

STATE OF MICHIGAN
COURT OF APPEALS

TOM ROTTA,

Plaintiff-Appellant,

v

CITY OF MANISTEE,

Defendant-Appellee.

UNPUBLISHED

April 23, 2019

No. 342776

Manistee Circuit Court

LC No. 17-016273-CZ

Before: BORRELLO, P.J., and SHAPIRO and RIORDAN, JJ.

PER CURIAM.

Plaintiff, Tom Rotta, appeals as of right the trial court’s order granting summary disposition under MCR 2.116(C)(10) (no genuine issue of material fact) in favor of defendant, the City of Manistee. Soon after the shooting death of Lee Pat Milks by a City of Manistee police officer in March 2017, plaintiff submitted a request to defendant under the Michigan Freedom of Information Act (“FOIA”), MCL 15.231 *et seq.*, for the police reports related to the shooting, in addition to the code enforcement records for Milks’s residence. Defendant disclosed the code enforcement records, but it declined to disclose the police reports, citing the law-enforcement-proceedings exemption in MCL 15.243(1)(b)(i). For the reasons set forth in this opinion, we affirm the trial court’s conclusion that defendant stated a sufficiently particularized reason for not disclosing the requested documents, but we conclude that the trial court’s refusal to review the documents *in camera* prevented the trial court from assessing whether that rationale applied to the entirety of the records and whether defendant improperly withheld nonexempt material. Therefore, we affirm in part, vacate in part, and remand for the trial court to review the disputed documents *in camera* to determine whether they contain nonexempt material that should have been disclosed.

I. BACKGROUND

According to a news article in the record, a Manistee City police officer was conducting routine code enforcement when Milks stepped out of his home with a gun and told the police officer to leave. The police officer maintained that he ordered Milks to drop the gun, but Milks

loaded it and pointed it at the police officer, who then shot Milks. Milks later died. The Michigan State Police (MSP) took over the investigation into the shooting.

Plaintiff submitted a FOIA request to defendant about one week later, on April 6, 2017. Plaintiff requested all police records related to the incident, including the use-of-force report and the code enforcement records. The next day, on April 7, 2017, defendant denied the request in full. Four days later, on April 11, 2017, defendant amended its decision, granting plaintiff's request for the code enforcement records, but maintaining its denial of the other police reports, citing the law-enforcement-proceedings exemption in MCL 15.243(1)(b)(i). Plaintiff appealed this decision to the City Council. At the recommendation of the City Attorney, who had consulted with the county prosecutor involved in the investigation, the City Council unanimously voted to deny plaintiff's FOIA request for the police records because the MSP investigation was not complete.

Plaintiff filed a lawsuit challenging this decision. Defendant subsequently moved for summary disposition under MCR 2.116(C)(10), defending the denial of plaintiff's FOIA request because of the pending MSP investigation and because disclosure would hamper the police's ability to obtain reliable information from witnesses. Plaintiff argued that defendant's records of what happened immediately after the shooting were not exempt from disclosure once the MSP took over the investigation. Plaintiff further argued that the MSP was not involved in defendant's decision to deny plaintiff's FOIA request. In addition, plaintiff contended, defendant should have disclosed the nonexempt portions of the requested records, and the trial court should review the documents *in camera* to determine whether defendant improperly withheld nonexempt information. The trial court found that the denial of the FOIA request on the basis of protecting the police's ability to obtain reliable information from witnesses was valid. The trial court declined to review the records *in camera*, however, because plaintiff did not bring a motion requesting this review. Accordingly, the trial court stated, it could not determine whether the records contained nonexempt material that should have been disclosed. Plaintiff now challenges both rulings.

II. DISCUSSION

A. STANDARD OF REVIEW

A trial court's ruling on a motion for summary disposition is reviewed de novo. *Arabo v Mich Gaming Control Bd*, 310 Mich App 370, 382; 872 NW2d 223 (2015). Summary disposition under MCR 2.116(C)(10) is proper if, "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." This Court considers affidavits and other evidence to determine whether the evidence gave rise to a genuine issue of material fact. *Rataj v City of Romulus*, 306 Mich App 735, 747; 858 NW2d 116 (2014).

