

RECEIVED
STATE OF MICHIGAN
IN THE COURT OF CLAIMS
2016 NOV -4 PM 3: 17

NANCY WARREN,

Plaintiff,

v

Case No. 16-000269-MZ
Honorable Stephens

MICHIGAN DEPARTMENT OF
NATURAL RESOURCES,

Defendant.

Scott W. Howard (P52028)
Rebecca Millican (P80869)
OLSON, BZDOK & HOWARD, P.C.
Attorneys for Plaintiff
420 East Front Street
Traverse City, MI 49686
Telephone: (231) 946-0044
Email: scott@envlaw.com
rebecca@envlaw.com

STATEMENT PURSUANT TO MCR 2.113(C)(2)(a): There is no other pending or resolved civil action arising out of the transaction or occurrence alleged in the Complaint.

COMPLAINT

NATURE OF THE CASE

This is a suit seeking documents under the Michigan Freedom of Information Act (MCL 15.231 et seq.) ("FOIA"). Plaintiff often submits FOIA requests to the Department of Natural Resources ("DNR") seeking records related to the management of Michigan's wild wolf population and, specifically, reports of wolf depredation of domestic dogs and livestock. In response to Plaintiff's most recent FOIA request, the DNR provided some redacted and incomplete documents and denied the existence of any other responsive information, though

Plaintiff has received complete records in response to prior similar requests. Plaintiff respectfully requests this Court order the DNR to disclose the records and award her costs, attorney's fees, and punitive damages.

PARTIES

1. Plaintiff Nancy Warren is an individual residing in Ontonagon County, Michigan.

2. Defendant Department of Natural Resources is a Michigan executive agency. According to its mission statement, the DNR is "committed to the conservation, protection, management, use and enjoyment of the state's natural and cultural resources for current and future generations."

3. Defendant DNR is a "public body" as defined by the FOIA (MCL 15.232(d)). The public records maintained by the DNR are subject to FOIA's disclosure requirements.

JURISDICTION AND VENUE

4. This Court has jurisdiction pursuant to MCL 15.240(1)(b) because Plaintiff Warren has requested under the FOIA that the DNR disclose certain public records in its possession, and the DNR has made a final determination to deny a portion of Plaintiff's request.

5. This Court also has jurisdiction pursuant to MCL 15.240a(1)(b)(iii) because Plaintiff challenged the fee charged by the DNR for the partial production of records she requested, and Keith Creagh, Director of the DNR, upheld that fee on appeal.

6. Venue is proper in this court pursuant to MCL 15.240(1)(b) because actions challenging the FOIA decision of a state public body are commenced in the Court of Claims.

FACTUAL BACKGROUND

7. Plaintiff Nancy Warren is an individual living in Ontonagon County, in Michigan's Upper Peninsula. Ontonagon County is a part of wolf management unit B, one of the three zones in the Upper Peninsula where wolf hunts have been conducted, with the purported purpose of reducing wolf conflicts. Plaintiff has been a self-described "wolf advocate" for more than twenty years.

8. In addition to wolf advocacy, Plaintiff conducts wolf education programs across Michigan and Wisconsin. Plaintiff relies on factual information from the DNR (among other sources) in educating others about wolves.

9. In 2006, Plaintiff represented the non-profit conservation organization Defenders of Wildlife on the Michigan Wolf Management Roundtable, a group of stakeholders of differing interests convened to craft principles and recommendations to the DNR for the management of Michigan's wild wolf population. The Roundtable's recommendations are included in the Michigan Wolf Management Plan.¹ Plaintiff currently serves as the Executive Director and Great Lakes Regional Director of the National Wolfwatcher Coalition, a 501(c)(3) non-profit organization whose mission is to "educate, advocate, and participate for the long term recovery and the preservation of wolves based on the best available science and the principles of democracy."

