

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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JEAN A. BEATY,

Plaintiff,

and

JAMES KEAG,

Plaintiff-Appellant,

v

GANGES TOWNSHIP and GANGES  
TOWNSHIP PLANNING COMMISSION,

Defendants-Appellees.

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UNPUBLISHED

June 29, 2010

No. 290437

Allegan Circuit Court

LC No. 07-042480-AS

Before: SAWYER, P.J., and BANDSTRA and WHITBECK, JJ.

PER CURIAM.

Plaintiff-appellant James Keag<sup>1</sup> claims an appeal from an order granting a motion for summary disposition of Keag's Freedom of Information Act claim filed by defendants Ganges Township and the Ganges Township Planning Commission. We reverse and remand for further proceedings consistent with this opinion. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

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<sup>1</sup> Keag and plaintiff Jean A. Beaty filed an appeal from a decision by defendants denying approval of a site plan. Allegan Circuit Court Docket No. 07-042480-AS. Thereafter, Keag, only, filed a Freedom of Information Act (FOIA) action against the Township. Allegan Circuit Court Docket No. 08-042615-CZ. Subsequently, Keag and Beaty filed an amended complaint incorporating Keag's FOIA claim. The circuit court consolidated the actions under Docket No. 07-042480-AS. The instant appeal is from an order granting summary disposition of the FOIA claim.

Keag and plaintiff Beaty filed an application for a planned unit development (PUD) to be built on property they owned in Ganges Township. Keag and Beaty submitted a preliminary site plan for review by the Planning Commission. The Planning Commission found the site plan to be consistent with the intent and purpose of the Ordinance, and compatible with adjacent land usage and the natural environment. Keag and Beaty submitted a final site plan as required; ultimately, the Planning Commission denied the application.

Keag and Beaty filed suit against the Township and the Planning Commission in circuit court, seeking an order of superintending control compelling defendants to approve the site plan (Count I), and bringing a claim of appeal from an administrative agency (Count II).

Keag filed four requests for information under the Michigan Freedom of Information Act (FOIA), MCL 15.231 *et seq.* Keag sought: (1) any tape recordings of Township Board monthly meetings made since Ronda Hall joined the Board in June 2007; (2) a tape recording of the September 11, 2007, Township Board monthly meeting; (3) copies of proposed zoning and PUD ordinance changes (marked either preliminary or final), including e-mails and correspondence exchanged by Planning Commission members (pertaining to the changes); a list of “new changes,” including “all new ordinances” added by the Township; and dates, times, and places of special Planning Commission meetings held for the purpose of making any changes to ordinances; and (4) a list of required new ordinances or changes to existing ordinances required by Allegan County or the State of Michigan.

Four days later, Keag filed three additional requests for information under the FOIA. Keag sought: (1) a copy of the final site plan submitted by Brian Bosgraaf and approved by the Planning Commission; (2) copies of the information, including the application, drawings, narrative, the notice of public hearing, and the names and addresses of the persons to whom the notices were sent, submitted by Darrell and Kathy DoornBos for a special use permit; (3) all communications, including e-mails and correspondence, between the Planning Commission and McKenna Associates dealing with reports and ordinance changes, dating back to when McKenna Associates was retained.

Cynthia Yonkers, the Ganges Township Clerk and FOIA Coordinator, submitted Keag’s FOIA requests to the Township attorney. By letter, Yonkers denied Keag’s FOIA requests on the ground that records or other information related to a civil action to which the requesting party and the public body are parties are exempt from disclosure pursuant to MCL 15.243(1)(v).

Keag filed a one-count complaint against the Township in circuit court seeking an order compelling disclosure of the requested information under the FOIA. The complaint alleged that the Township’s stated reason for denying his requests was insufficient because the requested information did not relate to the pending action against the Township and the Planning Commission. Subsequently, Keag and Beaty filed an amended complaint in the underlying litigation. That complaint realleged Count I (superintending control) and Count II (claim of appeal) from the original complaint, and added a claim of violation of the fair and just treatment

clause in Const 1963, art 1, § 17 (Count III), and a request to compel disclosure of information requested under the FOIA (Count IV).<sup>2</sup>

Defendants moved for summary disposition pursuant to MCR 2.116(C)(10) of Count IV of the amended complaint, arguing that the type of information sought by Keag was exempt from disclosure under MCL 15.243(1)(v) of the FOIA because it was related to the litigation filed by Keag and Beaty. Defendants noted that changes to the PUD ordinance or to zoning ordinances could affect review of a site plan. Site plans requested by other persons could be used for comparison purposes to challenge the Planning Commission's decision. Minutes of meetings involving discussion of the Keag-Beaty site plan or other plans could contribute to an understanding of how the Township proceeded in the underlying case or in other cases.

