STATE OF MICHIGAN

COURT OF APPEALS

DETROIT FREE PRESS, INC.,

Plaintiff-Appellee,

v

CITY OF SOUTHFIELD,

Defendant-Appellant,

and

CITY OF SOUTHFIELD FIRE AND POLICE RETIREMENT SYSTEM, CITY OF ANN ARBOR EMPLOYEES' RETIREMENT SYSTEM, CITY OF TAYLOR POLICE AND FIRE RETIREMENT FUND BOARD, and CITY OF WESTLAND POLICE AND FIRE RETIREMENT BOARD,

Defendants.

FOR PUBLICATION
December 20, 2005
9:05 a.m.

No. 260083
Wayne Circuit Court
LC No. 04-417402-CZ

DETROIT FREE PRESS, INC.,

Plaintiff-Appellee,

v

CITY OF SOUTHFIELD FIRE AND POLICE RETIREMENT SYSTEM, CITY OF ANN ARBOR EMPLOYEES' RETIREMENT SYSTEM, CITY OF TAYLOR POLICE AND FIRE RETIREMENT FUND BOARD, and CITY OF WESTLAND POLICE AND FIRE RETIREMENT BOARD,

Defendants-Appellants,

and

No. 260639
Wayne Circuit Court
LC No. 04-417402-CZ

CITY OF SOUTHFIELD,

Defendant.

Before: Whitbeck, C.J., and Saad and O'Connell, JJ.

O'CONNELL, J.

In this case involving the Michigan Freedom of Information Act (FOIA), MCL 15.231 *et seq*., defendant, the City of Southfield, appeals by right an order granting summary disposition in favor of plaintiff Detroit Free Press, Inc., against defendants. The remaining defendant retirement systems appeal the same order by leave granted. Defendants present overlapping arguments challenging the trial court's ruling that each defendant violated the FOIA by refusing to disclose the names and corresponding pension income amounts of the "top twenty" police and firefighter pension recipients from each public body. We affirm.

In January 2004, plaintiff's Lansing Bureau Chief, Chris Christoff, sent a letter to defendant City of Southfield which requested:

> [A] list of the individuals who receive the 20 largest pension payouts from the City of Southfield's general employee and police and fire retirement systems.
>
> Please include the names of 20 top current pension recipients of each retirement system, the amount of their pension benefits and information showing how individual pensions are calculated.

Christoff apparently never sent a FOIA request to the city's retirement system. The city, upon receiving Christoff's request, informed Christoff that it should have been submitted directly to defendant City of Southfield Fire and Police Retirement System's board of trustees. Nevertheless, the city eventually released information to Christoff. In its correspondence, the city noted that "a list of individuals who receive the 20 largest pension payouts, etc." did not exist. The city further stated, however, that it had compiled the information Christoff requested and created the lists. In the listed information it disclosed, the city provided the names of retired fire department employees along with their pension amounts, but it did not provide the names of any police department retirees. Instead, it provided the current "top twenty" pension incomes with the former rank of the retired officer who received each income. In its reply, the city stated that it considered the release of the names of police officers exempt under MCL 15.243(1)(s)(ix), because their release would disclose information from personnel records of law enforcement agencies. The City of Southfield Fire and Police Retirement System later sent a separate letter noting that it had been belatedly advised of the actions taken by the city. The letter explained that it objected to the city's release of the information, and that plaintiff should send future requests for retirement information directly to the system.

Around the same time, plaintiff sent requests for the same information to the other defendant police and firefighter retirement systems. In each case, plaintiff received a similar response—a list of ranks and their corresponding pension incomes, but no names. Plaintiff sued

to compel the release of the retirees' names with their corresponding pension incomes, and the trial court granted summary disposition in its favor.

