

STATE OF MICHIGAN
COURT OF CLAIMS

NANCY WARREN,

Plaintiffs

v

DEPARTMENT OF NATURAL RESOURCES,

Defendant.

OPINION AND ORDER

Case No. 16-000269-MZ

Hon. Cynthia Diane Stephens

Pending before the Court are the parties' competing motions for summary disposition. For the reasons stated herein, summary disposition is GRANTED to plaintiff in part as to whether the cited exemption applies, and DENIED in part as to plaintiff's remaining claims. Furthermore, summary disposition is GRANTED in part to defendant with respect to plaintiff's remaining claims.

I. PERTINENT BACKGROUND

On or about May 27, 2016, plaintiff submitted a Freedom of Information Act (FOIA) request to defendant, 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." In addition, the request sought copies of "all wolf activity" and wolf-livestock and/or wolf-dog complaints in Ontonagon County in 2016. Finally, the request asked for a copy of "reports and or documentation for any non-lethal measures implemented in Ontonagon County in an attempt to reduce wolf conflicts."

Defendant charged plaintiff a fee of \$87.50 for processing the request, which plaintiff paid. On or about August 3, 2016, defendant denied the request in part and granted it in part. As to the partial denial, defendant asserted that it made redactions to documents "removing information of a personal nature" and which would constitute a clearly unwarranted invasion of privacy. In addition, defendant stated, by way of an August 8, 2016 e-mail to plaintiff, that there "are no reports or documentation" pertaining to plaintiff's requests for reports or documentation for any non-lethal measures implemented in Ontonagon County to reduce wolf conflicts.

On September 1, 2016, plaintiff appealed the partial denial of her request. Defendant responded by upholding its prior partial denial of plaintiff's FOIA request as well as the fee charged plaintiff. As for its assertion of the privacy exemption in MCL 15.243(1)(a), defendant stated that the redacted information, while not revealing personal information, could nonetheless "be used to discern or discover personal information; namely an individual's or individuals' name(s), address(es), and property interests, or when combined with other personal or identifying information can be connected to a specific individual." In regard to plaintiff's assertion that information regarding non-lethal measures existed, defendant again certified that no such information existed, and stated that plaintiff did "not articulate[] a non-conjectural, adequate basis for reversal of the denial." Finally, defendant upheld the fee charged, contending that the fee comported with defendant's publicly available procedures and guidelines for processing FOIA requests.

Thereafter plaintiff filed a complaint in this Court challenging the validity of the privacy exemption as to the redacted township, range, and section information of the spreadsheet she received. She also challenged the redaction of names of reporting individuals from the depredation reports she received. In addition, plaintiff continues to dispute the DNR's assertion

that no records exist regarding the use of non-lethal measures to prevent wolf/livestock interactions in Ontonagon County. Count I of the complaint alleges that defendant violated FOIA in regard to the matters described above.

Count II of the complaint alleges that the \$87.50 fee defendant charged for producing 33¹ pages of responsive records was excessive. Although plaintiff's complaint alleges a number of issues with regard to the fee, her briefing has narrowed her claims to two issues: (1) the fee was excessive because she should not have been charged labor costs associated with redacting information that is not truly within the scope of MCL 15.243(1)(a); and (2) defendant arbitrarily and capriciously imposed the fee based on her identity as a wolf advocate and critic of defendant's wolf-management practices.

Plaintiff moved this Court for partial summary disposition, contending that she was entitled to relief on Count I of her complaint.² Defendant responded by requesting summary disposition in its favor as to the entire complaint under MCR 2.116(C)(8) and (C)(10).

II. ANALYSIS

FOIA provides that, with the exception of incarcerated individuals, all persons "are entitled to full and complete information regarding the affairs of government" MCL 15.231(2). This includes the right—upon providing a public body's FOIA coordinator with a written request describing records—"to inspect copy, or receive copies of the requested public

¹ Some documents in the record refer to this as a 35-page FOIA response.

² In her response to defendant's motion for summary disposition, plaintiff argues that this Court should, pursuant to MCR 2.116(I)(2), grant summary disposition to her as the nonmoving party as to Count II of the complaint (excessive fee).

record of the public body.” MCL 15.233(1). In response to a request that reasonably identifies the information sought, “a public body must disclose all public records that are not specifically exempted under the act.” *Rataj v City of Romulus*, 306 Mich App 735, 749; 858 NW2d 116 (2014). FOIA is a prodisclosure statute and its provisions are to be broadly construed in light of its prodisclosure nature. *Id.* at 748. At the same time, the exemptions listed in the act are to be narrowly construed. *Id.* at 749. A party asserting an exemption under the act bears the burden of proof with regard to the applicability of an exemption. *Herald Co v Bay City*, 463 Mich 111, 119; 614 NW2d 873 (2000).

