STATE OF MICHIGAN

COURT OF APPEALS

HERALD COMPANY, INC., d/b/a BOOTH NEWSPAPERS, INC., and d/b/a, ANN ARBOR NEWS, Plaintiff-Appellant, V EASTERN MICHIGAN UNIVERSITY BOARD OF REGENTS, Defendant-Appellee.	FOR PUBLICATION February 10, 2005 9:05 a.m. No. 254712 Washtenaw Circuit Court LC No. 04-000117-CZ Official Reported Version

Before: Whitbeck, C.J., and Sawyer and Saad, JJ.

SAAD, J.

I. NATURE OF THE CASE

The Michigan Constitution confers enormous responsibility and authority on the governing boards of public universities: our Constitution grants to boards of public universities the "supervision of the institution and the control and direction of all expenditures from the institution's funds." Const 1963, art 8, § 6. In furtherance of this constitutional mandate, our Legislature similarly invests university boards with this significant oversight role. MCL 390.551 *et seq.*[1]

Consistent with its constitutional and statutory role, the Board of Regents (Board) of Eastern Michigan University (University) investigated expenditures for the president's residence at the University, and, as part of its investigation, the Board, through one of its members, Jan Brandon, asked an immediate subordinate of the then-president of the University, Vice President of Finance Patrick Doyle, for his written opinion of the president's role in this project. In furtherance of its investigation, the Board also sought the assistance of an outside-certified public accounting firm, and asked Deloitte & Touche, LLP (Deloitte), to conduct a comprehensive audit

[1] "A board of control shall have general supervision of its institution, the control and direction of all funds of the institution, and such other powers and duties as may be prescribed by law." MCL 390.553.

relating to the expenditures for the president's residence. Deloitte ultimately issued a "voluminous and exhaustive"[2] report on the subject, which the Board made public and gave to the press. Upon receiving a Freedom of Information Act (FOIA), MCL 15.231 *et seq.*, request from the *Ann Arbor News*[3] for documents relating to the president's residence, the University, through its FOIA director, cited the "frank communications" exemption and identified, but declined to disclose, the Doyle-to-Brandon letter. Herald filed suit and asked the court to order disclosure and argued that the public had the right to know the contents of the Doyle letter. The Board responded that the Doyle letter clearly falls within the frank communications exemption because the public interest in fostering candid appraisals by subordinates of their supervisors at the highest level of the University administration is necessary to the Board's effective investigative and oversight role. The trial court reviewed the disputed letter in camera, balanced the public interests in disclosure versus nondisclosure and, in a written opinion, concluded that the frank communication exemption under these facts "clearly outweighs the public interest in disclosure."[4] Because our Supreme Court has ruled that we are to grant deference to trial courts, which have the difficult task of balancing the public interests under the FOIA, because our Supreme Court has specifically held that we are to uphold a trial court's "balancing" judgment unless the trial court committed clear error, and because we find that the trial court did not clearly err in its ruling, we affirm the trial court's holding.

II. FACTS AND PROCEDURAL HISTORY

As part of the Board's investigation into alleged overexpenditures for the president's residence, in the summer of 2003, Jan Brandon, a member of the Board, requested a letter from University Vice President of Finance Patrick Doyle regarding the construction of the president's house. In particular, Brandon desired to learn more about the University president's role in the construction project. There was a controversy regarding construction costs, and the Board needed information to aid it in determining the appropriate course of action. Doyle's letter, dated September 3, 2003, contained his candid appraisal of the conduct of the president regarding the construction.

On September 10, 2003, Herald sent the Board an FOIA request for documents relating to the construction of the president's residence. Citing MCL 15.243(1)(m), the Board's FOIA coordinator provided the following written explanation for the Board's refusal to provide a copy of the Doyle letter in response to Herald's FOIA request:

> Please be advised that [EMU] has identified one other document which may be within the scope of your September 10, 2003 [FOIA] request. The document is a September 3, 2003 letter from Patrick Doyle to EMU Regent Jan Brandon. Pursuant to [MCL 15.243(1)(m)] of the Michigan FOIA, EMU is

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[2] Trial Court Opinion and Order, March 12, 2004, p 4.

[3] Plaintiff Herald Company, Inc, (Herald) owns the *Ann Arbor News*.

[4] Trial Court Opinion and Order, *supra*, p 4

> denying your request for this letter as the letter is a communication/note within the public body EMU of an advisory nature covering other than purely factual material and preliminary to a final agency decision. Further, EMU has determined that in this particular instance the public interest in encouraging frank communications between officials and employees of EMU clearly outweighs the public interest in disclosure.

