

STATE OF MICHIGAN
COURT OF CLAIMS

MACKINAC CENTER FOR PUBLIC POLICY,
A Michigan nonprofit corporation,

Case Number: 19 - - MZ

Plaintiff,

Hon.

v

MICHIGAN DEPARTMENT OF LICENSING
AND REGULATORY AFFAIRS,
a Michigan state public body,

Defendant.

Derk A. Wilcox (P66177)
MACKINAC CENTER LEGAL FOUNDATION
Attorneys for Plaintiff
140 West Main Street
Midland, MI 48640
(989) 631-0900

VERIFIED COMPLAINT

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

Now comes Plaintiff, MACKINAC CENTER FOR PUBLIC POLICY, by and through its attorneys, and states the following:

BACKGROUND

The Plaintiff, MACKINAC CENTER FOR PUBLIC POLICY (the “Center”), is a nonprofit research and education institute that advances the principles of free markets and limited government. The Center believes that if government is to be, in the words of Abraham Lincoln,

“of the people, by the people, and for the people,” citizens must work hard to keep it accountable by understanding what it is doing. To that end the Center frequently makes use of the Freedom of Information Act process to obtain public records of interest. Here, the Center made a request for documents which has been continually ignored and has not been fulfilled, despite the original request having been made on May 13, 2019, and more than 90 days have passed.

THE PARTIES, VENUE AND JURISDICTION

1. The Plaintiff, MACKINAC CENTER FOR PUBLIC POLICY (the “Center”), is a nonprofit organization headquartered in Midland County, Michigan.
2. The Defendant, MICHIGAN DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS (“LARA”), is a state agency. Upon information and belief, it is headquartered in Lansing, Ingham County, Michigan.
3. Venue is proper pursuant to MCL 15.240(1)(b).
4. Pursuant to MCL 15.240(5), this action should be “assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.”
5. Pursuant to MCL 600.6419(1)(a), the Court of Claims has jurisdiction over this claim.

VIOLATIONS OF FREEDOM OF INFORMATION ACT

6. The Plaintiff hereby incorporates the preceding paragraphs as if fully restated herein.
7. On May 13, 2019, Center employee Jarrett Skorup submitted a FOIA request to LARA for records related to a LARA license review:

I am requesting the review of licensee Shawn McElmurray (file number 335464) and any other documents related to this case.

I found this report, but I cannot find it on the LARA website:
http://flintwaterstudy.org/wp-content/uploads/2019/03/335464_Shawn_McElmurry_part_2_-FINAL-DECISION.pdf

Jarrett Skorup Director of Marketing and Communications 140 W. Main Street Midland, Michigan 48640 989-631-0900

See Exhibit A, LARA's "Service Request Edit Page," at page 2.¹

8. On May 21, 2019, LARA responded, stating:

Your 5/13/2019 request has been received in this office and given the reference number R024415-051319 for tracking purposes. A written request made by facsimile, electronic mail, or other electronic transmission is not received by a public body's FOIA coordinator until one (1) business day after the electronic transmission is made. (MCL15.235(1))

In order to determine the existence of any records/information that might be responsive to your request we require additional time to search for and retrieve records; review and examine any found records to separate exempt from nonexempt material; and to determine any allowable processing costs. For these reasons, it is necessary to extend the time for response to 6/5/2019.

See Exhibit A, supra, at page 3.

9. Despite the extended response time, June 5, 2019 came and passed without LARA providing the requested information or any other further details.

10. On June 17, 2019, Skorup followed up, sending LARA a message:

TO: "MI LARA FOIA Center"[michiganlara@mycusthelp.net]

We are well past the time period on this one and I still don't have the documents. Please update me on where this is at.

Jarrett Skorup
Mackinac Center

Exhibit A, supra, at page 2.

11. To date, LARA has not provided the requested information, nor given any further explanation for the delay.

12. MCL 15.231(2) states:

¹ LARA uses an online request and response system. This "Service Request Edit Page" was last accessed and printed for this exhibit on August 2, 2019.

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.

