

STATE OF MICHIGAN
COURT OF APPEALS

BARRY L. KING,

Plaintiff-Appellant,

v

OAKLAND COUNTY PROSECUTOR,

Defendant-Appellee.

FOR PUBLICATION
November 14, 2013

No. 305299
Oakland Circuit Court
LC No. 2010-110251-CZ

CHRISTOPHER K. KING,

Plaintiff-Appellant,

v

OAKLAND COUNTY PROSECUTOR,

Defendant-Appellee.

No. 305369
Oakland Circuit Court
LC No. 2010-113449-CZ

Advance Sheets Version

Before: MURRAY, P.J., and WILDER and OWENS, JJ.

MURRAY, P.J. (*concurring in part, dissenting in part*).

I concur in the reasoning and conclusions contained in the majority opinion except for the conclusion that the circuit court gave a sufficiently particularized decision as to why the Freedom of Information Act (FOIA), MCL 15.231 *et seq.*, exemption at issue applied. Instead, I would hold that the circuit court's decision was too conclusory and, thus, did not comply with the particularized findings requirement set forth in *Evening News Ass'n v City of Troy*, 417 Mich 481; 339 NW2d 421 (1983), and would vacate that part of the trial court's order and remand for the trial court to make the appropriate findings.

No one disputes that under *Evening News* a trial court is required to give particularized findings of fact as to why a claimed exemption is appropriate. See, e.g., *Post-Newsweek Stations v City of Detroit*, 179 Mich App 331, 336-338; 445 NW2d 529 (1989). The difficult issue is *what constitutes* a sufficiently particularized finding. There is certainly no clear-cut answer. Nevertheless, in canvassing the published opinions issued since *Evening News*, it seems apparent that the trial court's findings in this case were not sufficient.

As the majority opinion has described, the trial court’s rationale for upholding the exemption under MCL 15.243(1)(b)(i) was that release of any information regarding Christopher Busch would compromise the open and ongoing investigation because the Busch information was “inextricably intertwined with other sensitive information” This finding amounts to nothing more than a partial recitation of the statutory exemption (that an ongoing investigation exists) coupled with a conclusory statement that all the information regarding Busch was “inextricably intertwined” with the other documents in defendant’s possession related to the ongoing investigation. Our caselaw requires more than that.

For instance, in *State News v Michigan State Univ*, 274 Mich App 558, 583; 735 NW2d 649 (2007), rev’d in part on other grounds, 481 Mich 692 (2008), our Court held that “a justification must ‘indicate factually *how* a particular document, or category of documents, interferes with law enforcement proceedings[,]’” quoting *Evening News*, 417 Mich at 503 (emphasis added). That documents may be intertwined with others containing sensitive information does not explain *how* release of those documents would interfere with the ongoing investigation. Likewise, in *Payne v Grand Rapids Police Chief*, 178 Mich App 193, 201; 443 NW2d 481 (1989), our Court reversed a trial court’s decision upholding an exemption because the trial court’s opinion—though somewhat lengthy—was composed of entirely conclusory comments. And, contrary to the majority’s assertion, even though the trial court in this case properly conducted an in camera review under *Evening News*, it was still required to give particularized findings of fact indicating *why* the claimed exemptions applied. *Newark Morning Ledger Co v Saginaw Co Sheriff*, 204 Mich App 215, 218; 514 NW2d 213 (1994), citing *Post-Newsweek Stations*, 179 Mich App at 337-338. In other words, although it is true that a trial court can use any one of the three *Evening News* procedures to review the evidence, it must still sufficiently explain its decision after employing one of the three *Evening News* procedures. *Id.* (“Even when the court chooses to conduct an in camera review, the court still must . . . give particularized findings of fact indicating why the claimed exemptions are appropriate.”).

For these reasons, I would hold that the trial court did not give sufficiently particularized findings as to why the exemption applies, i.e., *how* release of the documents regarding Busch that are inextricably intertwined¹ with the other documents regarding this ongoing investigation would actually interfere with the ongoing investigation. Of course, as noted earlier, how the trial court complies with this specific requirement is somewhat of an open question. However, it could include a particularization of the different categories or types of documents that were submitted by defendant (e.g., letters, memos, reports, etc.) along with general descriptions as to why divulging the contents of those documents would interfere with the ongoing investigation. See, e.g., *Herald Co, Inc v Ann Arbor Pub Sch*, 224 Mich App 266, 277-278; 568 NW2d 411 (1997). Compounding the problem, while making these findings the trial court must take significant caution to ensure that no specific content is divulged that would cause to occur what

¹ And how are these documents inextricably intertwined with the sensitive documents? Do the Busch documents (i.e., documents focusing on Busch) contain reference to other witnesses, suspects, etc., or are references to Busch contained in documents focusing on others aspects of the investigation?

the exemption is attempting to prevent, i.e., release of information that would interfere with an ongoing investigation. One possible measure that could be taken to remedy this last concern would be for the trial court to make the particularized findings in camera, and seal those findings (along with the documents reviewed) for further appellate review. See *Detroit Free Press, Inc v City of Detroit*, 429 Mich 860; 412 NW2d 653 (1987). In any event, I recognize compliance with these measures entails a difficult and delicate task, but it is a task that *Evening News* appears to place on the trial courts of this state.

/s/ Christopher M. Murray