

This case has been designated as an eFiling case. To review a copy of the Notice of Mandatory eFiling visit www.oakgov.com/clerkrod/efiling.

STATE OF MICHIGAN
CIRCUIT COURT FOR THE SIXTH JUDICIAL CIRCUIT
OAKLAND COUNTY

RICHARD BISIO,

Plaintiff,

v

THE CITY OF THE
VILLAGE OF CLARKSTON

Case no. 2015-147354-CZ

Hon. Leo Bowman

and

THE CITY COUNCIL OF THE CITY
OF THE VILLAGE OF CLARKSTON,

Defendants.

Richard Bisio
201 West Big Beaver, Suite 600
Troy, MI 48084
248 528-1111
richard.bisio@kkue.com

James E. Tamm (P38514)
Attorney for Defendants
40701 Woodward Avenue, Suite 105
Bloomfield Hills, MI 48304
(248) 433-2000
jetamm@odtlegal.com

FIRST AMENDED COMPLAINT

I file this First Amended Complaint as of right under MCR 2.118(A)(1) before defendants filed an answer to the original complaint.

1. This action is brought to vindicate the rights of the citizens of the City of the Village of Clarkston and the public in general to open, transparent government—where important decisions are made in public; where public records are readily available to the citizens and the public; where the city conducts its business in accordance with the law; where the city conducts its business in a manner that is

respectful of differing viewpoints; and where the city respects and adheres to the following precepts of law, among others:

(a) “[T]he overall objective of the OMA [Open Meetings Act] [is] to promote openness and accountability in government.” *Booth Newspapers, Inc v Wyoming City Council*, 168 Mich App 459, 472; 425 NW2d 695 (1988).

(b) “It is the public policy of this state that all persons ... are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees, consistent with this act. The people shall be informed so that they may fully participate in the democratic process.” Freedom of Information Act, MCL 15.231(2).

(c) “All official books, papers or records created by or received in any office or agency of the state of Michigan or its political subdivisions, are declared to be public property, belonging to the people of the state of Michigan.” MCL 750.491.

2. Plaintiff Richard Bisio is an individual, a resident of the City of the Village of Clarkston, and a former member of the city council of the City of the Village of Clarkston.

3. Defendant City of the Village of Clarkston (“City”) is a municipal corporation and a body corporate organized under the home rule city act. It is a public body as defined in the freedom of information act, MCL 15.232(d)(iii).

4. Defendant City Council of the City of the Village of Clarkston (“City Council”) is the legislative body of the City and a public body as defined in the open

meetings act, MCL 15.262(a). The City Council is composed of the mayor and six council members.

5. This action is brought—

(a) To enjoin defendants' further noncompliance with the open meetings act, MCL 15.271(1), and

(b) For a declaratory judgment regarding the City's policy and procedures of concealing and restricting access to public records.

6. This court has jurisdiction—

(a) Under section 11 of the open meetings act, MCL 15.271(1), which provides that "a person may commence a civil action to compel compliance or to enjoin further noncompliance with this act" and MCL 15.272(2), which provides for jurisdiction in the circuit court; and

(b) Because the complaint seeks declaratory and injunctive relief within the jurisdiction of the circuit court.

March 9, 2015 Closed Session of the City Council

7. The City entered into a Conditional Rezoning Agreement with GPL Investments, LLC, the then-owner of property at 148 N. Main Street in Clarkston, and Clarkston Corner, LLC, the purchaser of the property, on May 27, 2014. The agreement conditionally rezoned the property to allow development and use of the property as a "coffee house/food service establishment."

8. On information and belief, the City and Clarkston Corner, LLC engaged in discussions regarding a storm water discharge plan and other details of the development.

9. City attorney Thomas J. Ryan requested a closed session of the City Council to be held on March 9, 2015.

10. The agenda for the March 9, 2015 City Council meeting included under "New Business" a "Closed Session Attorney Client Privilege Discussion." Defendants have a copy of the agenda. MCR 2.113(F)(1)(b).

11. The material distributed to the City Council for the closed session consisted of a two-page March 9, 2015 letter (the "Engineer's Letter") from Hubbell, Roth & Clark, Inc., the City's engineering consultant, setting out two alternatives for storm water detention at 148 N. Main. Defendants have a copy of the letter. MCR 2.113(F)(1)(b).

