

STATE OF MICHIGAN
COURT OF APPEALS

FRANK LAWRENCE, JR.,

Plaintiff-Appellant,

v

CITY OF TROY,

Defendant-Appellee.

UNPUBLISHED

June 23, 2009

No. 289509

Oakland Circuit Court

LC No. 2008-095176-CZ

Before: Borrello, P.J., and Meter and Stephens, JJ.

PER CURIAM.

Plaintiff appeals as of right from a circuit court order granting summary disposition for defendant in this action under the Freedom of Information Act (FOIA), MCL 15.231 *et seq.* For the reasons set forth in this opinion, we reverse and remand for further proceedings.

Plaintiff filed a FOIA request stemming from a traffic citation issued to his brother, Thomas John Lawrence, for failing to provide proof of insurance and failing to change the address on his driver's license. Plaintiff sent a FOIA request to the Troy Police Department requesting the following information:

1. The full name of the officer who issued citation #733389. Please also include the full name of the second officer who was at the scene;
2. Any and all voice or video recordings of the time directly before, during, and after the citation was issued. This should include, but not be limited to, any voice or video records taken of Thomas Lawrence, as well as any voice or video records depicting one or both of the two officers described in #1 above, directly before, during, and after the citation was issued;
3. Any and all radio, cellular or text transmissions between the two officers described in #1 above, directly before, during, and after the citation was issued. This should include, but not limited to [sic], any radio transmissions to the Troy Police Station;
4. Any records indicating that one or both of the officers described in #1 above, between 6:00pm and 7:00pm, accessed or attempted to access

information from a database operated by the Michigan Secretary of State as to whether Thomas Lawrence or his vehicle had valid insurance;

5. Any and all records that indicate whether one or both of the officers described in #1 above are subject to any guidelines, goals, or expectations as to how many traffic citations they must issue in a given period (i.e., a quota);

6. Any and all records relating to whether one or both of the officers described in #1 have ever been subject to any discipline or disciplinary proceedings for misconduct, misfeasance and/or malfeasance, including whether the officer(s) has ever been sued for official misconduct (i.e., civil rights claims under 42 U.S.C. § 1983). [FOIA Request.]

Two days later, on October 6, 2008, defendant denied plaintiff's request, stating:

The City of Troy Police Department has recently received your Freedom of Information Act request. Since that request is for reports or information related to a criminal charge or a civil infraction (traffic ticket) pending with the City of Troy, your letter should be directed to either the Troy City Attorney's Office or the Oakland County Prosecutor's Office, depending on which of those offices is prosecuting the matter.

We are denying your FOIA request as exempt under MCLA 15.243(1)(D)....

Shortly thereafter, plaintiff filed this action alleging that defendant improperly denied his FOIA request. Plaintiff filed a motion for summary disposition arguing that he was entitled to disclosure of the requested information. Defendant requested summary disposition in its favor under MCR 2.116(I)(2). On December 1, 2008, the trial court denied summary disposition for plaintiff and granted summary disposition for defendant without hearing oral argument. The trial court opined that plaintiff's request appears to be an attempt to circumvent the discovery preclusion in civil infraction actions set forth in MCR 2.302(A)(3). The trial court further opined that the information sought is otherwise exempt, stating:

MCL 15.243(1)(b) provides an exemption for investigating records compiled for law enforcement purposes, to the extent that disclosure as a public record interferes with law enforcement proceedings and would constitute an unwarranted invasion of personal privacy. Here, the information sought implicates personal information of officers and witnesses, and police investigation techniques and guidelines. Accordingly, Plaintiff is not entitled to damages based on his claim of "arbitrary and capricious" acts.

Therefore, the trial court granted summary disposition for defendant pursuant to MCR 2.116(I)(2).

Plaintiff argues that the trial court erred by granting summary disposition for defendant under MCR 2.116(I)(2). A "trial court properly grants summary disposition to the opposing party under MCR 2.116(I)(2) if the court determines that the opposing party, rather than the

moving party, is entitled to judgment as a matter of law.” *Washburn v Michailoff*, 240 Mich App 669, 672; 613 NW2d 405 (2000). Further, in FOIA cases, this Court reviews de novo a trial court’s legal determinations and reviews for clear error a trial court’s factual findings supporting the court’s decision. *Herald Co, Inc v Eastern Michigan Univ Bd of Regents*, 475 Mich 463, 471-472; 719 NW2d 19 (2006). This Court must defer to the trial court’s factual findings unless it is left with a definite and firm conviction that a mistake was made. *Id.* at 472. Finally, when reviewing a decision within the trial court’s discretion, this Court must affirm unless the decision falls outside the principled range of outcomes. *Id.*

MCL 15.231(2) articulates the purpose of the FOIA. That provision states:

It is the public policy of this state that all persons, except those persons incarcerated in state or local correctional facilities, are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees, consistent with this act. The people shall be informed so that they may fully participate in the democratic process.