10. For more than twenty years, Plaintiff has communicated with various DNR officials about the wolves living in Michigan's Upper Peninsula and the DNR's management program. In particular, Plaintiff enjoyed a cordial working relationship with the DNR's biologists who would frequently (and quickly) respond to Plaintiff's email or telephone

¹ The Michigan Wolf Management Plan is available at:
http://www.michigan.gov/documents/dnr/wolf_management_plan_492568_7.pdf.

questions about wolf populations, depredation events, and other facts and data concerning wolves in the Upper Peninsula.

11. However, in mid- 2013, DNR officials' attitude towards Plaintiff began to change. Officials became much less forthcoming with information, and Plaintiff often had to submit formal FOIA requests to obtain information she had routinely received via email or telephone inquiry in the past. Plaintiff believes this shift was due to her opposition to a planned wolf hunt in 2013 and her willingness to publicly question the DNR's justification for that hunt.

12. The FOIA requests submitted by Plaintiff over the past three years have been met with varying response. One DNR FOIA liaison did not charge Plaintiff a fee; another liaison in a different office nearly always did. In the past Plaintiff's requests were often addressed within a day or two of submission; since 2013, the DNR often does not respond for many weeks (sometimes after the deadline), even after invoking the statutory 10-day extension. Plaintiff has also noticed lately that higher-level DNR officials (such as the heads of the wildlife division and natural resources commission) have been carbon-copied on emails sent to her by FOIA liaisons.

13. Local DNR employees (who had previously been very responsive to Plaintiff's questions), will no longer provide Plaintiff with any substantive information.

14. In short, it appears that higher-level officials have ended the friendly and informal relationship Plaintiff had previously enjoyed with local DNR officials in the Upper Peninsula and have instituted a policy of tight lips, responding to Plaintiff's questions by directing her to file a FOIA request in nearly every instance. The DNR's new policy towards Plaintiff is in conflict with tenets of the Wolf Management Plan², hinders the freedom of

² See, e.g., Section 6.1.1, setting forth the DNR's express recognition that coordination of an education program is "the most effective way to overcome many challenges and barriers . . . [and] can help identify target audiences, information needs, and the educational approaches that may be most effective. Partnership with multiple organizations and stakeholder groups can also lend credibility to educational materials and help ensure those

information, and clouds governmental transparency. Now even information obtained through the FOIA is being filtered.

SPECIFIC ALLEGATIONS

15. Although Plaintiff is interested in all aspects of Michigan wolf management, in particular, she seeks out township, range, and section information for reported depredation or conflicts events, and has often specifically highlighted that interest in her requests. The location and frequency of wolf depredation events can influence how wolves are managed in the Upper Peninsula, including whether lethal management measures are implemented. Township, range, and section is usually given in depredation reports and is included among data in a spreadsheet maintained by the DNR documenting such events.

16. In years past, township, range, and section were routinely provided in response to Plaintiff's FOIA requests. In 2014, after the DNR initially refused to include township, range, and section among FOIA records, Plaintiff was given that information after an appeal.

17. On May 27, 2016, Plaintiff submitted a FOIA request seeking:

The data spread sheet (or any other format this information is maintained) listing Section, Township, Range, Payments for all wolf depredations and missing livestock reported in 2016.

Please provide a copy of all wolf activity reports/investigation reports for all wolf-livestock and/or dog complaints in Ontonagon County in 2016.

Please provide a copy of reports and or documentation for any non-lethal measures implemented in Ontonagon County in an attempt to reduce wolf conflicts. [Exhibit A.]

18. On June 29, 2016, the DNR cashed Plaintiff's check for \$87.50, covering the alleged costs to the DNR in connection with Plaintiff's request.

19. On August 3, 2016, Plaintiff received an email response to her request, stating

materials provide unbiased, accurate information."

that her request had been granted in part and denied in part. **Exhibit B.** The stated reason for the partial denial was that “information of a personal nature (i.e., names, addresses, and personal identifiers of private individuals)” needed to be redacted under Section 13(1)(a) of the FOIA. Thus, the DNR provided Plaintiff with redacted copies of the depredation reports (with names and township, range, and section redacted) and a spreadsheet that omitted township, range, and section, but its response did not contain any further information or explanation as to which parts of Plaintiff’s request were being granted or denied or whether other records existed that were being withheld.

