State of Michigan
In the Court of Claims

HASSAN M. AHMAD, ESQ,

Plaintiff,

Case No. 17-000170-MZ

v.

Hon. Stephen L. Borrello

THE UNIVERSITY OF MICHIGAN,

Defendant.

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DATE 16/08/2017
DEFENDANT'S MOTION TO DISMISS

Oral Argument Requested

The University of Michigan ("University" or "Defendant") through its counsel, Miller, Canfield, Paddock and Stone, PLC, and pursuant to MCR 2.116(C)(8), moves the Court for an Order dismissing Plaintiff's claims in their entirety. In support of this Motion, as more fully explained in the attached Brief, the University states:

1. On June 13, 2017, Plaintiff filed a single-count complaint alleging that the University violated the Michigan Freedom of Information Act ("FOIA")

2. As set forth in the attached Brief, Plaintiff's complaint fails to state a claim for relief and should be dismissed because the documents at issue in this case are not "public records."

3. On August 14, 2017, the University unsuccessfully sought concurrence in the relief sought, thereby necessitating this Motion.

WHEREFORE, the University requests that the Court dismiss Plaintiff's lawsuit in its entirety, with prejudice.

Respectfully submitted,

MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.

By: _____

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Dated: August 16, 2017

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BRIEF IN SUPPORT OF DEFENDANT'S DATE 16/08/2017 MOTION TO DISMISS

Oral Argument Requested

I. Introduction

The Freedom of Information Act ("FOIA") provides individuals with the ability to obtain information regarding the "affairs of government." The purpose of requiring disclosure is so that the public is aware of the government's "operations and activities." Importantly, FOIA does not require the production of every document in the possession of a governmental entity. Instead, a document must only be produced if it meets the statute's definition of a "public record" and is not otherwise exempt from disclosure.

Plaintiff Hassan M. Ahmad ("Plaintiff") seeks documents that are not "public records." Specifically, Plaintiff seeks private records that were donated by Dr. John Tanton to the University of Michigan's Bentley Historical Library ("Bentley") pursuant to a charitable gift agreement that requires that some, but not all, of the records be completely closed to access for a limited period of time (the "Closed Tanton Papers"). These documents do not relate to decisions, actions or functioning of Bentley or the University and they have never been used in the "performance of an official function." They are also exempt from disclosure under the privacy exemption. Consequently, the Closed Tanton Papers are not subject to disclosure under the statute and Plaintiff's Complaint should be dismissed.

II. Statement of Facts

A. The Bentley Historical Library

Bentley, an administrative unit at the University of Michigan, includes both the "University Archives and Records Program" and the "Michigan Historical Collections." The Archives and Record program collects, preserves and makes available records generated by the University in the conduct of its business. The Historical Collection collects, preserves and makes available important historical materials:

> The Michigan Historical Collections will be maintained for the purpose of collecting, preserving, **and making available** to students manuscripts and other materials pertaining to the state, its institutions, and its social, economic, and intellectual development.[1] (emphasis added)

As noted below, none of the documents at issue in this case has ever been made available to students, faculty or even the general public.

B. Dr. John Tanton Donates Documents to the University, with Specified Conditions

Dr. John Tanton, an ophthalmologist and conservationist, donated various papers to Bentley, which are described on the Bentley webpage. Under "Access Restrictions," the webpage states:

> The collection is only partially open to research. Boxes 1-14 are open without restriction; boxes 15-25 are closed for 25 years from the date of accession, or until April 6, 2035.[2]

The webpage further describes generically what is in the various boxes and notes where access is "Closed until April 6, 2035." Aside from the documents that are closed to research by anyone (whether it be a student, faculty member, or the general public), the remainder of the documents donated by Dr. Tanton are available for public inspection and research.

C. Plaintiff's FOIA Request, and the University's Response

On December 14, 2016, Plaintiff filed a FOIA request seeking "all documents donated by Dr. John Tanton, Donor #7087, located in Boxes 15-25, and any others marked 'closed' at the Bentley Historical Archive (BHA) [sic] at the University of Michigan." (Compl, ¶8; Compl Ex 1 (FOIA Request)). Plaintiff admits that he "was aware that his request sought record marked 'closed for 25 years from the date of accession, or until April 6, 2035.'" (Compl, ¶11).

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[1] (University Board of Regent's Bylaws, Sec. 12.04, http://regents.umich.edu/bylaws/bylaws12.html#7)

[2] (http://quod.lib.umich.edu/b/bhlead/umich-bhl-861056?view=text)

On December 22, 2016, the University acknowledged receipt of the FOIA request. (Compl Ex 2). Due to the volume of requests being processed by the University, the University informed Plaintiff that it would respond to the request on or before January 13, 2017. (*Id.*)

On January 5, 2017, Plaintiff narrowed his original request. (Compl Ex 5). The narrowed request still sought documents marked "closed" to access. (*Id.*)

On May 8, 2017 the University responded to Plaintiff's request and confirmed that his request was denied. The University noted that Plaintiff "requested voluminous records from the John Tanton papers archived at the University of Michigan Bentley Historical Library, which are currently restricted and closed to research." (Compl Ex 7). The denial letter explains that after Plaintiff provided a deposit, the University determined that the documents were not "public records":

> Your request is denied. Subsequent to receiving your fee deposit, we have determined that the restricted records are not public records of the University of Michigan pursuant to Section 2(e) of the Michigan Freedom of Information Act, which defines a "public record" as "a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function..." As indicated on the Bentley Historical Library website, the restricted records are closed to research until April 2035. Thus, they are not utilized, possessed or retained in the performance of any official University function.

(*Id.*) The University returned Plaintiff's deposit and advised him of his appeal rights. (*Id.*)

On May 16, 2017, Plaintiff appealed the denial of his FOIA request. (Compl Ex 8). In the appeal, Plaintiff assumed the very thing he sets out to prove in this lawsuit: that the requested records are "public records" because (in his words) they "were acquired by the University for an official purpose." (*Id.* at 2).

On May 30, 2017, the University denied Plaintiff's appeal. (Compl Ex 9). In addition to incorporating the reasons set forth in the May 8 denial (above), the University noted that the requested records "emanating from a private source are restricted and are not available to the

university community or the public at this time by a valid charitable gift agreement with a donor. As such, they are not public records subject to disclosure under the FOIA and the University does not currently have the right to disseminate them." (*Id.*) The appeal denial further noted that the disclosure of the records "would not only violate the terms by which a private citizen donated his property to the University, but would constitute an unwarranted invasion of the donor's privacy and, potentially, that of unrelated and unknowing third parties." (*Id.*) Finally, the University explained that production of the documents in violation of the gift agreement would prevent the University from fulfilling its educational mission:

> [V]iolating the terms of the gift agreement in this manner would undermine the University's ability to fully achieve its educational mission, insofar as preserving the history of the state of Michigan is one important aspect of its academic mission and is directly related to the willingness of other (e.g., legislators and judges) to donate their papers to the Bentley Library. Potential donors with key historical documents will be chilled by the University's failure to observe the limits expressly placed upon such gifts.

