

**STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF HURON**

THOMAS LAMBERT and
MICHIGAN OPEN CARRY, INC,
Plaintiffs,

Case No.: 16-105457-CZ
Honorable Gerald R. Prill

v.

FIRST AMENDED COMPLAINT

CITY OF HARBOR BEACH,
Defendant

OUTSIDE LEGAL COUNSEL PLC
PHILIP L. ELLISON (P74117)
Attorney for Plaintiffs
PO Box 107
Hemlock, MI 48626
(989) 642-0055
(888) 398-7003 - fax
pellison@olcplc.com

AUDREY J. FORBUSH (P41744)
PLUNKETT COONEY
Attorney for Defendant
Plaza One Financial Center
111 E. Court Street- Suite 18
Flint, MI 48502
(810) 342-7014
(810) 232-3159- fax
aforbush@plunkettcooney.com

FIRST AMENDED COMPLAINT

NOW COMES Plaintiffs THOMAS LAMBERT and MICHIGAN OPEN CARRY, INC, by and through counsel, and complains as follows:

PARTIES

1. Plaintiff THOMAS LAMBERT is a resident of the State of Michigan and President of Michigan Open Carry, Inc.
2. Plaintiff MICHIGAN OPEN CARRY, INC is a public advocacy group promoting the lawful open carry of holstered handguns.
3. Defendant CITY OF HARBOR BEACH is a municipal corporation formed under the laws of the State of Michigan located in Huron County, State of Michigan.
4. Defendant CITY OF HARBOR BEACH is a public body as that term is defined by Michigan's *Freedom of Information Act*, MCL 15.232(d)(iii).

JURISDICTION

5. This Court has jurisdiction by statute pursuant to MCL 15.240(1)(b) and MCL 15.240a(1)(b).

6. Venue is proper in this case pursuant to MCL 15.240(4) and MCL 15.240a(4) as an office of the public body is located within this county.

7. This Court must advance this matter expeditiously as MCL 15.240(5) and MCL 15.240a(5) requires that “[a]n action commenced under this section... shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.”

GENERAL ALLEGATIONS

8. On October 3, 2016, Plaintiff THOMAS LAMBERT and/or Plaintiff MICHIGAN OPEN CARRY, INC made *Freedom of Information Act* requests seeking the following records from Defendant CITY OF HARBOR BEACH:

- a. Any and all records of discussion from, to, or between the Harbor Beach City Council and its members, and the City Director, in relation to resolution# 2016-92.
- b. Any and all records of discussion from, to, or between the Harbor Beach City Council and its members, and the City Director, from August 1st, 2016 through today October 3rd, 2016, in relation to the City's policy on firearms carried by employees.
- c. Any and all documentation obtained by or provided by the Harbor Beach City Council or one of its members, or the City Director, relating to how the City's policy on firearms carried by employees may affect the City's insurance rates.

[hereinafter the “Oct 3 FOIA Requests”]

9. The Oct 3 FOIA Requests specifically stated that if Defendant CITY OF HARBOR BEACH denies “any or all of this request, please cite each specific exemption you feel justifies the refusal and notify me of the appeal procedures available.”

10. In the first 250 words of the body of message, the Oct 3 FOIA Requests specifically used the phrase “freedom of information” and “FOIA” as required by statute.

11. A fair and accurate copy of the Oct 3 FOIA Requests tendered is part of and attached as **Exhibit A**.

12. On October 7, 2016, Defendant CITY OF HARBOR BEACH, by its City Director, allegedly responded to the Oct 3 FOIA Requests stating as follows:

This e-mail is in response to your request (sic) for information pursuant to the Michigan Freedom of Information Act.

I have determined that it will take me a minimum of 3 hours and City Clerk Leslie Woycehoski a minimum of 2 hours to collect the information you have requested.

The City Director's compensation, including benefits, is \$55.09 per hour. The Clerk's total compensation, including benefits, is \$43.30 per hour. The total cost to produce the information is \$251.87. You will need to have payment into City Hall prior to the information being released in the form of cash or money order.

I checked with Mayor Booms (who is also the FOIA Officer¹ for the City) he indicated that the City will not waive the cost for the FOIA request.

Please let me know how you want to proceed. The Clerk and I have blocked off time in our schedules to produce the Information you requested on Monday, so we can meet your demand of Tuesday, October 11th.

