

Court of Appeals, State of Michigan

ORDER

Detroit Police Officers Association v City of Detroit

Docket No. 292956

LC No. 09-016796-CL

Karen M. Fort Hood
Presiding Judge

Michael J. Talbot

Christopher M. Murray
Judges

The Court orders that the stay granted in our order dated July 10, 2009, is hereby
VACATED.



A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

JUL 30 2009
Date

Sandra Schultz Mengel
Chief Clerk

STATE OF MICHIGAN
COURT OF APPEALS

DETROIT POLICE OFFICERS ASSOCIATION,

Plaintiff-Appellant,

v

CITY OF DETROIT,

Defendant,¹

and

DETROIT FREE PRESS, INC.,

Intervenor-Appellee.

UNPUBLISHED

July 30, 2009

No. 292956

Wayne Circuit Court

LC No. 09-016796-CL

Before: Fort Hood, P.J., and Talbot and Murray, JJ.

PER CURIAM.

Plaintiff, Detroit Police Officers Association, appeals as of right the circuit court order dissolving a temporary restraining order. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

On July 9, 2009, plaintiff, a labor organization representing Detroit police officers that fall below the rank of investigator, filed a verified complaint seeking injunctive relief. Plaintiff and defendant, City of Detroit, are parties to a collective bargaining agreement (CBA). Pursuant to article 26, section A of the agreement, plaintiff alleged that defendant was precluded from releasing confidential information regarding department employees. Contrary to the terms of the CBA, plaintiff asserted that defendant city agreed to release a photograph of Officer Stevie Perry in response to a Freedom of Information Act (FOIA), MCL 15.231 *et seq.*, request brought by

¹ The verified complaint filed in the lower court named the City of Detroit as the only defendant. However, plaintiff's brief in support of the verified complaint for preliminary injunction named the Detroit Police Department and the City of Detroit Law Department as defendants. The disparity in the naming of defendants is irrelevant because the city has not taken a position with regard to the issues raised on appeal.

intervenor Detroit Free Press. Specifically, the intervening newspaper² requested the booking photograph or “mug shot” of the police officer. Officer Perry had been suspended from the Detroit Police Department and charged with crimes based on allegations that he improperly diverted funds from an automobile theft program.³ Plaintiff asserted that the release of the photograph was prohibited by the CBA and exempt from disclosure by the FOIA. It was alleged that Officer Perry’s status as an undercover officer was jeopardized by the release of the photograph, and the release would pose a threat to his reputation and safety without an adequate remedy at law. The circuit court authorized a temporary restraining order, but dissolved the order at the show cause hearing. The court concluded that the parties’ CBA could not “contravene state law” and that plaintiff failed to establish an exemption to the FOIA that would prevent the release of the booking photograph.

I

A temporary restraining order may be granted without notice only if it clearly appears that immediate and irreparable injury, loss, or damage will result to the applicant from the delay to effect notice, the applicant’s attorney certifies the efforts to give notice and the reasons why notice should not be required, and a permanent record is made of the representations made in support of the application. MCR 3.310(B); *Hawkins v Murphy*, 222 Mich App 664, 668; 565 NW2d 674 (1997). “At a hearing on a motion to dissolve a restraining order granted without notice, the burden of justifying continuation of the order is on the applicant for the restraining order whether or not the hearing has been consolidated with a hearing on a motion for a preliminary injunction or an order to show cause.” MCR 3.310(B)(5). The trial court’s decision to vacate or modify a previously entered temporary restraining order is a discretionary ruling. *Bowers v VanderMeulen-Bowers*, 278 Mich App 287, 295; 750 NW2d 597 (2008). A trial court abuses its discretion when it selects an outcome that is not within the range of reasonable and principled outcomes. *Id.* A trial court is not required to hold an evidentiary hearing before granting injunctive relief; only some type of formal hearing is required. *Campau v McMath*, 185 Mich App 724, 728; 463 NW2d 186 (1990). When a party’s entitlement to relief can be established by argument, briefs, affidavits or other nontestamentary evidence, testimony need not be taken at the hearing. *Id.*

² The circuit court granted the motion to intervene when the parties did not object to the intervention.

