STATE OF MICHIGAN

COURT OF CLAIMS

JASON GILLMAN,

Plaintiff,

v

Case No. 24-000204-MZ

UNIVERSITY OF MICHIGAN BOARD OF REGENTS,

Hon. Randy J. Wallace

Defendant.
_____ /

OPINION AND ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY DISPOSITION

Plaintiff Jason Gillman filed this Freedom of Information Act (FOIA), MCL 15.231 *et seq*., lawsuit, alleging that defendant University of Michigan Board of Regents (the University) constructively denied his FOIA request by failing to produce records within a reasonable time after plaintiff paid the required deposit. While this lawsuit was pending, the University denied plaintiff's FOIA request, invoking FOIA's litigation exemption, MCL 15.243(1)(v). The University initially moved for summary disposition at the outset of this case under MCR 2.116(C)(4) and (7), arguing that plaintiff's claim was unripe because the University had yet to issue a final determination on plaintiff's FOIA request when plaintiff filed his complaint, and that FOIA has no specific time requirement for fulfillment of a FOIA request. This Court's predecessor, Judge YATES, ruled that while plaintiff's claim was unripe, the University was required to move for summary disposition under the correct subrule—MCR 2.116(C)(10)—and include certain information in the motion about the basis for its subsequent denial of plaintiff's

FOIA request so that the Court could assess whether amendment of the complaint would be futile. The motion was denied. The University moved again for summary disposition under MCR 2.116(C)(8), again arguing that plaintiff's claim is unripe. The Court will exercise its discretion to consider the motion under the proper subrule, which Judge YATES already ruled was MCR 2.116(C)(10). For the reasons discussed in this Opinion and Order, the Court GRANTS the University's motion for summary disposition under MCR 2.116(C)(10).

I. BACKGROUND

On December 21, 2023, plaintiff sent a FOIA request to the University, requesting the following: "Any communications regarding alleged plans for Ms. Kara Murphy or the Michigan Coalition of Drone Operators to fly drones over the campus of the University of Michigan around the 22nd of December, 2023." The University received the FOIA request on December 22, 2023.

On January 8, 2024, the University responded to plaintiff's FOIA request by extending the response deadline to January 22, 2024. On January 22, 2024, the University's Chief FOIA Officer Patricia Sellinger responded to plaintiff's FOIA request with a more detailed letter but did not indicate in that letter whether the University granted the request, denied the request, or granted the request in part and denied it in part. Rather, Sellinger stated that the search of potentially responsive materials would "result in unreasonably high costs for the University." She estimated that it would take University personnel approximately 3.5 hours to fulfill the FOIA request. She informed plaintiff that the University estimated a cost of $166 to fulfill the request and demanded payment of a good-faith deposit of $83 by March 11, 2024. Sellinger provided instructions on how to pay by check or money order. Sellinger estimated that the request would be fulfilled within 45 business days of the date of receipt of the deposit (the "best efforts" estimate). Plaintiff characterizes the January 22, 2024 correspondence as "late," while the University maintains that

the correspondence was timely under FOIA because the University was closed in late December and early January.

On February 7, 2024, plaintiff ordered an $83 check from his financial institution to be sent to the University. According to the University, plaintiff did not follow the instructions outlined in the January 22, 2024 letter for sending the deposit to a particular individual associated with the University's FOIA Office and instead directed the check to go to the University's Cashier's Office, which is separate from the FOIA Office. On February 20, 2024, after noticing that the University had not deposited his check, plaintiff inquired with the University about the status of his FOIA request. On February 22, 2024, the University responded to plaintiff by stating that it had not received his check. Plaintiff later received notice that his check was deposited by the University on February 22, 2024.

