

STATE OF MICHIGAN
COURT OF APPEALS

PHILIP CAFFREY,

Plaintiff-Appellant,

v

GLADWIN COMMUNITY SCHOOLS,

Defendant-Appellee.

UNPUBLISHED

December 26, 2013

No. 314732

Gladwin Circuit Court

LC No. 12-006380-CZ

Before: MURPHY, C.J., and FITZGERALD and BORRELLO, JJ.

PER CURIAM.

In this Freedom of Information Act (FOIA)¹ case, plaintiff appeals as of right from an amended opinion and order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

Defendant provided a cellular telephone to its superintendent for school business, with personal use of the telephone allowed "subject to review by the Board." Plaintiff submitted FOIA requests for the cellular phone records. Defendant's superintendent provided an affidavit averring that defendant did not maintain or possess the subject records and did not use them in the course of official business. However, defendant obtained some of the records from its cellular phone provider and provided the records to plaintiff.² Defendant provided additional redacted cellular phone records after plaintiff filed the present action.

Ultimately, the parties brought cross-motions for summary disposition. The trial court held in pertinent part:

- At the time the requests were made on March 5 and 13, 2012, defendant did not maintain or possess the records and did not use them in the course of official business and, accordingly, they were not "public records" under MCL 15.232(e) and defendant was not obligated to provide them to plaintiff.

¹ MCL 15.231 *et seq.*

² Defendant redacted personal telephone numbers to protect the privacy of those individuals.

- Defendant nonetheless obtained the records for October 1, 2010, through March 11, 2011, and July 24, 2011, through March 8, 2012 before it responded and thus, they became “public records”; however, defendant provided them to plaintiff, albeit in redacted form.
- Defendant could have obtained records online through the cell phone service provider for March 12, 2011, through July 23, 2011, but since it did not do so and did not use the records as part of its official business, the records were not “public records” that defendant was obligated to provide.
- Once the records for March 12, 2011, through July 23, 2011, were obtained, defendant was not obligated to provide them since FOIA only requires provision at the time of the request and/or response and the requirement that “future issuances” of records be provided did not apply since the request was for past records.
- The telephone numbers were properly redacted because their disclosure would have constituted a “clearly unwarranted invasion of privacy.”
- Although the FOIA coordinator failed to explain the reasons for the redactions as required, plaintiff was not entitled to punitive damages because there was no arbitrary and capricious violation of FOIA by refusing or delaying to provide the records, and plaintiff was not entitled to attorney fees, costs and disbursements because plaintiff did not “prevail.”
- In light of the grant of summary disposition to defendant, plaintiff’s motion for summary disposition was moot.

Plaintiff acknowledges that the FOIA does not impose a duty to maintain or prepare a public record. However, plaintiff points out that retention of phone bills is required by the Records Retention and Disposal Schedule for Michigan Public Schools, General Retention Schedule #2 (Schedule #2), and argues that retention of phone bills was also required by MCL 399.5(2) and MCL 750.491. Because retention was mandatory, plaintiff maintains, the trial court erred in finding that the cellular phone records were not “public records.”

We review de novo grants of summary disposition, *Maiden v Rozwood*, 461 Mich 109, 118-120; 597 NW2d 817 (1999), and legal determinations in a FOIA case, *Hopkins v Twp of Duncan*, 294 Mich App 401, 408; 812 NW2d 27 (2011). “[B]ecause FOIA is a prodisclosure statute, it must be broadly interpreted to allow public access.” *Id.* at 410.

MCL 15.233 provides that a “public record” must be disclosed under the FOIA. MCL 15.232(e) defines “public record,” in pertinent part, as “a writing 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. Public record does not include computer software.”

Schedule #2 requires that a school district's telephone/communication bills be retained for seven years. MCL 399.5(2), which deals with preservation of records by the Michigan Historical Commission, prohibits disposal, mutilation, and destruction of public records inconsistent with statutory requirements, whereas MCL 750.491 makes it a misdemeanor to willfully carry away, mutilate, destroy or retain "official books, papers or records created by or received in any office or agency of the state of Michigan or its political subdivisions."

