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

MOTION FOR LEAVE FOR APPELLANT TO FILE A BRIEF RESPONDING TO MML/MTA AMICUS BRIEF ON MOTION FOR REHEARING

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MOTION FOR LEAVE FOR APPELLANT TO FILE A BRIEF RESPONDING TO MML/MTA AMICUS BRIEF ON MOTION FOR REHEARING

Appellee-city's amici[1] filed an "Answer in Support of the City of the Village of Clarkston's Motion for Rehearing" on 8/28/20. Plaintiff-appellant Susan Bisio moves for leave to file a brief replying to that answer. In support, she states:

1. MML/MTA's "answer" is not actually an answer to the city's motion for rehearing. An answer would be filed by an "opposing party." MCR 7.311(C). MML/MTA is not opposing the city's motion for rehearing. Rather it is supporting it and, like the city, attacking the Court's July 24, 2020 opinion. As such, the MML/MTA "answer" is really in the nature of an additional motion for rehearing. Accordingly, plaintiff should have an opportunity to respond, as provided by MCL 7.311(C).

2. MML/MTA raises additional arguments regarding rehearing, including—

(a) A claim that MML/MTA did not have an opportunity to respond to a statutory interpretation approach argued in the press amici's brief and it was somehow surprised when the Court adopted that approach.

(b) A claim that appellant conceded the press amici's statutory interpretation was not properly before the Court, mischaracterizing both appellant's arguments and the Court's decision.

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[1] The Michigan Municipal League, the Michigan Townships Association, and the Michigan Association of Municipal Attorneys. We will refer to them as the "MML/MTA."

(c) An unsubstantiated claim that the hundreds of municipalities and thousands of municipal officers the MML/MTA supposedly represents will be severely injured by the Court's decision.

(d) A critique of the Court's decision not offered by the city in its motion for rehearing.

3. In order for the Court to be fully informed when deciding whether to throw out its July 24, 2020 opinion, fairness requires that appellant be afforded an opportunity to respond to the MML/MTA arguments by filing a responsive brief.

For these reasons, appellant asks the court to allow her to file a brief responding to the MML/MTA "answer." Appellant's proposed brief is attached as an exhibit to this motion.

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Dated: August 31, 2020

Exhibit 1

STATE OF MICHIGAN

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I. The Case Is Properly Decided. There Is No Basis for a Rehearing

This Freedom of Information case has a long history, from the June 2015 record request to the appellee city, through unnecessary discovery in the circuit court that the city insisted on, appeal in the Court of Appeals, and ultimately arriving in this Court for a sojourn of almost two years before decision. The Court considered multiple briefs from the parties and amici, heard argument, and issued a considered opinion holding that a city attorney occupying an office created by charter can't keep secret files of his work that are immune from FOIA.

Now the city and its amici want a re-do, with more briefing and argument, because the Court got everything wrong—so wrong that the Court should just wash its hands of this case, deny leave to appeal, and erase its opinion after full briefing, argument, and decision.

The discussion below shows there is no basis for that. There is no "palpable error by which the court and the parties have been misled." MCR 7.311(F)(1), MCR 2.119(F)(3). The Court's opinion should stand.

II. MML/MTA Had an Opportunity to Respond to the Press Amici's Statutory Interpretation Approach

One of the themes of the MML/MTA "answer"[1] to the city's motion for rehearing is that the Court decided the case on a statutory interpretation approach that "no

[1] This brief refers to the Michigan Municipal League, the Michigan Townships Association, and the Michigan Association of Municipal Attorneys as "MML/MTA." It refers to their 8/28/20 Answer in Support of the City of the Village of Clarkston's Motion for Rehearing as the "MML/MTA Answer." The Court invited the first two entities to file an amicus brief in its grant order. It is by virtue of that status that

one addressed … at any stage in the litigation." MML/MTA answer, p 2. The Court proceeded "without any input from the parties or amici curiae." *Id.* Says MML/MTA, "never at any stage in this litigation … have the parties had the chance to litigate that new theory." *Id.,* p 4. "No one has had the opportunity to respond …." *Id.,* 5. Most insulting is MML/MTA's characterization of the Court's opinion a "a decision made only behind the closed chambers' doors" (*id.,* p 14), as though the justices were skulking about in darkness inventing a secret way to decide the case.

