STATE OF MICHIGAN
COURT OF CLAIMS

MARC EDWARDS,
An individual,

Plaintiff,

v

Case No. 18-000110-MZ

WAYNE STATE UNIVERSITY,
a Michigan state public body,

HON. Christopher M. Murray

Defendant,

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

Linda M. Galante (P35914)
Kristen L. Cook (P75034)
Office of the General Counsel
Wayne State University
Attorneys for Defendant
656 West Kirby, 4249 FAB
Detroit, MI 48202
(313) 577-2268

DEFENDANT WAYNE STATE UNIVERSITY'S 4/11/2019 RESPONSE TO PLAINTIFF'S 3/21/2019 MOTION FOR MCR 2.116(C)(10) SUMMARY DISPOSITION

NOW COMES Defendant, WAYNE STATE UNIVERSITY, by and through its attorneys, the Office of the General Counsel, and for its Response to Plaintiff's Motion for MCR 2.116(C)(10) Summary Disposition, states as follows:

1. Admitted.

2. Denied as untrue.

3. Upon information and belief, Defendant admits that in response to Plaintiff's First FOIA request, Defendant provided some emails and advised that it would search others and advise as to their applicability. Defendant denies the remaining allegations herein as untrue.

4. Denied as untrue.

5. Denied as untrue.

6. Denied as untrue.

7. Defendant admits that during the pendency of this case, Defendant has produced a large quantity of requested materials. Defendant further admits that it has refused to produce certain documents requested by Plaintiff but states that the documents that it has refused to produce are exempt from FOIA.

8. Admitted.

9. Defendant neither admits nor denies for lack of knowledge that after conducting discovery, Plaintiff believes that there does not exist any genuine issue as to any material fact. Defendant denies as untrue that this Court can and should grant summary disposition in favor of Plaintiff under MCR 2.116(C)(10). Defendant admits that summary judgment in favor of Defendant is appropriate.

WHEREFORE, Defendant WAYNE STATE UNIVERSITY respectfully requests that this Honorable Court deny Plaintiff's Motion for MCR 2.116(C)(10) Summary Disposition and instead grant Summary Disposition in favor of Defendant and dismiss Plaintiff's Complaint in its entirety pursuant to MCR 2.116(I)(2). Defendant further requests that this Court award costs wrongfully incurred in defense of this action pursuant to MCR 2.114.

Respectfully submitted,

OFFICE OF THE GENERAL COUNSEL
OF WAYNE STATE UNIVERSITY

By: _____

LINDA M. GALANTE (P35914)
KRISTEN L. COOK (P75034)
Attorney for Defendant Wayne State University
656 W. Kirby, St. 4259
Detroit, MI 48202
(313) 577-2268

Dated: April 11, 2019

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Office of the General Counsel
Wayne State University
Attorneys for Defendant
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Detroit, MI 48202
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BRIEF IN SUPPORT OF DEFENDANT WAYNE STATE UNIVERSITY'S 4/11/2019 RESPONSE TO PLAINTIFF'S 3/21/2019 MOTION FOR MCR 2.116(C)(10) SUMMARY DISPOSITION

INTRODUCTION

Plaintiff Marc Edwards has issued several requests to Defendant Wayne State University ("WSU") under Michigan's Freedom of Information Act ("FOIA") relating to research conducted by Dr. Shawn McElmurry, a WSU professor and scientist. The only such FOIA request that remains at issue in this lawsuit is a request dated March 3, 2018 in which Plaintiff sought certain slides from a presentation given by Dr. McElmurry as described in detail below. WSU has produced the majority of that presentation. It has, however, withheld Dr. McElmurry's intellectual property from only four slides as such information is exempt from FOIA pursuant to Michigan's Confidential Research and Investment Information Act ("CRIIA") due to the fact that the information has not yet been published. *See* MCL 390.1554(1)(a). Plaintiff now asks this Court to order disclosure of each slide containing unpublished intellectual property. There is no basis for Plaintiff's requested relief. As set forth below, not only was WSU's denial of Plaintiff's FOIA request justified under CRIIA, but the information sought is also exempt from disclosure pursuant to MCL 15.243(1)(y) as disclosure would pose a threat to the security and safety of the residents of Flint, Michigan, as explained in the Argument below.

FACTS

WSU is a leading research University in Michigan and the United States. Dr. Shawn McElmurry is a WSU professor and scientist who, along with other faculty and graduate student researchers, has been extensively involved in researching various aspects of the Flint water crisis. In particular, Dr. McElmurry received grant funding from the National Institutes of Health ("NIH") to research rapid response to contaminants in Flint drinking water. As of the filing of this Motion, Dr. McElmurry's research is still in the process of being submitted for peer review as part of the

pre-publication process. It has not been published in any journal. Dr. McElmurry expects the results of his research to be published within the next several months. **(Ex. A, ¶¶ 1-4, 25-26).**

On or about July 27, 2017, Michigan State University ("MSU") invited Dr. McElmurry to give a plenary presentation on October 27, 2017 at MSU's 5th annual Research Symposium – *Urban Environment: Sustainable Solutions for the Future.* **(Ex. B).** The Symposium, organized by Environmental Science and Policy Program (ESPP) Graduate Fellows, was directed primarily at students and served as a forum for early career environmental researchers (i.e. students) to highlight their research and have the opportunity for professional development. **(Exs. B-C).** External speakers were asked to attend to share their experiences and identify collaborative opportunities. As reflected in a brochure regarding the event, the Symposium would "showcas[e] oral and poster presentations of graduate student research projects." The three primary objectives of the Symposium, as described in the brochure, were:

- To promote environmental research at MSU and Great Lakes region with the special emphasis on supporting students and recognizing student success.
- To create an interdisciplinary forum for students and faculty from various MSU Colleges to network and showcase their research in the area of environment.
- To ascertain and promote MSU's role as a regional and national leader in environmental science and policy across MSU's research, education, and outreach mission. **(Ex. C).**

Dr. McElmurry accepted MSUs invitation and presented at the Symposium as a plenary speaker on October 27, 2017. During his one hour presentation entitled "The Challenge of Mitigating Risk Associated with Aging Drinking Water Infrastructure in Shrinking Cities: Lessons Learned from Flint," Dr. McElmurry provided an overview of his then-ongoing, unpublished research to this effect. Dr. McElmurry estimates that 30-40 people total attended his presentation, the majority of whom were MSU students, as contemplated by the Symposium objectives. There were also a few MSU faculty members. Of note is that it is common within the academic research

community for scientists to provide highlights of their ongoing, unpublished research at symposiums and conferences. **(Ex. A, ¶¶ 5, 9-11).**

Dr. McElmurry's presentation consisted of approximately 43 PowerPoint slides. While he displayed each slide for a brief time during his presentation, no handouts were provided, and no audience member ever had access to the slides. Most of these slides consisted of non-confidential photos, charts and graphs, many of which were taken from external sources and readily available to the public. Four of the slides, however—slides 22, 23, 25 and 33—contained Dr. McElmurry's intellectual property. Specifically, slides 22 and 23 contain results of Dr. McElmurry's manipulations of a model simulation provided pursuant to a memorandum of understanding by the City of Flint, which shows the flow of water within the City of Flint and the pipe network that constitutes the municipal drinking water system within the City. Slide 25 contains Dr. McElmurry's hypothesis for his research, and slide 34 contains findings pertaining to a water analysis from various Flint homes. **(Ex. A, ¶¶ 9, 12-16).**

While there was minimal risk that the students in attendance would seek to use this intellectual property, Dr. McElmurry took precautions in order to protect the information on these slides from disclosure. Prior to his presentation, he informed the audience of the confidential nature of the information and advised that any photos or recordings of any form were prohibited. Further, Dr. McElmurry went into little, if any, detail regarding the slides containing his intellectual property. He did not observe anyone taking photos or making recordings of the information contained in his slides and, to his knowledge, there has been no disclosure of such information. **(Ex. A, ¶¶ 17-19).** If such information had become public, Plaintiff would certainly not be seeking the information in this lawsuit.

Dr. McElmurry also continues to take measures to protect the information on the slides at issue and underlying data from public disclosure. All research and data pertaining to the slides, as well as the slides themselves, are stored electronically on password-protected computers. The data is encrypted when possible, access via a cloud drive requires two-factor authentication, and the only storage of the information is in password-protected folders. Dr. McElmurry can remotely delete the research and data at any time. **(Ex. A, ¶¶ 20-21).**

Only a select few individuals have access to the research and underlying data at issue, and this group is limited to other researchers working on the project. These include a researcher at the University of Michigan; two WSU PhD students who have worked under Dr. McElmurry's supervision; and WSU assistant professor. Notably, Dr. McElmurry has not shared the Flint model, which serves as the basis for slides 23 and 24, with anyone outside of his supervision. **(Ex. A, ¶¶ 22, 24).**

Dr. McElmurry had no intent to publish his research at the Symposium, nor was it ready to be published even if he had wanted to as his research was ongoing. Nor is it customary for academics to publish their research to a limited group of students from one university. Once the research is ready for publication—following peer review—the NIH will also publish it, as the funding agency, in PubMed, which provides open access to the public. To date, NIH has made no publication of Dr. McElmurry's data or research. This is the typical manner in which publication occurs in the academic community. **(Ex. A, ¶¶ 6-8, 25-27).**

On or about March 3, 2018, Plaintiff issued a FOIA request to WSU seeking, among other items, the slides from Dr. McElmurry's presentation. WSU has provided all but the four slides containing unpublished intellectual property. Following WSU's denial, in part, of his FOIA request, Plaintiff filed the instant lawsuit asserting various FOIA violations. (*See* Plaint. MSD).

Plaintiff acknowledges that the only issue remaining, however, is whether WSU properly denied Plaintiff's request for the four slides. (Plaint. brief, p. 10).

Plaintiff now seeks summary disposition on this sole issue pending before this Court. Plaintiff's Motion should be denied as the information sought is: 1) unpublished intellectual property of a WSU employee that is exempt from FOIA pursuant to § 390.1554(1)(a) of CRIIA; and 2) falls within the FOIA exemption for public water supply designs where disclosure would impair a public body's ability to protect the security or safety or persons or property. *See* MCL 15.243(1)(y).

ARGUMENT

I. STANDARD OF REVIEW

"Summary disposition is appropriate under MCR 2.116(C)(10) if the proffered evidence fails to establish a genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Hiner v Mojica*, 271 Mich App 604, 608, 742 NW2d 914 (2006). In this case, the undisputed facts show that WSU is entitled to summary disposition in its favor pursuant to MCR 2.116(I)(2), which permits the court to render judgment in favor of the non-moving party where it appears that it, rather than the moving part, is entitled to judgment.

II. PLAINTIFF FOCUSES LARGELY ON MISCHARACTERIZED AND IRRELEVANT INFORMATION.

In order to make a determination on the sole remaining issue in this case, this Court need only consider whether the information contained on the four slides at issue falls within the scope of the FOIA exemptions asserted by WSU—i.e. a CRIIA exemption for unpublished intellectual property and an express FOIA exemption relating to the safety and security of the public, as

discussed in detail below.[1] However, in order to avoid further unwarranted prejudice and to preserve Dr. McElmurry's reputation, WSU feels it is important to note that in discussing certain LARA findings, Plaintiff omits that LARA found that Dr. McElmurry did not violate any standard of practice and/or professional conduct as it relates to the Professional Engineering Occupation. (Plaintiff Ex. A). Further, following its investigation, LARA took no action whatsoever with respect to Dr. McElmurry's license. **(Ex. D).**

III. CRIIA's INTELLECTUAL PROPERTY EXEMPTION APPLIES TO THE REQUESTED RECORDS.

Pursuant to Michigan's FOIA, the public is generally entitled to access public records of a public body. The Act does, however, set forth certain types of records that are exempt from disclosure in response to a FOIA request. *See* MCL 15.243. One such exemption is for "[r]ecords and information specifically described and exempted from disclosure by statute." MCL 15.243(1)(d). Michigan's CRIIA was enacted, among other reasons, "to protect from public disclosure certain information obtained in research and related activities of public universities and colleges..." *See* CRIIA, MCL 390.1551, *et seq*. Pursuant to this purpose, CRIIA contains statutory exemptions to FOIA, including the following that is relevant to the instant Motion:

> Sec. 4.
> (1) Except as otherwise provided in this section, the following information in which a public university or college holds an interest, or that is owned, prepared, used, or

[1]Accordingly, it is unnecessary for this Court to consider Plaintiff's scientific work; his characterization of his own accomplishments; his unsubstantiated and defamatory accusations of wrongdoing by Dr. McElmurry; the history of Plaintiff's other *resolved* FOIA requests with Defendant; and Plaintiff's self-serving characterization of WSU's responses to those other resolved requests. Despite acknowledging that the "background" information that he provides is "not a fact at issue in the case," Plaintiff nonetheless spends pages of his brief discussing these issues in an apparent attempt to distract the Court from the issue at hand and to prejudice WSU. While WSU disagrees with Plaintiff's characterization of these irrelevant facts, it will not waste the Court's time refuting each of Plaintiff's points as this would not aid the Court in resolving the instant Motion.

> retained by, or in the possession of, a public university or college, is exempt from disclosure as a public record under the freedom of information act…
> (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. MCL 390.1554(1)(a).

WSU relied on § 1554(1)(a) of CRIIA in initially withholding information from the four slides at issue, and it has consistently asserted this exemption through this litigation. (*See* Plaint. MSD).

In arguing that the slides do not fall within the scope of the above CRIIA exemption, Plaintiff does not dispute that the slides sought contain intellectual property created by an employee of a public university (i.e. Dr. McElmurry) for research purposes. Rather, the only element of the exemption Plaintiff challenges is whether a reasonable opportunity has been provided for the information to be *published* in a forum intended to convey the information to the academic community, which is the standard set forth in MCL 390.1554(1)(a).

As discussed below, the parties primarily dispute the meaning of the word "published" as used in CRIIA and as applied to the undisputed facts. Plaintiff contends that Dr. McElmurry published his research at the Symposium. WSU maintains that he did not.

A. Even Looking Solely to the Dictionary Definitions Offered by Plaintiff, the Information in Dr. McElmurry's Slides was not Published.

In order to resolve the parties' sole remaining dispute, it is first necessary to determine what "published" means within the context of CRIIA. As CRIIA does not define "publish," it is appropriate to look to external sources. In arguing that Dr. McElmurry published the information in his slides at the Symposium, Plaintiff relies solely on dictionary definitions of "publish" and "publication." WSU does not dispute that in some instances, it is appropriate to refer to dictionary definitions in ascertaining the meaning of a word that is not defined in a statute. This should be

done, however, only where the word or phrase at issue is not a technical term or term of art. MCL 8.3a; *People v. Flick,* 487 Mich 1, 11 (2010).

The term "publish," as used in the context of academic research, is a technical term and therefore, it is inappropriate to rely only on dictionary definitions of the term. Further, even if it were not a technical term, courts must define ambiguous and undefined terms within *the context* of the statute. *Flick,* 487 Mich. at 11. Plaintiff fails to engage in any such analysis. Even looking no further than the dictionary definitions offered by Plaintiff, it is clear that Dr. McElmurry did not "publish" the information on his slides at the Symposium.

Plaintiff offers several definitions of the words "publish" and "publication," which he contends are applicable to Dr. McElmurry's presentation. Notably, each definition contemplates disseminating information to a wide audience and/or providing access to physical copies of a work to the public. For example, the definition of "publish", as cited by Plaintiff, includes "to make generally known," to "produce or release for distribution," to "disseminate to the public," and "to distribute copies (of a work) to the public." Similarly, per Plaintiff's cited sources, "publication" means "the act of declaring or announcing to the public." (Plaint. Brief, p. 11). Applying these definitions, Dr. McElmurry did not "publish" the slides at the Symposium.

By making one presentation at the request of MSU to a small group of mostly MSU students, Dr. McElmurry did not make his work "generally known" or disseminate or distribute his work to the public. Furthermore, Dr. McElmurry took steps to ensure that his intellectual property would not be further disclosed and thus made generally known or disseminated to the public at large by prohibiting any recording of his presentation or retention of the information on his slides, and by denying access to physical copies of his slides. **(Ex. A, ¶¶ 10, 12, 17).**

Similarly, Dr. McElmurry has not given the general public access to the slides or the intellectual property contained therein. Rather, only a select group of individuals working on the research with Dr. McElmurry have access to such information. **(Ex. A, ¶¶ 22-23).**

B. Plaintiff's Alternative Arguments as to Publication Likewise Fail.

Rather than apply the definitions that he offers to the facts, Plaintiff instead offers various alternative reasons as to why Dr. McElmurry had a reasonable opportunity to publish the information in his slides in a timely manner in a forum intended to convey the information to the academic community. These arguments are similarly unpersuasive.

i. Plaintiff's "showcase" argument fails to distinguish between types of presenters at the symposium.

Plaintiff first argues that Dr. McElmurry published his intellectual property at the Symposium because the presenters were at the event for the express purpose of "showcase[ing] their research." (Plaint. Brief, pp. 9, 12). There is no basis for Plaintiff's assertion. The language on which Plaintiff relies is contained in a brochure regarding the Symposium, which states one objective was: "To create an interdisciplinary forum for *students and faculty from various MSU Colleges to network and showcase their research* in the area of environment." **(Ex. C).** Dr. McElmurry, however, is not an MSU student or faculty member. Since the objective set forth in the Symposium brochure is inapplicable to the slides at issue, and the available evidence reflects that Dr. McElmurry was not at the Symposium to publish his research, Plaintiff's argument fails. **(Ex. A, ¶¶ 1-2, 7-8).**[2]

ii. Plaintiff's additional arguments do not support a finding of publication.

[2] WSU further disputes that "showcase" means to publish.

Plaintiff makes several other cursory arguments regarding publication that are again wholly unrelated to the definitions that he offers. For example, he makes much of the fact that the audience at the Symposium was not restricted. While true that no audience member was per se restricted from attending, Plaintiff fails to address the crucial fact that the Symposium was targeted only at MSU students and faculty who do environmental research, and the audience consisted largely of students.[3] **(Exs. B and C).**

One subset of people from one university hardly constitutes the general public, and giving a brief overview of ongoing research to approximately 30-40 members of this already small subset is not what one would typically consider to be making research or data "generally known" or disseminating to the public. Moreover, presenting to a group of students who do not even attend the university at which the researcher is employed would be wholly inconsistent with the way in which academics typically publish their research. **(Ex. A, ¶¶ 1, 7, 9-10).** In the academic community, publication is generally done in a peer-reviewed journal. (See also discussion in Section C below).