(*Id.*)

III. Argument

A. Standard of Review

A motion for summary disposition pursuant to MCR 2.116(C)(8) tests the legal sufficiency of the complaint. All well-pleaded factual allegations are to be accepted as true and construed in a light most favorable to the non-moving party. *Maiden v Rozwood*, 461 Mich 109, 119, 597 NW2d 817 (1999). A motion under MCR 2.116(C)(8) should be granted where the claims alleged are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.'" *Id.* (quoting *Wade v Dep't of Corrections*, 439 Mich 158, 163, 483 NW2d 26 (1992)). Additionally, dismissal pursuant to MCR 2.116(C)(8) is appropriate where claims are based on "mere conclusory allegations." *Porter v Fieger*, 2001 WL 738398, at *3

(Mich Ct App June 29, 2001); *ETT Ambulance Serv Corp v Rockford Ambulance*, 204 Mich App 392, 395, 516 NW2d 498 (1994) ("[M]ere statement of a pleader's conclusions, unsupported by allegations of fact, will not suffice to state a cause of action.").[3] When deciding a motion brought under this section of the court rule, the court considers only the pleadings. *See* MCR 2.116(G)(5). However, the Court may consider documents referenced in a complaint in considering a summary disposition motion brought under MCR 2.116(C)(8). *See Dalley v Dykema Gossett*, 287 Mich App 296, 301 n1, 788 NW2d 679, 684 (2010).

B. Governing Principles of Statutory Construction

The Michigan Supreme Court recently reiterated the ground rules that apply where, as here, the case involves a question of statutory interpretation:

> This case involves the interpretation and application of a statute, which is a question of law that this Court reviews *de novo*. When interpreting a statute, we follow the established rules of statutory construction, the foremost of which is to discern and give effect to the intent of the Legislature. To do so, we begin by examining the most reliable evidence of that intent, the language of the statute itself. If the language of a statute is clear and unambiguous, the statute must be enforced as written and no further judicial construction is permitted. Effect should be given to every phrase, clause, and word in the statute and, whenever possible, no word should be treated as surplusage or rendered nugatory. Only when an ambiguity exists in the language of the statute is it proper for a court to go beyond the statutory text to ascertain legislative intent.

Whitman v City of Burton, 493 Mich 303, 311-12, 831 NW2d 223 (2013). To determine whether language is clear and unambiguous, "the contested provision must be read in relation to the statute as a whole and work in mutual agreement." *United States Fidelity Insurance & Guaranty Co v Mich Catastrophic Claims Association*, 484 Mich 1, 13, 795 NW2d 101 (2009) (citing *In re Certified Question (preferred Risk Mutual Insurance Co v Mich Catastrophic Claims Association)*, 433 Mich 710, 722; 449 NW2d 660 (1989)). In other words, "each

[3] Unpublished cases are attached as Exhibit 1.

provision of the FOIA must be read ***so as to be consistent with the purpose announced in the preamble***." *Kestenbaum v Michigan State Univ*, 414 Mich 510, 522; 327 NW2d 783, 785 (1982) (emphasis added). "Effect should be given to every phrase, clause, and word in the statute. The statutory language must be read and understood in its grammatical context, unless it is clear that something different was intended." *Sun Valley Foods Co v Ward*, 460 Mich 230, 237; 596 NW2d 119 (1999). In other words, "Individual words and phrases . . . should be read in the context of the entire legislative scheme." *Michigan Properties, LLC v Meridian Township*, 491 Mich 518, 528, 817 NW2d 548 (2012); *see also* ANTONIN SCALIA AND BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 140 (Thomson/West 2012) (discussing the "Grammar Canon," which provides, "Words are to be given the meaning that proper grammar and usage would assign them").

C. The Freedom of Information Act

"The purpose of FOIA is to provide to the people of Michigan 'full and complete information ***regarding the affairs of government*** and the official acts of those who represent them as public officials and public employees,' thereby allowing them to 'fully participate in the democratic process.'" *Amberg v City of Dearborn*, 497 Mich 28, 30, 859 NW2d 674, 675 (2014) (quoting MCL 15.231(2))(emphasis added). *See also Detroit Free Press v Dep't of Consumer & Indus Servs*, 246 Mich App 311, 315; 631 NW2d 769, 772 (2001) ("By mandating the disclosure of information relating to the affairs of government and the official acts of public officials and employees, the FOIA facilitates the public's understanding of the operations and activities of government.") (emphasis added); *Kocher v Dep't of Treasury*, 241 Mich App 378, 380–81; 615 NW2d 767 (2000) ("By requiring the public disclosure of information regarding the affairs of government and the official acts of public officials and employees, the act enhances the public's

understanding of the operations or activities of the government.") Additionally, although courts have described FOIA as broadly written and pro-disclosure, "the stated purpose of the act relates to government affairs and official acts, not the actions of private organizations." *Sclafani v Domestic Violence Escape*, 255 Mich App 260, 269; 660 NW2d 97 (2003). This is because "[o]ne of the reasons prompting the legislation was concern over abuses in the operation of government." *Swickard v Wayne Co Medical Examiner*, 438 Mich 536, 543; 475 NW2d 304 (1991). As discussed below, the documents at issue in this lawsuit do not relate to the "affairs of government," are not "public records," and requiring their production would not fulfill the purposes of FOIA.

D. The Closed Tanton Papers Are Not Public Records Because They Are Not Being Owned Used, Possessed or Retained "in the Performance of an Official Function"

A public body is not required to produce a document pursuant to FOIA unless it is a "public record." MCL 15.233(1). FOIA defines a "public record" 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." MCL 15.232(e) (emphasis added). Additionally, the Michigan Court of Appeals has held that to further the purpose of the statute, "we must construe the FOIA in such a manner as to require disclosure of records of public bodies used or possessed in ***their decisions to act***, as well as of similar records pertaining to ***decisions of the body not to act***." *Walloon Lake Water Sys v Melrose Twp*, 163 Mich App 726, 730–31, 415 NW2d 292, 294–95 (1987) (emphasis added). "Under this holding, not every communication received by a public body will be subject to disclosure." *Id.* The logical corollary of this rule of construction is that when a document ***does not*** relate to a decision to act (or not act), it is not subject to disclosure.

Indeed, cases requiring the disclosure of documents look to the use, or reliance on the document. For example, in *Amberg* (relied upon by Plaintiff in his FOIA appeal), a surveillance

video created by a third party was a public record because the city "received copies of the recordings as relevant evidence in a pending misdemeanor criminal matter." *Amberg*, 497 Mich at 32. The court explained that "even if the recordings did not factor into defendants' decision to issue a citation, they were nevertheless collected as evidence by defendants to support that decision." *Id.* at 33.

