

STATE OF MICHIGAN
COURT OF CLAIMS

ERIN MARIE MILLER,

No. 23-000027-MZ

Plaintiff,

v.

Hon. ELIZABETH L. GLEICHER

THE MICHIGAN DEPARTMENT OF
HEALTH AND HUMAN SERVICES, a
state public body.

Defendant.

Erin Marie Miller
In Propria Persona

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PLAINTIFF'S REPLY TO
DEFENDANT'S AFFIRMATIVE DEFENSES

Plaintiff, Erin Marie Miller ("Plaintiff"), who is representing herself *pro se* in this case, states that she is not required to reply to Defendant's Answer to Plaintiff's Complaint because Defendant's Answer did not demand or require a reply, per MCR 2.110(B). Plaintiff further states, by like-numbered paragraphs, as follows for her Reply to Defendant's Affirmative Defenses:

1. Plaintiff denies Defendant's Affirmative Defense claiming that Plaintiff has "failed to state a claim on which relief can be granted," for the reason that it is untrue. Plaintiff's action was filed with this Court and commenced under MCL 15.231 et seq ("the Michigan Freedom of Information Act" or the "FOIA"). Plaintiff's Complaint identified a minimum of four separate and specific instances in which the Defendant violated MCL 15.231 et seq in its response to Plaintiff's FOIA request in question in this lawsuit, including but not limited to violations of MCL 15.243(1)(g), MCL 15.243(1)(m), and MCL 15.235(5)(a)-(c), upon which relief can be granted to Plaintiff under laws including but not limited to MCL 15.234(9), MCL 15.240(7), and MCL 15.240b. Further, Plaintiff's Complaint requested relief in the form of this Court's *in-camera* inspection of the information withheld by the Defendant in its response to Plaintiff's FOIA request in question in this lawsuit, as well as the release of any improperly withheld information associated with her FOIA request and "such other and further relief as this Court determines to be just and proper." MCL 15.240 § 10(4) allows for relief under actions commenced under the FOIA in the form of *in-camera* inspections by the Court:

"(4) In an action commenced under subsection (1)(b), a court that determines a public record is not exempt from disclosure shall order the public body to cease withholding or to produce all or a portion of a public record wrongfully withheld, regardless of the location of the public record. Venue for an action against a local public body is proper in the circuit court for the county in which the public record or an office of the public body is located has venue over the action. The court shall determine the matter de novo and the burden is on the public body to sustain its denial. The court, on its own motion, may view the public record in controversy in private before reaching a decision. Failure to comply with an order of the court may be punished as contempt of court."

Therefore, Plaintiff's complaint adequately and in good faith stated multiple specific claims on which relief can be granted under MCL 15.231 et seq, as well as the specific types of relief associated with Defendant's FOIA violations under the law.

2. Plaintiff denies Defendant's Affirmative Defense claiming that Plaintiff has "failed to present any genuine issues as to material facts, which should result in a judgment in favor of Defendant as a matter of law," for the reason that it is untrue. Plaintiff's action was filed with the Court in accordance with MCL 15.240(10)(1)(b). Plaintiff's Complaint identified a minimum of four separate and specific instances in which the Defendant violated MCL 15.231 et seq in its response to Plaintiff's FOIA request in question in this lawsuit, including but not limited to violations of MCL 15.243(1)(g), MCL 15.243(1)(m), and MCL 15.235(5)(a)-(c), upon which relief can be granted to Plaintiff per MCL 15.234(9), MCL 15.240(7), MCL 15.240b, and MCL 15.240 § 10(4). Plaintiff also attached specific examples of Defendant's FOIA violations to her Complaint as exhibits for the Court's convenience. Therefore, Plaintiff adequately and in good faith presented genuine issues as to material facts of Defendant's multiple FOIA violations, which should result in a judgment in favor of Plaintiff as a matter of law.
3. Plaintiff denies Defendant's Affirmative Defense claiming that "some or all of Plaintiff's claims may be barred by the statute of limitations," for the reason that it is untrue. MCL 15.240 §10 (1)(b) plainly states:

"(1) If a public body makes a final determination to deny all or a portion of a request, the requesting person may do 1 of the following at his or her option:
(a) Submit to the head of the public body a written appeal that specifically states the word 'appeal' and identifies the reason or reasons for reversal of the denial.
(b) Commence a civil action in the circuit court, or if the decision of a state public body is at issue, the court of claims, to compel the public body's disclosure of the public records within 180 days after a public body's final determination to deny a request."