20. On August 8, 2016, Plaintiff sent a follow-up email to the FOIA coordinator, pointing out the deficiencies in the August 3 email from the DNR and the fact that in the past, she had received the same information that was denied on August 3. **Exhibit C.** In response, Plaintiff was told that her requests were now being “reviewed and a determination made . . . as to the appropriate exemptions.” No explanation was offered as to why the DNR suddenly had determined names and township, range, and section information was exempt. Further email exchanges between Plaintiff and the FOIA coordinator clarified that the DNR had no documentation concerning the implementation of non-lethal measures or reports of missing livestock.

21. On September 1, 2016 Plaintiff filed a FOIA appeal, arguing that the privacy exemption should not apply, questioning the alleged non-existence of documents concerning non-lethal measures, and disputing the DNR’s fee. **Exhibit D.** On September 19, 2016, the DNR upheld in full the partial denial of Plaintiff’s request and the fee. **Exhibit E.**

COUNT I – FREEDOM OF INFORMATION

22. The township, range, and section information contained in the depredation reports and within the DNR's spreadsheet of depredation events is part of a "public record" subject to FOIA.

23. Further, names of individuals making depredation reports are also part of a "public record" subject to FOIA.

24. Any documentation evidencing the implementation of non-lethal measures used to manage wolf populations in Ontonagon County is also a "public record" subject to FOIA.

25. The DNR has provided names and township, range, and section information to Plaintiff in the past, without invoking any statutory exemption or charging a fee.

26. The DNR's proffered basis for denying disclosure of names and township, range, and section information is that such information is allegedly exempt from disclosure under Section 13(1)(a) of the Freedom of Information Act, MCL 15.243(1)(a).

27. Section 13(1)(a) provides an exemption for "[i]nformation of a personal nature if public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy." MCL 243(1)(a).

28. The names and township, range, and section information are not information of a "personal nature." Such information is not intimate, embarrassing, private or confidential under *Michigan Fed'n of Teachers v Univ of Michigan*, 481 Mich 657, 676 (2008).

29. Disclosure of the names and township, range, and section information would reveal information about the DNR's administration of Michigan's wolf management program and whether the program is functioning as intended and meeting its goals – core purposes of FOIA. *Michigan Fed'n of Teachers*, 481 Mich 657, 660.

30. The DNR's proffered basis for denying disclosure of documentation evidencing the implementation of non-lethal measures used to manage wolf populations in Ontonagon County is that no such records exist. This assertion is highly unlikely, since the use of non-lethal measures is mentioned among the documents Plaintiff did receive, and non-lethal measures are often subsidized through various government agencies. Moreover, the Wolf Management Plan places a high priority on the use of non lethal measures to prevent or deter livestock losses.³

31. The wild wolf population in Michigan's Upper Peninsula is of keen public interest. The 2015 Updated Wolf Management Plan drew 1481 public comments, the vast majority of which expressed a view that only problem wolves should be controlled. The Plan itself recognizes that the goal of maintaining a viable wolf population is supported by "the majority of Michigan citizens in every public opinion poll."

32. Among the "wolf management strategies" outlined in the Plan are an expressed intent to increase public awareness and understanding of wolves and wolf-related issues. In furtherance of that objective, the Plan recognizes that "[p]roviding prompt and professional responses to information requests is one way to increase individual understanding, dispel misconceptions, and generate support for wolf management efforts."

33. The DNR's refusal to release the requested information is a violation of the Freedom of Information Act and of the DNR's own policy as set forth in the Wolf Management Plan.

