

STATE OF MICHIGAN
COURT OF APPEALS

MICHAEL STEINBERG,

Plaintiff-Appellee,

v

CITY OF HIGHLAND PARK,

Defendant-Appellant.

UNPUBLISHED

January 18, 2018

No. 334432

Wayne Circuit Court

LC No. 15-008834-CZ

Before: Before: MARKEY, P.J., and SHAPIRO and GADOLA, JJ.

PER CURIAM.

Defendant appeals as of right the order of the trial court granting summary disposition to plaintiff and awarding plaintiff attorney fees, costs, and disbursements. We affirm.

The facts of this case are essentially undisputed. At all times relevant to this case, plaintiff Michael Steinberg was the Legal Director of the American Civil Liberties Union (ACLU) of Michigan. In July 2015, plaintiff sought information regarding a police raid of a commercial warehouse in Detroit in the early morning hours of October 25, 2014, where a late-night dance and music party known as “Rise of Live Vibes” had been held. Believing that Highland Park police had conducted the raid together with a task force from other law enforcement agencies, plaintiff submitted a request for public records related to the raid to the city of Highland Park pursuant to the Freedom of Information Act (FOIA), MCL 15.231, *et seq.* The request was made by letter dated July 6, 2015, and stated in relevant part:

This letter is to request documents from your agency pursuant to the Michigan Freedom of Information Act, M.C.L. § 15.231 *et seq.*, in conjunction with M.C.L. § 750.492.

I hereby request all documents relating to police activity at 7406 Grand River Ave., Detroit MI 48204 on October 25, 2014. The term “documents” specifically includes, but is not limited to, all search warrants, warrant affidavits, incident reports, disciplinary reports, arrest reports, police reports, statements, correspondence, videos, photographs, electronic records, email and any agreements regarding participation in any intergovernmental enforcement task forces. Correspondence shall specifically include any communication with a film or camera crew.

By letter dated March 3, 2015, defendant's Assistant City Attorney Nikkiya Branch responded to plaintiff's FOIA request as follows, in pertinent part:

The City has searched its records, and your request has been (x) denied.
Incident did not occur in the City of Highland Park.

Plaintiff appealed the denial of the request to defendant's mayor by letter dated March 13, 2015. Defendant responded by letter dated April 2, 2015, from Attorney Branch, stating:

Enclosed please find the response to your FOIA request regarding 7406 Grand River, Detroit, Michigan. If you have any question[s], please feel free to contact me.

Enclosed with the letter were approximately 30 pages of documents, including six pages of police incident and arrest reports related to that date and location, with the remaining pages relating to the proposed forfeiture of seized property from that date and location.

By complaint dated July 6, 2015, plaintiff commenced this action in the trial court alleging that defendant had failed to provide most of the records requested and had failed to provide a reason for its failure to provide the requested records. The complaint sought to compel production of the requested public records from defendant. On July 23, 2015, defendant allegedly mailed to plaintiff a copy of the search warrant and search warrant affidavit related to the raid.¹

On March 21, 2016, apparently in response to a new request by plaintiff for the same information, and while the case was pending before the trial court, Lt. Jamille Edwards of the Highland Park Police Department sent plaintiff a letter stating, in relevant part:

Your request regarding the matter referenced above has been granted in part to include the attached report. Pursuant to section 15.243(1)(a) of the Act, information of a personal nature, that would constitute a clearly unwarranted invasion of an individual's privacy, has been redacted from this record.

Your request has also been denied [in] part. After inquiry, we found no other documents or reports, other than those provided, in the possession of the Highland Park Police Department. No warrants, warrant affidavits, incident reports, arrest reports, police reports, statements, correspondence, videos, photos, electronic records, emails, agreements regarding participating in any intergovernmental task forces, or written or recorded correspondence with a film or camera crew.

