

STATE OF MICHIGAN
COURT OF APPEALS

ANIMAL PARTISAN, a nonprofit Virginia
corporation,

Plaintiff-Appellant,

v

UNIVERSITY OF MICHIGAN BOARD OF
REGENTS,

Defendant-Appellee.

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No. 374669
Court of Claims
LC No. 24-000045-MZ

Before: KOROBKIN, P.J., and MURRAY and MALDONADO, JJ.

KOROBKIN, P.J.

In this lawsuit under the Freedom of Information Act (FOIA), MCL 15.231 *et seq.*, plaintiff, Animal Partisan, appeals by right from the Court of Claims’s order granting summary disposition under MCR 2.116(C)(10) (no genuine issue of material fact) to defendant, University of Michigan Board of Regents. Plaintiff argues that the Court of Claims erred in holding that the public records plaintiff seeks are exempt from disclosure under the Confidential Research and Investment Act, MCL 390.1551 *et seq.* (CRIIA). We disagree, and therefore affirm.

I. BACKGROUND AND FACTS

Plaintiff, a nonprofit organization whose mission is to “end the suffering of animals in slaughterhouses, farms, and laboratories,” seeks the disclosure of video footage associated with laboratory experiments that academic researchers employed by defendant conducted on mice in 2018. At that time, defendant’s researchers began conducting research into the antidepressant-like effects of ketamine in mice, with the ultimate goal of translating the findings to benefit humans. During their studies, the researchers used a video camera system to track the movement of the mice and record other data. In April 2019, the researchers published an article, *Stress-sensitive Antidepressant-like Effects of Ketamine in the Mouse Forced Swim Test*, which discussed results from those experiments, in the peer-reviewed open access journal PLOS One. The article

described the setup and results of the experiments in detail but included no videos or still images from the videos.

In December 2023, plaintiff requested the following from defendant under the FOIA:

Any video recordings taken in association with a study published in 2019 entitled “Stress-sensitive antidepressant-like effects of ketamine in the mouse forced swim test” that was conducted by Paul J. Fitzgerald, Jessica Y. Yen, and Brendon O. Watson of the Department of Psychiatry, University of Michigan.

Defendant denied plaintiff’s FOIA request in January 2024, citing § 13(1)(d) of the FOIA, MCL 15.243(1)(d), which exempts “[r]ecords or information specifically described and exempted from disclosure by statute.” Defendant more specifically pointed to § 4 of the CRIIA, MCL 390.1554, which exempts from disclosure as a public record certain information held by public universities.¹ Plaintiff then initiated this action, arguing that the exemptions in the CRIIA did not apply to the requested video recordings.

Defendant thereafter moved for summary disposition under MCR 2.116(C)(10) on the basis that the information sought by plaintiff was exempt from disclosure as “intellectual property” under § 4(1)(a) of the CRIIA, MCL 390.1554(1)(a), and as “trade secrets or other proprietary information” under § 4(1)(d) of the CRIIA, MCL 390.1554(1)(d). Defendant supported its motion with an affidavit from Dr. Brendon Watson, M.D., Ph.D., an assistant professor of psychiatry who authored the article with the research team.

Dr. Watson averred that researchers created the recordings for about a year at an estimated cost of \$20,000 to \$25,000, which included the costs of equipment and compensating the individuals who recorded the videos. The videos were stored on a password-protected secure server, accessible only to members of the lab team. And no portion of the videos themselves had been publicly released.

Dr. Watson further averred that despite the 2019 article publishing some results of the experiments, the data from the experiments was still being analyzed, and researchers planned to correlate the data with new experiments that use different methods of testing the effects of antidepressants. In light of continuing research, he stated, “[a]lthough it is difficult to predict when that research will be complete, I anticipate that I will continue to use the data from the videos for at least three more years.” Additionally, Dr. Watson averred that “[a]s a result of these experiments, the new method of testing we are developing might have commercial value.” In support of its motion for summary disposition, defendant also pointed to an article in a medical journal, not associated with the researchers’ experiments, stating that “[i]t is frequently stated that it takes an average of 17 years for research evidence to reach clinical practice.”

