

STATE OF MICHIGAN
COURT OF APPEALS

PHIL FORNER,

Plaintiff-Appellant,

v

DEPARTMENT OF LICENSING AND
REGULATORY AFFAIRS,

Defendant-Appellee.

UNPUBLISHED

April 22, 2021

No. 354488

Court of Claims

LC No. 19-000145-MZ

Before: MARKEY, P.J., and SHAPIRO and GADOLA, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court’s order granting in part and denying in part defendant’s motion for summary disposition under MCR 2.116(C)(10) of plaintiff’s claim under Michigan’s Freedom of Information Act (FOIA), MCL 15.231 *et seq.*, and granting plaintiff summary disposition in part under MCR 2.116(I)(2). We affirm.

I. FACTS

This case arises from defendant’s denial of plaintiff’s request for a subscription to certain public documents under § 3(1) of the FOIA, MCL 15.233(1). By way of background, the Board of Mechanical Rules (BMR) is a board within defendant, Department of Licensing and Regulatory Affairs. See MCL 339.5103; MCL 339.5805. Pursuant to statute, the BMR performs various duties, such as “recommend[ing] to the state construction code commission the promulgation of rules the board considers necessary for the safe design, construction, installation, alteration, servicing, and inspection of systems used in compliance with the Michigan mechanical code,” as well as “recommend[ing] modifications, additions, or deletions to [the Skilled Trades Regulation Act] to update and maintain this act as an effective and enforceable instrument.” MCL 339.5805(5).

Under MCL 339.5311(a), the BMR “shall meet as often as necessary to fulfill its duties under this act, but shall meet at least 2 times a year and at other dates set by the director.” Although the BMR scheduled four meetings for 2018, only one occurred, and the other meetings were canceled. For 2019, the BMR was scheduled to meet February 27, 2019; May 22, 2019; August

21, 2019; and November 20, 2019. On April 23, 2019, plaintiff submitted a FOIA request to defendant, stating:

Given that the information the Bureau of Construction Codes provides to the members of the Board of Mechanical Rules before their regularly scheduled meetings are not being made available on the Bureau of Construction Codes website. Please accept this subscription request for the information that the Bureau of Construction Codes provides to the members of the Board of Mechanical Rules before its regularly scheduled meetings, commonly referred to as the “board packet.”

Defendant responded on May 2, 2019, stating that it would take 10 additional days to consider the request as permitted under FOIA. On May 7, 2019, Laurie Bass of the Bureau of Construction Codes (BCC) sent an e-mail to the members of the BMR asking them to review the agenda for the meeting scheduled for May 22, 2019. Bass referred the members to the “board packet” attached to the e-mail. The packet contained the agenda, the meeting minutes from the November 28, 2018 meeting, and a five-page memorandum regarding an application for licensing. Bass sent out a second e-mail 28 minutes later, stating that her previous e-mail was in error because there were no items of business for the meeting. Bass noted that the lack of any business could result in the meeting being canceled. On May 16, 2019, Kenneth Misiewicz, the chairperson of the BMR, informed Bass that the meeting should be canceled. Bass then e-mailed the BMR members that the May 22, 2019 meeting had been canceled, and that the next meeting was scheduled for August 21, 2019.

Also on May 16, 2019, defendant denied plaintiff’s FOIA request. Defendant explained that the May 22, 2019 meeting likely would be canceled because there was no actionable business for the BMR to consider, and that when meetings were canceled the board packets, to which plaintiff had requested a subscription, were not prepared. Defendant denied plaintiff’s request for a subscription, noting that BMR meetings were so often canceled that the board packets were not produced on a regular basis, and therefore were not subject to a subscription request under the FOIA.

Plaintiff sent an e-mail to defendant’s director, appealing defendant’s denial of his FOIA subscription request. Plaintiff contended that because the BMR had regularly scheduled meetings, the board packets produced for those meetings qualified for a subscription request under the FOIA. On June 3, 2019, defendant upheld the FOIA denial in a letter from Adam Sandoval, who was identified as defendant’s Appeals Officer. Sandoval provided the following reason for the denial:

