STATE OF MICHIGAN

COURT OF CLAIMS

ERIC L. VANDUSSEN,

Plaintiff,

v

DANA NESSEL, IN HER OFFICIAL CAPACITY AS THE ATTORNEY GENERAL OF THE STATE OF MICHIGAN,

Defendant.
_____/

OPINION AND ORDER

Case No. 22-000161-MZ

Hon. James Robert Redford

At a session of said Court held in the City of
Grand Rapids, County of Kent, State of Michigan.

In this case involving the application of the Freedom of Information Act (FOIA), MCL 15.231 *et seq*., defendant has moved for summary disposition under MCR 2.116(C)(8) and (C)(10). Because the Court finds that plaintiff was permitted to sue the Attorney General in her representative capacity and defendant cannot show that the materials sought fall under the exception found in MCL 15.243(1)(b), the Court DENIES defendant's motion. The Court instead GRANTS summary disposition to plaintiff under MCR 2.116(I)(2).

I. FACTS AND PROCEDURAL HISTORY

Plaintiff Eric L. VanDussen submitted a records request to the Michigan Department of Attorney General's FOIA Coordinator on September 6, 2022. Plaintiff, who is an independent journalist, sought a number of documents relating to the pending criminal actions arising out of the 2020 plot to kidnap and kill the Governor. Plaintiff sought "all exhibits that were admitted"

during preliminary examinations for eight criminal defendants in Antrim and Jackson counties, as well as exhibit lists that were admitted in the preliminary examination. Plaintiff maintains in his complaint that the records he sought had already been "previously (a) viewed, disclosed, displayed and utilized in open court; and (b) admitted as exhibits, under Michigan's rules of evidence, during preliminary examination proceedings". Defendant acknowledged in its answer to plaintiff's amended complaint that "with the exception of the exhibit lists, the records at issue in Plaintiff's FOIA request were admitted into evidence during the preliminary examinations referenced in the allegation and visible during portions of the court proceedings."[1]

The Department responded to the record request in a letter on September 28, 2022, in what was essentially a blanket denial of the request. The response to plaintiff stated that the records plaintiff sought were not subject to disclosure under MCL 15.243(1)(b)(*i*), (*ii*) and (*iii*) on the ground that they would either "interfere with law enforcement proceedings", "deprive [defendants] of the right to a fair trial", or would "constitute an unwarranted invasion of personal privacy." The response did not contain a specific discussion of each piece of evidence sought. Instead, it contained the following blanket statement:

> The public disclosure of the material composing the open investigation would adversely impact the investigation by having a chilling effect on the Department's ability to conduct an unhindered and thorough investigation, and would interfere with any prosecutorial determinations yet to be made. Disclosure further would jeopardize a constitutional right to a fair and impartial adjudication, and would result in the unwarranted invasion of the personal privacy of persons involved in the investigation by making public their names, addresses, and other personal

[1] In response to an initial request for the materials that plaintiff made to the Antrim District Court, the Antrim District Judge assigned to the case responded that no exhibits had been actually filed with the court or sealed by the court, that they were not court records subject to the court's control, and that the Attorney General would present redacted records to the court so it could make its bindover decision before returning the records to the Attorney General as it was required to do under MCR 2.518(B).

> information. The nondisclosure of witness information protects the integrity of evidence by preventing witness tampering and witness harassment by third parties.
>
> Thus, to ensure a thorough investigation; to protect evidence; to encourage the cooperation of witnesses; to give due deference to privacy considerations; and to assure fairness, including the right to fair and impartial adjudication, the Department must withhold the information from public disclosure at this time.

The materials, which plaintiff attached to his amended complaint, show that the items defendant did furnish consists of one redacted report concerning a redacted Facebook account, a number of photographs containing images about the "Wolverine Watchmen" and the "boogaloo" movement, and unflattering images of Governor Whitmer, some of which had been altered, with included memes. Plaintiff subsequently filed suit seeking declaratory and injunctive relief, as well as punitive damages and attorney fees. In his November 7, 2022, amended complaint plaintiff argued that defendant had violated the FOIA, again requested declaratory and injunctive relief, and requested that the Court issue a writ of mandamus compelling defendant to produce the records. Plaintiff also again asked for punitive damages and attorney fees.

