



TO: Members of Troy City Council
FROM: Lori Grigg Bluhm, City Attorney *LGB*
DATE: November 7, 2012
SUBJECT: Robert Davis v. City of Troy, Troy City Council et. al

Enclosed please find a copy of a lawsuit that was served on the City on October 19, 2012. This lawsuit was filed against the Troy City Council by Robert Davis. Mr. Davis is the founder of the non-profit entity *Citizens United Against Corrupt Government*, and this non-profit entity has a pending Open Meetings Act case against the Troy City Council. Both of these cases revolve around the selection process for the new Troy City Manager.

In order to avoid a default, our office was required to file responsive pleadings within a week of being served with this lawsuit. The assigned judge in this case, Wayne County Circuit Court Judge Robert Columbo Jr., has scheduled a second hearing in this matter for Friday, November 9, 2012.

In the event that this lawsuit is not dismissed on that date, we have prepared a proposed resolution authorizing our office to defend the interests of the Troy City Council, City of Troy, and our City Clerk.

Through the complaint, Mr. Davis alleges that the Troy City Council violated the Freedom of Information Act by refusing to provide the resumes and supplemental documentation submitted by all candidates for the City Manager position. In response to his request, Mr. Davis was only provided with a copy of the information that was posted on the City's web page, which includes the redacted resumes of the five finalists. The City denied Mr. Davis' request for public records of all non-finalist applicants, based on exemptions under FOIA.

Mr. Davis is seeking a writ of mandamus and also a declaratory judgment, plus attorney fees, costs and punitive damages.

STATE OF MICHIGAN
IN THE 3RD JUDICIAL CIRCUIT COURT
FOR THE COUNTY OF WAYNE

ROBERT DAVIS,
an individual person,
PLAINTIFF,

-v-

JIS, ROBERT v CITY OF TROY , et
1. Robert J. Colombo, Jr. 10/19/2012



12-013884-AW

CITY OF TROY, a municipal corporation,
TROY CITY COUNCIL, and
M. AILEEN BITTNER, in her official capacity as
City Clerk for the City of Troy and FOIA Coordinator,
DEFENDANTS.

ANDREW A. PATERSON (P18690)
Attorney for Plaintiff
46350 Grand River Ave., Suite C
Novi, MI 48374
(248) 568-9712
Aap43@hotmail.com

LORI GRIGG BLUHM (P46908)
ALLAN T. MOTZNY (P37580)
Attorneys for Defendants
500 W. Big Beaver Road
Troy, MI 48084
(248) 524-3320
motznyat@troymi.gov

COMPLAINT FOR WRIT OF MANDAMUS

PLAINTIFF, ROBERT DAVIS, by and through his attorney, Andrew A. Paterson,
for his Complaint for Writ of Mandamus, states and alleges the following:

COMMON ALLEGATIONS

The Parties

1. Plaintiff, Robert Davis ("Plaintiff"), is a resident of, and registered voter in, and of, the County of Wayne, State of Michigan.
2. On September 19, 2012, Plaintiff, submitted a written request pursuant to the Michigan Freedom of Information Act (Act 442 of 1976, MCL §15.231 *et seq* ("FOIA")) to the Defendants. (See Plaintiff's request dated September 19, 2012 attached hereto as Exhibit A ("FOIA Request")). The FOIA request was submitted

by Plaintiff on his own behalf and not on behalf of any other organization or entity that he may represent, be employed by, or serve.

3. Defendant, City of Troy ("**Defendant Troy**"), is a Home Rule Chartered City that is legally recognized as a municipal corporation and is governed by its Home Rule Charter and the Home Rule City Act, being MCL 117.1, *et seq.*
4. Defendant, Troy City Council ("**Defendant City Council**"), in accordance with the City of Troy's Home Rule City Charter, is the duly elected 7-member local legislative and governing body for the City of Troy charged with, and exercises, governmental and proprietary authority.
5. Defendant, M. Aileen Bittner ("**Defendant City Clerk**"), is the duly appointed/elected city clerk for the Defendant City of Troy and in her capacity as the city clerk, Defendant City Clerk is the Freedom of Information Act Coordinator for the Defendant City.
6. Plaintiff is a "person" as defined under MCL 15.232(c).
7. Plaintiff is a "person" who has the legal standing to commence the instant action against the named Defendants pursuant to MCL 15.235(7) and MCL 15.240(1)(b) of FOIA.
8. Defendant City and Defendant City Council are "public bodies" as defined under MCL 15.232(d)(iii).
9. The records Plaintiff requested from the Defendants pursuant to FOIA are "public records" as so defined under MCL 15.232(e) of the FOIA.
10. An actual controversy exists between the parties named herein: Defendant City Clerk has refused to honor Plaintiff's FOIA Request.

11. Defendants have a clear legal duty under FOIA to fulfill the FOIA Request and Plaintiff has a clear legal right to the discharge of such duty under FOIA. The specific act sought to be compelled – the delivery of the FOIA Requested public documents -- is of a ministerial nature and prescribed and defined by FOIA with precision and certainty so as to leave nothing to the exercise of discretion or judgment by the Defendant City Clerk. *Childers v Kent County Clerk*, 140 Mich App 131 (1985).