Defendants argue that the trial court erred in finding that the names of the police officers and their corresponding pension incomes were subject to disclosure under the FOIA. We reject defendants' arguments. We review de novo a trial court's decision to grant summary disposition, *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999) Under the FOIA, an individual has the right to inspect, copy or receive copies of a public record after providing the 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 . . . ." MCL 15.233(1). The request need not specifically describe the records containing the sought information, but rather, a request for information contained in the records will suffice. *Herald Co v Bay City*, 463 Mich 111, 122; 614 NW2d 873 (2000). The FOIA defines a "public record" as "a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function, from the time it is created." MCL 15.232(e). In response to an FOIA request, however, the public body is not required to make a compilation, summary, or report of information, nor is it required to create a new public record. MCL 15.233(4), (5). If a public body denies an FOIA request because it claims that a record does not exist, the public body must send written notice including a "certificate that the public record does not exist under the name given by the requester or by another name reasonably known to the public body . . . ." MCL 15.235(4)(b). In court, the burden is on the public body to justify its denial. MCL 15.240(4); *MacKenzie v Wales Twp*, 247 Mich App 124, 128; 635 NW2d 335 (2001).

Consistent with the FOIA's underlying policies, a public body is required to grant full disclosure of its records unless they are specifically exempt under MCL 15.243. MCL 15.231; *Herald Co*, *supra* at 118-119. Courts narrowly construe any claimed exemption and place the burden of proving its applicability on the public body asserting it. *Herald Co*, *supra* at 119; MCL 15.240(4).

Defendant retirement systems do not challenge the allegation that they possess public documents that contain the requested information, but rather, they argue that the information is exempt from disclosure. Specifically, they argue that MCL 15.243(1)(a) applies. This subsection exempts disclosure of personal information if public disclosure would constitute a clearly unwarranted invasion of an individual's privacy. *Bradley v Saranac Community Schools Bd of Ed*, 455 Mich 285, 293; 565 NW2d 650 (1997). Information is of a personal nature if it "reveals intimate or embarrassing details of an individual's private life" according to the moral standards, customs, and views of the community. *Id.* at 294. Determining whether the disclosure of such information would constitute a clearly unwarranted invasion of privacy requires a court to balance the public interest in disclosure against the interest the Legislature intended the exemption to protect. *Mager v Dep't of State Police*, 460 Mich 134, 145; 595 NW2d 142 (1999). The only relevant public interest is the extent to which disclosure would serve the core purpose of the FOIA, which is to facilitate citizens' ability to be informed about the decisions and priorities of their government. *Id.* at 145-146. This interest is best served through information about the workings of government or whether a public body is performing its core function. *Id*.

Regarding the first prong, the names of pension recipients combined with their pension amounts is not information of a personal nature. The information does not solely relate to

private assets or personal decisions. See, e.g., *Stone Street Capital*, *Inc v Michigan Bureau of State Lottery*, 263 Mich App 683, 692-693; 689 NW2d 541 (2004) (upholding a decision not to disclose the names, addresses, and other personal information of assignees of lottery winnings); *Mager*, *supra* at 143-144 (holding that registered handgun owners' names and addresses were personal because purchasing a handgun is a controversial, personal decision that could target gun owners for malicious acts). Rather, the pension amounts reflect specific governmental decisions regarding retirees' continuing compensation for public service. Therefore, the pension amounts are more comparable to public salaries than to private assets. See *Penokie v Michigan Technological Institute*, 93 Mich App 650, 663; 287 NW2d 304 (1979), disapproved in part on other grounds in *State Employees Ass'n v Dep't of Management & Budget*, 428 Mich 104, 117 n 15; 404 NW2d 606 (1987) (Cavanagh, J.). In *Penokie, supra*, we stated that the disclosure of the names and salaries of university employees would not "thwart the apparent purpose of the exemption to protect against the highly offensive public scrutiny of totally private personal details. The precise manner of expenditure of public funds is simply not a private fact."

Defendants argue that the information is exempt in this case though because the pensions are drawn from "private" trust assets. We disagree. Records are not automatically exempt under the FOIA merely because they disclose information about private assets. Rather, if private information is included in the records of a public body, the court must determine whether the information is exempt because it relates to an individual's "private life" according to the community standards, customs, and views. *Bradley*, *supra* at 294. Here, the "private" trust is primarily funded with public money, so defendants may not hide behind the trust's status as a private entity. Although we agree with defendants that the analysis might be different if the retirees' benefits were maintained in individually managed accounts such as IRAs, defendants presented no evidence that the information requested by plaintiff involves such personal accounts. Rather, the evidence suggests that the pensions represent mathematical application of specific, quantifiable rates to general employment circumstances.[1] For example, the plans generally calculated annual pension incomes by multiplying the number of years served by a negotiated percentage of the retiree's average salary over a few, selected years. Although the plans may also consider unused vacation time, etc., plaintiff did not request records of each retiree's individual decisions, so the personal privacy of each retiree remains inviolate. Only the retirees' publicly funded benefits, and the political decisions underlying them, are left open to public scrutiny.