Defendant moved for summary disposition on November 23, 2022. Defendant first argues that plaintiff had sued the wrong party when he named Attorney General Nessel as an individual defendant. Defendant also argues that it had properly complied with the FOIA request because the exhibits plaintiff sought fell within the FOIA exception in MCL 15.243(1)(b)(*i*), (*ii*) and (*iii*), and the exhibit lists were subject to the attorney work-product exception in MCL 15.243(1)(h).[2]

Plaintiff responded that Attorney General was the proper defendant. Plaintiff also argued that summary disposition was not appropriate because material questions of fact remained as to

[2] The Court notes that during the hearing, defendant abandoned its argument with respect to MCL 15.243(1)(b)(*i*) and (*iii*) and argued only that release of the information could deny the criminal defendants their rights to a fair trial.

whether the items sought fell within the exception. Plaintiff maintained that defendant's blanket denial did not provide the sufficiently particularized justification required under Michigan law. Plaintiff also argued that defendant's introduction of the sought exhibits into the public domain during the preliminary examinations render the claimed exemptions invalid. Plaintiff further noted that in its November 21, 2022 response to another FOIA request concerning exhibits from the Jackson County trial plaintiff made on October 13, 2022, defendant stated that it was currently processing plaintiff's request and provided a 458-page PDF file and 30 audio files that were exhibits admitted during the trial in Jackson County Circuit Court that commenced on October 3, 2022. In addition, notwithstanding defendant's apparent reliance on MCL 15.243(1)(h) with respect to the exhibit lists, defendant attached a redacted exhibit list as an exhibit to its reply brief.[3]

II. ANALYSIS

A. MCR 2.116(C)(8)

Defendant first argues that plaintiff was not permitted to sue Attorney General Dana Nessel in her official capacity and should be required to amend his complaint to name the Department of the Attorney General instead. Plaintiff disagrees.

In support of his position, plaintiff cites to MCR 2.201(C)(5), MCL 600.2051(4), and *Will v Michigan Dep't of State Police*, 491 US 58, 59; 109 S Ct 2304; 105 L Ed 2d 45 (1989). MCR 2.201(C)(5) provides:

> Actions to which the state or a governmental unit (including but not limited to a public, municipal, quasi-municipal, or governmental corporation, an unincorporated board, a public body, or a political subdivision) is a party may be brought by or against the state

[3] Although defendant argued during the hearing on this matter that the release of some of this information may have been inadvertent or a mistake, the Court finds this claim unpersuasive. Defendant did not file its motion for summary disposition until after it released these items to plaintiff.

> or governmental unit in its own name, or in the name of an officer authorized to sue or be sued on its behalf. An officer of the state or governmental unit must be sued in the officer's official capacity to enforce the performance of an official duty. An officer who sues or is sued in his or her official capacity may be described as a party by official title and not by name, but the court may require the name to be added.

MCL 600.2051(4) similarly provides:

> Actions to which this state or any governmental unit, including but not limited to a public, municipal, quasi-municipal, or governmental corporation, unincorporated board, public body, or political subdivision is a party may be brought by or against such party in its own name, or in the official capacity of an officer authorized to sue or be sued in its behalf, except that an officer of the state or any such unit shall be sued in his official capacity for the purpose of enforcing the performance by him of an official duty. Whenever any officer sues or is sued in his official capacity, he may be described as a party by his official title and not by name, subject to the discretion of the court, upon its own motion or that of any party, to require his name to be added.

In *Will*, the plaintiff brought a 42 USC 1983 action against the Department of State Police and its director and argued that he had been denied a promotion for an improper reason. The state Circuit Court, which was also the Court of Claims for the case, had found that the state and the individual were "persons" for the purpose of the statute. The Court of Appeals vacated in part after finding that the state was not a person under the statute but left intact the decision that the director was a person. The Michigan Supreme Court disagreed and held that neither qualified as persons under the statute. The United States Supreme Court affirmed. It held that a suit against state officials in their official capacities is not a suit against the officials but rather is a suit against the officials' offices and, thus, is no different from a suit against the State itself.

