FOIA Wars: The Government Strikes Back

BY JOSEPH E. RICHOTTE AND DOAA K. AL-HOWAISHY

When first enacted, laws protecting the public's right of access to information about their government were lauded as a new hope for transparency. Anyone could ask for records about the people's business, and the government was required to give them access, subject to certain limitations that balanced competing interests in certain circumstances (e.g., national security, law-enforcement investigations, legally privileged information, trade secrets, etc.). If the requestor disagreed with the government's reason for withholding information, then the requestor could sue the government and ask a judge to order disclosure. Many jurisdictions even allowed requestors to recover their attorney fees and costs for the trouble of vindicating their right of access.[1]

Government agencies and officials have long complained about the time and expense devoted to answering FOIA requests. From time to time, they have tried tinkering around the edges with reform legislation. Having limited success on that front, some are now quietly trying a new tactic that, if successful, will threaten to dissuade people from even making requests in the first place: They are suing the requestors.

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The Battle of Hoth

As our friends in the Upper Peninsula can attest, some parts of Michigan can easily pass for Hoth during the wintertime. So, it is fitting that we battled against this latest tactic in the FOIA wars in our home state. This time the rebels won.

In *Montcalm County v. Greenville Daily News*, a journalist submitted a FOIA request for the personnel files of the undersheriff and a sheriff's deputy who were candidates in an open race for sheriff. What better way for voters to evaluate the candidates for the job as "top cop" in the county than by studying how well they'd performed their jobs in law enforcement? The undersheriff had no objection to the release of his file. The deputy did.

He threatened to sue the county if it released his file, citing Michigan's Employee Right to Know Act (ERKA). ERKA gives employees a right to examine their own personnel records. The term "personnel record" is generally defined, but certain materials and information are excluded from the definition; those items are not available to the employee.[2] ERKA also requires an employer to review a personnel record and, before releasing information to a third party, delete disciplinary records that are more than four years old, unless ordered otherwise in connection with a lawsuit or arbitration.[3]

In our case, the county claimed there was a conflict between its duty to release records under FOIA and ERKA's requirement to delete disciplinary records that were more than four years old, even though (1) ERKA expressly provides that it does not diminish the right of access to records under FOIA[4] and (2) an unpublished (nonprecedential) appellate decision from the Michigan Court of Appeals found no conflict between FOIA and ERKA. It filed a declaratory action for instructions on how it should proceed.

The county also obtained an *ex parte* TRO that not only stayed the county's duty to respond to the request under FOIA, but also enjoined the newspaper from pursuing administrative appeals or suing the county under FOIA to compel production. The trial court also ordered the *newspaper* to show cause why the records should be disclosed, even though Michigan law assigns the burden of proof to the party invoking the exemption—i.e., the *government*.[5]

Somewhere, a Wookie roared. And we all know it's not wise to upset a Wookie.

The newspaper broke out the snow speeders and rushed into battle. We reminded the court that there are only two kinds of FOIA lawsuits: (1) a lawsuit brought *by a requestor* under MCL 15.240(1)(b) after a public body has denied access to a public record and (2) a reverse-FOIA lawsuit *by an affected third party* who claims a common-law or statutory right, independent of FOIA, to preclude the release of records about him – or herself.[6] In Michigan, a declaratory action cannot be brought unless a court would otherwise have jurisdiction over the substance of a dispute.[7]

There is no mechanism for the government to sue a requestor under Michigan's FOIA, which only confers jurisdiction over *claims by a requestor* to *compel disclosure* within six months of a *denial*.[8] A denial is a mandatory jurisdictional predicate; a claim is not ripe until after a denial has been issued.[9] Thus, a public body has no right under FOIA to ask a court to ratify its decision to grant a request or to instruct it how to proceed.[10]

There's a reason why FOIA gives the *requestor* the choice to seek court review if a request is denied. It lets the requestor decide whether to assume the burdens of litigation—paying filing fees, hiring lawyers, missing work for court dates, etc.

Nothing in FOIA says that a public body can foist those burdens upon unsuspecting requestors.

