

STATE OF MICHIGAN

SUPREME COURT

Appeal From the Michigan Court Of Appeals
Jane M. Beckering, PJ, Michael J. Kelly, and Colleen A. O'Brien, JJ

SUSAN BISIO,

Plaintiff-Appellant,

Supreme Court No. 158240

v

Court of Appeals No. 335422

THE CITY OF THE
VILLAGE OF CLARKSTON,

Oakland County Circuit Court
Case No. 2015-150462-CZ

Defendant-Appellee.

Richard Bisio (P30246)
Kemp Klein Law Firm
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(248) 433-2000

APPELLANT SUSAN BISIO'S APPENDIX

Appendix Contents

Lower Court Docket Entries

Oakland County Circuit Court, case no. 2015-150462-CZ	4a
Court of Appeals, docket no. 335422	11a

Lower Court Opinions

Circuit Court Opinion and Order (on cross-motions for summary disposition), filed 10/20/16	17a
(Corrected) Circuit Court Opinion and Order (on cross-motions for summary disposition), filed 10/21/16	36a
Unpublished per curiam opinion of the Court of Appeals, docket no. 335422, 7/3/18	55a

Correspondence Regarding FOIA Request

Excerpts from FOIA request letter listing contested records	65a
FOIA request, 6/7/15	68a
Ryan letter, 6/30/15	75a
Letter to FOIA coordinator, 8/24/15	77a
Ryan letter, 10/19/15	81a

Other Documents

Charter, City of the Village of Clarkston, 1/13/92	83a
Ryan invoice, 2/2/15	134a
Ryan invoice, 3/2/15	136a
Ryan invoice, 4/2/15	140a
Ryan invoice, 5/1/15	144a
Ryan invoice, 6/1/15	148a

Other Court Filings

Defendant's Response to First Requests for
Admission and Second Interrogatories to Defendant, 6/7/16 151a

Defendant's Answer to Plaintiff's Third Requests for
Admission and Fifth Interrogatories to Defendant, 7/27/16 157a

Defendant's Amended Answers to Plaintiff's Second Requests
for Admissions and Third Interrogatories to Defendant, 7/28/16 160a

Deposition Transcripts

Carol Eberhardt, 7/28/16 175a

Thomas J. Ryan, 8/9/16 217a

Unpublished Opinions

Johnston v Ashby Drain Dist, unpublished per curiam opinion
of the court of appeals, docket no. 244454, 2/24/2004 260a

Amberg v Dearborn, unpublished per curiam opinion
of the court of appeals, docket no. 311722, 3/25/2014 263a

Bormuth v Jackson, unpublished per curiam opinion
of the court of appeals, docket no. 347449, 10/15/2019 267a

Court Explorer

Register of Actions

Case Number	2015-150462-CZ	Entitlement	BISIO SUSAN vs. CITY OF VILLAGE OF CLARKSTON
Judge Name	LEO BOWMAN	Case E-Filed	YES
Case Filed	12/04/2015	Case Disposed	10/19/2016

Date	Code	Desc
09/27/2019	OTH	STATUS REPORT RE COA ORD FILED/PLF
09/27/2019	MPS	MIFILE PROOF OF SERVICE FILED
08/17/2018	OTH	STATUS REPORT FILED/PLF
08/17/2018	POS	AFFIDAVIT/PROOF OF SERVICE FILED
07/05/2018	OTH	STATUS REPORT FILED
07/05/2018	POS	AFFIDAVIT/PROOF OF SERVICE FILED
07/03/2018	OPN	OPINION FILED & ORD/COA
05/23/2017	OTH	STATUS REPORT FILED/POS/PLF
05/11/2017	NTC	NOTICE FILED REQ FOR FILE/COA
05/11/2017	SEN	SENT TO COA/FTP/MF
04/07/2017	OTH	STATUS REPORT FILED
03/09/2017	OTH	STATUS REPORT FILED/POS
02/16/2017	ORD	ORDER FILED RE MTN FOR COSTS/ATTY FEES
01/11/2017	TRN	TRANSCRIPT FILED MTN 03/30/16/NTC
01/11/2017	TRN	TRANSCRIPT FILED MTN 10/19/16
01/11/2017	TRN	TRANSCRIPT FILED MTN 06/08/16
01/11/2017	TRN	TRANSCRIPT FILED MTN 05/25/16
01/11/2017	TRN	TRANSCRIPT FILED MTN7/20/16
01/11/2017	TRN	TRANSCRIPT FILED MTN 07/27/16
01/11/2017	TRN	TRANSCRIPT FILED 08/10/16
01/11/2017	OTH	STATUS REPORT FILED
11/29/2016	OTH	EXH A TO STATUS REPORT FILED

Oakland County Circuit Court Case 2015-150462-CZ
Docket Entries

RECEIVED by MSC 11/20/2019 10:01:50 AM

Date	Code	Desc
11/28/2016	OTH	STATUS REPORT FILED
11/23/2016	M	MOTION FOR COSTS; TUA
11/23/2016	APR	DATE SET FOR STAT CONF ON 02232017 08 30 AM Y 09
11/23/2016	ORD	ORDER FILED DFT MTN COSTS/ATTY FEES TUA
11/15/2016	MPR	MOTION PRAECIPE FILED FOR 11232016 JUDGE 09
11/15/2016	NOH	NOTICE OF HEARING FILED /POS
11/09/2016	REP	REPLY FILED SUPPT MTN COSTS/ATTY FEES/POS/DFT
11/04/2016	NOH	NOTICE OF HEARING FILED /POS
11/04/2016	RES	RESPONSE FILED PLF/OPPOSING DFT MTN FOR COSTS
11/02/2016	CA	CLAIM OF APPEAL FILED
11/01/2016	MTN	MOTION FILED COSTS/ATTY FEES/BRF/NOH/POS/DFT
11/01/2016	MPR	MOTION PRAECIPE FILED FOR 11092016 JUDGE 09
10/31/2016	APP	APPEARANCE FILED /POS DFT
10/21/2016	OPN	OPINION FILED /ORD RE MSD
10/20/2016	OPN	OPINION FILED /ORDER RE MTN FOR SD/POS
10/19/2016	M	MOTION FOR SUMM DISP; GRANTED
10/19/2016	FDS	FINAL DISP-SUMMARY DISP
10/11/2016	RES	RESPONSE FILED IN OPPT TO MTN/POS/DFT
10/05/2016	MPR	MOTION PRAECIPE FILED FOR 10192016 JUDGE 09
10/05/2016	RES	RESPONSE FILED OPP PLF CRSSMTN SUM DISP/BRF/POS/DFT
09/21/2016	MPR	MOTION PRAECIPE FILED FOR 10192016 JUDGE 09
09/21/2016	MTN	MOTION FILED FOR ORD REQ DFT JUSTIFY CLAIMS/BRF /POS/PL
09/21/2016	NOH	NOTICE OF HEARING FILED
09/20/2016	NOH	NOTICE OF HEARING FILED
09/20/2016	NOH	NOTICE OF HEARING FILED
09/20/2016	MPR	MOTION PRAECIPE FILED FOR 10192016 JUDGE 09
09/20/2016	MTN	MOTION FILED PLF/CRS SUM DISP/BRF
09/20/2016	RES	RESPONSE FILED TO DFT MSD/REQ SUM DISP/POS/PLF
09/12/2016	SO	SCHEDULING ORDER FILED RE DFT MTN SUM DISP BRF
09/12/2016	SO	SCHEDULING ORDER FILED RE PLF CRSSMTN SUM DISP
09/09/2016	NOH	NOTICE OF HEARING FILED /POS

Oakland County Circuit Court Case 2015-150462-CZ
Docket Entries

RECEIVED by MSC 11/20/2019 10:01:50 AM

Date	Code	Desc
09/08/2016	MTN	MOTION FILED SUM DISP/BRF/NOH/POS/DFT
08/31/2016	RES	RESPONSE FILED REQ ADMISS/INT/POS/PLF
08/29/2016	RES	RESPONSE FILED MTN PROTECT ORD/BRF/POS/DFT
08/24/2016	RES	RESPONSE FILED INT/REQ DOC/POS/DFT
08/19/2016	NOH	NOTICE OF HEARING FILED
08/19/2016	MTN	MOTION FILED PROTECT ORD/BRF/POS/PLF
08/19/2016	MPR	MOTION PRAECIPE FILED FOR 08312016 JUDGE 09
08/18/2016	REQ	REQUEST FILED DFT 2ND ADM TO PLF & INT/POS
08/11/2016	ORD	ORDER FILED DENY DFT MTN PROTECTIVE ORD
08/10/2016	M	MOTION FOR PROTECTIVE ORDER; DENIED
08/03/2016	RES	RESPONSE FILED OPP MTN PROTECT ORD/POS/PLF
08/02/2016	MPR	MOTION PRAECIPE FILED FOR 08102016 JUDGE 09
08/02/2016	MTN	MOTION FILED DFT/FOR PROTECTIVE ORD/BRF/NOH/POS
07/29/2016	NTC	NOTICE FILED TAKING DEPO BISIO/POS
07/28/2016	ORD	ORDER FILED GRNT PRT PLF MTN DISC SNCTNS/OTHER RELIEF
07/28/2016	ANS	ANSWER FILED /AMD TO REQ FOR ADMISS/INT/POS/DFT
07/27/2016	ANS	ANSWER FILED DFT TO 3RD REQ ADM & 5TH INT/POS
07/27/2016	M	MOTION FOR DISC SANCTIONS; GRANTED IN PART
07/25/2016	POS	AFFIDAVIT/PROOF OF SERVICE FILED
07/22/2016	RES	RESPONSE FILED TO MTN DISCOVERY/BRF/POS/DFT
07/21/2016	ADJ	ORDER OF ADJOURNMENT FILED CASE EVAL/REMOVE FR CASE EV
07/20/2016	MPR	MOTION PRAECIPE FILED FOR 07272016 JUDGE 09
07/20/2016	NOH	NOTICE OF HEARING FILED
07/20/2016	MTN	MOTION FILED DISC SNCTNS/BRF/POS/PLF
07/20/2016	M	MOTION TO REMOVE FROM CASE EVAL; GRANTED
07/15/2016	REQ	REQUEST FILED ADMISS/INT/TO DFT/POS/PLF
07/13/2016	MPR	MOTION PRAECIPE FILED FOR 07202016 JUDGE 09
07/13/2016	MTN	MOTION FILED REMOVE CASE EVAL/BRF/NOH/POS/DFT
07/11/2016	ORD	ORDER FILED COA
07/05/2016	APM	ADJOURNED PER CASE EVALUATION CLERK FROM 09212016
07/05/2016	APR	DATE SET FOR CASE EVAL ON 09142016 3 20 PM

Oakland County Circuit Court Case 2015-150462-CZ
Docket Entries

RECEIVED by MSC 11/20/2019 10:01:50 AM

Date	Code	Desc
07/01/2016	APR	DATE SET FOR CASE EVAL ON 09212016 11:00 AM
06/23/2016	RES	RESPONSE FILED REQ ADMISS/POS/PLF
06/13/2016	ORD	ORDER FILED GRNT PRT PLF MTN EXCLD EVID SNCTNS
06/09/2016	ANS	ANSWER FILED REQ ADMISS/INT/POS/DFT
06/08/2016	M	MOTION TO EXCLUDE EVIDENCE OF MOTIVE; DENIED
06/08/2016	M	MOTION FOR STAY; DENIED.
06/08/2016	ORD	ORDER FILED DENY MTN FOR STAY OF PROCEEDINGS
06/08/2016	ORD	ORDER FILED DENY PLF MTN EXCLD EVID OF MOTIVE
06/08/2016	M	MOTION TO EXCLUDE EVIDENCE OF SANCTIONS; GRNTD IN PART
06/07/2016	RES	RESPONSE FILED DFT TO PLF REQ ADM & INT TO DFT/POS
06/07/2016	POS	AFFIDAVIT/PROOF OF SERVICE FILED (4)
06/06/2016	RES	RESPONSE FILED DFT/TO PLF MTN LIMINE/POS
06/06/2016	RES	RESPONSE FILED DFT/TO PLF MTN LIMINE/POS
06/02/2016	TRN	TRANSCRIPT FILED HRG 05/04/16 /CCR
05/31/2016	PAU	PLAINTIFF/ATTY UNAVAILABLE
05/31/2016	APC	ADJ-COUNSEL 10312016 TO 01052017
05/31/2016	APR	DATE SET FOR TRIAL ON 01052017 08 30 AM Y 09
05/31/2016	ORD	ORDER FILED EXTEND DATE
05/31/2016	APM	ADJOURNED PER CASE EVALUATION CLERK FROM 09212016
05/31/2016	APR	DATE SET FOR CASE EVAL ON 09212016 NO TIME SET
05/27/2016	RES	RESPONSE FILED OPPOSING MTN STAY OF PROCEEDINGS/POS/PL
05/27/2016	REQ	REQUEST FILED 1ST/ADMISSIONS/POS/DFT
05/26/2016	NOH	NOTICE OF HEARING FILED
05/26/2016	MPR	MOTION PRAECIPE FILED FOR 06082016 JUDGE 09
05/26/2016	MPR	MOTION PRAECIPE FILED FOR 06082016 JUDGE 09
05/26/2016	NOH	NOTICE OF HEARING FILED /POS
05/26/2016	MPR	MOTION PRAECIPE FILED FOR 06082016 JUDGE 09
05/25/2016	MPR	MOTION PRAECIPE FILED FOR 06012016 JUDGE 09
05/25/2016	MTN	MOTION FILED STAY PROCDNGS/BRF/NOH/POS/DFT
05/25/2016	M	MOTION TO EXTEND DATES; GRANTED

Oakland County Circuit Court Case 2015-150462-CZ
Docket Entries

RECEIVED by MSC 11/20/2019 10:01:50 AM

Date	Code	Desc
05/20/2016	WLT	WITNESS LIST FILED DFT/POS
05/20/2016	EXH	EXHIBIT LIST FILED DFT/POS
05/20/2016	WLT	WITNESS LIST FILED PLF/POS
05/20/2016	EXH	EXHIBIT LIST FILED PLF/POS
05/20/2016	FDE	FINAL DISPOSITION ERROR CLERICAL ERROR NO FEES
05/20/2016	ORD	ORDER FILED AMD RE 5/04/16 OPN/ORD/POS
05/18/2016	MPR	MOTION PRAECIPE FILED FOR 05252016 JUDGE 09
05/18/2016	MPR	MOTION PRAECIPE FILED FOR 05252016 JUDGE 09
05/18/2016	MTN	MOTION FILED PLF/TO REINSTATE CASE/POS
05/18/2016	NOH	NOTICE OF HEARING FILED
05/18/2016	MTN	MOTION FILED PLF/TO EXTEND DISC/POS
05/18/2016	NOH	NOTICE OF HEARING FILED
05/12/2016	REQ	REQUEST FILED 2ND FOR ADMISS/INT/POS/PLF
05/11/2016	MPR	MOTION PRAECIPE FILED FOR 05252016 JUDGE 09
05/10/2016	REQ	REQUEST FILED PLF ADM & 2ND INT TO DFT/POS
05/10/2016	MTN	MOTION FILED EXCLD EVID REQ RECORDS/BRF/NOH/POS/PLF
05/10/2016	MTN	MOTION FILED EXCLD EVID SNCTNS/NOH/POS/PLF
05/09/2016	REQ	REQUEST FILED ADMISSION/INT /POS
05/04/2016	M	MOTION FOR PARTIAL SD IS HEARD
05/04/2016	FDO	FINAL DISPOSITION-OPINION
05/04/2016	OPN	OPINION FILED /ORD PLF MSD DENIED
04/20/2016	RES	RESPONSE FILED DFT TO PLF MSD ON DFT AFM/BRF/POS
04/01/2016	MPR	MOTION PRAECIPE FILED FOR 05042016 JUDGE 09
04/01/2016	MPR	MOTION PRAECIPE FILED FOR 05042016 JUDGE 09
04/01/2016	REA	ORDER FILED REASSIGNING /ANDERSON
03/30/2016	SO	SCHEDULING ORDER FILED RE PLF MTN PT SD
03/30/2016	SO	SCHEDULING ORDER FILED RE PLF MSD BRF
03/17/2016	NOH	NOTICE OF HEARING FILED /POS SEE 15-147354-CZ
03/16/2016	MPR	MOTION PRAECIPE FILED FOR 03302016 JUDGE 09
03/16/2016	NOH	NOTICE OF HEARING FILED /POS
03/16/2016	MTN	MOTION FILED APPROV TRANSFR FRM ANDERSON TO BOWMAN/PLF

Oakland County Circuit Court Case 2015-150462-CZ
Docket Entries

RECEIVED by MSC 1/20/2019 10:01:50 AM

Date	Code	Desc
02/22/2016	ORD	ORDER FILED PRETRIAL
02/17/2016	BRF	BRIEF FILED REPLY/MTN SUM DISP/POS/PLF
02/16/2016	SE	SCHEDULING ERROR
02/16/2016	APJ	ADJ-JUDGE 08192016 TO 10172016 BY NOTICE
02/16/2016	APR	DATE SET FOR PRETRIAL ON 10172016 08 30 AM Y
02/16/2016	SO	SCHEDULING ORDER FILED
02/16/2016	ORD	ORDER FILED CANCEL PLF MTN PRT SD HRG
02/13/2016	SOP	SCHEDULING ORDER WRITTEN
02/13/2016		05/20/2016 EXPERT DATE.
02/13/2016		07/20/2016 CASE EVALUATION DATE.
02/13/2016		05/20/2016 WITNESS DATE.
02/13/2016		07/20/2016 MOTION DATE.
02/13/2016		06/20/2016 DISCOVERY DATE.
02/13/2016		08/19/2016 SETTLEMENT CONFERENCE.
02/13/2016		10/31/2016 TRIAL DATE.
02/13/2016	APR	DATE SET FOR PRETRIAL ON 08192016 09 00 AM
02/13/2016	APR	DATE SET FOR TRIAL ON 10312016 09 00 AM
02/12/2016	RES	RESPONSE FILED MTN PRTL SD/BRF/POS/DFT
02/11/2016	NOH	NOTICE OF HEARING FILED /POS
02/11/2016	MTN	MOTION FILED FOR SUM DISP ON AFM/POS/PLF
01/14/2016	ATC	ANSWER TO COMPLAINT FILED /AFM/JD/POS/DFT
01/06/2016	POS	AFFIDAVIT/PROOF OF SERVICE FILED
01/06/2016	POS	AFFIDAVIT/PROOF OF SERVICE FILED
01/05/2016	APP	APPEARANCE FILED /POS CLARKSTON
01/04/2016	ORD	ORDER FILED RE SUM DISP
01/04/2016	MPR	MOTION PRAECIPE FILED FOR 03092016 JUDGE 04
01/04/2016	NOH	NOTICE OF HEARING FILED
12/23/2015	SUM	P/S ON SUMMONS FILED 12/22/15
12/23/2015	SUM	P/S ON SUMMONS FILED 12/22/15
12/04/2015	SI	SUMMONS ISSUED
12/04/2015	C	COMPLAINT FILED

Oakland County Circuit Court Case 2015-150462-CZ
Docket Entries

Date	Code	Desc
12/04/2015	AFF	AFFIDAVIT FILED SUPPT PLF MTN FOR PARTIAL SD
12/04/2015	MTN	MOTION FILED FOR SUM DISP/PLF

Showing 1 to 178 of 178 records

[Home](#) [Cases, Opinions & Orders](#)

Case Search

Case Docket Number Search Results - 335422

Appellate Docket Sheet

COA Case Number: 335422

MSC Case Number: 158240

SUSAN BISIO V THE CITY OF THE VILLAGE OF CLARKSTON

1	BISIO SUSAN Oral Argument: Y Timely: Y	PL-AT	RET	(30246) BISIO RICHARD D
2	CLARKSTON THE CITY OF THE VILLAGE OF Oral Argument: Y Timely: Y	DF-AE	RET	(38484) O'CONNOR JULIE MCCANN
3	MICHIGAN PRESS ASSOCIATION	AC	RET	(70902) RICHOTTE JOSEPH E
4	DETROIT FREE PRESS	AC	SAM	
5	MICHIGAN MUNICIPAL LEAGUE	AC	RET	(32198) HATHAWAY IRENE BRUCE
6	MICHIGAN TOWNSHIPS ASSOCIATION	AC	SAM	

COA Status: Case Concluded; File Open

MSC Status: Pending on Application

Case Flags: Electronic Record

10/26/2016 1 Claim of Appeal - Civil

Proof of Service Date: 10/26/2016

Jurisdictional Checklist: Y

Register of Actions: Y

Fee Code: EPAY

Attorney: 30246 - BISIO RICHARD D

10/21/2016 2 Order Appealed From

From: OAKLAND CIRCUIT COURT

Case Number: 2015-150462-CZ

Trial Court Judge: 34867 BOWMAN LEO

Nature of Case:

Summary Disposition Granted

10/26/2016 3 LCt Order

Date: 10/20/2016

For Party: 1 BISIO SUSAN PL-AT

Attorney: 30246 - BISIO RICHARD D

Comments: order granting summary disposition-incomplete-missing page 8

10/26/2016 4 Steno Certificate - Tr Request Received

Date: 10/20/2016

Timely: Y

Reporter: 715 - PERNICK KIMBERLY D

Filed By Attorney: 30246 - BISIO RICHARD D

Hearings:

03/30/2016

05/25/2016

06/08/2016

07/20/2016
07/27/2016
08/10/2016
10/19/2016

10/31/2016 **5 Appearance - Appellee**
Date: 10/31/2016
For Party: 2 CLARKSTON THE CITY OF THE VILLAGE OF DF-AE
Attorney: 38484 - O'CONNOR JULIE MCCANN

10/31/2016 **6 Docketing Statement MCR 7.204H**
For Party: 1 BISIO SUSAN PL-AT
Proof of Service Date: 10/31/2016
Filed By Attorney: 30246 - BISIO RICHARD D

01/11/2017 **7 Notice Of Filing Transcript**
Date: 01/11/2017
Timely: Y
Reporter: 715 - PERNICK KIMBERLY D
Hearings:
03/30/2016
05/25/2016
06/08/2016
07/20/2016
07/27/2016
08/10/2016
10/19/2016

01/11/2017 **8 Proof of Service - Record on Appeal**
Date: 01/11/2017
For Party: 1 BISIO SUSAN PL-AT
Attorney: 30246 - BISIO RICHARD D

03/08/2017 **9 Brief: Appellant**
Proof of Service Date: 03/08/2017
Oral Argument Requested: Y
Timely Filed: Y
Filed By Attorney: 30246 - BISIO RICHARD D
For Party: 1 BISIO SUSAN PL-AT

03/21/2017 **10 Motion: Extend Time - Appellee**
Proof of Service Date: 03/21/2017
Filed By Attorney: 38484 - O'CONNOR JULIE MCCANN
For Party: 2 CLARKSTON THE CITY OF THE VILLAGE OF DF-AE
Fee Code: FP
Requested Extension: 05/10/2017
Answer Due: 03/28/2017

03/22/2017 **11 Answer - Motion**
Proof of Service Date: 03/22/2017
Event No: 10 Extend Time - Appellee
For Party: 1 BISIO SUSAN PL-AT
Filed By Attorney: 30246 - BISIO RICHARD D
Comments: and brief in support

03/22/2017 **12 Other**
Date: 03/22/2017
For Party: 2 CLARKSTON THE CITY OF THE VILLAGE OF DF-AE
Attorney: 38484 - O'CONNOR JULIE MCCANN
Comments: corrected motion to extend time to cure typographical errors only

03/22/2017 13 Other
Date: 03/22/2017
For Party: 1 BISIO SUSAN PL-AT
Attorney: 30246 - BISIO RICHARD D
Comments: answer to corrected motion

04/04/2017 14 Submitted on Administrative Motion Docket
Event: 10 Extend Time - Appellee
District: T
Item #: 9

04/05/2017 15 Order: Extend Time - Appellee Brief - Grant
View document in PDF format
Event: 10 Extend Time - Appellee
Panel: ELG
Attorney: 30246 - BISIO RICHARD D
Extension Date: 05/10/2017

05/10/2017 16 Brief: Appellee
Proof of Service Date: 05/10/2017
Oral Argument Requested: Y
Timely Filed: Y
Filed By Attorney: 38484 - O'CONNOR JULIE MCCANN
For Party: 2 CLARKSTON THE CITY OF THE VILLAGE OF DF-AE

05/10/2017 17 Noticed
Record: REQST
Mail Date: 05/11/2017

05/12/2017 18 Electronic Record Filed
Comments: trn lbl 06/20/16 is actually 07/20/16

05/23/2017 20 Brief: Reply
Proof of Service Date: 05/23/2017
Timely Filed: Y
Filed By Attorney: 30246 - BISIO RICHARD D
For Party: 1 BISIO SUSAN PL-AT

05/31/2017 21 Motion: Amicus Curiae Brief
Proof of Service Date: 05/31/2017
Filed By Attorney: 70902 - RICHOTTE JOSEPH E
For Party: 3 MICHIGAN PRESS ASSOCIATION AC
Fee Code: EPAY
Answer Due: 06/14/2017
Comments: amicus brief filed with motion

05/31/2017 24 Brief: Amicus Curiae
Proof of Service Date: 05/31/2017
Filed By Attorney: 70902 - RICHOTTE JOSEPH E
For Party: 3 MICHIGAN PRESS ASSOCIATION AC
Comments: allowed by order-see event 23

06/20/2017 22 Submitted on Administrative Motion Docket
Event: 21 Amicus Curiae Brief
District: T
Item #: 5

06/21/2017 23 Order: Amicus Brief - Grant
View document in PDF format
Event: 21 Amicus Curiae Brief
Panel: ELG

Attorney: 70902 - RICHOTTE JOSEPH E

Comments: on behalf of Michigan Press Assn & Free Press-amicus brief received 5/31/17 accepted

07/07/2017 25 Pleadings Rejected

Date: 07/07/2017

Attorney: 32198 - HATHAWAY IRENE BRUCE

Comments: untimely filed mtn for amicus brief-AE brief filed 5/10-any mtn due 5/31

07/11/2017 27 Motion: Motion

Proof of Service Date: 07/11/2017

Filed By Attorney: 32198 - HATHAWAY IRENE BRUCE

For Party: 5 MICHIGAN MUNICIPAL LEAGUE AC

Answer Due: 07/18/2017

Comments: motion for leave to file tardy motion to file amicus brief

07/12/2017 26 Correspondence Sent

Comments: Hathaway - Imagesoft refund \$100 Fee For Returned Motion AC Brief

07/13/2017 28 Answer - Motion

Proof of Service Date: 07/13/2017

Event No: 27 Motion

For Party: 1 BISIO SUSAN PL-AT

Filed By Attorney: 30246 - BISIO RICHARD D

07/25/2017 29 Submitted on Administrative Motion Docket

Event: 27 Motion

District: T

Item #: 2

07/26/2017 30 Order: Amicus Brief - Grant

[View document in PDF format](#)

Event: 27 Motion

Panel: ELG

Attorney: 32198 - HATHAWAY IRENE BRUCE

Comments: motion for leave to file tardy mtn for amicus brief and mtn for amicus brf grant-amicus due 8/7/17

07/31/2017 31 Pleadings Rejected

Date: 07/31/2017

For Party: 1 BISIO SUSAN PL-AT

Attorney: 30246 - BISIO RICHARD D

Comments: non-conforming supp authority-does not cite publish opinion-need mtn

08/03/2017 32 Telephone Contact

For Party: 2 CLARKSTON THE CITY OF THE VILLAGE OF DF-AE

Attorney: 38484 - O'CONNOR JULIE MCCANN

Comments: Confirmed that citation in returned supp auth not a published opinion (newspaper article)

08/07/2017 33 Brief: Amicus Curiae

Proof of Service Date: 08/07/2017

Timely Filed: Y

Filed By Attorney: 32198 - HATHAWAY IRENE BRUCE

For Party: 5 MICHIGAN MUNICIPAL LEAGUE AC

08/23/2017 34 Motion: Motion

Proof of Service Date: 08/23/2017

Filed By Attorney: 30246 - BISIO RICHARD D

For Party: 1 BISIO SUSAN PL-AT

Answer Due: 08/30/2017

Comments: motion for leave to file response to MML/MTA Amicus Brief

08/23/2017 35 Motion: Strike

Proof of Service Date: 08/23/2017

Filed By Attorney: 30246 - BISIO RICHARD D
For Party: 1 BISIO SUSAN PL-AT
Fee Code: EPAY
Answer Due: 09/06/2017
Comments: motion to strike MML/MTA Amicus Brief

08/23/2017 40 Brief: Supplemental Brief - AT
Proof of Service Date: 08/23/2017
Oral Argument Requested:
Timely Filed:
Filed By Attorney: 30246 - BISIO RICHARD D
For Party: 1 BISIO SUSAN PL-AT
Comments: response to Amicus Brief of MML/MTA-allowed by order-see event 39

08/29/2017 36 Answer - Motion
Proof of Service Date: 08/29/2017
Event No: 34 Motion
For Party: 5 MICHIGAN MUNICIPAL LEAGUE AC
Filed By Attorney: 32198 - HATHAWAY IRENE BRUCE

08/29/2017 37 Answer - Motion
Proof of Service Date: 08/29/2017
Event No: 35 Strike
For Party: 5 MICHIGAN MUNICIPAL LEAGUE AC
Filed By Attorney: 32198 - HATHAWAY IRENE BRUCE

09/05/2017 38 Submitted on Administrative Motion Docket
Event: 34 Motion
District: T
Item #: 3

09/06/2017 39 Order: Grant - Generic
View document in PDF format
Event: 34 Motion
Panel: ELG
Attorney: 30246 - BISIO RICHARD D
Comments: motion to reply to amicus brief granted-reply received on 8/23/17 accepted for filing

09/12/2017 41 Submitted on Administrative Motion Docket
Event: 35 Strike
District: T
Item #: 3

09/13/2017 42 Order: Strike - Motion - Deny
View document in PDF format
Event: 35 Strike
Panel: ELG
Attorney: 30246 - BISIO RICHARD D
Comments: motion to strike MML/MTA Amicus brief denied

09/26/2017 43 Correspondence Received
Date: 09/26/2017
For Party: 2 CLARKSTON THE CITY OF THE VILLAGE OF DF-AE
Attorney: 38484 - O'CONNOR JULIE MCCANN
Comments: vacation notice 11/2 to 11/3/17

03/12/2018 50 Correspondence Received
Date: 03/07/2018
For Party: 1 BISIO SUSAN PL-AT
Attorney: 30246 - BISIO RICHARD D
Comments: correspondence re: inquiry for potential disqualification?

03/13/2018 51 Order: Adjourn from Call - Place Next Call
View document in PDF format
Panel: MTB,JMB,AK
Attorney: 30246 - BISIO RICHARD D
Comments: Court's own mtn-Judge Krause advised of circumstances warranting her recusal

03/13/2018 52 Taken off Case Call
Event: 49 Submitted on Case Call
Comments: Per Panel's Adjourn Order Issued 3/13/2018

04/11/2018 49 Submitted on Case Call
District: D
Item #: 15
Panel: MTB,JMB,AK
Comments: Removed From April Call; See Adjourn Order Issued 3/13/2018

06/13/2018 54 Submitted on Case Call
District: D
Item #: 13
Panel: JMB,MJK,CAO

06/13/2018 55 Oral Argument Audio

06/13/2018 56 Oral Argument Audio

07/03/2018 59 Opinion - Per Curiam - Unpublished
View document in PDF format
Pages: 10
Panel: JMB,MJK,CAO
Result: L/Ct Judgment/Order Affirmed

08/14/2018 60 SCt: Application for Leave to SCt
Supreme Court No: 158240
Answer Due: 09/11/2018
Fee: E-Pay
For Party: 1
Attorney: 30246 - BISIO RICHARD D

08/14/2018 61 SCt Case Caption
Proof Of Service Date: 08/14/2018
Comments: Case caption

09/11/2018 62 SCt: Answer - SCt Application/Complaint
Filing Date: 09/11/2018
For Party: 2 CLARKSTON THE CITY OF THE VILLAGE OF DF-AE
Filed By Attorney: 38484 - O'CONNOR JULIE MCCANN

09/27/2018 63 SCt: Reply - SCt Application/Complaint
Filing Date: 09/27/2018
For Party: 1 BISIO SUSAN PL-AT
Filed By Attorney: 30246 - BISIO RICHARD D

09/25/2019 64 SCt Order: Application - Grant
View document in PDF format
Comments: 20 min arguments. Invited AC=MI Press Assn, Detroit Free Press, MI Muni League, MI Twps Assn.

Case Listing Complete

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

SUSAN BISIO,
Plaintiff,

Case No: 15-150462-CZ
Hon. Leo Bowman

v.

THE CITY OF THE VILLAGE OF CLARKSTON,
Defendant.

KEMP KLEIN LAW FIRM
RICHARD BISIO (P30246)
Attorneys for Plaintiff
2014 West Big Beaver Road, Suite 600
Troy, Michigan 48084
(248) 740-5698

JAMES E. TAMM (P38154)
PAUL T. O'NEILL (P57293)
Attorneys for Defendant
40701 Woodward Ave., Suite 105
Bloomfield Hills, Michigan 48304
(248) 433-2000

Proof of Service

The undersigned certifies that a copy of the within instrument was served upon the attorneys of record or the parties not represented by counsel in the above case at their respective addresses disclosed on the pleadings on the 19 day of ~~May 2016~~ October 2016, by:

- ☐ US Mail
☐ Hand Delivered
☒ Wiznet – Electronic Filing System

V King
V King

OPINION AND ORDER

At a session of said Court held in the Courthouse in Pontiac,
Oakland County, Michigan on 10/19/16

PRESENT: LEO BOWMAN, Circuit Judge

I. Introduction

This matter is before the Court on defendant's motion for summary disposition filed on September 8, 2016 as well as plaintiff's cross motion for summary disposition filed on September 20, 2016. Plaintiff allegedly made a Freedom of Information Act ("FOIA") request with defendant. In response, defendant allegedly provided some of the requested documents and declined to provide

other requested documents stating “[n]ot a public record pursuant to MCL 15.232(e).” Plaintiff filed this civil action to compel defendant’s disclosure of public records as well as seeking attorney’s fees. Defendant brings its motion for summary disposition pursuant to MCR 2.116(C)(10) and plaintiff brings her motion for summary disposition pursuant to MCR 2.116(C)(10). For the reasons stated more fully below, defendant’s motion for summary disposition is GRANTED and plaintiff’s cross motion for summary disposition is MOOT.¹

II. Background

Defendant alleges that plaintiff’s husband – Richard Bisio –was an elected official of defendant’s City Council and a practicing attorney. On June 2, 2015, Attorney Bisio filed a lawsuit (“Richard Lawsuit”) against defendant alleging (1) violation of the Open Meetings Act (March 9, 2015 Closed Session (Count I) and (2) violation of the Open Meetings Act (City Council’s Non-Public Email Deliberation and Decision) (Count II). *Richard Bisio v The City of the Village of Clarkston*, Case No. 15-147354-CZ.

Approximately 5 days later (June 7, 2015), plaintiff² sent a FOIA request to defendant seeking several documents. (Complaint at *Exhibit 1* – June 7, 2015 Letter). Plaintiff alleges that she requested the specific documents described in the invoices submitted by defendant’s attorney (Attorney Thomas J. Ryan). On June 30, 2015, defendant allegedly sent a letter to plaintiff responding to her FOIA request. (Complaint at *Exhibit 2* – June 30, 2015 Letter). Defendant alleges that it produced over 700 pages of documents pursuant to her FOIA request and declined to provide eighteen (18) records (the “contested records”) stating that they were “[n]ot a public record pursuant to MCL § 15.232(e).” Following defendant’s response to plaintiff’s FOIA request, Attorney Bisio

¹ It should be noted that an issue is considered moot and a decision should not be reached if a court can no longer fashion a remedy. See *In re Contempt of Dudzinski*, 257 Mich App 96, 112 (2003).

² Defendant alleges that Richard Bisio is merely acting through his wife to continue further litigation against it.

filed a first amended complaint on July 16, 2015 in the Richard Lawsuit, which added an action for declaratory judgment regarding public record (Count III).³ Plaintiff acknowledges that she made the FOIA request. (Plaintiff's *Exhibit 2* – FOIA Request). Plaintiff alleges that she described the “public records” she sought to obtain as Attorney Ryan’s invoices, which were allegedly posted on defendant’s web site.

Specifically, defendant alleges that the contested records represented correspondence sent or received by Attorney Ryan from individuals or entities outside defendant and it provides the following details about the contested records:

1. 1/30/2015: Correspondence from Neil Wallace Re: Water Table Re: 148 N. Main;
2. 2/4/2015: Correspondence from John Cecil at HRC Re: Having developer provide correspondence from MDEQ RE: any impacts to the existing contamination plume; NPDES permit waiver is fine Re: 148 N. Main Street;
3. 2/5/2015: Correspondence from Neil Wallace Re: Project Re: 148 N. Main Street;
4. 2/23/2015: Correspondence from Neil Wallace Re: response to Gary Tressel’s email regarding approval of MDEQ etc and a copy of the referenced email;
5. 3/23/2015: Correspondence from Neil Wallace Re: Indemnity for storm system Re: 148 N. Main Street;
6. 3/26/2015; Correspondence from Neil Wallace Re: Did HRC receive a copy of the revised ground water mounding analysis;
7. 3/27/2015: Correspondence from Neil Wallace Re: Proper party for Hold Harmless Agreement and forward appropriate language re: 148 N. Main Street;
8. 3/27/2015: Correspondence from Neil Wallace Re: revised draft of Hold Harmless Agreement re: 148 N. Main Street;
9. 3/30/2015: Correspondence from Thomas Biehl at HRC Re: comments

³ Defendant acknowledges that this Court dismissed the Richard Lawsuit through a consent judgment on March 14, 2016. (Defendant’s *Exhibit B* – Consent Judgment).

- relative to Hold Harmless Agreement Re: 148 N. Main Street;
10. 3/30/2015: Correspondence to Thomas Biehl and Kevin Gleason re: Hold Harmless Agreement re: 148 N. Main Street.
 11. 4/2/2015: Correspondence from Neil Wallace Re: the status of the Hold Harmless Agreement;
 12. 4/13/2015: Correspondence from John Cecil at HRC re Hold Harmless Agreement and final site plan;
 13. 4/13/2015: Correspondence from Neil Wallace Re: Hold Harmless Agreement re: 148 N. Main Street;
 14. 4/23/2015: Correspondence from Jeff Leib Re: meeting on 5/16/15 re: vacant property at Walden & M-15;
 15. 4/23/2015: Correspondence from Jeff Leib Re: vacant property cleanup at Walden & M-15;
 16. 5/7/2015: Correspondence from Jeff Leib Re: property at Walden & M-15;
 17. 5/13/2015: Correspondence from Jeff Leib Re: property at Walden & M-15; and
 18. 5/20/2015: Correspondence from Jeff Leib Re: property at Walden & M-15.

In its denial of the FOIA request as to the contested records, defendant alleges that Attorney Ryan stated as follows:

The basis for the denial [of the 18 documents] was, in my opinion as city attorney, I am not a "public body". Thus, the information sought was neither created nor obtained by a public body, i.e., the City of the Village of Clarkston and thus was not a public record. Thus very touchstone of a request for a "public record" by a "public body", your information requested for a "public record" by a "public body", your information requested was never received or in the possession of the public body, i.e., the City of the Village of Clarkston and therefore, in my opinion the stated exemption has been properly offered.

(Defendant's *Exhibit B* – Letter from Attorney Ryan dated October 19, 2015 at 1)(internal citations omitted). Defendant alleges that its decision to deny the FOIA request as to the contested records forms the basis of her lawsuit. Plaintiff acknowledges that her FOIA request included the contested records, which are at issue in this complaint. Plaintiff also acknowledges that defendant's response

was to produce some records and deliver a letter from Attorney Ryan, which asserted that the contested records were “not a public record pursuant to MCL 15.232(e).” (Plaintiff’s *Exhibit 3* – Letter dated June 30, 2015). Plaintiff alleges that the June 30, 2016 letter did not claim privilege for any records and did not claim any exemption from FOIA disclosure. (*Id.*). Plaintiff alleges that her attorney (Attorney Bisio) wrote a follow-up letter to explain why the requested records are public records. (Plaintiff’s *Exhibit 4* – Letter dated August 24, 2015). In response, plaintiff alleges that Attorney Ryan responded by producing more records and continuing to claim that the records in his file are not public record. (Plaintiff’s *Exhibit 5* – Letter dated October 19, 2015). Specifically, plaintiff alleges that Attorney Ryan stated that (1) he did not copy city officials or other city personnel on the correspondence; (2) the contested records were neither created nor obtained by a public body (e.g., defendant) such that it was not a public record; and (3) the contested records were never received or in the possession of the public body. (*Id.*). Plaintiff also alleges that the records of a public official who conducts public business are subject to FOIA even if they are in its attorney’s private files.⁴

On December 4, 2015, plaintiff filed a complaint against defendant alleging a violation of FOIA, MCL § 15.240(7) (Count I). On December 4, 2015, plaintiff also filed a motion for summary disposition (“December MSD”) pursuant to MCR 2.116(C)(10).⁵ On January 14, 2016, defendant filed an answer with affirmative defenses, which denied the allegations of liability as untrue. On February 11, 2016, plaintiff filed a second motion for summary disposition (“February MSD”)

⁴ To support this allegation, plaintiff directs this Court’s attention to the transcript for the May 4, 2016 (oral argument on the motion for summary dispositions) and this Court’s statements related to “private” files about public business; however, she failed to attach a copy of the transcript to her motion for summary disposition.

⁵ This Court notes that the county clerk assigned this matter to the Honorable Martha D. Anderson based on its random draw. On January 4, 2016, Judge Anderson entered an order setting a hearing date and a brief scheduling order. In her scheduling order, she set forth that defendant shall file a response on or before February 12, 2016 and permitted plaintiff to file a five page reply brief. Upon review of the court record, this Court finds that defendant filed a timely response that sought summary disposition pursuant to MCR 2.116(C)(6). Plaintiff filed a timely reply brief, which addressed

pursuant to MCR 2.116(C)(9). On February 12, 2016, defendant filed a response to plaintiff's December MSD, which sought summary disposition pursuant to MCR 2.116(C)(6). On February 16, 2016, Judge Anderson entered an order cancelling the hearing on the December MSD pending a ruling by this Court related to accepting a transfer of this matter based on its presiding over the Richard Lawsuit. On March 30, 2016, this Court entered an order accepting the case and Judge Anderson, Judge Bowman, and Chief Judge Nanci J. Grant entered an order reassigning the civil case. On May 4, 2016, this Court entered an opinion and order that DENIED the December MSD and February MSD and DISMISSED defendant's motion for summary disposition as MOOT.⁶

Defendant alleges that it deposed Attorney Ryan on August 9, 2016. During his deposition, defendant alleges that Attorney Ryan testified to the following facts:

- He (as defendant's attorney) and defendant had no express agreement regarding ownership of records compiled in the course of his work for defendant.
- He had no agreement with defendant regarding his retention or destruction of records compiled during the course of work as its attorney.
- If one of defendant's officials sought copies of correspondence with someone adverse to it, it would depend on the circumstances as to whether he would

defendant's request for summary disposition pursuant to MCR 2.116(C)(6).

⁶ Specifically, this Court stated as follows in its opinion and order related to the December MSD:

Viewing the evidence in the light most favorable to the non-moving party, the Court finds that there is a genuine issue of material fact. Plaintiff takes the position that the contested records are public record and defendant takes the position that the contested records are not public records. This Court cannot – as a matter of law – classify the contested records without additional information. Summary disposition pursuant to MCR 2.116(C)(10) is, therefore, inappropriate.

It stated as follows in its opinion and order related to the February MSD:

Accepting the well-pleaded allegations as true, this Court does not find that defendants' defenses (with the exception of the MCR 2.116(C)(6) grounds) are so clearly untenable as a matter of law that no factual development could possibly deny plaintiff's right to recovery. Having reviewed the pleadings, this Court finds that there are facts that could be uncovered to support defendant's affirmative defenses. Summary disposition pursuant to MCR 2.116(C)(9) is, therefore, [inappropriate].

It stated as follows in its opinion and order related to defendant's motion for summary disposition:

Viewing the evidence in the light most favorable to the non-moving party, the Court finds that defendant's motion is MOOT because of the parties' consent judgment in the other action expressly preserves plaintiff's claims in this pending action. An issue is considered moot and a decision should not be reached if a court can no longer fashion a remedy. See *In re Contempt of Dudzinski*, 257 Mich App 96, 112 (2003).

provide it. He further stated that the issue has never arisen.

- He clarified that he used his own firm's email address (sylvanlawtr@gmail.com) to send or receive information on behalf of defendant.
- He has never had an email address with defendant and has never sent emails from a city email address.
- He is not an employee of defendant, has no pension, no employee benefits.

(Defendant's *Exhibit F* – Attorney Ryan's Deposition at 9-12, 40-41).

On September 8, 2016, defendant filed its motion for summary disposition pursuant to MCR 2.116(C)(10). On September 12, 2016, this Court entered a Brief Scheduling Order pursuant to MCR 2.119(G), which stated that "[t]he responding party's responsive brief shall be filed and received by the Court and opposing counsel on or before **October 5, 2016** by 4:30 p.m."⁷ Plaintiff filed a timely response, which requested summary disposition pursuant to MCR 2.116(I)(2). On September 12, 2016, this Court entered a Brief Scheduling Order pursuant to MCR 2.119(G) prompted by plaintiff's request to file a cross motion, which stated that "[t]he responding party's responsive brief shall be filed and received by the Court and opposing counsel on or before **October 5, 2016** by 4:30 p.m."⁸ On September 20, 2016, plaintiff filed her cross motion for summary disposition pursuant to MCR 2.116(C)(10). Defendant filed a timely response.

III. Standard of Review

Under MCR 2.116(C)(10), the court will grant a motion for summary disposition if there is no issue of material fact and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10). In determining a motion for summary disposition under MCR 2.116(C)(10), the court

⁷ A trial court may order the parties to meet scheduling deadlines when the court "concludes that such an order would facilitate the progress of the case[.]" MCR 2.401(B)(2)(a). Also, MCR 2.401(B)(2) provides trial courts with the discretion to decline to consider motions a party files after the ordered deadline. *Velez v Tuma*, 283 Mich App 396, 409 (2009), *rev'd in part* on other grounds 492 Mich 1 (2012). This court rule "promotes the efficient management of the trial court's docket[.]" *Kemerko Clawson LLC v RXIV Inc*, 269 Mich App 347, 350 (2005).

- (v) The judiciary, including the office of the county clerk and employees thereof when acting in the capacity of clerk to the circuit court, is not included in the definition of public body.

MCL § 15.232(e) defines “public record” as follows:

“Public record” 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. Public record does not include computer software. This act separates public records into the following 2 classes:

- (i) Those that are exempt from disclosure under [MCL 15.243].
- (ii) All public records that are not exempt from disclosure under [MCL 15.243] and which are subject to disclosure under this act.

See also, *Hopkins v Duncan Tp*, 294 Mich App 401, 409-10 (2011) (discussing the definition of a public body). Further, a “writing” includes all means of recording or retaining meaningful content, including handwriting. MCL § 15.232(h); *Patterson v Allegan Co Sheriff*, 199 Mich App 638, 639–640 (1993). A writing can become a public record after its creation if possessed by a public body in the performance of an official function, or if used by a public body, regardless of who prepared it. *MacKenzie v Wales Twp.*, 247 Mich App 124, 129; *Detroit News, Inc v Detroit*, 204 Mich App 720, 723–724 (1994). Finally, mere possession of a record by a public body does not render it a public record because the record must be used in the performance of an official function to be a public record. *Howell Ed Ass’n MEA/NEA v Howell Bd of Ed*, 287 Mich App 228, 236 (2010).

“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.” *Manning v East Tawas*, 234 Mich App 244, 248 (1999). Both the Court of Appeals and the Michigan Supreme Court described FOIA as a prodisclosure statute and recognize that FOIA’s disclosure provisions must be interpreted broadly. *Herald Co, supra*, at 119; *Swickard v*

Wayne Co Med. Examiner, 438 Mich 536, 544 (1991); and *Practical Political Consulting, Inc v Secretary of State*, 287 Mich App 434, 465 (2010). FOIA contains several exceptions to the public body's duty to disclose, which "must be construed narrowly, and the burden of proof rests with the party asserting an exemption," *Manning, supra* at 248; MCL § 15.243 see also *Bradley v Saranac Community Schools Bd of Ed*, 455 Mich 285, 293.

"[I]f a public body makes a final determination to deny a request, the requesting person may either appeal the denial to the head of the public body or commence an action in the circuit court within 180 days." *Thomas v City of New Baltimore*, 254 Mich App 196, 201-02 (2002) (citing MCL § 15.235(7)). If a plaintiff prevails in an action to compel disclosure under the FOIA, the circuit court must award reasonable attorney fees, costs, and disbursements to the plaintiff. *Scharret v. Berkley*, 249 Mich App 405, 410 (2002). Under FOIA, the trial court must award reasonable attorney fees, costs, and disbursements to a prevailing party. MCL § 15.240(6) and (7).⁹

A. *Defendant's Motion for Summary Disposition Pursuant to MCR 2.116(C)(10)*

Defendant argues that (1) its attorney is not a public body as defined by FOIA and (2) the records in the possession of its attorney are not public records as defined by FOIA. In reply, plaintiff disagrees and argues that (1) it is irrelevant that defendant's attorney is not a "public body" and (2)

⁹ MCL § 15.240(6) and (7) states as follows:

- (6) 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).
- (7) If the 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 order the public body to pay a civil fine of \$1,000.00, which shall be deposited into the general fund of the state treasury. The court shall award, in addition to any actual or compensatory damages, punitive damages in the amount of \$1,000.00 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

Wayne Co Med. Examiner, 438 Mich 536, 544 (1991); and *Practical Political Consulting, Inc v Secretary of State*, 287 Mich App 434, 465 (2010). FOIA contains several exceptions to the public body's duty to disclose, which "must be construed narrowly, and the burden of proof rests with the party asserting an exemption," *Manning, supra* at 248; MCL § 15.243 see also *Bradley v Saranac Community Schools Bd of Ed*, 455 Mich 285, 293.

"[I]f a public body makes a final determination to deny a request, the requesting person may either appeal the denial to the head of the public body or commence an action in the circuit court within 180 days." *Thomas v City of New Baltimore*, 254 Mich App 196, 201–02 (2002) (citing MCL § 15.235(7)). If a plaintiff prevails in an action to compel disclosure under the FOIA, the circuit court must award reasonable attorney fees, costs, and disbursements to the plaintiff. *Scharret v. Berkley*, 249 Mich App 405, 410 (2002). Under FOIA, the trial court must award reasonable attorney fees, costs, and disbursements to a prevailing party. MCL § 15.240(6) and (7).⁹

A. *Defendant's Motion for Summary Disposition Pursuant to MCR 2.116(C)(10)*

Defendant argues that (1) its attorney is not a public body as defined by FOIA and (2) the records in the possession of its attorney are not public records as defined by FOIA. In reply, plaintiff disagrees and argues that (1) it is irrelevant that defendant's attorney is not a "public body" and (2)

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- (7) If the 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 order the public body to pay a civil fine of \$1,000.00, which shall be deposited into the general fund of the state treasury. The court shall award, in addition to any actual or compensatory damages, punitive damages in the amount of \$1,000.00 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 contested records are public records such that they must be produced under FOIA.

Defendant argues that its attorney is not a public body as defined by FOIA. To support its argument, defendant directs this Court's attention to MCL § 15.233(1) as well as MCL § 15.232(d)(iii) as well as case¹⁰ law, which finds that the legislature intentionally omitted "city attorney" from the definition of "public body." Specifically, defendant discusses the facts and holding in *Hoffman v Bay City School District*, 137 Mich App 333, 339 (1984), which held that the "information sought in this case was neither created nor obtained by the public body. As it was thus not a 'public record', as defined in the FOIA, its disclosure was not governed by the provision of FOIA." As such, the *Hoffman* Court concluded that the records in the possession of a private attorney that were not distributed to a public body (e.g., the school board) were not subject to FOIA disclosure. Then, defendant directs this Court's attention to the following *undisputed* facts:

- By its City Charter, Attorney Ryan is defendant's administrative officer but he is not its employee, receives no benefits, and never sent or received emails from defendant's email address or have email address associated with defendant. (Defendant's *Exhibit G* – Charter at Chapter V, 13-19).
- Attorney Ryan sent and received correspondence from his private office and private email account (SylvanlakeTR@gmail.com). (Defendant's *Exh. F* at 40).
- Attorney Ryan compiled some records in the course of his work and forwarded them to defendant and did not compile others. (*Id.* at 10).