Thereafter, Herald brought this suit and asked the trial court to review the Doyle letter in camera and order its disclosure. Herald claimed, among other things, that the claimed public interest in encouraging frank communications between public officials and employees did not clearly outweigh the public interest in disclosure because "the Doyle letter speaks to critical issues involving the President's financial accountability and his management style."

In its response to Herald's motion, the Board indicated that the Doyle letter was requested by Regent Brandon "to assist her in determining the appropriate course of action for [the Board] to take during the early stages of the controversy," and that the letter was "used as part of the deliberative process that [the Board] engaged in, through its individual members, to determine its course of action in the University House matter."

In light of these facts, the Board argued that the Doyle letter should be considered exempt from disclosure under MCL 15.243(1)(m) because it was an advisory communication from a subordinate regarding a superior, preliminary to a "final determination of action" by the Board, and the public interest in encouraging frank communication between officials and employees of the University clearly outweighed the public interest in disclosure.[5] The Board also argued that its publication of "a voluminous and exhaustive report on the investigation into the University House controversy," prepared by an independent auditing firm, Deloitte, weighed against disclosure of the Doyle letter. The Board asserted that all the facts had been released and were part of the public record, but that the opinions and personal views of Doyle, which were part of the deliberative process of the Board, should be protected from disclosure.

The trial court held a hearing, reviewed the Doyle letter in camera, denied Herald's motion to compel disclosure of the Doyle letter and granted summary disposition in favor of the Board, and held that the letter fell within the FOIA exemption provided by MCL 15.243(1)(m). The trial court stated:

> In the opinion of the Court, Defendant has sufficiently articulated a particularized justification for exemption under [MCL 15.243(1)(m)]. Based on its *in camera* review of the letter, the Court finds that: (1) the contents are of an advisory nature and cover other than purely factual materials; (2) the communication was made between officials and/or employees of public bodies;

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[5] The Board also emphasized that the Doyle letter includes "opinions and comments that could reflect on Mr. Doyle's immediate superior, the University president," and that if Doyle had known the letter would be made public, "he would be much more likely to be circumspect and cautious in his communication."

and (3) the communication was preliminary to a final agency determination of policy or action.

Although the document contains some "factual material," it is primarily a summary of events from Doyle's perspective. Any factual material contained in the letter is not easily severable. Doyle clearly exercised judgment in selecting the factual material, evaluating its relative significance, and using it to facilitate the impact of his opinions. *See*, *Montrose Chemical Corp v Train*, 491 F2d 63 (DC Cir, 1974) (Federal Court held that two factual summaries of evidence developed at a hearing before the Administrator of the EPA were exempt under a parallel provision of the federal FOIA). Further, under recent persuasive Michigan authority, a court may determine that a particular document that contains substantially more opinion than fact" falls within the exemption. *Barbier v. Basso*, 2000 WL 33521028 [; 2000 Mich App LEXIS 2560].

The trial court further ruled that the letter was exempt from disclosure under "the parameters set forth in *Herald Co, Inc v Ann Arbor Pub Schools*"[6] and made the following findings:

(1) The letter contains substantially more opinion than fact, and the factual material is not easily severable from the overwhelming majority of the comments: Doyle's views concerning the President's involvement with the University House project.

(2) The letter is preliminary to a final determination of policy or action. The communication was between officials of public bodies. The letter concerns [the Board's] investigation and ultimate determination of what action, if any, would be taken regarding the University House controversy.

(3) The public interest in encouraging frank communications within the public body or between public bodies clearly outweighs the public interest in disclosure. [Herald's] specific need for the letter, apparently to "shed light on the reasons why a respected public official resigned in the wake of [the University] being caught misleading the public as to the true cost of the President's house," or the public's general interest in disclosure, is outweighed by [the Board's] interest in maintaining the quality of its deliberative and decision-making process.

(4) [The Board] conducted an investigation and recently published a "voluminous and exhaustive report" concerning its findings regarding the University House project, a copy of which was furnished to [Herald].

This Court denied Herald's motion for peremptory reversal, but granted its motion for immediate consideration and ordered this appeal to be expedited. This Court also directed the

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[6] *Herald Co, Inc v Ann Arbor Pub Schools*, 224 Mich App 266; 568 NW2d 411 (1997).

