

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MARQUETTE

FREDRICK NANNESTAD,

Plaintiff,

v

FILE NO: 12-50327-CZ
HON. THOMAS L. SOLKA

REPUBLIC TOWNSHIP,

Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This is a FOIA complaint. Defendant Republic Township is a general law township, MCL 41.2, and a "public body" under the Freedom of Information Act (FOIA), MCL 15.231 § 2(d)(iii). Plaintiff Fredrick Nannestad is a resident of the township and a self-described "active civic person." His eleven-count FOIA complaint was filed May 01, 2012 alleging the Township violated the FOIA by failing to timely, completely, and in some instances not responding to his requests for public records.

Summary of Decision and Order

In summary the court finds Plaintiff entitled to the relief requested on some, but not all of his claims. Republic Township prevails on other of his claims with the court finding Plaintiff has no cause for action on certain counts.

Specifically Plaintiff is the prevailing party on Count I, the minute subscription FOIA request, partially prevailing on Count IV but only as to the Treasurer's Tax Collections Disbursement Journal for the period January 1, 2012 through February 29, 2012, Count VI but only as to the Clerk's Withdrawal Journal from Township checking accounts for the period January 1, 2009 to November 30, 2011, and Count IX but only as to bank (credit union) statements for all township accounts (including the Youth

Center, and Heritage Festival accounts) for the period September 1, 2011 to March 31, 2012.

Plaintiff has no cause for action and the Township prevails on Count II the F65 Audit Report, Count III Upper Peninsula Engineers and Architects records, Count V Receipt Journals, Count VII Treasurer's Disbursement Journals, Count VIII Treasurer's Receipt Journals and Count X the General Fixed and Capital Asset Ledger. The Township is partially prevailing on Count IV Tax Collection Disbursement Journals, Count IX Bank records, as to voided and cancelled checks, front and back.

As to Plaintiff's claim of unlawful fees or charges in violation of MCL 15.234 and requests for reimbursement in Count finds in part for Plaintiff and in part for Defendant.

Specific Findings and Conclusions

In general, the controversy centers on approximately 24 written FOIA requests from plaintiff to the defendant submitted during the period March 07, 2011 through April 02, 2012. Some requests are FOIA subscriptions to records that are created on a regular basis (meeting minutes) pursuant to MCL 15.233 § 3(1). Other FOIA requests relate to financial and accounting records generally described in the Municipal Financing Uniform Budgeting and Accounting Act, MCL 141.421, et seq.¹ Some FOIA requests are for identical records, but for successive and, in some cases, overlapping time periods.

Plaintiff's Complaint identifies the following types of public records requested in his FOIA requests:

1. Minutes of all meetings of all boards, commissions, and groups for which minutes are required to be kept, including TIFA.

¹ Or the Budget and State Accounts Uniform System of Account Act, MCL 21.41.

2. Audit reports and form F-65 accompanying the audit reports for the period April 01, 2009 through March 31, 2011.
3. All contracts, correspondence, grant requests, reports, memos and financial transactions between the Township and U.P. Engineers and Architects for the period January 01, 2010 through December 31, 2011.
4. Tax collection disbursement journals for the period January 01, 2008 through November 30, 2011.
5. Receipt journals for all accounts for the period January 01, 2008 to current date.
6. Withdrawal records for all checking accounts of the Township.
7. Treasurer's disbursement journal for all accounts for the period December 01, 2011 through March 31, 2012.
8. Receipt journals for the period December 01, 2011 through March 31, 2012.
9. Bank statements and copies of voided checks for all accounts with all financial institutions for the period September 01, 2011 through March 31, 2012.
10. General ledgers of township fixed and capital assets for the period January 01, 2010 through March 29, 2012.

The Complaint also includes a Count asserting the Township improperly charged plaintiff for costs either not authorized, or in excess of the amounts authorized, by FOIA at MCL 15.234. Plaintiff claims costs and attorney fees incurred for court-ordered production of public records that were not provided before this case was filed.

This court case is one of three between the Township/township officials and Mr. Nannestad.² An observation by the Court of Appeals in another FOIA case, *Hammond Bay Preserve, LLC v Donald E. Miller and Spring Lake Township*, COA docket numbers 244966; 246058 decided January 27, 2004 (unpublished), may be apt, "we first

² *Republic Township v Nannestad*, 11-49315-CZ, *Nannestad v Republic Township*, 12-50327-CZ, *Nannestad v Johnson*, 12-50920-AW

admonish both parties for what appears to be unnecessary, protracted litigation where amicable communication should have swiftly resolved any controversy." That being said, this court will undertake decision of this lengthy FOIA complaint.

This decision is made considering the general principles, purpose, intent and text of the Freedom of Information Act. The purpose of the statute is to provide to all citizens full and complete information regarding the workings of their government and to provide the public with sufficient information to make intelligent choices with respect to the nature and scope of governmental activities through the electoral process, *UPGWA v Department of State Police*, 118 Mich App 292 (1984), *Blue Cross and Blue Shield v Insurance Bureau Hearing Officer*, 104 Mich App 113 (1981). A person seeking information under FOIA is not required to divulge the reasons for the requests, *Cashel v Smith*, 117 Mich App 405 (1982). FOIA is a "pro disclosure" statute and a public body bears a heavy burden of justifying non-disclosure of information requested under the act, *Kincaid v Department of Corrections*, 180 Mich App 176 (1989). A party requesting information in a FOIA case need only show that the request was made and denied, thereafter the burden is on the public agency to show viable defense, *Pennington v Washtenaw County*, 125 Mich App 556 (1983).

