

STATE OF MICHIGAN
COURT OF CLAIMS

SPENCER WOODMAN,
Plaintiff,

OPINION AND ORDER

v

Case No. 17-000082-MZ

MICHIGAN DEPARTMENT OF
CORRECTIONS,

Hon. Cynthia Diane Stephens

Defendant.
_____ /

GEORGE JOSEPH,
Plaintiff,

v

Case No. 17-000230-MZ

MICHIGAN DEPARTMENT OF
CORRECTIONS,

Defendant.
_____ /

Pending before the Court in these consolidated cases are plaintiffs' and defendant's competing motions for summary disposition. For the reasons stated herein, defendant's motion is DENIED in part, and plaintiffs' motion is GRANTED in part under MCR 2.116(C)(10) with respect to their requests for audio recordings and with respect to whether defendant's blanket denials violated FOIA. In addition, defendant is ordered to produce, for the Court's *in camera* review, all responsive video recordings, with attempts made to redact, if possible, faces and identities of the individuals depicted therein.

I. BACKGROUND

On or about September 27, 2016, Ionia Bellamy Creek Correctional Facility (“IBC”) inmate Dustin Szot died following an altercation with another inmate. According to the allegations contained in plaintiffs’ respective complaints, Szot and the other inmate were subdued after corrections officers deployed electronic control devices (also referred to as “ECDs” or “tasers”) on the inmates. Szot died a short time later after attempts to resuscitate him were unsuccessful. According to an autopsy report, the cause of Szot’s death was blunt-force trauma.

A. PLAINTIFF WOODMAN’S FOIA REQUEST

On or about September 28, 2016, plaintiff Spencer Woodman submitted a Freedom of Information Act (FOIA) request for “a digital copy of video footage of the confrontation that led to the fatality of inmate Dustin Szot This request includes footage from any and all available cameras that captured this incident as well as any available accompanying audio records.”¹

Defendant denied the request on or about October 6, 2016. According to defendant’s FOIA response, the records that Woodman sought were “exempt from disclosure under Section 13(1)(c).² These records, if disclosed, could threaten the security of the Bellamy Creek

¹ The request named the wrong facility—Muskegon Correctional Facility; however, there have never been any allegations regarding whether Woodman’s misidentification of the facility where the incident occurred caused any confusion or whether it played any role in the denial of the request.

² The referenced exemption, MCL 15.243(1)(c), exempts from disclosure under FOIA a public record that, if disclosed, “would prejudice a public body’s ability to maintain the physical security of custodial or penal institutions occupied by persons arrested or convicted of a crime”

Correctional Facility by revealing fixed camera placement as well as the scope and clarity of the facility's fixed camera and handheld recordings." In addition, continued the denial notice, disclosure of the records "could also reveal the policies and procedures used by staff for disturbance control and the management of disruptive prisoners." The response did not expressly mention the audio recordings.

Woodman appealed the denial, arguing that revealing the placement of security cameras did not threaten the security of the IBC, given that cameras are generally visible and given that inmates know they are under constant surveillance. Taking a similar approach to the restraint tactics used on inmates, Woodman argued that "such means of control are already and rightly widely known." He also argued that the public interest in the requested footage was "abundantly clear," and that this interest outweighed the state's interest against releasing the same.

Defendant denied Woodman's appeal on October 25, 2016. According to the appeal denial, "[w]hile prisoners understand that cameras are in place throughout facilities and that they are under constant surveillance, the MDOC does not routinely release video footage to the public as you incorrectly assert." Rather, according to defendant, "[r]elease of the video footage compromises the safety, security, and order of the facility." Defendant continued to assert the exemption found in MCL 15.243(1)(c). In addition, defendant cited the exemption found in MCL 15.243(1)(u), which allows a public body to exempt from disclosure records "of a public body's security measures[.]" According to defendant, "[t]he release of video footage would reveal the recording and security capabilities of the facility's video monitoring system." The appeal denial did not expressly address audio recordings.

B. PLAINTIFF JOSEPH'S FOIA REQUEST

On or about June 28, 2016, plaintiff George Joseph filed a similar request to Woodman's request. Joseph sought "a digital copy of any and all footage of the September 27, 2016 confrontation that led to the death of inmate Dustin Szot" Joseph clarified that the request "should be understood to include footage from any and all available cameras that captured [] any parts of the confrontation, including but not limited to cameras installed on tasers deployed" as well as "any audio records that accompany footage found to be responsive to this request."³

Defendant denied the request on July 6, 2017, for the reason that the records sought were claimed to be exempt from disclosure. The one-sentence explanation for the denial was that, "[t]o the extent these records are available, they are exempt from disclosure under Section 13(1)(c)." The denial did not expressly address whether it applied to the video or audio recordings. In lieu of filing an appeal, Joseph filed a complaint in this Court challenging the denial of his FOIA request.

