STATE OF MICHIGAN

COURT OF APPEALS

CAROL ALEXANDER LEVITTE,

Plaintiff-Counter-Defendant/Appellant,

v

PLYMOUTH-CANTON COMMUNITY SCHOOL DISTRICT,

Defendant-Counter-Plaintiff/Appellee.

UNPUBLISHED
October 26, 2004

No. 246440
Wayne Circuit Court
LC No. 01-137005-NZ

Before: Donofrio, P.J., and White and Talbot, JJ.

PER CURIAM.

This case involves a request made by plaintiff Carol Alexander Levitte under the Freedom of Information Act (FOIA), MCL 15.231, *et seq.* Plaintiff appeals as of right the circuit court order granting summary disposition to defendant Plymouth-Canton Community School District. We affirm.

This Court reviews the trial court's grant or denial of summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). The stated purpose of the FOIA is "to provide for public access to certain public records of public bodies." Act 442, 1976, p 1503, eff April 13, 1977. The FOIA requires a public body to respond within five business days after it receives a written request for a public record. MCL 15.235. The requesting party may appeal if records are denied, and if a circuit court determines that the withheld documents were not exempt from disclosure, it "shall order the public body to cease withholding or to produce all or a portion of a public record wrongfully withheld, regardless of the location of the public record." MCL 15.240(4). If the public records are not disclosed in accordance with the statute, and the requesting party "prevails" in a legal action, the trial court must award "reasonable attorneys' fees, costs and disbursements." MCL 15.240(6). If the requesting party "prevails in part," the award of damages is discretionary. MCL 15.240(6). A plaintiff is generally considered a prevailing party "when the 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*." *Scharret v City of Berkley*, 249 Mich App 405, 414; 642 NW2d 685 (2002), emphasis in original.

Plaintiff argues on appeal that she was a prevailing party and entitled to costs, fees and damages, because she prevailed in some respects. We do not agree. The trial court did not order the disclosure of any records. Although a public body violates the FOIA if it destroys records in its possession before the matter is litigated, *Walloon Lake Water System, Inc v Melrose Twp*, 163 Mich App 726, 732-733; 415 NW2d 292 (1987), and may be held liable if it refuses to provide records until after legal action has commenced, *Thomas v New Baltimore*, 254 Mich App 196, 202; 657 NW2d 530 (2002), neither of those situations are present here. Panels of this Court have found that attorney fees, costs and punitive damages are not appropriate merely because there were violations of the FOIA, if those violations did not make the plaintiff's lawsuit reasonably necessary to compel disclosure. *Scharret, supra*, 414-415; *Bredemeier v Kentwood Board of Ed*, 95 Mich App 767, 773; 291 NW2d 199 (1980).

Plaintiff also argues that the trial court erred in failing to order defendant to locate the requested documents, even if they are located with other public bodies. Again, we disagree. Under the FOIA, a public record is specifically defined as any writing that is "prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function, from the time it is created." MCL 15.232(e); *Warren v Detroit*, 261 Mich App 165, 167; 680 NW2d 57 (2004); *Detroit News v Detroit*, 204 Mich App 720, 723; 516 NW2d 151 (1994). An agency has no duty to create a document, or to make a "compilation, summary, or report" of requested information. 15.233(4)-(5). If an agency is in possession of a public record at the time it receives an FOIA request, it should not destroy the document to circumvent the FOIA. *Walloon Water, supra*. If it does so, however, it "render[s] the issue of disclosure moot," although, in that event, this Court may consider a plaintiff's request for costs, attorney fees and punitive damages. *Id.*, at 733. If a public body does not have a document in its "possession or control," however, "logic dictates" that a court cannot order its production. *Easley v U of M*, 178 Mich App 723, 725; 444 NW2d 820 (1989). Here, there was no evidence that defendant destroyed the requested documents after they were requested, and no evidence that defendant had the documents in its possession at the time of plaintiff's request. In addition, plaintiff concedes that the FOIA does not expressly require defendant to retain documents or to locate them for plaintiff if they are in another public body. An agency which receives a request for documents that are not in its possession "does not 'improperly withhold' those materials by its refusal to institute a retrieval action." See *Kissinger v Reporters' Committee for Freedom of Press*, 445 US 136, 139; 63 L Ed 2d 267; 100 S Ct 960 (1980).

Nor is there any merit to plaintiff's claim that she should have been permitted to pursue an action under the Michigan Historical Commission Act, MCL 399.1 *et seq*, which provides, in part, that public records are the property of the state and that they cannot be destroyed except as provided by law. The Michigan Historical Act does not provide any mechanism for a private cause of action, and plaintiff offers no explanation why she would have standing to being such an action. Thus, even if defendant had a duty to retain the records, she has not shown that defendant owed that duty to her.

Affirmed.

/s/ Pat M. Donofrio
/s/ Helene N. White
/s/ Michael J. Talbot