STATE OF MICHIGAN

COURT OF APPEALS

KENNETH WAYNE RADFORD,

Plaintiff-Appellant,

v

MONROE COUNTY and MONROE COUNTY SHERIFF'S DEPARTMENT,

Defendants-Appellees.

UNPUBLISHED
March 17, 2020

No. 347142
Monroe Circuit Court
LC No. 15-138008-CZ

Before: M.J. KELLY, P.J., and FORT HOOD and BORRELLO, JJ.

PER CURIAM.

Plaintiff appeals as of right the judgment of the trial court finding in favor of plaintiffs, Monroe County (the County) and the Monroe County Sheriff's Department (the Sheriff's Department), that no violation of the Michigan Freedom of Information Act (FOIA), MCL 15.231 *et seq*., had occurred, and finding that neither party was entitled to costs or attorney fees. Defendants have relied on the law-enforcement-proceedings exemption to FOIA to explain their denial of plaintiffs FOIA request. We conclude that defendants failed to satisfy their burden of proof with respect to the exemption by failing to adequately describe how release of the requested records would have hindered an ongoing law-enforcement investigation. Accordingly, we reverse and remand for proceedings consistent with this opinion.

I. FACTUAL BACKGROUND

In a previous appeal, this Court detailed the factual background pertaining to this case:

> Around midnight on March 27, 2015, Monroe County Sheriff's Deputy Motylinski arrested Kenneth Wayne Radford for drunk driving. On March 30, 2015, Radford served on the Monroe County Prosecutor's Office an "Appearance of Counsel and Demand for Discovery," requesting "preservation and production of all police reports, patrol car videos, 911 calls, and station house video capturing [Radford's] driving, detention, arrest and chemical testing on or about March 27, 2015."

> Radford also served his first request under the Freedom of Information Act (FOIA), MCL 15.231 *et seq*., on the Monroe County FOIA Coordinator . . . and Sheriff's Department, along with a copy of his counsel's appearance and discovery demand. Radford captioned the request like a pleading in his criminal action. Radford sought production of the police report, "all in-car videos and audio from the patrol car of the arresting officer, Motylinski, from May 27, 2015,[1] at approximately 0000 hours, including the vehicle in motion (if applicable) through pre-arrest screening, the arrest and transport," any and all "station house video and audio of [Radford] through the time of chemical testing, including all Datamaster testing at the police station," all 911 and radio dispatch recordings related to his offense, and "all Datamaster breath tickets that were produced after [Radford] provided a breath sample . . . ."
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> The Sheriff's Department denied this FOIA request because "[i]t has been determined by this agency that the records you have requested is [sic] exempt from disclosure based on the provisions of the [FOIA]." More specifically, the Sheriff's Department indicated that it denied the request because "[w]e show this report to still be open under investigation. . . ." [*Radford v Monroe Co*, unpublished per curiam opinion of the Court of Appeals, issued June 7, 2018 (Docket No. 337654), pp 1-2 (alterations in original).]

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[1] Radford erroneously cited recordings from "May 27" instead of "March 27."

Thereafter, plaintiff filed suit in the Monroe Circuit Court, and specifically alleged that "the recordings from the patrol car and police station . . . were not subject to any FOIA exemption." *Id*. at 2.[1] This Court summarized plaintiff's argument as follows:

> MCL 15.243(1)(b)(*i*) exempts from FOIA disclosure "[i]nvestigating records compiled for law enforcement purposes but only to the extent that disclosure as a public record would . . . [i]nterfere with law enforcement proceedings." The recordings and test results were "not investigating records compiled for law enforcement purposes," Radford contended. Specifically, "nothing secret [was] contained in the records," "no confidential informants [were] mentioned," "no sensitive law enforcement techniques [were] revealed," and nothing in these records "could be used to compromise an ongoing law enforcement investigation." Moreover, defendants made no effort to redact any potentially exempt portions of the requested material so that the remainder could be released as required by MCL 15.243(1)(b). Accordingly, Radford asserted, he was entitled to production of these

[1] The only records initially requested by plaintiff that remain at issue in this appeal are the patrol car and stationhouse videos.

materials pursuant to his FOIA request, as well as damages and attorney fees. [*Id.* at 3 (alterations in original).]