¹ Defendant originally asserted that § 3 of the CRIIA, MCL 390.1553, also applied, but no longer relies on that statutory provision.

The Court of Claims granted defendant's motion on the basis that the videos were exempt as "intellectual property" protected by § 4(1)(a) of the CRIIA, MCL 390.1554(1)(a), and denied plaintiff's request for summary disposition under MCR 2.116(I)(2).² This appeal followed.

II. STANDARDS OF REVIEW

A trial court's ruling on a motion for summary disposition is reviewed de novo. *Rataj v City of Romulus*, 306 Mich App 735, 746; 858 NW2d 116 (2014). "A motion brought under MCR 2.116(C)(10) 'tests the factual support of a plaintiff's claim. The court considers the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted or filed in the action to determine whether a genuine issue of any material fact exists to warrant a trial.' " *Id.* at 747 (citation omitted). "On the other hand, summary disposition is proper under MCR 2.116(I)(2) 'if the court determines that the opposing party, rather than the moving party, is entitled to judgment as a matter of law.' " *Id.* (citation omitted). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *Piccione v Gillette*, 327 Mich App 16, 19; 932 NW2d 197 (2019) (cleaned up). "[P]arties opposing a motion for summary disposition must present more than conjecture and speculation to meet their burden of providing evidentiary proof establishing a genuine issue of material fact." *Libralter Plastics, Inc v Chubb Group of Ins Cos*, 199 Mich App 482, 486; 502 NW2d 742 (1993).

"This Court reviews de novo whether a public record is exempt from disclosure under the FOIA." *Mich Open Carry, Inc v Dep't of State Police*, 330 Mich App 614, 625; 950 NW2d 484 (2019). "[C]ertain FOIA provisions require the trial court to balance competing interests," and, "when an appellate court reviews a decision committed to the trial court's discretion, . . . the appellate court must review the discretionary determination for an abuse of discretion and cannot disturb the trial court's decision unless it falls outside the principled range of outcomes." *Herald Co, Inc v Eastern Mich Univ Bd of Regents*, 475 Mich 463, 470-471; 719 NW2d 19 (2006).

This Court reviews de novo the interpretation of statutes. *Woodman v Dep't of Corrections*, 511 Mich 427, 440; 999 NW2d 463 (2023). "The primary goal of statutory interpretation is to ascertain the legislative intent that may reasonably be inferred from the statutory language." *Id.* (cleaned up). If a statute is unambiguous, it "must be applied as written." *McQueer v Perfect Fence Co*, 502 Mich 276, 286; 917 NW2d 584 (2018) (cleaned up). Thus, this Court may not read something into the statute "that is not within the manifest intent of the Legislature as derived from the words of the statute itself." *Id.* (cleaned up). And statutory language "cannot be viewed in isolation, but must be construed in accordance with the surrounding text and the statutory scheme." *Id.* (cleaned up). In other words, a statute must be read as a whole. *Bush v Shabahang*, 484 Mich 156, 167; 772 NW2d 272 (2009). "Courts must give effect to every word, phrase, and clause in a statute and avoid an interpretation that would render any part of the statute surplusage or nugatory." *State Farm Fire & Cas Co v Old Republic Ins Co*, 466 Mich 142, 146; 644 NW2d

² Because the Court of Claims ruled that the records were exempt under the "intellectual property" provision of the CRIIA, MCL 390.1554(1)(a), it did not reach the question of whether they were also exempt as a "trade secrets or other proprietary information" under MCL 390.1554(1)(d).

715 (2002). Finally, courts “give undefined statutory terms their plain and ordinary meanings.” *Id.*

III. ANALYSIS

Plaintiff argues that the Court of Claims erred by concluding that the records were exempt from the FOIA, MCL 15.243(1)(d), as intellectual property under the CRIIA, MCL 390.1554(1)(a). We disagree.

