RECEIVED by MSC 11/6/2026 1:11:09 PM

STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
KELLY, P.J., and REDORD and FEENEY, JJ.

AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN and PETER ARMSTRONG SR.,

Plaintiffs/Appellants,

v.

CITY OF GRAND RAPIDS,

Defendant/Appellee.
_____/

SC: 169571
COA: 373417
Kent CC: 23-008846-CZ

APPELLEE'S SUPPLEMENTAL BRIEF

***** ORAL ARGUMENT REQUESTED *****

Elizabeth J. Fossel (P41430)
Sarah J. Hartman (P71458)
Kendall R. O'Connor (P84036)
City of Grand Rapids, Dept. of Law
300 Monroe Avenue NW, Suite 620
Grand Rapids, MI 49503
(616) 456-3181
efossel@grand-rapids.mi.us
shartman@grand-rapids.mi.us
koconnor@grand-rapids.mi.us

Counsel for City of Grand Rapids

RECEIVED by MSC 11/6/2026 1:11:09 PM

TABLE OF CONTENTS

APPELLATE JURISDICTION 1

COUNTER-STATEMENT OF APPELLATE JURISDICTION 1

I. INTRODUCTION 4
II. STATEMENT OF MATRIAL FACTS AND PROCEEDINGS 4
A. Prologue 4
B. The Relevant Undisputed Facts 5
C. The Procedural Posture of the case 7
III. STANDARD OF REVIEW 9
A. The answer to the first issue raised by the Supreme Court for supplemental briefing – ie, whether under Michigan's FOIA, a public body is required to fulfill a FOIA request within a reasonable time – is no. As the plain language of FOIA imposes deadlines for other actions under the statute, such as examination and inspection of records, under MCL 15.233, but does not impose a deadline for production of copies of the full and complete record, after a best-efforts estimate under MCL 15.234(8), the rules of statutory construction preclude the Court from writing in a time requirement where none exist 9
1. The Rules of Statutory Construction 11
2. The Plain Language of the Statute Controls 12
3. Other provisions of FOIA support the same conclusion 14
4. Appellants' Social Policy Concerns Do Not Control Over the Plain Statutory Language and Can Only Be Addressed by Action of the Legislature, Not the Court 18
5. Appellants' Reliance on Legislative History is Both Improper and Misleading 20
a. Legislative History Should Not Be Considered When the Statute is Clear 21
b. The FOIA Statute's Legislative History Does Not Support Appellants' Position 22
c. Legislative History Confirms the Plain Language of the Statute 23
6. Appellant's Reliance on the Laws of Other States as Well the Federal FOIA is Unwarranted 25
B. If the Court holds that FOIA Requires Fulfillment Within a Reasonable Time, the City's fulfillment of the ACLU's FOIA request thirteen months after payment of a good faith deposit was reasonable under the circumstances presented in this case, given the volume of requests processed by the City, the need to process all requests under MCL

15.234(8) fairly, and the statutory requirement to avoid any process that could be deemed arbitrary and capricious 26
C. This case was rendered moot by the City's fulfillment of Appellants' FOIA request 32
1. Appellants request for declaratory relief is moot 34
2. Appellants' request for attorneys fees cannot avoid mootness in this case 38
3. The "likely to recur, yet evade judicial review" exception does not apply 41

RECEIVED by MSC 11/6/2026 1:11:09 PM

INDEX OF AUTHORITIES

Page(s)

State Cases

Amberg v City of Dearborn,
497 Mich 28; 859 NW2d 674 (2014).....38, 40

American Civil Liberties Union of Michigan v Calhoun Cnty Sheriff's Office,
509 Mich 1; 983 NW2d 300 (2022).....11

American Civil Liberties Union of Michigan v City of Grand Rapids,
unpublished per curiam opinion of the Court of Appeals, issued Dec 11, 2025
(Docket No 373417), 2025 WL 3561489 2

Arabo v Mich Gaming Control Bd,
310 Mich App 370; 872 NW2d 223 (2015).....36, 37, 38

Attorney General v PowerPick Player's Club of Mich, LLC,
287 Mich App 13; 783 NW2d 515 (2010).....14

Carson City Hosp v Dep't of Cmty Health,
253 Mich App 444; 656 NW2d 366 (2002).....15, 17

Cashel v Regent of Univ of Mich,
141 Mich App 541; 367 NW2d 541 (1985).....15

Citizens for Common Sense in Gov't v Attorney General,
243 Mich App 43; 620 NW2d 546 (2000).....35

City of Gaylord v Beckett,
375 Mich 273; 144 NW2d 460 (1966).....31

City of Grand Rapids v Brookstone Capital, LLC,
334 Mich App 452; 965 NW2d 232 (2020).....11

Cramer v Village of Oakley,
316 Mich App 60; 890 NW2d 895, *vacated in part on other grounds*, 500
Mich 964; 892 NW2d 371 (2017).....38, 39, 40

Crooked Creek, LLC v Cass Cnty Treasurer,
507 Mich 1; 967 NW2d 577 (2021).....4, 11

Densmore v Dep't of Corr,
203 Mich App 363; 512 NW2d 72 (1994).....33

RECEIVED by MSC 11/6/2026 1:11:09 PM

EB by Next Friend Baker v Watervliet Pub Sch,
unpublished per curiam opinion of the Court of Appeals, issued May 4, 2023
(Docket No 361206), 2023 WL 3260974 41

Farrington v Total Petroleum, Inc,
442 Mich 201; 501 NW2d 76 (1993).....11

Federated Publ'ns, Inc v City of Lansing,
467 Mich 98; 649 NW2d 383 (2002), abrogated on other grounds by *Herald Co Inc v E Mich Univ Bd of Regents*, 475 Mich 463; 719 NW2d 19 (2006) 41

Fields v Flint City Council,
unpublished per curiam opinion of the Court of Appeals, issued Nov 10, 2022
(Docket No 359661), 2022 WL 16858781 41

Flynn v Ottawa Cnty Dep't of Pub Health,
344 Mich App 709; 1 NW3d 853 4

Frank W Lynch & Co v Flex Techs, Inc,
463 Mich 578; 624 NW2d 180 (2001).....21, 22

Hayes v City of Kalamazoo,
316 Mich 443; 25 NW2d 787 (1947).....31

Herald Co, Inc v Ann Arbor Pub Sch,
224 Mich App 266; 568 NW2d 411 (1997).....33, 37

Honigman Miller Schwartz and Cohn LLP v City of Detroit,
505 Mich 287; 952 NW2d 358 (2020).....15

Johnson v Recca,
492 Mich 169; 821 NW2d 520 (2012).....18, 19

In re Keast,
278 Mich App 415; 750 NW2d 643 (2008).....17

Kenneth Henes Special Projects Procurement, Mktg & Consulting Corp v Cont'l Biomass Indus (In re Certified Question),
468 Mich 109; 659 NW2d 597 (2003).....21

King v Mich State Police Dep't,
303 Mich App 162; 841 NW2d 914 (2013).....33, 36, 37, 38

Krohn v Home-Owners Ins Co,
490 Mich 145; 802 NW2d 281 (2011).....11

Lash v Traverse City,
479 Mich 180; 735 NW2d 628 (2007).....8, 13, 35

RECEIVED by MSC 11/6/2026 1:11:09 PM

Marposs Corp v Troy,
204 Mich App 156, 514 NW2d 202 (1994) (Taylor, PJ, dissenting).....22

McCahan v. Brennan,
492 Mich 730; 822 NW2d 747 (2012).....21

McKee v Peoria Unified Sch Dist,
236 Ariz 254; 338 P3d 994 (Ct App 2014).....26

Newton v Progressive Marathon Ins Co,
349 Mich App 536; 28 NW3d 377 (2024).....35

O'Donnell v State Farm Mut Auto Ins Co,
404 Mich 524; 273 NW2d 829 (1979).....19

People v. Sobczak–Obetts,
463 Mich. 687, 625 N.W.2d 764 (2001).....18

People v Tolbert,
216 Mich App 353; 549 NW2d 61 (1996).....22

People v Wood,
506 Mich 114; 954 NW2d 494 (2020).....32

PT Today, Inc v Comm'r of Office of Fin and Ins Servs,
270 Mich App 110 715 NW2d 398 (2006).....35

Rataj v City of Romulus,
306 Mich App 735; 858 NW2d 116 (2014).....9

In re Raymond L Frick Tr,
unpublished per curiam opinion of the Court of Appeals, issued Dec 11, 2018
(Docket No 341498), 2018 WL 6519620 13

Reichert v. People's State Bank,
265 Mich. 668, 252 N.W. 484 (1934).....19

Robertson v DaimlerChrysler Corp,
465 Mich 732, 641 NW2d 567 (2002).....18

Rouch World, LLC v Dep't of Civil Rights,
510 Mich 398; 987 NW2d 501 (2022).....21

Scharret v City of Berkeley,
249 Mich App 405; 642 NW2d 685 (2002).....40

State ex rel Shaughnessy v Cleveland,
149 Ohio St 3d 612; 76 NE3d 1171 (2016) 25

RECEIVED by MSC 11/6/2026 1:11:09 PM

State News v Mich State Univ,
481 Mich 692; 753 NW2d 20 (2008).....33, 36

T&V Assocs v Dir of Dep't of Health and Human Servs,
516 Mich 851; 12 NW3d 594 (2024).....41, 42

Voorhies v Recorder's Court Judge,
220 Mich 155, 189 NW 1006 (1922).....19

Walloon Lake Water Sys, Inc v Melrose Township,
163 Mich App 726; 415 NW2d 292 (1987).....38, 39, 40

Whitman v City of Burton,
493 Mich 303; 831 NW2d 223 (2013).....4, 5, 13, 15

Woodman v Kera LLC,
486 Mich 228; 785 NW2d 1 (2010).....19, 20, 32

Federal Statutes

5 USC § 552.....26

State Statutes

ARS 39-121.....25

ARS 39-122.....25

IC 22.8.....26

MCL 15.231.....12

MCL 15.233.....*passim*

MCL 15.234.....*passim*

MCL 15.235.....16, 23

MCL 15.240.....*passim*

ORC 149.43.....25

Rules

MCR 2.605.....34, 35

RECEIVED by MSC 11/6/2026 1:11:09 PM

RECEIVED by MSC 11/6/2026 1:11:09 PM

APPELLATE JURISDICTION

Appellants' Statement of Appellate Jurisdiction is incorrect in that it misstates the holdings of the Circuit Court and the Court of Appeals. The City offers the following counter-statement to correct Appellants' misstatements.

COUNTER-STATEMENT OF APPELLATE JURISDICTION

On September 8, 2023, Appellants, the American Civil Liberties Union of Michigan and Peter Amstrong (collectively, "ACLU" or "Appellants") sued the City of Grand Rapids (the "City") for an alleged violation of the Michigan Freedom of Information Act ("FOIA"), MCL 15.231 *et seq*. Appellants claimed that the City's estimate that it would take 8 to 10 months (after receipt of the ACLU's deposit) to fulfill the FOIA request – a request that was estimated to take 2 hours and 15 minutes to process – was unreasonable and amounted to a constructive denial of their FOIA request.

The Circuit Court dismissed the ACLU's claim, noting that '[t]he statute requires a public body to furnish a 'reasonable opportunity' for . . . *inspection and examination* of its public records [under MCL 15.233(2)]" but "does not impose the same requirement for requests for *copies* of public records" and that this omission must be presumed to indicate Legislative intent. (*Cir Ct Nov 4, 2024 Op & Order* ("*Cir Ct Op*"), Appellants' COA Appx, Ex 4 at 90a (emphasis added, citation omitted).) Further, "[i]f the Legislature intended for a public body to furnish a reasonable opportunity for a person to receive copies of the requested public records, the Legislature could have (and should have) written the requirement into the statute." (*Id.*) Consequently, the Circuit Court held that the policy relief the ACLU sought was "one that only the Legislature can address[.]" (*Id.*, at 93a.)

