

**STATE OF MICHIGAN
COURT OF CLAIMS**

**THE MACKINAC CENTER FOR PUBLIC
POLICY,**

Case No.: 22-_____ -CZ

Plaintiff,

v.

Hon.

**THE MICHIGAN ECONOMIC
DEVELOPMENT CORPORATION, a
government entity.**

Complaint

Defendant.

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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:

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.

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 600.605, the circuit court 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 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 FOIA Request.**
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 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.

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.

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.

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.

Dated: _____

/s/ Derk A. Wilcox
Derk A. Wilcox (P66177)