

STATE OF MICHIGAN
IN THE SUPREME COURT

SPENCER WOODMAN,

Plaintiff-Appellant,

v

Supreme Court No. 163382

Court of Appeals No. 353164

Court of Claims No. 17-000082-MZ

MICHIGAN DEPARTMENT OF
CORRECTIONS,

Defendant-Appellee.

GEORGE JOSEPH,

Plaintiff-Appellant,

v

Supreme Court No. 163383

Court of Appeals No. 353165

Court of Claims No. 17-000230-MZ

MICHIGAN DEPARTMENT OF
CORRECTIONS,

Defendant-Appellee.

**MICHIGAN DEPARTMENT OF CORRECTIONS'
SUPPLEMENTAL BRIEF APPENDIX**

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Dated: July 22, 2022

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STATE OF MICHIGAN

COURT OF CLAIMS

SPENCER WOODMAN,

Plaintiff,

No. 17-000082-MZ

v

HON. CYNTHIA D. STEPHENS

MICHIGAN DEPARTMENT OF
CORRECTIONS,

Defendant.

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DEFENDANT'S 30/1/2018 MOTION FOR SUMMARY DISPOSITION

Defendant, Michigan Department of Corrections (MDOC), through counsel, hereby moves the Court, pursuant to MCR 2.116(C)(8) and (10), for an order dismissing Plaintiff's complaint in its entirety. In support of its Motion, the MDOC, states as follows:

1. On April 3, 2017, Plaintiff filed a complaint under section 10 of the FOIA, MCL 15.240, seeking the disclosure of video recordings relating to the death of Dustin Szot.
2. On August 17, 2017, George Joseph filed Court of Claims case number 2017-230-MZ – a substantially identical lawsuit.
3. On November 22, 2017, the Court consolidated Mr. Joseph's complaint with Mr. Woodman's complaint.
4. Disclosure of the recordings requested by Mr. Woodman and Mr. Joseph would prejudice the MDOC's ability to maintain the security of its correctional facilities, reveal MDOC's security measures used at Ionia Bellamy Creek Correctional Facility, and result in a clearly unwarranted invasion of privacy.
5. Accordingly, dismissal of Mr. Woodman's complaint, as well as Mr. Joseph's complaint, is proper as the requested recordings are exempt from disclosure under the Freedom of Information Act (FOIA) – specifically under MCL 15.243(1)(a), (c), and (u).

As such, and for the reasons stated in the accompanying brief in support, the MDOC respectfully requests that this Honorable Court enter an order finding that

the requested recordings are exempt from disclosure under the FOIA and dismissing Mr. Woodman's complaint in its entirety.

Respectfully submitted,

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Attorney General



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Dated: January 30, 2018

2017-0177379-A

STATE OF MICHIGAN
COURT OF CLAIMS

SPENCER WOODMAN,

Plaintiff,

No. 17-000082-MZ

v

HON. CYNTHIA D. STEPHENS

MICHIGAN DEPARTMENT OF
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**DEFENDANT'S BRIEF IN SUPPORT OF ITS 30/1/2018 MOTION FOR
SUMMARY DISPOSITION**

INTRODUCTION

Before this Court is Mr. Woodman's complaint¹ which seeks an order disclosing all videos relating to the death of Dustin Szot at Ionia Bellamy Creek Correctional Facility (IBC). Michigan's Freedom of Information Act (FOIA) establishes a public interest in the disclosure of public records. This public interest is that "all persons . . . are entitled to full and complete information regarding the affairs of government . . . so that they may fully participate in the democratic process." MCL 15.231(2). However, in section 13 of the FOIA, MCL 15.243, the Legislature identified multiple types of records in which there is a public interest in nondisclosure.

At issue in Mr. Woodman's request are certain competing interests. On the one hand is Mr. Woodman's interest in being informed so that he may fully participate in the democratic process. And on the other hand is the public's interest in maintaining the security of the state's penal institutions and preventing unwarranted invasions of personal privacy. In this particular instance, for the reasons explained below, the public interest in nondisclosure must prevail.

STATEMENT OF FACTS

On September 28, 2016, Mr. Woodman submitted a FOIA request to the MDOC for a record that he described as a "digital copy of video footage of the confrontation that led to the fatality of inmate Dustin Szot on September 27th, 2016

¹ Given that *Joseph v MDOC*, 2017-230-MZ, was consolidated with this case, this motion for summary disposition also applies to Mr. Joseph's complaint.

at the Muskegon Correctional Facility.”² (Ex 1, PI’s FOIA Request). He further identified the record as, “footage from any and all available cameras that captured this incident as well as any available accompanying audio records.” *Id.*

On October 6, 2016, the MDOC issued its written notice denying Mr. Woodman’s FOIA request. (Ex 2, Def’s Response). In its written notice, the MDOC explained that the requested records are exempt from disclosure under section 13(1)(c) of the FOIA, MCL 15.243(1)(c) – the penal security exemption. On October 10, 2016, Mr. Woodman appealed the MDOC’s denial of his FOIA request. (Ex 3, PI’s Appeal). Relying on section 13(1)(c) and (u) of the FOIA, MCL 15.243(1)(c) and (u) – the latter being the security measures exemption – the MDOC upheld the denial in its October 25, 2016 written notice. (Ex 4, Def’s Decision on Appeal and transmittal email). The MDOC wrote:

Release of the video footage compromises the safety, security, and order of the facility. Under Section 13(1)(c) records are exempt from disclosure that if disclosed would prejudice a public body's ability to maintain the physical security of custodial or penal institutions occupied by person arrested or convicted of a crime. In addition, Section 13(1)(u) of the FOIA Statute also exempts from disclosure records of a public body's security measures. The release of video footage would reveal the recording and security capabilities of the facility's video monitoring system. [*Id.*]

Under section 10(1)(b) of the FOIA, MCL 15.240(1)(b), Mr. Woodman filed an unverified complaint on April 3, 2017. Plaintiff alleges that the requested video footage is not exempt from disclosure under the FOIA and requests that the Court order disclosure of the video footage and award attorney’s fees and damages.

² The incident described in Mr. Woodman’s FOIA request actually occurred at Ionia Bellamy Creek Correctional Facility.

In its answer to Mr. Woodman's first amended complaint, the MDOC additionally asserted as an affirmative defense the FOIA's personal privacy exemption, MCL 15.243(1)(a). Throughout the course of discovery, the MDOC has responded to over 30 interrogatories and 20 requests for production of documents. Additionally, Mr. Woodman's attorneys have taken the depositions of three MDOC employees – Andy Phelps, a litigation specialist responsible for managing various types of complaints filed against the MDOC; Cheryl Groves, the MDOC's FOIA coordinator at the time Mr. Woodman submitted his FOIA request, and Inspector Christine Wakefield who is responsible for the security and safety at IBC.

STANDARDS OF REVIEW

A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone to determine whether the plaintiff has stated a claim on which relief can be granted. *Spiek v Dep't of Transp*, 456 Mich 331, 337 (1998). When deciding a motion under MCR 2.116(C)(8), the Court accepts all well-pleaded factual allegations as true and construes them in the light most favorable to the non-moving party. *Maiden*, 461 Mich at 119.

Summary disposition is available under MCR 2.116(C)(10) when “the affidavits or other documentary evidence, viewed in the light most favorable to the nonmoving party, show that there is no genuine issue as to any material fact and the moving party is therefore entitled to judgment as a matter of law.” *Lowrey v LMPS & LMPJ, Inc*, 500 Mich 1, 5-6 (2016). The nonmoving party must then “set forth specific facts at the time of the motion showing a genuine issue for trial.”

Maiden v Rozwood, 461 Mich 109, 121 (1999). If the nonmoving party fails to do so, the grant of summary disposition is proper. *Lowrey v LMPS & LMPJ, Inc*, 500 Mich 1, 7 (2016).

ARGUMENT

I. Disclosure of the requested videos would prejudice the MDOC's ability to maintain the security of its correctional facilities

The public has a legitimate interest in the safety and security of state correctional facilities. See, e.g., *Pell v Procunier*, 417 US 817, 823; 94 S Ct 2800, 2804; 41 L Ed 2d 495 (1974) (“[C]entral to all other corrections goals is the institutional consideration of internal security within the corrections facilities themselves.”). It well established that “a prison's internal security is peculiarly a matter normally left to the discretion of prison administrators.” *Mithrandir v Dept of Corr*, 164 Mich App 143, 147; 416 NW2d 352, 354 (1987), citing *Rhodes v. Chapman*, 452 US 337, 349, n 14, 101 S Ct 2392, 2400, n 14, 69 L Ed 2d 59 (1981). Accordingly, “[p]rison administrators . . . should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.” *Bell v Wolfish*, 441 US 520, 547; 99 S Ct 1861, 1878; 60 L Ed 2d 447 (1979).

It is for these reasons that the Legislature created separate exemptions to the FOIA to protect the State's ability to maintain the security of its correctional facilities. Here, both MCL 15.243(1)(c), the penal security exemption, and MCL

15.243(1)(u), the security measures exemption, allow the MDOC to exempt the requested videos from disclosure to the public.

A. The videos are exempt from disclosure under MCL 15.243(1)(c)

In light of the public's interest in maintaining the security and safety of state correctional facilities, MCL 15.243(1)(c), allows the MDOC to exempt from disclosure certain records that "if disclosed would prejudice [the MDOC's] ability to maintain the physical security of [its correctional facilities], unless the public interest in disclosure under this act outweighs the public interest in nondisclosure." Accordingly, in order to decide whether the requested videos are properly exempt under the penal security exemption, the Court must answer two questions: (1) whether MDOC has demonstrated that disclosure of the videos would prejudice the MDOC's ability to maintain the physical security of its correctional facilities; and (2) whether public interest in nondisclosure outweighs the public interest in disclosure.

1. Disclosure of the videos would prejudice the MDOC's ability to maintain the physical security of IBC and its other facilities throughout the State

The MDOC denied Plaintiff's request for records because disclosure would prejudice the MDOC's ability to maintain security at IBC. In support, the MDOC relies on the attached affidavit of Inspector Christine Wakefield. (Ex 5, Affidavit of Christine Wakefield) Two Inspectors at IBC serve as the chief security officers for the facility. (*Id.*, ¶ 4) The job description for an Inspector provides that an

Inspector “is responsible for matters related to the enforcement of all prescribed security rules and regulations affecting the discipline, custody, security, and safety of the facility.” (Ex 6, Michigan Civil Service Commission Job Specification) In her affidavit, Inspector Wakefield has testified that “disclosure of the requested videos would severely interfere with [her] ability to maintain the safety and security at IBC.” (Ex 5, Wakefield Affidavit, ¶ 11) Ultimately, disclosure to the public of the information contained within the videos “presents a very definite and real risk to safety and security at IBC.” (*Id.*) Without repeating Inspector Wakefield’s affidavit verbatim in this brief, the MDOC will highlight several concerns identified in the affidavit.

Disclosure of the requested videos would reveal the identity of the MDOC officers who responded to the physical confrontation between Szot and the unnamed prisoner. (Ex 5, Wakefield Affidavit, ¶ 9b) In this particular instance, the concern regarding revealing these identities is not a general apprehension. Since his death, Szot’s family members have made threatening phone calls to IBC in which they threatened to blow up the facility. (*Id.* ¶ 8) And Szot’s mother has come to IBC premises and threatened to poison staff food and use her assault rifle on MDOC staff. (*Id.*) Given these threats by Szot’s family, disclosure would expose the responding MDOC officers to increased threats both at home and while on the job. (*Id.*, at ¶9b) Further, disclosure would require the MDOC to divert extra staff and resources to the protection of the unnamed prisoner. (*Id.*, at ¶9a)

Additionally, Inspector Wakefield stated that disclosure would provide the public with a video layout of IBC. (*Id.*, at ¶9c) By being able to see what the surveillance cameras see, the public would have knowledge regarding whether certain cameras have blind spots and the location of any blind spots. (*Id.*) Essentially, disclosure would provide to the public and the prisoners a blueprint of IBC in video form. And providing this information to the public would make it far less onerous both prisoners at IBC and the public to engage in threatening behavior. (*Id.*)

In sum, the videos reveal confidential information related to the safety and security at IBC. Because “there is no mechanism in the FOIA by which use can be restricted once a public body has permitted release,” *Kestenbaum v Michigan State University*, 414 Mich 510, 528 (1982), disclosure of these videos to Mr. Woodman is disclosure to the world at large. And, for the reasons identified by Inspector Wakefield, disclosure would prejudice the MDOC’s ability to maintain the security of its correctional facilities.

2. In this particular instance, the public interest in nondisclosure far outweighs any public interest in disclosure

Courts must “consider whether release of the material would be consistent with the legislative intent articulated in the public policy statement contained in the FOIA” when determining the public interest in disclosure. *Clerical-Tech. Union of Michigan State Univ v Bd of Trustees of Michigan State Univ*, 190 Mich App 300, 303 (1991). In Section 1 of the FOIA, MCL 15.231, the Legislature provided that

the FOIA's intent is "to facilitate disclosure to the public of public records held by public bodies" so that the people "may fully participate in the democratic process." *Herald Co, Inc v E Michigan Univ Bd of Regents*, 475 Mich 463, 472 (2006); MCL 15.231(2). However, by codifying the exemptions in section 13 of the FOIA, MCL 15.243, the Legislature has determined that in "particular instances . . . the policy of offering the public full and complete information about government operations is overcome by a more significant policy interest favoring nondisclosure." *Herald Co*, 475 Mich at 472.

Here, as noted above, one of the public interests in nondisclosure was specifically identified by the Legislature in MCL 15.243(1)(c): the public has an interest in the MDOC maintaining the physical security of its correctional facilities. Further, as mentioned above, "[p]rison administrators are accorded wide-ranging deference" in the methods undertaken to maintain the safety and security of their correctional facilities. *Bell*, 441 US at 547. Accordingly, the Court must weigh the public's interest allowing prison administrators to maintain the safety and security of their correctional facilities – the public interest in nondisclosure – against the public interest in disclosure as outlined in MCL 15.231.

In this particular instance, the balancing test weighs clearly in favor of the MDOC. MCL 15.231 entitles the public to a "full and complete information regarding the affairs of government" in order for "[t]he people [to] be informed so that they may fully participate in the democratic process." However, the videos request by Plaintiff shed little light on the affairs of government. These videos

merely depict the response by MDOC officers to a deadly confrontation between prisoners. (Ex 5, Wakefield Affidavit, ¶ 6) The videos also show Szot, who was unconscious after his confrontation with the unnamed prisoner, being transported to the IBC medical clinic where medical personnel were unable to revive him. (*Id.*) None of this information concerns the inner-workings of government, and disclosure, especially considering the numerous security concerns, is not necessary to fully participate in the democratic process.

On the other hand, Inspector Wakefield has testified in her affidavit that disclosure would create a real risk to the safety and security of IBC – both the facility and employees. (*Id.*, ¶ 11) Szot’s family members have made multiple threats to IBC staff, and disclosure would reveal the identity³ of the MDOC officers that responded to the confrontation between Szot or the identity of the unnamed prisoner. (*Id.*, ¶¶ 7-9) Furthermore, disclosure would provide the public with numerous amounts of confidential and security-related information including: the technical capabilities of MDOC’s security cameras; a general headcount as to the number of MDOC officers available to respond; and the tactics and procedures used

³ As mentioned later in this brief, Kyle Butler, the Ionia County Prosecuting Attorney, declined to reveal the identities of the MDOC officers who responded to the physical confrontation or the name of the prisoner who fought with Szot. (Ex 7, *No charges in death of Ionia Bellamy Creek prisoner Dustin Szot*, Ionia Sentinel-Standard, published March 31, 2017) The newspaper reported that Mr. Butler was not releasing the names “out of concern for (their) safety, concern for the security of the Michigan Department of Corrections, and to protect any invasion of (their) personal privacy” and because it was determined they “are innocent of any wrongdoing.” (*Id.*)

by officers responding to the confrontation between Szot and the unnamed prisoner.
(*Id.*, ¶ 7)

In sum, knowledge of this confidential and security-related information would provide little to no aid in allowing the public to fully participate in the democratic process. However, disclosure any one of items listed in Inspector Wakefield's affidavits decidedly jeopardizes and prejudices the MDOC's ability to maintain security at IBC and its other facilities throughout the state.

B. The videos are exempt from disclosure under MCL 15.243(1)(u)

Like the penal security exemption provided by the Legislature in MCL 15.243(1)(c), the Legislature has also provided an exemption that allows a public body to exempt from disclosure “[r]ecords of a public body's security measures . . . to the extent that the records relate to the ongoing security of the public body.” MCL 15.243(1)(u). However, unlike penal security exemption, the security measures exemption has no balancing test. The Legislature, in enacting MCL 15.243(1)(u), clearly and unambiguously provided public bodies with the ability to exempt from disclosure records of a public body's security measures that relate to its ongoing security.

In her affidavit, Inspector Wakefield testified that disclosure of the videos would reveal “[t]he exact capabilities of MDOC's cameras – including picture clarity, the ability to track movement, and zooming capabilities.” (Ex 5, Wakefield Affidavit, ¶ 10a) Inspector Wakefield further testified that public disclosure of this information would create a severe risk to the MDOC and staff at IBC because

disclosure of these capabilities “would allow prisoners to take more calculated risks when engaging in . . . prohibited and threatening activity.” (*Id.*)

Furthermore, it has long been the policy of the MDOC to exempt from disclosure under the FOIA records that would reveal “the capability of any monitoring device.” (Ex 8, FOIA Policy Directive, page 5 of 8) And while there is not a great deal of case law regarding the technical capabilities of prison surveillance cameras, several jurisdictions have recognized the inherent security concerns involved with public disclosure. See, e.g., *Cooper v Bower*, No. 5:15-CV-P249-TBR, 2017 WL 3388953, at *1 (WD Ky August 4, 2017) (Opinion attached as Exhibit 9) (granting a motion to admit video footage from within the secured premises of a prison under seal for security reasons); *Atkinson v Mackinnon*, No. 14-CV-736-BBC, 2016 WL 2901753, at *9 (WD Wis May 18, 2016) (Opinion attached as Exhibit 10) (finding that the concerns raised by the Bureau of Prisons regarding disclosure of the technical capabilities of surveillance cameras are “legitimate concern[s]”). Essentially, disclosure of the requested videos would result in the public being able to view both what the MDOC can observe in its IBC surveillance cameras and the level of control and clarity in its surveillance cameras.

In sum, disclosure of the requested videos would reveal the security measures used by the MDOC to maintain security at IBC. Revealing these security measures would “allow prisoners to take more calculated risks” and potentially avoid surveillance when planning to engage in prohibited activity. (Ex 5, Wakefield Affidavit, ¶ 10a) As such, the requested records are also exempt under the penal

security exemption, MCL 15.243(1)(c), because disclosure of these security measures would prejudice the MDOC's ability to maintain security at IBC.⁴

II. Disclosure would result in a clearly unwarranted invasion of personal privacy, and the videos are accordingly exempt from disclosure under MCL 15.243(1)(a)

In addition to the above security-related concerns, the requested videos contain certain information that is intrinsically personal. The requested videos show an unconscious Szot awaiting transport to the medical clinic, and they also show medical staff attempting to revive him at the clinic. (Ex 5, Wakefield Affidavit, ¶6) The videos also show the physical confrontation between Szot and the unnamed prisoner. (*Id.*) And the videos reveal the identity of the unnamed prisoner as well. (*Id.*, ¶ 7)

MCL 15.243(1)(a) allows a public body to exempt from disclosure “[i]nformation of a personal nature if public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy.” Accordingly, “two factors must exist to exempt information from public disclosure:” (1) “the information sought must be of a ‘personal nature;” and (2) “the disclosure of such information must constitute a ‘clearly unwarranted’ invasion of privacy.” *Booth Newspapers, Inc v Univ of Michigan Bd of Regents*, 444 Mich 211, 232 (1993).

⁴ And as explained earlier in this brief, the interest in nondisclosure far outweighs any interest in disclosure.

A. The requested videos contain information of a personal nature

In *Bradley v Saranac Community Schools Board of Education*, 455 Mich 285, 294 (1997), the court explained that information is of a personal nature if it “reveals intimate or embarrassing details of an individual’s private life.” That test was further expanded in *Michigan Federation of Teachers v University of Michigan*, 481 Mich 657, 675-676 (2008), where the court held that information is of a personal nature if it is “of an embarrassing, intimate, private, or confidential nature.”

In *Michigan Federation of Teachers*, the court examined whether the home addresses and telephone numbers of University of Michigan employees were exempt from disclosure under FOIA. *Id.* The Court held that employee’s home addresses and telephone numbers reveal “embarrassing, intimate, private or confidential details” about those individuals. *Id.* at 676.

Here, as opposed to addresses and phone numbers, the videos contain the final moments of Szot’s life where the IBC medical staff is attempting revive him as well as the physical confrontation led to his death. (Ex 5, Wakefield Affidavit, ¶ 6) Additionally, the video shows the unnamed prisoner fend off an attack from Szot. (*Id.*) If the home addresses and telephone numbers constitute information of a personal nature, then certainly the final moments of Szot’s life and the physical confrontation in which the unnamed prisoner defended himself from Szot’s attack likewise constitute information of a personal nature.

Furthermore, the Ionia County Prosecuting Attorney, Kyle Butler, has decided to keep the name of the prisoner involved in the physical confrontation with

Szot private. Mr. Butler decided to keep the unnamed prisoner's identity private⁵ because he determined that the unnamed prisoner "acted reasonably . . . in lawful self-defense." (Ex 7, *No charges in death of Ionia Bellamy Creek prisoner Dustin Szot*, Ionia Sentinel-Standard, published March 31, 2017) As indicated above, Mr. Butler did not release the name of the unnamed prisoner "out of concern for [his] safety, concern for the security of the Michigan Department of Corrections, and to protect any invasion of [his] personal privacy." (*Id.*) That the identity of the unnamed prisoner has been keep private is consistent with the Supreme Court's definition of "a personal nature" in *Michigan Federation of Teachers*.

B. In this particular instance, disclosure of the videos would result in a clearly unwarranted invasion of personal privacy

When determining whether there is an unwarranted invasion of an individual's privacy, a court must balance the public interest in disclosure against the interest the legislature intended the exemption to protect. *Mager v Dept of State Police*, 460 Mich 134, 145 (1999). The *Mager* Court determined that "the only relevant public interest in disclosure to be weighed in this balance 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*

⁵ As referenced in footnote 3, Mr. Butler also decided to keep the names of the responding MDOC officers private "out of concern for (their) safety, concern for the security of the Michigan Department of Corrections, and to protect any invasion of (their) personal privacy" and because it was determined they "are innocent of any wrongdoing." (Ex 7)

government.” *Id.*, citing *US Dept of Def v Fed Labor Relations Auth*, 510 US 487, 495; 114 S Ct 1006, 1012; 127 L Ed 2d 325 (1994).

Here, disclosure of the requested videos does not shed any additional light on the operations or inner-workings of the government. It has been reported by multiple news outlets that Szot’s death was “a freak and unusual result of . . . rather unremarkable punches by” the unnamed prisoner. (See, e.g., Ex 7) And Inspector Wakefield’s testimony in her affidavit – that the videos show the unnamed prisoner striking Szot in the head and neck after he and Szot fell to the ground – confirms portions of what has been reported. (Ex 5, Wakefield Affidavit, ¶ 6)

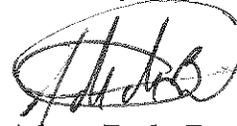
Simply put, disclosure cannot bring any new and meaningful information regarding the operations of government to the public arena. Rather, disclosure would only serve to prejudice MDOC’s ability to maintain the security of its penal institutions, reveal the MDOC’s security measures at IBC, and intrude on the personal privacy of Szot and the unnamed prisoner.

CONCLUSION AND RELIEF REQUESTED

For the above stated reasons, the MDOC asks that the Court find that the requested videos are properly exempt under sections 13(1)(a), (c), and (u) of the FOIA, MCL 15.243(1)(a), (c), and (u), and grant its motion for summary disposition pursuant to MCR 2.116(C)(8) and (10).

Respectfully submitted,

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Dated: January 30, 2018

2017-0177379-A

EXHIBIT 1

de Bear, Adam (AG)

From: Spencer Woodman <spencer.woodman@gmail.com>
Sent: Wednesday, September 28, 2016 6:07 PM
To: Nelson, Aimee (MDOC)
Subject: Submitting records request

Hi Aimee,

It turns out that I have another records request to submit. Thanks very much.

Spencer Woodman

--

Under the Michigan Freedom of Information Act § 15.231 et seq., I am requesting a digital copy of video footage of the confrontation that led to the fatality of inmate Dustin Szot on September 27th, 2016 at the Muskegon Correctional Facility. This request includes footage from any and all available cameras that captured this incident as well as any available accompanying audio records.

I would like to request a waiver of all fees in that the disclosure of the requested information is in the public interest and will contribute significantly to the public's understanding of government. This information is not being sought for commercial purposes.

If you deny any or all of this request, please cite each specific exemption you feel justifies the refusal to release the information and notify me of the appeal procedures available to me under the law.

Thank you very much for considering my request, and please feel free to contact me at the number or email address below with any questions.

Contact information:

Email: Spencer.woodman@gmail.com

Phone: [\(919\) 418-0817](tel:(919)418-0817)

EXHIBIT 2

MICHIGAN DEPARTMENT OF CORRECTIONS
RESPONSE TO REQUEST FOR PUBLIC RECORDS - FOIA

CSH-479
 REV 6/16

RECEIVED by MSC 7/22/2022 3:56:19 PM

Requester Name: Spencer Woodman	Requester Type: General Public	Files <input type="checkbox"/>	PB <input type="checkbox"/>	Request Date 9/28/2016	Received Date 9/29/2016	FOIA No. 16 950
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Address: spencer.woodman@gmail.com	Description of Requested Records: "I am requesting a digital copy of 1. video footage of the confrontation that led to the fatality of inmate Dustin Szot on September 27th, 2016 at the Muskegon Correctional Facility. This request includes footage from any and all available cameras that captured this incident as well as 2. any available accompanying audio records."
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THE FOLLOWING ACTION HAS BEEN TAKEN IN COMPLIANCE WITH THE MICHIGAN FREEDOM OF INFORMATION ACT

<input type="checkbox"/> Request Granted	No. of pages:	See fee assessment below.
<input type="checkbox"/> Request Granted in Part/Denied in Part	No. of pages:	Portions of requested records are exempt from disclosure. See explanation and fee assessment below.
<input checked="" type="checkbox"/>	Requested records are exempt from disclosure. See explanation below.	
<input type="checkbox"/>	Requested records do not exist within the records of this Department under the name or description provided or by another name reasonably known to this Department.	
<input type="checkbox"/> Request Denied	Request does not describe the record sufficiently to enable this Department to determine what record is requested.	
<input type="checkbox"/>	To the extent the records are available, home address, telephone numbers, and personnel records of employees of this Department are exempt from disclosure pursuant to MCL 791.230a. This includes but is not limited to investigatory, disciplinary, and time and attendance records.	
<input type="checkbox"/> 10 Business Day Extension Taken	Due Date:	Reason for Extension:

FEE ASSESSMENT

Fee Waived.

Non-exempt records will be sent upon receipt of payment in the amount of _____ payable by check or money order to the State of Michigan. Cash cannot be accepted. Send payment to Michigan Department of Corrections, Attn: FOIA Coordinator, at the return address identified on the envelope.

A 50% good faith deposit is required in the amount of _____ payable by check or money order to the State of Michigan. Cash cannot be accepted. Send payment to Michigan Department of Corrections, Attn: FOIA Coordinator, at the return address identified on the envelope. Upon receipt of the deposit, the Department will process your request. Thereafter, you will be informed of the balance due and any applicable exemptions.

SEE BELOW AND BACK OF FORM IF RECORDS ARE EXEMPT FROM DISCLOSURE OR FOR ADDITIONAL INFORMATION

The records you seek are exempt from disclosure under Section 13(1)(c). These records, if disclosed, could threaten the security of Bellamy Creek Correctional Facility by revealing fixed camera placement as well as the scope and clarity of the facility's fixed camera and handheld recordings. Disclosure of these records could also reveal the policies and procedures used by staff for disturbance control and the management of disruptive prisoners.

If your request is denied in whole or in part, you have the right under the Michigan Freedom of Information Act to do either of the following:

- 1 Appeal the denial to the Director. Your appeal must be submitted in writing to the Michigan Department of Corrections, Attn: Administrator of the Office of Legal Affairs, P.O. Box 30003, Lansing, MI 48909. The appeal must be specifically identified as a FOIA appeal and must state the reasons for reversal of the denial. The Director will respond to the appeal in accordance with MCL 15.240.
- 2 Appeal the Department's final determination to deny/partially deny your request by commencing an action in the Court of Claims within 180 calendar days after the final determination is made. If you prevail in such an action, the court is to award reasonable attorney fees, cost and disbursements, and possible damages.

I CERTIFY THAT THE DOCUMENTS PROVIDED IN RESPONSE TO THIS REQUEST ARE TRUE AND ACCURATE COPIES.

FOIA COORDINATOR:

Cheryl Aggroves

DATE:

10/6/16

FOIA Exemptions

- (a) information of a personal nature where the public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy.
- (b) Investigating records compiled for law enforcement purposes, but only to the extent that disclosure as a public record would do any of the following:
 - (i) Interfere with law enforcement proceedings.
 - (ii) Deprive a person of the right to a fair trial or impartial administrative adjudication.
 - (iii) Constitute an unwarranted invasion of personal privacy.
 - (iv) Disclose the identity of a confidential source, or if the record is compiled by a law enforcement agency in the course of a criminal investigation, disclose confidential information furnished only by a confidential source.
 - (v) Disclose law enforcement investigative techniques or procedures.
 - (vi) Endanger the life or physical safety of law enforcement personnel.
- (c) A public record which if disclosed would prejudice a public body's ability to maintain the physical security of custodial or penal institutions occupied by persons arrested or convicted of a crime or admitted because of a mental disability, unless the public interest in disclosure under this act outweighs the public interest in nondisclosure.
- (d) Records or information specifically described and exempted from disclosure by statute.
- (e) A public record or information described in this section that is furnished by the public body originally compiling, preparing or receiving the record or information to a public officer or public body in connection with the performance of the duties of that public officer or public body, if the considerations originally giving rise to the exempt nature of the public record remain applicable.
- (f) Trade secrets or commercial or financial information voluntarily provided to an agency for use in developing governmental policy if:
 - (i) The information is submitted upon a promise of confidentiality by the public body.
 - (ii) The promise of confidentiality is authorized by the chief administrative officer of the public body or by an elected official at the time the promise is made.
 - (iii) A description of the information is recorded by the public body within a reasonable time after it has been submitted, maintained in a central place within the public body, and made available to a person upon request. This subdivision does not apply to information submitted as required by law or as a condition of receiving a governmental contract, license or other benefit.
- (g) Information or records subject to the attorney-client privilege.
- (h) information or records subject to the physician-patient privilege, psychologist-patient privilege, Minister, priest, or Christian Science practitioner privilege, or other privilege recognized by statute or court rule.
- (i) A bid or proposal by a person to enter into a contract or agreement, until the time for the public opening of bids or proposals, or if a public opening is not to be conducted, until the deadline for submission of bids or proposals has expired.
- (j) Appraisals of real property to be acquired by the public body until (i) an agreement is entered into; or (ii) 3 years has elapsed since the making of the appraisal, unless litigation relative to the acquisition has not yet terminated.
- (k) Test questions and answers, scoring keys and other examination instruments or data used to administer a license, public employment, or academic examination, unless the public interest in disclosure under this act outweighs the public interest in nondisclosure.
- (l) Medical, counseling or psychological facts or evaluations concerning an individual if the individual's identity would be revealed by a disclosure of those facts or evaluation.
- (m) Communications and notes within a public body or between public bodies of an advisory nature to the extent that they cover other than purely factual materials and are preliminary to a final agency determination of policy or action. This exemption shall not apply unless the public body shows that in the particular instance the public interest in encouraging frank communication between officials and employees of public bodies clearly outweighs the public interest in disclosure. This exemption does not constitute an exemption under state law for purposes of MCL 15.268.
- (n) Records of law enforcement communication codes, or plans for deployment of law enforcement personnel, that if disclosed would prejudice a public body's ability to protect the public safety unless the public interest in disclosure under this act outweighs the public interest in nondisclosure in the particular interest.
- (p) Testing data developed by a public body in determining whether bidder's products meet the specifications for purchase of those products by the public body, if disclosure of the data would reveal that only 1 bidder has met the specifications. This subdivision does not apply after 1 year has elapsed from the time the public body completes testing.
- (s) Unless the public interest in disclosure outweighs the public interest in nondisclosure in the particular instance, public records of a law enforcement agency, the release of which would do the following:
 - (i) Identify or provide a means of identifying an informer.
 - (ii) Identify or provide a means of identifying a law enforcement undercover officer or agent or a plain clothes officer as a law enforcement officer or agent.
 - (iii) Disclose the personal address or telephone number of law enforcement officers or agents or any special skills they may have.
 - (iv) Disclose the name, address, or telephone numbers of family members, relatives, children, or parents of law enforcement officers or agents.
 - (v) Disclose operational instructions of law enforcement officers or agents.
 - (vi) Reveal the contents of staff manuals provided for law enforcement officers or agents.
 - (vii) Endanger the life or safety of law enforcement officers or agents or their families, relatives, children, parents, or those who furnished information to law enforcement departments or agencies.
 - (viii) Identify or provide a means of identifying a person as a law enforcement officer, agent, or informer.
 - (ix) Disclose personnel records for law enforcement agencies.
 - (x) Identify or provide a means of identifying residences that law enforcement agencies are requested to check in the absence of their owners or tenants.
- (u) Records of a public body's security measures, including security plans, security codes and combinations, passwords, passes, keys, and security procedures, to the extent that the records relate to the ongoing security of the public body.
- (v) Records or information relating to a civil action in which the requesting party and the public body are parties.
- (w) Information or records that would disclose the social security number of any individual.

EXHIBIT 3

de Bear, Adam (AG)

From: Spencer Woodman <spencer.woodman@gmail.com>
Sent: Monday, October 10, 2016 10:01 AM
To: Nelson, Aimee (MDOC)
Subject: Re: FOIA 16-950

Dear Ms. Nelson:

I am writing to appeal the denial of FOIA 16-950. I will address the two explanations were provided for this denial in order.

First, the state invokes Section 13(1)(c) in asserting that disclosure of the requested footage would reveal the placements and the level of clarity of the cameras within the jail. It is my understanding that many correctional institutions often do not attempt to hide their cameras at all and that inmates generally understand they are under constant surveillance. It seems unlikely to me that the Bellamy Creek Correctional Facility would have taken pains to hide its cameras in the first place. Even if the Bellamy Creek Correctional Facility's camera's are in fact hidden, the fact that so many other correctional facilities not only install their cameras in plain view of inmates, but also routinely release such footage to the public, confirms what I believe to be common sense: That the release of prison surveillance footage does not present a danger insofar as camera placement is concerned. The same argument applies to the state's assertion regarding the clarity of the camera footage. (For a recent example of such voluntary disclosure, see Cook County Sheriff Tom Dart's decision to release, unprompted by external pressure, various recordings of altercations between his employees and inmates in the Cook County Jail.)

Second, the state asserts that disclosure of the footage would reveal the policies and procedures used for disturbance control and to manage disruptive prisoners. Again, footage of inmate altercations with prison guards has been routinely released across the country, and such means of control are already and rightly widely known. Perhaps more importantly, as part of its commitment to insuring the civil rights of everyone working and living within prisons, correctional facilities must be able to publicly disclose the means by which they restrain, pacify and use force against prisoners.

This latter point applies to both explanations behind the state's denial: The public interest of the release of the requested footage is abundantly clear, imminent, and outweighs the state's arguments against releasing this footage. Taxpaying citizens must be afforded the opportunity to understand why the death of a state inmate occurred reportedly after he was shocked by Tasers, which are intended to be non-lethal.

Please feel free to email me or call me at the number below with any questions.

Many thanks,

Spencer Woodman
(919) 418-0817

On Fri, Oct 7, 2016 at 2:23 PM, Spencer Woodman <spencer.woodman@gmail.com> wrote:
Got it. Thank you.

On Oct 7, 2016, at 2:18 PM, Nelson, Aimee (MDOC) <NelsonA9@michigan.gov> wrote:

Yes, you just need to submit an email indicating you wish to appeal your FOIA response and the reasons why.

Aimee Nelson
Analyst/Assistant FOIA Coordinator
Michigan Department of Corrections
Main: (517) 373-0450
<image001.jpg>

From: Spencer Woodman [<mailto:spencer.woodman@gmail.com>]
Sent: Friday, October 07, 2016 1:36 PM
To: Nelson, Aimee (MDOC)
Subject: Re: FOIA 16-950

Thank you, Ms. Nelson. I would like to file an appeal. Can I do so over email?

Best,
Spencer Woodman
(919) 418-0817

On Thu, Oct 6, 2016 at 3:47 PM, Nelson, Aimee (MDOC) <NelsonA9@michigan.gov> wrote:
Attached.

Aimee Nelson
Analyst/Assistant FOIA Coordinator
Michigan Department of Corrections
Main: (517) 373-0450
<image001.jpg>

EXHIBIT 4

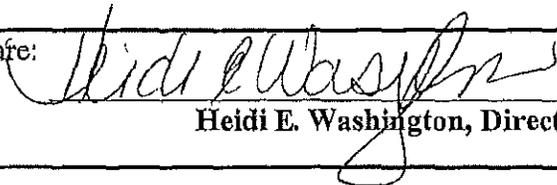
MICHIGAN DEPARTMENT OF CORRECTIONS NOTICE OF FREEDOM OF INFORMATION ACT APPEAL	
Date Received: October 11, 2016	Appeal Number: 2016-36
Requestor's Name: Spencer Woodman	Date of FOIA Response: October 6, 2016
Requestor's Address: Spencer.woodman@gmail.com	
<input type="checkbox"/> FOIA disclosure denial reversed <input checked="" type="checkbox"/> FOIA disclosure denial upheld <input type="checkbox"/> FOIA disclosure denial upheld in part, reversed in part	
<p>Reason for Decision:</p> <p>On September 29, 2016, the Michigan Department of Corrections (MDOC), received your request dated September 28, 2016, made under the Freedom of Information Act (FOIA), MCL 15.231 <i>et seq.</i> Your request stated:</p> <p>"I am requesting a digital copy of video footage of the confrontation that led to the fatality of inmate Dustin Szot on September 27th, 2016 at the Muskegon Correctional Facility. This request includes footage from any and all available cameras that captured this incident as well as any available accompanying audio records."</p> <p>On October 6, 2016, the MDOC denied your request under 13(1)(c) of FOIA stating, "These records, if disclosed, could threaten the security of Bellamy Creek Correctional Facility by revealing fixed camera placement as well as the scope and clarity of the facility's fixed camera and handheld recordings. Disclosure of these records could also reveal the policies and procedures used by staff for disturbance control and the management of disruptive prisoners."</p> <p>On October 11, 2016, the MDOC received your appeal regarding the denial of your FOIA request. You stated, "It is my understanding that many correctional institutions often do not attempt to hide their cameras at all and that inmates generally understand that they are under constant surveillance. It seems unlikely to me that the Bellamy Creek Correctional Facility would have taken pains to hide its cameras in the first place. Even if the Bellamy Creek Correctional Facility's camera's are in fact hidden, the fact that so many other correctional facilities not only install their cameras in plain view of inmates, but also routinely release such footage to the public, confirms what I believe to be common sense: That the release of prison surveillance footage does not present a danger insofar as camera placement is concerned." You also assert, "Footage of inmate altercations with prison guards has been routinely released across the country, and such means of control are already and rightly widely known. Perhaps more importantly, as part of its commitment to insuring the civil rights of everyone working and living within prisons, correctional facilities must be able to publicly disclose the means by which they restrain, pacify and use force against prisoners."</p> <p>While prisoners understand that cameras are in place throughout facilities and that they are under constant surveillance, the MDOC does not routinely release video footage to the public as you incorrectly assert. Release of the video footage compromises the safety, security, and order of the facility. Under Section 13(1)(c) records are exempt from disclosure that if disclosed would prejudice a public body's ability to maintain the physical security of custodial or penal institutions occupied by</p>	

person arrested or convicted of a crime. In addition, Section 13(1)(u) of the FOIA Statute also exempts from disclosure records of a public body's security measures. The release of video footage would reveal the recording and security capabilities of the facility's video monitoring system.

Therefore, the FOIA disclosure denial is upheld.

As noted in MCL 15.240(1)(b), you have the option to commence an action in the Court of Claims to compel the public body's disclosure of the public records within 180 days after a public body's final determination to deny a request. If you prevail in such an action, the court is to award reasonable attorney fees, costs, and disbursements, and possible damages.

Signature:


Heidi E. Washington, Director

Date:

10/25/16

EXHIBIT 5

STATE OF MICHIGAN
COURT OF CLAIMS

SPENCER WOODMAN,

Plaintiff,

No. 17-000082-MZ

v

HON. CYNTHIA D. STEPHENS

MICHIGAN DEPARTMENT OF
CORRECTIONS,

Defendant.

Robert M. Riley (P72290)
Marie L. Greenman (P80811)
Honigman Miller Schwartz and Cohn
Cooperating Attorneys, American Civil
Liberties Union Fund of Michigan
2290 First National Building
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Adam R. de Bear (P80242)
Eric M. Jamison (P75721)
Assistant Attorneys General
Attorneys for Defendant Michigan
Department of Corrections
Michigan Department of Attorney General
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Daniel S. Korobkin (P72842)
Michael J. Steinberg (P43085)
American Civil Liberties Union Fund of
Michigan
2966 Woodward Avenue
Detroit, MI 48201
(313) 578-6800
dkorobkin@aclumich.org
msteinberg@aclumich.org

Attorneys for Plaintiff

AFFIDAVIT OF CHRISTINE WAKEFIELD

I, Christine Wakefield, being first duly sworn, depose and say as follows:

1. This Affidavit is based upon my personal knowledge.
2. If sworn as a witness, I can testify competently as to the facts stated herein.
3. I am employed by the Michigan Department Corrections (MDOC) as an Inspector at the Ionia Bellamy Creek Correctional Facility (IBC).
4. Including myself, there are two Inspectors at IBC and together we serve as the chief security officers at IBC.
5. In my capacity with the MDOC, I have knowledge regarding the September 27, 2016, physical confrontation that lead to death of Dustin Szot (Szot) who was an inmate at IBC.
6. I have viewed all videos that captured the physical confrontation, the response to the confrontation by MDOC officers, and the attempted resuscitation of Szot. The videos show the following with regards to what transpired:
 - a. While walking in the prison yard, Szot jumped on the back of an unnamed prisoner, and the unnamed prisoner was able to tackle Szot to the ground.
 - b. While on the ground, the unnamed prisoner punched Szot on more than one occasion in the side of the head and neck.
 - c. Shortly after the two prisoners fell to the ground and began fighting, MDOC officers responded and ultimately discharged electronic control devices (ECDs) at the two prisoners.
 - d. After the physical confrontation between the unnamed prisoners, Szot was unconscious, and a wheelchair was provided to transport Szot to IBC's medical clinic.
 - e. At the IBC's medical clinic, medical personnel unsuccessfully attempted to revive Szot.
7. Whereas the preceding paragraph described what occurred in the videos, the below items are a list of what can be seen in videos:
 - a. Identities of the MDOC officers that responded to the physical confrontation;

- b. Identity of the unnamed prisoner;
 - c. Prisoner movement plans;
 - d. The total number of MDOC officers that responded to the physical confrontation;
 - e. A video layout of the IBC's secured premises as seen through its surveillance cameras;
 - f. Recording and technical capabilities of IBC's security cameras – i.e. the clarity of the recording and whether the camera can zoom and track movement;
 - g. Recording and technical capabilities of ECDs;
 - h. Location of security cameras and the angles of IBC visible in the security cameras;
 - i. Security equipment carried by MDOC officers within secured areas of IBC;
 - j. Tactics and procedures used by MDOC officers in responding to the physical confrontation between Szot and the unnamed prisoner;
 - k. Attempted revival of Szot
8. In addition to the above list of items visible on the videos, Szot's mother and another family member made threatening phone calls to IBC. In one of these phone calls, Szot's family members threatened to blow up the facility. Additionally, Szot's mother came to IBC and threatened, among other things, to poison the staff's food and to bring an assault rifle onto IBC's premises to use on staff.
9. Disclosure to the public of the requested videos would prejudice MDOC's ability to maintain the physical security of IBC in the following ways:
- a. Disclosure would reveal the identity of the unnamed prisoner, and this prisoner would be subjected to increased threats due to his role in Szot's death. This would require MDOC to devote more resources to ensuring the safety of the unnamed prisoner which would result in a lack of resources to respond to other sensitive matters.
 - b. Disclosure would reveal the identity of the MDOC officers who were present at the physical confrontation between Szot and the unnamed prisoner. Given threats by Szot's family members,

this would place MDOC officers at a higher risk of danger both within IBC and while off duty.

- c. Disclosure would provide the public with a video layout of the secured premises of IBC. Knowledge of what each camera sees would inform the public as to whether specific cameras have blind spots and where those blind spots are located. Public knowledge of such information would make it easier for prisoners and the public to engage in prohibited and threatening activity.
- d. Disclosure would reveal prisoner movement plans, and public knowledge of prisoner movement plans at IBC would make it easier for the public and prisoners to engage in prohibited and threatening activity.

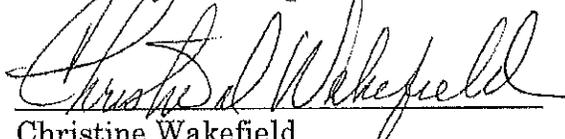
10. Disclosure of the requested videos would reveal sensitive information related to MDOC's security measures at IBC in the following ways:

- a. Disclosure would reveal the technical capabilities of all cameras within IBC. The exact capabilities of MDOC's cameras – including picture clarity, the ability to track movement, zooming capabilities – are not publicly available information. Should this information become known to the public, it will present a severe risk to the MDOC and staff at IBC. Disclosure of these capabilities allow prisoners to take more calculated risks when engaging in, or planning to engage in, prohibited and threatening activity.
- b. Disclosure would reveal the tactics and procedures used by MDOC officers in responding to physical confrontation. Disclosure to the public would present the risk that such information would be used to obstruct MDOC's responses in future physical confrontations.
- c. Disclosure would reveal the equipment carried by MDOC officers who work in the secured premises of IBC. Knowledge of the type of equipment carried by MDOC officers would afford prisoners at IBC and other correctional facilities greater knowledge in how to prevent the MDOC officers from performing their job duties.
- d. Disclosure would reveal a general headcount as to the number of MDOC officers that respond to physical confrontations.

Knowledge of the number of MDOC officers would allow prisoners to take more calculated risks when engaging in, or planning to engage in, prohibited activity.

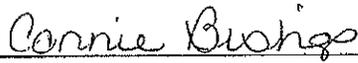
11. Ultimately, disclosure of the requested videos would severely interfere with my ability to maintain the safety and security at IBC. As an Inspector, my principal duty is to ensure the safety and security of both the prisoners in MDOC's custody and the employees who work at IBC. Each video contains a tremendous amount of information related to the MDOC's security measures at IBC. This information is not available to the public, and by keeping this information confidential, the MDOC is better able to maintain the safety and security of its facilities and prisoners. Public dissemination of any portion this confidential information related to the security measures of IBC presents a very definite and real risk to safety and security at IBC.

Affiant says nothing further.


Christine Wakefield
Michigan Department of Corrections

Date: January 29, 2018

Subscribed and sworn to before me,
a Notary Public, this 29th day
of January, 2018


Notary Public, State of Michigan

CONNIE L BISHOP
NOTARY PUBLIC, STATE OF MI
COUNTY OF BARRY
MY COMMISSION EXPIRES Mar 27, 2018
ACTING IN COUNTY OF Ionia

EXHIBIT 6

MICHIGAN CIVIL SERVICE COMMISSION
JOB SPECIFICATION
CORRECTIONS SECURITY INSPECTOR

JOB DESCRIPTION

Employees in this job serve as Corrections Security Inspectors responsible for functioning as the highest-ranking security official at a correctional facility on an assigned shift. The inspector is responsible for matters related to the enforcement of all prescribed security rules and regulations affecting the discipline, custody, security, and safety of the facility.

There is one classification in this job.

Position Code Title - Corrections Security Inspector

Corrections Security Inspector 13

This is the experienced level. Work is performed under administrative direction from a Deputy Prison Warden and requires extensive knowledge of the Department of Corrections and the facility's rules and regulations. The employee exercises technical supervision related to custody, security, and discipline over all custody and security staff during an assigned shift.

JOB DUTIES

NOTE: The job duties listed are typical examples of the work performed by positions in this job classification. Not all duties assigned to every position are included, nor is it expected that all positions will be assigned every duty.

Serves as the highest-ranking security official on an assigned shift.

Conducts unscheduled inspections to ensure that all personnel remain alert, diligent, and on their assigned posts or other assignments.

Evaluates and verifies employee performance through the review of completed work.

Conducts employee or prisoner investigations and resulting disciplinary conferences, including selecting, administering, and documenting progressive and disciplinary measures.

Handles issues related to union-management relationships and exercises responsibility for administration of the union contract.

Performs regularly scheduled inspections of all parts of the facility to review compliance with critical policies and procedures such as, critical tool control, key control, prisoner count procedures, emergency equipment and preparedness, etc.

Collects and maintains intelligence on prisoners, prisoner groups, and activities.

Maintains records, prepares reports, writes and/or revises related policies and/or procedures, and composes correspondence relative to the work.

Reviews security perimeter check reports for breaks or problems.

Serves as "duty deputy" in charge of the facility during evenings, weekends, and holidays on a rotating basis.

Directs contraband control and the shakedown of persons and buildings at frequent intervals.

Maintains evidence lockers and disposes of contraband and other evidence as necessary.

Monitors and evaluates program and organizational performance to assess efficiency and effectiveness.
Applies the laws, regulations, and principles of equal opportunity to personnel situations.
Serves on various facility committees as assigned.
Serves as liaison with State Police and local law enforcement authorities.
Performs related work as assigned.

JOB QUALIFICATIONS

Knowledge, Skills, and Abilities

Extensive knowledge of Department of Corrections and facility rules, regulations, policies, and procedures.
Extensive knowledge of the methods and techniques for ensuring the safety, security, and custody of prisoners.
Ability to perform detailed and difficult inspections within a correctional setting.
Ability to observe critically, obtain accurate data, and prepare reports.
Ability to direct and motivate others.
Ability to think and act quickly and appropriately in emergencies.
Ability to remain calm under tension and stress.
Ability to command respect and compliance with rules and regulations from correctional employees and prisoners.

Working Conditions

The job is located in a correctional facility requiring direct contact with prisoners.
The job duties require the employee to work in a hostile and stressful environment.

Physical Requirements

The job duties require an employee to be absent of any physical limitation which would impair effective performance in the Department of Corrections.

Education

Completion of 15 semester (23 term) credits in one or a combination of the following: correctional administration, criminal justice, criminology, psychology, social work, sociology, counseling and guidance, educational psychology, family relations, pastoral counseling, or law enforcement.

Experience

Corrections Security Inspector 13

Two years of experience equivalent to a Corrections Shift Supervisor 11 or Assistant Resident Unit Supervisor 11; OR, one year equivalent to a Corrections Shift Supervisor 12 or Resident Unit Manager 13.

Special Requirements, Licenses, and Certifications

Positions in this class are test-designated and subject to pre-appointment and random-selection drug and alcohol testing.

The Department of Corrections will not hire individuals who have been convicted of a felony or who have felony charges pending, in accordance with Public Act 140 of 1996.

NOTE: Equivalent combinations of education and experience that provide the required knowledge, skills, and abilities will be evaluated on an individual basis.

JOB CODE, POSITION TITLES AND CODES, AND COMPENSATION INFORMATION

<u>Job Code</u>	<u>Job Code Description</u>		
CORSECISP	CORRECTIONS SECURITY INSPECTOR		
<u>Position Title</u>	<u>Position Code</u>	<u>Pay Schedule</u>	
Corrections Security Inspector	CORSCISP	NERE-131	

JZ

06/24/2016

EXHIBIT 7

IONIA SENTINEL-STANDARD

No charges in death of Ionia Bellamy Creek prisoner Dustin Szot

By Karen Bota / karen.bota@sentinel-standard.com

Posted Mar 31, 2017 at 12:26 PM

IONIA COUNTY — Ionia County Prosecutor Kyle Butler said Friday that he will not pursue charges in the Sept. 27, 2016 death of Dustin Szot, a 24-year-old prisoner at Ionia Bellamy Creek Correctional Facility.

Szot was serving a sentence of three years to 20 years for first-degree home invasion out of Muskegon County in 2015, according to the Michigan Department of Corrections website.

He died after fighting with another prisoner and being shocked with a Taser as corrections officers broke up the fight.

A forensic autopsy at Sparrow Hospital the following day determined Szot's death was a homicide due to blunt force trauma sustained during a physical altercation, Butler said. The cause of death was "a subarachnoid hemorrhage due to right vertebral artery laceration."

A subarachnoid hemorrhage is bleeding in the space between the brain and the tissues that cover the brain, in this case due to a tear in the lining of the vertebral artery in the neck, which supplies blood to the brain.

"The investigation supports that prisoner A committed homicide; however, not all homicides are criminal in nature," Butler said.

Szot's attack on the unnamed prisoner at around 12:05 p.m. on an outdoor prison walkway was unprovoked and the prisoner was defending himself when he struck Szot several times with his left fist on the right side of Szot's head, ear and neck during the altercation.

“Due to what can only be characterized as a freak and unusual result of these rather unremarkable punches by prisoner A, prisoner Szot unfortunately died,” said Butler — “unremarkable” because prisoner A was lying on the ground next to Szot when punching him, so little weight or strength could have been used, he added.

Prisoner A’s version of being attacked by Szot was confirmed by another prisoner, as well as by a video surveillance recording that showed Szot approaching prisoner A from behind and jumping on his back, Butler said.

Within 15 seconds of the two prisoners falling to the ground, three corrections officers arrived and tried to stop the fight with verbal commands and then by discharging their electronic control devices (taser). While the ECD appeared to have no effect on prisoner A, likely due to the clothing he was wearing, at the time it did appear to have an effect on Szot, and both men were secured. The entire incident lasted just under one minute.

Butler said that initially it was reported that prisoner A may have kicked Szot in the head.

“However, upon review of the ECD video recordings — frame by frame — there is insufficient evidence to support that there was an intentional kick, or even an actual kick, by prisoner A to prisoner Szot,” said Butler.

When the ECD is deployed, it records both audio and video of the incident.

Other officers recognized Szot appeared to be unconscious and had labored breathing. They took him by wheelchair to the prison health care clinic “within seven minutes of the altercation,” Butler said.

MDOC personnel provided medical treatment, an oxygen mask, an IV line and cardiopulmonary resuscitation. Efforts to revive Szot failed and he was pronounced dead by an MDOC staff physician at 12:49 p.m., said Butler.

According to Butler, the corrections officers were trained in the use of the ECD and qualified to carry them, and they appeared to follow MDOC policy directives by verbally ordering the prisoners to stop fighting first, and then deploying their ECDs when verbal commands were ignored.

In addition, the Michigan State Police, the agency that investigated the incident,

determined that no one else deployed their ECD at the scene, and that the ECDs of the three corrections officers directly involved with the fighting prisoners delivered only a small amount of electrical charge to Szot (CO #1) or no electrical connection (CO #2 and #3).

"... (C)ontrary to initial investigation and reports of the effectiveness of the ECDs as perceived by the responding COs, no ECD deployed upon either prisoner A or prisoner Szot appeared to make any substantial connection and were either completely ineffective or the effectiveness was compromised during the altercation," Butler said. "With that, as well as the conclusions made through prisoner Szot's autopsy, it is clear that the ECDs deployed by COs #1, #2 and #3 were not the cause of prisoner Szot's death."

Butler said in analyzing the videos frame-by-frame, he further concluded that "in no way did any of the actions by the COs to intervene in this altercation between prisoners violate any criminal law."

The investigation supports that prisoner A was the only person involved in the altercation who had any contact with Szot that could lead to the listed cause of death, so prisoner A did commit a homicide. However, Butler said, Michigan law allows a person to use non-deadly force in self-defense.

"Life within prison walls is dangerous and unpredictable. Attacks by prisoners upon corrections staff, or upon fellow prisoners, are often quite violent, involve weapons and occur rather quickly with little to no warning," Butler said. "It is reasonable for a person violently attacked by a prisoner to act in a manner consistent with literally fighting for their life. Given the facts and circumstances surrounding the resulting death of prisoner Szot, prisoner A was within his rights to defend himself from attack."

Additional factors that played into Butler's decision not to charge prisoner A with a crime were that Szot's autopsy showed he had a blood alcohol content of .173, as obtained from his femoral artery, and a search of Szot after the incident found a weapon tucked in his waist band: a 4-inch-long sharpened piece of plastic with a rubber handle.

“Based on the facts and an application of the law to those facts, I do not conclude that prisoner A intended to kill prisoner Szot and I do conclude that prisoner A acted reasonably, as the situation presented itself to him, in lawful self-defense,” said Butler.

Butler also said a frame-by-frame analysis of video from the ECDs used by corrections officers showed that “in no way did (their) use of force, or use of ECD, violate any criminal law.”

Names of prisoner A and the three corrections officers who were directly involved in the altercation were not named by Butler “out of concern for (their) safety, concern for the security of the Michigan Department of Corrections, and to protect any invasion of (their) personal privacy” and because it was determined they “are innocent of any wrongdoing,” he said.

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EXHIBIT 8

MICHIGAN DEPARTMENT OF CORRECTIONS POLICY DIRECTIVE		EFFECTIVE DATE 02/21/2017	NUMBER 01.06.110
SUBJECT FREEDOM OF INFORMATION ACT - ACCESS TO DEPARTMENT PUBLIC RECORDS		SUPERSEDES 01.06.110 (03/31/2016)	
		AUTHORITY 442 PA 1976, MCL 15.231 et seq., MCL 4.359, 28.730, 423.504, 762.14, 771.14, 780.623, 791.229, 791.230a; Administrative Rule 28.5208, Booth v MDOC, Unpublished COA Nos. 331807 & 332014, December 1, 2016	
		PAGE 1	OF 8

POLICY STATEMENT:

All written requests for public records in the Department's possession shall be processed under the Michigan Freedom of Information Act (FOIA) as set forth in this policy.

RELATED POLICY:

02.01.140 Human Resource Files

POLICY:

DEFINITIONS

- A. Public Record - A writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function, from the time it is created. This includes but is not limited to photographs, photocopies, drawings, video and audio tapes, computer data or documents retained on a computer, CD, DVD, and any other means of recording or retaining information. It does not include computer software.

GENERAL INFORMATION

- B. The FOIA requires full disclosure of public records unless those records are exempted under the Act. All public records in the Department's possession are subject to FOIA but may be exempt from disclosure. This includes public records in the Department's possession that are created by another agency or by an entity under contract with the Department.
- C. Except if the request is from a prisoner and as set forth in Paragraph D, any written request for a public record is considered to be a FOIA request unless the requestor specifically states in writing that the request is not being made under FOIA. A written request for information also is considered to be a FOIA request if the request indicates it is being submitted under FOIA. A written request includes a writing transmitted by facsimile machine, e-mail, or any other electronic means.
- D. The following are generally not considered to be FOIA requests unless the requestor specifically states in writing that the request is being made under FOIA:
 - 1. A request from a federal, state, or local governmental agency, including a court or law enforcement agency. A request from the Department of Attorney General shall be referred to the appropriate Litigation Coordinator.
 - 2. A discovery request pertaining to a lawsuit (e.g., Request for Production of Documents). All discovery requests shall be referred to the appropriate Litigation Coordinator as set forth in PD 02.01.102 "Litigation - Department and Employee Responsibilities."
 - 3. A request for employee personnel information which the employee has authorized to be released (e.g., employment verification to a lending institution or prospective employer). Such requests shall be referred to the appropriate Human Resources office for processing. Employees may have access to their personal records in accordance with Civil Service rules.
 - 4. A request from a collective bargaining unit made pursuant to its contract. Such requests shall be

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referred to the appropriate Human Resources office for processing.

5. Documents required to be produced by a subpoena or other court order. Such requests shall be referred to the appropriate Litigation Coordinator.
 6. A request from an educational institution for a transcript of a prisoner's education record.
 7. A request from a news media representative unless the request is for copies of several Department documents or unless the request states that it is a FOIA request. The Public Information Officer or designee, through the Department's FOIA Coordinator, shall be consulted on any questions which may arise in processing a request from a news media representative.
 8. A request from legislative staff unless the request is for copies of several Department documents. The Public Information Officer or designee, through the Department's FOIA Coordinator, shall be consulted on any questions which may arise in processing a request from legislative staff.
- E. Department employees are entitled to make requests under FOIA. However, such requests shall not be made while on Department time or while using Department resources, including its computers and office supplies. Any known misuse of Department time or resources is to be reported to the employee's supervisor.

PRISONER REQUESTS FOR DOCUMENTS

- F. Under MCL 15.231(2) and 15.232(c), prisoners are not entitled to make FOIA requests. Prisoners also have no right to appeal or file suit under FOIA if a request for public records is denied. Therefore, prisoner requests for public records shall not be processed as FOIA requests but instead responded to by staff in the same manner as any other correspondence, with requested documents provided as appropriate.
- G. Prisoners may receive copies of documents about their medical care as set forth in OP 03.04.108-B "Prisoner Access to Medical Records."
- H. Upon request, a prisoner shall be provided with a copy of the hearing investigation compiled for his/her Class I misconduct hearing, except for those documents which have been determined by the hearing officer to be confidential. Such requests shall be made to the hearing investigator at the facility where the hearing occurred.

FOIA COORDINATORS

- I. The Manager of the FOIA Section in the Office of Legal Affairs is the FOIA Coordinator for the Department. The Department's FOIA Coordinator or designee is responsible for responding to requests received in Central Office and requests for documents in prisoner files in storage, except for the prisoner health record. Requests for prisoner health records are to be submitted to Duane L. Waters Health Center Medical Records at 3857 Cooper Street, Jackson, MI 49201.
- J. Local FOIA Coordinators shall be designated to act on behalf of the Department FOIA Coordinator to accept and process FOIA requests received at the following locations:
 1. At each Correctional Facilities Administration (CFA) institution, as identified by the Warden. A separate FOIA Coordinator may be identified for the Record Office and Human Resources Office.
 2. At each CFA Assistant Deputy Director's (ADD) office in Jackson and Kinross.
 3. At each Bureau of Health Care Services (BHCS) location, the Jackson Health Care Office, the Kinross Health Care Office and Mental Services Office as identified by the appropriate Assistant Health Services Administrator and at Duane L. Waters Health Center (DWH) as identified by the Warden of the Charles E. Egeler Reception and Guidance Center (RGC). This shall include a local FOIA coordinator for requests for records in prisoner/parolee health records in storage. Other local health care FOIA coordinators may be identified as needed by the BHCS Administrator or designee.
 4. At each Field Operations Administration (FOA) Regional and Area Office, as identified by the appropriate FOA ADD or Area Manager.

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5. At any Residential Reentry Program facility, as identified by the appropriate Deputy Director or designee.
- K. Each FOIA Coordinator shall maintain monthly statistics of the number of FOIA requests received and processed, including the amount of fees billed and collected. The local FOIA Coordinator shall forward the statistics to the Department FOIA Coordinator or designee at the end of each calendar year. The Department's FOIA Coordinator shall ensure Department-wide statistical reports are compiled at least annually.
- L. Each FOIA Coordinator shall maintain a copy of all FOIA requests received, responses sent and all responsive records. These documents shall be retained in accordance with the Department's Retention and Disposal Schedule, one calendar year from the date of the last action. Thereafter, provided that there is no pending litigation regarding the FOIA request, the records will be destroyed.
- M. A Response to Request for Public Records - FOIA form (CSH-479) shall be used to respond to all FOIA requests unless otherwise directed by the Department FOIA Coordinator or designee. A written notice responding to the request shall be provided to address issues not covered by the form. Anytime fees are assessed, the fees will be delineated on a separate FOIA Fee Calculation Form (CFJ-564).
- N. The local Litigation Coordinator shall be contacted to determine if there is pending litigation regarding the subject of any FOIA request. If there is pending litigation, the Department FOIA Coordinator shall be contacted for directions regarding how to proceed. A copy of the request and the response shall be forwarded to the local Litigation Coordinator as set forth in PD 02.01.102 "Litigation - Department and Employee Responsibilities."
- O. Questions regarding FOIA requests shall be directed to the Department's FOIA Coordinator or designee.

PROCESSING FOIA REQUESTS

- P. A FOIA request received by an employee shall be referred before the end of the business day to the FOIA Coordinator at the employee's work site. The FOIA Coordinator shall respond to the request within five business days after receipt by the Department. A request received by facsimile machine or e-mail is considered received on the next business day following the date of transmission. In the response, the FOIA Coordinator shall either:
1. Grant the request;
 2. Deny the request;
 3. Grant the request in part and deny the request in part; or
 4. Take a ten business day extension. In such cases, the requestor shall be notified in writing of the reason for the extension and the expiration date of the extension. The MDOC cannot issue more than one notice of extension.
- Q. The FOIA Coordinator shall review the request and determine which records in the Department's possession are responsive to the FOIA request. The exact name of the record is not required to be provided if it can reasonably be determined by the description provided what is being requested. A document is not required to be created to respond to a FOIA request if the record requested does not exist.
- R. The FOIA Coordinator shall review the documents responsive to the request to ensure information exempt from disclosure is not provided. If only a portion of a document is exempt, the exempt portion is to be redacted and only the non-exempt portion of the document disclosed. The FOIA Coordinator shall ensure redacted portions of a document are not legible on the copy provided.
- S. Only those exemptions authorized under FOIA shall be used. If more than one exemption applies to a particular request, all relevant exemptions should be indicated when responding to a FOIA request unless the document is statutorily exempt from disclosure. An explanation regarding what was exempted and the reason for the exemption shall be provided.
- T. If the MDOC does not respond to a written request in a timely manner, it shall reduce the charges for labor costs by 5% for each day the response is late with a maximum 50% reduction if the late response was willful and intentional or if the written request included language that conveyed a request for information within the first 250 words of the written document. For any questions regarding fee calculations, contact the Department's FOIA

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Coordinator.

REQUESTS FOR EMPLOYEE PERSONNEL RECORDS

- U. Pursuant to MCL 791.230a, the home addresses, home telephone numbers, clock numbers, employee identification numbers and personnel records of Department employees are exempt from disclosure under FOIA. For purposes of this exemption, personnel records include all records maintained regarding an employee as a result of employment with the Department. This includes but is not limited to personnel files, investigatory records relating to an employee, AIPAS records, certain complaints filed by or against an employee, time and attendance records, and work location.

REQUESTS FOR INFORMATION IN FILLING DEPARTMENT POSITIONS

- V. Although most records retained by the Department regarding the filling of Department positions are exempt from disclosure, each request must be reviewed to determine what records and/or information may be disclosed. Job posting information belongs to the Department of Civil Service. Information that may be released under FOIA unless otherwise exempt from disclosure (e.g., telephone numbers, home addresses, Social Security numbers) includes but is not limited to the following:

1. The names of all applicants.
2. The resume of the requestor, assuming s/he applied for the position (does not apply if a current MDOC employee).
3. The names of those applicants interviewed for the position, ensuring they are not presented in the order in which they were ranked (does not apply if a current MDOC employee).
4. The job posting.

FOIA EXEMPTIONS

- W. The exemptions allowed under FOIA are expressed in general language which must be applied to the specific public record requested. It is impractical to list all information or documents that may be exempt from disclosure. Therefore, local FOIA Coordinators must be familiar with all FOIA exemptions. Often, more than one exemption may apply. FOIA responses must include all applicable exemptions.

General Exemptions

- X. The following are some of the FOIA exemptions which are most frequently taken and examples of information to which the exemptions may apply:

1. Information of a personal nature if public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy. Section 13 (1)(a). The purpose of exemptions is to balance the policy of full disclosure with any significant privacy interests favoring nondisclosure.

Examples: Home addresses and home telephone numbers; emergency contact information; driver license numbers; Social Security numbers; victims' requests to receive information pursuant to PD 01.06.120 "Victim Notification" and the Department's response unless the requestor is the victim; fingerprint cards; resumes of unsuccessful job applicants except for the resume of the requestor.

2. A public record that, if disclosed, would prejudice the ability to maintain the physical security of a correctional facility unless the public interest in disclosure outweighs the public interest in non-disclosure. Section 13(1)(c).

Examples: Blueprints or maps of facility grounds; names of informants; mobilization scenarios and critiques; Special Problem Offender Notice; movement plans; Security Threat Group designations and related documentation; exempt policy directives and operating procedures; post orders for security sensitive assignment (e.g., sallyport); descriptions of security fencing; description of operation of personal protection devices; videos that would disclose capability of any monitoring device; document determined to be confidential by a hearing officer at a hearing conducted pursuant to MCL 791.252.

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3. Information or records subject to the physician-patient privilege, the psychologist-patient privilege, or other privilege recognized by statute or court rule. Section 13(1)(h).

Examples: Psychiatric and psychological information unless a release is provided; medical records; however, the request shall be forwarded to the Health Unit Manager for processing under the Medical Records Access Act if a release is provided.
4. Communications and notes of an advisory nature to the extent that they cover other than purely factual materials and are preliminary to a final agency decision of policy or action. This exemption only applies if the public interest of encouraging frank communications between officials and employees clearly outweighs the public interest in disclosure. Section 13(1)(m).

Examples: A Joint Evaluation Committee (JEC) recommendation before the Department of Technology, Management and Budget award is made.
5. Records of a public body's security measures, including security plans, security codes and combinations, passwords, passes, keys, and security procedures, to the extent that the records relate to the ongoing security of the public body. Section 13(1)(u).

Examples: Movement plans; exempt policy directives and operating procedures; post orders for security sensitive assignment (e.g., sallyport); descriptions of security fencing; description of operation of personal protection devices; videos that would disclose capability of any monitoring device.
6. Records or information relating to a civil action in which the requesting party and the Department are parties. Section 13(1)(v). This includes civil court actions in which the Department is representing an employee being sued.
7. Information or records that would disclose the Social Security number of an individual. Sections 13(1)(d), specifically MCL 445.85 and 13 (1)(w). This information shall not be disclosed even if a release is provided.

Statutory Exemptions

- Y. Section 13(1)(d) of FOIA also permits exemption of documents or information specifically exempted from disclosure by another statute. When using this exemption, it is necessary to identify the specific statute authorizing the exemption. The following are examples of information exempt under Section 13(1)(d) and the applicable statute:
1. Records and reports of investigations made by a probation agent, including presentence investigation reports. (MCL 791.229).
 2. The address and telephone number of a victim who has requested to receive information pursuant to PD 01.06.120 "Victim Notification." (MCL 780.769).
 3. Victim statements submitted for consideration by the Parole Board pursuant to MCL 780.771.
 4. Any information of the disposition of criminal charges and assignment as a youthful trainee unless youthful trainee status is revoked and the offender is subsequently convicted of the offense. (MCL 762.14).
 5. Any information received through the Law Enforcement Information Network (LEIN), including records of criminal charges which did not result in a conviction. (MCL 28.214).
 6. Quality assurance reviews (e.g., "peer reviews") conducted by BHCS. (MCL 331.533).
 7. A report prepared and recommendations made by the Office of the Legislative Corrections Ombudsman and submitted to the Legislative Council pursuant to an investigation. (MCL 4.359).
 8. A record ordered to be set aside ("expunged") if the Department has received notice of the set aside.

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(MCL 780.623).

9. Documents and information pertaining to an offender's registration and change of address notification pursuant to the Sex Offenders Registration Act. (MCL 28.730).
10. Information regarding the diagnosis, prognosis, or treatment of an offender involved in a substance abuse education or treatment program, unless a release is provided by the offender which specifically authorizes release of this information. (48 USC 290dd-3).

FEES

- Z. All FOIA requestors shall be charged 10 cents per page for each written document provided plus the actual cost of postage unless expedited shipping or insurance is stipulated by the requestor. The fee shall be limited to actual mailing costs and to the actual incremental cost of duplication or publication including labor, the cost of the search, examination, review, and the deletion and separation of exempt from non-exempt information. The actual cost of duplication shall be charged for copies of non-written documents, such as computer discs and non-paper physical media. If a portion of a document must be redacted and the document recopied prior to production, the requestor shall be charged only for the copy provided.
- AA. A fee may not be charged for the cost of search, review, examination, and the separation of exempt from non-exempt information unless failure to charge the fee would result in an unreasonably high cost to the Department. If assessed, the fee shall be charged at the hourly wage of the lowest-paid employee capable of searching for, locating and examining the public records in the particular instance regardless of whether that person is available or who actually performs the labor. The hourly wage includes the cost of up to 50% of the base rate paid by the State to cover or partially cover the cost of fringe benefits. Overtime wages shall not be included in the calculation of labor costs unless overtime is specifically stipulated by the requestor. Labor costs are to be estimated and charged in increments of 15 minutes or more, with all partial time rounded down. Such fees are not to be charged without first contacting the Department's FOIA Coordinator or designee for approval and direction on how to proceed.
- BB. The Department may waive or reduce fees if the Department determines it is in the public interest to do so or if providing the requested documents primarily benefits the general public for reasons identified by the requestor. A fee that totals \$10.00 or less, including postage, shall be waived. Other fees shall be waived or reduced pursuant to this paragraph only with approval of the Department FOIA Coordinator or designee.
- CC. A requestor shall not be charged for the first \$20.00 of fees assessed per request, including any fees waived under Paragraph BB for either of the following:
 - (a) Upon submission of a current affidavit verifying that s/he is receiving public assistance or, if not receiving public assistance, sufficiently stating facts showing an inability to pay the cost due to indigency. If the requestor is eligible for a requested discount, the public body shall fully note the discount on the Fee Calculation form. If the requestor is ineligible for the discount, the public body shall inform the requestor specifically of the reason for the ineligibility in the public body's written response. An individual is ineligible for this fee reduction if any of the following apply:
 - The individual requests the information in conjunction with outside parties who are offering or providing payment or other remuneration to the individual to make the request. The MDOC may require a statement by the requestor in the affidavit that the request is not being made in conjunction with outside parties in exchange for payment or other remuneration.
 - The requestor has previously received discounted copies of public records under this subsection from the MDOC twice during the calendar year.
 - (b) A nonprofit organization formally designated by the State to carry out activities and the protection and advocacy for individuals with mental illness if the requestor meets all of the following requirements:
 - Is made directly on behalf of the organization or its clients.
 - Is made for a reason wholly consistent with the mission and provisions of those laws under Section 931 of the Mental Health Code, 1974 PA 258, MCL 330.1931.
 - Is accompanied by documentation of its designation by the State, if requested by the public body.

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Questions regarding whether fees should be waived pursuant to this paragraph are to be directed to the Department's FOIA Coordinator or designee.

- DD. Whenever a fee is charged, the FOIA response shall specify the amount owed, the Department's best efforts estimate of how long it will take to provide the records to the requestor and indicate that the records will be provided after payment is received in full. If the amount owed exceeds \$50.00, exclusive of any waived amounts, a 50% good faith deposit may be required before processing begins. Once the good faith deposit is received, the request shall be processed. Upon completion of processing, the requestor shall be billed for the balance owed, which must be paid before the documents are provided to the requestor. A requestor who does not pay the balance owed will not be provided with the documents requested.

INSPECTION

- EE. When inspection of public records is requested in writing under FOIA, a reasonable opportunity for inspection of the non-exempt records must be allowed during normal business hours. The local FOIA Coordinator must ensure that any exempt information is redacted prior to the inspection.
- FF. A fee shall be charged a requestor to inspect public records only as set forth below:
1. For the search, review, examination, and the separation of exempt from non-exempt information as set forth in Paragraph AA.
 2. With approval of the Department FOIA Coordinator or designee, for the time spent by staff monitoring an inspection that is necessary to protect the original record and to prevent excessive and unreasonable interference with the discharge of Department functions. The fee shall be charged at the hourly rate of the lowest-paid employee capable of monitoring the inspection. The hourly wage includes the cost of up to 50% of the base rate paid by the State to cover or partially cover the cost of fringe benefits.
 3. With approval of the Department FOIA Coordinator or designee, for copies necessary to protect the original record as provided for under Section 3(3) of FOIA, MCL 15.233.
 4. For a copy made in order to redact a portion of the original that is exempt.

APPEALS UNDER FOIA

- GG. A requestor whose FOIA request has been denied in full or in part may appeal the denial to the Director. The appeal must be submitted in writing and is to be mailed to attention of the Administrator of the Office of Legal Affairs. The appeal must be specifically identified as a FOIA appeal and state the reasons for reversal of the denial. The Director will respond to the appeal within 10 business days.
- HH. A requestor may appeal the Department's final determination to deny a FOIA request by commencing an action in the Court of Claims within 180 calendar days after that final determination is made.
- II. A requestor may appeal the FOIA fees by submitting a written appeal for a fee reduction that specifically states the word "appeal" and identifies how the required fee exceeds the amount permitted under the public body's available procedures/guidelines. The appeal must be submitted in writing and is to be mailed to attention of the Administrator of the Office of Legal Affairs. The Director will respond to the appeal within 10 business days.
- JJ. A requestor may commence a civil action in the Court of Claims for a fee reduction only after having gone through the Department's fee appeal process. The action must be filed within 45 days after receiving the final determination from the Director.
- KK. For either appeal, the Director may, under unusual circumstances, issue a written notice taking a 10 business day extension in order to respond to the appeal.

PROCEDURES

- LL. Wardens and the FOA Deputy Director shall ensure that procedures are developed as necessary to implement requirements set forth in this policy directive within 60 calendar days after the effective date.

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AUDIT ELEMENTS

MM. A Primary Audit Elements List has been developed and is available on the Department's Document Access System to assist with self-audit of this policy pursuant to PD 01.05.100 "Self-Audits and Performance Audits."

APPROVED: HEW 02/16/2017

EXHIBIT 9

2017 WL 3388953

Only the Westlaw citation is currently available.

United States District Court,
W.D. Kentucky,
at Paducah.

Michael COOPER, Plaintiff

v.

Sojnia BOWER, et al., Defendants

CIVIL ACTION NO. 5:15-CV-P249-TBR

Signed 08/03/2017

Filed 08/04/2017

Attorneys and Law Firms

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Frankfort, KY, for Defendants.

MEMORANDUM OPINION AND ORDER

Thomas B. Russell, Senior Judge

*1 Plaintiff Michael Cooper filed this *pro se* 42 U.S.C. § 1983 prisoner civil rights action against various officials at Kentucky State Penitentiary (KSP). This matter is before the Court upon five motions by Defendants to seal exhibits (DNs 138, 139, 140, 141, & 142) they have filed in support of their motion for summary judgment (DN 137-3). The Court will consider each motion in turn.

I. MOTION TO SEAL SECURITY CAMERAL FOOTAGE (DN 138)

In their motion to seal this exhibit (docketed at DN 147), Defendants state that this exhibit contains video of the interior of KSP and poses a potential security risk by showing camera angles and blind spots. They also contend that it shows other inmates who “may have a privacy interest in having the video under seal.”

The Court finds that this exhibit should be placed under seal. Although the Kentucky Open Records Act, related state laws, and opinions of the Kentucky Attorney

General interpreting such are not controlling in regard to whether judicial records should be placed under seal in this federal action, they do offer helpful insight. For example, the Kentucky Attorney General has opined that the release of prison surveillance footage to the public could pose a threat to “the safety and security of the inmates, staff, and institution” because the footage may reveal the institution’s “methods or practices in obtaining the video” and “show areas where the camera is capable of focusing and blind spots outside the camera’s range.” *See, e.g.*, Ky. Att’y Gen. Op. 07-ORD-168 (citing several previous opinions and denying a newspaper’s open records request for prison surveillance video of a specific incident). The Court also notes that other courts have held that such footage may be properly placed under seal for security reasons. *See, e.g., Castillon v. Corr. Corp. Am.*, No. 1:12-cv-00559-EJL-CWD, 2015 U.S. Dist. LEXIS 84998, at *6-7, 2015 WL 3948459 (D.C. Idaho June 29, 2015); *Pugh v. Terhune*, No. CV F 01 5017 OWW LJO P, 2005 U.S. Dist. LEXIS 24593, at *3 (E.D. Cal. Oct. 6, 2005). Therefore, **IT IS ORDERED** that this motion to seal (DN 138) is **GRANTED**.

However, because Defendants have filed the security camera footage as evidence in support of their motion for summary, Defendants must make the footage available for Plaintiff to view. Courts have long recognized the “dangers supposed to arise from the taking of *ex parte* evidence.” *Patapsco Ins. Co. v. Southgate*, 30 U.S. 604 (1831); *see also Chaplin v. Kirwin*, 1 U.S. 187 (1786). Courts have also regularly cautioned that when a decision-maker relies on *ex parte* evidence in reaching his conclusion, a violation of the other party’s right to procedural due process may occur. *See, e.g., Tenn. Secondary Sch. Athletic Ass’n v. Brentwood Acad.*, 551 U.S. 291 (2007); *see also Kenny A. ex rel. Winn v. Perdue*, 547 F.3d 1319, 1326-27 (11th Cir. 2008) (noting that “the district judge failed to comprehend the due process implications of what he was doing” when he reached a decision based on *ex parte* evidence). It is beyond debate that a party retains “the right to know what information is being submitted to the decision-maker and the opportunity to challenge the reliability of the government’s sources as well as provide contrary information.” *United States v. Accetturo*, 783 F.2d 382, 390 (3d Cir. 1986).

*2 These holdings make clear why one district court rejected a magistrate judge’s report and recommendation

when it granted summary judgment to the defendants without allowing the plaintiff, a state prisoner who had brought an action for excessive force under 42 U.S.C. § 1983, to view a “silent still-frame videotape” which contained “key evidence.” *Evans v. Mallory*, No. 08-12725, 2009 U.S. Dist. LEXIS 79069, 2009 WL 2900718 (E.D. Mich. Sept. 2, 2009). Similarly, in *Pugh v. Terhune*, the court ordered defendants in a § 1983 action brought by a *pro se* prisoner to make a prison videotape which defendants had filed in support of their motion for summary judgment available to the plaintiff for viewing. 2005 U.S. Dist. LEXIS 24593; *see also Wallace v. Walker*, No. 5:13CV00068 JLH/JTR, 2014 U.S. Dist. LEXIS 3531 (E.D. Ark. 2014) (requiring defendants to allow § 1983 plaintiff to view prison surveillance video at least two weeks before his response to summary judgment would be due).

II. MOTION TO SEAL PRISON RAPE ELIMINATION ACT INVESTIGATIVE REPORT (DN 139)

In this motion to seal a Prison Rape Elimination Act (PREA) Investigative Report (docketed at DN 143), Defendants argue that the federal regulations allow individuals to make private reports to prison officials of an alleged PREA violation and that making this document publicly available “puts any confidential informant in harm's way.” Defendants' argument, however, fails because this document is already a matter of public record. Plaintiff filed this PREA investigative report with the Court when he filed his complaint (DN 1, Attach. 3). Moreover, a review of the report reveals that the “confidential informant” was Plaintiff himself, who not only requests that the report and related documents not be sealed, but initiated this very action based upon the allegations contained in the report. For these reasons, **IT IS HEREBY ORDERED** that Defendants' motion to seal this PREA Report and related documents (DN 139) is **DENIED**.

III. MOTION TO SEAL SECURED INSTITUTIONAL POLICY (DN 140)

In this motion, Defendants move to seal a KSP “secured institutional policy” (docketed at DN 144). Defendants argue that the release of this policy “would increase the risk of harm to correctional officers by revealing details of officers' duties, knowledge of which by inmates would

enable them to disrupt the safety and security of the institution more effectively.”

A thorough review of the policy leads this Court to conclude that it should indeed be sealed for the reasons set forth by Defendants. Accordingly, **IT IS HEREBY ORDERED** that this motion to seal (DN 140) is **GRANTED**.

Based on these same security concerns, the Court will not compel Defendants to produce this document for Plaintiff's viewing at this time. However, in light of the above-cited case law, should the Court determine that a pertinent issue of Defendants' motion for summary judgment can only be decided by relying upon this evidence, it will revisit whether Plaintiff should be allowed to view the policy, or portions of it, at that time.

IV. MOTION TO SEAL “OFFENDER SEPARATION CONFLICT” (DN 141)

In Defendants' motion to seal this exhibit (docketed at DN 145), they argue that “releasing the identity of individuals who provide information related to a PREA violation jeopardizes the efficacy of PREA and puts any confidential informant in harm's way.” Defendants also cite to federal regulatory provisions which permit staff members and inmates to “privately report” the sexual abuse and sexual harassment of inmates. *See* 28 C.F.R. § 115.41(a) & (d). The document at issue, however, does not contain the name of a confidential informant. Rather, this document contains the name of the prison official who investigated the sexual incident at issue and the prison official who issued a conflict based upon this investigation. Significantly, Defendants provide the name of the prison official who issued the conflict in their motion for summary judgment (DN 137-3, p. 28). The Court can discern no reason for protecting the name of the investigator while providing the name of the individual who issued the conflict. Accordingly, **IT IS HEREBY ORDERED** that Defendants' motion to seal the “Offender Separation Conflict” (DN 141) is **DENIED**.

V. MOTION TO SEAL PLAINTIFF'S MEDICAL RECORDS (DN 142)

*3 In this motion, Defendants move to seal a portion of Plaintiff's medical records (docketed at DN 146) to protect Plaintiff's privacy. However, the medical record at issue is a only a three-line “Progress Note” regarding a swollen

ankle and scratched knee. The Court finds no reason for sealing this document. Accordingly, **IT IS HEREBY ORDERED** that Defendants' motion to seal (DN 142) is **DENIED**.

VI. CONCLUSION AND AMENDED SCHEDULING ORDER

In light of the foregoing, **IT IS FURTHER ORDERED** as follows:

(1) The Clerk of Court is **DIRECTED** to unseal the exhibits docketed at DNs 143, 145, and 146.

(2) Defendants **SHALL** provide Plaintiff a copy of the exhibits docketed at DNs 143, 145, and 146 (to the extent they have not already done so) and to make a copy of the security camera footage (docketed as DN 147) available to Plaintiff for viewing;

(3) Within 21 days of the date of this Order, Defendants **SHALL** file a "Status Report" indicating the date Plaintiff has been provided copies of these exhibits and that

Plaintiff has viewed the security camera footage or that reasonable opportunity to view the tape was made to Plaintiff but not accepted;

(4) Although Plaintiff has already filed a response to Defendants' motion for summary judgment (DN 150), within 30 days of receiving these exhibits and viewing the security camera footage, Plaintiff may file a supplemental response to Defendants' pending motion for summary judgment.

(5) Because these and other outstanding motions have now been decided by the Court, the stay on the dispositive-motion deadline entered by the Court on May 26, 2017 (DN 122) is lifted. Defendants' motion for summary judgment is already pending. **If Plaintiff chooses to file his own motion for summary judgment, it should be filed no than August 30, 2017.**

All Citations

Slip Copy, 2017 WL 3388953

EXHIBIT 10

2016 WL 2901753

Only the Westlaw citation is currently available.
United States District Court,
W.D. Wisconsin.

Christopher Scott Atkinson, Plaintiff,
v.
Felipa Mackinnon, Joseph Warnke and
Crystal Schwersenska, Defendants.

14-cv-736-bbc
|
Signed 05/18/2016

OPINION and ORDER

BARBARA B. CRABB, District Judge

*1 In this prisoner civil rights case, pro se plaintiff Christopher Atkinson alleges that defendants Felipa MacKinnon, Joseph Warnke and Crystal Schwersenska (prison officials at the Federal Correctional Institution in Oxford, Wisconsin) discriminated against him because of his Muslim faith and then retaliated against him when he complained about his poor treatment. In particular, plaintiff is proceeding on the following claims: (1) defendants Warnke and Schwersenska violated his rights under the free exercise and establishment clauses of the First Amendment, the equal protection component of the Fifth Amendment and the Religious Freedom Restoration Act when they changed plaintiff's pay, job title, duties and hours; (2) defendant Mackinnon violated the free speech, free exercise and establishment clauses of the First Amendment, the equal protection component of the Fifth Amendment and RFRA by refusing to reinstate his job privileges, submitting poor work performance evaluations of plaintiff and telling plaintiff that he must find new work.

Defendants have filed a motion for summary judgment, dkt. #45, which is ready for review. The primary issue raised in defendants' motion is whether they disciplined plaintiff because of an honest belief that he stole food from the prison kitchen or because plaintiff is a Muslim and filed grievances against defendants. Because I conclude that genuine issues of material fact remain on these

questions, Fed. R. Civ. P. 56, I am denying defendants' motion.

After the parties finished briefing defendants' summary judgment motion, plaintiff filed several of his own motions: (1) a motion to supplement his responses to defendants' proposed findings of fact, dkt. #81; (2) two requests for a subpoena duces tecum for the Bureau of Prisons, dkt. ##83 and 86; and (3) a request to require the Bureau of Prisons to provide the court an unredacted copy of defendant Schwersenska's time and attendance report, dkt. #85. (In addition, plaintiff has filed a petition for a writ of habeas corpus ad testificandum with respect to prisoner Gregg Vandyke, dkt. #91, but defendants have not had the opportunity to respond to the request yet.)

In his motion to supplement his responses to defendants' proposed findings of fact, plaintiff says that he inadvertently failed to include one page of his responses when he submitted them to defendants and the court. Because defendants have not objected to plaintiff's motion, I will grant it. Further, because plaintiff submitted his proposed supplement with his motion, no additional action is needed.

I am denying both of plaintiff's subpoena requests because he has not shown that he is entitled to the materials he is requesting. Finally, I am granting plaintiff's request for an in camera inspection.

From the parties' proposed findings of fact and the record, I find that the following facts are undisputed.

UNDISPUTED FACTS

Plaintiff Christopher Atkinson is a federal prisoner incarcerated at the Federal Correctional Institute at Oxford, Wisconsin. In November 2013, plaintiff worked in the prison's food services department as a "Grade 2" inmate worker. He was assigned to the morning shift (4:30 a.m. to 12:30 p.m.), working on the serving line.

*2 On November 12, 2013, defendant Joseph Warnke, a cook supervisor, confronted plaintiff about one or more chicken patties that plaintiff was holding. (The parties dispute most of the details about this incident. I will discuss the parties' different versions in the context of the opinion.) The incident ended with Warnke confiscating

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the patty or patties and directing plaintiff to leave the food service area. After defendant Warnke spoke to defendant Crystal Schwersenska, another cook supervisor, about what he had observed on November 12, Schwersenska reassigned plaintiff to a new position away from the food service line. (The parties debate in their briefs and proposed findings of fact whether Schwersenska had authority to reassign plaintiff, but I need not resolve that dispute to decide defendants' motion. The parties do not identify what plaintiff's new position was.)