In a FOIA case, this Court reviews the trial court's legal conclusions de novo and its factual findings for clear error. *Bitterman v Village of Oakley*, 309 Mich App 53, 61; 868 NW2d 642 (2015). "Clear error exists only when the appellate court is left with the definite and firm conviction that a mistake has been made." *Herald Co, Inc v Eastern Mich Univ Bd of Regents*, 475 Mich 463, 471; 719 NW2d 19 (2006) (quotation marks and citation omitted). This Court

reviews a trial court's discretionary determinations for an abuse of discretion. *King v Mich State Police Dep't*, 303 Mich App 162, 175; 841 NW2d 914 (2013). "A trial court abuses its discretion when its decision falls outside the range of principled outcomes." *Id.* This Court reviews matters of statutory interpretation de novo. *Arabo*, 310 Mich App at 382.

B. DEFENDANT'S DENIAL OF PLAINTIFF'S FOIA REQUEST

FOIA begins by stating its purpose:

(2) 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. [MCL 15.231(2).]

To that end, FOIA gives individuals the right to inspect adequately identified public records, unless those records are exempt from disclosure. MCL 15.233(1). The FOIA exemptions should be "construed narrowly, in light of the public policy favoring disclosure." *Messenger v Ingham Co Prosecutor*, 232 Mich App 633, 641-642; 591 NW2d 393 (1998). In addition, "the appropriate time to measure whether a public record is exempt under a particular FOIA exemption is the time when the public body asserts the exemption." *State News v Mich State Univ*, 481 Mich 692, 703; 753 NW2d 20 (2008) (*State News I*).

In this case, defendant cited the law-enforcement-proceedings exemption in MCL 15.243(1)(b)(i), which states:

(1) A public body may exempt from disclosure as a public record under this act any of the following:

* * *

(b) Investigating records compiled for law enforcement purposes, but only to the extent that disclosure as a public record would do any of the following:

(i) Interfere with law enforcement proceedings. [MCL 15.243(1)(b)(i).]

Our Supreme Court construed this exemption, as it applied to the City of Troy's withholding of incident reports related to a homicide and the names of two police officers involved in the homicide, in *Evening News Ass'n v City of Troy*, 417 Mich 481, 484-486; 339 NW2d 421 (1983). Reviewing the language of FOIA and caselaw interpreting the federal FOIA, our Supreme Court distilled the following six rules for evaluating an asserted exemption:

1. The burden of proof is on the party claiming exemption from disclosure.
2. Exemptions must be interpreted narrowly.

3. The public body shall separate the exempt and nonexempt material and make the nonexempt material available for examination and copying.
4. Detailed affidavits describing the matters withheld must be supplied by the agency.
5. Justification of exemption must be more than conclusory, i.e., simple repetition of statutory language. A bill of particulars is in order. Justification must indicate factually how a particular document, or category of documents, interferes with law enforcement proceedings.
6. The mere showing of a direct relationship between records sought and an investigation is inadequate. [*Id.* at 502-503 (quotation marks, citations, and alterations omitted).]

Regarding disclosure of the police reports, the Supreme Court held that the defendant's reasoning that disclosure *could* jeopardize the investigation was not the same as saying disclosure *would* interfere with the investigation. *Evening News Ass'n*, 417 Mich at 505-506. Similarly, the Supreme Court held, statements that disclosure would interfere with the pending investigation and would have a chilling effect on the investigation, without explaining how or why, were too generic and conclusory to support the defendant's assertion of the exemption. *Id.* at 506-507. The Supreme Court did approve of the defendant's stated reason that some of the witnesses only gave statements because they understood that their statements would be kept confidential. *Id.* at 506. Nonetheless, the Supreme Court concluded, those witness statements could be separated from the disclosed records. *Id.* In short, "to establish the law-enforcement-proceedings exemption, [the public body] had to show both that an investigation was open and ongoing and that release of the requested documents 'would' interfere with law enforcement proceedings." *King v Oakland Co Prosecutor*, 303 Mich App 222, 231; 842 NW2d 403 (2013). However, "finding that the requested information merely 'could' hamper an investigation is insufficient to satisfy the law-enforcement-proceedings exemption under MCL 15.243(1)(b)(i)." *Id.* at 232.

