

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

The Traverse City Record-Eagle,

Plaintiff,

vs.

Case No. 20-  
HON.

CZ

Traverse City Area Public Schools Board  
of Education, a public body, and  
M. Sue Kelly, an individual and its President,

Defendants.

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**BUTZEL LONG, a professional corporation**

Robin Luce Herrmann (P46880)

Javon R. David (P78214)

41000 Woodward Avenue

Bloomfield Hills, MI

248.258.1616 Fax: 248.258.1439

Attorneys for Plaintiff the Traverse City Record-Eagle

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**COMPLAINT UNDER THE FREEDOM OF INFORMATION ACT AND  
OPEN MEETINGS ACT**

There is no other action between these parties arising out of the same transactions or occurrences as alleged in this Complaint pending in this Court, nor has any such action been filed and dismissed or transferred after having been assigned to a Judge.

Plaintiff, The Traverse City Record-Eagle (“TCRE”), by its attorneys, Butzel Long, and for its Complaint against Defendants, Traverse City Area Public Schools Board of Education (“TCAPS” or “Board”) and M. Sue Kelly, Board President (“Kelly”), states as follows:

## INTRODUCTION

*“Excessive secrecy breeds distrust. It prevents accountability. It does violence to the principle of government based on the informed consent of the governed....”*

- Adlai E. Stevenson III, Special Senate Study Committee on Political Ethics, Final Report (1973), at 10.

1. Defendant Traverse City Area Public Schools Board of Education (“TCAPS” or “Board”) and Defendant M. Sue Kelly (“Kelly”), have engaged in a deliberate course of conduct to deny the public information regarding former TCAPS Superintendent Ann Cardon, complaint(s) against Cardon, and the separation of Cardon’s employment with TCAPS. Further, TCAPS has deliberately delayed in providing information relating to these issues involving Cardon through the invocation of spurious exemptions, phony extensions of time, and hiding from public view a document detailing complaint(s) against Cardon by improperly incorporating the document into closed meeting minutes.

2. Plaintiff, The Traverse City Record-Eagle (“TCRE”), asks this Court to act quickly and decisively to enforce the public right to know and hold its public officials accountable.

## THE PARTIES & JURISDICTION

3. This matter arises under the Michigan Freedom of Information Act, MCL 15.231, *et seq.* (“FOIA”), the Michigan Open Meetings Act, MCL 15.261 *et seq.* (“OMA”), the United States and Michigan Constitutions, and the common law of the State of Michigan.

4. Plaintiff TCRE is a Michigan newspaper with its principal place of business located at 120 West Front St., Traverse City, Michigan 49684, which is located in Grand Traverse County.

5. Defendant Traverse City Area Public Schools Board of Education (“TCAPS” or “Board”) is a public body with its principal place of business located at 412 Webster St., Traverse City, Michigan 49686, which is located in Grand Traverse County.

6. Defendant M. Sue Kelly (“Kelly”), is the Board President and is, upon information and belief, a resident of Leelanau County, State of Michigan.

7. Defendant TCAPS is a public body as defined by FOIA. MCL 15.232(h).

8. Defendant TCAPS is a public body as defined by OMA. MCL 15.262(a).

9. Defendant Kelly is a member of a public body as defined by FOIA. MCL 15.232(h).

10. Defendant Kelly is a member of a public body as defined by OMA. MCL 15.262(a).

11. This Court has subject-matter jurisdiction under the Michigan Freedom of Information Act (“FOIA”) because this action has been instituted within 180 days after Defendant’s final determination to deny TCRE’s FOIA request. MCL 15.240(1)(b).

12. This Court has subject-matter jurisdiction under the Michigan Open Meetings Act (“OMA”) because this action has been instituted to compel compliance and/or to enjoin further non-compliance by the TCAPS, a person under OMA. MCL 15.271(1) and (2). In addition, this Court has subject matter jurisdiction under the Open Meetings Act because this action is commenced within 180 days after the date of the violations which gives rise to this cause of action.

13. Venue is proper under MCL 15.240(4) and MCL 15.271(2).

## FACTUAL BACKGROUND

### *The Public's Right of Access*

14. Plaintiff incorporates herein the allegations contained in paragraphs 1 through 13.

15. Pursuant to MCL 15.233, Plaintiff, as a member of the public, has the right to inspect and to copy public records of a public body, including records of TCAPS.