On June 4, 2024, plaintiff wrote to the University again, inquiring about the status of his FOIA request. The next day, the University responded that it considered the FOIA request abandoned due to nonpayment of the deposit. After plaintiff provided proof of payment, Shannon Hill, the new Chief FOIA Officer for the University, responded to plaintiff on June 6, 2024, by informing him that although the FOIA Office "just learned about the payment and has been working through a large backlog of requests for which fees were already paid," the FOIA Office would "do our best" to reduce the processing time and would begin to process the FOIA request. Plaintiff inquired about the best-efforts estimate, and on June 12 the University reaffirmed its 45-business-day best-efforts estimate and indicated it would update plaintiff on the status of his FOIA request by July 10, 2024. After that point, the University engaged in what plaintiff characterizes as a series of "perpetual extensions" from July 2024 through December 2024. The University sent

plaintiff monthly letters extending the estimate for fulfillment by another month. The University attributes this delay to a backlog of FOIA requests for which the deposit had been received.

On December 23, 2024, plaintiff filed this lawsuit, raising a single count for "wrongful denial" under FOIA, MCL 15.240. At the time plaintiff filed his lawsuit, the University had yet to fulfill the FOIA request or claim any exemptions. Plaintiff alleged in his complaint that the University "constructively denied" his FOIA request and acted in an arbitrary and capricious manner by withholding the documents and claiming perpetual extensions on its best-efforts estimate.

On January 20, 2025, the University issued a final determination denying plaintiff's FOIA request. The University invoked FOIA's litigation exemption, MCL 15.243(1)(v). The University did not submit the response letter as an exhibit to its motion for summary disposition, so it is not currently in the record before this Court. The University contends that the exemption did not refer to the instant lawsuit but to another matter pending in this Court involving the same subject matter.[1]

Before responding to the complaint, counsel for the University contacted plaintiff's counsel on January 23, 2025, noting that on January 20, 2025, the University formally responded to the FOIA request by denying it. Counsel for the University asked plaintiff's counsel if he intended to

[1] To the Court's knowledge, the only other recent matter involving the same general subject is *Mich Coalition of Drone Operators v Regents of the Univ of Mich*, Court of Claims Case No. 24-000079-MZ. That matter is currently pending on appeal with the Michigan Court of Appeals in Docket No. 378945. It is unclear based on the record presented to the Court whether plaintiff has a direct connection to the Michigan Coalition of Drone Operators for purposes of MCL 15.243(1)(v).

amend the complaint, and plaintiff's counsel stated that he did not intend to amend the complaint at that time.

In February 2025, in lieu of filing an answer to the complaint, the University moved for summary disposition under MCR 2.116(C)(4) and (7). The University argued that this Court lacked subject-matter jurisdiction over this lawsuit because the University had yet to make a final determination on plaintiff's FOIA request at the time plaintiff filed the complaint, as required to commence a civil action under Section 10 of FOIA, MCL 15.240(1)(b). Alternatively, the University argued that if some event constituted a final determination, such as the January 22, 2024 correspondence that plaintiff characterized as "late," or the acceptance of the deposit on February 22, then plaintiff's lawsuit was untimely because it was not filed within 180 days after the public body's final determination, as required under MCL 15.240(1)(b).

Plaintiff responded, arguing that discovery was needed on whether the University's delay in producing responsive documents was reasonable. Plaintiff argued that his claim was neither premature nor filed too late, explaining that his cause of action does not rest on hypothetical, future events or injuries but relates to the delay in fulfillment.

Judge YATES heard the motion on October 21, 2025. During the hearing, Judge YATES and plaintiff's counsel had the following discussion about amending the complaint:

> *The Court*: I understand it, Mr. Lambert, but I guess I'm not, unless you're trying to turn this into some sort of test case, I'm missing the point about why you don't want to just amend, challenge the final determination as based on the pending litigation exemption, have me say that's not applicable here, stop that, let's figure out what happened, let's have discovery, and then let's see if you can claim another exemption.
>
> *Mr. Lambert*: My client and I have discussed this. We feel our position under a constructive denial claim is strong given the precedent in Michigan law,

> and we are unsure at this time if we amend our complaint, what that will ultimately lead to and what new exemptions will come up or what new justifications will come up then. Effectively, the devil you know versus the devil you don't.