The FOIA “requires public bodies to release certain information at a citizen’s request.” *Warren v Detroit*, 261 Mich App 165, 166; 680 NW2d 57 (2004). The purpose of the FOIA is for people to “be informed so that they may fully participate in the democratic process,” MCL 15.231(2), and our “Legislature codified the FOIA to facilitate disclosure to the public of public records held by public bodies,” *Herald Co, Inc*, 475 Mich at 472. “Under FOIA, a public body must disclose all public records that are not specifically exempt under the act.” *King v Mich State Police Dep’t*, 303 Mich App 162, 176; 841 NW2d 914 (2013) (cleaned up). Except when a statutory exemption expressly applies, “a person has a right to inspect, copy, or receive copies of [a] requested public record of [a] public body.” MCL 15.233(1).

“[T]he FOIA must be broadly interpreted to allow public access to the records held by public bodies,” and, correspondingly, “the statutory exemptions must be narrowly construed to serve the policy of open access to public records.” *Mich Open Carry, Inc*, 330 Mich App at 625. “The burden of proving that an exemption applies rests with the public body asserting the exemption.” *Id.* “The FOIA exemptions signal particular instances where the policy of offering the public full and complete information about government operations is overcome by a more significant policy interest favoring nondisclosure.” *Herald Co, Inc*, 475 Mich at 472. In such instances, “the Legislature has made a policy determination that full disclosure of certain public records could prove harmful to the proper functioning of the public body.” *Id.* at 473.

MCL 15.243(1)(d) exempts from disclosure “[r]ecords or information specifically described and exempted from disclosure by statute.” In the present case, the “statute” that defendant has invoked is the CRIIA. The CRIIA’s stated purpose is “to protect from public disclosure certain information obtained in research and related activities of public universities and colleges[.]” 2004 PA 86, title. As relevant here, it exempts from disclosure universities’ intellectual property as follows:

(1) Except as otherwise provided in this section, the following information in which a public university or college holds an interest, or that is owned, prepared, used, or retained by, or in the possession of, a public university or college, is exempt from disclosure as a public record under the freedom of information act, Act No. 442 of the Public Acts of 1976, being sections 15.231 to 15.246 of the Michigan Compiled Laws:

(a) Intellectual property created by a person employed by or under contract to a public university or college for purposes that include research, education, and related activities, until a reasonable opportunity is provided for the information to

be published in a timely manner in a forum intended to convey the information to the academic community. [MCL 390.1554(1)(a).]

The CRIIA defines intellectual property as “original data, findings, or other products of the mind or intellect commonly associated with claims, interests, and rights that are protected under trade secret, patent, trademark, copyright, or unfair competition law.” MCL 390.1552(c). And the CRIIA further provides that “[t]he provisions of this act exempting information from disclosure shall be strictly construed.” MCL 390.1556.

To begin with, we agree with the Court of Claims that the requested videos satisfy the CRIIA’s definition of intellectual property, MCL 390.1552(c). The videos are recordings of academic researchers’ experiments concerning the antidepressant effects of ketamine in mice, with the goal of ultimately translating the findings to benefit humans. Also, as Dr. Watson’s affidavit explained, the researchers will also seek to use the videos to develop a new method of testing the effects of antidepressants that may have commercial value. Because the researchers designed the experiments to be captured by video recordings, the videos contain “original data . . . of the mind or intellect . . .” MCL 390.1552(c). Further, this “original data” is “commonly associated with” legally protected “claims, interests, and rights that are protected under trade secret, patent, trademark, copyright, or unfair competition law,” *id.*, because the findings from the videos were published in an academic article copyrighted by the authors, and researchers expended resources and sought to protect confidentiality while endeavoring to create a new testing method with commercial application. As the Court of Claims stated, the phrase “commonly associated with” indicates that the CRIIA’s definition of intellectual property “sweeps wider than merely the end, legally protectable product.” Put differently, defendant need not prove that the underlying data itself is legally protected so long as it is associated with a product that does have such protection. We also agree with the Court of Claims that, in light of the research goals expressed in Dr. Watson’s affidavit, classifying the videos as intellectual property is “consistent with the CRIIA’s purpose of allowing scholars to control and later publish or commercialize their research outputs and products.”