NATURE OF THE ACTION

12. Plaintiff has filed this civil action pursuant to MCL 15.235(7)(b) and MCL 15.240(1)(b) of FOIA, seeking a writ of mandamus to compel Defendants to disclose the public documents described in Plaintiff's FOIA Request.
13. Plaintiff does have the burden of establishing entitlement to the extraordinary remedy of a writ of mandamus. *Lansing Sch Ed Ass'n v Lansing Bd of Ed (On Remand)*, 293 Mich App 506, 519; 810 NW2d 95 (2011).
14. "Mandamus is a writ issued by a court of superior jurisdiction to compel a public body or public officer to perform a clear legal duty." *Lee v Macomb Co Bd of Comm'rs*, 235 Mich App 323, 331; 597 NW2d 545 (1999), rev'd on other rounds 464 Mich 726 (2001). A writ of mandamus is an extraordinary remedy. *Coalition for a Safer Detroit v Detroit City Clerk*, 295 Mich App 362, 366-367; ___ NW2d ___ (2012). Plaintiffs must show that (1) the plaintiffs have a clear legal right to the performance of the duty sought to be compelled, (2) the defendants have a clear legal duty to perform the requested act, (3) the act is ministerial, and (4) no other remedy exists that might achieve the same result. *Id.* See also *White-Bey v Dep't of*

Corrections, 239 Mich App 221, 223-224; 608 NW2d 833 (1999). An act is ministerial if it is “prescribed and defined by law with such precision and certainty as to leave nothing to the exercise of discretion or judgment.” *Citizens Protection Michigan’s Constitution*, 280 Mich App 273, 286; 761 NW2d 210, aff’d in part 482 Mich 960 (2008), quoting *Carter v Ann Arbor City Attorney*, 271 Mich App 425, 439; 722 NW2d 243 (2006).

15. “The Freedom of Information Act, MCL 15.231 et seq.; MSA 4.1801(1) et seq., protects a citizen’s right to examine and to participate in the political process. It requires public disclosure of information regarding formal acts of public officials and employees.” *Booth v U of M Bd of Regents*, 444 Mich 211, at 231; 507 NW2d 422 (1993).
16. Plaintiff’s Complaint meets all of these requirements for this Court to issue its writ of mandamus against the Defendants to disclose the public documents Plaintiff has requested. Plaintiff has a clear legal right to the performance by the Defendants sought to be compelled hereby; Defendants have a clear legal duty under FOIA to perform the requested act of disclosing the public documents Plaintiff has requested; the act sought to be compelled is ministerial in nature in that it is “prescribed and defined by law with such precision and certainty as to leave nothing to the exercise of discretion or judgment.”; and, there is no other adequate remedy at law to so compel Defendants to disclose the public documents Plaintiff has requested.
17. In addition, pursuant to MCL 15.240(7) of FOIA, Plaintiff seeks the Court to Declare that Defendants have violated FOIA by their arbitrary and capricious refusal, and by impermissible delay in disclosing, or providing copies of, the public records sought

by the FOIA Request. Accordingly, pursuant to FOIA, the Court must award Plaintiff, any actual or compensatory damages proven, and punitive damages in the amount of \$500.00.

18. An actual controversy exists by reason of the Defendants' refusal to fulfill the FOIA Request which is a violation of FOIA, and Plaintiff, as the person making the FOIA Request, is the proper party to litigate same.
19. Pursuant to MCL 15.240(5) of FOIA, Plaintiff respectfully requests the Court to assign for hearing and argument at the earliest practicable date and to otherwise expedite the action in accordance with MCR 3.301(D).

JURISDICTION AND VENUE

20. Jurisdiction and venue is conferred upon this Court by MCL 15.240(4).
21. MCL 15.240(4) states in pertinent part:
 - (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. **The circuit court for the county in which the complainant resides or has his or her principal place of business, or 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. (Emphasis supplied.)
22. Venue for an action brought pursuant to the FOIA properly lies in the county in which the complainant resides. *Grebner v Oakland Co Clerk*, 220 Mich App 513, 515-517 (1996).

23. Plaintiff is a “person” who has the legal standing to commence the instant action against the named Defendants pursuant to MCL 15.235(7) and MCL 15.240(1)(b) of FOIA.
24. Plaintiff is undeniably a resident of, and registered voter in, and of, the County of Wayne, State of Michigan. Plaintiff undeniably resides in the City of Highland Park, which is located in the County of Wayne.
25. Defendants principal office is located within the County of Oakland, in the City of Troy at 500 West Big Beaver Rd., Troy, MI 48084.
26. Exercising the discretion granted under MCL 15.240(4) of the FOIA and in accordance with *Grebner v Oakland Co Clerk*, 220 Mich App 513, 515-517 (1996), Plaintiff has chosen this Circuit Court in the County in which he resides, as the proper venue and forum to litigate this action.
27. Under MCL 15.240(4) of FOIA, this Court is the proper venue and forum to hear and decide this action.
28. This Court has jurisdiction over the parties, it can determine the truth or falsity of the allegations raised, and it can grant the relief sought herein.

