STATE OF MICHIGAN

IN THE COURT OF CLAIMS

HASSAN M. AHMAD, ESQ.,

Plaintiff,

CASE NO: 17-000170-MZ

-v-

HON. STEPHEN L. BORRELLO

UNIVERSITY OF MICHIGAN,

Defendant.

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BRIEF IN SUPPORT OF PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS

Oral Argument Requested

INTRODUCTION

The express purpose of Michigan's Freedom of Information Act ("FOIA") is to provide individuals with the information regarding the "affairs of government," so that people may fully participate in the democratic process. The Freedom of Information Act requires the full and complete disclosure of all non-exempt "public records" which is only limited by twenty (20) narrowly construed statutory exemptions. Furthermore, the statute defines records which are both "private" and exempt from disclosure and places the burden of proving that documents are exempt squarely on the shoulders of the public body denying the request.

The Plaintiff, Hassan Ahmad, seeks documents which meet the statutory definition of "public records." The documents in question were donated by Dr. John Tanton to the University of Michigan's Bentley Historical Library ("Bentley"). The official function of the Bentley library is to collect, preserve and make available historical materials. In fact, the documents sought by Plaintiff are not only part of a larger set of papers and documents, parts of which are already made public, but are themselves scheduled to become public at a future date. The documents sought by Plaintiff (the "Closed Tanton Papers") relate directly to the function of the Bentley library and do not fall within privacy exemption.

I. STATEMENT OF FACTS

A. Dr. John Tanton and His Documents

Dr. John Tanton is, by all definitions, a public figure, who has founded, run and directed many organizations which helped shape current U.S. immigration policy. As a

testament to his public nature, and the nature of his work's influence on the goings-on of the government, an administrative aide to Ronald Reagan called Tanton, "the most influential unknown man in America."[1]

Many individuals with whom Dr. Tanton has worked, organized and collaborated with, in organizations such as FAIR, CIS, NumbersUSA, US Inc. and US English, have since become influential members of the current administration, and hold various public positions in the government. In fact, the former executive director of FAIR, Julie Kirchner, is now the ombudsman of USCIS.[2] FAIR's positions have strongly influenced current immigration policy, as can be seen by the case of the administration's "Declined Detainer Outcome Report.[3]"

The current President of FAIR has stated that the organization began working with Presidential Counselor Kellyanne Conway as far back as 1996, a time period where Dr. Tanton was heading and driving the organization.[4] He went on to further brag that

1 Jason DeParle, *The Anti-Immigration Crusader*, N.Y. Times, Apr. 17, 2011, *at* http://www.nytimes.com/2011/04/17/us/17immig.html (last visited Oct. 2, 2017).

2 Maria Santana, *Hard-line anti-illegal immigration advocates hired at 2 federal agencies*, CNN, Apr. 12, 2017, *at* http://www.cnn.com/2017/04/11/politics/trump-administration-immigration-advisers/index.html (last visited Oct. 5, 2017), *see also* Tess Owen, *Six Top Trump Advisers Have Ties To FAIR, A Radical Anti-Immigration Group*, VICE, May 3, 2017, *at* https://news.vice.com/story/trump-advisers-fair-immigration-jeff-sessions-kellyanne-conway (last visited Oct. 5, 2017).

3 Hassan Ahmad, *The New Trump List of ICE's Declined Detainers and Sample Crimes Is Just Xenophobic Propaganda*, Latino Rebels, Mar. 29, 2017, *at* http://www.latinorebels.com/2017/03/29/the-new-trump-list-of-ices-declined-detainers-and-sample-crimes-is-just-xenophobic-propaganda/ (last visited Oct. 5, 2017) ("Trump didn't come up with this on his own. At least as far back as July 2015, the right-wing think tank Center for Immigration Studies urged Congress to mandate local cooperation with ICE detainers, running through the same type of numerology seen in the DDOR. For those who may not be familiar, CIS began as an "independent" offshoot to FAIR, the Federation for American Immigration Reform.")