They protest too much. This is an attempt to rewrite the history of this case. The press amici filed their brief—with the statutory interpretation argument the MML/MTA says surprises it—on January 31, 2020. That was "input from … amici curiae" that MML/MTA says didn't happen. The MML/MTA got a copy of that brief that day, since its lawyer was on the electronic filing service list ever since the MML/MTA filed an amicus brief in the Court of Appeals. Thus, it is not true that "no one addressed" this statutory interpretation approach. MML/MTA answer, p 2. The press amici addressed it. So it is also not true that "the argument on which the Court's

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they are permitted to answer the motion for rehearing. MCR 7.311(F)(3). The Michigan Association of Municipal Attorneys (MAMA) is not a separate body, but rather is an "entity of MML." MML/MTA Answer, p 2. It does not represent the views of municipal attorneys in general. Plaintiff is a municipal attorney with extensive FOIA experience. As a member of MAMA herself, she can attest that MAMA doesn't represent her views and MAMA never solicited her views or, to her knowledge, the views of any other municipal attorneys beyond perhaps those named as board members in MML/MTA's Answer. The addition of MAMA to MML/MTA's answer is a futile attempt to add heft to its arguments, as though all municipal attorneys agree they can keep secret files immune from FOIA.

decision was based [was] not addressed by … interested amici here ….” *Id.,* p 5. And, despite its aggressive rhetoric, MML/MTA eventually admits that the argument was “raised … in an amicus brief.” *Id.,* p 3. But this was “only … a two-page alternative argument in an amicus brief” (*id.*), as though succinct expression is prohibited and there is some kind of minimum page limit that must be exceeded to raise an argument.

The statutory interpretation approach the Court adopted was before the Court in January 2020, well before the March 5, 2020 oral arguments. The Court did not issue its opinion until July 24, 2020. It is just not true that “No one … had the opportunity to respond to [the argument].” MML/MTA Answer, p 3. The MML/MTA had ample time to seek leave to file a brief responding to the press amici’s argument. It now says this is “an issue of critical significance.” *Id.,* p 2. Yet it never sought to brief the issue. Did MML/MTA think the Court would ignore amicus briefs? That would destroy the usefulness of amicus briefing, which the Court often invites. See Plaintiff-Appellant’s Answer to Defendant’s Motion for Rehearing, 8/27/20 (“Plaintiff’s Answer”), pp 14-15.[2]

And MML/MTA knew exactly how to seek to file an additional brief to address this “issue of critical significance.” MML/MTA Answer, p 2. Its manipulation of the filing deadlines in the Court of Appeals shows that. The Michigan Press Association

[2] To the extent plaintiff addressed issues in her answer to the city’s motion, this brief refers to that answer. MML/MTA, however, raised additional arguments, which this brief addresses.

and Detroit Free Press filed a timely brief in the Court of Appeals.[3] On seeing that, the city solicited an amicus brief from MML/MTA, apparently believing that the city needed a balancing amicus brief on its side. So, more than a month later, MML/MTA filed a motion for leave to file an amicus brief.[4] The clerk rejected it as untimely.[5] MML/MTA then filed a motion to file an untimely brief.[6] The Court of Appeals allowed that.[7] As a result of all of this, MML/MTA was able to file an amicus brief more than two months after the filing deadline under MCR 7.212(H)(1) (amicus brief must be filed within 21 days of appellee's merits brief). MML/MTA knows how to get a brief filed when it wants to. It just decided not to do that after getting the press amici's brief.

Both MML/MTA and the city had ample time and opportunity "to challenge the argument" (MML/MTA Answer, p 3) the press amici raised. See Plaintiff's Answer, pp 12, 21-22 (noting it is the *opportunity* to be heard that is determinative). The argument on this "issue of critical significance" (MML/MTA Answer, p 2) was in the

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[3] Brief of Amici Curiae Supporting Appellant Susan Bisio, 5/31/17, *Bisio v City of the Village of Clarkston* (docket no 335422) ("COA case").

[4] The Michigan Municipal League's and the Michigan Township Association's Motion for Leave to File Amicus Curiae Brief, 7/7/17, COA case.

