

Exhibit L

February 05, 2008, Transcript of Hearing
before Honorable Judge Colombo

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STATE OF MICHIGAN

THIRD JUDICIAL CIRCUIT COURT (WAYNE COUNTY)

DETROIT FREE PRESS, INC.,

Plaintiff,

vs.

Case No. 08-100214-CZ

CITY OF DETROIT,

Defendant.

_____ /

MOTION

BEFORE THE HONORABLE ROBERT J. COLOMBO, JR., CIRCUIT JUDGE

Detroit, Michigan on Tuesday, February 5, 2008

APPEARANCES:

For the Plaintiff:
Detroit Free Press

MR. HERSCHEL P. FINK, (P-13427)
MR. RICHARD E. ZUCKERMAN, (P-26521)
MR. BRIAN D. WASSOM, (P-60381)
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For the Plaintiff:
Detroit News

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MS. ROBIN LUCE HERRMANN, (P-46880)
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APPEARANCES CONTINUED:

For the Defendant:
City of Detroit

MS. ELLEN HA, (P-46476)
MR. DENNIS A. MAZUREK, (P-34845)
City of Detroit Law Department
660 Woodward Avenue, Ste. 1650
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REPORTED BY:

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Certified Shorthand Reporter
(313) 224-5195

TABLE OF CONTENTS

1

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WITNESSES:

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None

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EXHIBITS:

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None

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Detroit, Michigan
Tuesday, February 5, 2008
At 8:26 a.m.

- - -

THE COURT: This is the case of the Detroit Free Press, Inc. v City of Detroit, 08-100214-CZ. Counsel, approach here. Appearances.

MR. STEWART: James E. Stewart on behalf of the Detroit News. With me is Robin Luce, your Honor.

MR. FINK: Herschel Fink, your Honor, on behalf of the Detroit Free Press. And with me is Richard Zuckerman and Brian Wassom.

MS. HA: Ellen Ha on behalf of the City of Detroit, your Honor.

MR. MAZUREK: Good morning, your Honor. Dennis Mazurek on behalf of the City of Detroit.

THE COURT: My clerk advised me that you've withdrawn your motion to compel?

MS. HA: Yes.

THE COURT: All right. I am not going to allow any argument on this motion for obvious reasons. I'm concerned that any argument might result in disclosures that should not occur at this point in time. In addition, the court rule recognizes that I don't have to

1 allow for argument. And finally, I think that everyone
2 had an opportunity to make all their arguments, each side
3 was able to file two briefs on this issue.

4 The Plaintiff, the Detroit Free Press, Inc. and
5 the Intervening Plaintiff, the Detroit News Inc., have
6 filed a motion for disclosure of the deposition of
7 Michael J. Stefani taken in this matter on Wednesday,
8 January --

9 MR. FINK: 25, your Honor.

10 THE COURT: 25 --

11 MR. FINK: No, I'm sorry -- excuse me, 30.

12 THE COURT: January 30, 2008 and Exhibits 8, 9,
13 10, 11, 13, 14, and 15 attached to that deposition.

14 The Defendant, City of Detroit, has filed a
15 motion for summary disposition pursuant to MCR
16 2.116(C)(8) and (I)(1).

17 This Opinion presents a practical difficulty of
18 ruling on the issues raised by the parties so that the
19 parties and appellate courts can understand this ruling.
20 However, this Court must be careful not to disclose
21 information that Defendant claims does not have to be
22 produced pursuant to the Freedom of Information Act, MCL
23 15.231, et seq. This is because no matter what this
24 Court rules, it is expected that one of the parties will
25 appeal. This Court cannot predict how an appellate court

1 may rule. And if an appellate court rules that the
2 information sought by Plaintiff and Intervening Plaintiff
3 is not subject to the Freedom of Information Act, it
4 would be error for this Court to disclose that
5 information.

6 This Court has conducted an in camera review of
7 the Stefani deposition and the exhibits attached to it.

8 The first issue raised by the Defendant is that
9 the Plaintiff did not, in its FOIA request, list specific
10 records it was seeking for production.