4 " "FAIR began working with Kellyanne Conway as far back as 1996, and we have used her for polling virtually every year since then," Dan Stein, FAIR's president, said. "We take it as a certain amount of personal pride, is that when she became the campaign manager for Donald Trump—first successful woman to lead, you know, a successful presidential campaign—she was possessed of intimate professional knowledge of the immigration issue as it related to the voter concerns. And we saw that

they could see the intimate knowledge they shared with Conway regarding their immigration concerns was being utilized in shaping Trump's statements and policies once Conway was added to his team.

Kris Kobach, current, Kansas Secretary of State, is of counsel to the Immigration Research Law Institute (IRLI), the legal arm of FAIR. Mr. Kobach was pictured with President Trump and listed as advising the president on strategic immigration plans for the first 365 days of the presidency. Kobach is also the architect of both the system to register nonimmigrant Muslim males[5] and Arizona's SB 1070 (largely struck down by the US Supreme Court). There is a volume in the sealed papers labeled "IRLI" which presumably holds papers of import relating to Mr. Kobach and many of the immigration issues instituted, constructed or otherwise advised upon by IRLI.

Dr. Tanton was a prolific writer, thought leader, and connector. His papers from 1960 to 2007 were donated to the University of Michigan's Bentley Historical Library and are currently located in 25 boxes. Boxes 1 - 14 are open without restriction, but boxes 15 - 25 are closed until April 6, 2035.[6] Dr. Tanton himself stated the purpose of

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influence helping to shape Donald Trump's positions and statements once she came on board." " Pema Levy, *Long Before Trump, Kellyann Conway Worked for Anti-Muslim and Anti-Immigrant Extremists*, Mother Jones, Dec. 9, 2016, *at* http://www.motherjones.com/politics/2016/12/kellyanne-conway-immigration-islam-bannon-trump/ (last visited Oct. 5, 2017).

5 Dara Lind, *Donald Trump's proposed 'Muslim registry,' explained*, Vox, Nov. 16, 2016, *at* https://www.vox.com/policy-and-politics/2016/11/16/13649764/trump-muslim-register-database (last visited Oct. 5, 2017) ("Kobach knows exactly what he's talking about. As a staffer in George W. Bush's Justice Department after 9/11, he led the effort to put together the National Security Entry-Exit Registration System, or NSEERS.")

6 "John Tanton Papers: 1960-2007." Bentley Historical Library, *at* https://quod.lib.umich.edu/b/bhlead/umich-bhl-861056?byte=53775665;focusrgn=contentslist;subview=standard;view=reslist (last visited Oct. 5, 2017).

releasing the papers to the University of Michigan was to prove that he and his colleagues were not "the unsavory types sometimes alleged."[7]

According to the Bentley Library, the Closed Tanton Papers hold, among other things: meeting minutes of FAIR from its inception in 1979, nine folders labelled "Pioneer Fund" (a group founded to "promote the genes of white colonials,"[8] that funds studies of race, intelligence and genetics), voluminous folders on immigration, including state-specific tomes, information on various other organizations including CIS and IRLI, as well as Dr. Tanton's correspondence.

In short, the sealed Tanton papers may shine a light onto the conceptual foundations of the current immigrant policy and directives as well as its strategic plans and key players. It may help us understand the origins of the groups currently informing White House immigration policy, and how the thought processes behind these policies evolved from Tanton's initial environmental concerns to official policies currently being promulgated. They would also shine a light into the operations and activities of the Bentley Historical Library, allowing the public to evaluate what documents Bentley finds historically significant, and whether Bentley is properly fulfilling its core purposes as a historical and research library.

B. Procedural History of Plaintiff's FOIA Request

Plaintiff filed the FOIA request which is the subject of this litigation on December 14, 2016. That FOIA request sought disclosure of all documents donated by

7 Jason DeParle, *The Anti-Immigration Crusader*, N.Y. Times, Apr. 17, 2011, *at* http://www.nytimes.com/2011/04/17/us/17immig.html (last visited Oct. 2, 2017).