C. THE INSTANT PROCEEDINGS

Plaintiffs filed similar complaints in this Court alleging that the defendant wrongfully denied their respective FOIA requests because the sought-after records were not exempt from disclosure. Plaintiffs sought disclosure of the video and audio records, as well as attorney fees, costs, and disbursements available under MCL 15.240(6). In addition, plaintiffs sought damages for what they alleged were arbitrary and capricious denials of their requests. See MCL

³ Like Woodman's request, Joseph's request also made reference to the wrong correctional facility. However, there have never been any assertions raised in this case concerning whether this mistaken reference to a different facility played any role in defendant's denial of the request.

15.240(7). Because of the commonality of issues raised, this Court consolidated the two cases in November 2017.

According to defendant's discovery responses, there are eight different video recordings responsive to plaintiffs' FOIA requests. Two of the recordings (identified by the parties as "Records 1 and 5") were taken from what were described as "facility cameras," or stationary cameras that were monitored by the IBC Control Center. Three recordings (identified as "Records 2-4") came from the ECD or tasers deployed in the incident. In addition, two other recordings ("Records 7-8") are described as video taken by iPhone cameras utilized by MDOC employees and which depicted the "attempted resuscitation" of Szot. Finally, "Record 6" is a video from a handheld recording device that depicted the attempted resuscitation.

On or about November 30, 2017, plaintiffs' counsel deposed two MDOC employees with respect to the FOIA requests. Cheryl Groves, MDOC's FOIA coordinator at the time of the requests, testified that no one from the MDOC "FOIA office" reviewed responsive videos before denying Woodman or George's requests. According to Groves, whenever MDOC received a request for video footage, department policy was to "deny that under our custody and safety security exemption" because "we do not release video footage." Groves testified at deposition that a review of a FOIA request for video records merely sought confirmation whether the video(s) existed. If responsive video footage existed, the request was denied under the safety and security exemption as a matter of course. Review was unnecessary, testified Groves, "[b]ecause we know that we don't release it" meaning video footage. Groves gave general reasons why video from an MDOC facility *could* implicate safety and security concerns; however, having not reviewed the videos at issue, she did not provide any specific concerns with the pertinent videos.

As it concerned the requests for audio recordings, Groves testified that she did not know whether audio could be redacted from a video and disclosed separately as an audio file. Later, when pressed, she admitted that the same was possible; however, she had never been involved in such a redaction during her time as FOIA coordinator. She also testified that audio files could potentially reveal some security issues, depending on what could be heard on such a recording. Furthermore, she testified that the responses to Woodman and George's FOIA requests did not contain separate responses to the requests for audio recordings and video recordings and that, instead, the recordings were "grouped together." Groves testified that she did not know whether separate audio recordings existed, because she "did not review" anything before defendant issued its response.

Plaintiff also deposed Christine Wakefield, an "Inspector" at the IBC facility. Prior to her deposition, Wakefield had not seen Woodman's FOIA request.⁴ Wakefield testified in general terms about safety and security measures that *could* be revealed by disclosure of videos from inside a prison facility. When asked about whether any of the video recordings also contained audio, Wakefield identified six records⁵ that captured audio in addition to video footage of the incidents involving Szot. She testified in general that the audio recordings could reveal MDOC "movement plans" and procedures employed in response to security incidents.

Attached to defendant's January 30, 2018 motion for summary disposition is the January 29, 2018 affidavit of Wakefield. In ¶ 6 of her affidavit, Wakefield averred that she watched all

⁴ From the record given to the Court, it is not apparent whether Wakefield saw Joseph's request prior to her deposition, either.