Defendants ultimately filed for summary disposition under MCR 2.116(C)(8) and (C)(10). *Id*. Defendants first contended that, at the time that plaintiff filed his FOIA request—around March 30, 2015—a police investigation was still pending lab analysis of a blood draw taken of plaintiff on the night of his arrest. *Id*. The blood-draw analysis, and therefore the investigation, were not completed until May 8, 2015. *Id*. Thus, according to defendants, the law-enforcement-proceedings exemption to FOIA applied to the record requested by plaintiff. *Id*. The trial court agreed with defendants, finding that the requested records fell within the law-enforcement proceedings exemption to FOIA. *Id*. The trial court also ordered plaintiff to pay costs and fees associated with the lawsuit. *Id*.

Plaintiff appealed, and this Court reversed the trial court's decision, concluding that the trial court improperly held that the law-enforcement-proceedings exemption applied, and more specifically, that defendants failed to justify their reliance on the exemption whatsoever. *Id*. at 8. This court noted:

> Deputy Motylinski observed [plaintiff's] erratic driving and pulled him over on March 27. Motylinski likely put [plaintiff] through field sobriety tests and made observations suggesting that [plaintiff] was intoxicated on March 27. Based on this information, Motylinski decided to arrest [plaintiff] on March 27. Once at the station, a sample of [plaintiff's] blood was taken and was sent for analysis, again on March 27.
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> The [trial] *court* first explained in its summary disposition judgment that defendants would not have decided whether to charge [plaintiff] with drunk driving until the blood test results came back. Therefore, in the court's estimation, all the information gathered was exempt until the rest results were in.
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> FOIA does not permit public bodies to wait nearly two years to explain why the production of public records would have interfered with an ongoing investigation. Here, the court had to fill in the blanks. But even the court did not explain how release of the recordings from the patrol car and station house would have interfered with the investigation. Defendants do not even attempt to give the mandatory particularized explanation on appeal. On this record, the circuit court improperly dismissed [plaintiff's] FOIA action as to the patrol car and station house recordings based on the ongoing investigation exemption. [*Id*. at 8-9 (alterations in original; emphasis added; footnotes omitted).]

Finally, this Court determined that, as the trial court improperly dismissed much of plaintiff's complaint, "it prematurely reached the issue of costs and fees," and thus, those issues "should be revisited by the lower court after resolution of the remaining claims." *Id*. at 11. This Court vacated the portion of the trial court's ruling concerning the law-enforcement-proceedings exemption, and remanded for further proceedings. *Id*.

On remand, the trial court scheduled an evidentiary hearing, at which defendants called four witnesses: plaintiff, Deputy Joshua Motylinski, Captain Brett Ortolano, and William Paul Nichols. At the close of evidence, defendants relied upon the latter three witnesses as having established that that release of the videorecordings would have hindered the investigation surrounding plaintiff's arrest. Plaintiff, on the other hand, argued that the witnesses did not provide a particularized justification for exemption, and instead provided only generic and speculative justifications. The trial court sided with defendants. The court also declined to award either party fees or costs. Plaintiff now appeals, and we reverse.

II. THE FREEDOM OF INFORMATION ACT

Plaintiff first contends that the trial court erred in determining that defendants adequately justified their reliance on the law-enforcement-proceedings exemption, and thus erred in failing to order defendants to release the patrol car and stationhouse videos. We agree.

"[W]hether a public record is exempt from disclosure under FOIA is a mixed question of fact and law." *Rataj v Romulus*, 306 Mich App 735, 747; 858 NW2d 116 (2014). We review the trial court's legal determinations de novo and factual determinations for clear error. *Herald Co, Inc v Eastern Mich Univ Bd of Regents*, 475 Mich 463, 471-472; 719 NW2d 19 (2006). "However, when facts are undisputed and reasonable minds could not differ, whether a public record is exempt under FOIA is a pure question of law for the court." *Rataj*, 306 Mich App at 747-748. FOIA's disclosure provisions are to be interpreted broadly to ensure public access, while the exemptions are to be construed narrowly. *Id*. at 748-749. With respect to factual findings, we defer to the trial court's factual findings unless left with a definite and firm conviction that a mistake has been made. *Herald*, 475 Mich at 472.[2] The burden to prove that an exemption exists rests with the party asserting exemption. *Rataj*, 306 Mich App at 749.

