

**STATE OF MICHIGAN
IN THE COURT OF CLAIMS**

MACKINAC CENTER FOR PUBLIC
POLICY,

Plaintiff,

vs.

Hon. Douglas B. Shapiro

Michigan Economic Development
Corporation,
Defendant

Case No. 22-000109-MZ

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**[08/22/2022] MOTION FOR SUMMARY DISPOSITION UNDER MCR 2.116(C)(7),
(C)(8), AND (C)(10) BY DEFENDANT MICHIGAN ECONOMIC DEVELOPMENT
CORPORATION**

*****ORAL ARGUMENT REQUESTED*****

Defendant Michigan Economic Development Corporation (“MEDC”), by their attorneys Miller, Canfield, Paddock and Stone, PLC, respectfully moves for summary disposition in the MEDC’s favor of all claims in Plaintiff Mackinac Center for Public Policy’s Complaint, under MCR 2.116(C)(7), (C)(8), and (C)(10), for the reasons set forth in the accompanying brief in support.¹

¹ Plaintiff incorrectly states in its caption that Michigan Economic Development Corporation is a “Michigan government state agency.” That is incorrect. MEDC is a Michigan public body corporate and a separate legal entity created by the execution of an Interlocal Agreement between the Michigan Strategic Fund and various Public Agencies on the Effective Date of the Interlocal Agreement, as amended, pursuant to the Michigan Constitution of 1963, Article 7 Section 28 and the Urban Cooperation Act of 1967, Act No. 7 of 1967, Ex. Sess., being sections 124.501 et seq. of the Michigan Compiled Laws.

Counsel for the MEDC requested concurrence in this motion from Plaintiff's counsel by on August 22, 2022. Plaintiff's counsel did not concur, thereby necessitating this motion.

WHEREFORE, the MEDC respectfully requests that this Court enter an order granting this motion, under MCR 2.116(C)(7), (C)(8), and (C)(10), and dismissing Plaintiff Mackinac Center for Public Policy's *Complaint* with prejudice.

Respectfully submitted,

Miller, Canfield, Paddock and Stone, P.L.C.

By: /s/ Joseph G. Vernon

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Dated: August 22, 2022

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**[08/22/2022] BRIEF IN SUPPORT OF MOTION FOR SUMMARY DISPOSITION
UNDER MCR 2.116(C)(7), (C)(8), AND (C)(10) BY DEFENDANT MICHIGAN
ECONOMIC DEVELOPMENT CORPORATION**

I. INTRODUCTION

This is the second suit the Mackinac Center for Public Policy (“Mackinac Center”) has filed against the Michigan Economic Development Corporation (“MEDC”) over the same requested records.² The MEDC has made clear—at least three times now—that these records do not exist and that nothing like them has ever been in the MEDC’s possession. The MEDC even went beyond its obligations under Michigan’s Freedom of Information Act (“FOIA”) and referred the Mackinac Center to the private entity that might have information related to the documents it sought.

But even that isn’t enough for the Mackinac Center. Instead, it wants the MEDC to investigate, find, and produce documents that are not public records under Michigan’s FOIA. The documents the Mackinac Center seeks here do not exist and do not even qualify as public records. Accordingly, the Mackinac Center’s Complaint should be dismissed in its entirety with prejudice.

II. FACTUAL BACKGROUND

A. *The Mackinac Center’s 2021 Requests*

On November 6, 2020, the Mackinac Center submitted a FOIA request (“First Request”) to MEDC seeking documents related to its “Pure Michigan” tourism campaign. (Ex A) The Mackinac Center’s request sought, among other things, what it called “input assumption worksheets used by Tourism Economics.” (*Id.*) The MEDC “granted in part and denied in part” the First Request and produced 63 pages of documents. (Compl, Ex 5) As for the partial denial,

² Plaintiff incorrectly states in its caption that Michigan Economic Development Corporation is a “Michigan government state agency.” That is incorrect. MEDC is a Michigan public body corporate and a separate legal entity created by the execution of an Interlocal Agreement between the Michigan Strategic Fund and various Public Agencies on the Effective Date of the Interlocal Agreement, as amended, pursuant to the Michigan Constitution of 1963, Article 7 Section 28 and the Urban Cooperation Act of 1967, Act No. 7 of 1967, Ex. Sess., being sections 124.501 et seq. of the Michigan Compiled Laws.

MEDC explained that “[a]fter diligent search and inquiry” it had “determined that some of the information requested [i.e. the input assumption worksheets] does not exist.” (*Id.*)

On February 23, 2021, the Mackinac Center wrote to the MEDC’s CEO challenging MEDC’s FOIA determination. (Compl, Ex 6) The Mackinac Center’s lengthy email (“Second Request”) purportedly clarified the Mackinac Center’s First Request. As for “the input worksheets and related output,” the Mackinac Center acknowledged that Tourism Economics may not have provided these to the MEDC but it “request[ed] that the MEDC ask Tourism Economics for these items for the . . . Mackinac Center’s behalf.” (Compl, Ex 6 at 3) The MEDC again granted in part and denied in part the Second Request, explaining again that the MEDC “[did] not have access” to any of Tourism Economics’ working documents. (Compl, Ex 7)

On May 7, 2021, the Mackinac Center submitted another FOIA request (“Third Request”) to MEDC. (Ex B) This Third Request mirrored the Mackinac Center’s first two requests. In fact, Michael LaFaive explained, on behalf of Mackinac Center, “[i]f these look familiar it is because I have submitted such requests before[.]” (*Id.*) The Mackinac Center’s new FOIA request acknowledged that it was submitting the same request because it did not believe MEDC’s prior responses were compliant with FOIA. (*Id.*: “To date MEDC/MSF responses have either been non-responsive or asserted language such as ‘We have no further data that we can provide you.’”) Again, the Mackinac Center sought from MEDC, “[a]ny input assumption worksheets used by Tourism Economics” and “[a]ny methodological explanation of Tourism Economics modeling efforts[.]” (*Id.*)

MEDC denied the Third Request for a third time, explaining again that it had no such records: “After diligent search and inquiry, it has been determined that the information requested

does not exist in the name you requested or in any other name reasonably known to MEDC. Therefore your request is denied.” (Ex C)

The same day it issued its final determination denying the Mackinac Center’s Third Request, MEDC emailed Mr. LaFaive at the Mackinac Center and suggested the name of private entity that might have information similar to what it was seeking: “You have likely received the response to your FOIA request. Chris Pike from Oxford Economics . . . would be someone you might want to reach out to.” (Compl, Ex 9)

The MEDC heard nothing further from the Mackinac Center for the next ten months. Then on March 10, 2022 the Mackinac Center sent a letter demanding that “the MEDC immediately respond to the Center’s requests by providing the requested input assumption worksheets and output produced from modelling efforts.” (Ex D) The Mackinac Center followed up with a suit against the MEDC on April 26, 2022. (Ex E) The MEDC moved for summary disposition under MCR 2.116(C)(7) because the Mackinac Center had blown the applicable statute of limitations. The Mackinac Center stipulated to dismiss its complaint with prejudice on June 7, 2022. (Ex F) The Court entered the dismissal order the next day. (Ex F)

B. The Mackinac Center’s 2022 Request

The day after this Court dismissed its complaint with prejudice, the MEDC received yet another FOIA request (“Fourth Request”) from the Mackinac Center seeking the very same documents again—an “input assumption worksheet(s) associated with the January 2020 Report ‘2019 Michigan Ad Effectiveness Study’” (“Requested Documents”). (Compl, Ex 1) MEDC responded to the Fourth Request in a similar way that it had the previous three times:

After diligent search and inquiry, it has been determined that the information requested does not exist in the name you requested or in any other name reasonably known to the MEDC. Therefore, your request is denied. As our office has informed you on several

occasions, what you appear to be seeking is not something that has ever been prepared, owned, used, or possessed by the MEDC.

(Compl, Ex 2)

On July 20, 2022, the Mackinac Center sued the MEDC, and the MEDC was served by mail on July 25, 2022. The Complaint challenges the MEDC's compliance with its FOIA obligations in responding to the Mackinac Center's Fourth Request submitted on June 9, 2022.

