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.

WHITBECK, C.J. (*dissenting*).

This case arises from the construction of a new official residence, University House, for the president of Eastern Michigan University (the University). Apparently, there was considerable public controversy regarding the expenditures associated with University House, and ultimately the president resigned, perhaps because of this controversy. In any event, it is clear from the record that University Regent Jan Brandon wrote a letter to Patrick Doyle, the University's vice president for finance, asking Mr. Doyle to address several questions relating directly or indirectly to the construction of University House. On September 3, 2003, Mr. Doyle responded by letter, and it is this communication (the Doyle letter) that is at issue here. Plaintiff Herald Company[1] sought to obtain a copy of the Doyle letter, and the University denied the request on the basis of the "frank communications" exception[2] of the Freedom of Information Act (FOIA).[3] The Herald Company sued, and the trial court upheld the University's denial, as does the majority here.

[1] Doing business as Booth Newspapers, Inc., and the Ann Arbor News.

[2] MCL15.243(1)(m).

[3] MCL 15.231 *et seq.*

I respectfully dissent from the majority's opinion. In construing the frank communications exemption of the FOIA the majority has posited a false choice between "good government" on the one hand and "disclosure for disclosure's sake" on the other. The FOIA contains no such choice but, by reading it into the statute, the majority assures that the contents of the Doyle letter will remain secret. In the process, the majority ignores the concept of accountability that is so essential to the process of governing. It disregards the requirement in the frank communications exemption that the public body must show *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. It articulates what amounts to an abuse of discretion standard for appellate court review of FOIA cases. It speculates about what may occur in the future under the guise of construing the frank communications exemption while ignoring facts that are, in my view, outcome determinative in the particular circumstances of this case. And finally, relying on a New York case, it reaches the amazing conclusion that "public welfare is more important than public knowledge." In the process, the majority overlooks the fundamental proposition that in a democracy public knowledge is essential to public welfare and ignores the explicit public policy statement in the FOIA that "[t]he people shall be informed so that they may fully participate in the democratic process."[4] For these reasons, I dissent.

I. Overview: Accountability And The Process Of Governing

Chess is a game of complete information.[5] In a chess game, each player looks at the board and sees the same information and that information is all that is available. By contrast, poker is a game of partial information. In a stud poker game, for example, all players have some information that they share equally—that is, knowledge of the cards that have been dealt face up—but each player also has some information unique only to that player—that is, knowledge of the cards that are in that player's hand.

The game of poker is more analogous to real life than is the game of chess, which may account for poker's significantly greater popularity. As individuals within a larger society, we rarely have exactly the same information and almost never do we have all the information that exists. The decisions that we make, therefore, may depend as much on past experience, on intuition, on context, and on our own value systems as they do on factual information.

The process of governing is a real life exercise and, while it is most certainly not a game, it is an exercise characterized by partial information. Rarely do individual citizens have the same information about governmental decisions. Almost never do such citizens have all the information that exists. In part, this is inevitable. Although the direct democracy of the town meeting still exists in a few areas, we now largely function within a representative form of

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[4] MCL 15.231(2).

[5] McManus, *Positively Fifth Street: Murderers, Cheetahs, and Binion's World Series of Poker* (New York: Farrar, Straus & Giroux, 2003).

government in which elected and appointed officials make decisions on our behalf without our participation and, indeed, often without our knowledge.

Nonetheless, as citizens we must be able to hold our elected and appointed officials accountable for the decisions that they make on our behalf. Accountability, in turn, depends on information; we cannot make an informed judgment about whether a decision of a government official was the correct one without having at least some information about that decision. In 1976, the Michigan Legislature took a decisive step toward regularizing the access that citizens have to information about governmental decision-making and, thereby, toward ensuring accountability by elected and appointed governmental officials. That step was the passage of the FOIA.