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[2] Defendants briefly contend that, whether a public body has provided sufficient evidence to establish that requested materials fall under an exemption to FOIA is a matter within the discretion of the trial court that should be reviewed for an abuse of discretion. Defendants provide no citation for this assertion, and we note that the FOIA case from which the abuse of discretion standard stems speaks specifically to provisions of FOIA that explicitly grant discretion to the trial court. See *Herald*, 475 Mich at 470 n 10, citing MCL 15.243(1)(c), (k), (n), (s), and (y). Indeed, where FOIA places an issue within the discretion of the trial court—ordinarily, by creating a balancing test—we review the discretionary determination for an abuse of discretion. *Herald*, 475 Mich at 472. The provisions of FOIA cited in *Herald*, however, create exemptions to FOIA that are universally conditioned on a balancing of public interests. Specifically, those provisions create an exemption and condition that exemption on a finding of whether "the public interest in disclosure under [FOIA] outweighs the public interest in nondisclosure." See MCL 15.243(1)(c), (k), (n), (s), (y). How the trial court balances the competing interests of those provisions is a matter we review for an abuse of discretion, *Herald*, 475 Mich at 470-472, but as further explained in this opinion , no such provision or balancing test is at issue in this case. At issue in this case is MCL 15.243(1)(b)(*i*), which creates an exemption from disclosure only when disclosure will interfere with law enforcement proceedings, regardless of any balancing of public interest. Accordingly, in

Our Legislature enacted FOIA with a particular purpose in mind:

> (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. [MCL 15.231(2).]

"FOIA is a manifestation of this state's public policy favoring public access to government information, recognizing the need that citizens be informed as they participate in democratic governance, and the need that public officials be held accountable for the manner in which they perform their duties." *Rataj*, 306 Mich App at 748 (quotation marks and citation omitted). Michigan courts have "repeatedly described FOIA as a 'prodisclosure statute,' " as it gives individuals a broad right to inspect public records that is only impeded where the records fall within narrowly defined exemptions from disclosure. *Id*. at 748-749, quoting *Herald*, 463 Mich at 119.

The exemption at issue in this case is found in MCL 15.243(1)(b)(*i*), which provides:

> (1) A public body may exempt from disclosure as a public record under this act any of the following:
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> * * *
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> (b) Investigating records compiled for law enforcement purposes, but only to the extent that disclosure as a public record would do any of the following:
>
> (*i*) Interfere with law enforcement proceedings.

With respect to this "law-enforcement-proceedings exemption," our Supreme Court has held that "a generic determination that the release of documents would interfere with law enforcement proceedings is not sufficient to sustain an exemption." *King v Oakland Co Prosecutor*, 303 Mich App 222, 226-227; 842 NW2d 403 (2013), citing *Evening News Ass'n v Troy*, 417 Mich 481, 486; 339 NW2d 421 (1983). A public body claiming exemption under the statute must establish both that an investigation was open and ongoing, and that disclosure of the documents *would* have interfered with law enforcement proceedings. See *King*, 303 Mich App at 231-232. In *Evening News*, 417 Mich at 503, our Supreme Court set forth a clear set of rules concerning the application of the law-enforcement-proceedings exemption:

> 1. The burden of proof is on the party claiming exemption from disclosure.

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this case, we review the trial court's application of MCL 15.243(1)(b)(*i*) de novo, and its findings of fact in relation to that application for clear error.

2. Exemptions must be interpreted narrowly.

3. The public body shall separate the exempt and nonexempt material and make the nonexempt material available for examination and copying.

4. Detailed affidavits describing the matters withheld must be supplied by the agency.

5. Justification of exemption must be more than "conclusory," i.e., simple repetition of statutory language. A bill of particulars is in order. Justification must indicate factually how a particular document, or category of documents, interferes with law enforcement proceedings.

6. The mere showing of a direct relationship between records sought and an investigation is inadequate.

With those rules in mind, we conclude that defendants failed to establish that MCL 15.243(1)(b)(*i*) applied to the requested videorecordings, and accordingly, the trial court erred in dismissing plaintiff's claim with respect to those records.

