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 MICHIGAN OPEN CARRY, INC'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION

The Michigan Court of Appeals has jurisdiction to entertain and adjudicate this appeal of right pursuant to MCR 7.202(6)(a), MCR 7.203(A)(1), and MCL 600.6446(1) as the March 22, 2019 *Opinion* issued by the assigned Court of Claims judge constitutes a final order with an appeal by right.

STATEMENT OF QUESTION(S) PRESENTED

I. Must the head of the public body render decisions on administrative FOIA appeals undertaken pursuant to MCL 15.240(2)?

Appellant/Plaintiff answers: Yes

II. Should the *Residential Ratepayer* "Do-Over" doctrine be disallowed?

Appellant/Plaintiff answers: Yes

III. Did the Court of Claims error in failing to order the Department to fulfill Michigan Open Carry, Inc's October 26, 2017 FOIA request?

Appellant/Plaintiff answers: Yes

FACTS

This is a *Freedom of Information Act* case. On October 26, 2017, Appellant/Plaintiff Michigan Open Carry, Inc ("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 28.421b(2)(f) and MCL 28.425e(4) between October 1st, 2016 and September 30th, 2017.

Appendix 28a [hereinafter the "Oct 26 FOIA Request"]. 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).

Under Michigan law, when a peace officer or other authorized user looks up records kept under the Firearms Records Database, the officer "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 Firearms Records 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). For purposes of this appeal, this inputted data is referred to as the Section 5(e) data. Further, 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."

Appendix 28a. Given that users query for information from the Firearms Records Database all year round, there should be thousands of entries of Section 5(e) data. 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). **Appendix 43a.** 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 by public officials and users.

On November 3, 2017, the Department issued a ten (10) business day extension via first-class mail postmarked the same day. **Appendix 29a** [hereinafter the "Nov 3 Extension"]; **Appendix 30a**. On November 17, 2017, FOIA Coordinator Lance Gackstetter, on behalf of the Department, responded via email. **Appendix 31a-32a** [hereinafter the "Gackstetter Email"]. 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

Appendix 33a [hereinafter the "Gackstetter Response"]. The Gackstetter Response only contained information never requested in any way by MOC. It also invoked no exemptions.[1]

On November 20, 2017, pursuant to MCL 15.243(1)(a), MOC administratively appealed to Col. Kriste Kibbey Etue as the head of the Department regarding her public body's denial of MOC's Oct 26 FOIA Request alleging a "willful and intentional" denial which was improper. **Appendix 35a-36a** [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, 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.***

[1] A failure to properly respond to a FOIA request is deemed an automatic denial. MCL 15.235(3).

On November 29, 2017, a Department employee named Lori Hinkley replied to MOC's Nov 20 Denial Appeal via first-class mail. **Appendix 37a** [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 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 two key judicial admissions[2]—

- 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.

Appendix 42a.

This lawsuit then followed. After discovery, MOC filed for partial summary disposition. See **Appendix 11a.** It argued that the Department was violating FOIA by allowing an individual other than the head of the public body to decide administrative appeals and by refusing to disclose the information actually requested by MOC—the reason(s) statutorily required to be inputted by public officials and public employees who access firearms records. The Department opposed and sought relief under MCR 2.116(I)(2). **Appendix 47a.**

[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).

The Court of Claims granted summary disposition in favor of the Department. **Appendix 71a**. First, the trial court concluded that the head of the public body does not need to decide administrative appeals because "another employee drafted a response in which, by all accounts, the Director of the Department of State Police acquiesced." **Appendix 75a**. Second, production of the sought information was not possible because the only method to get to where these non-exempt records are stored was to "*through*" LEIN or a similar system, yet are not actually stored *in* LEIN. Thusly, the Court of Claims held the non-exempt Section 5(e) information as exempt from disclosure pursuant to MCL 28.214(5) based on its storage location. **Appendix 80a**.[3] This appeal now follows.

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

[3] MCL 28.214(5) merely provides that "[a] person shall not disclose information governed under this act in a manner that is not authorized by law or rule." This exception was never raised by the Department until this suit was filed.

> 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). In other words, "a FOIA request must be fulfilled unless MCL 15.243 lists an applicable specific exemption." *Coblentz v City of Novi*, 475 Mich 558, 573; 719 NW2d 73 (2006).

