STATE OF MICHIGAN

COURT OF APPEALS

FEDERATED PUBLICATIONS, INC., d/b/a THE LANSING STATE JOURNAL,

Plaintiff-Appellee/Cross-Appellant,

v

CITY OF LANSING,

Defendant,

and

CAPITOL CITY LODGE NO. 141 OF THE FRATERNAL ORDER OF POLICE LABOR PROGRAM, INC.,

Intervening Defendant-Appellant/Cross-Appellee.

UNPUBLISHED
November 5, 2002

No. 218331
Ingham Circuit Court
LC No. 98-088151-AZ
ON REMAND

FEDERATED PUBLICATIONS, INC., d/b/a THE LANSING STATE JOURNAL,

Plaintiff-Appellee/Cross-Appellant,

v

CITY OF LANSING,

Defendant-Appellant/Cross-Appellee,

and

CAPITOL CITY LODGE NO. 141 OF THE FRATERNAL ORDER OF POLICE LABOR PROGRAM, INC., JANE DOE and JOHN DOE,

Intervening Defendants.

No. 218332
Ingham Circuit Court
LC No. 98-088151-AZ
ON REMAND

Before: Whitbeck, C.J., and Bandstra and Murray, JJ.

PER CURIAM.

This case comes to us on remand from the Michigan Supreme Court. We reverse and remand on the sole issue left for our consideration.

I. Basic Facts And Procedural History

Plaintiff Federated Publications, Inc., doing business as the Lansing State Journal (the Journal), is a newspaper of general circulation in Lansing. The Journal asked defendant City of Lansing (City) to disclose internal affairs investigative files for its police department from the year 1997. As the record reveals, these files generally fell into one of two categories. The first category of internal affairs investigative files were generated when citizens complained about police conduct (citizen-initiated files). The police department itself generated the second category of internal affairs investigative files (department-initiated files). The City denied the Journal's request for these files, asserting that the Freedom of Information Act (FOIA)[1] exempted the information from disclosure. The Journal brought suit against the City and requested that the trial court order disclosure of the documents pursuant to the FOIA.

When the parties filed cross-motions for summary disposition under MCR 2.116(C)(10), the trial court partly granted the Journal's motion for summary disposition and ordered the City to disclose its citizen-initiated files pursuant to the FOIA. However, the trial court also partly granted the City's motion for summary disposition, concluding that the City's department-initiated files were exempt from disclosure pursuant to the FOIA.

In the original appeal in this matter, the City and intervening defendant Capitol City Lodge Fraternal Order of Police (Lodge) appealed as of right the portion of the order allowing the citizen-initiated files to be disclosed and the Journal cross-appealed the trial court's order exempting the department-initiated files from disclosure. We reviewed de novo the trial court's decisions regarding the motions for summary disposition,[2] a standard of review amply supported in case law.[3] However, as concerned the substantive question whether the files at issue were subject to disclosure under the FOIA, we applied a mixed standard of review, examining "the trial court's factual determinations for clear error, but review[ing] its legal conclusions de novo."[4] Applying this mixed standard of review, we held that citizen-initiated files were subject to disclosure pursuant to the FOIA, thus affirming the trial court's order granting summary disposition regarding this aspect of the case.[5] Nevertheless, we held that the trial court erred

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[1] MCL 15.231 *et seq.*

[2] *Federated Publications, Inc v Lansing*, unpublished opinion per curiam of the Court of Appeals, issued November 14, 2000 (Docket Nos. 218331 and 218332) (*Federated I*), slip op at 2.

[3] See, e.g., *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999); *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

[4] *Federated I, supra* at 2.

[5] *Id*. at 5-6.

when it ruled that the department-initiated files were all exempt from disclosure.[6] Consequently, we remanded that matter to the trial court "to determine if some or all of the department-initiated complaints involved matters that would invoke the public's interest in the conduct of the internal affairs investigations."[7] We explained that if the public did, indeed, have an interest in the internal affairs investigations, then those records would be "subject to disclosure."[8] Additionally, we directed the trial court to reconsider the Journal's request for attorney fees, noting that "[i]f at least some of the department-initiated files are subject to disclosure, as we surmise, it might be fair to award plaintiff [the Journal] additional attorney fees."[9]

The defendants then filed separate applications for leave to appeal in the Michigan Supreme Court. The Supreme Court granted their applications for leave, limiting the issue on appeal to "whether the requested files were exempt from disclosure under MCL 15.243(1)(s)(ix) . . . ."[10] This subsection of the FOIA permits a public body to exempt "personnel records of law enforcement agencies" unless "the public interest in disclosure outweighs the public interest in nondisclosure in the particular instance."[11] The Supreme Court took special notice of the "particular instance" language in this statutory subsection, directing the parties to address it in their briefs.[12]