As an initial matter, this Court's previous opinion noted that, at that time, "[d]efendants never offered information beyond a generic justification for their claim that the investigation was ongoing on March 30." *Radford*, unpub op at 8. We noted, as a clear violation of the rule that defendants describe "the matters withheld" with particularity, that the only explanation as to why the investigation was ongoing came—not from defendants—but from the trial court. *Id*. On remand, defendants merely reiterated the reasoning that came from the trial court. In any event, at this juncture, the parties do not dispute that an investigation was ongoing at the time that plaintiff filed his FOIA claim. Thus, this Court need not address whether defendants properly proved the existence of an ongoing investigation, and instead, this case turns on whether defendants properly established that the release of the videorecordings requested by plaintiff would have hampered that investigation. We conclude that defendants failed to establish that fact.

As this Court noted in the previous appeal, at that time, "[d]efendants d[id] not even attempt to give the mandatory particularized explanation on appeal" as to how release of the videorecordings would have hampered the ongoing investigation, and "even the court did not explain how release of the recordings from the patrol car and stationhouse would have interfered with the investigation." *Id*. at 8-9. We noted that defendants' lack of guidance and specificity on the matter impermissibly left the trial court to "fill in the blanks." *Id*. at 9. On remand, defendants attempted to fill those blanks with speculative and generic explanations. Defendants relied entirely on the testimony of Deputy Motylinski, Captain Ortolano, and Nichols, none of whom adequately explained how release of the videorecordings *would* have hampered the law-enforcement investigation.

Deputy Motylinski testified that release of the videorecordings would have hampered the investigation as follows:

> Depending on the results of the blood, it depends on what we—the prosecutor could have possibly charged him with. He could have had a higher

> charge for OWI. He could have had a lower charge. He could have had no charges at all. Often when I'm investigating any type of crime, I get requests from the Prosecutor's Office to do follow ups to an investigation. So, depending on the results and what the prosecutor was going to charge him with, they could have asked me to do follow up. For instance, they could have had me talk to the witness again. And providing that information, you know, the defendant could have possibly talked to the witness and—or you know, done something to hinder the investigation.

Later, on cross-examination, Deputy Motylinski attempted to provide an example to illustrate how the videorecordings could hinder an investigation:

> Well, for example, I can give you an example, say the in-car video showed [plaintiff] stumbling or something to that effect, the prosecutor gets the blood results back, I submit the blood results, and he is a point zero, say we release that video, the media gets that, something happens to the fact or why—why didn't you arrest this guy, he's all over camera stumbling, when in fact something else could have possibly been going on. So, it could have—it could have affected him personally if—if it got out. It could affect the investigation in—in that way. That—that's one example, I mean.
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> * * *
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> Well, it—it could—the investigation, depending what the blood results are, it depends on what they're charged with. And like I said, the prosecutor might want me to go ask questions to somebody[ ] or do some follow up, and they—then that's what I would do at that time.

Deputy Motylinski's testimony is replete with what *could* and *might* have happened upon release of the videorecordings, but he gave no particularized explanation of what *would* have happened. The example cited by Deputy Motylinski itself relies on a presumption of what the videorecordings *might* contain in order to speculate as to how they *might* affect witnesses that *might* view them.

In fact, Deputy Motylinski himself recognized that defendants' explanation for how the videorecordings could have hampered the investigation was speculative in nature. When asked by plaintiff's counsel to describe how the investigation would have been hindered in less general and more specific terms, Deputy Motylinski testified:

> Because my investigation was not complete yet because of the blood results. All—all the information, until my investigation is complete—I—I—I cannot speculate and tell you a specific thing as to why.
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> * * *
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> There may be something on the video the prosecutor would see and say hey, I saw this, go back and take a look at this. I can't speculate. So, that's why—that's something that could happen.

* * *

> Again, I cannot speculate, but if the prosecutor had seen something in the video that I had missed or something like that and they wanted me to take another look at it, I would do so.

These were generic and conclusory explanations, and they were not sufficient for the purposes of the law-enforcement-proceedings exemption. See *King*, 303 Mich App at 226-227 (explaining that justification for an exemption must be described with particularity and may not be comprised of conclusory legal statements).

Similarly, Captain Ortolano provided no more specifics than Deputy Motylinski. To explain how release of the videorecordings would have hindered the investigation, Captain Ortolano testified:

> I have no control over what happens to the information once it's released from our office. And potentially, allowing other witnesses—a case on point might be, say we have to go back now and interview people at the establishment, wherever the defendant was drinking, they watched the video and the video taints their statements prior to us being able to follow up and get additional information, it potentially could impact our case. So, as a general matter of practice, while we're investigating these, we don't release the evidence that we've collected thus far for the case.
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> * * *
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> It's my believe [sic] that releasing partial evidence in a crime out into the public before we're done with our investigation, has a potential to taint people's statements. It's the same reason that we go to calls and we separate people and we gather information separately from each other. Our job is to compile a complete and fair investigation. And then when that's complete, submit it to the Prosecutor's Office, not to . . . [r]elease evidence in parts and pieces.