STANDARD OF REVIEW

This Court reviews de novo a trial court's decision on a motion for summary disposition. *DeFrain v State Farm Mut Auto Ins Co*, 491 Mich 359, 366; 817 NW2d 504 (2012). However, 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).

ARGUMENT

I. The Director of the Department, Col. Kriste Kibbey Etue, failed to actually review and render decision on 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 costly civil lawsuit or can first optionally seek review of the FOIA Coordinator's decision by submitting 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, within 10 business days after receiving a written appeal "*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 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 was Col. Kriste Kibbey Etue and it was expressly conceded she did not personally make or render the decision on the administrative appeal of the denial of MOC's November 20, 2017 FOIA.

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.

Appendix 42a. Shockingly, the Court of Claims held these judicial admissions[4] are unimportant. MOC respectfully and strongly disagrees. The trial court made two errors. First, it concluded that "another employee drafted a response in which, by all accounts, the Director of the Department of State Police acquiesced." **Appendix 75a**. There is no record-based support for the conclusion that Director Etue somehow acquiesced to another. In fact, the discovery concessions presented above establishes the opposite. Director Etue never made any such decision; Appeal Officer Lori Hinkley "render the decision" on the FOIA appeal. **Appendix 42a**, **¶¶1-2.** And it is undisputed that Appeal Officer Lori Hinkley is ***not*** the head of the public body.

Second, the FOIA statute does not expressly allow for such delegation of key decision-making in this instance. When an administrative appeal option is taken, Col. Kriste Kibbey Etue, as the head of the public body, has the express statutory duty and

[4] The trial court was expressly not permitted to disregard these admissions unless the party formally withdrew or amended the answers after filing a motion. *Hilgendorf v St John Hosp & Med Ctr Corp*, 245 Mich App 670, 689-690; 630 NW2d 356 (2001). Admissions under MCR 2.312 are judicial admissions, which are formal concessions in pleadings that "have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact." *Radtke*, *supra*, at 419-421.

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, not as is convenient. 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 legal duty non-delegation principle is well-established. [5]

Here, the Legislature gave Col. Kriste Kibbey Etue as the head of a public body a specific legal duty to render administrative FOIA appeal decisions. The statute does not provide that the head of the public body's *designee* may alternatively render such a decision. The Legislature knows how to authorize duty delegation when it desires to allow

[5] It is also harmonious with the legislative history of the FOIA statute. **Appendix 82a-86a**.

for such an option. Within the FOIA statute itself, the Legislature authorized the FOIA Coordinator to "designate another individual to act on his or her behalf" for certain activities. MCL 15.236(3).[6] However, for the "head of the public body," the Legislature offered no such option to delegate to another. We cannot presume that to be a mere oversight by the Legislature. *People v Hock Shop, Inc*, 261 Mich App 521, 528; 681 NW2d 669 (2004) (the Legislature is presumed to be aware of the consequences of its use or omission of statutory language). By not authorizing a designee in this portion of the statute, FOIA requires *the head of the Department* to make the decision on appeal. Col. Kriste Kibbey Etue has that duty and thusly she and her Department failed to require meet their statutory obligations. The appeal decision-making process utilized by the Department violated MCL 15.240(2)-(3). This is not to say that an appeal official is prohibited from *assisting* Col. Kriste Kibbey Etue in her decision-making. However, the ultimate and actual 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, and was required to be by statute. **Appendix 42a**, **¶¶1-2.** As such, the Court of Claims' decision to "decline[] to find a violation" was in error[7] and reversal is required.[8]

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[6] Another example is 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.

[7] "It is a judge's duty to decide all cases within his jurisdiction that are brought before him…." *Pierson v Ray*, 386 US 547, 554 (1967). Further, "[i]t is the duty of a judge wherever possible to resolve rights of citizens upon the facts and arguments that are presented in an adversary context exposed to public view…" *Military Audit Project v Bush*, 418 F Supp 876, 878 (DDC 1976).

[8] 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). MOC here sought both. Minimally, a trial 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, at minimum, warranted because the Department's undertaken procedures for administrative appeals violates the Michigan FOIA statute.

II. The Department violated FOIA by invoking exemptions for the first time in the trial court.

Count II challenges the non-disclosure of the records expressly sought from (but were not provided by) the Department. MOC sought essentially several thousand electronic data entries held as computerized records. Instead, the Department provided newly-made summary calculations containing only numerical totals. Thusly, the request was wrongfully unfulfilled (except by the Court of Claims improper use of MCL 28.214(5) as discussed below).

