STATE OF MICHIGAN
IN THE COURT OF APPEALS

HASSAN M. AHMAD,
Plaintiff/Appellant

v.

THE UNIVERSITY OF MICHIGAN,
Defendant/Appellee
_________________________________/

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

PHILIP L. ELLISON (P74117)
OUTSIDE LEGAL COUNSEL PLC
Attorney for Appellant
PO Box 107
Hemlock, MI 48626
(989) 642-0055
pellison@olcplc.com

BRIAN M. SCHWARTZ (P69108)
MILLER CANFIELD
Attorney for Appellee
150 W. Jefferson Ave, Ste 2500
Detroit, MI 48226
(313) 496-7551

APPELLANT HASSAN M. AHMAD'S REPLY BRIEF

OUTSIDE LEGAL COUNSEL PLC
www.olcplc.com

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REPLY

I. This case was decided on a motion under MCR 2.116(C)(8) without a full court record or after the collection of all the facts following reasonable discovery.

This case was decided on singular grounds by the Court of Claims—that the disputed public records are not FOIAable unless they are "actively" used by a public body. The Court of Claims did not review the donor agreement. The Court of Claims did not conduct an *in camera* review, receive a detailed bill of particulars, or provide access to the records to counsel as required under *Evening News*. See *infra*. The trial court instead granted summary disposition under MCR 2.116(C)(8)—failure to state a claim before an answer was filed. This clearly was in error.

In response on appeal, the University of Michigan raises a whole host of unpled affirmative defenses which were never parsed out in discovery, were never addressed by the Court of Claims, and were raised improperly via the wrong procedural vehicle—a (C)(8) motion. While perhaps these excuses might ultimately prove valid (though Appellant gravely doubts so), the motion was not made under (C)(7) or (C)(10) after discovery—it was made under MCR 2.116(C)(8) before any answer was filed, affirmative defenses pled, or needed discovery had.[1] The only question under MCR 2.116(C)(8) is whether Appellant Hassan M. Ahmad pled a possible claim in his complaint. A disappointed requester "need only make a showing in [] court that the request was made and denied" to bring a FOIA lawsuit. *Pennington v Washtenaw Co Sheriff*, 125 Mich App

[1] At minimum, the University must produce the donor gift agreement between Dr. Tanton and Bentley library showing if there actually is or is not an agreement of certain papers being kept private. But even if so, Appellant Hassan M. Ahmad has alleged such an agreement is void on public policy grounds. See **Ver Compl, ¶¶39, 41**.

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556, 564-565; 336 NW2d 828 (1983). A motion for summary disposition brought pursuant to MCR 2.116(C)(8) tests the legal sufficiency of the allegations in the complaint alone, *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001), and construes those allegations in light most favorable to the plaintiff. *Teel v Meredith*, 284 Mich App 660, 662; 774 NW2d 527 (2009).

FOIA cases also have their own special judicial procedures. The Supreme Court in *Evening News Ass'n v City of Troy*, 417 Mich 481; 339 NW2d 421 (1983) established a multi-step process to deal with disputed FOIA records to counterweigh the inherent problems of (1) only the government knowing what is in the requested documents, (2) *the natural reluctance of the government to reveal anything it does not have to*, and (3) the fact that courts normally look to two equally situated adversarial parties to focus and illuminate the facts and the law. *Evening News, supra*, at 515. The Supreme Court explained that—

> Where one party is cognizant of the subject matter of litigation and the other is not, the normal common-law tradition of adversarial resolution of matters is decidedly hampered, if not brought to a complete impasse. If one adds to this the natural tendency of bureaucracies to protect themselves by revealing no more information than they absolutely have to, it is clear that disclosure becomes neither automatic nor functionally obtainable through traditional methods.

Id., at 514. Thus, the three-part process was identified as controlling:

> 1. The court should receive a complete particularized justification as set forth in the six rules; or
>
> 2. the court should conduct a hearing *in camera* based on *de novo* review to determine whether complete particularized justification pursuant to the six rules exists; or
>
> 3. the court can consider "allowing plaintiff's counsel to have access to the contested documents *in camera* under special agreement '*whenever possible.'*"

Id., at 516 (emphasis added). The 'Six Rules' are:

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1. The burden of proof is on the party claiming exemption from disclosure.
2. Exemptions must be interpreted narrowly.
3. The public body shall separate the exempt and nonexempt material and make the nonexempt material available for examination and copying.
4. Detailed affidavits describing the matters withheld *must* be supplied by the agency.
5. Justification of exemption must be more than "conclusory", i.e., simple repetition of statutory language. A bill of particulars is in order.
6. The mere showing of a direct relationship between records… is inadequate.

