

STATE OF MICHIGAN

IN THE 30TH CIRCUIT COURT FOR THE COUNTY OF INGHAM

STEVEN R. HARRY,

Plaintiff,

v.

CITY OF LANSING,

Defendant.

Case No. 18-381-CZ

Hon. Clinton Canady III

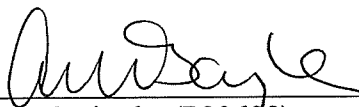
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NOTICE OF HEARING

PLEASE TAKE NOTICE that Defendant City of Lansing's Motion for Summary Disposition will be heard before the Honorable Clinton Canady III on **Wednesday, August 15, 2018, at 2:45 p.m.**, or as soon thereafter as counsel may be heard.

Dated: 7/6/2018

By 
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18/8

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DEFENDANT'S MOTION FOR SUMMARY DISPOSITION

NOW COME Defendant City of Lansing, by and through its attorneys, James D. Smiertka, City Attorney, F. Joseph Abood, Chief Deputy City Attorney, Heather Sumner, Deputy City Attorney, Amanda O'Boyle, Assistant City Attorney, and the Office of the City Attorney, and as permitted in MCR 2.108(B), prior to answering Plaintiff's Complaint, moves this court for summary disposition and dismissal of this action pursuant to MCR 2.116(C)(8) and MCR 2.116(C)(10) for the reason that Plaintiff has failed to state a claim in which relief may be granted, and states as follows:

1. That Plaintiff has presented a claim under the Freedom of Information Act, Public Act 442 of 1976 ("FOIA");

2. That Plaintiff seeks to compel disclosure of “retirement system computation sheets” and damages pursuant to MCL 15.240;

3. That the records sought are statutorily exempt from disclosure under FOIA pursuant to MCL 15.243(1)(d);

4. That the Public Employee Retirement System Investment Act states “information regarding the calculation of actual or estimated retirement benefits for members of the system is exempt from disclosure by the system or the political subdivision sponsoring the system pursuant to section 13(1)(d) of the freedom of information act, 1976 PA 442, MCL 15.243;”

5. That section 10(1)(b) of FOIA permits an individual to commence a civil action in circuit court, but only within 180 days after the public body’s final determination to deny the request;

6. That FOIA request 18-095 was granted in full and is not subject to appeal in circuit court, which is confined to denials alone;

7. That FOIA request 18-139 was granted in full and is not subject to appeal in circuit court, which is confined to denials alone;

8. That FOIA request 18-199 was denied due to statutory exemption on December 11, 2017;

9. That Plaintiff filed his complaint on June 11, 2018, exceeding the 180 day time limit for all of the FOIA requests listed above;

10. That FOIA request 18-232 is not a FOIA request for public records because Plaintiff acknowledges that he knows the information requested is exempt from disclosure under FOIA and instead seeks to instruct the City of Lansing how to redact the requested information, a power not granted to the individual requestor under FOIA;

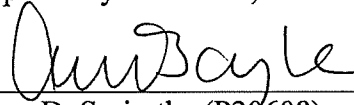
11. That FOIA grants the power to separate exempt and non-exempt solely to the public body;

12. That damages under MCL 15.240(7) may only be granted upon a showing that the public body acted arbitrarily and capriciously in violation of FOIA, which cannot be demonstrated in this matter because the information requested is statutorily exempt from disclosure.

WHEREFORE, for the foregoing reasons and pursuant to MCR 2.116(C)(8) and MCR 2.116(C)(10) as more fully set forth in Defendant's brief in support, Defendant respectfully requests this Honorable Court dismiss Plaintiff's Complaint with prejudice and award all such other relief the court deems appropriate.

Dated: 7/6/2018

Respectfully submitted,



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BRIEF IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY DISPOSITION

STATEMENT OF FACTS

Plaintiff, Steven Harry, is a frequent requestor to the City of Lansing under the Freedom of Information, Public Act 442 of 1976 ("FOIA"). During fiscal year 2018, Plaintiff made nine separate request to the City of Lansing. The present action filed by Plaintiff involves four of those nine requests.

On September 21, 2017, Plaintiff made a request under the Freedom of Information Act for the "straight life pension amounts" for twenty named current and former city employees. (**Exhibit A**, FOIA Request 18-095). Within the time allotted under the Act, Defendant granted

Plaintiff's request, FOIA 18-095, and provided responsive records at no cost. (**Exhibit B**, Grant Letter to FOIA 18-095). Because retirement calculation information is exempt from FOIA, the City looked up each city employee and provided a spreadsheet with the requested information. While a public body is not required to "make a compilation, summary, or report of information," the City of Lansing did create a document in an effort to provide responsive information to the Plaintiff. MCL 15.233(4).