After a review of the factors related to your appeal of the FOIA [denial], I am upholding [defendant]’s disclosure denial. (MCL 15.240(10)(2)(b)). Section 3(1) of the FOIA, MCL 15.233, provides, in pertinent part, that “[a] person has a right to subscribe to future issuances of public records that are created, issued, or disseminated on a regular basis.” The request does not qualify for a subscription because the type of information that you have identified is not prepared in accordance with, or otherwise released under, a predesignated or regular schedule. A subscription applies only to a public body’s public records that are issued on a steady or uniform and, thus, predictable basis. See *Gendler v Flint Community*

Schls, 2005 WL 1750798 (Mich App). In short, board meeting material is created when a scheduled meeting will occur, and is not created when a board meeting is cancelled; therefore, board meeting material is not prepared on a steady basis or, as stated above, prepared in accordance with a predesignated or regular schedule because the department cannot predict when it might cancel a board meeting.

Plaintiff again emailed defendant's director requesting reconsideration of the denial of his appeal, and asserting that the director was statutorily required under the FOIA to consider his appeal herself. On July 10, 2019, Sandoval sent another e-mail to plaintiff informing him that the decision to uphold the FOIA denial would not be reconsidered.

Plaintiff initiated this lawsuit, asserting that defendant had violated the FOIA by denying his subscription request. Plaintiff also alleged that defendant's director's delegation of the appeal decision to Sandoval violated the FOIA, that Sandoval's decision to uphold the subscription denial was done in bad faith and in a willful and intentional manner, and that plaintiff was entitled to fines and damages, as well as costs and equitable relief.

Defendant moved for summary disposition of plaintiff's claims under MCR 2.116(C)(8) and (10), contending that the board packets requested by plaintiff were not regularly produced, and thus could not be obtained via a FOIA subscription request. Defendant supported that contention with the affidavit of Misiewicz asserting that BMR meetings are generally scheduled to occur four times per year, but often are canceled because of a lack of actionable business; as a result, the board packets are not produced or distributed to BMR members for those meetings. Defendant also contended that its director was permitted under the FOIA to delegate her appellate review.

Plaintiff responded that defendant could not fail to comply with the subscription section of the FOIA by speculating that future meetings might be canceled. Plaintiff also asserted that defendant had created and distributed a board packet for the May 22, 2019 meeting, even though it was ultimately canceled, which undercut defendant's assertion that board packets were not prepared for canceled meetings. Plaintiff also asserted that defendant's director had improperly delegated her appellate duties.

The trial court decided the motion for summary disposition under MCR 2.116(C)(10) because defendant had supplied the trial court with documentary evidence outside of the pleadings. The trial court held that defendant violated FOIA by denying plaintiff's subscription request, and granted plaintiff partial summary disposition on that ground under MCR 2.116(I)(2). The trial court reasoned that the BMR scheduled meetings to be held on a fixed, regular basis, and at the time plaintiff requested the subscription under the FOIA there were scheduled BMR meetings that would have resulted in regular disbursement of board packets. The trial court explained that the fact that the BMR sometimes canceled meetings was not dispositive of the issue, and defendant was not permitted to deny plaintiff's request on the basis of "what it anticipates could happen in the future."

Addressing plaintiff's argument that defendant violated the FOIA in a willful and intentional manner by failing to produce certain e-mails and existing documents, the trial court observed that plaintiff had not requested the e-mails and existing documents, but had only

requested a subscription to upcoming board packets. The trial court also denied plaintiff's request for civil fines and damages, finding that the department had not failed to disclose available documents in an arbitrary and capricious manner. The trial court also determined that defendant's director was statutorily permitted to delegate the consideration of FOIA appeals. The trial court thus granted partial summary disposition in favor of plaintiff under MCR 2.116(I)(2), and granted in part and denied in part defendant's motion for summary disposition under MCR 2.116(C)(10). Plaintiff now appeals.

II. ANALYSIS

A. STANDARD OF REVIEW

We review de novo a trial court's decision to grant or deny summary disposition. *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159; 934 NW2d 665 (2019). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of a claim. *Id.* at 160. When reviewing a motion for summary disposition granted under MCR 2.116(C)(10), we consider the documentary evidence submitted by the parties in the light most favorable to the nonmoving party. *Id.* Summary disposition under MCR 2.116(C)(10) is warranted when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Id.* "A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds might differ." *Johnson v Vanderkooi*, 502 Mich 751, 761; 918 NW2d 785 (2018) (quotation marks and citations omitted).

