STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
Gadola, P.J., and Sawyer and Riordan JJ

SPENCER WOODMAN,

Plaintiff-Appellant,

v

MICHIGAN DEPARTMENT OF CORRECTIONS,

Defendant-Appellee.

SC: 163382
COA: 353164
Court of Claims No. 17-000082-MZ

GEORGE JOSEPH,

Plaintiff-Appellant,

v

MICHIGAN DEPARTMENT OF CORRECTIONS,

Defendant-Appellee.

SC: 163383
COA: 353165
Court of Claims No. 17-000230-MZ

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WOODMAN AND JOSEPH'S SUPPLEMENTAL BRIEF

ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION

Spencer Woodman sued Defendant Michigan Department of Corrections (the "MDOC") in the Court of Claims after the MDOC denied his FOIA request. Plaintiff George Joseph also sued MDOC in the Court of Claims after his FOIA request was denied.

The Court of Claims consolidated Woodman's and Joseph's cases on November 14, 2017 (Appellants' App'x 105a-106a, November 15, 2017 Order Consolidating Cases). In an August 28, 2018 opinion, the Court of Claims granted Woodman and Joseph's motion for summary disposition in part. (Appellants' App'x 304a-323a, August 28, 2018 Opinion and Order re Motion for Summary Disposition.) Woodman and Joseph then moved for attorneys' fees, costs, and punitive damages, which the Court of Claims granted in part. (Appellants' App'x 423a-544a, Plaintiffs' Motion for Attorney's Fees, Costs, and Punitive Damages; Appellants' App'x 589a-591a, March 2, 2020 Fee Order.)

Woodman and Joseph timely appealed the Court of Claims' 90% reduction of their reasonable attorneys' fee award and denial of their request for punitive damages. The MDOC cross-appealed the Court of Claims' determination that Woodman and Joseph prevailed in full. The Court of Appeals affirmed in part, reversed in part, and remanded the case for further proceedings. (Appellants' App'x 608-615a, June 24, 2021 Court of Appeals Opinion.)

Woodman and Joseph filed an application for leave to appeal to this Court. The Court ordered oral argument on their application and supplemental briefing addressing: (1) whether Woodman and Joseph prevailed in full; (2) whether the Court of Claims abused its discretion in reducing Woodman and Joseph's attorneys' fee award by 90%; and (3) whether the Court of Claims abused its discretion in not awarding Woodman and Joseph punitive damages.

The Court has jurisdiction over these consolidated cases under MCR 7.303(B)(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether Woodman and Joseph prevailed in full on their FOIA claims, and are thus statutorily entitled to attorney fees under MCL 15.240(6), when the Court of Claims ruled that the Michigan Department of Corrections (the "MDOC") had wrongfully denied Woodman and Joseph's FOIA requests, and ordered the MDOC to disclose the public records in question.

The MDOC would answer:	No.
Woodman and Joseph answer:	Yes.
The Court of Claims answered:	Yes.
The Court of Appeals answered:	No.
This Court should answer:	Yes.

2. Whether the Court of Claims abused its discretion when it reduced by 90% the attorneys' fees awarded to Woodman and Joseph based solely on the pro bono nature of Honigman LLP's representation, notwithstanding the Court of Claims' factual findings that Honigman's hourly rates and the number of hours worked were reasonable.

The MDOC would answer:	No.
Woodman and Joseph answer:	Yes.
The Court of Claims answered:	No.
The Court of Appeals answered:	No.
This Court should answer:	Yes.

3. Whether the Court of Claims clearly erred in denying Woodman and Joseph punitive damages under MCL 15.240(7) when it found that the MDOC had arbitrarily denied their FOIA requests for recordings by unlawfully issuing blanket denials without even reviewing the recordings they had requested.

The MDOC would answer:	No.
Woodman and Joseph answer:	Yes.
The Court of Claims answered:	No.
The Court of Appeals answered:	No.
This Court should answer:	Yes.

I. INTRODUCTION

This Freedom of Information Act ("FOIA") case against the Michigan Department of Corrections (the "MDOC") is about more than just the MDOC's wrongful withholding of nonexempt records and the rampant FOIA abuses stemming from the MDOC's policy of summarily rejecting FOIA requests without any substantive review. It is about the dangerous precedent that the Court of Appeals' decision sets regarding what it means for a party to prevail in full and the value of pro bono counsel in evaluating a reasonable attorneys' fee award. If that judgment is left undisturbed, Michigan will be the ***only state in the country*** that considers the pro bono nature of the representation as a basis to reduce an otherwise reasonable attorneys' fee award. The Court should reject the lower courts' bid to blaze that trail.

The Court should reverse the Court of Appeals' judgment for at least three reasons.

First, Woodman and Joseph prevailed in full on their FOIA actions. They obtained all audio recordings and all eight videos they requested from the MDOC. Whether the MDOC could blur the identities of MDOC personnel shown in the videos was never a contested issue. Put simply, Woodman and Joseph obtained everything they sought; by definition, that means they prevailed in full. The MDOC did not prevail in part.

Second, the pro bono nature of a representation is not a legitimate consideration in determining a reasonable fee award. Adopting such a rule would have severe consequences and deter private practitioners from accepting pro bono matters. Organizations like the American Civil Liberties Union Fund of Michigan (the "ACLU") would be severely hampered in their ability to litigate public interest cases if, after years of protracted litigation, plaintiffs could recover only 10% of their fees because their lawyers worked pro bono. And such a rule would defy the Legislature's determination that successful FOIA plaintiffs—among other categories of cases—

have a right to recover reasonable attorneys' fees, without mention of the pro bono nature of the representation.

Third, Woodman and Joseph are entitled to punitive damages as required by statute to hold the MDOC accountable for the dereliction of its duty under FOIA to assess the requested records and determine whether they should be produced. The Court of Claims found the MDOC's practice "arbitrary, apparently, and habitual." If the MDOC's arbitrary practice in issuing blanket FOIA denials does not warrant punitive damages, it is unclear how a plaintiff could ever recover punitive damages for a public body's failure to even try to follow the law.

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY[1]

The parties do not dispute the relevant facts. In 2016, inmate Dustin Szot was involved in an altercation with another prisoner at the MDOC's Bellamy Creek Correctional Facility. (Appellants' App'x 305a, August 28, 2018 Opinion and Order re Motion for Summary Disposition (the "August 28 Order") p 2.) The fight stopped when corrections officials discharged Tasers on the inmates. (*Id*.) Shortly after being Tasered, Szot died. (*Id*.) His death certificate listed homicide by blunt force trauma as the cause of death. (*Id*.)

A. The MDOC Denied Woodman's FOIA Requests for Video and Audio Recordings of the Altercation

Two days after the altercation, independent journalist Spencer Woodman submitted a request under FOIA to obtain video footage of "the confrontation that led to the fatality of inmate Dustin Szot" on September 27, 2016. (*Id*.) Woodman also requested "available accompanying audio records." (*Id*.) Woodman did not request the identities of the guards or other prison employees who were involved in the altercation. The MDOC summarily denied Woodman's

[1] This Factual Background and Procedural History is included without significant revision from Woodman and Joseph's August 5, 2021 Joint Application for Leave to Appeal.

request under MCL 15.243(1)(c) without reviewing the responsive recordings. (*Id.*) Woodman administratively appealed, challenging the applicability of MCL 15.243(1)(c). (*Id.*) The MDOC denied Woodman's appeal citing MCL 15.243(1)(c) and (1)(u). (Appellants' App'x 306a, August 28 Order p 3.)

