

STATE OF MICHIGAN

17th CIRCUIT COURT FOR KENT COUNTY

American Civil Liberties Union of Michigan
and
Peter Armstrong Sr.,

Plaintiffs,

v.

City of Grand Rapids,

Defendant.

Case No. 23-_____ -CZ

Honorable _____

Bradford W. Springer (P67201)
Cooperating Attorney, American Civil
Liberties Union Fund of Michigan
Scholten Fant, P.C.
100 N. Third Street; P.O. Box 454
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Fund of Michigan
1514 Wealthy St. SE, Ste. 260
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Detroit, MI 48201
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Attorneys for Plaintiffs

Verified Freedom of Information Act Complaint

There is no other pending or resolved civil action arising
out of the same transaction or occurrence alleged in the complaint.

Plaintiffs American Civil Liberties Union of Michigan (“ACLU”) and Peter Armstrong Sr., through their undersigned counsel, for their Verified Freedom of Information Act Complaint against Defendant City of Grand Rapids, respectfully state:

Introduction

1. This action to compel a public body’s disclosure of public records arises under the Michigan Freedom of Information Act, MCL 15.231 *et seq.* (“FOIA” or “the Act”). The central issue in this case is whether the City’s estimated delay of 8-10 months to fulfill plaintiffs’ FOIA request that will only take 2.25 hours to fulfill, constitutes a constructive denial of the request and/or a violation of the Act.

Parties, Jurisdiction, and Venue

2. Plaintiff ACLU is a nonprofit organization incorporated under the laws of the State of Michigan whose mission is concerned with the protection of civil liberties and, as such, is a “person” as defined under FOIA entitled to receive copies of public records. MCL 15.232(g); MCL 15.233(1).

3. Plaintiff Peter Armstrong Sr. is a Michigan resident and, like the ACLU, is a “person” as defined under FOIA entitled to receive copies of public records. MCL 15.232(g); MCL 15.233(1). Mr. Armstrong is a member of a committee within the ACLU known as the West Michigan ACLU Lawyers Committee and at all times relevant to this Complaint acted as an agent of the ACLU.

4. Defendant City of Grand Rapids is a “public body” as that term is defined in MCL 15.232(h) and has custody and control of “public records” as that term is defined in MCL 15.232(i).

5. The Court has subject matter jurisdiction over this dispute pursuant to MCL 15.240(1)(b) and MCL 600.6419.

6. Venue is proper in this Court pursuant to MCL 15.240(4) and MCL 600.6410(2).

General Allegations

7. Plaintiffs have the right to inspect, copy, or receive copies of public records of a public body, including records of the City of Grand Rapids, pursuant to MCL 15.233.

8. Plaintiffs have a long-standing interest in the use of drones by the City of Grand Rapids Police Department.

9. In December 2021, plaintiffs submitted a FOIA request (request 21-1760) to defendant for records of drone usage by the City's police department. Plaintiffs submitted this request (which is not the subject of this case) after receiving reports from citizens who observed what appeared to be the police department's use of official drones.

10. Defendant took more than a year to fulfill the FOIA request.

11. Troubled by the delay, and in an effort to better understand the defendant's delay in fulfilling not only request 21-1760 but also other FOIA requests, plaintiffs submitted a new FOIA request (23-505) to defendant on March 20, 2023. This is the FOIA request that is the subject of this case. It seeks public records relating to defendant's delays in fulfilling FOIA requests. A copy of this FOIA request is attached here as **Exhibit A**.

12. On March 29, 2023, defendant emailed plaintiffs to acknowledge receipt of FOIA request 23-505 and to assert an extension of time to respond to the request. Defendant's response is attached here as **Exhibit B**. In its response, defendant promised to further respond on or before April 12, 2023.

13. Defendant did not respond as promised on or before April 12, 2023.

14. On April 14, 2023, defendant further responded. A copy is attached as **Exhibit C**.
15. In its April 14, 2023 response, defendant included a written estimate that it would take 1 hour for a police records clerk to search, locate, and examine the requested records, and 1.25 hours for another employee to separate exempt from nonexempt information.
16. Based on this estimate of a total of 2.25 hours to fulfill plaintiffs' request, defendant estimated that the total cost to produce the requested records is \$73.82. Exhibit C, Estimated Calculation of Fees and Costs.
17. Defendant requested a good faith deposit of half of this amount, or \$36.91. Exhibit C, Estimated Calculation of Fees and Costs.
18. In its response, defendant also stated: "Please be advised that due to the amount of FOIA requests we're currently processing, it is estimated that once deposit payment is received, it will take eight to ten (8-10) months until you receive the final invoice and/or records." Exhibit C, page 2.
19. Plaintiffs promptly paid the good faith deposit.
20. Plaintiffs also submitted an administrative appeal to the Defendant's Committee on FOIA Appeals, asserting that a delay of 8-10 months to fulfill a FOIA request estimated to require only 2.25 hours to fulfill constitutes an inordinate delay and constructive denial in violation of the FOIA. A copy of plaintiffs' administrative appeal is attached here as **Exhibit D**.
21. Defendant submitted a lengthy response, accompanied by a lengthy affidavit, to plaintiffs' administrative appeal. A copy is attached as **Exhibit E**.
22. On information and belief, in the time it took to prepare its lengthy response to plaintiffs' administrative appeal, defendant simply could have fulfilled plaintiff's FOIA request, which defendant itself estimated to require only two hours and fifteen minutes to fulfill.

23. Defendant's Committee on FOIA Appeals heard plaintiffs' appeal on June 9, 2023. After limiting plaintiffs' comments in support of its appeal to three minutes, defendant's Committee on FOIA Appeals summarily rejected plaintiffs' appeal, finding that defendant's Committee on FOIA Appeals did not have jurisdiction to hear the appeal. This decision is reflected in the "Final Decision" of the defendant's Committee on FOIA Appeals. A copy is attached here as **Exhibit F**.

24. The rationale for this decision was that, according to defendant, the 8-10 month delay in fulfilling plaintiffs' FOIA request did not constitute a denial of the request, and thus, because plaintiffs' FOIA request had been granted and not denied, there was nothing to appeal. A copy of the meeting minutes reflecting this rationale and the decision of defendant's Committee on FOIA Appeals is attached here as **Exhibit G**.

25. Nevertheless, even the defendant's own Committee on FOIA Appeals claimed to be troubled by what it conceded was a pattern of "lengthy delay" in responding to FOIA requests (like plaintiffs' FOIA request here) issued to the City's police department. Indeed, the minutes of the defendant's Committee on FOIA Appeals state: "Commissioners agreed to document the lengthy delay in responding to Police Department FOIA requests and forward the concern to the Public Safety Committee." Exhibit G.

26. Defendant never informed plaintiffs whether defendant ever followed through on its stated commitment "to document the lengthy delay in responding to Police Department FOIA requests," or whether defendant followed through on its stated commitment to "forward the concern to the Public Safety Committee." Exhibit G.

27. In any event, plaintiffs still have not received the public records requested in its FOIA request 23-505 plaintiffs issued to defendant on March 20, 2023.

28. The issue in this case is whether a delay of 8-10 months, to fulfill a FOIA request that will (according to defendant's own estimate) only take 2.25 hours to fulfill, is effectively a denial of the request and/or a violation of the FOIA. Plaintiffs respectfully assert that the answer is yes.

29. Although the FOIA does not contain a specific time limit for fulfilling requests, the Act expressly recognizes that a public body can violate the Act not only by an outright refusal to produce responsive public records for which no exemption applies, but also by inordinate delay. MCL 15.240(7).

30. The FOIA requires that, "A public body shall furnish a requesting person a *reasonable opportunity* for inspection and examination of its public records" under the Act. MCL 15.233(3) (emphasis added).

31. Making plaintiffs wait 8-10 months to review public records that would take only 2.25 hours to produce does not comply with FOIA's mandate that a public body furnish a "reasonable opportunity" to inspect and examine the requested records, and such inordinate delay constitutes a constructive denial of the request and/or a violation of the Act.

32. FOIA does not specifically define what is meant by "reasonable opportunity" to inspect and examine public records, but other sections of the Act provide meaningful context for what is reasonable. For example, Section 5 of the Act requires that a public body respond to a request for a public record within 5 business days after the public body receives the request by granting the request, denying the request, granting the request in part and denying the request in part, or issuing a notice extending for not more than 10 business days the period during which the public body shall respond to the request. MCL 15.235(2). The Act further provides that failure to respond to a request within 5 business days or within a 10-business day extension period

generally constitutes a public body's final determination to deny the request. MCL 15.235(3). Of course, responding to a FOIA request is not the same as fulfilling the request, but the relevant context is that these are relatively prompt timelines imposed by the Act.

33. Section 4(8) of the Act provides that in responding to a FOIA request, a public body shall strive "to provide the public records in a manner based on this state's public policy under section 1 and the nature of the request in the particular instance." MCL 15.234(8).

34. The nature of the request in this particular instance is a request for records that defendant has estimated will take a mere two hours and fifteen minutes to produce, but that defendant has stated it will not produce, for 8-10 months.

35. The state's public policy is articulated in section 1 of the Act: "It is the public policy of this state 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. The people shall be informed so that they may fully participate in the democratic process." MCL 15.231(2).

