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STATE OF MICHIGAN

COURT OF APPEALS

THOMAS BLEAU,

Plaintiff-Appellant,

v

ALPENA COMMUNITY COLLEGE,

Defendant-Appellee.

UNPUBLISHED
February 25, 2020

No. 349466
Alpena Circuit Court
LC No. 18-008673-CZ

Before: BORRELLO, P.J., and METER and RIORDAN, JJ.

PER CURIAM.

In this action brought pursuant to Michigan's Freedom of Information Act (FOIA), MCL 15.231 *et seq*., plaintiff appeals as of right the trial court's order denying his motion for summary disposition under MCR 2.116(C)(10) and granting summary disposition in favor of defendant, Alpena Community College (ACC), under MCR 2.116(C)(10). We affirm.

I. FACTS & PROCEDURAL HISTORY

In August 2019, plaintiff submitted five FOIA requests to ACC. Following a 10-day extension under MCL 15.235(2)(d), Richard Sutherland, ACC's Vice President for Administration and Finance and FOIA Coordinator, granted plaintiff's FOIA requests by letter, which was sent by United States mail and electronic mail on September 21, 2018. In that letter, Sutherland estimated that the FOIA-production fees were approximately $2,566 and informed plaintiff that ACC required a good-faith deposit of 50% before producing the records. In response, plaintiff filed an administrative appeal, alleging that ACC was barred from demanding or requesting a fee to fulfill his FOIA requests because ACC was not in compliance with MCL 15.234(4)[1] at the time the requests were made. ACC subsequently denied plaintiff's appeal.

Thereafter, plaintiff filed a complaint in the trial court, claiming that ACC had violated the

[1] MCL 15.234(4) requires that a public body that administers or maintains an official internet presence post on its website a written public summary of its FOIA procedures and guidelines.

FOIA by charging an illegal and improper fee for fulfillment of the FOIA requests. Plaintiff claimed ACC could not demand a fee for the FOIA requests because ACC was not compliant with MCL 15.234(4) at the time ACC issued its response letter. Plaintiff contended that ACC's Public Summary of FOIA Procedures and Guidelines document had not been posted on its website, and that the FOIA guidelines and procedures and public summary were not "established" by a "public body" because they were not reviewed, adopted, or authorized by the Board of Trustees of ACC. ACC denied any violation of the FOIA and claimed that its public summary of FOIA procedures and guidelines was posted on its website on September 20, 2018, before it responded to plaintiff's request. ACC also claimed that Sutherland, as ACC's vice president and FOIA coordinator, had the authority to develop and establish such procedures and guidelines.

Following discovery, plaintiff and ACC each moved for summary disposition pursuant to MCR 2.116(C)(10). The trial court denied plaintiff's motion for summary disposition and granted summary disposition in favor of ACC. The trial court concluded that Sutherland, as ACC's FOIA coordinator, was a "public body" under MCL 15.232(f)(*i*)[2] and that, therefore, he was a public body entitled to establish procedures and guidelines in conformance with the FOIA. The trial court further concluded that Sutherland acted within his authority when he approved the FOIA procedures and responded to plaintiff's FOIA requests. This appeal followed.

II. STANDARD OF REVIEW

We review de novo whether a trial court properly granted a motion for summary disposition. *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009). Our review is "limited to the evidence that had been presented to the circuit court at the time the motion was decided." *Innovative Adult Foster Care*, *Inc v Ragin*, 285 Mich App 466, 475-476; 776 NW2d 398 (2009). We review de novo whether the trial court properly interpreted and applied the FOIA. *Mich Open Carry, Inc v Dep't of State Police*, ___ Mich App ___, ___; ___ NW2d ___ (2018) (Docket No. 348487); slip op at 3. The trial court's factual findings underlying its application of the FOIA are reviewed for clear error. *Id*. at ___; slip op at 3. A finding is clearly erroneous if, after reviewing the entire record, we are left with a definite and firm conviction that a mistake was made. *Id*. at ___; slip op at 3.

