STATE OF MICHIGAN
IN THE SUPREME COURT

MICHIGAN OPEN CARRY, INC.

Plaintiff-Appellant

v

MICHIGAN DEPARTMENT OF STATE POLICE

Defendant-Appellee.
_____/

Supreme Court No. 160870

Court of Appeals No. 348487

Court of Claims No. 18-000087-MZ

MICHIGAN STATE POLICE'S BRIEF IN OPPOSITION TO MICHIGAN OPEN CARRY'S APPLICATION FOR LEAVE TO APPEAL

Dana Nessel
Attorney General

Fadwa A. Hammoud (P74185)
Solicitor General
Counsel of Record

Adam R. de Bear (P80242)
Assistant Attorney General
Attorneys for Dep't of State Police
Defendant-Appellee
State Operations Division
PO Box 30754
Lansing, MI 48909
(517) 373-7573

Dated: February 24, 2020

TABLE OF CONTENTS

Page

Index of Authorities ii

Counter-Statement of Jurisdiction v

Counter-Statement of Questions Presented vi

Statutes and Rules Involved viii

Introduction 1

Counter-Statement of Facts and Proceedings 2

Standard of Review 5

Argument 5

I. Open Carry's application for leave to appeal does not satisfy the grounds set forth in MCR 7.305(B). 5

II. The Court of Appeals' opinion is consistent with Michigan law. 8

A. The information sought by Open Carry is exempt from disclosure under MCL 15.243(1)(d). 9

1. The information sought by Open Carry must be maintained in criminal justice information systems. 9

2. The Legislature has prohibited the public disclosure of information governed under the CJIS Policy Council Act. 11

B. Nothing in the FOIA prohibits the head of a public body from authorizing an appropriate employee to respond to appeals. 13

C. Public bodies are properly authorized to raise exemptions to disclosure for the first time in their affirmative defenses. 14

1. The State Police's use of MCL 15.243(1)(d) in its affirmative defenses is supported by precedent from the Court of Appeals. 14

2. A public body's ability to raise new exemptions at the trial court level ensures that a precise review of the requested records is conducted. 16

Conclusion and Relief Requested 18

INDEX OF AUTHORITIES

Page

Cases

Bitterman v Vill of Oakley,
309 Mich App 53 (2015) 17, 18

Bitterman v Vill of Oakley,
497 Mich 987 (2015) 17

Campbell v St John Hosp,
434 Mich 608 (1990) 15

Evening News Ass'n v City of Troy,
417 Mich 481 (1983) 16

Heindlmeyer v Ottawa Co Concealed Weapons Licensing Bd,
268 Mich App 202 (2005) 14

Herald Co v City of Bay City,
463 Mich 111 (2000) 9

Herald Co, Inc v E Michigan Univ Bd of Regents,
475 Mich 463 (2006) 5

King v MSP,
303 Mich App 162 (2013) 12

Messenger v Consumer & Indus Services,
238 Mich App 524 (1999) 15

MLive Media Group v City of Grand Rapids,
321 Mich App 263 (2017) 9

Residential Ratepayer Consortium v Pub Serv Comm'n,
168 Mich App 476 (1987) 15, 16, 17

Shuttleworth v Riverside Osteopathic Hosp,
191 Mich App 25 (1991) 7

Stanke v State Farm Mut Auto Ins Co,
200 Mich App 307 (1993) 15

Stone St Capital, Inc v Bureau of State Lottery,
263 Mich App 683 (2004) 16

United States Fidelity Guaranty Company v Michigan Catastrophic Claims Association,
484 Mich 1 (2009) 7

