

**STATE OF MICHIGAN
IN THE SUPREME COURT
APPEAL FROM MICHIGAN COURT OF APPEALS
Whitbeck, C.J., Bandstra, and Schuette, J.J.**

STATE NEWS,
a Michigan Nonprofit corporation,

Plaintiff-Appellee,

v.

MICHIGAN STATE UNIVERSITY,

Defendant-Appellant.

Supreme Court
Case No. 133682

Court of Appeals
Case No. 0271433

Ingham County Circuit Court
Case No. 06-674-CZ

**APPELLANT'S REPLY TO APPELLEE BRIEF OF STATE NEWS
ORAL ARGUMENT REQUESTED**

Date: February 8, 2008

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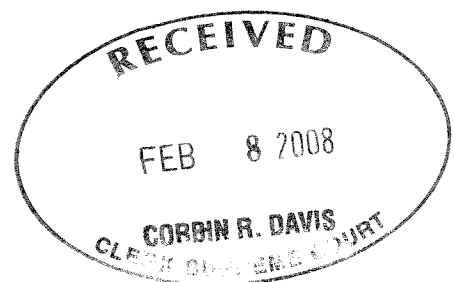


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INTRODUCTION

In this FOIA appeal, the Court has asked whether the court of appeals erred by requiring the trial court, on remand, to consider the public's knowledge about information contained in MSU's police incident report in determining whether the information is personal in nature.

Rather than answering this question, the State News proposes an entirely new standard for what constitutes information of a personal nature under the first prong of FOIA's privacy exemption. The State News urges the Court to hold that information can never be personal in nature when it is a matter of legitimate public concern. Specifically, the State News asserts that because the public always has an interest in crime, none of the information in MSU's police incident report can be personal in nature.

While the notion of legitimate public concern may be relevant to common law invasion of privacy principles, it has never been used by the Court to define the meaning of "personal in nature." Instead, this Court has long held that information is personal in nature when it contains intimate, potentially embarrassing details of a person's private life. Over a decade ago, the Court looked to the tort of invasion of privacy to interpret whether disclosure would constitute an unwarranted invasion of privacy under the second prong of FOIA's privacy exemption. Since the Court's decision in *Mager*, however, that has not been the standard. More importantly, the privacy exemption's second requirement is not within the scope of this appeal.

Last, in answer to the Court's question, the public's awareness of information is not an appropriate consideration in determining whether it is personal in nature. Public bodies are not capable of determining the public's knowledge with any degree of certainty or consistency. Attempting to ascertain public knowledge of information would impose impractical and costly

burdens on public bodies that the Legislature never intended them to assume. The State News, without any supporting authority, insists that once a fact is made known to the general public, it can no longer be an element of a person's private life. As *Mager* teaches, however, the publication of information about a person's private life does not make it any less personal or potentially embarrassing. Accordingly, the information about private citizens that is contained in MSU's police incident report is personal in nature, regardless of its publication.

REBUTTAL TO STATE NEWS' STATEMENT OF FACTS

The February 23 incident at Hubbard Hall, the subject of the requested police records, was an isolated incident. App 1b. The State News' characterization of it as one of several episodes of racial animosity and violence plaguing the entire campus is unsupported even by the State News' own reports. Nothing in the record indicates that the February 23 incident was racially motivated or linked to any other event on campus.

It is true that in February 2006, black student leaders led a discussion at Hubbard Hall as a result of "Blackout Hubbard," an event in which black students wore black to Hubbard Hall's cafeteria to raise awareness of racial issues on campus. App 4b. The Hubbard Hall discussion, however, was wholly unrelated to the February 23 incident.