Board to file a copy of the Doyle letter with this Court and the Clerk to "suppress the letter from public view upon receipt."[7]

III. STANDARD OF REVIEW

Our Supreme Court's decision in *Federated Publications,*[8] provides the rule of law and the rationale for the appropriate level of deference we are to give to trial courts that conduct the difficult and fact-sensitive balancing tests under the FOIA. In an opinion authored by Justice Markman, our Supreme Court observed that the standard of review for FOIA cases is not contained in the legislation itself, but in "our case law."[9] Specifically, the Court held that:

> *Exemptions involving discretionary determinations, such as application of the instant exemption requiring a circuit court to engage in a balancing of public interests, should be reviewed under a deferential standard.* We therefore hold that the clearly erroneous standard of review applies to the application of exemptions requiring determinations of a discretionary nature. A finding is "clearly erroneous" if, after reviewing the entire evidence, *the reviewing court is left with a definite and firm conviction that a mistake has been made.* [*Federated Publications, supra* at 106-107 (emphasis added).]

Our Supreme Court in *Federated Publications* emphasized that as trial courts carry out the "public interest balancing," each case, with its special facts, will implicate "differing public interest considerations."[10] Equally important, our Supreme Court ruled that "in undertaking this balancing, however, the circuit court must consider the fact that the inclusion of a record within an exemptible class . . . implies some degree of public interest in the non-disclosure of such a record."[11] The Court further observed:

> That is, some attribute of these records has prompted the Legislature to designate them as subject to disclosure only upon a finding that the public interest in disclosure predominates. [*Id.*][12]

In other words, our Supreme Court in *Federated* reasoned that although the FOIA's disclosure policy serves the public interest in good governance, our Legislature made clear in the same legislation that the public interest in good governance may also be served by the nondisclosure policy illustrated by specific exemptible classes of records:

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[7] Unpublished order, entered April 20, 2004 (Docket No. 254712).

[8] *Federated Publications, Inc v City of Lansing*, 467 Mich 98; 649 NW2d 383 (2002).

[9] *Federated Publications, supra* at 106.

[10] *Id.* at 109.

[11] *Id.*

[12] And, here, with respect to the frank communication exemption, the public interest in frank communication must "clearly outweigh" the public interest in disclosure. MCL 15.243(1)(m).

> [I]n performing the requisite balancing of public interests, the circuit court should remain cognizant of the special consideration that the Legislature has accorded an exemptible class of records. [*Id.* at 110.]

Accordingly, the relevant inquiry under *Federated Publications* is whether the trial court's ruling constitutes clear error.

IV. ANALYSIS

Under federal and state freedom of information acts (FOIAs), the public has a broad right to inspect government documents, and the general policy promoted is one of "full disclosure." *Swickard v Wayne Co Medical Examiner*, 438 Mich 536, 543; 475 NW2d 304 (1991). This right to review documents under FOIAs promotes the public interest in good government.[13] Yet, our Legislature clearly determined that there are certain circumstances where revealing information would undermine rather than further good governance.[14] Hence, the public's right to view government documents is conditional, and FOIAs contain specific exemptions that qualify, and in certain cases, override the right to disclosure.

A. THE PURPOSE OF THE FRANK COMMUNICATIONS EXEMPTION

The quality of a governmental decision is only as good as the information that informs it, and, accordingly, it is widely recognized that the public has a strong interest in promoting frank communications between government officials, as evidenced by numerous federal and state laws that contain exemptions for information falling into this category.[15]

One example is the federal FOIA, which contains a broad exemption for "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency . . . ." 5 USC 552(b)(5). The United States Supreme Court articulated the reason for the frank communications exemption:

> That Congress had the Government's executive privilege specifically in mind in adopting Exemption 5 is clear. The precise contours of the privilege in the context of this case are less clear, but may be gleaned from expressions of legislative purpose and the prior case law. The cases uniformly rest the privilege on the policy of protecting the "decision making processes of government agencies," . . . . The point, plainly made in the Senate Report, is that the "frank

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[13] See *Dep't of Justice v Reporters Comm for Freedom of Press*, 489 US 749, 770-773; 109 S Ct 1468; 103 L Ed 2d 774 (1989).

[14] "In contrast with the universe of public records that are non-exemptible, the Legislature has specifically designated [certain] classes of records as exemptible." *Federated Publications*, *supra* at 109.

