STATE OF MICHIGAN
WASHTENAW COUNTY TRIAL COURT

PATRICIA D. LESKO, THOMAS STULBERG and THOMAS F. WIEDER

Plaintiffs,

v

CITY OF ANN ARBOR,

Defendant.
_____/

Case No. 19-639CZ
Hon. Carol Kuhnke

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BRIEF IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY DISPOSITION

INTRODUCTION

Plaintiffs Patricia Lesko, Thomas Stulberg, and Thomas Wieder have petitioned this court for declaratory and injunctive relief to prevent the City from releasing certain communications in response to a request for records under Michigan's Freedom of Information Act ("FOIA"), MCL 15.231 et seq. It is the same FOIA process that Plaintiff Lesko has used, many times over a period of years, to obtain similar public records including communications between City Council members and private individuals and other documents involving City business. Nevertheless, because a resident has requested records that involve communications between Plaintiffs and members of the City Council, Plaintiffs hope to bar the City from disclosing public records by

having the court declare the communications from the three Plaintiffs to City Council members beyond FOIA's reach. Strangely, Plaintiffs have also petitioned for a declaratory judgment that not only includes their communications, but also any communications between Council members, on any topic of City business.[1]

However, Plaintiffs' claim lacks the requirements for declaratory relief and, regardless, is rooted in an incorrectly limited interpretation of Michigan's FOIA. Given these deficiencies, the court should dismiss their complaint under MCR 2.116(C)(8) for failure to state a claim for which relief can be granted. Furthermore, as a threshold matter, Plaintiffs lack standing to request a ruling on the scope of FOIA involving communications between City Council members.

RELEVANT FACTS

The FOIA Request

On April 18th, Ann Arbor resident Luis Vazquez requested public records through the City's FOIA website. ("The request").[2] The request was, in relevant part, for any communications received during 2019 by "[C]ity of Ann Arbor staff and/or council members" from Plaintiffs Wieder and Stulberg, and any "exchanged between" Plaintiff Lesko and any City Council member. The request sought all responsive public records in existence on either official (i.e. City-provided) or personal accounts. Further, the request also sought communications among City Council members Eaton, Bannister, Nelson, Griswold and Hayner during a certain time period.

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[1] Specifically, the complaint requests: "Declare that the City is not required to produce the material sought in the Request or such material sought in any future request." The Request refers to the Vasquez FOIA request, which requests the communications between the Plaintiffs and the Councilmembers as well as communications among certain Councilmembers.

[2] The request was attached to Plaintiffs' Complaint as Exhibit A.

The Plaintiffs

Plaintiff Lesko has for many years availed herself of the City's FOIA process. For example, just before filing the present lawsuit requesting that email communications with City Council members be exempt from FOIA, she filed a FOIA request on June 4, 2019 seeking: "Copies of all text messages, email messages, and messages sent via social media direct messaging (including any email messages sent via nongovernmental accounts, because these are also subject to Michigan FOIA)" received by City Council members from Joan Lowenstein, Chuck Warpehoski, or Kirk Westphal, all three of whom are private individuals. Furthermore, using this same language, Plaintiff Lesko sought communications "exchanged between any of the following: Chris Taylor, Julie Grand, Zack Ackerman, and Chip Smith dated January 1, 2019 to March 1, 2019." (See Request 2045, attached as Exhibit 1). Plaintiff Lesko has also requested as public records copies of communications between specific residents and City Council members over a period of time. (See for example Request 904 attached as Exhibit 2).

The City has complied with numerous such request by Plaintiff Lesko, both in her personal capacity and her claimed status as "a representative of news media affiliated with the Ann Arbor Independent newspaper" or "affiliated with A2Politco.com." With respect to communications, the City has produced records that involve City business, omitting only purely personal communication. In other words, the City recognizes that communications regarding personal matters, as opposed to City business, are not required to be produced in response to a FOIA request.

Plaintiff Tom Wieder, a local attorney, has in the past threatened to bring suit against the City for allegedly not fully complying with Plaintiff Lesko's FOIA requests. (See Wieder March 24, 2019 Email attached as Exhibit 3). Plaintiff Tom Stulberg is a politically active local resident who frequently corresponds with City Council members and attends public meetings.

