STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

CHETLY ZARKO,

Intervenor-Appellant,

v

Supreme Court No. 140929
Court of Appeals No. 288977

HOWELL EDUCATION ASSOCIATION, MEA/NEA, DOUG NORTON, JEFF HUGHEY, JOHNSON McDOWELL, and BARBARA CAMERON,

Plaintiffs-Appellees

BRIEF OF AMICI CURIAE MICHIGAN PRESS ASSOCIATION AND MACKINAC CENTER FOR PUBLIC POLICY IN SUPPORT OF LEAVE TO APPEAL

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INTEREST OF AMICI CURIAE

Amicus Michigan Press Association (MPA) is the official trade association for the newspapers of Michigan. The MPA was founded in 1868 to become an advocate for Michigan newspapers as well as a tool to collectively deal with the problems affecting newspapers. The MPA has over 320 member newspapers and websites read by 6.9 million adults across Michigan.

The Mackinac Center for Public Policy is a nonpartisan research and educational institute dedicated to improving the quality of life for all Michigan citizens by promoting sound solutions to state and local policy questions. The Mackinac Center assists policymakers, scholars, businesspeople, the media and the public by providing objective analysis of Michigan issues. The goal of all Center reports, commentaries and educational programs is to help Michigan citizens and other decision-makers better evaluate policy options. The Center engages in investigative journalism and publishes an online news source, Michigan Capitol Confidential.

JURISDICTIONAL STATEMENT

Amici curiae do not contest jurisdiction. The trial court declared that numerous e-mails should be provided to Intervenor Chetly Zarko, who sought them pursuant to the Freedom of Information Act (FOIA). But the trial court stayed its order pending appeal, and the Court of Appeals overturned the trial court's declaratory relief. Thus, Zarko has still not received the requested material, and there is a live controversy in this case.

STATEMENT OF QUESTION INVOLVED

Under the Freedom of Information Act, do "public records" include e-mails sent and received by public school teachers on an e-mail system provided by the school district?

Intervenor-Appellant says "Yes."

Plaintiffs-Appellees say "No."

Court of Appeals says "No."

Amici Curiae say "Yes."

INTRODUCTION

This case will determine whether FOIA will remain an affordable and effective way for the public to monitor the activity of state and local officials. The Court of Appeals' decision misconstrues the term "public record" in a manner that will lead to litigation and frustrate the purpose of the act. Further, the Court of Appeals' construction of the statute would prevent citizens from discovering illegal acts committed by governmental officials, particularly since it would often leave a direct supervisor, who will frequently have a personal incentive to hide a subordinate's wrongdoing, in charge of bringing the employee's inappropriate or criminal acts to light. The Court of Appeals' decision should be reversed.

STATEMENT OF FACTS

In March 2007, Intervenor Chetly Zarko began filing a series of Freedom of Information Act requests that sought e-mails sent on the Howell Public Schools e-mail system on or after January 1, 2007, both to and from three Howell Public School teachers. The three teachers were prominent in the Howell Education Association (HEA), the local Michigan Education Association (MEA) affiliate: (1) Doug Norton, president of the HEA; (2) Jeff Hughey, HEA vice president for bargaining; and (3) Johnson McDowell, HEA vice president for grievances. Zarko also specifically sought any e-mails to and from these three employees and Barbara Cameron, an MEA UniServ Director. Zarko's requests were made in the context of heated negotiations, covered by the local media, over a new collective bargaining agreement between the HEA and the school district.

In order to use the Howell Public Schools e-mail system, a school employee had first to view a sign-in screen that contained the following warning:

> This is a Howell Public Schools computer system. Use of this system is governed by the Acceptable Use Policy, which may be viewed at http://howellschools.com/aup.html.
>
> All data contained on any school computer system is owned by Howell Public Schools, and may be monitored, intercepted, recorded, read, copied, or captured in any manner by authorized school personnel. Evidence of unauthorized use may be used for administrative or criminal action.
>
> By logging onto this system, you acknowledge your consent to these terms and conditions of use.

The school district's acceptable use policy stated that "Howell Public Schools provides technology in furtherance of the educational goals and mission of the District" and contained the following terms and conditions:

> 4. Users of District technology will be responsible for its use and misuse. Appropriate use of District technology is defined as use in furtherance of the instructional goals and mission of the District. Users should consider any use, which does not fall under this definition of appropriate use as being potential misuse for which a loss of technology use and disciplinary consequences may occur.
>
> . . .
>
> 10. E-mail is <u>not</u> considered private communication. It may be re-posted. It may be accessed by others and is subject to subpoena. School officials reserve the right to monitor any and all activity on the district's computer system and to inspect any user's e-mail files.[1]

[1] The district's acceptable use policy was attached as Exhibit B to the document titled "Response to Plaintiffs' Brief in Support of Temporary Restraining Order and Order to Show Cause."

After Zarko filed his FOIA requests, the school district parties[2] suggested that a "friendly lawsuit" be filed. Subsequent to this suggestion, the union parties — i.e., the four individuals, the HEA, and the MEA — filed a "reverse FOIA" lawsuit against the school district parties seeking, in part, a declaration that both "personal e-mail" between the union parties and e-mail pertaining to union business not be considered "public records" under FOIA. Zarko intervened.

The school district parties provided Zarko with the subject titles of numerous e-mails that satisfied his request. This allowed Zarko to narrow the list of e-mails he was requesting, but thousands of e-mails remained of interest. These e-mails underwent an arduous in-camera review by a special discovery master at the behest of the trial court, and on October 2, 2008, the trial court declared that all of these e-mails were "public records." On November 20, 2008, the trial court stayed that judgment pending appeal.

On January 26, 2010, the Court of Appeals published an opinion overturning the trial court's holding that all of the e-mails were "public records." Zarko filed a motion for reconsideration. That motion was denied on March 4, 2010.

Zarko filed a timely application for leave to appeal with this Court.

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[2] For ease of reference, the Howell Board of Education and Howell Public Schools will be referred to as "the school district parties." The HEA, MEA, and plaintiffs affiliated with the two unions will be referred to as "the union parties." Finally, Chetley Zarko will be referred to as either "Zarko" or "Intervenor."

