STATE OF MICHIGAN
IN THE COURT OF APPEALS

HASSAN M. AHMAD,
Plaintiff/Appellant

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

v.

THE UNIVERSITY OF MICHIGAN,
Defendant/Appellee
_______________________________________/

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APPELLANT HASSAN M. AHMAD'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION

The Michigan Court of Appeals has jurisdiction to entertain and adjudicate this appeal of right pursuant to MCR 7.202(6)(a), MCR 7.203(A)(1), and MCL 600.6446(1) as the November 20, 2017 *Opinion and Order* issued by the assigned Court of Claims judge constitutes a final order with an appeal by right.

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STATEMENT OF QUESTION(S) PRESENTED

I. Did the Court of Claims wrongfully assume a donor gift agreement actually exists between Dr. Tanton and the University, and wrongfully presupposes it actually restricts disclosure of boxes 15-25 of the Tanton Papers?

Appellant/Plaintiff Ahmad answers: Yes

II. Are public records only those documents that are "actively" used by public bodies?

Appellant/Plaintiff Ahmad answers: No, see MCL 15.232(e).

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INTRODUCTION

FOIA is a pro-disclosure directive to public bodies. *Herald Co v Bay City*, 463 Mich 111, 119; 614 NW2d 873 (2000). The standard is clear: unless expressly exempt, a public body must disclose a public record if provided with a written request that sufficiently describes the information sought. MCL 15.233(1). The primary question in this case is what constitutes a "public record?" Appellant Hassan M. Ahmad, an attorney, seeks copies of documents owned by the University of Michigan's Bentley Historical Library, which were originally donated by Dr. John Tanton. The University of Michigan denied the request, because it concluded the "Tanton Papers" are not public records. When challenged, the Court of Claims created its own self-made definition contrary to the express definition given by the Legislature. See MCL 15.232(e). This violates the black-letter rules of statutory construction, and reversal is required.

FACTS

On December 14, 2016, Appellant Hassan M. Ahmad, an immigration lawyer, made a *Freedom of Information Act* request for papers located in boxes 15-25 within the University of Michigan's Bentley Historical Library, which had been previously donated by Dr. John Tanton. **Ver Compl, ¶¶4, 8; Ver Compl, Exhibit 1**.[2] Dr. John Tanton is a well-known (and perhaps even notorious) public figure, who has founded and directed many organizations which helped shape current U.S. immigration policies. His contentions and proposed policies are also highly controversial. **Ver Compl, ¶¶12-17.** According to the Southern Poverty Law Center, Tanton "is the racist architect of the modern anti-immigrant

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[2] A copy of the Verified Complaint is attached as **Exhibit A** hereto (with the exhibits attached to the complaint included numerically labelled exhibits) and is provided for the Court's convenience.

movement." *John Tanton*, SOUTHERN POVERTY LAW CENTER, *available at* https://goo.gl/wwE8N8. He created a network of organizations – the Federation for American Immigration Reform (FAIR), the Center for Immigration Studies (CIS) and NumbersUSA – that have profoundly shaped the immigration debate in the United States. *Id.* The nature of his work'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* https://goo.gl/nCFh9u. This polarizing figure lived in Northern Michigan. Francis X. Donnelly, *Mich Man Who Lead Anti-Immigration Fight Nearly Forgotten*, THE DETROIT NEWS, Mar 15, 2017, *available at* http://detne.ws/2mHwjVj.

Typically, fulfillment of such a FOIA request is simple. However, the complication in this case derives from the fact that Dr. Tanton's papers from 1960 to 2007, stored in 25 boxes, were donated to the University with an alleged[3] contractual restriction dictating that boxes 15 - 25 are to be treated as non-public until April 6, 2035. ***John Tanton Papers: 1960-2007*, Bentley Historical Library, accessible at** https://goo.gl/aFKeJb. Boxes 1 - 14 are open without restriction. ***Id.*** The dispute in this case only involves those closed boxes numbered as 15 - 25, referred hereinafter as the "Tanton Papers." The Tanton Papers are completely owned by the University. ***Id.***; *see also* **Ver Compl, ¶20.**

Initially, the University acknowledged receipt of the FOIA request on December 22, 2016, and requested additional time to respond due to the voluminous nature of the documents requested. **Ver Compl, Exhibit 2.** Around the same time, the University also

[3] A copy of the donor agreement was never entered into the court record. See Argument, Section I, *infra*.

