STATE OF MICHIGAN

COURT OF CLAIMS

GOVERNMENT ACCOUNTABILITY & OVERSIGHT, a Wyoming nonprofit corporation,

Plaintiff,

v

Case No. 24-000060-MZ

REGENTS OF THE UNIVERSITY OF MICHIGAN,

Hon. Michael F. Gadola

Defendant.
_____ /

OPINION AND ORDER GRANTING DEFENDANT'S 11/21/25 MOTION FOR SUMMARY DISPOSITION AND DENYING PLAINTIFF'S 11/21/25 MOTION FOR SUMMARY DISPOSITION

In this action involving the Freedom of Information Act (FOIA), MCL 15.231 *et seq*., plaintiff, Government Accountability & Oversight (GAO), claims that defendant, the Regents of the University of Michigan (the University), denied a proper FOIA request in an attempt to shield the work of Assistant Law Professor Rachel Rothschild from public disclosure and scrutiny. The University maintains that the requested records were not public records subject to disclosure and, even if they were, they were exempt from disclosure under the attorney-client privilege. After discovery, both parties moved for summary disposition under MCR 2.116(C)(10). Because the Court concludes that the records in question are not public records subject to production under FOIA, the Court GRANTS the University's motion for summary disposition and DENIES GAO's motion for summary disposition.

I. BACKGROUND

GAO is a Wyoming nonprofit corporation "dedicated to transparency relating to environmental and energy policy," and that "regularly uses state and federal public records laws to obtain documents from government bodies." This lawsuit involves three FOIA requests that GAO submitted to the University, requesting records of communications between Professor Rothschild and entities that Professor Rothschild represented on a pro bono basis while employed as a professor. Those entities included the Rockefeller Family Fund (RFF) and the Center for Biological Diversity.

A. PROFESSOR ROTHSCHILD'S BACKGROUND

Professor Rothschild is an assistant professor at the University of Michigan Law School (the Law School). Her specialization is in environmental law. She began working at the Law School in July 2022. Before accepting employment with the Law School, Professor Rothschild worked as a legal fellow with a nonprofit entity called the Institute for Policy Integrity, which is housed within the New York University School of Law (NYU Law). Professor Rothschild remained an affiliated scholar with the Institute for Policy Integrity upon joining the Law School's faculty. Before attending law school, Professor Rothschild earned a doctoral degree in history. Her faculty biography on the Law School's website states, in relevant part, "Rothschild's scholarship sits at the intersection of law, history, and policy. . . . Her recent research examines climate change litigation, as well as the past and present regulation of toxic substances." Her curriculum vitae lists various publications addressing the topic of climate change.

The central focus of this case is the scope of Professor Rothschild's job duties, which is relevant to whether the requested records were public records under FOIA. The Law School's Tenure Standards and Procedures (the Tenure Standards) outline three requirements that professors

must meet to achieve tenure: teaching, scholarship, and institutional service. As it relates to the category of scholarship, the Tenure Standards provide, in relevant part, "The candidate's scholarship need not be in the form of law review articles, but can consist of essays, book reviews, books or chapters in a book, monographs, or other types of publications." The Tenure Standards explain that the scholarly work should, except in rare cases, "include the equivalent of at least two substantial law review articles that have been published or submitted for publication."

Ekow Yankah serves as Associate Dean for Faculty and Research for the Law School and testified as the University's corporate representative for purposes of discussing Professor Rothchild's employment. Dean Yankah defined Professor Rothschild's three job requirements as follows: "Of course, any faculty member's primary duty is to teach, and so she has her teaching load, both her larger classes and her seminar classes. Those are her primary duties to the university." He added, "Your second duty, and frankly for academic advancement, perhaps your most important duty is to produce scholarship and publish that scholarship in academic fora." Finally,

> the third duty one has, though it is explicitly given much less weight, is to be of service to the institution in various ways: serve on committees; you know, certainly panels; student service, although student service I would actually rather put into the teaching bucket, but institutional service is what we call it.

Dean Yankah explained that for junior faculty members, including Professor Rothschild, the Law School seeks to "lighten the load" in terms of institutional service so that they can concentrate on teaching and scholarly work.

Professor Rothschild testified consistently with Dean Yankah on her job responsibilities: "I am expected to teach the doctrinal classes as well as seminars. I am expected to publish research and to perform internal service to the law school and broader university." Professor Rothschild

acknowledged that she has conducted research and, at the time of her deposition, was preparing a scholarly article on the topic of state climate Superfunds.[1]

Professor Rothschild also engaged in pro bono work while employed as an assistant professor. Professor Rothschild explained during her deposition that she represented several entities working on climate Superfund legislation, but she did not have a written engagement agreement with these entities. However, her understanding was that the pro bono work would not be considered part of her official job responsibilities for the University. Professor Rothschild communicated with those entities through her personal e-mail account.