11 A request for disclosure under FOIA must be
12 sufficiently descriptive to allow the public body to find
13 the public records containing the information sought.
14 MCL 15.233(1), Thomas v City of New Baltimore, 254 Mich
15 App 196, 2003 (2002). Or I said 2003, it's actually at
16 203 (2002). A request need not describe the specific
17 public records to be disclosed. Id.

18 Both of Plaintiff's FOIA requests sought
19 information regarding the Brown and Nelthrope case, and
20 the Harris case. The October 19, 2007 request included,
21 and was not limited to, all documents, attachments,
22 exhibits, notes, or other information related to the
23 settlements. The November 13, 2007 request included, but
24 was not limited to, all documents, attachments, exhibits,
25 notes, records, or other information related to the

1 conclusion of the cases. It requested any and all
2 documents that the City or its lawyers may consider or
3 have been labeled confidential. It also included, but
4 was not limited to, all documents or records produced by
5 or for city officials, staff attorneys, or lawyers
6 contracted by the City.

7 This request was sufficient to put the
8 Defendant on notice that the Plaintiff was requesting the
9 information contained in Exhibits 8 through 11 and 13
10 through 15.

11 Defendant asserts that Exhibit 13, executed by
12 private individuals, is a private contract and not a
13 public record under FOIA.

14 Under FOIA, a public body means a city. MCL
15 15.232(d)(iii). A public record under FOIA means a
16 writing prepared, owned, used, in the possession of, or
17 retained by a public body in the performance of an
18 official function. MCL 15.232(e).

19 There is no specific FOIA exemption for
20 settlement agreements. See MCL 15.243. Huron
21 Restoration, Inc. V Board of Control of Eastern Michigan
22 University, Court of Appeals' Docket No. 203719, released
23 January 22, 1999. Further, a public institution cannot
24 avoid a duty to disclose information by contracting to
25 maintain the confidentiality of that information.

1 Bradley v Saranac Community School Board of Education,
2 455 Mich 285, 303 (1997).

3 Defendant argues that Exhibit 13 was not used
4 to settle the Brown and Nelthrope case and the Harris
5 case. According to Defendant, Exhibit 13 is a separate
6 contract not related to the Brown and Nelthrope case.

7 Nothing could be further from the truth. When
8 the subject matter of Exhibit 13 came to light, it caused
9 the settlement of the Brown and Nelthrope case, and the
10 Harris case. As part of those settlements, Exhibit 13
11 was negotiated. There would have been no Exhibit 13 had
12 the Brown and Nelthrope case and the Harris case not
13 settled.

14 Just as the above case law recognizes that a
15 city cannot contract confidentiality to avoid the
16 requirements of FOIA, a city also cannot claim that an
17 agreement is not subject to FOIA merely because it was
18 not a party to the agreement and it was executed by
19 individuals. This is particularly true where the
20 contract executed by individuals would not have occurred
21 but for the City's settlement of the lawsuits. In other
22 words, the Defendant cannot claim that because Exhibit 13
23 is a private contract executed by private individuals, it
24 is not subject to Plaintiffs' FOIA request, where it is
25 clear that but for the settlement of the Brown and

1 Nelthrope case and the Harris case, Exhibit 13 would
2 never exist. Exhibit 13 would have never been negotiated
3 if there was no settlement of those lawsuits. Exhibit 13
4 was part of the settlement.

5 This is true whether or not the City Council
6 knew about it. If nothing else, Exhibit 13 was used by
7 the City in its official function to obtain a settlement
8 of the Brown and Nelthrope case and the Harris case. See
9 MCL 15.232(e).

10 Defendant also argues that Exhibit 11 is not a
11 public record within the meaning of FOIA. In addition,
12 it is claimed it was a tentative agreement that was the
13 product of mediation and is confidential under MCR
14 2.411(C)(5).

15 MCR 2.411(C)(5) provides that statements made
16 during the mediation, including statements made in
17 written submissions, may not be used in any other
18 proceedings, including trial. Any communications between
19 the parties or counsel and the mediator relating to a
20 mediation are confidential and shall not be disclosed
21 without the written consent of all parties.

