

**STATE OF MICHIGAN**  
**COURT OF CLAIMS**

MACKINAC CENTER FOR PUBLIC POLICY,

Plaintiff,

v

MICHIGAN ECONOMIC DEVELOPMENT  
CORPORATION,

Defendant.

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**OPINION AND ORDER**

Case No. 22-000109-MZ

Hon. Douglas B. Shapiro

At a session of said Court held in the City of  
Lansing, County of Ingham, State of Michigan.

Defendant moves for summary disposition under MCR 2.116(C)(7), (C)(8), and (C)(10), in this action under the Freedom of Information Act (FOIA), MCL 15.231 *et seq.* Having reviewed the briefing and hearing oral argument, the Court GRANTS defendant’s motion for summary disposition contingent on defendant filing a revised affidavit making clear that defendant never possessed the requested input assumption worksheets. The affidavit shall be filed within 14 days following the issuance of this opinion.

**I. BACKGROUND**

This FOIA action relates to a report entitled Pure Michigan 2019 Advertising Effectiveness and ROI (the Report), which defendant issued and posted on a public website in 2020. The Report discussed the efficacy of the Pure Michigan tourism program. In a June 8, 2022 FOIA request, plaintiff requested that defendant provide “[i]nput assumption worksheet(s)” associated with the

Report. Defendant contracted with third parties (such as SMARInsights and Tourism Economics) to create the Report, but defendant denies that it created, used, possessed, or provided the third parties with any input assumption worksheets.<sup>1</sup>

Plaintiff's June 8, 2022 FOIA request was the latest in several requests for documents relating to the Report. Defendant produced 63 pages of documents, in total, in response to plaintiff's earlier FOIA requests. Plaintiff stated in its June 8, 2022 FOIA request that defendant had already provided similar worksheets in response to plaintiff's earlier FOIA requests, and plaintiff attached an example of the type of document plaintiff was requesting. The exemplar is entitled: "Graphic 7: REMI Assumption Worksheet."<sup>2</sup> Plaintiff asked that defendant instruct the third-parties to provide the requested documents.

In its response to the June 8, 2022 FOIA request, defendant stated, "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." In support of its motion for summary disposition, defendant has submitted the affidavit of its FOIA coordinator, Karen Wieber. Wieber states, in relevant part, "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." Defendant also provided the affidavit of Sermad Bakkal, defendant's Chief Strategist. Bakkal states in his affidavit, "The Requested Documents, if they

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<sup>1</sup> Plaintiff did not provide the Court with a copy of defendant's contracts with the third parties. It is unclear whether this is because it never requested the contracts or whether plaintiff chose not to submit them with its response brief.

<sup>2</sup> Plaintiff has clarified in the course of this litigation that the exhibit was an example of the type of document plaintiff was requesting—not the exact item plaintiff was requesting.

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.” Bakkal denies that defendant controlled or directed the performance of the third parties. While Bakkal denies that defendant currently has possession of the input assumption worksheets, Bakkal does not state definitively whether defendant ever possessed these documents.

Plaintiff sued in this Court, raising claims that defendant failed to provide requested documents in violation of FOIA, and that defendant’s failure to request the records from its third-party contractors constituted an independent FOIA violation. Plaintiff also requests attorney fees, costs, and punitive damages under MCL 15.240(6) and (7).

Defendant moves for summary disposition under MCR 2.116(C)(7) (*res judicata*), (C)(8), and (C)(10).<sup>3</sup> Defendant argues that the requested documents do not exist and are not in its

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<sup>3</sup> “Summary disposition may be granted under MCR 2.116(C)(7) when a claim is barred by *res judicata* or collateral estoppel.” *Allen Park Retirees Ass’n, Inc v Allen Park*, 329 Mich App 430, 443; 942 NW2d 618 (2019).