8 Heidi Beirich, *The Nativist Lobby: Three Faces of Ignorance*, Southern Poverty Law Center, Jan. 31, 2009, *at* https://www.splcenter.org/20090201/nativist-lobby-three-faces-intolerance (last visited Oct. 5, 2017).

Dr. John Tanton located in boxes 15-25 which the Defendant had marked as "closed," which are currently located in the Bentley Historical Archive.

Defendant acknowledged receipt of the FOIA on December 22, 2016, and requested additional time to respond, due to the voluminous nature of the documents requested. Around the same time, Defendant requested Plaintiff to narrow the scope of his FOIA, stating the voluminous number of records sought. Plaintiff acquiesced to Defendant's request, after Defendant's agent assured Plaintiff that his request would be processed.

After Plaintiff submitted a revised and narrowed request, Defendant processed the same as an entirely new FOIA request, again requested more time for processing, and also requested a deposit from Plaintiff. Plaintiff forwarded the total sum of the deposit for the FOIA request to Defendant via check; the check was was cashed on April 25, 2017. On May 8, 2017, Defendant summarily denied Plaintiff's FOIA. On May 15, 2017, Plaintiff filed an appeal of that decision which was rejected by Defendant on May 30, 2017.

A. The Bentley Historical Library

The 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."[9]

9 University Board of Regent's Bylaws, Sec. 12.04, *available at* http://regents.umich.edu/bylaws/bylaws12.html#7 (last accessed Oct. 2, 2017). See also Defendant's Brief in Support of Motion to Dismiss p2 ¶1, footnote 1.

The documents currently sought are housed in the Michigan Historical Collections (the "Collection") and are subject to the legitimate public purpose of the Collection, which is to collect, preserve and make available documents and other materials. The documents donated by Dr. John Tanton to Bentley were sought by Defendant for many years, beginning as early as 1989.[10] As such, it is clear that Defendant has already acquiesced to the nature of the documents sought as materials pertaining to the state, its institutions, its social, economic or intellectual development (i.e. the public nature of these documents).

II. LAW AND APPLICATION

A. Standard of Review

MCR 2.116(C)(8) states that summary disposition is appropriate when a party has failed to state a claim upon which relief can be granted. Motions for summary disposition under MCR 2.116(C)(8) test the legal sufficiency of a claim. When deciding a motion under MCR 2.116(C)(8), the court is to accept as true all factual allegations and any reasonable inferences to be drawn from them. *Singerman v Municipal Serv Bureau*, 455 Mich 135, 565 NW2d 383 (1997); *Simko v Blake*, 448 Mich 648, 532 NW2d 842 (1995).

B. The Closed Tanton Papers are Clearly Within the Scope of the Freedom of Information Act

10 "Because of Dr. John Tanton's distinguished career as a conservationist, our library asked him for his papers." Letter from Kenneth Scheffel, Field Representative, Bentley Historical Library, University of Michigan, to Chevron Conservation Awards Committee (Nov. 29, 1989). *Available at* http://www.johntanton.org/docs/bentley_index_scheffel_letter.pdf (last accessed Oct. 5, 2017)

Michigan has long enjoyed a history, even prior to the codification of the Freedom of Information Act, of allowing citizens free access of public records. *See, e.g., Swickard v. Wayne County Medical Examiner,* 438 Mich. 536, 543 (1991) (quoting *Booth Newspapers, Inc v. Muskegon* Probate Judge, 15 Mich App 203; 166 NW2d 546 (1968). The Court in *Swickard* quotes the *Booth* court as stating "The fundamental rule in Michigan on the matter before us, first enunciated in the case of *Burton v. Tuite* (1889), 78 Mich 363 [44 NW 282], is that citizens have the general right of free access to, and public inspection of, public records." *Id*. The *Swickard* Court further quotes *Booth* as stating "The *Nowack* [*v. Auditor General*, 243 Mich 200; 219 NW 749 (1928)] decision has "placed Michigan at the vanguard of those states holding that a citizen's accessibility to public records must be given the broadest possible effect." *Id*. (internal citations omitted).

