STATE OF MICHIGAN

COURT OF APPEALS

DAVID SUTTON, JR.,

Plaintiff-Appellee,

v

CITY OF OAK PARK and G. ROBERT SEIFERT,

Defendants-Appellants.

FOR PUBLICATION
May 14, 2002
9:05 a.m.

No. 229640
Oakland Circuit Court
LC No. 00-021310-AW

Before: Holbrook, Jr., P.J., and Jansen and Wilder, JJ.

PER CURIAM.

Defendants appeal as of right from the trial court's order granting summary disposition in favor of plaintiff in this action brought under the Michigan Freedom of Information Act (FOIA), MCL 15.231 *et seq.* We reverse.

This case arises out of an incident that occurred on October 28, 1999, in the city of Oak Park. Plaintiff arrived at the home of Sabrina Finley, but she asked him to leave and he refused to do so. Finley advised plaintiff that if he did not leave, then she would call the police. At that point, plaintiff left, but returned to Finley's home shortly thereafter. Plaintiff was eventually approached by Oak Park Police Officer Bernard Anderson. Anderson told plaintiff that Finley requested that he stop harassing her and that he could be arrested for trespassing. This was the second time that Anderson warned plaintiff to stop harassing Finley, as Finley had twice reported to the police that plaintiff arrived uninvited to her home and would not leave when asked to do so.

On November 9, 1999, plaintiff filed a citizen's complaint with the Oak Park Public Safety Department, alleging misconduct on Anderson's part. This resulted in an internal investigation of Anderson. On December 21, 1999, Robert Bauer, Deputy Director of the Oak Park Public Safety Department, responded to plaintiff's complaint by stating that the investigation was complete and that there was no evidence of misconduct by Anderson.

On January 4, 2000, plaintiff sent a letter to Bauer requesting, under the FOIA, a copy of all documents regarding Anderson's internal investigation. The request was denied on January 5, 2000, stating that the records were exempt from disclosure as being investigative records compiled for law enforcement purposes. MCL 15.243(1)(b). Plaintiff appealed his denial to the Public Safety Department and had a discussion with defendant G. Robert Seifert, the Director of

the Oak Park Public Safety Department. On January 17, 2000, the Oak Park city council voted unanimously to deny plaintiff's request for the records relating to the internal investigation. The city council stated the records were exempt from disclosure because they were records compiled for law enforcement purposes and could interfere with an ongoing investigation and result in an unwarranted invasion of personal privacy. MCL 15.243(b)(*i*) and (*iii*). The city council also claimed the records were exempt from disclosure because they were personnel records of a law enforcement agency. MCL 15.243(s)(*ix*).[1]

Following these denials of his requests for the records, plaintiff filed a complaint in the Oakland Circuit Court on March 2, 2000, requesting the records under the FOIA. Thereafter, defendants moved for summary disposition under MCR 2.116(C)(8), contending that the records were exempt under MCL 15.243(1)(b)(*v*), and plaintiff also moved for summary disposition under MCR 2.116(C)(8).

The trial court, in an order entered on August 3, 2000, denied defendants' motion for summary disposition and granted in part plaintiff's motion for summary disposition. The trial court ordered defendants to produce the complete investigative file regarding plaintiff's complaint against Anderson to plaintiff by August 4, 2000. The trial court denied plaintiff's request for punitive damages. Defendants immediately moved for rehearing or reconsideration under MCR 2.119(F) contending that the records were exempt under § 13(1)(s)(*ix*) of the FOIA because they were personnel records of a law enforcement agency. The trial court denied the motion for reconsideration, but granted defendants' motion for stay of proceedings in a final order entered on August 23, 2000. Defendants have filed their claim of appeal, and argue that the records requested by plaintiff are exempt from disclosure under MCL 15.243(1)(b)(*i*), (*iii*) and (s)(*ix*).

Initially, we address the position of plaintiff and the trial court regarding the motion for reconsideration that defendants' reliance on MCL 15.243(1)(s)(*ix*) was improper because it was not relied upon in defendants' motion for summary disposition and that the trial court was therefore required to deny defendants' motion for reconsideration. This is not an accurate statement of the law because defendants' motion for reconsideration was brought under MCR 2.119(F), which, by its terms, does not restrict the discretion of the trial court in ruling on the motion. See MCR 2.119(F)(3). Clearly, whether MCL 15.243(1)(s)(*ix*) applies to the records at issue to exempt them from disclosure was presented both by the city council and defendants in their motion for reconsideration. More importantly, the issue on appeal is a question of law, brought under MCR 2.116(C)(8), and the facts necessary for its resolution are before this Court. *Michigan Twp Participating Plan v Federal Ins Co,* 233 Mich App 422, 435-436; 592 NW2d 760 (1999) (An issue not addressed by the trial court may nevertheless be addressed by the appellate court if it concerns a legal issue and the facts necessary for its resolution have been presented.).

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[1] We note that the statute was amended effective May 1, 2000, and that § 13(1)(s)(*ix*) was formerly designated as § 13(1)(t)(*ix*). We will refer to the new designation in this opinion and note that only the designation, but not the substance, of this subsection was amended.

