

STATE OF MICHIGAN
COURT OF APPEALS

PHILLIP D. FORNER,

Plaintiff-Appellant,

v

BUREAU OF COMMERCIAL SERVICES,
ARCHIE MILLBEN, RONALD M. BASSO, and
KATHLEEN M. WILBUR,

Defendants-Appellees.

UNPUBLISHED

March 20, 2001

No. 226995

Kent County Circuit Court

LC No. 99-009763-CZ

Before: Saad, P.J., and Fitzgerald and O'Connell, JJ.

PER CURIAM.

Plaintiff appeals as of right from the dismissal with prejudice of his complaint, seeking disclosure of certain materials under the Freedom of Information Act (FOIA), MCL 15.231 *et seq.*; MSA 4.1801(1) *et seq.*, and seeks the actual costs of the action (but not attorney fees) and punitive damages. We affirm.

Plaintiff complains that when the Bureau of Commercial Services (Bureau) partially affirmed and partially reversed the initial denial of his document request on administrative appeal, it relied on statutory exemptions not raised in the original denial. Because the Bureau raised these exemptions after the Bureau's original denial, plaintiff claims the Bureau cannot rely on them. Plaintiff is incorrect. The Bureau may raise these exemptions at any time during the administrative proceedings and, further, may raise these exemptions as affirmative defenses. *Residential Ratepayer Consortium v Public Service Commn #2*, 168 Mich App 476; 425 NW2d 98 (1987). Moreover, this Court may affirm a trial court's decision that an agency appropriately withheld materials by using a different exemption from that used by the trial court. *Messenger v Ingham Co Prosecutor*, 232 Mich App 633, 643; 591 NW2d 398 (1998). Accordingly, the Bureau had the legal right to raise additional exemptions throughout the administrative proceedings.

Plaintiff also says that the Bureau cannot claim as exempt legal advice it obtained from the Attorney General in connection with the underlying complaint filed by plaintiff against the appraiser with the Bureau. This assertion is incorrect. Materials covered by the attorney-client privilege are exempt from disclosure under the FOIA, MCL 15.243(1)(h); MSA

4.1801(13)(1)(h). *McCartney v Attorney General*, 231 Mich App 722, 735; 587 NW2d 142 (1999). The Attorney General's legal advice was based on confidential communications from the Bureau to the Attorney General, made both in this case and in an earlier case, *McCartney, supra* at 735; *Reed Dairy Farm v Consumers Power Co*, 227 Mich App 614, 618-619; 576 NW2d 709 (1998); *Yates v Keane*, 184 Mich App 80, 83; 457 NW2d 693 (1990). Therefore, the legal advice in question is exempt from the disclosure provisions of FOIA under the attorney-client privilege.

Additionally, plaintiff objects to the trial court's finding that materials submitted to the Bureau by the appraiser (the individual against whom plaintiff had complained to the Bureau) were exempt from disclosure under Section 13(1)(b)(iii) of the FOIA. An exemption under Section 13(1)(b)(iii) is warranted if disclosure of the materials would "[c]onstitute an unwarranted invasion of personal privacy." The trial court reviewed the materials, in camera, and determined that their disclosure would constitute an unwarranted invasion of privacy. We also reviewed the disputed materials, and agree with the trial court's conclusion. The materials contain matters of a private nature which are exempt from the FOIA.

Plaintiff also contends that the trial court erred in upholding the Bureau's decision to disclose only redacted portions of its investigator's report, and to release only portions identified as purely factual in character. The trial court reviewed the full report in camera before upholding the denial. We have also reviewed the report, and conclude that the trial court properly upheld the Bureau's decision.

Because plaintiff has not prevailed in this action, he is not entitled to costs or punitive damages.

Affirmed.

/s/ Henry William Saad
/s/ E. Thomas Fitzgerald
/s/ Peter D. O'Connell