Wheatley v Department of Corrections,
503 Mich 871 (2018) 18

Statutes

MCL 15.231 viii

MCL 15.233(3) 8, 13

MCL 15.240 ..... passim

MCL 15.240(1)(a) 4, 7, 13

MCL 15.240(2)(a)–(c) 13

MCL 15.240(3) 7

MCL 15.243 6

MCL 15.243(1)(d) ..... passim

MCL 15.243(1)(g) 17

MCL 15.243(1)(y) and (z) 17

MCL 15.246 viii

MCL 28.211 ..... 3, 9

MCL 28.214 ..... passim

MCL 28.214(5)–(6) 11

MCL 28.421b ..... passim

MCL 28.421b(2)(f) 2, 10, 12

MCL 28.425e(1)(a)–(f) 9

MCL 28.425e(4) ..... viii, 2, 10

MCL 28.425e(4)(a) 10

MCL 28.425e(4)(b) 10

MCL 338.1707 12

MCL 338.1728 12

MCL 400.10c ix

MCL 600.215(3) v

Other Authorities

1939 PA 280 ix

1976 PA 442 viii

Rules

MCR 2.111(F)(3) 15

MCR 2.116(I)(2) 4

MCR 7.303(B)(1) ..... v, 5

MCR 7.305(B) ..... passim

Mich Admin Code, R. 28.5101(k) 10

Mich Admin Code, R. 28.5101(n) 11

Mich Admin Rule 28.5208 x

COUNTER-STATEMENT OF JURISDICTION

Appellant Michigan Open Carry, Inc. (Open Carry) seeks leave to appeal the Court of Appeals' December 17, 2019 published per curiam opinion, which affirmed the Court of Claims' grant of summary disposition to Appellee Michigan Department of State Police (the State Police). The State Police does not dispute that this Court has jurisdiction to consider Open Carry's application for leave to appeal under MCR 7.303(B)(1) and MCL 600.215(3).

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. This Court may grant leave to appeal where the appellant satisfies the grounds set forth in MCR 7.305(B). Here, Open Carry's application satisfies none of these grounds. Should this Court deny Open Carry's application for leave to appeal?

   Appellant's answer: No.

   Appellee's answer: Yes.

   Trial court's answer: Did not answer.

   Court of Appeals' answer: Did not answer.

2A. The Criminal Justice Information Systems (CJIS) Policy Council Act prohibits the public disclosure of information stored on criminal justice information systems. For this reason, the Court of Appeals ruled that such information is exempt from disclosure under MCL 15.243(1)(d). Is the Court of Appeals' decision consistent with Michigan law?

   Appellant's answer: No.

   Appellee's answer: Yes.

   Trial court's answer: Did not answer.

   Court of Appeals' answer: Did not answer.

2B. Nothing in the plain language of MCL 15.240 prohibits the head of a public body from authorizing an employee to act on her behalf in responding to Freedom of Information Act (FOIA) appeals. For this reason, the Court of Appeals ruled that the State Police's use of an agent in responding to administrative appeals did not violate the FOIA. Is the Court of Appeals' decision consistent with Michigan law?

   Appellant's answer: No.

   Appellee's answer: Yes.

   Trial court's answer: Did not answer.

   Court of Appeals' answer: Did not answer.

2C. It is binding precedent that a public body is permitted to raise an exemption to disclosure for the first time in its affirmative defenses. For this reason, the Court of Appeals ruled that the State Police did not violate the FOIA when it raised MCL 15.243(1)(d) in its affirmative defenses. Is the Court of Appeals' decision consistent with Michigan law?

Appellant's answer: No.

Appellee's answer: Yes.

Trial court's answer: Did not answer.

Court of Appeals' answer: Did not answer.

STATUTES AND RULES INVOLVED

MCL 28.421b:

(1) Firearms records are confidential, are not subject to disclosure under the freedom of information act, 1976 PA 442, MCL 15.231 to 15.246, and shall not be disclosed to any person, except as otherwise provided by this section.

(2) Firearms records may only be accessed and disclosed 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. 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.

(3) A person who intentionally violates subsection (2) is responsible for a state civil infraction and may be ordered to pay a civil fine of not more than $500.00.

MCL 28.425e(4):

(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).

MCL 28.214:

(1) The council shall do all of the following:

(a) Establish policy and promulgate rules governing access, use, and disclosure of information in criminal justice information systems, including the law enforcement information network, the automated fingerprint information system, and other information systems related to criminal justice or law enforcement. The policy and rules must do all of the following:

(i) Ensure access to information obtained by a federal, state, or local governmental agency to administer criminal justice or enforce any law.

