STATE OF MICHIGAN

IN THE COURT OF APPEALS

Appeal from the Chippewa County Circuit Court
(Hon. James P. Lambros)

AMY HJERSTEDT,

Plaintiff-Appellant,

v

CITY OF SAULT ST. MARIE,

Defendant-Appellee.

Court of Appeals No. 358803

Chippewa County Circuit Court
No. 20-016126

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Statement of Interest of *Amici Curiae*[1]

This case involves the right of Michigan citizens to access information regarding the affairs and activities of their government pursuant to the Michigan Freedom of Information Act. The American Civil Liberties Union of Michigan ("ACLU") is the Michigan affiliate of a nationwide, nonpartisan organization with over a million members dedicated to protecting the rights guaranteed by the United States Constitution. The ACLU has long been committed to protecting the right to access public information. The ACLU provides direct representation and files amicus curiae briefs in cases involving civil rights that affect Michigan citizens' rights under the FOIA. See, e.g., *ACLU of Michigan v Calhoun Cnty Sheriff's Off*, ___ Mich ___; 2022 WL 351046 (2022).

Founded in 1868, the Michigan Press Association ("MPA") is the official trade association for more than 280 print and digital newspapers in Michigan and is dedicated to promoting the freedom of the press throughout the State. The MPA's members report on issues of great importance to Michiganders, including the operations of their local governments. The FOIA is an essential tool for the MPA's members to fulfill their duty to the public. On behalf of its members, the MPA offers this brief in support in aid of FOIA's purpose: fostering transparent government to safeguard our free society.

[1] Pursuant to MCR 7.212(H)(3), amici state that no counsel for a party authored this brief in whole or in part, nor did any such counsel or a party make a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici, their members, or their counsel made such a monetary contribution.

Introduction

Amy Hjerstedt, the appellant in this case, is not alone. She and countless people throughout Michigan—and indeed throughout the world—are repulsed by senseless, callous police violence of the kind that took the life of George Floyd, and they are committed to doing what they can to reform law enforcement. Although Michigan's laws are designed to facilitate such conscientious civic engagement, misapplication of those laws forced Ms. Hjerstedt to become a litigant.

When, on behalf of the Eastern Upper Peninsula League of Women Voters, Ms. Hjerstedt requested a copy of her local police department's use-of-force policy, the City of Sault Ste. Marie refused to disclose the entire policy, choosing instead to redact the portions of its policy that (presumably) outline the parameters of law enforcement officers' permissible use of force. The City's refusal to disclose the unredacted policy violated Michigan's Freedom of Information Act ("FOIA"), which provides that "all persons . . . are entitled to full and complete information regarding the affairs of government . . ." MCL § 15.231(2). The FOIA mandates disclosure for the purpose of ensuring that "[t]he people shall be informed so that they may fully participate in the democratic process." MCL § 15.231(2).

Ms. Hjerstedt did exactly what the FOIA was intended to foster and protect. Her alarm over the death of George Floyd fueled her inquiry into the parameters of her local law enforcement officers' use of force. But her efforts to become more educated about the City's policies were frustrated when local authorities refused to disclose an unredacted copy of the use-of-force policy.

By upholding the City's refusal to disclose its unredacted use-of-force policy, the trial court prevented Ms. Hjerstedt and the League of Women Voters from obtaining precisely what the FOIA requires to be placed in the hands of Michigan citizens: namely, the information

that is necessary for ordinary, civic-minded citizens to "examine and review the workings of government and its executive officials" and to thereby "hold public officials accountable for the manner in which they discharge their duties." *Messenger v Ingham Cnty Prosecutor*, 232 Mich App 633, 641; 591 NW2d 393 (1998). Ms. Hjerstedt's request for the City's use-of-force policy is at the core of the type of civic engagement that the FOIA applauds and protects.

The City's primary justification for nondisclosure—that releasing unredacted copies of the use-of-force policy would somehow endanger law enforcement officers—was supported only by speculation, not evidence. The City relied solely upon testimony from its police chief, who asserted—without any supporting facts—that disclosure either "would or could" imperil officers and that he "err[ed] on the side of caution" when deciding not to disclose the full policy. But the FOIA requires public bodies to prove the applicability of a FOIA exemption with particularized facts. The police chief's mere opinion—unmoored to any underlying factual basis—is not enough to support nondisclosure of general, policy-level information that is otherwise subject to the FOIA.

