STATE OF MICHIGAN
COURT OF CLAIMS

THE INVISIBLE INSTITUTE and THE DETROIT METRO TIMES,

Plaintiffs,

v

MICHIGAN STATE POLICE,

Defendant.

No. 23-000168-MB

HON. CHRISTOPHER F. YATES

4/3/24 MOTION OF ATTORNEY GENERAL DANA NESSEL FOR LEAVE TO FILE AMICUS CURIAE BRIEF

ORAL ARGUMENT NOT REQUESTED

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04/03/2024 MOTION OF ATTORNEY GENERAL DANA NESSEL FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Michigan Attorney General Dana Nessel, through counsel Linus Banghart-Linn, Chief Legal Counsel, moves for leave to file the attached amicus brief in support of Plaintiffs in this matter, and in support says as follows:

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1. Attorney General Dana Nessel is the chief law enforcement officer of the State of Michigan.

2. As the State's chief law enforcement officer, the Attorney General has an interest in ensuring that Michigan's statutes, including the Freedom of Information Act, are appropriately interpreted and applied.

3. In addition, the Attorney General has a strong interest in holding public officials and public servants accountable. The Attorney General believes that the balance of the public interests in this case militate in favor of the transparency the Legislature sought to ensure when it passed the FOIA.

4. Undersigned counsel has sought concurrence in the relief requested, and counsel for all parties do not oppose the relief requested.

For these reasons, Attorney General Nessel respectfully requests that this Court grant her leave to file the attached proposed brief amicus curiae in support of Plaintiffs.

Respectfully submitted,

Dana Nessel
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PROPOSED
BRIEF OF AMICUS CURIAE ATTORNEY GENERAL DANA NESSEL IN SUPPORT OF PLAINTIFFS

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ARGUMENT

I. The public interest in transparency and accountability demands that MSP, as a public body, disclose the names of licensed police officers.

> "*The role and responsibility of police officers in our society is a great one; one in which our authority is derived from the trust and support of the people we serve.*"
>
> — Colonel Joseph Gasper, former Director of the Michigan State Police.

Our State—like all states—gives a great deal of power to law enforcement officers—and not just a great amount of power, but indeed a monopoly on such power. Only police officers may lawfully pull over a driver, arrest and detain a person, or enter a home (with a warrant or exigent circumstances) in order to make a search or arrest. What would be trespass, assault, or kidnapping when done by another individual is the proper mission of police officers in the prevention, detection, and investigation of crime.

But it is an axiom of human nature that giving some people power over others entails a risk that this power will be abused. And to this end, our laws generally require that those who wield governmental power do their work in the sunlight. Except in specific and narrowly prescribed cases where secrecy is required, our courts hear cases as a matter of public record, and our judges sign their own names to their opinions and orders. Our deliberative bodies are governed by the Open Meetings Act, MCL 15.261 *et seq.*, and must open their meetings to the public accordingly. Our administrative agencies enjoy rulemaking power, but may only exercise it within the provisions of the Administrative Procedures Act, MCL 24.201 *et seq*. We do not accept Star Chamber courts, nor do we accept important

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policy decisions being made behind closed doors. Similarly, we do not accept a secret police force.

Even in the private sector, those granted a license from the government to ply their trade are publicly named. The State Bar of Michigan maintains a public directory of all licensed Michigan attorneys. And the Department of Licensing and Regulatory Affairs (LARA) maintains directories of all the professions it licenses—from barbers to plumbers, from hearing-aid dealers to MMA referees, the names of these licensed professionals are available for anyone to find.

Making these names public serves goals of transparency, accountability, and protection of the public. Not only does it promote accountability among those who are licensed, it also protects the public from those who are not licensed in good standing. Because of the availability of this licensing information, a person who is dealing with someone holding themselves out as an attorney, a chiropractor, or a roofer can easily check the standing of the relevant license. But not so when dealing with someone holding themselves out as a police officer. Because of their overbroad reading of the law-enforcement related exemptions in MCL 15.243, and relying on a bare assertion of endangerment of law enforcement officers, MSP has claimed the privilege of withholding the names of every licensed law enforcement officer in the State.

