STATE OF MICHIGAN

IN THE COURT OF APPEALS

RODD MONTS, Plaintiff-Appellant, v DETROIT PUBLIC SCHOOL DISTRICT, Defendant-Appellee.	)	Court of Appeals No. 321790 Circuit Court No. 13-011037

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Ralph C. Simpson (P30788)
Cooperating Attorney
AMERICAN CIVIL LIBERTIES UNION
FUND OF MICHIGAN
535 Griswold, No. 111-525
Detroit, Michigan 48226
(313) 638-8098

Michael J. Steinberg (P43085)
Kary L. Moss (P49759)
AMERICAN CIVIL LIBERTIES UNION
FUND OF MICHIGAN
2966 Woodward Ave.
Detroit, Michigan 48201
(313) 578-6800, ext. 814

Attorneys for Plaintiff-Appellant

Jean-Vierre Adams (P51641)
DPS General Counsel
Rebecca Shaw Hicks (P40732)
Asst. General Counsel
3011 West Grand Blvd., Suite 1002
Detroit, Michigan 48202
(313) 873-4528

Attorneys for Defendant-Appellee

PLAINTIFF-APPELLANT'S REPLY BRIEF

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REBUTTAL ARGUMENT

DPS erroneously fails to acknowledge that the *de novo* standard is appropriate for review of rulings on motions for summary disposition.

Appellee-Defendant Detroit Public School District's (hereafter "DPS") brief (pp iii, 2-3) misstates or, at best, provides an incomplete recitation of the standard of review—leaving out any mention of the *de novo* standard for rulings on motions for summary disposition.

Following the *Herald Co v Eastern Michigan University*, 475 Mich 463, 472; 719 NW 2d 19 (2006) case cited by DPS, the Michigan Supreme Court clearly set out the whole range of standards in reviewing a FOIA case after a motion or motions for summary disposition. Thus, in *Coblentz v City of Novi*, 475 Mich 558, 567-568; 719 NW 2d 73 (2006) , the Court held:

> We review questions of statutory interpretation and the proper application of statutes using a de novo standard. *Adams Outdoor Advertising, Inc v City of Holland*, 463 Mich 675, 681; 625 NW 2d 377 (2001). We review rulings on motions for summary disposition using the de novo standard as well. *Spiek v Dep't of Transportation, 456 Mich* 331, 337; 572 NW 2d 201 (1998). Summary disposition was granted here under MCR 2.116(C)(10). In reviewing a ruling made under this court rule, a court tests the factual support by reviewing the documentary evidence submitted by the parties. Spiek, 456 Mich at 337, 572 NW 2d 201. We review the evidence and all legitimate inferences in the light most favorable to the nonmoving party. Wilkinson v Lee, 463 Mich 388, 391; 617 NW 2d 305 (2000). 'Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law.' Maiden v Rozwood, 461 Mich 109, 120; 597 NW 2d 817 (1999).
>
> The standard of review for FOIA cases was clarified this term in *Herald Co Inc v Eastern Michigan Univ Bd of Regents*, 475 Mich 463; 719 NW 2d 19 (2006). The Court stated:
>
> We continue to hold that the clear error standard of review is appropriate where the parties challenge the factual findings of the trial court. However, where the parties do not dispute the underlying facts but rather challenge the trial court's exercise of discretion, we hold that an appellate court must review that determination for an abuse of discretion, which this Court now defines as a determination that is outside the principled range of outcomes. [Id, at 467 (emphasis in original).]

Clearly under *Coblentz*, and *Herald v EMU*, the abuse of discretion standard is only used for certain FOIA provisions that require the trial court to balance competing interests. See

*Coblentz, supra, (*whether a description of material claimed to be exempt under MCL 15.243(1)(f) was recorded in a central location within a reasonable time) and *Herald v EMU, supra*, (whether public interest in encouraging frank communication clearly outweighed the public interest in disclosure).

The trial court erred in relying on the misleading assertions of DPS that Mr. Monts' FOIA request was "too unclear" in denying Mr. Monts' motion for summary disposition and granting summary disposition in favor of DPS.

