

STATE OF MICHIGAN
COURT OF APPEALS

FEDERATED PUBLICATIONS, INC., d/b/a THE
LANSING STATE JOURNAL,

UNPUBLISHED
November 14, 2000

Plaintiff-Appellee/Cross-Appellant,

v

No. 218331
LC No. 98-088151-AZ

CITY OF LANSING,

Defendant,

and

CAPITOL CITY LODGE NO. 141 OF THE FRATERNAL
ORDER OF POLICE LABOR PROGRAM, INC.,

Intervening Defendant-Appellant/Cross-
Appellee.

FEDERATED PUBLICATIONS, INC., d/b/a THE
LANSING STATE JOURNAL,

Plaintiff-Appellee/Cross-Appellant,

v

No. 218332
LC No. 98-088151-AZ

CITY OF LANSING,

Defendant-Appellant/Cross-Appellee,

and

CAPITOL CITY LODGE NO. 141 OF THE FRATERNAL
ORDER OF POLICE LABOR PROGRAM, INC., JANE
DOE, and JOHN DOE,

Intervening Defendants.

Before: Kelly, P.J., and Whitbeck and Collins, JJ.

PER CURIAM.

In these consolidated appeals, defendant City of Lansing (city) and intervening defendant Capitol City Lodge Fraternal Order of Police (Lodge) appeal as of right from the trial court's order granting in part plaintiff's motion for summary disposition pursuant to MCR 2.116(C)(10) and ordering that the city disclose its citizen-initiated police department internal affairs investigative files pursuant to the Michigan Freedom of Information Act

(FOIA), MCL 15.231 *et seq.*; MSA 4.1808(1) *et seq.* Plaintiff cross-appeals from the trial court's order granting in part defendant's motion for summary disposition and ordering that the city's department-initiated internal affairs investigative files were exempt from disclosure pursuant to the FOIA. We affirm in part, reverse in part, and remand for further proceedings.

Plaintiff, a newspaper of general circulation located in Lansing, requested from the city disclosure of its police department internal affairs investigative files for the year 1997. The city denied the request, asserting that the FOIA exempted the information from disclosure. Plaintiff filed the present action against the city, requesting that the trial court order disclosure of the documents pursuant to the FOIA. The trial court granted Lodge's motion to intervene, finding that it had an interest in the action as the collective bargaining representative of many Lansing police officers, but denied John and Jane Doe's motion to intervene.

Defendants contend that the trial court erred in granting summary disposition in favor of plaintiff to the extent that the trial court found that the city's citizen-initiated investigative files were not exempt under the FOIA. In its cross-appeal, plaintiff asserts that the trial court erroneously granted defendant summary disposition regarding defendant's department-initiated investigative files. This Court reviews a trial court's decision on a motion for summary disposition de novo. *Harrison v Olde Financial Corp*, 225 Mich App 601, 605; 572 NW2d 679 (1997). In reviewing a motion for summary disposition under MCR 2.116(C)(10), this Court construes the facts in a light most favorable to the nonmoving party. *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455; 597 NW2d 28 (1999). "Whether requested information qualifies for exemption from disclosure under the FOIA is a mixed question of fact and law." *Messenger v Ingham Co Prosecutor*, 232 Mich App 633, 637; 591 NW2d 393 (1998). On appeal, we review a trial court's factual determinations for clear error, but review its legal conclusions de novo. *Id.* at 637.