Judge YATES informed defense counsel that MCR 2.116(C)(10) was the correct subrule for a motion for summary disposition based on ripeness. Given the University's explanation that another related lawsuit was pending in this Court, resulting in the invocation of the litigation exemption, Judge YATES ruled that he would allow the University to refile its motion for summary disposition under MCR 2.116(C)(10). He asked that the parties provide him with a copy of the University's final determination and identify the case for which the litigation exemption was claimed.

Following the hearing, Judge Yates entered an order denying the motion for summary disposition, which stated, in relevant part:

> For the reasons stated on the record at a hearing on October 21, 2025, defendant's motion for summary disposition under MCR 2.116(C)(4) and (C)(7) filed on February 21, 2025, is denied. Plaintiff filed his complaint before defendant made a final determination on his request under the [FOIA], so his claim was not yet ripe then. But ripeness should be raised for purposes of summary disposition on the basis of MCR 2.116(C)(10), not MCR 2.116(C)(4) or (7). See *Van Buren Charter Twp v Visteon Corp*, 319 Mich App 538, 542-544; 904 NW2d 192 (2017).

On November 11, 2025, the University moved for summary disposition under MCR 2.116(C)(8), renewing its ripeness argument. The University argues that it did not issue a final determination until January 20, 2025—several weeks after plaintiff filed this lawsuit. The University contends that because plaintiff filed this action before the University issued a final determination, plaintiff's lawsuit was premature. The University did not provide a copy of the January 20, 2025 final determination to this Court or identify the Court of Claims case on which the litigation exemption was asserted.

Plaintiff responds that FOIA does not require that a determination be "issued," but only that a determination be "made." He contends that the point at which the University made a final determination is a factual issue requiring discovery. Plaintiff also argues that Judge YATES suggested on the record that the matter should be decided after the opportunity for reasonable discovery. Plaintiff further argues that discovery is needed on whether the University purposely and unreasonably delayed in responding to his FOIA request. Plaintiff requests that this Court deny the University's motion for summary disposition or, alternatively, permit plaintiff to amend his complaint "to more clearly allege that the University has made a determination, constructively or otherwise." Plaintiff does not outline what he would include in an amended complaint or attach a proposed amended complaint to his response brief.

Plaintiff attached to his response brief an affidavit of his attorney, Thomas Lambert, filed under MCR 2.116(H), in which Lambert stated that only individuals within the University's FOIA office know what acts, if any, the University undertook or avoided taking to process the FOIA request and that the information obtained from these individuals would establish that plaintiff's request was "intentionally cast aside" while other requests were processed. Lambert represented that the information obtained from these individuals during discovery would show that the University falsely claimed delay due to backlog and that the 45-day response estimate was not made in good faith.

The University replied, arguing that a "final determination" is defined under FOIA to mean a "written notice." See MCL 15.235(2) and (5). Because there was no "written notice" of denial, there was no final determination until after plaintiff filed this lawsuit. The University argues that plaintiff's affidavit, provided under MCR 2.116(H), merely confirms that no final determination was issued given that the affidavit does not state the date of the final determination. The University

argues that plaintiff cannot rely on an affidavit to circumvent the basic pleading requirements. Because this Court's predecessor conducted a detailed hearing on the prior motion for summary disposition, and the briefing is sufficient to decide the instant motion, the Court dispenses with a hearing.