(ii) Ensure access to information provided by the law enforcement information network or the automated fingerprint identification system by a governmental agency engaged in the enforcement of child support laws, child protection laws, or vulnerable adult protection laws.

(iii) Ensure access by the department of health and human services to information necessary to implement section 10c of the social welfare act, 1939 PA 280, MCL 400.10c.

(iv) Authorize a fire chief of an organized fire department or his or her designee to request and receive information obtained through the law enforcement information network by a law enforcement agency for the following purposes:

(A) A preemployment criminal convictions history.

(B) A preemployment driving record.

(C) Vehicle registration information for vehicles involved in a fire or hazardous materials incident.

(v) Authorize a public or private school superintendent, principal, or assistant principal to receive vehicle registration information, of a vehicle within 1,000 feet of school property, obtained through the law enforcement information network by a law enforcement agency.

(vi) Establish fees for access, use, or dissemination of information from criminal justice information systems.

***

(2) A person having direct access to nonpublic information in the information systems governed by this act shall submit a set of fingerprints for comparison with state and federal criminal history records to be approved for access under the C.J.I.S. security policy. A report of the comparison must be provided to that person's employer.

(3) A person shall not access, use, or disclose nonpublic information governed under this act for personal use or gain.

(4) The attorney general or his or her designee, a prosecuting attorney, or the court, in a criminal case, may disclose to the defendant or the defendant's attorney of record information pertaining to that defendant that was obtained from the law enforcement information system.

(5) A person shall not disclose information governed under this act in a manner that is not authorized by law or rule.

(6) A person who intentionally violates subsection (3) or (5) is guilty of a crime as follows:

(a) For a first offense, the person is guilty of a misdemeanor punishable by imprisonment for not more than 93 days or a fine of not more than $500.00, or both.

(b) For a second or subsequent offense, the person is guilty of a felony punishable by imprisonment for not more than 4 years or a fine of not more than $2,000.00, or both.

Mich Admin Rule 28.5208:

(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.

INTRODUCTION

In its FOIA request, Open Carry requested criminal justice information which is prohibited from public disclosure by the Legislature. Later, it challenged the State Police Director's practice of authorizing an employee to respond to FOIA appeals on her behalf. And in disposing of Open Carry's arguments on appeal, the Court of Appeals engaged in a straightforward application of the FOIA, the CJIS Policy Council Act, and binding precedent. But despite the lower court's straightforward application of the law, Open Carry now seeks leave from this Court to appeal. Simply put, Open Carry's application lacks merit.

Open Carry's application should be denied for two reasons. First, Open Carry's statement of questions presented do not satisfy the requisite grounds under MCR 7.503 for its application to be granted. Specifically, none of the questions present a challenge the validity of the CJIS Policy Act; identify a significant public or jurisprudential interest; or demonstrate that the lower court's decision was clearly erroneous or contrary to binding law.

Second, each aspect of the Court of Appeals' opinion is consistent with Michigan law. Specifically, MCL 28.214's prohibition on the public disclosure of criminal justice information exempts such information from disclosure under the FOIA; the FOIA does not prohibit a department-head from authorizing another employee to respond to appeals on her behalf; and binding precedent allowed the State Police to raise MCL 15.243(1)(d) for the first time in its affirmative defenses.

For these reasons, the State Police Requests that this Court enter an order denying Open Carry's application for leave to appeal.

COUNTER-STATEMENT OF FACTS AND PROCEEDINGS

Background

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." (Appendix, 28a.) 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." (*Id.*) (emphasis added).

Due in part to the statutory citations that 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. (*Id.*, 48a–49a.) 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.*, 49a.) 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.*) MSP then issued a written

notice on November 17, 2017 granting Open Carry's request which provided the information that it had gained from DTMB. (*Id.*, 33a.)

Three days later, Open Carry emailed an appeal of MSP's "denial" in which it repeated a majority of its October 26 request. (*Id.* 35a–36a.) In its appeal, Open Carry simply 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, [it was] 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. (*Id.*, 37a.) 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.*, 50a.)