MCL 15.233(1) requires a public body to allow an individual to inspect, copy or receive copies of the "requested public record" of the "public body" which are not expressly excepted in Section 13 of the Act. MCL §15.232(e) defines public record in a FOIA request 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." (*Emphasis added*). MCL 15. §232(h) broadly defines writing as essentially any means of recording.

According to the plain language interpretation of the statute, the Plaintiff 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. As such, a document which

is either owned, possessed, or retained by a public body in the performance of its official function would be subject to access under the FOIA. The instant documents are either owned or possessed by Defendant in Bentley, and are definitively retained by Bentley.

Defendant has acknowledged that Bentley is a public body, and that its official purpose is to collect, preserve and make public materials of historic nature. Therefore, the fact that Defendant has collected these documents and preserved them in their archives meets the plain language of the statute as being either owned, possessed or retained by a public body, and therefore makes the closed papers subject to the reach of the FOIA.

a. The Defendant Has Implicitly Acquiesced to the Closed Papers Meeting Its Official Public Purpose

Defendant has, by soliciting, collecting, housing and preserving these documents, acquiesced to the fact that they meet its official purpose. It is incongruous to argue that the official purpose of Bentley is to collect and preserve documents of social, economic and intellectual import and then argue that these same documents do not fall within the "public purpose" of the institution. Defendant has implicitly acknowledged that these documents are public records of a historic import, such that they meet Bentley's stated purpose – the business of collecting and preserving. It is also true, that by making some of the documents obtained by Dr. Tanton accessible now, and the rest accessible at a later date, that Defendant has already further acknowledged, due to their historical import, that the documents are in fact public records, within the scope of their own public purpose, both now and at an already designated time in the future. This is reinforced by the Michigan Supreme Court's ruling in *Amberg v. City of Dearborn*.

Amberg dealt with a set of surveillance recordings obtained by the city for "a pending misdemeanor matter"; a citation for the misdemeanor in question was issued by the city before they obtained the recordings. *Amberg v. City of Dearborn*, 859 NW 2d 674, 676 (Mich. Sup. Ct. 2014). The Michigan Supreme Court noted that because defendants had "official purpose in acquiring" the documents at issue, the documents were considered public records within the reach of the FOIA, and denied defendants' motion for summary judgment on those grounds. *Id.*

b. The Defendant's Reliance on a "Use or Reliance" Requirement is Misplaced

Defendant's argument, that these documents are not *used* by them, is spurious at best. There is no requirement, based on a plain language interpretation of the statute, that the Defendant *use* these documents in any official, or unofficial capacity, in order to make them public records. Likewise, their assertion that only documents used in official decision making are public documents fails as well. As shown above, the Plaintiff must only show that these documents meet *at least* one of the criteria enumerated in MCL 15.232(e), not all of them, in order for the documents to be considered public records.

Defendant attempts to make a negative inference out of the court's decision in *Walloon Lake Water Sys v. Melrose Twp*, 163 Mich. App. 726, 731 (Mich. Ct. App. 1987), which held that a letter read to the town board was a public record because it was used to help the town board decide on a course of action in its official duties. It is the Defendant's contention that *Walloon* implies that if a document does *not* relate to an active decision on the part of a public body, it is not subject to disclosure. However, the instant case is readily distinguished from *Walloon*. In *Walloon*, the official purpose of

the Township's material is determined by the town board relying on the record when deciding whether or not to take affirmative action; this serves to distinguish between communications the town board received and documents that they used in enacting their official function. In the instant matter, however, one of the Defendant's official functions is to house exactly the types of historical documents donated by Dr. Tanton and sought by Plaintiff. Defendant is not tasked with conducting official business and decision making as the township in *Walloon* was. Instead of being a decision making body, it is a library whose official purpose includes the collection, preservation and dissemination of historic documents. *Walloon* never stated that *only* documents relating to decisions to act/not act would be under the purview of the FOIA, but rather should be read to indicate that those are a *category* of documents which fall under the scope of FOIA, emphasizing the scope rather than foreclosing all but a narrow category of documents. Indeed, the *Walloon* court emphasized that the court was following Michigan practice and tradition in "once again construing the FOIA liberally in order to enforce its stated objective..." *Id.* at 732.