On October 18, 2017, Plaintiff submitted another request under the Freedom of Information act requesting the "full retirement allowance" for the same twenty named city employees. (**Exhibit C**, FOIA request 18-139). This request required labor that exceeded the prior FOIA request, the cost of which exceeded \$50.00 and required a good faith deposit. MCL 15.234(4); City of Lansing Written Public Summary of FOIA Procedures and Guidelines. The cost to produce the records was \$125.88, or 16 increments at \$7.86, which equates to 12 minutes in labor to search for the relevant information for each of the twenty named city employees. A timely good faith deposit request was sent to Plaintiff on October 25, 2017. Plaintiff's request was granted on November 28, 2017, and responsive records were provided on December 1, 2017, after receipt of full payment (**Exhibit D**, Grant Upon Payment Letter).

On December 2, 2017, Plaintiff sent an emailing stating that "I realize that in my original FOIA request I did not specify that I wanted the source documents that showed the full retirement allowance for the 20 retirees listed in the request." (**Exhibit E**, FOIA request 18-199). Specifically, Plaintiff requested copies of the "Retirement System Computation Sheet" for each employee. Upon clarification that Plaintiff was making a new request under FOIA, the City of Lansing timely denied Plaintiff's request. (**Exhibit F**, Denial Letter for FOIA request 18-199). As explained in the denial letter, the specific records requested were not a public record subject

to disclosure under the Freedom of Information Act due to a statutory exemption under the public Employee Retirement System Investment Act. MCL 38.1140h. FOIA states that “records or information specifically described and exempted from disclosure by statute” are exempt under FOIA. MCL 15.243(1)(d). The Public Employee Retirement System Investment Act states that “information regarding the calculation of actual or estimated benefits for members of the system is exempt from disclosure by the system or the political subdivision sponsoring the system pursuant to section 13(1)(d) of the freedom of information act, 1976 PA 442, MCL 15.243.” The City of Lansing determined that the requested “Retirement System Computation Sheet” falls within the exemption listed in MCL 38.1140h. The City of Lansing determined that all of the information contained on the computation sheet is exempt from disclosure, so separation of exempt from non-exempt was not possible as to the requested records.

Plaintiff appealed this denial to the President of City Council, consistent with the City of Lansing’s FOIA Procedures and Guidelines, on December 11, 2017. City Council President Patricia Spitzley upheld the denial of Plaintiff’s request on December 18, 2017. (**Exhibit G**, Appeal Letter).

On January 5, 2018, Plaintiff requested the exact same information as FOIA 18-199, but indicated that “I realize that details of the pension calculation are exempt from FOIA.” (**Exhibit H**, FOIA follow up, 18-232). Rather than requesting a public record subject to disclosure, Plaintiff instead sought to instruct the City of Lansing on how to redact the Retirement System Computation Sheet, even though the City of Lansing had determined that the entire calculation sheet was exempt from disclosure because, as the name of the document suggests, all information contained in the computation sheet is “information regarding the calculation of actual or estimated benefits,” which is exempt from disclosure under MCL 38.1140h.

Consistently, the City of Lansing once again denied the information that was requested originally in 18-199. The City of Lansing further confirmed that the straight life pension amounts provided under FOIA request 18-095 in October 2017 were still accurate upon the denial date of January 26, 2018.

Plaintiff improperly appealed this denial to the Mayor of Lansing on January 26, 2018. The appeal was forwarded to City Council President Carol Wood, who denied Plaintiff's appeal due to the defective manner of the appeal. (**Exhibit I**, Second Appeal Letter). Specifically, Plaintiff failed to send the appeal to City Council President and failed to use the term "appeal" in his email as is required in the City of Lansing FOIA Procedures and Guidelines. (**Exhibit J**, City of Lansing FOIA Procedures and Guidelines).

Plaintiff now seeks judicial review of these four requests despite exceeding the 180-day appeal deadline and presenting no evidence that the City of Lansing arbitrarily and capriciously denied some of Plaintiff's requests despite the existence of a statute that expressly exempts the information sought.

LAW

MCR 2.116(C)(8): The Opposing Party has Failed to State a

Claim on which Relief can be Granted

A motion for summary disposition should be granted under MCR 2.116(C)(8) when the "opposing party has failed to state a claim on which relief can be granted." Plaintiff has failed to state a claim in this matter because Plaintiff has failed to meet the statutory deadline of filing within 180 days of final denial of a Freedom of Information Act request. Further, Plaintiff's claim is without merit because the information that the City of Lansing denied to release is

pursuant to a statutory exemption under the Public Employee Retirement System Investment Act. MCL 38.1140h.

