Founded in 1852
by Sidney Davy Miller

MILLER CANFIELD

Brian M. Schwartz
TEL (313) 496-7551
FAX (313) 496-8451
E-MAIL schwartzb@millercanfield.com

Miller, Canfield, Paddock and Stone, P.L.C.
150 West Jefferson, Suite 2500
Detroit, Michigan 48226
TEL (313) 963-6420
FAX (313) 496-7500
www.millercanfield.com

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November 3, 2017

VIA E-MAIL & U.S. MAIL - HMA@HMALEGAL.COM

Hassan M. Ahmad, Esq.
The HMA Law Firm, PLLC
7926 Jones Branch Drive, Suite 600
McLean, VA 22102

Re: Ahmad v University of Michigan
Case No: 17-000170-MZ

Dear Mr. Ahmad:

Enclosed please find Defendant's Reply Brief in Support of Its Motion to Dismiss.

Very truly yours,

Miller, Canfield, Paddock and Stone, P.L.C.

By
Brian M. Schwartz

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State of Michigan
In the Court of Claims

HASSAN M. AHMAD, ESQ,

Plaintiff,

v.

Case No. 17-000170-MZ

Hon. Stephen L. Borrello

THE UNIVERSITY OF MICHIGAN,

Defendant.

Hassan M. Ahmad, Esq, *Pro Se*
The HMA Law Firm, PLLC
7926 Jones Branch Drive, Suite 600
McLean, VA 22102
Tel: (703) 964-0245
Fax: (703) 997-8556
hma@hmalegal.com

Brian M. Schwartz (P69018)
Christopher M. Trebilcock (P62101)
Miller, Canfield, Paddock and Stone, P.L.C.
Attorneys for Defendant
150 West Jefferson, Suite 2500
Detroit, Michigan 48226
Tel: (313) 963-6420
Fax: (313) 496-845
schwartzb@millercanfield.com
trebilcock@millercanfield.com

Timothy G. Lynch (P77385)
Debra A. Kowich (P43346)
University of Michigan
Office of the Vice President and
General Counsel
Attorneys for Defendant
503 Thompson St Rm 5010
Ann Arbor, MI 48109-1340
(734) 764-0304

DATE 03/11/2017
REPLY IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

Oral Argument Requested

Plaintiff's response assumes the very thing he sets out to prove. But, he has not established that the sealed papers he seeks, which the University has never owned or possessed "in the performance of an official function," are "public records" subject to disclosure.

A. Production of the Closed Tanton Papers Would Not Satisfy FOIA's Purpose

Ordering disclosure would not be in keeping with the purpose of Michigan's FOIA, which is to provide this state's residents with information about the affairs of their state government, allowing them to "participate in the democratic purpose." MCL 15.231(2); *Amberg v City of Dearborn*, 497 Mich 28, 30 (2014). To fulfill that purpose, our FOIA "requires public disclosure of information regarding the formal acts of public officials and employees" in Michigan. *Booth Newspapers v Univ of Mich Bd of Regents*, 444 Mich 211, 231 (1993). Plaintiff's request has nothing to do with that purpose. Here, over the course of nearly three pages of his brief, Plaintiff concedes that he is seeking restricted papers housed by a ***state*** institution (the Bentley Historical Library) because he believes they may be relevant to the ***national*** immigration debate, including the formulation of the current presidential administration's ***national*** immigration policy. (Pl's Br at 2-5). But Bentley plays no role in federal immigration policy. Unsealing a donor's private papers (in contravention of the gift agreement) to satisfy Plaintiff's interest in ***national*** policy issues would shed no light on the actions of ***state*** government and thus do nothing to further the letter or spirit of Michigan's FOIA. Indeed, for the reasons noted below, it would undermine our FOIA's purposes.

B. Ordering Disclosure Would Contravene the University's Constitutional Autonomy Under Article VIII, §5 of the Michigan Constitution

Plaintiff's only remaining theory[1] – that obtaining the records might allow the public to

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[1] Plaintiff does not even really advance this theory. To the contrary, he mentions it in an unsupported throwaway line at the end of three pages outlining in detail why he really wants the

evaluate what records Bentley finds historically significant – is squarely foreclosed by the Michigan Constitution. Article VIII, §5 of the Michigan Constitution grants the University full autonomy to exercise jurisdiction over its educational mission. *Federated Publications v Mich State Univ Bd of Trustees*, 460 Mich 75, 87 (1999). Indeed, a "long series of Supreme Court decisions and Attorney General opinions ... established the independent authority of the universities to be free from legislative interference in the operation of their respective institutions." *Regents of Univ of Michigan v State*, 47 Mich App 23, 52 (1973).