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requested the narrowing of the scope of the FOIA request premised on the voluminous number of records sought. **Ver Compl, ¶29.** Appellant Hassan M. Ahmad acquiesced after University officials assured him that his FOIA request would be fulfilled. **Ver Compl, Exhibit 5**; 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. **Ver Compl, Exhibit 6, p. 2**. Appellant Hassan M. Ahmad paid the total deposit demanded by check, which was cashed in late April 2017. **Ver Compl, Exhibit 6, p. 1**. Shortly thereafter on May 8, 2017, the University denied the FOIA request claiming the Tanton Papers were not "public records." **Ver Compl, Exhibit 7.** Appellant Hassan M. Ahmad immediately filed an administrative appeal. **Ver Compl, Exhibit 8.** Again, the head of the University (via special counsel to the President) affirmed the denial. **Ver Compl, Exhibit 9.**

In June 2017, Appellant Hassam M. Ahmad brought suit challenging the denial. He alleged that the University's "actions unlawfully and unilaterally shield public records from the Michigan FOIA by declaring donated papers sealed pursuant to an unknown, undisclosed charitable gift agreement,'" and "[n]o such charitable gift agreement appears on Defendant's Bentley Historical Library website." **Ver Compl, ¶¶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 any answer, the University filed for summary disposition pursuant to MCR 2.116(C)(8), offering various reasons why the suit should fail on the pleadings. Appellant Hassan M. Ahmad opposed. On November 20, 2017, the Court of Claims

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granted the University's motion and dismissed the case. **Opinion and Order, dated 11/20/2017.** According to the Court of Claims, "[t]here is no dispute that defendant is a public body or that the materials sought qualify as 'writings' under FOIA." ***Id.*, at 2.** That is correct. It also correctly concluded that "the fact that a writing is not a public record at the time it is created does not control the outcome with regard to whether it is a 'public record" under FOIA." ***Id*.** However, concluded the trial court, the Tanton Papers are not public records because documents held by a public body must be "*actively* used" in the performance of an official function to constitute a public record. ***Id.*, at 3** (italics in original). This appeal now follows.

STANDARD OF REVIEW

The interpretation and application of a statute is a question of law that is reviewed de novo. *Cardinal Mooney High Sch v Mich High Sch Athletic Ass'n*, 437 Mich 75, 80; 467 NW2d 21 (1991). This Court reviews de novo a trial court's decision on a motion for summary disposition. *DeFrain v State Farm Mut Auto Ins Co*, 491 Mich 359, 366; 817 NW2d 504 (2012).

FOIA causes an unusual twist for typical case procedures. As the defendant and public body, the University solely bears the burden of proving that the refusal/denial was properly justified under FOIA. MCL 15.240(4); *Federated Publications, Inc v City of Lansing*, 467 Mich 98, 109; 649 NW2d 383 (2002). A requester need not prove anything. If a public body fails to meet its burden, the Court must order disclosure. *Hopkins v Duncan Twp*, 294 Mich App 401, 409; 812 NW2d 27 (2011).

Here, the University brought its motion solely pursuant to MCR 2.116(C)(8). A motion brought under MCR 2.116(C)(8) tests the legal, *not factual*, sufficiency of plaintiff's claim. MCR 2.116(C)(8); *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999).

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

FOIA PRINCIPLES AND MEMORANDUM OF LAW

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

> It is the public policy of this state that all persons, except those persons incarcerated in state or local correctional facilities, are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees, consistent with this act. The people shall be informed so that they may fully participate in the democratic process.

MCL 15.231(2). FOIA provides "that 'a person' has a right to inspect, copy, or receive public records upon providing a written request to the FOIA coordinator of the public

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body." *Detroit Free Press, Inc v City of Southfield*, 269 Mich App 275, 290; 713 NW2d 28 (2005). "Under FOIA, a public body must disclose all public records that are not specifically exempt under the act." *Hopkins*, *supra*, at 409; see also MCL 15.233(1). "Nothing in the FOIA prevents an agency from providing information it is willing to disclose," *Mager v Dep't of State Police*, 460 Mich 134, 138 fn8; 595 NW2d 142 (1999), but if it is going to withhold public documents, it has to meet its burden and it is a "heavy" one, *Penokie v Michigan Technological Univ*, 93 Mich App 650, 663; 287 NW2d 304 (1979); *Kincaid v Dep't of Corrections*, 180 Mich App 176, 182; 446 NW2d 604 (1989)("The burden is a heavy one, and it is the duty of this Court to determine whether it has been met.").