36. Plaintiffs are prevented from fully participating in the democratic process when documents they seek in order to fully engage in that process are withheld from them for 8-10 months.

37. Because defendant constructively denied plaintiffs' FOIA request and continue to violate FOIA through inordinate delay, plaintiffs are entitled to bring this action pursuant to MCL 15.240(1)(b) and (3), and pursuant to the inherent powers of the Court to order compliance with the law.

Count I: Violation of the Freedom of Information Act

38. Plaintiffs reallege and incorporate by reference the allegations contained in the preceding paragraphs, as if repeated here.

39. The records that are the subject of plaintiffs' FOIA request are public records subject to FOIA.

40. The records that are the subject of plaintiffs' FOIA request are not exempt from disclosure under any exemption set forth in FOIA or other applicable law, and defendant has claimed no such exemption.

41. By delaying production of public records responsive to plaintiffs' FOIA request for 8-10 months, when fulfillment of the request will only take 2.25 hours, defendant has violated and continues to violate the FOIA by failing to furnish plaintiffs "a reasonable opportunity for inspection and examination of its public records" under the Act and/or constructively denying plaintiffs' request. MCL 15.233(3); MCL 15.240(1).

42. MCL 15.240(5) provides that actions commenced pursuant to FOIA "shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way."

43. MCL 15.240(4) provides in relevant part that "The court shall determine the matter de novo and the burden is on the public body to sustain its denial."

WHEREFORE, plaintiffs respectfully request that this Court:

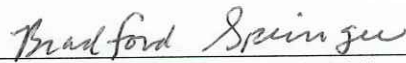
- A. Order expedited treatment of this matter as required by MCL 15.240(5);
- B. Enter judgment in favor of plaintiffs and against defendant, including a declaratory judgment under MCR 2.605, recognizing that delaying production of public records responsive to plaintiffs' FOIA request for 8-10 months, when

fulfillment of the request will only take 2.25 hours, violates the FOIA by failing to furnish plaintiffs “a reasonable opportunity for inspection and examination of its public records” under the Act and/or constructively denying plaintiffs’ request;

- C. Order defendant to furnish plaintiffs a reasonable opportunity for inspection and examination of its public records responsive to plaintiffs’ FOIA request, such as by ordering defendant to produce the requested public records within a reasonable period of time;
- D. Award plaintiffs reasonable attorney’s fees, costs, and disbursements pursuant to MCL 15.240(6); and
- E. Grant plaintiffs such further relief as the Court deems equitable and just.

Dated: September 7, 2023

Respectfully submitted,



Bradford W. Springer (P67201)
Cooperating Attorney, American Civil
Liberties Union Fund of Michigan
Scholten Fant, P.C.
100 N. Third Street; P.O. Box 454
Grand Haven, MI 49417
Telephone: (616) 842-3030

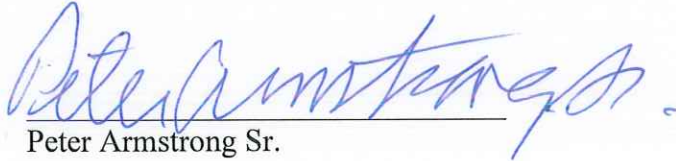
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Telephone: (616) 301-0930

Daniel S. Korobkin (P72842)
American Civil Liberties Union
Fund of Michigan
2966 Woodward Ave.
Detroit, MI 48201
Telephone: (313) 578-6824
Attorneys for Plaintiffs

Verification

I, Peter Armstrong Sr., declare that the statements above are true to the best of my information, knowledge, and belief.

Dated: 9/6, 2023


Peter Armstrong Sr.

Subscribed and sworn to before me this 6th day of September, 2023.

Susan K. Collins
Notary Public State of Michigan, County of Ottawa
My Commission Expires 6/04/2025
Acting in the County of Ottawa


Notary Public Susan K. Collins

My commission expires: 06/04/2025

EXHIBIT

A

**State Headquarters**

2966 Woodward Avenue
Detroit, MI 48201
Phone 313.578.6800
Fax 313.578.6811
E-mail aclu@aclumich.org
www.aclumich.org

Legislative Office

115 West Allegan Street
Lansing, MI 48933
Phone 517.372.8503
Fax 517.372.5121
E-mail aclu@aclumich.org
www.aclumich.org

West Michigan Regional Office

1514 Wealthy St. SE, Suite 260
Grand Rapids, MI 49506
Phone 616.301.0930
Fax 616.301.0640
Email aclu@aclumich.org
www.aclumich.org

March 20, 2023

By email (foiagrpd@grcity.us)

Grand Rapids Police Department
Records Unit
1 Monroe Center St., N.W.,
Grand Rapids, MI 49503

Dear FOIA Coordinator:

Please provide the following records under the Michigan Freedom of Information Act.
“Department” means the Grand Rapids Police Department.

1. Emails, memos and any other communications referring to production of records in response to FOIA request No. 21-1760.
2. Records of requests by the Department during 2020 through 2022 for additional resources to respond to FOIA requests.
3. The following FOIA requests and the Department’s responses to them, including the names of the requesting parties and the information redacted in your response to FOIA 22-2167. (Note that we do not want the records provided by the Department, only the requests and responses.)
 - A. Nos. 22-072, 22-073, 22-103, 22-111 and 22-0694.
 - B. Any requests received in 2022 in addition to the five listed above where more than 60 days elapsed between the latter of the Department’s substantive response or receipt of a requested deposit and the final production of responsive records.
 - C. Requests identified as “withdrawn” in your response to FOIA request 22-2167.

If there are fees for these records, please inform us if the cost will exceed \$50. We request a waiver of fees because disclosure of the information is in the public interest and will contribute significantly to the public’s understanding of the activities of the Department. The information is not requested for commercial purposes. If you have questions about the scope of the request, please call Peter Armstrong at 616-502-2133.

Respectfully,

Peter Armstrong
West Michigan ACLU Lawyers Committee

EXHIBIT

B

March 29, 2023

Peter Armstrong
ACLU
1514 Wealthy St SE, Ste. 260
Grand Rapids, MI 49506

Email: aclu@aclumich.org

RE: FREEDOM OF INFORMATION ACT REQUEST, FOIA #23-0505

Greetings:

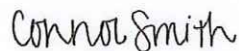
The Grand Rapids Police Department received your request for records on **March 22, 2023** and processed it under the provisions of the Michigan Freedom of Information Act (P.A. 442 of 1976). The request is for the following:

1. *Emails, memos and any other communications referring to production of records in response to FOIA 21-1760*
2. *Records of request by the department during 2020 through 2022 for additional resources to respond to FOIA requests*
3. *The following FOIA requests and the departments responses to them, including names of the requesting parties and the information redacted in your response to FOIA 22-2167 (do not want the records provided by department, only requests and responses)*
 - a. *Numbers 22-0072, 22-0073, 22-0103, 22-0111 and 22-0694*
 - b. *Any requests received in 2022 in addition to the five listed above where more than 60 days elapsed between the latter of the department's substantive response or receipt of a requested deposit and the final production of responsive records*
 - c. *Requests identified as "withdrawn" in your response to FOIA request 22-2167*

Due to the nature and scope of the requested records, it is necessary to extend the time for response as permitted by MCL 15.235(2)(d). A response will be mailed to you on or before **April 12, 2023**.

Please refer all responses to **FOIA #23-0505**.

Thank you,



Connor Smith, Records Unit Supervisor
on behalf of Captain Chad McKersie
Support Services Division

GC/mos

EXHIBIT

C

April 14, 2023

Peter Armstrong
ACLU
1514 Wealthy St SE, Ste. 260
Grand Rapids, MI 49506

Email: aclu@aclumich.org, garm7234@charter.net

RE: FREEDOM OF INFORMATION ACT REQUEST

Greetings:

The Grand Rapids Police Department received your request for records on **March 22, 2023** and processed it under the provisions of the Michigan Freedom of Information Act (P.A. 442 of 1976). The request was for the following item(s):

1. *Emails, memos and any other communications referring to production of records in response to FOIA 21-1760*
3. *The following FOIA requests and the departments responses to them, including names of the requesting parties and the information redacted in your response to FOIA 22-2167 (do not want the records provided by department, only requests and responses)*
 - a. *Numbers 22-0072, 22-0073, 22-0103, 22-0111 and 22-0694*
 - b. *Any requests received in 2022 in addition to the five listed above where more than 60 days elapsed between the latter of the department's substantive response or receipt of a requested deposit and the final production of responsive records*
 - c. *Requests identified as "withdrawn" in your response to FOIA request 22-2167*

Regarding part 3(b) of your request:

The Michigan Freedom of Information Act does not require a public body to answer questions, analyze data, or perform research for the requesting person. As the statute makes clear, "this act does not require a public body to make a compilation, summary, or report of information ..." MCL 15.233(4); "this act does not require a public body to create a new public record..." MCL 15.233(5). This portion of your Freedom of Information Act request seeks to have the Grand Rapids Police Department analyze data and perform research on a public record your office has already obtained in order to attempt locate additional records to part 3(1) of your request. Therefore, part 3(b) of your request is denied.