MCR 2.116(C)(10): Except as to the Amount of Damages, There is No Genuine Issue as to any Material Fact, and the Moving Party is Entitled to Judgment or Partial Judgment as a Matter of Law

A motion pursuant to MCR 2.116(C)(10) tests whether, based on the affidavit, pleadings, depositions, admissions, and other evidence viewed in the light most favorable to the non-moving party, a factual dispute exists sufficient to warrant a trial. “Where the proffered evidence fails to establish a genuine issue of material fact, the moving party is entitled to judgment as a matter of law.” *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999). A party opposing a motion under MCR 2.116(C)(10) may not rest on mere allegations or denials, but must, by affidavit or other documentary evidence, “set forth specific facts showing that there is a genuine issue for trial.” MCR 2.116(G)(4); *McCart v J. Walter Thompson, Inc.*, 437 Mich 109, 127; 469 NW2d 284 (1991). *Smith v Globe Life Ins. Co.*, 460 Mich 446, 455; 597 NW2d 28 (1999).

“If a party opposes a motion for summary disposition on the ground that discovery is incomplete, the party must at least assert that a dispute does indeed exist and support that allegation by some independent evidence.” *Bellows v Del. McDonald’s Corp.*, 206 Mich App 555, 561; 522 NW2d 707 (1994). The mere promise or assertion that facts will be established is insufficient. *Maiden, supra*. Summary disposition is appropriate, even though discovery is not yet complete, where further discovery does not stand a fair chance of uncovering factual support for the opposing party’s motion. *Neumann v State Farm Mutual Automobile Ins. Co.*, 180 Mich App 479, 485; 447 NW2d 786 (1989); *Great Lakes Gas Transmission Co. v MacDonald*, 193

Mich App 571; 485 NW2d 129 (1992); *Gara v Woodbridge Tavern*, 224 Mich App 63, 68; NW2d 138 (1997).

*A. Plaintiff May Not Commence an Action in Circuit Court
When the Request is Granted in Full*

Plaintiff brings this circuit court action under the Freedom of Information Act. An individual may commence a civil action in circuit court only after the “public body makes a final determination to deny all or a portion of a request. . . .” MCL 15.240(1). Two of the FOIA requests referenced in Plaintiff’s complaint were granted in full by the City of Lansing. FOIA request 18-095, received by the City of Lansing on September 21, 2017, was granted in full on October 9, 2017. Second, FOIA request 18-139, received by the City of Lansing on October 18, 2017, was granted in full on November 28, 2017. The Freedom of Information Act does not provide for a cause of action for a Plaintiff who timely received the information requested.

*B. Plaintiff Failed to Commence this Action within
180 Days of the Public Body’s Final Denial*

“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: . . . (b) Commence a civil action in the circuit court . . . to compel the public body’s disclosure of the public records **within 180 days after a public body’s final determination to deny a request.**” MCL 15.240 (emphasis added). The Michigan Court of Appeals has held that the 180 days period of limitations begins to run upon the mailing of the denial letter by the public body. *Prins v. Michigan State Police*, 291 Mich.App. 586, 587; 805 N.W.2d 619 (2011). Letters regarding FOIA requests 18-095, 18-139, and 18-199 were sent to the Plaintiff on October 9, 2017, November 28, 2017, and December 11, 2017, respectively. Plaintiff commenced this court action on June 11, 2018, which amounts to 245 days, 195 days, and 182 days between the correspondence date to Plaintiff and

commencement date of this action. All of these requests exceed the 180 day limitation under MCL 15.240(1)(b).

C. FOIA 18-232 is an Instruction on Redaction regarding FOIA 18-199 and is Not a Request for Public Records

In December 2017, Plaintiff submitted a request for records under the Freedom of Information Act, request 18-199, requesting the “Retirement System Computation Sheets” for twenty named current and former City of Lansing employees. The City of Lansing determined that all of the information included in such a computation sheet is used in the calculation of retirement benefits for public employees. Upon making this determination, Plaintiff’s request was denied in full because the computation sheet falls within the exemption outlined in the Public Employee Retirement System Investment Act. MCL 38.1140h. This act states:

information regarding the calculation of actual or estimated retirement benefits for members of the system is exempt from disclosure by the system or the political subdivision sponsoring the system pursuant to section 13(1)(d) of the freedom of information act . . .

MCL 38.1140(3). The denial was upheld upon appeal to the Lansing City Council President.

On January 5, 2018, Plaintiff sent the following “I would like the pension calculation sheets for the following 20 retirees. I realize that details of the pension calculation are exempt from the FOIA, so I would like all calculations details redacted, leaving only the straight life pension amount . . .” This request was for the same information requested in his prior FOIA request, 18-199. Further, Plaintiff expressly acknowledges that the information requested is exempt from FOIA.

