S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

AARON COX, Plaintiff-Appellant,	UNPUBLISHED November 29, 2018
v TOWNSHIP OF GROSSE ILE, Defendant-Appellee.	No. 341518 Wayne Circuit Court LC No. 16-008296-CZ

Before: JANSEN, P.J., and K. F. KELLY and BORRELLO, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order denying plaintiff's request for documents pursuant to the Freedom of Information Act (FOIA), MCL 15.231 *et seq*., and entering judgment in favor of defendant in this FOIA request denial. We reverse and remand for entry of an order requiring defendant to disclose the requested documents, and an appropriate award of attorneys' fees, costs, and disbursements in plaintiff's favor.

I. RELEVANT FACTUAL BACKGROUND

This case arises from the denial of plaintiff's FOIA request by defendant. Plaintiff is an attorney, and requested documents regarding the arrest of his client, Wyatt Andrew Garner, five days after Garner's arrest. The FOIA coordinator of defendant's police department, Michele Roehrig, sent plaintiff a response denying his FOIA request. The denial was based on MCL 15.243(1)(b)(*i*), which provides an exemption for investigating records compiled for law enforcement purposes, but only to the extent that disclosure would interfere with law enforcement proceedings. The response asserted that the request was denied because Garner's case was "currently open/under investigation." Roehrig included an initialed handwritten note on the last page of the response, providing "Available video will be pulled and held at this time." When plaintiff failed to receive the documents, he filed suit, and a bench trial was held. The court determined that defendant met its burden of establishing that the documents were exempt pursuant to the law-enforcement-proceedings exemption of FOIA, and therefore, denied plaintiff's request, and entered judgment in favor of defendant.

II. STANDARD OF REVIEW

This Court reviews de novo the interpretation of FOIA's statutory provisions. *Herald Co v Eastern Mich Bd of Regents*, 475 Mich 463, 486; 719 NW2d 19 (2006). "Whether requested information fits within an exemption from disclosure under FOIA is a mixed question of fact and law and, on appeal, the trial court's factual determinations are reviewed for clear error, but its legal conclusions are reviewed de novo." *Taylor v Lansing Bd of Water & Light*, 272 Mich App 200, 205; 725 NW2d 84 (2006). A finding is clearly erroneous if, after reviewing the entire record, this Court is left with the firm and definite conviction that a mistake was made. *Douglas v Allstate Ins Co*, 492 Mich 241, 256-257; 821 NW2d 472 (2012).

III. LAW-ENFORCEMENT-PROCEEDINGS EXEMPTION TO FOIA

Plaintiff first argues that the trial court erred by ruling that the FOIA denial was proper because defendant merely established that the police report and search warrant had a direct relationship to an investigation, and defendant failed to establish that disclosure of the materials would interfere with law enforcement proceedings. We agree.

FOIA provides that people "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 . . . so that they may fully participate in the democratic process." MCL 15.231(2). However, the Legislature made a policy decision to exempt and "shield[ ]" certain information "from public view." *Herald Co*, 475 Mich at 472-473. FOIA is a statute in favor of disclosure. *Rataj v City of Romulus*, 306 Mich App 735, 748; 858 NW2d 116 (2014). The disclosure provisions must be interpreted broadly, whereas, the exemptions to disclosure are construed narrowly. *Id*. at 749. The public body seeking to withhold the requested information bears the burden of establishing that a particular exemption applies. *Id*.

In defendant's response to plaintiff's FOIA request, Roehrig asserted that the entirety of the documents requested by plaintiff were exempt from disclosure because Garner's drunk driving case was "currently open/under investigation." The various exemptions to disclosure under FOIA are included in MCL 15.243(1), which provides in relevant part:

> (1) A public body may exempt from disclosure as a public record under this act any of the following:
>
> * * *
>
> (b) Investigating records compiled for law enforcement purposes, but only to the extent that disclosure as a public record would do any of the following:
>
> (*i*) Interfere with law enforcement proceedings. [MCL 15.243(1)(b)(*i*).]

