STATE OF MICHIGAN

COURT OF APPEALS

CAREY B. BISONET, Plaintiff-Appellant,	UNPUBLISHED June 22, 2010
v	No. 290448 Leelanau Circuit Court
BINGHAM TOWNSHIP, Defendant-Appellee.	LC No. 2006-007312-CZ

Before: SAWYER, P.J., and BANDSTRA and WHITBECK, JJ.

PER CURIAM.

Plaintiff Carey Bisonet appeals as of right from the trial court's order granting summary disposition to defendant Bingham Township in Bisonet's action alleging violations of Michigan's Freedom of Information Act (FOIA).[1] We affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

On September 12, 2005, Bingham Township held a special board meeting to discuss a lawsuit[2] that Sharon Lee Schellenberg[3] had recently filed against it, seeking relief under the Land Division Act.[4] Only three of the five members of the township board were present at the start of this meeting; they voted to enter into closed session to discuss the Land Division Act litigation and to invite into that closed session four additional township officials, including the Bingham Township attorney. A fourth board member arrived five minutes later and joined the session. Two hours later, the four board members voted to return to an open meeting and, immediately thereafter, to adjourn.

Schellenberg submitted a FOIA request for the minutes of the September 12, 2005 meeting, stating that she was entitled to the minutes because the closed session had been held in

[1] MCL 15.231 *et seq*.

[2] See *Schellenberg v Bingham Twp*, unpublished opinion per curiam of the Court of Appeals, issued July 16, 2009 (Docket No. 280872).

[3] David W. Riggle was also a plaintiff in this prior litigation.

[4] MCL 560.101 *et seq*.

violation of the Open Meetings Act,[5] which requires a "2/3 roll call vote" to call a closed session.[6] The trial court held that the minutes were protected under § 13(1)(v) of the FOIA, which exempts from public disclosure "[r]ecords or information relating to a civil action in which the requesting party and the public body are parties."[7] The trial court additionally permitted Bingham Township to cure its "technical violation" of the Open Meetings Act by reenacting, as permitted by MCL 15.270(5), the disputed vote to enter into closed session. Accordingly, on September 19, 2006, the township board conducted a reenactment, at which four board members voted in favor of closing the September 12, 2005 meeting. This Court affirmed the trial court's grant of summary disposition in favor of Bingham Township, agreeing that the requested minutes were exempt under § 13(1)(v).[8]

In the meantime, Bisonet, who was represented by Schellenberg's attorney, submitted a FOIA request on August 15, 2006, for the minutes of the September 12, 2005 board meeting. Bingham Township provided a copy of the minutes of only the open portion of the meeting, advising Bisonet of his right to appeal to the Bingham Township Supervisor or to commence a circuit court action to compel disclosure. Bisonet then initiated the instant FOIA action, alleging that Bingham Township had failed to disclose a portion of the requested minutes and that these minutes were not exempt from disclosure under MCL 15.243. Bisonet further alleged that Bingham Township's FOIA response letter had violated the notice requirements of MCL 15.235(4)(a), (c), (d)(i), and (e). Bisonet sought a declaration that Bingham Township's refusal to disclose the records was unlawful; an order requiring the disclosure of the minutes; and statutory damages, costs, and attorney fees under MCL 15.240(6) and (7).

Bingham Township moved for summary disposition, arguing that the requested closed-session minutes were exempt from disclosure under § 13(1)(d) of FOIA, which protects "records or information specifically described and exempted from disclosure by statute."[9] The Open Meetings Act provides that minutes of a closed session "are not available to the public, and shall only be disclosed if required by a civil action filed" under the Open Meetings Act.[10] Bingham Township noted, as the trial court had already ruled in the Schellenberg case, that to the extent any error occurred in closing the meeting under the Open Meetings Act, that defect had been cured by reenactment. Bingham Township further argued that, although it admittedly did not comply with all the notice requirements of MCL 15.235(4) in its FOIA request response letter,

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[5] MCL 15.261 *et seq*.

