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MICHIGAN HOUSE OF REPRESENTATIVES

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Thursday, July 28, 2022
Attorney General Dana Nessel
525 W Ottawa St.,
Lansing, MI 48933

Dear Honorable Attorney General Dana Nessel,

Several of my constituents in the 109th district have expressed to me deep concerns over what appears to be a set of significant conflict of interest concerns, including the possible misuse of state and local public funds involving the acquisition of the old Marquette General Hospital by a Northern Michigan University (NMU) Board of Trustee Member with the assistance of the NMU Foundation. In short, the expressed concerns involve what appears to be a scheme developed between the NMU Foundation CEO, an NMU Board Member and owner of the private real estate development company, the Veridea Group, and Lifepoint as owner of the property, with the assistance of other individuals, including the former MEDC Director.

Several constituents believe this scheme was put into motion Summer of 2021, where Lifepoint would sell the old hospital property to the NMU Foundation for \$1, the NMU Foundation would transfer the property to Veridea for an undisclosed limited equity stake of the property, contingent on the condition that public tax dollars would be used to demolish the property. The primary concern from my constituents is that this was a scheme developed exclusively for Veridea to the exclusion of other qualified entities, with the plan that by using the NMU Foundation as a non-profit entity to gift the property before the NMU Foundation sells it to Veridea, they can avoid FOIA, OMA, and possibly benefit greatly in how the property is taxed and valued.

My request on behalf of my constituents is serious, as it involves one of our state universities and its charitable arm (NMU Foundation) that I believe are both considered public bodies due to similar case law in Jackson v. Eastern Michigan University Foundation (see attachment). Therefore, I believe it is appropriate that your office conduct a full and comprehensive investigation into the possible insider dealings, the many conflicts of interest by a state appointed official and the potential misuse of state resources including various forms of public funding to Veridea that have been or will be transferred to Veridea through the NMU Foundation, and the engagement of public employees in the furtherance of this scheme. In addition, I request that an investigation occur of Apollo Management Group's Lifepoint hospital and the possibility of a

scheme to misstate the valuation of the property to benefit them as part of the donation scheme as it relates to both state and federal tax law.

Background

For the past several years, the old Marquette General Hospital which is part of Lifepoint's for-profit Upper Peninsula Health Systems and owned by Apollo Management Group hedge fund, has been for sale. Three years ago, Lifepoint and the Veridea Group (President and owner, Bob Mahaney, who is also an NMU Board of Trustee) entered into an agreement to purchase the property. While I am unclear and not aware of the private nature of that transaction, that sale did not conclude. What is clear is that Bob Mahaney and Veridea Group remained interested in acquiring that property.

Last summer, it looks as if the CEO of the NMU Foundation, Brad Canale, a public NMU employee, entered into discussions with Lifepoint to purchase the property for \$1 with the purpose of transferring the property to Bob Mahaney and Veridea. As Bob Mahaney was both a member of the NMU Board of Trustees and an ex-officio member to the NMU Foundation Board, it certainly raises the question as to his involvement early in the development of this plan. The plan also included Lifepoint providing a \$10M "donation" to the NMU Foundation on the condition that the NMU Foundation provide over 52,000 sq ft of suitable office space for 7 years. At current market rates, that has a likely value well over \$7M.

Central to the transfer of the property from the NMU Foundation to Veridea is that Veridea received preferential tax considerations (brownfield) to support the demolition of the majority of the property. To help with this it appears that the services of Steve Arwood, former MEDC director and CEO of Miller Canfield, were utilized to develop a public funding plan. Miller Canfield currently provides legal counsel to the NMU Board of Trustees.

After listening to my constituents concerns, I agree that there are some serious questions that should be answered surrounding the details of the sale, such as the reason why the NMU Foundation is serving as a project manager in private real estate negotiations that are not part of the university's footprint, and why a Board of Trustee member's private development company (Veridea) was the only development group that turned in an actual proposal to bid on the RFP that the NMU Foundation put out after 180 downloads by interested developers and construction companies took place. There are serious concerns from many community businesses that only allowing a 4-week window to properly bid on an approximate \$164M project was grossly inadequate for historical standards and averages for fair bidding practices, and done on purpose to control who would be able to submit a complete proposal.