A "public record" is a defined term. "Where a statute supplies its own glossary, courts may not import any other interpretation but must apply the meaning of the terms as expressly defined." *People v Schultz*, 246 Mich App 695, 703; 635 NW2d 491 (2001). A "public record" is defined as "a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function, from the time it is created." MCL 15.232(e). A "writing," in turn, broadly encompasses "handwriting, typewriting, printing, photostating, photographing, photocopying, and every other means of recording, and includes letters, words, pictures, sounds, or symbols, or combinations thereof, and papers, maps, magnetic or paper tapes, photographic films or prints, microfilm, microfiche, magnetic or punched cards, discs, drums, or other means of recording or retaining meaningful content." MCL 15.232(h). Writings include records kept as "electronic" copies and on computer tapes. *Ellison v Dep't of State*, 320 Mich App 169, 176; __ NW2d __ (2017).

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

ARGUMENT

The University's Bentley Historical Library has the express official governmental purpose of "collecting, preserving and making available…manuscripts and other materials pertaining to the state, its institutions, and its social, economic and intellectual development." Univ of Mich Bylaws, §12.04, *available at* http://regents.umich.edu/bylaws/bylaws12.html#7. The question this case presents is whether the Tanton Papers are public records under FOIA. The answer is clearly yes.

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I. **The Court of Claims errored in applying an impermissible judicial gloss on what are "public records."**

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

Appellant Hassan M. Ahmad has pled that the Tanton Papers are public records. **Ver Compl, ¶11** (Ahmad "submitted in the FOIA that the records still qualified as 'public records' within the meaning of the Michigan FOIA, that there was no qualifying exemption, and that strong public interest trumped any conceivable privacy interest."). He also pled the alleged charitable gift agreement between Dr. Tanton and the University has not been publicly disclosed. ***Id.*, ¶39.** Instead of filing an answer, the University brought a motion *solely* pursuant to MCR 2.116(C)(*8*).

When reviewing a (C)(8) motion, pled allegations and all reasonable inferences therefrom must be deemed true for purposes of analyzing the motion. *Teel, supra*, at 662. In its response, the University has *suggested* (but did not prove or provide) that a contract in the form of a donor gift agreement exists between the University and Dr. Tanton to keep these papers private. The likely reason is that the University's motion would have been converted from a (C)(8) to a (C)(10) motion, the latter of such is inappropriate to grant before discovery is complete. E.g. *Hasselbach v TG Canton, Inc*, 209 Mich App 475, 481-482; 531 NW2d 715 (1995). Yet, erroneously, the Court of Claims was not daunted in assuming a secrecy pact exists between the University and Dr. Tanton. No such donor gift agreement was ever produced, made part of the record, or had its provisions scrutinized. Thus, factual development is needed on whether the contract between Dr. Tanton and the University, in the form of a donor gift agreement, 1.) actually exists and 2.) actually provides for the restrictions the University suggests exist. We simply cannot assume the University's conclusion. The Court of Claims assuming the

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donor gift agreement exists and had restrictions was improper under a motion made pursuant to MCR 2.116(C)(8). This error warrants reversal.

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

Even if such a donor gift agreement exists, Appellant Hassan M. Ahmad argued it is void and unenforceable. *Brief in Support of Plaintiff's Response to Defendant's Motion to Dismiss*, pp. 14-15. Under Michigan law, a contract is valid "only if the contract performance requirements are not contrary to public policy." *Morris & Doherty, PC v Lockwood*, 259 Mich App 38, 54; 672 NW2d 884 (2003). The Legislature could not be clearer that a contract to withhold public records violates the public policy of Michigan—

> It is *the public policy of this state* that all persons...are entitled to *full and complete* information regarding the affairs of government and the official acts of those who represent them as public officials and public employees, consistent with this act.