The City's Response to the Vasquez FOIA

After a thorough search and review of records, the City responded to the Vasquez FOIA with the responsive records. However, on June 12th, 2019, the day before the City was to respond to the FOIA request, Plaintiffs filed the instant claim for declaratory and injunctive relief to prevent disclosure of certain communications that the City was prepared to release pursuant to its statutory obligation. The parties stipulated to a preliminary injunction staying the release of any of the contested documents pending resolution of the matter by this court. From the City's perspective this was done only for the efficient administration of this case.[3] The City's position is that Plaintiffs' arguments lack legal merit. In fact, as set forth below, Plaintiffs' assertion that communications between residents and members of City Council on matters of Council business is beyond the reach of the FOIA is contrary to the plain language of the FOIA and likely contrary to the practice of every municipality in Michigan.

STANDARD GOVERNING MOTION

A motion for summary disposition under MCR 2.116(C)(8) "tests the legal sufficiency of the complaint." *Maiden v Rozwood*, 461 Mich 109, 199 (1999). A claim is dismissible under this rule when it is "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery," despite "all well-pleaded factual allegations [being] accepted as true, and construed in a light most favorable to the nonmovant." *Wade v Dep't of Corrections*, 439 Mich 158, 162–63 (1992). A claim that Plaintiffs' lack the standing to sue is viewed as a motion under MCR 2.116(C)(5), i.e., that Plaintiffs lack the legal capacity to sue. *Pontiac Police & Fire Retiree Prefunded Grp Health & Ins Trust Bd of Trs v City of Pontiac*, 309 Mich App 611, 619 (2015). In

[3] The City did provide Mr. Vazquez with public records responsive to his request that were not subject to the preliminary injunction. (See Letters sent to Vazquez attached as Exhibit 4).

reviewing a motion under (C)(5), this Court can take into account all pleadings, affidavits, admissions, and any other documentary evidence submitted by the parties. *Kuhn v Secretary of State*, 228 Mich App 319, 332–33 (1998).

ARGUMENT

I. Plaintiffs lack standing to seek a declaratory judgment concerning whether FOIA covers correspondence between Councilmembers on matters of City business.

Plaintiffs' clearly lack standing to block the City from providing records—pursuant to the FOIA—of communication between its councilmembers about City business. Even if there were grounds to seek an injunction to prevent such disclosure (which there are not), Plaintiffs would not be the party with standing to bring such a suit. Michigan law of standing requires "a special injury or right, or substantial interest that will be detrimentally affected in a manner different from the citizenry at large or [a] statutory scheme [implying] that the Legislature intended to confer standing on the litigant." *Lansing Sch. Educ. Ass'n v. Lansing Bd. of Educ.*, 487 Mich. 349, 372 (2010). Plaintiffs have no rights implicated by Councilmember communications unrelated to the Plaintiffs. Any interest they have in preventing disclosure is, if anything, a general and theoretical interest as citizens and nothing in Michigan's FOIA suggests that citizens would be able to sue on the behalf of their elected representatives.

II. Plaintiffs lack the necessary "actual controversy" for declaratory relief

Michigan Court Rule 2.605 permits a Michigan court to declare "the rights and other legal relations of an interested party" only for cases of "actual controversy within its jurisdiction." This exists only if (1) "a declaratory judgment is necessary to guide a plaintiff's future conduct in order to preserve legal rights," and (2) there is "an adverse interest necessitating the sharpening of the issues raised." *UAW v Cent Michigan Univ Trustees*, 295 Mich App 486, 495 (2012); *Lansing Sch Educ Ass'n*, 487 Mich 349, 372 (2010).

