

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.

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**DEFENDANT’S RESPONSE TO PLAINTIFF’S MOTION FOR SUMMARY DISPOSITION
ONLY AS TO COUNT I OF THE FILED COMPLAINT**

NOW COMES the Defendant, **CITY OF HARBOR BEACH**, by and through its attorneys, **PLUNKETT COONEY**, and in Response to Plaintiff’s Motion for Summary Disposition, hereby states as follows:

Plaintiff is not entitled to the relief sought. Contrary to Plaintiff’s assertions, there is no obligation to produce the records within five business days; a public body need only state whether the request is being granted or denied (or whether an extension is being requested). Here, the City’s correspondence clearly grants the request, but notes that full payment will be required before the records will be released. This is consistent with Michigan law.

Plaintiff's reliance on the fee dispute¹ further undercuts Plaintiff's entitlement to relief. As stated in Defendant's Motion for Summary Disposition, the fee request of October 7, 2016 (on which Plaintiff relies) is moot because Plaintiff requested and received a revised fee calculation on October 11, 2016. Moreover, Plaintiff is barred from challenging the October 7, 2016 fee because his claim falls outside of the applicable statute of limitations. Nor is Defendant now obligated to provide the documents until the fee issue is resolved. FOIA expressly states that once an action is filed under MCL 15.240a (challenging fees), "the public body is not obligated to complete the processing of the written request for the public record at issue until the court resolves the fee dispute." (emphasis added). Plaintiff allegedly is not seeking a resolution of the fee dispute, or even the disclosure of the documents², but only punitive damages and attorney fees.

As Plaintiff has not requested the documents, and as the Court has not compelled disclosure of any documents, Plaintiff is not entitled to any damages or attorney fees.³

¹ Although Plaintiff claims to only be seeking relief as to Count I, Plaintiff's argument is heavily dependent on resolving Counts II and III, as Plaintiff seeks a determination from this Court as to the fees in order to obtain relief under Count I.

² Ironically, Plaintiff's Complaint likewise does not request that this Court compel disclosure of the documents, only that the Court determine that they were improperly withheld and award damages and costs to Plaintiff.

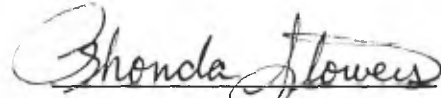
³ Once again, Plaintiff insists, without citation to any authority, that his single FOIA request should be deemed three separate requests. As set forth in Defendant's Motion for Summary Disposition, the Act recognizes that a single request may be seeking several separate and distinct public records. *See* MCL 15.232(g)(1). The analogous federal counterpart to the Michigan FOIA even treats multiple FOIA requests received from the same individual as a single request. 28 C.F.R. § 16.5(d). Plaintiff made a single request to the City of Harbor Beach, and should accordingly be deemed to have one FOIA request at issue.

Plaintiff's Motion must accordingly be denied in its entirety and summary disposition granted in Defendant's favor pursuant to MCR 2.116(I)(2).

Respectfully submitted,

PLUNKETT COONEY

Dated: 8/31/17



Audrey J. Forbush (P41744)
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(810) 342-7014

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**BRIEF IN SUPPORT OF DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION FOR
SUMMARY DISPOSITION ONLY AS TO COUNT I OF THE FILED COMPLAINT**

NOW COMES the Defendant, **CITY OF HARBOR BEACH**, by and through its attorneys, **PLUNKETT COONEY**, and hereby states the following in support of its Response to Plaintiff's Motion for Summary Disposition.

INTRODUCTION

Plaintiff has filed a Motion seeking a determination from this Court that the Defendant City wrongfully withheld documents in violation of the Freedom of Information Act (FOIA) and damages and attorney fees pursuant to Count I of his Amended Complaint. Defendant responded properly to Plaintiff's request for records; thus, Plaintiff cannot establish his claim of a wrongful denial. Plaintiff's reliance on the fee dispute to support his

claim of a wrongful denial is misplaced and barred by the statute of limitations. Further, as Plaintiff is not seeking, and this Court has not entered an order compelling, production of the documents at issue, Plaintiff is not entitled to any damages or attorney fees, and certainly isn't entitled to a treble award for a single FOIA request. Instead, Defendant is entitled to summary disposition pursuant to MCR 2.116(I)(2).

COUNTER-STATEMENT OF FACTS

Defendant has already provided to this Honorable Court a Statement of Facts and further maintains that the documents at issue, which are contained in the record of this Court (to include those exhibits attached to Plaintiff's Motion), speak for themselves. Additional facts, to the extent pertinent, are addressed within the Analysis contained below.

