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Open Meetings Act Proposed Senate Joint Resolution (2019)
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I am Herschel Fink, and I am legal counsel for the Detroit Free Press, as well as other USA Today Network (Gannett) Michigan news sites, including the Lansing State Journal, Battle Creek Enquirer, Port Huron Times Herald, Livingston Today, and Observer-Eccentric.

As an advocate for open government (I note that we are now observing Sunshine Week), I operate under a simple principle succinctly stated in 2002 by the 6th Circuit United States Court of Appeals in a case that I was privileged to litigate for the Free Press involving secret immigration court hearings.

There, the Court wrote:

An informed public is the most potent of all restraints upon misgovernment. Democracies die behind closed doors. When government begins closing doors, it selectively controls information rightfully belonging to the people. Selective information is misinformation. The framers of the First Amendment did not trust any government to separate the true from the false for us. They protected the people against secret government.

So, the Free Press (capital F capital P) salutes and fully supports this committee's efforts to expand and clarify the people's access rights under the Open Meetings Act and the Michigan Constitution, specifically regarding our increasingly secretive public university governing boards.

In both 2014 and 2015, I made presentations to committees of the House and Senate supporting a Joint Resolution similar to the one now before

you. That resolution passed the House, but, unfortunately, did not survive in the Senate. We haven't given up. We're encouraged that neither have you.

In addition to our efforts in the Legislature dating back to 2014 to amend the State Constitution to clarify the framers' intent that all meetings of public university governing boards be held in public, my clients, the *Free Press* and our sister newspaper in Lansing, the *State Journal*, also filed a lawsuit in 2014 against the Regents of the University of Michigan in an attempt to force all public university governing boards to comply with the Open Meetings Act, and to conduct the public's business in the open. We sought to convince the Courts that a throwaway line in a 1999 Supreme Court opinion involving university presidential searches, *Federated Publications, Inc. v Michigan State Univ Bd of Trustees*, 460 Mich 75, was non-binding *dicta* where, in one place, it broadly stated that public university governing boards were exempt from all requirements of the Open Meetings Act, rather than the issue before the court, which was presidential selection meetings.

I want to update you on the result of that costly litigation, which only underscores the importance of a Constitutional Amendment now, and the need for action in the Legislature on the current proposed joint resolution.

The issue that we presented to the Court of Claims in 2014, and then in appeals to the Court of Appeals and state Supreme Court, was over the interpretation of the phrase "Formal Sessions" in Article 8, Section 4 of the Constitution. Even had we succeeded in winning a re-interpretation, it likely would not have been a lasting solution to the problem of public university secrecy. Only a constitutional amendment, such as the current Joint Resolution proposes, can do that, and provide badly needed public oversight and accountability.

That, in fact, was the upshot of our lawsuit, *Detroit Free Press and Lansing State Journal v University of Michigan Regents*, 315 Mich App 294 (2016), lv denied, 500 Mich 897 (2016). The Court continued to interpret the 1999 *Federated* case as binding precedent, namely that the state Constitution as written prevented any other result.

During our litigation, the Regents went even further, taking the absolutist position that Article 8, Section 4 gives them sole discretion - not the Legislature, nor the courts - to define what is, and is not, a "formal session," and even whether, and when, to have them. Shockingly, the

Regents even claimed in their pleadings that voting in public is not a requirement under their view of their constitutional autonomy. While acknowledging that the Regents currently take votes during their "formal" monthly meetings, their legal brief added, "That is not to suggest that decisions can *never* [their emphasis] be made in informal sessions. But there is no need to reach that issue here since no decisions were made and no votes taken except in formal sessions open to the public."