On December 11, 1025, the Court of Appeals affirmed, reasoning that "to adopt the position sought by plaintiffs would have the effect of the judiciary rewriting a properly enacted statute." (See, *American Civil Liberties Union of Michigan v City of Grand Rapids*, unpublished per curium opinion of the Court of Appeals, issued December 11, 2025 (Docket No 373417), 2025 WL 3561489 *1 ("*COA Opinion*").)[1]

The ACLU sought leave to appeal to this Court on January 22, 2026. The City responded on February 19, 2026.

On July 10, 2026, this Court entered an Order directing the Clerk to schedule oral argument on the application for leave to appeal and ordering the parties to file supplemental briefs on three specific issues: (1) whether under Michigan's FOIA, a public body is required to fulfill a FOIA request within a reasonable time; (2) if so, whether the City's fulfillment of the ACLU's FOIA request thirteen months after payment of a good faith deposit constitutes a reasonable time under the circumstances presented in this case; and (3) whether the case was rendered moot by the City's fulfillment of the FOIA request. *Order*, dated July 10, 2026.

[1] The COA Opinion is attached in Appellee's Supreme Court Appendix as Exhibit A.

RECEIVED by MSC 11/6/2026 1:11:09 PM

COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR SUPPLEMENTAL BRIEFING

1. Where the Michigan's Freedom of Information Act (FOIA) contains short and specific deadlines or "reasonable opportunity" standards for other actions in other sections of the FOIA, but the FOIA does not contain a specific time limit or a "within a reasonable time" requirement for the fulfillment of a request through production of copies of the full and complete records following a proper best-effort estimate under MCL 15.234(8), is a public body required under FOIA to fulfill a FOIA request within a reasonable time?

The City answers: No

The Circuit Court answers: No

The Court of Appeals answers: No

Appellants answer: Yes

2. If FOIA requires fulfillment of FOIA requests within a reasonable time under MCL 15.234(8), did the City's fulfillment of the ACLU's FOIA request 13 months after payment of the good faith deposit and the City's good faith non-binding estimate that it would take 8 to 10 months to fulfill the request constitute a reasonable time under the circumstances presented by this case?

The City answers: Yes

The Circuit Court: Did not address

The Court of Appeals: Did not address

Appellants answer: No

3. Was this case rendered moot by the City's fulfillment of the FOIA request?

The City answers: Yes

The Circuit Court: Did not address

The Court of Appeals: Did not address

Appellants answer: No.

RECEIVED by MSC 11/6/2026 1:11:09 PM

RECEIVED by MSC 11/6/2026 1:11:09 PM

I. INTRODUCTION

The question presented by this litigation can be distilled into one simple thing: may a court rewrite the Freedom of Information Act (FOIA), MCL 15.231 *et seq*, to impose a time limit for the fulfillment of a FOIA request by production of copies of the record when the Legislature, itself, did not include such a limitation within the plain language of the statute? Michigan courts, including the Court of Appeals in this case, have consistently held that the judiciary "may not rewrite the plain statutory language or substitute its own policy decisions for those already made by the Legislature." *Flynn v Ottawa Cnty Dep't of Pub Health*, 344 Mich App 709, 716; 1 NW3d 853 (quotation marks and citation omitted). This is particularly true where, as here, Appellants have identified no ambiguities in the statutory language. Without ambiguity in the language itself, judicial construction is unwarranted and the clear statutory language must be enforced as written. *Crooked Creek, LLC v Cass Cnty Treasurer*, 507 Mich 1, 9; 967 NW2d 577 (2021). Moreover, without an ambiguity, it is wholly improper for a court to go beyond the statutory text to ascertain legislative intent. *Whitman v City of Burton*, 493 Mich 303, 312; 831 NW2d 223 (2013) (citation omitted). Consequently, Appellants' references to, and reliance on, selective legislative history, the statutes of other states, and even the Federal FOIA, itself, are unavailing. This case begins and ends with the plain language of the Michigan FOIA and neither the Court of Appeal, nor the Circuit Court below, erred by following that language to arrive at their decisions.

II. STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

A. Prologue

In the City's Brief on Appeal, and again in its Answer to Application for Leave to Appeal, the City provided detailed counter-statements of facts to correct Appellants' mischaracterization

of the facts,[2] and their tendency to ignore facts which disfavor their position[3] while highlighting others that amount to irrelevant information for purposes of this action.[4] The City incorporates its prior counter-statements of fact in full, and additionally offers the facts below which serve to sharpen the issues for this court.

B. The Relevant Undisputed Facts

Appellants have taken the position that "the facts of this case are undisputed." *Application for Leave*, at 5. With respect to the time it took to fulfill Appellants' FOIA request, that is true. It took 13 months after receipt of Appellants' deposit to fulfill the request that, itself, took 3.5 hours to process. (*Id*.) It is also true, as the Circuit Court pointed out, that "the parties agree that the Michigan FOIA contains no express timeline for fulfilling a FOIA request [,]" and that "the City

[2] For example, despite being reminded twice by the City of the facts in this case, Appellants expressly told this Court that "the City responded [to their request] several days late on April 14, 2023. . . ." *Application for Leave*, at 9. (See also, *Appellants' COA Brief on Appeal*, attached in Appellee's Supreme Court Appendix as Exhibit B, at 19b (". . . the City failed to timely respond and instead responded on April 14, 2023 with a letter partially granting the ACLU's request.").) In so doing, Appellants omitted the events preceding April 14, 2023 when Connor Smith, the Grand Rapids Police Department ("GRPD") Records Unit Manager: (1) spoke with Appellant Armstrong regarding the scope of his request and key search terms; (2) wrote to Mr. Armstrong *on April 12, 2023* – the due date for a response – granting his request and demanding a deposit for fulfillment; and (3) received from Mr. Armstrong a withdrawal of part of his FOIA request, which Ms. Smith confirmed by email, and which obligated Ms. Smith to send an amended response letter with an updated cost estimate and deposit request on April 14, 2023. See, *Answer to Application for Leave*, Counter-Statement of Facts, at 3–4. (See also, *Appellee's COA Brief on Appeal*, attached in Appellee's Supreme Court Appendix as Exhibit C, at Counter-Statement of Facts, 65b.)

[3] For example, Appellants never acknowledge, let alone discuss the impact of, the multitude of FOIA requests (over $50) that came into the City before Appellants' request. In this case, at the time of Ms. Smith's affidavit in June of 2023, Appellants' March 2023 FOIA request was number 74 out of 80 that were pending. (*Smith June 8, 2023 Affidavit*, Appellee's COA Appx, Ex A-6 at 37b, ¶ 15.) Appellants simply ignore the fact that the City must handle these prior requests on a fair and equitable basis (which the City's first-in-first out system is designed to do).

[4] For example, the ACLU spends a great deal of time discussing the legislative history of the FOIA. As discussed infra, given the plain unambiguous statutory language of the FOIA, courts must enforce the statute as written and may not go beyond the language of the statute itself to determine legislative intent. *Whitman*, 493 Mich at 311–12.

RECEIVED by MSC 11/6/2026 1:11:09 PM

produced the requested documents to Plaintiffs on June 10, 2024." (*Cir Ct Op*, Appellants' COA Appx, Ex 4 at 90a.)[5]

Other undisputed and material facts, although downplayed by Appellants, are also germane. For example, it is undisputed that the ACLU's FOIA request was estimated to cost more than $50 to fulfill, and that the City was therefore entitled to, and did, follow the procedure in MCL 15.234(8) for such requests – i.e., the City requested a good-faith deposit of half the estimated cost and provided a nonbinding, good-faith "best efforts estimate" of the "time frame it will take the public body to comply with the law in providing the public records to the requestor." MCL 15.234(8). (*COA Opinion*, Appellee's SC Appx, Ex A at 4b (*3)) ("There is no dispute that defendant followed this procedure.").)

The practice of the Records Unit in handling such requests is also undisputed. Once the good-faith deposit is paid, the FOIA request is processed and fulfilled in the order received. In other words, the request is "placed into a queue, and the Records Unit staff processes, reviews, redacts, and duplicates those records on a first-in, first-out basis." (*Def's MSD Br*, Appellee's COA Appx, Ex A at 5b); *Application for Leave*, at 8 ("the City places those requests in a 'first in, first out' queue after the City receives the deposit.").[6] As the ACLU conceded, "Plaintiffs do not claim

[5] The parties' agreement that the Michigan FOIA does not have a provision stating a time period in which a public body must fulfill a request, or even a requirement that a public body must do so promptly, is expressly and formally supported by the Michigan Attorney General. (See, *2017 Mich. OAG No. 7300 (Dec 12, 2017)*, Appellee's COA Appx, Ex B at 114b ("Thus, there is no fixed deadline imposed under subsection 4(8) [i.e., MCL 15.234(8)] by which the public body must fulfill the request for records.").)

[6] As Appellants acknowledged, "the number of requests already in the queue dictates the time it will take to fulfill the newest request." *Application for Leave*, at 8. And, as noted in the Affidavit of Records Unit Manager, Mikayla ("Connor") Smith: "This process has been implemented to provide a fair routine for processing and fulfilling FOIA requests and to not treat any individual FOIA request differently than another. The 'first in first out' process ensures consistency and provides some credibility to the output of the work despite the significant backlog." (*Smith June 8, 2023 Aff*, Appellee's COA Appx, Ex A-6 at 37b, ¶ 14.)

RECEIVED by MSC 11/6/2026 1:11:09 PM

that the City has acted arbitrarily and capriciously by adopting a first-in-first-out system." (*Pl's Resp to Def's MSD*, attached in Appellee's Supreme Court Appendix as Exhibit D, at 98b.)

It is also undisputed that once final payment for the public records was received from the ACLU on June 10, 2024, the records were transmitted to them. (*Smith June 24, 2024 Aff*, Appellee's COA Appx, Ex A-8 at 52b, ¶¶ 8–9); *Appellants' Supplemental Brief*, at 6. Finally, it is undisputed that Appellants have never challenged the production of records as incomplete or deficient in any way.

C. The Procedural Posture of the Case

On September 8, 2023, the ACLU filed suit against the City alleging a single count for violation of the FOIA by "delaying production of the records" and "failing to furnish plaintiff's 'a reasonable opportunity for inspection and examination of its public records under the Act," referencing MCL 15.233(3) and MCL 15.240(1). (*Complaint*, Appellants' COA Appx, Ex 3 at 40a, ¶ 41.) The ACLU has never alleged that the time (or actions) taken by the City constituted an arbitrary, capricious, or bad faith delay. (See generally, *id.*, at 32a–82a.)

On November 5, 2024, the Circuit Court granted the City's motion for summary disposition and denied the ACLU's motion for summary disposition, refusing to engraft onto the Michigan FOIA a requirement that FOIA requests be fulfilled within a "reasonable time," when the FOIA, itself, did not contain the requirement. (See generally, *Cir Ct Op*, Appellants' COA Appx, Ex 4, 83a–94a.)

The Circuit Court focused solely on the proper statutory construction of the FOIA, its plain language, and its context. Specifically, the court noted, "[u]nder the Michigan FOIA, a party has a right to do three things: inspect, copy, or receive copies of public records. MCL 15.233(1)." (*Id.*, at 90a.) Further, while "[t]he statute requires a public body to furnish a 'reasonable opportunity' for *two* of these things: *inspection and examination* of its public records [under MCL 15.233(2)][,]"

RECEIVED by MSC 11/6/2026 1:11:09 PM

the statute "does not . . . impose this same requirement for requests for *copies* of public records." (*Id.* (emphasis added).) Thus, the Circuit Court concluded that:

> [a]pplying the rules of statutory construction, the Court must presume that the Legislature's intent, as well as its policy choices, are reflected in this omission. . . . If the Legislature intended for a public body to furnish a reasonable opportunity for a person to receive copies of the requested public records, then the Legislature could have (and should have) written this requirement into the statute.

