

STATE OF MICHIGAN  
IN THE COURT OF APPEALS

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MICHIGAN OPEN CARRY, INC

Plaintiffs-Appellant,

v

MICHIGAN DEPARTMENT OF  
STATE POLICE

Defendants-Appellee.

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Court of Appeals No. 344936

Court of Claims No. 18-000058-MZ

**BRIEF OF APPELLEE MICHIGAN DEPARTMENT OF STATE POLICE**

**ORAL ARGUMENT REQUESTED**

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## STATEMENT OF JURISDICTION

Plaintiff-Appellant Michigan Open Carry, Inc. (Open Carry) timely filed a claim of appeal from the Court of Claims August 3, 2018 final opinion and order in which the Court dismissed Open Carry's complaint filed under the Freedom of Information Act (FOIA), MCL 15.231 *et seq.* Defendant-Appellee Michigan Department of State Police (MSP) does not dispute that this Court has jurisdiction under MCL 600.309 and MCR 7.203(A).

## COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. In appeals under the FOIA, this Court reviews a trial court's factual determinations under the clear error standard of review. The lower court determined that MSP provided Open Carry with the information described in its request. Was the lower court's determination clearly erroneous?

Appellant's answer: Yes.

Appellee's answer: No.

Trial court's answer: Did not answer.

2. Open Carry admitted that Count II of its amended complaint—titled “*Hartzell* FOIA claim with sought *Lash* relief”—was filed in the alternative and “only bec[ame] operative in the unlikely event responsive records do not actually exist.” The lower court dismissed Count II as it determined that MSP provided Open Carry with the information it described in its request. Did the lower court err in dismissing Count II of Open Carry's amended complaint?

Appellant's answer: Yes.

Appellee's answer: No.

Trial court's answer: Did not answer.

## STATUTES INVOLVED

### **MCL 15.233(1):**

Except as expressly provided in section 13, upon providing a public body's FOIA coordinator with a written request that describes a public record sufficiently to enable the public body to find the public record, a person has a right to inspect, copy, or receive copies of the requested public record of the public body. A person has a right to subscribe to future issuances of public records that are created, issued, or disseminated on a regular basis. A subscription shall be valid for up to 6 months, at the request of the subscriber, and shall be renewable. An employee of a public body who receives a request for a public record shall promptly forward that request to the freedom of information act coordinator.

### **MCL 28.425e(5)(m):**

(5) The department of state police shall by January 1 of each year file with the secretary of the senate and the clerk of the house of representatives, and post on the department of state police's internet website, an annual report setting forth all of the following information for the state for the previous fiscal year:

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(m) A list of expenditures made by the department of state police from money received under this act, regardless of purpose.

## INTRODUCTION

At issue in this appeal under the FOIA is the unremarkable proposition that, when a public body provides the requesting person with the information it describes in its request, no violation of the FOIA occurs. Here, Open Carry submitted a FOIA request to MSP seeking “[a] list of expenditures made by [MSP] from money received under the Firearms Act . . . regardless of purpose.” On three separate occasions, Open Carry explained that the information it was requesting is required by law to be posted to the Department’s website per MCL 28.425e(5)(m). In response to Open Carry’s FOIA request, MSP provided a link to its concealed pistol license (CPL) reports that are published to comply with the statute cited by Open Carry—MCL 28.425e(5)(m). Each CPL report contains a list of expenditures that is published pursuant to MCL 28.425e(5)(m).

In granting MSP’s motion for summary disposition, the Court of Claims made a factual determination that the relevant information contained in the CPL reports “is, simply a ‘list of expenditures’ by defendant from money received under the Firearms Act.” (8/3/2018 Opinion, p 6.) The Court of Claims accordingly ruled that “[w]here [MSP] provided a ‘list of expenditures’ as provided in MCL 28425e(5)(m) in response to plaintiff’s request for the same, the Court is hard-pressed to conclude that [MSP] violated its obligations under FOIA.” (8/3/2018 Opinion, p 6.)

In short, the Court of Claims dismissed the complaint because MSP provided Open Carry with the information that Open Carry described in its FOIA request. For this reason, this Court should affirm the Court of Claims.



