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# STATE OF MICHIGAN

# COURT OF APPEALS

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| TOOLES CONTRACTING GROUP, LLC,<br><br>Plaintiff-Appellant, | UNPUBLISHED<br>May 27, 2021 |
| v | No. 354045<br>Washtenaw Circuit Court |
| WASHTENAW COUNTY ROAD COMMISSION,<br><br>Defendant-Appellee. | LC No. 17-000765-CZ |

Before: SHAPIRO, P.J., and JANSEN and BECKERING, JJ.

PER CURIAM.

In this lawsuit to enforce the Freedom of Information Act (FOIA), MCL 15.231 *et seq*., plaintiff, Tooles Contracting Group, LLC (Tooles Group), appeals as of right the trial court's order denying Tooles Group's motion for summary disposition, instead granting summary disposition in favor of defendant, Washtenaw County Road Commission (the Road Commission), and dismissing Tooles Group's lawsuit. On appeal, Tooles Group argues that the trial court misapplied FOIA and should have granted its motion for summary disposition and denied the Road Commission's motion. We affirm in part, reverse in part, and remand for further proceedings.

## I. BACKGROUND

Tooles Group is a minority-owned contractor engaged in the business of preconstruction and construction services. In January 2017, the Road Commission submitted a request for bids on a project to construct a new service center. Tooles Group bid on the project and was the lowest bidder. After the Road Commission's architect interviewed the four lowest bidders, the Road Commission awarded the $7 million contract to another contractor.

In March 2017, counsel for Tooles Group submitted a FOIA request to the Road Commission. Tooles Group listed nine different requests. Request 5 asked for "[a]ny documents related to the Washtenaw County Road Commission's hiring or utilization of Minority-owned and/or Disadvantaged Business Entities on Washtenaw County Road Commission Projects." In Request 6, Tooles Group asked for [a]ny documents or communications that reference Tooles Contracting Group as a Minority-owned company."

The Road Commission acknowledged the request in an e-mail sent the next day. It stated that the request involved an "extensive amount of information" that would take "an extended period of time to gather." It also anticipated that cost would exceed $50 and, for that reason, asserted that it would require an up-front payment of 50%. The Road Commission indicated that it would notify Tooles Group when the information was ready.

On April 5, 2017, the Road Commission sent an e-mail indicating that it had completed Tooles Group's request. It further provided the following "overview of information to be provided" in satisfaction of the request:

Items 1 thru 4 – 158 pages – complete

Item 5 – These documents do not exist

Item 7 – 7 banker boxes of information that can be reviewed

Item 8 – Not applicable, documents do not exist

Item 9 – HR Manager – complete

The Road Commission did not mention Request 6. The Road Commission included invoices for the work and stated that Tooles Group must pay 50% of the fees up front before it would release the requested information.

In August 2017, Tooles Group sued the Road Commission for violating the requirements of FOIA. Tooles Group moved for summary disposition in February 2018, and the Road Commission moved for summary disposition in March 2018. The trial court held a hearing later in March. During the hearing, Tooles Group identified documents that the Road Commission had to submit to the federal government—referred to as subrecipient forms—that it obtained from the Michigan Department of Transportation (MDOT), which, it argued, the Road Commission should have disclosed under Request 5. The Road Commission took the position that Request 5 did not clearly apply to the subrecipient forms. It stated that, had Tooles Group asked for those forms, it would have provided a copy of them.

The trial court inquired about what Tooles Group would have had to have said if wanted those forms. The Road Commission replied:

> Well the exact same thing they said to MDOT. But—we have no issue with them having those forms, they already have them. The real issue is they're here having filed a lawsuit, which isn't necessary saying that we asked for something that they didn't ask for, and MDOT agrees with us, and they want all their attorneys' fees. . . .

The trial court at that point clarified that it would not be awarding attorney fees. It was only trying to be sure that Tooles Group got the documents that everyone agreed it was legally entitled to get. The Road Commission again stated that Tooles Group already had the documents from MDOT, but it agreed that it could "provide them again." The court instructed the parties to

go discuss what they wanted and come back for an order; it again related that it just wanted to get Tooles Group any documents that it was legally entitled to get.

