

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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WILLIAM ALLEN SIMPSON,

Plaintiff-Appellant,

v

WASHTENAW COUNTY CLERK and  
WASHTENAW COUNTY ELECTION  
ADMINISTRATOR,

Defendants-Appellees.

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UNPUBLISHED

July 24, 2007

No. 271277

Washtenaw Circuit Court

LC No. 04-001356-NZ

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WILLIAM ALLEN SIMPSON,

Plaintiff-Appellant,

v

WASHTENAW COUNTY and CURTIS N.  
HEDGER,

Defendants-Appellees.

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No. 271278

Washtenaw Circuit Court

LC No. 05-001117-NZ

Before: Murphy, P.J., and Talbot and Servitto, JJ.

PER CURIAM.

Plaintiff William Simpson, acting in propria persona, appeals as of right the trial court's rulings on his requests for public records under the Freedom of Information Act ("FOIA"), MCL 15.231 *et seq.* We affirm.

We begin by setting the parameters regarding the issues that can properly be considered by this Court, which is confined to the issues upon which this Court remanded the case in *Simpson v Washtenaw Co Clerk*, unpublished opinion per curiam of the Court of Appeals, issued

December 22, 2005 (Docket No. 262724)<sup>1</sup> and the issues raised in plaintiff's complaint in Docket No. 271278. See *K & K Constr, Inc v Dep't of Environmental Quality*, 267 Mich App 523, 544; 705 NW2d 365 (2005) (it is improper for a lower court to exceed the scope of a clear remand order). We shall limit ourselves to properly preserved issues, *Farmers Ins Exch v Farm Bureau Gen Ins Co of Michigan*, 272 Mich App 106, 117-118; 724 NW2d 485 (2006), and will only consider evidence as properly submitted to the trial court and contained in the lower court record, *Wiand v Wiand*, 178 Mich App 137, 143; 443 NW2d 464 (1989). We make these initial statements because plaintiff's appellate brief tends to stray from these parameters. Plaintiff's arguments and assertions that are not focused on matters appropriately considered by us in this appeal are hereby rejected.

In the first lawsuit, summary disposition had been granted in favor of defendants, and this Court affirmed in part, and reversed and remanded in part. *Simpson, supra*, slip op at 1. In that action, "plaintiff requested that he be provided the opportunity to examine and selectively copy the qualified voter and master card files referenced by [Melanie] Weidmayer in her affidavit, as well as 'all annotations made during recall petition evaluation, in electronic form.'" *Id.* The prior opinion further indicated that "[p]laintiff also requested the software associated with the electronic qualified voter file, as well as any related instructional or descriptive documentation." *Id.* This Court held that the request for "software" was properly denied because it was exempt under the FOIA, MCL 15.232(e). *Simpson, supra*, slip op at 5. But the Court also found that "summary disposition of plaintiff's claim concerning recall evaluation annotations was premature." *Id.*, slip op at 4. The panel indicated that plaintiff's additional requests, which would encompass qualified voter and master card files and related instructional or descriptive documentation, had been granted. *Id.*, slip op at 2. Plaintiff was quoted costs of \$5.00 per CD-R copy and \$.20 per page for paper copies, but he chose to pursue the suit instead of examining the materials or obtaining copies, arguing that the costs were excessive. *Id.* This Court held that "the trial court clearly erred in finding the fees not to be excessive." *Id.*, slip op at 6.

Before the appellate opinion was issued in *Simpson*, plaintiff made additional FOIA requests and instituted a second lawsuit, which is the subject of Docket No. 271278. The second lawsuit concerned four FOIA requests. First, plaintiff sought items from the master card file referenced in the 2002 Wiedmayer affidavit, with all annotations made during the recall petition evaluation. This request was identical to one made in relation to the first FOIA suit. The request was granted, noting a \$.20 per page charge and an hourly rate of \$15.00. The second request was for any records showing the personnel costs of the county clerk relative to assisting in the evaluation of a May 2002 recall petition. The response sought some clarification, but indicated that there was no document that would show what personnel costs were expended specifically on work related to the recall petition. Defendants did follow up by providing plaintiff a spread sheet showing the gross pay of employees, who worked in the elections office, for May 2002. The third request was for any records showing time extensions for processing FOIA requests during the past year, and this request was granted, with a charge of \$29.94, using \$24.95 per hour as the