The first section of the FOIA spells out a policy that would appear to be premised upon the concept of perfect information:

> It is the public policy of this state that all persons, except those persons incarcerated in state or local correctional facilities, are entitled to *full and complete information* regarding the affairs of government and the official acts of those who represent them as public officials and public employees, consistent with this act. The people shall be informed so that they may fully participate in the democratic process.[6]

The mechanisms of the FOIA, however, do not actually result in the provision of full and complete information in all instances. Section 13[7] of the FOIA currently contains twenty-five discrete exemptions from the broad sweep of the act. The inclusion of such exemptions reflects a wholly realistic series of policy decisions by the Legislature that, sometimes, full disclosure would not advance the process of governing. Court after court, however, has said that these exemptions are to be construed narrowly.[8]

Further, there can be no question that the concept of accountability is central to both the broad policy and the implementing mechanisms of the FOIA.[9] The FOIA, then, is a pro-

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[6] MCL 15.231(2) (emphasis supplied).

[7] MCL 15.243.

[8] See, for example, *Detroit Free Press, Inc v Dep't of Consumer and Industry Services*, 246 Mich App 311, 315; 631 NW2d 769 (2001) ("The exemptions in the FOIA are narrowly construed, and the party asserting the exemption bears the burden of proving that the exemption's applicability is consonant with the purpose of the FOIA."); *Herald Co v Bay City*, 463 Mich 111, 119; 614 NW2d 873 (2002) ("[T]he FOIA is a prodisclosure statute, and its exemptions are narrowly construed."); *Kent Co Deputy Sheriffs' Ass'n v Kent Co Sheriff*, 238 Mich App 310, 313; 605 NW2d 363 (1999) ("The FOIA [is] interpreted broadly to allow public access, and its exceptions are interpreted narrowly so its disclosure provisions are not undermined.").

[9] See, for example, *Detroit Free Press v City of Warren*, 250 Mich App 164, 168-169; 645 NW2d 71 (2002) ("Under [the] FOIA, citizens are entitled to obtain information regarding the

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disclosure statute that by its enactment sought to expand access to information in the hands of government officials. Thereby it allows the citizens of this state to hold those officials accountable for the decisions that they make on our behalf. While the Legislature did not, and could not, provide for complete access to information, it did significantly shift the balance away from restricted access to open access in all but a limited number of instances. The Legislature therefore necessarily made the decision that disclosure, except in a few instances, *facilitates* the process of governing because it incorporates the concept of accountability.

This was a deliberate, reasoned policy choice and one to which we in the judiciary should, in the process of judicial review, defer. In my view, the majority here exhibits no such deference. Rather, the majority substitutes its own view of proper policy—that the process of governing would be *hindered* in the context of the "frank communications" exemption by providing access to the Doyle letter—on grounds that are suspect at best when the actual language of that exemption is examined.

II. The Frank Communications Exemption

Section 13(1)(m)[10] of the FOIA is the "frank communications" exemption. The frank communications exemption contains, first, a description of the public documents that are to be exempted and, second, a requirement for a necessary showing for the exemption to apply. The description of the public documents to be exempted provides that such documents must be (1) communications and notes within a public body or between public bodies, (2) other than purely factual materials, and (3) preliminary to a final agency determination of policy or action. The trial court found, and I agree, that the Doyle letter at issue here met each of these three prongs.

The "necessary showing" requirement is, however, another matter. Section 13(1)(m) states that "[t]his 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." (Emphasis supplied.) Thus, the public body claiming exemption must show with particularity how the public interest in encouraging frank communications clearly outweighs the overall public interest in disclosure.

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manner in which public employees are fulfilling their public responsibilities."); *Manning v East Tawas*, 234 Mich App 244; 593 NW2d 649 (1999) (the FOIA is a manifestation of the state's public policy recognizing the need that public officials be held accountable for the manner in which they perform the duties); *Thomas v New Baltimore*, 254 Mich App 196, 201; 657 NW2d 530 (2002) (the FOIA was enacted "recognizing the need for citizens to be informed so that they may fully participate in the democratic process and thereby hold public officials accountable for the manner in which they discharge their duties").

[10] MCL 15.243(1)(m).

