State of Michigan
In the Court of Claims

GOVERNMENT ACCOUNTABILITY & OVERSIGHT, a Wyoming nonprofit Corporation,

Plaintiff,

v.

THE BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN,

Defendant.

Case No. 24-000060-MZ
Hon. Brock A. Swartzle

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James J. Fleming (P84490)
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DATE 06/20/2024
DEFENDANT'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY DISPOSITION

Oral Argument Requested

Plaintiff's response fails to demonstrate the existence of a genuine issue of material fact that the communications sought are "public records," as defined by the Freedom of Information Act ("FOIA"). It also does not credibly challenge the basic legal principle that legal advice requested by and provided to a client is protected from disclosure by the attorney-client privilege. Instead, Plaintiff relies solely on speculation and conjecture, which is insufficient to avoid dismissal. Because the communications Plaintiff seeks are Professor Rothschild's personal emails and not "public records" that the University has access to and because those documents are protected by the attorney-client privilege, the Court should dismiss.

I. The Communications Are Not Public Records

The threshold problem with Plaintiff's FOIA request is that the records sought are not "public records." FOIA 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, from the time it is created." MCL 15.232(e). None of these elements are present.

The University does not own, possess, or retain the private emails and did not prepare or use them. But most critically, Plaintiff does not demonstrate that the communications relate to "the performance of an official function." In this regard, Plaintiff presents no admissible evidence that providing legal advice to a non-profit entity is an "official function" of a University Law School Professor. To the contrary, Professor Rothschild's affidavit confirms that the communications ***do not*** relate to her job duties, as she is "not required or expected to provide pro bono legal advice in my role as an Assistant Professor." (Ex 1, Rothschild Affidavit, ¶ 6).[1]

It is irrelevant that Professor Rothschild's privileged advice relates to the same subject matter as her scholarship. While documents related to the research she performs as part of her job

[1] Exhibit references are to those attached to the University's initial Brief. Additional exhibits start at Exhibit 4 and are attached to this Reply Brief.

duties may theoretically constitute a "public record" – whether maintained in personal email or University email – communications made in her personal capacity do not. This is particularly so here, where there is a complete absence of support for Plaintiff's belief that any of Professor Rothschild's communications with the Rockefeller Family Fund was ever used "in the performance of an official function."[2] *See, e.g., Blackwell v City of Livonia*, 339 Mich App 495, 508 (2021) (private social media messages are subject to disclosure "only if such messages were utilized by the city of Livonia mayor's office in the performance of an official function.").

A similar result occurred in *Howell Ed Ass'n, MEA/NEA v Howell Bd of Ed*, 287 Mich App 228 (2010). There, the emails were sought during contentious collective bargaining negotiations between the teachers and the school. Although those emails related to the teacher's public employment, they were not public records since they were never used in an "official function." In other words, a tangential relationship between the subject matter of the documents and public employment is insufficient to turn a private document into a "public record." Instead, "purely personal documents can become public documents ***based on how they are utilized*** by public bodies." *Id.* at 243 (emphasis added). Since the only evidence here is that the communications were not used pursuant to an "official function," they are not public records.

II. The Communications Are Exempt From Disclosure

The only admissible evidence in the record confirms that all the potentially responsive communications maintained by Professor Rothschild are protected by the attorney-client privilege.

[2] Plaintiff's focus on whether state employees fit within the definition of a "public body" is off-the-mark. While documents within the possession of a University employee may be subject to disclosure, the statute still requires that they be used in the performance of an official function. *Blackwell, supra.*

Plaintiff also mistakenly focuses on interviews with Professor Rothschild, including a YouTube interview and a Q&A article. These interviews focus on her "scholarship" and do not demonstrate that providing pro bono legal advice is part of her job duties.

Each of Plaintiff's arguments seeking to avoid the privilege lack merit.

Initially, Plaintiff's assertion that there is "a serious question whether the University may claim a FOIA exemption not asserted," (Pl's Br at p 16, n7), ignores binding law: "[A] public body may assert for the first time in the circuit court defenses not originally raised at the administrative level." *Bitterman v Vill of Oakley*, 309 Mich App 53, 61 (2015) (citations omitted).

Next, there are no "fact based" questions that remain. As Professor Rothschild's uncontradicted affidavit explains, she provides pro bono legal advice to the Rockefeller Family Fund and "each of my emails with the Rockefeller Family Fund consist of legal advice or requests for legal advice and are therefore protected by the attorney-client privilege." (Ex 1, Rothschild Affidavit, ¶¶ 6, 8. *See also id.*, ¶ 10). No discovery will change these facts.[3] And, while Plaintiff asserts that its requests "should reflect a waiver," all communications it seeks are between attorneys (Professor Rothschild and other attorneys representing the Rockefeller Family Fund) and the client (the Rockefeller Family Fund). (*Id.*) Plaintiff's speculation that there might be a waiver is insufficient to defeat summary disposition. *Libralter Plastics v Chubb Grp of Ins Companies*, 199 Mich App 482, 486 (1993) ("parties opposing a motion for summary disposition must present more than conjecture and speculation to meet their burden of providing evidentiary proof establishing a genuine issue of material fact").

