STATE OF MICHIGAN

SUPREME COURT

Appeal From the Michigan Court Of Appeals
Jane M. Beckering, PJ, Michael J. Kelly, and Colleen A. O'Brien, JJ

SUSAN BISIO,

Plaintiff-Appellant,

v

THE CITY OF THE VILLAGE OF CLARKSTON,

Defendant-Appellee.

Supreme Court No. 158240

Court of Appeals No. 335422

Oakland County Circuit Court
Case No. 2015-150462-CZ

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APPELLANT SUSAN BISIO'S BRIEF ON APPEAL

Oral Argument Requested

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Statement of Appellate Jurisdiction

This Court has jurisdiction under MCR 7.303(B)(1) to "review by appeal a case … after decision by the Court of Appeals." Plaintiff-appellant Susan Bisio filed a timely application for leave to appeal on August 14, 2018, within 42 days after the July 3, 2018 court of appeals opinion. MCR 7.305(C)(2)(a). This court granted leave to appeal on September 25, 2019.

Statement of Question Presented

Are the charter-appointed city attorney's nonprivileged correspondence and emails, involving his conduct of official city business, public records subject to the freedom of information act, even though he kept them in a separate off-premises file and did not forward copies of the records to the city offices or other city officials?

The circuit court and court of appeals said "no."

Plaintiff-appellant Susan Bisio says "yes."

Statement of Facts

I. Nature of the Action

Clarkston's city attorney kept a "private" file of non-privileged correspondence and emails with third parties compiled in his conduct of official city business—addressing contract and ordinance disputes with parties adverse to the city. He kept the file outside the city office and didn't share the records with other city personnel. The city attorney is formally appointed by the city council to an office defined in the city charter.

The issue is whether the records in his file are subject to the freedom of information act. The court of appeals held they were not because the city attorney doesn't fall within FOIA's definition of "public body." Plaintiff-appellant Susan Bisio seeks reversal because the records are "public records" as defined by FOIA and are held by a city official on behalf of the city, which is a public body. The court of appeals' narrow construction of the statute would make most, maybe all, municipal records immune from FOIA requests. This is contrary to the statutory language and FOIA's pro-disclosure purpose.

II. Summary of Facts

A. The FOIA Request

Appellant's record request is at appendix, p 68a. The description of the records came verbatim from city attorney Thomas Ryan's invoices, which are posted on the city's web site and available to the public. Appendix, pp 134a-150a. The request included, among other things, 18 items of correspondence.[1] They involved two properties that were the subject of disputes between the property owners and the city: 148 N. Main Street, where the owner (the son of a city

[1] For convenient reference, the requests at issue are listed in a summary exhibit (appendix, p 65a). This exhibit excerpts from the original request the 18 contested records. There were no disputes about the accuracy of the summary exhibit or these excerpts.

council member) proposed a development on property that was the site of a plume of groundwater contamination;[2] and vacant property, where the owner cut down trees and the city's Historic District Commission (chaired by the daughter of the same city council member) had the owner cited for not obtaining a "certificate of appropriateness" for disturbing what the commission characterized as a "historic resource."[3]

B. The City Attorney

The city attorney is a formally appointed city officer.[4] The city charter defines the office and requires the city council to approve the appointment. Charter, §§ 5.1(a)-(b) (appendix, pp 100a-101a). In his capacity as city attorney, Ryan sends and receives written communications with persons outside the city. Ryan sent or received each contested record in his capacity as city attorney and they involved his conduct of city business.[5] He uses a private law firm email address, not the city's email address. Ryan deposition, pp 40-41 (appendix, pp 257a-258a). He doesn't have an office in the city's small municipal building. He is not an employee. *Id.*, p 41 (appendix, p 258a). Ryan billed the city for his work on the contested records and the city paid him.[6]

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[2] Requests 1e (discussing water table), 2a (discussing contamination plume), 2c, 2h (discussing Michigan Department of Environmental Quality approval), 3e (discussing storm water disposal system), 3g (discussing "groundwater mounding analysis"), 3j, 3k, 3l, 3m, 4a, 4d, and 4e. Appendix, pp 65a-67a.

[3] Requests 4j, 4k, 5a, 5b, and 5c. Appendix, p 67a.

[4] Ryan deposition, pp 4, 7-9 (acknowledging his office as city attorney); p 41 (acknowledging appointment under the city charter) (appendix, pp 221a, 224a-226a; 258a). There is an error on page 41 of the transcript (appendix, p 258a). "Chair" should be "charter" so that the sentence reads: "I'm an administrative officer by charter."

[5] Defendant's Amended Answers to Plaintiff's Second Requests for Admissions and Third Interrogatories to Defendant, ¶¶ 6-23 (amended answers), 7/28/16 (appendix, pp 161a-173a).

[6] The FOIA request references each of five invoices from Ryan. 6/7/15 letter, ¶¶ 1-5 (appendix, pp 68a-71a). The city admitted it paid Ryan for these invoices. Defendant's Answer to

C. The City Refused to Produce Non-Privileged Records in Its Official's File

The city's response[7] was to produce some records and deliver a letter from Ryan. Appendix, p 75a. For 18 items, the response was: "Not a public record pursuant to MCL 15.232(e)."[8] Appendix, pp 75a-76a. The response did not claim privilege or a FOIA exemption.

In response, appellant's attorney sent a letter stating the records were each a "'writing … owned, used, in the possession of, or retained' by the city attorney, a charter officer of the city acting on behalf of the city, a public body 'in the performance of an official function.'" Appendix, pp 77a-78a (quoting the definition of "public record").

Almost two months later, Ryan[9] responded, producing additional records but continuing to claim that the records in his file regarding his conduct of official city business are not public records. Appendix, p 81a. He said: "the information denied as received by myself as City Attorney was between myself and either other attorneys or city engineering staff without receipt by the City

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Plaintiff's Third Requests for Admission and Fifth Interrogatories to Defendant, ¶¶ 1-5, 7/27/16 (appendix, pp 157a-158a)).

[7] The response was from Ryan rather than the city clerk, who is the city's FOIA coordinator. MCL 15.236(1) (FOIA coordinator responsible for processing requests and approving denial); MCL 15.235(6) (FOIA coordinator or designee must sign denial).

[8] The reference is to the statutory definition of "public record" at that time. 2018 PA 68 amended MCL 15.232 by adding additional definitions and re-lettering previous definitions. This brief uses the current citations. The definition of "public record" is now at MCL 15.232(i). See section III.B in the argument for the text of the definition.

[9] Although the follow-up letter from appellant's counsel was sent to the city's FOIA coordinator (appendix, p 77a), Ryan responded. The letter from plaintiff's counsel was not an administrative appeal as defined in MCL 15.240(1)(a) because it was not directed to the "head of the public body" and did not "specifically state[] the word 'appeal.'" Nonetheless, Ryan treated it as an appeal, even though he didn't forward the letter to "the head of the public body," who is the person who would consider an appeal. MCL 15.240(1)(a), (2). Rather Ryan took it upon himself to act as "the head of the public body." His response (appendix, p 81a, ¶ 1) stated: "Appeal denied."

itself." *Id.*, ¶ 1. He stated the rationale for withholding the records was that he is not a public body and the records were not received or possessed by the city. *Id.*

To this day, to appellant's knowledge, no one in the city besides Ryan has seen the contested records. As this suit dragged on, new council members asked the lawyer from the Michigan Municipal League's insurance company handling the case (someone Ryan testified was his "social friend") to see the records. That lawyer threatened that the city might lose its insurance coverage or suffer financial losses if the council persisted in trying to see the records.

III. Proceedings in Circuit Court

The circuit court denied appellant's motion for summary disposition that was filed with her complaint and a later-filed motion for summary disposition on the city's defenses, citing supposed factual disputes. The court of appeals denied appellant's application for leave to appeal denial of summary disposition "for failure to persuade the Court of the need for immediate appellate review." Order 7/7/16, COA docket no. 333059.

After discovery closed, the parties filed cross-motions for summary disposition. The city argued (1) Ryan is not a public body and therefore records in his files are not public records and (2) the records were not public records because they were in Ryan's "private" file and thus not in the city's possession. Appellant argued Ryan is a charter-appointed city officer conducting official city business and the records in his possession are public records even if he did not provide copies to other city officials. The circuit court granted the city's motion and denied appellant's motion. Appendix, p 17a, p 36a.[10] The circuit court said that, although Ryan is not a "public body," he is

[10] The October 20, 2016 opinion omitted page 8 and contained duplicates of page 10. The court entered a corrected opinion on October 21, 2016. Appendix, p 36a. It contained a handwritten note on the first page: "Refiled & Serviced [*sic*] to replace 10/19/16 version missing pg 8."

the city's agent and may prepare, own, use, possess, or retain the city's public records. *Id.*, p 17 (appendix, p 52a). The opinion then considered "if defendant used the contested records … as a basis for its decision …." *Id.* The court held the records were not used "to assist defendant in making a decision." *Id.*, p 18 (appendix, p 53a). To reach this conclusion, the court said "plaintiff fails to direct this Court's attention to any documentary evidence (e.g., meeting minutes) to establish that defendant used the contested records to make a decision related to the subject matter of the contested records." *Id.* The court concluded "the contested records are not 'public records' because there is no evidence to support that defendant used or retained them in the performance of an official function or that Attorney Ryan shared the contested records (the actual correspondence) to assist defendant in making a decision." *Id.* Based on this, the court granted summary disposition to the city. *Id.* Given the court's conclusion that the records were not public records, it then denied appellant's cross-motion for summary disposition as moot. *Id.*, p 19 (appendix, p 54a).

IV. Court of Appeals Opinion

The court of appeals affirmed, relying on FOIA's definitions of "public body" and "public record." It noted the definition of "public body" includes state but not municipal officers and employees. Opinion 7/3/18, p 5 (appendix, p 59a). It rejected the argument that Ryan is an agent of the city and that "to the extent that the city attorney possesses [the records] in the conduct of city business, defendant possesses them in the performance of an official function." *Id.*, p 6 (appendix, p 60a). Rather, it said that "for a record to become a public record subject to FOIA, the record has to be adopted by the public body itself …, not simply used, possessed, or retained by someone acting on behalf of the public body." *Id.* It pointed out that "the records at issue in this case have remained in possession of the city attorney" and there was no evidence "that he has shown them to the city council, that council members have used them for the basis of a decision, or even that

the letters sent and received have resulted in an agreed-upon proposal that the city attorney could submit for the council's consideration." It concluded these were not public records because they were not "adopted by the public body [the city] itself in one of the ways stated in [the definition of "public record"]." *Id.* When saying that the records were not "adopted by" the city itself, the court thus distinguished Ryan from the city itself. Accord *id.*, p 7 ("there is no evidence that defendant [the city] used the letters prepared by its city attorney") (appendix, p 61a); p 8 ("no evidence of the city having acted on them") (appendix, p 62a). The court rejected the argument "that the city attorney's possession and use of records in his role as city attorney is tantamount to the public body's use and possession of the records in the performance of an official function." *Id.* In the court's view, that would be "an expansion of the definition of 'public body' and of 'public record' that is unsupported by Michigan law." *Id.*

This Court granted leave to appeal on September 25, 2019. It directed the parties to address two specific issues. Section I.C of the argument below shows where appellant discusses those issues.