12. City attorney Ryan attached a two-sentence "Memo" to the Engineer's Letter, characterizing the letter as an "Attorney-Client Memorandum." Defendants have a copy of the memo. MCR 2.113(F)(1)(b).

13. Neither the Engineer's Letter nor city attorney Ryan's cover memo contained any legal advice nor any communication for the purpose of obtaining or rendering legal advice.

14. At the March 9, 2015 City Council meeting, when the closed session agenda item was reached, council member Sharron Catallo excused herself, apparently on the ground that she had a conflict of interest regarding the 148 N. Main matter because her son Curt Catallo is a principal of Clarkston Corner, LLC.

15. A motion was made and seconded for the council to go into closed session for, as the approved minutes of the meeting state, “the purpose of an attorney/client privilege discussion.” Defendants have a copy of the minutes. MCR 2.113(F)(1)(b).

16. Bisio, at that time a member of the City Council, objected to holding a closed session on the ground that there was no written attorney-client privilege matter presented to the council, the open meetings act does not allow a closed session to discuss an attorney’s oral opinion or advice, and there was no provision under the open meetings act that authorized a closed session under the circumstances.

17. City attorney Ryan stated that he would have prepared a written memorandum for the City Council on this matter but that he did not have sufficient time to do so, having just received the Engineer’s Letter that afternoon.

18. City attorney Ryan stated that he was going to speak to the City Council in the closed session about what he would have put in a written memorandum if he had had time to prepare one.

19. In response to Bisio’s inquiry, city attorney Ryan declined to elaborate on what the subject of the closed session would be or why there was a need for a closed session.

20. After Bisio's objection to holding a closed session, city attorney Ryan withdrew his request for a closed session.

21. City attorney Ryan, at a later City Council meeting, claimed that he advised the City Council not to hold a closed session.

22. City attorney Ryan gave no such advice at the March 9, 2015 meeting.

23. The mayor then called for a vote on the pending motion to hold a closed session.

24. The open meetings act requires a vote of two-thirds of the "members elected or appointed and serving" to call a closed session, except for closed sessions permitted under certain provisions that did not apply to the March 9, 2015 meeting. MCL 15.267(1).

25. Before the vote, city attorney Ryan advised the council that a vote of four members of the seven-member council was sufficient to approve holding a closed session.

26. City attorney Ryan advised the council at later meetings that he believed that the two-thirds vote requirement was satisfied by the affirmative votes of four members of the seven-member council because council member Catallo had recused herself and should not be counted in determining the number required to satisfy the two-thirds vote requirement.

27. After council member Catallo excused herself, there were five members of the City Council in attendance. Council member Marsh was absent from the meeting.

28. The City Council voted to hold the closed session, with Mayor Luginski and council members Haven, Hunter, and Sabol voting in favor and council member Bisio voting against.

29. The City Council proceeded to meet in closed session.

Dissemination of the Engineer's Letter

30. On March 11, 2015, city attorney Ryan sent an email to Neil E. Wallace, counsel for Clarkston Corner, LLC, substantially communicating the information contained in the Engineer's Letter.

31. Consistent with his promise to voters when running for election to the City Council in November 2014, Bisio posted items on his Facebook page reporting to his constituents and the public about discussions that took place and decisions that were made at City Council meetings, meetings of City Council committees, and meetings of City commissions. He also used his Facebook page to post comments and answer questions about matters of public interest regarding City government.

32. On March 12, 2015, Bisio posted on his Facebook page a report regarding the City Council's closed session on March 9, 2015, in part responding to inquiries Bisio had received about why there was a closed session. The post included a lengthy explanation of the proceedings that led up to the closed session and included a link to a copy of the Engineer's Letter and city attorney Ryan's cover memo.

Dissemination of the Catallo Letter

33. On April 16, 2015, Curt Catallo, a principal of Clarkston Corner, LLC, delivered a letter to the City addressed “To Whom It May Concern” (the “Catallo Letter”). The letter expressed the opinion that the City was not adhering to the Conditional Rezoning Agreement; stated that Catallo’s counsel advised him that they would be successful in proving a breach of contract in litigation; stated that Catallo did not wish to engage in litigation; and proposed that the property at 148 N. Main be leased to the City as a department of public works garage. Defendants have a copy of the letter. MCR 2.113(F)(1)(b).

