

**STATE OF MICHIGAN
WAYNE COUNTY CIRCUIT COURT**

**THE MACKINAC CENTER FOR PUBLIC
POLICY, a nonprofit Michigan Corporation**

Case No.: 21-_____ -CZ

Plaintiff,

v.

Hon.

**THE CITY OF HIGHLAND PARK, a
Michigan municipal corporation.**

Complaint

Defendant.

Derk A. Wilcox (P66177)
Stephen A. Delie (P80209)
Patrick J. Wright (P54052)
Mackinac Center for Public Policy
Attorneys for Plaintiff
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Midland, MI 48640
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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.

NOW COMES Plaintiff, The Mackinac Center for Public Policy, and for its Complaint alleges and states as follows:

INTRODUCTION

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.

On March 29, 2021, the Mackinac Center made a routine request to the City of Highland Park (the “City”), seeking personnel and salary records for Police Lieutenant James McMahon. On April 6, 2021, the City responded by denying the Mackinac Center’s request based on MCL 15.243(1)(a) (the “privacy exemption”). This suit follows, as the law does not support the City’s redaction of public records.

PARTIES, JURISDICTION, AND VENUE

1. Plaintiff, the Mackinac Center for Public Policy (the “Mackinac Center”), is a Michigan nonprofit corporation headquartered in Midland County, Michigan.
2. Defendant, the City of Highland Park (“The City”), is a municipal corporation and public body which is headquartered in Wayne 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 15.240(1)(b) and MCL 600.605, the circuit court has jurisdiction over this claim.

VIOLATIONS OF THE FREEDOM OF INFORMATION ACT

6. The Plaintiff hereby incorporates the preceding paragraphs as if fully restated herein.
7. On March 29, 2021, Mackinac Center employee Jarrett Skorup submitted a FOIA request to the City for Lieutenant McMahon’s personnel and salary records.

8. On April 6, 2021, the City denied the Mackinac Center’s request, citing the privacy exemption. **Exhibit A, FOIA Denial.**
9. The City’s response to the Mackinac Center’s request is contrary to law, as the exemption cited does not justify the City’s response.
10. MCL 15.231(2) states:

It is the public policy of this state that all persons, except those persons incarcerated in state or local correctional facilities, are entitled to fully 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 participate in the democratic process.
11. The public body has the burden of proof in applying an exemption. MCL 15.235(5)(a)-(c); *MLive Media Group v City of Grand Rapids*, 321 Mich App 263, 271 (2017).
12. The FOIA is a pro-disclosure statute, and as a result, “exemptions to disclosure are to be narrowly construed.” *Swickard v Wayne County Medical Examiner*, 438 Mich 536, 544 (1991).
13. The privacy exemption states:
 - (1) A public body may exempt from disclosure as a public record under the 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.
14. The City bears the burden of demonstrating that its application of the privacy exemption is appropriate. *Herald Co v City of Bay City*, 463 Mich 111, 119 (2000).
15. When applying the privacy exemption, the courts apply a two-prong test. The first prong is whether the information sought contains “private or confidential information relating to a person” or “intimate or embarrassing” details about an individual’s personal life. *ESPN Inc v Michigan State University*, 311 Mich App 662, 665 (2015) citing *Mich Federation*

of Teachers v Univ of Mich, 481 Mich 657, 675 (2008). The second prong is, if the information is found to be personal under prong one, whether disclosure of that information would be a clearly unwarranted invasion of individual privacy. *ESPN, Inc*, 311 Mich App at 669 (citation omitted). In evaluating the second prong, the court balances the public's interest in disclosure against the individual's interest in privacy. *Id.*

16. The City cannot demonstrate that the disclosure of personnel records in this particular instance would constitute a clearly unwarranted invasion of privacy.
17. Michigan Courts have applied the privacy exemption in the context of police records before. Courts have acknowledged that a public record of a law enforcement body is not automatically exempt from FOIA. *Detroit Free Press Inc v City of Southfield*, 269 Mich 275, 285-86 (2005). Instead, records are only exempt if the public-interest balancing test is satisfied. *Id.*
18. Even if the information requested by Plaintiff could be considered of a "personal nature," the City's application of the privacy exemption is improper, as the public interest in the disclosure of the requested information is of such a magnitude that it is practically impossible for the privacy interest of Lieutenant James McMahon to clearly outweigh the public interest in disclosure.
19. James McMahon is law enforcement officer that has been accused of being involved in a towing and bribery scam in which vehicles were unlawfully seized and police officers were bribed to create false reports to cover up these unlawful seizures. The media has written extensively on this subject,¹ and the accusations have led to lawsuits against

¹ See, e.g., <https://www.detroitnews.com/story/news/local/detroit-city/2017/10/04/highland-park-officer-tow-firm-detroit-lawsuit/106282478/>;

Lieutenant McMahon.² An adequate understanding of Lieutenant McMahon's performance and disciplinary history is a matter of significant public interest, given the allegations of illegal activity and his continued employment as a police officer.