"The FOIA embodies this state's strong public policy favoring public access to government information, recognizing the need that citizens be informed as they exercise their role in a democracy, and the need to hold public officials accountable for the manner in which they discharge their duties." *Id.* at 641; MCL 15.231(2); MSA 4.1801(1)(2). Hence, the FOIA requires full disclosure of public records, unless the records are specifically exempted from disclosure under § 13. MCL 15.243; MSA 4.1801(13); *Bradley v Saranac Community Schools Bd of Ed*, 455 Mich 285, 293; 565 NW2d 650 (1997); *Nicita v Detroit*, 216 Mich App 746, 751; 550 NW2d 269 (1996). Exemptions to disclosure are narrowly construed to further the disclosure policy behind the FOIA. *Kent Co Deputy Sheriffs' Ass'n v Kent Co Sheriffs'*, 238 Mich App 310, 313, 330; 605 NW2d 363 (1999), *aff'd in part* ___ Mich ___; ___ NW2d ___ (Docket No. 115823, issued 9/19/00). When a public body refuses to disclose a requested document under the FOIA, the public body bears the burden of proving that its refusal was justified. *Id.* at 330.

Intervening defendant Lodge claims on appeal that the internal affairs investigation files were exempt under MCL 15.243(1)(a); MSA 4.1801(13)(1)(a), the personal information exemption in the FOIA. Under subsection 13(1)(a), a public body may exempt from disclosure "[I]nformation of a personal nature where the public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy." MCL 15.243(1)(a); MSA 4.1801(13)(1)(a). This issue was not raised below, and we conclude that failure to review this issue would not result in manifest injustice. *Herald Co, Inc v Kalamazoo*, 229 Mich App 376, 390; 581 NW2d 295 (1998); *Swickard v Wayne Co Medical Examiner*, 438 Mich 536, 562; 475 NW2d 304 (1991). In any event, the requested documents in the instant case contained information concerning police officers' conduct while performing their public jobs. Because defendant Lodge failed to demonstrate that the requested documents contained any information of a personal nature, subsection 13(1)(a) does not provide a basis for exemption from disclosure. *Bradley, supra* at 295.

Next, defendants argue that the trial court erred when it concluded that the internal affairs files were not exempt from disclosure under the FOIA when read in conjunction with the Employee Right to Know Act, MCL 423.501 *et seq.*; MSA 17.62(1) *et seq.* A public body may exempt from disclosure under the FOIA any record or information specifically described and exempted from disclosure by statute. MCL 15.243(1)(d); MSA 4.1801(13)(1)(d). Defendant claims such an exception is set forth by the Employee Right to Know Act. After review of the plain language of that act, we are unable to find any tenable support for defendant's argument. The plain language of the act provides that it "shall not be construed to diminish a right of access to records as provided in [the FOIA]." MCL 423.510; MSA 17.62(10). Where statutory language is unambiguous and clear, no further judicial construction is required or permitted, and the statute must be enforced as written with the statute's words

given their plain meaning. *Tryc v Michigan Veterans' Facility*, 451 Mich 129, 135-136; 545 NW2d 642 (1996); *DiBenedetto v West Shore Hospital*, 461 Mich 394, 402; 605 NW2d 300 (2000).

Defendants also contend that the deliberative process privilege exempted the requested documents. MCL 15.243(1)(n); MSA 4.1801(13)(1)(n),¹ the deliberative process exemption of the FOIA, provided, in pertinent part:

¹ This provision now appears at MCL 15.243(1)(m); MSA 4.1801(1)(m). See 2000 PA 88.

(1) A public body may exempt from disclosure as a public record under this act:

* * *

(n) Communications and notes within a public body or between public bodies of an advisory nature to the extent that they cover other than purely factual materials and are preliminary to a final agency determination of policy or action. This exemption does not apply unless the public body shows that in the particular instance the public interest in encouraging frank communications between officials and employees of public bodies clearly outweighs the public interest in disclosure.

As this Court explained in *Herald Co, Inc v Ann Arbor Public Schools*, 224 Mich App 266, 274; 568 NW2d 411 (1997):

[T]o prevent disclosure under this subsection, the public body must first establish that (a) the documents cover other than purely factual materials and (b) the documents are preliminary to a final determination of policy or action If the documents meet this substantive test, however, the public body must also establish that the public interest in encouraging frank communications within the public body or between public bodies clearly outweighs the public interest in disclosure.

