

STATE OF MICHIGAN  
COURT OF APPEALS

---

MARTIN B. BREIGHNER, III, and KATHRYN  
BREIGHNER,

Plaintiffs-Appellees/Cross-  
Appellants,

v

MICHIGAN HIGH SCHOOL ATHLETIC  
ASSOCIATION, INC.,

Defendant-Appellant/Cross-  
Appellee.

FOR PUBLICATION  
March 6, 2003  
9:00 a.m.

No. 243618  
Emmet Circuit Court  
LC No. 01-006712-CZ

Updated Copy  
May 9, 2003

---

Before: Sawyer, P.J., and Jansen and Donofrio, JJ.

JANSEN, J. (*dissenting*).

I would affirm the order granting plaintiffs' motion for summary disposition because the trial court properly held that defendant Michigan High School Athletic Association, Inc., (MHSAA) is a public body under subsection (d)(iv) of the Freedom of Information Act (FOIA), MCL 15.232(d)(iv).

At the outset, it needs to be kept in mind that the legislative policy underlying the FOIA is to require disclosure of public records by public bodies. See *Herald Co v Bay City*, 463 Mich 111, 118; 614 NW2d 873 (2000) ("Consistent with this broadly declared legislative policy, the FOIA's specific provisions generally require the full disclosure of public records in the possession of a public body." Our Supreme Court stated in *Kent Co Deputy Sheriffs Ass'n v Kent Co Sheriff*, 463 Mich 353, 362; 616 NW2d 677 (2000), that the "FOIA provides Michigan citizens with broad rights to obtain public records, limited only by the coverage of the statute and its exemptions." Thus, our Supreme Court has described the FOIA as a "prodisclosure statute." *Herald Co, supra* at 119.

In determining whether the MHSAA is a "public body" that "is primarily funded by or through state or local authority" under MCL 15.232(d)(iv), it is important to underscore the fact that the MHSAA is the institution that regulates interscholastic high-school athletics throughout the state of Michigan. However, the tournaments that provide funding for the MHSAA could not be held without the participation of the high schools. Specifically, it is the schools, predominately public, that authorize the MHSAA to operate the tournaments, the majority of

which are held in or on facilities owned by public schools, and receive the money for the tickets sold at those tournaments. In this regard, the majority's assertion that "[t]he MHSAA sells its own tickets for its own events in which member schools take part," *Ante* at \_\_\_, is belied by the record, which indicates that it is the participating member schools that sell the tickets, remitting a substantial portion of the gate receipts to the MHSAA. Thus, it is clear that the gate receipts come to the MHSAA only through or by means of the schools' authority to regulate sporting events for their students in the first place.

In addition, it is equally clear that the MHSAA is primarily funded by the sale of tickets to these tournaments. The trial court noted that defendant admitted that the primary source of its revenues comes from gate receipts of the athletic tournaments that it sponsors. Indeed, defendant's own financial statements for July 31, 2000, indicated that \$6,158,319 of its total revenue of \$6,866,406—ninety percent of its revenue—came from "tournament and meet income."

Finding that the MHSAA is a "public body" for purposes of the FOIA is consistent with our prior case law. The trial court noted correctly that the instant case is clearly distinguishable from *State Defender Union v Legal Aid*, 230 Mich App 426; 584 NW2d 359 (1998), where the defendant allegedly received more than eighty-five percent of its funding from governmental sources. In *State Defender*, this Court explained that "as used in the statute, 'funded' should be construed to mean the receipt of a governmental grant or subsidy." *Id.* at 432. Thus, this Court in *State Defender* held that the defendant was not a "public body" under the FOIA "merely because public monies paid in exchange for goods provided or services rendered comprise a certain percentage of the organization's revenue." *Id.* at 433. In contrast, and consistent with what the trial court found, the MHSAA does not receive funding from the schools in the form of fees for services rendered. Rather, the gate receipts remitted by the schools to the MHSAA are the functional equivalent of a grant or subsidy. Further, while this Court in *Kubick v Child & Family Services*, 171 Mich App 304, 308; 429 NW2d 881 (1988) "decline[d] to draw a bright line as to what percentage of funding constitutes 'primarily funded'" for purposes of the FOIA, it noted that "[f]unding that amounts to less than half the total funding of a corporation does not amount to chief, principal or primary funding." Here, virtually the entire budget of the MHSAA comes from gate receipts of the tournaments that it sponsors.

