

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

MICHIGAN OPEN CARRY, INC,  
Plaintiff/Petitioner,

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

v.

**REPLY / RESPONSE**

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

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**PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR PARTIAL  
SUMMARY DISPOSITION AND OPPOSITION TO DEFENDANTS' REQUEST FOR  
SUMMARY DISPOSITION PURSUANT TO MCR 2.116(I)(2)**

**I. Non-exempt records/information must be ordered disclosed.**

The Department is misapplying FOIA exemptions jurisprudence. 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). The Department only invokes Section 13(1)(d), i.e. MCL 15.240(1)(d), which exempts "records or information *specifically described* and *exempted* from disclosure *by statute*." (emphasis added). Given this, the Department must expressly and directly point to a *statute* which both *specifically* describes and *specifically* exempts from disclosure the records or information sought by a requester. The Department has named only two: MCL 28.421b of the

*Firearms Act* and MCL 28.214 of the *CJIS Policy Council Act*. Neither “specifically describes” and/or “specifically exempts” the information sought<sup>1,2</sup> by Plaintiff MOC.

First, MCL 28.421b(1) provides that “firearms records” are “confidential” and “are not subject to disclosure under the freedom of information act, 1976 PA 442, MCL 15.231 to 15.246.” This is undeniable because “firearms records” is a statutorily-defined<sup>3</sup> term to mean information gathered “*under sections 2, 2a, 2b, and 5b*” or “*any form, permit, or license issued by a government agency under this act.*” MCL 28.421(d) (expressly defining “firearms records” under the *Firearms Act*). The information being sought by Plaintiff MOC is that deriving *from Sections 1b(2)(f) and 5e(4)*, and not any information provided under sections 2, 2a, 2b, and 5b, or is a form, permit, or license of any type. **Ver Compl, Exhibit A.** As such, the “Sections 1b(2)(f) and 5e(4) data”<sup>4</sup> is not within the definition of a “firearms record,” not confidential, and thusly is subject to disclosure under FOIA. Ergo, this first claimed exemption by the Department fails.

Second, MCL 28.214(5) directs that “[a] person shall not disclose information governed under this act [the *CJIS Policy Council Act*] in a manner that is not authorized by law or rule.”<sup>5</sup> By its plain language, if a Michigan law authorizes disclosure, disclosure

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<sup>1</sup> The affidavit of Kevin Collins concedes the sought information exists and is held by the Department. Compare **Response, Exhibit 7, ¶6** with **Ver Compl, Ex A**.

<sup>2</sup> As has been made clear throughout, Plaintiff MOC is not seeking information related to applicants.

<sup>3</sup> “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).

<sup>4</sup> The data sought under Sections 1b(2)(f) and 5e(4) is not information related to applicants or CPL license holders, but rather information of when, how, and for what purpose government officials are accessing the Firearms Records Database. The sought information does not involve any information under sections 2, 2a, 2b, and 5b and thusly is not a confidential “firearms record” by definition.

<sup>5</sup> If the Department is claiming any administrative rule serves as the basis for non-disclosure, i.e. Admin Rule 28.5208(4) cited at page 11 of its response brief, that argument has been previously rejected and fails—Section 13(1)(d) specifically (and only) uses the phrase “by statute;” administrative rules are not statutes. *Detroit Free Press v City of Warren*, 250 Mich App 164, 171; 645 NW2d 71 (2002) (Section 13(1)(d) “plainly includes only statutes, and not rules of procedure”).

is authorized. FOIA is, clearly, such a law. Reading together MCL 28.214 and MCL 15.243(1)(d), there is no “specifically described” information or record that is specifically “exempted.” All that MCL 28.214 directs that information under the *CJIS Policy Council Act* cannot be released except as authorized by law. FOIA is such legal authorization—it is a pro-disclosure law commanding “full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees.” *Herald Co v Bay City*, 463 Mich 111, 119; 614 NW2d 873 (2000); MCL 15.231(2). Nothing under MCL 28.214 is “specifically” listed as being “exempted” by its plain language. Thusly, this second claimed exemption also fails.

