

STATE OF MICHIGAN  
IN THE COURT OF CLAIMS

DEPOSITIVE

2017 MAY -1 PM 4:31

BOARD OF TRUSTEES OF MICHIGAN  
STATE UNIVERSITY,

Case No. 17- 000114 -MZ  
STEPHENS

Plaintiff,

v

ESPN, INC.,

Defendant.

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Robert T. Kent (P71897)  
Brian T. Quinn (P66272)  
Michigan State University  
Office of the General Counsel  
426 Auditorium Rd., Room 494  
East Lansing, MI 48824  
(517) 353-3530  
Attorneys for Plaintiff

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COMPLAINT FOR DECLARATORY RELIEF

There is no other pending or resolved civil action arising out of the transaction or occurrence alleged in this complaint.

*Parties, Jurisdiction and Venue*

1. This matter arises under the Michigan Freedom of Information Act, MCL 15.231, *et seq.* ("FOIA").
2. Plaintiff is a body corporate, established under the Michigan Constitution, with general supervision and control over Michigan State University ("MSU"). Const 1963, art 8, § 5.
3. MSU is a public university, established by law as a state higher education institution, Const 1963, art 8, §4, and is a "public body" having custody and control over "public records". See MCL 15.232.

4. Defendant is a Delaware Corporation operating ESPN, a United States-based global cable and satellite television channel focusing on sports-related programming.

5. An actual case or controversy exists between the parties, as set forth below, and Plaintiff requests this Court declare the rights and other legal relations between the parties pursuant to MCR 2.605.

6. This Court has jurisdiction over the subject matter of this complaint and venue is proper, as this Court would have jurisdiction over an action under MCL 15.240(1)(b).

*General Allegations*

7. Plaintiff adopts by reference each of the previous paragraphs.

8. On February 10, 2017, MSU received a request under the FOIA from Defendant's employee, Paula Lavigne, for various records ("Defendant's FOIA Request"), including copies of police reports containing allegations of sexual assault from December 10, 2016, to February 10, 2017. **Exhibit A.**

9. MSU provided a partial response to Defendant's FOIA Request, but has not released copies of certain police reports which are (1) part of open investigations by the Ingham County Prosecutor (the "Prosecutor") and (2) for which the Prosecutor has not made a decision whether to charge the underlying accused parties (the "Police Reports").

10. Defendant acknowledged to Plaintiff that it intends to initiate legal action against Plaintiff under the FOIA if Defendant does not receive the requested police reports. **Exhibit B.**

11. MSU has received requests under the FOIA for Police Reports from parties other than Defendant and, upon information and belief, will continue to receive requests under the FOIA for Police Reports.



12. On April 24, 2017, after a meeting between Valerie O'Brien, an MSU Police Captain, and Lisa McCormick, the Ingham County Chief Assistant Prosecutor, Ms. McCormick wrote a letter to Captain O'Brien requesting that MSU withhold release of the Police Reports while underlying cases are under investigation by the Prosecutor. **Exhibit C** (the "Letter").

13. Included among the Police Reports referenced in the Letter are multiple police reports subject to Defendant's FOIA Request.

14. According to the Letter, "[s]ince the cases...are open investigations and charging decisions have not been made, we believe release of [the Police Reports] would infringe on the defendant's [sic] right to a fair trial, interfere with ongoing police investigations and constitute an unwarranted invasion of privacy pursuant to MCLA 15.243(b)." **Exhibit C**.

15. The Letter further requests that MSU "...deny the requests at this time until we have an opportunity to make a charging decision. Once that decision is made, we would be more than happy to re-evaluate our request that the records be denied [sic]." **Exhibit C**.

16. In Michigan, a prosecutor is considered the "chief law enforcement officer" within a county, *Matthews v Blue Cross & Blue Shield of Michigan*, 456 Mich 365, 384; 572 NW2d 603, 613 (1998). Thus, failing to honor the requests of a prosecutor as it relates to disclosure of the Police Reports would be direct interference with law enforcement proceedings.

17. Criminal "obstruction of justice" is defined under the common law as "an interference with the orderly administration of the law", *People v Somma*, 123 Mich App 658, 661; 333 NW2d 117, 119 (1983), citing *People v. Ormsby*, 310 Mich 291, 299, 17 NW2d 187 (1945), and "[i]t was an offense at common law to willfully and corruptly hamper, obstruct, and interfere with a proper and legitimate criminal investigation." *Id.*, citing 67 CJS, Obstructing Justice or Governmental Administration, § 9, p 134.

18. Based on Defendant's FOIA Request, and the Letter from the Ingham County

Prosecutor's Office, MSU has been placed in the impossible position of deciding whether to:

- a. Release the Police Reports to Defendant and disregard the request of the Ingham County Prosecutor, which, according to the Office of the Ingham County Prosecutor, will infringe on the potential underlying defendants' rights to a fair trial, interfere with ongoing police investigations, and constitute an unwarranted invasion of privacy; or
- b. Withhold the Police Reports from Defendant in reliance on the representations of the Office of the Prosecutor (representations alleging that the Police Reports are exempt from disclosure under FOIA) and subject itself to potential financial liability under the FOIA.

*Request for Declaratory Judgment*

19. Plaintiff adopts by reference each of the previous paragraphs.

20. MSU recognizes that it maintains obligations to both the Prosecutor and to Defendant.

21. As set forth above, the Prosecutor has requested that MSU not share the Police Reports under the FOIA, and asserts that the Police Reports are exempt from disclosure under the FOIA.

22. A present adjudication of the controversy is necessary to guide Plaintiff's future conduct and preserve legal rights.

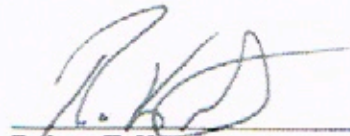
23. Upon information and belief, declaratory relief will avoid a multiplicity of actions by parties seeking police reports under the FOIA which meet the above-referenced parameters set by the Prosecutor.

24. Plaintiff requests this Court expedite hearing on this matter pursuant to MCR 2.605 and MCL 15.240(5).



For the reasons set forth above, Plaintiff requests this Court issue a declaratory judgment, deciding whether Plaintiff's police reports for current and future matters which are (1) part of open investigations by the Ingham County Prosecutor, and (2) for which the Ingham County Prosecutor has not made a decision whether to charge the underlying accused party, are properly withheld by Plaintiff as exempt from disclosure under MCL 15.243(b).

Respectfully submitted,



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Robert T. Kent  
Attorney for Plaintiff

Dated: May 1, 2017





F085.17  
transmitted to MSU 02/10/17  
MIFOIA statute-received 02/13/17

**From:** Lavigne, Paula [mailto:Paula.Lavigne@espn.com]  
**Sent:** Friday, February 10, 2017 10:07 AM  
**To:** FOIA <foia@msu.edu>  
**Subject:** records request

Pursuant to the state open records law Mich. Comp. Laws Secs. 15.231 to 15.246, I write to request a copy of all police reports containing allegations of sexual assault from Dec. 10, 2016, through present. In addition, I request a record of arrests made between February 6, 2017, to Feb. 9, 2017. As per the 2015 decision in ESPN Inc. v. Michigan State University, the names of suspects will be included on the records released.

The below descriptions of incidents should be included in the above request, but we are including them here to make sure that they are indeed included in the responsive records. (From the MSU Clery log.)

11002 - SEXUAL PENETRATION PENIS/VAGINA -CSC 3RD DEGREE 1172 - 11002 - CSC Third (3rd) Degree -Penetration Penis/Vagina 8 - Not a Crime/Other MSU Police Department 02/02/2017 02:18PM 02/02/2017 04:07PM 1758100329

11004 - SEXUAL PENETRATION ORAL/ANAL -CSC 3RD DEGREE 1174 - 11004 - CSC Third (3rd) Degree -Penetration Oral/Anal 4 - Active 1855 Place Bldg 1810 12/16/2016 12:00AM 01/30/2017 11:57AM 1758100298

11002 - SEXUAL PENETRATION PENIS/VAGINA -CSC 3RD DEGREE 1172 - 11002 - CSC Third (3rd) Degree -Penetration Penis/Vagina 4 - Active University Village Apartments 01/16/2017 02:00AM 01/17/2017 02:00PM 1758100153

11002 - SEXUAL PENETRATION PENIS/VAGINA -CSC 3RD DEGREE 1172 - 11002 - CSC Third (3rd) Degree -Penetration Penis/Vagina 4 - Active Butterfield Hall 12/14/2016 12:18AM 12/14/2016 02:24PM 1658104214

As provided by the open records law, I will expect your response within five (5) business days. See Mich. Comp. Laws Sec. 15.235(5)(2).

If you choose to deny this request, please provide a written explanation for the denial including a reference to the specific statutory exemption(s) upon which you rely. Also, please provide all segregable portions of otherwise exempt material.

Please let me know if you have any questions on our request. You can reach me at 860-406-1980.  
Thank you,

- Paula Lavigne, ESPN

A





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East Lansing, MI 48824  
(517) 353-3530  
Attorneys for Plaintiff

AFFIDAVIT OF JASON CODY

STATE OF MICHIGAN )

Oakland COUNTY )

Jason Cody, being sworn, states the following:

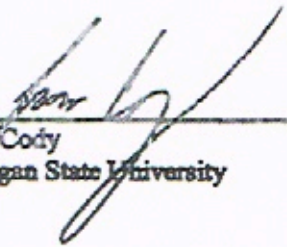
1. I am the Senior Communications Manager for Michigan State University  
Communications and Brand Strategy.
2. Occasionally, my office will call a media member in conjunction with a FOIA  
being filled to help a reporter/editor/producer better understand why certain decisions were  
made.

B

3. On or about April 17, 2017, I spoke with ESPN reporter Paula Lavigne concerning a FOIA request she had filed. The intent of the call was to explain to Lavigne why certain police records were being withheld from her.

4. During the call, Lavigne made it clear that she felt MSU was not following the law by withholding police records. She reminded me that ESPN had successfully sued MSU before, and that suing us again was an action they were prepared to take. She lamented MSU's adherence to FOIA law in general during the call.

Dated: 5-1-2017

  
\_\_\_\_\_  
Jason Cody  
Michigan State University

Signed and sworn before me on

May 1, 2017

Name: Karen Bourke  
Notary public, State of Michigan, County of  
Oakland ~~4-18-2021~~ My Commission expires  
4-18-2021. Acting in  
Oakland County.

KAREN J. BOURKE  
Notary Public, State of Michigan  
County of Oakland  
My Commission Expires 04-18-2021  
Acting in the County of Oakland





CAROL A. SIEMON  
INGHAM COUNTY PROSECUTING ATTORNEY

LISA McCORMICK  
Chief Assistant Prosecutor



JOHN J. DEWANE  
Deputy Chief Assistant Prosecutor

April 24, 2017

Captain Valerie O'Brien  
Investigative Division  
Michigan State University Police Department  
1120 Red Cedar Rd  
East Lansing MI 48823

RE: Release of Police Reports involving open investigations

Dear Captain O'Brien:

It was a pleasure speaking with you today regarding the FOIA requests your department has received regarding sexual assault cases at Michigan State University. This letter confirms our conversation that we are requesting you not release the reports while the cases are under investigation. As we discussed the Michigan Rules of Professional Conduct (MRPC) 3.8 states that there are special responsibilities of a prosecutor. Specifically, MRPC 3.8 (e) states:

The prosecutor in a criminal case shall:

(e) exercise reasonable care to prevent investigators, law enforcement personnel, employees, or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 (Trial Publicity).

Since the cases that were discussed are open investigations and charging decisions have not been made, we believe the release of this information would infringe on the defendant's right to a fair trial, interfere with ongoing police investigations and constitute an unwarranted invasion of privacy pursuant to MCLA 15. 243(b). We are only asking that you deny the requests at this time until we have an opportunity to make a charging decision. Once that decision is made, we would be more than happy to re-evaluate our request that the records be denied.

If you have any questions, please do not hesitate to contact me.

Very truly yours,

A handwritten signature in black ink, appearing to read "Lisa McCormick".

Lisa McCormick  
Chief Assistant Prosecutor

C



STATE OF MICHIGAN  
IN THE COURT OF CLAIMS

BOARD OF TRUSTEES OF  
MICHIGAN STATE UNIVERSITY,

Plaintiff,  
and

Case No. 17-000114-MZ

Hon. Cynthia Stephens

INGHAM COUNTY PROSECUTING  
ATTORNEY CAROL A. SIEMON,

Applicant for Intervention,

v

ESPN, INC.,

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\_\_\_\_\_  
Timothy M. Perrone (P37940)  
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601 N. Capitol Ave.  
Lansing, MI 48933  
(517) 372-9000

**INGHAM COUNTY PROSECUTING ATTORNEY'S**  
**05/25/2017 MOTION TO INTERVENE AS PLAINTIFF**

Ingham County Prosecuting Attorney Carol A. Siemon, Applicant for Intervention,  
(hereafter, "Prosecutor"), moves pursuant to MCR 2.209 to intervene in this case as a

2017 MAY 25 AM 11:51  
PROSECUTOR

Plaintiff, in order to assert the claim set forth in her proposed Complaint on Intervention (copy attached as Exhibit 1), on the grounds that:

(a) the Prosecutor may intervene as of right pursuant to MCR 2.209(A)(3), because she has an interest relating to the disclosure and exemption of investigatory records under the Freedom of Information Act, MCL 15.231 *et seq.*, such that the disposition of this declaratory judgment action may as a practical matter impair or impede the Prosecutor's ability to protect that interest, where the Prosecutor has a concern that her interest is not adequately represented by the existing Plaintiff; and

(b) in the alternative, intervention by the Prosecutor is permissive under MCR 2.209(B)(2), because her claim for declaratory relief and the main action have common questions of law and fact.

Counsel for Plaintiff has no objection to the proposed intervention.