In its opinion, the Supreme Court announced its holdings succinctly:

> First, we hold that the application of exemptions requiring legal determinations are reviewed under a de novo standard, while application of exemptions requiring determinations of a discretionary nature, such as the one presented here, are reviewed under a clearly erroneous standard. Second, we hold that MCL 15.240(4) of the FOIA specifically places the burden of proof on the public body to show that the public record is exempt from disclosure. Third, in applying the public interest balancing test, the circuit court should consider the fact that records have been made exemptible under § 243(1)(s). Fourth, the "particular instance" language set forth in § 243(1)(s) requires the circuit court to analyze the FOIA request to determine whether further categorization of the requested records is required in order to determine whether the public interest in disclosure outweighs the public interest in nondisclosure. If further categorization

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[6] *Id*. at 6.

[7] *Id*.

[8] *Id*.

[9] *Id*.

[10] *Federated Publications, Inc v Lansing*, 465 Mich 910; 638 NW2d 747 (2001) (*Federated II*).

[11] MCL 15.243(1)(s)(ix).

[12] See *Federated II*, *supra*.

> is required to perform the balancing test, the circuit court should direct the public body to assist it in reasonably categorizing the sought-after records. . . . [13]

The Supreme Court added that the issues regarding the citizen-initiated files were moot because the City had already released the records.[14] However, the Supreme Court remanded the case, essentially only the department-initiated files issue,[15] to this Court "for reconsideration in light of the principles expressed in this opinion."[16] The Court clarified that if this Court "find[s] that it is not 'left with the definite and firm conviction that a mistake has been made,' [*In re*] *Miller*, [433 Mich 331, 337; 445 NW2d 161 (1989),] it must affirm the circuit court's grant of summary disposition"[17] to the City on the department-initiated files issue.

II. Application Of The Supreme Court's Directives

A. Standard Of Review

As the Supreme Court explained, the clear error standard of review applies to the trial court's decision that the department-initiated files were exempt from disclosure because MCL 15.243(1)(s)(ix) is a discretionary exemption.[18] "A finding is 'clearly erroneous' if, after reviewing the entire evidence, the reviewing court is left with the definite and firm conviction that a mistake has been made."[19] However, questions of law, such as statutory interpretation, remain subject to review de novo.[20]

B. This Court's Original Opinion

Our original opinion in this matter was, simultaneously, broadly worded and narrowly applied. As we explained our essential holding regarding the department-initiated files:

> [D]isclosure of the *citizen-initiated complaints* furthers the public interest in ensuring the efficacy, fairness, and comprehensiveness of defendant's internal affairs investigations. Contrary to the trial court's conclusion, we believe that the public interest in this case would also be furthered by disclosing *department-initiated complaints.* The fairness of defendant's investigations into department-initiated complaints would also have bearing on citizens' confidence that

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[13] *Federated Publications, Inc v Lansing*, 467 Mich 98, 101; 649 NW2d 383 (2002) (*Federated III*).

[14] *Id*. at 101, 112-113.

[15] *Id*. at 113-114.

[16] *Id*. at 101.

[17] *Id*. at 114.

[18] *Id*. at 101.

[19] *Id*. at 107, quoting *Miller*, *supra* at 337.

[20] See *Omelenchuk v City of Warren*, 466 Mich 524, 527; 647 NW2d 493 (2002); see also *Federated III*, *supra* at 101.

> defendant investigates their complaints thoroughly and fairly and that defendant punishes appropriately. The citizens have a strong interest in knowing if department-initiated complaints are pursued with more or less vigor than those initiated by citizens. The public interest is not concerned so much with the infraction as how the department handles its investigations. This interest applies to both citizen-initiated and department-initiated complaints. Therefore, we believe that defendants did not demonstrate that the public interest favored nondisclosure regarding the department-initiated investigative files. These files were not per se exempt from disclosure. . . .[21]

Thus, while we indicated – broadly – our belief that the public interest would be furthered by disclosing the department-initiated files, we directed – narrowly – the trial court on remand to determine if some or all these complaints involved matters that would invoke the public's interest in the conduct of internal affairs investigations.