On appeal, plaintiff does not contest that the requested videos are intellectual property under MCL 390.1552(c) but instead challenges whether defendant has proven the other requirements of MCL 390.1554(1)(a)—that is, whether “a reasonable opportunity [was] provided for the information to be published in a timely manner in a forum intended to convey the information to the academic community.” *Id.* The CRIIA exemption for intellectual property lasts only “until” such an opportunity is provided. *Id.*³

³ Our Supreme Court has held that “the appropriate time to measure whether a public record is exempt under a particular FOIA exemption is the time when the public body asserts the exemption.” *State News v Michigan State Univ*, 481 Mich 692, 703; 753 NW2d 20 (2008); see also *id.* n 24 (noting that the same rule applies to exemptions that “contain explicit time limitations on their applicability”). Therefore, our task is to determine whether, at the time defendant denied plaintiff’s FOIA request in January 2024, “a reasonable opportunity [had been] provided for the information to be published in a timely manner in a forum intended to convey the information to the academic community.” MCL 390.1554(1)(a).

A. WHETHER “THE INFORMATION” HAS BEEN “PUBLISHED”

Plaintiff’s primary argument is that the exemption does not apply because the relevant “information” was already “published” for purposes of the CRIIA in the 2019 article. That is, plaintiff argues that once video records have been reviewed and information about them used in the publication of a publicly available article in a research journal, as here, they are “published” and thereby no longer protected from disclosure by MCL 390.1554(1)(a). Plaintiff’s position is that using information about the videos in a publication is enough to constitute publication, and that publication of the videos themselves is not required. So the question is whether this manner of publication means that “the information” has been “published.” *Id.*

Because the term “the information” is undefined, we must give it its plain and ordinary meaning, see *State Farm*, 466 Mich at 146, in the context of the statute as a whole, *Bush*, 484 Mich at 167. MCL 390.1554(1), the lead-in paragraph to the list of FOIA exemptions under the CRIIA, explains that “the following information” is “exempt from disclosure as a public record.” In subparagraphs, the statute then lists types of information that are exempt, including the exemption at issue, intellectual property, MCL 390.1554(1)(a), original works of authorship, MCL 390.1554(1)(b), records regarding a process, machine, item of manufacture, composition of matter, or a new and useful improvement of the above, MCL 390.1554(1)(c), and trade secrets or other proprietary information, MCL 390.1554(1)(d). Accordingly, “information” in MCL 390.1554(1) refers to each exemption type.

With the surrounding parts of the statute in mind, the structure of MCL 390.1554(1)(a), which exempts “intellectual property . . . until a reasonable opportunity is provided for the information to be published,” supports a reading that the term “the information” refers back to, and means, the “intellectual property” itself. Similarly, that the publication must be made “in a forum intended to convey the information to the academic community,” MCL 390.1554(1)(a), means that the intellectual property in question is conveyed through the publication. This reading is bolstered by the statute’s use of the term “information” to refer to types of exemptions, as discussed above. And because we read “the information” to mean the “intellectual property” in question, we apply its relevant definition, the “original data.” As stated, the “original data” is what plaintiff seeks—the videos themselves. Thus, the plain language of the statute provides that the exemption applies until a reasonable opportunity is provided for the videos themselves to be published to the academic community.

Returning to this case, then, we must determine whether the researchers’ publication of the 2019 article, in which findings and conclusions drawn from the experiments recorded in the videos appeared in an academic journal, means that “the information” has been published. As an initial matter, an academic journal is plainly “a forum intended to convey the information to the academic community.” MCL 390.1554(1)(a). But the published article contained neither the videos themselves nor still images from those videos. And no portion of the videos had otherwise been publicly released. Plaintiff’s position would seemingly mean that *any* underlying data associated with or used as part of a published study, but not actually included in the publication, would be subject to public disclosure, including perhaps even e-mails and notes, once a publication is released. See MCL 390.1552(c) (defining intellectual property as including “other products of the mind”). Such a position does not accord with either the plain language or the purpose of the CRIIA. As discussed, the statute’s plain language supports a conclusion that the exemption applies

until a reasonable opportunity is provided for the videos themselves to be conveyed to the academic community. And the CRIIA’s purpose is to protect “certain information obtained in research and related activities,” 2004 PA 86, title. We recognize that the *existence* of the videos was made generally known and publicly announced to the academic community via the 2019 article. However, as discussed, the 2019 article only contained an analysis of the data gathered from the videos, not the videos themselves.