A (C)(8) motion tests the legal sufficiency of the complaint. *Bailey v Antrim Co*, \_\_\_ Mich App \_\_\_; \_\_\_ NW2d \_\_\_ (2022) (Docket No. 357838); slip op at 5. “A motion under MCR 2.116(C)(8) may . . . be granted when a claim is so clearly unenforceable that no factual development could possibly justify recovery.” *Id.* The Court will consider the factual allegations in the complaint as true, but may also consider documentary evidence attached to the complaint. *Jawad A Shah, MD, PC v State Farm Mut Auto Ins Co*, 324 Mich App 182, 206; 920 NW2d 148 (2018).

A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Joseph v Auto Club Ins Ass’n*, 491 Mich 200, 206; 815 NW2d 412 (2012). The evidence submitted by the parties is reviewed in a light most favorable to the nonmovant. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). “Summary disposition under MCR 2.116(C)(10) is appropriately granted if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law.” *Greene v AP Prod, Ltd*, 475 Mich 502, 507; 717 NW2d 855 (2006) (citation and quotation marks omitted). A genuine issue of material fact exists when the “record which might be developed . . . would leave open an issue upon which reasonable minds might differ.” *Debano-Griffin v Lake Co*, 493 Mich 167, 175; 828 NW2d 634 (2013) (citation and quotation marks omitted). When a motion for summary

possession, and that it has no obligation to obtain the documents from its third-party contractors. Defendant denies that it provided input assumption worksheets in response to plaintiff's previous FOIA requests, and argues that the REMI worksheets are distinct from the input assumption worksheets. And, according to defendant, plaintiff failed to provide factual or legal support to establish that the third parties were defendant's agents. Finally, defendant argues that plaintiff's claims are barred by res judicata because plaintiff sued defendant in this Court, in Docket No. 22-000055-MZ, in relation to an earlier FOIA request that was similar in scope and nature, but plaintiff voluntarily dismissed the case before it was adjudicated.

Plaintiff responds that because defendant either used the documents or cooperated in their preparation, FOIA obligated defendant to produce the documents or sign a release authorizing their production. And, plaintiff reasons, defendant's affidavits do not specify whether defendant may have possessed the input assumption worksheets at one time. So, in plaintiff's view, there is a fact question about whether defendant properly retained the documents. Plaintiff also argues that its claims are not barred by res judicata because the earlier FOIA request was broader in scope and constituted a separate FOIA request.

## II. ANALYSIS

FOIA codified the public policy of the state to allow individuals to obtain complete information about governmental affairs. *Arabo v Mich Gaming Control Bd*, 310 Mich App 370,

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disposition is filed before the close of discovery, the operative question is whether summary disposition is premature because further discovery stands a fair chance of uncovering factual support for the nonmovant's position. *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 292; 769 NW2d 234 (2009).

380; 872 NW2d 223 (2015). The statute allows an individual to “inspect, copy, or receive public records upon providing a written request to the FOIA coordinator of the public body.” *Id.* (citations and quotation marks omitted). The term “public record” is defined 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.” MCL 15.232(i). FOIA is a prodisclosure statute, and must be interpreted broadly to allow access to public records. *Mich Open Carry, Inc v Dep’t of State Police*, 330 Mich App 614, 625; 950 NW2d 484 (2019). However, FOIA only grants a right of access to records in existence, and a public body has no obligation to create a record to comply with a FOIA request. *Walloon Lake Water Sys, Inc v Melrose Twp*, 163 Mich App 726, 731-732; 415 NW2d 292 (1987). When the requested record does not exist, the public body must certify that fact in its written response denying the request for records. MCL 15.235(5)(b). During litigation, when the defendant provides an affidavit attesting that the requested documents do not exist, the burden shifts to the plaintiff to produce evidence rebutting the affidavit. *Coblentz v City of Novi*, 475 Mich 558, 568-569; 719 NW2d 73 (2006).