III. ANALYSIS

Plaintiff first argues that there exists a genuine issue of fact as to whether ACC timely complied with MCL 15.234(4) by posting the required public summary before it allegedly charged plaintiff a fee or required a deposit in response to the FOIA requests.[3] We disagree.

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[2] MCL 15.232(f) provides:

> "FOIA coordinator" means either of the following:
>
> (*i*) An individual who is a public body.
>
> (*ii*) An individual designated by a public body in accordance with section 6 to accept and process requests for public records under this act.

[3] The trial court did not address this portion of plaintiff's argument in its opinion and order.

A motion for summary disposition under MCR 2.116(C)(10) should be granted if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law after a review of all the pleadings, admissions, and other evidence submitted by the parties. *BC Tile & Marble Co, Inc v Multi Bldg Co, Inc*, 288 Mich App 576, 582-583; 794 NW2d 76 (2010). A genuine issue of material fact exists when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party. *Id*. "The moving party has the initial burden to support its claim for summary disposition by affidavits, depositions, admissions, or other documentary evidence." *McCoig Materials, LLC v Galui Construction Inc*, 295 Mich App 684, 693; 818 NW2d 410 (2012). The burden is then shifted to the nonmoving party to demonstrate that a genuine issue of material fact exists. *Id.* The existence of a disputed fact must be established by substantively admissible evidence, although the evidence need not be in admissible form. MCR 2.116(G)(6); *Bronson Methodist Hosp v Auto-Owners Ins Co*, 295 Mich App 431, 441; 814 NW2d 670 (2012). If the nonmoving party fails to establish the existence of a material factual dispute, the moving party's motion is properly granted. *Karbel v Comerica Bank*, 247 Mich App 90, 97; 635 NW2d 69 (2001).

MCL 15.234(4) states:

> A public body shall establish procedures and guidelines to implement this act and shall create a written public summary of the specific procedures and guidelines relevant to the general public regarding how to submit written requests to the public body and explaining how to understand a public body's written responses, deposit requirements, fee calculations, and avenues for challenge and appeal. The written public summary shall be written in a manner so as to be easily understood by the general public. If the public body directly or indirectly administers or maintains an official internet presence, it shall post and maintain the procedures and guidelines and its written public summary on its website. A public body shall make the procedures and guidelines publicly available by providing free copies of the procedures and guidelines and its written public summary both in the public body's response to a written request and upon request by visitors at the public body's office. A public body that posts and maintains procedures and guidelines and its written public summary on its website may include the website link to the documents in lieu of providing paper copies in its response to a written request. A public body's procedures and guidelines shall include the use of a standard form for detailed itemization of any fee amount in its responses to written requests under this act. The detailed itemization shall clearly list and explain the allowable charges for each of the 6 fee components listed under subsection (1) that compose the total fee used for estimating or charging purposes. Other public bodies may use a form created by the department of technology, management, and budget or create a form of their own that complies with this subsection. *A public body that has not established procedures and guidelines, has not created a written public*

However, by granting summary disposition in defendant's favor, the trial court implicitly concluded that defendant had complied with MCL 15.234(4) before charging a fee or requiring a deposit.

> *summary, or has not made those items publicly available without charge as required in this subsection is not relieved of its duty to comply with any requirement of this act and shall not require deposits or charge fees otherwise permitted under this act until it is in compliance with this subsection.* Notwithstanding this subsection and despite any law to the contrary, a public body's procedures and guidelines under this act are not exempt public records under section 13. [Emphasis added.]