Plaintiff also attempts to prove publication by noting that that the audience members at Dr. McElmurry's presentation were not provided with non-disclosure agreements at the Symposium as a condition of attendance. Even so, Dr. McElmurry employed other adequate measures to prevent further disclosure of his materials. **(See Ex. A, ¶¶ 12, 17-18, 20-24).** In addition to

[3] Plaintiff notes that WSU initially stated that the Symposium was invitation only. WSU has since clarified that the presenters received invitations to speak as opposed to the Symposium as a whole being invite only. Regardless, the Symposium was still targeted at only a small subset of MSU students and faculty (i.e. environmental researchers) as opposed to the larger academic community. Further, the forum was not one designed for researchers to publish their work but was instead designed to allow students to benefit from the opportunity to present their work; expand their knowledge; foster their interests regarding current, ongoing environmental research in the community; and develop professional relationships. **(Exs. B and C).**

prohibiting recording or photographing of his slides, Dr. McElmurry used his own laptop at the Symposium. He declined the organizers request to load his slides onto a local computer set up for the presentation as this would have allowed third-party access to the slides. **(Ex. A, ¶ 12).** To the extent that Plaintiff argues that no enforcement measures were taken post-presentation to prevent disclosure, there was no need for this as no recordings took place per Dr. McElmurry's observations of the small audience. **(Ex. A, ¶¶ 12, 19).**

Plaintiff similarly suggests that in order to avoid a publication finding, there should have been some security in place to prevent against the recording of Dr. McElmurry's slides. Just as there is no requirement that one must utilize a non-disclosure agreement to avoid his/her research being deemed published, there is likewise no requirement that a researcher presenting a mere overview of his research as a plenary speaker must hire or demand security personnel to monitor an audience. If this were true, it is hard to imagine that anyone would agree to present at the Symposium. Plaintiff offers no authority to this effect, and WSU knows of none.

Finally, Plaintiff confusingly seeks to establish publication through an unofficial definition of publication provided by WSU in the discovery process. Specifically, he asserts that WSU has backtracked from saying that publication must be made to "the entire academic community" in now stating that the use of the word "entire" was superfluous. This point is not disputed and there is little need to dwell on it. Common sense dictates that WSU, of course, did not mean that research must be published to every single individual in the academic community in order to meet the definition of publish. This would be virtually impossible to do. If Plaintiff needs clarification on this point, however, WSU simply meant that in order to be published, work must be shared with the academic community at large, typically in a peer-reviewed journal, as opposed to providing

only a brief highlight of pre-publication research to a small group of MSU environmental researcher students.

Nor does Plaintiff explain how "sharing one's experiences" constitutes publication. In any event, if Dr. McElmurry had in fact published his research, the NIH would have likewise published, which it has not. Dr. McElmurry's research in this regard is still in the process of being submitted for peer review as part of the pre-publication process. **(Ex. A, ¶¶ 25, 27).**

C. The Term "Publish" as Used in CRIIA Is a Term of Art and Must be Interpreted Within the Context of Academic Research.

WSU contends that there should not be a finding of "publication" based solely on Plaintiff's dictionary definitions. WSU further contends that "published" is a technical term/term of art when used in the context of academic research, as it is in CRIIA. Therefore, the more appropriate analysis involves defining "publish" specifically within this framework. Even the most basic statutory interpretation requires defining terms in the context of the statute at issue. *Flick,* 487 Mich. at 11.

Although there is no Michigan case law or legislative history of which WSU is aware that addresses "publish" as it is used in CRIIA, "publish" has been deemed a term of art in other contexts. *See e.g. Canadian Pacific Enterprises (U.S.), Inc. v Krouse*, 506 F. Supp. 1192, 1199 (E.D. Ohio 1981); *Quintero v. Palmer,* 2017 U.S. Dist. LEXIS 104897, at *6 (D. Nev., July 7, 2017). **(Ex. I).** Moreover, both federal guidance and authority from other jurisdictions with statutes similar to CRIIA reflect that "publish" has a particular meaning within the academic community and that to find otherwise would pose a threat to the advancement of science.

i. Federal guidance supports the conclusion that Dr. McElmurry did not publish or have a reasonable opportunity to publish his intellectual property.

Michigan courts frequently look to interpretation of the federal FOIA and its exemptions in analyzing questions under Michigan's FOIA. *See e.g. Bredemeier v. Kentwood Bd. of Ed.*, 95 Mich. App. 767, 771 (Mich. App. 1980). This is particularly important here where there is no case law discussing the intellectual property CRIIA exemption. While "publish" is not defined in CRIIA, it is defined in a comparable federal regulation.

In 1998, the Shelby Amendment, a provision in Public Law 105-227, directed the U.S. Office of Management and Budget (OMB) to amend OMB Circular A-110, *Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations,* to comply with the underlying purpose of providing public access to data produced by federally-funded research by, among others, institutions of higher education. The OMB made multiple revisions to Circular A-110. Among these revisions were those made following a request for clarification on certain concepts, including the meaning of "publish."[4] **(Ex. E).** The final version provided, in relevant part:

> (d) (1) In addition, in response to a Freedom of Information Act (FOIA) request for research data relating to *published* research findings produced under an award that were used by the Federal Government in developing an agency action that has the force and effect of law, the Federal awarding agency shall request, and the recipient shall provide, within a reasonable time, the research data so that they can be made available to the public through the procedures established under the FOIA....
>
> (2) The following definitions apply for purposes of paragraph (d) of this section:
>
> (i) *Research data* is defined as the recorded factual material commonly accepted in the scientific community as necessary to validate research findings, but not any of the following: preliminary analyses, drafts of scientific papers, plans for future research, peer reviews, or communications with colleagues. This "recorded" material excludes physical objects (e.g., laboratory samples). Research data also do not include:

[4] The OMB received over 9,000 comments on proposed revisions and over 3,000 comments on clarifying changes, which it took into account in rendering a final version of the Circular, generally applicable to all federal agencies. **(Ex. E).**

> (A) Trade secrets, commercial information, materials necessary to be held confidential by a researcher until they are published, or similar information which is protected under law…
>
> * * *
>
> **(ii) *Published* is defined as either when:**
>
> **(A) Research findings are published in a peer-reviewed scientific or technical journal; or**
>
> **(B) A Federal agency publicly and officially cites the research findings in support of an agency action that has the force and effect of law. (Exs. E-F, emphasis added)**

This definition of "publish" is now codified at 2 CFR § 200.315, *Intangible Property.*

In finalizing Circular A-110 and defining the terms therein, including "publish," the OMB specifically noted that it recognized "the importance of ensuring that the revised Circular does not interfere with the traditional scientific process." It went on to state:

> During the revision process, many commenters expressed concern that the statute would compel Federally-funded researchers to work in a "fishbowl" in which they would be required to reveal the results of their research, and their research methods, prematurely. They argued that this could prevent researchers from operating under the traditional scientific process. As in many other fields of endeavor, scientists need to deliberate over, develop, and pursue alternative approaches in their research before making results public. *When a scientist is sufficiently confident of their results, they publish them for the scrutiny of other scientists and the community at large. Accordingly, in light of this traditional scientific process, we have not construed the statute as requiring scientists to make research data publicly available while the research is still ongoing.* **(Ex. E, emphasis added).**

This regulation is particularly relevant as it relates to federally-funded research by employees at universities, which is exactly what Dr. McElmurry's research is pursuant to the NIH grant. **(Ex. A, ¶ 4).** Notably, the OMB defined "publish" specifically within the context of the academic community, taking into account thousands of comments and concluding that limiting the definition was critical to ensuring that there was no interference with cutting-edge science and its significant role in society, as well as allowing researchers to continue to deliberate with colleagues

and pursue different approaches prior to making their research public. **(Ex. E).** It is thus only when research findings are officially published in a peer-reviewed scientific or technical journal that university researchers must produce them to federal agencies who have received FOIA requests for same. **(Ex. F).**

Taking into account the academic context and the concerns addressed by the OMB, this Court should similarly define "publish." These concerns remain applicable whether it is a federal agency responding to a FOIA request or the university itself. Regardless of where the FOIA request originates, it is the research of the university scientist that is at issue ant the researcher who must compile the responsive documents.

If this Court were to create new policy in Michigan by defining "publish" in a less-restricted way, it would open Michigan scientists to the very fishbowl-like scrutiny that the OMB saw crucial to avoid, and it would significantly interfere with the scientific process. Any time that university researchers collaborated and deliberated with colleagues, made any presentation whatsoever, revised their findings pre-publication, or even provided the service—as in this case—of educating and training students, they would open all of their preliminary work to public scrutiny pursuant to FOIA. The Michigan legislature could not have intended such a substantial deviation from federal law and the underlying purposes of the above regulations. To do so would have a chilling effect on science and thereby threaten society with the lack of scientific advancement.

Using the OMB's contextual regulations as guidance, Dr. McElmurry's presentation to select MSU students and faculty while his research remained ongoing in no way constituted publication. Even to date, his findings have not been published in a peer-reviewed journal and thus do not fall within the scope of "publish" in the academic context. **(Ex. A,¶¶ 25-26).** In light

of the technical meaning of "publish" in an academic context, WSU properly denied Plaintiff's FOIA request.

ii. Guidance from states with comparable statutes likewise demonstrates that the information at issue has not been published.

Further support for a finding that "publish" is a technical term when used in the context of academic research is found in authority from other jurisdictions. Many other states have exemptions to their respective open records laws which reflect that in determining whether a publication has been made in the context of academic research, it is crucial—just as recognized by the OMB—to account for the need to preserve the scientific process and allow an adequate opportunity for scientists to deliberate, collaborate and participate in the peer-review process prior to "publication." Mississippi, for example, provides an exemption for unpublished information in the possession of a state institution of higher learning and that is created, collected, developed, generated, ascertained or discovered during the course of academic research. Expressly exempted are "[u]npublished manuscripts, preliminary analyses, drafts of scientific or academic papers, plans or proposals for future research and **prepublication peer reviews** ..." Miss. Code. § 37-11-51, emphasis added. **(Ex. G).** Thus, very similar to the OMB's regulations, Mississippi recognizes the need to exempt research and data that has not yet been published in a journal but is merely in the pre-publication process.

Virginia likewise excludes the records of public universities or colleges from disclosure under its FOIA where the records are of a proprietary nature; produced by faculty or staff of a public institution of higher education; produced or collected as the result of research on medical, scientific, technical or scholarly issues; and the data/records have not been publicly released,

published, copyrighted or patented. Va. Code § 2.2-3705.4(4).[5] **(Ex. H).** In interpreting this statute, the Supreme Court of Virginia has recognized "the General Assembly's intent to protect public universities and colleges from being placed at a competitive disadvantage in relation to private universities and colleges." *Am. Tradition Inst. v. Rector & Visitors of the Univ. of Va.*, 287 Va. 330, 342 (2014). It further acknowledged that *competitive disadvantage* occurs not only in the form of financial injury, but also as "*harm to university-wide research efforts, damage to faculty recruitment and retention, undermining of faculty expectations of privacy and confidentiality, and impairment of free thought and expression.*" *Id.*, emphasis added. In citing affidavits from scholars regarding the harm that early disclosure would have, the Court noted that without the exemption, scientists at public institutions would lose the ability to protect their communications with faculty at other institutions and if so, their ability to collaborate would be gravely harmed. *Id.* at 343 (discussing the threat of loss of scientific and creative opportunities).

Ohio perhaps has the most extensive interpretation of "publish" in the context of its comparable intellectual property exemption, R.C. 149.439(A)(5), and Ohio case law reflects that it is generally understood in the academic community that disclosure of research or data must be far reaching before it is deemed "published." The Ohio Supreme Court has found no publication under its public records exemption, and therefore no required disclosure, where the records at issue were merely lent to select scientists and research trainees; were shown to scientists at medial conferences;[6] and were kept in a locked location in a laboratory accessible only to laboratory members. *State ex rel. Physicians Comm. For Resp. Med. v. Bd. Of Trs. of Ohio State Univ.*, 108

[5] Certain other requirements apply that are not relevant to the instant discussion.
[6] While the conferences at issue were closed, the conference in this matter was directed at MSU only, and mostly students. Regardless, even with more widespread disclosure than in the instant matter, and the records being shared with more scientists in the academic community, there was still no disclosure.

Ohio St. 3d 288, 294-295 (2006). The Court further distinguished sharing records with researchers at other institutions for advancement of a particular research area and for training purposes from disclosing proprietary research data for the public's unrestricted use. *Id.* at 295 (noting that "limited sharing of the records with researchers assists both OSU and those other scientists in their efforts to learn more about surgical procedures. That limited sharing does not mean that the records have been publicly released."). *See also Walker v. Ohio State Univ. Bd. Of Trs.*, 2010 Ohio 373, at *3, 19-21 (2010) (finding that certain questionnaires had not been published despite the study's results being discussed at a public meeting, the raw data presented in a written report to the district, and three scholarly papers prepared analyzing some of the study's results). *Contrast State ex rel. Rea v. Ohio Dept. of Ed.*, 81 Ohio St. 3d 527 (1998) (finding that proficiency tests and vocational assessments were subject to disclosure where they were disseminated to thousands of students, teachers and administrators throughout the state).

Thus, both the federal government and other states have consistently interpreted "publish" in a context similar to CRIIA as requiring some sort of official publication—most frequently in a peer-reviewed journal. As discussed above, other states have also considered the substantial harm to the scientific process that would result if "publish" was defined more broadly.

Ohio's exclusion of the sharing of records and research among colleagues, including at other universities, from the definition of "publish" is particularly significant to this case as that is exactly what occurred here, although to a much lesser extent as Dr. McElmurry did not provide copies of any records to the environmental researchers at MSU, nor did he even engage in an extensive discussion of the intellectual property included in his slides. **(Ex. A, ¶ 12, 18).**

Given the unique concerns that arise in defining "publish" in the context of academic research and the consistent interpretation of same, this Court should find that "publish" as used in the

context of CRIIA is a term of art and define it consistent with the OMB and the other jurisdictions cited herein. To hold otherwise would be a substantial deviation from all available authority and would effectively render the CRIIA exemption meaningless as nearly all situations in which a scientist discussed his/her work would be deemed a publication.

IV. DISCLOSURE OF SLIDES 22 AND 23 WOULD JEOPARDIZE THE SECURITY AND SAFETY OF THE RESIDENTS OF FLINT AND ARE THUS EXEMPT UNDER FOIA.

In addition to CRIIA, Michigan's FOIA sets forth certain types of information and records which a public body may exempt from disclosure. One such exemption exists in order to protect the security and safety of persons and property and provides as follows:

> (y) Records or information of measures designed to protect the security or safety of persons or property, or the confidentiality, integrity, or availability of information systems, whether public or private, including, but not limited to, building, public works, and **public water supply designs** to the extent that those designs relate to the ongoing security measures of a public body, capabilities and plans for responding to a violation of the Michigan anti-terrorism act, chapter LXXXIII-A of the Michigan penal code, 1931 PA 328, MCL 750.543a to 750.543z, emergency response plans, risk planning documents, threat assessments, domestic preparedness strategies, and cybersecurity plans, assessments, or vulnerabilities, unless disclosure would not impair a public body's ability to protect the security or safety of persons or property or unless the public interest in disclosure outweighs the public interest in nondisclosure in the particular instance. MCL 15.243(1)(y) (emphasis added).

Slides 22 and 23 fall squarely within this exception. These two slides reflect Dr. McElmurry's manipulations to a model simulation showing the flow of water within the City of Flint and the pipe network that constitutes the municipal drinking water system within the City. The model on which slides 22 and 23 were based thus constituted a public water supply design. **(Ex. A, ¶ 15).** This design directly relates to the ability of the City of Flint to protect the safety and security of its residents. If this information were disclosed to the general public, it would pose a threat to the Flint water system. For example, a terrorist or other individual would readily be able to see how

the water flows and could target particular areas of the city, such as government offices or police and fire offices, through the water supply. Once released, even on a limited basis, such as in the context of this litigation, there is no longer any control over distribution and the City of Flint's ability to protect the safety and security of its residents is compromised.[7] The public interest in protecting its water supply from outside threats far outweighs any interest in disclosure, and therefore, slides 22 and 23 are subject to protection for this additional reason.

V. PLAINTIFF IS NOT ENTITLED TO ATTORNEYS FEES OR PUNITIVE DAMAGES.

As WSU properly denied Plaintiff's FOIA request, Plaintiff is not entitled to attorneys' fees.

CONCLUSION AND RELIEF SOUGHT

WSU requests that this Court deny Plaintiff's Motion and instead grant summary disposition in its favor as the undisputed facts demonstrate that WSU properly denied Plaintiff's FOIA request.

Respectfully submitted,

OFFICE OF THE GENERAL COUNSEL
OF WAYNE STATE UNIVERSITY

By: _____

LINDA M. GALANTE (P35914)
KRISTEN COOK (P75034)
Attorneys for Defendant Wayne State University
656 W. Kirby, St. 4259
Detroit, MI 48202
(313) 577-2268

Dated: April 11, 2019

[7] It would not be possible to remember the intricate details of the Flint water system simply by seeing Slides 22 or 23 for a very limited time as during the Symposium. But if the slides were in the possession of an individual where they could be studied and where computer software could be used to align model output with special references, one would be able to target specific locations in the City of Flint.

EXHIBIT A

STATE OF MICHIGAN
COURT OF CLAIMS

MARC EDWARDS,
An individual,

Plaintiff,

v

Case No. 18-000110-MZ

WAYNE STATE UNIVERSITY,
a Michigan state public body,

HON. Christopher M. Murray

Defendant,

Patrick J. Wright (P54052)
Derk A. Wilcox (P66177)
Attorneys for Plaintiff
140 West Main Street
Midland, MI 48640
(989) 661-0900

Linda M. Galante (P35914)
Kristen L. Cook (P75034)
Office of the General Counsel
Wayne State University
Attorneys for Defendant
656 West Kirby, 4249 FAB
Detroit, MI 48202
(313) 577-2268

AFFIDAVIT OF SHAWN P. MCELMURRY

STATE OF MICHIGAN)
) SS
COUNTY OF WAYNE)

I, Shawn P. McElmurry, being first duly sworn, deposes and states that the following information is provided of my own personal knowledge, that the matters stated herein are true to the best of my knowledge, that I am of legal age and competent to testify if called as a witness, and that if called as a witness would testify as follows:

1. I am currently employed as an Associate Professor in the College of Engineering at Wayne State University ("WSU"), and I have held that position at all times relevant hereto.