Appellee DPS begins its argument with a misleading statement of the record that is critical to this case. Thus, DPS states that Mr. Monts "sent a five paragraph Freedom of Information Act (FOIA) request to [DPS]" (Appellee Br, p 1). In fact, Mr. Monts' two page FOIA request included five numbered paragraphs that were introduced by the following additional paragraph:

> This request concerns all middle schools and high schools within the Detroit Public School District. **Please produce the following records retained in DPS Forms 4549, Forms A-N and all other locations.**

The DPS attempt to read the introductory paragraph out of Mr. Monts' original FOIA request, although apparently somehow persuasive to the trial court (MH 13) is, quite simply, unsupportable by any argument in logic, linguistics or law.

Appellee-Defendant DPS's obfuscation is at the heart of its argument that Mr. Monts' FOIA request was inadequate under applicable Michigan FOIA law. Once it is acknowledged that Mr. Monts cited as a basis for his FOIA request "records retained in DPS Form 4549. . . and all other locations" it cannot seriously be maintained that Mr. Monts' request did not "describe a public record sufficiently to enable the public body to find the public record." MCL 15.233(1) states, in relevant part:

> Except as expressly provided in section 13 [exemptions from disclosure], upon providing a public body's FOIA coordinator with a written request **that describes a**

> **public record sufficiently to enable the public body to find the public record,** a person has a right to inspect, copy, or receive copies of the requested public record of the public body. [Emphasis added.]

As DPS acknowledges (Appellee's Br, p 7), "Form 4549 (Disciplinary Action) is part of a package that school administrators send to the Office of Student Conduct in advance of a disciplinary hearing." Form 4549 references whether Form 63 (Undesirable Incident Report) was filed in the particular student discipline matter. The attached highlighted forms 4549 and 63 show that there is information addressing every single point in numbered paragraphs 2-3 of Mr. Monts' original FOIA request—DPS or Detroit Police, school, grade, incident date, race or ethnicity of the student, and incident type (Reply Br Appendix).

As the Michigan Supreme Court reiterated in *Coblentz v City of Novi*, 475 Mich 571-573 (2006), it is in accord with the goals and intent of the Legislature in enacting the FOIA statute not to require an exacting standard for a FOIA request:

> The Legislature chose not to require an exacting standard in MCL 15.233(1). It could have required a "written request that describes a public record precisely or fully." But, instead, the Legislature chose to use the lesser standard of "sufficiently." The words chosen by the Legislature are presumed intentional. We will not speculate that it used one word when it meant another. *Detroit v Redford Twp*, 253 Mich 453, 456; 235 NW 217 (1931).
>
> Moreover, requiring only a description sufficient to permit identification of the requested items is consistent with the goals and intent of the Legislature in enacting the FOIA. It is a prodisclosure act. Swickard v Wayne Co Medical Examiner, 438 Mich 536, 544; 475 NW 2d 304 (1991). All public records are subject to full disclosure unless they are clearly exempt. Id. If a request is "sufficient" to allow the public body to find a nonexempt record, the record must be disclosed. MCL 15.233(1).

See also *Herald Co v City of Bay City*, 463 Mich 111, 120-122 (2000).

The trial court's suggestions (MH 13-14, 18-20) that Mr. Monts' request was "too unclear" and "wouldn't it have been easier to just to say: Please produce … all DPS forms 4549" (MH 13) misconstrued the record. Further, the court's findings represent an impermissible

shifting of the burden of proof and an improper application of the FOIA statute and relevant case law since there is no requirement that a request for public records be in the most precise form possible. Even more fundamentally, the trial court's position does not make sense. Why is it clearer to ask for records retained in "Form 4549 and. . . all other locations" than to ask for records retained in Form 4549 alone? The plain fact is that DPS collects records of police involvement in student discipline matters in Forms 4549 and 63. Even with all of the information and tools available to a full time DPS attorney, it is not obvious how Mr. Monts, a non-attorney, could have more clearly directed DPS to the information he was seeking.

Finally, the trial court error in finding that Mr. Monts did not sufficiently describe public records sufficiently is even more egregious when it is considered that the court failed to meaningfully address the detailed administrative appeal filed by Mr. Monts before taking the case to circuit court.