13. MCL 15.235(2) states that the public body must respond to a request within 5 business days:

(2) Unless otherwise agreed to in writing by the person making the request, a public body shall respond to a request for a public record within 5 business days after the public body receives the request by doing 1 of the following:

(a) Granting the request.

(b) Issuing a written notice to the requesting person denying the request.

(c) Granting the request in part and issuing a written notice to the requesting person denying the request in part.

(d) Issuing a notice extending for not more than 10 business days the period during which the public body shall respond to the request. A public body shall not issue more than 1 notice of extension for a particular request.

14. MCL 15.234(8) indicates that a public body may respond to a FOIA request with a good faith estimate as to the cost of the FOIA request. However, the statute further states:

The response shall also contain a best efforts estimate by the public body regarding the time frame it will take the public body to comply with the law in providing the public records to the requestor. The time frame estimate is nonbinding upon the public body, but the public body shall provide the estimate in good faith and strive to be reasonably accurate and to provide the public records in a manner based on this state's policy under [MCL 15.231] and the nature of the request in the particular instance.

15. Our Attorney General, on December 12, 2017, issued Opinion No. 7300 interpreting the requirements of MCL 15.234(8):

It is my opinion, therefore, that a public body's "best efforts estimate" under subsection 4(8) of FOIA, as to the time it will take to fulfill a request for public records, must be a calculation that contemplates the public body working diligently to fulfill its obligation to produce the records to the requestor. The estimate must be comparable to what a reasonable person in the same circumstances as the public body would provide for fulfilling a similar public records request. In addition, under subsection 4(8), the best efforts estimate must be made in "good faith," that is, it must be made honestly and without the intention to defraud or delay the requestor.

16. The requested materials were simply the file related to a LARA license review, and should have been easily reviewed and provided.
17. An unreasonable delay in providing FOIA documents is a denial under MCL 15.235, MCL 15.240(1) and MCL 15.240(7).
18. MCL 15.234(9) indicates a public body that does not timely respond to a FOIA request under MCL 15.235(2) shall reduce the charges for any labor at a rate of 5% a day with a maximum of 50% if the late response was willful or if the request was clearly identified as a FOIA request.
19. The FOIA request was clearly identified and should have been provided at least by June 5, 2019. To date, more than two months later, and three months after the request was made, it has not been provided to. Under MCL 15.234(9), Plaintiff is entitled to the statutory maximum 50% reduction in labor costs.
20. LARA's actions regarding this delay in providing these emails responsive to the FOIA request are arbitrary and capricious under MCL 15.240(7) thereby subjecting LARA to a civil fine of \$1,000 payable to the general treasury and a separate \$1,000 to Plaintiff.
21. LARA's actions regarding this delay in providing these emails responsive to the FOIA request constitute willful and intentional failure to comply under MCL

15.240b, thereby subjecting it to a civil fine of \$2,500 to \$7,500 payable to the state treasury.

22. Pursuant to MCL 15.240(6), the Center, if it prevails, is entitled to attorneys' fees and costs:

If a person asserting the right to inspect, copy, or receive a copy of all or a portion of a public record prevails in an action commenced under this section, the court shall award reasonable attorneys' fees, costs, and disbursements. If the person or public body prevails in part, the court may, in its discretion, award all or an appropriate portion of reasonable attorneys' fees, costs, and disbursements. The award shall be assessed against the public body liable for damages under subsection (7).

RELIEF REQUESTED

Plaintiff, MACKINAC CENTER FOR PUBLIC POLICY, respectfully requests that this Court order Defendant, LARA, to provide all documents sought in the FOIA request; apply the full penalties available under MCL 15.234(9), MCL 15.240(7), and MCL 15.240b; award attorneys' fees and costs under MCL 15.240(6); and award any other relief this Court determines to be just and equitable to remedy LARA's delays in providing the requested information and causing the need to bring this suit.

I declare that the statements above are true to the best of my information, knowledge, and belief.

Dated: August ____, 2019

Jarrett Skorup
Director of Marketing and Communications
Mackinac Center for Public Policy

Subscribed and sworn to by _____ before me on the _____ day of _____, _____ .
Signature _____