

STATE OF MICHIGAN

COURT OF CLAIMS

MICHIGAN OPEN CARRY, INC,

Plaintiff/Petitioner,

No. 18-000087-MZ

v

HON. CYNTHIA D. STEPHENS

MICHIGAN DEPARTMENT OF STATE
POLICE,

Defendant.

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**DEFENDANT'S ANSWER AND AFFIRMATIVE DEFENSES TO
PLAINTIFF'S VERIFIED COMPLAINT**

Defendant, Michigan Department of State Police (MSP), through counsel,
states for its Answer and Affirmative Defenses to Plaintiff's Complaint as follows:

I. Parties

1. MSP lacks knowledge or information sufficient to form a belief as to the truth of the allegation, and leaves Plaintiff to its proofs.
2. MSP admits the allegation.

3. MSP states that the allegation represents a legal conclusion which by law requires no answer. To the extent that an answer may be required, MSP admits the allegation.

Jurisdiction

4. MSP states that the allegation represents a legal conclusion which by law requires no answer. To the extent that an answer may be required, MSP admits the allegation.

5. MSP states that the allegation represents a legal conclusion which by law requires no answer. To the extent that an answer may be required, MSP admits the allegation.

6. MSP states that the allegation represents a legal conclusion which by law requires no answer. To the extent that an answer may be required, MSP states that the FOIA speaks for itself, and denies the allegation to the extent it is inconsistent with the FOIA.

General Allegations

7. MSP admits that Plaintiff submitted a request under the Freedom of Information Act (FOIA) on October 26, 2017. MSP further admits that a copy of Plaintiff's FOIA request is attached to Plaintiff's complaint as Exhibit A. MSP further states that Plaintiff's FOIA request speaks for itself and denies the remainder of the allegation to the extent that it is inconsistent with the FOIA request.

8. MSP admits the allegation.

9. MSP admits that Plaintiff has quoted from its October 26 FOIA request. By way of further pleading, MSP states that the emphasis that appears in Plaintiff's complaint did not appear in its FOIA request. MSP denies the remainder of the allegation to the extent that it is inconsistent with the FOIA request.

10. MSP states that the allegation represents a legal conclusion which by law requires no answer. To the extent that an answer may be required, MSP states that MCL 28.425e speaks for itself and denies the allegation to the extent that it differs from the statute.

11. MSP states that the allegation represents a legal conclusion which by law requires no answer. To the extent that an answer may be required, MSP states that MCL 28.421b and MCL 28.425e speaks for itself and denies the allegation to the extent that it differs from the statute.

12. MSP states that the allegation represents a legal conclusion which by law requires no answer. To the extent that an answer may be required, MSP states that MCL 28.425e speaks for itself and denies the allegation to the extent that it differs from the statute.

13. MSP admits that Plaintiff provided some explanation as to the records it was requesting in its FOIA request. MSP denies the remainder of the allegation as untrue.

14. MSP admits that the quoted language appears in Plaintiff's October 26 FOIA request. MSP denies the remainder of the allegation to the extent that it is inconsistent with the FOIA request.

15. MSP admits the allegation.

16. MSP states that the allegation represents a legal conclusion which by law requires no answer. To the extent that an answer may be required, MSP states that the FOIA speaks for itself, and denies the allegation to the extent it is inconsistent with the FOIA.

17. MSP states that a portion of the allegation represents a legal conclusion which by law requires no answer. To the extent that an answer to this portion may be required, MSP states that the FOIA speaks for itself, and denies the allegation to the extent it is inconsistent with the FOIA. MSP admits that it did not engage in discussions with Plaintiff regarding extensions to its initial response time under MCL 15.235(2).

18. MSP states that the allegation represents a legal conclusion which by law requires no answer. To the extent that an answer may be required, MSP states that the FOIA speaks for itself, and denies the allegation as untrue. In further support of its denial, MSP states that it properly responded to Plaintiff's FOIA request in accordance with MCL 15.235.

19. MSP admits that, on November 3, 2017, Mr. Lance Gackstetter issued a written notice extending MSP's time to respond by 10 business days under MCL 15.235(2)(d). MSP further admits that a copy of its November 3 written notice is attached to Plaintiff's Complaint as Exhibit B. MSP denies the allegation that its notice was after the statutory deadline for the reason that it is untrue. By way of

further pleading, MSP states that the fifth business day after it received Plaintiff's October 26 FOIA request was November 3, 2018⁷

20. MSP admits the allegation.

21. MSP lacks knowledge or information sufficient to form a belief as to the truth of the allegation, and leaves Plaintiff to its proofs.

22. MSP admits that, on November 17, 2017, MSP emailed Plaintiff its written notice granting Plaintiff's FOIA request. MSP further states that a copy of MSP's transmittal email is attached to Plaintiff's complaint as Exhibit D.