ARGUMENT

I. General issues related to FOIA

A. Standard of review

In *Herald Co Inc v Eastern Michigan University Board of Regents*, 475 Mich 463 (2006), this Court clarified the standard of review for FOIA cases:

> First, we continue to hold that legal determinations are reviewed under a de novo standard. Second, we also hold that the clear error standard of review is appropriate in FOIA cases where a party challenges the underlying facts that support the trial court's decision. In that case, the appellate court must defer to the trial court's view of the facts unless the appellate court is left with the definite and firm conviction that a mistake has been made by the trial court. Finally, when an appellate court reviews a decision committed to the trial court's discretion . . . we hold that the appellate court must review the discretionary determination for an abuse of discretion and cannot disturb the trial court's decision unless it falls outside the principled range of outcomes.

Id. at 471-72.

B. FOIA is meant to maximize public access to information concerning the functioning of government

MCL 15.231(2) sets forth the legislatively enacted purpose of FOIA:

> It is the public policy of this state that **all persons . . . are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees**, consistent with this act. The people shall be informed so that they may fully participate in the democratic process.

Id (emphasis added).

The courts have recognized this public policy. For instance, this Court has stated that FOIA is "a prodisclosure act." *Coblentz v Novi*, 475 Mich 558, 572 (2006). The Court of Appeals has previously stated:

> The FOIA protects a citizen's right to examine and to participate in the political process. *Booth Newspapers, Inc v Univ of Michigan Bd of Regents*, 444 Mich 211, 231 (1993). By requiring the public disclosure of information regarding the affairs of government and the official acts of public officials and employees, the act enhances the public's understanding of the operations or activities of the government.

Kocher v Dep't of Treasury, 241 Mich App 378, 380-81 (2000). FOIA was described as "a manifestation of this state's public policy favoring public access to government information, recognizing the need that citizens be informed as they participate in democratic governance, and the need that public officials be held accountable for the manner in which they perform their duties." *Manning v East Tawas*, 234 Mich App 244, 248 (1999) (emphasis added); see also *Messenger v Ingham Co Prosecutor*, 232 Mich App 633, 641 (1998) (noting state's policy in holding public officials accountable for the way in which they carry out their jobs). FOIA's intent "is to establish a philosophy of full disclosure by public agencies and to deter efforts of agency officials to prevent disclosure of mistakes and irregularities committed by them or the agency and to prevent needless denials of information." *Schinzel v Wilkerson*, 110 Mich App 600, 604 (1981) (emphasis added). FOIA "is intended primarily as a prodisclosure statute and the exemptions to disclosure are to be narrowly construed." *Swickard v Wayne Co Medical Examiner*, 438 Mich 536, 544 (1991).

The legislative desire to provide easy access to governmental information is present throughout FOIA statutes. FOIA requests can be submitted by a traditional letter, an e-mail, or facsimile. MCL 15.235(1). The government is given five business days to respond to FOIA requests, MCL 15.235(2), and may seek only a single ten-business-day extension, MCL 15.235(2)(d). The public is given the right to "inspect, copy, or receive copies of the requested public record," MCL 15.233(1), or personally examine public records, MCL 15.233(3). FOIA allows the government to charge only a minimal fee for meeting a FOIA request — compensation for the marginal cost of making copies of the requested documents and for the hourly wages of, at most, the lowest-paid individual who could capably retrieve the information. MCL 15.234. If the requesting party needs to file a lawsuit, that suit can be filed where the party resides or where its principal place of business is located. MCL 15.240(4). Courts are required to grant reasonable attorney fees if a FOIA request was improperly denied. MCL 15.240(6). If a court determines that the public body arbitrarily and capriciously denied a FOIA request, a $500 fine is mandated. MCL 15.240(7). Finally, the statute indicates that the courts are supposed to take special care to expedite FOIA hearings. MCL 15.240(5).

Each of the above provisions of FOIA indicates that the public should find this process easy and affordable.

C. Reverse FOIAs

Generally, a party filing a reverse FOIA suit seeks to "enjoin rather than compel disclosure of pubic records." *Tobin v Michigan Civil Service Comm*, 416 Mich

661, 663 (1982). While the union parties do not make a privacy-exemption claim, it is instructive to review how such reverse FOIA claims generally proceed. This Court noted that under MCL 15.243, a public body retains discretion over disclosure and is not required to withhold material that qualifies as 'exempt':

> We find nothing to indicate that the Legislature intended the Freedom of Information Act to require nondisclosure. . . .
>
> . . .
>
> The plaintiffs argue that it would be against public policy to permit a public body to disclose information exempted from disclosure under FOIA. We can accept plaintiffs' argument that most information exempted from disclosure under FOIA should not be routinely disclosed without accepting the argument that the FOIA absolutely prohibits such disclosures. . . .
>
> The ability to make a discretionary disclosure not required by the FOIA does not allow a public body to disregard other substantive limitations on disclosure. . . . [O]ther laws may affirmatively prohibit disclosure of information under certain circumstances. However, a party suing to prevent disclosure must rely on that substantive law to prevent disclosure. The FOIA provides no assistance for the plaintiff in a reverse FOIA lawsuit. In effect, a reverse FOIA suit to prevent disclosure of information within a FOIA exemption must be evaluated as if the FOIA did not exist.

Tobin, 416 Mich at 668-70; see also *Michigan Federation of Teachers v Univ of Michigan*, 481 Mich 657, 665 (2008).

In *Bradley v Saranac Community Schools Board of Education*, 455 Mich 285 (1997), this Court discussed common-law privacy and the courts' general course of analysis in reverse FOIA suits that involve MCL 15.243(a)(i), which exempts "public disclosure of the information [that] would constitute a clearly unwarranted invasion of an individual's privacy":

> Although the Legislature has provided scant guidance on the concept of privacy, it has specified that only clearly unwarranted invasions of privacy would be exempted. By using a higher standard, the Legislature permits disclosures of public records that are invasions of privacy, as long as that invasion of privacy is not clearly unwarranted. Therefore, an invasion of privacy that is less than clearly unwarranted cannot stand as an obstacle to disclosure. This fact underscores the logic of analyzing a reverse FOIA claim under the FOIA. If a court determines that the privacy exemption does not apply, no further analysis under invasion of privacy is necessary. After all, if an invasion of privacy does not satisfy the heightened clearly unwarranted standard under the privacy exemption, a lesser finding of invasion of privacy cannot serve as a basis to preclude disclosure because the FOIA, as a statute, governs regardless of whether there may have been a claim under the common law.
>
> Thus, in a reverse FOIA action, a determination whether the FOIA requires disclosure of the requested documents should be the first step in an action challenging an FOIA request. A finding that the documents are public records under the FOIA, and no exemptions apply, requires that the documents be disclosed. Additionally, a finding that the privacy exemption does not apply obviates the need for an analysis under the common law, because, irrespective of whether there was a common-law claim, the FOIA governs the resolution of the case. . . .
>
> Principles of common-law privacy do come into play when the court is determining whether information of a personal nature constitutes a "clearly unwarranted invasion of an individual's privacy."

