

STATE OF MICHIGAN
COURT OF APPEALS

KHARY LIDDELL,

Plaintiff-Appellant,

v

WAYNE COUNTY RECORDS KEEPER,

Defendant-Appellee.

UNPUBLISHED

July 21, 2009

No. 283839

Wayne Circuit Court

LC No. 06-635746-CZ

Before: Jansen, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Plaintiff, acting *in propria persona*, appeals by right the trial court's orders denying his motion to disclose documents and dismissing the case with prejudice and denying his motion for reconsideration. We affirm in part and remand for further proceedings. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

In a letter to defendant dated September 18, 2006, plaintiff requested the personnel files of six deputies, all citizen complaints against the deputies on August 26, 2006, all written incident reports by the deputies for assaulting, resisting, or obstructing for the previous four years, and all written incident reports concerning 169 Monterey, Highland Park, Michigan 48203. In a letter dated November 2, 2006, defendant granted the request in part and denied it in part. Defendant denied plaintiff's request for the citizen complaints, stating that the records did not exist. Defendant denied plaintiff's request for the personnel files, stating that the records were exempt under MCL 15.243(1)(s)(ix). Defendant denied plaintiff's request for the incident reports, stating that the records were exempt under MCL 15.243(1)(a) and (b)(iii).

In a letter to defendant dated November 8, 2006, plaintiff requested all written incident reports and police logs for September 10, 2005, concerning either 167 or 169 Monterey, Highland Park, Michigan. Defendant denied this request because the records either did not exist or could not be found with the information plaintiff provided. In a letter dated November 29, 2006, plaintiff appealed the partial denial. An appellate officer denied plaintiff's appeal.

Plaintiff filed suit in circuit court seeking to compel disclosure of the records pursuant to MCL 15.235(7)(b) and MCL 15.240(1)(b). Plaintiff sought all written reports for 167 and 169 Monterey, Highland Park, Michigan, from January 1, 2002, to November 29, 2006, and the complete personnel records for the six deputies. Plaintiff moved to disclose the documents.

At the motion hearing, defendant stated that initially, plaintiff's request for the citizen complaints had been denied because they could not be found, but that after a further search the complaints had been located and subsequently had been provided to plaintiff. Defendant also stated that plaintiff's request for any police reports concerning either 167 or 169 Monterey was denied because a query of each address turned up no incident reports. Defendant acknowledged that before the hearing, plaintiff had provided more information concerning an arrest at either 167 or 169 Monterey. Defendant stated that if plaintiff would provide additional information, her office would look into other ways of obtaining the records that plaintiff was requesting. Defendant then asked that the motion be denied. Without allowing plaintiff an opportunity to respond, the trial court denied the motion.

Thereafter, the trial court entered the order denying plaintiff's motion to compel disclosure of documents "for the reasons stated in Defendant's Response Brief and on the record" and dismissing plaintiff's lawsuit with prejudice. The trial court also denied plaintiff's motion for reconsideration.

The Freedom of Information Act (FOIA), MCL 15.231 *et seq.*, declares that the public policy of this state is that all persons except prisoners are entitled to complete information regarding the affairs of government and the official acts of those who represent them so that they may fully participate in the democratic process. MCL 15.231(2); *Herald Co v Eastern Mich Univ Bd of Regents*, 475 Mich 463, 472 n 17; 719 NW2d 19 (2006). Under the FOIA, a public body must disclose all public records that are not specifically exempt under the Act. MCL 15.233(1); *Coblentz v Novi*, 475 Mich 558, 571-573; 719 NW2d 73 (2006). A person desiring to inspect or receive copies of a public record must make the request in writing to the FOIA coordinator of the public body. MCL 15.235(1). The request must describe sufficiently the public record sought in order to enable the public body to find the record. MCL 15.233(1); *Coblentz, supra* at 572-573; *Detroit Free Press, Inc v Southfield*, 269 Mich App 275, 281; 713 NW2d 28 (2005). To be sufficiently descriptive, a request need not attempt to specifically describe the public records containing the sought information; a request for the information itself can suffice. *Id.*