This reading of the FOIA is reinforced by Michigan caselaw supporting the proposition that informational documents maintained by a public body are subject to FOIA, even when they are informational alone, and not used in a decision-making process. In *State Employee's Ass'n v Mich. Dep't. of Management and Budget*, 428 Mich. 104 (1987), the plaintiff sought to obtain records, including the home addresses of governmental employees. The Court ruled that since the records were public records subject to FOIA, and not an invasion of privacy, that disclosure under Michigan's FOIA act was warranted. It cannot be said that the addresses of employees were anything

more than a compilation of information created and held by the Michigan Department of Management and Budget. Absent from the opinion is any reference whatsoever to the governmental agency having used these addresses for an official decision making process, or that they related directly to the performance of the governmental agency – but nevertheless, they were still subject to the reach of the FOIA.

Defendant attempts to suggest that *Amberg* favors the usage requirement that they have created. However, Defendant's selective quoting elides over the crux of the *Amberg* decision as it relates to this case. The *Amberg* court recognized that even though the documents may not have been used in a decision-making capacity by the defendants, they still played a role in the official functions that the defendants exercised; while the Court of Appeals had held that the records in question were not subject to FOIA because "the defendants did not use the recordings in the performance of an official function," the Michigan Supreme Court disagreed, concluding that because the defendants had "official purpose in *acquiring them*," the records were subject to the FOIA. *Amberg,* 859 NW 2d at 676 (emphasis added). In the instant case, Defendant's purpose in acquiring the Tanton Papers (both open and closed) was identical; they were acquired together, as part of the same transaction. As the open Tanton Papers are public records, it would be illogical to conclude that the Closed Papers are not, ignoring the shared impetus for acquiring both.

C. Defendant's Own Intentional Failure to Meet Its Purpose Cannot Be Used as A Defense Against the FOIA Request

In the instant matter, the argument that the documents held are public records subject to the FOIA is strengthened by the explicit official purpose of Bentley Library: to

collect, preserve and make public documents of historical import. Defendant's own argument reinforces this fact when they acknowledge that, had they not sealed these documents, they would be considered public records.[11]

Defendant argues that since they themselves have decided that these documents are closed, they have unilaterally taken them out of the realm of public records, and they are asking the Court to look no farther than the Defendant's own decision. Allowing a public entity to determine whether or not a document is public, solely by determining when they will not follow their own by-laws and internal procedure, will surely frustrate the purpose and intent of Michigan's FOIA law.

According to their argument, Defendant is shielded from turning over these documents because it only adhered to two out of the three official functions, and they further attempt to cite a statutory construction argument to prove their point. This argument would set a duplicitous standard, allowing all governmental agencies to refuse to act within the scope of their official purpose, in order to keep information from the public by hiding behind a technicality. This argument, like the others utilized by Defendant regarding its use, fails; it is illogical for Defendant to claim that documents that it intends to make public at an already specified date, April 2035, pursuant to their express official purpose, currently do not meet the requirements for the same official purpose, especially in light of the fact that Bentley has already made some documents donated by Dr. Tanton public.

Indeed, Michigan FOIA caselaw has recognized the possibility that government bodies will attempt to circumvent the requirements of the FOIA and has chastised the

11 See Defendant's Brief In Support, p 9 ¶ 1 lines 1-3.

practice. In *MacKenzie v. Wales Tp.*, the Court of Appeals rejected the idea that tax record tapes created by a township's contractor, Port Huron, were not public records, noting that "Defendants may not avoid their obligations under the FOIA by contracting for a clerical service that allows them to more efficiently perform an official function." *MacKenzie v. Wales Tp.*, 635 NW 2d 335, 337 (Mich. Ct. App. 2001). Similarly, in Here, Defendant cannot avoid its obligations under the FOIA by attempting to contract around them through a donor gift agreement.

