STATE OF MICHIGAN

COURT OF APPEALS

GIOVANNI VINCENT LIGORI,

Plaintiff-Appellant,

v

DIRECTOR OF THE MICHIGAN STATE POLICE,

Defendant-Appellee.

UNPUBLISHED
May 24, 2002

No. 230946
Macomb Circuit Court
LC No. 00-001197-CZ

Before: Smolenski, P.J., and Neff and White, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting summary disposition to defendant in this case involving the Michigan Freedom of Information Act (FOIA), MCL 15.231 *et seq.* We affirm in part, reverse in part, and remand.

I

Beginning in February 1999, plaintiff filed a series of requests seeking information from defendant pursuant to the FOIA. Plaintiff's initial request sought information concerning his personal record in the Law Enforcement Information Network (LEIN) and the identification of defendant's designee for FOIA requests. When defendant failed to provide the information, plaintiff filed four additional requests for information with defendant, as well as two appeals of request denials, over the course of the next year. Defendant failed to satisfy plaintiff's various requests for information, and, on March 21, 2000, plaintiff filed a complaint in the circuit court, seeking an order compelling defendant to produce the requested documents, and seeking costs, attorney fees, and punitive damages.

Plaintiff's complaint alleged causes of action under: (1) the FOIA; (2) the Michigan Penal Code, MCL 750.491, MCL 750.492, and MCL 750.505; (3) the Privacy Act of 1974, 5 USC 552(a); (4) the Maintaining and Supplying of Information; Law Enforcement Agencies statute, MCL 752.3(f); and (5) the Michigan common-law right to public records. Plaintiff moved for summary disposition pursuant to MCR 2.116(C)(10). The court denied plaintiff's motion and instead granted in part, and denied in part, summary disposition for defendant under MCR 2.116(I)(2). The trial court found that defendant had satisfied its obligations for information under the FOIA, and plaintiff's remaining claims failed for lack of jurisdiction

because plaintiff had failed to allege separate jurisdictional bases for the claims. The court found neither party entitled to costs or fees.

II

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Detroit Free Press v City of Warren*, ___ Mich App ___; ___ NW2d ___ (Docket No. 231010, issued 2/26/02), slip op p 1. A trial court may properly grant summary disposition to the opposing party under MCR 2.116(I)(2) if the opposing party, rather than the moving party, is entitled to judgment as a matter of law. *Id*. Whether a public record is exempt from disclosure under the FOIA is a mixed question of fact and law. *Id*. We review the trial court's factual findings for clear error and review questions of law de novo. *Id*. at 1-2.

III

It is the public policy of Michigan that all people, except prisoners, 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 so that they may fully participate in the democratic process. MCL 15.231(2); *Herald Co v Bay City*, 463 Mich 111, 118; 614 NW2d 873 (2000). The FOIA is a pro-disclosure statute, and its exemptions are narrowly construed. *Id.* at 119. "The FOIA requires full disclosure of public records, unless those records are exempted under the act." *Detroit Free Press, supra* at 2.

The FOIA sets forth specific requirements that must be followed in filing and responding to information requests under the statutory mandates for disclosure of public records. Unless otherwise agreed to in writing, a public body must respond to a request for a public record within five business days after it receives the request; the failure to respond to a request constitutes the public body's final determination to deny the request. MCL 15.235(2) and (3); *Scharret v City of Berkley*, ___ Mich App ___; ___ NW2d ___ (Docket No. 233038, issued 1/29/02, slip op p 3-4. "[I]f a public body makes a final determination to deny a request, the requesting person may either appeal the denial to the head of the public body or commence an action in the circuit court within 180 days." *Id*., citing MCL 15.235(7). If a plaintiff prevails in a lawsuit to compel disclosure under the FOIA, the circuit court must award reasonable attorney fees, costs, and disbursements to the plaintiff. *Scharret, supra* at 5.

A

Plaintiff concedes that the circuit court properly dismissed the claims that were based on his February 24, 1999, March 12, 1999, and May 10, 1999 FOIA requests because they are not within the 180-day limitation period. MCL 15.240(1)(b). We agree and therefore affirm the circuit court's dismissal of those claims.[1]

[1] Further, plaintiff did not pay the required fee or provide his date of birth necessary for defendant to process plaintiff's requests.