2. As part of my employment at WSU, I conduct scientific research.

3. I have been extensively involved in researching various aspects of the Flint water crisis and have worked with faculty and supervised graduate students with respect to same.

4. I obtained grant funding from the National Institutes of Health ("NIH") in order to research rapid response to contaminants in Flint drinking water.

5. On October 27, 2017, I presented at Michigan State University's ("MSU") ESPP Research Symposium (the "Symposium").

6. I attended the Symposium solely because I was invited by MSU to speak as a plenary speaker.

7. My understanding of my role at the Symposium, and my intent in presenting at the Symposium, was to facilitate student interest in new and ongoing research; provide a highlight of my research experiences to students and an overview of the direction in which the research is going; provide an educational experience; build potential collaborations; and obtain feedback prior to publication.

8. I had no intent to publish my research or underlying data in the form presented at the Symposium, and I would not have published my research findings at a forum of primarily MSU students.

9. My presentation, entitled "The Challenge of Mitigating Risk Associated with Aging Drinking Water Infrastructure in Shrinking Cities," consisted of approximately 43 PowerPoint slides and lasted for approximately one hour. I displayed each slide for only a brief time.

10. I estimate that 30-40 people total attended my presentation at the Symposium. The majority of attendees were MSU students, and there were also a few MSU faculty members.

11. To my knowledge, it is common within the academic research community for other researchers to give similar presentation of their unpublished research at symposiums and conferences.

12. I did not provide any handouts of my slides or any of the information therein, and no audience member has ever had access to my slides. To further ensure security of my slides and intellectual property, I brought my own laptop to the Symposium and used it during the presentation. I declined the organizers request to load the slides onto a local computer set up for the presentation, which would have allowed third-party access to the slides.

13. Most of my slides consisted of non-confidential photos, charts and graphs, many of which were taken from external sources and readily available to the public.

14. Four of the slides—nos. 22, 23, 25 and 34—contained my unpublished intellectual property. I therefore took measures to ensure the continued confidentiality of the information contained in those slides and to prevent further disclosure of this information.

15. Slides 22 and 23 contain results of my manipulations of a model simulation showing the flow of water within the City of Flint and the pipe network that constitutes the municipal drinking water system within the City. I was provided the initial model pursuant to a memorandum of understanding with the City of Flint. After receiving the model, I modified conditions (input), selected parameters that were reported by the model (output), and presented same at the Symposium.

16. Slide 25 contains my hypothesis for my research, and slide 34 contains confidential findings pertaining to a water analysis from various Flint homes.

17. While there was minimal risk that the students or faculty in attendance would seek to use my intellectual property given the nature of the Symposium and the reasons for which I was

presenting and they were attending, I took the precaution of informing the audience of the confidential nature of the information prior to my presentation and advised that photos or recordings of any form were strictly prohibited.

18. I also went into little, and sometimes no, detail regarding the slides containing my intellectual property.

19. Given its relatively small size, it was easy for me to view the entire audience during my presentation. I did not observe anyone taking photos or recordings of the information contained in my slides and, to my knowledge, there has been no disclosure of such information.

20. I have also taken additional measures both prior to and following the Symposium to prevent disclosure of my intellectual property and related research data and findings. These measures remain in place today.

21. Specifically, all research and data pertaining to the slides, as well as the slides themselves, are stored electronically on password-protected computers. The data is encrypted when possible, access via a cloud drive requires two-factor authentication, and the only storage of the information is in password-protected folders. I can remotely delete the research and data at any time.

22. Only a few fellow researchers have access to my Flint research and underlying data, including a researcher at the University of Michigan; two WSU PhD students who have worked on the research under my supervision; and a WSU assistant professor.

23. There is no way for the public to access either my Symposium slides or the intellectual property contained in those slides.

24. I have not shared the Flint model, which serves as the basis for slides 23 and 24, with anyone outside of my supervision.

25. My NIH-funded research pertaining to Flint, including the research on which I presented at the Symposium, is still in the process of being submitted for peer review as part of the pre-publication process. Neither my findings nor any of the underlying data has been published in any journal.

26. I anticipate that the results of my research will be published in a peer-reviewed journal within the next several months. This is the typical manner in which publication occurs in the academic community.

27. Once I publish my research, the NIH will also publish the results of this work in PubMed, which provides open access to the public. As my research is not yet published, the NIH has made no publication to date.

Further Affiant sayeth not.

Shawn P. McElmurry

Subscribed and sworn to before me
this 16 day of April 2019.

Printed name: _____
Notary Public, State of Michigan, County of _____
My commission expires _____

DANA M RUDNICKI
Notary Public - Michigan
Wayne County
My Commission Expires Oct 18, 2021
Acting in the County of _____

EXHIBIT B

MICHIGAN STATE
UNIVERSITY

Dr. Shawn McElmurry
Associate Professor, Civil and Environmental Engineering
Wayne State University
Detroit, MI

July 27, 2017

Dear Dr. Shawn McElmurry,

On behalf of the Michigan State University's Environmental Science and Policy program (ESPP), we are writing to invite you to give a plenary presentation at the 5th annual Research Symposium - *Urban Environment: Sustainable Solutions for the Future.* The symposium will be held on **Friday, October 27, 2017.**

The ESPP Research Symposium serves 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 stakeholders and policy makers, as well as provide professional development opportunities for tomorrow's environmental researchers. Our vision for the event is to bring together multiple communities from within Michigan State University as well as external speakers to share their experiences and identify collaborative opportunities.

We would be very pleased to have you as a plenary speaker. Your work on the analytical methods to address environmental issues in urban systems has been highly influential. We believe that your voice would be a critical addition to this year's symposium. Travel expenses, lodging, and meals will be covered. In addition, $1,000 will be provided as an honorarium.

Please consider our invitation and let us know if you have any questions. We hope you would agree to deliver a plenary talk at the ESPP symposium and share with us your knowledge and vision.

Sincerely,

Timothy J. Gates, Ph.D., P.E., PTOE
Associate Professor, Civil and Environmental Engineering

Vlad Tarabara, Ph,D.
Professor, Civil and Environmental Engineering
Associate Director, ESPP

Environmental Science and Policy Program

274 Giltner Hall
Michigan State University
293 Farm Lane
East Lansing, MI 48824

517-432-8296
Fax: 517-432-8830
environment.msu.edu

And the ESPP Research Symposium organizing committee:

Peyman Akbari

Postdoctoral Researcher,

College of Veterinary Medicine

Meghna Chakraborty

PhD student,

College of Engineering

Hogeun Park

PhD student,

College of Agriculture and Natural Resources

Teng Zhang

PhD student,

College of Social Science

Shawn McElmurry

Thursday Oct. 26	Event	Location
TBA	Drive from Wayne State to Michigan State University; Check into Kellogg Hotel	Kellogg Hotel and Conference Center
4:30 p.m. – 6 p.m.	Panel Discussion	Rom 106, Kellogg Center
6 p.m. – 7 p.m.	break	
7 p.m.	Dinner with Dr. Tim Gates	TBA
Friday Oct. 27	**Event**	**Kellogg Center location**
7 a.m.- 8 a.m.	Registration	Lincoln Lobby
8 a.m. -8:30a.m.	Welcome remarks	Lincoln Room
8:30a.m.-9:30a.m.	Plenary 1 – Shawn McElmurry	Lincoln Room
9:45 a.m. - 10:45 a.m.	Student sessions	Lincoln Room Room 106 Room 102
10:45 a.m. – 11:15 a.m.	Coffee break	Lincoln Lobby
11:30 a.m. – 12:30 p.m.	Plenary 2- Harsha Ratnaweera	Lincoln Room
12:30 p.m. – 1:30 p.m.	Lunch	Lincoln Room Lincoln Lobby
1:30 p.m. – 2:30 p.m.	Plenary 3- Dan Costa	Lincoln Room
2:45 p.m. – 3:45 p.m.	Student sessions	Lincoln Room Room 106 Room 102
4 p.m. – 5 p.m.	Plenary 4- Bob Dixson	Lincoln Room
5 p.m. – 5:30 p.m.	Closing Remarks and Awards	Lincoln Room
6 p.m.	Dinner with fellow speakers, Dr. Jinhua Zhao, Dr. Vlad Tarabara and MSU administrators	The State Room

EXHIBIT C

EXHIBIT TWO

Environmental Science
& Policy Program
at Michigan State University

Friday, October 27, 2017
Kellogg Hotel and Conference Center

Organized by ESPP Graduate Fellows and showcasing oral and poster presentations of graduate student research projects

Environmental Science and Policy Program

Dr. Jinhua Zhao
Director
Dr. Vlad Tarabara
Associate Director

2017 Planning Committee Members:
Dr. Peyman Akbari, Pathobiology and Diagnostic Investigation
Meghna Chakraborty, Civil and Environmental Engineering
Hogeun Park, Planning, Design and Construction/ ESPP
Teng Zhang, Geography, Environment and Spatial Sciences

Faculty advisors to the committee:
Dr. Jan Beecher, Public Utilities Institute
Dr. Guo Chen, Global Urban Studies
Dr. Tim Gates, Civil and Environmental Engineering
Dr. Jack Harkema, Pathobiology and Diagnostic Investigation
Dr. M.G. Matt Syal, Planning, Design & Construction

ESPP Staff:
Marcy Heberer
Karessa Weir
Thrishika Balasubramanian
Kera Howell
Jack Trebtoske
Lauren Carr

2017 ESPP Research Symposium

About the ESPP Research Symposium

This symposium is a student organized event which brings together students from a range of disciplines across MSU campus and beyond to present their research in a public forum and explore interdisciplinary collaboration between graduate students, faculty, and community stakeholders. One of the unique attributes of this conference is that it is organized with direct participation of students: of the eight members of the symposium planning committee, three are graduate students and one is a post-doctoral researcher representing different MSU Colleges.

The Symposium series has been designed with the following three objectives in mind:

- To promote environmental research at MSU and Great Lakes region with the special emphasis on supporting students and recognizing student success.
- To create an interdisciplinary forum for students and faculty from various MSU Colleges to network and showcase their research in the area of environment.
- To ascertain and promote MSU's role as a regional and national leader in environmental science and policy across MSU's research, education, and outreach missions.

Previous Symposia focused on the topics of Environmental Health, International Research, Environmental Risk and Decision Making , and Water for a Sustainable World. See presentations from past symposia at environment.msu.edu/events/research_symposium/2017/index.php

Symposium Schedule at a glance

Time	Events	Location
7:30 - 8:20	Registration and Breakfast	Lincoln Lobby
8:20 - 8:30	Welcoming Remarks	Lincoln
8:30 - 9:30	Plenary #1 Dr. Shawn McElmurry Wayne State University	Lincoln
9:45 - 10:45	Student Sessions #1A-C	Lincoln; 102 and 106
10:45 - 11:30	Coffee Break/Poster Session #1	Lincoln Lobby
11:30- 12:30 p.m.	Plenary # 2 Dr. Harsha Ratnaweera Norwegian University of Life Sciences	Lincoln
12:30 - 1:30	Lunch/Poster Session #2	Lincoln
1:30 - 2:30	Plenary #3 Dan Costa U.S. EPA	Lincoln
2:45 - 3:45	Student Sessions #2A-G	Lincoln; 102; and 106
4:00 - 5:00	Plenary #4 Mayor Bob Dixson Greensburg, Kansas	Lincoln
5:00 - 5:15	Concluding Remarks	Lincoln

2017 ESPP Research Symposium

Shawn McElmurry

Wayne State University

Associate Professor of Civil and Environmental Engineering at Wayne State University. His research focuses on the fate and transport of pollutants in urban systems and developing new methods and techniques for the detection, quantification and treatment of organic and inorganic constituents.

Plenary Title: The Challenge of Mitigating Risk Associated with Aging Drinking Water Infrastructre in Shrinking Cities: Lessons Learned from Flint

Plenary Abstract: The Safe Drinking Water Act of 1974 drove a major investment in America's drinking water infrastructure, much of which is approaching its expected design life. At the same time, the geographic locations where American's reside is shifting and the cities that are losing population and experiencing economic decline are located across the U.S, with a high concentration present in America's Rustbelt. When cities and their demand for infrastructure services shrink, the underground water infrastructure does not. The loss of water demand is particularly problematic for drinking water distribution systems that need to maintain pressure to avoid contamination risks from infiltration and low-pressure events, yet have fewer demands for the water in the pipes. The challenge of concentrated blight and overall all loss of water demand can lead to high water age, the length of time it takes water to be transmitted from treatment to point of consumption, in distribution systems. This increase in water age has a dramatic impact on drinking water quality and increases the risk to public health.

Student Presentations

Student Session 1A : Water Management

Chaired by Hogeun Park

- Carly Cohen (Environmental Engineering): "Willingness of Rural Tanzanians to Incorporate More Efficient Household Water Treatment Methods"
- Tula Ngasala (Civil and Environmental Engineering): "An Interdisciplinary Evaluation of Domestic Water Contamination and the Public Health Impacts in Informal Settlements of Dar es Salaam City, Tanzania to Develop Risk-Based Intervention Strategies"
- Min Gon Chung (Fisheries & Wildlife): "Understanding the role of green infrastructure in complex urban water systems"

Student Session 1B: Waste Management

Chaired by Teng Zhang

- Edgar Castro-Aguirre (Packaging):"Bioaugmentation of Compostable Plastics: Creating an opportunity for diverting plastic waste from landfills and reducing urban environmental contamination"
- Noleen Chikowore (Community Sustainability): "Attitudes and behavior towards sustainable household waste management in Zimbabwe"
- Darius Bates (Construction Management): "Salvage Larch Lumber: Examining Mechanical Properties for Manufacturing Cross Laminated Timber Panel Inclusion"

Student Session 1C: Environmental Challenges

Chaired by Peyman Akbari

- Tom Logan (University of Michigan):"The role of behavior in undermining the effectiveness of adaptive measures in reducing long-term vulnerability to natural hazards"
- Jonah White (Geography, Environment and Spatial Sciences): "Spatial Inequalities of Urban Greening: Environmental Injustice in the Seattle Metropolitan Region, 1990 to 2011-15"
- Jelili Adebiyi (Community Sustainability): "Water-Food-Energy-Climate Nexus: Snapshots from a Study of Urban Organic Leafy Vegetable Farmers in Ajibode, Ibadan, Southwest Nigeria"

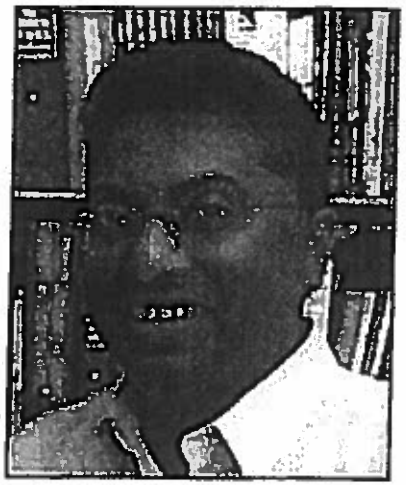
2017 ESPP Research Symposium

Poster Sessions

- Brooke Mason (Civil & Environmental Engineering/University of Toledo): "stormwater runoff is a major contributor to the degradation of many urban waterways"
- Sydney Salit (Engineering): "Methods for Detection Cyanuric Acid Concentrations in Outdoor Swimming Pools"
- Xiaoyu Wang (Engineering): "Analysis of energy costs for catalytic ozone membrane filtration"
- Tim Williams (Industrial and Operations Engineering/University of Michigan): "How Accessible Are Our Cities? A Cross-sectional Analysis Of Access To Green Space"
- Emily Banach (Biosystems Engineering): "Hydrologic Analysis of Michig State University Bioretention Site"
- Arthur Endsley (University of Michigan): "Are Remotely Sensed Trends in the Built Environment and Urban Vegetation Predictive of Changes in Metropolitan Housing Markets?"
- Sanpreet Gill (Civil & Environmental Engineering): "Preliminary study of Pennsylvania ground-level ozone formation in urban and rural areas: Effects of oxides of nitrogen and temperature"
- Mohsen Goodarzi: "Community Participation in Quality Assessment for Urban Public Spaces, The Case of Kowsar Park, Malayer, Iran"
- Jason Smith (Biosystems Engineering): Decision Support Tool Development for Michigan Based Renewable Energy: An Overview of MSU Developed Tools and Their Potential for Use
- Emily Banach (Biosystems Engineering): Rainwater Commection for Tanzanian School
- Abul Mazumder (Civil and Construction Engineering/Western Michigan University): Decision Framework for Managing Non-motorized Mobility within Work Zones
- Teng Zhang (Geography, Environment and Spatial Sciences): Food Des in urban China ---- the transformation of cuisine geography in Beijing from 2008-2017
- Amy Fredeland (Pathobiology and Diagnostic Investigation): "Fine Particulate Matter Co-Exposure Enhances Pulmonary Neutrophilic, but not Eosinophilic, Inflammation in a Murine Model of Ozone-Induced Non-Atopic Asthma"
- Bernard Bahaya (Civil and Environmental Engineering): "Estimating the Benefits of Active Control of Green Stormwater Infrastructure using Hydrologic Models"
- Mahlet Garadew (Biosystems Engineering): "Potential of biomass fast pyrolsis products in energy production and use in urban farming and wastewater treatment"
- Hongbo Yang (Fisheries and Wildlife) "Conservation policies in rural areas mitigate flooding risk to cities far away"

Harsha Ratnaweera

Norwegian University of Life Sciences



Prof. Harsha Ratnaweera is the Head of Research at the Faculty of Sciences and Technology, Norwegian University of Life Sciences since 2012. He has also worked at the Norwegian Institute for Water Research (www.niva.no) for 20 years as the Director of International Projects and Innovation. Prof. Ratnaweera represents Norway at the Council of the European Water Association and serves as Chairman/Board Member in several water and environment related organizations in Norway. He has been a member of the Norwegian National Commission for UNESCO.

