

STATE OF MICHIGAN  
COURT OF APPEALS

---

MICHAEL D. OLSON,

Plaintiff-Appellant,

v

DEPARTMENT OF CORRECTIONS,

Defendant-Appellee.

---

UNPUBLISHED

September 26, 2013

No. 314225

Gratiot Circuit Court

LC No. 12-011752-CZ

Before: SAWYER, P.J., and METER and DONOFRIO, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting summary disposition to defendant under MCR 2.116(C)(8). Plaintiff argues that the trial court erred in dismissing his claims that defendant violated Michigan's Freedom of Information Act (FOIA), MCL 15.231 *et seq.*, and his constitutional right to equal protection. We affirm.

Plaintiff is a Michigan Department of Corrections (MDOC) employee. In 2012, defendant had 19 openings for the new position of Administrative Manager 15, commonly referred to as "deputy warden." Plaintiff states that he applied for all 19 positions and was interviewed. According to the parties, interviewers are provided with "consensus interview forms" on which they grade an applicant's answers as "outstanding," "very good," "good," "adequate," or "less than adequate." Plaintiff was not hired to fill any of the positions. On April 20, 2012, plaintiff sent defendant a FOIA request for the following:

The Summary of the applicant pool, the letter summarizing the position, and selection process, the summary of the top-ranked candidates sent to the Departments [sic] Equal Employment Opportunity Office. No Exemptions are to be taken, assuming the candidates are indentified by number only. I am requesting the information listed in this section from the Administrative Manager 15 Position interviews held on or about 10-31-11 and 11-1-11 in Central Office. I am requesting this information for all the positions that were filled from this interview. If I am entitled to only those positions I interviewed for then I would like this information for all of the positions I interviewed for on those dates as listed in the next paragraph. IBC, I-Max, DRF, STF, SLF, SRF, RMI, and all the Jackson Prisons I interviewed for on the dates listed above

\* \* \*

The scores<sup>[1]</sup> of the top ranked candidates and this requestor (Michael D. Olson) that interviewed for the following Correctional Facility positions, Bellamy Creek (IBC), Ionia Maximum (I-Max), Carson city [sic] – (DRF), Central Michigan (STF), St. Louis – (SLF), Saginaw (SRF), Michigan Reformatory – (RMI), and All the Jackson Prisons I interviewed for on the dates listed above.

On May 5, 2012, defendant denied plaintiff's request, stating that the "scores of top ranked candidates" and the "score of requestor" were exempt from disclosure under MCL 15.243(1)(a) and (m). Pursuant to MCL 15.240(1)(a), plaintiff appealed the denial to MDOC Director Daniel H. Heyns. On July 10, 2012, defendant upheld the denial, writing that "under 13(1)(a) and (m) . . . the information is of a personal nature and preliminary to a final agency determination." On August 7, 2012, plaintiff sued defendant in circuit court, alleging that defendant had violated the FOIA in denying plaintiff's request.

On August 30, 2012, defendant moved for summary disposition under MCR 2.116(C)(10). Defendant asserted that plaintiff's requested information was exempt under MCL 791.230a and MCL 15.243(1)(m). On September 24, 2012, plaintiff amended his complaint to allege that defendant violated his equal-protection rights under both the United States and Michigan constitutions. Eventually, defendant moved for summary disposition under MCR 2.116(C)(8), and the trial court granted the motion.

This Court reviews de novo a trial court's granting of summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Additionally, we review issues of statutory interpretation de novo. *Pohutski v City of Allen Park*, 465 Mich 675, 681; 641 NW2d 219 (2002).

MCL 15.231(2) provides:

It is the public policy of this state that all persons, except those persons incarcerated in state or local correctional facilities, are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees, consistent with this act. The people shall be informed so that they may fully participate in the democratic process.

"Under FOIA, a public body must disclose all public records that are not specifically exempt under the act." *Hopkins v Duncan Twp*, 294 Mich App 401, 409; 812 NW2d 27 (2011). "The exemptions in the FOIA are narrowly construed, and the party asserting the exemption bears the burden of proving that the exemption's applicability is consonant with the purpose of the FOIA." *Detroit Free Press, Inc v Dep't of Consumer & Indus Servs*, 246 Mich App 311, 315; 631 NW2d 769 (2001).

