STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL

P.O. Box 30754
Lansing, Michigan 48909

BILL SCHUETTE
ATTORNEY GENERAL

December 17, 2018

Clerk of the Court
Michigan Court of Claims
Hall of Justice – 2nd Floor
925 West Ottawa Street
Lansing, MI 48909-7522

Re: *Michigan Open Carry, Inc. v Michigan State Police*
Docket No. 18-000087-MZ

Dear Clerk:

Enclosed for filing, please find the Defendant's 12/17/2018 Brief in Response to Plaintiff's 12/03/2018 Motion for Summary Disposition along with Proof of Service.

Sincerely,

Adam de Bear
Assistant Attorney General
State Operations Division
(517) 373-1162

AdB/llw
c: Philip L. Ellison

AG# 2018-0217975-A

STATE OF MICHIGAN

COURT OF CLAIMS

MICHIGAN OPEN CARRY, INC,

Plaintiff-Petitioner,

v

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

Defendant.

No. 18-0000087-MZ

HON. CYNTHIA D. STEPHENS

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PROOF OF SERVICE

On December 17, 2018 a copy of Defendant's 12/17/2018 Brief in Response to Plaintiff's 12/03/2018 Motion for Summary Disposition was sent by first class mail to the following:

Philip L. Ellison
P.O. Box 107
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Lynne L. Walton

Lynne L. Walton

AG# 2018-0217975-A

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MICHIGAN OPEN CARRY, INC,

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MICHIGAN DEPARTMENT OF STATE POLICE,
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HON. CYNTHIA D. STEPHENS

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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).]

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[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,

Bill Schuette
Attorney General

Adam de Bear (P80242)
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Attorneys for Defendant
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(517) 373-1162

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.

Gx1

Gackstetter, Lance (MSP)

From:	Tom Lambert <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.

Ex 2

STATE OF MICHIGAN
COURT OF CLAIMS

MICHIGAN OPEN CARRY, INC,

Plaintiff/Petitioner,

v

No. 18-000087-MZ

HON. CYNTHIA D. STEPHENS

MICHIGAN DEPARTMENT OF STATE POLICE,
Defendant.

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AFFIDAVIT OF LANCE GACKSTETTER

I, Lance Gackstetter, 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 a departmental analyst in its Records Resource Section.

4. In my capacity as a departmental analyst with the MSP, I serve as an assistant FOIA coordinator.

5. In my role as assistant FOIA coordinator, I was involved with the processing of Mr. Lambert's October 2017 FOIA request submitted on behalf of Michigan Open Carry, Inc.

6. In the FOIA request, Mr. Lambert specifically requested "[r]ecords created by and/or maintained by the [MSP] from peace officers and authorized system users compiled pursuant to MCL 28.421b(2)(4) and MCL 28.425e(4) between October 1st, 2016 and September 30th, 2017." In his request, Mr. Lambert further explained that he was seeking "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."

7. In responding to the request, due to the subject matter, I consulted with the CPL Unit within MSP's Criminal Justice Information Center. And because Mr. Lambert referenced both MCL 28.421b(2) and MCL 28.425e(4), MSP determined that Mr. Lambert was seeking non-confidential information related the access history of the firearm records.

8. Specifically, Mr. Lambert made reference to the "access protocol" described in MCL 28.425e(4) and to the lawful purposes for which the firearms records may be accessed as described in MCL 28.421b(2); MSP records and maintains information related to the access history of the firearms records and includes this information in its CPL annual reports. As of the date of Mr. Lambert's request, however, the 2016–2017 CPL Annual Report had not yet been finalized.

9. But even though the 2016-2017 CPL Annual Report was not available at the time of Mr. Lambert's request, MSP requested the Department of Technology Management and Budget (DTMB) to query the appropriate database in order to provide Mr. Lambert with information responsive to his request.

10. As a result of this query, DTMB gathered data regarding the number of times that the firearms records were accessed—between October 1, 2016 and September 30, 2017—for each particular purpose identified in MCL 28.421b(2)(a)–(f) .

11. I then, in turn, issued a written notice granting Mr. Lambert's request by providing him with the information received from DTMB—that is, the number of times the firearms records were accessed for each particular

purpose identified in MCL 28.421b(2)(a)–(f) from October 1, 2016 to September 30, 2017.

Affiant says nothing further.

Lance Gackstetter
Michigan Department of State Police

Date: December 14, 2018

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

Notary Public, State of Michigan

EX 3

STATE OF MICHIGAN
DEPARTMENT OF STATE POLICE
LANSING

RICK SNYDER
GOVERNOR

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

Gackstetter, Lance (MSP)

From: Tom Lambert <tlambert@miopencarry.org>
Sent: Monday, November 20, 2017 2:37 PM
To: Etue, Kriste (MSP)
Cc: MSP-FOI; MiOC Board
Subject: FOIA Denial APPEAL
Attachments: MOC Oct 26 FOIA Request.pdf; MSP Nov 17 Reply.pdf

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.

EXS

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

464

Gackstetter, Lance (MSP)

From: Tom Lambert <tlambert@miopencarry.org>
Sent: Thursday, January 25, 2018 4:57 PM
To: MSP-FOI
Cc: MiOC Board
Subject: MSP FOIA Request - 2016-2017 Annual CPL Report

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 copies of public records. Michigan Open Carry, Inc. is hereby requesting the following from the Michigan Department of State Police:

- The Michigan Department of State Police's Annual Concealed Pistol License Report for the 2016-2017 fiscal year.

The Michigan Department of State Police is required to file this report with the Secretary of the Senate and the Clerk of the House of Representatives, and post it on their internet website by January 1 of each year pursuant to Section 5e of 1927 PA 372; MCL 28.425e(5).

> *"(5) The department of state police shall* ***by January 1 of each year*** *file with the secretary of the senate and the clerk of the house of representatives, and post on the department of state police's internet website, an annual report setting forth all of the following information for the state for the previous fiscal year:*
> *(a) The number of concealed pistol applications received.*
> *(b) The number of concealed pistol licenses issued.*
> *(c) The number of statutorily disqualified applicants.*
> *(d) Categories for statutory disqualification under subdivision (c).*
> *(e) The number of concealed pistol licenses suspended or revoked.*
> *(f) Categories for suspension or revocation under subdivision (e).*
> *(g) The number of applications pending at the time the report is made.*
> *(h) The mean and median amount of time and the longest and shortest amount of time used by the Federal Bureau of Investigation to supply the fingerprint comparison report required in section 5b(10). The department may use a statistically significant sample to comply with this subdivision.*
> *(i) The total number of individuals licensed to carry a concealed pistol found responsible for a civil violation of this act, the total number of civil violations of this act categorized by offense, the total number of individuals licensed to carry a concealed pistol convicted of a crime, and the total number of those criminal convictions categorized by offense.*
> *(j) The number of suicides by individuals licensed to carry a concealed pistol.*
> *(k) The total amount of revenue the department of state police has received under this act.*
> *(l) Actual costs incurred per initial and renewal license by the department of state police under this act, itemized by each statutory section of this act.*
> *(m) A list of expenditures made by the department of state police from money received under this act, regardless of purpose.*
> *(n) Actual costs incurred per permit for each county clerk.*
> *(o) The number of times the database was accessed, categorized by the purpose for which the database was accessed."*

An examination of the Department's website on the day of this request, January 25th, 2018, shows the Department's website to not contain this report as required by law.

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 the Department of State Police's operations.

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 respond to this request electronically, and make any copies generated under this request available electronically per MCL 15.234(1)(c).

Thank you for your time processing this request.

Tom Lambert
President
Michigan Open Carry, Inc.

STATE OF MICHIGAN
DEPARTMENT OF STATE POLICE
LANSING

RICK SNYDER
GOVERNOR

COL. KRISTE KIBBEY ETUE
DIRECTOR

January 30, 2018

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

Subject: CR-20054159

Dear TOM LAMBERT:

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

Your request has been:

[X] Granted.

[ ] Granted in part and denied in part. Portions of your request are exempt from disclosure based on provisions set forth in the Act. (See comments on the back of this letter.) 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.

[ ] Denied. (See comments on the back of this letter.) 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.

[X] The documents you requested are enclosed. Please pay the amount of $-.--. Under the FOIA, Section 10a (a copy of which is enclosed), you have the right to appeal the fee to the head of this public body.

