

**STATE OF MICHIGAN
CIRCUIT COURT FOR THE COUNTY OF MIDLAND**

MACKINAC CENTER FOR PUBLIC POLICY,
a nonprofit Michigan corporation,

Hon.

- v -

Case No.:

MICHIGAN LIQUOR CONTROL COMMISSION,
a Michigan state agency.

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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.

INTRODUCTION

This matter involves an administrative agency of the State of Michigan erecting roadblocks to citizens using the Freedom of Information Act. The plaintiff, 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.

The Mackinac Center made a routine request to the Michigan Liquor Control Commission [the “Commission”] for electronically-stored information. Commission staff initially offering to transfer the electronic data on-site at the Commission, but Plaintiff’s agent did not, at that time, have an electronic storage device to transfer the data on to. The Commission staff therefore required a formal FOIA request. In response to the formal FOIA request, the Commission responded with a demand for payment of the estimated amount to process the request which staff had previously offered without requiring payment.

The estimated payment required by the Commission was \$1,550.22. This estimated payment was based on copying costs for 6,000 pages at a cost of 25 cents per page.

FOIA only authorizes governmental bodies to charge “the actual incremental cost of duplication or publication.” As the request was made for an electronic copy, the Commission cannot charge a fee equivalent to making a paper copy – it can only charge the actual incremental cost of duplication, which for copying onto a digital device should be zero or near zero. Furthermore, even if the Commission could charge a fee equal to making photocopies, 25 cents exceeds any reasonable incremental cost for making photocopies.

The costs demanded by the Commission’s policies are far in excess of these statutory limits and are designed to throw up roadblocks to the public’s access to information which impermissibly delay and dissuade the public from obtaining the “full and complete information regarding the affairs of government” which is the purpose of FOIA. Such excessive costs constitute a constructive denial of a request and are illegal.

PARTIES AND JURISDICTION

1. Plaintiff, the Mackinac Center for Public Policy (the “Mackinac Center”), is a nonprofit Michigan corporation “dedicated to improving the quality of life for all Michigan residents by promoting sound solutions to state and local policy questions.”
2. The Mackinac Center is headquartered in the City of Midland, Midland County, Michigan.
3. Defendant, the Michigan Liquor Control Commission (“Commission”), is a state of Michigan administrative agency and is headquartered in Ingham County, Michigan.
4. The circuit courts have jurisdiction pursuant to MCL 15.240(1)(b) over matters related to a public body’s refusal to disclose requested information.
5. Pursuant to MCL 15.240(4), venue is proper in the “circuit court for the county in which the complainant resides or has his or her principal place of business, ...”
6. Since the Mackinac Center is headquartered in Midland County, venue is appropriate in the Midland Circuit Court.

GENERAL ALLEGATIONS

7. On or about October 22, 2014 an intern at the Mackinac Center working on its behalf contacted the Commission seeking liquor price data which had been submitted to the Commission by liquor distributors under the Commission’s “post and hold” pricing policy.
8. On or about October 27, 2014, another agent of the Mackinac Center contacted the Commission by phone and was told that most of the price data requested was recorded on paper, but that approximately 2.5 months’ worth of price data was kept in a new electronic system on computer.

9. On or about November 7, 2014, the Mackinac Center agent visited the Commission and was told that he could have a copy of the electronically-stored data at that time if he could produce an electronic storage device such as a USB flash drive. No mention was made at that time of any cost for copying or duplication.

10. At that November 7, 2014 meeting, the Mackinac Center agent did not have an electronic storage device with him. At that time he asked the Commission staff whether he could mail a USB flash drive to them to obtain the data. The Commission staff and Mackinac Center agent agreed to submit the request as a formal FOIA request.

11. On or about November 11, 2014, the Mackinac Center agent submitted a formal FOIA request via email. A copy of that email is attached as Exhibit A.