On November 13, 2013, plaintiff received a "poor" rating on a work evaluation on the ground that he "grabbed a handful of chicken patties from the hotbox and took off with them." Dkt. #1-1 at 4. (Defendants do not identify the person who gave plaintiff the negative evaluation. Plaintiff alleges that defendant Felipa Mackinnon, the food services administrator, admitted that she was responsible. Cpt. ¶ 46, dkt. #1.)

Also on November 13, 2013, plaintiff submitted an administrative grievance in which he described the events on November 12 and 13 and alleged that defendant Warnke was mistreating him because of his religious beliefs. In response, the warden stated that plaintiff's "allegation of staff misconduct has been referred to the appropriate department for investigation."

Soon after the incident, plaintiff requested a meeting with defendant Felipa Mackinnon, the food services administrator. At the meeting, plaintiff denied stealing the chicken patties, but he did not accuse Warnke of making disparaging comments about the Muslim faith. Mackinnon did not give plaintiff his old job back.

Plaintiff was scheduled to work fewer hours in his new position. In October 2013, plaintiff worked 147 hours. In November 2013, he worked 74 hours. He worked 20 hours each month from December 2013 to March 2014. In April 2014, he worked 30 hours. In May, June and July 2014, he worked 32 hours. After that plaintiff received "maintenance pay" because he refused to participate in the "Financial Responsibility Program." (Plaintiff does not allege that defendants were involved in that decision.)

In March 2014, plaintiff's "poor" rating was changed to "good" retroactively. A notation on the unsigned evaluation form states that plaintiff "has a consistent institution work history." (Defendants do not say who

made the change or why. Plaintiff alleges that Mackinnon admitted that she was responsible for the retroactive changes, but she did not explain the reasons for them. Cpt. ¶ 46, dkt. #1.)

Plaintiff remained an employee in food services until March 2015, when the Special Investigative Services unit recommended a reassignment because of plaintiff's alleged involvement in making a threat to a coworker. (Plaintiff denies that he threatened anyone.) Neither defendants nor anyone else in food services participated in making the recommendation for reassignment.

OPINION

I. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants raise several arguments in support of their motion for summary judgment; (1) plaintiff's constitutional claims must be dismissed because plaintiff does not have the right to sue federal employees for damages under the First Amendment or Fifth Amendment; (2) plaintiff's claims under RFRA and the free exercise clause should be dismissed because defendants did not substantially burden plaintiff's religious exercise and their conduct furthered a compelling interest by the least restrictive means; (3) plaintiff's claims under the establishment clause and the equal protection component of the Fifth Amendment should be dismissed because defendants did not discriminate against plaintiff on the basis of his religion; and (4) plaintiff's retaliation claim against defendant Mackinnon should be dismissed because Mackinnon did not take any adverse actions against plaintiff and plaintiff has no evidence of retaliatory intent. In addition, defendants argue that plaintiff is not entitled to seek damages for mental or emotional injuries. I will address each of these arguments in turn. (Defendants discuss a retaliation claim against defendants Warnke and Schwersenska as well, but I did not allow plaintiff to proceed on such a claim, so I need not address it.)

A. Scope of Right to Sue for Constitutional Violations

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*3 If a state employee violates the Constitution, he may be sued for damages under 42 U.S.C. § 1983. However, there is no federal statute that authorizes lawsuits for money damages against federal employees for constitutional violations. In Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 389 (1974), the Supreme Court held that the Fourth Amendment implicitly authorizes a court to order federal agents to pay damages to a person injured by the agents' violation of the Amendment. After Bivens, the Court authorized damages suits by federal prisoners brought under the Eighth Amendment, Carlson v. Green, 446 U.S. 14 (1980), and discrimination suits brought under the Fifth Amendment, Davis v. Passman, 442 U.S. 228 (1979).

Defendants argue that a damages remedy should not be recognized in this case for plaintiff's constitutional claims because the Supreme Court has been reluctant to extend Bivens in more recent years. Ashcroft v. Iqbal, 556 U.S. 662, 675 (2009) ("Because implied causes of action are disfavored, the Court has been reluctant to extend Bivens liability to any new context or new category of defendants.") (internal quotations omitted). However, defendants do not attempt to distinguish Davis, 442 U.S. 228, in which the Court explicitly authorized a discrimination claim against federal officers under the Fifth Amendment. The Court has not resolved the question with respect to First Amendment claims. Wood v. Moss, 134 S. Ct. 2056, 2066 (2014) ("[W]e have several times assumed without deciding that Bivens extends to First Amendment claims. We do so again in this case.") (citation omitted). However, as defendants acknowledge, the Court of Appeals for the Seventh Circuit has allowed federal prisoners to maintain First Amendment claims against federal officials. E.g., Babcock v. White, 102 F.3d 267, 275 (7th Cir. 1996) (allowing prisoner to bring First Amendment retaliation claim under Bivens). See also Herron v. Meyer, No. 15-1659, — F.3d —, 2016 WL 1622543, at *3 (7th Cir. Apr. 25, 2016) (reversing dismissal of First Amendment Bivens claim brought by prisoner). Thus, until the court of appeals or the Supreme Court changes course, I will follow the practice of the court of appeals.

Defendants assume in their summary judgment submissions that plaintiff can recover damages for violations of RFRA, so I will do the same.

B. Claims against Joseph Warnke
and Crystal Schwersenska

Plaintiff's claim against defendants Warnke and Schwersenska is that they reassigned him to a less desirable position with less pay and fewer hours because plaintiff is a Muslim. (Although plaintiff submitted no evidence with his summary judgment materials regarding his religious beliefs, defendants do not seek summary judgment on that ground, so I need not consider that issue.) I allowed plaintiff to proceed under the First Amendment (free exercise clause and establishment clause), the Fifth Amendment (equal protection component) and the Religious Freedom Restoration Act. (In his summary judgment materials, plaintiff raises a new claim that, after he was reassigned, he was not paid for all the hours he worked. Plt.'s Br., dkt. #66, at 6. Because plaintiff did not include that claim in his complaint, he cannot raise it now. Anderson v. Donahoe, 699 F.3d 989, 997 (7th Cir. 2012) ("[A] plaintiff may not amend his complaint through arguments in his brief in opposition to a motion for summary judgment.") (internal quotations omitted).)

Plaintiff's claim is one of religious discrimination. Whether that claim is analyzed under the First Amendment or the Fifth Amendment, the key question is the same, which is whether defendants treated plaintiff unfavorably because of his religion. Ajala v. West, 106 F. Supp. 3d 976, 989 (W.D. Wis. 2015); Goodvine v. Swiekatowski, No. 08-cv-702-bbc, 2010 WL 55848, *3 (W.D. Wis. Jan. 5, 2010).

*4 On its face, RFRA imposes a different standard: "Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and(2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C.A. § 2000bb-1(b). In the screening order, I assumed that a "substantial burden" could include not only direct restrictions on a prisoner's religious exercise but also adverse acts taken against a prisoner because of his religious exercise. Neither side challenges this assumption in the summary judgment submissions, so I see no reason to revisit the issue. Defendants challenge various ways that plaintiff alleges that defendants' alleged discrimination inhibited

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his religious exercise, Dfts.' Br., dkt. #46, at 21-23, but I understand defendants' argument to be that any changes by plaintiff were "self-imposed" and therefore irrelevant to his claim because defendants' conduct was not religiously motivated. Thus, for the purpose of defendants' motion for summary judgment, the key question for all of plaintiff's claims against defendants Warnke and Schwersenska is whether a reasonable jury could find that those defendants removed him from his job because of his religion. As with any other claim of discrimination, it is not enough for plaintiff to show that defendants made a mistake. If defendants had an honest belief that there were legitimate reasons to reassign plaintiff, they cannot be held liable. Simpson v. Beaver Dam Community Hospitals, Inc., 780 F.3d 784, 797 (7th Cir. 2015).

The parties tell very different stories regarding why plaintiff lost his job. According to defendants in their proposed findings of fact, on November 12, 2013, defendant Warnke and another employee, Kirk Kangas, were supervising the main line lunch service in the food services department. Dfts.' PFOF ¶¶ 77-78. dkt. #78. Near the end of the lunch service, Kangas observed plaintiff closing the door to a hotbox and turning away toward the adjacent dish washing room hallway with his hands covering his stomach. Id. at ¶ 79. Plaintiff ignored repeated orders by Kangas to stop walking. Id. at ¶ 81. Kangas motioned to Warnke to follow plaintiff. Id. at ¶ 87. When Warnke walked into the dishwashing room, he discovered plaintiff in possession of "three or four" chicken patties, which plaintiff was attempting to place in plastic gloves. Id. at ¶ 88. Defendant Warnke spoke to defendant Crystal Schwersenska, another cook supervisor, about what he observed, Id. at ¶¶ 97-99. They concluded that plaintiff had been attempting to steal chicken patties from the hotbox. As a result, Schwersenska reassigned plaintiff to a new position away from the food service line. Id. at ¶ 102.

This account bears little resemblance to the one in plaintiff's verified complaint, which is admissible evidence in the context of a summary judgment motion. Devbrow v. Gallegos, 735 F.3d 584, 587 (7th Cir. 2013). Plaintiff says that, on November 12, 2013, at the end of lunch of service, he was socializing with friends in the dining area because he had finished all of his work. Dkt. #1 at ¶13. He began eating a single chicken patty that had been rationed to him earlier that morning. Id. at ¶ 14. (Defendants say

that a prisoner who received his lunch earlier should not be in possession of food service items during a later lunch service, Dfts.' PFOF ¶ 66, dkt. #78, but they cite nothing but their own say-so for that rule and they do not argue that plaintiff would have lost his job for eating his lunch at the wrong time. Accordingly, defendants are not entitled to summary judgment on that ground.) When defendant Warnke saw what plaintiff was doing, he asked plaintiff whether chicken was "also a Muslim thing." Id. at 15. When plaintiff did not respond, Warnke asked plaintiff where he had gotten the chicken. Id. at ¶ 16. Plaintiff told Warnke that the chicken had been rationed to him at lunch. Id. Warnke took the patty and told plaintiff to leave. Id.

The following day, plaintiff says, he returned to work wearing a kufi, which is a religious head covering worn by Muslims. Id. at ¶ 21. Warnke accused plaintiff of stealing chicken patties the previous day. Id. at ¶ 20. In addition, Warnke told plaintiff that, "if [he] wanted to be treated like an American, [he] needed to remove [his] kufi." Id. at ¶ 21. When plaintiff refused to remove his kufi, Warnke told plaintiff to "beat it ... before we beat you down on your way to" segregation. Id. at ¶ 22.

*5 Later, defendant Warnke and defendant Schwersenska told plaintiff that they were giving him a different job, reducing his pay grade and reducing his hours from 8 hours a day to 1.5 hours a day. Id. at ¶ 24. At the same time, Warnke stated, "Now that's American justice. Down with funny hats and shariah law." Id. at ¶ 26.

In context of a motion for summary judgment, I must accept plaintiff's version of the facts as true. Loudermilk v. Best Pallet Co., LLC, 636 F.3d 312, 314-15 (7th Cir. 2011) ("When ruling on a motion for summary judgment, the party opposing the motion gets the benefit of all facts that a reasonable jury might find."). This means I must accept his allegations that defendants are lying (and not just mistaken) about defendant Warnke's catching plaintiff trying to put multiple patties in plastic bags in the dishwashing room. I must also accept his allegations that defendant Warnke made multiple derogatory statements about plaintiff's religion around the time of the disciplinary decision. These allegations are sufficient to allow a reasonable jury to find that defendants changed plaintiff's job because of his religion rather than because of an honest belief that plaintiff

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stole anything. Simple v. Walgreen Co., 511 F.3d 668, 671 (7th Cir. 2007) (evidence that defendant lied about reasons for firing employee is evidence of discrimination); Hemsworth v. Quotesmith.Com, Inc., 476 F.3d 487, 491 (7th Cir. 2007) (discriminatory comments made by decision maker around time of adverse action support finding of discriminatory intent).

A potential wrinkle in plaintiff's claim is that defendant Warnke made the allegedly discriminatory comments but defendants say that Schwersenska made the decision to reassign plaintiff. However, this does not mean that plaintiff is barred from proceeding against either defendant.

With respect to defendant Warnke, a person who influences a decision can be held liable for a constitutional violation, even if he is not the final decision maker. Jones v. City of Chicago, 856 F.2d 985, 993-94 (7th Cir. 1988); Johnson v. Johnson, 385 F.3d 503, 527 (5th Cir. 2004). Because it is undisputed that Schwersenska relied on Warnke's input in making her decision, Warnke can be held liable.

With respect to defendant Schwersenska, even if Warnke had discriminatory intent, Schwersenska cannot be held liable unless her decision was motivated by her own discriminatory beliefs. Asheroft, 556 U.S. at 676-77; Wilson v. Greetan, 571 F. Supp. 2d 948, 955 (W.D. Wis. 2007). Plaintiff does not allege that Schwersenska made derogatory comments about Muslims, as Warnke allegedly did. However, plaintiff alleges that Schwersenska was present when Warnke allegedly said "down with funny hats and shariah law" and that the decision to remove plaintiff from his job was "American justice." In addition, plaintiff cites a declaration from another prisoner, who avers that, several days later, Schwersenska was present again when Warnke said to plaintiff, "[i]f I told you once, I have told you a thousand times to take off that stupid hat [plaintiff's kufi] if you want us to treat you like an American." Vandyke Decl. ¶¶ 1-4, dkt. #69. After plaintiff asked to be left alone, Schwersenska told plaintiff to "wise up" and "find another job." Id. at ¶ 7. If plaintiff's testimony is true, then Schwersenska not only failed to object to Warnke's discriminatory comments, but she also demonstrated implicit support for them by telling plaintiff immediately after one of those comments to find another job. Accordingly, I conclude that a reasonable

jury could infer that Schwersenska agreed with Warnke's statements and that the anti-Muslim views in those statements motivated Schwersenska's decision to reassign plaintiff. Cf. Smith v. Bray, 681 F.3d 888, 906-07 (7th Cir. 2012) ("If [the defendant] had stood idly by while [the plaintiff] complained to her of race discrimination, this might provide evidence of her own discriminatory animus.").

*6 In addition to his and Vandyke's testimony, plaintiff relies on discrepancies in defendants' account of the incident. Greengrass v. International Monetary System Ltd., 776 F.3d 481, 487 (7th Cir. 2015) ("weaknesses, implausibilities, inconsistencies, or contradictions in an employer's asserted reason for taking an adverse employment action" are evidence of discrimination). For example, in a response to one of plaintiff's grievances, defendants stated that plaintiff was observed with multiple chicken patties *before* he went into the dishwashing room and was then seen with only one chicken patty when he came out. There was no mention of anyone following plaintiff into the dishwashing room. Dkt. #35-3 at 8. This is significantly different from defendants' story now, which is that no one saw plaintiff with chicken patties before he entered the dishwashing room but that defendant Warnke followed plaintiff into the dishwashing room and then personally observed plaintiff with three or four chicken patties.

Plaintiff also notes that defendants departed from the usual way of handling alleged misconduct by a prisoner in the food services department. According to plaintiff, the general practice was to give the prisoner a choice: agree to leave the job on his own or be subject to formal disciplinary proceedings. Cpt. ¶ 25, dkt. #1; Plt's Resp. to Dfts. PFOF ¶¶ 37, 52, dkt. #78. In this case, defendants simply reassigned plaintiff without giving him the choice.

Defendants do not deny that they departed from the usual practice, but they argue that doing so is not probative of discrimination because the informal discipline they chose was more lenient than a formal incident report, which could have led to even harsher punishment, such as placement in segregation. I agree with defendants that plaintiff's evidence on this point is not helpful to show that other prisoners accused of misconduct were treated more favorably than he was. However, this evidence is relevant to another issue, which is pretext. Hobgood v. Illinois Gaming Board, 731 F.3d 635, 645

(7th Cir. 2013) (departure from usual practice is evidence of pretext and discriminatory intent). I understand part of plaintiff's theory to be that defendants did not give him a choice because they wanted to remove plaintiff from his job but they knew that their allegations against him would not hold up under the scrutiny required by formal disciplinary proceedings. In any event, the fact that defendants departed from their usual practice is a relevant piece of evidence that may be considered at trial.

Finally, with respect to plaintiff's RFRA claim, defendants raise an alternative argument that their actions furthered a compelling government interest by the least restrictive means. In particular, defendants argue that they have a compelling interest in preventing and deterring theft. However, that argument obviously is contingent on a finding that defendants honestly believed that plaintiff attempted to steal chicken patties. Defendants are not arguing that they have a compelling interest in fabricating an allegation of theft because of animus against Muslims. Because the reasons defendants disciplined plaintiff are genuinely disputed, I cannot grant defendants' motion for summary judgment on this ground.

B. Claims against Defendant Felipa MacKinnon

Plaintiff alleges that defendant Mackinnon refused to reinstate his job privileges, gave him poor work performance evaluations, told him that he must find new work and barred him from receiving promotions because of his religious beliefs and because he complained about the treatment he received from defendants Warnke and Schwersenska. I allowed plaintiff to proceed on claims under the free speech clause, the free exercise clause and establishment clause of the First Amendment, the equal protection component of the Fifth Amendment and RFRA.

I am dismissing plaintiff's claims under the free exercise clause, the establishment clause, the equal protection component of the Fifth Amendment and RFRA because plaintiff has not cited any evidence that defendant Mackinnon discriminated against him because of his religious beliefs. Plaintiff does not allege that Schwersenska made any disparaging comments about his faith or engaged in any other behavior that supports the drawing of an inference of religious discrimination. In fact, it is undisputed that, when plaintiff met

with Mackinnon, he did not even tell her about the discriminatory statements allegedly made by the other defendants. Plt.'s Resp. to Dfts.' PFOF ¶ 114, dkt. #78.

*7 I reach a different conclusion with respect to plaintiff's claim under the free speech clause. In his verified complaint, plaintiff alleges that, when he met with Mackinnon, she told him that the complaint he made against defendants Warnke and Schwersenska was "a problem" and that, because of these complaints, plaintiff needed to find a job outside food service. Cpt. ¶ 31, dkt. #1. If true, these allegations are sufficient to allow a reasonable jury to find that Mackinnon retaliated against plaintiff for exercising his right to free speech. Defendants' only argument to the contrary is that plaintiff's allegation is "dubious" because Mackinnon never forced plaintiff to leave food services. Dfts.' Br., dkt. #46, at 33. It is true that plaintiff continued working in food services, but this does mean necessarily that Mackinnon did not make the alleged statements. It is well established that a court may not make credibility determinations on a motion for summary judgment, even if the court believes that one's side story is more persuasive than the other's. *Miller v. Gonzalez*, 761 F.3d 822, 827 (7th Cir. 2014); *McCann v. Iroquois Memorial Hospital*, 622 F.3d 745, 752 (7th Cir. 2010). Thus, defendants' argument regarding Mackinnon's intent is better directed to the jury.

Alternatively, defendants argue that plaintiff has not identified a way in which Mackinnon harmed him. In particular, defendants argue that Mackinnon's alleged statement to find other work, the negative work evaluations and the refusal to reinstate plaintiff to his former position would not deter a person of ordinary firmness from exercising his rights, which is the standard for maintaining a claim for retaliation under the First Amendment. *Bridges v. Gilbert*, 557 F.3d 541, 552 (7th Cir. 2009) (applying standard in prison context).

It is not clear why defendants raised this argument with respect to plaintiff's claims against defendant Mackinnon but not with respect to plaintiff's claims against the other two defendants. Many of the alleged harms are the same for both claims. In any event, defendants have not shown that they are entitled to summary judgment on this ground.

With respect to plaintiff's job reassignment, defendants make the following argument:

Plaintiff was not denied prison employment or terminated from Food Service after the November 2013 incident. To the contrary, Plaintiff was merely reassigned to a new Food Service position away from where the incident occurred. Defs.' PFOF ¶ 102. He did not lose his Grade 2 pay level. Id. ¶¶ 104-105. His new position initially had fewer hours due to position availability, but those soon began to increase until he was placed on Maintenance Pay. Id. ¶ 26, 124.

Dfts.' Br., dkt. #46, at 31.

There are two problems with this argument. First, the prison's records provide inconsistent answers with respect to the question whether plaintiff's rate of pay was reduced. Defendants cite a record called "Inmate Transactions History Report," which shows that plaintiff's pay rate was \$.29 an hour from October 2013 to July 2014, dkt. #48-1 at 2, suggesting that defendants are correct. However, plaintiff cites a written statement from defendant Mackinnon that plaintiff's pay grade "was justly removed" because plaintiff stole chicken patties and because plaintiff disobeyed a supervisor's order to stop. Dkt. #35-3. Neither side cites evidence showing the actual amount of money that plaintiff was paid at the relevant time, so I cannot resolve this issue as a matter of law.

Second, it is undisputed that plaintiff's hours were reduced significantly as a result of the reassignment. According to defendants' own record, plaintiff worked 147 hours in October 2013, 74 hours in November 2013 and 20 hours from December 2013 through March 2014. Dkt. #48-1. Although plaintiff began receiving more hours in April 2014 and subsequent months, he never worked more than 32 hours, which is obviously significantly less than 147 hours. Thus, regardless of the rate of pay that plaintiff received, the reassignment led to a significant reduction in plaintiff's wages. Not surprisingly, a significant reduction in pay may be sufficiently adverse to sustain a civil rights claim. E.g., Alexander v. Casino Queen, Inc., 739 F.3d 972, 980 (7th Cir. 2014). Because defendants do not identify any reason that a different result should apply in this case, I decline to grant defendants summary judgment on this ground. Further, because I conclude that the

reduction in pay may be sufficient on its own to deter a person of ordinary firmness from exercising his rights, it is unnecessary to decide whether the other alleged adverse actions are sufficient as well.

*8 Finally, defendants argue that plaintiff cannot prevail on his retaliation claim because *he* was not deterred from exercising his rights. Rather, he continued to file grievances and lawsuits after the alleged retaliatory acts. Defendants' argument is a nonstarter because "[t]he question is not whether plaintiff has been deterred or is likely to be, it is whether plaintiff's injury was 'so trivial that a person of ordinary firmness would not be deterred from' exercising his constitutional rights." Jackson v. Thurmer, 748 F. Supp. 2d 990, 1003 (W.D. Wis. 2010) (quoting Pieczynski v. Duffy, 875 F.2d 1331, 1333 (7th Cir. 1989)). In other words, the standard is objective, not subjective. Thus, whether plaintiff was deterred is not dispositive. Accordingly, I am denying defendants' motion for summary judgment as to defendant Mackinnon.

C. Damages for Mental or Emotional Injuries

Under 42 U.S.C. § 1997e(e), a prisoner cannot recover damages for mental or emotional injuries unless he proves a physical injury as well. Because it is undisputed that plaintiff did not suffer a physical injury as a result of the events relevant to this case, I agree with defendants that plaintiff is not entitled to seek damages for emotional distress.

II. PLAINTIFF'S MOTIONS

A. Renewed Subpoena Request

In an order dated February 22, 2016, I granted plaintiff's request under Fed. R. Civ. P. 45 for subpoenas to obtain several categories of documents from nonparty Federal Bureau of Prisons. One of plaintiff's requests was for "[a]ll of Plaintiff's FCI Food Service Job Orientation, Training and Job Descriptions from Jan 2013 to March 2015."

In his renewed request, plaintiff says that the court failed to specify in the order that the bureau should provide copies of particular documents that plaintiff had signed and received. Plaintiff wants the court to issue a new

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subpoena for those documents. In response to plaintiff's first new request, the bureau says that it has no documents responsive to the request that they have not already produced. Accordingly, I am denying this request as moot.

B. In Camera Review

Plaintiff's second motion relates to a subpoena request as well. In the February 22, 2016 order, I issued a subpoena for "[a]ll time and attendance work records at FCI Oxford on November 12, 2013 in relation to defendant Crystal Schwersenska." However, I instructed the bureau that it may redact any personal or sensitive information that is unrelated to defendant Schwersenska's work assignment and work schedule on November 12.

In his motion, plaintiff says that the bureau may have redacted information that is relevant to his claim and he would like the court to review an unredacted copy of the document. In particular, plaintiff says that he believes that redacted accounting codes could confirm whether Schwersenska was in the food services department on November 12, 2013, as defendants say she was. (Plaintiff believes that she was not there and that Warnke is fabricating the conversation he says he had with her on November 12 about plaintiff.)

Defendants do not argue that the information plaintiff wants is irrelevant. Further, in a letter to plaintiff, the bureau admits that the accounting codes "reflect[] the department from which the employee was paid for the day or days in question." Dkt. #87-1. Because the bureau says that it has no objection to providing the court an unredacted copy, I will direct it do so. In addition, the bureau should provide any documents necessary to interpret the codes. After reviewing the unredacted documents, I will determine at the final pretrial conference or earlier whether the codes are probative of any issues in this case.

C. New Subpoena Request

In plaintiff's new subpoena request, he asks for an order allowing him to "measure and photograph property, designated objects and operations on it," "produce and preserve for inspection and trial surveillance camera recordings of the FCI Oxford Food Service Service-

Line, during normal week day operations of main line lunch service for inmate general population" and "make [im]mediate arrangements for plaintiff to take up to five photographs of the east side FCI Oxford Food Service Service line with the plaintiff's specification for angles from which photos are taken." Dkt. #86.

*9 I am not persuaded that plaintiff is entitled to the relief he seeks. With respect to the surveillance cameras, plaintiff does not say that he is asking for recordings from November 12, 2013. According to the bureau, "no surveillance footage exists from that date." Dfts.' Br., dkt. #88, at 3. To the extent that plaintiff wants current footage, he does not say why. Plaintiff says generally that the footage could help him rebut defendants' testimony regarding what they allegedly observed in food services on November 12, 2013, but he does not say *how* it would help him. In particular, plaintiff points to no testimony from defendants that the requested footage would rebut. In addition, plaintiff does not offer a way to address the bureau's security concerns. The bureau says that "[t]he existence, location, angle, and technical capabilities of surveillance cameras are closely guarded secrets. If disclosed to the prison population, inmates could use the information to circumvent surveillance cameras, thereby decreasing the ability of FCI Oxford personnel to monitor inmate behavior." Dfts.' Br., dkt. #88, at 4. This is a legitimate concern. Thus, without a showing by plaintiff that he needs the footage to prove his case, I decline to issue the subpoena.

Plaintiff's request to take photographs raises similar issues. Again, plaintiff does not explain how the photographs would help him prove his case in any specific way. In any event, plaintiff does not allege that he owns a camera or could obtain one on his own. Rather, as I understand the request, plaintiff wants the court to order the bureau to provide a camera to him and develop the pictures for him. However, as the bureau points out, Fed. R. Civ. P. 45 does not require a nonparty to create new documents or provide equipment to a litigant. Accordingly, I am denying this request as well.

Finally, with respect to plaintiff's request to inspect and measure the area, again, plaintiff does not explain how that will help him, so I decline to order it. However, the bureau says that it "does not object to Plaintiff inspecting and measuring the immediate area surrounding the East

Serving Line," Dfts.' Br., dkt. #88, at 4, so plaintiff can make that request directly to the bureau.

ORDER

IT IS ORDERED that

1. The motion for summary judgment filed by defendants Felipa MacKinnon, Joseph Warnke and Crystal Schwersenska, dkt. #45, is GRANTED with respect to the issue whether plaintiff Christopher Atkinson may recover damages for mental or emotional injuries. The motion is DENIED in all other respects.

2. Plaintiff's motion to supplement his responses to defendants' proposed findings of fact, dkt. #81, is GRANTED as unopposed.

3. Plaintiff's requests for subpoenas, dkt. ##83 and 86, are DENIED.

4. Plaintiff's request for an in camera inspection, dkt. #85, is GRANTED. The Federal Bureau of Prisons may have until June 6, 2016, to provide the court an unredacted copy of dkt. #85-1, exh. 2, along with any documents necessary to interpret the exhibit. The bureau may file the document ex parte and under seal.

Entered this 18th day of May, 2016.

All Citations

Not Reported in F.Supp.3d, 2016 WL 2901753

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STATE OF MICHIGAN
IN THE COURT OF CLAIMS

SPENCER WOODMAN,

Plaintiff,

Case No. 17-000082-MZ
Hon. Cynthia D. Stephens

v

MICHIGAN DEPARTMENT OF CORRECTIONS,

Defendant.

GEORGE JOSEPH,

Plaintiff,

Case No. 17-000230-MZ
Hon. Cynthia D. Stephens

v

MICHIGAN DEPARTMENT OF CORRECTIONS,

Defendant.

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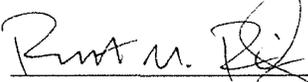
30/01/2018 PLAINTIFFS' MOTION FOR SUMMARY DISPOSITION
PURSUANT TO MCR 2.116(C)(10)

Plaintiffs Spencer Woodman and George Joseph (collectively “Plaintiffs”), by and through their undersigned *pro bono* counsel Honigman Miller Schwartz and Cohn LLP and pursuant to MCR 2.116(C)(10), move the Court for entry of an Order granting summary disposition in Plaintiffs’ favor in each of the above-captioned, consolidated cases against Defendant Michigan Department of Corrections (“MDOC”).

In support of their Motion, Plaintiffs rely on the attached Brief in Support.

Respectfully submitted,

HONIGMAN MILLER SCHWARTZ AND COHN LLP

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Dated: January 30, 2018

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BRIEF IN SUPPORT OF 30/01/2018 PLAINTIFFS'
MOTION FOR SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(10)

I. INTRODUCTION

“The degree of civilization in a society can be judged by entering its prisons.” Fyodor Dostoyevsky and David McDuff, *The House of the Dead* (2004). The ability to make informed judgments about what goes on behind Michigan’s prisons’ doors must not be taken for granted. The Freedom of Information Act (“FOIA”) is often the only means for getting a glimpse of the state’s treatment of prisoners.

Plaintiffs Spencer Woodman and George Joseph have written extensively about criminal justice and made countless government records available for public inspection. In these consolidated cases, Plaintiffs submitted FOIA requests to the MDOC seeking video and audio recordings related to an altercation at the Bellamy Creek Correctional Facility that led to the death of inmate Dustin Szot. The MDOC denied both requests. These cases ensued.

The Court should grant summary disposition to Plaintiffs for two reasons. First, the MDOC admitted that it never reviewed the requested videos and instead summarily denied Plaintiffs’ requests—a flagrant violation of MDOC’s duties in responding to FOIA requests. Second, even if the MDOC had reviewed the videos, it is black letter law that videos recorded within MDOC facilities are not categorically exempt from disclosure. For these reasons and those set forth below, the Court should grant Plaintiffs’ Motion and order the MDOC to disclose the requested videos.

II. FACTUAL BACKGROUND

On September 27, 2016, Szot was involved in an altercation with another prisoner at the MDOC’s Bellamy Creek Correctional Facility. The fight was stopped when guards discharged their Tasers on the inmates. Shortly after being Tasered, Szot died. His death certificate lists homicide caused by blunt force trauma as the cause of death. Szot’s death is of great public interest

because, among other things, it calls into question (1) the nature and amount of force used by guards in attempting to subdue Szot during the confrontation; (2) the propriety of criminal investigations wherein the victims are prisoners; and (3) the soundness of a recent change in MDOC policy allowing corrections officers to carry and use Tasers in Michigan prisons.

A. Woodman’s FOIA Request

On September 28, 2016, Woodman submitted a FOIA request to obtain video footage of “the confrontation that led to the fatality of inmate Dustin Szot on September 27, 2016” at the Bellamy Creek Correctional Facility. (**Exhibit A**, Woodman’s FOIA Request.) Woodman also requested “footage from any and all available cameras that captured this incident as well as any available accompanying audio records.” (*Id.*)

On October 6, 2016, the MDOC summarily denied Woodman’s request, citing MCL 15.243(1)(c). (**Exhibit B**, Def’s Resp to Woodman’s FOIA Request.) That statute exempts from disclosure records that, if disclosed, “would prejudice a public body’s ability to maintain the physical security of custodial or penal institutions occupied by persons arrested or convicted of a crime or admitted because of a mental disability, unless the public interest in disclosure under this act outweighs the public interest in nondisclosure.”

On October 10, 2016, Woodman appealed the denial, challenging the applicability of MCL 15.243(1)(c). (**Exhibit C**, Woodman’s Appeal.) On October 25, 2016, the MDOC denied Woodman’s appeal, again citing MCL 15.243(1)(c), and also citing for the first time MCL 15.243(1)(u), which exempts from disclosure “[r]ecords of a public body’s security measures, including security plans, security codes and combinations, passwords, passes, keys, and security procedures, to the extent that the records relate to the ongoing security of the public body.” (**Exhibit D**, Def’s Resp to Woodman’s Appeal.)

Woodman filed his Complaint against the MDOC on April 3, 2017. In response to the MDOC's April 28, 2017 Motion to Dismiss, Woodman filed his First Amended Verified Complaint on May 12, 2017. The Court ultimately denied the MDOC's motion to dismiss and on October 5, 2017, the MDOC filed its Answer and Affirmative Defenses. There, the MDOC again cited MCL 15.243(1)(c) (the only exemption cited in its original FOIA denial). The MDOC also cited MCL 15.243(1)(a), alleging that the requested records include personal information and the identities of the other individuals and that disclosure of their identities would constitute an unwarranted invasion of privacy, and MCL 15.243(1)(u), alleging that release of the Taser recordings would depict the officers' equipment, tactics, and procedures.

B. Joseph's FOIA Request

On June 28, 2017, Joseph submitted a FOIA request seeking video footage of "the confrontation that led to the fatality of inmate Dustin Szot on September 27, 2016." (**Exhibit E**, Joseph's FOIA Request.) Joseph's request included "footage from any and all available cameras that captured any parts of the confrontation, including but not limited to cameras installed on tasers" and "any audio records that accompany footage found to be responsive." (*Id.*) On July 7, 2017, the MDOC denied Joseph's request, citing MCL 15.243(1)(c). (**Exhibit F**, Def's Resp to Joseph's FOIA Request.)

Joseph filed suit against the MDOC on August 17, 2017. The MDOC filed its Answer and Affirmative Defenses to his Complaint on September 15, 2017. There, the MDOC cited MCL 15.243(1)(c) (the original exemption the MDOC's cited in its denial of Joseph's original request) and MCL 15.243(1)(a) and (1)(u).

C. Plaintiffs Unearth the MDOC's Unlawful FOIA Practices

On November 30, 2017, Plaintiffs deposed MDOC corporate representatives: (i) Cheryl Groves, the former MDOC FOIA Coordinator who denied Woodman's FOIA request;

(ii) Christine Wakefield, an Inspector at the MDOC's Bellamy Creek facility, and (iii) Andrew Phelps, an MDOC Litigation Specialist. Plaintiffs also deposed Groves in her individual capacity. Through these depositions, Plaintiffs learned of the MDOC's unlawful practices for processing video and audio FOIA requests, practices that constitute flagrant violations not only of Michigan law, but the MDOC's internal policies and procedures.

Groves explained how the MDOC processes FOIA requests. When a request is received, Assistant FOIA Coordinator Aimee Nelson would review it, prepare an initial response, and send it to Groves for review. (**Exhibit G**, Groves Indiv Dep Tr, p 44:13-44:19; **Exhibit H**, Groves Corp Rep Dep Tr, p 26:7-27:17.) Without further analysis, Groves would sign Nelson's proposed response and send it to the requestor. (Exhibit G, p 45:5-45:9.) Groves testified that she did not review *any materials* responsive to Woodman's FOIA request even though responsive records exist. (*Id.* at p 45:10-45:13.) Nor were the responsive recordings obtained from Bellamy Creek for her review. (*Id.* at p 45:22-45:24, 49:3-49:12.)

Groves further explained that requests for video recordings do not receive the same treatment as requests for other records. (*Id.* at p 45:19-45:24; Exhibit H, p 44:21-48:18.) She explained the MDOC's blanket denial policy: "Because of the request, which was for video footage, we deny that under our custody and safety security measures exemption; we do not release video[.]" (Exhibit G, p 45:24-46:1.) Groves later confirmed the MDOC's rubber-stamp denial process: "We would contact the facility and say, 'Do you have responsive records?' And in this case they would say, yes, we have video footage, but we would still deny it[.]" (*Id.* at p 47:14-47:16.) The MDOC does not require a person processing a FOIA request to determine the types of videos that were made or the recording devices that were used to create them. (*Id.* at p 47:20-48:9.) "[W]e know that we don't release it. All we need to verify is that the documents do exist,

and then we are appropriate in [] rejecting that, or taking an exemption.” (*Id.* at p 48:6-48:9.) Nor does the MDOC review any video footage before denying a FOIA request that seek those records:

- Q.* [A]t what point, if any, would the videos in the custody of the local facility be transferred to the Central Office [for review]?
- A.* We would not ask for that. We would ask if it exists, but we would not ask them to transfer those files to us.
- Q.* . . . So is anyone reviewing the video prior to making a determination?
- A.* No.

(*Id.* at p 49:4-49:15; see also Exhibit H, p 40:6-40:7, 51:1-54:11.) Groves admitted that the MDOC routinely denies FOIA requests without reviewing responsive recordings. (Exhibit G, pp 74:8-75:14, 76:6-78:18, 89:6-90:12, 91:17-92:19, 92:20-94:4, 94:5-95:19, 95:23-96:25.)

Groves also stated that the MDOC withholds all videos, regardless of the device used to create them:

- Q.* [W]ould you go through each one and make a determination of, this is a facility recording, this is a hand-held recording, this is a body mic, if it existed?
- A.* All that we would say is, do recordings exist, and if the answer is yes, then we would respond, ‘Your request has been denied based on 13(1)(c).’
- Q.* And then you would inform them that each type of video existed?
- A.* No, we would not.
- Q.* Is there a reason for that?
- A.* Because they’re all video recordings in some manner.

(*Id.* at p 88:18-89:3.)

The MDOC also ignores its duty under Section 13(1)(c) to consider the public interest. Remarkably, Groves admitted that she could not recall having *ever* considered the public interest when responding to a FOIA request because the MDOC’s statutory duty is superfluous:

- Q.* So is it the Department’s policy that even in [the gravest scenarios, such as the death of an inmate], the MDOC’s security is always going to outweigh the disclosure in every case?
- A.* From the ones that I have been presented with as a FOIA Coordinator, yes.

(*Id.* at p 72:25-73:4.) Wakefield testified to the significant differences between the eight responsive recordings and the four recording devices. (**Exhibit I**, Wakefield Dep Tr, pp 26:3-28:18, 33:6-33:8, 49:7-50:10, 50:19-50:25.) In doing so, she substantiated the impropriety of the MDOC's summary denial process and corroborated Groves' testimony that the MDOC ignores its statutory duties by failing to make case-by-case exemption determinations.

III. ARGUMENT

A motion brought under MCR 2.116(C)(10) tests the factual support of a plaintiff's claim. *Rataj v City of Romulus*, 306 Mich App 735, 747; 858 NW2d 116 (2014). The trial court reviews the record in the light most favorable to the nonmoving party. *Taylor v Lansing Bd of Water & Light*, 272 Mich App 200, 203; 725 NW2d 84 (2006). "The court considers the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted or filed in the action to determine whether a genuine issue of any material fact exists to warrant a trial." *Rataj*, 306 Mich at 747. The court must grant the motion if it finds no genuine issue as to any material fact and determines that the moving party is entitled to judgment as a matter of law. *Id.*

"As with all statutes, the proper interpretation and application of FOIA is a question of law[.]" *Id.* Whether a public record is exempt from disclosure under FOIA is a mixed question of fact and law, but when the facts are undisputed and reasonable minds could not differ, whether a public record is exempt from disclosure is a pure question of law. *Id.* Here, the requested video recordings are "without question" public records. *Id.* at 747-48; see also **Exhibit J**, MDOC Policy Directive 01.06.110, effective March 31, 2016 (the "MDOC Policy Directive"), p 1)¹ Thus, the only remaining question is whether the MDOC's application of FOIA was proper. It was not.

¹ The MDOC Policy Directive defines a public record as: "A writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function, from the time it is created. This includes but is not limited to photographs, photocopies, drawings, *video*,

A. Plaintiffs Are Entitled To Summary Disposition Because the MDOC Summarily Denied Plaintiffs' Requests in Violation of FOIA

It is the public policy of this state that all persons are entitled to full and complete information regarding affairs of government and the official acts of public officials and employees. MCL 15.231(2). "On its express terms, FOIA is a prodisclosure statute, and the exemptions listed in § 13 are narrowly construed. The burden of proof rests on the party asserting the exemption." *Herald Co v Bay City*, 463 Mich 111, 119; 614 NW2d 873 (2000) (citations omitted). FOIA presumes that all records are to be disclosed unless the governmental agency can show that records are exempt from disclosure. *Farrell v City of Detroit*, 209 Mich App 7, 11; 530 NW2d 105 (1995).

Generic assertions that responsive records are exempt from disclosure do not satisfy FOIA's pro-disclosure mandate. *Evening News Ass'n v City of Troy*, 417 Mich 481, 491–92; 339 NW2d 421 (1983); see also *Booth Newspapers, Inc v University of Michigan Bd of Regents*, 192 Mich App 574; 481 NW2d 778 (1992) (holding that claimed FOIA exemptions must be supported by substantial justification and explanation, not merely by conclusory assertions). Public bodies are required to review responsive records to make informed exemption determinations on a case-by-case basis. *Krug v Ingham Co Sheriff's Office*, 264 Mich App 475, 478; 691 NW2d 50 (2004) (holding unlawful the defendant's blanket denial of all FOIA requests); *Evening News*, 417 Mich at 503 (holding that the defendant's "generic determination" policy failed to meet its statutory obligation to separate exempt material from that which was nonexempt); see also *Ballard v Dept of Corr*, 122 Mich App 123, 126–27; 332 NW2d 435 (1982).

Any information not entitled to an exemption must be disclosed. MCL 15.244.

and audio tapes, computer data or documents retained on a computer, CD, DVD, and any other means of recording or retaining information." (Exhibit J, p 1 (emphasis added).)

1. The MDOC Admitted That It Did Not Review the Requested Videos before Denying Plaintiffs' FOIA Requests

When processing Plaintiffs' FOIA requests, the MDOC completely disregarded FOIA. At no point in denying Plaintiffs' requests did an MDOC employee review the recordings in question. (Exhibit H, p 30:8-30:11.) Instead, MDOC employees rubber-stamped denials of Plaintiffs' requests. Michigan courts have expressly held that practices like the MDOC's violate FOIA.

This case is analogous to *Ballard*. There, the plaintiff inmate submitted a request for surveillance video recorded in an MDOC facility. 122 Mich App at 126-27. The recording at issue showed the plaintiff being forcibly removed from a jail cell. *Id.* The MDOC argued the video was exempt because "disclosure of films of this type would prejudice [the MDOC's] ability to maintain the physical security of its institutions because such films may reveal the methods, tactics, and equipment used to restrain and subdue prisoners and because, by studying such films, prisoners might learn to circumvent such methods, tactics, and equipment." *Id.* at 124-25. After conducting an *in camera* review, the trial court ruled that video posed no danger to prison security and ordered the MDOC to disclose the video. *Id.*

On appeal, the MDOC argued that the video was exempt under Section 13(1)(c). The Court of Appeals rejected the MDOC's argument and held that the trial court properly compelled disclosure, recognized that nothing in the legislative history of Section 13(1)(c) suggests that the generic approach advocated by defendants was intended by the Legislature:

[T]he balancing test contained in [Section 13(1)(c)] at issue here suggests that a case-by-case approach is required because it reveals a legislative intent to accom[m]odate, insofar as it is possible, the respective public interests in institutional security and freedom of information. If the balancing test must be performed with generalizations rather than specifics, there will be cases in which one of these public interests must be sacrificed without any countervailing advancement of the other public interest. [*Id.*]

Similarly, in *Krug v Ingham Co Sheriff's Office*, 264 Mich App 475, 478; 691 NW2d 50 (2004), the Court of Appeals struck down a practice nearly identical to practice the MDOC uses to deny FOIA requests. In *Krug*, the plaintiff requested a file involved in an ongoing investigation. The defendant summarily denied the request—like it did all requests for information relating to investigations—citing MCL 15.243(1)(b)(i), which exempts from disclosure records that would interfere with an ongoing criminal investigation.

The Court of Appeals held that the defendant's blanket FOIA denial policy was improper: "Defendant was not entitled to deny plaintiff's FOIA request without actually determining that the entire case file was exempt from disclosure." *Id.* at 479. Particularly germane to these cases, the Court of Appeals also considered the defendant's deposition admission that its "policy [was] to issue blanket denials of all FOIA requests relating to open case files and that he actually failed to review the file before issuing defendant's response[.]" *Id.* The Court held that the "defendant's denial was clearly improper." *Id.*²

Ballard and *Krug* mandate summary disposition in favor of Plaintiffs in these cases. As detailed above, the MDOC's sworn testimony reveals that it never reviews requested videos and

² Courts have struck down similar policies. See *Evening News*, 417 Mich at 503; *Lawrence v City of Troy*, unpublished opinion per curiam of the Court of Appeals, issued June 23, 2009 (Docket No. 289509) (holding improper the defendant's perfunctory assertions that a FOIA request sought exempt information) (**Exhibit K.**) Other states echo Michigan's disapproval of blanket FOIA denial practices. See, e.g., *Friedman v Rice*, ___ NE3d ___, 2017 WL 5574476 (NY, 2017) (recognizing that "[D]efendants are not entitled to a blanket exemption from disclosure[.]"). Federal courts too have struck down blanket FOIA denial policies. See, e.g., *Jefferson v Reno*, 123 F Supp 2d 1, 4 (D DC, 2000) (holding that the defendant was barred from relying on its blanket denial policy because "[s]uch a practice would clearly violate the FOIA and binding case law," and "Plaintiff's assertion that [the defendant's] policy is to use Exemption 7(A) as a blanket exemption in direct violation of the law is an extremely serious charge."); *Gonzales & Gonzales Bonds & Ins Agency Inc v US Dept of Homeland Sec*, 913 F Supp 2d 865, 878–79 (ND Cal, 2012) (holding that the defendant failed to fulfill its FOIA obligations when it made no attempt to search for responsive documents, summarily refused to produce records, did not perform any analysis, and did not conduct the balancing test required by FOIA).

therefore never (a) determines whether disclosure of a particular video would prejudice prison security or (b) considers the public interest in disclosure. Further, the MDOC's own "Freedom of Information Act Guide" lists *Ballard* and *Krug* as relevant FOIA authority, demonstrating that the MDOC is perfectly aware that its policy violates Michigan law. (**Exhibit L**, MDOC FOIA Guide, pp 22, 31.) "We cannot hold our [corrections] officials accountable if we do not have the information upon which to evaluate their actions." *Rataj*, 306 Mich App at 751 (internal quotation marks omitted) (requiring disclosure of video showing police beating suspect inside police station). The MDOC's blanket policy of denying all video requests represents a dangerous effort to escape public accountability for even the most egregious abuses and misconduct in its facilities. In sum, the MDOC admitted that it failed to satisfy its obligations under FOIA, *Evening News*, *Ballard*, *Krug*, and other case law by summarily denying Plaintiffs' requests. There is no genuine issue of material fact and the Court should enter summary disposition in favor of Plaintiffs.

2. The MDOC Failed to Respond to All Portions of Plaintiffs' FOIA Requests

In addition to video, Plaintiffs' FOIA requests sought audio of the September 27, 2016, events. The MDOC admitted that six of the eight responsive videos also captured audio. (Exhibit I, p 33:6-33:8, 50:19-50:25.) The MDOC further recognized that the audio requests were separate and distinct from Plaintiffs' video requests. (Exhibit G, p 50:2-51:12.)

Here, the MDOC failed to separately respond to Plaintiffs' requests for audio recordings and instead rubber-stamp denied Plaintiffs' requests in their entirety. This too was improper, especially given Groves' admission that the audio recordings would not reveal the scope of surveillance cameras or their clarity—the MDOC's two professed security concerns in support of its denials. (*Id.* at 53:11-53:21.) Groves further testified that, in order to determine whether the audio recordings are exempt under Section 13(1)(c), the MDOC would need to make case-by-case

determinations, which it did not do. (*Id.* at 53:22-54:6.) Because the MDOC admitted that it failed to consider the audio portion of Plaintiffs' requests, the MDOC could not properly rely on any statutory exemption. *Evening News*, 417 Mich at 513. Again, there is no genuine issue of material fact and the Court should enter summary disposition in favor of Plaintiffs.

B. Even If the MDOC Properly Responded to Plaintiffs' Requests, the Videos Should Be Disclosed Because No Exemption Applies

Even if the MDOC had satisfied its FOIA obligations, none of the claimed exemptions apply to Plaintiffs' requests and the requested information must be disclosed. This is a second and independent basis for entry of summary disposition in favor of Plaintiffs.

1. Section 13(1)(c) Does Not Apply

The MDOC claims that its denials were proper under Section 13(1)(c) because releasing the video recordings would threaten the security of the Bellamy Creek facility. (Def's Answer to Woodman's First Am Verified Compl, ¶ 6.) The MDOC is incorrect.

MCL 15.243(1)(c) exempts from disclosure "A public record that if disclosed would prejudice a public body's ability to maintain the physical security of custodial or penal institutions occupied by persons arrested or convicted of a crime or admitted because of a mental disability, unless the public interest in disclosure under this act outweighs the public interest in nondisclosure." The MDOC Policy Directive provides examples of records that may fall within the Section 13(1)(c) exemption:

Blueprints or maps of facility grounds; names of informants; mobilization scenarios and critiques; Special Problem Offender Notice; movement plans; Security Threat Group designations and related documentation; exempt policy directives and operating procedures; post orders for security sensitive assignment (e.g., sallyport); descriptions of security fencing; description of operation of personal protection devices; videos that would disclose capability of any monitoring device; document determined to be confidential by a hearing officer at a hearing conducted pursuant to MCL 791.252.

(Exhibit J, pp 4-5.) Here, Groves admitted that, from the list above, the only applicable example is “videos that would disclose capability of any monitoring device.” (Exhibit G, p 57:21-59:5.) The MDOC further contends that disclosure of the videos would provide the public with a layout of the secured areas of Bellamy Creek and reveal cameras’ blind spots. (Def’s Answer to Woodman’s First Am Verified Compl, ¶ 6.) This argument fails.

First, it is no secret that Michigan prisons are under 24/7 video surveillance; the MDOC conceded that prisoners understand “cameras are in place throughout [prison] facilities and that they are under constant surveillance.” (Exhibit D, Def’s Resp to Woodman’s FOIA Appeal.) This concession alone entirely negates the MDOC’s argument that releasing the video would impermissibly disclose MDOC surveillance capabilities. Wakefield confirmed that inmates are aware that they are under video surveillance. (Exhibit I, p 22:9-22:16.) In light of this testimony, disclosing the requested video would not reveal the capability of a monitoring device.

Moreover, the MDOC’s overbroad argument that all requested videos are exempt from disclosure ignores the nature and type of responsive recordings. According to the MDOC, there are eight distinct responsive recordings in these cases, only two of which were made by facility cameras. (*Id.* at p 26:3-28:18.) The other six videos were recorded by Taser cameras, a hand-held camera, and two iPhone cameras and are therefore not from fixed recording devices. (*Id.*) After Wakefield described “facility” cameras as fixed cameras, she admitted that the six other videos were not recorded by fixed cameras and are not monitored in the prison’s control center:

- Q.* Inspector, can you define, tell me what a monitoring device is?
- A.* Fixed video, the tasers, you know record number one through eight, everything in that, basically; a hand-held camera, I mean, it’s a device we could use, potentially, within prison to monitor.
- Q.* So we talked about this earlier, and you described a difference between videos that go to the Control Center versus videos that don’t?
- A.* Right.
- Q.* Is someone monitoring the videos in the Control Center?

A. Well the facility cameras, yes.

Q. Is someone monitoring, in the Control Center, [the Taser, hand-held camera, and iPhone recordings]? Those aren't streaming?

A. No.

(*Id.* at p 49:7-50:10; see also Exhibit H, p 35:25-36:13, 37:22-38:5 (neither the hand-held camera nor the iPhones are surveillance cameras).)

Wakefield's testimony clearly establishes that the Taser, hand-held, and iPhone devices that recorded six of the videos responsive to Plaintiffs' requests are not part of the MDOC's surveillance system. As such, the MDOC's claim that those videos are exempt because disclosure would reveal the capability of the prison's surveillance system fails.

The MDOC also incorrectly claims that disclosing the videos would jeopardize the safety of other inmates and prison officers. First, the altercation between Szot and the other inmate occurred outdoors in front of numerous other inmates and officers. Those present were able to identify the other inmate involved and the identities of the officers that responded to the incident. To the extent that the MDOC argues that releasing the videos would provide inmates with this information, and that alone would create a security risk, this argument is moot; those present were already able to observe those facts on September 27, 2016. (Exhibit I, p 33:1-33:5.) The same can be said regarding the restraint methods the responding officers used to subdue Szot and the other inmate. The MDOC has also failed to explain how inmates would be able to review the video footage while incarcerated in the event the videos are disclosed. See MCL 15.232(c) (excluding prisoners from those entitled to request records under FOIA).

Finally, the MDOC makes a dangerously misplaced argument that if it is compelled to release videos from within the secured areas of Bellamy Creek in these cases, it will likely be compelled to release similar video footage in the future. This argument is a red herring, has no

basis in law, and should be rejected. See *Evening News*, 417 Mich at 505 (rejecting portions of trial court’s decision that did not speak directly to any exemption requirements). Whether future videos may be disclosed at an undetermined future time is of no legal consequence to whether the MDOC fulfilled its statutory obligations to disclose responsive information in these cases.

In sum, all of the MDOC’s arguments in support of Section 13(1)(c) share a common attribute—they are conclusory and lack merit. The Supreme Court rejected a conclusory FOIA response policy in *Evening News*. The Court should follow the Supreme Court’s lead and reject the MDOC’s conclusory approach in these (and all other) cases.³

2. Neither Section 13(1)(u) Nor Section 13(1)(a) Applies to these Cases

The MDOC Policy Directive provides that “FOIA responses *must* include all applicable exemptions.” (Exhibit J, p 4 (emphasis added).) Here, the MDOC only cited Section 13(1)(c) when it originally denied Plaintiffs’ requests. Yet now the MDOC claims that two additional exemptions (Sections 13(1)(u) and 13(1)(a)) also apply and bar disclosure of the requested information. The Court should hold the MDOC to its internal standards and should not allow the MDOC to rely on its newly-cited exemptions. And it is axiomatic that when a public body provides no supporting authority or legal analysis in support of an exemption’s applicability, the public body is deemed to have abandoned the exemption. *Bitterman v Village of Oakley*, 309 Mich App 53, 68-69; 868 NW2d 642 (2015).

The Court should reach the same conclusion here and reject the MDOC’s late-cited exemptions. But even if the Court considers those exemptions on their merits, they do not apply.

³ When faced with similar FOIA requests, courts in other jurisdictions have required the disclosure of videos. See, e.g., *Mack v Howard*, 91 AD3d 1315; 937 NYS2d 785 (2012) (holding that videotape depicting altercation between inmate and several deputy sheriffs in a jail cell was not exempt from disclosure under FOIA); *American Civil Liberties Union v Department of Defense*, 389 F Supp 2d 547 (SDNY, 2005) (ordering the defendant to release requested videos and photographs and denying the claimed exemption).

a. Section 13(1)(u): Security Measures

MCL 15.243(1)(u) exempts from disclosure “[r]ecords of a public body’s security measures, including security plans, security codes and combinations, passwords, passes, keys, and security procedures, to the extent that the records relate to the ongoing security of the public body.”

The MDOC Policy Directive provides examples of records that may fall within this exemption:

Movement plans; exempt policy directives and operating procedures; post orders for security sensitive assignment (e.g., sallyport); descriptions of security fencing; description of operation of personal protection devices; videos that would disclose capability of any monitoring device.

(Exhibit J, p 5.) Groves admitted that, from this list, the only possibly applicable example is “videos that would disclose capability of any monitoring device.” (Exhibit G, p 64:1-64:12.)

A plain reading of Section 13(1)(u) shows that it does not apply here. Neither of Plaintiffs’ requests seek records of the MDOC’s security measures, security plans, codes, combinations, or security procedures. And as explained above, the requested videos do not reveal the capability of any monitoring device, especially since the MDOC admitted that six of the videos were not recorded by the Bellamy Creek facility’s monitoring devices. Section 13(1)(u) does not apply.

b. Section 13(1)(a): Invasion of Privacy

Nor does MCL 15.243(1)(a) apply; that statute exempts from disclosure “[i]nformation of a personal nature if public disclosure of the information would constitute a clearly unwarranted invasion of an individual’s privacy.” This exemption has two prongs. Under the first prong, information “of a personal nature” is exempt if it is intimate, embarrassing, private, or confidential. *Rataj*, 306 Mich App at 750. If the first prong is met, the question then becomes whether public disclosure of the information contained in the public record “would constitute a clearly unwarranted invasion of an individual’s privacy.” *Id.* at 751. To answer this question, courts must

balance the public interest in disclosure against the interest [the Legislature] intended the exemption to protect . . . [T]he only relevant public interest in disclosure to be weighed in this balance 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.

Id. As part of this balancing test, “it is necessary to ask whether the requested information would shed light on the governmental agency’s conduct or further the core purposes of FOIA. ***In all but a limited number of circumstances, the public’s interest in governmental accountability prevails over an individual’s, or a group of individuals’, expectation of privacy.***” *Id.* (internal citations and quotations omitted) (emphasis added).

The MDOC Policy Directive lists examples of exempt information under Section 13(1)(a):

Home addresses and home telephone numbers; emergency contact information; driver license numbers; Social Security numbers; victims’ requests to receive information pursuant to PD 01.06.120 “Victim Notification” and the Department’s response unless the requestor is the victim; fingerprint cards; resumes of unsuccessful job applicants except for the resume of the requestor.

(Exhibit J, p 4.)

There is absolutely no basis for application of Section 13(1)(a) to these cases. The MDOC feigns a claim that disclosure of the requested videos would be an invasion of privacy because they show the (1) identities of inmates and officers, (2) altercation between Szot and the other inmate, and (3) attempts made by Bellamy Creek personnel to resuscitate Szot. (Def’s Answer to Woodman’s First Am Verified Compl, pp 6-7 ¶ 5.) This Hail Mary argument is belied by Groves’ admission that Plaintiffs do not seek any information that would otherwise be exempt under the MDOC Policy Directive. (Exhibit G, p 64:13-65:18.) Further, Groves admitted that she did not know on what the MDOC was relying to support its claim that Section 13(1)(a) applies here. (Exhibit H, p 41:12-41:24.)

Even without these admissions, the MDOC's Section 13(1)(a) argument fails. The identities of inmates and corrections officers do not constitute "information of a personal nature" and therefore does not satisfy the first prong of the Section 13(1)(a) analysis. Wakefield testified that inmates are fully aware that they are under surveillance. What's more, the State of Michigan publicly displays inmates' identities through its Offender Tracking Information System website. And in *Detroit Free Press, Inc v Oakland County Sheriff*, 164 Mich App 656; 418 NW2d 124 (1987), the Court of Appeals held that booking photographs of persons arrested, charged with felonies, and awaiting trial are not exempt from disclosure under Section 13(1)(a). The MDOC's claimed exemption here is illogical because it would extend greater privacy protections to inmates than the law extends to individuals not yet convicted of criminal wrongdoing.

Corrections officers' identities are similarly not exempt from disclosure under Section 13(1)(a). Courts have steadfastly refused to extend Section 13(1)(a) to prevent disclosure of documents containing information about public employees' conduct on the job. See *Bitterman*, 309 Mich App at 66 (holding that in the absence of special circumstances, an individual's name is not information of a personal nature for purposes of FOIA's privacy exemption). In fact, the Supreme Court has upheld the disclosure of law enforcement officers' address information—information that is significantly more personal than the officers' names or identities in these cases. See *Intl Union, United Plant Guard Workers of Am (UPGWA) v Dept of State Police*, 422 Mich 432, 453–54; 373 NW2d 713 (1985) (holding that the state failed to meet its burden of demonstrating that the requested address lists contained information so personal and private that the lists should not be disclosed).

In addition, Michigan law recognizes that prisoners lose nearly all of their privacy rights while in MDOC custody. Accordingly, the requested audio and video of the altercation and

subsequent resuscitation attempts do not satisfy the first prong of the Section 13(1)(a) analysis. Further, the incident in question occurred in an outdoor area of the prison accessible to the general inmate population. Therefore, there is no personal privacy interest that justifies exempting the video from disclosure. But even if the Court finds that footage of either event constitutes personal information, the MDOC's arguments fail to satisfy the second prong of the Section 13(1)(a) analysis.

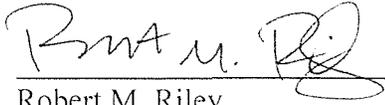
In *Rataj*, the plaintiff sought disclosure of a video related to an altercation between a Romulus Police Officer and a civilian that occurred inside the portion of the department used for detaining arrestees, in which the citizen spat on the officer and the officer used a racial slur. *Rataj*, 306 Mich App at 751. The defendant denied his request, citing Section 13(1)(a), among other exemptions. The Court of Appeals reversed the trial court's ruling that the records were exempt from disclosure under Section 13(1)(a), holding that even though the video could well be considered embarrassing and therefore of a personal nature, it was not exempt from disclosure:

Notwithstanding the personal and embarrassing information that is apparently depicted on the video[]recording, we conclude that the video would shed light on the operations of the RPD and, in particular, its treatment of those arrested and detained by its officers. These are matters of legitimate public concern. [W]e cannot hold our officials accountable if we do not have the information upon which to evaluate their actions. [*Id.*]

The public interests that mandated disclosure of the video in *Rataj* apply with equal force to these cases. If disclosed, the videos Plaintiffs requested would shed light on the MDOC's treatment of prisoners within the Bellamy Creek prison and potentially shed further light on the cause of Szot's death. Allowing the public to review the events that led to Szot's death would give the public the power to witness firsthand officers' actions and potentially hold them accountable if they acted improperly. Just as in *Rataj*, the public interest in disclosure significantly outweighs the nominal (if not nonexistent) privacy interests claimed by the MDOC.

CERTIFICATE OF SERVICE

I hereby certify that on January 30, 2018, a copy of the foregoing document was served on all counsel of record by first class mail.


Robert M. Riley

STATE OF MICHIGAN
IN THE COURT OF CLAIMS

SPENCER WOODMAN,

Plaintiff,

Case No. 17-000082-MZ
Hon. Cynthia D. Stephens

v

MICHIGAN DEPARTMENT OF CORRECTIONS,

Defendant.

GEORGE JOSEPH,

Plaintiff,

Case No. 17-000230-MZ
Hon. Cynthia D. Stephens

v

MICHIGAN DEPARTMENT OF CORRECTIONS,

Defendant.

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INDEX OF EXHIBITS

EX. NO.	DATE	DESCRIPTION
A	09/28/2016	FOIA Request from Woodman to the MDOC
B	10/06/2016	MDOC's Response to Woodman's FOIA Request
C	10/10/2016	Woodman's FOIA Appeal
D	10/25/2016	MDOC's Response to Woodman's FOIA Appeal
E	06/28/2017	FOIA Request from Joseph to the MDOC
F	07/07/2017	MDOC's Response to Plaintiff Joseph's FOIA Request
G	11/30/2017	Transcript of the Deposition of Cheryl Groves
H	11/30/2017	Transcript of the Deposition of Cheryl Groves (as MDOC Corporate Representative)
I	11/30/2017	Transcript of the Deposition of Christine Wakefield
J	03/31/2016	MDOC Policy Directive 01.06.110, eff. 3/31/2016
K	06/23/2009	<i>Lawrence v City of Troy</i> , unpublished per curiam opinion of the Court of Appeals issued June 23, 2009 (Docket No. 289509); 2009 WL 1782691
L	11/10/2015	MDOC Freedom of Information Act Guide, rev. 11/10/2015

EXHIBIT A



Spencer Woodman <spencer.woodman@gmail.com>

RECEIVED by MSC 7/22/2022 3:56:19 PM

Submitting records request

Spencer Woodman <spencer.woodman@gmail.com>
To: NelsonA9@michigan.gov

Wed, Sep 28, 2016 at 6:06 PM

Hi Aimee,

It turns out that I have another records request to submit. Thanks very much.

Spencer Woodman

--

Under the Michigan Freedom of Information Act § 15.231 et seq., I am requesting a digital copy of video footage of the confrontation that led to the fatality of inmate Dustin Szot on September 27th, 2016 at the Muskegon Correctional Facility. This request includes footage from any and all available cameras that captured this incident as well as any available accompanying audio records.

I would like to request a waiver of all fees in that the disclosure of the requested information is in the public interest and will contribute significantly to the public's understanding of government. This information is not being sought for commercial purposes.

If you deny any or all of this request, please cite each specific exemption you feel justifies the refusal to release the information and notify me of the appeal procedures available to me under the law.

Thank you very much for considering my request, and please feel free to contact me at the number or email address below with any questions.

Contact information:

Email: Spencer.woodman@gmail.com
Phone: (919) 418-0817

EXHIBIT B

MICHIGAN DEPARTMENT OF CORRECTIONS
RESPONSE TO REQUEST FOR PUBLIC RECORDS - FOIA

CSH-479
 REV 6/16

RECEIVED BY MSC 7/22/2022 3:56:19 PM

Requester Name: <i>Spencer Woodman</i>	Requester Type: <i>General Public</i>	Files <input type="checkbox"/>	PB <input type="checkbox"/>	Request Date <i>9/28/2016</i>	Received Date <i>9/29/2016</i>	FOIA No. 16 950
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Address: <i>spencer.woodman@gmail.com</i>	Description of Requested Records: <i>"I am requesting a digital copy of 1. video footage of the confrontation that led to the fatality of inmate Dustin Szot on September 27th, 2016 at the Muskegon Correctional Facility. This request includes footage from any and all available cameras that captured this incident as well as 2. any available accompanying audio records."</i>
--	--

THE FOLLOWING ACTION HAS BEEN TAKEN IN COMPLIANCE WITH THE MICHIGAN FREEDOM OF INFORMATION ACT

Request Granted	<input type="checkbox"/>	No. of pages:	See fee assessment below.
Request Granted in Part/Denied in Part	<input type="checkbox"/>	No. of pages:	Portions of requested records are exempt from disclosure. See explanation and fee assessment below.
	<input checked="" type="checkbox"/>		Requested records are exempt from disclosure. See explanation below.
	<input type="checkbox"/>		Requested records do not exist within the records of this Department under the name or description provided or by another name reasonably known to this Department.
Request Denied	<input type="checkbox"/>		Request does not describe the record sufficiently to enable this Department to determine what record is requested.
	<input type="checkbox"/>		To the extent the records are available, home address, telephone numbers, and personnel records of employees of this Department are exempt from disclosure pursuant to MCL 791.230a. This includes but is not limited to investigatory, disciplinary, and time and attendance records.
10 Business Day Extension Taken	<input type="checkbox"/>	Due Date:	Reason for Extension:

FEE ASSESSMENT

Fee Waived.

Non-exempt records will be sent upon receipt of payment in the amount of _____ payable by check or money order to the State of Michigan. Cash cannot be accepted. Send payment to Michigan Department of Corrections, Attn: FOIA Coordinator, at the return address identified on the envelope.

A 50% good faith deposit is required in the amount of _____ payable by check or money order to the State of Michigan. Cash cannot be accepted. Send payment to Michigan Department of Corrections, Attn: FOIA Coordinator, at the return address identified on the envelope. Upon receipt of the deposit, the Department will process your request. Thereafter, you will be informed of the balance due and any applicable exemptions.

SEE BELOW AND BACK OF FORM IF RECORDS ARE EXEMPT FROM DISCLOSURE OR FOR ADDITIONAL INFORMATION

The records you seek are exempt from disclosure under Section 13(1)(c). These records, if disclosed, could threaten the security of Bellamy Creek Correctional Facility by revealing fixed camera placement as well as the scope and clarity of the facility's fixed camera and handheld recordings. Disclosure of these records could also reveal the policies and procedures used by staff for disturbance control and the management of disruptive prisoners.

If your request is denied in whole or in part, you have the right under the Michigan Freedom of Information Act to do either of the following:

- 1 Appeal the denial to the Director. Your appeal must be submitted in writing to the Michigan Department of Corrections, Attn: Administrator of the Office of Legal Affairs, P.O. Box 30003, Lansing, MI 48909. The appeal must be specifically identified as a FOIA appeal and must state the reasons for reversal of the denial. The Director will respond to the appeal in accordance with MCL 15.240.
- 2 Appeal the Department's final determination to deny/partially deny your request by commencing an action in the Court of Claims within 180 calendar days after the final determination is made. If you prevail in such an action, the court is to award reasonable attorney fees, cost and disbursements, and possible damages.

I CERTIFY THAT THE DOCUMENTS PROVIDED IN RESPONSE TO THIS REQUEST ARE TRUE AND ACCURATE COPIES.

FOIA COORDINATOR: *Cheryl A Groves* DATE: *10/6/16*

FOIA Exemptions

- (a) Information of a personal nature where the public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy.
- (b) Investigating records compiled for law enforcement purposes, but only to the extent that disclosure as a public record would do any of the following:
 - (i) Interfere with law enforcement proceedings.
 - (ii) Deprive a person of the right to a fair trial or impartial administrative adjudication.
 - (iii) Constitute an unwarranted invasion of personal privacy.
 - (iv) Disclose the identity of a confidential source, or if the record is compiled by a law enforcement agency in the course of a criminal investigation, disclose confidential information furnished only by a confidential source.
 - (v) Disclose law enforcement investigative techniques or procedures.
 - (vi) Endanger the life or physical safety of law enforcement personnel.
- (c) A public record which if disclosed would prejudice a public body's ability to maintain the physical security of custodial or penal institutions occupied by persons arrested or convicted of a crime or admitted because of a mental disability, unless the public interest in disclosure under this act outweighs the public interest in nondisclosure.
- (d) Records or information specifically described and exempted from disclosure by statute.
- (e) A public record or information described in this section that is furnished by the public body originally compiling, preparing or receiving the record or information to a public officer or public body in connection with the performance of the duties of that public officer or public body, if the considerations originally giving rise to the exempt nature of the public record remain applicable.
- (f) Trade secrets or commercial or financial information voluntarily provided to an agency for use in developing governmental policy if
 - (i) The information is submitted upon a promise of confidentiality by the public body.
 - (ii) The promise of confidentiality is authorized by the chief administrative officer of the public body or by an elected official at the time the promise is made.
 - (iii) A description of the information is recorded by the public body within a reasonable time after it has been submitted, maintained in a central place within the public body, and made available to a person upon request. This subdivision does not apply to information submitted as required by law or as a condition of receiving a governmental contract, license or other benefit.
- (g) Information or records subject to the attorney-client privilege.
- (h) Information or records subject to the physician-patient privilege, psychologist-patient privilege, Minister, priest, or Christian Science practitioner privilege, or other privilege recognized by statute or court rule.
- (i) A bid or proposal by a person to enter into a contract or agreement, until the time for the public opening of bids or proposals, or if a public opening is not to be conducted, until the deadline for submission of bids or proposals has expired.
- (j) Appraisals of real property to be acquired by the public body until (i) an agreement is entered into; or (ii) 3 years has elapsed since the making of the appraisal, unless litigation relative to the acquisition has not yet terminated.
- (k) Test questions and answers, scoring keys and other examination instruments or data used to administer a license, public employment, or academic examination, unless the public interest in disclosure under this act outweighs the public interest in nondisclosure.
- (l) Medical, counseling or psychological facts or evaluations concerning an individual if the individual's identity would be revealed by a disclosure of those facts or evaluation.
- (m) Communications and notes within a public body or between public bodies of an advisory nature to the extent that they cover other than purely factual materials and are preliminary to a final agency determination of policy or action. This exemption shall not apply unless the public body shows that in the particular instance the public interest in encouraging frank communication between officials and employees of public bodies clearly outweighs the public interest in disclosure. This exemption does not constitute an exemption under state law for purposes of MCL 15.268.
- (n) Records of law enforcement communication codes, or plans for deployment of law enforcement personnel, that if disclosed would prejudice a public body's ability to protect the public safety unless the public interest in disclosure under this act outweighs the public interest in nondisclosure in the particular interest.
- (p) Testing data developed by a public body in determining whether bidder's products meet the specifications for purchase of those products by the public body, if disclosure of the data would reveal that only 1 bidder has met the specifications. This subdivision does not apply after 1 year has elapsed from the time the public body completes testing.
- (s) Unless the public interest in disclosure outweighs the public interest in nondisclosure in the particular instance, public records of a law enforcement agency, the release of which would do the following:
 - (i) Identify or provide a means of identifying an informer.
 - (ii) Identify or provide a means of identifying a law enforcement undercover officer or agent or a plain clothes officer as a law enforcement officer or agent.
 - (iii) Disclose the personal address or telephone number of law enforcement officers or agents or any special skills they may have.
 - (iv) Disclose the name, address, or telephone numbers of family members, relatives, children, or parents of law enforcement officers or agents.
 - (v) Disclose operational instructions of law enforcement officers or agents.
 - (vi) Reveal the contents of staff manuals provided for law enforcement officers or agents.
 - (vii) Endanger the life or safety of law enforcement officers or agents or their families, relatives, children, parents, or those who furnished information to law enforcement departments or agencies.
 - (viii) Identify or provide a means of identifying a person as a law enforcement officer, agent, or informer.
 - (ix) Disclose personnel records for law enforcement agencies.
 - (x) Identify or provide a means of identifying residences that law enforcement agencies are requested to check in the absence of their owners or tenants.
- (u) Records of a public body's security measures, including security plans, security codes and combinations, passwords, passes, keys, and security procedures, to the extent that the records relate to the ongoing security of the public body.
- (v) Records or information relating to a civil action in which the requesting party and the public body are parties.
- (w) Information or records that would disclose the social security number of any individual.

EXHIBIT C



Spencer Woodman <spencer.woodman@gmail.com>

FOIA 16-950

Spencer Woodman <spencer.woodman@gmail.com>
To: "Nelson, Aimee (MDOC)" <NelsonA9@michigan.gov>

Mon, Oct 10, 2016 at 10:01 AM

Dear Ms. Nelson:

I am writing to appeal the denial of FOIA 16-950. I will address the two explanations were provided for this denial in order.

First, the state invokes Section 13(1)(c) in asserting that disclosure of the requested footage would reveal the placements and the level of clarity of the cameras within the jail. It is my understanding that many correctional institutions often do not attempt to hide their cameras at all and that inmates generally understand they are under constant surveillance. It seems unlikely to me that the Bellamy Creek Correctional Facility would have taken pains to hide its cameras in the first place. Even if the Bellamy Creek Correctional Facility's camera's are in fact hidden, the fact that so many other correctional facilities not only install their cameras in plain view of inmates, but also routinely release such footage to the public, confirms what I believe to be common sense: That the release of prison surveillance footage does not present a danger insofar as camera placement is concerned. The same argument applies to the state's assertion regarding the clarity of the camera footage. (For a recent example of such voluntary disclosure, see Cook County Sheriff Tom Dart's decision to release, unprompted by external pressure, various recordings of altercations between his employees and inmates in the Cook County Jail.)

Second, the state asserts that disclosure of the footage would reveal the policies and procedures used for disturbance control and to manage disruptive prisoners. Again, footage of inmate altercations with prison guards has been routinely released across the country, and such means of control are already and rightly widely known. Perhaps more importantly, as part of its commitment to insuring the civil rights of everyone working and living within prisons, correctional facilities must be able to publicly disclose the means by which they restrain, pacify and use force against prisoners.

This latter point applies to both explanations behind the state's denial: The public interest of the release of the requested footage is abundantly clear, imminent, and outweighs the state's arguments against releasing this footage. Taxpaying citizens must be afforded the opportunity to understand why the death of a state inmate occurred reportedly after he was shocked by Tasers, which are intended to be non-lethal.

Please feel free to email me or call me at the number below with any questions.

Many thanks,

Spencer Woodman
(919) 418-0817

[Quoted text hidden]

RECEIVED by MSC 7/22/2022 3:56:19 PM

EXHIBIT D

**MICHIGAN DEPARTMENT OF CORRECTIONS
NOTICE OF FREEDOM OF INFORMATION ACT APPEAL**

Date Received: October 11, 2016

Appeal Number: 2016-36

Requestor's Name: Spencer Woodman

Date of FOIA Response: October 6, 2016

Requestor's Address: Spencer.woodman@gmail.com

- FOIA disclosure denial reversed
- FOIA disclosure denial upheld
- FOIA disclosure denial upheld in part, reversed in part

Reason for Decision:

On September 29, 2016, the Michigan Department of Corrections (MDOC), received your request dated September 28, 2016, made under the Freedom of Information Act (FOIA), MCL 15.231 *et seq.* Your request stated:

"I am requesting a digital copy of video footage of the confrontation that led to the fatality of inmate Dustin Szot on September 27th, 2016 at the Muskegon Correctional Facility. This request includes footage from any and all available cameras that captured this incident as well as any available accompanying audio records."

On October 6, 2016, the MDOC denied your request under 13(1)(c) of FOIA stating, "These records, if disclosed, could threaten the security of Bellamy Creek Correctional Facility by revealing fixed camera placement as well as the scope and clarity of the facility's fixed camera and handheld recordings. Disclosure of these records could also reveal the policies and procedures used by staff for disturbance control and the management of disruptive prisoners."

On October 11, 2016, the MDOC received your appeal regarding the denial of your FOIA request. You stated, "It is my understanding that many correctional institutions often do not attempt to hide their cameras at all and that inmates generally understand that they are under constant surveillance. It seems unlikely to me that the Bellamy Creek Correctional Facility would have taken pains to hide its cameras in the first place. Even if the Bellamy Creek Correctional Facility's camera's are in fact hidden, the fact that so many other correctional facilities not only install their cameras in plain view of inmates, but also routinely release such footage to the public, confirms what I believe to be common sense: That the release of prison surveillance footage does not present a danger insofar as camera placement is concerned." You also assert, "Footage of inmate altercations with prison guards has been routinely released across the country, and such means of control are already and rightly widely known. Perhaps more importantly, as part of its commitment to insuring the civil rights of everyone working and living within prisons, correctional facilities must be able to publicly disclose the means by which they restrain, pacify and use force against prisoners."

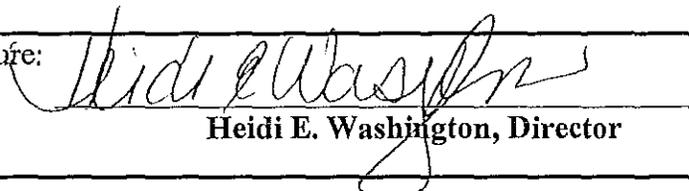
While prisoners understand that cameras are in place throughout facilities and that they are under constant surveillance, the MDOC does not routinely release video footage to the public as you incorrectly assert. Release of the video footage compromises the safety, security, and order of the facility. Under Section 13(1)(c) records are exempt from disclosure that if disclosed would prejudice a public body's ability to maintain the physical security of custodial or penal institutions occupied by

person arrested or convicted of a crime. In addition, Section 13(1)(u) of the FOIA Statute also exempts from disclosure records of a public body's security measures. The release of video footage would reveal the recording and security capabilities of the facility's video monitoring system.

Therefore, the FOIA disclosure denial is upheld.

As noted in MCL 15.240(1)(b), you have the option to commence an action in the Court of Claims to compel the public body's disclosure of the public records within 180 days after a public body's final determination to deny a request. If you prevail in such an action, the court is to award reasonable attorney fees, costs, and disbursements, and possible damages.

Signature:


Heidi E. Washington, Director

Date:

10/25/16

EXHIBIT E

----- Original Message -----

Subject: George Joseph June 28, 2017 FOIA Request to MDOC re the Death of Dustin Szot
Local Time: June 28, 2017 3:12 PM
UTC Time: June 28, 2017 7:12 PM
From: gmjoseph@protonmail.com
To: MDOC-OLAFOIA@michigan.gov <MDOC-OLAFOIA@michigan.gov>

Dear Michigan Department of Corrections,

Pursuant to the Michigan Freedom of Information Act, I hereby request a digital copy of any and all footage of the September 27, 2016 confrontation that led to the death of inmate Dustin Szot at the Muskegon Correctional Facility. This request should be understood to include footage from any and all available cameras that captured the any parts of the confrontation, including but not limited to cameras installed on tasers deployed at the Muskegon Correctional Facility. This request should also be understood to include any audio records that accompany footage found to be responsive to this request.

As a member of the media, freelancing for national outlets such as National Public Radio and The Guardian US, I request a fee waiver for this FOIA request as this information is being sought for dissemination to the public, rather than for commercial purposes. The death of Dustin Szot has become a public issue since last year, sparking several news articles in publications such as the Ionia Sentinel Standard (See: March 21, 2017 Ionia Sentinel Standard article entitled "No charges in death of Ionia Bellamy Creek prisoner Dustin Szot").

There is thus clearly a significant level of public interest in Szot's fatality and the subsequent response to it on the part of public officials. This request therefore merits a fee waiver as information about this issue would significantly contribute to the public's understanding of the government institution in which Szot's death occurred.

If you choose to deny any part of this request, please cite the specific each exemption used to refuse the release of records found to be responsive to this request and tell me what appeal procedures are available to me under Michigan state law.

Thank you for accepting my request, and feel free to contact me at my email gmjoseph@protonmail.com or on my cell phone at 940-300-0181.

Thank you,
George Joseph

Sent with ProtonMail Secure Email.

EXHIBIT F

**MICHIGAN DEPARTMENT OF CORRECTIONS
 RESPONSE TO REQUEST FOR PUBLIC RECORDS - FOIA**

CSH-479
 REV 6/16

Requester Name: <i>George Joseph</i>	Requester Type: <i>General Public</i>	Files <input type="checkbox"/>	PB <input type="checkbox"/>	Request Date <i>6/28/2017</i>	Received Date <i>6/29/2017</i>	FOIA No. <i>17- 602</i>
Address: <i>gmjoseph@prontonmail.com</i>		Description of Requested Records: <i>Szot 961740 "I hereby request a digital copy of any and all footage of the September 27, 2016 confrontation that led to the death of inmate Dustin Szot at the Muskegon Correctional Facility."</i>				

THE FOLLOWING ACTION HAS BEEN TAKEN IN COMPLIANCE WITH THE MICHIGAN FREEDOM OF INFORMATION ACT

Request Granted <input type="checkbox"/>	No. of pages:	See fee assessment below.
Request Granted in Part/Denied in Part <input type="checkbox"/>	No. of pages:	Portions of requested records are exempt from disclosure. See explanation and fee assessment below.
Request Denied	<input checked="" type="checkbox"/>	Requested records are exempt from disclosure. See explanation below.
	<input type="checkbox"/>	Requested records do not exist within the records of this Department under the name or description provided or by another name reasonably known to this Department.
	<input type="checkbox"/>	Request does not describe the record sufficiently to enable this Department to determine what record is requested.
	<input type="checkbox"/>	To the extent the records are available, home address, telephone numbers, and personnel records of employees of this Department are exempt from disclosure pursuant to MCL 791.230a. This includes but is not limited to investigatory, disciplinary, and time and attendance records.
10 Business Day Extension Taken <input type="checkbox"/>	Due Date:	Reason for Extension:

FEE ASSESSMENT

Fee Waived.

Non-exempt records will be sent upon receipt of payment in the amount of _____ payable by check or money order to the State of Michigan. Cash cannot be accepted. Send payment to Michigan Department of Corrections, Attn: FOIA Coordinator, at the return address identified on the envelope.

A 50% good faith deposit is required in the amount of _____ payable by check or money order to the State of Michigan. Cash cannot be accepted. Send payment to Michigan Department of Corrections, Attn: FOIA Coordinator, at the return address identified on the envelope. Upon receipt of the deposit, the Department will process your request. Thereafter, you will be informed of the balance due and any applicable exemptions.

SEE BELOW AND BACK OF FORM IF RECORDS ARE EXEMPT FROM DISCLOSURE OR FOR ADDITIONAL INFORMATION
To the extent these records are available, they are exempt from disclosure under Section 13(1)(c).

If your request is denied in whole or in part, you have the right under the Michigan Freedom of Information Act to do either of the following:

- 1 Appeal the denial to the Director. Your appeal must be submitted in writing to the Michigan Department of Corrections, Attn: Administrator of the Office of Legal Affairs, P.O. Box 30003, Lansing, MI 48909. The appeal must be specifically identified as a FOIA appeal and must state the reasons for reversal of the denial. The Director will respond to the appeal in accordance with MCL 15.240.
- 2 Appeal the Department's final determination to deny/partially deny your request by commencing an action in the Court of Claims within 180 calendar days after the final determination is made. If you prevail in such an action, the court is to award reasonable attorney fees, costs and disbursements, and possible damages.

I CERTIFY THAT THE DOCUMENTS PROVIDED IN RESPONSE TO THIS REQUEST ARE TRUE AND ACCURATE COPIES.

FOIA COORDINATOR: *Zed BL* DATE: *7/10/17*

FOIA Exemptions

- (a) Information of a personal nature where the public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy.
- (b) Investigating records compiled for law enforcement purposes, but only to the extent that disclosure as a public record would do any of the following:
 - (i) Interfere with law enforcement proceedings.
 - (ii) Deprive a person of the right to a fair trial or impartial administrative adjudication.
 - (iii) Constitute an unwarranted invasion of personal privacy.
 - (iv) Disclose the identity of a confidential source, or if the record is compiled by a law enforcement agency in the course of a criminal investigation, disclose confidential information furnished only by a confidential source.
 - (v) Disclose law enforcement investigative techniques or procedures.
 - (vi) Endanger the life or physical safety of law enforcement personnel.
- (c) A public record which if disclosed would prejudice a public body's ability to maintain the physical security of custodial or penal institutions occupied by persons arrested or convicted of a crime or admitted because of a mental disability, unless the public interest in disclosure under this act outweighs the public interest in nondisclosure.
- (d) Records or information specifically described and exempted from disclosure by statute.
- (e) A public record or information described in this section that is furnished by the public body originally compiling, preparing or receiving the record or information to a public officer or public body in connection with the performance of the duties of that public officer or public body, if the considerations originally giving rise to the exempt nature of the public record remain applicable.
- (f) Trade secrets or commercial or financial information voluntarily provided to an agency for use in developing governmental policy if:
 - (i) The information is submitted upon a promise of confidentiality by the public body.
 - (ii) The promise of confidentiality is authorized by the chief administrative officer of the public body or by an elected official at the time the promise is made.
 - (iii) A description of the information is recorded by the public body within a reasonable time after it has been submitted, maintained in a central place within the public body, and made available to a person upon request. This subdivision does not apply to information submitted as required by law or as a condition of receiving a governmental contract, license or other benefit.
- (g) Information or records subject to the attorney-client privilege.
- (h) Information or records subject to the physician-patient privilege, psychologist-patient privilege, Minister, priest, or Christian Science practitioner privilege, or other privilege recognized by statute or court rule.
- (i) A bid or proposal by a person to enter into a contract or agreement, until the time for the public opening of bids or proposals, or if a public opening is not to be conducted, until the deadline for submission of bids or proposals has expired.
- (j) Appraisals of real property to be acquired by the public body until (i) an agreement is entered into; or (ii) 3 years has elapsed since the making of the appraisal, unless litigation relative to the acquisition has not yet terminated.
- (k) Test questions and answers, scoring keys and other examination instruments or data used to administer a license, public employment, or academic examination, unless the public interest in disclosure under this act outweighs the public interest in nondisclosure.
- (l) Medical, counseling or psychological facts or evaluations concerning an individual if the individual's identity would be revealed by a disclosure of those facts or evaluation.
- (m) Communications and notes within a public body or between public bodies of an advisory nature to the extent that they cover other than purely factual materials and are preliminary to a final agency determination of policy or action. This exemption shall not apply unless the public body shows that in the particular instance the public interest in encouraging frank communication between officials and employees of public bodies clearly outweighs the public interest in disclosure. This exemption does not constitute an exemption under state law for purposes of MCL 15.268.
- (n) Records of law enforcement communication codes, or plans for deployment of law enforcement personnel, that if disclosed would prejudice a public body's ability to protect the public safety unless the public interest in disclosure under this act outweighs the public interest in nondisclosure in the particular interest.
- (p) Testing data developed by a public body in determining whether bidder's products meet the specifications for purchase of those products by the public body, if disclosure of the data would reveal that only 1 bidder has met the specifications. This subdivision does not apply after 1 year has elapsed from the time the public body completes testing.
- (s) Unless the public interest in disclosure outweighs the public interest in nondisclosure in the particular instance, public records of a law enforcement agency, the release of which would do the following:
 - (i) Identify or provide a means of identifying an informer.
 - (ii) Identify or provide a means of identifying a law enforcement undercover officer or agent or a plain clothes officer as a law enforcement officer or agent.
 - (iii) Disclose the personal address or telephone number of law enforcement officers or agents or any special skills they may have.
 - (iv) Disclose the name, address, or telephone numbers of family members, relatives, children, or parents of law enforcement officers or agents.
 - (v) Disclose operational instructions of law enforcement officers or agents.
 - (vi) Reveal the contents of staff manuals provided for law enforcement officers or agents.
 - (vii) Endanger the life or safety of law enforcement officers or agents or their families, relatives, children, parents, or those who furnished information to law enforcement departments or agencies.
 - (viii) Identify or provide a means of identifying a person as a law enforcement officer, agent, or informer.
 - (ix) Disclose personnel records for law enforcement agencies.
 - (x) Identify or provide a means of identifying residences that law enforcement agencies are requested to check in the absence of their owners or tenants.
- (u) Records of a public body's security measures, including security plans, security codes and combinations, passwords, passes, keys, and security procedures, to the extent that the records relate to the ongoing security of the public body.
- (v) Records or information relating to a civil action in which the requesting party and the public body are parties.
- (w) Information or records that would disclose the social security number of any individual.

EXHIBIT G

STATE OF MICHIGAN
IN THE COURT OF CLAIMS

SPENCER WOODMAN,

Plaintiff,

-vs-

Case No. 17-000082
Hon. Cynthia D. Stephens

MICHIGAN DEPARTMENT OF CORRECTIONS,

Defendant.

DEPOSITION OF CHERYL GROVES

Taken by the Plaintiff on Thursday, the 30th day of
November, 2017 at the office of Michigan Department of
Attorney General, 525 West Ottawa Street, Lansing, Michigan
at 9:00 a.m.