It is also true that in March 2006, MSU organized meetings in its residence halls to educate students about its anti-discrimination policy. App 2b. But, these meetings were held in response to recent incidents of harassment based on race and sexual orientation, and had nothing at all to do with the February incident. *Id.* The State News' article that reported these meetings did not even mention the February 23 incident. *Id.* In fact, Hubbard Hall was not one of the residence halls that participated in the meetings. *Id.*

The State News' "statement of facts" is an inappropriately argumentative, disingenuous, and inflammatory portrayal of the record, and a transparent attempt to bolster its legal argument regarding the public's interest in crime. But, even if these facts were true, disclosure of MSU's police incident report does not turn on the existence of legitimate public concern. Instead, the FOIA statute makes clear that information is exempt from disclosure when it is personal in nature, and when release would constitute a clearly unwarranted invasion of privacy.

ARGUMENT

I. The Existence of Legitimate Public Concern is not Relevant in Determining whether Information Falls within FOIA's Privacy Exemption.

This Court has held that information is personal in nature when it reveals intimate or embarrassing details of an individual's personal, not public, life. *Mager v Dep't of State Police*, 460 Mich 134, 143-44; 95 NW2d 142 (1999) ("no doubt that gun ownership is an intimate or, for some persons, potentially embarrassing detail of one's personal life"); *Herald Co v City of Bay City*, 463 Mich 111, 125; 614 NW2d 873 (2000) ("the fact of application for a public job, or the typical background information one may disclose with such an application, is simply not 'personal'"); *Bradley v Saranac Community Schools Bd of Educ*, 455 Mich 285, 295; 565 NW2d 650 (1997) (personnel files of public school principals and teachers did not contain information of an embarrassing, intimate, private, or confidential nature relating to the public employees' private lives); *Booth Newspapers, Inc v Univ of Mich Bd of Regents*, 444 Mich 211, 231; 507 NW2d 422 (1993) (travel expense records of public employees incurred in connection with university business were not personal in nature).

Although the State News also cites to these cases, it incorrectly argues that they stand for an altogether different proposition – that information is personal in nature only if the context in which it appears does not present a legitimate public concern.¹ MSU agrees that whether information is personal in nature often depends on the context in which the information occurs,² but

¹ Appellee's Brief at 14-15 ("[E]ach of MSU's other citations regarding 'personal nature' merely held that the intimate facts at issue were 'personal' only because the context in which they appeared did not present a legitimate public concern."); *id* at 11 ("personal nature" is a "context-dependent term").

² For example, although names and other personally identifying information may not by

the relevant factor is *not* whether the information appears in records in which the public is legitimately concerned. Instead, the cases above demonstrate that the defining context for the Court is whether the sensitive information pertains to persons in their private versus public lives.

In the State News' eyes, for information in MSU's police incident report to be personal in nature, "it must pertain solely to intimate private matters, such as medical treatment or sexuality, *and* be of no legitimate public concern."³ Under its theory, even medical or sexual information would not qualify as personal in nature if there is legitimate public concern about that information. Neither the plain words of the FOIA statute nor the cases interpreting it support this meaning. In fact, the Court has never used the phrase "legitimate public concern" in analyzing FOIA's privacy exemption. Nor has it ever restricted the privacy exemption's applicability to medical or sexual information. To the contrary, *Mager* and the Court's subsequent decisions turn on whether release would reveal intimate facts about persons in their private lives.

The State News' argument regarding legitimate public concern is not new. The State News simply borrowed it from common law invasion of privacy principles. To quote the State News, "Michigan tort law does not consider information to be private or personal unless the information is of no legitimate concern to the public." Appellee's Brief at 16; *see also id* at 17 ("[E]ven

themselves be personal in nature, the fact that a person is identified as being involved in a crime is. Information about persons in their private lives is sensitive and potentially embarrassing because of the fact that it is contained in a police incident report, and therefore is personal in nature.

³ Appellee's Brief at 17; *see also id* at 14 (concluding that an individual's private life includes matters of no legitimate concern to others); *id* at 15 (claiming that the cases hold that certain information was personal only because it did not present a legitimate public concern); *id* at 23 ("FOIA's privacy exemption is concerned with individuals' 'private lives,' which are those intimate matters in which the public has no legitimate concern.").

personally identifying information . . . is not an invasion of privacy if it aids the public in understanding a newsworthy event.”). Its argument should be rejected for a number of reasons.