22 Exhibit 11 was not the product of the mediation
23 or facilitation. It is clear that the mediation or
24 facilitation of the Brown and Nelthrope case on October
25 17, 2007 failed. After it had failed, Stefani requested

1 the facilitator to show a motion that Stefani intended to
2 file to Samuel McCargo, the attorney for the Mayor.
3 After McCargo read the motion, Exhibit 11 was negotiated.
4 The City of Detroit was a party to Exhibit 11. It was
5 signed by Defendant's attorney, Valerie Colbert-Osamuede.
6 Although Exhibit 11 never became an agreement because of
7 conditions that failed, it provided the framework with
8 certain changes for how the Brown and Nelthrope case and
9 the Harris case were settled.

10 If an appellate court should disagree with this
11 Court, this Court further concludes that the
12 confidentiality requirement of MCR 2.411(C)(5) is subject
13 to the exception recognized in People v Paasche, 207 Mich
14 App 698, 705-706 (1994).

15 For the same reasons that Exhibit 13 must be
16 produced under FOIA, this Court concludes that Exhibit 11
17 must also be produced under FOIA.

18 For the reasons this Court has ordered the
19 production of Exhibit 13 and 11 under FOIA, it also
20 orders the Defendant to produce Exhibits 8, 9, 10, 14,
21 and 15 pursuant to Plaintiffs' FOIA request.

22 Likewise, this Court concludes that the
23 deposition of Stefani is not protected by MCR 2.411(C)(5)
24 for the reasons it concluded that Exhibit 11 should be
25 produced pursuant to Plaintiffs' FOIA request. This

1 Court will exclude in the Stefani deposition page
2 179(sic), lines 2 through 7, up to the word so, which
3 begins a new sentence. The information discussed is
4 embarrassing and of a personal nature. It is irrelevant
5 to the issues.

6 Although the Defendant spent considerable time
7 in its brief discussing the Skytel messages, text
8 messages, Plaintiff and Intervening Plaintiff concede
9 that they are not at issue in this motion to disclose.

10 Defendant's motion for summary disposition
11 under MCR 2.116(C) (8) and (I) (1) is denied.

12 Plaintiff and Intervening Plaintiff's motion
13 for disclosure is granted as to the Stefani deposition,
14 except for page 175, lines 2 through 7, up to the word
15 so. Disclosure is also granted as to Exhibits 8 through
16 11 and 13 through 15.

17 Now, I don't know what the City's position is
18 going to be on this case. But there's a couple things we
19 have to figure out here. There was a suggestion -- first
20 of all, I need to find out if this is going to be a final
21 order that resolves this case or whether this case is
22 going to go on. I tend to think this is not a final
23 order for a couple of reasons, and then I'm going to ask
24 that the attorneys be very cautious in what they say to
25 me about these issues and keep on point with respect to

1 the issue. But it seems to me it's not a final order
2 because I still have to resolve an issue with respect to
3 attorney fees for the City -- or for the Free Press. I
4 also have a request here that was mentioned of a possible
5 request to amend the complaint. So, from my perspective,
6 it doesn't appear that this is a final order.

7 Is this a final order?

8 MR. FINK: You're exactly right, your Honor. I
9 have an amended complaint, which I need your guidance on
10 filing, because it directly relates to things that came
11 out at the Stefani deposition. But yet my time to amend
12 14 days after their answer expires today or tomorrow.
13 So, I don't want to put it in the public file but I would
14 give it to the Court so that it is filed. But yeah --
15 excuse me, yes. We would then probably ask for
16 summary -- you've essentially done that but we would move
17 for summary disposition. We would move for punitive
18 damages under the statute, as well as attorney fees.

19 THE COURT: Okay. So it's not a final order
20 from your perspective.

21 How about from the defense perspective?

22 MR. MAZUREK: Your Honor, we believe that would
23 be a final order in the sense that the court rules now
24 bifurcate between final orders that deal with all issues
25 except for attorney fees. And so, if that is the

1 outstanding issue, we think that the Court could enter a
2 final order.

3 THE COURT: Well, they want to amend their
4 complaint. And if they want to do that, then it's not a
5 final order. That goes to substantive issue. That is
6 different from the attorney fee issue. So, I don't think
7 we have a final order.

8 You can file your amended complaint with me
9 under seal. Give it to my clerk Matthew. Okay?

10 MR. FINK: I'll do that right now.

11 THE COURT: And I'll hold it.

12 So, since I believe this is an interlocutory
13 order or -- and does not dispose of this case, if you
14 wish to appeal my decision, you must take an application
15 for leave to appeal.

