

**STATE OF MICHIGAN
IN THE COURT OF CLAIMS**

MICHIGAN OPEN CARRY, INC,
Plaintiff/Petitioner,

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

v.

MOTION

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

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PLAINTIFF'S MOTION FOR PARTIAL SUMMARY DISPOSITION

NOW COMES Plaintiff MICHIGAN OPEN CARRY, INC, by counsel, and moves for summary disposition under Counts I and II¹ pursuant to MCR 2.116(C)(10) for these matters raised under the Freedom of Information Act.

FACTS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Discovery has resulted in key judicial admissions² that—

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

Exhibit I. This lawsuit then followed.

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In the spirit of cooperation, we have summarized the information you are requesting below:

1 - 24,493
2 - 1,771
3 - 48,626
4 - 1,448,241
5 - 905,110
6 - 42,329
7 - 87,717

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

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

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

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

B. The records are not protected from disclosure.

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

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

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

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

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

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

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

MCL 15.240b provides—

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

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

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

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

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

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

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

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

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

The Legislature went further in its amendments:

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

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

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

RELIEF REQUESTED

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

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

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

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

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

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

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

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

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

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

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

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

Date: December 1, 2018

RESPECTFULLY SUBMITTED:

PROOF OF SERVICE

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

1st day of December, 2018.

Philip L Ellison

PHILIP L. ELLISON
Attorney at Law

Philip L Ellison

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

**MOC**
mail

Tom Lambert <tlamb

EXHIBIT**A**OUTSIDE LEGAL COUNSEL PLC
www.olicplc.com**MSP FOIA Request - System Access Records****Tom Lambert** <tlambert@miopencarry.org>

Thu, Oct 26, 2017 at 1:03 PM

To: MSP-FOI@michigan.gov

Cc: MiOC Board <board@miopencarry.org>

To whom it may concern,

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

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

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

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

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

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

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

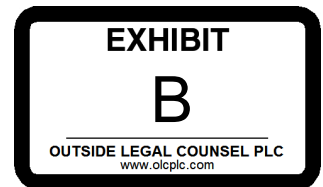
Thank you for your time processing this request.

Tom Lambert
President
Michigan Open Carry, Inc.



STATE OF MICHIGAN
DEPARTMENT OF STATE POLICE
LANSING

RICK SNYDER
GOVERNOR



COL. KRISTE KIBBEY ETUE
DIRECTOR

11/03/2017

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

NOTICE OF EXTENSION

Subject: CR-20049761

Dear TOM LAMBERT:

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

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

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

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

Sincerely,

LANCE GACKSTETTER
Freedom of Information Unit
Michigan State Police

EXHIBIT

C

OUTSIDE LEGAL COUNSEL PLC
www.olepc.com



Celebrating 100 Years of Service

STATE OF MICHIGAN
DEPARTMENT OF STATE POLICE
RECORDS RESOURCE UNIT
P.O. BOX 30634
LANSING, MICHIGAN 48909

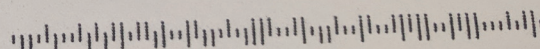


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**MOC**
mail

Tom Lambert <

EXHIBIT**D**OUTSIDE LEGAL COUNSEL PLC
www.olicplc.com

rg>

RE: MSP FOIA Request - System Access Records / CR-20049761**Gackstetter, Lance (MSP)** <GackstetterL1@michigan.gov>

Fri, Nov 17, 2017 at 12:16 PM

To: Tom Lambert <tlambert@miopencarry.org>

Cc: MiOC Board <board@miopencarry.org>

Mr. Lambert:

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

Thank you,

Lance E. Gackstetter

Assistant FOIA Coordinator

Records Resource Unit

Office of the Director

Michigan State Police

P.O. Box 30634

Lansing, MI 48909

TX: 517-241-1934

Fax: 517-241-1935

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

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

To whom it may concern,

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

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

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

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

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

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

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

Thank you for your time processing this request.

Tom Lambert
President
Michigan Open Carry, Inc.



20049761.pdf

121K



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

Sec. 10.

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

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

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

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

(a) Reverse the disclosure denial.

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

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

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

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

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

(5) An action commenced under this section and an appeal from an action commenced under this section shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.

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

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

MOC
mail

Tom Lambe



ry.org>

FOIA Denial APPEAL

Tom Lambert <tlambert@miopencarry.org>
To: EtueK@michigan.gov
Cc: MSP-FOI@michigan.gov, MiOC Board <board@miopencarry.org>

Mon, Nov 20, 2017 at 2:36 PM

Col. Etue,

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

Background

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

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

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

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

MCL 28.425e(4) states as follows: "(4) Information in the database shall only be accessed and disclosed according to an access protocol that includes the following requirements:

(a) That the requestor of the firearms records uses the law enforcement information network or another system that maintains a record of the requestor's identity, time, and date that the request was made.