However, by both the terms of the statute and case law, a public body is not required to create a public record that does not exist or is not in the possession of the public body when the request is made, *Hoffman v Bay City School District*, 137 Mich App 333, *Hammond Bay Preserve v Miller*, *supra*.

Some of the specifically named items requested by plaintiff that would be a "public record" under FOIA if prepared or maintained by the township, were not records prepared or in possession of Republic Township and are therefore not subject to

production under FOIA. In general, these are items plaintiff contends the township *should* have and maintain under the Uniform Budget and Accounting Act, MCL 141.421, more specifically described below. However, FOIA is not a statute requiring compliance with laws other than FOIA. This court granted the Defendant Township partial summary disposition on the record at the September 07, 2012 hearing, dismissing Plaintiff's claims of FOIA violations by the Township not creating and maintaining records Plaintiff thinks are required by other statutes.

At hearings on September 07, December 21, 2012 and January 08, 2013 testimony and exhibits were offered on the following specific FOIA violations alleged by plaintiff.

Meeting Minute Subscriptions. (Count I) Plaintiff submitted a FOIA request for subscription to Republic Township board and other agency meeting minutes under MCL 15.233. (Plaintiff's Ex 1) The request is dated March 07, 2011 and requests "a subscription to all copies of all minutes of all meetings from all boards, all commissions, and all groups where minutes are required to be kept. . ." Exhibits 2 through 5 are a series of letters and responses between plaintiff and the Township relating to the initial subscription request of March 07, 2011. In his testimony, Mr. Nannestad said the Township did not respond to the subscription request until July 27, 2011. However, the Township response (plaintiff's Exhibit 2) refers to plaintiff reapplying (for minutes) within the six month period of validity of the initial request. Mr. Nannestad also testified he received nothing in response to this subscription request until December 2011. Failure of the Township to reply within the statutory period to the March 07, 2011 subscription request would constitute a FOIA violation but this suit was not filed within the 180 day time period allowed for suits on a wrongful denial. MCL 15.240 sec.10(1)(b).

The court is not making a finding of a FOIA violation in response to the March 07, 2011 subscription request.

However, plaintiff renewed his subscription request with a FOIA subscription request dated January 30, 2012 (plaintiff's Exhibit 6) when he again requests, pursuant to MCL 15.233, a "subscription to all copies of all minutes of all meetings from all boards, all commissions, and all groups where minutes are required to be kept for Republic Township, Michigan." According to plaintiff's testimony, he received no response to this FOIA request until May 02, 2012, the day after this lawsuit was filed. On May 02, 2012 the Township provided a draft copy of the Republic Township Board minutes from April 26, 2012 and a copy of the Board of Review minutes from March 08 and March 29, 2012.³ In a separate transmittal letter dated May 14, 2012, the Township provided plaintiff with a draft copy of the Republic Township Board's special meeting minutes of May 03, 2012.

In his FOIA complaint filed with this court at Count I the plaintiff asserts FOIA violations by delayed responses to the Board of Review meeting minutes for March 2012 and all approved/final minutes for the Republic Township Board.

The Township contends the Republic Township Board of Review is an autonomous, independent body separate and apart from Republic Township as a municipality. The argument suggests that the subscription request in Exhibit 6 addressed to Republic Township should have been addressed to the Republic Township Board of Review. However, the statute at MCL 211.28 provides for appointment of Board of Review members by the Township Board. The statute also provides that on the Tuesday immediately following the first Monday in March the Board

³ Although the May 02, 2012 transmittal letter indicates Board of Review minutes were being provided from a March 08 and March 29 meeting, the attachments include Board of Review minutes from March 12, and March 29, 2012. These meetings appear to be continuation and recesses of ongoing Board of Review meetings.

of Review of each township shall meet at the office of the Supervisor at which time the Supervisor submits to the board the assessment role for the current year prepared by the township supervisor, MCL 211.29.

The FOIA statute describes a public body as "a . . . township . . . governing body . . . or a board, department, commission, counsel, or agency thereof", MCL 15.231(2)(d)(iii). The court concludes a township Board of Review is a "board" of the municipal entity known as Republic Township. Therefore, plaintiff's subscription request is deemed to include a subscription request to the Board of Review minutes. Exhibit 6 is a January 30, 2012 subscription request for six months running February through July 2012, inclusive of the March board of review meetings.

The FOIA statute is silent on how FOIA subscription requests are to be responded to. MCL 15.233(3)(1) provides "a person has a right to subscribe to future issuances of public records that are created, issued, or disseminated on a regular basis. A subscription shall be valid up to six months, at the request of the subscriber and shall be renewable." A FOIA subscription to minutes of township public bodies is satisfied by the clerk or secretary of the public body making available or sending copies of draft and final minutes to the subscriber when those minutes are disseminated to others, including the public body members. It would also be good practice to memorialize the subscription request response with a dated, written statement acknowledging the request and stating the requester is being added to the distribution list.

The Township officials also point out that plaintiff has, in fact, attended all Township Board meetings and many other commission and board meetings within the township. Minutes are available at these meetings to be picked up by citizens as well as board members. According to township testimony and records, plaintiff has

consistently picked up minutes at these meetings. Access to minutes, proposed (draft) and final is also required by the Open Meetings Act, MCL 15.269.

However, availability of the public record by other means does not satisfy the public body's obligation to respond to FOIA requests.

In summary, the court concludes Republic Township failed to timely respond to plaintiff's subscription for minutes of the Republic Township Board and the March 2012 Board of Review meetings. However the minutes were produced without this court ordering production, and within a few days of this lawsuit being filed. The township did not act arbitrarily and capriciously in denying or delaying its response. Plaintiff is awarded his statutory costs and partial, reasonable attorney fees and expenses on Count I, *The Local Area Watch v Grand Rapids*, 262 Mich App 136 (2004).