Accordingly, the pension amounts do not constitute personal information because "[t]he precise manner of expenditure of public funds is simply not a private fact." *Penokie*, *supra* at 663. It goes without saying that private information can be inextricably linked to an individual's public life, which is why our Supreme Court held that a list including the "names, current job titles, cities of residence and age of the seven final candidates for the job of Bay City fire chief" was not personal information. *Herald Co*, *supra* at 120, 125. Similarly, the retirees' publicly

---

[1] This indicates that defendants' retirement plans are defined benefit plans rather than defined contribution plans. We note that if a defined contribution plan was at issue, then our analysis and result would be substantially different.

funded pensions—like their previous salaries—are of interest to the public, and only through disclosure can the public expect to prevent abuse. Having found that the pension amounts do not constitute personal information, we need not address whether their disclosure would be a clearly unwarranted invasion of privacy. *Bradley*, *supra*. However, we note that a public official has no reasonable expectation of privacy in an expense the public bears to pay for income or any other benefit. We have consistently upheld the disclosure of publicly funded incomes and other benefits for more than twenty-five years. *Penokie*, *supra*. Moreover, defendants conceded below that this information was otherwise available at open meetings in which pension decisions were made, and the formula for calculating pension benefits was also subject to disclosure. Therefore, the disclosure of a retiree's name and pension income does not constitute an unwarranted invasion of the retiree's privacy.

Defendants also argue that the retired police officers' names should be exempt because the information would either identify law enforcement officials, MCL 15.243(1)(s)(viii), or disclose the personnel records of law enforcement agencies, MCL 15.243(1)(s)(ix).[2] The overarching subsection, MCL 15.243(1)(s), conditionally exempts these relevant categories of records as follows:

> 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:
>
> * * *
>
> (viii) Identify or provide a means of identifying a person as a law enforcement officer, agent, or informant.
>
> (ix) Disclose personnel records of law enforcement agencies.

As the statute indicates, a record that falls within one of these categories is not automatically exempt from disclosure. *Landry v City of Dearborn*, 259 Mich App 416, 424; 674 NW2d 697 (2003). Rather, the record is only exempt if the public interest balancing test is also satisfied. *Federated Publications*, *Inc v City of Lansing*, 467 Mich 98, 101; 649 NW2d 383 (2002); *Landry*, *supra* at 424. In conducting the balancing test from MCL 15.243(1)(s), defendants bear the burden of justifying nondisclosure, and we review for clear error the result of the trial court's balancing test. *Federated Publications*, *supra*.

Because the requested information involves retirees, defendants fail to demonstrate how the information would identify the pension recipients as law enforcement officers. Although the retired police officers were law enforcement officers once, defendants have not presented any evidence suggesting that they are still employed in that capacity. On the contrary, the very

---

[2] We note our reluctance to categorize defendants as "law enforcement" agencies, which are the only agencies that may claim these exemptions, but our ultimate conclusion does not require us to reach this issue.

nature of the request reflects that plaintiff only seeks information on individuals who are no longer law enforcement officers. Similarly, in MCL 15.243(s)(iii), the FOIA specifically exempts from disclosure information regarding the addresses and phone numbers of retired police officers, so the absence of the modifier "retired" in MCL 15.243(s)(viii) indicates that the Legislature intended the exemption in MCL 15.243(s)(viii) to apply only to the identities of active law enforcement officers. Therefore, providing the names of retirees with their corresponding pension incomes does not invoke the exemption in MCL 15.243(s)(viii).