34. On the same day, at approximately 4:45 p.m., the city’s ordinance enforcement officer sent a copy of the letter to the members of the City Council. The email was flagged “High Importance.” Defendants have a copy of the email. MCR 2.113(F)(1)(b).

35. Later that evening, in a comment to a post on his Facebook page, Bisio included a link to the Catallo Letter.

The City Council’s Non-Public Email Deliberation and Decision

36. On April 18, 2015, council member Sharron Catallo sent an email to the other City Council members and the city manager stating that—

(a) She was disappointed that Bisio had disseminated the Catallo Letter “long before the members of Council had made a decision to even discuss the option.”

(b) That Bisio's dissemination of the Catallo Letter "could have waited until after a council discussion."

(c) That Bisio's dissemination of the Catallo Letter constituted "prematurely releasing, what at this time is essentially private correspondence to a social media audience."

Defendants have a copy of the email. MCR 2.113(F)(1)(b).

37. Shortly after that on April 18, 2015, council member Haven replied to council member Catallo's email, with a copy to all other City Council members and the city manager, stating that he agreed with council member Catallo's statements. Defendants have a copy of the email. MCR 2.113(F)(1)(b).

38. On April 19, 2015, Mayor Luginski replied to council member Haven's and council member Catallo's emails, with a copy to all other City Council members and the city manager, stating that he agreed with the statements. Defendants have a copy of the email. MCR 2.113(F)(1)(b).

39. Less than an hour later, on April 19, 2015, council member Hunter replied to Mayor Luginski's, council member Haven's, and council member Catallo's emails, with a copy to all other City Council members and the city manager, stating that he agreed with the statement. Defendants have a copy of the email. MCR 2.113(F)(1)(b).

40. Less than an hour later, on April 19, 2015, council member Sabol replied to council member Hunter's, Mayor Luginski's, council member Haven's, and council member Catallo's emails, with a copy to all other City Council members and the city

manager, stating that he agreed “with the discussion string here and the comments made.” Defendants have a copy of the email. MCR 2.113(F)(1)(b).

41. On April 19, 2015, council member Haven sent an email to the other City Council members and the city manager requesting that the matter be placed on the agenda for the next City Council meeting on April 27, 2015, and asking that the city manager “provide all the council members with a copy of our ethics policy for review prior to the meeting.” Defendants have a copy of the email. MCR 2.113(F)(1)(b).

42. Council members Catallo, Haven, and Hunter and Mayor Luginski all used personal email accounts for the communications identified above rather than their City email accounts.

43. Council member Catallo stated in her email: “Please note: This is not for publication.”

April 27, 2015 City Council Meeting

44. The agenda for the April 27, 2015 City Council meeting included as the last item: “Discussion: Richard Bisio Social Media.”

45. Included with the packet of material distributed to the City Council and to the media and posted on the City’s web site were—

(a) An obsolete copy of the City’s ethics ordinance with the handwritten notation “See section 4.0” on the top of the first page. This was an apparent ref-

erence to section 4.01 of the ordinance, titled “Confidentiality.” That provision provides: “No city official or city employee who acquires any information in the course of his or her duties with the city, which information by law or policy is not available at that time to the general public, shall disclose that information to any person, except to those persons authorized to receive the information in the course of conducting official city business.”

(b) A one-page excerpt from the Michigan Attorney General’s Open Meetings Handbook, titled “Parliamentary Procedures,” with a highlight of the following sentence: “Disqualified members – a member of a public body who is disqualified due to a conflict of interest may not be counted to establish a quorum to consider that matter.” (Emphasis in original.)

(c) The city manager’s report, which included the following paragraph:

Councilman Mike Sabol requested a council discussion regarding Richard Bisio’s actions on social media. I was also requested to provide the Council with a copy of the Cities [*sic*] ethic’s [*sic*] policy, which you will find in the packet, which speaks to the ordinance requirements regarding the publication of information discussed in a closed meeting. You will also find a section of the open meeting [*sic*] act in the packet. A section of the act states the rules regarding calculating a quorum when a member of the board recuses themselves.

46. One could reasonably infer from the material in the council packet that the discussion would involve questions of whether Bisio’s conduct violated the City’s ethics ordinance.