The F-65 Form for the fiscal year ending March 31, 2011. (Count II)

Local municipalities, townships, and other public agencies are required to file financial form F-65⁴ with the State Department of Treasury in conjunction with periodic audits required by statute. This report is due within six months after the municipalities' fiscal year ends. The Single Audit Act (OMB Circular A-133) requires that F-65s be available for public inspection on request. The F-65 is a spreadsheet summarizing all financial activity of the governmental entity and submitted to the State Treasury along with the narrative audit report.

Plaintiff made a FOIA request for the Township's F-65 for the fiscal year ending March 31, 2011 (Exhibit 8). The Township responded to plaintiff's request on September 26, 2011.⁵ The Township's response indicated its auditor notified the Board that the audit will be finished later than expected with an unknown date of completion.

⁴ F-65 is the Local Unit Fiscal Report.

⁵ All of plaintiff's FOIA requests preemptively grant a 10 business day extension beyond the initial 5 day response period with the extension allowed for by statute.

The Township responded "as in previous years, your request will be granted when the data is available." Plaintiff's requested both the audit report and form F-65. He received the audit report. He did not receive the F-65 for the fiscal year requested. He alleges this is a violation of FOIA. Plaintiff testified that after not receiving the F-65, he went to other municipalities within Marquette County and received fiscal year 2011 F-65 from some, but not all, of the agencies he contacted.

The Township's independent auditor, CPA Michael Greutz testified he has been conducting Republic Township's audits and preparing and filing F-65s for a number of years.

Mr. Greutz described technical difficulties with the state Department of Treasury website for the year 2011 F-65. Plaintiff received F-65s for earlier years. Mr. Greutz testified that for fiscal year 2010 and prior years, the F-65 was an Excel spreadsheet which the auditor filled in, printed out, and mailed or emailed as an attachment to the state Department of Treasury for submission. The township also received a copy in prior years. The state Treasury website provided a new format for 2011 F-65s. The state provided an on-line form on which data was submitted directly to the website. The auditor completed that website F-65 form. He testified that once the data was entered onto the state website, it was not publically available on-line for a period of time. Then when available it could not be printed out in a PDF or useful spreadsheet format. The state website offered no print function. The auditor also testified he could not save a copy of the completed form to his database to provide to the township. By August 2012, it was possible to print individual screen shots, without identifying column and line descriptions. The printed "screen shots" were provided to the plaintiff. In that format the data was useless.

The court finds Gentz's testimony credible and concludes the fiscal year 2011 F-65 in the format described and submitted to the state Department of Treasury does not constitute a "public record owned, used, in the possession of, or retained by Republic Township". It was not in possession of the township in a useable form through no fault or control of Republic Township. Republic Township is not in violation of FOIA in responding to plaintiff's September 15, 2011 request for a copy of the annual audit and form F-65.

Plaintiff contends the Township's failure to retain and have available a hard copy of the 2011 F-65 constitutes a violation of the Uniform Accounting Procedures Manual. That manual is not submitted as an exhibit on trial of this case, but the court draws the inference the manual plaintiff is referring to is a manual derived from the Municipal Financing Uniform Budgeting and Accounting Act, MCL 141.421 et seq. As the court ruled on defendant's Motion for Summary Disposition, FOIA is not a statute for enforcing other statutes such as the Open Meetings Act, the Uniform Budgeting and Accounting Act, or other statutes relating to public entities.

U.P. Engineer and Architect documents. (Count III)

Plaintiff submitted a December 13, 2011 FOIA request for "all contracts (completed and incomplete), correspondence, grant requests (completed and incomplete), reports, memos and financial transactions (completed, incomplete and pending between U.P. Engineers and Architects, Inc.(UPEA) and Republic Township for the period January 01, 2010 through December 31, 2011" (Plaintiff's Exhibit 24.) This

request also grants the township a 10 day extension over the initial 5 day response period. The Township responded December 15, 2011 (Defendant's Exhibit List #3)⁶:

"RESPONSE

The Clerk that resigned, Ms. Paula Stone, reorganized the files prior to her leaving. Said reorganization has proven to be haphazard with multiple instances of misfiling. Republic Township cannot guarantee a complete fulfillment of your request, without a full search of the file system. If you are willing to accept what is presently in the contract file as sufficient to your request, the order will be processed at the first available opportunity. If you are demanding the specific request listed above, you must take written responsibility, at \$10 per hour and \$.15 per page, for a detailed search of the office filing system. Republic Township will hire an individual to do the search. Without that detailed search, Republic Township will not be responsible for missing documents.

Republic Township will hold your request in abeyance, until further written direction is received from you.

NOTICE OF REQUESTER'S RIGHT TO APPEAL TO THE
HEAD OF THE PUBLIC BODY

You are entitled under Section 10 of the Freedom of Information Act to submit a written appeal that specifically states the word "appeal" and identifies the reason or reasons for reversal of the denial to the head of the public body or seek action in circuit court. The head of the public body has 10 days to reverse the denial, uphold all or part of the denial, or issue a notice for a 10-day extension."

Plaintiff took the response as a denial. He appealed the denial on January 09, 2012. The Township responded to the appeal on January 20, 2012 (Plaintiff's Exhibit 23).