[6] MCL 15.267(1).

[7] MCL 15.243(1)(v).

[8] *Schellenberg v Bingham Twp*, unpublished opinion per curiam of the Court of Appeals, issued May 29, 2008 (Docket No. 274403). This Court declined to address Schellenberg's Open Meetings Act claim and Bingham Township's assertion that the reenactment cured any violation, holding that it was unnecessary to do so because the relief sought by Schellenberg (i.e., release of the minutes) was impermissible under § 13(1)(v). *Schellenberg*, unpub op at 4.

[9] MCL 15.243(1)(d).

[10] MCL 15.267(2).

that did not necessarily mean that Bisonet was entitled to a monetary award; rather, Bingham Township argued that damages, fees, and costs are awardable under the FOIA only where disclosure is ordered.

Following an administrative adjournment pending this Court's ruling in *Schellenberg*, the trial court granted Bingham Township's motion for summary disposition. The trial court held that calling a closed meeting was permissible under § 8(e) of the Open Meetings Act for the purpose of discussing the Schellenberg/Land Division Act litigation; that the reenactment of the deficient vote cured Bingham Township's violation of § 7(1) of the Open Meetings Act; and that, therefore, the minutes were exempt from disclosure under § 13(1)(d) of FOIA.

II. SUMMARY DISPOSITION

A. STANDARD OF REVIEW

Bingham Township's motion for summary disposition was based on both MCR 2.116(C)(8) and (C)(10); however, where the parties and the trial court rely on documentary evidence beyond the pleadings, this Court treats the motion as having been granted pursuant to MCR 2.116(C)(10), and examines the pleadings and the documentary evidence.[11] MCR 2.116(C)(10) tests the factual support of a plaintiff's claim.[12] The trial court may grant summary disposition under MCR 2.116(C)(10) if, considering the substantively admissible evidence in a light most favorable to the nonmoving party, there is no genuine issue concerning any material fact and the moving party is entitled to judgment as a matter of law.[13] This Court reviews a trial court's decision on a motion for summary disposition de novo.[14]

In FOIA cases, we review de novo a trial court's legal determinations.[15] Likewise, issues of statutory interpretation and the proper application of statutes present questions of law subject to this Court's de novo review.[16] This Court must give effect to the Legislature's intent as expressed in the language of the statute by interpreting the words, phrases, and clauses according to their plain meaning.[17]

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[11] *Mino v Clio School Dist*, 255 Mich App 60, 63 n 2; 661 NW2d 586 (2003); *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000).

[12] *Lind v City of Battle Creek*, 470 Mich 230, 238; 681 NW2d 334 (2004).

[13] *Id.*; *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999); see also MCR 2.116(G)(6).

[14] *Ardt v Titan Ins Co*, 233 Mich App 685, 688; 593 NW2d 215 (1999).

[15] *Herald Co, Inc v Eastern Mich Univ Bd of Regents*, 475 Mich 463, 471-472; 719 NW2d 19 (2006).

[16] *State News v Michigan State Univ*, 481 Mich 692, 699; 753 NW2d 20 (2008); *Coblentz v City of Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006).

[17] *State News*, 481 Mich at 699-700; *Bukowski v Detroit*, 478 Mich 268, 273-274; 732 NW2d 75 (2007).

B. MCL 15.243(1)(d)

Bisonet argues that Bingham Township waived reliance on § 13(1)(d) by failing to list that exemption in its written response to Bisonet's FOIA request. But, contrary to Bisonet's contention, a public body does not waive future reliance on any FOIA exemption that is not cited in its written response to a person's FOIA request.[18] Rather, an exemption may be raised at any time at the administrative level and may be raised as an affirmative defense in circuit court irrespective of whether it was cited in the response.[19] Accordingly, Bingham Township was permitted to rely on MCL 15.243(1)(d) as an affirmative defense in this litigation.

