STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

JESSICA FLINTOFT, as Clerk of Scio Township,	Case No. 22-000414-CZ
Plaintiff,	Hon. Timothy P. Connors
v.	
SCIO TOWNSHIP BOARD,	
Defendant.	

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DEFENDANT'S REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY DISPOSITION UNDER MCR 2.116(C)(4) and (C)(8)

Plaintiff's Brief in Opposition to the Township Board's Motion for Summary Disposition fails to articulate any cognizable cause of action based on the facts pled in her Complaint. This politically motivated lawsuit should be dismissed under MCR 2.116(C)(8).

I. Plaintiff has not stated a claim for being deprived of "custody" of public records.

The Township Board's motion was brought under MCR 2.116(C)(8), meaning the Court looks only at the Plaintiff's allegations *as pled* in the complaint. Despite the narrative in Plaintiff's opposing brief, Plaintiff's First Amended Complaint does not allege that the Township

Board prevented Plaintiff from accessing the public records necessary to do her job. Plaintiff does not claim that she was ever barred from using BS&A, preparing and maintaining the journals and ledgers, or accessing other Township financial records. Rather, Plaintiff pleads in her Complaint that she has a claim because other Township officials and staff had *concurrent* access to those same records and that Plaintiff should exclusively control who else can access public records. (Verified Complaint, ¶¶ 28, 30, 35.) But this is not what MCL 41.65 or any Michigan cases provide. *McKim* – on which Plaintiff relies – involved a township that prohibited a clerk from accessing township mail. Those are not the facts alleged in Plaintiff's complaint here: Plaintiff does not plead that the Board blocked her from accessing public records.

Plaintiff argues in her brief that the Township Board "revoke[d] authority and access of the Clerk to the Township's records[.]" (Brief, p. 4.) This is not what Plaintiff pled in her First Amended Complaint.[1] The Complaint alleges that the Township revoked her *Administrator* access (Verified Complaint, ¶ 34); Plaintiff does not plead that she was deprived of "read/write" access (because, as established in the Township's MCR 2.116(C)(10) response, she was not).

Similarly, Plaintiff argues in her brief that she "could not see what changes Mr. Merte or others may have made to the journals and ledgers, or if other unauthorized people had access." (Brief, p. 4.) Plaintiff cites the First Amended Complaint at paragraphs 33-34, but that is not what those paragraphs allege. Rather, those paragraphs allege only that Plaintiff could not "control who enters what into the journals and ledgers" – not that she "could not see" who had accessed the records and what changes they made. (Verified Complaint, ¶ 33-34.)

Plaintiff's "claim" in her complaint is that she is the *only* person allowed to control Township records. That is not the law, and so Count I must be dismissed.

[1] This allegation is also factually untrue, as set forth in the Township Board's Brief in Opposition to Plaintiff's Motion for Summary Disposition under MCR 2.116(C)(10).

II. Plaintiff has not stated a claim for "starvation of resources."

Count II of the Verified Complaint is entitled, "Declaratory Judgment and Injunction of the Board's Improper Appropriations Decision in the Finance Department." Plaintiff's Brief calls Count II "Starvation of Resources." (Brief, p. 1.) Under either title, Count II fails to state a claim.

Plaintiff acknowledges in her Brief that MCL 41.75a "permits" the Township Board to "hire employees as are necessary." (Brief, p. 13.) The statute does not *require* the Township Board to hire a certain number of employees, nor does it give the Township Clerk the power to hire and fire employees or control who the Township Board hires. Despite this, Plaintiff asks this Court to issue an injunction "mandating proper appropriations in compliance with the Board's duties to retain qualified finance staff[.]" (Verified Complaint, pg. 28.) Plaintiff's Brief more explicitly asks this Court to retain continuing jurisdiction to "**monitor the Board's finance staffing** necessary to adequately fund the Clerk's office." (Brief, p. 11, emphasis added.)