Plenary Title: Urban Environment: Sustainable Solutions for Water

Plenary Abstract: Water supply and wastewater management in urban areas are already under pressure duBoe to increasing population, backlog of infrastructure rehabilitation needs, lack of resources and pressures to meet increasing water supply expectations from inhabitants and authorities. Climate Change impacts make these challenges even more critical. Finding innovative solutions that are economical, technologically feasible and sustainable are the focus of many ongoing R&D activities. The use of Sustainable Urban Drainage System (SuDS) and intelligent solutions to unveil hidden reserve volumes in integrated sewer systems are potential solutions. They are promising examples that will not only reduce storm water overflows and flood events but will also enable increasing the treatment efficiencies at wastewater treatment plants.

Dan Costa

U.S. Environmental Protection Agency

Dan Costa is currently the National Program Director (NPD) for the Air Climate & Energy Research Program (ACE). Dan earned his B.S. in Biology / Chemistry from Providence College, RI, an M.S. in Environmental Sciences from Rutgers, an M.S. and a Sc.D. (doctor of science) in Physiology / Toxicology from the Harvard School of Public Health. He previously served as NPD for the Clean Air Research Program and was Chief of the Pulmonary Toxicology Branch of the National Health and Environmental Research Laboratory for 18 years.

Plenary Title: The Intersecting Realities of Air Science and Policy: Looking Through the EPA Prism

Plenary Abstract: Few would argue that clean air is not important to both human and environmental wellbeing. However, for many decades smoke billowing from industrial centers and, more recently, a complex highway network around an urban center were the hallmarks of prosperity. However, as the public came to appreciate the negatives of dirty air, they came to demand to their governments that the air had to be cleaned, and they truly believed that it could be had concurrent with prosperity and jobs. Policies evolved to achieve this end and evidentiary science underpinned policies and decisions while at the same time, promoting innovative technologies. The flow of information from the science to policy was, of course, perceived through political and economic lenses, which was brought tensions that exist to this day.

Dr. Costa's speech is sponsored by the College of Veterinary Medicine and the Jaqua Foundation.

Student Session 2A: Environmental Safety and Health

Chaired by Teng Zhang

- Yike Shen (Plant, Soil and Microbial Sciences): "Pharmaceutical Stress Changed Microbial Community and Distribution of Antibiotic Resistance Gene in Surface and Overhead Irrigated Greenhouse Lettuce"
- Elyse Eldridge (Pathobiology and Diagnostic Investigation): "Progression and Persistence of Eosinophilic Rhinitis in Ozone-Exposed Rats"
- Peyman Akbari (Pathobiology and Diagnostic Investigation):"Kinetics of silica-triggered pulmonary ectopic lymphoneogenesis and its suppression by omega-3 fatty acid consumption"
- Qiong Zhang (Geography, Environment and Spatial Sciences): "The Impact of Haze on Maternal and Infant Healthy in Xianyang City, China"

Student Session 2B: Urban Ecosystem

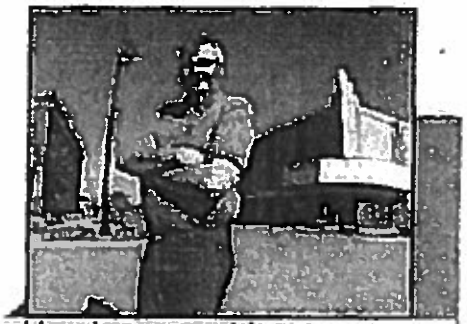
Chaired by Hogeun Park

- Rebecca Minardi (Community Sustainability):"Nature in the Shriking City: A Future for Detroit "
- Remington Moll (Fisheries and Wildlife): "Human activity and infrastructure facilitate the coexistence of competing carnivores in an extensive urban system"
- Caitlin Kirby (Earth and Environmental Science): "Exploring Urban Agriculture in South America through Interviews with a Theory of Planned Behavior Framework"
- Ramya Swayamprakash (History): "Country roads, border crossings: Transit, transportation and the urban environment in Detroit and Windsor"

Student Session 2C: Built Environment

Chaired by Meghna Chakraborty

- Eunsang Lee (Civil & Environmental Engineering):"Life cycle assessment and net environmental benefit of transparent organic photovoltaic in window and skylight application for sub-urban area"
- Yungjeong Mo (Construction Management): "Construction Work Plan Prediction for Facility Management Using Text Mining"
- Hebatalla Nazmy (Planning, Design & Construction): "Residential Interior Design and its Reflection on Urban Environment"
- Mingxuan Sun (Civil and Environmental Engineering): "Assessing Michigan's Potential for a More Sustainable Energy Mix

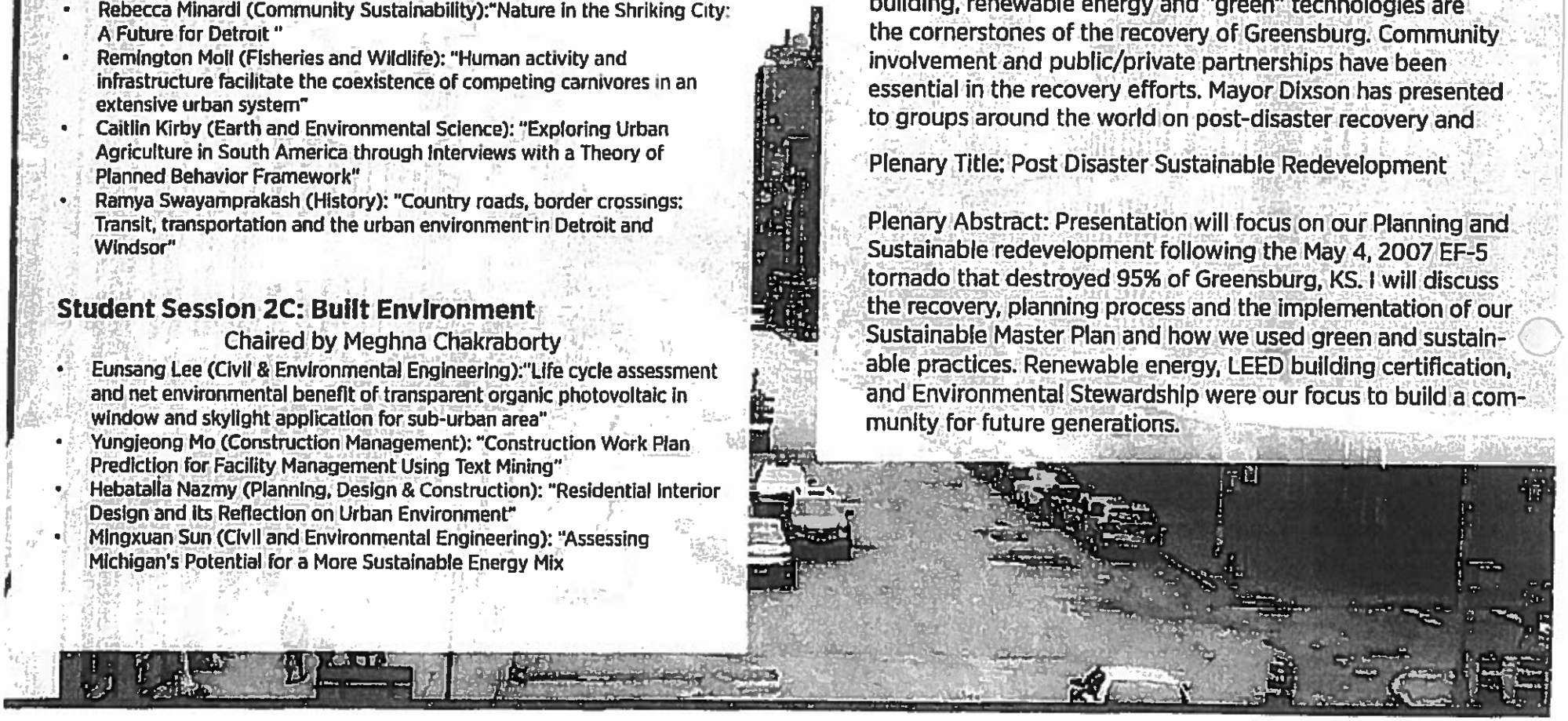


Bob Dixson
Greensburg
Kansas

Bob Dixson is a native Kansan and has been a resident of Greensburg since 1985. Dixson took office as mayor of Greensburg in May 2008 and he is leading the way in rebuilding Greensburg following the May 4, 2007, EF5 tornado that destroyed 95 percent of the community. Sustainable building, renewable energy and "green" technologies are the cornerstones of the recovery of Greensburg. Community involvement and public/private partnerships have been essential in the recovery efforts. Mayor Dixson has presented to groups around the world on post-disaster recovery and

Plenary Title: Post Disaster Sustainable Redevelopment

Plenary Abstract: Presentation will focus on our Planning and Sustainable redevelopment following the May 4, 2007 EF-5 tornado that destroyed 95% of Greensburg, KS. I will discuss the recovery, planning process and the implementation of our Sustainable Master Plan and how we used green and sustainable practices. Renewable energy, LEED building certification, and Environmental Stewardship were our focus to build a community for future generations.



Environmental Science
& Policy Program
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293 Farm Lane, Room 274
East Lansing, MI 48824
environment.msu.edu
esp@msu.edu
517-432-8296

Thank you to Hogetu Park for the photographs used in this program.

EXHIBIT D

GRETCHEN WHITMER
GOVERNOR

STATE OF MICHIGAN
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
LANSING

ORLENE HAWKS
DIRECTOR

February 20, 2019

Shawn P. McElmurry
239 E. Bloomfield Ave.
Royal Oak, MI 48073

Re: File # 33564

Dear Mr. McElmurry:

We are writing to advise you that after a thorough review and investigation of the complaint that was filed against you with this office, we have determined that a violation of the Occupational Code cannot be established. As the Department is unable to further proceed with this complaint, no further action will be taken, and this file is being closed.

Sincerely,

Investigations Section
Investigations & Inspections Division
Bureau of Professional Licensing
(517) 241-0205
BPL-Complaints@michigan.gov

/lcw

EXHIBIT E

Federal Register Notice re OMB Circular A-110

OFFICE OF MANAGEMENT AND BUDGET

OMB Circular A-110, "Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations"

AGENCY: Office of Management and Budget, Executive Office of the President

ACTION: Final Revision

SUMMARY: This notice finalizes the revision to OMB Circular A-110, required by a provision of OMB's appropriation for fiscal year (FY) 1999, contained in Public Law 105-277. The provision directs OMB to amend Section ___.36, Intangible property, of the Circular "to require Federal awarding agencies to ensure that all data produced under an award will be made available to the public through the procedures established under the Freedom of Information Act" (FOIA). Pursuant to the direction of the provision contained in Public Law 105-277, OMB published a Notice of Proposed Revision on February 4, 1999 (64 FR 5684), and a request for comments on clarifying changes to the proposed revision on August 11, 1999 (64 FR 43786). We received over 9,000 comments on the proposed revision and over 3,000 comments on the clarifying changes.

After a review of the comments on the clarifying changes, as well as the comments on the proposed revision, OMB is issuing this final revision to the Circular, as required by the provision contained in Public Law 105-277.

DATES: The revised Circular is effective November 6, 1999.

ADDRESSES: You may obtain the full text of the Circular, the text of this notice, and the text of the February 4th and August 11th notices on OMB's home page (/OMB), under the heading "Grants Management." You many obtain copies of Public Law 105-277 on the Library of Congress's home page (http://thomas.loc.gov).

FOR FURTHER INFORMATION CONTACT: F. James Charney, Policy Analyst, Office of Management and Budget, at (202) 395-3993. Please direct press inquiries to OMB's Communications Office, at (202) 395-7254.

SUPPLEMENTARY INFORMATION:

I. Background

A. The Statutory Direction to Amend Circular A-110

Congress included a two-sentence provision in OMB's appropriation for FY 1999, contained in Public Law 105-277, directing OMB to amend Section ___.36 of the Circular "to require Federal awarding agencies to ensure that all data produced under an award will be made available to the public through the procedures established under the Freedom of Information Act." The provision also provides for a reasonable fee to cover the costs incurred in responding to a request. The Circular applies to grants and other financial assistance provided to institutions of higher education, hospitals, and non-profit institutions, from all Federal agencies.

In directing OMB to revise the Circular, Congress entrusted OMB with the authority to resolve statutory ambiguities, the obligation to address implementation issues the statute did not address, and the discretion to balance the need for public access to research data with protections of the research process. In developing this revision to the Circular, OMB seeks to implement the statutory language fairly, in the context of its legislative history. This requires a balanced approach that (1) furthers the interest of the public in obtaining the information needed to validate Federally-funded research findings, (2) ensures that research can continue to be conducted in

accordance with the traditional scientific process, and (3) implements a public access process that will be workable in practice.

OMB recognizes the importance of ensuring that the revised Circular does not interfere with the traditional scientific process. Science and technology are the principal agents of change and progress, with over half of the Nation's labor productivity growth in the last 50 years attributable to technological innovation and the science that supports it. Although the private sector makes many investments in technology development, the Federal Government has an important role to play -- particularly when risks appear too great or the return to companies too speculative. Its support of cutting-edge science contributes to new knowledge and greater understanding, ranging from the edge of the universe to the smallest imaginable particles. When the Federal Government changes the requirements that apply to researchers whom it funds, it needs to ensure that the changes do not interfere with cutting-edge science and the benefits that such science provides to the American people.

During the revision process, many commenters expressed concern that the statute would compel Federally-funded researchers to work in a "fishbowl" in which they would be required to reveal the results of their research, and their research methods, prematurely. They argued that this could prevent researchers from operating under the traditional scientific process. As in many other fields of endeavor, scientists need to deliberate over, develop, and pursue alternative approaches in their research before making results public. When a scientist is sufficiently confident of their results, they publish them for the scrutiny of other scientists and the community at large. Accordingly, in light of this traditional scientific process, we have not construed the statute as requiring scientists to make research data publicly available while the research is still ongoing.

B. OMB's Two Requests for Public Comment on the Proposed Revision

To address implementation issues, OMB published two notices in the Federal Register requesting public comment on the proposed revision to the Circular. Interested parties can consult these notices, which provide extensive background information, for a more complete understanding of the final revision. The original proposal appeared on February 4, 1999 (64 FR 5684). It would have revised Section ___.36 of the Circular to read as follows:

> "(c) The Federal Government has the right to (1) obtain, reproduce, publish or otherwise use the data first produced under an award, and (2) authorize others to receive, reproduce, publish, or otherwise use such data for Federal purposes. In addition, in response to a Freedom of Information Act (FOIA) request for data relating to published research findings produced under an award that were used by the Federal Government in developing policy or rules, the Federal awarding agency shall, within a reasonable time, obtain the requested data so that they can be made available to the public through the procedures established under the FOIA. If the Federal awarding agency obtains the data solely in response to a FOIA request, the agency may charge the requester a reasonable fee equaling the full incremental cost of obtaining the data. This fee should reflect costs incurred by the agency, the recipient, and applicable subrecipients. This fee is in addition to any fees the agency may assess under the FOIA (5 U.S.C. 552(a)(4)(A))."

OMB received over 9,000 comments in response to the proposed revision. Commenters offered strongly differing views on the provision contained in P.L. 105-277. Those who supported the statutory provision stated that the public has a right to obtain research data that have been funded with tax dollars, particularly when the research findings were used by the Federal Government in developing policy or rules. These commenters also expressed the view that making this data available for public review and validation would improve the scientific process. Commenters who opposed the provision contained in P.L. 105-277 stated that they support the concepts of full disclosure and open access to information. They acknowledged that the traditional scientific process operates by requiring researchers to subject their findings to the scrutiny of the scientific community and the general public, so that those findings may be validated, corrected, or rejected. However, they expressed concern that the approach required by P.L. 105-277 would significantly impair scientific research. In their view, individuals and businesses would be reluctant to agree to participate in research, since the participants' personal privacy and proprietary information could not be assured of confidential treatment.

Many commenters on the original proposal asked OMB to clarify four concepts found in the proposed revision: "data," "published," "used by the Federal Government in developing policy or rules," and cost reimbursement. OMB agreed that clarification was needed for these concepts. On August 11, 1999, OMB published a second notice (64 FR 43786), requesting public comment on clarifications to the proposed revision:

> "(c) The Federal Government has the right to: (1) obtain, reproduce, publish or otherwise use the data first produced under an award; and (2) authorize others to receive, reproduce, publish, or otherwise use such data for Federal purposes.
>
> "(d) (1) In addition, in response to a Freedom of Information Act (FOIA) request for research data relating to published research findings produced under an award that were used by the Federal Government in developing a regulation, the Federal awarding agency shall request, and the recipient shall provide, within a reasonable time, the research data so that they can be made available to the public through the procedures established under the FOIA. If the Federal awarding agency obtains the research data solely in response to a FOIA request, the agency may charge the requester a reasonable fee equaling the full incremental cost of obtaining the research data. This fee should reflect costs incurred by the agency, the recipient, and

applicable subrecipients. This fee is in addition to any fees the agency may assess under the FOIA (5 U.S.C. 552(a)(4)(A))

"(2) The following definitions are to be used for purposes of paragraph (d) of this section:

"(i) *Research data* is defined as the recorded factual material commonly accepted in the scientific community as necessary to validate research findings, but not any of the following: preliminary analyses, drafts of scientific papers, plans for future research, peer reviews, or communications with colleagues. This "recorded" material excludes physical objects (e.g., laboratory samples). Research data also do not include: (A) trade secrets, commercial information, materials necessary to be held confidential by a researcher until publication of their results in a peer-reviewed journal, or information which may be copyrighted or patented; and (B) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, such as information that could be used to identify a particular person in a research study.

"(ii) *Published* is defined as either when: (A) research findings are published in a peer-reviewed scientific or technical journal; or (B) a Federal agency publicly and officially cites to the research findings in support of a regulation.

"(iii) *Used by the Federal Government in developing a regulation* is defined as when an agency publicly and officially cites to the research findings in support of a regulation (for which notice and comment is required under 5 U.S.C. 553).

The August 11th notice explained these clarifications were intended to implement the statute in a manner that (1) furthers the interest of the public in obtaining the information needed to validate Federally-funded research findings, (2) ensures that research can continue to be conducted in accordance with the traditional scientific process, and (3) implements a public access process that will be workable in practice. OMB received over 3,000 comments in response to the clarifying changes.