Argument

I. Introduction—City Officials Should Not Be Able to Insulate Records of Their Conduct of Official Business by Keeping Them in Off-Premises "Private" Files

A. When a City Officer Conducts City Business, the Records He Compiles Are Public Records Under FOIA

The city attorney holds an office defined by the city charter. The city council formally appointed him to that office. He negotiated with opposing counsel regarding ordinance and contract enforcement, an official function of the city. He consulted with the city's engineering firm about the same issues. The opposing attorneys he corresponded with thought they were dealing

with an official representative of the city. He billed the city for the work he did sending and receiving the contested records. The city paid his bills. The records satisfy FOIA's definition of "public record." They are "prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function." MCL 15.232(i).

The city argues the city attorney's records are not public records because he is not a "public body" as defined in FOIA. But it doesn't matter that the city attorney is not a "public body." The city is a "public body." The city attorney acts for the city. He performs an official function for the city. His actions are the city's actions. The city attorney is not some kind of separate, independent entity unrelated to the city. He is the city's agent. It doesn't matter that he may be an independent contractor. He is still an agent acting on behalf of the city. His preparation, use, possession, and retention of records of the performance of his official function as a city officer are the city's actions. And the city owns the records. This satisfies the definition of "public record."

It is only by diverting attention from the basic issue—whether the contested records are "public records"—that the city and the court of appeals sowed doubt about the simple proposition that, when a city officer performs an official function for the city, the records he compiles are public records. They try to divert attention from this common-sense proposition by parsing the definition of "public body" rather than focusing on the question of whether the records satisfy the definition of "public record." The city attorney is not a "public body." But that doesn't make any difference. He can still possess the city's public records. Only a flesh-and-blood individual acting for the city (which can only act through its agents) can possess the city's public records.

Accepting the city's misinterpretation of FOIA would allow city officials to keep separate, secret files not subject to FOIA. It would be a recipe for conducting government business behind closed doors, keeping separate "private" files and communicating on personal computers and cell

phones.

This Court should uphold FOIA's pro-disclosure policy by (1) requiring the city to disclose the records it has fought so hard to keep secret and (2) declaring that city officials cannot evade FOIA by the artifice of keeping separate off-site files about official city business.

B. The City's Fallacious Themes

Throughout the case, the city has tried to divert attention to two arguments that, if accepted, would eviscerate FOIA. These can be referred to as the "relationship" and "place" arguments.

The "relationship argument" focuses on the nature of the employment relationship between the city and the city attorney, suggesting that the agreement under which a city officer or employee is paid determines whether that person can hold public records. Like many smaller public bodies, Clarkston has few full-time employees working on the premises and contracts with many providers, including its charter-appointed city attorney. According to the city, this makes the city attorney an independent actor, separate from the city, and allows the city to deny FOIA requests for information that this officer prepares, uses, possesses, or retains, but entirely ignores his status as one of six officers appointed under the city charter. Accepting the relationship argument would give a green light to a public body of any size to contract out *any* activity or *any* function for which it wants to avoid scrutiny. Fairly or not, corruption charges are frequently levied at law enforcement, land banks, and public contracting, so if the city's argument were accepted, the solution to avoiding public scrutiny would be to simply use independent contractors to administer a function, instruct the contractor to keep records at its office location in what would amount to a "FOIA-free shelter," and allow the public body receiving the request to deny there are any public records available.

The "place argument" focuses on the *location* where the records are created, reviewed, or stored as determinative of the record's status. It postulates a sort of birthing process to change that

status: A record can go through the process of "becoming" a public record based on the whim of public officers or employees. Here, the charter-appointed officer created or reviewed the records at issue while sitting in his off-site office. Under the city's view of FOIA, the public officer or employee who creates or reviews records on a non-government computer system or in a non-government place independently determines whether to share the records with city hall. The theory is there can be no "use" or "adoption" by the city itself if the records are kept out of the city office. This would broadly open the doors to officers and employees to work from home on sensitive matters, collaborate using cloud-sourced websites, and exchange personal email, for example. Those records would stay hidden until the officer or employee decides the matter is ready for legislative approval. But by that point, the public has been shut out of any opportunity for input and can only object to a finalized plan. One need look no further than the recent headlines to know that the use of personal email and equipment to circumvent public records requests is becoming a common practice.

C. Issues in the Grant Order

The grant order directed briefing on two issues. This brief addresses them as follows:

Issue 1: "[W]hether the Court of Appeals erred in holding that the documents sought by the plaintiff were not within the definition of 'public record' in" FOIA. Section III shows the contested records satisfy that definition.

Issue 2:

> [W]hether the defendant city's charter-appointed attorney was an agent of the city such that his correspondence with third parties, which were never shared with the city or in the city's possession, were public records subject to the FOIA, see *Breighner v Michigan High Sch Athletic Ass'n*, 471 Mich 217, 233 ns 6 & 7 (2004); *Hoffman v Bay City School Dist*, 137 Mich App 333 (1984).

Section III.B.1.a shows the city attorney is the city's agent, making records compiled in

the course of his performing an official city function the city's records, hence "public records" subject to FOIA. Section IV.C further discusses application of the common law of agency to the city.

Section IV.B shows it is an incorrect premise that the contested records were not "shared with the city or in the city's possession." The records are the city's records, regardless of their location.

Section V discusses *Breighner* and shows (1) *Breighner* decided an issue not presented in this case—who falls within the definition of "public body"; and (2) the particular footnotes in *Breighner* that the grant order cites (471 Mich at 233, ns 6 and 7) reject the proposition that an agent of a public body is itself a public body—an issue inapplicable to this case—but also assume agency law applies in FOIA cases.

Section VI discusses *Hoffman* and shows that opinion is not binding on this Court, is distinguishable, and was wrongly decided.

II. Standard of Review

Summary disposition—including summary disposition in FOIA cases—is reviewed *de novo. Title Office, Inc v Van Buren Co Treasurer*, 469 Mich 516, 519; 676 NW2d 207 (2004). Questions of statutory interpretation are reviewed *de novo. Id. De novo* review means this Court reviews the decision below independently, with no required deference to the trial court or the court of appeals. *Millar v Constr Code Auth*, 501 Mich 233, 237; 912 NW2d 521 (2018).

III. The Contested Records Are Public Records

A. FOIA Is Construed in Favor of Disclosure

The statutory construction question here is whether records in a so-called "private" file of

the charter-appointed city attorney regarding his conduct of official city business are "public records." The answer should be simple: Records a public official creates or receives as part of the official's job are public records, regardless of where they are kept.

The overriding purpose of FOIA informs this statutory construction issue:

> It is the public policy of this state that *all persons … are entitled to full and complete information regarding* the affairs of government and *the official acts of those who represent them as public officials* and public employees, consistent with this act. The people shall be informed so that they may fully participate in the democratic process.

MCL 15.231(2) (emphasis added).

"Consistent with this broadly declared legislative policy, the FOIA's specific provisions generally require the full disclosure of public records in the possession of a public body …." *Herald Co v Bay City*, 463 Mich 111, 118; 614 NW2d 873 (2000). "[T]he burden is on the [city] to sustain its denial." MCL 15.240(4). Accord *MacKenzie v Wales Twp,* 247 Mich App 124, 128; 635 NW2d 335 (2001). Records must be produced "regardless of the location." MCL 15.240(4).

B. The Records Meet the Definition of Public Records

> "Public record" means a writing prepared, owned, used, in the possession of, *or* retained by a public body in the performance of an official function, from the time it is created.

MCL 15.232(i) (emphasis added). The city is a "public body." MCL 15.232(h)(*iii*) ("public body" includes a "city"). The issues are (1) whether the records in Ryan's file are "prepared, owned, used, in the possession of, or retained" by the city (discussed in section III.B.1 below) and (2) whether that was "in the performance of an official function" (discussed in section III.B.2 below). The Court must consider these issues in light of (1) the pro-disclosure purpose of FOIA (section III.A above); (2) the city's burden to sustain a claim that the records should be kept secret (MCL 15.240(4); *MacKenzie*, 247 Mich App at 128); and (3) the principle that the public policy

of disclosing "full and complete information regarding … the official acts of … public officials" (MCL 15.231(2)) "must be considered in resolving ambiguities in the definition of public record." *Walloon Lake Water Sys, Inc v Melrose Twp,* 163 Mich App 726, 730; 415 NW2d 292 (1987).

1. The Records Were Prepared, Owned, Used, in the Possession of, and Retained by the City

a. The Records Here Are the City's Records

"Public record" includes "records of public officials and employees." *Detroit News, Inc v Detroit,* 204 Mich App 720, 723; 516 NW2d 151 (1994). The following discussion shows a city's officials and employees act as agents of the city and the records they compile in doing so are the city's records.

(i) Legal Attributes of an Agent

An agency relationship exists when "one person acts for or represents another by his authority." *St Clair Intermediate School Dist v Intermediate Ed Ass'n/Michigan Ed Ass'n*, 458 Mich 540, 557; 581 NW2d 707 (1998). Accord 1 Restatement Agency, 3d, § 1.01, p 17. An agent "is a substitute, a deputy, appointed by the principal, with power to do the things which the principal may or can do." *Burton v Burton*, 332 Mich 326, 337; 51 NW2d 297 (1952).