Captain Ortolano's testimony relied on the same speculation as Deputy Motylinski, noting that releasing the videorecordings "potentially could impact" the investigation by affecting the testimony of potential witnesses. And, in fact, when asked on cross-examination by plaintiff's counsel about whether the witnesses to which Captain Ortolano referred were "fictitious" and "theoretical," Captain Ortolano replied: "Yes, correct." By providing no particular details as to why or how the videorecordings would actually interfere with the investigation, Captain Ortolano merely showed "a direct relationship between [the] records sought and [the] investigation," which is itself inadequate to trigger the law-enforcement-proceedings exemption. *Evening News*, 417 Mich at 503. Similar to Deputy Motylinski, Captain Ortolano's testimony did not provide a particularized justification for the exemption, but instead provided a generalized legal conclusion.

Finally, the trial court gave great weight to Nichols's testimony because of his position as the Monroe County Prosecutor. The trial court noted that the particularized justification necessary to establish the law-enforcement-proceedings exemption was given by Nichols when he testified that, "in fact, in fact, [release of the videorecordings] would have jeopardized and impaired the investigation . . . ." Again, this is a conclusory statement and not a particularized justification.

And, indeed, Nichols's testimony was largely comprised of similar conclusory legal statements. Nichols testified that release of the videorecordings "could interfere with an investigation in a number of ways," specifying:

> Release of information could interfere with that investigation. In one way, I believe it was talked about earlier, by releasing a video, certainly that would potentially allow a potential witness to look at that video and maybe taint their opinion of [plaintiff]. So, for instance, if there was a video at the jail that showed him walking properly, not stumbling and appearing normal, that may have been an hour or two after the incident, if that video was shown to the neighbor that appeared at the scene, or someone at the bar, or tow truck operator, any potential witness in the case, that might taint their opinion of him and they might think well, maybe he wasn't really that drunk. So, certainly, it was an open investigation, and certainly, release of information could have interfered with that investigation.

Again, Nichols's testimony, like that of Deputy Motylinski or Captain Ortolano, is comprised of inherently speculative and conclusory statements. Despite his position of authority as the Monroe County Prosecutor, Nichols provided no more a specific justification for how release of the videorecordings would have hindered the investigation than Deputy Motylinski or Captain Ortolano, and the substance of Nichols's testimony was insufficient to satisfy defendants' burden.

Moreover, Nichols's subsequent testimony evidenced that the legal conclusions he provided were not necessarily based on an adequate understanding of the applicable law:

> *Q*. Okay. But you didn't review these videos and you didn't review this report before instructing these folks over at the Monroe County Sheriff's Department to deny the FOIA based upon, in your words, he should deny the request based on the ongoing investigation period, right?
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> *A*. We didn't have the blood test results, it was an ongoing investigation. At that point in time, *everything should have been denied because it could have interfered with that investigation.*
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> * * *
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> *Q*. Your testimony today would appear to suggest that in any drunk driving case where blood is pending, nothing such as the videos or the reports should ever be released until the blood is returned, correct?
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> *A*. I haven't thought about that question before, but my general response would be to deny based on the ongoing investigation. [Emphasis added.]

Consistent with the testimony of Deputy Motylinski and Captain Ortolano, as well as the arguments defendants have crafted on appeal, Nichols's testimony ultimately suggests that the actual denial of plaintiff's FOIA request was premised on the mere existence of an ongoing investigation *without* adequate consideration of whether the investigation would actually have been hindered in any realistic, identifiable way if the requested records were released.

With all of that in mind, the trial court erred in determining that the testimony of Deputy Motylinski, Captain Ortolano, and Nichols was sufficient to satisfy defendants' burden. Defendant did not prove that the ongoing investigation would have been hindered by release of the records plaintiff sought, and thus could not rely upon the law-enforcement-proceedings exemption to FOIA.