Like the Court of Claims, we reject an interpretation of the CRIIA that would neutralize the intellectual property exemption merely because underlying data within a record sought for disclosure has been discussed or analyzed in a publication. Because we find that “the information” at issue is the videos themselves, and those videos were not published, plaintiff’s argument lacks merit.

Plaintiff’s reliance on a Louisiana case, *People for the Ethical Treatment of Animals v Bd of Supervisors of La State Univ*, 387 So 3d 527, 530; 2023-01396 (La 6/28/24) (*PETA*) does not change our conclusion.⁴ In that case, the plaintiff requested disclosure of various records from the defendant, Louisiana State University (LSU), associated with laboratory research conducted on wild songbirds. *Id.* at 530. One such request was for “all photographs and videographic records of birds held or used by Dr. Lattin from September 1, 2019, until date of fulfillment of the request” *Id.* at 531. The Louisiana Court of Appeal held that some of the videos were exempt, but others were not because they had already been “publicly released or published,” *id.* at 533, in accordance with Louisiana’s disclosure statute, see *id.* at 532-533. That statute exempts

[d]ata, records, or information produced or collected by or for faculty or staff of state institutions of higher learning in the conduct of or as a result of, study or research on commercial, scientific or technical subjects of a patentable or licensable nature, . . . until such data, records, or information have been publicly released, published, or patented. [*Id.* at 539, quoting La Stat Ann § 44:4(16)(b) (2024) (emphasis added.)].

On appeal to the Louisiana Supreme Court, LSU argued that the exemption should apply to the video records sought because Dr. Lattin’s research was ongoing. *Id.* at 540. The court disagreed and determined that the operative phrase “publicly released, published, or patented” did not have any language suggesting that “ongoing research” was included or that research must be “complete.” *Id.* (quotation marks omitted). The court determined that once research was either publicly released, published, or patented, the exemption no longer applied. *Id.*

The Louisiana Supreme Court concluded that some of the videos sought—those that Dr. Lattin had testified that she used in her article and several presentations at conferences and seminars—were disclosable because they had been “publicly released” or “published” under the disclosure statute. *Id.* at 541. In its reasoning, the court pointed to Dr. Lattin’s deposition testimony in which she stated that certain videos “have been analyzed for some types of behaviors.

⁴ We are not bound by the decisions of other states’ courts, but may find them persuasive. *IS by Owens v Crestwood Sch Dist*, ___ Mich ___, ___; ___ NW3d ___ (2025) (Docket No. 368021); slip op at 3 n 2.

And those behavior data have been published. Some of them have been published.” *Id.* at 541. The court also highlighted Dr. Lattin’s response to interrogatories in which she identified “ ‘what video recordings were made for [each] particular article or presentation.’ ” *Id.* Although Dr. Lattin believed “that her research had not been ‘broadly’ shared because presentations at conferences are ‘pretty high level,’ and usually involved ‘a graph or two from a project,’ ” the court declined to exempt the videos on those bases given the statute’s scope. *Id.*

Although at first glance *PETA* tends to support plaintiff’s argument for disclosure, upon closer examination we conclude that it is distinguishable. Importantly, in *PETA*, the court did not grapple with the argument being made by defendant here—that the publication of an article about the videos is distinct from publishing the videos themselves. Instead, the Louisiana Supreme Court’s focus was on LSU’s argument that the records were exempt because Dr. Lattin’s research was “ongoing.” *Id.* at 540. The Louisiana statute provides an exemption “until such data, records, or information have been publicly released, published, or patented,” La Stat Ann § 44:4(16)(b) (2024), so the court rejected LSU’s argument that the exemption applied merely because research was ongoing and not complete. In our case, by contrast, plaintiff argues that publication of the researchers’ article about the videos is equivalent to the publication of the videos themselves. That was not the central debate in *PETA*, but it is dispositive here.