47. When the agenda item was called for discussion at the April 27, 2015 City Council meeting, Bisio announced that he would be submitting his resignation from the City Council and explained the reasons for doing so.

48. Notwithstanding that announcement, there followed an approximately 45-minute discussion during which Mayor Luginski and council members Catallo, Haven, Hunter, and Sabol all expressed their strong disapproval of Bisio's actions in disseminating the Catallo Letter and otherwise publicizing matters of city business.

49. During that same discussion at the April 27, 2015 City Council meeting, city attorney Ryan expressed various legal opinions, gave legal advice to the council, and stated that—

(a) He advised the City Council not to hold a closed session on March 9, 2015.

(b) A vote of four members of the seven-member City Council was sufficient to hold a closed session at the March 9, 2015 meeting.

(c) The March 9, 2015 closed session was for the purpose of discussion "attorney-client privileged information," that was allowed under state law, and there was "a legitimate reason to go into closed session."

(d) He "did not present an actual memo with what we were gonna, with all the things we were gonna talk about" because he "didn't have time to prepare an actual memo about the other things we were going to talk about 148 North Main."

(e) The March 9, 2015 closed session "was a valid closed meeting."

(f) Bisio's dissemination of the Engineer's Letter, "which was in the closed session" "was grossly improper" and "in my 37 years [as a municipal attorney], that's probably one of the most irresponsible actions taken by a public official" and the letter "shoulda never been disseminated."

(g) The Catallo Letter was not a public record.

(h) With respect to both the Engineer's Letter and the Catallo Letter, "It's unfortunate that information was leaked out like that."

(i) "The public doesn't have to know every little hiccup in life that happens" and "... this, this information comin' out of city hall is gonna have to be adjusted, frankly, to make sure that something like this doesn't happen again."

**City's Refusal to Produce Public Records
in Response to a Freedom of Information Request**

50. On June 7, 2015, the City was served with a written request for copies of public records under the freedom of information act. Defendants have a copy of the request. MCR 2.113(F)(1)(b).

51. The request sought copies of public records described in the invoices of city attorney Ryan to the City for legal services he purportedly performed for the City in his official capacity as city attorney.

52. The requested records involve matters relating to the City's actions regarding the development and use of 148 N. Main, the City's obligation to remove snow from the steps and walkway between the City's parking lot behind 39 S. Main Street

and Main Street, and the City's response to the clearing of trees by the owner of property at the southeast corner of Main Street and Waldon.

53. City attorney Ryan sent a letter response to the requester dated June 30, 2015. Defendants have a copy of the letter. MCR 2.113(F)(1)(b).

54. City attorney Ryan's response denied the request for 17 of the requested records.

55. City attorney Ryan's denial of the request stated that each of the 17 requested records is "[n]ot a public record pursuant to MCL 15.232(e)." The reference to MCL 15.232(e) is to the statutory definition of a "public record" under the freedom of information act.

56. The records that city attorney Ryan stated are not public records are, on information and belief—

(a) Written communications to and from city attorney Ryan from and to counsel for Clarkston Corner, LLC regarding the development and use of 148 N. Main.

(b) Written communications from Hubbell, Roth & Clark, Inc., the City's engineering consultant, regarding the development and use of 148 N. Main.

(c) Written communications from city attorney Ryan to Hubbell, Roth & Clark, Inc., the City's engineering consultant, regarding the development and use of 148 N. Main.

(d) Written communications from and to city attorney Ryan to and from counsel for the owner of property at the southeast corner of Main Street and

Waldon regarding the City's response to the owner's clearing of trees on that property.

57. Under the City charter, city attorney Ryan is an administrative officer of the City. Charter, § 5.1(a). He is appointed by the City Council and is responsible to and serves at the pleasure of the City Council. Charter, § 5.1(b).

58. At all times relevant to this action, city attorney Ryan acted as an agent, representative, and attorney for the City.

59. City attorney Ryan performed services for the City in his official capacity as city attorney regarding the subject matter or content of each of the 17 records that he stated are not public records. This is evidenced by the facts that (a) city attorney Ryan explicitly identified each of those records in his invoices to the City for services that he purportedly performed for the City and (b) the City paid city attorney Ryan for those purported services.