II. ANALYSIS

The University moved for summary disposition under MCR 2.116(C)(8), rather than under MCR 2.116(C)(10) as directed by Judge YATES. The Court will exercise its discretion to consider the motion as filed under the correct subrule, MCR 2.116(C)(10). A motion for summary disposition filed under MCR 2.116(C)(10) examines the factual sufficiency of the plaintiff's claim. *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 160; 934 NW2d 665 (2019). "When considering such a motion, a trial court must consider all evidence submitted by the parties in the light most favorable to the party opposing the motion." *Id*. The motion will be granted when no genuine issue of material fact exists. *Id*. "A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds might differ." *Id*. (quotation marks and citation omitted). When an MCR 2.116(C)(10) motion for summary disposition is filed before the close of discovery, the Court must assess "whether further discovery stands a fair chance of uncovering factual support for the opposing party's position." *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 292; 769 NW2d 234 (2009).

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).]

The key issue in this matter is whether plaintiff's claim is ripe. "The ripeness doctrine requires that a party has sustained an actual injury to bring a claim." *Van Buren Charter Twp*, 319 Mich App at 554. Judge YATES has already ruled, "Plaintiff filed his complaint before defendant made a final determination on his request under the [FOIA], so his claim was not yet ripe then." The Court does not find a basis in the renewed briefing to reconsider that decision. And the Court concludes that amendment of the complaint would be futile because FOIA does not recognize a claim for constructive denial based solely on the delay in fulfillment of a FOIA request.

FOIA allows a plaintiff to commence a civil action in this Court after a public body makes a final determination to deny all or a portion of the FOIA request. Specifically, MCL 15.240(1)(b) provides:

> (1) If a public body makes a *final determination* to deny all or a portion of a request, the requesting person may do 1 of the following at his or her option:
>
> * * *
>
> (b) Commence a civil action in the circuit court, or if the decision of a state public body is at issue, the court of claims, to compel the public body's disclosure of the public records within 180 days after a public body's final determination to deny a request. [Emphasis added.]

Similarly, MCL 15.235(8) provides, in relevant part:

> (8) If a public body makes a *final determination* to deny in whole or in part a request to inspect or receive a copy of a public record or portion of that public record, the requesting person may do either of the following:
>
> * * *
>
> (b) Commence a civil action, under section 10. [Emphasis added.]

Section 5 of FOIA supports the University's theory that a written notice is required for a final determination and provides, in relevant part:

> (5) A *written notice* denying a request for a public record in whole or in part is a public body's final determination to deny the request or portion of that request. The written notice must contain:
>
> (a) An explanation of the basis under this act or other statute for the determination that the public record, or portion of that public record, is exempt from disclosure, if that is the reason for denying all or a portion of the request. [MCL 15.235(5)(a).]

Additionally, FOIA outlines the following steps that the public body must take upon receipt of a FOIA request:

> Unless otherwise agreed to in writing by the person making the request, a public body shall, subject to subsection (10), respond to a request for a public record within 5 business days after the public body receives the request by doing 1 of the following:
>
> (a) Granting the request.
>
> (b) Issuing a *written notice* to the requesting person denying the request.
>
> (c) Granting the request in part and issuing a written notice to the requesting person denying the request in part.
>
> (d) Issuing a notice extending for not more than 10 business days the period during which the public body shall respond to the request. A public body shall not issue more than 1 notice of extension for a particular request. [MCL 15.235(2) (emphasis added).]

The failure to respond to a request under the above subsection constitutes the public body's final determination under either of the following circumstances:

> (a) The failure was willful and intentional.
>
> (b) The written request included language that conveyed a request for information within the first 250 words of the body of a letter, facsimile, electronic mail, or electronic mail attachment, or specifically included the words, characters, or abbreviations for "freedom of information", "information", "FOIA", "copy", or a recognizable misspelling of such, or appropriate legal code reference to this act,

> on the front of an envelope or in the subject line of an electronic mail, letter, or facsimile cover page. [MCL 15.235(3).]