Article VIII, §5 precludes Plaintiff from using the courts to assess Bentley's curation decisions or otherwise second-guess whether it is fulfilling its mission. Indeed, such an intrusion on the University's autonomy was foreclosed almost 150 years ago when the Supreme Court rejected legislative efforts requiring the University to appoint a professor of homeopathic medicine. *People v Regents of the Univ of Mich*, 18 Mich 469, 482 (1869).

The same constitutional provision grants the University autonomy in how it acquires and uses property. *See, e.g., Regents of Univ of Mich v State*, 166 Mich App 314, 329 (1988) (striking down state law precluding investment of University funds in certain countries on constitutional autonomy grounds). That authority includes the right of the University to enter into charitable gift agreements with restrictions. Here, Bentley has determined that allowing donors to put modest restrictions on their private papers – a common practice[2] – would most effectively further its mission of obtaining documents that would at some point be available to students, scholars, and the residents of Michigan. This is a decision for Bentley to make in its considered judgment, not Plaintiff. His arguments fail to recognize that, if Bentley cannot

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papers: to obtain information on national policy issues, not because he is looking to shed light on the actions of state officials. (Pl's Br at 5).

[2] (Defendant's Br at 15, n7).

exercise its discretion to accept gifts in such a manner, records will almost certainly go to private institutions which, unlike the University, have no obligation to share them with the public at some point.[3] In short, casting aside the terms of a validly entered charitable gift agreement and ordering disclosure of what are still private papers would foil FOIA's purpose ***and*** violate Article VIII, §5 because it would ultimately lead to fewer publically available historical records.

C. The Closed Tanton Papers Were Never Owned or Possessed "in the Performance of an Official Function."

Plaintiff does not establish that the records fulfill the statute's definition.[4] Initially, Plaintiff's cases have an active timing element, where the records were used or imminently would be used.[5] Nothing similar is occurring here. Other cases assumed that the documents met the statutory definition, without considering whether they were owned or possessed "in the performance of an official function."[6]

Plaintiff also misconstrues other cases. For example, his attempt to distinguish *Walloon Lake Water Sys v Melrose Twp*, 163 Mich App 726, 730–31 (1987) falls short. The letter in

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[3] The University is not attempting to "contract around" its FOIA obligations. In *MacKenzie v Wales Twp*, 247 Mich App 124 (2001), a case Plaintiff relies upon, the documents were used by the defendant and remained public records notwithstanding the defendant's decision to contract with an outside entity "to more efficiently perform an official function." *Id.* at 129. Here, the documents never became public records. Instead, Dr. Tanton decided to prevent certain documents from becoming public records for 25 years.

[4] Plaintiff falsely states that the University has "acknowledged" that the documents are "public records." (Pl's Br at 9). To the contrary, the University consistently asserts that the Closed Tanton Records fall outside the definition of "public record." (D's Br at 7-14).

[5] The recordings in *Amberg* were collected as evidence to support a current, active decision to issue a citation. *See* 497 Mich at 32. Contrastingly, the records here cannot be used by anyone for 25 years.

[6] For example, in *Booth Newspapers v Cavanaugh*, 15 Mich App 203 (1968), *Swickard v Wayne County Medical Examiner*, 438 Mich 536, 545 (1991) and *State Employees Ass'n v Mich Dep't of Mgmt & Budget*, 428 Mich 104 (1984), the courts assumed that the documents at issue were public records. Moreover, *Booth Newspapers*, a pre-FOIA case addressing access to records under the probate code, noted that the legislature "may … so restrict access providing definitions of 'public' as opposed to 'private' records." *Id.* at 207. The legislature did precisely that when it enacted FOIA, requiring that a document be, among other things, "owned" or "possessed" "in the performance an official function."

Walloon was made a part of the public body's official minutes, served as the basis for official action, and was therefore a public record. *Id.* at 731. Here, Plaintiff cannot tie the records to the "performance of an official function" because Bentley does not exist merely to acquire documents. Instead, unless a document is "collect[ed], preserv[ed], **and** ma[de] available,"[7] the documents are not possessed in the performance of an "official function."

Similarly, Plaintiff's broad assertion that "informational documents maintained by a public body are subject to FOIA," (Pl's Br at 11), is off-the-mark because it would require the conclusion that any private document possessed by a public body is subject to FOIA. But, as noted previously, mere possession is not enough. Instead, "documents can become public documents ***based on how they are utilized*** by public bodies." *Howell Ed Ass'n, MEA/NEA v Howell Bd of Ed*, 287 Mich App 228, 243 (2010) (emphasis added). Here, the documents were never "made available" and therefore need not be disclosed. Consequently, Plaintiff ignores that Bentley's archival work does not turn private documents into public records.

