

STATE OF MICHIGAN
IN THE SUPREME COURT

MICHIGAN FEDERATION OF TEACHERS &
SCHOOL RELATED PERSONNEL, AFT,
AFL-CIO,

Plaintiff-Appellee,

SC Case No. 133819

COA Case No. 258666

LC Case No. 04-000314-CZ

v

UNIVERSITY OF MICHIGAN,

Defendant-Appellant.

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BRIEF OF AMICUS CURIAE WAYNE COUNTY
IN SUPPORT OF DEFENDANT-APPELLANT UNIVERSITY OF MICHIGAN

PROOF OF SERVICE

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JURISDICTIONAL STATEMENT

Amicus Curiae Wayne County accepts the jurisdictional statement of Defendant-Appellant.

QUESTION PRESENTED FOR REVIEW

ARE THE HOME ADDRESSES AND TELEPHONE NUMBERS OF PRIVATE CITIZENS WHO WORK FOR PUBLIC EMPLOYERS EXEMPT FROM DISCLOSURE PURSUANT TO THE "PRIVACY EXEMPTION" OF THE MICHIGAN FREEDOM OF INFORMATION ACT, MCL 15.243(1)(a)?

THE TRIAL COURT ANSWERED	YES
THE COURT OF APPEALS ANSWERED	NO
PLAINTIFF-APPELLEE ANSWERS	NO
DEFENDANT-APPELLANT ANSWERS	YES
<i>AMICUS CURIAE</i> WAYNE COUNTY ANSWERS	YES

STATEMENT OF FACTS

Amicus Curiae Wayne County accepts the facts presented by the Defendant-Appellant.

STANDARD OF REVIEW

Defendant-Appellant's appeal involves an issue of statutory interpretation that is reviewed de novo. *Abela v General Motors Corp*, 257 Mich App 513, 518; 669 NW2d 271, 274 (2003), *aff'd*, 469 Mich 603; 677 NW2d 325 (2004). The grant or denial of a motion for summary disposition is also reviewed under a de novo standard. *MacDonald v PKT, Inc*, 464 Mich 322, 332; 628 NW2d 33, 37 (2001).

ARGUMENT

I

All Public Employers, Including Wayne County, Have A Significant Interest In The Issue Presented In This Case

Amicus Curiae Wayne County has a significant interest in protecting the private information of its employees. It also has a strong interest in insuring that the application of the Michigan FOIA is consistent with its legislative purpose. Wayne County also believes that the "solution" proposed by the Court of Appeals for protecting certain of its employees from the potential "threat, harm, or peril" is unwieldy and expensive.

Specifically, the Court of Appeals placed the burden on all public employers to determine "whether any of [their] employees . . . have demonstrated 'truly exceptional circumstances' to prevent disclosure of names, addresses and telephone numbers."

Michigan Federation of Teachers v Univ of Michigan, unpublished opinion per curiam of the Court of Appeals, issued March 22, 2007 (Docket No. 258666), at p 3. In order to do this, a public employer would have to broadcast to all of its employees that a request for their personal information has taken place. Then, each of the employees¹ would have to be offered the opportunity to prove that there is a "truly exceptional circumstance" that should result in non-disclosure of his or her home address and telephone number. The public employer would have to devote time to review each of these claims for individual merit.

At that point, the public employer would presumably deny the FOIA request to the

¹ Public employers often employ thousands of people.

extent that it agrees with any individual employee's demonstration of "truly exceptional circumstances." If the FOIA requestor doesn't agree with this determination, then the public employer would be forced into a position of litigating each request for protection. At that point, a court would have to pass on each individual claim and grant injunctive relief to those claims that it believes are deserving.

Such a solution would result in a great expenditure of public time and money, none of which could be passed on to the requestor. The fact that such a procedure should be deemed necessary at all speaks volumes toward the fact that the Court of Appeals reached the wrong result in this case. The private addresses and telephone numbers of persons who happen to work for a public employer should not be available to the public at large through the Michigan FOIA in the first instance. The disclosure of such information does nothing to further the public's interest in learning about the inner workings of government or the official acts of public employees.

II

The Court Of Appeals Incorrectly Interpreted The Michigan FOIA To Require The Release Of The Personal Addresses And Telephone Numbers Of Private Citizens Who Work For A Public Employer

A. Statutory Interpretation

This Court has consistently held that when interpreting a statute, one must look to its specific language. The role of a court is to determine the legislative intent from the words expressed in the statute. *Koontz v Ameritech Svcs, Inc*, 466 Mich 304, 312; 645 NW2d 34, 38 (2002). Statutory construction must be reasonable and must consider both "the purpose of the statute and the object sought to be accomplished." *Frankenmuth Mut*

Ins Co v Marlette Homes, Inc, 456 Mich 511, 515; 573 NW2d 611, 613 (1998).

