STATE OF MICHIGAN

SUPREME COURT

SUSAN BISIO,

Plaintiff-Appellant,

v

THE CITY OF THE VILLAGE OF CLARKSTON,

Defendant-Appellee.

Supreme Court No. 158240

Court of Appeals No. 335422

Oakland County Circuit Court Case No. 2015-150462-CZ

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PLAINTIFF-APPELLANT'S ANSWER TO DEFENDANT'S MOTION FOR REHEARING

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I. Introduction—The City's Ultimatum to the Court: Change Your Ruling or We Won't Comply With It

A. The City's Ultimatum

The city says (1) the Court unfairly decided this case without giving the city a chance to be heard and (2) the Court's statutory interpretation is wrong in holding that the city attorney's records in the performance of city business are public records subject to the Freedom of Information Act. Not only that, but the city announces *it will not disclose the records even if the Court's opinion stands.* It considers the Court's opinion "advisory only" and says there is "no legal basis to enforce a disclosure order against … Clarkston." City motion, p 9. The city presents this ultimatum to the Court: *Change your decision or we won't comply with it.*

B. The Question Before the Court

This case presented a seemingly simple question: Can a city attorney, appointed as an officer under the city charter, conducting official business for the city, keep a separate file of records of that business that is not subject to the Freedom of Information Act? For most people familiar with FOIA and its overriding purpose of transparency, the answer would be simple. FOIA says the public is "entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees …." MCL 15.231(2). So when a city official conducts city business, the records compiled in that work should be public records, subject to disclosure under FOIA.

But this is not the policy in the City of the Village of Clarkston. For more than five years, the city concealed records that its city attorney compiled in conducting official city business regarding two different matters of public interest. Having litigated this case all the way to this Court, the city cannot graciously acknowledge it lost when this Court held the records are public records subject to disclosure under FOIA. Rather it now wants the Court to change its mind, notwithstanding the extensive briefing of the parties and dozens of amici, vigorous oral argument in which the justices engaged both counsel on the issues, and the issuance of extensive opinions in which six justices held the records are public records. And, if the Court doesn't change its mind, the city announces it won't disclose the records anyway.

C. The City's New Arguments

The city offers no good reason why the Court should reverse its opinion. The city ignores the requirement of showing palpable error (MCR 7.311(F)(1)) to justify a rehearing. It offers four reasons for reversing the Court's holding a month after the Court issued its opinion:

- The city faults the Court for adopting a statutory interpretation approach an amicus suggested, as though the city was taken by surprise by the Court's accepting an argument that was in the record for six months and that the city did not take the opportunity to respond to. See sections III.B and IV.B.2 below.
- The city claims its due process rights were violated because it had no opportunity to brief the alternative statutory interpretation the Court adopted. The city has no due process rights here. And it had the opportunity to brief the theory and didn't. See section IV below.
- The city claims the Court's judgment can't be enforced because the city has no control over its city attorney, it can't instruct him to turn over

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the contested records, and he would refuse such an instruction, claiming the records of city business the city paid him for are his and not the city's. See section V below.

- The city critiques the Court's analysis, saying the Court doesn't know how to properly do statutory interpretation and got it all wrong. See section VI below.

None of these arguments rises to the level of palpable error. MCR 7.311(F)(1), MCR 2.119(F)(3). None shows the Court or the parties have been misled. *Id.* None justifies reversing the Court's considered opinion before the ink is even dry. *Id.*

The city's motion simply says the Court is wrong—so wrong that the Court should just wash its hands of this case, vacate its opinion, reverse its grant of leave to appeal, and let the Court of Appeals opinion stand. The city doesn't candidly admit the alternative it advocates: Municipal officers can keep secret files with records of their performance of official governmental functions in off-site locations. Those files, the city says, don't contain public records subject to FOIA because city officers are not public bodies. The practical consequence of the city's theory is that virtually any municipal record could be shielded from FOIA if it is in the custody of an officer who can independently decide to keep records off-premises. The city doesn't attempt to confront or justify this result.

The far-reaching implications of the city's theory is what prompted the Court to grant leave, one of a handful of cases the Court deemed worthy of full briefing,

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argument, and decision this term.[1] Now the city says: "Never mind." Because of "multiple procedural and substantive irregularities" the *Court* perpetrated here (city motion, p 2), the Court should just throw up its hands and conclude there should be no decision on this important question. *And even if the Court doesn't throw this case out, the city won't comply anyway.*

D. The Court Should Reject the City's New Arguments

The Court should reject the city's invitation to reexamine issues that have already been briefed, argued, and decided in reasoned opinions. It is time for the years of litigation to be over. It is time to unequivocally affirm that records about the conduct of government in the offices of city officials are public records. It is time to unequivocally uphold the public policy of the Freedom of Information Act that everyone is "entitled to full and complete information regarding the affairs of government" and particularly information about "official acts of … public officials and public employees." MCL 15.231(2).

The Court should not only deny the motion for rehearing but, in light of the city's announced intention not to comply with the Court's opinion, also order the city to produce the contested records immediately. MCR 7.316(A)(7).

[1] The Court's July 2020 report on the Court's web site shows the Court granted leave in 11 cases this year out of 962 new cases filed.

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II. The City Does Not Meet the Palpable Error Standard for Rehearing

A. The Standard

Although the Court has discretion, generally it should not grant a motion "which merely presents the same issues ruled on by the court …." MCR 2.119(F)(3). Rather, the party seeking rehearing "must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition … must result from correction of the error." *Id.*

The Court incorporated this standard into MCR 7.311(F)(1) in its 2015 revision of the procedural rules in subchapter 7.300. 497 Mich cxci, ccvii (2015). The rule codifies a long-standing policy of the courts, including this Court. Order announcing proposed amendments to subchapter 7.300, 497 Mich 1201 (2014) (revision "would reflect current practice").

The Court has consistently denied rehearing when there is no change in the facts or the law, no new issues are presented, and the Court has considered and made a reasoned decision on the issues previously presented. *Boertmann v Cincinnati Ins Co*, 493 Mich 963; 828 NW2d 675 (2013) (denying reconsideration;[2] applying MCR 2.119(F)(3) before its express incorporation into MCR 7.311(F)(1)); *Lyon Charter Twp v McDonald's USA, LLC*, 493 Mich 963; 828 NW2d 676 (2013) (same); *Ile v*

[2] MCR 7.311(F) and (G) distinguish between motions for rehearing of an opinion and reconsideration of an order. Both incorporate the standard from MCR 2.119(F)(3).

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Foremost Ins Co, 493 Mich 964; 828 NW2d 676 (2013) (same); *Nichols v Marsh*, 62 Mich 439, 440; 29 NW 37 (1886) ("We discover no point which was not presented and considered on the original argument, and nothing, therefore, to call for a rehearing"); *Thompson v Jarvis*, 40 Mich 526 (1879) (denying rehearing when "nothing is suggested beyond what was considered by the court upon the original arguments"); *Hutchins v Kimmell*, 31 Mich 126,134-135 (1875) (counsel's decision not to address issue did not warrant rehearing). Accord, *Duncan v Michigan*, 486 Mich 1071, 1074, 1075; 784 NW2d 51 (2010) (Kelly, CJ, dissenting) (citing "palpable error" standard); *McCormick v Carrier*, 485 Mich 851; 770 NW2d 357 (2009) (Corrigan, J, dissenting) (reconsideration should be denied where "neither the law nor the facts of this case have changed"); *United States Fidelity & Guaranty Co v Michigan Catastrophic Claims Ass'n*, 484 Mich 1, 28; 795 NW2d 101 (2009) (Young, J, dissenting) ("For over a century this Court has adhered to the principle that a motion for rehearing should be denied *unless* a party has raised an issue of fact or law that was not previously considered but which may affect the outcome"); *Univ of Michigan Regents v Titan Ins Co*, 484 Mich 852, 853; 769 NW2d 646 (2009) (Young, J, dissenting) (same); *People v Osaghae*, 460 Mich 529, 535; 596 NW2d 911 (1999) (Kelly, J, dissenting) (citing the palpable error standard).[3]

[3] The dissents cited above are from an unfortunate period in the Court's history when there was a stark ideological division on the Court and changes in membership changed the Court's philosophical majority. *United States Fidelity & Guaranty Co v Michigan Catastrophic Claims Ass'n*, 484 Mich 1, 27; 795 NW2d 101 (2009) (Young, J, dissenting); *Sazima v Shepherd Bar & Restaurant*, 483 Mich 924, 925; 762 NW2d 924 (2009) (Markman, J, dissenting). Those dissents, however, cite the Court's long-

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“Palpable error” means error that is “[e]asily perceptible, plain, obvious, readily visible, noticeable, patent, distinct, manifest.” *Luckow Estate v Luckow*, 291 Mich App 417, 426; 805 NW2d 453 (2011); *Stamp v Mill Street Inn*, 152 Mich App 290, 294; 393 NW2d 614 (1986).

