

STATE OF MICHIGAN
COURT OF CLAIMS

MARC EDWARDS,
an individual,

Plaintiff,

v

WAYNE STATE UNIVERSITY,
a Michigan state public body,

Defendant.

Case Number: 18 - 0001100 - MZ

Hon. Christopher M. Murray

Patrick J. Wright (P54052)
Derk A. Wilcox (P66177)
MACKINAC CENTER LEGAL FOUNDATION
Attorneys for Plaintiff
140 West Main Street
Midland, MI 48640
(989) 631-0900

Linda M. Galante (P35914)
Office of General Counsel
WAYNE STATE UNIVERSITY
Attorney for Defendant
656 West Kirby, 4249 FAB
Detroit, MI 48202
(313) 577-2268

**PLAINTIFF'S BRIEF IN SUPPORT OF HIS 03/21/2019
MOTION FOR MCR 2.116(C)(10) SUMMARY DISPOSITION**

No comes Plaintiff, Dr. MARC EDWARDS, and, for his Brief in Support, states the following:

SUMMARY OF BACKGROUND

The matter at issue is related to a series of Freedom of Information Act (FOIA) requests made by the Plaintiff to Defendant. It might be instructive to provide a little background on the purpose of these FOIA requests. This background is not a fact at issue in the case, but may help

the Court to understand the underlying disagreement. Plaintiff, Dr. Marc Edwards, is a scientist intimately involved in what we all know of as the Flint water crisis:

Working with Flint residents, Edwards, the Charles P. Lunsford Professor of Civil and Environmental Engineering in the College of Engineering at Virginia Tech, and his water study team, executed an unprecedented independent evaluation of water contamination in Flint residents' homes. Together with Hanna-Attisha and Flint resident Lee-Anne Walters, they exposed problems with legionella and lead, vindicated residents' concerns, and brought national attention to the crisis.

In January 2016, both Hanna-Attisha and Edwards were appointed members of Gov. Rick Snyder's Flint Water Interagency Coordinating Committee, which seeks long-term solutions to Flint's water system.

Edwards' role in uncovering the problem has been widely reported by media from around the world, including The New York Times, Smithsonian magazine, Time, The Washington Post, CNN, MSNBC, and Scientific American.¹

Defendant Wayne State University is the home of a team of scientists investigating the Flint water matter. The leader of the Wayne State University team is a Wayne State professor, Dr. Shawn McElmurry. Dr. Edwards has accused Dr. McElmurry of falsely claiming to have experience with the Flint water system prior to the revelation of the crisis; and of claiming another scientist's work (a Dr. Faust, who is not a party here) as Dr. McElmurry's own in order to secure National Institute of Health (NIH) grants and team leadership. Dr. Edwards has made these accusations in public and in a complaint to the Michigan Board of Professional Engineers at the Department of Licensing and Regulatory Affairs (LARA), Bureau of Professional Licensing, Investigations & Inspections Division (IID). A recently obtained "Review Commentary by C. Hookham, MI Board of Professional Engineers" (the "Review Commentary") from LARA, attached here as Exhibit A², found that Plaintiff is correct on these matters, and that: "In summary,

¹ <https://www.cee.vt.edu/marc-edwards-receives-inaugural-award-from-mit/>

² This "Review Commentary by C. Hookham" was provided to Plaintiff's attorneys on March 20, 2019, after being obtained by a third party who had submitted his own FOIA request to

I believe that in at least two instances (e-mail to Edwards and NIH grant proposal cited above) Dr. McElmurry overstated his prior involvement in City of Flint's drinking water system and contamination issues. These overstatements were intended to both solicit/attract external contributions by other experts (e.g., Edwards) to his research team and to substantiate large research awards/funds for Wayne State University and other contributors. ... Apparently under oath and in response to the LARA Complaint, McElmurry has been unable to substantiate prior City of Flint experience." Exhibit A, *supra*, at page 2. Furthermore, "My conclusion is that Faust's dissertation and body of knowledge were used by McElmurry to assist in securing research funding without proper reference/credit and that Dr. Faust was not part of ensuing research work." Exhibit A, *supra*, at page 4.

Despite this Review Commentary from LARA, all the facts are not yet known. And documents related to this inquiry are the subject of these FOIA requests. Specifically, the FOIA requests included slides Dr. McElmurry made at a presentation which Dr. Edwards believes contains Dr. Faust's work without attribution. Wayne State University refuses to provide these slides.