When the intent of a statute is unambiguously conveyed, judicial construction is not permitted. *Koontz*, 466 Mich at 304; 645 NW2d at 38. A court must give effect to every word, phrase, and clause of a statute, and interpretations that render any portion of a statute surplusage or nugatory is to be avoided. *Id.* Undefined terms are given their ordinary meaning, and a dictionary may be consulted to aid in their definition. *Id.*

B. The Privacy Exemption

The Michigan Court of Appeals analyzed the Plaintiff-Appellee's request for the personal addresses and telephone numbers of University of Michigan ("U of M") employees under the privacy exemption of the Michigan FOIA. *Michigan Federation of Teachers, supra*; MCL 15.243(1)(a). That exemption allows a public body to withhold public records that contain "[i]nformation of a personal nature if public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy." *Id.*

There is no dispute that U of M is a public body as defined by MCL 15.232(d). There is also no dispute that records containing employee information are public records, since they are writings that are "prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function . . ." MCL 15.232(e). However, the Court of Appeals reached the wrong result in deciding that the privacy exemption requires disclosure of the personal addresses and telephone numbers of U of M employees.

The privacy exemption of the Michigan FOIA has been distilled into two factors. First, the requested information must be of a "personal nature." *Bradley v Bd of Educ of the Saranac Comm Schools*, 455 Mich 285, 294; 565 NW2d 650, 654 (1997). This factor

is evaluated in terms of the “customs, mores, or ordinary views of the community.” *Bradley*, 455 Mich at 294; 565 NW2d at 655. If the requested information is deemed not to be of a personal nature, then there is no need for further analysis. *Id.* at 295; 565 NW2d at 655. The term “personal” was interpreted by the Court of Appeals in this case to mean an “intimate or embarrassing” detail of a individual’s life. *Michigan Federation of Teachers, supra*, at p 3.

The second factor allows a public body to withhold the requested information if its disclosure would be a “clearly unwarranted” invasion of privacy. *Bradley*, 455 Mich at 294; 565 NW2d at 654. In determining whether this factor applies, a balancing test is used, which test has been borrowed from federal law. *Mager v Dept of State Police*, 460 Mich 134, 144; 595 NW2d 142, 147 (1999). Specifically, the public interest in disclosure is balanced against the protected privacy interest, and the only relevant public interest is whether the core purpose of FOIA would be furthered by release of the information. *Mager*, 460 Mich at 144-45; 595 NW2d at 147 (citation omitted).

That purpose, however, is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency’s own conduct. . . . [Where] one private citizen is seeking information about another – the requestor does not intend to discover anything about the conduct of the agency that has possession of the requested records. Indeed, response to [such a] request would not shed any light on the conduct of any Government agency or official.

Id. at 145-46; 595 NW2d at 148 (emphasis added). The balance appropriately tips in favor of disclosure where the inquiry concerns the inner workings of government or where information regarding how a particular agency is performing its statutory functions is sought. *Id.* at 146; 595 NW2d at 148.

1. The Definition Of "Personal" Used By The Court Of Appeals Is Erroneous

In analyzing the first prong of the privacy exemption, the Michigan Court of Appeals used a definition of "personal" that requires the requested information be "intimate or embarrassing." *Michigan Federation of Teachers, supra*, at p 3. And, after reaching this conclusion, the Court of Appeals determined that the analysis need go no further. *Amicus Curiae Wayne County* respectfully disagrees with this decision.

To begin with, the Court of Appeals used an incorrect definition. "Personal" means "appertaining to the person; belonging to an individual; limited to the person; having the nature or partaking of the qualities of human beings, or of movable property." BLACK'S LAW DICTIONARY, (6th ed), at p 1143. Alternatively, "personal" can be defined as "of, relating to, or affecting a person: private (~ correspondence)." *The Mirriam-Webster Dictionary, Home & Office Edition*, (1995), at p 389.

Under the Court of Appeals definition, a home address or telephone number would not meet the definition of "personal," because it is not "intimate or embarrassing." However, using either BLACK'S or *Mirriam-Webster's* definition, a home address or telephone number is personal information. And, when considering the "customs, mores, or ordinary views of the community," it is likely that most citizens would believe that their home addresses and home telephone numbers are personal pieces of information to be provided only where the citizen consents to publication.² It is also likely that the average person would not consider a consent to publication in one area to constitute a global

² This is particularly true where the citizen pays a monthly premium to the telephone company to prevent his or her information from being publicly listed.

consent to release his or her address and telephone number in all circumstances.

Indeed, most citizens would find it extremely objectionable if their addresses and telephone numbers were available to anyone who asks via a written request to their employers. It is one thing to choose to provide information voluntarily. It is quite another to be the subject of an involuntary disclosure. And, public employees are merely persons who, for a limited number of hours during the day, work for a public employer. Once they leave their places of employment, they are no different from any other private citizen.