Bradley, 455 Mich at 301-02 (footnotes omitted).

In *Bradley*, members of the public sought access to school employees' personnel files. The employees argued that disclosing the files would violate the process set forth in a collective bargaining agreement. This Court held a school district could "not eliminate its statutory obligations to the public merely by contracting to do so" with another party. *Id*. at 303. This Court stated: "The FOIA requires disclosure of all public records not with an exemption. No exemption provides for a public body to bargain away the requirements of the FOIA." *Id*.

(footnote omitted); See also *Kent Co Deputy Sheriff's Ass'n v Kent Co Sheriff*, 463 Mich 353, 361 (2000) (quoting *Bradley*); and *Detroit Free Press v Detroit*, 480 Mich 1079 (2008) (citing *Kent County Sheriff's Ass'n*).

Thus, privacy concerns and negotiated agreements are typically insufficient to overcome the public's right to prompt, affordable information from the government. As the instant case clearly illustrates, reverse FOIA suits impede timely access to public documents. The initial request was filed in March 2007, yet more than three years later, the Intervenor still has not seen most of the documents the trial court indicated he was entitled to. Moreover, reverse FOIA suits discourage the public from using FOIA, since many parties who would seek public documents conclude instead that they cannot afford the considerable money necessary to hire an attorney for the subsequent litigation. Even if the party believes he or she will win the suit and receive attorney fees and court costs, he or she may find it difficult to raise the money to pay a lawyer while the case is being litigated. This considerable expenditure stands in stark contrast to the expressly limited copying and labor fees set forth in FOIA.

II. All e-mails generated by school employees on public school computer systems are public records.

The union parties sought a declaration regarding the e-mails that have not been disclosed to date. At the Court of Appeals, they made the following relevant arguments: (1) "purely personal" e-mails are not public records; and (2) "internal

union communications" are not public records.[3] These arguments were mistakenly accepted by the Court of Appeals.

A. Union parties' Court of Appeals arguments

The first argument the union parties presented at the Court of Appeals was that "purely personal" e-mails are not public records. Thus, the union parties did not claim that the FOIA privacy exemption applied or that any common law or other statutory privacy concern prevented disclosure. The union parties argued that in order to constitute a "public record," a writing must pertain to an "official function" of a public body and "personal e-mails" do not meet this test. Oddly, it was not until their reply brief that the union parties made mention of the 3-3 decision of this Court wherein the official-function question is discussed: *Kestenbaum v Michigan State University*, 414 Mich 510 (1982).

Most of the union parties' arguments related to "internal union communications" mirrored those made for "purely personal" e-mails.

B. The Court of Appeals' decision in the instant case

The Court of Appeals' decision largely accepts the union parties' arguments and contains numerous flaws. The most important flaw lies in the Court of Appeals' erroneous treatment of the term "official function." This error, discussed in the section below, serves as a foundation for the Court of Appeals' outcome.

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[3] The union parties also made a third argument related to what they erroneously contended were admissions made by the school district at the trial court. Given that any admission of the school district would not have been binding on Intervenor Zarko, the argument was without merit and the Court of Appeals did not bother to address it.

1. Flawed analysis of "official function"

The Court of Appeals narrowly construed the term "official function" and declined to apply the term's broad definition from *Kestenbaum*. The Court of Appeals stated:

> In the present case, defendants [the school district parties] can function without the personal emails. There is nothing about the personal emails, given that by their very definition they have nothing to do with the operation of the schools, which indicates that they are required for the operation of an educational institution. Thus, we decline to conclude that they are equivalent to the student information at issue in *Kestenbaum*. Furthermore, "unofficial private writings belonging solely to an individual should not be subject to public disclosure merely because that individual is a state employee." [*Kestenbaum*, 414 Mich at 539]. We believe the same is true for all public body employees. Absent specific legislative direction to do so, we are unwilling to judicially convert every email ever sent or received by public body employees into a public record subject to FOIA.

Slip opinion at 5.

The Court of Appeals classified the "personal emails" as "unofficial" by dismissing language from *Kestenbaum* that indicates that an educational institution, such as a state university (or in this case, a school district), performs an official function by "facilitating communication" and preventing "havoc" through such systems as an e-mail network. The Court of Appeals likewise ignored the fact that here the school district's acceptable use policy expressly states that the school district "provides technology in furtherance of the educational goals and mission of the District" and that "[a]ppropriate use of District technology is defined as use in furtherance of the instructional goals and mission of the District." Here, the proper "official function" is the providing of an e-mail system generally — not an e-mail system less any "personal emails." While feigning deference to the Legislature, the

Court of Appeals' decision has the radical effect of amending the statute to vastly limit the public's ability to obtain "complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees."

This Court recently discussed statutory interpretation:

> When interpreting a statute, our primary obligation is to ascertain and effectuate the intent of the Legislature. To do so, we begin with the language of the statute, ascertaining the intent that may reasonably be inferred from its language. In interpreting the statute at issue, we consider both the plain meaning of the critical word or phrase as well as its placement and purpose in the statutory scheme. As far as possible, effect should be given to every phrase, clause, and word in a statute.

United States Fidelity Ins & Guar Co v Michigan Catastrophic Claims Ass'n, 482 Mich 414, 423 (2008) (quotation marks and footnote omitted).

MCL 15.232(e) states:

> (e) "Public record" means a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function, from the time it is created. Public record does not include computer software. This act separates public records into the following 2 classes:
>
> > (i) Those that are exempt from disclosure under [MCL 15.243].
> >
> > (ii) All public records that are not exempt from disclosure under [MCL 15.243] and which are subject to disclosure under this act.

Id.