[ ] Please pay the amount of $-.--. Once payment is received the documents will be mailed to you. Under the FOIA, Section 10a (a copy of which is enclosed), you have the right to appeal the fee to the head of this public body.

You may pay the amount due online at www.michigan.gov/mspfoiapayments using a credit card or check. You will need to provide your name and the reference number listed above. Please note, there is a $2.00 processing fee for using this service. If you prefer, you can submit a check or money order made payable to the STATE OF MICHIGAN and mail to P.O. Box 30266, Lansing, MI 48909. To ensure proper credit, please enclose a copy of this letter with your payment.

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 letter.

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

Ex 7

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
P.O. Box 107
Hemlock, MI 48626
(989) 642-0055 (phone)
pellison@olcplc.com

Adam R. de Bear (P80242)
Attorney for Defendant
Michigan Department of Attorney General
State Operations Division
P.O. Box 30754
Lansing, MI 48909
(517) 373-1162 (phone)
debeara@michigan.gov

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

Notary Public, State of Michigan

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

DEPARTMENT OF STATE POLICE

CRIMINAL RECORDS DIVISION

CRIMINAL JUSTICE INFORMATION SYSTEMS

(By authority conferred on the Department of State Police by 1974 PA 163, MCL 28.214, and Executive Reorganization Order No. 2008-2, MCL 28.162.

PART 1. GENERAL PROVISIONS

R 28.5101 Definitions.

Rule 101. As used in these rules:

(a) "Administration of criminal justice" means the performance of any of the following activities:

(i) Detection, apprehension, detention, pretrial release, post-trial release, prosecution, adjudication, correctional supervision, or rehabilitation of accused persons or criminal offenders.

(ii) Identification of criminals.

(iii)Collection, storage, and dissemination of criminal justice information.

(b) "AFIS" means the automated fingerprint identification system maintained and operated by the department.

(c) "CJIS Information Security Officer" (ISO) means the person designated to administer the LEIN and NCIC information security program. The CJIS ISO is an employee of the CSA. The CJIS ISO serves as the internal and external point of contact for all information security matters and ensures that each agency having access to the LEIN and NCIC system has a security point of contact.

(d) "CJIS System Agency" (CSA) means the criminal justice agency that has overall responsibility for the administration and usage of the NCIC within a district, state, territory or federal agency as designated by the Federal Bureau of Investigation. The CJIS System Agency for this state is the department.

(e) "CJIS System Officer" (CSO) means a member of the CJIS System Agency, selected by the head of the CSA, having the responsibility for monitoring system use, enforcing system discipline and security, and ensuring that all users follow operating procedures.

(f) "Criminal justice agency" means a court or other governmental agency, or any subunit thereof, that engages in the administration of criminal justice pursuant to a statute or executive order and that allocates a substantial part of its annual budget for the administration of criminal justice.

(g) "Criminal justice information" means data (electronic or hard copy) collected by criminal justice agencies that is needed for the performance of their functions as authorized or required by law.

(h) "Criminal justice information systems" (CJIS) means systems provided by a governmental agency or authorized private entity that store and/or disseminate information used for the administration of criminal justice and public safety.

(i) "Department" means the Michigan department of state police.

(j) "Law Enforcement Information Network" (LEIN) is the communication network that supplies information sharing for Michigan criminal justice agencies, the portal that links to and provides access to various state and national databases and the hot files.

(k) "Michigan Criminal Justice Information Network" (MiCJIN) means the web portal that provides a secure infrastructure with data encryption and single user sign-on and authentication to allow access to a variety of applications.

(l) "National crime information center" (NCIC) means the nationwide, computerized information system established as a service to all criminal justice agencies operated by the CJIS division of the Federal Bureau of Investigation (FBI).

(m) "Nonpublic information" means information to which access, use, or dissemination is restricted by a Law or rule of this state or of the United States.

(n) "Other information systems" are applications, other than LEIN or AFIS, which are accessed through the MiCJIN portal.

(o) "Public safety" means the protection of the general population from all manners of significant danger, injury, damage, or harm.

(p) "Public safety agency" means any entity that has a mission of, or assists with, protecting the public from harm and includes, but is not limited to, police, fire, courts, prosecutors, search and rescue, emergency services, and 911 centers.

History: 1981 AACS; 2009 AACS.

R 28.5102 Rescinded.

History: 1981 AACS; 2009 AACS.

R 28.5103 Rescinded.

History: 1981 AACS; 2009 AACS.

R 28.5104 Rescinded.

History: 1981 AACS; 2009 AACS.

R 28.5105 Rescinded.

History: 1981 AACS; 2009 AACS.

R 28.5106 Rescinded.

History: 1981 AACS; 2009 AACS.

R 28.5107 Rescinded.

History: 1981 AACS; 2009 AACS.

R 28.5108 Rescinded.

History: 1981 AACS; 2009 AACS.

R 28.5109 Rescinded.

History: 1981 AACS; 2009 AACS.

R 28.5110 Rescinded.

History: 1981 AACS; 2009 AACS.

R 28.5111 Rescinded.

History: 1981 AACS; 2009 AACS.

R 28.5112 Rescinded.

History: 1981 AACS; 2009 AACS.

R 28.5113 Rescinded.

History: 1981 AACS; 2009 AACS.

R 28.5114 Rescinded.

History: 1981 AACS; 2009 AACS.

R 28.5115 Rescinded.

History: 1981 AACS; 2009 AACS.

R 28.5116 Rescinded.

History: 1981 AACS; 2009 AACS.

R 28.5117 Rescinded.

History: 1981 AACS; 2009 AACS.

R 28.5118 Rescinded.

History: 1981 AACS; 2009 AACS.

R 28.5119 Rescinded.

History: 1981 AACS; 2009 AACS.

R 28.5120 Rescinded.

History: 1981 AACS; 2009 AACS.

PART 2. ACCESS, ELIGIBILITY, AND DATA DISSEMINATION PROVISIONS

R 28.5201 CJIS access.

Rule 201. Access to LEIN, AFIS, and other information systems shall be restricted to the following entities and persons:

(a) A criminal justice agency.

(b) A nongovernmental agency that is statutorily vested with arrest powers and whose primary function is the administration of criminal justice.

(c) A governmental agency with the administration of criminal justice as its primary function and whose governing board has criminal justice agencies as the majority of its members.

(d) The department of state.

(e) An agency authorized by statute.

(f) An agency, entity, or person approved by the CSA/CSO for public safety purposes.

(2) To qualify for access and use of LEIN, AFIS, and other information systems, an authorized agency, entity, or person shall do all the following:

(a) Complete an application and user agreement as required by the department.

(b) Submit a security plan to the ISO as required by the department.

(c) Participate in audits as required by the department.

(d) Complete a management control agreement as required by the department

(e) Agree to comply with state and federal statutes, the administrative rules, the Michigan and Federal CJIS security policies and the procedures outlined in the LEIN operations manual.

(3) Agencies shall notify the department in writing before any changes affecting access to LEIN, AFIS, or other information systems.

History: 1981 AACS; 2009 AACS.

R 28.5202 NCIC access; authorized agencies.

Rule 202. Access to NCIC shall be restricted to agencies approved by the appropriate federal agency and the CSA/CSO.

History: 1981 AACS; 2009 AACS.

R 28.5203 Rescinded.

History: 1981 AACS; 2009 AACS.

R 28.5204 Rescinded.

History: 1981 AACS; 2009 AACS.

R 28.5205 Rescinded.

History: 1981 AACS; 2009 AACS.

R 28.5206 Rescinded.

History: 1981 AACS; 2009 AACS.

R 28.5207 Rescinded.

History: 1981 AACS; 2009 AACS.

R 28.5208 LEIN, AFIS, and other information systems; use and dissemination.

Rule 208. (1) Criminal justice agencies who create, store, or maintain criminal justice information are considered the owners of those records and maintain all the rights and responsibilities of ownership of those records.

(2) Agencies who access LEIN, AFIS, or other information systems shall comply with these rules.

(3) LEIN, AFIS, or other information systems shall only be used for the administration of criminal justice or public safety purposes.

(4) Except as permitted in these rules or if authorized by statute, information from LEIN, AFIS, or other information systems shall not be disseminated to an unauthorized agency, entity, or person.