A. WHETHER THE PRIVACY EXEMPTION APPLIES

The first point of contention in this case is whether the information redacted from defendant’s response to plaintiff’s FOIA request was within the scope of the exemption listed in MCL 15.243(1)(a). The first part of plaintiff’s arguments stem from a spreadsheet provided in response to her request. The spreadsheet contains information about wolf-related incidents, including whether a report was filed, whether it was “verified,” the date and county of the incident, and the livestock involved in the incident. In response to prior FOIA requests³ for similar information, spreadsheets provided by defendant included additional geographic information specifying the “Township,” “Range,” and “Section” where the incident occurred. The spreadsheet provided to plaintiff in response to the FOIA request at issue does not include Township, Range, or Section information, and plaintiff argues that this information should not

³ Plaintiff cites her prior FOIA requests and suggests that, because defendant provided similar information in the past, it should not claim the information as exempt now. The Court disagrees with this assertion, and cites the prior responses only to highlight the information plaintiff sought, but did not receive, in the instant case.

have been redacted. In addition, plaintiff alleges that the redaction of the name(s) of reporting individuals on depredation reports she received in response to her request was improper.

According to defendant, although the Township/Range/Section information does not itself contain personal information—such as an individual’s name or address—it could be used to discern the address at which incidents took place and the name of the property owner(s). According to defendant, there was only one farm located within the township, range, and section responsive to plaintiff’s request; hence, providing this information could be used to ascertain the property owner’s name and address, which defendant believes to be information of a personal nature. In addition, defendant argues that names on reports constitute personal information which can be redacted under MCL 15.243(1)(a).

MCL 15.243(1)(a) permits a public body to exempt from disclosure “[i]nformation of a personal nature if public disclosure of the information would constitute a clearly unwarranted invasion of an individual’s privacy.” Caselaw interpreting this exemption has noted that exemption requires a public body to satisfy a two prong test: “First, the information must be ‘of a personal nature.’ Second, it must be the case that the public disclosure of that information ‘would constitute a clearly unwarranted invasion of an individual’s privacy.’ ” *ESPN, Inc v Mich State Univ*, 311 Mich App 662, 664-665; 876 NW2d 593 (2015), quoting *Mich Federation of Teachers v Univ of Mich*, 481 Mich 657, 675; 753 NW2d 28 (2008).

A public body can satisfy the first prong of the test by showing that the information sought contains intimate or embarrassing details about an individual, or if the information contains private or confidential information relating to a person. *ESPN*, 311 Mich App at 665. See also *Mich Federation of Teachers*, 481 Mich at 676 (“Thus, private or confidential

information relating to a person, in addition to embarrassing or intimate details, is ‘information of a personal nature.’ ”). In ascertaining whether information is “personal,” a reviewing court must remain mindful that FOIA exemptions are to be given narrow construction. *Mager v Dep’t of State Police*, 460 Mich 134, 140-141; 595 NW2d 142 (1999). In addition, a court uses a community standard in determining if something is “personal” in nature. *Id.* at 141. Finally, caselaw has remarked that something is “private” or “personal” if it pertains “to a particular person; one’s own[.]” *Id.* (citation and quotation marks omitted).

The Court concludes that the first set of redacted information at issue in this case—township, range, and section information of wolf-related incidents—does not meet the first prong of the test because it is not “Information of a personal nature.” On the documentary evidence submitted to the Court, the information at issue is simply not “personal.” The information redacted by defendant does not expressly identify an individual’s home address or telephone number. Nothing about the information expressly refers to a particular person. *Cf. Mager*, 460 Mich at 141 (explaining that information falling within the ambit of this exemption is that which pertains “to a particular person” or persons). In fact, the information is only general geographic information; it is not an address, let alone a *home* address.⁴ *Cf. Mich Fed of Teachers*, 481 Mich at 677 n 58 (explaining that the exemption will generally apply to *home* addresses and telephone numbers). Moreover, even if the information referred to a particular individual—and there is no indication that it does—general geographic information describing where a wolf encountered livestock does not fit the definition of “personal.” See *Herald Co*, 463 Mich at 124-125 (holding

⁴ To this end, defendant’s documentary evidence suggests that the information might pertain to a particular farm, but makes no mention of whether a home address is involved.

that a person's city of residence—among other information—included in a job application was not “private” information about the person).