[5] Clerk's letter, 7/7/17, COA case, citing MCR 7.212(H)(1) (amicus brief must be filed within 21 days of appellee's merits brief).

[6] The Michigan Municipal League's and the Michigan Township Association's Motion for Leave to File Tardy Motion to File an Amicus Curiae Brief, 7/11/17, COA case.

[7] Order, 7/26/17, COA case, allowing the brief to be filed by 8/7/17.

record before the Court. The Court did not "reach[] beyond the case before it." *Id.,* p 6. The full opportunity to respond to an argument in the record before the Court belies the belated claim that the Court's decision was an "unexpected holding," an "unexpected conclusion." *Id.,* pp 2, 7. The Court did not put the case in a "brand-new and unexpected cast" and leave "hundreds of municipalities … unexpectedly in the lurch." *Id.,* pp 7, 8. Both the city and MML/MTA had their chance to address this issue. The Court should not now go out of its way to rescue MML/MTA from its lack of diligence.

III. Statutory Interpretation of MCL 15.232(h)(*iv*) Was Properly Before the Court. Plaintiff Did Not Concede or Waive That

The Court held that 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" as defined in that subsection of the definition of "public body." MML/MTA disingenuously uses plaintiff's concession that the city attorney is not a public body under MCL 15.232(h)(*iii*) as a concession that the office of the city attorney is not a public body under MCL 15.232(h)(*iv*). (MCL 15.232(h)(*iii*) includes various municipal entities in its definition but does not include individual municipal officers.)

In making this argument, MML/MTA either misunderstands or intentionally mischaracterizes plaintiff's argument and the Court's decision.

There are four subsections of MCL 15.232(h)'s definition of "public body." A person or entity is a public body if it meets "any of the following" subsections. MCL 15.232(h). The fact that a person or entity is not a public body under one subsection doesn't mean it can't be a public body under another subsection. And, when it

granted leave, the Court did not limit arguments to only one subsection of MCL 15.232(h).

The distinction between the subsections of MCL 15.232(h) is the distinction the press amici and the Court made. The press amici said that, although "the city attorney is not himself a public body," "*the office* of city attorney *is* a public body under MCL 15.232(h)(iv)."[8] The press amici said this was an "alternative basis" for decision—a *different* argument than the one plaintiff advocated under a *different* subsection of the definition of "public body." So MML/MTA's claim "no one involved in this case thought that … [the city attorney's] 'office'—was a public body" is not true. The press amici ("involved in this case" just as much as MML/MTA) *did* make that argument.

The Court made precisely this distinction in its opinion:

> [W]e do not conclude that the city attorney, individually, is himself a "public body" under MCL 15.232(h)(*iv*). Rather, we conclude that the entity, the "office of the city attorney," constitutes the pertinent "public body" under MCL 15.232(h)(*iv*).

Bisio v City of the Village of Clarkston, __ Mich __; __ NW2d __ (2020) (docket no. 158240) ("Opinion"); slip op at 13 n 10.

It is disingenuous for MML/MTA to elide two separate arguments into one and then say that plaintiff conceded the argument under (h)(*iv*) and that "was not an issue that was properly before this Court." MML/MTA Answer, p 6. Plaintiff recognized the

[8] Brief of Press Amici Curiae in Support of Appellant Susan Bisio, 1/31/20, p 14 (emphasis in original).

language of (h)(*iii*) but made no concession about (h)(*iv*). See Plaintiff's Answer, pp 12-14. She did not "repeatedly disclaim[] this theory" under (h)(iv). MML/MTA Answer, p 4. And it is not true that "Plaintiff had expressly disclaimed … that the Clarkston city attorney fit *any* definition of a 'public body' under FOIA." *Id.,* p 5 (emphasis added). Plaintiff acknowledged the city attorney was not a public body under MCL 15.232(h)(*iii*). She made no admission under the catch-all provision of (h)(iv). It was not "an issue that Plaintiff herself had taken off the table." MML/MTA Answer, p 6. It is just wrong to say that "everyone involved thought this issue was settled." *Id.,* p 5. Not the press amici. Not plaintiff. And, most importantly, not the Court. The facts are (1) the statutory interpretation approach under (h)(*iv*) was properly before the Court as early as January 2020 in the press amici brief and (2) everyone (including MML/MTA) had the *opportunity* to brief and argue it long before the Court issued its opinion.