After considering the views and concerns of all the commenters, OMB now issues a final revision to the Circular. Although the final revision resembles the clarifying changes proposed on August 11, 1999, it reflects additional changes in response to the public comments.

Issuance of this final revision meets the statutory requirement imposed by OMB's appropriation for FY 1999 within the time in which it has legal effect. As OMB and the agencies develop experience with the revised Circular, changes to the data access process may be considered. These could range from technical and clarifying changes to substantive revision or rescission. OMB also endeavors to review each of its Circulars every three years.

II. Comments on the Clarifying Changes to the Proposed Revision

A. Research Data

A number of commenters objected that the proposed definition of "research data" would transfer authority to determine which records are exempt from mandatory disclosure under FOIA from Federal agencies to recipients. It was not OMB's intent to transfer the agency's FOIA exemption authority to recipients. Rather, we were providing a definition for what constitutes research "data," a term that is not defined in the provision contained in Public Law 105-277. We have always understood that it would be the recipient, not Federal agency staff, who would identify the research data in the recipient's files which are responsive to a FOIA request. In the over 12,000 comments OMB received on the proposed revision, we are not aware of any suggestion that Federal agency staff should perform the search of a recipient's offices to identify responsive research data. The fact that the recipient is responsible for searching for, and identifying, the research data does not mean the Circular has transferred the agencies' responsibility to recipients. When the recipient searches files for responsive research data, pursuant to Section ___.36(d), and in so doing applies the definition of "research data," the recipient is not exercising the agencies' authority under FOIA to determine exemptions. Rather, the recipient is simply identifying the research data that must be provided to the agency. The Federal awarding agency would retain its right to ask the recipient for additional information, if it believed the recipient's submission was not complete.

Several commenters expressed concern because the proposed definition of "research data" excluded "information which may be copyrighted or patented." These commenters believed the proposed language was too broad. They argued that, under copyright law, a wide range of materials "may be" copyrighted, and therefore that such a test could have unintended consequences for the scope of the public access process. In reviewing this language, we note that the protections available in the other parts of the definition (in particular, those protecting "trade secrets" and "commercial information") broadly protect the intellectual property rights of researchers. The proposed definition was not intended to create additional protections for intellectual property, but rather to ensure that existing protections continue to be respected. To avoid unintended consequences, and to avoid having to sort out the complexities of copyright law (and how it might apply in various areas of Federally-funded research), the final revision substitutes "similar information which is protected under law" for "information which may be copyrighted or patented." This language is intended to ensure that the public access process will not upset intellectual property rights that are elsewhere recognized and protected under the law.

Many commenters suggested a change to the definition of "research data" to ensure that appropriate data were protected from disclosure, no matter what the format. Their suggestion was to replace the word "files" with the word "information" in the phrase "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Examples of research data that might not be considered to be in the form of a "file" include video or audio tapes of research subjects. We agree with this technical change and have included it in the final revision to the Circular.

Several commenters noted that the definition of "research data" excluded "materials necessary to be held confidential until publication of their results in a peer-reviewed journal." However, since this language is not exactly the same as that used in the definition of "published," ("either when: (A) Research findings are published in a peer-reviewed scientific or technical journal; or (B) A Federal agency publicly and officially cites the research findings in support of an agency action that has the force and effect of law") it appeared that the two might be in conflict. We have revised the definition of "research data" to avoid any conflict between the two definitions.

Finally, several commenters asked for a clarification to the revision pertaining to research data already available to the public. They suggested that if a request is made for research data the recipient has already made available to the public, through a data archive or other means, further action should not be necessary. Since this principle is used when a Federal agency responds to FOIA requests, it makes sense to apply it in this case as well. However, the Federal awarding agency should respond to the FOIA request with directions on how the requester can access the publicly available research data.

B. Used by the Federal Government in Developing a Regulation

A number of commenters objected to the definition which applied the revision to research data that are used by the Federal Government in developing a "regulation." These commenters had generally been satisfied with the language found in the proposed revision ("used by the Federal Government in developing policy or rules"), because it had been used by congressional sponsors during the legislative consideration of Public Law 105-277. However, these commenters believed that the clarifying changes significantly narrowed the scope of the revision.

As we explained in the August 11th notice, its clarification was intended "to ensure that members of the public can obtain the information needed to validate those Federally-funded research findings on which Federal agencies rely when they take actions that have the force and effect of law, while at the same time ensuring that the provision contained in Public Law 105-277 can be administered in a manner that is workable for members of the public, Federal agencies and their recipients" (64 FR 43791). We sought to refer to agency actions that have "the force and effect of law" when it included "a regulation (for which notice and comment is required under 5 U.S.C. 553)" in the proposed definitions. While it is true that agencies also take actions that have "the force and effect of law" when they issue administrative orders (e.g., decisions issued by administrative law judges), we think that agencies rarely rely on Federally-funded research in the context of their administrative orders. Nevertheless, in response to the comments, we have changed the revision to refer to "an agency action that has the force and effect of law" rather than to "a regulation."

We believe this change addresses the concerns of most commenters. We note that a comment letter from Senators Shelby, Lott, Campbell, and Gramm stated that the revision should not be limited to regulations, but should apply generally to "federal actions that can dramatically impact the public." Agency actions that have "the force and effect of law" certainly represent "federal actions that can dramatically impact the public." Indeed, it is through actions that have the force and effect of law that an agency (in the words of one business association) "imposes costs, mandates, restrictions, obligations and responsibilities on the regulated community." However, as stated in the August 11th notice, we have decided not to extend the scope of the revision to agency guidance documents and other issuances that do not have the force and effect of law. We continue to believe that the public interest in such access is less than where the agency is taking action that has the force and effect of law, and that the revision would not be workable in those circumstances. Some commenters, who argued for a broader application, nevertheless were sympathetic to OMB's desire that the public access provision be workable. For example, one commenter stated that "the reproposal may be a workable *first step* in implementation. OMB could start with its August position and see how the system works."

A number of commenters raised a concern about whether requesters would be able to obtain the research data sufficiently in advance of when public comments are due on proposed regulations. These commenters offered various suggestions for how the Circular might be revised to address this concern. In the prior two notices, OMB has proposed a "reasonable time" standard for the response to a request for research data. Since OMB and the agencies do not yet have experience with implementing the public access process, we believe the "reasonable time" standard, which allows consideration of the circumstances of a particular case, is appropriate. As OMB and the agencies gain experience with the public access process, we may be able to develop further clarification on this point.

Finally, in the August 11th notice, OMB also requested comment "on whether limiting the scope of the proposed revision to regulations that meet [a] $100 million [impact] threshold would be appropriate" (64 FR 43791). Such a limitation received strong support, as well as strong opposition from commenters. For now, we have decided not to limit the scope of the revision to agency actions that have an impact in excess of $100 million. As OMB and the agencies develop experience from implementing the revision, we may revisit this issue.

C. Published

Commenters generally supported the proposed definition of "published." Some in the research community were more supportive of the first part of the definition (when "[r]esearch findings are published in a peer-reviewed scientific or technical journal") rather than the second part (when "[a] Federal agency publicly and officially cites the research findings in support of" an agency action). However, those who support the provision in Public Law 105-277 argued that the second part is necessary to ensure that the public can have access to the data that underlies Federally-funded research findings on which agencies rely to support their actions. We continue to believe that both parts of the definition are important to successful implementation of a data access provision that furthers the interest of the public in obtaining information while ensuring that research can continue to be conducted in accordance with the traditional scientific process. The only change that has been made to the definition of "published" is to make conforming revisions to reflect the previously-discussed change from "used by the Federal Government in developing a regulation" to "used by the Federal Government in developing an agency action that has the force and effect of law."

D. Cost Reimbursement

Many commenters, particularly recipients of Federally-funded research awards, expressed concern about the reimbursement mechanisms available under the proposed revision. In cases where the award's funding period expires before a request is made, neither the direct nor indirect methods of charging would allow reimbursement. Comments generally focused on the need for a separate agreement between the Federal awarding agency and the recipient, which would cover the full incremental cost of responding to the request. The process for such an agreement could work as follows:

When a request is received by the Federal awarding agency, it would pass the request on to the recipient for an assessment of the costs of complying. Once the recipient has estimated an amount, the Federal awarding agency can apply its existing standards for requesting appropriate prepayments from the requester, as with the FOIA fee. When the recipient transmits the responsive research data to the agency, it should include an accounting for the associated costs. The Federal awarding agency will then seek reimbursement from the FOIA requester and reimburse the recipient.

If we determine that this mechanism is not adequate, we will consider revising OMB Circular A-21, "Cost Principles for Educational Institutions," as necessary to ensure that recipient institutions are reimbursed for the incremental costs of complying with the provision contained in Public Law 105-277.

E. Record Retention

Some commenters questioned whether the final revision would impose additional record retention requirements on recipients. The final revision only affects Section ___36, which does not discuss recordkeeping responsibilities. Section ___53, Retention and access requirements for records, requires that "[f]inancial records, supporting documents, statistical records, and all other records pertinent to an award shall be retained for a period of three years from the date of submission of the final expenditure report." In addition, "[t]he Federal awarding agency...ha[s] the right of timely and unrestricted access to any books, documents, papers, or other records of recipients that are pertinent to the awards...The rights of access in this paragraph are not limited to the required retention period, but shall last as long as records are retained." Therefore, if a recipient chooses to keep records longer than three years, the recipient must make them available for review in response to requests from the Federal awarding agency.

F. Effective Date

Many commenters sought clarification on the effective date for the final revision. As stated above, the revised Circular is effective thirty days after it appears in the Federal Register. The revised Circular is effective for awards issued after the effective date and those continuing awards which are renewed after the effective date.

G. Projects Funded from Multiple Sources

Some commenters asked whether the final revision would apply in situations where research was funded not only by the Federal Government but also by other entities. As noted in the proposed revision, the legislative history to the provision contained in Public Law 105-277 indicates that "the amended Circular shall apply to all Federally-funded research, regardless of the level of funding or whether the award recipient is also using non-Federal funds." 144 Cong. Rec. S12134 (October 9, 1998) (Statement of Sen. Campbell). This statement is consistent with OMB's longstanding interpretation of the Circular which holds that it is applicable to all recipients, regardless of whether they also receive non-Federal funds.

H. Procurement Contracts

Some commenters asked whether the final revision would apply to research that is funded by a Federal agency through a procurement contract. However, the Circular does not apply to procurement contracts. Section ___2 (e) of the Circular defines "award," and specifically excludes "contracts which are required to be entered into and administered under procurement laws and regulations."

Issued in Washington, DC, September 30, 1999

/s/
Jacob J. Lew
Director

As directed by OMB's appropriation for FY 1999, contained in Public Law 105-277, OMB hereby amends Section ___ 36 of OMB Circular A-110 by revising paragraph (c), redesignating paragraph (d) as paragraph (e), and adding a new paragraph (d) to read as follows:

___36 Intangible property

* * * * *

(c) The Federal Government has the right to:

(1) obtain, reproduce, publish or otherwise use the data first produced under an award; and

(2) authorize others to receive, reproduce, publish, or otherwise use such data for Federal purposes.

(d) (1) In addition, in response to a Freedom of Information Act (FOIA) request for research data relating to published research findings produced under an award that were used by the Federal Government in developing an agency action that has the force and effect of law, the Federal awarding agency shall request, and the recipient shall provide, within a reasonable time, the research data so that they can be made available to the public through the procedures established under the FOIA. If the Federal awarding agency obtains the research data solely in response to a FOIA request, the agency may charge the requester a reasonable fee equaling the full incremental cost of obtaining the research data. This fee should reflect costs incurred by the agency, the recipient, and applicable subrecipients. This fee is in addition to any fees the agency may assess under the FOIA (5 U.S.C. 552(a)(4)(A))

(2) The following definitions apply for purposes of paragraph (d) of this section:

(i) *Research data* is defined as the recorded factual material commonly accepted in the scientific community as necessary to validate research findings, but not any of the following: preliminary analyses, drafts of scientific papers, plans for future research, peer reviews, or communications with colleagues. This "recorded" material excludes physical objects (e.g., laboratory samples). Research data also do not include:

(A) Trade secrets, commercial information, materials necessary to be held confidential by a researcher until they are published, or similar information which is protected under law; and

(B) Personnel and medical information and similar information the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, such as information that could be used to identify a particular person in a research study.

(ii) *Published* is defined as either when:

(A) Research findings are published in a peer-reviewed scientific or technical journal; or

(B) A Federal agency publicly and officially cites the research findings in support of an agency action that has the force and effect of law.

(iii) *Used by the Federal Government in developing an agency action that has the force and effect of law* is defined as when an agency publicly and officially cites the research findings in support of an agency action that has the force and effect of law.

EXHIBIT F

CIRCULAR A-110 REVISED 11/19/93 As Further Amended 9/30/99

TO THE HEADS OF EXECUTIVE DEPARTMENTS AND ESTABLISHMENTS

SUBJECT: Uniform Administrative Requirements for Grants and Agreements With Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations

1. Purpose. This Circular sets forth standards for obtaining consistency and uniformity among Federal agencies in the administration of grants to and agreements with institutions of higher education, hospitals, and other non-profit organizations.

2. Authority. Circular A-110 is issued under the authority of 31 U.S.C. 503 (the Chief Financial Officers Act), 31 U.S.C. 1111, 41 U.S.C. 405 (the Office of Federal Procurement Policy Act), Reorganization Plan No. 2 of 1970, and E.O. 11541 ("Prescribing the Duties of the Office of Management and Budget and the Domestic Policy Council in the Executive Office of the President").

3. Policy. Except as provided herein, the standards set forth in this Circular are applicable to all Federal agencies. If any statute specifically prescribes policies or specific requirements that differ from the standards provided herein, the provisions of the statute shall govern.

The provisions of the sections of this Circular shall be applied by Federal agencies to recipients. Recipients shall apply the provisions of this Circular to subrecipients performing substantive work under grants and agreements that are passed through or awarded by the primary recipient, if such subrecipients are organizations described in paragraph 1.

This Circular does not apply to grants, contracts, or other agreements between the Federal Government and units of State or local governments covered by OMB Circular A-102, "Grants and Cooperative Agreements with State and Local Governments," and the Federal agencies' grants management common rule which standardized and codified the administrative requirements Federal agencies impose on State and local grantees. In addition, subawards and contracts to State or local governments are not covered by this Circular. However, this Circular applies to subawards made by State and local governments to organizations covered by this Circular. Federal agencies may apply the provisions of this Circular to commercial organizations, foreign governments, organizations under the jurisdiction of foreign governments, and international organizations.

4. Definitions. Definitions of key terms used in this Circular are contained in Section ___.2 in the Attachment.

5. Required Action. The specific requirements and responsibilities of Federal agencies and institutions of higher education, hospitals, and other non-profit organizations are set forth in this Circular. Federal agencies responsible for awarding and administering grants to and other agreements with organizations described in paragraph 1 shall adopt the language in the Circular unless different provisions are required by Federal statute or are approved by OMB.

6. OMB Responsibilities. OMB will review agency regulations and implementation of this Circular, and will provide interpretations of policy requirements and assistance to insure effective and efficient implementation. Any exceptions will be subject to approval by OMB, as indicated in Section ___.4 in the Attachment. Exceptions will only be made in particular cases where adequate justification is presented.

7. Information Contact. Further information concerning this Circular may be obtained by contacting the Office of Federal Financial Management, Office of Management and Budget, Washington, DC 20503, telephone (202) 395-3993.

8. Termination Review Date. This Circular will have a policy review three years from date of issuance.

9. Effective Date. The standards set forth in this Circular which affect Federal agencies will be effective 30 days after publication of the final revision in the **Federal Register**. Those standards which Federal agencies impose on grantees will be adopted by agencies in codified regulations within six months after publication in the **Federal Register**. Earlier implementation is encouraged.

Attachment

Grants and Agreements with Institutions of Higher Education,
Hospitals, and Other Non-Profit Organizations

SUBPART A - GENERAL

Sec.

___.1 Purpose.

___.2 Definitions.

___.3 Effect on other issuances.

___.4 Deviations.

(a) The recipient may copyright any work that is subject to copyright and was developed, or for which ownership was purchased, under an award. The Federal awarding agency(ies) reserve a royalty-free, nonexclusive and irrevocable right to reproduce, publish, or otherwise use the work for Federal purposes, and to authorize others to do so.

(b) Recipients are subject to applicable regulations governing patents and inventions, including government-wide regulations issued by the Department of Commerce at 37 CFR part 401, "Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Grants, Contracts and Cooperative Agreements."

(c) The Federal Government has the right to:

(1) obtain, reproduce, publish or otherwise use the data first produced under an award; and

(2) authorize others to receive, reproduce, publish, or otherwise use such data for Federal purposes.

(d) (1) In addition, in response to a Freedom of Information Act (FOIA) request for research data relating to published research findings produced under an award that were used by the Federal Government in developing an agency action that has the force and effect of law, the Federal awarding agency shall request, and the recipient shall provide, within a reasonable time, the research data so that they can be made available to the public through the procedures established under the FOIA. If the Federal awarding agency obtains the research data solely in response to a FOIA request, the agency may charge the requester a reasonable fee equaling the full incremental cost of obtaining the research data. This fee should reflect costs incurred by the agency, the recipient, and applicable subrecipients. This fee is in addition to any fees the agency may assess under the FOIA (5 U.S.C. 552(a)(4)(A)).

(2) The following definitions apply for purposes of paragraph (d) of this section:

(i) Research data is defined as the recorded factual material commonly accepted in the scientific community as necessary to validate research findings, but not any of the following: preliminary analyses, drafts of scientific papers, plans for future research, peer reviews, or communications with colleagues. This "recorded" material excludes physical objects (e.g., laboratory samples). Research data also do not include:

(A) Trade secrets, commercial information, materials necessary to be held confidential by a researcher until they are published, or similar information which is protected under law; and

(B) Personnel and medical information and similar information the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, such as information that could be used to identify a particular person in a research study.

(ii) *Published* is defined as either when:

(A) Research findings are published in a peer-reviewed scientific or technical journal; or

(B) A Federal agency publicly and officially cites the research findings in support of an agency action that has the force and effect of law.