III. LEGAL STANDARD

A court may grant summary disposition under MCR 2.116(C)(7) when a claim is barred because of a prior judgment. *1300 LaFayette E Coop, Inc v Savoy*, 284 Mich App 522, 524; 773 NW2d 57 (2009). In reviewing a motion under MCR 2.116(C)(7), this Court considers the pleadings and any other documentary evidence in the light most favorable to the nonmoving party. *Odom v Wayne Cnty.*, 482 Mich 459, 466; 760 NW2d 217 (2008); MCR 2.116(G).

A motion under MCR 2.116(C)(8) challenges the legal sufficiency of a complaint. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). When considering a motion under this section, a court accepts all well-pleaded factual allegations as true and construes them in the light most favorable to the non-movant. *Id.*, citing *Wade v Dept of Corr*, 439 Mich 158, 162; 483 NW2d 26 (1992). "The motion must be granted if no factual development could justify the plaintiff's claim for relief." *Bailey v Schaaf*, 494 Mich 595, 603; 835 NW2d 413 (2013).

A motion under MCR 2.116(C)(10) tests the factual sufficiency of the plaintiff's complaint. *Innovation Ventures v Liquid Mfg*, 499 Mich 491, 507; 885 NW2d 861 (2016). Summary disposition is appropriate where "there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10); *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "[T]he rule is well established that a moving party may be entitled to summary disposition as a result of the nonmoving party's failure

to produce evidence sufficient to demonstrate an essential element of its claim.” *Lowrey v LMPS & LMPJ, Inc*, 500 Mich 1, 9; 890 NW2d 344 (2016). A defendant “is not required to go beyond showing the insufficiency of plaintiff’s evidence.” *Id.*

IV. ARGUMENT

A. *The Requested Documents Do Not Exist*

Michigan’s FOIA “only gives a right of access to records in existence.” *Walloon Lake Water Sys, Inc v Melrose Tp*, 163 Mich App 726, 731; 415 NW2d 292 (1987). “If a record does not exist, it cannot be produced.” *Coblentz v City of Novi*, 475 Mich 558, 568; 719 NW2d 73 (2006). “[N]onexistence of a record is a defense for the failure to produce or allow access to the record.” *Hartzell v Mayville Cmty Sch Dist*, 183 Mich App 782, 787; 455 NW2d 411 (1990). If a document does not exist, the public body must respond to the request and inform the requesting party of the document’s nonexistence. *See Key v Twp of Paw Paw*, 254 Mich App 508, 511; 657 NW2d 546 (2002). When the public body denies the existence of any records and provides evidence supporting that position, the burden to avoid summary disposition shifts to the plaintiff to produce countering evidence. *Coblentz*, 475 Mich at 568–569.

The MEDC has informed the Mackinac Center several times that the Requested Documents “do not exist in the name requested or in any other name reasonably known to the MEDC.” (Compl, Ex 2; Compl, Ex 5; Compl, Ex 7; Compl, Ex 9; Ex G, Affidavit of Karen Wieber ¶ 4: “After a reasonable search, the MEDC was unable to locate any responsive documents under the name requested or under any other name reasonable known to the MEDC.”)

Viewing the Complaint most generously, the Mackinac Center’s only basis for alleging the contrary is that other “input assumption documents/worksheets” may have been provided in response to other FOIA requests in prior years. (Compl, ¶ 9) This argument would fail for two reasons.

First, whether *other* documents existed, were in the possession of the MEDC, and were provided in response past FOIA requests is irrelevant to whether the Requested Documents exist, are in the possession of the MEDC now, and are available for production. *See Walloon Lake Water*, 163 Mich App at 731–732 (“FOIA generally does not impose a duty upon a government official to prepare or maintain a public record or writing independent from requirements imposed by other statutes.”)

Second, the Mackinac Center’s belief that “these types of ‘input assumptions’ documents/worksheets that were requested had previously been provided to Mackinac Center via FOIA requests” is simply incorrect. (Compl, ¶ 8) What the Mackinac Center is referencing are Regional Economic Modelling, Inc. (REMI) worksheets that were prepared and used by the MEDC itself in prior years. (Ex H, Affidavit of Sermad Bakkal, ¶ 8) MEDC wasn’t asked to and did not prepare these same worksheets—or anything similar for that matter—for Tourism Economics. (*Id.*)

Accordingly, the Mackinac Center’s *Complaint* should be dismissed because the Requested Documents do not exist. Summary disposition should be granted.

B. The Requested Documents Are Not A Public Record Under Michigan’s FOIA

1. *There are no writings prepared, used, owned, in the possession of, or retained by the MEDC that satisfy the Fourth Request*

MCL 15.232(i) defines a “public record” as “a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function, from the time it is created”). Only “public records” are subject to FOIA by definition. MCL 15.233(2).

There is no dispute that MEDC did not prepare, own, use, possess or retain the documents Mackinac Center requested. The MEDC did not prepare the Requested Document. (Ex H, ¶ 7) The MEDC does not own the Requested Document. (*Id.*) And the MEDC did not use the Requested

Document. (*Id.*) The Requested Documents are also not in the possession of or retained by the MEDC. (*Id.*)

The Mackinac Center knows this. It acknowledged this fact in its Fourth Request, (Compl, Ex 1: “To the extent these records are in the possession of one of MEDC’s contractors, such as Tourism Economics, please instruct said contractor to provide them”), and it **acknowledges this fact in its Complaint.**

The allegation that Mackinac Center has been previously informed that this was not something that has been prepared, owned, used, or in possession of MEDC, upon information and belief, appears to rest on the contention that because it is in the possession of a third-party contractor, that MEDC contends that it does not have and is not required to produce it in response to FOIA.

(Compl, p 3; see also Compl, ¶¶ 18-19; Compl, Ex 9)

The facts here are similar to *Victor v Thirty-Fourth Circuit Court*, unpublished opinion of the Court of Appeals, issued April 10, 2014 (Docket No. 315094), 2014 WL 1401851. In *Victor*, the plaintiff requested documents “concerning the election campaign finances of two judges.” *Victor*, 2014 WL 1401851, p*1. The plaintiff subsequently filed suit to obtain the records and defendant filed for summary disposition. *Id.* “The trial court read from an unrebutted affidavit from the county clerk advising that no such records were ever kept in that office and advised plaintiff that any such request would be better addressed to the Secretary of State.” *Id.* (emphasis added). The trial court then granted summary disposition and dismissed the complaint. *Id.*

The appellate court later affirmed the trial court’s dismissal. *Id.* In doing so the appellate court found that the trial “court correctly stated, ‘the Michigan Legislature was not foolish enough to pass a law that says the FOIA Coordinator and the county clerk have to provide documents that are not in their possession but instead are in the possession of [another].’” *Id.*

Just like *Victor*, the Requested Documents here are not in the possession or retained by the MEDC. And just like *Victor*, the MEDC advised the Mackinac Center that information about the Requested Records, if they exist, might be in the possession of Tourism Economics. (Compl, Ex 9) The MEDC did this *last year*, which was beyond its FOIA obligations. (Compl, ¶ 9) “[L]ogic dictates that the public body have in its possession or control a copy of the document before it can be produced or before a court can order its production.” *Easley v Univ of Michigan*, 178 Mich App 723, 725; 444 NW2d 820 (1989) (affirming summary disposition in favor of defendant because when it determined it did not have a memo written by a former dean of the law school after trying to locate the document).

The evidence is clear. The MEDC did not prepare, own, use, possess or retain the Requested Documents. Again, summary disposition is appropriate.

2. *The Mackinac Center’s Complaint seeks to broaden FOIA laws to apply to more than “public records”*

The Complaint improperly alleges that even if the Requested Documents “were *solely* used, owned, possessed or retained by Tourism Economics or another third-party contractor in connection with calculations later provided to MEDC for the performance of one of MEDC’s official functions, they would nevertheless still be public records subject to disclosure.” (Compl, ¶ 32, emphasis added) This is untrue for two reasons.