Whether divulging the retirees' pensions would "[d]isclose personnel records of law enforcement agencies" according to MCL 15.243(1)(s)(ix) is a more difficult question. The term "personnel" includes "all facets of the employment process, not simply records related to current employees of an agency," *Landry*, *supra* at 422-423, so the phrase "personnel records" presumably encompasses a retiree's individualized records. Nevertheless, defendants have failed to provide any evidence that the information only exists in each retiree's individual personnel records. On the contrary, the facts suggest that defendants are well aware of who receives which pension income without consulting any retiree's individual personnel file or any record generated as a result of plaintiff's request. Therefore, defendants have failed to demonstrate a genuine issue of fact that the exemption in MCL 15.243(1)(s)(ix) applies. *Federated Publications*, *supra*.

Even if disclosure of the names and pension amounts together fit within these exemptions, the trial court did not clearly err when it found that the interest in disclosure outweighed the retirees' interest in nondisclosure. Given the fact that the retirees' identities alone are not expressly exempted from disclosure, there is only a negligible increase in the possibility that defendants' speculative litany of various calamities would actually befall a retired police officer merely because the officer's corresponding pension income is also known. Therefore, the negligible additional risk does not outweigh the public's interest in knowing how and to whom the government is distributing its tax dollars. MCL 15.231. Accordingly, defendants have not met their burden of justifying nondisclosure. *Federated Publications*, *supra*.

Turning to the separate arguments raised by defendant City of Southfield, we disagree that plaintiff's request required the city to compile a summary report or create a new public record. MCL 15.233(4), (5). Although plaintiff's literal request was for "a list," the actual information sought by plaintiff was made clear by its description. The FOIA does not require a precise description of the actual records sought; rather, the statute's focus is on public access to *information*. In *Herald Co*, *supra* at 121, our Supreme Court opined that:

> the Legislature did not impose detailed or technical requirements as a precondition for granting the public access to information. Instead, the Legislature simply required that any request be sufficiently descriptive to allow the public body to find public records containing the information sought. . . . [W]e note that it would be odd indeed to ask a party who has no access to public records to attempt specifically to describe them.

Rather than compiling a list, the city could have satisfied the request by allowing plaintiff access to, or providing copies of, redacted records which contained only the requested information. *Id.* at 122. The city's exemption claims belie any argument that it did not have access to records containing the information.

The city also argues that it is not liable under the FOIA because it was the wrong public body to grant plaintiff's request and that plaintiff should have addressed its request to its retirement system. We disagree. Plaintiff does not contest that the city and its retirement system are separate public bodies and that the retirement system itself may be considered a public body under the FOIA. *Detroit News v Policemen and Firemen Retirement System of the City of Detroit*, 252 Mich App 59, 71; 651 NW2d 127 (2002). Nevertheless, the records were "public records" which the city must disclose under the FOIA, regardless of the difference between the two entities. Although the city's letter expressed its preference that plaintiff direct its FOIA requests to its retirement system, there is direct evidence that the city could also produce the requested records. The city compiled a list of pension information about retired fire and police employees and provided extensive documentation about pension calculation. The city also cited an exemption rather than claiming that it lacked the ability to produce the names, and at one point, the city's retirement system stated that "the requested information was contained within the City's records." Accordingly, the city failed to demonstrate a genuine issue of fact that it lacked the ability to produce the records. *MacKenzie*, *supra* at 131.

For the same reasons, we reject the city's claim that it is not liable for plaintiff's fees and costs. If a requesting person prevails in an action challenging nondisclosure under the FOIA, the court "shall award reasonable attorneys' fees, costs, and disbursements." MCL 15.240(6). A plaintiff has prevailed if: "(1) the action was reasonably necessary to compel the disclosure; and (2) the action had the substantial causative effect on the delivery of the information to the plaintiff." *Local Area Watch v City of Grand Rapids*, 262 Mich App 136, 149; 683 NW2d 745 (2004), quoting *Schinzel v Wilkerson*, 110 Mich App 600, 602; 313 NW2d 167 (1981). Whether a defending public body's actions in denying the request were reasonable is irrelevant. *Local Area Watch*, *supra* at 150. The award shall be assessed against the public body "that kept or maintained the public record as part of its public function." MCL 15.240. The city does not expressly challenge whether plaintiff has prevailed in this action; rather, the city claims that plaintiff has not prevailed *against the city*. However, plaintiff issued its request to the city, which failed to comply with the FOIA. Therefore, the trial court correctly found that plaintiff prevailed against the city.