On receipt of the Township's response to his appeal of the FOIA denial, Mr. Nannestad responded objecting to the Township's response on the appeal (Plaintiff's Exhibit 24), contending the Township's appeal response did not comply with FOIA. The

⁶ The parties stipulated their pretrial exhibit lists into the record at the start of hearing on September 07, 2012, but then re-marked exhibits during the hearing - hence, Defendant's pre-hearing exhibits are numbered 1 through 14, but defendant marked and offered other exhibits 1 - 6 during the hearing.

Township responded on February 01, 2012 by sending Mr. Nannestad notice that current contracts between the Township and U.P.E.A. were available for pickup at the Township offices at a copying charge of \$29.75.

Mr. Nannestad testified the Township also asked him to pay for 240 hours of record search time for additional records at \$10.00 an hour, or \$2,400, half of which he was asked to pay up front under the statute. MCL 15.234 § 4. Mr. Nannestad responded saying he was willing to work with the Township in paying a portion of the search cost, but also asserted the responsibility for proper filing of township records was with the township and not the citizens. He offered to pay \$800 for the search of UPEA's records with the Township. Mr. Nannestad asserts his FOIA requests could have been complied with if the Township requested the records from its vendor UPEA.

The Township's limited response to the UPEA FOIA request led to Mr. Nannestad explaining why he wanted the UPEA documents and alternate means he might consider, such as obtaining records directly by subpoena from UPEA:

My request was for UPEA files. The Anderson Tachman reports for 2011, 2009, and 2007 suggest the filing and compliance problem had been in existence for a long time. ...

One thing is clear, when one steps back to look at the big picture, in my opinion, any time information is desired about something involving money, the larger the amount of money the smaller amount of information is provided.

Added to that is the fact that Republic Township has raised real estate taxes every year for the last nine years, while going through the worst recession since the Great Depression. The Evergreen Street sewer project is beginning its five year with no action. The water line/water meter project is beginning its fourth year with no action. The "2012 water supply system revenue bond" issue was just approved for \$2 million for another water tank and a copy of the ordinance is not available to the public. At the last township board meeting the supervisor stated that they (the Township Board) were \$23,000 over budget.

Republic Township manages two-three million dollars in tax money a year. Republic Township manages three-seven million in bond/grant/loan money a year. UPEA is involved in many of the projects that involve millions of dollars. And in my opinion, the Board is hiding the fact that it can't follow the law, keep track of the proper paperwork, and keep proper records...

In my opinion, perhaps another method is at our disposal to acquire documents requested, including subpoena, State Police fraud investigation, treasury department investigation, or judicial review in circuit court. . .

After this FOIA lawsuit was filed Plaintiff subpoenaed UPEA records directly from the vendor. In response to the subpoena, he was notified by UPEA personnel that five banker boxes containing approximately 5,000 pages of material were available for his review and inspection. Mr. Nannestad was charged \$200 by UPEA for the search and gathering of Republic Township documents. He paid the \$200. The five banker boxes were transferred to an Ishpeming location where Mr. Nannestad went through the records under the supervision of a UPEA monitor. After going through the records, he identified approximately 800 pages of material that he wanted copied in response to the subpoena. Although by the time of his testimony Mr. Nannestad had not thoroughly gone through all of these documents, he concluded, "we obtained what I believe to be most of the material we asked for...". At the time of his testimony Mr. Nannestad was not yet aware of what UPEA would charge him for copying these pages, but he did pay \$200 for the search.

The Township called UPEA employee Eric Waara to testify. He headed up UPEA's response to the subpoena. He testified UPEA has had a long-term working relationship with Republic Township. The documents responsive to the period requested in the subpoena totaled approximately 5,000 pages. Waara testified this matter first came to his attention when the Township requested copies of current

contracts that were open between UPEA and the Township. Waara gathered these current contracts and sent them to the Township. The court draws the inference that these were the contracts sent on in the partial FOIA response to plaintiff.

Waara testified the documents made available to Plaintiff for review included design calculations, grant applications, preliminary engineering reports, field reports, bidding documents, affidavits of publications, bid ads, and field notes. He did not think all of these documents would be in the Township's possession in the usual course of business. He testified documents that would provide future usefulness to the Township would typically be provided to them, e.g., location of water lines and similar records. Under cross-examination Waara testified UPEA invoices to the Township were included in the records provided to plaintiff. Other items Waara would expect the Township to have received from UPEA, including invoices, were legal surveys, building blueprints, location of water mains, and similar documents, and Waara's assessment should be in possession of the Township.

In response to this production plaintiff sent the Township a letter on this FOIA request dated February 08, 2012 (Plaintiff's Exhibit 26) offering to partially pay for a search of documents for the UPEA FOIA request up to 4-6 hours "plus copies of properly filed and properly cared for documents." He declined to pay or deposit what he regarded as an unreasonable estimate from the Township. Mr. Nannestad then points out "it is the fiduciary responsibility of Republic Township. . . to follow the law and maintain all documents in the prescribed manners. If your files are in such a "mess", why did you not bring action against the alleged perpetrator, Ms. Stone?"

The court takes this exchange as Plaintiff's decision not to make the search fee deposit.

The FOIA statute authorizes a public body to charge a fee for a public record search limited to actual mailing and incremental cost of duplication or publication including labor, the cost of search, examination, review and deletion and separation of exempt from not exempt information, MCL 15.234. The statute also authorizes the public body to request a good faith deposit from the person requesting the public record if the estimated fee exceeds \$50, with the deposit not exceeding ½ of the total fee. In calculating the cost of labor, a public body may not charge more than the hourly wage of the lowest paid public body employee capable of retrieving the information.