Then, defendant concludes that Attorney Ryan is not a public body as an administrative officer even if it is a public body pursuant to MCL § 15.232(d)(i). See *GMAC, LLC v Treasury Dep't*, 286 Mich 365, 372 (2009) (holding that an administrative officer is not included since the legislature omitted it from the "public body" definition). Defendant also argues Attorney Ryan is not a public body based

the next succeeding public body that is not an individual and that kept or maintained the public record as part of its public function.

¹⁰ *Michigan's Adventure, Inc v Dalton Twp*, 290 Mich App 328, 332 (2010) and *Hoffman v Bay City School District*, 137

on his agency relationship because that the Michigan Supreme Court rejected that interpretation as inconsistent with the statutory scheme in *Breighner v Michigan High School Athletic Ass'n, Inc.*, 471 Mich 217 (2004) (holding that the Michigan High School Athletic Ass'n was not a public body subject to FOIA requests). As such, defendant concluded that the correspondence sought by plaintiff pursuant to her FOIA request is not in the possession of the "public body", which means that it is not a "public record" and not subject to the mandatory disclosure provisions. MCL § 15.232(1).

In reply, plaintiff disagrees and argues that it is irrelevant that defendant's attorney is not a "public body." Plaintiff acknowledges that the definition of a "public body" does not include a city attorney or a city employee. MCL § 15.232(d). Then, plaintiff argues that she filed a FOIA request for records from defendant not its attorney. (Plaintiff's *Exh. 2* (noting it is addressed to defendant's FOIA coordinator)). To support her argument, plaintiff directs this Court's to *Ross v Consumers Power Co*, 420 Mich 567 (1984) and *Briggs Tax Serv, LLC v Detroit Pub Sch*, 282 Mich App 29, 35 n7 (2008), *rev'd on other grounds*, 485 Mich 69 (2010), which recognized that a city can only act through its agents who do things for it and maintain its record. Then, plaintiff concludes that the records are still discoverable even if they are in the possession of a public body's agent because to conclude otherwise would mean that no records would be in the possession of a public body. Instead, plaintiff asserts that the question is whether the agent has record in his possession his role conducting defendant's business.

Defendant argues that the records in the possession of its attorney are not public records as defined by FOIA. To support its argument, defendant directs this Court's attention to MCL § 15.232(e) (defines a public record). Then, defendant states that the contested records were not public records and have not been used by defendant in the performance of an official function. Specifically,

Mich App 333 (1984).

defendant directs this Court's attention to the following *undisputed* facts related to the correspondence sought by plaintiff:

- The contested records are not in the possession of or owned by defendant.
- Private parties – not defendant – prepared the contested records.
- There is no evidence that the contested records were ever used or retained in the performance of an official function by defendant.
- Attorney Ryan has the contested records in his private files and he never shared the contested records with defendant's council members such that they are not in possession of defendant.

(Defendant's *Exh. B* and *F*). Then, defendant directs this Court's attention to case¹¹ law discussing that (1) records must be used for an official function to be a public record and (2) records must be in existence to be subject to public record (access only and does not require creation of the records). Then, defendant states that the contested records were not prepared, owned, used, in the possession of, or retained by it; instead, defendant states that private parties, including its attorney, prepared, owned, used, possessed, and retained them. Then, defendant discusses the facts and holding in the following cases:

- *Walloon Lake Water System, Inc v Melrose Twp*, 163 Mich App 726, 731 (1987) (holding that handwritten notes authored by a township board member during a township board meeting used for his personal use was not subject to FOIA disclosure);
- *Hopkins v Duncan Twp*, 294 Mich App 401 (2011) (holding that a personal letter read out loud to the township board of trustees at a regularly scheduled meeting and incorporated into the meeting minutes was subject to disclosure because the board used it for the basis of its decision);
- *Mackenzie v Wales Twp*, 247 Mich App 124, 129 (2001) (holding that computer tapes with tax information on individual properties located in defendant's township were subject to FOIA disclosure);

¹¹ *Howell Educ Ass'n, MEA/NEA v Howell Bd of Educ*, 287 Mich App 228, 236 (2010); *Mackenzie v Wales Twp*, 247 Mich App 124, 129 (2001); and *Walloon Lake Water System, Inc v Melrose Twp*, 163 Mich App 726, 731 (1987).

- *The Detroit News, Inc v City of Detroit*, 204 Mich App 720 (1994) (holding that telephone bills showing calls to and from the Mayor's Office were subject to FOIA disclosure because they formed the basis of an official function (use of public funds to pay telephone expenses)); and
- *Howell Educ Ass'n, MEA/NEA v Howell Bd of Educ*, 287 Mich App 228, 236 (2010) (holding that personal emails between the union and its members had nothing to do with the operation of the school such that they were not public records and not subject to FOIA disclosure).

As such, defendant concludes that the contested records are not subject to disclosure because defendant did not create, obtain, or possessed by defendant and did not form the basis for any of its decisions in the performance of an official function and Attorney Ryan had no agreement with defendant to retain possession of any records.

In reply, plaintiff disagrees and argues that the contested records are public records such that they must be produced under FOIA. Specifically, plaintiff argues that the contested records are public records because:

- **FOIA Is Construed In Favor Of Disclosure:** To support this argument, plaintiff directs this Court's attention to MCL § 15.231(2), which sets forth FOIA's purpose as well as case¹² law recognizing that it is broadly written to open the closed files of the government and that the public body bears the burden to support its denial to disclose. Plaintiff also directs this Court's attention to defendant's brief where it states that it has a duty to keep matters involving public controversy a secret. (Defendant's Brief at 16).
- **The Records Meet The Definition Of Public Record:** To support this argument, plaintiff directs this Court's attention to MCL § 15.232(e) (public record definition) and MCL § 15.232(d)(iii) (public body definition includes a city). Then, plaintiff concludes that the issues are (1) whether defendant's attorney was acting in the performance of an official function and (2) whether the records in his files are "used, in the possession of, or retained" by defendant.
 - **Attorney Ryan Performs Official Function for Defendant:** Plaintiff directs this Court's attention to defendant's charter, which sets forth that its attorney is an formally appointed city officer.

¹² *Walloon Lake*, *supra* at 730; *Herald Co v Bay City*, 463 Mich 111, 119 (2000); and *Warren v Detroit*, 261 Mich App 165 (2004).

(Plaintiff's *Exhibit 11* – Charter at § 5.1(a)-(b) and *Exhibit 10* – Attorney Ryan's Deposition at 41). In his capacity as its attorney, plaintiff argues that Attorney Ryan sends and receives communication from persons outside of the public body, which involve defendant's business and he represents defendant's interest in its business. Then, plaintiff argues that the contested records involve communication between Attorney Ryan and parties adverse to defendant (e.g., Wallace who represented a developer seeking approval from defendant for new construction; Leib who represented property owners in a dispute with defendant regarding his clients' cutting down trees on vacant property and being issued an ordinance violation for that act; and defendant's engineer regarding those same matters). Plaintiff requests those documents based on the descriptions in his invoices issued to defendant. If those records are relevant to defendant's business, plaintiff concludes that they are public records (i.e., in the performance of an official function). Then, plaintiff concludes that the link between the contested records establishes the link between Attorney Ryan's invoice and his representing the city on disputed matters.

- **The Records Were Used, in the Possession of, and Retained by Defendant:** Plaintiff argues that Attorney Ryan acted on defendant's behalf because it appointed him as its charter officer and attorney. To support this argument, plaintiff directs this Court's attention to case¹³ law recognizing that an attorney is the client's agent as well as case¹⁴ law recognizing that the agent stands in the shoes of the principle. Then, plaintiff directs this Court's attention to Attorney Ryan's testimony that he would turn over his records on open matters if the city appointed a new city attorney. As such, plaintiff concludes that the records in Attorney Ryan's possession are defendant's records such that they are subject to disclosure. Next, plaintiff argues that defendant's argument that "the records never served as a basis of any decision to act or refrain from acting" is wrong because (1) the definition for "public record" does not include that requirement; (2) it contradicts defendant's admission that each of the contested records involved its business and it paid Attorney Ryan for his work involving those records; and (3) she cannot determine if defendant used the records for its business because it will not disclose them.

- **The Physical Location Of Record Does Not Change Their Character as Public Records:** Specifically, plaintiff argues that defendant's reliance on the

¹³ *St Clair Intermediate School Dist v Intermediate Ed Ass'n / Michigan Ed Ass'n*, 458 Mich 540 (1998) and *Fletcher v Board of Ed*, 323 Mich 343, 438 (1948).

¹⁴ *In re Capuzzi Estate*, 470 Mich 399, 402 (2004); *St Clair Intermediate School Dist*, *supra*; and *Stephenson v Golden*, 279 Mich 710, 736 (1937).

fact that Attorney Ryan maintained the records in his private office; involves his private email; and keeps the records at his sole discretion is irrelevant. To support her argument, plaintiff directs this Court's attention to the defendant's city manager's deposition testimony where she stated that Attorney Ryan had a legal obligation to provide his records upon demand as well as case¹⁵ law recognizing that the records belong to the public body. (Plaintiff's *Exhibit 9* – Carol Eberhardt's Deposition) at 5). Then, plaintiff concludes that Attorney Ryan's files regarding his conduct of defendant's business are public record regardless if they reside in city hall or his office.

- **Hoffman, supra Is Readily Distinguishable And Does Not Give Defendant the Right to Conceal Public Business by Keeping Records In Its City Attorney's Office:** Specifically, plaintiff argues that *Hoffman* is distinguishable because it involved the school board's attorney conducting a short investigation into the school district's finance department; he made an oral report finding no improprieties; and did not share the records of his investigation with the school board.¹⁶ Further, plaintiff argues that the facts in this matter support that (1) it did not involve an internal investigation and (2) defendant's attorney acted as a public official to communicate with other attorneys about matters adverse to defendant and its engineering firm about a dispute involving two properties. As such, plaintiff concludes that Attorney Ryan was conducting defendant's business as a public official with third parties.

As it relates to the cases cited by defendant, plaintiff argues as follows:

- *Walloon Lake Water System, supra*: It does not help defendant's position because it involved a letter written to the township supervisor that was read aloud at a township meeting and considered when the township made its decision.
- *Hopkins, supra*: It does not help defendant's position because it involved the handwritten personal notes of a township board member that were taken for his own use and not circulated or read by anyone else.
- *Mackenzie, supra*: It supports her position because it ordered the disclosure of the records even though the public body did not create or have physical possession of the records.
- *Coblentz, supra*: It does not stand for the proposition that "a privately retained city attorney is not a public official." Instead, plaintiff argues that it states that the city cannot charge for an attorney's time to respond to a record

¹⁵ *Flagg v Detroit*, 252 FRD 346, 353 (ED Mich 2008); *Detroit News, supra*; *MacKenzie, supra*; and *Howell Ed Assn, supra*.

¹⁶ Plaintiff requests that this Court limit *Hoffman* to its facts arguing that it was wrongly decided.

request because the attorney is not a city employee.

- *Howell Educ Ass'n, surpa*: It supports her position that the content of a record – not its location – determines if it is a public record.

As such, plaintiff concludes that it is entitled to obtain these records pursuant to MCL § 15.231(2) and seeks summary disposition pursuant to MCR 2.116(I)(2).¹⁷

Viewing the evidence in the light most favorable to the non-moving party, the Court finds that there is no genuine issue of material fact. Specifically, this Court finds that:

- Defendant is a public body pursuant to MCL § 15.232(d)(iii), which recognizes a public body as “[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.”
- Attorney Ryan is not a public body as defined by MCL § 15.232(d)(iii); *Hoffman, surpa* at 336; and *Coblentz, sura* at 578-580.
- As its attorney, Attorney Ryan is defendant’s agent such that he *may* possess a writing that he prepared, owned, used, in the possession of, or retained on behalf of the defendant – a public body – in the performance of an official function, from the time it is created.
- It is sufficient that for a document to be considered a “public record” if a public body’s agent (such as a public body’s attorney) prepared, owned, used, possessed, or retained documentation in the performance of an official function. MCL § 15.232(e).

Having determined that the records retained by Attorney Ryan may be subject to a FOIA request, this Court must consider if defendant used the contested records (the actual correspondence) as a basis for its decision or merely used Attorney Ryan’s advice or oral report for a decision. *Walloon Lake Water System, surpa* at 731; *Hopkins, surpa*; *Mackenzie, supra* at 129.

- Defendant summarizes the contested records as containing communications from January 30, 2015 to May 20, 2015 and between Attorney Ryan and third-parties related to the property located at 148 N. Main and a hold

¹⁷ Under MCR 2.116(I)(2), the court may render judgment in favor of the opposing party if “appears to the court that the opposing party, rather than the moving party, is entitled to judgment.”

harmless agreement.

- Defendant states that there is no evidence that it used or retained the contested records in the performance of its official function and plaintiff fails to direct this Court's attention to any documentary evidence (e.g., meeting minutes) to establish that defendant used the contested records to make a decision related to the subject matter of the contested records. Instead, plaintiff directs this Court's attention to Attorney Ryan's invoice, which includes a line item billing defendant for his work on the subject matter of the contested record.
- Defendant states that Attorney Ryan never shared the contested records with defendant's council members such that they are not in possession of the contested records.

Having reviewed the documentary evidence, this Court finds that the contested records are not "public records" because there is no evidence to support that defendant used or retained them in the performance of an official function or that Attorney Ryan shared the contested records (the actual correspondence) to assist defendant in making a decision. Summary disposition pursuant to MCR 2.116(C)(10) is, therefore, appropriate. Having reached this decision, this Court finds that it is inappropriate to grant summary disposition pursuant to MCR 2.116(I)(2) to plaintiff.

B. Plaintiff's Cross Motion for Summary Disposition Pursuant to MCR 2.116(C)(10)

Plaintiff argues that she is entitled to (1) an order that defendant cease withholding the contested records and produce them; (2) impose a civil fine of \$1,000 against defendant payable to the State of Michigan; (3) award plaintiff punitive damages of \$1,000 pursuant to MCL § 15.240(7); and (4) grant an award of attorney's fees, costs, and disbursements pursuant to MCL § 15.240(6). In reply, defendant argues that plaintiff failed to establish that the contested records are subject to FOIA disclosure and reasserts its arguments that (1) the city attorney is not a "public body"; (2) an agent is not included in the FOIA definition of "public body"; (3) a writing is not a public record if the public body does not control it in the performance of an official function; (4) plaintiff failed to establish that the writings she sought were public record subject to FOIA disclosure; (5) the civil action

exemption¹⁸ applies to bar the disclosure of records sought by plaintiff; and (6) defendant's objections to plaintiff's request for FOIA disclosure were reasonable.

Having already determined that the contested records are not "public records" because there is no evidence to support that defendant used or retained them in the performance of an official function (e.g., to make a decision related to 148 N. Main Street), this Court finds that it is not necessary to address the arguments in plaintiff's cross motion because they are moot.

V. Conclusion

Accordingly, defendant's motion for summary disposition is GRANTED and plaintiff's cross motion for summary disposition is MOOT. IT IS HEREBY ORDERED that plaintiff's complaint against defendant is DISMISSED with prejudice. *This Order is the final order for the case because it resolves the last pending claim and it closes the case.*

IT IS SO ORDERED.

Hon. Leo Bowman

Date

10-19-

16

VBK

¹⁸ Defendant relies on this exemption related to plaintiff making a FOIA request a mere five days after her husband filed a lawsuit against defendant (e.g., Richard Lawsuit).

Refiled & Serviced to replace 10/19/16
version missing pg 8.
KBK

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

SUSAN BISIO,
Plaintiff,

Case No: 15-150462-CZ
Hon. Leo Bowman

v.

THE CITY OF THE VILLAGE OF CLARKSTON,
Defendant.

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Proof of Service

The undersigned certifies that a copy of the within instrument was served upon the attorneys of record or the parties not represented by counsel in the above case at their respective addresses disclosed on the pleadings on the 19 day of May 2016, by:

- October 2016
- ☐ US Mail
☐ Hand Delivered
☒ Wiznet - Electronic Filing System

V King
V King

OPINION AND ORDER

At a session of said Court held in the Courthouse in Pontiac,
Oakland County, Michigan on 10/19/16

PRESENT: LEO BOWMAN, Circuit Judge

I. Introduction

This matter is before the Court on defendant's motion for summary disposition filed on September 8, 2016 as well as plaintiff's cross motion for summary disposition filed on September 20, 2016. Plaintiff allegedly made a Freedom of Information Act ("FOIA") request with defendant. In response, defendant allegedly provided some of the requested documents and declined to provide

other requested documents stating “[n]ot a public record pursuant to MCL 15.232(e).” Plaintiff filed this civil action to compel defendant’s disclosure of public records as well as seeking attorney’s fees. Defendant brings its motion for summary disposition pursuant to MCR 2.116(C)(10) and plaintiff brings her motion for summary disposition pursuant to MCR 2.116(C)(10). For the reasons stated more fully below, defendant’s motion for summary disposition is GRANTED and plaintiff’s cross motion for summary disposition is MOOT.¹

II. Background

Defendant alleges that plaintiff’s husband – Richard Bisio –was an elected official of defendant’s City Council and a practicing attorney. On June 2, 2015, Attorney Bisio filed a lawsuit (“Richard Lawsuit”) against defendant alleging (1) violation of the Open Meetings Act (March 9, 2015 Closed Session (Count I) and (2) violation of the Open Meetings Act (City Council’s Non-Public Email Deliberation and Decision) (Count II). *Richard Bisio v The City of the Village of Clarkston*, Case No. 15-147354-CZ.

Approximately 5 days later (June 7, 2015), plaintiff² sent a FOIA request to defendant seeking several documents. (Complaint at *Exhibit 1* – June 7, 2015 Letter). Plaintiff alleges that she requested the specific documents described in the invoices submitted by defendant’s attorney (Attorney Thomas J. Ryan). On June 30, 2015, defendant allegedly sent a letter to plaintiff responding to her FOIA request. (Complaint at *Exhibit 2* – June 30, 2015 Letter). Defendant alleges that it produced over 700 pages of documents pursuant to her FOIA request and declined to provide eighteen (18) records (the “contested records”) stating that they were “[n]ot a public record pursuant to MCL § 15.232(e).” Following defendant’s response to plaintiff’s FOIA request, Attorney Bisio

¹ It should be noted that an issue is considered moot and a decision should not be reached if a court can no longer fashion a remedy. See *In re Contempt of Dudzinski*, 257 Mich App 96, 112 (2003).

² Defendant alleges that Richard Bisio is merely acting through his wife to continue further litigation against it.

filed a first amended complaint on July 16, 2015 in the Richard Lawsuit, which added an action for declaratory judgment regarding public record (Count III).³ Plaintiff acknowledges that she made the FOIA request. (Plaintiff's *Exhibit 2* – FOIA Request). Plaintiff alleges that she described the “public records” she sought to obtain as Attorney Ryan’s invoices, which were allegedly posted on defendant’s web site.

Specifically, defendant alleges that the contested records represented correspondence sent or received by Attorney Ryan from individuals or entities outside defendant and it provides the following details about the contested records:

1. 1/30/2015: Correspondence from Neil Wallace Re: Water Table Re: 148 N. Main;
2. 2/4/2015: Correspondence from John Cecil at HRC Re: Having developer provide correspondence from MDEQ RE: any impacts to the existing contamination plume; NPDES permit waiver is fine Re: 148 N. Main Street;
3. 2/5/2015: Correspondence from Neil Wallace Re: Project Re: 148 N. Main Street;
4. 2/23/2015: Correspondence from Neil Wallace Re: response to Gary Tressel’s email regarding approval of MDEQ etc and a copy of the referenced email;
5. 3/23/2015: Correspondence from Neil Wallace Re: Indemnity for storm system Re: 148 N. Main Street;
6. 3/26/2015: Correspondence from Neil Wallace Re: Did HRC receive a copy of the revised ground water mounding analysis;
7. 3/27/2015: Correspondence from Neil Wallace Re: Proper party for Hold Harmless Agreement and forward appropriate language re: 148 N. Main Street;
8. 3/27/2015: Correspondence from Neil Wallace Re: revised draft of Hold Harmless Agreement re: 148 N. Main Street;
9. 3/30/2015: Correspondence from Thomas Biehl at HRC Re: comments

³ Defendant acknowledges that this Court dismissed the Richard Lawsuit through a consent judgment on March 14, 2016. (Defendant’s *Exhibit B* – Consent Judgment).

relative to Hold Harmless Agreement Re: 148 N. Main Street;

10. 3/30/2015: Correspondence to Thomas Biehl and Kevin Gleason re: Hold Harmless Agreement re: 148 N. Main Street.
11. 4/2/2015: Correspondence from Neil Wallace Re: the status of the Hold Harmless Agreement;
12. 4/13/2015: Correspondence from John Cecil at HRC re Hold Harmless Agreement and final site plan;
13. 4/13/2015: Correspondence from Neil Wallace Re: Hold Harmless Agreement re: 148 N. Main Street;
14. 4/23/2015: Correspondence from Jeff Leib Re: meeting on 5/16/15 re: vacant property at Walden & M-15;
15. 4/23/2015: Correspondence from Jeff Leib Re: vacant property cleanup at Walden & M-15;
16. 5/7/2015: Correspondence from Jeff Leib Re: property at Walden & M-15;
17. 5/13/2015: Correspondence from Jeff Leib Re: property at Walden & M-15; and
18. 5/20/2015: Correspondence from Jeff Leib Re: property at Walden & M-15.

In its denial of the FOIA request as to the contested records, defendant alleges that Attorney Ryan stated as follows:

The basis for the denial [of the 18 documents] was, in my opinion as city attorney, I am not a "public body". Thus, the information sought was neither created nor obtained by a public body, i.e., the City of the Village of Clarkston and thus was not a public record. Thus very touchstone of a request for a "public record" by a "public body", your information requested for a "public record" by a "public body", your information requested was never received or in the possession of the public body, i.e., the City of the Village of Clarkston and therefore, in my opinion the stated exemption has been properly offered.

(Defendant's *Exhibit B* – Letter from Attorney Ryan dated October 19, 2015 at 1)(internal citations omitted). Defendant alleges that its decision to deny the FOIA request as to the contested records forms the basis of her lawsuit. Plaintiff acknowledges that her FOIA request included the contested records, which are at issue in this complaint. Plaintiff also acknowledges that defendant's response

was to produce some records and deliver a letter from Attorney Ryan, which asserted that the contested records were “not a public record pursuant to MCL 15.232(e).” (Plaintiff’s *Exhibit 3* – Letter dated June 30, 2015). Plaintiff alleges that the June 30, 2016 letter did not claim privilege for any records and did not claim any exemption from FOIA disclosure. (*Id.*). Plaintiff alleges that her attorney (Attorney Bisio) wrote a follow-up letter to explain why the requested records are public records. (Plaintiff’s *Exhibit 4* – Letter dated August 24, 2015). In response, plaintiff alleges that Attorney Ryan responded by producing more records and continuing to claim that the records in his file are not public record. (Plaintiff’s *Exhibit 5* – Letter dated October 19, 2015). Specifically, plaintiff alleges that Attorney Ryan stated that (1) he did not copy city officials or other city personnel on the correspondence; (2) the contested records were neither created nor obtained by a public body (e.g., defendant) such that it was not a public record; and (3) the contested records were never received or in the possession of the public body. (*Id.*). Plaintiff also alleges that the records of a public official who conducts public business are subject to FOIA even if they are in its attorney’s private files.⁴

On December 4, 2015, plaintiff filed a complaint against defendant alleging a violation of FOIA, MCL § 15.240(7) (Count I). On December 4, 2015, plaintiff also filed a motion for summary disposition (“December MSD”) pursuant to MCR 2.116(C)(10).⁵ On January 14, 2016, defendant filed an answer with affirmative defenses, which denied the allegations of liability as untrue. On February 11, 2016, plaintiff filed a second motion for summary disposition (“February MSD”)

⁴ To support this allegation, plaintiff directs this Court’s attention to the transcript for the May 4, 2016 (oral argument on the motion for summary dispositions) and this Court’s statements related to “private” files about public business; however, she failed to attach a copy of the transcript to her motion for summary disposition.

⁵ This Court notes that the county clerk assigned this matter to the Honorable Martha D. Anderson based on its random draw. On January 4, 2016, Judge Anderson entered an order setting a hearing date and a brief scheduling order. In her scheduling order, she set forth that defendant shall file a response on or before February 12, 2016 and permitted plaintiff to file a five page reply brief. Upon review of the court record, this Court finds that defendant filed a timely response that sought summary disposition pursuant to MCR 2.116(C)(6). Plaintiff filed a timely reply brief, which addressed

pursuant to MCR 2.116(C)(9). On February 12, 2016, defendant filed a response to plaintiff's December MSD, which sought summary disposition pursuant to MCR 2.116(C)(6). On February 16, 2016, Judge Anderson entered an order cancelling the hearing on the December MSD pending a ruling by this Court related to accepting a transfer of this matter based on its presiding over the Richard Lawsuit. On March 30, 2016, this Court entered an order accepting the case and Judge Anderson, Judge Bowman, and Chief Judge Nanci J. Grant entered an order reassigning the civil case. On May 4, 2016, this Court entered an opinion and order that DENIED the December MSD and February MSD and DISMISSED defendant's motion for summary disposition as MOOT.⁶

Defendant alleges that it deposed Attorney Ryan on August 9, 2016. During his deposition, defendant alleges that Attorney Ryan testified to the following facts:

- He (as defendant's attorney) and defendant had no express agreement regarding ownership of records compiled in the course of his work for defendant.
- He had no agreement with defendant regarding his retention or destruction of records compiled during the course of work as its attorney.
- If one of defendant's officials sought copies of correspondence with someone adverse to it, it would depend on the circumstances as to whether he would

defendant's request for summary disposition pursuant to MCR 2.116(C)(6).

⁶ Specifically, this Court stated as follows in its opinion and order related to the December MSD:

Viewing the evidence in the light most favorable to the non-moving party, the Court finds that there is a genuine issue of material fact. Plaintiff takes the position that the contested records are public record and defendant takes the position that the contested records are not public records. This Court cannot – as a matter of law – classify the contested records without additional information. Summary disposition pursuant to MCR 2.116(C)(10) is, therefore, inappropriate.

It stated as follows in its opinion and order related to the February MSD:

Accepting the well-pleaded allegations as true, this Court does not find that defendants' defenses (with the exception of the MCR 2.116(C)(6) grounds) are so clearly untenable as a matter of law that no factual development could possibly deny plaintiff's right to recovery. Having reviewed the pleadings, this Court finds that there are facts that could be uncovered to support defendant's affirmative defenses. Summary disposition pursuant to MCR 2.116(C)(9) is, therefore, [inappropriate].

It stated as follows in its opinion and order related to defendant's motion for summary disposition:

Viewing the evidence in the light most favorable to the non-moving party, the Court finds that defendant's motion is MOOT because of the parties' consent judgment in the other action expressly preserves plaintiff's claims in this pending action. An issue is considered moot and a decision should not be reached if a court can no longer fashion a remedy. *See In re Contempt of Dudzinski*, 257 Mich App 96, 112 (2003).

provide it. He further stated that the issue has never arisen.

- * He clarified that he used his own firm's email address (sylvanlawtr@gmail.com) to send or receive information on behalf of defendant.
- He has never had an email address with defendant and has never sent emails from a city email address.
- He is not an employee of defendant, has no pension, no employee benefits.

(Defendant's *Exhibit F* – Attorney Ryan's Deposition at 9-12, 40-41).

On September 8, 2016, defendant filed its motion for summary disposition pursuant to MCR 2.116(C)(10). On September 12, 2016, this Court entered a Brief Scheduling Order pursuant to MCR 2.119(G), which stated that "[t]he responding party's responsive brief shall be filed and received by the Court and opposing counsel on or before **October 5, 2016** by 4:30 p.m."⁷ Plaintiff filed a timely response, which requested summary disposition pursuant to MCR 2.116(I)(2). On September 12, 2016, this Court entered a Brief Scheduling Order pursuant to MCR 2.119(G) prompted by plaintiff's request to file a cross motion, which stated that "[t]he responding party's responsive brief shall be filed and received by the Court and opposing counsel on or before **October 5, 2016** by 4:30 p.m."⁸ On September 20, 2016, plaintiff filed her cross motion for summary disposition pursuant to MCR 2.116(C)(10). Defendant filed a timely response.

III. Standard of Review

Under MCR 2.116(C)(10), the court will grant a motion for summary disposition if there is no issue of material fact and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10). In determining a motion for summary disposition under MCR 2.116(C)(10), the court

⁷ A trial court may order the parties to meet scheduling deadlines when the court "concludes that such an order would facilitate the progress of the case[.]" MCR 2.401(B)(2)(a). Also, MCR 2.401(B)(2) provides trial courts with the discretion to decline to consider motions a party files after the ordered deadline. *Velez v Tuma*, 283 Mich App 396, 409 (2009), *rev'd in part* on other grounds 492 Mich 1 (2012). This court rule "promotes the efficient management of the trial court's docket[.]" *Kemerko Clawson LLC v RXIV Inc*, 269 Mich App 347, 350 (2005).

must consider “the affidavits, pleadings, depositions, admissions, and other documentary evidence in the light most favorable to the nonmoving party.” *Richie-Gamester v City of Berkley*, 461 Mich 73, 76 (1999). Additionally, a party opposing a motion for summary disposition pursuant to MCR 2.116(C)(10) has the burden of showing that a genuine issue of disputed fact exists. The party opposing such a motion must produce documentary evidence to set forth specific facts demonstrating that there is a genuine issue for trial. *Patterson v Kleiman*, 447 Mich 429, 432 (1994).

IV. Analysis

Plaintiff filed a complaint against defendant alleging a violation of FOIA, MCL § 15.240(7) (Count I). The issue in this case is whether the contested records are “public records” such that they are subject to FOIA disclosure pursuant MCL § 15.233(1).

Pursuant to MCL § 15.233(1), a public body must disclose all public records not specifically exempt under the act. *Thomas v City of New Baltimore*, 254 Mich App 196, 201 (2002)(citing *Herald Co v Bay City*, 463 Mich 111, 119 (2000)). MCL § 15.232(d) defines a “public body” as 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, but does not include the governor or lieutenant governor, the executive office of the governor or lieutenant governor, or employees thereof.
- (ii) An agency, board, commission, or council in the legislative branch of the state government.
- (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.

⁸ See note 2.

- (v) The judiciary, including the office of the county clerk and employees thereof when acting in the capacity of clerk to the circuit court, is not included in the definition of public body.

MCL § 15.232(e) defines “public record” as follows:

“Public record” 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. Public record does not include computer software. This act separates public records into the following 2 classes:

- (i) Those that are exempt from disclosure under [MCL 15.243].
- (ii) All public records that are not exempt from disclosure under [MCL 15.243] and which are subject to disclosure under this act.

See also, Hopkins v Duncan Tp, 294 Mich App 401, 409-10 (2011) (discussing the definition of a public body). Further, a “writing” includes all means of recording or retaining meaningful content, including handwriting. MCL § 15.232(h); *Patterson v Allegan Co Sheriff*, 199 Mich App 638, 639–640 (1993). A writing can become a public record after its creation if possessed by a public body in the performance of an official function, or if used by a public body, regardless of who prepared it. *MacKenzie v Wales Twp.*, 247 Mich App 124, 129; *Detroit News, Inc v Detroit*, 204 Mich App 720, 723–724 (1994). Finally, mere possession of a record by a public body does not render it a public record because the record must be used in the performance of an official function to be a public record. *Howell Ed Ass’n MEA/NEA v Howell Bd of Ed*, 287 Mich App 228, 236 (2010).

“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.” *Manning v East Tawas*, 234 Mich App 244, 248 (1999). Both the Court of Appeals and the Michigan Supreme Court described FOIA as a prodisclosure statute and recognize that FOIA’s disclosure provisions must be interpreted broadly. *Herald Co, supra*, at 119; *Swickard v*

Wayne Co Med. Examiner, 438 Mich 536, 544 (1991); and *Practical Political Consulting, Inc v Secretary of State*, 287 Mich App 434, 465 (2010). FOIA contains several exceptions to the public body's duty to disclose, which "must be construed narrowly, and the burden of proof rests with the party asserting an ex; emptio," *Manning, supra* at 248; MCL § 15.243 see also *Bradley v Saranac Community Schools Bd of Ed*, 455 Mich 285, 293.

"[I]f a public body makes a final determination to deny a request, the requesting person may either appeal the denial to the head of the public body or commence an action in the circuit court within 180 days." *Thomas v City of New Baltimore*, 254 Mich App 196, 201–02 (2002) (citing MCL § 15.235(7)). If a plaintiff prevails in an action to compel disclosure under the FOIA, the circuit court must award reasonable attorney fees, costs, and disbursements to the plaintiff. *Scharret v. Berkley*, 249 Mich App 405, 410 (2002). Under FOIA, the trial court must award reasonable attorney fees, costs, and disbursements to a prevailing party. MCL § 15.240(6) and (7).⁹

A. *Defendant's Motion for Summary Disposition Pursuant to MCR 2.116(C)(10)*

Defendant argues that (1) its attorney is not a public body as defined by FOIA and (2) the records in the possession of its attorney are not public records as defined by FOIA. In reply, plaintiff disagrees and argues that (1) it is irrelevant that defendant's attorney is not a "public body" and (2)

⁹ MCL § 15.240(6) and (7) states as follows:

- (6) 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).
- (7) If the 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 order the public body to pay a civil fine of \$1,000.00, which shall be deposited into the general fund of the state treasury. The court shall award, in addition to any actual or compensatory damages, punitive damages in the amount of \$1,000.00 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 contested records are public records such that they must be produced under FOIA.

Defendant argues that its attorney is not a public body as defined by FOIA. To support its argument, defendant directs this Court's attention to MCL § 15.233(1) as well as MCL § 15.232(d)(iii) as well as case¹⁰ law, which finds that the legislature intentionally omitted "city attorney" from the definition of "public body." Specifically, defendant discusses the facts and holding in *Hoffman v Bay City School District*, 137 Mich App 333, 339 (1984), which held that the "information sought in this case was neither created nor obtained by the public body. As it was thus not a 'public record', as defined in the FOIA, its disclosure was not governed by the provision of FOIA." As such, the *Hoffman* Court concluded that the records in the possession of a private attorney that were not distributed to a public body (e.g., the school board) were not subject to FOIA disclosure. Then, defendant directs this Court's attention to the following *undisputed* facts:

- By its City Charter, Attorney Ryan is defendant's administrative officer but he is not its employee, receives no benefits, and never sent or received emails from defendant's email address or have email address associated with defendant. (Defendant's *Exhibit G* – Charter at Chapter V, 13-19).
- Attorney Ryan sent and received correspondence from his private office and private email account (SylvanlakeTR@gmail.com). (Defendant's *Exh. F* at 40).
- Attorney Ryan compiled some records in the course of his work and forwarded them to defendant and did not compile others. (*Id.* at 10).

Then, defendant concludes that Attorney Ryan is not a public body as an administrative officer even if it is a public body pursuant to MCL § 15.232(d)(i). See *GMAC, LLC v Treasury Dep't*, 286 Mich 365, 372 (2009) (holding that an administrative officer is not included since the legislature omitted it from the "public body" definition). Defendant also argues Attorney Ryan is not a public body based

the next succeeding public body that is not an individual and that kept or maintained the public record as part of its public function.

¹⁰ *Michigan's Adventure, Inc v Dalton Twp*, 290 Mich App 328, 332 (2010) and *Hoffman v Bay City School District*, 137

on his agency relationship because that the Michigan Supreme Court rejected that interpretation as inconsistent with the statutory scheme in *Breighner v Michigan High School Athletic Ass'n, Inc*, 471 Mich 217 (2004) (holding that the Michigan High School Athletic Ass'n was not a public body subject to FOIA requests). As such, defendant concluded that the correspondence sought by plaintiff pursuant to her FOIA request is not in the possession of the "public body", which means that it is not a "public record" and not subject to the mandatory disclosure provisions. MCL § 15.232(1).

In reply, plaintiff disagrees and argues that it is irrelevant that defendant's attorney is not a "public body." Plaintiff acknowledges that the definition of a "public body" does not include a city attorney or a city employee. MCL § 15.232(d). Then, plaintiff argues that she filed a FOIA request for records from defendant not its attorney. (Plaintiff's *Exh. 2* (noting it is addressed to defendant's FOIA coordinator)). To support her argument, plaintiff directs this Court's to *Ross v Consumers Power Co*, 420 Mich 567 (1984) and *Briggs Tax Serv, LLC v Detroit Pub Sch*, 282 Mich App 29, 35 n7 (2008), *rev'd on other grounds*, 485 Mich 69 (2010), which recognized that a city can only act through its agents who do things for it and maintain its record. Then, plaintiff concludes that the records are still discoverable even if they are in the possession of a public body's agent because to conclude otherwise would mean that no records would be in the possession of a public body. Instead, plaintiff asserts that the question is whether the agent has record in his possession his role conducting defendant's business.

Defendant argues that the records in the possession of its attorney are not public records as defined by FOIA. To support its argument, defendant directs this Court's attention to MCL § 15.232(e) (defines a public record). Then, defendant states that the contested records were not public records and have not been used by defendant in the performance of an official function. Specifically,

Mich App 333 (1984).

defendant directs this Court's attention to the following *undisputed* facts related to the correspondence sought by plaintiff:

- The contested records are not in the possession of or owned by defendant.
- Private parties – not defendant – prepared the contested records.
- There is no evidence that the contested records were ever used or retained in the performance of an official function by defendant.
- Attorney Ryan has the contested records in his private files and he never shared the contested records with defendant's council members such that they are not in possession of defendant.

(Defendant's *Exh. B* and *F*). Then, defendant directs this Court's attention to case¹¹ law discussing that (1) records must be used for an official function to be a public record and (2) records must be in existence to be subject to public record (access only and does not require creation of the records). Then, defendant states that the contested records were not prepared, owned, used, in the possession of, or retained by it; instead, defendant states that private parties, including its attorney, prepared, owned, used, possessed, and retained them. Then, defendant discusses the facts and holding in the following cases:

- *Walloon Lake Water System, Inc v Melrose Twp*, 163 Mich App 726, 731 (1987) (holding that handwritten notes authored by a township board member during a township board meeting used for his personal use was not subject to FOIA disclosure);
- *Hopkins v Duncan Twp*, 294 Mich App 401 (2011) (holding that a personal letter read out loud to the township board of trustees at a regularly scheduled meeting and incorporated into the meeting minutes was subject to disclosure because the board used it for the basis of its decision);
- *Mackenzie v Wales Twp*, 247 Mich App 124, 129 (2001) (holding that computer tapes with tax information on individual properties located in defendant's township were subject to FOIA disclosure);

¹¹ *Howell Educ Ass'n, MEA/NEA v Howell Bd of Educ*, 287 Mich App 228, 236 (2010); *Mackenzie v Wales Twp*, 247 Mich App 124, 129 (2001); and *Walloon Lake Water System, Inc v Melrose Twp*, 163 Mich App 726, 731 (1987).

- *The Detroit News, Inc v City of Detroit*, 204 Mich App 720 (1994) (holding that telephone bills showing calls to and from the Mayor's Office were subject to FOIA disclosure because they formed the basis of an official function (use of public funds to pay telephone expenses)); and
- *Howell Educ Ass'n, MEA/NEA v Howell Bd of Educ*, 287 Mich App 228, 236 (2010) (holding that personal emails between the union and its members had nothing to do with the operation of the school such that they were not public records and not subject to FOIA disclosure).

As such, defendant concludes that the contested records are not subject to disclosure because defendant did not create, obtain, or possessed by defendant and did not form the basis for any of its decisions in the performance of an official function and Attorney Ryan had no agreement with defendant to retain possession of any records.

In reply, plaintiff disagrees and argues that the contested records are public records such that they must be produced under FOIA. Specifically, plaintiff argues that the contested records are public records because:

- **FOIA Is Construed In Favor Of Disclosure:** To support this argument, plaintiff directs this Court's attention to MCL § 15.231(2), which sets forth FOIA's purpose as well as case¹² law recognizing that it is broadly written to open the closed files of the government and that the public body bears the burden to support its denial to disclose. Plaintiff also directs this Court's attention to defendant's brief where it states that it has a duty to keep matters involving public controversy a secret. (Defendant's Brief at 16).
- **The Records Meet The Definition Of Public Record:** To support this argument, plaintiff directs this Court's attention to MCL § 15.232(e) (public record definition) and MCL § 15.232(d)(iii) (public body definition includes a city). Then, plaintiff concludes that the issues are (1) whether defendant's attorney was acting in the performance of an official function and (2) whether the records in his files are "used, in the possession of, or retained" by defendant.
 - **Attorney Ryan Performs Official Function for Defendant:** Plaintiff directs this Court's attention to defendant's charter, which sets forth that its attorney is an formally appointed city officer.

¹² *Walloon Lake*, supra at 730; *Herald Co v Bay City*, 463 Mich 111, 119 (2000); and *Warren v Detroit*, 261 Mich App 165 (2004).

(Plaintiff's *Exhibit 11* – Charter at § 5.1(a)-(b) and *Exhibit 10* – Attorney Ryan's Deposition at 41). In his capacity as its attorney, plaintiff argues that Attorney Ryan sends and receives communication from persons outside of the public body, which involve defendant's business and he represents defendant's interest in its business. Then, plaintiff argues that the contested records involve communication between Attorney Ryan and parties adverse to defendant (e.g., Wallace who represented a developer seeking approval from defendant for new construction; Leib who represented property owners in a dispute with defendant regarding his clients' cutting down trees on vacant property and being issued an ordinance violation for that act; and defendant's engineer regarding those same matters). Plaintiff requests those documents based on the descriptions in his invoices issued to defendant. If those records are relevant to defendant's business, plaintiff concludes that they are public records (i.e., in the performance of an official function). Then, plaintiff concludes that the link between the contested records establishes the link between Attorney Ryan's invoice and his representing the city on disputed matters.

- **The Records Were Used, in the Possession of, and Retained by Defendant:** Plaintiff argues that Attorney Ryan acted on defendant's behalf because it appointed him as its charter officer and attorney. To support this argument, plaintiff directs this Court's attention to case¹³ law recognizing that an attorney is the client's agent as well as case¹⁴ law recognizing that the agent stands in the shoes of the principle. Then, plaintiff directs this Court's attention to Attorney Ryan's testimony that he would turn over his records on open matters if the city appointed a new city attorney. As such, plaintiff concludes that the records in Attorney Ryan's possession are defendant's records such that they are subject to disclosure. Next, plaintiff argues that defendant's argument that "the records never served as a basis of any decision to act or refrain from acting" is wrong because (1) the definition for "public record" does not include that requirement; (2) it contradicts defendant's admission that each of the contested records involved its business and it paid Attorney Ryan for his work involving those records; and (3) she cannot determine if defendant used the records for its business because it will not disclose them.

- **The Physical Location Of Record Does Not Change Their Character as Public Records:** Specifically, plaintiff argues that defendant's reliance on the

¹³ *St Clair Intermediate School Dist v Intermediate Ed Ass'n / Michigan Ed Ass'n*, 458 Mich 540 (1998) and *Fletcher v Board of Ed*, 323 Mich 343, 438 (1948).

¹⁴ *In re Capuzzi Estate*, 470 Mich 399, 402 (2004); *St Clair Intermediate School Dist*, *supra*; and *Stephenson v Golden*, 279 Mich 710, 736 (1937).

fact that Attorney Ryan maintained the records in his private office; involves his private email; and keeps the records at his sole discretion is irrelevant. To support her argument, plaintiff directs this Court's attention to the defendant's city manager's deposition testimony where she stated that Attorney Ryan had a legal obligation to provide his records upon demand as well as case¹⁵ law recognizing that the records belong to the public body. (Plaintiff's *Exhibit 9* – Carol Eberhardt's Deposition) at 5). Then, plaintiff concludes that Attorney Ryan's files regarding his conduct of defendant's business are public record regardless if they reside in city hall or his office.

- **Hoffman, supra Is Readily Distinguishable And Does Not Give Defendant the Right to Conceal Public Business by Keeping Records In Its City Attorney's Office:** Specifically, plaintiff argues that *Hoffman* is distinguishable because it involved the school board's attorney conducting a short investigation into the school district's finance department; he made an oral report finding no improprieties; and did not share the records of his investigation with the school board.¹⁶ Further, plaintiff argues that the facts in this matter support that (1) it did not involve an internal investigation and (2) defendant's attorney acted as a public official to communicate with other attorneys about matters adverse to defendant and its engineering firm about a dispute involving two properties. As such, plaintiff concludes that Attorney Ryan was conducting defendant's business as a public official with third parties.

As it relates to the cases cited by defendant, plaintiff argues as follows:

- *Walloon Lake Water System, supra:* It does not help defendant's position because it involved a letter written to the township supervisor that was read aloud at a township meeting and considered when the township made its decision.
- *Hopkins, supra:* It does not help defendant's position because it involved the handwritten personal notes of a township board member that were taken for his own use and not circulated or read by anyone else.
- *Mackenzie, supra:* It supports her position because it ordered the disclosure of the records even though the public body did not create or have physical possession of the records.
- *Coblentz, supra:* It does not stand for the proposition that "a privately retained city attorney is not a public official." Instead, plaintiff argues that it states that the city cannot charge for an attorney's time to respond to a record

¹⁵ *Flagg v Detroit*, 252 FRD 346, 353 (ED Mich 2008); *Detroit News, supra*; *MacKenzie, supra*; and *Howell Ed Assn, supra*.

¹⁶ Plaintiff requests that this Court limit *Hoffman* to its facts arguing that it was wrongly decided.

request because the attorney is not a city employee.

- *Howell Educ Ass'n, surpa*: It supports her position that the content of a record – not its location – determines if it is a public record.

As such, plaintiff concludes that it is entitled to obtain these records pursuant to MCL § 15.231(2) and seeks summary disposition pursuant to MCR 2.116(I)(2).¹⁷

Viewing the evidence in the light most favorable to the non-moving party, the Court finds that there is no genuine issue of material fact. Specifically, this Court finds that:

- Defendant is a public body pursuant to MCL § 15.232(d)(iii), which recognizes a public body as “[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.”
- Attorney Ryan is not a public body as defined by MCL § 15.232(d)(iii); *Hoffman, surpa* at 336; and *Coblentz, sura* at 578-580.
- As its attorney, Attorney Ryan is defendant’s agent such that he *may* possess a writing that he prepared, owned, used, in the possession of, or retained on behalf of the defendant – a public body – in the performance of an official function, from the time it is created.
- It is sufficient that for a document to be considered a “public record” if a public body’s agent (such as a public body’s attorney) prepared, owned, used, possessed, or retained documentation in the performance of an official function. MCL § 15.232(e).

Having determined that the records retained by Attorney Ryan may be subject to a FOIA request, this Court must consider if defendant used the contested records (the actual correspondence) as a basis for its decision or merely used Attorney Ryan’s advice or oral report for a decision. *Walloon Lake Water System, surpa* at 731; *Hopkins, surpa*; *Mackenzie, supra* at 129.

- Defendant summarizes the contested records as containing communications from January 30, 2015 to May 20, 2015 and between Attorney Ryan and third-parties related to the property located at 148 N. Main and a hold

¹⁷ Under MCR 2.116(I)(2), the court may render judgment in favor of the opposing party if “appears to the court that the opposing party, rather than the moving party, is entitled to judgment.”

harmless agreement.

- Defendant states that there is no evidence that it used or retained the contested records in the performance of its official function and plaintiff fails to direct this Court's attention to any documentary evidence (e.g., meeting minutes) to establish that defendant used the contested records to make a decision related to the subject matter of the contested records. Instead, plaintiff directs this Court's attention to Attorney Ryan's invoice, which includes a line item billing defendant for his work on the subject matter of the contested record.
- Defendant states that Attorney Ryan never shared the contested records with defendant's council members such that they are not in possession of the contested records.

Having reviewed the documentary evidence, this Court finds that the contested records are not "public records" because there is no evidence to support that defendant used or retained them in the performance of an official function or that Attorney Ryan shared the contested records (the actual correspondence) to assist defendant in making a decision. Summary disposition pursuant to MCR 2.116(C)(10) is, therefore, appropriate. Having reached this decision, this Court finds that it is inappropriate to grant summary disposition pursuant to MCR 2.116(I)(2) to plaintiff.

B. Plaintiff's Cross Motion for Summary Disposition Pursuant to MCR 2.116(C)(10)

Plaintiff argues that she is entitled to (1) an order that defendant cease withholding the contested records and produce them; (2) impose a civil fine of \$1,000 against defendant payable to the State of Michigan; (3) award plaintiff punitive damages of \$1,000 pursuant to MCL § 15.240(7); and (4) grant an award of attorney's fees, costs, and disbursements pursuant to MCL § 15.240(6). In reply, defendant argues that plaintiff failed to establish that the contested records are subject to FOIA disclosure and reasserts its arguments that (1) the city attorney is not a "public body"; (2) an agent is not included in the FOIA definition of "public body"; (3) a writing is not a public record if the public body does not control it in the performance of an official function; (4) plaintiff failed to establish that the writings she sought were public record subject to FOIA disclosure; (5) the civil action

exemption¹⁸ applies to bar the disclosure of records sought by plaintiff; and (6) defendant's objections to plaintiff's request for FOIA disclosure were reasonable.

Having already determined that the contested records are not "public records" because there is no evidence to support that defendant used or retained them in the performance of an official function (e.g., to make a decision related to 148 N. Main Street), this Court finds that it is not necessary to address the arguments in plaintiff's cross motion because they are moot.

V. Conclusion

Accordingly, defendant's motion for summary disposition is GRANTED and plaintiff's cross motion for summary disposition is MOOT. IT IS HEREBY ORDERED that plaintiff's complaint against defendant is DISMISSED with prejudice. *This Order is the final order for the case because it resolves the last pending claim and it closes the case.*

IT IS SO ORDERED.

Hon. Leo Bowman

Date

10-19-16 *VBK*

¹⁸ Defendant relies on this exemption related to plaintiff making a FOIA request a mere five days after her husband filed a lawsuit against defendant (e.g., Richard Lawsuit).

STATE OF MICHIGAN
COURT OF APPEALS

SUSAN BISIO,

Plaintiff-Appellant,

v

THE CITY OF THE VILLAGE OF
CLARKSTON,

Defendant-Appellee.

UNPUBLISHED

July 3, 2018

No. 335422

Oakland Circuit Court

LC No. 2015-150462-CZ

Before: BECKERING, P.J., and M. J. KELLY and O'BRIEN, JJ.

PER CURIAM.

Plaintiff, Susan Bisio, appeals as of right from an order granting summary disposition of her claim under Michigan's Freedom of Information Act (FOIA), MCL 15.231 *et seq.*, to defendant, City of the Village of Clarkston, and deeming moot her cross-motion for summary disposition on defendant's defenses.¹ Plaintiff also challenges the trial court's June 8, 2016 order denying her motion in limine to exclude evidence of her motive for requesting the records at issue and her intended use of them. For the reasons stated below, we affirm the trial court's grant of summary disposition to defendant on plaintiff's FOIA claim.

¹ We permitted the Michigan Press Association and Detroit Free Press to file a joint amicus brief on behalf of plaintiff. *Susan Bisio v The City of the Village of Clarkston*, unpublished order of the Court of Appeals, entered June 21, 2017 (Docket No. 335422). We also permitted the Michigan Municipal League and the Michigan Townships Association to file a joint amicus brief on behalf of defendant. *Susan Bisio v The City of the Village of Clarkston*, unpublished order of the Court of Appeals, entered July 26, 2017 (Docket No. 335422). We also granted plaintiff's motion for leave to reply to the joint amicus brief of the Michigan Press Association and Detroit Free Press. *Susan Bisio v The City of the Village of Clarkston*, unpublished order of the Court of Appeals, entered September 6, 2017 (Docket No. 335422).

I. STATEMENT OF PERTINENT FACTS AND PROCEDURAL HISTORY

On June 7, 2015, plaintiff submitted a FOIA request to defendant requesting, among other things, correspondence referenced in certain monthly billing invoices submitted to the city by the city attorney, Thomas Ryan, and by engineering consultants Hubbell, Roth, & Clark (HRC). The documents requested pertained primarily to a development project at 148 N. Main Street and the cleanup of vacant property located at Walden Road and M-15. Plaintiff also requested any other correspondence “pertaining to the conditional rezoning of 148 N. Main and storm water collection, retention, or detention at the proposed redevelopment at 148 N. Main from January 1, 2014 to the present.” Plaintiff received most of the records she requested, but a letter from the city attorney informed her that 18 of the items referenced in his invoices were not public records. Subsequent communications brought the release of a few more records and corrections of some of the deficiencies in disclosures already made. Defendant maintained, however, that certain items in the city attorney’s files and the files of the HRC were not public records because the city had never received the records and neither the city attorney nor HRC was a “public body” for purposes of FOIA.