60. In his response to the freedom of information act request, city attorney Ryan produced copies of numerous other requested records involving the same subject matter as the records that he stated are not public records.

61. On information and belief, the only apparent rationale for city attorney Ryan to claim that the 17 withheld records are not public records is that they were not copied or sent to the city manager or other personnel in the City offices but were instead only sent to or by city attorney Ryan himself.

62. The records that city attorney Ryan stated are not public records are records sent and received by city attorney Ryan in the performance of an official function on behalf of the City, namely acting in his capacity as an agent, representative, and attorney for the City and participating in discussion, negotiations, and communications regarding City business.

63. The records that city attorney Ryan stated are not public records are therefore public records because they are “writing[s] ... owned, used, in the possession of, [and] retained” by the city attorney “in the performance of an official function” as defined by the freedom of information act. MCL 15.232(e).

Count 1
Violation of the Open Meetings Act
(March 9, 2015 Closed Session)

64. Plaintiff incorporates the preceding allegations.

65. The open meetings act provides—

(a) “All meetings of a public body shall be open to the public”
MCL 15.263(1).

(b) “All decisions of a public body shall be made at a meeting open to the public.” MCL 15.263(2).

(c) “All deliberations of a public body constituting a quorum of its members shall take place at a meeting open to the public” except as otherwise provided in the open meetings act. MCL 15.263(3).

(d) “A 2/3 roll call vote of members elected or appointed and serving is required to call a closed session” except for certain specific categories of closed sessions. MCL 15.267(1).

66. Section 8 of the open meetings act provides that “[a] public body may meet in a closed session only for” the purposes listed in that section. MCL 15.268.

67. The City Council is a “public body” as defined in the open meetings act. MCL 15.262(a).

68. The vote at the March 9, 2015 City Council meeting of four members of the seven-member City Council to meet in a closed session did not constitute a vote of “2/3 ... of members elected or appointed and serving” on the City Council. MCL 15.267(1).

69. None of the exceptions to the requirement of a vote of “2/3 ... of members elected or appointed and serving” on the City Council applied to the March 9, 2015 vote to meet in a closed session.

70. The open meetings act does not authorize meeting in a closed session “for the purpose of an attorney/client privilege discussion” when there is no written, privileged document that is the subject of the closed session.

71. City attorney Ryan did not provide the City Council with a written, privileged document to be discussed at the closed session on March 9, 2015.

72. There was no permissible purpose for the City Council to meet in a closed session on March 9, 2015.

73. The City Council violated the open meetings act by voting to hold and holding a closed session at the March 9, 2015 meeting.

Plaintiff requests the court to—

A. Declare that the closed session at the March 9, 2015 City Council meeting was held in violation of the open meetings act.

B. Declare that the Engineer's Letter and city attorney Ryan's cover memo were not privileged and were not a basis for holding the closed session of the City Council at the March 9, 2015 City Council meeting.

C. Enjoin defendants from holding a closed session of the City Council when a two-thirds vote of council members is required under MCL 15.267(1) unless five members of the seven-member City Council vote in favor of holding a closed session, regardless of whether a member recuses himself or herself and regardless of whether a member is absent from the meeting.

D. Enjoin defendants from holding a closed session of the City Council to discuss oral opinions or oral advice from the city attorney.

E. Award plaintiff court costs and actual attorney fees for this action.

F. Grant any other appropriate relief.

Count 2
Violation of the Open Meetings Act
(City Council's Non-Public Email Deliberation and Decision)

74. Plaintiff incorporates the preceding allegations.

75. In its exchange of emails on April 18 and 19, 2015, a quorum of the City Council deliberated and made a decision that the Catallo Letter was “private correspondence” and that Bisio improperly disseminated the letter to the public before the City Council decided whether and when the letter should be disclosed to the public.

76. In doing so, the City Council violated the open meetings act.

Plaintiff requests the court to—

A. Declare that the exchange of emails among the members of the City Council on April 18 and 19, 2015 constituted deliberation and a decision outside a public meeting in violation of the open meetings act.

B. Enjoin defendants from conducting deliberations (except as permitted for closed sessions) and making decisions by email or other communications outside a public meeting.

