STATE OF MICHIGAN
IN THE COURT OF APPEALS

MICHIGAN OPEN CARRY, INC,
Plaintiff-Petitioner/Appellant,

v.

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

Court of Appeals Case No.: 344936
Court of Claims Case No.: 18-000058-MZ

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APPELLANT'S APPENDIX

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

Case No.: 18-_____-MZ
Honorable _____

COMPLAINT

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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)

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.

2. Defendant MICHIGAN DEPARTMENT OF STATE POLICE (aka MICHIGAN STATE POLICE) is an 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 October 26, 2017, Plaintiff MOC submitted a *Freedom of Information Act* request to Defendant MICHIGAN DEPARTMENT OF STATE POLICE via electronic mail seeking the following records from Defendant MICHIGAN DEPARTMENT OF STATE POLICE:

> Records created by and/or maintained by the Michigan Department of State Police from peace officers and authorized system users compiled pursuant to MCL 28.421b(2)(f) and MCL 28.425e(4) between October 1st, 2016 and September 30th, 2017.
>
> [hereinafter the "Oct 26 FOIA Request"].

8. A fair and accurate copy of the Oct 26 FOIA Request is attached hereto as **Exhibit A**.

9. Plaintiff MOC expressly informed Defendant MICHIGAN DEPARTMENT OF STATE POLICE that--

> this request is not seeking any individual's firearm records, but rather the non-confidential separate public records associated with official acts of public officials and public employees in accessing said confidential records in compliance with their statutory duties. **Michigan Open Carry, Inc. is requesting *the reason(s) provided* pursuant to MCL 28.421b(2)(f), as well as the related information pertaining to the fulfillment of statutory access obligations pursuant to MCL 28.425e(4).** Pursuant the public policy of this state, Michigan Open Carry, Inc. "cannot hold our officials accountable [for complying with their public duties under MCL 28.421b(2)(f) and MCL 28.425e(4)] if we do not have the information upon which to evaluate their actions."

10. Defendant MICHIGAN DEPARTMENT OF STATE POLICE is required by law to "create and maintain a computerized database" of information relating to Concealed Pistol Licenses [CPL] pursuant to MCL 28.425e(1) [hereinafter "Firearms Records Database"].

11. State law pursuant to MCL 28.421b(2)(f) only allows public officials access to the Firearms Records Database for specific enumerated purposes; when doing so Michigan law requires the system user to "enter and record the specific reason in the system in accordance with the procedures in [MCL 28.425e]".

12. Pursuant to section 5e (MCL 28.425e(4)), the following additional information shall be recorded when the Firearms Records Database is accessed:

> 4) Information in the database shall only be accessed and disclosed according to an access protocol that includes the following requirements:
>
> > (a) That the requestor of the firearms records uses the law enforcement information network or another system that maintains a record of the requestor's identity, time, and date that the request was made.
> >
> > (b) Requires the requestor in an intentional query by name of the firearms records to attest that the firearms records were sought under 1 of the lawful purposes provided in section 1b(2) [MCL 28.421b(2)].

13. Plaintiff MOC's Oct 26 FOIA Request cited and quoted MCL 28.421b(2)(f) and MCL 28.425e(4), as well as provided detailed clarifications as to what information was being sought, and what information was not.

14. Plaintiff MOC's Oct 26 FOIA Request specifically stated that if Defendant MICHIGAN DEPARTMENT OF STATE POLICE denies "any or all of this request, please issue the denial certificate under MCL 15.235(5), cite each specific exemption you feel justifies the refusal, and notify us of the appeal procedures available."

15. The subject line of the Oct 26 FOIA Request contained the phrase "FOIA", and the body of the message specifically used the phrases "freedom of information" and "FOIA" in the first 250 words as required by statute; MCL 15.235(3)(b).

16. A written request made by electronic mail is not considered to have been received by a public body until one (1) business day after the electronic transmission is made; MCL 15.235(1). Thus, Plaintiff MOC's Oct 26 FOIA request was officially received by Defendant MICHIGAN DEPARTMENT OF STATE POLICE on October 27, 2017.

17. Unless otherwise agreed to in writing by the person making the request, a public body shall respond to a request within five (5) business days after the public body receives a request; MCL 15.235(2). Plaintiff MOC did not agree to waive this requirement, in writing or otherwise.

18. Failure of Defendant MICHIGAN DEPARTMENT OF STATE POLICE to respond to Oct 26 FOIA Request pursuant to MCL 15.235(2) constitutes a public body's final determination to deny the request, see MCL 15.235(3).

19. On November 3, 2017, after the statutory deadline and unbeknownst to Plaintiff MOC, Mr. Lance Gackstetter of Defendant MICHIGAN DEPARTMENT OF STATE POLICE's Freedom of Information Unit issues a ten (10) business day extension of Defendant MICHIGAN DEPARTMENT OF STATE POLICE's deadline via first-class mail postmarked the same day [hereinafter the "Nov 3 Extension"].

20. A fair and accurate copy of the Nov 3 Extension is attached hereto as **Exhibit B**.

21. A fair and accurate copy of the envelope transmitting the Nov 3 Extension is attached hereto as **Exhibit C**.

22. On November 17, 2017, Mr. Gackstetter responded to Plaintiff MOC's Oct 26 FOIA Request via email [hereinafter the "Gackstetter Email"].

23. A fair and accurate copy of the Gackstetter Email is attached hereto as **Exhibit D**.

24. The Gackstetter Email contained an attached document dated the same day stating:

> Your request is granted as to the information currently available. The Concealed Pistol License (CPL) report is not complete at this time. The report is not statutorily required to be released until January 1, of each year. However, in the spirit of cooperation, we have summarized the information you are requesting below:
>
> 1- 24,493
> 2- 1,771
> 3- 49,626
> 4- 1,449,241
> 5- 905,110
> 6- 42,329
> 7- 87,717

[hereinafter the "Gackstetter Response"].

25. A fair and accurate copy of the Gackstetter Response is attached hereto as **Exhibit E**.

26. The Gackstetter Response only contained information that was ***not*** requested in any way by Plaintiff MOC and invoked no exemptions.

27. On November 20, 2017, pursuant to MCL 15.240(1)(a), Plaintiff MOC appealed via electronic mail to COL. KRISTE KIBBEY ETUE as the head of Defendant MICHIGAN DEPARTMENT OF STATE POLICE regarding her public body's denial of Plaintiff MOC's Oct 26 FOIA Request alleging a "willful and intentional" unlawful denial [hereinafter the "Nov 20 Denial Appeal"].

28. A fair and accurate copy of the Nov 20 Denial Appeal is attached hereto as **Exhibit F**

29. Plaintiff MOC's Nov 20 Denial Appeal contained the word "appeal" in both the subject and body and identified the reasons for the appeal.

30. On November 29, 2017, an employee named LORI HINKLEY replied to Plaintiff MOC's Nov 20 Denial Appeal via first-class mail [hereinafter the "Hinkley Appeal Denial"].

31. A fair and accurate copy of the Hinkley Appeal Denial is attached hereto as **Exhibit G**.

32. A fair and accurate copy of the envelope transmitting the Hinkley Appeal Denial is attached hereto as **Exhibit H**.

33. In the Hinkley Appeal Denial dated Nov 29, 2017, Defendant MICHIGAN DEPARTMENT OF STATE POLICE purports to deny Plaintiff MOC's appeal claiming to have already provided "the only responsive records within the possession of the public body" and that a "statutory report that explains and summarizes the information has not yet been completed".

34. Defendant MICHIGAN DEPARTMENT OF STATE POLICE did not explain how it is possible for them to be in the process of summarizing information they simultaneously do not possess.

COUNT I
APPEAL DECIDED BY PERSON OTHER THAN HEAD OF A PUBLIC BODY
VIOLATION OF FOIA, MCL 15.240(1)(a) and MCL 15.240(2)

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

36. MCL 15.240(1)(a) provides that if a public body makes a final determination to deny all or a portion of a request, the requesting person may...[s]ubmit to *the head of the public body* a written appeal that specifically states the word "appeal" and identifies the reason or reasons for reversal of the denial.

37. MCL 15.240(2) requires that within 10 business days after receiving a written appeal pursuant to subsection (1)(a), *the head of a public body* ***shall*** do 1 of the following: (a) Reverse the disclosure denial; (b) Issue a written notice to the requesting person upholding the disclosure denial; (c) Reverse the disclosure denial in part and issue a written notice to the requesting person upholding the disclosure denial in part; or (d) Under unusual circumstances, issue a notice extending for not more than 10 business days the period during which the head of the public body shall respond to the written appeal. The head of a public body shall not issue more than 1 notice of extension for a particular written appeal.

38. COL. KRISTE KIBBEY ETUE is the head of Defendant MICHIGAN DEPARTMENT OF STATE POLICE.

39. LORI HINKLEY is not the head of Defendant MICHIGAN DEPARTMENT OF STATE POLICE.

40. The *Freedom of Information Act* does not allow for the delegation of appeal decisions belonging to the head of the public body to subordinates like LORI HINKLEY.

41. The act or omission of COL. KRISTE KIBBEY ETUE in failing to review and decide Plaintiff MOC's appeal made pursuant to MCL 15.240(1)(a) constitutes an intentional violation of the *Freedom of Information Act* and that such acts constitute an arbitrary and capricious violation of FOIA and/or a willfully and intentionally failure to comply with FOIA, and/or otherwise acted in bad faith.

42. The acts of LORI HINKLEY and the failure to act by COL. KRISTE KIBBEY ETUE as required by MCL 15.240(2) also constitutes an intentional violation of the *Freedom of Information Act* and that such acts constitute an arbitrary and capricious violation of FOIA and/or a willfully and intentionally failure to comply with FOIA, and/or otherwise acted in bad faith.

COUNT II
WRONGFUL DENIAL / FAILURE TO PRODUCE REQUESTED RECORDS VIA FOIA
OCT 26, 2017 REQUEST

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

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

45. 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*.

46. Because there is no proper justification for refusing to timely produce the requested records containing information sought pursuant to the Oct 26 FOIA Request, Defendant MICHIGAN DEPARTMENT OF STATE POLICE arbitrarily and capriciously violated this Michigan law by refusing to act in accordance with the Act.

47. 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).

48. 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 III
***HARTZELL/LASH* CLAIM**

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

50. This Count is pled in the alternative to Count II, contingent upon Defendant MICHIGAN DEPARTMENT OF STATE POLICE's failure to disclose via the Oct 26 FOIA Request that information/record sought does not exist.

51. 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).

52. At no time prior to the filing of this lawsuit did Defendant MICHIGAN DEPARTMENT OF STATE POLICE disclose that the responsive records sought vis-a-vis MCL 28.421b(2)(f) and MCL 28.425e(4) and sought by Plaintiff/Petitioner MOC did not and does not exist.

53. By remaining silent and/or actively undertaking an intentionally deceptive act to hide the non-existence of the responsive records sought by Plaintiff/Petitioner MOC via the Oct 26 FOIA Request, Defendant MICHIGAN DEPARTMENT OF STATE POLICE violated the *Freedom of Information Act*.

54. 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 FOIA as a matter of law; and 3.) reasonable attorney fees, costs, and disbursements pursuant to *Hartzell*.

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

RELIEF REQUESTED

56. 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 that LORI HINKLEY is not the head of the public body under MCL 15.240 and that COL. KRISTE KIBBEY ETUE is the actual head of Defendant MICHIGAN DEPARTMENT OF STATE POLICE;

c. find that COL. KRISTE KIBBEY ETUE, as the head of Defendant MICHIGAN DEPARTMENT OF STATE POLICE, violated the *Freedom of Information Act* by delegating decision authority to LORI HINKLEY as well as refusing to personally rule on Plaintiff/Petitioner MOC's Nov 20 Denial 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 an act undertaken in bad faith in violation of the *Freedom of Information Act*;

d. enter an order compelling Defendant MICHIGAN DEPARTMENT OF STATE POLICE to update its mandatory *Freedom of Information Act Procedures and Guidelines* located on its website at https://www.michigan.gov/documents/msp/Procedures_and_Guidelines_MSP_493660_7.pdf to mandate and reflect that COL. KRISTE KIBBEY ETUE, as the head of Defendant MICHIGAN DEPARTMENT OF STATE POLICE, must upon rule on internal FOIA appeals made pursuant to and provided by MCL 15.240(1)(a) and MCL 15.240(2);

e. find Defendant MICHIGAN DEPARTMENT OF STATE POLICE violated the *Freedom of Information Act* as it applies to Plaintiff MOC's Oct 26 FOIA Request;

f. enter an order against Defendant MICHIGAN DEPARTMENT OF STATE POLICE compelling the disclosure of the information and/or public records as requested via the Oct 26 FOIA Request;

g. 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);

h. 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);

i. enter an order awarding all punitive damages and imposing all civil fines authorized by Michigan's *Freedom of Information Act*; and

j. grant all other relief that Court deems equitable and just.

<<CONTINUE ON NEXT PAGE>>

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.

Tom Lambert — 5-4-2018

Thomas Lambert, on behalf of
Michigan Open Carry, Inc

Date

<<CONTINUE ON NEXT PAGE>>

Date: May 7, 2018

RESPECTFULLY SUBMITTED:

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

STATE OF MICHIGAN
IN THE COURT OF CLAIMS

MICHIGAN OPEN CARRY, INC,
Plaintiff/Petitioner,

v.

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

Case No.: 18-000087-MZ
Honorable Cynthia Stephens

MOTION

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PLAINTIFF'S MOTION FOR PARTIAL SUMMARY DISPOSITION

NOW COMES Plaintiff MICHIGAN OPEN CARRY, INC, by counsel, and moves for summary disposition under Counts I and II[1] pursuant to MCR 2.116(C)(10) for these matters raised under the Freedom of Information Act.

FACTS

On October 26, 2017, Plaintiff MICHIGAN OPEN CARRY, INC ("Plaintiff MOC") submitted a Freedom of Information Act request to Defendant MICHIGAN DEPARTMENT OF STATE POLICE (the "Department") via electronic mail seeking the following records—

> Records created by and/or maintained by the Michigan Department of State Police from peace officers and authorized system users compiled pursuant to MCL

[1] Plaintiff MICHIGAN OPEN CARRY, INC reserves the issue of Count III as it was pled in the alternative to Count II and contingent upon Defendant MICHIGAN DEPARTMENT OF STATE POLICE's failure to disclose via the Oct 26 FOIA Request that information/record sought does not exist.. See Ver Compl, ¶50.

> 28.421b(2)(f) and MCL 28.425e(4) between October 1st, 2016 and September 30th, 2017.

Exhibit A [hereinafter the "Oct 26 FOIA Request"]. Under Michigan law, when a peace officer or other authorized user looks up records kept under the Firearms Act database, he or she "shall enter and record the specific reason in the system in accordance with the procedures" required under section 5(e). Section 5(e), in turn, mandates that information contained in the database shall only be accessed and disclosed according to an access protocol that includes the following requirements: (a) that the requestor of the firearms records uses the law enforcement information network or another system that maintains a record of the requestor's identity, time, and date that the request was made; and (b) the requestor in an intentional query by name of the firearms records to attest that the firearms records were sought under 1 of the lawful purposes provided in section 1b(2). MCL 28.425e(4)(a)-(b). Plaintiff MOC expressly informed the Department that—

> this request is not seeking any individual's firearm records, but rather the non-confidential separate public records associated with official acts of public officials and public employees in accessing said confidential records in compliance with their statutory duties. Michigan Open Carry, Inc. is requesting *the reason(s) provided* pursuant to MCL 28.421b(2)(f), as well as the related information pertaining to the fulfillment of statutory access obligations pursuant to MCL 28.425e(4). Pursuant the public policy of this state, Michigan Open Carry, Inc. "cannot hold our officials accountable [for complying with their public duties under MCL 28.421b(2)(f) and MCL 28.425e(4)] if we do not have the information upon which to evaluate their actions."

Exhibit A. The Department is required by law to "create and maintain a computerized database" of information relating to Concealed Pistol Licenses [CPL] pursuant to MCL 28.425e(1) [hereinafter "Firearms Records Database"]. Michigan law expressly directs that public officials may only access the Firearms Records Database for specific enumerated purposes. MCL 28.421b(2)(f). Given that police officers and the like query

for information all year, there should been thousands of entries in the database and producible in response to the Oct 26 FOIA Request. In fact, discovery revealed that the database had been queried over a million times and, of that number, 42,329 queries were made specifically related to MCL 28.421b(2)(f). **Exhibit J.** That means there should be, *at least*, 42,329 data entries of the requestor's identity, time, and date that the request was made together with attestation required by MCL 28.425e(4)(b) why the confidential Firearms Records Database was accessed.