Regarding the remainder of your request:

A preliminary search resulted in thirty-two (32) FOIA requests, five (5) FOIA responses, five (5) FOIA final invoices and two hundred and twelve (212) PDF pages of emails including attachments. Please be advised that duplicates or emails that are non-responsive will be removed in the final production of the emails possibly resulted in less pages than originally listed. The estimated cost to produce these records is \$73.82.

Please submit a check payable to the Grand Rapids Police Department for \$36.91. This amount is half of the adjusted estimated total and will serve as your deposit to start the review process. Please only pay the 50% deposit to avoid overpayment as refunds can take up to a month or more to process. An itemized estimate is attached. Upon review of the records, we may find that portions of some records may be exempt from disclosure under FOIA or related statutes. That information may need to be redacted. You will be provided with an updated total balance once all documents are reviewed and redacted as needed. You must pay the full remaining balance after the work is complete in order to receive

CM/cs

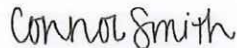
the requested records. Please be advised that due to the amount of FOIA requests we're currently processing, it is estimated that once deposit payment is received, it will take eight to ten (8-10) months until you receive the final invoice and/or records.

The deposit must be received by our office on or before May 30, 2023. Please be advised that pursuant to MCL 15.234(14) we will consider the request abandoned and will no longer be required to fulfill your request if a deposit is not received within forty-eight (48) days after the notice for deposit has been sent by our office or you have not filed an appeal of the deposit amount pursuant to section 10a.

You have certain rights to appeal the partial denial of your record request. You may either appeal to the City Commission within 48 days of this letter or commence a Kent County Circuit Court action within 180 days of this letter. Your appeal rights and rights to damages for improper denial are specifically set out in Section 10 of the Act. You also have certain rights to appeal a fee charged for your records request as set out in Section 10a of the Act. A copy of the City of Grand Rapids FOIA policy, including your right to appeal, is enclosed. A copy of the City of Grand Rapids' Freedom of Information Act Procedures and Guidelines and written public summary is available on the City's website at the following location: <https://www.grandrapidsmi.gov/Government/Policies-and-Orders/Administrative-Policies/Freedom-of-Information-Act-91-02>

Please refer all responses to FOIA 23-0505 Update.

Thank you,



Connor Smith, Records Unit Supervisor
on behalf of Captain Chad McKersie
Support Services Division

CM/cs

**GRAND RAPIDS POLICE DEPARTMENT FOIA UNIT
ESTIMATED CALCULATION OF FEES AND COSTS
FREEDOM OF INFORMATION ACT (FOIA) 23-0505 Update**

LABOR* - Search, location and examination of records:

Police Records Clerk

Hourly rate \$17.13 x 1.5 (fringe benefit multiplier) = \$25.70
 x 1 hour (estimated)** = **\$25.70**

REDACTION – Separation of exempt from nonexempt information:

Police Records Specialist

Hourly rate \$25.73 x 1.5 (fringe benefit multiplier) = \$38.50
 X 1.25 hours (estimated)** = **\$48.12**

DUPLICATION, COPYING & TRANSFERING RECORDS:

Police Records Clerk

Hourly rate \$17.13 x 1.5 (fringe benefit multiplier) = \$25.70
 x 0 hours (estimated)** = **\$0**

ESTIMATED COST TO PRODUCE THE REQUESTED RECORDS: **\$73.82**

50% DEPOSIT DUE: \$36.91

Please make only 50% deposit (not estimated total cost) payment to “Grand Rapids Police Department” and forward to: FOIA Coordinator, 1 Monroe Center St. NW, Grand Rapids, MI 49503

* Hourly rates reflect the wage of the lowest paid employee capable of performing the work.

** Rounded down to the nearest ¼ hour.

^ Rounded down to the nearest 1/10 hour.

Grand Rapids FOIA Procedures and Guidelines and Written Public Summary are available at www.grcity.us/FOIA

RIGHT TO SEEK JUDICIAL REVIEW

APPEALING A DENIAL OR PARTIAL DENIAL

Sec. 10. (1) If a public body makes a final determination to deny all or a portion of a request, the requesting person may do 1 of the following at his or her option:

(a) Submit to the head of the public body a written appeal that specifically states the word "appeal" and identifies the reason or reasons for reversal of the denial.

(b) Commence a civil action in the circuit court, or if the decision of a state public body is at issue, the court of claims, to compel the public body's disclosure of the public records within 180 days after a public body's final determination to deny a request.

(2) Within 10 business days after receiving a written appeal pursuant to subsection (1)(a), the head of a public body shall do 1 of the following:

(a) Reverse the disclosure denial.

(b) Issue a written notice to the requesting person upholding the disclosure denial.

(c) Reverse the disclosure denial in part and issue a written notice to the requesting person upholding the disclosure denial in part.

(d) Under unusual circumstances, issue a notice extending for not more than 10 business days the period during which the head of the public body shall respond to the written appeal. The head of a public body shall not issue more than 1 notice of extension for a particular written appeal.

(3) A board or commission that is the head of a public body is not considered to have received a written appeal under subsection (2) until the first regularly scheduled meeting of that board or commission following submission of the written appeal under subsection (1)(a). If the head of the public body fails to respond to a written appeal pursuant to subsection (2), or if the head of the public body upholds all or a portion of the disclosure denial that is the subject of the written appeal, the requesting person may seek judicial review of the nondisclosure by commencing a civil action under subsection (1)(b).

(4) In an action commenced under subsection (1)(b), 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, regardless of the location of the public record. Venue for an action against a local public body is proper in the circuit court for the county in which the public record or an office of the public body is located has venue over the action. The court shall determine the matter de novo and the burden is on the public body to sustain its denial. The court, on its own motion, may view the public record in controversy in private before reaching a decision. Failure to comply with an order of the court may be punished as contempt of court.

(5) An action commenced under this section and an appeal from an action commenced under this section shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.

(6) 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 attorney's 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. The award shall be assessed against the public body liable for damages under subsection (7).

(7) If the court determines in an action commenced under this section that the public body has arbitrarily and capriciously violated this act by refusal or delay in disclosing or providing copies of a public record, the court shall order the public body to pay a civil fine of \$1,000.00, which shall be deposited into the general fund of the state treasury. The court shall award, in addition, in addition to any actual or compensatory damages, punitive damages in the amount of \$1,000.00 to the person seeking the right to inspect or receive a copy of a public record. The damages shall not be assessed against an individual, but shall be assessed against the next succeeding public body that is not an individual and that kept or maintained the public record as part of its public function.

APPEALING A FEE

Sec. 10a. (1) If a public body requires a fee that exceeds the amount permitted under its publicly available procedures and guidelines or section 4, the requesting person may do any of the following:

(a) If the public body provides for fee appeals to the head of the public body in its publicly available procedures and guidelines, submit to the head of the public body a written appeal for a fee reduction that specifically states the word "appeal" and identifies how the required fee exceeds the amount permitted under the public body's available procedures and guidelines or section 4.

(b) Commence a civil action in the circuit court, or if the decision of a state public body is at issue, the court of claims, for a fee reduction. The action must be filed within 45 days after receiving the notice of the required fee or a determination of an appeal to the head of a public body. If a civil action is commenced against the public body under this

RIGHT TO SEEK JUDICIAL REVIEW

subdivision, the public body is not obligated to complete the processing of the written request for the public record at issue until the court resolves the fee dispute. An action shall not be filed under this subdivision unless 1 of the following applies:

- (i) The public body does not provide for appeals under this subdivision (a).
 - (ii) The head of the public body failed to respond to a written appeal as required under subsection (2).
 - (iii) The head of the public body issued a determination to a written appeal as required under subsection (2).
- (2) Within 10 days after receiving a written appeal under subsection (1)(a), the head of a public body shall do 1 of the following:
- (a) Waive the fee.
 - (b) Reduce the fee and issue a written determination to the requesting person indicating the specific basis under section 4 that supports the remaining fee. The determination shall include a certification from the head of the public body that the statements in the determination are accurate and that the reduced fee amount complies with its publicly available procedures and guidelines and section 4.
 - (c) Uphold the fee and issue a written determination to the requesting person indicating the specific basis under section 4 that supports the required fee. The determination shall include a certification from the head of the public body that the statements in the determination are accurate and that the fee amount complies with the public body's publicly available procedures and guidelines and section 4.
 - (d) Issue a notice extending for not more than 10 business days the period during which the head of the public body must respond to the written appeal. The notice of extension shall include a detailed reason or reasons why the extension is necessary. The head of the public body shall not issue more than 1 notice of extension for a particular written appeal.
- (3) A board or commission that is the head of a public body is not considered to have received a written appeal under subsection (2) until the first regularly scheduled meeting of that board or commission following submission of the written appeal under subsection (1)(a).
- (4) In an action commenced under subsection (1)(b), a court that determines the public body required a fee that exceeds the amount permitted under its publicly available procedures and guidelines or section 4 shall reduce the fee to a permissible amount. Venue for an action against a local public body is proper in the circuit court for the county in which the public record or an office of the public body is located. The court shall determine the matter de novo, and the burden is on the public body to establish that the required fee complies with its publicly available procedures and guidelines and section 4. Failure to comply with an order of the court may be punished as contempt of court.
- (5) An action commenced under this section and an appeal from an action commenced under this section shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.
- (6) If the requesting person prevails in an action commenced under this section by receiving a reduction of 50% or more of the total fee, the court may, in its discretion, award all or an appropriate portion of reasonable attorney's fees, costs, and disbursements. The award shall be assessed against the public body liable for damages under subsection (7).
- (7) If the court determines in an action commenced under this section that the public body has arbitrarily and capriciously violated this act by charging an excessive fee, the court shall order the public body to pay a civil fine of \$500.00, which shall be deposited in the general fund of the state treasury. The court may also award, in addition to any actual or compensatory damages, punitive damages in the amount of \$500.00 to the person seeking the fee reduction. The fine and any damages shall not be assessed against an individual, but shall be assessed against the next succeeding public body that is not an individual and that kept or maintained the public record as part of its public function.
- (8) As used in this section, "fee" means the total fee or any component of the total fee calculated under section 4, including any deposit.

