

**STATE OF MICHIGAN
CIRCUIT COURT FOR THE COUNTY OF MIDLAND**

MACKINAC CENTER FOR PUBLIC POLICY,
a nonprofit Michigan corporation,

Hon.

- v -

Case No.:

CITY OF WESTLAND,
a Michigan municipality.

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COMPLAINT

There is no other pending or resolved civil action
arising out of the same transaction or occurrence
alleged in the Complaint.

INTRODUCTION

This matter involves a municipal government erecting roadblocks to citizens using the Freedom of Information Act. The plaintiff, Mackinac Center for Public Policy (the “Mackinac Center”) is a nonprofit organization “dedicated to improving the quality of life for all Michigan residents by promoting sound solutions to state and local policy questions.” To that end, the Mackinac Center routinely uses the Freedom of Information Act (“FOIA”) to obtain relevant documents from state and local governments.

The Mackinac Center made a routine request to the City of Westland and was told that a \$5.00 'gatekeeper' fee would be charged before the request would begin to be processed. Such a fee is not provided for by the FOIA statute and is in fact prohibited by the statute. The Mackinac Center paid this illegal fee and proceeded with its request.

A second FOIA was filed seeking information related to the \$5.00 gatekeeper fee and Westland's administration of it. A third FOIA seeking more specific information related to the golf course was also filed. Westland then informed the Mackinac Center that requests would cost "\$1.00 for each page copied and \$45.61 for each hour of research, copying and collating." These costs are excessive, unreasonable and not permitted by the statute. The copying cost of \$1 per page is 10 times the cost of copying immediately across the street from Westland's city hall at a local copy shop. The hourly fee of \$45.61 extrapolated to a full-time position indicates that the fee for the searching, copying and collating work is being paid for someone who makes \$94,868.80 annually.

Both the labor cost and copying costs are far in excess of what is allowed by statute. MCL 15.234, being Section 4 of FOIA, provides that the cost of copying is limited to "the actual incremental cost of duplication or publication including labor" and that the cost of labor is limited so "a public body may not charge more than the hourly wage of the lowest paid public body employee capable of retrieving the information necessary to comply with a request under this act." It defies common sense that the "lowest paid public body employee" who could respond to the Mackinac Center's request is someone compensated with \$94,868.80 a year. The costs demanded by Westland's policies are far in excess of these statutory limits and are designed to throw up roadblocks to the public's access to information which impermissibly delay and dissuade the public from obtaining the "full and complete information regarding the affairs

of government” which is the purpose of FOIA. Such excessive costs constitute a constructive denial of a request and are illegal.

PARTIES, JURISDICTION AND VENUE

1. Plaintiff, the Mackinac Center for Public Policy (the “Mackinac Center”), is a Michigan nonprofit corporation “dedicated to improving the quality of life for all Michigan residents by promoting sound solutions to state and local policy questions.”

2. The Mackinac Center is headquartered Midland, Michigan, which is in Midland County.

3. Defendant, the City of Westland (“Westland”), is a municipality located in Wayne County, Michigan.

4. The circuit courts have jurisdiction pursuant to MCL 15.240(1)(b) over matters related to a public body’s refusal to disclose requested information under FOIA.

5. Pursuant to MCL 15.240(4), venue is proper in the “circuit court for the county in which the complainant resides or has his or her principal place of business.”

6. Since the Mackinac Center is headquartered in Midland County, venue is appropriate in the Midland Circuit Court.

GENERAL ALLEGATIONS

7. On or about June 18, 2013, a Mackinac Center intern submitted a FOIA request via email requesting information from the Westland Parks and Recreation Department. A copy of this request is attached as Exhibit A.

8. On or about June 18, 2013, an employee of the Westland Clerk’s office responded by email informing the Mackinac Center of the \$5.00 requirement that must be paid before any response is made. A copy of this response is attached as Exhibit B.