Similarly, in *Walloon Lake Water System*, the Court of Appeals held that "once the letter was read aloud and incorporated into the minutes of the meeting where the township conducted its business, it became a public record 'used ... in the performance of an official function.'" 163 Mich App at 729. The court explained that "the content of the document served as the basis for a decision to refrain from taking official affirmative action," and therefore the document became a "public record." *See also Rataj v City of Romulus,* 306 Mich App 735, 750-51; 858 NW2d 116 (2014) (video recording of police officer's alleged assault of an individual who had been arrested and handcuffed was a public record because it was used "in the performance of an official function" and "would shed light on the operations of the [police department]"); *MacKenzie v Wales Twp*, 247 Mich App 124, 131; 635 NW2d 335 (2001) (computer tax rolls were public records "because the tapes containing the tax information ... existed and were used in performing defendants' official function of property tax billing ... those tapes were subject to the FOIA"); *Ellison v Dep't of State*, _ Mich App _, 2017 WL 2562623, at *3 (Mich Ct App June 13, 2017) (insurance database maintained by Department of State was a public record "that defendant used to perform an official function"). In each of these cases, the documents were "public records" precisely because they related directly to the affairs of the government, were ***used*** during by the government (or governmental actor) in performing its official functions and would shed light on the government's operations.

Contrastingly, the Closed Tanton Papers have never been used by the University (or any University employee or student) "in the performance of an official function." Bentley's official functions include "collecting, preserving, **and making available**" historical records. Unless all three acts are completed, the documents are not public records. *See OfficeMax, Inc v United States*, 428 F3d 583, 589 (6th Cir 2005) (use of "and" in phrase should be read in its ordinary conjunctive sense, requiring all elements to be satisfied). The Closed Tanton Papers were never made available.[4] Instead, they have been completely closed to access. They do not reveal anything about the "affairs of government" because they do not relate to the functioning of Bentley or the University. The documents will not reveal anything about the official acts of University employees.

Plaintiff's focus on the University's possession of the Closed Tanton Papers is misplaced. The University's physical possession of the documents does not automatically lead to the conclusion that they are "public records." Addressing "purely personal documents," similar to the documents at issue here, the Court of Appeals has explained that such private "documents can become public documents based on how they are utilized by public bodies." *Howell Ed Ass'n, MEA/NEA v Howell Bd of Ed*, 287 Mich App 228, 243; 789 NW2d 495 (2010). This is because "it is their subsequent use or retention 'in the performance of an official function' that rendered them so." *Id.* In *Howell*, personal emails between teachers were not pubic records, despite the fact that the board of education had complete control of the emails, because the board did nothing more than perform a blanket saving of information of the entire email system. *Id.* at 239-40. *Howell* explained that its "holding is consistent with the underlying policy of FOIA,

[4] The University's mission statement refers to "creating, communicating, preserving **and** applying knowledge." (https://president.umich.edu/about/mission/). Again, since the Closed Tanton Papers are not open to research, knowledge has not been "applied."

which is to inform the public 'regarding the affairs of government and the official acts of ... public employees....' *Id.* at 246 (quoting MCL 15.231(2)). Because the emails were never used "in the performance of an official function," they remained outside the scope of FOIA notwithstanding that the board of education possessed the documents. *See also Kestenbaum v Michigan State Univ*, 97 Mich App 5, 23-24, 294 NW2d 228 (1980), *aff'd*, 414 Mich 510 (1982) ("FOIA provides for freedom of information, not freedom to acquire valuable technological data which was developed at public expense, nor highly personal and sensitive information through records maintained by the University"); *Hopkins v Duncan Twp*, 294 Mich App 401, 417; 812 NW2d 27 (2011) ("individual notes taken by a decision-maker on a governmental issue are only a public record when the notes are taken in furtherance of an official function"); *US Dep't of Justice v Tax Analysts*, 492 US 136, 145-46 (1989) ("the term "agency records" is not so broad as to include personal materials in an employee's possession, even though the materials may be physically located at the agency"). The same result applies here.

Moreover, as noted above, courts have confirmed that mere possession of a document by a public body is insufficient to make it a "public record." *Detroit News* v *City of Detroit*, 204 Mich App 720, 724-25; 516 NW2d 151 (1994). "Rather, it is ownership, use, possession, or retention in the performance of an official function that is determinative." *Id.* at 724. *See also Hopkins*, 294 Mich App at 409–10 ("Mere possession of a record by a public body does not, however, render it a public record; a record must be used in the performance of an official function to be a public record.").

Federal courts applying the federal FOIA have reached similar results.[5] The federal FOIA only reaches those documents the agency controls at the time of the request. The United States Supreme Court has held that control means "the materials have come into the agency's possession ***in the legitimate conduct of its official duties.***" *Tax Analysts*, 492 US at 144-45 (emphasis added). Determining whether an agency has "control" involves the application of a four factor test:

> (1) the intent of the document's creator to retain or relinquish control over the records; (2) the ability of the agency to use and dispose of the record as it sees fit; (3) ***the extent to which agency personnel have read or relied upon the document***; and (4) the degree to which the document was integrated into the agency's record system or files.

Judicial Watch v Federal Housing Finance Agency, 646 F3d 924, 926-27 (D.C. Cir. 2011). Oftentimes, courts conclude that "use is the decisive factor." *Consumer Fed'n of Am. v. Dep't of Agric.*, 455 F.3d 283, 288 (D.C. Cir. 2006). Here, although the Closed Tanton Papers are described generically on Bentley's website, they cannot "used and disposed," and their contents have ***never*** been relied upon. Moreover, although Dr. Tanton might have relinquished physical control of the documents, by the terms of the charitable gift agreement he has not yet provided the University with the right to control those records as it sees fit. *Judicial Watch*, 646 F3d at 927 (rejecting argument that the federal entity controls a document merely because it holds title to it; "out cases have never suggested that ownership means control").

Other federal courts, even while declining to apply the four-factor test described in *Judicial Watch*, have rejected attempts to obtain records stored with the National Archives, an

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[5] Michigan courts "look to federal courts for guidance in deciphering the various sections and attendant judicial interpretations, since the federal FOIA, 5 USC §552, is so similar to the Michigan FOIA." *Hoffman v Bay City Sch Dist*, 137 Mich App 333, 337; 357 NW2d 686 (1984). "Thus, a federal court decision on whether an item is an 'agency record' under the federal FOIA is persuasive in evaluating whether a record is a 'public record' under the Michigan FOIA." *Id.*

appropriate analogue to the Bentley Historical Library. In *Cause of Action v Nat'l Archives & Records Admin*, 753 F3d 210 (DC Cir 2014), the requestor sought copies of records that were prepared by the Financial Crisis Inquiry Commission, a legislative branch agency that was created to investigate the causes of the financial crisis. Although the Commission was not subject to FOIA, the requestor argued that the documents became "agency records" when they were transferred to the National Archives. The D.C. Circuit noted that, as applied to the Archives, the four-factor test was "divorced from FOIA's key objective—revealing to the public how federal agencies operate." *Id.* at 215. It explained that the Archives review and integration of records "do[es] not suddenly convert the records ... into 'agency records' able to expose the operations of the Archives 'to the light of public scrutiny.'" *Id.* (citing *Dep't of Air Force v Rose*, 425 US 353, 372 (1976)). Instead, the court noted that although the Archives controlled the records, its control consisted of "cataloguing, storing, and preserving, not unlike a 'warehouse.'" *Id.* at 216. Ultimately, as a matter of statutory interpretation and congressional intent, the court concluded that the documents were not "agency records" merely because they were deposited with the archives. *Id.*

Similarly here, although Bentley nominally possesses the documents, it is acting as a mere warehouse. The documents are locked away and "are not available to the university community or the public at this time," (Compl Ex 9), somewhat akin to being stored in a time capsule, or even a locked backpack left in a reading room. Unlike other University library records, the Closed Tanton Records are not digitized or searchable. The University might physically possess the documents, but it does not have the ***right*** to access the documents. In other words, while it may be true that the documents are physically within the Bentley building, they are only maintained pursuant to the charitable gift agreement. Consequently, they are not

"public records" subject to FOIA. *See Katz v National Archives*, 862 F Supp 476, 482-83 (DDC 1994) (photographs from President Kennedy's autopsy, which were donated to the National Archives pursuant to a deed of gift by the executors of the President's estate, were not "agency records" because the Archives "does not have the requisite control over them because of the Deed of Gift," which contained restrictions on access), *aff'd*, 68 F3d 1438 (DC Cir 1995).