FOIA also permits a public body to charge a fee for a public record search and outlines the requirements of the fee. See MCL 15.234. The public body's initial response must contain a "best efforts estimate" relating to "the time frame it will take the public body to comply with the law in providing the public records to the requestor." MCL 15.234(8). FOIA explains that "[t]he time frame estimate is *nonbinding* upon the public body, but the public body shall provide the estimate in good faith and strive to be reasonably accurate and to provide the public records in a manner based on this state's public policy under [MCL 15.231]." *Id*. (emphasis added).[2]

In this case, the University responded to plaintiff's FOIA request on January 22, 2024. Although the University did not state expressly whether it was granting the request, denying the request, or granting the request in part and denying it in part, inherent in the communication was the University's finding that it would need to search the records and separate any exempt records from nonexempt records, suggesting that the University was granting the request except as to any exempt materials. Plaintiff does not challenge the January 22, 2024 final decision—beyond characterizing it as "late" in his complaint.[3] He does not assert that this is a situation in which the University willfully and intentionally failed to respond to a FOIA request in the manner specified under MCL 15.235(2), or that the University failed to respond to a request that included language

[2] MCL 15.231(2) explains, in relevant part: "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."

[3] Even if plaintiff did challenge the January 22, 2024 decision, that claim would be untimely under the 180-day limitations period outlined in MCL 15.240(1)(b) because this lawsuit was not filed until December 23, 2024.

conveying a request for information that designated the request as a FOIA request. See MCL 15.235(3). Again, there is no dispute that the University responded to the FOIA request on January 22, 2024, regardless of whether that response was "late." Instead, plaintiff claims that the University's ongoing delay in production of responsive materials *after* its initial response resulted in the constructive denial of his FOIA request.

The Court of Appeals recently addressed a similar issue in *American Civil Liberties Union of Mich v Grand Rapids*, unpublished per curiam opinion of the Court of Appeals, issued December 11, 2025 (Docket No. 373417) (*ACLU*), oral argument scheduled on the application 36 NW3d 788 (Mich, 2026). In that case, the plaintiff submitted a FOIA request, and the defendant provided an initial response with a best-efforts estimate of 8 to 10 months from receipt of the deposit, despite the defendant's representation that the actual processing of the request would take only 2 hours and 15 minutes. *Id*. at 1. The plaintiff paid the good-faith deposit. *Id*.

The plaintiff then sued in the circuit court, claiming that the 8-to-10-month timeframe outlined in the response was a constructive denial of its FOIA request. *Id*. at 2. The request was fulfilled after 13 months. *Id*. On appeal of a circuit court decision granting summary disposition in favor of the defendant, the Court of Appeals explained the legal issue as follows:

> Plaintiffs do not cite, nor have we found, any binding authority addressing the time within which a public body must fulfill a request for public records under Michigan's FOIA. Certain remedies are available if a public body "has arbitrarily and capriciously violated [FOIA] by refusal or *delay* in disclosing or providing copies of public records . . . ." MCL 15.240(7) (emphasis added). However, plaintiffs have not alleged that defendant acted arbitrarily and capriciously. As plaintiffs readily conceded in the trial court, *there is no express provision in*

Michigan's FOIA that gives public bodies a specific time limit within which to fulfill requests. [*Id*. at 3 (emphasis added).[4]]

The Court further acknowledged that although MCL 15.231(2) advances a public policy that eligible individuals are entitled to full and complete disclosure of nonexempt public records, that statute did not outline a time frame for disclosure. *Id*. The Court rejected the plaintiff's request to establish a rebuttable presumption that a public body must fulfill, or at least start to fulfill, a FOIA request within a specific timeframe. *Id*. at 4. The Court affirmed the trial court's order granting summary disposition in favor of the public body. *Id*. at 4-5. *ACLU* supports the University's position that FOIA contains no required timeframe for fulfillment of a FOIA request.[5]

