

STATE OF MICHIGAN

COURT OF APPEALS

GREAT LAKES MEDIA, INC., d/b/a THE
OAKLAND PRESS,

Plaintiff-Appellee,

v

CITY OF PONTIAC,

Defendant,

and

MICHIGAN ASSOCIATION OF POLICE,

Intervening Defendant-Appellant.

UNPUBLISHED
May 19, 2000

No. 208306
Oakland Circuit Court
LC No. 94-486009 CZ

GREAT LAKES MEDIA, INC., d/b/a THE
OAKLAND PRESS,

Plaintiff-Appellee,

v

CITY OF PONTIAC,

Defendant-Appellant,

and

MICHIGAN ASSOCIATION OF POLICE,

Intervening Defendant.

No. 208320
Oakland Circuit Court
LC No. 94-486009 CZ

Before: Cavanagh, P.J., and Holbrook, Jr. and Kelly, JJ.

PER CURIAM.

I. Introduction

In these consolidated appeals, defendant City of Pontiac (hereafter “City”) and intervening defendant Michigan Association of Police (hereafter “MAP”) appeal as of right from the trial court’s order granting plaintiff’s motion for summary disposition pursuant to MCR 2.116(C)(10) and ordering that City disclose documents pursuant to the Michigan Freedom of Information Act (“FOIA”), MCL 15.231 *et seq.*; MSA 4.1801(1) *et seq.* Defendants also appeal from the trial court’s order granting plaintiff’s motion for a declaratory judgment that sections 12.8(B) and (D) of the collective bargaining agreement between City and MAP were void and unenforceable pursuant to the FOIA. We affirm.

II. Background Facts and Procedural History

On May 12, 1994, plaintiff, a newspaper of general circulation located in Pontiac, requested from City access to police records pertaining to the investigation of a December 30, 1993, incident of alleged brutality against an Auburn Hills resident by three Pontiac police officers. City responded by supplying the dates of birth, dates of service, and generic duty assignments of the three officers. Plaintiff was denied access to the remainder of the requested information. In denying disclosure of the requested documents, City cited several exemptions under the FOIA, as well as sections 12.8(B) and (D) of its collective bargaining agreement with MAP, which provided that police officers’ statements and other personnel information would not be released to third parties without the particular officer’s consent or by order of court.

Plaintiff filed this action against City, requesting that the trial court order disclosure of the documents pursuant to the FOIA and declare sections 12.8(B) and (D) of the collective bargaining agreement void as violative of the FOIA.¹ The trial court granted MAP’s motion to intervene, finding that, because its collective bargaining agreement with City was at issue, it had an interest in the action.

On August 13, 1996, the trial court granted plaintiff’s motion for a declaratory judgment that the following portion of defendants’ collective bargaining agreement was violative of the FOIA and void as against public policy:

12.8 RECORDS

* * *

- B. No statements of any employee relating to alleged misconduct on his/her part and required by the department for internal department purposes shall be released to any person or agency outside the department without the employee’s consent except upon order of a court or subpoena.

* * *

- D. All information in the personnel files of the police department or the personnel department regarding employees in the bargaining unit shall be treated in strict confidence by the City. No information which is against the interest of the employee shall be given to any person or agency except the City of Pontiac, which shall be interpreted to include the Trial Board, unless the permission of the employee is given or by order of a court. . . .

The trial court held that, because these provisions “attempt[ed] to absolve the City of its obligation to perform the balancing of interests which is clearly required by the FOIA to determine whether the requested information is exempt,” they were void and unenforceable.

Plaintiff then filed a motion for summary disposition of its FOIA claim for disclosure of the requested police documents. City filed a bill of particulars listing several documents related to the December 30, 1993, incident, claiming that two of the listed documents, identified as documents “E” and “GG,” contained coerced “*Garrity*”² statements” of police officers and were exempt from disclosure pursuant to MCL 15.243(1)(d); MSA 4.1801(13)(1)(d). MAP filed a brief objecting to the release of the majority of the documents listed in City’s bill of particulars, contending that all of the documents contained “*Garrity* statements” or the fruits of such statements and that, therefore, they were exempt from disclosure pursuant to MCL 15.243(1)(a), (1)(b)(ii) and (iii), and/or (1)(t)(ix); MSA 4.1801(13)(1)(a), (1)(b)(ii) and (iii), and/or (1)(t)(ix). MAP additionally argued that some of the documents were exempt because of the “public agency deliberative process privilege.” The court held an in camera inspection of the documents, and thereafter granted plaintiff’s motion for summary disposition ordering plaintiff to release all but one of the requested documents within fourteen days.³

III. Declaratory Judgment

Defendants first argue that the trial court erred in entering a declaratory judgment that sections 12.8(B) and (D) of their collective bargaining agreement were void as violative of the FOIA. This Court reviews de novo the trial court’s rulings with respect to questions of law in a declaratory judgment action. *Macomb Co Prosecutor v Murphy*, 233 Mich App 372, 379; 592 NW2d 745 (1999). The trial court’s factual findings will not be reversed unless they are clearly erroneous. *Id.*

The FOIA “embodies this state’s strong public policy favoring public access to government information, recognizing the need that citizens be informed as they exercise their role in a democracy, and the need to hold public officials accountable for the manner in which they discharge their duties.” *Messenger v Ingham Co Prosecutor*, 232 Mich App 633, 641; 591 NW2d 393 (1998). See MCL 15.231(2); MSA 4.1801(1)(2):

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.