That refusal runs counter to Michigan's Freedom of Information Act (FOIA), which advances a strong public interest in the disclosure of information in order to help inform the public how their government does its business. Our Supreme Court

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has observed that "disclosure has been the consistent outcome where citizens seek to learn about government employees and their work." *Mager v Dep't of State Police*, 460 Mich 134, 142 (1999). Time and again, our courts have held that the names of individuals (and even the addresses, which are not sought by plaintiffs in this case) who are employed by or associated with public institutions are not subject to be withheld under FOIA's privacy exemption. See, e.g., *Int'l Union, United Plant Guard Workers of America v Dep't of State Police,* 422 Mich 432 (1985) (list containing names and home addresses of individuals employed by private security guard agencies was not so personal and private that it should not be disclosed); *Tobin v Civil Serv Comm,* 416 Mich 661 (1982) (FOIA does not prohibit disclosure of names and addresses of classified civil service employees to public employee labor organizations); *Mich. State Employees Ass'n v Dep't of Mgt & Budget,* 135 Mich App 248 (1984) (employees' home addresses do not fall under privacy exemption of FOIA).

The Legislature has granted a number of exemptions from FOIA's requirement of transparency to law enforcement agencies. But these exemptions are not absolute—they are permissive and must be narrowly construed. And, as it relates to the exemption at issue here, it does not apply where "the public interest in disclosure outweighs the public interest in nondisclosure in the particular instance[.]" MCL 15.243(1)(s).

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MSP's motion to dismiss does not grapple meaningfully with this important balancing of interests. It does not recognize the strength of Plaintiffs' arguments in favor of disclosure. And the supposedly strong public interest in nondisclosure that MSP puts forward (specifically, a risk of danger to officers) is not plausible. For the reasons that follow, MSP has not shown entitlement to summary disposition, and this Court should deny their motion.

A. The balance of public interests regarding disclosure of the names of police officers weighs in favor of disclosure, and MSP has not satisfied its burden of showing that the "police-identity exemption" requires concealment.

MSP first asserts that the requested information is exempt from disclosure under the "police-identity exemption," found at MCL 15.243(1)(s)(*viii*). In this exemption, the Legislature has created a conditional ability for a law enforcement agency to withhold records:

> (1) A public body may exempt from disclosure as a public record under [the FOIA] any of the following:
>
> * * *
>
> (s) *Unless the public interest in disclosure outweighs the public interest in nondisclosure in the particular instance*, public records of a law enforcement agency, the release of which would do any of the following:
>
> * * *
>
> (*viii*) Identify or provide a means of identifying a person as a law enforcement officer, agent, or informant.
>
> [MCL 15.243 (emphasis added).]

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Thus, the Legislature has explicitly refused to grant law enforcement agencies carte blanche to withhold their records simply because those records would identify a person as a law enforcement officer. Rather, the Legislature has mandated a balancing test, here as elsewhere in the FOIA, which requires the public body to demonstrate that the public interest in nondisclosure outweighs the public interest in disclosure. See *Detroit Free Press, Inc v Southfield*, 269 Mich App 275, 282 (2005) (explaining that "[c]ourts narrowly construe any claimed exemption and place the burden of proving its applicability on the public body asserting it"). And that burden is not a minimal one—the public body must "provide [a] *complete particularized justification*" in support of the application of an exemption. *Detroit Free Press v City of Warren*, 250 Mich App 164, 167 (2002).

MSP has not made the required showing to justify withholding all names. MSP points to the statutory language as contemplating that "there certainly may be particular instances where the public interest in disclosure outweighs the Legislature's policy determinations concerning the identities of police." (Def's Br, p 19.)[1] But despite recognizing that to be true, MSP seeks to dismiss this suit in order to not release the names of *any* certified police officers. MSP accuses Plaintiffs of being too broad in their request by seeking the names of all law

[1] This description attempts to create a tension between "the public interest in disclosure" on one hand and "the Legislature's policy determinations" on the other. But this is erroneous: the Legislature made a policy determination to require consideration of the public interest in disclosure. Thus, the entire provision—not only the exemption but also the conditions the Legislature set on the exemption—is the Legislature's policy determination,

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enforcement officers. (Def's Br, p 19.) MSP points out that such an absolute approach cannot be squared with the Legislature's decision to make the law-enforcement exemptions subject to a balancing of interests. But it is MSP that is taking the absolute approach here—Plaintiffs recognize that releasing the names of undercover officers might well endanger those officers, and so they do not object to keeping those names secret. This is consistent with the case-by-case approach created by the Legislature. In contrast, MSP seeks to withhold *all* names, which is squarely at odds with the Legislature's approach.