The relevant sentence of MCL 15.232(e) states, " 'Public record' means a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function, from the time it is created." The words "in

the performance of an official function" constitute an adverbial prepositional phrase that modifies how a "public record" is "prepared, owned, used, [possessed], or retained by a public body." This phrase is relevant because it is the one to which the union parties' have appealed, claiming the e-mails were not involved in the performance of an official function.

The union parties are mistaken in their interpretation, as we discuss below, but first, in the interest of due diligence and a complete analysis of the entire sentence, we need to examine the meaning of the remainder of the sentence: "from the time it is created." Moreover, though this "creation" phrase is not central, it is discussed in the Court of Appeals' opinion in the instant case and in the longstanding FOIA case *Detroit News v Detroit,* 204 Mich App 720 (1994).

But discerning the meaning of the rest of the sentence — "from the time it is created" — requires patience. The pronoun "it" in the phrase could, at first blush, refer to three possible antecedent nouns in the sentence: (1) "writing"; (2) "body" (in the phrase "public body"); and (3) "function" (in the phrase "official function").[4] Only the first option causes any analytical complexity.

A moment's reflection shows that "it" cannot refer to "writing." True, there would be no problem if the sentence spoke only of "a writing *prepared*" by a public body, since the phrase "from the time it is created" would be construed to mean,

[4] Admittedly, because of this initial ambiguity, this sentence probably should not serve as a model of legislative draftsmanship. Also note that there is technically a fourth possibility — i.e., that "it" refers to "public record." While this possibility is grammatically coherent — "public record" is, after all, an antecedent noun — it would be logically incoherent, because the resulting statement would define a public record in terms of itself, thereby making the definition circular.

" 'Public record' means a writing prepared . . . by a public body in the performance of an official function, from the time the writing is created." Such an interpretation would be consistent with the intent of FOIA.

The idea that "it" refers to "writing" breaks down, however, when the remaining participles — "owned, used, [possessed], or retained by" — are considered. With these words, we would be forced to read, " 'Public record' means a writing … owned, used, [possessed], or retained by a public body in the performance of an official function, from the time the writing is created." While such a reading does not constitute an obvious grammatical error, it is clearly wrong: it would undermine FOIA's intent. Under this misconstruction of the statute, no writing would be subject to FOIA if it was not "owned, used, [possessed], or retained by a public body in the performance of an official function" *from the time the writing was created.* For instance, a scientific study requested of a private research firm by a committee of the Legislature would not later be subject to FOIA under this construction of the language, since the study was created before it was "owned, used, [possessed], or retained by a public body in the performance of an official function."

Arguably, it might conceivably be asserted that "created" is being used not in its plain meaning of "made" or "brought into being," but rather being used in the obscure sense of "investing with a new rank or function." Under this reading, a public record would therefore be "created" from the moment the government entity uses it, possesses it, retains it, or obtains ownership, since the government's

possession or use of the record would grant it a "new rank or function." But this construction would render the phrase "from the time it is created" superfluous, because the entire phrase could be dropped from the sentence without changing the sentence's meaning. A reading that renders statutory language nugatory is generally to be avoided.

If "it" does not refer to "writing," "it" must refer to "public body" or "official function." If "it" means "public body," then the analysis is simple. Any "writing prepared, owned, used, [possessed], or retained by a public body" is subject to a FOIA request from the moment of the public body's creation, and the document's point of origin is irrelevant. Under this reading, the Legislature would be ensuring that any public document that predated the enactment of the FOIA statute would still be subject to FOIA requests.

The final possibility is that "it" refers to "the official function." In this case, FOIA would apply to any document that postdates the creation of an official function. Such a function could be the maintenance of a public school system or the creation of an e-mail system to facilitate school business.

In the instant case, the Court of Appeals defined "it" as a "writing" and cited its decision in *Detroit News*, 204 Mich App at 720, in support. That case concerned a newspaper's request for records of all calls to and from Detroit's mayor at either the mayor's office or at Manoogian Mansion, the mayor's city-provided residence. *Id.* at 721. The city found a number of telephone bills, but argued that they were "not public records." *Id.* at 722. The Court of Appeals assumed that "it" referred to

"writing" and held that a document that originated in the private sphere could become a public record:

> The city relies on the statutory clause "from the time it is created" found in the definition of public record. We do not construe this clause as requiring that a writing be "owned, used, in the possession of, or retained by a public body in the performance of an official function" from the time the writing is created in order to be a public record.[4] A writing can become a public record after its creation. We understand the phrase "from the time it is created" to mean that the ownership, use, possession, or retention by the public body can be at any point from creation of the record onward.[5] See OAG, 1979-1980, No. 5500, pp. 263-264.
>
> [4] A writing that is "prepared ... by a public body in the performance of an official function" is, of course, a public record "from the time it is created."

Detroit News, 204 Mich App at 725.

As noted above, this reading, which relies on an obscure definition of created, renders a portion of MCL 15.232(e) nugatory. Having "it" refer to either the "public body" or the "official function" allows documents created outside the public sphere, such as reports to an administrative body or the phone records in *Detroit News*, to become public records without tortured reasoning.

Having clarified the meaning of the phrase "from the time it is created," we turn to "official function," the central phrase in dispute. In *Kestenbaum*, a student requested a magnetic tape that contained a list used to create a paperback directory

[5] As noted in the main text, "it" cannot refer to "writing." But the problem with this opinion goes further due to sloppiness by the Court of Appeals. In the previous sentence, the Court of Appeals implies "it" refers to "writing" ("A writing can become a public record after its creation"). But note that in this sentence, the Court of Appeals refers to "creation of the record," implying that "it" refers to "public record," not "writing." (As previously discussed in fn. 3, "it" cannot refer to "public record," either.)

of students. The university denied the request on privacy grounds, and the Court of Appeals affirmed. This Court divided 3-3, which led to the Court of Appeals' decision being affirmed. Justice Fitzgerald wrote the lead opinion, and his opinion was unclear on whether the student directory was a public record. At first he wrote, "A list of students appears to be a public record, i.e., 'a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function.' " *Kestenbaum*, 414 Mich at 521. Soon thereafter, he indicated, "Whether a list of students is the kind of information envisioned by the Legislature as appropriate for disclosure is debatable." *Id*. at 522. He then indicated that he would presume, without deciding, that the list was a public record and move on to the privacy question. *Id*.