It is within the context of this language that I find the majority's reliance on the "public interest balancing" mentioned in *Federated Publications*[11] to be, at the very least, interesting. It is clear from the case law, including *Federated Publications*, that applying the FOIA, of necessity, requires the balancing of the interest in disclosure and the interest in nondisclosure. However, in the frank communications exemption, the Legislature, in a manner of speaking, put its thumb on the scale. The Legislature placed the burden squarely on the public body to show that the interest in nondisclosure *clearly outweighs* the interest in disclosure. In addition, the Legislature provided that this showing must be made *in the particular instance*. Thus, in the frank communications exception the competing interests in nondisclosure and disclosure do not stand on equal footing. Rather, the Legislature has weighted the balance in favor of disclosure.

It follows that it is not enough to state that there is a public interest in the nondisclosure of communications and notes within a public body or between public bodies that contain other than purely factual materials and that are preliminary to a final agency determination of policy or action. The Legislature has already made such a determination and it is a given. Merely repeating that given advances the analysis not at all. The issue here is whether the interest in nondisclosure *clearly outweighs* the competing interest in disclosure *in this particular instance*. In my view, the majority skirts this issue, in the process conflating two considerably different standards of review.

III. Standard Of Review[12]

The majority states in its section on the standard of review that the applicable standard is whether the trial court's ruling constitutes clear error. Curiously, later in its analysis the majority revisits the standard of review. In its later analysis, the majority refers to *Federated Publications* to bolster its position that "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." *Ante* at ___.

This is simply inaccurate, factually and logically. *Federated Publications* did *not* deal at all with the frank communications exemption nor with its explicit "clearly outweighs" standard. Rather, *Federated Publications* dealt with the FOIA exemption applicable to personnel records of a law enforcement agency.[13] Therefore, *Federated Publications* did *not* deal at all with "precisely the type of balancing of public interests conducted here." It dealt with a wholly different "equal footing" balancing scheme applicable to another, and wholly distinct, exemption in which the Legislature had *not* weighted the scales in favor of disclosure. As articulated in *Federated Publications*, and subject of course to the broad policy bias in favor of disclosure and

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[11] *Federated Publications, Inc v Lansing*, 467 Mich 98, 109; 649 NW2d 383 (2002).

[12] Note that the standard of review in question here is at the appellate level. At the trial court level, the FOIA explicitly states that the court "shall determine the matter de novo and the burden of proof is on the public body to sustain its denial." MCL 15.240(4).

[13] MCL 15.243(1)(s)(ix).

to the narrow scope of the exemptions to disclosure in the FOIA, the interest in disclosure and the interest in nondisclosure in the law enforcement exception stand on something akin to equal footing. There is no such equal footing standard in the frank communications exception. That exemption has its own distinct and discrete "clearly outweighs" standard.

More broadly, there are three general categories of appellate review: de novo, clear error, and abuse of discretion. *Federated Publications* discussed the first two of these categories. It noted that the Supreme Court had, in some instances and without elaboration, applied a standard of review de novo to FOIA cases.[14] However, *Federated Publications* limited review de novo to applications of FOIA exemptions involving legal determinations.[15] In a footnote, the majority here propounds the theory that it would be an inefficient use of judicial resources to require appellate courts to review every FOIA challenge de novo. While I generally agree, I do note that *Federated Publications* appears to stand for the proposition that review de novo is required with respect to the applications of FOIA exemptions involving legal determinations.