MML/MTA argues the "bedrock principle" of "party presentation" (MML/MTA Answer, p 3) precluded the Court from considering the press amici's statutory interpretation approach. But "party presentation" is not an inexorable rule. Plaintiff's Answer, pp 9-12 (showing (1) the Court always has discretion to do what is necessary for a proper determination and (2) this is not a case where the Court sua sponte decided based on a theory that was never presented).

It is ironic MML/MTA (an amicus itself) says the Court had no business considering the argument of another amicus. By that reasoning, the Court likewise should not consider the MML/MTA amicus "answer" on rehearing.

IV. MML/MTA's Rhetoric About the Consequences of the Court's Decision Is Overblown

MML/MTA says it represents "551 Michigan local governments" and "more than 1,230 townships" and it is advocating the plight of "thousands" of local officers. MML/MTA Answer, pp 1, 13. The "sweeping impact" of the Court's decision will make these "thousands" of local officers "bear the brunt of the potential fallout from this Court's decision." *Id.,* pp 7, 4. The Court's decision will "drastically expand the scope of 'public bod[ies]' under FOIA" and "the brunt of that judicial expansion will be borne by the officers, employees, and consultants of Michigan municipalities and townships." *Id.,* p 12. It is a "watershed interpretive shift" with "far-reaching application." *Id.,* p 14.

There are several reasons why this apocalyptic hype is wrong.

A. The Court Fulfilled Its Role As the Court of Last Resort on Michigan Law

By criticizing the Court's decision for its supposedly "sweeping impact," MML/MTA disrespects this Court's role in deciding cases such as this. It says the Court's decision "has the potential for sweeping impact beyond the parties in this case." MML/MTA Answer, p 7. But it is exactly this kind of case the Court reserves its limited resources for. The Court grants leave to appeal in only a handful of the hundreds of cases that seek leave. The grounds for granting leave are limited. MCR 7.305(B). And, as shown by the Court's vigorous questioning of both counsel at oral argument, the Court is always concerned about the wider impact of its decisions because it is not deciding just the case before it but rather is deciding legal principles

that apply beyond that case. (That said, in *this* case, the Court affirmed what most thought was the scope of FOIA: It applies to the records of city officials performing official government functions.)

B. The Court's Decision is Narrower Than MML/MTA Portrays

The repeated references to "employees" and "consultants" (MML/MTA Answer, pp 2, 4, 7, 12, 13) is inapposite. The Court carefully limited its decision to "offices" that are "created by … local authority." Opinion, p 15. The decision applies to a small group of municipal officers whose offices are created by local law, like the city attorney in this case. How FOIA applies to other employees and to consultants is a question left for another day.

C. The Decision Does Not Impose Onerous Duties on Municipal Officers

Even if MML/MTA's overblown prediction of drastic consequences were true, one must ask why it is not a proper result and why it will effect the consequences MML/MTA fears. All state employees are public bodies. MCL 15.232(h)(*i*). Yet there has not been a problem with that in the decades FOIA has been the law. If state employees can survive being public bodies, why can't municipal officers? And the "practical import" of the Court's decision on people who "suddenly find themselves as 'public bod[ies]'" (MML/MTA Answer, p 13) is nil. They, like state employees, will simply forward record requests to their municipality to be handled like any other record requests. Or, as in this case, if they are so disposed, they can undertake to directly respond and handle appeals on their own. MML/MTA's complaint that the

Court is subjecting the city attorney here "to the burdensome procedural requirements of FOIA" (MML/MTA Answer, p 14) is ironic. The city attorney here acted as a public body by responding to the record request himself, specifically denying requests for the contested records, disclosing other records, and denying an appeal on his firm's letterhead. See Plaintiff's Answer, pp 28-29.