COUNT I

Writ of Mandamus Shall Be Issued Against Defendants To Compel Them to Disclose and Provide Plaintiff With the Public Documents Requested

29. Plaintiff incorporates, repeats, and realleges, the foregoing allegations as though fully set forth herein.
30. On July 23, 2012, Defendant City Council passed two resolutions establishing and setting forth a process to select a new city manager. The resolutions approved a standard application form for candidates to complete and established a deadline for the submissions. The Defendant City Council used the applications and resumes that were submitted by 54 applicants as their basis for determining who the 5 final candidates were that would be then interviewed by the Defendant City Council for the position of city manager.
31. On September 19, 2012, Plaintiff sent, via email, a written request to Defendant City Clerk, who serves as the FOIA coordinator for the Defendant City, requesting copies of all of the applications and resumes submitted by the 54 candidates. **(See Plaintiff's request dated September 19, 2012 attached hereto as Exhibit A).**
32. On or about September 26, 2012, Plaintiff received a written communication from the Defendant City Clerk dated September 25, 2012, requesting a 10-day extension as permitted under MCL 15.235(2)(d) of FOIA. **(See Defendant City Clerk's September 25, 2012 letter requesting a 10-day extension attached hereto as Exhibit B).**
33. On or about October 8, 2012, Plaintiff received a written response from the Defendant City Clerk, granting in part, and denying in part, Plaintiff's FOIA Request for copies of the applications and resumes of the 54 candidates that applied for the position of city manager. Defendant City Clerk claimed that these public documents were exempt, under various exemptions provided under MCL 15.243. **(See**

Defendant City Clerk's October 8, 2012 letter to Plaintiff attached hereto as Exhibit C).

34. On October 12, 2012, Plaintiff went in person to Defendant City Clerk's office to pay for the documents described in Plaintiff's FOIA Request that the Defendant City Clerk agreed were not exempt. On October 12, 2012 Plaintiff paid \$26.07 to the Defendant City Clerk and received no applications of any of the 54 applicants and received copies of only 5 resumes of the 54 applicants. **(See Plaintiff's affidavit attached hereto as Exhibit D).** The 5 copies of resumes Defendant City Clerk provided Plaintiff were the resumes of: John M. Gabor, Brian M. Kischnick, Mark F. Miller, Vincent D. Pastue, and James V. Creech.
35. Plaintiff asserts that the documents requested – the applications and resumes of those persons applying for the job of city manager -- are not exempt under any exemption in MCL 15.243.
36. Under FOIA Defendants are not permitted to deny Plaintiff the information sought by the FOIA Request. Plaintiff has a clear legal right to receive copies of such public documents and Defendants have a clear legal duty to provide the Plaintiff copies of such public documents.
37. Pursuant to FOIA, a person has the right to receive, upon proper request, copies of any public records that are not subject to an exemption from disclosure. *Booth Newspapers, Inc. v Univ. of Michigan Board of Regents*, 192 Mich App 574; 481 NW2d 778; appeal granted 441 Mich 881; 491 NW2d 825; affirmed in part, reversed in part 444 Mich 211; 507 NW2d 422 (1992).

38. A public body has a duty under FOIA, to provide access to nonexempt records sought or to deliver copies of such records. *Mackenzie v Wales Tp.*, 247 Mich App 124; 635 NW2d 335 (2001). Under FOIA, a public body must disclose all public records that are not specifically exempt. *Larry S Baker, PC v Westland*, 245 Mich App 90, 94; 627 NW2d 27 (2001). (Emphasis supplied.) See also MCL 15.231.
39. “The [FOIA] statute does not require that the record be created by the public body, or even created at its behest. Rather, it is ownership, use, possession, or retention in the performance of an official function that is determinative.” *Detroit News v Detroit*, 204 Mich App 720, at 724-725; 516 NW2d 151 (1994).
40. Under FOIA Defendants cannot choose to restrict and deny Plaintiff from receiving the information and public documents requested in his FOIA Request and Plaintiff has the legal right to receive copies of such public documents so requested and Defendants have a clear legal duty to provide the Plaintiff copies of such public documents.
41. Any FOIA exemption claims must be narrowly construed. “Courts narrowly construe any claimed exemption and place the burden of proving its applicability on the public body asserting it.” *Detroit Free Press v Southfield*, 269 Mich App 275, 281; 713 NW2d 28; appeal denied 475 Mich 860; 713 NW2d 775; appeal denied 475 Mich 860; 713 NW2d 776 (2005). “The burden of proving [a] need for an exemption rests on the public body asserting its application. To meet this burden, the public body claiming an exemption should provide complete particularized justification, rather than simply repeat statutory language.” *Detroit Free Press v Warren*, 250 Mich App 164, at 167 (2002).

42. The Michigan Court of Appeals, in *State News v MSU* (274 Mich App 558; 735 NW2d 649, affirmed in part and reversed in part, on other grounds, 481 Mich 692; 753 NW2d 20 (2007)), established the test by which courts must analyze and determine a claim of exemption under FOIA. The *State News*' Court held:

“In *Evening News Ass'n v City of Troy*, the Michigan Supreme Court set forth the following rules that should be used in analyzing a claim of exemption from disclosure under FOIA:

1. The burden of proof is on the party claiming exemption from disclosure.
2. Exemptions must be interpreted narrowly.
3. “[The] public body shall separate the exempt and nonexempt material and make the nonexempt material available for examination and copying.”
4. “[D]etailed affidavits describing the matters withheld” must be supplied by the agency.
5. Justification of exemption must be more than “conclusory”, i.e., simple repetition of statutory language. A bill of particulars is in order. Justification must indicate factually how a particular document, or category of documents, interferes with law enforcement proceedings.
6. The mere showing of a direct relationship between records sought and an investigation is inadequate.” [*State News v MSU*, 274 Mich App 558, 570-571; 735 NW2d 649 (2007).]

