STATE OF MICHIGAN

COURT OF APPEALS

MICHIGAN FEDERATION OF TEACHERS & SCHOOL RELATED PERSONNEL, AFT, AFL-CIO,

Plaintiff-Appellee,

v

UNIVERSITY OF MICHIGAN,

Defendant-Appellant.

UNPUBLISHED
March 22, 2007

No. 258666
Washtenaw Circuit Court
LC No. 04-000314-CZ

Before: Hoekstra, P.J., and Wilder and Zahra, JJ.

PER CURIAM.

Plaintiff appeals by right the circuit court's order granting summary disposition to defendant on plaintiff's request for information under Michigan's Freedom of Information Act ("FOIA"). MCL 15.231 *et seq*. We reverse and remand for further proceedings.

I. Facts and Proceedings

Plaintiff requested the names, home addresses, home telephone numbers, and over 20 items of job-related information for all of defendant's employees. Defendant provided the names and requested job-related information for all its employees. But defendant only provided the home addresses and telephone numbers of those employees listed in its faculty and staff directory. Defendant declined to provide the home addresses and telephone numbers of those employees who chose not to list this information in the directory.

Plaintiff sued defendant in circuit court to obtain the home addresses and telephone numbers of the employees who were not listed in the directory. On cross-motions for summary disposition, the circuit court granted summary disposition in favor of defendant, finding that the home addresses and telephone numbers were personal information and protected by FOIA's privacy exemption. MCL 15.243(1)(a).

II. Standard of Review

This Court reviews de novo a trial court's grant of summary disposition. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Summary disposition under MCR

2.116(C)(10) may be granted when, "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." *Id*.

Further, "the application of exemptions requiring legal determinations are reviewed under a de novo standard, while application of exemptions requiring determinations of a discretionary nature . . . are reviewed under a clearly erroneous standard." *Federated Publications, Inc v City of Lansing*, 467 Mich 98, 101; 649 NW2d 383 (2002).

III. Analysis

FOIA generally requires disclosure of any public document upon request. MCL 15.233(1) provides:

> Except as expressly provided in section 13, 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. 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 for up to 6 months, at the request of the subscriber, and shall be renewable. An employee of a public body who receives a request for a public record shall promptly forward that request to the freedom of information act coordinator.

That is, however, unless an exemption applies. The exemptions from disclosure are enumerated in section 13 of FOIA, MCL 15.243. Exemptions are narrowly construed, and the burden of proof rests on the party asserting the exemption. *Bradley v Saranac Community Schools Bd of Ed,* 455 Mich 285, 293; 565 NW2d 650 (1997). If a request for information held by a public body falls within an exemption, the decision to disclose the information is discretionary with the public body possessing the information. *Id.*

The privacy exemption claimed here, MCL 15.233(1)(a), provides:

> (1) A public body may exempt from disclosure as a public record under this act any of the following:
>
> (a) Information of a personal nature if public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy.

In *Bradley, supra,* the Supreme Court defined personal nature for purposes of FOIA as follows:

> In the past, we have used two slightly different formulations to describe "personal nature." The first defines "personal" as "[o]f or pertaining to a particular person; private; one's own. . . . Concerning a particular individual and his intimate affairs, interests, or activities; intimate . . . ." We have also defined this threshold inquiry in terms of whether the requested information was

> "personal, intimate, or embarrassing." Combining the salient elements of each description into a more succinct test, we conclude that information is of a personal nature if it reveals intimate or embarrassing details of an individual's private life. We evaluate this standard in terms of "the 'customs, mores, or ordinary views of the community.'. . . ." (Citations omitted.)

Here, the trial court relied on two affidavits by defendants' employees to conclude that disclosure of some of the employees' names, home addresses and telephone numbers could expose them to threats, harm, and peril. We agree with plaintiff that even if these two employees "could allege sufficient exceptional circumstances to justify nondisclosure, the appropriate remedy would be an injunction limited to those individuals rather than the blanket injunction issued by the trial judge in this case." *Tobin, supra* at 679 n 17. Thus, the trial court here improperly issued a blanket injunction.

Further, a home address and telephone number are personal in the sense that they identify a person's residence and telephone number. However, by themselves, they ordinarily do not reveal "intimate or embarrassing details of an individual's private life." Even when a person's home address and telephone number are considered in relation to "customs, mores, or ordinary views of the community," the information cannot fairly be characterized as "intimate or embarrassing." Thus, under *Bradley*, the home addresses and home telephone numbers of defendant's employees are not items of personal information for purposes of FOIA because they do not reveal intimate or embarrassing details of an individual's private life.

Further, based on our review of the relevant case law, we also conclude that there is no authority holding that public employees' home addresses and telephone numbers are items of personal information for purposes of FOIA. *See Tobin v Civil Service Comm,* 416 Mich 661, 671; 331 NW2d 184 (1982) and *State Employees Ass'n v Dep't of Management & Budget,* 428 Mich 104, 124; 404 NW2d 606 (1987). Although defendant identified several cases that applied the privacy exemption to home addresses, in those cases the plaintiffs sought disclosure of addresses to access other information our Courts deemed personal. See *Mager v State, Dept of State Police,* 460 Mich 134; 595 NW2d 142 (1999) (registered gun owners); *Detroit Free Press, Inc v Department of State Police,* 243 Mich App 218; 622 NW2d 313 (2000) (concealed weapon permits); *Clerical-Technical Union of Michigan State University v Board of Trustees*, 190 Mich App 300; 475 NW2d 373 (1991) (philanthropic donors).