(iii) *Used by the Federal Government in developing an agency action that has the force and effect of law* is defined as when an agency publicly and officially cites the research findings in support of an agency action that has the force and effect of law.

(e) Title to intangible property and debt instruments acquired under an award or subaward vests upon acquisition in the recipient. The recipient shall use that property for the originally-authorized purpose, and the recipient shall not encumber the property without approval of the Federal awarding agency. When no longer needed for the originally authorized purpose, disposition of the intangible property shall occur in accordance with the provisions of paragraph ___.34(g).

___.37 Property trust relationship. Real property, equipment, intangible property and debt instruments that are acquired or improved with Federal funds shall be held in trust by the recipient as trustee for the

contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing, including the opportunity to present evidence and cross-examine witnesses.

A request for a hearing or a petition for leave to intervene must be filed with the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, Attention: Rulemakings and Adjudications Staff, or may be delivered to the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC, by the above date. A copy of the petition should also be sent to the Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, and to Ernest L. Blake, Jr., Esquire, Shaw, Pittman, Potts & Trowbridge, 2300 N Street, NW., Washington, DC 20037, attorney for the licensee.

Nontimely filings of petitions for leave to intervene, amended petitions, supplemental petitions and/or requests for hearing will not be entertained absent a determination by the Commission, the presiding officer or the presiding Atomic Safety and Licensing Board that the petition and/or request should be granted based upon a balancing of the factors specified in 10 CFR 2.714(a)(1)(i)–(v) and 2.714(d).

If a request for a hearing is received, the Commission's staff may issue the amendment after it completes its technical review and prior to the completion of any required hearing if it publishes a further notice for public comment of its proposed finding of no significant hazards consideration in accordance with 10 CFR 50.91 and 50.92.

For further details with respect to this action, see the application for amendment dated April 28, 1999, as supplemented by letters dated August 30, 1999, and September 3, 1999, which are available for public inspection at the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC, and at the local public document room located at the Ernest L. Blake, Jr., Esquire, Shaw, Pittman, Potts & Trowbridge, 2300 N Street, NW., Washington, DC 20037.

Dated at Rockville, Maryland, this 4th day of October 1999.

For the Nuclear Regulatory Commission.

Helen N. Pastis,

Senior, Project Manager, Section 1, Project Directorate I, Division of Licensing Project Management, Office of Nuclear Reactor Regulation.

[FR Doc. 99–26302 10–7–99; 8:45 am]

BILLING CODE 7590–01–P

OFFICE OF MANAGEMENT AND BUDGET

OMB Circular A–110, "Uniform Administrative Requirements for Grants and Agreements With Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations"

AGENCY: Office of Management and Budget, Executive Office of the President

ACTION: Final Revision

SUMMARY: This notice finalizes the revision to OMB Circular A–110, required by a provision of OMB's appropriation for fiscal year (FY) 1999, contained in Public Law 105–277. The provision directs OMB to amend Section __.36, Intangible property, of the Circular "to require Federal awarding agencies to ensure that all data produced under an award will be made available to the public through the procedures established under the Freedom of Information Act" (FOIA). Pursuant to the direction of the provision contained in Public Law 105–277, OMB published a Notice of Proposed Revision on February 4, 1999 (64 FR 5684), and a request for comments on clarifying changes to the proposed revision on August 11, 1999 (64 FR 43786). We received over 9,000 comments on the proposed revision and over 3,000 comments on the clarifying changes.

After a review of the comments on the clarifying changes, as well as the comments on the proposed revision, OMB is issuing this final revision to the Circular, as required by the provision contained in Public Law 105–277.

DATES: The revised Circular is effective November 8, 1999.

ADDRESSES: You may obtain the full text of the Circular, the text of this notice, and the text of the February 4th and August 11th notices on OMB's home page (http://www.whitehouse.gov/OMB), under the heading "Grants Management." You many obtain copies of Public Law 105–277 on the Library of Congress's home page (http://thomas.loc.gov).

FOR FURTHER INFORMATION CONTACT: F. James Charney, Policy Analyst, Office of Management and Budget, at (202) 395–3993. Please direct press inquiries to OMB's Communications Office, at (202) 395–7254.

SUPPLEMENTARY INFORMATION:

I. Background

A. The Statutory Direction to Amend Circular A–110

Congress included a two-sentence provision in OMB's appropriation for FY 1999, contained in Public Law 105–277, directing OMB to amend Section __.36 of the Circular "to require Federal awarding agencies to ensure that all data produced under an award will be made available to the public through the procedures established under the Freedom of Information Act." The provision also provides for a reasonable fee to cover the costs incurred in responding to a request. The Circular applies to grants and other financial assistance provided to institutions of higher education, hospitals, and non-profit institutions, from all Federal agencies.

In directing OMB to revise the Circular, Congress entrusted OMB with the authority to resolve statutory ambiguities, the obligation to address implementation issues the statute did not address, and the discretion to balance the need for public access to research data with protections of the research process. In developing this revision to the Circular, OMB seeks to implement the statutory language fairly, in the context of its legislative history. This requires a balanced approach that (1) furthers the interest of the public in obtaining the information needed to validate Federally-funded research findings, (2) ensures that research can continue to be conducted in accordance with the traditional scientific process, and (3) implements a public access process that will be workable in practice.

OMB recognizes the importance of ensuring that the revised Circular does not interfere with the traditional scientific process. Science and technology are the principal agents of change and progress, with over half of the Nation's labor productivity growth in the last 50 years attributable to technological innovation and the science that supports it. Although the private sector makes many investments in technology development, the Federal Government has an important role to play—particularly when risks appear too great or the return to companies too speculative. Its support of cutting-edge science contributes to new knowledge and greater understanding, ranging from the edge of the universe to the smallest

imaginable particles. When the Federal Government changes the requirements that apply to researchers whom it funds, it needs to ensure that the changes do not interfere with cutting-edge science and the benefits that such science provides to the American people.

During the revision process, many commenters expressed concern that the statute would compel Federally-funded researchers to work in a "fishbowl" in which they would be required to reveal the results of their research, and their research methods, prematurely. They argued that this could prevent researchers from operating under the traditional scientific process. As in many other fields of endeavor, scientists need to deliberate over, develop, and pursue alternative approaches in their research before making results public. When a scientist is sufficiently confident of their results, they publish them for the scrutiny of other scientists and the community at large. Accordingly, in light of this traditional scientific process, we have not construed the statute as requiring scientists to make research data publicly available while the research is still ongoing.

B. OMB's Two Requests for Public Comment on the Proposed Revision

To address implementation issues, OMB published two notices in the **Federal Register** requesting public comment on the proposed revision to the Circular. Interested parties can consult these notices, which provide extensive background information, for a more complete understanding of the final revision. The original proposal appeared on February 4, 1999 (64 FR 5684). It would have revised Section __.36 of the Circular to read as follows:

(c) The Federal Government has the right to (1) obtain, reproduce, publish or otherwise use the data first produced under an award, and (2) authorize others to receive, reproduce, publish, or otherwise use such data for Federal purposes. In addition, in response to a Freedom of Information Act (FOIA) request for data relating to published research findings produced under an award that were used by the Federal Government in developing policy or rules, the Federal awarding agency shall, within a reasonable time, obtain the requested data so that they can be made available to the public through the procedures established under the FOIA. If the Federal awarding agency obtains the data solely in response to a FOIA request, the agency may charge the requester a reasonable fee equaling the full incremental cost of obtaining the data. This fee should reflect costs incurred by the agency, the recipient, and applicable subrecipients. This fee is in addition to any fees the agency may assess under the FOIA (5 U.S.C. 552(a)(4)(A)).

OMB received over 9,000 comments in response to the proposed revision. Commenters offered strongly differing views on the provision contained in Public Law 105–277. Those who supported the statutory provision stated that the public has a right to obtain research data that have been funded with tax dollars, particularly when the research findings were used by the Federal Government in developing policy or rules. These commenters also expressed the view that making this data available for public review and validation would improve the scientific process. Commenters who opposed the provision contained in Public Law 105–277 stated that they support the concepts of full disclosure and open access to information. They acknowledged that the traditional scientific process operates by requiring researchers to subject their findings to the scrutiny of the scientific community and the general public, so that those findings may be validated, corrected, or rejected. However, they expressed concern that the approach required by Public Law 105–277 would significantly impair scientific research. In their view, individuals and businesses would be reluctant to agree to participate in research, since the participants' personal privacy and proprietary information could not be assured of confidential treatment.

Many commenters on the original proposal asked OMB to clarify four concepts found in the proposed revision: "data," "published," "used by the Federal Government in developing policy or rules," and cost reimbursement. OMB agreed that clarification was needed for these concepts. On August 11, 1999, OMB published a second notice (64 FR 43786), requesting public comment on clarifications to the proposed revision:

(c) The Federal Government has the right to: (1) Obtain, reproduce, publish or otherwise use the data first produced under an award; and (2) authorize others to receive, reproduce, publish, or otherwise use such data for Federal purposes.

(d)(1) In addition, in response to a Freedom of Information Act (FOIA) request for research data relating to published research findings produced under an award that were used by the Federal Government in developing a regulation, the Federal awarding agency shall request, and the recipient shall provide, within a reasonable time, the research data so that they can be made available to the public through the procedures established under the FOIA. If the Federal awarding agency obtains the research data solely in response to a FOIA request, the agency may charge the requester a reasonable fee equaling the full incremental cost of obtaining the research data. This fee should reflect costs incurred by the agency, the recipient, and applicable subrecipients. This fee is in addition to any fees the agency may assess under the FOIA (5 U.S.C. 552(a)(4)(A)).

(2) The following definitions are to be used for purposes of paragraph (d) of this section:

(i) *Research data* is defined as the recorded factual material commonly accepted in the scientific community as necessary to validate researching findings, but not any of the following: Preliminary analyses, drafts of scientific papers, plans for future research, peer reviews, or communications with colleagues. This "recorded" material excludes physical objects (e.g., laboratory samples). Research data also do not include: (A) Trade secrets, commercial information, materials necessary to be held confidential by a researcher until publication of their results in a peer-reviewed journal, or information which may be copyrighted or patented; and (B) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, such as information that could be used to identify a particular person in a research study.

(ii) *Published* is defined as either when: (A) Research findings are published in a peer-reviewed scientific or technical journal; or (B) a Federal agency publicly and officially cites to the research findings in support of a regulation.

(iii) *Used by the Federal Government in developing a regulation* is defined as when an agency publicly and officially cites to the research findings in support of a regulation (for which notice and comment is required under 5 U.S.C. 553).

The August 11th notice explained these clarifications were intended to implement the statute in a manner that (1) furthers the interest of the public in obtaining the information needed to validate Federally-funded research findings, (2) ensures that research can continue to be conducted in accordance with the traditional scientific process, and (3) implements a public access process that will be workable in practice. OMB received over 3,000 comments in response to the clarifying changes.

After considering the views and concerns of all the commenters, OMB now issues a final revision to the Circular. Although the final revision resembles the clarifying changes proposed on August 11, 1999, it reflects additional changes in response to the public comments.

Issuance of this final revision meets the statutory requirement imposed by OMB's appropriation for FY 1999 within the time in which it has legal effect. As OMB and the agencies develop experience with the revised Circular, changes to the data access process may be considered. These could range from technical and clarifying changes to substantive revision or rescission. OMB also endeavors to

review each of its Circulars every three years.

II. Comments on the Clarifying Changes to the Proposed Revision

A. Research Data

A number of commenters objected that the proposed definition of "research data" would transfer authority to determine which records are exempt from mandatory disclosure under FOIA from Federal agencies to recipients. It was not OMB's intent to transfer the agency's FOIA exemption authority to recipients. Rather, we were providing a definition for what constitutes research "data," a term that is not defined in the provision contained in Public Law 105–277. We have always understood that it would be the recipient, not Federal agency staff, who would identify the research data in the recipient's files which are responsive to a FOIA request. In the over 12,000 comments OMB received on the proposed revision, we are not aware of any suggestion that Federal agency staff should perform the search of a recipient's offices to identify responsive research data. The fact that the recipient is responsible for searching for, and identifying, the research data does not mean the Circular has transferred the agencies' responsibility to recipients. When the recipient searches files for responsive research data, pursuant to section .__36(d), and in so doing applies the definition of "research data," the recipient is not exercising the agencies" authority under FOIA to determine exemptions. Rather, the recipient is simply identifying the research data that must be provided to the agency. The Federal awarding agency would retain its right to ask the recipient for additional information, if it believed the recipient's submission was not complete.

Several commenters expressed concern because the proposed definition of "research data" excluded "information which may be copyrighted or patented." These commenters believed the proposed language was too broad. They argued that, under copyright law, a wide range of materials "may be" copyrighted, and therefore that such a test could have unintended consequences for the scope of the public access process. In reviewing this language, we note that the protections available in the other parts of the definition (in particular, those protecting "trade secrets" and "commercial information") broadly protect the intellectual property rights of researchers. The proposed definition was not intended to create additional protections for intellectual property, but rather to ensure that existing protections continue to be respected. To avoid unintended consequences, and to avoid having to sort out the complexities of copyright law (and how it might apply in various areas of Federally-funded research), the final revision substitutes "similar information which is protected under law" for "information which may be copyrighted or patented." This language is intended to ensure that the public access process will not upset intellectual property rights that are elsewhere recognized and protected under the law.

Many commenters suggested a change to the definition of "research data" to ensure that appropriate data were protected from disclosure, no matter what the format. Their suggestion was to replace the word "files" with the word "information" in the phrase "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Examples of research data that might not be considered to be in the form of a "file" include video or audio tapes of research subjects. We agree with this technical change and have included it in the final revision to the Circular.

Several commenters noted that the definition of "research data" excluded "materials necessary to be held confidential until publication of their results in a peer-reviewed journal." However, since this language is not exactly the same as that used in the definition of "published," ("either when: (A) Research findings are published in a peer-reviewed scientific or technical journal; or (B) A Federal agency publicly and officially cites the research findings in support of an agency action that has the force and effect of law") it appeared that the two might be in conflict. We have revised the definition of "research data" to avoid any conflict between the two definitions.

Finally, several commenters asked for a clarification to the revision pertaining to research data already available to the public. They suggested that if a request is made for research data the recipient has already made available to the public, through a data archive or other means, further action should not be necessary. Since this principle is used when a Federal agency responds to FOIA requests, it makes sense to apply it in this case as well. However, the Federal awarding agency should respond to the FOIA request with directions on how the requester can access the publicly available research data.

B. Used by the Federal Government in Developing a Regulation

A number of commenters objected to the definition which applied the revision to research data that are used by the Federal Government in developing a "regulation." These commenters had generally been satisfied with the language found in the proposed revision ("used by the Federal Government in developing policy or rules"), because it had been used by congressional sponsors during the legislative consideration of Public Law 105–277. However, these commenters believed that the clarifying changes significantly narrowed the scope of the revision.

As we explained in the August 11th notice, its clarification was intended "to ensure that members of the public can obtain the information needed to validate those Federally-funded research findings on which Federal agencies rely when they take actions that have the force and effect of law, while at the same time ensuring that the provision contained in Public Law 105–277 can be administered in a manner that is workable for members of the public, Federal agencies and their recipients" (64 FR 43791). We sought to refer to agency actions that have "the force and effect of law" when it included "a regulation (for which notice and comment is required under 5 U.S.C. 553)" in the proposed definitions. While it is true that agencies also take actions that have "the force and effect of law" when they issue administrative orders (e.g., decisions issued by administrative law judges), we think that agencies rarely rely on Federally-funded research in the context of their administrative orders. Nevertheless, in response to the comments, we have changed the revision to refer to "an agency action that has the force and effect of law" rather than to "a regulation."

We believe this change addresses the concerns of most commenters. We note that a comment letter from Senators Shelby, Lott, Campbell, and Gramm stated that the revision should not be limited to regulations, but should apply generally to "federal actions that can dramatically impact the public." Agency actions that have "the force and effect of law" certainly represent "federal actions that can dramatically impact the public." Indeed, it is through actions that have the force and effect of law that an agency (in the words of one business association) "imposes costs, mandates, restrictions, obligations and responsibilities on the regulated community." However, as stated in the August 11th notice, we have decided

not to extend the scope of the revision to agency guidance documents and other issuances that do not have the force and effect of law. We continue to believe that the public interest in such access is less than where the agency is taking action that has the force and effect of law, and that the revision would not be workable in those circumstances. Some commenters, who argued for a broader application, nevertheless were sympathetic to OMB's desire that the public access provision be workable. For example, one commenter stated that "the reproposal may be a workable first step in implementation. OMB could start with its August position and see how the system works."

A number of commenters raised a concern about whether requesters would be able to obtain the research data sufficiently in advance of when public comments are due on proposed regulations. These commenters offered various suggestions for how the Circular might be revised to address this concern. In the prior two notices, OMB has proposed a "reasonable time" standard for the response to a request for research data. Since OMB and the agencies do not yet have experience with implementing the public access process, we believe the "reasonable time" standard, which allows consideration of the circumstances of a particular case, is appropriate. As OMB and the agencies gain experience with the public access process, we may be able to develop further clarification on this point.

Finally, in the August 11th notice, OMB also requested comment "on whether limiting the scope of the proposed revision to regulations that meet (a) $100 million [impact] threshold would be appropriate" (64 FR 43791). Such a limitation received strong support, as well as strong opposition from commenters. For now, we have decided not to limit the scope of the revision to agency actions that have an impact in excess of $100 million. As OMB and the agencies develop experience from implementing the revision, we may revisit this issue.

C. Published

Commenters generally supported the proposed definition of "published." Some in the research community were more supportive of the first part of the definition (when "(r)esearch findings are published in a peer-reviewed scientific or technical journal") rather than the second part (when "(a) Federal agency publicly and officially cites the research findings in support of" an agency action). However, those who support the provision in Public Law 105–277 argued that the second part is necessary to ensure that the public can have access to the data that underlies Federally-funded research findings on which agencies rely to support their actions. We continue to believe that both parts of the definition are important to successful implementation of a data access provision that furthers the interest of the public in obtaining information while ensuring that research can continue to be conducted in accordance with the traditional scientific process. The only change that has been made to the definition of "published" is to make conforming revisions to reflect the previously-discussed change from "used by the Federal Government in developing a regulation" to "used by the Federal Government in developing an agency action that has the force and effect of law."