On November 3, 2017, the Department issued a ten (10) business day extension via first-class mail postmarked the same day. **Exhibit B** [hereinafter the "Nov 3 Extension"]; **Exhibit C**. On November 17, 2017, FOIA Coordinator Lance Gackstetter, on behalf of the Department, responded to Plaintiff MOC's Oct 26 FOIA Request via email. **Exhibit D** [hereinafter the "Gackstetter Email"]. The Gackstetter Email contained an attached document, **Exhibit E,** dated the same day stating:

> Your request is granted as to the information currently available. The Concealed Pistol License (CPL) report is not complete at this time. The report is not statutorily required to be released until January 1, of each year. However, in the spirit of cooperation, we have summarized the information you are requesting below:
>
> 1- 24,493
> 2- 1,771
> 3- 49,626
> 4- 1,449,241
> 5- 905,110
> 6- 42,329
> 7- 87,717

Exhibit E [hereinafter the "Gackstetter Response"]. The Gackstetter Response only contained information that was *not* requested in any way by Plaintiff MOC and invoked no exemptions.

On November 20, 2017, pursuant to MCL 15.240(1)(a), Plaintiff MOC administratively appealed to Col. Kriste Kibbey Etue as the head of the Department regarding her public body's denial of Plaintiff MOC's Oct 26 FOIA Request alleging a "willful and intentional" denial which was improper. **Exhibit F** [hereinafter the "Nov 20 Denial Appeal"]. The Nov 20 Denial Appeal specifically explained that the Department's FOIA unit, through Gackstetter, responded to the Oct 26 FOIA Request by providing a reply "containing zero information matching the request." ***Id.*** It further explained that "[r]ather than providing anything remotely resembling the request described above, all that was provided in this reply were seven seemingly random and unlabeled numbers ranging from four to seven digits in length." ***Id.*** As part of the challenge, Plaintiff MOC asserted that "it can only be said that the records requested on October 26th have been improperly and unjustifiably denied in violation of the FOIA." ***Id.*** It further asserted that the denial was not only arbitrary and capacious, but also willful and intentional. ***Id.***

On November 29, 2017, a Department employee named Lori Hinkley replied to Plaintiff MOC's Nov 20 Denial Appeal via first-class mail. **Exhibit G** [hereinafter the "Hinkley Appeal Denial"]. In the Hinkley Appeal Denial dated Nov 29, 2017, Lori Hinkley (and not Col. Kriste Kibbey Etue) purports to deny Plaintiff MOC's appeal claiming to have already provided "the only responsive records within the possession of the public body" and that a "statutory report that explains and summarizes the information has not yet been completed." ***Id.*** Ms. Hinkley did not explain how it is possible for the Department to be in the process of "summarizing" information they simultaneously do not possess.

Discovery has resulted in key judicial admissions[2] that—

- The head of the Michigan Department of State Police, Col. Kriste Kibbey Etue, did not personally render the decision on Plaintiff Michigan Open Carry's November 20, 2017 FOIA appeal.

- FOIA Appeals Officer Lori M. Hinkley rendered the decision on Plaintiff Michigan Open Carry's November 20, 2017 FOIA appeal.

Exhibit I. This lawsuit then followed.

ARGUMENT

I. Col. Kriste Kibbey Etue failed to review the FOIA challenge as required by statute.

The failure to prove information sought via a FOIA request is deemed a denial if the materials sought were willfully and intentionally not produced. MCL 15.235(3). When that occurs, the disappointed requester has two options: it can directly file a civil lawsuit or can first submit to the head of the public body a written appeal that specifically states the word "appeal" and identifies the reason or reasons for reversal of the denial. MCL 15.240(1)(a)-(b). If electing the internal 'administrative' option, "[w]ithin 10 business days after receiving a written appeal pursuant to subsection (1)(a), *the head of a public body shall* do 1 of the following: (a) reverse the disclosure denial; (b) issue a written notice to the requesting person upholding the disclosure denial; or (c) reverse the disclosure denial in part and issue a written notice to the requesting person upholding the disclosure denial in part. MCL 15.240(2)(a)-(c). "If *the head of the public body* fails to respond to a written appeal…, or if *the head of the public body* upholds all or a portion of the disclosure denial

[2] Admissions under MCR 2.312 conclusively establishes the admitted facts "and the opposing side need not introduce evidence to prove the facts." *Radtke v Miller, Canfield, Paddock & Stone*, 453 Mich 413, 420; 551 NW2d 698 (1996).

that is the subject of the written appeal, the requesting person may seek judicial review of the nondisclosure by commencing a civil action…" MCL 15.240(3).

Here, the head of the Michigan Department of State Police is Col. Kriste Kibbey Etue and she did not personally render the decision on Plaintiff MOC's November 20, 2017 FOIA appeal. **Exhibit I, ¶1.** Instead, Lori M. Hinkley, a person with the title of FOIA Appeals Officer, rendered the decision on Plaintiff MOC's November 20, 2017 FOIA appeal.

When an administrative appeal option is taken, Col. Kriste Kibbey Etue, as the head of the public body, has the express statutory duty and assigned legal responsibility to personally review the appeal and "shall" do one of the options outlined in MCL 15.240(2). The duty has been designated to Col. Etue, not Hinkley. "The Legislature's use of the word 'shall' in a statute generally 'indicates a mandatory and imperative directive,'" *Costa v Cmty Emergency Med Services, Inc*, 475 Mich 403, 409; 716 NW2d 236 (2006); it is not discretionary, *Manuel v Gill*, 481 Mich 637, 647; 753 NW2d 48 (2008).

When the Legislature enacts statutes, courts are to apply the law as written. When construing statutes, courts presume that the Legislature intended the meaning expressed by the plain, unambiguous language of a statute. *In re Schwein Estate*, 314 Mich App 51, 59; 885 NW2d 316 (2016). Moreover, an official with a statutorily-assigned public duty cannot delegate his or her legal duty to another. For example, judges cannot delegate their ultimate responsibility for the hearing of evidence and the determination of issues. *Campbell v Evans*, 358 Mich 128, 132; 99 NW2d 341 (1959). Similarly, a municipality may not delegate its legal duty imposed by law. *Bivens v Grand Rapids*, 190 Mich App 455, 458; 476 NW2d 431 (1991). An adjudication agency may not delegate its statutory

responsibilities to hearing referees. *Shapiro Bag Co v Grand Rapids*, 217 Mich App 560, 563; 552 NW2d 185 (1996). The non-delegation principle is well-established.

Here, the Legislature gave Col. Kriste Kibbey Etue as the head of a public body a specific legal duty. The statute does not provide that the head of the public body *or its designee* may render the decision. The Legislature knows how to authorize duty delegation when it opts to allow for such an option. For example, the Motor Vehicle Service and Repair Act directs that the Michigan "[S]ecretary of [S]tate *or his designee* shall administer this act." MCL 257.1308. By not authorizing a designee by statute, FOIA requires the head of the Department to make the decision on appeal. Col. Kriste Kibbey Etue has that duty and she flatly refused to do her duty. The appeal process utilized by the Department violated MCL 15.240(2)-(3).[3] Because there is no material question of fact, summary disposition is warranted.

When a violation of a statute occurs and there is no private cause of action created by the Legislature, a plaintiff can seek to "enforce the statute by seeking injunctive relief pursuant to MCR 3.310, or declaratory relief pursuant to MCR 2.605(A)(1)." *Lash v Traverse City*, 479 Mich 180, 196; 735 NW2d 628 (2007). Plaintiff MOC here seeks both.

This Court can issue declaratory relief "in a case of actual controversy within its jurisdiction" and "declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted." MCR 2.605(A)(1). The existence of any other adequate remedy does not preclude a judgment for declaratory relief. MCR 2.605(C). Declaratory relief is warranted because the

[3] This isn't to say that an appeal official is prohibited from *assisting* Col. Kriste Kibbey Etue in her decision-making. However, the ultimate decision rests with the head of the public body, not their unauthorized designee. And here, Col. Kriste Kibbey Etue had no part of the decision whatsoever.

Department's undertaken procedures for administrative appeals violates the Michigan FOIA statute.

Injunctive relief, on the other hand, is "an extraordinary remedy that issues only when justice requires, there is no adequate remedy at law, and there exists a real and imminent danger of irreparable injury." *Jeffrey v Clinton Twp*, 195 Mich App 260, 263-264; 489 NW2d 211 (1992). In deciding whether injunctive relief is appropriate, the trial court will generally balance the benefit of an injunction to the plaintiff against the inconvenience and damage to the defendant, and decide in accordance with justice and equity under all the circumstances of the case. *Kernen v Homestead Dev Co*, 232 Mich App 503, 514; 591 NW2d 369 (1998).

All three elements are easily met. Justice requires a public official and a state department's processes to comply with positive law. The FOIA statute creates no money damages remedy so there is no adequate remedy at law. Lastly, the failure of the Department to provide the required process under FOIA is an irreparable injury. As such, an injunction is warranted to command compliance by the Department.

II. The Department violated FOIA by failing to properly disclose the information sought as required by the sunshine statute.

Count II challenges the non-disclosure of the records expressly sought from (but were not provided by) the Department. Plaintiff MOC sought essentially several thousand electronic entries held in computer records. Instead, they were provided a newly-made calculations containing only totals. Thusly, the request was wrongfully unfulfilled and denied.

A. FOIA is a pro-requester, pro-disclosure statute.

Michigan appellate courts have repeatedly and consistently described FOIA as a "pro-disclosure statute," e.g. *Herald Co v Bay City*, 463 Mich 111, 119; 614 NW2d 873 (2000), *Swickard v Wayne County Med Examiner*, 438 Mich 536, 544; 475 NW2d 304 (1991), which must be interpreted broadly to ensure proper public access, e.g. *Practical Political Consulting v Sec'y of State*, 287 Mich App 434, 465; 789 NW2d 178 (2010). "FOIA is a manifestation of this state's public policy favoring public access to government information, recognizing the need that citizens be informed as they participate in democratic governance, and the need that public officials be held accountable for the manner in which they perform their duties." *Manning v East Tawas*, 234 Mich App 244, 248; 593 NW2d 649 (1999). The Michigan Legislature has categorically announced that:

> It is the public policy of this state that all persons, except those persons incarcerated in state or local correctional facilities, are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees, consistent with this act. The people shall be informed so that they may fully participate in the democratic process.

MCL 15.231(2). FOIA provides "that 'a person' has a right to inspect, copy, or receive public records upon providing a written request to the FOIA coordinator of the public body." *Detroit Free Press, Inc v City of Southfield*, 269 Mich App 275, 290; 713 NW2d 28 (2005). Electronic data entries are public records subject to FOIA disclosure. *Ellison v Dep't of State*, 320 Mich App 169, 176; 906 NW2d 221 (2017). "Under FOIA, a public body must disclose all public records that are not specifically exempt under the act." *Thomas v New Baltimore*, 254 Mich App 196, 201; 657 NW2d 530 (2002); see also MCL 15.233(1). FOIA causes an unusual twist for typical case procedures. As the defendant and public body, the Department solely bears the burden of proving that the

refusal/denial was properly justified under FOIA. MCL 15.240(4); *Federated Publications, Inc v City of Lansing*, 467 Mich 98, 109; 649 NW2d 383 (2002). A requester need not prove anything. If a public body fails to meet its burden, the Court must order disclosure. *Hopkins v Duncan Twp*, 294 Mich App 401, 409; 812 NW2d 27 (2011).

A. The Department provided newly-made totals, not the records or information actually sought.

Plaintiff MOC sought very specific information—the "records created by and/or maintained by the Michigan Department of State Police *from peace officers and authorized system users* compiled pursuant to MCL 28.421b(2)(f) and MCL 28.425e(4) between October 1st, 2016 and September 30th, 2017." **Exhibit A.** As noted above, the response should have been the actual entries which have entered and recorded the specific reason in the system, together with the requestor's identity, time, and date that the query was undertaken. The Department instead provided totals, not the sought records/information. Instead of providing those data entries entered by the querying peace officer or an authorized user, the Department only provided a list of numbers. The Department's response was:

> *In the spirit of cooperation, we <u>have summarized</u> the information you are requesting below:*
>
> *1 - 24,493*
> *2 - 1,771*
> *3 - 48,626*
> *4 - 1,448,241*
> *5 - 905,110*
> *6 - 42,329*
> *7 - 87,717*

Exhibit B. It concedes the Department did not provide the information/records sought but rather undertook to "have summarized" the records. A summarization is not what was requested. As part of discovery, Plaintiff MOC inquired what these numbers mean. The

Depratment then explained that this represented the 'number of times' the database was accessed. The Department conceded that "the number of times the database was accessed because '[a] peace officer or an authorized user ha[d] reason to believe that access to the firearms records is necessary within the commission of his or her lawful duties'" citing MCL 28.421b(2)(f) was "42,329" times. As such, there should be, at least, 42,329 separate specific record-entries showing why the Firearms Records Database data was accessed. Moreover, there should be 42,329 reasons entered into and held by the system as inputted by the peace officer or user. Plaintiff MOC was clear:

> Michigan Open Carry, Inc. is requesting the reason(s) provided pursuant to MCL 28.421b(2)(f), as well as the related information pertaining to the fulfillment of statutory access obligations pursuant to MCL 28.425e(4).

Exhibit A. As such, the Department failed to provide the records demanded by Plaintiff MOC. This Court is requested to order disclosure. This Court is mandated to do so by MCL 15.240(4).

B. The records are not protected from disclosure.

It is expected that the Department may try to incorrectly and falsely argue the sought information is except from disclosure under the Freedom of Information Act. It would be wrong. FOIA has a list of exemptions which allows a public body to withhold disclosure. MCL 15.243(1). This also includes "records or information specifically described and exempted from disclosure by statute." MCL 15.243(1)(d).

Under the Firearms Act, "*firearms records* are confidential, are not subject to disclosure under the freedom of information act, 1976 PA 442, MCL 15.231 to 15.246…" MCL 28.421b(1). However, "firearms records" is a statutorily-defined term. "Where a statute supplies its own glossary, courts may not import any other interpretation but must apply the meaning of the terms as expressly defined." *People v Schultz*, 246 Mich App

695, 703; 635 NW2d 491 (2001), citing *Harder v Harder*, 176 Mich App 589, 591; 440 NW2d 53 (1989). Firearms records "means any form, information, or record required for submission to a government agency under sections 2, 2a, 2b, and 5b, or any form, permit, or license issued by a government agency under this act." The information being sought by Plaintiff MOC is that from section 5e, and not any information provided under sections 2, 2a, 2b, and 5b. This makes sense because sections 2, 2a, 2b, and 5b involves information submitted by citizen firearm owners. See *Mager v Dep't of State Police*, 460 Mich 134; 595 NW2d 142 (1999). Section 5e involves information created and retained *by the government* about its own activities. Plaintiff MOC was clear about this distinction as part of the Oct 26 FOIA Request—

> To be clear, this request is not seeking any individual's firearm records, but rather the non-confidential separate public records associated with official acts of public officials and public employees in accessing said confidential records in compliance with their statutory duties.

Exhibit A. As such, the records and information sought by Plaintiff MOC is not protected from disclosure under the Firearms Act. Disclosure must be ordered. MCL 15.240(4); *Hopkins, supra*, at 409.

III. This Court is now required to impose new additional statutory penalties.

In 2014, FOIA was amended and its penalties heavily stiffened. 2014 PA 563. The 2014 amendment added two mandatory penalties against guilty public bodies, separately from and additional to all others types of relief previously awarded.

MCL 15.240b provides—

> If the court determines, in an action commenced under this act, that a public body willfully and intentionally failed to comply with this act or otherwise acted in bad faith, the court <u>*shall*</u> order the public body to pay, in addition to any other award or sanction, a civil fine of not less than $2,500.00 or more than $7,500.00 for each occurrence. In determining the amount of the civil fine, the court shall consider the budget of the public body and whether the

> public body has previously been assessed penalties for violations of this act. The civil fine shall be deposited in the general fund of the state treasury.

This Court is requested to issue whatever civil fine it deems appropriate.

Furthermore, after July 1, 2015, punitive damages are awardable. Punitive damages relief is not technically a completely new remedy in light of the amendments, but merely became easier to obtain post-amendment. The *pre*-2015 statute read—

> *If the circuit court determines in an action commenced under this section that the public body has arbitrarily and capriciously violated this act by refusal or delay in disclosing or providing copies of a public record*, the court shall award, in addition to any actual or compensatory damages, punitive damages in the amount of $500.00 to the person seeking the right to inspect or receive a copy of a public record.

The *post*-2015 statute (i.e. current and operative statute) reads:

> If the court determines in an action commenced under this section that the public body has arbitrarily and capriciously violated this act by refusal or delay in disclosing or providing copies of a public record, the court shall order the public body to pay a civil fine of $1,000.00, which shall be deposited into the general fund of the state treasury. *The court shall award, in addition to any actual or compensatory damages, punitive damages in the amount of $1,000.00 to the person seeking the right to inspect or receive a copy of a public record.* The damages shall not be assessed against an individual, but shall be assessed against the next succeeding public body that is not an individual and that kept or maintained the public record as part of its public function.

