

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

SUSAN BISIO,

Plaintiff,

v

CITY OF THE
VILLAGE OF CLARKSTON,

Defendant.

2023-199444-CZ

JUDGE MARTHA D.
ANDERSON

Case No. 2023- -CZ

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COMPLAINT

1. Plaintiff Susan Bisio is an individual.
2. 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 (“FOIA”). MCL 15.232(h)(iii).
3. This court has jurisdiction under MCL 15.240(1)(b) because this is a civil action to compel the City’s disclosure of public records.
4. This action involves two FOIA requests to the City for public records involving the City’s actions against the Millpond Inn Bed & Breakfast, including, but not limited to, records regarding the City’s actions and plans to attempt to shut down

the bed and breakfast or take other adverse action against that business on a questionable legal basis and for which the city attorney recommended there be no public discussion at a city council meeting with representatives of the bed and breakfast.

5. On January 19, 2023, plaintiff sent an emailed FOIA request (the “First Request”) to the city clerk, who is the City’s FOIA coordinator.

6. The First Request asked for these public records:

(1) the document (or documents) referred to in the January 9th city council meeting as the “court-ordered special variance” for the Millpond Inn Bed and Breakfast;

(2) all correspondence between Clarkston or its agents or representatives and the owners of the Millpond Inn Bed and Breakfast within the last two years; and

(3) a copy of all non-privileged correspondence within OR between the city and any other person or business concerning the Millpond Inn Bed and Breakfast within the last two years. By way of example, but not limitation, this would include records of code officer or building inspection reports, any violations issued, or resident/business/council member complaints.

7. The First Request defined “Clarkston” to mean the City of the Village of Clarkston.

8. The First Request stated that it “should be read to include all records in the possession of any Clarkston charter officer, elected official, appointed official, contracted official, employee, or the Office of the City Attorney.” See *Bisio v City of the Village of Clarkston*, 506 Mich 37; 954 NW2d 95 (2020) (records in the possession of the City’s Office of the City Attorney are public records under FOIA).

9. The First Request was deemed received on Friday, January 20, 2023. MCL 15.235(1) (email request is deemed received on the next business day).

10. The City's response to the First Request was due on January 27, 2023. MCL 15.235(2) (public body must respond to request within five business days of receipt).

11. The City did not timely respond to the First Request and did not issue a notice extending the time to respond under MCL 15.235(2)(d).

12. The City's failure to timely respond to the First Request constitutes a denial of the request. MCL 15.235(3).

13. On February 2, 2023, plaintiff's counsel wrote to the City's FOIA coordinator regarding, among other things, the City's failure to timely respond to the First Request.

14. The City untimely responded to the First Request by letter dated February 3, 2023, with copies to the city manager and city attorney. The City produced two records purporting to be responsive to the First Request. The City's untimely response was deficient in at least the following respects:

(a) The City's untimely response suggested that there might be exempt records responsive to the First Request when the City purported to produce "existing, non-exempt records." To the extent the City claims there is an applicable exemption, its response did not comply with the requirements for claiming an exemption under MCL 15.235(5)(a) by stating the statutory basis for an exemption.

(b) The City's untimely response produced a copy of the published Michigan Court of Appeals opinion in *Kopietz v Zoning Board of Appeals for*

the City of the Village of Clarkston, 211 Mich App 666 (1995). The City purportedly produced this record in response to the request for the “court-ordered special variance” referred to in the January 9 city council meeting (request (1)). The court of appeals opinion is not a “court-ordered special variance.” Rather the opinion reverses a decision of the City’s zoning board of appeals that denied a request to change an existing nonconforming use to a different nonconforming use. The opinion remanded the matter to the City’s zoning board of appeals for further proceedings. It did not create or order a “special variance” and it did not specify any terms of such a variance. The record the City produced therefore was not responsive to request (1) of the First Request.

(c) The City’s untimely response to request (2) of the First Request stated that the City’s FOIA coordinator found no requested correspondence. The response did not expressly deny the request and did not comply with MCL 15.235(5)(b) by providing a certificate that the requested public records do not exist.

(d) The City’s untimely response provided a single violation notice, apparently in response to request (3) of the First Request. The City provided none of the correspondence requested in request (3), did not claim that such correspondence did not exist, and did not provide a certificate that the requested records do not exist as required by MCL 15.235(5)(b).

(e) To the extent the City’s response denied part or all of the First Request, the response did not comply with MCL 15.252(5)(d) and (e) by giving

notice to plaintiff of her rights to appeal, seek judicial review, and receive attorney fees as provided in FOIA.

15. Notwithstanding the inadequacy of the City's response to the First Request, plaintiff engaged in an email exchange with the City's FOIA coordinator in an attempt to obtain the requested records.