Evening News, supra, at 503. On this sparse and underdeveloped record, the Court of Claims did none of these steps, admittedly, because it prematurely errored in misapplying judicially-made definition of 'public records' instead of using the statutory definition (in defiance of the rules of construction). *People v Schultz*, 246 Mich App 695, 703; 635 NW2d 491 (2001)("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."). This Court must require the Court of Claims to use the Legislature's supplied glossary via MCL 15.232. *Id.* The proper remedy now is to vacate the dismissal and remand to allow this case to proceed in the normal course under the pleading procedures under the Court Rules and the processes outlined in *Evening News*.

II. The University raises new arguments not decided by the Court of Claims.

On appeal, the University raises a slew of affirmative defenses which it asserts warrants a decision in its favor on the merits without discovery or revealing the donor agreement. The Court of Claims dismissed for failing to state a claim; the University is seeking dismissal affirmance on a different legal basis, i.e. for affirmative defenses. It is seeking a decision on the merits not on the pleadings. The University never appealed or

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cross-appealed the Court of Claims' conclusion and thus the matter is not before this Court. MCR 7.207; *Rohl v Leone*, 258 Mich App 72, 77 fn2; 669 NW2d 579 (2003)("an appeal is limited to the issues raised by the appellant, unless the appellee cross-appeals as provided in MCR 7.207"); see also *Barnell v Taubman Co, Inc*, 203 Mich App 110, 123; 512 NW2d 13 (1993). The Court of Appeals sits as a court *of review*, not a court of first instance. In other words, the Court of Appeals is an error-correcting court, and that is its primary role in the judicial system. See *People v Gioglio (On Remand)*, 296 Mich App 12, 17; 815 NW2d 589 (2012), vacated in part on other grounds by 493 Mich 864 (2012). The proper role of the Court of Appeals is not to decide issues for the first time on appeal. E.g. *Calvert Bail Bond Agency, LLC v St Clair Co*, 314 Mich App 548, 557; 887 NW2d 425 (2016). When the specific disputed issue was not considered in the trial court, new argument "is not now open for appellate consideration." *Jamens v Shelby Twp*, 41 Mich App 461, 474; 200 NW2d 479 (1972); see also *Up & Out of Poverty Now Coalition v Michigan*, 210 Mich App 162, 168; 533 NW2d 339 (1995)("We are also mindful that this Court functions as a court of review that is principally charged with the duty of correcting errors"). As such, the University's merits arguments are best raised for the first time in the Court of Claims upon remand and this Court should currently decline to address them, on this record, at such an early procedural posture of the case.

III. If the Court is going to reach the arguments for the first time on appeal in the absence of pleading and with the lack of pled affirmative defenses, the Court should deny the University's arguments.

A. MCL 15.232(e) defines the Tanton Papers as public records.

As previously argued, a "public record" under FOIA is a legislatively-defined term and the courts must apply the definition given by the Legislature. *Schultz*, *supra*, at 703. In response, the University half-heartedly suggests that Bentley Library having

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possession of the records is not enough to render it a public record under MCL 15.232(e). This misconstrues Appellant's arguments. 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). Parsed out, the Tanton Papers are public records if they 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;
4. *retained* by the University in the performance of an official function.

The undisputed 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. Dr. Tanton was born, made career, and lived nearly his entire life in Michigan. **Ver Compl, Exhibit 3, p. 3.** As such, the Tanton Papers are clearly public records.[2] The University is making this issue far more complicated than it need be. This is merely a pure question of statutory interpretation. At minimum, because the Bentley Library has possession of the Tanton Papers in the performance of collecting, preserving and making available manuscripts and materials about Michigan's social, economic and intellectual

[2] The University never actually defends the Court of Claims actually holding which requires a public record to be *actively* used to fit within the definition of a public record under MCL 15.232(e). This is because it is impossible to go logically.

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development, it is a public record that can be only withheld if a proper exemption is asserted and proven.[3]

B. The guesses by the University of how a FOIA requester will utilize the Tanton Papers is legally irrelevant.

Next, the University argues that ordering production of public records in this case would frustrate the pro-disclosure purpose of FOIA by inhibiting the donation of private papers to public institutions. **Appellee Br, p. 24.** That makes no sense. It further asserts Appellant Hassan M. Ahmad's purpose for use in the *national* immigration debate is at odds with papers housed by a *state* institution. ***Id.*, at 25.** This argument is without legal merit. Suggested or guessed uses of the information requested under FOIA are irrelevant in the legal analysis, 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). The argument is a non-starter as the University's Bentley Library fully owns the Tanton Papers. **Ver Compl, ¶19; see also Ver Compl, Exhibit C, p. 2.**[4]

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[3] The University also points to various federal decisions made under the federal FOIA act. In this circumstance given the difference in definition/non-definition of public records, the federal decisions have essentially no applicability. See *Mager v Dep't of State Police*, 460 Mich 134, 144; 595 NW2d 142 (1999)(when the federal FOIA is worded differently than the corresponding state provision, federal decisions concerning the same are of "limited applicability" in Michigan).