The ghost of Admiral Ozzel warns of the obvious danger. He felt the power of the dark side when he irritated Lord Vader. Very few people are looking to get squeezed by a lawsuit for making a request. After all, any public body could proceed in the same manner in response to any FOIA request where an exemption may apply. Unsure whether the request seeks information of a clearly unwarranted invasion of privacy? Sue the requestor. Unsure whether releasing the information would interfere with law-enforcement proceedings? Sue the requestor. Unsure whether the public interest in disclosure outweighs the public interest in nondisclosure of law enforcement personnel records? Sue the requestor. The examples are as numerous as the exemptions listed in any given FOIA statute.

The Clone Wars

This phenomenon of suing FOIA requestors is not new. Nor is it unique to Michigan.[11] At least six states beat Michigan to the punch, and the trend continues. We are now deep in our own version of the Clone Wars.

The Battle of Texas—*City of Garland v. Dallas Morning News.*[12] In 1993, *The Dallas Morning News* requested a copy of records concerning the resignation of the finance director for Garland, Texas. Included within the responsive records was a draft memorandum prepared by the city manager, which listed reasons why the city should fire its finance editor. After the city council reviewed the memorandum, the finance director resigned. The city first claimed the memorandum wasn't a public record but then sued the newspaper for a declaration that its position was correct. Under Texas's version of FOIA, however, public bodies were supposed to ask the attorney general for a decision if they were unsure of a record's status. After a seven-year battle in the lower courts, the Texas Supreme Court ruled in 2000 that the State's 1993 version of FOIA did not preclude public bodies from suing requestors.[13] Fortunately, the victory was pyrrhic. In 1995, the Texas Legislature amended the statute to expressly preclude such lawsuits.

The Texas Legislature is to be applauded for this commonsense reform. To its credit, the Michigan House *unanimously* passed a bill last year that would expressly prohibit such lawsuits in Michigan—no small feat in our politically charged times.[14] But Senate Majority Leader Arlen Meekhof refuses to give the bill a hearing before the Senate Government Operations Committee he chairs. His indifference—which has been too common on matters affecting the press[15]—calls to mind Grand Moff Tarkin's legendary quip, "we will deal with your rebel friends soon enough."

The Battle of California at Los Angeles—*Filarsky v. Superior Court of Los Angeles County*.[16] In 1999, a requestor submitted a FOIA request to the City of Manhattan Beach, California, for public records. The city denied the request, and the requestor expressed an intent to sue. The city raced to the courthouse to file a declaratory action. The trial court and intermediate appellate court ruled that the city was within its rights to do so. In 2002, the California Supreme Court reversed, holding that these kinds of declaratory actions would "eliminate statutory protections and incentives for members of the public in seeking disclosure of public records, require them to defend civil actions they otherwise might not have commenced, and discourage them from requesting records pursuant to [California's version of FOIA], thus frustrating the Legislature's purpose of furthering the fundamental right of every person in [California] to have prompt access to information in the possession of public agencies.

The Battle of North Carolina—*City of Burlington v. Boney Publishers, Inc.*[17] and *McCormick v. Hanson Aggregates Southeast, Inc.*[18] In 2002, *The Alamance News* challenged a decision by the city council for Burlington, North Carolina, to meet in closed session for a conversation covered by attorney-client privilege when it learned a third party attended the meeting. It requested meeting minutes from the closed session. The city withheld the minutes and filed a declaratory action. The trial court ruled in favor of the city.

In the same year, Hanson Aggregates requested records from the city attorney for Raleigh, North Carolina, related to a quarry the company owned. The city attorney filed a declaratory action for a ruling that the records were not subject to North Carolina's version of FOIA. The trial court ruled in favor of the city attorney.

