Appeals, the Court of Appeals ignored it altogether.

In *Cause of Action v National Archives & Records Administration*, 410 US App DC 87; 753 F3d 210 (2014), the Financial Crisis Inquiry Commission, an entity not subject to FOIA, turned over certain records to the National Archives, an entity that is subject to FOIA. 753 F3d at 211-12. The question before the D.C. Circuit was whether those records were "agency records" under FOIA. *Id.* at 212. The D.C. Circuit had previously construed that term to encompass documents that are in "the agency's possession in the legitimate conduct of its official duties," *id.* (quotation marks omitted)—a definition virtually identical to the definition of "public records" in Michigan's FOIA. The D.C. Circuit held that the Commission's documents did not qualify as the National Archive's "agency records." The court explained that although "archivists review the

documents and make preservation decisions," those "typical archival functions … do not suddenly convert the records of a defunct legislative commission into 'agency records' able to expose the operations of the Archives 'to the light of public scrutiny.'" *Id.* at 215 (citation omitted). The court stated that "[t]he main function of the Archives is to preserve documents of enduring value," either "from any of the three branches of government" or "from private parties as a donation." *Id.* at 215-16 & n 6. It observed that "[t]he Archives does not use documents created in the three branches in any operational way, or indeed in any way comparable to any other federal agency. It may control them in a sense, but its control consists in cataloguing, storing, and preserving, not unlike a 'warehouse.'" *Id.* at 216. The court concluded that as a matter of "statutory interpretation and congressional intent," "Congress did not intend to expose legislative branch material to FOIA simply because the material has been deposited with the Archives." *Id.* Identical reasoning applies here. The Library is not using the Tanton papers "in any operational way." *Id.* It is merely "preserv[ing] documents of enduring value" that it received "from private parties as a donation." *Id.* at 215-16 & n 6. As such, they do not qualify as "public records" under Michigan's FOIA.

In *Cause of Action*, the D.C. Circuit relied heavily on *Katz v National Archives & Records Administration*, 314 US App DC 387; 68 F3d 1438 (1995)—a case that, like this case, involved a gift agreement. In *Katz*, President Kennedy's estate had transferred certain assassination photographs to the National Archives pursuant to a deed of gift. *Katz*, 68 F.3d at 1440-41. A FOIA requestor argued that he should be entitled to see those photographs because the deed of gift was invalid. *Id.* at 1441. The D.C. Circuit held that regardless of "the validity of the deed of gift," the photographs were not agency records. *Id.* The Court explained that "the Attorney General accepted the Kennedy family's donation of the materials to the Archives subject to the terms of the deed," and "the Archives has consistently obeyed the requirements of the deed." *Id.* at 1442.

Thus, the Court held that the materials were "presidential papers and not agency records." *Id.* "In other words, the depositing of these materials with the Archives did not convert them into 'agency records' subject to FOIA." *Cause of Action*, 753 F3d at 214 (discussing *Katz*'s holding). Here, likewise, Tanton created the Tanton papers, and the University is storing them in accordance with the gift agreement. Therefore, they are not public records.

Judicial Watch, Inc v Federal Housing Finance Agency, 396 US App DC 200; 646 F3d 924 (2011), is also instructive. In that case, the Federal Housing Finance Agency stored certain records disclosing how much money Fannie Mae and Freddie Mac had donated to political campaigns. 646 F3d at 925. But "no one at the FHFA ha[d] ever read or relied upon any such documents." *Id.* The D.C. Circuit found that the documents were not agency records subject to FOIA: "The public cannot learn anything about agency decisionmaking from a document the agency neither created nor consulted, and requiring disclosure under these circumstances would do nothing to further FOIA's purpose of 'open[ing] agency action to the light of public scrutiny.'" *Id.* at 927 (quoting *Dep't of Air Force v Rose*, 425 US 352, 372, 96 S Ct 1592, 48 L Ed 2d 11 (1976)). It observed: "Although we appreciate Judicial Watch's interest in how much money Fannie and Freddie gave to which politicians in the years leading up to our current financial crisis, satisfying curiosity about the internal decisions of private companies is not the aim of FOIA, and there is no question that disclosure of the requested records would reveal nothing about decisionmaking at the FHFA." *Id.* at 928. Those words could have been written for this case. Plaintiff may be interested in the content of Tanton's personal files, but they are not the University's "public records" because they reveal nothing about the University's decisionmaking.

