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. Brock A. Swartzle

Defendant.
_____/

ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY DISPOSITION

Plaintiff, Government Accountability & Oversight (GAO), filed this lawsuit against defendant, Regents of the University of Michigan (the university), alleging that defendant violated the Michigan Freedom of Information Act (FOIA), MCL 15.231 *et seq*., by failing to search for and produce public records in response to GAO's FOIA requests. Defendant moved for summary disposition under MCR 2.116(C)(8) and (C)(10), arguing that the documents requested are not public records or, alternatively, are exempt from disclosure under MCL 15.243(1)(g) and (1)(h) of the FOIA because the documents are subject to the attorney-client privilege. For the reasons stated below, the Court DENIES the university's motion.

I. BACKGROUND

GAO is a nonprofit corporation "dedicated to transparency relating to environmental and energy policy and how public institutions come to be used in the way they are, with whom, and with what public resources." This case originates from GAO's FOIA requests to the university for

electronic correspondence of Rachel Rothschild, an Assistant Professor at the University of Michigan Law School, "pertaining to work with outside parties on activist legal work which the Regents also promote on the University's website."

On February 9, 2024, GAO submitted a FOIA request to the university's FOIA office. The request sought

> 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) [sic] pirgrim.org.

On March 1, 2024, the university's FOIA coordinator denied GAO's request on the basis that the university had no records responsive to the request. The university explained that "[a]ny 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[.]' "

On March 6, 2024, GAO submitted a second FOIA request and sought

> 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".

On March 26, 2024, the university's FOIA coordinator denied the request and provided the same explanation as provided in response to the February request.

Also on March 26, 2024, GAO submitted a third FOIA request and sought

> 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:
>
> 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".

On April 3, 2024, the university denied GAO's request, again providing the same explanation as provided in response to the February and March requests.

On May 5, 2024, GAO sued the university for violation of FOIA. In Count I, GAO sought a declaratory judgment declaring that the records described in the FOIA requests are public records as defined by MCL 15.232(i). In Count II, GAO requested injunctive relief compelling the university to produce the requested communications and to order any withheld documents to be submitted to the Court for *in camera* review or, in the alternative, to order that the withheld documents be reviewed by the parties under seal. In Count III, GAO sought attorney fees and costs under MCL 15.240(6), and punitive damages for the "arbitrary and capricious withholding of records" under MCL 15.240(7).

In lieu of an answer, the university moved for summary disposition under MCR 2.116(C)(8) and (C)(10). The university argues that the records that GAO sought are personal communications between Professor Rothschild and a pro bono client regarding pro bono legal advice, and not communications made pursuant to her job duties at the university. It argues that the communications are not public records under MCL 15.232(i) because they do not relate to the

decisions, actions, or functioning of the university and that the communications have never been prepared, owned, used, in the possession of or retained by the university, "let alone in the 'performance of an official function.' " Alternatively, the university argues that the requested records are exempt from disclosure under the attorney-client privilege.

In response, GAO argues that summary disposition under MCR 2.116(C)(8) is unwarranted because the university's argument that the records are excluded from the definition of "public record" relies on facts outside the pleadings. GAO also contends that the university raises privilege claims that the university did not identify in response to the FOIA requests.

GAO argues that summary disposition under MCR 2.116(C)(10) is premature because the university's arguments that the records are not public records or are subject to the attorney-client privilege are fact-based questions that require development through discovery. It also argues that determining whether the university engaged in arbitrary and capricious denials can only be decided after discovery.

II. ANALYSIS

Under MCR 2.116(8), summary disposition is appropriate when "[t]he opposing party has failed to state a claim on which relief can be granted." When considering a motion brought under this rule, the Court must accept all factual allegations in the pleadings as true and consider the pleadings alone, granting the motion only when the claim is so clearly unenforceable that no factual development could possibly justify recovery. *Liggett Rest Group, Inc v City of Pontiac*, 260 Mich App 127, 133; 676 NW2d 633 (2003).

The primary function of a pleading in Michigan is to "give notice of the nature of the claim or defense sufficient to permit the opposite party to take a responsive position." *Stanke v State*

Farm Mut Auto Ins Co, 200 Mich App 307, 317; 503 NW2d 758 (1993). GAO's complaint alleged that the records sought in its FOIA requests pertained to the university's involvement with outside pressure groups and ideological lobbies to promote certain legislation across the United States. It alleged that the documents sought concerned Professor Rothschild's work at the university, that the documents involved communications sent or received in her official title, and that her work on the precise subject was actively promoted by the university. On the basis of these and other alleged facts, GAO asserted that the requested records are public records under MCL 15.232(i) and subject to disclosure under FOIA unless exempted under MCL 15.243. GAO alleged that the university categorically denied its request and refused to search for or assess potentially responsive documents in violation of Michigan law. GAO alleged the existence of records responsive to its requests, subject only to legitimate withholdings. Taking GAO's allegations as true, the Court is satisfied that the allegations in the complaint satisfy the requirements of notice pleading for sufficiently stating a claim on which relief may be granted. Accordingly, the Court DENIES the university's motion for summary disposition under MCR 2.116(C)(8).

A motion under MCR 2.116(C)(10) tests the factual sufficiency of a claim. *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 160; 934 NW2d 665 (2019). Summary disposition under MCR 2.116(C)(10) is proper when the evidence, "viewed in the light most favorable to the nonmoving party, show[s] that there is no genuine issue as to any material fact and the moving party is therefore entitled to judgment as a matter of law." *Lowrey v LMPS & LMPJ, Inc*, 500 Mich 1, 5-6; 890 NW2d 344 (2016).

Generally, a grant of summary disposition under MCR 2.116(C)(10) is premature if granted before discovery on a disputed issue is complete. *Davis v Detroit*, 269 Mich App 376, 379-380; 711 NW2d 462 (2005). The Court finds persuasive GAO's contention that discovery is needed to

determine (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, and that further discovery stands a fair chance of uncovering factual support for GAO's position. *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 292; 769 NW2d 234 (2009). Accordingly, the Court DENIES the university's motion for summary disposition under MCR 2.116(C)(10).

III. CONCLUSION

Accordingly, for the reasons stated in this Order,

IT IS ORDERED that the university's motion for summary disposition under MCR 2.116(C)(8) is DENIED.

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

Lastly, the Court notes for the parties' benefit two points: (1) the university may renew its motion for summary disposition at the close of discovery; and (2) the Court is willing to review records *in camera* if one or both parties request such review.

IT IS SO ORDERED. This is not a final order and does not close the case.

Date: 9/18/2024

Hon. Brock A. Swartzle
Chief Judge, Court of Claims