Defendant, in turn, relies on *State ex rel Physicians Comm for Responsible Med v Bd of Trustees of Ohio State Univ*, 108 Ohio St 3d 288; 2006-Ohio-903; 843 NE2d 174 (2006). In that case, the plaintiff requested that the defendant, Ohio State University (OSU), disclose photo and video records related to its research on spinal cord injuries, *id.* at 289. More specifically, the plaintiff sought

video records of mice and rats involved in spinal-cord research at OSU, video records documenting OSU’s current and developing surgical techniques for producing spinal-cord injuries, records documenting the procedures used by OSU in its spinal-cord-injury training program, and training videos used by OSU to develop and demonstrate techniques for assessing rodents’ neurological recovery from spinal-cord injuries. [*Id.* at 293.]

OSU argued that such records were exempt as intellectual property, defined by Ohio statute as “a record . . . that is produced or collected by or for faculty or staff of a state institution of higher learning in the conduct of or as a result of study or research . . . and that has not been *publicly released, published, or patented.*” *Id.*, citing Ohio Rev Code § 149.43(A)(5) (West 2025) (emphasis added).

The plaintiff argued that the records had been publicly released and were therefore disclosable under the Ohio statute. *Physicians Comm for Responsible Med*, 108 Ohio St 3d at 293. Although OSU acknowledged that it had loaned some of the requested records to other scientists and research trainees, this was “solely to trusted scientific collaborators from known and reputable laboratories who will use the data to improve spinal cord injury research methodologies” and who signed nondisclosure agreements. *Id.* at 294 (quotation marks omitted). OSU further admitted that it had shown a fraction of the records to scientists at medical conferences closed to the public. *Id.* (quotation marks omitted). OSU maintained that such “limited disclosure” was “integral and directly related to the conduct of the research itself, because it is done for training, validation or

collaboration.” *Id.* (quotation marks omitted). The records were securely stored and access was restricted to members of the lab. *Id.* The court noted that although some of the research techniques had been described in a published article, the records that the plaintiff sought had not been published. *Id.* at 295.

The Ohio Supreme Court held that such records were not “publicly released, published, or patented,” reasoning that they had not been made available to the public. *Id.* Further, the disclosure to other scientists and researchers was limited, controlled, and involved nondisclosure agreements. *Id.* In that court’s view, selectively sharing technology about experimental techniques for spinal cord injuries to other researchers did not amount to public disclosure under the statute. *Id.*

Somewhat similar to our case, *Physicians Comm for Responsible Med* involved whether the requested records, access to which had been tightly controlled, had been “publicly released” or “published” under the Ohio statute. *Id.* Notably, although OSU researchers had described some of their research techniques in a published article, the Ohio Supreme Court did not order disclosure of the underlying records. See *id.* As in *PETA*, however, the central issue in the Ohio Supreme Court’s analysis was not whether the requested records must be disclosed merely because they had been described or discussed, but not themselves published, in an academic article. Therefore, as with *PETA*, the Ohio decision is not squarely on point and offers only some illumination as to the issues before us. Instead, we are persuaded that, given the text and purpose of MCL 390.1554(1)(a) as discussed above, the information plaintiff seeks has not yet been “published.”

B. WHETHER THERE WAS A “REASONABLE OPPORTUNITY” TO PUBLISH IN A “TIMELY MANNER”

Having rejected plaintiff’s argument that the records have been “published,” we move on to plaintiff’s argument that the records must be disclosed because a “reasonable opportunity” had been provided for the videos to be published “in a timely manner.” MCL 390.1554(1)(a).