Justice Ryan wrote the other opinion. He directly addressed the official-function question:

> The expression "in the performance of an official function" is not defined in the statute. Accordingly, the term must be construed according to its commonly accepted and generally understood meaning. The need to exclude unofficial writings belonging to private citizens from the definition of "public record" is apparent when one recognizes that a state employee is included within the definition of a "public body." MCL § 15.232(b)(i). A public body may not thwart disclosure under the FOIA by the simple expedient of sending sensitive documents home with its employees. However, unofficial private writings belonging solely to an individual should not be subject to public disclosure merely because that individual is a state employee.
>
> We have no difficulty in concluding that the magnetic tape involved in this case was prepared, owned, used, possessed, and retained by the defendant public body "in the performance of an official function." As the circuit judge aptly noted in his opinion, "Indeed, it would be useless to argue [that] such an institution could function without such a list of students." The specific magnetic tape sought in this litigation was used in the preparation and publication of a student

> directory, a publication our brother describes as compiled "to ease communications within the campus community" and likely to prevent "a great deal of havoc." Facilitating communications among students, preventing a great deal of havoc, and simply operating the university in an efficient manner are all "official functions" of Michigan State University. Since the requested "writing" was prepared, owned, used, possessed, or retained by Michigan State University in the performance of these official functions, we hold that the magnetic tape is a "public record."

Id. at 539 (Ryan, J.) (emphasis added).

At first blush, there might appear to be tension between Justice Ryan's statements that "unofficial private writings belonging solely to an individual" should not be disclosed, while material created through official functions like "facilitating communications" should be. But Justice Ryan was concerned about the government using an employee's home as a sanctuary for housing sensitive documents. He sought a means to thwart this while preventing public employees from having to disclose personal things that they wrote at home using a personal, not a government-issued, system for facilitating communication. In his view, anything written on a government-issued system would be an official function and discoverable, whether it originated at the workplace or the employee's home.

In the instant case, the Court of Appeals was unable to cite a single published Michigan decision to directly support its concept of "official function." Nor did it cite the decisions of other states that have faced the "personal" e-mail issue, despite the clear majority of these states' courts accepting the Court of Appeals' position of treating "personal" e-mails differently. *Associated Press v Canterbury*, 688 SE2d 317 (W Va 2009) (rejecting claims that express terms of statute and unique circumstances required disclosure of certain e-mails); *Griffis v Pinal County*, 156

P3d 418 (Ariz 2007) ("purely personal e-mails" not per se public records, but are subject to in-camera review); *Pulaski County v Arkansas Democrat-Gazette, Inc*, 260 SW3d 718 (Ark 2007) (embezzler's e-mails subject to in-camera review to determine if they are "personal"); *Denver Pub Co v Arapahoe County*, 121 P3d 190 (Colo 2005) (e-mails related to affair between public officials that led to lawsuit not public records); *State v Clearwater*, 863 So2d 149 (Fla 2003) ("personal" e-mail not subject to state FOIA); and *State v Lake City Sherriff's Dep't*, 693 NE2d 789 (Ohio 1998) (rejecting FOIA request for allegedly racist e-mails).

In *Cowles Pub Co v Kootenai County*, 159 P3d 896 (Idaho 2007), the Idaho Supreme Court allowed all of the e-mail related to a sexual relationship between a supervisor and a subordinate to be discovered via that state's FOIA. But the court emphasized the context surrounding the e-mails. *Id*. at 901.

While many of the cases from other jurisdictions may be viewed as providing support for the union parties' arguments, they should not control the analysis of Michigan's FOIA. Here, the statutory language and the *Kestenbaum* decision lead to the conclusion that the government-provided e-mail system — which is expressly provided "in furtherance of the educational goals and mission" of the school district — is made, for example, to facilitate communication and prevent havoc. This properly defined "official function" leads to disclosure.

2. The Court of Appeals' definition shields both criminal and otherwise improper activities

By making so many government communications off-limits to FOIA, the Court of Appeals' narrow definition will help shield a government official's criminal

activity — an irrational outcome, given the historical context in which FOIA was created. FOIA was passed in the years immediately after one of our nation's greatest government scandals: Watergate. It defies belief to assert that in enacting FOIA, the people were merely seeking a way to monitor public officials for the occasional miscalculation or accidental error while performing their duties. The people wanted a way to monitor government activity themselves to make sure government workers and politicians weren't crooks. They did not trust the government to police itself.

A simple review of just one type of criminal activity shows that this is a legitimate concern. There have been a number of recent embezzlements at Michigan public schools. Between 2005 and 2008, Chippewa Valley Schools had two separate scandals. According to the US Attorney's Office, a principal was convicted and sentenced to a 31-month term for embezzling $400,000, and a purchasing agent was convicted and sentenced to a 42-month term for embezzling $2,000,000.[6] In 2007, a Montrose Community School payroll clerk was charged with embezzling $1.2 million and pled guilty.[7] In 2008, a Berkley School District employee was charged with embezzlement.[8] In 2009, five Detroit Public School employees were charged with embezzlement.[9] In 2010, a Van Dyke school official who allegedly had embezzled $100,000 took a plea deal for a lesser amount and was sentenced.[10] In

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6 http://www.justice.gov/usao/mie/press/Aug_2008.pdf at 19.

7 http://www.co.genesee.mi.us/Prosecutors/News Former Montrose Schools Employee Sentenced for Embezzlement.htm

8 http://www.dailytribune.com/articles/2008/09/18/news/srv0000003542312.txt

9 http://www.crainsdetroit.com/article/20090812/FREE/908129996#

10 http://www.macombdaily.com/articles/2010/04/16/news/srv0000008056856.txt

2010, the Big Bay de Noc School District discovered the embezzlement of $800,000.[11] The Otsego School District recently discovered an embezzlement that led to criminal charges.[12] The Detroit Free Press recently reported that the Detroit Public Schools may have been swindled out of $57 million by two employees.[13]

Of course, the Court of Appeals' decision would apply to all units of state and local government, and criminal activity by government officials is not limited to embezzlement in school districts. For example, the state of Michigan recently reached a $100 million settlement in a class action suit that accused prison guards of sexually abusing female prisoners.[14]

