

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PHILLIP D. FORNER,

Plaintiff-Appellant,

v

ALLENDALE CHARTER TOWNSHIP,

Defendant-Appellee.

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UNPUBLISHED

February 29, 2000

No. 218055

Ottawa Circuit Court

LC No. 98-032645-CZ

Before: Fitzgerald, P.J., and Saad and Whitbeck, JJ.

PER CURIAM.

Plaintiff Phillip D. Forner appeals as of right from a February 19, 1998 order granting summary disposition to defendant Allendale Charter Township pursuant to MCR 2.116(C)(10). Forner challenges the Township's denial of his request for documents made under the Freedom of Information Act (the "FOIA"), MCL 15.231 *et seq.*; MSA 4.1801 *et seq.* This document request and lawsuit follow a three-year history of conflict between the parties, including at least two other lawsuits by Forner against the Township. We affirm.

**I. Basic Facts And Procedural History**

Forner owns 37.62 acres of land in the Township that he wants to develop for residential use. However, much of it is zoned for agricultural and rural use. The Township only partially approved Forner's first application for a variance filed in December 1996 and consequently Forner filed a lawsuit challenging the Township's ordinance and decision. The Township deferred considering Forner's second application for a variance, which he filed in July 1997, until the pending lawsuit was concluded. This decision prompted Forner to file a second lawsuit in March 1998 challenging the Township's deferral. The Ottawa Circuit Court dismissed this second lawsuit, granting Township summary disposition in June 1998. Forner appealed that decision to this Court, and the parties eventually stipulated to dismiss that appeal.

Meanwhile, in late June 1998, Forner submitted a final site plan for approval. The Township consulted its legal counsel for advice and counsel drafted a document entitled "Resolution" approving Forner's site plan. That "Resolution" was, however, contingent on the trial court's decision in the

pending lawsuit and some modifications to the plan. The Township adopted that resolution at an open township planning commission meeting on July 20, 1998. The first condition of the adopted resolution, which eventually led to this present appeal before this Court, stated:

There first being obtained, to the satisfaction of the Township Zoning Administrator, a final binding determination in the above-referenced Pending Litigation, after all available appeals, that the Variance is applicable, valid and constitutional in all respects and that the Township's Zoning Ordinance as modified by the variance, when applied to the Applicants' AG Property, is valid, constitutional, and enforceable. If this condition is not fully and completely satisfied, then the final site plan shall not be approved.

On July 29, 1998 Forner submitted a completed FOIA request form asking for:

The section/article in the zoning ordinance, other township planning documents or other applicable ordinances showing the requirements and standards for which condition #1 of the 7/20/97 [sic] Planning Commission Resolution for Brookland Estate Phase III Final Site Plan conditional approval is based upon.

The Township denied the request in an August 4, 1998 letter signed by the township clerk and FOIA coordinator stating:

You do not request any specific public record by name. Therefore, your request does not describe a public record sufficiently to enable the Township to locate the same. The Freedom of Information Act specifically provides that a public body, such as the Township, is not required to make [a] compilation, summary or report of information, except as provided in Section II., which pertains to state agencies and is not applicable to your request.

Forner appealed the August 4, 1998 denial. On August 24, 1998 the Township upheld its earlier decision set forth in the August 4, 1998 letter, but also listed the resources the planning commission "would have likely relied upon" in making its decision.

In a document approved by the Township at a October 12, 1998 township board meeting, entitled "Allendale charter township board decision on appeal of conditional site plan approval," the Township upheld condition number one in the site plan approval. Forner was present at that township board meeting. In the Township's five-page, written decision, in a section entitled "reasons for action," the Township explained that the first condition was necessary because a local court was considering whether the variance applicable to Forner's property was constitutional and valid. The Township cited § 16e of the Township Zoning Act, MCL 125.286e; MSA 5.2963(16e), and § 24.07 of the local zoning ordinance as authority to impose conditions on site plan approvals.

Forner filed the present lawsuit on December 22, 1998, arguing in Count I that his FOIA request was sufficient and should have been granted by the Township and, in Count II, that the Township's decision on his final site plan was void. Forner later withdrew Count II. At a hearing on

February 19, 1999, the trial court denied Forner's motion for summary disposition and, instead, granted the Township summary disposition pursuant to the trial court's authority under MCR 2.116(I)(2). In making its decision, the trial court stated that Forner's FOIA request was not made to obtain a document but instead was "a request seeking admission that such a document does not exist." The trial court further stated that this goal does not conform with the purpose of the FOIA. It is Forner's appeal by right of that decision that is presently before this Court.

## II. The Township's Response To Forner's FOIA Request

### A. Standard Of Review

This Court reviews the trial court's grant of summary disposition *de novo*. *Pinckney Community Schools v Continental Casualty Co*, 213 Mich App 521, 525; 540 NW2d 748 (1995).