Sec. 10b. If the court determines, in an action commenced under this act, that a public body willfully and intentionally failed to comply with this act or otherwise acted in bad faith, the court shall order the public body to pay, in addition to any other award or sanction, a civil fine of not less than \$2,500.00 or more than \$7,500.00 for each occurrence. In determining the amount of the civil fine, the court shall consider the budget of the public body and whether the public body has previously been assessed penalties for violations of this act. The civil fine shall be deposited in the general fund of the state treasury.

EXHIBIT

D



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May 26, 2023

Via email: FOIAreq@grcity.us

Grand Rapids City Commission
Committee on FOIA Appeals
c/o FOIA Coordinator
300 Monroe Ave NW
Grand Rapids MI 49503

Re: Appeal of FOIA 23-0505

Dear FOIA Appeals Committee,

The ACLU Michigan respectfully appeals the Grand Rapids Police Department's determination that the estimated time for production of the requested public records will be eight to ten months.

The grounds for this appeal are:

1. The Department has prioritized the fulfillment of FOIA requests using an arbitrary distinction based on whether a deposit is required. As a result, we believe requests such as this one that require only several hours to fulfill (2 ¼ hours here) are delayed by being placed in a processing queue with much larger requests.
2. More important, a delay of eight to ten months is simply too long and constitutes a constructive denial of our FOIA request. Delays of this magnitude are incompatible with the transparency and reasonable promptness mandated by the FOIA statute and, we believe, violate the statute. The city must provide sufficient resources to enable timely production of public records.

Background

The ACLU has a long-standing interest in the use of drones by the Grand Rapids Police Department. In December 2021 we filed FOIA request 21-1760 for records of drone usage after receiving reports from citizens of observation of what appeared might be official drones. The request did not get to the top of the Department's "to-process queue" for nine months after the deposit was paid and the records were not produced for nearly a full year.

This delay was unacceptable. We were told that it was caused by the volume of FOIA requests and lack of adequate resources to process them. For further information on this issue, we filed FOIA 22-2167, which sought information on FOIA processing times. The response to that FOIA indicated the Department received 2230 FOIA's in 2022 and provided a spreadsheet showing

“records sent” data for approximately 1511 of these. Less than 1% of responses to these requests took more than 30 days and only five exceeded 100 days.

We thought, initially (and mistakenly), that this was the extent of FOIA delays. Because it seemed that our request was one of only a handful that experienced substantial delays, we questioned whether the Department was prioritizing fulfillment based on the content of the request or the identity of the requesting party. We wrote to the City Attorney in March 2023 to raise this issue and the question of delays generally, but noted that we were not sure if we were correctly interpreting the data.

The City Attorney’s May 1 response advised that we had misinterpreted the Department’s data and that there were even more delayed FOIA responses than we had believed. Specifically, she said that as of May 1, there were 120 FOIA requests outstanding from 2022, eight more from 2021 and even one from 2020. And, our 2021 request, although taking the best part of a year to fulfill, had in fact been placed ahead of others.

As a result, we no longer have concerns about differential treatment in the prioritizing of responses. However, we continue to see delayed fulfillment as a fundamental problem in the Department’s handling of FOIA requests.

The FOIA Request on Appeal

Meanwhile, in an effort to better understand the FOIA delays, in March we also submitted FOIA 23-0505, the request at issue in this appeal. That request sought documents related to the processing of FOIA request 21-1760 (the original request seeking drone information), and further information to help us understand the documents produced in response to FOIA 22-2167. After a conversation with the Department staff, we narrowed our request. We were informed on April 14, 2023, that the processing time for our request is expected to be 8-10 months.

The 8–10-month delay is unsupportable and constitutes a constructive denial of our request.

The Department’s response said the delay was due to the “amount of FOIA requests we’re currently processing.” But it cannot be justified by the volume of work entailed in this instance. The response estimated a fee of \$73.82 based on 2¼ hours work consisting of one hour to locate and examine the records and 1¼ hours to redact them.

We understand that the Department has chosen to prioritize FOIA requests into two categories based on whether a deposit may be required. Under MCL 15.234(8) a deposit may be required if the cost is estimated to exceed \$50. The “small” requests that do not require a deposit are fulfilled reasonably promptly and we believe nearly always within 30 days. We do not know how the “large” requests are prioritized but many of them take eight months or a year or even longer. Thus, a request such as ours, estimated to take 2¼ hours to fulfill, is arbitrarily put in line with other requests that we assume may take much longer.

The statute requires a “best efforts estimate” of the time it will take to comply. That estimate must be provided “in good faith.” MCL 15.234(8). The Legislature clearly intended to require public bodies to provide requested records expeditiously. In fact, public bodies are subject to

civil fines and actual and punitive damages if they have “arbitrarily and capriciously violated this act by refusal or delay in disclosing or providing” public records. MCL 15.240(7). It is significant that this provision specifically applies to “delay” as well as refusal.

The Michigan Attorney General issued an opinion in 2017 relating to the time within which a public body must fulfill a request for public records under Michigan’s FOIA. 2017 Mich. OAG No. 7300. The Attorney General’s opinion concludes that the FOIA does not impose a specific time by which a public body must fulfill a request for public records but opines that a public body’s “best efforts estimate” under Section 4(8) cited above, MCL 15.234(8), “must be a calculation that contemplates the public body working diligently to fulfil its obligation to produce the records to the requestor.” The Attorney General’s opinion also notes that, in addition, under Section 4(8), the “best efforts estimate” must be made “in good faith” under the statute -- “that is, it must be made honestly and without the intention to defraud or delay the requestor.”

Ms. Hitchcock’s May 1 letter justifies the delays because the “good faith” time estimate required by the statute may be based in part on the “nature of the request in the particular instance.” This is wrong for two reasons.

First, the same provision of the statute also requires that the estimate be based on the “state’s public policy” as established by the statute. MCL 15.234(8). That policy is one of prompt production of records.

Second, while the nature of the request obviously is an appropriate factor in determining how long it will take to deliver the records, it is difficult to see how a request needing only 2¼ hours to fulfill should take the best part of a year while ones taking an hour or so less than that will nearly always be fulfilled in less than 30 days. Without further explanation this would seem to be the very definition of arbitrariness.

Lengthy Delays are Unacceptable Even for More Complex Requests

This appeal, however, raises a larger issue. It is not simply about how the Department chooses to prioritize FOIA requests. Delays of eight to ten months or a year are so long that they destroy the very meaning and purpose of the statute. While the instant appeal involves a simple, small request, prompt access to records is also necessary for more complex requests.

Michigan’s FOIA 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). FOIA is designed to ensure that the public receive prompt access to information, for the very purpose of the statute is to allow the public 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).

The Department appears unable, at a systemic level, to comply with its obligations under FOIA to provide prompt access to information. Government transparency can hardly exist with delays

like this. In a real sense, information delayed is information denied. The Department cannot simply say we don't have the time or people to comply with the law.

Relief Requested

We respectfully ask that the Department be directed to produce the documents within 30 days. We further respectfully ask that the FOIA Appeals Committee conduct a systemic review of FOIA processing times at the Department, and prepare recommendations within 60 days to the City Commission outlining steps necessary to ensure that the people of Grand Rapids have access to timely information and that the Department is complying with Michigan's FOIA.

Sincerely,



Peter Armstrong
Brad Springer
ACLU West Michigan Lawyers Committee

EXHIBIT

E

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MICHIGAN

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June 8, 2023

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Re: Response to Appeal of FOIA #23-0505 by ACLU

Dear Commissioners:

Please accept this correspondence as the response to the Appeal of FOIA Request #23-0505, submitted on or around May 26, 2023, by ACLU Michigan seeking appeal of the alleged “constructive” denial of its FOIA request.

Contrary to the ACLU’s assertion, the FOIA request at issue has not been denied, expressly or constructively, by the Grand Rapids Police Department’s Records Unit. The Records Unit has used its best efforts to respond in good faith to the ACLU’s request in as timely a manner as is reasonably possible. The Records Unit has responded to, and continues to respond to, all records requests in good faith and using the Unit’s best efforts. Under the Michigan Freedom of Information Act (FOIA), this is all that is required.