However, as a threshold issue, the Court of Claims *sua sponte* used an exemption raised for the first time while in the trial court. The Department's FOIA Coordinator never *actually* invoked or cited MCL 28.214(5) prior to the suit. **Appendix 33a.** It was not invoked until the assigned Assistant Attorney General raised it in the Court of Claims after being sued to challenge the wrongful denial. This wait-until-we're-sued approach is improper, unlawful, and unfair.

A. *Residential Ratepayer* should be scrapped.

Under the FOIA statute, the decision whether to assert a denial based on an exemption belongs to the FOIA Coordinator, not the Attorney General's office. MCL 15.236(1) requires that "[t]he 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 under section 5(4) and (5)." "When the language of a statute is clear, it is presumed that the Legislature intended the meaning expressed therein." *Epps v 4 Quarters Restoration LLC*, 498 Mich 518, 529; 872 NW2d 412 (2015).

It must be "enforced as written" and "no further judicial construction is permitted." *Whitman v City of Burton*, 493 Mich 303, 311; 831 NW2d 223 (2013); *In re Jajuga Estate*, 312 Mich App 706, 712; 881 NW2d 487 (2015). As such, the FOIA Coordinator, not the Attorney General's office or the Court of Claims, is responsible for making discretionary FOIA exemption assertions. By not asserting the exempt, it should be deemed waived. *Napier v Jacobs*, 429 Mich 222; 414 NW2d 862 (1987) (Michigan traditionally and regularly applies the raise-or-waive rule).

B. The Do-Over doctrine in *Residential Ratepayer* is improper and this Court is invited to overrule it.

In supporting the Court of Claims' decision, the Department will claim that it can raise the exemption for the first time in the trial court based upon doctrine first outlined in *Residential Ratepayer Consortium v Pub Serv Comm*, 168 Mich App 476; 425 NW 2d 98 (1987).[9] The "Do-Over" doctrine is contrary to the structure, operation, and plain language of the FOIA statute. In *Residential Ratepayer*, the public body was requested to produce various coal contracts but dispossessed itself of the contracts before the request was to be fulfilled. The public body then tried to raise new exemptions in the trial court. The panel concluded:

> If a government agency fails to respond to a request or denies it without reason, but can raise a defense in a circuit court action, it would be illogical to hold that an

[9] The Do-Over doctrine has been followed, without analysis on its propriety, in several subsequent cases. *Stone St Capital, Inc v Bureau of State Lottery*, 263 Mich App 683, 688 fn2; 689 NW2d 541 (2004); *Bisonet v Bingham Twp*, unpublished pre curiam decision of the Court of Appeals, issued June 22, 2010 (Docket No. 290448); *Olson v Dep't of Corrections*, unpublished per curiam decision of the Court of Appeals, issued Sept 26, 2013 (Docket No. 314225); *Bitterman v Village of Oakley*, 309 Mich App 53; 868 NW2d 641 (2015); *Wheatley v Dep't of Corrections*, unpublished per curiam opinion of the Court of Appeals, issued Dec 19, 2017 (Docket No. 338197). However, longevity of process is not grounds for continuality when the initial decision was wrongfully premised. See *Speicher v Columbia Twp Bd of Trustees*, 303 Mich App 475; 843 NW2d 770 (2013) (calling for conflict panel to overturn two decades of established precedent under the *Open Meetings Act*) *overruled and adopting conflict argument* 497 Mich 125; 860 NW2d 51 (2014).

> agency that gives some reason for the denial is barred from raising other defenses in the circuit court action.

Id. at 481. This conclusion was never based on any language from the statute, or from any prior authority; it was created from the thin air. Moreover, such a doctrine is at direct odds with other portions of the statutory structures and processes.

First, this doctrine unfairly rewards a public body when failing its statutory duty to correctly respond to FOIA requests, and allows it to skirt the required written certificate (MCL 15.235(5)(a)) and/or the required explanation (MCL 15.235(5)(b)) with the hopes that the requester will not actually force the issue via an expensive lawsuit.