To establish that this exemption applies, the public body must show that (1) an investigation was open and ongoing, and (2) release of the requested documents "would" interfere with law enforcement proceedings. *King v Oakland Co Prosecutor*, 303 Mich App 222, 231; 842 NW2d 403 (2013). "[F]inding that the requested information merely 'could' hamper an investigation is insufficient to satisfy the law-enforcement-proceedings exemption under MCL

15.243(1)(b)(*i*)." *Id*. at 232. The public body's explanation for exemption, as well as the trial court's opinion affirming it, must include "particularized justification." *Evening News Ass'n v City of Troy*, 417 Mich 481, 506; 339 NW2d 421 (1983). It cannot be "an attempted generic justification," such as " 'that they are now engaged in an ongoing criminal investigation, that to disclose any information whatsoever . . . would . . . interfere with law enforcement proceedings in that regard.' " *Id*. (ellipsis in original). A "bill of particulars" is required, indicating factually how the requested document, or category of documents, interferes with law enforcement proceedings. *Id*. at 503. It is "inadequate" to merely show a "direct relationship" between the records requested and an investigation. *Id*.

Defendant established the first prong of the law-enforcement-proceedings exemption – the investigation related to Garner was open and ongoing. *King*, 303 Mich App at 231. The response mailed to plaintiff provided that the request was denied because Garner's case was "currently open/under investigation." Roehrig made the decision to deny plaintiff's FOIA request because "[t]he case was still listed as open." The case was still open because Garner underwent a blood draw, and the blood draw results were not in. Because the results were not in, there were no charges brought against Garner at the time of the request. Roehrig received the FOIA request only days after Garner's arrest. Garner was arrested on May 5 or 6, 2016, and Roehrig received the request on May 10, 2016. Once the blood draw results were received, the detectives could get a warrant, and file criminal charges. After that, the case is considered closed, and the information is releasable. However, in the five-day time period between Garner's arrest and Roehrig's receipt of the FOIA request, the blood draw results were not received, so no charges were issued.

However, defendant failed to provide a "particularized justification" for the second prong of the exemption – release of the requested documents "would" interfere with law enforcement proceedings. *Id*. At the hearing, plaintiff's counsel asserted that plaintiff was not seeking enforcement of the FOIA request related to the employment file of the arresting officer. Roehrig could not testify or explain how release of the police report, video, search warrant for Garner's blood, and training records would have interfered with the investigation because, as the records clerk, she did not participate in the investigation. The department detectives were in charge of the investigation. Roehrig testified that it was "standard practice not to release a case if it's an open investigation," pursuant to a written policy and her training. Therefore, the trial court erred when it determined that defendant "most certainly" met its burden in establishing that the exemption applied because defendant failed to establish that the requested documents would interfere with law enforcement proceedings. *Id*.

MCL 15.240 provides that, if a court determines that a public record is not exempt from disclosure, it shall order the public body to produce the record or a portion of the record. MCL 15.240(4). If the person making the FOIA request "prevails in an action commenced under this section, the court shall award reasonable attorneys' fees, costs, and disbursements." MCL 15.240(6). To find that a party "prevailed" in a FOIA action, the trial court must conclude that the action was reasonably necessary to compel disclosure of the public records, and that the action "had a substantial causative effect on the delivery of the information to the plaintiff." *Amberg v City of Dearborn*, 497 Mich 28, 34; 859 NW2d 674 (2014) (citation omitted). The fact that a plaintiff's substantive claim under FOIA becomes moot by virtue of a subsequent disclosure of the requested records after the commencement of a circuit court action is not

determinative of whether the plaintiff is entitled to attorneys' fees, costs, and disbursements under MCL 15.240(6). *Thomas v City of New Baltimore*, 254 Mich App 196, 202; 657 NW2d 530 (2002). "[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 […] FOIA, even though the action has been rendered moot . . . ." *Id*. at 205 (citation omitted).

Because defendant failed to establish that the law-enforcement-proceedings exemption applied, disclosure of the records requested by plaintiff is required. MCL 15.240(4). Plaintiff's request for the police report was rendered moot when plaintiff received the police report from Garner. Plaintiff asserts on appeal that he still wants the requested records. Seemingly, his FOIA request is altogether moot as the city attorney, Thomas Esordi, testified that Garner pleaded out in his misdemeanor case. However, the mootness of plaintiff's claims is not determinative of whether plaintiff is entitled to attorneys' fees, costs, and disbursements. *Id*. at 202. Because plaintiff was forced into litigation and successful on his central issue that the materials were not exempt, and therefore, subject to disclosure, plaintiff has "prevailed" within the meaning of the statute. *Id*. at 205. Therefore, reversal of the trial court order and a remand is necessary for the lower court to order disclosure of the records, MCL 15.240(4), and determine the appropriate amount of attorneys' fees, costs, and disbursements of which plaintiff is entitled, MCL 15.240(6).