Nondisclosure, moreover, substantially erodes the promises of the FOIA. The FOIA's explicit goal is to ensure that Michigan citizens may "be informed so that they may fully participate in the democratic process." MCL § 15.231(2). Civically engaged citizens like Ms. Hjerstedt cannot fully participate in the ongoing public and political discussion over the appropriate parameters of law enforcement officers' use of force if they are purposefully kept uninformed. Nor can they advocate that locally applicable use-of-force policies be revised if they are not allowed to see what those policies are in the first place.

The trial court's judgment, if upheld, would be a significant impediment to the goals of public participation and government transparency that the FOIA was designed to foster. It should be reversed.

Argument

I. Standard of Review

Legal determinations and questions of statutory interpretation are reviewed de novo. *Herald Co v E Mich Univ Bd of Regents*, 475 Mich 463, 470; 719 NW2d 19 (2006). The trial court's factual determinations are reviewed for clear error. *Id*. at 471. Clear error exists when "the appellate court is left with the definite and firm conviction that a mistake has been made." *Id*.

II. The information sought by Ms. Hjerstedt's FOIA request is at the heart of the pro-disclosure purpose for which the FOIA was enacted.

Even before Michigan's FOIA was enacted, it was the public policy of this State that a "citizen's accessibility to public records must be given the broadest possible effect." *Booth Newspapers, Inc v Cavanaugh*, 15 Mich App 203, 207; 166 NW2d 546 (1968). See also *Evening News Ass'n v City of Troy*, 417 Mich 481, 494–95; 339 NW2d 421 (1983); *Swickard v Wayne Cnty Med Exam'r*, 438 Mich 536, 543; 475 NW2d 304 (1991). Michigan's FOIA codified this prodisclosure policy, ensuring "that all persons . . . are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees, consistent with this act." MCL § 15.231(2). As the statute specifically explains, disclosure of this information is critical to enable Michigan's citizens to "be informed so that they may fully participate in the democratic process." *Id*.

Use-of-force policies are precisely the type of documents that FOIA envisions for disclosure. "[T]he core purpose of FOIA is disclosure of public records in order to ensure the accountability of public officials." *Prac Pol Consulting v Sec'y of State*, 287 Mich App 434, 465; 789 NW2d 178 (2010). The FOIA not only "promot[es] transparency and facilitat[es] the public's understanding of the operations and activities of government," *Sole v Mich Econ Dev Corp*, ___ Mich ___; 2022 WL 2347140, at *7 (2022), but it also provides the mechanism

through which citizens are entitled to obtain the information that is necessary for them to hold public servants accountable. *Messenger*, 232 Mich App at 641. And because the FOIA "focuses on the citizens' right to be informed about 'what their government is up to,'" information "that sheds light on an agency's performance of its statutory duties falls squarely within that statutory purpose." *Mager v State, Dep't of State Police*, 460 Mich 134, 145; 595 NW2d 142 (1999) (quotation omitted).

The ability to examine use-of-force policies is at the heart of the interests that are protected by the FOIA. Michigan citizens are entitled to know the scope of their local law enforcement officers' authorized powers so that—if necessary—they can advocate for change or hold public servants accountable. *Messenger*, 232 Mich App at 641. Ms. Hjerstedt, for example, was prompted to request a copy of the City's use-of-force policy on behalf of the Eastern Upper Peninsula League of Women Voters after the tragic death of George Floyd, which prompted a national discussion and reexamination of police use-of-force policies. (App'x 165). News organizations have used FOIA requests for the same purpose. In 2020, for example, MLive obtained twelve use-of-force policies from several of the largest localities in Michigan using FOIA requests.[2]

Access to this information is critically important for Michigan citizens' ability to meaningfully participate in the ongoing public debate over law enforcement tactics and uses of force. Especially in the wake of Mr. Floyd's death, the call for better access to and reform of use-of-policies has come from voices on all sides of the political aisle.[3] The "8 Can't Wait

[2] Devereaux, Brad. "Use-of-force policies from major Michigan police agencies fail to meet anti-brutality demands," *MLive* (updated Jan. 19, 2021), available at https://www.mlive.com/news/2020/07/use-of-force-policies-from-major-michigan-police-agencies-fail-to-meet-8-cant-wait-standards.html (last accessed August 1, 2022).
[3] Forliti, Amy. "Minneapolis Police Department overhauls use of force policy," *Washington Post* (Aug. 26, 2020), available at https://www.washingtonpost.com/national/minneapolis-police-

Campaign," for example, has urged citizens to obtain and review their city's use-of-force policies and to advocate that they meet eight specific criteria for reform: [4]

It will be impossible for Michigan citizens to engage in this sort of politically engaged advocacy if they cannot obtain their local government's use-of-force policies in the first place.