Second, it also places the decision of whether to invoke a discretionary exemption in the hands of the trial court rather than FOIA Coordinator as required by MCL 15.236(1). Section 6(1) is expressly clear: the FOIA coordinator… shall be responsible for approving a denial under section 5(4) and (5).” Courts act as a reviewer of the FOIA Coordinator’s decision, not its savior. *Mlive Media Group v City of Grand Rapids*, 321 Mich App 263, 271; 909 NW2d 282 (2017) (“A court only becomes involved in a FOIA request if a public body denies the request and the requester appeals… [and] the *trial court reviews* the [FOIA] denial de novo” citing MCL 15.240(4)). By allowing persons other than the FOIA Coordinator to assert (i.e. approve) a denial, *Residential Ratepayer’s* Do-Over doctrine improperly transfers the legal decision-making authority from the FOIA Coordinator to a judge or assistant attorney general. The FOIA statute does not permit this.[10] This Court would not allow a public body to raise new exemptions for the first time here. Due to the

[10] Statutes are to be applied as written. *Epps, supra,* at 529. Courts must also “construe the FOIA as a whole, harmonizing its provisions.” *Prins v Michigan State Police*, 291 Mich App 586, 590; 805 NW2d 619 (2011).

way FOIA cases are a quasi-appeal of the FOIA Coordinator's final determination in the circuit court per *Mlive*, there is no reason why it should be allowed in the trial court either.

Third, the practical effects of *Residential Ratepayer* unfairly encourage public bodies to not issue correct responses or issue deficient, blanket, irrelevant, or wholly inadequate denials only to have a public body's later-assembled legal team create new or trial-appropriate ones ***after*** a requester has undertaken the expense of a lawsuit. Such requesters, with far limited resources, are then blindsided by the new exemptions never before raised, presented, or prepared for prior to a FOIA review in the trial court. These new exemptions are costly and unfair additions to a requester's legal challenge being mounted by a requester, usually an average citizen is without the expansive resources of governmental agencies (and the insurance counsel). Then, many times, a public body simply abandons needless and inapplicable exemptions actually issued and then argues new previously-unmade ones for the first time in the trial court.

This gamesmanship was undertaken by the Department in this case and it is wrong. The plain language and clear intent of the Legislature provides that the time to assert any and all exemptions should be at the time of the "final determination" by the public body, not for the first time in the trial court on review pursuant to MCL 15.240(4). By Michigan law acquiescing to the 'late-invoked' exemptions, it improperly renders Section 5's command of an ***actual*** final determination (together with its explanation) as surplusage. Of course, a reviewing court should not interpret a statute in such a manner. *Hoste v Shanty Creek Management, Inc*, 459 Mich 561, 574; 592 NW2d 360 (1999).

In summary, the Court of Claims improperly casted off its role as reviewing the actions of the Department's FOIA Coordinator and instead adjudicated the matter afresh

using exceptions never raised in response to the FOIA request. This is the wrong and improper role of a trial court under the legal review structure provided by and the design created by the Michigan Legislature. As such, this Court is requested to overrule the continued use of the *Residential Ratepayer* 'Do-Over' doctrine. To the extent that this Court believes it is bound to follow *Residential Ratepayer* as binding precedent (or due to later decisions following the same), a conflict panel is requested pursuant to MCR 7.215(J).

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

Via the FOIA request, 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." **Appendix 28a.** As noted above, the production should have been the actual system-data entries that recorded the specifically inputted access reason(s), together with the requestor's identity, time, and date that the query was undertaken. The Department provided none of this. Instead of providing those data entries entered by the querying peace officers and authorized users, the Department only provided a list of numbers. The Department's response was:

> *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*

Appendix 33a. The trial court correctly concluded that this was not what MOC requested and the Department "misconstrues plaintiff's original request and that the original request sufficiently described the information sought." **Appendix 78a.** The Department has not cross-appealed this determination.

Now, we finally get to the meatiest part of this appeal—whether the Court of Claims erred by not issuing an order of production pursuant to MCL 15.240(4) to command disclosure of the sought public records. The records undisputedly exist. **Appendix 64a, ¶6** ("This information is also maintained in the CPL database."). However, the trial court concluded that despite the records MOC sought were not ***within*** the LEIN itself, they can only be accessed ***through*** LEIN. Thusly, held the Court of Claims, the data sought is exempt from disclosure citing *King*. This analysis in complete error.