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<sup>1</sup> These matters are now entailed in Docket No. 271277.

lowest rate of a qualified employee. Finally, plaintiff requested any records showing FOIA requests and final responses submitted and issued within the last year. This request was granted, subject to an estimated charge of \$4,415, of which half would be due prior to records being pulled. The response attached a summary in support of the charges, which included information from various county departments regarding the estimated time to gather the information and an hourly rate. Plaintiff did not pursue the final two requests that had been granted because of the costs, which he deemed unlawful.

The trial court conducted an evidentiary hearing to address both the remand issues arising from the first lawsuit and the issues raised in the second lawsuit, and it subsequently rendered an opinion and order. The court found, relative to Docket No. 271277, that no electronic annotations from the qualified voter file were ever provided to the county, that neither Wiedmayer nor staff members made any annotations during the recall evaluation, that the county did not possess nor have access to the qualified voter file, which the court found was owned, possessed, and maintained by the Secretary of State, that these records could not be recreated, and that the question of associated costs, therefore, was moot because there were no records to copy or reproduce. The trial court stated that plaintiff was allowed to review the records and files that did exist; however, no copies were requested. With respect to Docket No. 271278, the court noted that plaintiff had previously requested items from the master card file with annotations, and that the annotations from the qualified voter file did not exist, but a subset of the master card file was provided to plaintiff for review. Concerning the personnel costs associated with the May 2002 recall petition, the trial court found that no document on the matter existed, although plaintiff was provided some general salary information. With regard to the two remaining requests, the court noted that the requests were granted, but the issue concerned the costs to be charged for these documents. The court acknowledged that these requests involved voluminous documents, requiring substantial personnel labor on the part of defendants. On the basis of the evidence, the court found that a copy charge of \$.05 per page was proper. Further, the court acknowledged that the FOIA allows for a charge to cover labor expenses associated with a request, although persons cannot be charged unless it would result in unreasonably high costs to the public body and the public body specifically identifies the nature of the unreasonably high costs. The court noted that the FOIA requires public bodies to establish procedures to implement the setting of such labor fees, which defendants had done, and which procedures allowed the charging of labor costs if complying with the request required 30 minutes or more of staff time to complete. The court found that the lowest paid person in defendants' FOIA office capable of document retrieval and compilation was paid \$24.95 per hour. "Therefore, the county is authorized by law to charge this plaintiff the hourly rate of \$24.95 per hour prorated to the actual length of time that it will take to duplicate the copies along with \$.05 per page for the actual copies." The court also permitted defendants to charge actual mailing costs. Plaintiff appeals as of right.

In *Herald Co, Inc v Eastern Michigan Univ Bd of Regents*, 475 Mich 463, 471-472; 719 NW2d 19 (2006), our Supreme Court set forth the following standards of review applicable in FOIA cases:

[W]e continue to hold that legal determinations are reviewed under a de novo standard. Second, we also hold that the clear error standard of review is

appropriate in FOIA cases where a party challenges the underlying facts that support the trial court's decision. In that case, the appellate court must defer to the trial court's view of the facts unless the appellate court is left with the definite and firm conviction that a mistake has been made by the trial court. Finally, when an appellate court reviews a decision committed to the trial court's discretion . . . , we hold that the appellate court must review the discretionary determination for an abuse of discretion and cannot disturb the trial court's decision unless it falls outside the principled range of outcomes.

