

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
HON.: GERALD M. PRILL

v

CITY OF HARBOR BEACH,

Defendant.

**DEFENDANT'S ANSWER TO PLAINTIFF'S FIRST AMENDED COMPLAINT,
AFFIRMATIVE DEFENSES and PROOF OF SERVICE**

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DEFENDANT'S ANSWER TO PLAINTIFFS' FIRST AMENDED COMPLAINT

NOW COMES the Defendant, **CITY OF HARBOR BEACH**, by and through its attorneys, **PLUNKETT COONEY**, and for its Answer to Plaintiffs' First Amended Complaint, states as follow:

PARTIES

1. In response to the allegations contained in paragraph 1, Defendant is without knowledge or information sufficient to form a belief as to the truth of same and leaves Plaintiffs to their proofs.

2. In response to the allegations contained in paragraph 2, Defendant is without knowledge or information sufficient to form a belief as to the truth of same and leaves Plaintiffs to their proofs.

3. In response to the allegations contained in paragraph 3, same are admitted.

4. In response to the allegations contained in paragraph 4, same are admitted.

JURISDICTION

5. In response to the allegations contained in paragraph 5, Defendant is without knowledge or information sufficient to form a belief as to the truth of same and leaves Plaintiffs to their proofs.

6. In response to the allegations contained in paragraph 6, same are admitted.

7. In response to the allegations contained in paragraph 7, Defendant is without knowledge or information sufficient to form a belief as to the truth of same and leaves Plaintiffs to their proofs.

GENERAL ALLEGATIONS

8. In response to the allegations contained in paragraph 8, including subparagraphs (a-c), Defendant admits that Plaintiff Thomas Lambert emailed a FOIA request at 5:52 p.m. on October 3, 2016 to the City Director and the City Clerk. Defendant relies on the entirety of the email as it speaks for itself and no further response is required.

9. In response to the allegations contained in paragraph 9, Defendants rely upon the document in its entirety and do not dispute the contents of Exhibit A to Plaintiffs' First Amended Complaint.

10. In response to the allegations contained in paragraph 10, same are admitted.

11. In response to the allegations contained in paragraph 11, same are admitted.

12. In response to the allegations contained in paragraph 12, Defendant relies upon the document in its entirety and does not dispute the contents of Exhibit A to Plaintiffs' First Amended Complaint. Defendant affirmatively states that this response granted Plaintiff's FOIA request and did not constitute a denial.

13. In response to the allegations contained in paragraph 13, same are denied as untrue in the form and manner alleged. The FOIA response was issued by the City Director under the authority and direction of the Mayor and specifically references same in the response.

14. In response to the allegations contained in paragraph 14, same are denied as untrue in the form and manner alleged and in fact.

15. In response to the allegations contained in paragraph 15, same are denied as untrue in the form and manner alleged and in fact.

16. In response to the allegations contained in paragraph 16, same are denied as untrue in the form and manner alleged and in fact.

17. In response to the allegations contained in paragraph 17, same are denied as untrue in the form and manner alleged and in fact.

COUNT I
FAILURE TO GRANT THREE SEPARATE FOIA REQUESTS

18. Defendant incorporates by reference paragraphs 1-17 of its Answer to Plaintiffs' First Amended Complaint with the same force and effect as though fully set forth herein.

19. In response to the allegations contained in paragraph 19, same are denied as untrue in the form and manner alleged and in fact.

20. In response to the allegations contained in paragraph 20, same are denied as untrue in the form and manner alleged and in fact.

21. In response to the allegations contained in paragraph 21, same are denied as untrue in the form and manner alleged and in fact.

22. In response to the allegations contained in paragraph 22, same are denied as untrue in the form and manner alleged and in fact.

23. In response to the allegations contained in paragraph 23, same are denied as untrue in the form and manner alleged and in fact.

24. In response to the allegations contained in paragraph 24, same are denied as untrue in the form and manner alleged and in fact.

25. In response to the allegations contained in paragraph 25, same are denied as untrue in the form and manner alleged and in fact.

COUNT II
FOIA FEE VIOLATION - MCL 15.234(3)

26. Defendant incorporates by reference paragraphs 1-25 of its Answer to Plaintiffs' First Amended Complaint with the same force and effect as though fully set forth herein.

27. In response to the allegations contained in paragraph 27, same are legal conclusions as opposed to well-pled allegations of fact and therefore, no response is required. To the extent a response is required, Defendant relies upon the Michigan Freedom of Information Act in its entirety.

28. In response to the allegations contained in paragraph 28, including subparagraphs (a-b), same are denied as untrue in the form and manner alleged and in fact.

29. In response to the allegations contained in paragraph 29, same are denied as untrue in the form and manner alleged and in fact.

30. In response to the allegations contained in paragraph 30, same are denied as untrue in the form and manner alleged and in fact.

31. In response to the allegations contained in paragraph 31, same are denied as untrue in the form and manner alleged and in fact.

32. In response to the allegations contained in paragraph 32, same are denied as untrue in the form and manner alleged and in fact.