Plaintiff thereafter moved for summary disposition pursuant to MCR 2.116(C)(9) and (10), arguing that defendant had violated the provisions of FOIA by (1) failing to timely disclose

¹ It is unclear from the record whether these were newly disclosed records or the same records that had been disclosed previously.

the available records, and (2) failing to inform plaintiff that the nondisclosed records were not available. Plaintiff sought an order requiring defendant to produce all available records. Plaintiff also sought punitive damages, as well as attorney fees and costs pursuant to FOIA. At the conclusion of the hearing on the motion, the trial court granted plaintiff summary disposition as well as reasonable attorney fees, costs, and disbursements pursuant to FOIA.

The parties dispute whether defendant's response to plaintiff's FOIA request was sufficient to satisfy the requirements of FOIA. Defendant argues that plaintiff's request was general in nature and that defendant's general response was therefore sufficient, and that the trial court erred in its interpretation and application of FOIA, and therefore erred in granting plaintiff summary disposition. We disagree.

This Court reviews de novo the trial court's grant or denial of summary disposition. *Arabo v Michigan Gaming Control Bd*, 310 Mich App 370, 382; 872 NW2d 223 (2015). This Court also reviews de novo the trial court's interpretation and application of FOIA. *Rataj v City of Romulus*, 306 Mich App 735, 747; 858 NW2d 116 (2014). A trial court's factual determinations in a FOIA action, if any, are reviewed for clear error. *King v Mich State Police Dep't*, 303 Mich App 162, 174; 841 NW2d 914 (2013).

A motion for summary disposition brought under MCR 2.116(C)(9) (failure to state a valid defense) tests the sufficiency of the defendant's pleadings, and the motion is appropriately granted when the defendant has failed to state a valid defense to a claim. *Payne v Farm Bureau Ins*, 263 Mich App 521, 525; 688 NW2d 327 (2004). When considering a motion for summary disposition pursuant to MCR 2.116(C)(10) (no genuine issue of material fact), this Court considers "affidavits, pleadings, depositions, admissions, and other documentary evidence submitted by the parties in the light most favorable to the party opposing the motion." *Green v AP Prods, Ltd*, 475 Mich 502, 507; 717 NW2d 855 (2006). A motion for summary disposition under MCR 2.116(C)(10) is properly granted when, except as to damages, there is no genuine issue concerning any material fact, and the moving party is entitled to judgment as a matter of law. *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012). In this case, the trial court did not specify the section of MCR 2.116(C) under which it was granting the motion, but summary disposition under both sections is supported by the record.

The Michigan FOIA "provides for the disclosure of public records in the possession of a public body." *Kent Co Deputy Sheriff's Ass'n v Kent Co Sheriff*, 463 Mich 353, 360; 616 NW2d 677 (2000) (quotation marks omitted). FOIA provides that "all persons . . . 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." MCL 15.231; see also *Amberg v City of Dearborn*, 497 Mich 28, 30; 859 NW2d 674 (2014). In accordance with this directive, "FOIA's specific provisions generally require the full disclosure of public records in the possession of a public body." *The Herald Co v City of Bay City*, 463 Mich 111, 118; 614 NW2d 873 (2000), modified by *Michigan Federation of Teachers v Univ of Michigan*, 481 Mich 657, 672-673; 753 NW2d 28 (2008). FOIA is thus a pro-disclosure statute; if a public body denies a FOIA request, the burden is upon that public body to justify its decision. *Thomas v City of New Baltimore*, 254 Mich App 196, 203; 657 NW2d 530 (2003).

Once a request under FOIA has been made, a public body has a duty to provide access to or copies of the requested records unless those records are exempt from disclosure. *Pennington v Washtenaw Co Sheriff*, 125 Mich App 556, 564; 336 NW2d 828 (1983). MCL 15.235 sets forth the requirements of a public body responding to a FOIA request. Under subsection (5) of that section, a public body denying a request “in whole or in part” is required to send a written notice to the requester, containing, among other things:

- (a) An explanation of the basis under this act or other statute for the determination that the public record, or portion of that public record, is exempt from disclosure, if that is the reason for denying all or a portion of the request.
- (b) A certificate that the public record does not exist under the name given by the requester or by another name reasonably known to the public body, if that is the reason for denying the request or a portion of the request. [MCL 15.235(5).]