Defendant persuasively argues that the disclosure of names, home addresses and telephone numbers of some of defendant's employees could expose these employees to threats, harm, and peril. Plaintiff acknowledges this possibility and has stated that it will accept the nondisclosure of information for those employees who can show a credible fear of personal harm resulting from disclosure. Our Supreme Court has "recognize[d] that for a few individuals, disclosure of their names, addresses, or other seemingly impersonal information could be extremely harmful." *Tobin v Michigan Civil Service Com'n,* 416 Mich 661, 678; 331 NW2d 184 (1982). The Court specifically mentioned some, "truly exceptional circumstances such as . . . an imminent threat of physical danger as opposed to a generalized and speculative fear of harassment or retribution." *Id*. at 679, quoting Open Records Decision No. 169, Office of the Attorney General of Texas (1977). Thus, on remand, defendant may determine whether any of its employees not included in the directory have demonstrated "truly exceptional circumstances" to prevent disclosure of names, addresses and telephone numbers.

Accordingly, we reverse the grant of summary disposition to defendant and remand this case to the circuit court for further proceedings. We do not retain jurisdiction.

/s/ Brian K. Zahra
/s/ Joel P. Hoekstra

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Wilder, J. (concurring)

I join with the majority on the basis that under *Bradley v Saranac Community Schools Bd of Ed*, 455 Mich 285, 293; 565 NW2d 650 (1997), we have reached the correct outcome in this case. However, I write separately to raise two points.

First, the Freedom of Information Act (FOIA) entitles a citizen "to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees. MCL 15.231(2). To this end, FOIA generally requires disclosure of any public document upon request. MCL 15.233(1). Certain information is exempt from disclosure under FOIA, as provided in MCL 15.243. These exemptions are narrowly construed, and the burden to prove the application of the exemption rests with the party asserting it. *Bradley*, *supra* at 293.

Defendant asserts the application of the privacy exemption, MCL 15.233(1)(a), which permits exemption from disclosure of "[i]nformation of a personal nature if public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy." Under *Bradley*, "information is of a personal nature if it reveals intimate or embarrassing details of an individual's private life." *Id*. at 294. The *Bradley* definition combined "two slightly different formulations[,]" *id*., which had been articulated in *Swickard v Wayne Co Medical Examiner*, 438 Mich 536, 547; 475 NW2d 304 (1991) ("personal" means "'[o]f or pertaining to a particular person; private, one's own . . . . Concerning a particular individual and his intimate affairs, interests or activities; intimate[,]'" quoting *The American Heritage Dictionary of the English Language, Second College Ed*), and *Kestenbaum v Michigan State Univ*, 414 Mich 510,

549; 327 NW2d 783 (1982) (the threshold inquiry examines whether the requested information was "personal, intimate, or embarrassing") (opinion of Ryan, J.). However, the *Kestenbaum* definition, unlike the definition adopted in *Swickard*, appears to have been derived from decisions interpreting the federal FOIA, and not from the plain meaning of the language used in the Michigan FOIA.[1]

Because it does not appear that the operative definition of "personal" is consistent with the plain meaning that should govern under the applicable rules of statutory construction, *DiBenedetto v West Shore Hosp,* 461 Mich 394, 402; 605 NW2d 300 (2000), I would ask the Supreme Court to consider revisiting *Bradley* in order to determine whether, on the facts presented here, information that might otherwise be considered "ordinarily impersonal . . . might take on an intensely personal character,"[2] such that the privacy exemption might properly be asserted as argued by the defendant.

Second, to the extent the *Bradley* test is not modified by our Supreme Court, it seems appropriate to consider whether the advent of the National do-not-call Registry, Pub.L. 108-82, § 1, Sept. 29, 2003, 117 Stat. 1006, as well as the creation of the host of methods, unknown to the Court in 1997, which are designed for illicit purposes such as identity theft, have any impact on whether the disclosure of the home addresses and telephone numbers requested is inconsistent with "the customs, mores, or ordinary views of the community"[3] by which the applicability of the privacy exemption is evaluated.

/s/ Kurtis T. Wilder

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[1] For example, *Blacks Law Dictionary* defines personal to mean "of or affecting a person." *Black's Law Dictionary* (8th ed.), p. 1179. *Random House Webster's College Dictionary* defines personal to mean "of, pertaining to, or concerning a particular person; individual; private . . . ." *Random House Webster's College Dictionary* (2d revised ed.), p. 988. Neither Blacks, Random House, nor The American Heritage Dictionary defines personal to include "embarrassing."

[2] *Kestenbaum*, *supra* at 547.

[3] *Bradley, supra* at 294.