First, the Mackinac Center’s allegation misstates the text of the statute. MCL 15.234 applies only to “public records.” MCL 15.232(i) defines a “public record” as “a writing prepared, owned, used, in the possession of, or retained *by a Public body*.” MCL 15.232(i) (emphasis added). Thus, for FOIA to apply, *the MEDC* would need to prepare, own, use, possess, or retain the writing. The Mackinac’s Center allegation that Tourism Economics could be the one to “solely”

prepare, own, use, possess, or retain the Requested Documents contradicts the plain text of the statute.

Second, no Michigan court has interpreted the definition of “public record” in the way the Mackinac Center alleges. What the Mackinac Center alleges is, in essence, that no matter who prepares, owns, uses, possesses, or retains the writing, as long as some tangentially related document (in this case, alleged “calculations”) makes it in the hands of the MEDC, that is enough to touch every single link in the chain along the way. This is a misstatement of the law.

Indeed, courts “have consistently refused to require production of records held by private organizations which conduct studies or investigations for [] agencies, reasoning that such organizations are not public agencies and that records not in the actual possession of public agencies are not public records.” *Hoffman v Bay City Sch Dist*, 137 Mich App 333, 337; 357 NW2d 686, 688 (1984) (collecting cases). This is exactly the case here.

For example, in *Hoffman*, the appellate court held that records created by the school district’s attorney during his investigation of the district’s finance department were not public records. 137 Mich App at 338-339. The appellate court observed that an attorney created and retained information and reported only his opinion of the results of his investigation to the public body school board—not the information obtained during his investigation. *Id.*

That decision is instructive here. MEDC received the 2019 Advertising Effectiveness & ROI (the “Study”) that measured the reach and impact of its marketing from Strategic Marketing Research Insights (“SMARInsights”) (Ex H, ¶ 3) This report is publicly available on the MEDC’s website. (Ex H, ¶ 4) Just like *Hoffman*, the methodology behind the creation of the Study and underlying information is not a public record under Michigan’s FOIA simply because the MEDC received the Study. 137 Mich App at 338-339.

The Mackinac Center also appears to be suggesting that because purportedly similar “assumption worksheets” were requested and received from the MEDC in prior years, these Requested Documents must be available via FOIA now. (Compl, ¶ 8) Again, these purportedly similar “assumption worksheets” are actually not similar at all. *See supra* page 6 and Ex H, ¶ 8. But even setting that aside, the analysis of whether the input assumption worksheet for other years constitutes a “public record” under MCL 15.232(i) is an independent analysis that hinges on whether the record exists, was “prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function.” MCL 15.232(i). What the MEDC has done with respect to other records is of no moment.

Thus, the Mackinac Center’s allegation that FOIA extends to writings “solely used, owned, possessed or retained by Tourism Economics or another third-party contractor” is legally unsound, and the Complaint should be dismissed.

3. *The Mackinac Center’s Complaint seeks to broaden FOIA laws to apply to agents of a “public body”*

The Mackinac Center alleges that “a third-party contractor, even if not a public body itself, nevertheless stands in the shoes of the public body for purposes of FOIA” and cites *In re Estate of Capuzzi*, 470 Mich 399, 402; 684 NW2d 677 (2004) for support. (Compl, ¶ 36) This is simply not the law.

Capuzzi is not a FOIA case. Rather, the case is about “whether the death of the principal revokes his agent’s order to transfer limited partnership shares when all necessary actions by the agent were completed before the principal’s death, but the transfer was not yet completed by a third party.” *Id.* at 400-401. The proposition the Mackinac Center cites *Capuzzi* for—“the agent stands in the shoes of the principal”—is a standard formulation of agency law, but it has nothing to do with FOIA.

FOIA does not extend to records in possession of alleged “agents” of a public body. When interpreting a statute, a court must review the words of the statute. “[W]ords cannot be meaningless, else they would not have been used.” *United States v Butler*, 297 US 1, 65; 56 S Ct 312; 80 L Ed 477 (1936). No doubt the Legislature was aware of common law principles of agency when the FOIA statute was enacted in 1976. It could have extended the FOIA statute to officers, employees and agents of municipal and local units of government. But it did not. “[I]t would defy logic, as well as the plain language of § 232(d)(iii), to conclude that the Legislature intended that any person or entity qualifying as an agent of one of the enumerated governmental bodies would be considered a public body for purposes of the FOIA.” *Breighner v Michigan High Sch Athletic Ass’n, Inc*, 471 Mich 217, 233; 683 NW2d 639 (2004) (cleaned up).

And even if FOIA did extend to agents, the Complaint fails to allege any facts on which this Court could conclude that Tourism Economics acted as MEDC’s agent. To establish that an agency relationship exists, the party seeking to rely on the agency relationship must show three things: (1) the agent has the power to alter the legal relations between the principal and third parties; (2) the agent is a fiduciary of the principal for matters within the scope of the agency; and (3) the principal has the right to control the agent’s conduct of matters entrusted to him. *Restatement (Second) of Agency* §§ 12-14.

The Mackinac Center does not allege that Tourism Economics had the power to do any of these things. (*See generally* Compl) And the MEDC did not direct or control any aspect of Tourism Economics’ performance. (Ex H, ¶ 9) Thus, the Mackinac Center’s allegation that FOIA extends to apply to agents is legally and factually unsound, and the Complaint should be dismissed.

C. The Complaint Is Barred Under The Doctrine Of Res Judicata

Notwithstanding all of the above, the Mackinac Center’s complaint is barred due to Res Judicata.

Res judicata precludes parties from relitigating issues that were or could have been raised in a prior action. *See White v Colgan Elec Co, Inc*, 781 F2d 1214, 1216 (CA 6, 1986). There are three requirements for res judicata to apply: (1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first. *Sewell v Clean Cut Mgmt, Inc*, 463 Mich 569, 575; 621 NW2d 222 (2001). All three elements are met here.

First, Michigan courts have held that a voluntary dismissal with prejudice acts as an adjudication on the merits for res judicata purposes. *Brownridge v Michigan Mut Ins Co*, 115 Mich App 745, 748; 321 NW2d 798 (1982). Rather than respond to the MEDC’s motion for summary disposition in the earlier action, the Mackinac Center stipulated to dismiss the case with prejudice.³ (Ex F) The next day, the Court entered an order dismissing the earlier action with prejudice. (Ex F) This voluntary dismissal with prejudice operates as an adjudication on the merits for res judicata and satisfies the first requirement

Second, both the prior action and current action were brought by the same party—the Mackinac Center. (Ex E, ¶ 1; Compl, ¶ 1)

Third, both complaints asked this court to resolve the same issue. The Mackinac Center’s First Request from nearly two years ago and the Fourth Request at issue seek the same documents.

³ Dismissal based on the statute of limitations also operates as adjudication on the merits for res judicata. *Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412, 419; 733 NW2d 755, 759 (2007); *see also Mitchell v Chapman*, 343 F3d 811, 820 (CA 6, 2003); *Al-Shimmari v Detroit Med Ctr*, 477 Mich 280, 297; 731 NW2d 29, 38 (2007)

First Request

November 6, 2020

“The input assumption worksheets used by Tourism Economics and any related . . . output produced directly from its modelling effort for the MEDC/MSF Strategic Marketing and Research Insights report ‘2019 Michigan Ad Effectiveness Study,’ and/or its ‘Economic Impact of Advertising-Generated Tourism in Michigan – 2018’ report.” (Ex A)

Fourth Request

June 9, 2022

“Input assumption worksheet(s) associated with the January 2020 report ‘2019 Michigan Ad Effectiveness Study.’” (Compl, Ex A)

The Mackinac Center’s prior Complaint brought claims under Michigan’s FOIA and asked the Court to determine whether the MEDC was properly “withholding the input assumptions and impact outputs requested by the Plaintiff.” (Ex E, ¶ 29) The instant Complaint does the same. (Compl, ¶¶ 22-38) Indeed, the two complaints contain nearly identical allegations. *Compare* Ex E, ¶¶ 33-41 with Compl, ¶¶ 29-38. Thus, the issue *could have* been resolved in the prior action if the Mackinac Center had filed within the statute of limitations and not dismissed its prior complaint with prejudice.