MCL 15.240(7). In short, the Legislature has, by the 2014 amendment, decoupled the punitive damages remedy from the need for a prerequisite finding of a public body having acted "arbitrarily and capriciously" under the prior superseded statute. This amendment is no accident. Failure to comply with FOIA has long been an abuse by governments and their officials to hide public records (often times that are embarrassing or proof of its malfeasance) that they themselves solely hold and control. The Legislature is correcting those wrongful acts of self-serving non-transparency and preventing the improper withholding of public information. Punitive damages are now mandatory. MCL 15.240(7)

("the court shall…"). The Legislature is presumed to have intended the meaning it plainly expressed, *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012), and clear statutory language must be enforced as written, *Velez v Tuma*, 492 Mich 1, 16-17; 821 NW2d 432 (2012). We cannot presume the Legislature meant one thing when it actually did another. *People v Feezel*, 486 Mich 184, 211; 783 NW2d 67 (2010) ("It is a well-known principle that the Legislature is presumed to be aware of, and thus to have considered the effect on, all existing statutes when enacting new laws."); *People v Stone*, 463 Mich 558, 562; 621 NW2d 702 (2001) ("When that language is unambiguous, no further judicial construction is required or permitted, because the Legislature is presumed to have intended the meaning it plainly expressed."). A court is not free to rewrite an amended and stronger-worded statute because the end result may be subjectively unpalatable to robed judges, and that "the object of judicial statutory construction is not to determine whether there are valid alternative policy choices that the Legislature may or should have chosen, but to determine from the text of the statute the policy choice the Legislature actually made." *People v McIntire*, 461 Mich 147, 157; 599 NW2d 102 (1999). "Contrary judicial gloss" is strictly prohibited. *Morales v Auto-Owners Ins Co (After Remand)*, 469 Mich 487, 490; 672 NW2d 849 (2003).

The Legislature went further in its amendments:

> *The court shall award, **in addition to** any actual or compensatory damages, punitive damages in the amount of $1,000.00 to the person seeking the right to inspect or receive a copy of a public record.*

In short, the Legislature has, by the amendment (see 2014 PA 563), awarded punitive damages as a penalty "in addition to" the relief of actual or compensatory damages which may be awarded by MCL 15.235(4). The "in addition to" punitive award under MCL

15.240(7) is not conditional upon MCL 15.235(4)'s requirements like actual or compensatory damages; it stands alone. Something cannot be "in addition to" if it is already part of something else. As such, the $1,000.00 penalty is now mandatory relief "in addition to" any damages awarded. "Any material change in the language of a statute is presumed to indicate a change in legal rights." *Deschaine v St Germain*, 256 Mich App 665, 672; 671 NW2d 79 (2003). After the 2014 amendment, the Legislature solely placed the conditions *on the civil fine remedy* (see *supra*) and removed the conditions on the mandatory award of punitive damages in the new amended Section 10(7). The punitive award is required "in addition to," making the relief cumulative. See *Dep't of Agriculture v Appletree Mktg, LLC*, 485 Mich 1; 779 NW2d 237 (2010). As such, the $1,000.00 penalty is now mandatory, not conditional upon a prerequisite finding of acting "arbitrarily and capriciously" or the thresholds in Section 5(4). The award of punitive damages is sought in this case.

RELIEF REQUESTED

To be clear, Plaintiff MOC is seeking only partial relief and not a conclusion on all issues raised by the Verified Complaint. Specifically, this Court is requested to reserve the issues of Count III and the amount of attorney fees and costs authorized by Michigan's *Freedom of Information Act* for further briefing and/or proceedings.

By this motion, Plaintiff MOC requests this Court grant summary disposition and provide all of the following relief—

a. find and declare pursuant to MCR 2.605(A)(1) that LORI HINKLEY is not the head of the public body under MCL 15.240 and that COL. KRISTE KIBBEY ETUE is the actual head of the Department;

b. find and declare pursuant to MCR 2.605(A)(1) that the Department violated MCL 15.240 when COL. KRISTE KIBBEY ETUE, as the head of the Department, by refusing to personally rule on Plaintiff MOC's Nov 20 Denial Appeal, and that such acts constitute an act undertaken in bad faith in violation of the *Freedom of Information Act* with the imposition of an attendant fine pursuant to MCL 15.240b;

c. find and declare pursuant to MCR 2.605(A)(1) the Department violated MCL 15.240 when COL. KRISTE KIBBEY ETUE, as the head of the Department, delegated decision authority to LORI HINKLEY;

d. enter an injunction against the Department and its officers, agents, servants, employees, and attorneys enjoining the process of having administrative appeal decisions be made by anyone other than as the head of the Department as required by MCL 15.240;

e. enter an order compelling that the Department to update its mandatory *Freedom of Information Act Procedures and Guidelines* located on its website to mandate and reflect that "the head of the Department" shall be the individual who rules on internal FOIA appeals made pursuant to and provided by MCL 15.240(1)(a) and MCL 15.240(2);

f. find the Department violated the *Freedom of Information Act* as it applies to Plaintiff MOC's Oct 26 FOIA Request, and that such constitutes an act undertaken in bad faith in violation of the *Freedom of Information Act* with the imposition of an attendant fine pursuant to MCL 15.240b.

g. enter an order against the Department pursuant to MCL 15.240(4) compelling the disclosure of the information and/or public records as requested via the Oct 26 FOIA Request;

h. enter an order granting all reasonable attorney fees, costs, and disbursements required by MCL 15.240(6) in an amount to be later determined by this Court;

i. impose the proper civil fine under MCL 15.240b; and

j. reserve all other remaining issues raised by Plaintiff MOC for resolution by further proceedings.

Date: December 1, 2018

RESPECTFULLY SUBMITTED:

Philip L Ellison

OUTSIDE LEGAL COUNSEL PLC
BY PHILIP L. ELLISON (P74117)
Attorney for Plaintiff
PO Box 107 · Hemlock, MI 48626
(989) 642-0055
(888) 398-7003 - fax
pellison@olcplc.com

***Electronic signature(s) now authorized by MCR 1.109(E)(4)*

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing document(s) was served on parties or their attorney of record by mailing the same via US mail to their respective business address(es) as disclosed by the pleadings of record herein with postage fully prepaid, on the

1st day of December, 2018.

Philip L Ellison

PHILIP L. ELLISON
Attorney at Law

MOC mail

Tom Lambert <tlamb

MSP FOIA Request - System Access Records

Tom Lambert <tlambert@miopencarry.org> Thu, Oct 26, 2017 at 1:03 PM
To: MSP-FOI@michigan.gov
Cc: MiOC Board <board@miopencarry.org>

To whom it may concern,

Pursuant to the Michigan Freedom of Information Act (FOIA), Michigan Public Act 442 of 1976; MCL 15.231 et seq., Michigan Open Carry, Inc. is hereby requesting an opportunity to obtain electronic (or paper) copies of public records. Michigan Open Carry, Inc. is hereby requesting the following from the Michigan Department of State Police:

- Records created by and/or maintained by the Michigan Department of State Police from peace officers and authorized system users compiled pursuant to MCL 28.421b(2)(f) and MCL 28.425e(4) between October 1st, 2016 and September 30th, 2017.

MCL 28.421b(1) declares individual's firearm records to be confidential, not subject to FOIA, and specifies that the individual's record(s) shall only be accessed as provided in the section. MCL 28.421b(2)(f) allows these records to be accessed by "*A peace officer or an authorized user [who] has reason to believe that access to the firearms records is necessary within the commission of his or her lawful duties. The peace officer or authorized system user shall enter and record the specific reason in the system in accordance with the procedures in section 5e.*" MCL 28.425e(4) states "*(4) Information in the database shall only be accessed and disclosed according to an access protocol that includes the following requirements: (a) That the requestor of the firearms records uses the law enforcement information network or another system that maintains a record of the requestor's identity, time, and date that the request was made. (b) Requires the requestor in an intentional query by name of the firearms records to attest that the firearms records were sought under 1 of the lawful purposes provided in section 1b(2).*"

To be clear, this request is not seeking any individual's firearm records, but rather the non-confidential separate public records associated with official acts of public officials and public employees in accessing said confidential records in compliance with their statutory duties. Michigan Open Carry, Inc. is requesting the reason(s) provided pursuant to MCL 28.421b(2)(f), as well as the related information pertaining to the fulfillment of statutory access obligations pursuant to MCL 28.425e(4). Pursuant the public policy of this state, Michigan Open Carry, Inc. "*cannot hold our officials accountable [for complying with their public duties under MCL 28.421b(2)(f) and MCL 28.425e(4)] if we do not have the information upon which to evaluate their actions.*" Practical Political Consulting v Secretary of State, 287 Mich App 434, 464 (2010).

Michigan Open Carry, Inc. is also hereby requesting a waiver of all fees as the disclosure of the requested information is in the public interest, and will contribute to the public's understanding and knowledge of proper or improper fulfillment of statutory duties of public officials and public employees.

If you deny any or all of this request, please issue the denial certificate under MCL 15.235(5), cite each specific exemption you feel justifies the refusal, and notify us of the appeal procedures available.

Lastly, please make any copies generated under this request available electronically per MCL 15.234(1)(c). Electronic records held within databases, spreadsheets, and/or all other electronic computer files holding relevant data is/are public records. See Ellison v Dep't of State, __ Mich App __ (2017)(Docket No. 336759). It is not only acceptable but preferred for the copies of the requested records to be provided in a .csv or .xls format. If another option would be better for the Department, please let us know and we would be happy to discuss the matter.

Thank you for your time processing this request.

Tom Lambert
President
Michigan Open Carry, Inc.

EXHIBIT
B
OUTSIDE LEGAL COUNSEL PLC
www.olcplc.com

STATE OF MICHIGAN
DEPARTMENT OF STATE POLICE
LANSING

RICK SNYDER
GOVERNOR

COL. KRISTE KIBBEY ETUE
DIRECTOR

11/03/2017

TOM LAMBERT
MICHIGAN OPEN CARRY, INC
PO BOX 16184
LANSING, MI 48901

NOTICE OF EXTENSION

Subject: CR-20049761

Dear TOM LAMBERT:

The Michigan Department of State Police has received your request for public records under the Michigan Freedom of Information Act (FOIA), MCL 15.231 *et seq*.

We are extending the time for responding to your request by ten (10) business days, as permitted under MCL 15.235, Section 5(2)(d). Therefore, a written notice will be issued to you on or before November 20, 2017.

If you have any questions concerning this matter, please feel free to contact our office at 517-241-1934 or email MSP-FOI@michigan.gov. You may also write to us at the address listed below and enclose a copy of this correspondence.

To review a copy of the Department's written public summary, procedures and guidelines, go to www.michigan.gov/msp.

Sincerely,

LANCE GACKSTETTER
Freedom of Information Unit
Michigan State Police

EXHIBIT
C
OUTSIDE LEGAL COUNSEL PLC
www.olcplc.com

MOC mail

Tom Lambert <[illegible]rg>

RE: MSP FOIA Request - System Access Records / CR-20049761

Gackstetter, Lance (MSP) <GackstetterL1@michigan.gov> Fri, Nov 17, 2017 at 12:16 PM
To: Tom Lambert <tlambert@miopencarry.org>
Cc: MiOC Board <board@miopencarry.org>

Mr. Lambert:

Attached is the response to your Freedom of Information Act request below.

Thank you,

Lance E. Gackstetter

Assistant FOIA Coordinator

Records Resource Unit

Office of the Director

Michigan State Police

P.O. Box 30634

Lansing, MI 48909

TX: 517-241-1934

Fax: 517-241-1935

"A PROUD tradition of SERVICE through EXCELLENCE, INTEGRITY, and COURTESY"

JOIN THE MSP

From: Tom Lambert [mailto:tlambert@miopencarry.org]
Sent: Thursday, October 26, 2017 1:04 PM
To: MSP-FOI
Cc: MiOC Board
Subject: MSP FOIA Request - System Access Records

To whom it may concern,

Pursuant to the Michigan Freedom of Information Act (FOIA), Michigan Public Act 442 of 1976; MCL 15.231 et seq., Michigan Open Carry, Inc. is hereby requesting an opportunity to obtain electronic (or paper) copies of public records. Michigan Open Carry, Inc. is hereby requesting the following from the Michigan Department of State Police:

- Records created by and/or maintained by the Michigan Department of State Police from peace officers and authorized system users compiled pursuant to MCL 28.421b(2)(f) and MCL 28.425e(4) between October 1st, 2016 and September 30th, 2017.

MCL 28.421b(1) declares individual's firearm records to be confidential, not subject to FOIA, and specifies that the individual's record(s) shall only be accessed as provided in the section. MCL 28.421b(2)(f) allows these records to be accessed by "*A peace officer or an authorized user [who] has reason to believe that access to the firearms records is necessary within the commission of his or her lawful duties. The peace officer or authorized system user shall enter and record the specific reason in the system in accordance with the procedures in section 5e.*" MCL 28.425e(4) states "*(4) Information in the database shall only be accessed and disclosed according to an access protocol that includes the following requirements: (a) That the requestor of the firearms records uses the law enforcement information network or another system that maintains a record of the requestor's identity, time, and date that the request was made. (b) Requires the requestor in an intentional query by name of the firearms records to attest that the firearms records were sought under 1 of the lawful purposes provided in section 1b(2).*"

To be clear, this request is not seeking any individual's firearm records, but rather the non-confidential separate public records associated with official acts of public officials and public employees in accessing said confidential records in compliance with their statutory duties. Michigan Open Carry, Inc. is requesting the reason(s) provided pursuant to MCL 28.421b(2)(f), as well as the related information pertaining to the fulfillment of statutory access obligations pursuant to MCL 28.425e(4). Pursuant the public policy of this state, Michigan Open Carry, Inc. "*cannot hold our officials accountable [for complying with their public duties under MCL 28.421b(2)(f) and MCL 28.425e(4)] if we do not have the information upon which to evaluate their actions.*" Practical Political Consulting v Secretary of State, 287 Mich App 434, 464 (2010).

Michigan Open Carry, Inc. is also hereby requesting a waiver of all fees as the disclosure of the requested information is in the public interest, and will contribute to the public's understanding and knowledge of proper or improper fulfillment of statutory duties of public officials and public employees.

If you deny any or all of this request, please issue the denial certificate under MCL 15.235(5), cite each specific exemption you feel justifies the refusal, and notify us of the appeal procedures available.

Lastly, please make any copies generated under this request available electronically per MCL 15.234(1)(c). Electronic records held within databases, spreadsheets, and/or all other electronic computer files holding relevant data is/are public records. See Ellison v Dep't of State, __ Mich App __ (2017)(Docket No. 336759). It is not only acceptable but preferred for the copies of the requested records to be provided in a .csv or .xls format. If another option would be better for the Department, please let us know and we would be happy to discuss the matter.

Thank you for your time processing this request.

Tom Lambert
President
Michigan Open Carry, Inc.

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RICK SNYDER
GOVERNOR

STATE OF MICHIGAN
DEPARTMENT OF STATE POLICE
LANSING

COL. KRISTE KIBBEY ETUE
DIRECTOR

November 17, 2017

Mr. Tom Lambert
Michigan Open Carry, Inc.
PO Box 16184
Lansing, Michigan 48901

Subject: CR-20049761; Concealed Pistol License (CPL) Report

Dear Mr. Lambert:

The Michigan State Police have received your request for certain information and has processed it under the provisions of the Michigan Freedom of Information Act (FOIA), MCL 15.231 *et seq*.

Your request is granted as to the information currently available. The Concealed Pistol License (CPL) report is not complete at this time. The report is not statutorily required to be released until January 1, of each year. However, in the spirit of cooperation, we have summarized the information you are requesting below:

1- 24,493
2- 1,771
3- 49,626
4- 1,449,241
5- 905,110
6- 42,329
7- 87,717

You may wish to visit our website (http://www.michigan.gov/msp/0, 4643, 7-123-1878_1591_3503_4654-77621--, 00.html) for more detail related to the information provided above.

Under the FOIA, Section 10 (a copy of which is enclosed) you have the right to appeal to the head of this public body or to a judicial review of the denial.

To review a copy of the department's written public summary, procedures, and guidelines, go to www.michigan.gov/msp.

Sincerely,

Lance Gackstetter
Assistant FOIA Coordinator

Enclosure

(1) If a public body makes a final determination to deny all or a portion of a request, the requesting person may do 1 of the following at his or her option:

(a) Submit to the head of the public body a written appeal that specifically states the word "appeal" and identifies the reason or reasons for reversal of the denial.

(b) Commence a civil action in the circuit court, or if the decision of a state public body is at issue, the court of claims, to compel the public body's disclosure of the public records within 180 days after a public body's final determination to deny a request.

(2) Within 10 business days after receiving a written appeal pursuant to subsection (1)(a), the head of a public body shall do 1 of the following:

(a) Reverse the disclosure denial.

(b) Issue a written notice to the requesting person upholding the disclosure denial.

(c) Reverse the disclosure denial in part and issue a written notice to the requesting person upholding the disclosure denial in part.

(d) Under unusual circumstances, issue a notice extending for not more than 10 business days the period during which the head of the public body shall respond to the written appeal. The head of a public body shall not issue more than 1 notice of extension for a particular written appeal.

