

STATE OF MICHIGAN
COURT OF CLAIMS

MICHIGAN OPEN CARRY, INC.,

Plaintiff,

No. 18-0000058-CZ

v

HON. COLLEEN A. O'BRIEN

MICHIGAN DEPARTMENT OF STATE
POLICE A/K/A MICHIGAN STATE POLICE,

Defendant.

Philip L. Ellison (P74117)
Outside Legal Counsel PLC
Attorney for Plaintiff
P.O. Box 107
Hemlock, MI 48626
P: (989) 642-0055
F: (888) 398-7003
pellison@olcplc.com

Adam R. de Bear (P80242)
Assistant Attorney General
Attorney for Defendant
Michigan Department of Attorney General
P.O. Box 30754
Lansing, MI 48909
(517) 373-1162
deBearA@michigan.gov

**DEFENDANT'S 06/19/2018 RESPONSE TO PLAINTIFF'S 06/05/2018
MOTION TO REQUEST SCHEDULING CONFERENCE AND FOR ENTRY
OF SCHEDULING & CASE MANAGEMENT ORDER**

Introduction

In Plaintiff's above-styled motion, it requests the court to set a scheduling conference. (Pl's Br, 4.) The Michigan Department of State Police (MSP) does not object to a scheduling or status conference. However, an *Evening News* order, which Plaintiff also requests, is unnecessary in the instant case as MSP granted Plaintiff's FOIA request and did not exempt any information from disclosure.

ARGUMENT

I. **An *Evening News* Order is unnecessary because MSP granted Plaintiff's request and did not exempt any particular information.**

Generally speaking, when public bodies exempt certain information from disclosure, it can create procedural difficulties for the challenge of the public body's withholding. See, e.g., *Booth Newspapers, Inc v Regents of University of Michigan*, 93 Mich App 100, 109 (1979) and *Detroit News, Inc v City of Detroit*, 185 Mich App 296, 300 (1990). These procedural difficulties were also acknowledged in *Evening News Association v City of Troy*, 417 Mich 481 (1983), in which the Court suggested six rules and three options for trial courts to use in order to evaluate claims for exemptions under the FOIA. *Id.* At 516. The six rules for analyzing the use of an exemption identified by the *Evening News* Court are

1. The burden of proof is on the party claiming exemption from disclosure.
2. Exemptions must be interpreted narrowly.
3. "[T]he public body shall separate the exempt and nonexempt material and make the nonexempt material available for examination and copying."
4. "[D]etailed affidavits describing the matters withheld" must be supplied by the agency.
5. Justification of exemption must be more than "conclusory", i.e., simple repetition of statutory language. A bill of particulars is in order. Justification must indicate factually how a particular document, or category of documents, interferes with law enforcement proceedings.
6. The mere showing of a direct relationship between records sought and an investigation is inadequate. [*Id.* at 503 (citations omitted).]

Three options can then be used by the court to determine whether a particularized justification exists. *Nicta v City of Detroit*, 194 Mich App 657, 663 (1992). The first of the three options is that the "court should receive a complete

particularized justification as set forth in the six rules.” *Evening News*, 417 Mich. At 516. Second, the “court should conduct a hearing *in camera* based on *de novo* review to determine whether complete particularized justification pursuant to the six rules exists.” *Id.* Third, the “court can consider ‘allowing plaintiff’s counsel to have access to the contested documents *in camera* under special agreement ‘whenever possible.’” *Id.*

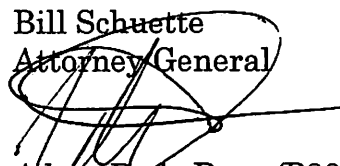
Here, Plaintiff’s request for records was granted. Thus, the reasoning behind *Evening News* is inapplicable to the disposition of Plaintiff’s FOIA lawsuit. In other words, because MSP did not assert any exemptions when it granted Plaintiff’s FOIA request¹, “a complete particularized justification” that “describes the matters withheld,” *Evening news*, 417 Mich at 503, is unnecessary for the instant lawsuit.

RELIEF REQUESTED

In sum, MSP does not object to a scheduling conference. However, for the reasons stated above, MSP requests that the Court deny Plaintiff’s motion with respect to its request for an *Evening News Order*.

Respectfully submitted,

Bill Schuette
Attorney General



Adam R. de Bear (P80242)
Assistant Attorney General
Attorneys for Defendant

Dated: June 19, 2018

¹ However, if the Court denies MSP’s dispositive motion, and if Plaintiff’s FOIA request is expanded during litigation in a way that requires MSP to assert new exemptions, an *Evening News Order* may be necessary at that time.

PROOF OF SERVICE

I hereby certify that on June 19, 2018, I served a copy of the foregoing *Defendant's 06/19/2018 Response to Plaintiff's 06/05/2018 Motion to Request Scheduling Conference and for Entry of Scheduling & Case Management Order* in this matter on all counsel of record at their last known addresses by U.S. mail, with first class postage fully prepaid.


Kristine Gaertner
Legal Secretary