---

<sup>1</sup> On appeal, defendant explains that "a request for candidate 'scores' has been historically recognized as a request for the applicant rating on the consensus interview panel rating forms."

In denying plaintiff's request, defendant originally cited MCL 15.243(1)(a) and (m), which provide:

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

(a) Information of a personal nature if public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy.<sup>[2]</sup>

\* \* \*

(m) 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 communication between officials and employees of public bodies clearly outweighs the public interest in disclosure. This exemption does not constitute an exemption under state law for purposes of section 8(h) of the open meetings act, 1976 PA 267, MCL 15.268. As used in this subdivision, "determination of policy or action" includes a determination relating to collective bargaining, unless the public record is otherwise required to be made available under 1947 PA 336, MCL 423.201 to 423.217.

Before the circuit court and on appeal, defendant asserts the "corrections exemption," codified as MCL 791.230a:

The home addresses, telephone numbers, and personnel records of employees of the [MDOC], employees of the center for forensic psychiatry, and employees of a psychiatric hospital that houses prisoners are exempt from disclosure under the freedom of information act, Act No. 442 of the Public Acts of 1976, being sections 15.231 to 15.246 of the Michigan Compiled Laws.

The corrections exemption exempts the "personnel records of employees" of defendant. MCL 791.230a. Although defendant requested the scores of the top-ranked *applicants* for the deputy warden positions, Melody A. P. Wallace, Manager of the Policy and FOIA Section in MDOC's Office of Legal Affairs, averred that "[t]he positions were only made available to existing department employees."

The primary goal of statutory interpretation is to ascertain the legislative intent that may reasonably be inferred from the statutory language. The first step

---

<sup>2</sup> On appeal, defendant has abandoned the argument that plaintiff's requested information is exempt under MCL 15.243(1)(a).

in that determination is to review the language of the statute itself. Unless statutorily defined, every word or phrase of a statute should be accorded its plain and ordinary meaning, taking into account the context in which the words are used. We may consult dictionary definitions to give words their common and ordinary meaning. When given their common and ordinary meaning, the words of a statute provide the most reliable evidence of its intent. . . . [*Krohn v Home-Owners Ins Co*, 490 Mich 145, 156-157; 802 NW2d 281 (2011) (internal quotation marks, citations, and brackets omitted).]

The phrase “personnel records” is not defined in the corrections exemption.

*The American Heritage Dictionary of the English Language* (2011) defines “personnel,” in part, as “the people employed by . . . an organization, business, or service.” Here, it is being used as an adjective to modify the noun “records,” which is defined in part as “[i]nformation . . . on a particular subject” and “[t]he known history of performance, activities, or achievement[.]” *Id.*

In *Landry v Dearborn*, 259 Mich App 416; 674 NW2d 697 (2003), the Court analyzed whether employment applications were exempt from the FOIA under the statutory provision exempting, in certain instances after a balancing test, “personnel records of law enforcement agencies.” See MCL 15.243(1)(s)(ix). The Court ended up defining the phrase “personnel records” as including “all records used by law enforcement agencies in the selection or hiring of employees.” *Landry*, 259 Mich App at 422. It is apparent that the Court defined the phrase in a broad manner.

In reviewing the pertinent dictionary definitions and in considering the instructive (even if not *entirely* apposite) analysis in *Landry*, it is apparent that the information requested here was indeed exempt from disclosure. As defendant argues, the phrase “personnel records” as used in the corrections exemption includes “the consensus panel interview rating forms of each employee because they are directly related to each employee’s qualifications for employment, promotion, transfer, or additional compensation”—matters concerning each employee’s employment within the agency and each employee’s history of activities.

Plaintiff contends that “personnel records of law enforcement agencies” (as analyzed in *Landry*) cannot be equated with “personnel records of employees” of the MDOC because the first phrase can be reasonably construed to encompass records maintained concerning applications for open positions and the latter cannot. However, this case is unique because *all of the applicants were current employees of the MDOC*; as such, records related to their applications were part of their “personnel records” as reasonably defined. Thus, the trial court properly granted summary disposition to defendant.<sup>3</sup>

---

<sup>3</sup> The trial court arguably should have granted summary disposition under MCR 2.116(C)(10) instead of (C)(8), given the importance of Wallace’s affidavit. Plaintiff argues that we may not affirm the trial court’s decision using MCR 2.116(C)(10), but this argument is incorrect. We