On a related note, the City of Southfield Fire and Police Retirement System argues that it was not a proper defendant under the FOIA because plaintiff did not submit its request directly to the retirement system. An appellant's issues are limited to those raised in the application for leave to appeal, and this issue was not addressed in defendants' application. MCR 7.205(D)(4); *Wilcoxon v Wayne Co Neighborhood Legal Services*, 252 Mich App 549, 555; 652 NW2d 851 (2002). Moreover, the argument lacks merit because the system's preemptive denial of the information forced plaintiff to either add the retirement system to this lawsuit or futilely expend its resources directing an already-rejected request to the retirement system. Because the retirement system's preemptive denial was a "final determination" denying plaintiff's request, MCL 15.240(1), plaintiff was entitled to initiate this action against the retirement system, MCL 15.240(1)(b), and entitled to attorney fees when it prevailed, MCL 15.240(6).

The city argues that plaintiff did not have standing to sue because only Christoff, himself, may be considered a "requesting person" under the FOIA. We disagree. The FOIA provides that "a person" has a right to inspect, copy, or receive public records upon providing a written request to the FOIA coordinator of the public body. MCL 15.233(1); MCL 15.235(1). The

statute then grants "the requesting person" standing to commence an action in a circuit court to compel disclosure of records which the public body has refused to disclose. MCL 15.235(7)(b); MCL 15.240(1)(b). Under the FOIA, "'[p]erson' means an individual, corporation, . . . or other legal entity." MCL 15.232(c). A corporation acts through its individual agents as a matter of course. Here, Christoff's request was written on "Detroit Free Press" letterhead, and Christoff identified himself as the "Lansing Bureau Chief." He also stated that he was a journalist for plaintiff and that he intended to use the requested information for an article "in our newspaper." Therefore, plaintiff issued the request and had standing to pursue its claim.

Regarding the city's last two justifications for nondisclosure, we first find that *Kallstrom v City of Columbus*, 136 F3d 1055 (CA 6, 1998), is distinguishable. This is not a case in which the requested disclosure may lead a drug gang to a police officer's doorstep. In fact, the city conceded that the names of the individuals are essentially a matter of public record, i.e., anyone may discover who occupied the office of police chief in 1994. The city only balked at associating the names behind the disclosed ranks with a particular pension benefit, which is information that is neither secure, private, nor exempt. Second, the federal FOIA does not apply to the city's records under the exemption in MCL 15.243(1)(d) regarding "[r]ecords or information specifically described and exempted from disclosure by statute." The federal FOIA relates to the public's access to the records of federal agencies, not state agencies, 5 USC 552(f)(1), 5 USC 551(1), so it does not particularly exempt the city's records from disclosure.

Affirmed.

/s/ Peter D. O'Connell
/s/ William C. Whitbeck

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

DETROIT FREE PRESS, INC.,

Plaintiff-Appellee,

v

CITY OF SOUTHFIELD,

Defendant-Appellant,

and

CITY OF SOUTHFIELD FIRE AND POLICE RETIREMENT SYSTEM, CITY OF ANN ARBOR EMPLOYEES' RETIREMENT SYSTEM, CITY OF TAYLOR POLICE AND FIRE RETIREMENT FUND BOARD, and CITY OF WESTLAND POLICE AND FIRE RETIREMENT BOARD,

Defendants.

FOR PUBLICATION
December 20, 2005

No. 260083
Wayne Circuit Court
LC No. 04-417402-CZ

DETROIT FREE PRESS, INC.,

Plaintiff-Appellee,

v

CITY OF SOUTHFIELD FIRE AND POLICE RETIREMENT SYSTEM, CITY OF ANN ARBOR EMPLOYEES' RETIREMENT SYSTEM, CITY OF TAYLOR POLICE AND FIRE RETIREMENT FUND BOARD, and CITY OF WESTLAND POLICE AND FIRE RETIREMENT BOARD,

Defendants-Appellants,

and

No. 260639
Wayne Circuit Court
LC No. 04-417402-CZ

CITY OF SOUTHFIELD,

Defendant.