Both the general public and professional law enforcement officers would be disserved by such a result. In July 2020, for example, "11 of the most significant law enforcement leadership and labor organizations in the United States" drafted a template use-of-force policy and made it available on the internet so that state and local law enforcement

department-overhauls-use-of-force-policy/2020/08/26/72a9010c-e7e4-11ea-bf44-0d31c85838a5_story.html (last accessed August 1, 2022); Rizer, Arthur & Emily Mooney, "The Evolution of Modern Use-of-Force Policies and the Need for Professionalism in Policing," Federalist Society Review, Vol. 21 (May 21, 2020), available at https://fedsoc.org/commentary/publications/the-evolution-of-modern-use-of-force-policies-and-the-need-for-professionalism-in-policing (last accessed August 1, 2022).

[4] #8CantWait, available at https://8cantwait.org/ (last accessed August 1, 2022).

agencies could "compare and enhance their existing policies."[5] That sort of comparative analysis and advocacy cannot occur if the public is prohibited from reviewing the policies that affect them most directly, at the level of local government.

Similarly, after MLive obtained twelve use-of-force policies from across Michigan, the "8 Can't Wait" campaign reviewed them and determined that none of them met all of the standards advocated by 8 Can't Wait.[6] MLive, which published all twelve policies on its website, subsequently reported that some of those jurisdictions intended to revise their policies to include some of the recommendations from the "8 Can't Wait" initiative.[7]

This type of constructive public and civic dialogue on a serious issue of significant public concern cannot continue if the public is kept in the dark. When FOIA requests ask for police use-of-force policies, they are asking for material that is core to the interests that the FOIA was enacted to preserve and promote.

III. The trial court incorrectly ruled that the City proved entitlement to its claimed FOIA exemptions.

A. Exemptions to disclosure under Michigan's FOIA must be narrowly construed, and the public body has the burden of proving entitlement to the exemption.

Because FOIA places a heavy thumb on the scale in favor of disclosure, "[t]he burden of proof is on the party claiming exemption from disclosure." *Evening News*, 417 Mich at 503. See also *Detroit Free Press, Inc v City of Southfield*, 269 Mich App 275, 281; 713 NW2d 28 (2005); *City of Warren v City of Detroit*, 261 Mich App 165, 680 NW2d 57 (2004).

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[5] "National Consensus Policy and Discussion Paper on Use of Force" (July 2020), available at https://www.theiacp.org/sites/default/files/2020-07/National_Consensus_Policy_On_Use_Of_Force%2007102020%20v3.pdf (last accessed August 1, 2022).

[6] The twelve jurisdictions from which use-of-force policies were obtained under FOIA were: Detroit, Lansing, Traverse City, Grand Rapids, Ann Arbor, Flint, Kalamazoo, Saginaw, Muskegon, Jackson, Bay City, and the Michigan State Police. See *supra*, note 2.

[7] See *supra*, note 2.

That rule applies equally to the statutory exemptions to disclosure delineated in MCL § 15.243. Because Michigan's FOIA statute "is a prodisclosure statute," the exemptions stated in MCL § 15.243 must be "narrowly construed." *Herald Co v City of Bay City*, 463 Mich 111, 119; 614 NW2d 873 (2000). And even if a record falls within one of the exemption categories, the record "is not automatically exempt from disclosure." *Detroit Free Press*, 269 Mich App at 285. Instead, the public body has the burden "to demonstrate why it is entitled to protect a record from disclosure." *Herald Co v Kent Cnty Sheriffs Dep't*, 261 Mich App 32, 38; 680 NW2d 529 (2004).

It is particularly important to hold the public body to its burden of proof when—as in this case—the person requesting the record is not able to view the document that the public body claims is exempt from disclosure. Here, for example, the trial court accepted City Police Chief Bierling's speculative assertion that disclosure of the unredacted use-of-force policy "could" allow a detainee to pre-plan a response to law enforcement officers' use of force. (App'x 328).[8] But counsel for the plaintiff, Ms. Hjerstedt, was functionally unable to cross-examine the police chief about his assertions because Chief Bierling declined to say what the redacted provisions of the policy were. As Chief Bierling testified, "If I confirm [the content of the redacted portions], I'm telling you . . . what could be in it, and we've redacted that out. . . . I can't enlighten a respective user on what those redactions are." (App'x 331; see also App'x 332 ("I feel like what you're asking me to do is disclose information that may be contained in those redactions.")).