IV. SEPARATION OF EXEMPT FROM NONEXEMPT MATERIALS

Plaintiff next argues that defendant failed to separate exempt from nonexempt materials that he requested pursuant to FOIA. We agree.

FOIA provides that the presence of exempt information in a requested material does not eliminate a public body's responsibility to disclose the nonexempt information:

> (1) If a public record contains material which is not exempt under section 13 [(MCL 15.243)], as well as material which is exempt from disclosure under section 13, the public body shall separate the exempt and nonexempt material and make the nonexempt material available for examination and copying. [MCL 15.244(1).]

"This provision applies without exception to every public record." *Herald Co,* 475 Mich at 482.

The denial of plaintiff's FOIA request authored by Roehrig denied plaintiff's request pursuant to the law-enforcement-purpose exemption. Roehrig denied the request in its entirety without any reference to defendant's obligation in MCL 15.224(1) to separate exempt material from nonexempt material, and make the nonexempt material available for examination and copying. Roehrig was responsible for separating exempt from nonexempt materials, and making the proper redactions. She understood that plaintiff was an attorney requesting documents related to his client when she received the request. However, Roehrig testified that, after discovering that the case was open, she denied the entire request. She said, "Because the case was still open I denied the whole FOIA." "One would assume that [plaintiff] wanted everything with regard to the arrest of his client, so therefore it was denied." This demonstrates that

defendant failed to fulfill its duty under FOIA to separate any exempt material from nonexempt material. MCL 15.244(1).

As noted, defendant did not meet its burden in establishing that the documents requested by plaintiff were exempt under the law-enforcement-proceedings exemption. Regardless, defendant still had the duty to separate any nonexempt material for disclosure. MCL 15.244(1). Roehrig did not testify how each document requested by defendant would interfere with law enforcement proceedings. Therefore, it is possible that at the very least, the training records requested by plaintiff were nonexempt material that should have been separated and produced to plaintiff. Additionally, some of the information in the police report, video, and search warrant may have been nonexempt. Roehrig testified that Garner was booked, and the video only featured Garner in the booking room. None of the other individuals arrested that night were in the video. This Court has held that disclosure of booking photographs does not constitute an unwarranted invasion of privacy, and are therefore not exempt from disclosure under FOIA as information of a personal nature. *Detroit Free Press, Inc v Oakland Co Sheriff*, 164 Mich App 656, 657, 669; 418 NW2d 124 (1987). Therefore, the trial court erred in ruling that the requested information was wholly exempt from disclosure when it was apparent that not all information was exempt, and defendant failed to separate any nonexempt material for disclosure. Remand is appropriate for defendant to separate the exempt material, if any, from the nonexempt material for disclosure to plaintiff. Moreover, because plaintiff has "prevailed" in his claim that some material was nonexempt and subject to disclosure, he has "prevailed" pursuant to MCL 15.240(6), and is entitled to attorneys' fees, costs, and disbursements. Determination of a proper amount shall be made on remand.

V. SUFFICIENCY OF FACTUAL FINDINGS

Plaintiff also argues that the trial court failed to provide sufficient findings of fact and conclusions of law because it "failed to address any of the relevant facts and any of the relevant case law, making a snap decision from the hip while rambling about Oakland County judges, dogs, Wendy's commercials, and Herman Melville." We agree that the court failed to provide sufficient findings of fact and conclusions of law.

In a bench trial, "the court shall find the facts specially, state separately its conclusions of law, and direct entry of the appropriate judgment." MCR 2.517(A)(1). This requirement is met when "[b]rief, definite, and pertinent findings and conclusions on the contested matters," are provided, "without overelaboration of detail or particularization of facts." MCR 2.517(A)(2). Findings of fact are sufficient when " 'it appears that the trial court was aware of the issues in the case and correctly applied the law, and where appellate review would not be facilitated by requiring further explanation.' " *Ford Motor Co v Dep't of Treasury*, 313 Mich App 572, 589; 884 NW2d 587 (2015), quoting *Triple E Produce Corp v Mastronardi Produce, Ltd*, 209 Mich App 165, 176; 530 NW2d 772 (1995). A trial court's opinion affirming a public body's exemption from disclosure must include "particularized justification." *Evening News Ass'n*, 417 Mich at 506.