[hereinafter the "Wrubel Response"]

13. The Wrubel Response was not issued by the FOIA Coordinator of Defendant CITY OF HARBOR BEACH.

14. The Wrubel Response did not expressly grant the Oct 3 FOIA Requests.

15. By not expressly granting the requests, the Wrubel Response is deemed denials pursuant to MCL 15.235(3).

16. Notwithstanding the failure to grant or expressly deny the Oct 3 FOIA Requests, the Wrubel Response improperly and unlawfully demanded fees of \$251.87 in violation of the costs provisions of Michigan *Freedom of Information Act*.

17. On October 17, 2016, an appeal to the City Council of Defendant CITY OF HARBOR BEACH was filed and has gone unanswered and undecided.

COUNT I FAILURE TO GRANT THREE SEPARATE FOIA REQUESTS

18. The previous allegations are re-alleged within this Court as if pled word for word herein.

19. By the Wrubel Response, Defendant CITY OF HARBOR BEACH failed to grant the Oct 3 FOIA Requests.

20. By operation of law, the failure of Defendant CITY OF HARBOR BEACH to respond to the Oct 3 FOIA Requests pursuant four options outlined by subsection (2) of MCL 15.235 automatically renders the Oct 3 FOIA Requests individually denied, MCL 15.235(3).

21. To date, Defendant CITY OF HARBOR BEACH has not produced any records and has not granted any of the three Oct 3 FOIA Requests.

¹ It is unclear why Mayor Bloom is the FOIA "Officer" when no such position exists under the statute.

22. Defendant CITY OF HARBOR BEACH has failed to grant any of the requests to produce responsive record(s) which Plaintiff THOMAS LAMBERT and/or Plaintiff MICHIGAN OPEN CARRY, INC is entitled to receive under Michigan's *Freedom of Information Act*, to which the law deems the inaction of Defendant CITY OF HARBOR BEACH as denials to the various requests.

23. Plaintiff THOMAS LAMBERT and/or Plaintiff MICHIGAN OPEN CARRY, INC has/have incurred and will continue to incur attorney fees, costs, and disbursements in seeking the rightful fulfillment of the requests under Michigan's *Freedom of Information Act*.

24. Because there is no debatable justification for denying the requests for records pursuant to the Oct 3 FOIA Requests, Defendant CITY OF HARBOR BEACH arbitrarily and capriciously violated this act by refusing to provide copies of public records.

25. The Court is requested to award all available punitive damages to Plaintiff THOMAS LAMBERT and/or Plaintiff MICHIGAN OPEN CARRY, INC and impose all civil fines against Defendant CITY OF HARBOR BEACH as authorized by Michigan's *Freedom of Information Act*.

COUNT II
FOIA FEE VIOLATION – MCL 15.234(3)

26. The previous allegations are re-alleged within this Court as if pled word for word herein.

27. Under Michigan's *Freedom of Information Act*, a fee for actual mailing costs, and to the actual incremental cost of duplication or publication including labor, the cost of search, examination, review, and the deletion and separation of exempt from nonexempt information "shall not be charged for the cost of search, examination, review, and the deletion and separation of exempt from nonexempt information... unless failure to charge a fee would result in *unreasonably high costs to the public body because of the nature of the request in the particular instance, and the public body specifically identifies the nature of these unreasonably high costs.*"

28. Defendant CITY OF HARBOR BEACH is not entitled to charge a fee for search, examination, review, and the deletion and separation of exempt from nonexempt information as to each of the individual requests because:

- a. there is no "unreasonably high costs" to Defendant CITY OF HARBOR BEACH because of the nature of the separate requests in the particular instance; and
- b. Defendant CITY OF HARBOR BEACH failed to specifically identify the nature of these unreasonably high costs by the Wrubel Response.

29. Defendant CITY OF HARBOR BEACH asserting any fee of any of the individual requests made by the Oct 3 FOIA Requests violates Michigan's *Freedom of Information Act*.

30. Plaintiff THOMAS LAMBERT and/or Plaintiff MICHIGAN OPEN CARRY, INC has/have incurred and will continue to incur attorney fees, costs, and disbursements in seeking the rightful fulfillment of the various requests under Michigan's *Freedom of Information Act*.