When the plaintiff is unable to learn what the undisclosed material is in the first place, it is difficult or impossible for the plaintiff to impeach the public body's assertion of an exemption or to demonstrate why the public interest favors disclosure. Because the plaintiff is

[8] The appendix filed by the Appellant is cited in this brief as "App'x ___."

hampered in her ability to participate in the ordinary crucible of litigation, trial courts must be assiduous about holding the public body to its burden of proof and "must give particularized findings of fact indicating why the claimed exemptions are appropriate." *Newark Morning Ledger Co v Saginaw Cnty Sheriff*, 204 Mich App 215, 217–18; 514 NW2d 213 (1994). Unfortunately, that did not happen here.

B. The City failed to prove that its claimed exemptions apply to the use-of-force policy.

1. MCL § 15.243(1)(n): Communication Codes and Plans for Deployment

The exemption in MCL § 15.243(1)(n) provides that a public body may exempt the following from disclosure:

> Records of law enforcement communication codes, or plans for deployment of law enforcement personnel, that if disclosed would prejudice a public body's ability to protect the public safety unless the public interest in disclosure under this act outweighs the public interest in nondisclosure in the particular instance.

Id. Contrary to the trial court's holding, a use-of-force policy is neither a "communication code" nor a "plan for deployment of law enforcement personnel."

The FOIA does not define the terms "communication codes" or "plans for deployment." Where a statute fails to provide definition of statutory term, Michigan courts look to consult dictionary definitions to determine the term's plain and ordinary meaning. *ACLU of Michigan v Calhoun Cnty Sheriff's Off*, ___ Mich ___; 2022 WL 351046, at *5 (2022); *People v Wood*, 506 Mich 114, 122; 954 NW2d 494 (2020).

"Communication" is "[t]he interchange of messages or ideas by speech, writing, gestures, or conduct; the process of bringing an idea to another's perception [or t]he messages or ideas so expressed or exchanged." *Black's Law Dictionary* (11th ed. 2019). "Code" is "a system of signals or symbols for communication" or "a word or phrase chosen in place of another word

or phrase in order to communicate an attitude or meaning without stating it explicitly."[9] The term "communication code," as used in MCL § 15.243(1)(n), therefore applies to covert systems used by law enforcement officers to exchange messages or ideas—not to routine use-of-force policies.

The term "plans for deployment of law enforcement personnel" does not apply to use-of-force policies, either. A "plan" is "a method for achieving an end" or "an orderly arrangement of parts of an overall design or objective."[10] And "deployment" is the "placement or arrangement (as of military personnel or equipment) in position for a particular use or purpose."[11] Especially when narrowly construed, as is required, a "plan for deployment" refers to a method for arranging law enforcement officers in a certain position or location for a particular purpose—for example, how to police certain neighborhoods or to focus task forces on certain portions of a municipality. Use-of-force policies do not typically outline particular deployments of officers in particular locations. Instead, they ordinarily establish "general department policy on the use of force by members in the performance of their duties."[12] There is nothing to suggest that the City's policy is any different. In fact, the City's brief does not seriously contend that its policy contains communication codes or deployment plans. (City's Br., at 9).

[9] Merriam-Webster Dictionary, available at https://www.merriam-webster.com/dictionary/code (last accessed August 1, 2022).
[10] Merriam-Webster Dictionary, available at https://www.merriam-webster.com/dictionary/plan (last accessed August 1, 2022).
[11] Merriam-Webster Dictionary, available at https://www.merriam-webster.com/dictionary/deployment (last accessed August 1, 2022).
[12] Michigan State Police, *Order No. 05-01– Subject Control and Use of Force* (April 19, 2022), available at https://public.powerdms.com/MSP1917/tree/documents/1919744 (last accessed August 1, 2022).

2. MCL § 15.243(1)(s)(v): Operational Instructions

MCL § 15.243(1)(s)(v) provides, in relevant part, that—unless the public interest in disclosure outweighs the public interest in nondisclosure—a public body may exempt from disclosure:

> public records of a law enforcement agency, the release of which would . . . (v) Disclose operational instructions for law enforcement officers or agents.