Schedule #2's requirement that the bills be retained for seven years presupposes that the bills were actually received. Section 5(2) presupposes that the record "required to be kept" is in fact "kept" and guards against its destruction. MCL 750.491 criminalizes the destruction of or secreting a record, implying that it must be possessed in the first instance. Taken together, these provisions indicate that if defendant had received the phone bills it would have been obligated to retain them for seven years and if plaintiff had been able to show that defendant in fact received phone bills and did not retain them, it could have established a violation of § 5(2) and the basis for a misdemeanor under MCL 750.491. However, a showing that defendant did not retain phone bills required to be maintained would not have established that defendant actually "prepared, owned, used, [was] in the possession of, or retained" the records. Thus, even if plaintiff was required to retain the phone bills, the requirement would not establish that defendant had a "public record" subject to disclosure. The duty to retain records does not establish a duty to acquire records and did not transform a nonexistent record into one actually "prepared, owned, used, [possessed], or retained." Plaintiff did not establish that defendant failed to disclose a "public record."

Plaintiff next argues that the superintendent's affidavit was too conclusory to support summary disposition, that his credibility was an issue, and that plaintiff's affidavits contradicted the superintendent's affidavit and created a genuine issue of material fact. We disagree.

MCR 2.119(B) provides:

(1) If an affidavit is filed in support of or in opposition to a motion, it must:

(a) be made on personal knowledge;

(b) state with particularity facts admissible as evidence establishing or denying the grounds stated in the motion; and

(c) show affirmatively that the affiant, if sworn as a witness, can testify competently to the facts stated in the affidavit.

"Opinions, conclusionary denials, unsworn averments, and inadmissible hearsay do not satisfy the court rule; disputed fact (or the lack of it) must be established by admissible evidence." *SSC Assocs Ltd Partnership v Gen Retirement Sys*, 192 Mich App 360, 364; 480 NW2d 275 (1991). Moreover, "[i]t is well settled that where the truth of a material factual assertion of a moving party's affidavit depends on the affiant's credibility, there exists a genuine issue to be decided at trial by the trier of fact and a motion for summary disposition cannot be granted." *Id.* at 365.

Plaintiff first argues that the superintendent's affidavit parroted the statute, was a "generic determination," and was insufficient to satisfy the FOIA. In *Evening News Ass'n v City of Troy*, 417 Mich 481, 491; 339 NW2d 421 (1983), the trial court did not require the defendants to "particularize their position" and "'generically' concluded" that documents were exempt under the FOIA because they would interfere with law enforcement proceedings. The Court held that "a 'generic determination' does not satisfy the FOIA." *Id.* The Court noted that "the exemption from disclosure does not automatically apply to all investigating records compiled for law enforcement purposes," *id.* at 492-493, and that "the exemptions require particularized justification," *id.* at 493-494.

The superintendent averred that "the school district did not maintain or possess the records" "or use them in the course of official business." Although statutory terminology was used, these words established the facts necessary to reach a conclusion. In contrast, the Court in *Evening News Ass'n* could not discern whether disclosure would interfere with an investigation based on the assertion that disclosure would interfere with an investigation without supporting facts. Here, the recitation was factually sufficient for the court to conclude that the requested records were not "public records" under MCL 15.232(e). Contrary to plaintiff's assertion, "facts" were set forth in the affidavit.³ This was not a "generic determination."

Plaintiff nonetheless asserts that his own affidavits created an issue of material fact. He averred, "I am aware that the cell phone bill records are used for determining expenditures, paying phone bills, determining budgets and for audits." MCR 2.119(B)(1)(a) requires that an affidavit be based on personal knowledge. While plaintiff claims to be aware of these facts, there is nothing in the affidavit to suggest that his awareness is a matter of personal knowledge. If plaintiff wanted to establish these facts, he could have deposed the superintendent or other personnel or engaged in some other form of discovery and acquired admissions that the records were used for these purposes. Absent competent evidence to establish these facts, however, the trial court properly granted defendant's motion for summary disposition.