9. On or about June 21, 2013, the Mackinac Center paid this \$5.00 fee. A copy of this check is attached as Exhibit C.
10. Westland sent no documents in response to the original June 18, 2013; however, the Mackinac Center sent another, narrower request on July 15, 2013 covering the same subject matter. A copy of the second request is attached as Exhibit D.
11. The July 15 request asked that fees be waived. See Exhibit D.
12. Westland responded by email on July 18, 2013 to the July 15 request and refused to waive fees. The July 18 response informed the Mackinac Center that copy costs would be "\$1.00 for each page copied and \$45.61 for every hour of research, copying and collating incurred." A copy of this July 18 email is attached as Exhibit E.
13. In response to this July 15 request, Westland sent four pages via email on July 24, 2013. Copies of these four pages sent in response are attached as Exhibit F.
14. The July 24 email states that no money was owed because the initial \$5.00 was paid, even though the response was in apparent response to the June 18 request, for which \$5.00 had been paid, rather than the July 15 request, for which \$5.00 had not been paid. A copy of this July 24 email response is attached as Exhibit G.
15. After being informed by the June 18, 2013 email from Westland (Ex. B) about the \$5.00 fee, the Mackinac Center sent another FOIA request on or about July 9, 2013. A copy of this request is attached as Exhibit H.
16. This July 9 request asked for information relating to the charging of this \$5.00 processing fee and a copy of "the cost calculation guidelines and procedures required pursuant to MCL 15.234(3)."

17. In response to this July 9 request, Westland responded on July 18, 2013 by saying that “This probably entails 1,000 or more sheets of paper. Also, there will be an hourly rate for the copying and collating of the files [MCL15.234 (1)]. At \$1.00 per page and \$45.61 per hour of time, the fee would be several thousands of dollars.” A copy of the July 18 response is attached as Exhibit I.

18. The Mackinac Center did not pay this “several thousands of dollars.” Instead, it considered this excessive amount a constructive denial of the request.

**COUNT I
WESTLAND’S FIVE DOLLAR FEE IS
NOT PERMITTED BY STATUTE**

19. The Mackinac Center hereby incorporates the preceding paragraphs as if fully restated herein.

20. FOIA allows for governing bodies to charge a fee for responses, which is set out in MCL 15.234, being Section 4 of FOIA.

21. The Section 4 fee “shall be limited to actual mailing costs, and to the actual incremental cost of duplication or publication including labor, the cost of search, examination, review, and the deletion and separation of exempt from nonexempt information as provided in section 14.”

22. Neither Section 4 nor any other section of FOIA allows for a ‘gatekeeper’ fee which must be paid before any search can commence, such as the \$5.00 fee at issue here.

23. Section 4(2) of FOIA allows the governing body to require “a good faith deposit,” but only in limited circumstances where “the fee authorized under this section exceeds \$50.00. The deposit shall not exceed ½ of the total fee.”

24. The \$5.00 Westland fee is charged without regard to any consideration as to whether or not the fee for the request in a particular instance exceeds \$50.00.

25. Because Westland's \$5.00 fee is made in all cases without regard to the total being more than \$50.00, it is not authorized by Section 4(2).

26. There is no provision of FOIA other than Section 4(2) authorizing fees or a deposit to be paid at the time of the request.

COUNT II
WESTLAND'S EXCESSIVE FEES AND COSTS VIOLATE FOIA
AND CONSTITUTE A CONSTRUCTIVE DENIAL

27. The Mackinac Center hereby incorporates the preceding paragraphs as if fully restated herein.

28. MCL 15.234, being Section 4 of FOIA, provides the allowable charges for FOIA compliance.

29. Section 4(1) states that "the fee shall be limited to actual mailing costs, and to the actual incremental cost of duplication or publication including labor, the cost of search, examination, review, and the deletion and separation of exempt from nonexempt information as provided in section 14."

30. Section 4(3) provides the standard for determining the "actual" costs:

In calculating the cost of labor incurred in duplication and mailing and the cost of examination, review, separation, and deletion under subsection (1), a public body may not charge more than the hourly wage of the lowest paid public body employee capable of retrieving the information necessary to comply with a request under this act.

