STATE OF MICHIGAN

COURT OF CLAIMS

MACKINAC CENTER FOR PUBLIC POLICY,

Plaintiff,

v

DEPARTMENT OF ENVIRONMENTAL QUALITY,

Defendant.

OPINION AND ORDER

Case No. 16-000164-MZ

Hon. Cynthia Diane Stephens

Before the Court is Defendant's motion for summary disposition. For the reasons stated herein, the motion is DENIED.

I. BACKGROUND

This action arises out of Plaintiff's Freedom of Information Act (FOIA), MCL 15.231 *et seq.*, request to Defendant. On or about March 30, 2016, Plaintiff sent an e-mail request to Defendant's FOIA coordinator and sought certain materials related to the Flint water crisis. The FOIA request sought e-mails from two employees, as well as the names of "any employees transferred, reassigned, or suspended as a result of the Flint water issues." On April 4, 2016, Defendant indicated that it would exercise the statutory 10 business day extension for issuing a response under MCL 15.235(2)(d). On April 21, 2016, the date due for Defendant's response, Defendant informed Plaintiff that its FOIA request "will be granted as to existing, nonexempt records in [Defendant's] possession falling within the scope of the request." Defendant estimated the cost of fulfilling the FOIA request to be $114.35, based on approximately 2.5 hours

of "Technical Staff Time" as well as 2 hours of "Administrative Staff Time" needed to fulfill the request. Defendant requested, pursuant to MCL 15.234(8), a good-faith deposit equal to one half ($57.17) of the processing fee. In accordance with its obligation under MCL 15.234(8) to provide a "best efforts estimate" regarding the length of time it would take to provide the records, Defendant indicated that it anticipated being able to process the request within 60 business days.[1]

On April 26, 2016, Plaintiff sent the full amount of the processing estimate to Defendant. On May 20, 2016, Plaintiff and Defendant exchanged e-mails regarding the request. Defendant informed Plaintiff that it had processed Plaintiff's check and that it would provide the requested materials on or before July 29, 2016, consistent with the original 60-day estimate. Plaintiff responded by expressing concern that its March 30, 2016 FOIA request might not be completed until July 29, 2016.

On or about June 21, 2016, Governor Snyder's office authorized the public release of a number of e-mails related to the Flint water crisis. In response to the release, Plaintiff sent an e-mail to Defendant and inquired whether the publicly released e-mails could be viewed as being responsive to Plaintiff's FOIA request. Defendant responded the next day and stated that, notwithstanding the public release, it intended to fulfill Plaintiff's FOIA request. On June 30, 2016, in a telephone call between employees of Plaintiff and Defendant, Defendant's FOIA coordinator indicated that Defendant was still working on the FOIA request, although Defendant indicated that the earlier e-mail release might have addressed the first matter (the e-mails) sought

[1] According to Plaintiff's briefing, Defendant's FOIA guidelines indicate that most requests will be completed within 10 business days.

by Plaintiff, but not the second matter (the transfer/reassignment/suspension of certain employees).

On July 13, 2016, Plaintiff filed its complaint and alleged that Defendant's delay in providing the requested materials constituted a denial of Plaintiff's FOIA request. Plaintiff sought an order from this Court requiring Defendant to immediately provide the requested documents, as well as the imposition of statutory penalties and attorney fees. On July 29, 2016, Defendant provided, by all accounts, all of the requested materials.[2]

In lieu of filing an answer, Defendant moved this Court for summary disposition on August 3, 2016. Defendant pointed out that Plaintiff's original complaint was not "verified by the claimant before an officer authorized to administer oaths" as is required by MCL 600.6431(1). Defendant argued that Plaintiff's failure to verify the complaint required dismissal under MCR 2.116(C)(7). In addition, Defendant argued that it was entitled to summary disposition on the merits of Plaintiff's complaint.

On August 17, 2016, Plaintiff filed a first amended complaint. The amended complaint complied with the verification requirement found in MCL 600.6431(1). In addition, the amended complaint acknowledged that Defendant fulfilled the FOIA request on or about July 29, 2016. In all other respects, the amended complaint was nearly identical to the original complaint, as Plaintiff continued to allege an unreasonable delay by Defendant.

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[2] Defendant's response indicated that the June 2016 e-mail release contained "responsive records" with regard to Plaintiff's request for e-mails. The response also contained specific information with regard to employees who were transferred, reassigned, or suspended because of the Flint water crisis.