16 Here's what I'm going to do. I'm going to stay
17 the order until Friday morning. It gives you three full
18 days to decide whether you're going to take an
19 application -- file an application for leave to appeal in
20 the Court of Appeals. If you file the application for
21 leave in the Court of Appeals, and I'll schedule this
22 matter for 8:30 on Friday, I will continue the stay
23 pending resolution of the appellate issues. If you do
24 not, I will lift my stay and the information can be
25 released.

1 Is that acceptable to you?

2 MR. MAZUREK: Yes.

3 MS. HA: Yes.

4 THE COURT: Is that acceptable to you?

5 MR. FINK: I would just ask, your Honor, to
6 require that they file, in addition to the motion for
7 stay, that they file an emergency motion for immediate
8 consideration by the Court of Appeals so that this
9 doesn't go for two years.

10 THE COURT: Right. You also have to file an
11 emergency motion on this matter.

12 MR. MAZUREK: We understand that.

13 THE COURT: Because I'm not going to let you
14 drag your feet on this issue. Okay?

15 MR. MAZUREK: We understand.

16 THE COURT: All right. Is there anything --
17 okay. Mr. Fink, will you prepare the orders --

18 MR. FINK: I have.

19 THE COURT: -- in this matter?

20 MR. FINK: -- one. And I think we can make a
21 couple of changes to conform to what you said, your
22 Honor.

23 THE COURT: It's fine with me if you write it
24 in. I think that's the better procedure. I'd like to
25 get an order entered.

1 MR. FINK: I think I -- we can do that in a
2 couple of minutes.

3 MR. STEWART: Your Honor, may I make one point?

4 THE COURT: Yes.

5 MR. STEWART: It has been our experience in
6 past Freedom of Information litigation, for both
7 newspapers, that the Court of Appeals will act quickly on
8 whether to grant or deny a stay. And with that knowledge
9 in mind, your Honor, I would like to respectfully ask
10 that if the City doesn't have a stay from the Court of
11 Appeals by Friday, the matter be released. I think
12 that's ample time for the court to rule and it has in the
13 past.

14 THE COURT: No. I'm going to enter a stay.
15 You can ask for a stay with the Court of Appeals. But my
16 stay will continue until the appellate process is
17 completed because I think that's the right thing to do.

18 MR. MAZUREK: Your Honor, just for clarity.
19 It's my understanding of the court rules that if the
20 trial court does grant the stay, then the Court of
21 Appeals, it will -- it's a quid pro quo to the Court of
22 Appeals granting a stay. So we will ask for a stay at
23 the Court of Appeals.

24 THE COURT: Okay. Anything --

25 MR. FINK: Your Honor --

1 THE COURT: Anything else, Mr. Fink?

2 MR. FINK: Will the Court of Appeals have the
3 transcript and the documents?

4 THE COURT: Here's how -- if they file an
5 application for leave to appeal, I intend to personally
6 deliver to the clerk down here in Detroit, the documents
7 that were filed under seal to me. I also have the court
8 file, I can deliver that also, and the transcript and the
9 exhibits. So I will personally take care of that.

10 MR. FINK: Thank you.

11 MR. MAZUREK: Your Honor, one more issue.

12 THE COURT: I would like to know if you -- if
13 you decide to file the application for leave to appeal
14 and do that, I would like to be notified of that because
15 then I can just ship that information right to the Court
16 of Appeals immediately.

17 MR. MAZUREK: We will do that, your Honor.

18 THE COURT: Okay?

19 MR. FINK: Is there any need to appear in front
20 of you at 8:30 if they've done that?

21 THE COURT: No. If that happens, then there is
22 no need for you to be there. But if it doesn't, I think
23 there is a need for you to be here so I can vacate the
24 stay.

25 MR. FINK: Thank you.

1 THE COURT: It may be that the City will decide
2 after hearing my opinion that the best course of action
3 is to turn these documents over. And I would urge them
4 to consider that course of action.