43. As the Court of Appeals noted:

“Although these rules were primarily directed to the *Evening News* Court’s analysis of the law-enforcement-purposes exemption, **with the exception of rule 6, we find them generally applicable to any claim of exemption from disclosure under FOIA.**” [*State News v MSU*, 274 Mich App 558, 571 fn16; 735 NW2d 649 (2007), (Emphasis supplied).]

44. Thus the applications and resumes submitted by the candidates who were seeking the position of city manager are not exempt under FOIA. In fact, the Michigan Court of

Appeals and the Michigan Supreme Court have addressed this very issue of applications and resumes of candidates for public offices as not being exempt from disclosure under FOIA. This was the holding in the Michigan Court of Appeals in *Booth Newspapers, Inc. v U of M Board of Regents*, 192 Mich App 574; 481 NW2d 778 (1992); affirmed in part and reversed in part on other grounds, 444 Mich 211; 507 NW2d 422 (1993).

45. Defendants are apparently of the mistaken belief and understanding that simply because §8(f) of the Open Meetings Act (Public Act 267 of 1976, as amended, MCL 15.261 et seq (“OMA”)) permits a public body to meet in closed session to review and consider a candidates personal matters disclosed in his/her application, that the entire application is not subject to disclosure under FOIA. Defendants’ application of OMA and FOIA are misplaced and incorrect.

46. The Court of Appeals opinion in *Booth Newspapers v U of M Board of Regents*, *supra*, identified what discussions and deliberations could take place in a closed session under §8(f) of OMA. The Court of Appeals held:

The phrase “specific contents of an application for employment” is clear and unambiguous, and it cannot be read to include, as the trial court held, all investigation and consideration of the applicants. **The purpose of this exception is not the protection of the applicants’ identity, inasmuch as all interviews are required to be open to the public. The exception applies only to the review of the specific contents of the candidates’ application for employment. The exception allows the public body to deliberate on the specific contents of the application, but does not disguise the fact that an application has been made.** [*Booth v U of M Board of Regents*, 192 Mich App 574, at 584. (Emphasis supplied).]

47. The Supreme Court affirmed this reasoning and they said and held:

In the instant case, the Court of Appeals construed the “specific contents” exemption narrowly and held that the OMA permitted closed sessions only to review personal matters contained in a candidate’s application. We agree. Considering the OMA’s prodisclosure nature, the requirement to strictly construe exemptions and the mandate for open candidate interviews, it is reasonable to assume that the Legislature intended this exemption to be a limited compromise, allowing privacy rights to dictate in instances where boards were not engaged in decision-making activities. Here we agree with the panel that the board went beyond this limitation and made reduction decisions under the guise of this exemption. Clearly, however, the OMA requires that “all decisions of a public body” be made in public. Consequently, the act mandates that the Presidential Selection Committee made any reduction decisions in public. [*Booth v U of M Bd of Regents*, 444 Mich 211, 230-231. (Emphasis supplied).]

48. In *Herald Co v Bay City*, 463 Mich 11, 125; 614 NW2d 873 (2000), our Supreme Court again decided that the applications and resumes of applicants for a public job are subject to disclosure under FOIA. They held:

[W]e conclude that the fact of application for a public job, or the typical background information one may disclose with such an application, is simply not “personal” within the contemplation of this exemption. Given the public nature of the position at issue, we think it difficult to conclude that the “customs,” “mores,” and “views” of the community contemplate that an application for such a position could be made without expectation of considerable public scrutiny. Certainly, defendants have failed to establish on his record why any of the information requested by plaintiff is the kind of intimate or embarrassing information that this FOIA exception protects.

Importantly, even if the requested information was contained in public documents that also referenced embarrassing or intimate personal information (for example, medical data), the FOIA imposes on the city a duty to “separate the exempt and nonexempt material and make the nonexempt

material available for examination and copying.” MCL 15.244(1); MSA 4.1801(14)(1); see also *Evening News Ass’n v City of Troy*, 417 Mich 481, 503; 339 NW2d 421 (1983). (Emphasis supplied).

49. The Supreme Court in *Herald Co*, *supra*, further said:

[W]e conclude that disclosure of the information concerning the final candidates for fire chief in the instant case *would* serve the policy underlying the FOIA because disclosure would facilitate the public’s access to information regarding the affairs of their city government. It can hardly be challenged that the citizens of Bay City had a valid interest in knowing the identities of the final candidates considered in contention for this high-level public position. Keeping in mind that defendants bear the burden of proof that an exemption applies, and balancing the public interest against the relatively circumscribed privacy interest protected by the FOIA exemption, we cannot conclude that the disclosure sought might result in a “clearly unwarranted invasion of an individual’s privacy.” [*Herald Co*, *supra*, 463 Mich at 127. (Emphasis in original and supplied).]

50. Defendants cannot satisfy their burden of justifying the denial of the FOIA Request with a nonexistent exemption.

51. The applications and resumes of the 54 candidates for the position of city manager are “public records” under MCL 15.232(e). Defendant City Council used those records, stored those records and retained those records, all in the performance of their official and public function. The selection of a new city manager by the city council and, in this case, the determination of whom to select from the 54 candidates to be interviewed for the position, was in accordance with the city councils public duties under the Troy City Charter. *Detroit News, Inc v Detroit*, 204 Mich App 720, 724-725; 516 NW2d 151 (1994).

