

STATE OF MICHIGAN
COURT OF APPEALS

RALPH W. BARBIER, JR. and MARINA S.
BARBIER,

UNPUBLISHED
March 31, 2000

Plaintiff-Appellant,

v

RONALD M. BASSO, DEPUTY DIRECTOR OF
THE DEPARTMENT OF CONSUMER AND
INDUSTRY SERVICES,

No. 212783
Wayne Circuit Court
LC No. 98-802087 CZ

Defendant-Appellee.

Before: Cavanagh, P.J., and White and Talbot, JJ.

PER CURIAM.

Plaintiff appeals as of right the order denying his motion for summary disposition pursuant to MCR 2.116(C)(10) and granting summary disposition in favor of defendant, Ronald M. Basso, the Deputy Director of the Department of Consumer and Industry Services (CIS) pursuant to MCR 2.116(I)(2).¹ We affirm.

This case arises from a series of complaints plaintiff submitted to CIS, claiming that various real estate licensees had committed statutory and administrative rule violations relating to a 1989 real estate transaction. At plaintiff's behest, CIS eventually issued formal complaints against certain licensees for misrepresenting material facts in relation to the size of the residence plaintiff purchased in 1989. Several months later, CIS notified plaintiff that the files CIS had sent to the Department of the Attorney General, the agency which represents CIS, had been returned advising that there was insufficient evidence to pursue the formal complaints against the real estate licensees. Thereafter, an administrative order was entered dismissing the complaints and canceling a scheduled administrative hearing.

Subsequently, plaintiff requested documents relating to the complaints from defendant under the Freedom of Information Act, (FOIA), MCL 15.231 *et seq.*; MSA 4.1801(1) *et seq.* CIS provided the majority of documents requested, but withheld others, asserting that they were exempt from disclosure under the FOIA. In response to CIS's written responses purporting to justify the exemptions, plaintiff filed a complaint to compel disclosure of the documents and a motion for summary

disposition. The trial court denied plaintiff's motion and granted defendant's request for summary disposition pursuant to MCR 2.116(I)(2), finding that the documents were exempt from disclosure under the FOIA.

Plaintiff argues that the trial court erred in denying his motion and granting defendant's motion for summary disposition on the ground that defendant satisfied the burden of proving that the documents at issue were exempt from disclosure under § 13(1)(n) of the FOIA. We disagree.

This court reviews a motion for summary disposition de novo. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). In reviewing a motion brought pursuant to MCR 2.116(C)(10), the court considers the documentary evidence in the light most favorable to the nonmoving party. *Id.*, quoting *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). Summary disposition is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* at 454-455, quoting *Quinto, supra* at 362. Summary disposition pursuant to MCR 2.116(I)(2) is properly granted to the opposing party if it appears to the court that that party, rather than the moving party, is entitled to judgment. *Sharper Image Corp v Dep't of Treasury*, 216 Mich App 698, 701; 550 NW2d 596 (1996). Additionally, whether requested information qualifies for exemption from disclosure under the FOIA is a mixed question of fact and law. *Messenger v Ingham Co Prosecutor*, 232 Mich App 633, 637; 591 NW2d 393 (1998). We review the trial court's factual determinations for clear error and its legal conclusions de novo. *Id.*

Under the FOIA, a public body must disclose all public records that are not specifically exempt under the Act. MCL 15.233(1); MSA 4.1801(3)(1); *State Defender Union Employees v Legal Aid and Defender Ass'n of Detroit*, 230 Mich App 426, 430; 584 NW2d 359 (1998). Because the FOIA is intended primarily as a full-disclosure statute, the exemptions must be narrowly construed. *Connoisseur Communication of Flint, LP v University of Michigan*, 230 Mich App 732, 734; 584 NW2d 647 (1998). When a public body refuses to disclose a requested document under the FOIA, the public body bears the burden of proving that the refusal was justified. *Id.* Claimed exemptions must be supported by substantial justification and explanation, not merely by conclusory assertions. *Booth Newspapers, Inc v Bd of Regents of the University of Michigan*, 192 Mich App 574, 586; 481 NW2d 778 (1992), rev'd on other grounds 444 Mich 211; 507 NW2d 422 (1993).