In arguing to the contrary, defendant posits that, for the redacted section/township/range information, there is only one particular farm located in the records sought; hence, the information plaintiff seeks could be used, in combination with other information, to discover the address of the location where the wolf-related incident occurred. The Court is not swayed by defendant's argument. Firstly, to adopt defendant's view would require a broad construction of the privacy exemption, because it would extend the exemption to information that is not only overtly personal, but that which has the potential to reveal personal information, if used in a certain way. A broad construction of exemptions is not permitted under FOIA caselaw. See, e.g., *Rataj*, 306 Mich App at 749. Secondly, to adopt defendant's position would require this Court to entertain, and give credence to, defendant's concerns about the potential, future use of the redacted information. Once again, this is contrary to FOIA caselaw, which cautions that future uses of information requested under FOIA are irrelevant in determining whether an exemption applies. *Id.* at 752.

The Court also agrees with plaintiff's contentions that the names of individuals making deprecation reports are not exempt under MCL 15.243(1)(a). Caselaw has recognized that a name, by itself, does not constitute information of a personal nature. *ESPN*, 311 Mich App at 666. Instead, the Court must look to that which is associated with the name in the report subject to the FOIA request. *Id.* at 666-667. For instance, a list of individuals who owned registered handguns was found to be information of a personal nature. *Mager*, 460 Mich at 143. In *Mager*, the disclosure of the person's name alone did not make the information “personal”; it was the

association of the person's name with "the fact of gun ownership" that made the information of a personal nature. *Id.*

In this case, there is nothing in the depredation reports that makes "the revelation of the names when coupled with the information in the reports" information of a personal nature. See *ESPN*, 311 Mich App at 667. The depredation reports simply note a wolf depredation event and contain brief information about the livestock lost or injured in the incident. The individual making the report is not necessarily the property owner or the owner of the livestock; hence the reports do not necessarily reveal additional information about where the reporter lives. Nor do the reports otherwise contain significant information about the individual(s) making the report. Accordingly, the inclusion of names on the reports does not constitute "information of a personal nature." See *ESPN*, 311 Mich App at 666-668.

In sum, the Court agrees with plaintiff that the redacted information is not subject to the privacy exemption and that it must be disclosed. Accordingly, plaintiff is entitled to summary disposition under MCR 2.116(C)(10) in respect to this matter.⁵

B. NON-EXISTENT INFORMATION

However, the Court does not agree with plaintiff's position in respect to her request for documentation or reports regarding non-lethal wolf measures taken in Ontonagon County. In response to plaintiff's request for the same, defendant certified that no public record existed

⁵ Because the information is not of a "personal nature" the Court need not decide whether disclosure of the same would constitute a clearly unwarranted invasion of privacy. *Bradley v Saranac Comm Schs Bd of Ed*, 455 Mich 285, 295; 565 NW2d 650 (1997). However, the Court agrees with plaintiff's position that, even assuming the information were personal, the balancing test would favor disclosure because the information reveals information about defendant's wolf-management policies. See *ESPN*, 311 Mich App at 669-670.

under the name given by plaintiff or by another name reasonably known to the public body. With respect to requests for non-existent records, MCL 15.240(5)(b) provides that if a public body denies a FOIA request by stating that records do not exist, the public body must provide “[a] certificate that the public record does not exist under the name given by the requester or by another name reasonably known to the public body” Here, defendant has repeatedly certified, and provided an affidavit from a DNR employee, that the particular records do not exist under the names given by plaintiff or by another name reasonably known to defendant. In response, plaintiff speculates that the records exist, but has not substantiated her claim in any respect. Although plaintiff is undoubtedly in a difficult position of having to prove the existence of that which is claimed not to exist, she cannot overcome defendant’s properly supported motion for summary disposition by simply stating that she disagrees with defendant’s certification that the record sought does not exist. See *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369-370; 775 NW2d 618 (2009). Indeed, FOIA permits defendant to respond in this matter, and the Court cannot compel defendant to produce under FOIA that which does not exist. *Key v Paw Paw Twp*, 254 Mich App 508, 510; 657 NW2d 546 (2002); *Hartzell v Mayville Comm Sch Dist*, 183 Mich App 782, 787; 455 NW2d 411 (1990).

C. THE FEE CHARGED TO PLAINTIFF

As it concerns Count II of her complaint, plaintiff challenges the fee charged to her by defendant. Plaintiff’s responsive briefing cites two other examples of similar FOIA requests where the requesters were charged a slightly lower fee—or no fee at all—to contend that the fee charged to her was arbitrary. Furthermore, plaintiff argues that any portion of the fee charged to her in relation to the improperly redacted information was improper.