Plaintiffs' issues can effectively be broken down into challenges regarding record production, costs associated with record production, costs and damages recoverable in a FOIA action, and miscellaneous arguments. We begin with record production. Under the FOIA, all public records are subject to disclosure, unless they are exempt from disclosure under MCL 15.243. MCL 15.233. Electronic recordings and computer records may be subject to disclosure under the FOIA. *City of Warren v Detroit*, 261 Mich App 165, 171-173; 680 NW2d 57 (2004). However, where a requested record does not exist, a public body is not required to create a new public record. MCL 15.233(5). "In response to an FOIA request, . . . the public body is not generally required to make a compilation, summary, or report of information, nor is it generally required to create a new public record." *Detroit Free Press, Inc v City of Southfield*, 269 Mich App 275, 281; 713 NW2d 28 (2005).

The only claim surviving the first lawsuit relative to record production concerned recall evaluation annotations in electronic form. At the evidentiary hearing, Election Administrator Derrick Jackson testified that defendants could access the qualified voter file database to obtain and update the list of the registered voters in Washtenaw County; however, the database was maintained at the Secretary of State's office. He further testified that there was "no possibility for any electronic annotations to be made in the qualified voter file" in 2002, when Weidmayer allegedly referenced the annotations in an affidavit. Moreover, assuming that a user might be capable of creating electronic annotations in the qualified voter file as suggested by plaintiff, Jackson's testimony established that defendants never utilized that feature. Based on Jackson's testimony, the trial court's finding that the annotations did not exist was not clearly erroneous.<sup>2</sup> Thus, defendants did not violate the FOIA by failing to provide the annotations to plaintiff. MCL 15.233(5); *Detroit Free Press, supra* at 281.

With respect to record production and the second lawsuit, there was the request for the master card files referenced in the 2002 Wiedmayer affidavit, with all annotations made during the recall petition evaluation. The trial court did confuse the master card file with the qualified voter file. The testimony in this case clearly established that the master card file was separate from the qualified voter file. The master card file consisted of hard copies of voter information cards and voter signatures, while the qualified voter file was used to store voter information electronically. Nonetheless, Jackson testified at the evidentiary hearing that defendants did not

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<sup>2</sup> Plaintiff's claim of perjury by Jackson lacks merit.

maintain the master card file that plaintiff requested and that the requested annotations did not exist. Therefore, defendants did not violate the FOIA. MCL 15.233(5); *Detroit Free Press, supra* at 281. Further, the record reflects that plaintiff received a copy of a subset of master card files that were in defendants' possession. To the extent that the records, which did exist, have been produced, this issue is moot. *Herald Co, Inc v Ann Arbor Public Schools*, 224 Mich App 266, 270-271; 568 NW2d 411 (1997); *Densmore v Dep't of Corrections*, 203 Mich App 363, 366; 512 NW2d 72 (1994). Thus, plaintiff is not entitled to relief on this issue.

The next request for records arising out of the second lawsuit concerns the request for any records showing the personnel costs of the county clerk relative to assisting in the evaluation of the May 2002 recall petition. As found by the trial court, the evidence established that there were no documents showing personnel costs specifically expended on work related to the referenced recall petition, although defendants graciously created a document for plaintiff in an attempt to fulfill his request. The fact that the document did not satisfy plaintiff's request does not afford a basis for relief on this issue as defendants were not required to create the document for plaintiff. MCL 15.233(5); *Detroit Free Press, supra* at 281. Because the records that plaintiff requested did not exist, defendants did not violate the FOIA.

The two remaining requests arising out of the second lawsuit concern the requests for any records showing time extensions for processing FOIA requests during the past year and for any records showing FOIA requests and final responses submitted and issued within the last year. The record clearly established that these requests were indeed granted, so there can be no claim that defendants failed or refused to produce the records, but plaintiff's focus is on a challenge to the costs associated with these requests. Therefore, at this juncture, we examine the issue concerning defendants' charges for handling FOIA requests.<sup>3</sup>

MCL 15.234 provides in part:

(1) A public body may charge a fee for a public record search, the necessary copying of a public record for inspection, or for providing a copy of a public record. Subject to subsections (3) and (4), the fee shall be limited to actual mailing costs, and to the actual incremental cost of duplication or publication