This Motion is supported by the attached Brief and Exhibits.

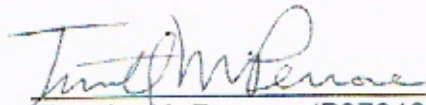
WHEREFORE, Ingham County Prosecuting Attorney Carol A. Siemon respectfully requests that this Honorable Court (a) grant her Motion to Intervene as Plaintiff in this case; (b) thereafter enter a Declaratory Judgment that police reports and other records of ongoing criminal investigations, for which the Prosecutor has not yet made a decision whether to charge the underlying accused person, are exempt from disclosure under MCL 15.243(1)(b)(i)-(iii); and (c) grant the Prosecutor such other and further relief as may be required.



Respectfully submitted,

COHL, STOKER & TOSKEY, P.C.

Date: May 25, 2017



Timothy M. Perrone (P37940)  
Attorneys for Applicant for Intervention  
601 N. Capitol Ave.  
Lansing, MI 48933  
(517) 372-9000

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2017 MAY 29 AM 11:51  
COHL, STOKER & TOSKEY, P.C.

STATE OF MICHIGAN  
IN THE COURT OF CLAIMS

BOARD OF TRUSTEES OF  
MICHIGAN STATE UNIVERSITY,

Plaintiff,  
and

Case No. 17-000114-MZ

Hon. Cynthia D. Stephens

INGHAM COUNTY PROSECUTING  
ATTORNEY CAROL A. SIEMON,

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(517) 372-9000

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**BRIEF IN SUPPORT OF**  
**INGHAM COUNTY PROSECUTING ATTORNEY'S**  
**05/25/2017 MOTION TO INTERVENE AS PLAINTIFF**

## TABLE OF CONTENTS

INTRODUCTION .....	1
STATEMENT OF FACTS.....	1
ARGUMENT .....	3
I. THE PROSECUTOR SHOULD BE GRANTED INTERVENTION IN THIS CASE.....	3
A. Legal Standards for Intervention.....	3
1. Intervention by Right .....	3
2. Permissive Intervention.....	4
B. The Prosecutor May Intervene by Right in this Case.....	5
C. The Prosecutor Should be Permitted to Intervene in this Case.....	7
CONCLUSION AND RELIEF.....	8



## INDEX OF AUTHORITIES

**Cases:**

*Auto-Owners Ins Co v Keizer-Morris, Inc*, 284 Mich App 610; 773 NW2d 267 (2009) ..... 4

*Cowles v Bank West*, 263 Mich App 213, 236; 687 NW2d 603 (2004),  
*aff'd in part, vacated in part on other grds*, 476 Mich 1; 719 NW2d 94 (2006),  
*reh'g den*, 477 Mich 1209; 722 NW2d 429 (2006) ..... 5

*D'Agostini v City of Roseville*, 396 Mich 185; 240 NW2d 252 (1976) ..... 4

*Hill v L F Transp, Inc*, 277 Mich App 500, 508; 746 NW2d 118 (2008) ..... 4

*Precision Pipe and Supply, Inc v Meram Construction, Inc*, 195 Mich App 153;  
 489 NW2d 166 (1992) ..... 4

*School Dist of City of Ferndale v Royal Oak Twp School Dist No 8*, 293 Mich 1;  
 291 NW 199 (1940) ..... 4, 5

**Statutes:**

MCL 15.231 *et seq* ..... 1

MCL 15.240 ..... 6

MCL 15.243(1)(b) ..... 2-3, 6, 8

**Court rules:**

MCR 2.206 ..... 5, 7

MCR 2.209(A) ..... 7

MCR 2.209(A)(3) ..... 1

MCR 2.209(B) ..... 4, 5, 7

MCR 2.209(B)(2) ..... 1, 5

**Other:**

Michigan Rules of Professional Conduct, Sec. 3.8 ..... 2, 6

## INTRODUCTION

Ingham County Prosecuting Attorney Carol A. Siemon (hereafter, "Prosecutor"), has moved to intervene in this case as a Plaintiff by right pursuant to MCR 2.209(A)(3), and alternatively by permission under MCR 2.209(B)(2). The Prosecutor has an interest relating to the disclosure and exemption of investigatory records under the Freedom of Information Act (FOIA), MCL 15.231 *et seq.*, such that the disposition of this declaratory judgment action may as a practical matter impair or impede the Prosecutor's ability to protect that interest, where the Prosecutor has a concern that her interest may not be adequately represented by the existing Plaintiff. Otherwise, intervention by the Prosecutor should be granted because her claim for declaratory relief and the main action have common questions of law and fact.

Plaintiff has no objection to the Prosecutor's proposed intervention.

## STATEMENT OF FACTS

On or about February 10, 2017, Michigan State University ("MSU") received a request under the Freedom of Information Act (FOIA), MCL 15.231 *et seq.*, from Paula Lavigne, an employee of ESPN, Inc., a Delaware corporation. The request was for copies of certain police reports containing allegations of sexual assault from December 10, 2016, through present, as well as and records of arrests made between February 6-9, 2017, specifically including the names of the suspects. (See Exhibit A to Plaintiff's Complaint.)

MSU provided a partial response to the FOIA request, but withheld copies of certain police reports which were part of open investigations by the Prosecutor and for



which the Prosecutor had not yet made a decision whether to charge the underlying accused persons ("Police Reports").

On April 17, 2017, an employee of MSU contacted ESPN's employee by telephone to explain why the Police Reports were withheld from disclosure under FOIA. (See Exhibit B to Plaintiff's Complaint.) The MSU employee's understanding from the conversation was that ESPN was dissatisfied with the FOIA response, and that ESPN was prepared to take legal action to obtain the Police Reports over the objections raised by MSU. (Plaintiff's Exhibit B.)

On April 24, 2017, after a meeting between Valerie O'Brien, an MSU Police Captain, and Lisa McCormick, the Ingham County Chief Assistant Prosecutor, Ms. McCormick wrote a letter to Capt. O'Brien requesting that MSU withhold release of the Police Reports while the cases were under investigation, i.e., until a charging decision was made. (See Exhibit C to Plaintiff's Complaint.) In her letter, Ms. McCormick cited the Prosecutor's special responsibilities under Sec. 3.8 of the Michigan Rules of Professional Conduct (MRPC), as well as the exemption under FOIA for investigating records, where release of the information (a) would infringe on the defendant's right to a fair trial, (b) interfere with ongoing police investigations, and (c) constitute an unwarranted invasion of an individual's privacy. MCL 15.243(1)(b).

As a consequence of the threat of litigation by ESPN (which had successfully sued MSU on a prior FOIA request), and having concerns that release of the Police Reports over the Prosecutor's objections could constitute criminal obstruction of justice, MSU decided to file suit in this Court seeking a Declaratory Judgment so as to guide



MSU's conduct with regard to the current FOIA request, as well as to future requests of a similar nature.

On May 1, 2017, MSU filed its Complaint for Declaratory Relief against ESPN, Inc. in this Court, alleging that an actual controversy exists between the parties, and requesting a Declaratory Judgment as to whether the Police Reports were properly withheld from disclosure as exempt under FOIA.

The Ingham County Prosecutor has an interest in adherence to the FOIA exemption for investigating records in MCL 15.243(1)(b). This interest is broader and greater than that of MSU, and encompasses records produced by several other law enforcement agencies in Ingham County. The Prosecutor has concerns that MSU may not adequately represent the Prosecutor's interest, necessitating this Motion to Intervene. The Prosecutor's proposed Intervening Complaint for Declaratory Relief, which expresses the Prosecutor's legal position and preferred outcome, has common questions of law and fact with the main action. (See proposed Intervening Complaint for Declaratory Relief, a copy of which is attached as Exhibit 1.)

## ARGUMENT

### I. THE PROSECUTOR SHOULD BE GRANTED INTERVENTION IN THIS CASE

#### A. Legal Standards for Intervention

##### 1. Intervention by Right

Intervention by right is provided for in MCR 2.209(A), which states:

"On timely application a person has a right to intervene in an action:

- (1) when a Michigan statute or court rule confers an unconditional right to intervene;
- (2) by stipulation of all the parties; or

(3) when the applicant claims an interest relating to the property or transaction which is the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." (Emphasis added)

*Precision Pipe and Supply, Inc v Meram Construction, Inc*, 195 Mich App 153; 489 NW2d 166 (1992).

The emphasis is on an applicant's "practical" rights, and whether those rights may be "impaired" or "impeded" by disposition of the action. *D'Agostini v City of Roseville*, 396 Mich 185; 240 NW2d 252 (1976)(mere possibility that a judgment would be binding on the intervenor was sufficient). See also *Auto-Owners Ins Co v Keizer-Morris, Inc*, 284 Mich App 610; 773 NW2d 267 (2009).

With regard to the issue of "adequate representation," the applicant need not make a positive showing that representation is inadequate, or any showing of bad faith on the part of existing parties. Rather, it is sufficient to show that representation *may* be inadequate. *Hill v L F Transp, Inc*, 277 Mich App 500, 508; 746 NW2d 118 (2008).

Whether an application for intervention is timely is a matter for the sound discretion of the Court. The Court views a number of factors, the most important of which is whether intervention at the time requested will prejudice the existing parties to the case, or have the effect of retarding the principal action, or delaying the trial. *School Dist of City of Ferndale v Royal Oak Twp School Dist No 8*, 293 Mich 1; 291 NW 199 (1940).

## 2. Permissive Intervention

If intervention by right is not available, a party may seek permissive intervention under MCR 2.209(B), which states:



On timely application a person may intervene in an action:

- (1) when a Michigan statute or court rule confers a conditional right to intervene; or
- (2) when an applicant's claim or defense and the main action have a question of law or fact in common.

In exercising its discretion, the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties. (Emphasis added)

The provision in MCR 2.209(B)(2), where the applicant's claim or defense involves a question of law or fact in common with the main action, serves as a corollary to permissive joinder under MCR 2.206. That rule allows parties to join or be joined when they have claims arising out of the same transaction and a common question of law or fact is involved. MCR 2.209(B) dovetails with the joinder rule by allowing a person to intervene into litigation already in progress when the applicant has a claim or defense involving a common question of law or fact. Thus, the Courts consider permissive motions to intervene in light of whether intervention will result in undue delay or prejudice to the rights of the original parties. See, e.g., *Cowles v Bank West*, 263 Mich App 213, 236; 687 NW2d 603 (2004), *aff'd in part, vacated in part on other grds*, 476 Mich 1; 719 NW2d 94 (2006), *reh'g den*, 477 Mich 1209; 722 NW2d 429 (2006).

An application for permissive intervention must be timely. *School Dist of City of Ferndale, supra*.

**B. The Prosecutor May Intervene by Right in this Case**

Ingham County Prosecuting Attorney Carol Siemon requests intervention as of right as a party-Plaintiff in this case. This case involves a FOIA request from Defendant ESPN, Inc. to Michigan State University (MSU) for certain law enforcement investigating



records involving certain student-athletes. However, MSU denied the FOIA request on the grounds that the requested records were exempt under MCL 15.243(1)(b). MSU's claim of exemption was based upon objections raised by the Prosecutor's Office, citing the Prosecutor's special responsibilities under Sec. 3.8 of the Michigan Rules of Professional Conduct (MRPC), as well as the exemption under FOIA for investigating records, where release of the information (a) would infringe on the defendant's right to a fair trial, (b) interfere with ongoing police investigations, and (c) constitute an unwarranted invasion of an individual's privacy.

In discussing the FOIA denial with ESPN, an MSU employee ascertained that ESPN would challenge MSU's claimed exemptions by appealing the FOIA denial under MCL 15.240. (Plaintiff's Exhibit B) Rather than simply allow the appeal to proceed, MSU chose to file this declaratory judgment action against ESPN, asking this Court to resolve an actual controversy between the parties.

However, the disposition of this declaratory judgment action may result in the disclosure of the requested records over the Prosecutor's objections, and contrary to the Prosecutor's interest in ensuring fair treatment to accused persons, particularly those for whom formal charges have not yet been issued (including those individuals for whom charges may never issue).

The Prosecutor thus has an interest in the transaction at issue (FOIA request denial). The Prosecutor's rights in reviewing warrant requests and issuing criminal charges while ensuring fairness in the process would as a practical matter be impaired or impeded if this Court were to enter a judgment in favor of Defendant, without the Prosecutor's participation. Although Plaintiff MSU is ably represented by its in-house



legal counsel, the Prosecutor has a genuine concern that MSU's attorneys would not adequately represent the Prosecutor's position. In its Complaint, MSU portrays itself as being placed in an "impossible situation" between the competing interests of ESPN and the Prosecutor. It may be that MSU is unconcerned how this matter is ultimately adjudicated, so long as it has a Court ruling it can rely upon in the face of future FOIA requests of a similar nature.

MSU may not have the same interests as the Prosecutor in preserving the anonymity of individuals named in police reports for whom charges are being sought, and for whom the criminal investigation remains ongoing. It is for this reason that the Prosecutor seeks intervention in this case, i.e., to ensure that her legal position on the issue is presented to the Court, and the Court is fully advised of the ramifications of the ruling sought by MSU.

The Prosecutor's Motion to Intervene is timely filed, as the Complaint was filed on May 1, 2017, and the Defendant has not yet filed an Answer or other initial response. There would be no prejudice to the existing parties, and the progress of the case will not be unduly delayed by the addition of another party Plaintiff. The Prosecutor does not seek to expand the scope of the action.

**C. The Prosecutor Should be Permitted to Intervene in this Case**

If it is determined that the Prosecutor may not intervene as of right under MCR 2.209(A), permissive intervention should be granted under MCR 2.209(B). As demonstrated by the Prosecutor's proposed pleading, the Prosecutor's claim for declaratory relief has common questions of law and fact as the main claim brought by MSU. MSU could have joined the Prosecutor as a party under MCR 2.206.