A complete or partial denial of a request must contain the reason for the denial: an explanation of the basis for the exemption from disclosure, a description of the deleted material, or a certificate that the record does not exist. MCL 15.235(4); *Federated Publications, Inc v City of Lansing*, 467 Mich 98, 102; 649 NW2d 383 (2002); *Detroit Free Press, supra* at 281. The personnel records of law enforcement agencies are exempt unless the public interest in disclosure outweighs the public interest in nondisclosure in the particular instance. MCL 15.243(1)(s)(ix); *Detroit Free Press, supra* at 285-286. Internal affairs investigative records are personnel records subject to the exemption. *Kent County Deputy Sheriff's Ass'n v Kent County Sheriff*, 463 Mich 353, 365-366; 616 NW2d 677 (2000). The exemptions are to be narrowly construed. *Detroit Free Press, supra* at 281. The burden is on the public body to prove that an exemption applies. *Id.*; MCL 15.240(4). Claimed exemptions must be supported by particularized explanation that is not mere repetition of statutory language. *State News v Michigan State Univ*, 274 Mich App 558, 570-571; 735 NW2d 649 (2007, rev'd in part on other grounds 481 Mich 692 (2007)). If a record contains both exempt and nonexempt material, the public body must, to the extent practicable, separate the exempt material and make the remaining material available. MCL 15.244(1); *Herald Co, supra* at 482.

If a public body denies an FOIA request, the person making the request may commence an action in circuit court to compel disclosure. MCL 15.235(7)(b); MCL 15.240(1)(b); *Federated Publications*, *supra* at 103. The circuit court is to determine by de novo review whether disclosure should be compelled. MCL 15.240(4); *Schroeder v Detroit*, 221 Mich App 364, 365; 561 NW2d 497 (1997). In determining whether information satisfies an FOIA exemption, the court should: (1) receive a complete particularized justification for the exemption; (2) conduct a hearing in camera to determine whether justification exists; or (3) consider allowing the plaintiff's counsel access to the information in camera under a special agreement whenever possible. *The Evening News Ass'n v City of Troy*, 417 Mich 481, 503, 516; 339 NW2d 421 (1983); *State News*, *supra* at 570-571; 580. Normally, the court should not conduct an in camera hearing if the defendant's statements can adequately provide de novo review. *Post-Newsweek Stations v Detroit*, 179 Mich App 331, 337; 445 NW2d 529 (1989). The court may not make conclusory or generic determinations regarding claimed exemptions, but must specifically find that particular parts of the information are exempt for particular reasons. *Id.*, at 335; *The Evening News*, *supra* at 486, 492, 517.

Whether a public record is exempt from disclosure under the FOIA is a mixed question of fact and law. We review the trial court's factual findings for clear error and review the trial court's legal conclusions de novo. *Detroit News, Inc v Policemen & Firemen Retirement System of Detroit*, 252 Mich App 59, 67; 651 NW2d 127 (2002). A finding is clearly erroneous if, after reviewing the entire record, we are left with the firm and definite conviction that a mistake was made. *Federated Publications*, *supra* at 107.

Plaintiff's argument that the trial court erred in dismissing this case is predicated on the assertions that all the records that he requested do exist and that defendant has not proven that any of the records are exempt from disclosure. But, with regard to the records that defendant claims either do not exist or cannot be found with the information plaintiff provided, we do not believe the trial court clearly erred.

Plaintiff's argument on appeal is unclear. An appellant may not leave it to this Court to search for the factual basis to sustain or reject a position, but must support factual statements with specific references to the record. *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 388; 689 NW2d 145 (2004). An appellant's failure to properly address the merits of his assertion of error constitutes abandonment of the issue. *Woods v SLB Prop Mgt, LLC*, 277 Mich App 622, 626-627; 750 NW2d 228 (2008). However, even if an issue is not properly raised on appeal, this Court may choose to address it. *Tingley v Kortz*, 262 Mich App 583, 588; 688 NW2d 291 (2004).

The trial court dismissed plaintiff's lawsuit with prejudice. This necessarily means that the trial court determined that the citizen complaints for August 26, 2006, and the police reports for September 10, 2005, either did not exist or could not be found with the information provided by plaintiff. Plaintiff was not given the opportunity to dispute this at the motion hearing. However, after viewing the entire record, we are not left with a definite and firm conviction that the trial court made a mistake. *Federated Publications*, *supra* at 107. The trial court's findings that defendant did not improperly deny disclosure of these records are not clearly erroneous.