Proceedings Below

Open Carry filed the instant complaint, under MCL 15.240, on May 9, 2018 and alleged that MSP violated the FOIA when (1) Colonel Etue did not personally respond to its written appeal, (2) it constructively denied the FOIA request. (App, 1a–10a.) In response to Open Carry's complaint, which described the requested information in a clearer fashion than it did in its request, MSP cited MCL 15.243(1)(d) and the Criminal Justice Information System (CJIS) Policy Council Act, MCL 28.211, *et seq*, as an affirmative defense. Later, in opposition to Open

Carry's subsequent motion for partial summary judgment, MSP requested that summary disposition be granted in its favor under MCR 2.116(I)(2) in part because the requested information was exempt from disclosure under MCL 15.243(1)(d). (*Id.*, 47a–62a.) Finally, the Court of Claims, in a March 22, 2019 opinion and order, dismissed Open Carry's complaint and made the following findings of law: (1) Open Carry's rights under the FOIA were not violated when an "appeals officer" signed a written notice upholding MSP's disclosure denial; and (2) the information Open Carry sought is exempt from disclosure under the FOIA. (*Id.*, 71a–81a.)

After the Court of Claims' dismissal of the complaint, Open Carry filed a timely claim of appeal with the Court of Appeals. On December 17, 2019, the Court of Appeals issued a published opinion affirming the Court of Claims' grant of summary disposition to the State Police. (*Id.*, 87a–94a.) Specifically, the Court of Appeals ruled that (1) the information requested by Open Carry—i.e. information contained in criminal justice information systems—is exempt from disclosure by way of MCL 15.243(1)(d) and MCL 28.214(5); (2) the FOIA does not prohibit the head of a public body from authorizing an appropriate employee to act on her behalf in responding to appeals under MCL 15.240(1)(a); and (3) a public body can raise exemptions in their affirmative defenses for the first time at the trial court level. (*Id.*)

Open Carry now files the instant application for leave to appeal. For the reasons discussed below, the State Police request that this Court deny Open Carry's application.

STANDARD OF REVIEW

This Court has discretion in granting leave to appeal a Court of Appeals' decision. MCR 7.303(B)(1). In appeals under the FOIA, while "legal determinations are reviewed under a de novo standard," a trial court's factual determinations are reviewed under the clear error standard of review. *Herald Co, Inc v E Michigan Univ Bd of Regents*, 475 Mich 463, 471–72 (2006). At issue in this appeal is the lower court's *legal determinations* that (1) the requested information was exempt from disclosure, (2) the State Police did not violate the FOIA when it issued a written notice upholding the disclosure denial was not personally drafted by the State Police Director, and (3) the State Police's use of MCL 15.243(1)(d) in its affirmative defenses did not violate the FOIA..

ARGUMENT

I. Open Carry's application for leave to appeal does not satisfy the grounds set forth in MCR 7.305(B).

Despite the straightforward nature of its statement of questions presented, Open Carry attempts to convince this Court that the routine issues decided below to satisfy the grounds set forth for review by this Court under MCR 7.305(B). Specifically, Open Carry asserts that "the Michigan Court of Appeals effectively gut[ted] the efficiency and clear public purpose of the [FOIA] interpreting it in ways to make it *harder* for the citizenry . . . to have direct, clear, and meaningful access to the full and complete information regarding the affairs of government and the official acts of those who represent them." (Application, p 1.) In short, Open Carry

is mistaken. Moreover, its flawed analysis of the Court of Appeals' opinion does not create grounds upon which this Court should grant the application.

This Court, in MCR 7.305, instructs that the following grounds justify the granting of an application for leave to appeal a decision of the Court of Appeals: when (1) "the issue involves a substantial question about the validity of a legislative act[;]" (2) "the issue has significant public interest and the case is one by or against the state[;]" (3) "the issue involves a legal principle of major significance to the state's jurisprudence[;]" or (4) a decision of the Court of Appeals is either "clearly erroneous and will cause material injustice" or conflicts with binding precedent. None of the above grounds is present here.