Federated Publications does hold, squarely, that "the clearly erroneous standard of review applies to the application of exemptions requiring determinations of a discretionary nature" and that "[a] finding is clearly erroneous if, after reviewing the entire evidence, the reviewing court is left with the definite and firm conviction that a mistake has been made."[16]

The majority, however, is not satisfied with this reasonably straightforward standard and quotes *People v Cheatham*[17] to the effect that to be clearly erroneous a decision must "strike us as wrong with the force of a five-week old, unrefrigerated dead fish." *Cheatam* was a criminal case and, in writing it, Justice Boyle noted that "[c]redibility is crucial in determining a defendant's level of comprehension, and the trial judge is in the best position to make this assessment."[18] Credibility is, generally, not at issue in FOIA cases and most certainly not an issue in *this* FOIA case; the trial court here made its decision after a review in camera of the Doyle letter in which credibility determinations played no part. The majority does not explain why an admittedly colorful illustration of the clearly erroneous standard in a footnote in a criminal case that quotes a federal Circuit Court of Appeals decision in another circuit is of any assistance in understanding the clearly erroneous standard in a Michigan FOIA case that involves no credibility determinations whatsoever.

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[14] *Federated Publications, supra* at 105-106 n 4, citing *Bradley v Saranac Community Schools Bd of Ed*, 455 Mich 285, 293; 565 NW2d 650 (1997), and *Herald Co v Bay Co*, 463 Mich 111, 117; 614 NW2d 873 (2000).

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

[16] *Id.* at 107.

[17] *People v Cheatham*, 453 Mich 1, 30, n 23; 551 NW2d 355 (1996), quoting *Parts & Electric Motors v Sterling Electric, Inc*, 866 F2d 228, 233 (CA 7, 1988).

[18] *Cheatham, supra* at 30.

Beyond that, however, is the fact that the majority has in essence conflated the clearly erroneous standard with the abuse of discretion standard. *Federated Publications* did not discuss the abuse of discretion standard and, clearly, it has no application to FOIA cases. At its core, the abuse of discretion standard recognizes that in some circumstances a trial court is in a better position to make certain factual determinations and is therefore to be accorded considerable deference as "an acknowledgment of the trial court's extensive knowledge of the facts and that court's direct familiarity with the circumstances . . . ."[19] The majority here seizes upon the word "deference," and states that because of the trial court's ability to "hear testimony and review documents in camera and appraise the multiple factors that influence this balance," the trial court's determination should be accorded "great deference."

There were no credibility determinations involved in the trial court's decision here. While the trial court reviewed the Doyle letter in camera, so have we. If there were other "multiple factors" that influenced the trial court's balancing process, those factors are not discernable from the trial court's opinion or from the record in this case. By conflating the clearly erroneous standard with the abuse of discretion standard and, in essence, applying the latter, the majority has made the trial court's decision virtually unreviewable. This is a far cry from a standard that requires us, in order to reverse, to review the entire evidence and come to a definite and firm conviction that the trial court has made a mistake. The deference that is due the trial court's decision is the deference that flows from a careful review of the evidence and from a reasoned analysis of that decision, no more and no less. I suggest that it is this review that we should be conducting in this case. I further suggest that this is not the review that the majority has conducted.

IV. The "Particular Instance" Of This Case

A. The Majority's View

The majority addresses the particularized circumstances of this case in one very specific instance and then in a series of very broad statements. Specifically, the majority notes that the University's Board of Regents honorably discharged its obligations. Presumably, the majority here refers to the undisputed fact that the University ultimately released a comprehensive report by the independent auditing firm that investigated the University House controversy. I agree that the University acted responsibly and in good faith in releasing this report. Were this the only factor bearing on this case, I would be inclined to affirm the trial court's decision. Of course, this is not the only factor involved here. (I do note, however, that the situation here is not precisely the same as in the federal case of *Montrose Chemical Corp of California v Train*,[20] a decision on which the majority relies. In *Montrose*, the court was faced with a situation in which *all* the facts concerning the matter at issue were in the public record and, therefore, the document that was

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[19] *People v Babcock*, 469 Mich 247, 270; 666 NW2d 231 (2003).

[20] *Montrose Chemical Corp of California v Train*, 160 US App DC 270; 491 F2d 63 (1974).

being withheld was, to a considerable extent, redundant. Here, a review in camera of the Doyle letter plainly discloses that all the facts are *not* in the public record.)