16. Pursuant to MCL 15.263, Plaintiff, as a member of the public has a right to attend meetings of public bodies.

### *The Board/Superintendent Relationship*

17. Among the responsibilities of the TCAPS Board of Education is the retention and evaluation of the Superintendent. **Ex. 1:** Policy 1240, Evaluation of the Superintendent; **Ex. 2:** Policy 1241, Non-Reemployment of the Superintendent. Non-renewal of a Superintendent's contract requires a board vote. *Id.*

18. Employee personnel records are not available to the Board as individuals, but are available to school administrators as may be required in the performance of their job. **Ex. 3:** Policy 8320, Personnel Files. This policy requires certain information to be maintained in personnel files, including information submitted by the Board. *Id.*

19. Ms. Ann Cardon ("Cardon") entered into an employment agreement with TCAPS on June 10, 2019 as Superintendent ("Superintendent Employment Agreement"). **Ex. 4:** Superintendent Employment Agreement. Cardon was hired by the Board for a term of 8/1/19 to 6/30/22. *Id.* Among other things, the Superintendent Employment Agreement:

- a. States that, should a concern arise regarding the Superintendent's relationship with the Board, the parties may agree to utilize a mutually selected outside facilitator. *Id.*, ¶ C.3.

- b. States that the Board is to evaluate Cardon at least annually and in writing. *Id.*, ¶ F.
- c. Details termination terms and requires the Board to provide written notice of the basis for discharge if the Board proposes to discharge the Superintendent, as well as an opportunity to be heard. *Id.*, ¶ G.4.
- d. Does not provide for unilateral termination by the Superintendent, but includes a provision for termination by “mutual agreement”. *Id.*, ¶ G.1.

***The Kelly Document is Created Before the October 7, 2019 Closed Session***

20. Upon information and belief, prior to a TCAPS board meeting on October 7, 2019, Board President Kelly prepared a letter/document, (hereinafter, “Kelly Document”), relating to then-Superintendent Cardon. The Kelly Document was provided to TCAPS board members. Upon information and belief, the Kelly Document (or portions thereof) was created electronically and distributed to at least one other person electronically. Upon information and belief, the Kelly document had at least one (and perhaps several) attachments. The Kelly Document may have also been shared with persons other than Board members either electronically or in hard copy. (Ex. 5: Communications from TCAPS, pg. 29). The October 7 Kelly Document related or referred to a complaint(s) against Cardon. *Id.* See also, Video Footage of November 25, 2019 Board Meeting at 53:27-57:22, <https://livestream.com/tcapslive/Board/videos/199310794>.

*The October 7, 2019 Closed Session*

21. On October 7, 2019, TCAPS' Board entered into a closed session to discuss a "complaint" later learned to be about Superintendent Ann Cardon. The TCAPS board left the 1 hour and 10 minute closed session with no vote. Nor did the TCAPS board further discuss any issue relating to Cardon. Further, there was no discussion nor any vote authorizing anyone to negotiate with Cardon regarding her employment nor was there any discussion or vote to authorize anyone to prepare a separation agreement with Cardon. **Ex. 6:** October 7, 2019 Meeting Minutes; See also, Video Footage of October 7, 2019 Board Meeting at 2:23:54-2:24:41, <https://livestream.com/tcapslive/Board/videos/197585374>.

*October 8-10: A Decision to Separate Cardon's Employment is Reached Outside an Open Meeting and TCRE Begins Requesting Information via FOIA*

22. Over the next days, TCAPS Board President Kelly and Cardon communicated multiple times. **Ex. 7:** Text Messages; **Ex. 8:** Call Records. It is apparent that at this point in time the Board and Cardon had come to "a mutual[] agree[ment] to separate" and TCAPS' counsel, as well as Cardon's, were in communication. **Ex. 7.**

23. Cardon also apparently communicated to a group of unknown persons that, "due to personal issues, with the Board's approval, I've requested some time off." **Ex. 7:** October 10, 2019 Text Messages. This text was apparently drafted by Kelly. *Id.*, p 2. Neither the request for time off by Cardon nor the Board approval of the request were the subject of discussion or decision at an open meeting.

24. On October 10, the TCRE submitted a FOIA request seeking a copy of the document prepared by Kelly. **Ex. 9: FOIA Request for Kelly Document.**

25. Also on October 10, TCRE issued a FOIA request seeking:

All written communications (including but not limited to emails, cell phone text messages, written letters and memos) sent or received during the period of Aug. 1, 2019-Oct. 10, 2019, by any Traverse City Area Public Schools Board of Education members or any member of the TCAPS executive team regarding Ann Cardon's job performance, Cardon's standing with the board, Cardon's employment with the district and complaints filed by or against Cardon"; "Ann Cardon's complete personnel record, including any complaints"; Jame McCall's personnel record, limited to evaluations, discipline and any complaints"; and "Copies of Jame McCall's contracts."