That is a chilling warning by the Regents of what their claimed absolute power, left unchecked by public oversight, the Legislature, or the Constitution means. The public significance of that power is hinted at in the Free Press' Court of Claims complaint (attached) in Paragraphs 9 through 14, which points out that U of M is one of the State's largest employers, with (at the time of the lawsuit) more than 44,000 permanent and 13,000 temporary employees; controlling annual revenue for operations exceeding $6.4 billion, which was $4 billion more than the state's next largest public university, MSU, and overseeing (in 2013) more than $315 million in State of Michigan appropriations ($365 million in 2016-17). Yet, as the Complaint spelled out, the Regents routinely conduct the public's business in closed quorum meetings which would violate OMA, if it applied.

To quote a line from the old Broadway musical, *The Music Man*, "Folks, we've got Trouble. That's Trouble. With a capital T."

By the way, the Regents admit - even boasted - in their brief that Michigan is an outlier in the position that its Regents are above scrutiny and accountability by being exempt from the decisional transparency that's required of every other public body in this state. In their Court of Claims brief they say, "Only California and Minnesota universities enjoy constitutional autonomy akin to that of Michigan universities." So, apparently, public universities in 47 other states are managing to muddle through with public accountability, which the Regents and other Michigan public university governing bodies are avoiding.

We support the plain and simple language of the proposed Joint Resolution to amend Article VIII, Sec. 4. It is a simple and clear command:

"Meetings of governing boards of these educational institutions shall be open to the public as provided by law (a reference to the Open Meetings Act)."

We would however, encourage that an additional sentence follow:

"Records of the governing bodies of these educational institutions are public records and open to inspection as provided by law (a reference to the Freedom of Information Act)."

That additional sentence was included in the proposed Joint Resolution that the Legislature considered in 2015. Although public universities currently process (albeit reluctantly in many cases) requests for records under the Freedom of Information Act, the addition of a specific constitutional guarantee would insure continued compliance.

Despite obstacles placed in its way to expose the public's business to sunlight, the Free Press performs its public watchdog role at great expense to hold public universities accountable to the public. Using the Freedom of Information Act and its own reporting resources, the Free Press recently exposed oversight abuses regarding U of M's $10.9 billion Endowment Fund investments, resulting in reforms instituted by the Regents. That required another lawsuit in the Court of Claims in 2017 and 2018, ending in a decision for the Free Press and the recovery of $36,000 in attorney fees.

The proposed 2015 Joint Resolution resulted in a claimed parade of horribles that the governing boards warned would result from having to conduct the public's business in public, such as having to discuss [quoting from page 6 of the Regents' 2015 Court of Claims Brief] "ongoing negotiations with potential business partners, legal matters, the status of capital projects, and various other matters relating to university operations." But, those are already likely the subject of existing OMA exceptions, which all public bodies, including large cities, may appropriately utilize, and which the Regents and other university governing boards managed to ably operate under for at least two decades prior to 1999, when our Supreme Court *for the first time* suggested - in the limited context of presidential searches - that the Open Meetings Act might not apply to the governing boards.

Indeed, when public universities complained to the Legislature following the Supreme Court's presidential search decision in *Booth Newspapers v. University of Michigan Board of Regents*, 444 Mich 211 (1993), the Legislature immediately responded by amending OMA to give the universities relief in conducting presidential searches. MCL 15.268(j) (Am. 1993, Act 81, Eff. April 1, 1994).

But, our public universities now conduct billions of dollars of the public's

business with almost zero public oversight. A study by the Free Press of how the Regents operate in secret was discussed in a March 30, 2014 article by Free Press higher education reporter David Jesse that was attached to my testimony in support of the 2015 Joint Resolution, which is also attached here, along with a column by then Free Press Editorial Page Editor Stephen Henderson, and a related Columbia Journalism Review article that year. It is further detailed in the lawsuit that the *Free Press* and *State Journal* filed in 2014 in the Court of Claims, which, as noted above, is attached.

Finally, when I argued the 2002 case that I referred to above in the 6th Circuit U.S. Court of Appeals against the Justice Department opposing secret deportation hearings, I finished by acknowledging that, while the Executive Branch had plenary powers in immigration and removal:

"We just want to watch," I said. "Watch and report to the people."

There is no reason that the same should not apply to all quorum meetings of public university governing boards.