In the present case, the citizen-initiated internal affairs investigative files were not exempt under MCL 15.243(1)(n); MSA 4.1808(13)(1)(n) because they did not constitute communications within a public body, but rather involved communications between private citizens and a public body. *Bradley, supra* at 296. Regarding the department-initiated internal affairs complaints, to the extent that any of the contents were other than factual in nature, we conclude that defendants failed to meet their burden of showing that the public interest favored nondisclosure. *Kent Co Deputy Sheriffs' Ass'n, supra* at 331-332.

Defendants next argue that the requested internal affairs investigation files were categorically exempt from disclosure pursuant to subsection 13(1)(t)(ix),² the law enforcement agency personnel records exemption of the FOIA. In support, defendant cites *Kent Co Deputy Sheriffs' Ass'n, supra*, and *Newark Morning Ledger Co v Saginaw Co Sheriff*, 204 Mich App 215, 218; 514 NW2d 213 (1994). "Internal investigation records of a law enforcement agency may be exempt from disclosure as personnel records under subsection 13(1)(t)(ix)." *Kent Co Deputy Sheriffs' Ass'n, supra* at 331. Notwithstanding, to justify nondisclosure pursuant to this subsection, a defendant must demonstrate that the public interest in disclosure of the records did not outweigh the public interest in nondisclosure. *Id.* Contrary to defendants' argument, neither *Kent Co Deputy Sheriffs' Ass'n, supra*, nor *Newark, supra*, held that internal affairs documents are categorically exempt from disclosure under the FOIA. Although both cases found that internal affairs documents were personnel records of a law enforcement agency, both cases proceeded to analyze the required balancing of public interests. *Kent Co Deputy Sheriffs' Ass'n, supra* at 331; *Newark, supra* at 224-225. Moreover, the statute itself requires that the records be disclosable, even if the records constitute law enforcement agency personnel records, unless defendant demonstrates that the public interest in disclosure of the records did not outweigh the public interest in nondisclosure. MCL 15.243(1)(t)(ix); MSA 4.1808(13)(1)(t)(ix); *Kent Co Deputy Sheriffs' Ass'n, supra* at 331.

Defendants argue that the trial court erroneously placed the burden of proving that the public interest in nondisclosure outweighed the public interest in disclosure of the files on defendants. We disagree. It is well settled that a party claiming that material is exempt from disclosure under the FOIA bears the burden of proving that the refusal was justified. MCL 15.240(4); MSA 4.1801(10)(4); *Kent Co Deputy Sheriffs' Ass'n, supra* at 330; *Booth Newspapers, Inc v University of Michigan Bd of Regents*, 444 Mich 211, 232; 507 NW2d 422 (1993); *In re Subpoena Duces Tecum to Wayne Co Prosecutor (On Remand)*, 205 Mich App 700, 705; 518 NW2d 522 (1994).

² This provision now appears at MCL 15.243(1)(s)(ix); MSA 4.1801(1)(s)(ix). See 2000 PA 88.

Defendants' next argument is that the trial court erroneously concluded that they did not demonstrate that the public interest favored nondisclosure regarding its citizen-initiated internal affairs investigative files. Defendants' primary argument that the public interest favored nondisclosure consisted of testimony that disclosure would have a chilling effect on future internal affairs investigations because people would be reluctant to come forward if they knew that their statements would be made public. On the other hand, plaintiff presented evidence from several witnesses that the public has an interest in disclosure to restore the public's trust in the police department, and allow the public an opportunity to gain much-needed confidence in defendant's internal affairs investigatory process. Plaintiff further presented evidence that the public's trust in the manner in which the City of Lansing's police department handled citizen complaints was severely diminished in light of the recent decision in the *Swans*³ case, that the city had recently dealt with a referendum and March for Justice on this issue, and that it had decided to hire a complaints investigator. Plaintiff also presented the deposition testimony of a local attorney that the only way the public could gain this confidence was by affording it an opportunity to review the police department's internal affairs records to ensure that its process was efficient, fair, comprehensive, and that any punishment handed out was appropriate. Even the then Lansing police chief conceded that the public might benefit from release of the requested documents to understand whether the internal affairs department fairly investigated citizen complaints. Under the circumstances of this case, the trial court did not err in determining that subsection 13(1)(t)(ix) did not provide a basis for exempting defendant's citizen-initiated investigatory files from disclosure; defendants failed to meet the burden of producing evidence explaining why and how this proffered interest outweighed the public interest in disclosure. *Bradley, supra* at 293, 299-300.