COUNT II

Plaintiff Shall be Awarded Court Costs and Attorney Fees Pursuant to the FOIA

52. Plaintiff incorporates, repeats, and realleges, the foregoing allegations as though fully set forth herein.
53. Plaintiff is entitled to court costs and attorney fees upon the Court declaring and determining Defendants violated FOIA by denying Plaintiff's FOIA Request, and/or upon the Court compelling delivery and disclosure of such public documents.
54. That MCL 15.240(6) states in pertinent part:
- (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....** (Emphasis supplied.)
55. "Attorney fees are available under [MCL 15.240] if a public body, in a final determination, denies an information request and the court orders production of the documents." *Detroit Free Press, Inc v Dep't of Attorney Gen*, 271 Mich App 418, 420; 722 NW2d 277 (2006).
56. "[A]ttorney fees and costs must be awarded under the first sentence of MCL 15.240(6) only when a party prevails completely." *The Local Area Watch v Grand Rapids*, 262 Mich App 136, 150; 683 NW2d 745 (2004).
57. If a Plaintiff prevails in an action to compel disclosure under FOIA, the circuit court must award reasonable attorney fees, costs, and disbursements to the Plaintiff. *Thomas v City of New Baltimore*, 254 Mich App 196; 657 NW2d 530 (2002).

58. “[A]s long as an action for disclosure of public records is initiated pursuant to the FOIA, the prevailing party’s entitlement to an award of reasonable attorney fees, costs, and disbursements includes *all* such fees, costs, and disbursements related to achieving production of the public records....The language of MCL 15.240(6) does not permit the circuit court to limit the prevailing party’s request for attorney fees to those incurred only when the defendant’s refusal to disclose the public records is unreasonable. Instead, the statute provides without qualification that the circuit court *must* award the prevailing party reasonable attorney fees, costs and disbursements.” *Meredith Corp v Flint*, 256 Mich App 703, at 715-716; 671 NW2d 101 (2003). (Emphasis supplied.)

59. It is undisputed that Plaintiff had to commence this action in order to cause the Defendants to produce the documents sought in Plaintiff ‘s FOIA Request. Therefore, the award of attorney fees and court costs is warranted under FOIA because “the instant litigation was reasonably necessary to determine that all of defendant’s claimed exemptions lacked merit.” *Meredith Corp v Flint*, 256 Mich App 703, 713-714; 671 NW2d 101 (2003).

COUNT III

Plaintiff Must be Awarded Punitive Damages of \$500 Under FOIA

60. Plaintiff incorporates, repeats, and realleges, the foregoing allegations as though fully set forth herein.

61. The Defendants have arbitrarily and capriciously violated FOIA by the refusal and delay in disclosing and/or providing copies of, the public records sought by Plaintiff’s FOIA Request. Accordingly, pursuant to MCL 15.240(7), the Court shall award, in

addition to any actual or compensatory damages, punitive damages in the amount of \$500.00 to the Plaintiff.

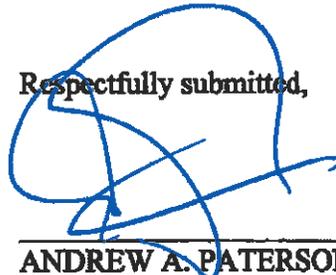
62. That the Legislature did not define the terms “arbitrarily and capriciously” in FOIA. However, when reviewing a statute, all non-technical words and phrases shall be construed and understood according to the common and approved usage of the language, and if a term is not defined in the statute, a Court may consult a dictionary to aid it in this goal; a court should consider the plain meaning of a statute’s words and their placement and purpose in the statutory scheme. *McCormick v Carrier*, 487 Mich 180 (2010). “Arbitrary means fixed or arrived at through an exercise of will or by caprice, without consideration or adjustment with reference to principles, circumstances, or significance. Capricious means apt to change suddenly, freakish, or whimsical.” *Binsfeld v Dep’t of Natural Resources*, 173 Mich App 779, 786; 434 NW2d 245 (1988).
63. That Defendants conduct in denying Plaintiff the right to receive copies of the public documents requested was both arbitrary and capricious. Evidence of the capricious nature of the denial is that the Defendants once *had the resumes of all 54 applicants on the Defendant City’s official website*. Accordingly, there is no proper reason why Defendants would not fulfill Plaintiff’s FOIA Request. (See Defendants’ website listing all of the resumes of all 54 candidates attached hereto as Exhibit E).

PRAYER FOR RELIEF

WHEREFORE, for the foregoing reasons, Plaintiff prays and respectfully requests that the Court grant relief as follows:

- A. ISSUE a Writ of Mandamus compelling Defendants to disclose all of the resumes and applications of all of the 54 applicants that submitted material to be considered for the position of city manager for the Defendant City.
- B. ISSUE a Declaratory Judgment declaring that Defendants violated FOIA by refusing to disclose the public documents Plaintiff requested in the September 19, 2012 FOIA Request.
- C. ISSUE its ORDER that Defendants pay the Plaintiff's court costs and attorney fees that Plaintiff has been forced to incur as a result of having to bring this action, pursuant to MCL 15.240(6).
- D. ISSUE its ORDER that Defendants pay punitive damages to the Plaintiff in the amount of \$500, pursuant to MCL 240(7).
- E. ORDER any and all such OTHER RELIEF as justice may so require.