An attorney is the client's agent. *Fletcher v Board of Ed*, 323 Mich 343, 348; 35 NW2d 177 (1948); *Garey v Kelvinator Corp*, 279 Mich 174, 190; 271 NW 723 (1937) (agency law governs employment of attorney); *Detroit v Whittemore*, 27 Mich 281, 286 (1873) (same). An attorney is a "legal agent." *Black's Law Dictionary* (11th ed 2019) (definition of "attorney"). Accord 1 Restatement Law Governing Lawyers, 3d, Ch 2, Introductory Note, p 124 ("A lawyer is an agent …"); *id.*, § 26, comment b, p 198 ("Lawyers … are recognized as agents for their clients …"); 1 Restatement Agency, 3d, § 1.01, comment c, p 19 ("The elements of common-law agency are

present in the relationships between … client and lawyer …").

An "agent stands in the shoes of the principal." *In re Capuzzi Estate*, 470 Mich 399, 402; 684 NW2d 677 (2004). He acts on behalf of his principal. *St Clair Intermediate School Dist*, 458 Mich at 557. His knowledge is attributed to the principal. *Stephenson v Golden*, 279 Mich 710, 736; 276 NW 849 (1937).

The fact that a person may be an independent contractor and not an employee does not preclude his acting as an agent. 1 Restatement Agency, 2d, § 14 N, comment a, p 80 (stating that most attorneys are independent contractors and also agents); *Lincoln v Fairfield-Nobel Co*, 76 Mich App 514, 518-519; 257 NW2d 148 (1977) (rejecting defense that independent contractor could not be defendant's agent).

Documents the agent has in the conduct of work for the principal belong to the principal. "An agent's fiduciary duty … has a corollary duty of performance that requires the agent to maintain records of dealings on the principal's behalf and provide them to the principal upon demand." 2 Restatement of Agency, 3d, § 8.12, comment d, p 388. "[D]ocuments in the possession of a party's agent—for example, an attorney—are considered to be within the party's control." *Flagg v Detroit*, 252 FRD 346, 353 (ED Mich 2008). Accord *Womack Newspapers, Inc v Kitty Hawk*, 181 NC App 1, 13; 639 SE2d 96 (2007) ("anything in a client's file, which is in the hands of the client's attorney, belongs to the client, with the exception only of the attorney's notes or work product").[11] (There is no valid privilege or work product claim here.)

[11] This Court can consider precedents from other jurisdictions and federal courts for their persuasive value. *Dodge v Blood*, 299 Mich 364, 371; 300 NW 121 (1941); *In re Jujuga Estate*, 312 Mich App 706, 723 n 7; 881 NW2d 487 (2015).

(ii) The City Attorney Is the City's Agent and the Records He Compiles in Performing an Official Function Are City Records

Applying the law discussed above, Ryan, acting as an appointed charter officer and attorney for the city, is the city's agent. Simply because he is the city's attorney, he is the city's agent. *Fletcher*, 323 Mich at 348. Additionally, when, as here, he represents the city and negotiates matters with attorneys for parties adverse to the city, he is the city's agent because he "acts for or represents another by his authority." *St Clair Intermediate School Dist*, 458 Mich at 557.

As the city's agent, the records Ryan compiles in the course of performing his official functions are the city's records. 2 Restatement of Agency, 3d, § 8.12, comment d, p 388; *Flagg*, 252 FRD at 353 (agent's records are in principal's control). The evidence confirms Ryan and the city understood this. When Ryan was appointed city attorney, the city council directed the city's previous attorney to turn over all his records to Ryan, showing that the city attorney's records are under the city's control. Ryan deposition, p 12 (appendix, p 229a). Ryan testified that, if the city appointed a new city attorney, he would turn over his records on open matters to the new attorney. *Id.*, pp 12-13 (appendix, pp 229a-230a). He would have an ethical obligation to do so. MRPC 1.4(a) (requiring a lawyer to "comply promptly with reasonable requests for information.") He correctly viewed the records in his possession as the city's records. The city manager testified Ryan would give her records pertinent to city business. Eberhardt deposition, p 5 (appendix, p 180a). Those records are thus in the city's control.

FOIA applies to records in the "control" of a public body, not just those in its physical possession. *MacKenzie*, 247 Mich App at 131-132 (ordering townships to disclose records in possession of a third party); *Easley v Univ of Michigan*, 178 Mich App 723, 725; 444 NW2d 820 (1989) (FOIA applies to records in public body's "possession or control").

In a case similar to this, *Journal/Sentinel, Inc v School Bd of School Dist of Shorewood,* 186 Wis 2d 443; 521 NW2d 165 (1994), the court held that a memorandum of understanding with terms of a lawsuit settlement in the school board's attorney's hands was a public record subject to the state's public records law. As in this case, the school board argued the record was not created or kept by the board but rather was created by its law firm and was in only the firm's files. 186 Wis 2d at 452. The court rejected the proposition that "a public body may avoid the public access mandated by the public-records law by delegating both the record's creation and custody to an agent." *Id.* at 452-453. It held the board's lawyer was its agent and delegating creation or retention of the record "to outside counsel does not thereby remove the document from the statute's definition of 'record.'" *Id.* at 454. It pointed out that, as in this case, the firm would have to turn over the document if its client requested it. *Id.* at 455. The court cited the policy section of Wisconsin's public records law, which is similar to MCL 15.231(2). *Id.* at 448. The bottom line: The records in the file of an attorney who performs services for a public body are public records. The lawyer's actions were the public body's actions for purposes of the public records law. *Id.* at 453. The case here is even stronger because the attorney is an appointed public official.

Similarly, in *Nissen v Pierce Co,* 183 Wash 2d 863; 357 P3d 45 (2015), the Washington Supreme Court held that "a record that an agency employee prepares, owns, uses, or retains in the scope of employment is necessarily a record 'prepared, owned, used, or retained by [a] state or local agency.'" 183 Wash 2d at 816 (quoting the Washington Public Records Act definition of "public record," which is substantially similar to MCL 15.232(i)). Accord *Knightstown Banner, LLC v Town of Knightstown,* 838 NE2d 1127 (Ind App 2005) (settlement agreement in attorney's file was a public record even though town never received a copy; delegating work to outside counsel does not remove records from definition of public record); *Forum Publishing Co v Fargo,*

391 NW2d 169 (ND 1986) (applications for police chief position in hands of consultant screening candidates were public records); *State ex rel Findlay Publishing Co v Hancock County Bd of Comm'rs,* 80 Ohio St 3d 134, 137-138; 1997-Ohio-353; 684 NE2d 1222 (1997) (settlement agreement held by private attorney defending county was a public record; "Government entities cannot conceal public records by delegating a public duty to a private entity"); *Creative Restaurants, Inc v Memphis,* 795 SW2d 672, 678-679 (Tenn App 1990) (records in file of private law office of city attorney are public records).

Consistent with these cases, in performing legal services for the city, Ryan, acting as city attorney, acts for the city. Under common-law agency principles, his records are the city's records. The circuit court recognized Ryan is the city's agent and can possess the city's public records. Opinion 10/21/16, p 17 (appendix, p 52a). One has to ask: If Ryan is not acting as the city's agent, how can he be an attorney at all? The essence of the attorney-client relationship is that the attorney represents—acts on behalf of—his client. An attorney is "one who is designated to transact business for another; a legal agent." *Black's Law Dictionary* (11th ed 2019) (definition of "attorney"). Ryan is not some independent entity untethered to his client. He stands in the client's shoes. His acts are the city's acts. That makes his records about city business the city's records.

b. The Records Satisfy the Requirement That They Are "Prepared, Owned, Used, in the Possession of, or Retained" by the City

Given that the records in the city attorney's possession are the city's records, the next step is to determine whether they are "prepared, owned, used, in the possession of, *or* retained by a public body"—by the city. MCL 15.232(i) (emphasis added). They are public records if they satisfy any one of the alternatives in the definition. They do for at least four reasons:

(i) The City Owns the Records

The discussion in section III.B.1.a above shows records an agent compiles within the scope of his agency belong to the principal. That alone shows the city owns the records. Case law defining ownership confirms this.

An owner is one who has a right to possess and use something. *People v Beam*, 244 Mich App 103, 109; 624 NW2d 764 (2000). Ownership is the right "to use, manage, and enjoy property." *Black's Law Dictionary* (11th ed 2019). Actual possession is not required. *Beam,* 244 Mich App at 109.

The city is the owner of the records because it has the right to possess and use them. Ryan used the records to conduct official city business.[12] He billed the city for preparing and receiving them and the city paid him.[13] He testified that, if the city appointed a new city attorney, he would turn over records to the new attorney. Ryan deposition, pp 12-13 (appendix, pp 229a-230a). He never refused to provide copies of correspondence or email regarding city business to city officials. *Id,* p 13 (appendix, p 230a).

Given the facts that (1) the records involve city business conducted by a city official, (2) the city paid for the work, and (3) the city has a right to get the records on request, the city has the right to possess and use the records. That right is ownership. *Beam,* 244 Mich App at 109. Cf.

[12] Defendant's Amended Answers to Plaintiff's Second Requests for Admissions and Third Interrogatories to Defendant, ¶¶ 6-23 (amended answers), 7/28/16 (appendix, pp 161a-173a).

[13] The FOIA request references each of five invoices from Ryan. Letter 6/7/15, ¶¶ 1-5 (appendix, pp 68a-71a). The city admitted it paid Ryan for these invoices. Defendant's Answer to Plaintiff's Third Requests for Admission and Fifth Interrogatories to Defendant, ¶¶ 1-5, 7/27/16 (appendix, pp 157a-158a).

MCL 399.811(2) (record "that is a memorial of a transaction of a public officer made in the discharge of a duty is the property of this state").

(ii) The City Possesses the Records

The records are "in the possession" of the city when they are in the possession of the city's authorized agent. The agent's possession is the city's possession. *Capuzzi Estate*, 470 Mich at 402 (agent stands in principal's shoes); *Flagg*, 252 FRD at 353 (documents in agent's possession are in principal's control). The city, through its agent Ryan, possessed the records. See *Womack Newspapers*, 181 NC App at 11-12 (rejecting argument that documents in attorney's file were not public records because they "were never in the Town's possession").

(iii) The City Used the Records

Acting on behalf of the city and as a charter-appointed official, Ryan "used" the records to conduct official city business. The city admits the records involve conduct of city business.[14]

(iv) The Records Were Prepared or Retained by the City

Ryan "retained" or "prepared" the records on behalf of the city. The descriptions in Ryan's invoices show he either sent or received them. Ryan invoices, appendix, pp 134a-150a. He "prepared" the records described in requests 3g, 3j, 3m, 4j, and 5b. FOIA request summary (describing each as Ryan's "correspondence to" someone) (appendix, pp 66a-67a). The remaining records are "correspondence from" someone. *Id.* (appendix, pp 65a-67a). He "retained" all the records, since he kept them in his file.