All of the reasons for which the Prosecutor should be allowed to intervene as of right would also apply to the Prosecutor's alternative request for permissive intervention. The Motion to Intervene is timely filed, and will not prejudice the existing parties.

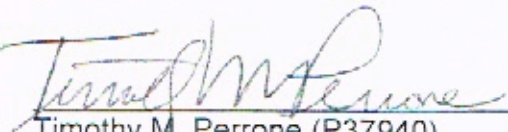
**CONCLUSION AND RELIEF**

For all the foregoing reasons, Ingham County Prosecuting Attorney Carol A. Siemon respectfully requests that this Honorable Court (a) grant her Motion to Intervene as Plaintiff in this case; (b) thereafter enter a Declaratory Judgment that police reports and other records of ongoing criminal investigations, for which the Prosecutor has not yet made a decision whether to charge the underlying accused person, are exempt from disclosure under MCL 15.243(1)(b)(i)-(iii); and (c) grant the Prosecutor such other and further relief as may be required.

Respectfully submitted,

COHL, STOKER & TOSKEY, P.C.

Date: May 25, 2017

  
\_\_\_\_\_  
Timothy M. Perrone (P37940)  
Attorney for Applicant for Intervention  
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Lansing, MI 48933  
(517) 372-9000

STATE OF MICHIGAN  
IN THE COURT OF CLAIMS

BOARD OF TRUSTEES OF MICHIGAN  
STATE UNIVERSITY,

Plaintiff/Counter-Defendant,

vs.

Case No. 17-000114-MZ  
Hon. Stephens

ESPN, INC.,

Defendant/Counter-Defendant.

---

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Attorneys for Defendant/Counter-Plaintiff

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**DEFENDANT ESPN, INC.'S ANSWER TO COMPLAINT, AFFIRMATIVE DEFENSES,  
AND COUNTERCLAIM**

**ANSWER**

Defendant/Counter-Plaintiff ESPN, Inc. ("ESPN") answers Plaintiff/Counter-Defendant's Complaint as follows:

**INTRODUCTION**

Plaintiff Board of Trustees of Michigan State University ("Michigan State University" or MSU") has sued Defendant ESPN to avoid its obligation under the Michigan Freedom of Information Act (MCLA 15.231 et seq.).

Michigan State University is in the midst of an ongoing public controversy over allegations of sex abuse on campus. This is a matter of intense public interest and concern that



ranges from the criminal and civil proceedings against Dr. Larry Nassar alleging sexual abuse of female gymnasts under his care to at least one ongoing prosecution for sexual abuse and other allegations of sexual abuse against members of the football team. ESPN has submitted requests for public records regarding this controversy to MSU pursuant to the Michigan Freedom of Information Act (MCLA 15.231 et seq) (“FOIA”) and as a result has been sued by MSU. To date, MSU has refused to provide the requested records as required by FOIA.

FOIA provides a clear legislative framework for this court’s jurisdiction in such matters. A citizen makes a request for records. The public body must grant the request, deny it in part, or deny it in whole. Only when the public body has denied the request does this court have jurisdiction under FOIA, which permits only the requestor and not the public body to institute litigation. If the requestor prevails in the litigation, FOIA provides specific recovery of the requestor’s fees and costs.

By filing this action MSU has devised an improper method of avoiding its obligations under FOIA—sue the citizen who requests public records. With this “sue the requestor” strategy, MSU is clearly seeking to chill other citizens from seeking its public records and to turn the legislative framework of FOIA on its head. Indeed MSU admits it is using this action to avoid the fee and cost recovery provisions required by FOIA. (Complaint ¶ 18 b.) This is perhaps not surprising as the last time MSU resisted an ESPN request for public records it lost in the Michigan Court of Appeals, *ESPN v. Michigan State University*, Michigan Court of Appeals Case No. 326773, resulting in its payment of a substantial portion of ESPN’s fees and costs. It is, however, directly contrary to the legislative command of FOIA.

In short, disputes over requests for public records are governed by FOIA, which does not permit a public body such as MSU to seek declaratory judgment and does not provide subject



matter jurisdiction to this court over such an action.

1. ESPN admits that MSU asserts that the case arises under FOIA. Further answering, ESPN denies that a declaratory judgment pursuant to MCR 2.605 is a proper procedure for resolution of disputes under FOIA.

2. The allegations of paragraph 2 are admitted.

3. The allegations of paragraph 3 are admitted.

4. The allegations of paragraph 4 are admitted.

5. The allegations of paragraph 5 are denied for the reason that they are untrue and for the reason that MCR 2.605 is not the proper mechanism for disputes under FOIA.

6. ESPN admits that this court has subject matter jurisdiction of a complaint filed by a citizen against MSU under FOIA and that venue in this court would be proper of such a claim. Further answering, ESPN denies that this court has subject matter jurisdiction of a Public Body's complaint for declaratory judgment of a dispute under FOIA.

7. ESPN incorporates here its responses to paragraphs 1-6.

8. The allegations of paragraph 8 are admitted.

9. The allegations of paragraph 9 are denied. Further answering, ESPN admits that Plaintiff has failed to release public records pursuant to the requirements of FOIA.

10. The allegations of paragraph 10 are denied for the reason that they are untrue.

11. The allegations of paragraph 11 are neither admitted nor denied for the reason ESPN is without knowledge or information sufficient to form a belief as to those allegations.

12. The allegations of paragraph 12 are neither admitted nor denied for the reason ESPN is without knowledge or information sufficient to form a belief as to those allegations.

13. The allegations of paragraph 13 are neither admitted nor denied for the reason ESPN is without knowledge or information sufficient to form a belief as to those allegations.

14. The allegations of paragraph 14 are neither admitted nor denied for the reason ESPN is without knowledge or information sufficient to form a belief as to those allegations and they constitute miscellaneous statements of law which have no application to the facts of this case.

15. The allegations of paragraph 15 are neither admitted nor denied for the reason ESPN is without knowledge or information sufficient to form a belief as to those allegations.

16. The allegations of paragraph 16 are denied for the reason that they are untrue.

17. The allegations of paragraph 17 are denied for the reason that they constitute miscellaneous statements of law which have no application to the facts of this case.

18. The allegations of paragraph 18 are denied for the reason that they are untrue.

19. ESPN adopts by reference each of the previous paragraphs 1-18.

20. The allegations of paragraph 20 are neither admitted nor denied for the reason ESPN is without knowledge or information sufficient to form a belief as to those allegations.

21. The allegations of paragraph 21 are neither admitted nor denied for the reason ESPN is without knowledge or information sufficient to form a belief as to those allegations.

22. The allegations of paragraph 22 are denied for the reason that they are untrue.

23. The allegations of paragraph 23 are denied for the reason that they are untrue.

24. ESPN admits that MSU seeks to expedite proceedings. Further answering, ESPN denies that MCR 2.605 has any application to this matter or that the court has subject matter jurisdiction of MSU's claim brought pursuant to MCR 2.605.



**WHEREFORE.** ESPN respectfully requests that the Court dismiss the Complaint with prejudice and in its entirety and that ESPN be awarded its costs and fees incurred in defending this action, and for all such further relief as the Court deems just and proper.

**AFFIRMATIVE DEFENSES**

In defense against the Complaint, ESPN asserts the following affirmative defenses:

1. The court lacks subject matter jurisdiction of Plaintiff Board of Trustees of Michigan State University's ("Michigan State University" or "MSU") claim.

2. The conduct of MSU, as alleged in its Complaint, is contrary to the requirements established by the Michigan Supreme Court in *Evening News Association v. Troy*, 417 Mich 581; 339 NW2d 421, 431-432 (1983) and by the Michigan Court of Appeals in *ESPN Inc. v Michigan State University*, Michigan Court of Appeals Case No. 326773.

3. Michigan State University's complaint fails to state a claim upon which relief can be granted for at least the following reasons:

- a. Michigan State University is using this court and this action as a means of abdicating its statutorily imposed duties under the Michigan Freedom of Information Act. (MCLA 15.231 et seq.) ("FOIA");
- b. Michigan State University is using this court and this action as a means of punishing a citizen requesting public records by suing that citizen in contravention of the clear legislative requirements of FOIA; and
- c. Michigan State University is using this court and this action as a means of avoiding the fee shifting provisions of FOIA that apply to a public body such as MSU that is found to have improperly withheld public records.

4. Defendant ESPN, Inc. reserves the right to raise such additional affirmative defenses as become known through discovery or otherwise, and hereby reserves the right to amend its Answer and Affirmative Defenses to assert any such defenses.

**WHEREFORE**, ESPN respectfully requests that the Court dismiss the Complaint with prejudice and in its entirety and that ESPN be awarded its costs and fees incurred in defending this action, and for all such further relief as the Court deems just and proper.

### **VERIFIED FOIA COUNTERCLAIM**

NOW COMES Defendant and Counter-Plaintiff ESPN, Inc., (“ESPN”) by its attorneys, Honigman Miller Schwartz and Cohn LLP, and for its counterclaim against Plaintiff and Counter-Defendant Michigan State University (“MSU”) says:

### **INTRODUCTION**

In recent months, MSU has been beset by a highly public sexual abuse scandal, and there is no mystery as to a major component of the public’s interest in the scandal. Members of the football team have been accused of rape of another student. Accordingly, ESPN has filed requests under the Michigan Freedom of Information Act for police reports regarding sexual assault on campus, police reports regarding members of the football team and sexual assault and for records of the text message and social media correspondence on the cell phone MSU issued to now suspended assistant football coach Curtis Blackwell. MSU has refused to provide any police reports that it describes as “under investigation,” or in which no charging decision has been made by the Ingham County Prosecutor. MSU refuses to produce Coach Blackwell’s cell phone records for the same reason.

Moreover, MSU refuses to produce the police reports or the cell phone records because it has filed its improper declaratory judgment suit against ESPN. None of these reasons are exemptions under FOIA. Moreover the Supreme Court has ruled in *Evening News Association v*



*Troy*, 417 Mich 481; 339 NW2d 421 (1983) that a public body may not, *as a matter of Michigan law*, deny the public access to public records by reliance on such conclusory claims. This counterclaim seeking the requested records, fees and costs, and punitive damages is the only proper vehicle that FOIA authorizes for remedying MSU's violation of FOIA.

#### **PARTIES, JURISDICTION AND VENUE**

1. This matter arises under the Michigan Freedom of Information Act, MCL § 15.231, *et seq.* ("FOIA") and the Constitution of the State of Michigan.

2. ESPN, Inc. is a Delaware corporation which operates ESPN, a United States based global cable and satellite television channel focusing on sports related programming.

3. MSU is a public body as defined in MCL § 15.232(d), having custody and control of public records. *See* MCL § 390.101 *et seq.* (establishing MSU).

4. This Court has jurisdiction over the subject matter of this complaint and venue is proper in this Court pursuant to MCL 15.240(1)(b) because MSU is a state public body.

#### **GENERAL ALLEGATIONS**

5. ESPN incorporates herein by reference each of the preceding paragraphs.

6. ESPN is a "person" as defined in MCL § 15.232(c) and, pursuant to MCL § 15.233, ESPN has the right to inspect, copy, or receive copies of public records of a public body, including records of MSU.

#### **The February 10, 2017 FOIA Request**

7. On February 10, 2017, ESPN reporter Paula Lavigne ("Lavigne" or "Ms. Lavigne") submitted a request to MSU pursuant to FOIA for the following records:

- a. "All police reports containing allegations of sexual assault from December 10, 2016 through the present", and

b. "A record of arrests made between February 6, 2017 to February 9, 2017."

In an effort to assist MSU in its search, Ms. Lavigne included the specific incidents referenced in the MSU Clery log as including, at a minimum, the incidents for which she was seeking police reports. (Ex. A).

8. On February 20, 2017, MSU extended its time to respond to Ms. Lavigne's request by ten additional business days. (Ex. B).

9. On March 6, 2017 MSU advised Ms. Lavigne in its PARTIAL RESPONSE & FEE & DEPOSIT NOTICE that it was declining to produce one of the reports responsive to her February 10, 2017 request because the incident was "currently under investigation" and therefore exempt pursuant to MCLA 15.243(1)(a) and (b). (Ex. C).

10. On April 17, 2017, MSU advised Ms. Lavigne in its "FOIA RESPONSE" that some unspecified number of police reports she had requested were under investigation by the MSU Police Department or under review by the Ingham County Prosecutor's Office and therefore exempt from disclosure. (Ex. D).

11. On April 27, 2017, MSU advised Ms. Lavigne that in response to her February 10, 2017 request "the Michigan State University Police Department advises that 15 arrests were made in that period." (Ex. E).

12. That same day Ms. Lavigne responded expressing confusion that no records were attached. (Ex. F).

13. MSU did not respond to Ms. Lavigne's April 27, 2017 request. Instead, on May 1, 2017, MSU sent Ms. Lavigne a copy of its Complaint for Declaratory Judgment naming ESPN as a Defendant that had been filed in this Court. (Ex. G).



### **The February 17, 2017 FOIA Request**

14. On February 17, 2017, Ms. Lavigne submitted a separate request to MSU pursuant to FOIA for all of the incident reports covering a specific period and relating to a list of individuals provided with the request. (Ex. H).

15. On February 27, 2017, MSU extended its time to respond to Ms. Lavigne's request by ten additional business days. (Ex. I).

16. On April 3, 2017, MSU advised Ms. Lavigne that the first tier of processing her February 17, 2017 request was completed and requested a further deposit before MSU began separating exempt from nonexempt information. Ms. Lavigne paid the deposit. (Ex. J).

17. On May 8, 2017, MSU sent Ms. Lavigne a "FOIA RESPONSE" to her February 17, 2017 request providing some records but further stating that "Four reports have been withheld entirely pending the resolution of the issues raised in Michigan State University's Complaint for Declaratory Leave." (Ex. K).