Res judicata precludes relitigation of an action when it is brought by a plaintiff against the same agency for the same documents, the withholding of which previously has been adjudicated. *Hanner v Stone*, 1 F3d 1240 (CA 6, 1993) (affirming lower court’s dismissal of FOIA claims based on res judicata) (unpublished table decision); *see also Natl Treasury Employees Union v IRS*, 765 F2d 1174, 1177; 247 US App DC 20 (1985) (refusing to consider successive FOIA suits for documents that were “identical except for the year involved”).

In all, the Complaint is barred by the doctrine of res judicata and should be dismissed under MCR 2.116(C)(7). The Mackinac Center had raised these exact same issues in its earlier complaint.

Then it dismissed that complaint voluntarily with prejudice when it realized the statute of limitations had run. For these reasons alone, dismissal is appropriate here.

V. CONCLUSION

For these reasons, Defendant Michigan Economic Development Corporation requests that this Court grant its motion for summary disposition on Plaintiff Mackinac Center for Public Policy's Complaint with prejudice.

Respectfully submitted,

Miller, Canfield, Paddock and Stone, P.L.C.

By: /s/ Joseph G. Vernon

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Attorneys for Defendant

Dated: August 22, 2022

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on August 22, 2022, a copy of the foregoing and this **Certificate of Service** were caused to be served upon the attorneys of record of all parties to the above cause by:

- First-Class Mail E-File/E-Serve Email
- FedEx Hand Delivery

I declare under the penalty of perjury that the statement above is true to the best of my information, knowledge, and belief.

By: /s/Michelle Lingenfelter
Michelle Lingenfelter

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EXHIBIT LIST

Exhibit Description

- A November 6, 2020 Request
- B May 7, 2021 Request
- C May 28, 2021 Denial
- D March 10 2022 Demand
- E April 26, 2022 Complaint (without exhibits)
- F Order of Dismissal
- G Affidavit of Ms. Wieber
- H Affidavit of Mr. Bakkal

EXHIBIT A

LaFaive, Michael D.

From: LaFaive, Michael D.
Sent: Friday, November 06, 2020 9:31 AM
To: medcfoia@michigan.org
Cc: LaFaive, Michael D.
Subject: Freedom of Information Act Request - Travel Michigan/Pure Michigan

November 6, 2020

FOIA Coordinator
Michigan Economic Development Corporation
300 North Washington Square
Lansing, MI 48913

Dear FOIA Coordinator:

Pursuant to the Michigan Freedom of Information Act, MCL 15.231 et seq., and any other relevant statutes or provisions of your agency's regulations, I hereby request the following records:

- The most recent "Sole Source Justification" document involving Tourism Economics and/or its parent company, Oxford Economics, and the MEDC/MSF.
- The most recent "Sole Source Justification" document involving D.K. Shifflet & Associates and the MEDC/MSF.
- The most recent purchase orders approved by the MEDC/MSF for Tourism Economics/Oxford Economics and D.K. Shifflet & Associates and contracts related to those
- The most recent "Notice of Intent to Purchase" document involving Tourism Economics or its parent, Oxford Economics.
- Expenditure data for the 2019 and (if available) 2020 data provided by D.K. Shifflet for the MEDC.

I would prefer to receive this data in an electronic format.

- The most recent license agreement between D.K. Shifflet and the MEDC/MSF.
- Any Requests for Proposals issued by the MEDC/MSF for the purpose of locating and choosing a vendor to perform the Pure Michigan campaign insights research most recently performed by Strategic Marketing and Research Insights, whose agreement will be in effect after December 31, 2020. In the alternative, any e-mails indicating why a new RFP or contract for such services have not been let.
- Any single document that would identify a winning vendor for the RFP referenced immediately above. An example of such a document would be a "Request to Award Contract" memo, such as the one previously authored by Lauren Branneman and sent to the MSF on September 26, 2017.
- Any estimate of the "percentage of State taxes generated for every dollar spent" provided to Strategic Marketing and Research Insights by Travel Michigan/MEDC/MSF for its most recent (2020) report. Previously, this information could be found in a 2017 Michigan Office of the Auditor General letter to two lawmakers explaining that it is the MEDC that makes this information available to its contractor (then, Longwoods International).

- The responses received by Strategic Marketing and Research Insights in the course of its research for the MEDC/MSF for their most recent (2020) report “2019 Pure Michigan Advertising Effectiveness” study for questions Q4 and Q6-Q19.

If your contractor has not provided the survey results to you in a discrete format I ask that you request that of them and provide me with a copy.

- The input assumption worksheets used by Tourism Economics and any related “direct, indirect and induced impacts” output produced directly from its modeling effort for the MEDC/MSF Strategic Marketing and Research Insights report “2019 Michigan Ad Effectiveness Study,” and/or its “Economic Impact of Advertising-Generated Tourism in Michigan – 2018” report.

To be clear, I am not requesting the Effectiveness Study or Economic Impact reports themselves. Just the input worksheets and related output. However, if Tourism Economics has not provided you with the above referenced worksheets/direct output, I would like to politely request that the MEDC ask Tourism Economics for these items for the state and Mackinac Center’s behalf.

- Fiscal Year 2019 Travel Budget, including any updates.
- Fiscal Year 2019 PO Summary.
- A list of “MEDC Procurement Contracts” hired or paid by MEDC/MSF in 2019 and 2020.
- Any single document evidencing the location and dates of the 2021 Pure Michigan Governor’s Conference on Tourism.
- The 2019 Pure Michigan “Partnership Contact List/Contribution.”

I have requested very similar data in the past, and would be happy to clarify any portion of my request. I can do so telephonically at 989-430-8669 or by e-mail at lafaive@mackinac.org. I would be happy to provide examples of the documents I am requesting that have been provided by the Department in previous years, if you believe those examples would be helpful. I would also be happy to work with the Department to minimize the administrative burden associated with the request, so please do not hesitate to contact me if you believe I could clarify any questions you may have.

If the documents I have requested are not disclosable in their entirety, I request that you release all nonexempt portions of the documents that may be segregated and all parts of the documents that can be rendered disclosable by redaction. As to any portion of the documents that you withhold, ***please state with specificity the legal and factual basis for withholding such portion, as well as the nature of the information being withheld.***

If non-exempt material can be separated from exempt material, the Department is responsible for doing so. *Herald Co, Inc v Ann Arbor Public Schools*, 224 Mich App 266, 275 (1997). This includes identifying those records that are being withheld, or the nature of any information being withheld. *Id.* Specific citations to the precise portions of FOIA justifying an exemption are also required. MCL 15.235(5)(a)-(c); *Peterson v Charter Township of Shelby*, 2018 WL 2024578 (Mich Ct App). Further, if no responsive documents exist for a particular portion of this request, please clearly identify which portions of this request have been denied for that reason.

Pursuant to MCL 15.234(1)(c), I respectfully request this data be provided to me in an electronic format. I would prefer that the documents I have requested be sent to me via PDF or the electronic records in a useable format, such as Excel. However, if that is not possible than I ask that they be sent to my alternative work address at: 1370 Saffron Circle, Traverse City, MI 49696.

Sincerely,

Michael LaFaive
Senior Director of Fiscal Policy
Mackinac Center for Public Policy
Midland, MI

EXHIBIT B

From: [LaFaive, Michael D.](#)
To: [MEDC FOIA](#)
Cc: [Otie McKinley \(MEDC\)](#); [LaFaive, Michael D.](#)
Subject: FOIA Request - Tourism Economics 5-7-21
Date: Friday, May 7, 2021 2:59:57 PM

To Whom It May Concern:

FOIA REQUEST FOR INFORMATION RELATED TO TOURISM ECONOMICS

Pursuant to the Michigan compiled Laws Section 15.231 et seq., and any other relevant statutes or provisions of your agency’s regulations I am making the following Freedom of Information Act request:

- Any input assumption worksheets used by Tourism Economics and any related “direct, indirect and induced impacts” output produced directly from its modeling effort for the MEDC/MSF Strategic Marketing and Research Insights report “2019 Michigan Ad Effectiveness Study,” and/or its “Economic Impact of Advertising-Generated Tourism in Michigan—2018 report.
- Any methodological explanation of Tourism Economics modeling efforts that contribute to the final ROI for the Pure Michigan program as reported by SMARInsights in its “2019 Michigan Ad Effectiveness Study.”