Not all inappropriate governmental behavior is criminal. There is the recent revelation that some key employees of the US Securities and Exchange Commission spent a good deal of their work time during the financial crisis surfing the internet for pornography on government computers.[15] The yet-to-be-released report indicates that there were 31 serious offenders, 17 of them making over $100,000 a year in salary.[16] While this improper activity is hardly the source of the nation's financial crisis, it may have distracted SEC employees from finding irregularities like Bernard Madoff's Ponzi scheme, which led to over $10 billion in losses.[17]

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[11] http://www.uppermichiganssource.com/news/story.aspx?id=413094
[12] http://www.mlive.com/news/kalamazoo/index.ssf/2010/01/ex-otsego_schools_official_acc.html
[13] http://www.freep.com/article/20100328/NEWS01/3280515/DPS--Scam-cost--57M
[14] http://www.freep.com/article/20090716/NEWS06/101250006/-100-million-ends-prisoner-sex-abuse-suit
[15] http://abcnews.go.com/GMA/sec-pornography-employees-spent-hours-surfing-porn-sites/story?id=10452544
[16] *Id*.
[17] http://www.haaretz.com/hasen/spages/1069457.html

The Court of Appeals' decision would prevent Michigan residents from monitoring their public officials for improper activities. An example proves the point. Say that a government official is in charge of a $100,000 account, and that this official authorized a purchase of staples for $280.37, paid the amount, and then wrote himself a check for the balance, $99,719.63. Under the Court of Appeals' analysis, the check used to pay for the staples would be subject to FOIA, but the check that the official used to embezzle funds would not, because embezzlement is not an "official function."

Clearly, people who wish to "fully participate in the democratic process" may want to determine whether public officials are acting improperly or illegally on the job. The Court of Appeals' question-begging construction of "official function" — concluding the e-mails are not part of an "official function" by simply asserting that they are "personal" — would prevent citizens from using FOIA to do so.

The best way to read "official function" is to analogize it to the manner that "under color of [state law]" is read in 42 U.S.C. § 1983, which provides federal penalties for misconduct by state and local officials. The Fifth Circuit stated: "Action taken 'under color of' state law is not limited only to that action taken by state officials pursuant to state law. Rather, it includes: 'Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law. . . .' " *Brown v Miller*, 631 F2d 408, 411 (5th Cir 1980) (citations omitted). Thus, federal § 1983 suits can be brought where a police officer beats a prisoner, despite the fact that such a beating is a violation of state law.

This reading is in line with Justice Ryan's opinion in *Kestenbaum*. There, he indicated that facilitating communication, preventing havoc, and simply operating a school in an efficient manner are all "official functions." *Kestenbaum*, 414 Mich at 539 (Ryan, J.). In other words, it is the e-mail system generally (which is "technology [provided] in furtherance of the educational goals and mission of the District") that must be subjected to the "official function" test; it is *not* the individual e-mails themselves. This remains true even if some of the e-mails involve activities that are not properly part of an official's prescribed duties.

3. Government officials sometimes have incentives to hide wrongdoing and scandals

The Court of Appeals sought to soften its ruling by indicating that "personal e-mails" could be converted into "public records" under certain circumstances:

> This is not to say personal emails cannot become public records. For example, were a teacher to be subject to discipline for abusing the acceptable use policy and personal emails were used to support that discipline, the use of those emails would be related to one of the school's official functions—the discipline of a teacher—and, thus, the emails would become public records subject to FOIA.

Slip opinion at 10.

The inadequacy of this interpretation of FOIA is highlighted by a 2008 investigative series by The Grand Rapids Press into Teachers' Tenure Act claims. This series covered attempts by all 31 school districts in Kent and Ottawa counties to fire tenured teachers during the previous four years. One of the findings was: "The amount of public disclosure varies widely by district when a teacher agrees to leave. Some administrators will write a letter of recommendation and shred

negative evaluations, leaving little or no evidence of incompetence or misconduct."[18] This finding shouldn't be surprising. Some school administrators consider the Teachers' Tenure Act to be an onerous and expensive process. Thus, a school district often will have an incentive to settle a tenure claim, rather than complete the frequently costly process of firing a tenured teacher. Further, district officials and board members might have been involved in either hiring or supervising the teacher in question and therefore may not wish to have the full extent of that teacher's transgressions made public.

Without the threat of FOIA, officials who "shred negative evaluations" are unlikely to take actions that would make public any e-mails that expose a substandard teacher's nonfeasance, incompetence, or dangerous behavior. Nevertheless, the Court of Appeals would effectively leave the public availability of such e-mails to the discretion of school administrators. This discretion might prevent the publication of material personally embarrassing to school employees, but it would completely undermine FOIA's aim to empower the people, and it would prevent Michigan parents from using FOIA to uncover evidence of teachers who are unfit to instruct their children.[19]

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[18] http://www.mlive.com/news/grand-rapids/index.ssf/2008/11/loopholes_allow_incompetence_m.html

[19] Recall that in the instant case, the union parties filed this reverse-FOIA suit after the school district parties suggested they do so. While the school district was a defendant and acted as such, it decided not to appeal the Court of Appeals decision. Zarko, on the other hand, did. These facts underscore the general dynamic likely to occur repeatedly with FOIA requests: The requestor clearly seeks full disclosure, while the government administrators are considerably less zealous in seeking — and may even discourage — disclosure. Similarly, in traditional FOIA cases (as opposed to the reverse-FOIA case presented here), it is the government agency that often seeks to thwart the document request.

This chain-of-command problem will not be limited to the teaching profession. There will be many times that a supervisor would be tempted to sweep certain activities of a subordinate under the rug. It is the rare government official who will draw attention to his or her own failures to properly supervise subordinates. President Richard Nixon, whose actions were a catalyst for Michigan's FOIA, certainly did not.

4. The Court of Appeals' decision sub silentio overrules this Court's repeated holding that collective bargaining agreements cannot trump FOIA

There is a second problem with the Court of Appeals' reliance on the view that "were a teacher to be subject to discipline for abusing the acceptable use policy and personal emails were used to support that discipline, the use of those emails would be related to one of the school's official functions — the discipline of a teacher — and, thus, the emails would become public records subject to FOIA." In effect, this interpretation of FOIA makes the determination of what is a public record a matter of collective bargaining.