[15] See Anno: *What constitutes preliminary drafts or notes provided by or for state or local governmental agency, or intra-agency memorandums, exempt from disclosure or inspection under state freedom of information acts*, 26 ALR4th 639.

> discussion of legal or policy matters" in writing might be inhibited if the discussion were made public; and that the "decisions" and "policies formulated" would be the poorer as a result. As a lower court has pointed out, "there are enough incentives as it is for playing it safe and listing with the wind," and as we have said in an analogous context, "[h]uman experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances . . . to the detriment of the decisionmaking process." [*Nat'l Labor Relations Bd v Sears, Roebuck & Co*, 421 US 132, 150-151; 95 S Ct 1504; 44 L Ed 2d 29 (1975) (citations omitted).]

State courts have expressed similar reasoning. The "deliberative process" exemption to New York's FOIA "was enacted to foster open and candid discussion among public officials and to protect uninhibited recommendations, made within the family, from being scrutinized by those affected and by the public." *In the Matter of Shaw*.[16] In *Shaw*, the plaintiff, a high school referee, sued to obtain rating reports that had been compiled on him by high school coaches. The court held that the reports fell within the exemption and, thus, did not have to be disclosed:

> It is not only preferable but imperative that the individual ratings remain private because disclosure would be extremely detrimental to the public interest. *A public dissemination of the ratings would temper an honest and free evaluation with fear of reprisals and animosity and deter a proper decision.*
>
> In the instant case the rating process provides useful advisory opinions which would become meaningless or nonexistent if the cloak of confidentiality were to be removed. The coaches and officials would hesitate to participate in any rating process which would be made public and any rating made under such circumstances would reflect more concern for its public acceptance than for its actual truth. The inevitable result would be an interference with the true sportsmanship of scholastic events and a detrimental impact upon the public's interest and participation in public high school functions. The potential harm to the public interest far outweighs any possible benefit to the single participant. If disclosure is more harmful to the public than nondisclosure is harmful to the person seeking the information, the scales of justice must tip toward nondisclosure. *Public welfare is more important than public knowledge*. [*Shaw, supra* at 261-262 (citations omitted; emphasis added).]

B. THE MICHIGAN FRANK COMMUNICATIONS EXEMPTION

Michigan also recognizes that the public has a strong interest in promoting frank communications between government officials.

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[16] *In the Matter of Shaw*, 112 Misc 2d 260, 261; 446 NYS2d 855, 856 (1981).

The Michigan Legislature determined that the public's interest in promoting frank communications necessary to the proper functioning of government may, at times, outweigh the disclosure policy of the FOIA, and thus included a specific exemption in the FOIA for:

> Communications and notes within a public body or between public bodies of an advisory nature to the extent that they cover other than purely factual materials and are preliminary to a final agency determination of policy or action. This exemption does not apply unless the public body shows that in the particular instance the public interest in encouraging frank communication between officials and employees of public bodies clearly outweighs the public interest in disclosure. . . . [MCL 15.243(1)(m).]

This exemption explicitly recognizes that there are special cases in which nondisclosure better serves the public's interest in good governance. The exemption forces courts to view the big picture and ask whether the public interest in the disclosure of a particular piece of information may be clearly outweighed by certain decision-making realities in which the disclosure would ultimately frustrate the goal of good governance.[17]

We note also that Michigan's frank communications exemption is narrower than the federal exemption. The federal exemption contains an implicit presumption that the value of promoting frank communications is such that it outweighs the public's right to know. However, the Michigan exemption is more limited: in order to prevent disclosure, the government must not only show that disclosure would inhibit frank communications, it must articulate why the promotion of frank communications, "in the particular instance," "clearly" outweighs the public's right to know.

Therefore, to conduct its analysis under MCL 15.243(1)(m), the trial court will ask and answer these questions: (1) did the public body show that the requested document covers "other than purely factual materials"; (2) did the public body show that the document is "preliminary to a final agency determination of policy or action"; and (3) did the public body "establish that the public interest in encouraging frank communications within the public body or between public bodies clearly outweighs the public interest in disclosure." *Ann Arbor Pub Schools*, *supra* at 274, quoting in part MCL 15.243(1)(m). Herald concedes the first and second points, but challenges the University's position and the trial court's ruling on the third point.