APPEARANCES:

For the Plaintiff: OLIVIA K. VIZACHERO (P81699)
Honigman Miller Schwartz and Cohn, LLP
Cooperating Attorneys, American
Civil Liberties Union Fund of Michigan
2290 First National Building
600 Woodward Avenue
Detroit, Michigan 48226
(313) 465-7000
ovizachero@honigman.com

Page 2

1 For the Defendant: ADAM R. DE BEAR (P80242)
 2 Michigan Department of Attorney General
 3 525 West Ottawa Street
 4 2nd Floor G. Mennen Williams Building
 5 Lansing, Michigan 48909
 6 (517) 373-1162
 7 debeara@michigan.gov
 8
 9
 10 Reported By: Heidi A. Cook, CSR 4827
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 12
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 14
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 21
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12	(FOIA Request Response)		
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25			

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 4 -----
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 7
 8 * * *
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1 Thursday, November 30, 2017
 2 Lansing, Michigan
 3 9:39 a.m.
 4 * * *
 5 CHERYL GROVES,
 6 having been first duly sworn, testified as follows:
 7 EXAMINATION
 8 BY MS. VIZACHERO:
 9 Q Good morning, Ms. Groves. How are you today?
 10 A Fine. How are you?
 11 Q Wonderful. Thank you.
 12 A Good.
 13 Q Would you mind stating your full name and spelling your last
 14 name for the record?
 15 A Cheryl Ann Groves, G-r-o-v-e, as in Victor, e-s.
 16 Q I say V, as in Victor, for my name, too.
 17 How are you currently employed?
 18 A I work for the Michigan Department of Corrections as the EPIC
 19 Manager.
 20 Q Okay. And what is an EPIC Manager?
 21 A EPIC stands for Effective Process Improvement and
 22 Communication, so that is our Process Improvement Office.
 23 Q Okay. So as I stated earlier, my name is Olivia Vizachero,
 24 and I am representing Spencer Woodman and George Joseph in
 25 the current litigation, and you're going to be deposed today

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1 the request is submitted govern?
2 A I guess I don't understand your question.
 3 Q Not a problem.
4 A So I'm sorry.
 5 Q We'll use real dates.
6 A Okay.
 7 Q If an event -- the most recent change happened in February --
8 A Correct.
 9 Q -- of 2017. If an event took place on January 1st of 2017,
 10 and two people submitted requests, one January 2nd and the
 11 other person March 1st of 2017, would one Policy Directive
 12 govern those two -- would the same Policy Directive --
13 A I see. No, it would not. The Policy Directive that is in
14 place, in effect governs FOIA Requests that are received of
15 that date.
 16 Q Okay.
17 A Does that make sense?
 18 Q Yes.
19 A Okay.
 20 Q So if a -- I won't say if, we'll just use the actual one. I
 21 am going to have Plaintiff, Spencer Woodman's First Amended
 22 Verified Freedom of Information Complaint marked as
 23 Exhibit E.
 24 (Deposition Exhibit E marked for identification.)
 25 Q (BY MS. VIZACHERO) And I'm going to direct you, Ms. Groves,

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1 to the exhibits.
2 A Okay.
 3 Q Which, as you explained earlier, you reviewed prior to coming
 4 here today, I believe. Have you seen that document before?
5 A Yes, I have.
 6 Q Okay. And what is it?
7 A It's a request; it's a FOIA Request.
 8 Q From whom?
9 A Spencer Woodman.
 10 Q And when is it dated?
11 A September 28, 2016.
 12 Q So which Policy Directive would have been in effect at that
 13 time?
14 A September 28th. It would be the one dated 3/31/16.
 15 Q Perfect. And who received this request?
16 A It looks like it was addressed to Aimee Nelson.
 17 Q Was that common, for requests to be directed specifically
 18 to --
19 A Yes.
 20 Q -- one person?
21 A (Witness nodding head.)
 22 Q While you were FOIA Coordinator what different ways did the
 23 office receive requests?
24 A We had them by E-mail, because her E-mail was on our web page
25 as the FOIA contact, so that's how they have her E-mail

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1 address.
 2 Q Only her E-mail?
3 A Yes.
 4 Q Okay.
5 A So we had that, and we could get them in the mail, we could
6 have them faxed, and sometimes people would hand-deliver
7 them.
 8 Q To the Central Office?
9 A Yes.
 10 Q Was there a general E-mail address for the office, like an
 11 info@, that wasn't assigned to one person?
12 A No, there was not.
 13 Q All right. And can you tell me what you know about this FOIA
 14 Request; it gets received by Aimee, and then what happened?
15 A Right. So she would get this information, and she would look
16 at the request; obviously, this is a request for a digital
17 copy of video footage of an incident that happened. And she
18 would prepare the initial response, and send it to me for my
19 review.
 20 Q What was the first conversation you had with Ms. Nelson about
 21 Mr. Woodman's FOIA Request?
22 A I don't recall.
 23 Q Prior to talking to you, or bringing you the, her final draft
 24 of the response, what did she do?
25 A I don't know.

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1 Q Did she talk to anyone?
2 A Did she?
 3 Q Yes.
4 A I don't recall. I don't know that.
 5 Q What do you recall in capacity with your involvement?
6 A Simply to review the request, and look at the proposed
7 response that she had drafted, and when I agreed with the
8 content, then I signed it and we processed it. By process, I
9 just mean put in the mail, put a stamp on it.
 10 Q What did you review?
11 A What did I review? Only this request.
 12 Q Only this page?
13 A Correct.
 14 Q The form titled, Response to Request for Public Records?
15 A Oh, I'm sorry. Yes.
 16 Q I'm just making sure.
17 A That's what she had given me, so I would see the request and
18 proposed response on the FOIA Response Form.
 19 Q You indicated earlier that when you review responses you also
 20 review whatever materials were responsive?
21 A Correct.
 22 Q Okay. So were there responsive materials in this, for this
 23 FOIA Request?
24 A Not that we had in our office. Because of the request, which
25 was for video footage, we deny that under our custody and

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1 safety security exemption; we do not release video footage.
 2 Q In all circumstances?
 3 A While I was FOIA Coordinator, yes.
 4 Q Okay. And is that a rule that you came up with, or is that
 5 something you were told to do?
 6 A I don't know that either one of those. It's in our FOIA
 7 Policy, and it doesn't specifically say that, it just -- it's
 8 an example of what can be exempted.
 9 Q And when you say FOIA policy, are you saying FOIA Policy
 10 Directive?
 11 A Yes.
 12 Q Okay.
 13 A Yes.
 14 Q Can you show me where it says in all cases --
 15 A It doesn't say that.
 16 Q Okay. How do you know that in all cases, that it shouldn't
 17 be, that the video or audio shouldn't be released?
 18 A Because of the nature of that.
 19 Q Can you explain that in a little more detail?
 20 A Right. Our prisons -- obviously there's a lot that goes on
 21 in our prisons, and if we were to release video footage it
 22 shows the camera angles, it shows the capability, it shows
 23 how our staff responds to incidents. We consider that a
 24 custody and safety security issue, therefore, we exempt that;
 25 we take exemption 13(1)(c).

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1 Q So whose job in this case would it have been to, say,
 2 Mr. Woodman's request comes in, we see it, it gets received
 3 on September 28, 2016, or that was the date that the request
 4 was made, it was received the following day, and as a side
 5 note, is that -- that's Department Policy, right, if you
 6 receive a request, it's dated as received the --
 7 A The following day, correct.
 8 Q -- subsequent day? So Ms. Nelson would have had to contact
 9 someone in order to determine whether there was responsive
 10 records for Mr. Woodman's request?
 11 A I don't know how to answer that, because I can't speak for
 12 what she did.
 13 Q Just in your understanding as --
 14 A In general, we would typically contact the facility and say,
 15 Do you have responsive records? And in this case they would
 16 say, yes, we have video footage, but we would still deny it
 17 because we wanted to make sure that we take the exemption
 18 correctly. So, yes, it does exist, and we're not going to
 19 release it.
 20 Q Okay. So -- well, let me say this: In your role as FOIA
 21 Coordinator, would you have expected Ms. Nelson to determine
 22 what videos, like enumerate a list of what videos were
 23 responsive to the request before drafting a response?
 24 A Would I ask her to do that?
 25 Q Yes.

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1 A To give me information that says, We have this video that's
 2 from this time, and this video --
 3 Q Yes.
 4 A No.
 5 Q And why is that?
 6 A Because we know that we don't release it. All we need to
 7 verify is that the documents do exist, and then we are
 8 appropriate in redacting that, or rejecting that, or taking
 9 an exemption.
 10 Q So at any point would there be a transfer of videos from, in
 11 this case it was Muskegon Correctional Facility?
 12 A I think that was a mistake, because it was Bellamy Creek.
 13 Q Right?
 14 A Right.
 15 Q Okay. I've been going through that, and I keep going back
 16 and forth.
 17 A Right.
 18 Q You would know better than I would. I'm like, are they right
 19 next to each other?
 20 A No, they're not; one is in Muskegon, and one is in Ionia.
 21 Q So it was at Bellamy Creek, yes?
 22 A Correct.
 23 Q Now I've got it in my mind's eye; we're good to go.
 24 A Okay.
 25 Q Do you know who was the, would it have been, I want to use

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1 the right term, the local FOIA Coordinator?
 2 A I do not know who that is at Bellamy Creek.
 3 Q In your understanding of how these are typically processed,
 4 of how FOIA Requests and responses are typically handled, at
 5 what point, if any, would the videos in the custody of the
 6 local facility be transferred to the Central Office?
 7 A Under FOIA?
 8 Q Yes.
 9 A Or in general?
 10 Q For the processing, like, making a determination on --
 11 A We would not ask for that. We would ask if it exists, but we
 12 would not ask them to transfer those files to us.
 13 Q Okay. So is anyone reviewing the video prior to making a
 14 determination?
 15 A No.
 16 Q Okay.
 17 A In our FOIA Office, I'm talking about our Central Office FOIA
 18 Office, we do not review those videos.
 19 Q Okay. Will you go to page four, please, of the March 31st
 20 Policy Directive.
 21 MR. DE BEAR: On Exhibit C?
 22 MS. VIZACHERO: C, yes. Give me just a second.
 23 (Off the record discussion.)
 24 Q (BY MS. VIZACHERO) Okay. So, initially, what exemption was
 25 cited for Spencer Woodman's FOIA Request?

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1 A 13(1)(c).

2 Q Okay. So let's turn to 13(1)(c). And if you can, for the
3 record, can you read what was requested?

4 A Yes. I am requesting a digital copy of, one, video footage
5 of the confrontation that led to the fatality of inmate
6 Dustin Szot on September 27, 2016 at the Muskegon
7 Correctional Facility. This request includes footage from
8 any and all available cameras that captured this incident, as
9 well as any, number two, any available accompanying audio
10 records.

11 Q Okay. And then can you read for me the explanation provided
12 in the response portion?

13 A In our response? The records you seek are exempt from
14 disclosure under Section 13(1)(c). These records, if
15 disclosed, could threaten the security of Bellamy Creek
16 Correctional Facility by revealing fixed camera placement, as
17 well as the scope and clarity of the facility's fixed camera
18 and hand-held recordings.
19 Disclosure of these records could also reveal the
20 policies and procedures used by staff for disturbance control
21 and the management of disruptive prisoners.

22 Q Okay. So is it common if -- strike that.
23 The one and the two in the description of the requested
24 record --

25 A Yes.

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1 Q -- who puts those there?

2 A Aimee does.

3 Q Okay. And why?

4 A We do that so we make sure that we have answered each one of
5 the parts of their request appropriately below.

6 Q Okay.

7 A So part one, we make sure that we have that, and we have our
8 response to that request, and part two, we make sure we
9 respond to both parts.

10 Q Okay. Do you see that included in the response portion
11 below?

12 A No, I do not.

13 Q Okay. So with the description it says, Revealing the
14 requested records would reveal the camera placement?

15 A Correct.

16 Q As well as the scope --

17 A Correct.

18 Q -- and the clarity of the camera?

19 A Yes.

20 Q And the hand-held recordings?

21 A Right.

22 Q Would that have related to request one or request two;
23 request one was video?

24 A It applies to both of them.

25 Q How would an audio recording reveal fixed camera placement?

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1 A It might not. It won't, but it will threaten the security of
2 the facility.

3 Q How?

4 A By audio. Because anything that happens in an incident, we
5 are not releasing that information; we're not releasing the
6 video footage or the audio that goes along with that.

7 Q And why not the audio?

8 A They are together; the camera records the video and audio as
9 one.

10 Q Is there a way that, for redaction purposes, the Department
11 could separate the two, and only provide an audio?

12 A I don't know that.

13 Q It's possible that a recording could be made just by taking a
14 recording device, holding it up to a speaker, if audio was
15 recorded, and then separating that from the video?

16 A I have not ever been involved with that, so I can't speak to
17 that.

18 Q I just mean, like, you would be able to, if someone was
19 playing a tape right now, we would be able to turn on our
20 phones, record, and even though we wouldn't be capturing the
21 image, video footage, we would be able to record the audio.
22 Does that make sense to you?

23 A Yes.

24 Q So it's possible that that could take place and be
25 accomplished?

Page 53

1 A Yes.

2 Q Okay. And that's kind of consistent with redacting, right,
3 you start with a whole --

4 A Uh-huh.

5 Q -- file or a larger item and then you say, Nope, we're not
6 going to do all of that, but we're going to take some of it?

7 A Right.

8 Q Okay. And then looking at scope, how would audio relate to
9 revealing the scope of a fixed camera?

10 A Scope means -- I'm sorry. What did you say?

11 Q How would audio recordings reveal the scope of a camera?

12 A Audio does not.

13 Q Okay. And would you answer the same for clarity of a fixed
14 camera?

15 A For audio?

16 Q Uh-huh.

17 A No.

18 Q I'm sorry. Clarify the no.

19 A Clarity does not include audio. Was that the question?

20 Q Audio wouldn't reveal a camera's clarity?

21 A Correct.

22 Q Okay. And audio wouldn't reveal placement, scope or clarity
23 for a hand-held recording?

24 A Audio, it depends on what's said in the audio. I mean, it's
25 possible, but it would depend on what is said.

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1 Q So you'd have to make, like, a case-by-case determination?

2 **A Right, because if you said, Okay, I'm standing here in East**

3 **Wing, you know, the audio could reveal some of the security**

4 **issues.**

5 Q Okay. But it could not?

6 **A Correct.**

7 Q Okay. The second page on the FOIA, following the FOIA

8 Request.

9 **A Uh-huh.**

10 Q Do you recognize that page?

11 **A Yes, I do.**

12 Q And what is that?

13 **A That is a list of FOIA exemptions.**

14 Q Okay. And who creates this list?

15 **A I honestly don't know who created it.**

16 Q Okay. Would it be under your understanding that this is

17 consistent with the actual FOIA Exemption Statute?

18 **A Yes.**

19 Q And you said C was marked on Mr., in response to the

20 exemption used for Mr. Woodman's request?

21 **A Yes.**

22 Q Okay. And that says, A public record, which if disclosed,

23 would prejudice a public body's ability to maintain the

24 physical security of custodial and penal institutions

25 occupied by persons arrested or convicted of a crime,

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1 admitted because of a mental disability, unless the public

2 interest and disclosure under this Act outweighs the public

3 interest and nondisclosure.

4 That last phrase, what do you understand that to mean?

5 MR. DE BEAR: I'm going to object to the extent

6 you're asking for a legal conclusion.

7 **THE WITNESS: From my understanding of what that**

8 **means is that the public has more of a need to know, and that**

9 **would outweigh our security concerns of the Department.**

10 Q (BY MS. VIZACHERO) Okay. And have you ever made a

11 determination involving audio or video where the public had

12 more of an interest in knowing than, that supported

13 disclosure versus nondisclosure?

14 **A No, I have not.**

15 Q Okay. And we're going to flip back and forth between this

16 Request and then the Policy Directive, the March 2016 one.

17 **A Okay.**

18 Q On page three, Section Q.

19 **A Uh-huh.**

20 Q When it says, The FOIA Coordinator shall, is it your

21 understanding that that's either the FOIA Coordinator or the

22 Assistant FOIA Coordinator shall do these things?

23 **A Yes.**

24 Q Okay. So Section Q says, The FOIA Coordinator shall review

25 the request and determine which records are in the

Page 56

1 Department's possession.

2 Who did that with regard to this; it was Ms. Nelson?

3 **A Initially, Aimee Nelson, correct.**

4 Q And then in Section R, The FOIA Coordinator shall review the

5 documents responsive to the Request to insure information

6 exempt from disclosures not provided.

7 **A Uh-huh.**

8 Q Who would have done that in this case?

9 **A Initially, Aimee Nelson.**

10 Q Is there any policy that allows, that says, as a matter of

11 course or habit or, you know, just knee jerk response, when

12 there's an informal policy that something is not able to be

13 disclosed because it falls under an exemption that a FOIA

14 Coordinator shall not review documents?

15 **A Well, we don't have any informal policies.**

16 Q Okay.

17 **A So I'm not quite sure how to answer your question.**

18 Q So there is no policy or provision or procedure that allows,

19 that states that someone cannot review in response. The only

20 one on point in terms of reviewing documents is it says,

21 Shall review documents?

22 **A Is there something that says they don't have to?**

23 Q Yeah.

24 **A Not to my knowledge.**

25 Q Okay. The list of FOIA exemptions on page four.

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1 **A Uh-huh.**

2 Q Who comes up with this list; where does this list --

3 **A Are you looking at the Policy?**

4 Q The Policy Directive, yes.

5 **A Okay. So the list of FOIA exemptions here are taken from the**

6 **Statute.**

7 Q Okay. And who comes up with the list of examples under each

8 one?

9 **A It could be -- I don't know who came up with these. I can't**

10 **tell you that, but it could be the Policy Manager, the FOIA**

11 **Manager, or the Administrator.**

12 Q So someone from within your office?

13 **A Correct.**

14 Q And what information would they use to come up with a list of

15 examples?

16 **A Knowledge, history of the Department.**

17 Q Any other outside authority?

18 **A The Attorney General's Office.**

19 Q Are Attorney General opinions binding?

20 **A I don't know that.**

21 Q Okay. So looking at Section X, Paragraph 2.

22 **A Uh-huh.**

23 Q Which is the same language for Exemption C?

24 **A Yes.**

25 Q The examples listed below, and I know this is going to sound

Page 58

1 redundant, but we're just going to check them off. Okay?

2 **A Okay.**

3 Q Did Mr. Woodman request blueprints or maps of a facility?

4 **A No.**

5 Q Okay. Did he request names of informants?

6 **A No, he did not.**

7 Q Did he request mobilization scenarios and critiques?

8 **A No.**

9 Q Did he request Special Problem Offender Notice?

10 **A No, he did not.**

11 Q Did he request movement plans?

12 **A No.**

13 Q Did he request Security Threat Group designations?

14 **A No.**

15 Q And related documentation?

16 **A No.**

17 Q Did he request Exempt Policy Directives and Operating
18 Procedures?

19 **A No.**

20 Q Did he request Post Orders for Security Sensitive Assignment?

21 **A No.**

22 Q Did he request description of security fencing?

23 **A No.**

24 Q Did he request description of operation of personal
25 protection devices?

Page 59

1 **A No.**

2 Q Did he request a document determined to be confidential by a
3 Hearing Officer at a hearing conducted pursuant to MCL
4 791.252?

5 **A No.**

6 Q Okay. And while we're on this page, and you participated in
7 composing a response for purposes of Mr. Woodman's appeal?

8 **A Yes, I did.**

9 Q Okay. What other exemptions were cited?

10 **A 13(1)(u).**

11 Q Do you know if since then any other exemptions have been
12 relied upon by the MDOC for this request?

13 **A I don't know that.**

14 Q Okay.

15 MS. VIZACHERO: If I can have that marked; I think
16 we're on Exhibit F.
17 (Deposition Exhibit F marked for identification.)

18 Q (BY MS. VIZACHERO) Ms. Groves, I'm handing you what's been
19 marked as Exhibit F, which is Defendant's Answer and
20 Affirmative Defenses to Plaintiff's First Amended and
21 Verified Freedom of Information Act Complaint. And for
22 purposes of clarification, I'm just going to have you review
23 page four, and tell me if it helps you understand whether any
24 other exemptions have been relied upon by the Department?
25 MR. DE BEAR: When she's reviewing, do you mind if

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1 we take a quick break after she answers her question?

2 MS. VIZACHERO: Not at all.

3 **THE WITNESS: This included 13(1)(a), (c) and (u).**

4 Q (BY MS. VIZACHERO) Okay. Perfect. And then I'll direct
5 your attention back to the Policy Directive.

6 **A Okay.**

7 Q So you added in the appeal 13(u) --

8 **A Correct.**

9 Q -- is that correct?

10 **A Yes.**

11 Q Why did you choose to do that?

12 **A Because it also is applicable. If I can be -- I honestly did
13 not add U, my supervisor did.**

14 Q Okay. By all means, all the facts.

15 **A Okay. Sure. I mean, I know it was added, and the Director
16 did sign off, but when the Administrator reviewed it, she
17 added U.**

18 Q Okay. And that was Daphne?

19 **A Correct.**

20 Q Did you two have a conversation about that?

21 **A We reviewed all of the appeals together.**

22 Q Together?

23 **A Right.**

24 Q Okay. So you had prepared the appeal --

25 **A (Witness nodding head.)**

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1 Q -- response?

2 **A Correct.**

3 Q With anyone's help?

4 **A No.**

5 Q Just you?

6 **A I mean, I would get the information from Aimee; I got the
7 original request from Aimee, the appeal, prepared the
8 response.**

9 Q But you didn't work with Aimee in preparing the response?

10 **A No.**

11 Q Just you?

12 **A Correct.**

13 Q And then you take what you prepare?

14 **A To the Administrator.**

15 Q And then you and Daphne would sit down and go through the
16 appeal response?

17 **A Yes.**

18 Q Is that correct?

19 **A Yes.**

20 Q Okay. And what were the reasons for adding Exemption U to
21 the appeal?

22 MR. DE BEAR: I'm just going to object to the
23 extent that you're requesting a legal conclusion.

24 **THE WITNESS: I want to find the language for U.**

25 **All right. So 13(1)(u) states, Records of a public body's**

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1 security measures, including security plans, security codes
 2 and combinations, passwords, passes, keys, and security
 3 procedures, to the extent that the records relate to the
 4 ongoing security of the public body.
 5 So she felt that this was a security issue, and that
 6 this was an applicable exemption to apply.
 7 Q (BY MS. VIZACHERO) And just for the record, were you reading
 8 from a document when you were reading that language?
 9 A Oh, I'm sorry. That's from the Policy Directive.
 10 Q And what page, page five?
 11 A Page five.
 12 Q Okay.
 13 A Number five.
 14 Q And you were reading the exact language; I don't believe you
 15 read the examples underneath, correct?
 16 A Nope, I read that from the Statute.
 17 Q Okay. So let's go through -- did you agree with her decision
 18 to add U?
 19 A Yes.
 20 Q Was it custom for you, up until this conversation, to add, to
 21 include U in video or audio request responses?
 22 A I can't speak to that. I honestly can't remember.
 23 Q Okay. All right. Going through Paragraph 5, did
 24 Mr. Woodman request a public body's security measures?
 25 A In our opinion, yes.

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1 MR. DE BEAR: Are you on Paragraph 5 of the
 2 response to Mr. Woodman's appeal?
 3 MS. VIZACHERO: Paragraph 5 of the Policy
 4 Directive.
 5 THE WITNESS: The Policy.
 6 MR. DE BEAR: Oh, okay.
 7 MS. VIZACHERO: Exhibit C.
 8 Q (BY MS. VIZACHERO) Did he request security plans?
 9 A No, he did not.
 10 Q Did he request security codes?
 11 A No.
 12 Q Or combinations?
 13 A No.
 14 Q Or passwords?
 15 A No.
 16 Q Or passes?
 17 A Nope.
 18 Q Or keys?
 19 A No.
 20 Q Or security procedures?
 21 A He requested something that would reveal our security
 22 procedures.
 23 Q But he didn't expressly request the procedures promulgated by
 24 the Department?
 25 A Correct.

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1 Q Okay. Did he request movement plans?
 2 A No, he did not.
 3 Q Did he request exempt Policy Directives and Operating
 4 Procedures?
 5 A No.
 6 Q Did he request Post Orders for security sensitive assignment?
 7 A No.
 8 Q Did he request descriptions of security fencing?
 9 A No.
 10 Q Did he request description of operation of personal
 11 protection devices?
 12 A No.
 13 Q Okay. And then I'm going to turn to page four, and we'll go
 14 through Section X, Paragraph 1. Just give me a general
 15 understanding before we get into the examples listed, what is
 16 Section (1)(a) used for?
 17 MR. DE BEAR: I'm going to object to the extent
 18 that you're calling for a legal conclusion.
 19 THE WITNESS: We call 13(1)(a) as our Privacy
 20 Exemption.
 21 Q (BY MS. VIZACHERO) Okay. And privacy of what?
 22 A It could be a number of things. It could be a telephone
 23 number, a home address, a name of a victim, a Social Security
 24 Number; anything that would be a personal number or, I'm
 25 sorry, a personal -- something of somebody that they would

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1 not release to the general public.
 2 Q Okay. Did Mr. Woodman ask for, request information including
 3 home addresses and home telephone numbers?
 4 A No, he did not.
 5 Q Did he request emergency contact information?
 6 A No.
 7 Q Did he request Driver License Numbers?
 8 A No.
 9 Q Did he request Social Security Numbers?
 10 A No.
 11 Q Did he request victims' requests to receive information
 12 pursuant to Policy Directive for victim notification and the
 13 Department's response? Sorry. That's a mouthful.
 14 A And I have to read how that is. No.
 15 Q Did he request fingerprint cards?
 16 A No.
 17 Q Did he request resumes' of unsuccessful job applicants?
 18 A No.
 19 MR. DE BEAR: Do you mind if we take that break?
 20 MS. VIZACHERO: Oh, I'm sorry. Not a problem.
 21 We're going to go off the record.
 22 (Whereupon, a short break was taken.)
 23 MS. VIZACHERO: Okay. We'll go back on the
 24 record.
 25 Q (BY MS. VIZACHERO) Okay. I just want to go through the

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1 interests outweighing, public interests favoring disclosure
 2 as opposed to not favoring disclosure?
 3 **A Do I understand the difference?**
 4 MR. DE BEAR: I'm just going to go ahead and object
 5 to the extent you're calling on Ms. Groves to speculate as to
 6 Mr. Woodman's intentions. Go ahead and answer.
 7 **THE WITNESS: Can you ask the question again?**
 8 Q (BY MS. VIZACHERO) Sure. Did you -- did you take his
 9 request, or his information language that he's using here,
 10 it's kind of presenting an argument that there are reasons
 11 that favor disclosure versus nondisclosure?
 12 **A Yes.**
 13 Q And do you take arguments -- how do you consider arguments
 14 favoring disclosures in these instances; how did you take it
 15 in this case?
 16 **A In this instance I still look at the overall, and in our**
 17 **opinion from the Department of Corrections, the overall**
 18 **guiding concern as the security and custody of our facility.**
 19 **I understand that he felt differently, but it was still**
 20 **our Department's understanding and belief that we had the**
 21 **right to exempt this material for custody and safety security**
 22 **reasons.**
 23 Q Okay. But that's without you having seen the video,
 24 yourself?
 25 **A Correct.**

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1 Q So could you -- could there be an instance where conduct is
 2 captured on a video that's so heinous that it would switch
 3 the scale, where we would have to know about it?
 4 **A I don't know that. I have not been involved in that**
 5 **situation.**
 6 Q Do you think that's possible?
 7 **A There would have to be some discussion on it with**
 8 **Administration, so I can't answer that question.**
 9 Q Do you think all videos capture events of the same severity?
 10 **A No.**
 11 Q Okay. So some would be worse than others?
 12 **A Correct.**
 13 Q Okay. I'm sure you're more than familiar with all of the
 14 video requests, having processed all of these.
 15 **A Uh-huh.**
 16 Q Have you received some really innocuous video requests, like
 17 all videos regarding inmate John Smith?
 18 **A Yes, we have.**
 19 Q Okay. And that could just be any video of them walking
 20 around doing nothing throughout the day, right?
 21 **A I can't tell you specifically what they would say, but in**
 22 **general terms, yes, it could be any request for any time that**
 23 **they would be under surveillance.**
 24 Q No violence -- there would be responsive videos that wouldn't
 25 involve any violent activity --

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1 **A Correct.**
 2 Q -- or any confrontation?
 3 **A Correct.**
 4 Q And those would be on a really low scale compared to the
 5 security risks you're expressing, is that fair?
 6 MR. DE BEAR: I guess I'm going to object to the
 7 extent that you're asking for a legal conclusion.
 8 **THE WITNESS: How I would answer that is, even**
 9 **though what they are capturing might be different, the**
 10 **security concern is still there from the, from the Department**
 11 **of Corrections' standpoint of you're releasing what it looks**
 12 **like inside our prison. You're looking at escape routes;**
 13 **you're looking at other things that we take very seriously,**
 14 **and would not want in the general public's hands.**
 15 Q (BY MS. VIZACHERO) So -- I want to phrase this properly. So
 16 the underlying events that were at the heart of Mr. Woodman's
 17 request, what were those, do you know, in terms of what was
 18 the incident that happened?
 19 **A The death of a prisoner.**
 20 Q Okay. So that would be probably on the opposite side of the
 21 scale rather than innocuous walking around, no event?
 22 **A Correct.**
 23 Q That's one of the most severe things?
 24 **A Correct.**
 25 Q Okay. So is it the Department's policy that even in those

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1 scenarios, the MDOC's security is always going to outweigh
 2 the disclosure in every case?
 3 **A From the ones that I have been presented with as FOIA**
 4 **Coordinator, yes.**
 5 Q Okay. In all of those ones that you've presented with, been
 6 presented with as FOIA Coordinator --
 7 **A Uh-huh.**
 8 Q -- did you review any of the videos prior to determining
 9 whether the public interest favored disclosure or
 10 nondisclosure?
 11 **A I can't recall if I've ever reviewed videos; I can't recall**
 12 **that.**
 13 Q Would you say chances are closer to you haven't or --
 14 **A If I review videos, there were very few that I reviewed.**
 15 Q Okay.
 16 **A But I can't say that I didn't review any.**
 17 Q In drafting your response, did you differentiate between the
 18 audio he requested, which was separate from the video that he
 19 requested, or was it grouped together?
 20 **A It was grouped together.**
 21 Q Okay. I'm going to go through a series of related and
 22 unrelated FOIA Requests --
 23 **A Okay.**
 24 Q -- that you processed.
 25 **A Okay.**

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1 Q Just really -- we won't get into too much detail, but just
2 briefly going through them.
3 Do you remember if you processed other FOIA Requests for
4 this video footage, the same that Mr. Woodman --
5 **A For this particular one, I don't recall that.**
6 MS. VIZACHERO: Okay. We'll start with that.
7 (Deposition Exhibit G marked for identification.)
8 (BY MS. VIZACHERO) Ms. Groves, I'm handing you what's been
9 marked as Exhibit G. Tell me if you are familiar with that
10 document.
11 **A Yes, I did sign this one.**
12 Q Can you tell me what it is?
13 **A It's a FOIA Request from Adam Duke requesting access to video
14 footage connected to tasing of inmate Dustin Szot at Bellamy
15 Creek Correctional Facility in Ionia; it happened on 9/27,
16 2016.**
17 Q Okay. And just for the record, will you read the FOIA number
18 request?
19 **A The FOIA Request is 16-951.**
20 Q Okay. And was the request granted or denied?
21 **A It was denied.**
22 Q And on what grounds?
23 **A They're exempt from disclosure under Section 13(1)(c).**
24 Q Do you remember who prepared, which Assistant FOIA
25 Coordinator prepared this Response?

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1 **A This would be Aimee Nelson, as well.**
2 Q Was she the only one at the time; I know we talked about
3 there being two earlier?
4 **A In October. I honestly can't recall.**
5 Q Okay.
6 **A I can't remember the dates.**
7 Q Okay. But you know this was prepared by Aimee Nelson?
8 **A Yes.**
9 Q Okay.
10 **A She did the majority of them.**
11 Q And I apologize for the redundancy, but as you understand it
12 neither Aimee nor you reviewed video in response to
13 Mr. Duke's request, correct?
14 **A Correct.**
15 Q And do you know if anyone that Aimee would have contacted
16 reviewed video in response to Mr. Duke's request?
17 **A I'm not sure who she contacted for this, so I don't know
18 that.**
19 Q Would they have -- do you know if they would have
20 reviewed --
21 **A I don't know that.**
22 Q Okay. Did you consider this request to be identical to
23 Mr. Woodman's?
24 **A It's not identical, but it's very similar.**
25 Q Because it's similar, would you have just treated it as the

Page 76

1 same?
2 **A We treated it the same because of what the nature of what
3 they were requesting, video footage, which we would not
4 release.**
5 (Deposition Exhibit H marked for identification.)
6 Q (BY MS. VIZACHERO) I'm handing you another FOIA Request,
7 which has been marked as Exhibit H. Are you familiar with
8 that Request and Response?
9 **A Yes. I did sign this one, as well.**
10 Q Okay. And can you tell me who it's from, and the FOIA number
11 for the record?
12 **A Troy Baker, and the FOIA number is 16-948.**
13 Q Okay. And what did he request?
14 **A A copy of the Central Office file for Dustin Szot, MDOT,
15 which is wrong; it should be MDOC, but it's MDOT Number
16 961740. A copy of video and audio recordings of a fight that
17 took place on or about September 27, 2016 at the Bellamy
18 Creek Correctional Facility, that led to a confrontation with
19 prison officers and, eventually, Szot's death.**
20 Q Okay. And who would have been responsible for the initial
21 response?
22 **A Aimee Nelson.**
23 Q And then Aimee would have presented it to you?
24 **A Correct.**
25 Q For approval?

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1 **A (Witness nodding head.)**
2 Q Yes?
3 **A Yes.**
4 Q And did you approve it?
5 **A It was granted in part and denied in part.**
6 Q Okay. And why is that?
7 **A Because some of the information that he was requesting was
8 releasable.**
9 Q And which information was that?
10 **A A copy of the Central Office file, with certain exemptions
11 taken.**
12 Q Okay. And then there is a -- there's a few pages involved
13 with this; there's a second answer sheet, so to speak, for a
14 continued portion?
15 **A Yes.**
16 Q So taking the first page, and then what I think is the third
17 page of this in whole, is there anything on the first page
18 that addresses video or audio recordings?
19 **A No, there is not.**
20 Q Okay. On the second page?
21 **A Uh-huh.**
22 Q Part two is denied on what grounds?
23 **A Part two is video, and that's denied under Section 13(1)(c).**
24 Q Okay. And part three was what?
25 **A Part three was a request for audio recordings of a fight that**

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1 **took place.**

2 Q Okay. And was that granted or denied?

3 **A It was denied.**

4 Q And why was it denied?

5 **A Because the requested records do not exist within the records**

6 **of the Department under the name or description provided, or**

7 **by another name reasonably known to the Department.**

8 Q So what is your understanding of audio not existing for

9 this? So there would have been audio recording made?

10 **A I don't know what recording was made, because I did not**

11 **review that.**

12 Q Okay. Do you know if the videos had audio on them, or

13 included with them?

14 **A I don't know that.**

15 Q Okay. And then, again, for the sake of redundancy, to the

16 best of your knowledge, neither you nor Aimee Nelson reviewed

17 video prior to responding to this?

18 **A Correct.**

19 Q Okay.

20 (Deposition Exhibit I marked for identification.)

21 Q (BY MS. VIZACHERO) I'm handing you what's been marked as

22 Exhibit I, and once you've had a second to review that, can

23 you tell me what that is?

24 **A This is another request, a FOIA Request from Stephen**

25 **Kloosterman, FOIA Request Number 16-947, for photos and audio**

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1 **and visual digital files showing the September 27th fight and**

2 **tasing that involved prisoner Dustin Allen Szot at the**

3 **Bellamy Creek Correctional Facility in Ionia.**

4 Q Okay. And are you familiar with this document?

5 **A Yes, I am.**

6 Q And why is that?

7 **A Because I signed it as the FOIA Coordinator.**

8 Q Okay. And would Ms. Nelson have prepared this, as well?

9 **A Yes.**

10 Q And was anything disclosed in response to?

11 **A No, there was not.**

12 Q And how do you know that?

13 **A Because it is marked that the requested records are exempt**

14 **from disclosure.**

15 Q Okay. And we have three different categories here, correct?

16 **A Correct.**

17 Q And those are what?

18 **A One is photos, two is audio, and three is visual digital**

19 **files.**

20 Q Okay. And in the exempt from the explanation why the records

21 are exempt from disclosure, is there an enumeration of the

22 first, second, and third?

23 **A No, there is not.**

24 Q Okay. It's just all grouped together?

25 **A Correct.**

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1 Q Is there a reason, and I'm just curious, why the narratives

2 are different between the different requests; they change a

3 little bit, if you noticed?

4 **A The narrative of the response?**

5 Q Yes. Just because they're all being prepared --

6 **A Well, the one 948 was different because there was a part that**

7 **was granted, so that's going to be different. The rest of**

8 **them should be fairly similar in nature, stating 13(1)(c).**

9 Q Give me one second. In Mr. Woodman's, there's a reference to

10 hand-held recordings that's not in Troy Baker's request --

11 **A Okay.**

12 Q Is there a reason for that?

13 **A In the response or in the request?**

14 Q In the response.

15 **A I have to see what was actually requested; one of them may**

16 **have requested a hand-held recording. Troy Baker, you said?**

17 Q Yes.

18 MR. DE BEAR: Troy Baker's request is Exhibit H.

19 **THE WITNESS: Okay. So I'm sorry, could you repeat**

20 **the question again.**

21 Q (BY MS. VIZACHERO) So in response on Troy Baker's request.

22 **A Uh-huh.**

23 Q And I think it will help if you flip to the third page;

24 that's the one with the two parts.

25 **A Okay.**

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1 Q There is no reference to hand-held camera, hand-held

2 recordings?

3 **A Okay.**

4 Q Whereas, in Mr. Woodman's there's a reference to hand-held

5 recordings, as well as in Stephen Kloosterman?

6 **A So if you're asking why there's a difference in the answers,**

7 **I can't tell you that, but I can say that hand-held**

8 **recordings are also video.**

9 Q Okay.

10 **A So the recordings, when the officer responds, has a camera,**

11 **that's a video recording. So I'm not sure why it wasn't**

12 **mentioned in each one, it just hasn't been. Sometimes, I**

13 **mean, the responses are never going to be 100 percent cookie**

14 **cutter all the way through.**

15 Q Okay. Have there been changes to -- were there changes

16 during the time that you were in charge of FOIA policies

17 regarding the Department's position on hand-held recordings

18 being discloseable under FOIA?

19 **A No.**

20 Q No?

21 **A That's always been consistent.**

22 Q Was there change to language to include that, expressly --

23 was there change to language of a Policy Directive at any

24 time to include a reference to hand-held recordings?

25 **A I would have to look at each version of the Policy Directive**

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1 A **Correct.**

2 Q Right?

3 A **(Witness nodding head.)**

4 Q It's kind of the main station, you would say?

5 A **Right.**

6 Q Hand-held recording devices don't, they're not monitoring

7 hand-held recording devices in that, correct?

8 A **No. Those cameras in the Control Center are from the fixed**

9 **camera placement; the hand-held is brought to the scene when**

10 **it's needed.**

11 Q Okay. Do you know, when you're going through any of the FOIA

12 Requests that we've reviewed thus far, if you were aware that

13 a hand-held camera had recorded any of the video footage

14 responsive to the requests?

15 A **I do not know that. Now, if Aimee called the facility, they**

16 **would have told her that information.**

17 Q Okay. And would she have told that to you?

18 A **She would typically put it in the response, if it was**

19 **something that we were going to exempt. So if a hand-held**

20 **recording existed, then we would mention that, that we're not**

21 **going to release that.**

22 Q So if someone received a -- if someone submitted a FOIA

23 Request for all videos responsive to a confrontation, a

24 physical confrontation or a death, like we have in this

25 instance?

Page 88

1 A **Right.**

2 Q Any others?

3 A **Tasers may have a camera on them; I don't know if all of them**

4 **do, but I know some of them do.**

5 Q Okay. Any other times that recordings would be made, that

6 you've seen?

7 A **No.**

8 Q That you've learned about?

9 A **Not that I've seen, or not that I'm aware of.**

10 Q Do you know if there's, like, body mics worn by correctional

11 facility officers?

12 A **I don't know that.**

13 Q I didn't know if you ever saw that --

14 A **I have not ever seen that.**

15 Q -- in response to a FOIA Request.

16 So let's say all of those things existed, and you

17 received just a request, a blanket request for audio and

18 video, would you go through each one and make a determination

19 of, this is a facility recording, this is a hand-held

20 recording, this is a body mic, if it existed?

21 A **Right, right. All that we would say is, do recordings exist,**

22 **and if the answer is yes, then we would respond, Your request**

23 **has been denied based on 13(1)(c).**

24 Q And then would you inform them that each type of video

25 existed?

Page 87

1 A **Right.**

2 Q Just so I see it in my mind's eye, Aimee would call the

3 facility?

4 A **Uh-huh.**

5 Q And she would get what from them?

6 A **What she would typically say is, Here is our request. We**

7 **have a request for all video recordings; does this exist?**

8 **And they would say yes or no.**

9 Q Okay.

10 A **Sometimes -- I mean, they may or may not say the difference**

11 **between the types of recordings that they have, but as long**

12 **as we know recordings exist, then we can respond to the**

13 **request.**

14 Q Okay.

15 A **And keep in mind that these examples that are listed are not**

16 **all inclusive; these are strictly examples.**

17 Q Are there any other recordings that get created within prison

18 facilities? We've got hand-held, and what is the hand-held?

19 A **It's a video camera; you walk up with a video camera.**

20 Q Just old school?

21 A **Yep, old school video camera.**

22 Q Okay. And then facility?

23 A **The cameras.**

24 Q Like you would typically think of as a security system,

25 right?

Page 89

1 A **No, we would not.**

2 Q Is there a reason for that?

3 A **Because they're all video recordings in some manner.**

4 Q Okay.

5 (Deposition Exhibit J marked for identification.)

6 Q (BY MS. VIZACHERO) I'm handing you what's been marked as

7 Exhibit J. Can you tell me what that is?

8 A **It's another public request for records from Steven Lee, FOIA**

9 **Request Number 16-1046.**

10 Q Did you -- were you involved with responding to that?

11 A **Yes, I was.**

12 Q And how so?

13 A **I was the FOIA Coordinator at the time, and I responded to**

14 **the FOIA Request.**

15 Q Okay. And who would have processed this as the Assistant?

16 A **Aimee Nelson.**

17 Q And what happened with this?

18 A **I have to read it first. Hold on.**

19 Q Not a problem.

20 A **Okay. So what it appears, is that the request came in, and**

21 **we took a 10-day extension. After the extension we had**

22 **gathered the documentation, realized that there was going to**

23 **be a fee associated with this request due to the volume of**

24 **materials.**

25 Q Okay.

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1 **A** So the requester would have been sent the Freedom of
 2 Information Act Fee Calculation Sheet, telling him the amount
 3 of money that he owed us before we would begin processing the
 4 request.
 5 **The check is obviously attached. At the very end he**
 6 **submitted a check for the amount of \$16.81. When we receive**
 7 **that check, then we process the request.**
 8 Q Okay. And for the sake of redundancy, to the best of your
 9 knowledge, neither you nor Aimee reviewed any video?
 10 **A Correct.**
 11 Q Okay. And did you disclose video?
 12 **A No, we did not.**
 13 Q And that's Number 13. Did you disclose 14, photographs?
 14 **A No, we did not.**
 15 Q Did you review any photographs before exempting them?
 16 **A I don't recall.**
 17 Q Could there be photographs outside of camera surveillance
 18 that would be taken in an incident?
 19 **A Yes.**
 20 Q Okay.
 21 MS. VIZACHERO: Will you mark these individually,
 22 please.
 23 (Deposition Exhibits K-N
 24 marked for identification.)
 25 Q (BY MS. VIZACHERO) The Steven Lee request that we were just

Page 91

1 looking at.
 2 **A Uh-huh.**
 3 Q The request is being made by -- does it say what capacity
 4 he's requesting those videos?
 5 **A It does not.**
 6 Q Or the requests are typed. I'm sorry.
 7 **A It looks like he is from the Neumann Law Group, and the**
 8 **requester type is attorney.**
 9 Q Okay. Do you know if, at any time while you were still
 10 working as FOIA Coordinator, this video was released in
 11 coordination with any suit brought on behalf of the decedent,
 12 Mr. Szot?
 13 **A I do not know that.**
 14 Q Okay. I'm going to give you a whole slew of exhibits: K, L,
 15 M and N, and they are similarly all FOIA Request Responses
 16 from other incidents, and I will give them to Mr. De Bear.
 17 Okay. The first one you have is, what's the requester's
 18 name?
 19 **A Paul Abboud.**
 20 Q And that's marked Exhibit K?
 21 **A K.**
 22 Q K. Thank you. And is this regarding -- is his request
 23 requesting the same footage that was requested by
 24 Mr. Woodman, or is this unrelated?
 25 **A The incident is unrelated.**

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1 Q Okay. Is it also a different facility?
 2 **A Correct.**
 3 Q And are you familiar with this document?
 4 **A Yes, I am.**
 5 Q Okay. And how is that?
 6 **A I was the FOIA Coordinator at the time.**
 7 Q Okay. And you signed it?
 8 **A Yes, I did.**
 9 Q And would it have been prepared by Ms. Nelson?
 10 **A Yes.**
 11 Q And we don't need to get into the facts of this. Did you
 12 just, again, did you, to the best of your knowledge, or
 13 Ms. Nelson review any of the documents?
 14 **A No. Video documents?**
 15 Q Video documents.
 16 **A Correct, we did not.**
 17 Q And were the videos disclosed, or was disclosure denied in
 18 that?
 19 **A That was denied.**
 20 Q Okay. You can turn to the next one.
 21 **A Okay.**
 22 Q And can you reveal the requester's name?
 23 **A Blake Roznowski, R-o-z-n-o-w-s-k-i.**
 24 Q And are you familiar with this document?
 25 **A Yes, I am.**

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1 MR. DE BEAR: Sorry. Let me just pause. The
 2 requester's name is Roznowski?
 3 MS. VIZACHERO: 16-88.
 4 MR. DE BEAR: 16-88.
 5 MS. VIZACHERO: Zero.
 6 MR. DE BEAR: Okay. I'll look off of your
 7 exhibit. Sorry, Ms. Vizachero. Go ahead.
 8 MS. VIZACHERO: You're fine.
 9 Q (BY MS. VIZACHERO) And did this requester also request
 10 surveillance video?
 11 **A Surveillance video from the Kinross Correctional Facility**
 12 **Housing Units during protests on 9/10, 2016.**
 13 Q Okay. And did videos exist responsive to this request?
 14 **A Yes, they did.**
 15 Q Do you know how many -- do you know anything about that?
 16 **A I do not know that, no.**
 17 Q So how do you know that they existed?
 18 **A Because we would have -- Aimee would have called the facility**
 19 **to make sure that they existed prior to taking the exemption.**
 20 Q And what exemption is cited for nondisclosure here?
 21 **A 13(1)(c).**
 22 Q Do you know why 13(u) or 13(a) was not used?
 23 **A I do not.**
 24 Q Were you trained that it was best practice to include all
 25 responsive exemptions?

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1 **A Yes.**

2 Q Okay. And then again, neither you nor Aimee, to the best of

3 your knowledge, reviewed any video --

4 **A Correct.**

5 Q -- in connection with this one? You can move to the next

6 one.

7 **A Okay.**

8 Q And will you read me the requester's name?

9 **A Dustin Ordway.**

10 Q And that is Exhibit --

11 **A M, as in Mary.**

12 Q Thank you. And I know there's two different responses here.

13 Is it accurate that one displays your signature, and one does

14 not?

15 **A Correct.**

16 Q Okay. And going through the one that you approved --

17 **A Uh-huh.**

18 Q -- did Mr. Ordway's request involve video?

19 **A Yes, video and other electronic records.**

20 Q Okay. And involving what underlying event?

21 **A A stabbing at the Kinross Correctional Facility.**

22 Q And initially -- this is an initial response, is that fair to

23 say?

24 **A Yes.**

25 Q It happens in two parts?

Page 95

1 **A Right.**

2 Q Why does that happen?

3 **A Because of the volume of records that are requested, and the**

4 **amount of time that it takes to produce it. If it's over a**

5 **threshold, then we have a fee that we assess in order to**

6 **produce the documents.**

7 Q Okay. And then this is marked, Granted In Part, Denied In

8 Part?

9 **A Correct.**

10 Q And even though no exemptions are cited below?

11 **A That's right, because we knew we were not going to release**

12 **the video.**

13 Q Okay. And then again, neither you -- who would have prepared

14 this for you, Ms. Nelson?

15 **A This one would be Ms. Nelson, correct.**

16 Q And neither you nor Ms. Nelson reviewed video --

17 **A Correct.**

18 Q -- before making that determination; that's correct?

19 **A Yes, correct.**

20 Q All right. Do you have one more, or was that it?

21 **A N.**

22 Q N?

23 **A Yes. Number 16-1011 from Brendan O'Connor.**

24 Q Okay. And what was -- are you familiar with this document?

25 **A I did not sign this one; this is signed by Todd Butler. For**

Page 96

1 **this response I signed the initial response.**

2 Q Gotcha. Let's look over your initial response.

3 **A Okay.**

4 Q This was requesting video in connection with incidents at

5 Kinross during the same time as the last exhibit?

6 **A Correct.**

7 Q Including video recordings?

8 **A Actually, the dates are different between this one and the**

9 **last one.**

10 Q Thank you. What are these dates?

11 **A The one on this request is between September 9, 2016 and**

12 **September 22, 2016.**

13 Q Perfect. Thank you for clarifying. An initial determination

14 was made that some records were exempt; is that fair?

15 **A Correct.**

16 Q Okay. And what records were exempt?

17 **A It's not listed on this document, but we would have exempted**

18 **the video that's being requested, video recordings.**

19 Q Okay. And who prepared this?

20 **A Aimee Nelson.**

21 Q And neither you nor Ms. Nelson reviewed video before --

22 **A Correct.**

23 Q -- issuing this initial determination that some records were

24 exempt?

25 **A Correct.**

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1 Q And those records would have been the video records, correct?

2 **A Right.**

3 Q Okay. We will finish up with two last documents.

4 **A Okay.**

5 Q While you were FOIA Coordinator did you ever authorize the

6 release of video recording taken within an MDOC facility?

7 **A Not to my knowledge.**

8 Q Okay. Is it your understanding that is a Department wide

9 policy --

10 **A It's --**

11 Q -- or stance?

12 **A Correct, that's our stance. It's not written in policy, as**

13 **in always, but it is our stance that custody and security**

14 **takes first priority.**

15 Q Okay. And you understand that to mean that that means never

16 disclosing any audio or video recording?

17 **A Correct.**

18 Q Recorded within a correctional facility, yes?

19 **A Correct.**

20 Q Okay.

21 (Deposition Exhibits 0-P

22 marked for identification.)

23 Q (BY MS. VIZACHERO) Okay. I've just handed you what's been

24 marked Exhibits O and P.

25 **A Okay.**

EXHIBIT H

1 STATE OF MICHIGAN
2 IN THE COURT OF CLAIMS

3 SPENCER WOODMAN,

4 Plaintiff,

5 -vs-

Case No. 17-000082
Hon. Cynthia D. Stephens

6 MICHIGAN DEPARTMENT OF CORRECTIONS,

7 Defendant.
8 _____/

9 DEPOSITION OF CORPORATE REPRESENTATIVE FOR

10 MICHIGAN DEPARTMENT OF CORRECTIONS

11 CHERYL GROVES

12 Taken by the Plaintiff on Thursday, the 30th day of
13 November, 2017 at the office of Michigan Department of
14 Attorney General, 525 West Ottawa Street, Lansing, Michigan
15 at 1:15 p.m.

16
17 APPEARANCES:

18 For the Plaintiff: OLIVIA K. VIZACHERO (P81699)
19 Honigman Miller Schwartz and Cohn, LLP
20 Cooperating Attorneys, American
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Page 2

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 10 Reported By: Heidi A. Cook, CSR 4827
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Page 4

1 Thursday, November 30, 2017
 2 Lansing, Michigan
 3 1:15 p.m.
 4 * * *
 5 CORPORATE REPRESENTATIVE FOR
 6 MICHIGAN DEPARTMENT OF CORRECTIONS
 7 CHERYL GROVES,
 8 having been first duly sworn, testified as follows:
 9 EXAMINATION
 10 BY MS. VIZACHERO:
 11 Q Good afternoon, Ms. Groves. How are you?
 12 A **Good afternoon. Good. How are you?**
 13 Q Wonderful. Thank you.
 14 A **Good.**
 15 Q Okay. I know we took some testimony earlier today, as I
 16 explained, of you testifying to facts, do you remember, in
 17 your individual capacity, is that correct?
 18 A **Yes.**
 19 Q Okay. And you understand that this is separate, and you're
 20 testifying now on behalf of MDOC?
 21 A **Yes.**
 22 Q Okay. And by MDOC, you understand that I am referring to
 23 Michigan Department of Corrections?
 24 A **Correct.**
 25 Q Perfect. For our lovely court reporter, can you please state

Page 3

1 EXAMINATION INDEX
 2 -----
 3 ATTORNEY'S NAME EXAMINATION RE-EXAMINATION
 4 -----
 5
 6 BY MS. VIZACHERO: 4
 7
 8 * * *
 9
 10 EXHIBIT INDEX
 11 -----
 12 EXHIBIT MARKED IDENTIFIED
 13 -----
 14 Deposition Exhibit Q 8 8
 15 (Freedom of Information Act Guide)
 16 Deposition Exhibit R 25 25
 17 (MDOC's Answers)
 18 Deposition Exhibit S 48 48
 19 (Verified FOIA Complaints)
 20 Deposition Exhibit T 50 50
 21 (MDOC's Responses)
 22
 23
 24 * * *
 25

Page 5

1 your first name and spell your last name for the record?
 2 A **Cheryl Groves, G-r-o-v, as in Victor, e-s.**
 3 Q And your current position and employer, please?
 4 A **EPIC Manager, the Michigan Department of Corrections.**
 5 Q Perfect. And did you have a chance to review the notice for
 6 this deposition today?
 7 A **Yes.**
 8 Q And you understand the topics that you're a designated
 9 representative for?
 10 A **Yes, I do.**
 11 Q Okay. And just to go over the formalities, you understand
 12 that this deposition is under oath, correct?
 13 A **Yes, I do.**
 14 Q Okay. And is there any reason that you cannot testify
 15 truthfully today?
 16 A **No, there's not.**
 17 Q Okay. And you understand that we're going to try and do our
 18 best, like we did this morning, to not talk over each other?
 19 A **Yes.**
 20 Q Perfect, because Heidi will get mad. And you understand that
 21 if you don't understand something, I need you to let me know
 22 you don't understand something?
 23 A **Yes.**
 24 Q That way, I can clarify.
 25 A **Okay.**

Page 26

1 Q Correct. Who is listed as --

2 **A Mike Walczak is listed as the FOIA Coordinator.**

3 Q Okay.

4 **A Now, I'm not sure how current this list is. If he was the**

5 **FOIA Coordinator at the time that incident happened, I can't**

6 **speak to that.**

7 Q Understood. And would an Assistant -- who would -- in this

8 case Aimee Nelson handled the initial inquiry with finding

9 out if there were responsive documents?

10 **A Uh-huh.**

11 Q Correct?

12 **A Correct.**

13 Q Who would she call at Bellamy Creek?

14 **A She would contact the FOIA Coordinator.**

15 Q So she would have contacted, if he was in place at the

16 time --

17 **A Correct.**

18 Q -- Mike Walczak?

19 **A Walczak, uh-huh.**

20 Q And what would Mike -- how would that process -- how would

21 that conversation go?

22 **A So she would E-mail him or call him and say we have a FOIA**

23 **Request for X, Y and Z; do you have this material?**

24 **Sometimes they would respond immediately, or they would**

25 **have to get back to her after they've done a search for those**

Page 27

1 **records.**

2 Q Okay.

3 **A And then he would call her back or E-mail her and say, yes,**

4 **we do have responsive records.**

5 Q Okay. And who's job is it to review the video recording?

6 **A From what perspective? There are a lot of people who review**

7 **those, so I'm not sure what you're referring to.**

8 Q In the context of a FOIA Request.

9 **A At the facility, or in Central Office?**

10 Q Start with Central Office.

11 **A Okay. It would not be the FOIA Coordinator; it would not be**

12 **anybody in the FOIA Office to review those videos.**

13 Q Okay. Who would -- would any other person be responsible for

14 reviewing those videos?

15 **A To respond to a FOIA Request?**

16 Q Yes.

17 **A No.**

18 Q Okay. Does MDOC train FOIA Coordinators to review videos, or

19 to not review videos; does the MDOC take a stance on that?

20 **A When we do our training we do, basically, what the policy**

21 **says. These are exemptions that you can take, and these are**

22 **the items, are examples of things that we would exempt or**

23 **redact under this exemption.**

24 **So they are trained that, yes, for when we talk about**

25 **13(1)(c), that videos are those documents that we do not**

Page 28

1 **release under FOIA for safety, custody and security reasons.**

2 Q For the MDOC -- scratch that. Strike that. Sorry.

3 What recordings are listed on the subsequent page to

4 Exhibit R? I'll give you a second to review that, and let me

5 know if you're familiar with that list.

6 **A I am not familiar with that list; I have not seen it before.**

7 Q Okay. Have you seen any similar lists like that before?

8 **A No, I have not.**

9 Q Okay.

10 MR. DE BEAR: Olivia, would it be a problem to

11 mark, as an exhibit, the dep notice that contains the 12

12 subjects? I'm not entirely sure that these are one of the 12

13 that Ms. Groves is supposed to be testifying to; I could be

14 wrong --

15 MS. VIZACHERO: No problem.

16 MR. DE BEAR: -- but I was just wondering if we

17 could mark that.

18 MS. VIZACHERO: We can. Prior to going on the

19 record I talked to the court reporter, and I was going to

20 mark it at the end --

21 MR. DE BEAR: Oh, okay.

22 MS. VIZACHERO: -- of all of them, because we're

23 keeping a running list, but I have an extra if you would

24 like.

25 MR. DE BEAR: Thanks. I do apologize.

Page 29

1 MS. VIZACHERO: Oh, you're fine. You're fine.

2 MR. DE BEAR: I withdraw the objection. It appears

3 that it's responsive to number -- I'm not entirely sure that

4 it actually is responsive. So to the extent that it's

5 inconsistent with the topics that Ms. Groves is testifying

6 to, I'd just object as it's outside the scope of her required

7 testimony.

8 MS. VIZACHERO: Okay.

9 MR. DE BEAR: But she can answer if she knows.

10 MS. VIZACHERO: It's been a while since I asked

11 that question, so --

12 **THE WITNESS: So I'll have to have you repeat it,**

13 **please.**

14 MS. VIZACHERO: Let's refresh. Actually, can read

15 back the question?

16 COURT REPORTER: Yes.

17 MS. VIZACHERO: Thank you.

18 (Requested portion of the record

19 was read by the reporter.)

20 **THE WITNESS: And, no, I haven't seen any similar**

21 **list to this.**

22 Q (BY MS. VIZACHERO) Okay. Would anyone have reviewed any of

23 those videos prior to responding to Mr. Woodman's or

24 Mr. Joseph's request?

25 **A From the FOIA Office, no.**

Page 30

1 Q Okay. Would Mr. Walczak have been required to review that in
2 order to assist Ms. Nelson's request for whether or not
3 videos existed?
4 **A I can't speak to whether he did review them. We would not**
5 **have asked him to review them; we would simply have asked**
6 **him, do they exist.**
7 Q Okay. Who else -- strike that.
8 Prior to responding to Mr. Woodman's request and
9 Mr. Woodman's appeal, and Mr. Joseph's request, to the best
10 of your knowledge, has anyone reviewed any of those videos?
11 **A From the FOIA Office, no. I can only speak to the FOIA**
12 **Office. Many people have reviewed these videos, but not from**
13 **the FOIA Office.**
14 Q Who has reviewed those videos, to the best of your knowledge?
15 **A To the best of my knowledge, and I'm only speculating here**
16 **because I don't know who all has reviewed these, but it's**
17 **common that the Inspector at the facility would have reviewed**
18 **them; the Warden would have reviewed them, the Deputy**
19 **Director would have reviewed them, and possibly the Director.**
20 Q Why would those individuals have reviewed the video?
21 **A Because they're looking at the security aspects of it to make**
22 **sure that our response was appropriate.**
23 Q Why else?
24 **A Because it's a significant event that happened in a facility.**
25 Q Is significant event a Department term?

Page 31

1 **A Yes, it is.**
2 Q Okay. Can you explain that?
3 **A Anything that rises to the level of out of the ordinary, I**
4 **should say. It's something that is going to cause public**
5 **attention; it's something that -- obviously, there was a**
6 **death involved here; that's pretty important. That's a**
7 **significant event.**
8 **I'm not sure how else to qualify it, just something**
9 **that's out of the ordinary, that is of a significant issue.**
10 Q You said these individuals at the facility would review the
11 video to determine if the response is appropriate?
12 **A Correct.**
13 Q Can you explain what you mean by that?
14 **A There are a lot of things that go into events that happen at**
15 **a facility. Our officers are trained to respond in a certain**
16 **manner. Our staff are instructed what is appropriate for**
17 **security, and that's one of the things that we're looking**
18 **for. Our response to a situation like this, our health care**
19 **responded, obviously, to make sure that our responses to**
20 **every step of what happened was appropriate.**
21 Q Okay. How, for FOIA purposes, how are videos saved from a
22 facility?
23 **A I don't know how they save them.**
24 Q Does the Michigan Department of Corrections have a document
25 retention policy for FOIA documents?

Page 32

1 **A Yes, we do.**
2 Q And what is that?
3 **A One year from the date of the last action with that request.**
4 Q And what has to be retained?
5 **A All of the documents: The requests, the appeals, any**
6 **responsive documents that are provided; any E-mails that are**
7 **associated with obtaining those records.**
8 Q So for responsive documents, would videos be considered
9 responsive?
10 **A It's a responsive document, but it's not that we have it in**
11 **our Central Office. We are not retaining that, that's not**
12 **part of our retention, because it's not a document that we**
13 **requested.**
14 Q The retention policy applies to all facilities, correct?
15 **A Correct.**
16 Q So they would also have to maintain --
17 **A Yes.**
18 Q -- these records?
19 **A Yes.**
20 Q Turning to Exhibit Q.
21 MR. DE BEAR: Q is the Reference Manual?
22 MS. VIZACHERO: Yes.
23 Q (BY MS. VIZACHERO) Can we walk through Paragraph 20, What
24 must the response contain?
25 **A Do you want me to read it?**

Page 33

1 Q No, I will ask some questions.
2 **A Okay.**
3 Q Thank you. Are FOIA Coordinators required to respond to
4 every request, every subrequest made in a request?
5 **A Yes.**
6 Q And what is the proper way to do that?
7 **A How Aimee has done it, and how we have instructed them is to**
8 **do what we saw in the request that we reviewed earlier this**
9 **morning, is to number them so that we know that we are**
10 **responding to each part of that request.**
11 Q And what description, if any, has to be put -- can you just
12 say, We deny it?
13 **A No.**
14 MR. DE BEAR: Object to the extent that you're
15 calling for a legal conclusion. You can answer.
16 **THE WITNESS: What we do is if there are certain**
17 **things in there that we're approving and some denying, that's**
18 **why they're numbered, so that we can say, item number one is**
19 **denied; item number two is being provided with exemptions**
20 **taken. So it's outlined that way in the bottom of the**
21 **response.**
22 Q (BY MS. VIZACHERO) Can you just say it's denied, or do you
23 have to include any extra information?
24 **A If you're denying it in whole, all you have to say is,**
25 **Documents are denied in whole based on, and why.**

Page 34

1 Q Okay. So what do you have to put in the why part?

2 **A The reason why you're denying it. So if there's a statutory**

3 **exemption, or just any of the exemptions that are listed on**

4 **the FOIA Statute, that's what we would list. Your request is**

5 **denied based on 13(1)(a), and then give just a little bit of**

6 **an explanation why, because the readers won't know what**

7 **13(1)(a) is.**

8 Q Correct. So you provide some extra reasoning?

9 **A Correct.**

10 Q How much, in the Department's opinion, is enough information

11 to be a proper response?

12 **A Well, we typically will recite the statutory language.**

13 Q Okay.

14 **A And to us, that's appropriate.**

15 Q Okay. What does the Department require in terms of listing

16 all applicable exceptions, or exemptions?

17 **A We're required to do that. Is that what you mean?**

18 Q You're required to --

19 **A To list all of the exemptions that apply to the document that**

20 **we are responding to.**

21 Q Okay. So if three applied, how many should be listed on --

22 **A If three exemptions apply?**

23 Q Yes.

24 **A All three should be listed.**

25 Q Okay. Once something is denied and a person chooses to

Page 35

1 appeal it, appeal the denial, what happens?

2 **A We will receive an appeal, it will be received in by any**

3 **means like we spoke of earlier of how FOIA Requests come in,**

4 **and the FOIA Coordinator would provide them to me, and I**

5 **would log them so we could keep a log of all the requests**

6 **that we received, and I would do the additional research of**

7 **pulling our previous FOIA Request and our response and the**

8 **responsive documents, and review that to make sure we were**

9 **appropriate, and then prepare our response accordingly.**

10 Q Was the information listed on, like, the list of video

11 recordings, that information would have been available to the

12 Central Office if an inquiry had been made at the time that

13 the Central Office responded to Mr. Woodman's appeal?

14 **A Would I have -- would I have reviewed the video, is that what**

15 **you're asking?**

16 Q No.

17 **A Okay.**

18 Q We just looked at a list of responsive videos, correct?

19 **A Right.**

20 Q And on there there's seven videos?

21 **A Uh-huh.**

22 Q And how many are from facility cameras?

23 **A They all should be, in my opinion, but I don't know that.**

24 **Let me look.**

25 **Facility cameras would be one, two; now, a hand-held**

Page 36

1 **camera is a facility -- I'm not sure what you're -- it's**

2 **still a facility video, it's just not mounted.**

3 Q Okay. That's not part of the control system video?

4 **A Right. The Control Center videos would be number one and**

5 **number five. The hand-held camera, like we said, is a**

6 **portable camera.**

7 Q Not a surveillance camera?

8 **A Correct. Correct. And the iPhone cameras are exactly what**

9 **they are. Our Inspectors are allowed to have their iPhones,**

10 **and sometimes the Wardens and Deputies are, depending on if**

11 **approval has been granted for them to have their iPhones into**

12 **the facility, which they could use, obviously they did here,**

13 **to record.**

14 Q Okay. Can you walk me through all of that with the iPhones?

15 **A Okay. And I have to say that I don't -- the Policy has**

16 **changed, and I'm not sure on the specifics of it. At one**

17 **time they were allowed to have their --**

18 MR. DE BEAR: I'm just going to place an objection,

19 and for the sake of not interrupting you continuously, I'll

20 ask that this be continuing.

21 It's my opinion it's outside the scope of the seven

22 items that Ms. Groves is testifying to, and so to the extent

23 that it is outside, because I don't believe that it deals

24 with FOIA policies, it's different policies, so to the extent

25 that it's outside those seven items, I'd object to the line

Page 37

1 of questioning. And to avoid having to repeat that same

2 objection, I'll ask that that be continuing, but you can

3 answer the question.

4 **THE WITNESS: Okay. To the best of my knowledge on**

5 **that, there was a point in time when they were allowed to**

6 **have their phones inside a facility. That policy changed,**

7 **where they were no longer allowed to have their phones inside**

8 **the facility, due to the fact that we were finding so many**

9 **cell phones in prisoner's hand. And I believe that that has**

10 **recently changed again to allow Inspectors to have their**

11 **phones back into the facilities again, but that's without me**

12 **looking at the Policy Directive; I'd have to see the current**

13 **language on there. That's to the best of my recollection.**

14 Q (BY MS. VIZACHERO) If a video is recorded in a facility on

15 an MDOC employee's phone, would that be a responsive document

16 under FOIA?

17 **A It would be a State issued cell phone?**

18 Q Yes.

19 **A Yes, it would.**

20 Q Do you have any idea what's on either of the iPhone videos?

21 **A I do not.**

22 Q On the appeal that we referenced earlier, and I'm handing you

23 Exhibit E, which is Spencer Woodman's first Complaint, and

24 attached to it is the appeal. Both the -- well, let's start

25 with the iPhone videos. You stated that those wouldn't be

Page 38

1 mounted, correct?

2 **A An iPhone is not mounted.**

3 Q That's not part of the facility's cameras?

4 **A That's not part of a facility camera; it's assigned to an**

5 **employee.**

6 Q Would iPhone cameras deal with, and I'm going to go through a

7 list. Would a video taken on an iPhone be considered a

8 blueprint or a map of a facility?

9 **A No.**

10 Q Would it include names of informants?

11 **A If it's used for a video, yes, it could.**

12 Q Did the video in this case have names of informants?

13 **A I don't know that.**

14 Q Did the iPhone videos in this case, were they mobilization

15 scenarios and critiques?

16 **A No.**

17 Q Were they Special Problem Offender Notices?

18 **A No.**

19 Q Movement plans?

20 **A No.**

21 Q Security Threat Group designations and related documentation?

22 **A No.**

23 Q Exempt Policy Directives?

24 **A No.**

25 Q Operating Procedures?

Page 39

1 **A No.**

2 Q Post Orders for security sensitive assignment?

3 **A No.**

4 Q Descriptions of security fencing?

5 **A No.**

6 Q Description of operating of personal protection devices?

7 **A No.**

8 Q Would they disclose the capability of any monitoring device?

9 **A Potentially, yes.**

10 Q How?

11 **A It depends on what they took a video of.**

12 Q Is there --

13 **A I mean, in any of those situations, I mean, you could say yes**

14 **to some degree, from the standpoint of I'm not sure what they**

15 **videod with their hand-held. If they were videoing the**

16 **walls, the cameras, I mean, the beds; I don't know what they**

17 **videod. So in some of those situations, yes, depending on**

18 **how far you take that, it's the potential to have some of**

19 **that information on that recording.**

20 Q But there's a chance that it wouldn't?

21 **A True.**

22 Q Okay. But no one is making that -- no one is reviewing the

23 videos to make that determination?

24 **A Not from the FOIA Office.**

25 MR. DE BEAR: I just want to place an objection,

Page 40

1 and I think she answered, but I was just wondering if you

2 could be a bit more specific as to no one from where in the

3 MDOC is reviewing those videos.

4 Q (BY MS. VIZACHERO) No one from the Central Office, to start;

5 no one responding to the FOIA Request?

6 **A Nobody involved with the FOIA Request has reviewed any of**

7 **those videos at all.**

8 Q To the extent that the listed examples in the Manual for

9 13(c) and 13(u) are the same, would your answers be the same,

10 so movement plans under 13(1)(u)?

11 **A Movement plans, would that have been recorded on an iPhone,**

12 **is that what you're asking?**

13 Q Yeah.

14 **A Movement plans, it possibly could.**

15 Q Okay. Earlier you said that, in response to my earlier

16 question you said that Mr., for Mr. Woodman's case, the

17 videos that were recorded, I asked if those were movement

18 plans; you said no.

19 **A Okay. But what I had clarified, depending on what they**

20 **videod. So if officers came to a situation and moved a**

21 **prisoner from this hallway down to segregation, that's**

22 **showing a movement plan, in my opinion.**

23 Q Are there documents -- are there procedures within the MDOC

24 that would set forth the proper procedures from movement

25 plans?

Page 41

1 **A Yes.**

2 Q Like I could request what is your -- I'll have you explain;

3 you said yes.

4 **A So there are Post Orders in our facilities, which are written**

5 **instructions for each assignment, each officer assignment;**

6 **there are Operating Procedures that guide each facility. So,**

7 **yes, those do outline movement plans of prisoners. When they**

8 **go to lunch, when they go to education, when they go out to**

9 **the yard, all of that stuff is documented in either a Post**

10 **Order, or their Operating Procedures or their movement plan**

11 **of the facility.**

12 Q Okay. What bases does the Department state that 13(1)(a)

13 applies to Mr. Woodman's request, or Mr. Joseph's request?

14 **A I did not take that exemption when I responded, so I cannot**

15 **respond to that.**

16 Q That's the Department's stance, however, at this point?

17 **A The Department applied 13(1)(a), but I can't speak to that**

18 **because I was not involved in that discussion.**

19 Q So is it just fair to say you don't know --

20 **A I do not know.**

21 Q -- what the Department is relying on?

22 **A Correct.**

23 Q What bases there is to support 13(1)(a)?

24 **A Correct.**

25 Q Okay. In responding to an appeal, is it required for any

Page 42

1 documents to be reviewed by a person who hadn't already
2 processed the underlying request? Does the Director have to
3 review any documents?
4 **A In order to sign the FOIA Appeal Response?**
5 Q Yes.
6 **A No.**
7 Q Okay. So what new information would be gathered pertaining
8 to the documents, themselves?
9 **A Any information that is listed in the appeal language like we**
10 **got from Mr. Woodman where he provided some additional**
11 **information.**
12 Q Okay. So no one is taking a second pass at, a first or
13 second pass at the underlying documents? No one is required
14 to make a separate determination from the determination
15 already made?
16 MR. DE BEAR: I'm going to object to the extent
17 that you're seeking a legal conclusion.
18 **THE WITNESS: When I would do a FOIA appeal, I**
19 **would look at the information that was previously provided.**
20 **So in my opinion, that's taking a second look at what was**
21 **originally provided. And then when it would go to the**
22 **Administrator for review, she oftentimes would look at the**
23 **documentation that was collected for the first response.**
24 **Does that answer your question?**
25 Q (BY MS. VIZACHERO) Often, she would oftentimes look at the

Page 43

1 documentation?
2 **A Right.**
3 Q When you say documentation, are you talking about -- define
4 documentation.
5 **A Any records that were provided.**
6 Q Okay. When you say provided, you don't mean disclosed, do
7 you?
8 **A Yes, I do. Anything that was released to the FOIA requester**
9 **through the FOIA process.**
10 Q Okay. It wouldn't be common practice to review documents
11 that had been exempted?
12 MR. DE BEAR: Do you want to -- object just as to
13 vagueness. It wouldn't be common practice by whom?
14 Q (BY MS. VIZACHERO) It wouldn't be common practice for the
15 Director, in reviewing an initial response on appeal, to look
16 at the documents that had been exempt from disclosure that
17 someone was now challenging by way of appeal?
18 **A She could. She could. If she asked for those documents, we**
19 **would provide those to her.**
20 Q It's not required, though, is that correct?
21 **A That is not required.**
22 Q And is it common for that to happen?
23 **A Is it common for her to request to see documents?**
24 Q To request, to see them?
25 **A No, it is not common.**

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1 Q Okay. What percentage of FOIA Requests are received at the
2 Central Office?
3 **A About 80 percent.**
4 Q Do you know how many FOIA Requests, on average, a year
5 request video or audio recordings?
6 **A That, I do not know.**
7 MR. DE BEAR: Do you think we should take a break,
8 or are you almost finished?
9 MS. VIZACHERO: I'm almost done.
10 MR. DE BEAR: Sorry to interrupt you.
11 MS. VIZACHERO: You're fine. I want to go through
12 one more thing.
13 MR. DE BEAR: Okay.
14 Q (BY MS. VIZACHERO) Okay. I am handing you Exhibit B and
15 Exhibit D, which are Policy Directives -- scratch that.
16 I am handing you Exhibit C and Exhibit D, which were the
17 Policy Directives in place.
18 MR. DE BEAR: Exhibit C and Exhibit D?
19 MS. VIZACHERO: Yes.
20 MR. DE BEAR: Okay.
21 Q (BY MS. VIZACHERO) Exhibit C is a Policy Directive on FOIA
22 that was in place when Mr. Woodman made his request, and D is
23 the Policy Directive in place when Mr. Joseph made his
24 request. Turning to -- and I'm providing them to you so you
25 have them in case you want to compare between the two --

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1 **A Okay.**
2 Q -- but I'll work off of C, for the most part.
3 On page four, Paragraph Q says, the FOIA Coordinator
4 shall review the request and determine which records in the
5 Department's possession are responsive to the FOIA Request.
6 How does someone make the determination of responsive?
7 MR. DE BEAR: Just quickly, would you mind
8 clarifying whom you mean by someone?
9 MS. VIZACHERO: A FOIA Coordinator or an Assistant
10 FOIA Coordinator.
11 MR. DE BEAR: At the Central Office or the
12 individual facilities? I'm assuming you mean at Central
13 Office, I just want to be --
14 MS. VIZACHERO: We'll start with Central Office.
15 **THE WITNESS: Okay. How do we determine what is**
16 **responsive?**
17 MS. VIZACHERO: Yes.
18 **THE WITNESS: Okay. Taking a look at the**
19 **information that's provided, so I guess if we were to ask**
20 **somebody to provide us with documentation, we would tell them**
21 **what the request was, and rely on that person to collect**
22 **documents that they believe are responsive to that request,**
23 **so those would go to our Assistant FOIA Coordinator for**
24 **review.**
25 **It's possible we could say, Okay, I think you're missing**

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1 something, or we need something different, because they might
 2 have misunderstood what was being requested. So it's on the
 3 Assistant FOIA Coordinator to look at the documents that are
 4 provided in response to make sure that they are responsive,
 5 accurately responsive.
 6 Q (BY MS. VIZACHERO) Okay. The use of the word shall here --
 7 A Uh-huh.
 8 Q -- does that mean that the FOIA Coordinator must, has to
 9 review the request and make a responsive determination?
 10 MR. DE BEAR: Object to the extent that you're
 11 calling for a legal conclusion.
 12 **THE WITNESS: In our policies we use the word shall**
 13 **in place of must; it basically means you must.**
 14 Q (BY MS. VIZACHERO) Okay. And then in the following
 15 paragraph, that would mean the FOIA Coordinator must review
 16 the documents responsive?
 17 A Correct.
 18 Q Does the MDOC -- you stated earlier that there are no
 19 informal policies, right?
 20 A Correct.
 21 Q So the current Policy Directive is the whole world?
 22 A That is our policy.
 23 Q Okay.
 24 A That is our guide.
 25 Q Is there any portion of this that allows, once a

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1 determination is made in one request, without reviewing the
 2 documents you can just apply, like --
 3 A I'm not sure I understand that question. Is there something
 4 written in this document that says you do not have to review;
 5 is that what you're asking me?
 6 Q Yes.
 7 A No, there is not.
 8 Q Okay. And when it says, Shall review the policy, as you
 9 understand it to mean, is it saying each, on each request,
 10 individually?
 11 A Yes.
 12 Q Okay. Like if you had 20 requests --
 13 A You review the documents for each request.
 14 Q Thank you.
 15 A Yes.
 16 Q Okay. Can you turn to the front page.
 17 A Are you still on the 3/31/16 version?
 18 Q I am.
 19 A Okay.
 20 Q How do you know -- how does the Assistant FOIA Coordinator or
 21 a FOIA Coordinator know if something is exempt?
 22 A According to the list of exemptions that are noted in the
 23 Statute, that we have put in our policy, and that we have in
 24 the documented Handbook from the Attorney General's Office.
 25 Q What do they have to do in order -- so it's kind of like a

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1 matching game, I assume?
 2 A It's all the same information. The exemptions that are
 3 listed in the policy are taken from the Manual; do you know
 4 what I mean? They're taken from the Statute; the Statute
 5 overrides.
 6 The Attorney General's Office put together a Handbook
 7 that has all of the information in there; our policy is built
 8 off of what's in that information. Does that make sense?
 9 Q Yes.
 10 A Okay.
 11 Q In order -- so we just determined you need to do, per the
 12 policy, a case-by-case review of documents?
 13 A For each request that comes in.
 14 Q For each request?
 15 A Yes.
 16 Q In a typical FOIA Request, do you make the determination that
 17 something is exempt after you review it?
 18 A Yes.
 19 Q Okay. And then I just want to touch on --
 20 MS. VIZACHERO: Can you mark that.
 21 (Deposition Exhibit S marked for identification.)
 22 Q (BY MS. VIZACHERO) This is Mr. Joseph's Verified FOIA
 23 Complaints, and I am just going to direct, Ms. Groves, your
 24 attention to Exhibits A and B at the back. And I know you
 25 said that you did not review this --

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1 A I did not.
 2 Q -- prior to coming here today? Have you ever seen this
 3 before?
 4 A I have not. I was not in that position at this time.
 5 Q Okay. Based on your prior experience, would it be -- I'll
 6 rephrase that.
 7 For this request, only Section 13(1)(c) is cited for
 8 Reason to Deny?
 9 A Yes, it is.
 10 Q And you stated that it's the policy, MDOC policy for FOIA
 11 Coordinators to provide all applicable exemptions?
 12 A Correct.
 13 Q And the only one cited on here is C?
 14 A Yes, it.
 15 Q Okay. I will ask you the same question with reference to
 16 Mr. Woodman's request, as well.
 17 A Okay.
 18 Q Do you recall what exemptions were listed on that original
 19 response?
 20 A 13(1)(c).
 21 Q Okay. No other ones?
 22 A No.
 23 Q Okay. In your capacity as representative for the MDOC, did
 24 anyone review the video prior to denying Mr., any of the
 25 seven videos, prior to denying Mr. Joseph's request?

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1 MR. DE BEAR: Can you rephrase. By him, do you
2 mean by anybody, in particular, differentiating between the
3 Central Facilities and the Ionia Bellamy Creek Facility?
4 Q (BY MS. VIZACHERO) Anybody within the Central Facility,
5 since they're the one responding to --
6 **A And I don't know that, because I wasn't in that office.**
7 Q But they wouldn't have been required to, is that your
8 understanding?
9 **A Would the Manager have been required to review the video**
10 **before responding?**
11 Q Yes.
12 **A No.**
13 Q Okay. I might just have one last thing.
14 (Deposition Exhibit T marked for identification.)
15 Q (BY MS. VIZACHERO) I want to hand you, Ms. Groves, a
16 document titled, MDOC's Responses to Mr. Joseph's Request for
17 Production of Documents.
18 **A Okay.**
19 Q And I want to point your attention to the very end, which is
20 documents provided in response to that, and referencing,
21 start at Bates stamp SOM 002524.
22 **A Okay.**
23 Q And this is the same request we were just looking at, is that
24 correct?
25 **A Yes.**

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1 Q Okay. And this next page, can you tell me what that is?
2 **A It's a FOIA Request addressed to MDOC-OLAFOIA, which appears**
3 **to be a new mailbox that they've set up since I have been**
4 **there.**
5 Q You're not familiar with that --
6 **A I am not.**
7 Q -- while you were there?
8 **A No, we did not have that.**
9 Q Okay. People only received FOIA Requests via -- people
10 within the Central Facility only received FOIA Requests
11 within their individual MDOC E-mail addresses --
12 **A Correct.**
13 Q -- if it was being received by E-mail?
14 **A Correct.**
15 Q Okay. And this is, is it fair to say, just Mr. Joseph's
16 initial request with some notes on it? Would those be MDOC
17 FOIA unit notes that are on --
18 **A Yes. This would be the prisoner number.**
19 Q Okay.
20 **A This would be our FOIA number at the top. I'm not sure what**
21 **the plus 16 means.**
22 Q And do you see the note down at the bottom, 13(1)(c)?
23 **A Correct.**
24 Q Okay. Do you recognize whose handwriting this is?
25 **A I do not.**

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1 Q Okay. On the next page, can you describe to me what you see?
2 **A An E-mail between Brianna Newton, who works in the FOIA**
3 **Section with Mike Walczak, who works at the Bellamy Creek**
4 **Correctional Facility.**
5 Q And underneath the initial E-mail, did she -- did Brianna
6 Newton send an E-mail contacting Mike Walczak, as you
7 explained is typically done?
8 **A Yes, that is correct.**
9 Q Okay. So the time stamp on the E-mail from Brianna Newton to
10 Mike Walczak is 8:25, or 8:27 a.m.?
11 **A 8:29 a.m.**
12 Q The one underneath.
13 **A Oh, I'm sorry.**
14 Q No, you're fine.
15 **A 8:27 a.m., yes, from Brianna to Mike Walczak is 8:27 a.m.**
16 Q Perfect. On June 29, '17?
17 **A Correct.**
18 Q Okay. And when was Mr. Joseph's request received by the
19 Michigan Department of Corrections?
20 **A Was received on June 29, 2017.**
21 Q Okay. So the first thing in the morning she sends an E-mail
22 right after this comes in --
23 **A Uh-huh.**
24 Q -- essentially? Is that a fair representation?
25 **A I would assume so.**

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1 Q Okay. The E-mail reads, Can you please tell me if the
2 following request exists. This is Brianna E-mailing Mike
3 Walczak. Footage of the September 27, 2016 confrontation
4 that led to the death of inmate Dustin Szot, and then has his
5 prisoner number?
6 **A Uh-huh.**
7 Q O-M-N-I, OMNI, states his last location was IBC. I
8 understand that the footage is exempt, but I need to know
9 whether or not it exists in order to properly respond to the
10 requester. Thank you.
11 **A Okay.**
12 Q What information would Brianna Newton have had at her
13 disposal, at this point, to make the exemption determination?
14 **A Because she knows I'm -- obviously, she's been trained and**
15 **she knows we do not release video footage. And she's looking**
16 **to see if there was video footage because that makes a**
17 **difference in how you respond; either the document does not**
18 **exist, or it's exempt. So if it doesn't exist, then she**
19 **would say that in the response, as opposed to your document**
20 **exists, but it's not being released --**
21 Q Okay.
22 **A -- under FOIA.**
23 Q Okay. And, again, she didn't have to -- she hadn't seen them
24 based on her E-mail, because she doesn't even know if they
25 exist yet, right?

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1 **A Correct.**

2 Q So she hasn't seen anything?

3 **A Correct.**

4 Q But she knows it's exempt?

5 **A Correct, if it exists.**

6 Q If it exists?

7 **A Correct.**

8 Q And he says it does?

9 **A Right.**

10 Q Is that correct?

11 **A Yes.**

12 MS. VIZACHERO: Okay. Give me one second, but I

13 might be all set.

14 MR. DE BEAR: Okay.

15 (Off the record discussion.)

16 Q (BY MS. VIZACHERO) Were there any other authorities that

17 bind determinations for FOIA, how to process and respond to

18 FOIA Requests outside of the Policy Directive, Attorney

19 General opinions, for instance?

20 **A Statute.**

21 Q Statute? What about case opinions, like legal cases from,

22 like, the Michigan Supreme Court?

23 MR. DE BEAR: Object to the extent that you're

24 calling for a legal conclusion.

25 **THE WITNESS: And I don't know how to answer that.**

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1 **Are you -- I'm not sure what you're asking.**

2 Q (BY MS. VIZACHERO) So the FOIA guide --

3 **A Uh-huh.**

4 Q -- that's used as a reference?

5 **A Uh-huh.**

6 Q Cites two cases that have been decided on whether an

7 exemption was proper or not proper. Are those decisions, do

8 they control FOIA determinations at the Central Office?

9 **A Ultimately, no. It gets you information reference to how**

10 **that has been used in the past, or been accepted in the past,**

11 **but you still have to look at each case on a case-by-case**

12 **basis.**

13 Q Okay. This is going to be my last area of inquiry. How are

14 people trained in terms of balancing disclosure versus

15 nondisclosure, because it's discretionary, correct?

16 **A Uh-huh.**

17 Q How does MDOC train people to exercise their discretion in

18 conformity with the FOIA Statute?

19 MR. DE BEAR: I object to the extent that you're

20 asking for a legal conclusion.

21 **THE WITNESS: They are trained in alignment with**

22 **our policy, from what we have gathered over the 100 years**

23 **that Corrections has been around, what we know to believe is**

24 **something that we need to keep undisclosed, or to keep**

25 **disclosed, if that makes sense.**

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1 **So incidents that happen over the years, things that**

2 **have happened to the Department of Corrections, or things**

3 **that we've been involved in help guide our decision, such as**

4 **in this case, to not release video footage. Does that answer**

5 **your question?**

6 Q Kind of. Is there, like, a test that you train people,

7 that's part of your training that you say, you look at this

8 and you list all of the -- you look at a request and you say,

9 should I or shouldn't I release; it's up to me, I have

10 discretion. I can choose to release it, even if it falls

11 within an exemption, or I can choose not to?

12 **A Right. The discretion is there, but if they are unsure, we**

13 **encourage them to call us to help them make that decision.**

14 Q Are you -- when you say they, are you referencing --

15 **A FOIA Coordinators that are outside of Central Office.**

16 Q Okay. How about people within Central Office making, using

17 their discretion?

18 **A So if I was unsure, I would go to my Administrator, who was**

19 **an attorney, and if we had any question, therefore, we would**

20 **contact Tom Quasarano in the Attorney General's office.**

21 Q Is the discretion just a go with your gut thing, though? I

22 guess that's what I'm trying to get at.

23 MR. DE BEAR: Object to the extent that it calls

24 for a legal conclusion.

25 **THE WITNESS: I don't know how to answer that. I**

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1 **guess because I've been around Corrections so long, I know**

2 **what kind of things are sensitive, what kinds of things we**

3 **need to protect from a custody and security standpoint. So I**

4 **don't know -- I don't know how else to answer your question.**

5 Q (BY MS. VIZACHERO) Okay. There's no formal balancing test

6 that check off --

7 **A No --**

8 Q -- pros and cons?

9 **A -- there's not. There's not.**

10 Q Okay. And no guide that's published through the Department

11 that says you have to review, and then determine what's in

12 the public's best interest?

13 **A Well, we -- the only -- they can review the documents that we**

14 **have available for them as a guide: The policy, the**

15 **Reference Manual, the Attorney General's Guide. They should**

16 **be using that information to guide their decision.**

17 Q But nothing that specifically references use of discretion?

18 **A No, not that I'm aware of.**

19 MS. VIZACHERO: I'm all set.

20 MR. DE BEAR: Thanks.

21 (Whereupon, Deposition concluded at 2:39 p.m.)

22

23

24

25

EXHIBIT I

1 STATE OF MICHIGAN
2 IN THE COURT OF CLAIMS

3 SPENCER WOODMAN,

4 Plaintiff,

5 -vs-

Case No. 17-000082
Hon. Cynthia D. Stephens

6 MICHIGAN DEPARTMENT OF CORRECTIONS,

7 Defendant.
8 _____/

9 DEPOSITION OF CORPORATE REPRESENTATIVE FOR

10 MICHIGAN DEPARTMENT OF CORRECTIONS

11 CHRISTINE WAKEFIELD

12 Taken by the Plaintiff on Thursday, the 30th day of
13 November, 2017 at the office of Michigan Department of
14 Attorney General, 525 West Ottawa Street, Lansing, Michigan
15 at 3:00 p.m.