12. On November 14, 2014, the Mackinac Center agent wrote to the Commission's FOIA coordinator, Jill Odell, and asked if he could come to the Commission in person with a USB flash drive and get a copy of the requested data. A copy of this November 14 email is attached as Exhibit B.

13. In response to this November 14 request, Ms. Odell replied that: "The FOIA request you submitted will require an estimate and a deposit before we can continue to process it. The MLCC has 5 business days to respond to your request, therefore, you will receive an estimate to process your request by November 20, 2014." A copy of this email response is attached as Exhibit C.

14. The Mackinac Center agent replied to this November 14 email, asking: "MLCC must do an estimate to ascertain the cost of sticking a thumb drive in your computer?" A copy of this November 14 email response is attached as Exhibit D.

15. Ms. Odell replied on November 17, 2014 that “As a number of the requested documents are not in electronic format, an estimate is necessary.” A copy of this November 17 email is attached as Exhibit E.

16. On November 19, 2014, the Mackinac Center agent corrected Ms. Odell’s November 17 response: “Is it possible that you folks misinterpreted my first request? I’m specifically interested in only the 2.5 months of data already in your computer system, presumably on spreadsheets.” A copy of this November 19 email is attached as Exhibit F.

17. On November 20, 2014, Ms. Odell provided the MLCC’s estimate and demand for payment: “REQUEST GRANTED. Pursuant to Section 4 of the FOIA, the estimated cost of processing your request is \$1,550.22 (find invoice enclosed). If the estimated cost exceeds \$50.00, a deposit of 50% of the amount must be received in order to continue the processing of your request. Please submit your payment per the enclosed invoice.” A copy of this response letter is attached as Exhibit G.

18. The November 20, 2014 response included an invoice. This invoice contained calculations that the request required 1.5 hours to locate and duplicate the requested electronic information at an hourly cost of \$33.48, and duplication costs of copying 6,000 pages as a cost of 25 cents per page. These total costs equaled \$1,550.22. A copy of this November 20, 2014 invoice is attached as Exhibit H.

19. FOIA allows a public body to charge: “[no] more than the hourly wage of the lowest paid public body employee capable of retrieving the information necessary to comply with a request under this act.” A full time employee who is paid an hourly wage of \$33.48 would be paid an annual salary of approximately \$69,638.40.

20. It defies belief that the “lowest paid public body employee capable of retrieving the information” is paid a \$69,638.40 annual salary, and that there are no qualified employees or clerks who are paid less who could transfer this electronic data to an electronic storage device, or that it would take him or her 1.5 hours to do so.

21. FOIA allows the Commission to charge only “the actual incremental cost of duplication or publication.”

22. The incremental cost of duplicating an electronic document is zero or near zero when the recipient provides an electronic storage device.

23. Nothing in FOIA allows a covered entity to demand a charge for electronic documents that is similar to what it could have charged if the documents were not in electronic form and required physical photocopying – only “actual incremental costs” may be charged, not hypothetical or comparable costs.

24. The Mackinac Center did not pay the requested \$1,550.22. Instead it considered this excessive amount for inserting an electronic memory storage device and clicking “save to” a constructive denial of the request.

COUNT I

THE COMMISSION’S CHARGE FOR COPIES WHEN NO PHOTOCOPYING OCCURS IS NOT PERMITTED BY STATUTE

25. The Mackinac Center hereby incorporates the preceding paragraphs as if fully restated herein.

26. FOIA allows for government bodies to charge a fee for responses, which is set out in MCL 15.234, being Section 4 of FOIA.

27. The Section 4 fee “shall be limited to actual mailing costs, and to the actual incremental cost of duplication or publication including labor, the cost of search, examination, review, and the deletion and separation of exempt from nonexempt information as provided in section 14.”

28. Neither Section 4 nor any other section of FOIA allows the Commission to charge a fee for an electronic copy that is equivalent to the cost of photocopying.

29. Only the “actual incremental cost of duplication” may be charged, and for an electronic file, this cost is negligible or zero.