### **The October 2016 FOIA Request**

18. On October 14, 17, 19, 21 and 27, 2016, ESPN producer Caitlin Stanco ("Stanco" or Ms. Stanco") submitted a request to MSU pursuant to the Michigan Freedom of Information Act for the following records:

"police reports by specified case numbers drawn from the Michigan State University (MSU) Police Clery Crime and Fire Log, as well as the Clery Crime and Fire Log for previous years."

(Ex. L).

19. MSU provided some records responsive to Ms. Stanco's request but on November 7, 2016, sent Ms. Stanco a "FOIA RESPONSE" to her requests stating that "the numbers listed

in your response correspond to current investigations, therefore, at this time no records pertaining to those investigations will be released.” (Ex. M).

**The May 4, 2017 FOIA Request**

20. On May 4, 2017, ESPN reporter Dan Murphy (“Murphy” or “Mr. Murphy”) submitted a request to MSU pursuant to the Michigan Freedom of Information Act for the following records:

“phone, text message and social media correspondence records from the cell phone provided to Curtis Blackwell from by Michigan State University’s athletic department.”

(Ex. N).

21. On May 12, 2017, MSU advised Mr. Murphy in its FOIA RESPONSE that it was denying his request for the reason that:

“The Michigan State University Police Department advises that the phone from which you seek information is currently in evidence in connection with an ongoing investigation for which no charging decisions have yet been made. The records responsive to your request are therefore being withheld entirely pending the resolution of the issues raised in Michigan State University’s Complaint for Declaratory Relief, attached here.”

(Ex. O).

**COUNT I**

**VIOLATION OF FOIA AS TO THE FEBRUARY 10, 2017 REQUEST**

22. ESPN incorporates herein by reference each of the preceding paragraphs.



23. The requested police reports in the February 10, 2017 requests by Ms. Lavigne are public records subject to FOIA.

24. MSU's refusal to provide the police report or reports in response to the February 10, 2017 request are unwarranted and violate MSU's obligations pursuant to FOIA.

25. MSU has refused to produce any records in response to the portion of Ms. Lavigne's February 10, 2017 request (see paragraph 6.b above) despite acknowledging that such records exist (see Exs. C & D hereto). This constitutes a final determination to deny that portion of Ms. Lavigne's request of that date.

26. MSU's March 6, 2017 "FOIA RESPONSE & FEE & DEPOSIT NOTICE" (Ex. C), April 17, 2017 "FOIA RESPONSE" (Ex. D), and April 27, 2017 email response (Ex. E) constitute a final determination to deny Ms. Lavigne's FOIA request and ESPN is entitled to bring this action pursuant to MCLA §§ 15.235 and 15.240.

27. MCL § 15.240(5) provides that actions commenced pursuant to FOIA "shall be assigned for hearing and trial and for argument at the earliest practicable date and expedited in every way."

28. MSU's filing a declaratory judgment action against ESPN and then using the existence of that litigation as a basis for denying Ms. Lavigne's requests is not permitted by the FOIA and constitutes an arbitrary and capricious violation of FOIA pursuant to MCLA 15.240(7).

## COUNT II

### VIOLATION OF FOIA AS TO THE FEBRUARY 17, 2017 REQUEST

29. ESPN incorporates herein by reference each of the preceding paragraphs.

30. The requested police reports in the February 17, 2017 requests by Ms. Lavigne are public records subject to FOIA.

31. MSU's refusal to provide the four police reports in response to the February 17, 2017 request are unwarranted and violate MSU's obligations pursuant to FOIA.

32. MSU's May 8, 2017 "FOIA Response" (Ex. K) constitutes a final determination to deny Ms. Lavigne's FOIA requests and ESPN is entitled to bring this action pursuant to MCLA §§ 15.235 and 15.240.

33. MCL § 15.240(5) provides that actions commenced pursuant to FOIA "shall be assigned for hearing and trial and for argument at the earliest practicable date and expedited in every way."

34. MSU's filing a declaratory judgment action against ESPN and then using the existence of that litigation as a basis for denying Ms. Lavigne's requests is not permitted by the FOIA and constitutes an arbitrary and capricious violation of FOIA pursuant to MCLA 15.240(7).

### **COUNT III**

#### **VIOLATION OF FOIA AS TO THE OCTOBER 2016 REQUEST**

35. ESPN incorporates herein by reference each of the preceding paragraphs.

36. The requested police reports in the October 2016 by Ms. Stanco are public records subject to FOIA.

37. MSU's refusal to provide some unknown number of police reports in response to the October 2016 requests is unwarranted and violates MSU's obligations pursuant to FOIA.



38. MSU's November 7, 2016 "FOIA RESPONSE" (Ex. M) constitutes a final determination to deny Ms. Stanco's requests and ESPN is entitled to bring this action pursuant to MCLA §§ 15.235 and 15.240.

39. MCL § 15.240(5) provides that actions commenced pursuant to FOIA "shall be assigned for hearing and trial and for argument at the earliest practicable date and expedited in every way."

#### COUNT IV

##### VIOLATION OF FOIA AS TO THE MAY 4, 2017 REQUEST

40. ESPN incorporates herein by reference each of the preceding paragraphs.

41. The requested phone, text messages and social media correspondence in the May 4, 2017 request by Mr. Murphy are public records subject to FOIA.

42. MSU's refusal to provide any of the requested records in response to the May 4, 2017 request is unwarranted and violates MSU's obligations pursuant to FOIA.

43. MSU's May 12, 2017 FOIA RESPONSE (Ex. O) constitutes a final determination to deny Mr. Murphy's FOIA request and ESPN is entitled to bring this action pursuant to MCLA §§ 15.235 and 15.240.

44. MCL § 15.240(5) provides that actions commenced pursuant to FOIA "shall be assigned for hearing and trial and for argument at the earliest practicable date and expedited in every way."

45. MSU's filing a declaratory judgment action against ESPN and then using the existence of that litigation as a basis for denying Ms. Lavigne's requests is not permitted by the FOIA and constitutes an arbitrary and capricious violation of FOIA pursuant to MCLA 15.240(7).

WHEREFORE, ESPN prays that this Court:

- A. Order that this case be expedited as required by MCL § 15.240(5);
- B. Order MSU to provide the withheld records described in Counts I, II, III, and IV;
- C. Award ESPN its reasonable attorneys' fees, costs and disbursements pursuant to MCL § 15.240(6);
- D. Award ESPN damages against MSU pursuant to MCL § 15.240(7) because MSU has arbitrarily and capriciously violated FOIA; and
- E. Grant ESPN any other relief as this Court deems necessary and proper.

Respectfully submitted,

HONIGMAN MILLER SCHWARTZ AND COHN LLP  
Attorney for Defendant/Counter-Plaintiff

By: 

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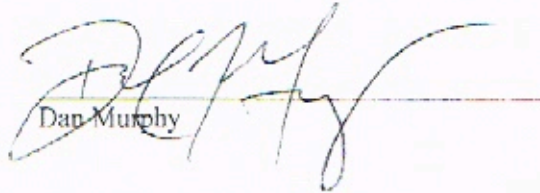
Dated: May <sup>30</sup> 2017



VERIFICATION OF COUNTERCLAIM

I, Dan Murphy, declare that the statements in the above Counterclaim are true to the best of my information, knowledge, and belief.

Date: 5/26/17

  
Dan Murphy

Subscribed and sworn to before me  
this 26 day of May, 2017

  
Notary Public

My commission expires: October 30, 2023

BRYAN ROSE  
Notary Public - State of Michigan  
County of Jackson  
My Commission Expires Oct 30, 2023  
Acting in the County of Jackson

**VERIFICATION OF COUNTERCLAIM**

I, Paula Lavigne, declare that the statements in the above Counterclaim are true to the best of my information, knowledge, and belief.

Date: May 25, 2017

  
Paula Lavigne

Subscribed and sworn to before me  
this 25<sup>th</sup> day of May, 2017

  
Notary Public

My commission expires: June 19, 2017





VERIFICATION OF COUNTERCLAIM

I, Caitlin Stanco, declare that the statements in the above Counterclaim are true to the best of my information, knowledge, and belief.

Date: 5/26/2017

Caitlin Stanco  
Caitlin Stanco

Subscribed and sworn to before me  
this    day of May, 2017

~~Notary Public~~

~~My commission expires: \_\_\_\_\_~~

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of California  
County of MARIN  
Subscribed and sworn to (or affirmed) before me this 26TH day  
of MAY, 2017, by CAITLIN STANCO

\_\_\_\_\_ proved to me on the basis  
of satisfactory evidence to be the person(s) who appeared before me.

Signature Linda Kincaid (Seal)



2017 MAY 30 PM 2:27

STATE OF MICHIGAN  
IN THE COURT OF CLAIMS

RECEIVED

2017 JUN 20 PM 3:12

BOARD OF TRUSTEES OF MICHIGAN  
STATE UNIVERSITY,

Plaintiff/Counter-Defendant,

v

ESPN, INC.,

Defendant/Counter-Plaintiff.

Case No. 17-000114-MZ

Hon. Cynthia D. Stephens

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**COUNTER-DEFENDANT'S ANSWER AND AFFIRMATIVE DEFENSES  
TO COUNTER-CLAIMS**



## **INTRODUCTION**

In response to Counter-Plaintiff's "introduction" to its counterclaim, Counter-Defendant objects to the unnumbered, run-on narrative inasmuch as it violates MCR 2.111(A)1 (requiring that "[e]ach allegation of a pleading must be clear, concise and direct"), and MCR 2.113(E) (requiring claims are made in separate paragraphs based on separate claims and underlying circumstances). To the extent that Counter-Defendant is capable of responding to the claims as required by the Court Rules, Counter-Defendant denies the allegations therein for the reason they are untrue as stated.

### **PARTIES, JURISDICTION AND VENUE**

1. Answering paragraph 1 of Counter-Plaintiff's counterclaim, Counter-Defendant neither admits nor denies the allegation as it calls for a legal conclusion, and leaves Counter-Plaintiff to its proofs.

2. Answering paragraph 2 of Counter-Plaintiff's counterclaim, Counter-Defendant neither admits nor denies the allegations for lack of knowledge or sufficient information upon which to form a belief and leaves Counter-Plaintiff to its proofs.

3. Answering paragraph 3 of Counter-Plaintiff's complaint, Counter-Defendant admits the allegations therein.

4. Answering paragraph 4 of Counter-Plaintiff's counterclaim, Counter-Defendant neither admits nor denies the allegation as it calls for a legal conclusion, and leaves Counter-Plaintiff to its proofs.

### **GENERAL ALLEGATIONS**

5. Counter-Defendant repeats and re-alleges each and every paragraph of this Answer as though fully set forth herein verbatim.

6. Answering paragraph 6 of Counter-Plaintiff's counterclaim, Counter-Defendant neither admits nor denies the allegation as it calls for a legal conclusion, and leaves Counter-Plaintiff to its proofs.

### **The February 10, 2017 FOIA Request**

7. Answering paragraph 7 of Counter-Plaintiff's counterclaim, Counter-Defendant neither admits nor denies the allegations for lack of knowledge or sufficient information upon which to form a belief and leaves Counter-Plaintiff to its proofs.

8. Answering paragraph 8 of Counter-Plaintiff's complaint, Counter-Defendant admits the allegations therein.

9. Answering paragraph 9 of Counter-Plaintiff's complaint, Counter-Defendant admits the allegations therein.

10. Answering paragraph 10 of Counter-Plaintiff's complaint, Counter-Defendant denies the allegations therein for the reason they are untrue.

11. Answering paragraph 11 of Counter-Plaintiff's complaint, Counter-Defendant admits the allegations therein.

12. Answering paragraph 12 of Counter-Plaintiff's complaint, Counter-Defendant neither admits nor denies the allegations for lack of knowledge or sufficient information upon which to form a belief and leaves Counter-Plaintiff to its proofs.

13. Answering paragraph 13 of Counter-Plaintiff's complaint, Counter-Defendant denies the allegation that Counter-Defendant did not respond to her "request" for the reason it is



untrue. Counter-Defendant admits it sent Ms. Lavigne a copy of its Complaint for Declaratory Judgment.

**The February 17, 2017 FOIA Request**

14. Answering paragraph 14 of Counter-Plaintiff's complaint, Counter-Defendant admits the allegations therein.

15. Answering paragraph 15 of Counter-Plaintiff's complaint, Counter-Defendant admits the allegations therein.

16. Answering paragraph 16 of Counter-Plaintiff's complaint, Counter-Defendant admits the allegations therein.

17. Answering paragraph 17 of Counter-Plaintiff's complaint, Counter-Defendant admits the allegations therein, but denies to the extent that the letter stated Complaint for Declaratory "Relief", not "Leave".

**The October 2016 FOIA Request**

18. Answering paragraph 18 of Counter-Plaintiff's complaint, Counter-Defendant admits that Ms. Stanco submitted a request with the language quoted therein, but denies that the requests on various dates constitute a single request as alleged, but rather are multiple requests with no consistent language.

19. Answering paragraph 19 of Counter-Plaintiff's complaint, Counter-Defendant generally admits the allegations therein, but denies the exact language of the quotation therein as it does not reflect the language within Counter-Defendant's letter.

**The May 4, 2017 FOIA Request**

20. Answering paragraph 20 of Counter-Plaintiff's complaint, Counter-Defendant generally admits the allegations therein, but denies the exact language of the quotation therein as it does not reflect the language within Mr. Murphy's request.

21. Answering paragraph 21 of Counter-Plaintiff's complaint, Counter-Defendant admits the allegations therein.

**COUNT I**

**VIOLATION OF FOIA AS TO THE FEBRUARY 10, 2017 REQUEST**

22. Counter-Defendant repeats and re-alleges each and every paragraph of this Answer as though fully set forth herein verbatim.