C. THE "CLEARLY OUTWEIGHS" STANDARD

1. Michigan

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[17] In the context of discovery, Michigan also recognizes a privilege for "'confidential intraagency advisory opinions,' based on a policy of protecting 'open, frank discussion' concerning governmental action." *Ostoin v Waterford Twp Police Dep't*, 189 Mich App 334, 338; 471 NW2d 666 (1991), quoting *Kaiser Aluminum & Chemical Corp v United States*, 157 F Supp 939, 946 (Ct Cl, 1958).

In *McCartney*,[18] this Court balanced the applicable public interests and applied the "clearly outweighs" standard. In *McCartney*, the plaintiff sought the release of memoranda prepared by the Attorney General's staff regarding the Governor's negotiations with Indian tribes over casino rights. The defendant argued, among other things, that the memoranda were protected by the frank communications exemption. The Court agreed, and specifically affirmed the following argument:

> "The large number of assistants and divisions, the diverse location of the divisions, the vast number of matters under consideration at any given moment, the pressure of court imposed deadlines, and the need to fully consider and evaluate various concerns make it absolutely essential that the Department of Attorney General utilize written memoranda as a means of communication to assist in decision making.
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> "The release to the public of the internal memoranda of the type at issue in this case would discourage the preparation of such memoranda and would impact negatively on the quality of the department's decision-making process with detrimental effect on the legal services provided to state agencies as well as on the public's interest." [*Id.* at 734-735.]

This Court, in *Favors v Dep't of Corrections*, 192 Mich App 131; 480 NW2d 604 (1991), also applied the clearly outweighs standard. The plaintiff, an inmate, sought to obtain a review form, which was used to determine disciplinary credits. The form contained a sheet used to record the committee's comments, which were then used to make a final decision. This Court noted:

> The comment sheet is designed to allow the committee members to state their candid impressions regarding the inmate's eligibility for disciplinary credits. Release of this information conceivably could discourage frank appraisals by the committee and, thus, inhibit accurate assessment of an inmate's merit or lack thereof. [*Id.* at 135.]

This Court held that the public interest in nondisclosure clearly outweighed the interest in disclosure:

> [T]he public interest in encouraging frank communications within the Department of Corrections clearly outweighs the public interest in disclosure of these worksheet forms. *The public has a clear interest in encouraging the members of disciplinary credit committees within the department to communicate frankly with a warden with regard to the issue of inmate disciplinary credit*, an issue that affects the length of an inmate's incarceration. *The public has a far greater interest in insuring that these evaluations are accurate than in knowing the reasons behind the evaluations*. [*Id.* at 136 (emphasis added).]

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[18] *McCartney v Attorney General*, 231 Mich App 722; 587 NW2d 824 (1998).

When, as here, the public body makes the proper showing that good governance is better served by nondisclosure than by disclosure, it will not be required to release the information. To make the proper showing, the public body must show that the information falls within the frank communications exemption and that nondisclosure clearly outweighs the public's interest in disclosure.

McCartney demonstrates how and why this balancing of public interests may favor nondisclosure. The goal of the communications in *McCartney* was the provision of accurate legal advice, undeniably a matter of great importance. Likewise, the nature of the communications, legal advice, is a sensitive subject that normally requires confidentiality. Because the communications in *McCartney* were of a type generally recognized as requiring confidentiality and were directed toward an important goal, the public interest in nondisclosure greatly outweighed the interest in disclosure. *Favors* also shows how the specific nature of a communication can justify nondisclosure. If the committee members knew that the inmates would view their comments, they would understandably be less candid in their appraisal of the inmates. Furthermore, their candid comments were invaluable to the warden's final determination: the warden could not be expected to keep track of and evaluate every inmate himself, thus he relied on the candid comments of the committee members.

2. California

Another jurisdiction that uses a "clearly outweighs" standard is California. The California FOIA contains a provision the allows a public body to withhold disclosure of a document if "on the facts of the particular case the public interest served by not making the record public clearly outweighs the public interest served by disclosure of the record." West's Ann Cal Gov Code 6255. The court analyzed this frank communications exemption in *Times Mirror Co.*[19] The plaintiff sought to obtain copies of the Governor's appointment schedules. The Governor argued that disclosure would interfere with his decision-making process because "disclosure of the records in question, which identify where, when and with whom he has met, would inhibit access to the broad spectrum of persons and viewpoints which he requires to govern effectively." *Id.* at 1339. The California Supreme Court first noted that the public had a strong interest in the disclosure of the schedules. "In politics, access is power in its purest form. Entrance to the executive office is the passport to influence in the decisions of government. The public's interest extends not only to the individual they elect as Governor, but to the individuals their Governor selects as advisors." *Id.* at 1344. The court also noted that public exposure could expand, rather than limit, the variety of people the Governor met with. *Id.* at 1345. With the goal of promoting good government, the court ultimately concluded:

> The answer to these arguments is not that they lack substance, but pragmatism. The deliberative process privilege is grounded in the unromantic reality of politics; *it rests on the understanding that if the public and the Governor were entitled to precisely the same information, neither would likely receive it.*

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[19] *Times Mirror Co v Sacramento Co Superior Court*, 53 Cal 3d 1325; 283 Cal Rptr 893; 813 P2d 240 (1991).