It appears that rather than making a new request for public records, Plaintiff seeks to instruct the City of Lansing on how to redact exempt information from information previously requested that the City of Lansing already made a final determination upon. If possible, the City

of Lansing would have granted in part and denied part Plaintiff's 18-199 request. The separation of exempt from non-exempt is required under the Act. MCL 15.244(1) ("If a public record contains material which is not exempt under section 13, as well as material which is exempt from disclosure under section 13, the public body **shall** separate the exempt and nonexempt material and make the nonexempt material available for examination and copying.) (emphasis added). The City of Lansing determined that the specific document sought by Plaintiff, the retirement computation sheet, could not be redacted in such a manner as to comply with MCL 38.1140h, which is why the City elected to voluntarily create a responsive document to Plaintiff's earlier FOIA requests.

D. Public Employee Retirement System Investment Act Prohibits the Disclosure of Information Sought by Plaintiff

The Freedom of Information Act permits a public body to exempt information from disclosure if the record sought meets any of the specific criteria listed in MCL 15.243. Section 13(1)(d) states "records or information specifically described and exempted from disclosure by statute." The applicable statute at issue in this matter is the Public Employee Retirement System Investment Act. Subsection 3 of this Act states that "information regarding the calculation of actual or estimated retirement benefits for members of the system is exempt from disclosure by the system or the political subdivision sponsoring the system pursuant to section 13(1)(d) of the freedom of information act, 1976 PA 442, MCL 15.243." MCL 38.1140h(3). This particular language was added in 2012 pursuant to Senate Bill 797. (**Exhibit K**, Legislative Draft of S.B. No. 797). Notably, Plaintiff submitted a 2011 Retirement System Computation Sheet with his 18-199 FOIA request. The information contained in the computation sheet would have been subject to public disclosure in 2011 because the amendment to MCL 38.1140h was not effective

until March 28, 2013. The change in the law expressly exempts the retirement computation sheets from disclosure under FOIA.

“When the language is clear and unambiguous, we will apply the statute as written and judicial construction is not permitted.” *CPAN v. MCCA*, 305 Mich.App. 301; 310; 852 N.W.2d 229 (2014), vacated in part on other grounds, *Coalition Protecting Auto No-Fault v. Michigan Catastrophic Claims Ass’n*, 498 Mich. 896; 870 N.W.2d 70 (2015) (finding that the Insurance Code expressly exempted records from disclosure under FOIA). The language used in MCL 38.1140h is clear and unambiguous and Plaintiff even acknowledged in his January 5, 2018 correspondence that he understood that information contained in the retirement computation sheets was exempt from disclosure under FOIA.

Plaintiff now seeks damages under subsection 10(7) of FOIA, which requires a determination by the court that the “public body has arbitrarily and capriciously violated this act by refusal or delay in disclosing or providing copies of the public record. . . .” The Michigan Court of Appeals has defined arbitrary as “decisive but unreasoned” and capricious as “whimsical.” *Laracey v. Fin. Inst. Bureau*, 163 Mich.App. 437, 440; 414 N.W.3d 909 (1987) (“While defendant’s actions in refusing to disclose the requested material were subsequently determined to be erroneous, we agree with the trial court that defendant did not act arbitrarily or capriciously. It is evident that defendant’s decision was not arrived at without consideration of principles or circumstances, but rather was reasonable”). Reliance upon the statutory exemption under MCL 38.1140h demonstrates that the City of Lansing did not act arbitrarily and capriciously when the public body denied Plaintiff’s request for exempted information.

Therefore, Plaintiff has failed to state a claim upon which relief can be granted. Plaintiff is seeking to compel disclosure of records that are expressly exempt from disclosure under

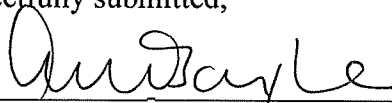
FOIA. Plaintiff also seeks damages, however the applicable statutory exemption demonstrates that the denial of any of the FOIA requests was well-reasoned and not arbitrary and capricious. Further, Plaintiff fails to meet the basic elements of bringing a claim before this court; Plaintiff's action is based upon FOIA requests that were granted in full and Plaintiff failed to meet the 180 day period of limitation set forth under the Freedom of Information Act.

CONCLUSION

For all the foregoing, Defendant respectfully request the Honorable Court dismiss Plaintiff's Complaint pursuant to MCR 2.116(C)(8) and MCR 2.116(C)(10) and award all such other relief the court deems appropriate.

Dated: 7/6/2018

Respectfully submitted,



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