

**STATE OF MICHIGAN
IN THE COURT OF CLAIMS**

MICHIGAN OPEN CARRY, INC,
Plaintiff/Petitioner,

Case No.: 18-000058-MZ
Honorable Colleen O'Brien

v.

FIRST AMENDED COMPLAINT

MICHIGAN DEPARTMENT OF STATE
POLICE also commonly known as the
MICHIGAN STATE POLICE,
Defendant

OUTSIDE LEGAL COUNSEL PLC
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*An action commenced under Section 10 of FOIA "shall
be assigned for hearing and trial or for argument at the
earliest practicable date and expedited in every way."
MCL 15.240(5)*

**FIRST AMENDED¹ VERIFIED COMPLAINT/PETITION FOR ENTRY OF ORDER
DIRECTING FOIA DISCLOSURE & SEEKING OTHER RELIEF**

NOW COMES Plaintiff/Petitioner MICHIGAN OPEN CARRY, INC, by and through
counsel, and complains as follows:

PARTIES

1. Plaintiff/Petitioner MICHIGAN OPEN CARRY, INC (hereinafter
Plaintiff/Petitioner MOC) is a Michigan not-for-profit public advocacy organization that
promotes the lawful open carry of holstered handguns.

¹ Because assigned counsel for Defendant MICHIGAN DEPARTMENT OF STATE POLICE (aka
the MICHIGAN STATE POLICE) is highly confused about the exact claims made in this lawsuit (see
05/07/2018 Motion to Dismiss in Lieu of an Answer), a more streamlined pleading is being provided to
remove details which are distracting from the two counts (Count I and II) actually pled by Plaintiff/Petitioner
MICHIGAN OPEN CARRY, INC.

2. Defendant MICHIGAN DEPARTMENT OF STATE POLICE (aka the MICHIGAN STATE POLICE) is agency/department of the State of Michigan.

3. Defendant MICHIGAN DEPARTMENT OF STATE POLICE is a public body as that term is defined by Michigan's *Freedom of Information Act*, MCL 15.232(d)(i).

JURISDICTION

4. This Court has jurisdiction by statute pursuant to MCL 15.240(1)(b) and MCL 600.6419.

5. Venue is proper in this Court pursuant to MCL 15.240(4).

6. This Court must advance this matter expeditiously as MCL 15.240(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

7. On September 28, 2017, Plaintiff/Petitioner MOC, by and through its agent and president, submitted a *Freedom of Information Act* request to Defendant MICHIGAN DEPARTMENT OF STATE POLICE via electronic mail seeking the following records—

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.

[hereinafter the "Sept 28 FOIA Request"] See **Exhibit A**.

8. Defendant MICHIGAN DEPARTMENT OF STATE POLICE responded asserting that—

Your request is granted. The records you have requested are available on the department's website at http://www.michigan.gov/msp/0,4643,7-123-1878_1591_3503_4654-77621--,00.html [hereinafter the Website].

Exhibit G.

9. The Website does not contain the actual information, i.e. the list of expenditures, demanded by Plaintiff MOC by its Sept 28 FOIA Request.

10. Instead, the reports on the Website only contain a summary of information and not a list of actual expenditures made by the Department of State Police from money received under the Firearms Act between October 1, 2015 to September 30, 2016.

11. Plaintiff MOC clearly explained its Sept 28 FOIA Request "was not requesting a list of reports... not requesting a summary of expenditures..., nor a list of

expenditure categories,” yet that is what Defendant MICHIGAN DEPARTMENT OF STATE POLICE wrongly provided. **Exhibit I.**

12. The pre-suit administrative appeal to COL. KRISTE KIBBEY ETUE, as the head of Defendant MICHIGAN DEPARTMENT OF STATE POLICE, did not result in the production of the information sought by Plaintiff MOC by its Sept 28 FOIA Request.

COUNT I

WRONGFUL DENIAL / FAILURE TO PRODUCE REQUESTED RECORDS VIA FOIA SEPT 28, 2017 REQUEST

13. Plaintiff/Petitioner MOC incorporates by reference the previous allegations as if set forth word for word herein.

14. Plaintiff/Petitioner MOC made a proper request for public record(s) under Michigan’s *Freedom of Information Act*.

15. Defendant MICHIGAN DEPARTMENT OF STATE POLICE has wrongfully withheld and/or otherwise failed to produce responsive record(s) which Plaintiff/Petitioner MOC is entitled to receive under Michigan’s *Freedom of Information Act*.

16. Because there is no proper justification for refusing to actually and timely produce the requested records pursuant to the Sept 28 FOIA Request, Defendant MICHIGAN DEPARTMENT OF STATE POLICE arbitrarily and capriciously violated this Michigan law by refusing to act in accordance with its legal duties under this sunshine statute.

17. By COL. KRISTE KIBBEY ETUE ignoring a rightful and proper appeal to her as the head of Defendant MICHIGAN DEPARTMENT OF STATE POLICE, Defendant MICHIGAN DEPARTMENT OF STATE POLICE, by COL. KRISTE KIBBEY ETUE, arbitrarily and capriciously violated this Michigan law by refusing to act in accordance with the Act.

18. Plaintiff/Petitioner MOC has incurred attorney fees, costs, and disbursements which must be ordered paid by Defendant MICHIGAN DEPARTMENT OF STATE POLICE pursuant to MCL 15.240(6).