Lastly, the Department is being somewhat elusive about the nature of the database that contains the nonconfidential information sought by Plaintiff MOC. The Firearms Records Database (aka CPL database) is not stored *in* LEIN, but is a separately maintained database. So while the Firearms Records Database can be opened through a LEIN computer terminal as a matter of convenience, the Sections 1b(2)(f) and 5e(4) data is stored in the separate Firearms Records Database, i.e. outside the LEIN system. See **Response, Exhibit 7, ¶¶6-7**. Any claimed LEIN protections do not extend to the Firearms Records Database.<sup>6</sup>

Because the Department solely bears the burden of proving that the refusal/denial of access to information was properly justified under FOIA, its failure to do so requires the Court to order disclosure. MCL 15.240(4) (“a court that determines a public record is not exempt from disclosure shall order the public body to cease withholding or to produce all

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<sup>6</sup> Even if certain information may be exempt, the Department has the duty to “separate the exempt and nonexempt material and make the nonexempt material available for examination and copying.” MCL 15.244(1).

or a portion of a public record wrongfully withheld”); see also *Federated Publications, Inc v City of Lansing*, 467 Mich 98, 109; 649 NW2d 383 (2002); *Hopkins v Duncan Twp*, 294 Mich App 401, 409; 812 NW2d 27 (2011). Summary disposition is warranted.

## II. Col. Etue as the head of the Department as a public body.

The Department conceded, correctly, that Col. Kriste Kibbey Etue is the actual head of the Department. **Motion, Exhibit I.** And the statute specifically directs that she, as the head of a public body, must decide administrative appeals. MCL 15.240(2)(a)-(c). In response, the Department claims that Col. Etue does not need to make the actual decisions involving appeals. The plain language of FOIA directs otherwise.

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; 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). In case that was not clear, the Legislature directs—

If the head of the public body fails to respond to a written appeal..., or if the head of the public body upholds all or a portion of the disclosure denial that is the subject of the written appeal, the requesting person may seek judicial review of the nondisclosure by commencing a civil action...

MCL 15.240(3). The Department failed to point to any legal authority which allows head of the Department to turn over that legal responsibility to someone else.

The Department also claims that fulfilling this responsibility is impossible because the Department receives “20,000 records request each year” with 80 percent being submitted under FOIA. Plaintiff MOC does not quibble with this assertion because FOIA requests are processed by *the FOIA Coordinator*. MCL 15.236(1).<sup>7</sup> The head of the public

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<sup>7</sup> “The FOIA coordinator shall be responsible for accepting and processing requests for the public body’s public records under this act and shall be responsible for approving a denial....”

body, on the other hand, only handles *administrative appeals*. MCL 15.240(2)-(3). The Legislature has placed this limited, but important, duty upon Col. Etue and no one else.<sup>8</sup>


Lastly, the Department suggests that even if Department is violating the law that it does not matter because it does not affect Plaintiff MOC's "substantive rights." Government agencies, like all citizens, do not get to pick which laws to obey and those it chooses to simply ignore. Such a flippant assertion is totally appalling coming from an agency whose sole purpose is to ensure others are, in fact, obeying the law and arresting those who are not. "[A]s a nation of laws, our society rightfully expects its public officials to observe proper and lawful procedures in enforcing the law; lest we make a mockery of the concept of government by the people, for the people." *ACLU v City of Pittsburgh*, 586 F Supp 417, 425 (WD Pa 1984).

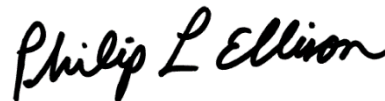
### RELIEF REQUESTED

WHEREFORE, this Court is requested to grant summary disposition in favor of Plaintiff MOC and provide all of the relief outlined in its motion.

Date: December 27, 2018

RESPECTFULLY SUBMITTED:

<p align="center"><b>PROOF OF SERVICE</b></p> <p>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</p> <p align="center">27th day of December, 2018.</p> <p align="center"></p> <p align="center">_____ PHILIP L. ELLISON Attorney at Law</p>
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\*\*Electronic signature(s) now authorized by MCR 1.109(E)(4)

<sup>8</sup> The non-delegation of the appellate decision-making task is further support by MCL 15.236(3) which expressly authorizes a *FOIA Coordinator* to delegate his or her duties, but the same Act does not allow *the head of the public body* to name someone else to make administrative appeal decisions. See *Farrington v Total Petroleum*, 442 Mich 201, 210; 501 NW2d 76 (1993) ("Courts cannot assume that the Legislature inadvertently omitted from one statute the language that it placed in another statute, and then, on the basis of that assumption, apply what is not there.").