Further, "[a] civil action is commenced by filing a complaint with a court." MCR 2.101(B). The statute of limitations is tolled "[a]t the time the complaint is filed, if a copy of the summons and complaint are served on the defendant within the time set forth in the

supreme court rules.” MCL 600.5856(a). See also *Gladych v New Family Homes, Inc*, 468 Mich 594, 595, 598-605 (2003).

- i) Plaintiff’s Complaint, which set forth specific factual allegations stating a claim upon which relief can be granted and contained a demand for judgment, per MCR 2.111(B), was accepted by the Court with a Court-stamped date of receipt of February 24, 2023, at 4:23:02 p.m. – 176 calendar days after September 1, 2022, which is the date Defendant partially granted and partially denied Plaintiff’s FOIA request at issue in this lawsuit.
- ii) Defendant was served with a copy of Plaintiff’s Summons and Complaint in compliance with MCR 2.103 and MCR 2.105, as follows:
 - (1) Per MCR 2.103 and MCR 2.105, a copy of Plaintiff’s Summons and Complaint was mailed Elizabeth Hertel, director of the Defendant, Michigan Department of Health and Human Services (“MDHHS”), via registered mail to the address of Director Hertel’s last known office on March 7, 2023. Service was made by Justin Christensen, an employee of Urban Serving (a Michigan-based process serving company), who is a competent adult, over the age of 18, and not a party to this lawsuit. Postmarked proof of service was filed with the Court on March 25, 2023.
 - (2) Per MCR 2.103 and MCR 2.105, a copy of Plaintiff’s Summons and Complaint was also personally served on March 13, 2023, to Theresa E. Myers, an executive assistant in the MDHHS legal department and an officer designated by MDHHS to accept service of process on behalf of Defendant. Service was made by Angela Vermillion, a Michigan process server and competent adult over the age of 18

who is not a party to this lawsuit. Proof of service was filed with the Court on March 25, 2023.

(3) Plaintiff's Complaint was filed with, and received by, the Court on February 24, 2023. The Summons associated with Plaintiff's Complaint was issued by the Court on February 27, 2023 (179 calendar days after Defendant's partial denial of Plaintiff's FOIA request at question in this lawsuit), with an expiration date of May 26, 2023. A copy of Plaintiff's Summons and Complaint was mailed to Defendant's director's last known office via registered mail on March 7, 2023, and was served personally on March 13, 2023. Therefore, the statute of limitations associated with Plaintiff's lawsuit was tolled, and Plaintiff's lawsuit falls within the statute of limitations per MCL 600.5856(a).

4. Plaintiff denies Defendant's Affirmative Defense claiming that "the Department complied with the FOIA in responding to each of Plaintiff's FOIA requests, and its processing of Plaintiff's FOIA request was not arbitrary or capricious," for the reason that it is untrue. Plaintiff identified a minimum of four FOIA violations committed by Defendant in her Complaint. Defendant's improper withholding of the requested information was arbitrary and capricious in its refusal and delay in disclosing a public record under MCL 15.240(7). The Defendant's inappropriate application of the aforementioned FOIA exemptions constitutes a willful and intentional failure to comply with the FOIA under MCL 15.240b. Further, Plaintiff maintains that Defendant's partial denial in response to Plaintiff's FOIA request at question in this case spoke in "platitudes and generalities," and failed to demonstrate how the specific circumstances of the "particular instance"

affected the public interest in disclosure versus withholding of the requested information, as the FOIA requires of public bodies.

5. Plaintiff denies, in part, Defendant's Affirmative Defense claiming that "certain parts of the records responsive to Plaintiff's FOIA request at issue in this lawsuit are exempt from disclosure under MCL 15.243(1)(g) for the reason that they are 'subject to the attorney client privilege,'" for the reason that Defendant's claim is only partly true. While Plaintiff admits that it may be generally true that *some* of the records responsive to Plaintiff's FOIA request at issue in this lawsuit *might* be legitimately exempt from disclosure under MCL 15.243(1)(g) ("the attorney-client privilege exemption"), Plaintiff's Complaint identified at least one instance in which the Defendant inappropriately applied the attorney-client privilege exemption under MCL 15.243(1)(g) to communications between the Defendant's attorney and individuals who were not acting as the client of Defendant's attorney on behalf of the Defendant, and/or were not expressly seeking legal advice directly on behalf of the Defendant. Therefore, the attorney-client privilege exemption did not apply to those records under the FOIA. Further, Plaintiff maintains that Defendant's partial denial citing, in part, MCL 15.243(1)(g) as the reason for some of its denial of the responsive records related to Plaintiff's FOIA request, spoke in "platitudes and generalities," and failed to demonstrate how the specific circumstances of the "particular instance" affected the public interest in disclosure versus withholding of the requested information, as is required of public bodies under the FOIA. Plaintiff argues there may have been other instances in the Defendant's response to Plaintiff's FOIA request at question in this lawsuit where the Defendant may have inappropriately applied the attorney-client privilege exemption. Because Plaintiff is unable to review the records

