STATE OF MICHIGAN

COURT OF CLAIMS

HASSAN A. AHMAD,

Plaintiff,

v

THE UNIVERSITY OF MICHIGAN,

Defendant.

OPINION AND ORDER

Case No. 17-000170-MZ

Hon. Stephen L. Borrello

Pending before the Court is defendant's motion for summary disposition under MCR 2.116(C)(8). For the reasons stated more fully in this Opinion and Order, defendant's motion for summary judgment is GRANTED. This matter is being decided without oral argument pursuant to LCR 2.119(A)(5).

I. BACKGROUND

In this FOIA action, plaintiff seeks records created and donated by a private individual, Dr. John Tanton, to the University of Michigan's Bentley Historical Library ("the Library"). Tanton's donation to the Library consisted of 25 boxes of papers. Boxes 1-14 were donated with no restrictions on their use. Boxes 15-25, however, are to be closed—meaning inaccessible to the public, students, or faculty—until approximately April 6, 2035.

In December 2016, plaintiff filed a FOIA request seeking the documents in Boxes 15-25, as well as any other "closed" materials. Plaintiff subsequently narrowed this request in January 2017, but still sought "closed" materials. Defendant denied the request on or about May 8, 2017,

contending that the materials sought were not "public records" as defined by FOIA. As an alternative, defendant argued that, even assuming the materials were "public records," they were exempt from disclosure under MCL 15.243(1)(a), which exempts from disclosure materials of a personal nature.

II. ANALYSIS

MCL 15.233(1) permits the inspection, upon written request, of "public records" of a public body. The purpose of FOIA is to provide persons with access 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 15.233(2). In light of the statute's stated purpose, FOIA has often been described as a pro-disclosure statute, and any interpretation of its provisions must be made with that purpose in mind. *Hopkins v Duncan Twp*, 294 Mich App 401, 410; 812 NW2d 27 (2011).

FOIA defines "public record" to mean "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." There is no dispute that defendant is a public body or that the materials sought qualify as "writings" under FOIA. Although the records in this case were prepared by a private individual and thus were not public records at the time of their creation, 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. In fact, "[a] writing can become a public record after its creation." *Detroit News, Inc v Detroit*, 204 Mich App 720, 725; 516 NW2d 151 (1994).

A writing can become a public record subject to FOIA depending on its use by the public body. *Hopkins*, 294 Mich App at 409-410. In order for a writing to become a public record, the

public body must do more than merely possess the record. *Id.* "[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). Thus, the Court's inquiry focuses on how or if the writings "are utilized by public bodies." *Howell Ed Ass'n*, 287 Mich App at 243.

In this case, the issue is whether materials possessed by a library are utilized by the public body in the performance of an official function. The parties have not identified any Michigan caselaw directly on point. Nonetheless, this state's appellate courts have, in answering the question of whether a writing is utilized in the performance of an official function, generally found such utilization in the context of a document that was *actively* used in a public body's decision-making process. For instance, in *Amberg*, 497 Mich at 32, a surveillance video that was found to have been used to help support the decision to issue a misdemeanor citation was used in the performance of an official function. In addition, in *Walloon Lake Water Sys, Inc v Melrose Twp*, 163 Mich App 726, 729-730; 415 NW2d 292 (1987), a letter became a public record when it was read aloud into the record at a public meeting and its contents were subsequently used by the township board in its decision-making process. The Court in *Walloon Lake* explained that its holding intended to capture within the definition of "public records" records or writings "used or possessed [by public bodies] in their decisions to act." *Id.* at 730.

Contrastingly, in *Hopkins*, 294 Mich App at 411-412, a public official's personal notes taken during a township board meeting—notes that were neither shared with anyone else nor utilized by the Board—the Court of Appeals held that the notes were not taken in the performance of an official function. In addition, in *Howell Ed Ass'n*, the Court of Appeals was

tasked with deciding whether private e-mails that were "captured in a public body's e-mail system's digital memory" became public records. Although it was apparent that the e-mails were used or retained, the Court of Appeals held that the e-mails were not so used or retained in the performance of an official function. *Id.* at 436. Merely saving and retaining the e-mail messages was not enough. *Id.* at 243.

Turning to the instant case, the Court concludes that the records sought by plaintiff are more akin to those sought in *Howell Ed Ass'n* and *Hopkins* and that the records are not used or maintained in the performance of an official function. The records are plainly possessed by the library, but this mere possession is not enough to render the records "public" under FOIA. The records must be utilized by the public body in the performance of an official function, and the Court finds that the records have not been so utilized in this case. Releasing the documents would not reveal any information regarding the affairs of the Library; rather, it would "only reveal information regarding the affairs" of Tanton, who is not a public body. See *Howell Ed Ass'n*, 287 Mich App at 246. Indeed, as the parameters of the donation agreement attest, Library staff members do not even have access to view the materials, thereby rendering dubious the assertion that the Library has done more than merely possess the records, and negating any assertion that the Library has applied the materials to an official function. Moreover, releasing the papers would not only violate the terms pursuant to which they were given to the library, but it would also permit the use of FOIA to interfere with the Library's statutory authority to determine the use of its own materials. See MCL 397.605(2) ("Except as otherwise provide by law or a regulation adopted by the governing body of the library, the *use of library materials* shall be determined only by an employee of the library.") (Emphasis added).