Although Plaintiff contends that the documents should be produced because they relate to the ongoing debate regarding this county's immigration policy, that documents relate to a current event is insufficient to transform a private document in a public record. FOIA does not provide *carte blanche* access to records simply because those records relate to a trending topic. Moreover, Plaintiff's belief that the records might shed light on the influence that certain private organizations might play in shaping the country's immigration policy, (Compl, ¶13), does not justify disclosure. *Judicial Watch v Federal Housing Finance Agency*, 646 F3d 924 (DC Cir 2011). In *Judicial Watch*, the court rejected the requestor's attempt under the federal FOIA to obtain information about how much money Fannie Mae and Freddie Mac gave to politicians leading up to the recent financial crisis. Affirming the denial of the request, the court explained that "satisfying curiosity about the internal decisions of private companies is not the aim of FOIA, and there is no question that disclosure of the requested records would reveal nothing about decisionmaking at the [Federal Housing Finance Authority]," the federal agency which possessed the private records. *Id.* at 928. Because the agency did not create or reference the documents while performing "official duties," they were outside the scope of FOIA. *Id.*

Analogously, although Plaintiff is curious as to how the Federation for American Immigration Reform ("FAIR") has shaped and affected US immigration policy, his curiosity does not turn private documents into public records. The documents will not reveal anything

about Bentley's functions, or even the functions of the University. "The public cannot learn anything about [Bentley's] decisionmaking from a document the agency neither created nor consulted, and requiring disclosure under these circumstances would do nothing to further FOIA's purpose of 'open[ing] agency action to the light of public scrutiny.'" *Judicial Watch*, 646 F3d at 927 (quoting *Rose*, 425 US at 372). In other words, FOIA's "purpose ... is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct." *Mager v Dep't of State Police*, 460 Mich 134, 148; 595 NW2d 142 (1999) (quotations omitted). *See also Kocher*, 241 Mich App at 382-83 ("Plaintiff's request for information concerning private citizens is unrelated to how well defendant is complying with its statutory functions").

Accordingly, the Closed Tanton Papers are not "public records" and are not subject to disclosure under FOIA.

E. Ordering the Production of the Closed Tanton Papers Would Frustrate the Purposes of FOIA and the University's Mission

As noted above, the purpose of FOIA is to provide individuals with "full and complete information regarding the affairs of government and the official acts of those who represent them." Even if Plaintiff were correct (he is not) that the Closed Tanton Papers somehow relate to the "affairs of government," ordering their production in this case would inhibit the donation of private papers to public institutions, thereby frustrating the pro-disclosure nature of the statute.

Dr. Tanton donated his papers pursuant to a charitable gift agreement, with the understanding that certain papers would remain sealed for 25 years. He was not obligated to donate the documents to Bentley or any public institution. He could have easily donated them to a private institution, which would not be subject to FOIA and could deny access to anyone. In the end, Dr. Tanton donated the records to Bentley precisely because the University agreed that

certain documents would remain sealed for the specified period, preventing access by anyone – University student, researcher or public citizen. Absent Bentley's agreement that the documents would remain sealed, Dr. Tanton likely would not have donated the documents to the University where, after an agreed upon period of time, they would be open to the public.

Ordering Bentley to produce the sealed records in this case would likely dissuade other similarly situated individuals from donating private papers of historical significance to public institutions. Such documents would instead either be donated to private institutions completely outside the reach of FOIA or destroyed. The University would be hindered from fulfilling its mission to "serve the people of Michigan and the world through preeminence in creating, communicating, ***preserving*** and applying knowledge, art and academic values...."[6] At the same time, Bentley's efforts to "collect[], preserv[e], and mak[e] available" historical records would be undermined.

The Closed Tanton Papers are not closed in perpetuity. Instead, they are merely restricted from public access for 25 years, a practice that is common when others (e.g., legislators or judges) donate private papers.[7] A "delayed" public record that is preserved is better than a destroyed or secret private record of historical significance. Accordingly, requiring access to the Closed Tanton Papers would frustrate the purposes of FOIA and the University's mission.

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[6] (https://president.umich.edu/about/mission/).

[7] For example, Justice William Brennan's papers maintained by the Library of Congress contain access restrictions (http://findingaids.loc.gov/db/search/xq/searchMfer02.xq?_id=loc.mss.eadmss.ms002010&_faSection=overview&_faSubsection=did&_dmdid=). And Justice Scalia's family recently donated his private papers to the (private) Harvard Law School, which "will be made available for research on a schedule agreed upon by the Scalia family and the Harvard Law School Library." (https://today.law.harvard.edu/scalia-family-donates-late-justices-papers-harvard-law-library/).

F. Alternatively, The Closed Tanton Papers are Exempt from Disclosure

The University's denial of Plaintiff's administrative appeal, in addition to stating that the Closed Tanton Papers fell outside the definition of "public records," concluded that disclosure would constitute an unwarranted invasion of the donor's privacy. (Compl Ex 9). Accordingly, the Court should dismiss Plaintiff's Complaint because the University of Michigan appropriately determined that Plaintiff's request for the Closed Tanton Papers were exempt under FOIA's privacy exemption.[8]

MCL 15.243(1)(a) exempts from FOIA disclosure "[i]nformation of a personal nature if public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy." This exemption "has two prongs that the information sought to be withheld from disclosure must satisfy. First, the information must be 'of a personal nature.' Second, it must be the case that the public disclosure of that information 'would constitute a clearly unwarranted invasion of an individual's privacy ....'" *Mich Fed of Teachers v Univ of Michigan*, 481 Mich 657, 675; 753 NW2d 28 (2008). "Information of a personal nature" includes "private or confidential information relating to a person" as well as "embarrassing or intimate details." *Id.* at 676. To determine whether disclosure would be "a clearly unwarranted invasion of an individual's privacy," the court "must balance the public interest in disclosure against the interest [the Legislature] intended the exemption to protect." *Mager*, 460 Mich at 145 (quotation marks and citation omitted). During this balancing analysis, "the only relevant public interest in disclosure ... is the extent to which disclosure would serve the core purpose of the FOIA, which

[8] Even if the appeal denial had not raised the privacy argument, the University is permitted to raise additional arguments not previously presented at the administrative level. *Bitterman v Vill of Oakley*, 309 Mich App 53, 61; 868 NW2d 642 (2015) ("a public body may assert for the first time in the circuit court defenses not originally raised at the administrative level") (citations omitted).

is contributing significantly to public understanding of the operations or activities of the government." *Id.* (quotation marks, citations, and emphasis omitted).