(5) A person shall not access, use, or disclose information from LEIN, AFIS, or other information systems for personal use or gain.

(6) The CSA/CSO may limit or terminate access to LEIN, AFIS, or other information systems for failure to cooperate with a request for investigation of misuse of LEIN, AFIS, or other information systems.

(7) Nonpublic information may be released for public safety purposes consistent with these rules and applicable laws.

History: 1981 AACS; 2009 AACS.

R 28.5209 Audit information; dissemination

Rule 209. A user agency's message transactions may be released to another agency under any of the following conditions:

(a) Upon written request from a local, county, state, or federal prosecuting attorney who shall specify that the information required is for a valid criminal justice purpose.

(b) A search warrant or subpoena authorized by a judge.

(c) Upon approval of the agency which initiated the messages.

(d) The CSO may release audit information to facilitate investigations of misuse.

(2) A user agency's message transactions may be released for noncriminal justice purposes if either of the following conditions is satisfied:

(a) The records are essential to issues raised in an administrative hearing related to the misuse of LEIN, AFIS, or other information systems.

(b) The records are essential information in a civil action to demonstrate the accuracy of LEIN, AFIS, or other information systems, and the records are sought pursuant to a valid court order.

(c) In either subdivision (a) or (b) of this subrule, the person requesting the information must agree to limit dissemination of information from LEIN, AFIS, or other information systems for the purposes of the hearing or civil action.

History: 1981 AACS; 2009 AACS.

R 28.5210 Rescinded.

History: 1981 AACS; 2009 AACS.

R 28.5211 Rescinded.

History: 1981 AACS; 2009 AACS.

R 28.5212 Rescinded.

History: 1981 AACS; 2009 AACS.

R 28.5213 Rescinded.

History: 1981 AACS; 2009 AACS.

R 28.5214 Rescinded.

History: 1981 AACS; 2009 AACS.

PART 3. TERMINALS AND EQUIPMENT

R 28.5301 Rescinded.

History: 1981 AACS; 2009 AACS.

R 28.5302 Rescinded.

History: 1981 AACS; 2009 AACS.

R 28.5303 Rescinded.

History: 1981 AACS; 2009 AACS.

R 28.5304 Rescinded.

History: 1981 AACS; 2009 AACS.

R 28.5305 Rescinded.

History: 1981 AACS; 2009 AACS.

R 28.5306 Rescinded.

History: 1981 AACS; 2009 AACS.

R 28.5307 Rescinded.

History: 1981 AACS; 2009 AACS.

R 28.5308 Rescinded.

History: 1981 AACS; 2009 AACS.

R 28.5309 Rescinded.

History: 1981 AACS; 2009 AACS.

R 28.5310 Rescinded.

History: 1981 AACS; 2009 AACS.

R 28.5311 Rescinded.

History: 1981 AACS; 2009 AACS.

R 28.5312 Rescinded.

History: 1981 AACS; 2009 AACS.

R 28.5313 Rescinded.

History: 1981 AACS; 2009 AACS.

R 28.5314 Rescinded.

History: 1981 AACS; 2009 AACS.

R 28.5315 Rescinded.

History: 1981 AACS; 2009 AACS.

R 28.5316 Rescinded.

History: 1981 AACS; 2009 AACS.

R 28.5317 Rescinded.

History: 1981 AACS; 2009 AACS.

R 28.5318 Rescinded.

History: 1981 AACS; 2009 AACS.

R 28.5319 Rescinded.

History: 1981 AACS; 2009 AACS.

PART 4. RECORDS

R 28.5401 Records responsibility.

Rule 401. (1) An agency is responsible for the accuracy and completeness of any record it enters into LEIN, AFIS, NCIC, and other information systems.

Each record in the file shall be identified with the agency that entered the record. Each agency shall validate records as required by Michigan and FBI CJIS policy. Both of the following shall apply:

(a) An agency that fails to comply with the validation and certification requirements within the prescribed time period shall have its records removed from LEIN, NCIC, and other information systems as required by state and federal policy.

(b) An agency that requires more than the specified time to validate its records shall submit a written request to the CSO for a reasonable time extension.

(2) Agencies may execute an agreement to allow an agency to enter records for another agency.

(3) An agency shall maintain complete and accurate files of all active records which are entered into LEIN, NCIC, or both, and shall ensure that the files are readily accessible to any person who is responsible for confirming the validity of records upon inquiry. Both of the following shall apply:

(a) An agency shall establish procedures to ensure that, upon inquiry, all records that are entered into either LEIN or NCIC files can be promptly confirmed as valid.

(b) An agency shall either maintain a 24-hour-a-day, seven-days-a-week operation or shall establish an alternative record verification procedure.

(4) If, following an inquiry, a positive response is received from LEIN or NCIC which indicates that a person is wanted or missing or that property is stolen, the agency shall immediately contact the agency listed on the record as responsible to confirm.

History: 1981 AACS; 2009 AACS.

R 28.5402 Timely entry of records.

Rule 402.

(1) An agency shall immediately enter all records into LEIN, NCIC, AFIS, or other information systems after becoming aware of the need to do so, except in cases where immediate entry may jeopardize a criminal investigation.

(2) All record entries shall be made pursuant to the procedures provided by the department.

(3) Courts may enter records with mutual agreement of all agencies involved.

History: 1981 AACS; 2009 AACS.

R 28.5403 Rescinded.

History: 1981 AACS; 2009 AACS.

R 28.5404 Record and broadcast message cancellation; record removal.

Rule 404.

(1) An agency shall promptly cancel a record from both LEIN and NCIC files when the record is no longer valid.

(2) An agency that initiates a broadcast message which is disseminated through the LEIN or NCIC and which requests that a person be arrested or that property be recovered shall ensure that the broadcast message is cancelled when it is no longer valid.

(3) A record may be removed from CJIS or NCIC if the CSO has a substantial question concerning the record's validity or accuracy. Immediately upon the removal of any record, the CSO shall notify the entering agency of the action taken.

History: 1981 AACS; 2009 AACS.

Editor's Note: An obvious error in R 28.5404 was corrected at the request of the promulgating agency, pursuant to Section 56 of 1969 PA 306, as amended by 2000 PA 262, MCL 24.256. The rule containing the error was published in Michigan Register, 2009 MR 12. The memorandum requesting the correction was published in Michigan Register, 2009 MR 13.

R 28.5405 Rescinded.

History: 1981 AACS; 2009 AACS.

R 28.5406 Rescinded.

History: 1981 AACS; 2009 AACS.

R 28.5407 Rescinded.

History: 1981 AACS; 2009 AACS.

R 28.5408 Rescinded.

History: 1981 AACS; 2009 AACS.

R 28.5409 Rescinded.

History: 1981 AACS; 2009 AACS.

R 28.5410 Rescinded.

History: 1981 AACS; 2009 AACS.

R 28.5411 Rescinded.

History: 1981 AACS; 2009 AACS.

R 28.5412 Rescinded.

History: 1981 AACS; 2009 AACS.

R 28.5413 Rescinded.

History: 1981 AACS; 2009 AACS.

R 28.5414 Fees for access to LEIN services.

Rule 414

(1) The department shall assess fees annually for access to LEIN services.Each agency or entity having been granted access to LEIN shall pay to the department the fees listed in subrule (2) of this rule. Both of the following apply:

(a) The department shall notify each agency or entity in writing of the fees for which they are responsible. The notification shall be mailed as soon as practical after the beginning of each state fiscal year.

(b) The notification shall identify a deadline by which payment must be made. The deadline shall be not less than 90 days from the date of mailing.

(2) Agencies or entities having LEIN access shall pay each of the following fees, as applicable:

(a) Law Enforcement Per Capita Fee - $12.00 per officer. This fee shall be determined by officer staffing reported by the agency to the Michigan Incident Crime Reporting (MICR) program. Officer staffing reported to the Michigan commission on law enforcement standards shall be used to determine this fee for agencies not reporting to the MICR.

(b) Agency Fee - $800.00. This fee shall be assessed to each agency in the LEIN.

(c) Station Fee - $2,000.00. This fee shall be assessed for each personal computer that receives unsolicited messages, or a mainframe, message switch, or server connected to the LEIN.

(d) Federal, Private, or Noncriminal Justice Agency Surcharge - $2,500.00.This fee shall be assessed for each federal, private, or noncriminal justice agency having access to the LEIN.