The adverse interest requirement ensures the "sincere and vigorous advocacy" needed to produce an outcome that reflects the rights of all interested parties. *Lansing Sch Educ Ass'n,* 487 Mich at 355 (quoting *Detroit Fire Fighters Ass'n v Detroit,* 449 Mich 629, 633 (1995)). Consequently, an issue is ineligible for declaratory relief when the parties before the court agree. *City of Detroit v Div 26 of Amalgamated Ass'n of St, Elec Ry & Motor Coach Employees of Am,* 332 Mich 237, 258 (1952). In addition to merely being adverse, the Michigan Supreme Court "has long recognized the necessity of having *all* interested parties before it in order to have a case that is appropriate for declaratory judgment." *Lansing Sch Educ Ass'n v Lansing Bd of Educ (On Remand),* 293 Mich App 506, 516–17 (2011). Therefore, anyone for whom a "declaration . . . would necessarily affect" their rights is also necessary party. *Id.*

In the instant case, plaintiffs' failure to join Luis Vazquez, the individual requesting the communications pursuant to the FOIA, renders declaratory judgment unavailable. Mr. Vazquez's right to full and complete information on the affairs of the government that represents him are inseparably linked to Plaintiffs' attempt to prevent open disclosure. The adverse interest requirement cannot be met unless and until plaintiff remedies this deficiency. Accordingly, declaratory relief is unavailable. Because Plaintiff has no independent grounds for their desired injunctive relief, nothing remains of their claim if it is ineligible for declaratory relief, and it should, therefore, be dismissed.

III. Plaintiffs are incorrect as a matter of law that records of communications between members of the public and elected City officials, which are retained by the official, are not public records[4]

Assuming that declaratory relief were somehow appropriate, Plaintiffs' substantive claims still fail as they rely on an incorrectly constructed interpretation of the FOIA, which is at odds with the plain language of the statute, the judicially recognized pro-disclosure policy of the FOIA, and relevant case law.

Michigan's FOIA provides that any person "has a right to inspect, copy, or receive copies of [a] requested public record of the public body." MCL 15.233(1). "Public record" is defined as all writings "prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function." MCL 15.232(i). Further, "public body" is defined, in the relevant part, as "A county, city, township, village, intercounty, intercity, or regional governing body, council, school district, special district, or municipal corporation, or a board, department, commission, council, or agency thereof." MCL 15.232(h)(*iii*).

The City of Ann Arbor clearly falls within the statutory definition of "public body" as a "city" or "municipal corporation." Whether individual elected Council members are part of the "City of Ann Arbor" as an entity is equally clear. Section 4.1(b) of the Ann Arbor City Charter explicitly states: "Subject only to limitations and exceptions provided by this charter or other provisions of law, all powers of the City shall be vested in and exercised by the Council."[5] When City Council members are acting in their official capacity then, they are part of the City of Ann

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[4] It is unclear to what extent Plaintiffs are in actual agreement on whether responsive documents to the Request held by Councilmembers and City staff are public records. As stated above, Plaintiff Lesko has submitted multiple FOIA requests seeking communications between City Council members and private residents. As such, it remains ambiguous which position plaintiff Lesko actually supports.

[5] "The Council" is defined by the charter as "the Mayor and ten Council Members." Ann Arbor City Charter, 4.1(a).

Arbor. The City is a political entity that acts through its constituent parts and no individuals are more closely aligned with the City in identity than the officials elected to lead it.

Therefore, in order to qualify as a public record, the communications at issue must be "prepared, owned, used, in the possession of, or retained by" a City Council member "in the performance of an official function." The City Charter sets out what exactly is Council's "official function." Aside from Section 4.1(b), the Charter also provides more specific grants of power to the Council, such as the City's legislative power (Section 7.1); the ability to amend and approve the City budget (Chapter 8); the authority to authorize the making of contracts (Section 14.1); oversight of the City Administrator and City Attorney (Sections 5.1(a), 5.2(a)); and many others. While no one individual member exercises any of these powers independent of the other, each individual member has a role in deciding how to exercise these powers. So, if any of the responsive communications were "prepared, owned, used, in the possession of, or retained by" a City Council member "in the performance" of any of Council's official functions.