Perhaps Open Carry could argue (although it does not appear to) that the issues decided by the Court of Appeals satisfy the second of these above grounds.[1] But an examination of the issues that the Court of Appeals actually decided clearly demonstrates a lack a significant public interest. In Particular, Open Carry only raised two new issues[2] before the Court of Appeals: whether (1) information stored in criminal justice information systems (such as the law enforcement information

[1] None of the other grounds identified in MCR 7.305(B) are even potentially applicable. To be clear, Open Carry is not challenging the validity of either the FOIA or the CJIS Policy Council Act. The issues decided below are not of *major* significance to the state's jurisprudence. And Open Carry cannot and has not demonstrated that the decision was clearly erroneous or contrary to binding precedent.

[2] Open Carry did raise an issue regarding a public body's ability to assert exemptions under MCL 15.243 for the first time in its affirmative defenses. But as discussed below in Part II-C, this ability has been consistently recognized by the Court of Appeals and this Court has previously denied applications for review on this ground.

network or LEIN) is exempt from disclosure under MCL 15.243(1)(d); and (2) the head of a public body can authorize an employee within the public body to act on her behalf in responding to FOIA appeals. The former issue is a straightforward application of MCL 28.214(5) (which provides that a person "shall not disclose" information stored in criminal justice information systems "in a manner that is not authorized by law or rule") to MCL 15.243(1)(d) (which permits the nondisclosure of records or information that are "specifically described and exempted from disclosure"). And because courts are required to enforce unambiguous statutes as written, see, e.g., *United States Fidelity Guaranty Company v Michigan Catastrophic Claims Association*, 484 Mich 1, 12 (2009), the Court of Appeals' disposition of this issue cannot be of significant public interest, particularly when Open Carry is not challenging the validity of either statute.

Additionally, the latter issue is not one of significant public interest because MCL 15.240 contains no prohibition of a department-head authorizing an employee to respond on her behalf to an internal appeal under MCL 15.240(1)(a). Moreover, the practice of authorizing employees to act on the department-head's behalf cannot be of significant public interest because the FOIA's remedy when the head of a public body fails to respond to an appeal to allow "the requesting person [to] seek judicial review of the nondisclosure by commencing a civil action under [section 10(1)(b).]" MCL 15.240(3); see also *Shuttleworth v Riverside Osteopathic Hosp*, 191 Mich App 25, 27 (1991) ("It is the general rule in this state that when a statute creates a new right or imposes a new duty having no counterpart in the common

law, the remedies provided in the statute for its violation are exclusive and not cumulative"). Simply stated, because the FOIA does not prohibit the practice and because a requesting person may commence a civil action regardless of whether the head of a public body responds to an appeal, Open Carry cannot demonstrate that this issue has any significant public interest.

For these reasons, that is because it does not satisfy the grounds set forth in MCR 7.305(B), Open Carry's application should be denied.

II. The Court of Appeals' opinion is consistent with Michigan law.

Each of the three rulings made by the Court of Appeals is a straightforward application of and consistent with Michigan law. First, because the CJIS Policy Council Act prohibits criminal justice agencies such as the State Police from publicly disclosing information stored on criminal justice information systems, the Court of Appeals correctly determined that the information requested by Open Carry is exempt from disclosure under MCL 15.243(1)(d). Second, because MCL 15.233(3) permits a public body "to make reasonable rules necessary to . . . prevent excessive and unreasonable interference with the discharge of its functions[,]" the Court of Appeals correctly determined that the FOIA does not prohibit the head of a public body from authorizing another employee to respond to appeals at the administrative level. And third, the Court correctly applied binding precedent regarding a public body's ability to raise exemptions for the first time in their affirmative defenses in determining that the State Police did not waive its ability to assert MCL 15.243(1)(d) as an affirmative defense.

A. The information sought by Open Carry 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 this exemption applies 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." *MLive Media Group v City of Grand Rapids*, 321 Mich App 263, 270 (2017). As such, an examination of the information requested by Open Carry and of the statute that prevents the disclosure of the requested information—the CJIS Policy Council Act, MCL 28.211 *et seq*— is required.