Dean Yankah agreed that pro bono work does *not* factor directly in the Law School's yearly tenure reviews:

> I mean pro bono work is part of your public citizenship, as was reflected in the yearly agenda, but it's not criterial in terms of your promotion or success at the law school. So it's the kind of thing we want to know about, in some sense celebrate, but it's not really—it's not really a critical factor. I don't want to use the word "decorative" because that's too dismissive, but it is a feature of your total academic complexion.
>
> It is not—it's not weighted in tenure . . . .

He explained that pro bono work might be "celebrate[d] and encourage[d]" among junior faculty to the extent that it promotes intellectual curiosity, but it is celebrated with the caveat that the pro bono work cannot be distracting or overly time consuming. He denied that pro bono legal advice would be considered part of the professor's scholarship responsibilities, explaining, "At most it's part of your larger academic profile and being an academic citizen in the world, but it's

[1] Legislation for climate Superfunds would require entities, such as fossil fuel companies, that are found to have engaged in pollution to pay for mitigation efforts.

not part of your scholarship, no." He explained that such activities can become "a conflict of commitment," in violation of the Law School's Policy on Faculty Conflicts of Interest and Conflicts of Commitment, if they become too time consuming because the "primary commitment" is to serve as a full-time law professor.

Dean Yankah also explained that faculty members may not speak on behalf of the University unless they are given permission to do so. However, he explained there was no official policy regarding when a professor may use his or her university letterhead, explaining that each situation requires an exercise of professional judgment.

Additionally, after this lawsuit was filed, Neel Sukhatme, Dean of the Law School, wrote a letter to Professor Rothschild responding to her request "to memorialize" the distinction between her official duties and her pro bono work, in which he explained that her "external consulting activities and pro bono work for environmental organizations are not within the scope of your employment at the University of Michigan Law School." He noted, "These external activities are separate from your faculty role and are undertaken independently of your position here."

On March 29, 2023, Professor Rothschild prepared a legal memorandum that is alleged to have some connection with her pro bono work. In the memorandum, Professor Rothschild identified herself by her official title and addressed the memorandum to "Interested Persons." This memorandum did not appear on the University's letterhead. GAO stated in its briefing that it obtained a copy of this memorandum from another public entity in response to a different public-records request and that the memorandum was voluntarily submitted to that entity by one of Professor Rothschild's pro bono clients. GAO referred to the memorandum in its FOIA requests

(as noted later) and throughout this litigation.[2] Dean Yankah testified that the March 29, 2023 memorandum would *not* be considered scholarly work for purposes of tenure consideration.

Members of the Law School faculty must complete Faculty Annual Reports (FARS) each year. Dean Yankah explained that the FARS were "just a way of the law school to really know what you're up to, know what you're doing." He explained that law professors largely control their own careers, and the Law School has an interest in knowing "if something is stopping you from being successful and productive."

Professor Rothschild disclosed her pro bono work on her FARS for the 2022–2023 and 2023–2024 academic years under the category of "External Contributions," and the subcategory of "Public Citizenship," which specifically invited the professor to discuss pro bono work and testimony to legislative bodies. Professor Rothschild explained for the 2022–2023 academic year, "I have been advising (pro bono) several NGOs working on state climate superfund acts." Professor Rothschild also detailed her advisory work for the New York Legislature and certain Massachusetts legislators on climate Superfund bills in those states. For the 2023–2024 academic year, Professor Rothschild disclosed under the same categories her pro bono work for several entities. Professor Rothschild denied during her deposition that she ever used student research in her pro bono legal work, although she acknowledged that law students have assisted her with research relating to climate Superfund laws, which she used for her scholarly pursuits.

[2] On April 10, 2024, Rothschild prepared another memorandum to "Interested Persons" regarding the climate Superfund program, which *was* on university letterhead.