We also review de novo a trial court's interpretation and application of the FOIA. *ESPN, Inc v Mich State Univ*, 311 Mich App 662, 664; 876 NW2d 593 (2015). Whether a record is exempt from disclosure generally is a mixed question of fact and law, but if the facts are undisputed and reasonable minds could not differ, whether a public record is exempt under the FOIA is a question of law for the court. *Rataj v City of Romulus*, 306 Mich App 735, 747-748; 858 NW2d 116 (2014). We review the trial court's factual determinations in a FOIA action, if any, for clear error. *King v Mich State Police Dep't*, 303 Mich App 162, 174; 841 NW2d 914 (2013).

B. FOIA

The Michigan FOIA "provides for the disclosure of public records in the possession of a public body." *Kent Co Deputy Sheriff's Ass'n v Kent Co Sheriff*, 463 Mich 353, 360; 616 NW2d 677 (2000) (quotation marks and citation omitted). Under the FOIA, "all persons . . . 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." MCL 15.231; see also *Amberg v City of Dearborn*, 497 Mich 28, 30; 859 NW2d 674 (2014). Michigan's FOIA therefore generally mandates the full disclosure of public records in the possession of a public body, *Ellison v Dep't of State*, 320 Mich App 169, 176; 906 NW2d 221 (2017), and is described as a pro-disclosure statute. *Thomas v New Baltimore*, 254 Mich App 196, 201; 657 NW2d 530 (2003). When a request for records is made under the FOIA, a public body has a duty to provide access to the records, or to copies of the requested records, unless those records are exempt from disclosure. *Arabo v Mich Gaming Control Bd*, 310 Mich app 370, 380; 872 NW2d 223 (2015). If a public body denies a FOIA request, the burden is upon that public body to justify

its decision. *Mich Federation of Teachers v Univ of Mich*, 481 Mich 657, 665; 753 NW2d 28 (2008), citing MCL 15.240(4).

The FOIA provides that, “a person has a right to inspect, copy, or receive copies of the requested public record of the public body,” after “providing a public body’s FOIA coordinator with a written request that describes a public record sufficiently to enable the public body to find the public record” MCL 15.233(1). That statutory section also provides:

A person has a right to subscribe to future issuances of public records that are created, issued, or disseminated on a regular basis. A subscription is valid for up to 6 months, at the request of the subscriber, and is renewable. [MCL 15.233(1).]

Here, the trial court found that plaintiff requested a subscription to future issuances of board packets for meetings of the BMR, and that defendant improperly denied plaintiff’s subscription request on the basis that the board packets were not regularly created. Rejecting defendant’s reasoning, the trial court held:

The Board must, pursuant to MCL 339.5311(a), meet at least two times per year. In addition, the record evidence reveals that the Board regularly schedules approximately four meetings per year. In light of this evidence, it is apparent that Board meetings are scheduled to occur on a fixed, regular basis. Our Supreme Court has explained that “[t]he denial of a FOIA request occurs at a definite point in time,” and that a public body’s decision to deny a request must be evaluated in light of the information available to it at the time it denies the request. *State News v Mich State Univ*, 481 Mich 692, 703; 753 NW2d 20 (2008). Subsequent, hypothetical events are irrelevant to the inquiry of whether a FOIA request should be granted. *Id.* at 703-704. Thus, as it concerns the instant case, the fact that the Board might cancel a scheduled meeting in the future is not dispositive. Nor is it dispositive that the Board might decline to produce or distribute relevant records in the event that a meeting is cancelled. Rather, what matters is that, at the time a request is made, Board meetings are scheduled to occur, which means that responsive records are scheduled to be produced on a regular, predictable basis. . . . As a result, the Court concludes defendant violated FOIA when it denied plaintiff’s valid subscription request. And because defendant violated FOIA when it denied the subscription request, the Court will grant summary disposition in plaintiff’s favor pursuant to MCR 2.116(I)(2). [Footnotes omitted.]

Plaintiff contends, however, that the trial court erred by determining that defendant did not also violate the FOIA by failing to disclose e-mails and board packets relevant to the scheduled May 22, 2019 BMR meeting. But as the trial court observed, plaintiff did not request those items and instead requested a subscription to the board packets under MCL 15.233(1). Plaintiff’s FOIA request stated:

Please accept this subscription request for the information that the Bureau of Construction Codes provides to the members of the Board of Mechanical Rules before its regularly scheduled meetings, commonly referred to as the “board packet.”