withheld by the Defendant, Plaintiff maintains that an *in-camera* review by this Court of the responsive records pertaining to Defendant's response to Plaintiff's FOIA request at issue in this case is necessary to ensure that the Defendant did not improperly apply the attorney-client privilege exemption under the FOIA to other responsive records related to Plaintiff's FOIA request.

6. Plaintiff denies, in part, Defendant's Affirmative Defense claiming that "certain parts of the records responsive to Plaintiff's FOIA request at issue in this lawsuit are exempt from disclosure under MCL 15.243(1)(m) for the reason that they are subject to the 'frank communications exemption,'" for the reason that it is only partly true. While Plaintiff admits that it may be generally true that *some* of the records responsive to Plaintiff's FOIA request at issue in this lawsuit *might* be legitimately exempt from disclosure under MCL 15.243(1)(m) ("the frank communications exemption"), Plaintiff's Complaint identified at least one instance in which the Defendant inappropriately applied the frank communications exemption under MCL 15.243(1)(m) to communications to which MCL 15.243(1)(m) did not apply, including but not limited to communications between Defendant and a non-public body and/or non-government entity, regardless of whether they were of an advisory nature. Plaintiff argues there may have been other instances in which the Defendant inappropriately applied the frank communications exemption to records responsive to Plaintiff's FOIA request at question in this lawsuit. Further, Plaintiff maintains that Defendant's partial denial citing, in part, MCL 15.243(1)(m) as the reason for some of its denial of the responsive records related to Plaintiff's FOIA request, spoke in "platitudes and generalities," and failed to demonstrate how the specific circumstances of the "particular instance" affected the public interest in disclosure versus

withholding of the requested information, as is required of public bodies under the FOIA. Because Plaintiff is unable to review the records withheld by the Defendant, Plaintiff maintains that an *in-camera* review by this Court of the responsive records pertaining to Defendant's response to Plaintiff's FOIA request at issue in this case is necessary to ensure that the Defendant did not improperly apply the frank communications exemption under the FOIA to other responsive records related to Plaintiff's FOIA request.

7. Plaintiff denies, in part, Defendant's Affirmative Defense claiming that "certain portions of the records responsive to Plaintiff's FOIA request at issue in this lawsuit are exempt from disclosure under MCL 15.243(1)(u) because they are '[r]ecords of a public body's security measures,'" for the reason that it is only partly true. While Plaintiff admits that it may be generally true that *some* of the records responsive to Plaintiff's FOIA request at issue in this lawsuit *might* be legitimately exempt from disclosure under MCL 15.243(1)(u) ("the security measures exemption"), Plaintiff's Complaint identified at least four FOIA violations committed by the Defendant in its response to Plaintiff's FOIA request at question in this lawsuit, as described in the above paragraphs. Plaintiff argues that those violations, taken together, identify a pattern of Defendant improperly applying FOIA exemptions to the responsive records related to Plaintiff's FOIA request at issue in this lawsuit. Because Plaintiff is unable to review any records withheld by Defendant, Plaintiff argues there may have been other instances in the Defendant's response to Plaintiff's FOIA request in question in this lawsuit where the Defendant improperly applied the security measures exemption. Plaintiff maintains that an *in-camera* review by this Court of the responsive records pertaining to Defendant's response to Plaintiff's FOIA request at issue in this case is necessary to ensure that the Defendant did not

improperly apply the security measures exemption under the MCL 15.243(1)(u) to other responsive records related to Plaintiff's FOIA request. Plaintiff further maintains that Defendant's partial denial citing, in part, MCL 15.243(1)(u) as the reason for some of its denial of the responsive records related to Plaintiff's FOIA request, spoke in "platitudes and generalities," and failed to demonstrate how the specific circumstances of the "particular instance" affected the public interest in disclosure versus withholding of the requested information, as is required of public bodies under the FOIA.