(Id., citing *Lash v Traverse City*, 479 Mich 180, 187; 735 NW2d 628 (2007).)[7]

Consequently, the Circuit Court's ultimate holding – and the basis for granting the City's motion for summary disposition – was that the policy relief the ACLU sought was "one that only the Legislature can address through amendment of the Michigan FOIA." (*Id.*, at 93a.)[8]

On December 11, 1025, the Court of Appeals affirmed the Circuit Court, reasoning that "to adopt the position sought by plaintiffs would have the effect of the judiciary rewriting a properly enacted statute." (See, *COA Opinion*, Appellee's SC Appx, Ex A at 2b (*1).)[9]

---

[7] Notably, the Circuit Court pointed out that the express policy of FOIA focused on disclosure of "full and complete information regarding the affairs of government[,]" but that "[t]his public policy does not provide for *when* such information must be produced. . . . In other words, the Legislature's intent was for public bodies to ensure that they were producing everything, even if responding to the request is delayed due to the nature or complexity of the request or, as in this case, the need on the part of the public body to first respond to older requests." (*Cir Ct Op*, Appellants' COA Appx, Ex 4 at 91a (italics in original).)

[8] Appellants have characterized the "circuit's court's view" as "there is no limit to how long a public body can *delay* production[.]" *Application for Leave*, at 11 (emphasis added). However, this misrepresents the circuit courts' holding and omits the court's reasoning.

[9] The Court of Appeals also noted that, although MCL 15.240(7) provides certain remedies when the public body has arbitrarily and capriciously violated FOIA through a delay in disclosure, Appellants did not allege an arbitrary and capricious violation of FOIA. (*COA Opinion*, Appellee's SC Appx, Ex A at 3b (*3).) Further, the Court of Appeals rejected Appellants' argument that MCL 15.234(8) implies a period of reasonableness binding the public body. (*Id.*, at 4b (*4).) The Court explained that "Michigan's FOIA does not now contain a deadline within which public bodies must fulfill FOIA requests," and as Appellants did not identify any ambiguities in the statute, the Court declined to "impose deadlines that the Legislature has not seen fit to impose." (*Id.*)

RECEIVED by MSC 11/6/2026 1:11:09 PM

The ACLU sought leave to appeal to this Court on January 22, 2026. The City responded on February 19, 2026.

On July 10, 2026, this Court entered an Order directing the Clerk to schedule oral argument on the application for leave to appeal and ordering the parties to file supplemental briefs on three specific issues: (1) whether under Michigan's FOIA, a public body is required to fulfill a FOIA request within a reasonable time; (2) if so, whether the City's fulfillment of the ACLU's FOIA request thirteen months after payment of a good faith deposit constitutes a reasonable time under the circumstances presented in this case; and (3) whether the case was rendered moot by the City's fulfillment of the FOIA request.[10] *Order*, dated July 10, 2026.

III. STANDARD OF REVIEW

The City acknowledges that the Standard of Review as stated by Appellants is correct as "the proper interpretation and application of FOIA is a question of law" and is, therefore, reviewed de novo. *Rataj v City of Romulus*, 306 Mich App 735, 747; 858 NW2d 116 (2014).

IV. LAW & ARGUMENT

A. The answer to the first issue raised by the Supreme Court for supplemental briefing – ie, whether under Michigan's FOIA, a public body is required to fulfill a FOIA request within a reasonable time – is no. As the plain language of FOIA imposes deadlines for other actions under the statute, such as examination and inspection of records, under MCL 15.233, but does not impose a deadline for production of copies of the full and complete record, after a best-efforts estimate under MCL 15.234(8), the rules of statutory construction preclude the Court from writing in a time requirement where none exists.

Throughout this litigation, Appellants have played havoc with the rules of statutory construction. They have ignored the plain language of the statute, as well as its context. They have conflated the provisions of FOIA in order to misconstrue it, and, ultimately, they have even asked

[10] Neither the Circuit Court nor the Court of Appeals opined as to whether the subsequent production of the records by the City rendered this action moot.

RECEIVED by MSC 11/6/2026 1:11:09 PM

the courts to rewrite the statute to enshrine policies and presumptive deadlines that the Legislature never saw fit to include. Indeed, that was the only way Appellants could construct their claim that the City violated FOIA.[11]

Yet, contrary to Appellants' position, the City followed the plain language of the law. The City: (1) timely responded to Appellants' request (by granting it[12]); (2) provided a good-faith, best-efforts estimate of the amount of time that it would take to fulfill the request; and (3) provided copies of the full and complete records requested. That was what FOIA required; that was what the City did.

That fulfillment of their FOIA request happened later than Appellants thought was reasonable, did not amount to a violation of the plain language of FOIA; that it did not happen within the 30 to 90 day window that Appellants now ask this Court to read into the statute, was clearly not a violation of the FOIA as written – and will not be in the future absent legislation to make it so. As the courts did below, this Court should reject Appellants' request that the Court – as opposed to the Legislature – make new social policy and add deadlines that the statute does not

[11] Appellants filed this lawsuit asking the Kent County Circuit Court to order the City to produce the requested public records on grounds that the City had violated Michigan's Freedom of Information Act by constructively denying their request. (*Complaint*, Appellants' COA Appx, Ex 3 at 40a–41a.) Specifically, Appellants alleged that the City violated MCL 15.233(3) and MCL 15.240(1) by "delaying production of public records responsive to plaintiffs' FOIA request . . ." and "by failing to furnish plaintiffs 'a reasonable opportunity for inspection and examination of its public records' under the Act and/or constructively denying plaintiffs' request." (*Id.*, at 40a, ¶ 41.) Certainly, things have changed. For one thing, when the lawsuit was filed, the City had not yet fulfilled the FOIA request. However, by the time the parties submitted their respective dispositive motions and had them heard, Appellants' FOIA request had been fulfilled and all records produced. The completeness of that production has never been challenged. Moreover, Appellants' request for relief has vastly expanded over time as they now ask the Court to impose specific presumptive deadlines for production that were never part of their original complaint.

[12] As the Circuit Court noted, the City's response did deny part 3(b) of the FOIA request, but this denial is not, and never has been, part of Appellants' appeal. (*Cir Ct Op*, Appellants' COA Appx, Ex 4 at 86a–87a, n2.)

RECEIVED by MSC 11/6/2026 1:11:09 PM

contain. The well-established rules of statutory construction demand enforcement of the FOIA as written, not as Appellants wish it to be.

1. The Rules of Statutory Construction

As the Court of Appeals properly noted, "[r]esolution of this matter turns on the interpretation of FOIA provisions." (*COA Opinion*, Appellee's SC Appx, Ex A at 3b (*2).)[13] The rules governing interpretation of a statute are well-known. As stated by this Court in *American Civil Liberties Union of Michigan v Calhoun Cnty Sheriff's Office*, 509 Mich 1, 8; 983 NW2d 300 (2022):

> "The primary goal of statutory interpretation is to ascertain the legislative intent that may reasonably be inferred from the statutory language." [*Krohn v Home-Owners Ins Co*, 490 Mich 145, 156; 802 NW2d 281 (2011) (citation omitted).] The first step in that determination is to review the language of the statute itself. [*Id*.] When statutory language is unambiguous, no further judicial construction is required or permitted because the Legislature is presumed to have intended the meaning it plainly expressed by the words it chose.

Id., citing *2 Crooked Creek*, 507 Mich at 9 ("When the statutory language is clear and unambiguous, judicial construction is not permitted and the statute is enforced as written.") (quotation marks and citations omitted). In addition, provisions of a statute must be construed in light of the other provisions of the statute to carry out the intent of the Legislature. *Farrington v Total Petroleum, Inc*, 442 Mich 201, 209; 501 NW2d 76 (1993). If there is no ambiguity in the statutory language, "the plain meaning of the statute reflects the legislative intent[.]" *City of Grand Rapids v Brookstone Capital, LLC*, 334 Mich App 452, 459; 965 NW2d 232 (2020). In this regard, "[c]ourts may not speculate regarding legislative intent beyond the words expressed in the statute." *Id*., at 458 (quotation and citation omitted). As the Court of Appeals noted, "plaintiffs have

[13] The Circuit Court also viewed construction of the statute as pivotal. (*Cir Ct Op*, Appellants' COA Appx, Ex 4 at 88a ("At issue in this case is the construction of a statute, the Michigan FOIA.").)

RECEIVED by MSC 11/6/2026 1:11:09 PM

identified no ambiguities in the statutory language" and "the clear statutory language must be enforced as written [.]" (*COA Opinion*, Appellee's SC Appx, Ex A at 4b (*4).)

2. <u>The Plain Language of the Statute Controls</u>

The first pertinent provisions in FOIA, as raised by the parties and the courts below, read as follows:

> Under MCL 15.231(2):
>
> It is public policy of this state that all persons, except those persons incarcerated in state or local correctional facilities, are entitled 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 consistent with this act. The people shall be informed so that may fully participate in the democratic process.
>
> Under MCL 15.234(8):
>
> In either the public body's initial response or subsequent response . . . , the public body may require a good-faith deposit from the person requesting information before providing the public records to the requestor if the entire fee estimate or charge authorized under this section exceeds $50.00, based on a good-faith calculation of the total fee . . . . The response must also contain a best efforts estimate by the public body regarding the time frame it will take the public body to comply with the law in providing the public records to the requestor. The time frame estimate is nonbinding upon the public body, but the public body shall provide the estimate in good faith and strive to be reasonably accurate and to provide the public records in a manner based on this state's public policy under section 1 and the nature of the request in the particular instance. If a public body does not respond in a timely manner as described under section 5(2), it is not relieved from its requirements to provide proper fee calculations and time frame estimates in any tardy responses. Providing an estimated time frame does not relieve a public body from any of the other requirements of this act.

Here, there is no ambiguity in the statute, nor have Appellants ever alleged otherwise. Rather, Appellants, the City, and the courts below all acknowledged that the FOIA does not contain a deadline by which a public body must fulfill a FOIA request when proceeding under MCL 15.234(8) with a good-faith best-efforts estimate, as was the case here.[14]

[14] In its Answer to Appellants' Application for Leave, the City laid out in full all of the relevant portions of the FOIA. See, *Answer to Application for Leave*, at 12–17. Under these provisions, there is obviously no language imposing a "reasonable time frame" for the fulfillment of a request

RECEIVED by MSC 11/6/2026 1:11:09 PM

Further, the words used in MCL 15.234(8) must be interpreted based on their ordinary meaning and the context within which they are used. *Lash*, 479 Mich at 197. "Effect should be given to every phrase, clause, and word in the statute and, whenever possible, no word should be treated as surplusage or rendered nugatory." *Whitman*, 493 Mich at 311–12.

Here, the obligation of the public body, when MCL 15.234(8) applies, is to respond to the requestor with a "best efforts estimate . . . regarding the time frame it will take the public body to comply with the law in providing the public records to the requestor." Further, the estimate, itself, is "nonbinding," but the public body must "strive to be reasonably accurate and to provide the public records in a manner based on this state's public policy under section 1 and the nature of the request in the particular instance." *Id.*

The ordinary meaning of the phrase "best efforts" in the context of this FOIA provision was defined by the Michigan Attorney General as "diligent attempts to carry out an obligation." (*OAG, 2017-2018 No 7300 (Dec 12, 2017)*, Appellee's COA Appx, Ex B at 114b (citing *Black's Law Dictionary* (10th Ed 2014)).)[15] Specifically addressing the issue of whether MCL 15.234(8) requires a public body to fulfill a FOIA request within a particular timeframe, the Attorney General

for copies of a public record. In fact, and as discussed infra, the only reference in the statute to "delay" is found in MCL 15.240(7), which makes clear that, to be actionable, a delay must be both arbitrary and capricious, and not merely unreasonable as Appellants' arguments necessarily imply. This not only undermines Appellants' argument that the statute, when read as a whole, includes a "reasonable time frame" for fulfillment, it demonstrates the great lengths to which Appellants have gone to misconstrue the statute and conflate its provisions, particularly as Appellants have never alleged that the City acted in an arbitrary and capricious manner.