In this case, Plaintiff cannot demonstrate that the public interest in disclosure of the Closed Tanton Papers outweighs Mr. Tanton's privacy rights and the right to control when and under what circumstances his private communications may be subject to public scrutiny. The Closed Tanton Papers contain the personal and confidential communications and writings of Mr. Tanton, including the intimate details of his expression of his personal beliefs regarding immigration policy. Mr. Tanton has taken proper legal steps to protect against disclosure by (a) not previously publishing the content of his private papers; and (b) entering into a contract with the University under which the University agreed not to disclose the papers for a certain period of time. Disclosure is unwarranted because it would breach the donor's gift agreement and understanding that certain papers would remain private.

What is more, Mr. Tanton is a private citizen and has never been employed by the University. Likewise, as noted above, the University has not used the Closed Tanton Records in the performance of any governmental function. As such, Plaintiff cannot credibly argue that the disclosure of the Closed Tanton Papers will contribute "significantly to public understanding of the operations or activities of the government." *Mager*, 460 Mich at 145. "As the U.S. Supreme Court explained in [*Dep't of Justice v Reporters Committee for Freedom of the of the Press*, 489 US 749 (1989], fulfilling a request for information on private citizens—a request entirely unrelated to any inquiry regarding the inner working of government, or how well the [the government] is fulfilling its statutory functions—would be an unwarranted invasion of the privacy of those citizens." *Mager*, 460 Mich at 146.

IV. Conclusion

For the foregoing reasons, the University of Michigan requests that the Court dismiss Plaintiff's Complaint, in its entirety, with prejudice.

Respectfully submitted,

MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.

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Dated: August 16, 2017

State of Michigan
In the Court of Claims

HASSAN M. AHMAD, ESQ,

Plaintiff,

Case No. 17-000170-MZ

v.

Hon. Stephen L. Borrello

THE UNIVERSITY OF MICHIGAN,

Defendant.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a copy of the foregoing **DATE 16/08/2017 - DEFENDANT'S MOTION TO DISMISS** and **BRIEF IN SUPPORT OF DEFENDANT'S DATE 16/08/2017 MOTION TO DISMISS** upon the following via U.S. Mail, postage prepaid and email, on August 16, 2017:

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Index of Exhibits

2017 WL 2562623
Only the Westlaw citation is currently available.
Court of Appeals of Michigan.

Terry Lee ELLISON, Plaintiff–Appellant,
v.
DEPARTMENT OF STATE, Defendant–Appellee.

No. 336759
|
June 13, 2017, 9:00 a.m.

Synopsis

Background: Requestor brought action under the Freedom of Information Act (FOIA) against Department of State, seeking an ordering compelling disclosure of information related to vehicle registrants that Department notified about inability to verify proof of insurance at renewal and paper copies of the letters Department sent to vehicle registrants. The Court of Claims, No. 16-000183-MZ, granted summary disposition to Department. Requestor appealed.

Holdings: The Court of Appeals, O'Connell, J., held that:

[1] insurance database maintained by Department, which contained names, addresses, vehicle ID numbers, registration, and insurance audit information for vehicle registrants, was a "writing," and thus, was public record subject to disclosure under FOIA, and

[2] fee provision of Michigan Vehicle Code's (MVC) commercial lookup service, rather than fee provision of FOIA, applied to request for information related to vehicle registrants.

Affirmed.

West Headnotes (15)

[1] **Appeal and Error**
Cases Triable in Appellate Court

The Court of Appeals reviews de novo the trial court's decision on a motion for summary disposition. Mich. Ct. R. 2.116(I)(1).

Cases that cite this headnote

[2] **Judgment**
Existence or non-existence of fact issue

A genuine issue of material fact exists on a motion for summary disposition if, when viewing the record in the light most favorable to the nonmoving party, reasonable minds could differ on the issue. Mich. Ct. R. 2.116(I)(1).

Cases that cite this headnote

[3] **Appeal and Error**
Cases Triable in Appellate Court

The Court of Appeals reviews de novo issues of statutory interpretation.

Cases that cite this headnote

[4] **Statutes**
Language and intent, will, purpose, or policy

The goal of statutory interpretation is to discern the Legislature's intent from the words expressed in the statute.

Cases that cite this headnote

[5] **Statutes**
Plain language;plain, ordinary, common, or literal meaning

If the language of a statute is clear and unambiguous, the plain meaning of the statute reflects the legislative intent and judicial construction is not permitted.

Cases that cite this headnote

[6] **Records**
Matters Subject to Disclosure; Exemptions

Exhibit No. 1

Freedom of Information Act's (FOIA) specific provisions generally require the full disclosure of public records in the possession of a public body. Mich. Comp. Laws Ann. § 15.231.

Cases that cite this headnote

[7] **Records**
⇐ Matters Subject to Disclosure; Exemptions

For the purposes of the Freedom of Information Act (FOIA), "writings," as used to define the term public record, include electronic copies and computer tapes. Mich. Comp. Laws Ann. §§ 15.232(e), 15.232(h).

Cases that cite this headnote

[8] **Records**
⇐ Matters Subject to Disclosure; Exemptions

If a writing exists in an electronic format, the plaintiff is entitled to an electronic copy under the Freedom of Information Act (FOIA). Mich. Comp. Laws Ann. §§ 15.232(e), 15.232(h), 15.234(1)(c).

Cases that cite this headnote

[9] **Records**
⇐ Matters Subject to Disclosure; Exemptions

Insurance database maintained by Department of State, which contained names, addresses, vehicle ID numbers, registration, and insurance audit information for vehicle registrants, was a "writing," and thus, was public record subject to disclosure under Freedom of Information Act (FOIA); database was information stored in computer that Department used to perform official function, and it was not necessary for Department to generate report from the database. Mich. Comp. Laws Ann. §§ 15.232(e), 15.232(h).

Cases that cite this headnote

[10] **Records**
⇐ In general;request and compliance

A Freedom of Information Act (FOIA) request need only be descriptive enough that a defendant can find the records containing the information that the plaintiff seeks. Mich. Comp. Laws Ann. § 15.231.

Cases that cite this headnote

[11] **Records**
⇐ In general;request and compliance

When a plaintiff does not ask the defendant to create a new record, the fact that the defendant had no obligation to create a record says nothing about its obligation to satisfy plaintiff's request in some other manner under the Freedom of Information Act (FOIA). Mich. Comp. Laws Ann. § 15.233(5).

Cases that cite this headnote

[12] **Appeal and Error**
⇐ Prejudice to Rights of Party as Ground of Review

A trial court's error is "harmless" if it is not decisive to the case's outcome.