Moreover, as further outlined below, the GRPD has not and does not use an arbitrary or capricious system for reviewing and prioritizing requests. The simple truth is that complicated, document intensive, and unusual requests take longer to process because they require more staff resources, including more highly trained staff time to review, redact (if necessary), and prepare the documents for production. A line must be drawn somewhere, and the Records Unit uses the one that is provided for expressly by the FOIA statute.

Because the Records Unit is using its best efforts to fulfill FOIA requests, it is complying with the law and has not denied the ACLU's request. Therefore, this Committee does not have jurisdiction to hear this appeal. Even if this Committee did have the jurisdiction to consider the ACLU's request, it should find that the Records Unit has fulfilled its obligations under the FOIA, by acting in good faith and not in any manner that can be considered arbitrary and capricious.

A. Background

The FOIA request at issue in this appeal is one in which the ACLU is seeking to uncover the reasons for the GRPD's delays in processing times for FOIA requests. On or around March 22, 2023, the ACLU submitted FOIA Request #23-0505 to the Grand Rapids Police Department. Specifically, the ACLU's request sought:

1. Emails, memos and any other communications referring to production of records in response to FOIA request No. 21-1760.
2. Records of requests by the [GRPD] during 2020 through 2022 for additional resources to respond to FOIA requests¹.
3. The following FOIA requests and the [GRPD's] responses to them, including the names of the requesting parties and the information redacted in your response to FOIA 22-2167. (Note that we do not want the records provided by the Department, on the requests and responses.)
 - a. Nos. 22-072, 22-073, 22-103, 22-111, and 22-0694.
 - b. Any requests received in 2022 in addition to the five listed above where more than 60 days elapsed between the latter of the [GRPD's] substantive response or receipt of a requested deposit and the final production of responsive records.
 - c. Requests identified as "withdrawn" in your response to FOIA request 22-2167.

(FOIA Request, attached as Exhibit A to the *Affidavit of Smith*, attached hereto.) On March 29, 2023, the GRPD Records Unit issued a notice of extension of time to respond, as it is legally permitted to do. On April 14, 2023, the GRPD provided its amended response to the FOIA Request, denying the request in part and granting it in part. (See, *Response*, attached as Exhibit B, the *Smith Aff.*) The Response, issued by the Records Unit Supervisor for the GRPD, stated the good faith estimate of time, and thus cost, to locate, review and redact, and transmit the requested records. (Ex. B.) It also included a good faith estimate of the time frame it would take the Records Unit to provide the records. (Ex. B.) As that estimate had a cost exceeding \$50.00, so, as expressly

¹ This paragraph of the request was subsequently omitted by the ACLU. In doing so, the ACLU requested that the GRPD Records Unit issue an "amended response," omitting paragraph 2 of its original request.

permitted by statute, the response included a demand for deposit and an estimated time in which the fulfillment would be made after that deposit was received. (Ex. B.)

Now on appeal, the ACLU does not challenge the partial denial. Instead, the ACLU challenges only the estimated length of time for the Records Unit to fulfill its request claiming that it is a “constructive denial.” Based on the volume of records requests (discussed further below) that the Records Unit was processing at the time this FOIA Request was made, it was estimated that it would take 8 to 10 months to fulfill the request and provide the requested records. (Ex. B.)

Moreover, the City’s Administrative Policy 91-02, governing the City’s FOIA policies, provides for an appeal to this Committee only when there has been a denial. Since there has been no denial, constructive or otherwise, this Committee does not have jurisdiction to hear this appeal.

B. Michigan’s FOIA statute requires only that the GRPD Records Unit use its “Best Efforts” to fulfill a FOIA request, and that it make a “Good Faith” Estimate of the time it will take to do so.

Michigan’s FOIA statute requires that public bodies, including the City of Grand Rapids and its Police Department, provide certain public records which have been requested. MCL 15.233. The statute expressly allows the City to charge a fee for searching, copying, and providing the requested records. MCL 15.234(1). Notably, the statute expressly allows the City to “require a good-faith deposit from the person requesting information” only if the estimated cost will exceed \$50.00. MCL 15.234(8).

The cost estimate is based, largely, on the estimated time it will take staff to search for and prepare the documents to be produced. The FOIA statute even provides a formula for calculating the cost of that labor, which includes hourly wages and fringe benefits. MCL 15.234(2).

The FOIA statute, however, does not contain an express time in which the records themselves must be provided. Instead, the statute provides only that the written “response” to the FOIA request:

...must also contain a best efforts estimate by the public body regarding the time frame it will take the public body to comply with the law in providing the public records to the requestor. The time frame estimate is nonbinding upon the public body, but the public body shall provide the estimate in good faith and strive to be reasonably accurate and to provide the public records in a manner based on this state’s public policy under section 1 and the nature of the request in the particular instance.

MCL 15.234(8) (emphasis added). In other words, there is no express time frame for providing the records requested. The only obligation is that the GRPD provide an estimate of the time it will take to fulfill the request and that it use its best efforts to do so.

Here, the GRPD Records Unit made a good faith estimate of the time it would take, using its best efforts, to fulfill the ACLU's request: 8 to 10 months.

C. The GRPD Records Unit's Responsibilities

The Records Unit at the GRPD handles the FOIA requests that are made to the Grand Rapids Police Department, as well as all other types of records requests that are made of the GRPD.

The FOIA workload for the GRPD has increased significantly for each of the past several years and continues to do so. (*Smith Affidavit*, attached.) By way of example, in 2018, the Records Unit processed 1,187 FOIA requests. But in 2022, it processed 2,230 such requests for information. As of this writing, there have been approximately 1,043 FOIA requests for 2023 YTD. (*Smith Aff.* at ¶16.)

Moreover, the GRPD's Records Unit does not merely process FOIA requests. It is also tasked with: processing fingerprints for assorted non-investigatory purposes; processing licenses to purchase pistols; processing pistol sales records (numbering over 100 per week); records requests from the City's Department of Law (which include discovery requests for civil lawsuit and MDCR charges); and records requests from various prosecuting agencies, other law enforcement agencies, various courts, attorneys for use in civil proceedings in which the City may or may not be a party, from CPS and other State agencies, and from Federal agencies. (*Smith Aff.* at ¶17.) The Records unit is also tasked with making entries into LEIN regarding stolen firearms and other items, placing holds on various records for assorted purposes (including litigation hold requests), processing U-Visa applications for certification, performing firearm verification for the GRPD Detective Bureau, as well as handling the general release of reports to members of the public over the counter ranging from incident reports to crash reports, processing records that are to be released to the Office of Oversight and Public Accountability, processing records that are released to the Civilian Appeals Board, and processing Lexis Nexis requests for reports. The Records Unit also assists members of the public at the counter and address hundreds of phone calls per week. (*Id.*)

The GRPD Records Unit is officially tasked with processing any and all records that are released from the GRPD.

In 2022, that extensive body of work was performed by one supervisor, three staff members, and one employee who was strictly assigned to process video footage (i.e. body-worn camera and in-car video footage). (*Smith Aff.*)

D. The GRPD Records Unit has not denied the ACLU's FOIA Request, constructively or otherwise. Therefore, this Committee does not have jurisdiction to hear the ACLU's appeal. Even if the Committee does decide the Appeal, it should find that the Records Unit has used its best efforts to fulfill the Request.

The GRPD Records Unit expressly granted the ACLU's FOIA Request². (*See*, Ex. B to *Smith Aff.*) The Records Unit did not deny the request. The Records Unit is intending to fulfill the ACLU's request and will do so without favoritism or discrimination to the requestor. (*See*, *Smith Aff.*) The GRPD is not acting in an arbitrary and capricious manner but is responding to FOIA requests in the order in which they are received.

The process used by the GRPD Records Unit is based on who submitted a FOIA request first – “first in, first out.” (*Smith Aff.* at ¶¶13-14.) The Records Unit first undertakes an estimation, made in good faith, of how much time it will take to respond to and fulfill the records request made pursuant to FOIA. If the time taken by Records Unit staff exceeds 1.5 hours, then it will cost more than \$50.00. (*Smith Aff.*, at ¶13.) By operation of the language contained in the FOIA statute, the GRPD is then permitted to request a demand for deposition of 50% of the estimated cost, and in doing so must provide its response indicating a grant or denial of the request and a good faith estimate of the time it will take to fulfill the request after the deposit is received. MCL 15.234(8).

Once a deposit is received, the FOIA request enters the “que,” which is based on the order in which the request was received. It is not based on who is making the request or what the subject matter of the request is. This process was enacted for the express purpose of not being arbitrary – but instead being fair to all those who submit FOIA requests. (*Smith Aff.* at ¶¶13-14.)

Since there is no explicit denial, the ACLU instead (erroneously) relies on a theory that is not supported by the facts or sustainable under the law. The ACLU's theory is that the length of time that it will take for the Records Unit to fulfill its request is a “constructive denial.” The ACLU provides no authority for its position that “prompt production of records” is required by the law³. This is because there is no such requirement under Michigan law that a public body, such as the City of Grand Rapids, constructively denies a FOIA request if it does not fulfill it “promptly.”