[3] Plaintiff's reference to a *Vaughn* index is misplaced. A *Vaughn* index is only potentially appropriate if the documents at issue are "public records" and, as noted above, the University has no right to access Professor Rothschild's private records. Additionally, the University cannot create a *Vaughn* index because the documents at issue involve communications to which the University does not hold the privilege – the client (Rockefeller Family Foundation) does. If the University were to create a *Vaughn* index, including conducting "an attendant review of individual records," (Pl's Br at p 2), Plaintiff would then presumably argue that since the University reviewed the documents for the purposes of creating the index, the privilege associated with these communications is waived, since the University is not Professor Rothschild's client. The Court should reject Plaintiff's attempt to bootstrap a waiver by suggesting a *Vaughn* index.

III. Plaintiff Failed To Demonstrate That Discovery Is Necessary

Throughout its response, Plaintiff asserts in a perfunctory manner that the University's motion should be denied because "no discovery has occurred." (Pl's Br at p 1). But the Court Rules do not prevent a party from filing a summary disposition motion under MCR 2.116(C)(10) at the outset of a case. Indeed, MCR 2.116(B)(2) states that such motions "may be filed at any time." Additionally, FOIA cases "shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way," MCL 15.240(5), a provision which Plaintiff's counsel agrees justifies "expedited treatment" of this case. (Ex 4, 5/17/24 email).

Regardless, there is a clear and concise Court Rule that applies when a party believes discovery is necessary before the Court rules on a motion for summary disposition. Specifically, Michigan Court Rule 2.116(H) states:

> (H) Affidavits Unavailable.
>
> > (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.
> >
> > (2) When this kind of affidavit is filed, the court may enter an appropriate order, including an order
> >
> > > (a) denying the motion, or
> > >
> > > (b) allowing additional time to permit the affidavit to be supported by further affidavits, or by depositions, answers to interrogatories, or other discovery.

MCR 2.116(H).

Plaintiff did not comply with this Rule. It did not submit any affidavits. Instead, its response

merely speculates that Professor Rothschild's attorney-client communications were made "in the performance of an official function" (as required to be a "public record" under MCL 15.232(i)) or that they "should reflect a waiver," (Pl's Br at p 18). But such speculation is insufficient to defeat summary disposition or warrant discovery. *Libralter Plastics*, 199 Mich App at 486. Similarly, Plaintiff cannot avoid summary disposition by generically asserting that discovery may be useful. *Coblentz v City of Novi*, 475 Mich 558, 571; 719 NW2d 73 (2006) ("In this [FOIA] case, plaintiffs did not comply with MCR 2.116(H). They did not offer the required affidavits of probable testimony to support their contentions. Therefore, they cannot complain that discovery was prematurely ended."); *Marilyn Froling Revocable Living Tr v Bloomfield Hills Country Club*, 283 Mich App 264, 292-93; 769 NW2d 234 (2009) ("The party opposing summary disposition must offer the required MCR 2.116(H) affidavits, with the probable testimony to support its contentions"). Finally, as set forth above, because the only admissible evidence proves that the requested communications are not "public records" and are protected from disclosure by the attorney-client privilege, summary disposition is appropriate "because further discovery d[oes] not stand a reasonable chance of uncovering factual support for plaintiffs' position." *Peterson Novelties v City of Berkley*, 259 Mich App 1, 25 (2003).

***

For the foregoing reasons and those set forth in its initial Motion and Brief, the University requests that the Court grant its motion and dismiss Plaintiff's lawsuit in its entirety, with prejudice.

Dated: June 20, 2024

Respectfully submitted,

/s/ Brian M. Schwartz
Brian M. Schwartz (P69018)
Attorney for Defendant
schwartzb@millercanfield.com

CERTIFICATE OF SERVICE

I hereby certify that June 20, 2024, I electronically filed the foregoing paper with the Clerk of the Court using the MiFile system which will send notification of such filing to the attorneys of record.

/s/ Brian M. Schwartz
Brian M. Schwartz (P69018)

Exhibit

Schwartz, Brian M.

From: Larsen, Zachary C. <zlarsen@clarkhill.com>
Sent: Friday, May 17, 2024 1:24 PM
To: Schwartz, Brian M.; Fleming, James J.; ccooper@clarkshill.com
Cc: Fitch, Alisha A
Subject: RE: Government Accountability and Oversight v. UM [MCPS-ACTIVE.FID3273631]

Brian,

Thanks for your email. Speaking with my clients, they are reluctant to provide a lengthy extension as they do not want to waive the expedited treatment legally due to FOIA matters under MCL 15.240(5).

With that said, we're happy to stipulate to a 7-day extension (or to June 3, 2024) as a courtesy in light of your current trial.

Please feel free to send me a proposed stipulation/order. Thanks!

Sincerely,

Zach Larsen
Member
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zlarsen@clarkhill.com | www.clarkhill.com

From: Schwartz, Brian M. <schwartzb@millercanfield.com>
Sent: Wednesday, May 15, 2024 9:56 PM
To: Larsen, Zachary C. <zlarsen@clarkhill.com>; Fleming, James J. <jfleming@clarkhill.com>; ccooper@clarkshill.com
Cc: Fitch, Alisha A <Fitch@millercanfield.com>
Subject: Government Accountability and Oversight v. UM [MCPS-ACTIVE.FID3273631]

[External Message]

Good evening:

I have been retained to represent the University in the above-referenced case. I understand that the University accepted service of the complaint on May 6. I am currently in trial that I do not expect to wrap up until next week. Please let me know if you will stipulate to a 21-day extension of time to answer or otherwise response to the complaint (i.e., June 17). If that is agreeable, I will prepare a stip and circulate it.

Thanks,

Brian

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