Woodman sought assistance from the ACLU, which in turn recruited Honigman as pro bono cooperating counsel. Woodman filed his Complaint against the MDOC on April 3, 2017. In response to the MDOC's motion to dismiss because the Complaint was not verified, Woodman filed his First Amended Verified Complaint (the "Amended Woodman Complaint"). (See Appellants' App'x 48a-65a.)

B. The MDOC Denied Joseph's FOIA Requests for Video and Audio Recordings of the Altercation

On June 28, 2017, another independent journalist, George Joseph, submitted a FOIA request seeking video footage of "the confrontation that led to the fatality of inmate Dustin Szot on September 27, 2016." (Appellants' App'x 307a, August 28 Order p 4.) Joseph's request also sought Taser videos and any audio recordings. (*Id.*) It did not seek the identities of prison guards or employees involved in the altercation. The MDOC denied Joseph's request, citing MCL 15.243(1)(c). (*Id.*)

Joseph, also with the assistance of the ACLU and Honigman as pro bono cooperating counsel, sued the MDOC on August 17, 2017 (the "Joseph Complaint", and collectively with the Amended Woodman Complaint, the "Complaints"). (See Appellants' App'x 14a-29a, 71a-82a.) In its Answer and Affirmative Defenses to the Joseph Complaint, the MDOC cited MCL 15.243(1)(c) (the exemption the MDOC cited in its denial of Joseph's original request) and MCL 15.243(1)(a) and (1)(u). (Appellants' App'x 87a-89a, MDOC Answer and Affirmative Defenses ¶¶ 5-7.)

Because Woodman's and Joseph's complaints sought to compel disclosure of the same video and audio recordings, the parties stipulated to consolidate the lawsuits. (Appellants' App'x 105a-106a, November 22, 2017 Order Consolidating Case.)

C. Discovery Uncovered the MDOC's Rampant FOIA Abuses

Under well-established FOIA law, a public body may not issue "blanket denials" of FOIA requests without actually reviewing the materials sought and making a case-by-case determination of whether a statutory exemption applies. *Krug v Ingham Co Sheriff's Office*, 264 Mich App 475, 479; 691 NW2d 50 (2004); *Ballard v Dep't of Corrections*, 122 Mich App 123, 127; 332 NW2d 435 (1982). In these cases, discovery revealed that, as a matter of policy and practice, the MDOC systematically and flagrantly violates FOIA by always issuing blanket denials of requests for videos and never reviewing the materials sought to determine whether an exemption applies.

Woodman and Joseph deposed Cheryl Groves, the former MDOC FOIA Coordinator who denied Woodman's FOIA request. Groves explained how the MDOC processes FOIA requests. When the MDOC receives a request, an Assistant FOIA Coordinator reviews it, prepares an initial response, and sends it to Groves to review. (Appellants' App'x 151a, Groves Indiv Dep Tr, p 44:13-19; Appellants' App'x 258a-259a, Groves Corp Rep Dep Tr pp 26:7-27:17.) Without further analysis, Groves would sign off on the Assistant Coordinator's proposed response and send it to the requestor. (Appellants' App'x 152a, Groves Indiv Dep Tr, p 45:5-13.) In Woodman's case, Groves did not review any responsive materials even though responsive records existed. (Appellants' App'x 152a-153a, 156a, Groves Indiv Dep Tr 45:22-46:1, 49:3-12.)

According to Groves, requests for videos did not receive the same treatment as requests for other records. (Appellants' App'x 152a, Groves Indiv Dep Tr p 45:19-24; Appellants' App'x 276a-280a, Groves Corp Rep Dep Tr 44:21-48:18.) She explained the MDOC's blanket policy: "Because of the request, which was for video footage, we deny that under our custody and safety

security measures exemption; we do not release video[.]" (Appellants' App'x 152a-153a, Groves Indiv Dep Tr, pp 45:24-46:1.) Even if the records existed, the MDOC would still rubber-stamp the denial. As Groves explained, "we would typically contact the facility and say, 'Do you have responsive records?' And in this case they would say, yes, we have video footage, but we would still deny it [.]" (Appellants' App'x 154a, Groves Indiv Dep Tr, p 47:14-16). The MDOC does not require a person processing a FOIA request to determine the types of video that were made or the recording devices that were used to create them. (Appellants' App'x 154a-155a, Groves Indiv Dep Tr, pp 47:20-48:9.) "[W]e know that we don't release it. All we need to verify is that the documents do exist, and then we are appropriate in . . . rejecting that, or taking an exemption." (Appellants' App'x 155a, Groves Indiv Dep Tr, p 48:6-9.) Nor does the MDOC review any video footage before denying a FOIA request that seeks those records:

> *Q*: [A]t what point, if any, would the videos in the custody of the local facility be transferred to the Central Office [for review]?
> *A*: We would not ask for that. We would ask if it exists, but we would not ask them to transfer those files to us.
> *Q*: . . . So is anyone reviewing the video prior to making a determination?
> *A*: No.

(Appellants' App'x 156a, Groves Indiv Dep Tr, p 49:4-15; see also Appellants' App'x 272a, 283a-286a, Groves Corp Rep Dep Tr, pp 40:6-7, 51:1-54:11). Groves thus admitted that the MDOC denies ***as a matter of course*** FOIA requests without reviewing responsive recordings. (Appellants' App'x 181a-203a, Groves Indiv Dep Tr, pp 74:8-14, 76:6-78:19, 89:6-90:12, 91:17-92:19, 92:20-94:4, 94:5-95:19, 95:23-96:25.)

Groves also testified that the MDOC withholds all videos as a matter of course, regardless of the device used to create them:

> *Q*: [W]ould you go through each one and make a determination of, this is a facility recording, this is a hand-held recording, this is a body mic, if it existed?

A: All that we would say is, do recordings exist, and if the answer is yes, then we would respond, "Your request has been denied based on 13(1)(c)."
Q: And then you would inform them that each type of video existed?
A: No, we would not.
Q: Is there a reason for that?
A: Because they're all video recordings in some manner.

(Appellants' App'x 195a-196a, Groves Indiv Dep Tr, pp 88:18-89:3.)

The MDOC also ignores its duty under § 13(1)(c), MCL 15.243(1)(c), to consider the public interest in responding to FOIA requests. Groves admitted that she could not recall having ***ever*** considered the public interest when responding to a FOIA request because the MDOC considers its perceived security concerns as overriding its statutory FOIA obligations:

Q: So is it the Department's policy that even in [the gravest scenarios, such as the death of an inmate], the MDOC's security is always going to outweigh the disclosure in every case?
A: From the ones that I have been presented with as a FOIA Coordinator, yes.

(Appellants' App'x 179a-180a, Groves Indiv Dep Tr, pp 72:25-73:4.)

At the close of discovery, the parties briefed cross-motions for summary disposition.

D. The Court of Claims Ordered the MDOC to Produce the Recordings

On August 28, 2018, the Court of Claims denied the MDOC's motion for summary disposition in part, and granted Woodman's and Joseph's motion in part. (Appellants' App'x 304a-323a, August 28 Order.) The Court of Claims ordered the MDOC to:

- Submit for an *in camera* review all eight of the responsive videos identified in the parties' briefing. The Court of Claims indicated that where possible, the MDOC could redact or blur the faces of the unnamed inmate and of the corrections officers; and

- Immediately disclose to Woodman and Joseph the audio portions of the recordings.