The communications that are responsive to the Request and have been held back pursuant to the preliminary injunction have almost certainly been possessed, retained by or used in the performance of individual City Council member's official functions.[6] Many of the communications constitute individuals lobbying City Council members (sometimes more than one at a time) for that individual's preferred decision on a particular matter, resolution, or contractual issue. Sometimes this is done by merely expressing support for an agenda item, sometimes it is done through an attempt to persuade the Council member that the individual's preferred solution is best, and sometimes it is to help strategize and organize opposition for a particular policy. There

[6] The City has filed a concurrent motion under MCR 8.119(I) to file the records subject to the preliminary injunction under seal. Those records are attached to that motion with a request that they remain temporarily non-public until the Court issues an order on the motion.

is certainly nothing wrong with individuals communicating with their elected officials in this way, indeed it is the root of representative democracy. However, the individual residents presumably hope or expect that such communication will influence the individual Council members mind when that Council member is deciding how to vote on a particular issue. On the flip side, constituent input is used by Council members when they act on policy or other matters, whether or not the member ends up agreeing with the resident or not. More specifically, the email, text, or social media direct message is used by the individual Council member when that member is performing their official function. This makes the responsive communications public records which are therefore subject to production under the FOIA.

Contrary to Plaintiffs' assertions, it is immaterial that Mr. Vazquez is not seeking any specific "records of any action taken by the City or its agents," or "record of any communication made by any employee or agent of the City," or that he "identifies no subject matter" for the requested communications. Plaintiffs' Complaint, ¶ 7. Under Michigan's FOIA public records are not limited only to records *of actions taken by* the City or its agents or communications made by employees or agents of the City. The FOIA also does not require the motive of the requestor to be anything more than what Plaintiffs dismiss as "idle curiosity." Plaintiffs' Complaint, ¶ 14. Michigan courts have consistently recognized the FOIA as a pro-disclosure statute. *E.g. Tobin v Michigan Civil Serv Comm'n,* 416 Mich. 661, 664 (1982) ("We hold that the [Michigan] FOIA never prohibits disclosure . . ."). Plaintiffs' misunderstanding about the nature of FOIA is central to their erroneous conclusion that the communications in question lie outside FOIA's reach.

More specifically, Plaintiff's conception of what constitutes a public record and public body are at odds with the statute's text and relevant case law. Plaintiff incorrectly asserts that communications to and from elected officials regarding public matters are not public records

because "they do not record any action by a public body in the performance of an official function." Plaintiffs' Complaint, ¶ 9 (internal quotes omitted). In keeping with the pro-disclosure nature of FOIA, courts have interpreted the meaning of "official function" to encompass abroad variety of activities. For example, a bill from a vendor has been considered a public record retained in the performance of the broad official function of using "public funds to pay telephone expenses." *Detroit News, Inc v City of Detroit*, 204 Mich App 720, 725 (1994).

Writings created in the process of City Councilmembers receiving input from the public about matters of public concern, a core function of their elected office, are clearly used in the performance of an official function, and as such would fall under the statutory definition of a public record. The communications in question are representative writings of one of the actual core functions of their office. They are not mere byproducts of an official function, inadvertently retained by the operation of a retention policy, nor were they solely private notes kept to jog a Councilmember's memory. *Howell Ed Ass'n, MEA/NEA v Howell Bd of Ed*, 287 Mich App 228 (2010) (concerning inadvertent capture of private teacher email on school email system); *Hopkins v Duncan Twp*, 294 Mich App 401 (2011) (concerning private notes of individual councilmember). When officials elected to represent constituents hear from members of the public, about matters of public concern, they obviously are engaged in an official function; records used in the performance of that function fall squarely within the statute's definition for public records.

The City does not suggest that Councilmembers can have no personal communications. In fact, the City does not provide documents of a personal nature in response to a FOIA request. However, when a Councilmember discusses matters of public concern with a member of the public, they do so in their capacity as an elected official of the City vested with the authority given

to them by the Charter, and records created or used in the performance of that function are clearly within the bounds of the FOIA.

Furthermore, it doesn't matter on what computer (city or home) that the individual Council member has the documents. To suggest otherwise would make it trivial to circumvent the disclosure and transparency sought by the State Legislature: all elected officials would need to do is exclusively conduct business on their personal email accounts that they would prefer to stay hidden. Councilmembers' function is to listen to the people and to represent those views by proposing and voting on policy. Documents created through that process are used by the City, as a representative government, in the most quintessential way.