COUNT II

THE COMMISSION’S EXCESSIVE COSTS FOR LABOR VIOLATE FOIA AND CONSTITUTE A CONSTRUCTIVE DENIAL

30. The Mackinac Center hereby incorporates the preceding paragraphs as if fully restated herein.

31. MCL 15.234, being Section 4 of FOIA, provides the allowable charges for FOIA compliance.

32. Section 4(3) provides the standard for determining the “actual” costs (emphasis added):

In calculating the cost of labor incurred in duplication and mailing and the cost of examination, review, separation, and deletion under subsection (1), a public body **may not charge more than the hourly wage** of the lowest paid public body employee capable of retrieving the information necessary to comply with a request under this act.

33. That the demanded 25 cents per page fee exceeds the “actual incremental cost of duplication” is shown where local copy shops, which presumably make a profit from the service, charge only ten cents per page.

34. The demanded hourly fee of \$33.48 exceeds “the hourly wage of the lowest paid public body employee capable of retrieving the information necessary to comply with a request...”

35. The locating of the file and transfer of the requested information to an electronic storage device could be done by a person who makes less than \$69,638.40 a year in wages.
36. MCL 15.243, being Section 13 of FOIA, permits a public body to exempt certain information from public disclosure.
37. MCL 15.244, being Section 14 of FOIA, permits a public body to “separate the exempt and nonexempt material.”
38. Section 4(1) allows the government body to charge for “the cost of search, examination, review, and the deletion and separation of exempt from nonexempt information as provided in section 14.”
39. The Mackinac Center request detailed in this complaint contained nothing that would be exempt under Section 13.
40. Section 14 does not allow the public body to charge a fee for separation of materials for every request.
41. Section 14 only allows a charge for separation of documents “If a public record contains material which is not exempt under section 13, as well as material which is exempt from disclosure under section 13.”
42. It is inappropriate to charge a fee which includes the cost of separation unless the requested materials contain information that must be separated.
43. Charging every request an amount for examining exempt material violates the intended public policy of FOIA which is to provide “full 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.”

44. When a public body charges costs and fees that exceed the amount allowed by the statute, and these costs and fees are clearly excessive, the courts will find that these prohibitive costs are a “constructive denial of the request.” See *Detroit Free Press v Michigan Department of State*, unpublished opinion per curiam of the Court of Appeals, issued May 16, 1997, (Docket No. 188313), available as 1997 WL 33347975. A copy of this unpublished opinion is attached as Exhibit I.

45. The Commission’s demand for excessive fees in this matter constitutes a constructive denial of the request.

CONCLUSION AND RELIEF REQUESTED

For the reasons stated in this complaint, the Mackinac Center requests that this honorable court declare that:

The \$1,550.22 in costs and fees demanded by the Michigan Liquor Control Commission for a simple electronic file transfer constitutes a constructive denial of its request.

The Commission cannot charge a fee for an electronic copy which is the equivalent to the cost of a photocopy when no actual photocopy has been made.

In the alternative, if the Commission can charge a fee equivalent to a hypothetical paper photocopy, copy fee of 25 cents per page is excessive, and the proper cost should be in the range of seven cents to ten cents. The Commission’s hourly cost of \$33.48 far exceeds “the hourly wage of the lowest paid public body employee capable of retrieving the information necessary to comply with a request.”

Further, the Mackinac Center requests that this Court award its “reasonable attorneys’ fees, costs, and disbursements” pursuant to MCL 15.240(6), being Section 10(6) of FOIA. Also, that this Court find that the Commission has “arbitrarily and capriciously violate[d] this act by

refusal or delay in disclosing or providing copies of a public record” and impose punitive damages in the amount of \$500.00 to the Mackinac Center pursuant to MCL 15.240(7), being Section 10(7) of FOIA; as well as any other relief that this court considers proper or equitable.

Respectfully submitted,

January 22, 2015

Derk A. Wilcox
Mackinac Center Legal Foundation