C. REENACTMENT VOTE

Bisonet argues that the trial court erred in holding that the reenactment of the deficient vote cured Bingham Township's Open Meetings Act violation. Resolution of this issue requires an examination of both the Open Meetings Act and the FOIA. "Statutes that have a common purpose should be read to harmonize with each other in furtherance of that purpose."[20]

MCL 15.231(2) sets forth the purpose of the FOIA:

> It is the public policy of this state that 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, consistent with this act. The people shall be informed so that they may fully participate in the democratic process.

The core purpose of the FOIA, as set forth in § 1(2), is disclosure of public records to ensure the accountability of public officials.[21] FOIA is a pro-disclosure statute that is to be construed broadly to allow public access; conversely, its exemptions are construed narrowly.[22]

Similarly to FOIA, "the purpose of the [Open Meetings Act] is to promote governmental accountability by facilitating public access to official decision making and to provide a means through which the general public may better understand issues and decisions of public

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[18] *Stone Street Capital, Inc v Bureau of State Lottery*, 263 Mich App 683, 688 n 2; 689 NW2d 541 (2004); *Residential Ratepayer Consortium v Public Service Comm #2*, 168 Mich App 476, 480-482; 425 NW2d 98 (1987).

[19] *Stone Street Capital*, 263 Mich App at 688 n 2; *Residential Ratepayer Consortium*, 168 Mich App at 480-482.

[20] *Manning v City of East Tawas*, 234 Mich App 244, 249; 593 NW2d 649 (1999).

[21] *Practical Political Consulting, Inc v Land*, ___ Mich App ___; ___ NW2d ___ (2010).

[22] *Booth Newspapers, Inc v Univ of Mich Bd of Regents*, 444 Mich 211, 231-232; 507 NW2d 422 (1993); *Practical Political Consulting*, ___ Mich App at ___; *Messenger v Ingham Co Prosecutor*, 232 Mich App 633, 641; 591 NW2d 393 (1998).

concern."[23] To this end, the Open Meetings Act strictly limits "closed session" meetings of public bodies and generally requires that whenever a quorum of a public body meets to consider and discuss public business, such deliberations or decisions must take place in an open meeting, unless an exception applies.[24]

Section 8 of the Open Meetings Act delineates the only circumstances under which a public body may close a meeting.[25] The trial court held that the September 12, 2005 meeting was properly closed under Open Meetings Act subsection 8(e),[26] providing that a public body may meet in a closed session "[t]o consult with its attorney regarding trial or settlement strategy in connection with specific pending litigation, but only if an open meeting would have a detrimental financial effect on the litigating or settlement position of the public body."[27] Section 7(2) of the Open Meetings Act further provides that the minutes of a closed session are generally not subject to disclosure to the public:

> A separate set of minutes shall be taken by the clerk or the designated secretary of the public body at the closed session. *These minutes shall be retained by the clerk of the public body, are not available to the public, and shall only be disclosed if required by a civil action filed under section 10, 11, or 13*. These minutes may be destroyed 1 year and 1 day after approval of the minutes of the regular meeting at which the closed session was approved.[28]

On the basis of this protection afforded by the Open Meetings Act, Bingham Township argues that it properly denied Bisonet's FOIA request for the closed-session minutes under § 13(1)(d) of FOIA.

Bingham Township concedes that there were insufficient votes on September 12, 2005, to close the meeting under § 7(1) of the Open Meetings Act, which provides, with exceptions that are not relevant here, that "[a] 2/3 roll call vote of members elected or appointed and serving is required to call a closed session." However, Bingham Township argued, and the trial court agreed, that the township board's September 19, 2006 reenactment of the vote to enter into a closed session cured the deficiency, as provided for in MCL 15.270(5):

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[23] *Kitchen v Ferndale City Council*, 253 Mich App 115, 125; 654 NW2d 918 (2002).

[24] MCL 15.263; *Herald Co v Bay City*, 463 Mich 111, 129; 614 NW2d 873 (2000); *Nicholas v Meridian Charter Twp Bd*, 239 Mich App 525, 531; 609 NW2d 574 (2000).

[25] MCL 15.268.

[26] MCL 15.268(e).