To say the least, that the trial court never had an opportunity to follow these instructions because the Supreme Court took the case before a remand occurred meant that this case was postured somewhat oddly in the Supreme Court. To some extent, the case was, and remains, in suspended animation. As a result, many of the legal principles the Supreme Court directed us to apply must, in actuality, be applied in the trial court.[22] The one aspect of the Supreme Court's opinion that was absolutely directed at this Court was its enunciation of the clear error standard of review for discretionary exemptions. Therefore, as we indicated above, we are approaching the analysis of the department-initiated files issue afresh under this standard.

C. The Trial Court's Decision

The trial court's analysis of the law enforcement personnel records exemption is at the heart of this case. After citing the exemption and discussing the implications of *Newark Morning Ledger Co v Saginaw County Sheriff*,[23] the trial court classified the documents in question as either "founded" or "unfounded," stating that this Court in *Newark* suggested that analyzing documents by the nature of the ultimate decision was appropriate. The trial court, after engaging in something of a balancing process, ultimately found that there was insufficient evidence to determine with particularity that the "unfounded" claims should not be released. The trial court also determined that the City had failed to provide any competent evidence to support its argument that the "founded" complaints should not be released.

The trial court then turned to citizen-initiated complaints and department-initiated complaints. With respect to the latter, the trial court stated:

> Plaintiff has emphasized throughout this case that it is concerned with police interaction with the public. Releasing documents that do not involve the

[21] Emphasis in the original.

[22] See, e.g., *Federated III*, *supra* at 111 (discussing the trial court's duties).

[23] *Newark Morning Ledger Co v Saginaw County Sheriff*, 204 Mich App 215; 514 NW2d 213 (1994).

> public as a complainant do [sic] nothing to further that interest. Therefore, this Court finds that there is no genuine issue of material fact upon which reasonable minds could differ and Defendant is entitled to judgment as a matter of law.

The trial court also considered what it categorized as "miscellaneous balancing test arguments." Those arguments ranged far and wide, encompassing concerns that citizen complainants would fear police officers if the identity of the citizen complainants became known; that public disclosure would have a detrimental effect on litigation, increase the potential for lawsuits, increase insurance coverage costs, and hamper the police department's efforts to build a case against wrongdoers by revealing its investigative techniques; and that, because the City's Board of Commissioners was created to oversee the police department's internal affairs activities, the Journal did not need to review the documents to ensure proper disposition. The trial court, however, found no support for the City's position. The trial court also found that, with respect to department-initiated files, the only files that it found to be exempt under FOIA, redacting the names of the officers "would not shift the balance" toward disclosure. With respect to month-end summaries and an active investigation file not turned over for *in camera* inspection, the trial court found that the City had failed to meet its burden, and therefore that these records were not exempt. The trial court determined that the department-initiated files were exempt from release under the law enforcement personnel records exemption of the FOIA on the basis that (1) the Journal was concerned with "police interaction with the public" and (2) "[r]eleasing documents that do not involve the public as a complainant do [sic] nothing to further that interest." As we outline below, based upon the Supreme Court's analysis and the record before us, we are left with the definite and firm conviction that trial court was mistaken in this, and only this, decision.

The Supreme Court unambiguously held that, under the FOIA, "the burden of proof is on the public body to demonstrate why it is entitled to protect a record from disclosure."[24] Citing *Newark*, the trial court stated that the government has the burden of proving that the records fall within the claimed exemption. Therefore, at a technical level, the trial court correctly allocated the burden of proof to defendants. However, with respect to department-initiated files, it appears that the trial court primarily emphasized the Journal's expressed concern regarding police interaction with the public. If this emphasis actually shifted the burden, the trial court clearly made a mistake.

Though Justice Weaver effectively dissented on this point,[25] the Supreme Court also held that a trial court must consider the fact that the Legislature included a record under the class of exemptible records listed in MCL 15.243(1)(s), because that inclusion "implies some degree of public interest in the nondisclosure of such a record."[26] Obviously, when the trial court made its decision, it did not have the benefit of this formulation of the balancing test. As a result, though the trial court held that the City could exempt these department-initiated files, nothing in the trial

[24] *Federated III*, *supra* at 108.

[25] Justice Weaver concurred, but wrote separately to express her view that making certain classes of records exemptible does not create a presumption of exemption, explaining that any presumption would be "inconsistent with a fair balancing of the public interest." See *id.* at 115.