MCL 15.231(2). In other words, a public body may not thwart FOIA disclosure by entering into a void contract, made in contravention of the public policy of this state, when the goal of the contracting parties is to circumvent the legislatively-mandated transparency requirements of this state. Prior binding precedence teaches that public bodies cannot use alternative arrangements or hide-the-ball techniques to turn public records into nonpublic records. See *MacKenzie v Wales Twp*, 247 Mich App 124; 635 NW2d 335 (2001)(public bodies "may not avoid their obligations under the FOIA by contracting for a clerical service that allows them to more efficiently perform an official function"); *Kestenbaum v MSU*, 414 Mich 510, 539; 327 NW2d 783 (1982)("a public body may not thwart disclosure under the FOIA by the simple expedient of sending sensitive documents home with its employees"). At this procedural posture (i.e. without a full lower court record), allowing public bodies, as a matter of law, to self-contract out of the Legislature's

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express requirement disclosure would directly contravene the public policy that the state of Michigan has enacted. Reversal is required.

II. Courts must apply the plain language of a statute; there is no requirement for *active* use of a public record under MCL 15.232(e) as a precondition to disclosure.

Taking the case one step further, even assuming *arguendo* that a contractual donor agreement exists between the University and Dr. Tanton to restrict access to University owned records, the Legislature has not created a 'contracting' exception to disclosure or to the definition of public records. **Ver Compl, ¶41.** A "public record" is a defined term and the courts must apply the definition given by the Legislature. *Schultz*, *supra*, at 703. The Legislature has decided that the University must disclose all non-exempt writings 1.) prepared, 2.) owned, 3.) used, 4.) in the possession of, *or* 5.) retained by a public body in the performance of an official function, from the time it is created. MCL 15.232(e). The official governmental purpose of the Bentley Historical Library is for "collecting, preserving and making available…manuscripts and other materials pertaining to the state, its institutions, and its social, economic and intellectual development." Univ of Mich Bylaws, §12.04, *available at* http://regents.umich.edu/bylaws/bylaws12.html#7. "[W]hat ultimately determines whether records in the possession of the public body are public records within the meaning of FOIA is *whether the public body prepared, owned, used, possessed, or retained them in the performance of an official function*." *Amberg v Dearborn*, 497 Mich 28, 32; 859 NW2d 674 (2014). As such, the Tanton Papers are writings—

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

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4. *retained* by the University in the performance of an official function.

Therefore, the Tanton Papers clearly are and within the definition of "public records" under MCL 15.232(e) via four of the five methods separately provided by the Legislature. As Appellant Hassan M. Ahmad accurately argued below,

> [he] need not prove that a record fits *all* of the criteria set forth in§15.232(e), but must show that it meets *at least one* of the criteria as set forth therein. The use of the modifier "or" in this instance creates an inclusive list of alternative possibilities.
>
> ***
>
> The instant [Tanton Papers] are either owned or possessed by [the University] in Bentley, and are definitively retained by Bentley.

Brief in Support of Plaintiff's Response to Defendant's Motion to Dismiss, pp. 8-9.

The Court of Claims misread and misapplied the definition of public records provided by the Legislature. It failed to analyze *each of the five methods* by which the Legislature deems writings to be public records, i.e. 1.) prepared, 2.) owned, 3.) used, 4.) in the possession of, *or* 5.) retained by a public body in the performance of an official function.[4] The Court of Claims clearly errored.

A. The Legislature has not differentiated active records from nonactive records.

Without directly applying the plain language of MCL 15.232(e), the Court of Claims opined that only those records that are "*actively* used in a public body's decision-making process" are public records. **Opinion and Order, dated 11/20/2017, p. 3.** This judicially-made differentiation does not appear in the definition of public records and no precedence has similarly made that conclusion. In fact, the "active" records standard created by the lower court is contrary to Supreme Court precedence because "what ultimately

[4] For example, the Court of Claims agrees the Tanton Papers "are plainly possessed by the library," but then incorrectly concludes "this mere possession is not enough to render the records 'public' under FOIA." The Legislature has said otherwise, see MCL 15.232(e).