First, the Court clearly did not grant leave on this issue. Why would it? The court of appeals did not base its remand instructions or any of its analysis on whether the public was legitimately concerned about the information in MSU’s incident report. Nor has the State News ever properly challenged its failure to do so. Regarding the trial court’s bench ruling, the State News is correct that the trial court recognized that “the public has an interest in learning about crime in the community” and is “a very important thing for the community to know about.” App 30a. What the State News omits, however, is that the trial court concluded that this fact is irrelevant to determining whether information should be disclosed under FOIA: “[T]he real question here is whether the information should be disclosed or is exempt under FOIA. Not whether the community merely has an interest in knowing about crime.” *Id.*

This Court instead has pointedly asked whether the court of appeals erred in instructing the trial court on remand regarding the “personal nature” of public records, and whether the “personal nature” of the information is affected by its “contemporaneous or later publication.” In truth, invasion of privacy principles would logically pertain only to the privacy exemption’s second prong, whether disclosure would constitute a clearly unwarranted invasion of privacy, not the exemption’s personal nature prong. Despite the State News’ back-door attempt, the privacy exemption’s invasion of privacy requirement simply is not within the scope of this appeal.

Second, even if the State News’ argument was legitimately before this Court, common law invasion of privacy principles have not been relevant in analyzing FOIA’s privacy exemption for

more than a decade.⁴ In *Mager*, the Court adopted the test employed by the United States Supreme Court in the federal FOIA context in giving meaning to the privacy exemption's invasion of privacy requirement. Specifically, this Court ruled that "the only relevant public interest in disclosure to be weighed ... is the extent to which disclosure would serve the core purpose of the FOIA, which is contributing significantly to public understanding of the operations or activities of the government." *Mager, supra* at 145 (quoting *Dep't of Defense v Federal Labor Relations Authority*, 510 US 487, 495; 114 SCt 1006; 127 LEd2d 325 (1994)). Thus, under *Mager*, the appropriate inquiry is whether disclosure of the information would contribute significantly to the public's understanding of government operations, not simply whether the public has a legitimate concern in the information.⁵

II. The Public Disclosure of Information is Irrelevant to whether it is Exempt under FOIA's Privacy Exemption.

The question posed by this Court is whether the court of appeals erred in instructing the trial court on remand regarding the personal nature of public records, including whether the information's personal nature is affected by its publication. In response, and without citing any relevant

⁴ In *Swickard v Wayne Cty Medical Examiner*, 438 Mich 536; 475 NW2d 304 (1991), the Detroit Free Press sought the autopsy report and toxicology test results with respect to the apparent suicide of the chief judge of the 36th District Court. The Court held that the privacy exemption did not apply because the information was not of a personal nature and no invasion of privacy was threatened because a deceased person cannot maintain an action for invasion of privacy. *Id* at 556-58.

⁵ The court of appeals in *Baker v City of Westland*, 245 Mich App 90; 627 NW2d 27 (2001), reconciled *Swickard* and *Mager*, finding that *Swickard's* analysis on invasion of privacy is not binding authority and is *obiter dicta*. See *Baker, supra* at 101 & n3. The court distinguished *Swickard*, reasoning that after reading it as a whole, the Court meant that the requested records were not personal in nature because of the deceased judge's status as a public figure and government employee. *Id* at 100.

authority,⁶ the State News simply proclaims that “[o]nce a fact is made known to the general public (or even to a single reporter) ... it is *ipso facto* no longer an element of one’s ‘private life.’”