[27] Although Bisonet, and Schellenberg before him, argued that § 8(e) was inapplicable because holding an open meeting would not have had a "detrimental financial effect," Bisonet does not pursue this argument on appeal.

[28] MCL 15.267(2) (emphasis added).

> In any case where an action has been initiated to invalidate a decision of a public body on the ground that it was not taken in conformity with the requirements of this act, the public body may, without being deemed to make any admission contrary to its interest, reenact the disputed decision in conformity with this act. A decision reenacted in this manner shall be effective from the date of reenactment and shall not be declared invalid by reason of a deficiency in the procedure used for its initial enactment.[29]

However, we conclude that the dispute over the effect of the reenactment misses the mark and that the minutes are exempt under § 13(1)(d) irrespective of Bingham Township's reenactment of the vote to enter into closed session. This Court has held that where a plaintiff seeks relief solely under the FOIA, "judicial review is not available to determine whether a public body had the authority under the Open Meetings Act to go into closed session and thereby exempt minutes of that meeting from disclosure under [§ 13(d)(1) of] the FOIA."[30] Rather, judicial review of a public body's decision to hold a closed session is available only through a civil action filed under §§ 10, 11, or 13 of the Open Meetings Act:

> The foundation of [the] plaintiff's argument is that it has a right to the minutes because the [Open Meetings Act] did not authorize defendants' closed sessions on the particular occasions referenced; therefore, they violated the statute. [The] [p]laintiff argues that because of this violation, the minutes of those meetings would no longer enjoy exemption from public disclosure under the [Open Meetings Act]. The parties agree on the proposition that if defendants violated the [Open Meetings Act] by meeting in closed session where no authority existed to do so, any minutes taken would no longer be exempt from disclosure. What the parties disagree on is how that issue is properly placed before a court for judicial review. . . .
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> The only viable way to interpret the pertinent statutory language is (1) minutes of closed sessions are exempt from disclosure to the public under the [Open Meetings Act] unless a civil suit filed under the [Open Meetings Act] itself results in a judgment requiring disclosure, and (2) under the FOIA a public body does not have to disclose records protected from disclosure to the public by other statutes. Therefore, [the] plaintiff's proposed reading of the statute to require disclosure of the minutes though no claim has been brought under the [Open Meetings Act] cannot be supported by the language of the statute itself and would require judicial construction to achieve. . . .

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[29] A vote to go into a closed session is a "decision" within the meaning of § 10(5) and, as such, is subject to validation through reenactment under that subsection. *Manning*, 234 Mich App at 252.

[30] *Local Area Watch v City of Grand Rapids*, 262 Mich App 136, 143; 683 NW2d 745 (2004).

> By the clear statutory language, at no time did defendants violate the FOIA by failing to release the minutes of its closed (executive) sessions. MCL 15.243(1)(d); MCL 15.267(2). . . . *To the contrary, defendants are strictly forbidden from releasing such minutes unless required by a judgment in a civil action filed under § 10, 11, or 13 of the [Open Meetings Act]*. Here, it is clear no such civil action was ever filed, and no order compelling disclosure was ever issued. In sum, defendants did not violate the FOIA. [The] [p]laintiff's lawsuit was brought exclusively under the FOIA and failed to state a cognizable claim under the [Open Meetings Act] for review of defendants' decision to hold closed sessions. Accordingly, the trial court did not err by dismissing [the] plaintiff's complaint.[31]

Precisely as in *Local Area Watch v City of Grand Rapids*, Bisonet here did not raise any separate claim seeking invalidation under the Open Meetings Act of Bingham Township's decision to hold a closed session. Therefore, the propriety of the decision to call a closed session in the first instance was not subject to attack in this litigation. Bingham Township was *required* under § 7(2) of the Open Meetings Act to refrain from releasing the minutes. Accordingly, the trial court properly concluded that the minutes were exempt from disclosure under § 13(1)(d) of FOIA.[32]

D. ATTORNEY FEES AND COSTS

Bisonet argues that Bingham Township's failure to fulfill the notice requirements of MCL 15.235(4)[33] in rejecting Bisonet's FOIA request constitutes a "per se violation" of the

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[31] *Id*. at 144-146 (citations omitted and emphasis added).