34. The DNR's refusal to release the requested information is arbitrary and capricious.

³ "This strategy places a high priority on developing, evaluating and applying non-lethal management methods to reduce depredation problems. Non-lethal methods will be applied wherever they are expected to be effective and where the severity and immediacy of the problem do not warrant more aggressive action. Non-lethal methods can include the elimination of wolf attractants, the use of improved husbandry practices and scare devices (see 6.10.2), as well as adverse conditioning." Wolf Management Plan, Section 6.10.3.

COUNT II-EXCESSIVE FEE

1. In response to her FOIA request, Plaintiff received only 33 pages of records. On this particular occasion, the DNR charged Plaintiff \$87.50 for the cost of searching for, redacting, copying, and sending (via e-mail) the requested records. **Exhibit F.**

2. The fee charged by the DNR was upheld in its entirety by DNR Director Creagh on appeal.

3. This fee was excessive and did not comport with Section 4 of the FOIA, MCL 15.234 for the following reasons: (1) Plaintiff was charged for labor costs related to the redaction of non-exempt information; (2) Plaintiff was charged an excessively high labor rate to search, locate, and examine records of \$31.20 per hour; (3) the labor charges were not reduced pursuant to MCL 15.234(9)(a), though the DNR took more than 60 days to respond to Plaintiff's FOIA request; (4) the fee should have been waived pursuant to MCL 15.234(2).

4. The DNR's response to Plaintiff's appeal did not comport with Section 10a of the FOIA, MCL 15.240a for the following reasons: (1) the DNR Director failed to respond within 10 business days; (2) the response failed to provide a "specific basis" supporting the required fee; (3) the response contained a statement that the fee amount complied with DNR's publicly available procedures and guidelines, when in fact the fee did not comply because the fee was not uniform and was imposed based on Plaintiff's identity as a wolf advocate and a sometimes-critic of DNR wolf management practices.⁴

5. The DNR acted arbitrarily and capriciously by imposing an excessive fee.

⁴ The DNR's FOIA Policy and Procedures is available at: http://www.michigan.gov/documents/dnr/DNR-FOIA-Procedure_482014_7.pdf. Among its stated fee guidelines is the statement that "[f]ees will be uniform and not dependent upon the identity of the requesting person."

RELIEF REQUESTED

For the reasons stated above, Plaintiff requests the Court grant the following relief:

- A. Order the DNR to provide the public records requested in Plaintiff's FOIA request, pursuant to MCL 15.240(4).
- B. Award Plaintiff her reasonable attorney's fees, costs and disbursements, pursuant to MCL 15.240(6).
- C. Award Plaintiff \$1000, or whatever amount the Court finds appropriate, as punitive damages, pursuant to MCL 15.240(7).
- D. Award Plaintiff \$500, or whatever amount the Court finds appropriate, as punitive damages, pursuant to MCL 15.240a(7).
- E. Order all other legal, declaratory, or equitable relief to which Plaintiff may be entitled under the circumstances, including compensatory damages, costs, interest, and attorney's fees.

OLSON, BZDOK & HOWARD, P.C.

DATE: November 2, 2016

BY: 
Rebecca Millican (P80869)

STATE OF MICHIGAN
IN THE COURT OF CLAIMS

NANCY WARREN,

Plaintiff,

v

Case No. _____
Honorable _____

MICHIGAN DEPARTMENT OF
NATURAL RESOURCES,

Defendant.

Scott W. Howard (P52028)
Rebecca Millican (P80869)
OLSON, BZDOK & HOWARD, P.C.
Attorneys for Appellant(s)
420 East Front Street
Traverse City, MI 49686
Telephone: (231) 946-0044
Email: scott@envlaw.com
rebecca@envlaw.com

PROOF OF SERVICE

On the date below, I sent by first class mail a copy of COMPLAINT to the counsel of record of all parties to this cause, at their business address(es) as set forth in the caption and/or disclosed by the pleadings filed in this matter.

The statements above are true to the best of my knowledge, information and belief.

OLSON, BZDOK & HOWARD, P.C.

Date: November 2, 2016

By: *Karla Gerds*
Karla Gerds, Legal Assistant