“Michigan courts have interpreted the policy of the FOIA as one of full disclosure of public records unless a legislatively created exemption expressly allows a state agency to avoid its duty to disclose the information.” *Messenger, supra* at 531. Exemptions to disclosure under MCL 15.243 of the FOIA are narrowly construed, and the party seeking to invoke an exemption has the burden of demonstrating its applicability. *Taylor v Lansing Bd of Water & Light*, 272 Mich App 200, 204-205; 725 NW2d 84 (2006); *Messenger, supra* at 532. “Whether requested information fits within an exemption from disclosure under FOIA is a mixed question of fact and law[.]” *Taylor, supra* at 205.

Plaintiff argues that the trial court essentially relied on the exemption under MCL 15.243(1)(v) in granting summary disposition for defendant. He contends that this exemption is inapplicable because plaintiff and defendant are not involved in any other litigation and this Court in *Taylor, supra*, rejected the notion that this provision prohibits a person from obtaining information by proxy. MCL 15.243(1)(v) provides:

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

* * *

(v) Records or information relating to a civil action in which the requesting party and the public body are parties.

Plaintiff correctly contends that this exemption is inapplicable because, under the plain language of MCL 15.243(1)(v), plaintiff is not seeking information regarding a civil action in which plaintiff and defendant are parties. Plaintiff also correctly argues that *Taylor, supra*, does not preclude him from seeking information regarding a civil action between defendant and plaintiff’s brother. In *Taylor, supra* at 206-207, this Court held that a literal interpretation of MCL 15.243(1)(v) allows “a party to obtain information by proxy that he or she would otherwise not be entitled to receive through FOIA[.]” Therefore, MCL 15.243(1)(v) would not prohibit

plaintiff from obtaining information from defendant through a FOIA request that the provision would prohibit plaintiff's brother from obtaining himself.¹

Despite the foregoing, the trial court did not rely on MCL 15.243(1)(v) in granting summary disposition for defendant and defendant did not rely on that exemption in denying plaintiff's request. Rather, the trial court relied in part on MCR 2.302(A)(3), which pertains to discovery in civil infraction actions. The trial court opined that plaintiff's request was an attempt to circumvent the discovery preclusion in civil infraction actions enunciated in that court rule. MCR 2.302(A) provides:

(A) Availability of Discovery.

(1) After commencement of an action, parties may obtain discovery by any means provided in subchapter 2.300 of these rules.

(2) In actions in the district court, no discovery is permitted before entry of judgment except by leave of the court or on the stipulation of all parties. A motion for discovery may not be filed unless the discovery sought has previously been requested and refused.

(3) Notwithstanding the provisions of this or any other rule, *discovery is not permitted* in actions in the small claims division of the district court or *in civil infraction actions*. [Emphasis added.]

In *Central Michigan Univ Supervisory-Technical Ass'n MEA/NEA v Central Michigan Univ Bd of Trustees*, 223 Mich App 727, 730; 567 NW2d 696 (1997), this Court held that the "FOIA does not conflict with the court rules governing discovery, nor does it supplement or displace them." *Taylor, supra* at 205, citing *Central Michigan*. That case involved whether the plaintiff could seek information under the FOIA when it had already filed suit against the defendants.² *Central Michigan, supra* at 729. This Court opined that there existed no conflict between the court rules and the FOIA and the fact that a party may obtain information through discovery does not forfeit that party's right to obtain the same information through the FOIA. *Id.* at 730. In a concurring opinion, Judge Holbrook opined that "the discovery rules and the FOIA represent 'two independent schemes for obtaining information[.]'" *Id.* at 731 (HOLBROOK, JR., J., concurring).

Accordingly, under the above authority, even though MCR 2.302(A)(3) precludes discovery in civil infraction actions, a party may nevertheless seek information related to such actions under the FOIA unless the FOIA specifically exempts the information sought from

¹ We express no opinion regarding whether a civil infraction action constitutes a "civil action" within the meaning of MCL 15.243(1)(v).

² The FOIA was amended by 1996 PA 553, effective March 31, 1997, to add the exemption currently listed under MCL 15.243(1)(v). This Court decided *Central Michigan* under the preamendment version of the FOIA.

disclosure. The trial court thus erred by determining that plaintiff's FOIA request was properly denied because the information sought was not obtainable through discovery pursuant to MCR 2.302(A)(3).