The Ninth Circuit reached a similar conclusion in an opinion by then-Judge Anthony Kennedy in *SDC Development Corp. v. Mathews*, 542 F2d 1116 (CA 9, 1976). In that case, the

court held that medical writings in a reference library, stored in a computer data bank maintained by a federal agency, were not "agency records" under FOIA. *Id.* at 1117. The court explained that FOIA's purpose was to allow "the American people to obtain information about the internal workings of their government." *Id.* at 1119. It perceived "a qualitative difference between the types of records Congress sought to make available to the public by passing the Freedom of Information Act and the library reference system sought to be obtained here": "The library material does not directly reflect the structure, operation, or decision-making functions of the agency." *Id.* at 1120. The court also explained:

> Requiring the agency to make its delivery system available to the appellants at nominal charge would not enhance the information gathering and dissemination function of the agency, but rather would hamper it substantially. Contractual relationships with various organizations, designed to increase the agency's ability to acquire and catalog medical information, would be destroyed if the tapes could be obtained essentially for free.

Id. The same reasoning applies here. The Tanton papers do not reflect the "structure, operation, or decision-making functions" of the University. *Id.* And here, likewise, requiring the University to disclose the Tanton papers would hamper the University by destroying gift agreements requiring the University to disclose documents on specific terms. *See id.* The Court should therefore follow federal case law and hold that the Tanton papers are not public records.

C. The Court of Appeals' Reasoning Does Not Withstand Scrutiny.

The Court of Appeals did not grapple with the straightforward textual analysis or the federal case law explained above. Instead, it offered a contorted explanation that cannot be reconciled with FOIA's text or purpose.

The Court of Appeals reasoned that "the act of presently collecting and acquiring papers that the Library intends to preserve and make available to students at a future date would be in the performance of its official function." Ct. App. Op. **(Tab 1)** at 4. Here, because "the Tanton papers

were 'closed' to research until April 2035," "the University was holding the papers with the intent to open them to research (and students) at that later time." *Id.* at 5. Thus, the "University's acts of collecting and preserving the papers were in furtherance of its official purpose." *Id.*

This reasoning conflicts with FOIA's text and purpose. According to the Court of Appeals, "holding the papers" *was* an official function, because it was done "with the intent to open them to research" at a later time. *Id.* Thus, the University was not possessing the papers "in the performance" of some distinct official function to which the papers were related. Rather, according the Court of Appeals, the University was possessing the papers "in the performance" of the "official function" of *possessing the papers*.

Purely as a textual matter, the Court of Appeals' analysis does not work. A public record is "a writing … in the possession of … a public body in the performance of an official function." MCL § 15.232(i)(*i*). If the "performance of an official function" *is* the possession of the writing, then the following, garbled phrase would result: "a writing … in the possession of … a public body *in the possession of* [*the writing*]." *Id.* The statute makes sense only if the "performance of an official function" is distinct from the possession of the writing itself. For instance, in *Dearborn*, the "official function" was the issuance of misdemeanor citations, not the possession of videotapes. Likewise, if the University possessed a document setting forth the University's policy on accepting gifts, that document would undoubtedly be a "public record." It would shed light on "the performance of an official function" distinct from the storage of the document itself, *i.e.*, the University's policy on accepting gifts. By contrast, here, there is no distinction between the possession of the documents and the official function: according to the Court of Appeals, the possession of the documents *is* the official function. As a textual matter, it makes little sense to

say that the University is "possessing" the documents "in the performance of" possessing those very documents.

Indeed, the Court of Appeals adopted this exact view of the phrase "public record" in *Howell Education Ass'n MEA/NEA v. Howell Board of Education*, 287 Mich App 228; 789 NW2d 495 (2010). In *Howell*, the Court of Appeals held that teachers' personal emails being stored on a public body's computer back-up system were not "public records" under FOIA. The Court reasoned that "[t]here is nothing about the personal e-mail … which indicates that they are required for the operation of an educational institution." *Id.* at 236-37. It concluded: "[A]bsent some showing that the retention of personal e-mail has some official function other than the retention itself, we decline to so drastically expand the scope of FOIA." *Id.* at 238. Here, likewise, the Court of Appeals should have assessed whether the possession of the Tanton papers "has some official function other than the retention itself." *Id.* Because the possession of the Tanton papers *is* the official function, the Court should have held that those papers are not public records.