Rather than agreeing to pay for the search as requested by the township or depositing money to initiate the search, Plaintiff elected to subpoena records from Upper Peninsula Engineering and Architects, Inc. after this lawsuit was filed.

Because a search of the haphazard filing mess described by the Township was never undertaken, it remains undetermined what UPEA documentation exists in the retention or possession of Republic Township beyond the contracts provided to plaintiff. The parties did not reach agreement on the Township's request for a search fee deposit the file search was not conducted.

There is no dispute of fact that the Republic Township records, particularly as they relate to the UPEA were disorganized and likely located at numerous locations. However, messy, haphazard record filing is not a violation of FOIA. While citizens like Mr. Nannestad have every right to complain of their township government not properly organizing their files and records so that they can be produced without significant cost, that is not a FOIA issue. It may be a political issue between the voters and their Republic Township officials, but FOIA does not mandate a particular filing or record keeping system.

Plaintiff suggests that Republic Township had the same access to UPEA's files as he did by subpoena and the township could have responded to his request by obtaining the records from its contractor UPEA, Inc.

Federal courts have ruled that a public agency access to data in the possession of its contractor or grantee does not mean that production of that data is required under the federal FOIA, *Forsham v Harris*, 445 US 169; 100 S Ct 977 (1980), *National Labor Relations Board v Sears Roebuck and Company*, 421 US 132; 95 S Ct 1504 (1975.) The federal courts, in applying FOIA, distinguish having access to records held by others and an agency's retention or possession of records, *Ciba-Giegy v Matthews*, 428 F Supp 523, (SD NY, 1977.)

Because state FOIA laws are premised on the federal statute, federal court decisions under the federal FOIA are persuasive in applying Michigan FOIA law, *Mackenzie v Wales Township*, 247 Mich App 124 (2001), *Hoffman v Bay City School District*, 137 Mich App 333 (1984.)

The court concludes and finds the Township did not violate the FOIA statute in its response to plaintiff's request for documents relating to Upper Peninsula Engineering and Architects, Inc. retained or in possession of the Township. FOIA does not require the township obtain records from a third party.

Accounting and Financial Records (Counts IV – IX)

Other FOIA requests at issue include Plaintiff's request for tax collection disbursement journals, receipt journals, checking account withdrawal records, treasurer's disbursement journal, receipt journals, bank statements and copies of checks or voided checks, and the Township's general ledgers of fixed and capital assets.

Plaintiff filed a FOIA request for Tax Collections Disbursement Journals for the period January 01, 2008 through December 31, 2011, and all Treasurer's Disbursement Journals for the period January 1, 2008 to November 30, 2011. That FOIA request was responded to in plaintiff's Exhibit 37. Then plaintiff made a subsequent FOIA request for Treasurer Disbursement Journals for the period July 01, 2011 through February 29, 2012. That request was dated March 12, 2012. (Count IV). This request, plaintiff's Exhibit 38, has an overlap in requested journals for the period July 01, 2011 through December 31, 2011, which was previously requested in plaintiff's Exhibit 36. (Repetitive FOIA requests are not barred by the statute.) However, this March 12, 2012 FOIA request includes an additional, subsequent, new period January 01, 2012 through February 29, 2012. The Republic Township Treasurer responded to this request on the same date, plaintiff's Exhibit 39, stating "I already gave you copies of the disbursement journal when you received copies of all receipts in each account. . .you received those detailed sheets when you requested copies of tax collections and disbursement journals on December 07, 2011."

It appears, and the court finds from the exhibits and the plaintiff's testimony, that the Republic Township Treasurer's response to the March 12, 2012 request for disbursement journals overlooked the new requested period of January 01, 2012 through February 29, 2012. Thus, the FOIA response is incomplete. However, the court does not find the treasurer's not sending a second set of the disbursement journal for the period July 01, 2011 through December 31, 2011, previously provided, constitutes a FOIA violation.

In *Densmore v Department of Corrections*, 203 Mich App 363 (1993), the Michigan Court of Appeals adopted with approval a Federal Court of Appeals decision

dealing with repeated FOIA requests under the federal statute, *Crooker v United States State Department*, 628 F2d 9 (9th Circuit 1980) held the federal Freedom of Information Act does not require that the agency from which documents are requested must release copies of those documents when another agency possessing the same material has already done so. In this case, we have repeated request for documents that were previously provided from the same agency. This court adopts the reasoning of *Crooker* approved by *Densmore*. The *Crooker* court concluded "once the records are produced, the substance of the controversy disappears and becomes moot since the disclosure which the suit seeks has already been made."

That accounts for only a portion of the documents requested on March 12 by Mr. Nannestad. The court finds the Township did not provide the disbursement journals for the period January 01, 2012 through February 29, 2012. However, given the large volume of FOIA requests and the responses from the Township, the court finds this to be a good faith error. It was not a deliberate decision to refuse to disclose January - February journal. The court, however, finds the FOIA response to be incomplete and the Township is ordered to produce a treasurer's disbursement journal for that January 01 through February 29, 2012 time period.

Plaintiff's March 12, 2012 FOIA request also for "receipt portions of all cashier's checks issued by Republic Township" for the period January 01, 2010 through February 29, 2012 is documented in plaintiff's Exhibit 40 (part of Count IV.) He had previously requested actual copies of the cashier's check and was told verbally the township did not keep copies. He therefore asked for copies of the receipt portions of the cashier's check. He testified he wanted to "build and complete my disbursement journal by adding these things to it because they would represent disbursements." Mr. Nannestad

further testified he had reason to believe the Township had detailed receipts of the cashier's check because he previously requested and received copies of cashier check receipts which detailed the payees of the checks (Exhibit 41).