1. The information sought by Open Carry must be maintained in criminal justice information systems.

Section 5e(1) of the Firearms Act requires MSP to "create and maintain a computerized database of individuals who apply . . . for a license to carry a concealed pistol" and this database must include the six categories of information that are listed in MCL 28.425e(1)(a)–(f) for each individual applicant. The firearms records stored in this computerized database (the CPL database) may only be accessed by a peace officer or authorized system user for one of the six purposes enumerated in section 1b of the Firearms Act, MCL 28.421b. When a peace officer or authorized systems user accesses firearms records for the sixth category of these enumerated purposes—i.e. the user has a "reason to believe that access to the

firearms records is necessary within the commission of his or her lawful duties"—"[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 section 5e." MCL 28.421b(2)(f) (emphasis added).

These procedures in section 5e of the Firearms Act, create a two-step process for accessing the CPL database. First, the peace officer or authorized system user must access the CPL database through one of two criminal justice information systems: the law enforcement information network (LEIN) or the CPL program application.[3] (Affidavit of Kevin Collins, Appendix 64a, ¶ 6); MCL 28.425e(4)(a). Consistent with the requirements of MCL 28.425e(4)(a), both information systems record the "requestor's identity, time, and date that the request was made." (*Id.*) Second, as required by MCL 28.425e(4)(b), 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)]." (*Id.*) Critically, MCL 28.425e(4) mandates that this information be recorded and maintained in the CPL database. (*Id.*) In sum, like the information stored in the CPL database, the information requested by Open Carry, which is recorded in the manner prescribed by MCL 28.425e(4), "can only be accessed by a peace officer or authorized system user through either LEIN or the CPL program application." (*Id.*, ¶ 8.)

[3] The CPL program application is an application which can be accessed in the Michigan Criminal Justice Information Network (MiCJIN) which is "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." Mich Admin Code, R. 28.5101(k).

2. The Legislature has prohibited the public disclosure of information governed under the CJIS Policy Council Act.

The CJIS Policy Council Act, mandates that MSP3 "[e]stablish policy and promulgate rules governing access, use, and disclosure of information *in criminal justice information systems*, including [LEIN] . . . and other information systems related to criminal justice or law enforcement."[4] MCL 28.214(1)(a) (emphasis added). Additionally, the CJIS Policy Council Act instructs that "information governed under this act"—i.e. information stored in LEIN or other information systems—"*shall not [be] disclose[d]* . . . in a manner that is not authorized by law or rule" and that persons who do so disclose will be subject to criminal penalties. MCL 28.214(5)–(6). Finally, consistent with its mandate to promulgate rules governing the access to information stored in criminal justice systems, MSP promulgated Rule 28.5208(4) which 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 *shall not be disseminated to an unauthorized agency, entity, or person*." (Emphasis added). In the end, a review of the CJIS Policy Council Act demonstrates that the State Police is prohibited from publicly disclosing the information requested by Open Carry.

[4] "Other information systems" include "applications, other than LEIN or AFIS, which are accessed through the MiCJIN portal." Mich Admin Code, R. 28.5101(n).

Moreover, the Court of Appeals correctly rejected Open Carry's argument that the FOIA itself is a law that authorizes the disclosure of such information.[5] In rejecting this argument, the Court relied on *King v MSP*, 303 Mich App 162 (2013), where the Court of Appeals was asked to determine whether a provision of the Forensic Polygraph Examiners Act (FPEA) rendered the requested information exempt from disclosure under MCL 15.243(1)(d). *Id.* at 176–181. Similar to the CJIS Policy Council Act, the provision of the FPEA at issue in *King* provided that "[a]ny recipient of information . . . from a polygraph examiner . . . *shall not provide, disclose or convey such information*. . . to a third party *except as may be required by law and the rules promulgated by the [Department of Licensing and Regulatory Affairs]* in accordance with [MCL 338.1707]." *Id.* at 177, citing MCL 338.1728 (emphasis added). Accordingly, because MSP was "prohibited from providing, disclosing, or conveying [the requested] information . . . except as required by law or administrative rules" and because the plaintiffs "identif[ied] no law or rules that would require disclosure[,]" the Court of Appeals in *King* ruled that the requested information was exempt from disclosure under MCL 15.243(1)(d). *Id.* at 178.