Since the NMU Foundation has nothing on their official website that includes any official statements, documents concerning the project, the RFP, bid awards, timeline, the \$44M brownfield plan that the NMU Foundation applied for and the Marquette City Commission approved most likely without a current independent appraisal of the property, we are left to gather the information and evidence from media coverage. I have included many links where pertinent background information is provided, but there are many more articles online with direct

quotes from the NMU Foundation, Veridea, and the City of Marquette from credible news sources that reported on the project over the last year.

It is important to again note that in 2018, Lifepoint entered into a land sale contract with Veridea Group to purchase the property (Marquette General Hospital Site Sold to Veridea | Radioresultsnetwork.com). However, by 2019, Veridea backed out of the property sale, stating that they would need to demolish all existing buildings, but the current agreement only allowed for the reuse of the buildings (Group rejects hospital property, search on for new buyers – The North Wind, thenorthwindonline.com) Community members report that Steve Arwood, a consultant with Invest U.P. (and also a possible consultant to the NMU Foundation for this project) advised the NMU Foundation to go after state money for the demolition of the old hospital buildings to create a larger return on investment for the developer, particularly local brownfield dollars. They were also advised to ask the legislature, and the MEDC for any brownfield monies or programs they could capture. The city of Marquette approved the largest local brownfield award ever to the NMU Foundation (\$44M) in an expedited timeframe, and to my surprise, the 2023 state budget approved \$8M as an “enhancement grant” under the LEO budget for the elimination of blighted properties.

It is now my understanding that the MEDC is prepared to award the NMU Foundation and this project another \$5M for the demolition of the buildings as well. As the Representative for this district, I was not aware that this enhancement grant ask and approval were in the budget until the day the legislature voted on it. After talking with Senator McBroom who shares the district with me, it appears he was also unaware of the ask and the line item in the budget. It is very unusual for legislators to not be consulted when there are enhancement grants asks from our local businesses or public entities. The last time this type of enhancement grant was given at the state level to benefit a private developer was in 2018, which drew tremendous criticism from Governor Whitmer (A year later, \$10M grant to help former Michigan GOP chair stuck in limbo | Bridge Michigan).

In summary, my constituents are asking for answers regarding the legality of this project. Specifically, whether the NMU Foundation is considered a public body, and whether there is a substantial conflict of interest from an NMU Board of Trustee member using public office for personal gains through his private development and investment company (Veridea). Second, is there a significant taxable gain and advantage made by the private entities by having the NMU Foundation accept the old hospital property from Apollo Management Group for \$1 instead of selling it at fair market value? Also, since the Marquette City Commission raised property taxes on its residents three weeks after approving the \$4.6M brownfield agreement that allows 16 years of reduced or no taxes on the old hospital site, constituents want to make sure they are not paying more while the hospital and developers find a way to pay less. My constituent’s specific questions to you through my office are as follows:

FOIA and OMA

Question 1: Is the NMU Foundation considered a public body as defined by, and thus subject to, the provisions of the Freedom of Information Act (FOIA), MCL 15.231 et seq; MSA 4.1801 (1) et seq., and the Open Meetings Act (OMA), MCL.15.261 et. seq.; MSA 4.1800(11) et. seq.?

It appears that the NMU Foundation does not have separate staff from the university, but rather, that the NMU Foundation employees are categorized as employees of Northern Michigan University.

Question 2: If the NMU Foundation is found to be subject to FOIA and OMA, can all of the documents surrounding the sale of the property and project be made available to the public on their website? Are all of the communication records, specifically communication via email and text messaging involving the discussion of the sale of the property and project with any local or state elected official or employee of the city of Marquette or state of Michigan, considered public documents? If they are helpful for the public to understand how the property sale and project came to be, my constituents would like to request that these documents be made available to the public on the appropriate websites as well.