[26] *Id*. at 109.

court's reasoning reflects that it was "cognizant of the special consideration that the Legislature has accorded an exemptible class of records," as the Supreme Court now requires.[27]

The Supreme Court also held that a trial court may be required to categorize records by their "particular instance" to enable it to identify and weigh similar aspects of the public interest in favor of disclosure or nondisclosure.[28] Clearly, the trial court in this case devised several categories, including the nature of the ultimate decision on the complaint and the origin of the complaint. However, the trial court denied the Journal access to the department-initiated files by identifying an extremely limited version of the Journal's concerns and because of the trial court's view that releasing the department-initiated files would "do nothing" to further the concern with police interaction with the public. This analysis, at most, was cursory, not the full balancing contemplated in the FOIA, even considering whatever weight must be accorded to a class of records listed as exemptible.[29] The trial court took notice of deposition testimony suggesting that department-initiated files could concern the most minor of work rule infractions, such as wearing the incorrect shirt to work, in which the public would have very little, if any, interest.

Nevertheless, the trial court did not consider at all the possibility that the department, not only citizens, may initiate investigations for much more serious police matters directly implicating the public interest. Some police activities might be the proper subject of an internal investigation, and yet never be observed by a citizen, or at least by a citizen free to report such misconduct. Rather, only a fellow officer might be in the position to observe and report such conduct, thereby generating a department-initiated file instead of a citizen-initiated file. For instance, and purely hypothetically in this case, if a police officer used excessive force against an undocumented alien, the alien might not feel safe reporting the conduct because of the risk of deportation.[30] A fellow officer observing the excessive force would not face similar consequences from reporting the misconduct, which would then be recorded in a department-initiated file instead of a citizen-initiated file. Surely, the public would have a significant interest in this sort of information in a department-initiated file.

Further, as we pointed out in our original opinion,[31] the public may have a highly compelling interest in knowing that the police department undertakes all its investigations in a fair and comprehensive manner, regardless of who initiates an investigation and the seriousness of the allegations at issue. This is why the fairly blunt categorical distinction between citizen-initiated and department-initiated files, as well as the trial court's characterization of the Journal's limited interest in the information in the files, failed to facilitate a full and accurate balancing of interests in this case. Having cast the Journal's interest in such narrow terms as the interaction between the police and the public, and having taken notice of only the most benign and uninteresting information potentially available in a department-initiated file, it is not surprising that the trial court determined that the City was entitled not to disclose the department-

[27] *Id*. at 110.

[28] *Id*.

[29] See *Federated III*, *supra* at 109.

[30] See, generally, *United States v Contreras*, 134 F Supp 820, 823, 825 (SD Tex, 2000).

[31] See *Federated I*, *supra* at 6.

initiated files. Accordingly, we are left with the definite and firm conviction that trial court was mistaken in engaging in this review. Had the trial court expanded its perspective on this case, it may very well have found certain records subject to disclosure because the public interest in disclosure outweighed the public interest in nondisclosure, which is why we have the definite and firm conviction that it made a mistake.

On remand, in light of the Supreme Court's reasoning in this case, the trial court shall: (1) ensure that the City alone shoulders the burden of demonstrating that the department-initiated files are exempt from disclosure under the FOIA; (2) consider the fact that these types of records have been designated as exemptible by the Legislature; (3) analyze the FOIA request to determine whether further categorization is needed to conduct the proper balancing of the public interests involved. If the trial court is unable to apply the statutory public interest balancing test, it shall direct the City to assist it in categorizing the department-initiated files in a reasonable manner. If the trial court is able to apply the statutory public interest balancing test without such assistance, it shall do so in accordance with the Supreme Court's elucidation of that test.

III. The Other Issues

At its inception, this case plainly consisted of more than a debate over the application of MCL 15.243(1)(s)(ix) to the department-initiated files. However, as the Supreme Court noted,[32] the release of the citizen-initiated complaints makes moot any challenge to the trial court's decision that those records had to be disclosed. Further, though we affirmed[33] the trial court's rulings that the Employee Right to Know Act[34] and the deliberative process disclosure exemptions[35] did not apply in this case, the way the Supreme Court crafted the issues on appeal and on remand to this Court makes it unnecessary to reexamine those issues. Consequently, though our first opinion involved a partial affirmance, the exclusion of these other issues for our consideration makes a straight reversal and remand appropriate in this case.

Reversed and remanded. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Richard A. Bandstra
/s/ Christopher M. Murray

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[32] See *Federated III*, *supra* at 112-113.

[33] See *Federated I*, *supra* at 3-4.

[34] MCL 423.501 *et seq.*

[35] See *In re Subpoena Duces Tecum to Wayne County Prosecutor (On Remand)*, 205 Mich App 700, 703-706; 518 NW2d 522 (1994); MCL 15.243(1)(m).