STATE OF MICHIGAN

COURT OF APPEALS

DETROIT FREE PRESS,

Plaintiff-Appellee,

v

MICHIGAN DEPARTMENT OF STATE,

Defendant-Appellant.

UNPUBLISHED
May 16, 1997

No. 188313
Oakland Circuit Court
LC No. 92432519 CZ

Before: Hoekstra, P.J., and Marilyn Kelly and J.B. Sullivan,* JJ.

PER CURIAM.

In this action brought under the Freedom of Information Act (FOIA), MCL 15.231 *et seq.*; MSA 4.1801(1) *et seq.*, defendant appeals as of right from a grant of summary disposition for plaintiff pursuant to MCR 2.116(C)(9) and (C)(10). The trial court held that defendant violated the FOIA by charging plaintiff approximately $50 million for its request of motorists' records.

Defendant argues that the trial court erred in substituting its determination of the fee to be charged for public records for the fee determination made by the Secretary of State pursuant to Legislative enactment. It asserts that its policies and actions were not arbitrary or capricious. It argues that the trial court erred when it awarded attorney fees to plaintiff after determining that defendant's fee requirement constituted a constructive denial of plaintiff's FOIA request. Finally, defendant argues that the trial court erred in concluding that plaintiff's status as a member of the press entitled it to treatment different from that afforded to other members of the public. We affirm in part, reverse in part and remand.

I

Pursuant to the FOIA, Detroit Free Press staff writer Dan Gillmor requested from defendant a copy of the computer tape containing the records of all Michigan motorists. The Free Press wanted to examine the relationship between accidents, motorists with bad driving records and the manner in which drivers were treated by the judicial system.

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

Defendant informed Gillmor that the entire file was available for duplication. However, the Free Press would be responsible for the commercial look-up fee of $6.55 for each motorist's record as prescribed by the Legislature. 1990 PA 208, § 904. Because there are approximately 7.6 million records on computer tape, the total charge for the file was $49,770,000.

After plaintiff unsuccessfully attempted to persuade defendant to lower its fees, it filed a complaint alleging that defendant violated the FOIA by arbitrarily and capriciously determining that the fee for plaintiff's information request would be nearly $50 million.

Following cross-motions for summary disposition, the trial court found that the $50 million fee was clearly prohibitive and constituted a constructive denial of the request. The court also found that the information request was for the benefit of the public. It determined that the Legislature's reason for setting the fee for a request at $6.55 a record was unclear and held that the $6.55 charge was not binding on defendant in this case, because the request was for the public's benefit. The court stated that it was attempting to interpret the FOIA in the best interest of the public given the conflict between defendant's authority to charge a look-up fee and the intent of the FOIA to provide the public with government records. However, the court noted that the duplication of the data file would require the creation of a new computer program that could delete confidential information not disclosable under the FOIA. The court directed the parties to arrive at a reasonable fee that would cover defendant's actual costs in meeting the information request.

Plaintiff filed a motion for entry of judgment, alleging that an independent computer consultant determined that it would cost defendant only $135 to comply with the request. Defendant objected to entry of the order, because it determined the cost for compliance to be $81,600. According to defendant, each record would have to be individually edited in order to delete information that is classified as confidential under the FOIA.

The trial court appointed its own expert, Barry Brickner, to assist in understanding the practicality of creating a computer program that would redact exempt information from disclosure. Brickner estimated that the cost of reprogramming would be $6,080, but recommended that plaintiff not be charged for reprogramming, because defendant had not charged others for it in the past.

Plaintiff filed a renewed motion for entry of judgment. Defendant responded by requesting that plaintiff be charged a reasonable fee of $6,080 for reprogramming, $6,300 for computer time spent running the program and $120 to cover the costs of copying the information.

Based upon the recommendations of Brickner, the court did not charge plaintiff for reprogramming costs. The court found that defendant's reasonable costs for supplying the requested information were $6,420. It also ordered defendant to pay plaintiff's reasonable attorney fees and costs associated with the FOIA request pursuant to MCL 15.240(4); MSA 4.1801(10)(4), as plaintiff was the prevailing party.

II

First, defendant argues that the trial court improperly substituted its determination of the fee to be charged for that of the Secretary of State. We disagree.