To support that the legislative work is connected to her role with the Law School, GAO relies on a July 5, 2023 Law School publication entitled: "5Qs: Rothschild on Fighting Climate Change with State 'Superfunds,' " which was authored by a Law School employee named Bob Needham and included five interview questions posed to Professor Rothschild. The article stated, in relevant part: "Rothschild, an assistant professor of law, has been doing extensive pro bono work to support the new approach, including researching the constitutionality of the concept, helping to draft legislation, and publicly testifying on the bills." In the article, Professor Rothschild detailed her work on Superfund bills, explaining the purpose of her memorandum as follows:

> A major part of my current work has been answering legislators' questions about the constitutionality of these [superfund] bills. For example, the American Petroleum Institute recently released a memo laying out their opposition to New York's bill, including several reasons they believe the bill is unconstitutional. So I drafted a response memo for state legislators explaining why I don't think their arguments have merit and how they're misreading certain cases.
>
> I also recently testified on the Massachusetts bill, and I've previously assisted the counsel in the New York State Senate on drafting the language of that bill. One of my law students . . . helped me throughout the past year with legal research for these bills . . . . In addition, I'm hoping to publish a paper related to this topic, though I'm not yet sure what form that will take.

GAO also relies on a publicly available video of an interview conducted through the Law School for a program called "Better Know a Professor," in which Professor Rothschild again referred to confronting the legal challenges to the Superfund legislation as part of her "work in this area."

B. GAO'S FOIA REQUESTS

GAO submitted three separate FOIA requests to the University that form the basis for this lawsuit. On February 9, 2024, GAO submitted its first FOIA request to the University, which requested the following records:

> [C]opies of all correspondence sent to or from (including as cc: and/or bcc:) Rachel Rothschild, Assistant Professor, University of Michigan Law School, which is dated at any time from January 1, 2023 through July 31, 2023, inclusive, that was sent to, from or which copies any email address ending in a) @rffund.org, b) @michiganlcv.org, c) @climateintegrity.org, d) @michiganlcv.org, e) @biologicaldiversity.org, and/or e) @pirgim.org.
>
> We request entire "threads" of which any responsive electronic correspondence is a part, regardless of whether any portion falls outside of the above time parameter. [Bolded emphasis omitted.]

On March 1, 2024, the University's FOIA Coordinator, Shannon Hill, responded to the FOIA request, stating:

> Your request is denied because we have no responsive records. Any records that meet the description you provided, if they were to exist, would not be public records of the University of Michigan pursuant to Section 2(i) of the Michigan Freedom of Information Act, which defines a "public record" as "a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function[.]"

Before she responded to the FOIA request, Hill contacted Professor Rothschild and learned that any responsive documents would consist of "legal advice being given to an organization." Professor Rothschild denied that the documents were related to her position with the University.

On March 6, 2024, GAO submitted a second FOIA request, which was narrower in scope and requested

> copies of all email correspondence sent to or from (including as cc: and/or bcc:) Rachel Rothschild, Assistant Professor, University of Michigan Law School, which is dated at any time from January 1, 2023 through July 31, 2023, inclusive, that includes, anywhere, whether in an email or an attachment thereto, "American Petroleum Institute Opposition to a Climate Superfund Act" and was sent to or from or includes as a copied party any email address ending in ".edu".
>
> We request entire "threads" of which any responsive electronic correspondence is a part, regardless of whether any portion falls outside of the above time parameter. [Footnotes omitted; bolded emphasis omitted.]

The second FOIA request further explained that the reference to "American Petroleum Institute Opposition to a Climate Superfund Act" was a reference to the March 29, 2023 memorandum.

On March 26, 2024, the University denied the March 6, 2024 FOIA request for the same reason as the denial of the February 9, 2024 FOIA request. Hill again consulted with Professor Rothschild before denying the second FOIA request and came to the same conclusion that any responsive documents were unrelated to Professor Rothschild's work for the University.

On the same day its second FOIA request was denied, GAO submitted a third FOIA request for

> all email correspondence sent to or from (including as cc: and/or bcc:) Rachel Rothschild, Assistant Professor, University of Michigan Law School, which is dated at any time from January 1, 2023 through July 31, 2023, inclusive, that includes, anywhere, whether in an email or an attachment thereto, "American Petroleum Institute Opposition to a Climate Superfund Act" and:
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> > 1) was sent to or from or includes as a copied party any email address ending in ".org".
> >
> > 2) was sent to or from or includes as a copied party any email address ending in ".gov", and/or
> >
> > 3) was sent to or from or includes as a copied party any email address ending in ".com".
>
> We request entire "threads" of which any responsive electronic correspondence is a part, regardless of whether any portion falls outside of the above time parameter. [Footnotes Omitted; bolded emphasis omitted.]

On April 3, 2024, the University denied the third FOIA request for the same given reason as the first two FOIA requests. Hill did not have a separate conversation with Professor Rothschild about this request and based the response on their prior conversations.