Defendant argues that it relied on MCL 15.243(1)(d) in conjunction with MCL 600.223 and MCR 2.302(A)(3) to deny plaintiff's FOIA request. MCL 15.243(1)(d) provides:

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

* * *

(d) Records or information specifically described and exempted from disclosure by statute.

MCL 600.223 grants our Supreme Court "authority to promulgate and amend general rules governing practices and procedure in the supreme court and all other courts of record[.]" Defendant apparently contends that because MCL 600.223 authorized the Supreme Court to create the discovery preclusion articulated in MCR 2.302(A)(3), records pertaining to civil infraction actions constitute "[r]ecords or information specifically described and exempted from disclosure by statute" as provided in MCL 15.243(1)(d). However, the mere fact that MCL 600.223 grants the Supreme Court authority to promulgate rules does not mean that the discovery preclusion in MCR 2.302(A)(3) "exempt[s] from disclosure by statute" information regarding civil infraction actions. Thus, defendant's argument, while creative, lacks legal merit.

Plaintiff next argues that the exemption under MCL 15.243(1)(a) is inapplicable because the requested information does not threaten any privacy interest.

MCL 15.243(1)(a) provides:

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

(a) Information of a personal nature if public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy.

According to the language of the statute, the privacy exemption consists of two elements: (1) the information sought must be of a "personal nature," and (2) the disclosure of the information must amount to "a clearly unwarranted invasion of an individual's privacy." *Michigan Federation of Teachers & School Related Personnel, AFT, AFL-CIO v Univ of Michigan*, 481 Mich 657, 675; 753 NW2d 28 (2008).

Information is of a "personal nature" if it involves intimate, embarrassing, private, or confidential details of a person's life according to the moral standards and customs of the community. *Id.* at 676; *Detroit Free Press, Inc v City of Southfield*, 269 Mich App 275, 282; 713 NW2d 28 (2005). Further, "[d]etermining whether the disclosure of such information would constitute a clearly unwarranted invasion of privacy requires a court to balance the public interest in disclosure against the interest the Legislature intended the exemption to protect." *Id.* "The

only relevant public interest is the extent to which disclosure would serve the core purpose of the FOIA, which is to facilitate citizens' ability to be informed about the decisions and priorities of their government." *Id.* "This interest is best served through information about the workings of government or information concerning whether a public body is performing its core function." *Id.*

Defendant failed to provide any evidence, other than perfunctory assertions that plaintiff's FOIA request sought intimate, embarrassing, private, or confidential information. Defendant asserts that the information sought would interfere with law enforcement proceedings and constitute an unwarranted invasion of privacy based on their belief that the information sought pertained to personal information of police officers and witnesses. Review of the request reveals that plaintiff requested information regarding a traffic stop and citation, whether the police officers involved are subject to a citation "quota," and whether the officers had ever been subject to any disciplinary proceedings or sued for official misconduct. The information sought regarding the officers pertains to their public employment and the information requested regarding plaintiff's brother pertains solely to his public traffic stop and civil infraction. The request does not seek intimate, embarrassing, confidential, or private details concerning the lives of plaintiff's brother or the police officers.

In addition, disclosure of the requested information would not amount to "a clearly unwarranted invasion of an individual's privacy." *Univ of Michigan, supra* at 675. Disclosure would serve the core purpose of the FOIA. As this Court has recognized, "[t]his interest is best served through information about the workings of government or information concerning whether a public body is performing its core function." *Detroit Free Press, supra* at 282. Plaintiff seeks information regarding what transpired immediately before, during, and after two Troy police officers stopped plaintiff's brother's vehicle and issued him a citation. The officers' reasons for stopping the vehicle, what occurred during the traffic stop, and any communications amongst the officers and the Troy Police Department shed light on the inner workings of the Troy Police Department and whether the department is fulfilling its duties to the public. Moreover, whether the officers accessed a Michigan Secretary of State database, whether they are subject to a citation "quota," and whether they have ever been subject to any disciplinary action or sued for official misconduct is indicative of whether Troy Police Department is performing its core function. As stated in MCL 15.231(2), "all persons . . . are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees[.]" Therefore, disclosure of the information sought would not constitute a clearly unwarranted invasion of an individual's privacy and is not exempt under MCL 15.243(1)(a).