B. The City Does Not Meet the Standard

The city doesn’t meet the standard. It argues on both substantive and procedural grounds. On the substantive merits, the city wants to reargue the statutory interpretation issue at the core of this case. This was briefed and argued before. The city presents nothing new other than a critique of the Court’s opinion and a re-argument of its own position. We discuss that in section VI below. The city “merely presents the same issues ruled on by the court.” MCR 2.119(F)(3).

On the procedural issues, sections III and IV.B below show the city had an opportunity to address the alternative statutory interpretation that the Court adopted and that the city chose not to address it until now. There is nothing in the procedure in this Court that “misled” either the Court or the parties. MCR 2.119(F)(3). The Court’s order granting leave to appeal invited amicus briefs. Order, 9/25/19. The statutory interpretation approach the city now challenges was in one of those briefs, filed well in advance of oral argument and decision. The city simply chose not to take the opportunity to respond to that argument when it could have done so.

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standing practice on rehearing, followed in the past and now embodied in MCR 7.311(F)(1).

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This is similar to *Hutchins*, where the party seeking rehearing was "in error as to the practice of this court" and did not address points raised in the record. 31 Mich at 134-135. The Court there held there was no reason for a rehearing because it had considered the issue: "The point which was not argued before, but which counsel desire to argue now, did not escape our observation before, but was the subject of our deliberation and investigation." *Id.* at 135. So also here, the statutory interpretation approach was "in the record" (*id.*), the Court considered it, and the city chose not to argue it. This is no basis for a rehearing.

The city wasn't "misled" by anything that happened in this case. The press amici presented the statutory interpretation approach the Court adopted. That was in the record long before oral argument and decision. The city had months to seek to respond, but apparently erroneously assumed the Court would not consider arguments in an amicus brief. That unfounded assumption is not a basis for finding "a palpable error by which the *court and the parties* have been misled." MCR 2.119(F)(3) (emphasis added). The Court was not misled by an argument in an amicus brief the Court expressly invited in its grant order. Plaintiff was not misled by the offer of an alternative statutory interpretation that supported her position. The city wasn't misled either. It made a strategic decision not to respond to the amicus and now regrets that decision.

The city does not address the standard for rehearing other than an *ipse dixit* that there are "[p]alpable and misleading errors." City motion, p 2. The following sections show there are neither palpable nor misleading errors.

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III. There Is No Party Presentation Issue Where the Court's Statutory Interpretation Approach Was Briefed and the City Had Ample Opportunity to Respond

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The city says the Court violated the "party presentation" principle by applying a statutory interpretation approach the press amici argued. It says the Court, rather than "act[ing] as a neutral arbiter," turned into an "advocate[] for arguments the parties have not presented." City motion, p 3. Accord, *id.,* p 5 ("the Court appears to be an advocate"). The essence of the city's argument is that the court may consider only the issues briefed by the parties and it should ignore anything an amicus says. *Id.,* p 1 (this "was not an issue addressed by the parties"). That would be an unwarranted extension of party presentation caselaw and would eliminate the usefulness of amicus briefs.

A. Party Presentation Is a Guideline But Not an Inflexible Principle

The party presentation principle applies when a court sua sponte decides a case on a completely new basis that no one addressed—when the court rules "on an argument almost entirely of its own construction." *Michigan Gun Owners, Inc v Ann Arbor Pub Sch,* 501 Mich 695, 710 n 9; 916 NW2d 756 (2018). Or when, as in *Michigan Gun Owners*, the Court declines to decide an issue the parties expressly waived. *Id.* at 709-710 (plaintiffs "abandoned" the issue by not asserting it in their application for leave to appeal, were "perfectly clear at oral argument that they were not advancing" the issue, and "decided not to present this issue"); *id.* at 711 n 1 ("the parties chose not to pursue this theory in our Court even when given the opportunity to do

so") (Viviano, J, concurring); *id.* at 723 ("plaintiffs expressly and unambiguously abandoned" the argument) (Clement, J, concurring).

But the party presentation principle is not absolute or inflexible. "[T]he court is *empowered,* however, to go beyond the issues raised and address any issue that, in the court's opinion, justice requires be considered and resolved." *Paschke v Retool Indus*, 198 Mich App 702, 705; 499 NW2d 453 (1993), rev'd on other grounds, 445 Mich 502; 519 NW2d 441 (1994) (emphasis in original). The Court of Appeals in *Paschke* cited MCR 7.216(A)(7), which is substantially similar to this Court's MCR 7.316(A)(7). That permits the Court to "enter any judgment or order that ought to have been entered, and enter other and further orders and grant relief as the case may require."

Thus the Court has wide discretion to do what is required by the particular case. "[W]hile an appellate court will not ordinarily review an issue that has been abandoned or waived, such review is allowed when it is 'necessary to a proper determination of a case ....'" *People v Rao*, 491 Mich 271, 289 n 4; 815 NW2d 105 (2012). A court "may go beyond the issues raised on appeal and address issues that, in this Court's opinion, justice requires be considered and resolved." *Frericks v Highland Twp*, 228 Mich App 575, 586; 579 NW2d 441 (1998). Accord, *Kenkel v Stanley Works*, 256 Mich App 548, 562 n 11; 665 NW2d 490 (2003) ("we find that justice and a proper determination of this case require us to exercise our authority to go beyond the issues raised ..."); *Sumner v General Motors Corp*, 245 Mich App 653, 658; 633 NW2d 1 (2001); *Taylor v Kurapati*, 236 Mich App 315, 356 n 58; 600 NW2d 670 (1999). The

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Court can also "permit the reasons or grounds of appeal to be amended or new grounds to be added" (MCR 7.316(A)(3)), although that is not what happened here.

Thus the Court, if it deems it appropriate to consider an issue the parties did not raise, has ample authority to do that when "justice and a proper determination of this case" require it. *Kenkel*, 256 Mich App at 562 n 11. Although this principle allows the court to "go beyond the issues raised," the Court did not even do that here: It addressed an issue that *was* raised (see the discussion in the next section). And, in applying basic statutory interpretation principles, it did nothing other than what courts always do—apply the law to the facts before the court, as justice always requires.

B. This Is Not a Case Where the Court Sua Sponte Decided Based on a Theory That Was Never Presented

The cases talk about the situation where no one raised the dispositive argument. E.g., *Wilson v Taylor*, 457 Mich 232, 243 n 14; 577 NW2d 100 (1998) (argument "was not even cited by any of the parties *or amici curiae*"; emphasis added). That is not what happened here. The Court did not decide the case on a theory that no one raised. It did not decide the case on a theory that was not part of the record or that conflicted with plaintiff's position. The Court did not "find and develop" a new argument. City motion, p 3. It applied a statutory interpretation approach that concluded, as plaintiff always contended, the contested records were "public records" under FOIA. *Bisio v City of the Village of Clarkston,* __ Mich __; __ NW2d __ (2020) (docket no. 158240); slip op at 8 n 7 (referred to below as "Opinion") ("plaintiff has consistently

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argued throughout this case that the documents at issue constitute 'public records' because, among other reasons, the city attorney holds an 'office' within defendant and therefore the documents were retained 'in the performance of an official function'"). This was not a new issue suddenly inserted into the case by surprise at the last minute.