On December 4, 2015, plaintiff filed a FOIA complaint asking the court to order defendant to produce all of the records she had requested, regardless of where they were located. In its answer, defendant denied having violated FOIA by refusing to disclose public records and asserted affirmative defenses under MCR 2.116(C)(8) (failure to state a claim), (C)(5) (plaintiff is not the party in interest), and (C)(6) (prior action asserting the same claims). Defendant contended that the purpose of plaintiff’s FOIA request was to obtain documents for use by her husband, Richard Bisio, in a complaint he had previously filed against defendant alleging violation of the Open Meetings Act, MCL 15.261 *et seq* (OMA).² Accordingly, defendant asserted that the requested documents were exempt under MCL 15.243(1)(v) because they related “to a civil action in which the requesting party and the public body are parties.”

Along with her FOIA complaint, plaintiff filed a motion for partial summary disposition. Relying on agency principles, plaintiff argued that the city attorney was defendant’s agent and stood in defendant’s shoes such that the documents the city attorney possessed that pertained to city business belong to defendant. Therefore, the requested documents are public records because they are “in the possession” of defendant and because the city attorney, as an agent for defendant, “used” them to conduct city business and “retained” them. Plaintiff further argued

² Five days before plaintiff filed the underlying FOIA complaint, her attorney and husband, Richard Bisio, filed a complaint alleging that defendant violated the OMA. After defendant denied plaintiff’s request in part, Richard amended his OMA complaint to add a count asking for a declaratory judgment that written documents to and from the city attorney, in his capacity as city attorney, were public records under FOIA, regardless of their being kept in his private files. Defendant has maintained throughout the instant action that plaintiff, as a proxy for her husband, submitted her FOIA request to obtain for Richard’s use in his OMA case documents otherwise not available to him.

that neither the physical location of the records in the city attorney's office nor the fact that the city attorney is not a "public body" changes the character of the records as "public records." Defendant filed a response to plaintiff's motion for partial summary disposition and a cross-motion for summary disposition pursuant to MCR 2.116(C)(6), asserting that Richard Bisio was the real party in interest and that plaintiff's FOIA complaint was in service of his OMA complaint. With these motions still pending, plaintiff filed a motion for summary disposition on defendant's affirmative defenses, contending that they were "based on the erroneous premise that Susan Bisio is not a person separate from her husband and that the 'real' plaintiff here is Richard Bisio."

Subsequent to oral argument, the trial court denied both of plaintiff's motions, finding that a genuine issue of material fact existed as to whether the records were public records and that facts could be developed to support defendant's affirmative defenses. Prior to oral argument, defendant and Richard had entered into a consent judgment in Richard's OMA claim that preserved plaintiff's FOIA claim. Consequently, the trial court also denied as moot defendant's motion for summary disposition pursuant to MCR 2.116(C)(6).

Plaintiff next filed a motion in limine to exclude evidence of her motive for requesting records and for her intended use of the records. She asserted that defendant based its defenses primarily on the erroneous assumption that she is just a "front" for her husband and that she filed her FOIA request at his behest "to obtain records for use in his now-dismissed lawsuit against the city." Denying this assumption as untrue, plaintiff argued that a requester's motive and intended use of the documents requested is nevertheless irrelevant, and irrelevant evidence is inadmissible under MRE 402. Defendant responded by indicating that granting plaintiff's motion would be premature, as discovery had not yet closed, and further discovery might produce evidence that plaintiff intended by her FOIA action to obtain documents relevant to her husband's now-dismissed OMA case. The trial court denied plaintiff's motion.

After discovery closed, defendant filed a motion for summary disposition primarily on the ground that the records sought were not public records for purposes of FOIA because they were not "prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function." Plaintiff responded with a cross-motion for summary disposition on the defendant's asserted exemptions from disclosure as well as on the exemptions defendant did not formally assert. In addition, plaintiff sought summary disposition on her request for imposition of a civil fine and award of punitive damage as provided for under FOIA, citing MCL 15.240(7) and MCL 15.240a(7).

Subsequent to oral argument, the trial court granted defendant's motion for summary disposition and deemed plaintiff's cross-motion moot. The trial court found no documentary evidence establishing that the city attorney shared the contested records with defendant, that defendant used the contested records to make a decision related to the subject matter of the records, or that defendant retained the contested records in performance of an official function. Thus, the trial court concluded that the contested records were not public records. Accordingly, the trial court granted defendant summary disposition of plaintiff's complaint pursuant to MCR 2.116(C)(10) and denied as moot plaintiff's cross motion for summary disposition. This appeal followed.

II. ANALYSIS

A. STANDARDS OF REVIEW

We review a trial court's summary disposition decision de novo. *Thomas v City of New Baltimore*, 254 Mich App 196, 200; 657 NW2d 530 (2002). Summary disposition under MCR 2.116(C)(10) is proper if the documentary evidence filed by the parties and viewed in the light most favorable to the party opposing the motion fails to show a genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich. 177, 183; 665 NW2d 468 (2003).

We also review de novo questions of statutory interpretation. *Ellison v Dep't of State*, 320 Mich App 169, 175; 906 NW2d 221 (2017). "If the language of a statute is clear and unambiguous, the plain meaning of the statute reflects the legislative intent and judicial construction is not permitted." *Id.* quoting *Herald Co. v City of Bay City*, 463 Mich 111, 117-118; 614 NW2d 873 (2000).

We review a trial court's decision on a motion in limine for an abuse of discretion. See *Lockridge v Oakwood Hosp*, 285 Mich App 678, 693; 777 NW2d 511 (2009). An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes. *Arabo v Michigan Gaming Control Bd*, 310 Mich App 370, 397-398; 872 NW2d 223 (2015). "A court by definition abuses its discretion when it makes an error of law." *In re Waters Drain Drainage Dist*, 296 Mich App 214, 220; 818 NW2d 478 (2012).

B. PUBLIC RECORDS

Plaintiff first contends that the trial court erred in granting defendant summary disposition based on its conclusion that the records at issue are not public records. We disagree.

The purpose of FOIA is to allow the public to "examine and review the workings of government and its executive officials." *Thomas*, 254 Mich App at 201. Unless public records are exempt from disclosure under MCL 15.243, they are subject to disclosure under FOIA. MCL 15.232(e)(i) and (ii). A "public record" 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." MCL 15.232(e). A "public body" includes "[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." MCL 15.232(d)(iii). Public records are not insulated from FOIA by their location or the fact that a private entity created them originally for its own use. See, e.g., *Amberg v City of Dearborn*, 497 Mich 28; 859 NW2d 674 (2014) (private businesses' surveillance videos collected as evidence by law enforcement personnel were public records because they were used to support the defendant's decision to issue a citation).

Plaintiff contends that the city attorney is defendant's agent and that the documents that the city attorney creates, possesses, retains, and uses in the conduct of his work for defendant belong to defendant, the city attorney's principal. For this reason, the letters at issue are records "prepared, owned, used, in the possession of, or retained" by defendant. Plaintiff also contends that the city attorney performed an "official function" for defendant when he sent or received each letter in his capacity as city attorney, and each letter involved city business. According to plaintiff, limiting "official business" to formal decisions of the type reflected in meeting minutes reads the FOIA statute too narrowly and gives defendant too much discretion in deciding what constitutes a public record.

Plaintiff's use of agency principles to argue that the contested documents the city attorney sent and received while negotiating for the city are public records subject to disclosure under FOIA is seductive, but it is unsupported by the plain language of the relevant statutes, by Michigan caselaw, and by the foreign caselaw relied upon by plaintiff.

Absent an ambiguity, the Court may presume that MCL 15.232(e) expresses the Legislature's intent that in order for a record to be subject to FOIA, a public body must have prepared, owned, used, possessed or retained the record in the performance of an official function. See *Ellison*, 320 Mich App at 175 ("If the language of a statute is clear and unambiguous, the plain meaning of the statute reflects the legislative intent and judicial construction is not permitted.") The definition of "public body" provided by MCL 15.232(d)(iii) does not include officers or employees acting on behalf of cities, townships, and villages. By contrast, MCL 15.232(d)(i), which provides the definition of "public body" relevant to the executive branch of state government, does include officers and employees acting on behalf of the public body. Had the Legislature so intended, it could have included officers or employees, or agents, in the definition of public body that pertains to cities, townships, and villages. That it did not indicates the Legislature's intent to limit "public body" in § 232(d)(iii) to the governing bodies of the entities listed. This interpretation finds support in the Michigan Supreme Court's decision in *Breighner v Mich High Sch Athletic Ass'n*, 471 Mich 217; 683 NW2d 639 (2004).

At issue in *Breighner* was whether the Michigan High School Athletic Association (MHSAA) was a "public body" as defined at MCL 15.232(d). *Breighner*, 471 Mich at 219. The plaintiffs argued that the MHSAA was a public body as defined by § 232(d)(iii) because "it acts as an 'agent' for its member schools[.]" *Id.* at 232. The trial court ruled for the plaintiff on other grounds, but this Court reversed in a split decision, with the majority rejecting the plaintiffs' argument that the MHSAA is an 'agent' of the state and therefore subject to FOIA under § 232(d)(iii). *Breighner*, 471 Mich at 224.

Affirming this Court's decision, the Michigan Supreme Court observed that the majority and the parties "appear to have assumed that § 232(d)(iii) includes 'agents' of enumerated governmental entities in the definition of 'public body.'" *Id.* at 232. Disagreeing, the *Breighner* Court stated that "agent" and "agency" were not the same thing, and that "[h]ad the Legislature intended any 'agent' of the enumerated governmental entities to qualify under § 232(d)(iii), it would have used that term instead of 'agency.'" *Id.* at 232-233. The Court further noted in a footnote that it would "defy logic to conclude that any person or entity qualifying as an 'agent' of one of the enumerated governmental bodies would be considered a 'public body' for purposes

of FOIA. *Id.* at 233 n 6. These observations are arguably nonbinding dicta, but we find the reasoning of the Supreme Court persuasive and consistent with the plain language of § 232(d)(iii) and with Michigan caselaw. See *Eyde Bros Dev Co v Eaton Co Drain Comm'r*, 427 Mich 271, 286; 398 NW2d 297 (1986); *Dye v St. John Hosp and Med Ctr*, 230 Mich App 661, 669; 584 NW2d 747 (1998).

Plaintiff argues that the *Breighner* Court's holding is irrelevant to the case at bar because she has never claimed that the city attorney was a public body. Rather, she argues that, because an agent's records are the principal's records, the city attorney's records are defendant's records; thus, to the extent that the city attorney possesses them in the conduct of city business, defendant possesses them in the performance of an official function. Plaintiff's argument is unavailing because it does not circumvent the requirement of § 232(e) that public records are those prepared, owned, used, possessed or retained in the performance of an official function by the "public body" and *Breighner*'s indication that "public body" does not include agents of the public body. Plaintiff's argument is also unsupported by caselaw suggesting that for a record to become a public record subject to FOIA, the record has to be adopted by the public body itself in one of the ways stated in § 232(e), not simply used, possessed, or retained by someone acting on behalf of the public body. In *Hoffman v Bay City Sch Dist*, 137 Mich App 333; 357 NW2d 686 (1984), this Court held that records created by the school district's attorney during his investigation of the district's finance department were not public records because the attorney reported his findings orally, without at any time sharing the documents in his investigatory file with the district. Like *Hoffman*, the records at issue in this case have remained in possession of the city attorney. There is no evidence suggesting that he has shown them to the city council, that council members have used them for the basis of a decision, or even that the letters sent and received have resulted in an agreed-upon proposal that the city attorney could submit for the council's consideration.

Plaintiff and his amici contend that *Hoffman* was wrongly decided. The amici argue that the Court should have concluded that the attorney's investigation records were public records, but that they were exempt under MCL 15.243(g) as attorney-client privilege, subsection (h) as work product, or subsection (m) as frank communication. Plaintiff contends that *Hoffman* should be limited to its facts and that the work of the charter-appointed city attorney on behalf of the defendant city is qualitatively different from "an internal investigation by a retained attorney on which no action was taken." Plaintiff further contends that *Hoffman* has been superseded by cases such as *MacKenzie v Wales Twp*, 247 Mich App 124, 129; 635 NW2d 335 (2001). Plaintiff relies on *MacKenzie* for the proposition that "FOIA applies to records in the 'control' of a public body, not just those in its possession" and that "it is the content of the record, not its location, that determines whether it is a public record."

We do not believe that *MacKenzie* has superseded *Hoffman*; in fact, this Court distinguished its holding in *MacKenzie* from that in *Hoffman*. At issue in *MacKenzie* was whether magnetic computer tapes created from tax information provided by two townships and possessed by a third party at the behest of the defendant townships were public records subject to disclosure under FOIA. *MacKenzie*, 247 Mich App at 125-126. The townships used the magnetic computer tapes created by the third party to generate tax notifications to their respective property owners. The third party kept the tapes after creating them, but sent the

documents from which it created the tapes back to the townships. When the plaintiff requested a copy of the tapes pursuant to FOIA, both townships argued essentially that the tapes were not subject to release under FOIA because the townships did not possess the tapes. The trial court granted summary disposition to the defendants, finding that the tapes “were not ‘records’ as defined by FOIA because defendants did not create or possess the tapes.” *Id.*

On appeal, this Court determined that the magnetic computer tapes were public records because defendants used them to perform the official function of preparing tax notices for property owners. *Id.* at 129. Distinguishing the case from *Hoffman*, the Court observed that the attorney in *Hoffman* created and retained information and reported only his opinion of the results of his investigation to the school board, not the information actually obtained during his investigation. In *MacKenzie*, however, the townships had access to the information from which the computer tapes were created, had provided that information to the third party so it could create the tapes at issue, used the tapes to send tax notifications to their property owners, and maintained a measure of control over the tapes. *Id.* at 130-131. Thus, although in both *Hoffman* and *MacKenzie*, the alleged public records were not in the possession of the relevant public bodies, the determining factor was not the location of the records at issue, but whether they were “prepared, owned, used, or retained” by the public bodies in the performance of an official function. In *Hoffman* they were not, but in *MacKenzie* they were.

Plaintiff relies on a number of cases from foreign jurisdictions to contend that records prepared on behalf of a public body and held remotely are public records subject to FOIA requests. See *In re Jajuga Estate*, 312 Mich App 706, 723 n 7; 881 NW2d 487 (2015) (noting, “[c]ases from other jurisdictions, although not binding, may be persuasive”). Having reviewed these cases, we do not find them applicable to the case at bar.

Plaintiff first relies on *Nissen v Pierce Co*, 183 Wash 2d 863, ¶ 17; 357 P3d 45 (2015). However, *Nissen* is inapplicable because it addresses whether work product prepared by an agency employee is necessarily a record of a state or local agency subject to disclosure under Washington law. The city attorney in the case at bar is not employed by defendant, and defendant is not a state agency. Plaintiff also relies on *Knightstown Banner, LLC v Town of Knightstown*, 838 NE2d 1127 (Ind App, 2005), and *State ex rel Findlay Publishing Co v Hancock Co Bd of Comm’rs*, 80 Ohio St 3d 134; 684 NE2d 1222 (1997), to argue that a public body’s documents filed in an attorney’s law office are public records subject to disclosure. But, these cases are distinguishable from the case at bar because the documents involved in *Knightstown Banner* and *State ex re Findlay Publishing* were settlement agreements drafted, adopted, and used by the public bodies to obtain release from liability during the course of their respective attorneys’ representation. *Knightstown Banner, LLC*, 838 NE2d at 1133; *State ex re Findlay Publishing Co*, 80 Ohio St 3d at 137. As the trial court noted in the instant case, there is no evidence that defendant used the letters prepared by its city attorney. Plaintiff’s reliance on *Forum Publishing Co v City of Fargo*, 391 NW2d 169 (ND, 1986), is misplaced because the breadth of North Dakota’s statute guaranteeing public access to records far exceeds that of Michigan. Under North Dakota law, *all* records of a public body are public records, without

regard to whether the public body prepared, owned, used, possessed, or retained them in the performance of an official function.³ This is not the law in Michigan.

Finally, *Creative Restaurants, Inc v Memphis*, 795 SW2d 672 (Tenn App, 2014), addresses whether subleases of real property owned by the city in its Beale Street Historic District and held in the office of the city's part-time attorney were public records. *Creative Restaurants, Inc*, 795 SW2d at 673-674. The city had leased the property to the Beale Street Development Corporation, which sublet it to a private concern that changed its name to Beale Street Management, which, in turn, sublet properties to tenants. The subleases benefitted the city's development of the property and listed the city as landlord as long as it was not in default. *Id.* Under these circumstances, and considering that the city had "financial, cultural, historical and political interests" in the property, the court held that the subleases qualified as public records under Tennessee's Open Records Act. *Id.* at 678. The court determined that the city's integral involvement in the Beale Street property and in the subleasing scheme is what made the subleases public records. In the present case, plaintiff presented no evidence that defendant is similarly involved in the two properties that are the subject of the disputed correspondence.

Plaintiff's foreign cases support her proposition that public records held remotely are subject to disclosure under FOIA. But they are not instructive on the issue of whether records prepared, used, and obtained by a city attorney during the course of negotiating issues relevant to the city's environmental concerns but not submitted to the city, and with no evidence of the city having acted on them, are public records under MCL 15.232(e). All of the relevant foreign cases involve records that the public bodies had somehow used in the performance of an official function, regardless of whether the public body ultimately possessed the records. Likewise, the plain language of the relevant statutes defining public record and public body, as well as relevant Michigan caselaw, do not support plaintiff's contention that the city attorney's possession and use of records in his role as city attorney is tantamount to the public body's use and possession of the records in the performance of an official function. Plaintiff's argument, though appealing, is ultimately unsuccessful because it represents an expansion of the definition of "public body" and of "public record" that is unsupported by Michigan law. For these reasons, we affirm the trial court's grant of summary disposition to defendant on plaintiff's FOIA claims. Given our disposition of this issue, we need not address plaintiff's argument regarding the inapplicability of the exceptions to disclosure provided in MCL 15.243.

³ NDCC 44-04-18(1) provides:

Except as otherwise specifically provided by law, all records of public or governmental bodies, boards, bureaus, commissions or agencies of the state or any political subdivision of the state, or organizations or agencies supported in whole or in part by public funds, or expending public funds, shall be public records, open and accessible for inspection during reasonable office hours.

B. MOTIVE AND INTENDED USE

Plaintiff argues that the trial court abused its discretion by denying her motion to exclude evidence of her motive and intended use of the requested records. We agree, but conclude that the error is harmless.

The seminal case addressing the relevance of a party's intended use of documents requested under FOIA is *Taylor v Lansing Bd of Water and Light*, 272 Mich App 200 (2006). At issue in *Taylor* was whether MCL 15.243(1)(v) exempted records requested from the Lansing Board of Water and Light ("BWL") by the plaintiff on behalf of her best friend, Virginia Cluley, who was involved in litigation against the BWL. The plaintiff filed a FOIA request for records that were relevant to Cluley's case against the BWL, but were unavailable to Cluley pursuant to MCL 15.243(1)(v).⁴ See *Taylor*, 272 Mich App at 202. The defendant denied the request, claiming exemption under MCL 15.243(1)(v) and arguing that plaintiff was acting as Cluley's agent to obtain documents to assist her in her case against the BWL. *Id.* The trial court disagreed, denied the defendant's motion for summary disposition, and ordered the defendant to produce the requested documents. Defendant appealed.

On appeal, this Court noted that "exemptions must be narrowly construed, and the party seeking to invoke an exemption must prove that nondisclosure is in accord with the intent of the Legislature. *Id.* at 205. The public body asserting the exemption in MCL 15.243(1)(v) has the burden to prove that it is a party to a civil action involving the requesting party." *Id.* Otherwise, "the public body is afforded no exemption from disclosure based solely on the status of one of the parties as litigants." *Id.* "[I]nitial as well as future uses of information requested under FOIA are irrelevant in determining whether the information falls within the exemption." *Id.* Because the plaintiff was not a party to the Cluley lawsuit with the BWL, MCL 15.243(1)(v) did not operate to exempt her request for documents related to the lawsuit. See also *Rataj v City of Romulus*, 306 Mich App 735, 752-753; 858 NW2d 116 (2014) (whether the attorney seeking disclosure of records sought to obtain evidence for another lawsuit was irrelevant); *Clerical-Technical Union of Michigan State Univ v Bd of Trustees of Michigan State Univ*, 190 Mich App 300, 303; 475 NW2d 373 (1991) (deeming irrelevant "[t]he initial as well as the future use of the requested information").

Although the trial court erred in denying plaintiff's motion in limine, the error was harmless with regard to the court's ultimate decision on plaintiff's FOIA claim. "An error in the admission or the exclusion of evidence, [or] an error in a ruling . . . is not ground for . . . vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice." MCR 2.613(A). The trial court's ruling that the records at issue are not public records subject to disclosure under FOIA,

⁴ MCL 15.243(1)(v) provides that "[a] public body may exempt from disclosure as a public record . . . [r]ecords or information relating to a civil action in which the requesting party and the public body are parties."

and this Court's affirmation of that ruling, renders harmless the trial court's denial of plaintiff's motion in limine.⁵

Affirmed.

/s/ Jane M. Beckering
/s/ Michael J. Kelly
/s/ Colleen A. O'Brien

⁵ Although plaintiff's claim that the trial court erred in not granting her motion in limine is effectively a moot point given our conclusion that the records sought are not public records under FOIA, plaintiff contends that this issue is relevant to defendant's motion for fees, which the trial court took under advisement pending our decision on appeal.

Exhibit 1
Excerpt from FOIA Request

The following are the requests that the city denied:

1. Copies of the following correspondence referenced in the February 2, 2015 invoice from Thomas J. Ryan, P.C.^[1] to the City of the Village of Clarkston (#10608):

* * *

- e. 1/30/15 - correspondence from Neil Wallace^[2] re: water table re: 148 N. Main.

2. Copies of the following correspondence referenced in the March 2, 2015 invoice from Thomas J. Ryan, P.C. to the City of the Village of Clarkston (#10614):

- a. 2/4/15 - correspondence from John Cecil at HRC^[3] re: having developer provide correspondence from MDEQ re: any impacts to the existing contamination plume; NPDES permit waiver is fine re: 148 N. Main Street;

* * *

- c. 2/5/15 - correspondence from Neil Wallace re: project re: 148 N. Main Street;

* * *

- h. 2/23/15 - correspondence from Neil Wallace re: response to Gary Tressel's email regarding approval of MDEQ etc. *and a copy of the referenced email;*

* * *

¹ Ryan is the city attorney.

² Neil Wallace is an attorney representing the developer of property at 148 North Main in Clarkston.

³ HRC is Hubbell, Roth & Clark, Inc., the city's engineering firm.

3. Copies of the following correspondence referenced in the April 2, 2015 invoice from Thomas J. Ryan, P.C. to the City of the Village of Clarkston (#10621):

* * *

- e. 3/23/15 - correspondence from Neil Wallace re: indemnity for storm water system re: 148 N. Main;

* * *

- g. 3/26/15 - correspondence to Neil Wallace re: did HRC receive a copy of the revised groundwater mounding analysis;

* * *

- j. 3/27/15 - correspondence to Neil Wallace re: proper party for Hold Harmless Agreement and forward appropriate language re: 148 N. Main Street;

- k. 3/27/15 - correspondence from Neil Wallace re: revised draft of Hold Harmless Agreement re: 148 N. Main;

- l. 3/30/15 - correspondence from Thomas Biehl at HRC re: comments relative to Hold Harmless Agreement re: 148 N. Main; and,

- m. 3/30/15 - correspondence to Thomas Biehl and Kevin Gleason re: Hold Harmless Agreement re: 148 N. Main Street.

4. Copies of the following correspondence referenced in the May 1, 2015 invoice from Thomas J. Ryan, P.C. to the City of the Village of Clarkston (#10626):

- a. 4/2/15 - correspondence from Neil Wallace re: the status of the Hold Harmless agreement;

* * *

- d. 4/13/15 - correspondence from John Cecil at HRC re: Hold Harmless agreement and final site plan;

- e. 4/13/15 - correspondence from Neil Wallace re: Hold Harmless Agreement re: 148 N. Main Street;

* * *

- j. 4/23/15 - correspondence to Jeff Leib⁴ re: meeting on 5/16/15 re: vacant property at Walden & M-15;
- k. 4/23/15 - correspondence from Jeff Lieb re: vacant property cleanup at Walden and M-15;

* * *

- 5. Copies of the following correspondence referenced in the June 1, 2015 invoice from Thomas J. Ryan, P.C. to the City of the Village of Clarkston (#10633):
 - a. 5/7/15 - correspondence from Jeffrey Leib re: property at Walden and M-15
 - b. 5/13/15 - correspondence to Jeff Leib re: vacant property at Walden and M-15
 - c. 5/20/15 - correspondence from Jeff Leib re: Walden Road and M-15 property

⁴ Jeffrey Leib is an attorney representing the owners of property at Waldon Road and M-15.

Susan Bisio
P.O. Box 1303
Clarkston, MI 48347

June 7, 2015

FOIA Coordinator
City of the Village of Clarkston
375 Depot Road
Clarkston, MI 48346

Dear FOIA Coordinator:

This is a request under the Michigan Freedom of Information Act for copies of the following records from the City of the Village of Clarkston, whether they exist in paper or electronic form. If these documents exist on line, please provide a website address in lieu of providing copies.

1. Copies of the following correspondence referenced in the February 2, 2015 invoice from Thomas J. Ryan, P.C. to the City of the Village of Clarkston (#10608):
 - a. 1/8/15 – correspondence from Neil Wallace re: easement walkway and steps between the municipal lot and 39 S. Main and Main Street re: snow and slush accumulation;
 - b. 1/9/15 – correspondence from Neil Wallace re: city did not remove snow from the walkway and stairs between Main Street and Municipal parking lot ...;
 - c. 1/16/15 – correspondence to Neil Wallace re: issue of snow accumulation on steps and walkway from Main Street to lower parking lot;
 - d. 1/26/15 – correspondence from Neil Wallace re: HRC issues re: 148 Main Street; and,
 - e. 1/30/15 – correspondence from Neil Wallace re: water table re: 148 N. Main.

2. Copies of the following correspondence referenced in the March 2, 2015 invoice from Thomas J. Ryan, P.C. to the City of the Village of Clarkston (#10614):
 - a. 2/4/15 - correspondence from John Cecil at HRC re: having developer provide correspondence from MDEQ re: any impacts to the existing contamination plume; NPDES permit waiver is fine re: 148 N. Main Street;
 - b. 2/4/15 - correspondence from Neil Wallace re: steps and walkway are not shoveled;
 - c. 2/5/15 - correspondence from Neil Wallace re: project re: 148 N. Main Street;
 - d. 2/10/15 - correspondence from Gary Tressel re: storm water plan for 148 N. Main Street;
 - e. 2/10/15 - correspondence from Gary Tressel at HRC re: storm water plan for 148 N. Main Street;
 - f. 2/18/15 - correspondence from Curt Catallo re: scheduling meeting re: 148 N. Main Street;
 - g. 2/18/15 - correspondence from Gary Tressel re: storm water system re: 148 N. Main Street;
 - h. 2/23/15 - correspondence from Neil Wallace re: response to Gary Tressel's email regarding approval of MDEQ etc. *and a copy of the referenced email*;
 - i. 2/26/15 - correspondence to Neil Wallace re: response to his correspondence of 2/23/15; Paragraph N of the Agreement and proposal of a letter from the developer relative to the storm water drainage system *and a copy of the referenced agreement*; and,
 - j. 2/27/15 - correspondence from Neil Wallace re: issues regarding HRC, MDEQ, storm water retention and attached documents re: 148 N. Main Street *and a copy of the referenced attached documents*.
3. Copies of the following correspondence referenced in the April 2, 2015 invoice from Thomas J. Ryan, P.C. to the City of the Village of Clarkston (#10621):
 - a. 3/5/15 - correspondence to Tom Biehl at HRC re: sent copy of Conditional Rezoning Agreement; confirmed meeting for 3/16/15 at 3:30 p.m. at City Attorney's office re: 148 N. Main Street;
 - b. 3/9/15 - correspondence from John Cecil at HRC re: detention system options re: 148 N. Main;
 - c. 3/10/15 - correspondence from Neil Wallace re: review of documents he sent for review and comment re: 148 N. Main Street *and a copy of the referenced documents*;

- d. 3/11/15 – correspondence to Neil Wallace re: environmental report relative to storm water system; options for developer relative to storm water system re: 148 N. Main Street *and a copy of the environmental report*;
 - e. 3/23/15 – correspondence from Neil Wallace re: indemnity for storm water system re: 148 N. Main;
 - f. 3/26/15 – revised Groundwater Mounding Analysis re: 148 N. Main;
 - g. 3/26/15 – correspondence to Neil Wallace re: did HRC receive a copy of the revised groundwater mounding analysis;
 - h. 3/26/15 – email to Neil Wallace and draft of Hold Harmless Agreement *and a copy of the draft Hold Harmless Agreement*;
 - i. 3/27/15 – correspondence from Neil Wallace re: comments relative to Hold Harmless Agreement;
 - j. 3/27/15 – correspondence to Neil Wallace re: proper party for Hold Harmless Agreement and forward appropriate language re: 148 N. Main Street;
 - k. 3/27/15 – correspondence from Neil Wallace re: revised draft of Hold Harmless Agreement re: 148 N. Main;
 - l. 3/30/15 – correspondence from Thomas Biehl at HRC re: comments relative to Hold Harmless Agreement re: 148 N. Main; and,
 - m. 3/30/15 – correspondence to Thomas Biehl and Kevin Gleason re: Hold Harmless Agreement re: 148 N. Main Street.
4. Copies of the following correspondence referenced in the May 1, 2015 invoice from Thomas J. Ryan, P.C. to the City of the Village of Clarkston (#10626):
- a. 4/2/15 – correspondence from Neil Wallace re: the status of the Hold Harmless agreement;
 - b. 4/3/15 – correspondence to Thomas Biehl at HRC and attorney, Kevin Gleason re: Hold Harmless Agreement re: 148 N. Main Street;
 - c. 4/8/15 – correspondence to Neil Wallace re: draft Hold Harmless Agreement he prepared is acceptable to the City and HRC;
 - d. 4/13/15 – correspondence from John Cecil at HRC re: Hold Harmless agreement and final site plan;
 - e. 4/13/15 – correspondence from Neil Wallace re: Hold Harmless Agreement re: 148 N. Main Street;
 - f. 4/14/15 – correspondence to Neil Wallace re: forwarded correspondence from HRC *and a copy of the referenced forwarded correspondence from HRC*;
 - g. 4/15/15 – correspondence from Neil Wallace re: Hold Harmless agreement and storm system engineering re: 148 N. Main Street;
 - h. 4/16/15 – correspondence to Neil Wallace re: getting HRC final storm water plans re: 148 N. Main Street;

- i. 4/20/15 – correspondence to Neil Wallace re: advise as to what his client believes are issues re: 148 N. Main Street;
 - j. 4/23/15 – correspondence to Jeff Leib re: meeting on 5/16/15 re: vacant property at Walden & M-15;
 - k. 4/23/15 - correspondence from Jeff Lieb re: vacant property cleanup at Walden and M-15; and,
 - l. 4/27/15 – correspondence from Gary Tressel re: 148 N. Main Street.
5. Copies of the following correspondence referenced in the June 1, 2015 invoice from Thomas J. Ryan, P.C. to the City of the Village of Clarkston (#10633):
 - a. 5/7/15 – correspondence from Jeffrey Leib re: property at Walden and M-15
 - b. 5/13/15 – correspondence to Jeff Leib re: vacant property at Walden and M-15
 - c. 5/20/15 – correspondence from Jeff Leib re: Walden Road and M-15 property
6. Any other correspondence, to include emails and text messages, pertaining to the conditional rezoning of 148 N. Main and stormwater collection, retention, or detention at the proposed redevelopment at 148 N. Main from January 1, 2014 to present. This includes but is not limited to communications with or concerning Curt Catallo or 148 N. Main, and also includes any communications between attorney Thomas Ryan and any counsel or other agent representing Curt Catallo, Clarkston Corner, LLC, or GPL Investments, LLC. The terms “emails” and “text messages” are intended to include any form of electronic communication between or among any city council member or city employee or agent (including employees or agents working under a contract or retainer, such as attorney Thomas Ryan and Hubble Roth & Clark), whether or not they reside on a city server or a personal hard drive, and whether they were sent or received using a personal or a city email address. This request includes, but is not limited to, emails sent or received from the following email addresses: sharroncat@comcast.net, erichaven@woodsidebible.org, jluginski@yahoo.com, Thomashunter40@aol.com, and dmarsh17@gmail.com.
7. With regard to the Hubbell, Roth & Clark invoice #0133899 dated January 16, 2015:
 - a. A copy of the email sent to HRC regarding the status of the storm water review and overall site plan review;

- b. A copy of the reply email sent by HRC regarding the status of the storm water review and overall site plan review; and,
 - c. A copy of the referenced letter that was issued to the City and the Developer.
- 8. With regard to the Hubbell, Roth & Clark invoice #0134445 dated February 17, 2015:
 - a. A copy of the email sent to HRC regarding the status of the storm water review and overall site plan review;
 - b. A copy of the reply email sent by HRC regarding the status of the storm water review and overall site plan review; and,
 - c. A copy of the referenced letter that was issued to the City and the Developer.
- 9. With regard to the Hubbell, Roth & Clark invoice #0134991 dated March 19, 2015:
 - a. A copy of the email sent to HRC regarding the status of the storm water review and overall site plan review;
 - b. A copy of the reply email sent by HRC regarding the status of the storm water review and overall site plan review; and,
 - c. A copy of the referenced letter that was issued to the City and the Developer.
- 10. A copy of the conditional rezoning agreement for 148 N. Main.
- 11. A copy of the legal services contract for attorney Thomas Ryan. If the billing rates and agreed upon billing increments are not contained within the contract, then I also request a copy the document that memorializes the current billing procedures between the City and attorney Thomas Ryan.

The new policy referenced by attorney Thomas Ryan during the April 27, 2015 City Council meeting where he advised that he would control what, when and even if public documents will be made available to the public¹ affects my confidence level that the City will produce all responsive records limited only by exemptions permitted by law. Therefore, if you claim that all or any portion of a record is exempt, please cite the statutory basis for the exemption along with the specific reason in a manner that makes it clear which exemption allegedly applies to which redaction. If you believe that a page within a larger document is exempt, please insert a blank page so that the context of the redaction is clear. If you believe that an

¹ "This information comin' out of city hall is gonna have to be adjusted"
Unofficial transcription of the Clarkston City Council meeting, April 27, 2015.

entire document is exempt, please describe the record sufficiently, to include the number of pages, as well as the statutory basis for the exemption(s) you claim applies.

At the same April 27, 2015 City Council meeting referenced in the paragraph above, attorney Thomas Ryan expressed a belief that information should be withheld from the public, seemingly to include the occasions when he serves as a business advisor rather than a legal advisor. By way of example but not limitation, Mr. Ryan's definition of privilege appears to include a document sent from Mr. Catallo, who would oppose the City in the event of litigation, addressed "to whom it may concern," delivered to the City Manager, and expressing the mere possibility of litigation.² Therefore, if the City asserts that a record or portion of a record is exempt under a claim of privilege or the work product doctrine, please provide sufficient information concerning the record so that I can determine whether or not the ostensible privilege claim should be challenged - specifically, the date, the subject, who the communication was from, and to whom it was addressed, the form of communication (e.g., email or memo), and a brief description of the communication - in short, a privilege log. If the allegedly privileged communication was included in an email string, I request the entire email string, as this will be probative in determining whether any privilege, if one exists at all, was waived.

Finally, given the familial relationship between councilmember Sharron Catallo and Curt Catallo, the refusal to provide information in response to public questions about the status of 148 N. Main during public meetings, the public statements made by attorney Thomas Ryan and by the City Council suggesting that public materials should not be distributed in public forums, and attorney Thomas Ryan's claim that public records should not be provided to the public unless and until the City Council or attorney Thomas Ryan make a determination they can be released, there is clearly a significant public interest in the records I've requested.

² "So I'm not so quick to say that that second letter was so public. I mean, I, I don't, I don't believe that. I'm not, that's not to say that someday it wouldn't have been released. But, but I'm not so quick to say that it, that it should have been released to anybody yet, because we may be able to fix it at some point. It may have been venting. It may have been whatever, and, that, that, you know. The public doesn't have to know every little hiccup in life that happens." Unofficial transcription of the Clarkston City Council meeting, April 27, 2015. Carrying this approach forward, and in response to a citizen's plea for more transparency about 148 N. Main, attorney Thomas Ryan suggested if citizens want to know what's going on, they should just look for themselves - "There's still the same building there and as the months go by, if the same building stays there, you'll know what's happening. Nothing." Unofficial transcription of the Clarkston City Council meeting, May 11, 2015.

Therefore, I ask that you waive all fees. If you refuse to waive fees, I request a detailed explanation of the fees with regard to each item.

I also request that any record you withhold in whole or in part be preserved for the statutory limitations period, as I intend to seek judicial review if I disagree with your decision to withhold any of the materials that I have requested. Depending on how forthcoming the City is in responding to my request, I may also seek an order that would require you to recover any electronic records that have been deleted or destroyed contrary to the City's record retention schedule, at City expense.

If any portion of this request is unclear, please feel free to contact me by return email.

Kind regards,
Susan Bisio

LAW OFFICES
THOMAS J. RYAN, P.C.

2055 ORCHARD LAKE ROAD
SYLVAN LAKE, MICHIGAN 48320

TELEPHONE (248) 334-9938
FAX (248) 858-8508

THOMAS J. RYAN

June 30, 2015

Mrs. Susan Bisio
P.O. Box 1303
Clarkston, MI 48347

Re: FOIA Request

Dear Mrs. Bisio:

In response to your FOIA request of June 7, 2015, please be advised as follows:

1.
 - a. see attached.
 - b. see attached.
 - c. see attached.
 - d. see attached.
 - e. Not a public record pursuant to MCL 15.232(e).
2.
 - a. Not a public record pursuant to MCL 15.232(e)
 - b. see attached.
 - c. Not a public record pursuant to MCL 15.232(e).
 - d. see attached.
 - e. see attached.
 - f. see attached.
 - g. see attached.
 - h. Not a public record pursuant to MCL 15.232(e). A copy of the referenced email is provided in 2g.
 - i. see attached.
 - j. see attached.
3.
 - a. see attached.
 - b. see attached.
 - c. see attached. A copy of the referenced email is provided in 2j.
 - d. see attached. A copy of the referenced email is provided in 2j.
 - e. Not a public record pursuant to MCL 15.232(e).
 - f. see attached.
 - g. Not a public record pursuant to MCL 15.232(e).
 - h. see attached.
 - i. see attached.
 - j. Not a public record pursuant to MCL 15.232(e).

- k. Not a public record pursuant to MCL 15.232(e).
 - l. Not a public record pursuant to MCL 15.232(e).
 - m. Not a public record pursuant to MCL 15.232(e).
4. a. Not a public record pursuant to MCL 15.232(e).
- b. see attached.
 - c. see attached.
 - d. Not a public record pursuant to MCL 15.232(e).
 - e. Not a public record pursuant to MCL 15.232(e).
 - f. see attached.
 - g. see attached.
 - h. see attached.
 - i. see attached.
 - j. Not a public record pursuant to MCL 15.232(e).
 - k. Not a public record pursuant to MCL 15.232(e).
 - l. see attached.
5. a. Not a public record pursuant to MCL 15.232(e).
- b. Not a public record pursuant to MCL 15.232(e).
 - c. Not a public record pursuant to MCL 15.232(e).
6. Already been provided by the City.
7. Already been provided by the City.
8. Already been provided by the City.
9. Already provided by the City.
10. See attachment to 2i.

11. There is no new policy adopted by the City referenced during the April 27, 2015 meeting. Your further reference to the April 27, 2015 City Council meeting regarding information that "should be withheld from the public" does not exist. The City is unable to answer your hypothetical question which does not involve a document request.

Respectfully submitted,


Thomas J. Ryan
City Attorney

TJR/lp
Enclosures
Cc (w/encls.) Sandy Miller, FOIA Coordinator

KEMPKLEIN

LAW FIRM

Richard Bisio
Direct dial: (248) 740-5698
E-mail: richard.bisio@kkue.com

August 24, 2015

FOIA Coordinator
City of the Village of Clarkston
375 Depot Road
Clarkston, MI 48346

Re: Freedom of Information Act request dated June 7, 2015

Dear FOIA Coordinator:

This firm represents Susan Bisio. I write regarding her freedom of information act (the "Act") request dated June 7, 2015 (the "Request"). The purpose of this letter is to afford the city the opportunity to cure the deficiencies in its response before Ms. Bisio seeks court review of the response.

I will assume that city clerk's post-it note included with the material hand-delivered on June 30, 2015 and the city attorney's June 30, 2015 letter together constitute the city's response to the Request, although the response does not comply with the Act's requirements. The city's response is deficient in at least the following respects:

1. For eighteen items listed in the city attorney's letter, the city denied the Request on the ground that the requested record is "Not a public record pursuant to MCL 15.232(e)." Without further explanation, it is unclear what the basis is for this claim. However, in light of the other records produced, it appears that the basis may be that the requested records do not reside in a city server or file but rather are emails or correspondence from and to either the city attorney or the city's engineering firm that were not copied to the city manager or other city personnel. Whether or not that is the ground, the denial of the Request for these 18 items on the ground that they are not public records is improper.

The records in these requests are communications from or to the city attorney or which the city attorney received regarding city business. Each of them is a "writing ... owned, used, in the possession of, or retained" by the city

FOIA Coordinator
August 24, 2015
Page 2

attorney, a charter officer of the city acting on behalf of the city, a public body, "in the performance of an official function." MCL 15.232(e); 15.232(d)(iii). They involve the city attorney's performance of his official functions by way of discussion, negotiations, or communications regarding (1) development of the property at 148 N. Main under a contract between the property owner and the city or (2) actions of the owner of property at the southeast corner of Waldon and Main Street regarding the owner's clearing of the property and city's potential enforcement action against the owner. The communications were with counsel for the property owners or with the city's engineering firm, Hubbell, Roth & Clark, Inc. ("HRC"). The city attorney billed the city for providing services to the city related to the subject matter or content of the requested records and the city paid those invoices. The Request used the description of the records in the city attorney's invoices. These are public records and there is no basis for the city to deny the Request for them.

2. There are several omissions in the records provided with the city attorney's letter that show that the city did not provide all requested records:

a. The email provided in response to request 2.d shows by numbering in the lower right-hand corner ("1/4") that the one-page email provided was part of a four-page email chain. The city did not provide the other three pages.

b. The email provided in response to request 2.e obscures the page numbering in the lower right-hand corner with a handwritten notation.

c. The email provided in response to request 2.e apparently responds to a previous communication ("Yes—you are correct on the next steps."), but the city did not provide the previous communication.

d. Several of the emails provided contain the statement "[Quoted text hidden]." This appears in the records provided in response to requests 2.f, 3.c, 3.i, 4.g, and 4.h. The city did not provide the "hidden" text.

e. The email chain provided in response to request 2.f references two attachments that the city did not provide.

f. The email provided in response to request 2.g shows by numbering in the lower right-hand corner ("1/2") that the one-page

FOIA Coordinator
August 24, 2015
Page 3

email provided was part of a two-page email chain. The city did not provide the other page.

g. The email provided in response to request 2.j obscures the page numbering in the lower right-hand corner with a handwritten notation "2i."

h. The email provided in response to request 3.b references an attachment that the city did not provide.

i. The email provided in response to request 4.l references an attachment that the city did not provide.

3. Request 6 sought copies of any other correspondence (including emails and text messages) regarding specified matters related to 148 N. Main. The city attorney's response was "Already been provided by the City." However, the material that the city clerk delivered on June 30, 2015 did not include any emails or other correspondence (other than the city clerk's letter to the city attorney stating "I do not have knowledge of this information nor do I know where to find it"). The claim that the requested records have "[a]lready been provided by the City" is demonstrably wrong because we are aware of at least four items that the city did not provide: (1) a March 9, 2015 letter from HRC regarding storm water detention at 148 N. Main; (2) the city attorney's March 9, 2015 two-sentence memorandum regarding the HRC letter; (3) the city manager's March 9, 2015 email to the city council, forwarding the two preceding items; and (4) the April 16, 2015 letter from Curt Catallo "To Whom It May Concern" regarding development of 148 N. Main. It thus appears that the city did not search its files for all records responsive to the Request.

4. Requests 7.a, 7.b, 8.a, 8.b, 8.c, 9.a, 9.b, and 9.c sought copies of emails and letters identified in HRC invoices. The city attorney's response was "Already been provided by the City." However, the material that the city clerk delivered on June 30, 2015 did not include any emails or other correspondence. The claim that the requested records have "[a]lready been provided by the City" is demonstrably wrong because we are aware of at least one letter that the city did not provide: a March 9, 2015 letter from HRC regarding storm water detention at 148 N. Main. And the records that the city provided do not appear to include all the records described in these particular requests.

5. The material that the city clerk delivered on June 30, 2015 included written inquiries to some of the members of the city council regarding whether they had any records responsive to request 6. There was no response

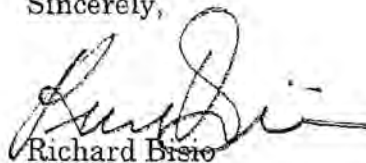
FOIA Coordinator
August 24, 2015
Page 4

from council members Sabol and Avery. Mayor Luginski's response stated that he had "information" and "will provide it to the clerk's office." However, it appears that the city did not provide those records.

6. The records the city provided create a strong inference that the city did not search its files and electronic records and did not search HRC's files for all requested records. For example, in addition to the omissions noted in paragraphs 3 and 4 above, it appears that there was not a search of the city's emails. Only one email from the city manager is provided. It is not credible to believe that the city manager initiated only this one email on the subjects involved. Likewise, nothing was provided from HRC's files except the material from the city's attorney. All the emails provided were from the city attorney's email system. There appears to have been no effort to search the city's own email system or HRC's files for all records in the Request.

For at least the reasons above, the city's response is incomplete and does not comply with the Act. I would appreciate a response to this letter—along with all the requested records—by September 4, 2015. Absent a satisfactory response, Ms. Bisio will seek court review.

Sincerely,



Richard Bisio

cc: Susan Bisio

LAW OFFICES
THOMAS J. RYAN, P.C.

2055 ORCHARD LAKE ROAD
SYLVAN LAKE, MICHIGAN 48320

THOMAS J. RYAN

TELEPHONE (248) 334-9938
FAX (248) 858-8508

October 19, 2015

Mr. Richard Bisio
201 West Big Beaver
Suite 600
Troy, MI 48084

Re: FOIA Request

Dear Mr. Bisio:

In response to your letter dated August 24, 2015 regarding FOIA request of June 7, 2015, by Susan Bisio, I offer the following:


1. As to the eighteen items listed as denied under MCL 15.232(e), you are correct in that the information denied as received by myself as City Attorney was between myself and either other attorneys or city engineering staff without receipt by the City itself. A public body is defined in MCL 15.232(d): "Public body" "means any of the following: (iii) "a county, city, township, village, inter county, inter city, or regional governing body, council, school district, special district or municipal corporation, or a board, department, commission, council or agency thereof."

As stated in our initial response, Subsection (e) states: "Public record" 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. The basis for the denial was, in my opinion as city attorney, I am not a "public body". Thus, the information sought was neither created nor obtained by a public body, i.e. The City of the Village of Clarkston and thus was not a public record. *Hoffman v. Bay City School District*, 137 Mich App 333, NW 2d 686 (1984). Appeal denied. Thus, the very touchstone of a request for a "public record" by a "public body", your information requested was never received or in the possession of the public body, i.e. The City of the Village of Clarkston and therefore, in my opinion, this stated exemption has been properly offered.

2.
 - a. see attached.
 - b. see attached.
 - c. see attachment to 2b.
 - d. see attached.
 - e. see attached. The referenced two attachments are "images" only.
 - f. see attached.
 - g. see attached.

3. See attached copies regarding 3(1); 3(2) and 3(4). There is no attachment for 3(3) as the City Manager did not send an email on 3/9/15 to city council forwarding two preceding items as the City Manager hand delivered a copy for the council members with the exception of Sharon Catallo. Please find attached emails provided from the City of Clarkston relative to 148 N. Main.
4. Any emails generated by HRC between them and the Developer are not in the possession of the City if the city was not copied on those emails then they are not on the city's system.
5. Mr. Avery was not on City Council when this matter transpired. See emails with Mr. Luginski's email address in Paragraph 3.
6. The records of HRC are not public records. As stated in our initial response, Subsection (e) states: "Public record" 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. The basis for the denial was, in my opinion as city attorney, I am not a "public body". Thus, the information sought was neither created nor obtained by a public body, i.e. The City of the Village of Clarkston and thus was not a public record. *Hoffman v. Bay City School District*, 137 Mich App 333, NW 2d 686 (1984). Appeal denied. Thus, the very touchstone of a request for a "public record" by a "public body", your information requested was never received or in the possession of the public body, i.e. HRC and therefore, in my opinion, this stated exemption has been properly offered. We have provided all the responses held by the City, which are public records and have been provided. The city has searched its information based and provided the information that they possess.