Accordingly, the FOIA requires the full disclosure of public records, unless the records are specifically exempted from disclosure under § 13. MCL 15.233(1); MSA 4.1801(3)(1);⁴ *Bradley v Saranac Community Schools Bd of Ed*, 455 Mich 285, 293; 565 NW2d 650 (1997); *Herald Co v Bay City*, 228 Mich App 268, 286; 577 NW2d 696 (1998). Because the FOIA is a prodisclosure statute, the exemptions in § 13 are to be narrowly construed. *Mager v Dep't of State Police*, 460 Mich 134, 143; 595 NW2d 142 (1999). Moreover, when a public body refuses to disclose a requested document under the FOIA, the public body bears the burden of proving that the refusal was justified. *Kent Co Deputy Sheriffs' Ass'n v Kent Co Sheriff*, 238 Mich App 310, 313; 605 NW2d 363 (1999). If a request for information held by a public body falls within an exemption, the decision becomes discretionary. *Tobin v Civil Service Comm*, 416 Mich 661, 667; 331 NW2d 184 (1982).

Section 13(1)(t) of the FOIA provides an exemption for certain law enforcement agency records, including personnel records:

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

* * *

(t) 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:

* * *

(ix) Disclose personnel records of law enforcement agencies.

“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* at 331, quoting MCL 15.243(1)(t); MSA 4.1801(13)(1)(t).

We conclude that a public body may not simply leave it to the courts to determine whether a particular public document is properly withheld pursuant to § 13 of the FOIA. Rather, when presented with a FOIA request, the public body must do one of three things: (1) grant the request; (2) deny the request, explaining the basis under the FOIA or other statute for nondisclosure; or (3) grant the request in part and deny the request in part, explaining the basis for denial. MCL 15.235(2), (4); MSA 4.1801(5)(2), (4). If a public record contains material which is not exempt under § 13 of the FOIA, as well as material which is exempt, a public body *has a duty* to separate the exempt and nonexempt material and make the nonexempt material available for examination and copying. MCL 15.244(1); MSA 4.1801(14)(1); *Manning v East Tawas*, 234 Mich App 244, 249; 593 NW2d 649 (1999).

Accordingly, when City was presented with plaintiff's request for public documents concerning the incident of alleged police brutality, it was required to disclose all records that were not specifically exempt under the FOIA. *State Defender Union Employees v Legal Aid & Defender Ass'n*, 230 Mich App 426, 430; 584 NW2d 359 (1998). If the requested records were personnel records of a

law enforcement agency, City was required to determine whether they were exempt from disclosure pursuant to MCL 15.243(1)(t)(ix); MSA 4.1801(13)(1)(t)(ix). Similarly, if the requested documents included personal information concerning an employee, the FOIA permits nondisclosure of such documents, but only if City determined that “public disclosure of the information would constitute a clearly unwarranted invasion of an individual’s privacy.” MCL 15.243(1)(a); MSA 4.1801(13)(1)(a).

City was not entitled to rely on the provisions in its collective bargaining agreement which mandate nondisclosure of such records unless a court of law orders, or the subject employee consents to, disclosure. Because a public body may not “ ‘eliminate its statutory obligations to the public merely by contracting to do so,’ ” *Bradley, supra* at 303, quoting *Lansing Ass’n of School Administrators v Lansing School Dist Bd of Ed*, 216 Mich App 79, 93; 549 NW2d 15 (1996), modified on other grounds 455 Mich 285 (1997). The trial court did not err in entering a declaratory judgment that sections 12.8(B) and (D) of defendants’ collective bargaining agreement were void as against public policy.