(Appellants' App'x 322a, August 28 Order p 19.) The Court of Claims held in abeyance the parties' requests for summary disposition on whether the videos were exempt from disclosure pending its *in camera* review. (*Id.*)

On February 27, 2019, following its *in camera* review, the Court of Claims issued an order (the "February 27 Order") finding that nothing in the videos revealed the placement of cameras or otherwise displayed material that would compromise the security of the MDOC facility, as the MDOC had continuously represented. (Appellants' App'x 324a-325a.) The Court of Claims noted that the MDOC had made no attempt to blur or otherwise conceal the identities of any of the persons in the videos, despite having allowed the MDOC to do so in the August 28 Order. (Appellants' App'x 324a, February 27 Order, p 1.)

In an abundance of caution, the Court of Claims appointed a Special Master to review the videos and to "report as to whether there are any security concerns, other than the identity of those persons who are seen on camera." (Appellants' App'x 325a, February 27 Order p 2.) The MDOC noted in its letter submitted with the videos for *in camera* review that it had attempted "to blur the faces of the unnamed inmate and the corrections officers, however, due to the short-time frame to respond to the order, the work could not be completed" and that "it would take approximately 25 hours to blur the faces of the unnamed inmate and all the corrections officers that are present throughout the eight videos." (Appellants' App'x 339a, 350a.)

After reviewing the videos, the Special Master concluded that none of the videos revealed any security concerns. (Appellants' App'x 332a, April 22, 2019 Order to Disclose Videos (the "April 22 Order").) The Court of Claims thus ordered the MDOC to "immediately disclose to the [P]laintiff[s] all eight of the responsive videos referenced in the Court['s] August 28, 2018 order within 7 days of entry of this order." (*Id.*)

Rather than disclose the videos, the MDOC filed a motion for reconsideration. (Appellants' App'x 333a-362a.) But the MDOC did not seek, nor did the Court of Claims grant, a stay of the April 22 Order. (*Id.*) Having not received by the deadline the material that the Court

of Claims ordered disclosed, Woodman and Joseph moved to enforce the April 22 Order and impose sanctions. (Appellants' App'x 363a-401a.) Woodman and Joseph's motion related solely to the MDOC's failure to comply with the court-imposed disclosure deadline and did not address whether those videos should be redacted.

On May 30, 2019, the Court of Claims denied the MDOC's motion for reconsideration and again ordered the MDOC to "immediately disclose to plaintiff all eight of the responsive videos." (Appellants' App'x 422a.) In that order, the Court of Claims stated that while it was "not convinced that an error of fact or law was made as to the Court's conclusion that the videos should be released" and "d[id] not believe that there is any law precluding the display of the faces of public employee correction officers," it would provide the defendant three weeks to redact the videos. (*Id.* at 421a-422a.) Further, the Court provided Woodman and Joseph's counsel "the opportunity to view both the redacted and un-redacted video" and "make further prayer for relief after the review." (*Id.* at 422a.) Then, finally, the MDOC relented and disclosed the videos to Woodman and Joseph. Opting to forgo further litigation after their counsel had a chance to review both versions of the videos as ordered by the Court, Woodman and Joseph did not contest the MDOC blurring the identities of the MDOC personnel in the videos that were disclosed to them. (Appellants' App'x 429a n 1.)

E. The Court of Claims Awarded Woodman and Joseph Attorneys' Fees but Reduced Honigman's Fees by 90% Because It Worked Pro Bono

Woodman and Joseph moved for their attorneys' fees, costs, and punitive damages under MCL 15.240(6) and MCL 15.240(7). (Appellants' App'x 423a-544a.) The MDOC argued that the Court of Claims should deny the motion because, among other reasons, (i) Honigman's rates were not reasonable; (ii) the number of hours Honigman worked on the cases was not reasonable;

and (iii) the MDOC was a partially prevailing party because the Court of Claims allowed the MDOC to conceal the identities of MDOC personnel depicted in the videos.

At a hearing on the motion, the Court of Claims ruled that:

- The MDOC was neither a partially nor fully prevailing party in this case (Appellants' App'x 572a, January 29, 2020 Hearing Tr 28:20-22)

- Honigman's and the ACLU's fees were reasonable and "do not in and of themselves shock the conscious [sic] as to whether or not those fees were reasonably necessary in the prosecution of this case" (Appellants' App'x 573a-574a, January 29, 2020 Hearing Tr 29:21-30:5)

- "[T]he Court will not find that the hours that have been requested by either the American Civil Liberties Union counsel or the attorneys and paralegals at Honigman were not reasonably necessary for the prosecution of this case in the manner in which they ordinarily practice" (Appellants' App'x 574a, January 29, 2020 Hearing Tr 30:16-21)

- The ACLU was entitled to its full fee request of $14,200 (Appellants' App'x 575a, January 29, 2020 Hearing Tr 31:8-11)

- Honigman was entitled to only 10% of its fees, in the amount of $19,218.63, because of the pro bono nature of its representation of Woodman and Joseph (Appellants' App'x 574a-576a, January 29, 2020 Hearing Tr 30:23-31:12, 31:24-32:2)

- Woodman and Joseph were not entitled to punitive damages, even though the MDOC acted "arbitrar[ily], apparently, and habitual[y]"in denying their FOIA requests (Appellants' App'x 552a, 573a, 576a, January 29, 2020 Hearing Tr 8:7-19, 29:6-13, 32:1-2).

The Court of Claims entered an order on March 2, 2020 (the "Fee Order") memorializing the findings it announced on the record. (Appellants' App'x 590a-591a.)

F. The Court of Appeals Reversed in Part, Affirmed in Part, and Remanded for Further Proceedings

Woodman and Joseph appealed the Court's 90% reduction of their reasonable attorneys' fee award and denial of their request for punitive damages. The MDOC cross-appealed the Court's determination that Woodman and Joseph prevailed in full. The MDOC did not appeal or cross-appeal the Court of Claims' orders on the merits of Woodman's and Joseph's FOIA claims.

The Court of Appeals affirmed in part, reversed in part, and remanded the cases for further proceedings. (Appellants' App'x 608a-615a, June 24, 2021 Court of Appeals Opinion.) The Court of Appeals affirmed the Court of Claims' denial of punitive damages and reversed its ruling that Woodman and Joseph prevailed in full. (*Id*. at 615a.) The Court of Appeals reasoned that because "defendant was permitted to redact certain information from the videos . . . plaintiffs were determined to be entitled to only a portion of the records requested." (*Id*. at 612a.)

The Court of Appeals remanded the case for the Court of Claims to determine "whether, in the trial court's discretion, plaintiffs are entitled to an award of all or an appropriate portion of reasonable attorney fees, costs, and disbursements." (*Id*.) The Court of Appeals instructed the Court of Claims that, if it "determines that plaintiffs are entitled to attorney fees in this case, the trial court should also determine whether the pro bono nature of the representation is a legitimate consideration in the determination of the reasonableness of the fees." (*Id*.) The Court of Appeals failed to address Woodman and Joseph's central argument on appeal: that attorneys' fees may not be reduced solely because an attorney provided pro bono representation.

G. The Court Ordered Oral Argument on Woodman and Joseph's Application

On April 22, 2022, this Court ordered oral argument on Woodman and Joseph's application for leave to appeal and directed the parties to file supplemental briefs addressing:

(1) Whether Woodman and Joseph prevailed in full, and are thus statutorily entitled to attorneys' fees under MCL 15.240(6);

(2) Whether the Court of Claims abused its discretion when it reduced by 90% the attorneys' fees awarded to Woodman and Joseph based solely on the pro-bono nature of Honigman LLP's representation, notwithstanding the Court of Claims' factual findings that Honigman's hourly rates and the number of hours worked were reasonable; and

(3) Whether the Court of Claims clearly erred in denying Woodman and Joseph punitive damages under MCL 15.240(7).

