

STATE OF MICHIGAN  
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

DETROIT FREE PRESS, INC.,  
a Michigan corporation,

Plaintiff,

Case No. 08-100214 CZ  
Hon. Robert J. Colombo, Jr.

DETROIT NEWS, INC.,

Intervenor-Plaintiff,

v.

CITY OF DETROIT,

Defendant.

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**MOTION FOR DISCLOSURE OF SKYTEL RECORDS,  
STEFANI ATTORNEY FEE MOTION, AND STEFANI EMAILS, WITH SUPPORTING  
BRIEF**

## **MOTION**

Plaintiffs Detroit Free Press and Detroit News, by their attorneys, hereby move this Court for an order (1) directing the Defendant City and/or Bell Industries, Inc. d/b/a SkyTel Corp. (“Skytel”) to immediately produce to Plaintiffs (a) the Christine Beatty text messages that this Court previously ordered SkyTel to preserve in its February 5, 2008 Order, as well as (b) the SkyTel text messages sent or received by Beatty and Mayor Kwame Kilpatrick on their city-owned text messaging devices from Aug. 1, 2007 to January 28, 2008, (2) directing the City to immediately produce to Plaintiffs (a) the motion for attorneys’ fees in the *Brown and Nelthrope v City of Detroit* (“Whistleblower Lawsuit”) drafted by Attorney Michael Stefani and delivered to City lawyers on October 17, 2007; and (b) the email communications referenced in Stefani’s deposition between Stefani and City attorneys related to the settlement of the Whistleblower Lawsuits and through which they further negotiated the confidential agreements (the “Stefani-City Emails”).

## **BRIEF**

### **INTRODUCTION**

Mayor Kilpatrick induced the Detroit City Council to approve a settlement of the Whistleblower Lawsuit, which ultimately cost the City \$9 million, while actively hiding from Council the fact that the settlements were designed to hide the SkyTel text messages that revealed that he and his former Chief of Staff, Christine Beatty, had repeatedly lied under oath at trial. The Mayor and Beatty accomplished their deception through various “Confidential” Settlement Agreements, which included elaborate mechanisms for keeping the text messages secret.

The Mayor's efforts, aided by his and the City's lawyers, to deceive his constituents, the Free Press, the Council, and the courts failed. The Free Press served FOIA requests for all documents related to the settlements. The City purported to grant the request, but delivered nothing related to the "confidential" aspects of the settlement. The Free Press brought this suit to enforce its requests and the City's clear duties under FOIA. With this Court's leave, Plaintiffs deposed Stefani, the Whistleblowers' lawyer, and confirmed the existence of numerous heretofore-secret documents responsive to the FOIA requests. This Court has already ruled—and been upheld by the Court of Appeals and the Supreme Court—that all of the purportedly "confidential" documents are public records subject to disclosure under FOIA, and that the full text of Stefani's testimony should be made public. They were disclosed, and the outcry from the public and City Council has been predictably fierce.

But, as the Court already acknowledged when deeming its February 5, 2008 disclosure order non-final, this case is not over. There are still public records related to the settlements that have not yet been disclosed. Specifically:

- The SkyTel text messages subpoenaed by the Free Press on Jan. 9 and 10, 2008 (the "2002-2003 Text Messages"). As the Court knows, these messages were originally subpoenaed by Stefani—twice—during the Whistleblower Lawsuits. The Free Press also subpoenaed them on January 9 and 10, 2008. The messages are those sent to or by Beatty on her City-owned pager between the dates of September 1, 2002 through October 31, 2002 and between April 1, 2003 and May 31, 2003. These were the timeframes Stefani testified he believed Beatty and Kilpatrick communicated about their romantic affair and their decision to fire Officer Brown—both of which they later denied under oath.

The City moved this Court to quash those Free Press subpoenas. But after publishing excerpts from the messages, the Free Press temporarily withdrew its subpoenas and focused on exposing the secret settlement documents at the heart of the matter. Recognizing that the issue would return, however, this Court entered an Order on February 5, 2008 directing SkyTel to preserve the messages. Now that the public nature of the settlement-related documents has been firmly established, Plaintiffs again seek production of all of these messages.