[5] Contrary to Plaintiff's suggestion that the FOIA, a statute of general applicability, is an authorizing law, section 5e of the Firearms Act itself is example of a law that authorizes the disclosure of *certain* information stored on criminal justice information systems. Specifically, MCL 28.425e(5) requires the State Police to publish a report of certain information contained within the criminal justice information systems. But fatal to Open Carry's arguments, however, is that the information that it is seeking (i.e. the individual entries logged when a peace officer accesses the Firearms database pursuant to MCL 28.421b(2)(f)) is not a class of information for which the Legislature has authorized disclosure.

Critically, however, the Court of Appeals did not find that the FOIA was a law that authorized the information's disclosure.

B. Nothing in the FOIA prohibits the head of a public body from authorizing an appropriate employee to respond to appeals.

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." MCL 15.240(2)(a)–(c).

Absent from these relevant statutory provisions is any requirement that the head of the public body personally uphold the public body's final determination. Indeed, MCL 15.240(2)(b) does require that the head of the public body *issue* a written notice upholding the denial of a FOIA request, but nothing in the FOIA mandates the head of the public body to *personally make* the decision to uphold the denial of the FOIA request. Instead, as explained by the Court of Claims, the FOIA allows a public body to take reasonable steps that are "necessary . . . to prevent excessive and unreasonable interference with the discharge of its functions." MCL 15.233(3). To this end, the Court of Appeals correctly recognized that because the State Police receives approximately 20,000 records requests each year that MCL

15.233(3) "supports use of Department agents . . . to act on behalf of the head of the Department[.]" (App, 91a.)

Ultimately, because the lower court's decision was consistent with the FOIA, this Court should deny Open Carry's application.

C. Public bodies are properly authorized to raise exemptions to disclosure for the first time in their affirmative defenses.

The Court of Appeals correctly decided that the State Police did not violate the FOIA when it raised MCL 15.243(1)(d) as an affirmative defense to Open Carry's complaint for two reasons. First, binding precedent from the Court of Appeals allowed the State Police to raise the exemption in its affirmative defense. And second, the ability to raise exemptions for the first time at the trial court level ensures that a careful examination of the requested records at issue is conducted.

1. The State Police's use of MCL 15.243(1)(d) in its affirmative defenses is supported by precedent from the Court of Appeals.

With respect to a public body's ability to raise the FOIA's exemptions as affirmative defenses in a civil action that has been commenced to compel the disclosure of records, a trial court is required to "determine the matter *de novo*[.]" MCL 15.240(4) (emphasis added). To that end, it is well-established that "[t]he very concept, 'de novo' hearing, means that all matters . . . are to be considered 'anew; afresh; over again.'" *Heindlmeyer v Ottawa Co Concealed Weapons Licensing Bd*, 268 Mich App 202, 219 (2005). Furthermore, the Michigan Court Rules provide that in civil actions a party's affirmative defenses to a complaint must be stated in

that party's responsive pleading. MCR 2.111(F)(3). And only "[t]he failure to raise an affirmative defense as required by the court rule constitutes a waiver of that affirmative defense." *Stanke v State Farm Mut Auto Ins Co*, 200 Mich App 307, 312 (1993), citing *Campbell v St John Hosp*, 434 Mich 608, 616 (1990).

In discussing affirmative defenses in the context of FOIA actions, the Court of Appeals has explained that the exemptions contained in MCL 15.243 "are affirmative defenses to requests for documents." *Messenger v Consumer & Indus Services*, 238 Mich App 524, 536 (1999). More specifically to the issue decided below, the Court of Appeals allows public bodies to raise MCL 15.243's exemptions for the first time as affirmative defenses to requesting person's complaint. In fact, the Court of Appeals explained in *Residential Ratepayer Consortium v Pub Serv Comm'n*, 168 Mich App 476, 481 (1987), that the FOIA's "provision for de novo review in circuit court suggests that the [public body] does not waive defenses by failing to raise them at the administrative level."

In short, the Court of Appeals correctly determined that the State Police's use of MCL 15.243(1)(d) did not violate the FOIA. And for this reason, this Court should deny Open Carry's application.