According to Professor Rothschild, the only documents that would be responsive to these three FOIA requests are maintained on her personal e-mail account. She explained in an affidavit attached to the University's motion for summary disposition, "These emails consist of legal advice, requests for legal advice, and discussions of the public release of a legal memorandum that I drafted at the request of the Rockefeller Family Fund [RFF]."

As for the memorandum, Professor Rothschild explained, "Although the memorandum lists my title as University professor after my name, it is included to identify me as the author and does not signify that the memorandum was drafted in my role as a University professor." Rather, Professor Rothschild prepared the memorandum in her "personal capacity providing pro bono legal advice."

Lee Wasserman, the Director and Secretary of RFF, confirmed in his affidavit the existence of the attorney-client relationship between RFF and Professor Rothschild. He explained, "RFF's attorney-client relationship with Ms. Rothschild exists independent of and is not related to her role at the University of Michigan." He explained that each e-mail in question contained legal advice or requests for legal advice. He noted that Professor Rothschild also communicated with the Institute of Policy Integrity "at RFF's request." Wasserman denied that RFF provided any of the e-mails to any individual outside of the attorney-client relationship or that RFF took other action to break the privilege.

C. PROCEDURAL BACKGROUND

In May 2024, GAO filed this lawsuit, requesting that this Court enter (1) a declaratory judgment ruling that the University has a duty under FOIA to produce responsive records (Count I), (2) an injunction ordering the University to produce all responsive records or, alternatively,

produce the documents or mutually selected exemplars for an *in camera* review (Count II), and (3) an order for costs and reasonable attorney fees under MCL 15.240(6), as well as punitive damages under MCL 15.240(7) (Count III).

In lieu of answering the complaint, the University moved for summary disposition at the outset of the case, which this Court denied, ruling that discovery was needed to determine two issues: "(1) whether Professor Rothschild's records are, in fact, not related to the university in any manner relevant to FOIA, and (2) whether Professor Rothschild's records are, in fact, subject to the attorney-client privilege." *Gov Accountability & Oversight v Regents of the Univ of Mich*, opinion of the Court of Claims, issued September 18, 2024 (Case No. 24-000060-MZ), p 6. During discovery, GAO served Professor Rothschild with a subpoena for the requested documents, and in response, she produced a *Vaughn*[3] Index, which revealed that the only responsive e-mails include communications between Professor Rothschild, individuals associated with RFF, and individuals associated with NYU.

Following discovery, both parties moved for summary disposition under MCR 2.116(C)(10). The motions for summary disposition focus on the same three issues: (1) whether the requested records are "public records" as defined in FOIA; (2) whether, even if the documents are public records, they are exempt from disclosure because of the attorney-client privilege; and (3) whether the University acted arbitrarily and capriciously for purposes of GAO's request for punitive damages.

[3] *Vaughn v Rosen*, 157 US App DC 340; 484 F2d 820 (1973).

On the first issue, GAO argues that the requested records are public records of a public body considering the connection between the records and Professor Rothschild's official functions, which include frequent public engagement on climate Superfund legislation. GAO argues that Professor Rothschild should be considered a public body in her individual capacity. The University, on the other hand, contends that Professor Rothschild's records are not public records because they are not maintained or used by the University for any official function, and pro bono work is not part of Professor Rothschild's job duties as a law professor. The University also denies that Professor Rothschild is a public body in her individual capacity.

On the second issue, GAO contends that the attorney-client privilege does not apply in this case or has been waived for the records at issue because of the subsequent disclosure of the memorandum that was at the heart of the legal advice provided. Alternatively, GAO requests an *in camera* review of the withheld documents. In contrast, the University argues that the attorney-client privilege applies because the responsive documents all pertained to legal advice Professor Rothschild gave her pro bono clients, and the clients have not waived privilege.

On the third issue, GAO argues that the University acted arbitrarily and capriciously when it failed to conduct a complete search for and vet the records in question. Thus, GAO argues it is entitled to its attorney fees, costs, and punitive damages as permitted under FOIA. The University counters that GAO is not entitled to costs, fees, or damages because it cannot prevail in establishing a FOIA violation. The University argues, instead, that the Court may exercise its discretion to award the University reasonable fees and costs under MCL 15.240(6). Because the briefing is adequate to address the issues, the Court dispenses with oral argument. See Court of Claims LCR 2.119(E)(3).