Respectfully submitted,



ANDREW A. PATERSON (P18690)
Attorney for Plaintiff
46350 Grand River Ave., Suite C
Novi, MI 48374
(248) 568-9712

DATED: October 19, 2012

EXHIBIT A

From: Robert Davis <rdavis@miafscme.org>
To: <bitnera@troymi.gov>
Cc:
Subject: FOIA Request for Applications and resumes of applicants
Date: 09/18/2012
Time: 04:46 PM
Attachments:
Dear Madam Clerk:

In accordance with Michigan's Freedom of Information Act ("FOIA"), I, Robert Davis, as an individual and as a citizen of the State of Michigan, respectfully requests a copy of the following public documents:

1. Copies of any and all applications and resumes that were submitted to the City of Troy and/or its hired search firm by all applicants who applied for the position of Troy City Manager.

If you should have any questions, please feel free to give me a call at (248) 470-8731. Please forward all correspondences to this email address (rdavis@miafscme.org).

Respectfully submitted,

Robert Davis
180 Eason
Highland Park, MI 48203

EXHIBIT B

City of Troy Freedom of Information Act - Response

Dear Robert Davis

Date September 25, 2012

FOIA # 2012-203

In response to your inquiry of September 19, 2012 requesting:

Copies of any and all applications and resumes submitted to City of Troy and/or its hired search firm by all applicants who applied for the position of Troy City Manager.

We have taken action as indicated below. Please note that if your request for information has been denied, we have indicated the appropriate provisions under State Law P.A. 442(1976), which defines such information as exempt.

1		Requested material attached.
2	X	Extension of 10 days
3		Copying costs are estimated to be: \$ _____
		Bill enclosed.
		A Good Faith deposit is required at this time. Make check payable to: City of Troy in the amount of: \$ _____
		The requested material is attached. Some of the information you requested does not exist.
		FOIA does not require a public body to make a compilation, summary or report of information (Section 3, Paragraph 4)
4		The Public Record does not exist.
5A		Part of the requested material is attached. Material denied is due to exemptions as Public Record as defined by State Law.
5B		The requested material is denied in full due to exemption as Public Record as defined by State Law.

A description of the denied record is attached. Those exemptions in State Law which are applicable to the City of Troy are listed below as enumerated under Section 13, Paragraph 1 of the Act. Check Indicates exemption invoked in denial of material. See back of form for specific provisions.

	a		d		e		f
	g		i		m		OTHER

SEE REVERSE SIDE FOR A FULL EXPLANATION OF YOUR RIGHT TO SEEK JUDICIAL REVIEW.

Sincerely,

M. Aileen Bittner

City of Troy City Clerk
FOIA Coordinator

EXHIBIT C

City of Troy Freedom of Information Act - Response

Dear Robert Davis

Date October 8, 2012

FOIA # 2012-203

In response to your inquiry of September 19, 2012 requesting:

Copies of any and all applications and resumes submitted to City of Troy and/or its hired search firm by all applicants who applied for the position of Troy City Manager.

We have taken action as indicated below. Please note that if your request for information has been denied, we have indicated the appropriate provisions under State Law P.A. 442(1976), which defines such information as exempt.

1	<input type="checkbox"/>	Requested material attached.
2	<input type="checkbox"/>	Extension of 10 days
3	<input type="checkbox"/>	Copying costs are estimated to be: \$ _____
	<input type="checkbox"/>	Bill enclosed.
	<input type="checkbox"/>	A Good Faith deposit is required at this time. Make check payable to: City of Troy in the amount of: \$ _____
	<input type="checkbox"/>	The requested material is attached. Some of the information you requested does not exist.
	<input type="checkbox"/>	FOIA does not require a public body to make a compilation, summary or report of information (Section 3, Paragraph 4)
4	<input type="checkbox"/>	The Public Record does not exist.
5A	<input checked="" type="checkbox"/>	Part of the requested material is attached. Material denied is due to exemptions as Public Record as defined by State Law.
5B	<input type="checkbox"/>	The requested material is denied in full due to exemption as Public Record as defined by State Law.

A description of the denied record is attached. Those exemptions in State Law which are applicable to the City of Troy are listed below as enumerated under Section 13, Paragraph 1 of the Act. Check indicates exemption invoked in denial of material. See back of form for specific provisions.

<input checked="" type="checkbox"/>	a	<input checked="" type="checkbox"/>	d	<input checked="" type="checkbox"/>	e	<input type="checkbox"/>	f
<input type="checkbox"/>	g	<input type="checkbox"/>	i	<input checked="" type="checkbox"/>	m	<input checked="" type="checkbox"/>	OTHER

SEE REVERSE SIDE FOR A FULL EXPLANATION OF YOUR RIGHT TO SEEK JUDICIAL REVIEW.

