

STATE OF MICHIGAN
COURT OF APPEALS

DAVID KATZ,

Plaintiff-Appellant,

v

STATE OF MICHIGAN BUREAU OF STATE
LOTTERY,

Defendant-Appellee,

UNPUBLISHED

August 21, 2003

No. 245296

Wayne Circuit Court

LC No. 02-224270-CZ

Before: Wilder, P.J., and Fitzgerald and Zahra, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting defendant State of Michigan Bureau of State Lottery's (the Lottery Bureau) motion to dismiss. The issue presented in this case is whether utilization of a fee-based telephone service to obtain winning lottery numbers constitutes a request for public information pursuant to Michigan's Freedom of Information Act, MCL 15.231 (FOIA). We hold that it does not. We affirm.

I. Facts and Procedure

Plaintiff utilized the Lottery Bureau's 1-900 telephone services to access lottery information for a fee of \$.50 per minute. Plaintiff subsequently filed a civil class action on behalf of himself and other citizens who had used the Lottery Bureau's 1-900 services to access public information, claiming a violation of the FOIA.¹ Plaintiff alleged that the Lottery Bureau was charging the public more than the actual expense of maintaining the lottery lines and was earning a profit from the public, in violation of the FOIA. The Lottery Bureau filed a motion to dismiss plaintiff's claims, asserting that prior to commencing an action for a violation of the FOIA, plaintiff must have first provided the public body's FOIA coordinator with a written request that described the public record being sought with sufficient particularity to enable the public body to find the public record and respond to the written request. In response, plaintiff argued that the FOIA does not require that a person "put pen to paper" to make a request, but rather a "writing" submitted by "electronic means" is sufficient. The Lottery Bureau contested

¹ Plaintiff's complaint also asserted claims against AT&T. However, plaintiff voluntarily dismissed its claims against AT&T.

plaintiff's interpretation of the statutorily defined terms "public record," "writing," and "written request."

The trial court dismissed plaintiff's claims, adopting the arguments advanced by the Lottery Bureau. The trial court explained that the purpose of the FOIA was to prevent the state from "stiff-arming citizens" in such a way as to preclude access to public information concerning the function of government. The trial court held that the present case did not come within the ambit of the FOIA.

II. Standard of Review

The Lottery Bureau moved for summary disposition pursuant to MCR 2.116(C)(1), (C)(7), and (C)(8) and (C)(10). However, the trial court did not specify which rule it relied on in granting the Lottery Bureau's motion. Because the trial court considered matters outside the pleadings, we will review this case under MCR 2.116(C)(10). *Kubisz v Cadillac Gage Textron, Inc*, 236 Mich App 629, 633 n 4; 601 NW2d 160 (1999). A trial court's decision to grant summary disposition is reviewed de novo on appeal. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). When reviewing a motion granted under MCR 2.116(C)(10), this Court must examine all relevant documentary evidence in the light most favorable to the nonmoving party and determine whether there exists a genuine issue of material fact on which reasonable minds could differ. *Progressive Timberlands, Inc v R & R Heavy Haulers, Inc*, 243 Mich App 404, 407; 622 NW2d 533 (2000). Summary disposition is appropriate when the party opposing the motion fails to provide evidence to establish a material factual dispute. *Porter v City of Royal Oak*, 214 Mich App 478, 484; 542 NW2d 905 (1995). The court may not make findings of fact or weigh credibility in deciding a summary disposition motion. *Nesbitt v American Community Mut Ins Co*, 236 Mich App 215, 225; 600 NW2d 427 (1999).

This case involves interpretation and application of the FOIA. Issues of statutory interpretation are also subject to review de novo. *Oakland Co Bd of Co Rd Comm'rs v Michigan Prop & Cas Guaranty Ass'n*, 456 Mich 590, 610; 575 NW2d 751 (1998).

III. Analysis

Plaintiff first argues that the trial court erred in determining that the FOIA does not govern the process of providing information from public records over the telephone via a 1-900 number. The critical question in resolving this issue is whether a 1-900 telephone call requesting public information from a public body constitutes a "written request" under the FOIA. Section 5 of the FOIA provides, in relevant part:

“[A] person desiring to inspect or receive a copy of a public record *shall* make a *written request* for the public record to the FOIA coordinator of a public body.” MCL 15.235 (emphasis added).

The FOIA defines a "written request" as "a *writing* that asks for information, and includes a writing transmitted by facsimile, electronic mail, or *other electronic means*." MCL 15.232(i) (emphasis added). "[W]riting" is defined as:

[H]andwriting, typewriting, printing, photostating, photographing, photocopying, and *every other means of recording*, and includes letters, words, pictures, sounds, or symbols, or combinations thereof, and papers, maps, magnetic or paper tapes, photographic films or prints, microfilm, microfiche, magnetic or punched cards, discs, drums, or *other means of recording or retaining meaningful content*. [MCL 15.232(h) (emphasis added).]