20. Thus, even if Plaintiff's request sought information of a personal nature, the public interest in that information renders the privacy exemption inapplicable.
21. Assuming, *arguendo*, that the City's application of the privacy exemption is otherwise appropriate, the City violated FOIA by failing to adequately explain its justification for the exemption or the nature of the specific information being withheld.
22. When records are being exempted from disclosure, the public body must provide a particularized justification for that exemption. *Nicita v City of Detroit*, 216 Mich App 746, 754 (1996). It is not sufficient for a public body to simply quote the statutory language of an exemption. *Hyson v Department of Corrections*, 205 Mich App 422, 424 (1994).
23. The City failed to provide a particularized justification in its denial, instead merely quoting MCL 15.243(1)(a).
24. Even if portions of Lieutenant McMahon's personnel records are exempt from disclosure, the City has the duty to separate exempt information from non-exempt information, and to produce all non-exempt information. *Herald Co, Inc v Ann Arbor Public Schools*, 224

<https://www.detroitnews.com/story/news/local/wayne-county/2018/09/04/towing-scandal-gasper-fiore-lawsuit-b-g-towing/1143453002/>;
<https://www.detroitnews.com/story/news/local/wayne-county/2018/12/09/detroit-area-police-officials-accuse-each-other-wrongdoing/2053813002/>;
<https://www.detroitnews.com/story/news/local/detroit-city/2019/05/08/detroit-cops-car-thefts-down-since-city-banned-tow-firm/3587257002/>.

² See, e.g., <https://casetext.com/case/dabish-v-mcmahon>;

<https://www.detroitnews.com/story/news/local/wayne-county/2018/09/04/towing-scandal-gasper-fiore-lawsuit-b-g-towing/1143453002/>;

Mich App 266, 275 (1997). The City must also state the nature of the exempt material being withheld. *Id.*

25. Instead, the City simply withheld release of all requested records, thereby violating the FOIA.

26. In addition, even if the entirety of Lieutenant McMahon's personnel records are found to be exempt under the privacy exemption, his salary information is not.

27. Michigan Courts have consistently held that salary information is not exempt from disclosure, even when combined with public employees' names. In *Penokie v Michigan Technological University*, 93 Mich App 650, 663-64 (1979), the court found that:

[t]he names and salaries of the employees of defendant university are not "intimate details" of a "highly personal" nature. Disclosure of this information would not thwart the apparent purpose of the exemption to protect against the highly offensive public scrutiny of totally private personal details. **The precise manner of expenditure of public funds is simply not a private fact.** The heavy burden of justifying nondisclosure has not been met by the conclusory allegations of "ill will, hard feelings prejudice among employees" and "chill(ing of) the applications of further persons for positions similar to" those of intervening defendants. Nor is there any support for the allegations of amicus curiae Oakland University that disclosure of the compensation of individual employees "would cause significant indignity, embarrassment, and humiliation and would disrupt existing relationships".

(Emphasis added).

28. The Court further held that, even if salary information about public employees were to be considered personal for purposes of the privacy exemption, the public's right to know how tax dollars are being spent clearly outweighs any privacy interest. The Court stated:

While we are not persuaded that salary information about individual public employees is "private" information for FOIA purposes, even assuming that disclosure would constitute an invasion of personal privacy, that invasion would not be "clearly unwarranted". **The minor invasion occasioned by disclosure of information which a university employee might hitherto have considered private is outweighed by the public's right to know precisely how its tax dollars are spent.**

(Emphasis added).

29. Michigan Courts have applied these principles consistently. In *Detroit Free Press v City of Southfield*, 269 Mich App 275, 287 (2005), the court held that the names of retired police officers, when combined with the amount of pension payment they were receiving, were subject to disclosure based on the public's strong interest in knowing how its tax dollars were being spent.
30. The City's improper withholding of the requested records is arbitrary and capricious under MCL 15.240(7), thereby subjecting the City to a civil fine of \$1,000.00 payable to the general treasury and a separate \$1,000.00 to the Mackinac Center.
31. The City's inappropriate application of MCL 15.243(1)(a) constitutes a 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.
32. 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, the City of Highland Park, to provide all documents sought in the FOIA request in unredacted form; 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 the City's improper exemption of the requested information and causing the need to bring this suit.

Dated: April 19, 2021

/s/ Derk Wilcox
Derk Wilcox (P66177)
Senior Attorney
Mackinac Center for Public Policy

Exhibit A

Delie, Steve

From: Ramsey, K <kramsey@highlandparkmi.gov>
Sent: Tuesday, April 6, 2021 4:30 PM
To: Skorup, Jarrett
Subject: FOIA Request: Personnel Records of James McMahon

Dear Mr. Skorup:

Your request for the personnel records of James McMahon has been denied pursuant to section MCL 15.243(1)(a) of the Freedom of Information Act, which states:

(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.

Under the Freedom of Information Act, you have the right to do either of the following:

1. Submit a written appeal to the City, which specifically states "appeal" and the reason or reasons the denial should be reversed; or
2. Commence an action in the Wayne County Circuit Court to compel disclosure. Should you prevail, you will be entitled to have reasonable attorneys' fees, costs and disbursements assessed against the City by the Court. If you or the City prevails in part, the Court may, in its discretion, award you all or an appropriate portion of reasonable attorney's fees, costs, and disbursements. If the Court determines that the City has been arbitrary and capricious in its denial, you will be entitled to, in addition to actual damages, punitive damages in the amount of \$1,000.00.

Sincerely,

Kathy B. Ramsey

Legal Projects Specialist

City of Highland Park

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