Respectfully submitted,


Thomas J. Ryan
City Attorney

TJR/lp
Enclosures
Cc (w/encls.) Sandy Miller, FOIA Coordinator

CHARTER

**CITY OF THE VILLAGE OF CLARKSTON
MICHIGAN**



JANUARY 13, 1992

TABLE OF CONTENTS

	<u>Section</u>	<u>Page</u>
PREAMBLE		1
CHAPTER I NAME AND BOUNDARIES		2
Name and Boundaries	1.1	2
Wards	1.2	2
CHAPTER II GENERAL MUNICIPAL POWERS		3
General Powers	2.1	3
Intergovernmental Cooperation	2.2	3
Exercise of Powers	2.3	3
CHAPTER III ELECTIONS		3
Qualifications of Electors	3.1	3
Election Procedure	3.2	4
Precincts	3.3	4
Election Commission	3.4	4
Regular Elections	3.5	4
Special Elections	3.6	4
Elective Officers and Terms of Office	3.7	4
Nominations Procedure	3.8	5
Approval of Petitions	3.9	5
Form of Ballot	3.10	6
Canvass of Votes	3.11	6
Tie Vote	3.12	6
Recount	3.13	6
Recall	3.14	6
CHAPTER IV THE CITY COUNCIL		6
Council - Manager Government	4.1	6
Elected Officers and Powers	4.2	7
Qualifications	4.3	7
Term of Office	4.4	7
Notice of Election	4.5	7
Oath of Office	4.6	7
Surety Bonds	4.7	7
Qualification of Members	4.8	8
Mayor and Mayor Pro Tem	4.9	8
Regular Meetings of the Council	4.10	8
Special Meetings of the Council	4.11	8
Meetings to be Public	4.12	8
Quorum and Vote Required	4.13	9
Attendance at Meetings	4.14	9
Rules of Order	4.15	9
Publication of Council Proceedings	4.16	9
Compensation for Mayor and Councilpersons	4.17	9
Restrictions Concerning Officers	4.18	10
Investigations	4.19	11
Vacancy Defined	4.20	11
Removal from Office	4.21	11
Filling Vacancies	4.22	12
Delivery of Office to Successor	4.23	12
Advisory Committees or Boards	4.24	12
Health	4.25	12

- 2 -

	<u>Section</u>	<u>Page</u>
CHAPTER IV THE CITY COUNCIL (cont'd.)		
Licenses and Permits	4.26	13
Rights as to Property	4.27	13
Trusts	4.28	13
Traffic Violations Bureau	4.29	13
CHAPTER V THE ADMINISTRATIVE SERVICE		13
Administrative Officers	5.1	13
City Manager	5.2	14
City Manager - Functions and Duties	5.3	15
City Clerk	5.4	16
City Treasurer	5.5	17
City Attorney	5.6	17
Assessor	5.7	18
Finance Officer	5.8	19
City Planning Commission	5.9	19
Zoning Board of Appeals	5.10	19
Other Boards and Commissions	5.11	19
CHAPTER VI LEGISLATION		19
Prior Legislation	6.1	19
Legislative Powers	6.2	20
Forms of Legislation	6.3	20
Action Requiring an Ordinance	6.4	20
Ordinances	6.5	21
Emergency Ordinances	6.6	21
Ordinance Record	6.7	22
Publication of Ordinances	6.8	22
Codification	6.9	22
Penalties	6.10	22
Publication of Notices, Proceedings and Ordinances	6.11	22
Severability of Ordinances	6.12	23
Initiative and Referendum	6.13	23
Petitions	6.14	23
Council Procedure	6.15	23
Submission to Electors	6.16	24
General Provisions	6.17	24
CHAPTER VII GENERAL FINANCE		24
Fiscal Year	7.1	24
Finance Committee	7.2	24
Budget Procedure	7.3	24
Budget Document	7.4	25
Budget Hearing	7.5	25
Adoption of the Budget	7.6	25
Transfer of Appropriations	7.7	25
Budget Control	7.8	25
Improvement Funds	7.9	26
Withdrawal of City Moneys	7.10	26
Depository	7.11	26
Investments	7.12	26
Independent Audit	7.13	26

- 3 -

	<u>Section</u>	<u>Page</u>
CHAPTER VIII TAXATION		27
Power to Tax	8.1	27
Tax Limits	8.2	27
Exemptions	8.3	27
Tax Day	8.4	27
Tangible Personal Property - Jeopardy		
Assessment	8.5	27
Assessment Roll	8.6	27
Board of Review	8.7	28
Duties and Functions of the Board of Review	8.8	28
Notice of Sessions	8.9	29
Sessions of the Board of Review	8.10	29
Endorsement of Roll	8.11	29
Clerk to Certify Tax Levy	8.12	30
State, County and School Taxes	8.13	30
City Tax Roll	8.14	30
Tax Roll Certified for Collection	8.15	30
Tax Lien	8.16	30
Taxes Due Notification Thereof	8.17	31
Collection Charges on Late Payment Fees	8.18	31
Collection of Delinquent Taxes	8.19	31
Disposition of Real Property Held by City	8.20	32
Failure or Refusal to Pay Tangible Personal		
Property Tax	8.21	32
Inequitable Assessment of Tax	8.22	32
CHAPTER IX BORROWING AUTHORITY		33
General Borrowing	9.1	33
Limits of Borrowing Authority	9.2	34
Preparation and Record of Bonds	9.3	34
Deferred Payment Contracts	9.4	35
CHAPTER X SPECIAL ASSESSMENT		35
General Powers	10.1	35
Procedure Fixed by Ordinance	10.2	35
CHAPTER XI UTILITIES AND FRANCHISES		36
General Powers Respecting Utilities	11.1	36
Control of Utilities	11.2	36
Purchase of Utility Service	11.3	36
Disposal of Plants and Property	11.4	36
Franchises	11.5	37
Right of Regulation	11.6	37
Rates of Franchised Utilities	11.7	38
Purchase - Condemnation	11.8	38
Revocable Permits	11.9	38
Use of Streets by Utility	11.10	38

- 4 -

	<u>Section</u>	<u>Page</u>
CHAPTER XII PURCHASES, SALES, AND LEASES		38
Contracting Authority of Council	12.1	38
Purchase, Sale and Lease of Property and Services	12.2	39
Limitations on Contractual Power	12.3	39
Official Interest in Contracts	12.4	40
CHAPTER XIII MUNICIPAL RIGHTS AND LIABILITIES		40
Rights, Liabilities, Remedies	13.1	40
Liability for Damages	13.2	40
Statements of City Officers	13.3	41
CHAPTER XIV GENERAL PROVISIONS AND DEFINITIONS		41
General Provisions and Definitions	14.1	41
Headings	14.2	41
Definitions and Interpretations	14.3	41
Amendments	14.4	42
Severability of Charter Provisions	14.5	42
CHAPTER XV SCHEDULE OF ADOPTION		43
Purpose and Status of Schedule Chapter	15.1	43
Election to Adopt Charter	15.2	43
Form of Ballot	15.3	43
Effective Date	15.4	43
First Election of Officers	15.5	43
First Meeting of the City Council	15.6	44
Existing Village Legislation and Rules	15.7	44
Council Action	15.8	45
Vested Rights and Liabilities	15.9	45
Officers and Employees	15.10	45
Boards and Commissions	15.11	45
RESOLUTION OF ADOPTION		46

PREAMBLE

We, the people of the City of the Village of Clarkston, Oakland County, State of Michigan, grateful to God and mindful of the ideals and labors of our forefathers in founding and developing this community, and pursuant to the authority granted by the Constitution and laws of the State of Michigan, do hereby ordain and establish this Charter for the City, in order to secure the benefits of local self government, to provide for the public peace, health, safety and welfare of all persons and property, and to provide for the continued preservation of the character of the community.

CHAPTER I

NAME AND BOUNDARIES

NAME AND BOUNDARIES

Section 1.1 (a) The Municipal Corporation now existing and known as the Village of Clarkston shall continue as a body corporate and shall henceforth be known as and include the territory constituting the City of the Village of Clarkston, Oakland County, State of Michigan, on the effective date of this Charter, described as follows:

All those tracts or parcels of land situated in the township of Independence, County of Oakland and State of Michigan, known and described as follows, to wit: The east half of the southwest quarter of Section 20; the west half of the southeast quarter of said Section 20; the south 20 acres of the east half of the northwest quarter of said Section 20; the south 20 acres of the west half of the northeast quarter of said Section 20 and the north half of the northwest quarter of Section 29;

AND

Part of northwest 1/4, Section 29 T4N, R9E, beginning at center of Section 29; thence westerly along the east and west 1/4 line approximately 1320 feet to the southwest corner of Clarkston Estates #1; thence northerly and westerly along the westerly line of Clarkston Estates #1, and Clarkston Estates to the south limit of the Village of Clarkston; thence easterly along said limits to the north and south 1/4 line of Section 29; thence southerly to beginning.

together with all territories that may be added thereto in the future and less any detachments therefrom that may be made in a manner prescribed by law.

(b) The Clerk shall maintain and keep available in the clerk's office for public inspection the official description and map of the current boundaries of the City.

WARDS

Section 1.2 The City shall consist of one (1) ward.

CHAPTER II

GENERAL MUNICIPAL POWERS

GENERAL POWERS

Section 2.1 The City of the Village of Clarkston and its officers shall be vested with any and all powers and immunities, expressed and implied, which cities are or hereafter may be permitted to exercise or provide for in their charters under the Constitution and Statutes mandated by the State of Michigan. It shall include all the powers of cities as fully and completely as though those powers and immunities were specifically enumerated in and provided for in this Charter. In no case shall any enumeration of particular powers or immunities in this Charter be held to be exclusive.

INTERGOVERNMENTAL COOPERATION

Section 2.2 The City may join with any municipal corporation or with any other unit or agency of government, whether local, state or federal, or with any number or combination thereof, by contract or otherwise, as may be permitted by law, in the ownership, operation, or performance, jointly or by one or more on behalf of all, of any property, facility or service which each would have the power to own, operate or perform separately.

EXERCISE OF POWERS

Section 2.3 Where no procedure is set forth in this Charter for the exercise of any power granted to or possessed by the City and its officers, the Council may resort to any procedure set forth in any statute of the State of Michigan which was passed for the government of cities, or in any other statute decreed by the State of Michigan. If alternate procedures are to be found in different statutes, then the Council shall select the procedure which it deems to be the most expeditious and to the best advantage of the City and its inhabitants. Where no procedure for the exercise of power of the City is set forth, either in this Charter or in any statute of the State of Michigan, the Council shall prescribe by ordinance or resolution a reasonable procedure for the exercise thereof.

CHAPTER III ELECTIONS

QUALIFICATIONS OF ELECTORS

Section 3.1 The residents of the City of the Village of Clarkston having the qualifications of electors in the State of Michigan shall be eligible to vote in the City.

ELECTION PROCEDURE

Section 3.2 The election of all city officers shall be on a non-partisan basis. The general election statutes shall apply to and control all procedures relating to city elections, including qualification of electors, establishment of precincts, verification of petitions, registration of voters and voting hours. The Clerk shall give public notice of each city election in the same manner as is required by law for the giving of public notice of general elections in the State.

PRECINCTS

Section 3.3 The election precinct of the City shall remain as it existed on the effective date of this Charter unless altered by the City Election Commission in accordance with statutes.

ELECTION COMMISSION

Section 3.4 An Election Commission is hereby created, consisting of the Clerk, one (1) other appointive city officer whom the Council shall designate, and one (1) other qualified registered elector whom the Council shall designate. These appointed persons shall serve at the pleasure of the Council. The Clerk shall be the chairperson. The Election Commission shall have charge of all activities and duties required of it by state law and this Charter relating to the conduct of elections in the City. The compensation of election personnel shall be determined in advance by the Election Commission, and provided for in the city budget.

REGULAR ELECTIONS

Section 3.5 A regular city election shall be held on the first Tuesday following the first Monday in November in each year.

SPECIAL ELECTIONS

Section 3.6 Special city elections shall be held when called by resolution of the Council at least sixty (60) days in advance of such election, or when required by this Charter or statute. The resolution calling a special city election shall set forth the purpose of such election.

ELECTIVE OFFICERS AND TERMS OF OFFICE

Section 3.7 Six (6) Councilpersons and a Mayor shall be elected from the City at large at regular city elections, all for two (2) year terms, except that at the first election under this Charter the Mayor and the three Council candidates receiving the highest number of votes shall be declared elected for a term beginning on July 1, 1992, and ending on the second Monday next following the date of the regular city election in 1994. The three (3) candidates for Council who receive the fourth, fifth, and sixth highest number of votes shall be declared elected for a term beginning on July 1, 1992, and ending on the second Monday following the date of the regular city election in 1993. At each succeeding annual election there shall be elected three (3) Councilpersons for terms of two (2) years. The term of office for the Councilpersons and Mayor

shall commence on the second Monday in November at 7:30 p.m. local time next following the date of the regular city election at which they were elected.

NOMINATIONS PROCEDURE

Section 3.8 Candidates for elective office shall be nominated from the City at large by nomination petitions, blanks for which shall be furnished by the Clerk. Candidates may use their own petition blanks, providing they conform substantially with state statutes. Each such petition shall be signed by not less than twenty (20) nor more than forty (40) registered electors of the City, and shall be filed at the clerk's office before 4:00 p.m., local time, on or before the first Tuesday after the first Monday in August (the August primary date).

The Clerk shall publish notice of the last day permitted for filing petitions and of the number of persons to be elected to each office at least one (1) week and not more than three (3) weeks before such last day.

Electors signing a petition shall add their residential street, number and the date of signature. Electors shall not sign petitions for more candidates for any office than the number to be elected to such office, and should an elector do so, the signature bearing the most recent date shall be invalidated, and if the elector should sign more than one (1) on the same date, none shall be validated. Petitions shall not be left for signatures in any public place unless accompanied by the circulator of the petition.

Petitions shall not be accepted for filing unless accompanied by an affidavit sworn to or affirmed by the candidate, stating that the candidate possesses the legal qualifications for the office and requesting that the candidate's name be printed on the ballot.

The Clerk may accept petitions for the election of any candidate for more than one (1) office, which petitions shall be subject to statute.

APPROVAL OF PETITIONS

Section 3.9 The Clerk shall accept only petitions which conform substantially with the forms provided and maintained by the Clerk, and which, considered together, contain the required number of valid signatures for candidates having those qualifications required for the respective elective city offices by the Charter. Within five (5) days after the last date of filing petitions, the Clerk shall make determinations as to the validity and sufficiency of each petition and whether or not the candidate has the qualifications required for that candidate's respective elective city office by this Charter and shall write the clerk's determinations thereof on the face of the petition and shall notify in writing the candidate whose name appears thereon of the clerk's determinations. Such notice to any candidate whose petitions are found invalid or insufficient shall be delivered by certified mail to the address shown on the petitions unless delivered personally. The names of the candidates for the respective elective city offices who file valid and sufficient petitions shall

be certified by the Clerk to the Election Commission to be placed upon the ballot for the next subsequent regular city election.

All petitions filed shall be open to public inspection in the office of the Clerk.

Withdrawal of a candidate's name from consideration on the ballot must be made in writing and in conformance with the time allowed by statute.

FORM OF BALLOT

Section 3.10 The ballots for all elections under this Charter shall conform to the printing and numbering of ballots as required by statute, except that no party designation or emblem shall appear on any city ballot.

CANVASS OF VOTES

Section 3.11 The Board of Canvassers designated by statute as being permitted to cities for canvass of votes on candidates and issues shall canvass the votes of all city elections in accordance with statute.

TIE VOTE

Section 3.12 If in any city election there shall be no choice between candidates by reason of two (2) or more candidates having received an equal number of votes, then the determination of the election of such candidate by lot will be as provided by statute.

RECOUNT

Section 3.13 A recount of the votes cast at any city election for any office, or upon any proposition, may be had in accordance with statute.

RECALL

Section 3.14 Any elected official may be removed from office by the electors of the City in the manner provided by statute. A vacancy created by the recall of any elected official shall be filled in the manner prescribed by statute.

CHAPTER IV

THE CITY COUNCIL

COUNCIL-MANAGER GOVERNMENT

Section 4.1 The City of the Village of Clarkston shall have the Council - Manager form of government.

ELECTED OFFICERS AND POWERS

Section 4.2 The legislative power of the City, except as reserved by this Charter, shall be vested in a Council consisting of a mayor and six (6) councilpersons elected at large on a nonpartisan basis. The Council shall have the power and authority to adopt such ordinances and resolutions as it shall deem proper in the exercise of its powers. The Council shall determine all matters of policy of the City and adopt ordinances and necessary rules and regulations to make the same effective. Further the Council shall, subject to the limitations of law, raise revenues and make appropriations for the operation of the city government and provide for the public peace, health, safety and welfare of persons and property.

QUALIFICATIONS

Section 4.3 Each candidate for city office shall be a duly-registered elector in the City, and shall have been a resident of the City for one (1) year immediately prior to the election at which he/she is a candidate for office. A person appointed to fill a vacancy in an elected office shall have such qualifications at the time of such appointment. No person who is in default to the City shall be eligible for elected office.

TERM OF OFFICE

Section 4.4 Term of office shall be as set forth in Section 3.7 of this Charter.

NOTICE OF ELECTION

Section 4.5 Notice of the election of any officer of the City shall be given such officer by the Clerk, in writing, within seven (7) days after the canvass of the vote determining election. If within ten (10) days from the date of notice, such officer shall not take, subscribe, and file with the Clerk an oath of office, such neglect shall be deemed a refusal to serve and the office shall thereupon be deemed vacant, unless the Council shall, for good cause, extend the time in which such officer may qualify as above set forth.

OATH OF OFFICE

Section 4.6 Each elected or appointed officer of the City, before entering upon the duties of the office and within the time specified in this Charter, shall take and subscribe to the oath of office prescribed by the State Constitution, which oath shall be filed and kept in the office of the Clerk.

SURETY BONDS

Section 4.7 Any city officer may be required to give a bond to be approved by the Council for the faithful performance of the duties of office in such sum as the Council shall determine, but all officers receiving or disbursing city funds shall be bonded. All official bonds shall be corporate surety bonds and the premiums thereon shall be paid by the City. All official bonds shall be filed with the Clerk, except that of the Clerk, which shall be filed with the Treasurer.

QUALIFICATION OF MEMBERS

Section 4.8 The Council shall be the judge of the election and qualifications of its members and of the grounds of forfeiture of office and for that purpose shall have power to subpoena witnesses, administer oaths and require production of evidence. A member charged with conduct constituting grounds for forfeiture of office shall be entitled to a public hearing on demand, and notice of such hearing shall be published in one (1) or more newspapers of general circulation in the City at least one (1) week in advance of the hearing. Decisions made by the Council under this section shall be subject to review by the appropriate court of law.

MAYOR AND MAYOR PRO TEM

Section 4.9 The Mayor shall preside at all meetings of the Council, shall speak and vote at such meetings as any other Council member, shall be recognized as the Chief Executive Officer of the City and as head of the city government for all ceremonial purposes but shall have no administrative duties. The Mayor shall be a conservator of the peace, may exercise within the City the powers conferred upon sheriffs to suppress riot and disorder, and shall have authority to command the assistance of all able-bodied citizens to aid in the enforcement of the ordinances of the City and to suppress riot and disorder. The Mayor or his/her designee shall be empowered as the conservator of public health, safety and welfare in cases of natural or manmade calamity as provided hereinafter by ordinance. The Council at its first meeting following each regular city election shall elect one (1) of its members as Mayor Pro Tem by an affirmative vote of a majority of its members. The Mayor Pro Tem shall act as Mayor during the absence or disability of the Mayor.

REGULAR MEETINGS OF THE COUNCIL

Section 4.10 Regular meetings of the Council shall be held at least twice in each calendar month at the usual place of holding meetings of the Council. If any time set by resolution of the Council for the holding of a regular meeting of the Council shall be a holiday, then such regular meeting shall be held on the next following secular day which is not a holiday or on such other day as may be set by the Council. The Clerk shall prepare an agenda of the business to be considered at each regular council meeting.

SPECIAL MEETINGS OF THE COUNCIL

Section 4.11 Special meetings of the Council may be called by the Clerk on the written request of the Mayor or any two (2) members of the Council or the City Manager on eighteen (18) hours written notice to each member of the Council, designating the purpose of such meeting and served personally or left at the councilperson's usual place of residence by the Clerk or someone designated by the Clerk. Public notice of any special meeting must be given pursuant to statute. No business shall be transacted at any special meeting of the Council unless the same has been stated in the notice of such meeting.

MEETINGS TO BE PUBLIC

Section 4.12 All regular and special meetings of the Council shall be

open to the public and subject to the Open Meeting Act except when closed meetings are authorized by statute. The rules of order of the Council shall provide that the citizens shall have a reasonable opportunity to be heard at any such meeting on matters within the jurisdiction of the Council. All records shall be made available to the general public in compliance with the Freedom of Information Act.

QUORUM AND VOTE REQUIRED

Section 4.13 Four (4) members of the Council shall be a quorum for the transaction of business. In the absence of a quorum, any number less than a quorum may adjourn a meeting to a later date. The vote of at least four (4) members shall be required for official action by the Council, unless a larger majority is required by statute or this Charter.

ATTENDANCE AT MEETINGS

Section 4.14 The Council may compel the attendance of absent members at a duly called meeting by a majority vote of the council members present whether or not a quorum is present. The Council may by ordinance provide penalties for non-attendance, including the penalty of forfeiture of office.

RULES OF ORDER

Section 4.15 The Council shall determine its own rules and order of business and shall keep a written or printed journal of all its proceedings in the English language which shall be signed by the Mayor and the Clerk. The vote upon the passage of all ordinances, and upon the adoption of all resolutions shall be taken by "Yes" and "No" votes and entered upon the record, except that where the vote is unanimous, it shall only be necessary to so state in such record. Each member of the Council, who shall be recorded as present at any meeting shall be required to vote on all questions decided by the Council at such meeting, unless excused by four (4) of the members present or in any case where the matter personally affects the member not voting. A member not excused can be considered in violation of this Charter when so determined by the Council. The presiding officer shall enforce orderly conduct at meetings. Any member of the Council or other officer who shall fail to maintain conduct in an orderly manner at any meeting shall be deemed guilty of misconduct in office. Any person designated by the presiding officer of the meeting shall serve as the Sergeant at Arms of the Council in the enforcement of the provisions of this section.

PUBLICATION OF COUNCIL PROCEEDINGS

Section 4.16 The minutes of the Council shall be published within twenty (20) days after the passage thereof. A synopsis of such minutes, prepared by the Clerk and approved by the Mayor, showing the substance of each separate proceeding of the Council shall be sufficient compliance with the requirements of this section.

COMPENSATION FOR MAYOR AND COUNCILPERSONS

Section 4.17 The compensation of the Mayor and Councilpersons shall be as herein set forth until otherwise changed by ordinance, provided that no change in such compensation shall be effective during the term of office for which any

member of the Council making the change was elected. All votes on this question shall be by roll call. Until otherwise provided by ordinance, such compensation shall be as follows: Each Councilperson other than the Mayor shall receive \$25 per meeting. The Mayor shall receive \$3,850 per year, prorated for each month served.

Such compensation shall be paid annually and except as otherwise provided in this Charter shall constitute the only compensation which may be paid the Mayor or Councilpersons for the discharge of any official duty for or on behalf of the City during their tenure of office. However, the Mayor and Councilpersons may, upon order of the Council, be paid such necessary bona fide expenses incurred in service in behalf of the City as are authorized and itemized.

The Council may by ordinance establish a compensation commission for review of compensation under the provisions of this section.

RESTRICTIONS CONCERNING OFFICERS

Section 4.18 Except where authorized by law or five (5) members of the Council, elected officers shall not hold any appointed city office or city employment during the term for which they were elected, and former elected officers shall not hold any compensated appointed city office or city employment until one (1) year after the expiration of their term of office. The application of this provision shall not apply to appointed city boards or commissions, or volunteer firemen.

Individual members of the Council shall not in any manner dictate the appointment or removal of any city administrative officers or employees, but a Councilperson may express views and fully and freely discuss with the City Manager anything pertaining to appointment and removal of such officers and employees.

Except for the purpose of inquiries and investigations, the Council or its members shall deal with city officers and employees who are subject to the direction and supervision of the City Manager solely through the City Manager, and neither the Council nor its members shall give direction to any such officer or employee, either publicly or privately.

An incumbent elective city officer shall not become a candidate for any elective city office, except to succeed oneself, without first resigning from city office, provided, that the provisions hereof shall not apply to any incumbent elective city officer whose term of office will expire with the election at which the incumbent is to be a candidate for another elective city office. An appointed city officer or employee shall not seek an elective office of the City unless first resigning from the incumbent's position with the City.

Members of the Council or of any board or commission of the City shall not vote on any issue or matter in which they or a relative (as defined in the following paragraph) shall have a proprietary or financial interest or as the result of which they may receive or gain a financial benefit, subject to state statute. If a question is raised under this section at any council, board or commission meeting, such specific question shall be resolved before the main question shall be voted on,

but the Council, board or commission member concerning whom the question was raised shall not vote on such determination.

Unless the Council shall by an affirmative vote of five (5) members, which vote shall be recorded as part of the official proceedings, determine that the best interests of the City shall be served, the following relatives of any elected or appointed officer are disqualified from holding any appointed office or city employment during the term for which the officer was elected or appointed: Spouse, child, parent, grandchild, grandparent, brother, sister, half-brother, half-sister, or the spouse of any of them.

All relationships shall include those arising from adoption. This section shall in no way disqualify such relatives or their spouses who are bona fide appointive officers or employees of the City at the time of the election or appointment of said official or employed by the City at the time of adoption of this charter.

The provisions of this relationship, above, specifically applies to the prohibition of the employment of relatives to be directly under the supervision of another relative. Employment in another department than that of the relatives' supervision is permissible subject to review by the Council.

INVESTIGATIONS

Section 4.19 The Council or its duly-appointed representatives may subpoena witnesses, administer oaths, and compel the production of books, papers, and other evidence to conduct formal investigation into the conduct of any department, office, or officer of the City and make investigations as to malfeasance, misfeasance, nonfeasance, or irregularities in municipal affairs. Failure to obey such subpoena or to produce books, papers, or other evidence as ordered under the provisions of this section shall constitute misconduct in office. The Council shall give a reasonable time for such action.

VACANCY DEFINED

Section 4.20 In addition to other provisions of this Charter, a vacancy shall be deemed to exist in any elective office on the day when the officer dies, files a resignation with the Clerk, is removed from office, moves from the City, is convicted of a felony, or of misconduct in office under this Charter, is judicially declared to be mentally incompetent, or is absent from four (4) consecutive regular meetings of the Council, unless excused by the Council for cause to be stated in the record of council proceedings.

REMOVAL FROM OFFICE

Section 4.21 Removals by the Council of elective officers or of members of boards or commissions shall be made for either of the following reasons:

(a) For any reason specified by statute for removal of city officers by the Governor;

(b) For any act declared by this Charter to constitute misconduct in office. Such removals by the Council shall be made only after hearing of which

such officer has been given notice by the Clerk at least ten (10) days in advance, either personally or by delivering the same at the officer's last known place of residence. Such notice shall include a copy of the charges against such officer. The hearing shall afford an opportunity to the officer, in person or by attorney, to be heard, to cross-examine witnesses and to present testimony.

If such officer shall neglect to appear at such hearing and answer such charges, the failure to do so may be deemed cause for removal. A majority vote of the members of the Council in office at the time, exclusive of any member whose removal is being considered, shall be required for any such removal.

FILLING VACANCIES

Section 4.22 Except as otherwise provided in this Charter, any vacancy occurring in any elective office shall be filled not sooner than fourteen (14) days nor later than thirty (30) days after such vacancy shall have occurred by the concurring vote of the majority of the remaining members of the Council. The person appointed by the Council shall serve until the next general city election at which time a successor shall be elected and installed to fill the office for the remainder of the term, if any.

If a vacancy occurs in any appointive office, it shall be filled in the manner provided for in making the original appointment. In the case of members of boards and commissions appointed for a definite term, such appointments shall be for the unexpired term.

DELIVERY OF OFFICE TO SUCCESSOR

Section 4.23 Whenever an officer or employee leaves an office or employment for any reason, that person shall deliver forthwith to a successor or supervisor in the office of employment or to the Mayor, all property of the City, such as books, working papers, moneys, and effects, which are in that person's custody, possession, or control.

ADVISORY COMMITTEES OR BOARDS

Section 4.24 The Mayor, with the advice and consent of the Council may, from time to time, appoint such committees or boards as are deemed appropriate to advise and consult with them, and with appropriate departments, regarding any municipal activity. Such committees or boards shall be advisory, serve temporarily and without compensation unless otherwise provided by the Council.

HEALTH

Section 4.25 The Council shall have and exercise within and for the City all the powers, privileges and immunities conferred upon boards of health and may enact such ordinances as may be deemed necessary for the preservation and protection of the health of the city's inhabitants.

LICENSES AND PERMITS

Section 4.26 The Council shall by ordinance prescribe the terms and conditions upon which licenses and permits may be granted, suspended, or revoked; and may require an exact payment of such reasonable sums for any licenses and permits as it may deem proper.

RIGHTS AS TO PROPERTY

Section 4.27 The Council shall have the power to acquire for the City by purchase, gift, condemnation, lease, construction or otherwise, either within or without its corporate limits, and either within or without the County of Oakland, private property, for any public use or purpose within the scope of its powers, whether herein specifically mentioned or not; and shall have the power to maintain and operate the same to promote the public health, safety and welfare.

TRUSTS

Section 4.28 The Council may, in its discretion receive and hold any property in trust for cemetery, park, or other municipal purposes. Any trust now existing for the benefit of the Village of Clarkston shall be continued in full force and in accordance with the cy-pres doctrine.

TRAFFIC/ORDINANCE VIOLATIONS BUREAU

Section 4.29 The Council shall have the power and authority to establish by ordinance a Traffic/Ordinance Violations Bureau, as provided by law, for the handling of such violations of ordinances and regulations of the City, or parts thereof, as prescribed in the ordinance establishing such bureau. Any person who has received any notice to appear to a charge of violating any of such ordinances may within the time specified in the notice of such charge answer at the Traffic/Ordinance Violations Bureau to the charges set forth in such notice by paying a fine, in writing pleading guilty to the charge and waiving a hearing in court. Acceptance of the prescribed fine by the bureau shall be deemed to be complete satisfaction for the violation, and the violator shall be given a receipt which so states. The creation of such a bureau shall not operate as to deprive any person of a full and impartial hearing in court, should a person so choose.

CHAPTER V

THE ADMINISTRATIVE SERVICE

ADMINISTRATIVE OFFICERS

Section 5.1 (a) The administrative officers of the City of the Village of Clarkston shall be the City Manager, the Clerk, the Treasurer, the City

Attorney, the Assessor, and the Financial Officer. The Council may, by ordinance or by resolution, establish such additional administrative officers or departments, or combine any administrative officers or departments, in any manner not inconsistent with law or this Charter, and prescribe the duties thereof as it may deem necessary for the proper operation of the city government.

(b) The City Manager and the City Attorney shall be appointed by the Council for an indefinite period, shall be responsible to and serve at the pleasure of the Council and shall have their compensation fixed by the Council.

(c) All administrative officers of the City, except the City Manager and the City Attorney shall be appointed by the Council after consultation with the City Manager. Such officers may be discharged for cause by the Council after consultation with the City Manager. Such officers shall have their compensation fixed by the Council.

(d) In making appointments of administrative officers, the appointing authority shall consider only the qualifications of the appointee and that person's ability to discharge the duties of the office to which he/she is appointed.

(e) There shall be no residency requirements for the city administrative officers.

(f) Except as may be otherwise required by statute or this Charter, the Council shall establish by ordinance such departments of the City as it deems necessary or advisable and shall prescribe therein the functions of each department and the duties, authorities, and responsibilities of the officers of each department. However, the Council may not diminish the duties or responsibilities of the City Manager. The City Manager may prescribe such duties and responsibilities of the officers of those departments responsible to the City Manager which are not inconsistent with this Charter or with any ordinance or resolution.

(g) The head of each department shall have the power to hire, suspend, or discharge the employees of that department with confirmation by the City Manager. Any employee who has been discharged may within ten days thereafter petition the Council to hear the facts regarding such discharge, and in any such case the Council may, in its own discretion, hold a hearing and inquire into such facts and may make such decisions as it considers proper.

(h) In the event of a vacancy in an administrative office the Council shall appoint a replacement within one hundred twenty (120) days or may appoint an acting officer during the period of a vacancy in the office. The City Manager, with the consent and approval of the Council may designate an administrative officer or employee of the City to temporarily fill the vacancy.

CITY MANAGER

Section 5.2 (a) The City Manager shall be the chief administrative officer of the city government, in conformity with the provisions of this Charter. The City Manager shall serve at the pleasure of, and be subject to removal by the Council, but shall not be removed from office during a period

of ninety (90) days following any regular city election except by the affirmative vote of five (5) members of the Council.

(b) The Council may remove the City Manager from office in accordance with the following procedures:

(1) The Council shall adopt by affirmative vote of a majority of all its members a preliminary resolution which must state the reasons for removal and may suspend the City Manager from duty for a period not to exceed forty five (45) days. A copy of the resolution shall be delivered promptly to the City Manager.

(2) Within five (5) days after a copy of the resolution is delivered to the City Manager, the City Manager may file with the Council a written request for a public hearing. This hearing shall be held at the council meeting not earlier than fifteen (15) days nor later than thirty (30) days after the request is filed. The City Manager may file with the Council a written reply not later than five (5) days prior to the hearing.

(3) The Council may adopt a final resolution for removal, which may be made effective immediately, by an affirmative vote of a majority of all its members at any time after five (5) days from the date when a copy of the preliminary resolution was delivered to the City Manager, if a hearing has not been requested, or at any time after a public hearing if one has been requested.

The City Manager shall continue to receive a salary until the effective date of the final resolution of removal.

CITY MANAGER - FUNCTIONS AND DUTIES

Section 5.3 The City Manager shall be vested with all administrative powers of the City not inconsistent with provisions of this Charter. The City Manager shall perform the duties of the office under the authority of and be accountable to the Council. It shall be the duty of the City Manager to:

(a) See that all laws and ordinances are enforced;

(b) Supervise and coordinate the work of the administrative officers and departments of the City, except as otherwise provided in this Charter, and except the work of the Clerk in keeping the council records and as the clerical official of the Council;

(c) Prepare and administer the annual budget under policies formulated by the Council and keep the Council advised as to the financial condition and needs of the City;

(d) Establish and maintain a central purchasing service for the City;

(e) Employ or be responsible for the employment of all city employees, establish, supervise and coordinate the personnel policies, compensation and practices of the City in accordance with any employment ordinance of the City;

(f) Keep informed and report to the Council the work of the officers and departments of the City and secure from the officers and heads of administrative departments such information and special reports as the City Manager or the Council may deem necessary;

(g) Furnish the Council an annual report which shall consolidate the reports of all city departments;

(h) Resolve conflicts of authority between officers and administrative departments or, in the absence of administrative authority occasioned by inadequacy of charter/ordinance provisions, supply the necessary authority so far as may be consistent with law and the ordinances of the City, and direct necessary action to be taken in conformance therewith, making a full report immediately to the Council;

(i) Attend all meetings of the Council, with the right to be heard in all council proceedings, but without the right to vote;

(j) Recommend to the Council, from time to time, such measures as the City Manager may deem necessary or appropriate for the improvement of the City or its services;

(k) Prepare and maintain an administrative code defining the duties and functions of the officers and departments of the City which, when adopted by the Council, shall supplement this Charter in establishing the duties and functions of each officer and department of the City;

(l) See that the terms and conditions of any public utility franchise, or in any contract, are faithfully kept and performed;

(m) Perform such additional duties as may be granted to or required of the City Manager from time to time by the Council so far as may be consistent with the provisions of law;

(n) Establish any procedures necessary to carry out any of the foregoing duties; and

(o) Preserve all city property and equipment.

CITY CLERK

Section 5.4 The Clerk shall:

(a) Be the clerical officer of the Council;

(b) Attend all meetings of the Council, and keep its journal;

(c) Keep a record of all actions of the Council at its regular and special meetings;

(d) Have the power to administer all oaths required by law and by the ordinances of the City;

(e) Be the custodian of the city seal, and affix the same to documents required to be sealed, also be custodian of this Charter, all city ordinances, resolutions, papers, documents, treasurer's bond, and records pertaining to the City, the custody of which is not otherwise provided by this charter;

(f) Give to the proper officials ample notice of the expiration or termination of any official bonds, franchises, contracts or agreements to which the City is a part;

(g) Notify the Council of the failure of any officer or employee required to take an oath of office or to furnish any bond required;

(h) Certify all ordinances and resolutions adopted by the Council;

(i) Perform all duties required of clerks by law and the ordinances of the City;

(j) Be responsible for the conduct of elections in the City as required by law;

(k) Perform such other duties in connection with the office as may be required by law, the ordinances or resolutions of the Council;

(l) Maintain a current inventory of city owned property; and

(m) Provide and maintain a supply of forms for all petitions required to be filed for any purpose by the provisions of this Charter.

CITY TREASURER

Section 5.5 The Treasurer shall:

(a) Have the custody of all monies of the City, the clerk's bond and all evidences of value or indebtedness belonging to or held in trust by the City;

(b) Keep and deposit all monies or funds in such manner and only in such places as the Council may determine, and report the same in detail to the Council;

(c) Have such powers, duties and prerogatives in regard to the collection and custody of state, county, school district, and city taxes and monies as are provided by law;

(d) Disburse all city funds in accordance with the provisions of statute, this Charter and procedures to be established by the Council; and

(e) Perform such other duties in connection with the office as may be required by law, the ordinances or resolutions of the Council, or by the City Manager.

CITY ATTORNEY

Section 5.6 (a) The City Attorney shall:

(1) Advise the Council on all matters of law and changes or developments therein, affecting the City;

(2) Act as legal advisor and be responsible to the Council.

(3) Advise the City Manager concerning legal problems affecting the city administration and any officer or department head of the City in matters relating to official duties when so requested in writing, and file with the Clerk a copy of all written opinions;

(4) Prosecute ordinance violations and represent the City in cases before the Courts and other tribunals;

(5) Prepare or review all ordinances, regulations, deeds, contracts, bonds, and such other instruments as may be required by this Charter or by the Council, and promptly give an opinion as to the legality thereof;

(6) Upon request of the Council, attend meetings of the Council or any other meeting;

(7) Defend all city officers and employees in all actions arising out of the performance of their official duties as directed by the Council;

(8) Obtain the Council's approval to commence or conclude any civil litigation; and

(9) Perform such other duties as may be prescribed by this Charter or the Council;

(b) Upon the City Attorney's recommendation, or upon its own initiative, the Council may retain special legal counsel to handle any matter in which the City has an interest, or to assist the City Attorney.

ASSESSOR:

Section 5.7 (a) The Assessor shall:

(1) Possess all the power vested in and be charged with the duties imposed upon assessing officers by law;

(2) Make and prepare all regular and special assessment rolls in the manner prescribed by law or ordinances of the City;

(3) Perform such other duties as may be prescribed by law or the ordinances of the City or by the City Manager; and

(4) Meet all qualifications required by the State of Michigan.

(b) The duties of the Assessor may be contracted for pursuant to statute.

FINANCE OFFICER

Section 5.8 (a) The City Manager shall designate a person to act as a Finance Officer from among the administrative officers of the City. However, when the Council feels that a separate official is required, it may so designate by ordinance and the official shall be appointed by the Council after consultation with the City Manager and be under the supervision of the City Manager.

(b) The Finance Officer shall:

(1) Be the general accountant of the City, keep the books of accounts of the assets, receipts, and expenditures of the City, and keep the Council and City Manager informed as to the financial affairs of the City. The system of accounts shall conform to such uniform systems as may be required by law;

(2) Balance all the books of account of the City at the end of each calendar month, and make a report thereon to the City Manager as soon as practical; and

(3) Upon direction of the City Manager, examine and audit all books of account kept by any official or department of the City.

CITY PLANNING COMMISSION

Section 5.9 The Council shall provide for and maintain a City Planning Commission which shall possess all of the powers and perform the functions of planning commissions as set forth by statute and city ordinance. The members of the City Planning Commission shall be appointed by the Mayor subject to confirmation by the Council and shall be residents of the City.

ZONING BOARD OF APPEALS

Section 5.10 The members of the Zoning Board of Appeals shall be appointed by the Mayor subject to confirmation by the Council and shall be residents of the City. Their functions and duties shall be in accordance with statute and city ordinance.

OTHER BOARDS AND COMMISSIONS:

Section 5.11 The Council may appoint any other boards or commissions by ordinance or resolution.

CHAPTER VI

LEGISLATION

PRIOR LEGISLATION

Section 6.1 All valid ordinances, resolutions, rules and regulations of

the City of the Village of Clarkston which are not inconsistent with this Charter and which are in force and in effect on the effective date of this Charter shall continue in full force and effect until repealed or amended. Those provisions of any effective, valid ordinance, resolution, rule or regulation which are inconsistent with this Charter are hereby repealed to the extent of such inconsistency.

LEGISLATIVE POWERS

Section 6.2 The legislative power of the City of Clarkston is vested exclusively with the Council, except as otherwise provided by law.

FORMS OF LEGISLATION

Section 6.3 (a) All city legislation shall be by ordinance or resolution.

(b) A resolution is the official council action in the form of a motion adopted by a majority vote of the council members present.

(c) The council's power to act by resolution is limited to matters required or permitted by law, this Charter, and to matters pertaining to the city's internal concerns.

(d) An ordinance is an official Council action by a majority vote of the council members present in the nature of a legislative act establishing a more permanent influence on the City than a resolution and requiring greater formalities in its adoption.

(e) The Council shall act by ordinance when establishing a rule or regulation which provides for a penalty, when amending or repealing an ordinance previously adopted, or when required by law or this Charter.

ACTION REQUIRING AN ORDINANCE

Section 6.4 (a) In addition to other acts required by law or by specific charter provisions to be done by ordinance, those council acts shall be by ordinance which:

(1) Adopt or amend an administrative code or establish, alter or abolish any city department, office or agency;

(2) Provide for a fine or other penalty or establish a rule or regulation for violation of which a fine or other penalty is imposed;

(3) Levy taxes, except as otherwise provided in Chapter VIII, with respect to the property tax levied by budget adoption;

(4) Grant, renew or extend a franchise;

(5) Authorize borrowing money;

(6) Convey, lease or authorize the conveyance or lease of any city lands;

(7) Adopt, with or without amendment, ordinances proposed under the initiative power; and

(8) Amend or repeal any ordinance previously adopted, except as otherwise provided by this Charter with respect to repealing ordinances reconsidered under the referendum power.

(b) Acts other than those referred to in Section 6.4 (a) may be done either by ordinance or resolution.

ORDINANCES

Section 6.5 Except in the case of an ordinance declared by the Council to be an emergency ordinance, no ordinance shall be finally passed by the Council at the same meeting at which it is introduced. The style of an ordinance shall be, "the City of the Village of Clarkston ordains." No ordinance shall be revised, altered or amended by reference to its title only, but the section or sections of the ordinance shall be revised, altered, and published in full, except as otherwise provided in this Charter. An ordinance may be repealed by reference to its number and title only. The effective date of any ordinance shall be prescribed therein, and shall not be less than twenty (20) days after its adoption and publication.

EMERGENCY ORDINANCES

Section 6.6 An emergency ordinance shall:

(a) Be enacted only to meet a public emergency affecting public peace, health, safety or welfare of all persons or property;

(b) Not levy taxes; grant, renew or extend a franchise; regulate the rate charged by any public utility for its services; make or amend a grant; or other special privilege;

(c) Be introduced in the form and manner required for ordinances generally, except that it shall contain, after the enacting clause, a declaration stating that an emergency exists and describing it in clear and specific terms;

(d) Be adopted at the meeting it is introduced by an affirmative vote of two-thirds (2/3) of council members present. An emergency ordinance may be given effect earlier than twenty (20) days after enactment if the requirements for publication are met by posting copies thereof in three (3) public places in the City. The Clerk shall immediately after such posting enter in the ordinance book under the record of the ordinance a certificate stating the time and place of such publication by posting. Any emergency ordinance shall also be published in accordance with Section 6.5, but not as a requirement for the effectiveness thereof.

(e) Be in effect for not more than sixty (60) days or may be renewed for an additional sixty (60) days upon affirmative vote of two-thirds (2/3) of council members present.

ORDINANCE RECORD

Section 6.7 An ordinance when enacted shall be recorded by the Clerk in a book called "The Ordinance Book," and it shall be the duty of the Mayor and the Clerk to authenticate such record by their official signatures.

PUBLICATION OF ORDINANCES

Section 6.8 Except as otherwise provided in this Charter, an ordinance when enacted shall be published forthwith by the Clerk in the manner provided by this Charter for publication of notices, or as otherwise provided by law, and the clerk's certificate shall be entered as to the manner and date of publication under each ordinance in The Ordinance Book. The Council may adopt any detailed technical regulations as a city ordinance by reference to any recognized standard code, official or unofficial. If such a code be written in detail for the City and adopted as an ordinance, the publication of a sufficient number of copies in booklet form, available for public distribution at cost, shall be sufficient publication of such ordinance, and any amendment to or revision of such adopted code or detailed technical ordinance may be published in the same manner.

CODIFICATION

Section 6.9 (a) Within three (3) years of this charter's effective date and at least every ten (10) years thereafter, the Council shall provide for preparing a general codification of all city ordinances and resolutions having the effect of law.

(b) The general codification shall be enacted by ordinance and be known as the City of the Village of Clarkston Code; copies shall be furnished to city officials, placed in a local library, and sufficient copies maintained in the clerk's office for free public reference, and made available for purchase by the general public at cost.

(c) After publishing of the first City of the Village of Clarkston Code, new ordinances and resolutions shall be printed annually in a form for integration with the code currently in effect.

PENALTIES

Section 6.10 The Council shall provide in each ordinance for the punishment of violations thereof, but, unless permitted by law, no such punishment, excluding the costs charged, shall exceed the maximum fine or imprisonment, or both, provided by statute, in the discretion of the court.

PUBLICATION OF NOTICES, PROCEEDINGS AND ORDINANCES

Section 6.11 Notices or proceedings requiring publication and any ordinance passed by the Council shall, unless otherwise provided by this Charter, be published once in a newspaper of general circulation in the City. Notices or proceedings may be published in synopsis form, and indicate that the detailed document is available for the public inspection at any time at the clerk's office during normal business hours.

SEVERABILITY OF ORDINANCES

Section 6.12 Unless an ordinance shall expressly provide to the contrary, if any portion of an ordinance or the application thereof to any person or circumstance shall be found to be invalid by a court, such invalidity shall not affect the remaining portion or applications of the ordinance which can be given effect without the invalid portion or application, provided, such remaining portions or applications are not determined by the court to be inoperable, and to this end ordinances are declared to be severable.

INITIATIVE AND REFERENDUM

Section 6.13 An ordinance may be initiated by petition. A referendum on an ordinance enacted by the Council may be had by a petition filed prior to twenty (20) days subsequent to enactment; as hereinafter provided.

PETITIONS

Section 6.14 An initiatory or a referendary petition shall be signed by registered qualified electors of the City in number equal to fifteen percent (15%) of the active registration file of voters at the preceding state even-numbered year election prior to the filing of the petition. Before being circulated for signatures, all such petitions shall be approved as to form by the Clerk. No such petition need be on one paper, but may be the aggregate of two (2) or more petition papers, each containing a copy of the issue. Each signer of a petition shall sign in ink or indelible pencil, and shall place thereon, the date and place of residence by street and number. To each petition paper there shall be attached a certificate by the circulator thereof, stating the number of signers thereto and that each signature thereon is the genuine signature of the person whose name it purports to be, and that it was made in the presence of the circulator. Any such petition shall be filed with the Clerk who shall within ten (10) days, determine the sufficiency thereof and so certify.

In the case of initiatory petitions, any signatures obtained more than ninety (90) days before filing of such petition with the Clerk shall not be counted. If found to contain an insufficient number of signatures of qualified registered electors of the City, or to be improper as to form or compliance with the provision of this section, ten (10) days shall be allowed for the filing of supplemental petition papers. When found sufficient and proper, the Clerk shall present the petition to the Council at its next regular meeting. If found not to be in compliance with this section, no further action will be had with these petitions.

COUNCIL PROCEDURE

Section 6.15 Upon receiving a certified initiatory or referendary petition from the Clerk, the Council shall within thirty (30) days, either:

(a) If it be an initiatory petition, adopt the ordinance or submit the proposal to the electors or

(b) If it be a referendary petition, repeal the ordinance or submit the proposal to the electors.

SUBMISSION TO ELECTORS

Section 6.16 When the provisions of this Charter require the Council to submit the proposal to the electors, it shall be submitted at the next election held in the City for any other purpose, or in the discretion of the Council, at a special election. In any event, it shall be submitted at an election where there is sufficient time for processing of the notice of registration and of election and providing for absentee ballots. The results shall be determined by a majority vote of the electors voting thereon, except in cases where otherwise required by law.

GENERAL PROVISIONS

Section 6.17 The certification by the Clerk of the sufficiency of a referendary petition shall automatically suspend the ordinance in question pending repeal by the Council or final determination by the electors, as the case may be. An ordinance adopted by the electorate through initiatory proceedings, may not be amended or repealed by the Council for two (2) years, and then only by the affirmative vote of not less than five (5) Councilpersons. Should two (2) or more ordinances adopted at the same election have conflicting provisions, the one receiving the highest vote shall prevail as to those provisions.

CHAPTER VII

GENERAL FINANCE

FISCAL YEAR

Section 7.1 The fiscal year of the City of the Village of Clarkston shall begin on the first day of July of each year.

FINANCE COMMITTEE

Section 7.2 Three (3) members of the Council appointed by the Mayor with advice and consent of the Council shall serve as the Finance Committee to assist the City Manager in the preparation of the annual budget and to advise the Council on budget matters.

BUDGET PROCEDURE

Section 7.3 On or before the first council meeting in March of each year, each officer, department, and board of the City shall submit to the Finance Committee and the City Manager an itemized estimate of the expected income, if any, and expenditures for the next fiscal year, for the department or activities under its control. The Finance Committee and the City Manager, shall compile and review such budget request and then prepare budgetary recommendations. The City Manager shall submit the budget recommendations to the Council at the second council meeting of May of each year.

BUDGET DOCUMENT

Section 7.4 The budget document shall present a complete financial plan for the ensuing fiscal year and shall include those items required by the Uniform Budgeting and Accounting Act 621, of the Public Acts of 1978, as amended or as required by law. Also to be included shall be such other supporting schedules as the Council may require.

BUDGET HEARING

Section 7.5 Before its final adoption, a public hearing on the budget proposal shall be held as provided by law. Notice of the time and place of holding such hearing shall be published by the Clerk in a newspaper having general circulation in the City at least a week in advance thereof. A copy of the proposed budget shall be on file and available to the public during office hours at the office of the Clerk for a period not less than one (1) week prior to such public hearing.

ADOPTION OF THE BUDGET

Section 7.6 The Council shall, not later than its second regular meeting in June, adopt by resolution a budget for the ensuing fiscal year and make appropriations therefor. After consideration of probable other revenues, the Council shall determine and declare the amount of money necessary to be raised by property taxation, which amount shall not be greater than otherwise limited in this Charter or by general law.

TRANSFER OF APPROPRIATIONS

Section 7.7 After the budget has been adopted, no money shall be drawn from the treasury of the City nor shall any obligation for the expenditure of the money be incurred, except pursuant to the budget appropriations. The Council may transfer any unencumbered appropriation, balance, or any portion thereof from one department, fund, or agency to another. The balance in any appropriation which has not been encumbered at the end of the fiscal year may be reappropriated during the next fiscal year as determined by the Council.

BUDGET CONTROL

Section 7.8 (a) The City Manager shall submit to the Council monthly financial reports showing the relationship between the estimated and actual revenue and expenses to date; and if it shall appear that the revenue is or may be less than anticipated, the Council shall reduce appropriations, except amounts required for debt and interest charges, to such a degree as may be necessary to keep expenditures within anticipated revenues. If revenue exceed the amounts estimated in the budget, the Council may make supplemental appropriations. Expenditures shall not be charged directly to the contingency account except in those cases where there is no other logical account to which expenditures can be charged. Instead, a necessary part of the appropriation from the contingency account shall be transferred to the logical account, and the expenditure charged to such account.

(b) The Council may make additional appropriations during the fiscal year for unanticipated expenditures required by the City, but such additional appropriations shall not exceed the amount by which actual and anticipated revenue of the year are exceeding the revenue as estimated in the budget.

IMPROVEMENT FUNDS

Section 7.9 The City may establish and maintain funds, including revolving funds, for special assessment projects or other improvements for the purpose of accumulating moneys to be used for financing, making, acquiring, extending, altering, or repairing public improvements. Moneys so accumulated may be transferred, encumbered or otherwise disposed of only for the purpose for which accumulated unless otherwise determined and declared by formal resolution of the Council and then only for the purpose of making some other public improvement.

WITHDRAWAL OF CITY MONEYS

Section 7.10 Unless otherwise provided by law or by ordinance, all moneys drawn from the treasury shall be drawn pursuant to the authority and appropriation of the Council. Checks for the disbursement of city funds shall be signed by two (2) of three (3) persons authorized by the Council.

DEPOSITORY

Section 7.11 The Council shall designate the depository or depositories for city funds and shall provide for the regular deposit of all city moneys.

INVESTMENTS

Section 7.12 Surplus moneys may be invested in obligations of the United States of America, or any certificate of deposit or deposited in any bank located in Michigan which is a member of the Federal Deposit Insurance Corporation, as may be directed by the Council or as allowed by statute.

INDEPENDENT AUDIT

Section 7.13 An independent audit shall be made of all accounts of the city government at the close of each fiscal year, and shall be completed within ninety (90) days thereafter. Special independent audits may be made at any time that the Council may designate. All such audits shall be submitted to the Council by a certified public accountant designated by the Council. Each audit and reports supplemental thereto shall be made public in the manner that the Council determines and copies of the audit shall be placed in the office of the Clerk.

CHAPTER VIII

TAXATION

POWER TO TAX

Section 8.1 The City of the Village of Clarkston shall have power to assess, levy and collect taxes, rents, tolls and excises. The subject of ad valorem taxation shall be the same as for state, county, and school purposes under general law. Except as otherwise provided by this Charter, city taxes shall be levied, collected and returned in the manner provided by law.

TAX LIMITS

Section 8.2 Exclusive of any levy for the payment of principal of and interest on outstanding general obligation bonds, and exclusive of any other levies authorized by law to be made beyond charter tax rate limitations, the levy of ad valorem taxes for general municipal purposes shall not exceed one and one half percent (1-1/2%), or fifteen (15) mills on the assessed value of all real and tangible personal property in the City.

EXEMPTIONS

Section 8.3 No exemptions from taxation shall be allowed except as expressly required or permitted by law.

TAX DAY

Section 8.4 Subject to the exceptions provided or permitted by statute, the taxable status of persons and property shall be determined as of the 31st day of December, or such other day as may subsequently be required by law, which shall be deemed Tax Day.