⁵ These recordings came from: the ECD or taser cameras; the handheld camera; and iPhone cameras possessed by MDOC personnel.

of the videos that captured footage of the altercation between Szot and the unnamed prisoner, as well as the response by MDOC officers, and the attempted resuscitation of Szot by MDOC personnel. The affidavit further stated, in general, what was depicted in the videos: (a) Szot attacked the unnamed prisoner while out in the prison yard; (b) the unnamed prisoner “punched Szot on more than one occasion in the side of the head and neck”; (c) MDOC officers responded and deployed tasers or ECDs to subdue the prisoners; (d) Szot was subsequently rendered unconscious and was transported by wheelchair to the facility’s medical clinic; and (e) medical personnel attempted, albeit unsuccessfully, to revive Szot. In addition to depicting the events related to Szot, Wakefield averred that the videos revealed: (a) the identity of MDOC officers involved as well as the identity of the unnamed prisoner attacked by Szot; (b) prisoner movement plans; (c) the number of MDOC officials who responded to the fight; (d) a “video layout of IBC’s secured premises”; (e) recording capabilities of IBC’s security cameras, including the “clarity of the recording and whether the camera can zoom and track movement”; (f) the recording capabilities of ECD cameras; (g) security equipment carried by MDOC personnel; (h) tactics used by MDOC officers in responding to a fight; and (i) the attempted revival of Szot.

Wakefield made several averments about security concerns related to the release of the video footage.⁶ Firstly, she noted that Szot’s family members had made threats against the IBC and/or IBC staff.⁷ Because disclosing the video footage requested by plaintiffs would disclose the identities of the unnamed prisoner and MDOC personnel, Wakefield concluded that disclosure of the videos would threaten the safety of the officers and of the unnamed inmate. In

⁶ She did not separately address audio contained in any of the video recordings, however.

⁷ There is no indication when these threats were made.

addition, Wakefield averred that disclosing a video layout of secured premises at IBC would “inform the public as to whether specific cameras have blind spots and where those blind spots are located,” which would make it “easier for prisoners and the public to engage in prohibited and threatening activity.”⁸ In addition, Wakefield contended that revealing prisoner movement plans would “make it easier for the public and prisoners to engage in prohibited and threatening activity.”

Finally, Wakefield averred that disclosing the requested videos would reveal “sensitive information” about MDOC’s security measures at IBC in several ways. To this end, she averred that disclosing the videos would “reveal the technical capabilities of all cameras” at the facility, and if the capabilities—such as clarity, movement tracking, and zoom capabilities—were known, it would “present a severe risk” to MDOC staff members because it would “allow prisoners to take more calculated risks when engaging in, or planning to engage in, prohibited and threatening activity.” In addition, she averred that disclosure of MDOC response tactics “would present the risk that such information would be used to obstruct MDOC’s responses in future physical confrontations.” Further, with respect to the disclosure of equipment carried by MDOC officers, Wakefield averred that public knowledge of such equipment “would afford prisoners at IBC greater knowledge in how to prevent the MDOC officers from performing their job duties.” Lastly, she averred that disclosing the videos would reveal a “general headcount” of the number of MDOC officers available to respond to a physical altercation, and that public disclosure of this

⁸ Wakefield repeatedly used the phrase “prohibited and threatening activity,” but did not clarify the term or provide any examples as to how or why that activity might occur.

knowledge “would allow prisoners to take more calculated risks when engaging in, or planning to engage in, prohibited activity.”

II. ANALYSIS

This state’s jurisprudence has recognized that FOIA is a pro-disclosure statute, such that a public body must disclose a responsive record “unless a legislatively created exemption expressly allows a state agency to avoid its duty to disclose the information.” *Estate of Nash v Grand Haven*, 321 Mich App 587, 592; 909 NW2d 862 (2017). In construing an exemption, this Court must, in light of FOIA’s pro-disclosure nature, be mindful that all exemptions are to be construed narrowly. *Id.* at 592-593. A public body bears the burden of proving that a cited exemption applies. *Id.* at 593.

Because a public body bears the burden of demonstrating that an exemption applies, conclusory assertions regarding the exemption, or the mere mimicking of the statutory language serving as the basis of the exemption, will not suffice. *Evening News Ass’n v City of Troy*, 417 Mich 481, 497-498, 503; 339 NW2d 421 (1983); *King v Oakland Co Prosecutor*, 303 Mich App 222, 227-228; 842 NW2d 403 (2013). Moreover, a public body may not “issue blanket denials of all FOIA requests” and must first review the records sought before making a determination as to the applicability of the exemption(s). *Krug v Ingham Co Sheriff’s Office*, 264 Mich App 475, 479; 691 NW2d 50 (2004).