Finally, holding that the MHSAA is a "public body" under the FOIA is in accord with the United States Supreme Court decision in *Brentwood Academy v Tennessee Secondary School Athletic Ass'n*, 531 US 288; 121 S Ct 924; 148 L Ed 2d 807 (2001), and the federal district court's decision in *Communities for Equity v Michigan High School Athletic Ass'n*, 178 F Supp 2d 805 (WD Mich, 2001). The trial court pointed out, that the United States Supreme Court in *Brentwood Academy* addressed a substantially identical funding arrangement used by the state of Tennessee's high school athletic association, the Tennessee Secondary School Athletic Association (TSSAA). In *Brentwood Academy*, the Court distinguished the funding arrangement from a fee for service arrangement as follows:

A small portion of the Association's revenue comes from membership dues paid by the schools, and the principal part from gate receipts at tournaments among the member schools. Unlike mere public buyers of contract services, whose payments for services rendered do not convert the service providers into

public actors, . . . the schools here obtain membership in the service organization and give up sources of their own income to their collective association. The Association thus exercises the authority of the predominantly public schools to charge for admission to their games; *the Association does not receive this money from the schools, but enjoys the schools moneymaking capacity as its own.* [531 US at 299 (emphasis provided).]

After discussing the organizational structure of the TSSAA and its role in the administration of high-school athletics in Tennessee, the Supreme Court held that the TSSAA was a "state actor" under the Fourteenth Amendment. In reaching this conclusion, the Supreme Court noted: "The nominally private character of the Association is overborne by the pervasive entwinement of public institutions and public officials in its composition and workings, and there is no substantial reason to claim unfairness in applying constitutional standards to it." *Id.* at 298.

More recently, Judge Enslen in *Communities for Equity* thoroughly considered the history and structure of the MHSAA before concluding that the MHSAA was a "state actor" for purposes of the Fourteenth Amendment. Relying upon *Brentwood Academy*, Judge Enslen found:

The purpose of the MHSAA—to create, establish and provide for, supervise and conduct interscholastic athletic programs throughout the state—is virtually the same as its Tennessee counterpart. The MHSAA has a membership of predominantly public schools and almost every eligible public school belongs. Its revenue is derived from gate receipts from tournaments held at member schools and broadcast fees, among other items, revenues to which schools would otherwise be entitled. The membership of the MHSAA's Representative Council includes a representative of the state superintendent of education and is comprised of mostly public school employees acting as representatives for their schools. Some MHSAA employees continue to be eligible for participation in the state employee retirement system. Moreover, the MHSAA exercises adjudicative power over schools with its ability to investigate and determine rules violations and resultant sanctions.

Just as the Supreme Court recognized that a mechanism is required to implement interscholastic sports schedules and competition rules governing Tennessee's schools, that mechanism in the State of Michigan takes the form of public school officials acting together under the auspices of the MHSAA. [178 F Supp 2d at 847.]

In finding that the MHSAA was a "state actor," Judge Enslen further noted that while "[i]ts legal status and official designation may have changed over the years. . . the crucial question of its relationship with Michigan schools has not." *Id.* at 847.

Simply put, the majority's holding in this case that the MHSAA is not a public body subject to the disclosure provisions of the FOIA cannot be reconciled with the reasoning and results in *Brentwood Academy* and *Communities for Equity*.

Accordingly, for the reasons stated above, I would affirm the trial court's order granting plaintiffs' motion for summary disposition.

/s/ Kathleen Jansen