Public records that would disclose personnel records of law enforcement agencies are exempted from disclosure unless the public interest in disclosure outweighs the public interest in

nondisclosure in the particular instance. MCL 15.243(1)(s)(ix). Public records that would disclose information of a personal nature are exempted from disclosure if public disclosure would constitute a clearly unwarranted invasion of an individual's privacy. MCL 15.243(1)(a). Information is of a personal nature if it constitutes intimate, embarrassing, private, or confidential details about an individual. *Michigan Federation of Teachers & School Related Personnel, AFT, AFL-CIO v Univ of Mich*, 481 Mich 657, 675-676; 753 NW2d 28 (2008). Public records that are investigative records compiled for law enforcement purposes are exempted from disclosure, but only to the extent that disclosure as a public record would constitute an unwarranted invasion of personal privacy. MCL 15.243(1)(b)(iii).

Defendant denied plaintiff's request for the deputies' personnel files on the ground that the files were exempt from disclosure under MCL 15.243(1)(s)(ix). The trial court did not properly review this denial. The trial court did not conduct an in camera hearing to determine whether justification existed to exempt the files. The trial court did not address this exemption at the hearing, nor did it make any specific findings that the personnel files are exempt from disclosure for particular reasons. The trial court may not make conclusory or generic determinations regarding a claimed exemption. *The Evening News, supra* at 486, 492, 517. Here, the trial court made no determination whatsoever, except for the ultimate determination to dismiss plaintiff's claim with prejudice for the reasons stated on the record (this request was not mentioned at the hearing) and for the reasons contained in defendant's response brief (one sentence stating, "Personnel files of law enforcement officers are exempt from disclosure under MCL 15.243(1)(s)(ix).").

MCL 15.243(1)(s)(ix) provides that public records that would disclose personnel records of law enforcement agencies are exempted from disclosure *unless the public interest in disclosure outweighs the public interest in nondisclosure in the particular instance*. Plaintiff was not given an opportunity to argue that the public interest in disclosure outweighed the public interest in nondisclosure. The trial court simply denied plaintiff's motion to compel disclosure, and dismissed this case with prejudice without making specific findings that the information in the personnel files was exempt for particular reasons. If the records contained both exempt and nonexempt material, defendant was required, to the extent practicable, to separate the exempt material and make the remaining material available. *Herald Co, supra* at 468.

Defendant denied plaintiff's request for all written incident reports by the named deputies over the previous four years for assaulting, resisting, and obstructing on the ground that the reports were exempt from disclosure under MCL 15.243(1)(a) and (b)(iii). The trial court did not conduct an in camera hearing to determine whether justification existed to exempt the files. The record does not reveal that the trial court received a complete, particularized justification for this exemption either. The trial court did not address this exemption at the hearing and made no specific findings that the requested incident reports are exempt from disclosure for particular reasons. The trial court may not make conclusory or generic determinations regarding a claimed exemption. *The Evening News, supra*. Here, just as with the personnel records, the trial court made no determination whatsoever except for the ultimate one to dismiss plaintiff's claim with prejudice for the reasons on the record (this request was not mentioned at the hearing) and for the reasons contained in defendant's response brief (this issue was not mentioned in defendant's response brief).

In his case, plaintiff was not given an opportunity to argue that the incident reports did not contain information of a personal nature, i.e., intimate, embarrassing, private, or confidential details about an individual that would constitute a clearly unwarranted invasion of privacy such that they would not fall within the claimed exception. *Michigan Federation of Teachers, supra* at 676. Similarly, plaintiff was not given the opportunity to argue that the incident reports were not investigative records compiled for law enforcement purposes, or even if they were, that their disclosure would not constitute an unwarranted invasion of personal privacy. If these incident reports contained both exempt and nonexempt material, defendant was required, to the extent practicable, to separate the exempt material and make the remaining material available. *Herald Co, supra* at 468.

The trial court, by dismissing plaintiff's lawsuit with prejudice, concluded that both the personnel files and incident reports were exempt from disclosure, but made no specific findings regarding the particular exemptions. Since there is no adequate record upon which we can review de novo the trial court's legal conclusions, we cannot determine whether the personnel files or incident reports were properly exempted from disclosure. Accordingly, we remand to the trial court so that it may specifically find if the requested personnel files or incident reports, or particular information they contain, are exempted from disclosure for particular reasons. It may then enter an appropriate order encompassing those findings.

We affirm in part and remand for further proceedings consistent with this opinion. We do not retain jurisdiction. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.

/s/ Kathleen Jansen
/s/ Joel P. Hoekstra
/s/ Jane E. Markey