16
17 APPEARANCES:

18 For the Plaintiff: OLIVIA K. VIZACHERO (P81699)
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Page 2

1 For the Defendant: ADAM R. DE BEAR (P80242)
 2 ERIC M. JAMISON (P75721)
 3 Michigan Department of Attorney General
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 11 Reported By: Heidi A. Cook, CSR 4827
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Page 4

1 Thursday, November 30, 2017
 2 Lansing, Michigan
 3 3:00 p.m.
 4 * * *
 5 CORPORATE REPRESENTATIVE FOR
 6 MICHIGAN DEPARTMENT OF CORRECTIONS
 7 CHRISTINE WAKEFIELD,
 8 having been first duly sworn, testified as follows:
 9 EXAMINATION
 10 BY MS. VIZACHERO:
 11 Q Good afternoon. How are you today?
 12 A I am fine. How are you.
 13 Q Wonderful. Thank you. Would you please state your first and
 14 last name for the record, and spell your last name?
 15 A Christine, with a C-h-r-i-s-t-i-n-e, and Wakefield,
 16 W-a-k-e-f-i-e-l-d.
 17 Q And your current title and name of employer?
 18 A My current title is Inspector, and my employer is the
 19 Michigan Department of Corrections, Bellamy Creek
 20 Correctional Facility.
 21 Q Inspector Wakefield, if I refer to MDOC instead of saying
 22 Michigan Department of Corrections, you know what I'm talking
 23 about, right?
 24 A (Witness nodding head.)
 25 MR. DE BEAR: You want to verbalize your answers.

Page 3

1 EXAMINATION INDEX
 2 -----
 3 ATTORNEY'S NAME EXAMINATION RE-EXAMINATION
 4 -----
 5
 6 BY MS. VIZACHERO: 4
 7
 8 * * *
 9
 10 EXHIBIT INDEX
 11 -----
 12 EXHIBIT MARKED IDENTIFIED
 13 -----
 14 There were no exhibits marked.
 15
 16 * * *
 17
 18
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Page 5

1 THE WITNESS: Yes.
 2 MS. VIZACHERO: I'm going to get to that in two
 3 seconds.
 4 THE WITNESS: Yes, I know what you mean.
 5 Q (BY MS. VIZACHERO) Okay. As I explained before we went on
 6 the record, my name is Olivia Vizachero. I am representing
 7 Spencer Woodman and George Joseph in relation to their FOIA
 8 Request that they submitted to the Michigan Department of
 9 Corrections, which were denied, and have now been filed as
 10 FOIA Complaints.
 11 You're being deposed today in connection with that, and
 12 you've been designated by the Michigan Department of
 13 Corrections, you understand, to respond to two items,
 14 specifically. Did you have an opportunity to look at the
 15 Notice of Deposition?
 16 A Yes.
 17 Q Okay.
 18 A Yeah.
 19 Q So you understand the scope of the items that you're
 20 testifying on behalf of the Michigan Department of
 21 Corrections, for all video recordings that are responsive to
 22 Mr. Woodman's FOIA Request, and all cameras that captured
 23 video and audio footage that's responsive to Mr. Woodman's
 24 FOIA Request?
 25 A Yes.

Page 22

1 **A Is a room typically surveilled by more than one --**
 2 MR. DE BEAR: I'm going to go ahead, and I'm not
 3 sure that the Inspector knows, but again, I'll place an
 4 objection on the record. The MDOC objects to the extent that
 5 you're seeking answers as to camera placements, locations of
 6 those cameras.
 7 **THE WITNESS: I don't know if there's -- yeah, I do**
 8 **not know.**
 9 Q (BY MS. VIZACHERO) Okay. Are cameras visible to
 10 incarcerated persons within the facility?
 11 **A Yes.**
 12 Q Do the persons incarcerated within Bellamy Creek know they're
 13 being video recorded?
 14 **A Absolutely.**
 15 Q Do the MDOC employees know they're being recorded?
 16 **A Absolutely.**
 17 Q I'm going to try and phrase this in a way that it's vague
 18 enough, because I understand Mr. De Bear's objection,
 19 although I'm not conceding to it, but I understand the point
 20 he's trying to make, and I want to try and hit it down the
 21 middle.
 22 So as part of -- can you explain to me -- we'll start
 23 with the one in this case, and we'll go from there. That
 24 makes more sense.
 25 Have you seen a list of all responsive video requests to

Page 23

1 Mr. Woodman's FOIA Request?
 2 **A I can't say that I have. I'm not exactly sure what you mean**
 3 **by that.**
 4 Q Have you seen Mr. Woodman's FOIA Request?
 5 **A Is that it right there?**
 6 Q I'm going to grab it for you.
 7 **A Okay.**
 8 Q It's not this one. I am handing you what has been marked as
 9 Exhibit E, which is Mr. Woodman's Complaint, and in it is his
 10 FOIA Request and the MDOC's Response, just so you have an
 11 idea --
 12 **A I have not seen that.**
 13 Q Okay.
 14 **A To my knowledge, I have not seen that.**
 15 Q Okay. In it he requests a digital copy of video footage of
 16 the confrontation that led to the fatality of inmate Dustin
 17 Szot on September 27, 2016 at the Muskegon Correctional
 18 Facility?
 19 **A At what facility?**
 20 Q And I was just going to ask you. You know that to not be the
 21 correct facility; you know it to be Bellamy Creek is the
 22 proper one?
 23 **A Yes.**
 24 Q That's a misstatement in the document?
 25 **A Right.**

Page 24

1 Q Do you know who pulled video footage --
 2 **A I do not.**
 3 Q -- in response? Does your FOIA Coordinator at Bellamy
 4 typically do that, or would someone underneath?
 5 **A I have no idea.**
 6 Q When a serious incident occurs, who's responsible for pulling
 7 video footage?
 8 **A I don't believe there's -- I don't believe there's any one**
 9 **person.**
 10 Q Okay.
 11 **A And if there is one person, I'm not exactly sure who that is.**
 12 Q Would it be -- do you ever do that in the course of an
 13 investigation?
 14 **A Pull video evidence?**
 15 Q Yes.
 16 **A Yes.**
 17 Q And review it and save it, right?
 18 **A Absolutely. It's part of my job.**
 19 Q All right. Did you do that in this case?
 20 **A I can't affirmatively tell you I did.**
 21 Q Okay. You know that it was done, is that fair?
 22 **A Oh, absolutely. Yes.**
 23 Q Because you've seen it?
 24 **A Yes.**
 25 Q Okay.

Page 25

1 **A Yes. And I apologize, it's been so long.**
 2 Q Do you have anyone that works under your supervision that
 3 would be responsible for doing that?
 4 **A No, I do not.**
 5 Q Okay. Is it something that Doug Welton might also do?
 6 **A No.**
 7 Q Okay. Do you know, off the top of your head, the videos that
 8 recorded information responsive to that request, the
 9 confrontation and ultimate death of Dustin Szot?
 10 **A I don't understand the question.**
 11 Q Okay. Mr. Woodman requested videos and then separately audio
 12 recordings of any recording from within Bellamy Creek
 13 involving the confrontation that led to the death of Dustin
 14 Szot?
 15 **A (Witness nodding head.)**
 16 Q Do you, off the top of your head, know how many videos were
 17 recorded that respond to that?
 18 **A I do not.**
 19 Q If I showed you a list, would that help refresh your
 20 recollection?
 21 **A Yeah, it could.**
 22 Q I am handing you what has been marked by our lovely court
 23 reporter as Exhibit R, and I'm turning your attention to the
 24 back page. Exhibit R is the Michigan Department of
 25 Corrections' Response To Plaintiff's Document Request.

Page 26

1 A So what is it that you -- so are you asking -- what is it
2 that you're asking me about these?
3 Q Does that represent a full list of the videos that you have
4 reviewed?
5 A To the best of my recollection, yes.
6 Q Okay. Do you know of any other videos outside of that list
7 that exist?
8 A No, I do not.
9 Q Okay. You believe that's an exhaustive list, to the best of
10 your knowledge?
11 A Yes.
12 Q Okay.
13 A Yes, to the best of my knowledge.
14 Q Can you read the first one for the record?
15 A Video description depicts MDOC officers responding to the
16 confrontation that led to the death of inmate Dustin Szot.
17 And then it says, Recording device, facility camera.
18 Q What's a facility camera?
19 A What is a facility camera?
20 Q Yes.
21 A I believe this, the way they're depicting this, it would be
22 our fixed cameras within the facility.
23 Q Is that what you understand to be the surveillance system?
24 A Yes.
25 Q Okay. All right. What's the second one?

Page 27

1 A The second one, it depicts the confrontation that led to the
2 death of inmate Dustin Szot, and recording device would be
3 electronic controlled device, in parentheses, ECD camera.
4 Q Do you know what that means?
5 A Yes, I do.
6 Q Can you tell me?
7 A It would be -- a better name for it would be a taser; the
8 public would know it as taser.
9 Q Okay. And Corrections Officers have tasers on their duty
10 belt, correct?
11 A Yes, they do.
12 Q And they're not walking around with it recording at all
13 times, are they? Does it have to be deployed in order for it
14 to record?
15 A Yes.
16 MS. VIZACHERO: Can we go off the record for a
17 second.
18 (Off the record discussion.)
19 MS. VIZACHERO: Okay. We'll go back on the record.
20 Q (BY MS. VIZACHERO) So video number two was recorded by a
21 taser?
22 A Yes, according to this list.
23 Q Okay. And what's video number three?
24 A The exact same thing as number two.
25 Q Would that have been from a separate device?

Page 28

1 A Yes, I do believe so. To the best of my recollection it was.
2 Q Okay. And what's the fourth one?
3 A The fourth one is a third, exact, Depicts the confrontation
4 that led to the death of inmate Dustin Szot and, again, an
5 Electronic Control Device, ECD camera.
6 Q And number five?
7 A Number five, Depicts the confrontation that led to the death
8 of Dustin Szot. MDOC officers responding to that
9 confrontation, and the attempted resuscitation of inmate
10 Dustin Szot, and recording device is facility camera.
11 Q And number six?
12 A Depicts the attempted resuscitation of inmate Dustin Szot;
13 recording device, hand-held camera.
14 Q And number seven?
15 A Depicts the attempted resuscitation of inmate Dustin Szot;
16 iPhone camera.
17 Q Is there an eighth on the list?
18 A Yes, and that's the exact same thing.
19 Q Okay.
20 A Which is the iPhone camera.
21 Q And you would take that to mean two different iPhone camera
22 videos?
23 A If I had to guess, that's what I would take that to mean.
24 Q Do you know if two separate iPhones were used, or if that
25 came from the same one?

Page 29

1 A I'm not -- I'm not positively sure on that.
2 Q How do you define surveillance system; what do you take that
3 to mean?
4 A How do I define surveillance system?
5 Q Like the facility's surveillance system.
6 A A body of cameras that overlooks our entire facility.
7 Q Okay. Would those be cameras that are recording every day?
8 A Yes.
9 Q Right?
10 A Yes.
11 Q Okay. So fixed cameras, is that --
12 A They're stationary cameras.
13 Q Okay.
14 A I don't know that fixed is the right word.
15 Q Stationary works for me.
16 A Okay.
17 Q Do you consider videos from tasers part of the facility's
18 surveillance system?
19 A Yes.
20 Q What about a hand-held camera?
21 A You're asking if the hand-held -- would I consider the
22 hand-held camera part of the facility's surveillance?
23 Q Yes.
24 A Yes, I would.
25 Q And what about an iPhone camera?

Page 30

1 **A Yes.**

2 Q Are iPhone camera videos reviewed in the Control Center?

3 **A No, they're not.**

4 Q How about videos recorded on a taser, that doesn't feed

5 into --

6 **A Right, no, it does not feed into the Control Center.**

7 Q Nor does a hand-held camera?

8 **A Like, feed into --**

9 Q The fixed stationary cameras, someone is in the Control

10 Center --

11 **A Yeah.**

12 Q -- I'm assuming, all hours of the day --

13 **A (Witness nodding head.)**

14 Q -- watching cameras?

15 **A Right.**

16 Q Right?

17 **A Yes.**

18 Q Okay. Those feeds show up on a screen?

19 **A Okay.**

20 Q Right, do you know what I'm saying?

21 **A Yes, I gotcha. So your question was, do the hand-helds feed**

22 **into the Control Center, and that would be no.**

23 Q Okay. What are, as you understand it, the purposes of having

24 video footage from those three items: iPhones, hand-held

25 camera, taser video; why would the Correctional Facility want

Page 31

1 those videos?

2 **A Why would we want the -- besides -- ask me the question**

3 **again.**

4 Q Why would the Facility want to have those recordings made?

5 **A For our own safety.**

6 Q How does that relate to your safety, if it's -- so the

7 recordings are being done in real time, right?

8 **A Uh-huh.**

9 Q No one is monitoring them while the recording is being made,

10 correct?

11 **A Uh-huh, uh-huh.**

12 Q So --

13 **A And you're talking about -- you're talking about the other --**

14 Q Hand-helds, iPhones --

15 **A All right.**

16 Q -- and the ECD.

17 **A Uh-huh.**

18 Q So those three. No one is watching people up to trouble on

19 those?

20 **A Right.**

21 Q Trouble happens, and then those get turned on?

22 **A Yes.**

23 Q Is that a fair way to say it?

24 **A Yes.**

25 Q I like it. So there's no -- you're only reviewing those

Page 32

1 videos after something happens?

2 **A That is correct.**

3 Q Okay. So reviewing -- those videos aren't done to prevent --

4 those videos aren't made to prevent an altercation from

5 happening, or to respond to an altercation?

6 **A For the most part, yes.**

7 Q Okay. Are there people present in any of the one through

8 eight, the videos that were made, one through eight, aside

9 from Mr. Szot?

10 **A Yes.**

11 Q Okay. In all videos?

12 **A To the best of my knowledge, yes.**

13 Q Okay. In all videos, both, other prisoners and employees?

14 **A Ask me -- ask that again.**

15 Q In all videos, were there -- was there a combination of both

16 MDOC employees and other incarcerated persons, other

17 prisoners?

18 **A Yes, if you include Mr. Szot.**

19 Q Not including Mr. Szot?

20 **A Then staff, yes.**

21 Q Okay. But not in every video was there other prisoners?

22 **A To the best of my knowledge --**

23 Q We can go through them one-by-one.

24 **A Okay.**

25 Q The first one, facility camera?

Page 33

1 **A So to make it easy, I mean, besides probably six, seven and**

2 **eight -- one through five, you're going to have both staff**

3 **and prisoners, and I mean plural. And then six, seven and**

4 **eight, you're going to have to staff, many staff, and**

5 **probably just Dustin Szot.**

6 Q Okay. Which of the recordings, one through eight, have

7 sound?

8 **A Okay. I would say two, three, four, six, seven, eight.**

9 Q Are MDOC employees allowed to have their iPhones with them in

10 the facility?

11 **A There are select people that can have an iPhone.**

12 Q Did this phone come from a person who was authorized to have

13 an iPhone?

14 **A Yes.**

15 Q Okay. Can you identify that person for me?

16 MR. DE BEAR: I'm going to object to the extent

17 that you're asking for names involved of the MDOC

18 Correctional Officers, and I'll instruct my witness not to

19 answer.

20 Q (BY MS. VIZACHERO) Are you going to answer, or listen to

21 advice of your counsel?

22 **A I'm going to listen to my counsel.**

23 Q Okay. Going from there, is there a way to -- okay. So

24 there's no sound on facility cameras?

25 **A No.**

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1 **videos would show that, movement plans.**
 2 Q Would show or are movement plans?
 3 **A I would say they are movement plans.**
 4 Q All of the videos?
 5 **A With the exception of six, seven and eight; to the best of my**
 6 **knowledge, I believe one through five would show movement**
 7 **plans.**
 8 Q Okay. Would someone need to review the videos in order to
 9 make that determination?
 10 **A I don't understand, like, where you're coming from.**
 11 Q What if the taser video didn't capture anything?
 12 **A Okay.**
 13 Q Right? What if, for whatever reason, it didn't capture any
 14 physical person; you'd have to know whether -- you'd have to
 15 review the video to know whether or not it captured movement,
 16 right?
 17 **A Yes.**
 18 Q Right?
 19 **A Yes.**
 20 Q All right. Videos one through eight, Security Threat Group
 21 designations and related documentation, do they constitute
 22 any of that?
 23 **A They don't capture Security Threat Group information.**
 24 Q Okay.
 25 **A No.**

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1 Q Exempt Policy Directives and Operating Procedures?
 2 **A They do capture Operating Procedures that are exempt.**
 3 Q The exempt policy, or Policy Directives and Procedures, are
 4 those paper documents?
 5 **A Yes.**
 6 Q Okay. So if I wanted to get my hands on those through FOIA,
 7 it's not going to happen?
 8 **A To the best of my knowledge, no.**
 9 Q They're exempt?
 10 **A They're exempt.**
 11 Q I don't get it?
 12 **A Right.**
 13 Q Okay. Is your point that saying -- I don't want to put words
 14 in your mouth. Policies and procedures are tangible paper
 15 documents, right?
 16 **A Yes, yes.**
 17 Q Okay. And videos aren't those, the tangible paper documents;
 18 they're not recording -- it's not video footage of the paper
 19 documents?
 20 **A It's a depiction of the paper document.**
 21 Q And --
 22 **A Is that the right word, depiction of the -- yeah. It shows**
 23 **our processes.**
 24 Q But it's not the tangible documents, themselves, if someone
 25 took that to mean the documents?

Page 48

1 **A Right.**
 2 Q Okay. Post Orders and security sensitive assignment?
 3 **A And I would say the same thing about that.**
 4 Q What is a sallyport?
 5 **A The sallyport is one of a couple entryways into the prison.**
 6 **So have you ever seen on TV where a vehicle will drive into a**
 7 **fence, and then you'll have a guy walk underneath the**
 8 **vehicle, looking?**
 9 Q Oh, okay.
 10 **A Looking up, like, underneath.**
 11 Q Okay.
 12 **A That's a sallyport.**
 13 Q Got it. What is a Post Order?
 14 **A The best way to describe a Post Order would be, it's the**
 15 **instructions on how to do your job, of the job that you are**
 16 **assigned.**
 17 MR. DE BEAR: I hate to do this, but I'd like to
 18 ask to take a quick break. There's something I have to check
 19 into.
 20 MS. VIZACHERO: That's fine.
 21 MR. DE BEAR: Can we go off the record?
 22 MS. VIZACHERO: Yeah.
 23 (Off the record discussion.)
 24 (Whereupon, Mr. Jamison entering deposition.)
 25 MS. VIZACHERO: Back on the record. Do you want to

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1 put a statement of the record?
 2 MR. JAMISON: Yes.
 3 MS. VIZACHERO: Okay.
 4 MR. JAMISON: Eric Jamison, appearing on behalf of
 5 the Department of Corrections.
 6 MS. VIZACHERO: Thank you.
 7 Q (BY MS. VIZACHERO) Inspector, can you define, tell me what a
 8 monitoring device is?
 9 A Can I tell you what a monitoring device is?
 10 Q Yes.
 11 A I would say it could be a lot of different things.
 12 Q Okay. In the context of videos recorded within the Michigan
 13 Department of Corrections --
 14 A Okay.
 15 Q -- Bellamy Creek Facility?
 16 A A monitoring device that could be used within prison would be
 17 our phone system, JPay.
 18 Q Okay. What about with videos?
 19 A Fixed video, the tasers, you know, record number one through
 20 eight, everything in that, basically; a hand-held camera, I
 21 mean, it's a device we could use, potentially, within prison
 22 to monitor.
 23 Q So we talked about this earlier, and you described a
 24 difference between videos that go to the Control Center
 25 versus videos that don't?

Page 50

1 A Right.

2 Q Is someone monitoring the videos in the Control Center?

3 A Well, the facility cameras, yes.

4 Q Yes.

5 A Yes.

6 Q Is someone monitoring, in the Control Center, two, three --

7 what was it. Two, three, five, seven, eight, I believe,

8 those videos? Those aren't streaming, right, in the Control

9 Center, we discussed that?

10 A No. Two, three, four, six, seven and eight are not

11 streaming.

12 Q Okay. So someone is not monitoring them while the recording

13 is taking place?

14 A Correct.

15 Q Okay. Just a few minor last things. You mentioned earlier

16 that a few of the items, one through eight, could constitute

17 movement plans. Do you remember that?

18 A Yes.

19 Q Okay. If the audio from all of the recordings that don't

20 include the facility videos, because you informed me that

21 those don't have audio --

22 A The facility cameras, yep. I mean, yes.

23 Q So just the taser recordings, the iPhone recordings, and the

24 hand-held camera --

25 A Have audio.

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1 Q -- have audio. Would just the audio recordings constitute

2 movement plans?

3 A If you took away the pictures?

4 Q Yeah.

5 A Would audio recordings -- yes, they could. I'll leave it at

6 that.

7 Q They could also not?

8 A No, I was going to elaborate, but then I decided not to.

9 Q Do the audio recordings here constitute movement plans?

10 A Yes, they do. The audio recordings that are within the two,

11 three and four could constitute how we move, yes, our

12 movement plans.

13 Q You're saying could?

14 A Yeah. No, they do, they constitute -- so when, like in the

15 event of an incident, we have, you know, protocols, and those

16 protocols are heard on the ECDs, you know, how we move.

17 Q What constitutes a personal protection device?

18 A What constitutes a personal protection device?

19 Q Yes.

20 A I'm not sure that I'm understanding your question, like, a

21 personal protection device?

22 MR. JAMISON: If you can't answer, you can't

23 answer.

24 THE WITNESS: I'm not sure -- I don't understand

25 exactly what you're asking me.

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1 Q (BY MS. VIZACHERO) Okay. Do you know of any instrument

2 used, or possessed by MDOC personnel that's considered a

3 personal protection device?

4 A Okay. I'm thinking personal protection. So I think what

5 you're referring to -- I believe what you're referring to is,

6 like, a PAL, a Personal Alarm Locator, and I would --

7 MR. JAMISON: I'll just say this on the record.

8 You don't have to try to guess what she's asking.

9 THE WITNESS: Okay.

10 MR. JAMISON: If you don't understand what she's

11 asking, just tell her you don't understand and she can

12 rephrase the question.

13 THE WITNESS: Okay. Yeah, I'm not sure that I'm

14 completely understanding you.

15 Q (BY MS. VIZACHERO) Okay. Have any of the videos, one

16 through eight, been determined to be confidential by a

17 Hearing Officer?

18 A I have no idea.

19 Q Conducted at a hearing pursuant to 791.252?

20 A Yeah, I'm not familiar.

21 Q Okay. Would any of the audio or video recordings one through

22 eight constitute passwords?

23 A Would they need a password?

24 Q Nope, are the videos passwords?

25 A No.

Page 53

1 Q Perfect. Are they passes?

2 A Are they passes?

3 Q Yeah. Do you have passes within Bellamy Creek, or keys? You

4 said you have control over the key and tool room?

5 A Uh-huh. Are the -- I'm not understanding you. I am so

6 sorry.

7 Q I have a whole long list of things that trigger not being

8 able to release video under certain exemptions, and I'm just

9 trying to cross off the ones that totally don't apply. So if

10 you think I sound crazy, it's because it's completely

11 opposite from videos, so you don't have to try and make sense

12 of it.

13 A Okay.

14 Q You can be like, No, clearly videos aren't keys. Perfect.

15 A No, videos are not keys.

16 Q Great.

17 A Sorry.

18 Q Not passes?

19 A They're not passes.

20 Q Not passwords, we discussed that?

21 A Right.

22 Q Okay. Codes and combinations?

23 A No, they are not, specifically, codes and combinations.

24 Q Perfect. I like it.

25 A Okay.

EXHIBIT J

MICHIGAN DEPARTMENT OF CORRECTIONS POLICY DIRECTIVE	EFFECTIVE DATE 03/31/2016	NUMBER 01.06.110
	SUBJECT FREEDOM OF INFORMATION ACT - ACCESS TO DEPARTMENT PUBLIC RECORDS	
SUPERSEDES 01.06.110 (07/01/2015)		AUTHORITY 442 PA 1976, MCL 15.231 et seq., MCL 4.359, 28.730, 423.504, 762.14, 771.14, 780.623, 791.229, 791.230a; Administrative Rule 28.5208, Booth v MDOC, Court of Claims, No. 324319, June 9, 2015
PAGE 1 OF 8		

POLICY STATEMENT:

All written requests for public records in the Department's possession shall be processed under the Michigan Freedom of Information Act (FOIA) as set forth in this policy.

RELATED POLICY:

02.01.140 Human Resource Files

POLICY:DEFINITIONS

- A. Public Record - A writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function, from the time it is created. This includes but is not limited to photographs, photocopies, drawings, video and audio tapes, computer data or documents retained on a computer, CD, DVD, and any other means of recording or retaining information. It does not include computer software.

GENERAL INFORMATION

- B. The FOIA requires full disclosure of public records unless those records are exempted under the Act. All public records in the Department's possession are subject to FOIA but may be exempt from disclosure. This includes public records in the Department's possession that are created by another agency (e.g., Department of Community Health, Federal Bureau of Prisons, jails) or by an entity under contract with the Department. However, public records that are possessed only by another agency or an entity under contract with the Department are not subject to a FOIA request received by the Department.
- C. Except if the request is from a prisoner and as set forth in Paragraph D, any written request for a public record is considered to be a FOIA request unless the requestor specifically states in writing that the request is not being made under FOIA. A written request for information also is considered to be a FOIA request if the request indicates it is being submitted under FOIA. A written request includes a writing transmitted by facsimile machine, e-mail, or any other electronic means.
- D. The following are generally not considered to be FOIA requests unless the requestor specifically states in writing that the request is being made under FOIA:
1. A request from a federal, state, or local governmental agency, including a court or law enforcement agency. A request from the Department of Attorney General shall be referred to the appropriate Litigation Coordinator.
 2. A discovery request pertaining to a lawsuit (e.g., Request for Production of Documents). All discovery requests shall be referred to the appropriate Litigation Coordinator as set forth in PD 02.01.102 "Litigation - Department and Employee Responsibilities."
 3. A request for employee personnel information which the employee has authorized to be released (e.g., employment verification to a lending institution or prospective employer). Such requests shall be referred to the appropriate Human Resource office for processing. Employees may have access to their personal records in accordance with Civil Service rules.

DOCUMENT TYPE POLICY DIRECTIVE	EFFECTIVE DATE 03/31/2016	NUMBER 01.06.110	PAGE 2 OF 8
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4. A request from a collective bargaining unit made pursuant to its contract. Such requests shall be referred to the appropriate Human Resource office for processing.
 5. Documents required to be produced by a subpoena or other court order. Such requests shall be referred to the appropriate Litigation Coordinator.
 6. A request from an educational institution for a transcript of a prisoner's education record.
 7. A request from a news media representative unless the request is for copies of several Department documents or unless the request states that it is a FOIA request. The Public Information Officer or designee, through the Department's FOIA Coordinator, shall be consulted on any questions which may arise in processing a request from a news media representative.
 8. A request from legislative staff unless the request is for copies of several Department documents. The Public Information Officer or designee, through the Department's FOIA Coordinator, shall be consulted on any questions which may arise in processing a request from legislative staff.
- E. Department employees are entitled to make requests under FOIA. However, such requests shall not be made while on Department time or while using Department resources, including its computers and office supplies. Any known misuse of Department time or resources is to be reported to the employee's supervisor.

PRISONER REQUESTS FOR DOCUMENTS

- F. Under MCL 15.231(2) and 15.232(c), prisoners are not entitled to make FOIA requests. Prisoners also have no right to appeal or file suit under FOIA if a request for public records is denied. Therefore, prisoner requests for public records shall not be processed as FOIA requests but instead responded to by staff in the same manner as any other correspondence, with requested documents provided as appropriate.
- G. Prisoners may receive copies of documents about their medical care as set forth in OP 03.04.108-B "Prisoner Access to Medical Records."
- H. Upon request, a prisoner shall be provided with a copy of the hearing investigation compiled for his/her Class I misconduct hearing, except for those documents which have been determined by the hearing officer to be confidential. Such requests shall be made to the hearing investigator at the facility where the hearing occurred.

FOIA COORDINATORS

- I. The Manager of the FOIA Section in the Office of Legal Affairs is the FOIA Coordinator for the Department. The Department's FOIA Coordinator or designee is responsible for responding to requests received in Central Office and requests for documents in prisoner files in storage, except for the prisoner health record. Requests for prisoner health records are to be submitted to Duane L. Waters Health Center Medical Records at 3857 Cooper Street, Jackson, MI 49201.
- J. Local FOIA Coordinators shall be designated to act on behalf of the Department FOIA Coordinator to accept and process FOIA requests received at the following locations:
 1. At each Correctional Facilities Administration (CFA) institution, as identified by the Warden. A separate FOIA Coordinator may be identified for the Record Office and Human Resource Office.
 2. At each CFA Assistant Deputy Director's (ADD'S) office in Jackson and Kinross.
 3. At each Bureau of Health Care Services (BHCS) location, the Jackson Health Care Office, the Kinross Health Care Office and Mental Services Office as identified by the appropriate Assistant Health Services Administrator and at Duane L. Waters Health Center (DWH) as identified by the Warden of the Charles E. Egeler Reception and Guidance Center (RGC). This shall include a local FOIA coordinator for requests for records in prisoner/parolee health records in storage. Other local health care FOIA coordinators may be identified as needed by the BHCS Administrator or designee.
 4. At each Field Operations Administration (FOA) Regional and Area Office, as identified by the appropriate

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Regional Administrator or Area Manager.

5. At any Residential Reentry Program facility, as identified by the CFA Deputy Director or designee.
- K. Each FOIA Coordinator shall maintain monthly statistics of the number of FOIA requests received and processed, including the amount of fees billed and collected. The local FOIA Coordinator shall forward the statistics to the Department FOIA Coordinator or designee at the end of each calendar year. The Department's FOIA Coordinator shall ensure Department-wide statistical reports are compiled at least annually.
- L. Each FOIA Coordinator shall maintain a copy of all FOIA requests received, responses sent and all responsive records. These documents shall be retained in accordance with the Department's Retention and Disposal Schedule, one calendar year from the date of the last action. Thereafter, provided that there is no pending litigation regarding the FOIA request, the records will be destroyed.
- M. A Response to A Request for Public Records - FOIA form (CSH-479) shall be used to respond to all FOIA requests unless otherwise directed by the Department FOIA Coordinator or designee. A written notice responding to the request shall be provided to address issues not covered by the form. Anytime fees are assessed, the fees will be delineated on a separate FOIA Fee Calculation Form (CFJ-564).
- N. The local Litigation Coordinator shall be contacted to determine if there is pending litigation regarding the subject of any FOIA request. If there is pending litigation, the Department FOIA Coordinator shall be contacted for directions regarding how to proceed. A copy of the request and the response shall be forwarded to the local Litigation Coordinator as set forth in PD 02.01.102 "Litigation - Department and Employee Responsibilities."
- O. Questions regarding FOIA requests shall be directed to the Department's FOIA Coordinator or designee.

PROCESSING FOIA REQUESTS

- P. A FOIA request received by an employee shall be referred before the end of the business day to the FOIA Coordinator at the employee's work site. The FOIA Coordinator shall respond to the request within five business days after receipt by the Department. A request received by facsimile machine or e-mail is considered received on the next business day following the date of transmission. In the response, the FOIA Coordinator shall either:
 1. Grant the request;
 2. Deny the request;
 3. Grant the request in part and deny the request in part; or
 4. Take a ten business day extension. In such cases, the requestor shall be notified in writing of the reason for the extension and the expiration date of the extension. The MDOC cannot issue more than one notice of extension.
- Q. The FOIA Coordinator shall review the request and determine which records in the Department's possession are responsive to the FOIA request. The exact name of the record is not required to be provided if it can reasonably be determined by the description provided what is being requested. A document is not required to be created to respond to a FOIA request if the record requested does not exist.
- R. The FOIA Coordinator shall review the documents responsive to the request to ensure information exempt from disclosure is not provided. If only a portion of a document is exempt, the exempt portion is to be redacted and only the non-exempt portion of the document disclosed. The FOIA Coordinator shall ensure redacted portions of a document are not legible on the copy provided.
- S. Only those exemptions authorized under FOIA shall be used. If more than one exemption applies to a particular request, all relevant exemptions should be indicated when responding to a FOIA request unless the document is statutorily exempt from disclosure. An explanation regarding what was exempted and the reason for the exemption shall be provided.
- T. If the MDOC does not respond to a written request in a timely manner, it shall reduce the charges for labor costs by 5% for each day the response is late with a maximum 50% reduction if the late response was willful and

intentional or if the written request included language that conveyed a request for information within the first 250 words of the written document. For any questions regarding fee calculations, contact the Department's FOIA Coordinator.

REQUESTS FOR EMPLOYEE PERSONNEL RECORDS

- U. Pursuant to MCL 791.230a, the home addresses, home telephone numbers, clock numbers, employee identification numbers and personnel records of Department employees are exempt from disclosure under FOIA. For purposes of this exemption, personnel records include all records maintained regarding an employee as a result of employment with the Department. This includes but is not limited to personnel files, investigatory records relating to an employee, AIPAS records, certain complaints filed by or against an employee, time and attendance records, and work location.

REQUESTS FOR INFORMATION IN FILLING DEPARTMENT POSITIONS

- V. Although most records retained by the Department regarding the filling of Department positions are exempt from disclosure, each request must be reviewed to determine what records and/or information may be disclosed. Job posting information belongs to the Department of Civil Service. Information that may be released under FOIA unless otherwise exempt from disclosure (e.g., telephone numbers, home addresses, Social Security numbers) includes but is not limited to the following:
1. The names of all applicants.
 2. The resume of the requestor, assuming s/he applied for the position (Does not apply if a current MDOC employee).
 3. The names of those applicants interviewed for the position, ensuring they are not presented in the order in which they were ranked (Does not apply if a current MDOC employee).
 4. The job posting.

FOIA EXEMPTIONS

- W. The exemptions allowed under FOIA are expressed in general language which must be applied to the specific public record requested. It is impractical to list all information or documents that may be exempt from disclosure. Therefore, local FOIA Coordinators must be familiar with all FOIA exemptions. Often, more than one exemption may apply. FOIA responses must include all applicable exemptions.

General Exemptions

- X. The following are some of the FOIA exemptions which are most frequently taken and examples of information to which the exemptions may apply:
1. Information of a personal nature if public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy. Section 13 (1)(a). The purpose of exemptions is to balance the policy of full disclosure with any significant privacy interests favoring nondisclosure.
Examples: Home addresses and home telephone numbers; emergency contact information; driver license numbers; Social Security numbers; victims' requests to receive information pursuant to PD 01.06.120 "Victim Notification" and the Department's response unless the requestor is the victim; fingerprint cards; resumes of unsuccessful job applicants except for the resume of the requestor.
 2. A public record that, if disclosed, would prejudice the ability to maintain the physical security of a correctional facility unless the public interest in disclosure outweighs the public interest in non-disclosure. Section 13(1)(c).
Examples: Blueprints or maps of facility grounds; names of informants; mobilization scenarios and critiques; Special Problem Offender Notice; movement plans; Security Threat Group designations and related documentation; exempt policy directives and operating procedures; post orders for security sensitive assignment (e.g., sallyport); descriptions of security fencing; description of operation of personal

protection devices; videos that would disclose capability of any monitoring device; document determined to be confidential by a hearing officer at a hearing conducted pursuant to MCL 791.252.

3. Information or records subject to the physician-patient privilege, the psychologist-patient privilege, or other privilege recognized by statute or court rule. Section 13(1)(h).

Examples: Psychiatric and psychological information unless a release is provided; medical records; however, the request shall be forwarded to the Health Unit Manager for processing under the Medical Records Access Act if a release is provided.

4. Communications and notes of an advisory nature to the extent that they cover other than purely factual materials and are preliminary to a final agency decision of policy or action. This exemption only applies if the public interest of encouraging frank communications between officials and employees clearly outweighs the public interest in disclosure. Section 13(1)(m).

Examples: A Joint Evaluation Committee (JEC) recommendation before the Department of Technology, Management and Budget award is made.

5. Records of a public body's security measures, including security plans, security codes and combinations, passwords, passes, keys, and security procedures, to the extent that the records relate to the ongoing security of the public body. Section 13(1)(u).

Examples: Movement plans; exempt policy directives and operating procedures; post orders for security sensitive assignment (e.g., sallyport); descriptions of security fencing; description of operation of personal protection devices; videos that would disclose capability of any monitoring device.

6. Records or information relating to a civil action in which the requesting party and the Department are parties. Section 13(1)(v). This includes civil court actions in which the Department is representing an employee being sued.

7. Information or records that would disclose the Social Security number of an individual. Sections 13(1)(d), specifically MCL 445.85 and 13 (1)(w). This information shall not be disclosed even if a release is provided.

Statutory Exemptions

- Y. Section 13(1)(d) of FOIA also permits exemption of documents or information specifically exempted from disclosure by another statute. When using this exemption, it is necessary to identify the specific statute authorizing the exemption. The following are examples of information exempt under Section 13(1)(d) and the applicable statute:

1. Records and reports of investigations made by a probation agent, including presentence investigation reports. (MCL 791.229).
2. The address and telephone number of a victim who has requested to receive information pursuant to PD 01.06.120 "Victim Notification." (MCL 780.769).
3. Victim statements submitted for consideration by the Parole Board pursuant to MCL 780.771.
4. Any information of the disposition of criminal charges and assignment as a youthful trainee unless youthful trainee status is revoked and the offender is subsequently convicted of the offense. (MCL 762.14).
5. Any information received through the Law Enforcement Information Network (LEIN), including records of criminal charges which did not result in a conviction. (MCL 28.214).
6. Quality assurance reviews (e.g., "peer reviews") conducted by BHCS. (MCL 331.533).
7. A report prepared and recommendations made by the Office of the Legislative Corrections Ombudsman and submitted to the Legislative Council pursuant to an investigation. (MCL 4.359).

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8. A record ordered to be set aside ("expunged") if the Department has received notice of the set aside. (MCL 780.623).
9. Documents and information pertaining to an offender's registration and change of address notification pursuant to the Sex Offenders Registration Act. (MCL 28.730).
10. Information regarding the diagnosis, prognosis, or treatment of an offender involved in a substance abuse education or treatment program, unless a release is provided by the offender which specifically authorizes release of this information. (48 USC 290dd-3).

FEES

- Z. All FOIA requestors shall be charged 10 cents per page for each written document provided plus the actual cost of postage unless expedited shipping or insurance is stipulated by the requestor. The fee shall be limited to actual mailing costs and to the actual incremental cost of duplication or publication including labor, the cost of the search, examination, review, and the deletion and separation of exempt from non-exempt information. The actual cost of duplication shall be charged for copies of non-written documents, such as computer discs and non-paper physical media. If a portion of a document must be redacted and the document recopied prior to production, the requestor shall be charged only for the copy provided.
- AA. A fee may not be charged for the cost of search, review, examination, and the separation of exempt from non-exempt information unless failure to charge the fee would result in an unreasonably high cost to the Department. If assessed, the fee shall be charged at the hourly wage of the lowest-paid employee capable of searching for, locating and examining the public records in the particular instance regardless of whether that person is available or who actually performs the labor. The hourly wage includes the cost of up to 50% of the base rate paid by the State to cover or partially cover the cost of fringe benefits. Overtime wages shall not be included in the calculation of labor costs unless overtime is specifically stipulated by the requestor. Labor costs are to be estimated and charged in increments of 15 minutes or more, with all partial time rounded down. Such fees are not to be charged without first contacting the Department's FOIA Coordinator or designee for approval and direction on how to proceed.
- BB. The Department may waive or reduce fees if the Department determines it is in the public interest to do so or if providing the requested documents primarily benefits the general public for reasons identified by the requestor. A fee that totals \$10.00 or less, including postage, shall be waived. Other fees shall be waived or reduced pursuant to this paragraph only with approval of the Department FOIA Coordinator or designee.
- CC. A requestor shall not be charged for the first \$20.00 of fees assessed per request, including any fees waived under Paragraph BB for either of the following:
 - (a) Upon submission of a current affidavit verifying that s/he is receiving public assistance or, if not receiving public assistance, sufficiently stating facts showing an inability to pay the cost due to indigency. If the requestor is eligible for a requested discount, the public body shall fully note the discount on the Fee Calculation form. If the requestor is ineligible for the discount, the public body shall inform the requestor specifically of the reason for the ineligibility in the public body's written response. An individual is ineligible for this fee reduction if any of the following apply:
 - The individual requests the information in conjunction with outside parties who are offering or providing payment or other remuneration to the individual to make the request. The MDOC may require a statement by the requestor in the affidavit that the request is not being made in conjunction with outside parties in exchange for payment or other remuneration.
 - The requestor has previously received discounted copies of public records under this subsection from the MDOC twice during the calendar year.
 - (b) A nonprofit organization formally designated by the State to carry out activities and the protection and advocacy for individuals with mental illness if the requestor meets all of the following requirements:
 - Is made directly on behalf of the organization or its clients.
 - Is made for a reason wholly consistent with the mission and provisions of those laws under Section 931 of the Mental Health Code, 1974 PA 258, MCL 330.1931.

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- Is accompanied by documentation of its designation by the State, if requested by the public body.

Questions regarding whether fees should be waived pursuant to this paragraph are to be directed to the Department's FOIA Coordinator or designee.

- DD. Whenever a fee is charged, the FOIA response shall specify the amount owed, the Department's best efforts estimate of how long it will take to provide the records to the requestor and indicate that the records will be provided after payment is received in full. If the amount owed exceeds \$50.00, exclusive of any waived amounts, a 50% good faith deposit may be required before processing begins. Once the good faith deposit is received, the request shall be processed. Upon completion of processing, the requestor shall be billed for the balance owed, which must be paid before the documents are provided to the requestor. A requestor who does not pay the balance owed will not be provided with the documents requested.

INSPECTION

- EE. When inspection of public records is requested in writing under FOIA, a reasonable opportunity for inspection of the non-exempt records must be allowed during normal business hours. The local FOIA Coordinator must ensure that any exempt information is redacted prior to the inspection.
- FF. A fee shall be charged a requestor to inspect public records only as set forth below:
1. For the search, review, examination, and the separation of exempt from non-exempt information as set forth in Paragraph AA.
 2. With approval of the Department FOIA Coordinator or designee, for the time spent by staff monitoring an inspection that is necessary to protect the original record and to prevent excessive and unreasonable interference with the discharge of Department functions. The fee shall be charged at the hourly rate of the lowest-paid employee capable of monitoring the inspection. The hourly wage includes the cost of up to 50% of the base rate paid by the State to cover or partially cover the cost of fringe benefits.
 3. With approval of the Department FOIA Coordinator or designee, for copies necessary to protect the original record as provided for under Section 3(3) of FOIA, MCL 15.233.
 4. For a copy made in order to redact a portion of the original that is exempt.

APPEALS UNDER FOIA

- GG. A requestor whose FOIA request has been denied in full or in part may appeal the denial to the Director. The appeal must be submitted in writing and is to be mailed to attention of the Administrator of the Office of Legal Affairs. The appeal must be specifically identified as a FOIA appeal and state the reasons for reversal of the denial. The Director will respond to the appeal within 10 business days.
- HH. A requestor may appeal the Department's final determination to deny a FOIA request by commencing an action in the Court of Claims within 180 calendar days after that final determination is made.
- II. A requestor may appeal the FOIA fees by submitting a written appeal for a fee reduction that specifically states the word "appeal" and identifies how the required fee exceeds the amount permitted under the public body's available procedures/guidelines. The appeal must be submitted in writing and is to be mailed to attention of the Administrator of the Office of Legal Affairs. The Director will respond to the appeal within 10 business days.
- JJ. A requestor may commence a civil action in the Court of Claims for a fee reduction only after having gone through the Department's fee appeal process. The action must be filed within 45 days after receiving the final determination from the Director.
- KK. For either appeal, the Director may, under unusual circumstances, issue a written notice taking a 10 business day extension in order to respond to the appeal.

PROCEDURES

- LL. Wardens and the FOA Deputy Director shall ensure that procedures are developed as necessary to implement

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requirements set forth in this policy directive within 60 calendar days after the effective.

AUDIT ELEMENTS

MM. A Primary Audit Elements List has been developed and is available on the Department's Document Access System to assist with self-audit of this policy pursuant to PD 01.05.100 "Self-Audits and Performance Audits."

APPROVED: HEW 03/28/2016

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EXHIBIT K

2009 WL 1782691

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES
BEFORE CITING.UNPUBLISHED
Court of Appeals of Michigan.Frank LAWRENCE, Jr., Plaintiff-Appellant,
v.
CITY OF TROY, Defendant-Appellee.

Docket No. 289509.

June 23, 2009.

West KeySummary

1

Records [Personal Privacy Considerations in General;](#)
[Personnel Matters](#)

Police department improperly denied the Freedom of Information Act (FOIA) request by the brother of a driver who was issued a traffic citation. Police department claimed that it could permissibly exempt disclosure of information under Michigan statute based on its personal nature and would constitute a clearly unwarranted invasion of the individuals' privacy. Police department failed to provide any evidence, other than perfunctory assertions that brother's FOIA request sought intimate, embarrassing, private or confidential information. *M.C.L.A. § 15.243(1)(a)*.

[Cases that cite this headnote](#)

Oakland Circuit Court; LC No.2008-095176-CZ.

Before: [BORRELLO, P.J.](#), and [METER](#) and [STEPHENS, JJ.](#)**Opinion**

PER CURIAM.

*1 Plaintiff appeals as of right from a circuit court order granting summary disposition for defendant in this action under the Freedom of Information Act (FOIA), [MCL 15.231 et seq.](#) For the reasons set forth in this opinion, we reverse and remand for further proceedings.

Plaintiff filed a FOIA request stemming from a traffic citation issued to his brother, Thomas John Lawrence, for failing to provide proof of insurance and failing to change the address on his driver's license. Plaintiff sent a FOIA request to the Troy Police Department requesting the following information:

1. The full name of the officer who issued citation # 733389. Please also include the full name of the second officer who was at the scene;
2. Any and all voice or video recordings of the time directly before, during, and after the citation was issued. This should include, but not be limited to, any voice or video records taken of Thomas Lawrence, as well as any voice or video records depicting one or both of the two officers described in # 1 above, directly before, during, and after the citation was issued;
3. Any and all radio, cellular or text transmissions between the two officers described in # 1 above, directly before, during, and after the citation was issued. This should include, but not limited to [sic], any radio transmissions to the Troy Police Station;
4. Any records indicating that one or both of the officers described in # 1 above, between 6:00pm and 7:00pm, accessed or attempted to access information from a database operated by the Michigan Secretary of State as to whether Thomas Lawrence or his vehicle had valid insurance;
5. Any and all records that indicate whether one or both of the officers described in # 1 above are subject to any guidelines, goals, or expectations as to how many traffic citations they must issue in a given period (i.e., a quota);
6. Any and all records relating to whether one or both of the officers described in # 1 have ever been subject to any discipline or disciplinary proceedings for misconduct, misfeasance and/or malfeasance, including whether the officer(s) has ever been sued for official misconduct (i.e., civil rights claims under [42 U.S.C. §](#)

1983). [FOIA Request.]

Two days later, on October 6, 2008, defendant denied plaintiff's request, stating:

The City of Troy Police Department has recently received your Freedom of Information Act request. Since that request is for reports or information related to a criminal charge or a civil infraction (traffic ticket) pending with the City of Troy, your letter should be directed to either the Troy City Attorney's Office or the Oakland County Prosecutor's Office, depending on which of those offices is prosecuting the matter.

We are denying your FOIA request as exempt under [MCLA 15.243\(1\)\(D\)](#)....

Shortly thereafter, plaintiff filed this action alleging that defendant improperly denied his FOIA request. Plaintiff filed a motion for summary disposition arguing that he was entitled to disclosure of the requested information. Defendant requested summary disposition in its favor under [MCR 2.116\(I\)\(2\)](#). On December 1, 2008, the trial court denied summary disposition for plaintiff and granted summary disposition for defendant without hearing oral argument. The trial court opined that plaintiff's request appears to be an attempt to circumvent the discovery preclusion in civil infraction actions set forth in [MCR 2.302\(A\)\(3\)](#). The trial court further opined that the information sought is otherwise exempt, stating:

*2 [MCL 15.243\(1\)\(b\)](#) provides an exemption for investigating records compiled for law enforcement purposes, to the extent that disclosure as a public record interferes with law enforcement proceedings and would constitute an unwarranted invasion of personal privacy. Here, the information sought implicates personal information of officers and witnesses, and police investigation techniques and guidelines. Accordingly, Plaintiff is not entitled to damages based on his claim of "arbitrary and capricious" acts.

Therefore, the trial court granted summary disposition for defendant pursuant to [MCR 2.116\(I\)\(2\)](#).

Plaintiff argues that the trial court erred by granting summary disposition for defendant under [MCR 2.116\(I\)\(2\)](#). A "trial court properly grants summary

disposition to the opposing party under [MCR 2.116\(I\)\(2\)](#) if the court determines that the opposing party, rather than the moving party, is entitled to judgment as a matter of law." *Washburn v. Michailoff*, 240 Mich.App. 669, 672, 613 N.W.2d 405 (2000). Further, in FOIA cases, this Court reviews de novo a trial court's legal determinations and reviews for clear error a trial court's factual findings supporting the court's decision. *Herald Co., Inc. v. Eastern Michigan Univ. Bd. of Regents*, 475 Mich. 463, 471-472, 719 N.W.2d 19 (2006). This Court must defer to the trial court's factual findings unless it is left with a definite and firm conviction that a mistake was made. *Id.* at 472, 719 N.W.2d 19. Finally, when reviewing a decision within the trial court's discretion, this Court must affirm unless the decision falls outside the principled range of outcomes. *Id.*

[MCL 15.231\(2\)](#) articulates the purpose of the FOIA. That provision 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 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.

"Michigan courts have interpreted the policy of the FOIA as one of full disclosure of public records unless a legislatively created exemption expressly allows a state agency to avoid its duty to disclose the information." *Messenger, supra* at 531. Exemptions to disclosure under [MCL 15.243](#) of the FOIA are narrowly construed, and the party seeking to invoke an exemption has the burden of demonstrating its applicability. *Taylor v. Lansing Bd. of Water & Light*, 272 Mich.App. 200, 204-205, 725 N.W.2d 84 (2006); *Messenger, supra* at 532. "Whether requested information fits within an exemption from disclosure under FOIA is a mixed question of fact and law[.]" *Taylor, supra* at 205, 725 N.W.2d 84.

Plaintiff argues that the trial court essentially relied on the exemption under [MCL 15.243\(1\)\(v\)](#) in granting summary disposition for defendant. He contends that this exemption is inapplicable because plaintiff and defendant are not involved in any other litigation and this Court in *Taylor, supra*, rejected the notion that this provision prohibits a

person from obtaining information by proxy. [MCL 15.243\(1\)\(v\)](#) provides:

*3 (1) A public body may exempt from disclosure as a public record under this act any of the following:

* * *

(v) Records or information relating to a civil action in which the requesting party and the public body are parties.

Plaintiff correctly contends that this exemption is inapplicable because, under the plain language of [MCL 15.243\(1\)\(v\)](#), plaintiff is not seeking information regarding a civil action in which plaintiff and defendant are parties. Plaintiff also correctly argues that *Taylor, supra*, does not preclude him from seeking information regarding a civil action between defendant and plaintiff's brother. In *Taylor, supra* at 206-207, 725 N.W.2d 84, this Court held that a literal interpretation of [MCL 15.243\(1\)\(v\)](#) allows "a party to obtain information by proxy that he or she would otherwise not be entitled to receive through FOIA[.]" Therefore, [MCL 15.243\(1\)\(v\)](#) would not prohibit plaintiff from obtaining information from defendant through a FOIA request that the provision would prohibit plaintiff's brother from obtaining himself.¹

Despite the foregoing, the trial court did not rely on [MCL 15.243\(1\)\(v\)](#) in granting summary disposition for defendant and defendant did not rely on that exemption in denying plaintiff's request. Rather, the trial court relied in part on [MCR 2.302\(A\)\(3\)](#), which pertains to discovery in civil infraction actions. The trial court opined that plaintiff's request was an attempt to circumvent the discovery preclusion in civil infraction actions enunciated in that court rule. [MCR 2.302\(A\)](#) provides:

(A) Availability of Discovery.

(1) After commencement of an action, parties may obtain discovery by any means provided in subchapter 2.300 of these rules.

(2) In actions in the district court, no discovery is permitted before entry of judgment except by leave of the court or on the stipulation of all parties. A motion for discovery may not be filed unless the discovery sought has previously been requested and refused.

(3) Notwithstanding the provisions of this or any other rule, *discovery is not permitted* in actions in the small claims division of the district court or *in civil infraction actions*. [Emphasis added.]

In *Central Michigan Univ. Supervisory-Technical Ass'n MEA/NEA v. Central Michigan Univ. Bd. of Trustees*, 223 Mich.App. 727, 730, 567 N.W.2d 696 (1997), this Court held that the "FOIA does not conflict with the court rules governing discovery, nor does it supplement or displace them." *Taylor, supra* at 205, 725 N.W.2d 84, citing *Central Michigan*. That case involved whether the plaintiff could seek information under the FOIA when it had already filed suit against the defendants.² *Central Michigan, supra* at 729, 567 N.W.2d 696. This Court opined that there existed no conflict between the court rules and the FOIA and the fact that a party may obtain information through discovery does not forfeit that party's right to obtain the same information through the FOIA. *Id.* at 730, 567 N.W.2d 696. In a concurring opinion, Judge Holbrook opined that "the discovery rules and the FOIA represent 'two independent schemes for obtaining information[.]'" *Id.* at 731, 567 N.W.2d 696 (HOLBROOK, JR., J., concurring).

*4 Accordingly, under the above authority, even though [MCR 2.302\(A\)\(3\)](#) precludes discovery in civil infraction actions, a party may nevertheless seek information related to such actions under the FOIA unless the FOIA specifically exempts the information sought from disclosure. The trial court thus erred by determining that plaintiff's FOIA request was properly denied because the information sought was not obtainable through discovery pursuant to [MCR 2.302\(A\)\(3\)](#).

Defendant argues that it relied on [MCL 15.243\(1\)\(d\)](#) in conjunction with [MCL 600.223](#) and [MCR 2.302\(A\)\(3\)](#) to deny plaintiff's FOIA request. [MCL 15.243\(1\)\(d\)](#) provides:

(1) A public body may exempt from disclosure as a public record under this act any of the following:

* * *

(d) Records or information specifically described and exempted from disclosure by statute.

[MCL 600.223](#) grants our Supreme Court "authority to promulgate and amend general rules governing practices and procedure in the supreme court and all other courts of record[.]" Defendant apparently contends that because [MCL 600.223](#) authorized the Supreme Court to create the discovery preclusion articulated in [MCR 2.302\(A\)\(3\)](#), records pertaining to civil infraction actions constitute "[r]ecords or information specifically described and exempted from disclosure by statute" as provided in [MCL 15.243\(1\)\(d\)](#). However, the mere fact that [MCL 600.223](#) grants the Supreme Court authority to promulgate rules does not mean that the discovery preclusion in [MCR](#)

2.302(A)(3) “exempt[s] from disclosure by statute” information regarding civil infraction actions. Thus, defendant’s argument, while creative, lacks legal merit.

Plaintiff next argues that the exemption under [MCL 15.243\(1\)\(a\)](#) is inapplicable because the requested information does not threaten any privacy interest.

[MCL 15.243\(1\)\(a\)](#) provides:

(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.

According to the language of the statute, the privacy exemption consists of two elements: (1) the information sought must be of a “personal nature,” and (2) the disclosure of the information must amount to “a clearly unwarranted invasion of an individual’s privacy.” [Michigan Federation of Teachers & School Related Personnel, AFT, AFL-CIO v. Univ. of Michigan](#), 481 Mich. 657, 675, 753 N.W.2d 28 (2008).

Information is of a “personal nature” if it involves intimate, embarrassing, private, or confidential details of a person’s life according to the moral standards and customs of the community. *Id.* at 676, 753 N.W.2d 28; [Detroit Free Press, Inc. v. City of Southfield](#), 269 Mich.App. 275, 282, 713 N.W.2d 28 (2005). Further, “[d]etermining whether the disclosure of such information would constitute a clearly unwarranted invasion of privacy requires a court to balance the public interest in disclosure against the interest the Legislature intended the exemption to protect.” *Id.* “The only relevant public interest is the extent to which disclosure would serve the core purpose of the FOIA, which is to facilitate citizens’ ability to be informed about the decisions and priorities of their government.” *Id.* “This interest is best served through information about the workings of government or information concerning whether a public body is performing its core function.” *Id.*

*5 Defendant failed to provide any evidence, other than perfunctory assertions that plaintiff’s FOIA request sought intimate, embarrassing, private, or confidential information. Defendant asserts that the information sought would interfere with law enforcement proceedings and constitute an unwarranted invasion of privacy based on their belief that the information sought pertained to personal information of police officers and witnesses. Review of the request reveals that plaintiff requested information regarding a traffic stop and citation, whether

the police officers involved are subject to a citation “quota,” and whether the officers had ever been subject to any disciplinary proceedings or sued for official misconduct. The information sought regarding the officers pertains to their public employment and the information requested regarding plaintiff’s brother pertains solely to his public traffic stop and civil infraction. The request does not seek intimate, embarrassing, confidential, or private details concerning the lives of plaintiff’s brother or the police officers.

In addition, disclosure of the requested information would not amount to “a clearly unwarranted invasion of an individual’s privacy.” *Univ of Michigan, supra* at 675. Disclosure would serve the core purpose of the FOIA. As this Court has recognized, “[t]his interest is best served through information about the workings of government or information concerning whether a public body is performing its core function.” [Detroit Free Press, supra](#) at 282, 713 N.W.2d 28. Plaintiff seeks information regarding what transpired immediately before, during, and after two Troy police officers stopped plaintiff’s brother’s vehicle and issued him a citation. The officers’ reasons for stopping the vehicle, what occurred during the traffic stop, and any communications amongst the officers and the Troy Police Department shed light on the inner workings of the Troy Police Department and whether the department is fulfilling its duties to the public. Moreover, whether the officers accessed a Michigan Secretary of State database, whether they are subject to a citation “quota,” and whether they have ever been subject to any disciplinary action or sued for official misconduct is indicative of whether Troy Police Department is performing its core function. As stated in [MCL 15.231\(2\)](#), “all persons ... 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[.]” Therefore, disclosure of the information sought would not constitute a clearly unwarranted invasion of an individual’s privacy and is not exempt under [MCL 15.243\(1\)\(a\)](#).

Plaintiff also argues that the trial court erroneously determined that the information sought is exempt under [MCL 15.243\(1\)\(b\)](#). That statute provides:

(1) A public body may exempt from disclosure as a public record under this act any of the following:

* * *

*6 (b) Investigating records compiled for law enforcement purposes, but only to the extent that disclosure as a public record would do any of the following:

- (i) Interfere with law enforcement proceedings.
- (ii) Deprive a person of the right to a fair trial or impartial administrative adjudication.
- (iii) Constitute an unwarranted invasion of personal privacy.
- (iv) Disclose the identity of a confidential source, or if the record is compiled by a law enforcement agency in the course of a criminal investigation, disclose confidential information furnished only by a confidential source.
- (v) Disclose law enforcement investigative techniques or procedures.
- (vi) Endanger the life or physical safety of law enforcement personnel.

The information that plaintiff sought cannot fairly be characterized as “[i]nvestigating records compiled for law enforcement purposes,” as stated in [MCL 15.243\(1\)\(b\)](#). For example, plaintiff requested the full names of the police officers, records indicating whether the officers were subject to a citation “quota,” records indicating whether the officers accessed a Michigan Secretary of State database to determine whether the vehicle was insured, records pertaining to whether either of the officers has ever been subject to any discipline, a disciplinary proceeding, or sued for official misconduct, and voice, video, text, radio, or cellular transmissions or recordings that occurred immediately before, during, and after the traffic stop. Narrowly construing the exemption listed under [MCL 15.243\(1\)\(b\)](#), as required pursuant to *Taylor, supra* at 204-205, [725 N.W.2d 84](#), and *Messenger, supra* at 532, this information simply does not constitute investigating records compiled for law enforcement purposes. Therefore, defendant has not met its burden of demonstrating that the exemption under [MCL 15.243\(1\)\(b\)](#) is applicable, and the trial court erred by relying on this exemption in granting summary disposition for defendant.

Defendant contends that [MCL 15.243\(1\)\(s\)](#) provides an alternative basis for denying plaintiff’s FOIA request. That provision states, in relevant part:

- (1) A public body may exempt from disclosure as a public record under this act any of the following:

* * *

- (s) Unless the public interest in disclosure outweighs the public interest in nondisclosure in the particular

instance, public records of a law enforcement agency, the release of which would do any of the following:

* * *

- (v) Disclose operational instructions for law enforcement officers or agents.
- (vi) Reveal the contents of staff manuals provided for law enforcement officers or agents.
- (vii) Endanger the life or safety of law enforcement officers or agents or their families, relatives, children, parents, or those who furnish information to law enforcement departments or agencies.

* * *

- (ix) Disclose personnel records of law enforcement agencies.

*7 Defendant argues that the full names of the police officers are exempt under subsection (vii) because disclosure of the officers’ full names would endanger their safety. Defendant also contends that any records indicating whether the officers are subject to guidelines, goals, or expectations regarding how many traffic citations they must issue within a certain time period is exempt under subsections (v) and (vi). Defendant further asserts that the disciplinary records of the officers are exempt from disclosure under subsection (ix). We note that Michigan courts have recognized that a law enforcement agency’s records regarding internal investigations fall within the personnel records exemption under subsection (ix). *Kent Co. Deputy Sheriffs Ass’n v. Kent Co. Sheriff*, 463 Mich. 353, 365-367, 616 N.W.2d 677 (2000); *Herald Co., Inc. v. Kent Co. Sheriff’s Dep’t*, 261 Mich.App. 32, 37-38, 680 N.W.2d 529 (2004).

The information sought in paragraphs one, five, and six of plaintiff’s FOIA request arguably falls under the exemptions on which defendant relies. “Once particular records qualify under a listed exemption for law enforcement agency records, the remaining inquiry is whether ‘the public interest in disclosure outweighs the public interest in nondisclosure in the particular instance.’” *Kent Co. Deputy Sheriffs Ass’n, supra*, 463 Mich. at 365, 616 N.W.2d 677, quoting *Kent Co. Deputy Sheriffs Ass’n v. Kent Co. Sheriff*, 238 Mich.App. 310, 331-332, 605 N.W.2d 363 (1999). The public body has the burden of proving that a particular record is exempt under the public-interest balancing test. *Landry v. City of Dearborn*, 259 Mich.App. 416, 420, 674 N.W.2d 697 (2003).

In its brief on appeal, defendant fails to advance any

argument regarding why the public interest favors nondisclosure of the records under [MCL 15.243\(1\)\(s\)](#). Defendant simply fails to properly address this issue. Because we conclude that the trial court erroneously granted summary disposition for defendant based on different exemptions, and failed to address defendant's argument regarding the applicability of [MCL 15.243\(1\)\(s\)](#), we remand this case to the trial court to determine whether "the public interest in disclosure outweighs the public interest in nondisclosure in the particular instance" with respect to the information that plaintiff requested in paragraphs one, five, and six of his FOIA request.

Plaintiff next argues that he is entitled to reasonable fees, costs and disbursements pursuant to [MCL 15.240\(6\)](#) and punitive damages pursuant to [MCL 15.240\(7\)](#). We review for an abuse of discretion a trial court's decision regarding an award of attorney fees to a prevailing party under the FOIA. *Messenger v. Ingham Co. Prosecutor*, 232 Mich.App. 633, 647, 591 N.W.2d 393 (1998). Further, we review for clear error a trial court's findings regarding whether a defendant acted arbitrarily and capriciously with respect to [MCL 15.240\(7\)](#). *Meredith Corp. v. City of Flint*, 256 Mich.App. 703, 717, 671 N.W.2d 101 (2003).

*8 [MCL 15.240\(6\)](#) provides:

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).

Thus, "[t]he first criterion for an award of attorney fees in litigation under the FOIA is that a party 'prevails' in its assertion of the right to inspect, copy, or receive a copy of all or a portion of a public record." *Local Area Watch v. City of Grand Rapids*, 262 Mich.App. 136, 149, 683 N.W.2d 745 (2004). Further, "whether to award plaintiff reasonable attorney fees, costs, and disbursements when a party only partially prevails under the FOIA is entrusted

to the sound discretion of the trial court." *Id.* at 151, 683 N.W.2d 745.

We direct the trial court to address on remand whether plaintiff is entitled to attorney fees, costs, and disbursements. Until the trial court reaches a decision on remand, it cannot be determined whether plaintiff is a prevailing party requiring an award of reasonable attorney fees, costs, and disbursements under [MCL 15.240\(6\)](#). We note that even if the trial court determines on remand that the information sought in paragraphs one, five, and six of plaintiff's FOIA request is exempt from disclosure, plaintiff nevertheless partially prevailed in his FOIA action and an award of reasonable fees, costs, and disbursements would be within the trial court's discretion pursuant to [MCL 15.240\(6\)](#). *Local Area Watch, supra* at 151, 683 N.W.2d 745.

Plaintiff also argues that he is entitled to punitive damages pursuant to [MCL 15.240\(7\)](#) because defendant's denial of his FOIA request was arbitrary and capricious. [MCL 15.240\(7\)](#) provides:

If the circuit court determines in an action commenced under this section that the public body has arbitrarily and capriciously violated this act by refusal or delay in disclosing or providing copies of a public record, the court shall award, in addition to any actual or compensatory damages, punitive damages in the amount of \$500.00 to the person seeking the right to inspect or receive a copy of a public record. The damages shall not be assessed against an individual, but shall be assessed against the next succeeding public body that is not an individual and that kept or maintained the public record as part of its public function.

Punitive damages in a FOIA case "may be assessed only if the court orders disclosure of a public record." *Michigan Council of Trout Unlimited v. Dep't of Military Affairs*, 213 Mich.App. 203, 221, 539 N.W.2d 745 (1995). Further, "[e]ven if defendant's refusal to disclose or provide the requested materials was a statutory violation, it was not necessarily arbitrary or capricious if defendant's decision to act was based on consideration of principles or circumstances and was reasonable, rather than whimsical." *Meredith Corp, supra* at 717, 671 N.W.2d 101 (quotation marks and citations omitted).

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*9 Here, the trial court denied plaintiff's request for punitive damages under [MCL 15.240\(7\)](#) based on its erroneous determination that the information sought by plaintiff is not discoverable pursuant to [MCR 2.302\(A\)\(3\)](#) and its erroneous conclusion that the information is exempt from disclosure under [MCL 15.243\(1\)\(b\)](#). Because we are reversing the trial court's determination with respect to paragraphs two, three, and four of plaintiff's FOIA request and have directed the trial court to determine on remand whether the information sought in paragraphs one, five, and six is exempt, we direct the trial court to address this issue on remand as well.

Plaintiff also argued that defendant waived its right to assert any FOIA exemptions in defense of this action by failing to assert them in its first responsive pleading. Plaintiff further contends that defendant waived its affirmative defenses by failing to "state the facts constituting" such defenses within the meaning of [MCR 2.111\(F\)\(3\)](#). Although plaintiff asserted these arguments below, the trial court failed to address them. Consequently they are not properly before this Court. *Polkton Charter Twp. v. Pellegrum*, 265 Mich.App. 88, 95, 693 N.W.2d

[170 \(2005\)](#). Considering our resolution of plaintiff's other arguments we decline to address this issue. Also in consideration of our resolution of the above issues, we need not address plaintiff's argument that the trial court denied him his right to due process by failing to provide him an opportunity to respond to the arguments that defendant raised in its response to plaintiff's motion for summary disposition. Courts should not address constitutional issues when a case can be decided on nonconstitutional grounds. *J & J Constr. Co. v. Bricklayers & Allied Craftsmen, Local 1*, 468 Mich. 722, 734, 664 N.W.2d 728 (2003), *People v. Riley*, 465 Mich. 442, 447, 636 N.W.2d 514 (2001).

Reversed and remanded for further proceedings. We do not retain jurisdiction.

All Citations

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Footnotes

- 1 We express no opinion regarding whether a civil infraction action constitutes a "civil action" within the meaning of [MCL 15.243\(1\)\(v\)](#).
- 2 The FOIA was amended by 1996 PA 553, effective March 31, 1997, to add the exemption currently listed under [MCL 15.243\(1\)\(v\)](#). This Court decided *Central Michigan* under the preamendment version of the FOIA.

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EXHIBIT L



Freedom of Information Act Guide
How to Submit a FOIA Request to the MDOC
And
Other Relevant FOIA Information

(Rev. November 10, 2015, Office of Legal Affairs)
(© State of Michigan)

DISCLAIMER: This Guide on “How to Submit a FOIA Request to the Michigan Department of Corrections” (MDOC) is intended to be a reference guide only for the MDOC. It is not to be construed as legal advice and it is not intended to resolve every situation that may be encountered. If you are an MDOC employee, legal questions should be addressed to the Administrator of the Office of Legal Affairs. If you are the general public, legal questions should be addressed by your attorney and cases cited should be reviewed for accuracy. (Rev. July 1, 2015) For additional information, also see the MDOC’s policy 01.06.110 “Freedom of Information Act – Access to Department Public Records” which can be reviewed at http://www.michigan.gov/corrections/0,1607,7-119-1441_44369---,00.html.

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FREEDOM OF INFORMATION ACT

1. **The Freedom of Information Act**, also referred to as FOIA (the Act), effective April 13, 1997, is 1976 PA 442 and may be found at MCL 15.231 - 15.246. The current statute can be obtained in full from the Michigan Legislative website at: <http://www.legislature.mi.gov/>. It can be found under the link of "Often Requested Laws," and can be found by common word search or MCL search. See: [http://www.legislature.mi.gov/\(S\(xihhqsegtkjvfudfmpqm2fcn\)\)/documents/mcl/pdf/mcl-act-442-of-1976.pdf](http://www.legislature.mi.gov/(S(xihhqsegtkjvfudfmpqm2fcn))/documents/mcl/pdf/mcl-act-442-of-1976.pdf).

2. What does FOIA provide?

General Provision – it is an act to provide for public access to certain public records of public bodies in Michigan. The basic intent of the FOIA is 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.¹ The people shall be informed so that they may fully participate in the democratic process.²

The Supreme Court in *Herald Co*³, stated:

The FOIA starts from a basic premise—the disclosure of public documents is the cornerstone of responsible government. The FOIA provides, "It is the public policy of this state that all persons . . . 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." MCL 15.231(2) (emphasis added). The FOIA also recognizes that the public has a strong interest in ensuring that it receives information to make sure that those individuals in government who are entrusted with the operation of public institutions do so in a responsible manner. To this end, the FOIA provides, "The people shall be informed so that they may fully participate in the democratic process." *Id.* This Court has consistently held that the FOIA is intended primarily as a prodisclosure statute. *Swickard v Wayne Co Medical Examiner*, 438 Mich 536, 544; 475 NW2d 304 (1991); see also *State Employees Ass'n v Dep't of Mgt & Budget*, 428 Mich 104, 109; 404 NW2d 606 (1987); *Booth Newspapers, Inc v Univ of Michigan Bd of Regents*, 444 Mich 211, 231-232; 507 NW2d 422 (1993). Accordingly, under the FOIA, unless expressly exempt, a public body must disclose a public record if provided with a written request that sufficiently describes the record. MCL 15.233(1). A person has a right to inspect, copy, or receive a copy of the requested record. *Id.* If a public body denies access to a public record, the public body has the burden to prove that its denial comports with the law. MCL 15.240(4).

¹ *Proctor v White Lake Twp Police*, 248 Mich App 457; 639 NW2d 332 (2001), MCL 15.231(2).

² MCL 15.231(2).

³ *Herald Co, Inc v Eastern Michigan Univ Bd of Regents*, 475 Mich 463; 719 NW2d 19 (2006).

3. Who is not entitled to full and complete information under FOIA?

Those persons incarcerated in state or local correctional facilities. MCL 15.231(2). The FOIA is not unconstitutional simply because it excludes prisoners from obtaining information. Application of the FOIA exclusion does not deprive prisoners of their fundamental right to access the courts or their First Amendment rights.⁴

4. What is a Public record?

Public record is defined in Section 2(e) and:

Means a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function, from the time it is created.⁵

There are two classes of Public records:

1. Those that are exempt from disclosure under Section 13.
2. All public records that are not exempt from disclosure under Section 13 and which are subject to disclosure under FOIA.

5. What is not a Public record?

Public record does not include computer software. "Software" is defined as "a set of statements or instructions that when incorporated in a machine usable medium is capable of causing a machine or device having information processing capabilities to indicate, perform, or achieve a particular function, task, or result. Software does not include computer-stored information or data, or a field name if disclosure of that field name does not violate a software license."⁶ Other information that is not considered a public record includes, but is not limited to, disclosing state legislators who applied for concealed weapons permits,⁷ names and addresses of registered handgun owners,⁸ attorney work product.⁹

6. What is a Public body?

A "public body" is broadly defined in section 2(d):

(d) "Public Body" means any of the following:

- (i) A state officer, employee, agency, department, division, bureau, board, commission, council, authority, or other body in the executive branch of the state government . . .
- (ii) An agency, board, commission, or council in the legislative branch of state government.

⁴ *Proctor v White Lake Twp Police*, 248 Mich App 457; 639 NW2d 332 (2001).

⁵ MCL 15.232(e); *The Detroit News, Inc v Detroit*, 204 Mich App 720; 516 NW2d 151 (1994).

⁶ MCL 15.232(2)(f); see also *Howell Education Association MEA/NEA v Howell Board of Education*, published opinion of the Court of Appeals, issued January 26, 2010 (Docket No 288977); 2010 Mich App LEXIS 143; 30 IER Cas (BNA) 594; 188 LRRM 2054.

⁷ *Detroit Free Press v Dep't of State Police*, 243 Mich App 218; 622 NW2d 313 (2000).

⁸ *Mager v Dep't of State Police*, 460 Mich 134; 595 NW2d 142 (1999).

⁹ *Messenger v Ingham County Prosecutor*, 232 Mich App 633; 591 NW2d 393 (1998).

- (iii) A county, city, township, village, intercounty, intercity, or regional governing body, council, school district, special district, or municipal corporation, or a board, department, commission, council, or agency thereof.
- (iv) Any other body which is created by state or local authority or which is primarily funded by or through state or local authority.¹⁰

Only "public bodies" must comply with FOIA. The MDOC is a public body.

7. What is not a Public Body

Public Bodies do not include:

- The Governor, Lieutenant Governor, Executive Office staff and employees
- The Judiciary, including the office of the county clerk and employees thereof when acting in the capacity of clerk to the circuit court
- Individual Legislators¹¹

The FOIA generally does not apply to private, voluntary unincorporated associations or private, nonprofit corporations.¹²

8. How many Public Bodies are there in Michigan?

There are in excess of 10,000 Public Bodies in Michigan.

9. What records are subject to disclosure?

All records except those specifically cited as exceptions are covered by FOIA.¹³ The records covered include e-mail, minutes of open meetings, officials' voting records, final orders or decisions in contested cases and the records on which they were made, and promulgated rules. Other written documents that implement or interpret laws, rules, or policies, including, but not limited to, guidelines, some manuals, and forms with instructions, adopted or used by the agency in the discharge of its functions, are also covered.

It does not matter what form the record is in. FOIA applies to any handwriting, typewriting, printing, photostating, photographing, photocopying and every other means of recording. It

¹⁰ MCL 15.232(d). See also OAG, 2001 - 2002, No 7087, p 45 (August 21, 2001); OAG, 1999 - 2000, No 7066, p 156 (November 7, 2000); OAG, 1997-1998, No 6942, p 40 (July 3, 1997); *Detroit News, Inc. v Policemen and Firemen Retirement Sys of the City of Detroit*, 252 Mich App 59; 651 NW2d 127 (2002); *Sclafani v Domestic Violence Escape*, 255 Mich App 260; 660 NW2d 97 (2003); *State Defender Union Employees v Legal Aid & Defender Ass'n of Detroit*, 230 Mich App 426; 584 NW2d 359 (1998); *Jackson v Eastern Michigan University*, 215 Mich App 240; 544 NW2d 737 (1996).

¹¹ MCL 15.232(d), OAG, 1985 - 1986, No 6390, p 375 (September 26, 1986).

¹² OAG, 1997-1998, No 6942, p 40 (July 3, 1997); OAG, 1985-1986, No 6386, p 369 (September 16, 1986); OAG, 1997-1998, No 6942, p 40 (July 3, 1997); OAG, 1989 - 1990, No 6563, P 27 (January 26, 1989); *Breighner v Michigan High School Athletic Ass'n, Inc*, 471 Mich 217; 683 NW2d 639 (2004); *Thomas v State Board of Law Examiners*, 210 Mich App 279; 533 NW2d 3 (1995); *Kubick v Child & Family Services of Michigan*, 171 Mich App 304; 429 NW2d 881 (1988); *Perlono v Iron River Cooperative TV*, 122 Mich App 433; 332 NW2d 502 (1983).

¹³ *Booth Newspapers, Inc v Kent County Treasurer*, 175 Mich App 523; 438 NW2d 317 (1989); *Hagen v Dep't of Education*, 431 Mich 118; 427 NW2d 879 (1988).

includes letters, words, pictures, sounds, or symbols, or combinations thereof, as well as papers, maps, magnetic or paper tapes, photographic films or prints, microfilm, microfiche, magnetic or punched cards, discs, drums, or other means of recording or retaining meaningful content. It does not include computer software.

10. How to make a FOIA request.

To access public records, a request must be made in writing and provided to the FOIA Coordinator of the public body. A written request means a writing that asks for information, and includes a writing transmitted by facsimile, electronic mail, or other electronic means.¹⁴ A written request must describe a public record sufficiently to enable the public body to find the public record.¹⁵ In other words, it must clearly describe what is wanted, including identifying material such as names, places, the time period covered and other documents describing the subject of the inquiry.

A person may ask to inspect, copy, or receive a copy of a public record.¹⁶ A FOIA Coordinator may designate another individual to act on his or her behalf to accept requests for processing.¹⁷

11. Who do I contact in the MDOC to make a FOIA request?

There is no single office in state government that handles all FOIA requests and there is no standard form to submit. Each FOIA request must be made to the particular agency that has the records that you seek. For example, if you want to know about an investigation of motor vehicle defects, write to the Michigan Department of State. If you want information about a work-related accident at a nearby manufacturing plant, write to the Michigan Department of Licensing & Regulatory Affairs. You may have to do a little research to find the proper agency office to handle your FOIA request, but you will save time in the long run if you send your request directly to the most appropriate office. A list of state agencies can be obtained at: <http://www.michigan.gov/>.

To submit a request to the Michigan Department of Corrections, mail your request to:

MDOC FOIA Coordinator,
P.O. Box 30003
Lansing, MI 48909

Or

E-mail it to: MDOC-OLAFOIA@michigan.gov

Or

Fax it to: (517) 373-2558

¹⁴ MCL 15.232(i).

¹⁵ MCL 15.233(1); *Herald Co v City of Bay City*, 463 Mich 111; 614 NW2d 873 (2000); *Kincaid v Dep't of Corrections*, 180 Mich App 176; 446 NW2d 604 (1989); *Capitol Information Ass'n v Ann Arbor Police Dep't*, 138 Mich App 655; 360 NW2d 262 (1984).

¹⁶ MCL 15.233(1) and 15.235(1).

¹⁷ MCL 15.236(3).

12. Who can make a FOIA Request?

An individual, corporation, limited liability company, partnership, firm, organization, association, governmental entity, or other legal entity may make a FOIA request. There are no qualifications such as residency or age that must be met in order to make a request. **However, prisoners in state, county, or federal correctional facilities are not included among persons who may make requests.**¹⁸

13. What is a FOIA Coordinator?

A FOIA Coordinator is either:

- (i) An individual who is a public body.
- (ii) An individual designated by a public body in accordance with section 6 of the Act to accept and process requests for public records under FOIA.¹⁹

14. What does a FOIA Coordinator do?

A FOIA Coordinator is responsible for accepting and processing FOIA requests for the public body's public records under the Act and is responsible for approving a denial.²⁰

15. Who can be a FOIA Coordinator?

- A public body that is a city, village, township, county, or state department, or under the control of a city, village, township, county, or state department, shall designate an individual as the public body's FOIA Coordinator.
- In a county not having an executive form of government, the chairperson of the county board of commissioners is designated the FOIA Coordinator for that county.
- For all other public bodies, the chief administrative officer of the respective public body is designated the public body's FOIA Coordinator.²¹

16. How does the MDOC process a FOIA request?

The FOIA request must be immediately forwarded to the FOIA Coordinator. Not more than five business days after receiving a request, the public body must respond to a request for a public record by doing one of the following:

- Grant the request.
- Issue a written notice denying the request.
- Issue a written notice granting the request in part and denying the request in part.
- Issue a written notice extending the time, for not more than 10 business days, to answer.²²

¹⁸ MCL 15.231(2) and 15.232(c).

¹⁹ MCL 15.232(b).

²⁰ MCL 15.236(1).

²¹ MCL 15.236.

²² MCL 15.235(2); OAG, 1979 - 1980, No 5500, p 255 (July 23, 1979).

17. How does the MDOC respond to a FOIA request?

If a request for a record is granted or denied in full or in part, written notice must be provided to the requester not more than five business days after the public body receives the request or within 15 business days if an extension is taken. Failure to respond constitutes a denial.

If the MDOC does not respond to a written request in a timely manner, it shall reduce the charges for labor costs by 5% for each day the response is late with a maximum 50% reduction if the late response was willful and intentional or if the written request included language that conveyed a request for information within the first 250 words of the written document.

18. Does the information have to be provided to the requestor within 5 business days?

No, the information that is the subject of the request, if it exists, does not have to be provided to the requester within 5 business days. The public body must respond to the request for a public record within 5 business days after receiving the request, unless an extension is taken.²³

19. When is a FOIA request deemed received?

A written request made by facsimile, electronic mail, or other electronic transmission is not received by a public body's FOIA Coordinator until 1 business day after the electronic transmission is made.²⁴ If a FOIA request is submitted via U.S. mail or is hand-delivered, it is considered received the day of receipt.

20. What must the Response Notice from the MDOC contain?

A written notice denying a request for a public record in whole or in part is a public body's final determination to deny the request or portion of that request. The written notice must contain:

- 1 An explanation of the basis under this Act or other statute for the determination that the public record, or portion of that public record, is exempt from disclosure, if that is the reason for denying all or a portion of the request.
- 2 A certificate that the public record does not exist under the name given by the requestor or by another name reasonably known to the public body, if that is the reason for denying the request or a portion of the request.
- 3 A description of a public record or information on a public record that is separated or deleted pursuant to Section 14, if a separation or deletion is made.

A full explanation of the requesting person's right to submit to the Director of the MDOC a written appeal and/or seek judicial review.²⁵ Sample notice language includes:

As to the denial of your FOIA request, the Department is obligated to inform you that under FOIA, MCL 15.240 and MCL 15.240a, you may do the following, as noted in #22 below:

²³ MCL 15.235(2).

²⁴ MCL 15.235(1).

²⁵ MCL 15.235(5).

21. Appeals

1. **Appeal this decision** in writing to the Director of the MDOC and mail it to:

- Attention: Administrator, Office of Legal Affairs, MDOC – FOIA Appeals, P.O. Box 30003, Lansing, MI 48909.
- The writing must specifically state the word "appeal" and must identify the reason or reasons you believe the denial should be reversed. The Director or his/her designee must respond to your appeal within 10 business days of its receipt. Under unusual circumstances, the time for response to your appeal may be extended by no more than 10 business days.

1a. File a civil action in the Court of Claims within 180 days after the date of the final determination to deny the request.

2. A requestor may **appeal the FOIA fees** by submitting a written appeal for a fee reduction that specifically states the word "appeal" and identifies how the required fee exceeds the amount permitted under the public body's available policy/procedures to the Director.

2a. A requestor may commence a civil action in the Court of Claims for a fee reduction only after having gone through the Department's fee appeal process. The action must be filed within 45 days after receiving the final determination from the Director.

22. Fees for public records.

The MDOC may, but is not required to, charge a fee for the necessary copying of a public record for inspection for providing a copy of a public record to a requester.²⁶

All FOIA requestors shall be charged 10 cents per page for each written document provided, plus, the actual cost of postage unless expedited shipping or insurance is stipulated by the requestor. The fee shall be limited to actual mailing costs and to the actual incremental cost of duplication or publication including labor, the cost of the search, examination, review, and the deletion and separation of exempt from non-exempt information. The actual cost of duplication shall be charged for copies of non-written documents, such as computer discs and non-paper physical media. If a portion of a document must be redacted and the document recopied prior to production, the requestor shall be charged only for the copy provided.

A fee may not be charged for the cost of search, review, examination, and the separation of exempt from non-exempt information unless failure to charge the fee would result in an unreasonably high cost to the Department. If assessed, the fee shall be charged at the hourly wage of the lowest-paid employee capable of searching for, locating and examining the public

²⁶ MCL 15.234. See also OAG, 2001 - 2002, No 7083, p 32 (June 7, 2001); OAG, 1999 - 2000, No 7017, p 27 (May 13, 1999); OAG 1995 - 1996, No 6923, p 224 (October 23, 1996); OAG, 1979 - 1980, No 5500, p 255 (July 23, 1979); *Tallman v Cheboygan Area Schools*, 183 Mich App 123; 454 NW2d 171 (1990); *Kearney v Dep't of Mental Health*, 168 Mich App 406; 425 NW2d 161 (1988); *Alpena Title, Inc v Alpena County*, 84 Mich App 308; 269 NW2d 578 (1978).

records in the particular instance regardless of whether that person is available or who actually performs the labor. The hourly wage includes the cost of up to 50% of the base rate paid by the State to cover or partially the cost of fringe benefits. Overtime wages shall not be included in the calculation of labor costs unless overtime is specifically stipulated by the requestor. Labor costs are to be estimated and charged in increments of 15 minutes or more, with all partial time rounded down. Such fees are not to be charged without first contacting the Department's FOIA Coordinator or designee for approval and direction on how to proceed.

The Department may waive or reduce fees if the Department determines it is in the public interest to do so or if providing the requested documents primarily benefits the general public for reasons identified by the requestor. A fee that totals \$10.00 or less, including postage, shall be waived. Other fees shall be waived or reduced pursuant to this paragraph only with approval of the Department FOIA Coordinator or designee.

The fee must be limited to actual duplication, mailing, and labor costs. The first \$20 of a fee must be waived for a person who is receiving public assistance or presents facts showing inability to pay because of indigency.²⁷

A requestor shall not be charged for the first \$20.00 of fees assessed per request, including any fees waived for either of the following:

(a) Upon submission of a current affidavit verifying that s/he is receiving public assistance or, if not receiving public assistance, sufficiently stating facts showing an inability to pay the cost due to indigency. If the requestor is eligible for a requested discount, the public body shall full note the discount on the detailed itemization. If the requestor is ineligible for the discount, the public body shall inform the requestor specifically of the reason for the ineligibility in the public body's written response. An individual is ineligible for this fee reduction if any of the following apply:

- The individual requests the information in conjunction with outside parties who are offering or providing payment or other remuneration to the individual to make the request. The MDOC may require a statement by the requestor in the affidavit that the request is not being made in conjunction with outside parties in exchange for payment or other remuneration.
- The requestor has previously received discounted copies of public records under this subsection from the MDOC twice during the calendar year.

(b) A nonprofit organization formally designated by the state to carry out activities and the protection and advocacy for individuals with mental illness if the requestor meets all of the following requirements:

- Is made directly on behalf of the organization or its clients.

²⁷ MCL 15.234(1) through (3). See also OAG 1997 - 1998, No 6977, p 131 (April 1, 1998) – A public body may require that its fees be paid in full prior to actual delivery of the copies. A public body may.

- Is made for a reason wholly consistent with the mission and provisions of those laws under section 931 of the mental health code, 1974 PA 258, MCL 330.1931.
- Is accompanied by documentation of its designation by the state, if requested by the public body.

A public body may require from the requester, at the time a request is made, a good faith deposit if the fee exceeds \$50.00. The deposit shall not exceed one-half of the total fee.²⁸

23. What if the requester has already asked for and received the records?

A public body may not deny a FOIA request simply because the requester has previously obtained the identical records under the FOIA.²⁹ A public body does not need to provide additional copies of records it has already provided unless the requester can demonstrate why the copy already provided was not sufficient.³⁰

24. What is the form of the records that must be given to the requester?

Public bodies are required to provide public records in the format requested. If there is no explicit statutory language that provides fees for electronic records, the records must be provided using the FOIA fee requirements.³¹

25. Common MDOC Exemptions.

A public body may (but is not required to) withhold from public disclosure certain categories of public records under the FOIA. Certain types of records are exempted from disclosure by other laws, either federal or state.

The exemptions allowed under FOIA are expressed in general language which must be applied to the specific public record requested. It is impractical to list all information or documents that may be exempt from disclosure; therefore, local FOIA coordinators must be familiar with all FOIA exemptions. Often, more than one exemption may apply. FOIA responses must include all applicable exemptions.

General Exemptions

The following are some of the FOIA exemptions which are most frequently taken and examples of information to which the exemptions may apply:

1. Information of a personal nature if public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy. Section 13 (1)(a). The purpose of exemptions is to balance the policy of full disclosure with any significant privacy interests favoring nondisclosure.

²⁸ MCL 15.234(2).

²⁹ OAG, 1993 - 1994, No 6766, p 52 (August 19, 1993).

³⁰ *Densmore v Dep't of Corrections*, 203 Mich App 363; 512 NW2d 72 (1994).

³¹ *Oakland County Treasurer v Title Office, Inc.*, 245 Mich App 196; 627 NW2d 317 (2001); *Grebner v Clinton Charter Twp.*, 216 Mich App 736; 550 NW2d 265 (1996); *Farrell v Detroit*, 209 Mich App 7; 530 NW2d 105 (1995).

Examples: Home addresses and home telephone numbers; emergency contact information; driver license numbers; Social Security numbers; victims' requests to receive information pursuant to PD 01.06.120 "Victim Notification" and the Department's response unless the requestor is the victim; fingerprint cards; resumes of unsuccessful job applicants except for the resume of the requestor.

2. A public record that, if disclosed, would prejudice the ability to maintain the physical security of a correctional facility unless the public interest in disclosure outweighs the public interest in non-disclosure. Section 13(1)(c).

Examples: Blueprints or maps of facility grounds; names of informants; mobilization scenarios and critiques; Special Problem Offender Notice; movement plans; Security Threat Group designations and related documentation; exempt policy directives and operating procedures; post orders for security sensitive assignment (e.g., sallyport); descriptions of security fencing; description of operation of personal protection devices; videos that would disclose capability of any monitoring device; document determined to be confidential by a hearing officer at a hearing conducted pursuant to MCL 791.252.

3. Information or records subject to the physician-patient privilege, the psychologist-patient privilege, or other privilege recognized by statute or court rule. Section 13(1)(h).

Examples: Psychiatric and psychological information unless a release is provided; medical records; however, the request shall be forwarded to the Health Unit Manager for processing under the Medical Records Access Act if a release is provided.