And the Court didn't pick this argument out of thin air, surprising the parties. This was not a "sua sponte" matter. City motion, p 4 n 2; p 7. The Court did not have a "change of heart." *Id.,* p 5. This statutory interpretation approach was part of the record for months before the Court issued its decision. The press amici filed their brief on January 31, 2020. Oral argument was not until March 5, 2020. The Court did not issue its opinion until July 24, 2020. So, not only did the Court have discretion to decide the case on this basis, this is not like a party presentation case where a court decides the case on a theory that no one ever knew about. "Judges who turn to amici are not setting their own agenda, as judges who raise issues sua sponte can be accused of doing." Frost, *The Limits of Advocacy*, 59 Duke LJ 447, 467 (2009).

C. Plaintiff Did Not Abandon or Concede the Issue of Whether the Office of the City Attorney Is a Public Body

The Court decided the office of the city attorney is a public body under MCL 15.232(h)(*iv*) because it is a "body that is created by … local authority." Opinion, pp 12-13. The city's party presentation argument claims plaintiff abandoned or con-

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ceded this interpretation and the Court thus "rendered a dispositive ruling on an issue that the parties, by concession, had abandoned"—the Court "overturns an important admission." City motion, pp 4, 5.

This argument ignores the important distinction the Court makes between the city attorney as an individual and the office of the city attorney. The city cites plaintiff's concession that the city attorney himself is not a "public body" because MCL 15.232(h)(*iii*) does not include municipal officers its definition. But the Court ruled on a different question. It held the office of the city attorney—not the city attorney as an individual—is a "public body" under a different subsection of the definition, MCL 15.232(h)(*iv*), because the office is a body created by local authority. Opinion, p 13 n 10.

This is not like *Michigan Gun Owners,* where plaintiffs expressly abandoned an argument. Plaintiff did not make a "judicial admission" (city motion, p 4) that disclaimed an argument under MCL 15.232(h)(*iv*) that the office of the city attorney is a "public body."[4] Her argument was under (h)(*iii*), not (h)(*iv*), and was no concession as to (h)(*iv*). The press amici made the argument under (h)(*iv*). Plaintiff agreed with

[4] A statement in a brief (which is what the city relies on) is not even a "judicial admission." That requires a formal act, such as a response to requests for admission under MCR 2.312, a stipulation, or a statement in a pleading. The case the city cites says these kinds of acts are "judicial admissions." *Radtke v Miller, Canfield, Paddock & Stone*, 453 Mich 413, 420; 551 NW2d 698 (1996) (citing MCR 2.312 and "formal concessions in the pleadings in the case or stipulations by a party or its counsel"). A brief is not a "pleading." MCR 2.110(A); *Village of Dimondale v Grable*, 240 Mich App 553, 565; 618 NW2d 23 (2000).

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it and saw no reason for additional briefing on the point, particularly because the city had nothing to say on the point (until now).

D. There Is Nothing Wrong With the Court Adopting an Amicus Argument

The city's claim that it was surprised that the Court considered and adopted a statutory interpretation suggested by an amicus is disingenuous. Did the city assume that the Court would simply ignore the press amici brief—a brief the Court expressly invited? What is the point of an amicus brief if it does not provide a new perspective on the case? The value of an amicus brief "comes not just from the show of support but from the *new arguments and information* they provide to the Court in favor of one party or the other." *The Limits of Advocacy*, 59 Duke LJ at 465 (emphasis added). This Court's own rules allows that. Compare MCR 7.312(H) (allowing amicus briefs without limitation as to subject matter) with MCR 7.212(H)(2) (Court of Appeals rule that an amicus brief "is limited to the issues raised by the parties").

This Court often invites amicus briefs. E.g., *People v Jemison*, 503 Mich 936; 921 NW2d 335 (2019); *Bingham Twp v RLTD RR Corp*, 462 Mich 902; 613 NW2d 724 (2000); *Odom v Wayne Co*, 480 Mich 1184; 747 NW2d 249 (2008). Its web site lists numerous pending cases in which the Court invited amicus briefs. https://courts.michigan.gov/courts/michigansupremecourt/clerks/pages/amicus-curiae.aspx (accessed August 23, 2020). The U.S. Supreme Court has even appointed amicus curiae to argue an issue the parties did not raise. *Irizarry v United States*, 553 US 708; 128 S Ct 2198, 2199; 171 L Ed 2d 28 (2008); *Goldboro Christian Sch, Inc*

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v United States, 456 US 922; 102 S Ct 1964, 1965; 72 L Ed 2d 437 (1982); both noted and discussed in *The Limits of Advocacy*, 59 Duke LJ at 466-467. The U.S. Supreme Court emphasizes that "An *amicus curiae* brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court. An *amicus curiae* brief that does not serve this purpose burdens the Court, and its filing is not favored"). U.S. Supreme Court Rule 37.1.

Consistent with widespread practice and the prevalence of amicus briefs in many cases, the Court found its reliance on a statutory interpretation approach suggested by the press amici entirely proper, citing other opinions that relied on amicus arguments. Opinion, p 8 n 7, citing *Council of Village of Allen Park v Allen Park Village Clerk,* 309 Mich 361, 363; 15 NW2d 670 (1944); *Teague v Lane,* 489 US 288, 300;109 S Ct 1060; 103 L Ed 2d 334 (1989); and *Mapp v Ohio,* 367 US 643, 646 n 3; 81 S Ct 1684; 6 L Ed 2d 1081 (1961). The party presentation principle does not preclude considering an amicus argument. "[T]he prevalence of amicus participation nonetheless emphasizes the shaky foundation of the party presentation norm." *The Limits of Advocacy,* 59 Duke LJ at 467.

E. The City Had Ample Opportunity to Brief and Argue the Issue

The city's party presentation argument is basically a claim that the city didn't have a chance to brief the statutory interpretation approach the Court adopted. It says the Court conducted "a judicial process that excludes the parties." City motion, p 19. That's just not true.

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Had the city wanted to address the alternative statutory interpretation, it had ample time to ask to file a reply brief to address the issue. The Court routinely grants party motions to reply to an amicus brief. E.g., *In re Rhea Brody Living Trust*, 922 NW2d 610 (2019); *Lowe's Home Centers, Inc v Marquette Twp*, 854 NW2d 481 (2014); *Majestic Golf, LLC v Lake Walden Country Club, Inc*, 837 NW2d 283 (2013). The city is not a stranger to this possibility, since the Court of Appeals granted a motion for leave to file a reply to an amicus brief while the case was pending there. *Bisio v City of the Village of Clarkston,* unpublished opinion of the Court of Appeals, entered 9/6/17 (docket 335422). The city also could have raised the issue at oral argument, or even in a post-argument brief during the four months before the Court issued its opinion. "[P]arties may respond to arguments by amici, and thus provide the judge with an adversarial exchange on the new issues raised." *The Limits of Advocacy*, 59 Duke LJ at 467.

So, if the city considered the amicus argument important, it had ample time and opportunity to respond to it. The situation here is like that where the courts reject a motion for reconsideration when the argument could have been presented at the original hearing. *Pioneer State Mut Ins Co v Michalek*, 330 Mich App 138 (2019); *Pierron v Pierron*, 282 Mich App 222, 264; 765 NW2d 345 (2009); *Werdlow v City of Detroit Policemen & Firemen Retirement Sys Bd of Trustees*, 269 Mich App 383, 411; 711 NW2d 404, vacated in part on other grounds, 477 Mich 893; 722 NW2d 428 (2006). As in those cases, the city could have raised its arguments before the Court issued its opinion.