The fee that may be charged by a public body for a request of information under the FOIA is set forth in MCL 15.234; MSA 4.1801(4), which provides in relevant part, as follows:

> (1) A public body may charge a fee for providing a copy of a public record. Subject to subsection (3), the fee shall be limited to actual mailing costs, and to the actual incremental cost of duplication or publication including labor, the cost of search, examination, review, and the deletion and separation of exempt from nonexempt information as provided in section 14. Copies of public records may be furnished without charge or at a reduced charge if the public body determines that a waiver or reduction of the fee is in the public interest because furnishing copies of the public record can be considered as primarily benefiting the general public.
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> (3) In calculating the costs under subsection (1), a public body may not attribute more than the hourly wage of the lowest paid, full-time, permanent clerical employee of the employing public body to the cost of labor incurred in duplication and mailing and to the cost of examination, review, separation, and deletion. A public body shall utilize the most economical means available for providing copies of public records. A fee shall not be charged for the cost of search, examination, review, and the deletion and separation of exempt from nonexempt information as provided in section 14 unless failure to charge a fee would result in unreasonably high costs to the public body because of the nature of the request in the particular instance, and the public body specifically identifies the nature of these unreasonably high costs. A public body shall establish and publish procedures and guidelines to implement this subsection.
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> (4) This section does not apply to public records prepared under an act or statute specifically authorizing the sale of those public records to the public, or where the amount of the fee for providing a copy of the public record as otherwise specifically provided by an act or statute.

Defendant argues that the fee limitation of the FOIA is inapplicable, because two congressional acts specifically authorize the sale of the registration lists and provide that a fee of $6.55 can be charged for each transaction. First, § 232 of the Motor Vehicle Code provides in pertinent part:

> The secretary of state is hereby authorized to sell, or contract for the sale of, any motor vehicle registration lists in addition to those distributed at no cost under this section and to sell or furnish any other information from the records of the department pertaining to the sale, ownership, and operation of motor vehicles. The secretary of

> state shall fix a reasonable price or charge for the sale of such lists or other information and the proceeds therefrom shall be added to the state highway fund provided for herein. [MCL 257.232; MSA 9.1932.]

Moreover, 1990 PA 208, the appropriations bill in effect at the time of the initiation of this suit, provides:

> [T]he department of state may provide a commercial look-up service of motor vehicles, including off-road vehicles and snowmobiles, watercraft, personal identification, and driver records on a fee basis of $6.55 per transaction and use the fee revenue received from the service for necessary expenses as appropriated in section 101. [1990 PA 208, § 904.]

In effect, defendant argues that these two provisions specifically authorize the sale of public records to the public. Therefore, the fee provisions of the FOIA do not apply.

Recently, this Court addressed what constitutes specific authorization under the FOIA. *Grebner v Clinton Charter Twp*, 216 Mich App 736; 550 NW2d 265 (1996). In *Grebner*, we held that a primary definition of the word "specific" is "explicit." *Id*. at 743, citing *Random House Webster's College Dictionary*, p 1285, def 1. Because the Michigan Election Law, § 522, provided only for the payment of costs of preparing copies of voter registration records as opposed to their sale, the exception to the FOIA fee restrictions did not apply. *Grebner, supra* at 743.

Here, we agree with defendant that the Motor Vehicle Code explicitly authorizes the sale of motor vehicle registration lists and other information from the motor vehicle records. MCL 257.232; MSA 9.1932. However, we find that the appropriations bill does not explicitly authorize the sale of lists or information. Rather, it states that defendant may provide a look up service and charge a transaction fee of $6.55. This is not the explicit authorization contemplated by the FOIA in order to render inapplicable its cost provisions. *Grebner, supra*. Therefore, we conclude that defendant was not authorized to charge $6.55 per transaction for plaintiff's request. Defendant was permitted, however, to charge a reasonable fee as provided by the Motor Vehicle Code. MCL 257.232; MSA 9.1932. We agree with the trial court that a $50 million fee is unreasonable.

III

Next, defendant argues that, in determining the reasonableness of the fee, the trial court improperly accepted the opinion of the court appointed expert, Brickner, when it failed to charge plaintiff a fee for reprogramming defendant's computers to comply with the request. Defendant argues that there was a genuine issue of material fact as to whether a fee had been routinely charged for this service in the past.