LEGAL BACKGROUND AND PROCEEDINGS

Plaintiff submitted several Freedom of Information Act (FOIA) requests to Defendant. These were on or about: May 30, 2017 (First FOIA Request); March 1, 2018 (Second FOIA Request); and March 3, 2018 (Third FOIA Request). In response, Defendant either provided incomplete disclosures or failed to respond. To the First FOIA Request, Defendant provided some emails, but promised to search others and to "advise you of their applicability." No further

LARA. Plaintiff is attempting to independently verify the information from LARA, but has not yet received a response. Plaintiff will update this court with any additional information accordingly.

emails or communications were forthcoming. To the Second FOIA Request, Defendant requested a check, which Plaintiff paid. Despite paying for the requested disclosures, no disclosures were provided. To the Third FOIA Request, Defendant did not respond in any way.

Due to Defendant's non-compliance with the three requests, it was necessary for Plaintiff to file this suit on or about June 13, 2018.

On or about August 16, 2018, in response to this lawsuit, Defendant provided a large number of documents. Attached is a copy of Defendant's letter accompanying those documents. See Exhibit B. The documents provided on August 16, 2018 fulfilled the majority of Plaintiff's requests with an exception that is important here: The Third FOIA Request asked for "A Copy of the presentation: The Challenge of Mitigating Risk Associated with Aging Drinking Water Infrastructre (sic) in Shrinking Cities: Lessons Learned from Flint McElmurry October 27, 2017 given at Kellogg Conference Center." (Hereafter, "The Presentation.") Defendant provided some of the pages from The Presentation, but redacted others, stating: "This request is granted except to the extent that information contained in the requested record is exempt under FOIA. Specifically, we have redacted from pages 22, 23, 25, and 33 of the record information that is intellectual property exempt from disclosure under MCL 15.243(1)(d) and MCL 390.1554(1)(a). While the presentation was discussed by Dr. McElmurry on October 27, 2017, at an environmental science program, Dr. McElmurry took steps to protect and preserve the confidentiality of the redacted materials from unfair competition and copyright infringement, and to protect and preserve the redacted materials from publication as that term is understood in the academic community." Exhibit B, *supra*.

After reviewing the materials provided by Defendant, on or about October 15, 2018, Plaintiff responded by letter and email and disagreed that the pages from The Presentation (which

was made in PowerPoint form) were exempt as protected intellectual property, as these had already been published at a public forum. Plaintiff wrote:

[Regarding] The power point presentation for “The Challenge of Mitigating Risk Associated With Aging Drinking Water Infrastructure in Shrinking Cities” given October 27, 2017. This information was already produced at a public forum, and should not be subject to intellectual property exemptions.

Plaintiff further stated that:

If any portions are, in fact, exempt intellectual property, please see below. ...

Moving forward, in the interests of minimizing court involvement, and obtaining a speedy resolution, we suggest the following options.

1. Wayne State produces the above-identified subject emails and/or materials pursuant to a non-disclosure agreement. I believe that your office conducts activities subject to such agreements on a regular basis (<https://research.wayne.edu/spa/contracts/cda.php>) and would be able to do so in this situation. We would be agreeable to viewing the requested documents under such an agreement wherein we promise to make no public disclosure until and unless we obtain a determination from the court that this information does not fit within the FOIA exemptions you have claimed. Further, we would not use the disclosed information for academic work, grant proposals, etc. We would agree that, until and unless the court determines that your claimed FOIA exemptions do not apply, subsequent use of these documents in a court of law would be done only under seal or similar protection afforded by MCR 2.302(C) - or similarly protected from public view. This would allow us to view these documents, as well as protect any interest you have in intellectual property or trade secrets related to these materials.

If the emails and/or materials are provided to us in this protected manner, we can then decide whether or not to proceed before the court in obtaining them for further use.

A copy of Plaintiff’s October 15, 2018 letter/email is attached here as Exhibit C.

On or about November 21, 2018, Defendant responded to Plaintiff’s October 15th response and proposal, and made the following claims about The Presentation and their claim to intellectual property:

Under MCL 390.1554(1)(a), intellectual property of a public university employee is exempt under FOIA until a reasonable opportunity is provided for “the information to be published in a timely manner in a forum intended to convey the information to the academic community.”