- The SkyTel Text Messages Requested by the Free Press under FOIA on Jan. 28, 2008 (the “2007-2008 Text Messages”). On that date, the Free Press served the City with FOIA requests for text messages from and to the City text pagers issued to Kilpatrick and Beatty from August 1, 2007 to present. As noted in the Second Amended Complaint, the City’s deadline for answering those requests has passed. *See* 2d Am. Compl. Exs H-I. These text messages—which cover the time period immediately before, during, and after the Whistleblower trial, including the period around the October 17, 2007 secret settlement—are just as relevant and subject to production as the other documents. They are likely to contain further evidence of the falsity of Kilpatrick’s and Beatty’s testimony, and their efforts to conceal it, leading to the settlement.

- The Stefani Attorney Fee Motion. Stefani revealed in his deposition that he first disclosed his knowledge of the text messages in a motion for attorneys’ fees that he delivered to lawyers for the City and the Mayor at the conclusion of the October 17, 2007 facilitation. *See* 2d Am. Compl. Ex F. He further testified that the delivery of this motion led directly to the settlement agreement, and that copies of the motion and its contents were kept secret as part of the settlement. Therefore, this document falls squarely within the Free Press’ original FOIA requests, and was in the possession of lawyers for the City and Mayor.

- The Stefani-City Emails. Stefani also testified that he and City lawyers exchanged a number of emails during the further negotiation of the secret settlement agreements, through which they negotiated the agreements' terms. See 2d Am. Compl. Ex G (Stefani Transcript at 147, 170) (“we were trading e-mails back and forth, negotiating little changes to the language. When it was finalized, Mr. McCargo had the mayor and Christine Beatty sign it. \* \* \* I presume that when I've sent e-mails to Ms. Osamuède, she probably. . . kept an electronic copy of it”). These are clearly public records related to the settlement agreements.

In the words of City Councilman Kwame Kenyatta: “Not only have we found the smoking gun, we have found the bullets. We have found the caliber of the bullets.” **Ex A.** Thanks to this Court, the people have seen the smoking gun. They deserve to see the bullets, as well.

## **ARGUMENT**

### **A. “Public Record” Is Broadly Defined**

#### **1. Under FOIA**

A “public record” under the Michigan Freedom of Information Act is a writing that is: (1) prepared; (2) owned; (3) used; (4) in the possession of, or (5) retained by a public body in the performance of an official function. . . . MCL 15.232(e); **Ex B** (Feb. 5, 2008 transcript) at 7.

Further, the breadth of the definition of “public record” includes the situation in which a public body incorporates information originating elsewhere into its own records, through possession, control or use of the information. *Walloon Lake Water System, Inc v Melrose Twp*, 163 Mich App 726, 730; 415 NW2d 292 (1987); *Hoffman v Bay City School Dist*, 137 Mich App 333; 357 NW2d 686 (1984). Thus, “[a] writing can become a public record after its creation.” *The Detroit News, Inc. v City of Detroit*, 204 Mich App at 725.

In addition, the Court of Appeals “has construed [a] public record to include ‘writings and other means of recording’ *such as electronic copies*”. *Warren v Detroit*, 261 Mich App 165, 172; 680 NW2d 57 (2004) (emphasis added). To hold otherwise would allow a public body to hide official functions by communicating via pagers.

**2. Under the City’s own Internal Policies**

On June 26, 2000, Mayor Kilpatrick signed a “Directive for the Use of the City of Detroit’s Electronic Communications System.” **Ex C.** The Directive could not be more clear that *all* electronic communications generated by City-owned devices are public records:

**3. City Property**

It is the policy of the City that any electronic communications created, received, transmitted, or stored through use of any part of the City’s electronic communications system including, but not limited to, all hardware and software, is the property of the City. Accordingly, any electronic communications created, received, transmitted, or stored in the City’s electronic communications system is not considered, in whole or in part, as private in nature regardless of the level of security on the communication....