In rendering its decision from the bench, the court stated, in full:

> Well, the [c]ourt's had an opportunity to hear testimony.

> I got a little note in front of me it says, [“]think it, don’t say it.[”] That was advice that Joan Young got from Hilda Gage, a couple of Oakland County Jurists.
>
> And it’s always, well most of the time held me in good shape by thinking it and not saying it.
>
> But I think that your last words –
>
> You know what I was really thinking about was a Wendy’s commercial and also a whale from a children’s fable, but – not a children’s fable, but from a, was it Herman Melville, right, yeah.
>
> I’m thinking about Herman Melville today, thinking about that old lady in the Wendy’s commercial, whales and dogs, and I think you’ve encapsulated it all by saying [“]gotcha.[”]
>
> [Defendant] most certainly has met its burden for the [exemption] as the matter was clearly under investigation.
>
> There were some missed and missed communication opportunities, not that they have to prove that there was some grand conspiracy here or some nefarious motive, but to the extent that it’s worth saying, there isn’t any grand conspiracy here to hide the ball or hide a document.
>
> Certainly we have a [FOIA] that’s very valuable, but there wasn’t any violation, certainly no blatant violation of a young records’ clerk who compiled the information indicated here clearly and convincingly that ultimately the documents were going to be turned over at an appropriate time.
>
> There was never any follow-up.
>
> Certainly neither party had a burden to follow up, but the party that wanted it didn’t simply make a phone call and instead we have, well I won’t call it a federal case, but you guys know the saying, we have this case.
>
> So the [c]ourt, that’s my decision.

The court entered an order denying plaintiff’s FOIA request, and entered judgment in favor of defendant “for the reasons set forth on the record.”

Seemingly, the trial court made only two findings of fact and conclusions of law (1) that defendant met its burden of establishing that the documents were exempt, and (2) there was no violation of FOIA by Roehrig. This was insufficient to meet the requirements of MCR 2.517(A)(1) and (2). Although only brief findings without overelaboration are sufficient, MCR 2.517(A)(2), the court failed to even do so. Although the lower court appeared aware of the issues, it incorrectly applied the law. *Ford Motor Co*, 313 Mich App at 589. As discussed above, the court clearly erred when it determined that defendant met its burden of establishing

that an exemption applied because defendant did not meet the second prong of the law-enforcement-proceeding exemption. Defendant failed to establish that release of the requested information would interfere with law enforcement proceedings. *King*, 303 Mich App at 231. Roehrig could not testify as to how release would affect the investigation by the detectives. Additionally, the trial court erred when it determined that that there was no violation of FOIA. As discussed, there was a violation because Roehrig failed to separate any nonexempt material for disclosure from the exempt material, if any. She testified that she denied the request in its entirety solely because the case was open. Therefore, remand is necessary for the circuit court to provide sufficient factual findings on the record.

VI. ALTERNATIVE SOURCES OF THE REQUESTED INFORMATION

Lastly, plaintiff argues that the trial court erred when it determined that plaintiff could have obtained the requested information by contacting Roehrig, or through discovery. We disagree.

At the bench trial, Roehrig testified that had plaintiff contacted her after the blood draw results came back and she knew whether or not charges were filed, she would have released the information. But there was no other communication from plaintiff, and she did not have a duty to follow up with plaintiff after the case was closed to see if he still wanted the information. When plaintiff received the FOIA response, he contacted defendant's attorneys, rather than Roehrig. Plaintiff testified that he had no duty to contact Roehrig for clarification regarding the note on the FOIA response in reference to the video. He went straight to defendant's attorneys because he thought that defendant's rejection was improper. In rendering its decision, the trial court determined that there was no "blatant violation" by Roehrig, and that neither party had a duty to follow up, but plaintiff could have contacted Roehrig, and avoided this litigation.