Thus, if the reason that a public body is denying a request or a portion of a request is that the record does not exist, MCL 15.235(5)(b) requires the public body to certify that the record does not exist. The purpose behind this certification requirement is to prevent a public body from using silence to effectively deny a FOIA request for records and obligating the requester to file a lawsuit to determine the existence of those records. See *Key v Twp of Paw Paw*, 254 Mich App 508, 511; 657 NW2d 546 (2002).

In this case, plaintiff sought public records from defendant and plaintiff’s request described the records sought as follows:

I hereby request all documents relating to police activity at 7406 Grand River Ave., Detroit MI 48204 on October 25, 2014. The term “documents” specifically includes, but is not limited to, all search warrants, warrant affidavits, incident reports, disciplinary reports, arrest reports, police reports, statements, correspondence, videos, photographs, electronic records, email and any agreements regarding participation in any intergovernmental enforcement task forces. Correspondence shall specifically include any communication with a film or camera crew.

In response, defendant provided certain records to plaintiff, consisting of approximately 30 pages of documents including police incident and arrest reports from that date at that location, and documents relating to the proposed forfeiture of the seized property. Defendant’s response was silent regarding whether the request for any other documents, such as photographs, videos, warrants, statements, or emails, was being denied.

Defendant argues that any records requested that were not provided were not provided because those records do not exist. Defendant, however, was required by MCL 15.235 to state this in its response to the request. Under MCL 15.235(5), if defendant was denying the request “in whole or in part” defendant was required to send a written notice to plaintiff containing either (a) an explanation of why the requested record was exempt from disclosure, or (b) a certificate that the public record did not exist, if that was the reason for denying the request. Defendant,

however, did not provide all records described but failed to state that it was denying any part of the request and the reason for the denial.

Defendant argues that plaintiff's request was so general that defendant was only required to make a general response. Specifically, defendant argues that plaintiff made only one specific request and that was for "documents." Defendant argues that the description of documents provided by plaintiff was not a formal list of separate requests but was instead a "definition of the types of documents that they are looking for when they used the term document." Defendant suggests that plaintiff should have used bullet points to clearly delineate any specific requests, and that plaintiff's failure to delineate its request absolves defendant of the duty to make a specific denial of those items.

A request under FOIA, however, need only be "sufficiently descriptive to allow the public body to find public records containing the information sought" by the plaintiff. *Herald Co*, 463 Mich at 121, modified 481 Mich at 672-673. Defendant's argument that plaintiff needed to use bullet points or otherwise use a particular format in making the request for records is therefore without support. FOIA is clear and unambiguous that defendant was required to specifically state whether it was denying any part of the request for public records. If the reason for the denial was that the document did not exist, defendant was required to state this. The trial court therefore did not err in determining that defendant failed to comply with FOIA and that plaintiff was entitled to summary disposition.

Defendant next contends that the trial court erred in awarding plaintiff attorney fees, costs, and disbursements. Defendant argues that under FOIA, plaintiff was entitled to attorney fees and costs only if plaintiff "prevailed," meaning that the litigation was necessary to compel the production of the public records, and that plaintiff did not prevail because the litigation did not result in plaintiff receiving any additional records from defendant. Again, we disagree.

When a person asserting the right to receive a copy of a public record prevails in a FOIA action, MCL 15.240(6) permits that person to recover "reasonable attorneys' fees, costs, and disbursements." *Amberg*, 497 Mich at 33-34. MCL 15.240(6) provides, in relevant part:

If a person asserting the right to inspect, copy, or receive a copy of all or a portion of a public record prevails in an action commenced under this section, the court shall award reasonable attorneys' fees, costs, and disbursements. If a person or public body prevails in part, the court may, in its discretion, award all or an appropriate portion of reasonable attorneys' fees, costs, and disbursements.