We note that defendants and the trial court cite plaintiff's failure to file a second FOIA request and plaintiff's guilty plea to operating while visibly impaired, as justifications for the dismissal of plaintiff's lawsuit. Defendants suggest that plaintiff had the power to file a second FOIA request following his guilty plea and the completion of the investigation related to that conviction.[3] And, the trial court essentially characterized plaintiff's guilty plea in his criminal case as a waiver to any objection to the denial of his initial FOIA claim. The court's logic was that, because plaintiff did not seek the videorecordings during discovery in that criminal case, plaintiff could essentially be estopped from doing so through FOIA.

Neither defendants nor the trial court cite any law with reference to the above arguments, and because it is unclear as to how the ideas fit in to the established legal framework for reviewing a FOIA denial, this Court will not entertain them. However, even briefly addressing the merits of the arguments, we note that what plaintiff did or did not do outside of this particular FOIA case is not relevant to the issues raised on appeal. As explained above, FOIA gives plaintiff a legal right to request certain records and obligates defendants to release those records except under limited circumstances. That is what this case is about, and that plaintiff may have had the ability to file a second FOIA claim or to seek the videorecordings through discovery in his criminal case did not obligate him to do so. Plaintiff's failure to do those things has no impact on the issue raised in this lawsuit, which is whether the denial of plaintiff's initial FOIA request was justified.

III. FEES, COSTS, AND PUNITIVE DAMAGES

Plaintiff next contends that the trial court erred by failing to award him attorneys' fees, costs, and punitive damages pursuant to MCL 15.240(6) and MCL 15.240(7). We disagree.

"We review a trial court's grant or denial of attorney fees for an abuse of discretion." *Reed v Reed*, 265 Mich App 131, 164; 693 NW2d 825 (2005). "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008). Findings of fact with respect to the trial court's discretionary ruling are reviewed for clear error, but questions of law are reviewed de novo. *Reed*, 265 Mich App at 164.

MCL 15.240(6) and (7) provide:

[3] Defendants' argument stems from the idea that, individuals who file a FOIA request for exempt materials are not precluded from filing another request if they "believe that, because of changed circumstances, the record can no longer be withheld from disclosure." *King*, 303 Mich App at 235 n 5 (quotation marks and citation omitted).

> (6) If a person asserting the right to inspect, copy, or receive a copy of all or a portion of a public record prevails in an action commenced under this section, the court shall award reasonable attorneys' fees, costs, and disbursements. If the person or public body prevails in part, the court may, in its discretion, award all or an appropriate portion of reasonable attorneys' fees, costs, and disbursement. The award shall be assessed against the public body liable for damages under subsection (7).
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> (7) If the court determines in an action commenced under this section that the public body has arbitrarily and capriciously violated this act by refusal or delay in disclosing or providing copies of a public record, the court shall order the public body to pay a civil fine of $1,000.00, which shall be deposited into the general fund of the state treasury. The court shall award, in addition to any actual or compensatory damages, punitive damages in the amount of $1,000.00 to the person seeking the right to inspect or receive a copy of a public record. The damages shall not be assessed against an individual, but shall be assessed against the next succeeding public body that is not an individual and that kept or maintained the public record as part of its public function.

With respect to MCL 15.240(6), the statute allows a plaintiff to recover attorney fees, costs, and disbursements after prevailing on a FOIA action that was "reasonably necessary to compel the disclosure of public records, and . . . had a substantial causative effect on the delivery of the information to the plaintiff." *Amberg v Dearborn*, 497 Mich 28, 33-34; 859 NW2d 674 (2014) (quotation marks and citation omitted). This Court has held that, "if a plaintiff prevails completely in an action to compel disclosure under the FOIA, the circuit court must award reasonable attorney fees," however, a trial court is not required to order the fees and costs unless the "party prevails completely." *Nash Estate v Grand Haven*, 321 Mich App 587, 606; 909 NW2d 862 (2017) (quotation marks and citation omitted). "Whether to award plaintiff reasonable attorney fees, costs, and disbursements when a party only partially prevails under the FOIA is entrusted to the sound discretion of the trial court." *Id.* (quotation marks and citation omitted). Most importantly, in order for a plaintiff to have "prevailed" under the law, the action must have been "reasonably necessary to compel the disclosure of public records." *Amberg*, 497 Mich at 33-34.

