

**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)<sup>[1]</sup> and MCL 28.425e(4)<sup>[2]</sup> 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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<sup>1</sup> 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.”

<sup>2</sup> 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"<sup>3</sup> 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

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<sup>3</sup> 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,<sup>4</sup> 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."<sup>5</sup>

"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—

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

<sup>5</sup> 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.

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#### V. CONCLUSION

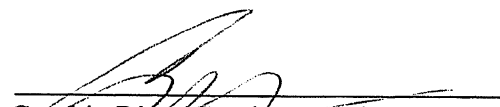
IT IS HEREBY ORDERED that plaintiff's motion for partial summary disposition is DENIED.

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