IV. Summary Disposition

Defendants next argue that the trial court erred in granting summary disposition in favor of plaintiff on its finding that holding that public documents containing “*Garrity* statements” of police officers were not exempt from disclosure pursuant to the FOIA. This Court reviews decisions on motions for summary disposition de novo to determine if the moving party was entitled to judgment as a matter of law. *UAW-GM Human Resource Center v KSL Recreation Corp*, 228 Mich App 486, 490; 579 NW2d 411 (1998). When reviewing a motion for summary disposition based on MCR 2.116(C)(10), this Court must determine whether any genuine issue of material fact exists which would preclude judgment for the moving party as a matter of law. *Morales v Auto-Owners Ins Co*, 458 Mich 288, 294; 582 NW2d 776 (1998). All pleadings, affidavits, depositions, admissions, and other documents are considered in favor of the party opposing the motion. *Id.* Giving the benefit of doubt to the non-movant, this Court must determine whether a record might be developed that will leave open an issue upon which reasonable minds could differ. *Michigan Nat’l Bank v Laskowski*, 228 Mich App 710, 712; 580 NW2d 8 (1998).

Whether information requested pursuant to the FOIA fits within an exemption from disclosure is a mixed question of fact and law. *Schroeder v Detroit*, 221 Mich App 364, 366; 561 NW2d 497 (1997). This Court reviews a trial court’s factual determinations for clear error. MCR 2.613(C); *Schroeder, supra* at 366. Questions of law are reviewed de novo. *Id.* The burden is on the public body to sustain its denial of disclosure. *Id.* at 365-366.

A. *Garrity* as a Separate Basis for Nondisclosure

In *Garrity v New Jersey*, 385 US 493; 87 S Ct 616; 17 L Ed 2d 562 (1967), the United States Supreme Court held that statements coerced from police officers (or other public employees) under threat of discharge could not be used against the officers in subsequent criminal proceedings. *Id.* at 500. Defendants appear to be arguing on appeal that so-called “*Garrity* statements”—i.e., statements coerced from police officers in connection with internal investigations—should be excluded per se from disclosure pursuant to the FOIA. “The public’s right to ‘full and complete’ disclosure is

limited only by the exemptions found in MCL 15.243; MSA 4.1801(13).” *Booth Newspapers, Inc v Kent Co Treasurer*, 175 Mich App 523, 527; 438 NW2d 317 (1989). Accordingly, to the extent that defendants argue that *Garrity* itself provides an additional basis for nondisclosure, their argument fails. The trial court did not err in holding that *Garrity* “does not bar the release of the coerced statements of police officers requested by Plaintiff under the FOIA.”

B. Subsection 13(1)(a), Privacy Exemption

Defendants have not raised on appeal § 13(1)(a) as a basis for exemption. However, because MAP makes a vague “privacy” argument on appeal, and because MAP raised subsection 13(1)(a) below, we will briefly address this exemption.

MCL 15.243(1)(a); MSA 4.1801(13)(1)(a) provides:

A public body may exempt from disclosure as a public record under this act:

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

“The privacy exemption consists of two elements, both of which must be present for the exemption to apply. First, the information must be of a ‘personal nature.’ Second, the disclosure of such information must be a ‘clearly unwarranted invasion of privacy.’ ” *Bradley, supra* at 294. Information is of a “personal nature” only if “it reveals intimate or embarrassing details of an individual’s *private life*,” evaluated in terms of the customs, mores, or ordinary views of the community. *Bradley, supra* at 294 (emphasis supplied).

The requested documents in the instant case contain the statements of police officers made in connection with an internal investigation concerning an incident of alleged police brutality. Defendants do not contend that the documents contain any information whatsoever concerning the police officers’ *private lives*; rather, they simply argue that the disclosure of “*Garrity* statements” and other information contained in internal disciplinary documents would infringe upon unspecified “privacy rights” of the police officers. As noted, the FOIA is a prodisclosure statute with narrowly construed exemptions and the public body bears the burden of proving that nondisclosure is justified under the act. *Herald Co, Inc v Ann Arbor Public Schools*, 224 Mich App 266, 271; 568 NW2d 411 (1997). The requested documents in the instant case contain information concerning the police officers’ conduct while performing their public jobs. Because defendants have failed to demonstrate that the requested documents contain any information of a personal nature, § 13(1)(a) does not provide a basis for nondisclosure. See *Bradley, supra* at 295.⁵

C. Subsection 13(1)(n), Deliberative Process Exemption

City next argues that the trial court erred in failing to determine that the requested documents were exempt because they were covered by the public agency deliberative process privilege. MCL 15.243(1)(n); MSA 4.1801(13)(1)(n), the deliberative process exemption of the FOIA,⁶ provides, in relevant part:

A public body may exempt from disclosure as a public record under this act:

* * *

(n) Communications and notes within a public body or between public bodies of an advisory nature to the extent that they cover other than purely factual materials and are preliminary to a final agency determination of policy or action. This exemption does not apply unless the public body shows that in the particular instance the public interest in encouraging frank communications between officials and employees of public bodies clearly outweighs the public interest in disclosure.