5 MR. MAZUREK: Your Honor, one more issue.

6 THE COURT: Yes.

7 MR. MAZUREK: In terms of the Plaintiff's
8 motion to amend, when will they be filing --

9 MR. FINK: It's not a motion, it's of right.
10 And I'll file it and give you a copy in a minute.

11 MR. MAZUREK: Okay.

12 THE COURT: Okay. All right.

13 MR. MAZUREK: Okay.

14 THE COURT: Thank you.

15 MR. FINK: Thank you, your Honor.

16 MS. HA: Thank you, your Honor.

17 MR. MAZUREK: Thank you, your Honor.

18 MR. STEWART: Thank you, your Honor.

19 MR. FINK: Your Honor, one more thing I forgot
20 to mention.

21 THE COURT: Let's get -- okay.

22 MR. FINK: Your Honor, you may recall that you
23 issued or you advised me that we could ask Skytel to
24 consent to an order of this Court to preserve the text
25 messages. I received back from the general counsel of

1 Skytel yesterday by an E-mail copy, hard copy to follow,
2 the order that Miss Ha signed, I signed, and now general
3 counsel Skytel has signed. So I would leave that with
4 the Court as well. She asked whether you needed the hard
5 copy. I said I would inquire today. But I have one
6 that's signed and faxed back to me with a cover E-mail.

7 THE COURT: The fax is fine with me. I can put
8 that -- that's the kind of thing that can go in the court
9 file, as well as the orders that we enter today can go in
10 the court file.

11 MR. FINK: Well, we would need you to issue
12 that and then I would send a true copy back to Skytel and
13 then it would be complete.

14 THE COURT: Right.

15 MR. FINK: I have all that.

16 THE COURT: Okay. We'll do that today.

17 MR. MAZUREK: Your Honor, just for clarity, in
18 terms of what Mr. Fink just indicated to the Court, am I
19 misunderstanding your ruling about the Skytel records?

20 THE COURT: You weren't here but back on --

21 MR. FINK: 25th.

22 THE COURT: -- Friday the 25th, the issue was
23 raised as to whether I would issue an injunction just
24 requiring Skytel to preserve the text messages.

25 MR. MAZUREK: Yes.

1 THE COURT: And Miss Ha had no objection to
2 that. And the request was made by Mr. Fink, and Mr.
3 Stewart had no objection to it. And I said if Skytel
4 doesn't have an objection to it, and Mr. Fink said he
5 didn't believe they did but he would verify it with them,
6 I said I would issue such an injunction. It appears that
7 no one has a problem with that. It's merely to preserve
8 the status quo, and that's the only purpose for the
9 injunction.

10 MR. MAZUREK: The reason I'm asking is because
11 the Plaintiffs are now arguing that the Skytel records
12 are at issue here.

13 THE COURT: No. No. You've missed the point.
14 The Skytel records were not at issue in their motion to
15 disclose.

16 MR. MAZUREK: Yes.

17 THE COURT: But they're still out there.
18 There's still an issue about whether the Free Press has
19 all of the Skytel records. So, that issue is still out
20 there.

21 MR. MAZUREK: Okay. Thank you.

22 MR. FINK: Thank you, your Honor.

23 (At 8:49 a.m., proceedings concluded)

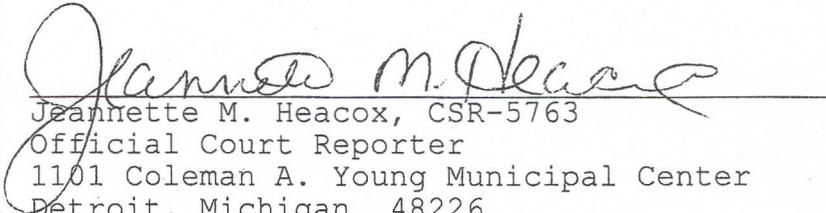
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1 R E P O R T E R ' S C E R T I F I C A T E

2
3 STATE OF MICHIGAN)
) SS.
4 COUNTY OF WAYNE)

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6
7 I do hereby certify that I have recorded
8 stenographically the proceedings had and testimony taken
9 in the above-entitled matter at the time and place
10 hereinbefore set forth, and that the foregoing is a full,
11 true and correct transcript of proceedings had in the
12 above-entitled matter; and I do further certify that the
13 foregoing transcript has been prepared by me.

14
15
16 
17 Jeannette M. Heacox, CSR-5763
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