C. Award plaintiff court costs and actual attorney fees for this action.

D. Grant any other appropriate relief.

Count 3
Action for Declaratory Judgment Regarding Public Records

77. Plaintiff incorporates the preceding allegations.

78. Defendants demonstrated their intention and policy to mischaracterize public records as non-public, to prevent or delay the public availability of public records, to use personal email accounts with the belief that they can communicate pri-

vately in the performance of an official function without those communications becoming public records, and denying freedom of information act requests for public records in at least the following ways:

(a) Improperly claiming that the Engineer's Letter is an attorney-client privileged document.

(b) Declaring, through city attorney Ryan's statement at a public meeting of the City Council, that the Engineer's Letter should not have been disseminated to the public.

(c) Suggesting that Bisio may have violated the City's ethics ordinance by disseminating the Engineer's Letter to the public.

(d) Declaring, through city attorney Ryan's statement at a public meeting of the City Council, that the Catallo Letter is not a public record.

(e) Deciding in an email exchange among a quorum of the City Council that the Catallo Letter was "private correspondence."

(f) Deciding in an email exchange among a quorum of the City Council that the City Council should determine whether a public record should be made available to the public.

(g) Using personal email accounts with the apparent belief that such communications do not constitute public records even though they are created in the performance of an official function.

(h) Characterizing an email of a City Council member regarding City business and created in the performance of an official function as “not for publication.”

(i) Declaring, through city attorney Ryan’s statement at a public meeting of the City Council, that the public does not need to know “every little hiccup in life that happens.”

(j) Declaring, through city attorney Ryan’s statement at a public meeting of the City Council, that “this information comin’ out of city hall is gonna have to be adjusted, frankly, to make sure that something like this doesn’t happen again.”

(k) Denying a freedom of information act request for public records received by or sent to the city attorney in his official capacity as city attorney regarding the City’s public business on the improper ground that those records are not public records.

79. Defendants’ past conduct and stated intention and policy show that defendants intend to and will violate the freedom of information act by mischaracterizing public records as non-public, preventing or delaying the availability of public records, using personal email accounts with the belief that they can communicate privately in the performance of an official function without those communications becoming public records, and denying freedom of information act requests for public records.

80. Plaintiff intends to request and/or disseminate copies of public records of the City in the future.

81. Based on defendants' actions and stated intention and policy, plaintiff reasonably believes that the City will mischaracterize public records as non-public, prevent or delay the availability of public records in violation of the freedom of information act, use personal email accounts with the belief that they can communicate privately in the performance of an official function without those communications becoming public records, and deny freedom of information act requests for public records.

82. There is an actual controversy regarding the defendants' intention and policy to violate the freedom of information act and regarding plaintiff's and the public's rights to obtain copies of the City's public records.

83. A declaratory judgment is necessary and appropriate to guide plaintiff's and defendants' future conduct in order to preserve plaintiff's and the public's rights to access to the City's public documents.

Plaintiff requests the court to—

A. Declare that written communications from members of the public received by the City regarding City business are public records from the time that the City receives them.

B. Declare that written communications from and to the city attorney acting in his official capacity as city attorney from persons outside of City government

regarding City business are public records regardless of whether the city attorney shares copies of those with other City officials or not.

C. Declare that the City must make its public records available to the public in response to a proper request for such records.

D. Declare that defendants may not delay making City public records available to the public in response to a proper request for such records in order to consider and decide whether such public records should be disseminated to the public.

E. Declare that any person in possession of a public record of the City may disseminate the public record without restriction.

F. Declare that all written communications in the performance of an official function are public records regardless of whether the communications are made on personal email accounts or other non-City media.

G. Declare that the Engineer's Letter and city attorney Ryan's cover memo are public records from the time they were created.

H. Declare that the Catallo Letter was a public record from the time that the City received it.

I. Declare that Bisio's dissemination of the Engineer's Letter and the Catallo Letter did not violate the City's ethics ordinance or any other City ordinance or the laws of the state.

J. Award plaintiff court costs.

K. Grant any other appropriate relief.

/s/ Richard Bisio
Richard Bisio
201 W. Big Beaver, Ste. 600
Troy, MI 48084
248 528-1111

Dated: July 16, 2015

Certificate of Service

I hereby certify that on July 16, 2015, I electronically filed the foregoing paper with the Clerk of the Court using the EFC system which sends notification of such filing to all parties of record.

By: /s/ Richard Bisio
Richard Bisio