4. Communications and notes of an advisory nature to the extent that they cover other than purely factual materials and are preliminary to a final agency decision of policy or action. This exemption only applies if the public interest of encouraging frank communications between officials and employees clearly outweighs the public interest in disclosure. Section 13(1)(m).

Examples: A Joint Evaluation Committee (JEC) recommendation before the Department of Technology, Management and Budget award is made.

5. Records of a public body's security measures, including security plans, security codes and combinations, passwords, passes, keys, and security procedures, to the extent that the records relate to the ongoing security of the public body. Section 13(1)(u).

Examples: Movement plans; exempt policy directives and operating procedures; post orders for security sensitive assignment (e.g., sallyport); descriptions of security fencing; description of operation of personal protection devices; videos that would disclose capability of any monitoring device.

6. Records or information relating to a civil action in which the requesting party and the Department are parties. Section 13(1)(v). This includes civil court actions in which the Department is representing an employee being sued.
7. Information or records that would disclose the Social Security number of an individual. Sections 13(1)(d), specifically MCL 445.85 and MCL 13(1)(w). This information shall not be disclosed even if a release is provided.

Statutory Exemptions

Section 13(1)(d) of FOIA also permits exemption of documents or information specifically exempted from disclosure by another statute. When using this exemption, it is necessary to identify the specific statute authorizing the exemption. The following are examples of information exempt under Section 13(1)(d) and the applicable statute:

1. Records and reports of investigations made by a probation agent, including presentence investigation reports. (MCL 791.229).
2. The address and telephone number of a victim who has requested to receive information pursuant to PD 01.06.120 "Victim Notification". (MCL 780.769).
3. Victim statements submitted for consideration by the Parole Board pursuant to MCL 780.771.
4. Any information of the disposition of criminal charges and assignment as a youthful trainee unless youthful trainee status is revoked and the offender is subsequently convicted of the offense. (MCL 762.14).
5. Any information received through the Law Enforcement Information Network (LEIN), including records of criminal charges which did not result in a conviction. (MCL 28.214).
6. Quality assurance reviews (e.g., "peer reviews") conducted by BHCS. (MCL 331.533).
7. A report prepared and recommendations made by the Office of the Legislative Corrections Ombudsman and submitted to the Legislative Council pursuant to an investigation. (MCL 4.359).
8. A record ordered to be set aside ("expunged") if the Department has received notice of the set aside. (MCL 780.623).
9. Documents and information pertaining to an offender's registration and change of address notification pursuant to the Sex Offenders Registration Act. (MCL 28.730).

10. Information regarding the diagnosis, prognosis, or treatment of an offender involved in a substance abuse education or treatment program, unless a release is provided by the offender which specifically authorizes release of this information. (48 USC 290dd-3).

26. What if I just want to inspect the records?

When inspection of public records is requested in writing under FOIA, a reasonable opportunity for inspection of the non-exempt records must be allowed during normal business hours. The local FOIA coordinator must ensure that any exempt information is redacted prior to the inspection.

A fee shall be charged a requestor to inspect public records only as set forth below:

1. For the search, review, examination, and the separation of exempt from non-exempt information.
2. With approval of the Department FOIA Coordinator or designee, for the time spent by staff monitoring an inspection that is necessary to protect the original record and to prevent excessive and unreasonable interference with the discharge of Department functions. The fee shall be charged at the hourly rate of the lowest-paid employee capable of monitoring the inspection. The hourly wage includes the cost of up to 50% of the base rate paid by the State to cover or partially cover the cost of fringe benefits.
3. With approval of the Department FOIA Coordinator or designee, for copies necessary to protect the original record as provided for under Section 3(3) of FOIA, MCL 15.233.
4. For a copy made in order to redact a portion of the original that is exempt.

27. Can I request a subscription?

A person also has the right to subscribe to future issuances of public records that are created, issued, or disseminated on a regular basis. A subscription is valid for up to six months, at the request of the subscriber, and is renewable.³²

28. How does the MDOC respond to an appeal?

The Director of the MDOC, whose power can be delegated, must do one of the following within 10 business days after receiving a written appeal:

- Reverse the disclosure denial.
- Issue a written notice to the requesting person upholding the disclosure denial.
- Reverse the disclosure denial in part and issue a written notice to the requesting person upholding the disclosure denial in part.

³² MCL 15.233(1).

- Under unusual circumstances, issue a notice extending for not more than 10 business days the period during which the head of the public body must respond to the written appeal. The head of a public body must not issue more than one notice of extension for a particular written appeal.³³

29. What are the penalties for violation of the FOIA?

If the requesting person prevails in an action commenced under Section 10a by receiving a reduction of 50% or more of the total fee, 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. MCL 15.240a(6).

If the court determines in an action commenced under this section that the public body has arbitrarily and capriciously violated this act by charging an excessive fee, the court shall order the public body to pay a civil fine of \$500.00, which shall be deposited in the general fund of the state treasury. The court may also award, in addition to any actual or compensatory damages, punitive damages in the amount of \$500.00 to the person seeking the fee reduction. The fine and any damages shall not be assessed against an individual, but shall be assessed against the next succeeding public body that is not an individual and that kept or maintained the public record as part of its public function. MCL 15.240a(7).

If the court determines, in an action commenced under the Act, that the public body willfully and intentionally failed to comply with the Act or otherwise acted in bad faith, the court shall order the public body to pay, in addition to any other award or sanction, a civil fine of not less than \$2,500.00 or more than \$7,500.00 for each occurrence. In determining the amount of the civil fine, the court shall consider the budget of the public body and whether the public body has been previously assessed penalties for violating the FOIA. The civil fine shall be deposited in the general fund of the state treasury. MCL 15.240b.

30. Federal FOIA.

To submit a FOIA request to federal agencies under 5 USC § 552 (2006), submit the request to the specific agency. For additional information, you may access the federal FOIA at: http://www.justice.gov/oip/right_to_federal_records09.htm#foia. The federal FOIA and Michigan FOIA are different.

31. Attorney General Opinions (not an exhaustive list).

Some opinions of the Attorney General (OAG) which explain various applications of the FOIA, are noted below. While these opinions are binding on state agencies, they are not binding on the courts or on local units of government. Attorney General opinions may be searched at: <http://www.michigan.gov/ag>.

1. Unless exempt from disclosure by law, records of the Brown-McNeeley insurance fund are public records. OAG, 1977–1978, No 5156, p 66 (March 24, 1977).

2. The FOIA's definition of public body includes single member bodies. OAG, 1977–1978, No 5183-A, p 97 (April 18, 1977).

³³ MCL 15.240(2).

3. Records subject to the confidentiality provisions of the Child Protection Law, MCL 722.621 *et seq.*; are exempt from disclosure under the FOIA, §§ 13(1)(a) and 13(1)(d). OAG, 1977–1978, No 5297, p 430 (April 28, 1978).
4. The office of county sheriff is subject to the provisions of the Freedom of Information Act. OAG, 1977–1978, No 5419, p 758 (December 29, 1978).
5. Certain records protected from disclosure by the Social Welfare Act, are exempt from disclosure under section 13(1)(d) of the Freedom of Information Act, which exempts records that are exempt from disclosure by statute. OAG, 1979–1980, No 5436, p 31 (February 1, 1979).
6. The Insurance Commissioner is required to charge a rate for making copies of public records requested in accordance with the FOIA. OAG, 1979–1980, No 5465, p 104 (March 26, 1979).
7. The following responses to specific inquiries are found in OAG, 1979–1980, No 5500 (July 23, 1979):
 - a. A summary of the FOIA, p. 255.
 - b. A government agency does not fall within the meaning of "person" for purposes of obtaining information under the Act, p. 261.
 - c. The Civil Service Commission is subject to the provisions of the Freedom of Information Act, p. 261.
 - d. Since the President's Council of State Colleges and Universities is wholly funded by state universities and colleges, it is a public body as defined by the Freedom of Information Act, p. 262.
 - e. A board of trustees of a county hospital may refuse to make available records of its proceedings or reports received and records compiled which would constitute a clearly unwarranted invasion of an individual's privacy under section 13(1)(a), involve disclosure of medical, counseling or psychological facts or evaluations concerning a named individual under section 13(m); or involve disclosure that would violate physician-patient or psychologist-patient privilege under section 13(1)(i), p. 263.
 - f. Transcripts of depositions taken in the course of an administrative hearing are subject to disclosure to a person who was not a party to the proceeding, as there is no specific exemption in section 13(1) or any other statute which exempts a deposition or a document referring to the deposition from disclosure. These documents may, however, contain statements which are exempt from disclosure and therefore, pursuant to section 14, where a person who is not a party to the proceeding requests a copy, it will be necessary to separate the exempt material and make only the nonexempt records available, p. 263.
 - g. Stenographer's notes or the tape recordings or dictaphone records of a municipal meeting used to prepare minutes are public records under the Act and must be made available to the public, p. 264.

- h. Computer software developed by and in the possession of a public body is not a public record, p. 264.
- i. Although a state university must release a report of the performance of its official functions in its files, regardless of who prepared it, if a report prepared by an outside agency is retained only by the private agency, it is not subject to public disclosure, p. 265.
- j. Copyrighted materials are not subject to the Act, p. 266.
- k. A request for data which refers only to an extensive period of time and contains no other reference by which the public record may be found does not comply with the requirement of section 3 that the request describe the public record sufficiently to enable the public body to find it, p. 268.
- l. If a public body maintains a file of the names of employees which it has fired or suspended over a certain designated period of time, it must disclose the list if requested, p. 268.
- m. A public body may charge a fee for providing a copy of a public record, p. 268.
- n. The five-day response provision begins the day after the public body has received the request sufficiently describing the public record. If the request does not contain sufficient information describing the public record, it may be denied for that reason. Subsequently, if additional information is provided that sufficiently describes the public record, the period within which the response must be made dates from the time that the additional information is received, p. 269.
- o. A school board may meet in closed session pursuant to the Open Meetings Act to consider matters which are exempt from disclosure under the FOIA, p. 270.
- p. The names and addresses of students may be released unless the parent of the student or the student has informed the institution in writing that such information should not be released, p. 282.
- q. A law enforcement agency may refuse to release the name of a person who has been arrested but not charged, in a complaint or information, with the commission of a crime, p. 282.
- r. Since motor vehicle registration lists have not been declared to be confidential, they are required to be open to public inspection, p. 300.
8. File photographs routinely taken of criminal suspects by law enforcement agencies are public records as defined by the FOIA. To the extent that the release of a person's photograph is clearly unwarranted invasion of personal privacy, a public body may refuse to permit a person to inspect or make copies of the photograph. OAG, 1979–1980, No 5593, p 468 (November 14, 1979).
9. The exemption contained in section 13(1)(n) of the FOIA for communications and notes within a public body or between public bodies of an advisory nature does not constitute an exemption for the purposes of the Open Meetings Act in view of a specific statutory provision

which states that this exemption does not constitute an exemption for the purposes of section 8(h) of the Open Meetings Act. OAG, 1979–1980, No 5608, p 496 (December 17, 1979).

10. The meetings of a board of education expelling a student from school must list a student's name. Unedited minutes must be furnished to the public on request in accordance with law. OAG, 1979–1980, No 5632, p 563 (January 24, 1980).

11. The confidentiality mandated by the Banking Code of 1969 is not limited to facts and information furnished by state chartered banks, but applies to all facts and information received by the Financial Institutions Bureau. Such facts and information are not subject to disclosure pursuant to the FOIA. OAG, 1979–1980, No 5725, p 842 (June 23, 1980).

12. Rules promulgated by the State Ethics Board require that records and files concerning dismissed complaints or terminated investigations be suppressed or expunged. This rule is consistent with the FOIA's privacy exemption since records would be suppressed only if a determination was made that the complaints were unfounded. OAG, 1979–1980, No 5760, p 935 (August 26, 1980).

13. Since the Law Enforcement Information Network Policy Council does not receive and maintain records in the LIEN system, it does not possess copies of records and as a result has no material to furnish persons seeking such records under the FOIA. OAG, 1979–1980, No 5797, p 1038 (October 14, 1980).

14. A public body is not required to disclose both the questions and answers of a sheriff's promotional test unless the public body finds it in the public interest to disclose both the test questions and answers. OAG, 1979–1980, No 5832, p 1125 (December 18, 1980).

15. Employment records disclosing salary history and employment dates are subject to disclosure under the FOIA. OAG, 1981–1982, No 6019, p 507 (December 29, 1981).

16. Copies of receipts maintained by a register of deeds for amounts paid as real estate transfer taxes fall within the mandatory exemption from disclosure established by 1966 PA 134, section 11b, and are exempt from disclosure under the FOIA. OAG, 1981–1982, No 6023, p 518 (January 8, 1982).

17. A township is not required to enact its own Freedom of Information Act in order to comply with the state FOIA. OAG, 1981–1982, No 6042, p 584 (February 25, 1982).

18. A school district must furnish the records of a student upon request of another school district in which the student is enrolled as incidental to the operation of free public elementary and secondary schools required by the Michigan Constitution 1963, art 8, § 2, and is precluded from withholding the records because the student or his or her parents is indebted to the school district possessing the records for fees or other charges. OAG, 1981–1982, No 6064, p 641 (April 30, 1982).

19. Records of a public body showing the number of days a public employee is absent from work are not exempt from disclosure under the FOIA. OAG, 1981–1982, No 6087, p 698 (July 28, 1982).

20. The FOIA does not require a sheriff to furnish jail booking records to a private security firm if the sheriff determines disclosure would constitute a clearly unwarranted invasion of privacy. OAG, 1985–1986, No 6389, p 374 (September 24, 1986).
21. State legislators are exempt from the FOIA. OAG, 1985–1986, No 6390, p 375 (September 26, 1986).
22. Surveys, comments, and other information received by the Qualifications Advisory Committee in its performance evaluation of worker's compensation magistrates are confidential by statute, MCL 418.212(1)(g), and, therefore, are exempt from disclosure under the FOIA. OAG, 1987–1988, No 6504, p 295 (March 4, 1988).
23. The FOIA does not apply to a private nonprofit corporation. OAG, 1989–1990, No 6563, p 27 (January 26, 1989).
24. While the personal files of the Auditor General are exempt from disclosure, the general files, records, and final audit reports prepared by the Auditor General's staff are subject to FOIA disclosure, except where a portion is specifically exempted by statute. OAG, 1989–1990, No 6613, p 299 (March 14, 1990).
25. A public officer's or employee's routine performance evaluation is not exempt from disclosure, even when the evaluation is discussed in a closed meeting held pursuant to the Open Meetings Act. OAG, 1989-1990, No 6668, p 409 (November 28, 1990).
26. A public body may not deny a FOIA request simply because the requester has previously obtained the identical records under that statute. A public body need not provide a waiver of fees to an indigent person requesting additional copies of identical documents previously provided with a waiver of fees pursuant to a prior request under the FOIA. OAG, 1993–1994, No 6766, p 52 (August 19, 1993).
27. The records maintained by the Department of State Police on the STATIS computer system meet the definition of a "public record" set forth in section 2(c) of the FOIA. Therefore, that Department must search the STATIS computer system when it responds to a FOIA request. It must also allow the examination of or produce copies of all documents it finds, unless the records sought fall within one or more of the specific exemptions set forth in section 13 of the FOIA. Although participating law enforcement agencies other than the Department of State Police have remote computer terminals, which allow them access to the STATIS computer, those records are not writings in the possession of those agencies within the meaning of the FOIA, section 2(c) and (e), unless those records are saved to a computer storage device or printed by the participating agency. Thus, law enforcement agencies other than the Department of State Police are not obligated under the FOIA to search the STATIS system for records except for those records which they contributed to that system. OAG, 1993–1994, No 6820, p 196 (October 11, 1994).
28. Section 4(2) of the FOIA permits a public body to charge a deposit of not more than one-half of the projected total fee if that fee exceeds \$50.00. A public body may establish a fee in advance of compiling the records responsive to a request under the FOIA so long as the fee represents the actual cost of responding to the request based on prior experience and it is

calculated in accordance with section 4 of the FOIA. OAG, 1995–1996, No 6923, p 224 (October 23, 1996).

29. A private, voluntary unincorporated association of lake property owners is not a public body subject to the FOIA.

A corporation formed under the Summer Resort Owners Corporation Act, 1929 PA 137, MCL 455.201 et seq., is a public body subject to the provisions of the FOIA. OAG, 1997–1998, No 6942, p 40 (July 3, 1997).

30. The state Insurance Bureau, in response to a request made under the FOIA, 1976 PA 442, must provide copies of copyrighted manuals of rules and rates which are in its possession and are required by law to be filed by insurers with the bureau, without first obtaining the permission of the copyright holder. OAG, 1997–1998, No 6965, p 91 (January 16, 1998).

31. Under the FOIA, the Auditor General may, in the discharge of his duties to audit the state and its departments, access nonexempt public records of local units of government under the FOIA. OAG, 1997–1998, No 6970, p 106 (January 28, 1998).

32. A public body may require that its fees be paid in full prior to actual delivery of the copies. However, a public body may not refuse to process a subsequent FOIA request on the ground that the requester failed to pay fees charged for a prior FOIA request.

A public body may refuse to process a FOIA request if the requester fails to pay a good faith deposit properly requested by the public body pursuant to section 4(2) of the FOIA.

Although the FOIA does not specify a limitations period within which a public body must commence a lawsuit to collect fees charged for complying with a records request, the 6-year limitations period applicable to contract claims governs such a cause of action. OAG, 1997 – 1998, No 6977, p 131 (April 1, 1998).

33. When establishing fees chargeable under the FOIA, a public body may include in the calculation of labor costs and fringe benefits paid to employees. OAG 1999 - 2000, No 7017, p 27 (May 13, 1999).

34. An urban redevelopment corporation organized under the Urban Redevelopment Corporations Law is a public body subject to the Open Meetings Act and FOIA. OAG, 1999 – 2000, No 7066, p 156 (November 7, 2000).

35. The FOIA permits a public body to charge a fee for the actual incremental cost of duplicating or publishing a record, including labor directly attributable to those tasks, even when the labor is performed by a public employee during business hours and does not add extra costs to the public body's normal budget.

Under section 4(3) of the FOIA, a public body may not charge a fee for the cost of its search, examination, review, and the deletion and separation of exempt from nonexempt information, unless failure to charge a fee would result in unreasonably high costs to the public body. This fee limitation, however, does not apply to a public body's costs incurred in the necessary copying

or publication of a public record for inspection, or for providing a copy of a public record and mailing the copy.

The phrase "unreasonably high costs," as used in section 4(3) of the FOIA, prohibits a public body from charging a fee for the costs of search, examination, review, and deletion and separation of exempt from nonexempt information unless the costs incurred by a public body for those activities in the particular instance would be excessive and beyond the normal or usual amount for those services. OAG, 2001–2002, No 7083, p 32 (June 7, 2001).

36. The board of trustees of a retirement system established and administered by a home rule city charter is a public body subject to the Open Meetings Act and the FOIA. OAG 2001 – 2002, No 7087, p 45 (August 21, 2001).

37. Under the FOIA, a public body may not impose a more restrictive schedule for access to its public records for certain persons than it does for the public generally, based solely upon the purpose for which the records are sought. OAG, 2001–2002, No 7095, p 64 (December 6, 2001).

38. Under section 5 of the FOIA, the five business days within which a public body must respond to a request for public records means five consecutive weekdays, other than Saturdays, Sundays, or legal holidays, regardless of when the particular public body is open for public business. OAG, 2005–2006, No 7172, p 20 (March 17, 2005).

39. In complying with its obligations under the OMA to provide the public access to meeting minutes, the public body must also discharge its other public functions and duties. To that end, a rule of reasonableness is applicable in providing a public body an adequate opportunity to meet the request to inspect minutes. A public body must make at least a copy of its minutes available for inspection as provided in MCL 15.269(1) of OMA. A public body must also avoid undue delay in meeting a request, and is obligated to comply with the response periods of the FOIA, and the specific provisions of the OMA, such as section 9(3) for the proposed and approved minutes. But to protect the integrity of its official records, and to allow sufficient time to retrieve such records, if necessary, it may be reasonable for a public body to require advance notice of, and supervision of, the inspection of a record copy of meeting minutes. OAG, 2010, p (March 3, 2010).

40. Photographs or video recordings of students participating in school activities will qualify as education records for purposes of the Family Educational Rights and Privacy Act, 20 USC 1232g, and that Act's prohibition on the release of such records, if they contain information directly related to a student, and are maintained by the school district.

A school or district may designate photographs and video recordings of students engaged in school activities as a category of "directory information" that may be disclosed without written consent under the Family Educational Rights and Privacy Act, 20 USC 1232g, as long as the school or district provides the required notice to parents that such media will be considered directory information, and further provides parents with a reasonable opportunity to opt out or deny consent to the release of such information.

A school or district has no legal responsibility under the Family Educational Rights and Privacy Act, 20 USC 1232g, with respect to photographs or video recordings of students participating in school activities taken by a person not acting on behalf of the school or district, unless the

photographs and video recordings are "maintained" by the school or district under 20 USC 1232g(a)(4)(A)(ii). OAG, 2010, No 7245, p (March 29, 2010).

32. Court Cases (this is not an exhaustive list)

Alpena Title, Inc v Alpena County, 84 Mich App 308; 269 NW2d 578 (1978). A county board of commissioners may charge a reasonable fee for access to and the copying of county tract index information in accordance with the statute regarding fees for the inspection of such records. However, the Insurance commissioner is required to charge a rate for making copies of public records requested in accordance with the FOIA.

Baker, PC v City of Westland, 425 Mich App 90; 627 NW2d 27 (2001). Accident reports containing the names, addresses, injury codes, and accident dates for injured and deceased accident victims do not have to be released when requested under the FOIA. Involvement in an automobile accident is an intimate detail of a person's private life. Disclosure of the information would not constitute significantly to the public's understanding of the operations or activities of the government and, therefore, would be a clearly unwarranted invasion of privacy.

The FOIA's privacy exemption may be applied to deceased private citizens and their families where there is no public interest in disclosure.

Ballard v Dep't of Corrections, 122 Mich App 123; 332 NW2d 435 (1982). A film made by the Department of Corrections (DOC) showing a prisoner being forcibly removed from his or her prison cell is a public record and must be disclosed. Exemption asserted by the DOC did not outweigh the public interest in disclosure.

Bechtel Power Corp v Dep't of Treasury, 128 Mich App 324; 340 NW2d 297 (1983). Tax information may be protected against disclosure under 13(1)(a) and 13(1)(d) of the FOIA.

Blue Cross/Blue Shield v Insurance Bureau, 104 Mich App 113; 304 NW2d 499 (1981). Information may be revealed under the FOIA despite claim of exemption. A decision to deny disclosure of exempt records is committed to discretion of agency and should not be disturbed unless abuse of discretion is found. Trade secret exemption does not apply to information required by law or as a condition of receiving a government contract, license or benefit.

Booth Newspapers, Inc v Kalamazoo School District, 181 Mich App 752; 450 NW2d 286 (1989). The trial court appropriately ordered the release of tenure charges and a settlement agreement concerning allegations of sexual misconduct against an unmarried teacher in redacted form. The records were redacted to prevent the identity of the teacher and the students involved from being disclosed in order to protect their privacy. The FOIA confers discretion upon a court to award an appropriate portion of the reasonable attorney fees incurred by a party that has prevailed in part. When a plaintiff prevails only as to a portion of the request, the award of fees should be fairly allocable to that portion.

Booth Newspapers, Inc v Kent County Treasurer, 175 Mich App 523; 438 NW2d 317 (1989). Tax records indicating the monthly or quarterly tax payments made by individual hotels and motels under a county hotel/motel tax do not fall within the FOIA's privacy exemption.

Booth Newspapers, Inc v Regents of University of Michigan, 93 Mich App 100; 286 NW2d 55 (1979). The written opinion of a public body's attorney is exempt from disclosure under the FOIA and may serve as a basis for closing a meeting under the Open Meetings Act.

Booth Newspapers, Inc v University of Michigan Board of Regents, 444 Mich 211; 507 NW2d 422 (1993). To exempt information under the FOIA, section 13(1)(a), information must be of a "personal nature," and disclosure of that information must constitute "clearly unwarranted" invasion of privacy. Travel expense records of members of a public body do not constitute "records of a personal nature." The privacy exemption does not permit the withholding of information that conceivably could lead to the revelation of personal information. Therefore, a public body may not withhold travel expense records because their disclosure might lead to information concerning the candidates interviewed by board members.

Bradley v Saranac Community Schools Board of Education, Lansing Ass'n of School Admr's v Lansing School District, 455 Mich 285; 565 NW2d 650 (1997). The Michigan FOIA does not have a specific exemption for personnel records. Thus, the personnel records of non-law enforcement public employees generally are available to the public. Information that falls within one of the exemptions of the FOIA may be redacted.

The privacy exemption under section 13(1)(a) of the FOIA consists of two elements, both of which must be met in order for an exemption to apply. First, the information must be of a "personal nature." Second, the disclosure must be a "clearly unwarranted invasion of privacy."

Performance appraisals, disciplinary actions, and complaints relating to employees' accomplishments in their public jobs do not reveal intimate or embarrassing details of their private lives and, therefore, they are not records of a "personal nature."

Performance evaluations of public employees are not counseling evaluations protected from disclosure by the FIOA, section 13(1)(l).

Section 13(1)(m) of the FOIA provides an exemption for communications passing within or between public bodies. Documents in the possession of a school district prepared by parents are not within the scope of this exemption. Further, the exemption must be asserted by a public body rather than by a private individual.

Bredemeier v Kentwood Board of Education, 95 Mich App 767; 291 NW2d 199 (1980). The FOIA does not require the information be recorded by a public body, but if it is, it must be disclosed. Attorney fees, costs, and disbursements are awarded to prevailing party under the FOIA. However, to prevail, a party must show at a minimum that bringing a court action was necessary and had a causative effect on delivery of the information. Lack of court-ordered disclosure precludes an award of punitive damages under the FOIA.

Breighner v Michigan High School Athletic Ass'n, Inc, 471 Mich 217; 683 NW2d 639 (2004). The Michigan High School Athletic Association, Inc. (MHSAA) is not a "public body" within the meaning of FOIA that is funded "by or through" a governmental authority, rather it is an independent, nonprofit corporation primarily funded through its own activities. Therefore, the MHSAA is not subject to the FOIA's provisions.

Capitol Information Ass'n v Ann Arbor Police Dep't, 138 Mich App 655; 360 NW2d 262 (1984). Plaintiff's request, seeking "all correspondence" between local police department and "all federal

law enforcement/investigative" agencies, was "absurdly overbroad" and failed to sufficiently identify specific records as required by the FOIA, 3(1).

Cashel v Regents of the University of Michigan, 141 Mich App 541; 367 NW2d 841 (1985). Where a person seeking to inspect records will take more than two weeks to complete inspection, he or she may be assessed labor costs incurred by a public body to supervise his or her inspection.

Cashel v Smith, 117 Mich App 405; 324 NW2d 336 (1982). Depositions may sometimes be appropriate in FOIA cases, but they must be justified. The Legislature intended that the flow of information from public bodies and persons should not be impeded by long court process.

City of Warren v City of Detroit, 261 Mich App 165; 680 Nw2d 57 (2004). The computer software formula used to set water rates is merely computer-stored information or data and, thus, is a public record under the FOIA. The FOIA's exception of "software" would allow for nondisclosure of the set of computer statements or instructions that are used to utilize the formula and data; however, the formula itself is distinct information separate from the software.

Clerical-Technical Union of MSU v MSU Board of Trustees, 190 Mich app 300; 475 NW2d 373 (1991). The home addresses of donors to Michigan state University are information of a personal nature, the disclosure of which would constitute a clearly unwarranted invasion of privacy.

CMU Supervisory-Technical Ass'n MEA/NEA v CMU Board of Trustees, A party to a lawsuit does not lose his or her right under the FOIA simply because the party may be able to obtain the records from a public body through the discovery phase of pending civil litigation. [But see section 13(1)(v) of the FOIA, which now exempts records or information relating to a civil action in which the requesting party and the public body are parties.]

Coblentz v City of Novi, 475 Mich 558; 719 NW2d 73 (2006). Defendant was not required to produce certain records described in plaintiff's FOIA request where defendant's uncontroverted affidavit stated that records did not exist. Plaintiff was entitled to the non-disclosed exhibits that accompanied a settlement agreement between defendant and a third party, where plaintiff's FOIA request described the records sufficiently to enable the defendant to find the records and where no exemption from disclosure applied. Plaintiff also was entitled to records exempted by defendant under section 13(1)(f) of the FOIA where defendant did not record a description of the records in a central place within a reasonable time after the records came into defendant's possession. Fees to recoup the labor costs incurred in processing FOIA requests do not include the cost of independent contractors.

Connoisseur Communication of Flint v University of Michigan, 230 Mich App 732; 584 NW2d 647 (1998). The University of Michigan properly denied a FOIA request for the vehicle records of a student athlete. The information was protected pursuant to the Family Education Rights and Privacy Act (FERPA) and, therefore, exempt from disclosure under the FOIA, section 13(2).

Curry v Jackson Circuit Court, 151 Mich App 854; 391 NW2d 476 (1986). The term "resides" as used in the FOIA, when applied to a prisoner, refers to the prisoner's intended domicile. Such a place may be the county where the prisoner last lived before being sent to prison or the county where the prison is located. Factors such as the possibility of parole and how the prisoner has ordered his or her personal business transactions will be considered relevant to corroboration of a prisoner's states intention relative to domicile.

Dawkins v Dep't of Civil Service, 130 Mich App 669; 344 NW2d 43 (1983). If a plaintiff in a FOIA case prevails only in part, she may be awarded either all of her court costs and attorney fees or only that portion fairly allocable to the successful portion of her case. The fact that the defendant's refusal to disclose the records was made in good faith and was not arbitrary or capricious has no bearing whatever on the plaintiff's right to recover these costs.

DeMaria Building Co, Inc, v Dep't of Management & Budget, 159 Mich App 729; 407 NW2d 72 (1987). The exemption found in 13(1)(m) of the FOIA, for communications and notes within a public body or between public bodies, does not apply to an outside consultant's report to a public body.

Detroit Free Press v Dep't of Consumer & Industry Services, 246 Mich App 311; 631 NW2d 769 (2001). Consumer complaints filed with the Department of Consumer and Industry Services against property insurers and health insurers contain information of a personal nature. Disclosure of the names and addresses of the complainants may be withheld, when requested pursuant to FOIA, because disclosure of the information would constitute a clearly unwarranted invasion of the individual's privacy. Other information in the complaints should, however, be disclosed of how the agency is complying with its statutory function.

Densmore v Dep't of Corrections, 203 Mich App 363; 512 NW2d 72 (1994). A public body does not need to provide additional copies of records it has already provided unless the requestor can demonstrate why the copy already provided was not sufficient.

Detroit Free Press v City of Southfield, 269 Mich App 275; 713 NW2d 28 (2005). The pension income amounts of police and firefighter pension recipients reflect specific governmental decisions regarding retirees' continuing compensation for public service. Therefore, the pension amounts are more comparable to public salaries than to private assets and do not constitute private information exempt from disclosure under the FOIA, and the public interest in disclosure outweighs a public interest in nondisclosure.

Detroit Free Press v City of Warren, 250 Mich App 164; 645 NW2d 71 (2002). The names of public officials and employees associated with information concerning grand jury proceedings constitute information concerning matters of legitimate public concern. It is not information of a personal nature that is exempt from disclosure under section 13 of the FOIA.

Detroit Free Press v Dep't of State Police, 243 Mich App 218; 622 NW2d 313 (2000). The State Police is not required to disclose information regarding state legislators who applied for concealed weapons permits. Legislators who apply for a concealed weapons permit are exercising a right guaranteed to all. The fact that a person has requested and/or secured

permission to carry a concealed weapon is an intimate and potentially embarrassing detail of one's private life. Disclosure of the information would not contribute significantly to the public's understanding of the operations or activities of the government and, therefore, would be a clearly unwarranted invasion of privacy.

Detroit Free Press, Inc v Dept's of Attorney General, 271 Mich App 418; 722 NW2d 277 (2006). Plaintiff was not a "prevailing party" as that term is defined under the FOIA where the trial court did not order disclosure of any public records and the dispute centered entirely on the FOIA processing fee charged for copies of records. Therefore, plaintiff was not entitled to the attorney fees and costs awarded by the trial court under section 10(6) of the FOIA.

Detroit Free Press, Inc v Oakland County Sheriff, 164 Mich App 656; 418 NW2d 124 (1987). Booking photographs of persons arrested, charged with felonies, and awaiting trial are not protected from release as an unwarranted invasion of personal privacy.

Detroit News, Inc v Detroit, 185 Mich App 296; 460 NW2d 312 (1990). The minutes of a closed city council meeting held in violation of the Open Meetings Act, are public records and are available upon request under the FOIA.

Detroit News, Inc v Policeman and Firemen Retirement Sys of the City of Detroit, 252 Mich App 59; 651 NW2d 127 (2002). The words of the FOIA state "a public body means any of the following." Thus, any of the entities listed in the statute are included as public bodies under the Act. The Policemen and Firemen Retirement System is a public body because it is a body which is "created by state or local authority or which is primarily funded by or through state or local authority."

Eastly v University of Michigan, 178 Mich App 723; 444 NW2d 820 (1989). A public body must have in its possession or control a copy of the requested document before it can be produced or before a court can order its production.

Evening News Ass'n v City of Troy, 417 Mich 481; 339 NW2d 421 (1983). A general claim that records are involved in an ongoing criminal investigation and that their disclosure would "interfere with law enforcement proceedings" is not sufficient to sustain an exemption under the FOIA, section 13(1)(b). A public body must indicate factually and in detail how a particular document or category of documents satisfies the exemption; mere conclusory allegations are not sufficient.

Farrell v Detroit, 209 Mich App 7; 530 NW2d 105 (1995). Computer records are public records that are subject to disclosure pursuant to the FOIA. A public body is required to provide public records in the form requested, not just the information they contain. The providing of a computer printout of the information contained on a computer tape does not satisfy a request for the computer tape itself.

Favors v Dep't of Corrections, 192 Mich App 131; 480 NW2d 604 (1991). The form used in determining whether a prisoner should be awarded disciplinary credits was exempt from disclosure under section 13(1)(m) of the FOIA in that it covered other than purely factual

materials, was advisory in nature and preliminary to final agency determination of policy or action. The public interest in encouraging frank communications within the Department of Corrections (DOC) clearly outweighed the public interest in disclosure of worksheet forms. The trial court failed to comply with the technical requirements of the FOIA because it did not require the DOC to bear the burden of proving that a public record was exempt. However, that failure did not require reversal of a grant of summary disposition for the DOC in the inmate's action where the Doc clearly reached the correct result.

Grebner v Clinton Charter Twp, 216 Mich App 736; 550 NW2d 265 (1996). Section 522(1) of the Michigan Election Law, 1954 PA 116, MCL 168.1 *et seq.*, which provides for the making, certifying, and delivery of a computer tape to any person upon the payment to the clerk of the court of the cost of making, certifying, and delivering the tape, disk, or listening is not a statute "specifically authorizing the sale" of the computer tape. Therefore, the determination of the fee to be charged for obtaining the computer tape is made pursuant to section 4 of the FOIA.

Grebner v Oakland County Clerk, 220 Mich App 513; 560 NW2d 351 (1996). Section 10(1) of the FOIA is a combined jurisdiction and venue provision. This provision makes it clear that circuit courts have jurisdiction to hear FOIA cases and specifies the counties in which the action may be brought.

Hagen v Dep't of Education, 431 Mich 118; 427 NW2d 879 (1988). The decisions of the State Tenure Commission are matters of public record. When a private hearing is requested by a teacher as provided under the Teacher Tenure Act, the decision may be withheld during the administrative stage of the teacher's appeal. Once a final administrative decision is reached, the decision may not be withheld from disclosure.

Hartzell v Mayville Community School District, 183 Mich App 782; 455 NW2d 411 (1990). The FOIA requires disclosure of the fact that a requested document does not exist. A plaintiff in a FOIA action that is forced to file a lawsuit to ascertain that a document does not exist is a prevailing party entitled to an award of costs and reasonable attorney fees.

Haskins v Oronoko Twp Supervisor, 172 Mich App 73; 431 NW2d 210 (1988). A trial court complies with the holding in *The Evening News Ass'n v City of Troy*, 417 Mich 481; 339 NW2d 421 (1983), where it conducts an *in camera* inspection of the records sought and determines that certain records are exempt from disclosures under the narrowly drawn statutory exemptions designed to protect the identity of confidential informants.

Health Central v Comm'r of Insurance, 152 Mich App 336; 393 NW2d 625 (1986). HMOs have no standing to raise common-law right of privacy claims. Such claims can only be asserted by individuals whose privacy has been invaded. The right of privacy does not protect artificial entities.

Herald Co v Ann Arbor Public Schools, 224 Mich App 266; 568 NW2d 411 (1997). Once documentation that is the subject of a FOIA lawsuit has been disclosed, the subject of the controversy disappears. The privacy exemption of the FOIA allows a public body to withhold from disclosure public records of a personal nature where the information would constitute a

clearly unwarranted invasion of an individual's privacy. Information is considered personal if it concerns a particular person and his or her intimate affairs, interests, or activities. While the records sought in this case were personal in nature in that they contained information about a teacher's family and observations about his or her conduct, the disclosure did not constitute a "clearly unwarranted" invasion of privacy because the records discussed the professional performance of a teacher in the classroom that is an issue of legitimate concern to the public.

A public body may exempt from disclosure, pursuant to section 13(1)(m), advisory communications within a public body or between public bodies to the extent that they are not nonfactual and are preliminary to a final agency determination. However, if records meet these substantive tests, the public body must also establish that the public interest in encouraging frank communications within the public body or between public bodies clearly outweighs the public interest in disclosure. In this case the public interest in disclosing records that contain public observations of a teacher who has been convicted or carrying a concealed weapon is not clearly outweighed by the public interest in encouraging frank communications within the public body.

A class of documents may be exempt from the FOIA, so long as, the exempt categories are clearly described and drawn with precision so that all documents within a category are similar in nature. Exempt material must be segregated from nonexempt material to the extent practicable.

The FOIA exempts, in section 13(1)(h), information subject to the physician-patient privilege. The purpose of the privilege is to protect the physician-patient relationship and ensure that communications between the two are confidential. Attendance records that do not contain any information that a physician acquired while treating an employee are not covered by this exemption.

The fact that an employee waives the physician-patient privilege by submitting to his or her employer attendance records that contain medical records does not mean that the privilege was waived with regard to third parties who request disclosure of the records under the FOIA.

The FOIA excludes from disclosure information protected by the attorney-client privilege. The scope of the privilege is narrow, including only those communications by the client to its advisor that are made for the purpose of obtaining legal advice. A tape recording of an interview of the teacher by the school district is not within the attorney-client privilege.

Herald Co v City of Bay City, 463 Mich 111; 614 NW2d 873 (2000). The FOIA does not establish detailed requirements for a valid request. If a citizen submits a request for the names, current job titles, and cities of residence for job candidates, and the city possesses records containing the information, the city is obligated to provide the records even though they were not specifically described in the request.

The fact of application for a public job, or the typical background information that may be contained in an application, is not information of a personal nature protected under section 13(1)(a) of the FOIA. If embarrassing or intimate personal information is contained in an application, the public body is under a duty to separate the exempt material and make the nonexempt material available to the public.

Herald Co, Inc v Eastern Michigan Univ Bd of Regents, 475 Mich 463; 719 NW2d 19 (2006). The advisory, non-factual portions of a letter written by defendant's vice president of finance to a member of the Board of Regents were exempt as frank communications under section 13(1)(m) of the FOIA, where the balance of competing interests favored nondisclosure.

Herald Co v Kalamazoo, 229 Mich App 376; 581 NW2d 295 (1998). Law enforcement exemptions of the Michigan FOIA are more restrictive than parallel provisions of the federal FOIA. The correct standard under the Michigan FOIA is whether a document "would" interfere with law enforcement proceedings or disclose investigative techniques or procedures.

An investigation will not be considered "on-going" for the purposes of the FOIA without an active, on-going, law enforcement investigation. In the absence of such activities, the investigation cannot be considered open although the period of limitations may still be running.

Hoffman v Bay City School District, 137 Mich App 333; 357 NW2d 686 (1984). Where an attorney conducted an investigation into the business and finance practices of a school district and orally reported his or her opinion regarding the investigation to the school board but did not share the actual documents, the investigative file itself is not a public record of the board.

Howell Education Association MEA/NEA v Howell Board of Education, published opinion of the Court of Appeals, issued January 26, 2010 (Docket No 288977); 2010 Mich App LEXIS 143; 30 IER Cas (BNA) 594; 188 LRRM 2054. This matter has been appealed to the Supreme Court of Michigan, SC 140929, lv den 2011.

Hubka v Pennfield Twp, 197 Mich App 117; 494 NW2d 800 (1992). Letters sent by a township attorney to a township board that contain information obtained by the attorney from township employees under compulsion and promises of confidentiality are protected from disclosure under the FOIA by the attorney-client privilege. Likewise, the opinions, conclusions, and recommendations of the attorney, based on the information, are protected.

Hyson v Dep't of Corrections, 205 Mich App 422; 521 NW2d 841 (1994). Statements made by confidential witnesses relating to a major misconduct charge against a prison inmate may be withheld when requested pursuant to the FOIA because disclosure of the documents, even with the names of witnesses deleted, would reveal their identities and jeopardize their personal safety within the prison. In addition, the release would preclude the public body's ability to maintain the physical security of the penal institution.

In re Buchanan, 152 Mich App 706; 394 NW2d 78 (1986). The common-law right of access to court records is not without limitation.

In re Subpoena Duces Tecum, on remand from the MI Supreme Court, 205 Mich App 700; 518 NW2d 522 (1994). Section 13(1)(m) of the FOIA protects from disclosure communications within or between public bodies of an advisory nature that are other than purely factual and are preliminary to a final agency determination of policy or action. The burden is on the public body to show, in each particular instance, that the public interest in encouraging frank communications between officials and employees of the public body clearly outweighs the public interest in disclosure. It is not adequate to show that the requested document falls within a general category of documents that may be protected.

International Union, UPGWA v Dep't of State Police, 118 Mich App 292; 324 NW2d 611 (1982), aff'd by equally divided court, 422 Mich 432 (1985). The exemption of a list of names

and home addresses of private security guards from disclosure to a union seeking that list for collective bargaining purposes is not justified. The public purpose of collective bargaining outweighs the employees' interest in the privacy of this information. However, the union is ordered not to engage in further disclosure of the list for other unrelated purposes.

Jackson v Eastern Michigan University, 215 Mich App 240; 544 NW2d 737 (1996). Eastern Michigan University Foundation is primarily funded by Eastern Michigan University and, therefore, is a public body subject to the FOIA.

Jordan v Martimucci, 101 Mich App 212; 300 NW2d 325 (1980). A plaintiff who brings an action under the FOIA for punitive damages for delay in disclosure of requested information must demonstrate that he or she has received the requested information as a result of court-ordered disclosure and that the defendant acted arbitrarily and capriciously in failing to comply with the disclosure request in a timely manner.

Kearney v Dep't of Mental Health, 168 Mich App 406; 425 NW2d 161 (1988). The FOIA exempts from disclosure records exempted from disclosure by other statutory authority. Mental Health treatment records are exempt under the Mental Health Code. However, treatment records may be disclosed where the holder of the record and the patient consent. Persons requesting records under the FOIA are not entitled to free copies of the records. The holder of a public record may charge a fee for providing copies. There is, however, a waiver of the first \$20.00 for those who, by affidavit, can show an inability to pay because of indigency.

Kent County Sheriff's Ass'n v Sheriff, 463 Mich 353; 616 NW2d 677 (2000). The FOIA provides citizens with broad rights to obtain public records limited only by the coverage of the statute and its exemptions. The fact that another body of law potentially gives an additional basis for access to records, in this case the Public Employment Relations Act, does not limit the applicability of the FOIA or the jurisdiction of the circuit court to consider relief under the FOIA.

Kestenbaum v Michigan State University, 414 Mich 510; 327 NW2d 783 (1982). An equally divided Supreme Court affirmed the lower court in holding that a list of names and addresses of students on a computer tape would appear to be a public record, but the nature of the information is personal and falls within an enumerated exception. Public disclosure of the tape would constitute a clearly unwarranted invasion of a person's privacy.

Key v Township of Paw Paw, 254 Mich App 508; 657 NW2d 546 (2002). The public body complied with the FOIA when the FOIA coordinator denied a request for information because the information sought could not be located.

When a public body timely claims the additional 10 business days for a response as provided in section 5(2)(d) of the FOIA, the new response deadline is 15 business days after the receipt of the request, regardless of when the notice of extension is issued.

Kincaid v Dep't of Corrections, 180 Mich App 176; 446 NW2d 604 (1989) – a request for disclosure of information under the FOIA must describe the requested records sufficiently to enable the public body to find them; when a request is denied because of an insufficient description, the requesting person may (1) rewrite the request with additional information, or (2)

file suit in circuit court where the sole issue would be the sufficiency of information to describe the records desired.

Kincaid v Dep't of Corrections, 180 Mich app 176; 446 NW2d 604 (1989). A public body bears the burden of proof on demonstrating a proper justification for the denial of a FOIA request. A request for disclosure of information under the FOIA must describe the requested records sufficiently to enable the public body to find them; when a request is denied because of an insufficient description, the requesting person may (1) rewrite the request with additional information, or (2) file suit in circuit court where the sole issue would be the sufficiency of information to describe the records desired. A FOIA request by an inmate, which erroneously states the date of a guilty determination on a misconduct or the hearing date with respect to which records are sought, reasonably and sufficiently describes the records sought. A public body acts in an arbitrary and capricious manner by repeatedly refusing to look for a record so described.

Kocher v Dep't of Treasury, 241 Mich App 378; 615 NW2d 767 (2000). The addresses of unclaimed property holders maintained by the Michigan Department of Treasury fall within the definition of personal information, and their release would constitute a clearly unwarranted invasion of privacy. Disclosure of the information would not enhance the public's understanding of the operations or activities of the government.

Krug v Ingham County Sheriff's Office, 264 Mich App 475; 691 NW2d 50 (2004). Defendant was not entitled to issue blanket denials of all FOIA requests relating to open case files without actually reviewing the case first to determine what information is exempt. A defendant should treat a lawsuit objecting to a FOIA request denial as a continuing request for information and release the records if the defendant determines that the information has become nonexempt during the course of the FOIA litigation.

Kubick v Child & Family Services of Michigan, 171 Mich App 304; 429 NW2d 881 (1988). While there is no bright-line rule to determine what constitutes "primarily funded" to determine if a body is a "public body" as defined at section 2(d) of the FOIA, a private nonprofit corporation which receives less than half of its funding from government sources is not a public body which is primarily funded by or through state or local authority. Accordingly, such corporation is not subject to the requirements of the FOIA regarding the disclosure of information by public bodies.

Landry v City of Dearborn, 259 Mich App 416; 674 NW2d 697 (2003). Section 13(1)s(ix) of the FOIA permits nondisclosure of law enforcement personnel records. The meaning of the term "personal records" in that section includes all records used by law enforcement agencies in the selection or hiring of officers, as well as the applications received by the city from unsuccessful applicants. The public interest in disclosing the information did not outweigh the public interest in not disclosing the information.

Laracey v financial Institutions Bureau, 163 Mich App 437; 414 NW2d 909 (1987). Attorney who filed pro se action is not entitled to recover attorney fees in a FOIA lawsuit.

Lapeer County Abstract & Title Co v Lapeer County Register of Deeds, 264 Mich App 167; 691 NW2d 11 (2004). While the FOIA grants a general right to receive copies of public records, nothing in the FOIA requires a public body to provide copies in a microfilm format rather than in the form of a paper copy. Furthermore, the Inspection of Records Act specifically provides that, in response to a request for a reproduction of a record of a register of deeds, the register of deeds may select the medium used to reproduce the record.

Lepp v Cheboygan Area Schools, 190 Mich App 726; 476 NW2d 506 (1991). Where the requested information pertains to the party making the request, it is unreasonable to refuse disclosure on the grounds of invasion of privacy.

Local Area Watch v City of Grand Rapids, 262 Mich App 136; 683 NW2d 745 (2004). Under the Open Meetings Act, minutes of closed session meetings may only be disclosed by court order under the Act. Further, under the FOIA, a public body is not required to disclose records protected from disclosure to the public by other statutes. Where the plaintiff sought disclosure of closed meeting minutes, the defendant did not violate the FOIA for withholding then where there was not a judicial determination that the minutes were subject to disclosure under the Open Meetings Act.

Local 79, Service Employees Intern'l Union v Lapeer County General Hospital, 111 Mich App 441; 314 NW2d 648 (1981). The proper forum in which to seek relief from a violation of the FOIA is the circuit court and not the Michigan Employment Relations Commission, notwithstanding labor-related issues.

Local 312 of the AFSCME, AFL-CIO v Detroit, 207 Mich App 472; 525 NW2d 487 (1994). The Public Employment Relations Act (PERA), 1947 PA 336, MCL 423.201 *et seq.*, and the FOIA are not conflicting statutes such that the PERA would prevail over the FOIA with the result that a person involved in a labor dispute would be precluded from obtaining public records under the FOIA. The Legislature has clearly defined the class of persons entitled to seek disclosure of public records pursuant to the FIOA. There is no sound policy reason for distinguishing between persons who are involved in litigation-type proceedings and those who are not.

MacKenzie v Wales Twp, 247 Mich App 124; 635 NW2d 335 (2001). A township must grant access to computer tapes used to prepare property tax notices for the township even though the tapes were created by, and in the possession of, another entity. Because the township used the tapes, albeit indirectly, in performing an official function, the tapes fall within the statutory definition of public records.

Mackey v Dep't of Corrections, 205 Mich App 330; 517 NW2d 303 (1994). A prison record about a prison inmate is exempt from disclosure under the prison security exemption of the FOIA where the record is requested by an inmate other than the one to whom the record pertains.

Mager v Dep't of State Police, 460 Mich 134; 595 NW2d 142 (1999). State Police is not required to provide the names and addresses of registered handgun owners. Gun ownership is information that meets both elements of the FOIA privacy exemption, section 13(1)(a). Gun

registration information is of a "personal nature," and the disclosure of such information would constitute a "clearly unwarranted" invasion of the individual's privacy.

Manning v City of East Tawas, 234 Mich App 244; 593 NW2d 649 (1999). When making an in camera determination whether to compel disclosure under the FOIA, a trial court may order disclosure of nonexempt information and may provide for the redaction of exempt information.

Meredith Corp v City of Flint, 256 Mich App 703; 671 NW2d 101 (2003). Where an action for disclosure of public records is initiated pursuant to the FOIA, the prevailing party's entitlement to an award of reasonable attorney fees, costs, and disbursements includes all such fees, costs, and disbursements related to achieving production of the public records.

Messenger v Dep't of Consumer & Industry Services, 238 Mich App 524; 606 NW2d 38 (1999). Investigation undertaken by the state public body did not fit the definition of investigation found in the Public Health Code as referenced in section 13(1)(t) of the FOIA.

Messenger v Ingham County Prosecutor, 232 Mich App 633; 591 NW2d 393 (1998). The privilege for attorney work product is recognized by court rule, MCR 2.302(B)(3)(a), and incorporated into the FOIA through section 13(1)(h). When information sought pursuant to the FOIA is identified as attorney work product, it is not subject to disclosure.

McCartney v Attorney General, 231 Mich App 722; 587 NW2d 824 (1998). Letters forwarded by the Governor to the Attorney General for the purpose of seeking legal advice were protected by the attorney-client privilege, and thus, by section 13(1)(g) of the FOIA. Internal memoranda within the Attorney General's office containing recommendations, opinions, and strategies with regard to legal advice requested by the Governor are exempted from disclosure by section 13(1)(m) of the FOIA to the extent that they are preliminary, nonfactual, and part of the deliberative process.

Michigan Council of Trout Unlimited v Michigan Dep't of Military Affairs, 213 Mich App 203; 539 NW2d 745 (1995). Notwithstanding the unique relationship between the Michigan National Guard and the federal government, which is explicitly recognized by Michigan statutes, the circuit court had jurisdiction to consider plaintiff's actions under the Michigan FOIA seeking to obtain documents in possession of the Michigan National Guard. While the state courts have jurisdiction, application of section 13(1)(d) of the Michigan FOIA encompasses federal regulations and the federal FOIA, both of which prohibit the release of the documents sought by plaintiff. Accordingly, plaintiff could not obtain the documents at issue.

Michigan Federation of Teachers and School Related Personnel, AFT, AFL-CIO v University of Michigan, 481 Mich 657; 753 NW2d 28 (2008). The Court held that employees' home addresses and telephone numbers meet both prongs of FOIA's privacy exemption because that information is "of a personal nature" and its disclosure would constitute a "clearly unwarranted invasion of an individual's privacy." The Court reexamined the definition of "information of a personal nature" set forth in *Bradley v Saranac Community Schools Bd of Ed*, 455 Mich 285; 565 NW2d 650 (1997), and conclude that it unnecessarily limited the intended scope of that phrase. The Court cured the deficiency and revised the definition to encompass information of an embarrassing,

intimate, *private*, or *confidential* nature. Accordingly, the University of Michigan employees' home addresses and telephone numbers are exempt from disclosure.

Michigan Tax Management Services Co v City of Warren, 437 Mich 506; 473 NW2d 263 (1991). When a prevailing party in a FOIA action is awarded "reasonable" attorney fees, the trial court is obligated to make an independent determination with regard to the amount of the fees. The standard utilized by an appellate court to review such a determination is abuse of discretion.

Milford v Gilb, 148 Mich App 778; 384 NW2d 786 (1985). Under the FOIA, a public body may be exempt from disclosure communications and notes within a public body or between public bodies of an advisory nature to the extent that they cover other than purely factual matters. The public body bears the burden of proof that a statutory exception applies to the item requested.

Mithrandir v Dep't of Corrections, 164 Mich App 143; 416 NW2d 352 (1987). Because of the special circumstances surrounding prison security and the confinement of prisoners, the Department of Corrections may set limits on a prisoner's right to examine nonexempt records.

Mullin v Detroit Police Dep't, 133 Mich App 46; 348 NW2d 708 (1984). Defendant properly exempted a computer tape containing personal information on persons involved in traffic accidents. Disclosure of the tape would have been a clearly unwarranted invasion of privacy.

Nabkey v Kent Community Action Program, Inc, 99 Mich App 480; 298 NW2d 11 (1980). No award of attorney fees is possible where a prevailing plaintiff under the FOIA is not represented by an attorney.

Newark Morning Ledger Co v Saginaw County Sheriff, 204 Mich App 215; 514 NW2d 213 (1994). Internal affairs investigation records of a law enforcement agency constitute personnel records, which are exempt from disclosure unless the public interest in disclosure outweighs the public interest in nondisclosure. The mere location of a public record in a personnel file is not determinative as to its status in a personnel record. In determining what is a "personal record" under the FOIA, the court looked to the definition of that term in the Bullard-Plawecki Employee Right to Know Act (ERKA), 1978 PA 397, MCL 423.501 *et seq.* While the purpose of the FOIA and the ERKA are different, the Legislature's clearly expressed intent in the ERKA to prohibit access by an employee to any internal investigations relating to that employee indicates an intent to not allow public access to such records.

Nicita v Detroit, 194 Mich App 657; 487 NW2d 814 (1992). Section 13(1)(i) of the FOIA does not exempt bids with respect to development projects from disclosure once a developer has been chosen.

Nicita v Detroit, 216 Mich App 746; 550 NW2d 269 (1996). Business records pertaining to a real estate development company are not exempt from disclosure pursuant to section 13(1)(a) of the FOIA where there is no indication that the records contain information of a personal nature. This section does not protect information that could conceivably lead to the revelation of personal information. Section 13(1)(m) of the FOIA protects communications within or between a public body that are other than purely factual and are preliminary to a final agency

determination of policy or action. A public agency must also show that the need for nondisclosure clearly outweighs the public interest in disclosure.

Oakland Press v Pontiac Stadium Building Authority, 173 Mich App 41; 433 NW2d 317 (1988). The release of names and addresses of licensees doing business with a public body is not an unwarranted invasion of privacy.

Oakland County Prosecutor v Dep't of Corrections, 222 Mich App 654; 564 NW2d 922 (1997). A prisoner's mental health records submitted to the parole board when seeking parole must be provided to a county prosecutor when requested pursuant to the FOIA so that the prosecutor may determine whether the board's decision to grant parole should be appealed.

Oakland County Treasurer v Title Office, Inc, 245 Mich App 196; 627 NW2d 317 (2001). Electronic records are writings as defined by the FOIA. Public bodies are required to provide public records in the format requested. If there is no explicit statutory language that provides fees for electronic records, the records must be provided using the FOIA fee requirements.

Palladium Publishing Co v River Valley School District, 115 Mich App 490; 321 NW2d 705 (1982). The name of a student suspended by the action of a board of education will appear in the meeting minutes and is not information exempt from disclosure under the FOIA.

Paprocki v Jackson County Clerk, 142 Mich App 785; 371 NW2d 450 (1985). Under the 10(1) of the FOIA, the term "resides," when applied to a prisoner, refers to the place where the prisoner last lived before being sent to prison; "resides" must be interpreted to mean a person's legal residence or domicile at the time of his or her incarceration.

Patterson v Allegan County Sheriff, A booking photograph of a county jail inmate kept in the files of a county sheriff is a public record under the FOIA; such photographs may not be withheld from disclosure on the basis of the privacy exemption found in 13(1)(a).

Payne v Grand Rapids Police Chief, 178 Mich App 193; 443 NW2d 481 (1989). A record of law enforcement investigation may be exempt from disclosure under the FOIA where disclosure would interfere with law enforcement proceedings. However, the agency must demonstrate how disclosure of particular records or kinds of records would amount to interference on the basis of facts and not merely conclusory statements that recite the language of the FOIA.

Pennington v Washtenaw County Sheriff, 125 Mich App 556; 336 NW2d 828 (1983). Failure to respond to a request is treated as a final decision to deny the request. A plaintiff need only make a showing in circuit court that the request was made and denied. The burden is on the defendant to show a viable defense. Nondisclosure based upon the privacy exemption of 13(1)(b)(iii) is limited to intimate details of a highly personal nature.

Penokie v Michigan Technological University, 93 Mich App 650; 287 NW2d 304 (1979). Disclosures of the names and salaries of employees of the defendant university is not a "clearly unwarranted" invasion of personal privacy under the FOIA.

Perlongo v Iron River Cooperative TV, 122 Mich App 433; 332 NW2d 502 (1983). A private nonstock, nonprofit cable television corporation is not a "public body" for purposes of either the Open Meetings Act or the FOIA, even though it is licensed, franchised, or otherwise regulated by the government.

Post-Newsweek Stations, Michigan, Inc v Detroit, 179 Mich App 331; 445 NW2d 529 (1989). In claiming an exemption under the FOIA, for interference with law enforcement proceedings, the burden of proof is on the public body claiming the exemption. The exemption must be interpreted narrowly and the public body must separate exempt material from nonexempt and make nonexempt information available. Exempt information must be described with particularity indicating how the information would interfere with law enforcement proceedings. When analyzing claims of exemption under the FOIA, a trial court must make sure it receives a complete particularized justification for a denial of a request, or hold *in camera* hearings to determine whether this justification exists. The court may allow counsel for the requesting party to examine, *in camera*, under special agreement, the contested material.

Practical Political Consulting, Inc v Terry Lynn Land, published opinion of the Court of Appeals, issued March 9, 2010 (Docket No 291176). The issue is whether the disclosure, or concealment, of public records (a copy of all vote history of the January 15, 2008 presidential primary including which ballots each voter selected) will lead to, or detract from, the public's ability to hold its elected and appointed public officials accountable for carrying out the law.

Proctor v White Lake Twp Police, 248 Mich App 457; 639 NW2d 332 (2001). The FOIA is not unconstitutional simply because it excludes prisoners from obtaining information. Application of the FOIA exclusion does not deprive prisoners of their fundamental right to access the courts or their First Amendment rights. The principles involving access to the court do not support a right to inspect police department records.

Quatrine v Mackinaw City Public Schools, 204 Mich App 342; 514 NW2d 254 (1994). Public schools were not required to release records under the FOIA where written parental consent for release of records was not provided.

Residential Ratepayer Consortium v Public Service Commission, 168 Mich App 476; 425 NW2d 98 (1987). An administrative agency does not waive its defenses in a circuit court action to compel disclosure of documents under the FOIA because they were not raised at the administrative level.

Ridenour v Dearborn Board of Education, 111 Mich App 798; 314 NW2d 760 (1981). Public disclosure of performance evaluation of school administrators is not an intrusion of privacy as defined by the FOIA because people have a strong interest in public education and because taxpayers are increasingly holding administrators accountable for expenditures of tax money.

Scharret v City of Berkley, 249 Mich App 405; 642 NW2d 685 (2002). According to section 5 of the FOIA, a public body is required to respond to a request for information within five business days after receiving the request, and its failure to timely respond constitutes its final determination to deny the request and is a violation of the FOIA.

In addition, nothing in the FOIA states that the resubmission of a request denied by virtue of the public body's failure to respond divests the requesting person of the ability to exercise the options granted under section 10 of the FOIA.

To get an award of attorney fees and costs under the FOIA, the action must be reasonably necessary to compel disclosure, and the action must have substantial causative effect on the delivery of the information to the requestor.

Schinzel v Wilkerson, 110 Mich App 600; 313 NW2d 167 (1981). A plaintiff appearing in propria persona who prevails in an action commenced pursuant to the FOIA is entitled to an award of his or her actual expenditures but is not entitled to an award of attorney fees.

Sclafani v Domestic Violence Escape, 255 Mich App 260; 660 NW2d 97 (2003). Section 2(d)(iv) of the FOIA states that a public body is "any other body which is created by state or local authority or which is primarily funded by or through state or local authority." The court found that Domestic Violence Escape (DOVE), a non-profit group that educates citizens about domestic violence and provides several services to victims, was a public body and therefore was subject to FOIA because a state or local government authority provided 50% or more of its funding. "Primary funding," as required under the statute, can be provided by multiple sources.

Shellum v MESC, 194 Mich App 474; 487 NW2d 490 (1992). Information held by MESC concerning the calculated unemployment insurance tax contribution rate of an employer is exempt from disclosure under 13(1)(d) of the FOIA because it utilizes information obtained from the employer, which is protected by statute and administrative rule.

Schroeder v Detroit, 221 Mich App 364; 561 NW2d 497 (1997). A person denied employment by a police department was not entitled to receive a copy of his or her psychological evaluation under the FOIA. In cases involving testing instruments as defined by section 13(1)(k) of the FOIA, release of the information is not required unless the public interest in disclosure outweighs the public interest in nondisclosure. Here, the public interest ensuring the integrity of the hiring process outweighed the public interest in disclosing the information to a candidate attempting to investigate the fairness of the test.

Soave v Michigan Dep't of Education, 139 Mich App 99; 360 NW2d 194 (1984). Because federal agency regulations have the force and effect of federal statutory law, a state agency may properly withhold a record under FOIA, 13(1)(d), if that record is exempt from disclosure under a federal agency regulation.

State Defender Union Employees v Legal Aid & Defender Ass'n of Detroit, 230 Mich App 426; 584 NW2d 359 (1998). An organization "primarily funded by or through state or local authority" is a public body pursuant to the FOIA. Primarily funded means the receipt of government grants or subsidies. An otherwise private organization is not a public body merely because public monies paid in exchange for goods or services comprise a majority of the organization's revenues.

State Employees Ass'n v Dep't of Management & Budget, 428 Mich 104; 404 NW2d 606 (1987). The disclosure of the home addresses of state employees to a recognized employee organization does not constitute a clearly unwarranted invasion of privacy.

Stone Street Capital, Inc v Michigan bureau of State Lottery, 236 Mich App 683; 689 NW2d 541 (2004). The names, addresses, and other personal information of persons who have received lottery winnings directly, by assignment, or by other judgment are exempt from disclosure under the FOIA as the information is entirely unrelated to any inquiry regarding the inner working of government and would constitute a clearly unwarranted invasion of an individual's privacy. Public disclosure of such personal information has the potential to endanger individuals.

Sutton v City of Oak Park, 251 Mich App 345; 650 NW2d 404 (2002). Internal investigation records may be exempt as personnel records of a law enforcement agency if the public interest favors nondisclosure over disclosure.

Swickard v Wayne County Medical Examiner, 438 Mich 536; 475 NW2d 304 (1991). In making a determination whether a disclosure of requested information would constitute an invasion of privacy one looks to constitutional law and common-law as well as customs, mores, or ordinary views of the community. The release of autopsy reports and toxicology test results are not unwarranted infringements on the right to privacy of either the deceased or the deceased's family. The autopsy reports and toxicology test results are not within the doctor-patient privilege.

Swickard v Wayne County Medical Examiner, 196 Mich App 98; 492 NW2d 497 (1992). A party who prevails completely in an action asserting the right to inspect or receive a copy of a public record under the FOIA is entitled to reasonable attorney fees, costs, and disbursements. No time limit is imposed upon a prevailing party for requesting attorney fees.

Tallman v Cheboygan Area Schools, 183 Mich App 123; 454 NW2d 171 (1990). A public body may charge a fee for providing a copy of a public record. Section 4 of the Act provides a method for determining the charge for records, and a public body is obligated to arrive at its fees pursuant to that section.

The Detroit News, Inc v Detroit, 204 Mich App 720; 516 NW2d 151 (1994). Telephone bills paid by a public body constitute expense records of public officials and employees and are "public records" under the FOIA.

Thomas v City of New Baltimore, 254 Mich App 196; 657 NW2d 530 (2002). Where a person sues under the FOIA and prevails in an action to compel disclosure, the person must be awarded costs and fees, "even though the action has been rendered moot by acts of the public body in disposing of the documents."

Thomas v State Board of Law Examiners, 210 Mich App 279; 533 NW2d 3 (1995). The State Board of Law Examiners is an agent of the judiciary and, therefore, not a public body subject to the disclosure requirements of the FOIA.

Title Office, Inc v Van Buren Co Treasurer, 469 Mich 516; 676 NW2d 207 (2004). Fees for electronic copies of property tax records requested from a county treasurer are computed according to the Transcripts and Abstracts of Records Act (TARA), as an exception under the FIOA, section 4(1). "Transcripts," as used in the TARA, is intended to apply to any reproduction of a record on file in the treasurer's office, including electronic copies.

Tobin v Michigan Civil Service Comm'n, 416 Mich 661; 331 NW2d 184 (1982). The FOIA does not compel a public body to conceal information at the insistence of one who opposes its release.

Traverse City Record Eagle v Traverse City Area Public Schools, 184 Mich App 609; 459 NW2d 28 (1990). A tentative bargaining agreement between a school district and the union which represents its employees was held to be exempt from disclosure pursuant to section 13(1)(m) of the FOIA, which exempts communication and notes within a public body or between public bodies which are advisory, nonfactual, and preliminary to a final decision. The public interest in encouraging frank communications between the employer and its employees, which leads to effective negotiations, in this case outweighs the public interest in disclosure.

Walen v Dep't of Corrections, 443 Mich 240; 505 NW2d 519 (1993). A prison disciplinary hearing falls within the definition of "contested case" and, therefore, pursuant to the FOIA, section 11(1), must be published and made available to the public. The Department of Corrections satisfied the publication requirement by retaining the final orders and decisions from disciplinary hearings in prisoners' files.

Walloon Lake Water System, Inc v Melrose Twp, 163 Mich App 726; 415 NW2d 292 (1987). A public body does not escape liability under the FOIA merely because a capricious act on its part rendered the lawsuit moot. This is particularly true when actions of the public body include direct violation of the FOIA, i.e., not giving a written explanation of the refusal as required and willfully disposing of the material knowing that a suit is pending under the FOIA for disclosure.

Wayne County Prosecutor v Detroit, 185 Mich App 265; 460 NW2d 298 (1990). For purposes of the FOIA, a county prosecutor is a person as defined in the Act. This allows him or her, in his or her official capacity, to request documents from public bodies under the FOIA.

Williams v Martimucci, 88 Mich App 198; 276 NW2d 876 (1979). Action of the manager of general office services at a state prison in denying inmate's request for copies of certain documents in inmate's file because inmate did not pay the \$3.00 fee for the cost of processing the request was not arbitrary and capricious, since the manager checked the institutional indigency list for the month and found that the inmate's name was not on it.

Wilson v Eaton Rapids, 196 Mich App 671; 493 NW2d 433 (1992). A public body's attempt to reconcile a contractual obligation to maintain the confidentiality of a resignation agreement with its statutory obligation under the FOIA does not constitute arbitrary and capricious behavior.

Yarbrough v Dep't of Corrections, 199 Mich App 180; 501 NW2d 207 (1993). Records compiled in the course of an internal investigation into a sexual harassment are "investigating

records compiled for law enforcement purposes" within the meaning of said terms at section 13(1)(b) of the FOIA.

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STATE OF MICHIGAN
IN THE COURT OF CLAIMS

SPENCER WOODMAN,

Plaintiff,

Case No. 17-000082-MZ
Hon. Cynthia D. Stephens

v

MICHIGAN DEPARTMENT OF CORRECTIONS,

Defendant.

GEORGE JOSEPH,

Plaintiff,

Case No. 17-000230-MZ
Hon. Cynthia D. Stephens

v

MICHIGAN DEPARTMENT OF CORRECTIONS,

Defendant.

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**20/02/2018 PLAINTIFFS' RESPONSE TO
DEFENDANT MDOC'S MOTION FOR SUMMARY DISPOSITION**

I. INTRODUCTION

The MDOC's motion for summary disposition entirely ignores the MDOC's admitted rampant FOIA abuses, entirely ignores the MDOC's failure to follow its internal FOIA operating procedures, and most importantly, entirely ignores the law. To misdirect from its legal deficiencies, the MDOC's motion is supported almost exclusively by an eleventh-hour affidavit that seeks to undo fatal damage of the crippling testimony of three MDOC employees who admitted that the agency *never reviews any* videos—and did not review the videos at issue in these cases—in response to FOIA requests. Simply, the MDOC believes it is above FOIA.

Despite the overwhelming weight of law and fact, the MDOC asks the Court to grant it summary disposition. The MDOC's motion should be denied because its admissions and the undisputed evidence detailed below and in Plaintiffs' motion for summary disposition shows that none of the cited exemptions apply to prevent the disclosure of the requested information. Disclosure of the videos would not threaten the security of MDOC facilities, would not release records of the MDOC's security measures, and would not release private information.

The Court should deny the MDOC's motion, grant Plaintiffs' motion, order the MDOC to disclose the requested records, and award Plaintiffs all damages to which they are entitled.

II. FACTUAL BACKGROUND¹

On September 27, 2016, inmate Dustin Szot was involved in an altercation with another prisoner at the MDOC's Bellamy Creek Correctional Facility. The fight was stopped when corrections officials discharged Tasers on the inmates. Shortly after being Tasered, Szot died. His death certificate lists homicide by blunt force trauma as the cause of death.

¹ The facts relevant to the parties' cross-motions for summary disposition are detailed in Plaintiffs' Brief in Support of their Motion for Summary Disposition and are incorporated by reference.

A. Plaintiffs' FOIA Requests

On September 28, 2016, Plaintiff Spencer Woodman submitted a FOIA request to obtain video footage of “the confrontation that led to the fatality of inmate Dustin Szot on September 27, 2016” at the Bellamy Creek Correctional Facility. (**Exhibit A**, Woodman’s FOIA Request.) Woodman also requested “available accompanying audio records.” (*Id.*) On October 6, 2016, the MDOC summarily denied Woodman’s request under MCL 15.243(1)(c). (**Exhibit B**, Def’s Resp to Woodman’s FOIA Request.) On October 10, 2016, Woodman appealed, challenging the applicability of MCL 15.243(1)(c). (**Exhibit C**, Def’s Resp to Woodman’s Appeal.) On October 25, 2016, the MDOC denied his appeal citing MCL 15.243(1)(c) and (1)(u). (*Id.*)

On June 28, 2017, Plaintiff George Joseph submitted a FOIA request seeking video footage of “the confrontation that led to the fatality of inmate Dustin Szot on September 27, 2016.” (**Exhibit D**, Def’s Resp to Joseph’s FOIA Request.) Joseph’s request also sought Taser videos and any audio recordings. (*Id.*) On July 7, 2017, the MDOC denied Joseph’s request, citing MCL 15.243(1)(c). (*Id.*)

Following the MDOC’s denial of Plaintiffs’ requests, Woodman and Joseph filed separate FOIA lawsuits seeking to compel disclosure of all relevant videos and audio recordings. The parties stipulated to consolidate the lawsuits.

B. Plaintiffs Uncovered the MDOC’s Rampant FOIA Abuse

Through discovery, Plaintiffs learned that there are eight recordings from eight distinct recording devices that captured the events leading to Szot’s death. It is undisputed that each of the eight videos is responsive to Plaintiffs’ FOIA requests. (**Exhibit E**, Def’s Resp to Woodman’s Interrog No. 27; **Exhibit F**, Groves Dep Tr, 93:13-93:14.) Plaintiffs also learned of the significant differences between the eight recordings:

No.	Video Description	Recording Device	Audio	Individuals
1	MDOC officers responding to the confrontation that led to Szot's death	Facility camera	No	Dustin Szot MDOC staff Other prisoner(s)
2	Confrontation that led to Szot's death	Electronic Control Device ("Taser")	Yes	Dustin Szot MDOC staff Other prisoner(s)
3	Confrontation that led to Szot's death	Electronic Control Device ("Taser")	Yes	Dustin Szot MDOC staff Other prisoner(s)
4	Confrontation that led to Szot's death	Electronic Control Device ("Taser")	Yes	Dustin Szot MDOC staff Other prisoners
5	Confrontation that led to Szot's death, MDOC officers responding to confrontation, and attempted resuscitation of Szot	Facility camera	No	Dustin Szot MDOC staff Other prisoner(s)
6	Attempted resuscitation of Szot	Handheld camera	Yes	Dustin Szot MDOC staff
7	Attempted resuscitation of Szot	iPhone camera	Yes	Dustin Szot MDOC staff
8	Attempted resuscitation of Szot	iPhone camera	Yes	Dustin Szot MDOC staff

(See also Exhibit E; Def's Resp to Woodman's Interrog No. 27; **Exhibit G**, Wakefield Dep Tr, pp 26:3-28:18, 33:6-33:8, 49:7-50:11, 50:19-50:25.) The MDOC never acknowledged these various recordings or the different devices that captured them in responding to Plaintiffs' requests.

Plaintiffs obtained the following additional facts: the MDOC's FOIA Coordinator did not review *any materials* responsive to Woodman's request before denying it. (Exhibit F, p 45:10-45:13; **Exhibit H**, Groves Corp Rep Dep Tr, p 29:22-29:25.) For the MDOC, this is standard practice—its FOIA staff does not review *any* footage before denying FOIA video requests. (Exhibit F, p 49:3-49:15.) The MDOC has a blanket denial policy for all FOIA requests for video. (*Id.* at pp 45:24-46:3; Exhibit H, pp 27:18-28:01.) The MDOC also ignores its statutory duty to balance the public's interest in disclosure against the reason for nondisclosure. (Exhibit F, pp 72:25-73:4; Exhibit H, p 57:5-57:18.) The MDOC made no attempt to extract audio or redact portions of responsive videos, despite FOIA's requirement to do so. (Exhibit G, pp 35:4-37:22.)

The MDOC likewise failed to respond separately to Plaintiffs' requests for audio, despite a requirement to respond to each part of a FOIA request separately. (Exhibit F, pp 53:22-54:6.)

III. ARGUMENT

A motion brought under MCR 2.116(C)(8) “tests the legal sufficiency of the claim on the pleadings alone to determine whether the plaintiff has stated a claim on which relief may be granted.” *Rataj v City of Romulus*, 306 Mich App 735, 746–47; 858 NW2d 116 (2014). “The motion must be granted if no factual development could justify the plaintiff’s claim for relief.” *Id.* A motion brought under MCR 2.116(C)(10) tests the factual support of a plaintiff’s claim. *Rataj*, 306 Mich App at 747. “The court considers the affidavits, pleadings, depositions, admissions, and other documentary evidence[.]” and reviews the record in the light most favorable to the nonmoving party. *Id.*; *Taylor v Lansing Bd of Water & Light*, 272 Mich App 200, 203; 725 NW2d 84 (2006). The court must grant the motion if it finds no genuine issue as to any material fact and determines that the moving party is entitled to judgment as a matter of law. *Id.*

“As with all statutes, the proper interpretation and application of FOIA is a question of law[.]” *Id.* Whether a public record is exempt from disclosure under FOIA is a mixed question of fact and law, but when the facts are undisputed and reasonable minds could not differ, whether a public record is exempt is a pure question of law. *Id.* Here, the requested videos are “without question” public records. *Id.* at 747-48. The only remaining question is whether the MDOC violated the FOIA in denying Plaintiffs’ requests. It did. The Court should deny the MDOC’s motion for summary disposition.

A. The MDOC Abandoned Its Argument Under MCR 2.116(C)(8)

The MDOC asserts without supporting argument that summary disposition should be granted in its favor under MCR 2.116(C)(8). At no point in its Brief does the MDOC actually claim that Plaintiffs’ complaints fail to state claim on which relief can be granted. Because it failed

to raise an argument under (C)(8), the MDOC abandoned this argument. *Bitterman v Village of Oakley*, 309 Mich App 53, 68-69; 868 NW2d 642 (2015) (holding that the defendant abandoned one of its arguments by failing to provide facts, authority, or legal analysis to support its position).

In any event, the MDOC's Brief relies entirely on evidence outside the pleadings and fails to identify how Plaintiffs' complaints were facially deficient. The Court should deny summary disposition under (C)(8).

B. The MDOC Fails to Satisfy Its Burden Under MCR 2.116(C)(10)

A party claiming that requested material is exempt from FOIA disclosure bears the burden of proving that the refusal to disclose was justified. *Payne v Grand Rapids Police Chief*, 178 Mich App 193, 198; 443 NW2d 481 (1989). To satisfy its burden, a public body must narrowly apply exemptions and justify their use with more than mere conclusory statements. *Id.* Simple repetition of statutory language is insufficient. *Id.* Opinions, conjecture, or conclusory statements will not suffice. Rather, public bodies must factually indicate how a particular record is exempt. *Id.*

In addition to justifying the application of a FOIA exemption, public bodies must also establish that they separated the exempt and nonexempt material and disclose the nonexempt material. *Id.* Courts consider the pleadings, deposition testimony, admissions, and other documentary evidence to determine whether the public body satisfied these requirements. Here, viewing the record in a light most favorable to Plaintiffs, the MDOC failed to satisfy its burden and the Court should deny its motion under (C)(10).

1. The MDOC cannot rely on Wakefield's affidavit to contradict the MDOC's sworn testimony

Rather than support its arguments with relevant, analogous, or precedential authority, the MDOC relies almost entirely on Wakefield's affidavit to support its claim that MCL 15.243(1)(c), (u), and (a) exempt the requested information from disclosure. But critically, Wakefield's affidavit

contains new statements that the MDOC never before disclosed to Plaintiffs or Plaintiffs' counsel—statements that expressly contradict the MDOC's sworn deposition testimony and interrogatory responses. Most notably, Wakefield claims that alleged threats made against the MDOC and its personnel justify denial of Plaintiffs' FOIA requests:

Szot's mother and another family member made threatening phone calls to IBC. In one of these phone calls, Szot's family members threatened to blow up the facility. Additionally, Szot's mother came to IBC and threatened, among other things, to poison the staffs food and to bring an assault rifle onto IBC's premises to use on staff. [Wakefield Aff, ¶ 8.]

If this newly feigned justification for withholding the requested information were legitimate, the MDOC could have cited it as a basis for denial on multiple occasions, including in its FOIA denials, its affirmative defenses, its deposition testimony, or its interrogatory responses. Instead, the MDOC is now attempting to blindside Plaintiffs with new "facts" that contradict the MDOC's sworn interrogatory responses and the deposition testimony of Cheryl Groves, who was designated as a MDOC corporate representative. (See Exhibit E, Def's Responses to Interrog Nos 24, 25, 33; Exhibit H, p 41:12-41:20.)

MDOC's reliance on Wakefield's affidavit is entirely inappropriate for two reasons. First, it is well established that facts that occurred subsequent to a public body's FOIA request denial may not be considered in hindsight to support justification of a FOIA exemption. *State News v Michigan State Univ*, 481 Mich 692, 703; 753 NW2d 20 (2008). Rather, the appropriate time to measure whether a public record is exempt under a particular exemption is the time when the public body asserts it. *Id.* This is because "[t]he determinative legal question is whether the public body erred because the FOIA exemption applied *when it denied the request*. Subsequent developments are irrelevant to that FOIA inquiry." *Id.* at 703-04.

Here, the record is devoid of any information regarding when the events involving Szot's family allegedly occurred. More importantly, the MDOC has not shown, let alone suggested, that anyone responsible for denying Plaintiffs' FOIA requests knew of these interactions. The MDOC bears the burden of proving the records are exempt. Having withheld these purported facts until the eleventh hour, after the close of discovery, after it swore its interrogatory responses were complete, and after giving sworn deposition testimony, the MDOC should not be allowed to use them now to justify their claimed exemptions.

Second, at the summary disposition phase, the MDOC cannot contradict its sworn discovery responses and deposition testimony. See *Casey v Auto Owners Ins Co*, 273 Mich App 388, 396; 729 NW2d 277 (2006) (“[A] witness is bound by his or her deposition testimony, and that testimony cannot be contradicted by affidavit in an attempt to defeat a motion for summary disposition.”); *Silberstein v Pro-Golf of Am, Inc*, 278 Mich App 446, 459; 750 NW2d 615 (2008) (“[A] party may not raise an issue of fact by submitting an affidavit that contradicts the party's prior clear and unequivocal testimony.”) Yet that is exactly what Wakefield's affidavit attempts to do. The Court should not consider Wakefield's affidavit and it cannot be used as a basis for entry of summary disposition in favor of the MDOC.

2. The MDOC unlawfully issued blanket denials of Plaintiffs' requests and repeatedly failed to follow the statutory review process

As set forth in Plaintiffs' Brief in Support of their Motion for Summary Disposition, the evidence establishes that the MDOC violated FOIA on several occasions. The MDOC fails to address the impropriety of its blanket denial policy and completely ignores *Evening News, Krug, infra*, and *Ballard, infra*—three cases that mandate summary disposition in favor of Plaintiffs.

First, the MDOC's staff did not review *any materials* responsive to Plaintiffs' requests. (Exhibit H, Groves Corp Rep Dep Tr, p 29:22-29:25.) This is the MDOC's standard practice; it

does not review *any* video footage before denying FOIA requests for videos. (Exhibit F, Groves Dep Tr, pp 49:4-49:15, 74:8-75:14, 76:6-78:18, 89:6-90:10, 91:17-92:16, 92:20-94:4, 94:5-95:17, 95:20-96:25; Exhibit H, Groves Corp Rep Dep Tr, pp 40:6-40:7, 51:1-54:11.)

Generic assertions that responsive records are exempt from disclosure do not satisfy FOIA's pro-disclosure mandate. *Evening News*, 417 Mich at 491–92; *Booth Newspapers, Inc v University of Michigan Bd of Regents*, 192 Mich App 574; 481 NW2d 778 (1992) (holding that exemptions must be supported by substantial justification, not merely conclusory assertions). Public bodies are required to review responsive records to make informed exemption determinations on a case-by-case basis. *Krug v Ingham Co Sheriff's Office*, 264 Mich App 475, 478; 691 NW2d 50 (2004) (holding unlawful the defendant's blanket denial of all FOIA requests relating to open case files); *Evening News*, 417 Mich at 503 (holding that defendant's "generic determination" policy failed to satisfy the obligation to separate exempt and nonexempt material); *Ballard v MDOC*, 122 Mich App 123; 332 NW2d 435 (1982) (requiring MDOC to use case-by-case approach to requests for video).

Ballard and *Krug* mandate denial of the MDOC's motion. In *Ballard*, the Court of Appeals held that the MDOC violated FOIA under nearly identical facts. 122 Mich App at 127. In *Krug*, the Court of Appeals held that that a law enforcement agency's blanket denial violated FOIA based in part on the defendant's deposition admission that its "policy [was] to issue blanket denials of all FOIA requests relating to open case files and that he actually failed to review the file before issuing defendant's response[.]" 264 Mich App at 479. Here, the MDOC's testimony definitively establishes that it never reviews requested videos and thus never (a) determines whether disclosure of a particular video would prejudice prison security or (b) considers the public interest in

disclosure. Even the MDOC's internal FOIA Guide lists *Ballard* and *Krug* as authoritative; the MDOC knows its policy violates Michigan law. (**Exhibit I**, MDOC FOIA Guide, pp 22, 31.)

Second, by issuing blanket denials, the MDOC failed to conduct the balancing test required by MCL 15.243(1)(c) and (a) to determine if the public interest in disclosure outweighs the interest in nondisclosure. Public bodies cannot sidestep statutorily-mandated balancing tests:

[T]he balancing test contained in [Section 13(1)(c)] at issue here suggests that a case-by-case approach is required because it reveals a legislative intent to accom[m]odate, insofar as it is possible, the respective public interests in institutional security and freedom of information. If the balancing test must be performed with generalizations rather than specifics, there will be cases in which one of these public interests must be sacrificed without any countervailing advancement of the other public interest. [*Ballard*, 122 Mich App at 126-27.]

Third, the MDOC made no attempt to extract audio or redact portions of responsive videos. (Exhibit G, Wakefield Dep Tr, pp 35:4-37:22.) MCL 15.244(1) provides that a “public body *shall* separate exempt and nonexempt material and make the nonexempt material available for examination and copying[.]” *Evening News*, 417 Mich at 512 (emphasis in original). Additionally, FOIA places the burden on the public body to sustain its denial. *Id.*; MCL 15.240(1). The statutory duty to separate exempt information from the nonexempt ensures that the public body will be able to sustain its denial with particularized reasons. *Id.* *Evening News* recognized this requirement where the defendant in that case “failed to separate admittedly nonexempt [from exempt] material contained in the two incident reports.” *Id.*; see also *Herald Co, Inc v E Michigan Univ Bd of Regents*, 475 Mich 463, 491; 719 NW2d 19, 34–35 (2006) (holding that even if there exists some exempt information, the nonexempt information must be disclosed).

Fourth, the MDOC failed to respond separately to Plaintiffs' requests for audio recordings despite the requirement that it address each part of a request separately. (Exhibit F, Groves Dep Tr, pp 50:23-51:12.) Rather, the MDOC rubber-stamp denied Plaintiffs' requests in their entirety.

The MDOC admitted that six of the eight responsive videos also captured audio. (Exhibit G, pp 33:6-33:8, 50:19-50:25.) The MDOC also acknowledged that the audio requests were separate and distinct from Plaintiffs' video requests. (Exhibit F, p 50:2-51:12.) Groves even admitted that, to determine whether audio is exempt under Section 13(1)(c), the MDOC would need to make case-by-case determinations, which it did not do. (*Id.* at 53:22-54:6.) Because the MDOC admittedly failed to consider the audio portion of Plaintiffs' requests, the MDOC could not properly rely on any statutory exemption. *Evening News*, 417 Mich at 513.

3. The MDOC's cited exemptions do not apply to Plaintiffs' requests

a. Section (1)(c) does not apply

MCL 15.243(1)(c) provides that a public record may be exempt from disclosure if disclosure would prejudice a public body's ability to maintain the physical security of custodial or penal institutions, unless the interest in disclosure outweighs the interest in nondisclosure. This balancing test must be conducted on a case-by-case basis. *Ballard*, 122 Mich App at 126-27.

i. Release of the videos does not threaten MDOC security

The MDOC argues that disclosure of the recordings would (1) severely interfere with or present a "very definite and real risk" to the security of MDOC correctional facilities; (2) reveal the identities of corrections officers; and (3) reveal a video layout of secured areas within ICB and other MDOC facilities. These purported justifications are insufficient.

The MDOC's arguments rest on conclusory claims that releasing the video will threaten the security of its correctional facilities. In her affidavit, Wakefield alleges that disclosure would severely interfere with her ability to maintain the safety and security at IBC and that it presents a very definite and real risk to safety and security at IBC. (Def's Br at 10, citing Wakefield Aff, ¶ 11.) Nondisclosure based on these statements is untenable since conclusory statements like Wakefield's do not justify the application of FOIA exemptions. *Evening News*, 417 Mich at 517.

The Court of Appeals reached the same conclusion about the affidavit at issue in *Payne*. There, parents, whose daughter's death was originally ruled a suicide but later determined to have been accidental, brought a FOIA suit against the police department and its chief after the city denied their request to release the city's 911 recordings. *Id.* In support of its refusal to disclose the recordings, the city cited its police chief's affidavit, which claimed that (1) the effectiveness of the 911 line and the department as a whole would be substantially impaired if the recordings were disclosed; (2) disclosure would have a chilling effect on crime reports or requests for police assistance if people's names, addresses and telephone numbers were disclosed; and (3) 911 callers often disclose matters of a highly personal or embarrassing nature. *Id.* The trial court upheld the city's denial. The Court of Appeals reversed the trial court after it reviewed the affidavit and found the statements to be "at best conclusory statements of opinion, not of factually based reasons, the type which were deemed to be improper in *Evening News*[".]” *Id.*

So it is here. The statements in Wakefield's affidavit are just as conclusory as the statements in *Payne* and *Evening News*. The affidavit is speculative and does not provide a basis for nondisclosure.

The MDOC also argues that disclosure would reveal the identities of the MDOC officers who responded to the confrontation between Szot and the other inmate. (Def's Br at 10, citing Wakefield Aff, ¶ 9b.) Similar to police officers, corrections officers are not entitled to anonymity. It is wholly speculative that prison security would be prejudiced by disclosing their identities. Even if the Szot family did threaten prison security, the MDOC has made absolutely no connection between that contrived threat and disclosure of the videos. Furthermore, the argument ignores the reality that people within the prison witnessed the events surrounding Szot's death; inmates in MDOC custody already know the identities of the other inmate and the officers involved. What's

more, faces could be redacted if that were truly necessary to ensure prison security. MCL 15.244 requires the MDOC to redact exempt information and disclose nonexempt information.

The MDOC also argues that disclosure would provide the public and prisoners with a video layout of IBC and knowledge of the facility cameras' blind spots. It claims that disclosure would make it less onerous for prisoners and the public at large to engage in threatening behavior. (Def's Br at 11, citing *Wakefield Aff* ¶ 9c.) This reasoning is wholly speculative. Prisoners are not permitted to make FOIA requests and outsiders cannot show prisoners videos or even speak with prisoners without being monitored. The MDOC's argument is premised on a highly improbable chain of events in which a member of the public who sees the video coincidentally is both convicted of a crime and winds up at this particular prison in the future, and has such specific memory of the video layout of the facility that they are able to take advantage of that somehow to compromise security. That scenario is improbable. And even if stationary facility cameras had blind spots (of which there is no record evidence), the MDOC cannot apply the same argument to the video recordings made by handheld cameras, where there are no blind spot concerns.

ii. The public interest in disclosure outweighs the public interest in nondisclosure

Under Section (1)(c), it is not enough for the MDOC to allege that release of the videos could implicate security. Even if the disclosure could be said to prejudice security in some way—which it does not—disclosure is still required if “the public interest in disclosure outweighs the public interest in nondisclosure.” MCL 15.243(1)(c).