DPS' extensive argument that it does not have a single data base precisely tracking Mr. Monts' FOIA request is irrelevant to a decision in this case, other than establishing the limits of appropriate relief in Mr. Monts' favor.

Much of the DPS brief is taken up in arguments that Mr. Monts' FOIA request did not precisely describe documents, data bases or procedures (Br 4-7). All of those arguments are irrelevant given that Mr. Monts did sufficiently describe the records retained in Form 4549 and other locations.

Likewise, it is not determinative of the outcome of this case that DPS is not required to make a compilation of information or a new public record. As this Court stated in *Detroit Free Press, Inc v City of Southfield*, 269 Mich App 275 (2005), such a contention does not properly focus on public access to information and actually belies a claim that the public body did "not have access to records containing the information":

> Although plaintiff's literal request was for "a list," the actual information sought by plaintiff was made clear by its description. The FOIA does not require a precise description of the actual records sought; rather, the statute's focus is on public access to information. In *Herald Co*, supra at 121, 614 NW 2d 873, our Supreme Court opined that the Legislature did not impose detailed or technical requirements as a precondition for granting the public access to information. Instead, the Legislature simply required that any request be sufficiently descriptive to allow the public body to find public records containing the information sought. . . [W]e note that it would be odd indeed to ask a party who has no access to public records to attempt specifically to describe them.
>
> Rather than compiling a list, the city could have satisfied the request by allowing plaintiff access to, or providing copies of, redacted records that contained only the requested information. Id at 122, 614 NW 2d 873. The city's claims of exemption belie any argument that it did not have access to records containing the information.

See also *Herald Co v City of Bay City*, 463 Mich 111, 122 (2000) (fact that the *city* had no obligation to create a record says nothing about its obligation to satisfy plaintiff's request in some other manner as required by the FOIA).

PRAYER FOR RELIEF

WHEREFORE, Plaintiff requests that this Court reverse the trial court judgment and order summary disposition in his favor and attorney fees as provided under the provisions of the FOIA.

Respectfully submitted,

BY: /s/ Ralph C. Simpson

Ralph C. Simpson (P30788)
Cooperating Attorney
AMERICAN CIVIL LIBERTIES UNION
FUND OF MICHIGAN
535 Griswold, No. 111-525
Detroit, Michigan 48207-2905
(313) 638-8098

Michael J. Steinberg (P43085)
Kary L. Moss (P49759)
AMERICAN CIVIL LIBERTIES UNION
FUND OF MICHIGAN
2966 Woodward Ave.

Detroit, Michigan 48201
(313) 578-6800, ext. 814

Attorneys for Plaintiff-Appellant

DATED: September 19, 2014

CERTIFICATE OF SERVICE

Ralph C. Simpson certifies that on September 19, 2014 he filed the foregoing document through the court's electronic filing system, and that a copy of same was served on the following counsel for the defendant-appellee by First Class Mail with postage pre-paid at the following address:

Jean-Vierre Adams (P51641)
DPS General Counsel
Rebecca Shaw Hicks (P40732)
Asst. General Counsel
3011 West Grand Blvd., Suite 1002
Detroit, MI 48202

/s/ Ralph C. Simpson

APPENDIX

DETROIT PUBLIC SCHOOLS
STUDENT CODE OF CONDUCT
DISCIPLINARY ACTION

1. ___/___/___/_____ 2. _____ 3. _____ 4. SPECIAL ED. [ ] Y [ ]
SCHOOL CODE — SCHOOL'S NAME — GRADE — SECTION 504 [ ] Y [ ]

5. __/__/__/__/__/__/__/__/__/__ 6. _____ 7. _____/_____/_____
STUDENT'S I.D. # — STUDENT'S NAME — DATE OF BIRTH

8. ___/___/_____ OFFENSE DATE

9. [ ] TYPE OF BEHAVIOR
Class Offense - 1, 2 or 3

10. ___/___ OFFENSE CODE
(01-19)

11. [ ] YES [ ] NO POLICE INVOLVED?