31. The demanded \$1.00 per page fee exceeds the "actual incremental cost of duplication" allowed by the statute.

32. That the demanded \$1.00 per page fee exceeds the "actual incremental cost of duplication" is shown where local copy shops, which presumably make a profit from the service,

charge only 10 cents per page. A copy of a receipt for copying from a copy shop across the street from the Westland City Hall, where copies are 10 cents per page, is attached as Exhibit J.

33. The demanded hourly fee of \$45.61 exceeds “the hourly wage of the lowest paid public body employee capable of retrieving the information necessary to comply with a request...”

34. The retrieval, collection and copying of the requested information could be done by a person who makes less than \$94,868.80 a year.

35. MCL 15.243, being Section 13 of FOIA, permits a public body to exempt certain information from public disclosure.

36. MCL 15.244, being Section 14 of FOIA, permits a public body to “separate the exempt and nonexempt material.”

37. Section 4(1) allows the government body to charge for “the cost of search, examination, review, and the deletion and separation of exempt from nonexempt information as provided in section 14.”

38. The Mackinac Center requests detailed in this complaint contained nothing that would be exempt under Section 13.

39. Section 14 does not allow the public body to charge a fee for separation of materials for every request.

40. Section 14 only allows a charge for separation of documents “If a public record contains material which is not exempt under section 13, as well as material which is exempt from disclosure under section 13.”

41. It is inappropriate to charge a fee which includes the cost of separation unless the requested materials contain information that must be separated.

42. Charging every request an amount equivalent to attorney fees for examining exempt material violates the intended public policy of FOIA which is to provide “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.”

43. The “cost calculation guidelines and procedures required pursuant to MCL 15.234(3)” which was requested on July 9 is a document which Westland is required by statute to keep and make available per Section 4(3): “A public body shall establish and publish procedures and guidelines to implement this subsection.”

44. Obtaining a copy of the Section 4(3) guidelines should not entail any costs for sorting, redaction, or any other cost beyond the “actual incremental cost of duplication.”

45. When a public body charges costs and fees that exceed the amount allowed by the statute, and these costs and fees are clearly excessive, the courts will find that these prohibitive costs are a “constructive denial of the request.” See *Detroit Free Press v Michigan Department of State*, unpublished opinion per curiam of the Court of Appeals, issued May 16, 1997, (Docket No. 188313), available as 1997 WL 33347975. A copy of this unpublished opinion is attached as Exhibit K.

46. Westland’s excessive fees in this matter constitute a constructive denial of the request.

CONCLUSION AND RELIEF REQUESTED

For the reasons stated in this complaint, the Mackinac Center requests that this honorable court declare that:

The “several thousands of dollars” in costs and fees demanded by Westland constitute a constructive denial of the Mackinac Center’s July 9 request. The \$5.00 fee is not provided for by the statute and cannot be charged. Westland’s copy fee of \$1.00 per page is excessive, and the

proper cost should be in the range of five cents to 10 cents based on previous court opinions and the comparable cost at nearby copy shops. Westland’s hourly cost of \$45.61 far exceeds “the hourly wage of the lowest paid public body employee capable of retrieving the information necessary to comply with a request.” The Mackinac Center further seeks a determination of what the incremental cost of copying is and the “hourly wage of the lowest paid public body employee capable of retrieving the information necessary to comply with a request.”

Further, the Mackinac Center requests that this Court award its “reasonable attorneys’ fees, costs, and disbursements” pursuant to MCL 15.240(6), being Section 10(6) of FOIA. Also, that this Court find that Westland has “arbitrarily and capriciously violates this act by refusal or delay in disclosing or providing copies of a public record” and impose punitive damages in the amount of \$500.00 to the Mackinac Center pursuant to MCL 15.240(7), being Section 10(7) of FOIA; as well as any other relief that this Court considers proper or equitable.

Respectfully submitted,

September 20, 2013

Derk A. Wilcox
Mackinac Center Legal Foundation