**See Ex. 10, Referencing FOIA Request for Personnel Records and Communications Regarding Performance.**

26. And also on October 10, TCRE issued a FOIA request seeking communications between Cardon and Kelly. **See Ex. 11, Referencing FOIA Request for Cardon/Kelly Communications.**

27. Ms. Kelly informed Ms. Cardon, as well as the rest of the Board, of TCRE's FOIA request that same day. **Ex. 7; Ex. 12:** October 10, 2019 Email Communication.

28. On that same date, Ms. Kelly informed various persons that TCAPS' executive team "has reached out to all bargaining heads and have received much support." **Ex. 12.**

29. That evening, October 10, TCAPS posted late evening notification of an untelevised special meeting for 3:00 pm the following day for the purpose of entering closed session for the purposes of receiving a privileged attorney client communication.

***October 11: More Information Concerning the Decision to Separate Cardon's Employment Comes to Light Though No Public Deliberation or Decision at an Open Meeting had Occurred***

30. On October 11, the TCAPS school administrators' union released a statement lamenting the "sudden leadership change" and thanking Cardon for her work. **Ex. 13:** TCAA Statement. TCAPS officials did not acknowledge the leadership change publicly for several more days.

31. That same day, October 11, a text message from Kelly to Cardon suggested a joint statement on Cardon's departure. **Ex. 7.**

32. On October 11, the TCRE issued a FOIA request seeking a copy of Cardon's resignation letter and a copy of the separation agreement. **Ex. 14: FOIA Request for Resignation Letter and Separation Agreement.**

33. As of October 11, no public discussion at an open meeting, much less a vote to separate Cardon's services had occurred.

***The October 11, 2019 Closed Session***

34. At the October 11 meeting, there was substantial public comment and criticism over TCAPS' failure to disclose what was occurring with Cardon. **Ex. 15:** October 11, 2019 Meeting Minutes.

35. At the October 11 meeting, the Board met in closed session "for the purpose of receiving Privileged Attorney Client Communication as allowed by the Open Meetings Act, P.A. 267 of 1976, Section 8(h)". *Id.*

36. OMA only allows a closed session for consideration of a written legal opinion limited to the meaning of any strictly legal advice presented in the written opinion. The exemption does not apply to receiving an oral legal opinion or communication. *Booth Newspapers, Inc. v Wyoming*, 168 Mich App 459 (1988).

37. Further, a public body must state on the record those documents it deems exempt. *Herald Co, Inc v Tax Tribunal*, 258 Mich App 78, 86 (2003).

38. No document was identified by TCAPS with respect to its closed session at the October 11 meeting.



39. Legal invoices from TCAPS' counsel do not reflect the preparation of any legal opinion or legal memoranda during the relevant time period. **Ex. 16:** Legal Invoices from August through November 2019.

40. The October 11, 2019 meeting, like the October 7, 2019 meeting, ended after a lengthy closed session with no public discussion by the TCAPS Board about Cardon's employment status. Once again there was no deliberation or any vote authorizing anyone to negotiate with Cardon regarding her employment.

***October 13-16, 2019: More Information Concerning the Decision to Separate Cardon's Employment Comes to Light Though No Public Deliberation or Decision at an Open Meeting had Occurred***

41. On October 13, 2019, Kelly sent an email outlining talking points to five other board members, an effort to organize messaging and quiet community uproar. Kelly excluded Board member Ms. Moon Mohr. **Ex. 17:** October 13, 2019 Email from Kelly to Board Members Excluding Ms. Moon.

42. On October 14, 2019, Kelly spoke on talk radio. Kelly admitted that the October 7, 2019 closed session was to discuss a complaint against a staff member. See *Radio Recording*: <https://soundcloud.com/ronjolly/r-j-show-10-14-vic-interviews-sue-kelly-tcaps>.

43. On October 16, TCAPS posted a last-minute notice for a second untelevised meeting for "Authorization of Mutual Agreement."

44. As of October 16, no public discussion at an open meeting, much less a vote to separate Cardon's services had occurred.

***October 17: Fait Accompli #1 – the Board Votes on a Separation Agreement with Cardon and  
Fait Accompli #2 – the Board Names Pavelka Interim Superintendent***

45. At the October 17, 2019 untelevised meeting, the TCAPS Board voted on an agreement (“Separation Agreement”) between Cardon and TCAPS that included \$180,000 in severance after 78 days on the job. **Ex. 18:** October 17, 2019 Meeting Minutes.