The primary goal of judicial interpretation of statutes is to discern and give effect to the intent of the Legislature. *Frankenmuth Mut Ins Co v Marlette Homes, Inc*, 456 Mich 511, 515; 573 NW2d 611 (1998). When construing a statute, every word should be given meaning, and this Court should avoid a construction that would render any part of the statute surplusage or nugatory. *Karpinski v St John Hosp Macomb CTR Corp*, 238 Mich App 539, 543; 606 NW2d 45 (1999). The Legislature is presumed to have intended the meaning it plainly expressed, and when the statutory language is clear and unambiguous, judicial construction is neither required nor permitted. *Walters v Bloomfield Hills Furniture*, 228 Mich App 160, 163; 577 NW2d 206 (1998). The interpreting court should accord every statutory word or phrase its plain and ordinary meaning. *Robertson v Daimler Chrysler Corp*, 465 Mich 732, 736; 641 NW2d 567 (2002).

If reasonable minds can differ in regard to the meaning of a statute, further judicial construction is appropriate. *People v Warren*, 462 Mich 415, 427; 615 NW2d 691 (2000); *Adrian School Dist v Michigan Pub School Employees Retirement Sys*, 458 Mich 326, 332; 582 NW2d 767 (1998); *Ross v State*, 225 Mich App 51, 55; 662 NW2d 36 (2003). “Only where the statutory language is ambiguous may a court properly go beyond the words of the statute to ascertain legislative intent.” *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999). The court must consider the object of the statute, the harm it is designed to remedy, and apply a reasonable construction which best accomplishes the statute’s purpose. *People v Adair*, 452 Mich 473, 479-480; 550 NW2d 505 (1996); *Marquis v Hartford Accident and Indemnity*, 444 Mich 638, 644; 513 NW2d 799 (1994); *Oberlies v Searchmont Resort, Inc*, 246 Mich App 424, 430; 633 NW2d 408 (2001); *People v Lawrence*, 246 Mich App 260, 265; 632 NW2d 156 (2001). In doing so, the court may consider a variety of factors and apply principles of statutory construction, but should also always use common sense. *Marquis, supra* at 644; *Proudfoot v State Farm Mut Ins Co*, 254 Mich App 702, 708; 658 NW2d 838 (2003); *Rancour v Detroit Edison Co*, 150 Mich App 276, 285; 388 NW2d 336 (1986).

Plaintiff contends that the telephone is an electronic means by which he used a combination of sounds and symbols to request information from the Lottery Bureau, and thus, he submitted a written request as required by the FOIA. The FOIA does not specifically include the telephone as a permissible means by which a requesting person can submit a “written request.” Rather, the FOIA includes catchall phrases such as “other electronic means” and every “other means of recording or retaining meaningful content” that presumably allows for the inclusion in the definitions of means that are not specifically mentioned in the statute. See *Patterson v Allegan Co Sheriff*, 199 Mich App 638, 640; 502 NW2d 368 (1993) (“The phrase ‘or other means of recording or retaining meaningful content’ at the end of MCL 15.232(e) is a catchall, not a modifier”). Because it is not mentioned or defined in the statute, this Court must give the term “electronic” its plain and ordinary meaning. See *Robertson, supra* at 736. “Reference to a dictionary is appropriate to ascertain what the ordinary meaning of a word is.” *Popma v Auto*

Club Ins Ass'n, 446 Mich 460, 470; 521 NW2d 831 (1994). The term “electronic” is defined as “of or pertaining to electronics or to devices, circuits, or systems developed through electronics; of or pertaining to electrons or to an electron; using electric or electronic means to produce or modify the sound; [and,] of or controlled by computers.” *Random House Webster’s College Dictionary* (2001).

Plaintiff has submitted the affidavit of a licensed engineer, A. James Partridge, who averred that the telephone registers sounds by mechanical and electrical means, converts the sounds into transmittable electrical signals (flowing electrons by nature), which are reproduced through computer-controlled public telephone switching networks. This uncontested affidavit established that the telephone is an “electronic means” of conveying information as that term is used in MCL 15.232(i).

However, our determination that the telephone is an electronic means under MCL 15.232(i) does not end the inquiry, since MCL 15.232(h) requires that, in order to constitute a “writing,” it must also qualify as a means of recording or retaining meaningful content. The telephone, as traditionally used, is not a means of recording or retaining meaningful content. Rather, the telephone is a method of transmitting sounds or speech. There is no indication in the record that any of plaintiff’s telephone calls provided a means of recording, or retaining the meaningful content of his “request.” Cognizant of this deficiency in the record, plaintiff supplemented the record to include his own affidavit attesting to the fact that on an occasion, when he utilized one of the State of Michigan 1-900 numbers, he was informed that the telephone call would be recorded for quality assurance purposes. We now must determine whether such a recording amounts to a recording of “meaningful content” as that term is used in the FOIA.

