STATE OF MICHIGAN

COURT OF APPEALS

DAVID GENDLER, Plaintiff-Appellant,	UNPUBLISHED July 26, 2005
v	Nos. 252118, 252119 Washtenaw Circuit Court
FLINT COMMUNITY SCHOOLS, Defendant-Appellee.	LC Nos. 02-000104-CZ, 02-000960-CZ

Before: Bandstra, P.J., and Fitzgerald and Meter, JJ.

PER CURIAM.

In these consolidated appeals[1] based on the Freedom of Information Act (FOIA), MCL 15.231 *et seq*, plaintiff, acting in propria persona, appeals as of right from an order granting defendant's motion for summary disposition and denying plaintiff's cross-motion for summary disposition. We affirm in part and remand for further proceedings. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff, a vocational electrical trades teacher at the Genesee Area Skills Center, made various FOIA requests to the Flint Community Schools; two of the requests are at issue in this appeal. The trial court determined that, despite delays in responding, defendant made a good faith effort to respond and there were no documents yet to be produced. Further, the court found that (1) documents turned over after the filing of the lawsuits were not turned over in response to the lawsuits; (2) plaintiff therefore did not "prevail" in the lawsuits and was not entitled to attorney fees and costs, see *Local Area Watch v City of Grand Rapids*, 262 Mich App 136, 149; 683 NW2d 745 (2004); and (3) defendant did not act arbitrarily and capriciously such that punitive damages were warranted.

Plaintiff asserts that defendant never complied with the subscription request made in his January 7, 2002 letter. MCL 15.233(1) provides that "[a] person has a right to subscribe to future issuances of public records that are created, issued, or disseminated on a regular basis" for a six-month period. Defendant established that, in responding to plaintiff's request, it consulted with an attorney and the state FOIA coordinator at the Attorney General's office and relied on a

[1] Plaintiff's two separate lawsuits were also consolidated at the trial court level.

1987 Attorney General response to a request for guidance in an unrelated case. Defendant then denied plaintiff's request on grounds that the items requested were not "disseminated on a regular basis." It evidently concluded, for example, that lesson plans were not "disseminated."

However, the Attorney General letter providing guidance indicated that subscription requests apply to items "generated on a regular, predetermined schedule," not just to items regularly *disseminated*. Moreover, defendant acknowledged that payroll information was created every two weeks and that grades came out about every five weeks. In making its ruling, the trial court stated only that "with respect to the subscription issue, the Defendant has complied to the extent required by law."

In *Meredith Corp v City of Flint*, 256 Mich App 703, 711-712; 671 NW2d 101 (2003), this Court held that findings of fact in FOIA cases are reviewed for clear error, whereas findings of law are reviewed de novo. The trial court made no findings of fact regarding which of the requested subscription items were provided or would qualify for subscription based on having been "created, issued, or disseminated" on a predictable, regular basis. The determination that defendant "complied to the extent required by law" does not allow for meaningful review; for example, it is not clear on what grounds the trial court implicitly found that compensation records, created every two weeks, would not be documents created on a regular, predictable basis. Therefore, we remand for specific findings of fact regarding whether each of the requested subscription items were provided, and, if not, why they do or do not qualify as documents that are "created, issued, or disseminated" on a regular, predictable basis and that are subject to disclosure under the FOIA. While Plaintiff states in his appellate brief that the passage of time and defendant's compliance with subsequent requests have rendered this issue moot, further findings of fact on remand are necessary in order for the trial court to determine whether plaintiff is entitled to an award of fees and costs, as discussed later in this opinion. See *Thomas v City of New Baltimore*, 254 Mich App 196, 202; 657 NW2d 530 (2002).

Plaintiff's next claim concerns the disclosure of principal Douglas Weir's personnel file. Defendant initially claimed, on the advice of counsel, that most of Weir's personnel file was exempt from disclosure. Counsel subsequently reconsidered and advised defendant to disclose the file, which defendant did. Although this occurred after the lawsuit had been filed, the trial court found that the personnel file was not "turned over as a result of the lawsuit or lawsuits." While different conclusions could have been drawn from the evidence, the trial court's finding of fact – that the lawsuit was not the cause of the subsequent disclosure – is not clearly erroneous. *Id*. at 712. No appellate relief is appropriate with respect to this finding by the trial court.

With regard to Weir's documents, plaintiff asserts that, "based on a preponderance of the evidence," "other records requested are likely to exist." He emphasizes that defendant claimed that Weir had not been formally evaluated since 1998, even though the applicable contract required yearly evaluations. Further, plaintiff claims that disciplinary materials were likely withheld from Weir's personnel file because defendant cited MCL 423.506, which addresses disclosure of disciplinary materials, in the original letter claiming a disclosure exemption. This "evidence" may raise a question regarding whether such documents exist, but it in no way establishes their existence. Apart from possible subscription issues, we find no clear error in the trial court's determination that there were not any records yet to be disclosed.

Plaintiff next claims that, apart from the above issues, he "prevailed" and was therefore entitled to reasonable attorney fees, costs, and disbursements under MCL 15.240(6) because defendant initially denied but ultimately admitted that there were delays in responding to the FOIA requests. However, the establishment of this fact alone did not entitle plaintiff to any relief. To prevail and be entitled to fees, plaintiff had to show that "'(1) the action was reasonably necessary to compel the disclosure; and (2) the action had the substantial causative effect on the delivery of the information to the plaintiff.'" *Local Area Watch, supra* at 149, quoting *Schinzel v Wilkerson*, 110 Mich App 600, 602; 313 NW2d 167 (1981). Establishing a fact that is not sufficient to compel disclosure is not "prevail[ing] in the action" as required by the statute pertaining to attorney fees and costs. MCL 15.240(6). Appellate relief is not appropriate with respect to the timeliness issue.

We note that attorney fees and costs *must* be awarded under the first sentence of MCL 15.240(6) only when a party prevails *completely* in a FOIA action. If a party only partially prevails under the FOIA, such an award is entrusted to the sound discretion of the trial court. *Local Area Watch, supra* at 150-151. If the court concludes on remand that documents should have been disclosed in response to plaintiff's subscription request, it will need to revisit the attorney fees and costs issue for this discretionary determination.

Plaintiff also argues that the trial court erred by not requiring defendant to carry the burden of sustaining its denials as required by MCL 15.240(4). However, apart from the issues identified earlier regarding the subscription request, defendant's testimony that certain documents were not found was sufficient to carry this burden. It would be difficult for defendant to otherwise prove a negative. The court's statement regarding plaintiff's failure to provide proof was, in essence, a determination that plaintiff offered nothing to refute defendant's testimony.

Finally, plaintiff argues that he should have been awarded punitive damages under MCL 15.240(7), which requires a payment of $500 if the public body arbitrarily and capriciously refused to provide or delayed in providing documents. Although mistaken with respect to the Attorney General's interpretation of a subscription request, defendant's consultation with the Attorney General's office and its securing of the letter of guidance on this issue reflects defendant's thoughtful consideration. It was not a "whimsical" delay or refusal that would warrant punitive damages. *Meredith, supra* at 717.

Affirmed in part and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ E. Thomas Fitzgerald
/s/ Patrick M. Meter