\* \* \*

**4. Public Records**

. . . Since electronic communications are often deemed under the law to be public records, all authorized users are put on notice the law provides that, in certain instances, electronic communications transmitted, or stored, via any electronic system are subject to disclosure and litigation. Therefore, authorized users of the City’s electronic communications system must bear in mind that, whenever creating and sending an electronic communication, they are almost always creating a public record which is subject to disclosure whether the communication is routine or intended to be confidential....

\* \* \*

**8. Privacy and Inspection**

Because all electronic communications are the sole property of the City, an authorized user may assume a ‘rule of thumb’ that any electronic communication created, received, transmitted, or stored on the City’s

electronic communications system is public information, and may be read by anyone.

Plaintiffs could not have described the public nature of the Mayor and Ms. Beatty's text messages more clearly than the Mayor's own Directive already has.

Skytel is a unique contractor serving governmental bodies and Fortune 100 corporations which may have statutory or other legal obligations to preserve electronic communications, and provides archival services for such bodies. The messages are the property of such bodies. Skytel merely provides the archival service.

**B. The Documents at Issue Are Public Records Subject to Disclosure Under FOIA**

**1. The Court has Already Ruled That Documents Related to the Settlement—Including Documents Disclosed and Discussions Held Leading Up to the Settlement—Are Public Records That Must Be Disclosed**

The Court's reasoning for ordering the production of Stefani Exhibit 13—the November 1, 2007 Confidential Agreement which, *inter alia*, provided for keeping the Kilpatrick-Beatty (or "K-B") text messages secret, and for paying millions of dollars of City money to the Whistleblower plaintiffs (**Ex D**) —is instructive here. The City had claimed that this document was not a public record because it was signed by Kilpatrick and Beatty in their individual capacities. "Nothing could be further from the truth," this Court said. **Ex B** at 8. The Court explained that the *subject matter* of this document, and the *function* it played in the settlement negotiations, were key factors rendering it subject to disclosure:

When the subject matter of Exhibit 13 came to light, it caused the settlement of the *Brown and Nelthrope* case, and the *Harris* case. As part of those settlements, Exhibit 13 was negotiated. There would have been no Exhibit 13 had the *Brown and Nelthrope* case and the *Harris* case not settled. . . . Exhibit 13 would never have been negotiated if there was no settlement of those lawsuits. Exhibit 13 was part of the settlement.

**Ex B** at 8-9. Similarly, the Court found Stefani Exhibit 11 (attached as **Ex E**)—the original confidential agreement that the City later called “tentative”—to be part of settlement because it too contained subject matter that contributed to the ultimate agreement, even though it was not itself part of that agreement:

It is clear that the mediation or facilitation of the *Brown and Nelthrope* case on October 17, 2007 failed. After it failed, Stefani requested the facilitator to show a motion that Stefani intended to file to Samuel McCargo, the attorney for the Mayor. After McCargo read the motion, Exhibit 11 was negotiated. \* \* \*

Although Exhibit 11 never became an agreement because of conditions that failed, it provided the framework with certain changes for how the *Brown and Nelthrope* case and the *Harris* case were settled. \* \* \*

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

**Ex B** at 9-10. The Court also disclosed Stefani Exhibits 8 (Designation of McCargo as representative); 9 (Mayor’s acceptance of settlement); 10 (Mayor’s rejection of original agreement); 14 (Escrow agreement for text messages); and 15 (supplemental escrow agreement).

The Supreme Court affirmatively upheld this Court’s reasoning, holding that this “Court did not err in concluding that the Settlement Agreement (Deposition Exhibit 11) and the Notice of Rejection (Deposition Exhibit 10) were “public records,” MCL 15.232(e), and subject to disclosure pursuant to the Freedom of Information Act, MCL 15.231 et seq.” **Ex F**.

**2. The Same Rationale Requires Disclosure of the Documents at Issue**

As the Court recounted, it was the Stefani Attorney Fee Motion that led directly to the negotiation of Stefani Exhibit 11 (the original agreement), which then provided the framework for Stefani Exhibits 13-15 (the second confidential agreement and the text message escrow agreements). But for the Stefani Motion, there would have been no settlement. Therefore, the Court should order the City to disclose the Stefani Motion.

