

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,

Supreme Court No. 163382
Court of Appeals No. 353164
Court of Claims No. 17-000082-MZ

v.

MICHIGAN DEPARTMENT OF CORRECTIONS,

Defendant-Appellee.

GEORGE JOSEPH,

Plaintiff-Appellant,

Supreme Court No. 163382
Court of Appeals No. 353164
Court of Claims No. 17-000082-MZ

v.

MICHIGAN DEPARTMENT OF CORRECTIONS,

Defendant-Appellee.

MICHIGAN ASSOCIATION FOR JUSTICE’S *AMICUS CURIAE* BRIEF

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INTEREST OF AMICI CURIAE¹

The MAJ is an organization of Michigan lawyers engaged primarily in trial litigation work. MAJ consists of member attorneys dedicated to advocating for the interest of the public and protecting the integrity of the judicial system. The MAJ recognizes an obligation to assist this Court on significant issues of law that would substantially affect the orderly administration of justice in trial courts of this state. In this matter, the MAJ supports Plaintiffs in urging the Court to reverse the decision of the Court of Appeals holding Plaintiffs did not prevail in full. In addition, we urge this Court to find it would be error for pro bono representation to be a consideration to reduce attorney fees.

The decision in this case may affect other statutes that include attorney fees to the prevailing party, such as ELCRA, PWDCRA, WPA, and OMA. MAJ is concerned that the decision of the Court of Appeals will also have a chilling affect making it less likely that attorneys will take cases where the illegal act is clear and harmful to society but the economic damages to the individual is minimal, in clear contravention of the intent of the reasons that these statutes include attorney fees to the prevailing plaintiff.

¹ No party and no counsel for a party has authored this brief in whole or in part, nor has any party or counsel for a party or anyone else made a monetary contribution intended to fund the preparation or submission of this brief.

QUESTIONS PRESENTED

- (1) Whether Plaintiffs prevailed in full on their FOIA claims and are thus statutorily entitled to attorney fees under MCL 15.240(6)?

Plaintiffs answer:	Yes
Defendant answers:	No
The Court of Claims answered:	Yes
The Court of Appeals answered:	No
MAJ Amicus answers:	Yes

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

Plaintiffs answer:	Yes
Defendant answers:	No
The Court of Claims answered:	No
The Court of Appeals answered:	No
MAJ Amicus answers:	Yes

- (3) Whether the Court of Claims clearly erred in denying Plaintiffs punitive damages under MCL 15.240(7)?

Plaintiffs answer:	Yes
Defendant answers:	No
The Court of Claims answered:	No
The Court of Appeals answered:	No
MAJ Amicus does not address this issue.	

STATUTES INVOLVED

MCL 15.240(6) provides:

“If a person asserting the right to inspect, copy, or receive a copy of all or a portion of a public record prevails in an action commenced under this section, the court shall award reasonable attorneys' fees, costs, and disbursements. If the person or public body prevails in part, the court may, in its discretion, award all or an appropriate portion of reasonable attorneys' fees, costs, and disbursements. The award shall be assessed against the public body liable for damages under subsection (7).”

INTRODUCTION

Amicus has a special interest in ensuring access of justice. The decision of the Court of Appeals contravenes the policy reasons for fee shifting under FOIA, which is to facilitate citizen access to the courts to vindicate their statutory rights. The decision conflicts with that policy by narrowly defining persons who have prevailed and by reducing attorney fees if the representation is pro bono.

STATEMENT OF FACTS AND PROCEEDINGS AND STANDARD OF REVIEW

MAJ Amicus Curiae hereby relies upon the statement of facts and proceedings and standard of review set forth by Plaintiffs-Appellants.

ARGUMENT

I. The Policy of FOIA Requires the Court to Broadly Apply the Fee Shifting Provision.

The FOIA statute in Michigan sets forth the policy of FOIA as follows:

It is the public policy of this state that all persons, except those persons incarcerated in state or local correctional facilities, 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.