Township Treasurer Faye Mattila testified the cashier's checks issued by the Township's depository - Ishpeming Community Federal Credit Union, no longer includes a detailed receipt including the payee information as the two earlier receipts referred to by Mr. Nannestad in Exhibit 41. Now the Township only receives a check stub with the cashier's check. The only information on that stub is the amount of the check. She testified "previously, it used to say Marquette County typed on it, but the new receipts from the credit union do not say Marquette County. We have to handwrite that information." The Township could not provide that which it did not have. The Township is not in violation of FOIA for not providing the receipt portions of cashier checks after the credit union changed the cashier check format

The court finds Plaintiff's request for Receipt Journals and Tax Collection Receipt Journals and Cash Receipt Journals through the period January 01, 2008 through November 30, 2011(Count V) detailed in plaintiff's Exhibits 28, 31, 32, and 34, were all responded to by Republic Township Treasurer Faye Mattila in Exhibits 29, 30, 33, and 35. After the initial response, plaintiff appealed contending the response to his request for tax collection receipt journals was incomplete. The appeal resulted in additional documents being provided. Appeal is a process provided for by FOIA. An initial response followed by an appeal with additional materials being provided after the appeal does not constitute a FOIA violation by non-response.

In plaintiff's Exhibits 43 through 55, plaintiff also made FOIA requests for "detailed Receipt Journals for all accounts in the name of Republic Township for the

period January 01, 2008 and January 01, 2011 to date of his request on July 01, 2011.” (Count V). Because of the volume of material covered by this request, the township Treasurer responded on July 06, 2011 indicating that because of resignation of the township clerk and related staffing problems, the township would need more than five office days to produce the records. “The requested documents will be provided as soon as possible depending on the availability of office staff and at the normal cost that you previously agreed to.” He was also given a notice of right of appeal on this response.

Ultimately, the township responded on August 02, 2011 with 202 pages detailing receipts for the general fund, water fund, sewer fund, solid waste fund, and special assessment funds (Exhibit 45).

Having received that response, Mr. Nannestad followed up with a second FOIA request for more detail on these documents with a request dated August 08, 2011. Specifically, he noted the 202 pages provided by the Township did not include any entries for certain “missing” months, June 2008, July 2008, October 2008, and other detailed “missing” months through June 2011. He also noted certain months missing from the special assessment, bond and interest redemption accounts and the emergency debt retirement accounts. In response to this request for information on these “missing” months, the Township Treasurer told plaintiff that there were no journal entries during these months; therefore there is no journal entry to provide in response to his FOIA request. Again, Mr. Nannestad considered that a FOIA violation because “I found that to be a little strange in that, having read through the Uniform Accounting Procedures Manual it is my understanding that, when there is no activity in an account, you enter zero for that particular month and then move on. I was told that they didn’t do that.”

As previously ruled, if the Township does not make entries for particular month and there is no document to produce, although they may be in violation of account standards (although the court is not so finding in this decision), failure to produce records the township does not have does not constitute a FOIA violation.

Throughout the records received by plaintiff in Exhibits 43 through 55, Mr. Nannestad testified the absence of detailed cash receipts for the various funds constituted an incomplete FOIA response, and therefore a violation of FOIA. His review of the documents provided showed no entries of any cash receipts of any kind. He concluded the absence of a detailed cash receipt journal constituted a FOIA violation.

The Township Treasurer testified she did not keep a journal specifically identified as a "cash receipt journal" for petty cash. She does keep \$100 "petty cash" in her drawer for making change to people coming making cash payments. She accounts for and balances that petty cash drawer. However, she testified cash payments are reflected in the receipt journals provided to plaintiff. Cash payments are reflected in the general ledger with a receipt. The Treasurer testified anytime anyone paid for anything with cash, including photocopying, faxes, or any other cash payments, those payments are reflected in the general ledger and accounted for.

The court finds the Treasurer's testimony credible and does not find a FOIA violation in the Township's response to Plaintiff's FOIA requests reflected in Exhibits 28, 31, 32, and 34, and 43 through 55.

On December 14, 2011 Plaintiff submitted a FOIA request for records of withdrawals from township checking accounts, along with a detailed explanation of what each entry was for, explaining specifically where the money went, the party authorizing the withdrawal, and the party receiving the funds withdrawn (Count VI). The Township

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responded December 15, 2011 declining to provide the explanations requested by plaintiff, indicating FOIA is a statutory system that requires a public body to produce records, not explanations. He was also informed of his right to appeal this decision. He appealed this response (Exhibit 58) and clarified his request by asking for copies of Township journal entries for each checking account withdrawal for the time period requested. When told the Township journals do not reflect this level of detail, Mr. Nannestad testified he found that "most distressing." Offering his accounting opinion based on common sense and experience that "every time money moves, you should make a note of it. We do that on our own checkbooks. When I was a bookkeeper for the business I ran, we had to do that. . .".

The Treasurer testified that other than her tax accounts, generally the treasurer does not make disbursements. Checks are issued by the Township Clerk after payment is authorized by the Township Board. Ms. Mattila testified the Township Clerk maintains a journal showing withdrawals with all of the checks and payments made.

In the multitude of exhibits and documents submitted by plaintiff and defendant, the court finds no record of an actual response to plaintiff's December 13, 2011 request for records relating to withdrawals from the identified checking accounts. If the Township Clerk maintained a journal detailing those checks, it would seem that journal should be responded to by the Township in response to the FOIA request in plaintiff's Exhibit 56.