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<sup>3</sup> We note that plaintiff also contends that defendants violated the FOIA when they denied his request to inspect or copy the software associated with the qualified voter file. However, in *Simpson, supra*, slip op at 5, this Court determined that defendants properly denied plaintiff's request because the software was exempt from disclosure under MCL 15.232. We are bound by that decision under the law of the case doctrine. *Grievance Administrator v Lopatin*, 462 Mich 235, 259; 612 NW2d 120 (2000), quoting *CAF Investment Co v Saginaw Twp*, 410 Mich 428, 454; 302 NW2d 164 (1981). Thus, plaintiff is not entitled to relief on this issue. Additionally, plaintiff challenges the time extensions for responses to the requests giving rise to the second suit, but we find the extensions proper under MCL 15.235.

including labor, the cost of search, examination, review, and the deletion and separation of exempt from nonexempt information as provided in section 14. A search for a public record may be conducted or copies of public records may be furnished without charge or at a reduced charge if the public body determines that a waiver or reduction of the fee is in the public interest because searching for or furnishing copies of the public record can be considered as primarily benefiting the general public. . . .

(2) A public body may require at the time a request is made a good faith deposit from the person requesting the public record or series of public records, if the fee authorized under this section exceeds \$50.00. The deposit shall not exceed 1/2 of the total fee.

(3) In calculating the cost of labor incurred in duplication and mailing and the cost of examination, review, separation, and deletion under subsection (1), a public body may not charge more than the hourly wage of the lowest paid public body employee capable of retrieving the information necessary to comply with a request under this act. Fees shall be uniform and not dependent upon the identity of the requesting person. A public body shall utilize the most economical means available for making copies of public records. A fee shall not be charged for the cost of search, examination, review, and the deletion and separation of exempt from nonexempt information as provided in section 14 unless failure to charge a fee would result in unreasonably high costs to the public body because of the nature of the request in the particular instance, and the public body specifically identifies the nature of these unreasonably high costs. A public body shall establish and publish procedures and guidelines to implement this subsection.

Following the evidentiary hearing, the trial court found that the “actual incremental cost of duplication” was \$.05 per page. The undisputed evidence established that the cost of the paper, toner, and the maintenance of the copying machine was approximately \$.05 per sheet. Contrary to plaintiff’s assertion, nothing in MCL 15.234 prohibited defendants from incorporating the cost of the toner and the maintenance of the copying machine into their copy fee. Defendants would necessarily incur those costs in producing photocopies of the public records that plaintiff requested. Thus, the copy fee of \$.05 was proper under MCL 15.234.<sup>4</sup>

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<sup>4</sup> Plaintiff also argues that defendants quoted excessive fees for the CD-Rs, which, he contends, would have been the media used by defendants to transfer electronic records from their computers. At the evidentiary hearing, the trial court properly sustained defendants’ objection to plaintiff’s line of questioning regarding the cost of the CD-Rs on the basis that plaintiff did not raise the issue in his complaint. To the extent that plaintiff’s argument reaches the remand order from the first lawsuit, the trial court, on the record, agreed with plaintiff, given no evidence to the contrary, that defendants’ charges for the CD-Rs had been excessive.

Further, the labor fee of \$24.95 per hour was proper under MCL 15.234(3). There was testimony that the hourly wage of the lowest paid public body employee, who was capable of fulfilling plaintiff's requests, was \$24.95 per hour. Plaintiff did not present any evidence to rebut this testimony. Rather, he argues that defendants should not have charged a labor fee because unpaid interns were capable of making the necessary photocopies. This argument is without merit. The "FOIA allows public bodies to charge a requesting party only for employees' labor." *Coblentz v City of Novi*, 475 Mich 558, 580; 719 NW2d 73 (2006). Plaintiff failed to present any evidence that unpaid interns would be considered public body "employees." Further, plaintiff failed to establish that there were unpaid interns working for defendants at the time he made his FOIA requests, or that the interns would have been capable of retrieving the information necessary to comply with his requests. This Court will not search the record for factual support for a party's claims. *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 388; 689 NW2d 145 (2004). We reject plaintiff's argument that defendants were prohibited from charging a labor fee unless plaintiff actually requested a copy of the record. The plain language of MCL 15.234 provides that a public body may charge a fee for a public record search, examination, and review. Finally, nothing in the record suggests that defendants charged plaintiff higher fees based upon his identity, as prohibited by MCL 15.234(3).