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The simple fact is the city did not take the amicus argument seriously and made a deliberate decision not to respond to it, even though the city had ample time and opportunity to do so. And now it argues it didn't have the opportunity to brief the issue. The party presentation principle does not bar the Court from relying on it.

IV. There Is No Due Process Violation

The city claims the Court deprived it of due process because the city didn't have an opportunity to argue the statutory interpretation approach the Court used. This is wrong for two reasons. First, the city cannot make a due process argument against the Court. Second, even if it could, there is no basis for a due process claim: The city has no protected property interest and, even if it did, it had notice and an opportunity to be heard.

A. The City Can't Make a Due Process Claim Against The Court

A constitutional due process claim requires state action against the claimant. *Sharp v Lansing*, 464 Mich 792, 813; 629 NW2d 873 (2001); *Woodland v Michigan Citizens Lobby*, 423 Mich 188, 205; 378 NW2d 337 (1985). "[T]he action of state courts and of judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment …." *Shelley v Kraemer*, 334 US 1, 14; 68 S Ct 836; 92 L Ed 1161 (1948). Thus the city's due process argument is a claim against this Court. The city claims the Court deprived the city of due process by deciding the case on a statutory interpretation approach "without affording Clarkston an opportunity to be heard on the dispositive issue." City motion, 6.

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The city cannot make a due process claim against the Court. Cities are creatures of state law. *Bay City v State Bd of Tax Admin*, 292 Mich 241, 257; 290 NW 395 (1940); *Kent Co v Dep't of Social Servs*, 149 Mich App 749, 754; 386 NW2d 663 (1986); *DeWitt Twp v Clinton Co*, 113 Mich App 709, 716; 319 NW2d 2 (1982); Const 1963, art 7, § 21 ("The legislature shall provide by general laws for the incorporation of cities and villages"). "As such they have no due process rights to invoke against the will of their creator." *Mayor of Detroit v Arms Tech, Inc*, 258 Mich App 48, 60; 669 NW2d 845 (2003) (city and county "lack standing to assert that they, as political subdivisions, have been deprived of due process of law"); *Kent Co v Dep't of Social Servs*, 149 Mich App at 754. Accord, *Kent Co Aeronautics Bd v Dep't of State Police*, 239 Mich App 563, 581; 609 NW2d 593 (2000) ("a constitutional due process challenge asserted by a subdivision of the state is precluded"); *DeWitt Twp*, 113 Mich App at 717, quoting *Williams v Mayor & City Council of Baltimore*, 289 US 36, 40; 53 S Ct 431; 77 L Ed 1015 (1933) ("A municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the federal constitution[5] which it may invoke in opposition to the will of its creator").

Since the city may not make a due process claim against the Court, its argument on that claim is irrelevant. But, even if the Court considers the argument, the next section shows the city has not offered a proper due process claim.

[5] "The due process guarantee of the Michigan Constitution is coextensive with its federal counterpart." *Mays v Snyder*, 323 Mich App 1, 58; 916 NW2d 227 (2018). Accord, *Grimes v Van Hook-Williams*, 302 Mich App 521, 530; 839 NW2d 237 (2013).

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B. There Could Be No Due Process Violation When the City Has No Property Interest and the City Had the Opportunity to Be Heard

1. The City Does Not Articulate a Property Interest That Could Be the Basis for a Due Process Violation

A due process claim must be based on deprivation of a property right protected by state law. *Williams v Hofley Mfg Co*, 430 Mich 603, 610-611; 424 NW2d 278 (1988). "[T]he [due process] clause is violated only if there has been a deprivation of life, liberty, or property." *Bauserman v Unemployment Ins Agency*, 503 Mich 169, 186; 931 NW2d 539 (2019). Property interests are created by state law. *Williams,* 430 Mich at 610-611.

The city claims it has a "property interest in litigation." City motion, p 7 n 6, citing *Williams*. The premise for this is that "a money judgment rendered in [the] litigation against the defendant would deprive it of property." *Id.* But the city offers no evidence supporting its claim that "FOIA poses the risk of financial implications." *Id.* We believe there is none.

We are informed the city is insured by the Michigan Municipal League Liability and Property Pool (MMLLPP), which directly pays the city lawyers in this case. The invoices of the city's lawyer show that he treats the insurer as his client and the city as someone "external."[6] We are informed that discussion at a city council meetings assured council members that MMLLPP is paying and will pay all fees for the

[6] Exhibit C to Defendant's Reply in Support of Defendant's Motion for Costs and Fees, 11/9/16 (copies of invoices). For example, the time entries on 12/23/15 show that the lawyer's communications with Carol Eberhardt, then the city manager, are

city's defense of this case. The city is likewise contesting the insurer's reservation of rights regarding any fee award on remand. Whatever the ultimate result of that may be, the Court need not explore these facts now. To make a due process claim, the city must show it has a property interest protected by state law. The city offers nothing to show it has or will have any monetary liability in this case. Just claiming there is a property interest protected by due process doesn't make it so.

In the absence of a showing that the city has a property interest created by state law that would be protected by procedural due process, the city has no due process claim. That alone is sufficient to dispense with the city's due process claim. The next section shows that, even if the city has some kind of property interest, it received the notice and opportunity to be heard required by due process.

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coded as "Communicate (other external)." His communications with people at the liability pool, such as "email from Tom Weed re: assignment," are coded as "Communicate (with client)." Tom Weed is a Michigan Municipal League claims supervisor. http://dev.mml.org/insurance/pool/about/claim_contacts.html (accessed August 23, 2020).

A lawyer who an insurance company retains to defend a case represents and has a duty to the client, the insured, not the insurance company. "[N]o attorney-client relationship exists between an insurance company and the attorney representing the insurance company's insured. The attorney's sole loyalty and duty is owed to the client, not to the insurer." *Kirschner v Process Design Assoc, Inc*, 459 Mich 587, 598; 592 NW2d 707 (1999); MRPC 5.4(c) ("A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services").

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2. The City Had an Opportunity to Be Heard. It Just Didn't Avail Itself of the Opportunity

Procedural due process requires notice and an opportunity to be heard. *Bonner v Brighton,* 495 Mich 209, 235; 848 NW2d 380 (2014), citing *Mullane v Central Hanover Bank & Trust Co,* 339 US 306, 313; 70 S Ct 652; 94 L Ed 865 (1950).

The city had notice of the alternative statutory interpretation approach in the press amici's brief. That brief addressed the first issue the Court highlighted in its grant order: whether the contested records are "public records" under FOIA. Order, 9/25/19. The city must have known that even an alternative statutory interpretation addressed an issue the Court wanted briefed—the central issue in this case: whether the records are public records.

The city also had an opportunity to be heard on that. The operative concept is "opportunity." As long as the city had the *opportunity* to brief and argue this issue, there was no due process violation. This is the same as *Thomson v Dearborn*, 347 Mich 365; 79 NW2d 841 (1956). There, it appeared the question was one of law and the circuit court asked for briefs, but also stated that, after briefing, there would be an opportunity to submit testimony if that was desirable. *Id.* at 369. Briefs were filed and the judge entered an opinion. *Id.* On appeal, defendant claimed a due process violation because it did not have the opportunity to present testimony. *Id.* at 376. This Court rejected that argument because:

> It does not appear that counsel for defendant at any time advised the trial judge that they desired to offer evidence for the purposes of the record. No claim is made that a further hearing was requested, nor is there any explanation why such course was not followed. … We have no

doubt the court would have received any proofs offered, and at an appropriate time, if request for leave to present such had been made.

Id.