[14] Defendant's Amended Answers to Plaintiff's Second Requests for Admissions and Third Interrogatories to Defendant, 7/28/16, ¶¶ 6-23 (amended answers) (admitting the records were sent or received by Ryan "regarding City business") (appendix, pp 161a-173a).

* * *

The records meet the first part of the definition of "public records": They are "prepared, owned, used, in the possession of, [and] retained by" the city. MCL 15.232(i). Accord *Nissen,* 183 Wash 2d at 879 ("records an employee prepares, owns, uses, or retains within the scope of employment are public records").

2. The City Attorney Performs an Official Function for the City

Since the records are "prepared, owned, used, in the possession of, or retained by a public body," the next step is to determine whether that was "in the performance of an official function." MCL 15.232(i).

a. What Constitutes an "Official Function"

> The expression 'in the performance of an official function' is not defined in the statute. Accordingly, the term must be construed according to its commonly accepted and generally understood meaning.

Kestenbaum v Michigan State Univ, 414 Mich 510, 538; 327 NW2d 783 (1982) (Ryan, J.).[15] When the statute does not expressly define a term, courts may consult dictionary definitions. *Pace v Edel-Harrelson*, 499 Mich 1, 7; 878 NW2d 784 (2016).

"Official," used as an adjective, means "belonging or relating to an office, position, or trust : connected with holding an office"; "derived from the proper office or authority"; "prescribed or recognized as authorized"; "befitting or characteristic of a person in office or acting in his capacity

[15] *Kestenbaum* affirmed the lower court by an equally divided Supreme Court. All six justices agreed the records (information used to produce the university's student directory) were public records. 414 Mich at 521 (lead opinion); 414 Mich at 539 (Ryan, J). The opinions stand for the proposition that those records were used "in the performance of an official function." MCL 15.232(i). The opinions disagreed on whether a privacy exemption applied, an issue not relevant to this case.

of an officer." *Webster's Third New International Dictionary, Unabridged Edition* (1986). Accord *Black's Law Dictionary* (11th ed 2019) ("Of, relating to, or involving an office or position of trust or authority"). "Function" means "the action for which a person or thing is specially fitted, used, or responsible or for which a thing exists : the activity appropriate to the nature or position of a person or thing." *Webster's Third New International Dictionary*. Accord *Black's Law Dictionary* (11th ed 2019) ("Activity that is appropriate to a particular business or profession").

Using these definitions, an "official function" of the city is an activity authorized and appropriate to the nature of the city and relating to the characteristics of the city. Cf. *Bostatter v Hinchman*, 243 Mich 589, 594; 220 NW 775 (1928) ("An official act is an act done by the officer in his official capacity under color and by virtue of his office"); *Adkisson v Paxton*, 459 SW3d 761, 771 (Tex App 2015) (transaction of official business includes communications involving "two parties that reciprocally affect or influence each other in a matter related to official business").

This Court applied this broad view of "official function" in *Amberg v Dearborn*, 497 Mich 28, 32-33; 859 NW2d 674 (2014). The Court held video surveillance records created by a private party were the city's public records because they related to prosecution of a criminal case. This was so even though the city received the records after filing criminal charges and they played no part in the city's decision to file charges.[16] Likewise, in *Kestenbaum*, Justice Ryan stated a broad view of what constitutes an "official function": "Facilitating communications among students, preventing a great deal of havoc, and simply operating the university in an efficient manner are all

[16] The fact that an outside party originated some records in this case is irrelevant, as it was in *Amberg*. "The statute does not require that the record be created by the public body, or even created at its behest. Rather, it is ownership, use, possession, or retention in the performance of an official function that is determinative." *Detroit News*, 204 Mich App at 724.

'official functions' of Michigan State University." 414 Mich at 539. These opinions confirm that, if the records relate to a public body's general business, they are records used "in the performance of an official function." They only need to involve activity that is authorized and appropriate to the nature of the city and relating to the characteristics of the city.

The Court should reject the circuit court's view that "official function" means only formal city council action. See the discussion in section IV.E below, showing the city does not have to formally "adopt" a record for it to be a public record.

b. The City Attorney's Actions Were "in the Performance of an Official Function"

Ryan is a formally appointed city officer. The city charter defines the office and requires the city council to approve the appointment. Charter, §§ 5.1(a)-(b) (appendix, pp 100a-101a);[17] Ryan deposition, p 41 (appendix, p 258a).[18] He is not, as the city characterized him, merely "a private attorney retained by the City."

In his capacity as city attorney, Ryan sends and receives written communications with persons outside the city.[19] He sent or received each contested record in his capacity as city attorney

[17] The city admitted Ryan is the city attorney and serves under the provisions of the charter. Defendant's Responses to Plaintiff's First Requests for Admission and Second Interrogatories to Defendant, ¶¶ 6-7, 6/7/16 (appendix, p 152a).

[18] There is an error in the transcript. "Chair" should be "charter" so that the sentence reads: "I'm an administrative officer by charter."

[19] Defendant's Responses to Plaintiff's First Requests for Admission and Second Interrogatories to Defendant, ¶¶ 9-11, 6/7/16 (appendix, p 153a).

and they involved city business.[20] The city paid him for his work involving the records.[21]

Most of the communications were between Ryan and attorneys for parties adverse to the city. FOIA request summary, ¶¶ 1e, 2c, 2h, 3e, 3g, 3j, 3k, 4a, 4e, 4j, 4k, 5a, 5b, 5c (appendix, pp 65a-67a). These were to or from Neil Wallace or Jeffrey Leib. Wallace represented a developer with extensive familial ties to people in city government seeking approval from the city for new construction.[22] Eberhardt deposition, p 20 (appendix, p 195a).[23] Leib represented property owners in a dispute with the city regarding his clients' cutting down trees on vacant property for which they were cited with an ordinance violation because the trees were supposedly a "historic resource" that required a "certificate of appropriateness" before any changes. *Id.*, pp 30-31 (appendix, pp 205a-206a).[24] The other communications were with the city's engineering firm regarding those

[20] Defendant's Amended Answers to Plaintiff's Second Requests for Admission and Fifth Interrogatories to Defendant, ¶¶ 6-23 (amended answers), 7/28/16 (appendix, pp 161a-173a).

[21] The FOIA request references five invoices from Ryan. ¶¶ 1-5 (appendix, pp 68a-71a). The city admitted it paid those invoices in Defendant's Answer to Plaintiff's Third Requests for Admission and Fifth Interrogatories to Defendant, ¶¶ 1-5, 7/27/16 (appendix, pp 157a-158a).

[22] The developer was Curt Catallo, whose mother, Sharron Catallo, is a former mayor of the city and recent member of the city council and previously a member of the zoning board of appeals; whose sister, Cara Catallo, chaired the city's Historic District Commission at the time of the FOIA request; and whose niece's father chaired the city's planning commission at that time. That there are relatives in positions to make decisions that could positively affect Catallo's business interests, and potentially negatively affect his competitors, makes transparency about potential conflicts imperative.

[23] Carol Eberhardt was the city manager. Eberhardt deposition, pp 4-5 (appendix, pp 179a-180a).

[24] These owners did not have the same close relationships with city officials as Curt Catallo. Cara Catallo, as chair of the historic district commission, initiated the action against the property owners.

same matters. FOIA request summary, ¶¶ 2a, 3l, 3m, 4d (appendix, pp 65a-66a).[25]

The descriptions in Ryan's invoices show he was communicating about enforcing city ordinances and dealing with contract disputes between the city and the developer. The city's business involves enforcing ordinances and contracts and addressing disputes about them. That is an activity authorized by the city and appropriate to the nature of the city—an "official function" as discussed in section III.B.2.a above. See *Adkisson*, 459 SW3d at 773 ("if the Commissioner is communicating in his official capacity about official County business, he is 'transacting official business'").

C. The Records Meet the Definition of "Public Records"

The discussion above shows the records meet every element of the definition of "public records." As such, they were subject to FOIA.

In the following sections, this brief discusses fallacies in the city's arguments, the *Breighner* and *Hoffman* opinions, and the importance of this case to the continued viability of FOIA.

IV. Fallacies in the City's Arguments

A. This Case Is Not About Whether the City Attorney Is a "Public Body." It Is About Whether the Records Are "Public Records"

The city (and the court of appeals) diverted attention from the controlling issue—whether the contested records are within the definition of "public records." Rather, they focused on the definition of "public body," which includes state but not municipal officers and employees. Compare MCL 15.232(h)(i) and (iii). But that is irrelevant because the request here was to a public body (the city) (section IV.A.1 below) and an individual who is not a public body can possess a public body's records. Section IV.A.2 below. Holding that an officer or employee of a public body

[25] These are communications from and to "HRC." HRC is Hubbell, Roth & Clark, the city's engineering firm. Eberhardt deposition, pp 21-22 (appendix, pp 196a-197a).

cannot possess public records leads to the absurd result that virtually no municipal records are public records. Section IV.A.3 below. And the physical location of records outside a public body's office does not determine whether they are public records. Section IV.A.4 below. The city's construction of the statute is contrary to the pro-disclosure purpose of FOIA. Section IV.A.5 below.

1. It Is Irrelevant That the City Attorney Is Not a "Public Body"

The city argues FOIA does not govern a request for records in possession of an individual who is not a "public body" because FOIA allows only requests to public bodies. This confuses two separate concepts: who a request may be directed to (a "public body") and what may be requested (a "public record"). The city's exclusive focus on who is a "public body" ignores the controlling issue of whether the contested records satisfy the definition of "public record."

A mainstay of the city's argument is that the city attorney is not a public body. But it is irrelevant that he is not a "public body." The FOIA request here was to the *city*, not to the city attorney. It was addressed to the city's FOIA coordinator. Request 6/7/15, p 1 (appendix, p 68a). It was a request for "records from the City of the Village of Clarkston." *Id.* Appellant never contended the city attorney was a public body and also never contended that, as the city posits, the common law of agency expands the definition of "public body." The identity of the public body in this case—the city—was never in dispute. That Ryan is not a "public body" is beside the point. The question is whether the records he has from his conduct of official city business as a public official are the *city's* public records. The discussion in section III above shows they are. And, as the next section shows, a person who is not a public body can possess a public body's records.

2. An Individual Who Is Not a Public Body Can Possess a Public Body's Records.

Focusing on the definition of "public body" diverts attention from the real question—

whether the records meet the definition of "public record." The fact that an individual is not a "public body" does not mean the individual can't possess public records on behalf of a public body. Nothing in the statute says that. In fact, it says the opposite: Public records must be produced "regardless of the location." MCL 15.240(4).