[15] The Attorney General offered further that "diligent attempts" would be "measured by the measures that a reasonable person in the same circumstances and of the same nature as the acting party would take." (*OAG, 2017-2018 No 7300*, Appellee's COA Appx, Ex B at 115b.) In another context, the Michigan Court of Appeals pointed out that using "best efforts" does not mean using "every conceivable effort" but rather what is reasonable under the circumstances. (See, *In re Raymond L Frick Tr*, unpublished per curiam opinion of the Court of Appeals, issued Dec 11, 2018 (Docket No 341498), 2018 WL 6519620 *2 (included in Appellee's COA Appx, Ex A-11 at 106b).)

RECEIVED by MSC 11/6/2026 1:11:09 PM

opined, "It is my opinion, therefore, that [MCL 15.234(8)] does not impose a specific time by which a public body must fulfill a request for public records that it has granted." (*Id*.) Rather, the public body must be "guided by but is not bound by" the best-efforts estimated it provided in its initial FOIA response. (*Id*.) The estimate must be made with an "honest intent to fulfill the public body's duty to provide public records in keeping with the purpose of FOIA." (*Id*., at 115b.) As the Attorney General recognized, the Legislature granted public bodies "significant latitude" for the time to fulfill a public records request. (*Id*.)[16]

Thus, a public body must strive to provide a reasonably accurate estimate of the time it will take the public body, using diligent attempts, to carry out its obligation to "provide the public records in a manner based on the state's public policy under section 1" of the FOIA. As section 1 requires production of the "full and complete information" requested, the public body's obligation, stated in full under MCL 15.234(8), is to provide the requestor with a reasonably accurate estimate of the time it will take the public body, using diligent attempts, to produce the full and complete information requested. No time frame is specified for fulfillment under the plain language of the Act and, indeed, the required time estimate, itself, is not binding.[17]

3. <u>Other provisions of FOIA support the same conclusion</u>

The absence of a time-frame for fulfillment under MCL 15.234(8) must be construed in light of other provisions contained in the statute. Doing so underscores the Legislature's intent that public bodies be given "significant latitude" with respect to the time to fulfill a FOIA request.

[16] As with unpublished Court of Appeals opinions, OAG opinions are not binding but may be considered for their persuasive value. *Attorney General v PowerPick Player's Club of Mich, LLC*, 287 Mich App 13, 34; 783 NW2d 515 (2010).

[17] Notably, although Appellants allege that the City's time estimate, and the actual time it took to fulfill their request, were too long, they have never alleged that the City's actions were less than diligent.

RECEIVED by MSC 11/6/2026 1:11:09 PM

(*OAG, 2017-2018 No 7300*, Appellee's COA Appx, Ex B at 115b.) For example, MCL 15.233(1) states that "a person has a right to inspect, copy, or receive copies of the requested public record of the public body." For purposes of inspecting public records, a separate subsection of the statute further provides that a public body "shall furnish a requesting person a reasonable opportunity for *inspection and examination* of its public records" and that the public body must also "furnish reasonable facilities for making memoranda or abstracts from its public records during the usual business hours." MCL 15.233(3) (emphasis added). Significantly, FOIA does not impose a similar "reasonable opportunity" standard on the right to "receive copies" of the public record as it does on the right to inspect and examine the records.[18]

This Court must presume that the Legislature's intent as well as its policy choices are reflected in this omission. "When the Legislature enacts laws, it is presumed to know the rules of statutory construction and therefore its use or omission of language is generally presumed to be intentional." *Carson City Hosp v Dep't of Cmty Health*, 253 Mich App 444, 447–48; 656 NW2d 366 (2002) (citation omitted). Thus, the lack of "reasonable opportunity" standard in connection with providing copies of the public record must be read as reflecting the Legislature's intent.

[18] Throughout this litigation, Appellants have attempted to conflate the right to receive copies of the records under MCL 15.233(1) with the right to inspect and examine the records under MCL 15.233(3). See, eg, *Appellants' Supplemental Brief*, at 28 ("Nor did it explain why requesting copies is not a request for inspection and examination."). Obviously when the Legislature uses different words, the words are intended to connote different meanings. *Honigman Miller Schwartz and Cohn LLP v City of Detroit*, 505 Mich 287, 317; 952 NW2d 358 (2020). This comports with the rule that no word in a statute should be treated as surplusage. *Whitman*, 493 Mich at 311–12. Further, inspection and examination of the records under MCL 15.233(3) is directed at on-site review of the records "during the usual business hours." *Id*. The Court of Appeals has interpreted MCL 15.233(3) to apply to the time allowed and the setting provided for the personal inspection, examination and copying of public records. See, *Cashel v Regent of Univ of Mich*, 141 Mich App 541, 549; 367 NW2d 541 (1985). In other words, the "reasonable opportunity" for inspection under MCL 15.233(3) applies only to an in-person, on-site review by the requestor.

RECEIVED by MSC 11/6/2026 1:11:09 PM

Other provisions in FOIA make clear that the Legislature knew how to impose deadlines on required actions when it wanted to. For example, MCL 15.235 requires a public body to "respond to a request for a public record within 5 business days after" receipt of the FOIA request by doing one of four things, including issuing a notice extending the time for response by not more than 10 business days. MCL 15.235(2).[19] FOIA also provides specific time frames for actions in the Circuit Court by the requestor after denial of a FOIA request, and for actions by the public body if an appeal is filed. See, MCL 15.240(1)(b) (requester may commence an action in circuit court within 180 days after a final determination to deny a request); MCL 15.240(2) (requiring the head of the public body within 10 days of receipt of a written appeal to respond by taking one of four actions, including, "under unusual circumstance," extending the time for response by not more than 10 business days).

If the Legislature intended for a public body to fulfill a FOIA request under MCL 15.234(8) by providing copies of the record within a specific time frame, or even if the Legislature intended the public body to furnish a "reasonable opportunity" for a person to receive copies, the Legislature could have – and as the Circuit Court said, "should have" – written such a requirement into the statute. (*Cir Ct Op*, Appellants' COA Appx, Ex 4 at 90a.) It simply did not do so.

Finally, the Legislature did expressly address the issue of delay and it did so in one section of FOIA and one section only. Specifically, MCL 15.240(7) provides:

[19] There is no dispute that the "response" to a request described in this section is not the same as "fulfillment" of the request, The response merely gives the requestor notice that the request will be granted, denied, granted in part and denied in part, or that the time frame for this response shall be extended by not more than 10 days. MCL 15.235(2). Fulfillment of the request connotes the actual production of the public record to the requestor and Appellants acknowledge this difference. (*Pl's Br Opp Def's MSD*, Appellants' COA Appx, Ex 5 at 120a–121a ("responding to a FOIA request is technically different from fulfilling the request[.]"); see also, *Complaint*, Appellants' COA Appx, Ex 3 at 39a, ¶ 32 ("Of course, responding to a FOIA request is not the same as fulfilling the request[.]").)

RECEIVED by MSC 11/6/2026 1:11:09 PM

> If the court determines in an action commenced under this section that the public body has *arbitrarily and capriciously violated this act by* refusal or *delay in disclosing or providing copies of a public record*, the court shall order the public body to pay a civil fine of $1,000.00, which shall be deposited into the general fund of the state treasury. The court shall award, in addition to any actual or compensatory damages, punitive damages in the amount of $1,000.00 to the person seeking the right to inspect or receive a copy of a public record. The damages shall not be assessed against an individual, but shall be assessed against the next succeeding public body that is not an individual and that kept or maintained the public record as part of its public function.

Thus, FOIA already expressly contemplates a remedy for delay in the production of a public record, but only in the context of a delay that rises to the level of an arbitrary and capricious action. An action is arbitrary where it is "determined by whim or caprice," or "arrived at through an exercise of will or caprice, without consideration or adjustment with reference to principles, circumstances, or significance . . . decisive but unreasoned." *In re Keast*, 278 Mich App 415, 424; 750 NW2d 643 (2008) (quotation marks and citation omitted). "The generally accepted meaning of 'capricious' is 'apt to change suddenly, freakish, whimsical, humorsome.'" *Id.* (quotation marks and citations omitted). Had the Legislature wished to penalize unreasonable delays, as opposed ones that are arbitrary and capricious, it could have – and should have – done so. It did not, and, as discussed above, the Legislature's omission must be presumed intentional. *Carson City Hosp*, 253 Mich App at 447–48.[20]

Thus, the other provisions of FOIA underscore the Legislature's intent that production of a public record under MCL 15.234(8) is not bound by a specific time frame. As both the Circuit

[20] Appellants argue that "the right to receive records means nothing if there is no limit on how long public bodies take to produce them." *Appellants' Supplemental Brief*, at 26. Given MCL 15.240(7), Appellants' complaint rings hollow. Where a delay is arbitrary and capricious, not only does FOIA impose a remedy, it provides for an expedited hearing or appeal. See, MCL 15.240(5), which, if decided in the requestor's favor, would necessarily stop the arbitrary delay. Of course, Appellants here have never alleged that the City's delay was arbitrary and capricious, nor could they in good conscience do so. This perhaps explains their Herculean efforts to rewrite the statute so that a lower level of delay could be sanctioned.

RECEIVED by MSC 11/6/2026 1:11:09 PM

Court and Court of Appeals concluded, the imposition of a time frame, whether specific or even reasonable, is a job for the Legislature to undertake, not the courts.

4. <u>Appellants' Social Policy Concerns Do Not Control Over the Plain Statutory Language and Can Only Be Addressed by Action of the Legislature, Not the Courts</u>

Appellants put forth a number of policy reasons which they believe warrant this Court in reading either specific presumptive deadlines into FOIA, or, at the very least, a requirement that fulfillment occur within "a reasonable time" (which they then argue requires this Court to further construct a "balancing test" to determine whether that standard has been met). Appellants' policy arguments include such things as: the struggle of requestors, public bodies, and courts to understand FOIA's timing provisions and the need "to apply FOIA without guesswork" (*Appellants' Supplemental Brief*, at 2); a concern that "lack of access to timely information compromises [the] ability to develop legal challenges" (*id.*, at 4, citing *Armstrong Aff*); limiting the reasonable opportunity under MCL 15.233(3) to inspect and examine public records to an in person, on site review – as Appellants admit was the case at the time of FOIA's enactment – frustrates Legislative intent in a now digital age (*id.*, at 29); and the concern that prolonged delay inflicts grave harm (*Reply in Support of Application for Leave*, at 4). Appellants' policy concerns must be remedied by the Legislature, not the judiciary. The law on this point is clear.

For example, in *Johnson v Recca*, 492 Mich 169; 821 NW2d 520 (2012), Plaintiffs argued that this Court should read the phrase "replacement services" into the provision of the No Fault Act allowing payment for "allowable expenses" even though that provision did not include the "replacement services" phrase. The Court rejected the argument noting that:

> [T]his argument is directed at the wrong branch of government. This Court only has the constitutional authority to exercise the "judicial power." Const. 1963, art. 6, § 1. "[O]ur judicial role 'precludes imposing different policy choices than those selected by the Legislature....'" *Robertson v. DaimlerChrysler Corp.,* 465 Mich. 732, 759, 641 N.W.2d 567 (2002), quoting *People v. Sobczak–Obetts,* 463 Mich. 687, 694–695, 625 N.W.2d 764 (2001). "Whether or not a statute is productive of

RECEIVED by MSC 11/6/2026 1:11:09 PM

> injustice, inconvenience, is unnecessary, or otherwise, are questions with which courts ... have no concern." *Voorhies v. Recorder's Court Judge,* 220 Mich. 155, 157, 189 N.W. 1006 (1922) (quotation marks and citation omitted). "It is to be assumed that the legislature ... had full knowledge of the provisions ... and we have no right to enter the legislative field and, upon assumption of unintentional omission ..., supply what we may think might well have been incorporated." *Reichert v. People's State Bank*, 265 Mich. 668, 672, 252 N.W. 484 (1934). Thus, despite the acknowledged possibility that the Legislature's failure to amend MCL 500.3135(3)(c) and the other provisions that employ the phrase "allowable expenses, work loss, and/or survivor's loss" to include replacement services may have been the result of an oversight, that is not self-evident to us, and the judiciary is powerless to address the problem. Simply stated, the judicial branch cannot amend the no-fault act to make it "better." That is an authority reserved solely to the Legislature.