Thus all that is needed for due process is the *opportunity* to be heard. There is no violation if, as here and in *Thomson,* the party had an opportunity to be heard but did not avail itself of the opportunity. *Boddie v Connecticut*, 401 US 371, 378-379; 91 S Ct 780; 28 L Ed 2d 113 (1971) ("the hearing required by due process is subject to waiver"); *D'Acquisto v Washington*, 640 F Supp 594, 623 (ND Ill, 1986) ("Due process requires only an *opportunity* to be heard; if an individual chooses not to take advantage of that opportunity, due process has nevertheless been satisfied"; emphasis in original). Accord, *Diaz Camacho v Lopez Rivera*, 699 F Supp 1020, 1024 (D PR, 1988) (same).

The discussion in section III.E above shows the city had ample opportunity to brief this statutory interpretation approach. The Court did not deprive the city of that opportunity. The city just chose not to avail itself of the opportunity. The Court did not violate due process.

V. The City's Claim That It Cannot Produce Records From Its City Attorney Is Wrong

A. The Office of the City Attorney Is Subject to the City's Control. The City Controls the Contested Records and Can Disclose Them

The city says the Court has issued an unenforceable "advisory" opinion and there is "no legal pathway for enforcing such an order [to disclose the records]." City motion, p 9. This theory is based on the Court's holding that the records are public

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records of the office of the city attorney, without ruling whether they are also public records of the city.

The unexpressed basis for this argument is that the city is powerless to require its city attorney to turn over records from his conduct of city business. In the city's view, the Court's decision is meaningless, the city doesn't have and can't get the records, and thus the city will refuse to produce the records the Court held are public records under FOIA.

The fallacy of this argument is that the office of the city attorney is part of the city. The city attorney works for the city. The city can tell him to turn over the records. He is responsible to and serves at the pleasure of the city council. Charter, § 5.1(b) (appendix, p 101a). When the city council appointed Mr. Ryan's firm as city attorney, it directed the city's previous law firm to turn over all its records to Ryan's firm, showing that the city attorney's records are under the city's control. Ryan dep, p 12 (appendix, p 229a); exhibit 1 (resolution authorizing previous firm "to transfer all files, records, and/or documents" to Ryan's firm).[7] Ryan testified that, if the city appointed a new city attorney, he would turn over his records on open matters to the new attorney. Ryan dep, pp 12-13 (appendix, pp 229a-230a).

Most importantly, in this case itself, Ryan directly responded to the records request and disclosed hundreds of records. Although plaintiff's records request was directed to the city, the city attorney responded to the request on behalf of the city.

[7] This was in the record below as exhibit 1 to Ryan's deposition.

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Ryan letter 6/30/15 (appendix, p 75a) (writing "[i]n response to your FOIA request"). Included with his letter were hundreds of responsive records. *Id.* (responding to numerous requests by saying "see attached"). This is how the city characterized it: "On June 30, 2015 [the date of Ryan's letter], the City produced over 700 pages of documents in response to the FOIA request …." Defendant-Appellee's Response Brief on Appeal, 12/20/19, p 1. This shows two things: First, the city attorney is fully capable of producing city records, including records from his own supposedly separate files. Second, since the record request was to the city, the city refers to Ryan's actions as the city's actions.

There is no question that the city attorney's records are the city's records and are under the city's control. The city can require the city attorney to produce those records.

B. The Office of the City Attorney Isn't an Entity Entirely Independent From the City

In the city's view, the city attorney gets to decide what records the city gets and the city anticipates he will refuse to give the contested records to the city even if the city manager or the city council order him to do so. The city offers no factual support for this scenario. Its argument is a reprise of the arguments the city made for years in this case—that the city attorney is an entity separate from the city itself, not part of the city at all. But that is simply wrong.

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The city attorney and the office of the city attorney are part of the city and subject to its control. "The City Charter creates the 'office of the city attorney.'" Opinion, p 12; accord, *id.,* pp 11-12 (citing charter provisions). The city attorney is an "administrative officer" of the city. Charter, § 5.1(a) (appendix, pp 100a-101a). The city attorney is "responsible to the Council." *Id.,* § 5.1(b) (appendix, p 101a); § 5.6(a)(2) (appendix, p 105a). The city attorney must "Perform such other duties as may be prescribed by … the Council." *Id.,* § 5.6(a)(9) (appendix, p 105a).

Given the fact that the city attorney is subject to the city council's direction, the city cannot credibly claim it cannot disclose the contested records because they are in the hands of the office of the city attorney. The city can direct him to turn over the records. The office of the city attorney exists within the city. Opinion, p 14 n 12 ("a 'public body' may exist within a 'public body'"). The city attorney has never said he would refuse to turn over the records if the city directed him to.[8] He would have no basis to refuse to turn over the records. They are records pertaining to his performance of an official government function. Opinion, p 7 n 6. The city paid him for his

[8] The city council discussed with its attorneys whether the council could see and publicly release the records. (Yes, the city council has never seen the records it has been fighting to keep secret for years.) There was no suggestion that the city attorney could or would refuse to give the council the records if directed to do so, only that such a disclosure would end the case. The insurance defense lawyer told the council that the records would be turned over if the council wanted them. But he told the council that disclosing the records before the lawsuit was over could compromise the city's insurance coverage, thus threatening the city with loss of payments the insurer has made and continues to make to the insurance defense lawyer.

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work on the records.[9] He has an ethical obligation to inform his client about his work, including complying promptly with reasonable requests for information. MRPC 1.4(a).

The office of the city attorney is part of the city. Opinion, p 14 n 12. As such, the records there are the city's records and the city can disclose them.

C. The City Must Produce Public Records Wherever They Are Located

The city cannot evade its obligations under FOIA by claiming the records are not in its physical possession but rather are in the possession of the supposedly separate and independent office of the city attorney. This case started with that contention—with the refusal to disclose records that were supposedly not public records because they were in the city attorney's files. It ended when the Court held the contested records are public records under FOIA. The city's response now is the same as its first response: We won't disclose the records because they are in the city attorney's file. In the city's view, the years of litigation and this Court's ultimate decision mean nothing and these public records will still not see the light of day.

The city must disclose a public record "regardless of the location of the public record." MCL 15.240(4). This is similar to *MacKenzie v Wales Twp*, 247 Mich App 124; 635 NW2d 335 (2001). There the townships did not have possession of the computer tapes the requester asked for, since they outsourced preparation of their property tax

[9] Defendant's Answer to Plaintiff's Third Requests for Admission and Fifth Interrogatories to Defendant, ¶¶ 1-5, 7/27/16 (appendix, pp 157a-158a)).

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bills. Nonetheless, the court held the tapes were public records and "the circuit court, on remand, must order defendants to produce the tapes, whether by signing the release provided by Port Huron [which had physical possession] or obtaining copies of the tapes and forwarding them to plaintiff …." 247 Mich App at 132.

So too here, the Court should not countenance the city's shell game. The office of the city attorney has the records. The office of the city attorney is subject to the city's control. Therefore the city can produce the records. There is no basis for the city's argument that this Court's opinion is meaningless.

D. The City Must Ultimately Disclose the Documents. There Is No Reason for Additional Procedural Skirmishing

Should the Court give any credence to the city's argument that it is impossible for the city to disclose the records because they are beyond the city's control, a simple procedure would make that argument irrelevant. The Court could add the office of the city attorney as a defendant.