(e) For-Profit Vendor Fee - $10,000.00.

(3) The department may assess fees on a prorated basis to agencies or entities granted LEIN access after the annual fee assessments described in subrule (1) of this rule.

(4) Agencies or entities that have not paid the required fees 30 days after the deadline for payment shall be notified by the department in writing of their delinquent status.

(5) The department may suspend or reduce LEIN services provided to agencies or entities that have not paid the required fees 90 days after the deadline for payment. Both of the following apply:

(a) The decision to suspend or reduce services shall be within the sole discretion of the department.

(b) At least 10 business days before suspending or reducing LEIN services, the department shall notify the head of the affected agency or entity in writing.

History: 1981 AACS; 2009 AACS.

Ex 9

STATE OF MICHIGAN
COURT OF CLAIMS

MICHAEL V. LASUSA,

Plaintiff,

v

MICHIGAN STATE POLICE,

Defendant.

No. 17-262-MZ

HON. STEPHEN L. BORRELLO

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AFFIDAVIT OF LORI HINKLEY

I, Lori Hinkley, 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 Records Resource Section and I serve as the Department's FOIA coordinator.

4. MSP's Records Resource Section is responsible for responding to records requests submitted under the Freedom of Information Act (FOIA), the fulfilment of document subpoenas in civil actions to which MSP is not a party, and the fulfillment of document subpoenas in criminal cases when the requested documents are not stored in local MSP worksites.

5. The Records Resource Section of the MSP is made up of two departmental analysts and six departmental technicians who serve as assistant FOIA coordinators and are responsible for responding to the majority of FOIA requests, two general office assistants, one departmental specialist, and one administrative assistant.

6. In my experience, on average, the MSP receives approximately 20,000 records requests per year, 80 percent of which are FOIA requests.

7. As required under MCL 15.234(4), MSP has adopted procedures and guidelines for assessing fees which provide that fees will be charged uniformly without regard to the identity of the requesting person. MSP's FOIA procedures and guidelines are available at the following website address: http://www.michigan.gov/msp/0,4643,7-123-8325_72687_72688-358005--,00.html.

8. In accordance with these procedures and guidelines, it is my experience that the substantial majority of FOIA requests received by MSP cost less than five dollars and take less than one hour to process.

9. However, in this particular instance, as to Mr. LaSusa's request, MSP located over 1,700 pages of records, 313 hours of audio recordings, and 150 photographs that were potentially responsive to the request. In order to process Mr. LaSusa's request, it would take an estimated 35 hours to review the records and separate exempt from nonexempt material. Under MCL 15.234 and MSP's above-mentioned procedures and guidelines, and as reflected in the Fee Calculation form attached to the written notice, MSP is entitled to charge approximately $1,200 and require a 50 percent deposit before beginning to process the request.

10. Therefore, in light of the substantial volume of records requests that MSP receives, the workload of employees within the Records Resource Section, and the processing cost and time of a typical records request compared to the processing cost and time of Mr. LaSusa's request, failure to charge a fee would result in an unreasonably high cost to MSP in this particular instance. Failure to charge a fee would result in an unreasonably high cost because in order to process Mr. LaSusa's request, MSP employees within the Records Resource Section must be taken away from their pending work to process the request and expend additional time to complete regularly assigned

Departmental work. And given the nature of the work that the Records Resource Section is responsible for—FOIA requests and document subpoenas—the regularly assigned Departmental work is frequently time sensitive.

11. Furthermore, because the failure to charge a fee in this particular instance would result in an unreasonably high cost to MSP and because MSP's procedures and guidelines require fees to be uniform, MSP exercised its discretion under MCL 15.234(2) and decided not to grant Mr. LaSusa's request for a fee waiver.

Affiant says nothing further.

Lori Hinkley
Michigan Department of State Police

Date: July 11, 2018

Subscribed and sworn to before me,
a Notary Public, this 11 day
of July, 2018

Notary Public, State of Michigan

EX 10

STATE OF MICHIGAN

COURT OF APPEALS

PHIL FORNER,

Plaintiff-Appellant,

v

DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS,

Defendant-Appellee,

and

ATTORNEY GENERAL,

Defendant.

UNPUBLISHED
July 18, 2017

No. 336742
Court of Claims
LC No. 16-000192-MZ

Before: SAWYER, P.J., and HOEKSTRA and BECKERING, JJ.

PER CURIAM.

In this action alleging violations of the Freedom of Information Act (FOIA), MCL 15.231 *et seq.*, plaintiff appeals as of right the Court of Claims opinion and order granting summary disposition in favor of defendant, Department of Licensing and Regulatory Affairs (LARA), and denying plaintiff's motion for declaratory relief. For the reasons explained in this opinion, we affirm in part, reverse in part, and remand for further proceedings.

In 2016, plaintiff made three FOIA requests for information from LARA that are relevant to this case. The first request was made on May 3, 2016 and the second on April 20, 2016.[1] Both requests were granted in part and denied in part. Following appeals to the head of LARA, plaintiff filed the current law suit, challenging LARA's compliance with FOIA in terms of the adequacy of the information disclosed by LARA as well as LARA's imposition of fees in connection with plaintiff's second FOIA request. After the current lawsuit had been filed,

[1] Chronologically, plaintiff's "first" FOIA request was on April 20, 2016. However, in keeping with the parties' briefing and the Court of Claims' analysis, we will treat his May 3rd request as his first request, and the April 20th request as his second request.

plaintiff made a third FOIA request on August 25, 2016, which LARA denied under MCL 15.243(1)(*v*) based on the assertion that the request was for records related to the current civil action between the parties. Following LARA's denial of plaintiff's third request and an unsuccessful appeal to LARA's director, plaintiff filed an amended complaint in this case, challenging LARA's denial of his third request and asserting that MCL 15.243(1)(*v*) was inapplicable. The Court of Claims granted LARA's motion for summary disposition and dismissed the case. Plaintiff now appeals as of right.

I. STANDARD OF REVIEW

We review a trial court's grant of summary disposition de novo. *Arabo v Michigan Gaming Control Bd*, 310 Mich App 370, 382; 872 NW2d 223 (2015). While LARA moved for summary disposition under MCR 2.116(C)(8) and (C)(10), the trial court considered evidence outside the pleadings, meaning we will review the grant of summary disposition under MCR 2.116(C)(10). *Sisk-Rathburn v Farm Bureau Gen Ins Co of Mich*, 279 Mich App 425, 427; 760 NW2d 878 (2008). "When reviewing a motion under MCR 2.116(C)(10), which tests the factual sufficiency of the complaint, this Court considers all the evidence submitted by the parties in the light most favorable to the non-moving party and grants summary disposition only where the evidence fails to establish a genuine issue regarding any material fact." *Id.*

This Court also reviews de novo a trial court's legal determinations in a FOIA case, and questions of statutory interpretation are reviewed de novo. *King v Mich State Police Dep't*, 303 Mich App 162, 174; 841 NW2d 914 (2013). A trial court's factual determinations in a FOIA action, if any, are reviewed for clear error, while any discretionary determinations are reviewed for an abuse of discretion. *Id.* at 174-175.

II. FOIA

"The purpose of FOIA is to provide to the people of Michigan 'full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees,' thereby allowing them to 'fully participate in the democratic process.'" *Amberg v City of Dearborn*, 497 Mich 28, 30; 859 NW2d 674 (2014), quoting MCL 15.231(2). Under FOIA, unless an exception applies, a person has the right, upon submitting a written request to a public body, "to inspect, copy, or receive copies of the requested public record of the public body." *Arabo*, 310 Mich App at 380. "By its express terms, the FOIA is a prodisclosure statute;" and "[i]f an FOIA request is denied, the burden is on the public body to justify its decision." *Thomas v New Baltimore*, 254 Mich App 196, 201, 203; 657 NW2d 530 (2002). Pursuant to MCL 15.234, a public body may charge a fee for processing a FOIA request. *Arabo* 310 Mich App at 381, 386.