In May 2018, the trial court signed an order requiring the Road Commission to provide the subrecipient forms to Tooles Group. The order provided that the court had taken the motions for summary disposition under advisement and that it did not resolve any of the matters in dispute. Later that same month, Tooles Group moved for an award of more than $90,000 in attorney fees. Tooles Group argued that it had prevailed because the trial court ordered the Road Commission to provide the subrecipient forms as requested in Request 5, and so was entitled to its fees.

The trial court held a hearing in July 2018 and indicated the it was going to deny the motion for attorney fees. It entered an order to that effect in August 2018. Tooles Group appealed the trial court's decision to deny its request for attorney fees in this Court. This Court concluded that it did not have jurisdiction to hear Tooles Group's appeal as an appeal of right because the trial court never entered an order resolving the parties' competing motions for summary disposition. This Court treated the appeal as though on leave granted, but for the limited purpose of vacating the trial court's order denying Tooles Group's motion for attorney fees. This Court then remanded the case back to the trial court to address the motions for summary disposition and conduct any further proceedings that might be necessary. See *Tooles Contracting Group, LLC v Washtenaw Co Rd Comm*, unpublished per curiam opinion of the Court of Appeals, issued October 3, 2019 (Docket No. 345182).

In April 2020, the Road Commission renewed its motion for summary disposition. The Road Commission incorporated its arguments and documentary support from its previous motion. The Road Commission specifically asked the trial court to order that it did not violate FOIA by failing to turn over the subrecipient forms because the request did not describe the public record sufficiently to enable the Road Commission to find it. The Road Commission also stated that it was not required to turn over any documents until the FOIA fee for the documents that it had collected had been paid.

In May 2020, Tooles Group renewed its motion for summary disposition. It argued that it was entitled to summary disposition in its favor because the undisputed evidence showed that the Road Commission failed to disclose the subrecipient forms, which were clearly encompassed under its Request 5, and completely failed to respond to Request 6. Tooles Group asked the trial court to grant summary disposition in its favor and schedule an evidentiary hearing to determine the amount of its attorney fees.

The trial court held a hearing on the renewed motions in June 2020. Tooles Group argued that its FOIA request sufficiently described the documents requested to include the subrecipient forms. For that reason, it maintained that it was undisputed that the Road Commission violated FOIA by failing to disclose the subrecipient forms. Tooles Group also argued that its decision not to pay the fee request did not absolve the Road Commission of its liability. It explained that the fee request did not apply to the subrecipient forms; it only applied to the documents responsive to Requests 1 through 4.

The Road Commission argued that Request 5 was vague and implied that Tooles Group wanted only documents related to programs for disadvantaged businesses that the Road

Commission itself administered. Because it did not administer any such programs, its answer that those documents did not exist was accurate. The Road Commission also argued that paying a fee request is also a prerequisite that must be met before a governmental body has any duty to provide any documents, even if the governmental entity denied in part and granted in part the request. For that reason, it maintained that it ultimately complied with the FOIA request, even though it initially denied that the documents existed, because it eventually provided copies of the subrecipient forms.

After hearing arguments, the trial court stated that it did not believe "that this request, FOIA request, was sufficiently described to enable the Washtenaw County Road Commission to respond about something that they don't have, that didn't exist." The court characterized the request as a "huge fishing net." Because the request was not "sufficient for them to respond," the trial court determined that the Road Commission's initial response that the documents did not exist did not violate FOIA. Finally, the trial court agreed that the payment of the FOIA deposit was a prerequisite to the Road Commission's obligation to disclose. Because Tooles Group did not pay the fee, it explained, the Road Commission could not be liable for its determination that there were no documents that fell under Tooles Group's Request 5, and the Road Commission timely rectified its error. On the same day, the trial court entered an order denying Tooles Group's motion for summary disposition, and granting the Road Commission's motion for summary disposition. This appeal followed.