Michigan's FOIA statute does not have a provision stating a time period in which a public body must provide the requested records, or even state that the public body must do so “promptly.” “Thus, there is no fixed deadline imposed under subsection 4(8) by which a public body must

² The portion of the FOIA Request #23-0505 which was denied is not challenged by the ACLU's appeal. Instead, the ACLU only challenges the timeliness of the portion that was expressly granted.

³ To the contrary, the case that the ACLU relies on for its position that FOIA requires “prompt access to information,” does not hold anything of the sort. In *Messenger v. Ingham County Prosecutor*, the case relied on by the ACLU in this Appeal, an individual sent the prosecutor a FOIA request for his criminal case file. There, the Court found that some of the prosecutor's file was attorney work product and that certain documents need not be produced.

The case does not deal with or discuss at all the issue of timeliness of responding to a FOIA request, only that, generally, FOIA is a “mechanizm through which the citizenry may examine and review the workings of government...” while recognizing “that imperatives exist for keeping some information from public disclosure.” *Messenger v. Ingham County Prosecutor*, 232 Mich. App. 633, 641-2; 591 N.W.2d 393 (1998). It does not hold that FOIA is “designed to esnure that the public receive prompt access to information,” as is suggested by the ACLU.

fulfill a request for records.” 2017 Mich. Op. Att’y Gen. No. 7300 (Dec. 12, 2017). Instead, the FOIA only states that the public body must provide a good faith estimate of the amount of time it will take to fulfill the request when utilizing its best efforts. MCL 15.234(8). In 2017, the Michigan Attorney General interpreted the term “best efforts,” which is not defined in the statute, for purposes of the FOIA statute as “diligent attempts to carry out an obligation.” *Id.*, citing *Black’s Law Dictionary* (10th Ed. 2014). The AG continued to opine that such “diligent attempts” would be “measured by the measures that a reasonable person in the same circumstances and of the same nature as the acting party would take.” *Id.*

In other words, acting with one’s “best efforts” is a matter of acting *reasonably under like or similar circumstances*. The Michigan Court of Appeals, in another context, has further found that using “best efforts” does not mean using “every conceivable effort,” just what is reasonable under the circumstances. *See, In re Raymond L. Frick Tr.*, No. 341498, 2018 WL 6519620 (Mich. Ct. App. Dec. 11, 2018).

Here, the Records Unit is acting reasonably and is using its best efforts to provide responses to the FOIA requests it receives. With the limited staffing that the Records Unit has, it fulfills all of its many responsibilities and mandates, which include responding to a large volume of FOIA requests (more than 1,000 already for calendar year 2023). Therefore, the GRPD Records Unit is fulfilling its statutory requirements under FOIA by making good faith estimations of time and using its best efforts to fulfill the records requests made to the Department.

Contrary to the ACLU’s position, a delay is not a denial. The GRPD Records Unit has not constructively denied the ACLU’s request.

Therefore, the GRPD respectfully requests that this Committee DENY the ACLU’s requested relief on appeal and permit the GRPD Records Unit to continue utilizing its best efforts in responding to all the FOIA requests in the order in which they are received.

Respectfully submitted,



Sarah J. Hartman
Assistant City Attorney

C: Phil Strom, Esq. *via email only* at pstrom@grand-rapids.mi.us
Peter Armstrong, *via email only* at aclu@aclumich.org and garm7234@charter.net

AFFIDAVIT OF MIKAYLA SMITH

STATE OF MICHIGAN)
) ss
COUNTY OF KENT)

I, Mikayla (“Connor”) Smith, being duly sworn, state as follows:

1. I am currently an Administrative Analyst, Police Records Supervisor for the Grand Rapids Police Department. I have served in the GRPD Records Unit since August 2017, in various positions.
2. I have been assigned to FOIA for the GRPD Records Unit since April 2018. My primary duties in my role as Police Records Supervisor (FOIA) include coordination of the operations of the Records Unit, processing and responding to FOIA requests on behalf of the Department.
3. In my position with the GRPD Records Unit, I have obtained personal knowledge of the facts set forth herein.
4. I am personally involved in the processing of the FOIA request directed to the GRPD, FOIA #23-0505, which is a request made by the ACLU and received by the Department on March 22, 2023. A true and accurate copy of that FOIA request is attached hereto as Exhibit A.
5. The City of Grand Rapids has an Administrative Policy on FOIA requests for public records, AO No. 91-02, which has been followed in the response and fulfillment processing for FOIA #23-0505.
6. The GRPD also has a Policy on responding to FOIA requests, Policy No. 13-1.1, which has been followed in the response and fulfillment processing for FOIA #23-0505.
7. In my role as Police Records Supervisor, I coordinated a search to identify records that may be responsive to FOIA Request #23-0505.
8. A preliminary search of responsive records was compiled to include an estimated thirty-two (32) FOIA requests, five (5) FOIA responses, five (5) FOIA final invoices and two hundred and twelve (212) PDF pages of emails, including attachments.
9. The production of records requested from the GRPD requires careful review and potential redaction by GRPD staff. Specifically, GRPD staff must review and redact any Criminal Justice Information System (CJIS) information (in accordance with law and GRPD Manual of Procedures 4-8), as well as review and redaction of other information which is exempt from production the FOIA or other statute. Certain information is protected by law and may not be produced or may only be produced under certain circumstances or permissively at the discretion of the Department and

must be reviewed by a Department employee and may also require review by an Assistant City Attorney.

10. Based on my prior experience and based on estimates we have used in fulfilling prior FOIA requests, I estimated that searching and finding the records responsive to the ACLU's request (#23-0505) would take approximately 60 minutes.
11. Additionally, reviewing and redacting the records, once they had been located, was estimated to take approximately 75 minutes.
12. All FOIA responses are provided consistent with the statutory timelines. The FOIA response was provided on April 12, 2023. A true and accurate copy of that response is attached hereto as Exhibit B.
13. The GRPD Records Unit has developed a standard process for FOIA request fulfillment which follows the FOIA statute. In general, the Records Unit issues responses to FOIA requests on a "first in, first out" basis. In other words, the responses to FOIA requests are made in the order in which the requests have been received by the Department.
 - a. For any FOIA request that has an estimated cost of less than \$50.00, the fulfillment of the records request is generally accomplished within the statutory timeframe for a response.
 - b. Larger requests, which have an estimated cost to fulfill of more than \$50.00, are issued a letter stating whether the request is granted or denied, the basis for any denial, providing an estimated cost and making demand for deposit of 50% of the estimated cost, and estimating how long it will take to fulfill the request for records once the deposit is received.
 - c. This distinction is made by the FOIA statute itself, which provides that the Department can ask for a deposit if a good faith estimate of the cost to fulfill the request is \$50.00 or more.
 - d. Based on staffing costs, any estimation for the time involved in locating, reviewing, redacting, and preparing records for production will have to exceed 1.5 hours before a request for demand and placement in the records production que is issued.
14. This process has been implemented to provide a fair routine for processing and fulfilling FOIA requests and to not treat any individual FOIA request differently than another. The "first in, first out" process ensures consistency and provides some credibility to the output of the work despite the significant back log.
15. The ACLU's FOIA request (#23-0505) is currently number 74 of 80 larger FOIA requests which are pending fulfillment.
16. Several factors have contributed to the current time estimates for larger-scale FOIA requests. Those factors include, but are not limited to:

- a. The increase in the number of FOIA requests made to the GRPD in recent years.
 - i. In 2018, there were 1,187 FOIA requests made to the GRPD Records Unit. The estimated time for fulfillment of FOIA requests which required a demand for deposit was generally 10-20 business days.
 - ii. More recently, in 2022 there were 2,230 FOIA requests made to GRPD. In early 2022, FOIA response times for larger-scale records requests had increased to 3-6 months. This was based primarily on increased FOIA requests and increased Records Unit responsibilities.
 - iii. In April 2022, an Officer Involved Shooting (OIS) incident caused a significant and immediate increase in urgent requests for records that had to be processed through the Records Unit. The Records Unit received at least 68 FOIA requests in a very short period of time, resulting in further delay of 2-3 months in processing requests that were already in the que waiting to be processed for fulfillment.
 - b. The GRPD has been working with the City to obtain additional resources to improve fulfillment times for FOIA requests. In 2022, all of the Records Unit tasks were performed by one supervisor (me), three staff members, and one additional employee whose sole responsibilities was to review and process video footage. At the end of 2022 and beginning of 2023, the Department was granted three additional individuals (one being a temporary employee) to help improve FOIA fulfillment times. These employees are currently in training. The training process for new hires to be able to properly review, redact, and process documents for FOIA response takes approximately 6 months, and includes certification so that they can review CJIS.
 - c. Internal resource limitations to expand the team of records specialists. The Police overall budget decreased from 35.5% of the GOF in 2022 to 32.7% of the GOF in 2023.
 - d. Additionally, there has been a series of recent command staff changes within the Records Unit. The GRPD Records Unit has had three different directors in the past three years.
 - e. Staffing levels and changeover have exacerbated the continuing increase to the volume of records requests. The Department has received 1,043 FOIA requests in 2023 so far, which is up 124 requests compared year to date to 2022. It is anticipated that there will be an overall increase of 10-20% in just FOIA requests in 2023.
 - f. Added use of technology in law enforcement has resulted in the added quantity of data associated with law enforcement responsibilities.
17. The Records Unit is tasked with processing any record that is released from the GRPD, not just through FOIA. In addition to processing FOIA requests, the GRPD Records Unit has other statutory and mandatory obligations to fulfill, such as:

- a. Processing fingerprints for assorted non-investigatory purposes;
- b. Processing licenses to purchase pistols;
- c. Processing pistol sales records;
- d. Requests for records from the City's Department of Law, which includes records that are requested in response to civil lawsuit discovery and MDCR charge investigations;
- e. Processing subpoenas;
- f. Records requests from various processing agencies, other law enforcement agencies, courts, CPS and other State agencies, and Federal agencies;
- g. Making entries into LEIN regarding stolen firearms and other items;
- h. Placing holds on records for assorted purposes (including the thread of civil litigation);
- i. Processing records that are released to the Office of Oversight and Public Accountability and the Civilian Appeals Board;
- j. Processing Lexis Nexis requests for reports;
- k. Processing U-Visa applications for certification, performing firearm verifications for the Detective Bureau; and
- l. Handling the general release of incident and crash reports to the public over the counter.