The majority then offers a series of generalized policy statements in support of its view. (For example, "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 . . . . " *Ante* at ___.) Ostensibly, these statements are related to the situation that the University's Board of Regents faced here. However, these generalized concerns do not actually relate to the particular circumstances of this case; in fact, they express an overall view on proper public policy not with respect to *this* instance, but to *future* instances. But speculation about what may occur in the future is not our task when construing the frank communications exemption of the FOIA. By the language of that exemption, our task is to confine our inquiry to the "particular instance" of this case. If we limit our inquiry to the facts as they exist here, then I am at a loss to understand how the public interest in encouraging frank communications "clearly outweighs" the public interest in disclosure.

B. The Facts As They Exist Here

The majority acknowledges, in passing, that that the matter here involves the "administration's expenditure of public funds." To me, this fact is central to our consideration of this case. We are not dealing here, as we were in *McCartney v Attorney General*,[21] with legal memoranda that the Attorney General's staff prepared regarding the Governor's negotiations with Indian tribes over casino rights. We are not dealing here, as we were in *Favors v Dep't of Corrections*,[22] with a comment sheet used by a Department of Corrections disciplinary credit committee to determine whether to recommend the award of disciplinary credits. Rather, we are dealing with the direct expenditure of public funds—derived, we may reasonably assume, from a combination of taxpayer dollars and tuition payments—by the president of a major university for the construction of a residence in which he would live. Further, we are dealing with a situation in which there were allegations, confirmed at least in part by the University's report, that these expenditures were extravagant and inappropriate. Thus, the question of the president's accountability, not just to the University's Board of Regents, but also to the taxpaying public, for these expenditures is at the core of this case.

The majority's opinion keeps the Doyle letter, a document that was highly critical of the president, hidden from public view. It posits, in my view, a false choice between "good government" on the one hand and "disclosure for disclosure's sake" on the other. There is no provision in the FOIA for disclosure for disclosure's sake. Rather, there is the broad policy decision by a fully cognizant Legislature that disclosure, because it fosters accountability, facilitates good government. To hide the contents of the Doyle letter behind the façade of a Manichean choice between "good government" and the disclosure of arguably extravagant and

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

[22] *Favors v Dep't of Corrections*, 192 Mich App 131; 480 NW2d 604 (1991).

inappropriate expenditures of public funds by a public official is not only to run from reality, it is to obscure the very existence of that reality.

The second fact central to our consideration of this case is that it is apparent that Mr. Doyle had decided to retire well before he wrote his letter to Regent Brandon and, as the trial court noted in its opinion, Mr. Doyle resigned several days after he wrote that letter. The majority's concern that a high level administrator such as Mr. Doyle might be "naturally reluctant" to give his candid opinion of the "highest ranking official in the administration, the president, his immediate superior, whose favor he needs for job security," *ante* at ___, is thus absolutely unfounded. Mr. Doyle could have no fears about his future job security, or about the president's "favor," because he had already decided to retire. Further, he had made that decision known to the president months before he penned his letter to Regent Brandon.[23]

In my view these facts determine the outcome in this case, for they exemplify precisely the sort of circumstances the Legislature commanded us to consider in the particular instance of an exemption claimed under the frank communications exemption to the FOIA. The majority avoids this conclusion by turning to case law from other states. It places heavy reliance on the California case of *Times Mirror Co v Sacramento Co Superior Court,*[24] In that case, the *Times Mirror* sought disclosure of the Governor's appointment schedules. The California Supreme Court ultimately denied that disclosure, stating: "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 be likely to receive it."[25]

I first note that the issue of access to a Governor's appointment schedule simply could not arise in Michigan as the definition of a "public body" "does not include the governor or lieutenant governor, the executive office of the governor or lieutenant governor, or employees thereof."[26] Second, the California court fell into the same error as the majority here when it expounded its own view of proper public policy, which was based on speculation about what might happen in the future, while ignoring the language that the legislature had actually enacted.

The New York decision in *In the Matter of Shaw*[27] exhibits the same hubris. At issue were rating reports of a high school referee that had been compiled by high school coaches.

