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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~~ October 2016, by:

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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), plaintiff[2] 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 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 official sought copies of correspondence with someone adverse to it, it would depend on the circumstances as to whether he would

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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 2.2116(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.

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[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; emption," *Manning, supra* at 248; MCL § 15.243see 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 case[10] 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

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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,

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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 case[11] 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 case[12] 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; *Hearld 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 case[13] law recognizing that an attorney is the client's agent as well as case[14] 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 case[15] 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

exemption[18] 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

10-19-16

Date

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).