The Court of Appeals' decision also conflicts with FOIA's purpose. As already explained, the purpose of FOIA is to ensure public access to documents shedding light on the operations of government. The Tanton documents shed no light on the operations of the University. The Court of Appeals did not suggest that there was any policy rationale for requiring disclosure of the Tanton papers; it merely said it was bound to "construe the public policy choice which the Legislature has enshrined in current law." Ct. App. Op. **(Tab 1)** at 5 n 4. But a statute's purpose can inform the interpretation of the statute's text—especially where, as here, the statute includes a preamble setting forth that purpose which the Legislature has *also* "enshrined in current law." *Id.* Viewed against the backdrop of FOIA's purpose, FOIA's text cannot be stretched to encompass private records being stored in a library.

Finally, the Court of Appeals' reasoning would have absurd implications to other agencies—underscoring both that the Court's decision is wrong and that this Court's review is warranted. Under the Court of Appeals' theory, any document in a P.O. Box at a post office is a "public record." After all, one of the official functions of the post office is to store mail. Thus, under the Court of Appeals' view, the temporary possession of mail—as part of the "official function" of storing that very mail—transforms the mail into public records. Likewise, suppose a police department holds lost or stolen property—including documents—until the owners of that property can be located. The Court of Appeals' decision would imply that the police department's temporary possession of those documents transforms them into public records. In that scenario, the police department is physically possessing documents as part of its official function. Under the Court of Appeals' decision, this is sufficient to transform them into public records.

In these examples, the documents are not "public records" for an obvious reason. A public body's possession of documents—even as part of its official function—does not transform those documents into "public records," when those documents are privately-created records that do not shed any light on the operations of that public body. So too here: the University's possession of the Tanton papers—even for the purpose of archiving and preserving those documents for future use—does not make them public records.

II. THIS CASE WARRANTS THIS COURT'S REVIEW IN VIEW OF ITS GRAVE IMPLICATIONS FOR PUBLIC UNIVERSITIES AND OTHER AGENCIES.

This Court should grant review of the Court of Appeals' misguided ruling. First, "the decision is clearly erroneous and will cause material injustice." MCR 7.305(B)(5)(a). The Court of Appeals' ruling improperly interferes with public universities' ability to carry out their public duties. Second, "the issue has significant public interest[,] and the case is one by or against the state or one of its agencies or subdivisions." MCL 7.305(B)(2). The Court's decision will harm

the public by deterring legislators, judges, and others from donating their records to public libraries under gift agreements. Third, "the issue involves a legal principle of major significance to the state's jurisprudence." MCL 7.305(B)(3). The impact of the Court of Appeals' ruling cannot be confined to this case: the Court of Appeals' expansive definition of a "public record" could affect the operations of every public agency.

Granting review would be consistent with this Court's prior practice. This Court has previously granted public universities' applications for leave to appeal decisions adopting an improperly broad interpretation of FOIA. *See, e.g.*, *Mich Fed'n of Teachers, AFT, AFL-CIO v Univ of Mich*, 481 Mich 657; 753 NW2d 28 (2008) (granting University of Michigan's application for leave to appeal decision requiring disclosure of university employees' home addresses and telephone numbers); *State News v Mich State Univ*, 481 Mich 692; 753 NW2d 20 (2008) (granting Michigan State University's application for leave to appeal decision requiring disclosure of police incident report related to crime at university). And this Court has heard many other FOIA cases: indeed, very recently, the Court granted a motion for leave to appeal in a case concerning procedural aspects of FOIA. *Progress Mich v Att'y Gen*, 503 Mich 982; 923 NW2d 886 (2019). The Court should grant review in this important case as well.

A. The Court of Appeals' Decision Will Harm Public Universities.

The Court should grant review because the Court of Appeals' ruling will improperly prevent the University, and other public universities, from carrying out their public duties.

FOIA's goal is to allow public access to information. The University shares that goal. Indeed, the core purpose of Bentley—one of the University's public libraries—is to ensure public access to knowledge. The University honors gift agreements in order to advance that goal. Many donors like Dr. Tanton understand that their personal papers may be of interest to the public. But they recognize that immediate public disclosure of those papers may harm themselves or others.

They therefore donate to public libraries on the condition that their records be temporarily closed to public access. The University agrees to such conditions because otherwise, the donors would not donate their private records at all. Adherence to the terms of gift agreements therefore advances, rather than inhibits, the University's mission of advancing public knowledge.