23. Answering paragraph 23 of Counter-Plaintiff's counterclaim, Counter-Defendant neither admits nor denies the allegation as it calls for a legal conclusion, and leaves Counter-Plaintiff to its proofs.

24. Answering paragraph 24 of Counter-Plaintiff's complaint, Counter-Defendant denies the allegations for the reason they are untrue.

25. Answering paragraph 25 of Counter-Plaintiff's complaint, Counter-Defendant denies the allegations for the reason they are untrue.

26. Answering paragraph 26 of Counter-Plaintiff's complaint, Counter-Defendant denies the allegations for the reason they are untrue.

27. Answering paragraph 27 of Counter-Plaintiff's complaint, Counter-Defendant denies the allegation for the reason it is untrue, as MCL 15.240(5), in relevant part, states "...shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way."



28. Answering paragraph 28 of Counter-Plaintiff's complaint, Counter-Defendant denies the allegations for the reason they are untrue.

**COUNT II**

**VIOLATION OF FOIA AS TO THE FEBRUARY 17, 2017 REQUEST**

29. Counter-Defendant repeats and re-alleges each and every paragraph of this Answer as though fully set forth herein verbatim.

30. Answering paragraph 30 of Counter-Plaintiff's counterclaim, Counter-Defendant neither admits nor denies the allegation as it calls for a legal conclusion, and leaves Counter-Plaintiff to its proofs.

31. Answering paragraph 31 of Counter-Plaintiff's complaint, Counter-Defendant denies the allegations for the reason they are untrue.

32. Answering paragraph 32 of Counter-Plaintiff's complaint, Counter-Defendant denies the allegations for the reason they are untrue.

33. Answering paragraph 33 of Counter-Plaintiff's complaint, Counter-Defendant denies the allegation for the reason it is untrue, as MCL 15.240(5), in relevant part, states "...shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way."

34. Answering paragraph 34 of Counter-Plaintiff's complaint, Counter-Defendant denies the allegations for the reason they are untrue.

**COUNT III**

**VIOLATION OF FOIA AS TO THE OCTOBER 2016 REQUEST**

35. Counter-Defendant repeats and re-alleges each and every paragraph of this Answer as though fully set forth herein verbatim.

36. Answering paragraph 36 of Counter-Plaintiff's counterclaim, Counter-Defendant neither admits nor denies the allegation as it calls for a legal conclusion, and leaves Counter-Plaintiff to its proofs.

37. Answering paragraph 37 of Counter-Plaintiff's complaint, Counter-Defendant denies the allegations for the reason they are untrue.

38. Answering paragraph 38 of Counter-Plaintiff's complaint, Counter-Defendant denies the allegations for the reason they are untrue.

39. Answering paragraph 39 of Counter-Plaintiff's complaint, Counter-Defendant denies the allegation for the reason it is untrue, as MCL 15.240(5), in relevant part, states "...shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way."

#### COUNT IV

##### VIOLATION OF FOIA AS TO THE MAY 4, 2017 REQUEST

40. Counter-Defendant repeats and re-alleges each and every paragraph of this Answer as though fully set forth herein verbatim.

41. Answering paragraph 41 of Counter-Plaintiff's counterclaim, Counter-Defendant neither admits nor denies the allegation as it calls for a legal conclusion, and leaves Counter-Plaintiff to its proofs.

42. Answering paragraph 42 of Counter-Plaintiff's complaint, Counter-Defendant denies the allegations for the reason they are untrue.

43. Answering paragraph 43 of Counter-Plaintiff's complaint, Counter-Defendant denies the allegations for the reason they are untrue.




44. Answering paragraph 44 of Counter-Plaintiff's complaint, Counter-Defendant denies the allegation for the reason it is untrue, as MCL 15.240(5), in relevant part, states "...shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way."

45. Answering paragraph 45 of Counter-Plaintiff's complaint, Counter-Defendant denies the allegations for the reason they are untrue.

Wherefore, Counter-Defendant MSU asks that Counter-Plaintiff's Counterclaim be dismissed.

Dated: June 20, 2017

  
\_\_\_\_\_  
Robert T. Kent  
Attorney for Plaintiff and Counter-Defendant  
Michigan State University

STATE OF MICHIGAN  
IN THE COURT OF CLAIMS

BOARD OF TRUSTEES OF MICHIGAN  
STATE UNIVERSITY,

Plaintiff/Counter-Defendant,

v

ESPN, INC.,

Defendant/Counter-Plaintiff.

---

Case No. 17-000114-MZ

Hon. Cynthia D. Stephens

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**COUNTER-DEFENDANT'S AFFIRMATIVE DEFENSES**


Defendant MSU states its affirmative defenses as follows:

1. MSU is entitled to withhold the relevant police reports and/or portions thereof under the Michigan Freedom of Information Act, MCL 15.231 et seq., including, but not limited to sections 13(1)(a), 13(1)(b), or 13(1)(d).
2. Counter-Plaintiff failed to exhaust administrative remedies.



3. Counter-Plaintiff's complaint fails to state a claim upon which relief can be granted.
4. Counter-Defendant is an improper party, improperly designated or otherwise improperly brought to this action.
5. Counter-Defendant reserves the right to add to its Answer and rely upon all Affirmative Defenses as may be hereafter disclosed by way of discovery.

Dated: June 20, 2017

  
\_\_\_\_\_  
Robert T. Kent  
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STATE OF MICHIGAN  
IN THE COURT OF CLAIMS

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JEROME W. ZIMM

BOARD OF TRUSTEES OF MICHIGAN  
STATE UNIVERSITY,

Plaintiff/Counter-Defendant,

vs.

Case No. 17-000114-MZ  
Hon. Stephens

ESPN, INC.,

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---

**ESPN, INC.'S 06/21/2017 MOTION FOR SUMMARY DISPOSITION OF BOARD OF  
TRUSTEES OF MICHIGAN STATE UNIVERSITY'S COMPLAINT**

Pursuant to MCR 2.116(C)(4), Defendant ESPN, Inc. ("ESPN") moves for summary disposition and dismissal of Plaintiff Board of Trustees of Michigan State University's ("MSU") Complaint with prejudice.

The bases for this motion are set forth in the attached ESPN, Inc.'s Brief in Support of Motion for Summary Disposition of Board of Trustees of Michigan State University's Complaint.

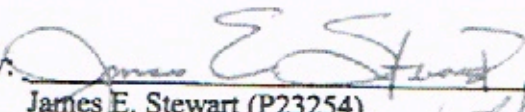
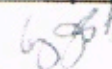
On June 20, 2017, counsel for ESPN sought to obtain the concurrence of counsel for MSU in the relief requested in this motion but was unable to do so.



WHEREFORE, ESPN respectfully requests that the Court grant its motion for summary disposition and dismiss MSU's complaint with prejudice.

Respectfully submitted,

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Attorney for Defendant/Counter-Plaintiff

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Dated: June 21, 2017

STATE OF MICHIGAN  
IN THE COURT OF CLAIMS

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COURT OF  
JEROME W. Z...

BOARD OF TRUSTEES OF MICHIGAN  
STATE UNIVERSITY,

Plaintiff/Counter-Defendant,

vs.

Case No. 17-000114-MZ  
Hon. Stephens

ESPN, INC.,

Defendant/Counter-Defendant.

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**ESPN, INC.'S BRIEF IN SUPPORT OF 06/21/2017 MOTION FOR SUMMARY  
DISPOSITION OF BOARD OF TRUSTEES OF MICHIGAN STATE UNIVERSITY'S  
COMPLAINT FOR DECLARATORY RELIEF**

**INTRODUCTION**

Plaintiff Board of Trustees of Michigan State University's ("Michigan State University" or "MSU") motivations in initiating this lawsuit are clear: MSU has sued Defendant ESPN to avoid its obligation under the Michigan Freedom of Information Act (MCLA 15.231 et seq.) ("FOIA"). Because the legislature provided no authority in FOIA for a public body to initiate litigation, MSU's Complaint should be dismissed with prejudice pursuant to MCR 2.116(C)(4) for lack of subject matter jurisdiction.



Michigan State University is in the midst of an ongoing public controversy over allegations of sex abuse on campus. This is a matter of intense public interest and concern that ranges from the criminal and civil proceedings against Dr. Larry Nassar alleging sexual abuse of female gymnasts under his care to several prosecutions for sexual abuse against members of the football team.<sup>1</sup>

It is this sexual abuse scandal that is the motivation for the MSU Complaint for Declaratory Relief which is attached at Exhibit A. It alleges in paragraphs 8 and 9 that on February 10, 2017, ESPN reporter Paula Lavigne submitted a FOIA request for MSU police reports containing allegations of sexual assaults during a specific period. A copy of that request is attached to the MSU Complaint. MSU concedes in paragraph 9 of its Complaint that it “has not released copies of certain police reports.” Specifically, MSU issued an April 17, 2017 FOIA RESPONSE (attached as Exhibit B) in which MSU declined to produce some unspecified number of police reports claiming that they were exempt from disclosure but then promised to produce some portion of the reports with “significant substantive withholdings” by May 1, 2017. As is customary and required by FOIA when a request is denied in whole or in part, The FOIA RESPONSE also outlined Ms. Lavigne’s rights under FOIA to seek an administrative appeal or to file a civil action.

Rather than rely on its claim of exemption or produce even the promised reports with “significant substantive withholdings”, on May 1, 2017, MSU filed this lawsuit against ESPN over Ms. Lavigne’s request. As a clear matter of the legislative command of FOIA, this court has

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<sup>1</sup> In fact, as this litigation has been pending, three MSU football players have been identified, criminally charged, and dismissed from the team stemming from allegations of sexual assault.



no subject matter jurisdiction over the MSU Complaint for Declaratory Relief.<sup>2</sup>

In short, disputes over requests for public records are governed by FOIA, which does not permit a public body such as MSU to initiate litigation or to seek a declaratory judgment and does not provide subject matter jurisdiction to this court over such an action.

### LEGAL STANDARD

A court may grant summary disposition when “the court lacks jurisdiction of the subject matter.” MCR 2.116(C)(4). By court rule, the Court only has jurisdiction over declaratory judgment actions in limited circumstances, circumstances which do not exist here:

(1) In a case of actual controversy, within its jurisdiction, a Michigan Court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted.

(2) For the purpose of this rule, an action is considered within the jurisdiction of a court if the court would have jurisdiction of an action on the same claim or claims in which the plaintiff sought relief other than a declaratory judgment.

MCR 2.605(A)(1)-(2). Moreover, the FOIA statute provides the Circuit Court or the Court of Claims with jurisdiction over claims brought by the requesting party.<sup>3</sup> See MCL 15.240(1)(b).

---

<sup>2</sup> Permitting such “sue the requestor” litigation would turn the entire legislative purpose of FOIA on its head. This “sue the requestor” strategy, would clearly chill other citizens from seeking public records and would destroy the clear fee and cost recovery provisions of FOIA. Illustratively, MSU admits it is using this action to avoid the fee and cost recovery provisions required by FOIA. (Complaint ¶ 18 b.) This is perhaps not surprising as the last time MSU resisted an ESPN request for public records it lost in the Michigan Court of Appeals, *ESPN v. Michigan State University*, Michigan Court of Appeals Case No. 326773, resulting in its payment of over \$70,000 of ESPN’s fees and costs. It is, however, directly contrary to the legislative command of FOIA.

<sup>3</sup> It has long been established in Michigan that “the affirmative description of the cases in which the jurisdiction may be exercised implies a negative on the exercise of such power in other cases.” *Luyk v Hertel*, 242 Mich 445, 447; 219 NW 721 (1928) (quoting *In re Heath*, 144 US 92; 12 S Ct 615; 36 L Ed 358 (1892)); see also *Mallory v Conida Warehouses, Inc*, 113 Mich App 280, 284-285; 317 NW2d 597 (1982) (applying same rule in context of personal jurisdiction).



For the reasons discussed fully below, MSU's declaratory judgment action has no basis in law, and this Court lacks jurisdiction to hear MSU's claim.

## ARGUMENT

### A. FOIA Creates Limited Jurisdiction to Resolve Disputes

FOIA provides courts with the limited jurisdiction to resolve disputes arising out of a request for public records. *See* MCL 15.240(1)(b). Specifically, FOIA provides that a requesting party may "commence a civil action in the Circuit Court, or if the decision of a state public body is at issue, the Court of Claims, to compel the public body's disclosure of the public records within 180 days after a public body's final determination to deny a request." *Id.* In other words, FOIA provides for jurisdiction in the Circuit Court or the Court of Claims *only* over claims by the *requesting party to compel disclosure* following a *final determination to deny* a request. Stated in the inverse, FOIA does not create an independent cause of action for a public body to ask a court to approve of its decision to grant or deny a request or to ask the Court to tell it what to do. Thus, there is no statutory basis in FOIA to permit the public body to deny a request and then file suit.

FOIA provides a simple legislative structure: a citizen requests documents from a public body. The public body grants or denies the request. If the request is denied, the citizen decides to (1) appeal the request administratively, (2) file a lawsuit, or (3) do nothing. In other words, the citizen decides whether to take the financial risks associated with litigation and further pursue the requested document. Allowing the public body to sue completely alters this statutory structure.

Declaratory judgment actions such as this also disrupt the legislatively prescribed fee-shifting provisions of FOIA. Pursuant to FOIA, a requesting party does not have to pay litigation expenses if it prevails in a suit to obtain records. *See* MCL 15.240(6). The Michigan Legislature deliberately created a risk-reward calculation that citizens are entitled to give the appropriate



weight before deciding to file suit. A public body's declaratory judgment action alters that calculus in two ways. First, it completely removes the risk-reward calculation from the hands of the requesting party, forcing litigation whether it wants to file suit or not. Second, it creates an avenue to completely strip *any reward* from the process.

