

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

BRUCE R. LAIDLAW

Plaintiff,

vs

Case No. 22-000327-CZ
Hon. Carol Kuhnke

CITY OF ANN ARBOR,

Defendants.

ORDER ON DEFENDANT’S MOTION FOR SUMMARY DISPOSITION

At a Session of the Court held in the
Washtenaw County Courthouse in
the City of Ann Arbor, on
November 16, 2022

PRESENT: HONORABLE CAROL KUHNKE, Circuit Judge

Before the Court is defendant City of Ann Arbor’s motion for summary disposition brought pursuant to MCR 2.116(C)(8) and (10). The Motion is GRANTED in full for the reasons stated herein.

I. BACKGROUND

This case arises from request submitted by plaintiff Laidlaw to defendant City of Ann Arbor pursuant to Michigan’s Freedom of Information Act (FOIA), MCL 15.231 *et seq.* Plaintiff’s FOIA request concerned a 9-page investigative report (the Report). That Report pertained to allegations that the (then current, now former) City Administrator had made comments demonstrating insensitivity toward diversity, equity, and inclusion.

Specifically, Plaintiff requested an *unredacted* copy of the Report. Defendant responded to the request by providing a *redacted* copy of the Report, along with a letter explaining that the redactions—13 in total—were made pursuant to subsection 13(1)(a) of the FOIA, MCL 15.243(1)(a), which exempts from disclosure any “[i]nformation of a personal nature if public disclosure of the information would constitute a clearly unwarranted invasion of an individual’s privacy.”

Plaintiff filed this lawsuit on March 21, 2022. The Complaint sought relief in the form of, *inter alia*, an order requiring Defendant to provide Plaintiff with an *unredacted* copy of the Report, and an order requiring Defendant to pay Plaintiff’s costs and reasonable attorney fees.

In lieu of answering, Defendant moved for summary disposition pursuant to MCR 2.116(C)(8) and (10). Plaintiff’s response in opposition was filed on June 21, 2022. In that response, Plaintiff conceded that, as a *pro se* litigant, he is not entitled to recover attorney fees. See *Laracey v Financial Institutions Bureau*, 163 Mich App 437, 446 (1987) (holding that an attorney acting *pro se* is not entitled to attorney fees under the FOIA).

On August 26, 2022, Plaintiff filed a document entitled, “Supplemental Brief Regarding Sanctions.” Attached to this brief was an *unredacted* copy of the Report. Plaintiff indicated he received this unredacted copy from the Michigan Attorney Grievance Commission (the AGC). Plaintiff’s supplemental brief requested additional relief in the form of an award of punitive damages and the imposition of a civil fine.¹ See MCL 15.240(7); MCL 15.240b.

On September 9, 2022, Defendant filed its reply in support of its motion for summary disposition. In its reply, Defendant argued that Plaintiff’s claim under the FOIA was now moot, insofar as Plaintiff had already obtained an unredacted copy.

¹ Plaintiff has not asserted a claim for actual or compensatory damages under MCL 15.240(7).

The Court heard argument on Defendant’s motion for summary disposition on September 14, 2022.

The issue of mootness was addressed at the motion hearing. When asked why the claim for court-ordered disclosure was not moot, Plaintiff stated that the *unredacted* copy he received from the AGC contained “markings” that were not contained in the *redacted* copy provided by Defendant in response to the FOIA request. In response, defense counsel confirmed on the record that the two documents were the same in all respects, with the exception of the redactions in the version produced in response to the FOIA request (obviously), and the inclusion of an electronic signature (of the Report’s author) on the unredacted copy that Plaintiff obtained through the attorney grievance process.² Plaintiff expressed satisfaction with this explanation.

II. STANDARD OF REVIEW

Summary disposition is appropriate under MCR 2.116(C)(8) if the well-pleaded factual allegations in the complaint, even if accepted as true and construed in a light most favorable to the non-moving party, fail to state a claim on which relief can be granted. See *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159-60 (2019).