III. STANDARD OF REVIEW

An appellate court reviews the trial court's factual findings for clear error and reviews questions of law de novo. *Estate of Nash by Nash v City of Grand Haven*, 321 Mich App 587, 592; 909 NW2d 862 (2017); see also *Outdoor Sys Inc v City of Clawson*, 273 Mich App 204, 209; 729 NW2d 893 (2006) (reviewing de novo whether plaintiff was a prevailing party under a federal attorneys' fee statute).

An award of attorney fees in a FOIA action is reviewed for an abuse of discretion. *Prins v Michigan State Police*, 299 Mich App 634, 641; 831 NW2d 867 (2013). An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). A trial court necessarily abuses its discretion when it makes an error of law. *Pirgu v United Services Auto Ass'n*, 499 Mich 269, 274; 884 NW2d 257 (2016).

On a plaintiff's request for punitive damages under MCL 15.240, a court's determination of whether a defendant acted arbitrarily and capriciously is reviewed for clear error. *Meredith Corp v City of Flint*, 256 Mich App 703, 717; 671 NW2d 101 (2003). A finding is clearly erroneous if, after reviewing the entire record, the appellate court is left with a definite and firm conviction that a mistake was made. *Estate of Nash*, 321 Mich App at 605.

IV. ARGUMENT

A. Woodman and Joseph Prevailed in Full and Are Entitled to Reasonable Attorneys' Fees

The Court of Appeals erred in reversing the Court of Claims' determination that Woodman and Joseph fully prevailed in their efforts to obtain audio and video recordings that the MDOC improperly withheld. The basis for the Court of Appeals' decision was that the MDOC was

"permitted to redact certain information from the videos," even though the litigation led to the disclosure of ***everything*** Woodman and Joseph sought in their requests.

The Court of Appeals erred for at least three independent reasons. First, Woodman and Joseph easily meet the "prevailing party" standards set forth in *Detroit Free Press, Inc v City of Southfield*, 269 Mich App 275, 289; 713 NW2d 28 (2005): by its own admission, the MDOC would not have released the video and audio recordings in response to Woodman and Joseph's FOIA requests, and only did so under court order. Second, neither Woodman nor Joseph asked for the identities of the individuals involved in the altercation, and holding they failed to prevail in full because they did not receive something they did not contest is an erroneous application of law. Third, FOIA's attorney fee provision is integral to the overall application of the statute, and allowing the government to unilaterally redact superfluous portions of a response would thwart FOIA's purpose.

Determining whether a party prevails is generally considered to be an issue of law subject to de novo review. See *Outdoor Sys Inc*, 273 Mich App at 209. A party prevails for purposes of FOIA when "(1) [the] action was reasonably necessary to compel the disclosure; and (2) the action had the substantial causative effect on the delivery of the information to the plaintiff." *Detroit Free Press*, 269 Mich App at 289. As the Court of Claims correctly found, Woodman and Joseph have met both prongs and should be deemed to have prevailed in full. The Court should find the same here.

MDOC testimony detailed the MDOC's rampant FOIA violations and blanket denial policy, leading the Court of Claims to describe the practice as "arbitrary, apparently, and habitual." (Appellants' App'x 573a, January 29, 2020 Hearing Tr 29:8-13.) Woodman and Joseph had their specific requests denied under this MDOC policy. It is difficult to think of a more prime example

of an action "necessary to compel disclosure"; without litigating the issue, Woodman and Joseph would never have received the records they requested in light of the MDOC's blanket (and illegal) denial policy for audio-visual records. Next, the action undoubtedly had "the substantial causative effect on the delivery of the information" previously requested. Indeed, the MDOC denied Woodman and Joseph's FOIA requests and only provided the requested records after it was ordered to do so by the Court of Claims. As the Court noted, MDOC "came into this case with an assertion that under no circumstances should anything be revealed" as its "overall premise." (Appellants' App'x 572a, January 29, 2020 Hearing Tr 28:23-25). The MDOC had no intention of producing anything to Woodman or Joseph unless and until the Court ordered it to do so, and did not produce anything to Woodman or Joseph until after the Court issued that order.

That the MDOC redacted the eight videos it disclosed, without objection, does not mean that it prevailed in part. Michigan courts have long held that prevailing in an action commenced under MCL 15.240 encompasses a wide range of victories and circumstances. In *Krug*, the court of appeals upheld an award of attorney fees because "[t]he fact that defendant disclosed [the requested] records in a deposition before trial could occur does not negate the time and effort plaintiff was required to expend." *Krug*, 264 Mich App at 483. In *Thomas v City of New Baltimore*, 254 Mich App 196, 202; 657 NW2d 530 (2002), the trial court "dismissed plaintiff's FOIA claim, concluding that the claim was moot because plaintiff had received the requested public records." But the court of appeals reversed because "[t]he mere fact that plaintiff's substantive claim under the FOIA was rendered moot by disclosure of the records after plaintiff commenced the circuit court action is not determinative of plaintiff's entitlement to fees and costs under MCL § 15.240(6)." *Id*. A plaintiff need not even receive the requested records to be entitled to an award of attorney fees. *Walloon Lake Water Sys, Inc v Melrose Tp*, 163 Mich App 726, 734;

415 NW2d 292 (1987). In *Walloon*, the defendant admitted to possessing the requested document, but rather than complying with the plaintiff's request, the defendant mooted the plaintiff's court action by discarding the document. *Id*. at 733. The court of appeals vacated the trial court's order denying attorney fees, reasoning that "a plaintiff 'prevails' in the action so as to be entitled to a mandatory award of costs and fees where he is forced into litigation and is ***successful with respect to the central issue*** that the requested materials were subject to disclosure under the FOIA." *Id.* at 734 (emphasis added).

Here, the Court of Appeals reasoned that, because Woodman and Joseph "demanded in their complaints the production of 'a complete, unredacted copy of the Video,'" anything less could only be deemed a partial victory. (Appellants' App'x 612a.) But this analysis sidesteps the fact that Woodman and Joseph never sought the identities of the individuals in the video footage and did not contest the MDOC's redactions, even though the Court of Claims provided them the opportunity. The MDOC never offered to produce to Woodman and Joseph redacted videos, and Woodman and Joseph never rejected such an offer from the MDOC. Redaction was never a contested issue during the litigation and neither the MDOC nor Woodman and Joseph even briefed the issue.

In fact, the Court of Claims' April 22, 2019 Order expressly required the MDOC to "immediately disclose[] to the plaintiff[s] all eight of the responsive videos." (Appellants' App'x 332a.) And on May 30, 2019, the Court of Claims ordered that "defendant's motion for reconsideration is DENIED." (*Id*. at 422a.) That Woodman and Joseph ended up receiving blurred versions of the videos, and simply chose not to "make further prayer for relief" (*id*.), does not negate the fact that, as to the litigation itself, they prevailed in full.

If allowed to stand, the Court of Appeals' judgment signals to public bodies that they can litigate a FOIA case to completion, lose, be ordered to produce wrongly withheld materials, and then unilaterally redact portions of those documents and be found a partially prevailing party. Such a determination defies common sense and sets dangerous precedent.