TANGIBLE PERSONAL PROPERTY - JEOPARDY ASSESSMENT

Section 8.5 If the Treasurer finds, or reasonably believes that a person who is or may be liable for taxes upon tangible personal property, the taxable situs of which was in the City on the Tax Day, intends to depart from the City, or to remove therefrom tangible personal property, which is or may be, liable for taxation, or to conceal themselves or their property, or to do any act tending to prejudice, or to render wholly or partially ineffective the proceeding to collect such tax, unless proceedings therefor be brought without delay, the Treasurer shall proceed to collect the same as jeopardy assessment in the manner provided by law.

ASSESSMENT ROLL

Section 8.6 On or before the first day in March in each year, the Assessor shall prepare and certify an assessment roll for all property in the City subject to taxation, and shall file the same in the clerk's office for public examination. Such rolls shall be prepared in accordance with statute

and this Charter. Values shall be estimated according to recognized systematic assessment methods.

On or before the first day in March the Assessor shall provide notice by first class mail of any increase over the previous year in the assessed value of any property, or of the addition of any property to the assessment roll that had not been on the assessment roll previously. The failure to give any such notice, or of the owner to receive it, shall not invalidate any assessment roll or assessment thereon.

BOARD OF REVIEW

Section 8.7 (a) A Board of Review is hereby created composed of three (3) members who have the following qualifications: A member shall be a qualified elector of the City, and shall have been a resident of the City for at least twelve (12) months immediately prior to the date of appointment. The appointment of members of such Board shall be based upon their knowledge and experience in property valuation.

(b) The members of the Board of Review shall be appointed by the Mayor with the advice and consent of the Council and may be removed for reasons of nonfeasance or misfeasance by the vote of five (5) members of the Council. The first such Board of Review appointed by the Mayor under the provisions of this Charter shall be made up of three (3) qualified members appointed for one (1), two (2) and three (3) year terms. Thereafter the Mayor shall appoint a member for a three (3) year term at the first regular council meeting in January of each succeeding year. The Council shall fix the compensation of the members of the Board.

(c) An annual organizational meeting of the Board of Review shall be held on the first Tuesday following the first Monday in March to select one of its members as chairperson for the ensuing year, to review the assessment roll and to examine the guidelines and practices followed in preparing the assessment roll. The Assessor shall be Clerk of the Board, and shall be entitled to be heard at its sessions, but shall have no vote on any proposition or question.

(d) The filing of a nominating petition for any elective office of the City by a member of the Board of Review shall constitute a resignation from the Board of Review.

DUTIES AND FUNCTIONS OF THE BOARD OF REVIEW

Section 8.8 For the purpose of revising and correcting assessments, the Board of Review shall have the same powers and perform like duties in all respects as are conferred by law and required of boards of review. It shall hear the complaints of all persons considering themselves aggrieved by assessment, and if it shall appear that any person or property has been wrongfully assessed or omitted from the rolls, the Board shall correct the roll in such manner as it deems just. In all cases, the roll shall be reviewed according to the facts existing on the Tax Day and no change in the status of any property after that day shall be considered by the Board in making its decision. Except as otherwise provided by law, no person, other than the Board, shall make or authorize any change upon or addition or correction to the

assessment roll. It shall be the duty of the Assessor to keep a permanent record of all the proceedings of the Board and to enter therein all resolutions and decisions of the Board. Such proceedings shall be filed in the office of the Clerk.

NOTICE OF SESSIONS

Section 8.9 Notice of the time and place of the sessions of the Board of Review shall be published by the Clerk in a newspaper having general circulation in the City at least ten (10) days prior to each session of the Board.

SESSIONS OF THE BOARD OF REVIEW

Section 8.10 The Board of Review shall convene its first session beginning on the second Monday in March of each year at such time of day and place as shall be designated by the Council and shall remain in session for at least six (6) hours on that and each succeeding business day thereafter as may be necessary for the purpose of considering and correcting the roll. During its first session the Board shall consider any written objections filed with it in respect to any assessment and may, on its own motion, revise said assessment roll and may increase or diminish valuations therein, add the names of persons and descriptions of property and shall correct all errors and deficiencies found therein or resolve to consider such action at its second session.

In each case in which, at the first session of the Board, the assessed value of any property is increased over the amount shown on the assessment roll, as prepared by the Assessor or any property is added to such roll by the Board, or the Board has resolved to consider at its second meeting such increasing of an assessment or the adding of any property to such roll, the Assessor shall give notice thereof to the owners as shown by such roll by first class letter mailed not later than the day following the last day of the first session of the Board. Such notice shall state the date, time, place and purpose of the second session of the Board. The failure to give any such notice or of the owner to receive it shall not invalidate any assessment roll or assessment thereon.

The Board of Review shall convene its second session on the third Monday in March of each year at such time of day and place as shall be designated by the Council and shall continue in session on that and each succeeding business day until all interested persons have had an opportunity to be heard, but in no case for less than six (6) hours. The Board may still add to the roll property previously omitted, but before so doing shall make every reasonable effort to notify the owner thereof and permit the owner to be heard.

ENDORSEMENT OF ROLL

Section 8.11 After the Board of Review has completed its review of the assessment roll, and not later than the first Monday in April, the majority of its members shall endorse thereon and sign a statement to the effect that the same is the assessment roll of the City for the year in which it has been prepared. The omission of such endorsement shall not affect the validity of

such roll. Such roll shall be the assessment roll of the City for all tax purposes.

CLERK TO CERTIFY TAX LEVY

Section 8.12 Within three (3) days after the Council has adopted the budget for the ensuing year, the Clerk shall certify to the Assessor the total amount which the Council determines shall be raised by the general ad valorem tax. The Clerk shall also certify all amounts of current or delinquent special assessments and all other amounts which the Council requires or orders to be assessed, reassessed, or charged upon said roll against any property or any person in accordance with the provisions of this Charter or any ordinances of the City.

STATE, COUNTY AND SCHOOL TAXES

Section 8.13 The levy, collection and return of state, county and school taxes shall be in conformity with the general laws of the State. To the extent permitted by law, the Council may contract for the collection of these and other taxes.

CITY TAX ROLL

Section 8.14 The Assessor shall prepare a copy of the assessment roll, to be known as the City Tax Roll, and upon receiving the certification of the several amounts to be raised, the Assessor shall spread upon said tax roll the several amounts determined by the Council to be charged, assessed, or reassessed against persons or property. The Assessor shall also spread thereon the amounts of the general ad valorem city tax according to and in proportion to the several valuations set forth in said assessment roll. To avoid fractions in computation of any tax roll, the Assessor may add to the amount of the several taxes to be raised not more than the amount prescribed by law. Any excess created thereby on any tax roll shall belong to the City.

TAX ROLL CERTIFIED FOR COLLECTION

Section 8.15 After spreading the taxes the Assessor shall certify the tax roll, annex the assessor's warrant thereto, direct and require the Treasurer to collect the several sums mentioned therein opposite their respective names as a tax, charge, or assessment, and grant to the Treasurer, for the purpose of collecting the taxes, assessments and charges of such roll, all the statutory powers and immunities possessed by township treasurers for the collection of taxes, except the Treasurer shall not add any collection fee or percentage for collection to such tax bills until and unless such taxes have become delinquent.

TAX LIEN

Section 8.16 On July 1st of each year, the taxes thus assessed on real and tangible personal property shall become a debt due to the City from persons to whom assessed. The amounts assessed on real property and all penalties, collection fees and interest charges thereon shall become a lien on all real property of such persons so assessed. The amounts assessed on personal tangible property and all penalties, collection fees and interest charges

thereon shall likewise become a lien on all tangible personal property of such persons so assessed. Such lien(s) shall take precedence over all other claims, encumbrances, and liens to the extent provided by law and shall continue until such taxes, interest and charges are paid.

TAXES DUE NOTIFICATION THEREOF

Section 8.17 In notifying taxpayers of tax due dates and taxes to be paid, the Treasurer shall not be required to call upon persons named in the city tax roll nor make personal demand for payment of taxes, but shall:

(a) Publish between June 15th and July 1st notice of the time when said taxes will be due for collection and of the penalties and fees for the late payment thereof; and

(b) Mail a tax bill to each person named in said roll. In cases of multiple ownership of property only one bill need be mailed. Failure on the part of the Treasurer to publish said notice or mail such bills shall not invalidate such taxes on said tax roll nor release the person or property assessed from the penalties and fees provided in this chapter in case of late or nonpayment of same.

COLLECTION CHARGES ON LATE PAYMENT FEES

Section 8.18 The Council shall comply with applicable statutory requirements governing tax due dates, collection procedures, interest and penalty charges and return of delinquent taxes to the County Treasurer. Within its authority, the Council may, for the benefit of taxpayers, establish payment schedules to approximately equalize summer and winter tax payments. Except as restricted by statute, the following schedule of collection dates shall apply:

(a) Taxes payable July 1st will be accepted without interest or penalty until September 14th of the same year.

(b) Taxes payable December 1st will be accepted without interest or penalty until February 14th of the succeeding year.

(c) Deferment of taxes payable July 1st until the following February 14th without penalty shall be, on application and qualification by September 14th, granted to taxpayers age sixty five (65) and over meeting statutory limitations on health and household income.

Taxes payable July 1st, unpaid as of September 15th, shall be assessed a 1% interest penalty if paid by September 30th, plus an additional one percent (1%) the first of each month thereafter on the unpaid balance. Taxes payable December 1st, unpaid as of February 15th, shall be assessed a three percent (3%) interest penalty if paid before March 1st. On March 1st such delinquent tax bills shall be returned to the Oakland County Treasurer for collection.

COLLECTION OF DELINQUENT TAXES

Section 8.19 All taxes on real and tangible property for which the City is the designated collection agency and remaining uncollected by the City

Treasurer on March 1st or such date established by statute shall be returned to the Oakland County Treasurer for collection. Such return should be made upon a delinquent tax roll to be prepared by the City Treasurer and shall include all the additional charges and assessments hereinbefore provided. Such charges shall be added to the amount assessed in said tax roll against each description. Taxes thus returned shall be collected in the same manner as other taxes returned to the County Treasurer for collection in accordance with the provisions of the general laws of the State, and shall be and remain a lien upon the property against which they are assessed until paid.

DISPOSITION OF REAL PROPERTY HELD BY CITY

Section 8.20 When the City has acquired any interest in property to protect the city's tax lien thereon, the owner of any interest therein, by fee title, as mortgagee, or as vendor or vendee under a land contract shall have the right to purchase the city's interest therein, upon payment to the City of the amount of money which the City has invested therein in the form of taxes, special assessments, charges, fees, penalties, interest, and costs, paid by the City to protect its title in such property. After the lapse of ninety (90) days after the date that the City acquired title to any such property, the Council may remove the same from the market by determining that such property is needed for and should be devoted to public purposes, naming such purposes, or may sell the same at a price which shall be not less than its market value, as determined and certified to the Council by the Assessor.

FAILURE OR REFUSAL TO PAY TANGIBLE PERSONAL PROPERTY TAX

Section 8.21 If any person, firm or corporation shall neglect or refuse to pay any tangible personal property tax assessed to that person, firm or corporation, the Treasurer shall collect the same by seizing the tangible personal properties of such person, firm or corporation, to an amount sufficient to pay such tax, fees and charges for subsequent sale, wherever the same may be found in the State, and from which seizure no property shall be exempt. The Treasurer may sell the property seized to an amount sufficient to pay the taxes and all charges in accordance with statutory provisions. The Treasurer may, if otherwise unable to collect a tax on tangible personal property, sue the person, firm or corporation to whom it is assessed in accordance with the statute.

INEQUITABLE ASSESSMENT OF TAX

Section 8.22 If it shall be found, at any time, that any property has been subjected to a substantially inequitable assessment or tax, as by reason of errors in computations, decimal misplacement, double entries, and the like, so that the same amounts to a constructive fraud upon the taxpayer, and if the City Attorney shall prepare and file a written opinion indicating that, under current law, relief would be granted by a court of competent jurisdiction, then the Council may so determine and declare by resolution without requiring the commencement of court proceedings and any necessary adjustment may be taken from the general fund of the City.

CHAPTER IX

BORROWING AUTHORITY

GENERAL BORROWING

Section 9.1 Subject to applicable provisions of law and this Charter, the Council may by ordinance or resolution authorize the borrowing of money for any purpose within the scope of powers vested in the City of the Village of Clarkston and permitted by law and may authorize the issuance of bonds or other evidences of indebtedness therefor. Such bonds or other evidences of indebtedness shall include, but not be limited to, the following types:

(a) General obligation bonds which pledge the full faith, credit, and resources of the City for payment of such obligations.

(b) Notes issued in anticipation of the collection of taxes, but the proceeds of such notes may be spent only in accordance with appropriations as provided in Section 7.6;

(c) In cases of fire, flood, windstorm, or other calamity, emergency loans due in not more than five (5) years for the relief of inhabitants of the City and for the preservation of city property.

(d) Special assessment bonds issued in anticipation of the payment of special assessments made for the purpose of defraying the cost of any public improvement, or in anticipation of payment of any combination of such special assessments; such special assessment bonds may be an obligation of the special assessment district or districts alone, or may be both an obligation of the special assessment district or districts, and a general obligation of the City.

(e) Mortgage bonds for the acquiring, owning, purchasing, constructing, improving, or operating of any public utility which the City is authorized by this Charter or by law to acquire or operate;

(f) Bonds for the refunding of the funded indebtedness of the City;

(g) Revenue bonds as authorized by law which are secured only by the revenues from a public improvement or public utility and do not constitute a general obligation of the City;

(h) Bonds issued in anticipation of future payments from the Motor Vehicle Highway Fund or any other fund of the state or federal government which the City may be permitted by law to pledge for the payment of principal and interest thereof;

(i) Budget bonds, which pledge the full faith, credit and resources of the City, in an amount which, in any year together with the taxes levied for the same year, will not exceed the limit of taxation authorized by statute; and

(j) Bonds which the City is, by any general law of the state authorized to issue, now or hereafter, which shall pledge the full faith, credit and resources of the City or be otherwise secured or payable as provided by law.

LIMITS OF BORROWING AUTHORITY

Section 9.2 (a) The net bonded indebtedness incurred for all public purposes shall not at any time exceed the maximum amount permitted by law, provided that in computing such bonded indebtedness there shall be excluded money borrowed on notes issued in the anticipation of the collection of taxes, special assessment bonds, even though they are a general obligation of the City, mortgage bonds, revenue bonds, bonds in anticipation of state-retained revenues to the extent permitted by law, and any other bonds or indebtedness excluded by law from such limitation. The amount of funds accumulated for the retirement of any outstanding bonds shall also be deducted from the amount of bonded indebtedness.

(b) The amount of emergency loans which may be made under the provisions of this Charter may not exceed the maximum amount permitted by law, and such loans may be made even if it causes the indebtedness of the City to exceed the limit of the net bonded indebtedness fixed in this Charter, or by law.

(c) No bonds shall be sold to obtain funds for any purpose other than that for which they were specifically authorized, and if such bonds are not sold within the time limited by law, such authorization shall be null and void.

(d) The issuance of any bonds not requiring the approval of the electorate shall be subject to applicable requirements of law with reference to public notice in advance of authorization of such issues, filing of petitions for a referendum on such issuance, holding such referendum, and other applicable procedural requirements.

PREPARATION AND RECORD OF BONDS

Section 9.3 Each bond or other evidence of indebtedness shall contain on its face a statement specifying the purpose for which it is issued and it shall be unlawful for any officer of the City to use the proceeds thereof for any other purpose. Any officer who shall violate this provision shall be deemed guilty of a violation of this Charter, except that, whenever the proceeds of any bond issue or parts thereof shall remain unexpended and unencumbered for the purpose for which said bond issue was made, the Council may authorize the use of said funds for the retirement of bonds of said issue or for any other purpose permitted by law. All bonds or other evidences of indebtedness issued by the City shall be signed by the Mayor and countersigned by the Clerk, under the seal of the City. The signatures of the Mayor and Clerk, and the seal of the City may be facsimiles in the case of fully-registered bonds. Interest coupons may be executed with the facsimile signature of the Mayor and the Clerk. A complete and detailed record of all bonds and other evidences of indebtedness issued by the City shall be kept by the Clerk or other designated officer. Upon the payment of any bond or other evidence of indebtedness, the same shall be cancelled.

DEFERRED PAYMENT CONTRACTS

Section 9.4 The City may enter into installment contracts for the purchase of property or capital equipment. Each such contract shall not extend over a period greater than, nor shall the total amounts of principal payment under all such contracts exceed a sum permitted by law. All such deferred payments shall be included in the budget for the year in which the installment is payable.

CHAPTER X

SPECIAL ASSESSMENTS

GENERAL POWERS

Section 10.1 The Council of the City of the Village of Clarkston shall have the power to determine that the whole or any part of the cost of any public improvement shall be defrayed by special assessment upon property in a special district and shall so declare by resolution. Such resolution shall state:

- (a) The estimated cost of the improvement;
- (b) What proportion of the cost shall be paid by special assessment, and what part, if any, shall be a general obligation of the City;
- (c) The number of installments in which assessments shall be levied; and
- (d) Whether the assessments shall be based upon special benefits, frontage, area, valuation or other factors permitted by law, or a combination thereof.

The Council shall also have the power of reassessment with respect to any such public improvement.

PROCEDURE FIXED BY ORDINANCE

Section 10.2 The Council shall prescribe by ordinance the complete special assessment or reassessment procedure governing:

- (a) The initiation of projects,
- (b) Preparation of plans and cost estimates,
- (c) Notice of hearings on necessity,
- (d) Confirmation of the assessment rolls,

- (e) Making and confirming of the assessment rolls,
- (f) Correction of errors,
- (g) The collection of special assessments, and
- (h) Any other matters concerning the making and financing of improvements by special assessment.

CHAPTER XI

UTILITIES AND FRANCHISES

GENERAL POWERS RESPECTING UTILITIES

Section 11.1 The City of the Village of Clarkston shall possess and hereby reserves to itself all the powers granted to cities by law to acquire, construct, own, operate, improve, enlarge, extend, repair, and maintain, either within or without its corporate limits, including but not by way of limitation, public utilities for supplying water, light, heat, power, gas, sewage treatment, transportation, and garbage and refuse disposal facilities, or any of them to the municipality and its inhabitants thereof; and also to sell and deliver water, light, heat, power, gas and other public utility services without its corporate limits as authorized by law.

CONTROL OF UTILITIES

Section 11.2 The Council may enact such ordinances and adopt such resolutions as may be necessary for the care, protection, preservation, control and operation of any public utilities which the City may, in any manner acquire, own, or operate and all fixtures, appurtenances, apparatus, building, and machinery connected therewith or belonging thereto, and to carry into effect the powers conferred upon the City by the provisions of this Charter and by law.

PURCHASE OF UTILITY SERVICE

Section 11.3 The City may purchase and resell public utilities services from any person, municipal or private, if such purchase may be deemed by the Council to be in the best interests of the City and its inhabitants.

DISPOSAL OF PLANTS AND PROPERTY

Section 11.4 The City shall not sell, exchange, lease, or in any way alienate or dispose of the property, easements, income or other equipment, privilege or asset belonging to and appertaining to any utility which it may acquire, unless and except the proposition for such purpose shall first have been submitted, at a special election held for the purpose in the manner provided in this Charter, to the qualified voters of the City and approved by

them by a majority vote of the electors voting thereon. All contracts, negotiations, grants, leases or other forms of transfer in violation of this provision, shall be void and of no effect as against the City. The provisions of this section shall not, however, apply to the sale or exchange or any articles or equipment of any city-owned utility as are worn out or useless, or which could, with advantage to the service, be replaced by new and improved machinery or equipment.

FRANCHISES

Section 11.5 (a) A franchise ordinance, which is not revocable at the will of the Council, shall not be granted or become operative until the same shall have been referred to the people at a regular or special election and has received the approval of three-fifths (3/5) of the electors voting thereon at such election or as required by law.

(b) All irrevocable public utility franchises, and all renewals, extensions and amendments thereof, shall be granted only by ordinance. Such ordinance shall not be adopted before thirty (30) days after application therefor has been filed with the Council, or until a full public hearing has been held thereon. Such ordinance shall not become effective until it has been submitted to the electors and has been approved by a three-fifths (3/5) majority of the electors voting thereon. Such ordinance shall be submitted to the electors at a general election to be held not less than sixty (60) days after the grantee named therein has filed unconditional acceptance of all terms of such franchise, and it shall not be submitted to a special election unless the expense of holding the election, as determined by the Council, shall have been paid to the Treasurer by the grantee.

(c) An exclusive franchise shall not be granted, and a franchise shall not be granted for a longer term than thirty (30) years.

(d) Such franchise shall not be transferable, directly or indirectly, except with the approval of the Council expressed by ordinance.

(e) Purchase of a franchised utility by the City shall require the approval of a three-fifths (3/5) majority of the electors voting thereon.

RIGHT OF REGULATION

Section 11.6 All public utility franchises, whether it be so provided in the granting ordinance or not, shall be subject to the right of the City to:

(a) Repeal the same for misuse or nonuse, or for failure to comply with the provisions thereof;

(b) Require proper and adequate extension of plant and service and maintenance thereof at the highest practicable standard of efficiency;

(c) Establish reasonable standards of service and quality of products, and prevent unjust discrimination in service or rates;

(d) Make independent audit and examination of accounts at any time, and require reports annually;

(e) Require continuous and uninterrupted service to the public in accordance with the terms of the franchise throughout the entire period thereof; and

(f) Impose such other regulations as may be determined by the Council to be conducive to the health, safety, welfare, and accommodation of the public.

RATES OF FRANCHISED UTILITIES

Section 11.7 The rates charged by public utilities under the supervision of state regulatory agencies shall be fixed by such agencies. The rates not preempted by the state for public utilities shall be set, after public hearing, by the Council.

PURCHASE - CONDEMNATION

Section 11.8 The City shall have the right to acquire by condemnation or otherwise the property of any public utility in accordance with general law, provided that the price to be paid shall in no event include any value predicated upon the franchise, goodwill, or prospective profits.

REVOCABLE PERMITS

Section 11.9 Temporary permits for public utilities, revocable at any time at the will of the Council, may be granted by the Council by resolution on such terms and conditions as it shall determine, provided that such permits shall not be construed to be franchises or amendments to franchises.

USE OF STREETS BY UTILITY

Section 11.10 Every public utility franchise shall be subject to the City's right to use, control and regulate the use of streets, alleys, bridges and public places, including the space above and beneath them. Every public utility shall pay such part of the cost of improvements and maintenance of streets, alleys, bridges and other public places as shall arise from its use and shall protect and hold the City harmless from damages arising from said use. The Council shall by ordinance establish the terms and conditions for such joint use of the public right-of-way and the compensation to be paid.

CHAPTER XII

PURCHASES, SALES, AND LEASES

CONTRACTING AUTHORITY OF COUNCIL

Section 12.1 The power to authorize the making of purchase, sale and lease

contracts on behalf of the City of the Village of Clarkston is vested in the Council, and shall be exercised in accordance with the provisions of law. All contracts, except as otherwise provided by ordinance in accordance with the provisions of this Charter shall be authorized by the Council, and shall be signed on behalf of the City by the Mayor and the Clerk.

PURCHASE, SALE AND LEASE OF PROPERTY AND SERVICES

Section 12.2 The Council shall establish by ordinance the procedures for the purchase, sale or lease of real and personal property and services for the City for the direction of the City Manager. The ordinance shall provide a dollar limit within which purchases, sales or leases of real and personal property and services may be made without the necessity of securing competitive bids, and the dollar limit within which purchases, sales or leases may be made without the necessity of prior council approval.

LIMITATIONS ON CONTRACTUAL POWER

Section 12.3 (a) The Council shall only have power to enter into contracts which, by the terms thereof, will be fully executed within a period of ten (10) years, unless such contract shall first receive the approval of the majority of the qualified electors voting thereon at a regular or special election. This qualification shall not apply to any contract for services with a public utility, or one or more other governmental units, nor to contracts for debt secured by bonds or notes which are permitted to be issued by the City by law.

(b) Except as provided by ordinance authorized in this Charter, each contract for construction of public improvements or for the purchase or lease of personal property and services, shall be let after opportunity for competition and shall require the posting of an adequate performance bond.

(c) Except as provided by ordinance all bids shall be opened and read aloud in public by the City Manager or the City Manager's authorized representative at the time designated in the notice of letting, and shall be reported by the City Manager to the Council at its next regular meeting. The Council may reject any or all bids if deemed advisable. If, after ample opportunity for competitive bidding, no bids are received, or such bids as are received are not satisfactory to the Council, the Council may either endeavor to obtain new competitive bids or authorize the City Manager, or other proper officials of the City, to negotiate or contract on the open market.

(d) No contract shall be made with any person, firm or corporation in default to the City.

(e) The Council's power to sell, lease or dispose of any real property shall be conditioned on the conducting of a public hearing thereon and receiving five (5) affirmative council votes and the requisite electoral approval if required by law.

OFFICIAL INTEREST IN CONTRACTS

Section 12.4 No person holding any elective or appointive office of the City shall take any official action on any city contract in which that person shall have a direct personal interest in the profits to be derived therefrom or be a bondsman or surety on any contract or bond given to the City. The provisions for handling this shall be in accordance with Act 317 of the Public Acts of 1968, as amended or as required by law. Any officer violating the provisions of this section shall be deemed guilty of misconduct in office and upon conviction shall forfeit that office.

CHAPTER XIII

MUNICIPAL RIGHTS AND LIABILITIES

RIGHTS, LIABILITIES, REMEDIES

Section 13.1 All rights and properties of any kind and description which were vested in the Village of Clarkston at the time of the adoption of this Charter shall continue, and no rights or liabilities, either in favor of or against the Village at the time of the adoption of this Charter, and no suit or prosecution of any kind shall be in any manner affected by the adoption of this Charter, but the same shall stand or progress as if no such change had been made, and all debts and liabilities of the Village and all taxes levied and uncollected at the time of the adoption of this Charter shall be collected the same as if such change had not been made; provided that, when a different remedy is given in this Charter, which can be made applicable to any rights existing at the time of the adoption of this Charter, the same shall be deemed cumulative to the remedies before provided, and may be used accordingly.

LIABILITY FOR DAMAGES

Section 13.2 The City shall not be liable for unliquidated damages for injuries to persons or property unless the person or persons claiming such damages, or someone on their behalf, shall file a claim in writing with the Clerk. Such claim shall be verified by the claimant or claimants, or some person having knowledge of the facts, who shall specify the time and place, the nature and extent of the injury sustained, the manner in which it occurred, the specific grounds upon which the claim of liability on the part of the City shall be asserted, the names and addresses of all known witnesses, the name of the attending physician, if any, and an itemized statement of the amount claimed. Upon filing such claim, the City shall investigate the same and may require the claimant to produce all witnesses for examination under oath. No action shall be maintained in any case unless the same be brought within the statutory period stated by law after such injury or damages shall have been received.

STATEMENTS OF CITY OFFICERS

Section 13.3 An officer of the City shall not have the power to make any representation or recital of fact in any franchise, contract, document, or agreement which is contrary to any public record of the City. Any such representation shall be void and of no effect as against the City.

CHAPTER XIV

GENERAL PROVISIONS AND DEFINITIONS

GENERAL PROVISIONS AND DEFINITIONS

Section 14.1 All records of the City of the Village of Clarkston shall be public, except those exempted by law, and shall be kept in the city offices except when required to be elsewhere for official reasons or for safekeeping. All city records shall be in the English language including the city's legislative journal and shall be available to the public during normal business hours.

HEADINGS

Section 14.2 The chapter, section and subsection headings used in this Charter are for convenience only and shall not be considered to be part of this Charter.

DEFINITIONS AND INTERPRETATIONS

Section 14.3 Except as otherwise specifically provided or indicated by the context of this Charter:

- (a) The word "State" shall mean the State of Michigan.
- (b) The word "City" shall mean the City of the Village of Clarkston.
- (c) The word "Council" shall mean the City Council of the City of the Village of Clarkston.
- (d) The word "officer" shall include the Mayor, City Manager, the members of the Council, and, as herein provided, the administrative officers, and members of city boards and commissions created pursuant to this Charter.
- (e) The word "employee" shall mean those persons not holding elective or appointive office, one who is generally subordinate to an officer and performs only those duties specifically assigned by a contract, department head, or other governmental body.

(f) The word "person" may extend and be applied to bodies politic and corporate and to partnerships and associations, as well as to individuals.

(g) The words "printed" and "printing" shall include printing, engraving, stenciling, duplicating, lithographing, typewriting, photocopying, or any similar method.

(h) Except in reference to signatures, the words "written" and "in writing" shall include handwritten script, printing, typewriting, photocopying and all electronic, facsimile, teletype, and telegraphic communications.

(i) The words "publish" or "published" shall include publication of any matter required to be published, in the manner provided by law, or where there is no applicable law, in one or more newspapers of general circulation in the City, qualified by law for the publication of legal notices or in accordance with this Charter.

(j) The words "public utility" shall include all common carriers in the public streets; water; sewage disposal; electric light and power; gas; telephone and telegraph lines and systems; cable television; garbage and refuse collection and disposal and reduction plants; transportation; and such other and different enterprises as the Council may determine or designate.

(k) All words indicating the present tense shall not be limited to the time of the adoption of this Charter, but shall extend to and include the time of happening of any event or requirement to which any provision of this Charter is applied.

(l) The singular shall include the plural, and plural shall include the singular, the masculine gender shall extend to and include the feminine gender and the neuter.

(m) The word "law" denotes applicable federal law, the Constitution and statutes of Michigan, and the applicable common law, and this Charter and the ordinances of the City.

(n) The word "statute" shall denote the public acts of the State of Michigan including amendments in effect at the time the provision of the Charter containing the word "statute" is to be applied.

AMENDMENTS

Section 14.4 This Charter may be amended at any time in the manner provided by statute. Should two (2) or more amendments, adopted at the same election, have conflicting provisions, the one receiving the largest number of affirmative votes shall prevail as to those provisions.

SEVERABILITY OF CHARTER PROVISIONS

Section 14.5 Should any provision or section or portion thereof, of this Charter be held by a court of competent jurisdiction to be invalid, illegal, or unconstitutional, such holding shall not be construed as affecting the validity

of this Charter as a whole or of any remaining portion of such provision or section.

CHAPTER XV

SCHEDULE OF ADOPTION

PURPOSE AND STATUS OF SCHEDULE CHAPTER

Section 15.1 The purpose of this schedule chapter is to inaugurate the government of the City of the Village of Clarkston under this Charter and to provide the transition from the Village of Clarkston. It shall constitute a part of this Charter only to the extent and for the time required to accomplish this end.

ELECTION TO ADOPT CHARTER

Section 15.2 This Charter shall be submitted to a vote of the registered electors of the Village of Clarkston at a special election to be held on February 4, 1992, between the hours of 7:00 AM and 8:00 PM local time. The provisions for the submission of the question of adopting this Charter at such election shall be made in a manner provided by law. The election shall be conducted by the Village Clerk, and if in said election a majority of the electors voting thereon shall vote in favor of the adoption of this Charter, then the Clerk shall perform all the other acts required by law to carry this Charter into effect.

FORM OF BALLOT

Section 15.3 The form of the ballot on submission of this Charter shall be as follows:

"Shall the proposed Charter of the City of the Village of Clarkston drafted by the Charter Commission elected on October 16, 1990, be adopted."

YES _____
NO _____

EFFECTIVE DATE

Section 15.4 If the canvass of the votes on the adoption of this Charter shows it to have been adopted, it shall take effect and become law as the Charter of the City of the Village of Clarkston for all purposes on July 1, 1992, at 12:01 AM local time.

FIRST ELECTION OF OFFICERS

Section 15.5 (a) An election to elect the first Mayor and City Council shall be held on Monday, June 15, 1991, between the hours of 7:00 AM and

8:00 PM, local time. The mayoral candidate receiving the highest vote shall have a term beginning at 12:01 AM, July 1, 1992, and extend until the second Monday in November following the annual city election in 1994. The three (3) council candidates receiving the highest vote shall have terms beginning at 12:01 AM, July 1, 1992, and extend until the second Monday in November following the annual city election in 1994. The three (3) candidates receiving the next highest number of votes shall have terms beginning at 12:01 AM July 1, 1992, and extend until the second Monday in November following the annual city election in 1993. Henceforth, the elections for the City Council shall be held in accordance with and at the times set forth in this Charter.

(b) Candidates for Mayor and for City Council who shall be duly registered electors of the Village of Clarkston and who shall have been residents of the Village of Clarkston for one (1) year immediately prior to the election shall file petitions signed by not less than twenty (20), nor more than forty (40) qualified and registered electors of the Village of Clarkston, and filed with the Village Clerk by 4:00 PM, local time, on Monday, April 23, 1992. The Village Clerk shall publish notice of the last day and time of filing of petitions which notice shall be published in the Clarkston News by April 1, 1992. Such petitions shall be in the form designated by statute for the use in nominations for nonpartisan office. The manner of approval of nominating petitions and those who qualify to sign shall be in general as outlined in this Charter.

(c) Monday, May 18, 1992 shall be the last day of registration for such election. The Village Clerk will act as registrar for the purpose of registering the electors of the Village of Clarkston for the election to be held on June 15, 1992. Those registered voters now registered with the Village of Clarkston will be eligible to vote without further registration if their registrations in the Village of Clarkston are in order. The Village Clerk shall also publish notices as required in accordance with state statutes for such election.

(d) The Oakland County Board of Canvassers shall canvass both the votes for and against the February 4, 1992, election on the adoption of this Charter and the June 15, 1992 election for the Mayor and the City Council.

FIRST MEETING OF THE CITY COUNCIL

Section 15.6 On or before the effective date of this Charter, each person who has been elected to an office of the City shall appear before the Clerk of the Village of Clarkston and take and subscribe to their oath of office. The officer receiving such oath shall file the subscribed copy of such oath with the City Clerk within ten (10) days after the effective date of this Charter. The first council meeting of the City shall convene at 7:30 PM, local time, on Monday, July 13, 1992 in the City Hall. The meeting shall be called to order by the Chairman of the Charter Commission who shall introduce the Mayor and the Council to the public and call the meeting to order. The Chairman shall then turn the meeting over to the Mayor and the Council shall proceed with the business before it.

(d) The Oakland County Board of Canvassers shall canvass both the votes for and against the February 4, 1992, election on the adoption of this Charter and the June 15, 1992 election for the Mayor and the City Council.

EXISTING VILLAGE LEGISLATION AND RULES

Section 15.7 All ordinances and resolutions of the Village and all rules and regulations made by any officer or agency of the Village which are not

inconsistent in their content with this Charter shall remain in effect until changed by action taken under this Charter. The adoption of this Charter shall not effect any rights, assets, obligations, liabilities or immunities of the Village of Clarkston or the officers thereof.

COUNCIL ACTION

Section 15.8 In all cases involving the transition of the Village of Clarkston to the City of the Village of Clarkston under this Charter which are not covered by this schedule or other provisions of this Charter, the Council shall supply the necessary details and procedures and may adopt such rules, regulations and ordinances as may be required therefor.

VESTED RIGHTS AND LIABILITIES

Section 15.9 After the effective date of this Charter, the City of the Village of Clarkston shall be vested with all property, moneys, contracts, rights, credits, effects, and the records, files, books and papers belonging to the Village of Clarkston according to statute and cases provided. No right or liability, contract, lease, or franchise either in favor or against the Village of Clarkston, and no existing suit or prosecution of any character shall be affected in any manner by any change resulting from the adoption of this Charter, but the same shall stand or proceed as if no change had been made. All debts and liabilities of the Village of Clarkston shall continue as debts and liabilities of the City, and all debts to it and fines and penalties, imposed and existing at the time of such change shall be collected by the City.

All trusts established for any municipal purpose shall be continued in accordance with the terms thereof subject to the cy-pras doctrine.

OFFICERS AND EMPLOYEES

Section 15.10 The adoption of this Charter shall not change or influence the Village Clerk, the Village Treasurer, any appointive officer or employee at the time of adoption. Each such person who holds any office or who is an employee shall continue therein until a successor has been appointed or employed in accordance with the provisions of this Charter.

BOARDS AND COMMISSIONS

Section 15.11 The present boards and commissions of the Village of Clarkston shall continue as now established under the terms of the ordinance establishing them and the members of such boards and commissions shall continue for the terms as established in the ordinance creating them.

RESOLUTION OF ADOPTION

At a meeting held on January 13, 1992, the Charter Commission elected on October 16, 1990 to draft a City Charter for the City of the Village of Clarkston adopted the following resolution:

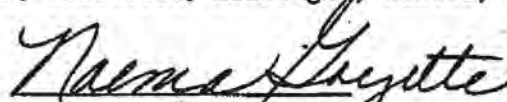
"RESOLVED, that the proposed charter for the City of the Village of Clarkston prepared by the Charter Commission after months of careful study, discussion and deliberation, be approved by the Charter Commission. That the Village Clerk of the Village of Clarkston is hereby instructed to transmit the same to the Governor of the State of Michigan in accordance with the provisions of Act 279 of the Public Acts of 1909, as amended, for his approval."

The vote on the adoption of the resolution was as follows:

Ayes: Johnston, Hitchcock, Sanderson, Arkwright, Hunter, Robertson, Smith

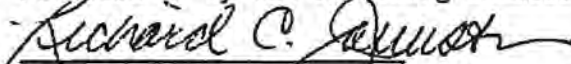
Nays: None.

Absent: Byers, Secatch.



Norma Goyette

Village Clerk

Attested to by the following Commissioners:



Richard C. Johnston, Chairman

Jackson G. Byers


James C. Hitchcock, Vice-Chairman


Thomas E. Hunter


Karen L. Sanderson, Secretary



Charles G. Robertson


Stephen D. Arkwright

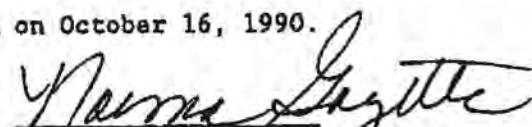
Stephen Secatch


James B. Smith

I hereby certify that the foregoing is a true copy of the resolution of January 13, 1992 adopted by the Charter Commission for the City of the Village of Clarkston and a true copy of the proposed charter adopted by that resolution.


Norma Goyette, Village Clerk

I hereby certify that the above Commissioners were those duly elected to the Clarkston Charter Commission on October 16, 1990.


Norma Goyette, Village Clerk

Thomas J. Ryan, P.C.
2055 Orchard Lake Road
Sylvan Lake, MI 48320

Invoice submitted to:
Carol Eberhardt
City Manager
City of the Village of Clarkston
375 Depot Road
Clarkston MI 48346

February 02, 2015

Invoice #10608



Professional Services

	<u>Hrs/Rate</u>	<u>Amount</u>
1/8/2015 Review correspondence from City Manager re: miscellaneous city matters	0.50 95.00/hr	47.50
Review correspondence from Neil Wallace re: easement walkway and steps between the municipal lot and 39 S. Main and Main Street re: snow and slush accumulation	0.50 95.00/hr	47.50
Review correspondence from City Manager re: miscellaneous city matters	0.50 95.00/hr	47.50
1/9/2015 Review correspondence from Neil Wallace re: city did not remove snow from the walkway and stairs between Main Street and Municipal parking lot; an elderly man did it with his snow blower and salted	0.50 95.00/hr	47.50
1/10/2015 Phone call to Neil Wallace re: maintenance of walkway between municipal lot and Main Street	0.50 95.00/hr	47.50
1/16/2015 Correspondence to Neil Wallace re: issue of snow accumulation on steps and walkway from Main Street to lower parking lot; copy to City Manager	0.50 95.00/hr	47.50
1/20/2015 Phone call from City Manager re: miscellaneous city matters	0.50 95.00/hr	47.50
1/22/2015 Review Beach Lease with Independence Township and Phone call to City Manager re: miscellaneous city matters	1.00 95.00/hr	95.00
1/23/2015 Review correspondence from City Manager re: miscellaneous city matters	0.50 95.00/hr	47.50
1/26/2015 Review correspondence from Neil Wallace re: HRC issues re: 148 Main Street	0.50 95.00/hr	47.50

Carol Eberhardt

Page 2

	<u>Hrs/Rate</u>	<u>Amount</u>
1/26/2015 Review correspondence from City Manager re: HRC issues re: 148 Main Street	0.50 95.00/hr	47.50
Review Council Packet	0.50 95.00/hr	47.50
1/27/2015 Phone call from Neil Wallace re: engineering matters re: 148 N. Main Street	0.50 95.00/hr	47.50
Phone call from City Manager re: miscellaneous city matters	0.50 95.00/hr	47.50
Review correspondence from City Manager re: miscellaneous city matters	0.50 95.00/hr	47.50
1/29/2015 Review correspondence from Jason Miller re: Depot Park Bridge	0.50 95.00/hr	47.50
Review correspondence from City Manager re: miscellaneous city matters	0.50 95.00/hr	47.50
1/30/2015 Review correspondence from Robyn Johnston re: Depot Park Bridge	0.50 95.00/hr	47.50
Review correspondence from Neil Wallace re: water table re: 148 N. Main	0.50 95.00/hr	47.50
For professional services rendered	10.00	\$950.00
Previous balance		\$475.00
Accounts receivable transactions		
1/26/2015 Payment - Thank You No. 7270		(\$475.00)
Total payments and adjustments		(\$475.00)
Balance due		\$950.00

Thomas J. Ryan, P.C.
2055 Orchard Lake Road
Sylvan Lake, MI 48320

Invoice submitted to:
Carol Eberhardt
City Manager
City of the Village of Clarkston
375 Depot Road
Clarkston MI 48346

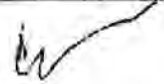
March 02, 2015

Invoice #10614

Professional Services

	<u>Hrs/Rate</u>	<u>Amount</u>
2/2/2015 Phone call from./to Neil Wallace re: engineering plans/MDEQ issues re: 148 N. Main Street	0.50 95.00/hr	47.50
Review correspondence from City Manager re: ordinance codification	0.50 95.00/hr	47.50
Phone call from/to City Manager re. miscellaneous city matter and 148 N. Main Street	0.50 95.00/hr	47.50
2/3/2015 Review correspondence from Sharon Rupe re: Ordinances for the City being revised and provided in a spreadsheet so the officers can use the e-citation program	0.50 95.00/hr	47.50
2/4/2015 Review correspondence from John Cecil at HRC re:having developer provide correspondence from MDEQ re: any impacts to the existing contamination plume; NPDES permit waiver is fine re: 148 N. Main Street	0.50 95.00/hr	47.50
Review correspondence from Neil Wallace re: steps and walkway are not shoveled	0.50 95.00/hr	47.50
Review correspondence from City Manager re: miscellaneous city matters	0.50 95.00/hr	47.50
2/5/2015 Review correspondence from Neil Wallace re: project re: 148 N. Main Street	0.50 95.00/hr	47.50
Review correspondence from Sandy Miller re: Michigan election law	0.50 95.00/hr	47.50
2/9/2015 Review Council Packet	0.50 95.00/hr	47.50

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Carol Eberhardt

Page 2

		<u>Hrs/Rate</u>	<u>Amount</u>
2/9/2015	Review correspondence from Sandy Miller re: Revised Agenda for 2/9/15 City Council Meeting	0.50 95.00/hr	47.50
	Attend City Council Meeting	3.00 95.00/hr	285.00
2/10/2015	Review correspondence from City Manager re: plan review for 148 N. Main Street	0.50 95.00/hr	47.50
	Review correspondence from City Manager re: storm water plans re: 148 N. Main Street	0.50 95.00/hr	47.50
	Review correspondence from Gary Tressel re: storm water plan for 148 N. Main Street	0.50 95.00/hr	47.50
	Review correspondence from Gary Tressel at HRC re: storm water plan for 148 N. Main Street	0.50 95.00/hr	47.50
	Review correspondence from City Manager re: plan review for 148 N. Main Street	0.50 95.00/hr	47.50
	Review correspondence from Sandy Miller re: Petition Filing Verification form and response from Oakland County Election Division	0.50 95.00/hr	47.50
2/11/2015	Review correspondence from City Manager re: meeting with Mayor and Gary Tressel re: storm water engineering issue and scheduling of meeting with engineer, Paul Boomer, Neil Wallace and City Attorney	0.50 95.00/hr	47.50
	Review correspondence from Gary Tressel re: his availability for possible meeting for 2/13/15	0.50 95.00/hr	47.50
	Phone call to City Manager re: miscellaneous city matters and 148 N. Main Street	0.50 95.00/hr	47.50
2/12/2015	Review correspondence from City manager re: miscellaneous city matters	0.50 95.00/hr	47.50
2/17/2015	Review correspondence from City Manager re: miscellaneous city matters	0.50 95.00/hr	47.50
	Review correspondence from Gary Tressel re: meeting availability re: 148 N. Main	0.50 95.00/hr	47.50
2/18/2015	Phone call from/to Neil Wallace re: 148 N. Main Street	0.50 95.00/hr	47.50
	Review correspondence from City Manager re: scheduling meeting re: 148 N. Main Street	0.50 95.00/hr	47.50
	Review correspondence from Curt Catallo re: scheduling meeting re: 148 N. Main Street	0.50 95.00/hr	47.50

Carol Eberhardt

Page 3

		<u>Hrs/Rate</u>	<u>Amount</u>
2/18/2015	Review correspondence from City Manager re: references to the MDEQ; not requiring something from the MDEQ that is not required	0.50 95.00/hr	47.50
	Review correspondence from Gary Tressel re: storm water system re: 148 N. Main Street	0.50 95.00/hr	47.50
	Review correspondence from City Manager re: submitting final site plan with letter from MDEQ re: allowing storm water into the plume re: 148 N. Main Street	0.50 95.00/hr	47.50
2/20/2015	Review correspondence from City Manager re: phone conversation with Tom Bihl of HRC; discussion re: 148 N. Main Street	0.50 95.00/hr	47.50
	Review correspondence from City Manager re: rezoning process for 42. W. Washington	0.50 95.00/hr	47.50
2/23/2015	Review correspondence from City Manager re: miscellaneous city matters	0.50 95.00/hr	47.50
	Review correspondence from Richard Carlisle re: his comments relative to a preliminary review with Planning Commission and suggest a conditional rezoning and present a plan re: 42 W. Washington	0.50 95.00/hr	47.50
	Review correspondence from City Manager re: desire of property owner to seeking rezoning to use as an Inn with 16 rooms and 2 guest cottages with a banquet center with a capacity of approximately 150 seats re: 42 W. Washington	0.50 95.00/hr	47.50
	Review correspondence from Neil Wallace re: response to Gary Tressel's email regarding approval of MDEQ; data provided that this will not affect the plume; Conditional Rezoning Agreement re: 148 N. Main Street	0.50 95.00/hr	47.50
	Review Council Packet for 2/23/15 council meeting	0.50 95.00/hr	47.50
2/25/2015	Review correspondence from City Manager re: miscellaneous city matters	0.50 95.00/hr	47.50
2/26/2015	Correspondence to Neil Wallace re: response to his correspondence of 2/23/15; Paragraph N of the Agreement and proposal of a letter from the developer relative to the storm water drainage system	1.00 95.00/hr	95.00
	Review correspondence from City Manager re: comment on response to Mr. Wallace's email of 2/23/15 re: 148 N. Main Street	0.50 95.00/hr	47.50
	Correspondence to Sandy Miller re: confirming State law supersedes the City Charter for the petition filing verification form; due 15 Tuesdays prior to the November 2016 election	0.50 95.00/hr	47.50
2/27/2015	Review correspondence from Neil Wallace re: issues regarding HRC, MDEQ, storm water retention and attached documents re: 148 N. Main Street	1.00 95.00/hr	95.00

Carol Eberhardt

Page 4

	<u>Hrs/Rate</u>	<u>Amount</u>
2/27/2015 Correspondence to City Manager re: approval process for 42 W. Washington	0.50 95.00/hr	47.50
For professional services rendered	25.00	\$2,375.00
Previous balance		\$950.00
Accounts receivable transactions		
2/20/2015 Payment - Thank You No. 7325		(\$950.00)
Total payments and adjustments		(\$950.00)
Balance due		\$2,375.00

Thomas J. Ryan, P.C.
2055 Orchard Lake Road
Sylvan Lake, MI 48320

Invoice submitted to:
Carol Eberhardt
City Manager
City of the Village of Clarkston
375 Depot Road
Clarkston MI 48346

April 02, 2015

Invoice #10621



Professional Services

	<u>Hrs/Rate</u>	<u>Amount</u>
3/3/2015 Phone call from Building Official re: fire/chimney/store issue	0.50 95.00/hr	47.50
Phone call to City Manager re: 148 N. Main Street	0.50 95.00/hr	47.50
3/5/2015 Correspondence to Tom Blehl at HRC re: sent copy of Conditional Rezoning Agreement; confirmed meeting for 3/8/15 at 3:30 p.m. at City Attorney's office re: 148 N. Main Street	0.50 95.00/hr	47.50
Phone call from/to Tom Blehl at HRC re: 148 N. Main	0.50 95.00/hr	47.50
Phone call with City Manager re: miscellaneous city matters	0.50 95.00/hr	47.50
3/6/2015 Phone call to City Manager re: miscellaneous city matters	0.50 95.00/hr	47.50
Conference with City Manager and Thomas Blehl of HRC re: 148 N. Main Street	1.00 95.00/hr	95.00
3/9/2015 Review Council Meeting Packet	0.50 95.00/hr	47.50
Review correspondence from John Cecil at HRC re: detention system options re: 148 N. Main	0.50 95.00/hr	47.50
Review correspondence from Richard Carlisle re: rezoning of 59 S. Main	0.50 95.00/hr	47.50
Phone call from/to Dick Carlisle re: 59 S. Main Sgreet (re-zoning)	0.50 95.00/hr	47.50

Carol Eberhardt

Page 2

	<u>Hrs/Rate</u>	<u>Amount</u>
3/9/2015 Attend City Council Meeting	3.00 95.00/hr	285.00
Correspondence to City Manager re: Attorney Client Privilege Memorandum re: 148 N. Main Street	0.50 95.00/hr	47.50
3/10/2015 Review correspondence from Neil Wallace re: review of documents he sent for review and comment re: 148 N. Main Street	0.50 95.00/hr	47.50
Phone call to Dick Carlisle re: 59 S. Main Street re: zoning request	0.50 95.00/hr	47.50
3/11/2015 Phone call from/to John Cecil at HRC re: 148 N. Main Street	0.50 95.00/hr	47.50
Correspondence to Neil Wallace re: environmental report relative to storm water system; options for developer relative to storm water system re: 148 N. Main Street; copy to City Manager	1.00 95.00/hr	95.00
3/13/2015 Phone call to City Manager re: miscellaneous city matters	0.50 95.00/hr	47.50
Phone call from Mayor Luginski re: miscellaneous city matters	0.50 95.00/hr	47.50
3/16/2015 Review correspondence from City Manager re: miscellaneous city matters	0.50 95.00/hr	47.50
Review correspondence from Sandy Miller re: miscellaneous city matters	1.00 95.00/hr	95.00
3/18/2015 Phone call from Tom Blehl and John Cecil at HRC re: speaking to engineer on 148 N. Main Street	0.50 95.00/hr	47.50
3/19/2015 Review correspondence from City Manager re: miscellaneous city matters	0.50 95.00/hr	47.50
3/20/2015 Phone call to Mayor Luginski re: miscellaneous city matters	0.50 95.00/hr	47.50
Phone call from City Clerk re: miscellaneous city matters	0.50 95.00/hr	47.50
Phone call to City Manager re: miscellaneous city matters	0.50 95.00/hr	47.50
3/23/2015 Review correspondence from Neil Wallace re: indemnity for storm water system re: 148 N. Main	0.50 95.00/hr	47.50
Review correspondence from City Manager re: Historic District Commission re: 25 Buffalo Street	0.50 95.00/hr	47.50

