STATE OF MICHIGAN

COURT OF APPEALS

CHARLES BLACKWELL,

Plaintiff-Appellant,

v

CITY OF LIVONIA,

Defendant-Appellee.

FOR PUBLICATION
December 16, 2021
9:05 a.m.

No. 357469
Wayne Circuit Court
LC No. 21-002860-CZ

Before: K. F. KELLY, P.J., and JANSEN and RICK, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order denying plaintiff's motion for summary disposition under MCR 2.116(C)(9) and MCR 2.116(C)(10) and granting summary disposition in favor of defendant under MCR 2.116(I)(2). In this case brought under the Freedom of Information Act (FOIA), MCL 15.231 *et seq.*, plaintiff sought production of inbox communications sent to a private social media account of Mayor Brosnan. The trial court determined the communications were not subject to disclosure under FOIA because the social media account was not prepared, owned, used, in the possession of, or retained by defendant and, thus, were not public records. Because there was no error warranting reversal, we affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

On February 22, 2021, plaintiff submitted a FOIA request to various individuals in Livonia city government seeking "inbox messages" sent to the Facebook profile entitled "Livonia Mayor Maureen Miller Brosnan." On March 1, 2021, defendant denied plaintiff's FOIA request, explaining: "No City resources were used to create or operate the page, and the City's [Information Technology] Department has no control over the page. The page in question is used for the Mayor's political campaign purposes, and not to conduct City business." Upon receipt of the denial letter, plaintiff again wrote to individuals within Livonia city government, stating any appeal to the mayor would be "futile," and asking instead if Livonia "would be willing to overturn it's [sic] denial and produce the requested inbox messages." Michael E. Fisher, Livonia's Chief Assistant City Attorney, responded to plaintiff that the requested records were "not available to

the City for review or disclosure and do[] not meet the definition of 'public record' in MCL 15.232."

On March 2, 2021, plaintiff filed a single-count complaint seeking to compel the production of inbox messages sent to the Facebook profile. In the complaint, plaintiff alleged that Mayor Brosnan used the Facebook profile to disseminate information about her official activities as mayor, such as presiding over a swearing-in ceremony for new firefighters. Plaintiff also alleged Mayor Brosnan used the Facebook profile to communicate directly with constituents who were seeking to contact the mayor's office. Thus, according to plaintiff, the Facebook profile was not strictly used for campaign purposes, and the writings he sought were public records as defined by MCL 15.232.

On March 26, 2021, plaintiff filed a motion for summary disposition under MCR 2.116(C)(9) and (10). Plaintiff argued Mayor Brosnan was operating the Facebook profile in furtherance of her official duties by posting about city business, rendering the messages "public records" under FOIA. In the motion, plaintiff appended screenshots taken from the Facebook profile, which showed that Mayor Brosnan had posted articles about defendant's efforts to abate COVID-19 and the number of mental health calls the Livonia Police Department received each month. On the basis of this evidence, plaintiff claimed the screenshots demonstrated that Mayor Brosnan used the Facebook profile for official purposes. Relying on *Bisio v Village of Clarkston*, 506 Mich 37; 954 NW2d 95 (2020), plaintiff asserted that the mayor's office was a "public body" as defined by FOIA, making the Facebook messages "public records" subject to disclosure.

In response, defendant averred that any direct messages sent to the Facebook profile were not subject to disclosure as public records under FOIA because they were not prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function. Defendant submitted affidavits of Livonia Information Systems Director Casey O'Neil and Livonia Mayoral Chief of Staff Dave Varga, both of whom attested that the Facebook profile was "not part of the City of Livonia's operations or on-line presence." They both also stated the Facebook profile was not "available for official use by the City of Livonia or the Office of the Mayor, nor has it been so used." Thus, defendant argued the Facebook messages were not subject to disclosure because they were not "public records," since they were not in defendant's possession and not created or used in furtherance of official business.

After a hearing, the trial court entered an order denying plaintiff's motion for summary disposition and granting summary disposition in favor of defendant under MCR 2.116(I)(2). The trial court reasoned that plaintiff failed to allege or demonstrate that the Facebook profile was "prepared, owned, used, possessed or retained in the performance of an official function," and the Facebook profile was "in the possession of [] candidate Maureen Brosnan and not even in her performance of an official function." Citing *Hopkins v Duncan Twp*, 294 Mich App 401; 812 NW2d 27 (2011), the trial court explained that the fact that a document is in the possession of a public body, standing alone, does not render the document a "public record" under FOIA. Instead, the trial court found the Facebook profile was used "for political purposes" and, therefore, not a public record. This appeal followed.

II. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Buckmaster v Dep't of State*, 327 Mich App 469, 475; 934 NW2d 59 (2019).[1] "A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual sufficiency of a complaint." *MLive Media Group v Grand Rapids*, 321 Mich App 263, 269; 909 NW2d 282 (2017). When considering a motion under MCR 2.116(C)(10), the trial court must consider all evidence submitted by the parties in the light most favorable to the party opposing the motion. *Id*. "A trial court must grant the motion if it finds 'no genuine issue as to any material fact' and determines that 'the moving party is entitled to judgment or partial judgment as a matter of law.' " *Id*. (quoting MCR 2.116(C)(10)). "[S]ummary disposition is proper under MCR 2.116(I)(2) if the court determines that the opposing party, rather than the moving party, is entitled to judgment as a matter of law." *Rataj v Romulus*, 306 Mich App 735, 747; 858 NW2d 116 (2014) (quotation marks and citation omitted).

Legal determinations made in the context of a FOIA proceeding are reviewed de novo. *Hopkins*, 294 Mich App at 408 (citation omitted). This Court also reviews de novo questions of statutory interpretation. *Buckmaster*, 327 Mich App at 475. The Court's primary goal of statutory interpretation is to give effect to the Legislature's intent. *Id*. If the statute's language is clear and unambiguous, this Court must give the words their plain and ordinary meaning, and judicial construction of the statute is not permitted. *Id*.

III. ANALYSIS

"The purpose of FOIA is to provide to the people of Michigan 'full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees,' thereby allowing them to 'fully participate in the democratic process.' " *Amberg v Dearborn*, 497 Mich 28, 30; 859 NW2d 674 (2014), citing MCL 15.231(2). Accordingly, except under certain exceptions specifically delineated in MCL 15.243, "a person who 'provid[es] 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' is entitled 'to inspect, copy, or receive copies of the requested public record of the public body.' " *Id*., citing MCL 15.233(1).

The term "public body" is defined under MCL 15.232(h) as any of the following categories:

> (*i*) A state officer, employee, agency, department, division, bureau, board, commission, council, authority, or other body in the executive branch of the state government, but does not include the governor or lieutenant governor, the executive office of the governor or lieutenant governor, or employees thereof.

[1] Although the trial court cited MCR 2.116(I)(2), it did not otherwise specify the grounds under which it granted summary disposition in favor of defendant. Plaintiff moved for summary disposition under MCR 2.116(C)(9) and MCR 2.116(C)(10). In deciding the motion, the trial court considered evidence outside of the pleadings when ruling in favor of defendant. We therefore treat the motion as having been decided under MCR 2.116(C)(10). *Williamston Twp v Sandalwood Ranch, LLC*, 325 Mich App 541, 547 n 4; 927 NW2d 262 (2018).

(*ii*) An agency, board, commission, or council in the legislative branch of the state government.

(*iii*) A county, city, township, village, intercounty, intercity, or regional governing body, council, school district, special district, or municipal corporation, or a board, department, commission, council, or agency thereof.

(*iv*) Any other body that is created by state or local authority or is primarily funded by or through state or local authority, except that the judiciary, including the office of the county clerk and its employees when acting in the capacity of clerk to the circuit court, is not included in the definition of public body.

Additionally, the term "public record" is defined under MCL 15.232(i) as "a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function, from the time it is created."

"[W]hat ultimately determines whether records in the possession of a public body are public records within the meaning of FOIA is whether the public body prepared, owned, used, possessed, or retained them in the performance of an official function." *Amberg*, 497 Mich at 32. "In the event a FOIA request is denied and the requesting party commences a circuit court action to compel disclosure of a public record, the public body bears the burden of sustaining its decision to withhold the requested record from disclosure." *Mich Federation of Teachers & Sch Related Personnel, AFT, AFL-CIO v Univ of Mich*, 481 Mich 657, 665; 753 NW2d 28 (2008), citing MCL 15.240(4).