To the extent the Township did not provide the Clerk's Journal of Withdrawals (if it exists), the court finds the Township in violation of this FOIA request and the Township is to provide the Clerk's journal showing any detail of checks written on these accounts for the time period requested.

On April 02, 2012, Mr. Nannestad submitted a FOIA request for “the Treasurer's Disbursement Journals,” (which may include treasurer’s cash disbursements journal, treasurer’s disbursements journal, treasurer’s tax disbursements journal, and any other disbursements journal) for all accounts in the name of Republic Township for the period December 01, 2011 through March 31, 2012 (Count VII).

The Township responded on April 04, 2012 with disbursement journals. The treasurer also wrote to plaintiff that this requested information “has been requested on more than one occasion and I have provided those documents already, which are shown by the enclosed copies of the FOIA requests and my reply.” The Treasurer then included earlier FOIA requests for disbursement journals and tax collection receipt journals on November 28, 2011. However, those requests were for disbursement journals for a period ending November 30, 2011. The Treasurer testified that on review of her letter and receipt for this request, that she did, in fact, provide the disbursement journals requested in Mr. Nannestad’s April 02, 2012 FOIA request. She testified “I provided everything that he requested.” The court finds the treasurer credible in her accounting for responses, within her records, to this FOIA request and the court does not find a FOIA violation in response to Mr. Nannestad’s April 20, 2012 FOIA request (plaintiff’s Exhibit 59.)

On April 03, 2012 Mr. Nannestad made a FOIA request for “all Receipt Journals (including cash receipts journal, receipts journal, and tax collection receipts journal for Republic Township for the period December 01, 2011 through March 31, 2012), as well as copies of all documents showing all deposits of cash into all accounts for the same time period as well as all cash deposits for the period January 01 through November 30, 2011 (plaintiff’s Exhibit 61) (Count VIII). Plaintiff had made prior FOIA requests for

receipt journals and the April 03, 2012 request was intended to dovetail up against the earlier time periods with some added dates. The Township responded to this April 03 with the same information and FOIA response that they provided in response to his April 02, 2012 request for treasury disbursement journals. Plaintiff testified, like the April 02, 2012 FOIA request the Township did not provide the requested material for the new dates. The court finds the treasurer's accounting of her response and the materials provide credible and the court does not find a FOIA violation in the Township's response to plaintiff's April 02, 2012 and April 03, 2012 FOIA requests reflected in plaintiff Exhibits 59 and 63.

On April 02, 2012 plaintiff also made a FOIA request for "all bank statements and copies of all voided checks attached to these bank statements, for all accounts from all financial institutions in the name of Republic Township for the period September 01, 2011 through March 31, 2012." (Count IX). Mr. Nannestad made similar requests for earlier time periods for the period January 01, 2008 through August 31, 2011.

The past FOIA requests for copies of bank statements were responded to with those copies, to the extent the Township had the records. FOIA requests made after this lawsuit was filed for bank statements were also provided (although they are not part of this lawsuit.) However it is not clear from the Township's response or the treasurer's testimony that bank statements for the period September 01, 2011 through March 31, 2012 were provided. Once a valid FOIA request is made, the Township is required to respond and to document their response. Although the court finds the Treasurer's testimony credible as to disbursement and receipts journals provided by the Treasurer, it is not clear that the FOIA request for Township bank statements for the period September 01, 2011 through March 31, 2012 were provided. The court accepts

Plaintiff's testimony as credible that this material is simply not included in the material provided by the Township and the Township overlooked the new dates testifying, "They didn't - probably didn't read 64 and didn't provide them."

The Township is to provide any bank account statements in its possession for the period September 01, 2011 through March 31, 2012.

The Township did not furnish copies of voided and cancelled checks. Plaintiff subpoenaed "copies of all documents from the attached itemized list for accounts held in the name of Republic Township" by the Ishpeming Community Federal Credit Union. One hundred sixteen withdrawals from various township accounts from the period April 30, 2009 through May 30, 2012 were listed. The credit union responded to this subpoena with 139 pages of copies of actual checks, front and back, account printouts for each check. (Plaintiff's Exhibit 42) These are documents and records held by the credit union and not the Township. The Township treasurer testified the township did not get copies of cancelled or voided checks, front and back from the credit union.

Mr. Nannestad testified he believes this constitutes a violation of FOIA because "after reading through the Uniform Accounting Procedures Manual and the Records Retention Act it is my belief and I understand they are required to keep copies of all cancelled checks on site, even though they may be electronic."

As the court ruled from the bench on the Township's Motion for Summary Disposition, the fact that the township does not have records that plaintiff believes are required by a statute other than FOIA does not, itself, constitute a violation of the Freedom of Information Act. The court does not find the township in violation of FOIA in response to his FOIA request in Exhibit 40.

The Township is not required to provide copies of cancelled and voided checks "front and back" that they did not have. Financial institutions, today, generally don't return cancelled checks to account holders, unless requested and paid for by the account holder. The Ishpeming Community Federal Credit Union software for keeping electronic copies of checks require an older computer operating system to read the data. Plaintiff purchased a computer with that older operating system, incurring a \$179 out-of-pocket expense. He also paid other fees to the credit union to get copies of these checks in that digital, electronic format. If plaintiff decided to subpoena these records directly from the credit union and to incur the cost of a computer and older operating system to read the digital format the checks were in, that is not an expense of FOIA violation chargeable to the Township.