Johnson, 492 Mich at 187 (punctuation in original).

The same may be said here. Even if the FOIA, as written, is "productive of injustice [and] inconvenience" as Appellants strongly suggest, it is the province of the Legislature, not the Court, to amend the FOIA to include a time-frame for fulfillment of a request. As in *Johnson*, "[t]he judiciary is powerless to address the problem" and it is not within the purview of the judicial branch to amend the FOIA "to make it 'better.'" *Id.*

Further, this Court has not only said in the past that "making social policy is a job for the Legislature, not the courts[,]" *Woodman v Kera LLC*, 486 Mich 228, 245; 785 NW2d 1 (2010) (quotation marks and citation omitted), the Court has made clear that:

> This is especially true when the determination or resolution requires placing a premium on one social interest at the expense of another: "The responsibility for drawing lines in a society as complex as ours – of identifying priorities, weighing the relevant considerations and choosing between competing alternatives – is the Legislature's, not the judiciary's."

Id., at 245–46, quoting *O'Donnell v State Farm Mut Auto Ins Co*, 404 Mich 524, 542; 273 NW2d 829 (1979).

Yet, inserting social policy into the FOIA and "placing a premium on one social interest at the expense of another" is precisely what Appellants ask this Court to do. For example, when

RECEIVED by MSC 11/6/2026 1:11:09 PM

Appellants ask this Court to impose a 30-to-90-day deadline on the production of public records, they are pitting their interest in prompt fulfillment against the Legislature's express interest in providing "full and complete information" to the public. As the Circuit Court correctly noted:

> There is, no doubt, tension between prompt response to a FOIA request and disclosure of "full and complete information." That is, a prompt response may pose a risk that some documents otherwise responsive to the request get overlooked or forgotten. But the express policy of the Michigan FOIA references only the latter policy of full and complete information. In other words, the Legislature's intent was for public bodies to ensure that they were producing everything, even if responding to the request is delayed due to the nature or complexity of the request or, as in this case, the need on the part of the public body to first respond to older requests.

(*Cir Ct Op*, Appellants' COA Appx, Ex 4 at 91a.)

Indeed, in this case, Appellants ask the Court to also put a premium on fulfilling their "smaller request" at the expense of some or all of the older requests that were already in the City's fulfillment queue just on the basis that such requests might be "larger." Appellants offer no thoughts on if or how these older requests should be prioritized amongst themselves or even vis-à-vis Appellants' request. Yet, some process must be put in place to avoid arbitrary and capricious selection. In fact, the need for some type of line-drawing and choosing between competing alternatives with respect to whose request will be fulfilled first (if not done on the first-in-first-out basis that the City uses now) is precisely why the Legislature, not the courts, must take responsibility in this case. *Woodman*, 486 Mich at 245–46.

5. <u>Appellants' Reliance on Legislative History is Both Improper and Misleading</u>

Appellants suggest that the FOIA statute's legislative history demonstrates the 5-day response deadline was intended as a fulfillment deadline. However, this notion is flawed for multiple reasons. Not only do the bill analyses cited by Appellants fail to establish that the 5-day response deadline was intended to require a complete production of records rather than an initial

RECEIVED by MSC 11/6/2026 1:11:09 PM

review of the request, but the broader legislative history demonstrates that the Legislature considered and declined to enact such requirement.

a. Legislative History Should Not Be Considered When the Statute is Clear

This Court has noted in the past that legislative history is not dispositive or reliable of legislative intent. Further, "[l]egislative history of a statute is relevant to the statute's meaning only where the statute is ambiguous." *Rouch World, LLC v Dep't of Civil Rights*, 510 Mich 398, 429; 987 NW2d 501 (2022).

No ambiguity has been identified by Appellants here. Consequently, the legislative history of the FOIA is not relevant to its meaning whatsoever. *Id*.

But, even when legislative history is properly consulted, its weight is assessed on a sliding scale of reliability, measured by whether the court can "draw reasonable inferences about the Legislature's intent" from the source in question. *Kenneth Henes Special Projects Procurement, Mktg & Consulting Corp v Cont'l Biomass Indus (In re Certified Question)*, 468 Mich 109, 115 n 5; 659 NW2d 597 (2003). Courts have established at length that the language of the statute itself should be the main guidance on interpretation instead. "The words of a statute provide 'the most reliable evidence of its intent. . . . When the Legislature has clearly expressed its intent in the language of the statute, no further construction is required or permitted." *McCahan v. Brennan*, 492 Mich 730, 736; 822 NW2d 747 (2012).

Even if this Court chooses to consider legislative history, bill analyses are particularly unreliable indicators of legislative intent. "The problem with relying on bill analyses is that they do not necessarily represent the views of even a single legislator. Rather, they are prepared by House and Senate staff. Indeed, the analyses themselves note that they do not constitute an official statement of legislative intent. *Frank W Lynch & Co v Flex Techs, Inc*, 463 Mich 578, 588; 624

RECEIVED by MSC 11/6/2026 1:11:09 PM

NW2d 180 (2001).[21] In sum, the Court should adhere to statute's plain language, rather than rely on preliminary discussions.

b. The FOIA Statute's Legislative History Does Not Support Appellants' Position

If this Court chooses to consider Legislative history at all, the Court should note that, Appellants' characterization of the legislative record rests largely on conjecture. Appellants appear to infer from the Legislature's retention of the 5-day response deadline, despite concerns raised by several public bodies, that the Legislature intended to require a complete production of responsive records within that period. *Appellants' Supplemental Brief*, at 10. Their cited examples include concerns raised by the Department of Social Services, noting that "an organization as large as complex as this Department, five days is arbitrarily short period for response." (*DSS 1976 Memo*, Appellants' SC Appx, Ex 28 at 574a.) In another section, a comment submitted by the Department of State Police to the Governor notes that state agencies are understaffed and "unable to keep up with existing workloads. To suggest they could handle this additional burden on a routine 5-day turn-around is ludicrous" (*DSP 1976 Memo*, Appellants' SC Appx, Ex 31 at 589a.)

However, Appellant's brief fails to establish that this concern is specific to the ultimate production of these records. There is no discussion that establishes that the Legislative concern was specifically directed at the production of records, rather than the time necessary for a public body to conduct an initial review of a request, determine the availability of response records, and

[21] This Court pointed out that, "As the Court of Appeals noted in *People v. Tolbert*, 216 Mich. App. 353, 360, n 5; 549 N.W.2d 61 (1996): 'It has been observed in the federal context that resort to "legislative history" in the search for legislative intent is a perilous venture.' *Marposs Corp. v. Troy,* 204 Mich.App. 156, 167–168, n. 2, 514 N.W.2d 202 (1994) (Taylor, P.J., dissenting), quoting Address by Justice Antonin Scalia before the Attorney General's Conference on Economic Liberties (June 14, 1986). This enterprise is doubly fraught with danger in Michigan which, unlike Congress, has failed to create an authoritative legislative record. *Id*." *Frank W Lynch & Co*, 463 Mich at 588 (punctuation in original).

RECEIVED by MSC 11/6/2026 1:11:09 PM

prepare its response. Contrary to Appellants' assertion, Appellants' own submitted bill analyses are lacking any discussion on fulfillment or any suggestion that the concerns regarding the 5-day response period were premised on the burden to produce all public records within that time frame. Rather, Appellants' inference is speculative and unsupported by the legislative analyses.

c. Legislative History Confirms the Plain Language of the Statute

Further, the Legislature already considered but ultimately declined to enact the sort of records production deadline that the Appellants seek to impose. In 2013, Public Act 563 of 2014 (HB 4001) introduced numerous suggested changes. One of these suggested changes expressly addressed production timing: if a public body did not deny a request but "fail[ed] to make the requested records available . . . until after the time specified in subsection (2)"[22] the bill would have reduced the fee "by 20% of the original fee for each day after the deadline that the record or copy is not made available," and would have prohibited any fee at all for a "record produced more than 5 days after the deadline." (*MML Amicus Br*, Appx A, at MML_007.) In summary, this fee reduction provision would effectively require all record production to occur within 5 business days, or 15 business days if an extension was issued. Failure to comply with this strict record production timeline would result in statutorily mandated fee reductions, up to and including a complete waiver of the fee. The House Fiscal Agency analyzed the projected impact on public bodies and

[22] The language under the referenced subsection (2) was written as follows: "(2) Unless otherwise agreed to in writing by the person making the request, a public body shall respond to a request for a public record within 5 business days after the public body receives the request by doing 1 of the following: (a) granting the request. (b) Issuing a written notice to the person denying the request. (c) Granting the request in part and issuing a written notice to the requesting person denying the request in part. (d) Issuing a notice extending for not more than 10 business days the period during which the public body shall respond to the request. A public body shall not issue more than 1 notice of extension for a particular request." This language is now reflected in MCL 15.235(2).

RECEIVED by MSC 11/6/2026 1:11:09 PM

summarized that this provision could place a financial burden on agencies, while providing a potential financial benefit to requestor. (*MML Amicus Br*, Appx B, at MML_013–MML_014.)

However, the production deadline provision was ultimately removed from the final text. It was replaced with what is now MCL 15.234(8)—the "best efforts estimate" framework that explicitly makes the production time frame "nonbinding." Notably, the surviving language clearly rejects a specified time frame and gives public bodies latitude to determine what is reasonable on a case-by-case basis: "The response must also contain a best efforts estimate by the public body regarding the time frame it will take the public body to comply with the law in providing the public records to the requestor. The time frame estimate is nonbinding upon the public body, but the public body shall provide the estimate in good faith and strive to be reasonably accurate and to provide the public records in a manner based on this state's public policy under section 1 and the nature of the request in the particular instance." MCL 15.234(8). Contrary to Appellant's argument, this revision instead reflects a deliberate departure from a precise production deadline. Furthermore, the original proposed fee reduction mechanism now appears in MCL 15.234(9) but specifically applies to untimely *responses*, removing all language that specified deadlines for *production*.

In summary, the Legislature considered enacting specific language that would mandate record production within a specified timeline, examined its fiscal consequences, and chose not to impose a definitive deadline. The distinction between the original proposed language and the enacted statute further supports the conclusion that the Legislature intended the 5-day deadline to apply to an initial *response* by a public body and rejected language that would mandate *production* in that time frame. Therefore, contrary to Appellant's argument, the legislative history indicates

RECEIVED by MSC 11/6/2026 1:11:09 PM

that the Legislature intentionally did not impose a production deadline, and the statutory intention is for public bodies to determine what is reasonable.

6. Appellant's Reliance on the Laws of Other States as Well the Federal FOIA is Unwarranted

Appellants cite legal authorities from other jurisdictions to urge this Court to establish a presumptive deadline within 30 days or so as this state's "reasonable" time frame. *Appellants' Supplemental Brief*, at 41. However, Appellants mischaracterize these authorities, several of which actually affirm the judicial deference towards public bodies to determine themselves what a reasonable response time entails. Moreover, the statutes on which those cases rely contain time frames language that is not present in the Michigan FOIA.

