

STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

DAVID SOLE,

Plaintiff-Appellant,

Supreme Court No. 161598
Court of Appeals No. 350764

v.

MICHIGAN ECONOMIC DEVELOPMENT CORP.,

Defendant-Appellee

**BRIEF OF AMICI CURIAE
MACKINAC CENTER FOR PUBLIC POLICY
AND MICHIGAN PRESS ASSOCIATION
ON ORAL ARGUMENT ON THE APPLICATION**

Submitted by:

Patrick J. Wright (P54052)
Mackinac Center for Public Policy
Vice President for Legal Affairs
140 West Main Street
P O Box 568
Midland, MI 48640

TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIESiii

INTRODUCTION 1

STATEMENT OF FACTS 1

 A. “Tax credit” basics 1

 B. 1995 to 2009 – a period of transparency..... 3

 C. GM bankruptcy and Global Retention Agreement 4

 D. GM corporate performance since emerging from bankruptcy 6

 E. Legislature creates significant fine for disclosing information related to tax certificates 8

 F. Various amendments to Global Retention Agreement 10

 G. GM’s limited confidentiality request 11

 H. MEGA credits impact budget process..... 12

 I. More Global Retention Agreement amendments..... 14

 J. Legislature requires a third MEGA report 15

 K. September 2017 Auditor General Report..... 16

 L. Lower court proceedings, two credit reports, and disclosure of the remaining value of the GM agreement..... 18

ARGUMENT 23

 I. Documents known to be in existence, the scope of Sole’s request, and this Court’s order 23

 II. Constitutional considerations indicate the requested documents are financial records that must be open to inspection 26

III. Statutory analysis of MCL 125.2005 shows that any tax-credit agreement is specifically excluded from being financial and proprietary information 32

IV. Alternatively, the particular confidentiality request made was quite narrow and should not prevent disclosure of most of the responsive documents..... 37

RELIEF REQUESTED..... 37

TABLE OF AUTHORITIES

CASES

Citizens Protecting Michigan’s Constitution v. Secretary of State, 503 Mich. 42 (2018) 27

Detroit News, Inc. v. Policeman and Fireman Ret. Sys. of the City of Detroit, 252 Mich. App. 59 (2002) 34

Grayson v. Michigan State Bd. of Accountancy, 27 Mich. App. 26 (1970)..... 28

Hays v. Kalamazoo, 316 Mich. 443 (1947) 29

Miller v. State Apple Comm’n, 296 Mich. 248 (1941) 29

The People ex rel Detroit and Howell RR Co v. the Twp Bd of Salem, 20 Mich. 452 (1870) 29

STATUTES

11 U.S.C. §§ 1101-1195..... 4

1995 PA 24 1, 8

1995 PA 24 § 6 2

2003 PA 248 8

2006 PA 283 8

2009 PA 124 9

2009 PA 125 8, 9

2016 PA 268 15

MCL 125.2005..... 26

MCL 125.2005(11)..... 22, 33

MCL 125.2005(9)..... 21, 32

MCL 15.232(i) 6

MCL 15.232(l) 6

MCL 205.28(1)(f) 10

MCL 205.28(5) 10, 19, 26

MCL 207.805(3) 33

MCL 207.805(5) 33

MCL 207.806..... 2

MCL 207.810..... 8, 16, 32

MCL 207.810(1)(j) 9, 10

CONSTITUTIONAL PROVISIONS

1 Official Record, Constitutional Convention 1961 31

2 Official Record, Constitutional Convention 1961 27

Const. 1835, art. 12, § 4 26

Const. 1850, art. 14, § 9 30

Const. 1850, art. 18, § 5 26

Const. 1908, art. 10, § 12 31

Const. 1908, art. 10, § 17 27

Const. 1908, art. 10, § 9 30

Const. 1908, art.10, § 14 30

Const. 1963, art. 4, § 11 10

Const. 1963, art. 9, § 18 31

Const. 1963, art. 9, § 23 27, 28, 31

OTHER AUTHORITIES

1961-62 Michigan Manual..... 30

<https://audgen.michigan.gov/wp-content/uploads/2017/09/r186041516-0809.pdf>.... 16,
29

<https://investor.gm.com/static-files/17192cfa-1e7c-4025-ae59-c6178e484170> 7

<https://investor.gm.com/static-files/218be7b0-a09c-4ad1-815f-65a6181a75f9> 7

<https://investor.gm.com/static-files/54070a3d-55d9-4a0c-9913-7ba9b4d366de> 7

<https://investor.gm.com/static-files/6e1cc515-418e-4c5b-9526-f8ea41e02aef>..... 8

<https://investor.gm.com/static-files/f1b9d4ef-a7c1-4768-8789-c15985d72fab> 8

https://www.mackinac.org/archives/2009/MEGA_Credits.pdf..... 4

<https://www.mackinac.org/archives/2021/2009%20retention%20agreement.pdf> . 5, 36

<https://www.mackinac.org/archives/2021/Second%20Amended%20Agreement.pdf>.. 23

<https://www.mackinac.org/media/images/2021/June92021Email.jpg> 3

<https://www.mackinac.org/mega-mistake-big-corporate-welfare-program-still-a-waste>..... 13

<https://www.mackinac.org/S2018-12>..... 29

<https://www.michiganbusiness.org/4a81e3/globalassets/documents/reports/legislative-reports/2008-mega-annual-report.pdf> 8

<https://www.michiganbusiness.org/4a823c/globalassets/documents/reports/legislative-reports/fy2020-mega-annual-legislative-report.pdf>..... 9

<https://www.michiganbusiness.org/4aef3a/globalassets/documents/reports/legislative-reports/fy-2018-mega-and-other-certificated-credits-report-final.pdf> 16

<https://www.michiganbusiness.org/4aef5c/globalassets/documents/reports/legislative-reports/mega-and-other-certificated-credits-report-sec.-941.1043-final.pdf> . 20

<https://www.michiganbusiness.org/4aef89/globalassets/documents/reports/legislative-reports/mega-and-other-certificated-credits-2020-annual-report.pdf> 21

<https://www.michiganbusiness.org/4aefec/globalassets/documents/reports/legislative-reports/mega-and-other-certificated-credits-fy16--annual-report.pdf> 15

<https://www.reuters.com/article/us-gm-bankruptcy-sb/timeline-gm-emerges-from-bankruptcy-idUSTRE56946X20090710> 4

<https://www.sec.gov/Archives/edgar/data/1467858/000119312511051462/d10k.htm>. 7

<https://www.sec.gov/Archives/edgar/data/1467858/000146785812000014/gm201110k.htm>..... 7

<https://www.sec.gov/Archives/edgar/data/1467858/000146785813000025/gm201210k.htm>..... 7

<https://www.sec.gov/Archives/edgar/data/1467858/000146785814000043/gm201310k.htm>..... 7

<https://www.sec.gov/Archives/edgar/data/1467858/000146785815000036/gm201410k.htm>..... 7

<https://www.sec.gov/Archives/edgar/data/1467858/000146785816000255/gm201510k.htm>..... 7

<https://www.usatoday.com/story/money/cars/2013/12/09/government-treasury-gm-general-motors-tarp-bailout-exit-sale/3925515/> 4

Michigan Executive Order 2012-9 (June 26, 2012) 11

Patrick Wright, Mackinac Center for Public Policy, *From Prohibited to Permitted: A Legal History of Corporate Handouts in Michigan* (2018) 29

State Notes: Topics of Legislative Interest – A primer on Certified Tax Credits under the Michigan Business Tax at 1, Senate Fiscal Agency (Winter 2015) . 2

INTRODUCTION

This case concerns the extent that the Legislature can keep key financial details of a corporate subsidy program – called refundable tax credits – secret. This subsidy program has already led to the state paying corporations billions of dollars, and billions more are still owed. The instant case arose out of questions surrounding a subsidy given to a particular recipient – General Motors. GM can still “earn” over \$2 billion from the state through this program.

This brief will go through the history of the GM subsidy and also discuss the size of the subsidy program in general. It will then identify a constitutional provision that requires “financial records,” such as key documents related to the GM subsidy to be disclosed. Finally, the brief will address the specific statutory questions put forth by this Court.