## II. STANDARD OF REVIEW

On appeal, Tooles Group argues that the trial court erred when it granted the Road Commission's motion for summary disposition involving Request 5 and Request 6. Tooles Group maintains that the trial court should have granted its motion for summary disposition as to those claims. This Court reviews de novo a trial court's decision on a motion for summary disposition. See *Herald Co v Bay City*, 463 Mich 111, 117; 614 NW2d 873 (2000). This Court also review de novo whether the trial court properly interpreted and applied Michigan's FOIA, see MCL 15.231 *et seq.* See *ESPN, Inc v Mich State Univ*, 311 Mich App 662, 664; 876 NW2d 593 (2015).

## III. ANALYSIS

### A. REQUEST 6

We first address Tooles Group's claims that it was entitled to summary disposition on its claim that the Road Commission violated FOIA by failing to answer Request 6.

When Tooles Group sued the Road Commission, it alleged a single claim involving four discrete FOIA violations. Tooles Group first alleged that, as a recipient of certain federal funds, the Road Commission had to file certain forms. It further alleged that the failure to disclose those forms—the "DBE material"—constituted an unwarranted denial of the request for those materials. It further alleged that the Road Commission violated FOIA by failing to state a proper reason for

extension of the deadline to answer, by failing to itemize its fee request, and by failing to inform Tooles Group of its rights under FOIA.[1]

At no point in the complaint did Tooles Group assert that the Road Commission violated FOIA by denying its request for documents referring to Tooles Group as a minority-owned company. Because Tooles Group did not allege a claim involving the denial of Request 6, the trial court cannot be faulted for failing to grant summary disposition in Tooles Group's favor on that claim. See MCR 2.116(B)(1) (stating that a party may move for dismissal or judgment on all or a part of a "claim"); MCR 2.111(B)(1) (requiring a statement of the allegations necessary reasonably to inform the adverse party of the nature of the claims); see also *Johnson v QFD, Inc*, 292 Mich App 359, 368; 807 NW2d 719 (2011) (stating that courts will look beyond the procedural labels to determine the exact nature of the claims and noting that a claim is adequate if the plaintiff has included allegations sufficient to put the adverse party on notice of the claims he or she is called to defend). The trial court did not err when it denied Tooles Group's motion for summary disposition premised on a claim that it did not plead.

B. PREREQUISITES TO FILING SUIT: DEPOSIT REQUEST

On appeal, Tooles Group also argues that the trial court erred to the extent that it determined that Tooles Group could not sue to compel disclosure of the subrecipient forms because Tooles Group did not pay the deposit that the Road Commission required. The Road Commission similarly argues that the trial court properly dismissed Tooles Group's lawsuit because Tooles Group did not pay the deposit. More specifically, the Road Commission maintains that, whenever a public body requests a deposit, that request puts all final determinations on hold until the requesting party pays the deposit. Because Tooles Group did not pay the requested deposit, the Road Commission states that it had no obligation to make a final determination regarding Request 5 and so, under its view of the law, Tooles Group could not sue to enforce Request 5, which requested information regarding the Road Commission's hiring and utilization of disadvantaged business entities.

The Legislature authorized a public body to "charge a fee for a public record search, for the necessary copying of a public record for inspection, or for providing a copy of a public record . . . ." MCL 15.234(1). The Legislature stated, however, that the public body may only charge a fee for the actual costs, which may include the cost associated with the search for the requested documents. MCL 15.234(1). The public body may also require a good-faith deposit from the person requesting information if the "fee estimate or charge" exceeds $50. See MCL 15.234(8). If the public body does not receive payment of the deposit within 45 days, the request is treated as abandoned. MCL 15.234(14).

[1] On appeal, Tooles Group has not argued that the trial court erred when it dismissed its claims involving the failure to state a proper reason for an extension, the fee dispute, or the failure to advise it of its rights. By failing to discuss these claims, Tooles Group has abandoned them on appeal. See *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). Accordingly, we need not address the Road Commission's arguments concerning the validity of those claims.