B

In regard to plaintiff's subsequent requests for information on October 6, 1999 and February 3, 2000, plaintiff first argues that defendant's failure to timely respond to plaintiff's requests constituted a denial of the requests. We agree. Defendant did not respond to the October 6, 1999 request until October 23, 1999, and did not respond to the February 3, 2000 request until April 19, 2000. Defendant's responses were not made within five business days of plaintiff's requests and, therefore, violated the FOIA and constituted a final determination to deny plaintiff's requests. MCL 15.235(2) and (3); *Scharret, supra* at 4. A public body's failure to timely respond is not excused even if the documents sought do not exist. *Id.* at 4 n 1. The circuit court erred in concluding that defendant's responses to these requests were proper. Furthermore, defendant violated MCL 15.235(4)(b) in its responses to plaintiff's FOIA requests by failing to include certificates that the records requested by plaintiff did not exist under the names given by plaintiff.

C

Because defendant's failure to timely respond constituted a denial of plaintiff's requests, plaintiff had the option of either appealing the denials to the head of the public body or commencing an action in the circuit court to compel disclosure. MCL 15.235(7) and 15.240(1); *Scharret, supra* at 4. Plaintiff filed two appeals of defendant's denials of his requests. The circuit court found that defendant properly responded to plaintiff's appeals. However, we conclude that defendant timely responded to the first appeal, but not the second.

Plaintiff filed his first appeal on November 19, 1999. On November 24, 1999, defendant sent a letter to plaintiff, stating that it was unable to process his request because:

> THE MSP NEEDS A DATE OF BIRTH TO RUN ANY TYPE OF LEIN CHECK. SINCE YOU AGAIN HAVE FAILED TO PROVIDE US WITH A DATE OF BIRTH TO PROCESS YOUR REQUEST AND BASED ON THE INFORMATION YOU HAVE PROVIDED, MSP HAS NO RECORD.

Although defendant's response was erroneous, in that plaintiff actually did supply his date of birth, it was "a written notice to the requesting person upholding the disclosure denial," within ten days, and properly responded to plaintiff's appeal pursuant to MCL 15.240(2).

Plaintiff again appealed defendant's denial of his FOIA requests on January 20, 2000, indicating that he had, in fact supplied his date of birth. On February 7, 2000, defendant sent plaintiff a letter, stating that it found no criminal history record under his name. Defendant did not respond to plaintiff's appeal within ten days; thus, defendant's response violated the FOIA, MCL 15.240(2).[2]

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[2] An exception exists to the ten-day requirement where the head of the public body is a board or commission, MCL 15.240(3); however, we find no evidence that the exception applies in this case.

Having determined that defendant's responses were untimely, we next consider whether plaintiff's requests were nonetheless met, thus rendering plaintiff's action to compel disclosure moot or whether an order compelling disclosure may be warranted. "When the disclosure that a suit seeks has already been made, the substance of the controversy disappears and becomes moot." *Herald Co, Inc, v Ann Arbor Public Schools*, 224 Mich App 266, 270-271; 568 NW2d 411 (1997).

IV

Plaintiff maintains his requests remain unfulfilled, in violation of the FOIA, and that the circuit court erred in concluding that defendant's responses were proper and sufficient. Plaintiff argues that, because the requested information is not exempt from disclosure, the trial court erred in failing to order defendant to produce the requested information. In response to plaintiff's motion for summary disposition, defendant argued that either the information requested by plaintiff that was not received, was not sufficiently described or the requested information did not exist.

With regard to the October 6, 1999 request, and plaintiff's subsequent appeals therefrom, the court concluded that defendant's response was proper because defendant indicated that it did not have the records, i.e., they did not exist, and defendant was not required to make a compilation, summary, or report of material, MCL 15.233(4).

"[T]he nonexistence of a record is a defense for the failure to produce or allow access to a record." *Hartzell v Mayville Comm School Dist*, 183 Mich App 782, 787; 455 NW2d 411 (1990). The FOIA generally does not require a public body to make a compilation, summary, or report of information and does not require a public body to create a new public record. MCL 15.233. In regard to the specificity with which a person requesting information must make his request, the FOIA states in relevant part:

> [U]pon providing a public body's FOIA coordinator with a written request *that describes a public record sufficiently to enable the public body to find the public record*, a person has a right to inspect, copy, or receive copies of the requested public record of the public body. [MCL 15.233(1) (emphasis added).]