STATEMENT OF FACTS

A. “Tax credit” basics

In 1995, Michigan passed the Michigan Economic Growth Authority Act. 1995 PA 24. This created the Michigan Economic Growth Authority (MEGA), which was largely brought into existence to issue tax credits.¹

¹ Section 6 of the act dealt with MEGA’s powers to effectuate its purpose:

- (a) To authorize eligible businesses to receive tax credits to foster job creation in this state.
- (b) To determine which businesses qualify for tax credits authorized under this act.

(Note continued on next page.)

One might logically assume by its name that a tax credit could only cancel tax liability for a given year, but that is not the case. If, through meeting the employment conditions of the agreement (generally a calculation based on the employer either retaining or increasing a number of employees multiplied by their rate of pay and their health-care costs), a recipient were to “earn” more than its tax liability, the state would pay that company the overage: “The Michigan Economic Growth Authority tax credits are refundable tax credits, which means that if the credit amount is greater than the tax owed, the State will pay the cash difference to the company as a refund, whether or not the company has any tax liability.” State Notes: Topics of Legislative Interest – A primer on Certified Tax Credits under the Michigan Business Tax at 1, Senate Fiscal Agency (Winter 2015).² Thus, while administered through the tax process, economic development tax credits really operate more as direct subsidies.³

-
- (c) To determine the amount and duration of tax credits authorized under this act.
 - (d) To enter into written agreements specifying the conditions under which tax credits are authorized and the circumstances under which those tax credits may be reduced or terminated.
 - ...
 - (h) To assist an eligible business to obtain the benefits of a tax credit, incentive, or inducement program provided by this act or by law.

1995 PA 24 § 6 codified at MCL 207.806.

² This document is Exhibit 8 to Plaintiff/Appellant’s Application for Leave to Appeal.

³ According to a June 9, 2021 email and attached table from David Zin of the Senate Fiscal Agency, since 2012, the first tax year wherein only MEGA certificated credit holders could continue to file under the Michigan Business Tax, refundable credits exceeded liabilities every single year.

(Note continued on next page.)

The Senate Fiscal Agency primer contains a flowchart that simplifies the credit process. *Id.* at 5. Essentially, MEGA and a company agree on the terms of a tax incentive. If the company meets the terms of that incentive for a particular year, it applies to MEGA for a “credit certificate.” This document can be attached to the company’s tax return. Michigan’s Department of Treasury then issues a refund check for any overage.

B. 1995 to 2009 – a period of transparency

From 1995 to 2009, pursuant to FOIA, MEGA used to disclose each and every tax-credit agreement and every issuance of a realized-tax-credit certificate. Amicus Mackinac Center for Public Policy kept and published a spreadsheet of the realized

The five columns are the tax year, the number of filers using the MBT, their liability without any credits, their liability after **nonrefundable** tax credits are considered (not the issue here – nonrefundable tax credits only go to the limit of tax liability), and the final column is net revenue to the state (all of which are losses) due to refundable credits exceeding tax liability.

year	filers	MBT liability	MBT liability less Nonrefundable credits	Final MBT liability after Refundable tax credits
2012	3,437	\$142,736,169	\$96,256,517	-\$502,547,413
2013	782	\$187,569,531	\$104,680,373	-\$611,421,832
2014	407	\$206,776,465	\$134,817,672	-\$573,195,330
2015	314	\$160,704,481	\$102,559,452	-\$547,596,263
2016	257	\$194,423,791	\$90,633,242	-\$507,233,686
2017	230	\$119,890,267	\$79,714,486	-\$485,396,069
2018	206	\$106,152,831	\$82,986,316	-\$449,579,913
2019	174	\$78,553,544	\$51,996,916	-\$499,731,943

Thus, using rough math on the fifth column, since 2012, the state has annually issued about one half a billion dollars in realized-tax-credit certificates.

<https://www.mackinac.org/media/images/2021/June92021Email.jpg>

(Note continued on next page.)

tax credits.⁴ The spreadsheet stopped being updated around 2009 because MEGA stopped disclosing the value of individual tax certificates it issued.

C. GM bankruptcy and Global Retention Agreement

This case concerns a FOIA request related to tax credits received by GM. Prior to its 2009 bankruptcy, GM entered into 10 separate tax-credit agreements dating from June 30, 2000, to December 17, 2008. Application for Leave to Appeal, Exhibit 10 at 9. Amicus' spreadsheet of realized tax credits indicated through those 10 agreements, GM had received 13 realized tax credits before MEGA stopped disclosing realized tax credits.⁵

On June 1, 2009, GM filed for bankruptcy under Chapter 11 (the reorganization chapter).⁶ It was one of the largest filings in history and was completed by the "new GM" purchasing the remaining assets of the "old GM" on July 10, 2009.⁷

⁴ https://www.mackinac.org/archives/2009/MEGA_Credits.pdf.

⁵ GM Delta \$765,013 and \$4,140,484; GM Lansing \$1,743,283, \$3,267,803, \$4,474,380, \$5,706,228, \$4,393,955, and \$4,117,593; GM Orion \$3,407,501 and \$3,706,125; GM Warren \$589,856; GM Flint \$5,960,783; and GM Ypsilanti-Willow Run \$1,931,055. Thus, there is publicly available document on GM receiving \$44,204,059 in realized tax credits. https://www.mackinac.org/archives/2009/MEGA_Credits.pdf.

⁶ See generally 11 U.S.C. §§ 1101-1195.

⁷ At the time of sale, the majority owner of the new GM was the U.S. Treasury. <https://www.reuters.com/article/us-gm-bankruptcy-sb/timeline-gm-emerges-from-bankruptcy-idUSTRE56946X20090710>. The US Treasury sold its last remaining GM interest in 2013 having taken a \$ 10.5 billion loss in the process. <https://www.usatoday.com/story/money/cars/2013/12/09/government-treasury-gm-general-motors-tarp-bailout-exit-sale/3925515/>.

(Note continued on next page.)

During the pendency of that bankruptcy (specifically, on June 25, 2009),⁸ MEGA approved by resolution a “MEGA Tax Credit Agreement: Retention Credit” related to GM. This agreement is sometimes referred to as the “Global Retention Agreement” and allowed GM to claim significant tax credits for the next 20 years.⁹

The 2009 Global Retention Agreement was amended November 17, 2009.¹⁰ This “Amendment One” was “to secure GM’s headquarters at the Detroit Renaissance Center.” Application for Leave to Appeal, Exhibit 11 at 3.¹¹ “Amendment Two” occurred on December 15, 2009 to be effective on December 18, 2009.¹² Among other things, this reduced the number of retained jobs at the Renaissance Center. Application for Leave to Appeal, Exhibit 11 at 3.

Oddly, despite indicating that it “is the entire agreement between the parties” and does not “omit material fact[s],” the 2009 document contains no liability cap (not even a redacted cap). Thus, according the documents MEDC provided, MEGA and GM entered into a multi-billion-dollar agreement and did not in the course of the

⁸ See MEGA Tax Credit Agreement: Retention Credit with General Motors of Michigan LLC a/k/a General Motors LLC at 1. <https://www.mackinac.org/archives/2021/2009%20retention%20agreement.pdf>

⁹ *Id.* at 4.

¹⁰ MEGA Tax Credit Agreement: Retention Credit with General Motors of Michigan LLC a/k/a General Motors LLC at 1

¹¹ The nomenclature and dating surrounding the various amendments to the GM-MEGA retention agreement have been quite sloppy. In discussing these amendments, it will be clearest (but not absolutely clear) to use the numeric system and dates from a January 22, 2020 memo, which is found in the Application for Leave to Appeal at Exhibit 11. As will be discussed below, some “amendments” are believed instead to instead be MSF board votes.