In *Johnston v Ashby Drain Dist*, unpublished per curiam opinion of the court of appeals, docket no. 244454, 2/24/2004, p 2 [2004 WL 345418], "the relevant records were made by the drain commissioner on behalf of and pertaining to the drainage district." Appendix, p 261a. The court held the commissioner, an officer of the drainage district, held the district's public records: "[T]he drain commissioner was acting in his role as an officer of the drainage district, and therefore, the drainage district is the 'public body ... that kept or maintained the public record as part of its public function.'" *Id.*[26] See *Adkisson*, 459 SW3d at 774 (rejecting argument that official's personal email account cannot contain public records). Accord Zansberg, *Cloud-Based Public Records Pose New Challenges for Access*, 31 Commercial Lawyer 12, 14 (2015) (majority of courts holds records of public business generated or received by a public official acting in an official capacity belong to the public body, even if on private devices).

Thus public records can be in the possession of someone who is not a public body.

3. The City's Argument Leads to an Absurd Result

Arguing that records in the hands of a person who is not a public body are not public records logically leads to a result that municipalities have no public records at all. Cities are artificial legal entities. They act only through individuals who are their agents. *Ross v Consumers Power*

[26] We cite this unpublished opinion because we found no published Michigan opinion that expressly held a public body's officer possesses the public body's records. MCR 7.215(C)(1), applicable under MCR 7.312(A) and MCR 7.212(C)(7).

Co, 420 Mich 567, 621 n 35; 363 NW2d 641 (1984) ("a governmental agency can only 'act' through its officers, employees and agents"); *Briggs Tax Serv, LLC v Detroit Pub Sch*, 282 Mich App 29, 35 n 7; 761 NW2d 816 (2008), *rev'd on other grounds,* 485 Mich 69; 780 NW2d 753 (2010) (same). Accord *Competitive Enterprise Institute v Office of Science & Technology Policy*, 423 US App DC 503, 507; 827 F3d 145 (2016) ("an agency always acts through its employees and officials. If one of them possesses what would otherwise be agency records, the records do not lose their agency character just because the official who possesses them takes them out the door …"); *San Jose v Superior Court*, 2 Cal 5th 608, 620-621; 389 P3d 848 (2017) ("A disembodied governmental agency cannot prepare, own, use, or retain any record. Only the human beings who serve in agencies can do these things"); *Nissen*, 183 Wash 2d at 876 (public bodies "act exclusively through their employees and other agents, and when an employee acts within the scope of his or her employment, the employee's actions are tantamount to 'the actions of the [body] itself.'"; alteration in original); Senat, *Whose Business Is It: Is Public Business Conducted on Officials' Personal Electronic Devices Subject to State Open Records Laws?*, 19 Comm L & Policy 293, 314-322 (2014). It is the city's agents—officials like the city attorney, city manager, clerk, treasurer, and mayor and employees like the DPW supervisor and ordinance enforcement officer—who do things for the city. The city's agents keep the city's records.

If, as the city argues, the records the city's officers and employees have in their files are not public records because they are not "public bodies," then *no* city records are subject to FOIA because they are *all* kept by individuals who conduct the city's business but who themselves are not "public bodies."

The city's argument (and the court of appeals' construction) leads to the absurd view that

records in the hands of any city official or employee are not public records because those individuals are not public bodies. But "statutes must be construed to prevent absurd results …." *People v Tennyson,* 487 Mich 730, 741; 790 NW2d 354 (2010).

4. The Physical Location of Records Does Not Change Their Character as Public Records

Perhaps the city's fallback position from this logical extension of its argument may be that documents physically in the city's offices are public records but those that are off-premises (like the city attorney's records) are not (because the individuals who hold those records are not "public bodies"). To try to support this argument, the city repeatedly argued the records were in Ryan's "private office," involved his "private email," and characterized him as a "private attorney" keeping records "at his sole discretion."[27] None of this is relevant to determining whether the records satisfy the definition of "public records" because the physical location of the records is not determinative.

Records not in the city's physical possession are still public records if, for example, they are "used" in performing an official function. MCL 15.232(i). A public record must be produced "regardless of the location." MCL 15.240(4). In *MacKenzie,* the defendant townships gave their paper records to a contractor to prepare computer tapes for property tax bills. The court ordered disclosure of the computer tapes even though "defendants did not create or have physical possession" of the records. 247 Mich App at 129. The townships there used the records by having the contractor prepare tax notices. They "*used* the tapes, albeit indirectly, in performing an official function" and they were therefore public records. *Id.* (emphasis in original). The court held

[27] Brief in Support of Defendant's Motion for Summary Disposition, 9/8/16, pp 9, 16.

"[d]efendants may not avoid their obligations under the FOIA by contracting for a clerical service that allows them to more efficiently perform an official function." *Id.* The court required the townships to either authorize the third party to release the records or obtain them from the third party and disclose them to the requester. *Id.* at 132.

MacKenzie highlights that it is the content of the record, not its location, that determines whether it is a public record. 247 Mich App at 129-132. *Howell Ed Ass'n MEA/NEA v Howell Bd of Ed*, 287 Mich App 228; 789 NW2d 495 (2010), supports this. *Howell* is the converse of *MacKenzie*. In *Howell*, the court held that records in the school district's computer system that did not deal with school business were not public records. The converse applies here. Records in an official's file dealing with city business are public records. Accord *Weaver v Superior Court*, 224 Cal App 4th 746, 750; 168 Cal Rptr 3d 864 (2014) ("[T]he content of the document at issue, not the location in which it is stored, [is] determinative"); *Florida v Clearwater*, 863 So 2d 149, 154 (Fla 2003) ("an agency cannot circumvent the Public Records Act by allowing a private entity to maintain physical custody of documents that fall within the definition of 'public records'"; "The determining factor is the nature of the record, not its physical location"); *Whose Business Is It?*, 19 Comm L & Policy at 300-306 (record's nature, not location, is determinative); *Cloud-Based Public Records*, 31 Commercial Lawyer at 14 (content determines if record is a public record; physical location immaterial; collecting cases).

Similarly here, the city "may not avoid [its] obligations under the FOIA by contracting for [the city attorney's] service … to … perform an official function." *MacKenzie*, 247 Mich App at 129. If the content of the record shows it is a public record, the city may not reject a request because it is not kept in the city's office. *Creative Restaurants*, 795 SW2d at 679 ("The fact that [an assistant city attorney] works in a private law office and retains the documents in private premises, as

contended by the City, is immaterial"). Allowing that would let a city attorney conceal records by avoiding copying the client city on matters of city business, as happened here. It would also allow cities to contract with other third parties, such as engineers, inspectors, and law enforcement, to immunize records from FOIA by storing them at their off-site offices.

5. Narrowly Applying the Definition of "Public Body" Is Contrary to FOIA's Purpose and Does Not Construe the Statute as a Whole

The focus only on the definition of "public body" to the exclusion of the definition of "public record" is wrong because it is the antithesis of the purpose of a statute intended to mandate open government. Under a similar public records act, the court in *Nissen* rejected the same argument the city makes here—that an official or employee who is not a public body can't possess public records. There, the county argued "county employees … are not literally a 'county,' … and the records they control are completely removed from the [Public Records Act's] coverage." 183 Wash 2d at 875. The court rejected that argument: "The relevant question then is not whether [the county prosecutor] is individually subject to the [Public Records Act] but, rather, whether records he handles in his capacity as the prosecutor are county public records." *Id.* at 875 n 6. "If the [Public Records Act] did not capture records individual employees prepare, own, use, or retain in the course of their jobs, the public would be without information about much of the daily operation of government." *Id.* at 876. Accord *San Jose*, 2 Cal 5th at 621 (rejecting the same argument about the difference between the definitions of state and local public bodies; "no reason why the Legislature would draw such an arbitrary distinction").

A statute must be construed as a whole. Here that means a court must not pick out a single definition and narrowly apply it to reach a result contrary to the overall policy of the statute. "The law is not properly read as a whole when its words and provisions are isolated and given meanings

that are independent of the rest of its provisions." *People v Feeley*, 499 Mich 429, 435; 885 NW2d 223 (2016). A court must "interpret statutes in their *entirety* in the most reasonable manner possible." *Duffy v Michigan Dep't of Natural Resources,* 490 Mich 198, 215 n 7; 805 NW2d 399 (2011) (emphasis in original). Individual phrases must be "read … in the context of the entire legislative scheme." *Ally Financial Inc v State Treasurer*, 502 Mich 484, 493; 918 NW2d 662 (2018). This "whole-text" canon of statutory construction is particularly apt here. "Reviewing the entire text requires consideration of the relationship of text within a single statutory provision as well as its relationship to the text of other provisions within the same act." *South Dearborn Environmental Improvement Ass'n, Inc v Dep't of Environmental Quality*, 502 Mich 349, 367 n 16; 917 NW2d 603 (2018). "Perhaps no interpretive fault is more common than the failure to follow the whole-text canon, which calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts." Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012), p 167, quoted in *McQueer v Perfect Fence Co*, 502 Mich 276, 309; 917 NW2d 584 (2018).

Isolating the definition of "public body" to conclude a city official can keep a separate file about his conduct of city business and the file is immune from FOIA violates these principles. FOIA is full of provisions that show it is a pro-disclosure statute and should be construed as such. Foremost of these is the statement of policy in the first section of the act:

> It is the public policy of this state that *all persons … are entitled to full and complete information regarding* the affairs of government and *the official acts of those who represent them as public officials* and public employees, consistent with this act. The people shall be informed so that they may fully participate in the democratic process.

MCL 15.231(2) (emphasis added). Note the inclusion of acts of public officials, such as the city attorney.

That is not the only provision supporting disclosure rather than non-disclosure. When a record contains exempt material, it is not completely exempt. The public body must separate exempt from nonexempt material and still produce the nonexempt part. MCL 15.244(1). The act mandates an award of fees and costs to a plaintiff who prevails in a suit to obtain disclosure. MCL 15.240(6). It mandates a civil fine and punitive damages if the public body arbitrarily and capriciously refuses or delays disclosure. MCL 15.240(7). It provides for fees, costs, fines, and punitive damages when a public body improperly demands an excessive fee for producing records. MCL 15.240a(6)-(7). A court also has discretion to impose a hefty fine when a public body willfully and intentionally fails to comply with the act or acts in bad faith. MCL 15.240b. All these provisions work together to favor disclosure rather than nondisclosure.