Plaintiff’s position is that, because defendant provided similar documents in the past (the REMI worksheets), defendant may have possessed the input assumption worksheets at one point. Plaintiff argues that Bakkal’s affidavit does not specify whether defendant ever had possession of the requested documents. As plaintiff puts it, the affidavit “can be read to say that MEDC did not prepare the documents, and does not possess them now, but did have them at one time.” In his affidavit, Bakkal states, “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.” But Bakkal does not state affirmatively that defendant never possessed the requested documents. Bakkal signed a second affidavit in connection with defendant’s reply

brief, but that affidavit also does not clarify whether defendant ever possessed input assumption worksheets. During oral argument, defense counsel clarified Bakkal's affidavit and represented to the Court that defendant never possessed the requested documents. To clarify the issue, defendant shall submit a revised affidavit within 14 days stating affirmatively that defendant never possessed the requested input assumption worksheets or that it did possess them.

Plaintiff also suggests that there is a factual question regarding how the third parties obtained the data that ultimately went into the Report, if not from input assumption worksheets. But plaintiff's June 8, 2022 FOIA request only requested one specific category of documents—the input assumption worksheets. Plaintiff did not request all data that the third parties used to prepared the Report. Because defendant has denied the existence or possession of such worksheets, and has represented that it can produce a revised affidavit clarifying that it never possessed such documents, the burden shifts to plaintiff to rebut that position. Plaintiff has not rebutted that position with evidence of its own, and fails to explain how further discovery would stand a fair chance of uncovering that factual support.

Therefore, the issue turns on whether FOIA obligated defendant to obtain responsive documents from the third parties who allegedly prepared them, or to sign a release for the third parties to produce the documents. Plaintiff argues that it did. The Court disagrees.

In *Hoffman v Bay City Sch Dist*, 137 Mich App 333, 335; 357 NW2d 686 (1984), the Court of Appeals addressed the issue whether the defendant, a public-school district, was obligated to produce attorney Richard Gustafson's investigation file. Gustafson investigated the policies, procedures, and controls of the school district's business and finance department. *Id.* After completing his investigation, Gustafson relayed his findings to the school board in a closed session.

*Id.* at 335-336. Gustafson did not share his file with the school board. *Id.* at 336. The Court concluded that because Gustafson did not provide the school board with the information he obtained in his investigation, and only provided his opinion on the results of the investigation, the school board's use of Gustafson's report did not amount of constructive possession of his investigation file. *Id.* at 338-339. Therefore, because the public body neither created nor obtained the requested information, FOIA did not obligate the school board to produce the investigation file. *Id.* at 339.

Plaintiff argues that this case is aligned with *MacKenzie v Wales Twp*, 247 Mich App 124; 635 NW2d 335 (2001). In *MacKenzie*, the defendants (two townships) contracted with the city of Port Huron to prepare property-tax notices. *Id.* at 125. Port Huron took the defendants' paper documents and created magnetic computer tapes with the relevant tax information. *Id.* Port Huron returned the paper documents but retained the tapes. *Id.* The plaintiff requested a copy of the tapes under FOIA, and asked the defendants to sign release forms for the tapes. *Id.* at 125-127. The defendants refused. *Id.* at 126.

On appeal, plaintiff argued that, because the sole purpose of the tapes was for use in performing the defendants' official functions, the tapes were public records. *Id.* at 128. The defendants argued that the tapes did not fall under the definition of "public record" in FOIA because the defendants did not own, use, possess, or retain the tapes. *Id.* The Court of Appeals agreed with the plaintiff, noting that "[w]hile defendants did not create or have physical possession of the tapes, it may be reasonably inferred that they *used* the tapes, albeit indirectly, in performing an official function; thus, those tapes fall within the statutory definition of a 'public record.'" *Id.* at 129. The Court explained that the defendants had delegated a clerical task to Port Huron and that the "[d]efendants may not avoid their obligations under the FOIA by contracting for a clerical

service that allows them to more efficiently perform an official function.” *Id.* The Court distinguished *Hoffman* by explaining that the defendants had access to the information on the tapes and provided that data to Port Huron. *Id.* at 130. Port Huron “simply converted the information that defendants supplied into a different format and stored the data for defendants in that format.” *Id.* The defendants also retained some measure of control over the tapes, considering that Port Huron would not release the tapes without the defendants’ consent. *Id.* at 130-131. So the Court required the defendants to either produce the tapes or sign the release forms. *Id.* at 132.