46. Also at the October 17 meeting, the Board voted to name Mr. Jim Pavelka as Interim Superintendent. **Ex. 18.**

47. Board member Moon Mohr was not included in any conversations as to recommendations for a replacement for Ms. Cardon. **Ex. 19:** October 17, 2019 Meeting Video.

48. In response to Moon Mohr’s question as to why she was not included in any conversations as to a replacement, Defendant Kelly admitted that she left Mr. Pavelka’s house minutes before the Board meeting. **Id.**

49. At no time prior to the October 17 meeting, was there deliberation or decision at a public meeting on a replacement for Cardon, in violation of OMA.

50. At no time prior to the October 17 meeting, was there deliberation or decision at a public meeting authorizing anyone, including Defendant Kelly, to offer the interim Superintendent position to Mr. Pavelka.

***The Board’s Delay and Obfuscation in Responding to TCRE’s FOIA Requests***

51. Immediately after the October 17 Board meeting, TCAPS Board President Kelly refused to release the Separation Agreement (previously requested via FOIA by TCRE, but which TCAPS had not yet responded to) when verbally requested to do so despite the fact that Cardon had signed the Separation Agreement 2 days prior and the TCAPS Board had just voted on it. **Ex. 14.** Kelly said the terms were confidential and it had to be FOIA’d.

52. TCAPS FOIA coordinator Christine Guitar also declined to fulfill TCRE's October 11 FOIA request seeking the Separation Agreement. Instead, 4 days later, on October 21, Ms. Guitar sent a notice with a 10-day extension for responding to TCRE's FOIA request for the Separation Agreement. **Ex. 20:** October 21, 2019 FOIA Extension Request. In that notice, TCAPS speciously claimed the need for the extension "**to enable us to search for the information requested**, as well as determine exempt from non-exempt information, and to redact exempt information, if any. **Ex. 20.**

53. This same day, October 21, Ms. Guitar claimed that she "found" TCRE's October 10 request for the Kelly Document in an archive folder. In other words, Guitar claimed that she found TCRE FOIA Request # 1 – the Request for the Kelly Document – 12 days after it was sent. **Ex. 21:** October 21, 2019 Correspondence Re: FOIA Request Archived.

54. On October 28, the TCAPS Board approved the minutes from its October 7, meeting, including its October 7 closed session. **Ex. 22:** October 28, 2019 Meeting Minutes; See also, Video Footage from October 28, 2019 Board Meeting at 44:39-45:10 <https://livestream.com/tcapslive/Board/videos/198332935>.

55. At this same meeting, the TCAPS Board approved without deliberation a contract with Mr. Pavelka.

56. Prior to the October 28 approval of the Pavelka contract, there was no deliberation or discussion at an open meeting authorizing anyone to negotiate a contract with Mr. Pavelka, nor draft such a contract.

57. During this same meeting, TCAPS Board President Kelly shut down the official video stream of the board's regular meeting to preserve the "privacy" of the nine candidates set to interview during the public meeting for a vacant seat on the board.

58. Nineteen days after its submission, on October 29 (the day after the approval of the October 7 minutes), TCAPS denied TCRE's FOIA Request for the Kelly Document on the basis that:

Your request identifies documentation that was specifically and exclusively prepared for use in a closed session of the Board. Such notes/documentation are exempt from disclosure under Section 13(1)(d) of the FOIA and Section 7(2) of the Open Meetings Act. Accordingly, your request must be denied.

**Ex. 23:** October 29, 2019 Denial of Kelly Document.

59. That same day, TCAPS denied in part TCRE's FOIA Request for Personnel Records and Communications Regarding Performance. **Ex. 24:** October 29, 2019 Denial of Personnel Records and Communications. Certain parts of the documents provided were redacted without explanation. In addition, the request for any complaints regarding Cardon was denied based on the assertion that "no public records exist as of October 29, 2019, under the name(s) set forth in your request, nor under another name reasonable known to the district." **Ex. 24.** Of course, that same day, that same TCAPS FOIA Coordinator – Ms. Guitar – had already denied the request for the Kelly Document, which request also specifically referenced a complaint. *See* ¶ 52 above.

60. On November 1, 2019, TCRE's FOIA Request for Cardon/Kelly Communications was denied in part. Redactions were made on the basis that the emails were "personal" and also on the basis of "attorney-client privileged information". **Ex. 25:** November 1, 2019 FOIA Denial, In Part).

