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Public Records – For Major Incentives, a Michigan Case Shows Some Rules Can Be Rethought

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Public record requests commonly target major economic development incentives. With awards of large scale tax credits or public funds under close scrutiny, journalists and citizens alike have historically directed a variety of public record requests to the public bodies responsible for granting them.

As a general rule, public record laws favor disclosure, but do have important exceptions. State public record laws typically shield from disclosure trade secrets and, in some cases, commercial or financial information. They do not, however, typically protect the amount of an incentive award.

Such award information is routinely disclosed to the public. This information can appear in public records, be disclosed in public meetings, or even be published by state agencies on their websites. Even in states which authorize private non-profit organizations, such as JobsOhio, to award incentives, state laws commonly impose certain minimal reporting requirements. See, e.g., R.C. § 187.04(B)(2)(e) (requiring that the contract between JobsOhio and the Ohio Development Services Agency have certain documents designated as public records, including the “Records of any fully executed incentive proposals, to be filed annually”).

Against this backdrop, it’s particularly notable when a State decides to go a different direction and protect incentive award amounts from disclosure (and even more notable when that decision is upheld in court). That’s exactly what happened recently in Michigan. The Michigan Court of Appeals was faced with a question regarding whether a public record request under Michigan’s Freedom of Information Act (FOIA) could require the Michigan Economic Development Corp. to identify the amount of tax credits awarded to

General Motors Corporation (GM). *Sole v. Michigan Economic Development Corp.*, Case No. 350764 (Mich. Ct. App. June 4, 2020). The Court determined that GM's tax credits, under Michigan's FOIA statute, could be kept from public disclosure because details about the tax credits satisfied an exclusion for "financial and proprietary information" under state law.

The case arose from the Michigan Economic Growth Authority (MEGA) tax credits that were created by the state of Michigan in order to support the struggling auto industry during the 1990's. A MEGA tax credit is worth up to 100 percent of the state's personal income tax rate multiplied by the actual wages and employer-paid health care costs on qualifying new or retained jobs. The credit can be awarded for up to 20 years. Although Michigan stopped offering MEGA tax credits in 2011, the state must continue paying out for the old ones. In 2015, one newspaper estimated the amount of GM's active MEGA tax credits at roughly \$2.1 billion. See "Auto tax breaks create budget fear," by Chad Livengood, *The Detroit News* (Feb. 5, 2015).¹ Needless to say, a tax credit liability of this size has a tendency to attract attention, including public record requests.

In *Sole*, the plaintiff had submitted a public record request seeking, among other things, the disclosure of the total amount of GM's MEGA tax credits. In response, the Michigan Economic Development Corp refused to disclose the total amount of the tax credits – claiming that the amount was exempt from disclosure under FOIA because it was confidential information under the Michigan Strategic Fund (MSF) Act, MCL 125.2003 *et seq.* The Court of Appeals in *Sole* agreed.

Under Michigan's FOIA, "[a] public body may exempt from disclosure . . . [r]ecords or information specifically described and exempted from disclosure by statute." MCL 15.243(1)(d). In this case, Michigan enacted a statute that protects any portion of a document that "relates to financial or proprietary information" where the board of the Michigan Strategic Fund (MSF), the predecessor to the Michigan Economic Development Corp., determined that the information should be protected from disclosure under Michigan's FOIA:

A record or portion of a record, material, or other data received, prepared, used, or retained by the fund or any of its centers in connection with an application to or with a project or product assisted by the fund or any of its centers or with an award, grant, loan, or investment that relates to financial or proprietary information submitted by the applicant that is considered by the applicant and acknowledged by the board or a designee of the board as confidential shall not be subject to the disclosure requirements of the freedom of information act

See MCL 125.2005(9) (within the Michigan Strategic Fund Act).

Under MCL 125.2005(9), the Michigan Economic Development Corp., through its predecessor, "granted GM's request to acknowledge the total tax credit as confidential, thereby rendering it not subject to disclosure under the [State's] FOIA." *Sole*, at 5. As a result, the court held that, "Even if we presume the amount of the tax credit is not, itself, 'financial or proprietary information,' because the total tax credit was related to the information provided by GM, it qualified for the potential exemption if approved by the MSF board." *Sole*, at 5-6.

Although the Court's reasoning may seem fairly unique to Michigan law, it does teach a very important lesson. On major incentives, it is sometimes possible for an award recipient to obtain additional protections under state public record laws that would ordinarily not apply. Michigan had a public record exception under its FOIA statute that was dependent on the approval of a state board to shield certain documents from disclosure. GM was able to obtain that approval and protect information which, in many other contexts, would be routinely disclosed.

The outcome of the *Sole* decision shows the value of rethinking the rules governing incentives.

¹ <https://www.detroitnews.com/story/news/politics/2015/02/05/michigan-tax-credits-car-companies/22908711/>