The city complains "the City Attorney … was not a named party to the underlying proceeding and is not a party to this appeal." City motion, p 8. That can be easily remedied. The Court could add "the office of the city attorney" as a defendant. MCR 2.118(A) (party may amend a pleading); MCR 2.118(C)(1) (issues actually tried are treated as if they had been raised in the pleadings; pleadings may be amended at any time, even after judgment); MCR 7.316(A)(1) (Supreme Court may "exercise any or all of the powers of amendment of the lower court"); MCR 7.316(A)(2) (Supreme Court may "allow new parties to be added"); MCR 7.316(A)(7) (Supreme Court may

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"enter any judgment or order that ought to have been entered, and enter other and further orders and grant relief as the case may require"). Once the office of the city attorney is added as a defendant, the city's contrived argument that it can't produce the records evaporates. The office of the city attorney can and must disclose the public records this Court has held it possesses.[10]

Adding the office of the city attorney as a defendant would not change anything in this case. The city attorney consistently acted as though he were the public body involved. Although plaintiff's records request was directed to the city, the city attorney himself responded to the request. Ryan letter 6/30/15 (appendix, p 75a) (writing "[i]n response to your FOIA request"). He produced some records, refused to produce others, and noted that the city's FOIA coordinator had produced other records. Plaintiff's counsel wrote to the FOIA coordinator pointing out deficiencies in the response. Letter 8/24/15 (appendix, p 77). The city attorney again responded "regarding [the] FOIA request." Ryan letter 10/19/15 (appendix, p 81a). He treated the letter from plaintiff's counsel as an appeal and stated: "Appeal denied." *Id.* FOIA provides for appeal of a denial to the "head of the public body." MCL 15.235(5)(d)(*i*); MCL 15.240(1)(a), (2). Ryan was purporting to act as the "head of the public body" by both responding to the FOIA request and denying an "appeal." Since he was not the

[10] The city also contends that the Court violated the city attorney's due process rights. City motion, p 8. The office of the city attorney has no due process rights against this Court. See the discussion in section IV.B.1 above. Nor does the city attorney as an individual, since the Court did not hold that he, as an individual, is a public body. Opinion, p 13, n 10.

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head of the city (either the mayor or the city manager would be), he must have been acting as the head of the office of the city attorney. Treating him as such and adding the office of the city attorney as a defendant would be consistent with how he and the city have acted in this case.

Adding the office of the city attorney as a party in order to enforce the Court's judgment would elevate form over substance. It would be an unnecessary formalistic procedure to accommodate the city's argument that it can't disclose the records itself. The city controls the records. It should disclose them. There is no basis for arguing this Court's decision is an unenforceable advisory opinion.

VI. The City's Critique of the Court's Opinion Elevates One Part of the Definition of "Public Body" Over Everything Else and Ignores the Other Parts

After offering its various procedural arguments, the city finally gets to the merits of the case—whether the contested records are "public records" under FOIA. Even though the argument has no merit, as discussed below, this is the argument the city could and should have made months ago when the press amici filed their brief in January.

A. There Is No Reason for Additional Briefing

Although the city's criticism of the Court's analysis is the only substantive basis for the city's plea for the Court to change its mind, the city cautions that its motion for rehearing "should not be taken as Clarkston's substantive argument on the merits of the dispositive issue." City motion, p 2. At this stage, after more than four-and-a-half years of litigation, one could reasonably say it is time for the city to "put up or

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shut up." *Pena v Ingham Co Rd Comm*, 255 Mich App 299, 313 n 4; 660 NW2d 351 (2003). If, after all this time, including two years in this Court, the city can't clearly articulate its argument, that should be the end of this saga. Litigation must come to an end. Notwithstanding the city's plea for more briefing, we address the city's argument as stated in its motion for rehearing.

B. The Court Properly Analyzed One of the Alternative Definitions of "Public Body"

The Court examined the several subsections of the definition of "public body" in MCL 15.232(h). Opinion, p 6 (quoting MCL 15.232(h)(*i*)-(*iv*)); pp 7-11 (examining the language and relationships of those subsections). It concluded MCL 15.232(h)(*iv*) includes the office of the city attorney because that office is a "body that is created by … local authority" under that subsection. Opinion, pp 12-13. This was a straightforward application of the statutory language, examining the language in each subsection of the definition of "public body"; concluding that a "body" can encompass an individual; noting the statute distinguishes between an "office" and the individual occupying the office; and concluding that the office of the city attorney is a "body that is created by … local authority" under MCL 15.232(h)(*iv*). The Court simply applied the statutory language. It did not, as the city claims, "impermissibly rewrite[] the statute." City motion, p 10.

The city criticizes the Court's conclusion because it ostensibly ignores MCL 15.232(h)(*iii*), which defines various municipal entities as public bodies but does not include municipal officers and employees. From that omission, the city concludes

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that a municipal officer or employee cannot be a "public body." The city says the Court ignored this. The city's reasoning is wrong for three reasons.

First, the city fails to distinguish between individual officers and the offices they hold. The Court was careful to make that distinction, recognizing that there is a difference between an "office" and the individual who happens to hold that office at any time. Opinion, p 9 ("individual officers are, for purposes of FOIA, separate and distinct entities from their respective 'offices'"); *id.,* p 13 n 10 ("we do not conclude that the city attorney, individually, is himself a 'public body'"; "Rather, we conclude that the entity, the 'office of the city attorney,' constitutes the pertinent 'public body'"). The city fails to make this distinction throughout its motion.[11] It points out that plaintiff "repeatedly conceded" the city attorney is not a "public body" under MCL 15.232(h)(*iii*), as though that is determinative. City motion, p 2. But that concession (required by the language of (h)(*iii*)) has no impact on whether the office of the city attorney (a body distinct from the city attorney as an individual) can be a "public body" under MCL 15.232(h)(*iv*).

Given the distinction between the office and the individual who holds the office, the fact that MCL 15.232(h)(*iii*) does not include municipal officers and employees (as

[11] City motion, p 1 (incorrectly stating "[t]he majority held that the City Attorney is a 'public body'"); *id.* (characterizing the Court's opinion as addressing "[w]hether the City Attorney is a 'public body'"); p 8 (claiming the Court ruled "that the City Attorney is a public body"); *id.* (the majority concludes "that the City Attorney is a public body"); p 9 (majority "appears to obligate the City Attorney to disclose the documents").

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individuals) in its definition of "public body" is irrelevant in determining what constitutes an "office" (a "body that is created by … local authority") under the definition of "public body" in MCL 15.232(h)(*iv*). The two (an individual and an office) are different legal concepts. Thus the definition in (h)(*iii*) doesn't limit the definition in (h)(*iv*).

<u>Second</u>, the definition in MCL 15.232(h)(*iii*) doesn't say municipal officers and employees can't be public bodies. MCL 15.232(h) contains several express exclusions. MCL 15.232(h)(*i*) excludes "the governor or lieutenant governor, the executive office of the governor or lieutenant governor, or employees thereof." MCL 15.232(h)(*iv*) excludes "the office of the county clerk and its employees when acting in the capacity of clerk to the circuit court." If the legislature similarly intended to exclude municipal officers and employees (or their offices), it could have expressly excluded them like it excluded others. *People v Lewis*, 503 Mich 162, 165-166; 926 NW2d 796 (2018) ("when the Legislature includes language in one part of a statute that it omits in another, it is assumed that the omission was intentional").

<u>Third</u>, the city's interpretation elevates MCL 15.232(h)(*iii*) over (h)(*iv*) without any textual indication that the legislature intended one subsection to take priority over another. The city's argument is that the supposed exclusion of municipal officers and employees in (h)(*iii*) supersedes (h)(*iv*) and prohibits interpreting the language of (h)(*iv*) to include a municipal office.

There is nothing in the language of either (h)(*iii*) or (h)(*iv*) to indicate that (h)(*iii*) takes precedence or limits (h)(*iv*). MCL 15.232(h)(*iv*) is a catch-all provision,

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Coalition Protecting Auto No-Fault v Michigan Catastrophic Claims Ass'n, 317 Mich App 1, 12; 894 NW2d 758 (2016) (*CPAN*); *Jackson v Eastern Michigan Univ Foundation*, 215 Mich App 240, 244; 544 NW2d 737 (1996). It is a disjunctive definition—a person or entity is a "public body" if it satisfied "any of the" subsections of MCL 15.232(h). *CPAN,* 317 Mich App at 12 (definition is disjunctive); *Jackson,* 215 Mich App at 244. A catch-all provision is one that is "[b]road; widely encompassing." *Black's Law Dictionary* (11th ed 2019). Thus (h)(*iv*) was intended to sweep in *additional* entities not included in the three previous subsections.