Again, *Ballard* controls this analysis. By including a balancing test in Section (1)(c), the legislature recognized that there would be occasions on which information must be disclosed *even though* doing so could have an impact on prison security. *Ballard*, 122 Mich App at 127. Our Legislature recognized that security, while important, is not the public's only concern. “FOIA is

a manifestation of this state's public policy favoring public access to government information, recognizing the need that citizens be informed as they participate in democratic governance, and the need that public officials be held accountable for the manner in which they perform their duties." *Rataj*, 306 Mich. App. at 748.

Here, the MDOC again speculates without any factual support or record evidence that releasing *any* prison surveillance videos would harm prison security. If the MDOC's logical fallacy were correct, the balancing test in Section (1)(c) would be rendered entirely meaningless and no prison video would *ever* be disclosed. Obviously this cannot be, and *Ballard* rejected this misguided and overhanded application of FOIA.

It is difficult to take seriously the MDOC's contention that the videos requested by Plaintiffs—investigative journalists with years of experience covering prisons and criminal justice issues throughout the country—do not shed light on the affairs of government.² Szot's death is of great public interest because, among other things, it calls into question (1) the nature and amount of force used by guards in attempting to subdue Szot during the confrontation; (2) the propriety of criminal investigations wherein the victims are prisoners; and (3) the soundness of a recent change in MDOC policy allowing corrections officers to carry and use Tasers in Michigan prisons. It is difficult to think of a FOIA request that better exemplifies "the need that public officials be held accountable for the manner in which they perform their duties," *Rataj, supra*, than this one—the request for disclosure of video involving the homicide of a prisoner in state custody.³

² Again, the MDOC argues that alleged inappropriate behavior by Szot's family could somehow nullify the public's right to basic information about what happens inside its prisons. Section (1)(c)'s emphasis on the *public* interest in disclosure clarifies that misconduct by one or two people does not allow the government to shield an otherwise public record from public view.

³ Further weighing in favor of disclosure is that the fact that the MDOC and similar authorities have released video recordings on other occasions. (Exhibit F, Groves Dep Tr, pp 97:23-102:1.); *Evening News*, 417 Mich at 497,506-07 (holding that the City failed to satisfy its burden for

Section 1(c) does not apply.

b. Section 1(u) does not apply

MCL 15.243(1)(u) exempts records of a public body's security measures, including security plans, security codes and combinations, passwords, passes, keys, and security procedures, to the extent that the records relate to the ongoing security of the public body. Section (1)(u) does not apply here.

The MDOC claims that disclosure would reveal the capabilities of its cameras and thus, create a risk to its staff, as the videos would allow prisoners to take more calculated risks when engaging in prohibited or threatening activity. (Def's Br at 14-15.) *Ballard* addressed and rejected this exact argument. There, the MDOC argued that disclosure of videos would prejudice its ability to maintain the physical security of its institutions because such videos may reveal the methods, tactics, and equipment used to restrain and subdue prisoners and because, by studying such videos, prisoners might learn to circumvent such methods, tactics, and equipment. *Ballard*, 122 Mich App 125. The Court of Appeals rejected the MDOC's argument. *Id.* at 125, 127.

The MDOC would have the Court read into Section (1)(u) several categories of records not contemplated by the Legislature, as evidenced by the language of Section 13 when viewed in its entirety. Where the Legislature lists items in a statute, it is the general rule that the express mention of one thing implies the exclusion of other similar things. *People v Malik*, 70 Mich App 133, 136; 245 NW2d 434 (1976). The list set forth in Section (1)(u) is not suggestive; the Legislature expressly enumerated the types of information exempt under this subsection.

In *People v Feeley*, 499 Mich 429, 438–39; 885 NW2d 223 (2016), the court explained that the Legislature's use of the phrase "including, but not limited to" indicates that it intended an

nondisclosure where the record indicated that the City of Troy and the Oakland County Prosecutor's Office had disclosed similar information in the past).

expansive and inclusive reading of the phrase. The Michigan Supreme Court has held that this phrase is not “one of limitation,” but is instead meant to be illustrative and “purposefully capable of enlargement.” Accordingly, by using this phrase, the Legislature expressly indicates its intention not to limit a definition to specifically enumerated examples.

Importantly, Section (1)(u) does not contain the phrase “but not limited to” unlike other Section 13 provisions, such as exemption (1)(y). Again, courts cannot assume that the Legislature inadvertently omitted from one statute the language that it placed in another. *Monaco*, 474 Mich at 57–58. Thus, Section (1)(u) *is* limited to the items it specifically includes.

Here, the MDOC does not identify anything from Section (1)(u)’s list that Plaintiffs’ FOIA requests implicate; it merely states in conclusory terms that disclosure of the videos would reveal “security measures.” Wakefield’s affidavit attempts to lump into the statutory definition of “security measures” the equipment MDOC personnel carry, the headcount of responding officers, and cameras. None of these items are included in (1)(u). (Wakefield Aff, ¶¶ 10a, c, and d.)

Additionally, Section (1)(u), which applies to all public bodies and not just prisons, must be read together with Section (1)(c), which applies to prisons specifically and contains a balancing test for the public interest in disclosure. If Section (1)(u) were as broad as the MDOC contends and exempts other types of information not listed in the statute, Section (1)(c) would effectively be rendered a nullity because any request could be denied under the MDOC’s broad interpretation of “security measures” under Section (1)(u). This cannot be. Section (1)(u) does not apply here.

c. Section 1(a) does not apply

MCL 15.243(1)(a) exempts from disclosure information of a personal nature if public disclosure of the information would constitute a clearly unwarranted invasion of an individual’s privacy. “Information is of a personal nature if it reveals intimate or embarrassing details of an individual’s private life according to the moral standards, customs, and views of the community.”

Detroit Free Press, Inc v City of Southfield, 269 Mich App 275, 282; 713 NW2d 28 (2005). Determining whether disclosure would constitute a clearly unwarranted invasion of privacy requires a court to balance the public interest in disclosure against the interest the Legislature intended the exemption to protect.”⁴ *Id.* In its Brief, the MDOC asserts two alleged privacy interests: (1) the final moments of Szot’s life; and (2) the identity of the unnamed prisoner with whom Szot had an altercation before his death. (Def’s Br at 16, citing *Wakefield Aff* ¶ 7.) Neither is a legitimate application of Section (1)(a).

(i) The videos do not contain personal information

The MDOC’s argument that the videos are exempt because they depict the moments before Szot’s death lacks merit. The MDOC cites no authority for the proposition that video footage of this nature is “information of a personal nature” under Section (1)(a). In fact, it is well established that Section (1)(a)’s privacy provision cannot be asserted after the death of the individual whose privacy is invaded. In *Swickard v Wayne Co Med Examr*, 438 Mich 536, 548; 475 NW2d 304 (1991), a newspaper reporter filed a FOIA suit to compel the county medical examiner to disclose the autopsy report and toxicology results of a deceased district court judge. The trial court ordered the records be disclosed. The Court of Appeals and Supreme Court affirmed. In so holding, the Supreme Court explained, “we follow the general rule that the right of privacy is personal[.] There is no relational right to privacy in Michigan.” *Id.* at 553-54. As such, the MDOC cannot base nondisclosure on the privacy interests of Szot (who is now deceased) or members of his family.

⁴ The MDOC never cited this exemption in its original denial of Plaintiffs’ FOIA requests, nor has the MDOC made any argument on the balancing test employed in evaluating this exemption. See *Ellison v Mich Dept of State*, unpublished opinion and order of the Michigan Court of Claims, issued January 26, 2017 (Case No. 16-000183-MZ) at *8 n 3 (refusing to consider applicability of exemption, noting that defendant never cited the exemption nor made any argument on the balancing test employed in evaluating this exemption), citing *Detroit Free Press*, 269 Mich App at 282 (noting that a balancing test must be conducted for Section 13(1)(a) exemption determinations).

Similarly, the MDOC's argument that the identity of the unnamed prisoner with whom Szot had an altercation is exempt from disclosure lacks merit. An individual's name is not "[i]nformation of a personal nature" within the meaning of Section (1)(a). *Rataj*, 306 Mich App at 753–54; *Practical Political Consulting*, 287 Mich App at 455; *Evening News*, 417 Mich at 506–08. In fact, the identities of Michigan's prisoners is public information made available online on the MDOC's Offender Tracking Information System ("OTIS") website. Disclosure of the unnamed prisoner's identity here is consistent with the MDOC's own disclosure of its prisoners' identities (including their photos) on OTIS as well as with Michigan law, which recognizes that prisoners lose nearly all of their privacy rights while in MDOC custody. Additionally, in this case the altercation took place in "the prison yard," (Wakefield Aff ¶ 6a), a particular area of the prison where clearly neither Szot nor the other prisoner had *any* expectation of privacy.

(ii) Disclosure would not result in a clearly unwarranted invasion of personal privacy

Even if the video contains information of a personal nature (which it does not), disclosure is mandated unless it would cause a clearly unwarranted invasion of privacy. Under this prong of the Section (1)(a) analysis, it is necessary to ask whether the requested information would shed light on the governmental agency's conduct or further the core purposes of FOIA. *Rataj*, 306 Mich App at 751. "In all but a limited number of circumstances, the public's interest in governmental accountability prevails over an individual's[] expectation of privacy." *Id.*

Rataj is directly on point. There, the Court of Appeals compelled disclosure of a video depicting an altercation between an officer and arrestee wherein the arrestee purportedly spit on the officer and used racial slurs. *Id.* While the Court recognized that this information was arguably personal and embarrassing, it held that release of the video did not constitute an unwarranted invasion of privacy given the public interest favoring disclosure. *Id.* (holding that disclosure of

the video would shed light on department operations and treatment of arrestees and detainees, which are matters of legitimate public concern).

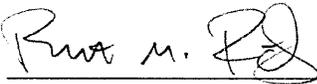
The public interests that mandated disclosure of the video in *Rataj* apply with equal force to these cases. If disclosed, the videos Plaintiffs requested would shed light on the MDOC's treatment of prisoners in MDOC custody and potentially shed further light on the cause of Szot's death. Allowing the public to review the events that led to Szot's death would give the public the power to witness firsthand officers' actions and potentially hold them accountable if they acted improperly. Just as in *Rataj*, the public interest in disclosure significantly outweighs the nominal (if not nonexistent) privacy interests claimed by the MDOC.

IV. CONCLUSION

For these reasons, the Court should (i) deny Defendant's Motion; (ii) enter judgment in favor of Plaintiffs and against the MDOC in each of their respective cases; (iii) order the MDOC to provide Plaintiffs with all of the information they requested; (iv) award Plaintiffs damages, plus attorney's fees and costs to which they are statutorily entitled under FOIA in an amount to be determined; and (v) grant such further relief as the Court deems just and reasonable.

Respectfully submitted,

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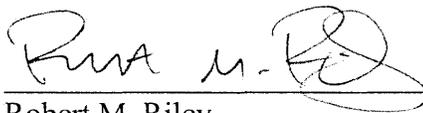
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Dated: February 20, 2018

CERTIFICATE OF SERVICE

I hereby certify that on February 20, 2018, a copy of the foregoing document was served on all counsel of record by first class mail.



Robert M. Riley

STATE OF MICHIGAN
IN THE COURT OF CLAIMS

SPENCER WOODMAN,

Plaintiff,

Case No. 17-000082-MZ
Hon. Cynthia D. Stephens

v

MICHIGAN DEPARTMENT OF CORRECTIONS,

Defendant.

GEORGE JOSEPH,

Plaintiff,

Case No. 17-000230-MZ
Hon. Cynthia D. Stephens

v

MICHIGAN DEPARTMENT OF CORRECTIONS,

Defendant.

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INDEX OF EXHIBITS

EX. NO.	DATE	DESCRIPTION
A	09/28/2016	FOIA Request from Woodman to the MDOC
B	10/06/2016	MDOC's Response to Woodman's FOIA Request
C	10/25/2016	MDOC's Response to Woodman's FOIA Appeal
D	07/07/2017	MDOC's Response to Plaintiff Joseph's FOIA Request
E	10/19/2017	MDOC's Responses to Plaintiff Woodman's Interrogatories
F	11/30/2017	Transcript of the Deposition of Cheryl Groves
G	11/30/2017	Transcript of the Deposition of Christine Wakefield
H	11/30/2017	Transcript of the Deposition of Cheryl Groves (as MDOC Corporate Representative)
I	11/10/2015	MDOC Freedom of Information Act Guide, rev. 11/10/2015
J	01/26/2017	<i>Ellison v Mich Dept of State</i> , unpublished per curiam opinion of the Michigan Court of Claims, issued January 26, 2017 (Case No. 16-000183-MZ)

EXHIBIT A



Spencer Woodman <spencer.woodman@gmail.com>

Submitting records request

Spencer Woodman <spencer.woodman@gmail.com>

Wed, Sep 28, 2016 at 6:06 PM

To: NelsonA9@michigan.gov

Hi Aimee,

It turns out that I have another records request to submit. Thanks very much.

Spencer Woodman

-

Under the Michigan Freedom of Information Act § 15.231 et seq., I am requesting a digital copy of video footage of the confrontation that led to the fatality of inmate Dustin Szot on September 27th, 2016 at the Muskegon Correctional Facility. This request includes footage from any and all available cameras that captured this incident as well as any available accompanying audio records.

I would like to request a waiver of all fees in that the disclosure of the requested information is in the public interest and will contribute significantly to the public's understanding of government. This information is not being sought for commercial purposes.

If you deny any or all of this request, please cite each specific exemption you feel justifies the refusal to release the information and notify me of the appeal procedures available to me under the law.

Thank you very much for considering my request, and please feel free to contact me at the number or email address below with any questions.

Contact information:

Email: Spencer.woodman@gmail.com

Phone: (919) 418-0817

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EXHIBIT B

MICHIGAN DEPARTMENT OF CORRECTIONS
RESPONSE TO REQUEST FOR PUBLIC RECORDS - FOIA

CSH-479
 REV 6/16

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Requester Name: Spencer Woodman	Requester Type: General Public	Files	PB	Request Date 9/28/2016	Received Date 9/29/2016	FOIA No. 16 950
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Address: *spencer.woodman@gmail.com*

Description of Requested Records: *"I am requesting a digital copy of 1. video footage of the confrontation that led to the fatality of inmate Dustin Szo on September 27th, 2016 at the Muskegon Correctional Facility. This request includes footage from any and all available cameras that captured this incident as well as 2. any available accompanying audio records."*

THE FOLLOWING ACTION HAS BEEN TAKEN IN COMPLIANCE WITH THE MICHIGAN FREEDOM OF INFORMATION ACT

Request Granted No. of pages: See fee assessment below.

Request Granted in Part/Denied in Part No. of pages: Portions of requested records are exempt from disclosure. See explanation and fee assessment below.

Requested records are exempt from disclosure. See explanation below.

Request Denied Requested records do not exist within the records of this Department under the name or description provided or by another name reasonably known to this Department.

Request Denied Request does not describe the record sufficiently to enable this Department to determine what record is requested.

To the extent the records are available, home address, telephone numbers, and personnel records of employees of this Department are exempt from disclosure pursuant to MCL 791.230a. This includes but is not limited to investigatory, disciplinary, and time and attendance records.

10 Business Day Extension Taken Due Date: Reason for Extension:

FEE ASSESSMENT

Fee Waived.

Non-exempt records will be sent upon receipt of payment in the amount of _____ payable by check or money order to the State of Michigan. Cash cannot be accepted. Send payment to Michigan Department of Corrections, Attn: FOIA Coordinator, at the return address identified on the envelope.

A 50% good faith deposit is required in the amount of _____ payable by check or money order to the State of Michigan. Cash cannot be accepted. Send payment to Michigan Department of Corrections, Attn: FOIA Coordinator, at the return address identified on the envelope. Upon receipt of the deposit, the Department will process your request. Thereafter, you will be informed of the balance due and any applicable exemptions.

SEE BELOW AND BACK OF FORM IF RECORDS ARE EXEMPT FROM DISCLOSURE OR FOR ADDITIONAL INFORMATION

The records you seek are exempt from disclosure under Section 13(1)(c). These records, if disclosed, could threaten the security of Bellamy Creek Correctional Facility by revealing fixed camera placement as well as the scope and clarity of the facility's fixed camera and handheld recordings. Disclosure of these records could also reveal the policies and procedures used by staff for disturbance control and the management of disruptive prisoners.

If your request is denied in whole or in part, you have the right under the Michigan Freedom of Information Act to do either of the following:

- 1 Appeal the denial to the Director. Your appeal must be submitted in writing to the Michigan Department of Corrections, Attn: Administrator of the Office of Legal Affairs, P.O. Box 30003, Lansing, MI 48909. The appeal must be specifically identified as a FOIA appeal and must state the reasons for reversal of the denial. The Director will respond to the appeal in accordance with MCL 15.240.
- 2 Appeal the Department's final determination to deny/partially deny your request by commencing an action in the Court of Claims within 180 calendar days after the final determination is made. If you prevail in such an action, the court is to award reasonable attorney fees, cost and disbursements, and possible damages.

I CERTIFY THAT THE DOCUMENTS PROVIDED IN RESPONSE TO THIS REQUEST ARE TRUE AND ACCURATE COPIES.

FOIA COORDINATOR:

Cheryl A Groves

DATE: *10/6/16*

FOIA Exemptions

- (a) Information of a personal nature where the public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy.
- (b) Investigating records compiled for law enforcement purposes, but only to the extent that disclosure as a public record would do any of the following:
 - (i) Interfere with law enforcement proceedings.
 - (ii) Deprive a person of the right to a fair trial or impartial administrative adjudication.
 - (iii) Constitute an unwarranted invasion of personal privacy.
 - (iv) Disclose the identity of a confidential source, or if the record is compiled by a law enforcement agency in the course of a criminal investigation, disclose confidential information furnished only by a confidential source.
 - (v) Disclose law enforcement investigative techniques or procedures.
 - (vi) Endanger the life or physical safety of law enforcement personnel.
- (c) A public record which if disclosed would prejudice a public body's ability to maintain the physical security of custodial or penal institutions occupied by persons arrested or convicted of a crime or admitted because of a mental disability, unless the public interest in disclosure under this act outweighs the public interest in nondisclosure.
- (d) Records or information specifically described and exempted from disclosure by statute.
- (e) A public record or information described in this section that is furnished by the public body originally compiling, preparing or receiving the record or information to a public officer or public body in connection with the performance of the duties of that public officer or public body, if the considerations originally giving rise to the exempt nature of the public record remain applicable.
- (f) Trade secrets or commercial or financial information voluntarily provided to an agency for use in developing governmental policy if
 - (i) The information is submitted upon a promise of confidentiality by the public body.
 - (ii) The promise of confidentiality is authorized by the chief administrative officer of the public body or by an elected official at the time the promise is made.
 - (iii) A description of the information is recorded by the public body within a reasonable time after it has been submitted, maintained in a central place within the public body, and made available to a person upon request. This subdivision does not apply to information submitted as required by law or as a condition of receiving a governmental contract, license or other benefit.
- (g) Information or records subject to the attorney-client privilege.
- (h) Information or records subject to the physician-patient privilege, psychologist-patient privilege, Minister, priest, or Christian Science practitioner privilege, or other privilege recognized by statute or court rule.
- (i) A bid or proposal by a person to enter into a contract or agreement, until the time for the public opening of bids or proposals, or if a public opening is not to be conducted, until the deadline for submission of bids or proposals has expired.
- (j) Appraisals of real property to be acquired by the public body until (i) an agreement is entered into; or (ii) 3 years has elapsed since the making of the appraisal, unless litigation relative to the acquisition has not yet terminated.
- (k) Test questions and answers, scoring keys and other examination instruments or data used to administer a license, public employment, or academic examination, unless the public interest in disclosure under this act outweighs the public interest in nondisclosure.
- (l) Medical, counseling or psychological facts or evaluations concerning an individual if the individual's identity would be revealed by a disclosure of those facts or evaluation.
- (m) Communications and notes within a public body or between public bodies of an advisory nature to the extent that they cover other than purely factual materials and are preliminary to a final agency determination of policy or action. This exemption shall not apply unless the public body shows that in the particular instance the public interest in encouraging frank communication between officials and employees of public bodies clearly outweighs the public interest in disclosure. This exemption does not constitute an exemption under state law for purposes of MCL 15.268.
- (n) Records of law enforcement communication codes, or plans for deployment of law enforcement personnel, that if disclosed would prejudice a public body's ability to protect the public safety unless the public interest in disclosure under this act outweighs the public interest in nondisclosure in the particular interest.
- (o) Testing data developed by a public body in determining whether bidder's products meet the specifications for purchase of those products by the public body, if disclosure of the data would reveal that only 1 bidder has met the specifications. This subdivision does not apply after 1 year has elapsed from the time the public body completes testing.
- (s) Unless the public interest in disclosure outweighs the public interest in nondisclosure in the particular instance, public records of a law enforcement agency, the release of which would do the following:
 - (i) Identify or provide a means of identifying an informer.
 - (ii) Identify or provide a means of identifying a law enforcement undercover officer or agent or a plain clothes officer as a law enforcement officer or agent.
 - (iii) Disclose the personal address or telephone number of law enforcement officers or agents or any special skills they may have.
 - (iv) Disclose the name, address, or telephone numbers of family members, relatives, children, or parents of law enforcement officers or agents.
 - (v) Disclose operational instructions of law enforcement officers or agents.
 - (vi) Reveal the contents of staff manuals provided for law enforcement officers or agents.
 - (vii) Endanger the life or safety of law enforcement officers or agents or their families, relatives, children, parents, or those who furnished information to law enforcement departments or agencies.
 - (viii) Identify or provide a means of identifying a person as a law enforcement officer, agent, or informer.
 - (ix) Disclose personnel records for law enforcement agencies.
 - (x) Identify or provide a means of identifying residences that law enforcement agencies are requested to check in the absence of their owners or tenants.
- (u) Records of a public body's security measures, including security plans, security codes and combinations, passwords, passes, keys, and security procedures, to the extent that the records relate to the ongoing security of the public body.
- (v) Records or information relating to a civil action in which the requesting party and the public body are parties.
- (w) Information or records that would disclose the social security number of any individual.

EXHIBIT C

MICHIGAN DEPARTMENT OF CORRECTIONS NOTICE OF FREEDOM OF INFORMATION ACT APPEAL	
Date Received: October 11, 2016	Appeal Number: 2016-36
Requestor's Name: Spencer Woodman	Date of FOIA Response: October 6, 2016
Requestor's Address: Spencer.woodman@gmail.com	
<input type="checkbox"/> FOIA disclosure denial reversed <input checked="" type="checkbox"/> FOIA disclosure denial upheld <input type="checkbox"/> FOIA disclosure denial upheld in part, reversed in part	
<p>Reason for Decision:</p> <p>On September 29, 2016, the Michigan Department of Corrections (MDOC), received your request dated September 28, 2016, made under the Freedom of Information Act (FOIA), MCL 15.231 <i>et seq.</i> Your request stated:</p> <p>"I am requesting a digital copy of video footage of the confrontation that led to the fatality of inmate Dustin Szot on September 27th, 2016 at the Muskegon Correctional Facility. This request includes footage from any and all available cameras that captured this incident as well as any available accompanying audio records."</p> <p>On October 6, 2016, the MDOC denied your request under 13(1)(c) of FOIA stating, "These records, if disclosed, could threaten the security of Bellamy Creek Correctional Facility by revealing fixed camera placement as well as the scope and clarity of the facility's fixed camera and handheld recordings. Disclosure of these records could also reveal the policies and procedures used by staff for disturbance control and the management of disruptive prisoners."</p> <p>On October 11, 2016, the MDOC received your appeal regarding the denial of your FOIA request. You stated, "It is my understanding that many correctional institutions often do not attempt to hide their cameras at all and that inmates generally understand that they are under constant surveillance. It seems unlikely to me that the Bellamy Creek Correctional Facility would have taken pains to hide its cameras in the first place. Even if the Bellamy Creek Correctional Facility's camera's are in fact hidden, the fact that so many other correctional facilities not only install their cameras in plain view of inmates, but also routinely release such footage to the public, confirms what I believe to be common sense: That the release of prison surveillance footage does not present a danger insofar as camera placement is concerned." You also assert, "Footage of inmate altercations with prison guards has been routinely released across the country, and such means of control are already and rightly widely known. Perhaps more importantly, as part of its commitment to insuring the civil rights of everyone working and living within prisons, correctional facilities must be able to publicly disclose the means by which they restrain, pacify and use force against prisoners."</p> <p>While prisoners understand that cameras are in place throughout facilities and that they are under constant surveillance, the MDOC does not routinely release video footage to the public as you incorrectly assert. Release of the video footage compromises the safety, security, and order of the facility. Under Section 13(1)(c) records are exempt from disclosure that if disclosed would prejudice a public body's ability to maintain the physical security of custodial or penal institutions occupied by</p>	

person arrested or convicted of a crime. In addition, Section 13(1)(u) of the FOIA Statute also exempts from disclosure records of a public body's security measures. The release of video footage would reveal the recording and security capabilities of the facility's video monitoring system.

Therefore, the FOIA disclosure denial is upheld.

As noted in MCL 15.240(1)(b), you have the option to commence an action in the Court of Claims to compel the public body's disclosure of the public records within 180 days after a public body's final determination to deny a request. If you prevail in such an action, the court is to award reasonable attorney fees, costs, and disbursements, and possible damages.

Signature:  Heidi E. Washington, Director	Date: 10/25/16
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EXHIBIT D

**MICHIGAN DEPARTMENT OF CORRECTIONS
RESPONSE TO REQUEST FOR PUBLIC RECORDS - FOIA**

CSH-479
REV 6/16

Requester Name: <i>George Joseph</i>		Requester Type: <i>General Public</i>	Files <input type="checkbox"/>	PB <input type="checkbox"/>	Request Date <i>6/28/2017</i>	Received Date <i>6/29/2017</i>	FOIA No. <i>17- 602</i>
Address: <i>gmjoseph@prontonmail.com</i>		Description of Requested Records: <i>Szot 961740 "I hereby request a digital copy of any and all footage of the September 27, 2016 confrontation that led to the death of Inmate Dustin Szot at the Muskegon Correctional Facility."</i>					
THE FOLLOWING ACTION HAS BEEN TAKEN IN COMPLIANCE WITH THE MICHIGAN FREEDOM OF INFORMATION ACT							
Request Granted	<input type="checkbox"/>	No. of pages:	See fee assessment below.				
Request Granted in Part/Denied in Part	<input type="checkbox"/>	No. of pages:	Portions of requested records are exempt from disclosure. See explanation and fee assessment below.				
Request Denied	<input checked="" type="checkbox"/>	Requested records are exempt from disclosure. See explanation below.					
	<input type="checkbox"/>	Requested records do not exist within the records of this Department under the name or description provided or by another name reasonably known to this Department.					
	<input type="checkbox"/>	Request does not describe the record sufficiently to enable this Department to determine what record is requested.					
	<input type="checkbox"/>	To the extent the records are available, home address, telephone numbers, and personnel records of employees of this Department are exempt from disclosure pursuant to MCL 791.230a. This includes but is not limited to investigatory, disciplinary, and time and attendance records.					
10 Business Day Extension Taken	<input type="checkbox"/>	Due Date:	Reason for Extension:				
FEE ASSESSMENT							
<input type="checkbox"/> Fee Waived.							
<input type="checkbox"/> Non-exempt records will be sent upon receipt of payment in the amount of _____ payable by check or money order to the State of Michigan. Cash cannot be accepted. Send payment to Michigan Department of Corrections, Attn: FOIA Coordinator, at the return address identified on the envelope.							
<input type="checkbox"/> A 50% good faith deposit is required in the amount of _____ payable by check or money order to the State of Michigan. Cash cannot be accepted. Send payment to Michigan Department of Corrections, Attn: FOIA Coordinator, at the return address identified on the envelope. Upon receipt of the deposit, the Department will process your request. Thereafter, you will be informed of the balance due and any applicable exemptions.							
SEE BELOW AND BACK OF FORM IF RECORDS ARE EXEMPT FROM DISCLOSURE OR FOR ADDITIONAL INFORMATION							
<i>To the extent these records are available, they are exempt from disclosure under Section 13(1)(c).</i>							
<p>If your request is denied in whole or in part, you have the right under the Michigan Freedom of Information Act to do either of the following:</p> <ol style="list-style-type: none"> 1 Appeal the denial to the Director. Your appeal must be submitted in writing to the Michigan Department of Corrections, Attn: Administrator of the Office of Legal Affairs, P.O. Box 30003, Lansing, MI 48909. The appeal must be specifically identified as a FOIA appeal and must state the reasons for reversal of the denial. The Director will respond to the appeal in accordance with MCL 15.240. 2 Appeal the Department's final determination to deny/partially deny your request by commencing an action in the Court of Claims within 180 calendar days after the final determination is made. If you prevail in such an action, the court is to award reasonable attorney fees, costs and disbursements, and possible damages. 							
I CERTIFY THAT THE DOCUMENTS PROVIDED IN RESPONSE TO THIS REQUEST ARE TRUE AND ACCURATE COPIES.							
FOIA COORDINATOR: <i>Zoe BL</i>				DATE: <i>7/10/17</i>			

FOIA Exemptions

- (a) Information of a personal nature where the public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy.
- (b) Investigating records compiled for law enforcement purposes, but only to the extent that disclosure as a public record would do any of the following:
 - (i) Interfere with law enforcement proceedings.
 - (ii) Deprive a person of the right to a fair trial or impartial administrative adjudication.
 - (iii) Constitute an unwarranted invasion of personal privacy.
 - (iv) Disclose the identity of a confidential source, or if the record is compiled by a law enforcement agency in the course of a criminal investigation, disclose confidential information furnished only by a confidential source.
 - (v) Disclose law enforcement investigative techniques or procedures.
 - (vi) Endanger the life or physical safety of law enforcement personnel.
- (c) A public record which if disclosed would prejudice a public body's ability to maintain the physical security of custodial or penal institutions occupied by persons arrested or convicted of a crime or admitted because of a mental disability, unless the public interest in disclosure under this act outweighs the public interest in nondisclosure.
- (d) Records or information specifically described and exempted from disclosure by statute.
- (e) A public record or information described in this section that is furnished by the public body originally compiling, preparing or receiving the record or information to a public officer or public body in connection with the performance of the duties of that public officer or public body, if the considerations originally giving rise to the exempt nature of the public record remain applicable.
- (f) Trade secrets or commercial or financial information voluntarily provided to an agency for use in developing governmental policy if:
 - (i) The information is submitted upon a promise of confidentiality by the public body.
 - (ii) The promise of confidentiality is authorized by the chief administrative officer of the public body or by an elected official at the time the promise is made.
 - (iii) A description of the information is recorded by the public body within a reasonable time after it has been submitted, maintained in a central place within the public body, and made available to a person upon request. This subdivision does not apply to information submitted as required by law or as a condition of receiving a governmental contract, license or other benefit.
- (g) Information or records subject to the attorney-client privilege.
- (h) Information or records subject to the physician-patient privilege, psychologist-patient privilege, Minister, priest, or Christian Science practitioner privilege, or other privilege recognized by statute or court rule.
- (i) A bid or proposal by a person to enter into a contract or agreement, until the time for the public opening of bids or proposals, or if a public opening is not to be conducted, until the deadline for submission of bids or proposals has expired.
- (j) Appraisals of real property to be acquired by the public body until (i) an agreement is entered into; or (ii) 3 years has elapsed since the making of the appraisal, unless litigation relative to the acquisition has not yet terminated.
- (k) Test questions and answers, scoring keys and other examination instruments or data used to administer a license, public employment, or academic examination, unless the public interest in disclosure under this act outweighs the public interest in nondisclosure.
- (l) Medical, counseling or psychological facts or evaluations concerning an individual if the individual's identity would be revealed by a disclosure of those facts or evaluation.
- (m) Communications and notes within a public body or between public bodies of an advisory nature to the extent that they cover other than purely factual materials and are preliminary to a final agency determination of policy or action. This exemption shall not apply unless the public body shows that in the particular instance the public interest in encouraging frank communication between officials and employees of public bodies clearly outweighs the public interest in disclosure. This exemption does not constitute an exemption under state law for purposes of MCL 15.268.
- (n) Records of law enforcement communication codes, or plans for deployment of law enforcement personnel, that if disclosed would prejudice a public body's ability to protect the public safety unless the public interest in disclosure under this act outweighs the public interest in nondisclosure in the particular interest.
- (p) Testing data developed by a public body in determining whether bidder's products meet the specifications for purchase of those products by the public body, if disclosure of the data would reveal that only 1 bidder has met the specifications. This subdivision does not apply after 1 year has elapsed from the time the public body completes testing.
- (s) Unless the public interest in disclosure outweighs the public interest in nondisclosure in the particular instance, public records of a law enforcement agency, the release of which would do the following:
 - (i) Identify or provide a means of identifying an informer.
 - (ii) Identify or provide a means of identifying a law enforcement undercover officer or agent or a plain clothes officer as a law enforcement officer or agent.
 - (iii) Disclose the personal address or telephone number of law enforcement officers or agents or any special skills they may have.
 - (iv) Disclose the name, address, or telephone numbers of family members, relatives, children, or parents of law enforcement officers or agents.
 - (v) Disclose operational instructions of law enforcement officers or agents.
 - (vi) Reveal the contents of staff manuals provided for law enforcement officers or agents.
 - (vii) Endanger the life or safety of law enforcement officers or agents or their families, relatives, children, parents, or those who furnished information to law enforcement departments or agencies.
 - (viii) Identify or provide a means of identifying a person as a law enforcement officer, agent, or informer.
 - (ix) Disclose personnel records for law enforcement agencies.
 - (x) Identify or provide a means of identifying residences that law enforcement agencies are requested to check in the absence of their owners or tenants.
- (u) Records of a public body's security measures, including security plans, security codes and combinations, passwords, passes, keys, and security procedures, to the extent that the records relate to the ongoing security of the public body.
- (v) Records or information relating to a civil action in which the requesting party and the public body are parties.
- (w) Information or records that would disclose the social security number of any individual.

EXHIBIT E

STATE OF MICHIGAN

COURT OF CLAIMS

SPENCER WOODMAN,

Plaintiff,

No. 17-000082-MZ

v

HON. CYNTHIA D. STEPHENS

MICHIGAN DEPARTMENT OF
CORRECTIONS,

Defendant.

Robert M. Riley (P72290)
Marie L. Greenman (P80811)
Honigman Miller Schwartz and Cohn
Cooperating Attorneys, American Civil
Liberties Union Fund of Michigan
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Attorneys for Plaintiff

**DEFENDANT MICHIGAN DEPARTMENT OF CORRECTIONS' ANSWERS
TO PLAINTIFF'S FIRST SET OF INTERROGATORIES**

INTERROGATORY NO. 24: Identify all reasons why disclosure of the Video (as defined in Plaintiff's First Amended Verified Complaint) would prejudice a public body's ability to maintain the physical security of custodial or penal institutions occupied by persons arrested or convicted of a crime or admitted because of a mental disability.

OBJECTION: MDOC objects to this interrogatory to the extent that Plaintiff improperly seeks to elicit a waiver by MDOC of any reasons not identified in its response. MDOC further objects to the extent that Plaintiff seeks discovery of attorney work product or trial preparation materials.

ANSWER: Subject to and without waving the above objection, MDOC incorporates by reference its answer to Interrogatory No. 25. MDOC further states that release of the requested records would undoubtedly compromise MDOC's ability to maintain the physical security of Bellamy Creek Correctional Facility (IBC) because it would provide the public with a video layout of the secured areas of IBC and it would reveal any blind spots with regards to camera placement. If camera location and any related blind spots were public knowledge, the prisoners at MDOC facilities would have an easier time engaging in prohibited behavior and MDOC would have substantially more difficulty in maintaining the physical security of its facilities. Again, as noted in the above objection, this answer cannot be and is not intended to be a waiver of any reason not identified.

INTERROGATORY NO. 25: Identify all ways in which the Video (as defined in Plaintiff's First Amended Verified Complaint) relate to the ongoing security of the public body.

OBJECTION: MDOC objects to this interrogatory to the extent that Plaintiff improperly seeks to elicit a waiver by MDOC of any reasons not identified in its response. MDOC further objects to the extent that Plaintiff seeks discovery of attorney work product or trial preparation materials.

ANSWER: Subject to and without waving the above objection, MDOC incorporates by reference its answer to Interrogatory No. 24. MDOC further states the requested records undoubtedly relate to the security measures employed by MDOC. Disclosure would reveal the recording and security capabilities of the electronic control devices (ECDs) and the cameras that make up the facility's video monitoring system. In particular, disclosure would reveal camera location, whether each camera is fixed or can track movement, and the capabilities of each camera as well as the clarity of the picture. Furthermore, the ECD recordings show the equipment carried by corrections officers within the secured areas of IBC, their tactics and procedures used in responding to the confrontation, and a general head count as to how many officers responded. Again, as noted in the above objection, this answer cannot be and is not intended to be a waiver of any reason not identified.

INTERROGATORY NO. 26: Identify and describe with specificity the area of the Bellamy Creek Correctional Facility in which the circumstances depicted in the Video took place.

OBJECTION: MDOC objects to this Interrogatory as unclear – it is not clear what Plaintiff means by “with specificity.” MDOC further objects to this interrogatory to the extent that Plaintiff seeks to circumvent MDOC’s decision to exempt the records from disclosure under the FOIA. Describing the areas of the IBC where the circumstances occurred in a high level of detail would defeat MDOC’s decision to exempt the requested from disclosure under MCL 15.243(1)(c).

ANSWER: Subject to and without waiving the above objection, MDOC states that the incident occurred in the yard of IBC, an area within the secured perimeter of IBC.

INTERROGATORY NO. 27: Identify and describe with specificity all videos that are responsive to FOIA Request No. 16-950.

OBJECTION: MDOC objects to this Interrogatory as unclear – it is not clear what Plaintiff means by “with specificity.” MDOC further objects to this interrogatory to the extent that Plaintiff seeks to circumvent MDOC’s decision to exempt the requested records from disclosure under the FOIA. Describing the requested records with a high level of detail would defeat MDOC’s decision to exempt the requested from disclosure under MCL 15.243(1)(c) and MCL 15.243(1)(u). Describing the videos with a high level of detail would also defeat the purpose of MDOC listing MCL 15.243(1)(a) in its affirmative defenses.

ANSWER: Subject to and without waiving the above objection, MDOC has attached a list of the responsive videos along with a brief description of what the video depicts and a general description of the recording camera.

INTERROGATORY NO. 28: Identify and describe with specificity all cameras that captured video or audio footage that is in any way responsive to FOIA Request No. 16-950.

OBJECTION: See objection to Interrogatory No. 27.

ANSWER: Subject to and without waiving the above objection, see answer to Interrogatory No. 27.

INTERROGATORY NO. 29: Identify and describe with specificity all instances in which the MDOC disclosed audio or video footage for any reason other than in response to a FOIA request.

OBJECTION: MDOC objects to this interrogatory as unclear, unduly burdensome and irrelevant. First, it is unclear what Plaintiff means by "disclosed." As a matter of general practice, any time that an incident occurs at a MDOC facility which requires an investigation by law enforcement agencies, the investigating agency, whether it is the state police or county sheriff departments, usually views any available audio or video footage in their investigation. It would be unduly burdensome on the MDOC to review its records to find each time a law enforcement agency viewed video or audio footage from an MDOC facility.

Further, this interrogatory seeks discovery of irrelevant evidence because, to the extent that Plaintiff is asking the MDOC to identify each time it disclosed such

that lead to the death of Dustin Szot which occurred during yard time at IBC when the prisoners were outside. MDOC has no way of knowing for fact each individual prisoner that was "present" in the yard at the time of the confrontation.

ANSWER: Subject to and without waiving the above objection, MDOC states that the Warden of IBC, Tony Trierweiler, is ultimately responsible for video surveillance at IBC.

INTERROGATORY NO. 33: Identify with specificity any and all other statutory bases for exempting the Video from disclosure and the complete factual basis for each such exemption.

OBJECTION: MDOC objects to the extent that Plaintiff improperly seeks to limit the grounds on which the responsive videos are properly exempted from disclosure. MDOC objects to this interrogatory to the extent that Plaintiff improperly seeks to elicit a waiver by MDOC of any statutory basis that exempts the requested records from disclosure. MDOC further objects to the extent that Plaintiff seeks discovery of attorney work product or trial preparation materials.

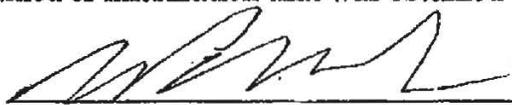
ANSWER: Subject to and without waiving the above objection, MDOC states that thus far it has cited MCL 15.243(1)(a), (c), and (u) as bases for exemption under the FOIA. MDOC further incorporates by reference its answers to Interrogatories No. 24 and 25. MDOC further states that the requested records include information of a personal nature that if disclosed would constitute an unwarranted invasion of privacy. The records sought by Plaintiff include video recordings in which the identities of the other prisoner in the confrontation with Szot and various

correctional officers are clearly visible. Accordingly, disclosure would subject the other prisoner and correctional officers to threat or other ill effects, and accordingly should be withheld from public dissemination. The requested records also show the confrontation between Szot and the other prisoner and the attempted resuscitation of Szot, which are inherently private by nature. Again, this answer cannot be and is not intended to be a waiver of any available statutory basis for exemption from disclosure under the FOIA.

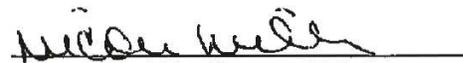
INTERROGATORY NO. 34: Identify each person who provided any information that forms the basis for MDOC's response or any portion thereof to these Interrogatories, including the substance of the information each such person provided.

ANSWER: MDOC states that the following current and/or former MDOC employees, with assistance of counsel, assisted in providing information for the response to these Interrogatories: Andrew Phelps, Aimee Nelson, Brianna Newton, Todd Butler, Cheryl Groves, Julius Curling, and Melody A.P. Wallace.

I declare that the responses above are true to the best of my knowledge, information and belief and based upon information I obtained or information that was obtained or gathered by persons who report to me.


Andrew Phelps, Litigation Specialist
Office of Legal Affairs
Michigan Department of Corrections

Subscribed and sworn to before me,
a Notary Public, this 19 day
of October, 2017


Notary Public, State of Michigan

NICOLE WILLSON
NOTARY PUBLIC - STATE OF MICHIGAN
COUNTY OF EATON
My Commission Expires August 24, 2023
Acting in the County of Ingham

AS TO ANY OBJECTIONS:



Adam R. de Bear (P80242)
Assistant Attorney General
Attorney for Defendant
P.O. Box 30754
Lansing, MI 48909
(517) 373-1162

Response to Interrogatory 27		
Record Number	Video Description	Recording Device
1	Depicts MDOC officers responding to the confrontation that lead to the death of inmate Dustin Szot	Facility Camera
2	Depicts the confrontation that lead to the death of inmate Dustin Szot	Electronic Control Device (ECD) Camera
3	Depicts the confrontation that lead to the death of inmate Dustin Szot	Electronic Control Device (ECD) Camera
4	Depicts the confrontation that lead to the death of inmate Dustin Szot	Electronic Control Device (ECD) Camera
5	Depicts the confrontation that lead to the death of inmate Dustin Szot, MDOC officers responding to that confrontation, and the attempted resuscitation of inmate Dustin Szot.	Facility Camera
6	Depicts the attempted resuscitation of inmate Dustin Szot	Handheld Camera
7	Depicts the attempted resuscitation of inmate Dustin Szot	iPhone Camera
8	Depicts the attempted resuscitation of inmate Dustin Szot	iPhone Camera

EXHIBIT F

STATE OF MICHIGAN
IN THE COURT OF CLAIMS

SPENCER WOODMAN,

Plaintiff,

-vs-

Case No. 17-000082
Hon. Cynthia D. Stephens

MICHIGAN DEPARTMENT OF CORRECTIONS,

Defendant.

DEPOSITION OF CHERYL GROVES

Taken by the Plaintiff on Thursday, the 30th day of
November, 2017 at the office of Michigan Department of
Attorney General, 525 West Ottawa Street, Lansing, Michigan
at 9:00 a.m.

APPEARANCES:

For the Plaintiff: OLIVIA K. VIZACHERO (P81699)
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Page 2

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 9
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1 Thursday, November 30, 2017
 2 Lansing, Michigan
 3 9:39 a.m.
 4 * * *
 5 CHERYL GROVES,
 6 having been first duly sworn, testified as follows:
 7 EXAMINATION
 8 BY MS. VIZACHERO:
 9 Q Good morning, Ms. Groves. How are you today?
 10 A Fine. How are you?
 11 Q Wonderful. Thank you.
 12 A Good.
 13 Q Would you mind stating your full name and spelling your last
 14 name for the record?
 15 A Cheryl Ann Groves, G-r-o-v, as in Victor, e-s.
 16 Q I say V, as in Victor, for my name, too.
 17 How are you currently employed?
 18 A I work for the Michigan Department of Corrections as the EPIC
 19 Manager.
 20 Q Okay. And what is an EPIC Manager?
 21 A EPIC stands for Effective Process Improvement and
 22 Communication, so that is our Process Improvement Office.
 23 Q Okay. So as I stated earlier, my name is Olivia Vizachero,
 24 and I am representing Spencer Woodman and George Joseph in
 25 the current litigation, and you're going to be deposed today

1 the request is submitted govern?
 2 **A I guess I don't understand your question.**
 3 Q Not a problem.
 4 **A So I'm sorry.**
 5 Q We'll use real dates.
 6 **A Okay.**
 7 Q If an event -- the most recent change happened in February --
 8 **A Correct.**
 9 Q -- of 2017. If an event took place on January 1st of 2017,
 10 and two people submitted requests, one January 2nd and the
 11 other person March 1st of 2017, would one Policy Directive
 12 govern those two -- would the same Policy Directive --
 13 **A I see. No, it would not. The Policy Directive that is in**
 14 **place, in effect governs FOIA Requests that are received of**
 15 **that date.**
 16 Q Okay.
 17 **A Does that make sense?**
 18 Q Yes.
 19 **A Okay.**
 20 Q So if a -- I won't say if, we'll just use the actual one. I
 21 am going to have Plaintiff, Spencer Woodman's First Amended
 22 Verified Freedom of Information Complaint marked as
 23 Exhibit E.
 24 (Deposition Exhibit E marked for identification.)
 25 Q (BY MS. VIZACHERO) And I'm going to direct you, Ms. Groves,

1 **address.**
 2 Q Only her E-mail?
 3 **A Yes.**
 4 Q Okay.
 5 **A So we had that, and we could get them in the mail, we could**
 6 **have them faxed, and sometimes people would hand-deliver**
 7 **them.**
 8 Q To the Central Office?
 9 **A Yes.**
 10 Q Was there a general E-mail address for the office, like an
 11 info@, that wasn't assigned to one person?
 12 **A No, there was not.**
 13 Q All right. And can you tell me what you know about this FOIA
 14 Request; it gets received by Aimee, and then what happened?
 15 **A Right. So she would get this information, and she would look**
 16 **at the request; obviously, this is a request for a digital**
 17 **copy of video footage of an incident that happened. And she**
 18 **would prepare the initial response, and send it to me for my**
 19 **review.**
 20 Q What was the first conversation you had with Ms. Nelson about
 21 Mr. Woodman's FOIA Request?
 22 **A I don't recall.**
 23 Q Prior to talking to you, or bringing you the, her final draft
 24 of the response, what did she do?
 25 **A I don't know.**

1 to the exhibits.
 2 **A Okay.**
 3 Q Which, as you explained earlier, you reviewed prior to coming
 4 here today, I believe. Have you seen that document before?
 5 **A Yes, I have.**
 6 Q Okay. And what is it?
 7 **A It's a request; it's a FOIA Request.**
 8 Q From whom?
 9 **A Spencer Woodman.**
 10 Q And when is it dated?
 11 **A September 28, 2016.**
 12 Q So which Policy Directive would have been in effect at that
 13 time?
 14 **A September 28th. It would be the one dated 3/31/16.**
 15 Q Perfect. And who received this request?
 16 **A It looks like it was addressed to Aimee Nelson.**
 17 Q Was that common, for requests to be directed specifically
 18 to --
 19 **A Yes.**
 20 Q -- one person?
 21 **A (Witness nodding head.)**
 22 Q While you were FOIA Coordinator what different ways did the
 23 office receive requests?
 24 **A We had them by E-mail, because her E-mail was on our web page**
 25 **as the FOIA contact, so that's how they have her E-mail**

1 Q Did she talk to anyone?
 2 **A Did she?**
 3 Q Yes.
 4 **A I don't recall. I don't know that.**
 5 Q What do you recall in capacity with your involvement?
 6 **A Simply to review the request, and look at the proposed**
 7 **response that she had drafted, and when I agreed with the**
 8 **content, then I signed it and we processed it. By process, I**
 9 **just mean put in the mail, put a stamp on it.**
 10 Q What did you review?
 11 **A What did I review? Only this request.**
 12 Q Only this page?
 13 **A Correct.**
 14 Q The form titled, Response to Request for Public Records?
 15 **A Oh, I'm sorry. Yes.**
 16 Q I'm just making sure.
 17 **A That's what she had given me, so I would see the request and**
 18 **proposed response on the FOIA Response Form.**
 19 Q You indicated earlier that when you review responses you also
 20 review whatever materials were responsive?
 21 **A Correct.**
 22 Q Okay. So were there responsive materials in this, for this
 23 FOIA Request?
 24 **A Not that we had in our office. Because of the request, which**
 25 **was for video footage, we deny that under our custody and**

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1 **safety security exemption; we do not release video footage.**

2 Q In all circumstances?

3 A **While I was FOIA Coordinator, yes.**

4 Q Okay. And is that a rule that you came up with, or is that

5 something you were told to do?

6 A **I don't know that either one of those. It's in our FOIA**

7 **Policy, and it doesn't specifically say that, it just -- it's**

8 **an example of what can be exempted.**

9 Q And when you say FOIA policy, are you saying FOIA Policy

10 Directive?

11 A **Yes.**

12 Q Okay.

13 A **Yes.**

14 Q Can you show me where it says in all cases --

15 A **It doesn't say that.**

16 Q Okay. How do you know that in all cases, that it shouldn't

17 be, that the video or audio shouldn't be released?

18 A **Because of the nature of that.**

19 Q Can you explain that in a little more detail?

20 A **Right. Our prisons -- obviously there's a lot that goes on**

21 **in our prisons, and if we were to release video footage it**

22 **shows the camera angles, it shows the capability, it shows**

23 **how our staff responds to incidents. We consider that a**

24 **custody and safety security issue, therefore, we exempt that;**

25 **we take exemption 13(1)(c).**

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1 Q So whose job in this case would it have been to, say,

2 Mr. Woodman's request comes in, we see it, it gets received

3 on September 28, 2016, or that was the date that the request

4 was made, it was received the following day, and as a side

5 note, is that -- that's Department Policy, right, if you

6 receive a request, it's dated as received the --

7 A **The following day, correct.**

8 Q -- subsequent day? So Ms. Nelson would have had to contact

9 someone in order to determine whether there was responsive

10 records for Mr. Woodman's request?

11 A **I don't know how to answer that, because I can't speak for**

12 **what she did.**

13 Q Just in your understanding as --

14 A **In general, we would typically contact the facility and say,**

15 **Do you have responsive records? And in this case they would**

16 **say, yes, we have video footage, but we would still deny it**

17 **because we wanted to make sure that we take the exemption**

18 **correctly. So, yes, it does exist, and we're not going to**

19 **release it.**

20 Q Okay. So -- well, let me say this: In your role as FOIA

21 Coordinator, would you have expected Ms. Nelson to determine

22 what videos, like enumerate a list of what videos were

23 responsive to the request before drafting a response?

24 A **Would I ask her to do that?**

25 Q Yes.

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1 A **To give me information that says, We have this video that's**

2 **from this time, and this video --**

3 Q Yes.

4 A **No.**

5 Q And why is that?

6 A **Because we know that we don't release it. All we need to**

7 **verify is that the documents do exist, and then we are**

8 **appropriate in redacting that, or rejecting that, or taking**

9 **an exemption.**

10 Q So at any point would there be a transfer of videos from, in

11 this case it was Muskegon Correctional Facility?

12 A **I think that was a mistake, because it was Bellamy Creek.**

13 Q Right?

14 A **Right.**

15 Q Okay. I've been going through that, and I keep going back

16 and forth.

17 A **Right.**

18 Q You would know better than I would. I'm like, are they right

19 next to each other?

20 A **No, they're not; one is in Muskegon, and one is in Ionia.**

21 Q So it was at Bellamy Creek, yes?

22 A **Correct.**

23 Q Now I've got it in my mind's eye: we're good to go.

24 A **Okay.**

25 Q Do you know who was the, would it have been, I want to use

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1 the right term, the local FOIA Coordinator?

2 A **I do not know who that is at Bellamy Creek.**

3 Q In your understanding of how these are typically processed,

4 of how FOIA Requests and responses are typically handled, at

5 what point, if any, would the videos in the custody of the

6 local facility be transferred to the Central Office?

7 A **Under FOIA?**

8 Q Yes.

9 A **Or in general?**

10 Q For the processing, like, making a determination on --

11 A **We would not ask for that. We would ask if it exists, but we**

12 **would not ask them to transfer those files to us.**

13 Q Okay. So is anyone reviewing the video prior to making a

14 determination?

15 A **No.**

16 Q Okay.

17 A **In our FOIA Office, I'm talking about our Central Office FOIA**

18 **Office, we do not review those videos.**

19 Q Okay. Will you go to page four, please, of the March 31st

20 Policy Directive.

21 MR. DE BEAR: On Exhibit C?

22 MS. VIZACHERO: C, yes. Give me just a second.

23 (Off the record discussion.)

24 Q (BY MS. VIZACHERO) Okay. So, initially, what exemption was

25 cited for Spencer Woodman's FOIA Request?

1 A 13(1)(c).
 2 Q Okay. So let's turn to 13(1)(c). And if you can, for the
 3 record, can you read what was requested?
 4 A Yes. I am requesting a digital copy of, one, video footage
 5 of the confrontation that led to the fatality of Inmate
 6 Dustin Szot on September 27, 2016 at the Muskegon
 7 Correctional Facility. This request includes footage from
 8 any and all available cameras that captured this incident, as
 9 well as any, number two, any available accompanying audio
 10 records.
 11 Q Okay. And then can you read for me the explanation provided
 12 in the response portion?
 13 A In our response? The records you seek are exempt from
 14 disclosure under Section 13(1)(c). These records, if
 15 disclosed, could threaten the security of Bellamy Creek
 16 Correctional Facility by revealing fixed camera placement, as
 17 well as the scope and clarity of the facility's fixed camera
 18 and hand-held recordings.
 19 Disclosure of these records could also reveal the
 20 policies and procedures used by staff for disturbance control
 21 and the management of disruptive prisoners.
 22 Q Okay. So is it common if -- strike that.
 23 The one and the two in the description of the requested
 24 record --
 25 A Yes.

1 Q -- who puts those there?
 2 A Aimee does.
 3 Q Okay. And why?
 4 A We do that so we make sure that we have answered each one of
 5 the parts of their request appropriately below.
 6 Q Okay.
 7 A So part one, we make sure that we have that, and we have our
 8 response to that request, and part two, we make sure we
 9 respond to both parts.
 10 Q Okay. Do you see that included in the response portion
 11 below?
 12 A No, I do not.
 13 Q Okay. So with the description it says, Revealing the
 14 requested records would reveal the camera placement?
 15 A Correct.
 16 Q As well as the scope --
 17 A Correct.
 18 Q -- and the clarity of the camera?
 19 A Yes.
 20 Q And the hand-held recordings?
 21 A Right.
 22 Q Would that have related to request one or request two:
 23 request one was video?
 24 A It applies to both of them.
 25 Q How would an audio recording reveal fixed camera placement?

1 A It might not. It won't, but it will threaten the security of
 2 the facility.
 3 Q How?
 4 A By audio. Because anything that happens in an incident, we
 5 are not releasing that information; we're not releasing the
 6 video footage or the audio that goes along with that.
 7 Q And why not the audio?
 8 A They are together; the camera records the video and audio as
 9 one.
 10 Q Is there a way that, for redaction purposes, the Department
 11 could separate the two, and only provide an audio?
 12 A I don't know that.
 13 Q It's possible that a recording could be made just by taking a
 14 recording device, holding it up to a speaker, if audio was
 15 recorded, and then separating that from the video?
 16 A I have not ever been involved with that, so I can't speak to
 17 that.
 18 Q I just mean, like, you would be able to, if someone was
 19 playing a tape right now, we would be able to turn on our
 20 phones, record, and even though we wouldn't be capturing the
 21 image, video footage, we would be able to record the audio.
 22 Does that make sense to you?
 23 A Yes.
 24 Q So it's possible that that could take place and be
 25 accomplished?

1 A Yes.
 2 Q Okay. And that's kind of consistent with redacting, right,
 3 you start with a whole --
 4 A Uh-huh.
 5 Q -- file or a larger item and then you say, Nope, we're not
 6 going to do all of that, but we're going to take some of it?
 7 A Right.
 8 Q Okay. And then looking at scope, how would audio relate to
 9 revealing the scope of a fixed camera?
 10 A Scope means -- I'm sorry. What did you say?
 11 Q How would audio recordings reveal the scope of a camera?
 12 A Audio does not.
 13 Q Okay. And would you answer the same for clarity of a fixed
 14 camera?
 15 A For audio?
 16 Q Uh-huh.
 17 A No.
 18 Q I'm sorry. Clarify the no.
 19 A Clarity does not include audio. Was that the question?
 20 Q Audio wouldn't reveal a camera's clarity?
 21 A Correct.
 22 Q Okay. And audio wouldn't reveal placement, scope or clarity
 23 for a hand-held recording?
 24 A Audio, it depends on what's said in the audio. I mean, it's
 25 possible, but it would depend on what is said.

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1 Q So you'd have to make, like, a case-by-case determination?
 2 A **Right, because if you said, Okay, I'm standing here in East**
 3 **Wing, you know, the audio could reveal some of the security**
 4 **issues.**
 5 Q Okay. But it could not?
 6 A **Correct.**
 7 Q Okay. The second page on the FOIA, following the FOIA
 8 Request.
 9 A **Uh-huh.**
 10 Q Do you recognize that page?
 11 A **Yes, I do.**
 12 Q And what is that?
 13 A **That is a list of FOIA exemptions.**
 14 Q Okay. And who creates this list?
 15 A **I honestly don't know who created it.**
 16 Q Okay. Would it be under your understanding that this is
 17 consistent with the actual FOIA Exemption Statute?
 18 A **Yes.**
 19 Q And you said C was marked on Mr., in response to the
 20 exemption used for Mr. Woodman's request?
 21 A **Yes.**
 22 Q Okay. And that says, A public record, which if disclosed,
 23 would prejudice a public body's ability to maintain the
 24 physical security of custodial and penal institutions
 25 occupied by persons arrested or convicted of a crime.

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1 admitted because of a mental disability, unless the public
 2 interest and disclosure under this Act outweighs the public
 3 interest and nondisclosure.
 4 That last phrase, what do you understand that to mean?
 5 MR. DE BEAR: I'm going to object to the extent
 6 you're asking for a legal conclusion.
 7 **THE WITNESS: From my understanding of what that**
 8 **means is that the public has more of a need to know, and that**
 9 **would outweigh our security concerns of the Department.**
 10 Q (BY MS. VIZACHERO) Okay. And have you ever made a
 11 determination involving audio or video where the public had
 12 more of an interest in knowing than, that supported
 13 disclosure versus nondisclosure?
 14 A **No, I have not.**
 15 Q Okay. And we're going to flip back and forth between this
 16 Request and then the Policy Directive, the March 2016 one.
 17 A **Okay.**
 18 Q On page three, Section Q.
 19 A **Uh-huh.**
 20 Q When it says, The FOIA Coordinator shall, is it your
 21 understanding that that's either the FOIA Coordinator or the
 22 Assistant FOIA Coordinator shall do these things?
 23 A **Yes.**
 24 Q Okay. So Section Q says, The FOIA Coordinator shall review
 25 the request and determine which records are in the

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1 Department's possession.
 2 Who did that with regard to this, it was Ms. Nelson?
 3 A **Initially, Aimee Nelson, correct.**
 4 Q And then in Section R, The FOIA Coordinator shall review the
 5 documents responsive to the Request to insure information
 6 exempt from disclosures not provided.
 7 A **Uh-huh.**
 8 Q Who would have done that in this case?
 9 A **Initially, Aimee Nelson.**
 10 Q Is there any policy that allows, that says, as a matter of
 11 course or habit or, you know, just knee jerk response, when
 12 there's an informal policy that something is not able to be
 13 disclosed because it falls under an exemption that a FOIA
 14 Coordinator shall not review documents?
 15 A **Well, we don't have any informal policies.**
 16 Q Okay.
 17 A **So I'm not quite sure how to answer your question.**
 18 Q So there is no policy or provision or procedure that allows,
 19 that states that someone cannot review in response. The only
 20 one on point in terms of reviewing documents is it says,
 21 Shall review documents?
 22 A **Is there something that says they don't have to?**
 23 Q Yeah.
 24 A **Not to my knowledge.**
 25 Q Okay. The list of FOIA exemptions on page four.

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1 A **Uh-huh.**
 2 Q Who comes up with this list; where does this list --
 3 A **Are you looking at the Policy?**
 4 Q The Policy Directive, yes.
 5 A **Okay. So the list of FOIA exemptions here are taken from the**
 6 **Statute.**
 7 Q Okay. And who comes up with the list of examples under each
 8 one?
 9 A **It could be -- I don't know who came up with these. I can't**
 10 **tell you that, but it could be the Policy Manager, the FOIA**
 11 **Manager, or the Administrator.**
 12 Q So someone from within your office?
 13 A **Correct.**
 14 Q And what information would they use to come up with a list of
 15 examples?
 16 A **Knowledge, history of the Department.**
 17 Q Any other outside authority?
 18 A **The Attorney General's Office.**
 19 Q Are Attorney General opinions binding?
 20 A **I don't know that.**
 21 Q Okay. So looking at Section X, Paragraph 2.
 22 A **Uh-huh.**
 23 Q Which is the same language for Exemption C?
 24 A **Yes.**
 25 Q The examples listed below, and I know this is going to sound

1 interests outweighing, public interests favoring disclosure
 2 as opposed to not favoring disclosure?
 3 **A Do I understand the difference?**
 4 MR. DE BEAR: I'm just going to go ahead and object
 5 to the extent you're calling on Ms. Groves to speculate as to
 6 Mr. Woodman's intentions. Go ahead and answer.
 7 **THE WITNESS: Can you ask the question again?**
 8 Q (BY MS. VIZACHERO) Sure. Did you -- did you take his
 9 request, or his information language that he's using here,
 10 it's kind of presenting an argument that there are reasons
 11 that favor disclosure versus nondisclosure?
 12 **A Yes.**
 13 Q And do you take arguments -- how do you consider arguments
 14 favoring disclosures in these instances; how did you take it
 15 in this case?
 16 **A In this instance I still look at the overall, and in our**
 17 **opinion from the Department of Corrections, the overall**
 18 **guiding concern as the security and custody of our facility.**
 19 **I understand that he felt differently, but it was still**
 20 **our Department's understanding and belief that we had the**
 21 **right to exempt this material for custody and safety security**
 22 **reasons.**
 23 Q Okay. But that's without you having seen the video,
 24 yourself?
 25 **A Correct.**

1 Q So could you -- could there be an instance where conduct is
 2 captured on a video that's so heinous that it would switch
 3 the scale, where we would have to know about it?
 4 **A I don't know that. I have not been involved in that**
 5 **situation.**
 6 Q Do you think that's possible?
 7 **A There would have to be some discussion on it with**
 8 **Administration, so I can't answer that question.**
 9 Q Do you think all videos capture events of the same severity?
 10 **A No.**
 11 Q Okay. So some would be worse than others?
 12 **A Correct.**
 13 Q Okay. I'm sure you're more than familiar with all of the
 14 video requests, having processed all of these.
 15 **A Uh-huh.**
 16 Q Have you received some really innocuous video requests, like
 17 all videos regarding inmate John Smith?
 18 **A Yes, we have.**
 19 Q Okay. And that could just be any video of them walking
 20 around doing nothing throughout the day, right?
 21 **A I can't tell you specifically what they would say, but in**
 22 **general terms, yes, it could be any request for any time that**
 23 **they would be under surveillance.**
 24 Q No violence -- there would be responsive videos that wouldn't
 25 involve any violent activity --

1 **A Correct.**
 2 Q -- or any confrontation?
 3 **A Correct.**
 4 Q And those would be on a really low scale compared to the
 5 security risks you're expressing, is that fair?
 6 MR. DE BEAR: I guess I'm going to object to the
 7 extent that you're asking for a legal conclusion.
 8 **THE WITNESS: How I would answer that is, even**
 9 **though what they are capturing might be different, the**
 10 **security concern is still there from the, from the Department**
 11 **of Corrections' standpoint of you're releasing what it looks**
 12 **like inside our prison. You're looking at escape routes;**
 13 **you're looking at other things that we take very seriously,**
 14 **and would not want in the general public's hands.**
 15 Q (BY MS. VIZACHERO) So -- I want to phrase this properly. So
 16 the underlying events that were at the heart of Mr. Woodman's
 17 request, what were those, do you know, in terms of what was
 18 the incident that happened?
 19 **A The death of a prisoner.**
 20 Q Okay. So that would be probably on the opposite side of the
 21 scale rather than innocuous walking around, no event?
 22 **A Correct.**
 23 Q That's one of the most severe things?
 24 **A Correct.**
 25 Q Okay. So is it the Department's policy that even in those

1 scenarios, the MDOC's security is always going to outweigh
 2 the disclosure in every case?
 3 **A From the ones that I have been presented with as FOIA**
 4 **Coordinator, yes.**
 5 Q Okay. In all of those ones that you've presented with, been
 6 presented with as FOIA Coordinator --
 7 **A Uh-huh.**
 8 Q -- did you review any of the videos prior to determining
 9 whether the public interest favored disclosure or
 10 nondisclosure?
 11 **A I can't recall if I've ever reviewed videos; I can't recall**
 12 **that.**
 13 Q Would you say chances are closer to you haven't or --
 14 **A If I review videos, there were very few that I reviewed.**
 15 Q Okay.
 16 **A But I can't say that I didn't review any.**
 17 Q In drafting your response, did you differentiate between the
 18 audio he requested, which was separate from the video that he
 19 requested, or was it grouped together?
 20 **A It was grouped together.**
 21 Q Okay. I'm going to go through a series of related and
 22 unrelated FOIA Requests --
 23 **A Okay.**
 24 Q -- that you processed.
 25 **A Okay.**

1 Q Just really -- we won't get into too much detail, but just
2 briefly going through them.
3 Do you remember if you processed other FOIA Requests for
4 this video footage, the same that Mr. Woodman --
5 **A For this particular one, I don't recall that.**
6 MS. VIZACHERO: Okay. We'll start with that.
7 (Deposition Exhibit G marked for identification.)
8 (BY MS. VIZACHERO) Ms. Groves, I'm handing you what's been
9 marked as Exhibit G. Tell me if you are familiar with that
10 document.
11 **A Yes, I did sign this one.**
12 Q Can you tell me what it is?
13 **A It's a FOIA Request from Adam Duke requesting access to video**
14 **footage connected to tasing of inmate Dustin Szot at Bellamy**
15 **Creek Correctional Facility in Ionia; it happened on 9/27,**
16 **2016.**
17 Q Okay. And just for the record, will you read the FOIA number
18 request?
19 **A The FOIA Request is 16-951.**
20 Q Okay. And was the request granted or denied?
21 **A It was denied.**
22 Q And on what grounds?
23 **A They're exempt from disclosure under Section 13(1)(c).**
24 Q Do you remember who prepared, which Assistant FOIA
25 Coordinator prepared this Response?

1 **A This would be Aimee Nelson, as well.**
2 Q Was she the only one at the time; I know we talked about
3 there being two earlier?
4 **A In October. I honestly can't recall.**
5 Q Okay.
6 **A I can't remember the dates.**
7 Q Okay. But you know this was prepared by Aimee Nelson?
8 **A Yes.**
9 Q Okay.
10 **A She did the majority of them.**
11 Q And I apologize for the redundancy, but as you understand it
12 neither Aimee nor you reviewed video in response to
13 Mr. Duke's request, correct?
14 **A Correct.**
15 Q And do you know if anyone that Aimee would have contacted
16 reviewed video in response to Mr. Duke's request?
17 **A I'm not sure who she contacted for this, so I don't know**
18 **that.**
19 Q Would they have -- do you know if they would have
20 reviewed --
21 **A I don't know that.**
22 Q Okay. Did you consider this request to be identical to
23 Mr. Woodman's?
24 **A It's not identical, but it's very similar.**
25 Q Because it's similar, would you have just treated it as the

1 same?
2 **A We treated it the same because of what the nature of what**
3 **they were requesting, video footage, which we would not**
4 **release.**
5 (Deposition Exhibit H marked for identification.)
6 Q (BY MS. VIZACHERO) I'm handing you another FOIA Request,
7 which has been marked as Exhibit H. Are you familiar with
8 that Request and Response?
9 **A Yes. I did sign this one, as well.**
10 Q Okay. And can you tell me who it's from, and the FOIA number
11 for the record?
12 **A Troy Baker, and the FOIA number is 16-948.**
13 Q Okay. And what did he request?
14 **A A copy of the Central Office file for Dustin Szot, MDDT,**
15 **which is wrong; it should be MDOC, but it's MDOT Number**
16 **961740. A copy of video and audio recordings of a fight that**
17 **took place on or about September 27, 2016 at the Bellamy**
18 **Creek Correctional Facility, that led to a confrontation with**
19 **prison officers and, eventually, Szot's death.**
20 Q Okay. And who would have been responsible for the initial
21 response?
22 **A Aimee Nelson.**
23 Q And then Aimee would have presented it to you?
24 **A Correct.**
25 Q For approval?

1 **A (Witness nodding head.)**
2 Q Yes?
3 **A Yes.**
4 Q And did you approve it?
5 **A It was granted in part and denied in part.**
6 Q Okay. And why is that?
7 **A Because some of the information that he was requesting was**
8 **releasable.**
9 Q And which information was that?
10 **A A copy of the Central Office file, with certain exemptions**
11 **taken.**
12 Q Okay. And then there is a -- there's a few pages involved
13 with this; there's a second answer sheet, so to speak, for a
14 continued portion?
15 **A Yes.**
16 Q So taking the first page, and then what I think is the third
17 page of this in whole, is there anything on the first page
18 that addresses video or audio recordings?
19 **A No, there is not.**
20 Q Okay. On the second page?
21 **A Uh-huh.**
22 Q Part two is denied on what grounds?
23 **A Part two is video, and that's denied under Section 13(1)(c).**
24 Q Okay. And part three was what?
25 **A Part three was a request for audio recordings of a fight that**

1 took place.

2 Q Okay. And was that granted or denied?

3 A It was denied.

4 Q And why was it denied?

5 A Because the requested records do not exist within the records
6 of the Department under the name or description provided, or
7 by another name reasonably known to the Department.

8 Q So what is your understanding of audio not existing for
9 this? So there would have been audio recording made?

10 A I don't know what recording was made, because I did not
11 review that.

12 Q Okay. Do you know if the videos had audio on them, or
13 included with them?

14 A I don't know that.

15 Q Okay. And then, again, for the sake of redundancy, to the
16 best of your knowledge, neither you nor Aimee Nelson reviewed
17 video prior to responding to this?

18 A Correct.

19 Q Okay.

20 (Deposition Exhibit I marked for identification.)

21 Q (BY MS. VIZACHERO) I'm handing you what's been marked as
22 Exhibit I, and once you've had a second to review that, can
23 you tell me what that is?

24 A This is another request, a FOIA Request from Stephen
25 Kloosterman, FOIA Request Number 16-947, for photos and audio

1 Q Is there a reason, and I'm just curious, why the narratives
2 are different between the different requests: they change a
3 little bit, if you noticed?

4 A The narrative of the response?

5 Q Yes. Just because they're all being prepared --

6 A Well, the one 948 was different because there was a part that
7 was granted, so that's going to be different. The rest of
8 them should be fairly similar in nature, stating 13(1)(c).

9 Q Give me one second. In Mr. Woodman's, there's a reference to
10 hand-held recordings that's not in Troy Baker's request --

11 A Okay.

12 Q Is there a reason for that?

13 A In the response or in the request?

14 Q In the response.

15 A I have to see what was actually requested; one of them may
16 have requested a hand-held recording. Troy Baker, you said?

17 Q Yes.

18 MR. DE BEAR: Troy Baker's request is Exhibit H.

19 THE WITNESS: Okay. So I'm sorry, could you repeat
20 the question again.

21 Q (BY MS. VIZACHERO) So in response on Troy Baker's request.

22 A Uh-huh.

23 Q And I think it will help if you flip to the third page:
24 that's the one with the two parts.

25 A Okay.

1 and visual digital files showing the September 27th fight and
2 tasing that involved prisoner Dustin Allen Szot at the
3 Bellamy Creek Correctional Facility in Ionia.

4 Q Okay. And are you familiar with this document?

5 A Yes, I am.

6 Q And why is that?

7 A Because I signed it as the FOIA Coordinator.

8 Q Okay. And would Ms. Nelson have prepared this, as well?

9 A Yes.

10 Q And was anything disclosed in response to?

11 A No, there was not.

12 Q And how do you know that?

13 A Because it is marked that the requested records are exempt
14 from disclosure.

15 Q Okay. And we have three different categories here, correct?

16 A Correct.

17 Q And those are what?

18 A One is photos, two is audio, and three is visual digital
19 files.

20 Q Okay. And in the exempt from the explanation why the records
21 are exempt from disclosure, is there an enumeration of the
22 first, second, and third?

23 A No, there is not.

24 Q Okay. It's just all grouped together?

25 A Correct.

1 Q There is no reference to hand-held camera, hand-held
2 recordings?

3 A Okay.

4 Q Whereas, in Mr. Woodman's there's a reference to hand-held
5 recordings, as well as in Stephen Kloosterman?

6 A So if you're asking why there's a difference in the answers,
7 I can't tell you that, but I can say that hand-held
8 recordings are also video.

9 Q Okay.

10 A So the recordings, when the officer responds, has a camera,
11 that's a video recording. So I'm not sure why it wasn't
12 mentioned in each one, it just hasn't been. Sometimes, I
13 mean, the responses are never going to be 100 percent cookie
14 cutter all the way through.

15 Q Okay. Have there been changes to -- were there changes
16 during the time that you were in charge of FOIA policies
17 regarding the Department's position on hand-held recordings
18 being discloseable under FOIA?

19 A No.

20 Q No?

21 A That's always been consistent.

22 Q Was there change to language to include that, expressly --
23 was there change to language of a Policy Directive at any
24 time to include a reference to hand-held recordings?

25 A I would have to look at each version of the Policy Directive

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1 **A Correct.**
 2 Q Right?
 3 **A (Witness nodding head.)**
 4 Q It's kind of the main station, you would say?
 5 **A Right.**
 6 Q Hand-held recording devices don't, they're not monitoring
 7 hand-held recording devices in that, correct?
 8 **A No. Those cameras in the Control Center are from the fixed**
 9 **camera placement; the hand-held is brought to the scene when**
 10 **it's needed.**
 11 Q Okay. Do you know, when you're going through any of the FOIA
 12 Requests that we've reviewed thus far, if you were aware that
 13 a hand-held camera had recorded any of the video footage
 14 responsive to the requests?
 15 **A I do not know that. Now, if Aimee called the facility, they**
 16 **would have told her that information.**
 17 Q Okay. And would she have told that to you?
 18 **A She would typically put it in the response, if it was**
 19 **something that we were going to exempt. So if a hand-held**
 20 **recording existed, then we would mention that, that we're not**
 21 **going to release that.**
 22 Q So if someone received a -- if someone submitted a FOIA
 23 Request for all videos responsive to a confrontation, a
 24 physical confrontation or a death, like we have in this
 25 instance?

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1 **A Right.**
 2 Q Just so I see it in my mind's eye. Aimee would call the
 3 facility?
 4 **A Uh-huh.**
 5 Q And she would get what from them?
 6 **A What she would typically say is, Here is our request. We**
 7 **have a request for all video recordings; does this exist?**
 8 **And they would say yes or no.**
 9 Q Okay.
 10 **A Sometimes -- I mean, they may or may not say the difference**
 11 **between the types of recordings that they have, but as long**
 12 **as we know recordings exist, then we can respond to the**
 13 **request.**
 14 Q Okay.
 15 **A And keep in mind that these examples that are listed are not**
 16 **all inclusive; these are strictly examples.**
 17 Q Are there any other recordings that get created within prison
 18 facilities? We've got hand-held, and what is the hand-held?
 19 **A It's a video camera; you walk up with a video camera.**
 20 Q Just old school?
 21 **A Yep, old school video camera.**
 22 Q Okay. And then facility?
 23 **A The cameras.**
 24 Q Like you would typically think of as a security system.
 25 right?

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1 **A Right.**
 2 Q Any others?
 3 **A Tasers may have a camera on them; I don't know if all of them**
 4 **do, but I know some of them do.**
 5 Q Okay. Any other times that recordings would be made, that
 6 you've seen?
 7 **A No.**
 8 Q That you've learned about?
 9 **A Not that I've seen, or not that I'm aware of.**
 10 Q Do you know if there's, like, body mics worn by correctional
 11 facility officers?
 12 **A I don't know that.**
 13 Q I didn't know if you ever saw that --
 14 **A I have not ever seen that.**
 15 Q -- in response to a FOIA Request.
 16 So let's say all of those things existed, and you
 17 received just a request, a blanket request for audio and
 18 video, would you go through each one and make a determination
 19 of, this is a facility recording, this is a hand-held
 20 recording, this is a body mic, if it existed?
 21 **A Right, right. All that we would say is, do recordings exist,**
 22 **and if the answer is yes, then we would respond, Your request**
 23 **has been denied based on 13(1)(c).**
 24 Q And then would you inform them that each type of video
 25 existed?

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1 **A No, we would not.**
 2 Q Is there a reason for that?
 3 **A Because they're all video recordings in some manner.**
 4 Q Okay.
 5 (Deposition Exhibit J marked for identification.)
 6 Q (BY MS. VIZACHERO) I'm handing you what's been marked as
 7 Exhibit J. Can you tell me what that is?
 8 **A It's another public request for records from Steven Lee, FOIA**
 9 **Request Number 16-1046.**
 10 Q Did you -- were you involved with responding to that?
 11 **A Yes, I was.**
 12 Q And how so?
 13 **A I was the FOIA Coordinator at the time, and I responded to**
 14 **the FOIA Request.**
 15 Q Okay. And who would have processed this as the Assistant?
 16 **A Aimee Nelson.**
 17 Q And what happened with this?
 18 **A I have to read it first. Hold on.**
 19 Q Not a problem.
 20 **A Okay. So what it appears, is that the request came in, and**
 21 **we took a 10-day extension. After the extension we had**
 22 **gathered the documentation, realized that there was going to**
 23 **be a fee associated with this request due to the volume of**
 24 **materials.**
 25 Q Okay.

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1 **A** So the requester would have been sent the Freedom of
 2 **Information Act Fee Calculation Sheet, telling him the amount**
 3 **of money that he owed us before we would begin processing the**
 4 **request.**
 5 **The check is obviously attached. At the very end he**
 6 **submitted a check for the amount of \$16.81. When we receive**
 7 **that check, then we process the request.**
 8 **Q** Okay. And for the sake of redundancy, to the best of your
 9 knowledge, neither you nor Aimee reviewed any video?
 10 **A** **Correct.**
 11 **Q** Okay. And did you disclose video?
 12 **A** **No, we did not.**
 13 **Q** And that's Number 13. Did you disclose 14, photographs?
 14 **A** **No, we did not.**
 15 **Q** Did you review any photographs before exempting them?
 16 **A** **I don't recall.**
 17 **Q** Could there be photographs outside of camera surveillance
 18 that would be taken in an incident?
 19 **A** **Yes.**
 20 **Q** Okay.
 21 **MS VIZACHERO:** Will you mark these individually,
 22 please.
 23 (Deposition Exhibits K-N
 24 marked for identification.)
 25 **Q** (BY MS. VIZACHERO) The Steven Lee request that we were just

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1 looking at.
 2 **A** **Uh-huh.**
 3 **Q** The request is being made by -- does it say what capacity
 4 he's requesting those videos?
 5 **A** **It does not.**
 6 **Q** Or the requests are typed. I'm sorry.
 7 **A** **It looks like he is from the Neumann Law Group, and the**
 8 **requester type is attorney.**
 9 **Q** Okay. Do you know if, at any time while you were still
 10 working as FOIA Coordinator, this video was released in
 11 coordination with any suit brought on behalf of the decedent,
 12 Mr. Szot?
 13 **A** **I do not know that.**
 14 **Q** Okay. I'm going to give you a whole slew of exhibits: K, L,
 15 M and N, and they are similarly all FOIA Request Responses
 16 from other incidents, and I will give them to Mr. De Bear.
 17 Okay. The first one you have is, what's the requester's
 18 name?
 19 **A** **Paul Abboud.**
 20 **Q** And that's marked Exhibit K?
 21 **A** **K.**
 22 **Q** K. Thank you. And is this regarding -- is his request
 23 requesting the same footage that was requested by
 24 Mr. Woodman, or is this unrelated?
 25 **A** **The incident is unrelated.**

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1 **Q** Okay. Is it also a different facility?
 2 **A** **Correct.**
 3 **Q** And are you familiar with this document?
 4 **A** **Yes, I am.**
 5 **Q** Okay. And how is that?
 6 **A** **I was the FOIA Coordinator at the time.**
 7 **Q** Okay. And you signed it?
 8 **A** **Yes, I did.**
 9 **Q** And would it have been prepared by Ms. Nelson?
 10 **A** **Yes.**
 11 **Q** And we don't need to get into the facts of this. Did you
 12 just, again, did you, to the best of your knowledge, or
 13 Ms. Nelson review any of the documents?
 14 **A** **No. Video documents?**
 15 **Q** Video documents.
 16 **A** **Correct, we did not.**
 17 **Q** And were the videos disclosed, or was disclosure denied in
 18 that?
 19 **A** **That was denied.**
 20 **Q** Okay. You can turn to the next one.
 21 **A** **Okay.**
 22 **Q** And can you reveal the requester's name?
 23 **A** **Blake Roznowski, R-o-z-n-o-w-s-k-i.**
 24 **Q** And are you familiar with this document?
 25 **A** **Yes, I am.**

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1 **MR. DE BEAR:** Sorry. Let me just pause. The
 2 requester's name is Roznowski?
 3 **MS. VIZACHERO:** 16-88.
 4 **MR. DE BEAR:** 16-88.
 5 **MS. VIZACHERO:** Zero.
 6 **MR. DE BEAR:** Okay. I'll look off of your
 7 exhibit. Sorry, Ms. Vizachero. Go ahead.
 8 **MS. VIZACHERO:** You're fine.
 9 **(BY MS. VIZACHERO)** And did this requester also request
 10 surveillance video?
 11 **A** **Surveillance video from the Kinross Correctional Facility**
 12 **Housing Units during protests on 9/10, 2018.**
 13 **Q** Okay. And did videos exist responsive to this request?
 14 **A** **Yes, they did.**
 15 **Q** Do you know how many -- do you know anything about that?
 16 **A** **I do not know that, no.**
 17 **Q** So how do you know that they existed?
 18 **A** **Because we would have -- Aimee would have called the facility**
 19 **to make sure that they existed prior to taking the exemption.**
 20 **Q** And what exemption is cited for nondisclosure here?
 21 **A** **13(1)(c).**
 22 **Q** Do you know why 13(u) or 13(a) was not used?
 23 **A** **I do not.**
 24 **Q** Were you trained that it was best practice to include all
 25 responsive exemptions?

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1 **A Yes.**
2 **Q** Okay And then again, neither you nor Aimee, to the best of
3 your knowledge, reviewed any video --
4 **A Correct.**
5 **Q** -- in connection with this one? You can move to the next
6 one.
7 **A Okay.**
8 **Q** And will you read me the requester's name?
9 **A Dustin Ordway.**
10 **Q** And that is Exhibit --
11 **A M, as in Mary.**
12 **Q** Thank you. And I know there's two different responses here.
13 Is it accurate that one displays your signature, and one does
14 not?
15 **A Correct.**
16 **Q** Okay. And going through the one that you approved --
17 **A Uh-huh.**
18 **Q** -- did Mr. Ordway's request involve video?
19 **A Yes, video and other electronic records.**
20 **Q** Okay. And involving what underlying event?
21 **A A stabbing at the Kinross Correctional Facility.**
22 **Q** And initially -- this is an initial response, is that fair to
23 say?
24 **A Yes.**
25 **Q** It happens in two parts?

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1 **A Right.**
2 **Q** Why does that happen?
3 **A Because of the volume of records that are requested, and the**
4 **amount of time that it takes to produce it. If it's over a**
5 **threshold, then we have a fee that we assess in order to**
6 **produce the documents.**
7 **Q** Okay. And then this is marked, Granted in Part, Denied in
8 Part?
9 **A Correct.**
10 **Q** And even though no exemptions are cited below?
11 **A That's right, because we knew we were not going to release**
12 **the video.**
13 **Q** Okay And then again, neither you -- who would have prepared
14 this for you, Ms. Nelson?
15 **A This one would be Ms. Nelson, correct.**
16 **Q** And neither you nor Ms. Nelson reviewed video --
17 **A Correct.**
18 **Q** -- before making that determination; that's correct?
19 **A Yes, correct.**
20 **Q** All right. Do you have one more, or was that it?
21 **A N**
22 **Q** N?
23 **A Yes. Number 16-1011 from Brendan O'Connor.**
24 **Q** Okay. And what was -- are you familiar with this document?
25 **A I did not sign this one; this is signed by Todd Butler. For**

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1 **this response I signed the initial response.**
2 **Q** Gotcha. Let's look over your initial response.
3 **A Okay.**
4 **Q** This was requesting video in connection with incidents at
5 Kinross during the same time as the last exhibit?
6 **A Correct.**
7 **Q** Including video recordings?
8 **A Actually, the dates are different between this one and the**
9 **last one.**
10 **Q** Thank you. What are these dates?
11 **A The one on this request is between September 9, 2016 and**
12 **September 22, 2016.**
13 **Q** Perfect. Thank you for clarifying. An initial determination
14 was made that some records were exempt; is that fair?
15 **A Correct.**
16 **Q** Okay. And what records were exempt?
17 **A It's not listed on this document, but we would have exempted**
18 **the video that's being requested, video recordings.**
19 **Q** Okay. And who prepared this?
20 **A Aimee Nelson.**
21 **Q** And neither you nor Ms. Nelson reviewed video before --
22 **A Correct.**
23 **Q** -- issuing this initial determination that some records were
24 exempt?
25 **A Correct.**

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1 **Q** And those records would have been the video records, correct?
2 **A Right.**
3 **Q** Okay We will finish up with two last documents.
4 **A Okay.**
5 **Q** While you were FOIA Coordinator did you ever authorize the
6 release of video recording taken within an MDOC facility?
7 **A Not to my knowledge.**
8 **Q** Okay. Is it your understanding that is a Department wide
9 policy --
10 **A It's --**
11 **Q** -- or stance?
12 **A Correct, that's our stance. It's not written in policy, as**
13 **in always, but it is our stance that custody and security**
14 **takes first priority.**
15 **Q** Okay. And you understand that to mean that that means never
16 disclosing any audio or video recording?
17 **A Correct.**
18 **Q** Recorded within a correctional facility, yes?
19 **A Correct.**
20 **Q** Okay.
21 (Deposition Exhibits O-P
22 marked for identification.)
23 **Q (BY MS. VIZACHERO) Okay. I've just handed you what's been**
24 **marked Exhibits O and P.**
25 **A Okay.**

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1 Q Have you ever seen either of these documents?

2 A I do not recall if I have read this.

3 Q Okay.

4 A Either one of them.

5 Q Can you, for the record, explain to me what you're looking

6 at?

7 A I am looking at a -- it looks like a newspaper article from

8 the Ionia Sentinel-Standard.

9 Q And that's Exhibit O?

10 A Correct.

11 Q Okay. And Exhibit P?

12 A Is another newspaper article. I'm trying to figure out where

13 it's from. I'm not seeing where it's from.

14 MR. DE BEAR: You're not seeing where Exhibit P is

15 from?

16 THE WITNESS: Yeah, which newspaper it would be

17 from.

18 MR. DE BEAR: For the record, Ms. Vizachero, it

19 appears to be from a website, Photographysnotacrime.com.

20 MS. VIZACHERO: Correct. Thank you.

21 THE WITNESS: Yeah.

22 Q (BY MS. VIZACHERO) Okay. So for Exhibit O, I'm going to

23 point your attention to first the date the article was

24 published.

25 A March 30, 2010. I sorry. I didn't know if you were looking

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1 for that answer.

2 Q No, you're fine, you're fine. And you were not Coordinator

3 at that time, correct?

4 A Correct.

5 Q In the fourth paragraph on the first page, can you read that

6 for the record?

7 A A video of the incident was released through a Freedom of

8 Information Act Request, which shows the altercation between

9 the officer and the inmate, who appears to be handcuffed

10 during the incident.

11 Q Just from reviewing the article, since I've handed it to you,

12 do you understand, from the facts set forth, where the

13 altercation that the journalist is writing about took place?

14 MR. DE BEAR: I'm going to object to the extent

15 that you're asking her to speculate, and it assumes facts not

16 in evidence.

17 THE WITNESS: And I'm sorry, what was the

18 question?

19 Q (BY MS. VIZACHERO) Do you understand where the altercation

20 took place, just by reviewing the news article?

21 A It appears to be the Bellamy Creek Correctional Facility.

22 Q Okay. And is that the same facility as the incident that

23 took place with Mr. Szot?

24 A Correct.

25 Q Okay. And the article conveys that a video was released

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1 pursuant to the Freedom of Information Act from within the

2 prison?

3 A Correct.

4 Q And you can turn to Exhibit P.

5 A Okay.

6 Q And can you point out the date of this public --

7 A January -- oh, that says, Died in custody. Is the date 5/10,

8 2017?

9 Q No. I'm sorry, that was printed on that.

10 A Okay. So this is, Died in custody January 2nd, but is that

11 the date of the article?