¹² MEGA Tax Credit Agreement: Retention Credit with General Motors of Michigan LLC a/k/a General Motors LLC at 1

(Note continued on next page.)

negotiations reduce the amount of potential liability to writing (or else MEDC would have provided it in response to the FOIA request or at least acknowledged its existence while claiming an exemption applied).¹³

D. GM corporate performance since emerging from bankruptcy

As will be discussed below, corporate subsidies have been a divisive political issue in Michigan since at least the 1961-62 Constitutional Convention. When corporations accept government subsidies, it makes every dollar spent by an accepting corporation a political matter. What does the CEO get paid in comparison to the governor? Why should the subsidy be used for a corporate dividend when schools need more money, roads need fixing, taxpayers need relief, etc.? As noted above, the corporate subsidies outstanding in Michigan total billions and the GM Global Retention Agreement alone is worth a couple of billion. This obviously leads to further questions. What politicians are receiving campaign contributions from subsidy recipients or their executives? Is that influencing whether the agreements get modified and in what matter? The corporate-subsidy process is permeated by politics and political concerns. GM's subsidy has been a subject of continuing interest because of its size, longevity, and the company's performance since bankruptcy which leads to questions of whether state of Michigan's help is still necessary (assuming for the sake of argument that it ever was).

¹³ FOIA definitions of "public records" and "writing" are quite broad. MCL 15.232(i) and MCL 15.232(l).

(Note continued on next page.)

According to its 10-K forms (required to be annually filed with the United States Security and Exchange Commission), GM has had the following annual net incomes since 2010:¹⁴

<u>Year</u>	<u>Net income in millions</u>
2010	4,688 ¹⁵
2011	7,585 ¹⁶
2012	4,859 ¹⁷
2013	3,770 ¹⁸
2014	2,804 ¹⁹
2015	9,687 ²⁰
2016	9,427 ²¹
2017	(3,880) ²²
2018	7,916 ²³

¹⁴ For this information, amici curiae are using the annualized “Net income (loss) attributable to common stockholders” line of GM’s 10-K forms. This is the amount generally reported as the company’s profit or loss for the year.

¹⁵

<https://www.sec.gov/Archives/edgar/data/1467858/000119312511051462/d10k.htm>

¹⁶

<https://www.sec.gov/Archives/edgar/data/1467858/000146785812000014/gm201110k.htm>

¹⁷

<https://www.sec.gov/Archives/edgar/data/1467858/000146785813000025/gm201210k.htm>

¹⁸

<https://www.sec.gov/Archives/edgar/data/1467858/000146785814000043/gm201310k.htm>

¹⁹

<https://www.sec.gov/Archives/edgar/data/1467858/000146785815000036/gm201410k.htm>

²⁰

<https://www.sec.gov/Archives/edgar/data/1467858/000146785816000255/gm201510k.htm>

²¹ <https://investor.gm.com/static-files/17192cfa-1e7c-4025-ae59-c6178e484170>

²² <https://investor.gm.com/static-files/218be7b0-a09c-4ad1-815f-65a6181a75f9>

²³ <https://investor.gm.com/static-files/54070a3d-55d9-4a0c-9913-7ba9b4d366de>

(Note continued on next page.)

2019	6,581 ²⁴
2020	6,247 ²⁵

Thus, cumulatively over that period, GM has had a net income (i.e. profit) of \$ 59.684 billion. As noted above, public interest in the full details of GM's subsidy is understandable. In sum, the company has done quite well since bankruptcy and is still in line to receive over \$2 billion from the State.

E. Legislature creates significant fine for disclosing information related to tax certificates

From the initial passage of the Michigan Economic Growth Authority Act in 1995, it has included a requirement that an annual report be filed with the Legislature. 1995 PA 24 section 10 codified at MCL 207.810. This report was required to include the “amount and duration of the tax credit separately for each authorized business.” *Id.* This report is another place where information on tax credits theoretically could be found.²⁶

Neither 2003 PA 248 nor 2006 PA 283 amended MCL 207.810 in a pertinent manner. 2009 PA 125 did.

A report on the “activities of the authority” was still required to be submitted to the Legislature, but the more detailed report that had been sent to all members from 1995 to 2008 was limited to the chairpersons of the Senate Appropriation and

²⁴ <https://investor.gm.com/static-files/6e1cc515-418e-4c5b-9526-f8ea41e02aef>

²⁵ <https://investor.gm.com/static-files/f1b9d4ef-a7c1-4768-8789-c15985d72fab>

²⁶ Prior to 2009, the report provided useful information. The 2008 report listed the company, the number of years of the agreement, and the maximum credit authorized.

<https://www.michiganbusiness.org/4a81e3/globalassets/documents/reports/legislative-reports/2008-mega-annual-report.pdf>

Finance committees, the chairpersons of the House Appropriation and Finance committees, and the Directors of the House and Senate Fiscal Agencies. Further, the more detailed report had to include “a copy of each [tax] certificate issued.” *Id.* at sec. 10(1)(j) codified at MCL 207.810(1)(j). Thus, there is a generic report given to the Legislature and a second report given to a discrete subset of Legislators (and Legislative agency heads) that contains restricted information.²⁷ This limited distribution report contains more information.

The same day 2009 PA 125 passed, the Legislature also approved 2009 PA 124, which made it a \$5,000 fine for a person who received tax-credit certificate information as part of the limited-distribution report to disclose it to anyone outside of the Legislature:

(5) A person identified in section 10(1) of the Michigan economic growth authority act, 1995 PA 24, MCL 207.810, who receives information under section 10(1)(j) of the Michigan economic growth authority act, 1995 PA 24, MCL 207.810, as permitted in subsection (1)(f), shall not willfully disclose that information for any purpose other than the proper administration of his or her legislative duties nor disclose that information to anyone other than an employee of the legislature, who is also bound by the same restrictions. A person who violates this subsection is responsible for and subject to a civil fine of not more than \$5,000.00 per violation.

²⁷ After 2009, the generic report given to the Legislature does not contain much information. The name of the company is given, but does not include either the number of years of the agreement or the maximum credit amount. See generally, <https://www.michiganbusiness.org/4a823c/globalassets/documents/reports/legislative-reports/fy2020-mega-annual-legislative-report.pdf>

(Note continued on next page.)

Id. at § 28(5) codified at MCL 205.28(5); see also MCL 205.28(1)(f) (indicating in conjunction with MCL 207.810(1)(j) that report information could only be given to legislative chairmen and legislative finance agency directors).²⁸

Thus, the Legislature enacted a large civil fine for those that disclosed tax-credit-certificate information (again, tax credits is a misnomer as payments often significantly exceed any tax liability).²⁹

F. Various amendments to Global Retention Agreement

On October 26, 2010, GM and MEGA entered into “Amendment Three,” which was “to support the proposed addition of Hybrid Electric Vehicle battery and vehicle engineering and development operations.” Application for Leave to Appeal, Exhibit 11 at 3.³⁰

On July 25, 2011, MEGA and GM belatedly assigned the 2009 credit agreement and all of the pre-bankrupt GM’s tax credits from previous agreements to the new GM and backdated the effectiveness of those assignments to July 11, 2009

²⁸ These Public Acts related to secrecy and disclosure of MEGA deals were passed with immediate effect a couple of months after the GM Global Retention Agreement was first agreed to. It is uncertain whether this is coincidence or if it is an example of cause and effect.

Although the secrecy requirements would appear to raise a question under the Speech and Debate Clause of Const. 1963, art. 4, § 11, amici are unaware of any such challenge to this provision.

²⁹ See *supra* note 3 and accompanying discussion.

³⁰ Neither the record in this case nor the response to a FOIA amicus curiae Mackinac Center for Public Policy filed after being requested to submit a brief contains this amendment. Emails with MEDC’s FOIA coordinator and discussion with Defendant’s counsel lead to the conclusion there might not be a written document related to this, but it instead might refer to either an agreement in principle and/or a board vote. The undersigned appreciates both their efforts to help provide clarity to the full course of the GM Global Retention Agreement.

(the day after the new GM came out of bankruptcy). Application for Leave to Appeal, Exhibit 10 at 9.

On June 12, 2012, MEGA was abolished by an executive order. Michigan Executive Order 2012-9 (June 26, 2012). MEGA's powers were transferred to the Michigan Strategic Fund (MSF).

On September 27, 2012, GM entered into "Amendment Four," which was related to an "IT Development Center . . . located at the GM Technical Center in Warren." First Amendment to the Amended and Restated Retention MEGA Tax Credit Agreement; Application for Leave to Appeal, Exhibit 11 at 3. This amendment did not set forth a cap on total liability.

