STATE OF MICHIGAN

COURT OF APPEALS

HAMMOND BAY PRESERVE, LLC, Plaintiff-Appellant,	UNPUBLISHED January 27, 2004
v	Nos. 244966; 246058 Ottawa Circuit Court LC No. 01-039820-CZ
DONALD E. MILLER and SPRING LAKE TOWNSHIP, Defendants-Appellees.	

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

PER CURIAM.

Plaintiff appeals as of right the trial court order that granted defendants' motion for summary disposition and the trial court order granting defendants' motion for costs and fees pursuant to MCR 2.405(D). Plaintiff, a developer seeking an amendment for its planned unit development, filed a claim against defendants, the township clerk and township, for an alleged violation of the Freedom of Information Act ("FOIA"), MCL 15.231 *et seq.* Plaintiff asserted that defendants denied requests for audiotapes of an October 18, 2000, planning commission meeting (first FOIA request) and a January 8, 2001, township board meeting (second FOIA request), where a proposed wetlands development moratorium was discussed. Plaintiff also maintained that defendants denied a request for various correspondence related to the moratorium matter. We affirm in part and reverse in part and remand.

We first admonish both parties for what appears to be unnecessary protracted litigation, where amicable communications should have swiftly resolved any controversy. That being said, we review the trial court's decision to grant defendants' motion for summary disposition de novo. *Dressel v Ameribank,* 468 Mich 557, 561; 664 NW2d 151 (2003). In *Thomas v City of New Baltimore,* 254 Mich App 196, 201; 657 NW2d 530 (2002), this Court discussed the basic principles on which the FOIA is grounded.

> The FOIA is a mechanism through which the public may examine and review the workings of government and its executive officials. It was enacted to carry out this state's strong public policy favoring access to government information, recognizing the need for citizens to be informed so that they may fully participate in the democratic process and thereby hold public officials accountable for the manner in which they discharge their duties. By its express

> terms, the FOIA is a prodisclosure statute; a public body *must disclose all public records not specifically exempt under the act.* [Citations omitted; emphasis added.]

"Except as expressly provided in section 13,[1] upon providing a public body's FOIA coordinator with a written request that describes a public record sufficiently to enable the public body to find the public record, a person has a right to inspect, copy, or receive copies of the requested public record of the public body." MCL 15.233(1). The FOIA further provides that "a court that determines a public record is not exempt from disclosure shall order the public body to cease withholding or to produce all or a portion of a public record wrongfully withheld[.]" MCL 15.240(4). Under MCL 15.235(1), a person seeking a public record is required to make a written request for the record to the FOIA coordinator of the public body. After receiving the request, the public body must then respond to the public record request within five business days in one of four ways: (1) granting the request, (2) denying the request in writing, (3) partly granting the request and partly denying it in writing, or (4) issuing an extension notice giving the public body ten extra business days to respond. MCL 15.235(2). A failure to respond in one of the above four ways constitutes "a public body's final determination to deny the request." MCL 15.235(3). The party requesting information in a FOIA action need only show that the request was made and denied; thereafter, the burden is on the agency to show a viable defense. *Pennington v Washtenaw Co Sheriff*, 125 Mich App 556, 564-565; 336 NW2d 828 (1983).

Regarding its first FOIA request, plaintiff failed to show that defendants denied the request. Plaintiff requested copies of the audiotapes made of the October 18, 2000, planning commission meeting and a copy of the minutes of the meeting. Although a copy of the minutes were provided, plaintiff presented the deposition testimony of Bradley Gruizinga, claiming that defendants failed to provide an audiotape of the first part of the planning commission meeting where the proposed wetlands moratorium was discussed. But, when the attorneys for the parties met to compare the contents of copies of the October 18, 2000, audiotapes each party had, they determined that, although defendants had two tapes of the commission meeting, the first one was completely blank. They also concluded that plaintiff's and defendants' second tape of the October 18, 2000, were the same. In addition, both Thomas DeGram and defendant Donald Miller averred in their affidavits that they did not intentionally alter, redact or edit information on the tapes and that Miller gave plaintiff everything he had.

The FOIA does not require a public body to create a new record. MCL 15.233(4); *Herald Co v Bay City,* 463 Mich 111, 122; 614 NW2d 873 (2000). Further, the FOIA does not require that information be recorded. *Bredemeier v Kentwood Bd of Ed*, 95 Mich App 767, 771; 291 NW2d 199 (1980). If, however, information is in fact recorded, it must be disclosed. *Id.* Plaintiff presented no testimony or documentary evidence establishing that defendants failed to furnish plaintiff with an audiotape with recordings on it from the October 18, 2000, planning

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[1] MCL 15.243. Section 243 lists items that are exempt from disclosure. Defendants do not claim any exemption under the statute.

commission meeting. Rather, the parties' attorneys agreed that one of defendants' original tapes, tape 1, were blank and that plaintiff's and defendants' tape 2 had the same information.

Because the evidence indicates that defendants furnished plaintiff with all of the public records in their possession in regard to the first FOIA request, and because the FOIA does not require a public body to create new records, defendants properly responded to this request and did not violate the FOIA.