COUNT III
FOIA FEE VIOLATION - MCL 15.234

33. Defendant incorporates by reference paragraphs 1-32 of its Answer to Plaintiffs' First Amended Complaint with the same force and effect as though fully set forth herein.

34. In response to the allegations contained in paragraph 34, including subparagraphs (a-e), same are denied as untrue in the form and manner alleged and in fact.

35. In response to the allegations contained in paragraph 35, same are denied as untrue in the form and manner alleged and in fact.

36. In response to the allegations contained in paragraph 36, same are denied as untrue in the form and manner alleged and in fact.

37. In response to the allegations contained in paragraph 37, same are denied as untrue in the form and manner alleged and in fact.

38. In response to the allegations contained in paragraph 38, same are denied as untrue in the form and manner alleged and in fact.

RELIEF REQUESTED

39. In response to the allegations contained in paragraph 39, including subparagraphs (a-h), same are denied as untrue in the form and manner alleged and in fact.

WHEREFORE, Defendant respectfully requests that this Honorable Court enter an Order for Judgment of No Cause for Action in its favor, with costs and attorney fees to be taxed.

Respectfully submitted,

PLUNKETT COONEY

By 

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Dated: January 30, 2017

DEFENDANT'S AFFIRMATIVE DEFENSES

NOW COMES the Defendant, **CITY OF HARBOR BEACH**, by and through its attorneys, **PLUNKETT COONEY**, and hereby asserts the following Affirmative Defenses in the above-entitled cause of action:

1. Plaintiffs have failed to state a claim upon which relief can be granted.
2. Defendant is entitled to governmental immunity pursuant to MCL 691.1407

et. seq.

3. Plaintiffs may have failed to mitigate damages.

4. To the extent applicable, the City of Harbor Beach is immune pursuant to MCLA 691.1401 *et. seq.* and MCLA 691.1407 *et. seq.*

5. The Freedom of Information Act request at issue was not denied by Defendant and the Defendant timely and appropriately modified its request for costs associated with responding to the request.

6. In accordance with the Freedom of Information Act, the Defendant properly sought a deposit from Plaintiff related to the unreasonably high costs associated with compiling the materials sought and Plaintiff has failed to remit same.

7. An FOIA coordinator may designate another individual to act on his or her behalf in accepting and processing requests for the public body's public records, and in approving a denial under section 5(4) and (5). MCL 15.236 *et. seq.*

8. The City of Harbor Beach has properly and timely revised its response to the Freedom of Information Act request.

9. Plaintiff has sought documents and such which may not have been prepared, owned, used or have been in the possession of or retained by the City of Harbor Beach as defined in the Michigan Freedom of Information Act, and they are therefore not a public record subject to disclosure.

10. A public record is 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). The examination sought by Plaintiff does not fall within MCL 15.232(e).

11. Mere possession of a record by a public body does not render the record a public document. *Detroit News, Inc. v Detroit*, 204 Mich App 720 (1994). Rather, the use or

retention of the document must be “in the performance of an official function.” The examination sought by Plaintiff is not of items which have been stored or retained by Defendant in the performance of an official function.

12. A public body may exempt from disclosure as a public record under this act:
- Records or information specifically described and exempted from disclosure by statute. MCL 15.243 (1)(d);
 - Information or records subject to the attorney-client privilege. MCL 15.243 (1) (g);
 - Communications and notes within a public body or between public bodies of an advisory nature to the extent that they cover other than purely factual materials and are preliminary to a final agency determination of policy or action. In this instance, the public interest in encouraging frank communication between officials and employees of public bodies clearly outweighs the public interest in disclosure. MCL 15.243 (1)(m).

The documents/materials sought by Plaintiff are exempt from disclosure pursuant to MCL 15.243 *et. seq.* as enumerated herein.

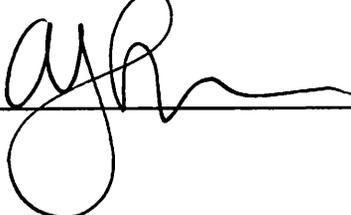
13. The City of Harbor Beach acted in good faith at all times in responding to Plaintiff's FOIA request.

14. Punitive damages are not available, as there is no evidence that Defendant arbitrarily and capriciously violated the Freedom of Information Act. See MCL 15.240(7).

15. Defendant reserves the right to amend its affirmative defenses as necessary.

Respectfully submitted,

PLUNKETT COONEY

By  _____

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Dated: January 30, 2017

PROOF OF SERVICE

KATHALEEN M. FORDE hereby certifies that on the 30th day of January, 2017, she caused to be served a copy of DEFENDANT'S ANSWER TO FIRST AMENDED COMPLAINT, AFFIRMATIVE DEFENSES and PROOF OF SERVICE, upon:

PHILIP L. ELLISON, ESQUIRE
P.O. BOX 107
HEMLOCK, MI 48626
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via email and by enclosing same in an envelope properly addressed as above and by depositing same in a United States mail receptacle, with postage thereon fully prepaid.


KATHALEEN M. FORDE

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