Documents in the possession of City Council members as part of their jobs as Council members are in the possession of the city. The City is a political entity that acts through its constituent parts; it is in possession of no records on its own and can only do so through those who act for it. Likewise, the City as an entity does not produce or receive documents, this is all done by individuals within the City. Perhaps no individuals are more closely aligned with the City in identify than the officials elected to lead it. Reading the FOIA to not cover documents held by individual Councilmembers or individual employees would largely neuter the statute and defeat the Legislature's intent.

IV. Whether the communications could be withheld under one of FOIA's exemptions is irrelevant as the decision to withhold is at the City's discretion

Plaintiffs also incorrectly assert that even if the communications were determined to be public records, they should not be disclosed because, "MCL 15.243(1)(a) provides that a public record is exempt from disclosure if disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy." Plaintiff's Complaint ¶¶ 12–13. The decision whether to exempt public records from disclosure is left to the discretion of the public body unless

external substantive law forbids it, subject to challenge by the requestor. According to Michigan Supreme Court, the "clear and unambiguous" language of the statute, "the language of the act, the intent of the Legislature, public policy, and federal case law support" the conclusion that "the Michigan FOIA authorizes, but does not require, nondisclosure of public records falling within a FOIA exemption." *Tobin*, 416 Mich. at 666-67. Thus, while Plaintiff is correct that the FOIA provides for an exemption for the protection of individual's privacy, they are mistaken in their assertion that they are situated to determine the applicability of the exemptions or that exemption is mandatory. Further, the City has a statutory obligation to separate exempt from non-exempt material, to the extent practicable. MCL 15.244. Practically, that takes the form of redactions of the material that would be an unwarranted invasion of privacy.

V. The Plaintiffs have no first amendment right to prevent the City from FOIA compliance.

Plaintiffs' complaint makes an ill-defined First Amendment claim, arguing that disclosure of their emails to Councilmembers about City business would chill their speech. Plaintiff's Complaint ¶ 14. The thrust of the claim appears to be that the mere risk that their emails might be responsive to a FOIA request amounts to "compelled disclosure" which inflicts an impermissible chill on their First Amendment rights. However, even assuming that the risk amounts to a compelled disclosure, Plaintiffs cannot demonstrate that their first amendment rights are in fact sufficiently chilled. As a practical consideration, the Plaintiffs can always simply talk to the Councilmembers rather than create a document subject to the FOIA if they so choose. Moreover, Courts in similar contexts have demanded that a "finding of a substantial 'chill' on protected first amendment rights requires a showing that the statutory scheme will result in threats, harassment, or reprisals to specific individuals. *Humphreys, Hutcheson & Moseley v. Donovan*, 755 F.2d 1211, 1220 (6th Cir. 1985) (quoting *Master Printers of Am. v. Donovan*, 751 F.2d 700, 704 (4th Cir.

1984)). Plaintiffs' entirely hypothetical harm, unsubstantiated by any facts pled in the Complaint does not rise to the level of an actionable First Amendment claim.[7]

CONCLUSION

The Michigan FOIA statute was designed to promote transparency in government. The Plaintiffs seek to influence elected officials (which is their right), but request that this Court allow them to do this secretly—whether with individual Councilmembers or the entire Council. In so doing, Plaintiffs claim that the FOIA does not apply and requests this Court order the City from complying with its requirements under the FOIA. Instead, for the above reasons, the City requests that the Court dismiss the Plaintiffs' complaint.

Respectfully submitted:
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Dated: August 15, 2019.

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[7] See, e.g., *Doe v Reed*, 561 US 186 (2010) (Disclosure of signatures on petition for referendum pursuant to the State of Washington's FOIA equivalent not sufficient to overcome Government's interest in transparency).

PROOF OF SERVICE

I hereby certify that on August 15, 2019 I sent first class mail, postage prepaid, a copy of the foregoing Defendant's Brief in Support of Motion for Summary Disposition to the above-named counsel for Plaintiff, at the address provided above.

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