Regarding the cross-appeal, plaintiff argues that the trial court erroneously concluded that defendant's police department-initiated internal affairs investigative files were exempt from disclosure under the FOIA exemption covering law enforcement agency personnel records, MCL 15.243(1)(t)(ix); MSA 4.1801(13)(1)(t)(ix). As indicated above, disclosure of the *citizen-initiated complaints* furthers the public interest in ensuring the efficacy, fairness, and comprehensiveness of defendant's internal affairs investigations. Contrary to the trial court's conclusion, we believe that the public interest in this case would also be furthered by disclosing *department-initiated complaints*. The fairness of defendant's investigations into department-initiated complaints would also have bearing on citizens' confidence that defendant investigates their complaints thoroughly and fairly and that defendant punishes appropriately. The citizens have a strong interest in knowing if department-initiated complaints are pursued with more or less vigor than those initiated by citizens. The public interest is not concerned so much with the infraction as how the department handles its investigations. This interest applies to both citizen-initiated and department-initiated complaints. Therefore, we believe that defendants did not demonstrate that the public interest favored nondisclosure regarding the department-initiated investigative files. These files were not per se exempt from disclosure. We reverse the trial court's ruling that the department-initiated internal affairs investigative files are all exempt from disclosure and remand this matter to the trial court to determine if some or all of the department-initiated complaints involved matters that would invoke the public's interest in the conduct of internal affairs investigations. If so, those complaints are subject to disclosure.

Plaintiff's remaining argument on cross-appeal is that the trial court's pro rata award of attorney fees was erroneous. We review a trial court's award of attorney fees to a prevailing plaintiff in an FOIA action for an abuse of discretion. *Messenger, supra* at 647. Under MCL 15.240(6); MSA 4.1801(10)(6), courts have the discretion to award an appropriate portion of the requesting party's attorney fees when the requesting party has prevailed in part. A plaintiff prevails when the plaintiff shows that the action was reasonably necessary to compel the disclosure of the documents sought, and the action had a substantial causative effect on the delivery of the information. *Oakland Co Prosecutor v Dep't of Corrections*, 222 Mich App 654, 663; 564 NW2d 922 (1997). When the plaintiff prevails only on a portion of the request, the award should be "fairly allocable" to that portion. *Dawkins v Dep't of Civil Service*, 130 Mich App 669, 674; 344 NW2d 43 (1983); quoting *Kestenbaum v Michigan State University*, 414 Mich 510, 566; 327 NW2d 783 (1982); *Booth Newspapers, Inc v Kalamazoo School Dist*, 181 Mich App 752, 760; 450 NW2d 286 (1989). In the present case, the trial court awarded plaintiff sixty-one percent of its attorney fees

³ *Swans v City of Lansing*, 65 F Supp 2d 625 (WD Mich, 1998) (upholding jury verdict of over \$12 million dollars in a civil rights action against the defendant City of Lansing by a personal representative of an arrestee's estate alleging that the arrestee died due to excessive force applied by Lansing police officers).

incurred, reasoning that plaintiff was only successful in forcing defendant to disclose sixty-one percent of all documents sought. In light of our conclusion that the trial court erred in granting a blanket exemption from disclosure for the department-initiated complaints, we direct the trial court to address the issue of attorney fees again on remand. If at least some of the department-initiated complaints are subject to disclosure, as we surmise, it may be fair to award plaintiff additional attorney fees.

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

/s/ Michael J. Kelly
/s/ William C. Whitbeck
/s/ Jeffrey G. Collins