As with FOIA requests, the requests for records and information from these other sources has also increased.

18. The Records Unit for the GRPD is utilizing its best efforts and making all diligent attempts to process and fulfill FOIA requests as they come in.
19. The Records Unit granted the ACLU's FOIA Request #23-0505, in part, and it intends to fulfill that request, subject to any legal exemptions that may apply.
20. The GRPD continues to seek additional support and resources to assist in the processing of the constantly expanding FOIA case load, as well as the volume of other types of requests for records that are made on the Department.
21. Currently, it is estimated that Records Unit will be able to produce and fulfill the ACLU's FOIA request for records in seven to nine (7-9) months.

Further, affiant sayeth not.

By: Mikayla Connor Smith
Mikayla "Connor" Smith
Police Records Supervisor
Grand Rapids Police Department
City of Grand Rapids

Subscribed and sworn to before me
this 8th day of June 2023.

Heidi Kutzli
_____, Notary Public

Kent County, Michigan
My Commission Expires: 8/15/2024
Acting in Kent County



EXHIBIT A



State Headquarters
2966 Woodward Avenue
Detroit, MI 48201
Phone 313.578.6800
Fax 313.578.6811
E-mail aclu@aclumich.org
www.aclumich.org

Legislative Office
115 West Allegan Street
Lansing, MI 48933
Phone 517.372.8503
Fax 517.372.6121
E-mail aclu@aclumich.org
www.aclumich.org

West Michigan Regional Office
1514 Wealthy St. SE, Suite 260
Grand Rapids, MI 49506
Phone 616.301.0930
Fax 616.301.0640
Email aclu@aclumich.org
www.aclumich.org

March 20, 2023

Grand Rapids Police Department
Records Unit
1 Monroe Center St., N.W.,
Grand Rapids, MI 49503

F.O.I.A. REQUEST
RECEIVED
MAR 22 2023
BY: RECORDS UNIT

Dear FOIA Coordinator:

Please provide the following records under the Michigan Freedom of Information Act.
"Department" means the Grand Rapids Police Department.

1. Emails, memos and any other communications referring to production of records in response to FOIA request No. 21-1760.
2. Records of requests by the Department during 2020 through 2022 for additional resources to respond to FOIA requests.
3. The following FOIA requests and the Department's responses to them, including the names of the requesting parties and the information redacted in your response to FOIA 22-2167. (Note that we do not want the records provided by the Department, only the requests and responses.)
 - A. Nos. 22-072, 22-073, 22-103, 22-111 and 22-0694.
 - B. Any requests received in 2022 in addition to the five listed above where more than 60 days elapsed between the latter of the Department's substantive response or receipt of a requested deposit and the final production of responsive records.
 - C. Requests identified as "withdrawn" in your response to FOIA request 22-2167.

If there are fees for these records, please inform us if the cost will exceed \$50. We request a waiver of fees because disclosure of the information is in the public interest and will contribute significantly to the public's understanding of the activities of the Department. The information is not requested for commercial purposes. If you have questions about the scope of the request, please call Peter Armstrong at 616-502-2133.

Respectfully,


Peter Armstrong

West Michigan ACLU Lawyers Committee

EXHIBIT B

April 14, 2023

Peter Armstrong
ACLU
1514 Wealthy St SE, Ste. 260
Grand Rapids, MI 49506

Email: aclu@aclumich.org, garm7234@charter.net

RE: FREEDOM OF INFORMATION ACT REQUEST

Greetings:

The Grand Rapids Police Department received your request for records on **March 22, 2023** and processed it under the provisions of the Michigan Freedom of Information Act (P.A. 442 of 1976). The request was for the following item(s):

1. *Emails, memos and any other communications referring to production of records in response to FOIA 21-1760*
3. *The following FOIA requests and the departments responses to them, including names of the requesting parties and the information redacted in your response to FOIA 22-2167 (do not want the records provided by department, only requests and responses)*
 - a. *Numbers 22-0072, 22-0073, 22-0103, 22-0111 and 22-0694*
 - b. *Any requests received in 2022 in addition to the five listed above where more than 60 days elapsed between the latter of the department's substantive response or receipt of a requested deposit and the final production of responsive records*
 - c. *Requests identified as "withdrawn" in your response to FOIA request 22-2167*

Regarding part 3(b) of your request:

The Michigan Freedom of Information Act does not require a public body to answer questions, analyze data, or perform research for the requesting person. As the statute makes clear, "this act does not require a public body to make a compilation, summary, or report of information ..." MCL 15.233(4); "this act does not require a public body to create a new public record..." MCL 15.233(5). This portion of your Freedom of Information Act request seeks to have the Grand Rapids Police Department analyze data and perform research on a public record your office has already obtained in order to attempt locate additional records to part 3(1) of your request. Therefore, part 3(b) of your request is denied.

Regarding the remainder of your request:

A preliminary search resulted in thirty-two (32) FOIA requests, five (5) FOIA responses, five (5) FOIA final invoices and two hundred and twelve (212) PDF pages of emails including attachments. Please be advised that duplicates or emails that are non-responsive will be removed in the final production of the emails possibly resulted in less pages than originally listed. The estimated cost to produce these records is \$73.82.

Please submit a check payable to the Grand Rapids Police Department for \$36.91. This amount is half of the adjusted estimated total and will serve as your deposit to start the review process. Please only pay the 50% deposit to avoid overpayment as refunds can take up to a month or more to process. An itemized estimate is attached. Upon review of the records, we may find that portions of some records may be exempt from disclosure under FOIA or related statutes. That information may need to be redacted. You will be provided with an updated total balance once all documents are reviewed and redacted as needed. You must pay the full remaining balance after the work is complete in order to receive

CM/cs

the requested records. Please be advised that due to the amount of FOIA requests we're currently processing, it is estimated that once deposit payment is received, it will take eight to ten (8-10) months until you receive the final invoice and/or records.

The deposit must be received by our office on or before May 30, 2023. Please be advised that pursuant to MCL 15.234(14) we will consider the request abandoned and will no longer be required to fulfil your request if a deposit is not received within forty-eight (48) days after the notice for deposit has been sent by our office or you have not filed an appeal of the deposit amount pursuant to section 10a.

You have certain rights to appeal the partial denial of your record request. You may either appeal to the City Commission within 48 days of this letter or commence a Kent County Circuit Court action within 180 days of this letter. Your appeal rights and rights to damages for improper denial are specifically set out in Section 10 of the Act. You also have certain rights to appeal a fee charged for your records request as set out in Section 10a of the Act. A copy of the City of Grand Rapids FOIA policy, including your right to appeal, is enclosed. A copy of the City of Grand Rapids' Freedom of Information Act Procedures and Guidelines and written public summary is available on the City's website at the following location: <https://www.grandrapidsmi.gov/Government/Policies-and-Orders/Administrative-Policies/Freedom-of-Information-Act-91-02>

Please refer all responses to FOIA 23-0505 Update.

Thank you,



Connor Smith, Records Unit Supervisor
on behalf of Captain Chad McKersie
Support Services Division

CM/cs

RIGHT TO SEEK JUDICIAL REVIEW

APPEALING A DENIAL OR PARTIAL DENIAL

Sec. 10. (1) If a public body makes a final determination to deny all or a portion of a request, the requesting person may do 1 of the following at his or her option:

(a) Submit to the head of the public body a written appeal that specifically states the word "appeal" and identifies the reason or reasons for reversal of the denial.

(b) Commence a civil action in the circuit court, or if the decision of a state public body is at issue, the court of claims, to compel the public body's disclosure of the public records within 180 days after a public body's final determination to deny a request.

(2) Within 10 business days after receiving a written appeal pursuant to subsection (1)(a), the head of a public body shall do 1 of the following:

(a) Reverse the disclosure denial.

(b) Issue a written notice to the requesting person upholding the disclosure denial.

(c) Reverse the disclosure denial in part and issue a written notice to the requesting person upholding the disclosure denial in part.

(d) Under unusual circumstances, issue a notice extending for not more than 10 business days the period during which the head of the public body shall respond to the written appeal. The head of a public body shall not issue more than 1 notice of extension for a particular written appeal.