"FOIA is a manifestation of this state's public policy favoring public access to government information, recognizing the need that citizens be informed as they participate in democratic governance, and the need that public officials be held accountable for the manner in which they perform their duties." *Rataj v City of Romulus*, 306 Mich App 735, 748, 858 NW2d 116 (2014). The Michigan FOIA statute is pro disclosure. *Thomas v City of New Balt*, 254 Mich App 196, 201, 657 NW2d 530, 534 (2002).

Federal courts² have held the basic policy of the FOIA is to encourage the maximum feasible public access to government information and ... to facilitate citizen access to the courts to vindicate their statutory rights." *Church of Scientology of California v Harris*, 653 F2d 584, 590, 209 US App DC 329 (DC Cir. 1981) (quoting *Nationwide Bldg. Maintenance, Inc. v Sampson*, 559 F2d 704, 715, 182 US App DC 83 (DC Cir. 1997)).

² Federal FOIA has been found to be similar to Michigan FOIA and, therefore, in some circumstances it is appropriate for the Court to look to federal courts for guidance in deciphering the various sections and judicial interpretations. *Evening News Ass'n v City of Troy*, 417 Mich 481, 495; 339 NW2d 421 (1983).

In order to advance the policy of FOIA in this state, the decision of the Court of Appeals must be reversed as to its finding that the plaintiffs did not prevail completely and its confirmation that reasonable attorney fees can be limited based on the pro bono nature of the representation.

II. Persons Who “Prevail” in a FOIA Action Should be Interpreted Broadly.

Under FOIA, when a party “prevails” completely in a FOIA action, the trial court must award reasonable attorney fees and costs pursuant to MCL 15.240(6). *Local Area Watch v Grand Rapids*, 262 Mich App 136, 150; 683 NW2d 745 (2004). Pursuant to MCL 15.240(6), where a requesting person “prevails,” attorney fees and costs are mandatory. In this regard, the statute states the following:

(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 attorneys' fees, costs, and disbursements. If the person or public body prevails in part, the court may, in its discretion, award all or an appropriate portion of reasonable attorneys' fees, costs, and disbursements. The award shall be assessed against the public body liable for damages under subsection (7).

In the instant case, the Court of Appeals held the Plaintiffs-Appellants did not prevail completely, stating the following:

In this case, plaintiffs prevailed because their actions were reasonably necessary to obtain the requested videos from defendant. However, plaintiffs demanded in their complaints the production of "a complete, unredacted copy of the Video" Defendant was permitted to redact certain information from the videos, and thus plaintiffs were determined to be entitled to only a portion of the records requested. We therefore conclude that under MCL 15.240(6), plaintiffs prevailed in part. *Woodman v Dep't of Corr.*, Nos. 353164, 353165, 2021 Mich. App. LEXIS 3920, at *10 (Ct. App. June 24, 2021).

Although the FOIA statute does not define “prevail” in its definitional section, MCL 15.232, several cases in both the Court of Appeals and this Court, have held to “prevail” in a FOIA action means, "the action was reasonably necessary to compel the disclosure [of public records],

and [that] the action had a substantial causative effect on the delivery of the information to the plaintiff." See e.g., *Scharret v City of Berkley*, 249 Mich App 405, 414; 642 NW2d 685 (2002); *See also, Amberg v City of Dearborn*, 497 Mich 28, 34, 859 NW2d 674, 677 (2014); *Oakland Cnty. Prosecutor v Dep't of Corr.*, 222 Mich App 654, 663, 564 NW2d 922, 926-27 (1997); *Yarbrough v. Dep't of Corr.*, 199 Mich App. 180, 186, 501 NW2d 207, 210 (1993); *Walloon Lake Water Sys, Inc. v Melrose Twp.*, 163 Mich App. 726, 733-34, 415 NW2d 292, 296 (1987).