Sincerely,

M. Aileen Bittner

City of Troy City Clerk
FOIA Coordinator

EXEMPTIONS UNDER P.A. 442, SECTION 13, PARAGRAPH 1, AS INDICATED IN ITEM 5 ON THE FRONT OF FORM INCLUDE:

- a. Information of a personal nature where the public disclosure of the information would constitute a clearly unwarranted invasion of the individual's privacy.
 - d. Records or information specifically described and exempted from disclosure by Statute.
 - e. A public record or information described in this Section which is furnished by the public body originally compiling, preparing or receiving the record or information to a public officer of public body in connections with the performance of the duties of that public officer or public body, if the considerations originally giving rise to the exempt nature of the public record remains applicable.
 - f. Trade secrets or commercial or financial information voluntarily provided to an agency for use in developing governmental policy if:
 - i. The information is submitted upon a promise of confidentiality by the public body.
 - ii. The promise of confidentiality is authorized by the chief administrative officer of the public body or by an elected official at the time the promise is made.
 - iii. A description of the information is recorded by the public body within a reasonable time after it has been submitted, maintained in a central place within the public body, and made available to a person upon request. This subdivision shall not apply to information submitted as required by law or as a condition of receiving a governmental contract, license, or other benefit.
 - g. Information or records subject to the Attorney Client Privilege.
 - i. A bid or proposal by a person to enter into a contract or agreement, until the time for the public opening of bids or proposals, or if a public opening is not to be conducted, until the time for receipt of bids or proposals has expired.
 - m. Communications and notes within a public body or between public bodies of an advisory nature to the extent that they cover other than purely factual materials and are preliminary to a final agency determination of policy or action.
- Other: k. Test questions and answers, scoring keys, and other examination instruments or data used to administer a license, public employment, or academic examination, unless the public interest in disclosure under this act outweighs the public interest in nondisclosure.
- w. Information or records that would disclose the social security number of an individual.
-

RIGHT TO APPEAL AND JUDICIAL REVIEW:

ACT 442, P.A. 1976, SECTION 10 ESTABLISHES THE REQUESTING PERSON'S RIGHT TO JUDICIAL REVIEW IN THE EVENT THAT PUBLIC BODY MAKES A FINAL DETERMINATION TO DENY ALL OR A PORTION OF A REQUEST. THE REQUESTING PERSON MAY COMMENCE AN ACTION IN THE CIRCUIT COURT TO COMPEL DISCLOSURE OF THE PUBLIC RECORDS. AN ACTION UNDER THIS SECTION ARISING FROM THE DENIAL OF AN ORAL REQUEST MAY NOT BE COMMENCED UNLESS THE REQUESTING PERSON CONFIRMS THE ORAL REQUEST IN WRITING NOT LESS THAN 5 DAYS BEFORE THE COMMENCEMENT OF THE ACTION. IF A PERSON ASSERTING THE RIGHT TO INFORMATION UNDER THIS ACT PREVAILS IN ALL OR A PORTION OF THE COURT ACTION, THE COURT SHALL AWARD AN APPROPRIATE AMOUNT TOWARD REASONABLE ATTORNEY'S FEES, COSTS AND DISBURSEMENTS. IN ADDITION, THE COURT MAY AWARD PUNITIVE DAMAGES IN THE AMOUNT OF \$500.00 TO THE PERSON SEEKING ACCESS TO THE PUBLIC RECORDS. IN ADDITION TO THE RIGHTS DESCRIBED ABOVE, YOU MAY ALSO FILE A WRITTEN APPEAL OF A DETERMINATION TO DENY ALL OR A PORTION OF A REQUEST BY DIRECTING THE APPEAL TO THE CITY OF TROY CITY MANAGER. SUCH AN APPEAL MUST SPECIFICALLY STATE THE WORD "APPEAL" AND IDENTIFY THE REASON OR REASONS FOR REVERSAL OF THE DISCLOSURE DENIAL.

**City of Troy
Freedom of Information Act
Statement of Costs**

Dear Robert Davis:

In response to the FOIA Request # 2012-203 that you submitted on Oct 8, 2012, the City of Troy has incurred the following costs and are permitted to recover these costs under the Michigan Freedom of Information Act ("FOIA").

1	Actual mailing costs (subtracted if picked up in person)	\$
2	Actual duplication or publication costs	
	66 pages @ \$0.32 per page	\$ 21.12
	_____ pages @ \$ _____ per page	\$
	_____ pages @ \$ _____ per page	\$
3	Actual labor costs incurred in searching, examining, reviewing, deleting or separating material (must be paid prior to viewing any documents contained in the results)	
	15Min x \$.33/ Minute	\$ 4.95
	_____ Min x \$ _____ / Minute	\$
	_____ Min x \$ _____ / Minute	\$
	_____ Min x \$ _____ / Minute	\$
	_____ Min x \$ _____ / Minute	\$
	_____ Min x \$ _____ / Minute	\$
	_____ Min x \$ _____ / Minute	\$
4	Electronic:	
	_____ x \$5.00 per CD or transaction	\$
	_ x \$25.00 per DVD	\$
TOTAL:		\$ 26.07
LESS DEPOSIT RECEIVED:		\$
PLEASE PAY:		\$ 26.07

Date: October 8, 2012

M. Aileen Bittner
City of Troy FOIA Coordinator

EXHIBIT D

STATE OF MICHIGAN
IN THE 3RD JUDICIAL CIRCUIT COURT
FOR THE COUNTY OF WAYNE

ROBERT DAVIS,
an individual person,
PLAINTIFF,

Case No. 12- -AW

-v-

Hon.

CITY OF TROY, a municipal corporation,
TROY CITY COUNCIL, and
M. AILEEN BITTNER, in her official capacity as
City Clerk for the City of Troy and FOIA Coordinator,
DEFENDANTS.