***TCRE's FOIA Appeals and TCAPS Response to the Appeal***

61. On November 6, 2019 the TCRE submitted FOIA appeals for the following:

- FOIA Request for the Kelly Document;

- FOIA Request for Personnel Records and Communications Regarding Performance; and
- FOIA for Communications between Cardon and Kelly

**Ex. 26:** November 6, 2019 Appeal for Kelly Document, Personnel Records, and Communications with Kelly and Cardon.

62. TCRE's appeals were considered at the Board's November 25, 2019 meeting.

**Ex. 27:** November 25, 2019 Meeting Minutes; **Ex. 28;** **Ex. 29;** **Ex. 30:** Appeal Responses.

63. With respect to the appeal for Communications between Cardon and Kelly, TCAPS granted the appeal in part, redacting only personal email addresses. **Ex. 29:** TCAPS Partial Denial for Communications between Cardon and Kelly.

64. Notably, TCAPS did not acknowledge that it was withdrawing its spurious assertion of attorney-client privilege with respect to such communications.

65. Moreover, TCAPS did not produce text messages from Kelly, despite the fact that Kelly clearly was exchanging responsive texts with Cardon. **Ex. 7.**

66. TCAPS never provided TCRE any certification that no responsive texts from Kelly existed and/or that they were unavailable.

67. With respect to the appeal for the Kelly Document, TCAPS denied the appeal, asserting for the first time that the document was exempt as part of closed session minutes. **Ex. 30:** TCAPS Denial of Appeal for Kelly Document.

68. The statements of the Board and its counsel are telling and demonstrate their affirmative intent to prevent the disclosure of information:

Board Member Moon: I thought the minutes were not materials presented.

Board President

Kelly: The Complaint is part of the minutes.

Ms. Mullett: FOIA in a vacuum is a law of disclosure. And it encourages districts to disclose information that would otherwise be exempt by not assigning a penalty if you do so disclose the information.

So if there is an exemption that says don't disclose and the district chooses to disregard that then under FOIA there is no penalty. You can't get in trouble.

...and in this case...closed session laws, and that says minutes of a closed session cannot be disclosed absent a court order. And other law – penalty for disclosure.

When you think about minutes, the law provides for a minimum of what the minutes must include. There is no maximum. So as a group you will all decide or it is decided based on the discussion what is included and what is not.

...But you have no limits on what is included.

\*\*\*\*

Board President Kelly: In my opinion, simply stated staff members requested confidentiality.

See Video Footage of November 25, 2019 Board Meeting at 53:27-57:22,  
<https://livestream.com/tcapslive/Board/videos/199310794>

69. In other public statements, Defendants TCAPS and Kelly have stated that they are legally obligated to protect the “privacy” of Cardon.

70. In public statements, Defendants TCAPS and Kelly have deliberately and erroneously indicated to the public that “privacy” concerns trump FOIA, OMA, and the public’s right to know.

71. FOIA’s purpose is clearly stated:

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. MCL 15.231(2).

72. The vast majority of FOIA's exemptions are discretionary, not mandatory. *See* MCL 15.243.

73. The assertion that FOIA is a statute designed merely to protect public bodies who wrongly disclose information is without support in its statutory text or the case law.

74. Similarly, Defendant Kelly's public assertion that OMA was enacted to protect individuals and organizations that would otherwise be negatively impacted by the disclosure of personal information is without support in its statutory text or the case law.

75. "[T]he purpose of the OMA is to promote governmental accountability by facilitating public access to official decision making and to provide a means through which the general public may better understand issues and decisions of public concern." *Kitchen v Ferndale City Council*, 253 Mich App 115, 125; 654 NW2d 918 (2002), overruled on other grounds by *Speicher*, 497 Mich 125, citing *Booth Newspapers, Inc v Univ of Mich Bd of Regents*, 444 Mich 211, 231; 507 NW2d 422 (1993).

76. Counsel for TCRE sent an appeal to TCAPS on December 3, 2019. **Ex. 31:** Correspondence from TCRE, December 3, 2019. Among other things, that appeal letter pointed out that TCAPS had provided 2 different explanations for its failure to disclose the Kelly Document, i.e., first that it was "prepared for use in a closed session" and then that it was "part of the minutes" of the closed session. **Ex. 23; Ex. 30.** It further pointed out that a public body does not have unfettered discretion to place any documents it wants into closed meeting minutes.