## COUNTER-STATEMENT OF FACTS AND PROCEEDINGS

### Background

Open Carry submitted a FOIA request to MSP on September 28, 2017 in which it requested “[a] list of expenditures made by the Department of State Police from money received under the Firearms Act (1927 PA 372, MCL 28.421 *et seq.*), regardless of purpose, between October 1, 2015 to September 30, 2016.” (Ex 1, FOIA request.) In the request, Open Carry specified that the information it was seeking “is required by law to be posted to the Department's website per Section 5e of 1927 PA 372, MCL 28.425e(5)(m).” (Ex 1, FOIA request.) MSP timely issued a written notice that granted Open Carry’s FOIA request in full on October 10, 2017. (Ex 2, written notice granting request.) In its written notice granting Plaintiff’s request, MSP provided a link to its annual CPL reports where the requested information is located. (Ex 2; Ex 3, Affidavit, Lance Gackstetter, ¶¶ 7-8.) Page 3 of the 2015-2016 CPL report contains “a list of expenditures’ by [MSP] from money received under the Firearms Act.” (8/3/2018 Opinion and Order, p 6; see also Ex 4, 2015-2016 CPL report, p 3.)

Open Carry, purportedly unaware that MSP had extended its deadline to respond to the request, submitted what it described as an appeal of a final determination to deny its request on October 10, 2017. (Ex 5, appeal.) Open Carry explained that it was appealing because it did not receive a response to its request. (*Id.*) The next day, Open Carry received MSP’s written notice granting the request and sent an additional email indicating that it “wish[ed] to maintain its appeal.”

(Ex 6, October 11 email.) On October 16, 2017, MSP responded to Open Carry's appeal. (Ex 7, response to appeal.)

### **Proceedings below**

Open Carry filed a complaint under section 10 of the FOIA, MCL 15.240, alleging that (1) MSP's failure to timely respond to the FOIA request resulted in a wrongful denial of the FOIA request, and, in the alternative, (2) MSP violated the FOIA by failing to certify that the requested records did not exist. (Compl, ¶¶ 36-40, 47.) MSP moved for summary disposition arguing, in part, that because Open Carry incorrectly calculated the deadline for MSP's response to the FOIA request, Open Carry's allegation that an automatic denial occurred was without merit. (Def's 5/7/2018 Mot to Dismiss, p 7-9.) In response to the motion, Open Carry filed an amended complaint and removed the allegations about the lack of timely responses. (See Pl's Am Compl; 8/3/2018 Opinion & Order, p 3.)

In its amended complaint, Open Carry alleged simply that (1) MSP wrongfully denied the FOIA request, and, in the alternative, (2) MSP violated the FOIA by failing to certify that the requested records do not exist. (Compl, ¶¶ 36-40, 47.) MSP then moved for summary disposition of Open Carry's amended complaint, and the Court granted MSP's motion determining that MSP's response to Open Carry's records request did not violate the FOIA.

Open Carry now appeals as of right. For the reasons discussed below, the Court of Claims properly granted summary disposition in favor of MSP.

## STANDARD OF REVIEW

In appeals under the FOIA, while “legal determinations are reviewed under a de novo standard,” a trial court’s factual determinations are reviewed under the clear error standard of review. *Herald Co, Inc v E Michigan Univ Bd of Regents*, 475 Mich 463, 471–72 (2006). At issue in this appeal is the lower court’s determination that MSP provided Open Carry with the information it described in the FOIA request.

A trial court’s factual determination is clearly erroneous if “although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made.” *In re Mason*, 486 Mich 142, 152 (2010), quoting *In re Miller*, 433 Mich 331, 337 (1989). Stated differently<sup>1</sup>, under this standard, “a reviewing court should not substitute its judgment on questions of fact unless the factual determination clearly preponderates in the opposite direction.” *In re COH, ERH, JRG, & KBH*, 495 Mich 184, 204 (2014), quoting *Pierron v Pierron*, 486 Mich 81, 85 (2010).