Consistent with this, many opinions conclude FOIA must be construed in favor of disclosure. "[E]ach provision of the FOIA must be read so as to be consistent with the purpose announced in the preamble." *Kestenbaum*, 414 Mich at 522. Accord *Herald Co*, 463 Mich at 119; *Warren v Detroit*, 261 Mich App 165, 169; 680 NW2d 57 (2004); *Walloon Lake Water System*, 163 Mich App at 730. "FOIA's disclosure provisions must be interpreted broadly to ensure public access." *Rataj v Romulus*, 306 Mich App 735, 748; 858 NW2d 116 (2014).

Here the city (and the court of appeals) focus on a single definition without reading it in the pro-disclosure context of the entire act. The Court should not look at that definition in isolation and give it a meaning independent of the rest of the act. *Feeley*, 499 Mich at 435. Nor should the Court discern a legislative intent to make state records more available than municipal records by enacting different definitions of "public body" for the state and municipalities. When the legislature wanted to exclude something from FOIA, it did so explicitly, even in the definition of "public

body." MCL 15.232(h)(*i*) expressly excludes the governor, lieutenant governor, and their employees. MCL 15.232(h)(*iv*) expressly excludes the judiciary and the county clerk when acting in the capacity of clerk to the circuit court. MCL 15.243(1) has a long list of specific exemptions. This Court shouldn't imply an additional exception not expressly stated in the statute.

Applying proper statutory construction principles, the definition of "public body" should be read as defining the entity to which a person must send a request, but not a limitation on who may prepare, use, possess, or retain a record on behalf of a public body. The city's (and the court of appeals') reading takes the definition out of context and is contrary to the pro-disclosure intent expressed throughout the statute.

B. The City Attorney Cannot Be Treated As a Separate Entity Distinct From and Unrelated to the City

The city's argument does not hold up as a matter of logic. It says the city attorney cannot possess public records because he is not a public body. There is an implicit assumption in that argument that the city attorney is separate and independent from the city itself. If he were viewed as part of the city (as a city officer is), then he would be part of the public body and his possession of records would be the city's possession; his records would be possessed by the city and would be public records.

Thus, in order to argue that the city's attorney does not possess the city's records, the city must characterize him as separate and apart from the city, independent from the city. Picking up on this argument in the city's answer to the application, the Court's grant order characterizes the city attorney's "correspondence with third parties" as something that was "never shared with the city or in the city's possession." Order granting leave, 9/25/19. The fallacy of this view is apparent on close analysis.

A "public record" must be "prepared, owned, used, in the possession of, or retained by a public body …." MCL 15.232(i). But that doesn't mean that the city attorney (or any other city officer or employee) can't be the person who prepared, used, possessed, or retained the record *on behalf of the public body*. The exclusion of municipal officers and employees in the definition of "public body" doesn't mean that anything they do is not done in the name of the public body. The discussion in section IV.A.3 above shows that an artificial legal entity such as a city can act only through its agents. The actions of those agents are the actions of the public body.

It follows one cannot consider the city attorney (or any other municipal officer or employee) as someone separate from the city itself and then ask whether the city satisfies the definition of "public record" without considering the actions of its officials or employees. Yet that is what the city urges the Court to do. And that is what the court of appeals did. Its opinion repeatedly refers to the city attorney as though he were some kind of independent, separate entity—not an official formally appointed by the city council to a position defined by the city charter. The opinion treats the city attorney as though he were not part of the city:

- In the court of appeals' view, Ryan's possession and use of a record was insufficient because "the record has to be adopted by the public body itself" (opinion 7/3/18, p 6 (appendix, p 60a))—as though Ryan weren't acting on behalf of the city. How could "the public body itself" act regarding the record if not through some official or employee, someone who is not within the definition of "public body"?

- "[T]he records at issue in this case have remained in the possession of the city attorney" (*id.*)—as though he were not part of the city and was not acting for the city. Someone else (who?) in the city apparently must do something for the records to become public records. But how could that be if that other person is also not a "public body"?

- "The city attorney in the case at bar is not employed by defendant …." *Id.*, p 7 (appendix, p 61a). He may not be an employee under labor law, but he is an officer formally appointed by the city council to an office defined by the city charter,

whose responsibilities include representing the city. He is not some separate, independent entity.[28]

- "[T]here is no evidence that defendant used the letters prepared by its city attorney" (*id*, p 7 (appendix, p 61a))—as though Ryan weren't acting for the city and using those records when communicating with opposing counsel.

- The opinion characterizes the records as "records prepared, used, and obtained by the city attorney during the course of negotiating issues relevant to the city's environmental concerns but not submitted to the city …" (*id*, p 8 (appendix, p 62a))—as though someone sending a letter to Ryan about city business is not sending it "to the city." But the lawyers representing parties with disputes with the city were ethically required to communicate with the city attorney rather than directly with someone else in the city. MRPC 4.2(a).

- The opinion says there is "no evidence of the city having acted on [the contested records]" (opinion 7/3/18, p 8 (appendix, p 62a))—as though Ryan's actions are not the city's actions.

The court of appeals' conclusion was: "the city attorney's possession and use of records in his role as city attorney" is not "the public body's use and possession of the records in the performance of an official function." Opinion 7/3/18, p 8 (appendix, p 62a). This treats Ryan as a separate, independent entity from the city.[29] Nothing in the statute shows the legislature intended this illogical and artificial distinction. One cannot logically extract from the definition of "public body"

[28] If employment were determinative, then whether a public official's files were subject to FOIA would depend on whether there is a legal employment relationship, allowing a municipality to retain independent contractors and insulate their records from FOIA. Here, this would mean that the mayor and council members and all city commission and board members—none of whom are employees—cannot possess records subject to FOIA.

[29] The court of appeals cited *Breighner* for the proposition that "'public body' does not include agents of the public body." Opinion 7/3/18, p 6 (appendix, p 60a). While it is true that an agent acting on behalf of a public body *can* be an entity separate from the public body, that doesn't mean *all* agents of a public body should be viewed as entities separate from the public body. Although *Breighner* properly viewed the Michigan High School Athletic Association as an entity separate from its school district members, that is an entirely different situation from this case, where the agent is officially appointed to a public office defined by city charter. See section V below, where appellant discusses *Breighner*.

the proposition that city officials and employees are separate from the city and do not act on behalf of the city. Accord *Cloud-Based Public Records*, 31 Commercial Lawyer at 14 (no basis in law to view an employee as distinct from the employee's agency).

The discussion above shows it is not a reasonable inference from the definition of "public body" to conclude a city official acts as a separate, independent entity from the city. But one might then ask why the legislature listed officers and employees in the definition of a state public body but not in the definition of a municipal public body. Appellant found nothing in the legislative history that sheds light on this. We can speculate about it. The state is a much larger entity than municipalities. Perhaps including state officers and employees in the definition of "public body" was intended to facilitate requests by having them directed to the person in a sprawling state government who is most likely to have access to the records. Municipalities have fewer resources and a centralized place for requests to a municipality is more likely to result in efficient processing. But this speculation is irrelevant here. To decide this case, we need not parse the definition of "public body." The issue is not who is a "public body" but what is a "public record." The issue is whether a formally appointed charter officer can keep a "private" file in his conduct of public business and claim the records are not "public records."

The city's interpretation that city officers and employees are separate from the city and don't actually act for the city is an extreme, absurd interpretation of a statute mandating full disclosure of government records. An absurd interpretation should not prevail when there is an alternative, reasonable interpretation that carries out the law's intent. *Tennyson*, 487 Mich at 741; *In re Schwein Estate*, 314 Mich App 51, 64; 885 NW2d 316 (2016). The common-sense alternative is that city officers and employees act for the city when they conduct city business and the records they use and create are the city's records subject to FOIA, regardless of where they are kept.

C. The Law of Principal and Agent Applies to the City

It is a common-sense concept that a charter-appointed city attorney, negotiating with parties adverse to the city about city business, is acting for the city and therefore is part of the city for all purposes, including FOIA. But the city says not. It argues the law of principal and agent doesn't apply because FOIA itself doesn't mention it. It says applying the common law of agency reads something into FOIA that isn't in the text of the statute. In the city's reckoning, the city attorney can't be considered as acting on behalf of the city when he conducts city business. The Court seemed to pick up on this argument when it directed the parties to brief "whether the defendant city's charter-appointed attorney was an agent of the city …." Order, 9/25/19.

The city has it backwards in arguing that FOIA must expressly incorporate agency law in order for it to apply to the city attorney. It is not necessary to read something into FOIA and it is not necessary for FOIA to expressly incorporate agency law. The common law applies unless expressly abrogated by constitution or statute. Const 1963, art 3, § 7; *People v Woolfolk*, 497 Mich 23, 25; 857 NW2d 524 (2014). Although the legislature can change the common law by statute, "to do so it must 'speak in no uncertain terms.'" *Planet Bingo, LLC v VKGS, LLC*, 319 Mich App 308, 320; 900 NW2d 680 (2017). Courts will not lightly presume the legislature abrogated the common law. *Velez v Tuma*, 492 Mich 1, 11; 821 NW2d 432 (2012).

Applying the principle of agency law that city officers and employees act for the city is simply an application of a general common-law principle to this case—one that applies because it has not been expressly abrogated by constitution or statute. In *Breighner,* this Court correctly assumed general agency law applies under FOIA. 471 Mich at 233 n 7 (stating that, even if an agent of a public body were a public body itself, the defendant there was not an agent, citing general agency law). As discussed in section III.B.1.a(i) above, an agent acts for a principal, his acts bind

the principal, and the agent's documents compiled in the course of his agency belong to the principal.

Appellant discussed agency law in response to the city's argument that the city attorney is somehow separate from the city and acts as an independent entity unrelated to the city. The fundamental fallacy of the city's argument is that a city officer or employee conducting city business isn't independent from the city. See section IV.B. above. Under agency law, his acts are the city's acts.

The city hangs its hat on the definition of "public body," which includes state but not municipal officers and employees. MCL 15.232(h)(*i*), (*iii*). But that definition gives no indication that the legislature intended to overturn the common law principle that an agent acts for the principal and an agent's records are in the principal's control (as discussed in section III.B.1.a(1) above). The difference in the definitions is scant evidence of legislative intent to effectively exclude municipal records from FOIA or at least radically limit the records subject to FOIA. If the legislature intended to effectively exclude many municipal records, it would not have hidden that intent in a definition in the way the city claims, rather than providing a clear exclusion, as it did for other entities. See MCL 15.232(h)(*i*) and (*iv*) (excluding governor and judiciary).