ANDREW A. PATERSON (P18690)
Attorney for Plaintiff
46350 Grand River Ave., Suite C
Novi, MI 48374
(248) 568-9712
Aap43@hotmail.com

LORI GRIGG BLUHM (P46908)
ALLAN T. MOTZNY (P37580)
Attorneys for Defendants
500 W. Big Beaver Road
Troy, MI 48084
(248) 524-3320
motznyat@troymi.gov

AFFIDAVIT OF ROBERT DAVIS

State of Michigan)
)
County of Wayne)

NOW COMES ROBERT DAVIS, a natural person, being first duly sworn and deposed and under the penalty of perjury states the following:

1. That I am the plaintiff in the above-captioned matter.
2. That I filed the above-captioned matter in my individual capacity as an individual person.
3. That on September 19, 2012, I, submitted a written request pursuant to the Michigan Freedom of Information Act (Act 442 of 1976, MCL §15.231 *et seq* ("FOIA") to the Defendants. The FOIA Request was submitted by me on my own behalf and not on

behalf of any other organization or entity that I may represent, be employed by, or serve.

4. That I, as an individual person, am not a "party" to any other pending litigation against the Defendants named in the above-captioned matter.
5. On September 19, 2012, I sent, via email, a written request to Defendant City Clerk, who serves as the FOIA coordinator for the Defendant City, requesting copies of all of the applications and resumes submitted by the 54 candidates.
6. On or about September 26, 2012, I received a written communication from the Defendant City Clerk dated September 25, 2012, requesting a 10-day extension as permitted under MCL 15.235(2)(d) of FOIA.
7. On or about October 8, 2012, I received a written response from the Defendant City Clerk, granting in part, and denying in part, my FOIA Request for copies of the applications and resumes of the 54 candidates that applied for the position of city manager. Defendant City Clerk claimed that these public documents were exempt, under various exemptions provided under MCL 15.243.
8. On October 12, 2012, I went in person to Defendant City Clerk's office to pay for the documents described in Plaintiff's FOIA Request that the Defendant City Clerk agreed were not exempt. On October 12, 2012 I paid \$26.07 to the Defendant City Clerk and received no applications of any of the 54 applicants and received copies of only 5 resumes of the 54 applicants.
9. I assert that the documents requested – the applications and resumes of those persons applying for the job of city manager -- are not exempt under any exemption in MCL 15.243.

10. That I reviewed the website of the Defendants and it had thereon copies of all of the resumes of the applicants who applied for the position of city manager for the City of Troy.
11. If called upon as a witness, I am competent to testify as to the facts stated herein.

FURTHER AFFIANT SAYETH NOT.



ROBERT DAVIS

Subscribed and sworn to before me
On this 19th day of October, 2012


NOTARY PUBLIC

My Commission Expires: 12-27-2012

ANDRANEK L DAVIS-JOHNSON
Notary Public, State of Michigan
County of Wayne
My Commission Expires 12-27-2012
Sitting in the County of _____

EXHIBIT E

Troy City Manager Search

City Manager Finalist Candidates

[City Announces Manager Finalists & Interview Schedule](#) 

[Resumes for all Candidates](#) 

Last modified: 8/20/2012 3:51:20 PM



PRESS RELEASE

Contact: Cindy Stewart
Community Affairs Director
500 West Big Beaver
Troy MI 48084
ph 248.524.1147
fax 248.524.3499

For Release: August 20, 2012

City of Troy Announces Finalist Candidates for City Manager Position

(Troy, MI) – The Troy City Council announced the finalist candidates for the position of Troy City Manager. Five finalists (all from Michigan) were chosen from 54 candidate applications for the position. The finalists are (in alphabetical order):

James Creech
John Gabor
Brian Kischnick
Mark Miller
Vincent Pastue

Phillip Robertson, Senior Vice President at The Mercer Group noted, "There was an excellent candidate pool, with significant interest from across the country as well as within the State of Michigan. The City of Troy should be proud of its reputation for providing a high quality of life as well as excellent government services."

Advanced copies of the resumes for each of the candidates will be available on the City's website. Hard copies will be available at the City Clerk's Office and Troy Public Library.

City Council will be conducting interviews of the candidates on **Wednesday, August 29** and **Thursday, August 30, starting at 9 am** in the City Council Boardroom, 500 W. Big Beaver Road. The schedule of interviews, each lasting two hours, will occur as follows:

Wednesday, August 29
9-11 am: James Creech
1-3 pm: Vincent Pastue
3:30-5:30 pm: John Gabor

Thursday, August 30
9-11 am: Brian Kischnick
11:30am-1:30pm: Mark Miller
3 pm: City Council Deliberations followed by Public Comment

Members of the public are invited to view these interviews, but will not be provided with an opportunity to formally question the candidates.

Members of the public are also encouraged to attend the **Public Forum** scheduled for **Tuesday, August 28 from 7-9 pm** at the Troy City Hall, Council Chambers, 500 W. Big Beaver. At that forum, each of the candidates will give a 5 minute personal introduction to the audience. Although the candidates will not be fielding questions, there will be opportunity for the public to meet and talk to all the candidates after their presentations.

City Council hopes to make their decision at the August 30 meeting.

Additional information, including the public hearing notices, can be found on the City of Troy's webpage at <http://www.troymi.gov/CityManagerSearch.asp>.

For additional questions, please contact Phillip Mercer of The Mercer Group at mercerc@aol.com or Lori Grigg Bluhm, Troy City Attorney, at 248.524.3320 or Bluhm1g@troymi.gov.

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