Plaintiff next argues that the personal telephone numbers were improperly redacted. However, MCL 15.243 provides in pertinent part:

(1) A public body may exempt from disclosure as a public record under this act any of the following:

(a) Information of a personal nature if public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy.

In *Michigan Federation of Teachers v Univ of Michigan*, 481 Mich 657, 676; 753 NW2d 28 (2008) (emphasis in original), the Court held that information is "of a personal nature" if it is

³ Plaintiff argues that the superintendent's credibility was suspect because the claim of never having used the records in the course of business did not ring true. An unsupported supposition is insufficient to impugn an affiant's credibility.

“intimate, embarrassing, private, *or* confidential.” Further, the Court concluded that telephone numbers fit this definition:

[T]he next question is whether employees’ home addresses and telephone numbers reveal embarrassing, intimate, private, or confidential details about those individuals. We hold that they do. Where a person lives and how that person may be contacted fits squarely within the plain meaning of this definition because that information offers private and even confidential details about that person’s life. As Chief Justice Fitzgerald noted in *Kestenbaum* [*v Michigan State Univ*, 414 Mich 510; 327 NW2d 783 (1982)], “the release of names and addresses constitutes an invasion of privacy, since it serves as a conduit into the sanctuary of the home.”⁵⁸

⁵⁸ *Kestenbaum*, 414 Mich at 524-525. This case is not the first occasion where this Court has considered whether home addresses and telephone numbers are “information of a personal nature.” This Court has a checkered history of splintered and equally divided decisions attempting to determine whether this type of information is “of a personal nature.” . . . Under the more accurate definition of “information of a personal nature” we adopt today, however, we settle the question and hold that home addresses and telephone numbers constitute private information about individuals.

This case is decisive. There simply is no basis for arguing that the personal telephone numbers were not exempt from disclosure.

Plaintiff suggests that the numbers are not private because Seebeck’s personal use of the cellular phone was subject to review by the school board. However, that a school board might review a document does not mean that the public disclosure of personal information in the document would not be an invasion of privacy. Moreover, plaintiff indicates that he is seeking to discern whether these phone numbers are associated with improper behavior. It is noted that MCL 15.240 allows for an appeal of a denial under the FOIA to circuit court and § 10(4) provides that “[t]he court, on its own motion, may view the public record in controversy in private before reaching a decision.” Thus, there is a means to ferret out whether redacted telephone numbers are in fact personal telephone numbers.

Finally, plaintiff argues that the trial court erred in concluding that his cross-motion for summary disposition was moot. Whether the issue is moot presents a question of law that is reviewed de novo. *Loweke v Ann Arbor Ceiling & Partition Co, LLC*, 489 Mich 157, 162; 809 NW2d 553 (2011).

Plaintiff asserts that under MCL 15.240(6), if the court had addressed his motion and found that defendant improperly failed to explain why it was redacting the records, he would have prevailed in part and could have been awarded attorney fees. However, the trial court found that defendant failed to give the explanation but concluded that plaintiff did not “prevail” because defendant had provided plaintiff with all of the documents to which he was entitled

before the lawsuit was filed, and because it had determined that the redactions were proper. Further, the court noted:

“[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. . . .*” *Walloon* [*Lake Water System, Inc v Melrose Twp*, 163 Mich App 726, 734; 415 NW2d 292 (1987)] (emphasis added). “A party prevails in the context of an [sic] FOIA action 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) (citing *Oakland Co. Prosecutor v Dep’t of Corrections*, 222 Mich App 654, 663; 564 NW2d 922 (1997) and *Wilson v City of Eaton Rapids*, 196 Mich App 671, 673; 493 NW2d 433 (1992)) (emphasis in original). . . [Capitalization added by trial court.]

The trial court did decide the attorney fee issue that plaintiff maintains should have been the subject of further proceedings. Because the issue was decided, there is no basis for plaintiff’s argument that his motion was not moot.

Affirmed.

/s/ William B. Murphy
/s/ E. Thomas Fitzgerald
/s/ Stephen L. Borrello