D. MML/MTA Offers No Example of the Dire Consequences It Predicts

MML/MTA's overblown rhetoric about the effect on "thousands" of municipal officers is bereft of factual support. Given the vast pool of resources and potentially injured municipalities and individuals that MML/MTA says it represents, one must ask: Why hasn't MML/MTA offered a single concrete example of how the Court's opinion would detrimentally affect any of the hundreds of municipalities and "thousands" of local officers who supposedly will suffer the consequences of a decision that the records they compile in the course of their official government functions are public records subject to disclosure under FOIA? Why can't MML/MTA offer anything specific? What exactly is the "significant impact on potentially thousands of local government employees and consultants"—the "broad impact that could upend the way FOIA has been applied to local governments and their employees and consultants for decades"? MML/MTA Answer, pp 4, 12.

The answer is that there is nothing. That is because the vast majority of municipalities approaches FOIA requests in good faith. Most would not think twice about the proposition that the records of their officers are public records subject to FOIA.

The Court's affirmance of that simple proposition is not a "substantial expansion" of FOIA. MML/MTA Answer, p 2. As the Court said, this is no great change:

> 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. Consider, for example, how FOIA applies at present to the office of the city mayor. MCL 15.232(i) defines a "public record" obtainable under FOIA as "a writing prepared, owned, used, in the possession of, or retained by a public body in the *performance of an official function*, from the time it is created." (Emphasis added.) That is, virtually all records "prepared, owned, used, in the possession of, or retained" by the office of the city mayor "in the performance of an official function" would *also* consist of records fairly characterized as "prepared, owned, used, in the possession of, or retained" by the city itself "in the performance of an official function." And a "city" indisputably constitutes a "public body" under MCL 15.232(h)(*iii*). We therefore struggle to conceive of an example or illustration of a "public record" subject to disclosure under FOIA in which the pertinent "public body" is the "office of the city mayor" but is not also understood to be the city itself.

Opinion, pp 13-14 n 10. Simply said, if the records are in the hands of an office "created by … local authority" (MCL 15.232(h)(*iv*)), then they are also the records of the municipality that created the office. Just as the Court "struggles to conceive of an example or illustration" when that is not true, so does plaintiff. And so does MML/MTA, since it can't offer any example. Nor has there been a flood of published commentary criticizing the Court's decision, as one might expect if the Court's decision were so wrong. And no public outcry from the hundreds of MML/MTA municipalities and the "thousands" of local officers who will have to disclose records of their official government functions.

The Court's decision is based on the text of the statute. MML/MTA's claims of the supposed burden on "thousands" of government officers are policy arguments—

arguments that are not for this Court. *Smitter v Thornapple Twp*, 494 Mich 121, 140; 833 NW2d 875 (2013) ("this Court may not substitute its policy preferences for those policy decisions that have been clearly provided by statute.")

V. MML/MTA's Critique of the Court's Decision Does Not Refute the Court's Careful Analysis

MML/MTA says there are "far-reaching errors" in the Court's decision and there are "multiple missteps in the majority's statutory reasoning." MML/MTA answer, p 8. Supposedly, "the Court's statutory interpretation is anything but plain and straightforward" and is "off the mark." *Id.,* pp 7, 11. Rather, "the majority's reasoning is up for debate." *Id.,* p 8. But the time for debate by the parties and amici is over. The Court majority and dissent have had the debate. The city and its amicus decided not to weigh in.

Nonetheless, we address MML/MTA's statutory interpretation arguments here. None of MML/MTA's criticisms of the Court's reasoning is sound.

A. MML/MTA Does Not Refute the Court's Analysis

First, MML/MTA criticizes the Court for "[s]kipping over MCL 15.232(h)(iii)" in its analysis. MML/MTA Answer, p 9. The Court "skipped over" that subsection because the Court analyzed a *different* subsection of the definition of "public body"—MCL 15.232(h)(*iv*). There was no need to discuss (h)(*iii*) when analyzing the language of (h)(*iv*). See Plaintiff's Answer, pp 31-32.

Second, MML/MTA says "the Legislature has actually defined which *local*-government entities are 'public bod[ies]' under FOIA" in MCL 15.232(h)(*iii*). MML/MTA

Answer, p 9 (emphasis and alteration in original). But the legislature didn't say a local government entity can *only* be a public body under (h)(*iii*). That would elevate (h)(*iii*), one of the *alternative* definitions of "public body," over the other subsections of the four-part definition in MCL 15.232(h). Each subsection stands on its own. Subsection (h)(*iii*) doesn't take precedence over (h)(*iv*). If an entity is not a public body under (h)(*iii*), that doesn't mean it can't be a public body under (h)(*iv*). See Plaintiff's Answer, pp 32-33.