> Petitioner asserts, alternatively, that state officials should be considered "persons" under § 1983 even though acting in their official capacities. In this case, petitioner named as defendant not only the Michigan Department of State Police but also the Director of State Police in his official capacity.
>
> Obviously, state officials literally are persons. But a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. As such, it is no different from a suit against the State itself. We see no reason to adopt a different rule in the present context, particularly when such a rule would allow petitioner to circumvent congressional intent by a mere pleading device.

> We hold that neither a State nor its officials acting in their official capacities are "persons" under § 1983. [*Id*. at 491 US 70-71 (citations omitted).]

The *Will* Court did provide an exception for prospective relief, such as an injunction. The Court stated, "Of course a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because official-capacity actions for prospective relief are not treated as actions against the State." *Id*. at 71 n 10 (quotation omitted).

With respect to the application of MCR 2.201(C)(5), in *Grabow v Macomb Twp*, 270 Mich App 222; 714 NW2d 674 (2006), a landowner brought action against township seeking writ of mandamus to compel township clerk to accept landowner's application for a use variance and to direct township's zoning board of appeals to rule on the application. When discussing whether a writ of mandamus should be ordered "with respect to defendant's clerk's refusal to submit [the plaintiff's] application for a variance to the township ZBA", the Court found that the clerk, not the township, was the proper defendant.

> "An officer of the state or governmental unit must be sued in the officer's official capacity to enforce the performance of an official duty." MCR 2.201(C)(5); see also MCL 600.2051(4). As such, the proper defendant in an action for a writ of mandamus is the officer who has the duty of performance. See *Boron Oil Co v Southfield*, 18 Mich App 135, 144, 170 NW2d 517 (1969). Here, plaintiff's action is not against the township clerk. Instead, plaintiffs have sued the township. Defendant has not defended this action below or on appeal on the basis that the plaintiffs named the wrong party. On remand, plaintiffs may move to amend their pleadings to name the appropriate party. See *Boron*, *supra* at 144; 170 NW2d 517. [*Grabow*, 270 Mich App at 230 n 4.]

In the instant case, plaintiff's amended complaint has two counts. The first is labeled "Violations of Michigan's Freedom of Information Act". It discusses the general FOIA allegations, and argues that defendant's "improper withholding of the requested public records was arbitrary and capricious under MCL 15.240(7)" and constituted "a willful and intentional failure to comply under MCL 15.240b", such that defendant should be subject to payment of civil fines and be required to pay plaintiff's attorney fees. Count two of the complaint is a joint request for

mandamus and declaratory relief. Plaintiff seeks to compel defendant to produce the records and declare that defendant has violated the FOIA. Plaintiff also seeks a preliminary injunction to "Order Defendant to cease their withholding of all public records sought by Plaintiff within his September 6, 2022, FOIA request." Plaintiff also seeks punitive damages and attorney fees.

With respect to plaintiff's request for mandamus and declaratory relief, MCR 2.201(C)(5), MCL 600.2051(4), and the cases above support plaintiff's position. Both requests for relief involve the "performance of an official duty" under the court rule and statute. Plaintiff's amended complaint satisfies MCR 2.201(C)(5) with respect to plaintiff's request for mandamus and declaratory relief. In addition, under *Will*, Attorney General Dana Nessel is also the proper party in plaintiff's request for an injunction.

With respect to Count one, the Court finds no substantive difference between this count and the requests for mandamus, declaratory relief, or an injunction. Although defendant might be correct that Attorney General Nessel did not personally provide the FOIA response to plaintiff, her employee did. And the Attorney General is the state officer "authorized to sue or be sued" who is responsible for performing the duty of responding to FOIA requests on behalf of the Attorney General's office. Also, this count is directly related to plaintiff's other requests for relief and forms the basis for those requests.

For these reasons, the Court DENIES defendant's motion under 2.116(C)(8).

B. MCR 2.116(C)(10).

Defendant has also argued that summary disposition is appropriate under MCR 2.116(C)(10). Summary disposition pursuant to MCR 2.116(C)(10) is appropriate only when "[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." MCR 2.116(C)(10);

Maiden v Rozwood, 461 Mich 109, 120; 597 NW2d 817 (1999). "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); see also *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 424; 751 NW2d 8 (2008).