Both defendants appealed. The North Carolina Court of Appeals held in both cases that FOIA gives *requestors* the right to sue, but not the government. The North Carolina Supreme Court initially granted leave in the *Burlington* case but rescinded that order as improvidently granted, leaving the intermediate decision intact.[19]

The Battle of Vermont—*Addison Rutland Supervisory Union v. Cyr*.[20] In 2012, a Vermont school board issued a no-trespass order to a parent of an active student. He wrote to the board asking why the order had been issued. When the board responded that a "professional" gave a "clinical opinion" that his "escalating hostility" posed "a serious threat," the parent submitted a FOIA request for all records showing the basis for the order. The board granted itself an extension but ultimately filed a declaratory action instead of responding, relying on the Texas *Garland* decision as the basis for asking the court to decide if the records were exempt from production. Employing the same reasoning we advocated in *Greenville Daily News*, the court ruled that the State's declaratory judgment act did not expand the court's jurisdiction, and nothing in Vermont's version of FOIA gave public bodies the right to sue requestors; only requestors can sue. The court dismissed the action for want of jurisdiction, finding *Garland* inconsistent with the purpose and text of Vermont's statute.

The Battle of Montana—*City of Billings v. Billings Gazette Communications*.[21] In 2014, *The Billings Gazette* requested records about an investigation into cash being diverted

from the city's recycling program to coffee, food, kitchen supplies, and personal use. Rather than release the records, the city filed a declaratory action, asking the court to decide if releasing the records would impinge on the privacy rights of the wrongdoers under Montana's constitution. In 2015, the court ruled that the city had improperly sued the newspaper, and it ordered the city to disclose over 1,000 pages of records.

The Battle of New Jersey—*Hamilton Township v. Scheeler*.[22] In 2015, a requestor asked for a copy of surveillance footage of the town hall and police department under New Jersey's version of FOIA. Instead of responding to the request, the township filed a declaratory action, seeking a ruling that it had no duty to respond. The requestor then narrowed his request, only to be met with an amended complaint that also asked for attorney fees. The township would have done well to heed Princess Leia's advice to Grand Muff Tarkin: "The more you tighten your grip, Tarkin, the more star systems will slip through your fingers." The court held that the township had no legal right to file a declaratory action; New Jersey's version of FOIA only gives requestors the right to sue. For extra measure, the court allowed the requestor to ask for his fees, essentially holding that public bodies that try to evade FOIA by imposing litigation burdens on requestors should not escape the fee-shifting provision in the statute.[23]

The Battle of California at Alameda—*Newark Unified School District v. Brazil*.[24] In 2014, a requestor asked a school district for records under California's version of FOIA. The school district produced records but later claimed to have inadvertently produced privileged information. It sued the requestor to recover the records when the requestor refused to return the records. In a move that would make Senator Palpatine smile a sinister smile, the school district *demanded attorney fees* from the requestor—$449,317.60 to be exact. Because that's reasonable, right? ("Darth Vader. Only you could be so bold.") The court rejected the demand, holding that the school district was not a "plaintiff" under the applicable statute.[25]

The Debate in the Galactic Senate: Should the Government Be Allowed to Sue Requestors?

A key argument running through several of these lawsuits, including the one we handled in Michigan, is that the government is stuck in a Catch 22. If it releases private information under FOIA that is protected under another law, then it may be sued by the person whose privacy interests are invaded. If it refuses to disclose information but is wrong about the privacy protections afforded by another law, then the requestor may sue. In both cases, the government may incur not only the normal costs of litigation, but also the other side's attorney fees. How best to protect the public fisc? File a declaratory judgment and let the court make the decision, so it can release or withhold records without fear of a fee award. Plus, in the government's view, the specter of litigation will diminish "abusive" FOIA requests and lead to "better" requests that will reveal information truly helpful to FOIA's purpose: to shed a light on agency action and increase government accountability.

We are unmoved by these arguments for several reasons.

First, these lawsuits rob requestors *and* public bodies of the benefits of administrative appeals. Because exemptions are largely permissive, not mandatory, an administrative appeal gives a requestor the chance to plead his or her case directly to the public body (not the FOIA coordinator who denied the request), while also giving the public body an opportunity to decide whether to keep invoking an exemption at the risk of being sued.