Plaintiff is not entitled to fees and costs pursuant to MCL 15.240(6) because plaintiff cannot establish that this action was reasonably necessary to compel the disclosure of the videorecordings. While defendants' references to plaintiff's ability to file a second FOIA request or to seek the release of the videorecordings through discovery in his criminal case were irrelevant to the first issue on appeal, on this issue they are dispositive. With the knowledge that plaintiff's FOIA request was denied based upon the law-enforcement-proceedings exemption, plaintiff certainly had the ability to renew the request at the close of his criminal proceedings rather than engage in this litigation. See *King*, 303 Mich App at 235 n 5. Similarly, and while we are careful not to penalize plaintiff for pleading guilty or to even presume his reasons for doing so, it cannot be discounted that plaintiff testified that he required the videorecordings to aid in the defense of his criminal case, and plaintiff could have easily sought production of the videorecordings through discovery in that case. With these options having been available to plaintiff, this Court cannot conclude that the extensive litigation that ensued over application of the law-enforcement-

proceedings exemption to plaintiff's initial FOIA request was reasonably *necessary* to compel the disclosure of the videorecordings.

With respect to MCL 15.240(7), the statute exposes public bodies to civil fines for arbitrarily and capriciously refusing to provide requested records under FOIA. This Court has made clear that, under MCL 15.240(7), " '[t]he prerequisites to an award of punitive damages are . . . a court-ordered disclosure *and* a finding that the defendant acted arbitrarily and capriciously in refusing to provide the requested information.' " *Local Area Watch v Grand Rapids*, 262 Mich App 136, 153; 683 NW2d 745 (2004) (emphasis added), quoting *Bredemeier v Kentwood Bd of Ed*, 95 Mich App 767, 773; 291 NW2d 199 (1980). The trial court in this case made no findings with respect to whether defendants' actions were arbitrary and capricious, and is better situated than this Court to address that issue on remand.

All that having been said, we note that, seemingly for the first time on remand, defendants' witnesses suggested that the videorecordings sought by plaintiff might not even exist. Deputy Motylinski testified that he could not recall whether a patrol car recording existed, and testified only that he "believed" a stationhouse video existed. Captain Ortolano flatly denied the existence of a patrol car video before subsequently testifying that he actually was not fully certain whether it existed, and with respect to the stationhouse video, Captain Ortolano testified that he did not know whether it existed, but that it "would be reasonable" to believe that it did exist. Given the length of the litigation in this case, particularly with respect to the application of the law-enforcement-proceedings exemption *to the videorecordings*, we agree with plaintiff that it is somewhat shocking that defendants are now unsure as to whether any videos exist in the first place. A plain reading of FOIA would suggest that, in the first instance, it is incumbent on defendants to determine whether materials requested under FOIA do, in fact, exist. See MCL 15.235(5)(b) (where a record cannot be provided because it does not exist, and where a FOIA request is denied for that reason, the public body must explain so in its written notice of denial). And, notably, Captain Ortolano explicitly testified that defendants were obligated under FOIA to ascertain whether the materials plaintiff requested existed at the time the FOIA request was made. Should the videorecordings not exist, the extensive litigation that has occurred in this case would have been a waste that only defendants could have avoided.

On remand, the trial court should order the disclosure of the videorecordings to plaintiff, but to the extent that neither or only one of the videorecordings exist, the trial court should consider that fact during its consideration of damages under MCL 15.240(7), and should consider whether reasonable attorney fees and costs might then be applicable pursuant to another statute or court rule.

IV. CONCLUSION

The trial court erred in determining that defendants satisfied their burden to establish that the law-enforcement-proceedings exemption applied to the videorecordings sought in plaintiff's FOIA request, and accordingly, those items should be disclosed to plaintiff. The court did not err, however, in declining to award fees and costs under MCL 15.240(6) because plaintiff had less litigious avenues through which he could have obtained the requested items. With respect to MCL 15.240(7), the trial court should consider on remand whether defendants' refusal to provide the items was arbitrary and capricious. The court should determine whether, in fact, the requested

videorecordings exist, and if not, consider that fact in its application of MCL 15.240(7), as well as any other statute or court rule under which plaintiff would be entitled to fees and costs.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction. As the prevailing party, plaintiff may tax costs under MCR 7.219.

/s/ Michael J. Kelly
/s/ Karen M. Fort Hood
/s/ Stephen L. Borrello