23. MSP admits the allegation.

24. MSP admits that Plaintiff has quoted a portion of MSP's November 17 written notice granting Plaintiff's FOIA request. MSP further admits that a copy of its November 17 written notice is attached to Plaintiff's complaint as Exhibit E. MSP denies the remainder of the allegation to the extent that it is inconsistent with the November 17 written notice.

25. MSP admits the allegation.

26. MSP admits that it did not assert any exemptions in its November 17 written notice. MSP denies the remainder of the allegation as untrue.

27. MSP admits that, on November 20, 2017, Plaintiff emailed an appeal of what it erroneously referred to as a "denial" of its October 26 FOIA request. MSP further admits that a copy of Plaintiff's appeal is attached to the complaint as Exhibit F.

28. MSP further admits that a copy of Plaintiff's appeal is attached to the complaint as Exhibit F.

29. MSP admits that its November 20, 2017 email contained the word "appeal" in both the subject and body of the email. By way of further pleading, MSP states that the reasons identified in its appeal are without basis in fact or law.

30. MSP denies the allegation that MSP responded to Plaintiff's appeal on November 29, 2018 as untrue. In further support of this denial, MSP states that it responded to Plaintiff's appeal on November 28, 2018 via first class mail. MSP admits that a copy of its response to Plaintiff's appeal is attached to the Complaint as Exhibit G.

31. MSP admits the allegation.

32. MSP lacks knowledge or information sufficient to form a belief as to the truth of the allegation, and leaves Plaintiff to its proofs.

33. MSP admits that the quoted portions of the allegation appear in MSP's response to Plaintiff's appeal. By way of further pleading, MSP states that its response to Plaintiff's appeal speaks for itself and denies the allegation to the extent that it is inconsistent with MSP's response to the appeal.

34. MSP denies the allegation as untrue.

Response to Count I – Appeal decided by person other than head of a public body – [Alleged] Violation of FOIA, MCL 15.240(1)(a) and MCL 15.240(2)

35. MSP incorporates by reference its responses to the previous as if fully stated herein.

36. MSP states that the allegation represents a legal conclusion which by law requires no answer. To the extent that an answer may be required, MSP states that the FOIA speaks for itself, and denies the allegation to the extent it is inconsistent with the FOIA.

37. MSP states that the allegation represents a legal conclusion which by law requires no answer. To the extent that an answer may be required, MSP states that the FOIA speaks for itself, and denies the allegation to the extent it is inconsistent with the FOIA.

38. MSP states that the allegation represents a legal conclusion which by law requires no answer. To the extent that an answer may be required, MSP admits the allegation.

39. MSP states that the allegation represents a legal conclusion which by law requires no answer. To the extent that an answer may be required, MSP admits the allegation.

40. MSP states that the allegation represents a legal conclusion which by law requires no answer. To the extent that an answer may be required, MSP denies the allegation as untrue.

41. MSP states that the allegation represents a legal conclusion which by law requires no answer. To the extent that an answer may be required, MSP denies the allegation as untrue.

42. MSP states that the allegation represents a legal conclusion which by law requires no answer. To the extent that an answer may be required, MSP denies the allegation as untrue.

**Response to Count II – Wrongful Denial / Failure to produce
requested records via FOIA Octo 26, 2017 request**

43. MSP incorporates by reference its responses to the previous as if fully stated herein.

44. MSP states that the allegation represents a legal conclusion which by law requires no answer. To the extent that an answer may be required, MSP denies the allegation as untrue. In further support of its denial, MSP states that, to the extent the information Plaintiff received is different from what it hoped to receive, Plaintiff failed to sufficiently describe the requested information as is required under MCL 15.233.

45. MSP states that the allegation represents a legal conclusion which by law requires no answer. To the extent that an answer may be required, MSP denies the allegation as untrue.

46. MSP states that the allegation represents a legal conclusion which by law requires no answer. To the extent that an answer may be required, MSP denies the allegation as untrue.

47. MSP states that the allegation represents a legal conclusion which by law requires no answer. To the extent that an answer may be required, MSP denies the allegation as untrue.

48. MSP states that the allegation represents a legal conclusion which by law requires no answer. To the extent that an answer may be required, MSP denies the allegation as untrue.

Response to Count III – *Hartzell / Lash* claim

49. MSP incorporates by reference its responses to the previous as if fully stated herein.

50. MSP states that the allegation represents a legal conclusion which by law requires no answer. To the extent that an answer may be required, MSP denies the allegation as untrue.

51. MSP states that the allegation represents a legal conclusion which by law requires no answer. To the extent that an answer may be required, MSP states that the *Hartzell* opinion speaks for itself and denies the allegation to the extent that it is inconsistent with *Hartzell*.

52. MSP admits that it did not certify that the requested records do not exist. MSP denies the remainder of the allegation as untrue. By way of further pleading, MSP incorporates by reference its response to paragraph 44 of Plaintiff's complaint.