Third, MML/MTA criticizes the Court's conclusion that the executive office of the governor is an "other body" under MCL 15.232(h)(*i*). MML/MTA Answer pp 9-10, citing Opinion, pp 9-10. But what else can "the executive office of the governor" be? MML/MTA posits it could be a "division," a "department," or an "authority" in the executive branch. MML/MTA Answer, p 10. Close analysis shows that can't be true.

The "executive office of the governor" is not a "department" or "division" of the executive branch. The Executive Organization Act of 1965, MCL 16.101, *et seq.,* defines 19 "departments" of the executive branch. MCL 16.104 (listing the "principal departments" of the executive branch); MCL 16.125 to MCL 16.577 (defining each department). The statute refers to "divisions," but transfers them to "departments." MCL 16.104. The "executive office of the governor" is not among either the departments or divisions the statute refers to. Rather the statute refers to the "office of governor" and the "executive office of the governor"—an entity separate and distinct from the departments of the executive branch. MCL 16.110, MCL 16.113, MCL 16.332.

Neither is "the executive office of the governor" or lieutenant governor "plainly" an "authority." MML/MTA Answer, p 10 (citing no reason for this conclusion). State law creates various "authorities." E.g., MCL 123.1347(1) (Local Community Stabilization Authority); MCL 125.1421(1) (Michigan State Housing Development Authority); MCL 141.1054 (Michigan Municipal Bond Authority); MCL 254.302(1) (Mackinac Bridge Authority); MCL 285.253(1) (Michigan Family Farm Development Authority); MCL 285.315 (Farm Produce Insurance Authority); MCL 331.41(1) (State Hospital Finance Authority); MCL 390.923 (Michigan Higher Education Facilities Authority); MCL 390.1153(1) (Michigan Higher Education Student Loan Authority); MCL 447.153(1) (Michigan Export Development Authority); MCL 484.3204(1) (Michigan Broadband Development Authority); MCL 500.6103(1) (Automobile Theft Prevention Authority). There are others. The "executive office of the governor" is not one of them.

Thus, of the entities listed in MCL 15.232(h)(*i*), the only one that fits is "other body." The Court correctly held that "the executive office of the governor" and "the executive office of the lieutenant governor" "are necessarily and logically 'other bodies' under MCL 15.232(h)(*i*)." Opinion, p 10.

Fourth, MML/MTA criticizes the Court's conclusion that "the office of the county clerk … when acting in the capacity of clerk to the circuit court" is an "other body" under MCL 15.232(h)(*iv*). MML/MTA Answer, p 10. It says "the 'office of the county clerk' expressly contemplates a plural body, 'the office of the county clerk *and its employees*.'" *Id.* (emphasis in original). But that says nothing about whether "the

office of the county clerk" is not an "other body" under (h)(*iv*). Simple logic says that the legislature excluded "the office of the county clerk" because otherwise it would have been swept into the general phrase "[a]ny other body that is created by state or local authority" in (h)(*iv*). If "the office of the county clerk" were not an "other body," the exclusion would be surplusage. And that is what the Court held. Opinion, pp 10-11.

Fifth, MML/MTA again criticizes the Court for not giving "any significant consideration of the provision that actually deals with which local-level entities are 'public bod[ies],' MCL 15.232(h)(iii)." MML/MTA Answer, p 10. That is just another argument that (h)(*iii*) takes precedence over the other subsections of MCL 15.232(h). That is wrong, as discussed in First and Second above and in Plaintiff's Answer, pp 32-33.

Sixth, MML/MTA says the Court ignored "the *collective* nature of a 'public body.'" MML/MTA Answer, p 11 (emphasis in original). The Court did not ignore that at all. It noted that the term "public body," in the abstract, "suggests a 'collective entity.'" Opinion, p 7. But that cannot be the case here because FOIA includes "[a] state officer [and] employee" in the definition of "public body." MCL 15.232(h)(*i*). So FOIA does not adopt MML/MTA's theory that a public body must be a collective entity. That concept is directly contrary to the language of (h)(*i*). Opinion, p 7.