The Court finds no merit to plaintiff's challenge to the fee assessed by defendant in processing her request. FOIA expressly allows a public body to charge a fee for, among other matters, the "necessary review" of materials and "separating and deleting" exempt information. MCL 15.234(1)(b). There is no provision of the statute authorizing a refund of fees associated with the time taken to review records in the event the public body is mistaken about the application of an exemption. The act contains penalty provisions for violations of the act, see, e.g., MCL 15.240(6), (7); and MCL 15.240a, but plaintiff has pointed to no provisions authorizing the type of refund she seeks. Moreover, the Court disagrees with plaintiff's assertion that a penalty should be imposed in this case under MCL 15.240a(7) for arbitrarily and capriciously charging an excessive fee. Plaintiff has noted that other fees charged to other requestors were different than the fee charged to her; however, this does not mean that the fee charged to her was "whimsical" or otherwise lacking in consideration of applicable principles. See *Meredith Corp v Flint*, 256 Mich App 703, 717; 671 NW2d 101 (2003) (describing the arbitrary and capricious standard). Indeed, plaintiff has not compared the scope or breadth of the requests, nor has she accounted for the notion that one of the requests—made by her attorney in this case—came *after* plaintiff's request and thus was duplicative of work already done on plaintiff's request, thereby providing an explanation lower cost in processing the request.

D. DEFENDANT DID NOT ARBITRARILY AND CAPRICIOUSLY VIOLATE THE ACT

Further, the Court does not share plaintiff's assessment that defendant's decision to redact the information discussed in Section II.A. of this opinion was arbitrary and capricious such that the Court should award damages under MCL 15.240(7). Again, plaintiff argues arbitrary treatment because of her status as a purported wolf advocate. While the Court agrees with plaintiff that her identity should be irrelevant to defendant when processing a FOIA request,

see *Taylor v Lansing Bd of Water & Light*, 272 Mich App 200, 205; 725 NW2d 84 (2006), the record before this Court does not support the notion that defendant's decision was arbitrary and capricious. That defendant may not have claimed an exemption in the past, or that it may not have even charged a fee in the past, do not demonstrate that defendant's activity in this case was without principal or that it was otherwise whimsical. See *Meredith Corp*, 256 Mich App at 717.

E. ATTORNEY FEES

Finally, the Court agrees with plaintiff that she is entitled to reasonable attorney's fees under MCL 15.240(6), having prevailed in part on the issue of whether the cited exemption applies. A FOIA litigant "prevails" when "the action was reasonably necessary to compel the disclosure [of public records], and [that] the action had a substantial causative effect on the delivery of the information to the plaintiff." *Amberg v City of Dearborn*, 497 Mich 28, 34; 859 NW2d 674 (2014) (citation and quotation marks omitted; alteration in original). When a party prevails in part, FOIA gives the trial court discretion whether to award fees. *Estate of Nash v City of Grand Haven*, 321 Mich App 587, 606; ___ NW2d ___ (2017), citing MCL 15.240(6). In this case, plaintiff prevailed with respect to the claimed exemption, which was the primary issue in this case. Although she did not prevail in total—see discussion above regarding the fee charged and non-existent records—the Court nevertheless finds that her success on the central FOIA issue entitles her to fees under MCL 15.240(6). Accordingly, the Court finds it appropriate to award a pertinent "portion of reasonable attorneys' fees, costs, and disbursements" to plaintiff under MCL 15.240(6). The fees awarded shall correspond to the central issue of whether the FOIA exemption applies. In accordance with this Court's opinion and order, plaintiff shall file a bill of costs and fees with this Court within 14 days of the entry of this order. Defendant shall have 14 days from service of the same to file any objections.

III. CONCLUSION

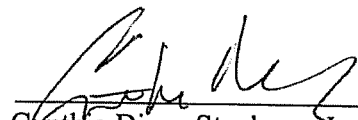
IT IS HEREBY ORDERED that plaintiff's motion for partial summary disposition is GRANTED insofar as the privacy exemption does not apply to the information redacted from the materials submitted in response to plaintiff's FOIA request. Defendant shall supply the previously redacted information to plaintiff.

IT IS HEREBY FURTHER ORDERED that defendant's motion for summary disposition is GRANTED in part as it concerns: (1) plaintiff's claim of error related to defendant's assertion that certain documents sought in plaintiff's FOIA request do not exist; (2) plaintiff's claim that defendant acted arbitrarily and capriciously; and (3) plaintiff's claim that the fee charged in association with her FOIA request was excessive.

IT IS HEREBY FURTHER ORDERED that plaintiff, having prevailed in part in this FOIA action with respect to her assertion that the claimed exemption does not apply, is entitled to reasonable attorney fees, costs, and disbursements pursuant to MCL 15.240(6). Plaintiff shall file a bill of costs and fees with this Court within 21 days of the entry of this opinion and order. Defendant shall have 21 days from service of the same during which to file any objections.

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

Dated: May 16, 2018


Cynthia Diane Stephens, Judge
Court of Claims