III. PLAINTIFF'S FIRST FOIA REQUEST

As noted, plaintiff submitted his first FOIA request on May 3, 2016. The request indicated that the Bureau of Construction Codes (BCC) website contained a link to a document entitled "2015 Michigan Residential Code Errors and Conflicts" (the 2015 MRC), and that the first paragraph of that document stated that the director of LARA "has delegated the authority to make, and has approved, the following determinations which are binding on all enforcing

agencies." Plaintiff requested copies of documents "relating to the identified above sentence/document" involving the following:

1) Where the Director of Department of Licensing and Regulatory Affairs has "delegated authority" as shown above.

2) Where the Director of Department of Licensing and Regulatory Affairs has "approved, the following determinations" as claimed above.

3) Where the legal authority used to state that the delegated determinations "are binding on all enforcing agencies" is identified.

4) Any and all other documents used in the development of the above identified sentence.

5) Any and all documents used to come up with the "following determinations" contained in therein.

LARA granted plaintiff's request in part and denied his request in part. Specifically, LARA provided plaintiff with documents in relation to items one and two. Pertinent to plaintiff's arguments on appeal, in response to item number three, LARA also provided a link to a website where plaintiff could access MCL 125.1505. With respect to items four and five, LARA informed plaintiff that no documents existed for these items. Plaintiff appealed LARA's response, contending that, while MCL 125.1505 might be "a possible authority," this response by LARA was nonetheless inadequate because citation to the statute is not the same as providing actual documents, such as the minutes of the Construction Code Commission, where the legal authority in question was identified. In denying plaintiff's appeal, the deputy director of LARA indicated that the documents requested by plaintiff did not exist and that plaintiff had been "provided all the documentation responsive to [his] request."

On appeal, plaintiff again challenges LARA's provision of a statutory citation, asserting that additional documentation should have been provided. However, this argument is without merit because LARA has repeatedly informed plaintiff that additional documents do not exist. "[N]onexistence of a record is a defense for the failure to produce or allow access to the record." *Hartzell v Mayville Cmty Sch Dist*, 183 Mich App 782, 787; 455 NW2d 411 (1990). That is, FOIA "only gives a right to access to records in existence." *Walloon Lake Water Sys, Inc v Melrose Twp*, 163 Mich App 726, 731; 415 NW2d 292 (1987). Generally, FOIA does not require public bodies to record information, *id.*, or to create documents in response to a FOIA request, *Bitterman v Vill of Oakley*, 309 Mich App 53, 67-68; 868 NW2d 642 (2015). See also MCL 15.233(4), (5). Instead, if a document does not exist, the public body's responsibility is to respond to the request and to inform the requesting party of the document's status. *Key v Twp of Paw Paw*, 254 Mich App 508, 511; 657 NW2d 546 (2002). See also MCL 15.235(5)(b). Here, LARA endeavored to provide plaintiff with the information he sought by providing citation to MCL 125.1505 as the legal authority in question. Plaintiff apparently also wishes to see some document in which this authority has been identified as the basis for the 2015 MRC's statement that the delegated determinations "are binding on all enforcing agencies." But, LARA has

repeatedly stated that it does not possess additional documents relevant to plaintiff's request. Nothing more was required.[2] Cf. *Key*, 254 Mich App at 511.

IV. PLAINTIFF'S SECOND FOIA REQUEST

On April 20, 2016, plaintiff submitted his second FOIA request to LARA, seeking an email "copy of all the documents referenced by Mr. Poke in the 2nd paragraph of his below 4/12/16 email; specifically the hearing report and the department and legislative service bureau ["LSB"] acceptances for the public testimony of the proposed (at that time)" 2015 MRC. The email referenced by plaintiff was from Irvin Poke, the BCC Director. In relevant part, Poke stated: "As is the process all public comments were addressed in the hearing report and the responses were accepted by the department and the [LSB]." On May 4, 2016, LARA informed plaintiff that his request totaled 2,358 pages, that the cost of fulfilling his request was estimated at $459, and that, upon receipt of the fee, LARA would process plaintiff's request in approximately 60 business days. Plaintiff paid the fee amount in full. In July of 2016, LARA sent plaintiff paper copies of records, stating that his request had been granted in part and denied in part. The denial was based on the redaction of certain personal information in the records.

Plaintiff appealed to LARA's director, asserting that he should have been given electronic copies of the materials, that he had not been given the requested hearing report or LSB acceptances, that LARA failed to respond within the statutory timeframe, and that the fees were improper. LARA's director upheld the response in part, and reversed in part. Specifically, in an email response to plaintiff, the director concluded that LARA's May 4th response was timely, that the records were too voluminous to send via email, and that the fees charged for "labor, copying, and postage were appropriate" because the documents could not be sent via email. However, with regard to the hearing report and the LSB acceptances, the director stated that "the [Joint Commission on Administrative Rules ("JCAR")] report and the Certificate of Approval from the [LSB] were located and are attached." On appeal to this Court, plaintiff raises a variety of challenges relating to his second FOIA request.

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[2] On appeal, in relation to his first FOIA request, plaintiff also asserts that LARA violated MCL 15.240(2) by allowing the deputy director to respond to plaintiff's FOIA appeal as opposed to providing a response from "the head of the public body." This argument was not raised or addressed below, meaning that it is unpreserved and need not be considered by this Court. *O'Connell v Dir of Elections*, 316 Mich App 91, 109; 891 NW2d 240 (2016). If we exercised our discretion to review this unpreserved issue, our review would be for plain error, *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000); and we are not persuaded that plaintiff has shown plain error affecting his substantial rights given that LARA provided plaintiff with the requested information and informed him that additional records did not exist. Indeed, given that LARA released the existing records to plaintiff, any claim that LARA failed to comply with FOIA would be moot. *State News v Mich State Univ*, 481 Mich 692, 704 n 25; 753 NW2d 20 (2008) ("[R]elease of the requested public record by the public body would render the FOIA appeal moot because there would no longer be a controversy requiring judicial resolution.").

A. PUBLICATION

First, plaintiff contends that the JCAR report and LSB acceptances should have been published on LARA's website pursuant to MCL 15.241, which would have enabled LARA to simply respond to his FOIA request with an Internet link. However, even assuming that the documents in question are subject to publication under MCL 15.241, plaintiff's claim is without merit. While MCL 15.241 mandates that a state agency "shall publish" certain materials and make those publications "available" to the public, the statute does not specifically require a state agency to publish documents online. Thus, plaintiff has not shown a violation of MCL 15.241 arising from LARA's failure to publish the information on its website.

B. SCOPE OF LARA'S RESPONSE

Second, plaintiff argues that his second FOIA request was for the JCAR report and the LSB acceptances, documents which totaled 21 pages. In view of his request, plaintiff contends that it was improper for LARA to respond with 2,358 pages of documents. In essence, plaintiff maintains that LARA provided too much information. Further, plaintiff asserts that LARA's disclosure of 2,358 pages did not include the JCAR report or LSB acceptances. While the LARA director later emailed these documents to plaintiff, plaintiff contends this disclosure was untimely and did not satisfy LARA's obligations under FOIA. We disagree.

To the extent plaintiff claims that LARA violated FOIA by providing too much information, we find this argument to be without merit. As noted, in his second FOIA request, plaintiff asked for "*all* the documents" referenced in the second paragraph of Poke's email, and Poke's email in turn referred to public comments, a hearing report, acceptances by the department, and acceptances by the LSB. It is true that plaintiff indicated that he "specifically" wished to see the hearing report and acceptances. But, fairly read, this particularization on the heels of a broad request for "all documents" suggests that plaintiff had a specific interest in a subset of documents but that he also wanted *all* of the relevant documents. See *LaCedra v Executive Office for US Attorneys*, 317 F3d 345, 348; 354 US App DC 443 (2003) ("The drafter of a FOIA request might reasonably seek all of a certain set of documents while nonetheless evincing a heightened interest in a specific subset thereof.").[3] Based on plaintiff's request, LARA identified 2,358 pages of documents that met these criteria, meaning that they were required to disclose this information to plaintiff. See *Coblentz v Novi*, 475 Mich 558, 573; 719 NW2d 73 (2006). And, ultimately the disclosure of this allegedly "extra" information did not prevent plaintiff from obtaining the documents he now claims were his sole aim: namely, the JCAR report and LSB acceptances. In short, we cannot conclude that LARA violated FOIA by providing plaintiff with 2,358 pages in response to his request.