"[T]he FOIA must be broadly interpreted to allow public access to the records held by public bodies," and, in contrast, "the statutory exemptions must be narrowly construed to serve the policy of open access to public records." *Michigan Open Carry, Inc v Dep't of State Police*, 330 Mich App 614, 625; 950 NW2d 484 (2019). "The burden of proving that an exemption applies rests with the public body asserting the exemption." *Id*.

In pertinent part, MCL 15.243 provides:

> (1) A public body may exempt from disclosure as a public record under this act any of the following:
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> * * *
>
> (b) Investigating records compiled for law enforcement purposes, but only to the extent that disclosure as a public record would do any of the following:
>
> (*i*) Interfere with law enforcement proceedings.
>
> (*ii*) Deprive a person of the right to a fair trial or impartial administrative adjudication.
>
> (*iii*) Constitute an unwarranted invasion of personal privacy.

During the hearing on this matter, defendant abandoned its claim that the exhibits plaintiff sought fell within subsection (b)(*iii*) and maintained only that the records were not subject to release because they might deprive the criminal defendants a fair trial. Defendant likewise at oral argument substantially stepped back its previous reliance on subsection (b)(*i*).

As relates to subsection (b)(*ii*), plaintiff urges the Court to adopt the federal "public-domain doctrine", which provides that materials normally immunized from disclosure under the FOIA lose

their protective cloak once disclosed and preserved in a permanent public record, such that a public body can no longer rely on an otherwise valid exemption to withhold them. See e.g., *Niagara Mohawk Power Corp v United States Dep't of Energy*, 335 US App DC 100, 103; 169 F3d 16 (1999). However, while plaintiff's argument is not without merit, the Court finds it unnecessary to make such a blanket holding in light of the particular records plaintiff seeks in the instant case.

Defendant has essentially argued that these exhibits continued to qualify as an investigatory record notwithstanding their use as exhibits because the underlying information was compiled as a result of a criminal investigation.

In this case, the documents at issue were offered by the Attorney General's office as exhibits in open court, in a public hearing, in a public trial, in a public courthouse. Some of the exhibits were simultaneously displayed over social media. The Attorney General's office relied on these exhibits in their arguments seeking bindover. There were, to this Court's understanding, no motions made by the Attorney General's office seeking closure of the proceedings, protective orders, or any other prophylactic measures as relates to the requested documents.

The Court finds that defendant cannot show that the specific exhibits, as they were presented and redacted, were themselves "investigating records" or that they were compiled "for law enforcement purposes.

This Court holds, for purposes of the FOIA, records such as the exhibits plaintiff seeks are no longer records that are investigatory, or "compiled for law enforcement purposes" once they have been used in a preliminary examination or other open court proceeding. With respect to the exhibits that were presented, nothing is being "investigated"; rather, defendant compiled and presented the exhibits prepared specifically for use in the preliminary examinations to support its argument that the criminal defendants should be bound over for trial. See *People v McGee*, 258

Mich App 683, 696; 672 NW2d 191 (2003) (discussing that the purpose of a preliminary examination is to determine whether a crime had been committed and whether probable cause exists that the defendant committed it.) Thus, at that stage of the proceedings, the exhibits are used for an adjudication of whether a party is to be bound over for trial.

The exhibits may have, along with other underlying information, been initially collected for law enforcement purposes as part of the underlying investigation and prior to their admission as exhibits in open court been exempt from production under MCL 15.243(1)(b). However, plaintiff did not seek the underlying investigatory materials. He requested only those that were used during the preliminary examinations, in the form that they were admitted during the proceedings. Under the circumstances, the particular records or exhibits that plaintiff now seeks have been "compiled", in their current redacted form, for adjudication purposes.

Defendant's argument is also at odds with the Department's November 21, 2022 response to plaintiff's second FOIA request concerning exhibits from the Jackson County trial, which plaintiff made on October 13, 2022. Essentially, defendant asks the Court to draw a distinction between the same material disclosed during different public proceedings. Yet defendant presents no support for such a differentiation. When questioned about its position during the hearing, defendant also urged the Court to find that the records are protected under the exemption at least through the initial appeal process and possibly through any ancillary proceedings, such as a request for habeas relief or a motion for relief from judgment.