Question 3: As it further relates to FOIA and OMA, my constituents believe that both NMU Board of Trustee members, as well as NMU Foundation members, have purposely used private emails when conducting the official business of their appointed positions to these boards when discussing the property sale and project. If those private emails and text messages pertain to the official business being conducted around the property sale and project, are those communications also considered public documents that the public has the right to view?

Conflict of Interest

As mentioned, NMU Board of Trustee member Bob Mahaney is also the CEO of Veridea, who was negotiating with Apollo Management Group (Lifepoint), an international hedge fund investor that owns the current Lifepoint hospital and the old hospital site that is being sold.

Trustee Mahaney was also the ex-officio NMU Board liaison to the NMU Foundation from 2019 until he stepped down between November and December of 2021, and it appears he only stepped down from that role after questions on conflicts of interest were raised by then NMU President Fritz Erickson.

It is impossible to follow the reasoning behind the NMU Foundations involvement in this property sale in the first place, who asked them to become involved, and exactly what tasks they have performed as an official non-profit body under Northern Michigan University's creation of the endowment arm. Even though they are the face of this project, they have no meeting minutes and information surrounding the \$164M plus project on their website. The NMU Board of Trustee minutes and committee minutes also do not reveal how, when, or why the NMU Foundation became involved in the sale of the property and project.

It is very important to note that in the fall of 2021, then NMU President Fritz Erickson raised significant questions about conflicts of interest on the part of two NMU Board Members – Bob Mahaney and NMU Board Chair Tami Seavoy. In fact, President Erickson demanded that the board attorney provide legal opinion. The concern with Chair Seavoy was that she, along with

other board members, participated in active discussions as a board regarding the acquisition of the old hospital, meaning that this was not exclusive to the NMU Foundation. In addition, Chair Seavoy, while serving on the NMU Board, was also serving on the Lifepoint Hospital Board.

Shortly, after receiving an opinion from the NMU attorney stating no conflict of interest existed because there was no vote, President Erickson was immediately terminated without cause.

After the termination of President Erickson, at the very next NMU Board of Trustee Meeting (December 2021) the NMU Board of Trustees changed their Conflict of Interest Policy to include a very concerning clause. The Conflict of Interest policy reads as follows (Board of Trustees Bylaws | NMU Board of Trustees) with the specific change highlighted in black:

If there is a conflict of interest on the part of a Board of Trustees member or Officer in respect to a contract within the University, and if the personal interest of the Board of Trustees member or the Officer is of such substance to induce action on his or her part in promoting the contract for his or her personal benefit, then the conflict of interest shall be deemed to be substantial. A substantial conflict of interest of a Board of Trustees member or Officer shall also be deemed to exist as to any contract between the University and 1) any firm, partnership, or other unincorporated association, in which the Board of Trustees member or Officer is a partner, member, or employee; 2) any corporation in which the Board of Trustees member or Officer is a stockholder owning more than 1% of the total stock outstanding in any class if the stock is not listed on a stock exchange or the stock has a present market value in excess of \$25,000 if the stock is listed on a stock exchange; 3) any corporation where the Board of Trustees member or Officer is a director, officer, or employee; or 4) any trust of which the Board of Trustees member or Officer is a beneficiary or trustee, or a corporation in whose stock the trust funds are invested, if the investment exceeds the amounts specified in subparagraph 2 above.

Notwithstanding the above, there shall be deemed to be no conflict of interest which is substantial with respect to a University contract in which a Board of Trustees member or Officer has an interest, which is awarded to the lowest qualified bidder upon receipt of sealed bids pursuant to published notice for bids provided the notice does not bar, except as authorized by law, any qualified person, firm, corporation, or trust from bidding. This sub-paragraph does not apply to amendments or re-negotiations of a contract or to additional payments under the contract which were not authorized at the time of the award. Further, there shall be deemed no conflict of interest which is substantial with respect to a University contract with a professional limited liability company organized under Michigan law, if a Board of Trustees member or Officer is an employee but not a member of the company.