Id. A routine use-of-force policy does not contain "operational instructions." It is a policy-level document, not an operational-level document.

No Michigan court has addressed the definition of "operational instructions,"[13] but Justice Corrigan, in her partial dissent in *Coblentz v City of Novi*, 475 Mich 558, 591; 719 NW2d 73 (2006) (Corrigan, J., dissenting), explained the difference between a "policy" and "operational" decisions for purposes of Michigan's FOIA. See *Coblentz*, 475 Mich at 577 n.5 ("[W]e take no position on Justice Corrigan's discussion of 'governmental policy.'"). As Justice Corrigan explained, a "policy" is "a definite course or method of action selected . . . from among alternatives and in the light of given conditions to guide and usu[ally] determine present and future decisions." *Id.* at 592 (Corrigan, J., dissenting) (quoting *In re Certified Question*, 432 Mich 438, 455–456; 443 NW2d 112 (1989)). "Operational decisions," on the other hand, "concern routine, everyday matters and do not require evaluation of broad policy factors." *Id.* at 593 (Corrigan, J., dissenting).

"Operational decisions may also be characterized as 'the execution or implementation of previously formulated policy.'" *Coblentz*, 475 Mich at 593 (Corrigan, J., dissenting). See also *id.* at 593 n. 5 (Corrigan, J., dissenting) (addressing authority from other

[13] The City complains that Appellant fails to cite any cases addressing the FOIA exemptions that are relevant to this appeal. (City's Br. at 1). But the City does not cite any such case, either. It appears that these particular exemptions have not previously been litigated before this Court.

jurisdictions). For example, the policy of the Obama Administration was to target and trace unlawful firearms; the Justice Department's Operation Fast and Furious was an implementation of that general policy within a specific context.[14]

The City's use-of-force policy is exactly that: a policy-level document, not an operational-level document. It does not, for example, outline the tactics to be employed by specific anti-gun or anti-drug operations or task forces. The use-of-force policy is instead a generally applicable document providing guidance about how officers should make "future decisions" and contains the City's "evaluation of broad policy factors," not specific instructions about particular operational tasks. *Coblentz*, 475 Mich at 593 (Corrigan, J., dissenting).

3. MCL § 15.243(1)(s)(vii): Endangerment of life and safety

MCL § 15.243(1)(s)(vii) provides, in relevant part, that—unless the public interest in disclosure outweighs the public interest in nondisclosure—a public body may exempt from disclosure:

> public records of a law enforcement agency, the release of which ***would*** . . . (vii) Endanger the life or safety of law enforcement officers or agents or their families, relatives, children, parents, or those who furnish information to law enforcement departments or agencies.

Id. (emphasis added).

Despite the City's burden of proving that disclosure of the use-of-force policy "would" endanger the life or safety of police officers, the City offered only speculative testimony that disclosure potentially "could" endanger officers. Chief Bierling testified that disclosure of the redacted information "could or would impact" officer safety because it could inform members of the public about the circumstances under which City police officers are trained to

[14] U.S. Department of Justice, Office of the Inspector General. "A Review of ATF's Operation Fast and Furious and Related Matters," (November 2012), available at https://oig.justice.gov/reports/2012/s1209.pdf (last accessed August 1, 2022).

use force. (App'x 327). Chief Bierling testified that he believed disclosure of this information "would" jeopardize officer safety "or at some point it could." (App'x 328).

"Would" and "could" are not the same thing. The exemption requires proof that disclosure "would" endanger officer safety, not that it merely "could," in a theoretical sense. The *Evening News* court was faced with almost an identical trial-court finding, and the court ruled that the finding was insufficient. In *Evening News*, the trial court found that the law enforcement agency had shown that a particular investigation "*could indeed well be jeopardized* by providing to the plaintiff the information that it seeks at this time." *Evening News*, 417 Mich at 505 (emphasis in original). The Supreme Court held that this finding "does not satisfy the statute" because, in part, "it was the defendants' burden to show, and the court's duty to find, that the particular information the plaintiff wanted "would * * * interfere with law enforcement proceedings." *Id*. at 505–06. As the court observed,

> "Could indeed well be jeopardized" and "would * * * interfere" are obviously not the same thing. The statute is positive. The opinion is tentative. The court has not made the required findings.

Id. at 506.