31. Because there is no debatable justification for denying the requests for records pursuant to the Oct 3 FOIA Requests, Defendant CITY OF HARBOR BEACH arbitrarily and capriciously violated this act by refusing to provide copies of public records.

32. The Court is requested to award all available punitive damages to Plaintiff THOMAS LAMBERT and/or Plaintiff MICHIGAN OPEN CARRY, INC and impose all civil fines against Defendant CITY OF HARBOR BEACH as authorized by Michigan's *Freedom of Information Act*.

**COUNT III
FOIA FEE VIOLATION – MCL 15.234**

33. The previous allegations are re-alleged within this Court as if pled word for word herein.

34. The actions of Defendant CITY OF HARBOR BEACH in demanding a total fee of \$251.87 for three FOIA requests was in excess of the allowable fee and was illegal under Michigan's *Freedom of Information Act* because, by the Wrubel Response, Defendant CITY OF HARBOR BEACH —

- a. did not calculate the fee using the hourly wage of its lowest-paid employee capable of searching for, locating, and examining the public records in the particular instance regardless of whether that person is available or who actually performs the labor in violation of MCL 15.234(1)(b);
- b. calculated and utilized an hourly fee which is exceeded an amount equal to 6 times the state minimum hourly wage rate determined under section 4 of the workforce opportunity wage act, 2014 PA 138, MCL 408.411 to 408.424 in violation of MCL 15.234(1)(b);
- c. on information and belief, charged more than the actual cost of benefits provided to city employees in calculating the hourly rates charged in response to the Oct 3 FOIA Requests in violation of MCL 15.234(2);
- d. demanded a deposit exceeding 1/2 of the total estimated fee in violation of MCL 15.234(8); and

- e. failed to reduce the charges for labor costs as the required penalty pursuant to MCL 15.234(9)(a).

35. The City Council of Defendant CITY OF HARBOR BEACH, as the administrative appellate body, has neglected and/refused to act on the October 17, 2016 appeal and the same has gone unanswered and undecided.

36. Plaintiff THOMAS LAMBERT and/or Plaintiff MICHIGAN OPEN CARRY, INC has/have incurred and will continue to incur attorney fees, costs, and disbursements in seeking the rightful fulfillment of the requests under Michigan's *Freedom of Information Act*.

37. Because there is no debatable justification for denying the request for records pursuant to the Oct 3 FOIA Requests, Defendant CITY OF HARBOR BEACH arbitrarily and capriciously violated this act by refusing to provide copies of public records.

38. The Court is requested to award all available punitive damages to Plaintiff THOMAS LAMBERT and/or Plaintiff MICHIGAN OPEN CARRY, INC and impose all civil fines against Defendant CITY OF HARBOR BEACH as authorized by Michigan's *Freedom of Information Act*.

RELIEF REQUESTED

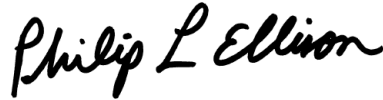
39. WHEREFORE, Plaintiff THOMAS LAMBERT and/or Plaintiff MICHIGAN OPEN CARRY, INC respectfully requests this Court to—

- a. Enter an order determining that Defendant CITY OF HARBOR BEACH failed to actually grant the Oct 3 FOIA Requests and as such the Wrubel Response is a denial by law pursuant to MCL 15.235(3) and/or by action of not producing the records;
- b. Determine that Defendant CITY OF HARBOR BEACH improperly and illegally demanded any fee when the cost for lack of "unreasonably high costs" to Defendant CITY OF HARBOR BEACH and because Defendant CITY OF HARBOR BEACH failed to specifically identify the nature of these unreasonably high costs by the Wrubel Response;
- c. Determine, in the alternative, that Defendant CITY OF HARBOR BEACH has improperly asserted cost purposely and intentionally designed to constructively deny access to the records sought pursuant to the Michigan's *Freedom of Information Act*;
- d. Determine the correct costs that that Defendant CITY OF HARBOR BEACH may actual charge, if any and including all required reductions, and enjoin the Defendant CITY OF HARBOR BEACH from acting in non-accordance with that costs determination;

- e. Award attorney fees, costs, and disbursements pursuant to MCL 15.240(6), MCL 15.240a(6), and all other court rules, statutes, and laws for each improperly actual or constructively denied request;
- f. Award all punitive damages pursuant to MCL 15.240(7), MCL 15.240a(7), and all other court rules, statutes, and laws for each improperly actual or constructively denied request;
- g. Impose the appropriate and applicable fines pursuant to MCL 15.240(7), MCL 15.240a(7), MCL 15.240b, and all other court rules, statutes, and laws for each improperly actual or constructively denied request; and
- h. Grant all other relief that is warranted and just.