The matter is now before this Court on Defendant's renewed motion for summary disposition. Defendant first argues that this Court should dismiss Plaintiff's complaint because the original complaint did not meet MCL 600.6431(1)'s verification requirements. According to Defendant, Plaintiff should not be given the opportunity to amend the complaint. As an alternative, Defendant argues that it is entitled to summary disposition because it met its own 60-day deadline for fulfilling Plaintiff's FOIA request. In turn, Plaintiff argues that Defendant's delay in fulfilling the FOIA request was unreasonable. Plaintiff admits that it is not entitled to an award of attorney fees, given that it did not hire counsel in this case. However, Plaintiff seeks "the full penalties available under MCL 15.240(7) and MCL 15.240b, costs," as well as other relief that this Court might deem to be appropriate.

II. VERIFICATION UNDER MCL 600.6431

There are two sets of issues in this case. The first concerns the Court of Claims Act. It is undisputed that Plaintiff's original complaint was not "verified by the claimant before an officer authorized to administer oaths" as is required by MCL 600.6431(1). However, within the timeframe established in MCL 600.6431(1), Plaintiff filed an amended complaint that met the verification requirements. Defendant argues that Plaintiff's initial failure to verify is fatal to its maintenance of an action and that Plaintiff should not be permitted to rectify that flaw by simply filing an amended complaint. This Court disagrees with Defendant's position.

MCL 600.6431(1) sets forth mandatory notice provisions for filing claims against the state and provides that:

> No claim may be maintained against the state unless the claimant, within 1 year after such claim has accrued, files in the office of the clerk of the court of claims either a written claim or a written notice of intention to file a claim against the state or any of its departments, commissions, boards, institutions, arms or

> agencies, stating the time when and the place where such claim arose and in detail the nature of the same and of the items of damage alleged or claimed to have been sustained, which claim or notice shall be signed and verified by the claimant before an officer authorized to administer oaths.

In cases involving claimants' failures to give timely notice in accordance with MCL 600.6431, our Supreme Court has explained that compliance with the notice provisions contained in MCL 600.6431 is a condition precedent to pursuing a claim against the state. *Fairley v Dep't of Corrections*, 497 Mich 290, 292; 871 NW2d 129 (2015); *McCahan v Brennan*, 492 Mich 730, 732-733; 822 NW2d 747 (2012). Unless the conditions in MCL 600.6431 are met, a plaintiff's claim "cannot proceed against the state." *Fairley*, 497 Mich at 293. Indeed, the statute demands strict compliance, and defective notice is a complete defense that will result in dismissal of the case. *Id.* at 292-293. See also *McCahan*, 492 Mich at 732-733.

In *McCahan*, 492 Mich at 738, the Court held that MCL 600.6431's prohibition on maintaining a suit in the Court of Claims was implicated "*as a consequence of a failure to file compliant notice within*" the statutory time period. (Emphasis added). The Court reiterated the idea that a compliant notice or claim had to be filed within the specified time period, but did not go so far as to declare that a plaintiff only had a single opportunity to file that compliant claim or notice. See *id.* at 742 ("Therefore, the failure to file a compliant claim or notice of intent to file a claim against the state within the relevant time periods designated in either subsection (1) or (3) will trigger the statute's prohibition that '[n]o claim may be maintained against the state . . . .' "). Indeed, it was the failure to file a compliant notice or claim *within* the statutory time period that was pertinent to invoking the so-called "bar-to-claim" language found in the statute. Consistent with this approach, the Court of Appeals in *Rusha v Dep't of Corrections*, 307 Mich App 300, 306; 859 NW2d 735 (2014), explained that MCL 600.6431 unambiguously sets forth a "window within which to file a claim or notice of intent to file a claim after an alleged" injury.

The Court gleans from these authorities that the bar-to-claim language in MCL 600.6431 is triggered by the failure to file a compliant notice or claim *within* the statutory time period, and that an amended complaint, if timely filed, does not trigger the prohibition on maintaining a claim against the state. Turning to the instant case, it is undisputed that Plaintiff's initial complaint[3] was filed within the 1-year timeframe for filing such claims set forth in MCL 600.6431(1). The claim was not verified as is required by the statute. However, Plaintiff filed a verified complaint during the 1-year period for doing so.[4] Accordingly, unlike the plaintiffs in cases such as *McCahan*, *Fairley*, and *Rusha*, she filed a compliant claim "within 1 year after such claim has accrued . . ." as is required by MCL 600.6431(1).