We agree with defendants that the records are exempt under MCL 15.243(1)(s)(*ix*), which provides:

> A public body may exempt from disclosure as a public record under this act:
>
> * * *
>
> (s) Unless the public interest in disclosure outweighs the public interest in nondisclosure in the particular instance, public records of a law enforcement agency, the release of which would do any of the following:
>
> * * *
>
> (*ix*) Disclose personnel records of law enforcement agencies.

In *Newark Morning Ledger Co v Saginaw Co Sheriff,* 204 Mich App 215, 223; 514 NW2d 213 (1994), this Court held that internal investigation records of a law enforcement agency can fall within the meaning of "personnel records of law enforcement agencies" as used in the FOIA. Once it is determined that the records are personnel records of a law enforcement agency, it must be determined whether the public interest in disclosure outweighs the public interest in nondisclosure in the particular instance. *Id.* at 224. This analysis with respect to internal investigation records of a law enforcement agency was affirmed by our Supreme Court in *Kent Co Deputy Sheriffs Ass'n v Kent Co Sheriff,* 463 Mich 353, 365-367; 616 NW2d 677 (2000).

Consequently, the internal investigation records requested by plaintiff constitute personnel records of a law enforcement agency that can be exempt from disclosure. Further, we believe that the affidavit of Deputy Director Robert Bauer provides sufficient reasons for nondisclosure. In his affidavit, he avers:

> 3. It is my experience that the process involved in conducting internal investigations is extremely difficult since employees are reluctant to give statements about the conduct and actions of fellow employees.
>
> 4. If such statements made during the course of internal investigations were made public, employees would likely refuse to give such statements, or would not be completely candid and forthcoming during such investigations.
>
> 5. Further, if such statements are made public, the ability of the City's Public Safety Department to conduct such investigations would be destroyed or severely curtailed since information could not be obtained.

We find that these reasons establish that the public interest favors nondisclosure of the records requested by plaintiff. See, e.g., *Kent Co Deputy Sheriffs, supra* at 365-366. Plaintiff has not shown that the public interest in disclosure outweighs the public interest in nondisclosure, as required by the statute to warrant disclosure.

Accordingly, defendants had the right to exempt from disclosure the internal investigation records requested by plaintiff under MCL 15.243(1)(s)(*ix*).[2] Therefore, we reverse the trial court's order that denied defendants' motion for summary disposition and granted plaintiff's motion for summary disposition. We remand for the trial court to enter summary disposition in favor of defendants.

Reversed and remanded for entry of judgment in favor of defendants. Jurisdiction is not retained.

/s/ Donald E. Holbrook, Jr.
/s/ Kathleen Jansen

[2] Because we find that the requested records are exempt from disclosure under MCL 15.243(1)(s)(*ix*), we need not address the other subsections relied on by defendants as an alleged basis for nondisclosure.

S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

DAVID SUTTON, JR., Plaintiff-Appellee,	FOR PUBLICATION May 14, 2002
V CITY OF OAK PARK and G. ROBERT SEIFERT, Defendants-Appellants.	No. 229640 Oakland Circuit Court LC No. 00-021310-AW

Before: Holbrook, Jr., P.J., and Jansen and Wilder, JJ.

WILDER, J., *(concurring.)*

I join with the majority in finding that the records at issue in this case are exempt from disclosure under MCL 15.243(1)(s)(*ix*). I write separately to explain why I conclude that the trial court had discretion to consider this ground for dismissal of plaintiff's action asserted in defendant's motion for reconsideration, despite defendant's failure to assert this ground in its motion for summary disposition.

MCR 2.119(F)(3) provides:

> (3) *Generally, and without restricting the discretion of the court*, a motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted. The moving party must demonstrate a palpable error by which the court was misled and show that a different disposition of the motion must result from correction of the error. [Emphasis added.]

Here, the trial court erred by failing to recognize its discretion to address the ground asserted in defendants' motion for reconsideration. See *Kowalski v Fiutowski*, 247 Mich App 156, 165-166; 635 NW2d 502 (2001). The trial court's failure to recognize its discretion is particularly significant here because the record clearly establishes that all of the *evidence* necessary to support summary disposition in favor of defendants based on the personnel records exemption, MCL 15.243 (1)(s)(*ix*), had been submitted to the trial court as exhibits attached to the motion for summary disposition, and were available to the trial court as it conducted its in camera hearing. Thus, while a party may be precluded from submitting new *evidence* to the trial court in support of a motion for reconsideration, see *Maiden v Rozwood*, 461 Mich 109, 126 n 9; 597

NW2d 817 (1999); *Quinto v Cross & Peters*, 451 Mich 358, 366 n 5; 547 NW2d 314 (1996)(in ruling on a motion for summary disposition, a court considers *the evidence then available to it*), a party raising a newly asserted *basis* for dismissal in a motion for reconsideration does not necessarily run afoul of *Maiden* and *Quinto* in the appropriate circumstances.

/s/ Kurtis T. Wilder