(3) A board or commission that is the head of a public body is not considered to have received a written appeal under subsection (2) until the first regularly scheduled meeting of that board or commission following submission of the written appeal under subsection (1)(a). If the head of the public body fails to respond to a written appeal pursuant to subsection (2), or if the head of the public body upholds all or a portion of the disclosure denial that is the subject of the written appeal, the requesting person may seek judicial review of the nondisclosure by commencing a civil action under subsection (1)(b).

(4) In an action commenced under subsection (1)(b), a court that determines a public record is not exempt from disclosure shall order the public body to cease withholding or to produce all or a portion of a public record wrongfully withheld, regardless of the location of the public record. Venue for an action against a local public body is proper in the circuit court for the county in which the public record or an office of the public body is located has venue over the action. The court shall determine the matter de novo and the burden is on the public body to sustain its denial. The court, on its own motion, may view the public record in controversy in private before reaching a decision. Failure to comply with an order of the court may be punished as contempt of court.

(5) An action commenced under this section and an appeal from an 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.

(6) If a person asserting the right to inspect, copy, or receive a copy of all or a portion of a public record prevails in an action commenced under this section, the court shall award reasonable attorneys' fees, costs, and disbursements. If the person or public body prevails in part, the court may, in its discretion, award all or an appropriate portion of reasonable attorneys' fees, costs, and disbursements. The award shall be assessed against the public body liable for damages under subsection (7).

(7) If the court determines in an action commenced under this section that the public body has arbitrarily and capriciously violated this act by refusal or delay in disclosing or providing copies of a public record, the court shall order the public body to pay a civil fine of $1,000.00, which shall be deposited into the general fund of the state treasury. The court shall award, in addition to any actual or compensatory damages, punitive damages in the amount of $1,000.00 to the person seeking the right to inspect or receive a copy of a public record. The damages shall not be assessed against an individual, but shall be assessed against the next succeeding public body that is not an individual and that kept or maintained the public record as part of its public function.

MOC mail

Tom Lambe ry.org>

FOIA Denial APPEAL

Tom Lambert <tlambert@miopencarry.org> Mon, Nov 20, 2017 at 2:36 PM
To: EtueK@michigan.gov
Cc: MSP-FOI@michigan.gov, MiOC Board <board@miopencarry.org>

Col. Etue,

Pursuant to Section 10 of the Michigan Freedom of Information Act (FOIA), MCL 15.240, Michigan Open Carry, Inc. is hereby appealing the denial of our FOIA request submitted to the Michigan Department of State Police (MSP) on October 26th, 2017, which has been attached as MOC Oct 26 FOIA Request.

Background
On October 26th, 2017, we submitted a FOIA request to the Michigan Department of State Police, pursuant to the FOIA. The request was sent to MSP-FOI@michigan.gov, and an automatic reply from the same address was received shortly after acknowledging the request.

Along with a detailed explanation, the request asked for "***Records created by and/or maintained by the Michigan Department of State Police from peace officers and authorized system users compiled pursuant to MCL 28.421b(2)(f) and MCL 28.425e(4) between October 1st, 2016 and September 30th, 2017.***"

The request also stated "*To be clear, this request is not seeking any individual's firearm records, but rather the non-confidential separate public records associated with official acts of public officials and public employees in accessing said confidential records in compliance with their statutory duties.* ***Michigan Open Carry, Inc. is requesting the reason(s) provided pursuant to MCL 28.421b(2)(f), as well as the related information pertaining to the fulfillment of statutory access obligations pursuant to MCL 28.425e(4)***."

MCL 28.421(2)(f) states as follows: "*(f) A peace officer or an authorized user has reason to believe that access to the firearms records is necessary within the commission of his or her lawful duties. The peace officer or authorized system user shall enter and record the specific reason in the system in accordance with the procedures in section 5e.*"

MCL 28.425e(4) states as follows: "*(4) Information in the database shall only be accessed and disclosed according to an access protocol that includes the following requirements:*
(a) That the requestor of the firearms records uses the law enforcement information network or another system that maintains a record of the requestor's identity, time, and date that the request was made.
(b) Requires the requestor in an intentional query by name of the firearms records to attest that the firearms records were sought under 1 of the lawful purposes provided in section 1b(2)."

On November 17, 2017 (15 business days after the request was submitted), the MSP FOIA unit, through Mr. Lance Gackstetter, responded by providing a reply containing **zero** information matching the request, attached as MSP Nov 17 Reply. Rather than providing anything remotely resembling the request described above, all that was provided in this reply were seven seemingly random and unlabeled numbers ranging from four to seven digits in length.

This appeal follows.

Reasons for Appeal
Pursuant to Section 5 of the FOIA, if a request is denied, in full or in part, a public body is required to respond within five business days, fifteen if an extension is issued, in writing with and with a full explanation of the reasons for denial. Failure to respond as such constitutes a denial.

If the requested documents do not exist, the FOIA requires a disclosure of this fact. "*We would concede that the nonexistence of a record is a defense for the failure to produce or allow access to the record. However, it is not a defense to the failure to respond to a request for a document* ***with the information that it does not exist***." (Hartzell v Mayville Community Sch Dist, 183 Mich App 782; 455 NW2d 411 (1990)).

The response submitted by Mr. Gackstetter on November 17th stated that the request was "*granted as to the information currently available*", and supplied seven random unlabeled numbers. No reasons for a denial were provided, nor were any exemptions taken.

As the information supplied in the November 17th response in no way remotely resembled the requested information, and no justification for a denial was provided nor exemptions taken, it can only be said that the records requested on October 26th have been improperly and unjustifiably **denied** in violation of the FOIA.

Lastly, due to the extreme disparity between the requested records and the supplied records, we are alleging that this denial is not only arbitrary and capacious, but also willful and intentional.

Action Requested
We ask that you please reverse this improper denial at your soonest ability and instruct the FOIA Unit to comply with the Act.

If you have any questions, I may be reached through this email address.

Thank you,

Tom Lambert
President
Michigan Open Carry, Inc.

---

2 attachments

MOC Oct 26 FOIA Request.pdf
110K

MSP Nov 17 Reply.pdf
121K

EXHIBIT
G
OUTSIDE LEGAL COUNSEL PLC
www.olcplc.com

STATE OF MICHIGAN
DEPARTMENT OF STATE POLICE
LANSING

RICK SNYDER
GOVERNOR

COL. KRISTE KIBBEY ETUE
DIRECTOR

November 28, 2017

Mr. Tom Lambert
Michigan Open Carry, Inc.
P.O. Box 16184
Lansing, Michigan 48901

Subject: Appeal, Freedom of Information Act Request, File No: CR-20049761

Dear Mr. Lambert:

This notice responds to your November 20, 2017, correspondence, received by the Michigan State Police (MSP) on November 21, 2017, concerning the department's November 17, 2017, written notice granting your October 26, 2017, request for information under the Freedom of Information Act (FOIA), MCL 15.231 *et seq.*

You requested a copy of:

> Records created by and/or maintained by the Michigan Department of State Police from peace officers and authorized system users complied pursuant to MCL 28.421b(2)(f) and MCL 28.425e(4) between October 1st, 2016 and September 30th, 2017.

Your stated reason for appeal is that the MSP's response did not include a reason for denial and no exemptions were taken.

After review, your appeal is denied and the department's original decision is upheld.

Your FOIA request was not denied; the request was granted and you were provided with the only responsive records within the possession of the public body, the summarized information that was provided to you is the only information in the MSP's possession. A statutory report that explains and summarizes the information has not yet been completed and therefore cannot be produced in response to your request.

A public body does not have any obligation to compile a summary or create a new public record (see section 3(4) and 3(5) of the FOIA). As such, MSP's letter advised that you may wish to review our website for last year's report to assist you in understanding the numbers that were provided.

The department is obligated to inform you that under section 10 of the FOIA (a copy of which is enclosed) you may file an action in the Court of Claims within 180 days from the final determination. If applicable, the Court may award reasonable attorneys' fees, costs and disbursements and possible fines and damages.

The department's FOIA Procedures and Guidelines can be accessed at www.michigan.gov/msp.

Sincerely,

Lori M. Hinkley
FOIA Appeals Officer
Michigan State Police

Enclosure

Sec. 10.

(1) If a public body makes a final determination to deny all or a portion of a request, the requesting person may do 1 of the following at his or her option:

(a) Submit to the head of the public body a written appeal that specifically states the word "appeal" and identifies the reason or reasons for reversal of the denial.

(b) Commence a civil action in the circuit court, or if the decision of a state public body is at issue, the court of claims, to compel the public body's disclosure of the public records within 180 days after a public body's final determination to deny a request.

(2) Within 10 business days after receiving a written appeal pursuant to subsection (1)(a), the head of a public body shall do 1 of the following:

(a) Reverse the disclosure denial.

(b) Issue a written notice to the requesting person upholding the disclosure denial.

(c) Reverse the disclosure denial in part and issue a written notice to the requesting person upholding the disclosure denial in part.

(d) Under unusual circumstances, issue a notice extending for not more than 10 business days the period during which the head of the public body shall respond to the written appeal. The head of a public body shall not issue more than 1 notice of extension for a particular written appeal.

(3) A board or commission that is the head of a public body is not considered to have received a written appeal under subsection (2) until the first regularly scheduled meeting of that board or commission following submission of the written appeal under subsection (1)(a). If the head of the public body fails to respond to a written appeal pursuant to subsection (2), or if the head of the public body upholds all or a portion of the disclosure denial that is the subject of the written appeal, the requesting person may seek judicial review of the nondisclosure by commencing a civil action under subsection (1)(b).

(4) In an action commenced under subsection (1)(b), a court that determines a public record is not exempt from disclosure shall order the public body to cease withholding or to produce all or a portion of a public record wrongfully withheld, regardless of the location of the public record. Venue for an action against a local public body is proper in the circuit court for the county in which the public record or an office of the public body is located has venue over the action. The court shall determine the matter de novo and the burden is on the public body to sustain its denial. The court, on its own motion, may view the public record in controversy in private before reaching a decision. Failure to comply with an order of the court may be punished as contempt of court.

(5) An action commenced under this section and an appeal from an 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.

(6) If a person asserting the right to inspect, copy, or receive a copy of all or a portion of a public record prevails in an action commenced under this section, the court shall award reasonable attorneys' fees, costs, and disbursements. If the person or public body prevails in part, the court may, in its discretion, award all or an appropriate portion of reasonable attorneys' fees, costs, and disbursements. The award shall be assessed against the public body liable for damages under subsection (7).

(7) If the court determines in an action commenced under this section that the public body has arbitrarily and capriciously violated this act by refusal or delay in disclosing or providing copies of a public record, the court shall order the public body to pay a civil fine of $1,000.00, which shall be deposited into the general fund of the state treasury. The court shall award, in addition to any actual or compensatory damages, punitive damages in the amount of $1,000.00 to the person seeking the right to inspect or receive a copy of a public record. The damages shall not be assessed against an individual, but shall be assessed against the next succeeding public body that is not an individual and that kept or maintained the public record as part of its public function.

Sec. 10a.

(1) If a public body requires a fee that exceeds the amount permitted under its publicly available procedures and guidelines or section 4, the requesting person may do any of the following:

(a) If the public body provides for fee appeals to the head of the public body in its publicly available procedures and guidelines, submit to the head of the public body a written appeal for a fee reduction that specifically states the word "appeal" and identifies how the required fee exceeds the amount permitted under the public body's available procedures and guidelines or section 4.

(b) Commence a civil action in the circuit court, or if the decision of a state public body is at issue, in the court of claims, for a fee reduction. The action must be filed within 45 days after receiving the notice of the required fee or a determination of an appeal to the head of a public body. 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. An action shall not be filed under this subdivision unless 1 of the following applies:

(i) The public body does not provide for appeals under subdivision (a).

(ii) The head of the public body failed to respond to a written appeal as required under subsection (2).

(iii) The head of the public body issued a determination to a written appeal as required under subsection (2).

(2) Within 10 business days after receiving a written appeal under subsection (1)(a), the head of a public body shall do 1 of the following:

(a) Waive the fee.

(b) Reduce the fee and issue a written determination to the requesting person indicating the specific basis under section 4 that supports the remaining fee. The determination shall include a certification from the head of the public body that the statements in the determination are accurate and that the reduced fee amount complies with its publicly available procedures and guidelines and section 4.

(c) Uphold the fee and issue a written determination to the requesting person indicating the specific basis under section 4 that supports the required fee. The determination shall include a certification from the head of the public body that the statements in the determination are accurate and that the fee amount complies with the public body's publicly available procedures and guidelines and section 4.

(d) Issue a notice extending for not more than 10 business days the period during which the head of the public body must respond to the written appeal. The notice of extension shall include a detailed reason or reasons why the extension is necessary. The head of a public body shall not issue more than 1 notice of extension for a particular written appeal.

(3) A board or commission that is the head of a public body is not considered to have received a written appeal under subsection (2) until the first regularly scheduled meeting of that board or commission following submission of the written appeal under subsection (1)(a).

(4) In an action commenced under subsection (1)(b), a court that determines the public body required a fee that exceeds the amount permitted under its publicly available procedures and guidelines or section 4 shall reduce the fee to a permissible amount. Venue for an action against a local public body is proper in the circuit court for the county in which the public record or an office of the public body is located. The court shall determine the matter de novo, and the burden is on the public body to establish that the required fee complies with its publicly available procedures and guidelines and section 4. Failure to comply with an order of the court may be punished as contempt of court.

(5) An action commenced under this section and an appeal from an 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.

(6) If the requesting person prevails in an action commenced under this section by receiving a reduction of 50% or more of the total fee, the court may, in its discretion, award all or an appropriate portion of reasonable attorneys' fees, costs, and disbursements. The award shall be assessed against the public body liable for damages under subsection (7).

(7) If the court determines in an action commenced under this section that the public body has arbitrarily and capriciously violated this act by charging an excessive fee, the court shall order the public body to pay a civil fine of $500.00, which shall be deposited in the general fund of the state treasury. The court may also award, in addition to any actual or compensatory damages, punitive damages in the amount of $500.00 to the person seeking the fee reduction. The fine and any damages shall not be assessed against an individual, but shall be assessed against the next succeeding public body that is not an individual and that kept or maintained the public record as part of its public function.

(8) As used in this section, "fee" means the total fee or any component of the total fee calculated under section 4, including any deposit.

EXHIBIT
H
OUTSIDE LEGAL COUNSEL PLC
www.olcplc.com

STATE OF MICHIGAN

COURT OF CLAIMS

MICHIGAN OPEN CARRY, INC,

Plaintiff/Petitioner,

v

MICHIGAN DEPARTMENT OF STATE POLICE,
Defendant.

No. 18-000087-MZ

HON. CYNTHIA D. STEPHENS

Philip L. Ellison (P74117)
Outside Legal Counsel PLC
Attorney for Plaintiff/Petitioner
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Michigan Department of Attorney General
State Operations Division
P.O. Box 30754
Lansing, MI 48909
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debeara@michigan.gov

DEFENDANT MICHIGAN STATE POLICE'S ANSWERS TO PLAINTIFF'S FOURTH SET OF DISCOVERY REQUESTS – REQUESTS FOR ADMISSION

Defendant Michigan Department of State Police ("MSP"), through counsel, responds to Plaintiffs' Fourth Set of Discovery Requests (Requests for Admission) as follows:

General Objections

Defendant objects to each instruction, definition, and request to the extent that it purports to impose any requirement or discovery obligation greater than or different from those under the Michigan Court Rules and any applicable rules and orders of the Court. Defendant further objects to each instruction, definition, and

request to the extent that it seeks information or documents protected from disclosure by the attorney-client privilege, deliberative process privilege, attorney work product doctrine or any other applicable privilege.

1. REQUEST TO ADMIT: The head of the Michigan Department of State Police, Col. Kriste Kibbey Etue, did not personally render the decision on Plaintiff Michigan Open Carry's November 20, 2017 FOIA appeal.

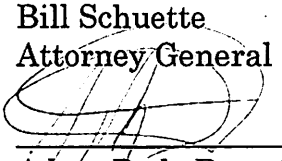
ANSWER: Admitted.

2. REQUEST TO ADMIT: FOIA Appeals Officer Lori M. Hinkley rendered the decision on Plaintiff Michigan Open Carry's November 20, 2017 FOIA appeal.

ANSWER: Admitted.

Respectfully submitted,

Bill Schuette
Attorney General



Adam R. de Bear (P80242)
Attorney for Defendant
State Operations Division
P.O. Box 30754
Lansing, Michigan 48909

Dated: November 16, 2018

EXHIBIT
J
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STATE OF MICHIGAN

COURT OF CLAIMS

MICHIGAN OPEN CARRY, INC,

Plaintiff/Petitioner,

v

MICHIGAN DEPARTMENT OF STATE POLICE,

Defendant.