As this case demonstrates, prevailing plaintiffs should not be denied a mandatory attorneys' fees award whenever they voluntarily choose to forgo pursuit of information beyond what they requested or desire. Woodman and Joseph simply had no reason to continue their lawsuit, just like the plaintiffs in *Thomas* and *Walloon*. And if Woodman and Joseph had deemed it necessary to continue, the Court of Claims had already stated that it "[did] not believe that there is any law precluding the display of the faces of public employee correctional officers." (Appellants' App'x 421a-422a). As *Walloon* observed, "the Legislature apparently intended to enforce the obvious salutary purposes of the FOIA to encourage voluntary compliance with requests under the FOIA and to encourage plaintiffs who are unable to afford the expense of litigation to nonetheless obtain judicial review of alleged wrongful denials of their requests." 163 Mich App at 733. That Woodman and Joseph could now be penalized for endeavoring to ***reduce*** that expense is antithetical to the purpose of the statute. Woodman and Joseph prevailed in full and the Court should restore the Court of Claims' judgment to that effect.

B. The Court Of Claims Abused Its Discretion When It Reduced Woodman and Joseph's Fee Award on the Basis of Pro Bono Representation

The Court of Claims abused its discretion when it reduced Woodman and Joseph's fee award by 90% simply because their attorneys worked pro bono. This determination has no basis in federal or Michigan fee-shifting statutes, runs contrary to court determinations nationwide, and if allowed to stand, could devastate private firm pro bono practice across the state. As far as Woodman and Joseph's counsel are aware, no Michigan court has considered this question. And

when no Michigan court has considered the issue, Michigan courts may turn to other jurisdictions for guidance. See *Kyocera Corp v Hemlock Semiconductor, LLC*, 313 Mich App 437, 446-47 n2; 886 NW2d 445 (2015) (holding that when there is a "paucity of Michigan cases" on an issue, "Michigan courts have turned to other jurisdictions for guidance . . . ."). Courts nationwide have refused to reduce attorneys' fees on the basis of pro bono representation. Put simply, there is no authority to support any reduction of Woodman and Joseph's attorneys' fee award on that basis.

1. MCL 15.240(6) provides for reasonable attorneys' fees without regard to pro bono representation

FOIA's fee-shifting statute, MCL 15.240(6), provides that the Court "shall award reasonable attorneys' fees, costs, and disbursements" to a prevailing party. Nowhere in the statute is there any carve-out for pro bono representation; in fact, "pro bono" is not mentioned at all. And courts "cannot read into the statute what is not there." *Signature Villas, LLC v City of Ann Arbor*, 269 Mich App 694, 701; 714 NW2d 392 (2006); see *Haynes v Neshewat*, 477 Mich 29, 38; 729 NW2d 488 (2007) ("We will not read into the statute a limitation that is not there.").

Woodman and Joseph prevailed in full, not "in part," MCL 15.240(6), for the reasons detailed above. But even if they had prevailed only in part, it would be an abuse of discretion for the Court of Claims not to award fees at all, or to determine that it is "appropriate" to award only a "portion of reasonable attorneys' fees," see *id.*, solely because Woodman and Joseph's counsel provided their representation pro bono. The "appropriate portion" of fees is based on the extent to which the plaintiff prevails in relation to the plaintiff's request, not the nature of the plaintiff's relationship with counsel. See *Int'l Union, United Plant Guard Workers of Am (UPGWA) v Dep't of State Police*, 422 Mich 432, 455; 373 NW2d 713 (1985) (requiring fee award where, although "victory may not be total, it is still a very substantial one"); *Rataj v City of Romulus*, 306 Mich App 735, 756; 858 NW2d 116 (2014) ("conclud[ing] that plaintiff, having prevailed in part in this

action, is *entitled* to an appropriate portion of his attorney fees, costs, and disbursements pursuant to MCL 15.240(6)") (emphasis added).

Under comparable federal fee-shifting statutes in which awarding fees is also discretionary, see, e.g., 42 USC 1988(b), "[w]here a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee," *Hensley v Eckerhart*, 461 US 424, 435; 103 S Ct 1933; 76 L Ed 2d 40 (1983), and fees may not be reduced or denied based on the pro bono nature of the prevailing party's engagement with counsel, *Blanchard v Bergeron*, 489 US 87, 94; 109 S Ct 939; 103 L Ed 2d 67 (1989). Therefore, the Court of Appeals erred in instructing the Court of Claims to consider the pro bono nature of Honigman's representation regardless of whether it erred in reversing the Court of Claims' ruling that Woodman and Joseph prevailed in full.

2. The Court of Claims' 90% reduction of Woodman and Joseph's fee award on the basis of pro bono representation has no foundation in Michigan law

Michigan cases are abundantly clear that any reduction in attorneys' fees must hinge on the *reasonableness* of that award, not the pro bono nature of the representation. As summarized in *Prins*, "[t]he touchstone in determining the amount of attorney fees to be awarded to a prevailing party in a FOIA case is reasonableness." *Prins*, 299 Mich App at 642. This Court has set out the guiding principles that lower courts should use to make this determination: "a trial court should begin its analysis by determining the fee customarily charged in the locality for similar legal services," and "[t]his number should be multiplied by the reasonable number of hours expended in the case." *Smith v Khouri*, 481 Mich 519, 530; 751 NW2d 472 (2008). See also *Prins*, 299 Mich App at 645 (holding that *Smith* should be applied to FOIA cases). To calculate a reasonable hourly rate, *Smith* instructs courts to "use reliable surveys or other credible evidence of the legal market." *Smith*, 481 Mich at 530-531. Courts commonly use data from surveys such as the State

Bar of Michigan's *Economics of Law Practice: Attorney Income and Billing Rate Summary Report*. *Id*. at 530 (and cases cited therein).

Smith also recognized that, once a court determines the reasonable hourly rate and the reasonable number of hours expended in the case, the court may consider several other factors, including the factors identified in Rule 1.5(a) of the Michigan Rules of Professional Conduct, to determine whether an adjustment up or down is appropriate:

1. The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly
2. The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer
3. The fee customarily charged in the locality for similar legal services
4. The amount involved and the results obtained
5. The time limitations imposed by the client or by the circumstances
6. The nature and length of the professional relationship with the client
7. The experience, reputation, and ability of the lawyer or lawyers performing the services
8. Whether the fee is fixed or contingent.

Id. at 529-530 (quoting MRPC 1.5(a)).

Here, the Court of Claims ruled that Honigman charged "reasonable hourly rates [that] comport with fees customarily charged in the locality for similar legal services." (Appellants' App'x 590a, Fee Order ¶ 2.) It further concluded that the number of hours worked by Honigman attorneys "were not unreasonable for the prosecution of these cases." (*Id.* at ¶¶ 2-3.) The Court of Claims acknowledged at the January 29, 2020 hearing that Honigman's billing rates were "reasonable and within the ranges of those law practice surveys by the State Bar of Michigan and by the Michigan Lawyers Weekly, and do not in and of themselves shock the conscious [sic] as to whether or not those fees were reasonably necessary in the prosecution of this case." (Appellants'

App'x 573a-574a, January 29, 2020 Hearing Tr 29:25-30:5). The Court of Claims ruled that it "will not find that the hours that have been requested by either the [ACLU] or the attorneys and paralegals at Honigman were not reasonably necessary for the prosecution of this case in the manner in which they ordinarily practice." (Appellants' App'x 574a, January 29, 2020 Hearing Tr 30:16-21.).

At no point during the January 29, 2020 hearing or in the Fee Order did the Court of Claims reference or cite any of the *Smith* factors or Rule 1.5(a) that would support a reduction in an otherwise reasonable award. Instead, the sole basis offered for reducing Honigman's fees by 90% was because "those were pro bono dollars." (Appellants' App'x 575a, January 29, 2020 Hearing Tr 31:2-3.) That determination has no basis in law, flies in the face of this Court's previous rulings and defies common sense.