Defendant attempts to suggest that Bentley's role is more of a warehouse than an active party, disclaiming any role in selecting and curating the papers, analogizing the Closed Papers to "being stored in a time capsule, or even a locked backpack left in a reading room." Motion to Dismiss at 12. This suggestion, however, is belied by the fact that Bentley entered into an active agreement with Dr. Tanton regarding acquisition of the papers. If Bentley acquires documents, then chooses to put documents that it owns in a time capsule or in a backpack that it also owns (to then be locked and left in a reading room for purposes inscrutable), that does not shield it from producing the documents when subjected to a legitimate FOIA. The Michigan Supreme Court concluded over thirty-five years ago that "a public body may not thwart disclosure under the FOIA by the simple expedient of sending sensitive documents home with its employees." *Kestenbaum v. MSU*, 414 Mich. 510, 539 (Mich. Sup. Ct. 1982). The same principle applies here: a public body may not thwart FOIA disclosure by entering into a contract that circumvents it, such as the donor gift agreement. Under Michigan law, a contract is valid "only if the contract performance requirements are not *contrary to public policy." Morris & Doherty, PC v. Lockwood*, 672 NW 2d 884, 893 (Mich. Ct. App.

2003). MCL 15.231(2) clearly states that "[i]t 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) (emphasis added). The Michigan legislature has chosen to limit the reach of FOIA by specific exemptions, but "[o]n its express terms, the FOIA is a prodisclosure statute," and contracting out of this would directly contravene the public policy that the state of Michigan has put forth. *Herald Co. v. City of Bay City*, 614 NW 2d 873, 877 (Mich. Sup. Ct. 2000).

D. Defendant Fails to Meet Its Burden in Proving that the Closed Tanton Papers Are Exempt From Disclosure and Are Private Documents

Defendant argues that because it has determined that the Closed Tanton Papers are exempt from disclosure under FOIA's privacy exemption, the Court should dismiss Plaintiff's complaint under the standards of MCR 2.116(C)(8). However, this issue is not currently ripe for discussion under MCR 2116(C)(8), which (as Defendants note) centers on the legal sufficiency of the complaint, not upon legal decisions that the Defendant took in regards to Plaintiff's request. The proper time to assess whether an exemption was properly or improperly granted would be during the trial proper, not a pre-trial, pre-discovery motion to dismiss. Defendant has adduced no evidence to support its unripe claim that the exemptions apply; this is solely the argument of its counsel.

To the degree that this court chooses to address the exemption issue at this time, however, MCL §15.243(1)(a) allows for a public body to exclude records from a FOIA request if it is "information of a personal nature if public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy." However, it

is the public body's responsibility to "provide complete particularized justification, rather than simply repeat statutory language" for a record to be exempt. *Hyson v. Dept of Corrections*, 205 Mich. App. 422, 424 (1994).

Hyson clearly creates a burden shifting standard, where the Defendant is required to assert with particularity why these Closed Documents are of a private nature. Thus far, Defendant has failed to do so. Despite the attempts by Defendant to suggest that the burden currently lies with Plaintiff to show a public interest, the truth is that Defendant must prove these documents fall within the scope of the two-prong test as laid out in *Michigan Fed. Of Teachers v. University of Michigan*, 481 Mich. 657 (2008).

In *Rataj v. City of Romulus*, 306 Mich. App. 735, (2014), the Court used a two-prong test modified in *Michigan Fed. Of Teachers v. University of Michigan*, in applying §15.243(1)(a), to find that a video recording of an arrestee spitting on and using a racial slur against an officer, was a public record and subject to a FOIA request. The first part of the test allows an exemption from a FOIA request if the information is of a personal nature, based on applying MCL §15.243(1)(a). Personal nature is further defined as intimate, private, confidential, or embarrassing information, "as evaluated in terms of the customs, mores or ordinary views of the community." *Herald Co., v. Bay City*, 463 Mich. 111, 123-4 (2000). The Court found that that although the spitting and racial slur could be embarrassing for an officer, who wanted to keep the video exempt, is not sufficient to do so. *Rataj,* 306 Mich App at 753. In *Detroit Free Press v. City of Warren*, 250 Mich. App. 164, 168 (Mich. Ct. App. 2002), Defendant failed to prove how

revealing names of its officials and employees would "rise to the level of revealing intimate or embarrassing details."