Before: Whitbeck, C.J., and Saad and O'Connell, JJ.

SAAD, J. *(dissenting)*.

I respectfully dissent. While, under the Freedom of Information Act, the public has the right to documents that show how much public monies were spent on pensions for public employees, the request here exceeds that right. The FOIA does not require the Boards to disclose documents that reveal how much any specifically identified individual receives in annual pension payments. And, because the majority's holding goes too far, I dissent.

During oral argument, counsel for the Boards pointed out, without contradiction or rebuttal, that the majority of funds used to pay the pensions of the retired police officers and firefighters come from monies *earned* by the funds, not monies contributed by the public. That is, the monies that are ultimately used to pay pensions come from three distinct sources: (1) public contributions, (2) employee contributions, including employee investment decisions (such as "buying years of service" or using accumulated sick leave), and (3) monies earned via investment decisions by the Board. The majority incorrectly characterizes pension payments as "more comparable to public salaries than to private assets." To the contrary, a salary is paid by current government funds while the pension payments at issue are comprised, in large part, of monies other than the amount originally paid into the retirement system. Thus, the amount of taxpayer dollars the government previously contributed into the retirement system should be disclosed, not how much individual retirees or their families receive as a result of personal investment decisions.

If, for example, the purpose of the FOIA request is to discover how much Ann Arbor contributed to the "top twenty retirees," then the only information the Board is required to disclose is those monies Ann Arbor contributed to the retirement system, not the monies received by retirees now, which includes employee contributions and investment-produced accumulations. The purpose of the FOIA is to show how government operates – here, how government spends public funds on pensions. Again, this is accomplished by showing the amount of tax dollars the government entity contributed, not the amount now paid to select retirees.

Furthermore, the pension payments to any specific individual retiree or the retiree's spouse or child is personal financial information and disclosure would constitute a clearly unwarranted invasion of privacy. Indeed, unless the public interest in disclosure outweighs the public interest in nondisclosure, the identities of law enforcement officers and relatives of active or retired law enforcement officers are exempt from FOIA. MCL 15.243(1)(s). Moreover, FOIA exempts from disclosure personnel records of law enforcement agencies and makes no distinction between the records of active or retired officers. *Id*. Michigan case law has protected personal financial information of citizens from disclosure on the grounds of privacy and we

should do so here as well. *Stone Street Capital, Inc v Michigan Bureau of State Lottery*, 263 Mich App 683; 689 NW2d 541 (2004).

Key to our analysis under the FOIA is that whatever information we hold to be subject to FOIA disclosure serves the interest of the FOIA – to inform citizens about how the government operates. *Mager v Dep't of State Police*, 460 Mich 134, 145-146; 595 NW2d 142 (1999). And, therefore, here, the only amount that shows how the government operates – i.e., what it spends for pensions, is the amount the government contributes, not the amount the private citizen/retiree receives in pension payments. Moreover, because the individual retiree has a privacy interest in his or her personal financial information, we, as an appellate court, must ask the ultimate policy question: Does the public interest in disclosure here outweigh the retiree's privacy interest? The answer is that the individual retiree's privacy interests clearly outweigh whatever public interest there may be in disclosure of any specific individual's pension payments. The reasons for this conclusion are clear. The retiree's personal financial information, including decisions whether to designate a spouse or child to receive the pension, is and should remain private. And, because the public's interest in knowing how its government operates can be accomplished by showing what the government *contributed* rather than what the retiree receives, a more limited ruling serves both the interests of the public and privacy.

Therefore, I would respectfully disagree with the majority and instead hold that the retirement boards must disclose what the respective governmental entities paid into the retirement system for the "top twenty," not what any individual in the "top twenty" receives on an annual basis. Accordingly, I would reverse the trial court and hold that the pension boards have fully[1] complied with the FOIA by supplying the information regarding the job category, amount and method of computation for the "top twenty" retirees.

/s/ Henry William Saad

[1] Indeed, because the boards produced documents that show how much the "top twenty" received, the boards have provided more than the FOIA requires because the FOIA only requires a disclosure of what the public *contributed* to these pensions.