With regard to plaintiff's claim that LARA violated FOIA by not initially disclosing the JCAR report and LSB acceptances, given plaintiff's request it would seem these materials should

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[3] While the federal FOIA is not identical to Michigan's FOIA, "federal law is generally instructive in FOIA cases." *Mager v Dep't of State Police*, 460 Mich 134, 144; 595 NW2d 142 (1999).

have been part of LARA's release of the 2,358 pages initially given to plaintiff. Indeed, the invoice for the good-faith deposit described the materials to be disclosed as the "hearing report and LSB acceptance for the 2015 [MRC]." However, LARA's failure to include these documents does not entitle plaintiff to relief from this Court because plaintiff undisputedly received those materials from LARA's director in July of 2016. In these circumstances, his FOIA claim relating to these documents, including his assertion that LARA's response was untimely, is moot. See *State News*, 481 Mich at 704 n 25.

C. ELECTRONIC RECORDS

Third, plaintiff contends that, if the 2,358 pages provided by LARA were responsive to his request, LARA nevertheless violated FOIA by providing the documents to him in paper form as opposed to providing the documents via email as requested by plaintiff. Relevant to plaintiff's argument, MCL 15.234(1)(c) allows a requestor to "stipulate that the public records be provided on nonpaper physical media, electronically mailed, or otherwise electronically provided to him or her in lieu of paper copies." However, this provision does not apply "if a public body lacks the technological capability necessary to provide records on the particular nonpaper physical media stipulated in the particular instance." MCL 15.234(1)(c).

In this case, defendant requested electronic copies via email; but, he was supplied with paper copies. The LARA director concluded, and the Court of Claims agreed, that emailing copies of the documents was beyond LARA's technological capabilities because the number of documents "was too large to send via electronic mail." As argued by plaintiff, this finding is specious given that LARA transmitted the JCAR report and LSB acceptances to plaintiff as attachments to an email, evincing that LARA had the technological capability of sending documents via email. While it may well be true that LARA could not have attached 2,358 pages to one email, there is nothing to indicate that LARA lacked the technological capabilities to send the 2,358 pages in smaller increments spread out over numerous emails. In short, it may have been inconvenient for LARA to send the records via email, but it was clearly erroneous to conclude that LARA lacked the "technological capability" to do so.

Although LARA *could* have proceeded in this manner, it does not follow as a matter of law that FOIA required LARA to adopt this piecemeal email approach. With regard to FOIA, the caselaw is clear that "electronic copies" constitute "public records," and that "[i]f a writing exists in an electronic format, the plaintiff is entitled to an electronic copy." " *Ellison v Dep't of State*, __ Mich App __, __; __ NW2d __ (2017) (Docket No. 336759); slip op at 3; *City of Warren v Detroit*, 261 Mich App 165, 172; 680 NW2d 57 (2004); *Farrell v Detroit*, 209 Mich App 7, 14; 530 NW2d 105 (1995). However, we are not aware of any authority that requires a public body to create an electronic record if the records in question exist only in paper format. To the contrary, the general rule under FOIA is that a public body does *not* have to create a new public record, MCL 15.233(5); and, as noted, electronic copies constitute "public records," *City of Warren*, 261 Mich App at 172. Quite simply, generally, FOIA does not mandate the creation of electronic records merely because a requestor would prefer electronic records.

According to plaintiff, the provision of electronic records is required by MCL 15.234(1)(c) because the provision states that a "requestor may stipulate" to receipt of public records via email. However, fairly read, the statute does nothing more than afford a requestor

the option of agreeing to receive records electronically. The statute does not provide that a requestor's stipulation is binding on the public body or that the public body shall or must provide the records in the requested format. In other words, nothing in MCL 15.234(1)(c) mandates the creation of electronic records merely because a requestor would prefer electronic records via email.[4] Absent language requiring the public body to provide records in the requestor's chosen email format, such a requirement should not be read into the statute. Cf. *Lapeer Co Abstract & Title Co v Lapeer Co Register of Deeds*, 264 Mich App 167, 178; 691 NW2d 11 (2004) (concluding that a public body was not required to provide copies in microfilm format).

In this case, because the Court of Claims resolved LARA's failure to provide electronic records on the basis of LARA's purported lack of technological capabilities, the Court of Claims did not consider whether the documents existed in electronic format. Further, the format of the existing records is not clear from the information before us.[5] Consequently, we reverse the Court of Claims, and we remand for consideration of this factual issue. If the public records requested by plaintiff exist as electronic records, plaintiff is entitled to electronic copies of those records. See *Farrell*, 209 Mich App at 14.

D. FEES

Fourth, plaintiff raises several challenges related to the $459 fee, which he paid for the records in question. We conclude that the invoice provided to plaintiff did not comply with MCL 15.234(4) and that the insufficient record regarding fees does not support the Court of Claims' decision regarding the appropriateness of the fee charged under MCL 15.234(1). In addition, related to the question of electronic records, we also conclude that a fact question remains about the propriety of charging for paper copies. Accordingly, we reverse the Court of Claims and remand for further proceedings consistent with this opinion.

i. GOOD-FAITH DEPOSIT

On May 4, 2016, LARA informed plaintiff that the estimated cost of providing the information was $459.00 and LARA required that plaintiff pay this amount in full before they would process his request for information. We agree with plaintiff's argument that LARA

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[4] Plaintiff contends that, even if a requestor cannot simply demand records in a specific format, MCL 15.234 should be read to require that the public body employ, and charge for, the most "economical" means of providing copies, which in this case means providing electronic records. However, we decline to reach this issue at this time because it is not apparent, as a factual matter, that the provision of electronic records would constitute the most economical method for supplying records in this case. Although the 0.10 per sheet charge authorized by MCL 15.234(1)(d) would not be implicated with electronic mail, there could be increased labor charges associated with the task of transferring 2,358 pages of digital records via email. See MCL 15.234(1)(e). We leave this issue for the Court of Claims to consider on remand.

[5] Indeed, LARA conceded at oral arguments that the original format of the documents is not clear from the lower court record.

violated MCL 15.234(8). The statute limits the amount of a good-faith deposit to no more than 50% of the total estimated charges, meaning that LARA should have required no more than $229.50 and LARA's demand for $459.00 was excessive. MCL 15.234(8). However, plaintiff's challenge to the deposit is time-barred. Under MCL 15.240a, a "deposit" is a "fee" which may be challenged by appeal to the head of the public body or the commencement of a civil action within 45 days after receiving the notice of the required fee. See MCL 15.240a(1), (8). Plaintiff paid the deposit without challenge. He never appealed the deposit to the LARA director and he did not commence a civil action within 45 days of LARA's request for the deposit. Thus, with respect to the deposit, his claim is time-barred, and he is not entitled to relief. See MCL 15.240a.

ii. FEE REDUCTION UNDER MCL 15.234(9)

Aside from the deposit,[6] plaintiff also contends that he was entitled to a reduction of the final fee under MCL 15.234(9) because defendant failed to respond to plaintiff's FOIA request within the timeframe established by MCL 15.235(2). Plaintiff's argument is premised on the mistaken assertion that LARA failed to provide a timely response. In actuality, LARA abided by MCL 15.235(2) by, within 5 business days, issuing a notice extending the response time by 10 business days. See MCL 15.235(2)(d). Then, within 10 business days, specifically on May 4, 2016, LARA responded to plaintiff's request for information, informing plaintiff of the good-faith deposit and providing him with a 60 business day "best efforts estimate" under MCL 15.234(8). By its plain terms, MCL 15.235(2)(d) requires a public body to "respond to" a FOIA request, it does not require the release of information within 5 or 15 business days. As characterized in MCL 15.234(8), a request for a deposit and the provision of a good-faith time estimate is a "response" by the public body, and we are persuaded that this "response" satisfied MCL 15.235(2). While LARA did not disclose the JCAR report and LSB acceptances within 60 days, the estimate under MCL 15.234(8) is "nonbinding" and it does not entitle plaintiff to a fee reduction under MCL 15.234(9), which is only applicable when a party fails to comply with MCL 15.235(2). Because LARA complied with MCL 15.235(2), plaintiff was not entitled to a fee reduction under MCL 15.234(9).

iii. INVOICE

Next, plaintiff argues that defendant violated MCL 15.234 by failing to provide an invoice showing the actual cost of providing the requested material and failing to specifically address statutory fees components listed in MCL 15.234. We agree.