Whether the content of a recording is meaningful must be considered in the context of the purpose of the FOIA—to ensure that “the people shall be informed so that they may fully participate in the democratic process.” MCL 15.231(2). The requirement that the request be in writing insures that the person making the request provided the public body with sufficient information to respond to the request for information. Thus, in order to be a recording of “meaningful content,” the recording must be for the purpose of retaining the specific request for information under the FOIA. However, there is no evidence in the record that supports the conclusion that telephone calls that are recorded for the purpose of monitoring quality are retained for purposes of responding to FOIA requests. Moreover, calls monitored for quality assurance are recorded only on a sporadic basis.² The sporadic recording of calls, regardless of the reason for such recordings, is insufficient as a matter of law to amount to the recording of meaningful content under the FOIA. The FOIA coordinator of a public body could not review such a recording and obtain the information needed to respond to all the FOIA requests made over the telephone lines. Obviously, the FOIA coordinator’s review will be limited to the calls actually recorded. Because of the sporadic nature of the recording of information for quality

² Plaintiff does not allege that all of his calls to the 1-900 telephone numbers were recorded. Rather, plaintiff alleges only that “on an occasion” he was notified that his call would be recorded for purposes of assuring quality. We therefore conclude that quality assurance recordings were preserved only on a sporadic basis.

assurance purposes, we hold that such recordings are not recordings of meaningful content under the FOIA. Therefore, although the telephone constitutes an “electronic means,” plaintiff’s use of this device to request lottery information did not qualify as a “writing.” Plaintiff failed to satisfy the “written request” requirement set forth in MCL 15.235.

Even assuming that plaintiff had submitted a written request as required by the FOIA, we nonetheless conclude that plaintiff’s claim is without legal merit because there was no final determination by the Lottery Bureau. Section 10 of the FOIA provides, in relevant part:

If a public body makes a final determination to deny all or a portion of a request, the requesting person may do 1 of the following at his or her option:

* * *

(b) 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) (emphasis added).]

Based on the plain and ordinary meaning of this statutory language, we conclude that, in order for plaintiff to bring suit in the circuit court under the FOIA, the Lottery Bureau must have first made a final determination to deny all or a portion of plaintiff’s request. While plaintiff alleges that he used the 1-900 service to request lottery information, he does not allege that the Lottery Bureau denied him access to any of the information he sought. Instead, plaintiff merely alleges that he was excessively charged for the information that he was presumably provided.³ Since there is no evidence that the Lottery Bureau made a final determination denying any or all of plaintiff’s request, we conclude that plaintiff did not have the option of commencing suit in circuit court under the FOIA against the Lottery Bureau.

Plaintiff also argues that by “freely” and “willingly” providing requested information to the public via the 1-900 service, the Lottery Bureau waived the written request requirement. Plaintiff further contends that because the Lottery Bureau does not dispute plaintiff’s right to receive the requested information, a written request is not required. We disagree.⁴

³ Plaintiff alleged that the Lottery Bureau’s 1-900 service excessively charges callers for providing information, in violation of the FOIA. However other than his own allegations, plaintiff has presented no documentary evidence of the actual costs the Lottery Bureau incurs for providing the public with this service. Further, the FOIA limits on fees charged for public records applies only when a valid FOIA request is served on the public body. Here, no such request has been made. Thus, the fee provisions do not apply. We further observe that the Lottery Bureau provided other free or nominally-charged methods for citizens to obtain the same information supplied by the 1-900 service. Therefore, the Lottery Bureau’s fee charging for the use of the 1-900 service is not governed by MCL 15.234, as it is an additional means of providing the public with the same information that may be obtained under the FOIA, and is not in conflict with the purpose of the FOIA. There is no provision in the FOIA prohibiting a public body, such as the Lottery Bureau, from providing supplemental means of assessing information and charging for that service.

⁴ Although it appears that this issue was raised in the lower court by plaintiff’s counsel, the
(continued...)

Plaintiff's waiver argument is not supported by the language of the FOIA and plaintiff cites no authority suggesting that a public body is prohibited from providing a citizen with access to public information absent a written request. Such situations cannot fairly be construed as constituting a waiver of the FOIA's written request requirement. Rather, the dissemination of public information without a written request simply falls outside the scope of the FOIA. Accordingly, we conclude that plaintiff's utilization of the Lottery Bureau's 1-900 telephone services to request and receive lottery information is not governed by the FOIA. Plaintiff has no viable claim that the Lottery Bureau waived a requirement under the FOIA.

IV. Conclusion

We conclude that by contacting the 1-900 line, plaintiff failed to satisfy the written request requirement under the FOIA. Therefore, because plaintiff's claim cannot properly be brought under the FOIA, the trial court properly granted the Lottery Bureau's motion for summary disposition. Secondly, the Lottery Bureau's providing of requested information to the public via the 1-900 telephone line did not constitute a waiver of the written request requirement set forth in the FOIA. Thus, the trial court did not err in determining that plaintiff's claim against the Lottery Bureau for excessive charges were not properly governed by the FOIA.

Affirmed.

/s/ Kurtis T. Wilder
/s/ E. Thomas Fitzgerald
/s/ Brian K. Zahra

(...continued)

record indicates that the lower court did not address it. This court in the interest of judicial economy has the authority to address the issue. *Peterman v DNR*, 446 Mich 177, 183; 521 NW2d 499 (1994).