D. Cost Reimbursement

Many commenters, particularly recipients of Federally-funded research awards, expressed concern about the reimbursement mechanisms available under the proposed revision. In cases where the award's funding period expires before a request is made, neither the direct nor indirect methods of charging would allow reimbursement. Comments generally focused on the need for a separate agreement between the Federal awarding agency and the recipient, which would cover the full incremental cost of responding to the request. The process for such an agreement could work as follows:

When a request is received by the Federal awarding agency, it would pass the request on to the recipient for an assessment of the costs of complying. Once the recipient has estimated an amount, the Federal awarding agency can apply its existing standards for requesting appropriate prepayments from the requester, as with the FOIA fee. When the recipient transmits the responsive research data to the agency, it should include an accounting for the associated costs. The Federal awarding agency will then seek reimbursement from the FOIA requester and reimburse the recipient.

If we determine that this mechanism is not adequate, we will consider revising OMB Circular A–21, "Cost Principles for Educational Institutions," as necessary to ensure that recipient institutions are reimbursed for the incremental costs of complying with the provision contained in Public Law 105–277.

E. Record Retention

Some commenters questioned whether the final revision would impose additional record retention requirements on recipients. The final revision only affects Section .__36, which does not discuss recordkeeping responsibilities. Section .__53, Retention and access requirements for records, requires that "(f)inancial records, supporting documents, statistical records, and all other records pertinent to an award shall be retained for a period of three years from the date of submission of the final expenditure report." In addition, "(t)he Federal awarding agency * * * ha(s) the right of timely and unrestricted access to any books, documents, papers, or other records of recipients that are pertinent to the awards * * *. The rights of access in this paragraph are not limited to the required retention period, but shall last as long as records are retained." Therefore, if a recipient chooses to keep records longer than three years, the recipient must make them available for review in response to requests from the Federal awarding agency.

F. Effective Date

Many commenters sought clarification on the effective date for the final revision. As stated above, the revised Circular is effective thirty days after it appears in the **Federal Register**. The revised Circular is effective for awards issued after the effective date and those continuing awards which are renewed after the effective date.

G. Projects Funded From Multiple Sources

Some commenters asked whether the final revision would apply in situations where research was funded not only by the Federal Government but also by other entities. As noted in the proposed revision, the legislative history to the provision contained in Public Law 105–277 indicates that "the amended Circular shall apply to all Federally-funded research, regardless of the level of funding or whether the award recipient is also using non-Federal funds." 144 Cong. Rec. S12134 (October 9, 1998) (Statement of Sen. Campbell). This statement is consistent with OMB's longstanding interpretation of the Circular which holds that it is applicable to all recipients, regardless of whether they also receive non-Federal funds.

H. Procurement Contracts

Some commenters asked whether the final revision would apply to research that is funded by a Federal agency

through a procurement contract. However, the Circular does not apply to procurement contracts. Section .__2(e) of the Circular defines "award," and specifically excludes "contracts which are required to be entered into and administered under procurement laws and regulations."

Issued in Washington, DC, September 30, 1999.

Jacob J. Lew,

Director.

As directed by OMB's appropriation for FY 1999, contained in Public Law 105–277, OMB hereby amends Section __.36 of OMB Circular A–110 by revising paragraph (c), redesignating paragraph (d) as paragraph (e), and adding a new paragraph (d) to read as follows:

__ .36 Intangible property.

* * * * *

(c) The Federal Government has the right to:

(1) Obtain, reproduce, publish or otherwise use the data first produced under an award; and

(2) Authorize others to receive, reproduce, publish, or otherwise use such data for Federal purposes.

(d)(1) In addition, in response to a Freedom of Information Act (FOIA) request for research data relating to published research findings produced under an award that were used by the Federal Government in developing an agency action that has the force and effect of law, the Federal awarding agency shall request, and the recipient shall provide, within a reasonable time, the research data so that they can be made available to the public through the procedures established under the FOIA. If the Federal awarding agency obtains the research data solely in response to a FOIA request, the agency may charge the requester a reasonable fee equaling the full incremental cost of obtaining the research data. This fee should reflect costs incurred by the agency, the recipient, and applicable subrecipients. This fee is in addition to any fees the agency may assess under the FOIA (5 U.S.C. 552(a)(4)(A)).

(2) The following definitions apply for purposes of paragraph (d) of this section:

(i) *Research data* is defined as the recorded factual material commonly accepted in the scientific community as necessary to validate research findings, but not any of the following: preliminary analyses, drafts of scientific papers, plans for future research, peer reviews, or communications with colleagues. This "recorded" material excludes physical objects (*e.g.*, laboratory samples). Research data also do not include:

(A) Trade secrets, commercial information, materials necessary to be held confidential by a researcher until they are published, or similar information which is protected under law; and

(B) Personnel and medical information and similar information the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, such as information that could be used to identify a particular person in a research study.

(ii) *Published* is defined as either when:

(A) Research findings are published in a peer-reviewed scientific or technical journal; or

(B) A Federal agency publicly and officially cites the research findings in support of an agency action that has the force and effect of law.

(iii) *Used by the Federal Government in developing an agency action that has the force and effect of law* is defined as when an agency publicly and officially cites the research findings in support of an agency action that has the force and effect of law.

[FR Doc. 99–26264 Filed 10–7–99; 8:45 am]

BILLING CODE 3110–01–P

OFFICE OF PERSONNEL MANAGEMENT

[OPM Form of 510, Applying for a Federal Job, and OPM Form of 612, Optional Application for Federal Employment]

Proposed Collection; Comment Request

AGENCY: Office of Personnel Management.

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13, May 22, 1995), this notice announces a proposed reinstatement of the optional forms Applying for a Federal Job (OF 510) and Optional Application for Federal Employment (OF 612). The OF 510 is used to provide guidance to the general public on how to apply for Federal jobs. The form provides information on what necessary work, education, and other information applicants should provide in association with vacancy announcements and completing their application method of choice. The OF 612 is a data collection form used to collect applicant qualification information associated with vacancy announcements. The form provides necessary guidance to applicants so that they can be considered for employment when applying for Federal jobs. Presently the OF 612 is downloadable from OPM's electronic forms page on our website at http://www.opm.gov/forms. This information is necessary for Federal agencies to evaluate applicants for Federal jobs under the authority of sections 1104, 1302, 3301, 3304, 3320, 3361, 3393, and 3394 of title 5 United States Code.

We estimate 245,000 applications will be completed annually. Each form takes approximately 40 minutes to read and/or complete. The annual estimated burden is 9,800 hours.

This action is being taken to continue and expand employment application options for both Federal agencies and job seekers.

Comments on this proposed reinstatement are particularly invited on:

- Whether this collection of information is necessary for the proper performance of functions of the Office of Personnel Management, and whether it will have practical utility;
- Whether our estimate of the public burden of this collection of information is accurate, and is based on valid assumptions and methodology; and
- Ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of the appropriate technological collection techniques or other forms of information technology.

For copies of this proposal, contact Mary Beth Smith-Toomey on 202–606–8358 or e-mail at mbtoomey@opm.gov.

DATES: Comments on this proposal should be received on or before December 7, 1999.

ADDRESSES: Send or deliver comments to: U.S. Office of Personnel Management, Washington Service Center/Employment Information Office, ATTN: Rob Timmins, 1900 E Street, NW., Room 1425, Washington, DC 20415–9820.

Office of Personnel Management.

Janice R. Lachance,

Director.

[FR Doc. 99–26230 Filed 10–7–99; 8:45 am]

BILLING CODE 6325–01–U

OFFICE OF PERSONNEL MANAGEMENT

Privacy Act of 1974; Amendment to a System of Records

AGENCY: Office of Personnel Management (OPM).

EXHIBIT G

Miss. Code Ann. § 37-11-51

Current through HB 84, 273, 323, 366, 535, 572, 584, 626, 628, 630, 654, 677, 695, 713, 725, 726, SB 2802, 2864, 2947, and 2918, 2019 Regular Session, not including changes and corrections made by the Joint Legislative Committee on Compilation, Revision and Publication of Legislation. The final official version of the statutes affected by 2019 legislation will appear on Lexis Advance in September 2019.

Mississippi Code 1972 Annotated > Title 37. Education (Chs. 1 — 181) > Chapter 11. General Provisions Pertaining to Education (§§ 37-11-1 — 37-11-75)

§ 37-11-51. Documents exempt from Public Records Act.

(1)Test questions and answers in the possession of a public body, as defined by paragraph (a) of *Section 25-61-3*, which are to be used in future academic examinations, shall be exempt from the provisions of the Mississippi Public Records Act of 1983.

(2)Letters of recommendation in the possession of a public body, as defined by paragraph (a) of *Section 25-61-3*, respecting admission to any educational agency or institution, shall be exempt from the provisions of the Mississippi Public Records Act of 1983.

(3)

(a)Except as provided in paragraph (b) of this subsection, documents, records, papers, data, protocols, information or materials in the possession of a community college or state institution of higher learning that are created, collected, developed, generated, ascertained or discovered during the course of academic research, shall be exempt from the provisions of the Mississippi Public Records Act of 1983.

(b)The exemption under paragraph (a) of this subsection shall not apply to a public record that has been published, copyrighted, trademarked or patented.

(4)Unpublished manuscripts, preliminary analyses, drafts of scientific or academic papers, plans or proposals for future research and prepublication peer reviews in the possession of a community college or state institution of higher learning, or submitted and accepted for publication by publishers shall be exempt from the provisions of the Mississippi Public Records Act of 1983.

(5)Nothing in this section shall otherwise create a public record right over, or shall impede or infringe upon, the copyright in any work.

(6)School safety plan documents containing preventive services listed in *Section 37-3-83* shall be exempt from the provisions of the Mississippi Public Records Act of 1983.

History

Laws, 1983, ch. 424, § 16; Laws, 2014, ch. 409, § *1*; Laws, 2016, ch. 349, § *1*, eff from and after July 1, 2016.

Annotations

Notes

Editor's Notes —

EXHIBIT H

Va. Code Ann. § 2.2-3705.4

Current through the 2018 Special Session I of the General Assembly and Acts 2019, cc. 11, 17, 18, 49, 100,164, 225 and 282.

Code of Virginia > TITLE 2.2. ADMINISTRATION OF GOVERNMENT > SUBTITLE II. ADMINISTRATION OF STATE GOVERNMENT > PART B. TRANSACTION OF PUBLIC BUSINESS > CHAPTER 37. VIRGINIA FREEDOM OF INFORMATION ACT

§ 2.2-3705.4. Exclusions to application of chapter; educational records and certain records of educational institutions

A.The following information contained in a public record is excluded from the mandatory disclosure provisions of this chapter but may be disclosed by the custodian in his discretion, except as provided in subsection B or where such disclosure is otherwise prohibited by law. Redaction of information excluded under this section from a public record shall be conducted in accordance with § 2.2-3704.01.

1.Scholastic records containing information concerning identifiable individuals, except that such access shall not be denied to the person who is the subject thereof, or the parent or legal guardian of the student. However, no student shall have access to (i) financial records of a parent or guardian or (ii) records of instructional, supervisory, and administrative personnel and educational personnel ancillary thereto, that are in the sole possession of the maker thereof and that are not accessible or revealed to any other person except a substitute.

The parent or legal guardian of a student may prohibit, by written request, the release of any individual information regarding that student until the student reaches the age of 18 years. For scholastic records of students under the age of 18 years, the right of access may be asserted only by his legal guardian or parent, including a noncustodial parent, unless such parent's parental rights have been terminated or a court of competent jurisdiction has restricted or denied such access. For scholastic records of students who are emancipated or attending a public institution of higher education in the Commonwealth, the right of access may be asserted by the student.

Any person who is the subject of any scholastic record and who is 18 years of age or older may waive, in writing, the protections afforded by this subdivision. If the protections are so waived, such records shall be disclosed.

2.Confidential letters and statements of recommendation placed in the records of educational agencies or institutions respecting (i) admission to any educational agency or institution, (ii) an application for employment or promotion, or (iii) receipt of an honor or honorary recognition.

3.Information held by the Brown v. Board of Education Scholarship Committee that would reveal personally identifiable information, including scholarship applications, personal financial information, and confidential correspondence and letters of recommendation.

4.Information of a proprietary nature produced or collected by or for faculty or staff of public institutions of higher education, other than the institutions' financial or administrative records, in the conduct of or as a result of study or research on medical, scientific, technical or scholarly issues, whether sponsored by the institution alone or in conjunction with a governmental body or a private concern, where such information has not been publicly released, published, copyrighted or patented.

5.Information held by the University of Virginia or the University of Virginia Medical Center or Eastern Virginia Medical School, as the case may be, that contain proprietary, business-related information pertaining to the operations of the University of Virginia Medical Center or Eastern Virginia Medical

School, as the case may be, including business development or marketing strategies and activities with existing or future joint venturers, partners, or other parties with whom the University of Virginia Medical Center or Eastern Virginia Medical School, as the case may be, has formed, or forms, any arrangement for the delivery of health care, if disclosure of such information would be harmful to the competitive position of the University of Virginia Medical Center or Eastern Virginia Medical School, as the case may be.

6.Personal information, as defined in *§ 2.2-3801*, provided to the Board of the Virginia College Savings Plan or its employees by or on behalf of individuals who have requested information about, applied for, or entered into prepaid tuition contracts or savings trust account agreements pursuant to Chapter 7 (*§ 23.1-700* et seq.) of Title 23.1, including personal information related to (i) qualified beneficiaries as that term is defined in *§ 23.1-700*, (ii) designated survivors, or (iii) authorized individuals. Nothing in this subdivision shall be construed to prevent disclosure or publication of information in a statistical or other form that does not identify individuals or provide personal information. Individuals shall be provided access to their own personal information.

For purposes of this subdivision:

"Authorized individual" means an individual who may be named by the account owner to receive information regarding the account but who does not have any control or authority over the account.

"Designated survivor" means the person who will assume account ownership in the event of the account owner's death.

7.Information maintained in connection with fundraising activities by or for a public institution of higher education that would reveal (i) personal fundraising strategies relating to identifiable donors or prospective donors or (ii) wealth assessments; estate, financial, or tax planning information; health-related information; employment, familial, or marital status information; electronic mail addresses, facsimile or telephone numbers; birth dates or social security numbers of identifiable donors or prospective donors. Nothing in this subdivision, however, shall be construed to prevent the disclosure of information relating to the amount, date, purpose, and terms of the pledge or donation, or the identity of the donor unless the donor has requested anonymity in connection with or as a condition of making a pledge or donation. The exclusion provided by this subdivision shall not apply to protect from disclosure (i) the identities of sponsors providing grants to or contracting with the institution for the performance of research services or other work or (ii) the terms and conditions of such grants or contracts.

8.Information held by a threat assessment team established by a local school board pursuant to *§ 22.1-79.4* or by a public institution of higher education pursuant to *§ 23.1-805* relating to the assessment or intervention with a specific individual. However, in the event an individual who has been under assessment commits an act, or is prosecuted for the commission of an act that has caused the death of, or caused serious bodily injury, including any felony sexual assault, to another person, such information of the threat assessment team concerning the individual under assessment shall be made available as provided by this chapter, with the exception of any criminal history records obtained pursuant to *§ 19.2-389* or *19.2-389.1*, health records obtained pursuant to *§ 32.1-127.1:03*, or scholastic records as defined in *§ 22.1-289*. The public body providing such information shall remove personally identifying information of any person who provided information to the threat assessment team under a promise of confidentiality.

B.The custodian of a scholastic record shall not release the address, phone number, or email address of a student in response to a request made under this chapter without written consent. For any student who is (i) 18 years of age or older, (ii) under the age of 18 and emancipated, or (iii) attending an institution of higher education, written consent of the student shall be required. For any other student, written consent of the parent or legal guardian of such student shall be required.

History

EXHIBIT I

Quintero v. Palmer

United States District Court for the District of Nevada

July 7, 2017, Decided; July 7, 2017, Filed

Case No. 3:13-cv-00008-MMD-VPC

Reporter
2017 U.S. Dist. LEXIS 104897 *

JOHN QUINTERO, Plaintiff, v. JACK PALMER, et al., Defendants.

Prior History: *Quintero v. Palmer, 2017 U.S. Dist. LEXIS 11574 (D. Nev., Jan. 27, 2017)*

Core Terms

reconsideration motion, settlement agreement, hardcover, Amend, motion to enforce, ban, motion for leave, reply, in forma pauperis, religious, changes, Prison, composite, parties, district court, hardbound, meetings, promised, secular, issues, rights

Counsel: [*1] For Lisa Walsh, James Stogner, Edward Gibson, Pauline Simmons, Law Librarian; Added per [18] First Amended Complaint, Isidro Baca, Shannon Moile, 4th Amended Complaint - 3/17/15, Greg Cox, 4th Amended Complaint - 3/17/15, E.K. McDaniels, 4th Amended Complaint - 3/17/15, Crowder, 4th Amended Complaint - 3/17/15, Eugene Murgia, Julitte Robeson, Defendants: Clark G Leslie, LEAD ATTORNEY, Office of the Attorney General, Carson City, NV.

Judges: MIRANDA DU, UNITED STATES DISTRICT JUDGE.

Opinion by: MIRANDA DU

Opinion

ORDER

I. SUMMARY

Before the Court are four motions brought by Plaintiff John Quintero: (1) motion for reconsideration of this Court's order accepting Magistrate Judge Valerie Cooke's Report and Recommendation ("Motion for Reconsideration") (ECF No. 238); (2) motion for leave to file a supplemental brief in support of his Motion for Reconsideration ("Motion for Leave") (ECF No. 246); (3) objections to this Court's order certifying denial of in forma pauperis status on appeal based on his appeal being frivolous ("Objection") (ECF No. 247); and (4) motion for leave to file composite reply to Defendants' opposition and response[1] ("Motion for Composite Reply") (ECF No. 252). The Court has reviewed Defendants' responses [*2] (ECF Nos. 248, 250, 251, 254) and Plaintiff's reply (ECF No. 249).

For the reasons discussed below, the Court grants Plaintiff's Motion for Composite Reply, overrules Plaintiff's Objection, and denies Plaintiff's remaining motions.