Prior to the award of any University contract in which a Board of Trustees member or Officer has an interest, full disclosure of the contract shall be made to the Board of Trustees. Further, the interested Board of Trustees member or the interested Officer shall not solicit the contract and shall take no part in the negotiations for or in the approval of the contract or any amendment to the contract, and shall not represent either party in the transaction.

In addition to the above, no Board of Trustees member shall accept any payment, remuneration, gratuity, or other money or property of any kind from a corporation, individual, or entity which is engaged in one or more business transactions with the University where there is any relationship, direct or indirect, between the payment to the individual and the transaction with the University.

The Secretary shall consult with the President and General Counsel regarding all conflict questions of which the Secretary is informed and shall report regularly to the Board of Trustees regarding any unresolved conflict questions. This policy statement is to be interpreted and applied in a manner that will best serve the interests of the University. In some cases, it may be determined that, after full disclosure to those concerned, the University's interests are best served by participation by the Board of Trustees member or Officer despite the conflict. The University will assist the Board of Trustees in determining if such proposed participation violates the state conflict of interest laws. The General Counsel will provide a Board of Trustees member or Officer, upon his or her request, a written opinion as to whether a conflict of interest situation exists.

It is the individual responsibility of each Board of Trustees member and the Officers to disclose conflicts of interest or potential conflicts of interest to the University.

The Secretary shall distribute annually a copy of this provision to each Board of Trustees member and Officer for their signature.

Question 4: Pursuant to Public Act 318 of 1968, or any other Michigan law that pertains to public university or publicly elected or appointed officials, is it legal to exclude a board member from a conflict of interest if only one bid occurs? Given the timing of the NMU Board of Trustees policy change above, if this section of board policy was done knowing that the NMU Foundation was going to limit the timeline of the RFP to the point where it would not be feasible for any other outside developer to bid properly on the project, does that constitute unlawful activity?

NMU Foundation and 501c3 Status

Question 5: Is the NMU Foundation, by being the project manager for a large piece of property and development outside of the university footprint, operating substantially outside of its non-profit 501c3 scope and purpose, as it pertains to Public Act 162 of 1982, or any other Michigan law?

Asked a different way, a long contentious issue between the city of Marquette and Northern Michigan University is the large swath of taxable land in the city that the university has taken off the tax rolls for 'future development' in their economic strategic plan. If NMU is now acting as a manager of an adjacent land sale and project with the old hospital project as acceptable to its' exempt status, there would be several other large property sales and projects they could justify as being within their scope. My constituents feel that this is a direct conflict of their purpose to support higher educational purposes- not land development and real estate on private parcels of land around them.

Question 6: The IRS lists the following reasons a 501(c)(3) such as the NMU Foundation can lose its exempt status (see below). Does the state of Michigan or the IRS or both have the power to determine whether a non-profit has violated its exempt status as it pertains to the following:

1. Private Benefit/Inurement

Private benefit:

A 501(c)(3) organization's activities should be directed toward some exempt purpose. Its activities should not serve the private interests, or private benefit, of any individual or organization more than insubstantially.

Inurement:

A 501(c)(3) organization is prohibited from allowing its income or assets to benefit insiders – typically board members, officers, directors and important employees of an organization. If an organization benefits insiders, the insiders and the organization could be subject to penalty excise taxes and the organization could lose its tax-exempt status.

2. Lobbying

Lobbying is when an organization contacts, or urges the public to contact, members or employees of a legislative body (or any executive branch official who may participate in the formulation of legislation) for the purpose of proposing, supporting, or opposing legislation, or when the organization advocates the adoption or rejection of legislation. While a 501(c)(3) organization is allowed to do some lobbying, too much can hurt its tax-exempt status. Its lobbying activities cannot be more than an insubstantial part of its overall activities.