If these look familiar it is because I have submitted such requests before and asked the MEDC to “ask Tourism Economics for these items for the state and Mackinac Center’s behalf.” To date MEDC/MSF responses have either been non-responsive or asserted language such as “We have no further data that we can provide you.”

To the extent that the MEDC/MSF does not have this information in its possession, but does contract with another entity that does, please note that any responsive records in the possession of the contractor would qualify as being “used,” “owned,” or “retained” by the MEDC/MSF for purposes of MCL 15.232.

As such, please produce those records as well, as they are being retained to further MEDC/MSF’s interest. See e.g. *Bisio v City of Village of Clarkston*, 506 Mich 37 (2020); *Detroit News, Inc v. City of Detroit*, 204 Mich App 720 (1994).

Sincerely,

Michael LaFaive
Senior Director of Fiscal Policy
Mackinac Center for Public Policy

EXHIBIT C

May 28, 2021

Michael LaFaive
Senior Director of Fiscal Policy
Mackinac Center for Public Policy
Midland, MI
LaFaive@mackinac.org

Via E-Mail

Dear Mr. LaFaive:

This written notice is issued in response to your email request dated May 7, 2021 to the Michigan Economic Development Corporation (MEDC) for information under the Freedom of Information Act (FOIA), MCL 15.231 *et. Seq.*, which was received at this office on May 10, 2021.

You requested the following:

“Any input assumption worksheets used by Tourism Economics and any related “direct, indirect and induced impacts” output produced directly from its modeling effort for the MEDC/MSF Strategic Marketing and Research Insights report “2019 Michigan Ad Effectiveness Study,” and/or its “Economic Impact of Advertising-Generated Tourism in Michigan—2018 report.”

“Any methodological explanation of Tourism Economics modeling efforts that contribute to the final ROI for the Pure Michigan program as reported by SMARInsights in its “2019 Michigan Ad Effectiveness Study.”

After diligent search and inquiry, it has been determined that the information requested does not exist in the name you requested or in any other name reasonably known to the MEDC. Therefore your request is denied.

As to the denial of your request, pursuant to section 10 of the FOIA, you may do either of the following:

1. Appeal this decision, in writing, to D. Jeffrey Noel, CEO, Michigan Economic Development Corporation, 300 N. Washington Square, Lansing, Michigan 48913. Your written appeal must specifically state, using the word *appeal*, that it is an appeal of this decision and must specify the reasons you believe the denial should be reversed. Mr. Burton or his designee must respond to your appeal within 10 business days of its receipt. Under unusual circumstances, the time for response to your appeal may be extended by 10 business days.
2. File an action in the Michigan Court of Claims to compel disclosure of the records. The action must be filed within 180 days after the date of the final determination to deny the request. If you prevail in such an action, the court is to award reasonable attorney fees, costs, and disbursements. Further, if the court finds the denial to be arbitrary and capricious, you may receive punitive damages in the amount of \$1,000.

Sincerely,

Karen Wieber

Karen Wieber
MEDC FOIA Coordinator

RECEIVED by MCCOC 5/20/2022 2:26:41 PM

Document received by the MI Court of Claims.

EXHIBIT D

MACKINAC CENTER LEGAL FOUNDATION

March 10, 2022

Michigan Economic Development Corporation
Attn: FOIA Coordinator
300 N. Washington Square
Lansing, MI 48913
medcfoia@michigan.org

Via E-mail

Stephen Delie
Mackinac Center Legal Foundation
140 West Main Street
Midland, MI 48640
delie@mackinac.org

Re: Demand for Compliance with the Freedom of Information Act, MCL 15.231 et seq.

To Whom it May Concern,

My name is Stephen Delie, and I am writing you on behalf of the Mackinac Center Legal Foundation. Over the past months, the Mackinac Center has repeatedly attempted to obtain input assumption worksheets used by Tourism Economics with IMPLAN, and output produced from modeling efforts. Those records have not been produced, despite MEDC's obligations under the Michigan Freedom of Information Act, MCL 15.231 *et. seq.* As such, please treat this letter as a formal demand that MEDC adhere to the requirements of FOIA by promptly responding to the Center's current FOIA request.

On November 6, 2020, the Mackinac Center made a request for a number of records, including "the input assumption worksheets used by Tourism Economics and any related 'direct, indirect and induced impacts' output produced directly from its modeling effort for the MEDC/MSF Strategic Marketing and Research Insights report '2019 Michigan Ad effectiveness Study' and/or its "Economic Impact of Advertising-Generated Tourism in Michigan – 2018 report." **Exhibit A, November 6, 2020 Request.** After correspondence with MEDC, portions of the Center's request were clarified on November 19, 2020. **Exhibit B, November 19, 2020 Clarified Request.** MEDC responded on February 1, 2021 by granting the Center's request in part. **Exhibit C, February 1, 2021 MEDC Response.**

Although MEDC's response cites MCL 15.243(1)(a) as an exemption, no information was provided as to what specific information fell within that exemption. *Id.* Similarly, the response stated that certain records were withheld on the basis that no documents existed, but without specifying which portion of the Center's request lacked responsive records. *Id.*

MACKINAC CENTER LEGAL FOUNDATION

The Center challenged MEDC's response on the basis that the Corporation had failed to provide a legal and factual basis for withholding records. **Exhibit D, February 23, 2021 Mackinac Center Rebuttal.** In that response, the Center noted:

As with the aforementioned bullet points, I received no explanation for why I did not receive requested records relating to the following portions of my request: ... The input assumption worksheets used by Tourism Economics and any related "direct, indirect and induced impacts" output produced directly from its modeling effort for the MEDC/MSF Strategic Marketing and Research Insights report "2019 Michigan Ad Effectiveness Study," and/or its "Economic Impact of Advertising-Generated Tourism in Michigan – 2018" report.

With respect to the bullet immediately above, I also added: just "the input worksheets and related output. However, if Tourism Economics has not provided you with the above referenced worksheets/direct output, I would like to politely request that the MEDC ask Tourism Economics for these items for the state and Mackinac Center's behalf."

Id. After further correspondence with MEDC, the Center followed up again on March 31, 2021. **Exhibit E, March 31, 2021 Follow Up.** In this correspondence, the Center again noted that MEDC had failed to address the portion of the Center's request seeking input assumption worksheets. *Id.* MEDC acknowledged this correspondence on April 8, 2021, but did not produce the requested records. **Exhibit F, April 8, 2021 Correspondence.** The Mackinac Center again attempted to obtain the requested input assumptions on April 21, 2021, but did not receive a response. **Exhibit G, April 21, 2021 Correspondence.** On May 28, 2021, the MEDC directed the Mackinac Center to Chris Pike of Oxford Economics to obtain the requested records. **Exhibit H, May 28, 2021 Correspondence.**

The Mackinac Center and Chris Pike exchanged a number of e-mails in June and July of 2021, but input assumption worksheets were not produced. On August 3, 2021, the Center again requested input assumption worksheets. **Exhibit I, August 3, 2021 Request.** The Center did not receive a response, and reiterated its request on August 20, 2021. **Exhibit J, August 20, 2021 Follow Up.** The Center, again, did not receive the requested records. A subsequent request on January 18, 2022 also did not result in the production of input assumption worksheets. **Exhibit K, January 18, 2022 Follow Up.**

It has now been 489 days since the Mackinac Center made its initial request for input assumption worksheets and output produced from modeling efforts. Responsive records have not been produced, despite the Center's repeated attempts. In addition, no adequate legal explanation has been provided for why these records cannot be produced.

We hereby demand that the MEDC immediately respond to the Center's requests by providing the requested input assumption worksheets and output produced from modeling efforts. It should not be necessary for any FOIA requestor to engage an attorney to receive a response to their request.

MACKINAC CENTER LEGAL FOUNDATION

The MEDC's ongoing failures to satisfy FOIA harms not only the Mackinac Center, but the public at large, who deserve government transparency.

Please note that, should the MEDC fail to remedy the legal errors identified in this letter, we are prepared to file a legal complaint. Thank you for your consideration.

Sincerely,

Steve Delie (P80209)
Mackinac Center Legal Foundation

EXHIBIT E

STATE OF MICHIGAN
COURT OF CLAIMS

THE MACKINAC CENTER FOR PUBLIC
POLICY,

Plaintiff,

v.