### B. The Specificity Of The Request

Under the FOIA, "[u]pon an oral or written request which describes the public record sufficiently to enable the public body to find the public record, a person has a right to inspect, copy, or receive copies of a public record of a public body, except as otherwise expressly provided by section 13." MCL 15.233(1); MSA 4.1801(3)(1). Here, the Township denied Forner's request because he did "not request any specific record by name." We must examine the full record to determine whether there was a genuine issue of material fact remaining to be decided regarding the sufficiency of his FOIA request. MCR 2.116(C)(10). Because Michigan's FOIA is the same as the federal FOIA, this Court has found federal FOIA decisions to be highly persuasive in determining what constitutes an adequate record request. *Capitol Information Ass'n v Ann Arbor Police Dep't*, 138 Mich App 655, 658; 360 NW2d 262 (1984). It is not necessary that a specific document be named or cited in the record request if the document is described with enough detail so that a trained employee can locate it with reasonable effort. *Marks v United States*, 578 F2d 261, 263 (CA 9, 1978). We learn from the facts of *Marks*, in which the plaintiff requested all documents kept by the Federal Bureau of Investigation under his name, that the request need not describe a known document. *Id.* at 262. Similarly vague requests, such as a request for all "abandoned U.S. patent applications," are sufficient when the government "makes no claim that [it] does not know what plaintiff wishes to see or where to locate it." *Sears v Gottschalk*, 502 F2d 122, 124, 125 (CA 4, 1974). To the contrary, a request for "all correspondence, documents, memoranda, tape recordings, notes, and any other material pertaining to the atrocities committed against plaintiffs . . . , including, but not limited to, the files of [various government offices]" lacks sufficient detail, *Mason v Callaway*, 554 F2d 129, 131 (CA 4, 1977), because it fails to ask for a record or records that even *hypothetically* exist.

Here, it is fairly apparent that Forner may have suspected that the Township did not have requirements and standards in the various ordinances and documents on which it could base its conditional approval. Certainly, however, documents containing such requirements and standards *could* have existed, at least hypothetically, at the time Forner made his initial request (and did, in fact, actually exist as the Township's subsequent disclosures made clear). We believe, therefore, that the trial court's

conclusion that Forner's FOIA request was actually, a request for an admission that such documents did not exist was overbroad.<sup>1</sup>

However, following the August 4, 1998 denial of Forner's request, the Township fully responded to that request. A letter sent two days later from the Township's building and zoning administrator to Forner, written "in response to your freedom of information request," provided the source materials for the planning commission's decision on Forner's site plan. Following that letter, the Township compiled a more extensive list of documents it believed pertinent to its decision regarding the site plan and provided it to Forner in an August 28, 1998 letter. Again in October 1998, the Township identified in writing what it relied on to make its decision on the site plan. In the August 28, 1998 letter, the Township noted that it would act under the FOIA to provide any of those listed documents to Forner.

Forner focused his argument on appeal on the Township's August 4, 1998 denial and has not indicated why the Township's subsequent disclosures and offer to provide records did not satisfy his needs. We therefore conclude that Forner's appeal on this point is moot.<sup>2</sup>

### III. The Township's Damages

#### A. Preservation Of The Issue

The Township requests the award of damages incurred in defending this case. There is no preservation requirement for this issue because a motion for damages for a vexatious appeal can be made for the first time in this Court. MCR 7.216(C).

#### B. MCR 7.216(C)(1)

Michigan court rules allow this Court to require one party to pay the costs of defending a lawsuit incurred by the opposing party in certain circumstances described in MCR 7.216(C)(1):

The Court of Appeals may, on its own initiative or the motion of any party, assess actual and punitive damages or take other disciplinary action when it determines that an appeal or any of the proceedings in an appeal was vexatious because

(a) the appeal was taken for purposes of hindrance or delay or without any reasonable basis for belief that there was a meritorious issue to be determined on appeal; or

(b) a pleading, motion, argument, brief, document, or record filed in the case or any testimony presented in the case was grossly lacking in the requirements of propriety, violated court rules, or grossly disregarded the requirements of a fair presentations of the issues to the court.

This Court has held that "a question raised on appeal is vexatious if the result is apparent and should have been apparent even to the appellant." *McIntosh v Chrysler Corp*, 212 Mich App 461, 470; 538 NW2d 428 (1995).

MCR 7.216(C)(1)(a) permits us to assess damages to an appellant: (1) if the appeal was pursued to hinder the opposing party; (2) if it was pursued to delay the situation affected by the appeal; or (3) if it was filed without a reasonable belief that it had merit. Given that documents existed containing the requirements and standards on which the Township gave its conditional approval, we do not believe that any of these alternative grounds apply here. That Forner's appeal is moot, given the Township's later actions, does not change our conclusion in this regard. For these reasons, we decline to award the costs and attorney fees asked for by the Township.

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Henry William Saad

/s/ William C. Whitbeck

<sup>1</sup> As noted below, this court has held that the nonexistence of a document is not a defense for the failure to respond to a request for a document with information that the document does not exist. See *Hartzell v Mayville Sch Dist*, 183 Mich App 782; 455 NW2d 411 (1990). See also MCL 15.235(6)(b); MSA 4.1801(5)(6)(b).

<sup>2</sup> Forner places considerable reliance on the decision of this Court in *Hartzell, supra*. In that case, the plaintiff requested "the written rule" relating to certain parking requirements. *Id.* at 784. The defendant failed to respond to this request. *Id.* This Court stated that the nonexistence of a record is a defense for the failure to produce or allow access to the record. However, we went on to say that, "[I]t is not a defense to the failure to respond to a request for a document with the information that it does not exist." *Id.* at 787. Here, ultimately, the Township did respond with the relevant documents. Thus, the documents *did* exist and Forner ultimately *did* receive them. The Township, therefore, was not under an obligation in its first, or subsequent, FOIA response(s) to certify that the public record Forner requested did not exist, pursuant to § 5(4)(b) of the FOIA, MCL 15.235(4)(b); MSA 4.1801(5)(4)(b).