In examining the deposit provisions, this Court has held that a public body has no obligation to respond to a request for information until after the person making the request has paid the required good-faith deposit. See *Arabo v Mich Gaming Control Bd*, 310 Mich App 370, 386-387; 872 NW2d 223 (2015). This Court explained that the "Legislature's authorization for a public body to require a deposit, i.e., a down payment, equal to ½ of the authorized fee, 'at the time a request is made' under § 4(2) of the FOIA, MCL 15.234(2), clearly contemplates that the public body may recover part of its costs up front *before* processing the request." *Id*. at 387.[2] Construing that provision with the requirements stated under MCL 15.235(2), this Court held that a public body is not required to make a "final determination" within the meaning of MCL 15.235(2) until the person making the request has "paid the deposit" required by the public body. *Id*. at 388. Moreover, when there has been no final determination because the person making the request has not paid the required deposit, the person making the request cannot sue to enforce his or her FOIA request. *Arabo*, 310 Mich App at 388-389.

In *Arabo*, the requestor asked for two categories of information. The public body responded to the two requests with a writing in which it estimated the costs in labor to collect the information covered by *both* requests. It then stated that it would require payment of 50% of the estimated costs *before* it would even begin to compile and copy the relevant records, and would require the remaining payment before it would disclose the records. See *id*. at 376. Although the public body indicated that it would grant the request to the extent that an exception did not apply to the information compiled, because the public body had no obligation to reach a final determination until the deposit had been paid, this Court held that there was no final determination for either request because the fee had not been paid. *Id*. at 387. Relying on language that no longer exists in the statute, the Court in *Arabo* determined that the law allows a public body to make the payment of a good-faith deposit a prerequisite to a final determination. It did not, however, hold that a request for a deposit automatically constitutes a condition precedent to the public body making a final determination. Moreover, the facts of this case are different from those involved in *Arabo* in significant ways.

Once Tooles Group submitted its requests for information under FOIA, the Road Commission had to grant the individual requests, deny the requests, or grant in part and deny in

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[2] The Court in *Arabo* interpreted a prior version of the statute. Former MCL 15.234(2) read: "A public body may require at the time a request is made a good faith deposit from the person requesting the public record or series of public records, if the fee authorized under this section exceeds $50.00." See 1996 PA 553. The Legislature subsequently moved the relevant provision to MCL 15.234(8), which states:

> In either the public body's initial response or subsequent response as described under section 5(2)(d), the public body may require a good-faith deposit from the person requesting information before providing the public records to the requestor if the entire fee estimate or charge authorized under this section exceeds $50.00, based on a good-faith calculation of the total fee described in subsection (4).

The new language became effective on July 1, 2015. See 2014 PA 563.

part the requests. See MCL 15.235(2). The failure to respond to a request within the required number of business days, or the denial of a request, both constitute final determinations as to the request. See MCL 15.235(3); MCL 15.235(5); see also *Hartzell v Mayville Community Sch Dist*, 183 Mich App 782, 787; 455 NW2d 411 (1990) ("It is inconsistent with the purposes of the FOIA for a public body to remain silent, knowing that a requested record does not exist, and force the requesting party to file a lawsuit in order to ascertain that the document does not exist."). Likewise, the statement that a document does not exist is a denial of the request and a final determination. See MCL 15.235(5)(b). Once a public body makes a final determination, a "requesting person may"—at his or her option—"commence a civil action in the circuit court . . . to compel the public body's disclosure of the public records." MCL 15.240(1)(b).

In this case, the Road Commission issued a writing in which it granted the requests stated under Requests 1 through 4, Request 7, and Request 9. It also effectively denied Requests 5, 6, and 8, by either failing to respond (Request 6), or by denying the existence of any documents that fit the requests (Requests 5 and 8). As such, the Road Commission made a final determination as to each of the requests for which it failed to answer or denied the existence of the requested information. See MCL 15.235(3); MCL 15.235(5)(b). Unlike the case with the public body in *Arabo*, the Road Commission did not make the payment of the deposit a prerequisite to compiling and copying the materials. Instead, the Road Commission stated that Tooles Group had to pay the deposit before the Road Commission would "release" the information and copies that it had collected. It also specifically stated that the fee reflected the staff time and copying of records related to Request "#1 thru #4 and #9."