The Appellants reference other jurisdictions in their argument, including Ohio. *Id.*, at 41–42. The Ohio FOIA statute, unlike Michigan's, requires public bodies to provide records within "a reasonable period of time." ORC § 149.43(B)(1). Further, Appellants cite to *State ex rel Shaughnessy v Cleveland*, 149 Ohio St 3d 612; 76 NE3d 1171 (2016), but, in that case, the Supreme Court of Ohio upheld the City of Cleveland's disclosure of records within 24 business days after the request, finding that the City's *own* determination of a reasonable response time was timely. Similarly, in another case cited by Appellants, the Court of Appeals of Arizona (where the state FOIA requires a records custodian to "promptly furnish . . . copies")[23] found that the public body's

[23] Arizona Revised Statues, sections 39-121.01 states:

> (D)(1) Any person may request to examine or be furnished copies, printouts or photographs of any public record during regular office hours or may request that the custodian mail a copy of any public record not otherwise available on the public body's website to the requesting person. The custodian may require any person requesting that the custodian mail a copy of any public record to pay in advance for any copying and postage charges. **The custodian of such records shall promptly furnish such copies**, printouts or photographs and may charge a fee if the facilities are available, except that public records for purposes listed in section 39-122 or 39-127 shall be furnished without charge.

RECEIVED by MSC 11/6/2026 1:11:09 PM

chosen response time of 24 business days was reasonable. *McKee v Peoria Unified Sch Dist*, 236 Ariz 254, 259; 338 P3d 994 (Ct App 2014). In other words, instead of making a blanket determination of what a "reasonable" time frame constitutes, courts in other jurisdictions have adhered to the plain language of their respective statutes, deferring to public agencies' own judgment of reasonable response times and fulfillment time frames.

Appellants also rely on legal authority with a decisive time frame built into the statute. The Federal FOIA statute, for example, specifies 20 days for a public agency to determine whether to *comply* with the request. 5 USC § 552(a)(6)(A)(i–ii). Appellants also cite Iowa law, which states that a reasonable delay shall not exceed twenty calendar days. IC § 22.8(4)(d). In citing these statutes, what Appellants fail to mention is that the courts are not establishing a presumptive deadline but are adhering to the plain language of the statute. Appellants own cited authorities and arguments demonstrate that these courts are applying the plain language of the relevant statutes (language which is not present in the Michigan FOIA) and, when applicable, affording public agencies discretion to determine reasonable response times given the nature of the requests.

B. If the Court holds that FOIA Requires Fulfillment Within a Reasonable Time, the City's fulfillment of the ACLU's FOIA request thirteen months after payment of a good faith deposit was reasonable under the circumstances presented in this case, given the volume of requests processed by the City, the need to process all requests under MCL 15.234(8) fairly, and the statutory requirement to avoid any process that could be deemed arbitrary and capricious.

Under MCL 15.234(8), a public body is "to provide the public records in a manner based on this state's public policy under section 1 and the nature of the request in the particular instance." In other words, the public body is expected to provide the "full and complete information" in light of "the nature of the request in the particular instance." Appellants appear to argue that all that is of importance here is that the "nature" their FOIA request was relatively small, in that it would

RECEIVED by MSC 11/6/2026 1:11:09 PM

take only three and one half hours to process. But the statute requires an appreciation of the particular circumstances surrounding the processing of that request as well.

While no one wants fulfillment of any FOIA request to take 13 months, the circumstances here support the conclusion that the City's approach to processing Appellants' FOIA request – and those of every other requestor – was reasoned and fair.

First, there is no dispute that the City was entitled to, and did, follow the procedure set forth in MCL 15.234(8) by providing to Appellants a "best-efforts" estimate in good faith. (See, eg, *Smith June 8, 2023 Aff*, Appellee's COA Appx, Ex A-6 at 39b, ¶ 18; *COA Opinion*, Appellee's SC Appx, Ex A at 4b (*3) ("There is no dispute that defendant followed this procedure.").) Consequently, the City appropriately discharged this part of its obligation under the law and must be deemed to have acted reasonably through this point.

Second, there is no dispute that the City processes all FOIA requests over $50 on a first-in-first-out basis by placing them in a queue for processing after the City receives the requestor's deposit. See, *Application for Leave*, at 8. Nor is there a dispute that the number of requests in the queue affects when the newest request will be processed. *Id.* (citing *Smith Dep Tr*, Appellants' SC Appx, Ex 7 at 151a–152a). While the size of an individual request bears on the amount of time that it takes to collect, review, redact, and separate out exempt from nonexempt material for that specific request, the size of the request does not bear on the order in which it is taken up to be processed.[24] Each request is taken up in the order received (after deposit) to guarantee fairness in the system. Indeed, as described by Police Records Supervisor, Mikayla ("Connor") Smith:

[24] Appellants misleadingly state that "the size or substance of a request (if over the $50 threshold) has no bearing on how fast it will be processed." *Appellants' Supplemental Brief*, at 4. While it is true that the "size or substance" of a request will not affect when it is eligible to be taken from the queue for processing and fulfillment – ie, it will be taken on a first-in-first-out basis – the time for processing any individual request will depend on the number, scope, and length of the responsive

RECEIVED by MSC 11/6/2026 1:11:09 PM

> This process has been implemented to provide a fair routine for processing and fulfilling FOIA requests and to not treat any individual FOIA request differently than another. The "first in, first out" process ensures consistency and provides some credibility to the output of the work despite the significant backlog.

(*Smith June 8, 2023 Aff*, Appellee's COA Appx, Ex A-6 at 37b, ¶ 14.)

Appellants have never argued that the City's first-in-first-out process is arbitrary and capricious under MCL 15.240(7), or even that it is unreasonable. Their only argument seems to be that, because their request was estimated to take only a few hours to process, the City should have allowed them to "jump the line" and have their request processed before other "larger" requests. That raises the obvious question: how would the City decide which requests to process first? Should it move all requests that will take under 4 hours to the head of the line? Or 5 hours? Or 10? What would the cut-off be? And of those "smaller" requests, how should they be prioritized? Should all incoming smaller requests be continually reshuffled with the older "smaller" requests to create a new order for all pending requests? And if this system leads (as it surely would) to longer fulfillment times for those requests that are "larger" in scope, would it be fair to automatically "backlog" those "larger" requests? If so, how would these lingering "larger" requests be prioritized? Indeed, without a clearly delineated process that orders the processing of *all* requests in a fair manner, the City might well be subject to a charge that it acted arbitrarily and capriciously under MCL 15.240(7) – a result that the first-in-first-out process wholly avoids. Appellants ignore this issue altogether.

Appellants also ask this Court to turn a blind eye to the many factors (most of which are entirely beyond the City's control) that have contributed to the increasing time that it takes to fulfill

---

records that are found. As Ms. Smith testified in her deposition: "so the 16 incident reports could be 500 pages or they could be 32 pages, and the body cameras could be 30 seconds long or they could be 5 hours long each, so it would really vary." (*Smith Dep Tr*, Appellee's COA Appx, Ex A-9 at 69b, 28:7–10; see also, *id*., at 27:10–12 (acknowledging that size and complexity of a request affect the processing).)

RECEIVED by MSC 11/6/2026 1:11:09 PM

a FOIA request from the queue. Yet this Court specifically asked the parties to address whether the City's fulfillment of Appellants' FOIA request 13 months after payment of the good faith deposit "constitutes a reasonable time *under the circumstances presented by this case*." *Order*, dated July 10, 2026 (emphasis added). Consequently, the circumstances that the City faced when processing FOIA requests are highly germane.

As Ms. Smith explained, the circumstances affecting fulfillment times at the time of Appellants' request were significant. These included: (a) the continued increase in the number of FOIA requests made to GRPD over the years, including a substantial influx following an officer involved shooting in 2022 (*Smith June 8, 2023 Aff*, Appellee's COA Appx, Ex A-6 at 37b–38b, ¶ 16a)[25]; (b) the substantial increase in volume of available data subject to FOIA arising from the

[25] In 2022, GRPD processed 2,230 FOIA requests. In June of 2023, at the time of Ms. Smith's affidavit, FOIA requests were projected to increase by 10–20%. (*Smith June 8, 2023 Aff*, Appellee's COA Appx, Ex A-6 at 38b, ¶¶ 16a.ii, 16a.iii, 16e.) The final total processed by GRPD in 2023 was 2,340. (*Ex 17 to Pl's MSD*, Appellants' COA Appx, Ex 5 at 297a–298a, Def's Answer to Interrogatory No. 1.)

RECEIVED by MSC 11/6/2026 1:11:09 PM

increased use of technology by law enforcement[26]; staffing[27] and budget constraints[28]; and changeover in the Records Unit command staff.[29]

In addition, the Records Unit was tasked with far more than handling FOIA requests alone. In 2023, while processing a total of 2,340 FOIA requests,[30] including Appellants' request, the Records Unit staff was also processing all: fingerprints for assorted non-investigatory purposes; licenses to purchase pistols, pistol sales records (then numbering over 100 per week); records requests from the City's Department of Law (which included discovery in civil lawsuits and MDCR investigations); and records requests from various prosecuting agencies, other law enforcement agencies, courts, civil subpoenas, CPS and other State agencies, as well as Federal agencies. (*Smith June 8, 2023 Aff*, Appellee's COA Appx, Ex A-6 at 38b–39b, ¶ 17.) The Records Unit was also tasked with making entries into LIEN regarding stolen firearms and other items, placing holds on various records for multiple purposes (including litigation hold requests), processing records to be released to the Office of Oversight and Public Accountability and the

[26] As Ms. Smith explained, the added use of technology in law enforcement "has resulted in the added quantity of data associated with law enforcement" activities. (*Smith June 8, 2023 Aff*, Appellee's COA Appx, Ex A-6 at 38b, ¶ 16f.) In other words, use of digital technology by law enforcement has increased the quantity of information accessible under FOIA.

[27] In 2022, all records tasks (including but not limited to FOIA) were performed by one supervisor, three staff members, and one additional employee whose sole responsibility was to review and process video footage. (*Smith June 8, 2023 Aff*, Appellee's COA Appx, Ex A-6 at 38b, ¶ 16b; see also, *id.*, at 38b–39b, ¶ 17 (list of all tasks performed by this staff).) In 2023, three individuals (including one temp) were added in order to improve FOIA fulfillment times. At the time of Appellants' request, these three were in training which takes six months before they are considered qualified and certified to properly review, redact, and process documents for FOIA. (*Id*., at 38b, ¶ 16b.)

[28] Ms. Smith described the internal resource limitations on record staff expansion due to reductions in the Police Department budget. (*Smith June 8, 2023 Aff*, Appellee's COA Appx, Ex A-6 at 38b, ¶ 16c.)

[29] (See, *Smith June 8, 2023 Aff*, Appellee's COA Appx, Ex A-6 at 38b, ¶¶ 16d and 16e.)

[30] (See, *Ex 17 to Pl's MSD*, Appellants' COA Appx, Ex 5 at 297a–298a, Def's Answer to Interrogatory No. 1.)

RECEIVED by MSC 11/6/2026 1:11:09 PM

Civilian Appeals Board, processing Lexis Nexis requests for reports, processing U-Visa applications for certification, performing firearm verification for the GRPD Detectives Bureau, as well as handling the general release of incident and crash reports to members of the public over the counter. (*Id.*). In other words, the Records Unit was, and is, officially tasked with processing *all* records that are released from the GRPD. While processing FOIA requests is one component of its job, albeit a very important one, there is nothing in MCL 15.234(8), or anywhere else in FOIA, that would require the Records Unit to devote its time solely to processing FOIA requests until they were all fulfilled without regard for other departmental responsibilities.

Appellants argue that the "public body's choices about how to allocate its resources do not shield it from its statutory obligations" (*Appellants' Supplemental Brief*, at 37) and that "the delay was a result of the City's staffing choices" (*id.*, at 38). In other words, Appellants essentially argue that the City should have thrown more money at the "problem" to resolve it. Appellants are unrealistic.