Finally, Plaintiff concedes that, if his interpretation of FOIA were correct, which it is not, any public entity would be required to dig up a time capsule if it received a FOIA request for records placed in the capsule, even if the entity was not owning or possessing the records "in the performance of any official function." (Pl's Br at 14). Such an interpretation would produce an absurd result, in violation of a well-recognized canon of statutory interpretation. *Luttrell v Dep't of Corr*, 421 Mich 93, 106 (1984) ("It is a recognized rule of statutory interpretation that the courts will not construe a statute so as to achieve an absurd or unreasonable result."). Overall, while Plaintiff focuses on physical possession, he ignores case law cited by the University establishing that mere possession is not enough and that "it is ownership, use, possession, or

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[7] (http://regents.umich.edu/bylaws/bylaws12.html#7) (emphasis added).

retention ***in the performance of an official function that is determinative***." *Detroit News* v *City of Detroit*, 204 Mich App 720, 724-25 (1994) (emphasis added).

D. The Privacy Exemption Restricts Access to the Closed Tanton Papers

FOIA's privacy exemption provides an alternative and independent basis for dismissal. The charitable gift agreement contains express provisions limiting access to certain documents for a period of time, limitations designed to protect Dr. Tanton's privacy.[8] It is well established that "[c]ourts must enforce an agreement as written absent an unusual circumstance, such as the contract's violating the law or being contrary to public policy." *Bill & Dena Brown Trust v Garcia*, 312 Mich App 684, 697–98 (2015). "The circumstances under which a contract provision can be said to violate law or public policy are … narrow." *DeFrain v State Farm Mut Auto Ins Co*, 491 Mich 359, 372 (2012). Here, nothing in FOIA prevents a charitable gift agreement from delaying the time during which a private document will become a public record.[9] The University does not have the right to make the documents publicly available and FOIA should not be used to subvert an otherwise enforceable private charitable gift agreement.

E. Conclusion

For the foregoing reasons and those set forth in its initial Motion and Brief, the University requests that the Court dismiss Plaintiff's Complaint, in its entirety, with prejudice.

Respectfully submitted,
By: ______________________
Attorney for Defendant

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[8] These contractual provisions provide the "particularized justification" for the claimed exemption. *Hyson v Dept of Corr*, 205 Mich App 422, 424 (1994). Providing details of those documents, as Plaintiff suggests, would undermine the purpose of sealing.

[9] *Rataj v City of Romulus*, 306 Mich App 735 (2014) is distinguishable because that case dealt with a request by a citizen to shield a public record (a video of an arrestee) from disclosure. This case addresses whether a private citizen can prevent his own records from becoming public in the first place. Consequently, unlike in *Rataj*, the private nature of the records will not "shed light on the governmental agency's conduct or further the core purposes of FOIA." *Id.* at 751.

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Hassan M. Ahmad, Esq, *Pro Se*
The HMA Law Firm, PLLC
7926 Jones Branch Drive, Suite 600
McLean, VA 22102
Tel: (703) 964-0245
Fax: (703) 997-8556
hma@hmalegal.com

Brian M. Schwartz (P69018)
Christopher M. Trebilcock (P62101)
Miller, Canfield, Paddock and Stone, P.L.C.
Attorneys for Defendant
150 West Jefferson, Suite 2500
Detroit, Michigan 48226
Tel: (313) 963-6420
Fax: (313) 496-845
schwartzb@millercanfield.com
trebilcock@millercanfield.com

Timothy G. Lynch (P77385)
Debra A. Kowich (P43346)
University of Michigan
Office of the Vice President and
General Counsel
Attorneys for Defendant
503 Thompson St Rm 5010
Ann Arbor, MI 48109-1340
(734) 764-0304

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a copy of the foregoing **DATE 03/11/2017 REPLY IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS** upon the following via U.S. Mail, postage prepaid and email, on November 3, 2017:

Hassan M. Ahmad, Esq, *Pro Se*
The HMA Law Firm, PLLC
7926 Jones Branch Drive, Suite 600
McLean, VA 22102
hma@hmalegal.com

Respectfully submitted,

MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.

By: ______________________________
Brian M. Schwartz (P69018)
Attorneys for Defendant
150 West Jefferson, Suite 2500
Detroit, MI 48226
(313) 963-6420
schwartzb@millercanfield.com

Dated: November 3, 2017

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