STATE OF MICHIGAN

COURT OF APPEALS

WILLIAM ALLEN SIMPSON, Plaintiff-Appellant,	UNPUBLISHED December 22, 2005
v	No. 262724 Washtenaw Circuit Court
WASHTENAW COUNTY CLERK and WASHTENAW COUNTY ELECTION ADMINISTRATOR, Defendants-Appellees.	LC No. 04-001356-NZ

Before: Hoekstra, P.J., and Neff and Davis, JJ.

PER CURIAM.

In this action under the Freedom of Information Act (FOIA), MCL 15.231 *et seq*., plaintiff, acting in propria persona, appeals as of right the trial court's order granting defendants' motion for summary disposition under MCR 2.116(C)(10). We affirm in part, reverse in part, and remand.

I. Basic Facts and Procedural History

In a letter served at the office of the Washtenaw County Clerk on August 16, 2004, plaintiff requested certain materials and information referenced by former Washtenaw County Election Administrator Melanie Weidmayer in an affidavit provided by Weidmayer in a separate suit regarding a failed attempt to institute proceedings to recall several elected Ypsilanti Township officials. Specifically, plaintiff requested that he be provided the opportunity to examine and selectively copy the qualified voter and master card files referenced by Weidmayer in her affidavit, as well as "all annotations made during recall petition evaluation, in electronic form."[1] Plaintiff also requested the software associated with the electronic qualified voter file, as well as any related instructional or descriptive documentation.

[1] The "qualified voter file" is an interactive electronic database that catalogs and allows voter registration information to be shared between local jurisdictions and the Department of State, which created and maintains the database pursuant to statute. See MCL 168.509o. The "master card file" contains the signature of each registered voter in a jurisdiction. See MCL 168.501.

On August 18, 2004, Judy Kramer, the Washtenaw County FOIA Coordinator, informed plaintiff that she was unilaterally extending the statutory five-day period for response to a FOIA request by an additional ten business days, and that his request would be "granted, denied, or granted in part and denied in part by September 7, 2004." Kramer thereafter, in a letter dated September 1, 2004, but which the parties agree was not mailed until the following day, granted plaintiff's request in part.

Citing MCL 15.232, which expressly exempts "software" from the definition of a public record for purposes of the FOIA, Kramer denied plaintiff's request to inspect or copy the software associated with the electronic qualified voter file. Kramer also denied plaintiff's request for "all annotations made during recall petition evaluation, in electronic form," indicating that "no such records exist." In all other respects, Kramer granted plaintiff's requests and quoted the fees to obtain that information, including $5.00 per CD-R copy and $.20 per page, should he choose to pursue his request further. Kramer concluded her letter by informing plaintiff of his statutory right to either appeal her decisions to the county administrator or seek judicial review of her FOIA compliance through an action in the circuit court. See MCL 15.240(1). Without response to Kramer, plaintiff chose to pursue the latter of these options and on December 29, 2004 filed the instant suit alleging that defendants had improperly failed to respond and produce the records requested by him, and sought to impose fees that "greatly exceed[ed]" the actual incremental cost of complying with his request.

In lieu of answering the complaint, defendants moved for summary disposition. Relying on documentary evidence, including plaintiff's written FOIA request as well as Kramer's extension notice and ultimate response, defendants asserted that there was no genuine issue of material fact regarding whether plaintiff had received a response that was both timely and appropriate under the requirements of the FOIA. In response, plaintiff submitted a self-attested affidavit in which he declared himself to be an expert in the field of "computers" and recall elections, who had "designed and implemented a petition analysis program used . . . in multiple states and many causes." Plaintiff further indicated that, on the basis of his experience, he did not believe that Weidmayer could have verified the recall petition signatures without "a voter file, with annotations particular to each voter that had been successfully identified during the analysis."

After reviewing the documentary evidence submitted by the parties, the trial court found that defendants had, "as a matter of law," complied with plaintiff's request to the extent required by the FOIA. Finding further that the fees challenged by plaintiff were not excessive, the trial court granted summary disposition in favor of defendants under MCR 2.116(C)(10). On appeal, plaintiff challenges the trial court's ruling in this regard on a number of grounds.

II. Analysis

We review de novo a trial court's ruling on a motion for summary disposition. *Glancy v City of Roseville*, 457 Mich 580, 583; 577 NW2d 897 (1998). In doing so, however, we limit our review to the evidence presented to the trial court at the time the motion was decided. *Peña v Ingham Co Road Comm*, 255 Mich App 299, 313 n 4; 660 NW2d 351 (2003). A motion for summary disposition under MCR 2.116(C)(10) tests the factual support of a claim. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). A trial court may grant summary disposition under MCR 2.116(C)(10) if, after reviewing the evidence in a light most favorable to

the nonmoving party, it determines that no genuine issue concerning a material fact exists and the moving party is entitled to judgment as a matter of law. *Coblentz v City of Novi*, 264 Mich App 450, 452-453; 691 NW2d 22 (2004). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds could differ." *West v GMC*, 469 Mich 177, 183; 665 NW2d 468 (2003).