Plaintiff also argues that the trial court erroneously determined that the information sought is exempt under MCL 15.243(1)(b). That statute provides:

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

* * *

(b) Investigating records compiled for law enforcement purposes, but only to the extent that disclosure as a public record would do any of the following:

- (i) Interfere with law enforcement proceedings.
- (ii) Deprive a person of the right to a fair trial or impartial administrative adjudication.
- (iii) Constitute an unwarranted invasion of personal privacy.
- (iv) Disclose the identity of a confidential source, or if the record is compiled by a law enforcement agency in the course of a criminal investigation, disclose confidential information furnished only by a confidential source.
- (v) Disclose law enforcement investigative techniques or procedures.
- (vi) Endanger the life or physical safety of law enforcement personnel.

The information that plaintiff sought cannot fairly be characterized as “[i]nvestigating records compiled for law enforcement purposes,” as stated in MCL 15.243(1)(b). For example, plaintiff requested the full names of the police officers, records indicating whether the officers were subject to a citation “quota,” records indicating whether the officers accessed a Michigan Secretary of State database to determine whether the vehicle was insured, records pertaining to whether either of the officers has ever been subject to any discipline, a disciplinary proceeding, or sued for official misconduct, and voice, video, text, radio, or cellular transmissions or recordings that occurred immediately before, during, and after the traffic stop. Narrowly construing the exemption listed under MCL 15.243(1)(b), as required pursuant to *Taylor, supra* at 204-205, and *Messenger, supra* at 532, this information simply does not constitute investigating records compiled for law enforcement purposes. Therefore, defendant has not met its burden of demonstrating that the exemption under MCL 15.243(1)(b) is applicable, and the trial court erred by relying on this exemption in granting summary disposition for defendant.

Defendant contends that MCL 15.243(1)(s) provides an alternative basis for denying plaintiff’s FOIA request. That provision states, in relevant part:

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

* * *

(s) Unless the public interest in disclosure outweighs the public interest in nondisclosure in the particular instance, public records of a law enforcement agency, the release of which would do any of the following:

* * *

(v) Disclose operational instructions for law enforcement officers or agents.

(vi) Reveal the contents of staff manuals provided for law enforcement officers or agents.

(vii) Endanger the life or safety of law enforcement officers or agents or their families, relatives, children, parents, or those who furnish information to law enforcement departments or agencies.

* * *

(ix) Disclose personnel records of law enforcement agencies.

Defendant argues that the full names of the police officers are exempt under subsection (vii) because disclosure of the officers' full names would endanger their safety. Defendant also contends that any records indicating whether the officers are subject to guidelines, goals, or expectations regarding how many traffic citations they must issue within a certain time period is exempt under subsections (v) and (vi). Defendant further asserts that the disciplinary records of the officers are exempt from disclosure under subsection (ix). We note that Michigan courts have recognized that a law enforcement agency's records regarding internal investigations fall within the personnel records exemption under subsection (ix). *Kent Co Deputy Sheriffs Ass'n v Kent Co Sheriff*, 463 Mich 353, 365-367; 616 NW2d 677 (2000); *Herald Co, Inc v Kent Co Sheriff's Dep't*, 261 Mich App 32, 37-38; 680 NW2d 529 (2004).

The information sought in paragraphs one, five, and six of plaintiff's FOIA request arguably falls under the exemptions on which defendant relies. "Once particular records qualify under a listed exemption for law enforcement agency records, the remaining inquiry is whether 'the public interest in disclosure outweighs the public interest in nondisclosure in the particular instance.'" *Kent Co Deputy Sheriffs Ass'n, supra*, 463 Mich at 365, quoting *Kent Co Deputy Sheriffs Ass'n v Kent Co Sheriff*, 238 Mich App 310, 331-332; 605 NW2d 363 (1999). The public body has the burden of proving that a particular record is exempt under the public-interest balancing test. *Landry v City of Dearborn*, 259 Mich App 416, 420; 674 NW2d 697 (2003).

In its brief on appeal, defendant fails to advance any argument regarding why the public interest favors nondisclosure of the records under MCL 15.243(1)(s). Defendant simply fails to properly address this issue. Because we conclude that the trial court erroneously granted summary disposition for defendant based on different exemptions, and failed to address defendant's argument regarding the applicability of MCL 15.243(1)(s), we remand this case to the trial court to determine whether "the public interest in disclosure outweighs the public interest in nondisclosure in the particular instance" with respect to the information that plaintiff requested in paragraphs one, five, and six of his FOIA request.

Plaintiff next argues that he is entitled to reasonable fees, costs and disbursements pursuant to MCL 15.240(6) and punitive damages pursuant to MCL 15.240(7). We review for an abuse of discretion a trial court's decision regarding an award of attorney fees to a prevailing party under the FOIA. *Messenger v Ingham Co Prosecutor*, 232 Mich App 633, 647; 591 NW2d 393 (1998). Further, we review for clear error a trial court's findings regarding whether a defendant acted arbitrarily and capriciously with respect to MCL 15.240(7). *Meredith Corp v City of Flint*, 256 Mich App 703, 717; 671 NW2d 101 (2003).