As an initial matter, to the extent that plaintiff suggests that the statute is ambiguous because of the language of its timing requirement, we disagree. “A term is ambiguous ‘when it is equally susceptible to more than a single meaning,’ *Lansing Mayor v Pub Serv Comm*, 470 Mich 154, 166; 680 NW2d 840 (2004), not when reasonable minds can disagree regarding its meaning.” *Toll Northville LTD v Twp of Northville*, 480 Mich 6, 15-16 n 2; 743 NW2d 902 (2008). That determining the meaning of “reasonable opportunity” to publish “in a timely manner” requires interpretation does not render the statute ambiguous. Reasonableness requirements are commonplace in Michigan statutes. See, e.g., *Wilson v Alpena Co Rd Comm*, 474 Mich 161, 163, 170; 713 NW2d 717 (2006) (describing a plaintiff’s burden to defeat governmental immunity when arguing that a governmental agency has failed to “maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel,” MCL 691.1402(1)). Moreover, reasonableness is a familiar standard that courts are often called upon to apply. See, e.g., *Bronson Med Hosp v Auto-Owners Ins Co*, 295 Mich App 431, 442-443; 814 NW2d 670 (2012) (concerning whether a medical provider’s charges for surgical implant products were “reasonable charges” under the No-Fault Act, MCL 500.3107(1)(a)). Because the statute is unambiguous, “it must be applied as written.” *McQueer*, 502 Mich at 286 (cleaned up).

The statute written by the Legislature requires a flexible, but neither fixed nor indefinite, application of the intellectual property exemption. We read the statute as a whole, see *Bush*, 484 Mich at 167, and accord undefined terms their plain and ordinary meanings, see *State Farm Fire*, 466 Mich at 146. Unlike the intellectual property exemption, other provisions within MCL 390.1554 describing exemptions from disclosure under the FOIA contain firm deadlines. For example, MCL 390.1554(1)(b) exempts certain “[o]riginal works of authorship fixed in any tangible medium of expression . . . until a reasonable opportunity is provided for the author to secure copyright registration, not to exceed 12 months from the date the work is first fixed in a tangible medium of expression.” Similarly, MCL 390.1554(1)(c) exempts certain records “until a reasonable opportunity is provided for the inventor to secure patent protection, not to exceed 5 years from the date the records are first made.” And MCL 390.1554(1)(d) exempts “[t]rade secrets or other proprietary information” with no deadline at all. “Generally, when language is included in one section of a statute but omitted from another section, it is presumed that the drafters acted intentionally and purposely in their inclusion or exclusion.” *Menard Inc v Dep’t of Treasury*, 302 Mich App 467, 471; 838 NW2d 736 (2013) (cleaned up). Thus, the inclusion of specific deadlines for the exemptions in MCL 390.1554(1)(b) and (c) and absence of any deadline for the exemption in MCL 390.1554(1)(d) supports an inference that the Legislature intended the duration of the intellectual property exemption in MCL 390.1554(1)(a) to be case-dependent.

This inference is further supported by the fact that the exemption’s “reasonable opportunity . . . in a timely manner” requirement is cabined by the requirement that the information be published “in a forum intended to convey the information to the academic community.” MCL 390.1554(1)(a). The timing requirement cannot be understood in a vacuum, but is instead tied to the information being conveyed to scholars in the field. Further, our interpretation must balance the CRIIA’s purpose, “to protect from public disclosure certain information obtained in research and related activities of public universities and colleges,” 2004 PA 86, title, with the FOIA’s policy of narrowly construing exemptions “to serve the policy of open access to public records,” *Mich Open Carry, Inc*, 330 Mich App at 625. In light of the purpose and language of the timing requirement, we conclude that the statute requires an opportunity to publish that is reasonable and timely for the field of study and type of intellectual property in question.

Returning to this case, plaintiff argues that the exemption does not apply because defendant had a “reasonable opportunity” to publish to the academic community “in a timely manner” because it published the 2019 article. Plaintiff also advocates for a five-year disclosure rule. Yet plaintiff provides no factual support for that proposal in its experts’ affidavits, or otherwise explains why five years is an appropriate benchmark under the statute. Instead, plaintiff argues that defendant has already made the information public. But, as explained above, we reject this argument. Nor does the statute allow for such a bright-line rule. Instead, as explained, the standard is flexible according to the nature of the intellectual property at issue.

In support of its motion for summary disposition, defendant attached an affidavit from Dr. Watson which stated that

[d]espite the publication of the April 2019 Article, the data from those experiments is still being analyzed. Specifically, my lab is planning on correlating the data from those videos with upcoming experiments in an effort to validate new methods of testing the effects of antidepressants that do not involve what is commonly referred

to as a forced swim test. Using pre-existing high-quality videos removes the need to perform additional animal experiments as part of this ongoing research. Although it is difficult to predict when the research will be complete, I anticipate that I will continue to use the data from the videos for at least three more years. . .