Summary disposition is appropriate under MCR 2.116(C)(10) if there “is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law.” *Patrick v Turkelson*, 322 Mich App 595, 605 (2018). “A motion under MCR 2.116(C)(10) is generally premature if discovery has not been completed unless there is no fair likelihood that

² Defense counsel explained that the copy provided in response to the FOIA request lacked a signature because the author’s (electronic) signing of the Report “locked” the document and had the effect of preventing Defendant from using software to make the redactions it believed necessary for purposes of public disclosure.

further discovery will yield support for the nonmoving party's position." *Liparoto Const, Inc v General Shale Brick, Inc*, 284 Mich App 25, 33 (2009).

III. DISCUSSION

If a FOIA request is denied in full or in part, the person making the request may commence an action in the circuit court to compel disclosure. MCL 15.240(1)(b) and (4). In addition to court-ordered disclosure, the FOIA allows a prevailing plaintiff to recover reasonable attorneys' fees and costs. MCL 15.240(6). Further, the court "shall" award punitive damages and order the defendant public body to pay a civil if the court determines that the defendant "arbitrarily and capriciously violated [the FOIA] by refusal or delay in disclosing or providing copies of a public record," MCL 15.240(7), and/or if the defendant "willfully and intentionally failed to comply with [the FOIA] or otherwise acted in bad faith," MCL 15.240b.³

A. Mootness

In this matter, the Court finds that Plaintiff's substantive claim under the FOIA (i.e., for public disclosure of an unredacted copy of the Report) is moot in light of Plaintiff having already obtained a complete, unredacted copy of the Report through the AGC process. See *Herald Co, Inc v Ann Arbor Pub Schs*, 224 Mich App 266, 270-271 (1997) ("When the disclosure that a suit seeks has already been made, the substance of the controversy disappears and becomes moot."). That mootness, however, does not resolve Plaintiff's request for costs under MCL 15.240(7), nor does it resolve Plaintiff's request for an award of punitive damages and the imposition of a civil fine. See *Amberg v City of Dearborn*, 497 Mich 28, 33 (2014); *Thomas v New Baltimore*, 254 Mich App 192, 202 (2002) ("The mere fact that plaintiff's substantive claim under the FOIA was

³ Separate remedies are available if a court determines that the fee charged by the public body under MCL 15.234 exceeded that allowed under the FOIA. MCL 15.240a. No such claim is made by Plaintiff in this case.

rendered moot by disclosure of the records after plaintiff commenced the circuit court action is not determinative of plaintiff's entitlement to fees and costs under MCL 15.240(6).”)

B. Costs

The Michigan Supreme Court has held that a FOIA plaintiff whose substantive claim is rendered moot by the disclosure of the public record(s) at issue is nevertheless entitled to costs under MCL 15.240(6) if the plaintiff “prevailed” in their action brought under MCL 15.240(1)(b). See *Amberg*, 497 Mich at 33-34. The *Amberg* Court further explained that to “prevail” in this context, the plaintiff must demonstrate that the action was “reasonably necessary to compel the disclosure of public records, and . . . had a substantial causative effect on the delivery of the information to the plaintiff.” *Id.* at 34 (internal quotation marks and brackets omitted).

Applying *Amberg* to this matter, the Court concludes that Plaintiff is not entitled to an award of costs under MCL 15.240(6). Critically, Plaintiff offers no evidence whatsoever that the present litigation had any causative effect on Plaintiff obtaining the unredacted copy of the Report through the attorney grievance process. Nor does Plaintiff argue that discovery in this matter would lead to such evidence. For these reasons, the Court concludes that Defendant is entitled to summary disposition on Plaintiff's request for costs.

C. Fines and Punitive Damages

The only violation of (or failure to comply with) the FOIA alleged by Plaintiff concern the 13 redactions that were made pursuant to the “privacy exemption” of the FOIA. See MCL 15.243(1)(a).

The FOIA's privacy exemption has two requirements. See *Michigan Federation of Teachers v University of Michigan*, 481 Mich 657, 675 (2008). “First, the information [withheld from disclosure] must be ‘of a personal nature.’ Second, it must be the case that the public

disclosure of that information ‘would constitute a clearly unwarranted invasion of an individual’s privacy.’” *Id.* (quoting MCL 15.243(1)(a)).