II. ANALYSIS

A. STANDARD OF REVIEW

Both parties move for summary disposition under MCR 2.116(C)(10). A motion for summary disposition filed under MCR 2.116(C)(10) examines the factual support for the claims by reviewing the evidence in the light most favorable to the nonmoving party. *Coblentz v Novi*, 475 Mich 558, 567-568; 719 NW2d 73 (2006). "Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law." *Id*. at 568 (quotation marks and citation omitted). Because the parties dispute the proper interpretation of FOIA, the Court applies the following principles of statutory interpretation:

> The goal of statutory interpretation is to give effect to the Legislature's intent as determined from the language of the statute. In order to accomplish this goal, this Court interprets every word, phrase, and clause in a statute to avoid rendering any portion of the statute nugatory or surplusage. [The Court will] give the words of a statute their plain, ordinary meaning unless the Legislature employs a term of art. [*Bukowski v Detroit*, 478 Mich 268, 273-274; 732 NW2d 75 (2007).]

B. PUBLIC BODY

The public policy behind FOIA is that

> all persons, except those persons incarcerated in state or local correctional facilities, are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them 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).]

In line with the prodisclosure nature of the statute, the disclosure provisions outlined in FOIA must be interpreted broadly, and the exceptions must be construed narrowly. *Rataj v Romulus*, 306 Mich App 735, 748-749; 858 NW2d 116 (2014). FOIA provides that, in response to a request, "[a] public body must disclose all public records that are not specifically exempt under

the act." *Arabo v Mich Gaming Control Bd*, 310 Mich App 370, 380; 872 NW2d 223 (2015) (quotation marks and citation omitted). See also MCL 15.233(1).

There is no dispute that the University is a public body subject to FOIA. However, GAO argues that Professor Rothschild is also a public body subject to FOIA in her individual capacity. To support this theory, GAO relies on the definitions outlined in MCL 15.232(h)(*i*) and (*iv*), which provide:

> (h) "Public body" means any of the following:
>
> (*i*) A state officer, employee, agency, department, division, bureau, board, commission, council, authority, or other body in the executive branch of the state government, but does not include the governor or lieutenant governor, the executive office of the governor or lieutenant governor, or employees thereof.
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> * * *
>
> (*iv*) Any other body that is created by state or local authority or is primarily funded by or through state or local authority, except that the judiciary, including the office of the county clerk and its employees when acting in the capacity of clerk to the circuit court, is not included in the definition of public body.

To support that Professor Rothschild may be a public body in her individual capacity, GAO relies on the Michigan Supreme Court's statement, in *Bisio v Village of Clarkston*, 506 Mich 37, 47; 954 NW2d 95 (2020), that "MCL 15.232(h) provides that a single officer or individual may, in particular circumstances, be considered a 'public body' for purposes of FOIA."

The language used in the definition of "public body" in MCL 15.232(h)(*i*) does not support GAO's interpretation that Professor Rothschild, as an individual, is a public body. MCL 15.232(h)(*i*) refers to an "employee" as a public body but does so in a list that qualifies the definitions as "state" officers, employees, agencies, departments, divisions, bureaus, boards, commissions, councils, authorities, and other bodies, and then specifies that it also includes other

bodies "in the executive branch," with limited exceptions. The context of the word "employee" within the statutory provision supports the University's interpretation that the definition of "public bodies" applies specifically to employees within the executive branch of State government. There is no language in the statute suggesting a legislative intent to extend the meaning of the term "public body" to all individual employees or professors at a public university. The definition of "public body" in MCL 15.232(h)(*iv*) does not include a broad term such as "employees," so it does not provide a basis for finding that Professor Rothschild is a separate public body.

The Court also finds *Bisio*, 506 Mich at 47-54, distinguishable because that case involved documents in the possession of a city attorney and did not involve a public university or its employees. *Bisio*, therefore, is not binding on this issue.

GAO relies on two additional cases to support that Professor Rothschild is a public body subject to FOIA. The first is *Garner v Mich State Univ*, 185 Mich App 750, 759; 462 NW2d 832 (1990). However, *Garner* involved a wrongful-discharge claim, and the portion of the opinion cited by GAO outlines the due-process rights of public employees and tenured professors to continued employment. *Id*. The opinion does not include an analysis about when a university professor is considered a public body under FOIA. GAO also cites *Rideaux v Winter*, 155 NE3d 1120, 1124 (Ill App Ct, 2020), which is a nonbinding Illinois Court of Appeals opinion involving whether the Illinois Court of Claims had exclusive jurisdiction over the plaintiff's battery action involving a university professor. The Appellate Court of Illinois held, in relevant part, that the professor was a state employee, and the Illinois Court of Claims therefore had jurisdiction over the action. *Id*. The case did not involve a FOIA statute and is not otherwise relevant to the meaning of the term "public body" as defined in Michigan's FOIA. Accordingly, the Court concludes that

Professor Rothschild was not a public body subject to FOIA in her individual capacity.[4] However, because there is no dispute that the University is a public body, the Court will analyze whether the requested records were public records of the University subject to FOIA.