Applying this rationale, this Court has disapproved of a trial court's finding that disclosing police reports could result in retaliation against witnesses, in addition to the potential for depriving criminal defendants of the right to a fair trial, supported the law-enforcement-proceedings exemption. *State News v Mich State Univ*, 274 Mich App 558, 574-578; 735 NW2d 649 (2007) (*State News II*), rev'd in part on other grounds 481 Mich 692. This Court determined that "the trial court's rationale [was] insufficient to uphold the trial court's conclusion that the entire report [was] exempt from disclosure." *Id.* at 574. Accordingly, this Court remanded for the trial court to reevaluate whether the police report was exempt from disclosure. *Id.* at 582-583.¹

¹ The Supreme Court reversed this Court's holding that subsequent events could affect a FOIA determination and held that courts should evaluate the application of a FOIA exemption at the

In this case, as a preliminary matter, the pertinent notice under review is defendant's April 11, 2017 amended notice of denial. Plaintiff challenges defendant's April 7, 2017 denial, without reference to defendant's amended denial issued on April 11, 2017. By failing to challenge the April 11 denial, defendant has abandoned this issue. See *Bitterman*, 309 Mich App at 66. This Court "may nevertheless consider the issue." *Id.* The trial court found that defendant properly refused to disclose police reports because disclosure would have affected the reliability of statements made by witnesses if they had more detailed information about the investigation and what other witnesses said. This reasoning reflected a particularized concern for the production of reliable evidence, a valid and specific reason grounded in the pending investigation.

Moreover, this reasoning is more compelling considering that the MSP took over the investigation almost immediately after the shooting occurred, consequently limiting defendant's direct involvement in the investigation. Plaintiff faults defendant for failing to produce documentation from the MSP regarding disclosure of the records. However, the county prosecutor's statements refer to the MSP investigation and signal his involvement in the investigation. Therefore, plaintiff's criticism that defendant made a unilateral decision on his FOIA request without any input from the MSP misunderstands the prosecutor's role. Further, plaintiff did not make a FOIA request of the MSP, or if he did, he did not introduce evidence related to that request. Additionally, "FOIA does not prevent a party that unsuccessfully requested a public record from submitting another FOIA request for that public record if it believes that, because of changed circumstances, the record can no longer be withheld from disclosure." *State News I*, 481 Mich at 704-705. But plaintiff did not respond to the City Attorney's statement to plaintiff that the records would be available after the prosecutor notified the City Attorney that the investigation was complete. We regret that plaintiff has not made another request for the records which would seemingly make this entire matter moot.

Plaintiff similarly argues that defendant's records were nonexempt because defendant's investigation was complete once the MSP took over. There is no dispute that the MSP investigation was ongoing at the time defendant denied plaintiff's request for the police reports less than two weeks after the shooting. Plaintiff's argument presupposes that defendant's records were irrelevant to the MSP investigation. The prosecutor noted that disclosure of defendant's records would hamper the investigation by discouraging witnesses from talking openly to the police. Therefore, we reject plaintiff's unsubstantiated attempt to separate out defendant's records from the ongoing MSP investigation.

Plaintiff appears to be arguing separately that defendant's stated justification for refusing to disclose the requested records did not extend to disclosure of the police officer's name. On the contrary, the trial court found that some witnesses may favor the police officer, while some may favor the decedent, applying the reasons given for the nondisclosure to the police officer's

time the public body asserted the exemption. *State News I*, 481 Mich at 703. The Supreme Court stated that it was not addressing "whether the police incident report ultimately is exempt from disclosure." *Id.* at 701.

identity. In *Evening News Ass'n*, 417 Mich at 511-512, the defendant refused to disclose the police officers' names to protect them from public criticism. By contrast, in this case, defendant's rationale was to preserve the reliability of the information obtained in the investigation, a valid, particularized reason.

Plaintiff argues that the prosecutor's reasons for recommending denial of the FOIA request were baseless because the prosecutor had not yet reviewed the requested records. Plaintiff faults the prosecutor for making an uninformed decision, but plaintiff misconstrues the prosecutor's point. The prosecutor stated that he recommended denial of plaintiff's FOIA request because he had not yet been able to review the results of the investigation, which was still pending. The prosecutor's point was that the investigation was so nascent that he had not yet even reviewed the records, which he needed to do in connection with his duty to make charging decisions, not that he recommended denial of plaintiff's FOIA request on the basis of documents he had not reviewed, as plaintiff maintains.