Based on the information provided, the Court of Claims determined that defendant had not yet had a reasonable opportunity to publish the videos in a timely manner. We agree with this conclusion. Dr. Watson and his colleagues began their experiments in 2018 and published their article in 2019, and Dr. Watson's affidavit was created in 2024. Moving forward three years from that date to 2027, this would put the total duration of the exemption at around nine years. Given that the statute's purpose is to protect universities' intellectual property and that a "reasonable opportunity" must be given to share the videos with the academic community in a "timely manner," we conclude that defendant met its burden of proving that the exemption applies. In short, defendant demonstrated that it had not yet had a "reasonable opportunity" to publish the videos in a timely manner because its researchers were continuing to use them for research for three more years.⁵

We disagree with plaintiff that this conclusion will allow universities to self-determine the extent and duration of the exemption. The CRIIA does not give universities carte blanche to withhold public records by asserting the exemption without justification. Our task is to interpret and apply the statute in light of the standards of review. The exemption provides for a "reasonable opportunity" for publication "in a timely manner," not an indefinite one, MCL 390.1554(1)(a), and under the FOIA the public body has the burden of proving the exemption applies, see *Mich Open Carry, Inc*, 330 Mich App at 625. However, in this case plaintiff has presented nothing more than "conjecture and speculation," devoid of any factual basis, in response to Dr. Watson's affidavit, which is insufficient to establish a genuine issue of material fact. See *Libralter Plastics*, 199 Mich App at 486.

We also reject plaintiff's argument that the Court of Claims erred in granting summary disposition before discovery. Although "[g]enerally, summary disposition under MCR 2.116(C)(10) is premature if it is granted before discovery on a disputed issue is complete," *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 292; 769 NW2d 234 (2009), a nonmovant seeking to survive summary disposition when discovery is incomplete "must offer the required MCR 2.116(H) affidavits, with the probable testimony to support its contentions." *Id.* (emphasis added). An affidavit under MCR 2.116(H)(1) must assert that "the facts necessary to support the party's position cannot be presented because the facts are known only to persons whose affidavits the party cannot procure." Plaintiff now argues that it could have deposed Dr. Watson and asked questions such as what supported his estimated timeline of "at least three more years." But in the Court of Claims, although it asserted that discovery had

⁵ We reject defendant's invitation to rely on an article in a medical journal stating that "[i]t is frequently stated that it takes an average of 17 years for research evidence to reach clinical practice." The CRIIA does not anchor its timeframe to the time for research to reach *clinical practice*; it seeks to provide a reasonable opportunity for information to be conveyed in a timely manner "to the academic community." MCL 390.1554(1)(a).

not been completed, plaintiff did not file MCR 2.116(H) affidavits or otherwise describe what helpful information it might uncover during discovery. “[A] party opposing summary disposition cannot simply state that summary disposition is premature without identifying a disputed issue and supporting that issue with independent evidence.” *Marilyn Froling Revocable Living Trust*, 283 Mich App at 292. Plaintiff cannot now complain that discovery was not completed when it failed to develop an argument or follow the procedures of MCR 2.116(H)(1) below.

In sum, we agree with the Court of Claims’s conclusion that the exemption applies because defendant established that it had not yet had a “reasonable opportunity” to publish the records “in a timely manner” to the academic community. MCL 390.1554(1)(a).

IV. CONCLUSION

Because the requested video records were not “published” in the 2019 article and because defendant established on this record that it had not yet had a “reasonable opportunity” to publish the requested items “in a timely manner” to the academic community, we conclude that the Court of Claims did not err in granting summary disposition to defendant under CRIIA’s intellectual property exemption from the FOIA, MCL 390.1554(1)(a).⁶

Affirmed. No costs, a public question being involved. MCR 7.219(A).

/s/ Daniel S. Korobkin
/s/ Christopher M. Murray
/s/ Allie Greenleaf Maldonado

⁶ Because we conclude that the intellectual property exemption applies, we need not address plaintiff’s argument that the trade secret exemption, MCL 390.1554(1)(d), does not apply.