Additionally, to the extent that there was a dispute over the fee reflected in the request for a deposit, as Tooles Group correctly notes on appeal, that dispute did not preclude Tooles Group from suing. The Legislature provided that, if a requesting party sues for a fee reduction in circuit court, "the public body is not obligated to complete the processing of the written request for the public record at issue until the court resolves the fee dispute." MCL 15.240a(1)(b). In this case, the undisputed evidence showed that the Road Commission had completed processing the written requests by denying some requests and granting others. Moreover, the Road Commission specifically identified the requests for which the deposit was required. Consequently, the "public record at issue," MCL 15.240a(1)(b), did not include Request 5.

Because Tooles Group had a final determination on Request 5, it had the authority to sue in circuit court to compel the requested disclosure. See MCL 15.240(1)(b). Consequently, the trial court misapplied FOIA to the extent that it dismissed Tooles Group's claim to enforce disclosure on the ground that Tooles Group failed to pay a deposit. See *ESPN*, 311 Mich App at 664. The Road Commission did not make payment of the deposit a prerequisite to its final determination for Request 5; for that reason, the rule stated in *Arabo* did not apply to bar Tooles Group's suit. See *Arabo*, 310 Mich App at 387-389.

## C. REQUEST 5

Tooles Group also argues that the trial court erred when it dismissed its claim that the Road Commission wrongfully denied its request for information on the Road Commission's hiring and utilization of minority and disadvantaged businesses on the ground that the request did not sufficiently describe the records sought. Under FOIA, the Legislature established the right to

"inspect, copy, or receive copies of [a] public record of [a] public body." MCL 15.233(1). To assert the right, a person must provide a "written request that describes a public record sufficiently to enable the public body to find the public record." MCL 15.233(1). Whether a request sufficiently described the record to enable the public body to find the record is not a matter of historical fact subject to discovery; the "request is either sufficient," on its face, "or it is not." *Cashel v Smith*, 117 Mich App 405, 412; 324 NW2d 336 (1982). The trial court had to determine as a matter of law whether the request met the statutory requirements and applied to the document at issue. See *ESPN*, 311 Mich App at 664.[3]

FOIA is a prodisclosure statute and, accordingly, a public body must disclose all public records that are not specifically exempted. See *Thomas v New Baltimore*, 254 Mich App 196, 201; 657 NW2d 530 (2002). Consistent with its purposes, the Legislature chose not to impose an "exacting standard" under MCL 15.233(1). *Coblentz v Novi*, 475 Mich 558, 572; 719 NW2d 73 (2006). As our Supreme Court has explained:

> Consistent with this stated purpose, 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. [*Herald*, 463 Mich at 121.]

The Supreme Court rejected the contention that the "request must describe the specific public records to be disclosed" because it had "no authority to impose requirements not found in the statute." *Id*. It also observed that "it would be odd indeed to ask a party who has no access to public records to attempt specifically to describe them." *Id*. Nevertheless, the request must be sufficiently detailed to allow the public body to determine what documents the requesting party wishes to review. *Coblentz*, 475 Mich at 573. A request that is "absurdly overbroad" does not comply with MCL 15.233(1). See *Capitol Info Ass'n v Ann Arbor Police Dep't*, 138 Mich App 655, 658; 360 NW2d 262 (1984).

As noted, Tooles Group asked the Road Commission in Request 5 to provide "[a]ny documents related to the Washtenaw County Road Commission's hiring or utilization of Minority-owned and/or Disadvantaged Business Entities on Washtenaw County Road Projects." The language of the request was not ambiguous: it asked the Road Commission to disclose any document that has some relation to the Road Commission's "hiring or utilization" of minority-owned businesses or businesses that are classified as disadvantaged business entities. The request was also sufficiently particular to limit the Road Commission's search to a narrow set of documents, which should have been readily identifiable by those persons familiar with the hiring and utilization of minority-owned or disadvantaged businesses. See *Herald*, 463 Mich at 121.