II. BACKGROUND

Plaintiff, proceeding pro se and *in forma pauperis*, is an inmate in the custody of Nevada Department of Corrections ("NDOC") and is currently housed at Northern Nevada Correctional Center ("NNCC") in Carson City. Plaintiff's Fourth Amended Complaint ("FAC") alleged violations of Plaintiff's *First* and *Fourteenth Amendment* rights as well as his rights under the *Religious Land Use and Institutionalized Persons Act* ("RLUIPA"). (ECF No. 105.) In February 2016, the parties participated in a settlement conference before Magistrate Judge Valerie P. Cooke and reached resolution whereby in exchange for NDOC's promise to undertake a variety of actions, Plaintiff agreed to dismissal of this action and not to pursue a claim based on Count X of his FAC. (ECF No. 189.) Count X challenged NDOC's policy of allowing inmates to possess religious hardcover books without their covers but otherwise banning all secular hardcover books (ECF No. 105 at 21-22). The Court subsequently granted [*3]

[1] Plaintiff went ahead and filed this composite reply without leave of Court. (ECF No. 253.)

the parties' stipulation of dismissal on May 6, 2016. (ECF No. 207.) Plaintiff, however, filed two motions prior to his Motion for Reconsideration contesting the validity of the settlement agreement, specifically a Motion for Judgment on the Pleadings, which was untimely, and a Motion to Amend or Alter the Judgment ("Motion to Amend"). (ECF Nos. 201,[2] 212.) On the latter motion, Magistrate Judge Cooke issued a Report and Recommendation ("R&R") denying the Motion to Amend (ECF No. 224), which this Court then adopted over Plaintiff's objection. (ECF No. 237 at 2-7.) Plaintiff also filed a Motion to Enforce the Settlement Agreement ("Motion to Enforce") (ECF No. 228), which this Court denied as well. (ECF No. 237 at 7-12.)

III. MOTION FOR RECONSIDERATION

A. Legal Standard

Although not mentioned in the Federal Rules of Civil Procedure, motions for reconsideration may be brought under Rules 59(e) and 60(b). A Rule 60(b) Motion must be made within a reasonable time and no more than a year after the entry of the order that the party is seeking reconsideration of. *See* Fed. R. Civ. P. 60(c)(1). Under Rule 60(b), a court may relieve a party from a final judgment, order or proceeding only in the following circumstances: (1) mistake, inadvertence, surprise, [*4] or excusable neglect; (2) newly discovered evidence; (3) fraud; (4) the judgment is void; (5) the judgment has been satisfied; or (6) any other reason justifying relief from the judgment.

A district court should generally leave a previous decision undisturbed absent a showing of clear error or manifest injustice. Abada v. Charles Schwab & Co., Inc., 127 F. Supp. 2d 1101, 1102 (S.D. Cal. 2000). Reconsideration is not a mechanism for parties to make new arguments that could reasonably have been raised in their original briefs. *See* Kona Enters. v. Estate of Bishop, 229 F.3d 877, 890 (9th Cir.2000). Nor is it a mechanism for the parties "to ask the court to rethink what the court has already thought through-rightly or wrongly." United States v. Rezzonico, 32 F. Supp. 2d 1112, 1116 (D. Ariz. 1998) (internal quotation marks and citation omitted). "To succeed, a party must set forth facts or law of a strongly convincing nature to induce the court to reverse its prior decision." United States v. Westlands Water Dist., 134 F. Supp. 2d 1111, 1131 (E.D. Cal. 2001).

B. Analysis

Plaintiff now asks for reconsideration of two aspects of the Court's prior order: (1) adoption of the R&R's denial of his Motion to Amend to permit Count X in the FAC to proceed; and (2) denial of his separate Motion to Enforce the Settlement Agreement ("Motion to Enforce"). The Court will address each issue in turn below.

1. Motion to Amend

Plaintiff makes three arguments. First, Plaintiff argues that *Ashker v. Schwarzenegger [*5]* (*Ashker II*) is a published opinion and is therefore controlling law, stating that "[t]he Court may have based decision [sic] on false fact [sic] that Ashker v. Schwarzenegger is not valid binding law because it is 'unpublished.'" (ECF No. 238 at 2.) In *Ashker II*, the Ninth Circuit affirmed the district court's holding that a blanket ban of hardcover books in a California prison was unconstitutional. Ashker II, 339 Fed. Appx. 751, 752 (9th Cir. 2009), aff'g Ashker v. Schwarzenegger (Ashker I), No. C 04-1967 CW, 2006 U.S. Dist. LEXIS 14625, 2006 WL 648725, at *9 (N.D. Cal. Mar. 8, 2006). In this Court's order accepting the Magistrate's R&R, the Court stated that the basis for denying the Motion to Amend was that the Prison Legal News ("PLN") Agreement[3] did not constitute new evidence and that there was no evidence to support Plaintiff's assertions that Defendants had tricked him into settling and foregoing a future claim based on Count X. (*See* ECF No. 237 at 5.) The Court went on to mention that Plaintiff's reliance on *Ashker II* was misplaced because *Ashker II* is an unpublished decision and therefore not binding precedent on this Court. (*See id.* at 5-6.)

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[2] Plaintiff filed a motion to voluntarily dismiss the Motion for Judgment on the Pleadings. (ECF No. 210.)

[3] This is a settlement agreement resulting from *Prison Legal News v. Crawford*, No. 3:00-cv-00373. In that case, Prison Legal News, a non-profit corporation that publishes a monthly journal of corrections news and analyses, sued the Nevada Department of Prisons ("NDOP"), alleging that their ***First Amendment*** Rights had been violated. (*See Prison Legal News v. Crawford*, No. 3:00-cv-00373-HDM-WGC, Complaint (ECF No. 1.)) They alleged that the NDOP refused to allow any mail from Prison Legal News to be delivered to prisoners who were under NDOP's control. (*Id.*)

However, the opinion that Plaintiff cites in his Motion for [*6] Reconsideration[4] to hold that the "law of Ninth Circuit [sic] is that blanket bans of hardbound books are unconstitutional" is the district court's opinion,[5] which is both unpublished and not binding on this court. (ECF No. 238 at 4.) Moreover, while Plaintiff is correct that both the district court opinion and Ninth Circuit opinion in *Ashker* are "***published***" as that term is defined colloquially, in the Ninth Circuit and other federal courts "***published***" is a ***term of art*** encompassing only those court decisions that are ***published*** in the Federal Reporter or its supplement. *See Hilton v. Apple Inc., No. CV 13-7674 GAF (AJWx), 2014 U.S. Dist. LEXIS 184769, 2014 WL 10435005, at *4 (C.D. Cal. Apr. 18, 2014)* ("What's more, *Speyer* can be found only in the Federal Appendix, and is therefore not binding on the courts of this Circuit.") (citing *9th Cir. R. 36-3*). Thus, both the district court opinion and the Ninth Circuit's opinion in *Ashker* are unpublished: the district court's opinion is not reported in a Federal Reporter or supplement and the Ninth Circuit's opinion is reported in the Federal Appendix. Plaintiff's contention that *Ashker*—whether it be the district court opinion or the Ninth Circuit's opinion affirming the district court's holding—is published is without merit. There is no clear error of [*7] fact or law.

Second, Plaintiff contends that NDOC gave no consideration for his agreement to forego a future claim based on Count X. (*See* ECF No. 238 at 5-6.) In this section of his motion, he also discusses the failure of this Court to give warnings to pro se litigants on the rules of contract law. (*See id.* at 5.) This argument does not specifically address any of the six *Rule 60(b)* factors noted above. However, the Court will address the merits of Plaintiff's contention that there was no consideration given by NDOC for his agreement to forego a claim based on Count X and that he was not informed of the procedural rules of contract law, somehow making the settlement agreement void. Regarding Plaintiff's second point, parties entering into contracts do not have to be familiar with the rules of contract law in order to knowingly and voluntarily enter into those contracts. Regarding Plaintiff's first point, the Court finds that there was adequate consideration given by NDOC. Specifically, the various injunctive relief that NDOC promised to perform pursuant to the settlement agreement constituted consideration.[6]

Plaintiff's third argument raises a similar issue found in his Motion to Amend—specifically [*8] that Defendants misrepresented that the PLN Agreement addressed the hardcover book issue. (*See* ECF No. 238 at 7; *see also* ECF No. 212 at 2.) The Court will address the merits of this claim as it appears to be an allegation of fraud under the *Rule 60(b)* factors noted above.

In Plaintiff's Motion to Amend, Plaintiff alleged that during the settlement negotiations, Defendants Baca and McDaniel "made false representations that the stipulation between [NDOC] and [PLN] required the defendants to change the mailroom administrative regulations to exclude the hardbound book waiver."[7] (ECF No. 212 at 2.) He also claims that Attorney General Barraclough directed his attention to "the 'fact' that 'Director McDaniel was going to use the PLN Agreement's required changes to mailroom policies to create a no hardbound books policy for both secular and religious books." (*Id.*) Plaintiff stated that he relied on these representations as implying that *Ashker II* had been overruled. (*See id.* at 4.)

In his Motion for Reconsideration, Plaintiff states that Defendants made a false representation that the PLN Agreement addressed hardcover books. However, based on the allegations in Plaintiff's Motion to Amend, Defendants stated [*9] that the PLN Agreement required changes to be made to the mailroom policies, specifically concerning the processing and distribution of publications, which necessarily includes books. (*See* ECF No. 212 at 28-30.) McDaniel allegedly stated that during these changes he was going to also include an amendment to the waiver allowing hardcover religious texts with their covers removed in order to ban all hardcover books (*see* ECF No. 212 at 2, 17), which would ostensibly render moot Plaintiff's claim that allowing religious hardcover books and not secular ones

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[4] In his Motion to Amend, Plaintiff identifies both the district court opinion and the Ninth Circuit opinion affirming the district court's holding. (*See* ECF No. 212 at 4-5, 38-48.)

[5] Plaintiff attached a copy of the district court's opinion to his Motion for Reconsideration.

[6] If NDOC fails to perform on that promise, then this is an issue Plaintiff should address through a separate motion to enforce the settlement agreement. Plaintiff is only precluded from raising the same issues he raised in his prior Motion to Enforce, meaning that if NDOC fails to perform on some new issue then Plaintiff has grounds to bring a second motion to enforce the settlement agreement.

[7] The waiver allows only religious books that are in hardbound or hardcover form to have their covers removed. Secular books in hardbound or hardcover form are still not permitted even with their covers removed.

violated his *First* and *Fourteenth Amendment* rights.[8] In his Motion for Reconsideration, Plaintiff implies that these statements and representations were false and misled him into thinking the PLN Agreement was somehow relevant. (ECF No. 238 at 7.)

These statements and representations are not clearly false nor do they amount to fraudulent conduct that would render the settlement agreement void. As noted previously, the PLN Agreement requires certain changes to be made to NDOC's mailroom policies regarding the processing of publications. If NDOC decides to add additional changes at that time as well, then they are permitted to do so. Moreover, the **[*10]** law that Plaintiff cites in his Motion for Reconsideration about psychological coercion is inapposite; he cites to *Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)*, which concerns psychological coercion in the context of police custody and interrogation, not when negotiating a contract. (ECF No. 238 at 7.) Thus, the PLN Agreement was mentioned because it required general changes regarding the processing of publications, and NDOC officials planned to change the hardcover book policy to an outright ban upon making those changes.[9]

For the aforementioned reasons, the Court denies Plaintiff's Motion for Reconsideration concerning the portion of the Court's order addressing Plaintiff's Motion to Amend.

2. Motion to Enforce the Settlement Agreement

Plaintiff raises three issues relating to his Motion to Enforce (ECF No. 228). The Court retains jurisdiction over enforcement of the settlement agreement,[10] and will address these issues.

First, Plaintiff states that his prior motion raised the complaint that his RRT application had not yet been responded to and not that the application had not yet been granted. (ECF No. 238 at 8-9.) Based on Defendants' response, Plaintiff's RRT application was rejected one day after he filed his Motion for **[*11]** Reconsideration. (*See* ECF No. 248 at 8-9; *see also* ECF No. 248-3 at 2.) Therefore, this issue has been rendered moot.

Second, Plaintiff states that "the OP 722 was promised to be made available on or about April 23 [sic] 2016 [sic] it was not issued on that date[] [and] it is still not issued." (ECF No. 238 at 10.) This claim is different from the claim he raised in his Motion to Enforce, where Plaintiff complained about inmates' lack of access to ***research*** computers and the failure of the binders to include adequate case law. (*See* ECF No. 228 at 5.) Plaintiff is essentially asking the Court to reconsider an earlier ruling based on unrelated disputes having to do with OP 722. To the extent Plaintiff contends that NDOC failed to implement OP 722 within the time frame promised in the settlement agreement, Plaintiff must bring a new motion to enforce the settlement agreement.

Third, Plaintiff states that no Spanish AA meetings have been put in place. (*See* ECF No. 238 at 10.) This is distinct from the issue concerning Spanish AA meetings raised in his Motion to Enforce, which specifically targeted Chaplain Stogner's and other NDOC staff's alleged obstruction in setting up the schedule for **[*12]** the AA meetings. (*See* ECF No. 228-1 at 26.) Defendants respond that the reason for a lack of Spanish AA meetings is that Plaintiff has failed to find a non-inmate volunteer to lead the sessions. (ECF No. 248 at 9.) To the extent that this disagreement concerns who is responsible for finding and selecting the non-

[8] This does not render moot a claim that a ban on all hardcover books in NDOC is unconstitutional, but this was not Plaintiff's claim in his FAC (Count X). (*See* ECF No. 105 at 21 ("[t]he following civil rights has been violated: ***First Amendment*** prohibition of endorsing religious book over secular" and "[t]he ***Fourteenth Amendment*** requires equal application of the laws to all classifications of persons and legal activity").) However, Plaintiff's belief that McDaniel's ability to ban all hardcover books implied that *Ashker II* was no longer good law is not an affirmative misrepresentation on McDaniel's part requiring this Court to void the settlement agreement. Plaintiff's decision to settle, which requires him not to bring any claims against NDOC "relating to issues or claims arising from the disputes and those claims asserted, or which could have been asserted" (*see* ECF No. 233-2 at 7), is an unfortunate misunderstanding based on Plaintiff's assumption that McDaniel could only issue a total ban on hardcover books if the law allowed it.

[9] Because the PLN Agreement allows NDOC to consider safety and security concerns when changing its policies, from NDOC's point of view the change to an outright ban on hardcover books was "sanctioned" by the Agreement. (*See* ECF No. 212 at 17.)

[10] Section IV of the agreement allows Plaintiff to make a motion to the Court to reopen this case and seek enforcement of the agreement's terms for two years following the date that the agreement is fully executed. (ECF No. 199-1 at 7.) The agreement was signed in April of 2016. (*See id.* at 10.)

inmate volunteer to lead the Spanish AA meetings, this is a distinct issue that Plaintiff must raise in a new motion to enforce the settlement agreement.

The Court therefore declines to reconsider its order concerning Plaintiff's Motion to Enforce but grants Plaintiff leave to file a new motion to enforce the settlement agreement.

IV. MOTION FOR LEAVE (ECF No. 246)

Plaintiff requests leave to supplement his Motion for Reconsideration "due to the oppressive restrictions on the amount of time an inmate may do legal ***research*** at Northern Nevada Correction Center." (ECF No. 246 at 1.) The issues raised in Plaintiff's Motion for Reconsideration have been thoroughly briefed and more legal ***research*** will not be helpful to the Court's consideration. Accordingly, Plaintiff's Motion for Leave is denied.

V. OBJECTION (ECF No. 247)

Plaintiff objects to this Court's order wherein it certified **[*13]** to the Ninth Circuit that "any in forma pauperis appeal from its order denying the motion to amend judgment . . . would not be taken in good faith" and, therefore, "Plaintiff's *in forma pauperis* status should be revoked on appeal." (ECF No. 245 at 1.) However, to the extent Plaintiff disagrees with the Court's certification, the proper recourse is to file a motion to proceed in forma pauperis with the court of appeals.[11]

Thus, Plaintiff's Objection to this Court's certification of denial of forma pauperis status on appeal is overruled.

VI. MOTION FOR COMPOSITE REPLY (ECF No. 252)

Plaintiff requests leave of court to file late replies regarding his Motion for Reconsideration and his Motion for Leave. (ECF No. 252 at 1.) Plaintiff's motion is granted.

VII. CONCLUSION

The Court notes that the parties made several arguments and cited to several cases not discussed above. The Court has reviewed these arguments and cases and determines that they do not warrant discussion as they do not affect the outcome of the pending motions.

The Court therefore orders that Plaintiff's motion for reconsideration (ECF No. 238) and motion for leave to file a supplemental brief (ECF No. 246) are denied. The Court **[*14]** overrules Plaintiff's Objection (ECF No. 247). The Court grants Plaintiff's motion for leave to file a composite reply (ECF No. 252).

DATED THIS 7th day of July 2017.

/s/ Miranda Du

MIRANDA DU

UNITED STATES DISTRICT JUDGE

End of Document

[11] ***Federal Rule of Appellate Procedure 4(a)(5)*** permits a party to file a motion to proceed on appeal in forma pauperis in the court of appeals within thirty (30) days after service of the district court's notice denying in forma pauperis status on appeal.

STATE OF MICHIGAN
COURT OF CLAIMS

MARC EDWARDS,
An individual,

Plaintiff,

v

Case No. 18-000110-MZ

WAYNE STATE UNIVERSITY,
a Michigan state public body,

HON. Christopher M. Murray

Defendant,

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

Linda M. Galante (P35914)
Kristen L. Cook (P75034)
Office of the General Counsel
Wayne State University
Attorneys for Defendant
656 West Kirby, 4249 FAB
Detroit, MI 48202
(313) 577-2268

PROOF OF SERVICE

STATE OF MICHIGAN)
)*s.s.*
COUNTY OF WAYNE

Dana Rudnicki, being first duly sworn, deposes and says that on the 11th day of April, 2019, she served a copy of Defendant Wayne State University's 4/11/2019 Motion for MCR 2.116(C)(10) Summary Disposition and Brief in Support upon Derk A. Wilcox to his email address at wilcox@mackinac.org.

Dana Rudnicki

Subscribed and sworn to me this
11th day of April, 2019.

Verena L. Reddick

VERENA L. REDDICK
Notary Public, State of Michigan
County of Wayne
My Commission Expires Jul. 29, 2025
Acting in the County of _____