C. PUBLIC RECORDS

FOIA defines a "public record" as, in relevant part, "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). The parties dispute whether the records were "prepared, owned, used, in the possession of, or retained" by the University and whether those records related to "the performance of an official function." The statute does not define the term "official function." The Michigan Court of Appeals has explained, in consultation with dictionary definitions, that the term "official functions" includes "those authorized acts or operations that are expected" of the public body "as it relates to its position" as a public body. See *Ahmad v Univ of Mich*, unpublished per curiam opinion of the Court of Appeals, issued June 20, 2019 (Docket No. 341299), p 3, aff'd by equal division 507 Mich 917 (2021).[5]

The caselaw makes clear that some affirmative conduct on the part of the public body is required as the "mere possession of a record by a public body does not render the record a public document." *Howell Ed Ass'n, MEA/NEA v Howell Bd of Ed*, 287 Mich App 228, 236; 789 NW2d 495 (2010) (quotation marks and citation omitted). Nor is the personal nature of the documents in question dispositive on this issue: "[P]urely personal documents can become public documents

[4] It is also noteworthy that GAO submitted its FOIA requests to the University—not to Rothschild.

[5] Although unpublished opinions of the Court of Appeals are not binding authority, the Court may consider them for their persuasive value. See MCR 7.215(C)(1); *Cox v Hartman*, 322 Mich App 292, 307; 911 NW2d 219 (2017).

based on how they are utilized by public bodies." *Id*. at 243. The key is whether "their subsequent use or retention [is] 'in the performance of an official function.' " *Id*. Caselaw analyzing similar factual scenarios has drawn a distinction between private documents that are used by public employees in a personal capacity and those records that may originate in a private setting but are later used by a public body in the performance of an official function.

For example, in *Amberg v City of Dearborn*, 497 Mich 28, 32; 859 NW2d 674 (2014), the Michigan Supreme Court held that copies of video surveillance recordings created by a private party but received by the defendant (a city) during the course of a criminal-misdemeanor proceeding were public records under FOIA because, although the defendant did not use the recordings to issue the criminal-misdemeanor citation, the defendant used the recordings as evidence in the criminal proceedings to support its original decision. In *Walloon Lake Water Sys, Inc v Melrose Twp*, 163 Mich App 726, 729-730; 415 NW2d 292 (1987), the Court of Appeals held that a letter written by a private individual and received by a township supervisor became a public record subject to disclosure under FOIA when it was read aloud and incorporated into the meeting minutes of a public township meeting.

In contrast, in *Hopkins v Duncan Twp*, 294 Mich App 401, 402; 812 NW2d 27 (2011), the Michigan Court of Appeals held that "handwritten notes of a township board member taken for his personal use, not circulated among other board members, not used in the creation of the minutes of any of the meetings, and retained or destroyed at his sole discretion, are not public records subject to disclosure under FOIA." In *Hopkins*, the notes in question were taken in the board member's personal diary, where he kept notes of his other affairs, and he did not refer to any notes during township board meetings that were related to his "substantive decision-making." *Id*. at 415. He did not share his notes with other board members, and they were not included in the meeting

minutes. *Id*. Thus, the records were not public records because the board member "alone, retained the records at his sole discretion." *Id*. at 416.

Similarly, in *Howell Ed Ass'n*, 287 Mich App at 231-232, the Court of Appeals addressed whether private e-mails sent to and from three public high school teachers (who were also union officials) were public records because they happened to be captured in the digital memory for the high school's e-mail back-up system. The Court of Appeals rejected the theory that "every e-mail ever sent or received by public body employees" should be converted "into a public record subject to FOIA." *Id*. at 237. The Court explained that "unofficial private writings belonging solely to an individual should not be subject to public disclosure merely because that individual is a state employee." *Id*. (quotation marks and citation omitted). The Court reasoned that the back-up system was not an official function because it merely engaged in a "blanket saving of all information" and did not distinguish the e-mails "sent pursuant to the district's education goals" and those "sent by employees for personal reasons." *Id*. at 243.