On July 22, 2014, GM and MSF agreed to "Amendment Five," which "increased the number of qualified retained jobs by 1,750, allowing up to 34,750 qualified jobs to be covered under this credit." Application for Leave to Appeal, Exhibit 10 at 7-8; Application for Leave to Appeal, Exhibit 11 at 3. This document did not contain any liability cap. Application for Leave to Appeal, Exhibit 10 at 7-8.

G. GM's limited confidentiality request

On November 23, 2015, MSF indicated that GM made a "confidentiality request" related to the "Amended MEGA Summary of Terms" and "E-mail Correspondence with General Motors LLC related to the Amended MEGA Summary of Terms and Communication Plan around MEGA Amendment from **April 1, 2015-December 15, 2015.**" Application for Leave to Appeal, Exhibit 7 (emphasis added). MSF agreed to this request – but the date of this agreement is unknown. *Id.*

H. MEGA credits impact budget process

In “Winter 2015,” the Senate Fiscal Agency (SFA) released a primer on MEGA tax credits. This primer was issued in response to revenue estimates that had to be decreased due to the size of the MEGA credits being claimed. SFA explained:

The revenue decrease was due primarily to the larger-than-expected amount of refunds issued for the Michigan Business Tax (MBT). Although the Michigan Business Tax Act was repealed on January 1, 2012 for most business tax filers, some businesses continue to file MBT returns in order to claim refundable tax credits. While new MBT tax credits have not been issued since the MBT Act was repealed, previous tax credit agreements are still in place have been amended, and the improving economy has made it more likely that eligible businesses can complete the investments and job increases required to claim credits; thus, the amount of credits claimed by eligible businesses has continued to grow.

Application for Leave to Appeal, Exhibit 8 at 1. SFA further stated: “Approximately 200 taxpayers continue to file MBT returns in order to claim MEGA credits and other credits. Because of the value of these credits, it is likely that these businesses will continue to do so until they have redeemed all of the MEGA tax credit certificates for which they are eligible.” *Id.* at 1-2. It was noted there is a “debate over the value of economic development incentives” and “an issue that often arises is whether an incentive is generating new economic activity or merely subsidizing activities that otherwise would have occurred.” *Id.* at 2. On this issue, SFA stated: “Evaluating this aspect of incentives is very difficult for even a single year, let alone when done for awards that may have been made almost two decades ago.” *Id.* at 2-3.³¹

³¹ While the intent of this brief is to discuss whether keeping details of corporate subsidies from the public is legal, amicus Mackinac Center for Public Policy is a long-time critic of such subsidies and released a 2020 study finding the MEGA
(Note continued on next page.)

This same document discussed the outstanding liability: “As of November 2014, the MEDC estimate of the amount of MEGA credits that were awarded for the years 2015 through 2032 but not yet redeemed totaled \$6.5 billion, up \$1.6 billion from an estimated \$4.9 billion in March 2011.” *Id.* at 4. SFA explained the increase:

According to the MEDC, the \$1.6 billion change in the estimated value of MEGA awards from March 11 to November 2014 represents approximately \$73.0 million in new awards made during 2011, approximately \$391.0 million in increased awards attributable to amendments to previous awards, and approximately \$1.1 billion from the revised calculations made to estimate the value of the awards. The majority of these revisions affect job retention credits, and the value of those credits depends heavily on the compensation (wages, health care costs, etc.) paid to retained employees. Apparently, earlier estimates not only assumed no growth in compensation rate on retained jobs that was too low, but also assumed no growth in compensation rates over the 20-year period of the awards. While the MEDC has updated the projected costs to reflect compensation costs submitted under recent claims, the projections continue to assume no growth in future years from those revised levels.

Id. at 4. Even with the updated projections, SFA was concerned they “likely understate the future value of both the awards and projected claims.” *Id.* SFA warned that it “is unknown what power of the award amounts reflect job . . . retention credits” but if “the retention credits are 70% of the total and compensation costs average 8.0% growth, the value of the awards is approximately \$4.2 billion higher.” *Id.* at 4. If this hypothetical were true, this would mean the value of remaining credits would have topped \$10 billion as of 2014.

program and other Michigan incentive programs to be inefficient. <https://www.mackinac.org/mega-mistake-big-corporate-welfare-program-still-a-waste>. In the blogpost announcing that study, it was claimed that the majority of studies on the subject have found that MEGA’s corporate subsidy programs “have had zero to negative impacts” on job creation. *Id.*

I. More Global Retention Agreement amendments

According to a later MEDC memo, “Amendment Six” was entered into on December 15, 2015, and contained “an overall credit value cap” and required GM to invest more money in Michigan. *Id.*³²

On March 8, 2016, GM and the MSF entered the “2016 Amendment to the Amended and Restated MEGA Tax Credit Agreement: Retention Credit.” Application for Leave to Appeal, Exhibit 10 at 1-6. Using the numbering system from a later memo, it would appear this should have been informally titled “Amendment Seven,” but no mention of it was made in the memo. Importantly, this amendment had a redacted valuation cap – the first written indication that there was a limit to the amount GM could “earn” as tax credits. *Id.* at 3-4.³³ There was no “Summary of Terms” language in that document mirroring the item listed in the 2015 confidentiality request.

That document did discuss financial and proprietary information. MSF and GM agreed that MSF could inspect GM’s files “solely for the purpose of verifying

³² Again, neither the record in this case nor the response to a FOIA amicus curiae Mackinac Center for Public Policy filed after being requested to submit this brief contains this amendment. As with “Amendment Three” it is presumed this is some sort of agreement in principle or board vote and not something that had been reduced to writing. If there was a writing, MEDC should have either provided it or identified the document and then claimed a statutory exemption to disclosure.

³³ Perhaps, given the temporal proximity and similar subject matter, the March 8, 2016 document could be the written reduction of “Amendment Six.” But this writing does not fall within the express terms of the 2015 confidentiality request.

Regardless, almost seven years into the Global Retention Agreement, this is the first document provided that indicates there was a ceiling to liability regarding GM’s tax-credit agreement.

eligibility for the MEGA tax credits authorized for the Company.” *Id.* at 5. MSF was allowed to examine wage and hour records, health-benefit records, employment history and the like. MSF was to protect employee social security numbers “or other private information to the fullest extent of state and federal privacy laws.” *Id.* GM sought to “request confidential treatment of its financial or proprietary information retained by the MEGA in the course of its inspection.” *Id.*

J. Legislature requires a third MEGA report

As part of the Fiscal 2016-17 omnibus bill, and in each budget bill thereafter, MSF and the Michigan Department of Treasury have had to file reports on MEGA and other Certificated Credits.³⁴ The MEGA and other Certified Credits 2016 Annual Report was issued on November 1, 2016, and indicated there was \$7.3 billion remaining in MEGA liability.³⁵ The MEGA and other Certified Credits 2017 Annual Report was issued on October 31, 2017, and indicated there was \$7.0 billion remaining in MEGA liability.³⁶ The MEGA and other Certified Credits 2018 Annual Report was issued on November 7, 2018, and indicated there was \$6.3 billion remaining in MEGA liability.³⁷

³⁴ This now-boilerplate requirement has been found at sections 941 and 1043 of all the omnibus budget bills since 2016. See, e.g. 2016 PA 268.

³⁵

<https://www.michiganbusiness.org/4aefec/globalassets/documents/reports/legislative-reports/mega-and-other-certificated-credits-fy16--annual-report.pdf>

³⁶

https://www.michiganbusiness.org/4aefed/globalassets/documents/reports/legislative-reports/sec._941_and_1043_fy17_mega_other_certificated_credits.pdf

³⁷

<https://www.michiganbusiness.org/4aef3a/globalassets/documents/reports/legislative>
(Note continued on next page.)