3. Political Activity

All 501(c)(3) organizations are prohibited from participating in any political campaign on behalf of (or in opposition to) any candidate running for public office. The prohibition applies to all campaigns at the federal, state and local levels.

4. Unrelated Business Income (UBI)

Earning too much income generated from unrelated activities can jeopardize an organization's 501(c)(3) tax-exempt status. This income comes from a regularly carried-on trade or business that is not substantially related to the organization's exempt purpose.

5. Operation in accord with stated exempt purpose(s)

An organization must pursue the exempt activities it promised in its IRS application for exemption. If an organization has deviated from its original purposes, it must inform the IRS to prevent future problems.

Question 7: As publicly stated in the media, Veridea offered to do all of the pre-site evaluation work for free for the project Request For Proposals (RFP), giving them a significant advantage

over other developers in the bidding process. Knowing that the NMU Foundation significantly reduced the timeline to accept bids on a massive \$164M project to just 4 weeks, when average industry standards for a type of project of this scale and price often include Request for Inquiry periods that put the minimum acceptable timeframe for accepting proposals at 3 months. If the Foundation used any state or federal dollars to aid in the development or design of the RFP, was the RFP fair and competitive, following state procurement or bidding laws? Who specifically created the RFP proposal (name of person or business hire? How does the RFP timeline compare to other large university projects like building the Berry Events Center or the new Norther Center on Campus?

Taxes

With the hospital property being “sold” to the NMU Foundation for \$1, when does the sale take place? Does the NMU Foundation plan on carrying the proper insurance for the donated site, the buildings, the renters? Who at the NMU Foundation will manage the Apollo hedge fund group rental agreement for parts of the old hospital that they currently use, or will the property transfer immediately to Veridea and they become managers of the rented space? It is important that the public be allowed to see the agreement that the NMU Foundation entered into so it can understand if a public body is involved in the management, maintenance and rental agreements between the two entities, or if it is simply a passthrough for tax purposes.

Question 9: Instead of selling the property directly to another private developer as originally planned, what state and federal charitable gift tax incentives will be rewarded to Apollo for donating the property to the NMU Foundation? How does this impact taxes paid to the state of Michigan and the city of Marquette, as they relate to any portion of Public Act 206 of 1893, the Michigan General Property Tax Act, or any other relevant state law? Whose appraisal is used in determining the gift tax?

Question 10: My understanding is that the agreement between Apollo (Lifepoint) and the NMU Foundation includes a \$10M payout at the end of the sale agreement. If Apollo (Lifepoint and the Veridea group) receive considerable tax incentives for brokering the deal through the NMU Foundation, is this \$10M gift legal given the apparent requirement of the NMU Foundation to provide over \$7M in suitable office space?

Depreciation of Assets

Question 11: It is my understanding that the old hospital site had either a deed restriction limiting the use of the property to exclude similar healthcare services or an encumbrance. If and when these provisions are changed, they could significantly impact the value or devaluation of the property, creating a significant advantage in the appraisal of the property to the seller. Did the NMU Foundation do its own appraisal of the property and can that appraisal be shared with the public to make sure the taxable values are fair market value?

Question 12: In doing it's due diligence, did the city of Marquette do an appraisal of the property between January 1, 2022 and May 31, 2022 when it approved the \$44.6M local Brownfield tax credit? It is reported that the city will receive \$1.6M in property taxes once the old hospital site

is redeveloped, but what are those numbers based off? It is impossible to know how the property sale is valued, whether there was independent assessment? Since the NMU Foundation received the local Brownfield award, the public would like to see any and all documents used in calculating the taxable gift and value for the sale.

Question 13: In 2018, it was found that a University of Michigan donor overvalued its gift to the university to receive a larger tax exemption on his personal taxes after gifting a property to the university for \$1 (How a \$3.4M gift to the University of Michigan ended up in tax court, freep.com). Does the public have a right to know the financial details of the \$1 gift since that announcement has been made public? Should further questions regarding gift taxes and the \$1 gift from Lifepoint/Apollo Management Group being made to the NMU Foundation be addressed to you and your office at the state level, or should my constituents address those concerns to the IRS?