According to the Court of Appeals' logic, FOIA would apply if the school district and the union agreed that something like excessive "personal" e-mail use could become a subject of discipline, and if the district decided to take some disciplinary action. But that takes the determination of what is a public record from the Legislature and places it in the hands of each district and its corresponding union. One district may negotiate an excessive e-mail use policy in its collective bargaining agreement, while another may not. One district may negotiate a

student-teacher sexual relationship prohibition, while another may not. One district may negotiate a policy to disclose crime or fraud, while another may not. One district may negotiate a prohibition on forwarding prurient material, while another may not. The Court of Appeals' decision would create a patchwork of mini-FOIAs all dependent on each district's bargaining agreements and enforcement actions.

This Court has emphasized: "The FOIA requires disclosure of all public records not within an exemption. No exemption provides for a public body to bargain away the requirements of the FOIA." *Kent Co Deputy Sheriff's Ass'n v Kent Co Sheriff*, 463 Mich 353, 361 (2000). Thus, this Court has made clear that what is a "public record" cannot be narrowed through collective bargaining; the term is meant to have a fixed scope. The Court of Appeals' decision conflicts with that holding by effectively allowing the term to be contracted or expanded by collective bargaining. The reach of FOIA requests would therefore vary among each and every unit of state and local government, creating confusion as to what kind of information is accessible through the act. This uncertainty would discourage many citizens from using FOIA, while uniformity would increase certainty and encourage the statute's use.

5. If FOIA is ambiguous, the meaning of "official function" should be read broadly

This Court has explained the process for interpreting ambiguous statutes:

> [W]hen statutory language is ambiguous, this Court has consistently held that a court construing it may go beyond the plain language of the statute. In fact, where the language leaves the statute's meaning ambiguous, it is the duty of the courts to construe it, giving it an

> interpretation that is reasonable and sensible. Therefore, a finding of ambiguity has important interpretive ramifications.

Petersen v Magna Corp, 484 Mich 300, 307-08 (2009) (footnotes omitted).

Without saying so explicitly, it appears that the Court of Appeals interpreted FOIA on the presumption that the phrase "official function" was ambiguous. Thus, the Court of Appeals engaged in a free-wheeling review of various policy concerns related to the role "today's ubiquitous email technology" plays in our society and likened its task to "that of a court being asked to apply the laws governing transportation adopted in a horse and buggy world to the world of automobiles and air transport." Slip opinion at 3.

The crux of the Court of Appeals' concern is that e-mail makes too much information too easily discoverable:

> This is a difficult question requiring that we apply a statute, whose purpose is to render government transparent, to a technology that did not exist in reality (or even in many people's imaginations) at the time the statute was enacted and which has the capacity to make "transparent" far more than the drafters of the statute could have dreamed. When the statute was adopted, personal notes between employees were simply thrown away or taken home and only writings related to the entity's public function were retained. Thus, we conclude that the statute was not intended to render all personal emails public records simply because they are captured by the computer system's storage mechanism as a matter of technological convenience.
>
> Accelerating communications technology has greatly increased tension between the value of governmental transparency and that of personal privacy. As we stated out [sic] the outset, the ultimate decision on this important issue must be made by the Legislature and we invite it to consider the question. However, based on the statute adopted in 1977, the technology that existed at that time and the caselaw available to us, we conclude that the trial court erred in its conclusion that all emails captured in a government email computer storage system, regardless of their purpose, are rendered public records subject to FOIA.

Slip opinion at 10.[20]

The Court of Appeals is incorrect that e-mail did not exist in 1977, when FOIA was first enacted. The first form of e-mail was invented in 1962.[21] In 1971, the now common user@host method of addressing e-mails began.[22] The Court of Appeals ignored that the definition of "writing," which is codified at MCL 15.232(h) and remains unchanged since FOIA was first enacted, clearly included computer technologies:

> "Writing" means handwriting, typewriting, printing, photostating, photographing, photocopying, and every other means of recording, and includes letters, words, pictures, sounds, or symbols, or combinations thereof, and papers, maps, magnetic or paper tapes, photographic films or prints, microfilm, microfiche, magnetic or punched cards, discs, drums, or other means of recording or retaining meaningful content.

Id. (emphasis added). Further, FOIA has been amended 12 times since 1977. 1978 PA 329; 1979 PA 130; 1988 PA 99; 1993 PA 82; 1994 PA 131; 1996 PA 553; 1997 PA 6; 2000 PA 88; 2001 PA 74; 2002 PA 130; 2002 PA 437; and 2006 PA 482. The sheer volume of amendments to FOIA — including five amendments in the past ten years — makes it difficult to accept the Court of Appeals' implication that the Legislature has had no opportunity to "update" the law to account for changing technology. In

[20] There is nothing in the record to support the Court of Appeals' assertion that "When the statute was adopted, personal notes between employees were simply thrown away or taken home and only writings related to the entity's public function were retained." Certainly, this would not be necessarily true, for example in the instance where one employee complains that another sent inappropriate "personal" notes. Moreover, this rank speculation assumes that any "personal" notes were unrelated to an entity's or public employee's official function. Once again, the Court of Appeals would shield criminal or otherwise improper behavior between, for example, co-conspirators.

[21] http://www.livinginternet.com/e/ei.htm

[22] *Id.*

addition, the Court of Appeals appears to have grievously erred when it stated that FOIA was "adopted in 1977 and last amended in 1997. . . ." Slip opinion at 3.

The FOIA exemption provision, MCL 15.243, was amended in 1978, 1993, 1996, 2000, 2001, 2002 (twice), and 2006. It seems odd that the Legislature failed to take any of these opportunities to amend the exemption provision to account for "personal e-mail" if it wanted to correct FOIA disclosures that were "far more than the drafters of the statute could have dreamed." Further, the 1996 amendment specifically allowed FOIA requests to be sent via e-mail. MCL 15.232(i). It is thus quite difficult to argue that in 1996 the Legislature was unaware of e-mail technology and its reach. Yet the Legislature has done nothing to limit FOIA's scope and prevent disclosure of so-called "personal" e-mails sent and received on a government e-mail system.