[32] Although the trial court did not rely on *Local Area Watch* in upholding Bingham Township's denial of Bisonet's FOIA request, this Court may affirm the trial court when it reaches the correct result, even if for a different reason. *MOSES, Inc v Southeast Mich Council of Gov'ts*, 270 Mich App 401, 423; 716 NW2d 278 (2006); *Hess v Cannon Twp*, 265 Mich App 582, 596; 696 NW2d 742 (2005).

[33] Bingham Township admits that its response to Bisonet's FOIA request violated several of the notice requirements of MCL 15.235(4), which provides, in relevant part:

> A written notice denying a request for a public record in whole or in part is a public body's final determination to deny the request or portion of that request. The written notice shall contain:
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> (a) An 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, if that is the reason for denying all or a portion of the request.
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> * * *
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> (c) A description of a public record or information on a public record that is separated or deleted pursuant to section 14, if a separation or deletion is made.
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> * * *

FOIA, entitling Bisonet to an award of statutory fees and costs under § 10(6). MCL 15.240(6) provides, in relevant part:

> 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. . . .

However, a violation of the response requirements of § 5 "does not alone entitle [a] plaintiff to an award of attorney fees and costs."[34] "The 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."[35] A party "prevails" within the meaning of § 10(6) when bringing a FOIA action was reasonably necessary to compel the disclosure, and the action had a substantial causative effect on the delivery of the information to the plaintiff.[36]

This Court has under certain circumstances awarded fees and costs even where there was no court-ordered disclosure.[37] However, this case presents no such circumstances. Most importantly, Bisonet has not been successful with respect to the pivotal issue that the requested minutes were subject to disclosure.[38] Because the initiation of this litigation did not have any

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> (e) Notice of the right to receive attorneys' fees and damages as provided in section 10 if, after judicial review, the circuit court determines that the public body has not complied with this section and orders disclosure of all or a portion of a public record.

[34] *Bredemeier v Kentwood Bd of Ed*, 95 Mich App 772; 291 NW2d 199 (1980); see also *Scharret v City of Berkley*, 249 Mich App 405, 414; 642 NW2d 685 (2002).

[35] *Local Area Watch*, 262 Mich App at 149.

[36] *Id.* at 149-150; *Scharret*, 249 Mich App at 414; *Oakland Co Prosecutor v Dep't of Corrections*, 222 Mich App 654, 673; 564 NW2d 922 (1997).

[37] See *Thomas v New Baltimore*, 254 Mich App 196, 202; 657 NW2d 530 (2002) (holding that "[t]he mere fact that [the] plaintiff's substantive claim under the FOIA was rendered moot by disclosure of the records after [the] plaintiff commenced the circuit court action is not determinative of [the] plaintiff's entitlement to fees and costs"); *Hartzell v Mayville Community School Dist*, 183 Mich App 786-787; 455 NW2d 411 (1990) (holding that "the nonexistence of a record . . . is not a defense to the failure to respond to a request for a document with the information that it does not exist"); *Walloon Lake Water System, Inc v Melrose Twp*, 163 Mich App 726, 732-733; 415 NW2d 292 (1987) (holding that a plaintiff "prevails" in the action so as to be entitled to a mandatory award of costs and fees where he is forced into litigation and is successful with respect to the central issue that the requested materials were subject to disclosure under FOIA, even though the action has been rendered moot by acts of the public body in destroying the documents).

[38] *Walloon Lake Water System*, 163 Mich App at 732-733.

effect on the delivery of information to Bisonet, he did not prevail in full or in part within the meaning of § 10(6).[39]

We affirm.

/s/ David H. Sawyer
/s/ Richard A. Bandstra
/s/ William C. Whitbeck

[39] *Scharret*, 249 Mich App at 414-415.