In *Walloon Lake Water Sys, Inc.*, *supra*, the Court of Appeals explained further what it means to "prevail" stating where the Plaintiff is forced into litigation and is successful with respect to the *central issue that the requested materials were subject to disclosure under the FOIA*, even though the action has been rendered moot by acts of the public body in disposing of the documents. (Emphasis Added). *Walloon Lake Water Sys, Inc.*, *supra* at pp. 733-34. In *Walloon Lake Water Sys, Inc.*, the trial court initially denied that the plaintiff "prevailed" in a FOIA action because instead of the requested document being disclosed, the document in question was disposed of by the government entity. *Id.* at p. 729. The appellate court recognized a strict application of "prevail" would mean the plaintiff in *Walloon Lake Water Sys, Inc.* would be denied attorney fees and costs because there was no disclosure. The Court held a strict application was inappropriate in cases where there was no disclosure because the municipality disposed of the document. *Id.* In *Thomas v City of New Balt.*, 254 Mich App 196, 205, 657 NW2d 530 (2002), the Court of Appeals held the plaintiff "prevails" when the lawsuit has a "substantial effect on the delivery" of the requested records. Both cases focus on the disclosure (or failure to disclose because of disposal) and whether that happened because of the lawsuit, not what was disclosed and whether the disclosure was redacted in some fashion.

In the present case, while the trial court held the plaintiffs had completely prevailed, the Court of Appeals held the plaintiffs only prevailed in part because the defendant was permitted to redact certain information from the videos. *Woodman v Dep't of Corr.*, Nos. 353164, 353165, 2021 Mich App LEXIS 3920, at *10 (Ct. App. June 24, 2021). By holding the plaintiffs in the present case did not prevail completely, the Court of Appeals focused on the substance of what was disclosed, as opposed to the disclosure of the information and whether the action had a substantial causative effect on the delivery of the information to the plaintiff. There is no dispute the requested video would not have been disclosed without the lawsuit. The defendant refused to disclose the video citing to the “custody and safety security exemption” under FOIA, without even viewing the requested video. It was only after an *in camera* review and Special Master review that it was determined the videos did not reveal any security concerns with the individuals in the video obscured and the video was disclosed. Accordingly, the lawsuit was necessary and resulted in the disclosure of the video, albeit with redaction.

By focusing on what was disclosed rather than the disclosure, the decision of the Court of Appeals narrows the opportunity for plaintiffs bringing a FOIA action to “prevail” completely and, therefore, be entitled to mandatory attorney fees and costs under the statute. The FOIA statute provides a long list of exemptions for disclosing information to a requesting party. See MCL §15.243. The exceptions are to be construed narrowly, in light of the public policy favoring disclosure. *Booth Newspapers, Inc v Univ of Michigan Bd of Regents*, 444 Mich 211, 231-232; 507 NW2d 422 (1993). Notwithstanding the public policy favoring disclosure, government entities often broadly apply the exceptions to deny disclosure of requested materials, as evidenced in the instant case, where the Defendant did not even view the video in question when the request was denied. In addition, because there are so many exceptions, if the requested materials are ordered

to be disclosed through litigation, there are likely to be redactions, such as social security numbers pursuant to MCL §15.243(1)(w). According to the decision of the Court of Appeals, such redaction would arguably render the plaintiff only prevailing in part, which would make the award of attorney fees and costs discretionary not mandatory under the statute. MCL §15.240(6).

The decision of the Court of Appeals provides an incentive for government entities to redact anything it can, such as a social security number, when ordered to disclose in a FOIA action. According to the lower court's decision, any such redaction will render the party requesting the information to have only partially prevailed, making attorney fees and costs discretionary as opposed to mandatory under the statute. Aggrieved parties may be less likely to bring FOIA actions because of the likelihood of being denied mandatory attorney fees and costs. Thereby limiting access to the court for those who have been denied access to information from the government. Notwithstanding this, in the event the Court finds a requesting party has only partially prevailed, the Court should adopt the "fairly allocable" standard as argued by Amici - the State Bar of Michigan, Michigan State Planning Body, Legal Services Association of Michigan, and Disability Rights Michigan.