The absurdity of the city's view that the common law of agency doesn't apply is apparent: If city officers and employees don't act for the city, then who does? If the city attorney's conduct of city business is not the city's performance of an official function, then what is the city attorney doing? How can he be conducting city business, yet not acting for the city? And why is the city paying him?

One might ask how far this application of the common law of agency extends. The city's amici predicted a parade of horribles if FOIA applies to all records of all municipal agents (such

as tree trimmers and trash collectors) and urged rejection of an "extreme expansion" of FOIA that would increase costs and discourage people from doing business with municipalities. But the question whether FOIA applies to municipal agents is the wrong question. It diverts attention from the pertinent question of whether the records satisfy the definition of "public records," even if they are in the hands of a municipal agent. Appellant doesn't advocate an absolute rule that FOIA applies to all records in the hands of all municipal agents or that anyone can send FOIA requests directly to municipal agents. FOIA applies—to the public body, not its agents—only if the records satisfy each of the elements of the definition of "public record." That includes the fact that the records were related to "performance of an official function." MCL 15.232(i). So the question in a case such as this is whether the agent performs an official function (and the records otherwise satisfy the definition of "public record"). This implicates the law of agency because artificial entities such as the city can act only through their agents. See section IV.A.3 above. It is unexceptional that the common law of agency should apply to discern the relationship of a municipal agent to his public body in the course of deciding whether records satisfy the definition of "public records." If, as the city argues, the law of agency doesn't apply, then how can a municipality act at all? It *must* act through agents. In doing so, those agents prepare, own, use, possess, or retain the municipality's records, within the meaning of MCL 15.232(i), the definition of "public record."

D. The City Relies on a Defective Syllogism

The city argues: (1) FOIA applies only to records in possession of a public body; (2) the city attorney is not a public body; therefore (3) FOIA doesn't apply to the city attorney's records. There are several defects in this reasoning.

First, FOIA is not limited to records in possession of a public body. Possession is only one of several attributes that define a public record. A writing is a public record if it is "prepared,

owned, used, in the possession of, *or* retained by a public body in the performance of an official function ….” MCL 15.232(i) (emphasis added). Given these alternatives, possession by the public body is not always required. See the discussion in section IV.A.2 above.

The second premise is wrong because the fact that the city attorney is not a public body is not relevant. See the discussion in section IV.A.1 above. The issue here is not who is a “public body” but rather whether the records fall within the definition of “public record.”

It is also wrong because it relies on the assumption that Ryan is someone separate and distinct from the city itself, so that his possession and use of the records couldn’t be the city’s possession or use. See the discussion in section IV.B above.

The conclusion is wrong because it assumes the records in the city attorney’s file are “the city attorney’s records.” But his possession doesn’t equate to ownership and it doesn’t mean the city doesn’t own the records or have at least a right to get those records. See the discussion in section III.B.1.b(i) above.

E. The City Does Not Have to “Adopt” an Official’s Records for Them to Be Public Records

The court of appeals rejected the argument that Ryan’s records were public records because the records must “be adopted by the public body [the city] itself” in order for them to be public records. Opinion 7/3/18, p 6 (appendix, p 60a). In concluding that there was no “adoption,” the court of appeals said that (1) the records were off-premises; (2) Ryan didn’t “show[] them to the city council”; (3) the council did not “use[] them for the basis of a decision”; and (4) there was no “proposal that the city attorney could submit for the council’s consideration.” *Id.*

Requiring one of these uses of the records for the city to “adopt” the record is wrong for several reasons. First, it relies on the flawed proposition that the city must somehow act separately

on the records because the city attorney is a separate, independent entity who does not act for the city. That is wrong, as discussed in section IV.B above.

Second, it adds requirements that are not in the definition of "public record." It requires actual use of the records by the city council. That severely narrows the definition in two ways. The definition of "public record" goes beyond just use and has several alternatives: "prepared, owned, used, in the possession of, *or* retained by a public body …." MCL 15.232(i) (emphasis added). Requiring actual use by the city council ignores the other alternatives. And those actions in the definition must be taken by the "public body," not just the city council. A city acts in ways that do not require city council involvement (for example, by conducting elections, by sending out property tax bills and collecting taxes, by enforcing ordinances, and by issuing building permits, among other things). The court of appeals' narrow concept of how something from the "private" file of a city official could become a public record would place most city records outside the scope of FOIA because the city council is not involved in and does not "adopt" records of much of the day-to-day operations of the city.

Third, requiring proof that a record was "used … for the basis of a decision" places a virtually insurmountable burden on a FOIA requester. Without knowing the contents of the records, without knowing the subject of any "private" discussions there may have been on personal devices, without knowing the internal discussions in the city (and perhaps closed meeting discussions)—knowing none of this, a requester would have no way of proving how records are "used … for the basis of a decision." Making a FOIA requester present such evidence turns the statute on its head, allowing a public body—which has the records and knows what is in them—to conceal the records unless the requester—who doesn't know what is in the records—can present some kind of evidence to prove what is in the records and how they were used. This Court rejected this requirement

in *Amberg*. It reversed a court of appeals opinion that said: "Plaintiff has presented no record evidence to support the conclusion that the videos were used in the performance of an official function." *Amberg v Dearborn*, 497 Mich 28; 859 NW2d 674 (2014), *rev'g* unpublished opinion per curiam of the court of appeals, docket no. 311722, 3/25/14, p 3 [2014 WL 1233723] (appendix, p 265a).[30] "[T]he burden is on the [city] to sustain its denial." MCL 15.240(4). The court of appeals opinion here reversed that burden.

Finally, using the court of appeals' narrow view of what constitutes a public record would give city officials complete discretion to determine whether something is a public record. The city argued for that discretion when it claimed Ryan could stop records from becoming public records by keeping them in a so-called "private" file and not copying other city officials. Giving this discretion to city officials to determine what constitutes a public record is contrary to the objective definition of "public record" in the statute and contrary to the pro-disclosure purpose of FOIA.

V. *Breighner* Doesn't Address the Issue Here and Doesn't Abrogate the Common Law of Agency in FOIA Cases

In the context of asking whether the city attorney acts as the city's agent, the grant order directs the parties to address *Breighner v Michigan High School Athletic Ass'n, Inc*, 471 Mich 217; 683 NW2d 639 (2004), particularly footnotes 6 and 7. Order, 9/25/19. As discussed above, (1) the city attorney cannot be viewed as a separate entity independent of the city (section IV.B) and (2) the common law of agency applies to him. Sections III.B.1.a(ii) and IV.C above. *Breighner* does not address these issues.

[30] We cite this unpublished opinion to show that this Court reversed the court of appeals' holding that a FOIA requester must produce evidence to show that the requested documents were used in the performance of an official function. MCR 7.215(C)(1), applicable under MCR 7.312(A) and MCR 7.212(C)(7).

The issue in *Breighner* was whether the Michigan High School Athletic Association (MHSAA) was a public body so that the plaintiff could make a FOIA request directly to MHSAA. Plaintiff argued MHSAA was an agent of its school district members and therefore was a public body because it was an "agency" within the definition of "public body." 471 Mich at 231-232. This Court rejected that argument because there is a "fundamental difference between the terms 'agent' and 'agency'" and "the word 'agency' clearly refers to a *unit or division of government* and not to the *relationship* between a principal and an agent." *Id.* at 232 (emphasis in original). The Court rejected the argument that an agent of a public body is a public body than can be subject to a FOIA request.[31] *Id.* at 233.

Breighner doesn't say an agent of a public body can't possess a public body's records. Its holding that an agent of a public body is not a public body is irrelevant to this case. Appellant never argued that the city's agent (the city attorney) is a public body subject to FOIA. Appellant has not, as the city argues, sought to include the city attorney as a public body through general agency principles. It is the *city* that is the public body here. The fact that the city's agent isn't a public body doesn't mean he can't possess public records of the public body that he acts for. As discussed in section III.B.1.a(i) above, an agent's records are the principal's records. The issue here is whether the city—the public body in this case—can prepare, own, use, possess, or retain records that are in the hands of someone who acts on its behalf. That wasn't an issue in *Breighner*. Nothing in *Breighner* precludes an agent of a city from possessing the city's records.

[31] Unlike this case, the record request in *Breighner* was to MHSAA as a supposed public body. 471 Mich at 222. The request in this case was not to an agent of the city but to the city itself. FOIA request (addressing the request to the city's FOIA coordinator, not to Ryan) (appendix, p 68a).

MacKenzie shows an agent can possess a public body's records. There the defendant townships gave their paper records to a contractor to prepare computer tapes for property tax bills. The court ordered disclosure of the tapes in the contractor's hands even though "defendants did not create or have physical possession" of the records. 247 Mich App at 129. The disputed records were in the hands of an agent. Yet the court concluded they were under the townships' control and were subject to FOIA. The fact that public records can be in the hands of someone other than the public body itself is why FOIA requires that a public record must be produced "regardless of the location." MCL 15.240(4).

The grant order specifically cites footnotes 6 and 7 in *Breighner*. Order, 9/25/19. Footnote 6 repeats the main holding of the case, saying: "[I]t would defy logic … to conclude that the Legislature intended that any person or entity qualifying as an 'agent' of one of the enumerated governmental bodies [in the definition of "public body"] would be considered a 'public body' for purposes of the FOIA." 471 Mich at 233 n 6. This simply says an agent of a public body is not necessarily a public body. Here that means the city attorney, an agent of the city, is not himself a public body—something appellant never argued.

Footnote 7 says that, even if the law were that an agent of a public body was itself a public body, that wouldn't apply to MSHAA because MSHAA wasn't an agent of its school district members. 471 Mich at 233 n 7. The Court cited general agency law, which includes the tenet that the principal has the right to control the agent's conduct on matters entrusted to him. By citing this authority, the Court recognized that general agency law applies under FOIA. This refutes the city's argument that general agency law doesn't apply.