GAO argues that the records in question were prepared, owned, used, in the possession of, or retained by the University in the performance of an official function relating to Professor Rothschild's duties as a law professor. Its theory of the case is that the records constituted public records because they (1) "center around" Professor Rothschild's March 29, 2023 memorandum that was published using her official title and allegedly supported by student research; (2) addressed climate change topics that are at the core of Professor Rothschild's scholarship and expertise; (3) concerned acts, such as lobbying, that Professor Rothschild self-reported as part of her scholarly agenda; and (4) concerned work that the University has actively promoted on numerous occasions. The Court disagrees and concludes that there is no factual support in the

record for GAO's position that the requested documents were used in the performance of an official function.

The Court notes at the outset that the three FOIA requests were not identical in nature. The first submission broadly requested all e-mail correspondence between Professor Rothschild and certain e-mail domains from January 1, 2023 through July 31, 2023. The request did not mention the March 29, 2023 memorandum or any subject matter. The second and third FOIA requests were narrower in scope. The second FOIA request asked for correspondence relating to the American Petroleum Institute's Opposition to a Climate Superfund Act sent to any educational entity's e-mail address, suggesting an attempt to narrow the scope of the request to communications relating to the March 29, 2023 memorandum. The third FOIA request asked for correspondence referring to Professor Rothschild's memorandum sent to or from a .org, .gov, or .com e-mail address. Professor Rothschild produced a *Vaughn* Index in connection with this lawsuit, in which she represented that all responsive documents were communications with RFF or with NYU (the Institute for Policy Integrity). GAO had possession of the memorandum mentioned in its FOIA requests, and its FOIA requests were limited solely to communications that it believed may have related to the subject of that memorandum.

The fatal flaw in GAO's argument is that, even assuming the e-mails related in some way to the memorandum, GAO has presented no evidence connecting the e-mail communications to Professor Rothschild's required job duties or other authorized acts or operations of the University. GAO's argument appears to rest on a theory that Professor Rothschild's legislative testimony bolsters her scholarly reputation and, therefore, her communications with her clients about the same general subject matter may indirectly benefit the University. However, an indirect benefit is

not an official function, and no evidence exists that Professor Rothschild's pro bono work was ever used as part of an official University function.

Both Professor Rothschild and Dean Yankah testified that pro bono legal work is not mandatory or considered in the Law School's tenure or employment decisions. As Dean Yankah explained, pro bono work is encompassed within "public citizenship," which is *not* part of the professor's job duties, and is considered by the University only to the extent that it features into the professor's "total academic complexion." In fact, it is allowed only to the extent that it does not detract from the professor's official duties of teaching, scholarly work, and institutional service.

More specifically, there is no evidence that the pro bono work was encompassed within Professor Rothschild's scholarship, which was one of her three required job functions. GAO argues that the March 29, 2023 memorandum itself was a piece of scholarly work, but the record evidence, including Professor Rothschild's and Dean Yankah's testimony, contradicts this theory. In fact, Dean Yankah expressly denied that the University would consider the memorandum a work of legal scholarship. There is also no evidence that the e-mails GAO requested through FOIA were part of Professor Rothschild's scholarly work, even if they may have touched on a topic that is also covered in some of her scholarly work (e.g., Superfund legislation).

The Court also does not find dispositive the fact that Professor Rothschild may have referred to her official title with the University in the memorandum. See *Blackwell v Livonia*, 339 Mich App 495, 507-509; 984 NW2d 780 (2021) (holding that a city mayor's private Facebook messages were not public records subject to disclosure under FOIA, even though the mayor's Facebook profile referred to her by her official title, because the profile was used as a campaign

page rather than an official page for her office). As Dean Yankah explained, professors have discretion over whether and when they use their official titles, and the mere use of that title does not establish that the University sanctioned the memorandum or used the results of the memorandum for any official function.

GAO points out that Professor Rothschild spoke about her legislative and pro bono work during interviews for the Law School's social media and stated in her "5Qs" interview that "[a] major part" of her "current work" was answering legislators' questions about the constitutionality of the Superfund bills. She also referenced the March 29, 2023 memorandum in her 5Qs interview. GAO argues that the University promoted Professor Rothschild's legislative work through the social media interviews to benefit the Law School. However, Professor Rothschild's broad reference to the Superfund issue as part of her "work" is not an admission that her communications with her pro bono clients are part of her official job duties as a university professor. Nor did the brief discussion of Professor Rothschild's legislative or pro bono work on various forms of media convert her private activities into official University functions.