19. The Court is requested to award all available punitive damages to Plaintiff/Petitioner MOC and impose all civil fines against Defendant MICHIGAN DEPARTMENT OF STATE POLICE as authorized by Michigan’s *Freedom of Information Act*.

COUNT II

HARTZELL FOIA CLAIM WITH SOUGHT LASH RELIEF

20. Plaintiff/Petitioner MOC incorporates by reference the previous allegations as if set forth word for word herein.

21. This Count is pled in the alternative to Count I, contingent upon Defendant MICHIGAN DEPARTMENT OF STATE POLICE's failure to disclose via the Sept 28 FOIA Request that information/record sought does not exist.

22. Under Michigan law, it is "inconsistent with the purposes of the FOIA for a public body to remain silent, knowing that a requested record does not exist, and force the requesting party to file a lawsuit in order to ascertain that the document does not exist," *Hartzell v Mayville Sch Dist*, 183 Mich App 782 (1990).

23. Defendant MICHIGAN DEPARTMENT OF STATE POLICE is statutorily duty bound to have compiled and possess the records and information sought by Plaintiff/Petitioner MOC pursuant to MCL 28.425e(5)(m).

24. At no time prior to the filing of this lawsuit did Defendant MICHIGAN DEPARTMENT OF STATE POLICE disclose that the responsive records required to be compiled and published pursuant to MCL 28.425e(5)(m) and sought by Plaintiff/Petitioner MOC did not and does not exist.

25. By remaining silent and/or actively undertaking intentional deceptive act to hide the non-existence of the responsive records required to be compiled and published pursuant to MCL 28.425e(5)(m) which were expressly sought by Plaintiff/Petitioner MOC via the Sept 28 FOIA Request, Defendant MICHIGAN DEPARTMENT OF STATE POLICE violated the *Freedom of Information Act*.

26. If the responsive records do not exist, Defendant MICHIGAN DEPARTMENT OF STATE POLICE has violated the *Freedom of Information Act* which imposes numerous remedies including 1.) the mandatory award of costs and fees where one is forced into litigation to discover the non-existence of a requested record, even though the action has been rendered moot by the illegal acts of the public body; 2.) fines and punitive damages for the arbitrary and capricious violation of the *Freedom of Information Act* as a matter of law; and 3.) reasonable attorney fees, costs, and disbursements pursuant to *Hartzell*.

27. Plaintiff/Petitioner MOC has incurred attorney fees, costs, and disbursements in seeking the rightful fulfillment of her request under Michigan's *Freedom of Information Act*.

RELIEF REQUESTED

28. WHEREFORE, Plaintiff/Petitioner MOC requests this Court—

- a. enter an order assigning this matter hearing and trial or for argument at the earliest practicable date and be expedited in every way pursuant to MCL 15.240(5);
- b. find Defendant MICHIGAN DEPARTMENT OF STATE POLICE violated the *Freedom of Information Act* as it applies to Plaintiff MOC's Sept 28 FOIA Request;

- c. enter an order against Defendant MICHIGAN DEPARTMENT OF STATE POLICE compelling the disclosure of the public records requested and granted via the Sept 28 FOIA Request;
- d. find that COL. KRISTE KIBBEY ETUE, as the head of Defendant MICHIGAN DEPARTMENT OF STATE POLICE, violated the *Freedom of Information Act* by refusing to rule on Plaintiff/Petitioner MOC's appeal and that such acts constitute an arbitrary and capricious violation of the *Freedom of Information Act* and/or a willfully and intentionally failure to comply with the *Freedom of Information Act*, and/or otherwise acted in bad faith in violation of the *Freedom of Information Act*;
- e. to the extent applicable, find Defendant MICHIGAN DEPARTMENT OF STATE POLICE violated the *Freedom of Information Act* pursuant to *Hartzell v Mayville Sch Dist*, 183 Mich App 782 (1990);
- f. to the extent applicable, enter an order pursuant to *Lash v Traverse City*, 479 Mich 180 (2007) commanding Defendant MICHIGAN DEPARTMENT OF STATE POLICE to comply with MCL 28.425e(5)(m) henceforth by posting on Defendant MICHIGAN DEPARTMENT OF STATE POLICE's internet website an annual report setting forth a list of expenditures made by the Defendant MICHIGAN DEPARTMENT OF STATE POLICE from money received under the *Firearms Act*, regardless of purpose and disclose the same to Plaintiff/Petitioner MOC;
- g. enter an order awarding all reasonable attorney fees, costs, and disbursements required by MCL 15.240(6) and/or *Hartzell v Mayville Sch Dist*, 183 Mich App 782 (1990);
- h. enter an order awarding all punitive damages and imposing all civil fines authorized by Michigan's *Freedom of Information Act*, and
- i. grant all other relief that Court deems equitable and just.

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VERIFICATION

1. Plaintiff/Petitioner MICHIGAN OPEN CARRY, INC, by its agent and president Thomas Lambert, has reviewed the above-pled complaint.
2. Regarding the allegations of which Plaintiff/Petitioner MICHIGAN OPEN CARRY, INC, by its agent and president Thomas Lambert, has personal knowledge, it believes them to be true.
3. Regarding the allegations of which Plaintiff/Petitioner MICHIGAN OPEN CARRY, INC, by its agent and president Thomas Lambert, does not have personal knowledge, it believes them to be true based on specified information, documents, or both.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Thomas Lambert, on behalf of
Michigan Open Carry, Inc

Date

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Date: May __, 2018

RESPECTFULLY SUBMITTED:

Philip L Ellison

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