Cases that cite this headnote

[13] **Records**
⇐ Costs and fees

Fee provision of Michigan Vehicle Code's (MVC) commercial lookup service, rather than fee provision of Freedom of Information Act (FOIA), applied to request under FOIA for information related to vehicle registrants that Department of State notified about inability to verify proof of insurance at renewal; Department maintained database with relevant information pursuant to requirements of MVC, requested records were prepared under MVC, which specifically provided amount of the fee, and MVC prohibited Department from providing requestor with database unless it charged requestor fee for each individual record that

the file contained. Mich. Comp. Laws Ann. §§ 15.234(1), 15.234(10), 257.208a, 257.208b(1), 257.208b(9).

Cases that cite this headnote

[14] **Statutes**
Conjunctive and disjunctive words

The word "or" is a disjunctive statutory term that allows a choice between alternatives.

Cases that cite this headnote

[15] **Statutes**
Mandatory or directory statutes

The statutory term "shall" is mandatory.

Cases that cite this headnote

Court of Claims, LC No. 16-000183-MZ

Before: Swartzle, P.J., and Saad and O'Connell, JJ.

Opinion

O'Connell, J.

*1 Plaintiff, Terry Lee Ellison, appeals by right the January 26, 2017 order of the Court of Claims granting summary disposition under MCR 2.116(I)(2) (opposing party entitled to judgment) to defendant, Michigan Department of State, on plaintiff's claims under the Freedom of Information Act (FOIA), MCL 15.231 *et seq.* The Court of Claims erred by concluding that a computerized database was not a public record, but because plaintiff did not pay the appropriate fee for the records he sought, we affirm.

I. FACTUAL BACKGROUND

Plaintiff's allegations included that on March 31, 2016, defendant notified plaintiff that it was canceling his license plate and registration because it was unable to verify his insurance. Plaintiff submitted appeal paperwork, but his license plate was forfeited. After calling defendant's insurance fraud unit and speaking with numerous workers, defendant reversed its forfeiture decision and reinstated plaintiff's license plate.

On July 6, 2016, plaintiff sent defendant a FOIA request that included two distinct requests. First, plaintiff requested "any and all" information related to the full name, address, vehicle plate or registration number, vehicle ID number, insurance audit date, date of most recent vehicle renewal, and fee category for all vehicle registrants that defendant notified about an inability to verify proof of insurance at renewal. Second, in the alternative, plaintiff requested that defendant provide paper copies of the letters it sent resulting from the same circumstances.

Defendant denied plaintiff's first request under MCL 15.233 and MCL 15.235(4)(b) on the basis that it did not possess a responsive record and was "not required to make a compilation, summary, report of information, or create a new public record." Defendant denied plaintiff's second request because he had not completed a record lookup request form and paid a fee for each record. At her deposition, defendant's FOIA coordinator Michelle Halm testified that she denied plaintiff's FOIA request because the computerized system did not provide an electronic output, there was no way to create an output, and defendant was not required to create one.

Joe Rodriguez testified at his deposition that he is the assistant administrator of defendant's Office of Customer Services. He was familiar with the insurance database, which included some of the information—such as registration, VIN numbers, and customer information —that plaintiff sought. Rodriguez testified that it was not possible to simply copy the database because it had a front end and a back end, and the front end was shared between all the users on the staff. However, it would be possible to copy the database's back-end tables onto a jump drive.

On August 2, 2016, plaintiff filed his complaint in this action, seeking an order compelling FOIA disclosure, a fine, punitive damages, and costs. Plaintiff alleged that defendant improperly denied his first FOIA request because it maintained an electronic database with the information he sought, and improperly denied his second FOIA request because he was entitled to the records through FOIA rather than through the Michigan Vehicle Code (MVC)[1] commercial lookup service. Plaintiff moved for summary disposition under MCR 2.116(C)

(10) (no genuine issue of material fact), asserting that defendant violated FOIA by requiring him to use the MVC service and by not providing a copy of its electronic database in response to his FOIA request.

*2 Defendant responded by moving for summary disposition under MCR 2.116(I)(2), arguing that plaintiff had requested personal information that was exempt from disclosure and that the records plaintiff sought did not exist, and defendant was not required to create a new record that would be responsive to plaintiff's request. Additionally, the MVC required defendant to charge a person a fee for each record contained in a computerized file, and plaintiff did not submit his request in the proper format because he failed to submit the proper fees.

The Court of Claims granted summary disposition to defendant on plaintiff's first request on the basis that the record did not exist in the form sought by plaintiff. It reasoned that the database contained "some or most of the information," but it was not a public record because "there was no routinely generated report containing this information." It additionally reasoned that defendant was not required to compile or summarize the database or create a new record.

Regarding plaintiff's second request, the Court of Claims refused to consider defendant's personal information exemption request because defendant did not cite the exemption when denying plaintiff's request, nor did defendant make any argument before the court on the balancing test employed in evaluating the exemption. However, the Court of Claims determined that defendant properly denied plaintiff's request because plaintiff had not met the statutory requirement to pay the statutory fee under the MVC.

II. STANDARDS OF REVIEW

[1] [2] This Court reviews de novo the trial court's decision on a motion for summary disposition. *Herald Co. v. Bay City*, 463 Mich. 111, 117, 614 N.W.2d 873 (2000). MCR 2.116(I)(1) provides that "[i]f the pleadings show that a party is entitled to judgment as a matter of law, or if the affidavits or other proofs show that there is no genuine issue of material fact, the court shall render judgment without delay." A genuine issue of material fact exists if, when viewing the record in the light most favorable to the nonmoving party, reasonable minds could differ on the issue. *Gorman v. American Honda Motor Co., Inc.*, 302 Mich.App. 113, 115, 839 N.W.2d 223 (2013).

[3] [4] [5] We also review de novo issues of statutory interpretation. *Herald*, 463 Mich. at 117, 614 N.W.2d 873. The goal of statutory interpretation is to discern the Legislature's intent from the words expressed in the statute. *Id.* "If the language of a statute is clear and unambiguous, the plain meaning of the statute reflects the legislative intent and judicial construction is not permitted." *Id.* at 117–118, 614 N.W.2d 873.

III. ANALYSIS

First, plaintiff argues that an insurance database itself is a public record and defendant improperly denied plaintiff's request because the database was responsive to his request. We conclude that there is a question of fact on whether defendant could simply copy the relevant database file or instead defendant would have to create or alter a record.

[6] FOIA broadly 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. Accordingly, "FOIA's specific provisions generally require the full disclosure of public records in the possession of a public body." *Herald*, 463 Mich. at 118, 614 N.W.2d 873.

[7] FOIA defines "public record" 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." MCL 15.232(e). FOIA defines "writing" as

> *3 handwriting, typewriting, printing, photostating, photographing, photocopying, and every other means of recording, and includes letters, words, pictures, sounds, or symbols, or combinations thereof, and papers, maps, magnetic or paper tapes, photographic films or prints, microfilm, microfiche, magnetic or

> punched cards, discs, drums, or other means of recording or retaining meaningful content. [MCL 15.232(h).]

For the purposes of FOIA, writings include "electronic copies and computer tapes." *City of Warren v. Detroit*, 261 Mich.App. 165, 172, 680 N.W.2d 57 (2004) (citations omitted).