Similarly, here the defendant argues, without presenting any corroborating evidence, that the records Dr. Tanton donated to the Bentley library contain intimate details that he wishes not to reveal for twenty-five years, or until April 6, 2035. He took legal steps to ensure that the University does not make them public by entering into a contract and not previously publishing them. However, Defendant does not provide more details on how the documents in question are private and intimate information that should not be revealed. Defendant claims that because his personal beliefs regarding immigration are in the records, they must be exempt. If Dr. Tanton permits the records to be made public in less than twenty-five years, why not make them public now? If not at this moment in time, then on April 6, 2035, the public will know of his personal beliefs. What changes will arise within these eighteen years that will make it acceptable to learn then what plaintiff seeks to learn now, besides it being Dr. Tanton's request? Defendant has not met the burden of proof to establish why these records cannot be made available at this very moment, beyond the fact that Dr. Tanton did not wish to them to do so.

The second part of the test in *Michigan Fed. of Teachers*, at 668, asks if disclosure of records would be an invasion of a person's privacy. To determine this, there must be a balancing test of the public interest in granting the FOIA request and the legislature's intent to protect privacy by allowing the exemption. *Id*. Plaintiff argues Dr. Tanton's records will help to reveal a more detailed insight on U.S. immigration policy. Defendant counters that making these records invade Dr. Tanton's privacy

because it was his specific request to keep them private for another twenty-five years.

However, it is a well-established tenet of Michigan FOIA law that "in all but a limited number of circumstances, the public interest in governmental accountability prevails over an individual's, or a group of individuals', expectation of privacy." *Rataj*, 858 NW at 125, quoting *Practical Political Consulting v. Secretary of State*, 789 N.W.2d 178, 193 (Mich. Ct. App. 2010). For example, neither the officer nor the arrestee in *Rataj* wanted the video to be made public. Indeed, the arrestee wrote a letter to the Romulus Police Department asking for all information related to the incident to be kept private. However, the Court of Appeals found that the **public interest outweighed the interest of the individuals,** because it shed light on the police department's conduct. Likewise, Dr. Tanton's request for privacy is outweighed by the public interest in learning more about U.S. immigration policies, especially since the current presidential administration has worked closely with Tanton affiliates in constructing its policies. Referring to the previous point, Dr. Tanton only requests that these records not be made public until 2035. There is no significant privacy difference in making them public then and making them public now; however, there is a strong public interest favoring granting access, especially since the papers contain relevant information regarding influential players in the federal political sphere, shaping current immigration policy. The public interest is also served in examining what documents the Bentley Library chooses to select for preservation and archival purposes. Examining the documents in question and comparing them to the gift agreement helps the public assess whether the Bentley library is making sound decisions about what documents to preserve, and whether the public interest is satisfied by the presence of onerous donor gift agreements.

Finally, the Michigan Supreme Court has concluded that FOIA exemptions must be interpreted *narrowly*, and that even if exemptions exist, the public body must separate exempt and non-exempt material, make the non-exempt material available, and provide detailed affidavits regarding the matter being withheld, including a bill of particulars regarding how the exemption is justified. *Evening News Ass'n v. City of Troy*, 339 NW 2d 421, 503 (Mich. Sup. Ct. 1983). The presence of an exemption cannot be used to justify the blanket denial of a FOIA request with no further information provided.

CONCLUSION

For the reasons stated above, Plaintiff respectfully requests this honorable Court, deny Defendant's Motion.

Respectfully Submitted,

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Dated: October 5, 2017

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of October, 2017, I mailed a copy of the foregoing Brief in Support of Plaintiff's Response to Defendant's Motion To Dismiss to counsel of record for Defendant:

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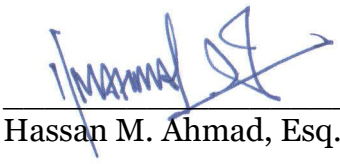

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