> The FOIA clearly provides a method for determining the charge for records. It is incumbent on a public body, if it chooses to exercise its legislatively granted right to charge a fee for providing a copy of a public record, to comply with the

[6] While plaintiff's challenge to the good-faith deposit is time-barred under MCL 15.240a, plaintiff timely challenged the final invoice by promptly appealing to LARA's director, MCL 15.240a(1)(a); and, within 45 days of the director's decision, plaintiff filed his complaint in the Court of Claims, MCL 15.240a(1)(b). Thus, apart from his challenges to the good-faith deposit, plaintiff's arguments regarding the fee are not time barred under MCL 15.240a.

legislative directive on how to charge. The statute contemplates only a reimbursement to the public body for the cost incurred in honoring a given request—nothing more, nothing less. [*Arabo*, 310 Mich App at 390 (citation omitted).]

In particular, MCL 15.234 governs the computations of costs for responding to FOIA requests. The statute provides in relevant part as follows:

> (1) A public body may charge a fee for a public record search, for the necessary copying of a public record for inspection, or for providing a copy of a public record . . . . Subject to subsections (2), (3), (4), (5), and (9), the fee shall be limited to actual mailing costs, and to the actual incremental cost of duplication or publication including labor, the cost of search, examination, review, and the deletion and separation of exempt from nonexempt information as provided in section 14. Except as provided otherwise in this act, if the public body estimates or charges a fee in accordance with this act, the total fee shall not exceed the sum of the following components:
>
> (a) That portion of labor costs directly associated with the necessary searching for, locating, and examining of public records in conjunction with receiving and fulfilling a granted written request. The public body shall not charge more than the hourly wage of its lowest-paid employee capable of searching for, locating, and examining the public records in the particular instance regardless of whether that person is available or who actually performs the labor. . . .
>
> (b) That portion of labor costs, including necessary review, if any, directly associated with the separating and deleting of exempt information from nonexempt information . . . .
>
> (c) For public records provided to the requestor on nonpaper physical media, the actual and most reasonably economical cost of the computer discs, computer tapes, or other digital or similar media. . . .
>
> (d) For paper copies of public records provided to the requestor, the actual total incremental cost of necessary duplication or publication, not including labor. The cost of paper shall be calculated as a total cost per sheet of paper and shall be itemized and noted in a manner that expressed both the cost per sheet and the number of sheets provided. The fee shall not exceed 10 cents per sheet of paper . . . .
>
> (e) The cost of labor directly associated with duplication or publication, including making paper copies, making digital copies, or transferring digital public records to be given to the requestor on nonpaper physical media or through the internet or other electronic means stipulated by the requestor. The public body shall not charge more than the hourly wage of its lowest paid employee capable of necessary duplication or publication in the particular instance . . . .

> (f) The actual cost of mailing, if any, for sending the public records in a reasonable, economical, and justifiable manner. The public body shall not charge more for expedited shipping or insurance unless specifically requested by the requestor, but may otherwise charge for the least expensive form of postal delivery confirmation when mailing public records.

MCL 15.234(2) also allows a public body to "add up to 50% to the applicable labor charge amount to cover or partially cover the cost of fringe benefits if it clearly notes the percentage multiplier used to account for fringe benefits . . . ." In addition, MCL 15.234(4) requires a public body to establish FOIA procedures and guidelines and to implement "the use of a standard form for detailed itemization of any fee amount." Under MCL 15.234(4), the form must "clearly list and explain the allowable charges for each of the 6 fee components" identified in MCL 15.234(1).

In this case, the total fee assessed was $459, which represented $223.20 in "cost of labor" and $235.80 in "copying cost." No charge is listed in a column for "mailing, shipping costs." As noted in plaintiff's complaint, the invoice is not the FOIA itemization form found on LARA's website. More importantly, the form does not include the detailed itemization of the fee required by MCL 15.234(4). Notably, $223.20 is vaguely attributed to "cost of labor" and under a heading of "Misc. Charges & Description" there is a note of "8 Hrs – GOA 5." This is a far cry from detailing the costs of labor in the manner required by MCL 15.234(1) and (4). That is, the invoice does not contain an itemization of the labor costs "to search, locate, and examine," to review documents for exempt materials, and/or to "duplicate or publish," including the hourly wage and multiplier for fringe benefits (if applicable). The sparse information contained in this invoice was insufficient to support the Court of Claims conclusion that the fee imposed by LARA complied with the legislative directives for charging fees under MCL 15.234(1). See *Tallman v Cheboygan Area Sch*, 183 Mich App 123, 129; 454 NW2d 171 (1990). Consequently, we reverse the Court of Claims with respect to the fee imposed for plaintiff's second FOIA request and remand for further proceedings consistent with this opinion.[7]

iv. FEES FOR PAPER COPIES

As discussed, plaintiff's second FOIA request specified that he wished to receive copies of the public records in question via email. Because the record does not disclose whether the requested records existed in electronic form, we have determined that a fact question remains with respect to whether LARA was required to provide plaintiff with electronic copies of the records. If the documents exist in electronic format, plaintiff is entitled to an electronic copy. *Ellison*; slip op at 3; *City of Warren*, 261 Mich App at 172; *Detroit*, 209 Mich App at 14.

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[7] On appeal, plaintiff contends that MCL 15.234 prohibits a public body from charging any fee if it fails to follow its published FOIA procedures and guidelines, including the use of a standard form. See MCL 15.234(1), (4). The Court of Claims did not address the issue, and we decline to consider this argument for the first time on appeal. Plaintiff may raise this issue in the Court of Claims.

As a corollary to this conclusion, it also follows that the Court of Claims should consider the propriety of the $235.80 copying costs in light of whether an electronic record was required. In particular, whether plaintiff receives paper copies or electronic copies, MCL 15.234(3) allows LARA to charge for the labor costs associated with duplicating records. However, when the requestor is provided with "paper copies," MCL 15.234(1)(d) also authorizes a per sheet charge, not to exceed 10 cents per page, to account for the "cost of paper copies."[8] Given that electronic records would not involve costs for paper, MCL 15.234 does not include a similar per sheet provision for transmitting documents electronically. Consequently, if plaintiff is entitled to electronic copies, LARA could not assess $235.80 in copying costs for the cost of paper.

V. PLAINTIFF'S THIRD FOIA REQUEST

On August 18, 2016, after plaintiff filed this lawsuit in the Court of Claims, plaintiff made another FOIA request, asking for an e-mail copy "of pages 1-8 that are referenced on the Board of Mechanical Rules 8/17/16 Agenda." LARA granted the request on August 24, 2016, and provided plaintiff with a link to the document. On August 25, 2016, plaintiff asked for additional documents as follows:

> On the attached LARA provided document titled "Mechanical Matrix Vision 7_25_16 one page.pdf" it states on page 1 under License/Permits:
>
> "Department & the board review & approve exams* (MCL 338.975(2))."
>
> "*Denotes that E.O. No. 1996-2 supersedes this section of the act."
>
> ***
>
> Please email me a copy of all documents within LARA that were used to determine that E.O. No. 1996-2 supersedes MCL 338.975(2).
>
> Additionally please email me a copy of all documents within LARA that are not included in the above, that discusses or references the applicability of E.O. 1996-2 to the second sentence of MCL 338.975(2), being: "Before an examination or other test required under this act is administered, the department and the board,

[8] We again note that the invoice in this case is simply insufficient to comply with LARA's obligation to itemize the costs imposed. In particular, with regard to the copying costs, it appears that the $235.80 listed on the invoice represents a charge of 10 cents per page for 2,358 pages. However, the charges are not detailed in the manner required by MCL 15.234. Specifically, MCL 15.234(1)(d) directs that "[t]he cost of paper shall be calculated as a total cost per sheet of paper and shall be itemized and noted in a manner that expressed both the cost per sheet and the number of sheets provided." If it is determined that per page costs for paper copies are appropriate under MCL 15.234(1)(d), it should be determined on remand whether the copying cost on the invoice in fact represents a 10 cent per page charge under MCL 15.234(1)(d).

acting jointly, shall review and approve the form and content of the examination or other test."