[8] If a writing exists in an electronic format, the plaintiff is entitled to an electronic copy. *Farrell v. Detroit*, 209 Mich.App. 7, 14, 530 N.W.2d 105 (1995). See MCL 15.234(1)(c). However, subject to exceptions that do not apply in this case, FOIA "does not require a public body to make a compilation, summary, or report of information," MCL 15.233(4), and "does not require a public body to create a new public record ...." MCL 15.233(5).

In *Warren*, 261 Mich.App. at 173, 680 N.W.2d 57, this Court determined that a computer formula used to calculate water and sewer rates was a public record. In that case, the defendant argued that the formula did not exist in the form of a public record because it was not itself a document or computer disk. *Id.* at 172, 680 N.W.2d 57. This Court rejected the argument because the formula was information stored in a computer and was used during a computing process in the same way that entered data would be. *Id.* at 171, 680 N.W.2d 57. The Court further reasoned:

> We can discern no reason why the formula contained on the computer disk would be different than those types of electronic recordings already recognized as "writings" by this Court. To hold otherwise would allow public bodies to hide behind the exception by creating and maintaining public records within software and on computer disks only. [*Id.* at 173, 680 N.W.2d 57.]

[9] In this case, the database contained some of the information plaintiff sought, including the names, addresses, vehicle ID numbers, registration, and insurance audit information. It was not necessary for defendant to generate a report from the database for it to be a public record. The database itself was a writing because it was information stored in a computer, *Warren*, 261 Mich.App. at 172–173, 680 N.W.2d 57, that defendant used to perform an official function, MCL 15.232(e). The Court of Claims erred when it held that the database was not a public record.

Defendant responds that disclosing the information stored on the database would have required it to create a new record because the database did not contain *only* the information plaintiff sought. Summary disposition on these grounds would be improper because there is a question of fact regarding whether defendant could have copied the database without creating a new, more specifically responsive record.

[10] **[11]** A FOIA request need only be descriptive enough that a defendant can find the records containing the information that the plaintiff seeks. *Herald*, 463 Mich. at 121, 614 N.W.2d 873. When a plaintiff does not ask the defendant to create a new record, "the fact that the [defendant] had no obligation to create a record says nothing about its obligation to satisfy plaintiff's request in some other manner ...." *Id.* at 122, 614 N.W.2d 873. In this case, simply because defendant could have created a strictly responsive record does not mean that it could not have satisfied plaintiff's request by copying the back-end tables. Plaintiff requested "any" information that was included in its list. The database's tables contained much of the information plaintiff sought.

*4 Rodriguez's testimony about whether he could copy the tables containing the information plaintiff sought without needing to create a new record was self-contradictory. Rodriguez testified that he could not simply copy the entire database onto a jump drive. He testified that to put the entire database on a thumb drive, he "would have to change the programming ...." Rodriguez testified that he would have to program the database to give him *specific* output, like names and addresses.[2] But he also testified that he could copy the back-end tables onto a jump drive. The types of information plaintiff sought were stored as fields in the database tables. Rodriguez's self-contradictory testimony created a question of fact regarding whether defendant could have provided plaintiff the information he sought by simply copying the database's back-end tables or whether defendant could not do so without creating a new compilation of the data.

[12] [13] However, this Court need not reverse or vacate a trial court's order unless doing so appears to this Court to be inconsistent with substantial justice. MCL 2.613(A). The trial court's error is harmless if it is not decisive to the case's outcome. See *Ypsilanti Fire Marshal v. Kircher (On Reconsideration)*, 273 Mich.App. 496, 529, 730 N.W.2d 481, vacated and remanded in part on other grounds 480 Mich. 910, 739 N.W.2d 622 (2007). We conclude that the Court of Claim's error does not require reversal because plaintiff did not submit the appropriate fees for the records he sought.

[14] The MVC provides that a person seeking records may proceed through either the MVC or FOIA:

> Records maintained under this act, other than those declared to be confidential by law or which are restricted by law from disclosure to the public, shall be available to the public in accordance with procedures prescribed in this act, the freedom of information act, ... or other applicable laws. [MCL 257.208a.]

The word "or" is a disjunctive term that allows a choice between alternatives. *Michigan v. McQueen*, 293 Mich.App. 644, 671, 811 N.W.2d 513 (2011). But while plaintiff is correct that he may proceed under FOIA or the MVC, this does not mean that FOIA's fee provision applies.

FOIA allows a public body to charge a fee to respond to a public record search. MCL 15.234(1). For records on "nonpaper physical media," this fee is "the actual and most reasonably economical cost of the computer discs, computer tapes, or other digital or similar media." MCL 15.234(1)(c). However, FOIA's fee provisions "do[ ] not apply to public records prepared under an act or statute specifically authorizing sale of those public records to the public, or if the amount of the fee for providing a copy of the public record is otherwise specifically provided by an act or statute." MCL 15.234(10).

In this case, defendant maintains the database pursuant to the requirements of the MVC. The MVC provides that records maintained under the act "shall be available to the public." MCL 257.208a. The database is therefore a public record maintained under the MVC. The MVC specifically provides that the Secretary of State may provide a commercial lookup service of records maintained under the MVC. MCL 257.208b(1). A fee shall be charged for each record looked up. *Id.* The fee is established annually by the Legislature or the Secretary of State. *Id.* Therefore, FOIA's fee does not apply because the records are prepared under an act that specifically authorizes sale of its records to the public, and the act specifically provides the amount of the fee.

[15] The fact that plaintiff is seeking a database rather than individual paper records is not determinative. The MVC expressly addresses this scenario:

> The secretary of state shall not provide an entire computerized central file or other file of records maintained under this act to a nongovernmental person or entity, unless the person or entity pays the prescribed fee for each individual record contained within the computerized file. [MCL 257.208b(9).]

*5 The term "shall" is mandatory. *Walters v. Nadell*, 481 Mich. 377, 383, 751 N.W.2d 431 (2008).

The database in this case is a computerized central file that contains records for numerous individual persons. Accordingly, MCL 257.208b(9) prohibits defendant from providing plaintiff with the database unless defendant charges plaintiff a fee for each individual record that the file contains. Halm estimated that this fee would be an estimated $1.6 million in this case, and it is undisputed that plaintiff has not paid this amount. Accordingly, the Court of Claims correctly concluded that defendant had grounds to deny plaintiff's FOIA request because plaintiff had not paid the statutorily required fee.

We affirm.

All Citations

--- N.W.2d ----, 2017 WL 2562623

Footnotes

1 MCL 257.1 *et seq.*

2 Such a query would necessarily compile and create a report of the information, which the FOIA does not require defendant to do. See MCL 15.233(4). See *Warren*, 261 Mich.App. at 173, 680 N.W.2d 57.

2001 WL 738398
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

Mark PORTER, Plaintiff-Appellant,
v.
Geoffrey FIEGER and Fieger, Fieger & Schwartz, P.C., Defendants-Appellees.

No. 221349.
|
June 29, 2001.

Before: SAWYER, P.J., and GRIFFIN and O'CONNELL, JJ.

Opinion

PER CURIAM.

*1 Plaintiff appeals as of right from the trial court's opinion and order granting defendants' motion for summary disposition in this action for defamation and intentional infliction of emotional distress. We affirm.