This Court’s review of the FOIA denial is de novo. *MLive Media Group v Grand Rapids*, 321 Mich App 263, 271; 909 NW2d 282 (2017). In reviewing a FOIA denial, the Court can consider exemptions even if they were not cited by a public body in its denial of the request. For instance, the Court of Appeals has recognized that a court may consider exemptions cited for the

first time during litigation. See *Bitterman v Village of Oakley*, 309 Mich App 53, 61; 868 NW2d 642 (2015). However, the only facts that are pertinent to this Court's review of the denial are those which were in existence at the time the exemption was cited. See *State News v Mich State Univ*, 481 Mich 692, 703; 753 NW2d 963 (2008).

In this case, there is no dispute that the recordings at issue are public records. The only issues raised concern whether the recordings are exempt from disclosure. In short, the Court concludes that defendant's motion must be denied under MCR 2.116(C)(8) because the arguments raised go beyond the pleadings and they require an examination of the documentary evidence submitted by the parties. See *Dalley v Dykema Gossett*, 287 Mich App 296, 304-305; 788 NW2d 679 (2010) (describing MCR 2.116(C)(8) review, generally). And as to defendant's request for summary disposition under MCR 2.116(C)(10), the record is insufficient, based on defendant's conclusory assertions, for this Court to make particularized findings of fact with respect to the video recordings. Because this Court is unable, on the evidence presented, to make particularized findings of fact, *in camera* review of the videos is necessary. However, the audio recordings, for the reasons discussed, must be disclosed.

A. THE PENAL SECURITY EXEMPTION

Turning to the exemptions in this case, the Court will first address the penal security exemption, i.e., MCL 15.243(1)(c).⁹ This exemption permits a public body to exempt from disclosure:

⁹ MCL 15.243 was amended effective June 17, 2018, by 2018 PA 68; however, the amendments did not change the pertinent exemptions at issue in this case.

A public record that if disclosed would prejudice a public body's ability to maintain the physical security of custodial or penal institutions occupied by persons arrested or convicted of a crime or admitted because of a mental disability, unless the public interest in disclosure under this act outweighs the public interest in nondisclosure. [MCL 15.243(1)(c).]

By including a caveat for instances where “the public interest in disclosure . . . outweighs the public interest in non-disclosure,” the statute creates a balancing test that “reveals a legislative intent to accommodate, insofar as it is possible, the respective public interests in institutional security and freedom of information.” *Ballard v Dep't of Corrections*, 122 Mich App 123, 127; 332 NW2d 435 (1982). In weighing the applicability of the exemption, the Court must remain mindful that a prison's internal security is particularly a matter left to the discretion of prison administrators.” *Mackey v Dep't of Corrections*, 205 Mich App 330, 333; 517 NW2d 303 (1994).

In this case, defendant's responses to both Woodman and Joseph clearly violated FOIA because the responses were nothing more than a blanket denial of the respective requests. Groves admitted that no one reviewed the videos prior to the denial, and that the requests were denied, more or less, because they used the word “video.” While the Court is not unmindful of the significant security concerns and challenges faced by a penal institution, this type of blanket denial does not serve the purposes of FOIA and it is not permitted under the act. See *Krug*, 264 Mich App at 479; *Ballard*, 122 Mich App at 127 (recognizing that the penal security exemption “contains no generalized language . . . Rather the balancing test contained in the exemption at issue here suggests that a case-by-case approach is required[.]”).

Defendant's more recent justifications for invocation of the exemption fare do not convince the court, either. Wakefield's affidavit contains several generic assertions that disclosure of the videos would make it “easier for prisoners and the public to engage in

prohibited and threatening activity.” Her assertions about how disclosure would affect prisoners are not explained in any detail. Nor is it apparent from Wakefield’s affidavit how the videos would affect prisoners, given that they are expressly exempted from making FOIA requests. See MCL 15.231(2). Moreover, her statements are far too conclusory to satisfy defendant’s burden under FOIA. For instance, Wakefield’s assertions about how the clarity of video recordings and about how the movement-tracking capabilities of cameras would affect the security of the IBC provide no explanation for why this is so. Nor are her generic comments about the capabilities of the cameras entirely remarkable, given the recent proliferation of handheld, high-definition recording devices and doorbell video cameras—available at most electronics retailers—that can sense and track movement. The mere mention of such unremarkable characteristics, without a more particularized justification for applying the exemption, does not satisfy defendant’s burden under FOIA.¹⁰ In this respect, while the Court appreciates the difficult task of maintaining security at a penal institution as well as the expertise of MDOC officials in determining how to best accomplish this difficult task, mere generic and conclusory assertions do not satisfy a public body’s burden of establishing an exemption under FOIA. See *Evening News Ass’n*, 417 Mich at 503-504.