Thus, if a plaintiff prevails completely in its FOIA action, the award of attorney fees by the trial court is mandatory. *Estate of Nash v City of Grand Haven*, ___ Mich App ___, ___; ___ NW2d ___ (2017) (Docket No 336907), slip op at 7. Where a party partially prevails in its FOIA action, the decision to award attorney fees is within the discretion of the trial court, and this Court reviews the trial court's decision for an abuse of discretion. *Local Area Watch v City of Grand Rapids*, 262 Mich App 136, 150-151; 683 NW2d 745 (2004).

To find that a party has "prevailed" in a FOIA action within the meaning of MCL 15.240(6), the trial court must conclude that the action was reasonably necessary to compel the

disclosure of public records and that the action “had a substantial causative effect on the delivery of the information to the plaintiff.” *Amberg*, 497 Mich at 34 (citation omitted). Further, the fact that a plaintiff’s substantive claim under FOIA became moot by virtue of a defendant’s subsequent disclosure of the requested records is not determinative of whether the plaintiff is entitled to attorney fees, costs, and disbursements under MCL 15.240(6). *Thomas*, 254 Mich App at 202. This Court has stated that “we believe that a plaintiff ‘prevails’ in the action so as to be entitled to a mandatory award of costs and fees where he is forced into litigation and is successful with respect to the central issue that the requested materials were subject to disclosure under the FOIA, even though the action has been rendered moot by acts of the public body. . . .” *Id.* at 205 (citation omitted).

Here, defendant argues that the action was not reasonably necessary to compel the disclosure of the requested records because defendant provided the records before the action was initiated and the action produced no additional records. It is unclear from the record whether this is accurate. Assuming for the sake of argument that defendant did disclose all requested records before the action was initiated, however, the trial court nonetheless correctly determined that defendant failed to properly respond to plaintiff’s FOIA request, and that failure necessitated the filing of the FOIA action. Defendant was obligated by FOIA to state whether and why it was denying the request for any of the requested documents, even if the reason for the denial was that those records did not exist. Defendant failed to do so, necessitating plaintiff bringing this FOIA action to compel defendant to explain why the production of certain requested documents had been denied. This Court has explained that FOIA requires a public body to specify why it is denying requested records for the very reason that the silence of a public body otherwise may necessitate a FOIA action. See *Key*, 254 Mich App at 511. Defendant failed to adequately respond to plaintiff’s request for records, and that failure necessitated plaintiff bringing the FOIA action.

Although defendant argues that plaintiff’s action did not produce more records and that defendant subsequently provided an adequate denial for the records not produced, defendant’s failure to adequately respond to plaintiff’s request for records initially necessitated plaintiff’s bringing the FOIA action. Because plaintiff was “forced into litigation and [was] successful with respect to the central issue that the requested materials were subject to disclosure under the FOIA, even though the action has been rendered moot by acts of the public body,” *Thomas*, 254 Mich App at 202, plaintiff “prevailed” within the meaning of the statute and was entitled to reasonable attorney fees, costs, and disbursements. It therefore cannot be said that the trial court erred by determining that plaintiff “prevailed” in the action within the meaning of MCL 15.240(6). Further, even if viewed as plaintiff’s prevailing only in part, the trial court had it within its discretion to grant attorney fees and costs under the statute. Given that plaintiff’s action was necessitated by defendant’s failure to adequately respond initially as directed by FOIA, we detect no abuse of discretion in the trial court awarding reasonable attorney fees and costs. *Local Area Watch*, 262 Mich App at 151 (“whether to award plaintiff reasonable attorney

fees, costs, and disbursements when a party only partially prevails under the FOIA is entrusted to the sound discretion of the trial court.”)

Affirmed. Plaintiff is entitled to tax costs as the prevailing party. MCR 7.219(A).

/s/ Jane E. Markey
/s/ Douglas B. Shapiro
/s/ Michael F. Gadola