3. The Court of Claims' 90% reduction of Woodman and Joseph's fee award on the basis of pro bono representation has no foundation in analogous federal law

Further, the Court of Claims' fee award reduction is an unwarranted outlier in light of federal courts' interpretations of the federal FOIA fee-shifting statute and the consistent granting of fee awards to pro bono attorneys in similar contexts. Though the Michigan and federal FOIA statutes are not identical, this Court has recognized that the Michigan FOIA is patterned after the federal FOIA. See *Bradley v Saranac Community Sch Bd of Educ*, 455 Mich 285, 299; 565 NW2d 650 (1997) (concluding that absence of federal privacy exemption from Michigan FOIA was intentional "[b]ecause the Legislature modeled its FOIA on the federal version"). And as this issue is novel to Michigan courts, analogous federal FOIA cases provide helpful guidance.

Federal courts have had no qualms awarding fees under FOIA to attorneys engaged on a pro bono basis. See, e.g., *Williams v FBI*, 17 F Supp 2d 6, 9 (DDC 1997) ("[D]eny[ing]" pro bono counsel's fees motion "would discourage other attorneys from making a similar commitment," and

is "[in]consistent with the legislative history of subsection (a)(4)(E)."); *Mattachine Society of Washington, DC v United States Dep't of Justice*, 406 F Supp 3d 64, 70 (DDC 2019) ("[E]ven though [counsel] performed its work for [plaintiff] pro bono, that is not a bar to recovering attorneys' fees, as courts frequently award costs and fees in pro bono cases."); *Jarno v Dep't of Homeland Security*, 365 F Supp 2d 733, 741 (ED Va, 2005) (awarding attorneys' fees to pro bono counsel in a federal FOIA lawsuit). Rather, recent decisions indicate pro bono representation *supports* an award of attorney fees. See, e.g., *Sheppard v United States Dep't of Justice*, unpublished opinion of the United States District Court for the Western District of Missouri, issued Sept. 21, 2021 (Case No. 4:17-cv-1037-NKL); 2021 WL 4304218 (awarding fees to plaintiff's "diligent[]" pro bono counsel in FBI "impropriety" case, as "courts can consider the effect that denying fees would have on attorneys representing clients pro bono")

The federal FOIA legislative history also speaks to this issue. When considering amending the statute to "permit . . . assess[ment] [of] reasonable attorneys' fees," Congress noted "[t]oo often the barriers presented by court costs and attorneys' fees are insurmountable for the average person requesting information, allowing the government to escape compliance with the law." S Rep No 93-854, at 17 (1974). Moreover, "[i]f the government had to pay legal fees each time it lost a case . . . it would be much more careful to oppose only those areas that it had a strong chance of winning." *Id*. (citations omitted). This is precisely the policy at issue here. Woodman and Joseph are freelance journalists who would not have been able to litigate this complex matter against a large state agency without pro bono counsel. Providing victorious pro bono attorneys with reasonable fees better ensures the government does not "escape compliance with the law." (*Id*.)

Outside of the FOIA context, the U.S. Court of Appeals for the Sixth Circuit has likewise found that the pro bono nature of a representation should not preclude the prevailing party from

receiving its reasonable fees. See, e.g., *Turner v Comm'r of Social Security*, 680 F3d 721, 724 (CA 6, 2012) ("Indeed, it is 'well-settled' that the existence of an unsatisfied contingency or pro bono representation agreement does not preclude a fee award, even where the statute limits fees to those 'incurred' by the plaintiff in that action.").[2] And the U.S. Courts of Appeals for the Third, Fourth, Eighth, Eleventh, and Federal Circuits have issued identical judgments. See *Brinn v Tidewater Transp Dist Comm*, 242 F3d 227, 234-235 (CA 4, 2001) ("[C]ourts have consistently held that entities providing pro bono representation may receive attorney's fees where appropriate, even though they did not expect payment from the client and, in some cases, received public funding."); *Ed A Wilson, Inc v Gen Serv Admin*, 126 F3d 1406, 1409 (CA Fed, 1997) ("It is well-settled that an award of attorney fees is not necessarily contingent upon an obligation to pay counsel."); *Martin v Heckler*, 773 F2d 1145, 1152 (CA 11, 1985) ("An award of attorney's fees to a successful plaintiff is not contingent upon an obligation to pay an attorney and is not affected by the fact that no fee was charged."); *Cornella v Schweiker*, 728 F2d 978, 986-987 (CA 8, 1984) ("[T]he fact that [the plaintiff] was represented by counsel on a *pro bono* basis does not preclude an award of fees."); *Ramos v Lamm*, 713 F2d 546, 551 (CA 10, 1983) (rejecting argument that "fee awards to public interest lawyers, those employed by public interest organizations or those in private practice who donate their services to such organizations, should be calculated differently than awards to lawyers in private practice who would personally receive the benefit of the

[2] Within the Sixth Circuit, see *Career Agents Network, Inc v Careeragentsnetwork.biz*, 722 F Supp 2d 814, 824 n 6 (ED Mich, 2010); *Zack v McLaren Health Advantage, Inc*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued December 13, 2018 (Case No 17-11253); 2018 WL 6571230 (Appellants' App'x 598a-602a); *Automotive Support Group, LLC v Hightower*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued January 6, 2012 (Case No. 11–11169); 2012 WL 32733 (Appellants' App'x, 592a-597a); see also *White v Equity Experts.org, LLC*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued March 6, 2019 (Case No. 17-cv-12102); 2019 WL 1057419 (Appellants' App'x 603a-607a).

awards"); *Rodriguez v Taylor*, 569 F2d 1231, 1245 (CA 3, 1977) ("[A]wards of attorneys' fees where otherwise authorized are not obviated by the fact that individual plaintiffs are not obligated to compensate their counsel.").

Finally, the Court of Claims' decision—and the Court of Appeals' instruction on remand—subverts the principle embraced by the U.S. Supreme Court that "where there are lawyers or organizations that will take a plaintiff's case without compensation, that fact does not bar the award of a reasonable fee." *Blanchard*, 489 US at 94. As the U.S. Supreme Court further explained in the context of federal law, "Congress did not intend the calculation of fee awards to vary depending on whether plaintiff was represented by private counsel or by a nonprofit legal services organization." *Blum v Stenson*, 465 US 886, 894; 104 S Ct 1541; 79 L Ed 2d 891 (1984).

4. The Court of Claims' 90% reduction of Woodman and Joseph's fee award on the basis of pro bono representation has no support in any other state's laws or rulings

Other states' courts have likewise firmly rejected the argument that attorneys' fees should be denied or reduced because a prevailing plaintiff is represented pro bono. See *Kirk v Arnold*, 157 NE3d 1111, 1117-1121 (Ill App, 2020) (reversing a trial court's denial of attorneys' fees on account of pro bono representation under the Illinois Civil Rights Act where the plaintiff was represented by the law firm Jenner & Block in cooperation with the ACLU); *Ostermeier v Prime Props Investments Inc*, 589 SW3d 1, 8-9 (Mo App, 2019) (reversing denial of attorneys' fees "because a litigant is represented by Legal Aid or pro bono counsel" because such denial "thwarts the remedial purposes of the [statutory] fees shifting provisions"); *Henriquez v Henriquez*, 992 A2d 446, 449 (Md App, 2010) (rejecting challenge to trial's court's award of attorneys' fees to pro bono counsel of a nonprofit legal services organization in a family law matter); *Council House, Inc v Hawk*, 147 P3d 1305, 1308 (Wash App, 2006) ("[T]he fact that representation is pro bono is never justification for denial of fees."); *Barker v Utah Pub Serv Comm*, 970 P2d 702, 711

(Utah, 1998) ("Whether the attorneys provided their services pro bono, at a discount, or at full market rate does not effect a determination of reasonable attorney fees."); *Benavides v Benavides*, 526 A2d 536, 538, 539 (Conn App, 1987) (rejecting as "arbitrary and erroneous" a reduction in a fee award because of a party's pro bono representation); *Antini v Antini*, 440 P3d 57, 61 (Okla, 2019) ("[F]ees must be awarded even where the party did not pay for the legal services."); *In re New Hampshire Dep't of Transp*, 724 A2d 1284, 1285, 1286 (NH, 1999) (holding that a fee award does not hinge on an actual obligation on a party to pay their attorney); *Council H, Inc v Hawk*, 147 P3d 1305, 1308 (Wash App, 2006) (noting that absent a statutory prohibition "the fact that representation is pro bono is never justification for denial of fees").