The definition of “personal” used by the Court of Appeals is also unworkable, with no stopping point. For example, Wayne County employees typically provide the following information at the time of hire:

- Name, including previous names (such as a maiden name)
- Marital status
- Telephone number
- Address and mailing address (if different)
- Gender
- Date of birth
- Racial designation
- Driver’s license number, state of issue, and expiration date
- Emergency contact information, including name, address, telephone number, and relationship to employee
- Direct deposit information, which includes a copy of a check
- W-4 forms, which include employee location, identification number, and number of exemptions claimed

- Benefit enrollment forms, which provide information about dependents and spouses, including their genders, dates of birth, and relationship to the employee; primary care physician names; and, the address of the spouse (if different)

Presumably, the Court of Appeals would find none of this information to be intimate or embarrassing, and thus it would be subject to disclosure under the Michigan FOIA. Yet, in considering the “customs, mores, or ordinary views of the community,” most people would believe that this information is extremely personal. And, in an age of rampant identity theft, personal information – including address and telephone number – should be protected from involuntary disclosure wherever possible.

Indeed, identity theft is so prevalent that Wayne County offers its employees the option to purchase “identity theft insurance” on a voluntary basis. The decision of the Court of Appeals only acts to thwart the protection offered by such insurance, because it forces the County to disclose information that could potentially increase the risk of identity theft.³

There is nothing that would stop a requestor from publishing an online database with

³ “The Motley Fool,” a financial website, cautions readers seeking to avoid identity theft to “[c]onsider having your address removed from the phone book. In some instances a thief needs only your name, address and phone number to commit fraud.” <http://www.fool.com/Server/printarticle.aspx?file=/ccc/check/check06.htm>

See <http://www.thetravelinsider.info/2003/0523.htm> (cautioning readers to protect their home addresses and home telephone numbers). See also “Identity Theft 911,” a website that cautions readers that some of the things that thieves want most include names, addresses and telephone numbers; the site further suggests that readers should shred anything that includes their name, address, or other sensitive data to help avoid identity theft – <http://www.identitytheft911.org/protection/protection.htm>.

names, home addresses, and home telephone numbers of public employees, as the Lansing State Journal has recently done with the names, titles, departments, counties of employment and salaries of every single state employee it could get its hands on through use of the Michigan FOIA.⁴ Adding salary to home addresses and home telephone numbers would create both an invitation and a roadmap for potential thieves. Alternatively, an unscrupulous requestor could sell the list to telemarketers or advertisers with a particular interest in soliciting government employees. Clearly, this kind of dangerous exposure to the whims of the public cannot be permitted by a rational interpretation of a statute that seeks to provide information about the “affairs of government and the official acts of those who represent [the public] as public officials and public employees.” MCL 15.231 (emphasis added).

2. *A Proper Application Of The Balancing Test Would Protect Personal Addresses and Telephone Numbers From Disclosure Under The Privacy Exemption Of The Michigan FOIA*

The second factor in the privacy exemption analysis allows a public body to withhold information if its disclosure would be a “clearly unwarranted” invasion of privacy. This requires a balancing of the public and private interests. The only public interest that is factored into this equation is whether the release of the requested information would further the “core purpose” of the Michigan FOIA.

The core purpose of the Michigan FOIA is found in MCL 15.231(2), which states:

It is the public policy of this state that all persons, except those persons incarcerated in state or local correctional facilities, are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them

⁴ Available for viewing at <http://db.lsj.com/community/dc/som/index.php>

as public officials and public employees, consistent with this act. The people shall be informed so that they may fully participate in the democratic process.

Thus, the purpose of the Michigan FOIA is to provide information regarding only "the affairs of government" and the "official acts" of public officials and employees. Providing any other information by virtue of its location in a government file would be clearly unwarranted.

In this case, Plaintiff-Appellee, a union, requested a great deal of information concerning U of M employees, including their personal addresses and telephone numbers. U of M withheld the addresses and telephone numbers of employees who had not consented to publication of this personal information in a university directory.⁵ The Circuit Court upheld this action. The Court of Appeals reversed without even performing a balancing test, because it erroneously concluded that a public employee's home address and telephone number is not information of a personal nature.

A fair application of the balancing test would lead to the correct conclusion that the home addresses and home telephone numbers of U of M employees should not be released in response to a request under the Michigan FOIA. Personal addresses and telephone numbers of public employees provide absolutely no information "regarding the affairs of government" or the "official acts" of any public employee. The only way such information could remotely meet this test is if the public employees were living in housing or using telephones that were provided at taxpayer expense.