LAW AND ANALYSIS

Plaintiff's contention that there has been an illegal failure to produce requested records under FOIA is without merit. Defendant was not obligated to produce the records and responded to Plaintiff's FOIA request in a timely manner. The issue of the October 7, 2016 fee estimate is moot, as Plaintiff requested and received a revised fee calculation. In any event, Plaintiff is barred by the applicable statute of limitations from challenging the October 7, 2016 fee estimate of Defendant. As there has been no order of production (or even a request for such an order), Plaintiff is not entitled to fees or summary disposition; to the contrary, judgment must enter in Defendant's favor.

Plaintiff has failed to establish a failure to respond under FOIA.

Plaintiff contends that Defendant failed to respond to his FOIA request pursuant to MCL 15.235(2)(a)-(d). This argument ignores Plaintiff's own exhibits and the record evidence in this matter.

Plaintiff sent his FOIA request, via email, on Monday, October 3, 2016. Pursuant to the applicable FOIA provision, it was deemed received on Tuesday, October 4, 2016. MCL 15.235(1) ("A written request made by facsimile, electronic mail, or other electronic transmission is not received by a public body's FOIA coordinator until 1 business day after the electronic transmission is made."). In his request, Plaintiff specifically indicated:

Please inform me if the expected costs for searching and copying these documents will exceed \$20.00....Please respond to this request no later than Tuesday, October 11th.⁴

The City responded on Friday, October 7, 2016, advising of the full amount of the fees pursuant to Plaintiff's request and advising that the fees would need to be paid "prior to the information being released." (Ex. 2 to Pl.'s Mot.). The City went on to state:

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.⁵ (Ex. 2 to Pl.'s Mot.).

⁴ Plaintiff also requested that the City "make any copies generated under this request available electronically." (Ex. 1 to Pl.'s Mot., filed with this Court). It was this anticipated need for scanning and creation of electronic copies that caused the two hour estimate questioned by Plaintiff in his Motion. (Pl.'s Mot., n.4).

⁵ The City also indicated in its correspondence of October 10, 2016: "I already started gathering the information"—yet further proof that the City was granting Plaintiff's request. (Ex. 4 to Pl.'s Mot.). And, again, on October 14, 2016, the City advised: "the city has complied within the allotted time by responding with an email sent on October 11, 2016. In our previously sent email the city was granting your request not denying your request[.]" (Ex. 8 to Pl.'s Mot.) (emphasis added).

In other words, Defendant was prepared to, and intended to, provide the documents. Defendant was even prepared to produce the documents within five days pursuant to Plaintiff's demand, although it was not obligated to do so under FOIA. See *Cramer v. Village of Oakley*, 316 Mich. App. 60 (2016), *subsequently vacated as moot*, 500 Mich. 964. This cannot be construed as anything other than a response granting Plaintiff's request within five business days as required by MCL 15.235.

While Plaintiff takes issue with the requirement that the fee for the records be paid before the release of the documents, this is permitted under Michigan law. The Michigan Attorney General has concluded that "once copies of the requested documents have been prepared, nothing in the FOIA precludes a public body from requiring that final payment in full be made prior to actual delivery of the copies to the requestor." 1997-1998 Mich. Op. Att'y Gen. 131 (1998).

The Michigan Court of Appeals has gone so far as to hold that the obligation to respond under MCL 15.235 does not even arise until and unless the requestor pays a required deposit. *Arabo v. Michigan Gaming Control Bd.*, 310 Mich. App. 370, 386-87 (2015) (stating "the public body's obligation to respond pursuant to MCL 15.235(2) would only arise once the requester had paid the deposit required. This would enable the public body to recover a portion of its costs before processing the request"). However, in this case, Defendant responded timely and evinced that the records would be produced by Tuesday, October 11th, if Plaintiff wanted to proceed. Defendant did not fail to respond as required by FOIA and Defendant is entitled to summary disposition as to Plaintiff's Count I.

Moreover, Michigan law expressly provides that Defendant is not obligated to produce any documents until the fee dispute has been resolved. MCL 15.240a provides, in

pertinent part: “If a civil action is commenced against the public body under this subdivision, the public body is not obligated to complete the processing of the written request for the public record at issue until the court resolves the fee dispute.” As the fee dispute has not been resolved, Defendant cannot be held to have wrongfully withheld the documents. Defendant is entitled to summary disposition with respect to Count I of Plaintiff’s Complaint.

Plaintiff’s fee challenges fail as moot and barred.

The remainder of Plaintiff’s brief concerns the whether or not the fees were properly estimated by the City. These are improper considerations, as they relate to Plaintiff’s Counts II and III, for which Plaintiff denies he is seeking summary disposition. Should the Court nonetheless consider these issues, the October 7, 2016 fee estimate is moot due to the revision specifically requested and received by Plaintiff (and within the five day statutory window). Plaintiff has also failed to bring his fee challenge within the statute of limitations. His claims therefore fail.