Like the U.S. Supreme Court, state courts have likewise stressed the importance of awarding fees to pro bono attorneys "where a plaintiff has obtained excellent results," particularly when the litigation has served the public interest, as in the context of FOIA litigation, where "every breach of the wall of bureaucratic secrecy produces significant benefits to the public at large." *New Jerseyans for a Death Penalty Moratorium v New Jersey Dep't of Corrections*, 850 A2d 530, 535 (NJ App, 2004), aff'd 883 A2d 329 (NJ, 2005); see also *Brown v Comm for Lawyer Discipline*, 980 SW2d 675, 684 (Tex App, 1998) (affirming a fee award to a pro bono attorney in a disciplinary hearing to avoid shifting the benefits of representation to a non-prevailing party).

Overwhelming authority weighs in favor of pro bono attorneys recovering the full amount of attorneys' fees to which they are otherwise entitled. The Court of Claims' conclusion to the contrary and reduction of Honigman's fees by 90% was an abuse of discretion that is unsupported by any analysis or authority, and has never been adopted by any other state or federal court. The Court should reject this conclusion and follow the overwhelming weight of federal and state

authority that rejects the pro bono nature of a representation as a basis to reduce an otherwise reasonable fee award.

5. Allowing reductions in fee awards for pro bono representation would undermine and radically alter pro bono practice in Michigan

The Court of Claims and Court of Appeals effectively ruled that pro bono representation is not on par with paid representation. And not merely that pro bono representation is worth less, but that it is in fact worth 90% less than its paid counterpart. Such a ruling would shake the foundation of vital pro bono civil rights litigation and leave state agencies like the MDOC virtually unaccountable for violations of state law.

Courts and commentators have long recognized that statutory fee-shifting must be available to attorneys who provide their services free of charge to the client in order to fulfill the legislative intent behind the relevant statutes, which is to expand access to justice and provide an incentive for citizens and attorneys to bring meritorious lawsuits in the public interest. As the U.S. Court of Appeals for the Eighth Circuit explained, "[i]f attorneys' fees to pro bono organizations are not allowed in litigation . . . it would more than likely discourage involvement by these organizations in such cases, effectively reducing access to the judiciary for indigent individuals." *Cornella*, 728 F2d at 986-987.

Nor is this concern limited to nonprofit organizations. As the U.S. District Court for the Western District of Missouri recognized when granting attorneys' fees for a pro bono representation in a FOIA action, "[r]ejecting [plaintiff's] request for attorney's fees . . . likely would discourage other attorneys from making a similar commitment to represent FOIA requesters who cannot afford to fund years of litigation against the Government." *Sheppard*, 2021 WL 4304218, at *4 (quotations omitted). The California Court of Appeals acknowledged similar concerns:

> We do not find it self-evident a law firm's commendable willingness to provide its services on a pro bono basis to low income clients should necessarily justify a diminishment in the fee award when that pro bono representation proves successful. . . . Our research indicates courts reduce a fee award to adjust, for example, for duplicative work, for lack of success on certain issues, or the like. However, our research uncovered no case in which a trial court reduced a fee award simply because of the "pro bono type of work" involved. [*Cruz v Ayromloo*, 155 Cal App 4th 1270, 1278-1279 (2007) (internal citations omitted).]

See also *United Companies Lending Corp v Sargeant*, 32 F Supp 2d 21, 25 (D Mass, 1999) ("While the possibility of attorneys' fees may not have factored heavily into the decision to represent [the plaintiff], it would be strange indeed to penalize attorneys who are willing to sacrifice profits to represent the less fortunate.") (internal citations omitted); *Barker*, 970 P2d at 711 (rejecting argument that the pro bono nature of representation militates against a fee multiplier because "[h]olding otherwise would only discourage lawyers from taking such cases pro bono in the future"); *Ostermeier*, 589 SW3d at 9 ("A holding that private law firms who agree to take these cases are prohibited by law from receiving any recourse for the time expended merely because they are acting on behalf of Legal Aid could have a chilling effect on the willingness of lawyers and law firms to take on this representation."); *Lilly v Co of Orange*, 910 F Supp 945, 955 (SDNY, 1996) (rejecting request for 5% "pro bono reduction" because "[s]uch an automatic adjustment would run counter to the legislative intent . . . for law firms to accept such assignments"); *Witherspoon v Sielaff*, 507 F Supp 667, 670 (ND Ill, 1981) ("[E]ven though individual attorneys or law firms may have the financial resources to absorb the costs of pro bono services, they are entitled to a fee award to encourage future service by them and promote greater respect for our civil rights by all.").

The Court of Claims' comment in this case that Honigman's fees were "pro bono dollars," (Appellants' App'x 575a, January 29, 2020 Hearing Tr 31:2-3), reflects a misunderstanding

regarding the relationship between pro bono work and fee-shifting statutes. Not only is it widely recognized that attorneys in private practice are expected to engage in pro bono work, it is also widely accepted that such work "still counts" as pro bono when the attorney recovers fees under a fee-shifting statute. For example, where ABA Model Rules of Professional Conduct provide that "every lawyer has a professional responsibility to provide legal services to those unable to pay," the ABA's comment to the rule expressly states that "the award of statutory attorneys' fees in a case originally accepted as pro bono would not disqualify such services from inclusion under this section." American Bar Ass'n, Model Rules of Professional Conduct, § 6.1, cmt 4.

Similarly, the Pro Bono Institute, a nonprofit organization whose mission is to assist law firms in identifying opportunities for pro bono work, affirms that "[i]f the firm originally accepted the matter in question on a pro bono basis, then an award of attorneys' fees will not change it from being a pro bono matter." Pro Bono Institute, *What Counts? A Compilation of Questions and Answers Interpreting the Law Firm Pro Bono Challenge Statement of Principles* (2019), p 12 http://www.probonoinst.org/wpps/wp-content/uploads/Whatcounts2019-6-11.pdf. Indeed, the Institute encourages firms to seek fee awards in their pro bono work:

> In handling cases in the public interest, law firms are acting as "private attorneys general," enforcing legal rights, promoting access to justice for those who would otherwise be unable to press their suits, and uncovering and deterring unlawful behavior. Seeking attorneys' fees, as well as damages or equitable relief, on behalf of pro bono clients increases the disincentives and deterrence benefits of these cases by making defendants who have acted unlawfully pay the full costs associated with their behavior. Accordingly, firms are encouraged to seek attorneys' fees and to request compensation at the usual and customary billing rates. [*Id.*]

Firms are also encouraged to donate "an appropriate portion" of the fees they recover. American Bar Ass'n, Model Rules of Professional Conduct, § 6.1, cmt 4; Pro Bono Institute, *What Counts?*, p 12. While smaller firms and solo practitioners might be unable or unlikely to take such

cases if they were unable to recover and keep some portion of the fees generated by their work, well-resourced firms like Honigman working in cooperation with nonprofit organizations like the ACLU typically donate the fees they recover to the organization or its charitable foundation. See *Kirk*, 157 NE3d at 1121; see also MRPC 5.4(a)(4) (allowing a lawyer in Michigan to share court-awarded fees with a nonprofit organization that retained or recommended them for the case).