Defendant provides no caselaw authority to support such a sweeping position.[4] The Court finds, therefore, that defendant has not shown that the materials plaintiff sought fall within the exemption from disclosure in MCL 15.243(b).

In addition, to the extent that the Court could find that the specific records plaintiff sought fell generally within the category of records compiled for law enforcement purposes, defendant's claim that they would not be subject to disclosure under MCL 15.243(1)(b)(*ii*) is not persuasive. Defendant has argued that a release of this information may result in increased media attention, particularly in such a high-profile case, and that the Department has a responsibility to avoid placing the evidence it has collected in the underlying investigation in the spotlight any more than necessary. However, notwithstanding the actions defendant has already taken that have arguably placed the underlying criminal cases in the spotlight, defendant does not discuss what evidence plaintiff seeks which could affect prospective jurors in a way different from the rest of the coverage or other information that has been released.

The records plaintiff has requested have been admitted in open court proceedings, attended by plaintiff and other members of the public, and which were streamed on YouTube.

To the extent a party in future litigation were to believe a question exists as to whether any prospective juror may have seen this now public information prior to trial, or could have a preconceived notion of whether the defendants are guilty, this can be, and routinely is, discussed

[4] At oral argument, counsel for defendant was asked if they were aware of any appellate decision in the entire United States from any state or federal court which embraced this view of how long documents admitted as exhibits in a public trial could be withheld from a state or federal FOIA requestor based on the ongoing law enforcement investigation exception and was unable to cite to any authority so holding.

and resolved during voir dire. Likewise, the Michigan Model Criminal Jury instructions have a specific instruction to address this possible issue during the course of trial.[5]

Moreover, the presentation of evidence and testimony during a preliminary examination is part and parcel of a proceeding specifically designed to afford a defendant due process and a fair trial. Defendant's argument that the information, if re-released, would deprive the criminal defendants of a fair trial is without merit.

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[5] See M Crim JI 2.17: Caution About Publicity in Cases of Public Interest When Recessing, which provides the following:

> [*Give this instruction when recessing:*]
>
> During the trial, do not read, listen to, or watch any news reports about the case. Under the law, the evidence you consider to decide the case must meet certain standards. For example, witnesses must swear to tell the truth, and the lawyers must be able to cross-examine them. Because news reports do not have to meet these standards, they could give you incorrect or misleading information that might unfairly favor one side. So, to be fair to both sides, you must follow this instruction.
>
> *Use Note*
>
> In any case that appears likely to be of significant public interest, an admonition should be given before the end of the first day if the jury is not sequestered. If the process of selecting a jury is a lengthy one, such an admonition may also be given to each juror when selected. At the end of each subsequent day of the trial, and at other recess periods if the court deems it necessary, an admonition should be given. See generally American Bar Association Standards Relating to the Administration of Criminal Justice (Approved Draft, 1978), Fair Trial and Free Press, 8-3.6(c) and Commentary, pp 8-49 et seq. (2d ed 1978).

Accordingly, for the reasons above, the Court DENIES defendant's motion for summary disposition. The Court instead GRANTS summary disposition to plaintiff under MCR 2.116(I)(2).[6]

The Court orders that defendant produce the exhibits admitted in open court that were requested by plaintiff. The exhibits are to be produced in the manner they were admitted in court. Specifically, this means if an exhibit had redactions or deletions when admitted in open court, then the documents produced may likewise contain those redactions or deletions. If the exhibit did not have redactions or deletions when produced in open court, they may not now have redactions or deletions added to the exhibit before production to plaintiff.

Plaintiff has requested attorney fees under MCL 15.240(6). The parties may submit briefs in support or opposition to this request within 21 days of this opinion and order.

This is not a final order and does not close the case.

Date: August 9, 2023

Hon. James Robert Redford
Judge, Court of Claims

[6] "Summary disposition is properly granted [under MCR 2.116(I)(2)] to the opposing party if it appears to the court that that party, rather than the moving party, is entitled to judgment." *Sharper Image Corp v Dep't of Treasury*, 216 Mich App 698, 701, 550 NW2d 596 (1996).