> Politics is an ecumenical affair; it embraces persons and groups of every conceivable interest: public and private; popular and unpopular; Republican and Democratic and every partisan stripe in between; left, right and center. *To disclose every private meeting or association of the Governor and expect the decision making process to function effectively, is to deny human nature and contrary to common sense and experience.* [*Id.* (emphasis added).]

Thus, the court held that "the public interest in nondisclosure clearly outweighs the public interest in disclosure." *Id.*

3. Application to the Doyle Letter

Because the goal of both the FOIA and its exemptions is good government, not disclosure for disclosure's sake, our Legislature, by placing the frank communications exemption within the FOIA, made the policy judgment that "public welfare is more important than public knowledge."[20] That is, the public has a far greater interest in ensuring that boards of public universities provide effective oversight of the administration's expenditure of public funds than knowing the opinions of one administrator about another. The Board needed more than cold and dry data to do its job, it needed the unvarnished candid opinion of insiders to make policy judgments and, particularly, to conduct sensitive investigations of top administrators. And, when a high-level administrator is asked to give his opinion of the highest ranking official in the administration, the president, his immediate superior, whose favor he needs for job security, the insider may be naturally reluctant to trust the outsider and to trust the confidentiality of the communication. Also, not unimportantly, the outside board member, in assessing the advisability of conducting further and more exhaustive investigations into alleged over-expenditures for the president's residence, must assess the reliability, credibility, and validity of such communications. In other words, these frank communications are essential to an outside board's ability to discharge its vital constitutional oversight function on behalf of the public. There is a substantial risk that these vital sources of candid opinions would dry up were insiders justifiably fearful that their candid appraisals would make front-page headlines. This is especially true where, as here, the Board is investigating potential misconduct of a high-ranking official and seeks the insight of other high-ranking officials who work for and side-by-side with the target of the investigation. The natural human tendency to "circle the wagons" or "play it safe," coupled with apprehension of retaliation if the written opinion is made public, would, we fear, deprive the Board of an important perspective:

> The point, plainly made in the Senate Report, is that the "frank discussion of legal or policy matters" in writing might be inhibited if the discussion were made public; and that the "decisions" and "policies formulated" would be the poorer as a result. As a lower court has pointed out, "there are enough incentives as it is for playing it safe and listing with the wind," and as we have said in an analogous context, "[h]uman experience teaches that those who expect public

[20] *In the Matter of Shaw, supra* at 262.

> dissemination of their remarks may well temper candor with a concern for appearances. . . to the detriment of the decisionmaking process." [*Sears, Roebuck & Co*, *supra* at 150 (internal citations omitted).]

To make Doyle's letter public would likely hurt, not advance, the public interest. It would, in this context, kill the goose that laid the golden egg, because, to paraphrase the California Supreme Court, if the public and the Board are entitled to receive exactly the same information, then neither would likely receive it. See *Times Mirror Co*, *supra* at 1345.

Also important to our decision is the uncontroverted fact that the Board acted in fulfillment, not in derogation, of its constitutional role. That is, the Board investigated and reported to the public, it did not conceal and sweep the issue under the rug.[21] Had this been a case in which the president himself concealed documents to hide his alleged misconduct, with the complicity of the Board, then the balancing of public policy interests and the calculus of decision making would clearly weigh in favor of disclosure. But, where, as here, a board needs insiders' opinions to investigate other insiders to protect the use of public funds and, where that board honorably discharges its obligations, the public interest in nondisclosure clearly predominates. Indeed, this factual scenario strikes us as the prototype the Legislature had in mind when it adopted the frank communications exemption in the FOIA. The express recognition by the Legislature of the need for candor and its vital role in internal decision making and internal investigations[22] gave birth to the frank communications exemption, and, were we to hold this exemption inapplicable under these facts, this may very well sound the death knell of this vital tool for board members to discharge their oversight roles for the benefit of the public.