No. 18-000087-MZ

HON. CYNTHIA D. STEPHENS

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DEFENDANT MICHIGAN STATE POLICE'S ANSWERS TO PLAINTIFF'S THIRD DISCOVERY REQUESTS - INTERROGATORIES

Defendant Michigan State Police ("MSP"), through counsel, responds to Plaintiffs' First Discovery (Interrogatories) requests as follows:

General Objections

Defendants object to each instruction, definition, and request to the extent that it purports to impose any requirement or discovery obligation greater than or different from those under the Michigan Court Rules and any applicable rules and orders of the Court. Defendants further object to each instruction, definition, and request to the extent that it seeks information or documents protected from disclosure by the attorney-client privilege, deliberative process privilege, attorney work product doctrine or any other applicable privilege.

1. **INTERROGATORY:** As part of your response to Plaintiff's FOIA request dated October 26, 2017 (see attached), you provided the following statement:

Your request to grant as the information currently available. In the spirit of cooperation, we have summarized the information you are requesting below:

1- 24,493

2- 1,771

3- 48,626

4 - 1,448,241

5- 905,110

6- 42,329

7- 87,717

Please explain in precise detail what *each* of these numbers purport to count, represent, summarize, and/or otherwise disclose. For example, the statement "1-24,493" is mean to disclose: 24,493 _____? (Please explain what each number, 1 through 7, means.)

OBJECTION: MSP objects to this interrogatory for the reason that nothing in the Freedom of Information requires a public body to explain or describe the records it produces.

ANSWER: Subject to and without waiving the above objection, see below:

1- 24,493 means the number of times the database was accessed because "[t]he individual whose firearms records are the subject of disclosure poses a threat

to himself or herself or other individuals, including a peace officer." See MCL 28.421b(2)(a).

2- 1,771 means the number of times the database was accessed because "[t]he individual whose firearms records are the subject of disclosure has committed an offense with a pistol that violates a law of this state, another state, or the United States." See MCL 28.421b(2)(b).

3- 4[9],626 means the number of times the database was accessed because "[t]he pistol that is the subject of the firearms records search may have been used during the commission of an offense that violates a law of this state, another state, or the United States." See MCL 28.421b(2)(c).

4 - 1,44[9],241 means the number of times the database was accessed "[t]o ensure the safety of a peace officer." See MCL 28.421b(2)(d).

5 - 905,110 means the number of times the database was accessed for purposes of the Firearms Act. See MCL 28.421b(2)(e).

6 - 42,329 means the number of times the database was accessed because "[a] peace officer or an authorized user ha[d] reason to believe that access to the firearms records is necessary within the commission of his or her lawful duties." See MCL 28.421b(2)(f).

7 - 87,717 means the number of times the database was accessed for the purposes of the Firearms Act. See MCL 28.421b(2)(e). This number in particular, unlike the number in 5, represents the number of times the database was queried

by a Department automated system process. For reporting purposes, this number is reported together with the number in 5.

2. INTERROGATORY: Identify all persons with whom you consulted and/or checked with to investigate actual or possible answers to these discovery requests; for each person, itemize each discovery request the person contributed information which became your answer in response thereto.

ANSWER: MSP states that the following individuals were collectively involved with the response to Plaintiff's discovery requests: Lori Hinkley, Lance Gackstetter, and Kevin Collins.

I DECLARE THAT THE FOREGOING ANSWERS TO PLAINTIFF'S INTERROGATORIES ARE TRUE TO THE BEST OF MY KNOWLEDGE, INFORMATION, AND BELIEF AND BASED UPON INFORMATION THAT I OBTAINED OR THAT WAS OBTAINED OR GATHERED BY PERSONS WHO REPORT TO ME.

Subscribed and sworn to before me
this 12 day of September, 2018

Notary Public
Ingham County, MI

My Commission Expires: 1/13/24
Acting in Eaton County, MI

AS TO ANY OBJECTIONS

Adam R. de Bear (P80242)
Attorney for Defendant
State Operations Division
P.O. Box 20754
Lansing, Michigan 48909

Dated: September 13, 2018

STATE OF MICHIGAN
COURT OF CLAIMS

MICHIGAN OPEN CARRY, INC,

Plaintiff/Petitioner,

v

MICHIGAN DEPARTMENT OF STATE POLICE,
Defendant.

No. 18-000087-MZ

HON. CYNTHIA D. STEPHENS

Philip L. Ellison (P74117)
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DEFENDANT'S 12/17/2018 BRIEF IN RESPONSE TO PLAINTIFF'S 12/03/2018 MOTION FOR SUMMARY DISPOSITION

INTRODUCTION

Plaintiff Michigan Open Carry, Inc. (Open Carry) made a Freedom of Information Act (FOIA) request to the Department of Michigan State Police (MSP) in which it asserted that it was seeking *nonconfidential* information related to access of the information of concealed pistol license (CPL) applicants. But after being provided with the nonconfidential information in MSP's possession, Open Carry appears to have realized that it did not sufficiently describe the information it was seeking.

In its motion for summary disposition, Open Carry avers for the first time that it "sought essentially several thousand electronic entries held in computer records." But the "several thousand electronic entries" is information that exists exclusively in the law enforcement information network (LEIN) and other restricted information systems. And this type information is prohibited from being disclosed to the public under the Criminal Justice Information Systems (CJIS) Policy Council Act, MCL 28.211, *et seq*. Accordingly, had Open Carry originally requested this information, its FOIA request would have been denied under MCL 15.243(1)(d) as information specifically described and exempted from disclosure by another statute.

STATEMENT OF FACTS

Open Carry submitted a FOIA request to MSP on October 26, 2017 in which it requested "[r]ecords created by and/or maintained by the Michigan Department of State Police from peace officers and authorized system users compiled pursuant to MCL 28.421b(2)(f) and MCL 28.425e(4) between October 1st, 2016 and September 30th, 2017." (Ex 1, FOIA request.) Open Carry then cited the entirety of MCL 28.421b(2)(f) and MCL 28.425e(4) before limiting what it wanted to "*non-confidential* separate public records associated with official acts of public officials and public employees in accessing said confidential records in compliance with their statutory duties" (Ex 1) (emphasis added).

Due in part to the statutory citations Open Carry included in its FOIA request, MSP determined that Open Carry was requesting non-confidential information related to the access history of firearm records which is information

that MSP includes in its annual concealed pistol license (CPL) reports. (Ex 2, Gackstetter Affidavit, ¶ 7.) At the time of the request, however, the CPL report for the time period listed in Open Carry's request was not complete, so MSP requested the Department of Technology, Management and Budget (DTMB) to query its CPL database in order to provide Open Carry with information responsive to its request. (*Id.*, ¶¶ 8–9.) Specifically, DTMB gathered information related to the number of times the firearms records were accessed from October 1, 2016 to September 30, 2017 for each particular purpose identified in MCL 28.421b(2). (*Id.*, ¶ 10.) MSP then issued a written notice on November 17, 2017 granting Open Carry request which provided the information that it had gained from DTMB. (*Id.*, ¶ 11; Ex 3, written notice.)

On November 20, 2017, however, Open Carry was not satisfied with the information it received, emailed an appeal of MSP's "denial" in which it repeated a majority of its October 26 request. (Ex 4, written appeal.) Instead of attempting a more detailed description of the information it was seeking, Open Carry merely stated that the written notice contained "zero information matching the request" and threatened that "due to the extreme disparity between the requested records and the supplied records, we are alleging that this denial is not only arbitrary and capacious, but also willful and intentional." (*Id.*) (emphasis omitted from original). MSP, in responding to Open Carry's appeal, explained that the request "was granted and [that Open Carry was] provided with the only responsive records within" MSP's possession. (Ex 5, written notice upholding final determination.)

MSP further informed Open Carry that the annual CPL report which "explains and summarizes the information [provided in the written notice] has not yet been completed and therefore cannot be produced in response to your request."[1] (*Id.*)

Open Carry filed the instant complaint on May 9, 2018 and alleges that MSP violated the FOIA when (1) Colonel Etue did not personally respond to its written appeal, (2) it constructively denied its FOIA request on November 17, 2017. Open Carry now moves for summary disposition under MCR 2.116(C)(10), and MSP requests that summary disposition be granted in its favor under MCR 2.116(I)(2).

STANDARD OF REVIEW

A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone to determine whether the plaintiff has stated a claim on which relief can be granted. *Spiek v Dep't of Transp*, 456 Mich 331, 337 (1998). When deciding a motion under MCR 2.116(C)(8), the Court accepts all well-pleaded factual allegations as true and construes them in the light most favorable to the non-moving party. *Maiden v Rozwood*, 461 Mich 109, 121 (1999).

Summary disposition is available under MCR 2.116(C)(10) when "the affidavits or other documentary evidence, viewed in the light most favorable to the nonmoving party, show that there is no genuine issue as to any material fact and the moving party is therefore entitled to judgment as a matter of law." *Lowrey v*

[1] On January 25, 2018, Open Carry requested the 2016–2017 CPL Annual Report, and MSP granted the request and provided a copy of the report. (Ex 6, January 25 FOIA request and written notice.)

LMPS & LMPJ, Inc, 500 Mich 1, 5-6 (2016). The nonmoving party must then "set forth specific facts at the time of the motion showing a genuine issue for trial." *Maiden*, 461 Mich at 121. If the nonmoving party fails to do so, the grant of summary disposition is proper. *Lowrey*, 500 Mich at 7 (2016).

ARGUMENT

I. MSP provided Plaintiff with the information it described in its request, and to the extent Plaintiff desired different information, it failed to provide a sufficient description.

The FOIA provides requesting persons with the right to inspect public records, but the requesting person must submit a "request that *describes a public record sufficiently* to enable the public body to find the public record." MCL 15.233(1) (emphasis added). Stated differently, 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).

Open Carry, in this particular instance, requested "[r]ecords created by and/or maintained by the Michigan Department of State Police from peace officers and authorized system users compiled pursuant to MCL 28.421b(2)(f) and MCL 28.425e(4) between October 1st, 2016 and September 30th, 2017." (Ex 1.) And Open Carry then explained that the records it was seeking were "nonconfidential." (Ex 1) (emphasis added). Accordingly, MSP endeavored to locate nonconfidential records created and complied pursuant to an access protocol system required under the Firearms Act. (Ex 2, ¶ 7.)

Open Carry's records request did not lend itself to an easy fulfillment, however, because, for the most part, the CPL database does not have "nonconfidential" information. As explained below in Part II *infra*, information stored in LEIN and other information systems is prohibited from being disclosed to the public. Furthermore, as Open Carry acknowledges, information provided by CPL license applicants is confidential, and the Legislature, in the Firearms Act, specifically exempted that information from disclosure under the FOIA. MCL 28.421b(1). But MSP is required to publish an annual report containing "[t]he number of times the database was accessed, categorized by the purpose for which the database was accessed." MCL 28.425e(5)(o). This information that is required to be published is axiomatically *nonconfidential information*, and it is indeed compiled and maintained pursuant to MCL 28.421b(2)(f) and MCL 28.425e(4).

Accordingly, MSP construed Open Carry's request as seeking the nonconfidential information related to the CPL database's access history. (Ex 3, ¶ 7.) And that is what Open Carry was provided with—nonconfidential information maintained by MSP relating to the access history of the CPL database. Further, no exemptions needed to be raised because Open Carry informed MSP that it was only seeking "nonconfidential information."

In sum, because MSP provided Open Carry with the information it described in its request, a grant of summary disposition in MSP's favor under MCR 2.116(I)(2) is appropriate.

II. The information that Plaintiff now asserts that it was seeking in its October 2017 FOIA request is exempt from disclosure under MCL 15.243(1)(d).

After reviewing MSP's answer and affirmative defenses, and after four sets of discovery, Open Carry has now changed its request. Instead of nonconfidential information related to records maintained under MCL 28.421b(2)(f) and MCL 28.425e(4), Open Carry now asserts that it sought "separate specific record-entries showing why the Firearms Records Database data was accessed" in accordance with MCL 28.421b(2)(f).[2] (Pl. Br, 10.) In particular, Open Cary explained that "the response should have been the actual entries which have entered and recorded [with] the specific reason in the system, . . . the requestor's identity, time, and date that the query was undertaken." Open Carry had the opportunity to provide this explanation to MSP in its original request, in its appeal, and its complaint. But it chose not to do so. Had Open Carry made this request initially, however, it would have been denied because this information is exempt from disclosure under MCL 15.243(1)(d).

MCL 15.243(1)(d) provides for the nondisclosure of "[r]ecords or information specifically described and exempted from disclosure by statute." The burden of proving that an exemption applies in any particular instance rests with the public body asserting the exemption. *Herald Co v City of Bay City,* 463 Mich 111, 119 (2000). And when a public body invokes MCL 15.243(1)(d), "it is necessary to examine the statute under which the public body claims disclosure is prohibited."

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[2] In particular, it asserts that 42,239 separate record entries should have been produced in response to its original request.

MLive Media Group v City of Grand Rapids, 321 Mich App 263, 270 (2017). Accordingly, MSP must demonstrate that this newly requested information is described and exempted from disclosure by another statute.

A. The information that MSP is required to maintain under the Firearms Act regarding the access of history of the CPL database is only accessible through LEIN or MiCJIN.

Section 5e(1) of the Firearms Act requires MSP to "create and maintain a computerized database of individuals who apply under this act for a license to carry a concealed pistol" and this database must include the following information for each individual:

> (a) The individual's name, date of birth, address, county of residence, and state-issued driver license or personal identification card number.
> (b) If the individual is licensed to carry a concealed pistol in this state, the license number and date of expiration.
> (c) Except as provided in subsection (2), if the individual was denied a license to carry a concealed pistol after July 1, 2001 or issued a notice of statutory disqualification, a statement of the reasons for that denial or notice of statutory disqualification.
> (d) A statement of all criminal charges pending and criminal convictions obtained against the individual during the license period.
> (e) A statement of all determinations of responsibility for civil infractions of this act pending or obtained against the individual during the license period.
> (f) The status of the individual's application or license. [MCL 28.425e(1).]

The records described stored in this database—the CPL database—may only be accessed by a peace officer or authorized system user for the following purposes:

> (a) The individual whose firearms records are the subject of disclosure poses a threat to himself or herself or other individuals, including a peace officer.

> (b) The individual whose firearms records are the subject of disclosure has committed an offense with a pistol that violates a law of this state, another state, or the United States.
> (c) The pistol that is the subject of the firearms records search may have been used during the commission of an offense that violates a law of this state, another state, or the United States.
> (d) To ensure the safety of a peace officer.
> (e) For purposes of this act.
> (f) A peace officer or an authorized user has reason to believe that access to the firearms records is necessary within the commission of his or her lawful duties. [MCL 28.421b(2).]

MCL 28.421b(2)(f) further provides that "[t]he peace officer or authorized system user shall enter and record the specific reason [for which they accessed the firearms records] in the system in accordance with the procedures in [MCL 28.425e]." MCL 28.421b(2)(f).

Section 5e(4) of the Firearms Act, MCL 28.425e(4), establishes a two-step process for each instance that the CPL database is accessed. First, the peace officer or authorized system user must access the CPL database through either LEIN or the CPL program application in the Michigan Criminal Justice Information Network (MiCJIN) which both record the "requestor's identity, time, and date that the request was made." (Ex 7, Affidavit of Kevin Collins, ¶ 6); MCL 28.425e(4)(a). Second, the peace officer or authorized system user is required to "attest that the firearms records were sought under 1 of the lawful purposes provided in [MCL 28.421b(2)]." (Ex 7, ¶ 6); MCL 28.425e(4)(b). This information is maintained in the CPL database. (Ex 7, ¶ 6.)

To summarize, in addition to the information required in MCL 28.425e(1), the CPL database includes the following information regarding each instance it was

accessed: (a) "[t]he LEIN operator (the authorized system user or peace officer that ran the CPL database query in LEIN);" (b) "[t]he LEIN requester (the authorized system user or peace officer that requested the CPL query to be run in LEIN);" (c) "[t]he particular purpose under MCL 28.421b(2)(a)–(f) for which the LEIN requester queried the CPL database;" and (d) "[t]he reason that was provided by the LEIN requester if the CPL database was quired for the purpose described in MCL 28.421b(2)(f)." [Ex 7, ¶ 7.]

This information stored in the CPL database "can only be accessed by a peace officer or authorized system user through either LEIN or the CPL program application in" the Michigan Criminal Justice Information Network (MiCJIN).[3] (Ex 7, ¶ 8.)

B. Information stored in LEIN and MiCJIN is restricted to a certain group of entities and cannot be disclosed to the public.

MSP, in the Criminal Justice Information Systems (CJIS) Policy Council Act, was delegated[4] with the authority to

> [e]stablish policy and promulgate rules governing access, use, and disclosure of information in criminal justice information systems, including the [LEIN], the automated fingerprint information system, and other information systems related to criminal justice or law enforcement. [MCL 28.214(1)(a).]

[3] MiCJIN is a web portal that provides secure access to a variety of law enforcement applications. (Ex 1, ¶ 8.)
[4] The Governor abolished the CJIS Policy Council and placed all of the council's authority in the Director of the Department of State Police. MCL 28.162.