Plaintiff's motion for summary disposition was granted pursuant to MCR 2.116(C)(9) and (C)(10). It appears, however, that this precise issue was decided under MCR 2.116(C)(10) as the trial court found no genuine issue of material fact as to whether defendant had routinely charged others for

reprogramming the computer. A motion under this section is not proper where there is a genuine issue of material fact. *Johnson v Wayne Co*, 213 Mich App 143, 149; 540 NW2d 66 (1995). We consider the pleadings, affidavits, depositions, admissions and any other documentary evidence in favor of the opposing party. *Id*.

We find that there was a genuine issue of material fact as to whether plaintiff should have been charged the cost for reprogramming defendant's computer to accommodate plaintiff's FOIA request. Brickner opined that plaintiff should not be charged for reprogramming, because defendant had not charged others for it in the past. Brickner based this conclusion on the deposition of Michael Miner, Director Systems Programming Division, Bureau of Information Systems for the state. Miner testified that defendant had not charged its customers for the cost of reprogramming computers.

However, in opposition to Brickner's findings, defendant submitted the affidavit of Robert Walker, the director of the Michigan Bureau of Information Systems. He stated that defendant had previously charged, and still charges, for unique computer programming in order to comply with a request under the FOIA. Walker stated that previously the charge had been paid by the requesting party directly to Unisys, the company that performed the computer programming for the state. Walker related that plaintiff's request could not be completed using existing programs and that new programming would be required.

The testimony of Walker and Miner creates a genuine issue of material fact as to whether defendant's past and present policy was to charge a requesting party for unique computer programming needed to complete an information request. Therefore, summary disposition was improperly granted to plaintiff with respect to the issue of programming costs. On remand, the issue should be resolved by the trier of fact.

IV

Next, defendant argues that the trial court erred in finding that it constructively denied plaintiff's request. The finding resulted in an improper award of attorney fees to plaintiff. We disagree.

This Court will not set aside findings of fact by the trial court unless they are clearly erroneous. MCL 2.613(C), *Tallman v Cheboygan Area Schools*, 183 Mich App 123, 126; 454 NW2d 171 (1990). A finding of fact is not clearly erroneous unless there is no evidence to support it or the review court on the entire record is left with the definite and firm conviction that a mistake has been made. *Tallman, supra*.

Here, the trial court found that, while defendant offered to copy the information for plaintiff, it constructively denied the request because of the exorbitant fee it charged. Applying our standard of review, we find that the court's findings were not clearly erroneous. Defendant could not reasonably expect plaintiff to pay such a high fee in order to receive a copy of the records.

Moreover we find that the trial court properly awarded attorney fees to plaintiff. A trial court must award attorney fees when a party prevails in an action brought under the FOIA. *Yarbrough v*

Dep't of Corrections, 199 Mich App 180, 186; 501 NW2d 207 (1993). A plaintiff prevails when the action was reasonably necessary to compel the disclosure of the records and the action had a substantial causative effect on the delivery of the information. *Id*.

Here, plaintiff would not have obtained the records without commencing its cause of action, because it was not prepared to pay $50 million for the FOIA request. Plaintiff prevailed in its cause of action and was properly awarded reasonable attorney fees. *Tallman, supra*.

V

Finally, we find no support in the record for defendant's argument that plaintiff received special treatment by the trial court because it is a member of the press. See *In re Midland Publishing, Inc*, 420 Mich 148, 155 n 7; 362 NW2d 580 (1984). The trial court gave significant weight to its finding that plaintiff's information request was in the public interest and was under the jurisdiction of the FOIA. Based upon the public interest of the request, the trial court determined that the FOIA would be "emasculated" if the normal commercial look-up fee were charged for each driver's record. Because plaintiff was not given inappropriate treatment, defendant's argument is without merit. Furthermore, the weight the trial court gave the request was suitable given the legislative intent of the FOIA. *See Clerical-Technical Union of Michigan State University v Bd of Trustees of Michigan State University*, 190 Mich App 300, 303; 475 NW2d 373 (1991).

Affirmed in part, reversed in part and remanded.

/s/ Joel P. Hoekstra
/s/ Marilyn Kelly
/s/ Joseph B. Sullivan