The subrecipient forms identified during the litigation clearly included information about the Road Commission's "hiring or utilization" of disadvantaged business entities. Indeed, Question 8 on the form asked the Road Commission to list the number of contracts that it entered

[3] For that reason, the Road Commission's reliance on evidence concerning how MDOT responded to a similarly worded FOIA request is inapposite.

into with disadvantaged business enterprises during the reporting period and for each period the Road Commission wrote that it did not enter into any such contracts. It explained that MDOT handled its administration of disadvantaged business entities. The fact that the Road Commission did not contract with disadvantaged business entities directly plainly implicated its utilization of such businesses.

The trial court misapplied the law when it determined that Request 5 did not sufficiently describe the records sought. See *ESPN*, 311 Mich App at 664. Consequently, it erred when it dismissed Tooles Group's claim premised on the failure to disclose the subrecipient forms; rather, because it was undisputed that the Road Commission failed to disclose the subrecipient forms until after Toole Group sued, the trial court should have granted summary disposition in Tooles Group's favor on that claim.

## D. PREVAILING PARTY

The Legislature provided that, "[i]f 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" § 10 of FOIA, the trial court must "award reasonable attorneys' fees, costs, and disbursements." MCL 15.240(6). If the person only prevails in part, then the trial court has the discretion to award all or a portion of reasonable attorney fees, costs, and disbursements. MCL 15.240(6). The award includes "all fees, costs, and disbursements related to achieving production of the public records." See *Meredith Corp v Flint*, 256 Mich App 703, 715; 671 NW2d 101 (2003). The fee-shifting provision applies only to claims brought under § 10, MCL 15.240(1)(b), because the Legislature did not include a fee-shifting provision for violations of other sections. See *Detroit Free Press, Inc v Dep't of Attorney General*, 271 Mich App 418, 423; 722 NW2d 277 (2006).

The purpose of the fee-shifting provision in the statutory scheme is to "encourage voluntary compliance" and "to encourage plaintiffs who are unable to afford the expense of litigation to nonetheless obtain judicial review of alleged wrongful denials of their requests." *Walloon Lake Water Sys, Inc v Melrose Twp*, 163 Mich App 726, 733; 415 NW2d 292 (1987). To prevail in a FOIA action, the plaintiff must demonstrate that "the prosecution of the action was necessary to and had a causative effect on the delivery of or access to the document." *Id*. But a plaintiff can prevail in a FOIA action even if the court does not order the release of the requested documents; the plaintiff need only demonstrate that he or she was "forced into litigation" and has been "successful with respect to the central issue that the requested materials were subject to disclosure under the FOIA . . . ." *Id*. at 734.

Request 5 was unambiguous and clearly encompassed the subrecipient forms at issue. As such, the Road Commission's denial of that request was wrongful. Because Tooles Group was forced into litigation—at least with regard to its claim involving Request 5—to establish its right to have a copy of the subrecipient forms, it has prevailed for purposes of a mandatory award of attorney fees. See *id*. at 733-734. Consequently, the trial court should have granted Tooles Group's motion for summary disposition in part and ordered the Road Commission to pay those reasonable attorney fees that it incurred to litigate whether the Road Commission wrongfully denied Request 5. See *Meredith Corp*, 256 Mich App at 715.

On appeal, the Road Commission argues that, even if this Court were to conclude that Tooles Group established that the subrecipient forms should have been disclosed, this Court should nevertheless conclude that Tooles Group only prevailed in part. The Road Commission argues that this must be the case because Tooles Group did not—and cannot—prevail on its claims involving the fee deposit, its claim involving Request 6, or its claim involving the extension of the time to respond. The Road Commission's argument is inapposite. Tooles Group did not assert a claim premised on the denial of Request 6, and its other claims did not involve claims brought under § 10. The only claim brought under § 10 was the claim involving Request 5, and Tooles Group should have prevailed as a matter of law on that claim. As such, an award of attorney fees is mandatory as to that claim. See MCL 15.240(6); see also *Detroit Free Press*, 271 Mich App at 423. Although the award is mandatory, Tooles Group would not be entitled to its fees associated with those other claims; instead, it may only recover its reasonable attorney fees that it incurred litigating Request 5. See *Meredith Corp*, 256 Mich App at 715.