K. September 2017 Auditor General Report

The Office of Auditor General issued a Performance Audit Report titled “Michigan Economic Growth Authority Tax Credit Program” in 2017.³⁸ A finding was that MEGA’s limited distribution report was lacking in some of the information statutorily required by MCL 207.810. Specifically, a couple of reports did not contain “the tax credits issued in all previous years.” *Id.* at 12. The Auditor General stated: “Inclusion of the yearly detail and total cumulative value of MEGA tax credits provides designated recipients with useful information to help evaluate the total historic value of MEGA tax credits and the amount of tax credits that have been granted to each business each year.” *Id.* MSF agreed with the recommendation and “implemented a new process to ensure continued compliance with its reporting obligations going forward.” *Id.* Thus, it is clear that this report has all the realized-tax-credit certificates.

The Auditor General also made an observation about public transparency related to MEGA tax credits. In full, the Auditor General stated:

Statutory clarification is needed for certain statutes that limit the public transparency of MEGA tax credit information. Our audit identified instances in which confidentiality provisions in various state laws restricted MSF and the Office of Auditor General (OAG) from reporting essential tax credit information to Michigan citizens and report users. We noted:

-reports/fy-2018-mega-and-other-certificated-credits-report-final.pdf. An incomplete version of this report is Exhibit 9 of the Application for Leave to Appeal (Tables 2 and 3 are missing).

³⁸ <https://audgen.michigan.gov/wp-content/uploads/2017/09/r186041516-0809.pdf>

- a. The MEGA Act (specifically MCL 207.810(1) of the Michigan Compiled Laws) requires MSF to annually report to the Legislature and the directors of the Senate and House Fiscal Agencies the total value of tax received for the year and all previous years for each MEGA agreement with each authorized business. However, the Revenue Act (specifically Section 205.28(1)(f) of the Michigan Compiled Laws) prohibits further disclosure of this tax credit information to others outside the Legislature.
- b. Subsequent to December 31, 2011 and the elimination of any new MEGA tax credit agreements, MSF and MEDC renegotiated previously executed MEGA tax credit agreements with Ford, Fiat Chrysler, and General Motors. The amended agreements consolidated most of the businesses' previously executed agreements and capped the total amount of tax credits that the businesses could receive throughout the terms of the amended agreements.

However, when MSF and MEDC renegotiated with General Motors, the business requested that the estimated total value of the MEGA tax credit and tax credit cap amount remain confidential. MSF granted the request in December 2015 based on legal consultation in relation to its interpretation of a confidentiality provision in the MSF Act (specifically Section 125.2005(9) of the Michigan Compiled Laws). This Section allows that financial or proprietary information submitted by an applicant that is considered by the applicant and acknowledged by the MSF Board or designee of the Board to be confidential shall not be subject to disclosure requirements of the Freedom of Information Act (specifically Sections 15.243(1)(e) and (f) of the Michigan Compiled Laws). The MSF Act (specifically Section 125.2005(12) of the Michigan Compiled Laws) defines financial or proprietary information as information that if released might cause the applicant significant competitive harm.

Confidentiality provision in law pertaining to information gathered from an agency under audit by the OAG are binding on us and prohibit further disclosure of such information. Therefore, in this case, the confidentiality agreement with one participant limited our ability to fully report information about MEGA tax credits for all participants because the reporting of estimated credits for the remaining participants would allow the readers of this report to determine the agreed-upon confidential amount.

Matters that could be addressed through statutory clarification of these various confidentiality provisions are:

- What type of tax information should be precluded from public disclosure? Should such preclusion exist for only the amount of taxes paid and/or taxable income, and not preclude estimated tax credits negotiated with public funds?
- When do State officials have the discretion to negotiate confidentiality provisions into individual agreements involving public funds? Do such agreements limit transparency and consistency among program participants or other taxpayers?
- Should the MSF Act more clearly define the type of information that could cause the applicant significant competitive harm? Does information such as the agreed-upon amount of estimated and capped tax credits impact a business's competitive advantage?

Id. at 13-14.

L. Lower court proceedings, two credit reports, and disclosure of the remaining value of the GM agreement

Plaintiff/Appellant David Sole filed a FOIA request with the Michigan Economic Development Corporation (MEDC) on November 30, 2018, seeking information related to GM's tax credits. His specific request stated:

I am requesting any and all documents regarding Michigan Economic Growth Authority tax credits extended to General Motors for any all [sic] years the tax credits were issued, including amendments to the credits, values of certificates issued, remaining liability on the certificates including how many years the MEGA tax credits can be claimed, the amount of investment tied to credits, the amount of job growth and/or retention tied to the credits, any alleged basis for not disclosing these credits and legal opinions regarding same, and whether the job growth and or retention goals have been met for each and every credit issued.

Application for Leave to Appeal, Ex. 4. From the tenor of Sole's Application for Leave to Appeal, he was concerned whether GM was taking credit for maintaining jobs at certain Michigan facilities that were slated for closure.

On December 11, 2018, Sole's attorney sent an email indicating he was not seeking confidential and proprietary information:

The FOIA states very clearly what documents we are seeking and which I clarified in discussion with Ms. Bishop today. We are not worried about all the financial information GM might have submitted in seeking the MEGA tax credits, but the documents spelling out the amount, length, and conditions for the credits.

Application for Leave to Appeal, Exhibit 5. He then reiterated his initial request in full. *Id.*

On December 20, 2018, the MEDC issued a FOIA response granting in part and denying in part Sole's request. The paragraph regarding the denial stated:

Your request for information regarding the **MEGA Tax Credit Cap** is denied in part because the total cap is exempt from disclosure pursuant to Section 13(1)(d) of the FOIA, MCL 15.243(1)(d), which exempts records protected from disclosure under another statute. MCL 125.2005(9) of the Michigan Strategic Fund Act grants the Michigan Strategic Fund Board authority to acknowledge financial or proprietary information submitted by the applicant that is considered by the applicant and acknowledged by the board or a designee of the board as confidential.

Id., Ex. 6. Despite Sole explicitly requesting the "values of certificates issued" to GM, no part of the denial referenced GM's realized-tax-credit certificates, nor was MCL 205.28(5) cited. Soon thereafter, MEDC sent the 2015 confidentiality designation related to the GM tax credit. See *id.*, Ex. 7.

Based on the case number, Sole filed suit at the Court of Claims very early in 2019. On September 9, 2019, Judge Murray of the Court of Claims dismissed the action. He held that GM had requested confidentiality related to the value of the estimated total value of the tax credit and the tax-credit cap amount. Therefore, he

held “the requested information is exempt from disclosure under MCL 125.2004(9) [sic – MCL 125.2005(9)] and MCL 15.243(1)(d).” No discussion occurred concerning the limited dates of the confidentiality request (again, April 1, 2015, to December 15, 2015).

Sole filed an appeal on September 24, 2019.

The MEGA and other Certified Credits 2019 Annual Report was issued on November 1, 2019, and indicated there was \$5.6 billion remaining in MEGA liability.³⁹

On January 22, 2020, Joshua Hundt, the Chief Development Officer at the MEDC, sent a memo to the MSF Board members. This document contained a history of the GM global retention credits and its various amendments.⁴⁰ It also laid out the terms of an attached proposed amendment. This amendment set out the “remaining credit value” as \$2,276,905,235, which it noted was a reduction of \$325 million. Application for Leave to Appeal Exhibit 11 at 3. Thus, simple arithmetic indicates that at one time the value of the cumulative credits was \$2.6 billion plus whatever tax credits had been realized prior to that one-time valuation. The new deal meant the cumulative award could be up to \$2.3 billion plus whatever tax credits had been realized before 2020.⁴¹

39

<https://www.michiganbusiness.org/4aef5c/globalassets/documents/reports/legislative-reports/mega-and-other-certificated-credits-report-sec.-941.1043-final.pdf>

⁴⁰ It also discussed another GM MEGA credit – the GM Subsystems LLC.

⁴¹ A February 5, 2015 memo from the House Fiscal Agency indicated that in Fiscal Year 2010-11 Chrysler received a 20-year \$1.36 billion credit and Ford received a 15-year \$909 million credit. Application for Leave to Appeal, Exhibit 12 at 3. These
(Note continued on next page.)

Noting this amendment to the Global Retention Agreement disclosed its remaining value to GM, on January 28, 2020, Sole filed a “Motion for Other Relief Pursuant to MCR 7.126.” In this motion, Sole claimed this made him a “prevailing party” under FOIA and entitled him to attorney fees and costs. On February 19, 2020, the Court of Appeals denied this motion.