Campaign Finance

Question 14: A constituent brought up the fact that a donation was made to a Marquette City Commissioner that is running for State Representative by the spouse of Veridea's CEO less than 2 weeks after the vote to approve the \$44.6M local brownfield took place. Is there be any conflict of interest with this donation under the Campaign Finance Act, Public Act 388 of 1976, or the Michigan Penal Code, Act 328 of 1931, section 750.117, given that the NMU Foundation has solicited money from the state for this project in the form of an enhancement grant, is currently applying for MEDC money for the demolition of the buildings on the property, and will likely seek out more MEDC brownfield money in coming years for the project?

Conclusion

Due to the severe lack of transparency surrounding all aspects of the sale and development of the old hospital property in Marquette, I believe that many constituents in my district have raised valid concerns that are outlined in this letter. The only other point I would like to mention is that I believe there are employees of NMU that are extremely afraid of the repercussions or losing their jobs if they question any aspect of this project. After seeing the firing of the former president and demotion of a senior administrator since last November, I have serious concerns that there are employees at NMU that have been punished for trying to do the right thing by asking questions of the Board of Trustees over this project. It is my hope that they will be able to speak freely to your office should you need additional details from them.

Thank you for the opportunity to bring these concerns to your office. I look forward to your response and allowing the public a better understanding of the details of the sale and project.

Sincerely,



Sara Cambensy
State Representative, 109th District

Jackson v. Eastern Michigan University Foundation

215 Mich. App. 240 (Mich. Ct. App. 1996) · 544 N.W.2d 737
Decided Jan 19, 1996

Docket No. 168185.

Submitted June 20, 1995, at Lansing.

Decided January 19, 1996, at 9:15 A.M.

Dykema Gossett, PLLC (by *John B. Curcio* and *Michael Brown*), for the defendant.

Amici Curiae:

Butzel Long (by *James E. Stewart* and *Leonard M. Niehoff*), for Ann Arbor News.

Greenspon, Scheff Washington, P.C. (by *George B. Washington* and *Donald B. Greenspon*) *241 and *Richard W. McHugh*, for International Union, UAW.

Before: SAAD, P.J., and TAYLOR and O'CONNELL, JJ.

PER CURIAM.

Plaintiff's claims raise this legal issue: Is Eastern Michigan University Foundation a "public body" as defined by, and thus subject to, the provisions of the Freedom of Information Act (FOIA), [MCL 15.231 et seq.](#); MSA 4.1801(1) *et seq.*, and the Open Meetings Act (OMA), [MCL 15.261 et seq.](#); MSA 4.1800(11) *et seq.*? The trial court concluded that defendant foundation was not a public body for purposes of either the FOIA or the OMA. We hold that the foundation is a public body as defined by the FOIA because it is primarily funded by Eastern Michigan University (EMU). Further, we conclude that the foundation is a public body as defined by the OMA because the foundation is empowered by resolution to exercise

proprietary authority. Accordingly, we reverse the decision of the trial court and remand for further proceedings.

FACTS

On October 24, 1989, the Board of Regents of Eastern Michigan University approved a resolution that authorized the establishment of the foundation. The resolution stated that the foundation "would serve to receive and disburse funds, property and gifts of any kind exclusively for the benefit of Eastern Michigan University" and "would enable the University to utilize the expertise of highly successful individuals, executives and entrepreneurs to promote the long-term viability of the University." *242

On May 29, 1990, articles of incorporation for the foundation were filed with the Michigan Department of Commerce. The foundation was incorporated as a nonprofit, nonstock corporation organized and operated "exclusively to receive, hold, invest, and administer funds and to make expenditures to or on behalf of Eastern Michigan University." The corporation was created pursuant to the NonProfit Corporation Act, [MCL 450.2101 et seq.](#); MSA 21.197(101) *et seq.* At the time, the president of EMU, Dr. William Shelton, signed the foundation's articles of incorporation in his individual capacity. The foundation later received tax-exempt status as a charitable organization under the [Internal Revenue Code](#), 26 U.S.C. § 501(c)(3).