Plaintiff contends the trial court erred when it granted summary disposition in defendant's favor because it misapplied the holding in *Bisio* when it concluded the Facebook inbox messages were not "public records." According to plaintiff, *Bisio* stands for the proposition that the office of the mayor for the city of Livonia constitutes a public body and, therefore, the Facebook inbox messages are "retained, used, or possessed" by that body. While on the one hand we agree with plaintiff that the "office of the mayor" for the city of Livonia is a public body—*Bisio* settled that question—we do not agree with plaintiff that the office of the mayor retains, uses, or possesses the *private* messages of a political office holder's social media account, such that those messages become "public records" under FOIA.

In *Bisio*, 506 Mich at 51-53, our Supreme Court held that the office of the city attorney for the Village of Clarkston fell within the definition of a "public body" under MCL 15.232(h)(*iv*) because the village charter established that the city attorney was one of several administrative officers for the Village of Clarkston. The office of the city attorney was a "public body" because the office was an " 'other body that is created by . . . local authority' under MCL 15.232(h)(*iv*)." *Bisio*, 506 Mich at 53. Therefore, communications between the city attorney and a consulting firm, which were in the possession of the office of the city attorney and were used in furtherance of the office's municipal duties, were public records subject to disclosure under FOIA. *Id*. at 53-54.

In the same manner, the office of the mayor of the city of Livonia falls within the definition of a public body under MCL 15.232(h)(*iv*) because it too was created by local authority. Much

like the charter for the Village of Clarkston addressed in *Bisio*, the City of Livonia Charter, ch V, § 1 provides as follows:

> The administrative officers of the City shall be the Mayor, City Clerk, City Treasurer, and not less than two (2) nor more than four (4) constables, and all directors and heads of the several departments, and all members of the several commissions and boards of the City government. All other persons in the service or employ of the City shall be deemed employees.

The City of Livonia Charter ch V, § 3 also indicates that each of the administrative officers occupies an office within the city administration:

> No person shall be eligible for any *administrative office* of the City, elective or appointive, unless he is a duly qualified and registered elector in the City and has continuously resided in the City for at least two (2) years immediately prior to his appointment or the election at which he is a candidate; provided, however, that said requirement of two (2) years continuous residence shall not exist or have any effect as to the first City election held under this Charter. [Emphasis added.]

These provisions are consistent with the common understanding that officers generally occupy offices within an entity. See *Bisio*, 506 Mich at 52. Thus, as in *Bisio*, the city of Livonia mayor's office falls within the definition of a public body under MCL 15.232(h)(*iv*) because it was created by the City of Livonia Charter.

That the *office of the mayor* is a public body, however, is not the end of the analysis. The question presented in this case is whether the inbox messages sent to Mayor Brosnan's Facebook profile, which is not maintained or used by the office of the mayor, are also public records under FOIA. We hold that they are not.

In *Bisio*, 506 Mich at 53 n 10, our Supreme Court recognized the distinction between the city attorney—the individual—and the office of the city attorney—the public body—stating:

> [W]e do not conclude that the city attorney, individually, is himself a "public body" under MCL 15.232(h)(iv). Rather, we conclude that the entity, the "office of the city attorney," constitutes the pertinent "public body" under MCL 15.232(h)(iv).

While our Supreme Court did not explicitly state that the city attorney was excluded from the definition of "public body," plaintiff advances no convincing argument to hold otherwise. While FOIA includes in the definition of "public body" officers and employees of state government, see MCL 15.232(h)(*i*), the definitional section does not also include officers and employees of municipalities such as cities or townships. The distinction between the state and local government officials demonstrates the Legislature's intent to exclude individual government officers and employees not working in state government from the definition of "public body." See *Breighner v Mich High Sch Athletic Ass'n, Inc*, 471 Mich 217, 233 n 6; 683 NW2d 639 (2004) ("[I]t would defy logic (as well as the plain language of § 232[d][iii]) to conclude that the Legislature intended that any person or entity qualifying as an "agent" of one of the enumerated governmental bodies would be considered a "public body" for purposes of the FOIA.") (alteration in original).