Case No.: 22- 000055-MZ ~~CZ~~

Hon. Thomas C. Cameron

THE MICHIGAN ECONOMIC
DEVELOPMENT CORPORATION, a
government entity.

Complaint

Defendant.

Derk A. Wilcox (P66177)
Stephen A. Delic (P80209)
Patrick J. Wright (P54052)
Mackinac Center Legal Foundation
Attorneys for Plaintiff
140 West Main Street
Midland, MI 48640
(989) 631-0900 – voice
(989) 631-0964 – fax
Wilcox@mackinac.org

COMPLAINT

There is no other pending or resolved civil action arising out of the same transaction or occurrence alleged in the complaint.

NOW COMES Plaintiff, The Mackinac Center for Public Policy, and for its Complaint alleges and states as follows:

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Document received by the MI Court of Claims.

INTRODUCTION

The plaintiff, the Mackinac Center for Public Policy (the “Mackinac Center”) is a nonprofit organization dedicated to improving the quality of life for all Michigan residents by promoting sound solutions to state and local policy questions. To that end, the Mackinac Center routinely uses the Freedom of Information Act (“FOIA”) to obtain relevant documents from state and local governments.

This case deals with a matter of significant public interest, namely, the ability of Michigan’s citizens to accurately evaluate the Michigan Economic Development Corporation’s (MEDC’s) claims regarding the return on investment (ROI) for the well-known “Pure Michigan” tourism program. Although MEDC has made claims that the Pure Michigan program is a highly successful investment, it has nevertheless refused to produce the information needed for the public to more precisely evaluate these claims. Given the importance of citizens’ ability to understanding how the State is spending their tax dollars, such a lack of transparency is both unacceptable and illegal.

On November 6, 2020, Plaintiff, through its employee Michael LaFaive, submitted a FOIA request to the MEDC for the release of information relating to the Pure Michigan program. One of the items specifically sought by this request included “the input assumption worksheets¹ used by Tourism Economics and any related ‘direct, indirect, and induced impacts’ output produced directly from its modeling effort for the MEDC/MSF Strategic Marketing and Research Insights report ‘2019 Michigan Ad effectiveness Study’ and/or its ‘Economic Impact of Advertising-Generated Tourism in Michigan – 2018 report.’” The Mackinac Center later clarified portions of its request on November 19, 2020.

¹ Different inputs that provide a range of possible values and their associated output.

MEDC responded on February 1, 2021 by partially granting the Center's request. This response was legally deficient, as it cited MCL 15.243(1)(a) as an applicable exemption, but without specifying the information to which that exemption allegedly applied. Further, MEDC's response acknowledged that certain records did not exist, but without describing the portion of the Mackinac Center's request for which no responsive documents could be located.

In response, the Mackinac Center challenged MEDC's determination on February 23, 2021. The Center's communication stated, in part:

As with the aforementioned bullet points, I received no explanations for why I did not receive requested records relating to the following portions of my request: ... The input assumption worksheets used by Tourism Economics and any related "direct, indirect and induced impacts" output produced directly from its modeling effort for the MEDC/MSF Strategic Marketing and Research Insights report "2019 Michigan Ad Effectiveness Study," and/or its "Economic Impact of Advertising-Generated Tourism in Michigan – 2018" report.

With respect to the bullet immediately above, I also added: just "the input worksheets and related output. However, if Tourism Economics has not provided you with the above referenced worksheets/direct output, I would like to politely request that the MEDC ask Tourism Economics for these items for the state and Mackinac Center's behalf.

After additional correspondence with the MEDC, the Mackinac Center followed up with the MEDC once again, on March 31, 2021. MEDC acknowledged this correspondence on April 8, 2021, but still failed to produce the requested records. The Center again attempted to obtain input assumption worksheets on April 21, 2021, but to no avail. On May 28, 2021, the MEDC directed the Mackinac Center to Christopher Pike of Oxford Economics to obtain the requested records.

Mr. Pike and the Mackinac Center exchanged numerous correspondence in June and July of 2021, with the Center again requesting those records on August 3, 2021. The Center received no response, so it repeated its request on August 20, 2021. Again, the requested records were not produced. This request was repeated on January 18, 2022, once again unsuccessfully.

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Document received by the MI Court of Claims.

In light of the MEDCs failure to produce the records requested by the Center, Plaintiff brings this action against the MEDC. Neither the MEDC's refusal to release the requested records, nor its failure to request those records from Tourism Economics and other contractors, comport with Michigan law.

PARTIES, JURISDICTION, AND VENUE

1. Plaintiff, the Mackinac Center for Public Policy (the "Mackinac Center"), is a Michigan nonprofit corporation headquartered in Midland County, Michigan.
2. Defendant, the Michigan Economic Development Corporation, is a government entity headquartered at 300 North Washington Square, Lansing, Ingham County, Michigan 48913.
3. Venue is proper pursuant to MCL 15.240(1)(b).
4. Pursuant to MCL 15.240(5), this action should be "assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way."
5. Pursuant to MCL 15.240(1)(b) and MCL 600.6419(1)(a), the court of claims has jurisdiction over this claim.

FACTUAL BACKGROUND

6. The Plaintiff hereby incorporates the preceding paragraphs as if fully restated herein.
7. On November 6, 2020, the Mackinac Center made a request for a number of records, including "The input assumption worksheets used by Tourism Economics² and any related 'direct, indirect and induced impacts' output produced directly from its modeling effort for the MEDC/MSF Strategic Marketing and Research Insights report '2019 Michigan Ad Effectiveness Study' and/or its 'Economic Impact of Advertising-Generated Tourism in Michigan – 2018' report." **Exhibit A, November 6, 2020 FOIA Request.**

² A third-party vendor not a party to this action.

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Document received by the MI Court of Claims.

8. After correspondence with MEDC, portions of the Center's request were clarified on November 19, 2020. **Exhibit B, November 19, 2020 Clarified Request.**
9. MEDC responded on February 1, 2021 by granting the Center's request in part. **Exhibit C, February 1, 2021 MEDC Response.**
10. Although MEDC's response cites MCL 15.243(1)(a) as an exemption, no information was provided as to what specific information fell within that exemption. *Id.* Similarly, the response stated that certain records were withheld on the basis that no documents existed, but without specifying which portion of the Center's request lacked responsive records. *Id.*
11. The Center challenged MEDC's response on the basis that the Corporation had failed to provide a legal and factual basis for withholding records. **Exhibit D, February 23, 2021 Mackinac Center Rebuttal.** In that response, the Center noted:

As with the aforementioned bullet points, I received no explanation for why I did not receive requested records relating to the following portions of my request: ...

The input assumption worksheets used by Tourism Economics and any related "direct, indirect and induced impacts" output produced directly from its modeling effort for the MEDC/MSF Strategic Marketing and Research Insights report "2019 Michigan Ad Effectiveness Study," and/or its "Economic Impact of Advertising-Generated Tourism in Michigan – 2018" report.

With respect to the bullet immediately above, I also added: just "the input worksheets and related output. However, if Tourism Economics has not provided you with the above referenced worksheets/direct output, I would like to politely request that the MEDC ask Tourism Economics for these items for the state and Mackinac Center's behalf."

12. After further correspondence with MEDC, the Center followed up again on March 31, 2021. **Exhibit E, March 31, 2021 Follow Up.** In this correspondence, the Center again noted that MEDC had failed to address the portion of the Center's request seeking input assumption worksheets. *Id.*

13. MEDC acknowledged this correspondence on April 8, 2021, but did not produce the requested records. **Exhibit F, April 8, 2021 Correspondence.**
14. The Mackinac Center again attempted to obtain the requested input assumptions on April 21, 2021, but did not receive a response. **Exhibit G, April 21, 2021 Correspondence.**
15. On May 28, 2021, the MEDC directed the Mackinac Center to Chris Pike of Oxford Economics to obtain the requested records. **Exhibit H, May 28, 2021 Correspondence.**
16. The Mackinac Center and Chris Pike exchanged a number of e-mails in June and July of 2021, but input assumption worksheets were not produced. On August 3, 2021, the Center again requested input assumption worksheets. **Exhibit I, August 3, 2021 Request.**
17. The Center did not receive a response, and reiterated its request on August 20, 2021. **Exhibit J, August 20, 2021 Follow Up.** The Center, again, did not receive the requested records.
18. A subsequent request on January 18, 2022 also did not result in the production of input assumption worksheets. **Exhibit K, January 18, 2022 Follow Up.**
19. On March 10, 2022, the Mackinac Center sent MEDC a demand letter for the production of records. **Exhibit L, March 10, 2022 Demand.** That demand went unanswered.
20. It has now been 536 days since the Mackinac Center made its initial request for input assumption worksheets and output produced from modeling efforts. Responsive records have not been produced, despite the Center's repeated attempts. In addition, no adequate legal explanation has been provided for why these records cannot be produced.