D. THE "CLEARLY ERRONEOUS" STANDARD OF REVIEW

Because we agree with the trial court that the public interest in protecting frank communications clearly outweighs the interest in disclosure, *a fortiori*, we conclude that the trial court did not commit clear error by so ruling. And because our Supreme Court instructs us to use the clearly erroneous standard when we review a trial court's balancing judgment, we hold that the trial court did not clearly err in ruling that the public interest in nondisclosure predominates here. Indeed, the clearly erroneous standard was adopted by our Supreme Court to provide deference to trial courts that engage in precisely the type of balancing of public interests conducted here. *Federated Publications*, *supra* at 105-107. There is often a delicate balance between the public interest in disclosure and the public interest in nondisclosure. The trial court must make a careful appraisal of the special circumstances and all relevant facts to ensure that

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[21] In a case involving the federal FOIA, the United States Court of Appeals for the District of Columbia held that the availability of the facts in question from another source was a factor weighing against disclosure. "[O]ur case here is to be distinguished from a situation in which the *only* place certain facts are to be is in the administrative assistants' memoranda. Here *all* the facts are in the public record." *Montrose Chemical*, *supra* at 70.

[22] Indeed, arguably, the need for candor is even greater with respect to internal investigations of allegations of wrongdoing than it is for day-to-day policymaking.

the correct balance is struck.[23] Because the trial court is in a better position to hear testimony and review documents in camera and appraise the multiple factors that influence this balance, its determination should be accorded the appropriate deference reflected in a "clearly erroneous" standard of review. *Id*. at 107.[24]

The United States Supreme Court has given the following description of the application of the clearly erroneous standard of review:

> Although the meaning of the phrase "clearly erroneous" is not immediately apparent, certain general principles governing the exercise of the appellate court's power to overturn findings of a district court may be derived from our cases. The foremost of these principles, as the Fourth Circuit itself recognized, is that "[a] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently*. The reviewing court oversteps the bounds of its duty under [F R Civ P] 52(a) if it undertakes to duplicate the role of the lower court. "In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*." *If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently*. Where there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous. [*Anderson v Bessemer City*, 470 US 564, 573-574; 105 S Ct 1504; 84 L Ed 2d 518 (1985) (citations omitted; emphasis added)].

Also, in colorful language adopted from the United States Court of Appeals for the Seventh Circuit, the Michigan Supreme Court has stated: "To be clearly erroneous, a decision must strike us as more than just maybe or probably wrong; it must . . . strike us as wrong with the force of a five-week old, unrefrigerated dead fish." *People v Cheatham*, 453 Mich 1, 30 n 23; 551 NW2d 355 (1996), quoting *Parts & Electric Motors, Inc v Sterling Electric, Inc*, 866 F2d 228, 233 (CA 7, 1988).

V. RESPONSE TO THE DISSENT

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[23] Perhaps this is why our Supreme Court in *Federated Publications* held that these "*determinations of a discretionary nature*" should be "reviewed under a deferential standard." *Federated Publications*, *supra* at 107 (emphasis added).

[24] Furthermore, there is a steady stream of FOIA requests made at every level of government, and it would be an inefficient use of judicial resources to require appellate courts to review de novo every challenge.