Despite Defendant's contentions that Plaintiff should not be permitted to file an amended complaint to comply with the verification requirements, the Court sees no reason that the "window" described in *Rusha*, 307 Mich App at 306, does not remain open for the entirety of the statutory period. Indeed, the purpose of the statute is to give timely notice to the proper governmental entity, see *Fairley*, 497 Mich at 298-299, and Defendant in this case received timely notice. Thus, the same concerns in *Fairley*, *McCahan*, and *Rusha* are not present in this case. Again, there is no failure to comply with the statutory time period in this case because Plaintiff's amended complaint complied with MCL 600.6431(1).

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[3] Plaintiff did not file a notice in this case.

[4] Indeed, assuming, for purposes of deciding this issue, that Defendant's delay in fulfilling the FOIA request was unreasonable, Plaintiff's claim would have accrued sometime between May 2016 and July 29, 2016. Plaintiff's amended verified complaint—filed on August 17, 2016—was filed within one year of this accrual timeframe.

Moreover, as Plaintiff correctly points out, the amendment in this case was an amendment by right under MCR 2.118(A)(1); Plaintiff did not even need to seek leave of court before amending the complaint. MCR 2.118(A)(1) provides that "[a] party may amend a pleading once as a matter of course within 14 days after being served with a responsive pleading by an adverse party, or within 14 days after being served the pleading if it does not require a responsive pleading." In this case, Defendant, in lieu of filing an answer, moved for summary disposition. A motion for summary disposition is not a responsive pleading under the court rules. See MCR 2.110(A) (defining the term "pleading"). However, that Defendant chose to move for summary disposition, rather than filing a responsive pleading, did not deprive Plaintiff of the ability of the opportunity to amend the complaint as a matter of right. See *Badeen v PAR, Inc*, 300 Mich App 430, 441; 834 NW2d 85 (2013), vacated in part on other grounds 496 Mich 75 (2014) ("MCR 2.118(A) allows a party to amend a pleading once as a matter of course *as long as 14 days have not lapsed after receiving a responsive pleading.*") (emphasis added). Rather, amendment as of right under MCR 2.118(A)(1) remains an option after the opposing party moves for summary disposition in lieu of filing an answer. See, e.g., *Carey v Foley & Lardner, LLP (On Reconsideration)*, unpublished opinion per curiam of the Court of Appeals, issued August 9, 2016 (Docket No. 321207), at 14. See also 1 Longhofer, Michigan Court Rules Practice (6th ed), p 788 (explaining that a party may reply to a motion for summary disposition "with an amended pleading designed to cure the defect revealed by the motion (assuming a responsive pleading has not also been filed and served more than 14 days before the proposed amendment)."). Accordingly, the Court concludes that Plaintiff could amend the complaint as of right in this case. And, by amending the complaint so as to make it a "compliant claim" under

MCL 600.6431(1), within the statutory timeframe, the statutory "bar-to-claim" language was not implicated.

III. REASONABLENESS OF THE DELAY

Defendant argues that, even assuming Plaintiff can amend the complaint, it is entitled to summary disposition on the FOIA claim under MCR 2.116(C)(8) and (C)(10). Plaintiff responds by arguing that factual issues exist which preclude a grant of summary disposition in this case. A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of the complaint, and summary disposition is appropriate "if the opposing party has failed to state a claim on which relief can be granted." *Dalley v Dykema Gossett PLLC*, 287 Mich App 296, 304; 788 NW2d 679 (2010) (citations, quotation marks, and alteration omitted). Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. "When entertaining a summary disposition motion under Subrule (C)(10), the court must view the evidence in the light most favorable to the nonmoving party, draw all reasonable inferences in favor of the nonmoving party, and refrain from making credibility determinations or weighing the evidence." *Dillard v Schlussel*, 308 Mich App 429, 445; 865 NW2d 648 (2014).

Upon receipt of a FOIA request, a public body, such as Defendant, must respond in accordance with MCL 15.235(2). In this case, Defendant opted to take the 10-day extension permitted under MCL 15.235(2)(d) before informing Plaintiff that it was going to grant the FOIA request. In so responding, Defendant charged a good-faith deposit, pursuant to MCL 15.234(8), equal to half of the estimated fee of processing the request. In addition, Defendant complied with MCL 15.234(8)'s directive that it shall provide "a best efforts estimate . . . regarding the

time frame it will take the public body to comply with the law in providing the public records to the requestor." The issue in this case concerns the reasonableness of the 60-day timeframe.