12 Q It is, yes.

13 A January 2, 2017.

14 Q Were you FOIA Coordinator at that time?

15 A Yes, I was.

16 Q Okay. And I'm going to turn your attention to page three of

17 10, the very last paragraph.

18 A Okay.

19 Q Can you read that for the record?

20 A Audio from the prison surveillance camera captured Edmond

21 choking and gasping for air during the next --

22 Q And it's covered by the banner?

23 A And it's cut off.

24 Q And then I'll point your attention to page five, the last

25 paragraph.

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1 A Would you like me to read it?

2 Q Just take a moment to review it, and I'll ask a question.

3 A Okay.

4 Q From the portions you've just read, and if you need more time

5 to review the article in its entirety, do you understand the

6 audio and video recording that is being referenced on page

7 three to be audio and video recording, or audio recording

8 from within a prison?

9 A Do I believe that's where the audio recording occurred, is in

10 a prison; is that what you're asking?

11 Q Yes.

12 A Yes.

13 Q Okay. And based on the information on page five that

14 discusses that a lawsuit had not been filed yet?

15 A Correct.

16 Q What other ways would a journalist have been able to obtain

17 this footage?

18 MR. DE BEAR: I'm going to object to the extent

19 that you're asking Ms. Groves to speculate.

20 THE WITNESS: And it would be speculative, but we

21 have -- I believe that from our Public Information Officer

22 has released information outside of the FOIA realm.

23 Q (BY MS. VIZACHERO) Can you explain that?

24 A So it would be a news reporter asking our Public Information

25 Officer for information that has not been processed through

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1 the FOIA Office.

2 Q Okay. And how is the Public Information Officer allowed to

3 disclose recordings that threaten the security of a

4 correctional facility?

5 A That would have to have authorization from the Director.

6 Q Who was the Director January 2nd of 2017?

7 A Heidi Washington. And I'm not saying that that's how this

8 was released, but how it could have been released.

9 Q Okay. Are you familiar with the underlying facts?

10 A I don't know -- I know just the surface of this case.

11 Q Okay. Do you know if you, at any time, processed a FOIA

12 Request for this video footage?

13 A This, I don't recall.

14 Q Could a request have been made to Huron Valley Correctional

15 Facility, itself, rather than coming through --

16 A Yes.

17 Q And they could have disclosed it?

18 A They could have, but I don't know that they did.

19 Q Okay. Did you oversee, in your role as Director, FOIA

20 Director --

21 A FOIA Coordinator.

22 Q FOIA Coordinator. Thank you.

23 A Uh-huh.

24 Q FOIA Coordinator, if you were looking at a hierarchy, would

25 FOIA Coordinators, local facilities, because they send you

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1 their reports, right?

2 A Correct.

3 Q Do they technically fall under your heading, like your

4 supervision?

5 A I do not -- I did not supervise them; they report up through

6 their own chain of command at the facility. However, there

7 was a dotted line reporting, so if they had questions they

8 would call either Aimee or myself for some direction.

9 Q Okay. No one contacted you with regard to the video, or the

10 audio released from Huron Valley Women's --

11 A Not that I'm aware of.

12 MS. VIZACHERO: Okay. All right. That's all I

13 have. Do you have anything?

14 MR. DE BEAR: No questions for Ms. Groves. No.

15 (Whereupon, Deposition concluded at 12:31 p.m.)

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Page 104

1 STATE OF MICHIGAN)
ISS

2 COUNTY OF CLINTON)
CERTIFICATE OF NOTARY PUBLIC

3

4 I certify that this transcript is a complete, true

5 and correct record of the testimony of the witness held in

6 this case.

7 I also certify that prior to taking this

8 deposition, the witness was duly sworn or affirmed to tell

9 the truth.

10 I further certify that I am not a relative or an

11 employee of or an attorney for a party; and that I am not

12 financially interested, directly or indirectly, in the

13 matter.

14 I hereby set my hand this day, Tuesday, December

15 2017

16

17

Heidi A. Cook

18 Heidi A. Cook, RPR/CSR-4827
Certified Shorthand Reporter,
Registered Professional Reporter, and
Notary Public, County of Clinton,
State of Michigan.
My Commission Expires: 06-02-2020

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RECEIVED by MSC 7/22/2022 3:56:19 PM

EXHIBIT G

STATE OF MICHIGAN
IN THE COURT OF CLAIMS

SPENCER WOODMAN,

Plaintiff,

-vs-

Case No. 17-000082
Hon. Cynthia D. Stephens

MICHIGAN DEPARTMENT OF CORRECTIONS,

Defendant.

DEPOSITION OF CORPORATE REPRESENTATIVE FOR

MICHIGAN DEPARTMENT OF CORRECTIONS

CHRISTINE WAKEFIELD

Taken by the Plaintiff on Thursday, the 30th day of
November, 2017 at the office of Michigan Department of
Attorney General, 525 West Ottawa Street, Lansing, Michigan
at 3:00 p.m.

APPEARANCES:

For the Plaintiff: OLIVIA K. VIZACHERO (P81699)
Honigman Miller Schwartz and Cohn, LLP
Cooperating Attorneys, American
Civil Liberties Union Fund of Michigan
2290 First National Building
600 Woodward Avenue
Detroit, Michigan 48226
(313) 465-7000
ovizachero@honigman.com

Page 2

1 For the Defendant: ADAM R. DE BEAR (P80242)
 2 ERIC M. JAMISON (P75721)
 3 Michigan Department of Attorney General
 4 525 West Ottawa Street
 5 2nd Floor G. Mennen Williams Building
 6 Lansing, Michigan 48909
 7 (517) 373-1162
 8 debeara@michigan.gov
 9
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 11 Reported By: Heidi A. Cook, CSR 4827
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Page 4

1 Thursday, November 30, 2017
 2 Lansing, Michigan
 3 3:00 p.m.
 4 * * *
 5 CORPORATE REPRESENTATIVE FOR
 6 MICHIGAN DEPARTMENT OF CORRECTIONS
 7 CHRISTINE WAKEFIELD,
 8 having been first duly sworn, testified as follows:
 9 EXAMINATION
 10 BY MS. VIZACHERO:
 11 Q Good afternoon. How are you today?
 12 A I am fine. How are you.
 13 Q Wonderful. Thank you. Would you please state your first and
 14 last name for the record, and spell your last name?
 15 A Christine, with a C-h-r-i-s-t-i-n-e, and Wakefield,
 16 W-a-k-e-f-i-e-l-d.
 17 Q And your current title and name of employer?
 18 A My current title is Inspector, and my employer is the
 19 Michigan Department of Corrections, Bellamy Creek
 20 Correctional Facility.
 21 Q Inspector Wakefield, if I refer to MDOC instead of saying
 22 Michigan Department of Corrections, you know what I'm talking
 23 about, right?
 24 A (Witness nodding head.)
 25 MR. DE BEAR: You want to verbalize your answers.

Page 3

1 EXAMINATION INDEX
 2 -----
 3 ATTORNEY'S NAME EXAMINATION RE-EXAMINATION
 4 -----
 5
 6 BY MS. VIZACHERO: 4
 7
 8 * * *
 9
 10 EXHIBIT INDEX
 11 -----
 12 EXHIBIT MARKED IDENTIFIED
 13 -----
 14 There were no exhibits marked.
 15
 16 * * *
 17
 18
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Page 5

1 THE WITNESS: Yes.
 2 MS. VIZACHERO: I'm going to get to that in two
 3 seconds.
 4 THE WITNESS: Yes, I know what you mean.
 5 Q (BY MS. VIZACHERO) Okay. As I explained before we went on
 6 the record, my name is Olivia Vizachero. I am representing
 7 Spencer Woodman and George Joseph in relation to their FOIA
 8 Request that they submitted to the Michigan Department of
 9 Corrections, which were denied, and have now been filed as
 10 FOIA Complaints.
 11 You're being deposed today in connection with that, and
 12 you've been designated by the Michigan Department of
 13 Corrections, you understand, to respond to two items,
 14 specifically. Did you have an opportunity to look at the
 15 Notice of Deposition?
 16 A Yes.
 17 Q Okay.
 18 A Yeah.
 19 Q So you understand the scope of the items that you're
 20 testifying on behalf of the Michigan Department of
 21 Corrections, for all video recordings that are responsive to
 22 Mr. Woodman's FOIA Request, and all cameras that captured
 23 video and audio footage that's responsive to Mr. Woodman's
 24 FOIA Request?
 25 A Yes.

Page 26

1 A So what is it that you -- so are you asking -- what is it
2 that you're asking me about these?
3 Q Does that represent a full list of the videos that you have
4 reviewed?
5 A To the best of my recollection, yes.
6 Q Okay. Do you know of any other videos outside of that list
7 that exist?
8 A No, I do not.
9 Q Okay. You believe that's an exhaustive list, to the best of
10 your knowledge?
11 A Yes.
12 Q Okay.
13 A Yes, to the best of my knowledge.
14 Q Can you read the first one for the record?
15 A Video description depicts MDOC officers responding to the
16 confrontation that led to the death of inmate Dustin Szot.
17 And then it says, Recording device, facility camera.
18 Q What's a facility camera?
19 A What is a facility camera?
20 Q Yes.
21 A I believe this, the way they're depicting this, it would be
22 our fixed cameras within the facility.
23 Q Is that what you understand to be the surveillance system?
24 A Yes.
25 Q Okay. All right. What's the second one?

Page 27

1 A The second one, it depicts the confrontation that led to the
2 death of inmate Dustin Szot, and recording device would be
3 electronic controlled device, in parentheses, ECD camera.
4 Q Do you know what that means?
5 A Yes, I do.
6 Q Can you tell me?
7 A It would be -- a better name for it would be a taser; the
8 public would know it as taser.
9 Q Okay. And Corrections Officers have tasers on their duty
10 belt, correct?
11 A Yes, they do.
12 Q And they're not walking around with it recording at all
13 times, are they? Does it have to be deployed in order for it
14 to record?
15 A Yes.
16 MS. VIZACHERO: Can we go off the record for a
17 second.
18 (Off the record discussion.)
19 MS. VIZACHERO. Okay. We'll go back on the record.
20 Q (BY MS. VIZACHERO) So video number two was recorded by a
21 taser?
22 A Yes, according to this list.
23 Q Okay. And what's video number three?
24 A The exact same thing as number two.
25 Q Would that have been from a separate device?

Page 28

1 A Yes, I do believe so. To the best of my recollection it was.
2 Q Okay. And what's the fourth one?
3 A The fourth one is a third, exact, Depicts the confrontation
4 that led to the death of inmate Dustin Szot and, again, an
5 Electronic Control Device, ECD camera.
6 Q And number five?
7 A Number five, Depicts the confrontation that led to the death
8 of Dustin Szot. MDOC officers responding to that
9 confrontation, and the attempted resuscitation of inmate
10 Dustin Szot, and recording device is facility camera.
11 Q And number six?
12 A Depicts the attempted resuscitation of inmate Dustin Szot;
13 recording device, hand-held camera.
14 Q And number seven?
15 A Depicts the attempted resuscitation of inmate Dustin Szot;
16 iPhone camera.
17 Q Is there an eighth on the list?
18 A Yes, and that's the exact same thing.
19 Q Okay.
20 A Which is the iPhone camera.
21 Q And you would take that to mean two different iPhone camera
22 videos?
23 A If I had to guess, that's what I would take that to mean.
24 Q Do you know if two separate iPhones were used, or if that
25 came from the same one?

Page 29

1 A I'm not -- I'm not positively sure on that.
2 Q How do you define surveillance system; what do you take that
3 to mean?
4 A How do I define surveillance system?
5 Q Like the facility's surveillance system.
6 A A body of cameras that overlooks our entire facility.
7 Q Okay. Would those be cameras that are recording every day?
8 A Yes.
9 Q Right?
10 A Yes.
11 Q Okay.. So fixed cameras, is that --
12 A They're stationary cameras.
13 Q Okay.
14 A I don't know that fixed is the right word.
15 Q Stationary works for me.
16 A Okay.
17 Q Do you consider videos from tasers part of the facility's
18 surveillance system?
19 A Yes.
20 Q What about a hand-held camera?
21 A You're asking if the hand-held -- would I consider the
22 hand-held camera part of the facility's surveillance?
23 Q Yes.
24 A Yes, I would.
25 Q And what about an iPhone camera?

Page 30

1 A Yes.

2 Q Are iPhone camera videos reviewed in the Control Center?

3 A No, they're not.

4 Q How about videos recorded on a taser, that doesn't feed

5 into --

6 A Right, no, it does not feed into the Control Center.

7 Q Nor does a hand-held camera?

8 A Like, feed into --

9 Q The fixed stationary cameras, someone is in the Control

10 Center --

11 A Yeah.

12 Q -- I'm assuming, all hours of the day --

13 A (Witness nodding head.)

14 Q -- watching cameras?

15 A Right.

16 Q Right?

17 A Yes.

18 Q Okay. Those feeds show up on a screen?

19 A Okay.

20 Q Right, do you know what I'm saying?

21 A Yes, I gotcha. So your question was, do the hand-helds feed

22 into the Control Center, and that would be no.

23 Q Okay. What are, as you understand it, the purposes of having

24 video footage from those three items: iPhones, hand-held

25 camera, taser video; why would the Correctional Facility want

Page 31

1 those videos?

2 A Why would we want the -- besides -- ask me the question

3 again.

4 Q Why would the Facility want to have those recordings made?

5 A For our own safety.

6 Q How does that relate to your safety, if it's -- so the

7 recordings are being done in real time, right?

8 A Uh-huh.

9 Q No one is monitoring them while the recording is being made,

10 correct?

11 A Uh-huh, uh-huh..

12 Q So --

13 A And you're talking about -- you're talking about the other --

14 Q Hand-helds, iPhones --

15 A All right.

16 Q -- and the ECD.

17 A Uh-huh.

18 Q So those three. No one is watching people up to trouble on

19 those?

20 A Right.

21 Q Trouble happens, and then those get turned on?

22 A Yes.

23 Q Is that a fair way to say it?

24 A Yes.

25 Q I like it. So there's no -- you're only reviewing those

Page 32

1 videos after something happens?

2 A That is correct.

3 Q Okay. So reviewing -- those videos aren't done to prevent --

4 those videos aren't made to prevent an altercation from

5 happening, or to respond to an altercation?

6 A For the most part, yes.

7 Q Okay. Are there people present in any of the one through

8 eight, the videos that were made, one through eight, aside

9 from Mr. Szot?

10 A Yes.

11 Q Okay. In all videos?

12 A To the best of my knowledge, yes.

13 Q Okay. In all videos, both, other prisoners and employees?

14 A Ask me -- ask that again.

15 Q In all videos, were there -- was there a combination of both

16 MDOC employees and other incarcerated persons, other

17 prisoners?

18 A Yes, if you include Mr. Szot.

19 Q Not including Mr. Szot?

20 A Then staff, yes.

21 Q Okay. But not in every video was there other prisoners?

22 A To the best of my knowledge --

23 Q We can go through them one-by-one.

24 A Okay.

25 Q The first one, facility camera?

Page 33

1 A So to make it easy, I mean, besides probably six, seven and

2 eight -- one through five, you're going to have both staff

3 and prisoners, and I mean plural. And then six, seven and

4 eight, you're going to have to staff, many staff, and

5 probably just Dustin Szot.

6 Q Okay. Which of the recordings, one through eight, have

7 sound?

8 A Okay. I would say two, three, four, six, seven, eight.

9 Q Are MDOC employees allowed to have their iPhones with them in

10 the facility?

11 A There are select people that can have an iPhone.

12 Q Did this phone come from a person who was authorized to have

13 an iPhone?

14 A Yes.

15 Q Okay. Can you identify that person for me?

16 MR. DE BEAR. I'm going to object to the extent

17 that you're asking for names involved of the MDOC

18 Correctional Officers, and I'll instruct my witness not to

19 answer.

20 Q (BY MS. VIZACHERO) Are you going to answer, or listen to

21 advice of your counsel?

22 A I'm going to listen to my counsel.

23 Q Okay. Going from there, is there a way to -- okay. So

24 there's no sound on facility cameras?

25 A No.

Page 34

1 Q Okay. You stated that the iPhone recordings were made by
2 someone who had authorization to make them, or to carry an
3 iPhone?
4 **A Yes.**
5 Q All right. Are MDOC employees authorized to record with
6 their iPhone within a facility?
7 **A If you're authorized to carry an iPhone, then absolutely,**
8 **yes.**
9 Q You can use it to record?
10 **A Yes.**
11 Q Okay. Is the iPhone a Department iPhone?
12 **A Meaning?**
13 Q Is it provided to the person by the Michigan Department of
14 Corrections?
15 **A Yes.**
16 Q Are you familiar with iPhones?
17 **A I'd say pretty familiar.**
18 Q Do you have an iPhone?
19 **A Yes, I do.**
20 Q One of the main aims of FOIA is to provide information that
21 isn't required to be exempt from disclosure for certain
22 reasons, and one way to do that is to redact information.
23 **A Okay.**
24 Q Okay. To set aside stuff that would be exempt, and then to
25 release the rest of the material that isn't exempt.

Page 35

1 **A Okay.**
2 Q Does that make sense?
3 **A Yes.**
4 Q Would an iPhone be able to -- would an MDOC iPhone be able to
5 record sound from a video that has sound that was played?
6 **MR. DE BEAR:** I'm going to object just to the
7 extent that it's outside the two items that Ms Wakefield is
8 supposed to be testifying to. That said, if you know, you
9 can answer the question.
10 **THE WITNESS: If I know if an iPhone could record**
11 **another video?**
12 Q (BY MS VIZACHERO) Can an iPhone record sound?
13 **A Yes.**
14 Q Okay. If I played a video right now on mine, would you be
15 able to record the sound, not the video, you don't need to
16 see the screen, but would you be able to record the audio
17 playing from your own iPhone?
18 **A Yes.**
19 Q And you indicated that on six of the eight videos sound does
20 exist?
21 **A Yes.**
22 Q Does video -- did any of the video recordings that we just
23 went through get produced from Bellamy Creek to an outside
24 entity, like Michigan State Police or anything like that?
25 **A This video?**

Page 36

1 Q Any of the eight, yeah.
2 **A Yes, we would have given this to the Michigan State Police.**
3 Q All eight?
4 **A I'm assuming, yes. To the best of my knowledge, yes, all**
5 **eight of these went to the Michigan State Police.**
6 Q How did, if you know, how did the hand-held video, the iPhone
7 videos, and the videos from the tasers get made to be, like,
8 within the custody, right, because they're on someone else's
9 phone, or -- how does MDOC end up getting those files?
10 **A Okay. Basically, anybody that's recording knows, or anybody**
11 **that's involved in an incident knows that they have to turn**
12 **those things in, those recordings in as evidence, you know,**
13 **to the situation that they're involved in.**
14 Q And that was done in this case?
15 **A Yes, clearly.**
16 Q And then how are those recordings stored?
17 **A How are these recordings stored?**
18 Q Like electronically, or tapes in a cabinet from the Walkman
19 days?
20 **A I love it. How are these recordings stored? I would say a**
21 **variety of ways.**
22 Q Okay. Can you explain?
23 **A Yes. I would say -- I mean, probably on disc would be the**
24 **best way to say it.**
25 Q Okay.

Page 37

1 **A But I mean, I guess what I mean is I don't know what I mean.**
2 **I would say on DVD they would be stored, and then they would**
3 **be stored with the critical.**
4 Q Okay.
5 **A The whole packet, the whole --**
6 Q Is that your case file --
7 **A The critical?**
8 Q -- the critical?
9 **A Yes.**
10 Q Okay.
11 **A So they're going to be stored with everything, basically --**
12 Q Okay.
13 **A -- that involved that case.**
14 Q So it's fair to say they're stored in electronic format?
15 **A Yes, electronic type format.**
16 Q Have you ever redacted, in this case or any other, have you
17 ever redacted video footage?
18 **A I wouldn't know how.**
19 Q Okay. Have you ever clipped video footage?
20 **A No, I wouldn't know how to do that.**
21 Q Okay. Do you know if that's possible?
22 **A People do it every day, yes.**
23 Q Okay.
24 **A Hollywood.**
25 Q Hollywood. Okay. I'm going to go through -- if you cropped

Page 46

1 **videos would show that, movement plans.**
 2 Q Would show or are movement plans?
 3 **A I would say they are movement plans.**
 4 Q All of the videos?
 5 **A With the exception of six, seven and eight; to the best of my**
 6 **knowledge, I believe one through five would show movement**
 7 **plans.**
 8 Q Okay Would someone need to review the videos in order to
 9 make that determination?
 10 **A I don't understand, like, where you're coming from.**
 11 Q What if the taser video didn't capture anything?
 12 **A Okay.**
 13 Q Right? What if, for whatever reason, it didn't capture any
 14 physical person; you'd have to know whether -- you'd have to
 15 review the video to know whether or not it captured movement,
 16 right?
 17 **A Yes.**
 18 Q Right?
 19 **A Yes.**
 20 Q All right. Videos one through eight, Security Threat Group
 21 designations and related documentation, do they constitute
 22 any of that?
 23 **A They don't capture Security Threat Group information.**
 24 Q Okay.
 25 **A No.**

Page 47

1 Q Exempt Policy Directives and Operating Procedures?
 2 **A They do capture Operating Procedures that are exempt.**
 3 Q The exempt policy, or Policy Directives and Procedures, are
 4 those paper documents?
 5 **A Yes.**
 6 Q Okay. So if I wanted to get my hands on those through FOIA,
 7 it's not going to happen?
 8 **A To the best of my knowledge, no.**
 9 Q They're exempt?
 10 **A They're exempt.**
 11 Q I don't get it?
 12 **A Right.**
 13 Q Okay. Is your point that saying -- I don't want to put words
 14 in your mouth. Policies and procedures are tangible paper
 15 documents, right?
 16 **A Yes, yes.**
 17 Q Okay. And videos aren't those, the tangible paper documents;
 18 they're not recording -- it's not video footage of the paper
 19 documents?
 20 **A It's a depiction of the paper document.**
 21 Q And --
 22 **A Is that the right word, depiction of the -- yeah. It shows**
 23 **our processes.**
 24 Q But it's not the tangible documents, themselves, if someone
 25 took that to mean the documents?

Page 48

1 **A Right.**
 2 Q Okay. Post Orders and security sensitive assignment?
 3 **A And I would say the same thing about that.**
 4 Q What is a sallyport?
 5 **A The sallyport is one of a couple entryways into the prison.**
 6 **So have you ever seen on TV where a vehicle will drive into a**
 7 **fence, and then you'll have a guy walk underneath the**
 8 **vehicle, looking?**
 9 Q Oh, okay.
 10 **A Looking up, like, underneath.**
 11 Q Okay
 12 **A That's a sallyport.**
 13 Q Got it. What is a Post Order?
 14 **A The best way to describe a Post Order would be, it's the**
 15 **instructions on how to do your job, of the job that you are**
 16 **assigned.**
 17 MR. DE BEAR I hate to do this, but I'd like to
 18 ask to take a quick break. There's something I have to check
 19 into.
 20 MS. VIZACHERO: That's fine.
 21 MR. DE BEAR: Can we go off the record?
 22 MS. VIZACHERO: Yeah.
 23 (Off the record discussion.)
 24 (Whereupon, Mr. Jamison entering deposition.)
 25 MS. VIZACHERO: Back on the record. Do you want to

Page 49

1 put a statement of the record?
 2 MR. JAMISON: Yes.
 3 MS. VIZACHERO: Okay.
 4 MR. JAMISON: Eric Jamison, appearing on behalf of
 5 the Department of Corrections.
 6 MS. VIZACHERO: Thank you.
 7 Q (BY MS. VIZACHERO) Inspector, can you define, tell me what a
 8 monitoring device is?
 9 A Can I tell you what a monitoring device is?
 10 Q Yes.
 11 A I would say it could be a lot of different things.
 12 Q Okay. In the context of videos recorded within the Michigan
 13 Department of Corrections --
 14 A Okay.
 15 Q -- Bellamy Creek Facility?
 16 A A monitoring device that could be used within prison would be
 17 our phone system, JPay.
 18 Q Okay. What about with videos?
 19 A Fixed video, the tasers, you know, record number one through
 20 eight, everything in that, basically; a hand-held camera, I
 21 mean, it's a device we could use, potentially, within prison
 22 to monitor.
 23 Q So we talked about this earlier, and you described a
 24 difference between videos that go to the Control Center
 25 versus videos that don't?

1 A Right.

2 Q Is someone monitoring the videos in the Control Center?

3 A Well, the facility cameras, yes.

4 Q Yes.

5 A Yes.

6 Q Is someone monitoring, in the Control Center, two, three --

7 what was it. Two, three, five, seven, eight, I believe,

8 those videos? Those aren't streaming, right, in the Control

9 Center, we discussed that?

10 A No. Two, three, four, six, seven and eight are not

11 streaming.

12 Q Okay. So someone is not monitoring them while the recording

13 is taking place?

14 A Correct.

15 Q Okay. Just a few minor last things. You mentioned earlier

16 that a few of the items, one through eight, could constitute

17 movement plans. Do you remember that?

18 A Yes.

19 Q Okay. If the audio from all of the recordings that don't

20 include the facility videos, because you informed me that

21 those don't have audio --

22 A The facility cameras, yep. I mean, yes.

23 Q So just the taser recordings, the iPhone recordings, and the

24 hand-held camera --

25 A Have audio.

1 Q (BY MS. VIZACHERO) Okay. Do you know of any instrument

2 used, or possessed by MDOC personnel that's considered a

3 personal protection device?

4 A Okay. I'm thinking personal protection. So I think what

5 you're referring to -- I believe what you're referring to is,

6 like, a PAL, a Personal Alarm Locator, and I would --

7 MR. JAMISON: I'll just say this on the record.

8 You don't have to try to guess what she's asking.

9 THE WITNESS: Okay.

10 MR. JAMISON: If you don't understand what she's

11 asking, just tell her you don't understand and she can

12 rephrase the question.

13 THE WITNESS: Okay. Yeah, I'm not sure that I'm

14 completely understanding you.

15 Q (BY MS. VIZACHERO) Okay. Have any of the videos, one

16 through eight, been determined to be confidential by a

17 Hearing Officer?

18 A I have no idea.

19 Q Conducted at a hearing pursuant to 791.252?

20 A Yeah, I'm not familiar.

21 Q Okay. Would any of the audio or video recordings one through

22 eight constitute passwords?

23 A Would they need a password?

24 Q Nope, are the videos passwords?

25 A No.

1 Q -- have audio. Would just the audio recordings constitute

2 movement plans?

3 A If you took away the pictures?

4 Q Yeah.

5 A Would audio recordings -- yes, they could. I'll leave it at

6 that.

7 Q They could also not?

8 A No, I was going to elaborate, but then I decided not to.

9 Q Do the audio recordings here constitute movement plans?

10 A Yes, they do. The audio recordings that are within the two,

11 three and four could constitute how we move, yes, our

12 movement plans.

13 Q You're saying could?

14 A Yeah. No, they do, they constitute -- so when, like in the

15 event of an incident, we have, you know, protocols, and those

16 protocols are heard on the ECDs, you know, how we move.

17 Q What constitutes a personal protection device?

18 A What constitutes a personal protection device?

19 Q Yes.

20 A I'm not sure that I'm understanding your question, like, a

21 personal protection device?

22 MR. JAMISON: If you can't answer, you can't

23 answer.

24 THE WITNESS: I'm not sure -- I don't understand

25 exactly what you're asking me.

1 Q Perfect. Are they passes?

2 A Are they passes?

3 Q Yeah. Do you have passes within Bellamy Creek, or keys? You

4 said you have control over the key and tool room?

5 A Uh-huh. Are the -- I'm not understanding you. I am so

6 sorry.

7 Q I have a whole long list of things that trigger not being

8 able to release video under certain exemptions, and I'm just

9 trying to cross off the ones that totally don't apply. So if

10 you think I sound crazy, it's because it's completely

11 opposite from videos, so you don't have to try and make sense

12 of it.

13 A Okay.

14 Q You can be like, No, clearly videos aren't keys. Perfect.

15 A No, videos are not keys.

16 Q Great.

17 A Sorry.

18 Q Not passes?

19 A They're not passes.

20 Q Not passwords, we discussed that?

21 A Right.

22 Q Okay. Codes and combinations?

23 A No, they are not, specifically, codes and combinations.

24 Q Perfect. I like it.

25 A Okay.

EXHIBIT H

STATE OF MICHIGAN
IN THE COURT OF CLAIMS

SPENCER WOODMAN,

Plaintiff,

-vs-

Case No. 17-000082
Hon. Cynthia D. Stephens

MICHIGAN DEPARTMENT OF CORRECTIONS,

Defendant.

DEPOSITION OF CORPORATE REPRESENTATIVE FOR
MICHIGAN DEPARTMENT OF CORRECTIONS
CHERYL GROVES

Taken by the Plaintiff on Thursday, the 30th day of
November, 2017 at the office of Michigan Department of
Attorney General, 525 West Ottawa Street, Lansing, Michigan
at 1:15 p.m.

APPEARANCES:

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Page 4

1 Thursday, November 30, 2017
 2 Lansing, Michigan
 3 1:15 p.m.
 4 * * *
 5 CORPORATE REPRESENTATIVE FOR
 6 MICHIGAN DEPARTMENT OF CORRECTIONS
 7 CHERYL GROVES,
 8 having been first duly sworn, testified as follows:
 9 EXAMINATION
 10 BY MS. VIZACHERO:
 11 Q Good afternoon, Ms. Groves. How are you?
 12 A **Good afternoon. Good. How are you?**
 13 Q Wonderful. Thank you.
 14 A **Good.**
 15 Q Okay. I know we took some testimony earlier today, as I
 16 explained, of you testifying to facts, do you remember, in
 17 your individual capacity, is that correct?
 18 A **Yes.**
 19 Q Okay. And you understand that this is separate, and you're
 20 testifying now on behalf of MDOC?
 21 A **Yes.**
 22 Q Okay. And by MDOC, you understand that I am referring to
 23 Michigan Department of Corrections?
 24 A **Correct.**
 25 Q Perfect. For our lovely court reporter, can you please state

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1 EXAMINATION INDEX
 2 -----
 3 ATTORNEY'S NAME EXAMINATION RE-EXAMINATION
 4 -----
 5
 6 BY MS. VIZACHERO: 4
 7
 8 * * *
 9
 10 EXHIBIT INDEX
 11 -----
 12 EXHIBIT MARKED IDENTIFIED
 13 -----
 14 Deposition Exhibit Q 8 8
 15 (Freedom of Information Act Guide)
 16 Deposition Exhibit R 25 25
 17 (MDOC's Answers)
 18 Deposition Exhibit S 48 48
 19 (Verified FOIA Complaints)
 20 Deposition Exhibit T 50 50
 21 (MDOC's Responses)
 22
 23
 24 * * *
 25

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1 your first name and spell your last name for the record?
 2 A **Cheryl Groves, G-r-o-v, as in Victor, e-s.**
 3 Q And your current position and employer, please?
 4 A **EPIC Manager, the Michigan Department of Corrections.**
 5 Q Perfect. And did you have a chance to review the notice for
 6 this deposition today?
 7 A **Yes.**
 8 Q And you understand the topics that you're a designated
 9 representative for?
 10 A **Yes, I do.**
 11 Q Okay. And just to go over the formalities, you understand
 12 that this deposition is under oath, correct?
 13 A **Yes, I do.**
 14 Q Okay. And is there any reason that you cannot testify
 15 truthfully today?
 16 A **No, there's not.**
 17 Q Okay. And you understand that we're going to try and do our
 18 best, like we did this morning, to not talk over each other?
 19 A **Yes.**
 20 Q Perfect, because Heidi will get mad. And you understand that
 21 if you don't understand something, I need you to let me know
 22 you don't understand something?
 23 A **Yes.**
 24 Q That way, I can clarify.
 25 A **Okay.**

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1 Q Correct. Who is listed as --

2 **A Mike Walczak is listed as the FOIA Coordinator.**

3 Q Okay.

4 **A Now, I'm not sure how current this list is. If he was the**

5 **FOIA Coordinator at the time that incident happened, I can't**

6 **speak to that.**

7 Q Understood. And would an Assistant -- who would -- in this

8 case Aimee Nelson handled the initial inquiry with finding

9 out if there were responsive documents?

10 **A Uh-huh.**

11 Q Correct?

12 **A Correct.**

13 Q Who would she call at Bellamy Creek?

14 **A She would contact the FOIA Coordinator.**

15 Q So she would have contacted, if he was in place at the

16 time --

17 **A Correct.**

18 Q -- Mike Walczak?

19 **A Walczak, uh-huh.**

20 Q And what would Mike -- how would that process -- how would

21 that conversation go?

22 **A So she would E-mail him or call him and say we have a FOIA**

23 **Request for X, Y and Z; do you have this material?**

24 **Sometimes they would respond immediately, or they would**

25 **have to get back to her after they've done a search for those**

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1 **records.**

2 Q Okay.

3 **A And then he would call her back or E-mail her and say, yes,**

4 **we do have responsive records.**

5 Q Okay. And who's job is it to review the video recording?

6 **A From what perspective? There are a lot of people who review**

7 **those, so I'm not sure what you're referring to.**

8 Q In the context of a FOIA Request.

9 **A At the facility, or in Central Office?**

10 Q Start with Central Office.

11 **A Okay. It would not be the FOIA Coordinator; it would not be**

12 **anybody in the FOIA Office to review those videos.**

13 Q Okay. Who would -- would any other person be responsible for

14 reviewing those videos?

15 **A To respond to a FOIA Request?**

16 Q Yes.

17 **A No.**

18 Q Okay. Does MDOC train FOIA Coordinators to review videos, or

19 to not review videos; does the MDOC take a stance on that?

20 **A When we do our training we do, basically, what the policy**

21 **says. These are exemptions that you can take, and these are**

22 **the items, are examples of things that we would exempt or**

23 **redact under this exemption.**

24 **So they are trained that, yes, for when we talk about**

25 **13(1)(c), that videos are those documents that we do not**

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1 **release under FOIA for safety, custody and security reasons.**

2 Q For the MDOC -- scratch that 'Strike that' Sorry.

3 What recordings are listed on the subsequent page to

4 Exhibit R? I'll give you a second to review that, and let me

5 know if you're familiar with that list.

6 **A I am not familiar with that list; I have not seen it before.**

7 Q Okay. Have you seen any similar lists like that before?

8 **A No, I have not.**

9 Q Okay.

10 MR. DE BEAR: Olivia, would it be a problem to

11 mark, as an exhibit, the dep notice that contains the 12

12 subjects? I'm not entirely sure that these are one of the 12

13 that Ms Groves is supposed to be testifying to; I could be

14 wrong --

15 MS VIZACHERO: No problem.

16 MR. DE BEAR: -- but I was just wondering if we

17 could mark that.

18 MS. VIZACHERO: We can. Prior to going on the

19 record I talked to the court reporter, and I was going to

20 mark it at the end --

21 MR. DE BEAR: Oh, okay.

22 MS. VIZACHERO: -- of all of them, because we're

23 keeping a running list, but I have an extra if you would

24 like.

25 MR. DE BEAR: Thanks. I do apologize.

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1 MS. VIZACHERO: Oh, you're fine. You're fine.

2 MR. DE BEAR: I withdraw the objection. It appears

3 that it's responsive to number -- I'm not entirely sure that

4 it actually is responsive. So to the extent that it's

5 inconsistent with the topics that Ms. Groves is testifying

6 to, I'd just object as it's outside the scope of her required

7 testimony.

8 MS. VIZACHERO: Okay.

9 MR. DE BEAR: But she can answer if she knows.

10 MS. VIZACHERO: It's been a while since I asked

11 that question, so --

12 **THE WITNESS: So I'll have to have you repeat it,**

13 **please.**

14 MS. VIZACHERO: Let's refresh. Actually, can read

15 back the question?

16 COURT REPORTER: Yes.

17 MS. VIZACHERO: Thank you.

18 (Requested portion of the record

19 was read by the reporter.)

20 **THE WITNESS: And, no, I haven't seen any similar**

21 **list to this.**

22 Q (BY MS. VIZACHERO) Okay. Would anyone have reviewed any of

23 those videos prior to responding to Mr. Woodman's or

24 Mr. Joseph's request?

25 **A From the FOIA Office, no.**

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1 mounted, correct?
2 **A An iPhone is not mounted.**
3 Q That's not part of the facility's cameras?
4 **A That's not part of a facility camera; it's assigned to an**
5 **employee.**
6 Q Would iPhone cameras deal with, and I'm going to go through a
7 list. Would a video taken on an iPhone be considered a
8 blueprint or a map of a facility?
9 **A No.**
10 Q Would it include names of informants?
11 **A If it's used for a video, yes, it could.**
12 Q Did the video in this case have names of informants?
13 **A I don't know that.**
14 Q Did the iPhone videos in this case, were they mobilization
15 scenarios and critiques?
16 **A No.**
17 Q Were they Special Problem Offender Notices?
18 **A No.**
19 Q Movement plans?
20 **A No.**
21 Q Security Threat Group designations and related documentation?
22 **A No.**
23 Q Exempt Policy Directives?
24 **A No.**
25 Q Operating Procedures?

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1 and I think she answered, but I was just wondering if you
2 could be a bit more specific as to no one from where in the
3 MDOC is reviewing those videos.
4 Q (BY MS. VIZACHERO) No one from the Central Office, to start;
5 no one responding to the FOIA Request?
6 **A Nobody involved with the FOIA Request has reviewed any of**
7 **those videos at all.**
8 Q To the extent that the listed examples in the Manual for
9 13(c) and 13(u) are the same, would your answers be the same,
10 so movement plans under 13(1)(u)?
11 **A Movement plans, would that have been recorded on an iPhone,**
12 **is that what you're asking?**
13 Q Yeah.
14 **A Movement plans, it possibly could.**
15 Q Okay. Earlier you said that, in response to my earlier
16 question you said that Mr., for Mr. Woodman's case, the
17 videos that were recorded, I asked if those were movement
18 plans; you said no.
19 **A Okay. But what I had clarified, depending on what they**
20 **videoed. So if officers came to a situation and moved a**
21 **prisoner from this hallway down to segregation, that's**
22 **showing a movement plan, in my opinion.**
23 Q Are there documents -- are there procedures within the MDOC
24 that would set forth the proper procedures from movement
25 plans?

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1 **A No.**
2 Q Post Orders for security sensitive assignment?
3 **A No.**
4 Q Descriptions of security fencing?
5 **A No.**
6 Q Description of operating of personal protection devices?
7 **A No.**
8 Q Would they disclose the capability of any monitoring device?
9 **A Potentially, yes.**
10 Q How?
11 **A It depends on what they took a video of.**
12 Q Is there --
13 **A I mean, in any of those situations, I mean, you could say yes**
14 **to some degree, from the standpoint of I'm not sure what they**
15 **videoed with their hand-held. If they were videoing the**
16 **walls, the cameras, I mean, the beds; I don't know what they**
17 **videoed. So in some of those situations, yes, depending on**
18 **how far you take that, it's the potential to have some of**
19 **that information on that recording.**
20 Q But there's a chance that it wouldn't?
21 **A True.**
22 Q Okay. But no one is making that -- no one is reviewing the
23 videos to make that determination?
24 **A Not from the FOIA Office.**
25 MR. DE BEAR: I just want to place an objection,

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1 **A Yes.**
2 Q Like I could request what is your -- I'll have you explain;
3 you said yes.
4 **A So there are Post Orders in our facilities, which are written**
5 **instructions for each assignment, each officer assignment;**
6 **there are Operating Procedures that guide each facility. So,**
7 **yes, those do outline movement plans of prisoners. When they**
8 **go to lunch, when they go to education, when they go out to**
9 **the yard, all of that stuff is documented in either a Post**
10 **Order, or their Operating Procedures or their movement plan**
11 **of the facility.**
12 Q Okay. What bases does the Department state that 13(1)(a)
13 applies to Mr. Woodman's request, or Mr. Joseph's request?
14 **A I did not take that exemption when I responded, so I cannot**
15 **respond to that.**
16 Q That's the Department's stance, however, at this point?
17 **A The Department applied 13(1)(a), but I can't speak to that**
18 **because I was not involved in that discussion.**
19 Q So is it just fair to say you don't know --
20 **A I do not know.**
21 Q -- what the Department is relying on?
22 **A Correct.**
23 Q What bases there is to support 13(1)(a)?
24 **A Correct.**
25 Q Okay. In responding to an appeal, is it required for any

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1 MR. DE BEAR: Can you rephrase. By him, do you
2 mean by anybody, in particular, differentiating between the
3 Central Facilities and the Ionia Bellamy Creek Facility?
4 Q (BY MS. VIZACHERO) Anybody within the Central Facility,
5 since they're the one responding to --
6 A **And I don't know that, because I wasn't in that office.**
7 Q But they wouldn't have been required to, is that your
8 understanding?
9 A **Would the Manager have been required to review the video**
10 **before responding?**
11 Q Yes.
12 A **No.**
13 Q Okay. I might just have one last thing.
14 (Deposition Exhibit T marked for identification.)
15 Q (BY MS. VIZACHERO) I want to hand you, Ms. Groves, a
16 document titled, MDOC's Responses to Mr. Joseph's Request for
17 Production of Documents.
18 A **Okay.**
19 Q And I want to point your attention to the very end, which is
20 documents provided in response to that, and referencing,
21 start at Bates stamp SOM 002524.
22 A **Okay.**
23 Q And this is the same request we were just looking at, is that
24 correct?
25 A **Yes.**

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1 Q Okay. And this next page, can you tell me what that is?
2 A **It's a FOIA Request addressed to MDOC-OLAFOIA, which appears**
3 **to be a new mailbox that they've set up since I have been**
4 **there.**
5 Q You're not familiar with that --
6 A **I am not.**
7 Q -- while you were there?
8 A **No, we did not have that.**
9 Q Okay. People only received FOIA Requests via -- people
10 within the Central Facility only received FOIA Requests
11 within their individual MDOC E-mail addresses --
12 A **Correct.**
13 Q -- if it was being received by E-mail?
14 A **Correct.**
15 Q Okay. And this is, is it fair to say, just Mr. Joseph's
16 initial request with some notes on it? Would those be MDOC
17 FOIA unit notes that are on --
18 A **Yes. This would be the prisoner number.**
19 Q Okay.
20 A **This would be our FOIA number at the top. I'm not sure what**
21 **the plus 16 means.**
22 Q And do you see the note down at the bottom, 13(1)(c)?
23 A **Correct.**
24 Q Okay. Do you recognize whose handwriting this is?
25 A **I do not.**

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1 Q Okay. On the next page, can you describe to me what you see?
2 A **An E-mail between Brianna Newton, who works in the FOIA**
3 **Section with Mike Walczak, who works at the Bellamy Creek**
4 **Correctional Facility.**
5 Q And underneath the initial E-mail, did she -- did Brianna
6 Newton send an E-mail contacting Mike Walczak, as you
7 explained is typically done?
8 A **Yes, that is correct.**
9 Q Okay. So the time stamp on the E-mail from Brianna Newton to
10 Mike Walczak is 8:25, or 8:27 a.m.?
11 A **8:29 a.m.**
12 Q The one underneath.
13 A **Oh, I'm sorry.**
14 Q No, you're fine.
15 A **8:27 a.m., yes, from Brianna to Mike Walczak is 8:27 a.m.**
16 Q Perfect. On June 29, '17?
17 A **Correct.**
18 Q Okay. And when was Mr. Joseph's request received by the
19 Michigan Department of Corrections?
20 A **Was received on June 29, 2017.**
21 Q Okay. So the first thing in the morning she sends an E-mail
22 right after this comes in --
23 A **Uh-huh.**
24 Q -- essentially? Is that a fair representation?
25 A **I would assume so.**

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1 Q Okay. The E-mail reads, Can you please tell me if the
2 following request exists. This is Brianna E-mailing Mike
3 Walczak. Footage of the September 27, 2016 confrontation
4 that led to the death of inmate Dustin Szot, and then has his
5 prisoner number?
6 A **Uh-huh.**
7 Q O-M-N-I, OMNI, states his last location was IBC. I
8 understand that the footage is exempt, but I need to know
9 whether or not it exists in order to properly respond to the
10 requester. Thank you.
11 A **Okay.**
12 Q What information would Brianna Newton have had at her
13 disposal, at this point, to make the exemption determination?
14 A **Because she knows I'm -- obviously, she's been trained and**
15 **she knows we do not release video footage. And she's looking**
16 **to see if there was video footage because that makes a**
17 **difference in how you respond; either the document does not**
18 **exist, or it's exempt. So if it doesn't exist, then she**
19 **would say that in the response, as opposed to your document**
20 **exists, but it's not being released --**
21 Q Okay.
22 A **-- under FOIA.**
23 Q Okay. And, again, she didn't have to -- she hadn't seen them
24 based on her E-mail, because she doesn't even know if they
25 exist yet, right?

1 **A Correct.**
 2 Q So she hasn't seen anything?
 3 **A Correct.**
 4 Q But she knows it's exempt?
 5 **A Correct, if it exists.**
 6 Q If it exists?
 7 **A Correct.**
 8 Q And he says it does?
 9 **A Right.**
 10 Q Is that correct?
 11 **A Yes.**
 12 MS. VIZACHERO: Okay. Give me one second, but I
 13 might be all set.
 14 MR. DE BEAR: Okay.
 15 (Off the record discussion.)
 16 Q (BY MS. VIZACHERO) Were there any other authorities that
 17 bind determinations for FOIA, how to process and respond to
 18 FOIA Requests outside of the Policy Directive, Attorney
 19 General opinions, for instance?
 20 **A Statute.**
 21 Q Statute? What about case opinions, like legal cases from,
 22 like, the Michigan Supreme Court?
 23 MR. DE BEAR: Object to the extent that you're
 24 calling for a legal conclusion.
 25 **THE WITNESS: And I don't know how to answer that.**

1 **Are you -- I'm not sure what you're asking.**
 2 Q (BY MS. VIZACHERO) So the FOIA guide --
 3 **A Uh-huh.**
 4 Q -- that's used as a reference?
 5 **A Uh-huh.**
 6 Q Cites two cases that have been decided on whether an
 7 exemption was proper or not proper. Are those decisions, do
 8 they control FOIA determinations at the Central Office?
 9 **A Ultimately, no. It gets you information reference to how**
 10 **that has been used in the past, or been accepted in the past,**
 11 **but you still have to look at each case on a case-by-case**
 12 **basis.**
 13 Q Okay. This is going to be my last area of inquiry. How are
 14 people trained in terms of balancing disclosure versus
 15 nondisclosure, because it's discretionary, correct?
 16 **A Uh-huh.**
 17 Q How does MDOC train people to exercise their discretion in
 18 conformity with the FOIA Statute?
 19 MR. DE BEAR: I object to the extent that you're
 20 asking for a legal conclusion.
 21 **THE WITNESS: They are trained in alignment with**
 22 **our policy, from what we have gathered over the 100 years**
 23 **that Corrections has been around, what we know to believe is**
 24 **something that we need to keep undisclosed, or to keep**
 25 **disclosed, if that makes sense.**

1 **So incidents that happen over the years, things that**
 2 **have happened to the Department of Corrections, or things**
 3 **that we've been involved in help guide our decision, such as**
 4 **in this case, to not release video footage. Does that answer**
 5 **your question?**
 6 Q Kind of. Is there, like, a test that you train people,
 7 that's part of your training that you say, you look at the
 8 and you list all of the -- you look at a request and you say,
 9 should I or shouldn't I release; it's up to me, I have
 10 discretion. I can choose to release it, even if it falls
 11 within an exemption, or I can choose not to?
 12 **A Right. The discretion is there, but if they are unsure, we**
 13 **encourage them to call us to help them make that decision.**
 14 Q Are you -- when you say they, are you referencing --
 15 **A FOIA Coordinators that are outside of Central Office.**
 16 Q Okay How about people within Central Office making, using
 17 their discretion?
 18 **A So if I was unsure, I would go to my Administrator, who was**
 19 **an attorney, and if we had any question, therefore, we would**
 20 **contact Tom Quasarano in the Attorney General's office.**
 21 Q Is the discretion just a go with your gut thing, though? I
 22 guess that's what I'm trying to get at.
 23 MR. DE BEAR: Object to the extent that it calls
 24 for a legal conclusion.
 25 **THE WITNESS: I don't know how to answer that. I**

1 **guess because I've been around Corrections so long, I know**
 2 **what kind of things are sensitive, what kinds of things we**
 3 **need to protect from a custody and security standpoint. So I**
 4 **don't know -- I don't know how else to answer your question.**
 5 Q (BY MS. VIZACHERO) Okay. There's no formal balancing test
 6 that check off --
 7 **A No --**
 8 Q -- pros and cons?
 9 **A -- there's not. There's not.**
 10 Q Okay And no guide that's published through the Department
 11 that says you have to review, and then determine what's in
 12 the public's best interest?
 13 **A Well, we -- the only -- they can review the documents that we**
 14 **have available for them as a guide: The policy, the**
 15 **Reference Manual, the Attorney General's Guide. They should**
 16 **be using that information to guide their decision.**
 17 Q But nothing that specifically references use of discretion?
 18 **A No, not that I'm aware of.**
 19 MS. VIZACHERO: I'm all set.
 20 MR. DE BEAR: Thanks.
 21 (Whereupon, Deposition concluded at 2:39 p.m.)
 22
 23
 24
 25

EXHIBIT I



Freedom of Information Act Guide
How to Submit a FOIA Request to the MDOC
And
Other Relevant FOIA Information

(Rev. November 10, 2015, Office of Legal Affairs)
(© State of Michigan)

DISCLAIMER: This Guide on “How to Submit a FOIA Request to the Michigan Department of Corrections” (MDOC) is intended to be a reference guide only for the MDOC. It is not to be construed as legal advice and it is not intended to resolve every situation that may be encountered. If you are an MDOC employee, legal questions should be addressed to the Administrator of the Office of Legal Affairs. If you are the general public, legal questions should be addressed by your attorney and cases cited should be reviewed for accuracy. (Rev. July 1, 2015) For additional information, also see the MDOC’s policy 01.06.110 “Freedom of Information Act – Access to Department Public Records” which can be reviewed at http://www.michigan.gov/corrections/0,1607,7-119-1441_44369---,00.html.

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photographs and video recordings are "maintained" by the school or district under 20 USC 1232g(a)(4)(A)(ii). OAG, 2010, No 7245, p (March 29, 2010).

32. Court Cases (this is not an exhaustive list)

Alpena Title, Inc v Alpena County, 84 Mich App 308; 269 NW2d 578 (1978). A county board of commissioners may charge a reasonable fee for access to and the copying of county tract index information in accordance with the statute regarding fees for the inspection of such records. However, the Insurance commissioner is required to charge a rate for making copies of public records requested in accordance with the FOIA.

Baker, PC v City of Westland, 425 Mich App 90; 627 NW2d 27 (2001). Accident reports containing the names, addresses, injury codes, and accident dates for injured and deceased accident victims do not have to be released when requested under the FOIA. Involvement in an automobile accident is an intimate detail of a person's private life. Disclosure of the information would not constitute significantly to the public's understanding of the operations or activities of the government and, therefore, would be a clearly unwarranted invasion of privacy.

The FOIA's privacy exemption may be applied to deceased private citizens and their families where there is no public interest in disclosure.

Ballard v Dep't of Corrections, 122 Mich App 123; 332 NW2d 435 (1982). A film made by the Department of Corrections (DOC) showing a prisoner being forcibly removed from his or her prison cell is a public record and must be disclosed. Exemption asserted by the DOC did not outweigh the public interest in disclosure.

Bechtel Power Corp v Dep't of Treasury, 128 Mich App 324; 340 NW2d 297 (1983). Tax information may be protected against disclosure under 13(1)(a) and 13(1)(d) of the FOIA.

Blue Cross/Blue Shield v Insurance Bureau, 104 Mich App 113; 304 NW2d 499 (1981). Information may be revealed under the FOIA despite claim of exemption. A decision to deny disclosure of exempt records is committed to discretion of agency and should not be disturbed unless abuse of discretion is found. Trade secret exemption does not apply to information required by law or as a condition of receiving a government contract, license or benefit.

Booth Newspapers, Inc v Kalamazoo School District, 181 Mich App 752; 450 NW2d 286 (1989). The trial court appropriately ordered the release of tenure charges and a settlement agreement concerning allegations of sexual misconduct against an unmarried teacher in redacted form. The records were redacted to prevent the identity of the teacher and the students involved from being disclosed in order to protect their privacy. The FOIA confers discretion upon a court to award an appropriate portion of the reasonable attorney fees incurred by a party that has prevailed in part. When a plaintiff prevails only as to a portion of the request, the award of fees should be fairly allocable to that portion.

Booth Newspapers, Inc v Kent County Treasurer, 175 Mich App 523; 438 NW2d 317 (1989). Tax records indicating the monthly or quarterly tax payments made by individual hotels and motels under a county hotel/motel tax do not fall within the FOIA's privacy exemption.

file suit in circuit court where the sole issue would be the sufficiency of information to describe the records desired.

Kincaid v Dep't of Corrections, 180 Mich app 176; 446 NW2d 604 (1989). A public body bears the burden of proof on demonstrating a proper justification for the denial of a FOIA request. A request for disclosure of information under the FOIA must describe the requested records sufficiently to enable the public body to find them; when a request is denied because of an insufficient description, the requesting person may (1) rewrite the request with additional information, or (2) file suit in circuit court where the sole issue would be the sufficiency of information to describe the records desired. A FOIA request by an inmate, which erroneously states the date of a guilty determination on a misconduct or the hearing date with respect to which records are sought, reasonably and sufficiently describes the records sought. A public body acts in an arbitrary and capricious manner by repeatedly refusing to look for a record so described.

Kocher v Dep't of Treasury, 241 Mich App 378; 615 NW2d 767 (2000). The addresses of unclaimed property holders maintained by the Michigan Department of Treasury fall within the definition of personal information, and their release would constitute a clearly unwarranted invasion of privacy. Disclosure of the information would not enhance the public's understanding of the operations or activities of the government.

Krug v Ingham County Sheriff's Office, 264 Mich App 475; 691 NW2d 50 (2004). Defendant was not entitled to issue blanket denials of all FOIA requests relating to open case files without actually reviewing the case first to determine what information is exempt. A defendant should treat a lawsuit objecting to a FOIA request denial as a continuing request for information and release the records if the defendant determines that the information has become nonexempt during the course of the FOIA litigation.

Kubick v Child & Family Services of Michigan, 171 Mich App 304; 429 NW2d 881 (1988). While there is no bright-line rule to determine what constitutes "primarily funded" to determine if a body is a "public body" as defined at section 2(d) of the FOIA, a private nonprofit corporation which receives less than half of its funding from government sources is not a public body which is primarily funded by or through state or local authority. Accordingly, such corporation is not subject to the requirements of the FOIA regarding the disclosure of information by public bodies.

Landry v City of Dearborn, 259 Mich App 416; 674 NW2d 697 (2003). Section 13(1)s)(ix) of the FOIA permits nondisclosure of law enforcement personnel records. The meaning of the term "personal records" in that section includes all records used by law enforcement agencies in the selection or hiring of officers, as well as the applications received by the city from unsuccessful applicants. The public interest in disclosing the information did not outweigh the public interest in not disclosing the information.

Laracey v financial Institutions Bureau, 163 Mich App 437; 414 NW2d 909 (1987). Attorney who filed pro se action is not entitled to recover attorney fees in a FOIA lawsuit.

EXHIBIT J

STATE OF MICHIGAN
COURT OF CLAIMS

HERRY LEE ELLISON,

Plaintiff,

OPINION AND ORDER

v

Case No. 16-000183-MZ

MICHIGAN DEPARTMENT OF STATE,

Defendant,

Hon. Cynthia Diane Stephens

At a session of said Court held,
Detroit, Wayne, Michigan, on
December 20, 2016.

PRESENT: Honorable Cynthia Diane Stephens
Court of Claims Judge

Before the Court is Plaintiff's motion for summary disposition. For the reasons stated herein, Plaintiff's motion for summary disposition is DENIED and summary disposition is GRANTED to Defendant pursuant to MCR 2.116(f)(2).

I. PERTINENT FACTS

This action arises out of a Freedom of Information Act (FOIA) request. In March 2016, Plaintiff's license plate and vehicle registration were cancelled because Defendant informed Plaintiff that it was unable to verify his no-fault automobile insurance. On July 9, 2016, Plaintiff, through counsel, submitted a FOIA request to Defendant and sought information concerning other individuals who received similar cancellation notices from Defendant. Plaintiff made two requests, the first of which sought the following information:

During the time period from January 1, 2016 to present for all vehicle registrant(s) in which [sic] the Michigan Department of State gave notice of the Department's inability to verify insurance presented at renewal or purchase of plate/registration, please provide an electronic output from the computerized system any and all of the following information:

- a. Full name of registrant;
- b. Address (with city and zip code) of registrant;
- c. Plate/Registration Number;
- d. Vehicle ID Number
- e. Date the Department conducted review/audit to verify insurance presented at renewal or purchase of plate/registration for the registrant;
- f. Date of most recent vehicle plate renewal prior to the Department's notice of plate cancellation/forfeiture; and
- g. The fee category for registration/plate that was cancelled/forfeited [Footnotes omitted.]

Plaintiff made a second request, which he described as an alternative request that was only to be fulfilled if Defendant could not produce an electronic record in response to his first request. This second request sought:

paper copies of each and every letter/notice sent (example attached) as a result of the Michigan Department of State's inability to verify insurance presented at renewal or purchase of plate/registration during the time period of [sic] from January 1, 2016 to present.

In recognition of the fact that the information sought was maintained, if it indeed existed, by Defendant under the Michigan Vehicle Code (MVC), MCL 257.201 *et seq.* and that the information contained "personal information" as the term is defined under the MVC, Plaintiff attached, in purported compliance with MCL 257.208e, a copy of his driver's license as well as a signed certification that the information would be used for a permissible purpose¹ under the MVC. Plaintiff's request also stated that, "[p]ursuant to MCL 257.208a," he was making his request "pursuant to the *Freedom of Information Act*" Plaintiff declared that he was willing

¹ Plaintiff states that the purpose of the request was for a forthcoming civil action related to the wrongful forfeiture of license plates and/or vehicle registrations.

to pay fees "in accordance with FOIA cost regulations" in association with the fulfillment of his request. In essence, Plaintiff's position, as it is for purposes of this motion, was that the MVC allowed him to choose whether to seek the information through FOIA's procedures or the MVC's procedures.

After taking a statutorily permitted extension for responding to the request, Defendant denied the request on July 27, 2016. In regard to the first request, Defendant's FOIA coordinator certified that Defendant "does not possess a record with the information you requested." In addition, the FOIA coordinator noted that, pursuant to MCL 15.233(4) and (5), "the Department is not required to make a compilation, summary, report of information, or create a new record. Therefore, your request has been denied."

As it concerned Plaintiff's second, alternative request, Defendant denied the request and cited MCL 15.243(1)(d), which provides that a public body may exempt from disclosure "[r]ecords or information specifically described and exempted from disclosure by statute." Defendant asserted that MCL 257.208b(1) of the MVC authorized Defendant to provide a commercial look-up service for records maintained under the MVC and that Defendant would only process such a request if it was "in the form or format prescribed by the secretary of state," as set forth in MCL 257.208b(1). According to Defendant, the information Plaintiff sought was personal information under the MVC, and while Plaintiff provided the requisite certification and proof of identity under the MVC, he did not "complete the enclosed Record Lookup Request form and pay upfront the associated lookup fees" of \$8 per record- -or \$9 for certified records. In essence, Defendant denied the alternative FOIA request, but directed Plaintiff to the procedure for obtaining records under the MVC.

Plaintiff filed a two-count complaint on August 1, 2016, and alleged that Defendant wrongfully denied his FOIA requests. During discovery Plaintiff deposed three Secretary of State employees regarding the existence of the record sought in his first FOIA request. Joe Rodriguez, an assistant administrator to the director of Defendant's Office of Customer Services, testified that Defendant maintained an "insurance database" that was used to generate letters like the one Plaintiff received concerning an inability to verify automobile insurance. Rodriguez testified that, based on the way the database was currently configured, he could not determine all of the individuals who received a letter such as the one Plaintiff received. According to page 21 of his deposition, Rodriguez maintained that certain information Plaintiff sought in his FOIA request was in the database maintained by Defendant, but, as the database was currently configured, he would not be able to "pull up all of those records with the names and addresses of those who were in the database as a list." Instead, he could only access a single record at a time. Rodriguez testified that it was not possible, given the way the database was configured, to make a complete copy of the entire database; however, Rodriguez could copy certain "back end" tables of information in about "an hour or so."

Latrese Roberts, the supervisor for Defendant's Insurance Fraud Prevention Unit, was familiar with the database at issue and testified that most of the information Plaintiff sought in his request was in the database. She testified that the information is manually entered into the database, one record at a time. She testified at pages 31-32 of her deposition that neither she nor her staff was able to produce from the database, in its current configuration, a list with the information Plaintiff sought in his first FOIA request.

At oral argument on the parties' summary disposition motions, Plaintiff's counsel --and Defendant's counsel -- agreed that "there is no evidence that there is a specific report routinely

generated by the department that responds” to Plaintiff’s FOIA inquiries. In addition, they agreed that although there was no specific report, the information Plaintiff sought could be located on a database maintained by Defendant.

II. ANALYSIS

“The purpose of FOIA is to provide to the people of Michigan ‘full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees,’ thereby allowing them to ‘fully participate in the democratic process.’” *Amberg v City of Dearborn*, 497 Mich 28, 29; 859 NW2d 674 (2014), quoting MCL 15.231(2). Unless an exemption applies, a person making a FOIA request that sufficiently identifies a public record “is entitled to ‘inspect, copy, or receive copies of the requested public record of the public body.’” *Amberg*, 497 Mich at 29, quoting MCL 15.233(1).

However, in order to be entitled to inspect or receive copies of a public record, the requested public record must first exist. See *Bitterman v Village of Oakley*, 309 Mich App 53, 67; 868 NW2d 642 (2015). Except in limited exceptions not implicated in this case, FOIA “does not require a public body to make a compilation, summary, or report of information” MCL 15.233(4). Nor does FOIA “require a public body to create a new public record” MCL 15.233(5). “In other words, if the record requested does not exist, then the public body is under no obligation to scrutinize its existing records in order to create a responsive document.” *Bitterman*, 309 Mich App at 67.

A. THE RECORD SOUGHT IN PLAINTIFF’S FIRST REQUEST DOES NOT EXIST

In the case at bar, there is no dispute concerning whether Plaintiff’s first request sufficiently identified the information sought. The only question is whether the information

existed as it was sought by Plaintiff. Defendant denied the request on the ground that the record did not exist in the form sought by Plaintiff. This Court agrees with that position. Although deposition testimony revealed that Defendant maintained a database with some or most of the information covered by Plaintiff's request, there was no routinely generated report containing this information. The parties agreed to as much at oral argument. Nor does the deposition testimony in this case reveal that the record existed. It appears from deposition testimony that the database was not accessible in the manner in which Plaintiff sought to access it. Defendant was not required to make a compilation or summary of the database, nor was it required to create the new record Plaintiff sought. See MCL 15.233(4); MCL 15.233(5). See also *Arabo v Mich Gaming Control Bd*, 310 Mich App 370, 400; 872 NW2d 223 (2015) (explaining that a public body "is not generally required to make a compilation, summary, or report of information, nor is it generally required to create a new public record.");²

B. THE MVC'S PROCEDURES APPLY TO PLAINTIFF'S SECOND REQUEST

Another concern in this case, which has some bearing on both of Plaintiff's FOIA requests, is the interaction between the MVC and FOIA. In particular, both statutes authorize the disclosure of public records, although they set forth different procedures for obtaining the information. "The primary goal of statutory interpretation is to give effect to the intent of the Legislature. To discern the legislative intent, this Court must first examine the language of the statute itself. If the statute is unambiguous it must be enforced as written." *Title Office, Inc v*

² Moreover, even if the record existed in its current form, Plaintiff did not have the ability to simply cite FOIA and maintain a bulk quantity of records created under the MVC without complying with the cost provisions of the MVC. See MCL 257.208b(9). The interaction between the MVC and FOIA is discussed in more detail below.

Van Buren Co Treasurer, 469 Mich 516, 519; 676 NW2d 207 (2004) (citation and quotation marks omitted). When construing multiple statutory provisions that share a common purpose, a court is to read the statutes in harmony, if possible. *Streng v Mackinac Co Bd Rd Comm'rs*, Mich App ___, ___ NW2d ___ (2016) (Docket No. 323226); slip op at 5-6. “If statutes lend themselves to a construction that avoids conflict, that construction should control.” *Walters v Leech*, 279 Mich App 707, 710; 761 NW2d 143 (2008). If a conflict in statutory language is unavoidable, however, the more specific statute will control over the more general statute. *Streng*, ___ Mich App at ___; slip op at 6.

In this case, Plaintiff sought a compilation of individual records—or, in the alternative, the individual records themselves—that was maintained by Defendant under the MVC. As Plaintiff points out, the MVC contains a provision concerning the disclosure of records maintained under the act. In this regard, MCL 257.208a provides that “[r]ecords maintained under this act, other than those declared to be confidential by law or which are restricted by law from disclosure to the public, shall be available to the public in accordance with procedures prescribed in this act, the freedom of information act . . . or other applicable laws.” Plaintiff, noting that MCL 257.208a employs the disjunctive phrase “or” in reference to how records may be sought—i.e., “in accordance with procedures prescribed in this act, the [FOIA] . . . or other applicable laws”—takes the position that he can choose, at his sole discretion, which procedures that may be used to obtain the records sought. And, according to Plaintiff, this means he can obtain the records sought by paying the fees for obtaining such records under MCL 15.234(1), rather than the fee set forth in MCL 257.208b for Defendant’s commercial record lookup service, which Defendant cited in its denial letter. In essence, Plaintiff argues that he can obtain personal

information, which might otherwise be exempt under FOIA³ and which is exemptible under the MVC, by complying with the MVC's procedures for obtaining personal information, but by paying the considerably lower fees authorized by MCL 15.234 of FOIA.

Although Plaintiff is correct that MCL 257.208a employs the disjunctive phrase "or" which is usually indicative of a choice between alternatives, see *AFSCME Council 25 v Wayne Co.*, 292 Mich App 68, 92-93; 811 NW2d 4 (2011), his position oversimplifies the issue, particularly with regard to fees, and it overlooks pertinent provisions of both the FOIA or MVC. MCL 15.234, the provision of FOIA authorizing a public body to charge fees for processing and fulfilling FOIA requests, contains an express exception to FOIA's fee provisions. Subsection 10 provides that "[t]his section does not apply to public records prepared under an act or statute specifically authorizing the sale of those public records to the public, or if the amount of the fee for providing a copy of the public record is otherwise specifically provided by an act or statute." MCL 15.234(10). In this case, the records – to the extent they existed – were maintained under the MVC. The MVC fits both conditions enumerated in MCL 15.234(10)'s exception to invoking FOIA's fee procedures. Relevant to this case,⁴ the MVC specifically establishes a fee for obtaining records pursuant to the commercial lookup service noted in Defendant's denial letter. See MCL 257.208b. Indeed, the MVC specifically directs that Defendant "shall charge a fee specified annually by the legislature" – or a market-based price established by Defendant, if

³ MCL 15.243(1)(a) provides a FOIA exemption for "[i]nformation of a personal nature" Although some of the information Plaintiff sought could conceivably fit this exemption, Defendant never cited this exemption, nor has Defendant made any argument on the balancing test employed, see *Detroit Free Press, Inc v Southfield*, 269 Mich App 275, 282; 713 NW2d 28 (2005), in evaluating this exemption. Accordingly, the Court does not consider this exemption.

⁴ In addition, although not applicable here because the records were not sold, the MVC authorizes Defendant to sell records maintained under the act. See MCL 257.232(2).

the Legislature does not provide a fee for “each individual record looked up.” MCL 257.208b(1). In other words, the MVC specifically provides “the amount of the fee for providing a copy of the public records” see MCL 15.234(10), meaning that FOIA’s fee provisions do not apply to requests for the records sought in this case.

Because the MVC expressly provides a fee for the type of records Plaintiff sought in this case, the plain language of MCL 15.234(10) required Plaintiff to comply with the MVC’s fee provisions, rather than FOIA’s provisions. See *Title Office*, 469 Mich at 521 (interpreting a previous, but substantially similar, version of MCL 15.234(10) and explaining that “FOIA makes clear that if [the other statute] is an act or statute specifically authorizing the sale of public records or if [the other statute] specifically provides the amount of the fee for providing a copy of the public record, *the FOIA fee provisions do not apply*”) (emphasis added; citation and quotation marks omitted). Defendant is correct that Plaintiff cannot, by merely citing MCL 257.208a, simply choose which procedures he wants to apply when seeking the type of records at issue. The plain language of FOIA directs Plaintiff to the fee schedule set forth in the MVC.

In denying Plaintiff’s second FOIA request, Defendant cited MCL 15.243(1)(d), which provides an exemption for “[r]ecords or information specifically described and exempted from disclosure by statute.” Here, the MVC makes the records Plaintiff sought subject to exemption, unless the requestor complies with certain requirements set forth in the MVC. One set of requirements, found in MCL 257.208c, places certain restrictions on a request for public records when those records contain “personal information” as that term is used under the act. The motor vehicle code defines “personal information” as “information that identifies an individual, including the individual’s photograph or image, name, address (but not the zip code), driver license number, social security number, telephone number, digitized signature, and medical and

disability information.” Here, Plaintiff sought, among other information, names and addresses; hence, he sought “personal information” under the act.⁵ Plaintiff complied with MCL 257.208c(3), which required him to provide proof of identity and to identify a statutorily-enumerated permissible purpose.

However, MCL 257.208c was not the only requirement with which Plaintiff needed to comply. As noted above, the fee schedule set forth in MCL 257.208b also applied to Plaintiff’s request. Plaintiff sought to avoid that fee schedule and instead sought to obtain records that were otherwise subject to the MVC’s fee provisions by invoking FOIA. Defendant’s denial correctly recognized that Plaintiff could not elect to follow the procedures of his own choosing. See MCL 257.208b(1) (setting forth the fee structure and declaring that “[t]he secretary of state shall process a commercial look-up request only if the request is in a form or format prescribed by the secretary of state.”). Therefore, Plaintiff did not meet all of the requirements for obtaining the information sought. Plaintiff sought records which were exemptible under the MVC, but he did not satisfy all of the requirements for obtaining the information. Accordingly, the Court finds that Defendant did not violate FOIA in regard to Plaintiff’s second, alternative request.

IT IS HEREBY ORDERED that Plaintiff’s motion for summary disposition is DENIED and that summary disposition in favor of Defendant is GRANTED.⁶

⁵ Indeed, in recognition of the fact that he sought personal information, Plaintiff’s request made an effort to comply with the procedural requirements of MCL 257.208c.

⁶ In arguing that it was entitled to summary disposition, Defendant contends that Plaintiff’s position is frivolous, and Defendant seeks attorney fees under MCR 2.114. Given that the issue involved in this case was one of statutory interpretation with no published caselaw on point, the Court disagrees with Defendant’s contention and finds no basis to award sanctions.

This order resolves the last pending claim and closes the case.

Dated: January 26, 2017


Hon. Cynthia Diane Stephens
Court of Claims Judge

STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL



P.O. Box 30754
LANSING, MICHIGAN 48909

DANA NESSEL
ATTORNEY GENERAL

October 14, 2019

Clerk of the Court
Court of Claims
925 W. Ottawa St., 2nd Floor
Lansing, MI 48909-7522

Re: *Spencer Woodman v Michigan Department of Corrections*
Docket No. 17-000082-MZ

Dear Clerk:

Enclosed for filing in the above entitled matter, please find Defendant's Response to Plaintiff's Motion for Attorney Fees, Costs, and Punitive Damages along with Proof of Service upon Plaintiff's counsel.

Sincerely,

A handwritten signature in black ink, appearing to read "Adam R. de Bear", written over a large, stylized circular flourish.

Adam R. de Bear
Assistant Attorney General
State Operations Division
(517) 335-7573

ARD/llw

Enc.

c: Robert M. Riley
Daniel S. Korobkin

2017-0177379-A

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STATE OF MICHIGAN
COURT OF CLAIMS

SPENCER WOODMAN,
PLAINTIFF,

v

MICHIGAN DEPARTMENT OF
CORRECTIONS,
DEFENDANT.

NO. 17-000082-MZ

HON. CYNTHIA D. STEPHENS

GEORGE JOSEPH,
PLAINTIFF,

v

MICHIGAN DEPARTMENT OF
CORRECTIONS,
DEFENDANT.

NO. 17-000230-MZ

HON. CYNTHIA D. STEPHENS

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STATE OF MICHIGAN
COURT OF CLAIMS

SPENCER WOODMAN,
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MICHIGAN DEPARTMENT OF
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NO. 17-000082-MZ

HON. CYNTHIA D. STEPHENS

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**ORAL ARGUMENT
REQUESTED**

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**DEFENDANT'S RESPONSE TO PLAINTIFF'S
MOTION FOR ATTORNEYS FEES, COSTS, AND PUNITIVE DAMAGES**

STATEMENT OF FACTS

On August 28, 2018, the Court issued an opinion on the parties' cross motions for summary disposition. In its opinion, the Court wrote that "*because of the concerns with the safety of the unnamed inmate and of the MDOC officers, the video[s] may be submitted in a format that blurs or obscures the faces of the individuals involved in the videos[.]*" (Opinion and Order, p. 16) (emphasis added). Because MDOC was unable edit the videos within the 10-day period set by the Court, defense counsel, in transmitting the videos for *in camera* review, explained to the Court that "[a]n attempt was made to blur the faces of the unnamed inmate and the corrections officers, however, due to the short-time frame to respond to the order, the work could not be completed." (See April 29, 2019 Motion for Reconsideration, Ex A.) Defense counsel further requested that the "Court allow the MDOC sufficient time to blur the faces of the unnamed inmate and the corrections officers before disclosure." (*Id.*) (emphasis omitted from original).

Prior to ordering disclosure, the Court, "in an abundance of caution," appointed a special master to review the videos and determine whether any security concerns existed, (see February 27, 2019 Order), and the Special Master determined that there were no "security concerns *except for* the display of the staff members and inmates that were caught on camera during this incident." (Special Master Report, p 2) (emphasis added). But two weeks after the Special Master completed her report, the Court concluded that "the appointed Special Master has reviewed the videos and concluded that there are no security concerns[.]" and it ordered MDOC to produce the videos to Plaintiff's counsel by April 29, 2019. (April 22, 2019 Order.)

Due to the safety concerns identified by Inspector Wakefield, MDOC filed a motion for reconsideration in which it asked, in part, that the Court “allow [it] sufficient time to make redactions, prior to any disclosure, and blur the faces and protect the identities of the MDOC employees as well as the identity of the unnamed prisoner involved in the fight with Szot.” (Mot. for Reconsideration, at 13.) The Court, in denying the motion for reconsideration, granted MDOC’s request to produce the videos in redacted form. (May 30, 2019 Order.) And more than three months after receiving redacted videos, Plaintiffs’ counsel have filed the instant motion in which they seek an award of \$211,000 in attorneys’ fees and costs.

ARGUMENT

I. Because Plaintiffs only prevailed in part, the Court should exercise its discretion and refrain from awarding attorneys’ fees and costs.

In their motion, Plaintiffs are indeed correct that when “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.” See MCL 15.240(6). “A party prevails in the context of an FOIA action when the action was reasonably necessary to compel the disclosure, and *the action had a substantial causative effect on the delivery of the information to the plaintiff.*” *Scharret v City of Berkley*, 249 Mich App 405, 414 (2002) (emphasis in original).

But Plaintiff's fail to acknowledge that when "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." MCL 15.240(6) (emphasis added); see also *Local Area Watch v City of Grand Rapids*, 262 Mich App 136, 151 (2004) (providing that "whether to award plaintiff reasonable attorney fees, costs, and disbursements when a party only partially prevails under the FOIA is entrusted to the sound discretion of the trial court"). In deciding whether to award fees to a partially prevailing party, courts may look to multiple factors including "the reasonableness of a [public body's] actions[.]" *Estate of Nash by Nash v City of Grand Haven*, 321 Mich App 587, 608 (2017).

Ultimately, because the Court's allowed MDOC to make significant redactions to records that were disclosed, both Plaintiffs *and* MDOC prevailed in part. For this reason, an award of attorneys' fees is discretionary. And at least two reasons exist for the Court to exercise its discretion and deny the instant motion in its entirety: (1) awarding a substantial amount of fees to *pro bono* attorneys would serve as a punishment on MDOC for endeavoring to maintain safety in its facilities; and (2) Plaintiff Woodman needlessly increased the cost of this litigation by failing to verify his complaint.

A. Awarding fees and costs to the pro bono attorneys would serve as a punishment on MDOC for endeavoring to maintain safety in its correctional facilities.

As explained in prior briefing, “a prison’s internal security is peculiarly a matter normally left to the discretion of prison administrators.” *Mithrandir v Dept of Corr*, 164 Mich App 143, 147 (1987), citing *Rhodes v Chapman*, 452 US 337, 349, n 14 (1981). Stated differently, “[p]rison administrators . . . should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.” *Bell v Wolfish*, 441 US 520, 547 (1979). And here, Inspector Wakefield explained to the Court how disclosure of the requested videos would prejudice MDOC’s ability to maintain the security of its correctional facilities.

Indeed, MDOC was unsuccessful in exempting the entirety of the video footage from disclosure, but its security concerns were at least recognized. For example, in discussing the threats made by Szot’s family, the Court concluded that simply because “these threats do not warrant invocation of the exemption does not mean that they are of no moment.” (August 28, 2018 Opinion, p 14 n 12.) To that end, the Court permitted MDOC to provide the videos in a manner that “blur[red] or otherwise obscure[d] the identities of those involved.” (*Id.*, p 16 n 13.) Further, in recognizing the seriousness of the safety concerns at issue, the Court appointed a special master to aid in determining whether any security concerns were present. (February 27, 2019 Order.) And while MDOC disagrees with the Special Master’s ultimate conclusion, she nevertheless determined that there were no security

concerns “*except for the display of the staff members and inmates that were caught on camera during [the] incident.*” (Special Master Report, p 2) (emphasis added).

Additionally, an award of attorneys’ fees in this particular instance “would not relieve the burden of [Plaintiffs’] legal costs, but would instead afford them a windfall for costs that were never incurred.” *Watkins v Manchester*, 220 Mich App 337, 343 (1996), citing *Laracey v Fin Institutions Bureau*, 163 Mich App 437, 445 (1987). In other words, “[t]here is no need to assess attorney fees as a penalty for nondisclosure under the Michigan FOIA” for the reason that “[a] penalty may be assessed through the act’s punitive damages provision.” *Laracey*, 163 Mich App at 444. And here, because the FOIA provides for punitive damages—which Plaintiffs are seeking in this case—a \$211,000 judgment would effectively render the punitive damages provision nugatory and superfluous. See, e.g., *Koontz v Ameritech Services, Inc*, 466 Mich 304, 312 (2002) (explaining that “[c]ourts must give effect to every word, phrase, and clause in a statute, and must avoid an interpretation that would render any part of the statute surplusage or nugatory”).

Ultimately, the Court should deny Plaintiffs’ request for attorneys’ fees for the reason that such a high award for attorneys who did not seek reimbursement of costs from Plaintiffs, (see Pl’s Motion, Riley Affidavit, ¶8), would serve as a punishment for MDOC’s refusals to disclose the requested videos. And because of the security concerns inherent in disclosing the videos, a \$211,000 punishment would create an improper incentive for MDOC to ignore its security concerns when responding to FOIA requests for video within its facilities secured perimeters.

B. Plaintiff Woodman needlessly increased the cost of this litigation by failing to verify his complaint.

In their motion, Plaintiffs accuse MDOC of “engaging in unnecessary motion practice” when it “claim[ed] that [Woodman’s original complaint] was defective because it was not verified.” (PI’s Motion, 10.) But with respect to the requirement that claims against the State must be verified, the Court agreed that Woodman’s “original complaint failed to comply with [MCL 600].6431(1) for the reason that it was neither signed nor verified by the claimant.” (October 17, 2017 Opinion and Order, p 2.) And while the Court denied MDOC’s motion and found that Woodman could amend his complaint in accordance with MCR 2.118(D), (*id.*, p 6), MDOC’s position was ultimately vindicated by the Court of Appeals in *Progress Michigan v Attorney Gen*, 324 Mich App 659, 663.¹

Specifically, in *Progress Michigan*, the Court of Appeals cited to existing caselaw and confirmed that, when the original complaint is not verified, “[a]ny attempt by [the] plaintiff to amend under MCR 2.118 [is] ineffectual[.]” and that “although MCR 2.118 creates a general right to amend a complaint, the statutory provisions of the FOIA and the Court of Claims Act, as substantive law, control over any conflicting court rule.” 324 Mich App at 673, citing *Stenzel v Best Buy Co, Inc*, 320 Mich App 262, 279 (2017). Given this decision, Plaintiffs’ assertion

¹ *Progress Michigan*’s application for leave to appeal was granted by the Supreme Court, see 503 Mich 982 (2019), and the parties, who have reached a potential settlement on the merits of the claim, are presently briefing the question of whether the Supreme Court has authority to grant a motion for vacatur of a Court of Appeals opinion, see 933 NW2d 35 (2019).

that MDOC engaged in unnecessary motion practice is without merit. And, MDOC should not be required to pay for *Woodman's decision* to continue litigating the complaint when the Court of Appeals explained that the original complaint “was invalid from its inception,” and that, therefore, “there was nothing pending that could be amended.” *Progress Michigan*, 324 Mich App at 672.

II. Alternatively, in the event the Court is inclined to award at least a portion of fees and costs, significant reductions are required.

In determining what amount represents an award of reasonable attorneys' fees, Courts must “consider the totality of special circumstances applicable to the case at hand[,]” and it is well-established that “the burden of proving the reasonableness of the requested fees rests with the party requesting them.” *Smith v Khouri*, 481 Mich 519, 528–29 (2008). To aid in deciding whether a fee is reasonable, the Supreme Court has explained that “a trial court should begin its analysis by determining the fee customarily charged in the locality for similar legal services[,]” and reliance the Economics of the Law Practice Survey that is published by the State Bar of Michigan is appropriate. *Id.* at 530. After determining a reasonable rate, the “trial court must then multiply that rate by the reasonable number of hours expended in the case to arrive at a baseline figure.” *Pirgu v United Services Auto Ass'n*, 499 Mich 269, 281 (2016). Finally, to determine whether an upward or downward adjustment to the baseline figure is appropriate, a trial court must consider the following factors:

- (1) the experience, reputation, and ability of the lawyer or lawyers performing the services,

(2) the difficulty of the case, i.e., the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly,

(3) the amount in question and the results obtained,

(4) the expenses incurred,

(5) the nature and length of the professional relationship with the client,

(6) the likelihood, if apparent to the client, that acceptance of the particular employment will preclude other employment by the lawyer,

(7) the time limitations imposed by the client or by the circumstances, and

(8) whether the fee is fixed or contingent. [*Id.* at 282.]

“These factors are not exclusive, and the trial court may consider any additional relevant factors.” *Id.*

A. The product of a reasonable hourly rate multiplied by a reasonable number of hours worked is substantially less than Plaintiff’s quoted \$211,000.

It is well-established that a trial court’s “determination of a reasonable fee must be an independent determination.” *Prins v Michigan State Police*, 299 Mich App 634, 642 (2013). In interpreting a different fee-shifting rule, our Supreme Court explained that such statutes are “not designed to provide a form of economic relief to improve the financial lot of attorneys or to produce windfalls.” *Smith*, 481 Mich at 528, citing *Pennsylvania v Delaware Valley Citizens’ Council for Clean Air*, 478 US 546, 565 (1987). To the contrary, such rules “only permit[] an award of a *reasonable fee*,” and “reasonable fees ‘are different from the prices charged to well-to-do clients by the most noted lawyers and renowned firms in a region.’” *Id.* (emphasis in original). And as noted above, the 2017 Economics of Law Practice Report provides sufficient information from which to determine a reasonable fee.

1. Counsels' quoted hourly rates are not reasonable.

By looking at the 2017 Economics of Law Practices, the following rates for each relevant participating attorney² likely represent reasonable hourly rates: \$285 for Mr. Riley, a partner at Honigman, a Detroit-based law firm, who has practiced between 11 and 15 years³; \$225 for Ms. Vizachero, former associate at Honigman who had less than one year of practice at the time⁴; and \$250 for Mr. Korobkin, the Legal Director at ACLU of Michigan.⁵ It should also be noted that none of the attorneys involved in representing Woodman and Joseph contend that they have significant experience in litigating FOIA cases. See, e.g., *Crommie v State of Cal, Pub Utilities Comm'n*, 840 F Supp 719, 725 (ND Cal, 1994) (explaining that a “reasonable hourly rate reflects the skill and experience of the lawyer, including any relevant areas of particular expertise and the nature of the work [per]formed”). Furthermore, as discussed in Part II-B, *infra*, further reduction is necessary after application of the *Smith* factors.

² As is explained below in Part II-C, *infra*, it was not reasonable for eight attorneys to work on these matters.

³ This rate represents the approximate average of the median rates for the following categories of attorneys: \$250 for attorneys who have between 11 and 15 years of experience, \$315 for non-equity partners, \$347 for law firms with over 50 attorneys, \$250 for attorneys who practice in downtown Detroit, and \$250 for Wayne County attorneys.

⁴ This rate is a compromise between Ms. Vizachero's status as a new attorney at the time of the proceedings—the State Bar Directory shows Ms. Vizachero was admitted practice on June 27, 2017—and as an associate at the Honigman law firm.

⁵ This rate represents is consistent with median rates for the following categories of attorneys: \$250 for attorneys with between 11 and 15 years of experience, \$250 for attorneys who work in downtown Detroit, and \$250 for Wayne County attorneys.

2. Counsel billed an excessive number of hours.

The first number that stands out in Plaintiff's timekeeper summary attached to the instant motion is 600—the combined number of hours spent on these two cases. Simply put, spending more than a quarter of a year's billable hours on a straightforward FOIA case is not reasonable. Accordingly, a review of Plaintiff's counsel's "invoices" are necessary to determine a reasonable number of hours worked. And there are five principal areas in which the number of hours charged needs to be reduced: (1) the number of hours charged prior to MDOC's response to the complaint; (2) the number of hours charged in responding to MDOC's initial motions to dismiss; (3) the number of hours charged in drafting and responding to the motions for summary dispositions; and (4) the number of hours charged after the point in time where a resolution to the disclosure determination could have been reached; and (5) the large number of hours charged in general by Ms. Vizachero.

First, as to the pre-MDOC response charges, in *Dawkins v Dep't of Civil Service*, 130 Mich App 669, 674 (1983), the Court of Appeals determined that a prevailing plaintiff was entitled to reasonable attorneys' fees incurred *during the course of trial court proceedings*. In other words, attorneys' fees and costs incurred by a person before an action has been properly initiated in the trial court should not be included in a claim under the FOIA for attorney fees and costs. But Mr. Riley, however, billed 28 hours prior to MDOC's response, and Ms. Vizachero billed 8.5 hours for legal research.⁶ (Pl's Motion, Riley Affidavit, Woodman Invoice, p 1–2.)

⁶ In *Joseph*, Mr. Riley billed 5.25 hours prior to MDOC's answer and Ms. Vizachero billed 2.75 hours. (See Riley Affidavit, *Joseph* Invoice, p 1.) And Mr. Korobkin

Simply put, 36.5 billable hours prior to a public body filing its response to the complaint is unreasonable, and these hours should be stricken or at least substantially reduced.

Second, as to the number of hours billed in responding to MDOC's initial motions to dismiss, the Court of Appeals confirmed that the MDOC's legal position was correct in *Progress Michigan*. See 324 Mich App at 672–73; see also Part I-B, *supra*. And in responding to MDOC's motions to dismiss, which were both filed as a result of *Plaintiff's* failure to comply with applicable law, Mr. Riley billed 32.75 hours.⁷ (*Id.*, p 2–4.) Billing this number of hours, which at Mr. Riley's 2017 hourly rate cost nearly \$13,000, is unreasonable especially considering that the motion was due to Plaintiff's failure to comply with the Court of Claims Act.

Third, in reviewing the "invoices" attached to Mr. Riley's affidavit, it appears that in drafting their own motion for summary disposition and reply brief and responding to MDOC's motion, the Honigman law firm billed approximately 180 hours. In particular, Ms. Vizachero, who had been admitted to practice for less than one year at the time, billed approximately 131.5 hours and Mr. Riley billed approximately 53.25 hours. (*Id.*, p 8–11.) For comparison purposes, the undersigned, using a conservative estimate, spent approximately 14 hours on the

billed 3.8 hours prior to MDOC's response in *Woodman* and 1.4 hours prior to MDOC's response in *Joseph*. (Pl's Motion, Korobkin Affidavit, Billing Statement.)

⁷ Other attorneys billed a substantial number of hours in responding to the motions to dismiss, but, as explained below in Part II-C, *infra*, Plaintiffs have failed entirely to satisfy their burden of demonstrating entitlement to such fees. Additionally, Mr. Korobkin spent approximately 8 hours in responding to MDOC's motions to dismiss. (Pl's Motion, Korobkin Affidavit, Billing Statement.)

dispositive motions. (Ex A, de Bear Affidavit, Attachment 1.) And Mr. Korobkin spent 6.4 hours. (Pl's Motion, Korobkin Affidavit, Billing Statement, p 2.)

Fourth, Plaintiffs are seeking attorneys' fees for approximately 36.5 hours that were billed after a point in time where a resolution to the disclosure determination could have been reached.⁸ For this reason—i.e. because this substantial amount of motion practice was unnecessary to obtain disclosure of the videos—it is improper for Plaintiffs to seek approximately \$17,000 in attorneys' fees for this work from MDOC. Cf. *Rataj v City of Romulus*, 306 Mich App 735, 756 (2014) (where the Court of Appeals explained that a requesting person may be entitled to reasonable attorneys' fees incurred on appeal when the appeal is necessary to obtain disclosure of the requested information).

Fifth, and finally, Ms. Vizachero, spent a large number of hours, as is common with new attorneys, on the majority of her work assignments. For example, Ms. Vizachero billed approximately 22 hours in legal research. (Pl's Motion, Riley Affidavit, Woodman Invoice, p 1–2.) This number of hours in legal research is likely something that an experienced FOIA attorney would not be required to undertake prior to litigating a case. Additionally, Ms. Vizachero billed 26 hours on preparing for and taking the depositions in this case. (*Id.*, p 7.) For

⁸ MDOC raises this issue out of respect for the confidential nature of settlement negotiations. At an evidentiary hearing, MDOC can provide the requisite facts and documentary evidence. Furthermore, it should be noted that introduction of this information would be allowable under MRE 408; it would be introduced for a reason other than to demonstrate the invalidity of Plaintiff's underlying claim for disclosure of the requested records.

comparison purposes, the undersigned, likewise a new attorney, spent 14 hours preparing for and defending the depositions. (Ex A, de Bear Affidavit, Activity Log.) And as mentioned above, Ms. Vizachero spent over 100 hours in drafting Plaintiffs' motion for summary disposition, responding to MDOC's motion, and drafting Plaintiff's reply brief.