(3) A board or commission that is the head of a public body is not considered to have received a written appeal under subsection (2) until the first regularly scheduled meeting of that board or commission following submission of the written appeal under subsection (1)(a). If the head of the public body fails to respond to a written appeal pursuant to subsection (2), or if the head of the public body upholds all or a portion of the disclosure denial that is the subject of the written appeal, the requesting person may seek judicial review of the nondisclosure by commencing a civil action under subsection (1)(b).

(4) In an action commenced under subsection (1)(b), 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, regardless of the location of the public record. Venue for an action against a local public body is proper in the circuit court for the county in which the public record or an office of the public body is located has venue over the action. The court shall determine the matter de novo and the burden is on the public body to sustain its denial. The court, on its own motion, may view the public record in controversy in private before reaching a decision. Failure to comply with an order of the court may be punished as contempt of court.

(5) An action commenced under this section and an appeal from an action commenced under this section shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.

(6) 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 attorney's 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. The award shall be assessed against the public body liable for damages under subsection (7).

(7) If the court determines in an action commenced under this section that the public body has arbitrarily and capriciously violated this act by refusal or delay in disclosing or providing copies of a public record, the court shall order the public body to pay a civil fine of \$1,000.00, which shall be deposited into the general fund of the state treasury. The court shall award, in addition, in addition to any actual or compensatory damages, punitive damages in the amount of \$1,000.00 to the person seeking the right to inspect or receive a copy of a public record. The damages shall not be assessed against an individual, but shall be assessed against the next succeeding public body that is not an individual and that kept or maintained the public record as part of its public function.

APPEALING A FEE

Sec. 10a. (1) If a public body requires a fee that exceeds the amount permitted under its publicly available procedures and guidelines or section 4, the requesting person may do any of the following:

(a) If the public body provides for fee appeals to the head of the public body in its publicly available procedures and guidelines, submit to the head of the public body a written appeal for a fee reduction that specifically states the word "appeal" and identifies how the required fee exceeds the amount permitted under the public body's available procedures and guidelines or section 4.

(b) Commence a civil action in the circuit court, or if the decision of a state public body is at issue, the court of claims, for a fee reduction. The action must be filed within 45 days after receiving the notice of the required fee or a determination of an appeal to the head of a public body. If a civil action is commenced against the public body under this

RIGHT TO SEEK JUDICIAL REVIEW

subdivision, the public body is not obligated to complete the processing of the written request for the public record at issue until the court resolves the fee dispute. An action shall not be filed under this subdivision unless 1 of the following applies:

- (i) The public body does not provide for appeals under this subdivision (a).
 - (ii) The head of the public body failed to respond to a written appeal as required under subsection (2).
 - (iii) The head of the public body issued a determination to a written appeal as required under subsection (2).
- (2) Within 10 days after receiving a written appeal under subsection (1)(a), the head of a public body shall do 1 of the following:
- (a) Waive the fee.
 - (b) Reduce the fee and issue a written determination to the requesting person indicating the specific basis under section 4 that supports the remaining fee. The determination shall include a certification from the head of the public body that the statements in the determination are accurate and that the reduced fee amount complies with its publicly available procedures and guidelines and section 4.
 - (c) Uphold the fee and issue a written determination to the requesting person indicating the specific basis under section 4 that supports the required fee. The determination shall include a certification from the head of the public body that the statements in the determination are accurate and that the fee amount complies with the public body's publicly available procedures and guidelines and section 4.
 - (d) Issue a notice extending for not more than 10 business days the period during which the head of the public body must respond to the written appeal. The notice of extension shall include a detailed reason or reasons why the extension is necessary. The head of the public body shall not issue more than 1 notice of extension for a particular written appeal.
- (3) A board or commission that is the head of a public body is not considered to have received a written appeal under subsection (2) until the first regularly scheduled meeting of that board or commission following submission of the written appeal under subsection (1)(a).
- (4) In an action commenced under subsection (1)(b), a court that determines the public body required a fee that exceeds the amount permitted under its publicly available procedures and guidelines or section 4 shall reduce the fee to a permissible amount. Venue for an action against a local public body is proper in the circuit court for the county in which the public record or an office of the public body is located. The court shall determine the matter de novo, and the burden is on the public body to establish that the required fee complies with its publicly available procedures and guidelines and section 4. Failure to comply with an order of the court may be punished as contempt of court.
- (5) An action commenced under this section and an appeal from an action commenced under this section shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.
- (6) If the requesting person prevails in an action commenced under this section by receiving a reduction of 50% or more of the total fee, the court may, in its discretion, award all or an appropriate portion of reasonable attorney's fees, costs, and disbursements. The award shall be assessed against the public body liable for damages under subsection (7).
- (7) If the court determines in an action commenced under this section that the public body has arbitrarily and capriciously violated this act by charging an excessive fee, the court shall order the public body to pay a civil fine of \$500.00, which shall be deposited in the general fund of the state treasury. The court may also award, in addition to any actual or compensatory damages, punitive damages in the amount of \$500.00 to the person seeking the fee reduction. The fine and any damages shall not be assessed against an individual, but shall be assessed against the next succeeding public body that is not an individual and that kept or maintained the public record as part of its public function.
- (8) As used in this section, "fee" means the total fee or any component of the total fee calculated under section 4, including any deposit.

Sec. 10b. If the court determines, in an action commenced under this act, that a public body willfully and intentionally failed to comply with this act or otherwise acted in bad faith, the court shall order the public body to pay, in addition to any other award or sanction, a civil fine of not less than \$2,500.00 or more than \$7,500.00 for each occurrence. In determining the amount of the civil fine, the court shall consider the budget of the public body and whether the public body has previously been assessed penalties for violations of this act. The civil fine shall be deposited in the general fund of the state treasury.

EXHIBIT

F

**CITY OF GRAND RAPIDS
COMMITTEE ON FREEDOM OF INFORMATION ACT (FOIA) APPEALS**

ACLU MICHIGAN,

Appellant,

FOIA REQUEST GRPD 23-0505

v.

CITY OF GRAND RAPIDS (GRPD),

Appellee.

FINAL DECISION

This matter having come before the City of Grand Rapids Committee on FOIA Appeals ("Committee"), on June 9, 2023, at the time and place set out in the Meeting Notice issued by the Grand Rapids City Clerk; and

This matter representing the specific appeal of FOIA request number 23-0505 filed by ACLU Michigan; and

The Committee having reviewed the submissions of Appellant and Appellee; having reviewed the materials at issue; having heard statements from Appellant and Appellee and asking questions of the parties at the hearing; and having been fully advised regarding this matter prior to its decision;

Therefore, the Committee:

UPHOLDS the FOIA Coordinator's decision and deny the Appeal.

AFFIRM in part and reverse in part the FOIA Coordinator's decision.

REVERSE the FOIA Coordinator's decision.

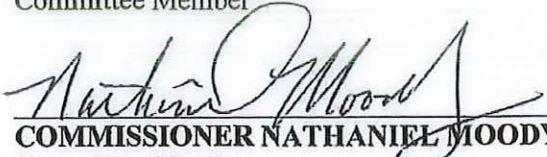
Finds that it lacks jurisdiction to hear this Appeal.

Date: June 9, 2023



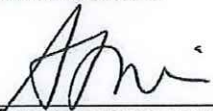
COMMISSIONER MILINDA YSASI
Committee Member

Date: June 9, 2023



COMMISSIONER NATHANIEL MOODY
Committee Member

Date: June 9, 2023



COMMISSIONER DREW ROBBINS
Committee Member

EXHIBIT

G

City of Grand Rapids
FOIA Appeal Hearing
June 9, 2023 @ 2:00 pm
City Hall, City Commission Chambers

Present:

City Commissioners: Millinda Ysasi, Nathaniel Moody, Drew Robbins
City Attorneys: Philip Strom, Sarah Hartman
Grand Rapids Police Department: Conor Smith
City Clerk: Joel Hondorp

RE: GRPD FOIA APPEAL #23-0505
FOIA APPEAL #MUN 23-037

The meeting was called to order by Commissioner Ysasi at 2:00 pm.

Roll Call was taken, and a quorum was present.

Commissioner Ysasi stated the purpose of the appeal.

Brad Springer, ACLU Michigan Lawyer Group, presented on behalf of the Appellant.

Sarah Hartman, City Attorney's Office, summarized the FOIA Coordinator's decision regarding the GRPD FOIA #23-0505 and FOIA Appeal #MUN 23-037.

Conor Smith presented clarifying information on the length of time to produce documents.

Questions were asked of Ms. Hartman and Ms. Smith by the Commissioners.

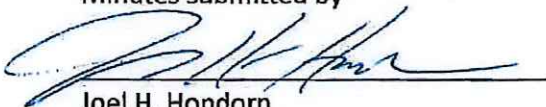
Motion by Commissioner Moody with support by Commissioner Robbins to find that the Committee lacks jurisdiction as the FOIA request was **not denied**. Motion carries 3-0.

Commissioners agreed to document the lengthy delay in responding to Police Department FOIA requests and forward the concern to the Public Safety Committee.

No Public Comment was offered.

Meeting adjourned at 2:21 pm.

Minutes submitted by



Joel H. Hondorp
Grand Rapids City Clerk