Plaintiff contends that defendants improperly inflated the cost of the qualified voter file instruction manual, which he requested in August 2004. However, he admits, in his brief on appeal, that he "has been provided a copy of the manual at no charge." Thus, this issue is moot, and we decline to review it. *Ann Arbor Public Schools*, *supra* at 270-271.

Plaintiff also presents an argument that the court's ruling was inconsistent with the language in MCL 15.234(3), which provides that "[a] fee shall not be charged for the cost of search, examination, [and] review . . . unless failure to charge a fee would result in unreasonably high costs to the public body because of the nature of the request in the particular instance, and the public body specifically identifies the nature of these unreasonably high costs." The record clearly showed that the nature of the record requests still at issue, i.e., records regarding all FOIA requests, final responses, and extensions during the past year, would entail a great deal of extra expense and work by defendants and the various county departments that are subject to the FOIA. We find no basis for reversal. Additionally, we have examined all of plaintiff's arguments under MCL 15.234 and conclude that there was no error in the court's application of the statute.

Plaintiff also contends that the trial court erred in failing to permanently enjoin defendants from charging excessive fees in responding to FOIA requests. We disagree. Plaintiff apparently sought a broad order that would encompass all future FOIA requests made to defendants by anyone, and which would essentially require defendants to comply with MCL 15.234. Under the FOIA, "[a] public body is not at liberty to simply 'choose' how much it will charge for records." *Tallman v Cheboygan Area Schools*, 183 Mich App 123, 130; 454 NW2d 171 (1990). Defendants are already legally required to comply with MCL 15.234, and neither the trial court, nor this Court, is in a position to set a particular cost amount that defendants may charge in the future, given that actual costs and labor expenses are subject to change over time and dependent on circumstances, e.g., a rise in copying costs. There is simply no legal basis for an all-encompassing injunction as requested by plaintiff. Justice does not require such an

injunction, there is not a real and imminent danger of irreparable injury, and, as reflected in this litigation and the prior appeal regarding costs charged here, remedies exist if a party believes he or she is being overcharged relative to particular record requests under the FOIA. See *Higgins Lake Property Owners Ass'n v Gerrish Twp*, 255 Mich App 83, 106; 662 NW2d 387 (2003). Plaintiff's unsupported assertion that defendants charge excessive fees to thousands of people each year in response to FOIA requests was mere speculation and was insufficient to support his claim for a permanent injunction. See *Kernen v Homestead Dev Co*, 232 Mich App 503, 514-515; 591 NW2d 369 (1998).

Turning to the issue of costs and damages potentially recoverable in a FOIA action, plaintiff contends that the trial court erred in failing to award him actual and punitive damages in this case. We disagree.

Under the FOIA, if a public body makes a final determination to deny all or a portion of a request, the requesting person may, as plaintiff did in this case, commence an 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(1)(b). MCL 15.240(6) provides:

If a person asserting the right to inspect, copy, or receive a copy of all or a portion of a public record prevails in an action commenced under this section, the court shall award reasonable attorneys' fees, costs, and disbursements. If the person or public body prevails in part, the court may, in its discretion, award all or an appropriate portion of reasonable attorneys' fees, costs, and disbursements. The award shall be assessed against the public body liable for damages under subsection (7).