³ At the hearing regarding the dissolution of the temporary restraining order, counsel for the City of Detroit explained the circumstances that gave rise to the FOIA request. Apparently, members of the press were waiting at Livonia District Court for Officer Perry’s arraignment when they were told that the arraignment would occur in 36th District Court. When the press proceeded to the new location, Officer Perry was arraigned in Livonia. The FOIA request was filed by the intervening newspaper shortly after reporters were unable to photograph Officer Perry at his court appearance. The circuit court questioned the validity of plaintiff’s complaint in light of the fact that Officer Perry could be photographed at his next court appearance. Counsel for plaintiff refused to address the issue raised by the circuit court, instead proceeding on the CBA and FOIA theories.

Questions of statutory interpretation and the appropriate application of statutes present questions of law subject to de novo review. *State News v Michigan State Univ*, 481 Mich 692, 699; 753 NW2d 20 (2008); *Coblentz v City of Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006). With regard to FOIA cases, the clear error standard of review applies when the parties challenge the factual findings of the trial court. *Coblentz, supra* at 568, citing *Herald Co, Inc v Eastern Michigan Univ Bd of Regents*, 475 Mich 463, 467; 719 NW2d 19 (2006). When the parties do not contest the trial court’s underlying factual findings, but challenge the trial court’s exercise of discretion, the appellate court must review that decision for an abuse of discretion which is defined as a determination that falls outside the principled range of outcomes. *Id.*

II

In the verified complaint and in the trial court, plaintiff asserted that the CBA precluded the release of the information. We disagree. “The FOIA requires disclosure of all public records not within an exemption.” *Bradley v Saranac Community Schools Bd of Ed*, 455 Mich 285, 303; 565 NW2d 650 (1997) (Footnote omitted). There is no exemption in the FOIA that allows “a public body to bargain away the requirements of the FOIA.” *Id.* Accordingly, plaintiff’s reliance on the CBA to preclude release of the photograph is without merit.

III

The purpose of the FOIA is set forth in MCL 15.231(2):

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.

The application of a statutory exemption in the FOIA to preclude disclosure of a public record presents a question of law subject to de novo review. *Detroit Free Press, Inc v Dep’t of Consumer & Industry Services*, 246 Mich App 311, 314; 631 NW2d 769 (2001).

[T]he FOIA is “a broadly written statute designed to open the closed files of government.” By mandating the disclosure of information relating to the affairs of government and the official acts of public officials and employees, the FOIA facilitates the public’s understanding of the operation and activities of government.

Accordingly, our courts have interpreted the FOIA as an act requiring full disclosure of public records unless a statutory exemption precludes the disclosure of information. The exemptions in the FOIA are narrowly construed, and the party asserting the exemption bears the burden of proving that the exemption’s applicability is consonant with the purpose of the FOIA. [*Id.* at 315 (citations omitted).]

“If a request for information held by a public body falls within an exemption, the decision becomes discretionary.” *Bradley, supra* at 293 citing *Tobin v Civil Service Comm*, 416 Mich 661, 667 n 2; 331 NW2d 184 (1982).

A reverse FOIA case occurs when the plaintiff seeks to prohibit the release of public records sought by a third party instead of compelling their disclosure. *Michigan Federation of Teachers & School Related Personnel, AFT, AFL-CIO v Univ of Michigan*, 481 Mich 657, 668 n 27; 753 NW2d 28 (2008). The FOIA is purely a disclosure statute as evidenced by the enforcement provisions of the act. *Tobin, supra* at 668. The act only provides for a circuit court action to compel disclosure; there is no provision for an action to forbid disclosure. *Id.* Accordingly, in a reverse FOIA case, an asserted right by third parties to prohibit disclosure “must have a basis independent of the FOIA.” *Id.* at 669.

MCL 15.243 sets forth items that are exempt from disclosure and provides that certain public records are exempt unless the public interest in disclosure outweighs the public interest in nondisclosure and provides in relevant part:

(1) A public body may exempt from disclosure as a public record under this act any of the following:

(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:

(ii) Identify or provide a means of identifying a law enforcement undercover officer or agent or a plain clothes officer as a law enforcement officer or agent.