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determines whether records in the possession of the public body are public records within the meaning of FOIA is whether the public body prepared, owned, used, possessed, or retained them in the performance of an official function." *Amberg*, *supra*, at 32. Under *Amberg*, the Supreme Court does not so differentiate between an active record and an inactive record, and neither should have the trial court. The bottom line is clear: perceived inactive use of existing government-held documents does not render them exempt from disclosure.

Moreover, this incorrect interpretation makes little practical sense. If active status were the standard under the law, any public records kept in records retention, filing cabinets, or backup hard drives of governments not recently touched by government workers would never be subject to FOIA's disclosure because a public body would simply claim document 'inactivity' and therefore is not a public record. Courts are to apply the law *as written*. *Allstate Ins Co v Dep't of Ins*, 195 Mich App 538, 547; 491 NW2d 616 (1992). The Court of Claims reading failed to do so, and also reaches an impermissible absurd result. *People v Tennyson*, 487 Mich 730, 741; 790 NW2d 354 (2010) ("[s]tatutes must be construed to prevent absurd results").

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

The University does bring up a good point. Disclosure could arguably breach the donor's gift agreement[5] which seemingly directs that certain of Dr. Tanton's papers would remain private. That may be true for this case. However, the University is presuming that

[5] As noted above, the gift agreement by Dr. Tanton has not been produced for this court record and this Court does not know what it actually says.

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the Legislature supports such secrecy agreements. FOIA law presumes the opposite. When the Legislature wanted to allow a public body to withhold public records, it creates an exemption under Section 13 of the Act. "[E]ach FOIA exemption, by its plain language, advances a separate legislative policy choice." *Mich Federation of Teachers & Sch Related Personnel v Univ of Mich*, 481 Mich 657, 680 fn63; 753 NW2d 28 (2008). Courts do not create new exemptions and the ones that have been created by the Legislature are "narrowly construed" with "the burden of proving its applicability on the public body asserting it." *Southfield*, *supra*, at 281. Seemingly here, no exemption applies.[6] There certainly is no donor gift exemption in today's current version of FOIA (see MCL 15.243), and thus any individual contracting with a public entity should realize that the transaction will be subject to public scrutiny. *Oakland Press v Pontiac Stadium Building Authority*, 173 Mich App 41, 45; 433 NW2d 317 (1988). The University's remedy here is with the Legislature and for that policy-making branch to decide whether (and to the scope of which) such agreements are in the best interests of the citizenry. Until then, this Court cannot assume the Legislature would do so. E.g. *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999)(The plain words of the statute are the best indicators of legislative intent). Additionally, the judiciary is not permitted to pass on the wisdom or fairness of a legislative enactment or, in essence, to enact correcting legislation to rectify a perceived inequity. *Heinz v Chicago Road Inv Co*, 216 Mich App 289, 308-309; 549

[6] Notwithstanding, the Court of Claims noted that it "need not decide defendant's conclusory assertion that the records meet the privacy exemption in MCL 15.243(1)(a)" when concluding the Tanton Papers are not public records. On remand, this Court may wish to direct the lower court to answer this unpreserved issued. For an issue to be preserved <u>*for appellate review*</u>, it must be raised, addressed, <u>*and decided*</u> by the lower court. *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 443; 695 NW2d 84 (2005).

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NW2d 47 (1996) (NEFF, J, concurring in part and dissenting in part). If the University wants a new exemption, it must petition the Legislature.

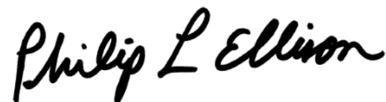
The records sought by Appellant Hassan M. Ahmad relate directly to the function of the University's Bentley library and have not been determined to fit within any exemption. In the absence of an exemption, the records must be ordered disclosed. MCL 15.233(1); MCL 15.240(4); *Hopkins*, *supra*, at 409. Reversal is required.

RELIEF REQUESTED

WHEREFORE, this Court is requested to reverse the misapplication of the definition of public records by the Court of Claims, vacate its order, and remand with instructions to proceed with this action. Upon remand, this Court is also directed to require the Court of Claims to address, if appropriate, the other forms of relief that are mandated by MCL 15.240(6), MCL 15.240(7), and MCL 15.240b.

Date: February 21, 2018

RESPECTFULLY SUBMITTED:



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