VI. *Hoffman* Is Not Binding, Is Readily Distinguishable, and Was Wrongly Decided. It Does Not Give the City the Right to Conceal Public Business by Keeping Records in the City Attorney's Office

The grant order directs the parties to address *Hoffman v Bay City School Dist*, 137 Mich App 333; 357 NW2d 686 (1984). Order, 9/25/19. In that case the school board's attorney conducted a short investigation of the school district's finance department. 137 Mich App at 335. There is no indication the attorney—unlike Ryan—held a formal office created by charter or other law. The attorney made an oral report finding no improprieties. *Id.* at 335-336. He did not share his investigation records with the school board. *Id.* at 336. The court of appeals held his records were not public records, analogizing to federal cases involving "records held by private organizations which conduct studies or investigations for federal agencies" and "data produced by an independent organization." *Id.* at 337, 338. It concluded the attorney's report was "neither created nor obtained by the public body" and therefore was not a public record. *Id.* at 339.[32]

There are three reasons why *Hoffman* doesn't apply and doesn't support an argument that the city attorney's files here are not public records.

First, a court of appeals opinion does not bind this Court. *Catalina Mktg Sales Corp v Dep't of Treasury*, 470 Mich 13, 23; 678 NW2d 619 (2004). And *Hoffman*, decided before November 1,

[32] The court could have viewed the attorney's investigation file as a public record that constituted work product, which would be exempt from disclosure under MCL 15.243(1)(h). See *Creative Restaurants,* 795 SW2d at 679 ("The file sought to be inspected in *Hoffman* in essence was the work product of the attorney employed by the school board …"). That might justify the result in *Hoffman*, but was not the reasoning the court used. In this case, there is no work product protection.

Hoffman also tacitly approved a closed session of a school board to receive its attorney's oral opinion, a violation of the open meetings act. *Booth Newspapers, Inc v Wyoming City Council*, 168 Mich App 459, 469; 425 NW2d 695 (1988). This casts additional doubt on the soundness of the opinion's reasoning.

1990, is not even binding on other court of appeals panels. MCR 7.215(J)(1).

Second, *Hoffman* should be limited to its facts. The instant case does not involve an internal investigation by a retained attorney on which no action was taken. Here, the charter-appointed city attorney, acting as a public official carrying out his duties to represent the city, communicated with attorneys for parties adverse to the city and with the city's engineering firm on disputes about two properties as part of his regular work for the city. Here the city attorney is not a "private organization[] which conduct[s] studies or investigations" for the city or an "independent organization," which the court of appeals compared the attorney in *Hoffman* to. 137 Mich App at 337, 338. Ryan was conducting city business with third parties as a public official as part of his regular work for the city. That is qualitatively different from the private investigation in *Hoffman.*

Finally, *Hoffman* was wrongly decided. The attorney there performed an official function for the school board—supervising and monitoring the performance of school employees and considering potential discipline by investigating possible wrongdoing in the district's finance department. 137 Mich App at 335. As such, he was acting on behalf of the school board and performing its official function of supervising employee conduct. In deciding he was not acting on behalf of the school board, the court of appeals accepted the same fallacious premise the city offers here: that the district's attorney should be viewed as separate from the district itself, so that his possession of the records was not the district's possession. *Id.* at 335 ("file not in defendants' possession"). It did not recognize or discuss the common law of agency and the fact that the attorney was acting for the district and was performing an official function of the district. In assuming the attorney's possession was not the district's possession, the court decided the issue without analysis of the attorney's actual role as an agent of the school board. In analogizing to federal cases involving "data produced by an independent organization" (*id.* at 338), the court of appeals mischaracterized

the attorney's status. He was not some "independent organization." He was specially retained and "directed … to conduct an investigation, in his capacity as the school district's attorney." *Id.* at 335. One can reasonably assume that, if asked to turn his investigative file over to the school board, the attorney would have done so. In any case, in investigating finance department procedures and controls, he prepared, used, and possessed records in the performance of an official function for the district. That satisfies the definition of "public record" and the court of appeals was wrong in holding otherwise. More appropriate is *Hurt v Liberty Twp*, 2017-Ohio-7820; 97 NE3d 1153 (Ohio App 2017) (holding interview notes of a "private" attorney retained to investigate and draw up charges against a fire chief were public records, even though not provided to the township board; public body cannot escape responsibility for public records by contracting with a private entity to perform a public function).

For all these reasons, the Court should not adopt or follow *Hoffman.*

VII. It Is Crucial for the Continued Vitality of FOIA to Clearly Hold That City Officials and Employees Cannot Evade FOIA by Keeping Private Files of Documents Pertaining to Their Official Functions

Unfortunately, the first impulse of some public officials is to conceal what they are doing, to reject exposing their communications about public business. Things just work more smoothly if there isn't someone looking over your shoulder, questioning what you are doing. City attorney Ryan epitomized this view, announcing at a city council meeting:

> [T]his information comin' out of city hall is gonna have to be adjusted …. The public doesn't have to know every little hiccup in life that happens.[33]

And the full-throated support of the city's allies from the Michigan Municipal League (MML) and

[33] Informal transcript of recording of 4/27/15 city council meeting, exhibit 18 to Plaintiff's Response Opposing Defendant's Motion for Costs and Attorney Fees, 11/4/16.

Michigan Townships Association (MTA) confirms their penchant for quietly conducting public business without scrutiny. It's so much easier that way.

This case presents the Court with the opportunity to clearly uphold FOIA's purpose that the public is "entitled to *full and complete information* regarding the affairs of government." MCL 15.231(2) (emphasis added). That is because the case deals with more than just 18 pieces of paper in this city attorney's off-premises file. If accepted, the city's theory would apply widely.

The city's theory isn't limited to city attorneys or even to offices defined by local law such as a city charter. Nothing in the city's argument or the court of appeals opinion relies on the nature of the city attorney's office. The reasoning applies to any city officer or employee. It isn't even limited to records kept off the premises of a city office. Nothing in the court of appeals opinion relies on the records' location. The decision turned only on the interplay of the definitions of "public record" (must be possessed by a public body) and "public body" (the city attorney isn't a public body and therefore can't possess public records). Opinion 7/3/18, p 6 (appendix, p 60a).

Nor is the city's theory limited to municipal officers and employees. Under its theory, a city can delegate its official functions to outside contractors and then argue that the contractors are not the city and their documents are not public records.[34]

In addition, the city's theory and the court of appeals decision isn't limited to cities. Its reasoning applies to every "county, city, township, village, intercounty, intercity, or regional governing body, council, school district, special district, or municipal corporation, or a board, department, commission, council, or agency thereof" (MCL 15.232(h)(*iii*)), none of whose officers or

[34] The city here contracts for others to perform many official functions, including police and fire protection, property assessment, and building permits and enforcement. Under the city's view of FOIA, none of their records would be public records.

employees are within the definition of "public body."

There has not been a single case in the four-decade history of Michigan's FOIA that adopted the city's theory that a city official can keep a separate file with records of his conduct of city business and FOIA doesn't apply to that file because the official isn't a "public body." There isn't any such case with good reason. The pro-disclosure purpose of FOIA—cited specifically in the statute itself and in case law—overrides a tortured interpretation of the subtle difference in subsections of the definition of "public body." The city's inventive interpretation—never before recognized in more than four decades of FOIA litigation—provides a roadmap for concealing virtually anything a municipality does. No wonder the MML and MTA supported this theory in the court of appeals. Their members won't have to deal with those pesky FOIA requests because the records are in files maintained by officers and employees who are not "public bodies" and the records are therefore not in the possession of a "public body" and not subject to FOIA.

But that's not all. With the proliferation of personal electronic devices—cellphones, laptops, tablets—that facilitate easy and instant communication, public officials have found many avenues of communication they argue the public should not see. Across the country, they resist disclosing these records, using the same argument the city uses here and the courts uniformly reject that argument. *San Jose*, 2 Cal 5th at 616, 621 (mayor's and council members' personal emails, voicemails, and text messages about official business are public records); *Adkisson*, 459 SW3d at 773 (e-mails discussing county government matters are public records); *Nissen*, 183 Wash 2d at 875 ("the County argues public employees can avoid the [Public Records Act] simply by using a private cell phone"); *O'Neill v Shoreline*, 170 Wash 2d 138, 150; 240 P3d 1149 (2010) (requiring search of deputy mayor's personal computer used for city business); *Whose Business Is It?*, 19 Comm L & Policy at 293 (surveying decisions and concluding the decisions overwhelmingly hold

records of official business on personal devices are public records); *Cloud-Based Public Records*, 31 Commercial Lawyer at 12 (citing examples of "crafty maneuver[s] by government officials to evade accountability and transparency mandates"; noting increasing use of personal devices to conduct public business); Morgan, *New ethics policy will help hold elected officials accountable in Ingham County*, Lansing State Journal (10/3/19), https://www.lansingstatejournal.com/story/opinion/contributors/viewpoints/2019/10/03/viewpoint-new-ingham-county-ethics-policy-improves-transparency/3851647002/ (accessed November 4, 2019) ("time and time again, unscrupulous public officials have used private email servers as a way to circumvent public records laws and shield themselves from accountability"); City of Detroit, Report of Office of Inspector General (October 21, 2019), p 35, https://detroitmi.gov/document/oig-case-no-2019-0013-inv-make-your-date (accessed November 4, 2019) (finding the practice of using personal email to conduct city business "extremely problematic"). Cf. *Bormuth v Jackson*, unpublished per curiam opinion of the court of appeals, docket no. 347449, 10/15/19 [2019 WL 5204544] (text messages on mayor's personal cell phone at issue) (appendix, p 267a).[35]

In this context, the Court should note the city repeatedly emphasized that the city attorney used his private email account and not a city email account for all his electronic communications. If this Court approves a city official keeping a secret off-premises file of his official functions, the implications range much further than just a small off-premises paper file. If an official's or employee's "private" file is outside FOIA, then so is his email and other material on a personal computer and his text messages on his personal cell phone, all of which fall within the definition of

[35] We cite this unpublished opinion because we found no published Michigan opinion that expressly ruled on a FOIA request for text messages. MCR 7.215(C)(1), applicable under MCR 7.312(A) and MCR 7.212(C)(7).

"writing" in MCL 15.232(*l*).

The city offers a reading of FOIA that no one before this imagined. In the 42 years of the existence of FOIA, in hundreds (perhaps thousands) of litigated cases, no one discerned the legislative intent the city argues, cleverly hidden away in the definition of "public body," that municipal officers and employees can keep separate files of their conduct of public business and those files are immune from disclosure under FOIA.

This case involves the essence of FOIA. The court of appeals opinion vindicates the desire of the city, the MML, and the MTA that, in the city attorney's words, "The public doesn't have to know …." This Court should reject that.

Relief Requested

Appellant asks the Court to reverse the court of appeals and the circuit court and remand with directions to grant summary disposition to appellant.

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