In a written opinion and order, the circuit court granted defendants' motion for summary disposition of Count IV. The circuit court noted that prior to 2000, the FOIA did not contain an exemption for information related to litigation to which the requesting party and the public body were parties, and that at that time, *Central Mich Univ Supervisory-Technical Ass'n MEA/NEA v Bd of Trustees of Central Mich Univ*, 223 Mich App 727; 567 NW2d 696 (1997), was the controlling authority. That case held that, "[t]he fact that discovery is available as a result of pending litigation between the parties does not exempt a public body from complying with the public records law." *Id.* at 730. The circuit court also noted that 2000 PA 88, effective May 1, 2000, added several exemptions to the FOIA, including that exempting from disclosure information related to litigation to which the requesting party and the public body are parties. The circuit court concluded that the language of MCL 15.243(1)(v) controlled over the holding in *Central Michigan*.

The circuit court noted that the underlying litigation resulted from the denial of the application for a PUD. The circuit court reasoned that Keag submitted the FOIA requests to assist him in his challenge of the denial of the PUD application. The circuit court concluded that the requested information related to the litigation and thus was exempt from disclosure under the FOIA. The circuit court noted that Keag could have obtained the information via the discovery process in the underlying litigation, provided that the information was not protected by a privilege. The circuit court granted summary disposition for defendants and dismissed Count IV.

Thereafter, the circuit court entered a consent order resolving the remaining claims between the parties and closing the case. The order provided that Keag could pursue an appeal from the circuit court's order granting defendants' motion for summary disposition of Count IV of the amended complaint.

We review the trial court's decision on a motion for summary disposition de novo. In reviewing the decision on a motion brought pursuant to MCR 2.116(C)(10), we must review the record evidence and all reasonable inferences drawn therefrom in a light most favorable to the nonmoving party and decide whether a genuine issue of material fact exists. *Trepanier v Nat'l Amusements, Inc*, 250 Mich App 578, 582-583; 649 NW2d 754 (2002).

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<sup>2</sup> The circuit court consolidated Keag's action with the pending suit filed by Keag and Beaty.

We review issues of statutory interpretation and the proper application of statutes de novo. *Coblentz v Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006).

Under the FOIA, a public body must disclose any public record that is not specifically exempted from disclosure. MCL 15.233(1). A public body must respond to an FOIA request within five business days by granting the request, denying the request, or granting the request in part and denying it in part. MCL 15.235(2). *Scharret v City of Berkley*, 249 Mich App 405, 412; 642 NW2d 685 (2002). A complete or partial denial of a request must state the basis for the denial. MCL 15.235(4).

A public body may deny in whole or in part a request for disclosure of public records for the reasons listed in MCL 15.243. That statute provides in pertinent part:

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

\* \* \*

(v) Records or information relating to a civil action in which the requesting party and the public body are parties.

The exemptions listed in MCL 15.243 are to be narrowly construed, *Detroit Free Press, Inc v Southfield*, 269 Mich App 275, 281; 713 NW2d 28 (2005), and the burden is on the public body to prove that a claimed exemption applies. MCL 15.240(4).