On June 4, 2020, the Court of Appeals affirmed the lower court’s holding. As with the Court of Claims, the Court of Appeals focused on MCL 125.2005(9) and implicitly held that the confidentiality request applied outside of its express dates.

On July 13, 2020, Sole filed the instant Application for Leave to Appeal.

The MEGA and other Certified Credits 2020 Annual Report was issued on October 30, 2020, and indicated there was \$5.1 billion remaining in MEGA liability.⁴²

On April 23, 2021, this Court entered an order indicating that oral argument was going to be scheduled on the application. Further briefing on two issues was requested: (1) at the time of the request was the total value of tax credits extended to GM exempt from FOIA under MCL 125.2005(9) as “financial or proprietary information” or as “[a] record or portion of a record, material, or other data received, prepared, used, or retained by the fund . . . in connection with an application to or with . . . an award, grant, loan, or investment that relates to financial or proprietary information submitted by the applicant that is considered by the applicant and

were the initial agreements. Whether they have turned out to be accurate estimates over the course of the tax-credit agreements is unknown.

⁴²

<https://www.michiganbusiness.org/4aef89/globalassets/documents/reports/legislative-reports/mega-and-other-certificated-credits-2020-annual-report.pdf>

acknowledged by the board or a designee of the board as confidential?"; and (2) whether MCL 125.2005(11) requires "full disclosure, without redaction, of the tax credit agreement" since "[a]ny document to which the fund is a party evidencing a loan, insurance, mortgage, lease, venture, or other type of agreement the fund is authorized to enter into shall not be considered financial or proprietary information that may be exempt from disclosure under subsection (9)?"

The Mackinac Center for Public Policy was invited to file a brief amicus curiae. In conjunction with the Michigan Press Association, the Mackinac Center for Public Policy hereby files that brief.

ARGUMENT

I. Documents known to be in existence, the scope of Sole's request, and this Court's order

This Court has expressed interest in the total value of tax credits that was extended to GM “at the time of filing” the FOIA. There are no unredacted documents in the record prior to Sole's November 30, 2018, FOIA filing that specifically set this amount out. But, the 2016 amendment to the Global Retention Agreement seems to have two redacted references to the liability cap over the course of the tax-credit agreement. Application for Leave to Appeal, Exhibit 10 at 3, 4.⁴³ There is nothing in the record indicating that GM sought to have the 2016 amendment (with its discussion of liability caps) designated as financial or proprietary information.

Three publicly disclosed documents after that 2018 date discuss the total-value amount in part – in that they discuss the value of the remaining tax credits (but not the value of credits that had been realized prior). The first document is the “Second Amendment and Restated MEGA Tax Agreement: Retention Credit General Motors LLC,”⁴⁴ which contains redactions regarding the “Tax Credit Cap” [page 3 and 5 of the document] and a redacted table of annual cap limits [schedule C]. It appears this document covers the cap from 2019 to 2029 and provides no information of realized credits that occurred from 2009 to 2019. The second and third documents are the January 22, 2020, memo authored by Joshua Hundt, and the accompanying MSF

⁴³ One assumes that number did not change significantly in the time period between 2016 and when Sole filed his FOIA request in 2018.

⁴⁴

<https://www.mackinac.org/archives/2021/Second%20Amended%20Agreement.pdf>

“Resolution 2020-011” of the same date. Application for Leave to Appeal, Exhibit 11. The Hundt memo stated the amendment to global retention agreement would “Reduce the maximum credit benefit by \$325 million for a remaining credit value of \$2,276,905,235.” *Id.* at 4 (emphasis added). The resolution said the amendment would: “Reduce the State of Michigan’s obligations under the Global MEGA Tax Credit as a result of MSF Resolution 2015-187 for total tax credits that the Company may claim over the life of the Global MEGA Tax Credit (“Tax Credit Limit”).” *Id.* at 6. The Tax Credit Limit includes Global MEGA Tax Credits that have already been issued.” This third document indicates that MSF board members were informed not only of the remaining potential liability (the \$ 2,276,905,235 figure) but also of the amount that had been realized to date (the sum of the tax credit certificates that had been issued to GM for tax years 2010 to 2019). *Id.* at 6.

Thus, there is some publicly disclosed information about the remaining potential liability of the Global Retention Agreement, but the “total value of the tax credits” cannot be determined without access to the realized-tax-credit certificates and the proposed valuations of each amendment to the Global Retention Agreement (assuming a writing of such valuation exists – the 2016 amendment with the two redactions appears to be the most likely document to contain it). The limited circulation report issued to Legislature also seems a good vehicle for obtaining necessary information, but was not disclosed as being within the MEDC’s possession (nor subject to a statutory exemption to prevent disclosure).

Plaintiff's FOIA request was much broader than just the total value of the tax credits:

I am requesting **any and all documents** regarding Michigan Economic Growth Authority tax credits extended to General Motors for any all [sic] **years the tax credits were issued**, including amendments to the credits, **values of certificates issued, remaining liability on the certificates including how many years the MEGA tax credits can be claimed**, the amount of investment tied to credits, the amount of job growth and/or retention tied to the credits, any alleged basis for not disclosing these credits and legal opinions regarding same, and whether the job growth and or retention goals have been met for each and every credit issued.

Application for Leave to Appeal, Ex. 4 (emphasis added). The follow-up email did not narrow the request. It indicated that the request “states very clearly what documents we are seeking” and denied that “financial information GM might have submitted in seeking the MEGA credits” was being requested. Application for Leave to Appeal, Exhibit 5. It then set out the earlier request verbatim. *Id.*

There are numerous documents that MEGA or MSF produce that would be responsive: (1) each and every credit agreement and amendment thereto (which would include any reference to initial liability and/or remaining potential liability); (2) the realized-tax-credit certificates for GM; and (3) the report to the limited members of the Legislature (which includes the realized-tax-credit certificates).⁴⁵ To

⁴⁵ Amicus Economic Development Leaders for Michigan (EDLM) is a subset of entities that make up Defendant/Appellee MEDC. MEDC paid its law firm to file a brief on behalf of EDLM. In that brief, EDLM repeatedly claims that only one “item” was not given to Sole. *Id.* at 3 (“MEDC withheld only one item from the disclosure – the total amount of tax credit awarded to GM.”), *id.* at 4 (“MEDC’s action here – disclosing hundreds of pages of documents and withholding *one* item of information”), *id.* at 6 (“Plaintiff received nearly all the information he requested from MEDC except the one item that related to GM’s financial and proprietary information), and *id.* at 7 (Note continued on next page.)

date, on the questions of fully understanding how much was promised to GM and how much has actually been given, Sole has received the redacted 2016 amendment, and the three documents listed above that contain some information about liability post-2018. Those three documents post-2018 give some indication of future liability, but none address past payments made to GM prior to 2018 or what the liability cap is (assuming that the cap had not changed prior to being lowered by \$325 million in 2020).

Obviously, MCL 205.28(5) is an impediment to disclosure of the realized tax credits, and this Court's specific questions regarding MCL 125.2005 will need to be addressed. But, first, there are some constitutional matters to consider.

II. Constitutional considerations indicate the requested documents are financial records that must be open to inspection

Const. 1963, art. 9 § 23

Michigan's constitutions have all had a requirement that state receipts and expenditures be disclosed to the public. Const. 1835, art. 12, § 4 stated: "No money shall be drawn from the treasury but in consequence of appropriations made by law; and an accurate statement of the receipts and expenditures of the public money shall be attached to and published with the laws annually." Const. 1850, art. 18, § 5 stated: "An accurate statement of the receipts and expenditures of the public moneys shall

("MEDC held back only *one* piece of information in response to Plaintiff's request, sensitive information that GM and MEDC agreed to keep confidential."). When it says "item," EDLM appears to really mean any and all documents (not just a single document, but a panoply of documents) related to the total amount promised to GM. No mention is made of the realized tax credits, despite those documents being explicitly requested by Sole and clearly being relevant to the total amount given to GM. Further, no mention is made of MCL 205.28(5).

be attached to, and published with the laws, at every regular session of the Legislature.” Const. 1908, art. 10, § 17 stated: “An accurate statement of receipts and expenditures of the public moneys shall be attached to and published with the laws passed at every regular session of the legislature.” The current version is broader and states: “All financial records, accountings, audit reports and other reports of public moneys shall be public records and open to inspection. A statement of all revenues and expenditures of public moneys shall be published and distributed annually, as provided by law.” Const. 1963, art. 9, § 23. About the current provision, the address to the people stated: “This is a revision of Sec. 17, Article X, of the present constitution and is a more comprehensive and modern declaration of the public right to know details of state finance.” 2 Official Record, Constitutional Convention 1961, p. 3402. Thus, the first sentence was an addition to the previous requirements and meant to cover more material.