Likewise, the Court made repeated reference to the “subject matter” of Stefani Exhibits 11 and 13, the confidential agreements. That “subject matter” was the 2002-2003 Text Messages. These are the “smoking gun” documents that showed that Kilpatrick and Beatty lied under oath, and they are the same documents that the confidential agreements required to be kept secret. They are an integral part of the settlement. Moreover, they are in the City’s possession. The confidential agreements required them to be surrendered to the Mayor’s representative, Mr. McCargo, and he has publicly acknowledged that he has them. **Ex G.**

The Stefani-City Emails were part of the communications through which the confidential agreements were negotiated. *See* 2d Am. Compl. Ex G. Obviously, they, too, are documents related to the settlement.

Although Stefani did not possess the 2007-2008 Text Messages, subsequently requested by the Free Press under FOIA, at the time of the settlement, they are nevertheless just as integral to the “subject matter” thereof. The entire settlement came about because Stefani suspected, and used the 2002-2003 Text Messages to prove, that Kilpatrick and Beatty had lied during the Whistleblower trial, which began in August 2007. It is logical to believe that Kilpatrick and Beatty, facing the proverbial “prisoner’s dilemma,” communicated with each other before or during the trial to coordinate their testimony, or afterwards to congratulate themselves on it. Similarly, they may have communicated with each other in October 2007 regarding the cover-up. For them to have done this—and done it via text message—is entirely consistent with the behavior revealed by the 2002-2003 Text Messages. Regardless of their content, however, these messages are every bit as much public records as the 2002-2003 Text Messages, or any other communications between City officials.

Therefore, this Court's February 5 rulings, and the law of the case doctrine, require that the additional documents sought by this motion be produced.

**3. Additional Case Law Compels This Conclusion**

The City's text messages are clearly public records subject to FOIA. This conclusion is supported by the Court of Appeal's decision in *Mackenzie v Wales Twp*, 247 Mich App 124; 635 NW2d 335 (2001) which explained that "while defendants did not create or have physical possession of the tapes, it may be reasonably inferred that they used the tapes, albeit indirectly, in performing an official function; thus those tapes fall within the statutory definition of a 'public record.'" The Court of Appeals further rejected the contention that the defendants were not required to execute a release for records not in their possession:

A public body has a duty under the FOIA to provide access to nonexempt records sought or to release copies of those records. Indeed, the FOIA provides that "a court that determines a public record is not exempt from disclosure shall order the public body to cease withholding or to produce all or a portion of a public record wrongfully withheld, *regardless of the location of the public record.*" MCL 15.240(4)

*Mackenzie*, 247 Mich App at 131-32 (emphasis in original).<sup>1</sup>

Just as in *Walloon, supra*, where the Court of Appeals held that "the content of the document served as the basis for a decision to refrain from taking official affirmative action, that document must be considered a 'public record,' as defined by FOIA" the text messages here are public records. *Walloon*, 163 Mich App at 731. And, of course, a public body cannot relinquish possession of a public record in an effort to defeat FOIA. *Id* at 733.

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<sup>1</sup> Here, like the property tax records in *MacKenzie*, Skytel "simply converted the information that defendants supplied into a different format and stored the data for defendants in that format." *Id.* at 130. Thus, here, as in *MacKenzie*, the City must provide access to the text messages. *Id.* at 131.

The underlying Whistleblower lawsuits, which were against the City and the Mayor in his official capacity, were fundamentally about “official functions”—the firing of City employees and the reasons therefore. That the City is a public body and that the Mayor is a public official cannot be disputed. It is equally clear that Ms. Colbert-Osamuede (counsel for the City in the instant matter) was acting in her official capacity as an attorney of record for both the City and the Mayor with respect to the underlying lawsuits and execution of the October 17 Settlement Agreement, and that McCargo was the City-paid attorney of record for the Mayor in the underlying suits. Thus, just as with the Settlement Agreements, Confidentiality Agreements, Escrow Agreement and Amendment, and the Mayor’s “rejection,” the text messages are documents that were prepared, owned, used, in the possession of, or retained by the City, the Mayor, and/or their attorneys, agents or representatives with respect to a multi-million dollar settlement of a lawsuit against the City and the Mayor.