To support that FOIA recognizes a cause of action for indefinite delay in fulfillment, plaintiff relies on *King v Mich State Police Dep't*, 303 Mich App 162; 841 NW2d 914 (2013). In *King*, an attorney representing one of the plaintiffs submitted a FOIA request to the Michigan State Police (the MSP) for documents regarding a suspect's possible involvement in a series of murders that occurred in the 1970s. *Id*. at 167. The MSP granted the request as it related to " 'existing, non-exempt records in the possession of the [MSP] that fall within the scope of the request,' " and provided a fee estimate. *Id*. at 167-168. The deposit was paid. *Id*. at 168. Eventually, while the lawsuit was pending, the plaintiffs paid the balance of fees owed, and the MSP produced what it deemed to be nonexempt records but also withheld some records as exempt. *Id*. at 169. The MSP

[4] The Michigan Supreme Court has granted oral argument on the application for leave to appeal in *ACLU*, requesting supplemental briefing on three topics, including "whether under Michigan's Freedom of Information Act (FOIA), MCL 15.231 *et seq*., a public body is required to fulfill a FOIA request within a reasonable time[.]" *American Civil Liberties Union of Mich v Grand Rapids*, 36 NW3d 788, 788-789 (Mich, 2026).

[5] Although *ACLU* is unpublished and nonbinding, it may be considered for its persuasive value. See MCR 7.215(C)(1); *Cox v Hartman*, 322 Mich App 292, 307; 911 NW2d 219 (2017).

moved for summary disposition under both MCR 2.116(C)(8) and (10), arguing, in relevant part, that the plaintiffs "brought this action prematurely because it was filed before their FOIA requests were denied and before defendant had a chance to make a final determination after having searched for and reviewed the documents and separated exempt from nonexempt information." *Id*. at 170.

On appeal of the denial of the motion for summary disposition under MCR 2.116(C)(8), the Court of Appeals rejected the MSP's argument that the plaintiffs filed their FOIA claims prematurely before the MSP denied their FOIA requests. *Id*. at 188. The Court explained that "[the MSP's] response letters reflect that the requests were effectively granted in part and denied in part, as the letters contemplated the separation of exempt material and thereby implicitly denied the requests with respect to such material." *Id*. at 190.

The Court then explained:

> It could be argued that defendant's responses did not expressly deny any portion of the requests but merely asserted the possibility that an exemption would later be asserted. In that event, however, defendant must be deemed to have failed to timely respond to the FOIA requests in their entirety by granting, denying, or granting in part and denying in part the requests. In other words, defendant granted the requests in part but failed to respond with respect to all the requested documents because the response suggested some material might be withheld as exempt but failed to state conclusively whether the response was granted or denied with respect to those potentially exempt items. A public body's failure to timely respond to a request as required by the FOIA constitutes a final determination to deny the request. [*Id*. (citations omitted).]

Thus, the Court held that the responses reflected a partial denial, and the plaintiffs' claims were ripe. *Id*. at 191. Additionally, in a letter provided to the plaintiffs after the lawsuit was filed, the MSP expressly asserted certain exemptions and declined to produce certain documents. *Id*. That decision was appealed within the Agency, and the trial court agreed with the MSP's

suggestion to treat the response to the motion for summary disposition as an appeal of the MSP's decision. *Id*. The Court of Appeals reasoned that

> even if this action had originally been filed prematurely, that fact would have become irrelevant after defendant expressly denied in part plaintiffs' FOIA requests and the trial court, at defendant's urging, treated plaintiffs' response to the motion for summary disposition as an 'appeal' from the partial denial of the FOIA requests. [*Id*.]

This case is distinguishable from *King* because plaintiff does not base his claim on the original final decision issued on January 22, 2024. See *id*. at 167-168. And the two matters can be distinguished for another key reason—plaintiff did not appeal the denial of his FOIA request with the University. The fact that the plaintiffs had appealed the partial denial and the MSP upheld that partial denial on appeal was a key reason the Court of Appeals held that the plaintiffs' claims were ripe. See *id*. at 191. The trial court in that case was able to convert the action, which was initially premised on constructive denial, into an action based on an appeal of the final determination itself. See *id*. Here, plaintiff does not (and cannot) request that this Court treat this case as an appeal from that decision because, to the Court's knowledge, he did not submit an internal appeal with the University, and he does not request that this Court treat his claim as an appeal.