To the extent there may be some circumstances that would require withholding names of certain officers (beyond undercover officers, which Plaintiffs concede and to which amicus agrees), that creates an issue of fact which makes this case inappropriate for summary disposition. This Court should deny MSP's motion.

B. MSP has failed to show that disclosure of the requested records would endanger the safety of law enforcement officers.

MSP also asserts that the records sought are exempt under MCL 15.243(1)(s)(*vii*), which allows a law enforcement agency to withhold public records if disclosure would "[e]ndanger the life or safety of law enforcement officers or agents or their families, relatives, children, parents, or those who furnish information to law enforcement departments or agencies." Again, MSP bears the burden of demonstrating the applicability of the exemption, and it has failed to do so. MSP supports this claim with a declaration from MSP Sgt. Richard Chaffee, who asserts that law enforcement is a dangerous occupation. (Def's Ex I, Chaffee

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Decl, ¶ 13.) But it is not enough to simply assert that police work is dangerous—there must be some showing as to how disclosing the names of police officers makes police work more dangerous than it already is. See *Kozak v City of Lincoln Park*, 499 Mich 465, 468 (2016) ("An affidavit that contains mere conclusory statements is insufficient to support a motion for summary disposition."). Sgt. Chaffee's declaration does not support such a showing.

MSP has not given a plausible explanation of how disclosure of the names of law enforcement officers creates an increased risk of danger. Simply asserting it does not make it so. MSP asserts, quoting Sgt. Chaffee's affidavit, that releasing the requested information "would create a virtual shopping list for anyone interest in harming police officers." (Def's Br, p 16 (quoting Chaffee Decl, ¶ 15).) But what would a list of names give such a person that they do not already have? The location of police stations and MSP posts is already public knowledge. Many police officers and police agencies use social media, publicizing the names, jurisdictions, and likenesses of these officers for public consumption.[2] Press releases contain much of the same information.[3] If it were truly the case that publishing the names of police officers puts them in danger, then one would not expect to see widespread use of social media by law enforcement.

[2] See, e.g., https://twitter.com/MichStatePolice/status/1755329801533931886.

[3] See, e.g., https://www.michigan.gov/mspnewsroom/news-releases/2024/02/07/state-police-employees-honored-for-dedication-and-service; https://www.mlive.com/news/2023/11/where-61-new-michigan-state-police-troopers-will-soon-be-on-patrol.html.

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In fact, as Plaintiffs have pointed out, most states already provide the names of their licensed law enforcement officers, either proactively or in response to FOIA requests similar to the one at issue here. If the release of this information endangered law enforcement officers in those states, one would think MSP could point to instances in which someone seeking to harm a police officer used this public information to find an officer to harm. Yet MSP points to no such examples, instead relying on Sgt. Chaffee's creation of a hypothetical example relating to the attempted kidnapping of Governor Whitmer. (Chaffee Decl, ¶ 16.) But even in that hypothetical, there is no showing that the disclosure of names would put any officers in danger.

At bottom, MSP's attempt at showing a risk of danger amounts to nothing more than an ipse dixit contained in a self-serving declaration: Sgt. Chaffee says that disclosing the names of police officers would endanger them, therefore MSP has demonstrated that disclosing the names of police officers would endanger them. This is far from adequate to require summary disposition in MSP's favor. This Court should deny the motion for summary disposition.

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CONCLUSION AND RELIEF REQUESTED

For these reasons, Attorney General Nessel respectfully requests that this Court deny Defendant MSP's motion for summary disposition.

Respectfully submitted,

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