Defendant presented the affidavit of the MSP Manager of the Identification Section of the Criminal Justice Information Center, stating that no information existed on the LEIN under plaintiff's name and birth date. The affidavit also stated that the databases under the CLEMIS and the NCIC are not accessible by defendant. The court cannot order production of a nonexistent document, *Hartzell, supra* at 787, order defendant to make a summary, compilation, or report of the information, MCL 15.233(4), or order defendant to create a new public record, MCL 15.233(5). Therefore, defendant cannot be ordered to produce the LEIN, CLEMIS, or NCIC documents requested by plaintiff in his October 6, 1999, request.

In regard to the STATIS information requested by plaintiff in his October 6, 1999, request, however, defendant did not argue that the information did not exist or was not accessible by defendant. In responding to plaintiff's motion for summary disposition, defendant provided the affidavit of the MSP Assistant FOIA Coordinator, stating that the STATIS is a database used for intelligence information in criminal investigations and that information on this database is not

subject to public disclosure, under privacy and law enforcement investigation exemptions of the FOIA. However, the circuit court did not address this issue.

In determining whether information is exempt from disclosure under the FOIA, the circuit court should: (1) receive a complete particularized justification for the exemption; (2) conduct a hearing in camera to determine whether justification exists; or (3) consider allowing the plaintiff's counsel access to the information in camera under a special agreement whenever possible. *Evening News Ass'n v City of Troy*, 417 Mich 481, 515-516; 339 NW2d 421 (1983).

> The burden of proving need for an exemption rests on the public body asserting its application. To meet this burden, the public body claiming an exemption should provide complete particularized justification, rather than simply repeat statutory language. [*Detroit Free Press*, *supra* at 2 (citations omitted).]

The circuit court may not make conclusory or generic determinations regarding claimed exemptions. *Post-Newsweek Stations, Michigan, Inc v Detroit*, 179 Mich App 331, 335; 445 NW2d 529 (1989).

The circuit court erred in merely relying on defendant's claim of exemption and granting defendant's motion for summary disposition in regard to the STATIS documents. We therefore remand for the circuit court's determination whether the information sought from the STATIS is exempt from public disclosure. To meet the burden of proving that the STATIS information is exempt from disclosure under the privacy and law enforcement investigation exemptions to the FOIA, defendant should provide complete particularized justification, rather than simply repeating statutory language. *Detroit Free Press*, *supra* at 2. If the court determines that the public record is not exempt from disclosure, it must order the public body to produce the record. MCL 15.240(4).

In regard to plaintiff's October 6, 1999 request for the name and department of the operator who accessed information databases for his personal information in the past, we remand to the trial court for a determination whether this information exists and, if so, whether it is subject to disclosure under the FOIA. According to plaintiff, access to the LEIN, CLEMIS, NCIC, and STATIS databases results in a report, and at the bottom of the report "is a code that tells when and who requested this information in the past." Plaintiff's FOIA request sought "the name of the operator that accessed the data and his department." Defendant argued that this request "posed an interrogatory" and the information need not be disclosed because plaintiff's request was not for a specific document, but was for an answer that needed to be reduced to writing.

Defendant is correct that under the FOIA, a public body is not required to make a new public record, or a compilation, summary, or report of information. MCL 15.233(4) and (5). However, the Supreme Court in *Herald Co v Bay City*, *supra* at 121-122, held that merely because an FOIA request cannot be met by the production of a particular document, does not excuse a public body's failure to provide the *information* sought. Under the FOIA, a person is entitled to full and complete *information* regarding the affairs of government. *Id*. at 121. A public body is obligated to satisfy a valid request for *information* under the FOIA, and while not required to create a new record, the body must utilize other means of disclosing information such as allowing access to, or copying the records containing the information. *Id*. at 122.