Nor does defendant present a compelling argument with respect to the balancing test that must be employed under MCL 15.243(1)(c). In *Ballard*, 122 Mich App at 127, the Court of

¹⁰ Moreover, the Court notes that the subject matter of some of Wakefield’s assertions—for instance, those concerning the necessity of maintaining the secrecy of the headcount of MDOC officers available to respond to an incident, as well as response tactics of the officers—were disclosed, at least in part, in an Ionia Journal-Sentinel article attached to defendant’s briefing, by the Ionia County Prosecutor, via information obtained from defendant. See *Evening News Ass’n*, 417 Mich at 512 (considering, in determining whether the public body met its burden, that the public body had disclosed similar information in the past).

Appeals recognized that there will be cases in which the institution's interest in nondisclosure must yield to the public interest in disclosure. Here, the public interest in disclosure is particularly strong, given that a prisoner lost his life while in the custody and care of the MDOC and while MDOC personnel were responding to a security incident. As plaintiffs note, this raises concerns about the conduct and response tactics of the MDOC, the policy authorizing the use of tasers, and the subsequent investigation into the incident, to name a few. See *Rataj v City of Romulus*, 306 Mich App 735, 748; 858 NW2d 116 (2014) (explaining that FOIA recognizes the need "that public officials be held accountable for the manner in which they perform their duties") (citation and quotation marks omitted). Consequently, the Court agrees that significant questions remain with respect to whether defendant can carry its burden under FOIA as it concerns the application of MCL 15.243(1)(c).

Citing threats made by Szot's family members, defendant argues that the videos must be exempted, because disclosing them would threaten defendant's ability to ensure the safety of MDOC personnel and of the unnamed inmate. However, there is no indication that these concerns were present at the time defendant denied the FOIA requests and cited the penal security exemption.¹¹ As our Supreme Court has made clear, the only facts that are pertinent to this Court's review of the denial are those in existence at the time the exemption was cited. *State News*, 481 Mich at 703. Where there is nothing in the record to indicate that purported threats by Szot's family members played any role in the initial decision to withhold the requested videos,

¹¹ In fact, as noted above, it appears defendant made no effort to review the videos or to make an informed decision regarding the exemption before denying plaintiffs' requests.

defendant failed to carry its burden under FOIA. See *id.*¹² Cf. *Hyson v Dep't of Corrections*, 205 Mich App 422, 426; 521 NW2d 841 (1994) (upholding the denial of a FOIA request under MCL 15.243(1)(c) for the identity of, and statements made by, confidential informants where the justification for denial was, at the outset, to ensure the safety of the informants).

B. SECURITY MEASURES EXEMPTION

The next exemption cited by defendant is MCL 15.243(1)(u), which permits a public body to exempt from disclosure “Records of a public body’s security measures, including security plans, security codes and combinations, passwords, passes, keys, and security procedures, to the extent that the records relate to the ongoing security of the public body.” For the reasons stated above regarding the conclusory nature of defendant’s cited exemptions, the record is insufficient to permit the Court to make particularized findings as to whether defendant carried its burden on this exemption. To that end, conclusory assertions with no concrete explanation as to how the videos pertain to security do not satisfy defendant’s obligations under FOIA. See *Evening News Ass’n*, 417 Mich at 503-504. Moreover, the Court has concerns—and defendant has not offered a compelling argument to the contrary—about the applicability of this exemption to a penal institution. In essence, defendant asks this Court to apply the exemption found in MCL 15.243(1)(u), which does not contain a balancing test, in a way that would render the penal security exemption in MCL 15.243(1)(c)—and its balancing test—superfluous. MCL 15.243(1)(u) applies to “Records of a public body’s security measures”; plaintiffs have clearly

¹² Nevertheless, that these threats do not warrant invocation of the exemption does not mean that they are of no moment. As will be discussed *infra*, the Court finds that *in camera* review is appropriate here, and that efforts to blur the faces and/or to otherwise hide the identities of the individuals involved in the incident is appropriate.

not sought records of security measures. To the extent their request touches on the security of a penal institution, the Court, reading the FOIA exemptions as a harmonious whole, would find that MCL 15.243(1)(c), i.e., the specific exemption applying to penal institution, applies over the more generalized exemption regarding the security measures of a public body. See *Robinson v City of Lansing*, 486 Mich 1, 15; 782 NW2d 171 (2010) (describing principles of statutory interpretation, in general). Stated otherwise, defendant cannot, by categorizing the FOIA requests in a manner of its choosing, render irrelevant the balancing test employed under MCL 15.243(1)(c).