This runs directly against the city's argument that (h)(*iii*) limits what can be a "public body" under (h)(*iv*). In the city's reckoning, (h)(*iii*) controls everything; the Court's examination of (h)(*iv*) is prohibited because (h)(*iii*) controls. But this violates a basic rule of statutory interpretation, one that the Court itself applied in its opinion: "Courts must give effect to every word, phrase, and clause in a statute and avoid an interpretation that would render any part of the statute surplusage or nugatory." Opinion, p 10. Accord, *South Dearborn Environmental Improvement Ass'n, Inc v Dep't of Environmental Quality*, 502 Mich 349, 361; 917 NW2d 603 (2018). Accepting the city's argument would render meaningless the Court's careful examination of what constitutes a "body that is created by … local authority" under (h)(*iv*). In the city's view, that phrase cannot include the city attorney (or the office of the city attorney) because (h)(*iii*) prohibits that.

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The Court's interpretation of MCL 15.232(h)(*iv*) to include the office of the city attorney as a public body is a logical, well-reasoned interpretation, carefully examining the subsections of MCL 15.232(h) and the distinctions they make between offices and the individuals who hold those offices. Opinion, pp 8-10 (noting the statute distinguishes between "the governor [and] lieutenant governor" and "the executive office of the governor [and] lieutenant governor"); *id.,* pp 10-11 (exclusion of "the office of the county clerk … when acting in the capacity of clerk to the circuit court"). It is not required that a "body" must be a "collective entity." City motion, p 18. As the Court pointed out, the statutory definition of "public body" includes single officers and individuals. Opinion, p 7, citing MCL 15.232(h)(*i*) ("public body" includes state officer or employee).

The Court's interpretation is particularly apt in light of the fact that the city retained Mr. Ryan's firm, not him as an individual, as the city attorney and the previous city attorney was also a firm. Exhibit 1 (resolution terminating the previous firm and appointing "Thomas Ryan, P.C., as the legal representative and general counsel for all Village of Clarkston legal matters of whatever kind or whatever nature").[12] Thus the "office of the city attorney" has always been a law firm. The city incorrectly claims only a single individual can be the city attorney (city motion, p 18),

[12] Although adopted while Clarkston was a village, the resolution carried over to the city after its incorporation. Charter, § 15.7 (appendix, pp 131a-132a).

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contrary to what the city has done for all 28 years of its existence and when it was a village before incorporation.

C. The Alternative Subsections of MCL 15.232(h) Are Independent and the Court Properly Analyzed (h)(*iv*)

The Court's conclusion under MCL 15.232(h)(*iv*) that the office of the city attorney is a "public body" is independent of MCL 15.232(h)(*iii*). The fact that the majority and dissenting opinions referred to each other and noted their different analysis shows the Court thoroughly considered the matter. Thus the city's criticism of the Court's "failure" to discuss (h)(*iii*)[13] is inapposite, since both subsections stand on their own and there is no reason why, if an entity does not qualify as a "public body" under one subsection, it cannot by a "public body" under another subsection.

D. The Court Did Not "Expand" the Definition of "Public Body." It Just Interpreted the Words of the Statute

In arguing against the Court's interpretation, the city claims the Court "radically expands the definition of 'public body.'" City motion, p 10. It highlights the dissenting opinion's parade of horrors and "serious consequences" from this "radical expansion of the definition of 'public body.'" *Id.,* p 5, quoting Viviano, J, dissenting.

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[13] The city says the Court reached its decision "without addressing the language differences in MCL 15.232(h)(iii)." City motion, p 1. In addition to quoting (h)(iii) along with the other subsections of MCL 15.232(h) (opinion, p 6), the Court addressed (h)(*iii*) in its discussion about the possibility of a "department" consisting of a single person. Opinion, p 13 n 10.

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The prediction of dire consequences is overblown. The reach of the Court's decision is limited by the definition of "public record," which is limited to records involved "in the performance of an official function" of government. MCL 15.232(i). Those are the only records involved.

The city highlights the dissent's list of local officers whose records would be subject to FOIA under the Court's decision. City motion, p 5 n 4, referring to p 12 n 9 of the dissenting opinion. But, unlike Clarkston, most municipalities would readily disclose the records of their officers regarding public business rather than advocating a scheme to conceal the records by keeping separate secret files. "To the extent the dissent is concerned with the practical implications of our decision, we again disagree that it will effect any radical change in the operation of FOIA." Opinion, p 13 n 10. That is because "virtually all records" of city offices are records of the city itself, so there is no expansion of the scope of FOIA. *Id.* And one has to ask why it should be a problem to require holders of public offices who are performing an official function of government to make the records of that work public.

E. The Court's Analysis Is Consistent with the Policy of FOIA

Let's remember what is at issue here. Can city officials keep files with records of their conduct of official city business immune from FOIA? The city rejects the Court's analysis but offers no alternative statutory interpretation that would further the policy of the FOIA. The city's simplistic interpretation, which its motion understandably does not expressly articulate, is: The city attorney is not a "public body" under MCL 15.232(h)(*iii*). Therefore he cannot possess public records. This reasoning

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would apply to all city officers. And virtually all municipal records are in the possession of a municipal officer who, in the city's view, cannot be a public body. For example, the city clerk is the "custodian of … all city ordinances, resolutions, papers, documents, treasurer's bond, and records pertaining to the City." Charter, § 5.4(e) (appendix, p 104a). The finance officer must "keep the books of accounts … of the City." *Id.,* § 5.8(b)(1) (appendix, p 106a). The city assessor (an administrative officer under Charter, § 5.1(a) (appendix, pp 100a-101a)) must "maintain records relevant to the assessments." MCL 211.10e. Under the city's interpretation, the records of official functions of these and other municipal officers can be kept in secret off-premises files.[14] This is a radical departure from FOIA law never before offered or approved by any court in the more than four decades that FOIA existed.

When faced with alternative interpretations, "the tendency of the courts has always been to favor interpretations which are consistent with public policy." *Sam v Balardo*, 411 Mich 405, 435; 308 NW2d 142 (1981), quoting 2A Sutherland, Statutory Construction (4th ed), § 56.01, p 401 (see now 2B Sutherland, Statutes & Statutory Construction (7th ed), § 56.1). Accord, *Cronin v Minster Press*, 56 Mich App 471, 475; 224 NW2d 336 (1974) ("policies and purposes" of statute are "clearly an integral part

[14] Not all city officers have an office at the city hall. The assessor, for example, does not. Under the city's theory, all the assessor's files would be immune from FOIA.

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of statutory construction”). The interpretation that records in the office of a city official are “public records” is certainly more in keeping with the FOIA policy of transparency in government. MCL 15.231(2).

Nothing the city says refutes the Court’s analysis. There is no reason now for the Court to change its mind. The city’s motion attempts to cloud the air with inaccurate and erroneous argument and then say that this is so complicated and the Court’s “splintered decision”[15] is so wrong that the Court should just throw up its hands and be rid of this case by denying leave to appeal. City motion, p 2.

Denying leave to appeal and vacating the Court’s opinion will hand a victory to the city when this Court concluded that this case was one of the few that deserved a full grant of leave to appeal this term. Certainly the Court thought the issues here were of significant importance—significant enough to direct the parties to brief explicit questions that highlighted the Court’s concerns and to invite amicus briefs. There is no justification for now sweeping this all away and leaving the Court of Appeals opinion standing as a beacon for cities who want to conceal public records by the device of using off-premises files of their officers. The issues will not go away and, after two years in this Court, they deserve a decision.

[15] A 6 to 1 decision is hardly “splintered.” City motion, p 19. A five-justice supermajority opinion and a concurrence is a clear and strong statement of what the law is.

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The city has not offered a cogent reason for rehearing this case, let alone vacating leave.[16]

VII. If the Court Decides to Reconsider the Lead Opinion, It Should Adopt Chief Justice McCormack's Opinion

The sections above show the city has not offered a cogent reason for changing its decision. But, if the Court is persuaded to reexamine its decision and decides to reject the reasoning it crafted just a month ago, there is a simple, alternative ground for finding the contested records are "public records."