Indeed MSU has made no secret of its intent to try to do just that. See paragraph 18b of its Complaint in which MSU asserts that it is in an "impossible position" because, if its claim of exception is found to be legally wrong, "it will subject itself to potential liability under FOIA." This is not an "impossible position" at all. It is precisely the cost shifting procedure that the legislature has established and which MSU is trying to avoid.

**B. Courts across the Country Have Rejected Declaratory Judgment Actions like This**

Government bodies in a number of states have attempted to thwart the procedures of the state's respective Freedom of Information or Open Records Act—and the fee shifting provisions included in each—by filing declaratory judgment actions before the requesting party can file suit. Without fail, the vast majority of courts to consider such a complaint have dismissed it.

In *Filarsky v Superior Court of Los Angeles County*, 28 Cal 4th 419; 121 Cal Rptr 2d 844; 49 P3d 194 (2002) (attached as Exhibit C), the City of Los Angeles refused to disclose documents requested pursuant to the California Public Records Act. Before the requesting party could initiate his own proceeding, the city filed a declaratory relief action, seeking a declaration that it was not required to disclose the records sought. The trial court concluded that the documents were not subject to disclosure. The Supreme Court of California reversed, determining that "the Act does not authorize a public agency to initiate an action to determine the agency's obligation to disclose public records after the agency denies a request for disclosure, and that permitting a public agency to maintain such an action would thwart the intent and purpose of the Act." *Id.* at 432-433. Further, the court considered whether the Code of Civil



Procedure nevertheless authorizes a public agency to bring a declaratory relief action to determine whether it must disclose public records. The court concluded that “the Legislature specified the *exclusive procedure* in these circumstances for litigating disputes regarding a person’s right to obtain disclosure of public records under the Act, and that a superior court abuses its discretion in bypassing this statutory procedure and granting declaratory relief in an action initiated by a public agency[.]” *Id.* at 433 (emphasis added). Accordingly, the declaratory judgment action was dismissed.

Similarly, in *McCormick v Hanson Aggregates Southeast, Inc.*, 164 NC App 459; 596 SE2d 431 (2004) (attached as Exhibit D), the North Carolina Court of Appeals considered the Raleigh City Attorney’s Office declaratory judgment action challenging a document request. The trial court ordered the production of certain documents, but denied the production of others. *Id.* at 462. On appeal, the Court of Appeals first addressed whether the Public Records Act even allowed a government entity to file such an action, thereby forcing the requestor into litigation before seeking to compel a response through the courts. *Id.* at 463. In reviewing North Carolina’s Public Records Act, the court found that the act “does not appear to allow a government entity to bring a declaratory judgment action; only the person making the public records request is entitled to initiate judicial action to seek enforcement of its request.” *Id.* at 464. Based on that determination, the court held that the use of a declaratory judgment action was improper. *Id.*; see also *City of Burlington v Boney Publishers, Inc.*, 166 NC App 186; 600 SE2d 872 (2004) (attached as Exhibit E) (relying on *McCormick* and holding that, in the parallel context of the Open Meetings Act, “Allowing a governmental agency to bring a declaratory judgment action against someone who has not initiated litigation will have a chilling effect on the public, in



essence eliminating the protection offered them under the statute by requiring them ‘to defend civil actions they otherwise might not have commenced[.]’”).

Finally, several trial court orders from other jurisdictions have similarly rejected the “sue the requestor” approach attempted by MSU. *See for example, The City of Billings v Billings Gazette Communications*, unpublished order of the Montana Thirteenth District Court for Yellowstone County at 14-16, issued January 21, 2015 (Case No. DV 14-964) (attached as Exhibit F):

Therefore, the court finds that the City’s method by which it chose to resolve what it may have viewed as a future dispute between itself and the Gazette was inappropriate and not supported by legal precedent. Its method also had the effect of chilling future request for information for fear one might be in essence requesting a lawsuit along with one’s request for information. The Gazette was required to answer the Complaint and file compulsory counterclaims to preserve their positions. This case is now “justiciable” because the Gazette was forced to respond.

*See also Township of Hamilton v Scheeler*, unpublished opinion of the Superior Court of New Jersey, Atlantic County at 14, issued June 24, 2015 (Docket No.: L-0833-15) (attached as Exhibit G) (“The government agency may not, in the guise of a declaratory judgment action, file suit against a requestor solely for the purposes of having a court determine whether the request is appropriate.”); *Addison Rutland Supervisory Union v Cyr*, unpublished decision of the Vermont Superior Court Rutland Unit at 3, issued November 5, 2012 (Docket No. 275-4-12 Rdcv) (attached as Exhibit H) (“To allow ARSU to maintain this suit would subvert the statutory framework established by the legislature.”).

The reasoning that each of these state courts have considered applies in equal measure to the Michigan FOIA at issue here. The Court lacks jurisdiction over MSU’s Complaint for Declaratory Relief and it should be dismissed forthwith.



## CONCLUSION


WHEREFORE, ESPN respectfully requests that the Court grant its motion, dismiss the Complaint for Declaratory Relief with prejudice, and grant ESPN any other relief as this Court deems necessary and proper.

Respectfully submitted,

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Dated: June 21, 2017

STATE OF MICHIGAN  
IN THE COURT OF CLAIMS

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BOARD OF TRUSTEES OF MICHIGAN  
STATE UNIVERSITY,

Plaintiff/Counter-Defendant,

vs.

ESPN, INC.,

Defendant/Counter-Defendant.

Case No. 17-000114-MZ  
Hon. Cynthia Stephens

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**ESPN, INC.'S RESPONSE IN OPPOSITION TO INGHAM COUNTY PROSECUTING  
ATTORNEY'S 05/25/2017 MOTION TO INTERVENE AS PLAINTIFF**

The motion of the Ingham County Prosecutor (the "Prosecutor") to intervene as a plaintiff should be promptly denied for at least three simple reasons: 1) subsequent developments have rendered it moot; 2) it seeks to intervene as a plaintiff in an action over which the court does not have subject matter jurisdiction; and 3) it does not meet the requirements to intervene.



## MOOTNESS

Repeatedly the Prosecutor stresses that her reason for intervention is that no charging decision has been made as to the MSU football players involved in the requested MSU records. For example, the Prosecutor requests that the Court “enter a Declaratory Judgment that police reports and other reports and other records of ongoing criminal investigations, for which the Prosecutor has *not yet made a decision to charge* the underlying accused person are exempt from disclosure....” (Prosecutor Brief at p 8 (emphasis added).) Similarly, the Prosecutor describes the basis for her April 24, 2017 letter request to MSU that it not disclose the MSU records as follows: “Ms. McCormick wrote a letter to Captain O’Brien requesting that MSU withhold release of the police reports while the cases were under investigation i.e. *until a charging decision was made.*” (Prosecutor Brief at p 2 (emphasis added).)

Of course, as everyone is now well aware, the Prosecutor has since made its charging decision. *E.g.*, Scooby Axson, *Arrest warrants issued for Michigan State football players charged with sexual assault*, SPORTS ILLUSTRATED, June 6, 2017, <https://www.si.com/college-football/2017/06/06/michigan-state-football-players-sexual-assault-charges> (identifying charges against Josh King, Donnie Corley, and Demetric Vance). Thus, the very basis for the Prosecutor’s request to intervene—that no charging decision has yet been made—and the very relief it requests—that the court exempt records for which no charging decision has been made—are mooted by the prosecutor’s decision to charge the three individuals.<sup>1</sup>

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<sup>1</sup> The prosecutor’s motion would not be saved by a claim that she is seeking some sort of ruling that police reports can never be released prior to a charging decision as that would run directly afoul of the Supreme Court’s command in *Evening News Association v Troy*, 417 Mich 481, 503; 339 NW2d 421 (1983) that a denial of any request must be supported by specific facts applicable to that particular case, i.e. “a bill of particulars”.

### **LACK OF SUBJECT MATTER JURISDICTION**

The Prosecutor is seeking to intervene as a Plaintiff in MSU's Complaint for Declaratory Judgment. Thus, MSU and the Ingham County Prosecutor have apparently decided to double down on the "sue the requestor" theory being pursued by MSU. Having made a request for public records, ESPN is now to be sued not by one but by two public bodies, one of which is not even the owner of the requested records. As set forth in its Motion for Summary Disposition, the Freedom of Information Act does not permit public bodies to sue requestors and hence the court has no subject matter jurisdiction over the MSU complaint. This provides a separate and independent basis for the court to deny the Prosecutors' Motion to Intervene, and ESPN hereby incorporates by reference the entirety of its 06/21/2017 Motion for Summary Disposition and Brief in Support thereof ("Motion for Summary Disposition").

### **THE PROSECUTOR DOES NOT MEET THE REQUIREMENTS TO INTERVENE**

To say that there is no need for the Prosecutor to intervene in MSU's Complaint is to engage in understatement. The records sought are not the Prosecutor's records, and FOIA provides no basis for any government agency but the one from which the records are sought to claim an exemption. Indeed, the Prosecutor's motion demonstrates just how dangerous this "sue the requestor" tactic is to the language and policy of FOIA. MSU is seeking to avoid the fee and cost provisions of FOIA in its Complaint for Declaratory Judgment which is contrary to FOIA's clear provisions. *See* Brief in Support Motion for Summary Disposition at 4-5 (incorporated by reference herein) (discussing chilling effect and reversal of statutory incentive structure caused by "sue the requestor" suits). Now, the Prosecutor seeks to join the suit, assist in the withholding of the records, and similarly avoid being responsible for FOIA fees and costs if she is unsuccessful.




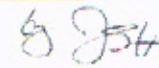
Additionally, even if the court were to conclude that it had subject matter jurisdiction over the MSU complaint, there is absolutely no need for the Prosecutor to intervene. MSU has an in house counsel staff experienced in FOIA matters and so far MSU has been doing a fine job in protecting the Prosecutor's purported interests by disclosing nothing. Finally any interest the Prosecutor has in advancing her views can easily be accomplished by affidavits or witness testimony. Such an approach is not uncommon. See, for example, *Evening News Association v Troy, supra*, in which the Oakland County Prosecutor provided evidence in the trial court hearing supporting the City's non-disclosure of a police report.

**CONCLUSION**

For all of the reasons set forth above, the Prosecutor's Motion to Intervene should be denied.

Respectfully submitted,

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Dated: June 22, 2017

STATE OF MICHIGAN  
IN THE COURT OF CLAIMS

BOARD OF TRUSTEES OF MICHIGAN  
STATE UNIVERSITY,

Plaintiff/Counter-Defendant,

v

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Defendant/Counter-Plaintiff.

Case No. 17-000114-MZ

Hon. Cynthia D. Stephens

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**MSU'S 07/05/2017 RESPONSE AND REQUEST FOR ORAL ARGUMENT  
REGARDING ESPN INC.'S 06/21/2017 MOTION FOR SUMMARY DISPOSITION OF  
BOARD OF TRUSTEES OF MICHIGAN STATE UNIVERSITY'S COMPLAINT**

**Introduction**

By its declaratory action, Michigan State University ("MSU") requests that this Court make a determination of law to guide MSU's current and future actions related to FOIA requests for copies of Police Reports, which prosecutors have specifically requested that MSU not



disclose to requesters because—according to the prosecutors—the entirety of the reports are exempt from disclosure under FOIA.<sup>1</sup>

MSU is not attempting to avoid its obligations under FOIA. Rather, MSU is asking this Court to declare MSU's obligations when a law enforcement agency takes the position that the Police Reports the MSU Police Department ("MSUPD") submits to the agency for the exercise of its prosecutorial authority are FOIA-exempt. MSUPD are not the only law enforcement agents involved in the law enforcement process. While MSUPD may be the law enforcement agency commencing the criminal investigation, its investigation is inextricably linked to the prosecutorial investigation.<sup>2</sup> Prosecutors are the ultimate arbiters of the criminal investigatory process; they are responsible for presenting the underlying evidence in court. Police, as first actors who are responsible only for a portion of the law enforcement process, are often incapable of knowing how and why the release of their reports would affect the remainder of the process. It is, therefore, reasonable that the police rely upon the prosecutor and other chief law enforcement agents when those agents assert that release of Police Reports during the investigatory process will interfere with the remainder of the law enforcement process and adversely affect the accused's right to a fair trial. Instead of merely denying ESPN's FOIA request, MSU initiated this declaratory action to allow the Court to determine whether MSU may rely on the assertions of FOIA exemption from the prosecutorial authorities to whom the Police Reports are submitted as a consequence of MSUPD's criminal investigations. If the Court determines it cannot, MSU intends to release the non-exempt portions of the requested Police Reports.

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<sup>1</sup> MSU received a similar request from the Office of the Attorney General in relation to an ongoing investigation it is conducting related to Larry Nasser, a former MSU employee and physician. See the attached email correspondence at Exhibit A. As is evident from the content of ESPN's counterclaim, MSU has also received a number of requests from ESPN and other news outlets requesting access to Police Reports prosecutors recognize as FOIA-exempt.

<sup>2</sup> In fact, the Prosecutor will sometimes have significant involvement with police investigations. It is commonplace that prosecutors request police to conduct interviews of certain witnesses and otherwise establish investigatory focus.



### **A Continuing, Recurring Question with Significant Impact**

ESPN paints itself as an aggrieved party dragged into court against its will to defend a lawsuit designed to punish ESPN for filing a FOIA request. This could not be further from the truth. MSU's complaint is clear in its intentions.<sup>3</sup> MSU does not take lightly its responsibility to provide access to its records under FOIA. MSUPD does not take lightly its responsibility to seek justice for alleged victims in a system that mandates a fair trial for alleged criminals.