To be “published,” research must be fully disclosed and the disclosure must be made to the entire academic community. The usual method is through publication in an academic journal or at a conference. The contents of the power point presentation, however, were not made completely available to the audience. Dr. McElmurry took steps to protect and preserve the confidentiality of the redacted materials (slides 22, 23, 25 and 33) from unfair competition and copyright infringement. The audience was not allowed to make photographic copies of any of the slides and none of the slides remained on screen long enough for anyone to be able to retain the information presented in slides 22, 23, 25 and 33, as would be possible where the presentation was actually “published” in an academic journal.

Furthermore, the presentation was not made in a forum that was open to anyone in the academic community. This was an invitation only, educational symposium described as: “a student-organized forum that brings together early career researchers working on different facets of the environment to highlight interdisciplinary research, foster interactions with stake holders and policy makers, as well as provide professional development opportunities for tomorrow’s environmental researchers.” Thus the power point contents were not presented “...in a forum intended to convey the information to the academic community.”

See a copy of Defendant’s November 21, 2018 letter, attached as Exhibit D, at page 3.

After Defendant’s November 21st letter, on or about January 21, 2019, Plaintiff submitted discovery requests including some related to the Defendant’s claim of exemption as intellectual property. Among other things, Plaintiff requested:

1. Regarding the power point presentation “The Challenge of Mitigating Risk Associated With Aging Drinking Water Infrastructure in Shrinking Cities” given on October 27, 2017, which was part of Plaintiff’s third FOIA request of March 3, 2018. You have stated that this presentation is exempt from FOIA under MCL 15.243(1)(d) and MCL 390.1554(1)(a). Please provide the following information:

a. You have stated that this presentation was made at an “invitation only, educational symposium.” Please provide a list of invitees. Provide sufficient information to identify and contact these invitees.

b. Please provide a list of attendees. Provide sufficient information to identify and contact these attendees.

c. Please provide evidence of the invitations, tickets, or similar notice that a person was invited and/or allowed to attend.

d. Please provide any advertisements or notices for this event provided to the Wayne State community.

e. Please provide any advertisements or notices for this event provided to the broader community. e.g., To Flint residents, community activists, academics affiliated with other institutions, etc.

f. Please provide the names and identifying information for all security personnel who controlled entrance to this event.

g. Please provide the names and identifying information for all security personnel who controlled and/or monitored attendees to ensure that they did not photograph or otherwise record the presentation.

h. Please provide any materials provided to attendees informing them of any non-disclosure imposition placed on them at this event.

i. Please provide the recording and/or text of any verbal notification given to attendees notifying them of any nondisclosure requirements or policy associated with attending this event.

j. Please provide copies of any nondisclosure agreements associated with this event.

k. You have stated that “none of the slides remained on screen long enough for anyone to be able to retain the information presented in slides 22, 23, 25 and 33.” Please state with specificity how long these slides remained on screen.

l. In regards to the previous question, please state how it was determined what length of time was sufficient for the audience to see the slides, yet not “retain the information.”

m. You have stated that “To be “published”, research must be fully disclosed and the disclosure must be made to the “entire academic community.” Please provide the legal basis (i.e., case law, statute, etc.) for the claim that publication to the “entire” academic community is a prerequisite for publication.

A copy of Plaintiff’s First Interrogatories and Requests for Production of Documents is attached here as Exhibit E.

On or about March 1, 2018, Defendant responded to Plaintiff's discovery requests and filed its objections with this Court. Although it is believed that Defendant filed these Objections and Responses with this Court, Plaintiff is attaching a copy here as Exhibit F.

Whereas Defendant had claimed that The Presentation slides in question were not presented in a public manner, but rather, at "an invitation only" symposium; Defendant's discovery response only shows that the speakers, not the audience, were by invitation only. See Exhibit F, *supra*, at page 3, and Exhibit 1 attached to Exhibit 3. Whereas Defendant had claimed that, "the presentation was not made in a forum that was open to anyone in the academic community"; Defendant's discovery response contradicts this, stating: "Defendant has no information regarding who was invited or allowed to attend this symposium." See Exhibit F, *supra*, at page 4. Further, Defendant's Responses stated that (1) "Defendant has no knowledge or information about any security personnel who controlled entrance to this event." Exhibit F, *supra*, at pages 4-5.