LARA denied the request by e-mail on August 31, 2106, stating that, under MCL 15.243(1)(*v*), the requested information was "exempt from disclosure because it relates to a civil action in which you and LARA are parties." Plaintiff appealed to LARA's director, who upheld the denial under MCL 15.243(1)(*v*). The Court of Claims agreed with LARA's director, reasoning that plaintiff's current lawsuit and all his FOIA requests involved information concerning LARA's rulemaking authority. Thus, the Court of Claims concluded that the third FOIA request was related to the civil action and exempt from disclosure under MCL 15.243(1)(*v*).

On appeal, plaintiff contends that the Court of Claims misapplied MCL 15.243(1)(*v*). Specifically, plaintiff argues that the provision is not applicable merely because he and LARA are parties to a civil action. Instead, plaintiff asserts there must a showing that his request *relates* to the "civil action," and in this case the civil action is not about LARA's rule-making authority, rather it involves LARA's failure to comply with FOIA. At a minimum, plaintiff contends that the Court of Claims decision was premature and improper insofar as the Court of Claims failed to place the burden to prove the applicability of MCL 15.243(1)(*v*) on LARA, failed to examine the requested documents, and failed to make particularized findings. We agree.

Under FOIA, unless an exemption applies, a person has the right "to inspect, copy, or receive copies of the requested public record of the public body." *Arabo*, 310 Mich App at 380. The exemptions in FOIA must be narrowly construed. *Taylor v Lansing Bd of Water & Light*, 272 Mich App 200, 204; 725 NW2d 84 (2006). Further, "[b]ecause FOIA is a prodisclosure act, the public agency bears the burden of proving that an exemption applies." *Coblentz*, 475 Mich at 574. A public body cannot demonstrate the applicability of an exemption by offering mere conclusory statements. *Evening News Ass'n v City of Troy*, 417 Mich 481, 503; 339 NW2d 421 (1983). When determining whether an exemption applies, the court should: (1) receive a complete particularized justification for the claimed exemption from the public agency, (2) conduct a de novo in camera hearing to determine whether the exemption applies, or (3) consider allowing plaintiff's counsel access to the documents in camera. *King*, 303 Mich App at 228. While all of these steps are not necessarily required, *id.*, the Court "must make particularized findings of fact indicating why the claimed exemption is appropriate," *Messenger v Consumer & Indus Services*, 238 Mich App 524, 532; 606 NW2d 38 (1999).

In this case, the particular exemption in question is MCL 15.243(1)(*v*), which provides that a public body may exempt from disclosure "[r]ecords or information relating to a civil action in which the requesting party and the public body are parties." There can be no dispute that the present case is a "civil action." See MCL 15.240a(1)(b). It is equally clear that plaintiff and LARA are parties to the action. See *Taylor*, 272 Mich App at 205-206. The question is whether plaintiff's third FOIA request sought "records or information relating to" the "civil action."

The Court of Claims adopted a broad understanding of what it means for information or records to relate to a civil action. Specifically, the Court of Claims reasoned that all three FOIA requests sought information about LARA's rule-making authority and that, because the underlying information sought involved LARA's rule-making authority, the subject of the present FOIA action was also LARA's rule-making authority. Based on this understanding of

the lawsuit, the Court of Claims concluded that the third FOIA request related to the current civil action. However, a "civil action" is "[a]n action brought to enforce, redress, or protect a private or civil right; a noncriminal litigation." *Black's Law Dictionary* (10th ed. 2014). In a civil action under FOIA, the wrong to be redressed is a public agency's noncompliance with FOIA. See, e.g., MCL 15.240; MCL 15.240a; MCL 15.241(5). In other words, contrary to the Court of Claims' description of the present "civil action," the subject of the lawsuit is not LARA's rule-making authority, it is LARA's compliance with FOIA and plaintiff's right to access LARA's public documents.

Thus, in considering whether plaintiff's third FOIA request sought information "relating to" the civil action, the emphasis should have been on whether plaintiff sought records or information relating to LARA's FOIA noncompliance. That is, narrowly construed, the term "relate" means "to show or establish logical or causal connection between" or "to have relationship or connection." *Merriam-Webster's Collegiate Dictionary* (2014). By exempting documents and information "relating to a civil lawsuit," the Legislature evinced an intent to limit the scope of MCL 15.243(1)(*v*) to those documents and information with a relationship or causal connection to the lawsuit. In other words, plaintiff could not use FOIA as a pretrial discovery procedure to, for example, find documents and information to establish the basis for his FOIA claim. See *Kent Co Deputy Sheriffs' Ass'n v Kent Co Sheriff*, 238 Mich App 310, 326 n 6; 605 NW2d 363 (1999) (noting that, in light of civil action exemption, "persons involved in litigation are no longer entitled to use the FOIA as a pretrial discovery procedure"). For instance, he could not seek records generated in his dealings with LARA as a result of his earlier FOIA requests or as a result of his appeals to LARA's director. See *Beaty v Ganges Twp*, unpublished opinion of the Court of Appeals, issued June 29, 2010 (Docket No. 290437); slip op at 4.[9]

But, we are unaware of any caselaw interpreting MCL 15.243(1)(*v*) as a bar to prevent a party to a FOIA action from filing additional FOIA requests relating to the same general subject matter as an earlier FOIA request, and such a constrictive reading of MCL 15.243(1)(*v*) would be at odds with FOIA's prodisclosure purpose.[10] Ultimately, as an exemption, MCL 15.243(1)(*v*) must be narrowly construed; and unless the public body proves the applicability of the exemption, it remains the general rule that litigation between the parties does not allow the public body to deny disclosure of public records in response to a FOIA request, regardless of how the requestor intends to use that information. *Taylor*, 272 Mich App at 204-206; *Cent Mich Univ Supervisory-Tech Ass'n v Bd of Trustees of Cent Mich Univ*, 223 Mich App 727, 730; 567 NW2d 696 (1997).

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[9] Although unpublished opinions of this Court are nonbinding, MCR 7.215(C)(1), they may be considered as persuasive authority. *Roberts v Saffell*, 280 Mich App 397, 407; 760 NW2d 715 (2008).

[10] Indeed, although not decided in the context of MCL 15.243(1)(*v*), this Court has previously determined that pursuing civil action and resubmitting a FOIA request are not mutually exclusive. See *Scharret v Berkley*, 249 Mich App 405, 413; 642 NW2d 685 (2002).

On the record before us, we cannot determine whether the documents sought by plaintiff in his third FOIA request constitute records and information relating to a civil action so as to implicate MCL 15.243(1)(*v*). The Court of Claims made a blanket determination that all the documents were exempt from disclosure because they touched on the same general subject matter as plaintiff's earlier FOIA requests. As we have discussed, such a broad application of MCL 15.243(1)(*v*) is not in keeping with the rule that FOIA exemptions must be narrowly construed. We therefore reverse the Court of Claims and remand for further proceedings. On remand, it should be remembered that it is LARA's burden to prove the applicability of MCL 15.243(1)(*v*), and that such a showing requires particularity, not conclusory assertions that all the information sought in plaintiff's third FOIA request relates to the present case. See *Evening News Ass'n*, 417 Mich at 503. Moreover, the Court of Claims should make more particularized findings and, if necessary, review the documents in question. See *King*, 303 Mich App at 228.

VI. CONCLUSION

With regard to plaintiff's first FOIA request, no material question of fact remains and the Court of Claims did not err by granting LARA's request for summary disposition. However, summary disposition should not have been granted with respect to plaintiff's second and third FOIA request. In particular, with regard to plaintiff's second request, the Court of Claims clearly erred by concluding that LARA lacked the ability to transmit records via email. Consequently, we remand for consideration of whether plaintiff was entitled to receive the records related to his second FOIA request as electronic records. On remand, regarding plaintiff's second FOIA request, the Court of Claims should also address LARA's noncompliant fee itemization and the propriety of the fees assessed under MCL 15.234, particularly if the court concludes that plaintiff was entitled to electronic records. Finally, with regard to plaintiff's third FOIA request, we reverse the judgment of the Court of Claims and remand for consideration of whether plaintiff's third FOIA request sought records and information relating to a civil action.[11]

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. Neither party having prevailed in full, no costs are awarded under MCR 7.219.

/s/ David H. Sawyer
/s/ Joel P. Hoekstra
/s/ Jane M. Beckering

[11] On appeal, plaintiff offers the cursory assertions that LARA acted arbitrarily and capriciously and in bad faith, but the argument is undeveloped and we decline to consider the issue. See *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003).