77. When no response was forthcoming, and Plaintiff received different stories from different TCAPS officials about TCAPS responding to the letter, a second letter was sent on December 17, 2019. **Ex. 32:** Correspondence from TCRE, December 17, 2019. That letter prompted a phone call from TCAPS counsel essentially stating that because the Kelly Document

was part of the closed meeting minutes, TCAPS could not provide the document absent a court order.

**COUNT I – VIOLATIONS OF THE FREEDOM OF INFORMATION ACT**

78. Plaintiff incorporates herein the allegations contained in paragraphs 1 through 77.

79. TCAPS knowingly and deliberately delayed disclosing the Separation Agreement and Resignation letter.

80. TCAPS knowingly and deliberately delayed in disclosing certain communications between Cardon and Kelly by improperly invoking attorney-client privilege.

81. TCAPS knowingly and deliberately withheld responsive text communications in the possession of Kelly. Alternatively, TCAPS knowingly and deliberately failed to certify that no responsive texts from Kelly existed and/or that they were unavailable.

82. TCAPS knowingly and deliberately delayed in responding to TCRE's request for the Kelly Document.

83. The Kelly Document was prepared in advance of the Board's October 7, 2019 closed session.

84. The Kelly Document is not a transcription of testimony of witnesses during a closed session.

85. The Kelly Document, having been prepared prior to the closed session, is not a transcription of dialogue between board members in a closed session.

86. OMA provides that: "A separate set of minutes shall be taken by the clerk or the designated secretary of the public body at the closed session. These minutes shall be retained by the clerk of the public body, are not available to the public..." MCL 15.267(2).



87. OMA does not provide for a public body to add any materials it desires to closed minutes.

88. Pursuant to the FOIA, the public and TCRE have a right of access to the Kelly Document.

89. This is a matter of great importance to the public.

90. Because of Defendants' denial of access, TCRE is unable to fulfill its duty to promptly and fully inform the public as to the conduct of TCAPS and its former Superintendent.

**WHEREFORE**, Plaintiff prays this Court:

- a. To expedite the hearing of this action as required by MCL 15.240(3);
- b. To order Defendants to cease withholding and to produce the Kelly Document in each and every iteration;
- c. To award TCRE reasonable attorney fees, costs and disbursements to be taxed against Defendants pursuant to MCL 15.240(6);
- d. To award TCRE additional actual damages against Defendants pursuant to MCL 15.240(7), as well as punitive damages, because Defendants have arbitrarily and capriciously violated the FOIA by delaying and refusing disclosure or production of public records; and
- e. To grant such other and further relief as the Court may deem just and proper.

**COUNT II – VIOLATIONS OF THE OPEN MEETINGS ACT – MCL 15.271**

91. Plaintiff incorporates herein the allegations contained in paragraphs 1 through 90.

92. TCAPS engaged in multiple and ongoing acts in violation of OMA within a relevant timeframe, reflecting that it is a public body has been regularly engaging in activity that violates the OMA.

93. Pertinent here, OMA provides that: “A public body may meet in a closed session only for the following purposes:

- (a) To consider the dismissal, suspension, or disciplining of, or to hear complaints or charges brought against, or to consider a periodic personnel evaluation of, a public officer, employee, staff member, or individual agent, if the named person requests a closed hearing. A person requesting a closed hearing may rescind the request at any time, in which case the matter at issue shall be considered after the rescission only in open sessions.”

MCL 15.268(a).

94. OMA further provides that “[a]ll decisions of a public body shall be made at a meeting open to the public.” MCL 15.263(2).

95. Over the course of several weeks in October 2019, the TCAPS board held multiple, closed board meetings in direct violation of OMA.

96. During the October closed meetings, the TCAPS board made multiple decisions with respect to the complaint against Cardon. None of these decisions were made at an open meeting and each separately constitutes a violation of OMA.

97. The TCAPS board made a decision to separate its relationship with Cardon prior to the public vote ratifying the Separation Agreement that officially ended Cardon’s employment. That decision was not made at an open meeting and constitutes a violation of OMA.

98. The TCAPS board made a decision to negotiate a Separation Agreement with Cardon. That decision was not made at an open meeting and constitutes a violation of OMA.

99. The TCAPS board made a decision to authorize someone to negotiate a Separation Agreement with Cardon. That decision was not made at an open meeting and constitutes a violation of OMA.

100. The TCAPS board made a decision to authorize an attorney to negotiate and draft a Separation Agreement with Cardon. That decision was not made at an open meeting and constitutes a violation of OMA.

101. The TCAPS board made a decision to offer the interim Superintendent position to Mr. Pavelka. That decision was not made at an open meeting and constitutes a violation of OMA.