Carol Eberhard

Page 3

	<u>Hrs/Rate</u>	<u>Amount</u>
3/24/2015 Phone call from City Clerk re: trees being cut down at 42 W. Washington	0.50 95.00/hr	47.50
Phone call from/to Mr. Strong re: trees being cut down at 42 W. Washington	0.50 95.00/hr	47.50
Correspondence to City Manager and Cara Catallo re: HDC for 25 Buffalo Street	0.50 95.00/hr	47.50
Review correspondence from Cara Catallo re: Building Inspector looked it over; homeowner reapplied to route the chimney through the house	0.50 95.00/hr	47.50
3/25/2015 Correspondence to Sandy Miller re: applications for rezoning and special land use re: 148 N. Main Street	0.50 95.00/hr	47.50
3/26/2015 Review Council Packet for 3/26/15 council meeting	0.50 95.00/hr	47.50
Review revised Groundwater Mounding Analysis re: 148 N. Main	0.50 95.00/hr	47.50
Correspondence to Neil Wallace re: did HRC receive a copy of the revised groundwater mounding analysis; working on indemnity agreement	0.50 95.00/hr	47.50
Draft Hold Harmless Agreement re: 148 N. Main Street; Email to Neil Wallace draft of Hold Harmless Agreement; copy to City Manager	1.00 95.00/hr	95.00
3/27/2015 Phone call from City Clerk re: miscellaneous city matters	0.50 95.00/hr	47.50
Phone call from/to Mayor Lugtinski re: miscellaneous city matters	0.50 95.00/hr	47.50
Review correspondence from Neil Wallace re: comments relative to Hold Harmless Agreement	0.50 95.00/hr	47.50
Correspondence to Neil Wallace re: proper party for Hold Harmless Agreement and forward appropriate language re: 148 N. Main Street	0.50 95.00/hr	47.50
Review correspondence from City Manager re: miscellaneous city matters	0.50 95.00/hr	47.50
Review correspondence from Neil Wallace re: revised draft of Hold Harmless Agreement re: 148 N. Main	0.50 95.00/hr	47.50
3/30/2015 Review correspondence from Thomas Biehl at HRC re: comments relative to Hold Harmless Agreement re: 148 N. Main	0.50 95.00/hr	47.50
Correspondence to Thomas Biehl and Kevin Gleason re: Hold Harmless Agreement re: 148 N. Main Street	0.50 95.00/hr	47.50

Carol Eberhardt

Page 4

	<u>Hrs/Rate</u>	<u>Amount</u>
3/30/2015 Phone call to attorney, Kevin Gleeson, at HRC re: Hold Harmless language re: 148 N. Main Street	0.50 95.00/hr	47.50
3/31/2015 Correspondence to Sharon Rupe re: ordinances are being reviewed by a subcommittee; then will be reviewed by city attorney; copy to City Manager	0.50 95.00/hr	47.50
Review correspondence from Sandy Miller re: closed meeting minutes	0.50 95.00/hr	47.50
Review correspondence from Sharon Rupe re: ordinances and process for entry when completed	0.50 95.00/hr	47.50
For professional services rendered	29.00	\$2,755.00
Previous balance		\$2,375.00
Accounts receivable transactions		
3/18/2015 Payment - Thank You No. 7365		(\$2,375.00)
Total payments and adjustments		(\$2,375.00)
Balance due		\$2,755.00

Thomas J. Ryan, P.C.
2055 Orchard Lake Road
Sylvan Lake, MI 48320

Invoice submitted to:
Carol Eberhardt
City Manager
City of the Village of Clarkston
375 Depot Road
Clarkston MI 48346

May 01, 2015

Invoice #10626

Professional Services

	<u>Hrs/Rate</u>	<u>Amount</u>
4/2/2015 Review correspondence from Nell Wallace re: status of Hold Harmless Agreement	0.50 95.00/hr	47.50
Phone call to City Manager re: miscellaneous city matters	0.50 95.00/hr	47.50
4/3/2015 Correspondence to Thomas Blehl at HRC and attorney, Kevin Gleeson re: Hold Harmless Agreement re: 148 N. Main Street	0.50 95.00/hr	47.50
4/6/2015 Review correspondence from Sandy Miller re: closed session minutes	0.50 95.00/hr	47.50
4/7/2015 Phone call from City Manager re: miscellaneous city matters	0.50 95.00/hr	47.50
4/8/2015 Phone call to Kevin Gleeson at HRC re: 148 N. Main	0.50 95.00/hr	47.50
Correspondence to Nell Wallace re: draft Hold Harmless Agreement he prepared is acceptable to City and HRC; copy to City Manager and Kevin Gleeson	0.50 95.00/hr	47.50
4/9/2015 Correspondence to Sandy Miller re: procedure for closed session minutes	0.50 95.00/hr	47.50
4/10/2015 Review correspondence from City Clerk re: correspondence relative to new deadline date for filing nominating petitions	0.50 95.00/hr	47.50
4/13/2015 Attend City Council Meeting	3.00 95.00/hr	285.00
Review correspondence from John Cecil at HRC re: Hold Harmless Agreement and final site plan	0.50 95.00/hr	47.50

Carol Eberhardt

Page 2

	<u>Hrs/Rate</u>	<u>Amount</u>
4/13/2015 Review council packet	0.50 95.00/hr	47.50
Review correspondence from Neil Wallace re: Hold Harmless Agreement re: 148 N. Main Street	0.50 95.00/hr	47.50
4/14/2015 Correspondence to Neil Wallace re: forwarded correspondence from HRC re: waiting for revised plans and once approved will send an approval letter to the City; copy to City Manager	0.50 95.00/hr	47.50
Phone call from Mayor Lugniski re: miscellaneous city matters	0.50 95.00/hr	47.50
Phone call from Jennifer Miller re: miscellaneous city matters	0.50 95.00/hr	47.50
4/15/2015 Review correspondence from Neil Wallace re: Hold Harmless Agreement and storm system engineering re: 148 N. Main Street	0.20 95.00/hr	19.00
4/16/2015 Correspondence to Neil Wallace re: getting HRC final storm water plans re: 148 N. Main Street; copy to City Manager	0.50 95.00/hr	47.50
Phone call from City Manager re: 148 N. Main	0.50 95.00/hr	47.50
4/17/2015 Review correspondence from City Clerk re: HDC research/trees re: M-15 and Walden Road	1.00 95.00/hr	95.00
Phone call to City Clerk re: miscellaneous city matters	0.50 95.00/hr	47.50
Phone call to City Manager re: Walden Road/M-15 property	0.50 95.00/hr	47.50
Phone call from Dick Carlisle re: phone call with Bob Roth and land issues	0.50 95.00/hr	47.50
Phone call from Dick Carlisle re: bulldozer on property at Walden and M-15	0.50 95.00/hr	47.50
Phone call from/to Sharon Catallo re: Walden/M-15 property; bulldozer; permit	0.50 95.00/hr	47.50
4/20/2015 Phone call to Mayor Lugniski re: miscellaneous city matters	0.50 95.00/hr	47.50
Phone call to City Manager re: miscellaneous city matters	0.50 95.00/hr	47.50
Phone call from Cara Catallo re: HDC & M-15/Walden Road	0.50 95.00/hr	47.50

Carol Eberhardt

Page 3

	<u>Hrs/Rate</u>	<u>Amount</u>
4/20/2015 Phone call to Dick Carlisle re: miscellaneous city matters	0.50 95.00/hr	47.50
Correspondence to Neil Wallace re: advise as to what his client believes are issues re: 148 N. Main Street; copy to City Manager, City Mayor and Richard Carlisle	0.50 95.00/hr	47.50
4/21/2015 Phone call from Ed Adler re: lot at M-15 and Walden Road and HDC meeting	0.50 95.00/hr	47.50
Phone call to Cara Catallo re: HDC meeting tonight	0.50 95.00/hr	47.50
4/22/2015 Phone call from/to Ed Adler re: M-15 and Walden Road property	0.50 95.00/hr	47.50
Phone call to Cara Catallo re: HDC meeting of 4/21/15	0.50 95.00/hr	47.50
Phone call to City Manager re: miscellaneous city matters	0.50 95.00/hr	47.50
Review correspondence from City Manager re: miscellaneous city matters	0.50 95.00/hr	47.50
4/23/2015 Correspondence to Jeff Leib re: meeting on 5/6/15 at 10:00 a.m. re: vacant property at Walden & M-15	0.50 95.00/hr	47.50
Phone call from Jeff Leib re: Adler property at M-15 and Walden Road; meeting with attorneys and City Manager	0.50 95.00/hr	47.50
Correspondence to City Manager re: scheduling a meeting with Ed Adler and his attorney on 5/6/15 re: vacant property at Walden and M-15	0.50 95.00/hr	47.50
Review correspondence from Jeff Lieb re: vacant property cleanup at Walden and M-15	0.50 95.00/hr	47.50
4/24/2015 Phone call from Cara Catallo re: HDC and M-15/Walden Road property	0.50 95.00/hr	47.50
Review correspondence from Mike Sabolm re: letter from City re: cleanup of property at Walden and M-15	0.50 95.00/hr	47.50
4/27/2015 Review Council packet	0.50 95.00/hr	47.50
Attend City Council meeting	3.00 95.00/hr	285.00
Review correspondence from Gary Tressel re: 148 N. Main Street	0.50 95.00/hr	47.50

Carol Eberhardt

Page 4

	<u>Hrs/Rate</u>	<u>Amount</u>
4/28/2015 Correspondence to City Manager and City Mayor re: miscellaneous city matters	0.50 95.00/hr	47.50
4/30/2015 Review correspondence from Sandy Miller re: resignation letter of Councilmember Bisio	0.50 95.00/hr	47.50
For professional services rendered	28.70	\$2,726.50
Previous balance		\$2,755.00
Accounts receivable transactions		
4/23/2015 Payment - Thank You No. 7422		(\$2,755.00)
Total payments and adjustments		(\$2,755.00)
Balance due		\$2,726.50



Thomas J. Ryan, P.C.
2055 Orchard Lake Road
Sylvan Lake, MI 48320

RECEIVED by MSC 11/20/2019 10:01:50 AM

Invoice submitted to:
Carol Eberhardt
City Manager
City of the Village of Clarkston
375 Depot Road
Clarkston MI 48346

June 01, 2015

Invoice #10633



Professional Services

	<u>Hrs/Rate</u>	<u>Amount</u>
5/4/2015 Review correspondence from City Manager re: miscellaneous city matters	0.50 95.00/hr	47.50
5/6/2015 Meeting with attorney, Jeff Leib, Ed Adler, Bob Roth, Mayor Luginski, City Manager and HDC Chair, Cara Catallo re: M-15 and Walden Road property	2.00 95.00/hr	190.00
5/7/2015 Review correspondence from City Manager re: miscellaneous city matters	0.50 95.00/hr	47.50
Review correspondence from Jeffrey Leib re: property at Walden and M-15	0.50 95.00/hr	47.50
Review correspondence from City Manager re: Walden Road property at M-15	0.50 95.00/hr	47.50
Review correspondence from City Clerk re: tree cutting at vacant lot at M-15 and Walden Road	0.50 95.00/hr	47.50
5/8/2015 Correspondence to City Manager re: Walden Road Property at M-15	0.50 95.00/hr	47.50
Review correspondence from City Manager re: Walden Road Property and M-15	0.50 95.00/hr	47.50
5/11/2015 Review correspondence from City Manager re: Storm Water Sewer Ordinance	0.50 95.00/hr	47.50
Attend City Council Meeting	3.00 95.00/hr	285.00
Review Council Packet for 5/11/5 meeting	0.50 95.00/hr	47.50

Carol Eberhardt

Page 2

	<u>Hrs/Rate</u>	<u>Amount</u>
5/13/2015 Correspondence to Jeff Leib re: vacant property at Walden and M-15	0.50 95.00/hr	47.50
5/14/2015 Phone call to City Manager re: HDC meeting	0.50 95.00/hr	47.50
Phone call from Dick Carlisle re: 148 N. Main Street	0.50 95.00/hr	47.50
5/18/2015 Phone call from/to Jeff Leib re: Walden and M-15 property	0.50 95.00/hr	47.50
Phone call from/to Dick Carlisle re: 148 N. Main Street	0.50 95.00/hr	47.50
Review correspondence from City Manager re: storm sewer ordinance	0.50 95.00/hr	47.50
5/19/2015 Review correspondence from City Manager re: 148 N. Main Street	0.50 95.00/hr	47.50
5/20/2015 Review correspondence from Jeff Leib re: Walden Road and M-15 property	0.50 95.00/hr	47.50
5/21/2015 Review correspondence from City Manager re: Clarkston News/city attorney statement	0.50 95.00/hr	47.50
5/26/2015 Review Council Packet	0.50 95.00/hr	47.50
5/27/2015 Correspondence to City Manager re: Walden Road and M-15 vacant property	0.50 95.00/hr	47.50
Review correspondence from City Manager re: opinion letter from Richard Carlisle re: Morgan's and 3 East	0.50 95.00/hr	47.50
Phone call from/to Jeff Leib re: landscape plans for M-15 & Walden Road vacant property	0.50 95.00/hr	47.50
5/28/2015 Phone call to City manager re: M-15/Walden Road Property; Clean out of Mill Pond; 59 S. Main Street	0.50 95.00/hr	47.50
Review correspondence from City Manager re: Mill Race Clean out	0.50 95.00/hr	47.50
5/29/2015 Phone call from/to Larry Barnett re: Mill Race Clean out	0.50 95.00/hr	47.50
For professional services rendered	17.50	\$1,662.50
Previous balance		\$2,726.50

Carol Eberhardt

Page 3

	<u>Amount</u>
Accounts receivable transactions	
5/21/2015 Payment - Thank You No. 7468	<u>(\$2,726.50)</u>
Total payments and adjustments	<u>(\$2,726.50)</u>
Balance due	<u><u>\$1,862.50</u></u>

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

SUSAN BISIO,

Plaintiff,

vs.

Hon. Leo Bowman

Case No.: 15-150462-CZ

THE CITY OF THE
VILLAGE OF CLARKSTON,

Defendant.

RICHARD BISIO (P30246)
Attorney for Plaintiff
201 W. Big Beaver Road, Ste. 600
Troy, MI 48084
(248) 740-5698
richard.bisio@kkue.com

JAMES E. TAMM (P38154)
PAUL T. O'NEILL (P57293)
Attorneys for Defendant
40701 Woodward Avenue, Ste. 105
Bloomfield Hills, MI 48304
(248) 433-2000
jettamm@odtlegal.com
ptoneill@odtlegal.com

**DEFENDANT'S RESPONSE TO PLAINTIFF'S FIRST REQUESTS FOR ADMISSION
AND SECOND INTERROGATORIES TO DEFENDANT**

Defendant, THE CITY OF THE VILLAGE OF CLARKSTON, by and through its attorneys O'CONNOR, DEGRAZIA, TAMM & O'CONNOR, P.C., and for its response to Plaintiff's First Requests for Admission and Second Interrogatories to Defendant states as follows:

REQUESTS FOR ADMISSIONS

1. Admit that exhibit 1 is an accurate copy of a letter sent to and received by Defendant.

ANSWER: Defendant admits this request.

2. Admit that exhibit 2 is an accurate copy of a letter sent by "Thomas J. Ryan, City Attorney" to Plaintiff.

ANSWER: Defendant admits this request.

3. Admit that exhibit 3 is an accurate copy of a letter sent to and received by Defendant.

ANSWER: Defendant admits this request.

4. Admit that exhibit 4 is an accurate copy of a letter sent by "Thomas J. Ryan, City Attorney" to Richard Bisio.

ANSWER: Defendant admits this request.

5. Admit that exhibit 5 is an accurate copy of the Charter of the City of the Village of Clarkston.

ANSWER: Defendant admits this request.

6. Admit that Thomas J. Ryan and/or Thomas J. Ryan, P.C. ("Ryan") is the City Attorney for Defendant.

ANSWER: Defendant admits this request.

7. Admit that Ryan serves as City Attorney for Defendant under the provisions of the Charter for the City of the Village of Clarkston.

ANSWER: Defendant admits this request.

8. Admit that, in his capacity as City Attorney for Defendant, Ryan is an agent of Defendant.

ANSWER: Defendant denies only that for the purposes of the documents at issue in this action, Mr. Ryan is not an agent of the City of the Village of Clarkston. To the extent that this request seeks additional information, Defendant objects on the basis that it is vague, overbroad and unduly burdensome.

9. Admit that, in his capacity as City Attorney for Defendant, Ryan engages in communications (oral and written) with persons outside of the City regarding City business.

ANSWER: Defendant admits this request.

10. Admit that, in his capacity as City Attorney, Ryan receives written communications (including, but not limited to, electronic communications) from persons outside of the City.

ANSWER: Defendant admits this request.

11. Admit that, in his capacity as City Attorney, Ryan sends written communications (including, but not limited to, electronic communications) to persons outside of the City.

ANSWER: Defendant admits this request.

12. Admit that Defendant's City Manager has a right to request and receive copies of written communications from and to Ryan regarding Ryan's conduct of City business.

ANSWER: Defendant admits only that the City Manager has the right to request copies of written communications from and to Mr. Ryan regarding Mr. Ryan's conduct of City business. Defendant denies the remaining portions of this request.

13. Admit that Defendant's Mayor has a right to request and receive copies of written communications from and to Ryan regarding Ryan's conduct of City business.

ANSWER: Defendant admits only that the Mayor has the right to request copies of written communications from and to Mr. Ryan regarding Mr. Ryan's conduct of City business. Defendant denies the remaining portions of this request.

14. Admit that other officials of Defendant have a right to request and receive copies of written communications from and to Ryan regarding Ryan's conduct of City business to the extent that those written communications are relevant to the official's responsibilities.

ANSWER: Defendant admits only that Defendant's other officials have the right to request copies of written communications from and to Mr. Ryan regarding Mr. Ryan's conduct of City business. Defendant denies the remaining portions of this request.

15. Admit that there is no written agreement between Defendant and Ryan governing ownership of written communications sent to or received by Ryan in his capacity as Defendant's City Attorney.

ANSWER: Defendant admits this request.

16. Admit that Defendant is entitled to access to material in Ryan's files regarding City business.

ANSWER: Defendant denies this request to the extent that this request covers all possible materials contained in Mr. Ryan's files regarding his conduct of legal affairs related to the City of the Village of Clarkston. To the extent that this request seeks

additional information, Defendant objects on the basis that it is vague, overbroad and unduly burdensome.

17. Admit that Plaintiff's motive in making the Freedom of Information request to Defendant that is the subject of this action is not relevant.

ANSWER: Defendant denies this request.

18. Admit that Plaintiff's intended use of the records requested in the Freedom of Information request to Defendant that is the subject of this action is not relevant.

ANSWER: Defendant denies this request.

INTERROGATORY

1. For every request for admission for which Defendant's answer denies the request in whole or in part or does not unequivocally and without any reservation or objection admit the request, state in detail the factual basis for Defendant's denial or failure to admit that identify all documents that either support or rebut that factual basis.

ANSWER: See responses to requests above. To the extent that this interrogatory seeks additional information, Defendant objects on the basis that it is overbroad, unduly burdensome and seeks information that is not reasonably calculated to lead to the discovery of admissible evidence.

O'CONNOR, DeGRAZIA, TAMM & O'CONNOR, P.C.

By: /s/ Paul T. O'Neill

JAMES E. TAMM (P38154)
PAUL T. O'NEILL (P57293)
Attorneys for Defendant
40701 Woodward Avenue, Ste. 105
Bloomfield Hills, MI 48304
(248) 433-2000
jetamm@odtlegal.com
ptoneill@odtlegal.com

Dated: June 7, 2016

CERTIFICATE OF SERVICE

I hereby certify that on June 7, 2016, I electronically filed the foregoing paper(s) with the Clerk of the Court using the Wiznet system which will send notification of such filing to the following: *Richard Bisio*; and I hereby certify that I have mailed by United States Postal Service the Paper(s) to the following non-Wiznet participants: None.

/S/ Cheryl Pinter (capinter@odtlegal.com)
40701 Woodward Avenue, Ste. 105
Bloomfield Hills, MI 48304
(248) 433-2000
Paul T. O'Neill (P57293)
ptoneill@odtlegal.com

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

SUSAN BISIO,

Plaintiff,
vs.

Hon. Leo Bowman
Case No.: 15-150462-CZ

THE CITY OF THE
VILLAGE OF CLARKSTON,

Defendant.

RICHARD BISIO (P30246)
Attorney for Plaintiff
201 W. Big Beaver Road, Ste. 600
Troy, MI 48084
(248) 740-5698
richard.bisio@kkue.com

JAMES E. TAMM (P38154)
PAUL T. O'NEILL (P57293)
Attorneys for Defendant
40701 Woodward Avenue, Ste. 105
Bloomfield Hills, MI 48304
(248) 433-2000
jetamm@odtlegal.com
ptoneill@odtlegal.com

**DEFENDANT'S ANSWER TO PLAINTIFF'S THIRD REQUESTS
FOR ADMISSION AND FIFTH INTERROGATORIES TO DEFENDANT**

Defendant, City of the Village of Clarkston, by and through its attorneys, O'Connor, DeGrazia, Tamm & O'Connor, P.C., in answer to Plaintiff's Third Requests for Admission and Fifth Interrogatories to Defendant, states as follows:

1. Admit that the City paid the February 2, 2015 invoice from Thomas J. Ryan, P.C. to the City of the Village of Clarkston (#10608).

ANSWER: Admitted.

2. Admit that the City paid the March 2, 2015 invoice from Thomas J. Ryan, P.C. to the City of the Village of Clarkston (#10614).

ANSWER: Admitted.

3. Admit that the City paid the April 2, 2015 invoice from Thomas J. Ryan, P.C. to the City of the Village of Clarkston (#10621).

ANSWER: Admitted.

4. Admit that the City paid the May 1, 2015 invoice from Thomas J. Ryan, P.C. to the City of the Village of Clarkston (#10626).

ANSWER: Admitted.

5. Admit that the City paid the June 1, 2015 invoice from Thomas J. Ryan, P.C. to the City of the Village of Clarkston (#10633).

ANSWER: Admitted.

INTERROGATORY

1. For every Request for Admission for which Defendant's answer denies the request in whole or in part or does not unequivocally and without any reservation or objection admit the request, state in detail the factual basis for Defendant's denial or failure to admit and identify all documents that either support or rebut that factual basis.

ANSWER: Not applicable.

O'CONNOR, DeGRAZIA, TAMM & O'CONNOR, P.C.

By: /S/ James E. Tamm

JAMES E. TAMM (P38154)
Attorney for Defendant
40701 Woodward Avenue, Ste. 105
Bloomfield Hills, MI 48304
(248) 433-2000
jetamm@odtlegal.com

Dated: July 27, 2016

CERTIFICATE OF SERVICE

I hereby certify that on July 27, 2016, I electronically filed the foregoing paper(s) with the Clerk of the Court using the Wiznet system which will send notification of such filing to the following: *Richard Bisio* and I hereby certify that I have mailed by United States Postal Service the Paper(s) to the following non-Wiznet participants: None.

/S/ Carolyn Rowland (cmrowland@odtlegal.com)
40701 Woodward Avenue, Ste. 105
Bloomfield Hills, MI 48304
(248) 433-2000
James E. Tamm P 38154
jetamm@odtlegal.com

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

SUSAN BISIO,

Plaintiff,
vs.

Hon. Leo Bowman
Case No.: 15-150462-CZ

THE CITY OF THE
VILLAGE OF CLARKSTON,

Defendant.

RICHARD BISIO (P30246)
Attorney for Plaintiff
201 W. Big Beaver Road, Ste. 600
Troy, MI 48084
(248) 740-5698
richard.bisio@kkue.com

JAMES E. TAMM (P38154)
PAUL T. O'NEILL (P57293)
Attorneys for Defendant
40701 Woodward Avenue, Ste. 105
Bloomfield Hills, MI 48304
(248) 433-2000
jetamm@odtlegal.com
ptoneill@odtlegal.com

**DEFENDANT'S AMENDED ANSWERS TO PLAINTIFF'S SECOND REQUESTS FOR
ADMISSIONS AND THIRD INTERROGATORIES TO DEFENDANT**

NOW COMES Defendant THE CITY OF THE VILLAGE OF CLARKSTON, by and through its attorneys, O'CONNOR, DEGRAZIA, TAMM & O'CONNOR, P.C., and for its Answers to Plaintiff's Second Requests for Admissions and Third Interrogatories to Defendant, states as follows:

1. Admit that exhibit 1 is an accurate copy of a February 2, 2015 invoice from Thomas J. Ryan, P.C. to the City of Village of Clarkston (#10608).

ANSWER:

Defendant admits this Request.

2. Admit that exhibit 2 is an accurate copy of a March 2, 2015 invoice from Thomas J. Ryan, P.C. to the City of the Village of Clarkston (#10614).

ANSWER:

Defendant admits this Request.

3. Admit that exhibit 3 is an accurate copy of a April 2, 2015 invoice from Thomas J. Ryan, P.C. to the City of the Village of Clarkston (#10621).

ANSWER:

Defendant admits this Request.

4. Admit that exhibit 4 is an accurate copy of a May 1, 2015 invoice from Thomas J. Ryan, P.C. to the City of the Village of Clarkston (#10626).

ANSWER:

Defendant admits this Request.

5. Admit that exhibit 5 is an accurate copy of a June 1, 2015 invoice from Thomas J. Ryan, P.C. to the City of the Village of Clarkston (#10633).

ANSWER:

Defendant admits this Request.

6. Admit that the "correspondence from Neil Wallace re water table re 148 N. Main" referenced in the 1/30/15 entry in the February 2, 2015 invoice from Thomas J. Ryan P.C. to the City of the Village of Clarkston (#10608) is correspondence received by Thomas J. Ryan ("Ryan") in his capacity as City Attorney regarding City business.

ANSWER:

Defendant admits only that the document was received by Mr. Ryan while he served as City Attorney. Defendant objects to the remainder of this Request to Admit on the bases that it is vague, overbroad, unduly burdensome and not reasonably calculated to the discovery of admissible evidence. Defendant further objects on the basis that it is

irrelevant. The FOIA statute provides that certain documents are “public records” and subject to the statute if they are: 1) possessed by a “public body” and 2) in the performance of an official function. Defendant denies that the referenced document is possessed by a public body in the performance of an official function.

Further answering, Defendant denies that the documents are subject to disclosure because of the exemptions contained in MCL 15.243(m) and (v).

AMENDED ANSWER:

Defendant admits this request. Further answering, Defendant denies that the documents are subject to disclosure because of the exemptions contained in MCL 15.243(1)(m) and (v).

7. Admit that the “correspondence from John Cecil at HRC re: having developer provide correspondence from MDEQ re: any impacts to the existing contamination plume; NPDES permit waiver is fine re: 148 N. Main Street” referenced in the 2/14/15 entry in the March 2, 2015 invoice from Thomas J. Ryan P.C. to the City of the Village of Clarkston (#10614) is correspondence received by Ryan in his capacity as City Attorney regarding City business.

ANSWER:

Defendant admits only that the referenced document was received by Mr. Ryan while he served as City Attorney. Defendant objects to the remainder of this Request to Admit on the bases that it is vague, overbroad, unduly burdensome and not reasonably calculated to the discovery of admissible evidence. Defendant further objects on the basis that it is irrelevant. The FOIA statute provides that certain documents are “public records” and subject to the statute if they are: 1) possessed by a “public body” and 2) in the performance of an official function. Defendant denies that the referenced document is possessed by a public body in the performance of an official function.

Further answering, Defendant denies that the documents are subject to disclosure because of the exemptions contained in MCL 15.243(m) and (v).

AMENDED ANSWER:

Defendant admits this request. Further answering, Defendant denies that the documents are subject to disclosure because of the exemptions contained in MCL 15.243(1)(m) and (v).

8. Admit that the "correspondence from Neil Wallace re: project re: 148 N. Main Street" referenced in the 2/5/15 entry in the March 2, 2015 invoice from Thomas J. Ryan P.C. to the City of the Village of Clarkston (#10614) is correspondence received by Thomas J. Ryan ("Ryan") in his capacity as City Attorney regarding City business.

ANSWER:

Defendant admits only that the referenced document was received by Mr. Ryan while he served as City Attorney. Defendant objects to the remainder of this Request to Admit on the bases that it is vague, overbroad, unduly burdensome and not reasonably calculated to the discovery of admissible evidence. Defendant further objects on the basis that it is irrelevant. The FOIA statute provides that certain documents are "public records" and subject to the statute if they are: 1) possessed by a "public body" and 2) in the performance of an official function. Defendant denies that the referenced document is possessed by a public body in the performance of an official function.

Further answering, Defendant denies that the documents are subject to disclosure because of the exemptions contained in MCL 15.243(m) and (v).

AMENDED ANSWER:

Defendant admits this request. Further answering, Defendant denies that the documents are subject to disclosure because of the exemptions contained in MCL 15.243(1)(m) and (v).

9. Admit that the "correspondence from Neil Wallace re: response to Gary Tressel's email regarding approval of MDEQ; data provided that this will not affect the plume; Conditional [sic] Rezoning Agreement re: 148 N. Main Street" referenced in the 2/23/15 entry in the March 2, 2015 invoice from Thomas J. Ryan P.C. to the City of the Village of Clarkston

(#10614) is correspondence received by Thomas J. Ryan ("Ryan") in his capacity as City Attorney regarding City business.

ANSWER:

Defendant admits only that the referenced document was received by Mr. Ryan while he served as City Attorney. Defendant objects to the remainder of this Request to Admit on the bases that it is vague, overbroad, unduly burdensome and not reasonably calculated to the discovery of admissible evidence. Defendant further objects on the basis that it is irrelevant. The FOIA statute provides that certain documents are "public records" and subject to the statute if they are: 1) possessed by a "public body" and 2) in the performance of an official function. Defendant denies that the referenced document is possessed by a public body in the performance of an official function.

Further answering, Defendant denies that the documents are subject to disclosure because of the exemptions contained in MCL 15.243(m) and (v).

AMENDED ANSWER:

Defendant admits this request. Further answering, Defendant denies that the documents are subject to disclosure because of the exemptions contained in MCL 15.243(1)(m) and (v).

10. Admit that the "correspondence from Neil Wallace re: indemnity for storm water system re: 148 N. Main" referenced in the 3/23/15 entry in the April 2, 2015 invoice from Thomas J. Ryan, P.C. to the City of the Village of Clarkston (#10621) is correspondence received by Ryan in his capacity as City Attorney regarding City business.

ANSWER:

Defendant admits only that the referenced document was received by Mr. Ryan while he served as City Attorney. Defendant objects to the remainder of this Request to Admit on the bases that it is vague, overbroad, unduly burdensome and not reasonably calculated to the discovery of admissible evidence. Defendant further objects on the basis that it is irrelevant. The FOIA statute provides that certain documents are "public records" and subject to the statute if they are: 1) possessed by a "public body" and 2) in the performance of an official function. Defendant denies that the referenced document is possessed by a public body in the performance of an official function.

Further answering, Defendant denies that the documents are subject to disclosure because of the exemptions contained in MCL 15.243(m) and (v).

AMENDED ANSWER:

Defendant admits this request. Further answering, Defendant denies that the documents are subject to disclosure because of the exemptions contained in MCL 15.243(1)(m) and (v).

11. Admit that the "correspondence to Neil Wallace re: did HRC receive a copy of the revised groundwater mounding analysis; working on indemnity agreement" referenced in the 3/26/15 entry in the April 2, 2015 invoice from Thomas J. Ryan, P.C. to the City of the Village of Clarkston (#10621) is correspondence sent by Ryan in his capacity as City Attorney regarding City business.

ANSWER:

Defendant admits only that the referenced document was sent by Mr. Ryan while he served as City Attorney. Defendant objects to the remainder of this Request to Admit on the bases that it is vague, overbroad, unduly burdensome and not reasonably calculated to the discovery of admissible evidence. Defendant further objects on the basis that it is irrelevant. The FOIA statute provides that certain documents are "public records" and subject to the statute if they are: 1) possessed by a "public body" and 2) in the performance of an official function. Defendant denies that the referenced document is possessed by a public body in the performance of an official function.

Further answering, Defendant denies that the documents are subject to disclosure because of the exemptions contained in MCL 15.243(m) and (v).

AMENDED ANSWER:

Defendant admits this request. Further answering, Defendant denies that the documents are subject to disclosure because of the exemptions contained in MCL 15.243(1)(m) and (v).

12. Admit that the "correspondence to Neil Wallace re: proper party for Hold Harmless Agreement and forward appropriate language re: 148 N. Main Street" referenced in the 3/27/15 entry in the April 2, 2015 invoice from Thomas J. Ryan, P.C. to the City of the Village of Clarkston (#10621) is correspondence sent by Ryan in his capacity as City Attorney regarding City business.

ANSWER:

Defendant admits only that the referenced document was sent by Mr. Ryan while he served as City Attorney. Defendant objects to the remainder of this Request to Admit on the bases that it is vague, overbroad, unduly burdensome and not reasonably calculated to the discovery of admissible evidence. Defendant further objects on the basis that it is irrelevant. The FOIA statute provides that certain documents are "public records" and subject to the statute if they are: 1) possessed by a "public body" and 2) in the performance of an official function. Defendant denies that the referenced document is possessed by a public body in the performance of an official function.

Further answering, Defendant denies that the documents are subject to disclosure because of the exemptions contained in MCL 15.243(m) and (v).

AMENDED ANSWER:

Defendant admits this request. Further answering, Defendant denies that the documents are subject to disclosure because of the exemptions contained in MCL 15.243(1)(m) and (v).

13. Admit that the "correspondence from Neil Wallace re: revised draft of Hold Harmless Agreement re: 148 N. Main" referenced in the 3/27/15 entry in the April 2, 2015 invoice from Thomas J. Ryan, P.C. to the City of the Village of Clarkston (#10621) is correspondence received by Ryan in his capacity as City Attorney regarding City business.

ANSWER:

Defendant admits only that the referenced document was received by Mr. Ryan while he served as City Attorney. Defendant objects to the remainder of this Request to Admit on the bases that it is vague, overbroad, unduly burdensome and not reasonably calculated to the discovery of admissible evidence. Defendant further objects on the basis

that it is irrelevant. The FOIA statute provides that certain documents are “public records” and subject to the statute if they are: 1) possessed by a “public body” and 2) in the performance of an official function. Defendant denies that the referenced document is possessed by a public body in the performance of an official function.

Further answering, Defendant denies that the documents are subject to disclosure because of the exemptions contained in MCL 15.243(m) and (v).

AMENDED ANSWER:

Defendant admits this request. Further answering, Defendant denies that the documents are subject to disclosure because of the exemptions contained in MCL 15.243(1)(m) and (v).

14. Admit that the “correspondence from Thomas Biehl at HRC re: comments relative to Hold Harmless Agreement re: 148 N. Main” referenced in the 3/30/15 entry in the April 2, 2015 invoice from Thomas J. Ryan, P.C. to the City of the Village of Clarkston (#10621) is correspondence received by Ryan in his capacity as City Attorney regarding City business.

ANSWER:

Defendant admits only that the referenced document was received by Mr. Ryan while he served as City Attorney. Defendant objects to the remainder of this Request to Admit on the bases that it is vague, overbroad, unduly burdensome and not reasonably calculated to the discovery of admissible evidence. Defendant further objects on the basis that it is irrelevant. The FOIA statute provides that certain documents are “public records” and subject to the statute if they are: 1) possessed by a “public body” and 2) in the performance of an official function. Defendant denies that the referenced document is possessed by a public body in the performance of an official function.

Further answering, Defendant denies that the documents are subject to disclosure because of the exemptions contained in MCL 15.243(m) and (v).

AMENDED ANSWER:

Defendant admits this request. Further answering, Defendant denies that the documents are subject to disclosure because of the exemptions contained in MCL 15.243(1)(m) and (v).

15. Admit that the "correspondence to Thomas Biehl and Kevin Gleason re: Hold Harmless Agreement re: 148 N. Main Street" referenced in the 3/30/15 entry in the April 2, 2015 invoice from Thomas J. Ryan, P.C. to the City of the Village of Clarkston (#10621) is correspondence sent by Ryan in his capacity as City Attorney regarding City business.

ANSWER:

Defendant admits only that the referenced document was sent by Mr. Ryan while he served as City Attorney. Defendant objects to the remainder of this Request to Admit on the bases that it is vague, overbroad, unduly burdensome and not reasonably calculated to the discovery of admissible evidence. Defendant further objects on the basis that it is irrelevant. The FOIA statute provides that certain documents are "public records" and subject to the statute if they are: 1) possessed by a "public body" and 2) in the performance of an official function. Defendant denies that the referenced document is possessed by a public body in the performance of an official function.

Further answering, Defendant denies that the documents are subject to disclosure because of the exemptions contained in MCL 15.243(m) and (v).

AMENDED ANSWER:

Defendant admits this request. Further answering, Defendant denies that the documents are subject to disclosure because of the exemptions contained in MCL 15.243(1)(m) and (v).

16. Admit that the "correspondence from Neil Wallace re: the status of Hold Harmless agreement" referenced in the 4/2/15 entry in the May 1, 2015 invoice from Thomas J. Ryan, P.C. to the City of the Village of Clarkston (#10626) is correspondence received by Ryan in his capacity as City Attorney regarding City business.

ANSWER:

Defendant admits only that the referenced document was received by Mr. Ryan while he served as City Attorney. Defendant objects to the remainder of this Request to Admit on the bases that it is vague, overbroad, unduly burdensome and not reasonably calculated to the discovery of admissible evidence. Defendant further objects on the basis

that it is irrelevant. The FOIA statute provides that certain documents are “public records” and subject to the statute if they are: 1) possessed by a “public body” and 2) in the performance of an official function. Defendant denies that the referenced document is possessed by a public body in the performance of an official function.

Further answering, Defendant denies that the documents are subject to disclosure because of the exemptions contained in MCL 15.243(m) and (v).

AMENDED ANSWER:

Defendant admits this request. Further answering, Defendant denies that the documents are subject to disclosure because of the exemptions contained in MCL 15.243(1)(m) and (v).

17. Admit that the “correspondence from John Cecil at HRC re: Hold Harmless agreement and final site plan” referenced in the 4/13/15 entry in the May 1, 2015 invoice from Thomas J. Ryan, P.C. to the City of the Village of Clarkston (#10626) is correspondence received by Ryan in his capacity as City Attorney regarding City business.

ANSWER:

Defendant admits only that the referenced document was received by Mr. Ryan while he served as City Attorney. Defendant objects to the remainder of this Request to Admit on the bases that it is vague, overbroad, unduly burdensome and not reasonably calculated to the discovery of admissible evidence. Defendant further objects on the basis that it is irrelevant. The FOIA statute provides that certain documents are “public records” and subject to the statute if they are: 1) possessed by a “public body” and 2) in the performance of an official function. Defendant denies that the referenced document is possessed by a public body in the performance of an official function.

Further answering, Defendant denies that the documents are subject to disclosure because of the exemptions contained in MCL 15.243(m) and (v).

AMENDED ANSWER:

Defendant admits this request. Further answering, Defendant denies that the documents are subject to disclosure because of the exemptions contained in MCL 15.243(1)(m) and (v).

18. Admit that the "correspondence from Neil Wallace re: Hold Harmless Agreement re: 148 N. Main Street" referenced in the 4/13/15 entry in the May 1, 2015 invoice from Thomas J. Ryan, P.C. to the City of the Village of Clarkston (#10626) is correspondence received by Ryan in his capacity as City Attorney regarding City business.

ANSWER:

Defendant admits only that the referenced document was received by Mr. Ryan while he served as City Attorney. Defendant objects to the remainder of this Request to Admit on the bases that it is vague, overbroad, unduly burdensome and not reasonably calculated to the discovery of admissible evidence. Defendant further objects on the basis that it is irrelevant. The FOIA statute provides that certain documents are "public records" and subject to the statute if they are: 1) possessed by a "public body" and 2) in the performance of an official function. Defendant denies that the referenced document is possessed by a public body in the performance of an official function.

Further answering, Defendant denies that the documents are subject to disclosure because of the exemptions contained in MCL 15.243(m) and (v).

AMENDED ANSWER:

Defendant admits this request. Further answering, Defendant denies that the documents are subject to disclosure because of the exemptions contained in MCL 15.243(1)(m) and (v).

19. Admit that the "correspondence to Jeff Leib re: meeting on 5/16/15 at 10:00 a.m. re: vacant property at Walden & M-15" referenced in the 4/23/15 entry in the May 1, 2015 invoice from Thomas J. Ryan, P.C. to the City of the Village of Clarkston (#10626) is correspondence sent by Ryan in his capacity as City Attorney regarding City business.

ANSWER:

Defendant admits only that the referenced document was sent by Mr. Ryan while he served as City Attorney. Defendant objects to the remainder of this Request to Admit on the bases that it is vague, overbroad, unduly burdensome and not reasonably calculated to the discovery of admissible evidence. Defendant further objects on the basis that it is irrelevant. The FOIA statute provides that certain documents are "public records" and subject to the statute if they are: 1) possessed by a "public body" and 2) in the performance

of an official function. Defendant denies that the referenced document is possessed by a public body in the performance of an official function.

Further answering, Defendant denies that the documents are subject to disclosure because of the exemptions contained in MCL 15.243(m) and (v).

AMENDED ANSWER:

Defendant admits this request. Further answering, Defendant denies that the documents are subject to disclosure because of the exemptions contained in MCL 15.243(1)(m) and (v) and because the documents were furnished to Mr. Ryan on the grounds that they remain confidential.

20. Admit that the "correspondence from Jeff Lieb re: vacant property cleanup at Walden and M-15" referenced in the 4/23/15 entry in the May 1, 2015 invoice from Thomas J. Ryan, P.C. to the City of the Village of Clarkston (#10626) is correspondence received by Ryan in his capacity as City Attorney regarding City business.

ANSWER:

Defendant admits only that the referenced document was received by Mr. Ryan while he served as City Attorney. Defendant objects to the remainder of this Request to Admit on the bases that it is vague, overbroad, unduly burdensome and not reasonably calculated to the discovery of admissible evidence. Defendant further objects on the basis that it is irrelevant. The FOIA statute provides that certain documents are "public records" and subject to the statute if they are: 1) possessed by a "public body" and 2) in the performance of an official function. Defendant denies that the referenced document is possessed by a public body in the performance of an official function.

Further answering, Defendant denies that the documents are subject to disclosure because of the exemptions contained in MCL 15.243(m) and (v).

AMENDED ANSWER:

Defendant admits this request. Further answering, Defendant denies that the documents are subject to disclosure because of the exemptions contained in MCL 15.243(1)(m) and (v) and because the documents were furnished to Mr. Ryan on the grounds that they remain confidential.

21. Admit that the "correspondence from Jeffrey Leib re: property at Walden and M-15" referenced in the 5/7/15 entry in the June 1, 2015 invoice from Thomas J. Ryan, P.C. to the City of the Village of Clarkston (#10633) is correspondence received by Ryan in his capacity as City Attorney regarding City business.

ANSWER:

Defendant admits only that the referenced document was received by Mr. Ryan while he served as City Attorney. Defendant objects to the remainder of this Request to Admit on the bases that it is vague, overbroad, unduly burdensome and not reasonably calculated to the discovery of admissible evidence. Defendant further objects on the basis that it is irrelevant. The FOIA statute provides that certain documents are "public records" and subject to the statute if they are: 1) possessed by a "public body" and 2) in the performance of an official function. Defendant denies that the referenced document is possessed by a public body in the performance of an official function.

Further answering, Defendant denies that the documents are subject to disclosure because of the exemptions contained in MCL 15.243(m) and (v).

AMENDED ANSWER:

Defendant admits this request. Further answering, Defendant denies that the documents are subject to disclosure because of the exemptions contained in MCL 15.243(1)(m) and (v) and because the documents were furnished to Mr. Ryan on the grounds that they remain confidential.

22. Admit that the "Correspondence to Jeff Leib re: vacant property at Walden and M-15" referenced in the 5/13/15 entry in the June 1, 2015 invoice from Thomas J. Ryan, P.C. to the City of the Village of Clarkston (#10633) is correspondence sent by Ryan in his capacity as City Attorney regarding City business.

ANSWER:

Defendant admits only that the referenced document was sent by Mr. Ryan while he served as City Attorney. Defendant objects to the remainder of this Request to Admit on the bases that it is vague, overbroad, unduly burdensome and not reasonably calculated to

the discovery of admissible evidence. Defendant further objects on the basis that it is irrelevant. The FOIA statute provides that certain documents are "public records" and subject to the statute if they are: 1) possessed by a "public body" and 2) in the performance of an official function. Defendant denies that the referenced document is possessed by a public body in the performance of an official function.

Further answering, Defendant denies that the documents are subject to disclosure because of the exemptions contained in MCL 15.243(m) and (v).

AMENDED ANSWER:

Defendant admits this request. Further answering, Defendant denies that the documents are subject to disclosure because of the exemptions contained in MCL 15.243(1)(m) and (v) and because the documents were furnished to Mr. Ryan on the grounds that they remain confidential.

23. Admit that the "correspondence from Jeff Leib re: Walden Road and M-15 property" referenced in the 5/20/15 entry in the June 1, 2015 invoice from Thomas J. Ryan, P.C. to the City of the Village of Clarkston (#10633) is correspondence received by Ryan in his capacity as City Attorney regarding City business.

ANSWER:

Defendant admits only that the referenced document was received by Mr. Ryan while he served as City Attorney. Defendant objects to the remainder of this Request to Admit on the bases that it is vague, overbroad, unduly burdensome and not reasonably calculated to the discovery of admissible evidence. Defendant further objects on the basis that it is irrelevant. The FOIA statute provides that certain documents are "public records" and subject to the statute if they are: 1) possessed by a "public body" and 2) in the performance of an official function. Defendant denies that the referenced document is possessed by a public body in the performance of an official function.

Further answering, Defendant denies that the documents are subject to disclosure because of the exemptions contained in MCL 15.243(m) and (v).

AMENDED ANSWER:

Defendant admits this request. Further answering, Defendant denies that the documents are subject to disclosure because of the exemptions contained in MCL 15.243(1)(m) and (v) and because the documents were furnished to Mr. Ryan on the grounds that they remain confidential

Interrogatory

Plaintiff serves this interrogatory under MCR 2.309(A).

1. For every request for admission for which defendant's answer denies the request in whole or in part or does not unequivocally and without any reservation or objection admit the request, state in detail the factual basis for defendant's denial or failure to admit and identify all documents that either support or rebut that factual basis.

ANSWER:

See responses to requests above. To the extent that this interrogatory seeks additional information, Defendant objects on the basis that it is overbroad, unduly burdensome and seeks information that is not reasonably calculated to lead to the discovery of admissible evidence.

O'CONNOR, DeGRAZIA, TAMM & O'CONNOR, P.C.

By: /s/ Paul T. O'Neill

JAMES E. TAMM (P38154)
PAUL T. O'NEILL (P57293)
Attorneys for Defendant
40701 Woodward Avenue, Ste. 105
Bloomfield Hills, MI 48304
(248) 433-2000
jetamm@odtlegal.com
ptoneill@odtlegal.com

Dated: July 28, 2016

CERTIFICATE OF SERVICE

I hereby certify that on July 28, 2016, I electronically filed the foregoing paper(s) with the Clerk of the Court using the Wiznet system which will send notification of such filing to the following: *Richard Bisio*; and I hereby certify that I have mailed by United States Postal Service the Paper(s) to the following non-Wiznet participants: None.

/S/ Cheryl A. Pinter (cpinter@odtlegal.com)
40701 Woodward Avenue, Ste. 105
Bloomfield Hills, MI 48304
(248) 433-2000

BISIO v. THE CITY OF THE VILLAGE OF
CLARKSTON

CAROL EBERHARDT

July 28, 2016

Prepared for you by



Bingham Farms/Southfield • Grand Rapids
Ann Arbor • Detroit • Flint • Jackson • Lansing • Mt. Clemens • Saginaw

CAROL EBERHARDT
July 28, 2016

Page 1

1 STATE OF MICHIGAN
2 IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND
3
4 SUSAN BISIO,
5 Plaintiff,
6 vs. Case No. 15-150462-CZ
7 Hon. Leo Bowman
8 THE CITY OF THE VILLAGE OF CLARKSTON,
9 Defendant.
10
11

12 The Deposition of CAROL EBERHARDT,
13 Taken at 40701 Woodward Avenue,
14 Bloomfield Hills, Michigan,
15 Commencing at 10:11 a.m.,
16 Thursday, July 28, 2016,
17 Before Amy W. Reckling, CSR-3893.
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24
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CAROL EBERHARDT
July 28, 2016

Page 2

1 APPEARANCES:

2

3 RICHARD D. BISIO

4 Kemp Klein

5 201 West Big Beaver Road

6 Suite 600

7 Troy, Michigan 48084

8 248.740.5698

9 richard.bisio@kkue.com

10 Appearing on behalf of the Plaintiffs.

11

12 JAMES E. TAMM

13 O'Connor, DeGrazia, Tamm & O'Connor, P.C.

14 40701 Woodward Avenue

15 Suite 105

16 Bloomfield Hills, Michigan 48304

17 248.433.2000

18 jetamm@odtlegal.com

19 Appearing on behalf of the Defendant.

20

21 ALSO PRESENT:

22 Susan Bisio

23

24

25

CAROL EBERHARDT
July 28, 2016

Page 3

1	TABLE OF CONTENTS	
2		
3	Witness	Page
4	CAROL EBERHARDT	
5		
6	EXAMINATION	
7	BY MR. BISIO:	4
8	EXAMINATION	
9	BY MR. TAMM:	39
10	RE-EXAMINATION	
11	BY MR. BISIO:	39
12		
13	EXHIBITS	
14		
15	Exhibit	Page
16	(Exhibits attached to transcript.)	
17		
18	DEPOSITION EXHIBIT 1	6
19	DEPOSITION EXHIBIT 2	15
20	DEPOSITION EXHIBIT 3	15
21	DEPOSITION EXHIBIT 4	15
22	DEPOSITION EXHIBIT 5	15
23	DEPOSITION EXHIBIT 6	15
24		
25		

CAROL EBERHARDT
July 28, 2016

Page 4

1 Bloomfield Hills, Michigan

2 Thursday, July 28, 2016

3 10:11 a.m.

4

5 CAROL EBERHARDT,

6 was thereupon called as a witness herein, and after
7 having first been duly sworn to testify to the truth,
8 the whole truth and nothing but the truth, was
9 examined and testified as follows:

10 EXAMINATION

11 BY MR. BISIO:

12 Q. Good morning, Carol. Is Mr. Tamm representing you
13 individually as distinguished from representing the
14 city?

15 A. No.

16 MR. TAMM: Well, she is not a lawyer.
17 That's a legal question, and I am representing her.

18 MR. BISIO: As an individual?

19 MR. TAMM: Yes. She is an employee of the
20 city and she is here as a city representative. She is
21 not here in her individual capacity.

22 MR. BISIO: Okay.

23 BY MR. BISIO:

24 Q. And you are city manager of the City of the Village of
25 Clarkston; is that correct?

CAROL EBERHARDT
July 28, 2016

Page 5

- 1 A. That's correct.
- 2 Q. How long have you been city manager?
- 3 A. Three years.
- 4 Q. Have you had previous positions with the city?
- 5 A. Yes.
- 6 Q. Can you tell me what those were?
- 7 A. I have been a city council person, I have been on the
8 city tax board of appeals, I had been the president of
9 the village before it was a city.
- 10 Q. You are familiar with Tom Ryan?
- 11 A. Yes.
- 12 Q. He is a city attorney for the city?
- 13 A. Yes.
- 14 Q. Have you had occasion to obtain records from him
15 regarding the city business?
- 16 A. I don't understand the question. What are you
17 speaking of?
- 18 Q. Well, have you ever asked him to give you records that
19 might be pertinent to city business?
- 20 A. Yes.
- 21 Q. And have you received those from him?
- 22 A. Yes.
- 23 Q. Has he ever refused to give you any records regarding
24 city business?
- 25 A. Not if I have specifically asked him.

CAROL EBERHARDT
July 28, 2016

Page 6

1 Q. Okay. Do you know what this case is about?

2 A. Yes.

3 Q. Tell me what your understanding is about what the case
4 is about.

5 A. I understand that Mrs. Bisio wants confidential
6 correspondence between our attorney and other people.

7 MR. BISIO: Can we mark that as Exhibit 1,
8 please.

9 MARKED FOR IDENTIFICATION:

10 DEPOSITION EXHIBIT 1

11 10:12 a.m.

12 BY MR. BISIO:

13 Q. I am handing you what we marked as Exhibit 1. Do you
14 recognize that?

15 A. Yes.

16 Q. And on page 4, is that your signature?

17 A. Yes.

18 Q. And you understand that when you signed these, you
19 were swearing that the answers in this document were
20 true?

21 A. Yes.

22 Q. Let's look at page 3, number 3. The answer says
23 defendant, and defendant refers to the city, is not
24 able to access the confidential documents at issue in
25 the present case. Some authors requested that certain

CAROL EBERHARDT
July 28, 2016

Page 7

1 documents remain confidential.

2 Can you tell me who those authors were that
3 requested that documents remain confidential?

4 A. I have told Tom he can accept confidential
5 information.

6 Q. Can you tell me who the authors were who requested
7 that certain documents remain confidential?

8 A. No, no.

9 Q. You have told Tom Ryan that he can accept confidential
10 information. Is that with respect to any specific
11 documents, --

12 A. No.

13 Q. -- or is that a general statement to him?

14 A. It was not specific to anything.

15 Q. So it's a general statement to him?

16 A. I wouldn't say I made it in a general manner, and I
17 don't say it's something that I have said often.

18 Q. Well, I want to understand what exactly it is that you
19 told him, and what it applies to. Can you explain
20 that?