53. MSP denies the allegation as untrue.

54. MSP states that the allegation represents a legal conclusion which by law requires no answer. To the extent that an answer may be required, MSP denies the allegation as untrue.

55. MSP states that the allegation represents a legal conclusion which by law requires no answer. To the extent that an answer may be required, MSP lacks knowledge or information sufficient to form a belief as to the truth of the allegation, and leaves Plaintiff to its proofs.

Response to Plaintiff's Requested Relief

56. MSP states that the allegations composing Plaintiff's prayer for relief represent legal conclusions, which by law require no answer. To the extent that an answer may be required, MSP denies that Plaintiff is entitled to any relief. In support of this denial, MSP states that it complied with the FOIA in responding to Plaintiff's FOIA request. MSP further incorporates by reference the above numbered paragraphs of its Answer and its Affirmative Defenses.

AFFIRMATIVE DEFENSES

1. Plaintiff has failed to state claims upon which relief can be granted.
2. Plaintiff has failed to present any genuine issues as to material facts, which should result in a judgment in favor of MSP as a matter of law.
3. Some or all of Plaintiff's claims may be barred by the statute of limitations.
4. Plaintiff lacks standing as to some of its alleged claims.
5. Plaintiff is not entitled to any relief under the FOIA because MSP should prevail in this action.
6. MSP complied with the FOIA in responding to Plaintiff's FOIA request.

7. To the extent that Plaintiff's FOIA request is expanded during litigation to include, for example, all records related to law enforcement access of firearm records, certain records will be exempt from disclosure under MCL 15.243(1)(d) because this information is described as exempt from disclosure by statutes outside the FOIA. In particular, MCL 28.421b(1) provides that "[f]irearms records are confidential, are not subject to disclosure under the [FOIA] . . . and shall not be disclosed to any person, except as otherwise provided by this section." MCL 28.214(1) tasks the law enforcement information network (LEIN) council to "[e]stablish policy and promulgate rules governing access, use, and disclosure of information in criminal justice information systems, including the [LIEN]." The LEIN council promulgated Rule 28.5208 which prohibits disclosure from information from LEIN, and other information systems, from being disseminated to unauthorized persons. Thus, in the event that Plaintiff's FOIA request is broadened and more sufficiently described throughout litigation, certain records will be mandatorily exempt from disclosure as the records will include information firearm records as well as information from LEIN and/or other information systems.

8. To the extent that Plaintiff's FOIA request is expanded during litigation to include, for example, all records related to law enforcement access of firearm records, certain records will likely be exempt from disclosure under MCL 15.243(1)(s)(vii) – (ix). In the event that Plaintiff's FOIA request is broadened and more sufficiently described throughout litigation, certain records will include the names of officers who searched firearms records pursuant to statute. While MSP

has not reviewed *all* records related to law enforcement access of firearm records, it is likely that, as to certain records, the public interest in nondisclosure will outweigh the public interest in disclosure.

9. To the extent that Plaintiff's FOIA request is expanded in any way during litigation, MSP reserves the right to raise exemptions as it completes its review of the expanded scope of the request.

10. To the extent that Plaintiff's FOIA request is expanded in any way during litigation, MSP reserves the right to charge a fee as authorized under MCL 15.234.

11. Plaintiff, in response to its FOIA request dated January 25, 2018, has already received the information described it is allegedly seeking in this lawsuit. Therefore, as described in *Densmore v Dept of Corr*, 203 Mich App 363, 367 (1994), the instant litigation amounts to a dissipation of agency resources and taxpayer dollars.

12. Contrary to the requirement in MCL 15.233, Plaintiff failed to sufficiently describe the information it sought in its October 26, 2017 FOIA request.

13. MSP's processing of Plaintiff's FOIA request was not arbitrary or capricious.

MSP reserves the right to add additional affirmative defenses as they become known through discovery.

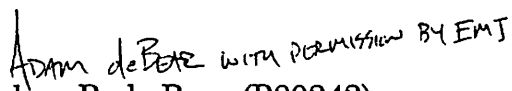
RELIEF REQUESTED

WHEREFORE, Defendant Michigan Department of State Police asks that
this Court:

- A. Deny Plaintiff the relief it seeks in its complaint;
- B. Determine that Plaintiff is not entitled to attorneys' fees or costs;
- C. Dismiss Plaintiff's complaint with prejudice;
- D. Award costs to Defendant, including reasonable attorney fees; and
- E. Grant Defendant such other relief as provided by law.

Respectfully submitted,


Bill Schuette
Attorney General


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Dated: May 30, 2018

PROOF OF SERVICE

I hereby certify that on May 30, 2018, I served a copy of the foregoing *Defendant's Answer and Affirmative Defenses to Plaintiff's Verified Complaint* in this matter on all counsel of record at their last known addresses by U.S. mail, with first class postage fully prepaid.



Kristine Gaertner
Legal Secretary