In *Sheffield v. Detroit City Clerk*, ___ Mich. ___ (2021), this Court stated: “When interpreting provisions of the Michigan Constitution, this Court should give constitutional language “the meaning that reasonable minds, the great mass of people themselves, would give it while considering the circumstances surrounding the adoption of the constitutional provision and the purpose sought to be accomplished.” *Id.* at ___ (cleaned up). Further, in *Citizens Protecting Michigan’s Constitution v. Secretary of State*, 503 Mich. 42 (2018), this Court stated that “constitutional convention debates and the address to the people, though not controlling, are relevant.” *Id.* at 61.

There is but one case on Const. 1963, art. 9, § 23. *Grayson v. Michigan State Bd. of Accountancy*, 27 Mich. App. 26 (1970). In that case, a businessman who provided a CPA review course sought the names and addresses of CPA exam applicants so that he could send them promotional materials. One argument was that when the individual paid the application fee and the clerk stamped it, the application became a “financial record” under Const. 1963, art. 9, § 23. *Grayson*, 27 Mich. App. at 33.

The Court of Appeal noted: “[T]here has been no judicial pronouncement as to the precise meaning of the words ‘financial records.’” *Id.* But, the “manifest purpose of article 9, § 23 is to allow the public to keep their finger on the pulse of government spending.” *Id.* at 34. Thus, it held that “financial records” are those necessary to compile “audit reports, financial reports, and statements” and “include general and subsidiary ledgers within which summary and detail entries are made from documents, listings, and recapitulations.” *Id.* Items that are too picayune to constitute financial records include receipts, applications for licensures, and every other expenditure of this type. *Id.* at 35. The Court of Appeals indicated the line is whether the financial transaction is significant enough to “achieve the purpose aforementioned” (i.e. finger on the pulse of government spending). *Id.*

The spending here (called a tax credit but really a corporate subsidy) constitutes hundreds of millions annually just to GM. This is not the same magnitude as a fee for an accounting exam, but instead is a budget-busting item that occasionally (like in 2015) requires legislative financial staff to explain to members what

happened. Further, the realized-tax-credit certificates are an item required to be part of an annual financial report (the one to limited members of the Legislature) on MEGA credits. As the Auditor General noted, “tax credits [are] negotiated with public funds.”⁴⁶

Turning to the constitutional convention debates and the address to the people, while almost certainly beyond the scope of the issues this Court would willing consider in the instant matter, there is some strong evidence that direct payments of state money to private industry was considered to be illegal at the time of the 1961-62 constitutional convention. This evidence may shed some light on what the convention delegates would have considered of the Legislature’s subsequent attempts to have information about large corporate subsidies (putatively tax policy) to be hidden from the public.

An unbroken string of all of this Court’s caselaw before 1941 prohibited such payments. See generally, *The People ex rel Detroit and Howell RR Co v. the Twp Bd of Salem*, 20 Mich. 452 (1870); Patrick Wright, Mackinac Center for Public Policy, *From Prohibited to Permitted: A Legal History of Corporate Handouts in Michigan* (2018) (discussing numerous cases following *Salem* over the course of the next seven decades).⁴⁷ Two opinions of this Court then ran to the contrary. *Miller v. State Apple Comm’n*, 296 Mich. 248 (1941); and *Hays v. Kalamazoo*, 316 Mich. 443 (1947).

⁴⁶ <https://audgen.michigan.gov/wp-content/uploads/2017/09/r186041516-0809.pdf> at 14.

⁴⁷ <https://www.mackinac.org/S2018-12>

Michigan's most-recent constitutional convention occurred in 1961 and 1962. On April 3, 1961, Michigan voters defeated a proposed constitutional amendment that would have allowed \$50,000,000 to be used to "for the purpose of financing industrial, manufacturing, and municipal development projects in this state." Public and Local Acts of the Legislature of the State of Michigan Passed at the Regular Session of 1961 at p. 760.⁴⁸ At the constitutional convention, there were numerous indications the delegates did not want to facilitate state aid being given to private interests. The delegates rejected attempts to eliminate what would become 1963 Const., art. 3, § 6, which concerned a ban on the state being a party to or financing non-public internal improvements (a concept that had been in Michigan's various constitutions since 1850).⁴⁹ In modifying what would become 1963 Const., art. 9, §2 (ban on contracting away power of taxation),⁵⁰ the sole speech on the provision was:

The power of taxation should reside perpetually with the state and its corporate districts and should never be surrendered, delegated or assigned to private parties. An important development in regard to this section in the recent years has been the practice of some communities to give exemptions or other special incentives to lure industry to their areas. Potential problems arise when communities promise tax exemptions of 5, 10, or 20 years to new industries. Some of these industries remain only as long as these exemptions or other special incentives remain in force, and the long run value of this special treatment for new industries is questionable. These policies to some extent involve a contracting away of the taxing power and to this extent are construed by some to be in violation of this section.

This practice was used many times in England colonial history, but is one that is normally looked down upon in the United States today.

⁴⁸ The proposed amendment came from a joint resolution of the Legislature and was rejected 568,476 to 541,826. 1961-62 Michigan Manual at p. 82.

⁴⁹ See Const. 1908, art.10, § 14; and Const. 1850, art. 14, § 9.

⁵⁰ The previous version of this provision was Const. 1908, art. 10, § 9.

1 Official Record, Constitutional Convention 1961, p. 912.

Finally, and most directly on the question of economic development, was the debate surrounding what would become Const. 1963, art. 9, § 18. That provision was a carryover from Const. 1908, art. 10, § 12. These indicate or indicated that: “The credit of the state shall not be granted to, nor in aid of any person, association or corporation.” When first introduced to the delegates, the chair of the committee responsible for the provision stated:

One thing that we were asked to do that we have not done was to so change this wording so that it would not prevent the loaning of state credit for the purpose of improving, bringing in industry and making industrial inducements. That was carefully considered by the committee. It was ruled out. We don't think it is sound policy. We know that we have competitors that use it, but we don't think that we should add to that situation by permitting Michigan to get into the same category.

1 Official Record, Constitutional Convention 1961 p. 623. Immediately thereafter, after lengthy debate, the Constitutional Convention rejected an amendment that would have allowed \$100 million for use in economic development. *Id.* at pp. 623-629. The amendment was defeated 39-84. *Id.* at 629. A second amendment that would have allowed the Legislature to decide when to allow economic development aid was quickly defeated. *Id.* Another attempt to allow \$100 million to be used for economic development followed. This one was defeated 40-93. *Id.* at 632.

The convention delegates repeatedly rejected attempts to allow economic development to be funded by the state. Despite that, these programs now exist in Michigan. But, Const. 1963, art. 9, § 23 requires “financial records” and “reports of public moneys shall be public records and open to inspection.” As noted above, these

MEGA retention agreements cumulatively run in the billions of dollars. Further, just using back-of-the-napkin math, GM's annual tax certificates alone will be around \$200 million. It is difficult to believe the delegates would mean to allow the Legislature to prevent the disclosure of the tax certificates that are part of the MCL 207.810 report from being reviewed by the public when there is a significant record from the Constitutional Convention of hostility to economic development generally. Along those same lines, the delegates would likely have looked with disfavor on a hidden corporate subsidy program that could significantly impact the budget process.