Plaintiff notes that the prosecutor did not mention any witnesses other than Milks and the police officer when the prosecutor later announced his decision not to bring charges against the police officer at a press conference after the end of the investigation, apparently suggesting that no other witnesses would have been affected by disclosure of the requested documents. The record contains no information about the press conference, however, and we decline to speculate about the meaning of remarks not included in the record or extrapolate from plaintiff's summary of remarks the prosecutor later made that defendant was required to disclose certain information at the time plaintiff made his FOIA request. In short, the trial court found a particularized reason supporting defendant's assertion of the FOIA exemption in its amended denial issued on April 11, 2017.

C. *IN CAMERA* REVIEW

Plaintiff asserts that the trial court had a duty to review the documents at issue *in camera* and determine whether defendant failed to disclose nonexempt material. We conclude that the trial court abused its discretion by refusing to review the records *in camera* only because plaintiff did not file a motion requesting *in camera* review. A public body is required to "separate the exempt and nonexempt material and make the nonexempt material available for examination and copying." MCL 15.244(1). In a FOIA case,

a court that determines a public record is not exempt from disclosure shall order the public body to cease withholding or to produce all or a portion of a public record wrongfully withheld, regardless of the location of the public record. . . . The court shall determine the matter de novo and the burden is on the public body to sustain its denial. The court, on its own motion, may view the public record in controversy in private before reaching a decision. . . . [MCL 15.240(4).]

When used in a statute, the word "may" is generally permissive, not mandatory. *Grabow v Macomb Twp*, 270 Mich App 222, 229; 714 NW2d 674 (2006). Therefore, FOIA allows for *in camera* review even if a party did not file a motion requesting *in camera* review, but it does not require it.

Our Supreme Court discussed the difficulty inherent in determining whether records in the public body's possession are exempt from disclosure in *Evening News Ass'n*, 417 Mich at 513-515. Because the public body seeking to withhold the records is the only party that knows what the records contain, the Supreme Court concluded, trial courts should apply the following procedure:

1. The court should receive a complete particularized justification as set forth in the six rules above [listed in the discussion of Issue I]; or
2. the court should conduct a hearing *in camera* based on de novo review to determine whether complete particularized justification pursuant to the six rules exists; or
3. the court can consider allowing plaintiff's counsel to have access to the contested documents *in camera* under special agreement whenever possible. [*Id.* at 515-516 (quotation marks and citations omitted).]

The purpose of this procedure is to ensure disclosure of all nonexempt material. *Id.* This procedure does not require *in camera* review, but *in camera* review may be necessary if the public body is reluctant to disclose documents, or if the trial court is in doubt about whether the records contain nonexempt material. *State News II*, 274 Mich App at 581. Applying these principles, this Court concluded that the trial court abused its discretion when it ruled in favor of a public body's decision not to disclose a police incident report without reviewing the report. *Id.* at 581-582. Consequently, this Court instructed the trial court "to review the police incident report and, to the extent practicable, separate the exempt information . . . and the nonexempt information and make the nonexempt information available to" the plaintiff. *Id.* at 582.

In this case, the trial court refused to review the documents *in camera* because plaintiff had not filed a motion requesting *in camera* review, but the trial court also stated that it could not determine whether defendant complied with its statutory duty to separate exempt and nonexempt material. Although the trial court was properly satisfied that defendant put forth a valid basis for not disclosing the documents, the trial court did not consider whether the stated rationale was a complete justification for withholding the entirety of the police records and whether the records contained nonexempt information that should have been disclosed. Because of the trial court's expressed doubt on this issue, it should have reviewed the records *in camera*. Accordingly, we remand for that *in camera* review. We instruct the trial court to review the records through the lens of when defendant asserted the exemption, on April 11, 2017.

For the foregoing reasons, we affirm in part, vacate in part, and remand for the trial court to review the disputed records *in camera* to determine whether defendant's rationale for not disclosing the records applied to all of the material contained in the requested records and whether the records contain nonexempt material that should have been disclosed. The trial court

should make this determination from the perspective of the time when defendant asserted the FOIA exemption on April 11, 2017. We do not retain jurisdiction. No costs are awarded. MCR 7.219(A).

/s/ Stephen L. Borrello

/s/ Douglas B. Shapiro

/s/ Michael J. Riordan