Appellee’s Brief at 23. Because neither the FOIA statute nor case law provides support for its statement, out of necessity, the State News urges the Court to adopt it as a “common-sense proposition.” *Id* at 24. The State News makes this leap with surprising ease because it repeatedly has misinterpreted “personal in nature” as meaning “private.” *See id* at 10 (stating the issue in this appeal is the “‘private nature’ element”); *id* at 9-10 (arguing that “crime-related information” is not “private”). This Court, however, consistently has held that information is personal in nature when it reveals intimate or embarrassing details of an individual’s personal life. Conversely, it has never held that personal in nature means private or never published.⁷

It is equally troubling that the State News refuses to tackle the more difficult questions that arise from a standard that says information is not personal in nature if it is has been published. For example, by what means must a fact become known to the general public or to a single reporter to

⁶ The State News points to several First Amendment cases highlighting the press’ right to publish newsworthy matters. *See* Appellee’s Brief at 23-24. Michigan’s FOIA statute, however, does not prohibit the disclosure of any information by a public body. Nor does it say anything about what a newspaper may or may not publish. Rather, it governs whether and the extent to which public bodies must disclose their records and does so without referring to the press or the newsworthiness of the information to be disclosed. Nothing precludes the State News from publishing what it discovers through investigative reporting methods. But, making a reporter’s job easier is not one of FOIA’s stated purposes. In fact, as the State News recognizes, the identity of the FOIA requestor is irrelevant in determining whether an exemption applies. *See id* at 20 n9 (quoting *Taylor v Lansing Bd of Water & Light*, 272 Mich App 200, 203; 725 NW2d 84 (2006)).

⁷ The federal courts, when interpreting the federal FOIA’s law enforcement exemption, have held that privacy interests are not diminished by the fact that events have been disclosed to the public. *See, e.g., United States Dep’t of Justice v Reporters Committee for Freedom of the Press*, 489 US 749, 762-73; 109 SCt 1468; 103 LEd2d 774 (1989); *see* Appellant’s Brief on Appeal at 25-27 for a discussion of these federal cases.

qualify as public information? May it be in a newspaper, a court hearing, or could it be a blog? How does a public body detect when the public becomes aware of a fact, or that a fact is relayed especially if it is only to a single reporter? Public bodies are not equipped to determine the public's knowledge with any degree of certainty and consistency. Nor can they continuously keep watch over information they previously declared exempt from disclosure, perhaps for a period long after responding to the FOIA request, and monitor whether changed circumstances warrant a different response. The State News' answer is that public bodies need not worry about these questions, because they are concerns for the trial courts only.⁸ Although many reasons exist for rejecting this approach, most importantly, it is an invitation to FOIA litigation and an extremely inefficient use of judicial resources to require court intervention for each and every determination of whether and when information is public.

In sum, the court of appeals' statements regarding public knowledge cannot stand. Under *Mager* and its progeny, information is personal in nature when it contains intimate and potentially embarrassing details of a person's private life, regardless of its publication.

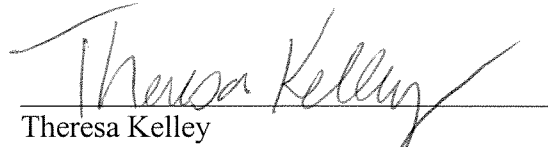
⁸ "The Court of Appeals' opinion makes no explicit or implicit attempt to create any such judicial lawmaking. Rather, the opinion's instructions are addressed solely to the trial court." Appellee's Brief at 30.

CONCLUSION AND REQUESTED RELIEF

Newsworthiness and the public's interest in crime in the community are irrelevant to whether police incident records contain information that is personal in nature. Instead, this Court should adhere to the standard it set forth in *Mager*. Whether published or not, the information about individuals in their private lives that is contained in MSU's police incident report is personal in nature under FOIA's privacy exemption.

For the reasons set forth above, MSU requests this Court to reverse the court of appeals' decision instructing the trial court, on remand and during the in camera review, to consider, under MCL 15.243(1)(a) and MCL 15.243(1)(b)(iii), whether any information should now be disclosed because of the effect of the passage of time, the contemporaneous or later publication of any of the information, or the current status of the police investigation or criminal trials.

Date: February 8, 2008



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