16. On February 3, 2023, plaintiff informed the City's FOIA coordinator (with copies to the city manager and city attorney) of the City's failure to comply with the statutory requirements for denying a record request and stated the First Request included records that likely exist but that the City did not produce.

(a) Plaintiff provided the City's FOIA coordinator with a copy of a city attorney statement billing the City for "B&B response to Notice of Violation." Plaintiff stated: "If there is an existing written response to the notice of violation that was made to any Clarkston charter officer, elected official, appointed official, contracted official, employee, or the Office of the City Attorney, it should have been included in your response to my request."

(b) Plaintiff provided the City's FOIA coordinator with a copy of the code enforcement officer's statement billing the City for various matters regarding the Millpond Inn Bed & Breakfast.

(c) Plaintiff's email informed the City's FOIA coordinator that "The city attorney billing references correspondence from the code enforcement officer and the city manager, and the code enforcement officer's billing references

correspondence from Jennifer Speagle [former city clerk] and correspondence to Jonathan Smith [city manager], which were not provided.”

(d) Plaintiff’s email once again requested that the City perform a thorough search for responsive records:

If there are any written communications (including emails or text messages) among the city’s agents (including emails or text messages from or to the code enforcement officer, the city manager, or the city attorney), they should have been included. The failure to include such records when the city attorney’s and code enforcement officer’s billing records indicate otherwise brings into question the thoroughness of the city’s efforts to find responsive records. I request that you confirm that the city thoroughly reviewed all sources of responsive records, including offsite files, emails (including Jennifer Speagle’s [former city clerk’s] email account), and electronic devices maintained by the code enforcement officer, the city manager, and the city attorney and any other city agent involved in this matter.

17. Plaintiff’s February 3, 2023, email to the City’s FOIA coordinator also informed the FOIA coordinator that, to the extent the City claimed any exemption for records not produced, the City’s untimely response did not comply with the requirements for claiming an exemption under MCL 15.235(5)(a) by stating the statutory basis for an exemption. Plaintiff requested that the City “clarify whether the city is withholding records based on an exemption claim.”

18. On February 4, 2023, because of the City’s failure to timely and properly respond to the First Request and in a second attempt to obtain the specific City records that the City repeatedly publicly stated govern operation of the Millpond Inn Bed & Breakfast and on which the City supposedly relied to restrict the use of the Millpond Inn Bed & Breakfast property, plaintiff sent another record request to the City (the “Second Request”).

19. The Second Request asked for these public records:
 1. All non-privileged documents, including but not limited to settlement agreements, correspondence, court filings, and court orders pertaining to any litigation between the city (including its boards and commissions) and Floyd Kopietz or Joan Kopietz or any other persons with an interest in the Millpond Inn Bed & Breakfast, including, but not limited to Oakland County Circuit Court cases 1992-442118-CZ, 1993-467476-AA, 1991-423336-AA, and 1992-442117-AA, dated on or after May 6, 1997. This is the date of the (unpublished) court of appeals opinion in court of appeals case no. 185309 in the zoning dispute involving 155 North Main Street (the Millpond Inn). (Please note that I do not need a copy of the unpublished May 6, 1997 court of appeals opinion in case no. 185309.)
 2. All Zoning Board of Appeals records dated on or after May 6, 1997, including but not limited to minutes and determinations, pertaining to 155 North Main Street (the Millpond Inn).
 3. All Planning Commission records dated on or after May 6, 1997, including but not limited to minutes and determinations, pertaining to 155 North Main Street (the Millpond Inn).

20. The Second Request stated that it “should be read to include all records in the possession of any Clarkston charter officer, elected official, appointed official, contracted official, employee, or the Office of the City Attorney.”

21. The Second Request was deemed received on Monday, February 6, 2023. MCL 15.235(1) (email request is deemed received on the next business day).

22. The City’s response to the Second Request was due on February 13, 2023. MCL 15.235(2) (public body must respond to request within five business days of receipt).

23. The City did not respond to the Second Request and did not issue a notice extending the time to respond under MCL 15.235(2)(d).

24. The City's failure to respond to the Second Request constitutes a denial of the request. MCL 15.235(3).

25. On February 6, 2023, the City's FOIA coordinator responded to plaintiff's February 3 email (with copies to the city manager and city attorney) by stating that she was "checking any past correspondence" in the previous city clerk's email account and was "working on the rest of your request," apparently referring to the First Request. She did not produce any additional records.

26. On February 7, 2023, plaintiff wrote to the City's FOIA coordinator (with copies to the city manager and city attorney) to clarify that plaintiff had included the city attorney's and code enforcement officer's billing records in plaintiff's February 3, 2023, email to show that there were communications involving at least the city manager, former city clerk, code enforcement officer, and city attorney and "they should be asked to search for responsive records." Plaintiff provided the City's FOIA coordinator with a form used by a previous city clerk that that clerk had sent to persons who might have records responsive to FOIA requests, so that the City's FOIA coordinator was fully informed of the need to search for responsive records in the hands of other City personnel.