Despite Defendant's claim that at The Presentation, "The audience was not allowed to make photographic copies of any of the slides and none of the slides remained on screen long enough for anyone to be able to retain the information presented", Defendant's response states that the only non-disclosure request was "Dr. McElmurry verbally announced to his audience that no photographing of his slides or recording of his presentation was allowed. No attendee objected...nor did Dr. McElmurry observe any attendee photographing or recording his presentation or slides. See Exhibit F, *supra*, at page 5. However, other than a verbal announcement – for which Defendant offers no recorded proof - Defendant's discovery responses state that "Defendant has no knowledge or information about any security personnel who controlled and/or monitored attendees to this event to ensure that they did not photograph or otherwise record the presentation. ... [With the exception of the verbal announcement] Defendant has no knowledge or

information about any materials provided to attendees informing them of any non-disclosure imposition placed on them at this event. ... Defendant has no knowledge or information regarding any verbal notification or nondisclosure requirements or policy associated with attending this event. ... Defendant has no knowledge or information regarding any non-disclosure agreements associated with this event.” See Exhibit F, *supra*, at pages 5-6.

Defendant stated that “Dr. McElmurry’s intent in presenting at this symposium” was to “share [his] experiences and identify collaborative opportunities.” See Exhibit F, *supra*, at 5.

Regarding Defendant’s claim that “none of the slides remained on screen long enough for anyone to be able to retain the information presented in slides 22, 23, 25 and 33”; “Defendant estimates that slides 22, 23, 25 and 33 were on the screen approximately one minute each.” See Exhibit F, *supra*, at pages 6-7. When Plaintiff asked “how it was determined what length of time was sufficient for the audience to see the slides, yet not ‘retain the information’,” Defendant’s response was that “given the detailed nature of the redacted slides in his presentation and the limited time available to view each slide, Dr. McElmurry determined that, while individuals could retain the major points and thematic messages he was conveying, there was little or no risk that they would be able to retain the details contained in slides 22, 23, 25 and 33.” See Exhibit F, *supra*, at page 7.

Defendant had stated, in its November 21st letter, that “to be published,” research must be fully disclosed and the disclosure must be made to the “entire academic community.” In its response, Defendant stated that its “use of the word ‘entire’ was superfluous.” Defendant then went on to reveal that other presenters at The Presentation were there, at that same forum, for the express purpose of “showcase[ing] their research.” See Exhibit F, *supra*, at page 7.

LEGAL STANDARDS AND STANDARDS OF REVIEW

Plaintiff is making this motion as a request for summary disposition under MCR 2.116(C)(10), as he believes that there is no remaining factual issue, and the matter can be determined on the pleadings and discovery responses. Plaintiff also believes that this is the only remaining issue in this matter, except for reasonable attorneys' fees.

As our Supreme Court articulated in *Bonner v City of Brighton*, 495 Mich 209; 848 NW2d 380 (2014), regarding summary disposition under MCR 2.116(C)(10):

Summary disposition is appropriate under MCR 2.116(C)(10) if, “[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law.” “A genuine issue of material fact exists when, viewing the evidence in a light most favorable to the nonmoving party, the record which might be developed ... would leave open an issue upon which reasonable minds might differ.” In deciding whether to grant a motion for summary disposition pursuant to MCR 2.116(C)(10), a court must consider “[t]he affidavits, together with the pleadings, depositions, admissions, and documentary evidence then filed in the action or submitted by the parties,” in the light most favorable to the nonmoving party.

Id at 220-1 (internal notes and citations omitted).

Michigan's FOIA statute, MCL 15.231(2) states:

It is the public policy of this state 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.

Defendant is claiming that the requested materials are exempt under MCL 15.243(1)(d) and MCL 390.1554(1)(a). MCL 15.243(1)(d), part of the FOIA statutes, provides a FOIA exemption for “Records or information specifically described and exempted from disclosure by statute.” “When a public body invokes this exception, it is necessary to examine the [other] statute under which the public body claims disclosure is prohibited.” *MLive Media Group v Grand*

Rapids, 321 Mich App 263, 270; 909 NW2d 282 (2017). The ‘other’ statute Defendant relies upon as an exemption to the FOIA is MCL 390.1554(1)(a), which states:

(a) Intellectual property created by a person employed by or under contract to a public university or college for purposes that include research, education, and related activities, until a reasonable opportunity is provided for the information to be published in a timely manner in a forum intended to convey the information to the academic community.

There does not appear to be any opinions of the Michigan Court of Appeals or Supreme Court interpreting MCL 390.1554(1)(a).