MCL 15.240(6) provides:

If a person asserting the right to inspect, copy, or receive a copy of all or a portion of a public record prevails in an action commenced under this section, the court shall award reasonable attorneys' fees, costs, and disbursements. If the person or public body prevails in part, the court may, in its discretion, award all or an appropriate portion of reasonable attorneys' fees, costs, and disbursements. The award shall be assessed against the public body liable for damages under subsection (7).

Thus, "[t]he first criterion for an award of attorney fees in litigation under the FOIA is that a party 'prevails' in its assertion of the right to inspect, copy, or receive a copy of all or a portion of a public record." *Local Area Watch v City of Grand Rapids*, 262 Mich App 136, 149; 683 NW2d 745 (2004). Further, "whether to award plaintiff reasonable attorney fees, costs, and disbursements when a party only partially prevails under the FOIA is entrusted to the sound discretion of the trial court." *Id.* at 151.

We direct the trial court to address on remand whether plaintiff is entitled to attorney fees, costs, and disbursements. Until the trial court reaches a decision on remand, it cannot be determined whether plaintiff is a prevailing party requiring an award of reasonable attorney fees, costs, and disbursements under MCL 15.240(6). We note that even if the trial court determines on remand that the information sought in paragraphs one, five, and six of plaintiff's FOIA request is exempt from disclosure, plaintiff nevertheless partially prevailed in his FOIA action and an award of reasonable fees, costs, and disbursements would be within the trial court's discretion pursuant to MCL 15.240(6). *Local Area Watch, supra* at 151.

Plaintiff also argues that he is entitled to punitive damages pursuant to MCL 15.240(7) because defendant's denial of his FOIA request was arbitrary and capricious. MCL 15.240(7) provides:

If the circuit court determines in an action commenced under this section that the public body has arbitrarily and capriciously violated this act by refusal or delay in disclosing or providing copies of a public record, the court shall award, in addition to any actual or compensatory damages, punitive damages in the amount of \$500.00 to the person seeking the right to inspect or receive a copy of a public record. The damages shall not be assessed against an individual, but shall be assessed against the next succeeding public body that is not an individual and that kept or maintained the public record as part of its public function.

Punitive damages in a FOIA case "may be assessed only if the court orders disclosure of a public record." *Michigan Council of Trout Unlimited v Dep't of Military Affairs*, 213 Mich App 203, 221; 539 NW2d 745 (1995). Further, "[e]ven if defendant's refusal to disclose or provide the requested materials was a statutory violation, it was not necessarily arbitrary or capricious if defendant's decision to act was based on consideration of principles or circumstances and was reasonable, rather than whimsical." *Meredith Corp, supra* at 717 (quotation marks and citations omitted).

Here, the trial court denied plaintiff's request for punitive damages under MCL 15.240(7) based on its erroneous determination that the information sought by plaintiff is not discoverable pursuant to MCR 2.302(A)(3) and its erroneous conclusion that the information is exempt from

disclosure under MCL 15.243(1)(b). Because we are reversing the trial court's determination with respect to paragraphs two, three, and four of plaintiff's FOIA request and have directed the trial court to determine on remand whether the information sought in paragraphs one, five, and six is exempt, we direct the trial court to address this issue on remand as well.

Plaintiff also argued that defendant waived its right to assert any FOIA exemptions in defense of this action by failing to assert them in its first responsive pleading. Plaintiff further contends that defendant waived its affirmative defenses by failing to "state the facts constituting" such defenses within the meaning of MCR 2.111(F)(3). Although plaintiff asserted these arguments below, the trial court failed to address them. Consequently they are not properly before this Court. *Polkton Charter Twp v Pellegrum*, 265 Mich App 88, 95; 693 NW2d 170 (2005). Considering our resolution of plaintiff's other arguments we decline to address this issue. Also in consideration of our resolution of the above issues, we need not address plaintiff's argument that the trial court denied him his right to due process by failing to provide him an opportunity to respond to the arguments that defendant raised in its response to plaintiff's motion for summary disposition. Courts should not address constitutional issues when a case can be decided on nonconstitutional grounds. *J & J Constr Co v Bricklayers & Allied Craftsmen, Local 1*, 468 Mich 722, 734; 664 NW2d 728 (2003), *People v Riley*, 465 Mich 442, 447; 636 NW2d 514 (2001).

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Stephen L. Borrello
/s/ Patrick M. Meter
/s/ Cynthia D. Stephens