102. The TCAPS board made a decision for Defendant Kelly to discuss the offer of the interim Superintendent position to Mr. Pavelka. That decision was not made at an open meeting and constitutes a violation of OMA.

103. The Board's October 11, 2019 closed session failed to comply with the law. No document was identified by TCAPS with respect to its closed session at the October 11 meeting.

104. Further, TCAPS' counsel's invoices do not reflect the preparation of a written legal opinion or memorandum during the relevant time period.

105. A closed session to receive an oral legal opinion is a violation of OMA.

106. The TCAPS Board made the decision to make the document prepared by Board President Kelly part of the minutes of the October 7 closed session. This constitutes another violation of OMA as the document pre-dates the closed session, was not a transcript of the closed session nor otherwise constitutes "minutes" of a closed session.

107. The TCAPS Board's decision to include the Kelly Document as part of the closed session "minutes" was a deliberate, knowing and intentional act to prevent the public from knowing the nature of and details on the complaint and to circumvent FOIA.

108. The TCAPS Board beginning at least sometime before the October 7 closed session engaged in a pattern of activity violating OMA as set forth in ¶ 20 above.

109. This pattern of activity was willful and intentional.

110. The October 17, 2019 vote by the Board on the Separation Agreement was, practically speaking, a *fait accompli* by the time the vote occurred.

111. As a result of this pattern the public has been harmed in at least the following ways:

- a. Having no information on the nature of the complaint brought against the CEO of TCAPS;
- b. Having no information on what due diligence if any, the public's elected officials (the TCAPS Board) conducted with respect to the complaint brought against Cardon;
- c. Having paid Cardon's entire salary as part of a separation agreement;
- d. Having TCAPS' administration disrupted by Cardon's departure;
- e. Incurring the expense and disruption related to the selection of a new Superintendent; and
- f. Having no information on what mistakes might have been made in the hiring of Cardon that should guide the hiring of the next Superintendent.

**WHEREFORE**, Plaintiff prays this Court:

- a. Issue an injunction compelling Defendants' compliance with OMA or alternatively enjoin further noncompliance;
- b. Order Defendants to cease withholding and to produce the requested document as a public record;
- c. To award TCRE attorney fees and costs to be taxed against Defendants pursuant to MCL 15.271(4); and

d. To grant such other and further relief as the Court may deem just and proper.

**COUNT III – INTENTIONAL VIOLATION OF  
THE OPEN MEETINGS ACT – MCL 15.273  
M. Sue Kelly – Board President**

112. Plaintiff incorporates herein the allegations contained in paragraphs 1 through 111.

113. Defendant Kelly had the subjective desire to keep the contents of the Kelly Document from public disclosure.

114. Defendant Kelly had the subjective desire to keep the details of the Cardon employment separation from public disclosure.

115. Kelly had text communications with Cardon on October 8 and 9 reflecting the fact that a decision had been made with respect to Cardon's employment.

116. Kelly had at least 6 calls with Cardon between October 7 and October 9 reflecting the fact that a decision had been made with respect to Cardon's employment.

117. Prior to TCAPS Board member Moon Mohr's letter to her fellow board members on October 10, Kelly was negotiating a statement with Cardon regarding Cardon leaving her position.

118. Defendant Kelly was the leader and instigator of the Board's OMA violations as evidenced by her texts and emails.

119. Prior to the Board's October 11 meeting, TCAPS' counsel and counsel for Cardon were working on an agreement.

120. The TCAPS board, led by Kelly, made a decision with respect to the complaint against Cardon. That decision was not made at an open meeting and constitutes a violation of OMA.

121. The TCAPS board, led by Kelly, made a decision to separate its relationship with Cardon. That decision was not made at an open meeting and constitutes a violation of OMA.

122. The TCAPS board, led by Kelly, made a decision to negotiate a separation agreement with Cardon. That decision was not made at an open meeting and constitutes a violation of OMA.

123. The TCAPS board, led by Kelly, made a decision to authorize someone to negotiate a separation agreement with Cardon. That decision was not made at an open meeting and constitutes a violation of OMA.

124. The TCAPS board, led by Kelly, made a decision to authorize someone to negotiate a statement with Cardon. That decision was not made at an open meeting and constitutes a violation of OMA.

125. The TCAPS board, led by Kelly, made a decision to authorize someone to draft a separation agreement with Cardon. That decision was not made at an open meeting and constitutes a violation of OMA.

