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May 16, 2017
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VIA EMAIL
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President's Office, c/o Liz Barry
University of Michigan
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RE: APPEAL OF FOIA DENIAL (AHM 0633-16)

Dear Mr. Schlissel and Ms. Barry:

Pursuant to §10(1)(a) of the Michigan Freedom of Information Act (FOIA), this is an appeal of a denial of a FOIA request made by the undersigned. Attached to this appeal is a lawsuit that will be filed in the Michigan Court of Claims after 20 business days from today (on or about June 14, 2017) or on the date of your decision to uphold the denial, whichever is sooner.

PROCEDURAL HISTORY

On December 15, 2016 the undersigned properly filed a FOIA request with the University of Michigan (“the University”) seeking “all documents donated by Dr. John Tanton, Donor #7087, located in Boxes 15 – 25, and any others marked 'closed' at the Bentley Historical Archive (BHA) [sic] at the University of Michigan.” The University requested additional time to respond to the FOIA request on December 22, 2017. The undersigned was aware that the request sought records marked “closed” until April 2035, but argued 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 public interest trumped any conceivable privacy interest.

On January 5, 2017 Patricia Sellinger, chief FOIA officer, called the undersigned to inquire whether the FOIA request might be limited in any way, claiming it was “voluminous.” On the same day, the undersigned complied with the request in good faith and narrowed the scope of the request by excluding some of the named records as listed on the Bentley Historical Library (BHL) website.

During that conversation, the undersigned specifically asked Ms. Sellinger whether the University would deny the FOIA request, given that they were marked closed until 2035. She responded, “We would not be having this conversation if we weren't going to process it.” The undersigned relied on Ms.

Sellinger's representation that the records would be produced in good faith.

The University treated the narrowed request as a new FOIA request and, after asking for additional time, responded with a cost estimate on January 27, 2017. The undersigned obtained the required deposit of \$6,417 and sent the funds to the University, which were received and cashed on April 25, 2017.

On May 8, 2017, the University denied the FOIA request, finding the requested records not to be “public records” within the meaning of the Michigan FOIA because they were marked closed, and thus not utilized, possessed, or retained in the performance of any official University function. In its denial, the University claimed that this determination was made *subsequent* to receiving the fee deposit.

ARGUMENT

The University's determination that the records are not “public records” within the meaning of the Michigan FOIA is incorrect as a matter of law.

In *Amberg v. City of Dearborn*, 859 NW 2d 674 (Mich. 2014), the Michigan Supreme Court considered whether the Court of Claims correctly upheld denial a FOIA request. The request in *Amberg* consisted of video surveillance recordings created by third parties but received by defendant, a public body, during pending criminal proceedings, and the Court of Claims found they did not constitute “public records.” In reversing the Court of Claims, the Michigan Supreme Court found the crucial component is “whether the public body prepared...or retained them in the performance of an official function.”

In the instant case, it is beyond dispute that the records are in the possession of the University and that the University is a public body. It is likewise beyond dispute that the requested records were acquired by the University for an official purpose. Indeed, the mere fact they are listed on the BHL website suffices to show same. At issue is whether, by being marked “closed,” they ceased to be utilized, possessed or retained in the performance of an official University function. The official function is the research purposes of the University.¹ The fact that the records are under seal or closed is not apropos here.

There is simply no provision in the Michigan FOIA for a public body to utilize, retain or possess records pursuant to an official function and subsequently unilaterally shield them from FOIA by marking them “closed.” Whatever right the University may have to restrict files from research as an administrative matter, it cannot override the law. As *Amberg* notes, even if the items are not in use at the time of the FOIA, they may still be discoverable through a FOIA: “...even if the recordings did not factor into defendants' decision to issue a citation, they were nevertheless collected as evidence by defendants to support that decision.” *Id.* at 677. Michigan courts have consistently interpreted the FOIA as an act requiring full disclosure of public records unless a statutory exemption precludes the disclosure of information. *See, e.g., Messenger v. Dep't of Consumer & Industry Services*, 238 Mich.App. 524, 531, 606 N.W.2d 38 (1999). Moreover, FOIA exemptions are narrowly construed, and it is squarely the University's burden here to prove that the exemption's applicability is consonant with the purpose of the FOIA. *Manning v. East Tawas*, 234 Mich.App. 244, 248, 593 N.W.2d 649 (1999).

¹ Indeed, the donor himself, Dr. John Tanton, reproduced a letter from Kenneth Scheffel, former archivist at the BHL, dated November 28, 1989. That letter stated: “Because of Dr. John Tanton's distinguished career as a conservationist, **our library asked him** for his papers.” (Emphasis added.)

Based on the foregoing, we respectfully request that the denial be overturned and the records be produced forthwith.

We also request that all documents currently listed on the BHL website as “on loan to donor” *also* be provided, as they also fall into the definition of “public record” within the meaning of the Michigan FOIA. We would request formal acknowledgment by the University that copies of said documents exist. According to information on the BHL website as of today's date, these include:

Box 18: (Federation for American Immigration Reform)

Board meeting minutes 1978-1989, 1993, 1998-1999 (5 folders)

Reports to the Board 1979-1996 (4 folders)

Summer Summit 1989-1990 (2 folders)

Box 22: (WITAN)

Meetings 1986-1988

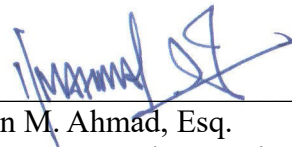
Box 23: (Immigration Reform Law Institute)

Meetings and reports 1986-1990 (3 folders)

Lastly, we would note that the estimated timeframe to respond (18 months) is egregiously long and would request that you order the FOIA office to comply with the request in 30 days.

Respectfully,

THE HMA LAW FIRM, PLLC



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