Although a best efforts estimate is intended to be non-binding under MCL 15.234(8), it does not, as Defendant appears to suggest, immunize the public body under the FOIA. Indeed, the last sentence of MCL 15.234(8) expressly acknowledges that "[p]roviding an estimated time frame does not relieve a public body from any of the other requirements of this act." One of those requirements is that the public body not "arbitrarily and capriciously violate[ ] this act by refusal or *delay in disclosing or providing copies of a public record* . . . ." MCL 15.240(7) (emphasis added). Indeed, a reviewing court will look past the labels of a public body's response to "grant" a FOIA request if that request is not actually fulfilled in accordance with the FOIA's purpose and directives. *Cramer v Village of Oakley*, __ Mich App __; __ NW2d __ (2016) (Docket No. 330736); slip op at 5. As explained in *Cramer*:

> Thus, nothing precludes a plaintiff, if faced with an inordinate delay in the production of requested documents, from filing suit on the ground that a public body's actions in response to a FOIA request effectively constitute a denial in whole or in part, notwithstanding that body's labelling of a response as a 'grant' of the request. See MCL 15.240(1)(b). Indeed, the FOIA allows a trial court to award punitive damages for arbitrary and capricious "refusal or delay in disclosing" public records. MCL 15.240(7). [*Cramer*, __ Mich App at __; slip op at 5.]

A public body's decision is arbitrary or capricious if it was not "based on consideration of principles or circumstances" or was "whimsical." *Meredith Corp v City of Flint*, 256 Mich App 703, 717; 671 NW2d 101 (2003) (citation and quotation marks omitted).

Turning to the instant case, the Court agrees with Plaintiff that the facts and circumstances alleged are sufficient to deny summary disposition to Defendant on Plaintiff's claim that Defendant occasioned an inordinate delay. As Plaintiff notes, Defendant estimated

that it would take approximately 4.5 hours to produce the requested records in this case. However, despite this relatively short time estimate, Defendant proceeded to give—and adhere to—a 60-day "best efforts" estimate for producing the records under MCL 15.234(8). As noted above, Defendant was not immunized under MCL 15.234(8) by giving this estimate, as the plain language of the statute required Defendant to comply with the provisions of the FOIA, including that it not act arbitrarily or capriciously in delaying disclosure of the requested documents. See MCL 15.234(8); MCL 15.240(7). Although Defendant alleges that it received a number of requests for information related to the Flint water crisis, taking 60 days to produce records deemed to take 4.5 hours to discover and produce, at first glance, creates a question of fact as to whether Defendant's delay was unreasonable or inordinate. See *Cramer*, __ Mich App at __; slip op at 5.

Moreover, as Plaintiff points out, the alleged delay appeared to persist even after Plaintiff's FOIA request was narrowed by the June 2016 e-mail release. In correspondence between Plaintiff and Defendant, Defendant noted that the June 2016 e-mail release contained some of the information requested by Plaintiff. All that remained in light of the e-mail release was Plaintiff's request for information regarding the reassignment/transfer of certain employees. Despite the fact that the request was narrowed at this point, the record reveals that Defendant nevertheless took over a month to fulfill the remaining request. Again, Defendant's position that it fulfilled the request within the timeframe specified in its best efforts estimate is not dispositive. See *Cramer*, __ Mich App at __; slip op at 5.

IV. CONCLUSION

In sum, the Court finds that Plaintiff's amended complaint was filed within the timeframe set forth under MCL 600.6431(1), and that the "bar-to-claim" language found therein was not

implicated. Moreover, as to the underlying FOIA claim, the Court finds that a genuine issue of material fact remains concerning whether Defendant unreasonably delayed in responding to Plaintiff's FOIA request. Lastly, because the Court has rejected Defendant's arguments, it disagrees with Defendant's assertions that Plaintiff's complaint and filings violated MCR 2.114, and the Court DENIES Defendant's request for sanctions.

IT IS HEREBY ORDERED that Defendant's motion for summary disposition is DENIED.

This is not a final order and does not close the case.

Dated: December 28, 2016

Hon. Cynthia Diane Stephens
Court of Claims Judge