Regarding plaintiff's February 3, 2000 FOIA requests, we conclude that plaintiff's requests have, in part, been satisfied. Plaintiff requested the name of the chief administrative officer, FOIA coordinator, or those persons designated in writing to reply to FOIA requests. Plaintiff eventually responded to this request, although belatedly, and it appears that the information sought has been provided. Defendant provided the name of the chief administrative officer, and identified the MSP Assistant FOIA Coordinator, who had been responding to plaintiff's FOIA requests. It also appears that plaintiff's request for the written policy and procedures for answering FOIA requests is met by the copy of the MSP Official Order No 67, outlining the MSP's policies for implementing the FOIA, which accompanied defendant's motion for summary disposition. Thus, these issues are moot. *Herald Co v Ann Arbor Public Schools*, *supra* at 270-271.

Further, we find no error in the court's conclusion that plaintiff failed to sufficiently describe the information sought with regard to several requests: (1) "a copy of last years [sic] approval from the legislature, for the Michigan State police to run and/or participate in the Law Enforcement Information Network (LEIN) system," (2) the document that discloses the names of the members of the citizen committee board, (3) the documents establishing the existence of the citizen committee board, and (4) the written policy and procedures of the citizen committee. According to the affidavit of the MSP Assistant FOIA Coordinator, plaintiff's descriptions were insufficient to find the requested records. An FOIA request must describe a public record sufficiently to enable the public body to find the public record. MCL 15.233(1).

Finally, several of plaintiff's February 3, 2000 FOIA requests, remain unsatisfied. Although defendant argued, and the trial court found generally, that the records requested on February 3, 2000, as described by plaintiff did not exist, we find no evidence in the record that supports this conclusion with regard to the following items, which appear to be sufficiently described to permit finding them: (1) the written policy and procedures for appealing FOIA denials, (2) defendant's formal delegation of authority to answer FOIA requests, (3) the names of the board members who are on the FOIA appeals committee for FOIA denials, (4) the contract between the Attorney General's office and defendant to use and participate in the LEIN system. We therefore remand this portion of the FOIA request to the trial court for a specific determination whether these records exist, and whether they are subject to disclosure. As discussed, *supra*, if they do not exist, defendant cannot be required to produce them. *Hartzell, supra* at 787. However, as discussed, *supra*, the court can properly determine that defendant violated the FOIA by failing to respond to plaintiff's request within five business days and failing to disclose that the requested document does not exist. *Id.*

Because we find that plaintiff is entitled to the existing documents he requested, absent a proper exemption, we need not address plaintiff's other arguments for the production of these documents.

V

Plaintiff further argues that the trial court erred by denying his request for attorney fees, costs, and punitive damages. A prevailing party in an FOIA action is entitled to reasonable attorney fees, costs and disbursements. MCL 15.240(6).

Where a litigant partially prevails in an action commenced under the FOIA, the court may in its discretion award reasonable attorney fees, costs, and disbursements or an appropriate portion thereof. MCL 15.240(6). We find that, because defendant violated MCL 15.235(2) and MCL 15.235(4) and failed to produce existing non-exempt records, plaintiff is a prevailing party, in part, and the case must be remanded to the trial court for a determination of reasonable costs and attorney fees. "A party prevails in the context of an FOIA action when the action was reasonably necessary to compel the disclosure, *and the action had a substantial causative effect on the delivery of the information to the plaintiff*." *Scharret, supra* at 5. If the plaintiff in an FOIA action partially prevails, the court may in its discretion award all or a portion of reasonable attorneys' fees, costs, and disbursements. MCL 15.240(6), *Manning v East Tawas*, 234 Mich App 244, 253; 593 NW2d 649 (1999). On remand, the trial court should also determine whether defendant must pay punitive damages pursuant to MCL 15.240(7).

VI

In sum, we find that the trial court erred when it determined that defendant did not violate the FOIA. We reverse in part, and affirm in part, the trial court's order granting summary disposition for defendant and denying plaintiff's motion for summary disposition, and we remand for further findings with regard to the FOIA requests noted. If a public record is determined to be not exempt from disclosure, the court must order defendant to produce the record. MCL 15.240(4). On remand, the trial court should determine plaintiff's entitlement to reasonable costs and attorney fees, in compliance with MCL 15.240(6), and determine whether plaintiff is entitled to punitive damages pursuant to MCL 15.240(7).

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael R. Smolenski
/s/ Janet T. Neff
/s/ Helene N. White