Seventh, the Court held the Clarkston charter created the office of the city attorney. Opinion, pp 11-12. The analysis is based on (1) the literal words of the charter, which defines "administrative officers," including the city attorney, and (2) the "common understanding that an 'officer' generally occupies an 'office.'" *Id.,* p 12.

MML/MTA dismisses that analysis because it says an "office" must be "staffed by numerous employees." MML/MTA Answer, p 11. But, as noted above, that is contrary to the fact that individuals, and their offices, can be "public bodies." And MML/MTA cites nothing to support the proposition that an "office" cannot be held by an individual rather than "numerous employees." As the Court noted, "the common understanding [is] that an 'officer' generally occupies an 'office.'" Opinion, p 12.

Thus, when closely reviewed, MML/MTA's criticism of the Court's statutory interpretation does not hold up.

B. It Doesn't Matter That the Records Request Here Was to the City Rather Than the Office of the City Attorney

MML/MTA says there is a "hiccup" in the Court's opinion because plaintiff's record request was to the city rather than to the "newly formed" office of the city attorney. MML/MTA Answer, p 12 n 3. This adopts the city's argument that it can't produce records from the city attorney's office because that is somehow an independent entity separate from the city and not under its control; that the city attorney would refuse to follow a direction from the city council or city manager to turn over the records. The discussion in Plaintiff's Answer, pp 22-27 refutes that.

C. The City Attorney Is Not a "Private Attorney"

MML/MTA reprises the city's long-standing argument that the city attorney is a "private attorney." MML/MTA Answer, pp 12, 14. Irrelevant. He's not just some guy

off the street who happens to be a lawyer doing random work for the city. His firm[9] was formally appointed by the city council to an office defined by the city charter. Opinion, pp 11-12 (citing charter provisions).

D. MML/MTA Offers No Reasonable Alternative Statutory Interpretation

What alternative does MML/MTA offer? In its view, "thousands" of local officers are not public bodies and therefore can't possess public records. They can't be public bodies, can't be subject to FOIA, and therefore can keep records of their official government functions in secret files immune from FOIA. This is not consistent with the prodisclosure purpose of FOIA. *Kent Co Deputy Sheriff's Ass'n v Kent Co Sheriff*, 463 Mich 353, 360 n 13; 616 NW2d 677 (2000) (citing several other cases). The Court's interpretation—making those records subject to FOIA—is "faithful to the decisive terms of FOIA." Opinion, p 14 n 10, citing *Kent Co Deputy Sheriff's Ass'n* ("FOIA provides Michigan citizens with broad rights to obtain public records …").

VI. Conclusion—There Is No Basis for Rehearing

Like the city, MML/MTA does not discuss or apply the requirement for a rehearing of showing "palpable error by which the court and the parties have been misled." MCR 2.119(F)(3), MCR 7.311(F)(1). See Plaintiff's Answer, pp 5-8. As discussed in Plaintiff's Answer and above, there is no palpable error. And MML/MTA was not misled. It deliberately chose not to respond to an alternative statutory interpretation

[9] The city council appointed Mr. Ryan's firm, not him as an individual as city attorney. See Plaintiff's Answer, p 23, and exhibit 1 to that answer.

approach and now, after that approach prevailed, it belatedly wants to offer arguments it could have made months ago—arguments that, as section V above shows, have no merit.

MML/MTA does not suggest what more it has to say on this subject. It, and the city, made their statutory interpretation arguments at length in their merits briefs. And then both critiqued the Court's analysis after the fact and made additional statutory interpretation arguments. They have not suggested what a complete re-do with more briefing and more argument would accomplish. The Court decided with a reasoned opinion that explained at length an interpretation of MCL 15.232(h)(*iv*) that includes in that catch-all subsection offices created by local authority as public bodies—which the literal words of the statute require. The Court's opinion addressed MML/MTA's criticisms when it responded to the dissent. The case is decided. MML/MTA just doesn't like the decision.

All the pertinent arguments are before the Court now. There is no reason to further extend the life of this case, which will be reaching its 5-year anniversary in a few months. To grant a rehearing, more briefing, and more argument would directly contradict the statutory requirement 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).

The Court should deny the motion for rehearing.

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