A. The "LEIN statute" does not render its data exempted.

First and foremost, LEIN is not a forbidden realm of data which is only available to those with special permissions. Remember, the Department solely bears the burden of proving that denial of production is properly justified under FOIA. MCL 15.240(4); *Federated Publications, supra,* at 109. If a public body fails to meet its burden, the Court ***must*** order disclosure. *Hopkins, supra,* at 409.

Despite over two dozen exemptions, the only one utilized is the "pass through" exemption. MCL 15.243(1)(d) narrowly 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. Because MCL 15.243(1)(d) uses the word "statute," pointing to an

administrative rule is completely insufficient. This is well established. *Detroit Free Press, Inc v City of Warren*, 250 Mich App 164, 171; 645 NW2d 71 (2002).

Turning to the text of the LEIN statute (which is properly known as the *CJIS Policy Council Act*), there is no statutory language therein which both *specifically* describes and *specifically* exempts from disclosure the records or information in or through LEIN. The only language utilized by the trial court was MCL 28.214(5). This fails. That statute merely 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." By its plain language, if a Michigan law ***authorizes*** disclosure, disclosure of LEIN information is ***authorized***.

B. FOIA is an authorizing law.

Looking at MCL 28.214(5), there is no "specifically described" information or record that is specifically "exempted." All that MCL 28.214(5) 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(5) is "specifically" listed as being completely "exempted" by its plain language. No case law has ever held otherwise. The false assumption that LEIN data is completely off limits is not an accurate statement of law. It is more nuisance than that.

C. The responsive material is not in LEIN.

Notwithstanding and ironically enough, the data MOC seeks is not ***in*** LEIN at all. The Department concedes that such data is stored in a non-LEIN database known as the CPL database. **Appendix 64a, ¶6**. However, the Department suggests that because they

merely store the non-exempt information MOC seeks inside the CPL database and can be accessed by going ***through*** LEIN, it is somehow exempt. This makes no sense whatsoever. Yet the Court of Claims adopted the same. In other words, the Court of Claims gave its judicial blessing to those schemes whereby the Department has collected information about the activities of public officials (which is not exempt) and tries to hide it within a system which, itself, is not covered by a FOIA exception. Claiming a legal firewall, the Department now believes this allows the public records not be disclosed via a FOIA request. This is clear reversable error. This hide-the-records scheme is specifically rejected by FOIA. MCL 15.240(4) directs that production shall be ordered "regardless of the location of the public record." The correct legal question is not where the responsive materials ***are stored***, but rather whether the material sought ***is exempt***. Here, the Section 5(e) data sought by MOC (see *infra*) is not exempt under the FOIA statute.

D. The records sought are not confidential or exempted from public disclosure.

Under the *Firearms Act*, "***firearms records*** are confidential" and "are not subject to disclosure under the freedom of information act…" MCL 28.421b(1). This is undisputed. 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). "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."

However, MOC ***did not*** request public records involving materials under collected under sections 2, 2a, 2b, and 5b or via any form, permit, or license thereof. Instead, the

sought information derives from section *5e*. 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 officials'' and employees' activities*. MOC was clear about this distinction as part of the 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.

Appendix 28a.

The Court of Claims erred in believing the location where non-exempt records are stored by the Department matters. It does not. MCL 15.240(4). Instead, the question is whether the government has a proven (via its burden) a valid exemption under FOIA to withhold production of sought information/records, especially when it comes to information about how public officials are (or are not) performing their legal duties. Because the records and information sought by MOC are not protected from disclosure due to the lack of any exemptions being asserted on November 17, 2017 via the Gackstetter Response. Alternatively, there is no proper invocable exemption under the *Firearms Act*, the *CJIS Policy Council Act*, or Section 13 of the FOIA. Therefore, disclosure must be ordered. MCL 15.240(4); *Hopkins, supra*, at 409. The Court of Claims erred in not ordering the same.

RELIEF REQUESTED

WHEREFORE, this Court is requested to reverse the March 22, 2019 opinion of the Court of Claims, vacate its order granting summary disposition to the Department, grant summary disposition in favor of MOC, and remand with instructions to order

production pursuant to MCR 15.240(4). Upon remand, this Court is also directed to require the Court of Claims to address, if appropriate, the other forms of relief that are mandated or authorized by *Lash*, MCL 15.240(6), MCL 15.240(7), and MCL 15.240b. A standard award of appellate courts is also requested. MCR 7.219.

Date: May 3, 2019

RESPECTFULLY SUBMITTED:

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