Similarly, when ruling whether exemptions within the FOIA prevent disclosure of documents, a trial court may not make conclusory or generic determinations, but must specifically find that particular parts of the information would be exempt for particular reasons. *Post-Newsweek Stations v Detroit*, 179 Mich App 331, 335; 445 NW2d 529 (1989). In making this determination, the court should (1) receive a complete particularized justification for the exemption, or (2) conduct a hearing in camera to determine whether justification exists, or (3) consider allowing the plaintiff's counsel access to the information *in camera* under a special agreement whenever possible. *Id.* at 337.

Defendant claimed, and the trial court ruled, that the documents were exempt from disclosure under § 13(1)(n), which provides in pertinent part:

(1) A public body may exempt from disclosure as a public record under this act:

* * *

(n) Communications and notes within a public body or between public bodies of an advisory nature to the extent that they cover other than purely factual materials and are preliminary to a final agency determination of policy or action. This exemption does not apply unless the public body shows that in the particular instance the public interest in encouraging frank communications between officials and employees of public bodies clearly outweighs the public interest in disclosure. . . . [MCL 15.243(1)(n); MSA 4.1801(13)(1)(n).]

To claim exemption and prevent disclosure under § 13(1)(n), the public body must establish that (1) the documents cover other than purely factual materials, and (2) the documents are preliminary to a final determination of policy or action. *Herald Co, Inc v Ann Arbor Public Schools*, 224 Mich App 266, 274; 568 NW2d 411 (1997), citing *Milford v Gilb*, 148 Mich App 778, 782-783; 384 NW2d 786 (1985). If these substantive conditions are met, the public body must then establish that the public interest in encouraging frank communications within the public body or between public bodies clearly outweighs the public interest in disclosure. *Id.*

In this case, the information sought by plaintiff consisted of two memoranda from the Department of the Attorney General to CIS's Director of Enforcement in the Office of Commercial Services. In addition to its written responses to plaintiff justifying exemption and an affidavit from its FOIA coordinator, defendant provided the trial court with copies of the memoranda for in camera inspection. *Post-Newsweek Stations, supra* at 337. After review, the trial court noted that the memoranda concerned whether the attorney general was prepared to present testimony on CIS's behalf at the hearing relative to the formal complaints that were filed at plaintiff's behest. The court determined that both memoranda contained substantially more opinion than fact, noting that the "overwhelming majority" of the documents were either opinions or recommendations by the attorney general to CIS regarding the "manner of presentation" of the formal complaints. The court further concluded that the documents were "preliminary to a final determination of policy or action" because they involved the attorney general's ultimate decision regarding the extent of its participation in the potential proceeding and whether a hearing would be granted on the complaint. Plaintiff does not appear to challenge the trial court's findings pertaining to defendant's satisfaction of the exemption's substantive conditions, and we cannot conclude that they are clearly erroneous. *Messenger, supra* at 637.

The court also concluded, and we agree, that defendant sustained the burden of proving that the public interest in encouraging frank communications between the officials and employees of the two public bodies at issue clearly outweighed the public interest in disclosure in this case. In support of its determination, the court found that the memoranda were "brutally frank" and were designed to cause "substantial reflection" regarding the nature of the complaints at issue and the attorney general's recommendations regarding CIS's method of processing cases in general. Defendant maintained below that "[f]or the general welfare, the state must have thorough legal representation unhampered by

disclosure of legal advice preliminary to official action” and provided a supporting affidavit. Like the trial court, we are not persuaded that plaintiff’s specific need for the memoranda, apparently to show that CIS was conspiring with the real estate industry it was designed to police, or the public’s general interest in disclosure, was outweighed by CIS’s interest in keeping its deliberative analyses confidential. Indeed, “the release to the public of the internal memoranda [] at issue would discourage the preparation of such memoranda and would impact negatively on the quality of defendant’s decision-making process with detrimental effect on the legal services provided to state agencies as well as on the public’s interest.” See *McCartney v Attorney General*, 231 Mich App 734-735; 587 NW2d 824 (1998). After reviewing the memoranda at issue, which were provided under seal to this Court, we are persuaded that the trial court did not err in its findings or in concluding that defendant satisfied the burden of proving that the memoranda fell within the exemption provided by § 13(1)(n). Therefore, it was not necessary for defendant to produce them pursuant to plaintiff’s FOIA request.

Affirmed.

/s/ Mark J. Cavanagh

/s/ Helene N. White

/s/ Michael J. Talbot

¹ Plaintiff Marina S. Barbier was dismissed from the suit and is not a party to this appeal.