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<sup>1</sup> Additionally, the Supreme Court has noted that “[t]o be clearly erroneous, a decision must strike us as more than just maybe or probably wrong; it must . . . strike us as wrong with the force of a five-week old, unrefrigerated dead fish.” *People v Cheatham*, 453 Mich 1, 30 n 23 (1996), quoting *Parts & Elec Motors, Inc v Sterling Elec, Inc*, 866 F2d 228, 233 (CA 7, 1988)

## ARGUMENT

### I. MSP did not violate the FOIA in responding to Appellant's request for records.

In reaching its decision to dismiss Open Carry's complaint, the Court of Claims reviewed Open Carry's communications to MSP regarding the FOIA request and MSP's 2015-2016 CPL report. (8/3/2018 Opinion and Order, p 1–3.) After its review, the Court of Claims determined that the information on page 3 of the 2015-2016 CPL report “is, simply, a ‘list of expenditures’ by [MSP] from money received under the Firearms Act.” Consequently, the Court of Claims dismissed Open Carry's lawsuit, which was filed under MCL 15.240, because Open Carry “received exactly what it requested”—i.e., “the list of expenditures [MSP] published in conjunction with its obligations under MCL 28.425e(5)(m).” (8/3/2018 Opinion and Order, p 7.)

As noted above, a trial court's factual determinations in a FOIA action are reviewed for clear error, *Herald*, 475 Mich at 472, and under this standard, “a reviewing court should not substitute its judgment on questions of fact unless the factual determination clearly preponderates in the opposite direction.” *In re COH*, 495 Mich at 204. Accordingly, unless this Court determines that the lower court's finding that MSP provided Open Carry with a list of expenditures published under MCL 28.425e(5)(m) was clearly erroneous, the Court of Claims must be affirmed.

**A. MSP provided Open Carry with the information it described in its request.**

As noted above, in its FOIA request, Open Carry requested “[a] list of expenditures made by the [MSP] from money received under the Firearms Act . . . regardless of purpose, between October 1, 2015 [and] September 30, 2016.” (Ex 1.) Apparently, for clarification, Open Carry added “that this information is required by law to be posted to [MSP’s] website per . . . MCL 28.425e(5)(m).” (Ex 1) (emphasis as in original). Open Carry then quoted MCL 28.425e(5)(m). (Ex 1.)

In its dispositive motion, MSP demonstrated that, because Open Carry explained that the information it was requesting was required to be published under MCL 28.425e(5), it granted Open Carry’s request by providing a link that contains each annual CPL report. (Ex 3, ¶ 8.) On page 3 of the CPL report for the fiscal year listed in Open Carry’s request, there are five separate line items of expenditures made by MSP from money received under the Firearms Act that are responsive to the FOIA request. (Ex 4, 2015-2016 CPL report, p 3; 8/3/2018 Opinion and Order, p 6.)

The Court of Claims, citing *King v MSP*, 303 Mich App 162, 189 (2013), acknowledged that MSP’s granting of the FOIA request did “not foreclose review.” (8/3/2018 Opinion and Order, p 5.) However, upon review, the Court of Claims ultimately agreed that “[a] review of [Open Carry’s] FOIA request reveals that [MSP’s] response provided [Open Carry] with the *information [it] requested.*” (*Id.*) (emphasis added). Thus, because MSP provided Open Carry with the information it described in its request, MSP did not violate the FOIA.

**B. Open Carry’s complaint that it did not request the 2015-2016 CPL report is of no moment—it requested information contained within the report.**

In its brief on appeal, Open Carry argues that it “never asked for production of” the 2015-2016 CPL report but that it rather “asked *for information.*”

(Appellant’s Br, p 19.) That information, Open Carry argues, is a “list of expenditures made by [MSP] from money received under the *Firearms Act* . . . regardless of purpose, between October 1, 2015 to September 30, 2016.”

(Appellant’s Br, p 19, quoting MCL 28.425e(5)(m)) (emphasis in original).

This argument lacks merit specifically because it ignores case law and statute. It is well established in Michigan that a FOIA request does not need to “specifically describe the records containing the sought information; rather, *a request for information contained in the records will suffice.*” *Detroit Free Press, Inc v City of Southfield*, 269 Mich App 275, 281 (2005) (emphasis added).