12. ___/___ REPORTED BY:

01 – Principal	08 - Security
02 – Administrator	09 – Bus Driver/Attendant
03 - Counselor	10 - Parent
04 – Teaching Staff	11 – Lunchroom Staff
05 – Support Staff	12 – Student
06 – Paraprofessional	13 - Police
07 – Building Maintenance	14 - Citizen

13. [ ] YES [ ] NO FORM 63 FILED?

14. [ ] TYPE OF ACTION
S = Short Term Suspension
L = Long Term Suspension
T = Administrative Transfer
E = Expulsion Review

15. ____/____/_____ DATE OF ACTION
(mo, day, yr)

16. ____/____/_____ DATE PARENT NOTIFIED
(mo, day, yr.)

17. ____/____/_____ EXPECTED DATE OF RETURN
(mo, day, yr)

CODE OF CONDUCT SUPERVISOR'S USE ONLY

18. ____/____/_____ FORM M DATE
(mo, day, yr)

19. ____/____/_____ CONFERENCE DATE
(mo, day, yr)

20. _____ APPEAL DISPOSITION
N = None
U = Upheld
D = Denied

21. ___/___/_____ RETURNED TO SCHOOL
(mo, day, yr)

22. _____ NEW SCHOOL CODE

23. ___/___/_____ DATE OF REVIEW

24. [ ] YES [ ] NO SPECIAL REVIEW

25. [ ] YES [ ] NO RECOMMENDATION TO EXPEL?

26. ___/___/_____ CENTRAL HEARING DATE
(mo, day, yr)

27. _____ SPECIAL REVIEW DISPOSITION
A = Approved
B = Not Approved

28. _____ EXPULSION DISPOSITION

29. ___/___/_____ DATE OF BOARD ACTION
(mo, day, yr)

Form 4549

Rvsd. 08.06

DETROIT PUBLIC SCHOOLS

UNDESIRABLE INCIDENT REPORT

DIRECTIONS

1. All undesirable incidents of a **serious** nature should be **phoned** to the Area Office.
2. Area offices will make **telephone report** to Deputy Superintendent, Fiscal Affairs when serious incidents occur within the Area.
3. **Form 63** will be used by principal, security officer and others making a written report.
4. Principals are to follow up telephone reports with a written report (Form 63) within 24 hours. Area check should be made within 48 hours.
5. The Security Officer will give a copy of any incident reported by him/her to the school principal.
6. All serious cases involving police must be reported.
   INJURIES TO PUPILS SHOULD ALSO BE REPORTED ON FORM 53. INJURIES TO STAFF SHOULD ALSO BE REPORTED ON FORM 48. DAMAGE TO OR THEFT OF SCHOOL PROPERTY MUST ALSO BE REPORTED ON FORM 446.
7. **Routing:** Copies made in quadruplicate. Distribute copies to Security Office, Northern Annex; Area Superintendent; Code Office; school file.

SCHOOL _____ AREA _____

Has this incident been called in to Area Office? Yes ☐ No ☐

Filed by: _____ _____
Name Title

Type of Incident: _____ Date: _____ Time: _____ A.M. / P.M.

Weapons Used: _____ (Kind of weapon used or none)

Police Involved: _____ In-school Officer ☐ Other ☐ Precinct Call ☐

Incident Location (Room, Hall, In-School, Campus, etc.) _____

PERSON(s) INVOLVED: (Indicate student, staff* or other)

Name _____ Sex _____ Birthdate _____ Race _____

Address _____
City Zip Code

Name _____ Sex _____ Birthdate _____ Race _____

Address _____
City Zip Code

Name _____ Sex _____ Birthdate _____ Race _____

Address _____
City Zip Code

Name _____ Sex _____ Birthdate _____ Race _____

Address _____
City Zip Code

(Additional Names May Be Entered on Back)

If witness is non-student write "parent", "citizen", or "staff".

WITNESSES:

Name _____ Sex _____ Birthdate _____ Race _____

Address _____
City Zip Code

Name _____ Sex _____ Birthdate _____ Race _____

Address _____
City Zip Code

Name _____ Sex _____ Birthdate _____ Race _____

Address _____
City Zip Code

Name _____ Sex _____ Birthdate _____ Race _____

Address _____
City Zip Code

_____
SIGNATURE DATE

(Use p. 2 for Details of Incident)

*For staff - use school address. birthdate optional.