The Chief Justice's opinion adopted plaintiff's statutory interpretation approach.[17] This relies on the fact that the city, as an artificial legal entity, can act only through its agents. McCormack, CJ, concurring, slip op at 4-5. The city attorney, as a charter officer of the city, is the city's agent. *Id.,* p 2. His records are the city's records. "[B]ecause the city attorney created the requested records while representing the City of the Village of Clarkston … in conducting government business, they are subject to disclosure." *Id.,* pp 1-2. If neither the lead opinion's reasoning nor plaintiff's reasoning applies, as the city argues, then "no records from a municipal corporation

[16] The city tries to resurrect its argument that *Hoffman v Bay City Sch Dist,* 137 Mich App 333; 337 NW2d 686 (1984), should control. Although the Court mentioned *Hoffman* in its grant order, none of the three opinions cited or discussed *Hoffman,* not even the dissent. Plaintiff's Brief on Appeal, 11/20/19, pp 44-46, showed *Hoffman* is not binding on this Court, is distinguishable, and was wrongly decided.

[17] The city says six justices declined to adopt plaintiff's statutory interpretation approach. City motion, p 2 ("six of seven Justices have declined to address" plaintiff's argument"), p 9 (same). That ignores the Chief Justice's opinion, which did in fact adopt plaintiff's approach.

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would be subject to disclosure; it can't prepare, use, or retain records on its own." McCormack, CJ, concurring, slip op at 5. This would frustrate the purpose of FOIA to give people "full and complete information regarding … those who represent them as public officials and public employees." MCL 15.231(2); McCormack, CJ, concurring, slip op at 5.

Adopting the Chief Justice's opinion would negate most of the city's arguments. There would be no party presentation issue because the parties briefed the issue. There would be no due process claim because the decision would be based on issues the parties briefed and argued. There would be no games with enforcing a judgment against the city.

The city suggests the Court majority rejected plaintiff's argument that the city attorney holds the city's public records as an agent for the city. City motion, p 9 ("Six of the seven Justices declined to hold that … the City Attorney is an agent of Clarkston"). But the Court did not reject that argument. It adopted a separate, independent statutory interpretation approach. The fact the Chief Justice concurred with the majority shows the two approaches are not incompatible and the majority opinion did not reject the plaintiff's approach. It just discussed a different approach.

Thus, if for any reason the Court concludes the analysis in its opinion is wrong, it should adopt Chief Justice McCormack's opinion as the Court's opinion.

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VIII. The Court Should Not Only Deny the Motion for Rehearing But Should Also Order the City to Produce the Contested Records Immediately

This litigation started in 2015, preceded by months of exchanges with the city attempting to persuade the city that the city attorney can't keep a secret file of records he compiles in the course of performing his official functions. Although plaintiff presented the legal issue in a summary disposition motion filed with the complaint—the legal issue of whether the contested records are "public records" under FOIA—the city insisted on conducting discovery, then resisted discovery requests; offered unpled defenses that had no factual support;[18] and dragged out this case as long as possible. It is time to put this case to rest.

Although the Court remanded the case to the circuit court for further proceedings consistent with its opinion, that leaves it open to the city to interpose new arguments for refusing to turn over these public records. The city raised no affirmative defenses here. Opinion of McCormick, CJ, p 2 n 1. But the city now presents a new argument and announces that it will not turn over the records even if the Court denies the city's motion for rehearing. In the city's view, the Court's judgment would be unenforceable against the city because the Court did not hold that the contested records are *city* records. Rather they are records of the office of the city attorney, which the city apparently thinks is not under its control. City motion, pp 8-9. So the city

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[18] One example is the claim of attorney-client privilege or work product protection for the city attorney's correspondence with opposing counsel—counsel representing parties adverse to the city.

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says there is "no legal mechanism for directing Clarkston to produce documents possessed by another public body [the office of the city attorney]." *Id.,* p 9. If the Court's opinion stands, the city has announced it will not turn over the records because: "The bottom line is that the majority does not articulate a legal basis to enforce a disclosure order against the City Attorney or Clarkston." *Id.*

One of FOIA's purposes is that "[t]he people shall be informed so that they may fully participate in the democratic process." MCL 15.231(2). That can't happen if a city can hide records for years and put its citizens though a gauntlet of litigation to get them and then say at the end, after losing, that the city still will not disclose the records. To fulfill the statute's purpose, the litigation process must be swift and final. That is why FOIA mandates that FOIA cases, including appeals, "shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way." MCL 15.240(5).

It is now time to carry out that policy. Although the Court usually denies a motion for rehearing with a one-sentence order, this case requires the Court to go farther. When a party announces its intent to defy the Court's opinion and rely on a technicality to evade the opinion, the Court should not tolerate that. The Court should not only deny the city's motion for rehearing. It should also order the city to disclose the contested records immediately. "[A] court that determines a public record is not exempt from disclosure shall order the public body to cease withholding or to produce all or a portion of a public record wrongfully withheld, regardless of the location of the public record." MCL 15.240(4). This Court may "enter any judgment or order that

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ought to have been entered, and enter other and further orders and grant relief as the case may require." MCR 7.316(A)(7).

Plaintiff requests that the Court deny the motion for rehearing and order the city to disclose the contested records immediately.

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Attorneys for Plaintiff-Appellant

Dated: August 27, 2020

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EXHIBIT 1

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VILLAGE OF CLARKSTON
375 DEPOT ROAD
CLARKSTON MI 48346

Village Council
Minutes of Special Meeting
December 5, 1991

Meeting called to order by President Catallo at 7:20 p.m.

Roll: Present: Basinger, Catallo, Haven, Mauti, Roeser, Schultz, Whitmer.
Absent: None.

After discussion of legal services for the Village of Clarkston, Trustee Whitmer offered the following resolution:

WHEREAS The Village of Clarkston Council has retained the firm of Campbell, Keenan, Harry, Cooney & Karlstrom represented by Thomas Gruich to act as its legal representative and general counsel in legal matters of any kind or matter; and

WHEREAS The Village of Clarkston has also retained the law firm of Thomas Ryan, P.C., to act as its special counsel in certain matters; and

[WH]EREAS the Village of Clarkston deems it necessary, desirable, and [ex]pedient to be represented by a single legal counsel in all legal matters;

BE IT RESOLVED This Thursday, the fifth day of December, 1991, that the Village of Clarkston elects to terminate Campbell, Keenan, Harry, Cooney & Karlstrom represented by Thomas Gruich as legal representative and general counsel for all current and outstanding legal matters regarding the Village of Clarkston as client and/or defendant, and/or complainant, and hereby substitutes the firm of Thomas Ryan, P.C., as the legal representative and general counsel for all Village of Clarkston legal matters of whatever kind or whatever nature effective December 9, 1991; provided that the Village of Clarkston reserves the right to retain additional and/or substituted special legal counsel as it deems necessary and appropriate at any time.

BE IT ALSO RESOLVED That the firm of Campbell, Keenan, Harry, Cooney & Karlstrom represented by Thomas Gruich and Thomas Ryan, P.C., are authorized to undertake whatever appropriate actions are necessary to transfer all files, records, and/or documents pertaining to the Village of Clarkston in order to effectuate said substitution.

BE IT FURTHER RESOLVED that the new and substituted counsel of Thomas Ryan, P.C., shall undertake to represent the Village of Clarkston in all legal matters of whatever kind or whatever nature at the stipulated rate of $90 per hour.

[BE] IT FURTHER RESOLVED that the Village of Clarkston retains the firm of [Th]omas Ryan, P.C., at $50 per month, said amount to include appearances at [r]egularly scheduled Village of Clarkston Council meetings.

Roll. Yeas: Basinger, Catallo, Haven, Mauti, Roeser, Schultz, Whitmer.
Nays: None.