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[23] I also note that the Legislature has effectively dealt with the fear that employers will retaliate against employees, including public employees with the exception of those in the state classified service, who report violations or suspected violations of laws, regulations, or rules through the enactment of the Whistleblowers' Protection Act, MCL 15.361 *et seq.*

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

[25] *Id.* at 1345.

[26] MCL 15.232(d)(i).

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

There, the court stated that "[a] public dissemination of the ratings would temper an honest and free evaluation with fear of reprisals and animosity and deter a proper decision."[28] The court reached the amazing conclusion that "[p]ublic welfare is more important than public knowledge."[29] Remarkably, the majority here cites *In the Matter of Shaw*, a New York case, for the proposition that the *Michigan* Legislature had made the policy judgment that public welfare is more important than public knowledge. How a decision construing a New York statute can shed any light whatsoever on the intent of the Michigan Legislature in enacting the FOIA completely eludes me. My puzzlement is increased by the fact that neither the Michigan Legislature nor, to my knowledge, any court construing the FOIA in Michigan has ever reached the astounding conclusion that the public knowledge of the functioning of its government is overridden by the incantation of the phrase "public welfare," a phrase that both the New York court and the majority here leave conveniently undefined. If this is the law in Michigan, then the FOIA is simply a dead letter.

V. The Majority's Response To This Dissent

The majority responds to my dissent in this case and I will do similarly, briefly. The majority's response commences with the charge that there are "many misstatements, misapprehensions, and mischaracterizations contained in the dissent . . . ." *Ante* at ___. Such alliterative ruffles and flourishes neither require nor deserve a response. The majority's view and my own are set out in the language of our respective opinions and I am content to let the chips fall where they may.

More substantively, the majority circles around the question of the standard of review at some length, with frequent references to *Federated Publications*.[30] The majority view appears to have two components. The first is that *Federated Publications* articulates a "clearly erroneous" standard of review. I agree. Indeed, I say exactly that in the body of this dissent. I also point out, however, that *Federated Publications* dealt with the FOIA exemption applicable to personnel records of a law enforcement agency and not to the frank communications exemption at issue here. As the majority appears to concede, the frank communications exemption has its own "clearly outweighs" standard. Unless the specific language of the frank communications exemption is to be rendered entirely nugatory, this "clearly outweighs" standard, along with the requirement to take into account the "particular instance" of a case involving the frank communications exemption, *must* be part of the public interest balancing that *Federated Publications* requires.

The second component of the majority's view appears to stem from the rather common-sense observation in *Federated Publications* that "[i]n contrast with the universe of public records that are non-exemptible, the Legislature has specifically designated these classes of

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[28] *Id.* at 261.

[29] *Id.* at 262.

[30] See *Federated Publications, supra.*

records as exemptible."[31] Of course, the fact that the Legislature designated a class of records as exemptible does not end the inquiry. As the Supreme Court said, "[W]e emphasize that these records are merely exemptible and not exempt, and that exemption is not automatic."[32] And, I suggest, even when taking into account the Supreme Court's following comment that a reviewing court should remain "cognizant of the special consideration that the Legislature has accorded an exemptible class of records,"[33] that special consideration can be overriden by a conclusion that the records should be made public when, as here, the public interest in encouraging frank communication does not clearly outweigh the public interest in disclosure.

In short, I do not see the conflict in emphasis on which the majority seizes. To me, the process is rather simple. Under *Federated Publications*, we are to review a lower court's decision under a "clearly erroneous" standard. Under the language of the frank communications exemption, that review necessarily involves a special inquiry into whether the public interest in encouraging frank communications "clearly outweighs" the public interest in disclosure. The second inquiry is just as important as the first and neither can be disregarded. Indeed, in my view at least, the two inquiries constitute a seamless whole.[34]

In this regard, the majority states that I disagree with the trial court's findings. Indeed, I do. But I do not simply disagree. After reviewing the entire evidence, I am left with the definite and firm conviction that the trial court made a mistake. As set out below, that mistake was in ignoring the special "clearly outweighs" standard contained in the frank communications exemption and thereby ignoring the fact that, with respect to this particular exemption, the Legislature has made a policy decision that tilts the balance in favor of disclosure.[35]

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[31] *Federated Publications, supra* at 109.