Second, this approach upsets the decision, made by most legislatures, that requestors should not be required to pay litigation expenses if they prevail in obtaining records in court. In those states, the legislatures have built into FOIA a "risk-reward" element. If a requestor obtains a judicial ruling in favor of disclosure, then the requestor is relieved of the financial burdens of litigating the matter. If a court finds the records to be exempt, then the requestor bears those financial burdens. If public bodies bring declaratory actions, a requestor may be denied reasonable attorney fees even if he or she wins because the case was not "commenced by the requestor" under the state's FOIA law.

Third, when public bodies obtain TROs in declaratory actions, they can impermissibly shift the burden of proof. Under most FOIA statutes, the public body has the burden of proving that an exemption applies.[26] But, in the *Greenville Daily News* case, the TRO required the *newspaper* to show cause why the records should be disclosed. Such requirements impermissibly interfere with a pro-disclosure scheme that puts the onus on a public body to justify withholding information under an exemption.

Fourth, third parties are perfectly capable of protecting their own privacy interests. Reverse FOIA lawsuits already provide a mechanism for third parties to seek court intervention. Nothing stops the government from notifying the third party so that it can protect its own interests. If the third party doesn't act, then why should the government care more about that person's privacy interests than the person does?

Fifth, the government's interest in protecting itself from litigation isn't the only interest in play. We are a sovereign people. Although we entrust the day-to-day operations of our government to elected and appointed officials, we exercise self-government as an informed electorate by supervising them and holding them accountable for their work. It is essential to the health of our republic to be able to inform ourselves about the workings of our government by accessing its records, attending its meetings, and questioning its activities.

Sixth, the notion of an "abusive" FOIA request is in the eye of the beholder. Usually, this boils down to one of three complaints: (1) the requestor asks for too much, (2) the requestor makes too many requests, and (3) it's too expensive to respond to the requests. If only people would make "better" requests, right? Superficially, these are reasonable complaints. But they don't hold much water when you think about

them.

The Twin Suns of Tatooine. The volume of requests likely signals an active voter who cares enough to take the time to become informed so as to responsibly exercise the franchise at the next election—or a reporter looking to help the electorate do that. Does it make sense that the government can complain a citizen is too informed about what government is doing in the citizen's name? These are "sunshine laws." The government should hardly be heard to complain it's too bright.

These Are Not the Droids You're Looking for. The volume of data responsive to a request may simply mean that the requestor is unsure of exactly how to word a request to capture what the requestor wants, so the requestor is overbroad to obtain the desired information. We lawyers do that all the time in discovery requests. And we all know how our judges deal with that. They tell the lawyers to talk to each other and work it out. What's more time-consuming: kvetching about overbroad requests while you search for, review, redact, and produce everything requested *or picking up the phone* and *asking* the person if there's a way to get at the heart of the request? The Michigan Department of Corrections did just that when one of us issued a broadly worded FOIA request in a civil rights case. A ten-minute telephone call reduced the burden on corrections officials and speeded production, and we still obtained everything we needed. If C-3PO can be fluent in over six million forms of communication, we're betting a public body can handle a telephone call.

It's a Trap! (What *Star Wars*–themed article could be complete without a nod to everyone's favorite character, Admiral Ackbar?) On the expense issue, it is our experience that the vast majority of a public body's "cost" to answer a FOIA request comes from redacting information from responsive documents. But the government isn't *required* to redact anything, except in narrow circumstances. In Michigan, for example, the only educational records that fall under FERPA are subject to a mandatory exemption under FOIA.[27] Every other exemption is permissive. So, when public bodies redact in Michigan, it is almost always a *voluntary choice*. If the government has no legal duty to redact, then why should it get to shift the costs to requestors? Your choice, your cost.

Proposed Legislation

These problems are not without sensible solutions. Here are some simple proposals to amend state FOIA laws to address the competing concerns in ways that don't harm the average requestor.

Section 1. A public body cannot sue a person who makes a request under this Act for any reason related to the request.

Section 2. A public body cannot recover its attorney fees incurred in connection with a lawsuit brought by a requestor under this Act, even if the public body prevails.

Section 3. A public body shall not withhold a public record from inspection or production under any other law, unless that law states, by specific reference to this section, that it controls in the event of a conflict between this Act and that law.