The trial court's analysis in this case exhibits the same problem. A finding that disclosure "could" jeopardize officers is a "tentative" finding, not the "positive" one that FOIA demands.

In fact, Chief Bierling testified that his primary concern in making the decision to redact was officer safety—and that "I always err on the side of caution" in order to ensure officer and public safety. (App'x 329). But erring on the side of caution contradicts the mandate of FOIA. FOIA's exemptions must be construed "narrowly," and public bodies must prove their case. *Evening News*, 417 Mich at 503. If public bodies are going to err on one side or the other, they must err on the side of disclosure, not on the side of caution. See *Rataj v City of Romulus*,

306 Mich App 735, 749; 858 NW2d 116 (2014) ("Under FOIA, a public body must disclose all public records that are not specifically exempt under the act.").

Nor did the City identify any evidence supporting its assertion that disclosure "could" be potentially dangerous. Because of the strong public interest in disclosure, a trial court may not "foreclose the right of a citizen to know what his government is doing" without giving "particularized" reasons for doing so. *Evening News*, 417 Mich at 491–92, 493. If there are "only generic assertions by the defendants that disclosure would harm their [law enforcement activity]" and there is "no particularized evidence in the record that disclosure would have interfered" with the defendants' law enforcement activity, then the public body has not carried its burden of demonstrating that nondisclosure is appropriate. *Id*. at 501. "A bill of particulars is in order. Justification must indicate factually how a particular document, or category of documents, interferes with law enforcement proceedings." *Id*. at 503. The City made no such showing.

The City's theory seems to be that future arrestees may study the City's use-of-force policy and somehow use their knowledge of officers' authority to use force in order to endanger the officers. The City submitted no evidence in the trial court that this scenario—or anything similar to it—has ever occurred or that there was any likelihood that it would happen. Chief Bierling's conclusory statement that disclosure "could or would" result in harm is not enough, because it is simply a statement of Chief Bierling's opinion, unsupported by any factual support. In *Evening News*, the public body presented testimony that any disclosure "would indeed have a chilling effect on the investigation." *Evening News*, 417 Mich at 507. The court ruled that this statement was not enough to carry the public body's burden of proof: "[T]his statement is entirely conclusory. There are no reasons given. In no way does this statement satisfy statutory requirements." *Id*.

Beyond speculation, the City introduced no evidence indicating that would-be arrestees intentionally peruse various jurisdictions' use-of-force policies in order to determine how to exploit the officers' training. Chief Bierling failed to identify a single instance in which something similar had ever happened. And the fact that numerous other jurisdictions across Michigan and across the country, including the federal government,[15] have released their use-of-force policies substantially undercuts the City's position that it is inherently dangerous to do so.

Even putting to one side the inherent unlikelihood of future arrestees' engaging in such extensive pre-planning, the City has failed to establish why citizens' knowledge of when an officer will use particular types of force would in any way increase the danger posed to the officer. In fact, the redacted use-of-force policy presumably outlines the scenarios in which City officers may escalate or de-escalate the use of force. If the public knew the circumstances under which officers were trained to escalate the use of force, presumably this knowledge would enable members of the public to avoid triggering those circumstances and thereby help ensure that police-citizen encounters are conducted at a lower level of force than they otherwise might be. It is unclear why the City believes that increased knowledge of the parameters of officers' use-of-force authority necessarily would increase the likelihood of violence. The opposite is just as likely. In the long run, transparency does not detract from officer safety; it enhances it.[16]

At minimum, the City failed to prove that officer endangerment necessarily "would" result from a disclosure of its unredacted policy. See also *Detroit News, Inc v Policemen & Firemen Ret Sys of City of Detroit*, 252 Mich App 59, 74; 651 NW2d 127 (2002)

[15] Department of Justice, "Department's Updated Use-of-Force Policy," (May 20, 2022), available at https://www.justice.gov/ag/page/file/1507826/download (last accessed August 1, 2022).

[16] Felton, SteVon. "Criticism and Transparency are Good for Police Departments," *R Street* (Oct. 25, 2018), available at https://www.rstreet.org/2018/10/25/criticism-and-transparency-are-good-for-police-departments/ (last accessed August 1, 2022).

(remanding where "the trial court did not provide detailed and particularized reasoning" explaining the basis for the exemption).