[32] *Id.*

[33] *Id.* at 110.

[34] The majority also refers to the University as a "constitutionally mandated board." The University is specifically mentioned in Const 1963, art 8, § 4 and is covered by art 8, § 6. But, for example, the Civil Rights Commission is also a constitutionally created entity. See Const 1963, art 5, § 29. Yet, no court, to my knowledge, has concluded that the commission enjoys any special or unique status with respect to the application of the FOIA. Nor, in my view, does the University enjoy any such status.

[35] The majority also states, inferentially, that I have speculated 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." *Ante* at ___. Try as I have, I can find no such speculation in my dissent. The majority here perhaps engages in the informal, but material, fallacy of *tu quoque:* meeting criticism with the argument that the other person engages in the very conduct he or she is criticizing. I have indeed suggested that that majority is speculating about the policy effect of future events. The statement that I myself have done the same is, to put it gently, without any foundation, at least that I can find, in the words of my dissent.

VI. Conclusion

In its conclusion, the majority states that:

> 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. [*Ante* at ___.]

I see nothing in the trial court's opinion referring to the "important, constitutional oversight function and investigative role" of the University's Board of Regents. However, I do agree that the trial court found in essence that nondisclosure of the Doyle letter would better serve the public than would disclosure. And it is for that precise reason that the trial court's decision was clearly erroneous.

In its opinion, the trial court reached a general conclusion: "The public interest in encouraging frank communication within the public body or between the public bodies clearly outweighs the public interest in disclosure." The trial court apparently recognized, however, that such a general conclusion, standing alone, could not carry the day. The trial court therefore went on to say:

> Plaintiff's specific need for the letter, apparently to "shed light on the reasons why a highly respected public official resigned in the wake of EMU 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 Defendant's interest in maintaining the quality of its deliberative and decision-making process.

Obviously, the trial court was aware of the "clearly outweighs" standard. However, when analyzing the particular instance of the Herald Company's FOIA request, it ignored that standard. Rather, the trial court simply balanced the interest in nondisclosure against the interest in disclosure and came down on the University's side. In so doing, the trial court failed to recognize that, under the FOIA's frank communications exemption, the interest in nondisclosure and the interest in disclosure do not stand on equal footing. With respect to this particular exemption, the Legislature has weighted the scales in favor of disclosure. Ignoring this legislative policy decision is the very definition of clear error.

The majority commits the same error. It states that, "[w]hen, as here, the public body makes the proper showing that good governance is better served by nondisclosure rather than by disclosure, it will not be required to release the information." *Ante* at ___. Like the trial court, the majority is obviously aware of the "clearly outweighs" standard. Indeed, it quotes that standard in its very next sentence. Like the trial court, however, it then simply ignores that standard. Like the trial court, it balances the supposed harm that may flow from disclosure against the supposed good that may flow from nondisclosure, *in the future as a policy matter*, without regard to the legislatively imposed mandate that requires consideration of the particularized instance *of this case*. Like the trial court, it overlooks the concept of accountability that is at the core of the FOIA. Like the trial court, therefore, it clearly errs.

In my view, this error is profound. The majority reaches the astounding conclusion that in Michigan the "public welfare"—defined without regard to the particular circumstances of this case—is more important than public knowledge. If this is the law of this state, then the Legislature's broad policy decisions in the FOIA and its carefully tuned implementing mechanisms are without meaning. In the process, a narrowly tailored exemption from the broad sweep of the act will have swallowed the overall rule. Within the context of the frank communications exception, this consigns our citizens to the receipt of only that information that the public body determines it is safe, according to *its* definition of the public welfare, to release. I cannot agree that this is the result the Legislature intended. I would reverse and remand.

/s/ William C. Whitbeck