Furthermore, the principle cited in *Free Press v Southfield*, which involved a requesting person’s duty to provide sufficient description in a FOIA request, applies equally to a public body’s response to a FOIA request. For example, MCL 15.234(5) provides in pertinent part that “[i]f the FOIA coordinator knows or has reason to know that *all or a portion of the requested information* is available on its website, the public body shall notify the requestor in its written response that all or a portion of the requested information is available on its website.” (Emphasis added.) MCL 15.234(5) further provides that the public body’s “written response, to the degree practicable in the specific instance, shall include a specific webpage address where the requested *information* is available.” (Emphasis added.)

Here, as demonstrated in its dispositive motion, MSP understood Open Carry to be requesting *information contained within* its annual CPL reports. (Ex 3, ¶ 7.) Accordingly, as is required under MCL 15.234(5), MSP provided Open Carry with a link to the 2015–2016 CPL report which contains “a list of expenditures” as described in Open Carry’s FOIA request. (Ex 3, ¶ 8.) And, once again, the Court of Claims, after reviewing the parties’ briefing, agreed with MSP and determined that the 2015-2016 CPL report contained “a list of expenditures’ by [MSP] from money received under the Firearms Act.” (8/3/2018 Opinion and Order, p 6.)

**C. To the extent Open Carry desired different information, it failed to sufficiently describe the information it was seeking.**

As noted in the preceding section, the FOIA requires the requesting person to submit a “request that *describes a public record sufficiently* to enable the public body to find the public record.” MCL 15.233(1). And while the requesting person does not need to “precisely” describe the information sought, a sufficiently described request must at least “enable the public body to find the public record [or information].” *Coblentz v City of Novi*, 475 Mich 558, 572 (2006). In this instance, Open Carry’s description enabled MSP to provide a link to its CPL reports; but to the extent that Open Carry desired different information, it failed to provide a sufficient description of what it allegedly was seeking.

In its FOIA request and appeal, Open Carry specifically requested information that is required to be published under MCL 28.425e(5)(m), and MSP accordingly provided Plaintiff with a webpage address where the requested information is available. (Ex 1; Ex 3, ¶ 7.) MSP acknowledges that, after receiving

MSP's written notice granting its request, Open Carry expressed dissatisfaction via email with the information it received; however, Open Carry *reiterated* its desire to receive the information required to be published under MCL 28.425e(5)(m). (Ex 6.) Once again, MSP provided Open Carry with the information it is obliged to publish under the Firearms Act. (8/3/2018 Opinion and Order, p 7.)

What is more, Open Carry's brief in response to MSP's dispositive motion contains further evidence of its failure to sufficiently describe the information it allegedly was seeking. In particular, Plaintiff in its brief indicated for the first time that it desires to learn whether "dollar-by-dollar" accountings actually exist and that it believes it is "unclear whether the Department actually has accounting records (i.e. a list) of expenditures made by [MSP] from money received under the Firearms Act." (Pl's Resp, p 6 and 11.) Quite simply, nothing prevented Open Carry from requesting MSP to produce "dollar-by-dollar" accounting records. Instead, Open Carry's repeated insistence on receiving "a list of expenditures as provided for in MCL 28.425e(5)(m)" resulted in MSP providing a link to its CPL reports where that information is contained. (See Ex 1, Ex 5, Ex 6.)

In short, nothing in the FOIA requires a public body to "extend the meaning of [records] request[s] to include things not asked for." See *Wallick v Agric Mktg Serv*, 281 F Supp 3d 56, 68 (DDC, 2017). Because MSP provided the information described by Open Carry—i.e. the information it publishes to comply with MCL 28.425e(5)(m)—the decision of the Court of Claims be affirmed.



**II. Count II of Open Carry’s amended complaint was properly dismissed as it was pleaded in the alternative.**

In dismissing Open Carry’s lawsuit, the Court of Claims observed that Open Carry “has not cited any caselaw declaring that a FOIA request, or lawsuit concerning the same, is the proper avenue for contesting an agency’s interpretation of a statute.” (8/3/2018 Opinion and Order, p 8.) The trial court further commented that the issue of whether MSP’s “interpretation of the meaning of ‘list of expenditures’ in MCL 28.425e(5)(m) is in accordance with the statute’s plain language . . . would seem better left to an action for declaratory or injunctive relief.” (8/3/2018 Opinion and Order, p 8.)