21 A. I did not say anything that applied to him
22 specifically or applied to a specific thing.

23 Q. What did you say then?

24 A. I'm sure at some point, in some general conversation,
25 when we were talking about negotiation of something, I

CAROL EBERHARDT
July 28, 2016

Page 8

1 said to him to simply take care of it. You can do the
2 negotiation, accept the memos from the attorney; I
3 don't want to be involved in the minutia, I don't want
4 them. And that was a long time ago. I have worked
5 with Tom before.

6 Q. You have worked with him before what?

7 A. I have worked with him before.

8 Q. Before what?

9 A. Before I was city manager.

10 Q. Okay.

11 A. I don't micromanage. I simply want the end result.

12 MR. TAMM: Wait until there is a question.

13 BY MR. BISIO:

14 Q. Before you were city manager, what did you work with
15 Tom Ryan about?

16 A. I worked with him as village president.

17 Q. The general discussion that you had with him, --

18 A. I don't remember.

19 Q. I understand that you don't remember. You described
20 it generally though, that he should take care of the
21 details, you didn't want to get involved in the
22 minutia of negotiations. Did that apply to anything
23 regarding confidential documents?

24 A. I don't know.

25 Q. Okay. Did you explicitly tell him that he could tell

CAROL EBERHARDT
July 28, 2016

Page 9

1 someone he was negotiating with, for example, that
2 they were going to keep their exchanges confidential?

3 A. I don't remember.

4 Q. Okay. And going back to your interrogatory answer
5 number 3, it says, some authors requested that certain
6 documents remain confidential.

7 Do you know who those authors are?

8 A. I don't remember.

9 Q. Where did you get this information that some authors
10 requested that certain documents remain confidential?

11 A. From just general memory, but not specifics.

12 Q. And this is not tied to any of the specific documents
13 that are at issue in this case, is it?

14 A. It beats me. I have absolutely no idea.

15 Q. You are aware that there are 18 documents that are at
16 issue in this case?

17 A. I have no idea.

18 Q. And you haven't seen any of those?

19 A. I don't even know what you're talking about.

20 Q. You haven't gotten involved in the details of what
21 this lawsuit is about?

22 A. Absolutely not, no.

23 Q. In your view, if Tom Ryan is involved in discussions
24 with, for example, Neil Wallace in his representation
25 of Curt Catallo, or Jeff Leib in his representation of

CAROL EBERHARDT
July 28, 2016

Page 10

1 the owners of the property at Main and Walden, is it
2 proper for him to keep a separate file about those
3 exchanges with Wallace or Leib?

4 A. I have no knowledge of the law to say whether or not
5 it's proper.

6 Q. As far as you're concerned as city manager, in the
7 operations of the city, you don't have a problem with
8 him keeping a separate file?

9 A. I do not.

10 Q. If he had a separate file with documents regarding his
11 exchanges with those two, Neil Wallace or Jeff Leib,
12 would you feel free to ask him for specific documents
13 from that file?

14 MR. TAMM: Objection to form, foundation.
15 If you know.

16 A. I don't know. I suppose I would feel free, but I have
17 never done it.

18 BY MR. BISIO:

19 Q. So that has never come up, that you have had occasion
20 to ask Mr. Ryan for documents from his files regarding
21 his discussions with --

22 A. Not one time in my tenure as city manager have I ever
23 asked him.

24 Q. Let me ask you about the terms of Mr. Ryan's retention
25 as city attorney. Is there any written engagement

CAROL EBERHARDT
July 28, 2016

Page 11

1 agreement that governs his relationship with the city?

2 A. It was done years ago, yes.

3 Q. Are you aware of any written agreement?

4 A. Uh-huh.

5 Q. What written agreement is there?

6 A. It was a contractual agreement, and basically his fee
7 was outlined.

8 Q. Are you talking about minutes of a city council
9 meeting where he was retained?

10 A. No.

11 Q. So there is some kind of contract that governs his
12 service as city attorney?

13 A. Yes, there is.

14 MR. TAMM: Objection to form and
15 foundation.

16 MR. BISIO: Can you produce that contract,
17 Mr. Tamm?

18 MR. TAMM: I have never seen it, if it
19 exists, and it's not been provided to me.

20 MR. BISIO: Well, have you asked for it?

21 MR. TAMM: Mr. Bisio, I'm not here to
22 answer questions.

23 MR. BISIO: Okay. So she has testified
24 that there is some contract, you have refused to
25 provide it to me, and you haven't --

CAROL EBERHARDT
July 28, 2016

Page 12

1 MR. TAMM: No, Mr. Bisio, that's untrue. I
2 have not refused to provide it. I'll provide
3 something if it's appropriately requested.

4 To my knowledge, there is no such document
5 that exists. If the city manager knows that such a
6 document exists, it may have been with the Village of
7 Clarkston, not with the City of Clarkston. I'm
8 unaware of any document existing between the City of
9 Clarkston and Mr. Ryan. I understand that at some
10 point in time, in the distant past, there may have
11 been an agreement, but I'm not aware of a current
12 agreement. If such a document exists, I would
13 certainly produce it.

14 MR. BISIO: I would ask you to investigate
15 whether such a document exists, because we have
16 requested that document.

17 MR. TAMM: We are taking a break.

18 MR. BISIO: Okay.

19 (Off the record at 10:22 a.m.)

20 (On the record at 10:24 a.m.)

21 MR. BISIO: We took a short recess while
22 the witness consulted with her attorney.

23 Did you have anything else that you wanted
24 to say regarding what we were discussing?

25 MR. TAMM: My understanding is that there

CAROL EBERHARDT
July 28, 2016

Page 13

1 is no agreement between Mr. Ryan and the City of
2 Clarkston, no current agreement, written agreement.

3 MR. BISIO: Well, that may be your
4 understanding, but she has testified that there is
5 something, so I want to see what there is.

6 MR. TAMM: She indicated to me that there
7 was an agreement with the Village of Clarkston that is
8 more than 20 years old, and that the Village of
9 Clarkston is not the current entity.

10 MR. BISIO: But the contracts with the
11 Village of Clarkston carried over to the City of the
12 Village of Clarkston, and the city charter expressly
13 provides for that. So if there was a contract with
14 the Village of Clarkston, that would apply as well to
15 the city, and it's within the scope of the request
16 that I made.

17 MR. TAMM: Well, I have asked for documents
18 responsive to your request, Mr. Bisio. I have
19 provided the documents that the city has given me, and
20 if there is a document that's responsive based on what
21 Ms. Eberhardt testified to today, I will certainly
22 produce it.

23 MR. BISIO: Okay.

24 BY MR. BISIO:

25 Q. Whether it's in a written document or not, are you

CAROL EBERHARDT
July 28, 2016

Page 14

1 aware of any provisions regarding Mr. Ryan's service
2 as city attorney that applies to the ownership of
3 records that he compiles in the course of his
4 representation?

5 A. No.

6 Q. Are you aware of any provisions regarding who can have
7 access to those records?

8 A. No.

9 Q. Are you aware of any provisions regarding retention or
10 destruction of those records?

11 A. No.

12 Q. The city has a record retention and destruction
13 policy, does it not?

14 A. The city policy states a retention and destruction
15 policy.

16 Q. It adopted --

17 A. It adopted it, yes.

18 Q. -- the state's policy on retention and destruction of
19 records?

20 A. Yes.

21 Q. Do you view that as applying to the records that Mr.
22 Ryan compiles in the course of his service as city
23 attorney?

24 MR. TAMM: Objection, form and foundation,
25 calls for a legal conclusion.

CAROL EBERHARDT
July 28, 2016

Page 15

1 BY MR. BISIO:

2 Q. Can you answer the question? He is making an
3 objection for the record. If we go to court, the
4 judge will rule on that objection, but you are still
5 required to answer the question.

6 A. Can you restate it?

7 MR. BISIO: Can you read the question back?
8 (The following portion of the record was
9 read by the reporter at 10:27 a.m.: Do you
10 view that as applying to the records that
11 Mr. Ryan compiles in the course of his
12 service as city attorney?)

13 A. I don't know, no.

14 BY MR. BISIO:

15 Q. You are not sure whether it applies or not; is that
16 correct?

17 MR. TAMM: Objection, form.

18 A. I don't know.

19 MR. BISIO: I am going to mark five
20 exhibits here, Exhibits 2 through 6.

21 MARKED FOR IDENTIFICATION:

22 DEPOSITION EXHIBITS 2 THROUGH 6

23 10:29 a.m.

24 BY MR. BISIO:

25 Q. We have handed to you exhibits marked as Exhibits 2,

CAROL EBERHARDT
July 28, 2016

Page 16

1 3, 4, 5, and 6. Do you recognize those exhibits?

2 A. Yes.

3 Q. And the city has stated that these are invoices for
4 Thomas Ryan's work for the city. Is that correct?

5 A. Yes.

6 Q. Let's look at Exhibit 1. There is what looks like a
7 handwritten --

8 MR. TAMM: Do you mean Exhibit 2?

9 BY MR. BISIO:

10 Q. I am sorry, Exhibit 2, yes. It looks like there is a
11 handwritten, I don't know if those are initials or
12 something else, up at the top, kind of opposite where
13 February 2, 2015 is. Do you recognize what that is?

14 A. Yes.

15 Q. What is that?

16 A. That's my initials.

17 Q. Okay. And why would you be initialing this document?

18 A. I look at and approve all invoices from our vendors.

19 Q. So you review them and approve them for payment?

20 A. Yes.

21 Q. And then your initials there indicate that you
22 reviewed and approved this?

23 A. Yes.

24 Q. If you had some questions about some items on here,
25 what would you do?

CAROL EBERHARDT
July 28, 2016

Page 17

1 A. I would typically call.

2 Q. Okay. And if you approve something, does it go into
3 the city council packet as part of the consent agenda
4 for approval by the council?

5 A. Yes.

6 Q. On Exhibit 3, are those your initials at the bottom of
7 the first page?

8 A. Yes.

9 Q. And Exhibit 4, are those your initials on the top of
10 the first page?

11 A. Yes.

12 Q. And Exhibit 5, on the last page of the exhibit, are
13 those your initials?

14 A. Yes.

15 Q. And on Exhibit 6, at the top of the page, are those
16 your initials?

17 A. Yes.

18 Q. I want to go back to your interrogatory answers in
19 Exhibit 1, where it says some authors requested that
20 certain documents remain confidential. Are you aware
21 of any promise of confidentiality that was made to
22 authors who requested confidentiality?

23 A. I'm not aware of anything.

24 Q. So you don't know if Tom Ryan, for example, promised
25 someone that the communications he would have with

CAROL EBERHARDT
July 28, 2016

Page 18

1 them would remain confidential?

2 A. I don't know.

3 Q. I would have to ask him to find that out? Could you
4 answer verbally, please?

5 A. I don't know.

6 Q. So as far as you know, you are not aware of any
7 specific promise to anyone regarding the documents
8 that are at issue in this case, that they would be
9 kept confidential?

10 A. Just to clarify, are you asking me if I was a witness
11 to a conversation?

12 Q. No. I am asking if you were aware, whether you were a
13 witness to a conversation or whether someone told you
14 something.

15 A. I don't know.

16 Q. Just your general knowledge.

17 Let me just be clear on what I am asking.
18 Are you aware that there was any promise made to
19 anyone that something would be kept confidential?

20 A. I'm not aware of anything.

21 Q. Okay. You didn't promise anybody that their
22 documents, their records would be confidential, did
23 you?

24 A. I don't remember.

25 Q. You don't remember if you promised someone that their

CAROL EBERHARDT
July 28, 2016

Page 19

1 documents would be confidential?

2 MR. TAMM: Objection, asked and answered.

3 A. I do not remember.

4 BY MR. BISIO:

5 Q. Are you aware of any member of the city council or the
6 mayor making a promise of confidentiality to anyone
7 regarding their documents?

8 A. I'm not aware of anything that the mayor or city
9 council did.

10 Q. And to your knowledge, was there a description of the
11 confidential information filed with the city?

12 A. I have no knowledge of that.

13 Q. Okay. Let's look at Exhibit 2, the second page. And
14 the second entry for 1-30-2015, this refers to
15 correspondence from Neil Wallace re: water table re:
16 148 North Main. Do you know who Neil Wallace is?

17 A. Yes.

18 Q. Do you see it?

19 A. No, I don't see where you are.

20 Q. On Exhibit 2, --

21 A. Are you on invoices?

22 Q. Yes, Exhibit 2.

23 A. Exhibit 2?

24 Q. Yes. The second page, under 1-30-2015, the second
25 entry there refers to correspondence from Neil Wallace

CAROL EBERHARDT
July 28, 2016

Page 20

1 re: water table re: 148 North Main. Do you see that?

2 A. Yes.

3 Q. Who is Neil Wallace?

4 A. He is Curt Catallo's attorney.

5 Q. And 148 North Main, at this time in January 2015, was
6 proposed to be developed into a coffee shop by Curt
7 Catallo's company; correct?

8 A. Yes.

9 Q. And Neil Wallace was representing Mr. Catallo or his
10 company with regard to that development; is that
11 correct?

12 A. Yes.

13 Q. To your knowledge, does this correspondence involve
14 any trade secrets?

15 A. I have no knowledge.

16 Q. Does it involve commercial or financial information?

17 A. I have no knowledge.

18 Q. Do you know what a public body is?

19 A. I believe so.

20 Q. Is Neil Wallace a public body?

21 MR. TAMM: Objection, form and foundation.

22 MR. BISIO: What's your objection to the
23 form?

24 MR. TAMM: It calls for a legal conclusion
25 on the part of this witness.

CAROL EBERHARDT
July 28, 2016

Page 21

1 MR. BISIO: She has already testified that
2 she knows what a public body is.

3 MR. TAMM: That's not true, Mr. Bisio. She
4 said she thinks she knows.

5 BY MR. BISIO:

6 Q. Can you answer the question, please? Is Neil Wallace
7 a public body?

8 A. I have no idea.

9 Q. During the time that this was occurring on January
10 30th, 2015, was Neil Wallace a member of a public
11 body?

12 A. I don't know.

13 Q. Was he representing a public body?

14 A. I don't know.

15 Q. To your knowledge, was he representing anyone other
16 than Curt Catallo or Curt Catallo's company with
17 regard to 148 North Main?

18 A. I don't know.

19 Q. Let's look at Exhibit 3, the first page. The first
20 entry under 2-4-2015 refers to correspondence from
21 John Cecil at HRC re: having developer provide
22 correspondence from MDEQ re: any impacts to the
23 existing contamination plume; NPDES permit waiver is
24 fine, re: 148 North Main Street.

25 Do you know who John Cecil is?

CAROL EBERHARDT
July 28, 2016

Page 22

- 1 A. He is an employee of HRC.
- 2 Q. And HRC is --
- 3 A. Hubbell, Roth and Clark.
- 4 Q. Does Hubbell, Roth and Clark provide engineering
5 services to the city?
- 6 A. Yes.
- 7 Q. You were aware of some issues that arose about a plume
8 of contaminated water under or around 148 North Main;
9 correct?
- 10 A. Yes.
- 11 Q. And wasn't one of the concerns about the new
12 development how the storm water runoff might affect
13 that contaminated plume?
- 14 A. That concern was voiced.
- 15 Q. That was an issue of some public interest, wasn't it?
- 16 A. Yes.
- 17 Q. There were newspaper articles about it?
- 18 A. That I don't know.
- 19 Q. Do you subscribe to the Clarkston News?
- 20 A. I do not.
- 21 Q. Were there letters written to the editor about it, do
22 you know?
- 23 A. I don't know.
- 24 Q. Were there complaints or inquiries that the city
25 received about that issue?

CAROL EBERHARDT
July 28, 2016

Page 23

- 1 A. The city staff never received an inquiry.
2 Q. Did you receive an inquiry?
3 A. I did not.
4 Q. Do you know if members of the council did?
5 A. I have no knowledge about what the council received.
6 Q. Were there comments and questions about that at city
7 council meetings?
8 A. Yes.
9 Q. You attend all the city council meetings when you are
10 available; is that correct?
11 A. Yes.
12 Q. This correspondence from John Cecil that we are
13 looking at here, do you know if that involves any
14 trade secrets?
15 A. I don't know.
16 Q. Do you know if it involves any commercial or financial
17 information?
18 A. I don't know.
19 Q. Let's go on to the next entry. It refers to
20 correspondence from Neil Wallace re: steps and walkway
21 are not shoveled. Are you aware of what steps and
22 walkway that refers to?
23 A. I don't know.
24 Q. Neil Wallace owns a building in the city on Main
25 Street, does he not?

CAROL EBERHARDT
July 28, 2016

Page 24

1 A. Yes, he does.

2 Q. Adjacent to that building, there is a walkway and
3 steps that go from Main Street down to the city's
4 parking lot off of Depot Road; is that correct?

5 A. Yes.

6 Q. And could that be the steps and walkway that this
7 correspondence was referring to?

8 A. Where is it at? I don't see it.

9 Oh, shoveled. I thought you said leveled.

10 MS. BISIO: That's a big difference.

11 THE WITNESS: Yes.

12 BY MR. BISIO:

13 Q. So now that we have clarified it, this is related to
14 shoveling steps and walkways. Do you remember what
15 this issue was about?

16 A. Yes.

17 Q. What was it about?

18 A. Mr. Wallace did not like the timing of when we
19 shoveled and de-iced the steps.

20 Q. Are those city property?

21 A. No, they are not.

22 Q. Why would the city be shoveling and de-icing them?

23 A. Apparently, years ago, some deal was struck between
24 Neil and the city that we would maintain the steps in
25 the winter.

CAROL EBERHARDT
July 28, 2016

Page 25

1 Q. To your knowledge, does this correspondence involve
2 any trade secrets?

3 A. No.

4 Q. Does it involve any commercial or financial
5 information?

6 A. No.

7 Q. Let's go to page 3 of Exhibit 3. I am looking at the
8 entries for February 23rd, 2015. The fourth item
9 there references correspondence from Neil Wallace re:
10 response to Gary Tressel's e-mail regarding approval
11 of MDEQ; data provided that this will not affect the
12 plume; conditional rezoning -- it looks like
13 conditional is misspelled here, I think it is intended
14 to be conditional rezoning agreement re: 148 North
15 Main Street.

16 Who is Gary Tressel?

17 A. Gary Tressel is the city engineer.

18 Q. He works for Hubbell, Roth and Clark; is that correct?

19 A. Yes, he does.

20 Q. To your knowledge, did this correspondence include or
21 reference any trade secrets?

22 A. I have no knowledge.

23 Q. And to your knowledge, did this correspondence involve
24 any commercial or financial information?

25 A. I have no knowledge.

CAROL EBERHARDT
July 28, 2016

Page 26

1 Q. Let's go on to Exhibit 4, page 2. The first entry for
2 March 23rd, 2015, refers to correspondence from Neil
3 Wallace re: indemnity for storm water system re: 148
4 North Main.

5 To your knowledge, did that involve any
6 trade secrets?

7 MR. TAMM: Objection to form and
8 foundation.

9 A. No.

10 BY MR. BISIO:

11 Q. To your knowledge, did that correspondence involve any
12 commercial or financial information?

13 A. I have no knowledge.

14 Q. Do you know if Neil Wallace requested any of his
15 correspondence or e-mails with Tom Ryan be kept
16 confidential?

17 A. I don't know.

18 Q. Let's go to page 3 of Exhibit 4. The third entry
19 under March 26th, 2015, the first correspondence to
20 Neil Wallace re: did HRC receive a copy of the revised
21 groundwater mounding analysis; working on indemnity
22 agreement.

23 To your knowledge, did that correspondence
24 involve any trade secrets?

25 A. I have no knowledge.

CAROL EBERHARDT
July 28, 2016

Page 27

1 Q. To your knowledge, did it involve any commercial or
2 financial information?

3 A. I have no knowledge.

4 Q. Let's move on to the fourth entry under March 27th,
5 2015. That refers to correspondence from Neil Wallace
6 re: proper party for hold harmless agreement and
7 forward appropriate language re: 148 North Main
8 Street.

9 To your knowledge, did that involve any
10 trade secrets?

11 A. I have no knowledge.

12 Q. To your knowledge, did that involve any commercial or
13 financial information?

14 A. I have no knowledge.

15 Q. And the last entry for March 27th, 2015, refers to
16 correspondence from Neil Wallace re: revised draft of
17 hold harmless agreement re: 148 North Main.

18 To your knowledge, did that involve any
19 trade secrets?

20 A. I have no knowledge.

21 Q. To your knowledge, did that involve any commercial or
22 financial information?

23 A. I have no knowledge.

24 Q. Is it correct that in the discussions that were going
25 on between Neil Wallace and Tom Ryan regarding 148

CAROL EBERHARDT
July 28, 2016

Page 28

1 North Main, you did not get involved in some of the
2 details of those discussions?

3 A. That's correct.

4 Q. That's something that you believe Mr. Ryan was going
5 to take care of; correct?

6 A. That's correct.

7 Q. Let's look at the last entry on page 3 of Exhibit 4.
8 That refers to correspondence to Thomas Biehl and
9 Kevin Gleason re: hold harmless agreement re: 148
10 North Main Street.

11 Do you know who Thomas Biehl is?

12 A. Yes.

13 Q. Who is he?

14 A. He works for HRC.

15 Q. And who is Kevin Gleason?

16 A. I don't know.

17 Q. To your knowledge, did this correspondence involve any
18 trade secrets?

19 A. No, I have no knowledge.

20 Q. To your knowledge, did it involve commercial or
21 financial information?

22 A. No, I have no knowledge.

23 Q. Let's go on to Exhibit 5. The first entry on that
24 exhibit dated April 2nd, 2015 refers to correspondence
25 from Neil Wallace re: status of hold harmless

CAROL EBERHARDT
July 28, 2016

Page 29

- 1 agreement.
- 2 To your knowledge, did that involve any
- 3 trade secrets?
- 4 A. I have no knowledge.
- 5 Q. To your knowledge, did that involve any commercial or
- 6 financial information?
- 7 A. I have no knowledge.
- 8 Q. And the last entry on this page refers to
- 9 correspondence from John Cecil at HRC re: hold
- 10 harmless agreement and final site plan.
- 11 Did your knowledge, did that involve any
- 12 trade secrets?
- 13 A. I have no knowledge.
- 14 Q. To your knowledge, did that involve any commercial or
- 15 financial information?
- 16 A. I have no knowledge.
- 17 Q. Let's go on to page 2. The second entry on page 2
- 18 refers to correspondence from Neil Wallace re: hold
- 19 harmless agreement re: 148 North Main Street.
- 20 To your knowledge, did that involve any
- 21 trade secrets?
- 22 A. I have no knowledge.
- 23 Q. To your knowledge, did that involve any commercial or
- 24 financial information?
- 25 A. I have no knowledge.

CAROL EBERHARDT
July 28, 2016

Page 30

1 Q. I will direct your attention to page 3, the first
2 entry for April 23rd, 2015. This refers to
3 correspondence to Jeff Leib re: meeting on 5-6-15 at
4 10:00 a.m. re: vacant property at Walden and M-15.

5 Do you know who Jeff Leib is?

6 A. Yes.

7 Q. Who is he?

8 A. He is an attorney.

9 Q. And with respect to this particular entry, who was he
10 representing?

11 A. Mr. Adler.

12 Q. And Mr. Adler is one of the owners of the property at
13 Main Street and Walden; is that correct?

14 A. That's correct.

15 Q. There was some controversy about the property owners
16 cutting down trees at that location, wasn't there?

17 A. The controversy wasn't regarding trees.

18 Q. What was the controversy about?

19 A. Changing the terrain of the land.

20 Q. And there was an allegation that this violated the
21 city ordinance, because the owners did not obtain a
22 certificate of appropriateness from the Historic
23 District Commission before doing the work; is that
24 correct?

25 A. That's correct.

CAROL EBERHARDT
July 28, 2016

Page 31

- 1 Q. Was there a stop work order entered?
- 2 A. Yes, there was.
- 3 Q. Did the property owners take the position that they
- 4 did not require any approval from the city for the
- 5 work that they did on that property?
- 6 A. Yes.
- 7 Q. So the controversy then was whether the city's
- 8 approval was necessary for the work that they were
- 9 doing, that they wanted to do on that property; is
- 10 that correct?
- 11 A. Yes.
- 12 Q. And that was a matter that was a subject of public
- 13 interest, too, wasn't it?
- 14 A. Yes.
- 15 Q. Were there newspaper articles about that?
- 16 A. I don't know.
- 17 Q. Letters to the editor?
- 18 A. I don't know.
- 19 Q. Were there complaints or inquiries to the city about
- 20 what was going on on that property?
- 21 A. Yes.
- 22 Q. Do you know how many inquiries or complaints there
- 23 were?
- 24 A. I don't know.
- 25 Q. Was it a large number?

CAROL EBERHARDT
July 28, 2016

Page 32

1 A. I don't know.

2 Q. Were there e-mails that you received about this from
3 citizens?

4 A. Not that I recall.

5 Q. Do you know if other city officials received any
6 complaints or inquiries about this?

7 A. I don't know.

8 Q. Were there discussions about this controversy at city
9 council meetings?

10 A. Yes.

11 Q. Do you know if Jeff Leib requested that any
12 correspondence between him and Tom Ryan be kept
13 confidential?

14 A. I don't know.

15 Q. And this particular item at April 23rd, 2015, do you
16 know if that involved any trade secrets?

17 A. I don't know.

18 Q. And to your knowledge, did it involve commercial or
19 financial information?

20 A. I don't know.

21 Q. Let's go to the last entry under April 23rd, 2015.
22 This refers to correspondence from Jeff Leib re:
23 vacant property cleanup at Walden and M-15.

24 To your knowledge, did that involve any
25 trade secrets?

CAROL EBERHARDT
July 28, 2016

Page 33

- 1 A. I have no knowledge.
- 2 Q. To your knowledge, did that involve any commercial or
3 financial information?
- 4 A. I have no knowledge.
- 5 Q. Is Jeff Leib a public body?
- 6 A. I don't know.
- 7 Q. Let's go on to Exhibit 6. I would draw your attention
8 to the second entry under May 7th, 2015. This refers
9 to correspondence from Jeffrey Leib re: property at
10 Walden and M-15.
- 11 To your knowledge, did that involve any
12 trade secrets?
- 13 A. I have no knowledge.
- 14 Q. To your knowledge, did that involve any commercial or
15 financial information?
- 16 A. I have no knowledge.
- 17 Q. Look at the second page of this exhibit under May
18 13th, 2015. This refers to correspondence to Jeff
19 Leib re: vacant property at Walden and M-15. To your
20 knowledge, did that involve any trade secrets?
- 21 A. I have no knowledge.
- 22 Q. To your knowledge, did that involve any commercial or
23 financial information?
- 24 A. I have no knowledge.
- 25 Q. Look at the entry on May 20th, 2015. This refers to

CAROL EBERHARDT
July 28, 2016

Page 34

1 correspondence from Jeff Leib re: Walden Road and M-15
2 property.

3 To your knowledge, did that involve any
4 trade secrets?

5 A. I have no knowledge.

6 Q. To your knowledge, did that involve any commercial or
7 financial information?

8 A. I have no knowledge.

9 Q. What did you do to prepare for your deposition today?

10 A. I talked with Attorney Tamm yesterday.

11 Q. Did you talk with anybody else about getting ready for
12 your deposition?

13 A. No.

14 Q. Did you talk to Joe Luginski about his deposition?

15 A. I did not.

16 Q. Did you review any documents to prepare for the
17 deposition?

18 A. Yes.

19 Q. What did you review?

20 A. I don't remember.

21 Q. When did you do that?

22 A. Yesterday.

23 Q. You don't remember what you looked at yesterday?

24 A. I do not.

25 Q. If you want to give us a few minutes, I think we are

CAROL EBERHARDT
July 28, 2016

Page 35

1 close to being finished.

2 (Off the record at 10:48 a.m.)

3 (On the record at 11:01 a.m.)

4 BY MR. BISIO:

5 Q. When I asked you towards the beginning of the
6 deposition if you knew what the case was about, you
7 said it was the plaintiff, Susan Bisio's attempt to
8 get confidential documents. Where did you get the
9 idea that the documents involved were confidential?

10 A. Because they weren't in the possession of the city.

11 Q. Whether they are in the possession of the city or
12 someone else I'm not sure makes them confidential.
13 What makes them confidential?

14 A. My understanding is anything -- if I don't possess
15 them, if they're in the possession of my attorney or
16 the city's attorney, they're confidential information.
17 That is his confidential information. I --

18 THE WITNESS: I don't know if you want me
19 to volunteer information or not.

20 MR. TAMM: No. He can ask you another
21 question.

22 BY MR. BISIO:

23 Q. Well, I want to understand your view on that. You are
24 saying that if a record is not in the city offices,
25 then it's not in the possession of the city. Is that

CAROL EBERHARDT
July 28, 2016

Page 36

1 what you're saying?

2 A. If it's something that I haven't requested and it's
3 not in the city offices, I don't know.

4 Q. Then it's not in the city's possession?

5 A. It's not in the city's possession.

6 Q. So that people who work for the city can keep
7 documents outside the city offices that are not city
8 records; is that correct?

9 A. I didn't say that. I did not say that.

10 MR. TAMM: I would object to foundation.
11 You mean people who work for the city? If you can be
12 more descriptive, Mr. Bisio.

13 MR. BISIO: Okay.

14 BY MR. BISIO:

15 Q. The city treasurer, can she keep a separate file at
16 her home with documents that involve city business,
17 but are not city records, because they're not in the
18 city offices?

19 A. No.

20 Q. Why not? How is that different from Tom Ryan's
21 separate file in his office?

22 A. The treasurer does not keep city records in her home.

23 Q. But if she did, if she took something home, --

24 A. Then I have no knowledge. No one from the city keeps
25 city records in their home.

CAROL EBERHARDT
July 28, 2016

Page 37

1 Q. So that applies, as well, to the city clerk?

2 A. As far as I know, no one from the city keeps any city
3 records out of the city office.

4 Q. But Tom Ryan can do that?

5 A. I don't know. Are you -- well, never mind.

6 Q. Well, I'm trying to understand your idea that some
7 records are confidential and are not city records. I
8 guess I still don't have a clear understanding of why
9 you think, when Tom Ryan is conducting city business
10 in his capacity as city attorney and corresponding
11 with people who are adverse to the city, why those
12 records are not the city's records.

13 A. Mr. Ryan has permission to negotiate for the city
14 between people who may request that that information
15 be confidential. The city administration does not
16 interfere with the process of negotiation.

17 Q. But as I understand your testimony before, and correct
18 me if I'm wrong, you said there wasn't a specific
19 authorization for Mr. Ryan to keep confidential
20 records.

21 A. I will tell you this: When we enter into
22 negotiations, Mr. Ryan and I have a conversation. I
23 direct him, based on a conversation that we have,
24 based on a suggestion as far as what might be
25 acceptable to the council, to negotiate on behalf of

CAROL EBERHARDT
July 28, 2016

Page 38

1 the city. I tell him to do what he needs to do
2 between the parties, and bring back a recommendation
3 at some point. I do not request a copy of all of the
4 letters. As far as I am concerned, that's
5 confidential between him and the person that he is
6 negotiating with. That's the process that I use each
7 time something comes up which requires a contract
8 negotiation.

9 Q. And is that the process that applied for Mr. Ryan's
10 exchanges with Neil Wallace regarding 148 North Main?

11 A. It is typically always the process.

12 Q. And that is the process that applied to Mr. Ryan's
13 exchanges with Jeffrey Leib regarding the property at
14 Main and Walden?

15 A. Yes.

16 Q. I want to be clear about this confidentiality. You
17 didn't make any promises that anything would be kept
18 confidential; is that right?

19 MR. TAMM: Objection to form.

20 A. Any promises to who?

21 BY MR. BISIO:

22 Q. Neil Wallace or Jeff Leib?

23 A. No.

24 Q. Or anybody else regarding the documents that we went
25 through here today?

CAROL EBERHARDT
July 28, 2016

Page 39

1 A. No, --

2 Q. Okay.

3 A. -- because I was not -- no.

4 Q. Okay. As far as you know, nobody on the city council
5 made any such promises either?

6 A. I have no knowledge of what the city council does, no.

7 MR. BISIO: I don't have any more
8 questions.

9 MR. TAMM: I just have one or a couple
10 follow-ups.

11 EXAMINATION

12 BY MR. TAMM:

13 Q. Ms. Eberhardt, what you told Mr. Bisio is that in
14 connection with these projects that are referred to in
15 Mr. Ryan's invoices, you had authorized Mr. Ryan to
16 engage in confidential conversations?

17 A. Absolutely, I did.

18 Q. And you would wait until he provided a final
19 recommendation to the city or city council?

20 A. Yes.

21 MR. TAMM: Thank you.

22 RE-EXAMINATION

23 BY MR. BISIO:

24 Q. You just said that you authorized Ryan to engage in
25 confidential communications. Did you specifically

CAROL EBERHARDT
July 28, 2016

Page 40

1 tell him, you can keep whatever you discuss
2 confidential?

3 A. I don't specifically use words, you can keep
4 everything you discuss confidential.

5 Q. Okay. As I understand what you are telling me, here
6 are the general parameters of what we want to
7 accomplish; you go ahead and discuss it and come back
8 to us with a concrete proposal. Is that basically it?

9 A. That's basically it, and that's basically it most of
10 the time.

11 MR. BISIO: I don't have any other
12 questions.

13 MR. TAMM: No questions.

14 (The deposition was concluded at 11:10 a.m.
15 Signature of the witness was not requested by
16 counsel for the respective parties hereto.)
17
18
19
20
21
22
23
24
25

CAROL EBERHARDT
July 28, 2016

Page 41

CERTIFICATE OF NOTARY

STATE OF MICHIGAN)

) SS

COUNTY OF OAKLAND)

I, AMY W. RECKLING, certify that this deposition was taken before me on the date hereinbefore set forth; that the foregoing questions and answers were recorded by me stenographically and reduced to computer transcription; that this is a true, full and correct transcript of my stenographic notes so taken; and that I am not related to, nor of counsel to, either party nor interested in the event of this cause.

Amy W. Reckling



AMY W. RECKLING, CSR 3893

Notary Public,

Oakland County, Michigan

My Commission expires: September 19, 2016

BISIO v. THE CITY OF THE VILLAGE OF
CLARKSTON

THOMAS J. RYAN

August 9, 2016

Prepared for you by



Bingham Farms/Southfield • Grand Rapids
Ann Arbor • Detroit • Flint • Jackson • Lansing • Mt. Clemens • Saginaw

THOMAS J. RYAN
August 9, 2016

Page 1

1 STATE OF MICHIGAN
2 CIRCUIT COURT FOR THE SIXTH JUDICIAL CIRCUIT
3 OAKLAND COUNTY
4
5 SUSAN BISIO,
6 Plaintiff,
7 vs. Case No. 2015-150462-CZ
8 Hon. Leo Bowman
9 THE CITY OF THE VILLAGE
10 OF CLARKSTON,
11 Defendant.

12
13
14
15 The Deposition of THOMAS J. RYAN,
16 Taken at 40701 Woodward Avenue, Suite 105,
17 Bloomfield Hills, Michigan,
18 Commencing at 1:01 p.m.,
19 Tuesday, August 9, 2016,
20 Before Helen F. Benhart, CSR-2614.
21
22
23
24
25

THOMAS J. RYAN
August 9, 2016

Page 2

1 APPEARANCES:

2

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20

21 ALSO PRESENT:

22 Susan Bisio

23

24

25

THOMAS J. RYAN
August 9, 2016

Page 3

1	TABLE OF CONTENTS	
2		
3	WITNESS	PAGE
4	THOMAS J. RYAN	
5		
6	EXAMINATION	
7	BY MR. BISIO:	4
8	EXAMINATION	
9	BY MR. TAMM:	40
10		
11	EXHIBITS	
12		
13	EXHIBIT	PAGE
14	(Exhibits attached to transcript.)	
15		
16	DEPOSITION EXHIBIT 1	8
17	DEPOSITION EXHIBIT 2	15
18	DEPOSITION EXHIBIT 3	17
19	DEPOSITION EXHIBIT 4	24
20		
21		
22		
23		
24		
25		

THOMAS J. RYAN
August 9, 2016

Page 4

1 Bloomfield Hills, Michigan

2 Tuesday, August 9, 2016

3 1:01 p.m.

4

5

THOMAS J. RYAN,

6

was thereupon called as a witness herein, and after

7

having first been duly sworn to testify to the truth,

8

the whole truth and nothing but the truth, was

9

examined and testified as follows:

10

EXAMINATION

11

BY MR. BISIO:

12

Q. Mr. Ryan, are you appearing here today in your

13

capacity as city attorney for the City of the Village

14

of Clarkston?

15

A. I am.

16

Q. Do you speak for the city regarding this lawsuit?

17

A. I don't know what you mean by that.

18

Q. Well, are the answers -- I'm going to ask questions

19

about the city's defenses and allegations in this

20

lawsuit. Are you speaking on behalf of the city

21

regarding its defenses and allegations in the lawsuit?

22

A. No. We have an attorney that's been retained for that

23

by our insurance carrier. I'm here to answer

24

questions that you have relative to --

25

Q. So you're not going to be speaking on behalf of the

THOMAS J. RYAN
August 9, 2016

Page 5

1 city with regard to its claims and defenses in this
2 lawsuit, is that correct?

3 A. I don't know. I guess I'll have to answer the
4 questions as you present them, but I'm not attorney of
5 record for the city relative to this lawsuit is all
6 I'm saying.

7 Q. You are familiar with the lawsuit, correct?

8 A. I know, yeah, uh-huh. Yes.

9 Q. And the reason I ask that question is the city has
10 filed a motion for protective order against
11 interrogatories and document requests that I made
12 regarding a defense that the city just raised a couple
13 of weeks ago. Mr. Tamm has explained to me you're
14 going to tell me everything I need to know and those
15 answers are not necessary. If you're not going to be
16 speaking on behalf of the city, though, I guess
17 there's some question as to whether the city can
18 disclaim what you say or not agree with what you say,
19 so I just ask that question so that I get a clear
20 answer as to whether you're speaking about the city's
21 defenses and claims in this case or not.

22 A. I guess it depends on the question. Why don't you
23 start with the questions, and I can answer to the best
24 of my ability.

25 Q. All right. Can you tell me what your experience is as

THOMAS J. RYAN
August 9, 2016

Page 6

1 a municipal attorney?

2 A. Well, I started municipal practice on July 1st, 1978,
3 when I joined the law firm of Thomas J. Dillon, Jr.,
4 at 2055 Orchard Lake Road. He represented the City of
5 Keego Harbor, the Village of Beverly Hills, and the
6 Township of Bloomfield. I was interested in doing
7 municipal work, so he hired me as an associate, and I
8 represented -- I prosecuted for Bloomfield Township.
9 He was the general attorney, although I did help him
10 on cases, and I eventually became -- handled the Keego
11 Harbor and Beverly Hills meetings and municipal
12 matters under his direction.

13 Q. And you got more experience since then, is that
14 correct?

15 A. I've represented -- I've been special counsel for a
16 couple other communities over the years, Independence,
17 the Village of Oxford, maybe some others, but then I
18 was retained by the City of Orchard Lake Village for a
19 period of time and then I was retained by the City of
20 the Village of Clarkston -- or the village, actually,
21 in the late '80s when they were still a village and
22 wanted to incorporate, and then when they became a
23 city, I became their attorney.

24 Q. Did you mention you represented Independence Township?

25 A. As special counsel. I've done like conflict work at

THOMAS J. RYAN
August 9, 2016

Page 7

1 one point for various cases over the years.

2 Q. So you've been a practicing municipal attorney since
3 1978, is that --

4 A. Yeah. July 1st of '78, yes, sir.

5 Q. When did you -- when were you admitted to practice?

6 A. In May of '73.

7 Q. Okay. So in your experience as a municipal attorney,
8 are you familiar with the Freedom of Information Act?

9 A. I believe I am, yes, sir.

10 Q. And you're familiar with the definition of a public
11 record under that act?

12 A. Yes, sir, I believe I am.

13 Q. Your familiar with the definition of a public body
14 under that act?

15 A. Yes, sir, I believe I am.

16 Q. And you're familiar with the exemptions to disclosure
17 under the Freedom of Information Act?

18 A. I believe I am, yes, sir.

19 Q. Can you tell me what your terms of employment with the
20 City of the Village of Clarkston are?

21 MR. TAMM: Objection to form, foundation.

22 THE WITNESS: I'm a -- I was -- I was
23 retained by the village and then -- to represent them
24 in their incorporation effort, and then when they
25 became a city, they I believe by resolution appointed

THOMAS J. RYAN
August 9, 2016

Page 8

1 me city attorney and removed the prior firm from
2 employment.

3 BY MR. BISIO:

4 Q. Was that after the city was incorporated or before?

5 A. Around the time of the incorporation, I believe. I
6 think it was December of '91, I think.

7 MARKED FOR IDENTIFICATION:

8 DEPOSITION EXHIBIT 1

9 1:07 p.m.

10 BY MR. BISIO:

11 Q. I've handed you what we've marked as Exhibit 1. These
12 are minutes of the Village Council of the Village of
13 Clarkston for December 5th, 1991, and if you look at
14 the first be it resolved paragraph, that speaks about
15 substituting your firm as legal representative and
16 general counsel for all Village of Clarkston legal
17 matters. Does that refresh your recollection as to
18 when you started to become attorney for the city or
19 the predecessor village?

20 A. Well, actually, when I became predecessor was before
21 this, but this is when I was going to be -- when they
22 were going to become a city, then they were going to
23 change attorneys. I was hired by the village a couple
24 years before this to be involved with a bond or
25 commission issue, but this is when the city issue

THOMAS J. RYAN
August 9, 2016

Page 9

- 1 first came up and I was appointed city attorney, if
2 that answers your question.
- 3 Q. So previously on the bonding matter, you were not the
4 city -- or village attorney for the village. That was
5 a single --
- 6 A. Right.
- 7 Q. -- task that --
- 8 A. I was special counsel for the village for
9 incorporation purposes, yes, sir.
- 10 Q. So this is when you were the -- when you became the
11 general counsel for the city, is that correct?
- 12 A. Yes, sir. Correct.
- 13 Q. Other than this resolution, is there any written
14 document that sets out the terms of your retention as
15 the --
- 16 A. No, sir.
- 17 Q. -- village attorney or city attorney?
- 18 A. No, sir.
- 19 Q. You're aware that Carol Eberhardt testified that there
20 was some written document, are you?
- 21 A. I'm generally aware of that, yeah, but she's mistaken.
22 This is the only thing that I know of.
- 23 Q. Okay. With respect to your providing services as city
24 attorney, are there any agreements you have with the
25 city regarding the ownership of records that you

THOMAS J. RYAN
August 9, 2016

Page 10

1 compile in the course of your work?

2 A. I don't -- I mean, I don't know what you mean by that.

3 There are no -- the only agreement I have is that I
4 was hired as the city attorney, and as far as the
5 ownership of the records, some records I present I
6 forward on to the city, some records I don't.

7 Q. But you don't have any express agreement --

8 A. No, sir, I do not.

9 Q. -- regarding ownership of records?

10 A. Correct.

11 Q. Do you have any agreement with the city regarding who
12 can have access to the records that you compile during
13 the course of your work for the city?

14 A. Well, normally I -- when I forward some things for the
15 city manager to give to city council, she's the
16 gatekeeper for that, or sometimes I'll forward it
17 directly to city council.

18 Q. I don't think you answered the question as to whether
19 you have any agreement regarding access to those
20 records.

21 A. I guess, no, we do not.

22 Q. Do you have any record retention or record destruction
23 policy that you follow?

24 A. I generally follow the state bar recommendations about
25 record retention, which I try to keep things probably

THOMAS J. RYAN
August 9, 2016

Page 11

1 for seven years or something, then destroy them.

2 Q. And you -- other than that, do you have any agreement
3 with the city regarding retention or destruction of
4 records that you compile during the course of your
5 work as city attorney?

6 A. I do not.

7 Q. If someone from the city asks you for something from
8 your file, would you give it to them?

9 A. It depends on what it is. I mean, it's never come up
10 before, so depends on what's being requested and by
11 whom.

12 Q. What criteria do you use to decide whether someone
13 from the city can get something from your files?

14 A. I guess it depends on the circumstances, whether
15 something was given to me by someone in confidence and
16 negotiations and discussions, if it's something in
17 draft form that's not finished yet. It depends on
18 what it is.

19 Q. Okay. Set aside something given to you in confidence.

20 A. Okay.

21 Q. We'll address that later. But in the normal course,
22 if you have correspondence back and forth with someone
23 who's adverse to the city and someone from the city
24 requests copies of that, would you give it to them?

25 A. Maybe. I mean, it depends on the circumstances. It's

THOMAS J. RYAN
August 9, 2016

Page 12

1 never come up, so it's hard to answer.

2 Q. This resolution we marked as Exhibit 1 also addresses
3 the transfer of all files, records and/or documents
4 pertaining to the Village of Clarkston from the firm
5 of Campbell, Keenan, Harry, Cooney, and Karlstrom to
6 your firm. Did you receive all of the records from
7 your predecessor law firm?

8 A. I received records from them. Whether they're all the
9 records, I don't know. I mean, this was 1991. I did
10 receive files from them.

11 Q. You don't know if they withheld anything from you?

12 A. I don't.

13 Q. And in the normal course when you are substituted or
14 someone substitutes for you as a city attorney or
15 municipal attorney, would you be turning over the
16 records to the new attorney?

17 A. Yes.

18 Q. Would you -- would there be any exclusions that you
19 would have about what you would turn over to them?

20 A. There might be.

21 Q. And what -- how would that come about? What would be
22 excluded?

23 A. Well, maybe things that were in process but not
24 concluded or concluded without success or concluded
25 without resolution. I mean --

THOMAS J. RYAN
August 9, 2016

Page 13

- 1 Q. As far as open matters, would you be turning
2 everything over to --
- 3 A. Yeah. Open matters I would, yes, sir.
- 4 Q. If I understand correctly from your previous
5 testimony, you have never refused to give a copy of
6 correspondence or e-mail regarding city business to
7 someone at the city because that just hasn't come up?
- 8 A. Correct. I've never been asked.
- 9 Q. You're familiar with the records that are at issue in
10 this case?
- 11 A. Yes, sir.
- 12 Q. There are 18 of them. I guess I want to try to
13 streamline this without going through every single
14 one, but you'll answer as best you can. The records
15 were identified from the descriptions on your invoices
16 to the city. Each of your invoices for the records
17 that are in dispute show a time billed of one-half
18 hour. Do you bill your time in minimum increments of
19 one-half hour?
- 20 A. I do, yes. For the city I do, yes, sir.
- 21 Q. So if you spend any time, a half hour or less than a
22 half hour, you would bill a half hour, is that
23 correct?
- 24 A. Well, if it's a little over a half hour, I mean, it's
25 a half an hour.

THOMAS J. RYAN
August 9, 2016

Page 14

1 Q. If it's ten minutes, you bill a half hour, is that
2 correct?

3 A. Correct.

4 Q. So I should not assume from the fact that you billed a
5 half hour for, for example, reviewing a letter from
6 Neil Wallace that it actually took you a half hour and
7 it was a big, long letter that it took you that long
8 to look at it. It could be, but it maybe not?

9 A. Yeah. It could be, maybe not. I don't know.

10 Q. Is the city claiming attorney-client privilege with
11 respect to any of the records that are in contest in
12 this case?

13 A. I don't believe so.

14 Q. Okay. Is the city claiming work product protection
15 with regard to any of those records?

16 A. I don't believe so.

17 Q. You can't say answer that simply yes or no, is that
18 right?

19 A. I'm sorry?

20 Q. You can't answer that question yes or no?

21 A. I thought I did.

22 Q. You said you don't believe so. That's an equivocal
23 answer. It's not clear whether you're saying yes, no
24 or maybe and you're leaving it perhaps open for the
25 city to come up with a claim later on.

THOMAS J. RYAN
August 9, 2016

Page 15

1 A. I don't remember what all defenses have been raised by
2 our attorney, the city's attorney, but I've just
3 answered I don't believe that those are the issues
4 that we're contending our defenses.

5 Q. So when the city cited the exclusion for
6 attorney-client privilege in its response to the
7 summary disposition motion, it's not really seriously
8 claiming that privilege, is that correct?

9 A. No, it's not. I don't know the answer to that
10 question.

11 Q. You don't know. Okay.

12 One of the -- well, the city is claiming a
13 number of exemptions under the Freedom of Information
14 Act. When you responded to the FOIA request, you did
15 not assert any objections in your response -- any
16 exemptions in your response letter, did you?

17 A. My responses speak for themselves. I mean, I think
18 there are two responses that I sent.

19 Q. Yes, there were.

20 A. Okay. And those responses speak for themselves.

21 Q. All right. We can mark them and go through each one.

22 MARKED FOR IDENTIFICATION:

23 DEPOSITION EXHIBIT 2

24 1:20 p.m.

25 BY MR. BISIO:

THOMAS J. RYAN
August 9, 2016

Page 16

1 Q. We've marked as Exhibit 2 a June 30th, 2015, letter.
2 Do you recognize this?

3 A. Yes, sir.

4 Q. Is that your signature on the last page?

5 A. It is.

6 Q. Is this your response to Susan Bisio's Freedom of
7 Information Act request of June 7th, 2015?

8 A. Yes, sir.

9 Q. Are there any exemptions that the city claimed in this
10 letter?

11 A. Well, no. I mean, it speaks for itself. I referred
12 to the fact that they're not public records.

13 Q. That's a different question, whether they're public
14 records.

15 A. I understand.

16 Q. So if something is a public record, then there's a
17 list of exemptions in the act that the city can claim
18 even though it's a public record, it doesn't have to
19 disclose it, but if it's not a public record at all,
20 you don't even get to the question of exemptions, so
21 I'm asking about exemptions, and did you claim any
22 exemptions?

23 A. Respectfully, the exhibit speaks for itself, and there
24 are no exemptions mentioned in this June 30th, 2015,
25 letter response.

THOMAS J. RYAN
August 9, 2016

Page 17

1 MR. BISIO: Would you mark that as Exhibit
2 3, please.

3 MARKED FOR IDENTIFICATION:
4 DEPOSITION EXHIBIT 3
5 1:22 p.m.

6 BY MR. BISIO:

7 Q. We've marked as Exhibit 3 a letter dated October 19th,
8 2015. Is this your response to an August 25th, 2015,
9 letter regarding Susan Bisio's Freedom of Information
10 Act request?

11 A. Yes. This was a supplemental response signed by
12 myself and sent to Mrs. Bisio.

13 Q. It was sent to me, not to Mrs. Bisio, is that correct?

14 A. Sent to you. Excuse me. Yep, you're right.

15 Q. Did the city claim any exemptions in this letter?

16 A. No, they -- the document speaks for itself, and no
17 exemptions were claimed in this response.

18 Q. One of the exemptions the city is now claiming is
19 the -- what I'll call the civil action exemption which
20 says that a party in litigation with a public body
21 cannot use the Freedom of Information Act to request
22 records from that body regarding that litigation.
23 You're familiar with that exemption?

24 A. I am.

25 Q. And you understand the city is claiming that exemption

THOMAS J. RYAN
August 9, 2016

Page 18

1 in this case?

2 A. I don't, and, I mean, as I understand, sir, I'm not
3 here as an expert witness. We have legal counsel
4 defending the city. I'm here as a fact witness and to
5 add whatever I can relative to the response the city
6 made during the initial request.

7 Q. So you don't know whether the city's claiming a civil
8 action exemption?

9 A. I may know it, but I don't know where that gets us
10 because we have another attorney handling the matter
11 for and on behalf of the city.

12 Q. Are you aware of any evidence the city has to support
13 that claim of exemption?

14 A. I've not investigated it because it wasn't my job
15 responsibility.

16 Q. What is your role in this litigation?

17 A. Well, I just I provided the information to Mrs. Bisio
18 that I believe was appropriate, and there was an
19 objection taken to that information, so we're trying
20 to figure out if the information withheld was not --
21 was withheld improperly or not.

22 Q. And what is your role in this litigation?

23 A. I'm a witness.

24 Q. So you're not taking any substantive role in this
25 litigation?

THOMAS J. RYAN
August 9, 2016

Page 19

1 A. What do you mean by that?

2 Q. You're not determining the city's positions or
3 strategy?

4 MR. TAMM: I think that calls for
5 information protected by the attorney-client
6 privilege.

7 MR. BISIO: I'm not asking for the
8 substance of what he's saying.

9 BY MR. BISIO:

10 Q. Are you consulting with your lawyer about strategy and
11 how to handle this lawsuit?

12 A. First of all, Mr. Tamm is not my lawyer, he's the
13 city's lawyer, and if you're asking me if I have
14 occasionally talked to him about matters about the
15 case because I know I have fact information about
16 these issues, yes, I've talked to him.