Date: January 16, 2017

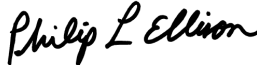
RESPECTFULLY SUBMITTED:



OUTSIDE LEGAL COUNSEL PLC
BY PHILIP L. ELLISON (P74117)
Attorney for Plaintiffs
PO Box 107 · Hemlock, MI 48626
(989) 642-0055
(888) 398-7003 - fax
pellison@olcplc.com

PROOF OF SERVICE
The undersigned certifies that a copy of the foregoing document(s) was served on parties or their attorney of record by 1.) emailing the same to the email addresses or record and 2.) mailing the same via US mail to their respective business address(es) as disclosed by the pleadings of record herein with postage fully prepaid, on the

16th day of January, 2017.



PHILIP L. ELLISON
Attorney at Law

**Electronic signature authorized by MCR 2.114(C)(3) and MCR 1.109(D)(1)-(2)



MOC
mail

Tom Lambert <tlambert@miopencarry.org>

Harbor Beach FOIA Request

Ron Wruble <rwruble@harborbeach.com>
To: Tom Lambert <tlambert@miopencarry.org>
Cc: Gary Booms <gary.s.booms@gmail.com>

Fri, Oct 7, 2016 at 1:44 PM

Mr. Lambert,

This e-mail is in response to your request for information pursuant to the Michigan Freedom of Information Act.

I have determined that it will take me a minimum of 3 hours and City Clerk Leslie Woycehoski a minimum of 2 hours to collect the information you have requested. The City Director's compensation, including benefits, is \$55.09 per hour. The Clerk's total compensation, including benefits, is \$43.30 per hour. The total cost to produce the information is

\$251.87. You will need to have payment into City Hall prior to the information being released in the form of cash or money order.

I checked with Mayor Booms (who is also the FOIA Officer for the City) he indicated that the City will not waive the cost for the FOIA request.

Please let me know how you want to proceed. The Clerk and I have blocked off time in our schedules to produce the information you requested on Monday, so we can meet your demand of Tuesday, October 11th.

Ron Wruble

City Director

City of Harbor Beach

989-551-3393

From: Tom Lambert [mailto:tlambert@miopencarry.org]
Sent: Monday, October 03, 2016 5:52 PM
To: rwruble@harborbeach.com; lwoycehoski@harborbeach.com
Cc: MiOC Board
Subject: Harbor Beach FOIA Request

October 3rd, 2016

To whom it may concern,

Pursuant to the Michigan Freedom of Information Act (FOIA), Michigan Public Act 442 of 1976; MCL 15.231 et. seq., I am hereby requesting an opportunity to inspect or obtain copies of public records. I am hereby requesting the following from the City of Harbor Beach and the Harbor Beach City Council.

- Any and all records of discussion from, to, or between the Harbor Beach City Council and its members, and the City Director, in relation to resolution # 2016-92.
- Any and all records of discussion from, to, or between the Harbor Beach City Council and its members, and the City Director, from August 1st, 2016 through today October 3rd, 2016, in relation to the City's policy on firearms carried by employees.
- Any and all documentation obtained by or provided by the Harbor Beach City Council or one of its members, or the City Director, relating to how the City's policy on firearms carried by employees may affect the City's insurance rates.

Please inform me if the expected costs for searching and copying these documents will exceed \$20.00. However, I would like to request a waiver of all fees as the disclosure of the requested information is in the public interest and will contribute to the public's understanding and knowledge of the City's operations.

The FOIA requires a response to this request within five business days. Please respond to this request no later than Tuesday, October 11th.

If you deny any or all of this request, please cite each specific exemption you feel justifies the refusal and notify me of the appeal procedures available.

Lastly, please make any copies generated under this request available electronically.

Tom Lambert

President

Michigan Open Carry, Inc.