**C. The Privacy Exemption Does Not Apply**

The City, notwithstanding its clear policy directive to the contrary, likely will contend that disclosure of the text messages would constitute a “clearly unwarranted invasion of privacy.”

MCLA 15.243(1)(a). Under this section, a public body may exempt from disclosure:

Information of a personal nature where the public disclosure of the information would constitute a clearly unwarranted invasion of an individual’s privacy.

MCLA 15.243(1)(a). The Michigan Supreme Court has made clear that this exemption:

consists of two elements, both of which must be present for the exemption to apply. First, the information must be of a “personal nature.” Second, the disclosure of such information must be a “clearly unwarranted invasion of privacy.”

*Bradley v Saranac Community Schools Bd of Ed*, 455 Mich 285, 294; 565 NW2d 650 (1997).

Defendant cannot satisfy either element.

**1. The Requested Information is Not “of a Personal Nature”**

According to the Michigan Supreme Court, “information is of a personal nature if it reveals intimate or embarrassing details of an individual’s private life.” *Bradley*, 455 Mich at 294 (emphasis supplied). This standard is evaluated in terms of “the customs, mores, or ordinary views of the community....” *Id* at 294 (quoting *Swickard v Wayne County Medical Examiner*, 438 Mich 536, 547; 475 NW2d 304 (1991)). In *Mager v Dep’t of State Police*, 460 Mich 134, 142-43; 595 NW2d 142 (1999), the Michigan Supreme Court summarized recent case law on the subject as follows:

[O]ne can readily observe that disclosure has been the consistent outcome where citizens seek to learn about government employees and their work. In recent years, cases like *Booth* and *Bradley* have given access to information regarding the manner in which public employees are fulfilling their public responsibilities. Likewise, *Swickard* reminds us that “the FOIA is a prodisclosure statute with narrowly construed exemptions’....

Here, in balancing the public’s interest in disclosure of the text messages against what the Michigan Legislature intended to protect with the privacy exemption, the Court’s decision in *Mager* makes clear that a prime consideration in weighing disclosure is “the extent to which disclosure would serve the core purpose of the FOIA, which is contributing significantly to public understanding of the operations or activities of the government.” *Id* at 145.

It cannot be seriously disputed that disclosure of the text messages—which were at the core of the settlement of the Whistleblower lawsuits—would contribute significantly to public understanding of the operations or activities of the government, *i.e.*, the issues in the underlying Whistleblower lawsuit brought against the City and the Mayor, the testimony of public officials and employees in that lawsuit, and the ultimate resolution of that lawsuit for almost \$9 million in public funds.

The text messages are not exempt merely because they evidence, in some part, individuals engaged in sexual activity. In determining whether information of a sexual nature is private, the context must be considered. Thus, while inquiring into the purely private sexual lives of the general public may be considered “information of a personal nature,” the extra-marital activities of public officials—the Mayor of Detroit and his Chief of Staff—which were the subject of inquiry in trial testimony in a Whistleblower lawsuit and the reason for the secret settlement—is not “information of a personal nature.” *See, e.g., Swickard*, 438 Mich at 558 (“Upon review of the law of privacy, the circumstances surrounding the death of a leading legal figure in the community, and in view of the fact that the FOIA is a prodisclosure statute with narrowly construed exemptions, we conclude that Defendant has failed to meet his burden that the autopsy and test results are ‘information of a personal nature’”); *cf People v Williams*, 135 Mich App 537; 355 NW2d 268 (1984) (holding that individuals do not have a right of privacy in the illegal activity of possessing marijuana). Moreover, Judge Callahan publicly stated that the text messages would have been admissible at trial if he had had them. (Ex \_).<sup>2</sup>

In sum, an individual who engages in potentially illegal activity does not have a “right” to keep that fact “private.”

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<sup>2</sup> Even if some of the text messages contain some private information, this obviously does not prevent disclosure of all of the messages. To the contrary, even where public records contain some exempt information, the public body is responsible for separating the exempt and non-exempt material and producing the non-exempt material. MCL 15.244.