Defendant denied the request for a subscription to the board packets, and the trial court found that defendant thereby violated the FOIA. Plaintiff failed to establish that he requested any other item from defendant, and the trial court correctly determined that defendant did not violate the FOIA by failing to produce documents not requested.¹

C. CIVIL FINE AND DAMAGES

Plaintiff also contends that the trial court erred by granting defendant summary disposition of plaintiff's claims for a civil fine and damages under MCL 15.240(7). We disagree.

MCL 15.240(7) provides:

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. . . .

Accordingly, a civil fine and damages are payable if the trial court finds “that the public body has arbitrarily and capriciously violated” FOIA by delaying or refusing to disclose certain records. To prevail under MCL 15.240(7), there must be both “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) (quotation marks and citation omitted). “Even if defendant’s refusal to disclose or provide the requested materials was a statutory violation, it was not necessarily arbitrary or capricious if defendant’s decision to act was based on consideration of principles or circumstances and was reasonable, rather than ‘whimsical.’ ” *Meredith Corp v Flint*, 256 Mich App 703, 717; 671 NW2d 101 (2003) (quotation marks and citation omitted).

In this case, plaintiff sued under FOIA after defendant denied his request for a subscription to BMR board packets typically issued in anticipation of a meeting of the BMR. The trial court determined that the subscription request was valid, and that defendant violated FOIA when it denied plaintiff’s request for future board packets. The trial court observed, however, that it had not ordered the disclosure of any documents. Because there was no court-ordered disclosure, the

¹ Plaintiff argues for the first time on appeal that the trial court should have denied defendant’s motion for summary disposition because defendant came to the court with unclean hands. This argument was waived by plaintiff’s failure to raise it with the trial court, and consequently, we decline to consider it. *Walters v Nadell*, 481 Mich 377, 387; 751 NW2d 431 (2008). Further, plaintiff’s unclean-hands argument lacks merit because defendant was not seeking equitable relief, but rather summary disposition regarding the applicability and effect of the FOIA. See *Varela v Spanski*, 329 Mich App 58, 83; 941 NW2d 60 (2019).

trial court properly determined that plaintiff was not entitled to a civil fine or damages under MCL 15.240(7). *Local Area Watch*, 262 Mich App at 153.

A review of the record also supports the trial court's determination that defendant's denial of plaintiff's subscription request was not arbitrary or capricious. Defendant denied plaintiff's request because it determined that the board packets were not regularly produced. Although this reason did not justify denial of plaintiff's request, we agree with the trial court's observation that "the mere violation of FOIA does not amount to an arbitrary and capricious act, and there is nothing in the record to suggest that defendant's decision to deny the request rose to the level of being 'whimsical' or void of principles as would be required to support a finding of an arbitrary and capricious denial." Thus, the trial court did not err in summarily disposing of plaintiff's claim for a civil fine and damages.²

D. DELEGATION OF FOIA APPELLATE AUTHORITY

Plaintiff also contends that the trial court erred by holding that defendant did not violate the FOIA by permitting Sandoval to respond to his FOIA appeal in the place of the director of the department. We disagree.

Under MCL 15.240(1)(a), a person wishing to appeal a denial of a request under the FOIA is required to "[s]ubmit to the head of the public body a written appeal that specifically states the word 'appeal' and identifies the reason or reasons for reversal of the denial." In response, the "head of the public body" must either uphold or reverse the decision of the public body, in whole or in part. MCL 15.240(2); *Mich Open Carry, Inc v Dep't of State Police*, 330 Mich App 614, 622; 950 NW2d 484 (2019). But "[n]othing in the plain language of MCL 15.240 prohibits the head of a public body from employing personnel to act on behalf and under the authority of the head of the public body." *Id.* at 622-623. Accordingly, the director of a public body is permitted to delegate the review of FOIA denial appeals to an agent within the public body, *id.*, and the trial court in this case correctly determined that defendant's director did not violate the FOIA by delegating her appellate review authority to Sandoval.

Affirmed.

/s/ Jane E. Markey
/s/ Douglas B. Shapiro
/s/ Michael F. Gadola

² For the first time on appeal, plaintiff asserts that he is entitled to costs and attorney fees as the prevailing party under MCL 15.240(6). By failing to properly raise this argument before the trial court, plaintiff waived the issue, and we decline to consider it. *Walters*, 481 Mich at 387.