III. Recovery of Attorney Fees in a FOIA Action Should Not be Limited Where Representation is Pro Bono in Nature.

The Michigan FOIA statute has a fee-shifting provision for parties who prevail. The purpose of the fee-shifting provision is to "encourage voluntary compliance" 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." *Walloon Lake Water Sys, Inc. v Melrose Twp, supra*, p. 733. Those who are unable to afford the expense of litigation can oftentimes be represented pro bono. Rule 1.8 of the Michigan Rules of Professional Conduct provides that "a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client." The fee-

shifting provision included in statutes provides a pro bono attorney the opportunity to recover costs advanced and attorney fees, if representing the prevailing party. In addition to Michigan's FOIA statute, there are numerous other statutes, which involve fee-shifting provisions. e.g., Open Meetings Act, MCL 15.273(1); Elliott-Larsen Civil Rights Act, MCL 37.2802; Whistleblowers' Protection Act, MCL 15.364. Notably, *Smith v Khouri*, 481 Mich 519, 535-536 751 N.W.2d 472 (2008) established a framework to be applied to "various fee-shifting rules and statutes" to provide guidance for "Michigan courts that are asked to impose 'reasonable attorney fees' under fee-shifting rules and statutes." The *Smith* framework has been applied to FOIA's fee-shifting provision. *Kennedy v Robert Lee Auto Sales*, 313 Mich App 277, 294-95, 882 NW2d 563, 573 (2015).³ Accordingly, a ruling by this Court affirming the error of the lower court in significantly reducing attorney fee awards if the representation is pro bono in nature can potentially penalize those with pro bono representation in other fee-shifting matters. Accordingly, the decision of the Court of Appeals to limit attorney fees because of the pro bono nature of the representation must be reversed.

Importantly, the Michigan FOIA does not state that a court should reduce a prevailing party's attorney fees, if the representation is pro bono in nature. The statute states, "If a person...prevails in an action commenced under this section...the Court shall award reasonable attorneys' fees..." MCL 15.240(6). There is neither statutory basis to reduce recovery of attorney fees because of pro bono representation nor caselaw. In fact, the federal courts have rejected the proposition that pro bono representation justifies a reduction in fees to a prevailing plaintiff. In this regard, one federal court stated:

Court concludes that counsel may not have had a sufficient incentive to bring a FOIA action without the expectation of being able to recoup attorneys' fees if

³ Notably, the *Smith* framework does not include a fee reduction for pro bono cases. *Id.*, at p. 530.

successful. The D.C. Circuit has explained that, in determining if a plaintiff is entitled to an attorneys' fees, a district court should "always keep in mind the basic policy of the FOIA to encourage the maximum feasible public access to government information and ... to facilitate citizen access to the courts to vindicate their statutory rights." *Church of Scientology of California v. Harris*, 653 F.2d 584, 590, 209 U.S. App. D.C. 329 (D.C. Cir. 1981) (quoting *Nationwide Bldg. Maintenance, Inc. v. Sampson*, 559 F.2d 704, 715, 182 U.S. App. D.C. 83 (D.C. Cir. 1997)). **Granting attorneys' fees in these circumstances, where Plaintiff is represented pro bono and where her request benefits others, would further the purposes of FOIA.** See *Williams v. FBI*, 17 F. Supp. 2d 6, 9 (D.D.C. 1997) (granting attorneys' fees in part because "an award of fees would serve the larger public purpose of encouraging service on the Civil Pro Bono Counsel Panel").

Reyes v United States Nat'l Archives & Records Admin., 356 F Supp 3d 155, 166 (D.DC 2018). (Emphasis Added).

Under both state and federal FOIA law, the policy for fee-shifting is advanced only if those represented pro bono receive equal justice to individuals represented by private litigators. To rule otherwise is not only unreasonable, but contrary to this Court's goal for 100% access to the civil justice system.

CONCLUSION

The policy of FOIA can only be advanced if this Court reverses the decision below by:
(1) more broadly interpreting who “prevails” in a FOIA action; and (2) providing those who are represented on a pro bono basis with equal treatment in the award of reasonable attorney fees.

Respectfully Submitted:

Dated: August 25, 2022

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