First, every public body makes choices about how best to allocate its tax-payor based resources, and they are obligated to use what resources they have for the benefit of all tax-paying citizens. See, e.g., *City of Gaylord v Beckett*, 375 Mich 273, 295; 144 NW2d 460 (1966); *Hayes v City of Kalamazoo*, 316 Mich 443, 454; 25 NW2d 787 (1947). If the City's resources are inadequate to provide services, they must do one of two things: cut other services or raise taxes. If the City should cut other services in order to increase the funding for FOIA fulfillment by its Records Unit, what services should be on the chopping block – Elections? Fire service? Non-FOIA police services? Infrastructure maintenance? Oversight and accountability functions? Appellants offer no thoughts on how this should be done or who should be affected. If the City should raise taxes to fund a faster FOIA fulfillment, then all tax-payors will be affected whether they make use

RECEIVED by MSC 11/6/2026 1:11:09 PM

of FOIA or not. Either way, Appellants' argument essentially requires that the interests of some citizens should trump the interests of other citizens. This is precisely why the Court should not engage in policy making as it puts a premium on the interests of one group over that of another. *Woodman*, 486 Mich at 245–46. Certainly, if FOIA – which is currently without a timeframe for fulfillment of requests – is to be wholly prioritized at the expense of either other City services or the taxpayer's pocketbooks, that direction must come from the Legislature and not the Court. *Id*.

Second, the City's actions were reasonable under the circumstances presented by this case. The term "reasonable" is not defined by FOIA and it is therefore proper to consult a dictionary for assistance. *People v Wood*, 506 Mich 114, 122; 954 NW2d 494 (2020). *Black's Law Dictionary* (11th Ed) defines "reasonable" as "[f]air, proper, or moderate under the circumstances; sensible." At the very least, the City's fulfillment of FOIA requests has been fair and sensible.

Here, the City has set up a fair first-in-first-out system for handling all FOIA requests over the $50 threshold. Appellants have not challenged that choice by the City as unreasonable, much less arbitrary or capricious. The very factors that Ms. Smith described as affecting the time for fulfillment *are* the circumstances at play in this case. Appellants have not challenged the existence of these circumstances or their effect on the timing of fulfillment. For that matter, Appellants have never actually challenged the diligence with which Ms. Smith and her staff strove to provide Appellants with the full and complete information to which they were entitled under the Act. Rather, Appellants complaint has always been simply "it took too long." But what they need to show, instead, was that it took too long *under the circumstances presented by this case* – as this Court asked them to do – and they failed to address the *circumstances* here at all.[31] In contrast, the

[31] Appellants suggest that this Court (an ultimately ever other court in the state) should evaluate the reasonableness of a public body's fulfilment of a FOIA request by means of either a presumptive 30-day/90-day window, or a balancing test based on several artificially constructed

RECEIVED by MSC 11/6/2026 1:11:09 PM

City has shown that, under the unrebutted circumstances presented by this case, its actions were "fair" and "sensible" and therefore reasonable with respect to fulfillment of Appellants' FOIA request.

C. This case was rendered moot by the City's fulfillment of Appellants' FOIA request

"When the disclosure that a FOIA suit seeks has already been made, the substance of the controversy disappears and becomes moot." *King v Mich State Police Dep't*, 303 Mich App 162, 194; 841 NW2d 914 (2013), quoting *Herald Co, Inc v Ann Arbor Pub Sch*, 224 Mich App 266, 270–71; 568 NW2d 411 (1997). "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." *Densmore v Dep't of Corr*, 203 Mich App 363, 366; 512 NW2d 72 (1994). See also, *State News v Mich State Univ*, 481 Mich 692, 704, n 25; 753 NW2d 20 (2008) ("Of course, release of the requested public record by the public body would render the FOIA appeal moot because there would no longer be a controversy requiring judicial resolution.") (citation omitted).

Here, Appellants' FOIA request was fulfilled on June 10, 2024. *Appellants' Supplemental Brief*, at 6. Appellants have never challenged the records provided as incomplete or violative of FOIA in any way. Therefore, since the records, which were the substance of this controversy, have been produced, there is no controversy requiring judicial resolution and application for leave to appeal to this Court should be denied as moot.

---

factors. The problem with the 30/90 window is evident: there is absolutely no basis in the statute for such a standard and imposing such a presumption would amount to the rankest form of legislating by judicial fiat. The glaring flaw in Appellants' "balancing test" is that it takes no heed of the FOIA requests that came in *before* Appellants' request in this case. Nor do Appellants suggest any means by which all requests that are subject to MCL 15.234(8) may be treated fairly. Moreover, by suggesting that the Court consider such factors as whether a public body properly allocated resources to FOIA, or used its "best efforts," Appellants invite an explosion of additional litigation over FOIA fulfilment which, of necessity, will require an additional drain on public resources.

RECEIVED by MSC 11/6/2026 1:11:09 PM

In response, Appellants argue only two points. First, they posit that their claims are not moot because, beyond production of the records, they seek a declaratory judgment that FOIA requires production of the records within a reasonable time as well as statutory attorneys' fees under MCL 15.240(6). Second, they claim an exception to mootness, arguing that they have raised an issue of public significance that is likely to recur, yet evade judicial review. Appellants are wrong on both counts.

1. **Appellants request for declaratory relief is moot**

Appellants' complaint states only one count for violation of FOIA: It is based on the City's "best-efforts estimate" and states:

> By delaying production of public records responsive to plaintiffs' FOIA request for 8-10 months, when fulfillment of the request will only take 2.25 hours, defendant has violated and continues to violate the FOIA by failing to furnish plaintiffs "a reasonable opportunity for inspection and examination of its public records" under the Act and/or constructively denying plaintiffs' request. MCL 15.233(3); MCL 15.240(1).

(*Complaint*, Appellants' COA Appx, Ex 3 at 40a, ¶ 41.) Consequently, Appellants requested the Court to order the City to "produce the records within a reasonable time." (*Id.*, at 40a–41a, WHEREFORE clause "C".)

Appellants' request for declaratory relief requested the Court to:

> Enter judgment in favor of plaintiffs and against defendant, including a declaratory judgment under MCR 2.605, recognizing that delaying production of public records responsive to plaintiffs' FOIA request for 8-10 months, when fulfillment of the request will only take 2.25 hours, violates FOIA by failing to furnish plaintiffs "a reasonable opportunity for inspection and examination of its public records" under the Act and/or constructively denying plaintiffs' request[.]

(*Id.*, at WHEREFORE clause "B".) Since it is apparent that the request for declaratory judgment parrots the allegation that would support the Court in ordering production of the records, and those records have been produced, the request for declaratory relief does not avoid mootness here.

RECEIVED by MSC 11/6/2026 1:11:09 PM

First, as stated in *Newton v Progressive Marathon Ins Co*, 349 Mich App 536, 546; 28 NW3d 377 (2024):

> "To assert a claim for declaratory judgement under MCR 2.605, the plaintiff (1) must allege a 'case of actual controversy' within the jurisdiction of the court, and (2) must be an 'interested party seeking a declaratory judgement.'" *T & V Assoc, Inc*, 347 Mich App [486,] 499, 15 N.W.3d 313 [(2023),] quoting MCR 2.605(A)(1). An actual controversy exists when declaratory relief is required to "guide a party's future conduct in order to preserve that party's legal rights." *T & V Assoc, Inc,* 347 Mich App at 499, 15 N.W.3d 313 (quotation marks and citation omitted).

(Punctuation in original.)

Further, "[t]he existence of an 'actual controversy' is a condition precedent to the invocation of declaratory relief." *PT Today, Inc v Comm'r of Office of Fin and Ins Servs*, 270 Mich App 110; 127 715 NW2d 398 (2006) (citation omitted). An actual controversy exists:

> where a declaratory judgment is necessary to guide a plaintiff's future conduct in order to preserve the plaintiffs' legal rights. "[W]hat is essential to an 'actual controversy' under the declaratory judgment rule is that plaintiff plead and prove facts which indicate an adverse interest necessitating a sharpening of the issues raised." Generally, where the injury sought to be prevented is merely hypothetical, a case of actual controversy does not exist.

Id., at 140, quoting *Citizens for Common Sense in Gov't v Attorney General*, 243 Mich App 43, 55; 620 NW2d 546 (2000). See also, *Lash*, 479 Mich at 196 ("An 'actual controversy' exists for purposes of a declaratory judgment where a plaintiff pleads and proves facts demonstrating an adverse interest *necessitating* a judgment *to preserve the plaintiff's legal rights*") (emphasis added). "As such, a court may not 'decide moot questions in the guise of giving declaratory relief,' . . . because moot cases 'present[] only abstract questions of law that do not rest upon existing facts or rights.'" *PT Today*, 270 Mich App at 127 (citations omitted; bracket in original).

Here, the City's fulfillment of Appellants' FOIA request rendered both their request for the documents under Count I and their request for declaratory relief moot. There is no "actual controversy" any longer, as there is no necessity for a judgment "to guide [Appellants'] future

RECEIVED by MSC 11/6/2026 1:11:09 PM

conduct in order to preserve plaintiff's legal rights." In fact, it is the City's future conduct that Appellants wish to guide, not their own. Further, as the case is currently postured, it presents only an abstract question of law. This is particularly evident as the request for declaratory relief parrots Appellants' substantive allegation of a violation of FOIA. Finally, to the extent that Appellants argue that a declaratory judgment is needed to prevent future injury from the City's "delays" in responding to FOIA, they raise only a hypothetical and speculative scenario.[32] Appellants, therefore, cannot avoid mootness in this manner.

Appellants rely on *Arabo v Mich Gaming Control Bd*, 310 Mich App 370; 872 NW2d 223 (2015), and *King v Mich State Police Dep't*, 303 Mich App 162; 841 NW2d 914 (2013), to avoid mootness.[33] However, their reliance is misplaced, as neither case supports their position.

In *Arabo*, plaintiff sought records from the Michigan Gaming Control Board (Board) regarding restrictions on card counters in certain casinos. *Arabo*, 302 Mich App at 226–27. The Board responded by granting the request and demanding a good-faith deposit. *Id.*, at 375. Plaintiff requested a fee waiver, which the Board denied. *Id.*, at 377. Plaintiff did not pay the deposit but filed a two count FOIA complaint claiming that (1) the Board wrongfully denied his FOIA request, and (2) the Board had imposed excessive deposit fees. *Id.*, at 378. The Circuit Court granted summary disposition to the Board and dismissed the case. The Court of Appeals affirmed summary

[32] In this case, as the Affidavit of Ms. Smith made clear, the City has already added resources and staff to the Records Unit with the specific goal of reducing FOIA fulfillment times. (*Smith June 8, 2023 Aff*, Appellee's COA Appx, Ex A-6 at 38b–39b, ¶¶ 16b, 18, 20.) As Appellants have not sued the City over delays, since the request at issue in the case was made in 2023, future injury appears, at best, speculative.

[33] Appellants also cite footnote 25 from *State News*, 481 Mich at 704, n 25, for the proposition that their "claims are not moot because they go well beyond simply obtaining the records." *Appellants' Supplemental Brief*, at 44. Footnote 25, however, merely recites the general rule that the release of public records by a public body renders FOIA appeal moot and points out that mootness was not an issue in this case. *State News*, 481 Mich at 704, n 25.

RECEIVED by MSC 11/6/2026 1:11:09 PM

disposition of plaintiff's first claim (i.e., to compel disclosure of the documents) because plaintiff had failed to pay the requested deposit. *Id.*, at 388–89. While the Court also determined that FOIA did not provide for monetary damages or other remedies related to plaintiff's excessive fee claim, it chose to treat that claim as one for declaratory relief rather than damages. *Id.*, at 395. In this regard, the Court looked to whether the claim regarding the deposit fees – which was wholly distinct from the claim to compel production of the documents – could survive summary disposition and decided it could. *Id.*, at 394–96. Mootness, however, was never part of the discussion in the case.

Here, the request for declaratory relief was based on the same claim – word for word – as Appellants' claim for delay and there is no basis for distinction as there was in *Arabo* between the claim for documents and the claim for excessive fees. Consequently, *Arabo* does not support Appellants' argument in this regard. Given that *Arabo* did not even consider the issue of mootness, the case is irrelevant to Appellants' position in that regard as well.

