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Good Deed Goes Unpunished: Michigan Supreme Court Rules that Attorney Fees and Costs are Recoverable in Pro Bono FOIA Case

Client Alert

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In *Woodman v Michigan Department of Corrections*, *Woodman v. Dep't of Corr.*, No. 163382, 2023 WL 4770671 (Mich. July 26, 2023), the Michigan Supreme Court ruled on the award of attorney fees to a prevailing party in a Freedom of Information Act (FOIA) action, particularly in pro bono cases. The Court ruled that, despite arguments that plaintiff only “partially prevailed” in appealing a FOIA denial, plaintiff nonetheless prevailed within the meaning of MCL 15.240(6) and was entitled to statutory attorney fees and costs. Significantly, as a matter of first impression, the Court further held that pro bono representation is not an appropriate consideration in determining the reasonableness of attorney fees.

In *Woodman*, plaintiffs, two freelance journalists, submitted separate FOIA requests to defendant, the Michigan Department of Corrections (MDOC), seeking video and audio recordings of a prisoner altercation that resulted in one inmate’s death. MDOC denied their FOIA requests, asserting that the records were exempt under MCL 15.243(1)(c), which exempts from disclosure “[a] public record that if disclosed would prejudice a public body’s ability to maintain the physical security of custodial or penal institutions occupied by persons arrested or convicted of a crime.”

Following the FOIA denials, plaintiffs separately filed lawsuits alleging that MDOC wrongfully denied their requests under FOIA and requested “a complete, unredacted copy of the video and any accompanying audio recordings.” The cases were ultimately consolidated.

After a lengthy battle regarding the scope of production, the trial court ultimately allowed MDOC to blur the faces of individuals in the videos, but also permitted plaintiffs’ counsel to view both the redacted and unredacted videos and make further prayer for

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relief after the review. Thereafter, plaintiffs moved for attorney fees and costs under MCL 15.240(6) and for punitive damages under MCL 15.240(7). MDOC opposed the motion, arguing first that because the court allowed the MDOC to redact the identities of the individuals in the videos, plaintiffs only prevailed in part under MCL 15.240(6) and the court should decline to award fees in its discretion. MDOC also argued that because plaintiffs were represented pro bono, plaintiffs should not receive fees.

Ultimately, the Court of Claims determined that MDOC was not a prevailing party and that plaintiffs prevailed “in full;” therefore, plaintiffs were entitled to reasonable attorney fees and costs under MCL 15.240(6). The court further held that the attorneys’ hourly rate and the number of hours billed on the cases were reasonable. However, the Court of Claims only awarded 10% of the fees sought because the work was performed pro bono. Both parties appealed. The Appellate Court reversed the Court of Claims finding that plaintiffs prevailed “in full,” finding that plaintiffs only prevailed in part since MDOC was permitted to produce redacted videos. The Appellate Court then remanded the case for further determination of whether any attorney fees and costs should be awarded since plaintiffs only partially prevailed. The parties appealed to the Michigan Supreme Court.

As outlined in the Supreme Court opinion, Michigan’s FOIA statute is intended to provide members of the public access to public records unless the Legislature enacted a statutory exemption to disclosure. “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.” *Rataj v Romulus*, 306 Mich App 735, 748; 858 NW2d 116 (2014).

When a public body denies a FOIA request and the requesting party seeks to compel disclosure of a public record in a circuit court action under MCL 15.240(i)(b), the public body bears the burden of proving that its decision to withhold the records was justified under FOIA. MCL 15.240(4); see *Mich Federation*, 481 Mich at 665; *Swickard*, 438 Mich at 544. “[A] court that determines a public record is not exempt from disclosure shall order the public body to cease withholding or to produce all or a portion of a public record wrongfully withheld. . . .” MCL 15.240(4).

FOIA includes a fee-shifting provision that awards attorney fees to requesting parties that “prevail” in actions seeking to compel disclosure under MCL 15.240(i)(b). MCL 15.240(6) provides, in relevant part:

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.

Therefore, under MCL 15.240(6), when a party “prevails,” the court is *required* to award the party reasonable attorney fees. See *Fradco, Inc v Dep’t of Treasury*, 495 Mich 104, 114; 845 NW2d 81 (2014) (recognizing that “shall” denotes a mandatory directive). On the other hand, when a party only “prevails in part,” then “the court *may, in its discretion*, award all or an appropriate portion” of a reasonable fee. MCL 15.240(6).

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As the Supreme Court noted, in order to “prevail” under MCL 15.240(6), “a court must conclude that 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 Dearborn*, 497 Mich 28, 34; 859 NW2d 674 (2014) (quotation marks, citation, and brackets omitted). Courts should also consider whether the party “obtained everything it initially sought.” *Int’l Union, United Plant Guard Workers of America v Dep’t of State Police*, 422 Mich 432, 455; 373 NW 2d 713 (1985) (opinion by LEVIN, J.).

Thus, a court’s analysis of whether the plaintiff prevailed considers three fundamental questions:

1. Was the action reasonably necessary to compel the disclosure of the records?
2. Did the action *actually* have the causative effect of delivering the information?
3. Did the plaintiff obtain everything it initially sought?

In *Woodman*, the significant question was whether plaintiffs obtained everything they initially sought. Plaintiffs’ FOIA requests to the MDOC sought video footage of the incident from all available cameras and accompanying audio records. Neither plaintiff asked that the footage be “unredacted” in their initial FOIA requests. Nor did plaintiffs request the identities of the individuals in the videos. However, as noted by the MDOC, in their complaints filed to compel disclosure of the records in the Court of Claims, plaintiffs did request “a complete, unredacted copy” of the relevant video footage.

The Supreme Court found that the trial court’s decision allowing the MDOC to “redact” the identities of individuals by blurring faces in the videos—after the court had already ordered the immediate disclosure of the records to plaintiffs and denied the MDOC’s motion for reconsideration—does not support the conclusion that plaintiffs prevailed only in part. Rather, the plaintiffs here had a substantial victory in the action and were entitled to attorney fees and costs as a result. As such, plaintiffs were entitled to collect attorney fees and costs and pro bono representation should not factor into the amount of awarded fees and costs.

The *Woodman* case is significant and underscores that prevailing party attorney fees and costs are mandatory under FOIA. Further, in a first impression case, the Court ruled that whether a party is represented pro bono has no bearing on their ability to collect attorney fees and costs.

Please feel free to contact the author of this Client Alert or your Butzel attorney for more information.

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