The Court of Appeals' ruling would usurp public universities' ability to make those judgments. The Court of Appeals concluded the very act of possessing a document—even subject to the terms of a gift agreement—is the "performance of an official function," sufficient to transform the document into a "public record." But the Court of Appeals' decision has the perverse effect of nullifying the University's ability to engage in its *actual* official functions. Entering into gift agreements, and honoring gift agreements once they are signed, is unquestionably an official function of the University. Ordering disclosure of the Tanton papers under FOIA would require the University to breach the gift agreements it signed. Or, put another way: Even if the Court of Appeals was correct that possessing the Tanton papers was the "performance of an official function," it understood that official function too narrowly. The University's official function, at present, is to possess *and temporarily limit public access to portions of* the Tanton papers—because that is what the gift agreement *and its academic mission* require. The very act of disclosing those records would inherently mean that the University cannot perform those functions.

The Court of Appeals' ruling is especially troubling because it infringes on the University's core constitutional right of autonomy on a matter central to its academic mission of preserving knowledge. Article VIII, § 5 of the Michigan 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, "the Legislature may not interfere with the management and control of universities,"

and "[t]his Court has jealously guarded these powers from legislative interference." *Federated Publ'ns, Inc v Bd of Trs of Mich State Univ*, 460 Mich 75, 87; 594 NW2d 491 (1999) (internal quotation marks and citations omitted). Here, however, the Court of Appeals read FOIA so as to intrude on the University's core power to make academic, curatorial decisions and more broadly manage the affairs of its library. The lower courts did not resolve the University's constitutional objection to Plaintiff's FOIA request, and that issue would remain open on remand. Nonetheless, the University's constitutional objection is relevant to the statutory-interpretation question in this case in view of the principle that "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). Further, the profound implications of this case to the University's constitutionally-recognized autonomy is a powerful basis for granting discretionary review.

B. The Court of Appeals' Decision Will Harm the Public.

In addition to harming the University, the Court of Appeals' decision will harm the public. Gift agreements are socially beneficial because they ensure public access to private records of historical significance. Indeed, several Supreme Court Justices have donated records pursuant to such agreements. For instance, Justice Blackmun donated his papers to the Library of Congress in May 1997 on the condition that they would not be opened until five years after his death, while Justice Jackson similarly required that his papers be closed to public access for 30 years. Watts, *Judges and their Papers*, 88 NYU L Rev 1665, 1671 n 27, 1684 (2013). Those papers are now publicly available and are an unparalleled resource in understanding the deliberations underlying *Brown v Board of Education*, 347 US 483; 74 S Ct 686; 98 L Ed 873 (1954), *Roe v Wade*, 410 U.S. 113; 93 S Ct 705; 35 L Ed 2d 147 (1973), and other seminal decisions. Watts, 88 NYU L Rev at 1697-98, 1701. Other Justices have made their papers available for future scholars. For

instance, Chief Justice Burger's son donated his father's papers to the College of William & Mary on the condition that they remain closed until 2026. *Id.* at 1684. Chief Justice Rehnquist donated his papers to Stanford University on the condition that they be kept closed until during the lifetime of any Justice who served with him. *Id.* Justice O'Connor has similarly restricted access to her papers until the retirement of the Justices who served with her. *Id.* at 1682 n 92. Justice Scalia's family donated his papers to Harvard Law School, on the condition that they "will be made available for research on a schedule agreed upon by the Scalia family and the Harvard Law School library." *Scalia Family Donates Late Justice's Papers to Harvard Law School Library*, Harv Law Today (Mar. 6, 2017), https://today.law.harvard.edu/scalia-family-donates-late-justices-papers-harvard-law-library/. Justice Souter donated his papers to a historical society on the condition that they be kept closed until fifty years after his retirement. Watts, 88 NYU L Rev at 1671 & n 27.

If Plaintiff prevails in this case, any such gift agreement with a public university in Michigan will be unenforceable. The mere act of taking possession of private records will automatically transform those records into "public records" under FOIA, regardless of the terms of the gift agreement. This will not improve public access to information; rather, it will guarantee that no one will ever donate their papers to a public university ever again.