With respect to the first requirement, this Court must consider whether the subject person’s name or other identifying information “when coupled with the information in [the Report] constitutes information of a personal nature and, if so, whether the method for protecting the private information was minimally sufficient to avoid an unwarranted invasion of privacy.” *ESPN, Inc v Michigan State University*, 311 Mich App 662, 667 (2015). As to the second, this Court “must balance the public interest in disclosure against the interest [the Legislature] intended the exemption to protect.” *Mager v Dep’t of State Police*, 460 Mich 134, 145 (1999) (internal quotation marks and citation omitted). Further, “the only relevant public interest in disclosure to be weighed in this balance is the extent to which disclosure would serve the core purpose of the FOIA, which is contributing significantly to public understanding of the operations or activities of the government.” *Id.*

With regard to civil fines and punitive damages, the FOIA provides:

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).]

And:

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. [MCL 15.240b.]

Having fully reviewed the Report, the Court concludes that Plaintiff is *not* entitled to award of punitive damages or the imposition of a civil penalty. In so ruling the Court is mindful that “even if defendant’s refusal to disclose or provide the requested materials [violated the FOIA], it was not necessarily arbitrary or capricious if the defendant’s decision . . . was based on consideration of principles or circumstances and was reasonable, rather than whimsical.” *Mededith Corp v City of Flint*, 256 Mich App 703, 717 (2003). In other words, as it relates to punitive damages and fines, the precise question before this Court is *not* whether the redactions to the Report were permitted by the FOIA’s privacy exemption; rather, it is whether Defendant acted “arbitrarily and capriciously” or “willfully and intentionally failed to comply with [the FOIA] or otherwise acted in bad faith.” MCL 15.240(7); MCL 15.240b.

The redactions made pursuant to the FOIA’s privacy exemption were as follows:

- On page 3 of the Report, addressing a comment allegedly made by the City Administrator to “another member of the City leadership team” regarding the hiring of minority job applicants, a single redaction of the job title of the individual in Defendant’s legal department to whom the comment was reported;
- On page 4 of the Report, addressing a comment allegedly made by the City Administrator concerning one of Defendant’s several city commissions, eight (8) redactions of information tending to identity of specific commission that was the subject of the alleged comment; and
- On page 5 of the Report, addressing comments allegedly made by the City Administrator regarding the sexual orientation of two city employees, a total of four (4) redactions of information tending to identify the subject of the alleged comments.

The Court concludes that Defendant’s assertion of the privacy exemption in relation to these redactions was not “arbitrary and capricious” as those terms have been defined in relation to the FOIA. Nor is the Court persuaded that Defendant’s actions constitute a willful or intentional failure to comply with the FOIA. All of the redactions concern information that is, arguably at

least, of a personal nature, insofar as they are descriptors (such as job titles, physical attributes, or other identifiers) that could be used to identify the subject of the remarks attributed to the City Administrator, or alleged witnesses to those remarks. And as Defendant notes in its brief, several of those remarks relate to the subject individuals' sexual orientation.

Further, the Court is not persuaded that the redactions at issue had the effect of frustrating the "core purpose of the FOIA, which is contributing significantly to public understanding of the operations or activities of the government." See *Mager*, 460 Mich at 145. Although the redactions may demonstrate a broad interpretation of the FOIA's privacy exemption, a casual reader of the Report could readily understand Defendant's operations and/or activities as it relates to its former City Administrator.

IV. CONCLUSION

Defendant's motion for summary disposition is GRANTED for the reasons stated on the record and in this opinion and order.

This is a final order and DOES close this case.

/s/ Carol Kuhnke
November 16, 2022

Carol Kuhnke
Circuit Court Judge

The seal of the Circuit Court of Wayne County, Michigan, is circular with a scalloped border. It features a central figure holding a scale and a sword, surrounded by the text "CIRCUIT COURT OF WAYNE COUNTY MICH." and a star.