If the public body denies a request, the person making the request may file suit in circuit court to compel disclosure. MCL 15.235(7)(b); MCL 15.240(1)(b). A circuit court determines by de novo review whether disclosure should be compelled. MCL 15.240(4); *Schroeder v Detroit*, 221 Mich App 364, 365; 561 NW2d 497 (1997). In determining whether a claimed exemption applies, a circuit court should: (1) obtain a particularized justification for the claimed exemption; (2) conduct an in camera hearing to determine whether the exemption applies; or (3) consider allowing the plaintiff's counsel in camera access to the material under an agreement. *The Evening News Ass'n v City of Troy*, 417 Mich 481, 516; 339 NW2d 421 (1983). If the defendant's statements can provide adequate de novo review, the court should not conduct an in camera hearing. *Post-Newsweek Stations v Detroit*, 179 Mich App 331, 337; 445 NW2d 529 (1989). A court cannot make a conclusory determination regarding the applicability of a claimed exemption, but must specifically find that particular parts of the requested information are exempt for particular reasons. *Messenger v Dep't of Consumer & Indus Servs*, 238 Mich App 524, 532; 606 NW2d 38 (1999).

We review de novo a circuit court's legal determination regarding the applicability of an exemption, review for an abuse of discretion a discretionary determination, and review for clear error findings of fact. *Coblentz*, 475 Mich at 568.

Keag argues that the trial court erred by granting defendants' motion for summary disposition of his FOIA claim. We agree, reverse the trial court's decision, and remand for further proceedings consistent with this opinion.

In determining that the information sought in Keag's FOIA requests was exempt from disclosure under MCL 15.243(1)(v), the trial court reasoned as follows:

The statute [MCL 15.243(1)(v)] does not define the word "relate." When a statute does not define a term, the ordinary meaning of a term may be applied or a dictionary may be consulted. *People v Peals*, 476 Mich 636, 641; 741 NW2d 61 (2007). Webster's Revised Unabridged Dictionary defines relate as "[t]o stand in some relation; to have bearing or concern; to pertain; to refer; -- with to."

In this sense, all of the FOIA requests "relate" to the litigation. The underlying litigation involves a denial of an application for a planned unit development. Presumably the reason Plaintiff made the requests is to get information concerning the denial. That is, were it not for the denial, he would not be making the requests. As such, the documents requested stand in some relation, have a bearing or concern on, pertain to, and refer to the litigation. Furthermore, the requested items could all have been obtained through discovery, provided they were not protected by some privilege. This is the precise situation for which the exemption is intended.

The materials that Keag requested via the FOIA were not from the actual record generated by his dealings with the Planning Commission or his appeal of the Commission's denial of his PUD application. Nevertheless, the trial court concluded that the materials, which the trial court did not examine in camera prior to ruling, "related" to the underlying litigation because Keag might be able to use them in some way for comparison purposes in pursuing his appeal of the Planning Commission's decision. That possibility notwithstanding, however, we conclude that the trial court erred in making a general conclusion that all the information Keag requested was exempt from disclosure. As noted, an exemption to the FOIA is to be narrowly construed. *Detroit Free Press*, 269 Mich App at 281. Keag requested various types of information, i.e., tape recordings, e-mails, drafts and final copies of ordinances, plans and applications submitted by other persons, etc., and the trial court simply made a blanket determination that all the information was exempt under MCL 15.243(1)(v). The trial court was required to sort through the requests and make a particularized determination regarding each piece of information sought under the requests. *Messenger*, 238 Mich App at 532. It is likely that portions of the information sought by Keag, for example some e-mails between the Planning Commission and McKenna Associates, would have no bearing whatsoever on Keag's underlying litigation and thus would be subject to disclosure under the FOIA.

The record before this Court indicates that Yonkers told Keag that audio recordings of the type he requested did not exist; otherwise, it is difficult to discern to what extent Yonkers determined what pieces of the information Keag requested could be made available. Defendants cannot be required to make a public record that does not exist. See *Detroit Free Press*, 269 Mich App at 281. However, assuming that other pieces of the requested information exist in some format or formats, and assuming that the claimed exemption did not apply to a particular piece of that information, Keag would have the right to inspect the information in the stored format. See *Oakland Co Treas v The Title Office, Inc*, 245 Mich App 196, 203; 627 NW2d 317 (2001), overruled on other grounds *The Title Office, Inc v VanBuren Co Treas*, 469 Mich 516; 676 NW2d 207 (2004).

The trial court erred in granting defendants' motion for summary disposition on the ground that the information Keag requested via the FOIA was exempt from disclosure pursuant to MCL 15.243(1)(v).

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ David H. Sawyer

/s/ Richard A. Bandstra

/s/ William C. Whitbeck