On appeal, plaintiff argues that the trial court's deference to Roehrig's discretion in denying the request failed to hold defendant to its burden of proof. We agree that defendant failed to establish that the law-enforcement-proceedings exemption applied. However, the trial court's determination that there was no "grand conspiracy" to violate FOIA was not a clear error. MCL 15.240b provides that, if "a public body willfully and intentionally failed to comply with this act or otherwise acted in bad faith, the court shall order the public body to pay, in addition to any other award or sanction, a civil fine of not less than $2,500[ ] or more than $7,500[ ] for each occurrence." FOIA authorizes an assessment of punitive damages against a public body for arbitrary and capricious refusals to abide by FOIA only if the court orders disclosure of the public record. *Mich Council of Trout Unlimited v Dep't of Military Affairs*, 213 Mich App 203, 221; 539 NW2d 745 (1995).

The lower court likely made these determinations because plaintiff requested punitive damages in his complaint. There was no indication that Roehrig acted willfully, intentionally, or in bad faith when she denied plaintiff's FOIA request. She testified that it was written policy to deny requests pertaining to open cases, and she was trained to do so. But as the records clerk, she could not testify as to how release of the information would affect law enforcement proceedings, because the investigation was conducted by detectives. Because Roehrig noted on the FOIA request that the video would be pulled, the court merely noted that plaintiff could have contacted her to see what she meant, which would have led to the explanation that she could

release the video, as well as the other records, once the blood draw results were in. Plaintiff also requests an award of punitive damages on appeal. Although remand is necessary for disclosure of the requested documents, punitive damages are not appropriate because Roehrig did not act in bad faith.

Additionally, plaintiff argues on appeal that the trial court erred when it "chastised" him for not seeking the materials through discovery in Garner's district court case. This Court has determined that "[t]he fact that discovery is available as a result of pending litigation between the parties does not exempt a public body from complying with the public records law." *Central Mich Univ Supervisory-Technical Ass'n, MEA/NEA v Bd of Trustees of Central Mich Univ*, 223 Mich App 727, 730; 567 NW2d 696 (1997). Whether a plaintiff is seeking disclosure of a record for the purposes of discovery in a different case is irrelevant to a public body's duty to disclose. *Rataj*, 306 Mich App at 752. Plaintiff testified that he could have filed a motion for discovery in Garner's misdemeanor case in district court, but discovery is not a matter of right in district court, and the district court judge could have denied his motion. Esordi testified that the district court judge assigned to Garner's case freely granted discovery. Plaintiff testified that he ultimately received the police report from Garner, and Esordi testified that Garner's case was eventually pleaded out. The trial court did not refer to plaintiff's ability to obtain the requested documents through discovery when it rendered its decision. It does not appear to be a factor in the court's decision to deny plaintiff's request. Therefore, there was no clear error in this regard.

Defendant argues on appeal that plaintiff's claims are moot because the requested materials have been available to plaintiff for some time, and it is plaintiff's fault that he has not obtained them. Defendant does not provide if or when plaintiff ever actually received the requested records. Rather, plaintiff claims on appeal that the records remain undisclosed. While it may be true that the records are no longer needed in regards to Garner's case because he pleaded out, plaintiff's issues on appeal are not moot as they pertain to the errors made by defendant in responding to the FOIA request, and remand is necessary for a determination of proper attorneys' fees, costs, and disbursements that plaintiff is entitled to as a result of defendant's errors.

Defendant also asserts on appeal that plaintiff committed an abuse of process because his motive in bringing suit was pecuniary gain, and he had no intention of relying on the requested materials because Garner pleaded out. The party claiming an abuse of process must prove (1) an ulterior purpose, and (2) an act in the use of process that is improper in the regular prosecution of the proceeding. *Bonner v Chicago Title Ins Co*, 194 Mich App 462, 472; 487 NW2d 807 (1992). A meritorious abuse of process claim arises out of a situation where a party has used a proper legal procedure for a purpose collateral to the intended use of that procedure. *Id*. A corroborating act must demonstrate the ulterior purpose. *Id*. "A bad motive alone will not establish an abuse of process." *Id*. Defendant offers no proof on appeal or in the lower court record to support this argument. Rather, plaintiff testified that he made the FOIA request because discovery is not always available in district court, and asserted on appeal that he had to attend Garner's implied consent hearing without any evidence. Therefore, defendant has failed to establish that plaintiff committed an abuse of process.

We reverse and remand for entry of an order requiring defendant to disclose the requested documents, and an appropriate award of attorneys' fees, costs, and disbursements in plaintiff's favor. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Kirsten Frank Kelly
/s/ Stephen L. Borrello