COUNT I: VIOLATIONS OF THE FREEDOM OF INFORMATION ACT

A. The MEDC's Failure to Specifically Respond to Plaintiff's Request Violates the Freedom of Information Act

21. The Plaintiff hereby incorporates the preceding paragraphs as if fully restated herein.
22. MCL 15.231(2) states:

It is the public policy of this state that all persons, except those persons incarcerated in state or local correctional facilities, are entitled to fully and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees, consistent with this act. The people shall be informed so that they may participate in the democratic process.

23. The public body has the burden of proof in applying an exemption. MCL 15.235(5)(a)-(c); *MLive Media Group v City of Grand Rapids*, 321 Mich App 263, 271 (2017).
24. The FOIA is a pro-disclosure statute, and as a result, “exemptions to disclosure are to be narrowly construed.” *Swickard v Wayne County Medical Examiner*, 438 Mich 536, 544 (1991).
25. Here, the MEDC’s response alleged that portions of records had been redacted pursuant to MCL 15.243(1)(a), which exempts personal information the disclosure of which would constitute a clearly unwarranted invasion of privacy. **Exhibit C**.
26. In claiming that exemption, however, no explanation was offered as to what records, or portion of records, were exempt under that section. *Id.*
27. MCL 15.235 states “[a] written notice denying a request for a public record in whole or in part is a public body’s final determination to deny the request or a portion of that request. The written notice must contain...a description of a public record or information that is separated or deleted under Section 14, if a separation or deletion is made.”
28. MCL 15.244 requires a public body separating exempt and non-exempt material to “generally describe the material exempted unless that description would reveal the contents of the exempt information and thus defeat the purpose of the exemption.”
29. It remains unclear whether the MEDC is withholding the input assumptions and impact outputs requested by the Plaintiff under MCL 15.243(1)(a), another exemption, or no exemption at all. Plaintiff’s repeated attempts to obtain an answer to this question without relying on this Court have all failed.

30. Here, MEDC did not describe the information separated or deleted, thereby violating MCL 15.235 and MCL 15.244.

B. The MEDC's Failure to Request Records from Third-Party Contractors is an Independent Violation of FOIA.

31. The Plaintiff hereby incorporates the preceding paragraphs as if fully restated herein.

32. The MEDC is a public body created by the execution of an interlocal agreement between the Michigan Strategic Fund and various public entities, and is therefore a public body for purposes of MCL 15.232(h).

33. Given the MEDC's failure to specifically address Plaintiff's request for input assumptions and impact outputs, it is unclear whether the Corporation itself is in possession of that information. Upon information and belief, however, that information is either in the MEDC's direct possession, or in the possession of non-parties Tourism Economics, Oxford Economics, or another third-party contractor working at MEDC's direction.

34. MCL 15.232 defines a public record as "a writing prepared, owned, used, in the possession of, or retained by the public body in the performance of an official function, from the time it is created.

35. Thus, to the extent the MEDC used, or even merely owned, the input assumptions and impact outputs requested by the Mackinac Center, those records would be disclosable as public records under MCL 15.232(i).

36. If, however, those records were solely used, owned, possessed or retained by Tourism Economics or another third-party contractor in connection with calculations later provided to MEDC for the performance of one of MEDC's official functions, they would nevertheless still be public records subject to disclosure.

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Document received by the MI Court of Claims.

37. The input assumptions and impact outputs prepared for MEDC were used, prepared, or retained in the performance of an official MEDC function, namely, to study the alleged return on investment of the Pure Michigan program.
38. To the extent that a third-party contractor working for the MEDC possesses public records of the MEDC that may be responsive to Plaintiff's request, it is the MEDC's duty to locate and produce those records.
39. In preparing materials for MEDC's use, any third-party contractor was acting as MEDC's agent. Given this, a third-party contractor, even if not a public body itself, nevertheless stands in the shoes of the public body for purposes of FOIA. See, e.g. *In re Capuzzi Estate*, 470 Mich 399, 402 (2004) (holding "the agent stands in the shoes of the principle.").
40. Thus, even records prepared by a private party on behalf of MEDC for use in an official public function are therefore disclosable under FOIA.
41. The MEDC's failure to produce the records requested by Plaintiff therefore violated Plaintiff's rights as established by MCL 15.233(1).
42. Furthermore, to the extent that neither the MEDC, nor any of its third-party contractors are in possession of the information requested by the Center, the MEDC's failure to indicate as such nevertheless represents a violation of the FOIA as outlined in Count I(A), *supra*.

C. Statutory Damages

43. The Plaintiff hereby incorporates the preceding paragraphs as if fully restated herein.
44. In light of the above, the MEDC's improper response to Plaintiff's request is arbitrary and capricious under MCL 15.240(7), thereby subjecting the MEDC to a civil fine of \$1,000.00 payable to the general treasury and a separate \$1,000.00 to Plaintiff.

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Document received by the MI Court of Claims.

45. The MEDC's inappropriate application of the aforementioned exemptions constitutes a willful and intentional failure to comply under MCL 15.240b, thereby subjecting it to a civil fine of \$2,500.00 to \$7,500.00 payable to the state treasury.

46. Pursuant to MCL 15.240(6), Plaintiff, if it prevails, is entitled to attorneys' fees and costs:


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

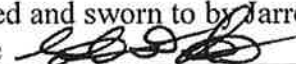
RELIEF REQUESTED

Plaintiff, the Mackinac Center for Public Policy, respectfully requests that this Court order Defendant, the Michigan Economic Development Corporation, to provide all information sought in its FOIA requests in unredacted form; apply the full penalties available under MCL 15.234(9), MCL 15.240(7), and MCL 15.240b; award attorneys' fees and costs under MCL 15.240(6); and award any other relief this Court determines to be just and equitable to remedy the MEDC's improper withholding of the requested information and causing the need to bring this suit.

I declare that the statements above are true to the best of my information, knowledge, and belief.

Dated: April 26, 2022


Jarrett Skorup

Subscribed and sworn to by Jarrett Skorup before me on the twenty-sixth day of April, 2022.
Signature 
Notary Public, State of Michigan
County of Ingham
My Commission Expires: 07/29/2025
Acting in the County of Midland

STEPHEN DELIE
Notary Public, State of Michigan
County of Ingham
My Commission Expires 07-29-2025
Acting in the County of Midland

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Document received by the MI Court of Claims.

EXHIBIT F

STATE OF MICHIGAN	DISMISSAL	CASE NO.
Court of Claims JUDICIAL DISTRICT JUDICIAL CIRCUIT COUNTY PROBATE		22-000055-MZ

Court address
925 W. Ottawa St., P.O. Box 30185, Lansing, MI 48909

Court telephone no.
(517) 373-2252

Plaintiff's name(s) and address(es)
Mackinac Center for Public Policy

Defendant's name(s) and address(es)
MEDC

v

Plaintiff's attorney, bar no., address, and telephone no.
Derk Wilcox (P66177)
Mackinac Center Legal Foundation
140 West Main Street
Midland, MI 48226
(989) 631-0900

Defendant's attorney, bar no., address, and telephone no.
Joseph G. Vernon (P68951)
Miller, Canfield, Paddoc and Stone, PLC
150 West Jefferson, Suite 2500
Detroit, MI 48226
(313) 963-6420

NOTICE OF DISMISSAL BY PLAINTIFF

with
 without prejudice as to:

1. Plaintiff/Attorney for plaintiff files this notice of dismissal of this case
 all defendants.
 the following defendant(s): _____

2. I certify, under penalty of contempt, that:
 a. This notice is the first dismissal filed by the plaintiff based upon or including the same claim against the defendant.
 b. All costs of filing and service have been paid.
 c. **No answer or motion has been served upon the plaintiff by the defendant as of the date of this notice.**
 d. A copy of this notice has been provided to the appearing defendant/attorney by mail personal service.