In these cases, Honigman was acting in the highest traditions of the legal profession by serving as pro bono counsel, in cooperation with the ACLU, on behalf of independent journalists to obtain the disclosure of public records that the MDOC was unlawfully keeping secret. The litigation took more than two years. That neither Honigman nor the ACLU expected Woodman or Joseph to pay for the legal services provided does not eliminate the expectation that, upon prevailing, both entities would be entitled to reasonable attorneys' fees under FOIA. See *New Jerseyans for Death Penalty Moratorium*, 883 A2d at 340 ("Although [the plaintiff's attorney] neither expected nor received payment from the [plaintiff], he performed his services contingent upon being fully compensated for his time under the fee-shifting provision of the [Open Public Record Act] if he prevailed."). As recognized in *Sheppard*, *supra*, organizations like the ACLU would be severely hampered in their ability to litigate public interest cases if, after years of protracted litigation that uncovers serious violations of state law, cooperating counsel could recover only 10% of their reasonable fees because they did their work pro bono. Likewise, public officials and other defendants in fee-shifting cases would have little incentive to resolve cases efficiently when private counsel are providing their services pro bono if, at the end of the case, the amount that they will owe would be only a fraction of what a reasonable fee would otherwise be.

For these reasons, the Court should not allow the Court of Claims—in which FOIA and other cases are litigated to ensure our state government remains transparent and accessible to the

public—to reduce reasonable attorneys' fees awards based solely on the pro bono nature of the representation. Validating the Court of Claims' ruling would not only defy the overwhelming weight of authority, but would discourage attorneys from taking on pro bono matters. The Court should reverse the Court of Appeals' judgment and remand these cases to the Court of Claims to enter an order awarding Woodman and Joseph 100% of their attorneys' fees.

C. Woodman and Joseph Are Entitled to Punitive Damages

To hold public bodies accountable for refusing to properly consider and respond to the public's FOIA requests, a plaintiff is entitled to punitive damages if "the public body has arbitrarily and capriciously violated this act by refusal or delay in disclosing or providing copies of a public record." MCL 15.240(7). Punitive damages for a wrongful rejection of a FOIA request are statutorily prescribed when a plaintiff shows that "the review of his file was the result of a court ordered disclosure and that defendant acted arbitrarily and capriciously in failing timely to comply with the disclosure request." *Jordan v Martimucci*, 101 Mich App 212, 214; 300 NW2d 325 (1980). An act or decision is arbitrary and capricious "when it lacks an adequate determining principle, when it reflects an absence of consideration or adjustment with reference to principles, circumstances, or significance, or when it is freakish or whimsical." *Wescott v Civil Serv Comm*, 298 Mich App 158, 162; 825 NW2d 674 (2012).

The MDOC is no stranger to arbitrary and capricious FOIA denials. For instance, in *Kincaid v Dep't of Corrections*, 180 Mich App 176, 183; 446 NW2d 604 (1989), the Court of Appeals affirmed the trial court's ruling that the MDOC acted arbitrarily and capriciously where it denied the plaintiff's FOIA requests because they were not sufficiently specific and that the records did not exist, even though the MDOC's records established that the exact opposite was true.

So it is here. In these cases, the MDOC did not articulate a single valid reason for denying Woodman's and Joseph's FOIA requests. In fact, the MDOC admitted that it did not even review the videos before denying their FOIA requests. This is a textbook case of an arbitrary and capricious FOIA violation; the MDOC acted without consideration at all of the content of the requested videos, and instead robotically denied the requests as a matter of course. The Court of Claims even acknowledged at the January 29, 2020 hearing that the MDOC did not follow "the [FOIA] mandate that each request be individually reviewed to ascertain whether or not it was one for which one of the exceptions applied or not; ergo, ***their actions were arbitrary. Arbitrary, apparently, and habitual***." (Appellants' App'x 573a, January 29, 2020 Hearing Tr 29:8-13 (emphasis added).) If the MDOC's conduct in these cases was not arbitrary and capricious, MCL 15.240(7) could realistically never be invoked, and public bodies would be insulated from punitive damages by simply refusing to consider the content of any FOIA-requested records. This Court should not condone such a rule.

The fact that late in the litigation the MDOC contrived a far-fetched, post-hoc basis for the records' nondisclosure does not alter the arbitrary-and-capricious analysis.[3] Much of this came from the testimony of "Inspector" Christine Wakefield, who "had not seen the FOIA request" before her deposition. (Appellants' App'x 309a, August 28 Order p 6.) As the Court of Claims explained, these "more recent justifications for invocation of the [FOIA] exemption do not convince the court," and "are far too conclusory." (*Id*. at 314a-315a, August 28 Order pp 11-12.) And "there is no indication that these concerns were present at the time defendant denied the FOIA

[3] For example, MDOC alleged that disclosure of the video would lead to vague "security concerns," including the release of the "identities of the unnamed prisoner and MDOC personnel," as well as other "sensitive information about MDOC's security measures at [the Bellamy Creek Correctional Facility]." (Appellants' App'x 309a-310a, August 28 Order pp 7-8.)

requests." (*Id*. at 316a, August 28 Order p 13.) Ultimately, "defendant made ***no effort*** to review the videos or to make an informed decision regarding the [FOIA] exemption ***before denying plaintiffs' requests***." (*Id*. at 316a, August 28 Order n11 (emphasis added).) That is the epitome of an arbitrary and capricious action.

By declining to award Woodman and Joseph punitive damages despite the arbitrary and capricious nature of the MDOC's conduct and the factual finding that the MDOC's actions were "arbitrary, apparently, and habitual," the Court of Claims and Court of Appeals clearly erred. See MCL 15.240(7) (providing that "[t]he court *shall* award . . . punitive damages" (emphasis added)). To give effect to MCL 15.240(7) and to hold the MDOC accountable for its FOIA abuses, Woodman and Joseph request that this Court reverse the Court of Appeals' judgment and award them punitive damages of $2,000, or $1,000 for each of these two consolidated cases.

V. CONCLUSION

For these reasons, Woodman and Joseph request that the Court reverse the Court of Appeals' judgment and (i) hold that the pro bono nature of a representation is not an appropriate consideration in the determination of a reasonable attorneys' fee award, (ii) hold that a state agency's failure to review records responsive to a FOIA request before responding to that request is an arbitrary and capricious practice, and (iii) remand these cases to the Court of Claims for entry of an order:

a. Reinstating the Court of Claims' ruling that Woodman and Joseph prevailed in full in their FOIA cases;

b. Awarding Woodman and Joseph 100% of the attorneys' fees the Court of Claims determined were reasonable in light of its factual findings that Honigman's hourly rates were reasonable, and that the hours worked on these cases were not unreasonable;

c. Awarding Woodman and Joseph $1,000 each in punitive damages under MCL 15.240(7); and

d. Awarding Woodman and Joseph such further relief that the Court deems just and equitable.

Dated: July 1, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 1, 2022, I electronically filed the foregoing using the MiFile/TrueFiling System which will send notification of such filing to all registered counsel of record.

Date: July 1, 2022

Respectfully submitted,

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