C. PRIVACY EXEMPTION

The Court also concludes that the same concerns noted above apply to whether defendant can satisfy its burden under the privacy exemption found in MCL 15.243(1)(a). That provision permits a public body to exempt from disclosure “Information of a personal nature if public disclosure of the information would constitute a clearly unwarranted invasion of an individual’s privacy.” This exemption requires a public body to satisfy a two prong test: “First, the information must be ‘of a personal nature.’ Second, it must be the case that the public disclosure of that information ‘would constitute a clearly unwarranted invasion of an individual’s privacy.’” *ESPN, Inc v Mich State Univ*, 311 Mich App 662, 664-665; 876 NW2d 593 (2015), quoting *Mich Federation of Teachers v Univ of Mich*, 481 Mich 657, 675; 753 NW2d 28 (2008). In general, an individual’s name does not, by itself, constitute information of a personal nature. *Id.* at 666.

Defendant first argues that disclosure of the video infringes on Szot’s privacy. However, our Supreme Court has recognized that, under FOIA, “privacy rights expire with the holder of the rights.” *Swickard v Wayne Co Med Examiner*, 438 Mich 536, 556; 475 NW2d 304 (1991).

As it concerns the unnamed prisoners and the responding MDOC officers, defendant has not presented an argument regarding why the mere identities of the individuals are of a personal nature, as is required under the exemption. See *ESPN*, 311 Mich App at 666. And with respect to defendant's concerns about the safety of the individuals, as noted above, it is not apparent that the safety concerns associated with these individuals were present at the time defendant denied the request. As a result, it is not apparent whether these concerns are relevant to the issue of whether defendant can justify its exemption of the videos under MCL 15.243(1)(a).¹³ Moreover, as will be discussed *infra*, any disclosure of the videos in this case, to the extent it can be accomplished, is to be done with provisions made for protecting the identity of these individuals.

III. DISCLOSURE

A. THE VIDEO RECORDINGS MUST BE PRODUCED FOR *IN CAMERA* REVIEW

The next questions concern whether disclosure must occur at this time and what must be disclosed. In determining whether disclosure is required, this Court has an obligation to make "particularized findings of fact[.]" *Estate of Nash*, 321 Mich App at 593 (citation and quotation marks omitted). Based on the conclusory nature of defendant's assertions and documentary evidence, the Court cannot, for the reasons articulated above, do so in this case with respect to the videos. As a result, the Court concludes that *in camera* review of the video recordings is

¹³ For the avoidance of doubt, it should be noted that the Court is not disregarding the safety concerns cited by defendant. However, in reviewing a FOIA request, defendant must satisfy its burden of proving that the records at issue are exempt. And here, defendant's arguments fall short. In addition, the Court notes that there are exemptions which touch on the safety of individuals and of law enforcement personnel, see MCL 15.243(1)(b)(vi), (1)(s)(vii), and (1)(y), but defendant has not cited those. Nevertheless, as will be discussed, the Court will take those concerns into account by requiring defendant to submit, for *in camera* review, videos that blur or otherwise obscure the identities of those involved. In addition, if the individuals' identities are disclosed on the audio recordings, the recordings can be edited to remove the same.

necessary. See MCL 15.240(4). See also *Evening News Ass'n*, 417 Mich at 516-517. And, because of the concerns with the safety of the unnamed inmate and of the MDOC officers, the video may be submitted in a format that blurs or obscures the faces of the individuals involved in the videos, and/or that otherwise obscures their identities without otherwise altering the content of the videos. Defendant shall submit the videos for this Court's review within 10 days of the entry of this opinion and order. The videos will be kept under seal.