The Court agrees with defendant that this conclusion is in accord with federal authorities that have decided similar issues.[1] In general, materials that are purely reference materials or research materials do not fall within the ambit of "agency records" that are subject to disclosure under the federal FOIA. See, e.g., *Tax Analysts v United States Dep't of Justice*, 845 F2d 1060, 1069 (DC Cir, 1998). For instance, in *SDC Dev Corp v Matthews*, 542 F2d 1116, 117 (1976), then-Judge (now Justice) Anthony M. Kennedy wrote for the Ninth Circuit, which concluded that a reference library of medical writings and publications was not an "agency record" as contemplated by FOIA. The Ninth Circuit explained that "[t]he library reference material does not directly reflect the structure, operation, or decision-making functions of the agency . . . ." *Id.* at 1120. In *Baizer v United States Dep't of Air Force*, 887 F Supp 225, 228-229 (ND Cal, 1995), a case that relied heavily on *SDC Dev Corp*, the Northern District of California held that material maintained "solely for reference purposes or as a research tool" was not an "agency record" subject to FOIA. Such materials, like museum materials, are only used for reference and exhibition purposes, and do not serve the same purpose as the types of records to which Congress intended the federal FOIA to apply. *Id.* at 229. In so concluding, the *Baizer* Court noted that the information requested in that case was not withheld in order for the agency to protect its own information. *Id.*

The United States Court of Appeals for the D.C. Circuit has reached similar conclusions in cases involving materials held at the National Archives. For instance, in *Katz v Nat'l Archives & Records Admin*, 68 F3d 1438, 1441 (DC Cir, 1995), autopsy photographs of President John F.

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[1] "Federal court decisions regarding whether an item is an 'agency record' under the federal freedom of information act, 5 USC 552, are persuasive in determining whether a record is a 'public record' under the Michigan FOIA." *Hopkins*, 294 Mich App at 414.

Kennedy were not transformed into "agency records" by merely depositing the photographs with the Archives. See also *Cause of Action f Nat'l Archives & Records Admin*, 753 F3d 210, 215 (DC Cir, 2014), quoting *Dep't of Air Force v Rose*, 425 US 352, 361; 96 S Ct 1592; 48 L Ed 2d 11 (1976) ("[T]ypical archival functions—common to every record in the Archives—do not suddenly convert the records . . . into 'agency records' able to expose the operations of the Archives "to the light of public scrutiny.' ").

In light of the absence of Michigan caselaw directly on point, the Court finds these federal authorities particularly convincing. The records sought in this case are held by the Library as reference material, and therefore outside the scope of the records to which Michigan's FOIA was intended to apply. See MCL 15.232(e) (defining "public records.").[2] The Library's mere possession of the records in this archival fashion does not establish the requisite relationship between the records and the official function of the public body.

Plaintiff would have this Court find that defendant's mere possession is enough to satisfy the definition of "public records," because the Library's official function is to possess records. The Court declines to adopt such a view, and instead finds persuasive the views espoused in the federal authorities documented above. Additionally, the Court finds that plaintiff's argument contradicts the stated general purpose of FOIA statutes to inform citizens "about what their government is up to." *U.S. Dep't of Justice v Reporters Comm for Freedom of the Press*, 489 US 749, 773; 109 S Ct 1468; 103 L Ed 2d 774 (1989) (internal quotation marks and citation

[2] For the avoidance of doubt, this Court's opinion should not be construed as applying to material beyond reference material, nor should it be construed as giving public bodies license to withhold materials that would otherwise be within the scope of FOIA simply by referring to them as being "closed" from access for any period of time.

omitted). See also *Rataj v City of Romulus*, 306 Mich App 735, 748; 858 NW2d 116 (2014) (describing the purpose, in a similar fashion, of the Michigan FOIA statute). Simply paraphrasing, the library materials sought in this case plainly do not have the capacity to inform the citizenry about what the Library "is up to."

Because the Court concludes that the records are not public records within the meaning of FOIA, the Court need not decide defendant's conclusory assertion that the records meet the privacy exemption in MCL 15.243(1)(a).

IT IS HEREBY ORDERED that defendant's motion for summary disposition is GRANTED.

This order resolves the last pending claim and closes the case.

Dated: November 20, 2017,

Stephen L. Borrello, Judge
Court of Claims