Plaintiff also relies on *Cramer v Village of Oakley*, 316 Mich App 60; 890 NW2d 895 (2016), vacated in part 500 Mich 964 (2017), in which the Court of Appeals explained that

> nothing precludes a plaintiff, if faced with an inordinate delay in the production of requested documents, from filing suit on the ground that a public body's actions in response to a FOIA request effectively constitute a denial in whole or in part, notwithstanding that body's labeling of a response as a "grant" of the request. [*Id*. at 68.]

Plaintiff relies on Part III of the Court of Appeals' opinion, which was vacated as moot and remanded for dismissal of the plaintiff's FOIA claims. See *Cramer v Village of Oakley*, 500 Mich 964, 964 (2017). The Michigan Supreme Court vacated the entire section of the Court of Appeals' opinion in question, and thus that section is not precedentially binding. See *People v Akins*, 259 Mich App 545, 550 n 8; 675 NW2d 863 (2003) ("A Court of Appeals opinion that has been vacated by the majority of the Supreme Court without an expression of approval or disapproval of [the] Court's reasoning is not precedentially binding.").

The University, in contrast, relies on *Gillman v Dep't of Technology, Mgt, & Budget*, unpublished per curiam opinion of the Court of Appeals, issued September 28, 2023 (Docket No. 362504). In *Gillman*, the plaintiff sued the defendant after the defendant failed to respond in a timely manner to the plaintiff's FOIA request, which was sent via e-mail but not received by the defendant because it was quarantined in the defendant's e-mail server. *Id*. at 1-2. The defendant claimed it never received the request, and it denied part of the request after learning about the request approximately one month after the alleged failure to respond. *Id*. at 2-3. The defendant moved at the outset of the case for summary disposition on the basis that this Court lacked subject-matter jurisdiction. *Id*. at 2.

Relevant to this matter, the Court of Appeals affirmed this Court's decision that the matter was not ripe because the lawsuit was filed before a denial of the plaintiff's request for public records was issued—although (as in this case) the Court concluded the issue should have been decided under MCR 2.116(C)(10) rather than under MCR 2.116(C)(4). *Id*. at 7-8. This Court held that it could not consider the defendant's later partial denial because the lawsuit was premised on the failure to respond—not the subsequent partial denial. *Id*. at 3. *Gillman* confirmed that a later

partial denial cannot be considered for purposes of analyzing whether the claim is ripe when the lawsuit is premised on an alleged failure to respond.

Again, Judge YATES ruled previously that plaintiff's claim was not ripe. There is no basis in FOIA to find that the University's delay in fulfillment, considered alone, violates FOIA or constitutes a final determination to deny plaintiff's FOIA request.[6] Plaintiff was required to await partial or complete fulfillment of his request, or a final decision to deny the request on the basis of a statutory exemption, before filing this lawsuit. A final decision was issued on January 20, 2025, but plaintiff did not amend his complaint to add a claim premised on that final decision, despite prompting by defense counsel and the Court.

The MCR 2.116(H) affidavit signed by plaintiff's counsel does not create a genuine issue of material fact requiring this case to proceed to discovery. MCR 2.116(H) provides, in relevant part:

> (1) A party may show by affidavit 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. The affidavit must
>
> (a) name these persons and state why their testimony cannot be procured, and
>
> (b) state the nature of the probable testimony of these persons and the reason for the party's belief that these persons would testify to those facts.

[6] Whether FOIA *should* recognize constructive denial is a question for the Legislature. Until the Legislature deems otherwise, the Court is required to follow its public policy pronouncements as outlined in FOIA. See *Rembert v Ryan's Family Steak Houses, Inc*, 235 Mich App 118, 131; 596 NW2d 208 (1999) ("Unquestionably, public policy pronouncements of the Michigan Legislature, enacted as statutes, are binding on this Court.").