The plain language of the statute provides that a public body cannot require deposits or charge fees for FOIA requests until it has established procedures and guidelines, created a written public summary, and made those items publicly available. MCL 15.234(4). "When the language of a statutory provision is unambiguous, we must conclude that the Legislature intended the meaning that was clearly expressed, requiring enforcement of the statute as written, without any additional judicial construction." *Wayne Co v AFSCME Local 3317*, 325 Mich App 614, 634; 928 NW2d 709 (2018). According to affidavits and exhibits submitted by ACC, the Public Summary of FOIA Procedures and Guidelines was established and posted to ACC's website on September 20, 2018—prior to the issuance of its September 21, 2018 FOIA-response letter. Plaintiff asserts, without offering any supporting evidence, that the documents were created at the time indicated by a metadata-timestamp and uploaded to ACC's website after ACC issued the response letter. However, plaintiff failed to produce evidence on how the metadata-timestamp either supported his argument or rebutted ACC's evidence. Nor did the trial court take judicial notice on the significance of metadata-timestamps. Speculation cannot create a question of fact. *Detroit v Gen Motors Corp*, 233 Mich App 132, 139; 592 NW2d 732 (1998). Accordingly, plaintiff's argument is without merit.

Plaintiff next argues that ACC did not "establish" FOIA procedures and guidelines as required by MCL 15.234(4) because the establishment of these procedures and guidelines required the approval of the public body itself—i.e., the Board of Trustees—and Sutherland had no individual authority to establish such procedures and guidelines. We conclude that the trial court reached the correct result, albeit for the wrong reason.

MCL 15.232(h) defines "public body" as any of the following:

> (*i*) A state officer, employee, agency, department, division, bureau, board, commission, council, authority, or other body in the executive branch of the state government, but does not include the governor or lieutenant governor, the executive office of the governor or lieutenant governor, or employees thereof.
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> (*ii*) An agency, board, commission, or council in the legislative branch of the state government.
>
> (*iii*) A county, city, township, village, intercounty, intercity, or regional governing body, council, school district, special district, or municipal corporation, or a board, department, commission, council, or agency thereof.
>
> (*iv*) Any other body that is created by state or local authority or is primarily funded by or through state or local authority, except that the judiciary, including

the office of the county clerk and its employees when acting in the capacity of clerk to the circuit court, is not included in the definition of public body.

Notably absent from this definition is "FOIA coordinator" or any other language indicating that Sutherland, in his individual capacity as a community college administrator, constitutes a "public body" for FOIA purposes. Additionally, MCL 15.232(f) states that "FOIA coordinator" means either "(*i*) [a]n individual who is a public body" or "(*ii*) [a]n individual designated by a public body in accordance with section 6 to accept and process requests for public records under this act." The trial court incorrectly interpreted subdivision (*i*) to mean that an individual serving as a FOIA coordinator is *ipso facto* a public body. Rather, subdivision (*i*) provides that an individual who qualifies as a "public body" as defined by MCL 15.232(h)—such as a state officer or employee in the executive branch, MCL 15.232(h)(*i*)—is also considered to be a "FOIA coordinator." Accordingly, the trial court erred to the extent it held that Sutherland as an individual is a public body.

The trial court nonetheless reached the right result.[4] There is no indication that Sutherland lacked the authority to act on behalf of ACC, and the plain language of the FOIA does not prohibit a public body from authorizing an agent to act on its behalf. See *Mich Open Carry, Inc*, ___ Mich App at___ ; slip op at 3 (holding that the department appeals officer had authority to act on behalf of the defendant, the Department of State Police, to decide the plaintiff-organization's interagency appeal). ACC presented evidence that Sutherland had the express authority to establish and implement the FOIA procedures and guidelines, and plaintiff failed to provide documentary evidence showing that Sutherland did not have such authority. Thus, the trial court correctly concluded that no genuine issue of material fact existed with respect to defendant's compliance with MCL 15.234(4).

IV. CONCLUSION

The trial court properly granted summary disposition in favor of ACC because plaintiff failed to establish that there exists a genuine issue of material fact regarding whether ACC violated MCL 15.234(4). Although the trial court erred to the extent it concluded that Sutherland as an individual was a "public body" under the statute, it nevertheless reached the correct result. Accordingly, we affirm.

/s/ Stephen L. Borrello
/s/ Patrick M. Meter
/s/ Michael J. Riordan

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[4] "A trial court's ruling which reaches the right result, although for the wrong reason, may be upheld on appeal." *Mulholland* v *DEC Int'l Corp*, 432 Mich 395, 411, n 10; 443 NW2d 340 (1989).