In support of his argument the Facebook inbox messages are "public records," plaintiff relies principally on *West v Puyallup*, 2 Wash App 2d 586, 594-596 (2018),[2] in which the Court of Appeals of Washington held that posts made by public officials on their private social media accounts may constitute public records under that state's public records laws, provided the records met the statutory elements of a "public record." Similar to this state's FOIA law, the public records law in Washington defines a "public record" as "consisting of three elements: (1) 'any writing' (2) 'containing information relating to the conduct of government or the performance of any governmental or proprietary function' (3) 'prepared, owned, used, or retained by any state or local agency.' " *West*, 2 Wash App 2d at 592, citing *Nissen v Pierce Co*, 183 Wash 2d 863, 879; 357 P3d 45 (2015). Ultimately, the Washington Court of Appeals concluded that while the social media posts were writings that related to the conduct of government, thus satisfying the first two elements, the social media posts were not prepared by a governmental body. *West*, 2 Wash App 2d at 594-598. The court explained:

> [T]here is no indication that Door was acting in her "official capacity" as a City Council member in preparing these posts. The Facebook page was not associated with the City and was not characterized as an official City Council member page. Instead, the Facebook page was associated with the "Friends of Julie Door," which according to Door's declaration was used to provide information to her supporters. [*Id*. at 599.]

Defendant met its burden of supporting its decision to withhold the requested records from disclosure because the evidence demonstrates, like the records in *West*, the direct messages sent to Mayor Brosnan's Facebook profile were not subject to disclosure as public records under FOIA given that they were not owned, used, in the possession of, or retained by the city of Livonia mayor's office. In support of his motion for summary disposition, plaintiff relied upon screenshots from the Facebook profile showing Mayor Brosnan had publicly posted articles about the city of Livonia's efforts to abate COVID-19 and the number of mental health calls the city of Livonia Police Department received each month. Like the social media posts in *West*, these posts do not, by themselves, demonstrate Mayor Brosnan was performing an official function when making them public. The content of the posts, coupled with the affidavits from Varga and O'Neil, demonstrate the Facebook profile was used as a campaign page, and not an official page for the office of the mayor. The Facebook profile was not part of defendant's operations or online presence, and neither O'Neil nor Varga had access to any direct messages sent to the Facebook profile. Considering that Mayor Brosnan is not herself a public body under MCL 15.232(h)(*iv*), see *Bisio*, 506 Mich at 53 n 10, defendant met its burden of sustaining its decision to withhold the requested records from disclosure because the direct messages were not owned, used, in the possession of, or retained by the city of Livonia mayor's office.

This Court's opinion in *Howell Ed Ass'n, MEA/NEA v Howell Bd of Ed*, 287 Mich App 228, 247; 789 NW2d 495 (2010), is instructive. In *Howell*, this Court held that personal e-mails sent by public body employees and captured in the digital memory of a public body's e-mail system

[2] Cases from foreign jurisdictions are not binding on this Court but may be considered for their persuasive value. *Hiner v Mojica*, 271 Mich App 604, 612; 722 NW2d 914 (2006).

did not render such personal e-mails public records subject to FOIA. *Id*. This Court recognized that "unofficial private writings belonging solely to an individual should not be subject to public disclosure merely because that individual is a state employee[, and] . . . the same is true for all public body employees." *Id*. at 237 (citation omitted). Applying similar reasoning here, private direct messages sent or received by Mayor Brosnan through an unofficial Facebook profile are not subject to public disclosure merely because Mayor Brosnan is an administrative officer for the city of Livonia. Instead, such direct messages would be subject to disclosure under FOIA only if such messages were utilized by the city of Livonia mayor's office in the performance of an official function. See MCL 15.232(i).

Contrary to plaintiff's assertions, none of the evidence submitted by him demonstrated that Mayor Brosnan used the Facebook profile to communicate with individual constituents regarding official business. On the contrary, Mayor Brosnan's comment instructing a constituent to call her office directly showed that Mayor Brosnan did not use the Facebook profile to communicate with individual constituents regarding official business. Instead, she directed the constituent to communicate with her office through official channels by calling her office directly. Indeed, Varga attested in his affidavit that Mayor Brosnan's Facebook profile had never been available for official use by the city of Livonia mayor's office.

In sum, the circuit court did not err when it granted summary disposition in favor of defendant under MCR 2.116(I)(2) because the direct messages sent to the Facebook profile entitled "Livonia Mayor Maureen Miller Brosnan" were not subject to disclosure as public records under FOIA. Defendant met its burden of sustaining its decision to withhold the requested records from disclosure because the record evidence indicates that the direct messages were not owned, used, in the possession of, or retained by the city of Livonia mayor's office in the performance of an official function.

Affirmed. Defendant, as the prevailing party, may tax costs.

/s/ Kirsten Frank Kelly
/s/ Kathleen Jansen
/s/ Michelle M. Rick