~~B. IMMEDIATE DISCLOSURE OF THE AUDIO RECORDINGS IS REQUIRED~~

Plaintiffs also sought audio recordings under FOIA. Defendant never expressly responded to those requests. Now, during litigation, defendant argues that audio recordings cannot be disclosed because they do not exist. Defendant also argues that it should not be required to create a "new" public record consisting solely of the audio recordings. See MCL 15.233(5). Accepting, for the sake of argument that this is true, this course of conduct by defendant would, in and of itself, constitute a violation of FOIA that could potentially subject defendant to paying an award of attorney fees to plaintiffs. See *Hartzell v Mayville Comm Sch Dist*, 183 Mich App 782, 787; 455 NW2d 411 (1990). Indeed, "[i]t is inconsistent with the purposes of the FOIA for a public body to remain silent, knowing that a requested record does not exist, and force the requesting party to file a lawsuit in order to ascertain that the document does not exist." *Id.*

However, the Court need not reach such a conclusion, because defendant is mistaken by simply declaring that the audio recordings do not exist. There is no dispute that six of the eight recordings contained audio. And defendant's argument that audio does not exist entirely ignores a public body's duty to separate exempt material from non-exempt material under FOIA. See MCL 15.244(1) ("If a public record contains material which is not exempt under section 13, as

well as material which is exempt from disclosure under section 13, the public body *shall separate* the exempt and nonexempt material and make the nonexempt material available for examination and copying”) (emphasis added). See also *Evening News Ass’n*, 417 Mich at 512-513 (describing a public body’s duty to separate exempt material from non-exempt material and to make available to the requestor the non-exempt material). If defendant truly believed the video recordings were exempt, it had a statutory duty to separate the non-exempt (audio) from the exempt (video). And, extracting the audio from the recordings is not the creation of a new record; rather, it is merely a recognition of defendant’s duties under MCL 15.244(1).¹⁴ In fact, Groves even admitted at deposition that extracting the audio could be accomplished by simply pressing “record” on an audio recording device while the video was playing on a separate device. And here, defendant’s documentary evidence does not separately address audio recordings. To that end, Wakefield’s affidavit only refers to “video recordings” and what can be *seen* on the videos. These conclusory assertions do not satisfy defendant’s burden. See *Evening News Ass’n*, 417 Mich at 503-504. Defendant does not otherwise present an argument as to why the videos fit within the plain language of any of the cited exemptions. And it is axiomatic that the concerns about what can be *seen* on the videos do not apply to the audio recordings. As a result, defendant has not satisfied its burden and the Court is able to conclude that there is no evidence in the record to support application of any of the cited exemptions to the audio recordings. Defendant must separate the audio recordings from the video recordings, and it must disclose the same to plaintiffs within 10 days of the entry of this Court’s order. However, if the recordings disclose the identity of any of the individuals at issue, defendant may edit the videos, but only for

¹⁴ For the sake of argument, the Court will assume, for now, that the video recordings are indeed exempt under FOIA.

the narrow purpose of excluding an individual's identity. Any alteration done for this purpose must be accompanied by a written justification and explanation of the same.

IV. CONCLUSION

IT IS HEREBY ORDERED that defendant's motion for summary disposition is DENIED in part and that plaintiffs' motion for summary disposition is GRANTED in part under MCR 2.116(C)(10) with respect to the issue of whether defendant's blanket denial of the requests violated FOIA and whether disclosure of the audio recordings is required.

IT IS HEREBY FURTHER ORDERED that all eight of the responsive videos identified in the parties' briefing shall be submitted to the Court for *in camera* review within 10 days of the entry of this order. Where possible, attempts may be made to redact or blur the faces of the unnamed inmate and of the corrections officers, so as to protect the individuals' identities. The videos shall be kept under seal and will not be accessible by anyone other than the Court. See MCR 8.119(I).

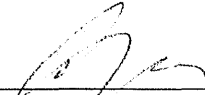
IT IS HEREBY FURTHER ORDERED that the audio recordings must be separated from the video recordings and that they must be DISCLOSED to plaintiffs within 10 days of the entry of this Court's order.

IT IS HEREBY FURTHER ORDERED that the parties' competing requests for summary disposition with respect to the issue of whether the video recordings are exempt, are HELD IN ABEYANCE pending this Court's *in camera* review of the videos.

IT IS HEREBY FURTHER ORDERED that plaintiffs' requests for damages for an arbitrary and capricious FOIA denial, as well as their requests for costs, attorney fees, and disbursements, are HELD IN ABEYANCE pending this Court's *in camera* review of the videos.

This is not a final order and it does not resolve the last pending claim or close this case.

Dated: August 28, 2018



Cynthia Diane Stephens, Judge
Court of Claims