126. The fact that no public deliberations took place with respect to the decisions outlined in ¶¶ 97-105 above evidences that deliberations had already taken place privately.

127. The fact that no public decisions took place with respect paragraphs ¶¶ 97-105 above evidences that that decisions had already taken place privately.

128. Defendant Kelly's multiple texts and 16 phone calls with Cardon between October 7 and the October 17 board meeting authorizing the signing of the Separation Agreement evidences that a decision had been made and that negotiations were taking place.

129. The TCAPS board, led by Kelly, made a decision to offer the interim Superintendent position to Mr. Pavelka. That decision was not made at an open meeting and constitutes a violation of OMA.

130. The TCAPS board, led by Kelly, made a decision for Defendant Kelly to offer the interim Superintendent position to Mr. Pavelka. That decision was not made at an open meeting and constitutes a violation of OMA.

131. Defendant Kelly made the offer of the interim-Superintendent position to Mr. Pavelka without any deliberation or decision in an open meeting and constitutes a violation of OMA.

132. The Board's October 11, 2019 closed session failed to comply with the law. No document was identified by Kelly or TCAPS with respect to its closed session at the October 11 meeting.

133. In addition, the TCAPS Board, led by Kelly, made the decision to make the document prepared by Kelly part of the minutes of the October 7 closed session. This constitutes another violation of OMA as the document pre-dates the closed session, was not a transcript of the closed session or otherwise constitute "minutes" of a closed session.

134. The TCAPS Board's decision, led by Kelly, to include the Kelly Document as part of the closed session "minutes" was a deliberate, knowing, and intentional act to circumvent FOIA and prevent the public from knowing the nature of the complaint.

135. The TCAPS Board beginning at least sometime before the October 7 closed session engaged in a pattern of activity violating OMA as set forth above.

136. This pattern of activity was willful and intentional.

**WHEREFORE**, Plaintiff prays this Court:

- a. To award TCRE actual and exemplary damages of not more than \$500 total to be taxed against Defendant Kelly pursuant to MCL 15.273(1).
- b. To award TCRE actual attorney fees and costs to be taxed against Defendant Kelly pursuant to MCL 15.273(1); and
- c. To grant such other and further relief as the Court may deem just and proper.

**COUNT IV-- STATUTORY ATTORNEYS' FEES AND COSTS PURSUANT  
TO MCL 15.240 and MCL 15.271**

137. Plaintiff incorporates herein the allegations contained in paragraphs 1 through 136.

138. Defendants' actions and/or omissions, as set forth herein, violate the Freedom of Information Act.

139. As a result of Defendants' violation of the Freedom of Information Act, Plaintiff is entitled to actual or compensatory damages, as well as punitive damages in the amount of \$1,000 pursuant to MCL 15.240(7).

140. As a result of Defendants' violation of the Freedom of Information Act, Plaintiff is entitled to reasonable attorneys' fees, costs, and disbursements pursuant to MCL 15.240(6).

141. Defendants' actions and/or omissions, including TCAPS' multiple and ongoing acts in violation of OMA within a relevant timeframe, entitle Plaintiff to injunctive relief, as well as costs and attorneys' fees.

142. As a result of Defendants' violation of the Open Meetings Act, Plaintiff is entitled to recover court costs and actual attorneys' fees for the prosecution of the subject action pursuant to MCL 15.271(4).



143. As a result of Defendant Kelly's intentional violation of the Open Meetings Act, Plaintiff is entitled to recover court costs and actual attorneys' fees for the prosecution of the subject action pursuant to MCL 15.273(1).

**WHEREFORE**, Plaintiff prays this Court:

- a. Award Plaintiff actual or compensatory damages against Defendants, as well as punitive damages in the amount of \$1,000 pursuant to MCL 15.240(7);
- b. Award Plaintiff reasonable attorneys' fees, costs, and disbursements against Defendants pursuant to MCL 15.240(7); and
- c. Award Plaintiff costs and actual attorneys' fees against Defendants pursuant to MCL 15.271(4).
- d. Award Plaintiff costs and actual attorneys' fees against Defendant Kelly pursuant to MCL 15.273(1).
- e. To grant such other and further relief as the Court may deem just and proper.

Respectfully submitted,

**BUTZEL LONG, a professional corporation**

By: 

Robin Luce Herrmann (P46880)

Javon R. David (P78214)

41000 Woodward Avenue

Bloomfield Hills, MI

248.258.1616 Fax: 248.258.1439

Attorneys for Plaintiff Traverse City Record-Eagle

Dated: January 21, 2020  
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