Date

Plaintiff/Attorney signature

STIPULATION TO DISMISS

with
 without prejudice as to:

I stipulate to the dismissal of this case
 all parties.
 the following parties: _____

June 7, 2022

Date

/s/ Derk A. Wilcox

Plaintiff/Attorney signature

June 7, 2022

Date

/s/ with permission, Joseph G. Vernon

Defendant/Attorney signature

ORDER TO DISMISS


with
 without prejudice. Conditions, if any: _____

IT IS ORDERED this case is dismissed. _____

This order resolves the last pending claim and closes the case.

June 8, 2022

Date



Judge/Magistrate (when authorized in small claims cases)

EXHIBIT G

**STATE OF MICHIGAN
IN THE COURT OF CLAIMS**

MACKINAC CENTER FOR PUBLIC
POLICY,

Plaintiff,

vs.

Hon. Douglas B. Shapiro

Michigan Economic Development
Corporation,

Case No. 22-000109-MZ

Defendant

AFFIDAVIT OF KAREN WIEBER


STATE OF MICHIGAN)
)SS:
COUNTY OF INGHAM)

Karen Wieber, being first duly sworn, states as follows:

1. I am an adult and otherwise competent to testify to the facts stated below. I make this Affidavit based on my own personal knowledge.
2. I am the Freedom of Information Act Coordinator for the Michigan Economic Development Corporation (“MEDC”).
3. On June 9, 2022, the MEDC received a Freedom of Information Request (“FOIA”) request from Mr. Michael LaFaive of the Mackinac Center that requested “Input assumption worksheet(s) associated with the January 2020 Report ‘2019 Michigan Ad Effectiveness Study’” (“Requested Documents”).
4. After a reasonable search, I was unable to locate any responsive documents under the name requested or under any other name reasonably known to the MEDC.

Document received by the MI Court of Claims.

Further deponent saith not.


KAREN WIEBER

Subscribed and sworn before me
This 22 day of August, 2022

Notary's
Stamp exp. "10/2024
(Notary's name, county, acting in county,
and date commission expires)

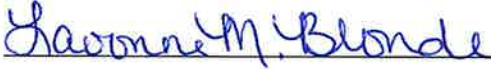
Notary's
Signature


EXHIBIT H

**STATE OF MICHIGAN
IN THE COURT OF CLAIMS**

MACKINAC CENTER FOR PUBLIC
POLICY,

Plaintiff,

vs.

Hon. Douglas B. Shapiro

Michigan Economic Development
Corporation,

Case No. 22-000109-MZ

Defendant

AFFIDAVIT OF SERMAD BAKKAL

STATE OF MICHIGAN)
)SS:
COUNTY OF OAKLAND)

Sermad Bakkal, being first duly sworn, states as follows:

1. I am an adult and otherwise competent to testify to the facts stated below. I make this Affidavit based on my own personal knowledge.

2. I am the Chief Strategist at the Michigan Economic Development Corporation ("MEDC"). I was previously the Senior Vice President of Strategy, Planning, and External Affairs at the MEDC, and before that, I was the Senior Vice President of Research Strategy and Policy at the MEDC.

3. The Pure Michigan 2019 Advertising Effectiveness & ROI report was received by the MEDC from Strategic Marketing Research Insights ("SMARInsights").

4. The MEDC subsequently made the Pure Michigan 2019 Advertising Effectiveness & ROI report publicly available on the MEDC's website at www.michigan.org/industry/researchandreports.

5. On June 8, 2022, I understand that the MEDC received a Freedom of Information Request ("FOIA") requests from Mr. Michael LaFaive of the Mackinac Center for Public Policy ("Mackinac Center") that requested "Input assumption worksheet(s) associated with the January 2020 Report '2019 Michigan Ad Effectiveness Study'" ("Requested Documents").

6. I understand that the Mackinac Center initiated the above-captioned lawsuit to challenge the MEDC's denial of the FOIA request for the Requested Documents.

7. The Requested Documents, if they exist, are not writings that MEDC has prepared or used. The Requested Documents, if they exist, are also not owned, in possession of, or retained by the MEDC.

8. The documents attached as Exhibit 1-A to the Mackinac Center's Complaint are Regional Economic Models, Inc (REMI) worksheets that were prepared and created by the MEDC for use unrelated to Tourism Economics. MEDC did not prepare anything similar for Tourism Economics.

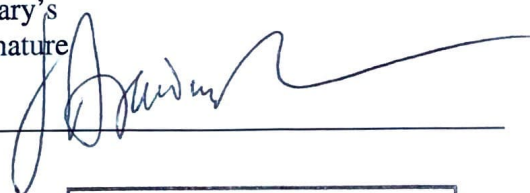
9. The MEDC did not direct or control any aspect of Tourism Economics' performance.

Further deponent saith not.


SERMAD BAKKAL

Subscribed and sworn before me
This 22 day of August, 2022

Notary's
Stamp JULIAN AZARIAH
(Notary's name, county, acting in county,
and date commission expires)

Notary's
Signature 



JULIAN AZARIAH
NOTARY PUBLIC - STATE OF MICHIGAN
COUNTY OF OAKLAND
My Commission Expires July 28, 2028
Acting in the County of OAKLAND

UNPUBLISHED CASES

2014 WL 1401851

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK
COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

Kim L. VICTOR, Plaintiff–Appellant,
v.

THIRTY–FOURTH CIRCUIT COURT and
Unknown FOIA Coordinator, Defendants–Appellees.

Docket No. 315094.

|
April 10, 2014.

Roscommon Circuit Court; LC No. 12–729922–CZ.

Before: DONOFRIO, P.J., and CAVANAGH and JANSEN,
JJ.

Opinion

MEMORANDUM.

*1 In this case arising under the Freedom of Information Act (FOIA),¹ plaintiff appeals as of right from the order the circuit court granting the motion of defendant the “Unknown FOIA Coordinator” for summary disposition, and sua sponte doing likewise on behalf of defendant circuit court itself. We affirm.

Plaintiff requested information concerning the election campaign finances of two judges operating in Roscommon County. His complaint asserted that the records sought were “located in the 34th Circuit Courthouse,” and he insists that he sent his request to the attention of the FOIA Coordinator at an address covering not only the Roscommon Circuit Court, but other Roscommon County offices as well. In granting summary disposition to defendants, the trial court read from

an un rebutted affidavit from the county clerk advising that no such records were ever kept in that office and advised plaintiff that any such request would be better addressed to the Secretary of State. The court correctly stated, “the Michigan Legislature was not foolish enough to pass a law that says the FOIA Coordinator and the county clerk have to provide documents that are not in their possession but instead are in the possession of the Bureau of Elections of the ... Department of State.” See [MCL 15.232\(e\)](#) (defining “public record” as “a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function”). The court further noted that the FOIA exempts the judiciary from its definition of “public body” for purposes of any duty of disclosure under the act. See [MCL 15.232\(d\)\(v\)](#). The court thus identified two sound bases for disposing of this case in defendants' favor.

Plaintiff correctly cites the Michigan Campaign Finance Act² in claiming that an election campaign has a duty to compile, store, and make available for public inspection certain information, see [MCL 169.216](#) and [MCL 169.222](#), but he fails to appreciate that the act does not direct that a circuit judge's election information be kept by that judge's particular court itself or by the county hosting that judicial entity.

Because plaintiff failed to direct his FOIA requests to the proper office or jurisdiction, and beyond that, sought to compel the judiciary, which is not a “public body” under the FOIA, to disclose information it did not possess, the trial court properly concluded that the lack of response on the part of defendants constituted no FOIA violation and dismissed the case.

Affirmed.

All Citations

Not Reported in N.W.2d, 2014 WL 1401851

Footnotes

¹ [MCL 15.231 et seq.](#)

2 MCL 169.201 *et seq.*

End of Document

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