If this Court were to decide, as ESPN suggests, that an action for declaratory judgment is not available to MSU under FOIA, it would effectively strip MSU of its only avenue for obtaining guidance on questions that may not otherwise be decided by a court. Without the availability of declaratory guidance, MSU faces a Hobson's choice—deny FOIA requests for Police Reports until a FOIA requester initiates a lawsuit for them and defend that suit, or ignore the requests of those responsible for the conduct of the criminal proceedings for which the Police Reports are collected. Should it select the first course of action, MSU will be exposed to potential liability for the attorney fees of the FOIA requester. Such a result is not fair or just for any of the affected parties.

Not only would it be bad policy to prevent MSU from sustaining an action for declaratory judgment that implicates FOIA, it would also depart from case law interpreting the availability of declaratory remedies. "An action for a declaratory judgment is typically equitable in nature and subject to different rules than other causes of action." *Adair v State*, 486 Mich 468, 490; 785 NW2d 119, 131–32 (2010). Michigan courts recognize broad discretion to determine declaratory actions:

The remedy by means of declaratory judgments is highly remedial, and the statute and rules should be accorded a liberal construction to carry out the purposes underlying such judgments. One great purpose is to enable parties to have their

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<sup>3</sup> Notably absent from MSU's complaint is a request for attorneys' fees and costs.



differences authoritatively settled in advance of any claimed invasion of rights, that they may guide their actions accordingly and often may be able to keep them within lawful bounds, and so avoid the expense, bitterness of feeling, and disturbance of the orderly pursuits of life which are so often the incidents of law suits.

*Merkel v Long*, 368 Mich 1, 13; 117 NW2d 130, 136 (1962), citing *Sigal v. Wise*, 114 Conn. 297, 158 A. 891. The fact that ESPN has the ability under FOIA to commence a civil action does not foreclose MSU's right to request a declaratory judgment. Actions for declaratory judgment are not limited when other remedies are available to resolve the dispute. By rule, "[t]he existence of another adequate remedy does not preclude a judgment for declaratory relief in an appropriate case." MCR 2.605(c).

Finally, despite ESPN's allegations to the contrary, the Legislature appears to believe public bodies currently do have the ability to file a declaratory action under FOIA. Passed by the State House of Representatives, and currently pending before the State Senate, is a proposed amendment to FOIA expressly removing the right of public bodies to commence a civil action under FOIA. 2017 HB 4077. Accordingly, this is a matter that will be resolved by the Legislature if and when the statute is amended. Until then, the judiciary should refrain from interfering with a matter in the purview of the legislative branch.

#### **Foreign Cases Interpreting Foreign Law are Not Persuasive**

In an attempt to persuade the Court that it may not consider MSU's declaratory action, ESPN cites appellate and trial court opinions from foreign jurisdictions, interpreting foreign law. Due to the express differences between the MI FOIA and out-of-state freedom of information laws, and the inherent differences between the bodies of state common law concerning declaratory judgments, the foreign cases cited by ESPN are not persuasive when interpreting MI FOIA.

As this Court is aware, cases from foreign jurisdictions are not binding on Michigan courts. *Lewis v Farmers Ins Exch*, 315 Mich App 202, 214; 888 NW2d 916, 922 (2016), citing *Hiner v Mojica*, 271 Mich App 604, 612; 722 NW2d 914 (2006).<sup>4</sup> While foreign cases can be persuasive, blind adherence to outcome—without full consideration of foundation—does not create the basis for persuasion.

The primary case relied on by ESPN is California appellate matter *Filarisky v Superior Court of Los Angeles County*, 28 Cal 4<sup>th</sup> 419; 121 Cal Rptr 2d 844; 49 P3d 194 (2002). Exhibit B. ESPN cites the court’s finding, but it completely disregards the California-specific foundation for the court’s opinion. The court recognized that the language of California’s freedom of information statute (“Cal. FOIA”) provides a clear intent that the Cal. FOIA was meant to preclude public bodies from filing declaratory actions. Of primary importance is the listing within Cal. FOIA of a number of specific causes of action available to a requestor under the statute, including “declarative relief.” CA GOVT § 6258, Exhibit C. Based on the plain language of the statute, the court determined only a requestor may initiate a declaratory relief proceeding. *Filarisky*, 28 Cal 4<sup>th</sup> at 426.<sup>5</sup>

The only other state appellate court decisions relied upon by ESPN are North Carolina cases which adopt the *Filarisky* case’s holding. The *McCormick* case, for example, recognizes that the NC FOIA is silent regarding whether a government agency may bring a declaratory judgment; inexplicably suggests that the *Filarisky* matter is instructive, disregarding the fact that Cal. FOIA expressly grants the requestor the right to file a declaratory action under FOIA; adopts the holding in *Filarisky* by long-form citation; then conducts a perfunctory review of the public

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<sup>4</sup> In fact, the trial court opinions cited by ESPN likely are not even binding on other courts in their states of origin.

<sup>5</sup> The *Filarisky* court also gleaned legislative intent from the fact that the Cal. FOIA requestor fee award provision recognizes that the court shall award attorney fees and costs to the “plaintiff” if it prevails in litigation under the section. *Filarisky*, 28 Cal 4<sup>th</sup> at 431, citing CA GOVT § 5259 (d).



policy behind NC FOIA without any review of the express statutory differences between Cal. FOIA and NC FOIA, or the differences in the law underlying declaratory judgments in the two states. *McCormick v Hanson Aggregates Se, Inc*, 164 NC App 459, 463; 596 SE2d 431, 434, writ den, review den, app dis 359 NC 69; 603 SE2d 131 (2004), Exhibit D. Notably, the *Burlington* matter, also cited by ESPN, merely adopts the holding of *McCormick*. *City of Burlington v Boney Publishers, Inc*, 166 NC App 186, 191; 600 SE2d 872, 876 (2004), Exhibit E. Because the *McCormick* and *Burlington* opinions provide little substantive analysis of the underlying law and statutes, but merely rely on public policy to reach the same outcome as *Filarsky*, neither of the cases is persuasive. ESPN overreaches.

The trial court opinions cited by ESPN are equally impotent. In fact, one of the three decisions bolsters MSU's position. The New Jersey case cited by ESPN highlights the significant effect statutory differences can have when determining the availability of declaratory actions to public bodies under FOIA. The New Jersey freedom of information statute, relied upon by the court in the *Scheeler* case cited by ESPN, specifies "The right to institute any proceeding under this section shall be solely that of the requestor." *Township of Hamilton v Scheeler*, unpublished opinion of the Superior Court of New Jersey, Atlantic County at 8, issued June 24, 2015 (Docket No.: L-0833-15), citing NJ Stat Ann 47:1A-6 (West), Exhibit F. MI FOIA does not provide a similar statutory prohibition against public bodies initiating proceedings under the MI FOIA statute.

The opinions of the Montana and Vermont courts both summarily conclude—based on the absence of respective state FOIA law statutory permission, and the limitations of jurisdiction allowed courts by their state declaratory judgment laws—that a public body cannot sustain a declaratory action and must wait until a FOIA requester initiates its own action after a public

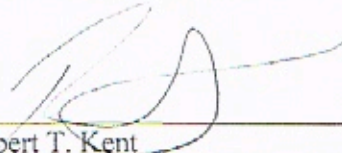
body's denial of the FOIA request. *The City of Billings v Billings Gazette Communications*, unpublished order of the Montana Thirteenth District Court for Yellowstone County, issued January 21, 2015 (Case No. 14-964), Exhibit G; and *Addison Rutland Supervisory Union v Cyr*, unpublished decision of the Vermont Superior Court Rutland Unit, issued November 5, 2012 (Docket No. 275-4-12 Rdev), Exhibit H.

For the reasons set forth above, based on Michigan's expansive scope of declaratory relief and the significant impact the underlying matter may have on MSU, ESPN, prosecutors, and alleged criminals and victims, the matter before this court is differentiable from the Montana and Vermont opinions. Furthermore, the notion highlighted in both cases that declaratory actions by public bodies would have a chilling effect on FOIA requests is without merit. A declaratory action, standing alone, requests a court to determine the rights and relations of parties and potential parties. In the declaratory action before this Court, had ESPN chosen not to participate in this declaratory action, it would not have incurred financial liability or any other damages. The Court would have had the same responsibility to make a determination as to the parties' rights. In essence, MSU's declaratory action allowed ESPN the right of judicial review without having to incur any additional expense. A FOIA requester's participation is not required in order for a court to decide a declaratory action.



For the reasons set forth above, MSU requests this Court deny ESPN's Motion for Summary Disposition and requests oral argument.

Respectfully submitted,



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Robert T. Kent  
Attorney for Plaintiff/Counter-Defendant  
Michigan State University

Dated: July 5, 2017

JUL 5 5 35 PM '17

STATE OF MICHIGAN  
IN THE COURT OF CLAIMS

BOARD OF TRUSTEES OF  
MICHIGAN STATE UNIVERSITY,

Plaintiff/Counter-Defendant,

Case No. 17-000114-MZ

and

Hon. Cynthia D. Stephens

INGHAM COUNTY PROSECUTING  
ATTORNEY CAROL A. SIEMON,

Intervenor-Plaintiff,

v

ESPN, INC.,

Defendant/Counter-Plaintiff.

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**INTERVENOR-PLAINTIFF INGHAM COUNTY PROSECUTING ATTORNEY'S**  
**07/19/2017 BRIEF IN OPPOSITION TO**  
**DEFENDANT'S 06/21/2017 MOTION FOR SUMMARY DISPOSITION**



## INTRODUCTION

Rather than simply allow a FOIA appeal to proceed upon its denial of Defendant ESPN's request for certain criminal investigation records, Plaintiff MSU chose to file this Declaratory Judgment Action against ESPN, asking this Court to resolve an actual controversy between the parties. The issue of the applicability of the exemptions for criminal investigation records, MCL 15.243(1)(b)(i), (ii) and (iii), remains in controversy, and is capable of repetition in the context of future FOIA requests for similar records.

Pursuant to this Court's July 10, 2017 Order, Ingham County Prosecuting Attorney Carol A. Siemon (hereafter, "Prosecutor") has been granted intervention as a Plaintiff by permission in this case under MCR 2.209(B)(2), because the Prosecuting Attorney has a significant interest relating to the disclosure and exemption of investigatory records under the Freedom of Information Act (FOIA), MCL 15.231 *et seq.*

At the July 13, 2017 Status Conference, the Court asked the Prosecuting Attorney to file a response by July 20, 2017 to Defendant ESPN's 06/21/2017 Motion for Summary Disposition, filed pursuant to MCR 2.116(C)(4).

In its 06/21/2017 Motion for Summary Disposition, ESPN argues that this Court lacks subject matter jurisdiction over Plaintiff's claim for declaratory relief, essentially because the FOIA does not by its terms expressly authorize an action for a declaratory ruling as a remedy. Plaintiff MSU opposed the Motion in its 07/05/2017 Response.

The Ingham County Prosecuting Attorney as Intervenor-Plaintiff concurs with and joins Plaintiff MSU's 07/05/2017 Response to ESPN's Motion for Summary Disposition, and incorporates Plaintiff's Response by reference. In this Brief, the Ingham County Prosecuting Attorney also offers additional argument.

## ARGUMENT

### I. DEFENDANT'S MOTION FOR SUMMARY DISPOSITION SHOULD BE DENIED

#### A. Legal Standards for Summary Disposition.

Defendant ESPN has filed a motion for summary disposition pursuant to MCR 2.116(C)(4), alleging lack of subject matter jurisdiction. Whether subject matter jurisdiction exists is a question of law for the court to decide. *Walker v Johnson & Johnson Vision Products, Inc*, 217 Mich App 705; 552 NW2d 679 (1996). The trial court must determine whether the pleadings demonstrate that the defendant is entitled to judgment as a matter of law, or whether affidavits and other proofs show that there is no genuine issue of material fact. *Cork v Applebee's of Michigan, Inc*, 239 Mich App 311; 608 NW2d 62 (2000).

Jurisdiction does not inhere in a court; jurisdiction is conferred on a court by the power that creates it. *Detroit v Rabaut*, 389 Mich 329, 331; 206 NW2d 625 (1973). When a court is without jurisdiction of the subject matter, any action with respect to such a cause, other than to dismiss it, is absolutely void. *Todd v Dept of Corrections*, 232 Mich App 623, 628; 591 NW2d 375 (1998).

#### B. This Court Has Jurisdiction of Declaratory Actions under FOIA.

Pursuant to MCR 2.605(A):

(1) In a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted.

(2) For the purpose of this rule, **an action is considered within the jurisdiction of a court if the court would have jurisdiction of an action on the same claim or claims in which the plaintiff sought relief other than a declaratory judgment.** (Emphasis added)



Thus, a Court has jurisdiction over a declaratory judgment action if it has jurisdiction over the underlying action on the same claim. *Boyd v Nelson Credit Centers, Inc*, 132 Mich App 774, 778; 348 NW2d 25 (1984). See also *Grunow v Sanders*, 84 Mich App 578; 269 NW2d 683 (1978) (Court of Claims has jurisdiction to render declaratory judgment in a case otherwise within its subject matter jurisdiction).

The Circuit Courts in this State have the power and jurisdiction that they had at common law, and as prescribed by the rules of the Supreme Court. MCL 600.601; MCL 600.605. The Court of Claims' jurisdiction expressly includes actions for declaratory relief. MCL 600.6419(a) and (b). The Court of Claims also has jurisdiction over cases arising under FOIA. MCL 15.241(5).

In arguing that this Court lacks subject matter jurisdiction, Defendant ESPN relies primarily upon the language of FOIA itself, MCL 15.231 *et seq.*, arguing, without authority, that declaratory relief is not expressly available under FOIA, and raising policy implications if Courts were to permit it. However, ESPN did not cite any Michigan cases in support of its argument that the Courts lack jurisdiction of declaratory judgment actions implicating FOIA.