General Fixed and Capital Asset Ledger (Count X)

On April 02, 2012 Plaintiff also made a FOIA request for "the Republic Township general ledger" showing general fixed and capital assets for the period January 01, 2010 through March 29, 2012. The Treasurer responded April 09, 2012 indicating the requested material could be picked up at the Township offices, which Plaintiff did on April 10, 2012. The Township's response includes a general fixed asset and capital ledger prepared by the Township's accountant, Anderson Tackman & Company, PLC, and they passed on Anderson Tackman's professional billing fee in the amount of \$150 for plaintiff to pay.

Mr. Nannestad found this response objectionable and in violation on two counts: (1) he contends the assets listed were incomplete. Again, he described his understanding of what should generally be included in fixed assets. He was looking for both the depreciation schedule and line item "hard inventory" of all physical items the

Township owned. He gave examples of going into township offices and seeing desks, tables, chairs, computers and printers, etc., but on the asset list provided by the Township there are no listings of such tables, chairs, desks, computers or printers. He wants the Township to provide a complete list; (2) he also objects to the Township passing on Anderson Tackman's \$150 charge for producing this ledger.

The Township's independent accountant, Michael Greutz, with Anderson Tackman, testified that generally accepted accounting principles require listing assets valued at \$5,000 or over. He testified "anything under a cost of \$5,000 is not required to be on that list." He testified that generally accepted accounting principles do not require the Township to keep a detailed inventory of every physical item owned by the Township. The court finds Greutz qualified and credible as it relates to what is required to be kept on the Township's ledge of fixed and capital assets and the document provided is complete as required by generally accepted accounting principles and does not constitute a FOIA violation for being incomplete.

However, the court finds the Township erred by passing on Anderson Tackman's professional fee for producing this response. The amounts the Township can charge are set by statute and the law does not allow the Township to pass through charges from third parties.

Violation of MCL 15.234 Charges (Count XI)

FOIA allows the public body to charge limited fees for providing public records, MCL 15.234. Fees are limited to actual copying and mailing costs. Labor for searching, examination, review and separation of exempt from non-exempt records is limited to the lowest paid public employee capable of retrieving the material. If the estimated cost of

search and retrieval exceeds \$50 the agency may require the requestor to deposit ½ of the estimated cost over \$50.

The court finds and concludes the Township wrongfully passed on the Anderson Tackman bill of \$150 for the Fixed and Capital Asset Ledger. However the Township did not violate FOIA and Plaintiff is not entitled to reimbursement for \$200 paid to UPEA, \$179 for an older operating system on a laptop to read ICFCU digital check records, or cost of subpoenaing those check records from the credit union. The Township was not required to provide records they did not have. If Plaintiff chose to spend money to get records from third parties that cost is not chargeable to the Township under FOIA.

Miscellaneous Items

Although Plaintiff submitted other FOIA requests as marked exhibits, neither his Complaint nor testimony details any alleged FOIA violations in the Township's response to these requests.

In summary the court finds and concludes the Republic Township properly responded to most, but not all of Mr. Nannestad's FOIA requests. The court also finds and concludes township officers were attempting, in good faith, to respond to all of Mr. Nannestad's frequent, serial, and numerous FOIA requests. There was no *de facto*, willful denial of Plaintiff's access to public records. Errors of omission in responses were human errors and not a willful "stonewalling" of Mr. Nannestad.

Nevertheless, because Plaintiff prevails on some, but not all, of the Counts in his Complaint Plaintiff can recover his statutory and taxable costs⁷ and partial, reasonable attorney fees. Plaintiff prevails on the following Counts:

⁷ MCL 600.2405, 600.2441, MCR 2.625

- Count I, Meeting Minute Subscriptions. These were given after this case was filed, but without need for a court order. Plaintiff is awarded partial, reasonable attorney fees and statutory costs.
- Counts IV – IX, Accounting and Financials, partially prevailing
 - The Defendant Township is ordered to produce:
 - Count VII Treasurers Disbursement Journal for January 1, 2012 to February 29, 2012.
 - Count VI Account Withdrawal Journals, but only as account withdrawals; FOIA does not require the public body to provide explanations.
 - Count IX, Bank statements, partial, only for the period September 01, 2011 through March 31, 2012, and no cancelled or voided check copies.
- Count XI, MCL 15.234, Fees and Costs, partially prevailing
 - The Defendant Township is ordered to reimburse Plaintiff for the \$150 charge from Anderson Tackman for the Fixed and Capital Asset Ledger

Plaintiff's loses on the following Counts, for which he has no cause for action:

- Count II, F65 Audit.
- Count III, UPEA records and documents.
- Count IV Cashier Check Receipts, Tax Collection Disbursement Journals, and all requested Treasurers' Disbursement Journals except for the period January 1- February 29, 2012,
- Count V, Receipt Journals January 1, 2008 through November 30, 2011
- Count VIII, Receipt Journals December 1, 2011 through March 31, 2012
- Count IX , Cancelled and voided check copies.
- Count X, General Fixed and Capital Asset Ledger
- Count XI Fees and Costs

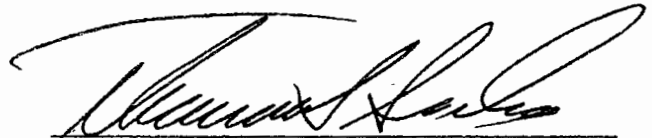
- Township not required by FOIA to reimburse Plaintiff for \$200 and other copying costs paid to UPEA, \$179 for a laptop and old operating system to read ICFCU digital check records, or subpoena costs for those records.

Plaintiff may submit a Bill of Taxable Costs and a statement of attorney fees.

SO ORDERED.

Dated:

March 07, 2013



Hon. Thomas L. Solka, Circuit Judge

c: Daniel Mead
David R. Mechlin

Date of mailing:

03/07/13

cc: Terry Butchart