8. Plaintiff denies Defendant's Affirmative Defense claiming that "Plaintiff is not entitled to any relief under the FOIA, including attorney fees, costs, fines, or damages," for the reason that it is untrue. Plaintiff's Complaint identified at least four instances in which Defendant violated the Freedom of Information Act in its response to Plaintiff's FOIA request in question in this lawsuit, including but not limited to violations under MCL 15.243(1)(g), MCL 15.243(1)(m), and MCL 15.235(5)(a)-(c). Plaintiff's Complaint also identified the specific relief Plaintiff is entitled to under MCL 15.231 et seq, as a result of Defendant's FOIA violations, which includes but is not limited to the relief described in MCL 15.234(9), MCL 15.240(7), MCL 15.240b, and MCL 15.240 § 10(4). Further, Plaintiff's lawsuit against Defendant has legal merit, is not frivolous or vexatious, and is very much in the public interest.
9. Plaintiff reserves the right to add and/or reply to additional affirmative defenses as they become known through discovery.

RELIEF REQUESTED

WHEREFORE, Plaintiff, Erin Marie Miller, respectfully requests that this Court:

- A. Deny the relief sought by Defendant in its Answer to Plaintiff's Complaint and Affirmative Defenses. In support of the requested denial, Plaintiff states that her Complaint identified a minimum of four separate and specific instances in which the Defendant violated MCL 15.231 et seq in its response to Plaintiff's FOIA request at question in this lawsuit, including but not limited to violations under MCL 15.243(1)(g), MCL 15.243(1)(m), and MCL 15.235(5)(a)-(c). Further, MCL 15.231 et seq does not award costs or attorney's fees to Defendants, public bodies and/or government entities against which legal actions have been brought by persons that requested information under the Freedom of Information Act. Further, Plaintiff's lawsuit against Defendant has legal merit, is not frivolous, and is very much in the public interest.
- B. Per MCL 15.240 § 10(4), conduct an *in-camera* inspection of all information in possession of the Defendant, the Michigan Department of Health and Human Services, pertaining to the information requested in Plaintiff's Freedom of Information Act request and the Defendant's response to Plaintiff's request, including but not limited to the redacted and exempted information that was partially granted to Plaintiff by the Defendant in response to her FOIA request, as well as any other information that was withheld and/or denied by the Defendant in response to Plaintiff's FOIA request, for the purpose of determining whether any information was incorrectly withheld from Plaintiff by Defendant;
- a. Because the Defendant elected of its own free will to provide Plaintiff with information that was dated beyond the dates specified in the language of Plaintiff's FOIA request, Plaintiff respectfully requests that this Court include in the requested *in camera* inspection all information relevant to Plaintiff's FOIA

request that extends to the latest date of the records provided by the Defendant in its response to Plaintiff's FOIA request. This will prevent the otherwise inevitable outcome of Plaintiff having to file an additional FOIA request for the same records that were already provided to her by the Defendant and wasting this Court's time by filing an additional lawsuit against the Defendant regarding the same records already in question in this case (however, Plaintiff is prepared to do so if necessary). To the best of Plaintiff's knowledge, the latest record provided by the Defendant in response to her FOIA request is dated October 31, 2020, but there may be records of a later date that Plaintiff is not aware of.

- C. If any information related to Plaintiff's FOIA request is found to have been incorrectly withheld by the Defendant during the requested *in-camera* inspection by this Court, Plaintiff respectfully requests that this Court order the Defendant to promptly provide any improperly withheld information related to Plaintiff's FOIA request at question in this lawsuit to the Plaintiff in unredacted form via the Michigan Department of Health and Human Services FOIA Records Center in the GovQA web portal relevant to this FOIA request per MCL 15.240 § 10(4); and
- D. Apply the full penalties available under MCL 15.234(9), MCL 15.240(7), and MCL 15.240b; and
- E. Award such other and further relief as this Court determines to be just and proper to remedy the Defendant's improper withholding of the information requested by the Plaintiff under the Freedom of Information Act and causing the need to bring this suit.

Respectfully submitted,



Erin Marie Miller
In Propria Persona



Dated: April 17, 2023