Plaintiff, a police officer who shot and killed an unarmed person while on duty, alleged that defendant Geoffrey Fieger publicly, falsely, and maliciously referred to plaintiff as a "murderer" and an "executioner." Plaintiff brought this action against Fieger, as well as his law firm, defendant Fieger, Fieger & Schwartz, P.C. The trial court granted defendants' motion for summary disposition pursuant to MCR 2.116(C)(8), holding that plaintiff was a public official and that plaintiff was unable to prove that the statements were made with actual malice. The trial court also dismissed plaintiff's claim of intentional infliction of emotional distress because plaintiff failed to offer evidence that he had experienced emotional suffering.

We review de novo the trial court's decision whether to grant a motion for summary disposition under MCR 2.116(C)(8). *Beaty v. Hertzberg & Golden, PC,* 456 Mich. 247, 253; 571 NW2d 716 (1997). Summary disposition is proper where, taking all factual allegations in the complaint as true, the claim "is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Simko v. Blake,* 448 Mich. 648, 654; 532 NW2d 842 (1995). We also bear in mind that, because defamation actions necessarily implicate First Amendment freedoms of speech and expression, summary disposition is an essential tool in protecting against forbidden intrusions into those fields. *Ireland v. Edwards,* 230 Mich.App 607, 613; 584 NW2d 632 (1998). We hold that the trial court did not err by granting defendants' motion for summary disposition.

Not all defamatory statements are actionable. *Id.* at 614. Where a statement, although factual and provably false, "could not be interpreted by a reasonable listener or reader as stating actual facts about the plaintiff [,]" the statement is protected by the First Amendment. *Id.* at 617. Thus, a statement that is simply "rhetorical hyperbole" is not actionable. *Id.* at 618-619; *Kevorkian v. American Medical Ass'n,* 237 Mich.App 1, 7; 602 NW2d 233 (1999). For example, in *Ireland, supra* at 610-611, the defendant, an attorney, made several statements to the media during a child-custody battle between her client and the plaintiff. Some of the defendant's statements essentially claimed that the plaintiff never spent any time with the child, and this Court held that these statements were not actionable, but amounted to "rhetorical hyperbole." *Id.* at 618-619. The statements "were obviously expressions of disapproval regarding the amount of time plaintiff spent with her child, and, taken literally, they are patently false. However, any reasonable person hearing these remarks in context would have clearly understood what was intended." *Id.* at 619.

*2 Similarly, in *Kevorkian, supra* at 4-6, the defendants made statements to the effect that the plaintiff, a well-known proponent of assisted suicide, was a killer and a murderer. This Court, noting that its decision was strictly limited to the facts of the case, held that the trial court should have granted the defendants' motion for summary disposition. *Id.* at 10, 14. The panel set forth many reasons for its decision, one of them being that the statements amounted to "nonactionable rhetorical hyperbole" because they could not be understood as stating actual facts about the plaintiff. *Id.* at 13. The panel noted that the plaintiff's actions in assisting persons with suicide "can be described as murder or mercy, and any reasonable person could understand that both *or neither* could be taken as stating actual facts about [the] plaintiff."

Id. at 7. See also *Greenbelt Cooperative Publishing Ass'n, Inc v Bresler,* 398 U.S. 6, 14; 90 S Ct 1537; 26 L.Ed.2d 6 (1970) (holding that a reference to the plaintiff's negotiating position as "blackmail" was not actionable, in that it "was no more than rhetorical hyperbole, a vigorous epithet used by those who considered [the plaintiff's] negotiating position extremely unreasonable"); *Hodgins v. The Times Herald Co,* 169 Mich.App 245, 253-254; 425 NW2d 522 (1988) (holding that, although direct accusations of criminal conduct are not protected as opinion, "[e]xaggerated language used to express opinion, such as 'blackmailer,' 'traitor' or 'crook,' does not become actionable merely because it could be taken out of context as accusing someone of a crime").

In this case, plaintiff was a police officer who shot and killed an unarmed citizen. Defendant Fieger's references to plaintiff as a "murderer" and an "executioner" would be understood by any reasonable listener as rhetorical hyperbole, designed to express the opinion that the shooing was unjustified. Thus, Fieger's statements could not be understood as stating actual facts about plaintiff. Just as assisting someone to commit suicide may be viewed as mercy or murder, a police shooting of an unarmed person may be viewed as protecting society or murdering a citizen. Fieger's statements, although certainly containing vigorous epithets, simply conveyed disapproval of the shooting; therefore, they do not subject him to liability for defamation. The freedom of expression guaranteed by the First Amendment protects a statement that cannot be reasonably interpreted as stating actual facts about the plaintiff. *Ireland, supra* at 614.

The question whether a statement is an actionable defamatory statement may be decided by a court as a matter of law. *Id.* at 619. Therefore, the trial court appropriately granted defendants' motion for summary disposition. Although the trial court did not rely on this reasoning, this Court will nonetheless affirm the correct result. *Messenger v. Ingham Co Prosecutor,* 232 Mich.App 633, 643; 591 NW2d 393 (1998). Plaintiff's allegations did not show that defendants made an actionably false and defamatory statement concerning plaintiff. Thus, plaintiff failed to satisfy the elements of a defamation claim, and summary disposition was appropriate under MCR 2.116(C)(8).

*3 We also note an alternative ground for granting summary disposition. Plaintiff, a police officer, was a public official for purposes of defamatory statements relating to the performance of his official duties. Thus, plaintiff was required to prove that the statements were made with actual malice. *Garvelink v. The Detroit News,* 206 Mich.App 604, 608; 522 NW2d 883 (1994). "Actual malice" means that a statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times Co v. Sullivan,* 376 U.S. 254, 279-280; 84 S Ct 710; 11 L.Ed.2d 686 (1964). In this case, the circumstances surrounding the shooting were reasonably in dispute. Also, beyond mere conclusory allegations, plaintiff fails to plead actual malice. Mere statements of the pleader's conclusions will not survive a motion for summary disposition. *ETT Ambulance Service Corp v. Rockford Ambulance,* 204 Mich.App 392, 395; 516 NW2d 498 (1994). Plaintiff fails to specifically plead factual allegations that defendant Fieger knew that his statements were false or entertained serious doubts concerning the truth of his statements. *Ireland, supra* at 622. Plaintiff claims that summary disposition was premature because no discovery had taken place. However, because the motion was brought under MCR 2.116(C)(8), the court only looked to the pleadings. No factual development would justify recovery. Plaintiff simply failed to state a claim on which relief could be granted.

Plaintiff argues that he was not a public official, because he was merely a street-level policeman without control over the affairs of government. However, we need not decide this issue because, in any event, summary disposition of plaintiff's defamation claim was appropriate because defendant Fieger's statements were nonactionable rhetorical hyperbole. Because plaintiff's claim of intentional infliction of emotional distress is based on the same statements, summary disposition of that claim was also appropriate. *Ireland, supra* at 624-625. First Amendment protections are not exclusive to defamation claims. *Collins v. Detroit Free Press, Inc,* 244 Mich.App 27, 36; 624 NW2d 761 (2001).

Affirmed.

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