17 Q. Do you talk to him about matters other than factual
18 matters?

19 A. What do you mean? I mean, I know him socially. I
20 talk to him about social items. I mean, I have a
21 conversation and relationship with Mr. Tamm outside of
22 this case, so I don't understand the question,
23 respectfully.

24 Q. The question is have you talked with him about this
25 case regarding anything other than factual matters.

THOMAS J. RYAN
August 9, 2016

Page 20

1 A. Yes.

2 Q. Okay. And, in fact, you've billed the city for your
3 consultations with Mr. Tamm, haven't you?

4 A. Yes, I have.

5 Q. And you've gotten paid for that, correct?

6 A. I have.

7 Q. Notwithstanding that you're discussing the case with
8 Mr. Tamm, are you still saying that you don't have any
9 awareness of any evidence the city has to support a
10 claim of a civil action exemption?

11 A. No. I have information about that.

12 Q. What information do you have?

13 A. Just that there was a lawsuit started by yourself
14 earlier which claimed this very same information
15 that's being sought now.

16 Q. So that's the basis for the civil action exemption,
17 that the previous lawsuit claimed -- had a claim to
18 receive the same information? Is that --

19 A. I don't know the basis. You said do you know of a
20 basis, and that's the basis that I'm familiar with.
21 Whether there's any more than that, I don't know.

22 Q. Were you aware of that lawsuit when you wrote your
23 June 30th letter, Exhibit 2?

24 A. I'm not sure when that lawsuit was filed.

25 Q. I can find that out. That lawsuit was filed on

THOMAS J. RYAN
August 9, 2016

Page 21

1 June 2nd, 2015. So knowing that, were you aware of
2 that lawsuit when you --

3 A. I may have been. I don't know when we were served, so
4 I don't know.

5 MR. TAMM: Mr. Bisio, I might add that you
6 filed an amended complaint in which you raised that it
7 wasn't in the initial complaint.

8 THE WITNESS: Oh, that's right. Thank you.
9 So it was added in Count III. So I was -- I might
10 have been aware of the lawsuit on June 30th, but I was
11 unaware of the FOIA issue on June 30th.

12 BY MR. BISIO:

13 Q. You were aware of that on October 19th when you wrote
14 Exhibit 3, weren't you?

15 A. When was the amended complaint filed?

16 Q. The amended complaint was filed July 16th, 2015.

17 A. Then I probably would have been aware of it.

18 Q. I guess I'm a little perplexed about this civil action
19 exemption the city is claiming. The city did disclose
20 a large number of documents in response to the FOIA
21 request, didn't it?

22 A. I would agree with that, absolutely.

23 Q. And it didn't claim a civil action exemption with
24 respect to any of those documents, correct?

25 A. Right, because we believe they should be appropriately

THOMAS J. RYAN
August 9, 2016

Page 22

1 turned over.

2 Q. And the only difference with the 18 documents that are
3 at issue in this case now is that those documents were
4 not copied to and did not involve people in the city
5 offices, correct?

6 A. Correct.

7 Q. Why is there a distinction between all of the
8 documents that were disclosed and those 18 with
9 respect to the civil action exemption? Why -- what's
10 the difference between those two sets of documents?

11 A. First of all, as I recall the civil action exemption,
12 when the -- when the first complaint was filed in I
13 think you said June of 2015, then it was amended in
14 whenever of 2015, you were the named plaintiff in that
15 case, not Mrs. Bisio, so the civil action complaint
16 wouldn't have mattered in this response because their
17 response was due to Mrs. Bisio, not to you. So
18 because she wasn't the party in the lawsuit, in my
19 opinion the civil action matter wouldn't have been in
20 play at that time because I was responding to her, not
21 to you, her request, not to your request.

22 Q. Your October 19th, 2015, letter, Exhibit 3, was also
23 responding with respect to her request?

24 A. Yes, sir.

25 Q. I appeared as her counsel.

THOMAS J. RYAN
August 9, 2016

Page 23

- 1 A. Correct.
- 2 Q. But it's still involved her request, not my request.
- 3 A. Yes, sir. Right. Exactly.
- 4 Q. Are you aware of any other privilege that the city is
5 claiming with respect to the contested documents here?
- 6 A. I would have to defer to Mr. Tamm on that. I provided
7 my documentation as to what my reasons were for
8 denying the information.
- 9 Q. Okay. The city has claimed a frank communications
10 exemption. Are you familiar with that exemption under
11 the Freedom of Information Act?
- 12 A. Yes, sir.
- 13 Q. And that applies to communications within a public
14 body or between public bodies, is that correct?
- 15 A. Could be, yeah.
- 16 Q. What do you mean could be?
- 17 A. I'm not a public body. I don't believe I'm a public
18 body.
- 19 Q. I'm not asking if you're a public body. I'm asking if
20 the exemption applies.
- 21 A. But the exemption, you know, speaks for itself. I
22 mean, the statute speaks for itself.
- 23 Q. I want to be sure that you understand the statute. Do
24 you understand that that frank communications
25 exemption applies to communications within a public

THOMAS J. RYAN
August 9, 2016

Page 24

1 body or between public bodies?

2 MR. TAMM: Objection, form, calls for a
3 legal conclusion.

4 THE WITNESS: I'll rely on the statute.
5 The statute speaks for itself.

6 BY MR. BISIO:

7 Q. So you don't know what the exemption covers? Is that
8 what you're saying?

9 A. No. I just --

10 Q. It's a simple question as to whether you know what the
11 statute covers.

12 MR. BISIO: Mark that, please.

13 MARKED FOR IDENTIFICATION:

14 DEPOSITION EXHIBIT 4

15 1:34 p.m.

16 BY MR. BISIO:

17 Q. I've handed you what's been marked as Exhibit 4. This
18 is a printout of Michigan Compiled Laws 15.243 which
19 is a part of the Freedom of Information Act titled
20 items exempt from disclosure. If you go to the third
21 page, the paragraph at the bottom, Subparagraph F, do
22 you recognize that as the frank communications
23 privilege exemption?

24 A. I do.

25 Q. Okay. That involves communications and notes within a

THOMAS J. RYAN
August 9, 2016

Page 25

1 public body or between public bodies, correct?

2 A. Yeah. Yeah. As I said, the statute speaks for
3 itself. Correct.

4 Q. Do you claim that your correspondence and e-mails with
5 Neil Wallace are subject to the frank communications
6 exemption?

7 A. I didn't say that. If that's been raised by the city,
8 then that's their legal defense.

9 Q. Okay. You're not a public body, correct?

10 A. Correct.

11 Q. Neil Wallace is not a public body, correct?

12 A. Correct.

13 Q. Jeffrey Leib is not a public body, correct?

14 A. Right. Correct.

15 Q. So would it be proper for us to conclude, for example,
16 when you're looking at correspondence from Neil
17 Wallace, re water table, re 148 North Main, that that
18 is not a communication within a public body or between
19 public bodies?

20 MR. TAMM: Objection to form, calls for a
21 legal conclusion.

22 THE WITNESS: That is not between public
23 bodies. That's correct.

24 BY MR. BISIO:

25 Q. And it's not within a public body, either, correct?

THOMAS J. RYAN
August 9, 2016

Page 26

1 A. Correct.

2 Q. So that each of the contested records involving
3 communications to and from Neil Wallace are not
4 communications within a public body or between public
5 bodies, is that correct?

6 A. That would be correct.

7 Q. Does that apply as well to communications to and from
8 Jeffrey Leib?

9 A. It would.

10 MR. TAMM: I'm just going to object that
11 you're mischaracterizing the record. We've not raised
12 this as an affirmative defense, either of the matters
13 that you're inquiring about, so it's a
14 mischaracterization of the record.

15 MR. BISIO: Well, if you want to stipulate
16 that the city is not claiming a frank communications
17 privilege exemption, I'll move on, but the city did
18 extensively brief that in its -- it raised it in its
19 response to summary disposition and it raised it in
20 its Court of Appeals brief, so I'll readily
21 acknowledge that you haven't pled it and it should be
22 waived, but you put it in two different briefs. Are
23 you saying now the city is not going to rely on that?

24 MR. TAMM: You said it was raised as an
25 affirmative defense and it's not been raised as an

THOMAS J. RYAN
August 9, 2016

Page 27

1 affirmative defense.

2 MR. BISIO: Are you going to say the city
3 is not going to rely on that exemption?

4 MR. TAMM: The city is relying primarily on
5 Mr. Ryan's argument as raised in his response that
6 he's not a public body and these are not public
7 records.

8 MR. BISIO: Are you claiming in any way in
9 this case the frank communications exemption?

10 MR. TAMM: I'm not arguing for the purpose
11 of going forward that we're relying on the frank
12 communication exemption.

13 MR. BISIO: You give me these qualified
14 answers that don't make it clear. You've raised --

15 MR. TAMM: Well, Mr. Bisio --

16 MR. BISIO: Let me finish. You've raised
17 it in two different briefs.

18 MR. TAMM: Right.

19 MR. BISIO: Are you saying now the city is
20 not going to rely on that exemption in this case?

21 MR. TAMM: With all due respect, Mr. Bisio,
22 I'm not going to allow you to argue at some later
23 point that defenses I've raised were -- may have been
24 raised were inappropriate, so I'm not going to agree
25 to something unless you agree on the record that you

THOMAS J. RYAN
August 9, 2016

Page 28

1 would waive that -- an argument that arguments
2 previously raised should not have been raised. So
3 that's, frankly, my concern, Mr. Bisio, and so while
4 something may have been raised in a pleading that I
5 think was appropriate, I think it was a
6 mischaracterization to say that they were raised as an
7 affirmative defense because they were not, and we can
8 go forward from there.

9 MR. BISIO: Well, I agree they weren't
10 raised as an affirmative defense, but they were
11 raised, and I guess all I'm trying to determine is
12 whether that's part of this case.

13 MR. TAMM: Well, you get to ask this
14 witness what he wrote in his responses, and that's
15 what we're here to discuss, is this witness and what
16 he wrote in his responses, and I think that he's
17 already indicated he's not counsel for the city. He
18 didn't file the answers, and so it's inappropriate to
19 ask him those legal conclusions, and just like you
20 instructed yesterday when I attempted to ask your wife
21 questions about legal issues and you objected on those
22 grounds, so I think it's not an appropriate area of
23 inquiry of this witness.

24 MR. BISIO: Okay. Let me see if I
25 understand what you're saying. You're saying it's not

THOMAS J. RYAN
August 9, 2016

Page 29

1 an appropriate area of inquiry, but the city is not
2 agreeing that it will not raise the frank
3 communications exemption. Is that where we are?

4 MR. TAMM: No. I'm saying it's an
5 inappropriate area of inquiry for Mr. Ryan where he
6 hasn't raised that issue and he's here as a fact
7 witness to talk about what he wrote. He hasn't filed
8 any briefs on behalf of the city, and, you know, I see
9 you going in a different direction and making a record
10 in a way -- in an attempt to claim that in some way
11 defenses were inappropriately raised, and I'm not
12 going to agree that any defenses at any point were
13 inappropriately raised. That's what I'm saying.

14 MR. BISIO: Can we go off the record to
15 discuss this a little bit further?

16 MR. TAMM: Sure.

17 (Off the record at 1:42 p.m.)

18 (Back on the record at 1:47 p.m.)

19 MR. BISIO: We had a discussion off the
20 record about the city's assertion of the frank
21 communications privilege or exemption, and we've not
22 been able to reach an agreement on that, so I'm going
23 to proceed with questions on that.

24 BY MR. BISIO:

25 Q. Does the city claim the frank communications exemption

THOMAS J. RYAN
August 9, 2016

Page 30

1 with respect to your communications with Hubbell,
2 Roth, and Clark?

3 A. I don't know, sir. I didn't raise that issue, so that
4 would be something that you'd -- the city -- the
5 city's counsel would have to answer.

6 Q. In response to the FOIA request, the city did produce
7 a number of communications from and to Hubbell, Roth,
8 and Clark where the city manager received a copy, is
9 that correct?

10 A. Yes, sir.

11 Q. Did you review the records and produce them?

12 A. Yes, sir. I mean, I assisted the clerk in doing it,
13 but, yes, sir.

14 Q. Let's go back to Exhibit 4, which is the list of items
15 exempt from disclosure. On Page 2, Subparagraph D,
16 involves records or information specifically described
17 and exempted from disclosure by statute. Are you
18 aware of any basis for the city to claim that
19 exemption?

20 MR. TAMM: Objection to form and
21 foundation, calls for a legal conclusion.

22 THE WITNESS: I'm not the attorney handling
23 this case on behalf of the city, sir. I responded as
24 I believed was appropriate back when I sent my
25 responses, so whatever has been proffered since then,

THOMAS J. RYAN
August 9, 2016

Page 31

1 I mean, I -- I don't know. I've not been involved in
2 that, and I did what I did. You have the letters
3 there.

4 Q. I'm asking for whatever your knowledge is. If it's
5 nothing, then you tell me.

6 A. I don't have any knowledge about that.

7 Q. Are you aware of any basis for the city to claim that
8 exemption?

9 MR. TAMM: Objection to form.

10 THE WITNESS: I don't know. I've not
11 looked into it.

12 MR. TAMM: Calls for a legal conclusion.

13 BY MR. BISIO:

14 Q. What did you last say?

15 A. I've not looked into that.

16 Q. Thank you. Are you aware that the city filed
17 interrogatory answers claiming that some of the
18 documents that are at issue here are confidential
19 documents?

20 A. I am.

21 Q. Can you tell me which documents are confidential
22 documents among the 18 that are at issue here?

23 A. I can't.

24 Q. Are you aware of the basis for the city to claim that
25 they're confidential?

THOMAS J. RYAN
August 9, 2016

Page 32

1 A. One attorney asked me to keep the information
2 confidential.

3 Q. Who was that?

4 A. Mr. Leib.

5 Q. So the claim of confidentiality then doesn't apply to
6 your communications with Neil Wallace, is that
7 correct?

8 A. I don't believe it does. I mean, I don't think that
9 he asked me -- I specifically remember Mr. Leib
10 requesting confidentiality. I don't remember
11 Mr. Wallace requesting that. He may have, but I don't
12 remember.

13 Q. So maybe the documents involving communications back
14 and forth with Mr. Wallace might also be confidential?
15 Is that what you're saying?

16 A. Perhaps, but I think it's unlikely.

17 Q. Okay. How about the documents with communications
18 between you and people at Hubbell, Roth, and Clark?
19 Did they request that they be kept confidential?

20 A. They did not.

21 Q. Okay. So with respect to this confidentiality matter,
22 we're dealing mainly with your communications with
23 Jeff Leib, perhaps those with Neil Wallace --

24 A. Yes, sir.

25 Q. -- is that correct?

THOMAS J. RYAN
August 9, 2016

Page 33

1 All right. You said Jeff Leib -- you
2 specifically remember I think Jeff Leib asked you to
3 keep things confidential, is that correct?
4 A. Yes, he did.
5 Q. Who did he represent?
6 A. He represented Bob Roth and Ed Adler of Lehman
7 Investment.
8 Q. And the subject of your discussions with him was the
9 property at Walden and Main, is that correct?
10 A. Yes, sir, mm-hum, yes.
11 Q. And the tree cutting and the change in topography that
12 occurred there?
13 A. Correct.
14 Q. Tell me how it came about that there was some
15 discussion about confidentiality with him.
16 A. He requested that in -- we had a meeting at the -- at
17 Mr. Adler and Mr. Roth's office, and we were talking
18 about trying to come to a resolution of the matter, so
19 he sent me a proposal which he requested initially be
20 kept confidential, so I did, and then eventually
21 things -- we were in discussion trying to resolve it
22 and then things broke down, and it never went any
23 further until probably a year later when it did get
24 resolved. So it stopped and then it picked up again
25 about a year later and finally got resolved. There's

THOMAS J. RYAN
August 9, 2016

Page 34

1 a new lawyer involved. Mr. Larry Barnett was
2 involved, and the agreement was adopted by the city in
3 a public meeting. The solution and the resolution of
4 the matter was adopted by the city at a public
5 meeting.

6 Q. So there was a written request from Mr. Leib to keep
7 the proposal he sent you confidential, is that
8 correct?

9 A. There was until we could come to some final resolution
10 of the matter when that would become public.

11 Q. Did he specify who it should be kept confidential
12 from?

13 A. He wanted it between the two lawyers initially until
14 we could see if we could come up with something that
15 would work.

16 Q. So he didn't want you to discuss that with anyone at
17 the city?

18 A. Not yet, no. Eventually I did, but not at that time.

19 Q. There came a time when ultimately you discussed it
20 with the city, is that correct?

21 A. Correct.

22 Q. Did Mr. Leib say it was okay to do that then?

23 A. Actually, Mr. Leib was not involved at that point.

24 Q. Okay.

25 A. They hired a new lawyer, and then we got the matter

THOMAS J. RYAN
August 9, 2016

Page 35

- 1 resolved about a year later.
- 2 Q. The new lawyer's Larry Barnett?
- 3 A. Correct. Yes, sir.
- 4 Q. When Jeff Leib asked you to keep this proposal
- 5 confidential, did you respond in writing in some way
- 6 to him saying, yes, we'll keep it confidential?
- 7 A. I don't know. I probably had a phone conversation
- 8 with him. I don't remember responding in writing.
- 9 Q. Did you make a specific promise that -- let me back up
- 10 first. He asked that his proposal be kept
- 11 confidential. Did you understand that to apply to
- 12 more than just that single proposal? Did you
- 13 understand that to apply to all of your communications
- 14 back and forth with him?
- 15 A. Well, our communications were about the single
- 16 proposal.
- 17 Q. Okay. So did you understand his request for
- 18 confidentiality to apply to all of your
- 19 communications, your written communications?
- 20 A. Until we came to some resolution, yes, sir.
- 21 Q. And you don't know whether there's something in
- 22 writing in which you acknowledged that request and
- 23 said you would honor it?
- 24 A. I don't know if there's anything in writing. I do
- 25 not.

THOMAS J. RYAN
August 9, 2016

Page 36

1 Q. I want to clarify whether you understand this to be a
2 claim for keeping trade secrets or commercial or
3 financial information confidential.

4 A. I don't. Confidential is a colloquial term meaning
5 two lawyers talking about trying to resolve a matter,
6 and until the matter can be resolved, keeping the
7 information between the two lawyers.

8 Q. And you are -- and your understanding is this is not a
9 specific exemption under the Freedom of Information
10 Act, is that right?

11 A. Right.

12 Q. Rather, it's a --

13 A. Common practice --

14 Q. Okay.

15 A. -- for discussion and negotiation between lawyers.

16 Q. Okay. Did the city manager know that you were having
17 these confidential discussions?

18 A. She knew I was in discussion with Mr. Leib, yes.

19 Q. Did she know that you promised confidentiality to him?

20 A. She may have.

21 Q. Did she approve that?

22 A. She had no problem with it.

23 Q. Did she approve it?

24 A. I don't know what you mean by that.

25 Q. Did she say I authorize you to have confidential

THOMAS J. RYAN
August 9, 2016

Page 37

1 discussions with Jeffrey Leib?

2 A. Not in so many words. I guess we were all trying to
3 get the matter resolved, so whatever could get it
4 resolved seemed to work the best.

5 Q. Did any elected official of the city authorize you to
6 make that confidentiality promise?

7 A. No. Again, you're referring to the act, and this is a
8 practice and procedure between lawyers trying to
9 resolve a problem.

10 Q. Other than what you characterize as a typical
11 procedure, is there any authority you're aware of for
12 you to make a promise that records that you send and
13 receive in the course of conducting city business be
14 kept confidential?

15 A. I'm sorry. Repeat that question because I don't
16 understand the premise. If you could repeat it, I'd
17 appreciate it.

18 MR. BISIO: Would you read back the
19 question, please.

20 THE WITNESS: Other than the fact that as
21 an attorney with an ethical obligation to honor
22 another attorney's request to keep something
23 confidential, if it doesn't impact the client and it's
24 in the preliminary stages of discussion attempting to
25 resolve a matter, I would say have an ethical

THOMAS J. RYAN
August 9, 2016

Page 38

1 obligation to honor his request until and unless we
2 come to an agreement which I can then present to my
3 client.

4 Q. What rule of ethics imposes that obligation on you?

5 A. I think in fair dealing with brother counsel --
6 brother or sister counsel. I mean, if somebody says I
7 need to talk to you about this, keep it confidential
8 for the time being, and I say okay, and we talk about
9 it as lawyers. Otherwise, I don't think my word means
10 much if I'm not going to keep it confidential if
11 there's no reason not to, and in this case I didn't
12 find any reason that I should disclose it at his
13 request because we were still talking preliminarily
14 about trying to resolve the issue.

15 Q. Okay. You explicitly remember this with regard to
16 your communications with Jeff Leib. Do you have any
17 memory with regard to your communications with Neil
18 Wallace about any promises of confidentiality?

19 A. As I said before, not specifically.

20 Q. What did you do to prepare for your deposition?

21 A. I reviewed -- I spoke with Mr. Tamm. I reviewed some
22 notes from Mr. Luginski and Carol Eberhardt's
23 deposition. I tried to review some of the file,
24 reviewed my responses to the -- two responses I sent,
25 which are the two exhibits we have here, Exhibits 1

THOMAS J. RYAN
August 9, 2016

Page 39

1 and 2 I think.

2 Q. What notes from the Luginski and Eberhardt depositions
3 did you review?

4 A. Summary from Mr. Tamm.

5 Q. What was the purpose of your reviewing those notes?

6 A. I review the correspondence that comes through to the
7 city from our attorney and so I review -- I reviewed
8 that information.

9 Q. And you did that to prepare for the deposition?

10 MR. TAMM: Objection.

11 THE WITNESS: Well, no. I read it. I
12 tried to refresh my recollection about -- this stuff
13 happened a while ago, just trying to reorient myself
14 to everything.

15 MR. BISIO: Can you provide me with those
16 notes, Mr. Tamm?

17 MR. TAMM: No, absolutely not. It's
18 privileged.

19 MR. BISIO: Not once he uses it to refresh
20 his recollection for testimony.

21 MR. TAMM: He didn't say that he -- he said
22 he reviewed it generally.

23 MR. BISIO: Well, he said what he said, and
24 that's not a correct characterization.

25 MR. TAMM: It's my work product.

THOMAS J. RYAN
August 9, 2016

Page 40

1 MR. BISIO: Not once you give it to a
2 witness to refresh their recollection or to prepare
3 for a deposition.

4 MR. TAMM: I didn't --

5 MR. BISIO: That's something that the judge
6 will have to decide.

7 THE WITNESS: Just to make it clear, I
8 reviewed it because it came to me as correspondence to
9 the insurance company. That's all.

10 MR. BISIO: Okay. I don't have any other
11 questions.

12 MR. TAMM: I have a couple.

13 EXAMINATION

14 BY MR. TAMM:

15 Q. What e-mail address do you send and receive
16 information from when you're dealing on behalf of the
17 City of the Village of Clarkston?

18 A. Well, I had a former e-mail address. It was an AOL
19 address which got hacked a couple years ago so I
20 changed it. The e-mail address I use is my own
21 address, Sylvan Law, S-Y-L-V-A-N, law, TR, for Tom
22 Ryan, at Gmail dot com.

23 Q. Have you ever had an e-mail address at the Village of
24 Clarkston?

25 A. No.

THOMAS J. RYAN
August 9, 2016

Page 41

- 1 Q. Have you ever sent or received e-mails from the
2 Village of Clarkston -- a Village of Clarkston
3 address?
4 A. No, sir.
5 Q. Do you receive any pension from the City of the
6 Village of Clarkston?
7 A. No.
8 Q. Do you receive any benefits, other employee benefits?
9 A. Other than the pleasure of working there, no, I do
10 not.
11 Q. Do you consider yourself an employee of the City of
12 the Village of Clarkston?
13 A. No, I'm not.
14 Q. Are you a department?
15 A. I'm not.
16 Q. Okay.
17 A. I'm an administrative officer by chair.
18 Q. Thank you. I have nothing further.
19 MR. BISIO: I don't have any other
20 questions.

21 (The deposition was concluded at 2:06 p.m.
22 Signature of the witness was not requested by
23 counsel for the respective parties hereto.)
24
25

THOMAS J. RYAN
August 9, 2016

Page 42

1 CERTIFICATE OF NOTARY

2 STATE OF MICHIGAN)

3) SS

4 COUNTY OF WAYNE)

5

6 I, HELEN F. BENHART, certify that this
7 deposition was taken before me on the date
8 hereinbefore set forth; that the foregoing questions
9 and answers were recorded by me stenographically and
10 reduced to computer transcription; that this is a
11 true, full and correct transcript of my stenographic
12 notes so taken; and that I am not related to, nor of
13 counsel to, either party nor interested in the event
14 of this cause.

15

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21

Helen F. Benhart



22

HELEN F. BENHART, CSR-2614

23

Notary Public,

24

Wayne County, Michigan.

25

My Commission expires: 7/7/20

STATE OF MICHIGAN
COURT OF APPEALS

LEE A. JOHNSTON, NEIL MCLAUGHLIN, JR.,
and RICHARD HLAVACEK,

UNPUBLISHED
February 24, 2004

Plaintiffs-Appellants,

v

ASHBY DRAIN DISTRICT, DOUGLAS ENOS,
and MIDLAND COUNTY,

No. 244454
Midland Circuit Court
LC No. 01-004039-CZ

Defendants-Appellees.

Before: Sawyer, P.J., and Saad and Bandstra, JJ.

PER CURIAM.

Plaintiffs appeal as of right from an order that granted summary disposition to defendants under MCR 2.116(C)(10).¹ We affirm.

The underlying lawsuit involved a Freedom of Information Act (FOIA) request made to the drain commissioner for notes he prepared regarding the Ashby Drain. Despite the drain commissioner's refusal, the trial court ordered him to disclose some of the notes and it awarded attorney fees as sanctions to the prevailing plaintiffs. Midland County paid the sanctions and then charged the drainage district for the FOIA costs. Plaintiffs here allege that the drainage district is not the appropriate governmental entity to be responsible for payment of FOIA sanctions.

Sanctions for failing to prevail in defending a FOIA action are provided under MCL 15.240:

(6) 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

¹ "A motion for summary disposition under MCR 2.116(C)(10) is properly granted if, there being no genuine issue of material fact, the moving party is entitled to judgment as a matter of law." *Mahnick v Bell Co*, 256 Mich App 154, 157; 662 NW2d 830 (2003).

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).

(7) 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. [MCL 15.240(6-7).]

The parties agree that the drainage district is a “public body,” MCL 280.5, MCL 15.232(d)(iii) and (iv), and that the drain commissioner, as an individual, is not personally liable for the sanctions, MCL 15.240(7). Therefore, sanctions must “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.” *Id.*

The drain commissioner is an officer for the drainage district, not for the county. *Brooks v Oakland Co*, 268 Mich 637, 639; 256 NW 576 (1934). Furthermore, absent misfeasance or malfeasance, a drainage district is statutorily “responsible for and liable for all acts and defaults” of the drain commissioner. MCL 280.25. The parties agree that the relevant records were made by the drain commissioner on behalf of and pertaining to the drainage district. No misfeasance or malfeasance has been alleged in the *preparation* of those records. Although there is no evidence directly stating where the records were physically located, the drain commissioner was acting in his role as an officer of the drainage district, and therefore, the drainage district is the “public body . . . that kept or maintained the public record as part of its public function.” MCL 15.240(7). Under the FOIA, the drainage district is thus the appropriate “next succeeding public body” against which sanctions “shall be assessed.” *Id.*

Plaintiffs argue that, because the drain commissioner did not entirely prevail in the FOIA suit and, therefore, was found to have improperly refused to disclose the records, he committed misfeasance or malfeasance under the terms of the Drain Code. Under MCL 280.25, the drainage district would be statutorily exempt from liability for the drain commissioner’s allegedly wrongful act. However, the Drain Code does not determine liability for FOIA sanctions. The FOIA determines liability for FOIA sanctions, based on a determination of the “public body . . . that kept or maintained the public record as part of its public function.” MCL 15.240(7). The Drain Code establishes that the drainage district was the public body that is responsible for the FOIA sanctions because the notes concerned the district, not the county. The drain commissioner challenged the disclosure of his notes under FOIA and these notes pertained to the drainage district, not the county. The drain commissioner thus acted in his capacity as an officer for the drainage district in regard to the FOIA dispute over his notes.

Affirmed.

/s/ David H. Sawyer
/s/ Henry William Saad
/s/ Richard A. Bandstra

STATE OF MICHIGAN
COURT OF APPEALS

JAMES AMBERG,

Plaintiff-Appellant,

v

CITY OF DEARBORN and CITY OF
DEARBORN POLICE DEPARTMENT,

Defendants-Appellees.

UNPUBLISHED
March 25, 2014

No. 311722
Wayne Circuit Court
LC No. 12-002188-CZ

Before: BECKERING, P.J., and STEPHENS and RIORDAN, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting summary disposition to defendants in this Freedom of Information Act (FOIA), MCL 15.231 *et seq.*, action. We affirm.

Plaintiff first argues that the trial court erred in granting defendants' motion for summary disposition. We disagree.

Generally, an issue must have been raised before, and addressed and decided by, the trial court to be preserved for appellate review. *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 443; 695 NW2d 84 (2005). Defendants argued in the trial court that the videos were not public records. Although the trial court failed to specifically conclude that the videos were not public records, the trial court implicitly came to this conclusion. Therefore, the issue regarding public records is preserved for review.

However, plaintiff's claim that the trial court granted summary disposition in favor of defendants because he could have obtained the videos through subpoena is unpreserved. See *Hines*, 265 Mich App at 443. No party argued this claim in their respective briefs in the trial court. In addition, the trial court did not base its ruling on the premise that plaintiff's claim was moot or that his claim was proper under *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963), rather than FOIA. Therefore, plaintiff's claims regarding mootness and *Brady* are also unpreserved. *Id.*

Defendants moved for summary disposition pursuant to MCR 2.116(C)(8) and (10). The trial court granted defendants' motion for summary disposition, but did not specify under which subpart. After reviewing the record, we conclude that the trial court granted summary disposition pursuant to MCR 2.116(C)(10) because it considered evidence outside of the

pleadings. Thus, we confine our analysis to that which is normally applied to a MCR 2.116(C)(10) motion. See *Spiek v Michigan Dept of Transp*, 456 Mich 331, 338; 572 NW2d 201 (1998).

“This Court . . . reviews de novo a trial court’s legal determination in a FOIA case.” *Hopkins v Duncan Twp*, 294 Mich App 401, 408; 812 NW2d 27 (2011). This Court also reviews de novo a trial court’s determination on a motion for summary disposition. *Hill v Sears, Roebuck and Co*, 492 Mich 651, 659; 822 NW2d 190 (2012). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). This Court reviews the motion by considering “the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party.” *Douglas v Allstate Ins Co*, 492 Mich 241, 256; 821 NW2d 472 (2012). “This Court considers only the evidence that was properly presented to the trial court in deciding the motion.” *Lakeview Commons v Empower Yourself*, 290 Mich App 503, 506; 802 NW2d 712 (2010). “Summary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to a judgment as a matter of law.” *Douglas*, 492 Mich at 256. “There is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party.” *Lakeview Commons*, 290 Mich App at 506 (internal quotations and citation omitted).

This Court reviews plaintiff’s unpreserved claims for plain error affecting his substantial rights. See *Lenawee Co v Wagley*, 301 Mich App 134, 164-165; 836 NW2d 193 (2013).

Plaintiff argues that the trial court erred in concluding that the videos were not public records under FOIA. We disagree.

MCL 15.231(2) provides:

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.

“The FOIA provides that ‘a person’ has a right to inspect, copy, or receive public records upon providing a written request to the FOIA coordinator of the public body.” *Detroit Free Press, Inc v Southfield*, 269 Mich App 275, 290; 713 NW2d 28 (2005). “Under FOIA, a public body must disclose all public records that are not specifically exempt under the act.” *Hopkins*, 294 Mich App at 409, citing MCL 15.233(1) and *Coblentz v City of Novi*, 475 Mich 558, 571, 573; 719 NW2d 73 (2006).

MCL 15.232(e) defines “public record” as follows:

“Public record” 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. Public record does not include computer software. This act separates public records into the following 2 classes:

- (i) Those that are exempt from disclosure under section 13.
- (ii) All public records that are not exempt from disclosure under section 13 and which are subject to disclosure under this act.

A “writing” includes a “means of recording or retaining meaningful content.” MCL 15.232(h); *Hopkins*, 294 Mich App at 409. “A writing can become a public record after its creation if possessed by a public body in the performance of an official function, or if used by a public body, regardless of who prepared it.” *Hopkins*, 294 Mich App at 409.

Plaintiff contends that the videos became public records once defendants came into possession of them. However, mere possession of a record by a public body does not render it a public record. See *id.* at 409-410. Rather, the record must be used or possessed in the performance of an official function to be a public record. *Id.* Plaintiff has presented no record evidence to support the conclusion that the videos were used in the performance of an official function. However, it is clear that the records were subpoenaed in the course of the official function of the prosecutor’s office. It is equally clear that the videos were equally available to the defense through the same mechanism and that the documents were potentially a part of the discovery in the underlying criminal case.

However, contrary to plaintiff’s claim, it is at best unclear as to the basis of the court’s ruling. After a lengthy colloquy, the court indicated that based upon the arguments and briefs it was granting summary disposition. A remand would be appropriate to ascertain the basis of the ruling but for the fact that the plaintiff has all of the requested records and that attorney fees and costs would not have been awarded for reasons stated below.

Plaintiff argues that the trial court abused its discretion in denying additional discovery. We disagree. “This Court reviews a trial court’s decision to grant or deny discovery for an abuse of discretion.” *Shinkle v Shinkle (On Rehearing)*, 255 Mich App 221, 224; 663 NW2d 481 (2003).

The purpose of discovery in this case would have been to uncover an additional video. The record does not support plaintiff’s claim that an additional video existed. On appeal, plaintiff merely argues that an additional video exists based on an alleged assertion by defendants in a “supplemental brief.” To the contrary, the record supports the conclusion that plaintiff made this assertion in the trial court based solely on his own review of the videos that were disclosed by defendants. Thus, the trial court did not abuse its discretion in denying plaintiff’s request for additional discovery based on conjecture. See *Augustine v Allstate Ins Co*, 292 Mich App 408, 419-420; 807 NW2d 77 (2011) (“Michigan’s commitment to open and far-reaching discovery does not encompass fishing expeditions. Allowing discovery on the basis of conjecture would amount to allowing an impermissible fishing expedition.”) (internal quotation marks, citations, and brackets omitted).

Plaintiff argues that the trial court erred in not awarding him costs, attorney fees, and punitive damages. We disagree.

This Court reviews de novo questions of law such as statutory interpretation. *Meredith Corp v City of Flint*, 256 Mich App 703, 711-712; 671 NW2d 101 (2003). This Court reviews for clear error the circuit court's findings of fact. *Id.* at 712.

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 first requirement for an award of attorney fees in a FOIA action is that the 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 NW2d 745 (2004). “The test is whether: (1) the action was reasonably necessary to compel the disclosure; and (2) the action had the substantial causative effect on the delivery of the information to the plaintiff.” *Id.* at 149-150 (citations and quotation marks omitted).

MCL 15.240(7) provides:1

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.

Here, plaintiff failed to meet the first requirement of proving that a FOIA claim was reasonably necessary to obtain the records. As noted earlier, the defendant could have also subpoenaed the records from the third party and had the ability to obtain them through discovery in the criminal case. Likewise, plaintiff has not made any claim in his brief that defendants arbitrarily and capriciously violated the act. Rather, plaintiff merely asserts that he was entitled to attorney fees, costs, and punitive damages. “It is not enough for an appellant to simply announce a position or assert an error in his or her brief and then leave it up to this Court to discover and rationalize the basis for the claims, or unravel and elaborate the appellant’s arguments, and then search for authority either to sustain or reject the appellant’s position.” *DeGeorge v Warheit*, 276 Mich App 587, 594-595; 741 NW2d 384 (2007).

Affirmed.

/s/ Cynthia Diane Stephens
/s/ Michael J. Riordan

STATE OF MICHIGAN
COURT OF APPEALS

PETER BORMUTH,

Plaintiff-Appellant/Cross-Appellee,

v

CITY OF JACKSON,

Defendant-Appellee/Cross-Appellant.

UNPUBLISHED

October 15, 2019

No. 347449

Jackson Circuit Court

LC No. 18-001387-CZ

Before: REDFORD, P.J., and JANSEN and LETICA, JJ.

PER CURIAM.

In this action brought pursuant to Michigan's Freedom of Information Act (FOIA), MCL 15.231 *et seq.*, plaintiff, Peter Bormuth, acting *in propria persona*, appeals the order granting summary disposition in favor of defendant, the City of Jackson, under MCR 2.116(C)(10). Defendant cross-appeals, arguing that the trial court erred by denying defendant's request for costs and attorney fees on account of the frivolous nature of plaintiff's civil action. We affirm.

I. RELEVANT FACTUAL BACKGROUND

This case arose out of a complaint filed by plaintiff where he claimed that defendant violated the FOIA when it failed to produce text messages allegedly sent between Mayor Derek Dobies and Nikki Joly, a local community activist, in response to plaintiff's FOIA request for "[a]ll text messages" between those two individuals. In a written response, defendant's FOIA manager explained that "Mayor Dobies determined that he has no text messages that qualify as a public record" and that he "did not communicate with Ms. Joly in his official capacity as a City Councilmember or Mayor via text message." Defendant provided a Certification of Nonexistence stating that defendant's attorney attempted to locate the requested documents and that "such does not exist or cannot be located using the description provided." Plaintiff appealed defendant's determination to the city manager. Defendant's city manager explained in another written response that defendant "has no choice but to deny your appeal as we do not have records that match your request under the Freedom of Information Act." The city manager further explained, "[a]s you suggested in your appeal, emails and text messages that are personal in

nature and do not involved work related function by a public official, do not qualify as public records and are not required to be remitted to the City.”

Plaintiff filed a complaint in the circuit court claiming defendant violated the FOIA by failing to produce the text messages between Mayor Dobies and Joly in response to his February 22, 2018 FOIA request. In claiming that defendant violated the FOIA, plaintiff asserted that he “does not believe Derek Dobies when he states that none of his text messages with Nikki Joly involve public business” and asked that the trial court review *in camera* any text messages between the two individuals to ascertain whether any of the messages constituted public records subject to FOIA. In support of his claim that text messages sent on private electronic devices are nevertheless subject to disclosure under state public record laws if they pertained to public business, plaintiff cited cases from California and Washington, as well as an opinion of the Illinois Attorney General’s Public Access Bureau.¹

Defendant moved for summary disposition under MCR 2.116(C)(10), asserting that it did timely, appropriately, and completely respond to plaintiff’s FOIA request. Defendant sought dismissal of plaintiff’s complaint with prejudice, as well as attorney fees and costs. In support of its motion, defendant attached an affidavit by Mayor Dobies, where Mayor Dobies averred, in relevant part:

4. While I do not retain personal text messages, I conducted a thorough and diligent search of my saved text messages. I have checked all of my backups to locate any text messages that may have been saved, however, I did not locate any texts from Nikki Joly in those backups.

5. Further, on November 2, 2017 I was the victim of automobile theft and my old phone, its accessories, and some other personal effects were stolen at that time as they were contained within my vehicle. I filed a police report and the incident number was 497-34157-17. Any text messages or other public records contained physically on that device are no longer in my possession.

6. As I understand Plaintiff’s lawsuit, he has taken issue with the fact that no text messages have been produced. I have made diligent search, and I do not have any official text messages between myself and Nikki Joly in my possession.

¹ For additional context, we note that plaintiff’s complaint raised the possibility that Mayor Dobies, a former councilperson, was involved in some form of conspiracy with Joly to win his election as mayor. The theory related to the mayor’s support for the enactment of a nondiscrimination ordinance following an “outpouring of community support” after a fire destroyed Joly’s home. According to plaintiff, both Joly and Mayor Dobies, working together, initially claimed that the fire was a hate crime. Subsequently, law enforcement determined that Joly herself was responsible for the fire and charged her with first-degree arson. Although he admits that there is no direct evidence supporting such a claim, it is plaintiff’s position that the text messages he seeks “could show a conspiracy” between Mayor Dobies and Joly.

In response, plaintiff continued to assert that the trial court had the authority to order that defendant produce the text messages so that it could review for itself the text messages for references to the nondiscrimination ordinance or “other matters of City business subject to FOIA.” Further, plaintiff argued that Mayor Dobies’s affidavit “clearly shows a lack of good faith” and that under the FOIA, Mayor Dobies “had a responsibility to contact the former server for his stolen phone and retrieve any text messages between [him] and Nikki Joly that are public records.”

Ultimately, the trial court determined that plaintiff should not “just have to accept” defendant’s certification of nonexistence and that plaintiff was “entitled to know some answer, develop a little bit of discovery about that in the courtroom or by way of deposition.” Defendant agreed to make Mayor Dobies available for an evidentiary hearing in lieu of a deposition. Accordingly, the trial court permitted plaintiff “to at least be able to explore” the issue of the stolen phone and the ability to recover any data.

At the evidentiary hearing, Mayor Dobies testified consistent with his affidavit. Following his testimony, the trial court concluded that plaintiff had “a fair opportunity” to explore “the nature of the phone, whether it was public or private,” and “what ultimately happened to the phone, whether there was any capability to even retrieve this information.” The trial court concluded that the evidence established that the sought-after text messages did not exist. Accordingly, the trial court held that it did not “even have to make the ruling on the public versus the private phone” because it appeared that there was no genuine issue of material fact as to whether defendant could even produce the text messages for disclosure. The trial court denied defendant’s request for attorney fees, concluding that attorney fees are “normally absorbed by each side” and that it did not believe that plaintiff was acting in bad faith. This appeal followed.

II. STANDARD OF REVIEW

“[T]he proper interpretation and application of [the] FOIA is a question of law that we review de novo.” *Rataj v Romulus*, 306 Mich App 735, 747; 858 NW2d 116 (2014). “[T]he clear error standard of review is appropriate in FOIA cases where a party challenges the underlying facts that support the trial court’s decision.” *Herald Co, Inc v Eastern Mich Univ Bd of Regents*, 475 Mich 463, 472; 719 NW2d 19 (2006). “Clear error exists only when the appellate court is left with the definite and firm conviction that a mistake has been made.” *Id.* at 471 (quotation marks and citation omitted). This Court reviews a trial court’s discretionary determination for an abuse of discretion and cannot overturn the trial court’s decision unless it falls outside the range of principled outcomes. *Id.* at 472.

III. PLAINTIFF’S FOIA CLAIMS

Plaintiff argues on appeal that the trial court erroneously granted summary disposition in favor of defendant because Mayor Dobies could have recovered the missing text messages directly from Verizon, his service provider, and that text messages relating to public business remain subject to FOIA requests even if exchanged on a private cell phone.

Initially, we believe that plaintiff mischaracterizes the trial court’s decision below. The trial court granted summary disposition only after concluding that plaintiff failed to create a

genuine issue of material fact as to whether defendant could produce any text messages responsive to his FOIA request. The trial court did not consider the relevance of Mayor Dobies' use of a private cell phone, or whether he ever conducted public business using that phone. Because the trial court did not address or decide the circumstances in which private text messages can constitute public records, we decline to consider that issue for the first time on appeal. See *Mouzon v Achievable Visions*, 308 Mich App 415, 419; 864 NW2d 606 (2014). We instead focus on the crux of plaintiff's argument; that the trial court erred by granting summary disposition because there was a genuine issue of fact concerning the recoverability of text messages responsive to plaintiff's FOIA request. Plaintiff argues that Mayor Dobies' testimony, that he "can't recall" whether he "back[ed] up" the data on his stolen phone was on iTunes or iCloud, created a genuine issue of disputed fact as to the existence of responsive public records. We disagree.

In *Coblentz v Novi*, 475 Mich 558, 568-569; 719 NW2d 73 (2006), our Supreme Court held that where the public body denies the existence of any records and provides evidence supporting that position, the burden to avoid summary disposition shifts to the plaintiff to produce countering evidence. In this case, defendant attached an affidavit from Mayor Dobies stating that he "conducted a thorough and diligent search of [his] text messages" and "checked all of [his] backups to locate any text messages that may have been saved" but "did not locate any texts from Nikki Joly in those backups." Mayor Dobies further averred that he did "not have any official text messages between [himself] and Nikki Joly in [his] possession."

In the interest of fairness, the trial court gave plaintiff an opportunity to directly examine Mayor Dobies on this precise issue. During an evidentiary hearing, Mayor Dobies testified that his phone was stolen out of his truck, and that he went to an AT&T store, a Verizon store, and an Apple store in an attempt to transfer any data from his old phone to his new phone. However, sales clerks at all three stores "indicated that they couldn't do that." Moreover, Mayor Dobies testified that he completed "a diligent search of what [he had] on [his] computer and [that he did not] have any [text messages] that would be considered public documents" for the period in question. This testimony was consistent with his affidavit.

Despite having an opportunity to develop and introduce additional evidence, plaintiff was unable to present any proofs that defendant retained any text messages responsive to plaintiff's FOIA request. "If a record does not exist, it cannot be produced." *Coblentz*, 475 Mich at 568; *Easley v Univ of Mich*, 178 Mich App 723, 725; 444 NW2d 820 (1989) ("[L]ogic dictates that the public body have in its possession or control a copy of the document before it can be produced or before a court can order its production."). Notably, in his briefing on appeal, plaintiff even admits that he "does not know what information those lost text messages contain." Without any factual support contradicting Mayor Dobies's affidavit and testimony, we cannot conclude that the trial court erroneously granted summary disposition in favor of defendant. See *Coblentz*, 475 Mich at 570; *Hartzell v Mayville Comm Sch Dist*, 183 Mich App 782, 787; 455 NW2d 411 (1990) ("We would concede that the nonexistence of a record is a defense for the failure to produce or allow access to the record.").

IV. DEFENDANT’S CLAIM FOR ATTORNEY FEES AND COSTS

On cross-appeal, defendant argues that the trial court erred by refusing to award attorney fees and costs. We disagree.

As a general rule, “Michigan follows the ‘American rule’ with respect to the payment of attorney fees and costs.” *Haliw v Sterling Hts*, 471 Mich 700, 706; 691 NW2d 753 (2005). “Under the American rule, attorney fees generally are not recoverable from the losing party as costs in the absence of an exception set forth in a statute or court rule expressly authorizing such an award.” *Id.* at 707. In this case, defendant sought—and the trial court denied—an award of attorney fees pursuant to MCL 15.240(6), MCL 600.2591, and MCR 2.114.²

A. MCL 15.240(6)

MCL 15.240(6), which is part of FOIA, 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). [Emphasis added.]

The decision to award reasonable attorney fees and costs in a FOIA action where the plaintiff does not fully prevail “is entrusted to the sound discretion of the trial court.” See *Estate of Nash by Nash*, 321 Mich App at 606 (quotation marks and citation omitted). “An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes.” *Estate of Nash by Nash v Grand Haven*, 321 Mich App 587, 605; 909 NW2d 862 (2017).

In this case, the trial court recognized that “sometimes citizen investigations are a good thing and warranted under certain circumstances, necessary.” Notably, although not sworn testimony, plaintiff informed the trial court that he personally witnessed Joly receive a text message from Mayor Dobies concerning the nondiscrimination ordinance, giving him a legitimate basis to question defendant’s denial of responsive records. Likewise, defendant’s initial response that the documents did not exist was, at best, equivocal because defendant’s response changed over time. Although defendant’s briefing is vague regarding this point, it does not appear that Mayor Dobies ever denied that he conducted public-related business subject to the FOIA on his private cell phone, but simply maintained that the records no longer existed because of the theft of the phone. Accordingly, we see no error in the trial court’s determination that plaintiff did not act in bad faith. We reject defendant’s attempt to cast aspersions against

² MCR 2.114 was repealed by our Legislature, effective September 1, 2018. The existing language transferred to MCR 1.109.

plaintiff as a “frequent litigant” who is never sanctioned when his claims are dismissed and that “there is no deterrent” against him continuing to do so. Plaintiff’s identity or the intended use for any information obtained is an irrelevant consideration. See *Taylor v Lansing Bd of Water and Light*, 272 Mich App 200, 205; 725 NW2d 84 (2006). More importantly, defendant’s “deterrence” argument is utterly incompatible with the purpose of FOIA “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 Dearborn*, 497 Mich 28, 30; 859 NW2d 674 (2014), quoting MCL 15.231(2). The trial court’s decision to deny defendant’s request for attorney fees and costs was a reasonable and principled one.

B. MCL 600.2591

Defendant also sought attorney fees under MCL 600.2591, which, “require[s] a court to sanction an attorney or party that files a frivolous action or defense.” *Meisner Law Group PC*, 321 Mich App at 731; see also MCR 2.625(A)(2) (requiring an award of costs as provided by MCL 500.2591 where the trial court “finds on motion of a party that an action or defense was frivolous”). As set forth in MCL 600.2591(3)(a), civil action is frivolous where at least one of the following conditions exists:

- (i) The party’s primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party.
- (ii) The party had no reasonable basis to believe that the facts underlying that party’s legal position were in fact true.
- (iii) The party’s legal position was devoid of arguable legal merit.

“To determine whether sanctions are appropriate under MCL 600.2591, it is necessary to evaluate the claims or defenses at issue at the time they were made, and the factual determination by the trial court depends on the particular facts and circumstances of the claim involved.” *DC Mex Holdings LLC v Affordable Land LLC*, 320 Mich App 528, 548; 907 NW2d 611 (2017) (quotation marks, citation, and alteration omitted). “The purpose of imposing sanctions for asserting a frivolous action or defense is to deter parties and their attorneys from filing documents or asserting claims or defenses that have not been sufficiently investigated and researched or that are intended to serve an improper purpose.” *Meisner*, 321 Mich App at 731-732.

Defendant contends that it fully complied with FOIA by filing a Certification of Nonexistence and that plaintiff filed this suit based on “nothing more than supposition, innuendo, and defamatory statements . . . not warranted by existing law or grounded in good faith.” As stated earlier in this opinion, the trial court determined that (1) plaintiff was not acting in bad faith; (2) there was at least some basis to believe that responsive public records may have at one point existed; and (3) that it was not unreasonable for plaintiff to believe that those documents were potentially recoverable, even though the evidence did not ultimately bear out on that belief. This Court explained in *Louya v William Beaumont Hosp*, 190 Mich App 151, 162; 475 NW2d 434 (1991), “[t]here is a significant difference between bringing a lawsuit with no basis in law or

fact at the outset and failing to present sufficient evidence to justify relief at trial.” Nothing about defendant’s argument on appeal undermines the trial court’s factual determination under a clear error standard of review. The trial court’s finding has sufficient evidentiary support, and we are not left with a definite and firm conviction that a mistake was made. See *Meisner Law Group PC*, 321 Mich App at 733.

C. MCR 1.109

Finally, defendant sought attorney fees under MCR 2.114, which is now MCR 1.109. MCR 1.109 provides, in relevant part:

(5) Effect of Signature. The signature of a person filing a document, whether or not represented by an attorney, constitutes a certification by the signer that:

(a) he or she has read the document;

(b) to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the document is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law; and

(c) the document is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

(6) Sanctions for Violation. If a document is signed in violation of this rule, the court, on the motion of a party or on its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including reasonable attorney fees. The court may not assess punitive damages.

(7) Sanctions for Frivolous Claims and Defenses. In addition to sanctions under this rule, a party pleading a frivolous claim or defense is subject to costs as provided in MCR 2.625(A)(2). The court may not assess punitive damages.

Defendant’s arguments for obtaining attorney fees under this court rule closely track those under MCL 600.2591 and, therefore, fail for the same reasons. Specifically, plaintiff did not file this action in bad faith; plaintiff had some reason to believe that the text messages sought may have existed at one point in time; and plaintiff’s belief that the text messages were potentially recoverable was not unreasonable.

Based on the foregoing, we conclude that the trial court did not abuse its discretion in declining to award defendant an award of attorney fees and costs under FOIA and did not clearly err when it found that plaintiff’s FOIA action was not frivolous at the time of its filing.

Affirmed.

/s/ James Robert Redford
/s/ Kathleen Jansen
/s/ Anica Letica