The Road Commission also argues that this Court should hold that Tooles Group would not be entitled to punitive damages. A trial court may order punitive damages if it finds that the public body "has arbitrarily and capriciously violated this act by refusal or delay in disclosing or providing copies of a public record." MCL 15.240(7). The trial court never reached that issue because it dismissed all Tooles Group's claims. Whether to order punitive damages should be decided in the first instance by the trial court on remand.

## IV. CONCLUSION

For the reasons explained, we reverse the trial court's order dismissing Tooles Group's claim that the Road Commission violated FOIA when it denied the existence of any documents that satisfied Request 5. The trial court should have denied the Road Commission's motion and granted Tooles Group's motion with respect to that claim. We further remand this case to the trial court for entry of an order granting Tooles Group's motion for summary disposition of that claim, and providing that Tooles Group is entitled to its attorney fees as a prevailing party. In all other respects, we affirm the trial court's order.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Jane M. Beckering

*If this opinion indicates that it is "FOR PUBLICATION," it is subject to revision until final publication in the Michigan Appeals Reports.*

# STATE OF MICHIGAN

# COURT OF APPEALS

TOOLES CONTRACTING GROUP, LLC,

Plaintiff-Appellant,

v

WASHTENAW COUNTY ROAD COMMISSION,

Defendant-Appellee.

UNPUBLISHED
May 27, 2021

No. 354045
Washtenaw Circuit Court
LC No. 17-000765-CZ

Before: SHAPIRO, P.J., and JANSEN and BECKERING, JJ.

SHAPIRO, P.J. (*dissenting*).

I respectfully dissent. In my view, the trial court properly ruled that the relevant request was not sufficiently specific "to enable the public body to find the public record." MCL 15.233(1). Notably, plaintiff submitted the same general request to MDOT and that entity also did not identify the subject forms as responsive until plaintiff later specifically identified them—a clarification that was not provided to defendant. In its opinion from the bench, the trial court stated:

> On March 21st, 2017, the plaintiff served a nine-part FOIA request on the Washtenaw County Road Commission. Parts 5 and 6 of that nine-part request sought documents relating to the Washtenaw County Road Commission's hiring or utilization of minority-owned and/or disadvantaged business entitles, also known as DBEs.
>
> On April 5th, 2017, the defendant . . . had complied seven bank boxes of information that can be reviewed and that the requested DBE documents do not exist. That's Exhibit 5. At that time, they also sent a FOIA invoice to Tooles for $434.78 with 50 percent payment due up front, $217.39, Exhibit 6, pursuant to MCL 15.240, 240(A). Plaintiff did not look at the seven bankers[']boxes, Exhibit 2, paragraphs 8 and 11, and also did not pay the FOIA invoice, Exhibit 2, paragraphs 9 and 10.
>
> On August 14th, 2017, plaintiff filed its complaint alleging that the Washtenaw County Road Commission violated FOIA by failing to provide DBE

documents required to be maintained under federal law, failing to specify the reason for a ten-day extension under FOIA, and failing to itemize hourly wage and number of hours to support the FOIA invoice, Exhibit 1, paragraphs 24 through 30.

The same request was made to the MDOT, . . . the request I'm going to rule on the first point. I do not believe that this request, FOIA request, was sufficiently described to enable the Washtenaw County Road Commission to respond about something that they don't have, that didn't exist. They don't run the program, they don't monitor the program, and they said they don't do that. So the fact that there's a sub recipient form that ultimately when that was requested is provided, I just think this was sort of a huge fishing net and, you know, it's one thing to say well it's, it's very, very broad therefore that's sufficient description, anything under the sun. I think there was a misunderstanding of the Washtenaw Road Commission's process in this and that it really was MDOT that ran the program. So on the first point I don't feel that this was a FOIA request that was sufficient for them to respond to. The fact that they don't run the . . . DBE program, they're not the recipient of the federal funds, they're a sub recipient, it's not their responsibility. And on that count then therefore there has not been a violation.

I see no error in the trial court's analysis and would affirm.

/s/ Douglas B. Shapiro