4. MCL § 15.243(1)(s)(vi): Staff Manuals

Finally, the City claims in its brief that it is entitled to the exemption in MCL § 15.243(1)(s)(vi). (City's Br. at 8). But the trial court did not agree. It concluded only that the City was entitled to the exemptions in MCL § 15.243(1)(s)(v), MCL § 15.243(1)(s)(vii), and MCL § 15.243(1)(n). (App'x 362). The City did not file a cross-appeal challenging the trial court's finding that MCL § 15.243(1)(s)(vi) does not apply. Because the City cannot obtain greater relief in this Court than it obtained in the trial court, the City cannot assert entitlement to the exemption now. *Bank of Am, NA v Fid Nat Title Ins Co*, 316 Mich App 480, 518; 892 NW2d 467 (2016).

IV. The trial court failed to meaningfully weigh the public's interest in disclosure.

Even if one of the exemptions facially applies, the trial court failed to meaningfully assess the public's interest in disclosure of use-of-force policies, ruling instead that the interest in disclosure is overridden even if nondisclosure potentially "could" prevent only "one injury." Especially given the conclusory and speculative nature of the City's assertions that disclosure "could" endanger officers or the public, the trial court's failure to engage in any rigorous examination of the public interest in disclosure is reversible error. See *Herald*, 475 Mich at 472 (noting standard of review).

A. The trial court collapsed the two steps of the analysis and failed to assess whether the strong interest in disclosure outweighed the City's speculative safety concern.

Each of the FOIA exemptions upon which the City relies requires a two-step test to determine whether the disclosure of public records is appropriate. First, the court must assess whether disclosure of the record (assuming that it is a "communication code" or a "plan for deployment") prejudices the ability to protect public safety. Second, even if public safety is

prejudiced, the court must assess whether the public interest in disclosure nevertheless outweighs the interest in nondisclosure. See MCL § 15.243(1)(n), (s)(v), & (s)(vii).

Instead of separately weighing the public's interest in disclosure, the trial court collapsed the two steps of the inquiry. The trial court accepted Chief Bierling's testimony that disclosure of the redacted information "poses a threat of injury to both the suspect and the officer." (App'x 361). The trial court then ruled that "[t]he safety of the Sault Ste. Marie Police Officers . . . is paramount and consequently the public interest is outweighed in the disclosure of said policy." (App'x 362).

By holding that safety concerns always outweigh the public interest in disclosure, the trial court's analysis eliminated the second step of the test. The trial court did not weigh the speculative concerns about potential safety against the strong public interest in disclosure; instead, the trial court simply found that safety concerns were "paramount," no matter how speculative.

B. The trial court failed to recognize the strong public interest in disclosure of use-of-force policies.

The trial court's error was particularly unfortunate, because it led the trial court improperly to neglect the strong interest possessed by Michigan citizens in knowing the levels of force that their state and local law enforcement officers have been authorized to use in the course of their duties.

As highlighted by the events surrounding George Floyd's death, the public has a strong interest in knowing the circumstances under which police officers are authorized to use force. Voters like Ms. Hjerstedt and news organizations like MLive cannot advocate for or report on changes to use-of-force policies if they are kept in the dark about the terms of those policies. For ordinary citizens to be able to meaningfully participate in this significant public and political debate, they must be able to review municipalities' use-of-force policies and shape their political

advocacy and votes accordingly. That is precisely the informed democratic process that the FOIA was designed to protect. MCL § 15.231(2); *Messenger*, 232 Mich App at 641.

Thus, even in the event that the redacted use-of-force policies contain "operational instructions" or "communication codes," the public retains "a strong and ongoing interest in knowing how public officials perform the tasks that the law assigns to them." *Prac Pol Consulting*, 287 Mich App at 463. That strong public interest in disclosure outweighs the City's interest in keeping the public in the dark. Nor is it overcome by speculative testimony that disclosure "could" potentially result in only "one injury"—with no evidence indicating that disclosure in any of the numerous other jurisdictions that have disclosed their policies has ever resulted in any harm. The trial court erroneously disregarded the second step of the required analysis and improperly discounted the substantial public interest in the disclosure of use-of-force policies under Michigan law.

Conclusion

Use-of-force policies fall squarely within the information to which Michigan citizens are entitled under the FOIA. Upholding the trial court's ruling would frustrate the FOIA's purposes and deprive Michigan citizens of a vital tool in the ongoing public debate over the appropriate parameters of law enforcement officers' use of force. The trial court's judgment should be reversed.

Respectfully submitted,

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