As it relates to Professor Rothschild's teaching obligations, Professor Rothschild's inclusion of the topics of climate change and environmental law on her teaching syllabi is not indicative of whether the requested communications were used, prepared, retained, or owned in the performance of an official function. There is no evidence Professor Rothschild used the content of her pro bono communications in her classes. The fact that Professor Rothschild may have used student research to support her scholarly pursuits on the topic of Superfund bills (as she noted in her 5Qs interview) does not establish that she used that research in the context of her pro bono legal work. Professor Rothschild disclaimed that idea during her deposition, testifying that she did not use any students to research issues involved in her pro bono activities.

As for the requirement that Professor Rothschild serve the institution, GAO argues that this tenure criterion includes assisting legislative bodies, thus rendering Professor Rothschild's communications with her clients on this issue an official University function. GAO notes that the Tenure Standards include, as an example of service to the University, " 'assisting legislative bodies.' " (Emphasis omitted.) GAO also notes that Professor Rothschild's job duties, as reported within her "scholarly agenda" on her FARS, included public engagement, such as testimony in front of state legislatures on climate Superfund issues. However, there is no evidence that such pro bono work was ever required as part of the service to the intuition or otherwise used by the University as part of its official functions. Rather, Dean Yankah explained that the subject of assisting legislative bodies is reported on the FARS to inform the Law School of Professor Rothschild's external commitments. Furthermore, the requested communications were between Professor Rothschild, her clients, and another entity representing the same clients—not the legislative bodies themselves. Even if assisting legislative bodies is a job duty, communicating with pro bono clients about that legislative work would not be a job responsibility.

Nor does the fact that Professor Rothschild has a general scholarly interest in climate Superfunds or an expertise in climate change transform the topic into an area involving the University's official functions. Instead, like with the records in *Hopkins* and *Howel Educ Ass'n,* Professor Rothschild's communications, which took place through her personal e-mail address,[6]

[6] The University explains that it "is not arguing that using a private email inherently shields communications from being 'public records.' " The Court agrees that the fact that the communications occurred via a private e-mail is not dispositive as there are other ways the communications could have been used for an official function. However, the Court concludes that the fact that Rothschild used her private e-mail account to maintain these communications is consistent with Rothschild's testimony that this work was considered to be separate from her job

remained private records that were never disclosed to the University or used by the University for an official function. Accordingly, no genuine issue of material fact exists for trial on whether the requested communications are public records, and the University properly denied the FOIA requests. Therefore, the University is entitled to summary disposition under MCR 2.116(C)(10).

Because the Court concludes that the requested records are not public records subject to FOIA, the Court need not address the University's alternative argument that the records are exempted from disclosure under the FOIA exemption for records subject to the attorney-client privilege. See MCL 15.243(1)(g).

D. FEES AND COSTS

GAO is not entitled to costs or fees under MCL 15.240(6) because it did not prevail in this action. MCL 15.240(6) provides, in relevant part, "If a person asserting the right to inspect, copy, or receive a copy of all or a portion of a public record prevails in an action commenced under this section, the court shall award reasonable attorneys' fees, costs, and disbursements." The statute applies to the person asserting the right to the public records and does not require the Court to award reasonable fees, costs, and disbursements as a matter of course if the *public body* prevails in the action. See *id*. Rather, that decision remains within the Court's discretion. See MCL 15.240(6) ("If the person or public body prevails in part, the court may, in its discretion, award all or an appropriate portion of reasonable attorneys' fees, costs, and disbursements."). The Court declines to award the University its attorney fees or costs in this circumstance considering the complexity and novelty of the legal issues involved in this case. Finally, GAO is not entitled to

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duties as a professor, and demonstrates that the University never prepared, owned, or retained the records.

punitive damages because the Court does not order disclosure of any documents under FOIA. See *Local Area Watch v Grand Rapids*, 262 Mich App 136, 153; 683 NW2d 745 (2004).

III. CONCLUSION

For the reasons stated in this Opinion and Order,

IT IS ORDERED that the University's motion for summary disposition under MCR 2.116(C)(10) is GRANTED.

IT IS FURTHER ORDERED that GAO's motion for summary disposition under MCR 2.116(C)(10) is DENIED.

IT IS FURTHER ORDERED that GAO's complaint is DISMISSED with prejudice.

IT IS FURTHER ORDERED that neither party is entitled to attorney fees, costs, or punitive damages.

IT IS SO ORDERED. This is a final order that resolves the last pending claim and closes the case.

Date: August 10, 2026

Hon. Michael F. Gadola
Chief Judge, Court of Claims