(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.

The use of the term “may” instead of the mandatory term “shall” demonstrates that the Legislature’s delineation of exemptions does not automatically require nondisclosure. *Tobin, supra* at 667-668.

Plaintiff contends that the above exemptions preclude the release of the booking photograph. However, plaintiff’s cause of action does not seek disclosure of information regarding the actions of governmental employees, but rather seeks to preclude the disclosure of the photograph of a governmental employee. Consequently, this is a reverse FOIA case, and plaintiff’s asserted right to prohibit disclosure must have a basis independent of the FOIA.

Tobin, supra. Plaintiff does not provide an independent basis to prohibit disclosure,⁴ but rather alleges that the photograph is subject to an exemption of the FOIA. Accordingly, plaintiff's challenge is without merit.

Even if plaintiff's challenge did not involve a reverse FOIA case, exemptions in the FOIA are narrowly construed, and the party asserting the exemption bears the burden of proving the exemption and that the application of the exemption is consistent with the purpose of the FOIA. *Detroit Free Press, supra*. Plaintiff failed to meet this burden. The booking photograph was taken as a result of the initiation of criminal proceedings; it is not part of the personnel file of the accused, MCL 15.243(1)(s)(ix).⁵ Irrespective of whether the photograph itself or the context of the photograph identify an undercover officer, MCL 15.243(1)(s)(ii) and (viii), the application of an exemption is discretionary and information is not exempt when the public interest in disclosure outweighs nondisclosure. Information regarding individuals charged with felonies who are awaiting trial is not material of a personal nature subject to nondisclosure because of privacy interests, and any court proceedings are open to the public. *Detroit Free Press, Inc v Oakland Co Sheriff*, 164 Mich App 656, 668-669; 418 NW2d 124 (1987).⁶ In the present case, the officer was charged with criminal conduct related to his employment, appeared at a public court proceeding for an arraignment, and his continued prosecution is of public interest. The public interest in disclosure outweighs the public interest in nondisclosure when a governmental employee is accused of violating the public trust. MCL 15.243(1)(s). In light of the FOIA'S purpose of full disclosure and the public interest in disclosure, we cannot conclude that the trial court's decision regarding the applicability of a discretionary exemption was clearly erroneous. *Federated Publications, Inc v City of Lansing*, 467 Mich 98, 106-107; 649 NW2d 383 (2002). We affirm the trial court's decision to release the booking photograph.

⁴ To the extent that plaintiff submitted that the CBA precluded release, we have rejected that argument in section II. Although plaintiff now argues that the CBA applies to the balancing interests when addressing exemptions, the argument was not preserved for appellate review because it was not raised, addressed, and decided below. *Persinger v Holst*, 248 Mich App 499, 510; 639 NW2d 594 (2001).

⁵ Plaintiff contends that the booking photograph falls within the exemption prohibiting disclosure of the personnel file because it is the result of an investigation by the Internal Affairs section, the photograph was taken in connection with the arrest, and ultimately this information will be used in any subsequent disciplinary proceeding brought against Officer Perry. However, the determination regarding the release of information pursuant to a FOIA request is made at a definite point in time. "[T]he appropriate time to measure whether a public record is exempt under a particular FOIA exemption is the time when the public body asserts the exemption." *State News, supra* at 703. The photograph is part of the criminal proceeding against the accused. The subsequent use of the photograph and whether it ultimately becomes part of the personnel file is not the appropriate inquiry. *Id.*

⁶ In this case, this Court expressly authorized the release of booking photographs pursuant to FOIA. To avoid application of this decision, plaintiff does not allege that the release violates a privacy interest, but rather asserts it inappropriately discloses law enforcement records.

Consequently, the stay previously entered in our order dated July 10, 2009, is hereby vacated.

Affirmed.

/s/ Karen M. Fort Hood

/s/ Michael J. Talbot

/s/ Christopher M. Murray