III. Statutory analysis of MCL 125.2005 shows that any tax-credit agreement is specifically excluded from being financial and proprietary information

Turning to the statutory interpretation questions presented by this Court, the Michigan Strategic Fund Act states:

A record or portion of a record, material, or other data received, prepared, used, or retained by the fund or any of its centers in connection with an application to or with a project or product assisted by the fund or any of its centers or with an award, grant, loan, or investment that relates to financial or proprietary information submitted by the applicant that is considered by the applicant and acknowledged by the board or a designee of the board as confidential shall not be subject to the disclosure requirements of the freedom of information act, 1976 PA 442, MCL 15.231 to 15.246.

MCL 125.2005(9). The Michigan Strategic Fund Board is to determine “whether it acknowledges as confidential any financial or proprietary information submitted by the applicant and considered by the applicant as confidential. Unless considered proprietary information, the board shall not acknowledge routine financial information as confidential.” *Id.* If the MSF Board finds information is confidential, it is supposed to release a written statement listing the name and location of the

company and a “broad nonspecific overview of the financial or proprietary information.” *Id.* In making the confidentiality determination, the Legislature indicated that: “Any document to which the fund is a party evidencing a loan, insurance, mortgage, lease, venture, or other type of agreement the fund is authorized to enter into shall not be considered financial or proprietary information that may be exempt from disclosure under subsection (9).” MCL 125.2005(11).

There is no case law on either MCL 125.2005(9) or MCL 125.2005(11). The MEGA statute contains similar language about financial and proprietary information. See MCL 207.805(3) and MCL 207.805(5). But there is no MEGA analogue to the “loan, insurance, mortgage, lease, venture, or other type of agreement” language found in the MSF statute. There is also no case law on any of the MEGA terms mirroring the MSF ones.

As some of the responsive documents were created when MEGA and not MSF was in charge of implementing the tax credits (e.g. the initial Global Retention Agreement, early amendments to it, and realized tax credit certificates issued before MSF took over), it is tempting to contend that the MEGA statute should apply to analysis of those documents. Both the Court of Claims and Court of Appeals recognized, however, that MCL 125.2005 controls. Once MSF was placed in charge of implementing the refundable-tax-credit program, its rules of operation covered disclosure.⁵¹ Only if MSF’s statute prevented disclosure, would MCL 15.243(d) of the

⁵¹ At that point, MSF controlled the pertinent documents and its rules of disclosure applied. Had those same documents been sought when MEGA controlled them, then MEGA’s statute would have guided disclosure.

Freedom of Information Act allow MSF to withhold documents. Thus, while it is more than a little curious why MEGA allowed all of its agreements (including liability caps without redactions) and all of the realized tax credits to be disclosed via FOIA before 2009 despite similar “financial or proprietary information” language being present in the MEGA statute, the documents here must be analyzed under MCL 125.2005.⁵²

Thus, this is a matter of first impression. This Court recently discussed statutory interpretation in *Rott v. Rott*, ___ Mich. ___ (2021). A number of general rules were set forth:

As we have often stated, the purpose of statutory interpretation is to understand and give effect to the intent of the Legislature. We must consider “both the plain meaning of the critical word or phrase as well as its placement and purpose in the statutory scheme.” Each word and phrase in a statute “must be assigned such meanings as are in harmony with the whole of the statute, construed in light of history and common sense.” When the language of the statute remains obscure or doubtful, we may also consider the historical context surrounding its enactment.

Id. at ___ (citations omitted).

As to the Global Retention Agreements and its various amendments, MCL 125.2005(11) is dispositive under a plain-meaning analysis. MCL 125.2007(a) lists some of the powers of the MSF: “Sue and be sued; to have a seal and alter the seal at pleasure; to have perpetual succession; **to make, execute, and deliver contracts,**

⁵² MCL 38.1140l also contains the financial-and-proprietary language. (The typesetting makes this potentially confusing. Here, “l” indicates the lower-case letter L. Thus, the statute is MCL 38.1140 – lower case L – all strung together). There is one FOIA case related to it. *Detroit News, Inc. v. Policeman and Fireman Ret. Sys. of the City of Detroit*, 252 Mich. App. 59 (2002). But that case had to do with whether the information has been widely disseminated and is not particularly instructive to the matter here.

conveyances, and other instruments necessary or convenient to the exercise of its powers; and to make and amend bylaws.” *Id.* (emphasis added). The Global Retention Agreement and its various amendments are all contracts. MCL 125.2005(11) indicates: “Any document to which the fund is a party evidencing a loan, insurance, mortgage, lease, venture, or **other type of agreement the fund is authorized to enter into** shall not be considered financial or proprietary information that may be exempt from disclosure under subsection (9).” *Id.* (emphasis added). A contract is a type of agreement and the MSF is authorized by statute to enter into contracts. The Global Retention Agreement and amendments created when MEGA controlled the process have all been assumed by MSF – thus, the fact that it was not the party signing the document at the time of creation is irrelevant.

Given that a contract that MSF and GM can enter into by statute is not confidential and proprietary information, the whole “related to” issue from MCL 125.2005(9) is irrelevant. Perhaps MEDC could make a “related to” argument regarding the realized-tax-credit certificates if it were to ever identify them as responsive to the FOIA request and claim a statutory exemption. But it did not do so here.

Further, the 2016 amendment discussion of inspection’s by GM indicates that both it and MEDC/MSF properly recognize that proprietary and financial information relates to things such as employee social security numbers, wage and hour records, employment locations, and employment histories, but not the state’s decision to spend billions of dollars to aid a particular employer.

There is also the 2015 confidentiality request. Consider the item about email correspondence related to the “Communication Plan around MEGA Amendment.” Are these email items that a private-market competitor (Ford, Honda, Toyota, etc.) would care about in creating a new product or seeking to increase market share or are they items that a public-policy entity (teachers association, county road commission, taxpayers, etc.) would care about as each competes with GM to seek state spending outlays? If it is the latter, it is difficult to contend that information is financial and proprietary.

As noted, the Global Retention Agreement and various amendments alone will not tell Sole how much GM was promised or how much it has received to date. For instance, the MEGA Tax Credit Agreement, says it “is the entire agreement between the parties” and does not “omit material fact,” yet contains no liability cap.⁵³ It is not until 2016 that a redacted tax credit cap shows up in an amended Global Retention Agreement. Application for Leave to Appeal, Exhibit 10 at 3, 4.

The realized-tax-credit certificates would be responsive to determining how much GM has received to date, and those documents were expressly requested. The simplest way to avoid having to determine what to do about MEDC not identifying these documents and not claiming them to be exempt would be to recognize that, as

53

<https://www.mackinac.org/archives/2021/2009%20retention%20agreement.pdf>. It is quite difficult to believe that in 2009 GM and MEDC did not agree to a figure on what was likely a multi-billion dollar agreement, but no document has been provided with a liability cap (not even a document with such a figure redacted).

discussed earlier, Const. 1963, art. 9, § 23 requires their disclosure and would overcome MCL 208.25(1)(f) and MCL 208.25(5).

IV. Alternatively, the particular confidentiality request made was quite narrow and should not prevent disclosure of most of the responsive documents.

The 2015 confidentiality request is quite narrow. There is no document that contains the title “MEGA Summary of Terms.” Nor is any email correspondence related to the 2015 amendment being sought. Thus, it is difficult to discern why both the Court of Claims and the Court of Appeals treated this confidentiality request as applying across the entirety of the Global Retention Agreement. Assuming for the sake of argument that the liability cap is financial or proprietary information instead of information directly related to governmental spending to subsidize a particular company, GM only sought that designation for that the 2015 amendment to the Global Retention Agreement. Each prior and subsequent amendment would require their own confidentiality request. As there is no indication that such was sought for the 2016 amendment, the redacted liability caps should be disclosed. Further, nothing in that confidentiality request covers realized-tax-credit agreements and MEDC would instead have to rely on MCL 208.25, which it has not referenced to date.

RELIEF REQUESTED

For the reasons stated above, this Court should grant oral argument in this matter. If this Court were to decide the issue in lieu of argument, it should require unredacted liability caps and unredacted realized-tax-credit agreements to be provided to Sole.

Respectfully Submitted,

/s/ Patrick J. Wright
Patrick J. Wright (P54052)
Attorney for Amici Curiae
Mackinac Center for Public Policy and
Michigan Press Association

Dated: October 4, 2021