Plaintiff’s reliance on the October 7, 2016 fee estimate fails as moot, for the reasons set forth in Defendant’s Motion for Summary Disposition. Upon receipt of the fee estimate of October 7th, Plaintiff sought a revised response. (Ex. 3 to Pl.’s Mot.). The City revised its fee and on October 11, 2016 (the same day the FOIA materials were posted to its website and within the five-day response window), provided Plaintiff with a fee calculation, providing a complete breakdown of the fees. (Ex. 6 to Pl.’s Mot.). Plaintiff did not pay either of these fees, or any subsequent fees, at any time, precluding him from obtaining relief under Count I. *Arabo, supra* (finding the payment of a requested deposit is not only a

prerequisite to obtain the records, it is a prerequisite for a suit asserting that records were wrongfully withheld under FOIA).

Plaintiff's challenge of the October 7, 2016 fee estimate is also barred by the applicable statute of limitations. FOIA fee challenges have a shorter statute of limitations than challenges for the denial of records. Actions for fee reductions must be filed "within 45 days after notice of receiving the required fee or a determination of an appeal to a public body." MCL 15.240a(1)(b). Plaintiff did not administratively appeal the October 7, 2016 fee estimate, because he recognized that it had been revised and withdrawn. Instead, Plaintiff's administrative appeal concerned the City's response of October 14, 2016. (Ex. 10 to Pl.'s Mot.). Plaintiff did not file an action concerning the October 7, 2016 fee estimate until December of 2016, well beyond the 45-day statute of limitations for challenging fees. He is therefore barred from asserting impropriety relating to that fee estimate in this action.

Plaintiff is not entitled to the relief sought.

Under FOIA, a prevailing party is entitled to attorney fees and costs. MCL 15.240(6). "A party prevails in the context of a FOIA action when the action was reasonably necessary to compel the disclosure, and the action had a substantial causative effect on the delivery of the information to the plaintiff." *Scharret v. City of Berkley*, 249 Mich. App. 405, 414 (2002) (citing *Oakland Cnty. Prosecutor v. Dept. of Corrections*, 222 Mich. App. 654, 663 (1997); *Wilson v. City of Eaton Rapids*, 196 Mich. App. 671, 673 (1992)). Where the lawsuit is not reasonably necessary to compel the disclosure of the information sought, no costs or attorney fees will be awarded. *Scharret, supra*. Moreover, where the Court has not ordered disclosure, damages are wholly unavailable. *Id.*; see also *Michigan Council of Trout*

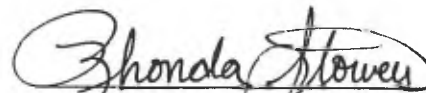
Unlimited v. Department of Military Affairs, 213 Mich. App. 203 (1995); *Jordan v. Martimucci*, 101 Mich. App. 212 (1980); *Bredemeier v. Kentwood Bd. of Ed.*, 95 Mich. App. 767 (1980).

The same is true for punitive damages. *Scharret, supra*; *Michigan Council of Trout Unlim., supra* (holding “it is clear that damages may be assessed only if the court orders disclosure of a public record. The circuit court therefore did not err in denying plaintiffs’ request for punitive damages in this case.”). Moreover, in order for punitive damages to be awarded, the lack of disclosure by the Defendant must be arbitrary and capricious. MCL 15.240(7); *Jordan, supra*. Unless the court orders disclosure **and** Defendant is found to have acted arbitrarily and capriciously, Plaintiff is not entitled to punitive damages. *Id.*

There has been no court ordered disclosure in this case; in fact, Plaintiff has not sought disclosure, either in his Motion for [Partial] Summary Disposition or in his Amended Complaint. (Pl.’s Am. Compl., filed with this Court). Unless and until the Court orders disclosure of records—which is not proper until the fee issue is resolved—Plaintiff is not entitled to either damages or attorney fees.⁶ Plaintiff’s Motion therefore fails in its entirety, and Defendant is entitled to summary disposition of Count I pursuant to MCR 2.116(I)(2).

Respectfully submitted,

PLUNKETT COONEY



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Rhonda R. Stowers (P64083)
Attorneys for Defendant
(810) 342-7014

Dated: 8/31/17

⁶ And Plaintiff would not be entitled to treble damages, regardless. Plaintiff filed a single FOIA request.

PROOF OF SERVICE

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause to each of the attorneys of record herein at their respective addresses disclosed on the pleadings on 9-1, 2017

By: U.S. Mail FAX
 Hand Delivered Overnight Courier
 Certified Mail Other *email*

Signature Shonda Flowers