This Court has opined that it is appropriate to look to federal law when interpreting

⁵ Though, under the balancing test, U of M could have properly withheld the addresses and phone numbers of all of its employees, as there simply is no public interest involved in their dissemination.

the Michigan FOIA. *Evening News Ass'n v City of Troy*, 417 Mich 481, 494; 339 NW2d 421, 427 (1983). *US Dept of Defense v Federal Labor Relations Auth*, 510 US 487; 114 Sct 1006; 127 LEd2d 325 (1994) is particularly instructive because it involves a nearly identical set of facts. In *US Dept of Defense*, two local unions requested the names and home addresses of employees within their respective bargaining units. The government provided the unions with employee names and work station locations, but it refused to release the home addresses of the employees. The U.S. Supreme Court determined that unless the federal FOIA allowed for their release, employee home addresses were protected from disclosure by the federal Privacy Act (5 USC 552a(b)(2)). Thus, the case is relevant for FOIA analysis, as the issue before the U.S. Supreme Court was "whether disclosure of [employee] home addresses 'would constitute a clearly unwarranted invasion of [the] personal privacy' of bargaining unit employees within the meaning of FOIA." *US Dept of Defense*, 510 US at 495; 114 Sct at 1012; 127 LEd 325.

The *US Dept of Defense* court engaged in a balancing test similar to the balancing test articulated in *Mager*, which test weighs the public's interest in disclosure against the interest that the Legislature intended to protect with the privacy exemption. Specifically:

[T]he only relevant 'public interest in disclosure' to be weighed in this balance is the extent to which disclosure would serve the 'core purpose of the FOIA,' which is 'contribut[ing] significantly to public understanding of the operations or activities of the government.'

Id. at 495; 114 Sct at 1013; 127 LEd2d 325 (emphasis in original).

The *US Dept of Defense* court found that the public interest in disclosure was negligible at best, while the employees' interest in maintaining the privacy of their home addresses was substantial. Disclosure of the information would have made things more

convenient for the union. However, the release of home addresses would neither inform the citizenry regarding what their government was up to nor reveal much of anything about the government employer or its activities. The U.S. Supreme Court acknowledged that home addresses are often publicly available through telephone directories or voter registration lists, however, “[a]n individual’s interest in controlling the dissemination of information regarding personal matters does not dissolve simply because that information may be available to the public in some form.” *Id.* at 500; 114 S Ct at 1015; 127 LEd2d 325.

The result should be the same in this case. U of M employees – indeed, public employees generally – have a substantial interest in controlling the dissemination of their home addresses and telephone numbers. The Plaintiff-Appellee union is similarly situated to any requestor under the Michigan FOIA whose request must be balanced under the rule of *Mager*. There is simply no public interest in an employee’s personal address and telephone number, because such information offers no insight into either the operations of U of M or how any employee is performing his job.

III

The Balance Struck By The Michigan Supreme Court With Regard To Its Own Employees Is Rational And Consistent With The Legislative Purpose Of The Michigan FOIA

The judiciary is specifically exempted from the coverage of the Michigan FOIA. MCL 15.232(d)(v). Yet, this Court has chosen to provide access to judicial branch administrative information through its Administrative Order 1997-10. In Section 7 of AO 1997-10, the Court has flatly stated that certain items are simply exempt from disclosure, which items include:

- (a) Personal information if public disclosure would be an unwarranted invasion of an individual's privacy. Such information includes, but is not limited to:
 - (i) The home address, home telephone number, social security account number, financial institution record, electronic transfer fund number, deferred compensation, savings bonds, W-2 and W-4 forms, and any court-enforced judgment of a judge or employee.

(Emphasis added). The Court goes on to define what types of records are open to public access in Section 10 of AO 1997-10:

- (a) The full name of the employee.
- (b) The date of employment.
- (c) The current and previous job titles and descriptions within the judicial branch, and effective dates of employment for previous employment within the judicial branch.
- (d) The name, location, and telephone number of the court or agency of the employee.
- (e) The name of the employee's current supervisor.
- (f) The current salary of the employee. . . .

The Court's treatment of its own employees is rational and fair. Presumably, the Court would wish to govern any decision with regard to the private information of other public employees consistent with these same principles. Yet, the Court of Appeals did not even consider AO 1997-10 when it ordered public dissemination of the private addresses and telephone numbers of U of M employees.

CONCLUSION

The decision of the Court of Appeals should be reversed. The Court should hold that employee addresses and telephone numbers are private pieces of information that should not be disclosed to the general public under the Michigan FOIA, as the disclosure provides no insight into either the inner workings of government or the official acts of any public employee.

RELIEF

This Court should reverse the Michigan Court of Appeals. The private addresses and telephone numbers of persons who happen to work for a public employer should not be available to the public at large through the Michigan FOIA. The disclosure of such information does nothing to further the public's interest in learning about the inner workings of government or the official acts of public employees.

Respectfully submitted,

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A handwritten signature in black ink, appearing to read "Susan M. Bisio", is written over a horizontal line.

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