(b) Requires the requestor in an intentional query by name of the firearms records to attest that the firearms records were sought under 1 of the lawful purposes provided in section 1b(2)."

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

This appeal follows.

Reasons for Appeal

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

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

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

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

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

Action Requested

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

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

Thank you,

Tom Lambert
President
Michigan Open Carry, Inc.

2 attachments



MOC Oct 26 FOIA Request.pdf
110K



MSP Nov 17 Reply.pdf
121K



STATE OF MICHIGAN

DEPARTMENT OF STATE POLICE
LANSING

RICK SNYDER
GOVERNOR



COL. KRISTE KIBBEY ETUE
DIRECTOR

November 28, 2017

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

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

Dear Mr. Lambert:

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

You requested a copy of:

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

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

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

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

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

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

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

Sincerely,

Lori M. Hinkley
FOIA Appeals Officer
Michigan State Police

Enclosure

Sec. 10.

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

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

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

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

(a) Reverse the disclosure denial.

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

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

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

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

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

(5) An action commenced under this section and an appeal from an action commenced under this section shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.

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

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

Sec. 10a.

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

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

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

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

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

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

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

(a) Waive the fee.

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

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

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

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

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

(5) An action commenced under this section and an appeal from an action commenced under this section shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.

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

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

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

EXHIBIT

H

OUTSIDE LEGAL COUNSEL PLC
www.olicplc.com



STATE OF MICHIGAN
DEPARTMENT OF STATE POLICE
RECORDS RESOURCE UNIT
P.O. BOX 30634
LANSING, MICHIGAN 48909

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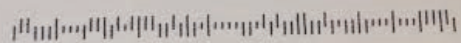


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STATE OF MICHIGAN

COURT OF CLAIMS

MICHIGAN OPEN CARRY, INC,

Plaintiff/Petitioner,

No. 18-000087-MZ

v

HON. CYNTHIA D. STEPHENS

MICHIGAN DEPARTMENT OF STATE
POLICE,
Defendant.

Philip L. Ellison (P74117)
Outside Legal Counsel PLC
Attorney for Plaintiff/Petitioner
P.O. Box 107
Hemlock, MI 48626
(989) 642-0055 (phone)
pellison@olicplc.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

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

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

General Objections

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

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

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

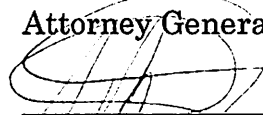
ANSWER: Admitted.

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

ANSWER: Admitted.

Respectfully submitted,

Bill Schuette
Attorney General



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

Dated: November 16, 2018

STATE OF MICHIGAN

COURT OF CLAIMS

MICHIGAN OPEN CARRY, INC,

Plaintiff/Petitioner,

No. 18-000087-MZ

v

MICHIGAN DEPARTMENT OF STATE
POLICE,

Defendant.

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

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

Defendant Michigan State Police ("MSP"), through counsel, responds to

Plaintiffs' First Discovery (Interrogatories) requests as follows:

General Objections

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

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

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

1- 24,493

2- 1,771

3- 48,626

4 - 1,448,241

5- 905,110

6- 42,329

7- 87,717

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

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

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

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

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

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

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

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

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

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

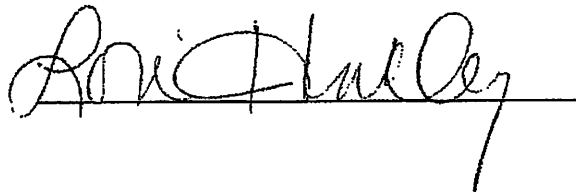
7 - 87,717 means the number of times the database was accessed for the purposes of the Firearms Act. See MCL 28.421b(2)(e). This number in particular, unlike the number in 5, represents the number of times the database was queried

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

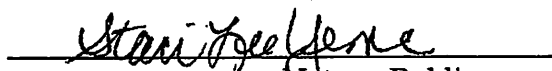
2. INTERROGATORY: Identify all persons with whom you consulted and/or checked with to investigate actual or possible answers to these discovery requests; for each person, itemize each discovery request the person contributed information which became your answer in response thereto.

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

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




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


Notary Public
Ingham County, MI

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

AS TO ANY OBJECTIONS


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Dated: September 13, 2018