By contrast, there are Michigan cases that specifically addressed and allowed for declaratory relief under FOIA. For example, in *Arabo v Michigan Gaming Control Bd*, 310 Mich App 370; 872 NW2d 223 (2015), a FOIA requester brought an action against the public body upon its denial of his request for public records. Summary disposition for the public body was reversed on appeal, where the Court of Appeals determined that the requester had set forth an actual controversy, and stated a claim for declaratory

judgment that the fees assessed for the records violated FOIA. *Arabo, supra*, at 395-396.

The Court in *Arabo* noted that, although a cause of action cannot be inferred when a statute, like FOIA, does not explicitly provide for a cause of action for money damages or confer a remedy based on a statutory violation, injunctive or declaratory relief may still be available. 310 Mich App at 394, citing *Lash v Traverse City*, 479 Mich 180, 196; 735 NW2d 628 (2007). Moreover, the Court noted that declaratory relief is an equitable remedy, not a claim, citing *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 221; 761 NW2d 293 (2008).

Similarly, in *Howell Education Assn v Howell Bd of Educ*, 287 Mich App 228; 789 NW2d 495 (2010), a teachers' union (not the FOIA requester himself) brought an action against the public school board, seeking a declaratory judgment that certain e-mails on the public school e-mail system were not public records subject to disclosure under FOIA. The Circuit Court determined that the requested records were "public records," and granted summary disposition for the defendants, which ruling was reversed by the Court of Appeals, which declared that the requested records were not, in fact, public records. *Howell, supra*, at 246.

These cases recognize that there is not a statutory prohibition against declaratory judgment actions involving FOIA disputes, as argued by ESPN. Therefore, where actions under FOIA are within a Court's jurisdiction, the Court also has jurisdiction to grant declaratory relief so long as an actual controversy exists. MCR 2.605; *Boyd, supra*; *Grunow, supra*.



Finally, a distinction must be made between a Court's subject matter jurisdiction, and whether it is able to grant relief in particular circumstances. For example, in *Winkler v Marist Fathers of Detroit, Inc*, \_\_\_ Mich \_\_\_; \_\_\_ NW2d \_\_\_; 2017 WL 2800040 (June 27, 2017), a student brought a civil rights action against a religious school for denying him admission on account of his disability. The trial court ruled for the plaintiff student, but the Court of Appeals reversed, holding that the lower court lacked subject matter jurisdiction, based upon the ecclesiastical abstention doctrine derived from the Religion Clauses in the First Amendment to the U.S. Constitution. On further appeal, the Michigan Supreme Court reversed, and held that the ecclesiastical abstention doctrine informs how civil courts must adjudicate claims involving ecclesiastical questions, but it does not deprive the courts of subject-matter jurisdiction over such claims. Thus, the existence of subject matter jurisdiction turns not on the particular facts of the matter before the court, but on its general legal classification.

Here, this Court clearly has jurisdiction of matters arising under FOIA. There is nothing in FOIA that precludes declaratory relief, or that divests the Court of subject matter jurisdiction to consider declaratory relief. Rather, there is ample Michigan case law which recognizes that declaratory relief is available under FOIA, and not only to the FOIA requester itself. *Arabo, supra; Howell, supra*.

This Court has subject matter jurisdiction to consider Plaintiff's and Intervenor's request for declaratory relief. Defendant's Motion for Summary Disposition for lack of subject matter jurisdiction must be denied.

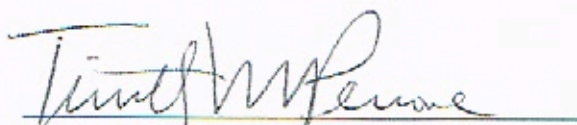
CONCLUSION AND RELIEF

For all the foregoing reasons, and those stated by Plaintiff in its 07/05/2017 Response, Ingham County Prosecuting Attorney Carol A. Siemon respectfully requests that this Honorable Court (a) deny Defendant ESPN's 06/21/2017 Motion for Summary Disposition, and (b) grant the Prosecutor such other and further relief as may be required.

Respectfully submitted,

COHL, STOKER & TOSKEY, P.C.

Date: July 19, 2017



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STATE OF MICHIGAN  
IN THE COURT OF CLAIMS

BOARD OF TRUSTEES OF MICHIGAN  
STATE UNIVERSITY,

Plaintiff/Counter-Defendant,

and

INGHAM COUNTY PROSECUTING ATTORNEY  
CAROL A. SIEMON,

Intervenor-Plaintiff,

vs.

ESPN, INC.,

Defendant/Counter-Defendant.

Case No. 17-000114-MZ  
Hon. Cynthia D. Stephens

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**07/25/2017 REPLY IN SUPPORT OF ESPN'S 06/21/2017 MOTION FOR SUMMARY  
DISPOSITION OF BOARD OF TRUSTEES OF MICHIGAN STATE UNIVERSITY'S  
COMPLAINT FOR DECLARATORY RELIEF**

The issue before the Court is simple: does the Court of Claims have jurisdiction over a  
Complaint for Declaratory Judgment brought by a governmental entity that has withheld

documents subject to a Freedom of Information Act (“FOIA”) request? By the very terms of the Act (MCLA 15.231 *et seq*), the Legislature has provided this Court with subject matter jurisdiction only over suits by a requesting party challenging a final determination to deny a FOIA request. Thus, the Court lacks jurisdiction to consider MSU’s Complaint for Declaratory Judgment, and the Complaint should be dismissed.

**A. The Statutory Grant of Authority Must Be Narrowly Construed**

The Court of Claims is not a constitutional court of general jurisdiction but instead derives all of its powers from the Legislature. *Okrie v State of Michigan*, 306 Mich App 445, 467; 857 NW2d 254 (2014). As such, “the legislation establishing the court guides the determination of the court’s authority,” and the statutes providing jurisdiction must be closely considered. *Id.* FOIA narrowly grants the Court of Claims jurisdiction over claims raised by FOIA requesters, and by implication necessarily excludes jurisdiction over other claims, such as the Complaint for Declaratory Judgment brought by MSU. *Mallory v Conida Warehouses, Inc.*, 113 Mich App 289; 317 NW2d 597 (1982) (“Where there is an affirmative statutory description of jurisdiction that may be exercised, there is an implication that the court lacks jurisdiction in other cases.”).

In an attempt to expand the Court’s jurisdiction, the Intervenor-Plaintiff Ingham County Prosecuting Attorney (the “Prosecutor”) relies on two decisions in which declaratory judgment actions were brought in relation to FOIA disputes and one decision directed to the Ecclesiastical Abstention Doctrine. The cases are factually and legally distinct from this case and, if anything, support ESPN’s assertion that this Court lacks jurisdiction.

First, the Prosecutor relies on *Arabo v Michigan Gaming Control Bd*, 310 Mich App 370; 872 NW2d 223 (2015). In *Arabo*, the *requesting party* brought suit against the public body to compel release of documents under MCL 15.240—the only provision of FOIA which expressly



confers jurisdiction—and also brought a claim for declaratory judgment related to the determination of copying fees by the governmental entity. *See Arabo*, 310 Mich App at 379. The request for declaratory judgment did not itself confer jurisdiction, and the Court made clear that FOIA does not broadly confer jurisdiction beyond claims under MCL 15.240:

Under § 10, the Legislature has explicitly permitted a cause of action against a public body that refuses to disclose or delays disclosing a public record; and the Legislature has provided for the recovery of damages by the plaintiff, including attorney fees, costs, and punitive damages, for actions commenced under § 10. Yet the Legislature has provided for no such cause of action under § 4 of the FOIA. This distinction provides “persuasive evidence that the Legislature did not intend to create a private cause of action” for damages for violations of § 4 of the FOIA. We therefore hold that, ***because the FOIA does not explicitly provide*** for money damages or confer a remedy based on a violation of the § 4 fee provisions, as contrasted with § 10, plaintiff does not have a valid cause of action for damages under § 4.

*Id.* at 393-394. The court already had jurisdiction, pursuant to § 10, over the dispute, and the injunctive and declaratory relief available to a requesting party could not exist independent of this statutory grant. Rather than standing for the Prosecutor’s asserted provision that FOIA should be broadly construed to provide jurisdiction over claims by governmental entities, *Arabo* expressly acknowledges the limited jurisdiction provided by FOIA.

The Prosecutor’s reliance on *Howell Education Ass’n v Howell Bd of Educ*, 287 Mich App 228; 789 NW2d 495 (2010) is similarly misplaced. *Howell* itself contains no discussion of jurisdiction but rather demonstrates the now well-established principle that third-parties with personal interest in the documents to be disclosed may file a so-called “reverse FOIA” suit to challenge disclosure of the records. *Id.* The Prosecutor suggests that because the plaintiff in *Howell Education Ass’n* was not the requesting party, FOIA therefore confers jurisdiction for actions by third-parties with personal interest in the documents. This is demonstrably wrong. The seminal decision on “reverse FOIA” cases is *Tobin v Michigan Civil Service Com’n*, 416 Mich



661; 331 NW2d 184 (1982). In that decision the Michigan Supreme Court emphasized that FOIA itself provides for jurisdiction in very limited situations:

Only a person requesting public documents is authorized to commence an action in circuit court under FOIA. M.C.L. § 15.235(7); M.S.A. § 4.1801(5)(7). The absence of any provisions in the statute allowing third parties such as these plaintiffs to bring an action to compel nondisclosure is persuasive evidence that the FOIA did not create such rights. Any asserted right by third parties to prohibit disclosure must have a basis independent of the FOIA.

*Id.* at 668-669. Simply put, to establish “reverse FOIA” claims, the court in *Tobin* had to look beyond the statute itself to rights of privacy independent of FOIA. MSU and the Prosecutor rely only on FOIA to support the declaratory relief sought and assert no independent basis for the purported cause of action, an argument already considered and rejected by the Court in *Tobin*.

Finally, the Prosecutor’s reliance on *Winkler v Marist Fathers of Detroit, Inc.*, \_\_\_ Mich \_\_\_, \_\_\_NW2d\_\_\_; 2017 WL 2800040 (June 27, 2017) is completely misplaced. The decision has nothing whatsoever to do with FOIA. It is a case over a parochial school’s denying Plaintiff admission to its high school. The Supreme Court simply held that “there was no dispute” that the Circuit Court had jurisdiction over claims such as that brought in the case and that the Ecclesiastical Abstention Doctrine did not divest the court of such jurisdiction but was to be applied on a case by case basis. The Prosecutor concludes from this that therefore subject matter jurisdiction turns not on the facts of the particular case but “on its general legal classification” (Response p 5). This simply proves ESPN’s point. ESPN’s motion is not at all dependent on the unique facts of this case. Rather it is based on the “general legal classification” of FOIA that authorizes jurisdiction only of cases brought by a requestor.



**B. Pending Legislation Confirms that the Court Lacks Jurisdiction**

In its Response, MSU relies on pending Legislation<sup>1</sup> to assert that “the Legislature appears to believe public bodies currently do have the ability to file a declaratory action under FOIA.” 07/05/2017 MSU Response at 4. In so arguing, MSU ignores the context in which the pending amendment arose. As described in the House Fiscal Agency Analysis, the bill addresses an incident arising out of Montcalm County court. Ex. 1, House Fiscal Agency Analysis. As described therein:

[A] local newspaper, The Daily News, filed a FOIA request to obtain the personnel files of five candidates running for sheriff in two counties. . . . Montcalm County sued the paper—asking the court for a declaratory judgment to resolve what it saw as a statutory conflict. . . . Ultimately, the circuit court found that FOIA requests may only be granted or denied, and that *a declaratory judgment was not the proper course of action.*

*Id.* at 1 (emphasis added). The pending bill thus clarifies and confirms the ruling of the Montcalm County court and preserves the existing judicial interpretation. House Bill 4077 provides no evidence of the Legislature’s intent to alter the interpretation of FOIA.

**CONCLUSION**

WHEREFORE, for the reasons stated herein and in ESPN’s 06/21/2017 Motion and Brief in Support, ESPN respectfully requests that the Court grant its motion, dismiss the Complaint for Declaratory Relief with prejudice, and grant ESPN any other relief as this Court deems necessary and proper.

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<sup>1</sup> The bill, as passed by the House, states “A public body that receives a request for information shall not commence a civil action under this act against the requesting person.” 2017 HB No 4077.

Respectfully submitted,

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STATE OF MICHIGAN  
IN THE COURT OF CLAIMS

BOARD OF TRUSTEES OF MICHIGAN  
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**CERTIFICATE OF SERVICE**

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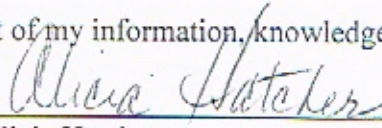
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tperrone@estmlaw.com

I declare that the statements are true to the best of my information, knowledge and belief.

  
Alicia Hatcher  
Alicia Hatcher

2017 JUL 26 PM 2:41

COHL, STOKER & TOSKEY, P.C.  
601 N. CAPITOL AVE.  
LANSING, MI 48933

2017 JUL 25 PM 1:23

COHL, STOKER & TOSKEY, P.C.  
601 N. CAPITOL AVE.  
LANSING, MI 48933



Receipt Date: 02/14/2018 3:29 PM  
Receipt No: COC-LAN.0002600  
Cashier: MMLA  
Financial Location: COURT OF CLAIMS  
Page 1 of 1

RECEIPT

CASE NO.

COURT OF CLAIMS-LANSING  
2ND FLOOR, HALL OF JUSTICE  
925 W. OTTAWA ST., P.O. BOX 30185  
LANSING MI 48909  
(517) 373-0807

Paid By: CATHERINE HARRIS

COMMENT: Copy Request: 17-000114-MZ

DESCRIPTION	AMOUNT	APPLIED	BALANCE
OTHER FEE	\$45.00	\$45.00	\$0.00
Payment Method:			
	CASH	\$45.00	
Total Amount Applied		\$45.00	
Change		\$0.00	
Total Balance Remaining Due			\$0.00

CATHERINE HARRIS