Instead, donors will destroy their records or donate them to private universities that are not subject to FOIA.[1] Alternatively, donors could donate them to a federal entity such as the Library of Congress, in view of the federal case law holding that such records are not public records under the federal FOIA. *Supra*, Part I.B. Notably, the Library of Congress has a strict policy of enforcing

[1] A well-known law professor, commenting on this case, reached the same conclusion. *See* Volokh, *Want to Donate Your Papers to a University, to Be Opened Some Years Later? Donate to a Private University, Not a Public One*, Reason (July 2, 2019), https://reason.com/2019/07/02/want-to-donate-your-papers-to-a-university-to-be-opened-some-years-later-donate-to-a-private-university-not-a-public-one/.

such gift agreements. As the Librarian of Congress has explained at a congressional hearing on the matter: "It is for the donor to decide when the collection is to be made available, and for us to carry out that determination. We have consistently, rigorously, scrupulously adhered to that principle." *Public Papers of Supreme Court Justices: Assuring Preservation and Access: Hearing Before the Subcomm. on Regulation and Gov't Info. of the S. Comm. on Governmental Affairs*, 103d Cong. 1, 7 (1993).

Donors of documents with historical significance to the State of Michigan should not be forced to donate their records to non-public institutions or to a federal agency in order for their wishes to be carried out. Michigan's public universities are recognized in the Michigan Constitution. They have a public mission and public responsibilities. The Bentley Historical Library is a public institution specifically devoted to preserving historical records about Michigan and its people. Bentley is the natural place for such records to be stored, and Michigan public figures should be able to donate their records to Bentley without the threat of FOIA litigation.

C. Although the University May Win on Remand, Review is Warranted.

The University does not concede that it will ultimately have to disclose the Tanton papers. The University asserted a defense under the Michigan Community Foundation Act, MCL 123.901 *et seq.*, which authorizes public libraries to accept gifts accordance to the terms of donor agreements. As the Court of Appeals expressly acknowledged, that defense remains open on remand. Ct. App. Op. **(Tab 1)** at 5-6 & n 6. The University also asserted, among other defenses, a constitutional objection to Plaintiff's FOIA request, and a defense under FOIA's personal privacy exemption, MCL 15.243(1)(a). If the Court denies review, the University would vigorously pursue those and other defenses on remand.

But although the University may yet win this case, the Court should grant review. It is possible that the University will prevail in the Court of Claims on narrow, case-specific grounds—

for instance, on the basis of the particular terms of the gift agreement with Tanton, or because the disclosure of these particular documents would unduly burden personal privacy. Such a ruling would leave intact the Court of Appeals' blanket ruling that *all* documents that the University collects or preserves for historical purposes are *automatically* public records.

Regardless of the outcome of proceedings on remand, that ruling will cause substantial harm to the University and other public universities. For one, the Court of Appeals' decision, if left intact, will have a chilling effect on future donors. Those donors will be aware that any donation of their private papers to a public institution will transform them into public records, presumptively subject to disclosure under FOIA. They will therefore donate to private universities or the federal government, rather than running the risk that the public university will be unable adhere to the terms of the gift agreement.

For another, the Court of Appeals' decision will also have a chilling effect on public universities seeking to enter into gift agreements. The Court of Appeals' decision will put universities who enter into gift agreements between a rock and a hard place. If they honor the agreements and refuse to turn over documents, they will be faced with FOIA litigation. If they acquiesce to the FOIA request and turn over the documents, they will be faced with a lawsuit by the donor for failing to adhere to the donor's wishes. Public universities will decline to enter into such agreements rather than face such dueling litigation—to the detriment of donors, the universities, and the public.

Finally, the effect of the Court of Appeals' ruling stretches beyond public universities. The Court of Appeals construed the phrase "public record" in FOIA. That phrase defines the scope of FOIA as applied to all public bodies, not just public universities. *See* MCL 15.233(1) ("Except as expressly provided in section 13, upon providing a public body's FOIA coordinator with a written

request that describes a public record sufficiently to enable the public body to find the public record, a person has a right to inspect, copy, or receive copies of the requested public record of the public body." (footnote omitted)). Thus, if the Court of Appeals' decision stands, then any time *any* agency—whether a library, a police department, or any other state institution—physically holds onto a privately-created document as part of its official duties, it will be deemed a public record subject to FOIA. Other state agencies will not be able to assert defenses specific to public libraries or to the facts of this case.

This Court should grant review and reverse the Court of Appeals' misguided and unprecedented interpretation of FOIA.

RELIEF SOUGHT

The application for leave for appeal should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on the 31st day of July 2019, he served a copy of Defendant-Appellant, University of Michigan's Application Leave to Appeal upon Plaintiff-Appellee, Hasson 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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