On September 25, 1990, the bylaws of the foundation were signed. The bylaws provided that "[a]ll corporate actions" of the foundation would "be approved by the Board of Trustees" of the foundation. The initial board of trustees was to consist of a minimum of fifteen trustees. Ten of these trustees were required to be people "representing a variety of University constituencies" and were not permitted to be "Regents or employees of the University." The other five trustee positions were to be permanently filled by university officials. The bylaws also provided that the foundation's initial presidency would be reserved for a "University-related official."

During the first two years of the foundation's existence, the university contributed more than half of the foundation's assets, which totaled approximately \$420,000. Then, on March 24, 1992, the university's board of regents approved a resolution to transfer the university's entire endowment of \$7.7 million to the foundation. The transfer agreement stated that while the foundation is a support organization for the university, the parties²⁴³ are independent contractors and "that neither the University nor any of the University's employees, agents or affiliates be considered the agent, employee, servant or other representative of the Foundation, nor that the Foundation nor any of the Foundation's employees, agents or affiliates be considered the agent, employee, servant or other representative of the University." Subsequently, the endowment fund, valued at approximately \$7.7 million, was transferred from the university to the foundation.

Plaintiff, Eric Jackson, filed this declaratory action after defendant foundation denied plaintiff's request for information related to the foundation's meetings and financial condition pursuant to the FOIA and the OMA. Cross motions for summary disposition were filed with regard to the issue whether the foundation was a "public body" within the meaning of the FOIA and the OMA. In an opinion and order dated August 30, 1993, the

trial court held that the foundation is not a "public body" within the meaning of either the FOIA or the OMA. Accordingly, the trial court granted defendant's motion for summary disposition pursuant to [MCR 2.116\(C\)\(10\)](#), and denied plaintiff's motion for summary disposition. Plaintiff now appeals from that decision as of right.¹

¹ The Ann Arbor News and International Union, UAW, have filed amicus briefs in support of plaintiff's contention that the foundation is a public body for purposes of the FOIA and the OMA.

Plaintiff raises nine issues on appeal, which are actually different facets of two primary issues: Is the foundation subject to the FOIA and to the OMA?

I

The Michigan Legislature made it public policy that citizens are entitled to complete information²⁴⁴ regarding the affairs of their government so they may fully participate in the democratic process. [MCL 15.231\(2\)](#); [MSA 4.1801\(1\)\(2\)](#); *Swickard v Wayne Co Medical Examiner*, [438 Mich. 536, 543; 475 N.W.2d 304](#) (1991). Under the FOIA, a "public body" must disclose all public records that are not specifically exempt under the act. [MCL 15.233\(1\)](#); [MSA 4.1801\(3\)\(1\)](#); *Hagen v Dep't of Ed*, [431 Mich. 118, 123; 427 N.W.2d 879](#) (1988).

The term "public body" is defined under the FOIA as follows:

(b) "Public body" means:

- (i) A state officer, employee, agency, department, division, bureau, board, commission, council, authority, or other body in the executive branch of the state government, but does not include the governor or lieutenant governor, the executive office of the governor or lieutenant governor, or employees thereof.

(ii) An agency, board, commission, or council in the legislative branch of the state government.

(iii) A county, city, township, village, intercounty, intercity, or regional governing body, council, school district, special district, or municipal corporation, or a board, department, commission, council, or agency thereof.

(iv) *Any other body which is created by state or local authority or which is primarily funded by or through state or local authority.*

(v) The judiciary, including the office of the county clerk and employees thereof when acting in the capacity of clerk to the circuit court, is not included in the definition of public body. [MCL 15.232(b); MSA 4.1801(2)(b) (emphasis added).]