However, Open Carry, in response now alleges—despite never making this argument below—that it did ask for declaratory and injunctive relief as described by the Court of Claims. (Appellant’s Br, p 12.) In support, Open Carry cites subparagraph 28f of its amended complaint—a portion of its relief requested paragraph. (Appellant’s Br, p 12–13.) In making this argument, however, Open Carry mischaracterizes its own complaint.

As noted by the lower court, Open Carry admitted that Count II of its amended complaint—titled “*Hartzell*<sup>2</sup> FOIA claim with sought *Lash*<sup>3</sup> relief”—was

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<sup>2</sup> The phrase “*Hartzell* FOIA claim” appears to refer to *Hartzell v Mayville Community School District*, 183 Mich App 782 (1990). In *Hartzell*, the Court of Appeals determined that the requesting party prevailed for the purposes of MCL 15.240(6) when litigation was required to disclose the fact that the requested records did not exist. *Hartzell*, 183 Mich App at 789.

<sup>3</sup> The phrase “*Lash* relief” appears to refer to *Lash v City of Traverse City*, 479 Mich 180 (2007). In *Lash*, a civil action entirely unrelated to the FOIA, the Supreme Court ruled that the defendant’s residency requirement for public employment violated MCL 15.602(2).

pleaded “*in the alternative* and only becomes operative in the unlikely event that response do not actually exist.” (Brief in response to MSD, p 12; Brief on Appeal, p 22.; see also Am Compl, ¶ 21) (emphasis added). Moreover, the amended complaint on its face demonstrates that subparagraph 28f did not apply to Count I of the amended complaint; rather, it only applied to Count II.

Upon review, there are two subparagraphs that appear to relate specifically to Count II of Open Carry’s amended complaint. First, subparagraph 28e of Open Carry’s amended complaint requested the Court of Claims “to the extent applicable find that [MSP] violated the [FOIA] pursuant to *Hartzell v Mayville Sch Dist*, 183 Mich App 782 (1990).” (Emphasis added). Second, subparagraph 28f of the amended complaint asked the Court of Claims,

to the extent applicable, enter an order pursuant to *Lash v Traverse City*, 479 Mich 180 (2007) commanding [MSP] to comply with MCL 28.425e(5)(m) henceforth by posting on [its]website an annual report setting forth a list of expenditures made by [MSP] from money received under the *Firearms Act*, regardless of purpose and disclose the same. [(Underlined emphasis added).]

These two subparagraphs are the only portions of Open Carry’s requested relief that use the phrase “to the extent applicable.” Open Carry’s use of “to the extent applicable” makes sense given that Count II is titled “*Hartzell* FOIA claim with sought *Lash* relief”—subparagraph 28e requests a ruling under *Hartzell* and subparagraph 28f requests a ruling under *Lash*.

Recognizing that Count II was pleaded in the alternative, the Court of Claims noted that MSP “has never alleged that responsive records do not exist, but has instead has taken the position that it granted and fulfilled [Open Carry’s] FOIA

request.” (8/3/2018 Opinion and Order, p 9.) The trial court ultimately agreed with MSP’s argument and dismissed Open Carry’s alternatively pleaded Count II as a result. (*Id.*)

In short, common sense dictates Open Carry’s alternative request for so-called “*Lash* relief” is not applicable given that MSP provided Open Carry with information responsive to its FOIA request. See, e.g., *alternative*, merriam-webster.com (defining “alternative” as “a proposition or situation offering a choice between two or more things only one of which may be chosen.”). As such, the decision of the Court of Claims to dismiss Count II of Open Carry’s complaint must be affirmed.

### **CONCLUSION AND RELIEF REQUESTED**

The Court of Claims did not clearly err when it determined that MSP provided the records described in Open Carry’s FOIA request. Because there was no clear error in this factual determination, the Court of Claims properly dismissed Count I of Open Carry’s amended complaint. Additionally, because the Court of Claims determined that MSP provided Open Carry with records responsive to its request, dismissal of Count II of the amended complaint was likewise warranted.,

As such, for these reasons and the reasons stated above, MSP requests that this Court affirm the lower court’s August 3, 2018 opinion and order and deny Open Carry the relief it seeks.

Respectfully submitted,

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