Here, plaintiff's counsel has provided an affidavit in an effort to show that the facts necessary to support plaintiff's position cannot be presented because they are known only to individuals whose affidavits plaintiff cannot procure because they are employes of defendant and discovery has not yet occurred. Counsel stated in his affidavit that information obtained from individuals from the University's FOIA Office would show that plaintiff's FOIA request "was intentionally cast aside while other requests were processed," and that "the University did not process [plaintiff's] request in the order in which it was received as the University has claimed." Additionally, counsel stated that the information obtained from these individuals would show that the University's updates were "pretextual and falsely claimed a delay" based on an unprecedented backlog. But the affidavit cannot cure the fundamental legal issue in this case that FOIA does not recognize constructive denial. The affidavit has other deficiencies, including that it does not articulate a date for the alleged final determination or outline the reasons behind Lambert's belief that the FOIA Officers would testify consistently with the facts outlined in the affidavit, i.e., it does not lay a foundation establishing the factual basis for Lambert's belief.

Plaintiff also alleged in his complaint that the University "has acted arbitrarily and capriciously in regard to its handling of the Dec 21 FOIA Request." Although plaintiff does not cite a statute, he is presumably relying on MCL 15.240(7), which provides that the Court must order the public body to pay a civil fine of $1,000 and punitive damages in the same amount when "the public body has arbitrarily and capriciously violated this act by refusal or *delay* in disclosing or providing copies of a public record." (Emphasis added.)

Plaintiff did not develop this issue in his response to the University's motion for summary disposition. He provides no legal basis to support his claim that a delay of approximately six months, standing alone, constitutes arbitrary and capricious conduct. The University provided its

response on January 20, 2025, within a month after plaintiff filed this lawsuit. The University's rationale for its delay was a lengthy backlog of FOIA requests for which payment of the deposit had been received. The Court of Appeals has held that a delay attributable to reconciling various legal obligations is *not* arbitrary and capricious. See *Wilson v Eaton Rapids*, 196 Mich App 671, 673-674; 493 NW2d 433 (1992). Plaintiff has not articulated that this delay is the type of unreasonable, whimsical conduct that would support a finding that the University arbitrarily and capriciously delayed in providing its response. See *Meredith Corp v City of Flint*, 256 Mich App 703, 717; 671 NW2d 101 (2003).

Finally, plaintiff included in his response brief a request for leave to amend the complaint "to more clearly allege that the University has made a determination, constructively or otherwise."

> Under MCR 2.118(A)(2), leave to amend pleadings should be freely given when justice so requires. Leave to amend should be denied only for particularized reasons, such as undue delay, bad faith or dilatory motive on the movant's part, repeated failure to cure deficiencies by amendment previously allowed, undue prejudice to the opposing party, or where amendment would be futile. [*Miller v Chapman Contracting*, 477 Mich 102, 105; 730 NW2d 462 (2007) (quotation marks and citation omitted).]

Plaintiff's request for leave to amend the complaint does not explain how amendment would alter the substance of the claim or address the deficiencies noted above. Nor has plaintiff provided a proposed amended complaint. He has refused to request leave to amend despite multiple prior inquiries by defense counsel and Judge YATES. Most critically, plaintiff cannot allege that the University has made a constructive denial when such a theory has not been adopted in FOIA itself or by the appellate court. So any amendment to add a claim for constructive denial, which is not recognized under FOIA, would be futile. Accordingly, plaintiff's request for leave to amend the complaint is denied.

III. CONCLUSION

For the reasons discussed in this Opinion and Order,

IT IS ORDERED that the University's motion for summary disposition is GRANTED.

IT IS FURTHER ORDERED that plaintiff's complaint is DISMISSED WITH PREJUDICE.

IT IS SO ORDERED. This order resolves the last pending claim and closes the case.

Date: October 6, 2026

Hon. Randy J. Wallace
Judge, Court of Claims