Among the many misstatements, misapprehensions, and mischaracterizations contained in the dissent, the most glaring flaw in the dissent's reasoning is the dissent's failure to properly apply the principles regarding the standard of review, enunciated by our Supreme Court in *Federated Publications*, to the trial court's role in the balancing of public interests required by MCL 15.243(1)(m). While inaccurately accusing the majority of ignoring the "clearly outweighs" standard to determine when disclosure prevails over nondisclosure, the dissent ignores our Supreme Court's express review limitations articulated in *Federated Publications*. That is, our Supreme Court in *Federated* made it abundantly clear that, not simply in that case, but in any case in which a trial court makes "discretionary determinations" involving "balancing of public interests," we are not to disturb the trial court's findings simply because we may disagree (as the dissent clearly does). Rather, we may overrule the trial court only when the trial court "clearly" errs. The dissent overstates the clearly outweighs standard under the FOIA beyond its intended meaning to accomplish the dissent's purpose of overruling the trial court because it disagrees with the trial court. At the same time, to accomplish the dissent's purposes here, the dissent relegates our Supreme Court's mandated "clearly erroneous" standard to something much less than our Supreme Court intended. In doing so, the dissent falsely accuses the majority of positing a balance between disclosure for disclosure's sake and good government. This is simply wrong. Rather, the majority simply makes the observation that it was not we, but our Legislature, that, by creating the frank communications exemption, determined that good governance in limited cases may be better served by nondisclosure than by disclosure in order to encourage the very kind of successful investigation that we witness here. Moreover, the dissent mistakenly accuses the majority of conflating the clearly erroneous standard with the abuse of discretion standard. The simple answer is that we do not conflate or confuse the two standards. Instead, we simply note the concrete fact that it was not we, but our Legislature, that determined that there are clear exceptions to disclosure when nondisclosure clearly outweighs the public interest in disclosure. And, equally important and compelling to our analysis is our Supreme Court's holding and teaching in *Federated* that "exemptions involving discretionary determinations . . . requiring a circuit court to engage in a balancing of public interests, should be reviewed under a deferential standard."[25] It is this admonition that the dissent ignores. And, contrary to the dissent's hyperbolic accusations, we do not invent this standard of review. Rather, our Supreme Court simply articulated the appropriate standard of review in *Federated*. Simply because the balancing here requires the trial court to find that one interest "clearly" outweighs another does not render meaningless the obvious proposition that the trial court's job—weighing one interest against another in light of all the facts of the particular case—remains one of conducting a balancing test. That the frank communications exemption carries with it a "clearly outweighs" mandate, which is obvious, nonetheless leaves the trial court with the discretionary job of weighing public interests and leaves us, as a reviewing court, with the obligation to review the trial court's ruling using what *Federated* tells us is a "deferential standard." As our Supreme Court makes clear in *Federated*, "some attribute of these records," here records that fall within the category of frank communications, prompted our Legislature to give them "special consideration"—to make them subject to special treatment (unlike public records falling outside any exemptible class) as an "exemptible class of records." We observe

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[25] *Federated Publications, supra* at 106-107.

that, throughout the dissent, the dissent prefers to minimize the "clearly" in the clearly erroneous standard of review and to inflate the "clearly" in the clearly outweighs of the FOIA to effectuate the dissent's objectives.

Moreover, the dissent, again inaccurately and unfairly, accuses the trial court and the majority of balancing the public interests and reviewing the trial court's balancing decision, respectively, contrary to the legislative mandate, by ignoring the language, "in the particular instance." To support this unfair characterization, the dissent accuses the majority of speculating about facts (which we do not) while the dissent itself speculates about the meaning of some of Doyle's statements in his letter (speculation that is, in our view, naive).

Again, the dissent is simply wrong. The trial court and this Court each makes its respective ruling with the particular facts of this case at the center of the analysis. Indeed, in its opinion, the trial court said that defendant articulated "a particularized justification." Further, the trial court specifically details its reasoning and its basis for its holding "in this particular instance." Significantly, we conduct our review of the trial court's ruling with special emphasis on this particular instance. Unlike the dissent, we cannot and do not speculate on: (1) why Doyle wrote what he did; (2) when he wrote the letter; (3) whether Doyle is credible to the Board in his opinions; (4) how the Board may have judged his credibility, reliability, or sincerity; or (5) what the Board may have known about the relationship between Doyle and the University president and how this affected its decision regarding further investigations. This is for the constitutionally mandated board to sort out, not for us. The Michigan Constitution gives the Board, not judges, the very difficult job of protecting the public interests by ensuring that public funds are properly spent. And here, there is no question that the Board was able to discharge its duty in no small part because of its ability to obtain the opinions and assessments of insiders about other insiders, a perspective that the Board may not have obtained absent the frank communications exception. The management of this very sensitive mix of an outside board, insiders' opinions about other insiders, and the weighing of motivations and credibility in a delicate balancing of investigations is the constitutional charge of the Board, not judges. It is this delicate balancing of interests that creates the unique "particular instance" here that informed the trial court's well-reasoned, correct, and most certainly not "clearly erroneous" decision under the frank communications exemption.

VI. CONCLUSION

In balancing the public interests, the trial court determined that the Board's important, constitutional oversight function and investigative role, and thus, the public interest in good government, would be better served by nondisclosure rather than disclosure of the Doyle letter. In so finding, the trial court did not clearly err.

For all the foregoing reasons, we hold that the trial court properly granted summary disposition in favor of defendant.

Affirmed.

Sawyer, J., concurred.

/s/ Henry William Saad
/s/ David H. Sawyer