Plaintiff first argues that because the documentary evidence clearly indicates that Kramer failed to provide a reason for extending the period of response to his request, the trial court erred in finding that defendants had complied with his request to the extent required by the FOIA. Although we agree that Kramer's failure in this regard precludes a finding of full compliance with the requirements of the FOIA, we do not find such noncompliance sufficient to preclude summary disposition.

MCL 15.235(2) requires that, "[u]nless otherwise agreed to in writing by the person making the request," a public body must respond to a FOIA request within five business days of receiving the request. Pursuant to MCL 15.235(2)(d), however, a public body may unilaterally extend the period of response by an additional ten business days by issuing notice of such extension to the requesting party. Plaintiff is correct, however, that MCL 15.235(6) requires that any such notice also "specify the reasons for the extension and the date by which the public body" will either grant or deny the request in whole or part.[2] Relying on Kramer's failure to so explain the basis for extending the period for a response to his request, plaintiff asserts that Kramer's unilateral extension of the time period for response was invalid, thereby rendering her response untimely and, in effect, a complete denial of his request. See MCL 15.235(3) (providing that the "[f]ailure to respond to a request pursuant to [MCL 15.235](2) constitutes a public body's final determination to deny the request"); see also *Scharret v City of Berkley*, 249 Mich App 405, 412; 642 NW2d 685 (2002) (failure to timely respond to a FOIA request constitutes a final determination to deny the request). Thus, plaintiff argues, he was entitled to file and maintain the instant action in order to recover actual and punitive damages. We do not agree.

Plaintiff's argument ignores the nature of the right of action provided for under the FOIA, which is to compel disclosure of records improperly withheld by a public body, see MCL 15.240(1),[3] as well as the reality that Kramer in fact responded to his request within the extension period she sought to assert. Although Kramer's failure to provide a reason for unilaterally extending the period of response rendered her substantive response untimely, she did nonetheless respond and in doing so indicated that plaintiff could obtain the bulk of the requested

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[2] Contrary to plaintiff's assertion, a public body seeking to extend the time for response to a FOIA request under MCL 15.235(2)(d) is not limited to the "unusual circumstances" necessary to unilaterally extend the statutorily prescribed ten-day period of response for an *appeal* to the head of a public body from the denial of a request in whole or part. See MCL 15.232(g) and 15.240(2)(d).

[3] MCL 15.240(1)(b) provides that where "a public body makes a final determination to deny all or part of a request," the requesting party may "[c]ommence an action in the circuit court to compel the public body's disclosure of the public records . . . ."

information after paying a portion of the estimated fees. While Kramer also denied a portion of plaintiff's request, her failure to state a reason for the extension was not material to the dispositive legal question at issue in a suit to compel disclosure under the FOIA, i.e., the propriety of the public body's denial of the request. Consequently, under the circumstances presented here, the mere fact that Kramer failed to state a reason for the extension did not preclude summary disposition in favor of defendants.[4] See *Auto Club Ins Ass'n v State Automobile Mut Ins Co*, 258 Mich App 328, 333; 671 NW2d 132 (2003) (to preclude summary disposition under MCR 2.116(C)(10), a disputed factual issue "must be material to the dispositive legal claim").

Indeed, consistent with this reasoning this Court has held that punitive damages, fees, and other costs associated with a FOIA action are not appropriate merely because there were violations of the FOIA. *Scharret*, *supra* at 414-416; *Bredemeier v Kentwood Bd of Ed*, 95 Mich App 767, 773; 291 NW2d 199 (1980). Rather, for any such award to be proper, the violation at issue must have rendered the plaintiff's lawsuit reasonably necessary to compel disclosure. *Scharret*, *supra*; *Bredemeier*, *supra*. Because the mere fact that Kramer failed to provide a reason for extending the period of response is not itself sufficient to compel disclosure, plaintiff was not entitled to maintain an action for damages solely on the basis of that violation. Consequently, the mere fact that Kramer failed to state a reason for the extension did not preclude summary disposition in favor of defendants.

Plaintiff also argues that summary disposition in favor of defendants was improperly granted because they failed to meet their burden of justifying the denial of his requests for the software associated with the electronic qualified voter file and "all annotations made during recall petition evaluation, in electronic form." Although we find no error in the grant of summary disposition with respect to plaintiff's request for "software," we agree that summary disposition of plaintiff's claim concerning recall petition evaluation annotations was premature.

Under the FOIA, a public body must disclose all public records that are not specifically exempt under the act. MCL 15.233(1); *Scharret*, *supra* at 411. Any denial of such a request must be contained in a writing setting forth the reason for the denial, including an explanation of the basis for any claimed exemption from disclosure. MCL 15.235(4)(a); *Federated Publications, Inc v City of Lansing*, 467 Mich 98, 102; 649 NW2d 383 (2002). Where the basis for denial is that the public record requested does not exist, the public body must also provide the requesting party with "[a] certificate that the public record does not exist under the name given by the requester or by another name reasonably known to the public body." MCL 15.235(4)(b). The public body denying the request for a public record, as defined in the FOIA, has the burden to justify its denial. MCL 15.240(4); *Thomas v New Baltimore*, 254 Mich App 196, 203; 657 NW2d 530 (2002).