Consistent with this authority, MSP has promulgated rules regarding the use and disclosure of information stored in its criminal justice information systems. (Ex 8, CJIS Rules.)

In particular, Rule 28.5208(4) provides that "[e]xcept as permitted in these rules or if authorized by statute, information from LEIN, AFIS [the automated fingerprint identification system], or other information systems[5] shall not be disseminated to an unauthorized agency, entity, or person." Persons with access to information stored on LEIN or MiCJIN "shall not access, use, or disclose nonpublic information[6] governed under this act for personal use or gain," and are subject to criminal penalties to the extent they "disclose information governed under this act in a manner that is not authorized by law or rule." MCL 28.214(3) and (5).

C. Disclosure of the information that Plaintiff is now requesting is prohibited by the CJIS Policy Council Act.

Ultimately, when two statutes pertain to the same general subject, they should be construed to give reasonable effect to both, if such a construction is possible. *Murphy v Michigan Bell Telephone Co.*, 447 Mich 93, 98 (1994). In this particular instance, reading the FOIA and the CJIS Policy Council Act together, MCL 15.243(1)(d) requires MSP to comply with the access, use, and disclosure

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[5] The term "other information systems" is defined to include "applications, other than LEIN or AFIS, which are accessed through the MiCJIN portal." Rule 28.5101(n).

[6] Nonpublic information is defined as "information to which access, use, or dissemination is restricted by a law or rule of this state or the United States." MCL 28.211a(b).

provisions—which prohibit the disclosure of information obtained from LEIN or other information systems to a private entity for any purpose or in a manner that is not authorized by law or rule—of MCL 28.214(1)(a).

Again, Open Carry now requests separate specific record-entries showing why the CPL database was accessed together with the identity of the requester as well as the time and date that the query was undertaken. (Pl. Br, 10.) This information, however, "can only be accessed by a peace officer or authorized system user through either LEIN or the CPL program application in . . . MiCJIN." (Ex 1, ¶ 8.) Accordingly, the information described by Open Carry, for the first time, in its motion for summary disposition is exempt from disclosure under MCL 15.243(1)(d).

III. Plaintiff's complaints regarding its appeal being denied by MSP's Appeal officer has failed to state a claim upon which relief has been granted.

Open Carry argues that because the head of MSP, Colonel Kristie Etue, did not "personally render the decision on" Open Carry's written appeal, its rights under the FOIA were violated. (Pl Br, 5.) For this reason, Open Carry requests numerous forms of relief including a declaratory ruling as well as a seemingly permanent injunction requiring the head of MSP to "personally render" *all* decisions on written appeals received under MCL 15.240(1)(a). However, Open Carry's requests for relief should be denied for two reasons.

A. The FOIA does not require the head of the public body to "personally render" a response to a written appeal.

MCL 15.240(1)(a) allows a requesting person to "[s]ubmit to the head of the public body a written appeal that specifically states the word 'appeal' and identifies the reason or reasons for reversal of the denial." Within 10 business days of receipt of such a written appeal, the head of the public body shall either "[r]everse the disclosure denial," [i]ssue a written notice to the requesting person upholding the disclosure denial," or "[r]everse the disclosure denial in part and issue a written notice . . . upholding the disclosure denial in part."[7] MCL 15.240(2)(a)–(c).

Absent from the relevant statutory provisions is any requirement that the head of the public body personally uphold the public body's final determination. Specifically, MCL 15.240(2)(b) requires only that the head of the public body *issue a written notice* upholding the denial of a FOIA request. The FOIA does not provide that the head of the public body must *personally make* the decision to uphold the denial of the FOIA request, and, in any event, it is well established that "statutes must be construed to prevent absurd results, injustice, or prejudice to the public interest." *Rafferty v Markovitz*, 461 Mich 265, 270 (1999)

As it relates to the MSP in particular, the absence of a requirement that the head of the public body personally make the decision to uphold a disclosure denial on appeal makes sense given the volume of FOIA requests that MSP and other public bodies receive annually. MSP previously informed this Court in *LaSusa v*

[7] MCL 15.240(2)(d) also allows the head of a public body to issue a written notice extending the time by which it will respond to a written appeal by 10 business days.

MSP, Court of Claims No. 2017-262-MZ, that it receives approximately 20,000 records request each year and that approximately 80 percent of those requests are submitted under the FOIA. (See, Ex 9, Affidavit of Lori Hinkley, ¶ 4.) An order providing that the Director of MSP must personally make the decision in all written appeals submitted under MCL 15.240(1)(a) would result in Col. Etue being tasked with reviewing potentially thousands FOIA requests instead of being afforded the option of delegating the task to an appropriate MSP employee. Such a result would be absurd—and particularly with respect to the MSP—contrary to the public interest.

In sum, because the plain language of MCL 15.240(2)(b) does not require the head of a public body to personally make the decision to uphold the public body's final determination, MSP is entitled to a grant of summary disposition in its favor under MCR 2.116(I)(2).

B. Even if the FOIA were to require the head of the public body to "personally render" a decision on a written appeal, Plaintiff's substantive rights were not violated in this particular instance.

The FOIA provides the public with two basic substantive rights: it allows a requesting person to (1) receive copies of public records that are not exempt from disclosure, and (2) commence a civil action in order to compel the disclosure of wrongfully withheld documents. Even if this Court were to decide that the FOIA requires the head of the public body to personally render the decision on a written appeal submitted under MCL 15.240(1)(a), MSP did not violate either of the above

substantive rights when it rendered the decision to "uphold" the decision on Open Carry's written appeal.

First, as explained above in Part II, *supra*, Open Carry is prohibited from accessing the information that it claims it requested in its FOIA request.[8] In other words, because it was not permitted to access this information in the first place, Open Carry's rights under the FOIA to review this information could not have been violated by Ms. Hinkley responding to the written appeal. Second, even though MSP *granted*[9] its request, Open Carry nevertheless exercised its right to "[c]ommence a civil action in the . . . court of claims . . . to compel the public body's disclosure of the public records within 180 days after a public body's final determination to deny a request." MCL 15.240(1)(b).

Simply put, Open Carry can point to no manner in which its substantive rights were negatively affected by MSP's determination on—Open Carry was not denied access to any records that it was entitled to review, see Part II, *supra*, and Open Carry still exercised its right to have MSP's final determination reviewed by the Court under MCL 15.240(1)(b). For this reason, Open Carry has failed to state

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[8] In *Forner v Department of Licensing and Regulatory Affairs*, unpublished opinion per curiam of the Court of Appeals, issued July 18, 2017 (Docket No. 336742) at 4, similarly determined that the plaintiff's substantive rights under the FOIA were not violated when the deputy director responded to the written appeal. (Ex 10, unpublished opinion.)

[9] MSP recognizes that, in FOIA actions, "[a] party's choice of labels is not binding on this Court." *King v Michigan State Police Dept*, 303 Mich App 162, 189 (2013). But MSP maintains that in this particular instance, it did *grant and* fulfill the request.

a claim upon which relief can be granted, and summary disposition is warranted in MSP's favor under MCR 2.116(I)(2).

CONCLUSION AND RELIEF REQUESTED

In conclusion, for the reasons stated above, MSP requests that the Court enter an order dismissing Plaintiff's complaint in its entirety and granting summary disposition in its favor under MCR 2.116(I)(2).[10]

Respectfully submitted,

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Dated: December 17, 2018
AG# 2018-0217975-A

[10] Similarly, Open Carry's requests for attorney fees under MCL 15.240(6) must also be dismissed because, as explained within this brief, MSP did not violate the FOIA in responding to Open Carry's request.

STATE OF MICHIGAN
COURT OF CLAIMS

MICHIGAN OPEN CARRY, INC,

Plaintiff/Petitioner,

v

MICHIGAN DEPARTMENT OF STATE POLICE,
Defendant.

No. 18-000087-MZ

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AFFIDAVIT OF KEVIN COLLINS

I, Kevin Collins, being first duly sworn, depose and say as follows:

1. This Affidavit is based upon my personal knowledge.

2. If sworn as a witness, I can testify competently as to the facts stated herein.

3. I am employed by the Michigan Department of State Police (MSP) as the manager of the Field Support Section within MSP's Criminal Justice Information Center.

4. Within the Field Support Section, my responsibilities include overseeing the LEIN (the Law Enforcement Information Network) Field Services Unit, the Firearms Records Unit, and the Concealed Pistol License (CPL) Unit.

5. As it relates to this lawsuit in particular, I am responsible for overseeing the administration of the database which MSP is required to maintain under MCL 28.425e (the CPL database) of all persons who submit an application for a license to carry a concealed pistol—this database contains all the information described in MCL 28.425e(1)(a)–(f).

6. As required under MCL 28.425e(4), in order for a peace officer or authorized system user to access the CPL database, the user must do so through LEIN or the CPL program application in the Michigan Criminal Justice Information Network (MiCJIN). When the CPL database is accessed, both the requester's and operator's identity as well as the time and date that the request was made is automatically recorded and retained in the CPL database. Further, before being able to gain access to the information within the CPL database, the peace officer or authorized system user must first certify that the database is being accessed for one of the identified purposes found in MCL 28.421b(2)(a)–(f). This information is also maintained in the CPL database.

7. To summarize, in addition to maintaining the information related to the license applicants required under 28.425e(1)(a)–(f), the CPL database maintains the following information for each instance of access:

    a. The LEIN operator (the authorized system user or peace officer that ran the CPL database query in LEIN).
    b. The LEIN requester (the authorized system user or peace officer that requested the CPL query to be run in LEIN).
    c. The particular purpose under MCL 28.421b(2)(a)–(f) for which the LEIN requester queried the CPL database.
    d. The reason that was provided by the LEIN requester if the CPL database was quired for the purpose described in MCL 28.421b(2)(f).

[Remainder of page intentionally left blank]

8. The CPL database, and the information described in paragraphs six and seven, can only be accessed by a peace officer or authorized system user through either LEIN or the CPL program application in the MiCJIN which is a web portal that provides secure access to a variety of law enforcement applications.

Affiant says nothing further.

Kevin Collins
Michigan Department of State Police

Date: December 14, 2018

Subscribed and sworn to before me, a Notary Public, this 14th day of December, 2018

SM VLASIC
NOTARY PUBLIC - STATE OF MICHIGAN
COUNTY OF CLINTON
My Commission Expires March 7, 2021
Acting in the County of Eaton

Notary Public, State of Michigan

STATE OF MICHIGAN
IN THE COURT OF CLAIMS

MICHIGAN OPEN CARRY, INC,
Plaintiff/Petitioner,

v.

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

Case No.: 18-000087-MZ
Honorable Cynthia Stephens

REPLY / RESPONSE

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PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY DISPOSITION AND OPPOSITION TO DEFENDANTS' REQUEST FOR SUMMARY DISPOSITION PURSUANT TO MCR 2.116(I)(2)

I. Non-exempt records/information must be ordered disclosed.

The Department is misapplying FOIA exemptions jurisprudence. A public body must disclose all public records that are not specifically exempt under the act. *Thomas v New Baltimore*, 254 Mich App 196, 201; 657 NW2d 530 (2002). The Department only invokes Section 13(1)(d), i.e. MCL 15.240(1)(d), which exempts "records or information *specifically described* and *exempted* from disclosure *by statute*." (emphasis added). Given this, the Department must expressly and directly point to *a statute* which both *specifically* describes and *specifically* exempts from disclosure the records or information sought by a requester. The Department has named only two: MCL 28.421b of the

Firearms Act and MCL 28.214 of the *CJIS Policy Council Act*. Neither "specifically describes" and/or "specifically exempts" the information sought[1,2] by Plaintiff MOC.

First, MCL 28.421b(1) provides that "firearms records" are "confidential" and "are not subject to disclosure under the freedom of information act, 1976 PA 442, MCL 15.231 to 15.246." This is undeniable because "firearms records" is a statutorily-defined[3] term to mean information gathered "u*nder sections 2, 2a, 2b, and 5b*" or "*any form, permit, or license issued by a government agency under this act*." MCL 28.421(d) (expressly defining "firearms records" under the Firearms Act). The information being sought by Plaintiff MOC is that deriving *from Sections 1b(2)(f) and 5e(4)*, and not any information provided under sections 2, 2a, 2b, and 5b, or is a form, permit, or license of any type. **Ver Compl, Exhibit A.** As such, the "Sections 1b(2)(f) and 5e(4) data"[4] is not within the definition of a "firearms record," not confidential, and thusly is subject to disclosure under FOIA. Ergo, this first claimed exemption by the Department fails.

Second, MCL 28.214(5) directs that "[a] person shall not disclose information governed under this act [the *CJIS Policy Council Act*] in a manner that is not authorized by law or rule."[5] By its plain language, if a Michigan law authorizes disclosure, disclosure

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[1] The affidavit of Kevin Collins concedes the sought information exists and is held by the Department. Compare **Response, Exhibit 7, ¶6** with **Ver Compl, Ex A**.

[2] As has been made clear throughout, Plaintiff MOC is *not* seeking information related to *applicants*.

[3] "Where a statute supplies its own glossary, courts may not import any other interpretation but must apply the meaning of the terms as expressly defined." *People v Schultz*, 246 Mich App 695, 703; 635 NW2d 491 (2001), citing *Harder v Harder*, 176 Mich App 589, 591; 440 NW2d 53 (1989).

[4] The data sought under Sections 1b(2)(f) and 5e(4) is *not* information related to applicants or CPL license holders, but rather information of when, how, and for what purpose government officials are accessing the Firearms Records Database. The sought information does not involve any information under sections 2, 2a, 2b, and 5b and thusly is not a confidential "firearms record" by definition.

[5] If the Department is claiming any administrate *rule* serves as the basis for non-disclosure, i.e. Admin Rule 28.5208(4) cited at page 11 of its response brief, that argument has been previously rejected and fails—Section 13(1)(d) specifically (and only) uses the phrase "by statute;" administrative rules are not statutes. *Detroit Free Press v City of Warren*, 250 Mich App 164, 171; 645 NW2d 71 (2002) (Section 13(1)(d) "plainly includes only statutes, and not rules of procedure").

is authorized. FOIA is, clearly, such a law. Reading together MCL 28.214 and MCL 15.243(1)(d), there is no "specifically described" information or record that is specifically "exempted." All that MCL 28.214 directs that information under the *CJIS Policy Council Act* cannot be released except as authorized by law. FOIA is such legal authorization—it is a pro-disclosure law commanding "full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees." *Herald Co v Bay City*, 463 Mich 111, 119; 614 NW2d 873 (2000); MCL 15.231(2). Nothing under MCL 28.214 is "specifically" listed as being "exempted" by its plain language. Thusly, this second claimed exemption also fails.

Lastly, the Department is being somewhat elusive about the nature of the database that contains the nonconfidential information sought by Plaintiff MOC. The Firearms Records Database (aka CPL database) is not stored *in* LEIN, but is a separately maintained database. So while the Firearms Records Database can be opened through a LEIN computer terminal as a matter of convenience, the Sections 1b(2)(f) and 5e(4) data is stored in the separate Firearms Records Database, i.e. outside the LEIN system. See **Response, Exhibit 7, ¶¶6-7**. Any claimed LEIN protections do not extend to the Firearms Records Database.[6]

Because the Department solely bears the burden of proving that the refusal/denial of access to information was properly justified under FOIA, its failure to do so requires the Court to order disclosure. MCL 15.240(4) ("a court that determines a public record is not exempt from disclosure shall order the public body to cease withholding or to produce all

[6] Even if certain information may be exempt, the Department has the duty to "separate the exempt and nonexempt material and make the nonexempt material available for examination and copying." MCL 15.244(1).

or a portion of a public record wrongfully withheld"); see also *Federated Publications, Inc v City of Lansing*, 467 Mich 98, 109; 649 NW2d 383 (2002); *Hopkins v Duncan Twp*, 294 Mich App 401, 409; 812 NW2d 27 (2011). Summary disposition is warranted.

II. Col. Etue as the head of the Department as a public body.

The Department conceded, correctly, that Col. Kriste Kibbey Etue is the actual head of the Department. **Motion, Exhibit I.** And the statute specifically directs that she, as the head of a public body, must decide administrative appeals. MCL 15.240(2)(a)-(c). In response, the Department claims that Col. Etue does not need to make the actual decisions involving appeals. The plain language of FOIA directs otherwise.

> Within 10 business days after receiving a written appeal pursuant to subsection (1)(a), the *head of a public body shall do 1 of the following*: (a) reverse the disclosure denial; (b) issue a written notice to the requesting person upholding the disclosure denial; or (c) reverse the disclosure denial in part and issue a written notice to the requesting person upholding the disclosure denial in part.

MCL 15.240(2)(a)-(c). In case that was not clear, the Legislature directs—

> If the head of the public body fails to respond to a written appeal…, or if the head of the public body upholds all or a portion of the disclosure denial that is the subject of the written appeal, the requesting person may seek judicial review of the nondisclosure by commencing a civil action…

MCL 15.240(3). The Department failed to point to any legal authority which allows head of the Department to turn over that legal responsibility to someone else.