The Court agrees with defendants that this case is distinguishable from *MacKenzie*. Unlike that case, the third-parties here did not perform a mere clerical function such as converting paper documents into an electronic format. The third parties obtained and analyzed data, and ultimately created a report on the efficacy of defendant’s tourism program. Like *Hoffman*, defendant received the report from one of the third parties (SMARInsights) and made that report publicly available. But defendant never possessed the input assumption worksheets (assuming such documents exist). Finally, while plaintiff notes that defendant *may* have provided data to the third parties in some format for use in the Report, plaintiff only requested one category of documents in its FOIA request—the input assumption worksheets. Defendant denies ever having possession of those documents and has no obligation under FOIA to obtain the documents from the third parties.

Plaintiff also relies on the Michigan Supreme Court’s decision in *Bisio v Village of Clarkston*, 506 Mich 37; 954 NW2d 95 (2020). *Bisio* involved a FOIA request for documents that were contained in a city attorney’s files. *Id.* at 41. The defendant denied the request, reasoning that the records in the city attorney’s possession were not public records because the city attorney was not a public body for purposes of FOIA. *Id.* The Supreme Court concluded that the city attorney’s office *was* a public body for purposes of FOIA because it constituted an “ ‘other body



that is created by . . . local authority' ” as defined under MCL 15.232(h)(iv). *Id.* at 52-53. So the city attorney’s documents were public records subject to production under FOIA. *Id.* at 54. Plaintiff argues that *Bisio* supports its position that even if a third-party contractor created the documents, if defendant used the documents or cooperated in their preparation, they must be disclosed. The *Bisio* Court did not make such a broad pronouncement. Instead, the Court concluded that because the defendant’s charter created the office of the city attorney, the office constituted a public body under FOIA. *Id.* at 53-54. *Bisio* does not support plaintiff’s position.

Plaintiff next suggests that the third parties were acting as defendant’s agents, and defendant was obligated to produce the input assumption worksheets under an agency theory. Plaintiff relies on former Chief Justice MCCORMACK’s concurrence in *Bisio* to support its theory. Chief Justice MCCORMACK reasoned in her concurrence that the city attorney was the defendant’s agent, and that common-law agency principles applied to FOIA. *Id.* at 57 (MCCORMACK, C.J., concurring). A concurrence is not binding on this Court. See *Negri v Slotkin*, 397 Mich 105, 107-108; 244 NW2d 98 (1976). Plaintiff also has not pointed the Court to any language in FOIA or any binding caselaw establishing that the law of agency applies in the FOIA context. But even if FOIA does obligate public bodies to produce the documents of their agents, plaintiff neither asserts nor argues any facts that would establish that the third parties represented defendant in any capacity, or that defendant had the right to control the conduct of the third parties. See *Meretta v Peach*, 195 Mich App 695, 697; 491 NW2d 278 (1992) (“The test of whether an agency has been created is whether the principal has a right to control the actions of the agent.”). Accordingly, FOIA did not obligate plaintiff to produce any input assumption worksheets in the possession of its third-party contractors.

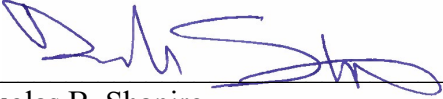
Because plaintiff has not established a duty under FOIA to produce responsive documents, the Court need not address defendant's alternative argument that plaintiff's claims are barred by the doctrine of res judicata.

### III. CONCLUSION

Defendant's motion for summary disposition is GRANTED, contingent on defendant's submission of a revised affidavit to the Court within 14 days of this opinion and order.

This order is a final order and closes the case.

Date: February 24, 2023

  
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Douglas B. Shapiro  
Judge, Court of Claims