Plaintiff argues that the trial court should have estopped defendant from asserting the corrections exemption before the court because defendant failed to assert the exemption in either its initial denial of plaintiff's request or its denial on administrative appeal. Plaintiff's argument is without merit. This Court has stated that

[a] disappointed [FOIA] requester may sue in circuit court under § 10 of the act. In that proceeding, the court determines whether or not the public records are exempt from disclosure. The court makes that determination de novo and the burden is on the agency to sustain the denial. MCL 15.240; MSA 4.1801(10). The provision for de novo review in circuit court suggests that *the agency does not waive defenses by failing to raise them at the administrative level.* [*Residential Ratepayer Consortium v Public Service Comm #2*, 168 Mich App 476, 481; 425 NW2d 98 (1987) (emphasis added).]

In *Stone Street Capital, Inc v Bureau of State Lottery*, 263 Mich App 683, 688 n 2; 689 NW2d 541 (2004), the Court cited *Residential Ratepayer* for the proposition that “a public body may assert for the first time in the circuit court defenses not originally raised at the administrative level.” In *Sutton v Oak Park*, 251 Mich App 345, 348-349; 650 NW2d 404 (2002), this Court went a step further, ruling that a public body may raise FOIA exemptions for the first time in a motion for reconsideration. Defendant was not estopped from asserting the corrections exemption for the first time before the trial court.<sup>4</sup>

Plaintiff contends that the trial court improperly dismissed his equal-protection claim. “Whether a party is denied equal protection under the law is a constitutional question that is reviewed de novo.” *USA Cash #1, Inc v Saginaw*, 285 Mich App 262, 277; 776 NW2d 346 (2009).

“The equal protection clauses of the Michigan and United States constitutions provide that no person shall be denied the equal protection of the law.” *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 486 Mich 311, 318; 783 NW2d 695 (2010), citing Const 1963, art 1, § 2, and US Const, Am XIV. The Michigan and federal clauses are coextensive and “require[] that all persons similarly situated be treated alike under the law.” *Shepherd Montessori*, 486 Mich at 318. “When reviewing the validity of state legislation or other official action that is challenged as denying equal protection, the threshold inquiry is whether [the] plaintiff was treated differently from a similarly situated entity.” *Id.*

Plaintiff's equal-protection claims are based on a “class of one” theory. The United States Supreme Court has stated that “[o]ur cases have recognized successful equal protection  

---

may affirm when the trial court reaches the correct result, even if it used improper reasons. *Miller-Davis Co v Ahrens Constr, Inc (On Remand)*, 296 Mich App 56, 70; 817 NW2d 609 (2012), lv granted 494 Mich 861 (2013). Moreover, contrary to plaintiff's contention, further discovery was not necessary for a proper resolution of this case.

<sup>4</sup> Defendant also appears to be making an argument related to the location of the various files. However, as noted in *Newark Morning Ledger Co v Saginaw County Sheriff*, 204 Mich App 215, 219; 514 NW2d 213 (1994), the storage location of or the label used for files is not dispositive.

claims brought by a ‘class of one,’ where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.” *Village of Willowbrook v Olech*, 528 US 562, 564; 120 S Ct 1073; 145 L Ed 2d 1060 (2000). The Michigan Supreme Court has recognized “class of one” claims, requiring “a plaintiff to show that it was actually treated differently from others similarly situated and that no rational basis exists for the dissimilar treatment.” *Shepherd Montessori*, 486 Mich at 319-320.

Plaintiff failed to adequately allege other similar denials. He stated in his complaint that “Defendant has previously released Consensus Rating Form Scores for other requesters under the Michigan FOIA statute without invoking an exemption under FOIA,” but he did not state whether these releases were made in materially similar circumstances, such as, for example, when interviews were being held for only internal candidates. See, e.g., *Loesel v City of Frankenmuth*, 692 F3d 452, 462 (CA 6, 2012) (discussing the “class of one” theory and stating that the plaintiffs “must show that they were treated differently than those similarly situated in all material respects”). As such, we find no basis on which to disturb the trial court’s grant of summary disposition under MCR 2.116(C)(8).

Affirmed.

/s/ David H. Sawyer  
/s/ Patrick M. Meter  
/s/ Pat M. Donofrio