Section 4. A public body cannot charge a fee for time spent redacting information exempt from production, unless the exemption is mandatory or unless the head of the public body certifies, on a per-redaction basis, that the redaction is necessary to protect the physical safety of a person because of a specific, credible threat of physical violence.

By adding these four clauses, we can end this battle tactic in the FOIA wars. The requesting public would be protected from lawsuits and vengeful demands for attorney fees, public bodies would be given clear guidance on how to address perceived conflicts between statutes, and public bodies would be incentivized financially to expedite the release of information without compromising legal duties or public safety.

Endnotes

1. Michigan's FOIA largely follows the federal format, which makes almost every record possessed by a federal agency disclosable to the public unless it is specifically exempted from disclosure or excluded from the Act's coverage. *Compare* NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 136 (1975), *with* Mich. Comp. Laws § 15.233(1) ("Except as expressly provided in [exemptions], upon . . . request . . . a person has a right to inspect, copy, or receive copies of the requested public record of the public body.")

2. Newark Morning Ledger Co. v. Saginaw Cty. Sheriff, 204 Mich. App. 215, 221 (1994).

3. Mich. Comp. Laws § 423.507.

4. *Id.* § 423.510.

5. *Id.* § 15.240(4) (in a lawsuit to compel disclosure, "[t]he court shall determine the matter *de novo* and the burden is on the public body to sustain the denial"). Importantly, the statutory exemptions to disclosure found in Mich. Comp. Laws 15.243 are narrowly construed and largely permissive: "FOIA is intended primarily as a prodisclosure statute and the exemptions to disclosure are to be narrowly construed." Swickard v. Wayne Cty. Med. Examiner, 438 Mich. 536, 544 (1991). "Michigan FOIA authorizes, but does not require, nondisclosure of public records falling within a FOIA exemption." Tobin v. Mich. Civil Serv. Comm'n, 416 Mich. 661, 667 (1982).

6. *Tobin*, 416 Mich. at 670.

7. Mich. Ct. R. 2.605(A)(2).

8. Mich. Comp. Laws § 15.240(1)(b).

9. *See* King v. Mich. State Police, 303 Mich. App. 162, 188–91 (2013).

10. *See* Mich. Comp. Laws § 15.240(1)(b).

11. Hat tip to Jonathan Peters at the Columbia Journalism Review. Jonathan Peters, *When Governments Sue Public-Records Requesters*, Colum. Journalism Rev. (June 30, 2015), https://www.cjr.org/united_states_ project/when_governments_sue_public_record_requesters.php.

12. 22 S.W.2d 351, 358 (Tex. 2000).

13. *Id.* at 357–58.

14. H.R. 4077, 99th Legis., Reg. Sess. (Mich. 2017).

15. Brian Dickerson, *Subject Michigan Legislature to FOIA? Meekhof Says MYOB*, Detroit Free Press (Feb. 3, 2017).

16. 28 Cal. 4th 419 (2002).

17. 166 N.C. App. 186 (2004).

18. 164 N.C. App. 459 (2004).

19. City of Burlington v. Boney Publ'rs, Inc., 359 N.C. 187 (2004) (granting leave), 359 N.C. 422 (2005)

(rescinding leave).

20. No. 275-4-12 (Vt. Super. Ct., Civ. Div., Rutland Unit 2012).

21. No. 14-0964 (Yellowstone Cty. Dist. Ct., Mont. 2015).

22. 2015 WL 3915926, at *1 (N.J. Super., Law Div., 2015).

23. *Id.* at *6.

24. No. RG14738281 (Cal. Super. Ct. 2018).

25. Hat tip to Nikki Moore with the California News Publisher's Association for letting us know about this recent victory for the Republic.

26. *See*, *e.g.*, Colo. Rev. Stat. 24-72-204(6)(a); D.C. Code Ann. § 2-537(b); 5 Ill. Comp. Stat. 140/1.2; Mich. Comp. Laws § 15.240(1), (4); N.J. Stat. Ann. 47:1A-6; N.Y. Pub. Off. Law § 89(4)(b); 65 Pa. Cons. Stat. § 67.708(a); Va. Code § 2.2-3713(E); W. Va. Code § 29B-1-5(2).