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[4] Moreover, because no further factual development could alter this fact, summary disposition prior to the completion of discovery was not premature. See *Trentadue v Buckler Automatic Lawn Sprinkler Co*, 266 Mich App 297, 306; 701 NW2d 756 (2005).

The term "public record" is defined in MCL 15.232(e) 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. *Public record does not include computer software*." (Emphasis added). As previously noted, Kramer relied on this exclusion of "software" from the definition of a "public record" to deny plaintiff's request for the software associated with the electronic qualified voter file and, in doing so, specifically cited MCL 15.232 as the basis for denying disclosure of that information. Plaintiff fails to provide any authority to support his claim that Kramer's response in this regard was insufficient to meet her burden of explaining or otherwise justifying the denial, and we find to the contrary that such explanation was sufficient for that purpose. Indeed, in requiring that a public body inform a requester of the basis for its denial, the FOIA requires only "[a]n explanation of the basis under this act or other statute for the determination that the public record, or portion of that public record, is exempt from disclosure." MCL 15.235(4)(a). Kramer's citation of the statutory provision excluding software from the definition of a public record subject to disclosure under the FOIA was sufficient for that purpose. Moreover, while plaintiff is correct that the term "'[s]oftware' does not include computer-stored information or data, or a field name" see MCL 15.232(f), we note that Kramer acknowledged this fact by granting his request "to the extent that [his] request was for computer data or field names."

However, with regard to plaintiff's claim that summary disposition was improper because Kramer failed to include with her response a certificate that the electronic annotations requested by plaintiff do not exist, MCL 15.235(4)(b), we find that although such failure is itself insufficient to create a question of material fact regarding the propriety of defendants' denial of the request, *Auto Club*, *supra*, summary disposition of plaintiff's claim in this regard was, nonetheless, improper. As plaintiff correctly notes, a motion for summary disposition is generally premature if discovery on a disputed issue has not been completed, unless "further discovery does not stand a reasonable chance of uncovering factual support for the opposing party's position." *Trentadue v Buckler Automatic Lawn Sprinkler Co*, 266 Mich App 297, 306; 701 NW2d 756 (2005). Here, in opposing summary disposition plaintiff submitted an affidavit in which he attested that, based on his professional experience as a programmer of election-related software, he believed it would be impossible for Weidmayer to have reviewed the validity of each petition signature without having created an electronic annotation file. When viewed in a light most favorable to plaintiff, his affidavit, against which defendants offered no contrary evidence, was sufficient to raise a question of material fact warranting additional discovery regarding the existence of the annotations sought by plaintiff. Consequently, there being no basis to conclude that such discovery "does not stand a reasonable chance of uncovering support for [plaintiff's] position," summary disposition on that issue was premature. *Id*.; *Coblentz, supra*.

Finally, plaintiff argues that the trial court erred in granting summary disposition on the ground that the fees quoted by Kramer to obtain the requested information were not excessive. We agree.

The trial court's decision regarding the appropriateness of the fees charged in connection with a request under the FOIA constitutes a finding of fact that we review for clear error. See, generally, *Tallman v Cheboygan Area Schools*, 183 Mich App 123; 454 NW2d 171 (1990). A finding of fact is clearly erroneous where there is no evidence to support the finding, or the

reviewing court on the entire record is left with a definite and firm conviction that a mistake has been made. *Id*. at 126.

MCL 15.234(1) provides that "[a] public body may charge a fee for a public record search, the necessary copying of a public record for inspection, or for providing a copy of the public record." Such search and copying fees must, however, be limited to "actual mailing costs, and to the actual incremental costs 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 [MCL 15.244]." *Id*. In addressing the significance of the limitations set forth in MCL 15.234, this Court, in *Tallman, supra* at 130-131, stated:

> The FOIA clearly provides a method for determining the charge for records. It is incumbent on a public body, if it chooses to exercise its legislatively granted right to charge a fee for providing a copy of a public record, to comply with the legislative directive on how to charge. The statute contemplates only a reimbursement to the public body for the cost incurred in honoring a given request – nothing more, nothing less. If the statutorily computed charge is $1 per page for the request, then $1 per page may be charged. However, if the computed charge is $0.09 per page, no more can be charged, regardless of the ease of application of a "policy" or the difficulty in determining the legislatively mandated computation.

Here, defendants presented no evidence regarding the basis for the quoted fees and, in fact, failed to even address plaintiff's challenge in this regard in seeking summary disposition. As a result, the record is devoid of any evidence from which to conclude that defendants complied with the requirements of MCL 15.234 in charging the fees at issue. Although the fees quoted by Kramer may seem reasonable on their face, reasonableness is not the test for compliance with the express statutory requirements concerning the fees that may be charged by a public body in compiling and producing public records requested under the FOIA. *Tallman, supra*.

Because there is no evidence from which to reach such conclusion, the trial court clearly erred in finding the fees not to be excessive. *Id*. at 126. Consequently, we reverse the trial court's finding in this regard and remand this matter for proceedings consistent with this opinion.

Affirmed in part, reverse in part, and remanded. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Janet T. Neff
/s/ Alton T. Davis