With respect to the second FOIA request, the record shows that defendants failed to provide plaintiff with complete copies of the audiotapes of the January 8, 2001, township board meeting. Defendants' myriad arguments in regard to why plaintiff did not receive complete copies are inapposite because there is no claim that portions of the tapes were exempt from disclosure under the FOIA; defendants had a complete recording of the meeting; the recordings were requested, and the recordings were not fully provided to plaintiff. See MCL 15.233(1); MCL 15.240(4); *Thomas, supra* at 201. The trial court's reliance on *Kitchen v Ferndale City Council,* 253 Mich App 115; 654 NW2d 918 (2002), was misplaced. At best, *Kitchen* could be read to state that once the written minutes of public meetings are officially adopted by a public body, nothing in the Open Meetings Act, MCL 15.261 *et seq.,* requires the public body to continue to maintain audiotapes of public meetings. Here, however, assuming application of the ruling to the FOIA, defendants continued to maintain the audiotapes of the relevant meetings; they existed and were in defendants' possession, thus disclosure or submission was required. See *Bredemeier, supra* at 771. The trial court erred in granting summary disposition in favor of defendants. Rather, plaintiff is entitled to summary disposition on its cross-motion because there is no factual dispute that defendants failed to fully comply with plaintiff's second FOIA request, and because there is no exemption claimed under MCL 15.243. As a matter of law, defendants committed a FOIA violation. In light of our ruling, we see no need to address any factual issues regarding the correspondence that plaintiff requested but now has in its possession.

Plaintiff next argues that the trial court erred when it concluded that plaintiff was not a "prevailing party" under FOIA entitled to an award of attorney fees and costs pursuant to MCL 15.240(6). We review an award of attorney fees to a prevailing plaintiff in a FOIA action for an abuse of discretion. *Messenger v Ingham Co Prosecutor*, 232 Mich App 633, 647; 591 NW2d 393 (1998).

MCL 15.240(6), the provision of the FOIA that governs an award of attorney fees and costs, provides in relevant part:

> 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….

In general, a party prevails in a FOIA action when: (1) the action was "reasonably necessary to compel the disclosure," and (2) the action had "a substantial causative effect on the delivery of the information to the plaintiff." *Scharret v City of Berkley*, 249 Mich App 405, 414; 642 NW2d 685 (2002).

Even though plaintiff was able to obtain a full recording of the January 8, 2001, meeting from other sources before the litigation was concluded, he did not receive the information until after the suit was filed, nor did defendants provide it. In fact, discovery was necessary to verify that plaintiff indeed now had a complete copy of the requested materials. Under the unusual factual circumstances found here, we find instructive this Court's ruling in *Thomas, supra* at 205, quoting *Walloon Lake Water Sys, Inc v Melrose Twp,* 163 Mich App 726, 733-734; 415 NW2d 292 (1987), wherein the Court stated:

> "[W]e believe that a party 'prevails' in the action so as to be entitled to a mandatory award of costs and fees where he is forced into litigation and is successful with respect to the central issue that the requested materials were subject to disclosure under the FOIA, even though the action has been rendered moot by acts of the public body in disposing of the documents. An otherwise successful claimant should not assume the expenses of the litigation solely because it has been rendered moot by the unilateral actions of the public body."

In the present case, plaintiff was entitled to a full copy of the audiotapes related to the second FOIA request. Plaintiff was therefore entitled to summary disposition, where a complete copy was not provided, regardless whether plaintiff obtained the materials subsequent to the filing of the complaint. A person should not be required to seek disclosure through secondary sources and then assume that he has in his possession the full record. Minimally, the litigation here was necessary to find out what was missing and why it was not provided. Plaintiff should have been deemed the prevailing party on its FOIA claim, and thus, it should not have to assume the expenses of litigation; it may recover costs and attorney fees pursuant to MCL 15.240(6).

It is arguable that, because we found that there was no FOIA violation concerning the first request, defendants should only pay attorney fees and costs associated with the second FOIA request. MCL 15.240(6) provides, in pertinent part, that "[i]f the person or public body prevails in part, the court may, in its discretion, award all or an appropriate portion of the reasonable attorneys' fees, costs, and disbursements." Considering that, on their face, defendants' responses to both FOIA requests clearly appeared incomplete without an explanation by defendants, the litigation could be viewed as necessary simply to ascertain what materials were not provided and why they were not provided *as to all requests.* Therefore, plaintiff is entitled to recover all reasonable costs and attorney fees associated with both requests.

To avoid any conflicts on remand, we conclude that the documentary evidence does not support any claim that defendants' actions were arbitrary and capricious, which would trigger punitive damages in the amount of $500 under MCL 15.240(7).[2] Plaintiff's complaint and appellate brief make no claims for compensatory damages. Thus, on remand, a determination in regard to plaintiff's recovery is limited to attorney fees and costs pursuant to MCL 15.240(6).

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[2] Plaintiff's prayer for relief in its complaint requested punitive damages.

In light of our ruling, the award of costs and fees to defendants under the "offer of judgment" rule, MCR 2.405, is vacated. The issue may of course be revisited depending on the trial court's determination of the amount to award plaintiff under MCL 15.240(6).

Affirmed in part and reversed in part and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ William B. Murphy
/s/ Michael J. Talbot