MCL 390.1554(1)(a) is part of the broader Confidential Research and Investment Information Act (CRIIA), Act 55 of 1994. MCL 390.1551 *et seq.* CRIIA does not contain a definition for the word “publish” or “publication.” When the statute does not provide a definition, “We consult a lay dictionary when defining common words or phrases that lack a unique legal meaning.” *People v Thompson*, 477 Mich 146, 151-2; 730 N.W.2d 708 (2007). Merriam Webster’s online dictionary definition for “publish” includes³: “1a: to make generally known; 1b: to make public announcement of; 2a: to disseminate to the public; 2b: to produce or release for distribution.” Merriam Webster’s first definition of “publication” is: “1: the act or process of publishing.”

Similarly, Black’s Law Dictionary, Abridged 9th Edition, lists the first definition for “Publish” as: “To distribute copies (of a work) to the public.” Black’s Law Dictionary lists the first definition of “publication” as: “Generally, the act of declaring or announcing to the public.”

FOIA exemptions are to be narrowly construed, and a public body bears the burden of proving that an exemption applies. See, *Taylor v Lansing Bd of Water & Light*, 272 Mich App 200, 204; 725 NW2d 84 (2006).

³ <https://www.merriam-webster.com/dictionary/publish> accessed March 20, 2019.

Pursuant to MCL 15.240(6), if Plaintiff prevails, he is entitled to attorneys' fees and costs:

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. 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 award shall be assessed against the public body liable for damages under subsection (7).

ARGUMENT

The plain language of the statute relied upon by Defendants, MCL 390.1554(1)(a), makes it clear that intellectual property is only exempted from FOIA “until a reasonable opportunity is provided for the information to be published in a timely manner in a forum intended to convey the information to the academic community.” Here, Defendant had a reasonable opportunity and did in fact publish the information which is being sought in this FOIA request. The Presentation was made in a forum that was held for the purpose of giving academics a chance to “showcase their research.” Exhibit F, *supra*, at 7. By Defendant’s own admission, the slides in question appeared on screen for about a minute each in front of academics and students. Exhibit F, *supra*, at 7. Defendant stated that “Dr. McElmurry’s intent in presenting at this symposium” was to “share [his] experiences and identify collaborative opportunities.” Exhibit F, *supra*, at 5. These all point to publishing his research in front of an academic audience to share with the academic community.

Audience members were not preselected, nor restricted. Defendant can offer no proof that any member of the academy (or public) was turned away. Exhibit F *passim*. There were no confidentiality agreements entered into as a condition of attending, and there was no attempt made at enforcement. Exhibit F at 4-5.

Defendant backtracked on its earlier representations that any qualifying publication must be made to “the entire academic community” now noting that “use of the word ‘entire’ was

superfluous.” Exhibit F, *supra*, at 7. Indeed, nothing in the statute or act which they rely upon, is “publish or “publication” defined. Yet, as we have seen, nothing in the dictionary or legal definitions for “publish” or “publication” is there a qualification that publication must be made to the “entire” academic community. The information was revealed to academic community in a public forum. That forum was one designed for academics to “showcase their research,” and the public was invited and not excluded. Defendant’s purpose at the forum was to “share [his] experiences.”

Contrary to Defendant’s prior position that “the presentation was not made in a forum that was open to anyone in the academic community.” All the evidence produced during discovery shows that the forum was open to anyone in the academic community. The only invite-only attendees were presenters.

By the plain language of the statute which Defendant relies upon, the exemption from FOIA disclosure only applies *prior* to the information’s disclosure. Nothing here can carry the Defendant’s burden of showing that the exemption applies, especially when narrowly construed.

RELIEF REQUESTED

Plaintiff requests that:

- 1) This Court order that Defendant comply with FOIA and release copies of “slides 22, 23, 25 and 33” to Plaintiff with no restrictions; or, in the alternative,
- 2) Order that slides 22, 23, 25 and 33 be disclosed to Plaintiff under the condition that he not make use of the information contained therein for his own profit, nor claim as his own, nor use without proper attribution; and,

3) Further, Plaintiff requests that this Court award its “reasonable attorneys’ fees, costs, and disbursements” pursuant to MCL 15.240(6), being Section 10(6) of FOIA. Also, that this Court find that Defendant has “arbitrarily and capriciously violates this act by refusal or delay in disclosing or providing copies of a public record” and impose punitive damages in the amount of \$500.00 to the Plaintiff pursuant to MCL 15.240(7), being Section 10(7) of FOIA; and,

4) This Court award any other relief that this Court considers proper and equitable.

Respectfully Submitted,

Dated: March 21, 2019

Derk A. Wilcox (P66177)
MACKINAC CENTER LEGAL FOUNDATION
Attorneys for the Plaintiff