“[A]ttorney fees and costs must be awarded under the first sentence of MCL 15.240(6) only when a party prevails completely.” *The Local Area Watch v Grand Rapids*, 262 Mich App 136, 150; 683 NW2d 745 (2004). “Applying the plain text of the second sentence of § 10(6), we conclude that whether to award plaintiff reasonable attorney fees, costs, and disbursements when a party only partially prevails under the FOIA is entrusted to the sound discretion of the trial court.” *Id.* at 151. To determine whether a plaintiff prevailed in an action,

[t]he test is whether: “(1) the action was reasonably necessary to compel the disclosure; and (2) the action had the substantial causative effect on the delivery of the information to the plaintiff.” [*Id.* (citation omitted).]

In this case, plaintiff was only successful on his claim that the copy fees quoted by defendants were excessive.<sup>5</sup> However, for the most part, he did not prevail, as evidenced by the fact that no records were disclosed or provided to plaintiff as a result of this action. Thus, at best, the decision whether to award damages was within the trial court's discretion. In light of

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<sup>5</sup> To the extent that CD-R charges were excessive in the first suit, it does not give rise to a damage claim when such a claim was not part of the earlier remand order.

the fact that plaintiff failed to present any documentary evidence showing that he, in fact, paid any of the fees quoted by defendants, and the fact that the records that plaintiff sought to discover were either made available to him or did not exist, we cannot conclude that the trial court abused its discretion in declining to award damages or costs to plaintiff under MCL 15.240(6).

Further, the trial court did not abuse its discretion in failing to award punitive damages to plaintiff. MCL 15.240(7) provides:

If the circuit 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 award, in addition to any actual or compensatory damages, punitive damages in the amount of \$500.00 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.

A trial court may only assess punitive damages in a FOIA case “if the court orders disclosure of a public record.” *Michigan Council of Trout Unlimited v Dep’t of Military Affairs*, 213 Mich App 203, 221; 539 NW2d 745 (1995). The trial court in this case did not order disclosure of any public records. Therefore, plaintiff was not entitled to punitive damages. “The lack of a court-ordered disclosure precludes the award of punitive damages.” *Local Area Watch, supra* at 153, quoting *Bredemeier v Kentwood Bd of Ed*, 95 Mich App 767, 773; 291 NW2d 199 (1980). Moreover, there was no evidence showing an arbitrary or capricious FOIA violation.

Finally, in the category of miscellaneous arguments or issues, plaintiff maintains that former County Clerk Peggy Haines and former Election Administrator Melanie Weidmayer were in contempt of court for failing to appear at the evidentiary hearing “and other hearings.” Plaintiff waived this issue by not including the issue in his statement of questions presented, and by giving the issue less than cursory treatment in his brief on appeal. *Caldwell v Chapman*, 240 Mich App 124, 132; 610 NW2d 264 (2000). Plaintiff also argues that Haines’ and Weidmayer’s failure to testify prevented the disclosure of records and that their testimony was essential to a fair resolution of this case and appeal. However, plaintiff failed to present any satisfactory argument in support of his position that would necessitate reversal. He failed to establish how the witnesses’ testimony prevented the disclosure of records. Further, he failed to cite any authority in support of his position. An appellant may not merely announce his or her position and leave it to this Court to discover and rationalize the basis for his claims. *In re Petition by Wayne Co Treasurer for Foreclosure of Certain Lands for Unpaid Prop Taxes*, 265 Mich App 285, 299-300; 698 NW2d 879 (2005). Thus, this issue is deemed abandoned on appeal. *Etefia v Credit Technologies, Inc*, 245 Mich App 466, 471; 628 NW2d 577 (2001). Moreover, we see no ultimate impact on resolution of the substantive matters addressed in this case.

Plaintiff also argues that the trial judge should be disqualified, and that this case should be reassigned to a different judge on remand, because the trial judge was biased against him.

Because a remand is unnecessary in this case, this issue is moot. See *In re Contempt of Dudzinski*, 257 Mich App 96, 112; 667 NW2d 68 (2003).

In sum, and to the extent that we have not specifically analyzed above every issue posed by plaintiff, we conclude, on review and examination of all the issues raised by plaintiff on appeal, that there is no basis for reversal.

Affirmed.

/s/ William B. Murphy  
/s/ Michael J. Talbot  
/s/ Deborah A. Servitto