The Department also claims that fulfilling this responsibility is impossible because the Department receives "20,000 records request each year" with 80 percent being submitted under FOIA. Plaintiff MOC does not quibble with this assertion because FOIA requests are processed by *the FOIA Coordinator*. MCL 15.236(1).[7] The head of the public

[7] "The FOIA coordinator shall be responsible for accepting and processing requests for the public body's public records under this act and shall be responsible for approving a denial…."

body, on the other hand, only handles *administrative appeals*. MCL 15.240(2)-(3). The Legislature has placed this limited, but important, duty upon Col. Etue and no one else.[8]

Lastly, the Department suggests that even if Department is violating the law that it does not matter because it does not affect Plaintiff MOC's "substantive rights." Government agencies, like all citizens, do not get to pick which laws to obey and those it chooses to simply ignore. Such a flippant assertion is totally appalling coming from an agency whose sole purpose is to ensure others are, in fact, obeying the law and arresting those who are not. "[A]s a nation of laws, our society rightfully expects its public officials to observe proper and lawful procedures in enforcing the law; lest we make a mockery of the concept of government by the people, for the people." *ACLU v City of Pittsburgh*, 586 F Supp 417, 425 (WD Pa 1984).

RELIEF REQUESTED

WHEREFORE, this Court is requested to grant summary disposition in favor of Plaintiff MOC and provide all of the relief outlined in its motion.

Date: December 27, 2018

RESPECTFULLY SUBMITTED:

Philip L Ellison

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***Electronic signature(s) now authorized by MCR 1.109(E)(4)*

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing document(s) was served on parties or their attorney of record by mailing the same via US mail to their respective business address(es) as disclosed by the pleadings of record herein with postage fully prepaid, on the

27th day of December, 2018.

Philip L Ellison

PHILIP L. ELLISON
Attorney at Law

[8] The non-delegation of the appellate decision-making task is further support by MCL 15.236(3) which expressly authorizes a *FOIA Coordinator* to delegate his or her duties, but the same Act does not allow *the head of the public body* to name someone else to make administrative appeal decisions. See *Farrington v Total Petroleum*, 442 Mich 201, 210; 501 NW2d 76 (1993) ("Courts cannot assume that the Legislature inadvertently omitted from one statute the language that it placed in another statute, and then, on the basis of that assumption, apply what is not there.").

STATE OF MICHIGAN

COURT OF CLAIMS

MICHIGAN OPEN CARRY, INC.,

Plaintiff,

v

MICHIGAN DEPARTMENT OF STATE POLICE,

Defendant.
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OPINION AND ORDER

Case No. 18-000087-MZ

Hon. Cynthia Diane Stephens

Pending before the Court is plaintiff's motion for partial summary disposition under MCR 2.116(C)(10) as to Counts I and II of its complaint. For the reasons stated herein, the motion is DENIED and summary disposition is GRANTED to defendant, the non-moving party, on this matter. Moreover, because the records are exempt from disclosure, summary disposition is GRANTED in favor of defendant pursuant to MCR 2.116(I)(2). Plaintiff's motion to expedite is DENIED as moot.

I. BACKGROUND

This case arises out of an October 26, 2017 Freedom of Information Act (FOIA) request submitted by Tom Lambert, who, according to the complaint, is the president of a non-profit organization known as "Michigan Open Carry" (plaintiff). Lambert's e-mailed request sought "Records created by and/or maintained by the Michigan Department of State Police from peace

officers and authorized system users complied pursuant to MCL 28.421b(2)(f)[1] and MCL 28.425e(4)[2] between October 1st, 2016 and September 30th, 2017." After making this request, Lambert's e-mail quoted in full the statutory provisions noted in the request. Thereafter, the e-mail states:

> To be clear, this request is not seeking any individual's firearm records, but rather the non-confidential separate public records associated with official acts of public officials and public employees in accessing said confidential records in compliance with their statutory duties. Michigan Open Carry, Inc. is requesting the reason(s) provided pursuant to MCL 28.421b(2)(f), as well as the related information pertaining to the fulfillment of statutory access obligations pursuant to MCL 28.425e(4).

After taking a statutorily-authorized ten-day extension for responding, defendant issued a letter to plaintiff and Lambert stating that the request "is granted as to the information currently available." While not directly stating that any of the information was contained in the same, the letter referenced a "Concealed Pistol License report" that defendant releases on January 1st of each year and stated that the report was not yet complete. However, the letter continued, in the "spirit of cooperation," defendant stated that it summarized the information plaintiff sought and provided a list of seven numbers. The letter referred the reader to a link on defendant's website "for more detail related to the information provided above."

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[1] MCL 28.421b(2)(f) provides that "firearms records" may only be accessed and disclosed if a "peace officer or an authorized user has reason to believe that access to the firearms records is necessary within the commission of his or her lawful duties. The peace officer or authorized system user shall enter and record the specific reason in the system in accordance with the procedures in section 5e."

[2] MCL 28.425e pertains to law-enforcement access of a database of individuals who apply for a license to carry a concealed pistol.

In accordance with MCL 15.240(1)(a), Lambert submitted an appeal to Col. Kriste Kibbey Etue, who at the time was the Director of the Michigan Department of State Police. Lambert's e-mail characterized defendant's previous response as a denial of his request. The appeal protested the lack of exemptions cited for the purported denial, as well as the list of the "supplied seven random [and] unlabeled numbers." Furthermore, the appeal stated that because the information supplied in defendant's prior response "in no way remotely resembled the requested information, and no justification for a denial was provided nor exemptions taken, it can only be said that the records requested on October 26th have been improperly and unjustifiably denied in violation of the FOIA." Finally, Lambert's appeal alleged that the denial was arbitrary, capricious, and intentional, and asked that the decision be reversed.

On November 28, 2017, Lori M. Hinkley, defendant's "FOIA Appeals Officer" responded to Lambert by denying the appeal and by upholding defendant's original decision. According to Hinkley's response:

> Your FOIA request was not denied; the request was granted and you were provided with the only responsive records within the possession of the public body, the summarized information that was provided to you is the only information in the MSP's possession. A statutory report that explains and summarizes the information has not yet been completed and therefore cannot be produced in response to your request.
>
> A public body does not have any obligation to compile a summary or create a new public record . . . . As such, MSP's letter advised that you may wish to review our website for last year's report to assist you in understanding the numbers that were provided.

Plaintiff filed a complaint in this Court in May 2018 challenging defendant's FOIA decision. Count I of the complaint contends that defendant violated FOIA because Lambert's appeal was not decided by "the head of the public body" because Hinkley, not Kibbey Etue,

decided the appeal. Plaintiff alleges that FOIA does not permit the head of a public body to delegate appellate decisions.

Count II of the complaint alleges that defendant wrongfully denied the FOIA request and acted arbitrarily and capriciously by failing to disclose records that were responsive to Lambert's FOIA request. Plaintiff requests punitive damages, attorney fees, and the imposition of a fine against defendant. Finally, in Count III, which plaintiff states is pled as an alternative to Count II, plaintiff alleges that defendant violated FOIA by failing to disclose that the information requested by Lambert does not exist.

II. APPEAL TO THE HEAD OF THE PUBLIC BODY

The matter is presently before the Court on plaintiff's motion for partial summary disposition as to Counts I and II of the complaint. Plaintiff's first contention concerns Lambert's written appeal filed pursuant to MCL 15.240(1)(a). According to plaintiff, the appeal had to be decided by the "head of the public body,"—here, the director of the Department of State Police—and not by anyone else. Where the appeal was not so decided, plaintiff claims that defendant violated FOIA.

"Under the FOIA, a person has a right to inspect a public record of a public body upon written request unless the record is exempt from disclosure." *Truel v City of Dearborn*, 291 Mich App 125, 129; 804 NW2d 744 (2010). FOIA is a pro-disclosure statute, and any statutory exemptions from disclosure must be narrowly construed. *Estate of Nash v City of Grand Haven*, 321 Mich App 587, 592-593; 909 NW2d 862 (2017). In an action commenced under FOIA to compel disclosure, "[t]he public body has the burden to 'sustain its denial' " of the request. *MLive Media Group v Grand Rapids*, 321 Mich App 263, 271; 909 NW2d 282 (2017). In

addition, the public body's choice of labels in responding to a FOIA request (e.g., grant, deny) is not dispositive as to whether the request has, in fact, been granted. *King v Mich State Police Dep't*, 303 Mich App 162, 189; 841 NW2d 914 (2013).

In the event a public body denies all or a portion of a request for information, a requestor has two options at his or her disposal. Pursuant to MCL 15.240(1), the requestor may either:

> (a) *Submit to the head of the public body a written appeal* that specifically states the word "appeal" and identifies the reason or reasons for reversal of the denial.
>
> (b) Commence a civil action in the circuit court, or if the decision of a state public body is at issue, the court of claims, to compel the public body's disclosure of the public records within 180 days after a public body's final determination to deny a request. [Emphasis added.]

If, as in this case, a requestor submits a written appeal to the head of a public body, "the head of the public body" must, within 10 business days of receiving the request, either: (a) reverse the denial; (b) issue a written notice upholding the denial; or (c) reverse in part and issue a written notice upholding the partial denial. MCL 15.240(2)(a)-(c). Moreover, "[i]f the head of the public body fails to respond to a written appeal pursuant to subsection (2), or if the head of the public body upholds all or a portion of the disclosure denial that is the subject of the written appeal, the requesting person may seek judicial review of the nondisclosure by commencing a civil action under subsection (1)(b)." MCL 15.240(3).

In this case, there appears to be no dispute that Hinkley, the individual who authored the denial of plaintiff's appeal, was not the "head of the public body" at issue. However, the Court declines to find a violation of the statute simply because another employee drafted a response in which, by all accounts, the Director of the Department of State Police acquiesced. Indeed, FOIA permits a public body to undertake steps designed "to prevent excessive and unreasonable

interference with the discharge of its functions." MCL 15.233(3). Requiring the Director of the Department of State Police to personally draft each of the, by defendant's assertions, thousands of FOIA requests it receives and which are appealed would certainly constitute an unreasonable interference with the Director's duties. Moreover, even if plaintiff were correct in its interpretation of the law, the relief requested by plaintiff is not warranted. In this respect, MCL 15.240(3) specifies what is to happen in the event "the head of the public body fails to respond to a written appeal," which is what plaintiff has contended happened in this case. In the event the head of a public body fails to respond, "the requesting person may seek judicial review of the nondisclosure by commencing a civil action under subsection (1)(b)." Plaintiff has done so here, and as a result is unable to convince the Court that the injunctive or declaratory relief requested would be warranted, even if a violation of the statute occurred. Instead, defendant, as the non-moving party, is entitled to summary disposition pursuant to MCR 2.116(I)(2).

III. DISCLOSURE IS NOT WARRANTED

Turning to the second point of contention in the parties' briefing, i.e., disclosure, there are two issues that must be resolved. The first is whether plaintiff's FOIA request sufficiently described the information it now contends was wrongfully withheld. The second is whether, in the event the description was sufficient, the records sought were exempt from disclosure.

With respect to the adequacy of plaintiff's description of the records sought, a FOIA request "need not specifically describe the records containing the information sought; rather, a request for information contained in the records will suffice." *Detroit Free Press, Inc v City of Southfield*, 269 Mich App 275, 281; 713 NW2d 28 (2005). See also MCL 15.233(1) (stating that a FOIA request need only "enable the public body to find the public record[.]"). In this case, plaintiff's request for information expressly cited statutes in the description of that which was

sought. A brief overview of these statutes is warranted in order to understand the breadth of plaintiff's request.

The FOIA request at issue sought records created and compiled pursuant to MCL 28.421b(2)(f) and MCL 28.425e(4). MCL 28.421b concerns "firearms records," meaning "any form, information, or record required for submission to a government agency under" pertinent provisions of the Firearms Act pertaining to licenses issued to applicants, as well as "any form, permit, or license issued by a government agency under this act." MCL 28.421(d). These records are, under the Firearms Act "confidential" and are "not subject to disclosure under" FOIA and "shall not be disclosed to any person," absent as provided in the act. MCL 28.421b(1). The subsection referenced in the FOIA request, § 1(b)(f), concerns an exception for access to firearms records by a "peace officer"[3] who: "has reason to believe that access to the firearms records is necessary within the commission of his or her lawful duties. *The peace officer or authorized system user shall enter and record the specific reason in the system in accordance with the procedures in section 5e.*" (Emphasis added). The "procedures in section 5e" refer to MCL 28.425e, which is another one of the statutes mentioned in plaintiff's FOIA request. That section requires defendant to "create and maintain a computerized database of individuals who apply under this act for a license to carry a concealed pistol." MCL 28.425e(1). As it concerns access to that database, such access is to be "according to an access protocol that includes the following requirements": (a) that the requestor either uses the Law Enforcement Information Network (LEIN) or some other system "that maintains a record of the requestor's

[3] MCL 28.421(h) defines the term "peace officer," in pertinent part, as "an individual who is employed as a law enforcement officer" by this state, another state, or the United States, and who is required to carry a firearm in the course of his or her duties.

identity, time, and date that the request was made"; and (b) that the requestor of "an intentional query by name of the firearms records attest that the firearms records were" sought for a lawful purpose. MCL 28.425e(4). As it concerns the Concealed Pistol License (CPL) report, defendant is to publish an annual report that includes, among other matters, "The number of times the database was accessed, categorized by the purpose for which the database was accessed." MCL 28.425e(5)(o).

Returning to the instant case, defendant appears to have initially construed plaintiff's FOIA request as one that sought information required to be included in the CPL report by way of MCL 28.425e(5)(o). Defendant's brief in response to summary disposition contends that plaintiff's FOIA request did not specify any information beyond these categories. Although the Court agrees with defendant that plaintiff's position in litigation is clearer than that which was expressed in the FOIA request, the Court nonetheless concludes that defendant misconstrues plaintiff's original request and that the original request sufficiently described the information sought. Plaintiff's FOIA request sought non-confidential records "associated with official acts of public officials and public employees in accessing [Firearms Records] in compliance with their statutory duties." The next sentence of the request specifies that plaintiff sought "*the reason(s) provided pursuant to MCL 28.421(b)(f)*, as well as *the related information pertaining to the fulfillment of statutory access obligations pursuant to MCL 28.425e(4).*" (Emphasis added). As noted above, § 5e(4) requires that any access to the CPL database be done in a way that "maintains a record of the requestor's identity, time, and date that the request was made," as well as an attestation by the requestor that the records were sought for a lawful purpose under MCL 28.421b(1). By seeking the "related information" under § 5e(4), it is apparent that plaintiff's request sought information beyond the number of times the CPL report was accessed and the

general categories of reasons listed for such access. Stated otherwise, the request for information was sufficient for defendant to be able to find the record(s) containing the described information, notwithstanding plaintiff's failure to name the precise record. See MCL 15.233(1); *Detroit Free Press*, 269 Mich App at 281.

The bigger question becomes whether the information, which pursuant to MCL 28.425e(4), is to only be accessed through LEIN or a similar system,[4] is exempt from disclosure under FOIA. As noted above, § 1b(1) of the Firearms Act exempts "Firearms Records" from disclosure under FOIA. Here, plaintiff does not seek the "Firearms Records" themselves, but instead seeks information about when, why, and by whom those Firearms Records were sought. Recognizing as much, defendant has not argued the exemption cited in § 1b(1) applies. Instead, defendant cites MCL 15.243(1)(d), which exempts from disclosure under FOIA "Records or information specifically described and exempted from disclosure by statute."[5]

"When a public body invokes this exception, it is necessary to examine the statute under which the public body claims disclosure is prohibited." *MLive Media Group*, 321 Mich App at 270. In this case, Kevin Collins, a Michigan State Police employee with oversight responsibilities for LEIN and the CPL database, averred that the information plaintiff seeks can only be accessed through LEIN or "the CPL program application in the Michigan Criminal Justice Information Network (MiCJIN)." Information regarding access to the CPL database—

[4] According to defendant's documentary evidence, the only other, similar system is the "CPL program application in the Michigan Criminal Justice Information Network (MiCJIN)."

[5] Defendant, which asserted this exemption in its affirmative defenses, is not precluded from citing an exemption that was not contained in its FOIA responses. *Bitterman v Village of Oakley*, 309 Mich App 53, 60-61; 868 NW2d 642 (2015).

including the requestor's identity, the time, date, and reason for the request, is, according to ¶ 6 of Collins's affidavit, "maintained in the CPL database." This limited means of accessing the information (i.e., through LEIN or the MiCJIN), as well as its appearance in the CPL database is significant, argues defendant. Indeed, defendant argues that under MCL 28.214(5), information contained in the LEIN and in the MiCJIN is prohibited from disclosure by way of MCL 28.214(5), which provides that "A person *shall not disclose information governed under this act in a manner that is not authorized by law or rule.*" (Emphasis added). Moreover, the CPL database shall only be accessed, and information thereon disclosed, via LEIN. See MCL 28.425e(4).