**2. The Requested Information Does Not Constitute a Clearly Unwarranted Invasion of Privacy**

Even assuming that the text messages contain “information of a personal nature,” disclosure of the information under the present circumstances would not constitute a “clearly unwarranted invasion” of the Mayor’s and Beatty’s privacy. Michigan courts have recognized the high standard for nondisclosure:

If revelation of information is merely an invasion of privacy, disclosure is warranted. If revelation is arguably an unwarranted invasion of privacy, disclosure is still required. **It is only when the privacy invasion is *clearly unwarranted* that the exception provision of Section 13 is an obstacle to revelation.**

*International Union, United States Plant Guard Workers of America v Department of State Police*, 422 Mich 432, 458; 373 NW2d 713 (1985) (emphasis added). This is consistent with the statute’s strong pro-disclosure language and spirit.

Here, the ruse of using millions of dollars of public money to settle a lawsuit to hide potential perjury by the Mayor and his Chief of Staff is not what the Legislature had in mind in its public policy declaration of the Michigan FOIA in section 1 that “The people shall be informed so that they may fully participate in the democratic process.” These actions constitute a matter of utmost public concern. Under these circumstances, disclosure of the text messages cannot be deemed a “clearly unwarranted invasion of privacy.” *See, e.g., Herald Co v Ann Arbor Public Schools*, 224 Mich App 266, 568 NW2d 411 (1977) (where a public school teacher pled guilty to carrying a concealed weapon, court ordered disclosure, under FOIA, of various records relating to the teacher because “the memorandum discussed [the teacher’s] professional performance as a teacher and in the classroom, *an issue of legitimate concern to the public*”) (emphasis added); *Swickard, supra*, (circumstances surrounding the alleged suicide of a public figure are *matters of legitimate public concern*) (emphasis added).

Similarly, in determining what constitutes a “clearly unwarranted invasion of privacy,” the courts look to the constitution and common law in determining whether a valid right to privacy exists. A privacy cause of action requires that public disclosure of private embarrassing facts “be highly offensive to a reasonable person and of no legitimate concern to the public.” *See People v Jensen*, 1998 WL 549283 (Mich Ct App 1998) (Court held, in a non-FOIA context, that HIV disclosure statute was constitutional because the right to privacy was not absolute and “does not shield all private sexual acts from state regulation” because there is a compelling public health and welfare interest that overrides the privacy interest).

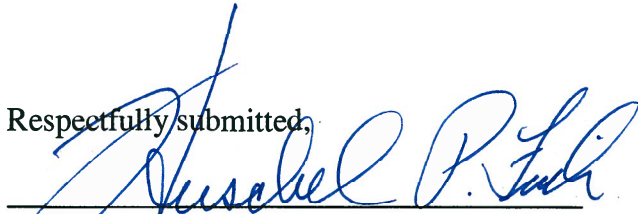
In light of these legitimate public concerns, the disclosure of the Text Messages simply does not rise to the level of a *clearly unwarranted* invasion of privacy for FOIA purposes.

### **CONCLUSION**

For all of the foregoing reasons, the Free Press and News request that this Court Order the City and/or SkyTel to immediately provide copies of (1) the 2002-2003 Text Messages, (2) the 2007-2008 Text Messages, (3) the Stefani Attorney Fee Motion, and (4) the Stefani-City Emails.

March 7, 2008

Respectfully submitted,

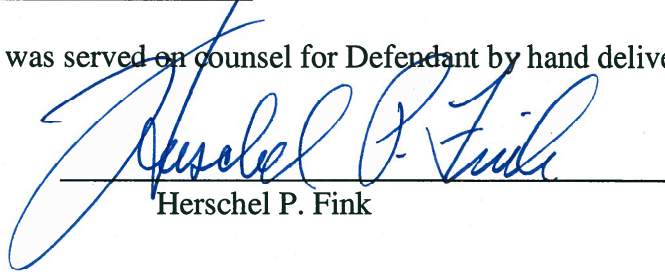


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**Certificate of Service**

I certify that the foregoing paper was served on counsel for Defendant by hand delivery on March 7, 2008.

  
Herschel P. Fink

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