Plaintiff's request is absurd. There is no recognized cause of action to compel the judicial branch to "monitor" and manage a local government's ongoing staffing decisions. *Wayne County Prosecutor* does not remotely stand for that proposition. As discussed at length in the Township's brief, the Township has no clear legal duty to hire any minimum number of finance employees or to hire the specific individuals who Plaintiff chooses. Count II must be dismissed.

III. Plaintiff does not hold the Township's attorney-client privilege and cannot waive it on behalf of the Township.

Plaintiff makes two incredible assertions in her Brief regarding the privileged legal opinions that she attached to her complaint. First, Plaintiff suggests that the legal opinions are not protected by the attorney-client privilege because they are not a communication from the client *to* the attorney. (Brief, p. 15.) Second, Plaintiff claims that she – as one member of a

seven-member elected board – can unilaterally waive the attorney-client privilege on behalf of the Township Board. *Id.* Both assertions are contrary to law.

First, a written communication from a township's attorney to a township official is protected by the attorney-client privilege. *Leibel v Gen Motors Corp*, 250 Mich App 229, 239; 646 NW2d 179, 185 (2002) (holding that a written memorandum drafted by an attorney for his client containing legal opinions and recommendations was protected by the attorney-client privilege). Here, Exhibit 1 plainly offers Attorney Fink's legal opinion and is privileged, and Exhibit 7 provides Attorney Homier's legal advice and is also privileged.

Second, the attorney-client relationship is "personal to the client, and only the client can waive it." *See Liebel*, 250 Mich App at 240. A waiver must be intentional and voluntary. *Id.* Here, the attorney-client relationship exists between the attorney and the Township Board on behalf of the Township as a municipal entity. One member of the Board cannot waive that privilege; the privilege must be voluntarily and intentionally waived by the Board through a vote at a public meeting. *See Tavener v Elk Rapids Rural Agricultural School District*, 341 Mich 244, 251; 67 NW2d 136 (1954) (public body "speaks only through its minutes and resolutions").

Plaintiff argues that she is the one who posed (some of) the questions to the Township's attorneys, so she should hold the privilege. (Brief, p. 17.) But the Township's attorney represents the Township as an entity – not any individual member of the Board. This is black-letter municipal law derived from MRPC 1.13(a), which states that "[a] lawyer employed or retained to represent an organization represents the organization as distinct from its directors, officers, employees, members, shareholders or other constituents." *See* Ethics Opinion RI-259 **(Exhibit A)** ("as city attorney the lawyer represents the city council entity, not city departments, individual city officials, individual council members or employees"). Thus, the Township – not

Plaintiff – is the client and holds the attorney-client privilege. Only the Township Board can waive that privilege.

IV. The Township Attorney does not have a conflict of interest.

Plaintiff's misunderstanding of the attorney-client relationship pervades her final argument alleging that the Township Board's counsel has a conflict of interest because Plaintiff, the adverse party, is a member of the Township Board. Under that faulty reasoning, *any* attorney representing the Township Board will automatically have a conflict of interest if a member of the Board (like Plaintiff) sues the Board. As noted above, the Township's attorney represents the municipal entity, not individual officials. (Exhibit A.) The Township's attorney has never represented Plaintiff individually in this matter or any other matter, and thus no conflict exists.

As to disqualification, as Plaintiff's counsel likely knows, an attorney who will be called as a witness is only disqualified from handling the trial, not pre-trial proceedings. MRPC 3.7. Even if Attorney Homier were a necessary witness in this case (which is disputed), that would not disqualify the law firm from representing the Township. *Id.* Plaintiff has not formally moved for disqualification, but if she does, the Township Board will seek its costs under MCR 1.109(E).

For these reasons, the Township Board requests that this Court grant its motion for summary disposition under MCR 2.116(C)(8) and dismiss Plaintiff's Complaint in its entirety.

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Dated: August 22, 2022

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