2. A public body's ability to raise new exemptions at the trial court level ensures that a precise review of the requested records is conducted.

In its brief, and despite the fact that this proposition set forth in *Residential Ratepayer* is binding[6], Open Carry argues that this opinion allows public bodies to utilize a "wait-until-we're sued approach [that] is improper, unlawful, and unfair." (Application, p 14.) Open Carry is wrong.

This Court has long required that trial courts conduct a precise and careful review of the records before determining whether those records are subject to disclosure. See *Evening News Ass'n v City of Troy*, 417 Mich 481, 508 (1983) (where this Court explained that the disposition of a civil action brought under the FOIA "requires a more particularized showing by the government and *a more precise examination by the [trial] court* before a judgment [on the issue of disclosure] may be made") (emphasis added). The *Residential Ratepayer* line of cases furthers this requirement. Specifically, because public bodies are allowed to assert exemptions for the first time at the trial court level, a precise and careful review of the records at issue prior is more likely to be conducted before a trial court issues an order on disclosure.

Additionally, while state departments and larger municipalities may have readily available access to legal advice in responding to FOIA requests, the majority of public bodies subject to the FOIA do not. Accordingly, removing the ability to

[6] This opinion became binding precedent under MCR 7.215(J)(1) when the Court of Appeals reaffirmed the decision in *Stone St Capital, Inc v Bureau of State Lottery*, 263 Mich App 683, 688 (2004).

raise new exemptions at the trial court level would place a substantial burden on many non-attorney FOIA coordinators throughout the state to raise each potentially applicable exemption in responding to all FOIA requests. Placing such a burden on these FOIA coordinators would be imprudent because the FOIA's exemptions are important[7] and a FOIA coordinator's time to respond to a request is limited. For these reasons, this Court should refrain from taking away the ability of public bodies to properly defend against civil actions filed under the FOIA and decline Open Carry's request to overturn *Residential Ratepayer*.

What is more, in the many years since *Residential Ratepayer* was decided, multiple requesting persons applied for leave to appeal opinions that confirmed a public body's ability to raise exemptions for the first time in affirmative defenses. For example, the Court of Appeals in 2015 rejected a requesting person's argument that a public body should be "estopped from raising any new defenses in support of its decision to deny her FOIA requests after it made its 'final determination to deny the request[.]'" *Bitterman v Vill of Oakley*, 309 Mich App 53, 60 (2015). The plaintiff in *Bitterman* filed an application for leave to appeal the opinion, but this Court was "not persuaded that the question presented should be reviewed[,]" and ultimately denied the application. *Bitterman v Vill of Oakley*, 497 Mich 987 (2015). Similarly,

[7] In particular, MCL 15.243(1)(g) involves privileges that may not ultimately belong to the public body responding to the FOIA request. MCL 15.243(1)(*l*) involves "[m]edical, counseling, or psychological facts or evaluations concerning an individual if the individual's identity would be revealed by a disclosure of those facts or evaluation[.]" Additionally, MCL 15.243(1)(y) and (z) involve information that would disclose a public body's cybersecurity plans.

in 2018 this Court again denied application for leave to appeal on the same issue in *Wheatley v Department of Corrections*, 503 Mich 871 (2018).

In the end, the ability to raise exemptions for the first time at the trial court level serves an important purpose. Accordingly, and just like in *Bitterman* and *Wheatley*, this Court should deny Open Carry's application for leave to appeal.

CONCLUSION AND RELIEF REQUESTED

The Court of Appeals correctly decided this case, and Open Carry has failed to show that there are significant issues that warrant review under MCR 7.305(B). Accordingly, the State Police respectfully requests that this Court deny Open Carry's application for leave to appeal.

Respectfully submitted,

Dana Nessel
Attorney General

Fadwa A. Hammoud (P74185)
Solicitor General
Counsel of Record

/s/ *Adam R. de Bear (P80242)*
Assistant Attorney General
Attorneys for Dep't of State Police
Defendant-Appellee
State Operations Division
PO Box 30754
Lansing, MI 48909
(517) 373-7573

Dated: February 24, 2020

AG# 2018-0215209-D