For these reasons, MDOC requests that, should Plaintiffs receive a portion of their reasonable attorneys' fees, the Court make substantial reductions to the number of hours billed—particularly to the hours billed by the Honigman attorneys.

B. Application of the *Smith* factors requires a downward adjustment.

First⁹, a downward adjustment is required because none of Plaintiffs' attorneys have significant FOIA experience. Second, because this case concerns a straightforward question of whether certain videos were exempt from disclosure, the second factor also requires a downward adjustment. Third, because Plaintiffs prevailed in part, the third factor is the only one that weighs slightly in Plaintiffs' favor. Fourth, because no expenses were incurred by Plaintiffs, the fourth factor requires a downward adjustment. Fifth, because Plaintiffs have not indicated that their relationship with counsel has been a lengthy one, the fifth factor requires a downward adjustment. Sixth, given the size of the Honigman law firm, it is unlikely that acceptance of Plaintiffs as clients precluded other employment. Seventh, given that this case took place over the course of two-and-a-half years,

⁹ The *Smith* factors are provided in Part II, *supra*, pages 8–9.

with substantial time spent waiting for decisions on pending motions, no substantial time limitations were imposed. Eighth, and as previously noted, Plaintiffs' counsel did not charge any fees; rather, they appeared *pro bono*.

C. Plaintiffs' counsel failed to satisfy its burden of demonstrating entitlement to attorneys' fees for multiple attorneys and other professionals.

As noted above, "the burden of proving the reasonableness of the requested fees rests with the party requesting them." *Smith*, 481 Mich at 528–29. Additionally, the use of multiple attorneys in "a relatively straightforward" case is unreasonable, and "one attorney well versed in FOIA litigation could have adequately represented [Plaintiffs] in this matter." *Reyes v United States Natl Archives & Records Admin*, 356 F Supp 3d 155, 170 (DDC, 2018). This is especially true when multiple attorneys results in a "duplication of attorney efforts[.]" *Bloomgarden v United States Dept of Justice*, 253 F Supp 3d 166, 179 (DDC, 2017).

Here too, "one attorney well versed in FOIA litigation could have adequately represented [Plaintiffs] in this matter." *Reyes*, 356 F Supp 3d at 170. But, according to the timekeeper summary, Plaintiffs had seven Honigman attorneys working on the file together with Mr. Korobkin from the ACLU, and in attempting to satisfy their burden of entitlement to fees, Plaintiffs only provided affidavits from Mr. Riley and Mr. Korobkin. Further, in Mr. Riley's affidavit, he only discusses Ms. Vizachero's qualifications, but makes no reference to the remaining five Honigman attorneys. (Pl's Motion, Riley Affidavit.) Simply put, without any explanation as to why so many attorneys were necessary, Plaintiffs have failed to satisfy their burden

of demonstrating entitlement to fees. See, e.g., *Sarkar v Doe*, 318 Mich App 156, 201 (2016) (explaining that a party abandons an argument when they fail to provide the Court with any supporting authority).

Moreover, in addition to the attorneys, Plaintiffs seek reimbursement of fees from one “summer associate,” and four other professionals billed time on these cases. (See Pl’s Motion, Riley Affidavit, *Woodman Timekeeper Summary*.) Indeed, while “reasonable ‘attorney fees’ should already include the work of paralegals, as well as that of attorneys and other factors underlying the fee,” *Joerger v Gordon Food Serv, Inc*, 224 Mich App 167, 182 (1997), the Court Rules provide that “[a]n award of attorney fees may include an award for the time and labor of any legal assistant who contributed nonclerical, legal support under the supervision of an attorney, provided the legal assistant meets the criteria set forth in Article 1, § 6 of the Bylaws of the State Bar of Michigan[,]” MCR 2.626. But Plaintiffs have failed to present any evidence on whether these professionals may satisfy the requirements of MCR 2.626. Thus, Plaintiffs have failed to satisfy their burden of demonstrating entitlement to these other professionals’ fees. See *Smith*, 481 Mich at 528–29.

III. Plaintiffs have not satisfied their burden of demonstrating entitlement to costs arising out of Westlaw research or depositions.

Like with attorneys’ fees, the requesting party has the burden in demonstrating entitlement to costs. See, e.g., *City of Detroit v Lufran Co*, 159 Mich App 62, 68 (1987) (explaining that “[t]he burden of proof rests upon the one who has the affirmative of an issue”). Further, in Michigan, “[c]osts are not recoverable

where there is no statutory authority.” *JC Bldg Corp II v Parkhurst Homes, Inc.*, 217 Mich App 421, 429 (1996). However, in their motion, Plaintiffs request the Court to award approximately \$2,547.14 in Westlaw research fees and \$2,176.50 in depositions costs. (Pl’s Motion, Riley Affidavit, Woodman Invoice, p 15–17.) And they make this request without attaching any supporting documentation.

Moreover, while there is statutory authority allowing for the recovery of costs associated with deposition transcripts¹⁰, Plaintiffs have identified no such statutory authority for the allowance of research-related costs. Indeed, there is not significant case law from Michigan Courts on whether Westlaw charges are recoverable as costs, but several federal courts have found that “computerized legal research such as LEXIS or WESTLAW are considered by most courts as an ‘overhead’ component of attorneys’ fees, and not separately compensable as costs.” *In re Rio Hair Naturalizer Prods Liability Litigation*, Case No. MCL 1055, 1996 WL 780512, at * 19 (ED Mich, Dec 20, 1996) (citation omitted); *see also EEOC v Sears, Roebuck & Co.*, 111 FRD 385, 394 (ND Ill 1986), and cases cited therein. Accordingly, because there is no statutory authority allowing for the award of such costs, and because research costs are typically an overhead component of attorneys’ fees, Plaintiffs are not entitled to recover the \$2,547.14 purportedly paid to Westlaw by the Honigman law firm.

¹⁰ See MCL 600.2549. It must also be noted that while Plaintiffs did file the portions of the transcripts from Ms. Groves’s and Inspector Wakefield’s depositions in these actions, the transcript of “Peter Phelps” was never filed. And without the underlying invoices from the court reporting firm, Plaintiff cannot demonstrate entitlement to the \$2,176.50 line-item for “Deposition Transcript Services.”

IV. Any award of attorneys' fees should be reduced by an amount representing defense counsel's reasonable attorneys' fees.

MCL 15.240(6) provides courts with discretion to award fees when either the requesting person or the public body prevails *in part*. As explained above in Part I, *supra*, because MDOC also prevailed in part, the Court has discretion to award fees to MDOC, the public body.

To be clear, MDOC is not requesting an award of attorneys' fees. However, in the event that the Court is inclined to award Plaintiffs' a portion of its reasonable attorneys' fees, the Court should offset such an award by MDOC's reasonable attorneys' fees and costs. Again, this Court and the Special Master have recognized that MDOC had legitimate security concerns regarding the videos at issue in this lawsuit. (See Part I, *infra*.) In protecting those concerns, the undersigned and AAG Jamison spent approximately 111.75 hours of work on this file. (See Ex A, de Bear Affidavit; Ex B, Jamison Affidavit.) Together, in addition to \$5,623.30 in costs, MDOC would be entitled to \$19,976.25 in reasonable attorneys' fees.¹¹ (*Id.*) And by reducing Plaintiffs' potential award of attorneys' fees by \$25,599.55, the Court would be recognizing the litigation efforts of both parties. Accordingly, MDOC requests that in the event the Court is inclined to award Plaintiffs a portion of their reasonable attorneys' fees that the Court reduce that amount by \$25,599.55.

¹¹ The basis for arriving at the amount of costs, and at defense counsel's hourly rate and the hours spent on these cases are set forth in detail in Exhibits A and B.

V. **Finally, MDOC requests an evidentiary hearing prior to an award of attorneys' fees to determine whether the fees charged were reasonable.**

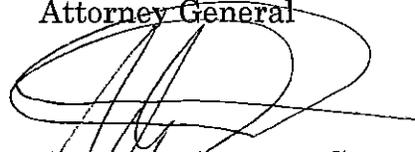
“If a factual dispute exists over the reasonableness of the hours billed or hourly rate claimed by the fee applicant, the party opposing the fee request is entitled to an evidentiary hearing to challenge the applicant's evidence and to present any countervailing evidence.” *Smith*, 481 Mich at 532. Accordingly, in the event that the Court is inclined to award a portion of Plaintiffs' reasonable attorneys' fees, MDOC requests that the Court hold an evidentiary hearing to determine the reasonableness of Plaintiffs' requested fees due, in part, to the large amount in requested attorneys' fees, the number of hours billed on these cases, and the lack of supporting evidence regarding the five additional Honigman attorneys and other professionals.

CONCLUSION AND RELIEF REQUESTED

For the reasons stated above, MDOC requests that the Court exercise its discretion and award Plaintiffs' no attorneys' fees. Alternatively, in the event that the Court is inclined to award a portion of the requested amount in attorneys' fees, MDOC requests that the Court award only a *reasonable* amount and that the Court reduce that amount by defense counsel's reasonable attorneys' fees. Finally, prior to an award of attorneys' fees in this case, MDOC requests an evidentiary hearing to determine the reasonableness of Plaintiffs' requested fees.

Respectfully submitted,

Dana Nessel
Attorney General



Assistant Attorney General
Attorneys for MDOC
State Operations Division
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(517) 335-7573

Dated: October 14, 2019

AG# 2017-0177379-A

Exhibit A

STATE OF MICHIGAN
COURT OF CLAIMS

SPENCER WOODMAN,

PLAINTIFF,

NO. 17-000082-MZ

v

HON. CYNTHIA D. STEPHENS

MICHIGAN DEPARTMENT OF
CORRECTIONS,

DEFENDANT.

GEORGE JOSEPH,

NO. 17-000230-MZ

PLAINTIFF,

HON. CYNTHIA D. STEPHENS

v

MICHIGAN DEPARTMENT OF
CORRECTIONS,

DEFENDANT.

Robert M. Riley (P72290)
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Cooperating Attorneys, American Civil
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AFFIDAVIT OF ADAM R. DE BEAR

I, Adam R. de Bear, being first duly sworn, depose and say as follows:

1. This Affidavit is based upon my personal knowledge.
2. If sworn as a witness, I can testify competently as to the facts stated herein.
3. I graduated from Michigan State University College of Law in May of 2015, and I have been admitted to practice in the State of Michigan since November of 2015.
4. After working as a law clerk for a state circuit court, I was appointed as an assistant attorney general in November of 2016. Since my appointment, I have worked in the Department of Attorney General's State Operations Division where the majority of my work assignments have been litigation.
5. A significant portion of the litigation that I have been assigned has been in defending state public bodies in actions arising out of the Freedom of Information Act (FOIA), MCL 15.231 *et seq.* During my time with the Department, I have appeared in 17 civil actions arising under the FOIA. And in addition to FOIA litigation, I routinely provide advice to state public bodies regarding the FOIA's requirements and how to properly comply with the law in processing requests for records.
6. With respect to the two instant civil actions, I have attached an "activity log" that was prepared for the purpose of responding to the instant motion for attorneys' fees and costs; the activity log details the approximate dates, times, and hours worked. (Attachment 1, Activity Log.)
7. The Department of Attorney General does not require its attorneys to track billable hours in the way that private law firms so require. As a result, the attached activity log, was prepared *post hoc* by reviewing emails, calendar entries, docket entries, and other similar records. In preparing the activity log, the hours spent on each particular activity were conservatively estimated, and the majority of intra-Department meetings regarding these civil actions were omitted.
8. To date, I have spent approximately 90.75 hours on legal work relating to the two instant civil actions.

- 9. In calculating the reasonable attorneys' fees for my work throughout these cases, I selected \$175 as an hourly rate by referencing the State Bar of Michigan 2017 Economics of Law Practice Attorney Income and Billing Rate Summary Report (Summary Report) and selecting the 25th percentile amount for hourly rates by attorneys with 3 to 5 years of practice. (See PI's Motion, Sgroi Affidavit, Ex 2.) This number is less than the 25th percentile for attorneys in the Lansing area and Ingham County.
- 10. The dollar amount of reasonable attorneys' fees based on the above hourly rate and number of hours worked is \$15,881.25.
- 11. In addition to the dollar amount in reasonable attorneys' fees, MDOC has incurred \$5,623.30 in costs. These costs include the following: \$140 in motion fees; 862.25 in deposition transcripts; and \$4,621.05 in video redactions.¹ (See Attachment 2, Register of Actions; Attachment 3, FortzLegal Invoice; Attachment 4, Michael Snyder Invoice.)

~~Affiant says nothing further.~~



Adam R. de Bear
Michigan Department of Attorney General

Date: October 14, 2019

Subscribed and sworn to before me,
a Notary Public, this 14 day
of October, 2018

Lynne L. Walton
Notary Public, State of Michigan

LYNNE L. WALTON
NOTARY PUBLIC, STATE OF MI
COUNTY OF BARRY
MY COMMISSION EXPIRES Mar 26, 2026
ACTING IN COUNTY OF Ingham

¹ The total amount MDOC was charged for the video redaction services was \$6,112.50 which the vendor arrived at by charging an hourly rate of \$75. However, under the FOIA for contracted labor costs, public bodies are only permitted to charge up to "6 times the state minimum hourly wage rate determined under . . . MCL 408.934." MCL 15.234(1)(b). Accordingly, if this cost was charged prior to litigation it would have been at a reduced hourly rate of \$56.70 for a total of \$4,621.05.

EXHIBIT 1

Woodman v. MDOC Joseph v. MDOC
Court of Claims No. 17-000082-MZ; Page 1

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Date	Activity	Hours
4/12/2017	Review Complaint; research exemptions; gather records	2
4/18/2017	Prepare legal hold notice	0.5
4/19/2017	Phone call with opposing counsel; research cases discussed in phone call	1
4/24/2017	Conduct research re: motion to dismiss	1.5
4/26/2017	Prepare motion to dismiss	1
4/27/2017	Revise motion to dismiss and prepare for filing	1.5
5/3/2017	Phone call with opposing counsel; research issues discussed in phone call	1
5/8/2017	Review videos responsive to FOIA request	2
5/12/2017	Review amended complaint; research re: court of claims act	0.75
5/24/2017	Research re: 2nd motion to dismiss	2
5/25/2017	Meeting re: amended complaint and 2nd motion to dismiss; conduct research re: court of claims act and separation of powers	1.75
5/26/2017	Meeting w/ First Assistant re: 2nd motion to dismiss	0.25
6/5/2017	Revise 2nd motion to dismiss	1.5
6/7/2017	Revise 2nd motion to dismiss; conduct research re: motion to dismiss	1
6/8/2017	Review request for default; file 2nd motion to dismiss; research re: motion to strike	2.5
6/9/2017	Prepare motion to strike for filing	0.5
6/13/2017	Exchange email with opposing counsel re: motion to dismiss and motion to strike	0.25
6/14/2017	Phone call with opposing counsel	0.25
6/23/2017	Review responses to motions to dismiss and to strike; research re: responses	2
6/29/2017	Prepare reply brief re: motion to dismiss	1.25
8/24/2017	[Joseph v MDOC] review complaint; compare complaint w/ Woodman complaint	0.5
9/12/2017	[Joseph v MDOC] Prepare answer to complaint; research potential consolidation	1.25
9/12/2017	Phone call with opposing counsel; research re: phone call	0.25
9/18/2017	Review discovery requests; research re: potential objections	
9/20/2017	Phone call with MDOC re: response to discovery requests; research re: objections	1.25
9/26/2017	discussions with MDOC re difficult in responding to certain discovery requests; research re: potential motions/objections	1
9/27/2017	Phone call with opposing counsel re discovery requests; research issues re: discovery that came up during call	1
10/3/2017	Email to opposing counsel re: discovery;	0.5

Woodman v. MDOC Joseph v. MDOC
Court of Claims No. 17-000082-MZ; Page 2

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10/9/2017	Review responses to discovery; review records to be produced	1
10/11/2017	Revise objections discovery; review responses to discovery	1.25
10/12/2017	Review responses to discovery; check to make sure all responsive documents are accounted for	1
10/16/2017	[Joseph v MDOC] Review discovery requests and prepare for processing	0.5
10/19/2017	Finalized responses to discovery and prepared for mailing	0.75
10/26/2017	Communication with Scott Pilat re: access to discovery documents	0.5
10/30/2017	Reviewed additional records responsive to discovery requests; prepared for mailing	0.25
11/9/2017	Prepare stipulation consolidating cases	0.25
11/13/2017	Reviewed deposition notices; discussed notices with MDOC	0.5
11/13/2017	Prepared revised stipulation re consolidation of cases; emailed opposing counsel re: revised stipulation	0.5
11/17/2017	Research re: corporate representative deposition notice; email with opposing counsel re: same;	
11/21/2017	Deposition Preparation; meet with MDOC	3
11/22/2017	Research re: corporate representative deposition notices; phone call with opposing counsel	1.25
11/28/2017	Deposition Prep; Bellamy Creek Visit	3
11/29/2017	Prepare for depositions	1
11/30/2017	Depositions from 9am to 4pm	7
12/6/2017	Review deposition transcripts	1.75
1/25/2018	Research re: MSD	1.5
1/28/2018	Prepare MSD	3
1/29/2018	Prepare MSD for filing	3
1/31/2018	Review Plaintiffs' MSD; research re: exemptions; prepare response	1.75
2/18/2018	Prepare response to Plaintiff's MSD	1.5
2/19/2018	Revise and finalize response to MSD for filing	1
2/21/2018	Review Plaintiff's response to MSD; research re: response; prepare reply brief	1.5
2/26/2018	Finalize reply brief for filing	0.75
8/29/2018	Review 8/28/2018 opinion; research re: opinion	1.5
8/30/2018	Prepare for in camera production; research video redaction capabilities	0.75
8/31/2018	Prepare records for in camera production and/or potential redaction	0.25
9/11/2018	Review in camera filing; send email correspondence to Plaintiff's counsel re filing	0.5
2/28/2019	Review Court's Order appointing special master; research re: special masters	0.5

Woodman v. MDOC Joseph v. MDOC
 Court of Claims No. 17-000082-MZ; Page 3

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3/4/2019	Communication w MDOC re special master	0.25
4/16/2019	Review email from Court re special master invoices; review order appointing special master	0.25
4/17/2019	email communication with Court/opposing counsel re: special master report	0.25
4/22/2019	Review special master report; communicate with MDOC re: report; research re: conclusions in report; review prior briefing	1
4/23/2019	Communication re: video editing software; review 4/22/2019 Court Order; research re: motion for reconsideration; review past briefing and orders	1.75
4/25/2019	Email communications with opposing counsel re: settlement; telephone call with opposing counsel re: same.	1.5
4/26/2019	Communicate w MDOC re: settlement negotiations	0.25
4/28/2019	Prepare motion for reconsideration	1.25
4/29/2019	Finalize motion for reconsideration; email same to opposing counsel; communication w video editor	1.5
6/20/2019	Communication with opposing counsel re: redacted videos; review redacted videos; provide videos to opposing counsel	1
6/25/2019	Communication with opposing counsel re: review of unredacted videos	0.25
6/28/2019	Meeting with opposing counsel in Detroit Office	3
7/30/2019	Communication with opposing counsel re: attorneys fees	0.25
10/3/2019	Review Honigman's fee petition; review billing statement for inappropriate items	2
10/8/2019	Research re: fee petition; prepare response	1
10/9/2019	Prepare fee petition	1
10/14/2019	Prepare fee petition	3
	Total Hours =	90.75
	at 175/hr =	15881.25

EXHIBIT 2

STATE OF MICHIGAN COURT OF CLAIMS	REGISTER OF ACTIONS	CASE ID 17-000082-MZ C/COC/MI	Public 10/14/2019 11:16:10 AM Page: 1 of 4
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CASE

Judicial Officer	Date Filed	Adjudication	Status
STEPHENS, CYNTHIA	4/3/17		OPEN

PARTICIPANTS

PLAINTIFF 1	WOODMAN, SPENCER	FILED: 4/3/17
	ATTY: ROBERT M. RILEY # 72290 PRIMARY RETAINED	
DEFENDANT 1	MICHIGAN DEPARTMENT OF CORRECTIONS	FILED: 4/3/17
	ATTY: ADAM R. DE BEAR # 80242 PRIMARY RETAINED	

RECEIVABLES/PAYMENTS

	Assessed	Paid/Adjusted	Balance
PTF 1 SPENCER WOODMAN	\$235.00	\$235.00	\$0.00
DEF 1 MICHIGAN DEPARTMENT OF CORRECTIONS	\$140.00	\$140.00	\$0.00

RELATED CASES

Case ID	Entitlement	Primary/Secondary
17-000230-MZ	GEORGE JOSEPH V MICHIGAN DEPARTMENT OF CORRECTIONS	Primary

CHRONOLOGICAL LIST OF ACTIVITIES

Activity Date	Activity	User	Entry Date
4/3/17	SUMMONS AND COMPLAINT	mmla	4/3/17
	PTF 1	mmla	4/3/17
	DEF 1		
4/3/17	JUDICIAL OFFICER ASSIGNED TO STEPHENS, CYNTHIA DIANE 28417	mmla	4/3/17
4/3/17	RECEIVABLE ELECTRONIC FILING SYSTEM FEE	mmla	4/3/17
4/3/17	RECEIVABLE FILING FEE	mmla	4/3/17
4/3/17	PAYMENT	mmla	4/3/17
	RECEIPT NUMBER: COC-LAN.0001866		
	METHOD: CHECK \$175.00		
4/17/17	RETURN OF SERVICE - NONPERSONAL	mmla	4/17/17
	DEF 1		
4/28/17	MOTION TO DISMISS AND BRIEF IN SUPPORT IN LIEU OF AN ANSWER	mmla	5/1/17
	DEF 1	mmla	5/25/18
5/1/17	RECEIVABLE MOTION FEE	mmla	5/1/17
5/12/17	AMENDED COMPLAINT (FIRST)	mmla	5/16/17
	PTF 1		
6/6/17	DEFAULT REQUEST AND AFFIDAVIT	mmla	6/8/17
	PTF 1		
6/8/17	MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT IN LIEU OF AN ANSWER AND BRIEF IN SUPPORT	mmla	6/8/17
	DEF 1	mmla	5/25/18

STATE OF MICHIGAN COURT OF CLAIMS	REGISTER OF ACTIONS	CASE ID 17-000082-MZ C/COC/MI	Public 10/14/2019 11:16:10 AM Page: 2 of 4
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Activity Date	Activity		User	Entry Date
6/8/17	RECEIVABLE MOTION FEE	\$20.00	mmla	6/8/17
6/9/17	MOTION TO STRIKE PLAINTIFF'S REQUEST AND AFFIDAVIT FOR ENTRY OF DEFAULT WITH BRIEF IN SUPPORT DEF 1	\$20.00	amd	6/9/17
6/9/17	RECEIVABLE MOTION FEE	\$20.00	amd	6/9/17
6/16/17	PAYMENT RECEIPT NUMBER: COC-LAN.0002104 METHOD: ELECTRONIC FUND TRANSFER \$20.00	\$20.00	mlh	6/16/17
6/22/17	RESPONSE TO (IN OPPOSITION) MOTION TO DISMISS COMPLAINT IN LIEU OF AN ANSWER (ORAL ARGUMENT REQUESTED) PTF 1		mmla	6/26/17
6/22/17	RESPONSE TO (IN OPPOSITION) MOTION TO STRIKE PLAINTIFF'S REQUEST AND AFFIDAVIT FOR ENTRY OF DEFAULT (ORAL ARGUMENT REQUESTED) PTF 1		mmla mmla	6/26/17 7/17/17
6/30/17	MOTION FOR LEAVE TO FILE A REPLY TO PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS AND BRIEF IN SUPPORT DEF 1	\$20.00	mmla mmla	7/3/17 5/25/18
6/30/17	RECEIVABLE MOTION FEE	\$20.00	mmla	7/3/17
7/10/17	ORDER		mmla mmla	7/10/17 7/10/17
7/17/17	PAYMENT RECEIPT NUMBER: COC-LAN.0002170 METHOD: ELECTRONIC FUND TRANSFER \$40.00	\$40.00	mlh	7/17/17
8/9/17	PAYMENT RECEIPT NUMBER: COC-LAN.0002220 METHOD: ELECTRONIC FUND TRANSFER \$20.00	\$20.00	mlh	8/9/17
10/5/17	ANSWER, CIVIL AND AFFIRMATIVE DEFENSES TO PLAINTIFF'S FIRST AMENDED VERIFIED FREEDOM OF INFORMATION ACT COMPLAINT DEF 1		mmla	10/5/17
10/16/17	OPINION AND ORDER PTF 1 DEF 1		amd	10/16/17
10/20/17	PROOF OF SERVICE DEF 1		mmla	10/20/17
11/14/17	STIPULATION TO CONSOLIDATE CASE AND PROPOSED ORDER PTF 1 DEF 1		mmla mmla	11/15/17 11/15/17
11/15/17	STIPULATION TO CONSOLIDATE CASE AND PROPOSED ORDER [CORRECTED] PTF 1 DEF 1		mmla	11/15/17
11/22/17	ORDER CONSOLIDATING CASE		mmla	11/22/17
11/22/17	COMMENT Case 17-000230-MZ Joseph v Michigan Department of Corrections has been consolidated into this case.		mmla	11/22/17
11/27/17	APPEARANCE OF OLIVIA K. VIZACHERO PTF 1		mmla	11/28/17

STATE OF MICHIGAN COURT OF CLAIMS	REGISTER OF ACTIONS	CASE ID 17-000082-MZ C/COC/MI	Public 10/14/2019 11:16:10 AM Page: 3 of 4
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Activity Date	Activity		User	Entry Date
1/30/18	MOTION FOR SUMMARY DISPOSITION WITH BRIEF IN SUPPORT (DEFENDANT) DEF 1	\$20.00	amd mmla	1/30/18 2/1/18
1/30/18	RECEIVABLE MOTION FEE	\$20.00	amd	1/30/18
1/30/18	MOTION FOR SUMMARY DISPOSITION AND BRIEF IN SUPPORT (PLAINTIFF) PTF 1	\$20.00	mmla amd	2/1/18 2/21/18
1/30/18	RECEIVABLE MOTION FEE	\$20.00	mmla	2/1/18
1/30/18	INDEX OF EXHIBITS AND EXHIBITS TO PLAINTIFF'S MOTION FOR SUMMARY DISPOSITION PTF 1		mmla mmla	2/1/18 2/6/18
2/1/18	PAYMENT RECEIPT NUMBER: COC-LAN.0002571 METHOD: CHECK \$20.00	\$20.00	mmla	2/1/18
2/20/18	RESPONSE TO PLAINTIFFS' 30/1/2018 MOTION FOR SUMMARY DISPOSITION DEF 1		amd	2/20/18
2/20/18	RESPONSE TO DEFENDANT MDOC'S MOTION FOR SUMMARY DISPOSITION PTF 1		mmla	2/22/18
2/20/18	EXHIBITS - PLAINTIFF'S INDEX OF EXHIBITS PTF 1		mmla	2/22/18
2/26/18	EXHIBIT 1 TO DEFENDANT'S 2/20/18 RESPONSE TO 1/30/18 MOTION FOR SUMMARY DISPOSITION DEF 1		mmla mmla	2/26/18 2/26/18
2/26/18	REPLY BRIEF IN SUPPORT OF ITS 30/1/2018 MOTION FOR SUMMARY DISPOSITION DEF 1		amd	2/26/18
2/26/18	REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY DISPOSITION PTF 1		mmla	2/27/18
4/23/18	PAYMENT RECEIPT NUMBER: COC-LAN.0002741 METHOD: ELECTRONIC FUND TRANSFER \$20.00	\$20.00	mlh mlh	4/23/18 4/23/18
8/28/18	OPINION AND ORDER PTF 1 DEF 1		amd amd	8/28/18 8/28/18
9/11/18	LETTER SUBMITTING VIDEOS FOR IN CAMERA REVIEW DEF 1		mmla	9/14/18
11/15/18	CERTIFICATE OF SERVICE DEFENDANTS' SUPPLEMENTAL RESPONSES TO PLAINTIFF'S INTERROGATORIES REGARDING EXPERT WITNESSES DEF 1		mmla	11/15/18
2/27/19	ORDER		amd	2/27/19
4/18/19	SPECIAL MASTER REPORT		mmla	4/18/19
4/22/19	ORDER		mmla	4/22/19
4/29/19	MOTION FOR RECONSIDERATION AND BRIEF IN SUPPORT DEF 1	\$20.00	mmla	4/29/19

STATE OF MICHIGAN COURT OF CLAIMS	REGISTER OF ACTIONS	CASE ID 17-000082-MZ C/COC/MI	Public 10/14/2019 11:16:10 AM Page: 4 of 4
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Activity Date	Activity		User	Entry Date
4/29/19	RECEIVABLE MOTION FEE	\$20.00	mmla	4/29/19
5/14/19	MOTION TO ENFORCE APRIL 22, 2019, ORDER AND IMPOSE SANCTIONS PTF 1	\$20.00	nmh nmh	5/28/19 5/28/19
5/14/19	RECEIVABLE MOTION FEE	\$20.00	nmh	5/28/19
5/28/19	PAYMENT RECEIPT NUMBER: COC-LAN.0003818 METHOD: CASH \$20.00 Handwritten Receipt #190747	\$20.00	nmh	5/28/19
5/28/19	MOTION FOR STAY OF ORDER PENDING MOTION FOR RECONSIDERATION WITH BRIEF IN SUPPORT DEF 1	\$20.00	nmh	5/29/19
5/28/19	RECEIVABLE MOTION FEE	\$20.00	nmh	5/29/19
5/30/19	ORDER		mmla	5/30/19
5/31/19	PROPOSED STIPULATION EXTENDING TIME FOR DEFENDANT MICHIGAN DEPARTMENT OF CORRECTIONS TO FILE RESPONSE TO PLAINTIFF'S 5/14/19 MOTION TO ENFORCE APRIL 22, 2019 ORDER AND IMPOSE SANCTIONS PTF 1 DEF 1		nmh	5/31/19
5/31/19	RESPONSE TO PLAINTIFFS' 05/14/2019 MOTION TO ENFORCE APRIL 22, 2019 ORDER AND IMPOSE SANCTIONS DEF 1		nmh	5/31/19
5/31/19	PROOF OF SERVICE DEF 1		nmh	5/31/19
6/5/19	ORDER		amd	6/5/19
8/20/19	PAYMENT RECEIPT NUMBER: COC-LAN.0003949 METHOD: ELECTRONIC FUND TRANSFER \$20.00	\$20.00	mlh mlh	8/20/19 8/20/19
8/20/19	PAYMENT RECEIPT NUMBER: COC-LAN.0003986 METHOD: ELECTRONIC FUND TRANSFER \$20.00	\$20.00	mlh	8/20/19
10/2/19	MOTION FOR ATTORNEY'S FEES, COSTS, AND PUNITIVE DAMAGES AND BRIEF IN SUPPORT WITH CERTIFICATE OF SERVICE PTF 1	\$20.00	mmla mmla	10/2/19 10/2/19
10/2/19	RECEIVABLE MOTION FEE	\$20.00	mmla	10/2/19
10/2/19	PAYMENT RECEIPT NUMBER: COC-LAN.0004063 METHOD: CHECK \$20.00	\$20.00	mmla	10/2/19
10/7/19	REVIEW FOR INTERNAL COURT USE ONLY	SET 10/14/19 8:00 A	amd	10/7/19
10/7/19	ORDER		amd	10/7/19

EXHIBIT 3

INVOICE



Adam De Bear
 Michigan Department of Attorney General
 525 W. Ottawa St.
 5th Floor
 PO Box 30736
 Lansing, MI 48909

Invoice No.	Invoice Date	Job No.
8869	12/10/2017	5693
Job Date	Case No.	
11/30/2017	17-000082-MZ	
Case Name		
Woodman v Michigan Department of Corrections		
Payment Terms		
Due upon receipt		

One Certified Copy Deposition of:				
Peter Phelps	36.00	Pages	@	2.50
Exhibit	3.00	Pages	@	0.75
Electronic only package - COPY				15.00
One Certified Copy Deposition of:				
Cheryl Groves	124.00	Pages	@	2.50
Exhibit	29.00	Pages	@	0.25
Electronic only package - COPY				15.00
One Certified Copy Deposition of:				
Cheryl Groves(CorpRep)	71.00	Pages	@	2.50
Exhibit	97.00	Pages	@	0.25
Electronic only package - COPY				15.00
One Certified Copy Deposition of:				
Christine Wakefield	67.00	Pages	@	2.50
Electronic only package - COPY				15.00
TOTAL DUE >>>				\$862.25

- Approved for payment - Adam de Bear

Thank you for your business! Please call 844.730.4066 with any questions.

Tax ID: 47-5468331

Phone: Fax:

Please detach bottom portion and return with payment.

Adam De Bear
 Michigan Department of Attorney General
 525 W. Ottawa St.
 5th Floor
 PO Box 30736
 Lansing, MI 48909

Invoice No. : 8869
 Invoice Date : 12/10/2017
 Total Due : \$862.25

Remit To: Fortz Legal Support, LLC
 P.O. Box 290
 Birmingham, MI 48012

Job No. : 5693
 BU ID : 1-MAIN
 Case No. : 17-000082-MZ
 Case Name : Woodman v Michigan Department of Corrections

EXHIBIT 4

Michael Snyder
6166173851

Michigan
United States

RECEIVED by MSC 7/22/2022 3:56:19 PM

Billed To
Kari Anders
Attorney General

Invoice Date
06/28/2019

Invoice Number
0000001

Description	Rate	Hrs	Line Total
Video Redactions Pixelation of subjects in videos	\$75.00/Hr	81.5	\$6,112.50

Subtotal	\$6,112.50
Tax	0.00

Invoice Total (USD)	\$6,112.50
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Description	Rate	Hrs	Line Total
Video Redactions Pixelation of subjects in videos	\$75.00/Hr	81.5	\$6,112.50
30-Apr		1.5	
1-May		2	
2-May		3.5	
3-May		1.5	
4-May		6	
5-May		7.5	
6-May		2	
14-May		2.5	
15-May		4.5	
16-May		4.5	
17-May		6	
25-May		2	
26-May		5	
27-May		4.5	
28-May		6.5	
29-May		8	
9-Jun		3	
13-Jun		2	
14-Jun		2.5	
16-Jun		2	
17-Jun		3.5	
18-Jun		1	

Exhibit B

STATE OF MICHIGAN
COURT OF CLAIMS

SPENCER WOODMAN,

PLAINTIFF,

NO. 17-000082-MZ

v

HON. CYNTHIA D. STEPHENS

MICHIGAN DEPARTMENT OF
CORRECTIONS,

DEFENDANT.

GEORGE JOSEPH,

NO. 17-000230-MZ

PLAINTIFF,

HON. CYNTHIA D. STEPHENS

v

MICHIGAN DEPARTMENT OF
CORRECTIONS,

DEFENDANT.

Robert M. Riley (P72290)
Honigman Miller Schwartz and Cohn
Cooperating Attorneys, American Civil
Liberties Union Fund of Michigan
2290 First National Building
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(313) 465-7000
rriley@honigman.com

Daniel S. Korobkin (P72842)
American Civil Liberties Union Fund of
Michigan
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Detroit, MI 48201
(313) 578-6800
dkorobkin@aclumich.org

Attorneys for Plaintiff

Adam R. de Bear (P80242)
Eric M. Jamison (P75721)
Assistant Attorneys General
Attorneys for Defendant Michigan
Department of Corrections
Michigan Department of Attorney General
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(517) 373-1162
deBearA@michigan.gov
JamisonE@michigan.gov

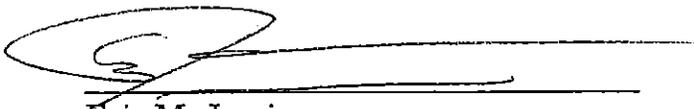
AFFIDAVIT OF ERIC M. JAMISON

I, Eric M. Jamison, being first duly sworn, depose and say as follows:

1. This Affidavit is based upon my personal knowledge.
2. If sworn as a witness, I can testify competently as to the facts stated herein.
3. I have been admitted to practice in the State of Michigan since January 2012.
4. I worked at Miller, Canfield, Paddock and Stone, PLC as a research assistant prior to admission to the bar and an associate attorney after admission to the bar. I was appointed as an assistant attorney general in February 2013. Since my appointment, I have worked in the Department of Attorney General's Revenue and Tax Division as a litigator and in the State Operations Division as a litigator and managing electronic discovery matters for complex litigation.
5. A portion of the litigation that I have been assigned in the State Operations Division has been in defending state public bodies in actions arising out of the Freedom of Information Act (FOIA), MCL 15.231 *et seq.* During my time with the Department, I have appeared in several civil actions arising under the FOIA. And in addition to FOIA litigation, I routinely provide advice to state public bodies regarding the FOIA's requirements and how to properly comply with the law in processing requests for records.
6. I have prepared an "activity log" for the purpose of responding to the plaintiffs' motion for attorneys' fees and costs. The activity log details the approximate dates, times, and hours worked on the consolidated *Woodman and Joseph* matters, Case Nos. 17-82-MZ and 17-230-MZ. (Attachment 1, Jamison Activity Log.)
7. The Department of Attorney General does not require its attorneys to track billable hours in the way that private law firms do. As a result, the attached activity log, was prepared *post hoc* by reviewing emails, calendar entries, docket entries, and other similar records. In preparing the activity log, the hours spent on each particular activity were conservatively calculated.
8. According to my records, I have spent approximately 21 hours relating to the *Woodman and Joseph* matters, Case Nos. 17-82-MZ and 17-230-MZ.

- 9. In calculating reasonable attorneys fees for my work on these cases, I selected \$195, as an hourly rate by referencing the State Bar of Michigan 2017 Economics of Law Practice Attorney Income and Billing Rate Summary Report (Summary Report) and selecting the 25th percentile amount for hourly rates by attorneys with 6 to 10 years of practice.¹ This number is less than the 25th percentile for attorneys in the Lansing area and Ingham County.
- 10. The dollar amount of reasonable attorneys' fees based on the above hourly rate and number of hours worked is \$4095.

Affiant says nothing further.


 Eric M. Jamison
 Michigan Department of Attorney General

Date: October 14, 2019

Subscribed and sworn to before me, a Notary Public, this 14 day of October, 2019

Lynne L. Walton
 Notary Public, State of Michigan

LYNNE L. WALTON
 NOTARY PUBLIC, STATE OF MI
 COUNTY OF BARRY
 MY COMMISSION EXPIRES Mar 26, 2026
 ACTING IN COUNTY OF Ingham

¹ See <https://www.michbar.org/file/pmrc/articles/0000154.pdf>

EXHIBIT 1

Woodman v. MDOC Joseph v. MDOC
Court of Claims No. 17-000082-MZ

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Date	Activity	Hours
4/14/2017	Review Complaint	0.25
4/27/2017	Review motion to dismiss, provide edits	0.75
5/26/2017	Review 2nd motion to dismiss; provide comments	0.5
6/8/2017	Review MSD, provide comments	0.5
6/8/2017	Discussion/emails regarding default	0.25
6/9/2017	Review motion to strike, provide comments	0.5
6/30/2017	Review motion for leave to file reply, provide comments	0.25
11/30/2017	Depositions	2
1/29/2018	Review MSD, provide comments	0.5
1/31/2018	Review Plaintiffs' MSD	0.5
8/29/2018	Review 8/28/2018 opinion; discussion regarding same	1
9/4/2018	Discussion/communications about pixilation of faces in videos	0.25
9/5/2018	Discussion regarding production of audio files	0.25
9/6/2018	Emails with client regarding video files	0.25
9/7/2018	Draft letter to court regarding submission of videos under seal; prep videos for submission.	1
9/7/2019	Draft letter to opposing counsel regarding production of audio files; prep audio files for production.	1
2/28/2019	Review Court's Order appointing special master	0.25
3/18/2019	Email with clerk regarding production of videos to special master. Internal discussions regarding production	0.25
5/15/2019	Call with opposing counsel regarding contempt motion; internal discussion regarding motion; review motion	1
5/15/2019	Emails with client regarding contempt motion	0.25
5/24/2019	Email with opposing counsel seeking concurrence	0.25
5/28/2019	Draft response to contempt motion and prepare for filing; draft motion to stay.	2.5
5/31/2019	Emails regarding providing electronic copy of motion to stay to opposing counsel	0.25
5/31/2019	Emails regarding status of video pixilation	0.25
5/31/2019	Emails regarding stipulation; draft stipulation and prepare for filing; review order denying reconsideration.	1.25
6/3/2019	Email to client regarding denial of reconsideration	0.25
6/3/2019	Internal discussion regarding order to produce videos	0.25
6/4/2019	Email to client regarding order to produce videos	0.25
6/4/2019	Call with opposing counsel regarding order to produce videos	0.25
6/5/2019	Review pixilated videos; internal discussions about pixilation work; email about status of work	2

Jamison Activity Log

Defendant's Appendix 337a

Woodman v. MDOC Joseph v. MDOC
Court of Claims No. 17-000082-MZ

RECEIVED by MSC 7/22/2022 3:56:19 PM

**STATE OF MICHIGAN
IN THE COURT OF CLAIMS**

SPENCER WOODMAN,

Plaintiff,

Case No. 17-000082-MZ
Hon. Cynthia D. Stephens

v

MICHIGAN DEPARTMENT OF CORRECTIONS,

Defendant.

GEORGE JOSEPH,

Plaintiff,

Case No. 17-000230-MZ
Hon. Cynthia D. Stephens

v

MICHIGAN DEPARTMENT OF CORRECTIONS,

Defendant.

HONIGMAN LLP
Robert M. Riley (P72290)
Cooperating Attorneys, American Civil
Liberties Union Fund of Michigan
2290 First National Building
600 Woodward Avenue
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(313) 465-7000
rriley@honigman.com

MICHIGAN DEPARTMENT OF ATTORNEY GENERAL
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Eric M. Jamison (P75721)
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debeara@michigan.gov
jamisone@michigan.gov

AMERICAN CIVIL LIBERTIES UNION FUND
OF MICHIGAN
Daniel S. Korobkin (P72842)
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Detroit, Michigan 48201
(313) 578-6800
dkorobkin@aclumich.org

Attorneys for Defendant

Attorneys for Plaintiffs

**HONIGMAN LLP'S RESPONSES AND OBJECTIONS TO
DEFENDANT MDOC'S INTERROGATORIES TO PLAINTIFF'S COUNSEL**

Honigman LLP (“Honigman”) submits the following responses and objections to Defendant Michigan Department of Corrections’ (“MDOC”) Interrogatories to Plaintiff’s Counsel.

GENERAL OBJECTIONS

1. These responses are based on information available to Honigman at this time and are made on the basis of current knowledge and belief after reasonable inquiry. Despite reasonable investigation and inquiry, Honigman may be currently unaware of additional facts and/or documents that could affect these responses. Honigman reserves the right to modify its responses as additional information and/or documents are discovered. Honigman’s responses are made without prejudice to its use or reliance on subsequently discovered information or documents.

2. Honigman objects to the Interrogatories to the extent they seek information in Defendant’s possession, custody, and/or control.

3. Honigman objects to the Interrogatories to the extent they seek information protected by any privilege, including the work-product doctrine, attorney-client privilege, and accountant-client privilege.

4. Honigman objects to the Interrogatories to the extent they seek to impose obligations on Honigman beyond those imposed by the Michigan Court Rules or other applicable law.

5. Honigman objects to the Interrogatories to the extent they seek information that is not relevant or likely to lead to the discovery of admissible evidence.

6. Honigman objects to the Interrogatories to the extent they are designed to annoy, embarrass, oppress, and/or unduly burden Honigman.

7. Honigman is providing these responses without waiving the right to object to all or part of the Interrogatories should Defendant request additional information.

8. Honigman provides these responses without waiving, or intending to waive, but on the contrary preserving, and intending to preserve: (a) the right to object, on the grounds of competency, confidentiality, privilege, relevance, or materiality, or any other proper grounds, to the use of these answers for any purpose, in whole or in part, in any subsequent stage or proceeding in this action or any other action; and (b) the right to object on any and all grounds, at any time, to other discovery involving or relating to the subject matter of the Interrogatories.

9. Nothing in these responses constitutes an assent to the terms, instructions, or definitions used in the Interrogatories, or any assumptions contained therein.

10. Honigman does not concede the relevance of any information being provided in response to the Interrogatories, and expressly reserves the right to object to the introduction of any answers into evidence.

11. Any response containing privileged information shall not constitute a waiver of the privilege with respect to the subject matter addressed therein.

12. Honigman reserves the right to rely, in any proceeding in this action or any other action, on documents and information beyond what Honigman provides in response to the Interrogatories.

13. Honigman reserves the right to make all appropriate objections at any hearing or trial in this matter regarding the subject matter of the Interrogatories

14. Each of the General Responses and Objections is incorporated by reference in each of the following Specific Responses.

RESPONSES AND OBJECTIONS TO INTERROGATORIES

Interrogatory No. 1:

Please identify the number of civil actions filed under MCL 15.240(1)(b) or MCL 15.240a(1)(b) that each attorney who billed time to the above-captioned matters has litigated.

For your information, the relevant billing statements, which appear to contain a list of each attorney who billed time to the above-captioned matters, can be found in Exhibits A and C to Plaintiff's Motion for Attorney's Fees, Costs, and Punitive Damages.

RESPONSE:

Honigman objects to this Interrogatory because it is overbroad, vague, and unduly burdensome. Honigman objects to this Interrogatory to the extent it seeks irrelevant information and is not reasonably calculated to lead to the discovery of relevant or admissible evidence. Honigman objects to this Interrogatory because the terms "filed" and "litigated" are vague and ambiguous. Honigman objects to this Interrogatory because the referenced statutes have been amended at various times and the Interrogatory is ambiguous as to which version(s) of the statutes MDOC is referring. Honigman objects to this Interrogatory to the extent it implies that cases "filed" or "litigated" under the referenced statutes are the only cases that provide relevant experience to litigating *Woodman* and *Joseph*, in which Plaintiffs achieved a total victory on the merits, notwithstanding the specific FOIA experience (or lack thereof) of each of Honigman's attorneys who worked on these cases.

Subject to these objections and the General Objections, Honigman states as follows:

Attorney/Timekeeper (Descending Order of Hours Worked on <i>Woodman and Joseph</i>)	Position	Number of FOIA Cases	Case Names (where known)
Olivia Vizachero	Associate (former)	2	<i>Woodman v MDOC</i> , Case No. 17-000082-MZ <i>Joseph v MDOC</i> , Case No. 17-000230-MZ
Robert Riley	Partner	2	<i>Woodman v MDOC</i> , Case No. 17-000082-MZ <i>Joseph v MDOC</i> , Case No. 17-000230-MZ In addition to these consolidated cases, Riley worked on dozens of FOIA cases filed under the referenced statutes in his more than 4.5 years as a Senior Law Clerk to Chief Justices Marilyn J. Kelly and Bridget McCormack of the Michigan Supreme Court. Specific case names are unknown.
Scott Kitei	Partner	2	<i>Woodman v MDOC</i> , Case No. 17-000082-MZ <i>Joseph v MDOC</i> , Case No. 17-000230-MZ
Marie Greenman	Associate (former)	2	<i>Woodman v MDOC</i> , Case No. 17-000082-MZ <i>Joseph v MDOC</i> , Case No. 17-000230-MZ
Stephen Fritz	Summer Associate (former)	Unknown	Unknown
Lynnyetta Keller	Associate (former)	Unknown	Unknown
Rian Dawson	Associate	2	<i>Woodman v MDOC</i> , Case No. 17-000082-MZ <i>Joseph v MDOC</i> , Case No. 17-000230-MZ
Joseph Piatkiewicz	Litigation Support Manager	2	<i>Woodman v MDOC</i> , Case No. 17-000082-MZ <i>Joseph v MDOC</i> , Case No. 17-000230-MZ
Karen Gooze	Paralegal	2	<i>Woodman v MDOC</i> , Case No. 17-000082-MZ <i>Joseph v MDOC</i> , Case No. 17-000230-MZ
Leanna Simon	Director of Library Services	2	<i>Woodman v MDOC</i> , Case No. 17-000082-MZ <i>Joseph v MDOC</i> , Case No. 17-000230-MZ
Scott Pilat	Litigation Support Manager (former)	Unknown	Unknown

Attorney/Timekeeper (Descending Order of Hours Worked on <i>Woodman and Joseph</i>)	Position	Number of FOIA Cases	Case Names (where known)
I.W. Winsten	Partner	Several	Specific case names are unknown, as the cases were litigated many years ago.

Interrogatory No. 2:

Please identify the number of prospective paying clients that you and your law firm were precluded from representing as a result of the representation of Mr. Woodman and Mr. Joseph in Case Nos. 17-82-MZ and 17-230-MZ.

RESPONSE:

Honigman objects to this Interrogatory because it is overbroad, vague, and unduly burdensome. Honigman objects to this Interrogatory to the extent it seeks irrelevant information and is not reasonably calculated to lead to the discovery of relevant or admissible evidence. Honigman objects to this Interrogatory because the terms “prospective,” “paying clients,” and “precluded from representing” are vague and ambiguous.

Subject to these objections and the General Objections, Honigman states that the attorneys and other timekeepers who worked on these cases—primarily Riley and Vizachero—incurred an opportunity cost equal to the number of hours worked on these cases multiplied by their standard billing rates. But for these cases, those attorneys’ and timekeepers’ time would have been spent on paying-client work. Honigman’s revenue therefore decreased by the fees and costs attributable to it (excluding time spent by the ACLU) as set forth in 2019-10-02 Plaintiffs’ Motion for Attorney’s Fees, Costs, and Punitive Damages. Further answering, the Honigman attorneys who worked on these cases could have spent that time developing additional business for paying clients,

or representing any number of additional pro bono clients who seek Honigman's assistance on a regular basis.

Interrogatory No. 3:

Please identify the number of civil actions, or other matters, in which you have represented Mr. Woodman and Mr. Joseph.

RESPONSE:

Honigman objects to this Interrogatory because it is overbroad, vague, and unduly burdensome. Honigman objects to this Interrogatory to the extent it seeks irrelevant information and is not reasonably calculated to lead to the discovery of relevant or admissible evidence. Honigman objects to this Interrogatory because the terms "civil actions" and "other matters" are vague and ambiguous.

Subject to these objections and the General Objections, Honigman states that it has represented Mr. Woodman or Mr. Joseph in two civil actions.

Interrogatory No. 4:

Exhibits A and C to Plaintiff's Motion for Attorney's Fees, Costs, and Punitive Damages indicate that Robert Riley, Daniel Korobkin, and Olivia Vizachero collectively billed more than 180 hours in drafting and preparing the following filings: Plaintiffs' January 30, 2018 motion for summary disposition; Plaintiffs' response to MDOC's January 30, 2018 motion for summary disposition; and Plaintiffs' February 26, 2018 reply brief. Please justify the number of hours billed for the filings mentioned in this Interrogatory by describing (1) any unordinary events and/or circumstances which existed at the time of the filing, (2) to the novelty of the facts and law at issue, or (3) any other pertinent difficulties.

RESPONSE:

Honigman objects to this Interrogatory because it is overbroad, vague, and unduly burdensome. Honigman objects to this Interrogatory to the extent it seeks irrelevant information and is not reasonably calculated to lead to the discovery of relevant or admissible evidence. Honigman objects to this Interrogatory because the terms “justify,” “unordinary events and/or circumstances,” “novelty of the facts and law at issue,” and “pertinent difficulties” are vague and ambiguous.

Subject to these objections and the General Objections, Honigman states that the hours incurred with respect to the parties’ respective motions for summary disposition were necessary in light of the MDOC’s failure to comply with its obligations under FOIA, which amounts to unusual circumstances given that Plaintiffs assumed that the MDOC would lawfully respond to their requests. These cases—and all of the corresponding work completed during them—would not have been necessary had the MDOC faithfully carried out its obligations to properly respond to Plaintiffs’ FOIA requests, review the requested materials, and produce those materials in a timely fashion. Instead, the MDOC ignored those duties, ignored its obligations under the law, and Plaintiffs’ ultimately prevailed in full in this litigation. These circumstances alone justify the time incurred preparing summary disposition briefs.

Further answering, briefing summary dispositions motions is a time-intensive process and arguably the most important activity in a case given those motions’ dispositive nature. Dispositive motion practice requires extensive initial legal research, and for these cases, extensive research in Michigan and other jurisdictions with similar FOIA statutes because there was not well established Michigan law regarding MDOC’s contrived justifications for withholding the requested materials. The motions also required drafting, myriad revisions that incorporate client and co-counsel

feedback, incorporation of information discovered through the discovery process, and other tasks to produce file-ready briefs, including preparation of exhibits. It should not be lost on either MDOC or the Court that Plaintiffs' briefs resulted in a judgment in Plaintiffs' favor.

In addition, the parties to these cases briefed cross-motions for summary disposition, which necessarily doubled the amount of work required to present the cases to the Court for its consideration. What's more, that the MDOC believed it had a plausible legal basis to seek summary disposition in *its* favor strains credibility given that it failed to even review the requested materials before denying both Woodman's and Joseph's FOIA requests.

Interrogatory No. 5:

Please explain the nature of your law firm's Pro bono Program including the existence of any incentives and/or requirements for participation as well as whether your law firm routinely seeks to collect awards of attorneys' fees in matters within the Program.

RESPONSE:

Honigman objects to this Interrogatory because it is vague. Honigman objects to this Interrogatory to the extent it seeks irrelevant information and is not reasonably calculated to lead to the discovery of relevant or admissible evidence. Honigman objects to this Interrogatory because the terms "nature of," "incentives and/or requirements," and "routinely" are vague and ambiguous. Honigman objects to this Interrogatory because it includes two separate questions that are properly two interrogatories, and MDOC is only permitted to ask five interrogatories.

Subject to these objections and the General Objections, Honigman requires its attorneys to meet the State Bar of Michigan's Voluntary Pro Bono Standard. Further answering, Honigman seeks to collect attorney's fees in matters in which such fees may be recovered under applicable law.

VERIFICATION

I declare and affirm under the penalty of perjury that the foregoing responses to MDOC's Interrogatories are true and correct to the best of my information, knowledge, and belief.

Date: January 22, 2020

Respectfully submitted,



As to objections to MDOC's Interrogatories only:

Respectfully submitted,

HONIGMAN LLP

By: /s/ Robert M. Riley _____

Robert M. Riley (P72290)
Cooperating Attorneys, American Civil
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rriley@honigman.com

Daniel S. Korobkin (P72842)
American Civil Liberties Union Fund of Michigan
2966 Woodward Avenue
Detroit, MI 48201
(313) 578-6824
dkorobkin@aclumich.org

Dated: January 22, 2020

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on January 22, 2020, a copy of the foregoing document was served on all counsel of record by first class mail.

/s/ Robert M. Riley
Robert M. Riley

STATE OF MICHIGAN
IN THE COURT OF CLAIMS

SPENCER WOODMAN,

Plaintiff,

Case No. 17-000082-MZ
Hon. Cynthia D. Stephens

v

MICHIGAN DEPARTMENT OF CORRECTIONS,

Defendant.

GEORGE JOSEPH,

Plaintiff,

Case No. 17-000230-MZ
Hon. Cynthia D. Stephens

v

MICHIGAN DEPARTMENT OF CORRECTIONS,

Defendant.

HONIGMAN LLP
Robert M. Riley (P72290)
Cooperating Attorneys, American Civil
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Attorneys for Defendant

Attorneys for Plaintiffs

Dept of Attorney General
JAN 27 2020
State Operations Division
RECEIVED

**DANIEL S. KOROBKIN'S RESPONSES AND OBJECTIONS TO
DEFENDANT MDOC'S INTERROGATORIES TO PLAINTIFFS' COUNSEL**

Daniel S. Korobkin, Plaintiffs' counsel in the above-captioned case, submits the following responses and objections to Defendant Michigan Department of Corrections' ("MDOC") Interrogatories to Plaintiffs' Counsel.

GENERAL OBJECTIONS

1. These responses are based on information available to Korobkin at this time and are made on the basis of current knowledge and belief after reasonable inquiry. Despite reasonable investigation and inquiry, Korobkin may be currently unaware of additional facts and/or documents that could affect these responses. Korobkin reserves the right to modify his responses as additional information and/or documents are discovered. Korobkin's responses are made without prejudice to its use or reliance on subsequently discovered information or documents.

2. Korobkin objects to the Interrogatories to the extent they seek information in Defendant's possession, custody, and/or control.

3. Korobkin objects to the Interrogatories to the extent they seek information protected by any privilege, including the work-product doctrine, attorney-client privilege, and accountant-client privilege.

4. Korobkin objects to the Interrogatories to the extent they seek to impose obligations on him beyond those imposed by the Michigan Court Rules or other applicable law.

5. Korobkin objects to the Interrogatories to the extent they seek information that is not relevant or likely to lead to the discovery of admissible evidence.

6. Korobkin objects to the Interrogatories to the extent they are designed to annoy, embarrass, oppress, and/or unduly burden him.

7. Korobkin is providing these responses without waiving the right to object to all or part of the Interrogatories should Defendant request additional information.

8. Korobkin provides these responses without waiving, or intending to waive, but on the contrary preserving, and intending to preserve: (a) the right to object, on the grounds of competency, confidentiality, privilege, relevance, or materiality, or any other proper grounds, to the use of these answers for any purpose, in whole or in part, in any subsequent stage or proceeding in this action or any other action; and (b) the right to object on any and all grounds, at any time, to other discovery involving or relating to the subject matter of the Interrogatories.

9. Nothing in these responses constitutes an assent to the terms, instructions, or definitions used in the Interrogatories, or any assumptions contained therein.

10. Korobkin does not concede the relevance of any information being provided in response to the Interrogatories, and expressly reserves the right to object to the introduction of any answers into evidence.

11. Any response containing privileged information shall not constitute a waiver of the privilege with respect to the subject matter addressed therein.

12. Korobkin reserves the right to rely, in any proceeding in this action or any other action, on documents and information beyond what he provides in response to the Interrogatories.

13. Korobkin reserves the right to make all appropriate objections at any hearing or trial in this matter regarding the subject matter of the Interrogatories

14. Each of the General Responses and Objections is incorporated by reference in each of the following Specific Responses.

RESPONSES AND OBJECTIONS TO INTERROGATORIES

Interrogatory No. 1:

Please identify the number of civil actions filed under MCL 15.240(1)(b) or MCL 15.240a(1)(b) that each attorney who billed time to the above-captioned matters has litigated. For your information, the relevant billing statements, which appear to contain a list of each attorney

who billed time to the above-captioned matters, can be found in Exhibits A and C to Plaintiff's Motion for Attorney's Fees, Costs, and Punitive Damages.

RESPONSE:

Korobkin objects to this Interrogatory because it is overbroad, vague, and unduly burdensome. Korobkin objects to this Interrogatory to the extent it seeks irrelevant information and is not reasonably calculated to lead to the discovery of relevant or admissible evidence. Korobkin objects to this Interrogatory because the terms "filed" and "litigated" are vague and ambiguous. Korobkin objects to this Interrogatory because the referenced statutes have been amended at various times and the Interrogatory is ambiguous as to which version(s) of the statutes MDOC is referring. Korobkin objects to this Interrogatory to the extent it implies that cases "filed" or "litigated" under the referenced statutes are the only cases that provide relevant experience to litigating *Woodman* and *Joseph*, in which Plaintiffs achieved a total victory on the merits, notwithstanding the specific FOIA experience (or lack thereof) of each of the attorneys who worked on these cases.

Subject to these objections and the General Objections, Korobkin states that he has litigated six FOIA actions.

Interrogatory No. 2:

Please identify the number of prospective paying clients that you and your law firm were precluded from representing as a result of the representation of Mr. Woodman and Mr. Joseph in Case Nos. 17-82-MZ and 17-230-MZ.

RESPONSE:

Korobkin objects to this Interrogatory because it is overbroad, vague, and unduly burdensome. Korobkin objects to this Interrogatory to the extent it seeks irrelevant information

and is not reasonably calculated to lead to the discovery of relevant or admissible evidence. Korobkin objects to this Interrogatory because the terms “prospective,” “paying clients,” and “precluded from representing” are vague and ambiguous.

Subject to these objections and the General Objections, Korobkin states that he does not represent prospective paying clients.

Interrogatory No. 3:

Please identify the number of civil actions, or other matters, in which you have represented Mr. Woodman and Mr. Joseph.

RESPONSE:

Korobkin objects to this Interrogatory because it is overbroad, vague, and unduly burdensome. Korobkin objects to this Interrogatory to the extent it seeks irrelevant information and is not reasonably calculated to lead to the discovery of relevant or admissible evidence. Korobkin objects to this Interrogatory because the terms “civil actions” and “other matters” are vague and ambiguous.

Subject to these objections and the General Objections, Korobkin states that he has represented Mr. Woodman or Mr. Joseph in two civil actions.

Interrogatory No. 4:

Exhibits A and C to Plaintiff’s Motion for Attorney’s Fees, Costs, and Punitive Damages indicate that Robert Riley, Daniel Korobkin, and Olivia Vizachero collectively billed more than 180 hours in drafting and preparing the following filings: Plaintiffs’ January 30, 2018 motion for summary disposition; Plaintiffs’ response to MDOC’s January 30, 2018 motion for summary disposition; and Plaintiffs’ February 26, 2018 reply brief. Please justify the number of hours billed for the filings mentioned in this Interrogatory by describing (1) any unordinary events and/or

circumstances which existed at the time of the filing, (2) to the novelty of the facts and law at issue, or (3) any other pertinent difficulties.

RESPONSE:

Korobkin objects to this Interrogatory because it is overbroad, vague, and unduly burdensome. Korobkin objects to this Interrogatory to the extent it seeks irrelevant information and is not reasonably calculated to lead to the discovery of relevant or admissible evidence. Korobkin objects to this Interrogatory because the terms “justify,” “unordinary events and/or circumstances,” “novelty of the facts and law at issue,” and “pertinent difficulties” are vague and ambiguous.

Subject to these objections and the General Objections, Korobkin relies on Honigman LLP’s response to this Interrogatory.

Interrogatory No. 5:

Please explain the nature of your law firm’s Pro bono Program including the existence of any incentives and/or requirements for participation as well as whether your law firm routinely seeks to collect awards of attorneys’ fees in matters within the Program.

RESPONSE:

Korobkin objects to this Interrogatory because it is vague. Korobkin objects to this Interrogatory to the extent it seeks irrelevant information and is not reasonably calculated to lead to the discovery of relevant or admissible evidence. Korobkin objects to this Interrogatory because the terms “nature of,” “incentives and/or requirements,” and “routinely” are vague and ambiguous. Korobkin objects to this Interrogatory because it includes two separate questions that are properly two interrogatories, and MDOC is only permitted to ask five interrogatories.

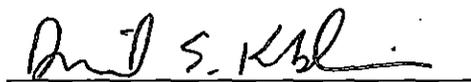
Subject to these objections and the General Objections, Korobkin states that this Interrogatory does not apply to him.

VERIFICATION

I declare and affirm under the penalty of perjury that the foregoing responses to MDOC's Interrogatories are true and correct to the best of my information, knowledge, and belief.

Date: January 22, 2020

Respectfully submitted,



As to objections to MDOC's Interrogatories only:

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION FUND OF MICHIGAN

By: /s/ Daniel S. Korobkin

Daniel S. Korobkin (P72842)

American Civil Liberties Union Fund of Michigan

2966 Woodward Avenue

Detroit, MI 48201

(313) 578-6824

dkorobkin@aclumich.org

Dated: January 22, 2020

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on January 22, 2020, a copy of the foregoing document was served on all counsel of record by first class mail.

/s/ Daniel S. Korobkin _____
Daniel S. Korobkin

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STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL



P.O. Box 30754
LANSING, MICHIGAN 48909

DANA NESSEL
ATTORNEY GENERAL

February 19, 2020

Clerk of the Court
Court of Claims
925 W. Ottawa St., 2nd Floor
Lansing, MI 48909-7522

Re: *Spencer Woodman v Michigan Department of Corrections*
Docket No. 17-000082-MZ

Dear Clerk:

Enclosed for filing in the above entitled matter, please find Defendant's Response to Plaintiff's 2019-02-13 Motion for Entry of Order along with Proof of Service upon Plaintiff's counsel.

Sincerely,

A handwritten signature in black ink, appearing to read "Adam R. de Bear", written over a circular stamp.

Adam R. de Bear
Assistant Attorney General
State Operations Division
(517) 335-7573

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COURT OF CLAIMS
JENNIFER W. HARRISON, CLERK

ARD/llw
Enc.

c: Robert M. Riley
Daniel S. Korobkin
2017-0177379-A

RECEIVED by MSC 7/22/2022 3:56:19 PM

STATE OF MICHIGAN
COURT OF CLAIMS

SPENCER WOODMAN,
PLAINTIFF,

v

MICHIGAN DEPARTMENT OF
CORRECTIONS,
DEFENDANT.

NO. 17-000082-MZ

HON. CYNTHIA D. STEPHENS

GEORGE JOSEPH,
PLAINTIFF,

v

MICHIGAN DEPARTMENT OF
CORRECTIONS,
DEFENDANT.

NO. 17-000230-MZ

HON. CYNTHIA D. STEPHENS

PROOF OF SERVICE

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Eric M. Jamison (P75721)
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STATE OF MICHIGAN
COURT OF CLAIMS
SERVED BY ZIMMERMAN, J. OLIVER

STATE OF MICHIGAN
COURT OF CLAIMS

SPENCER WOODMAN,

PLAINTIFF,

NO. 17-000082-MZ

v

HON. CYNTHIA D. STEPHENS

MICHIGAN DEPARTMENT OF
CORRECTIONS,

DEFENDANT.

GEORGE JOSEPH,

PLAINTIFF,

NO. 17-000230-MZ

HON. CYNTHIA D. STEPHENS

v

MICHIGAN DEPARTMENT OF
CORRECTIONS,

DEFENDANT.

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STATE OF MICHIGAN

DEFENDANT'S RESPONSE
TO PLAINTIFFS' 2019-02-13 MOTION FOR ENTRY OF ORDER

ARGUMENT

In their motion, Plaintiff attempts to place blame on MDOC for the parties' inability to provide the Court with a stipulated-to-form order. But in their attempts to assign blame, Plaintiffs misrepresent the following: (1) the parties' communications after the January 29, 2020 hearing; and (2) the Court's oral rulings as reflected by the plain language of the transcript.

First, as to Plaintiffs' misrepresentation of the parties' post-hearing communications, Plaintiffs fail to mention that the undersigned proposed two separate orders for entry with the Court. (See Ex A, January 31, 2020 email and attachment); Ex B, February 10, 2020 email and attachment.) What is more, Plaintiffs neglect to inform the Court that they never contested the accuracy of MDOC's initial proposed order. Instead, Plaintiffs now accuse MDOC's counsel of "fail[ing] to listen to the Court's rulings[,]" and "want[ing] to relitigate" Plaintiffs' motion for attorneys' fees. (Pls' Br, at 1.) But a review of MDOC's proposed orders and the email communications between counsel demonstrate that these assertions are not true. (See Ex C, February 12, 2020 email in which MDOC's counsel "agree[d] that an order should be entered[,]" but further informed Plaintiff's counsel that "MDOC does not concur to the entry of the order that Honigman proposed which includes findings of law that were not specifically made by the Court.")

Second, as to Plaintiff's misrepresentation of the Court's oral rulings, the Court never ruled that Plaintiffs prevailed *in full* or that all of the hours Plaintiffs'

attorneys worked were reasonably necessary for the prosecution of this case.

Regarding Plaintiffs' status as prevailing parties, MDOC recognizes that, due to the Court's disposition of the parties' dispositive motions, Plaintiffs are prevailing parties because the filing of the lawsuits "had a substantial causative effect on the delivery of or access to the [videos]." See *Estate of Nash by Nash v City of Grand Haven*, 321 Mich App 587, 606 (2017). But being a prevailing party is different from being a completely prevailing party, see *id.*, and, while this Court did rule that Plaintiffs were prevailing parties, it never ruled Plaintiffs' prevailed *completely* or *in full*. For this reason, the undersigned informed Plaintiffs' counsel that it would not agree to including a finding of law that Plaintiffs prevailed completely or in full. (See Ex B, p 1.)

Regarding the inclusion of a finding that the hours worked by Plaintiff's counsel were reasonably necessary to the prosecution of these cases, MDOC similarly informed Plaintiff's counsel that no such finding was made. Specifically, the undersigned informed Plaintiff's counsel that "declining to find that hours worked are unreasonable is not the same thing as explicitly finding that the hours were reasonable." (*Id.*) For this reason, and because the Court found the fact that no compromise had been reached on the claim of attorneys' fees for multiple counsel to be "utterly amazing[.]" (see Hearing Tr, Pls' Ex C, 5:15–22), the undersigned

informed Plaintiff's counsel that MDOC could not "stipulate[e] to the inclusion of a finding that the number of hours worked was reasonable."¹ (Ex B, p 1.)

In the end, nowhere in the highlighted portions of the hearing transcript did this Court explicitly rule that Plaintiffs prevailed in full or that the hours Plaintiffs' counsel worked were reasonable. (See Hearing Tr, Pls' Ex C, p 8:21–23, 28:20–22, 29:6–13, 30:6–22.) Indeed, MCR 2.612(A)(1) does provide the Court with discretion to clarify its rulings made on the record at the January 29, 2020 hearing. But in the interest of simplicity and bringing this matter to a close, MDOC has attached as Exhibit D a proposed order that accurately reflects the Court's rulings.

MDOC's proposed order provides in relevant part that "for the reasons stated on the record":

1. The ACLU is awarded 100% of its requested attorney's fees in the amount of \$14,200.
2. Honigman LLP is awarded 10% of its requested attorney's fees in the amount of \$19,218.63.
3. Honigman LLP is awarded costs in the amount of \$3,027.36. These costs do not include costs related to online legal research.
4. Plaintiffs' request for punitive damages is denied. [Ex D, Proposed Order.]

Critically, Plaintiffs' cannot contest that the above language in MDOC's proposed order accurately reflects the Court's rulings made on the record on January 29, 2020.

¹ MDOC did not object to including a finding of law in the proposed order that Plaintiffs' hourly rates were reasonable because the Court did include such a finding.

CONCLUSION AND RELIEF REQUESTED

In the end, the Court did not find as a matter of law that Plaintiffs prevailed in full or that the hours worked by Plaintiffs' counsel were reasonable. For this reason, MDOC requests that the Court deny Plaintiffs' request to enter the order attached as Plaintiffs' exhibit A. Further, because it is not contested that the language in MDOC's proposed order accurately reflects the Court's rulings, MDOC requests that the Court enter Defendant's Exhibit D as an order so that these consolidated cases can finally be closed.

Respectfully submitted,

Dana Nessel
Attorney General



Assistant Attorney General
Attorneys for MDOC
State Operations Division
PO Box 30754
Lansing, MI 48909
(517) 335-7573

Dated: February 19, 2020

AG# 2017-0177379-A

Exhibit A

de Bear, Adam (AG)

From: de Bear, Adam (AG)
Sent: Friday, January 31, 2020 5:45 PM
To: 'Riley, Robert M.'; Dan Korobkin
Cc: Jamison, Eric (AG)
Subject: Woodman/Joseph v MDOC: Court of Claims Nos. 17-82-MZ and 17-230-MZ
Attachments: Order Granting in Part Denying in Part Pls' Mot for Attorneys Fees, Costs, Pun Damages_Woodman v MDOC.docx

Hi, Robert and Dan,

I've attached a draft order for filing with the Court. Please review and let me know whether you see any changes that need to be made (it is also likely that several typos are evading me). Additionally, please double check the total numbers to make sure that they are correct, and if they are mistaken, please let me know how you arrived at your calculation so that I may compare to my calculations.

After the order is entered by the Court, I will eventually need to get the information from both of you that is necessary to enroll you as a payee on the State's electronic payment system. Dan, I assume that that the ACLU is already registered given my understanding of the disposition of several § 1983 case that ACLU Michigan has been involved with. But in any event, I'll get more information early next week about the process of registering and transmitting payment. Feel free to call or email if you'd like to discuss in more detail.

Additionally, do either of you plan on filing a claim of appeal? If you can't answer this question at this point in time, however, I do understand.

Thanks again,

Adam

—
Adam R. de Bear
Michigan Department of Attorney General
State Operations Division
525 W Ottawa St
Lansing, MI 48933
(517) 335-7573

Notice: This email, including attachments, may contain confidential or privileged information and is solely for the use of the intended recipient. If you have received this communication in error, please notify the sender immediately and delete this message from your system. Any use, distribution, or reproduction of this message by unintended recipients is not authorized and may be unlawful.

STATE OF MICHIGAN
COURT OF CLAIMS

SPENCER WOODMAN,

PLAINTIFF,

v

MICHIGAN DEPARTMENT OF
CORRECTIONS,

DEFENDANT.

NO. 17-000082-MZ

HON. CYNTHIA D. STEPHENS

GEORGE JOSEPH,

PLAINTIFF,

v

MICHIGAN DEPARTMENT OF
CORRECTIONS,

DEFENDANT.

NO. 17-000230-MZ

HON. CYNTHIA D. STEPHENS

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**ORDER GRANTING IN PART AND DENYING IN PART
PLAINTIFFS' 2019-10-02 MOTION FOR ATTORNEYS' FEES, COSTS,
AND PUNITIVE DAMAGES**

At a session of said Court, held in
the County of Wayne, City of Detroit,
State of Michigan, on: January 29, 2020

PRESENT: _____
Hon. Cynthia D. Stephens

This matter having come before the Court on Plaintiffs' motion for attorneys' fees, costs, and punitive damages, the parties having given oral argument, and for the reasons stated orally on the record, **IT IS HEREBY ORDERED** as follows:

1. The American Civil Liberties Union Fund of Michigan, as Plaintiffs' counsel, shall receive the entirety of its requested award of reasonable attorneys' fees in the amount of \$14,200.
2. Honigman LLP, as Plaintiffs' counsel, shall receive 10 percent of its requested award of reasonable attorneys' fees for a total amount of \$19,218.63.
3. Honigman LLP, as Plaintiffs' counsel, shall receive all requested costs with the exception of those costs reflecting "Westlaw Research" for a total amount of \$3,027.36.
4. Plaintiffs' request for an award of punitive damages against Defendant is denied.
5. This order resolves all pending claims and closes the case.

IT IS SO ORDERED.

Date

Hon. Cynthia D. Stephens
Court of Claims Judge

Approved as to form:

/s/

Daniel S. Korobkin (P72842)
ACLU Fund of Michigan
Attorney for Plaintiffs

Dated:

/s/

Robert M. Riley (P72290)
Honigman LLP
Attorney for Plaintiffs

Dated:

/s/Adam R. de Bear

Adam R. de Bear (P80242)
Assistant Attorney General
Attorney for Defendant

Dated: January 31, 2020

RECEIVED by MSC 7/22/2022 3:56:19 PM

Exhibit B

de Bear, Adam (AG)

From: de Bear, Adam (AG)
Sent: Monday, February 10, 2020 3:07 PM
To: 'Riley, Robert M.'; Dan Korobkin
Cc: Jamison, Eric (AG)
Subject: RE: Woodman/Joseph v MDOC: Court of Claims Nos. 17-82-MZ and 17-230-MZ
Attachments: 2020-02-04 Order on Motion for Attorney_s Fees Costs and Punitive Damages_ARD edits.docx

Hi, Robert,

With respect to paragraph 1 of your proposed order, there is no need to include a provision in the order regarding prevailing-party status. It is clear from these cases' procedural history that Plaintiffs prevailed in part. Specifically, throughout the entirety of these lawsuits, your clients insisted that there were no security concerns inherent with the disclosure of the requested videos. See, e.g., Pls' 30/01/2018 mot for summ disp, p. 13 ("MDOC incorrectly claims that disclosing the videos would jeopardize the safety of other inmates and prison officers" because "[t]hose present [would be] able to identify the other inmate involved and the identities of the officers that responded to the incident"). Then, after a referral by the Court, the Special Master concluded that the identities of the MDOC staff members and other inmates involved were security concerns. As a result of this finding, and after a motion for reconsideration, the Court permitted MDOC to redact the portions of the videos that were determined by the Special Master to constitute security concerns. In short, your clients insisted that they were entitled to receive unredacted videos and to know the identities of the responding officers and other inmates. But they received redacted videos. And the identities of the responding officers and other inmates were protected from disclosure.

In any event, should you feel that it is necessary to include a paragraph that discusses prevailing-party status, MDOC would stipulate to the following change which accurately reflects these cases' disposition: "Plaintiffs Spencer Woodman and George Joseph partially prevailed in these consolidated cases." In the end, however, MDOC cannot stipulate to the inclusion of a finding that Plaintiffs prevailed completely because such a finding (1) was never made, (2) would be inconsistent with the procedural history of these cases, and (3) would be contrary to the plain language of MCL 15.240(6).

With respect to paragraph 3 of your proposed order, apart from your description of double negatives, you cite no relevant statement in the transcript to support the assertion that the Court ruled that the hours worked by Honigman were reasonable. Simply put, declining to find that hours worked are unreasonable is not the same thing as explicitly finding that the hours were reasonable. What's more, the Court found the fact that no compromise had been reached on your claim of attorneys' fees for multiple counsel to be "utterly amazing[.]" (Tr, 5:15-22.) This statement together with the fact that the Court did not expressly find the number of hours worked by each Honigman attorney to be reasonable prevents MDOC from stipulating to the inclusion of a finding that the number of hours worked was reasonable.

Simply stated, any reluctance to stipulate to the form of your proposed order is not disingenuous. Rather, the reluctance exists because Honigman is insisting that MDOC stipulate to material findings of law that were never made by the Court of Claims.

Finally, in the interest of “bring[ing] this matter to a close[.]” please see the attached revisions to your most recent proposed order. If these revisions meet your approval, you may file the revised order with the Court so that these consolidated cases will finally be closed and we can discuss the process and manner of payment of the awarded fees and costs.

Thanks,

Adam

From: Riley, Robert M. <RRiley@honigman.com>
Sent: Friday, February 7, 2020 4:32 PM
To: de Bear, Adam (AG) <deBearA@michigan.gov>; Dan Korobkin <dkorobkin@aclumich.org>
Cc: Jamison, Eric (AG) <JamisonE@michigan.gov>
Subject: RE: Woodman/Joseph v MDOC: Court of Claims Nos. 17-82-MZ and 17-230-MZ

Adam,

We’ve reflected further on the MDOC’s position regarding paragraphs 1 and 3 of the draft order.

With respect to paragraph 1, we agree that the MDOC neither prevailed in full nor in part. The only logical corollary to the MDOC’s failure to prevail is that Plaintiffs did in fact prevail in full. It’s disingenuous to suggest that because Judge Stephens didn’t state as much on the record, that Plaintiffs somehow weren’t the prevailing party. A suggestion to the contrary implies that Plaintiffs somehow didn’t obtain the relief we sought, which Plaintiffs very clearly did, including an award of attorney’s fees. I’m happy to include in the order the language you suggested that MDOC didn’t prevail in full or part, but by the same token, it is only fair to include language that Plaintiffs did prevail. Simply put, that was the outcome of the case.

Similarly, with respect to paragraph 3, Judge Stephens used a double negative with respect to the reasonableness of the hours Honigman worked. When something is unreasonable, it is by definition “not reasonable.” Thus, when something is “not unreasonable,” it is not “not reasonable.” In other words, it is “reasonable”—the two “nots” cancel each other out. It is abundantly clear from the transcript that Judge Stephens believed Honigman’s rates and hours were reasonable, but that she declined to award the entire requested fee amount because of the pro bono nature of our engagement. She expressly stated that she would not second guess the hours we worked.

Dan and I respectfully request that you reconsider your position on these paragraphs. Plaintiffs are attempting to bring this matter to a close and our proposed order comports with the letter and spirit of the Judge’s statements on the record. Please let us know if you’ll agree so we can get the order on file.

Thanks, and have a nice weekend.

Robert M. Riley
Partner, Litigation Department

HONIGMAN LLP
O 313.465.7572
rriley@honigman.com

From: de Bear, Adam (AG) <deBearA@michigan.gov>
Sent: Tuesday, February 4, 2020 5:23 PM
To: Riley, Robert M. <RRiley@honigman.com>; Dan Korobkin <dkorobkin@aclumich.org>
Cc: Jamison, Eric (AG) <JamisonE@michigan.gov>
Subject: RE: Woodman/Joseph v MDOC: Court of Claims Nos. 17-82-MZ and 17-230-MZ

[EXTERNAL EMAIL]

Hi, Robert,

Could you do me a favor and forward me the portions of the transcript in which Judge Stephens stated that the hours worked by Honigman were reasonable and that the 10 percent award was based solely on its pro bono status?

My notes did not capture either finding (and I do recall Judge Stephens at the outset of the hearing expressing some disbelief as to why the parties hadn't settled claims for the fees of multiple attorneys), so I would need to review the relevant portions of the transcript before agreeing to the revised order.

Thanks,

Adam

From: Riley, Robert M. <RRiley@honigman.com>
Sent: Tuesday, February 4, 2020 10:16 AM
To: de Bear, Adam (AG) <deBearA@michigan.gov>; Dan Korobkin <dkorobkin@aclumich.org>
Cc: Jamison, Eric (AG) <JamisonE@michigan.gov>
Subject: RE: Woodman/Joseph v MDOC: Court of Claims Nos. 17-82-MZ and 17-230-MZ

Hi Adam,

Thanks for putting together the draft order. I've made a few suggested edits in the attached version (along with a redline) to more fully capture the basis for the order (namely that (i) Plaintiffs prevailed, (ii) Plaintiffs' attorneys rates and hours were reasonable, and (iii) that the 10% award to Honigman was on account of its pro bono representation). I tried to use Judge Stephens' language as reflected on the transcript.

Let us know if you're amenable to these revisions, and if so, we can email the order to Judge Stephens' clerk and file it with the Court of Claims as well.

I don't have an answer to your question about whether Plaintiffs will appeal.

Thanks.

Robert M. Riley
Partner, Litigation Department

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rriley@honigman.com

From: de Bear, Adam (AG) [<mailto:deBearA@michigan.gov>]
Sent: Friday, January 31, 2020 5:45 PM
To: Riley, Robert M. <RRiley@honigman.com>; Dan Korobkin <dkorobkin@aclumich.org>
Cc: Jamison, Eric (AG) <JamisonE@michigan.gov>
Subject: Woodman/Joseph v MDOC: Court of Claims Nos. 17-82-MZ and 17-230-MZ

[EXTERNAL EMAIL]

Hi, Robert and Dan,

I've attached a draft order for filing with the Court. Please review and let me know whether you see any changes that need to be made (it is also likely that several typos are evading me). Additionally, please double check the total numbers to make sure that they are correct, and if they are mistaken, please let me know how you arrived at your calculation so that I may compare to my calculations.

After the order is entered by the Court, I will eventually need to get the information from both of you that is necessary to enroll you as a payee on the State's electronic payment system. Dan, I assume that the ACLU is already registered given my understanding of the disposition of several § 1983 case that ACLU Michigan has been involved with. But in any event, I'll get more information early next week about the process of registering and transmitting payment. Feel free to call or email if you'd like to discuss in more detail.

Additionally, do either of you plan on filing a claim of appeal? If you can't answer this question at this point in time, however, I do understand.

Thanks again,

Adam

Adam R. de Bear
Michigan Department of Attorney General
State Operations Division
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Lansing, MI 48933
(517) 335-7573

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RECEIVED by MSC 7/22/2022 3:56:19 PM

STATE OF MICHIGAN
COURT OF CLAIMS

SPENCER WOODMAN,

PLAINTIFF,

NO. 17-000082-MZ

v

HON. CYNTHIA D. STEPHENS

MICHIGAN DEPARTMENT OF
CORRECTIONS,

DEFENDANT.

GEORGE JOSEPH,

PLAINTIFF,

NO. 17-000230-MZ

HON. CYNTHIA D. STEPHENS

v

MICHIGAN DEPARTMENT OF
CORRECTIONS,

DEFENDANT.

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Attorneys for Plaintiff

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Eric M. Jamison (P75721)
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Michigan Department of Attorney General
State Operations Division
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deBearA@michigan.gov
JamisonE@michigan.gov

Attorneys for Defendant

**ORDER GRANTING IN PART AND DENYING IN PART
PLAINTIFFS' 2019-10-02 MOTION FOR ATTORNEYS' FEES, COSTS,
AND PUNITIVE DAMAGES**

At a session of said Court, held in
the County of Wayne, City of Detroit,
State of Michigan, on: January 29, 2020

PRESENT: _____
Hon. Cynthia D. Stephens

This matter having come before the Court on Plaintiffs' motion for attorneys' fees, costs, and punitive damages, the Court having heard oral argument, the Court otherwise being advised in the premises, and for the reasons stated on the record;

IT IS HEREBY ORDERED as follows:

~~1. Plaintiffs Spencer Woodman and George Joseph are the prevailing parties in these cases.~~

~~2.1. The hourly rates charged by each of the attorneys representing Plaintiffs throughout these cases (including the attorneys at Honigman LLP ("Honigman") and the American Civil Liberties Union Fund of Michigan (the "ACLU")) are reasonable hourly rates and comport with fees customarily charged in the locality for similar legal services.~~

~~3. The number of hours worked on these cases by each of the attorneys representing Plaintiffs (including the attorneys at Honigman and the ACLU) was reasonably necessary for the prosecution of these cases.~~

~~4.2. The ACLU is awarded 100% of its requested attorney's fees in the amount of \$14,200.~~

5.3. Because it represented Plaintiffs on a pro bono basis, Honigman is awarded 10% of its requested attorney's fees in the amount of \$19,218.63.

6.4. Honigman is awarded costs in the amount of \$3,027.36. These costs do not include costs related to online legal research.

7.5. Plaintiffs' motion for punitive damages is denied.

THIS IS A FINAL ORDER THAT DISPOSES OF ALL REMAINING CLAIMS AND CLOSES THE CASE.

IT IS SO ORDERED.

Date

Hon. Cynthia D. Stephens
Court of Claims Judge

Approved as to form:

/s/
Daniel S. Korobkin (P72842)
ACLU Fund of Michigan
Attorney for Plaintiffs

Dated:

/s/
Robert M. Riley (P72290)
Honigman LLP
Attorney for Plaintiffs

Dated:

/s/Adam R. de Bear
Adam R. de Bear (P80242)
Assistant Attorney General
Attorney for Defendant

Dated: January 31, 2020

Exhibit C

de Bear, Adam (AG)

From: Riley, Robert M. <RRiley@honigman.com>
Sent: Wednesday, February 12, 2020 11:24 AM
To: de Bear, Adam (AG)
Cc: Jamison, Eric (AG); Dan Korobkin
Subject: RE: Woodman/MDOC - motion concurrence

Thanks, Adam. We disagree on the Court's findings and I disagree with your statement that we have proposed an order inconsistent with the Judge's rulings. We'll let the Court sort this out.

Robert M. Riley
Partner, Litigation Department

HONIGMAN LLP
O 313.465.7572
rriley@honigman.com

From: de Bear, Adam (AG) <deBearA@michigan.gov>
Sent: Wednesday, February 12, 2020 11:19 AM
To: Riley, Robert M. <RRiley@honigman.com>
Cc: Jamison, Eric (AG) <JamisonE@michigan.gov>; Dan Korobkin <dkorobkin@aclumich.org>
Subject: Re: Woodman/MDOC - motion concurrence

[EXTERNAL EMAIL]

Hi, Robert,

MDOC agrees that an order should be entered. And in the interest of transparency, I would request that Honigman inform the Court that MDOC proposed two draft orders (one that I drafted and one that I made revisions to) that accurately reflected the Court's disposition of the motion for attorney's fees.

But you are correct that MDOC does not concur to the entry of the order that Honigman proposed which includes findings of law that were not specifically made by the Court.

Additionally, let me know if you'd like to discuss by phone further. The State's Lansing offices are closed today, so I'll have to call you on my cell phone.

Thanks,

Adam

Adam R. de Bear
Michigan Department of Attorney General
State Operations Division
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From: Riley, Robert M. <RRiley@honigman.com>
Sent: Wednesday, February 12, 2020 10:33:27 AM
To: de Bear, Adam (AG) <deBearA@michigan.gov>
Cc: Jamison, Eric (AG) <JamisonE@michigan.gov>; Dan Korobkin <dkorobkin@aclumich.org>
Subject: Woodman/MDOC - motion concurrence

Adam,

Plaintiffs intend to file today a Motion for Entry of Order on Motion for Attorney's Fees, Costs, and Punitive Damages and Entry of Final Judgment in the *Woodman* and *Joseph* matters. Our email and phone correspondence over the last week suggests that the MDOC does not concur in the relief we are seeking (entry of the order we proposed). If I am incorrect in that assumption, please let me know.

Thanks,
-Robert

Robert M. Riley
Partner, Litigation Department

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rriley@honigman.com

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Exhibit D

STATE OF MICHIGAN
COURT OF CLAIMS

SPENCER WOODMAN,

PLAINTIFF,

NO. 17-000082-MZ

v

HON. CYNTHIA D. STEPHENS

MICHIGAN DEPARTMENT OF
CORRECTIONS,

DEFENDANT.

GEORGE JOSEPH,

PLAINTIFF,

NO. 17-000230-MZ

HON. CYNTHIA D. STEPHENS

v

MICHIGAN DEPARTMENT OF
CORRECTIONS,

DEFENDANT.

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Eric M. Jamison (P75721)
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ACLU Fund of Michigan
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Attorneys for Defendant

Attorneys for Plaintiff

**ORDER GRANTING IN PART AND DENYING IN PART
PLAINTIFFS' 2019-10-02 MOTION FOR ATTORNEYS' FEES, COSTS,
AND PUNITIVE DAMAGES**

At a session of said Court, held in
the County of Wayne, City of Detroit,
State of Michigan, on: January 29, 2020

PRESENT: _____
Hon. Cynthia D. Stephens

This matter having come before the Court on Plaintiffs' motion for attorneys' fees, costs, and punitive damages, the Court having heard oral argument, the Court otherwise being advised in the premises, and for the reasons stated on the record;

IT IS HEREBY ORDERED as follows:

1. The ACLU is awarded 100% of its requested attorney's fees in the amount of \$14,200.
2. Honigman LLP is awarded 10% of its requested attorney's fees in the amount of \$19,218.63.
3. Honigman LLP is awarded costs in the amount of \$3,027.36. These costs do not include costs related to online legal research.
4. Plaintiffs' request for punitive damages is denied.

**THIS IS A FINAL ORDER THAT DISPOSES OF ALL REMAINING CLAIMS
AND CLOSES THE CASE.**

IT IS SO ORDERED.

Date

Hon. Cynthia D. Stephens
Court of Claims Judge