[4] If Dr. Tanton wished to retained his privacy to a certain date, he could have arranged for the donation of his papers to the University later actually in April 2035 so that they do not become public records subject to mandatory disclosure. Dr. Tanton, as an individual contracting with a public entity, should realize that the transaction will be subject to public scrutiny. *Oakland Press v Pontiac Stadium Bldg Auth'y*, 173 Mich App 41, 45; 433 NW2d 317 (1988). As of current, Dr. Tanton's papers are undisputedly owned *publicly* vis-à-vis the Bentley Library.

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C. The arguments under the *Library Privacy Act* were never raised below and not before this Court.

Next, the University argues that the *Library Privacy Act* provides it exclusive authority to control access to library materials to the University and, by extension, not subject to FOIA. This argument was not raised by the University below and thus is not before this Court. *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 443; 695 NW2d 84 (2005).[5] Moreover, the argument is meritless. Appellant Ahmad acknowledges that "the use of library materials shall be determined only by an employee of the library." MCL 397.605(2). As an initial matter, Bentley Library has already given the ability to decide whether to use the Tanton Papers to the patrons for purposes of the *Library Privacy Act*. See **Ver Compl, ¶19.** But even more important, the same employee of a public body like Bentley Library must still comply with all of its other statutory obligations, including the *Freedom of Information Act*. The *Library Privacy Act* does not exempt donor materials from disclosure like other statutory schemes. See e.g. MCL 290.424a. The pass-through exemption of Section 13(1)(d) only applies when the records or information are "[1.] specifically described and [2.] exempted from disclosure by statute." MCL 15.243(1)(d). The Legislature knew how to do so but opted not to for library *materials* as it did for library *records*. MCL 397.603(1).

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[5] The University attempts to argue that this issue was waived because it was not challenged by Appellant in his primary brief. Undisputedly, the University never used it as its basis for summary disposition. However, a careful reading of the Court of Claims' decision shows that the lower did not use the *Library Privacy Act* as an exemption under FOIA but rather merely as mere support for its judicial reinterpretation of the term "public records." The real issue on appeal is the Court of Claims' addition of "actively" to uses under MCL 15.232(e).

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D. The University is subject to FOIA as a public body.

Next, the University raises a constitutional argument suggesting, without exactly saying, it is constitutionally exempt from the requirements of the *Freedom of Information Act*. This argument too is without merit. A public body subject to the statute expressly includes "any other body which is created by state authority." MCL 15.232(d)(iv). The University of Michigan Board of Regents constitute "a body corporate" created by the State Constitution. Const 1963, art VIII § 5. The University even publicly concedes it is subject to its provisions. *The University of Michigan Faculty Handbook*, Univ of Michigan Office of the Provost, *available at* http://provost.umich.edu/faculty/handbook/12/12.B.html (last visited Apr 18, 2018). The argument is a non-starter.

E. The Court of Claims properly declined to reach any decision on the personal privacy exemption, MCL 15.243(1)(a).

Lastly, the University argues that that disclosure of the Tanton Papers would constitute an unwarranted invasion of the donor's privacy rendering the Tanton Paper exempt from disclosure. The Court of Claims expressly declined to rule on this "conclusory assertion that the records meet the privacy exemption in MCL 15.243(1)(a)." **Opinion and Order, p. 7.** This was proper because claimed exemptions are affirmative defenses. *Detroit News, Inc v City of Detroit*, 185 Mich App 296, 300; 460 NW2d 312 (1990)("Exemptions are affirmative defenses to requests for documents."). Summary disposition pursuant to an affirmative defense is required to be made under MCR 2.116(C)(*7*); the University's pre-answer motion was made pursuant to MCR 2.116(C)(*8*). An affirmative defense cannot succeed unless the matters upon which it rests are proved with the burden of proof upon the defendant. *Booth Newspapers, Inc v Regents of the Univ of Michigan*, 93 Mich App 100, 108-109; 286 NW2d 55 (1979). For purposes of

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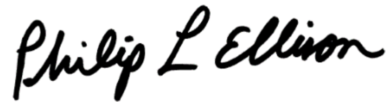
pleading in avoidance of MCR 2.116(C)(8), "a plaintiff need not anticipate an affirmative defense in its complaint and ordinarily is not obligated to respond to such a defense when it is raised by an opponent." *Id.,* at 109. As such, the issue was extremely premature and it was properly to be brought by the University so early in this case, including on this appeal.

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: April 18, 2018

RESPECTFULLY SUBMITTED:



OUTSIDE LEGAL COUNSEL PLC
BY PHILIP L. ELLISON (P74117)
Attorney for Appellant
PO Box 107 · Hemlock, MI 48626
(989) 642-0055
(888) 398-7003 - fax
pellison@olcplc.com

OUTSIDE LEGAL COUNSEL PLC
www.olcplc.com

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