27. On February 9, 2023, the City's FOIA coordinator sent plaintiff an email purporting to include correspondence responsive to request (2) of the First Request (correspondence between the City and the owners of the Millpond Inn Bed & Breakfast). The coordinator sent copies to the city manager, city attorney, and mayor. The communication did not address the Second Request.

28. On February 12, 2023, plaintiff sent the City's FOIA coordinator a lengthy email with several attachments showing that the City still had not produced all records responsive to the First Request that were referenced in various billing records and referenced in records previously produced, including attachments to emails the City produced. Plaintiff requested that the City provide the additional records "as soon as possible" or, alternatively, if the referenced records didn't exist, certify their nonexistence as required under MCL 15.245(5)(b), and, if the City was withholding something under an exemption claim, describe what is being withheld and the claimed exemption as required under MCL 15.245(5)(a).

29. Plaintiff's February 12, 2023, email also stated:

The response doesn't evidence an effort by city officials to search off-site and personal email files. Please be advised that such records of the conduct of city business are public records regardless of whether they may have been copied to someone with a city email address. I once again ask that the city make a full review of all sources of responsive records, including email files of those persons acting on behalf of the city who used other emails systems and addresses besides the city's email system.

30. On February 17, 2023, the City's FOIA coordinator told plaintiff the coordinator was "working on answering" plaintiff's First Request but that she didn't have time "without unduly burdening or interfering with the City of the Village of Clarkston's operations." She did not provide a date when she might produce all responsive records. The communication did not address the Second Request.

31. On February 20, 2023, plaintiff informed the City's FOIA coordinator that "unduly burdening or interfering with the City of the Village of Clarkston's operations" was not a statutory ground for delaying a response to a FOIA request and

that FOIA does not authorize a public body to unilaterally extend a statutory response deadline.

32. Plaintiff's February 20, 2023, email further stated—

Messrs. Smith [city manager] and Ryan [city attorney] know what I'm looking for, they have some of the records, and they have not turned them over to you. As an example, they both have copies of the draft and finalized recent "notice of violation" for the Millpond Inn that were attached to internal emails, yet those attachments were not provided to me. They both also have the Millpond Inn's response to that "notice of violation," and both know that I requested that document originally and in our subsequent email exchanges.

33. Plaintiff's February 20, 2023, communication to the City's FOIA coordinator also informed her that the City had failed to timely respond to the Second Request.

34. Plaintiff's February 20, 2023, communication to the City's FOIA coordinator authorized an extension of time for responding to plaintiff's requests to February 24, 2023.

35. The City did not respond to plaintiff's February 20, 2023, communication, did not advise that additional time was needed beyond February 24, 2023, and did not provide a date certain by which it would respond.

36. The City has not produced the records responsive to the First Request notwithstanding that records the City produced and other publicly available records reference other responsive records.

37. The City has not responded to the Second Request.

38. In a final attempt to obtain the requested records, on March 9, 2023, plaintiff sent an email to the members of the City's city council (with copies to the

city manager and city attorney) setting out the history of plaintiff's attempts to obtain the requested records.

39. The city council did not acknowledge or respond to plaintiff's March 9, 2023, communication.

40. Plaintiff reluctantly decided to file this action because it has become clear that the City is unwilling to produce or certify the nonexistence of records regarding its plans for and the basis for its actions in trying to put the Millpond Inn Bed & Breakfast out of business, which are being conducted at taxpayer expense; the City and its officers, agents, and employees possess responsive records that the City has failed to produce; and the City has not proceeded in good faith in responding to plaintiff's requests despite plaintiff's efforts to explain to the City's FOIA coordinator, the city manager, the city attorney, and the city council the City's legal obligations and the nature of the records plaintiff is seeking.

41. The City's denial of plaintiff's requests and its failure to provide the requested records violated the freedom of information act.

42. Plaintiff does not seek actual, compensatory, punitive, or exemplary damages or a civil fine under MCL 15.240(7). Plaintiff seeks only the non-monetary relief of an order for production of the requested records and an award of reasonable attorney fees, costs, and disbursements associated with the non-monetary relief under MCL 15.240(6).

Plaintiff requests that the court—

A. Order the City to cease withholding and to produce all records responsive to plaintiff's requests, regardless of location. MCL 15.240(4).

B. Award plaintiff her reasonable attorney fees, costs, and disbursements under MCL 15.240(6).

C. Grant any other appropriate relief except damages or a fine under MCL 15.240(7).

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March 22, 2023