Subparagraph b(iv), the "catchall" provision, is the provision relevant to this appeal. Set in the disjunctive, subparagraph b(iv) indicates that "any other body" is a public body, and thus subject to

245 the FOIA, if it is either (1) created by state or local authority, or (2) primarily funded by or through state or local authority. As will be discussed below, the undisputed evidence establishes that defendant foundation is "primarily funded" by state or local authority — i.e., by Eastern Michigan University. Accordingly, we find that the foundation is a public body under the FOIA without reaching the question whether the foundation was created by state or local authority.

This Court in *Kubick v Child Family Services of Michigan, Inc*, 171 Mich. App. 304; 429 N.W.2d 881 (1988), examined the "primarily funded" language of the FOIA. Although the Court declined to establish a bright-line rule with respect to what percentage of funding constitutes "primarily funded," the Court stated that where the government's contribution does not reach half of

an organization's total funding, the body is not primarily funded by or through state or local authority. *Id.* at 308.

In this case, there is no real dispute over the amount and timing of the foundation's funding. In the first two years, EMU provided more than half of the foundation's funding. Then, in 1992, the foundation's funding was dramatically increased when EMU transferred its entire endowment of \$7.7 million to the foundation. These undisputed facts compel our finding that the foundation is primarily funded by EMU, thereby making the FOIA applicable to the foundation.

The trial court's reasoning, that the foundation is not primarily funded by EMU because of EMU's projections that the foundation would be self-sustaining and would have dramatically increased its private funding by the year 1999, is erroneous. Such reasoning ignores the plain language of the

246 act, which is set in the present tense. In other words, the relevant inquiry is whether the foundation "is" primarily funded by or through state or local authority at the time of the FOIA request. Here, at the time of plaintiff's FOIA request, the foundation was primarily funded by EMU. As such, we find that the foundation is a public body subject to the FOIA.

II

In addition to our holding that the foundation is a "public body" under the FOIA, we also find that the foundation is a "public body" under the OMA.

The OMA defines a "public body" as follows:

(a) "Public body" means any state or local legislative or governing body, including a board, commission, committee, subcommittee, authority, or council, which is empowered by state constitution, statute, charter, ordinance, resolution, or rule to exercise governmental or proprietary authority or perform a governmental or proprietary function, or a lessee thereof performing an essential public purpose and function pursuant to the lease agreement. [MCL 15.262(a); MSA 4.1800(12)(a).]

Although we recognize the need for confidentiality in the important and sensitive area of fundraising to support our public institutions, the statutory language and specific facts of this case compel the conclusion that the foundation is a public body for purposes of the FOIA and the OMA.

Reversed and remanded for further proceedings in accordance with this opinion. We do not retain jurisdiction.

248 *248

Plaintiff argues that the foundation should be considered a "public body" under the OMA because it effectively performs a governmental or proprietary function through its unique relationship with Eastern Michigan University. We agree. Applying the statutory language of the OMA, the foundation was "empowered by" a "resolution" of the university board of regents to "exercise proprietary authority" over the university's endowment fund. Under the particular facts of this case, where the university delegated authority to the foundation to manage, in essence, its entire endowment fund, it is required in MCL 390.554; MSA 15.1120(4) that the agreement between the foundation and the university be construed to comply with the OMA. To hold otherwise would make the contract invalid. *Hoekzema v Van Haften*, 313 Mich. 417; 21 N.W.2d 183 (1946); *Kukla v Perry*, 361 Mich. 311; 105 N.W.2d 176 (1960). Further, the interests of public disclosure require that the foundation be subject to the OMA. *Booth Newspapers, Inc v Univ of Michigan Bd of Regents*, 444 Mich. 211, 223-226; 507 N.W.2d 422 (1993). Accordingly, we agree with plaintiff that the trial court erred in concluding that the foundation was not subject to the OMA.