The "privacy" interest that the Court of Appeals would protect is quite limited. The Court of Appeals appears not to question the prerogative of state and local government entities to monitor the e-mail systems that they provide.[23] So the

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[23] The United States Supreme Court heard oral arguments on April 19, 2010 in *City of Ontario, California v Quon*, No. 08-1332. That case dealt with a government employer monitoring an employee's pager. According to the United States Supreme Court website, these were the questions presented in that case:

> 1. Whether a SWAT team member has a reasonable expectation of privacy in text messages transmitted on his SWAT pager, where the police department has an official no-privacy policy but a non-policymaking lieutenant announced an informal policy of allowing some personal use of the pagers.
>
> 2. Whether the Ninth Circuit contravened this Court's Fourth Amendment precedents and created a circuit conflict by analyzing whether the police department could have used "less intrusive methods" of reviewing text messages transmitted by a SWAT team member on his SWAT pager.

(Note continued on next page.)

privacy interest at stake is not keeping e-mails solely between the sender and the recipients; instead, it is keeping the e-mails solely between the recipients, the sender, and any government official that has the right to review them. The only party excluded is the government workers' true employer: the public at large. Given that the right of government supervisors to review interoffice e-mails is fairly common knowledge — and explicit knowledge in the instant case, due to the e-mail system's sign-in warning — it seems strange to presume that a government employee would disclose highly personal information on a government e-mail system. Items that the Court of Appeals listed, such as "carpooling, childcare, [and] lunch or dinner plans," slip opinion at 7, are not highly private matters. But these are likely to constitute the vast majority of "personal" e-mails that would be occasionally disclosed through FOIA disclosures.

Finally, while the Court of Appeals ponders the increased use of e-mail technology since 1977, it ignores obvious technological solutions to the "problem" of disclosure of "personal" e-mails. The Court of Appeals seems to assume that government employees have no alternative to communicating through the government e-mail system while at work. This is just not true. Cell phones are ubiquitous. Almost all have texting capabilities. Many have e-mail capabilities.

> 3. Whether individuals who send text messages to a SWAT team member's SWAT pager have a reasonable expectation that their messages will be free from review by the recipient's government employer.

http://www.supremecourt.gov/qp/08-01332qp.pdf. Thus, there may be a constitutional expectation of privacy in pager communications, which could limit the reach of Michigan's FOIA if applied to e-mail as well. In light of the questions presented at the United States Supreme Court, this Court should consider either a formal or informal abeyance until *Quon* is decided.

There are devices, such as BlackBerries, that allow users to respond to e-mails. Government employees who want to communicate "personal" information can quite easily do so, even when they are at work, without using the government provided e-mail system. In trying to write an opinion that accounts for current technology, the Court of Appeals has written one that is already many years behind the times.

So the Court of Appeals is wrong on its technological history; it failed to recognize a number of amendments to FOIA; and it failed to discuss one that specifically mentioned e-mail technology. Further, the privacy interest it is concerned about is attenuated by the fact that government employees know that their e-mail on government networks can be monitored and that they have easy technological means of avoiding using governmental e-mail systems for truly private matters.

The Freedom of Information Act recognizes that this limited privacy interest pales in comparison with the public's interest in monitoring the activities of its government. It would be nice if every FOIA request were filed for benevolent purposes, and if no FOIA response ever disclosed a "personal" matter that was largely unrelated to official business. But in order to monitor government operations, there have to be some FOIA requests that do little but expose mundane personal items.

The Legislature has chosen to make FOIA requests fast and affordable for the public. If there is any ambiguity in FOIA's language, a "reasonable and sensible" reading of the statute would favor disclosure and read "official function"

broadly, so that the public can meaningfully check on state and local employees in the workplace.

6. "Internal union communications" e-mails

There is nothing in the language of FOIA that justifies creating a special rule for "internal union communications." Moreover, contracts between public employers and public employees necessarily involve the expenditure of public money. Education spending is one of the largest portions of the state budget. Employee compensation is the biggest part of school budgets, and collective bargaining agreements are principally about salaries, benefits and working conditions. FOIA explicitly allows for the disclosure of school district employees' salaries. MCL 15.243a. Pension information of public employees can also be properly sought under FOIA. *Detroit Free Press, Inc v Southfield*, 269 Mich App 275 (2005). The Court of Appeals has clarified: "[W]e note that a public official has no reasonable expectation of privacy in an expense the public bears to pay for income or any other benefit. We have consistently upheld the disclosure of publicly funded incomes and other benefits for more than 25 years." *Id.* at 285.[24] Further, this Court has rejected any contention that there is something inherent in the Public Employment

[24] While perhaps not directly applicable, it should be noted that the Michigan Constitution indicates that public expenditures are required to be disclosed to the public:

> All financial records, accountings, audit reports and other reports of public moneys shall be public records and open to inspection. A statement of all revenues and expenditures of public moneys shall be published and distributed annually, as provided by law."

Const 1963 Art 9 § 23.

Relations Act, MCL 423.201 et. seq., that supersedes FOIA. *Kent Co Deputy Sheriff's Ass'n v Kent Co Sheriff*, 463 Mich 353 (2000).

III. Conclusion

In summary, the Court of Appeals' decision provides a flawed analysis of the term "official function" and its applicability to this case. This failure leads the court to an opinion that would inevitably produce a variety of outcomes antithetical to FOIA's purposes. The Court of Appeals' decision would shield from public discovery both inappropriate use of governmental resources and criminal activity by government employees. It would allow government administrators with a vested interest in hiding subordinates' misdeeds to prevent public disclosure of the transgressions. It would have the practical effect of undermining three of this Court's decisions holding that FOIA's scope cannot be limited through collective bargaining agreements.

The Court of Appeals appears to have based its opinion on an implicit assumption that FOIA is ambiguous concerning what constitutes a public record. But the court then failed to acknowledge the extent to which the privacy interest it championed is attenuated and selective, allowing government supervisors access to e-mails, but withholding those e-mails from the taxpayers whom the employers and supervisors are supposed to serve. Moreover, the court failed to recognize that widespread technological innovations have already provided effective solutions to the "privacy" problem the court found troubling.

Finally, the court errs in finding that "internal union e-mail" is by definition outside the reach of FOIA. The court's elevation of "internal union e-mail" to this privileged status has no basis in the statutory language.

RELIEF REQUESTED

For the reasons stated above, this Court should rule that the requested e-mails are public documents that can properly be sought under FOIA. It should either peremptorily reverse the Court of Appeals or grant leave to appeal.

Respectfully Submitted,

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