In light of the above statutory prohibitions on disclosure, the Court agrees that defendant has identified a statutory prohibition to disclosure of the information plaintiff sought in its FOIA request. That prohibition is sufficient to trigger application of the exemption in MCL 15.243(1)(d). See *King*, 303 Mich App at 177-178. In *King*, the Court of Appeals held that where a statute prohibited disclosure of—in that case, a polygraph examination report—information "except as may be required by law" the exemption in MCL 15.243(1)(d) applied. *King*, 303 Mich App at 178. Stated otherwise, there is no merit to plaintiff's contention in the instant case that the general disclosure obligation imposed by FOIA is authorization for disclosure of law enforcement records that are otherwise prohibited from being disclosed under MCL 28.214(5) and MCL 28.425e(4). See *id.* ("Accordingly, because the polygraph reports are exempt from disclosure by the [Forensic Polygraph Examiners Act], they are likewise exempt under the FOIA."). In light of the above, the Court concludes that defendant is entitled to summary disposition pursuant to MCR 2.116(I)(2).

IV. COUNT III OF PLAINTIFF'S COMPLAINT

Lastly, the Court notes that Count III of plaintiff's complaint, which is pled in the alternative, is predicated on an assertion by defendant that the sought records do not exist. Where there has never been an assertion that the records do not exist, defendant is entitled to summary disposition on this Count as well. Moreover, any arguments plaintiff has about attorney fees or statutory damages are moot, for the reason that plaintiff cannot prevail in this FOIA action.

V. CONCLUSION

IT IS HEREBY ORDERED that plaintiff's motion for partial summary disposition is DENIED.

IT IS HEREBY FURTHER ORDERED that summary disposition in favor of defendant, the non-moving party, is GRANTED in accordance with MCR 2.116(I)(2).

IT IS HEREBY FURTHER ORDERED that plaintiff's motion to expedite is DENIED as moot.

This order resolves the last pending claim and closes the case.

Dated: March 22, 2019

Cynthia Diane Stephens, Judge
Court of Claims

House Legislative Analysis Section
Olds Plaza Building, 10th Floor
Lansing, Michigan 48909
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AMEND THE FREEDOM OF INFORMATION ACT

House Bill 4849 as enrolled
Public Act 553 of 1996
Third Analysis (1-15-97)

Sponsor: Rep. Greg Kaza
Committee: Judiciary and Civil Rights

THE APPARENT PROBLEM:

Passed in 1976, the Freedom of Information Act was, along with its counterpart, the Open Meetings Act (MCL 15.261 et al.), intended to make government more accountable to the general public by providing a means by which average citizens could have more access to find out about and observe the decision-making processes of governmental bodies. The acts minimized the amount of governing that would be allowed to take place behind closed doors and required a degree of openness and public access in governing.

The Freedom of Information Act allows the general public the opportunity to request and receive copies of or access to records and information held by certain public bodies. It has been felt that by allowing citizens this degree of access the act helps to provide for a greater degree of public oversight and citizen involvement and helps to limit the possibility of abuses of the public trust.

Under the act's provisions a wide variety and large number of people have requested and received records and information from public or governmental bodies. However, it has been suggested that a number of changes could be made to the act in order to streamline and clarify the request process. To begin with, it has been suggested that by specifying a particular individual to accept and process requests received under the act, a public body could deal with these requests in a more effective manner. The current law also allows for oral requests and when conflicts arise it is difficult to determine the nature of the request and whether it was properly fulfilled or rejected. As a result, it has also been suggested that confusion and conflicts regarding the nature of FOIA requests could be eliminated or at least reduced by requiring that requests for records and information be made in writing.

In addition, there is a need for complementary amendments to the Freedom of Information Act that would enable the Enhanced Access to Public Records Act, established by Public Act 462 of 1996 (enrolled House Bill 5832), to take effect. (For further information, see the House Legislative Analysis Section's analysis of enrolled House Bill 5832 dated 1-13-96.)

Although the act entitles citizens to full and complete information regarding "the affairs of government and the official acts of those who represent them as public officials and public employees," the act also contains limitations and restrictions on the types of records and information that may be provided. Some argue that these limitations should be increased because the act allows for the release of some records and information that should be kept secret and should not be provided to the public. There has, for example, been a great deal of concern that the requirements of the act have been harmful to the university president selection process.

Under current law, when an individual's FOIA request is denied, he or she has limited options. The individual may either pursue the matter further by seeking review of the denial in a circuit court, or he or she may let the denial of the request stand. In order to attempt to have the public body's denial of his or her request reversed, the individual who made the request has no other alternative than to hire an attorney and pursue the matter in court. Because review of the public body's decision must be undertaken in circuit court, the potential cost in time and money limits the number of people who are willing and able to seek to have a denial of their request reviewed. It has been argued that a number of denials of requests are made in error; in such cases requiring that the requestor go through the time and expense of a circuit court proceeding serves no useful purpose and undermines the effectiveness of the act. It has been suggested that providing simpler and less costly options for review of a public body's decision to deny a request would increase the public's access to public information and serve to quickly correct denials which were made in error.

THE CONTENT OF THE BILL:

House Bill 4849 would amend the Freedom of Information Act to, among other things, require that

FOIA requests be made in writing, provide an alternative to court action where a request for records has been denied, and add certain records and information to the act's list of items exempted from disclosure (including records regarding applicants for university president positions).

FOIA coordinator. Each public body would have to designate an individual as FOIA coordinator for the public body, who would be responsible for accepting and processing requests for the public body's public records and for approving denials of such requests. A FOIA coordinator would be defined in the bill as either an individual who was subject to the act's requirements (a "public body") or an individual designated by a public body to accept and process requests for public records. In cases where the public body is a city, village, township, county or state department or where the public body is under the control of a city, village, township, county or state department the public body would be required to appoint an individual to act as the FOIA coordinator. Where the public body is a county that does not have an executive form of government, the chairperson of the county board of commissioners would be designated as the FOIA coordinator. For all other public bodies, the chief administrative officer of the public body would be designated as the FOIA coordinator. A FOIA coordinator would be allowed to designate another person to act on his or her behalf.

Requests. Under the bill's provisions oral requests for records would no longer be accepted and a public body's FOIA coordinator would only be required to respond to written requests for records. A written request would be defined as a writing that asked for information and would include writings transmitted by facsimile, electronic mail, or other electronic means. However, a request for records that was made by facsimile, electronic mail, or other electronic transmission would not be considered to have been received until one business day after the electronic transmission had been made.

Whenever a public employee received a written FOIA request he or she would be required to promptly forward it to the public body's FOIA coordinator. The coordinator would be required to keep a copy of all written requests on file for no less than one year. In addition, the bill would also require public bodies to protect public records from loss, unauthorized alteration, mutilation, or destruction.

Responses to requests. Under the Freedom of Information Act, a public body must respond to a request for a public record immediately, but not more than five business days after the request was received, by either granting the request, providing a written denial of the request, granting the request in part and issuing a written denial on the remaining portion, or, under unusual circumstances, extending the time within which it is required to act for up to ten days. The failure to respond to a request is considered to have the effect of a denial.

The bill would provide that public body would merely have to respond within five days after the request had been received and would not require the existence of unusual circumstances to allow a public body to extend the time for its response for an additional ten business days.

The bill would also limit the right of an individual whose request for records has been denied by a public body to seek judicial review of the public body's decision in a circuit court. Although currently the act provides no time limit on when an individual may decide to bring a suit in circuit court, the bill would require that such an action be commenced within 180 days of the public body's final determination to deny the individual's request.

Appeals. The bill would give an individual whose written request for records or information had been denied an opportunity to appeal to the head of the public body that denied the request instead of being required to seek redress in circuit court. The individual would have the opportunity to make a written appeal to the head of the public body; the appeal would have to specifically identify itself as an "appeal" and explain the reasons the disclosure denial should be reversed. The head of a public body would be required to respond to a written appeal within ten days after receiving it, by either reversing the denial, sending a written notice to the requesting person that the denial would be upheld, reversing the denial in part and issuing a written statement upholding part of the denial, or, under unusual circumstances, extending the time to respond for up to ten business days. A written appeal submitted to a public body whose head was a board or commission would not be considered to have been received until the first regularly scheduled meeting of that board after the appeal was submitted. If the head of the public body failed to respond to a written appeal, or upheld all or part of the denial, the person requesting the record or information would then be allowed to seek judicial review of the denial in circuit court.

Records and information exempted from disclosure. The bill would amend the act's list of records and information exempted from disclosure by adding several exemptions. Records of a public body's security measures, including security plans, security codes and combinations, passwords, passes, keys, and security procedures, would be exempted from disclosure to the extent that they related to the ongoing security of the public body. Records or

information relating to a civil action involving both the requesting party and the public body, and records or information that would disclose the Social Security number of any individual, would also be exempt from disclosure.

In addition, applications for the position of president of a constitutionally established institution of higher education, as well as materials submitted with such applications, letters of recommendation, references, and records or information relating to the process of searching for and selecting a university president, if the records or information could be used to identify a candidate for the position, would also be exempted from disclosure. However, once the field of applicants had been narrowed to one or more individuals identified as finalists, such records could be released, except for letters of recommendation or reference to the extent that they related to an individual identified as a finalist.

The bill would also specify that computer software would not be considered a public record and therefore would not be subject to disclosure. Computer software would be defined as statements or instructions (i.e. computer programs) that would cause a machine or device having information processing capabilities to indicate, perform, or achieve a particular function, task, or result. However, computer-stored information or data, or a "field name," could be released as long as such disclosure would not violate a software license. A "field name" would be defined as the label or identification of an element of a computer data base that contains a specific item of information, including, but not limited to, a subject heading such as a column header, data dictionary, or record layout. (Note: These amendments, along with the provision allowing for requests to be made via electronic means, would complement the Enhanced Access to Public Records Act [Public Act 462 of 1996]. See the analysis of enrolled House Bill 5832 dated 1-13-96.)

Finally, although the governor, the lieutenant governor, their respective executive offices and their employees are excluded from the act's definition of a public body and therefore are not subject to the provisions of the act, the bill would require records in their possession to be released under certain circumstances. Under the bill after a legitimate request for a public record had been made to a state officer, employee, agency, department, division, bureau, board, commission, council, authority, or other body in the executive branch of government the record could not be withheld from disclosure by transferring the record to the possession of the executive offices of the governor or lieutenant governor, or an employee of either executive office.

Fees. The bill would allow a public body to charge a fee not only for the cost of providing a copy of a public record, but also for the cost of searching for and copying the record. In calculating the cost of the fee to be charged a public body would be limited to charging no more than the hourly wage of the lowest paid public body employee who was capable of retrieving the necessary information in order to comply with the request. The fees charged would have to be uniform and could not be dependent upon the identity of the individual making the request.

Other provisions. In addition, the act currently states that it is the public policy of the state that all persons (except those who are incarcerated) are entitled to full and complete information regarding "the affairs of government and the official acts of those who represent them as public officials and public employees" consistent with the act. The bill would change this statement of policy to provide that public is entitled to full and complete information regarding "governmental decision-making" consistent with the act.

Finally, the bill would also amend the act's definition of a "person" to include limited liability companies, governmental entities, and other legal entities so that they would also be entitled to request records and information from public bodies under the act.

MCL 15.23 et al.

FISCAL IMPLICATIONS:

Fiscal information is not available.

ARGUMENTS:

For:

The Freedom of Information Act needs a number of changes to clarify provisions, increase access where reasonable and limit access where necessary. The exemptions from disclosure that would be added by the bill are necessary to protect information and records that, if released to the public, could do more harm than good. Most of these changes are simply common sense changes. Clearly, records relating to a public body's security measures are obviously not something to which the general public should have access. In the same vein, access to the Social Security numbers of individuals should be restricted and persons involved in civil suits with a public body should not be able to use the act to circumvent the court rules regarding discovery.

The bill would also allow public bodies to calculate the cost of searching for and reproducing documents based upon the lowest wage rate of a person "capable of responding to the request." This will allow public bodies to recoup the higher cost of computer programmers whose

time is sometimes needed to write programs to retrieve data from computer databases. In addition, changes allowing "enhanced access" to public records, such as the release of information in a computer-generated format, are needed so that the Enhanced Access to Public Records Act can be implemented.

For:

Finally, as a result of the Michigan Supreme Court decision in *Booth Newspapers, Inc. v University of Michigan Board of Regents*, 444 Mich 211 (1993), all privacy has been removed from the university presidential search process. Qualified candidates for university presidencies are rare and, more often than not, already employed at other universities or other positions of responsibility. Under the current system anyone who applies for such a position will automatically have his or her name published by the media. Obviously, this can result in problems for many of the candidates; the controlling board or employer of the candidate may not be pleased to discover that its president or employee has applied for another position. If the candidate does not get the job, he or she may find that his or her position has been undermined, or that staff morale has deteriorated, because he or she is now viewed as a temporary employee. Without any hope of privacy, few qualified applicants will be willing to risk their current positions by applying to a university where their application would instantly become public knowledge. The changes allowing privacy in the university president selection process will complement the changes to the Open Meetings Act made by Public Act 464 of 1996 (enrolled Senate Bill 211).

Against:

The public and candidates who have run for office have called long and loud in recent years for more accountability in government. Conducting presidential searches in private would erode public confidence in the process and create an element of distrust of the person selected because the process would be ripe with the potential for abuse. In state and local governments across the country governing bodies are required to conduct their business in open meetings. What is so special about university presidents that they need to be discussed and selected in secret?

The Michigan Supreme Court ruled that the process of selecting a university president should be done in the open, and the state should abide by that wisdom rather than attempting to change the rules. The Freedom of Information Act was developed to make government accessible and accountable to the public. For nearly 20 years the act has been effective in achieving that purpose. Now comes a proposal to close a portion of government, the selection of university presidents, to the public. This bill likely will be the first in a succession of proposals by public officials claiming they too are harmed by a public selection process. If that were allowed to happen, this bill would be the beginning of a path that would lead not to less government, but to less accessible government.

Another similar proposal [see Senate Bill 212] would have provided for a period of public comment between the time the name of the final candidates were released and the time that the president could be appointed. This would have at least given an opportunity for a public examination of the would-be president's credentials. Such an investigation is sometimes helpful since the press is often able to turn up information about candidates that those involved in the hiring process are unable to discover.

For:

Under the current law, few people can afford the time or the money to seek review of a rejected FOIA request. Review of the public body's decision to deny a request is necessary in order to maintain public confidence in the process. If review of the decision is out of the reach of most citizens, then the decision making process itself becomes suspect. While some groups, particularly the media, have access to attorneys and the money required to have denials reviewed through the court system, ordinary citizens rarely have the resources needed to seek review of FOIA denials in the same manner. Further, the final version of the bill is an improvement over the original version which would have established a mandatory administrative hearing process. The bill will increase the average citizen's access to public information by giving an alternative means of review to all citizens.

Against:

Most people who have made requests for information under FOIA have already aimed their requests at the person or group in charge of the public body. The bill doesn't offer a real solution; in many cases the head of the public body is the very entity who has already denied the request. The bill would also serve the public better if it included a clear listing of the types of records which are exempted from the act. This would make it simpler for the average citizen to understand what he or she would or would not be able to receive, thus limiting the number of requests seeking exempt material.

Response:

The bill does not require that an individual make an appeal to the head of a public body where it would be futile to do so. The bill merely offers the opportunity to make such an appeal where it might be successful.

Against:

The bill changes the policy statement of the act from allowing information regarding "the affairs of government

and the official acts of public officials and public employees" to allowing information regarding "governmental decision-making." This change could be interpreted to significantly restrict the amount of information to which the people would have access.

Response:

The change in the wording of this statement is insignificant since the types information to which access is allowed under the act is exclusive. In other words, the act provides that there are only two types of public records, those that are specifically exempted from disclosure in the act and those that are not specifically exempt from disclosure and therefore are subject to disclosure under the act. The statement in question is thus of little relevance in determining whether a particular record is subject to disclosure.

Rebuttal:

Even if that is true, the fact remains that the change in language could be used as basis for a claim that certain records did not relate to governmental decision-making and therefore were not subject to disclosure. The determination of whether a record is exempt or not is not always crystal clear; questions often arise in which a particular record could be argued to fit either category, exempt or not exempt. Furthermore, the current language has been cited in a number of court cases, including the recent *Booth Newspapers, Inc. v University of Michigan Board of Regents* case, as a statement of the broad openness intended by the legislature. As a result, it seems likely that the change in the wording could lead to litigation over the meaning of the term "governmental decision-making". It is possible that a court could determine that the change in language was intended to restrict the type of records that public bodies would be required to disclose. Of course, on the other hand, it could also be determined that the language was intended to broaden the openness of the act.

Against:

Although the bill contains some provisions that expand the public's ability to request and receive records from public bodies, its overall impact will be to restrict the information available to the public by adding further limitations on what information is subject to the act. Furthermore, many of the bill's provisions were never considered in committee or in any forum where public comment would have been permitted.

Analyst: W. Flory

■This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.