27. *See, e.g.*, Mich. Comp. Law § 15.243(2) ("A public body shall exempt from disclosure information that, if released, would prevent the public body from complying with 20 USC 1232g, commonly referred to as the family educational rights and privacy act of 1974."); 5 U.S.C. § 552(b) (federal exemptions); *id*. § 552(c) (federal exclusions). *See also* U.S. Dep't of Justice, Guide to the Freedom of Information Act: Discretionary Disclosure (Dec. 8, 2014), *available at* https://www.justice.gov/sites/default/files/oip/pages/attachments/2014/12/08/discretionary_disclosure_sent_for_posting_december_5_2014.pdf (explaining the different considerations agencies examine when determining whether to disclose information). "As a general rule, the ability to make a discretionary release will vary according to the exemption involved and whether the information is required to be protected by some other legal authority." *Id.* at 3.

Close Enough for Jazz?

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sending tens of thousands of text messages to a woman whom he had known in high school and appearing unannounced and uninvited outside her home. The challenged news story stated that the individual was "convicted of felony aggravated stalking and sentenced to three years' probation." The pro se libel plaintiff argued (among numerous other claims) that the news report was actionable because he was not a convicted felon; instead, he had agreed to a judicial deferral. The plaintiff therefore argued that the media defendants could not rely upon the fair report privilege, claiming that the reporting that he had been "convicted" was simply wrong.

Recently appointed District Judge Wm. "Chip" Campbell dismissed the case on two grounds. The court held that the defendants did not publish the news reports with knowledge that any statement was false and defamatory, with reckless disregard for the truth of the statements, or with negligence in failing to ascertain the truth of the statements. The court also held that the news reports were a fair and accurate summary of the "gist" of the plaintiff's court records and therefore dismissed the case on the basis of the fair report privilege. The *Molthan* case has been appealed.

Another case in which a "deferred conviction" was characterized as a conviction *was Williams v. Cordillera Communications.*[4] In that case, a television station had reported that the plaintiff had "one conviction" for telephone harassment of a sexual nature. In fact, the individual had acknowledged the factual basis of the harassment charge and negotiated a deferred conviction pending successful probation.

The *Williams* court ultimately granted summary judgment in favor of the television station on plaintiff's libel claims, holding that the report was "substantially true" and thus nonactionable. "While Williams was not convicted of a crime, he confessed to the crime and was punished for it. The damaging issue in the mind of an ordinary viewer with respect to Williams' reputation is guilt and KRIS's statement that Williams had been convicted did not carry a heavier sting than the truth of his confessed guilt."[5] The Williams court also held that the reporting was subject to the fair report/fair comment privilege. Thanks to our friends at Haynes and Boone for the win in Williams.

Whether or not news reports like those in *Williams* and *Molthan* will be held to be "substantially true" or fall under the fair report privilege depends on a myriad of factors. How the trial court views the media in general is one of those factors.

What can media professionals do to ensure accurate reporting of the conviction status of a criminal defendant?

- Obtain an official determination of an individual's conviction status from a government office prior to publication or obtain an interpretation from an attorney. Beware of online docket searches, as the shorthanded nature of the system may prevent a full explanation of the disposition of charges.
- Keep a copy of any documentation showing a conviction status. Relying upon public records will allow a media defendant to assert the fair report privilege, assuming the privilege is recognized.
- Take screen shots of online databases showing particular conviction statuses to bolster the media outlet's position as to propriety of the fact gathering that took place prior to publication.

The media are inarguably under heightened scrutiny in today's environment. Reporters easily can misinterpret a judicial report, leading to costly litigation. Media lawyers should advise their clients about the morass of pleas, convictions, deferrals, and diversions.

Endnotes

1. *See* Tenn. Code Ann. § 40-35-313.
2. *Id.*
3. No. 3:17-cv-00380 (M.D. Tenn. 2018).
4. 26 F. Supp. 3d 624 (S.D. Tex. 2014).
5. *Id.* at 632.