As this Court explained in *Herald Co*, *supra*, 224 Mich App 266, [i]n order to prevent disclosure under this subsection, the public body must first establish that (a) the documents cover other than purely factual materials and (b) the documents are preliminary to a final determination of policy or action. . . . If the documents meet this substantive test, however, the public body must also establish that the public interest in encouraging frank communications within the public body or between public bodies clearly outweighs the public interest in disclosure. [*Id.* at 274 (citations omitted).]

In the instant case, the record is utterly devoid of any indication that either City or MAP attempted to demonstrate that the documents at issue met the criteria listed in *Herald Co*.⁷

Moreover, even assuming that the documents cover other than purely factual materials and that they are preliminary to a final determination of policy or action, we conclude that there is a significant public interest in the disclosure of public documents containing information regarding an incident of brutality by police officers against a private citizen. Defendants failed to establish that public interest favored nondisclosure in this case. See *Kent Co Deputy Sheriff's Ass'n*, *supra* at 331-332.

D. Subsection 13(1)(t)(ix), Law Enforcement Personnel Records Exemption

City argues that the subject documents are personnel records of a law enforcement agency which are exempt from disclosure pursuant to § 13(1)(t)(ix), and that the trial court erred in determining that the public interest in disclosure of the documents outweighs the public interest in nondisclosure.

Internal investigation records of a law enforcement agency may be exempted from disclosure as personnel records under § 13(1)(t)(ix). *Kent Co Deputy Sheriffs' Ass'n*, *supra* at 331. However, in order to justify nondisclosure pursuant to this subsection, City was required to demonstrate that the public interest in disclosure of the records did not outweigh the public interest in nondisclosure. *Id.*

City did not argue below that subsection 13(1)(t)(ix) was applicable. MAP did raise this exemption, but its argument concerning this subsection was limited to the conclusory contention that police officers' statements in connection with internal investigations should be protected, and that the officers' *privacy interests* outweighed the public interest in disclosure of documents containing such statements. However, as this Court noted in *Newark Morning Ledger Co v Saginaw Co Sheriff*, 204 Mich App 215, 218-219; 514 NW2d 213 (1994), subsection 13(1)(t)(ix), unlike certain other

exemptions, does not involve a balancing of personal privacy interests; rather, this exemption balances the *public* interests in disclosure and nondisclosure.

The trial court in the instant case, applying subsection 13(1)(t)(ix), determined that the public interest in disclosure of the subject documents outweighed the public interest in nondisclosure. Under the circumstances of this case, defendants failed to articulate or prove how the public interest favored nondisclosure. Consequently, the trial court did not err in determining that § 13(1)(t)(ix) did not provide a basis for exemption.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Donald E. Holbrook, Jr.
/s/ Michael J. Kelly

¹ Counts II and III of plaintiff's complaint pertained to its FOIA requests for certain financial information. City apparently released the information requested in Counts II and III, and only Count I—concerning the police documents—is at issue in the instant appeal.

² *Garrity v New Jersey*, 385 US 493; 87 S Ct 616; 17 L Ed 2d 562 (1967).

³ The trial court held that document “EE” was an “informant statement” which was exempted from disclosure pursuant to subsection 13(1)(b)(i).

⁴ MCL 15.233(1); MSA 4.1801(3)(1) provides, in relevant part: “Except as expressly provided in section 13, upon providing a public body’s FOIA coordinator with a written request that describes a public record sufficiently to enable the public body to find the public record, a person has a right to inspect, copy, or receive copies of the requested public record of the public body.”

⁵ Amicus curiae, Michigan Police Legislative Coalition, presents the additional argument that the requested documents contained personal information such as home addresses and health records. However, as noted *supra*, City carries the burden of demonstrating that the documents did, indeed, contain such personal information, and neither City nor MAP has contended that any such personal information was contained in the documents. Moreover, even if the documents did contain personal information, City was required to separate the exempt and nonexempt material and make the nonexempt material available for examination. MCL 15.244(1); MSA 4.1801(14)(1); *Herald Co*, *supra*, 228 Mich App at 290.

⁶ Neither City nor MAP have cited § 13(1)(n) as providing a basis for exempting the documents from disclosure, nor was this subsection specifically raised below. Rather, MAP framed its argument below in terms of the “public agency deliberative process privilege” which applies to discovery, and the parties continue on appeal to frame the argument in this manner. However, because public documents must be disclosed under the FOIA unless expressly exempted pursuant to § 13, *Bradley*, *supra* at 293, and because § 13(1)(n) is the applicable “deliberative process” exemption, we will assume that defendants intended to rely on this subsection.

⁷ We are not persuaded by counsel's statement at oral argument that the trial court failed to hold an evidentiary hearing. To the contrary, our review of the record reveals that the parties had ample opportunity to present and to argue their respective positions concerning disclosure. In fact, counsel for MAP, prior to the in camera review of the documents, stated, "our objections are essentially part of the record already and I don't want to go over those," and noted that MAP "did file objections and supplemental objections."