King is particularly at odds with Appellants' position. In *King*, defendant failed to establish that plaintiff's claims were moot at all because (1) defendant did not produce *all* of its records, (2) defendant's asserted exemptions for some of the records withheld were still in dispute; and (3) plaintiffs sought a partial refund of the processing fee and attorneys fees. *King*, 303 Mich App at 194–95. As the Court of Appeals noted, "Defendant has thus failed to establish mootness." Moreover, even *King* recognized that "[w]hen the disclosure that a [FOIA] suit seeks has already been made, the substance of the controversy disappears and becomes moot." *Id.*, at 194, quoting *Herald Co*, 224 Mich App at 270–71 (other citations omitted).

RECEIVED by MSC 11/6/2026 1:11:09 PM

Here, there is no dispute that *all* of the public records have produced. Consequently, this matter is moot as to both the substantive claim of delay and the request for declaratory relief that is specifically based upon it. *Arabo* and *King* do not alter that conclusion; they support it.

2. Appellants' request for attorneys fees cannot avoid mootness in this case

Appellants rely on three cases to support their argument that their claim for attorneys fees saves their case from being declared moot – *Amberg v City of Dearborn*, 497 Mich 28; 859 NW2d 674 (2014); *Cramer v Village of Oakley*, 316 Mich App 60; 890 NW2d 895, *vacated in part on other grounds*, 500 Mich 964; 892 NW2d 371 (2017); *Walloon Lake Water Sys, Inc v Melrose Township*, 163 Mich App 726; 415 NW2d 292 (1987). Appellants are incorrect.

The City acknowledges that, in line with these cases, a court may consider a plaintiff's request for costs and fees even after a FOIA suit is rendered moot. However, none of these cases stand for the proposition that a request for fees prevents the underlying substantive claims from actually being moot.

For example, in *Amberg*, the question was whether copies of video recordings created by third parties but received by defendants as part of a criminal investigation were public records under FOIA. At some point, defendants released the recordings to plaintiff. *Amberg,* 497 Mich at 33. Defendants then argued that the case had been rendered moot by their eventual release of the recordings. As to the issue of fees available under MCL 15.240(6) the Michigan Supreme Court noted, that:

> the mere fact that plaintiff's *substantive claim* under FOIA *was rendered moot* by disclosure of the records after plaintiff commenced the circuit court action is not determinative of plaintiff's entitlement to fees and costs.

Amberg, 497 Mich at 33 (emphasis added). The Court then returned the case to the circuit court "for a consideration, on proper motion, of whether he is entitled to costs and fees under MCL 15.240(6)." *Id*., at 35.

RECEIVED by MSC 11/6/2026 1:11:09 PM

In *Cramer*, defendant provided the requested public records to plaintiff shortly after plaintiff filed her FOIA complaint in circuit court. *Cramer*, 316 Mich App at 62–62. The Court of Appeals determined that defendant was entitled to summary disposition and that plaintiff was not entitled to attorneys fees, costs, or disbursement, pointing out that:

> Although a party may be entitled to attorneys fees when his or her action *is rendered moot* by subsequent disclosure, . . . such entitlement is still based on proof of an underlying FOIA violation.

Id., at 70 (emphasis added). On April 5, 2017, the Michigan Supreme Court, in lieu of granting leave, vacated "as moot" Part III of the Court of Appeals opinion and remanded the "case to the Shiawassee Circuit Court for dismissal of plaintiff's Freedom of Information Act claims." The Court further stated that "[i]n all other respects, leave to appeal is denied, because we are not persuaded that the remaining question presented should be reviewed by this Court. Thus, the award of attorneys fee, costs, and disbursements remains vacated." 500 Mich 964, 964; 892 NW2d 371 (2017).

In *Walloon Lake*, the public body did not have a public record because the public body's representative disposed of the record (a letter) by giving it to a third party after plaintiff made a FOIA request for it. *Walloon Lake*, 163 Mich App at 732–33. The Court said:

> Although defendant Ollie's violation of FOIA in this manner *obviously rendered the issue of disclosure moot*, it did not preclude consideration of plaintiff's request for costs, attorney fees and punitive damages.

Id., at 733 (statutory citation omitted; emphasis added).[34]

None of these cases suggest that a claim for attorneys fees under FOIA negates the mootness of the underlying substantive claim once documents have been disclosed. To the

[34] Of note, the Court held Ollie's actions of "rendering a judicial order of disclosure impossible by disposing of the only copy of the document was an arbitrary and capricious violation of the FOIA *as a matter of law*." *Walloon Lake*, 163 Mich App at 734 (emphasis added).

RECEIVED by MSC 11/6/2026 1:11:09 PM

contrary, the language employed by the courts suggest the determination of mootness remains without regard to a plaintiff's potential entitlement to fees under FOIA.

Perhaps more importantly, all three cases highlight an issue, that Appellants gloss over in their rush to avoid mootness. As stated in *Amberg*:

> MCL 15.240(6) allows a plaintiff to recover "reasonable attorneys' fees, costs, and disbursements" in the event "a person asserting the right to … receive a copy of all or a portion of a public records prevails" in a FOIA action. To "prevail" in a FOIA action within the meaning of MCL 15.240(6), a court must conclude that "the action was reasonably necessary to compel the disclosure [of public records], and [that] the action had a substantial causative effect on the delivery of the information to the plaintiff." *Scharret v. City of Berkeley*, 249 Mich App. 405, 414; 642 N.W.2d 685 (2002) (emphasis omitted).

Amberg, 497 Mich at 33–34 (punctuation and brackets in original). Accord, *Cramer*, 316 Mich App at 79–81 (citing *Amberg*, 497 Mich at 33–34); *Walloon Lake*, 163 Mich App at 733 ("to show that he 'prevailed' in the action, a plaintiff must demonstrate that prosecution of the action was necessary to and had a causative effect on the delivery of or access to the document") (citation omitted). Thus, these three cases demonstrate that, while a plaintiff may move for fees after a substantive claim for the records has been rendered moot (i.e., by showing that plaintiff's suit was necessary to, and substantially causative of, the disclosure), he does so without resurrecting the underlying substantive claim itself.

Further, here, Appellants have made no argument, that this lawsuit was "reasonably necessary to compel the disclosure" of the records in this case, or that the action "had a substantial causative effect on the delivery of the information." The mere fact that Appellants received the documents after they had filed suit should not, alone, be sufficient for this Court to determine that there is a valid claim to attorney's fees here any more than in *Cramer*. Nor should the Court

RECEIVED by MSC 11/6/2026 1:11:09 PM

conclude that a request for attorney's fees somehow avoids the general rule of mootness of the substantive issues in the case.[35] Appellants' own cases undercut that theory.

3. The "likely to recur, yet evade judicial review" exception does not apply

The City acknowledges that, even though an issue is moot, it may nonetheless be justiciable if the issue is one of public significance that is likely to recur, yet evade judicial review. *Federated Publ'ns, Inc v City of Lansing*, 467 Mich 98, 112; 649 NW2d 383 (2002), abrogated on other grounds by *Herald Co Inc v E Mich Univ Bd of Regents*, 475 Mich 463; 719 NW2d 19 (2006). That is not the case here.

As stated in *T&V Assocs v Dir of Dep't of Health and Human Servs,* "the question is whether the issue is '*likely* to recur.' A possibility that an issue will recur is not sufficient." 516 Mich 851, 853; 12 NW3d 594 (2024) (emphasis in original). Moreover, where the possible recurrence is speculative, or the facts have changed, the exception to the general rule of mootness does not apply. See, *EB by Next Friend Baker v Watervliet Pub Sch*, unpublished per curiam opinion of the Court of Appeals, issued May 4, 2023 (Docket No 361206), 2023 WL 3260974[36] (exception does not apply where the likelihood of school district reinstating mask mandate was speculative); *Fields v Flint City Council*, unpublished per curiam opinion of the Court of Appeals, issued November 10, 2022 (Docket No 359661), 2022 WL 16858781[37] ("speculative assertion that

[35] This is particularly true given that the only facts that exist in the record below show that this suit was not the substantial causative reason that disclosure occurred here. In her Affidavit, Records Supervisor, Ms. Smith, attested to the fact that she was using her best efforts and making all diligent attempts to process and fulfill all FOIA requests as they came in. (*Smith June 8, 2023 Aff*, Appellee's COA Appx, Ex A-6 at 39b, ¶ 18.) That included Appellants' request which, at the time of Ms. Smith's Affidavit, was number 74 out of 80 pending requests. (*Id*., at 37b, ¶ 15.) Further, Ms. Smith attested to the fact that the Records Unit "intends to fulfill that request" (*id.*, ¶ 19), and no one disputes that Appellants' request was, indeed, fulfilled in full.

[36] A copy of *EB by Next Friend Baker* is attached in Appellee's Supreme Court Appendix as Exhibit C.

[37] A copy of *Fields* is attached in in Appellee's Supreme Court Appendix as Exhibit D.

RECEIVED by MSC 11/6/2026 1:11:09 PM

Fields could run – without evidence to support it – does not satisfy the 'likely to recur' prong"); *T&V Assocs*, 516 Mich at 853 (recognizing changed circumstances affected likelihood of recurrence).

As noted above, Appellants' argument that the City will engage in future unreasonable delay in fulfillment of FOIA requests is speculative. Further, the facts have changed here. The City has taken reasonable steps to reduce fulfillment times by adding staff and resources to the Records Unit. (*Smith June 8, 2023 Aff*, Appellee's COA Appx, Ex A-6 at 38b–39b, ¶¶ 16b, 18, 20.) Appellants themselves have not filed any additional lawsuits based on delays since they submitted the FOIA request at issue here, which was three years ago in 2023. Consequently, Appellants have not shown that the issue is "*likely* to recur." *T&V Associates*, 516 Mich App at 853. For that matter, Appellants have not shown that any future issue will evade judicial review. The issue of delay here has been fully and substantively reviewed by two lower courts already. That Appellants dislike the results they received from those courts is not a basis for applying "likely to reoccur" exception here. The application for leave to appeal should be dismissed as moot.

Respectfully submitted,

Dated: November 6, 2026

By: */s/ Elizabeth J. Fossel*

Elizabeth J. Fossel (P41430)
Director of Civil Litigation
Grand Rapids Dept. of Law
Attorneys for Defendant-Appellee
300 Monroe Ave. NW, Ste. 620
Grand Rapids, MI 49503
(616) 456-3099
efossel@grand-rapids.mi.us

RECEIVED by MSC 11/6/2026 1:11:09 PM

CERTIFICATE OF COMPLIANCE

This Brief was prepared by the use of Microsoft Word 365 and contains 15,236 words, excluding the case caption, cover sheets, table of contents and authorities, signature block, attachments, exhibits, affidavits, and other addenda. This word count was generated by that application and the count provided by the application is relied upon in conformance with MCR 7.212(B)(3)

Respectfully submitted,

Dated: November 6, 2026

By: */s/ Elizabeth J. Fossel*

Elizabeth J. Fossel (P41430)
Director of Civil Litigation
Grand Rapids Dept. of Law
Attorneys for Defendant-Appellee
300 Monroe Ave. NW, Ste. 620
Grand Rapids, MI 49503
(616) 456-3099
efossel@grand-rapids.mi.us

RECEIVED by MSC 11/6/2026 1:11:09 PM

CERTIFICATE OF SERVICE

I hereby certify that on November 6, 2026, I electronically filed the foregoing using the MiFile/TrueFiling System, which will send notification of such filing to all registered counsel of record.

Respectfully submitted,

Dated: November 6, 2026

By: */s/ Elizabeth J. Fossel*

Elizabeth J. Fossel (P41430)
Director of Civil Litigation
Grand Rapids Dept. of Law
Attorneys for Defendant-Appellee
300 Monroe Ave. NW, Ste. 620
Grand Rapids, MI 49503
(616) 456-3099
efossel@grand-rapids.mi.us

RECEIVED by MSC 11/6/2026 1:11:09 PM