STATE OF MICHIGAN
IN THE SUPREME COURT

THE HERALD COMPANY d/b/a
THE BAY CITY TIMES,

Plaintiff-Appellees,

vs.

CITY OF BAY CITY, a municipal corporation, JACOB HUTTER, BRUCE WAGNER, BRUCE McCANDLESS, TOM RHINE, BOYD BOETTGER and HOWARD ASCH, jointly and severally,

Defendants-Appellants.
_____/

Supreme Court No. 111709
Court of Appeals Case No. 200187
Bay County Case No. 96-3643-CZ-C
Hon. William J. Caprathe

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BRIEF AMICUS CURIAE
OF MICHIGAN MUNICIPAL LEAGUE LEGAL DEFENSE FUND
IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

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QUESTIONS INVOLVED

1. DID THE COURT OF APPEALS IMPROPERLY AND CONTRARY TO LAW COMBINE THE CITY COMMISSION AND CITY MANAGER OF THE CITY OF BAY CITY TO CREATE A PUBLIC BODY SUBJECT TO THE OPEN MEETINGS ACT?

   Defendants and Amici Michigan Municipal League Legal Defense Fund and the Public Corporation Law Section of the State Bar of Michigan say "Yes."

   Plaintiff says "No."

2. DID THE COURT OF APPEALS INCORRECTLY REVERSE THE TRIAL COURT'S DECISION THAT THE FREEDOM OF INFORMATION ACT WAS NOT VIOLATED BECAUSE THE CITY WAS NOT REQUIRED TO COMPILE OR CREATE A RECORD UNDER FOIA.

   Defendants and Amici Michigan Municipal League Legal Defense Fund and the Public Corporation Law Section of the State Bar of Michigan say "Yes."

   Plaintiff says "No."

STATEMENT OF FACTS

Amicus Michigan Municipal League Legal Defense Fund accepts the Statement of Facts of the Defendants-Appellants.

ARGUMENT

1. THE COURT OF APPEALS' DECISION WHICH COMBINED THE BAY CITY CITY COMMISSION AND THE BAY CITY CITY MANAGER INTO ONE PUBLIC BODY WAS IMPROPER AND INCORRECT AS A MATTER OF LAW.

The Court of Appeals, to reach the conclusion that the Open Meetings Act (OMA), MCL 15.261 et seq.; MSA 4.1800(11) was violated, held that the Bay City City Commission and the Bay City City Manager constituted one public body.[1] This holding is not only an improper description of the relationship between a city commission and a city manager, it is contrary to Michigan law.

The fatal flaw in the Court of Appeals' legal analysis can be traced to one of the footnotes in its opinion. In footnote 4, page 10, the Court states, in pertinent part:

> . . . . The *city manager*, as chief executive officer and head of the administrative branch of the city government (citation omitted), is clearly part of the "local legislative body" and, in exercising the powers delegated to him in the city charter, is bound by the OMA to conduct open interviews. (emphasis in original)

This statement by the Court is in direct conflict with the Home Rule Cities Act (HRCA), MCL 117.1 et seq.; MSA 5.2070 et seq. The HRCA is the statutory authority for establishing cities in Michigan. It provides that every city charter adopted under the Act must have a mandatory charter provision which provides, among other things:

> [F]or the election of a mayor who shall be the chief executive officer of the city, and of a body vested with legislative power, and for the election or appointment of a clerk, a treasurer, an assessor, or board of assessors, a board of review, and other officers as may be considered necessary.

MCL 117.3a; MSA 5.2073(a) (emphasis added).

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[1] "Rather, under the narrow facts of this case, we conclude that the city manager and the city commission together constituted a public body." Court of Appeals Slip Opinion, p. 5.

This mandatory charter provision expressly provides for the election or appointment of three separate and distinct categories of local officials or bodies.

First, there must be a "mayor," who is considered to be the chief executive officer of the city (not an administrative officer).

Second, there must be a "body" vested with "legislative power," e.g., a city council or city commission.

Third, there must be administrative officers such as a clerk, treasurer, assessor, etc. This third category would include city managers.

With this statutory mandate that the legislative body be separate from the administrative officers, the city manager cannot be "clearly part of the 'local legislative body'" as the Court of Appeals concluded in its opinion.

The statutory scheme in Michigan is not unusual and is consistent with the standard municipal organization and grant of power:

> Under the usual municipal organization the council is the authority vested with power to legislate, to enact bylaws, ordinances, or local laws, resolutions and so forth, and it is well settled that this legislative power cannot be delegated nor may its use be prohibited by court order. A city manager ordinarily is not vested with legislative powers. . . .

McQuillin, Municipal Corporations (3d ed), § 13.03.15.

Indeed, the whole idea of the city commission/city manager form of government is to separate and delineate the legislative from the administrative/executive functions of local government for better efficiency and responsibility. The city commission as the legislative body exercises the legislative and policy authority of

the city, i.e., the "governmental authority." The city manager has the administrative/executive responsibility to carry out the policy and legislative acts of the city commission. The Court of Appeals' rather casual conclusion that the city manager is part of the legislative body destroys, or at least does great damage to, this concept in one fell swoop.

Even more surprising, the Court of Appeals came to this conclusion while acknowledging that the Bay City Charter clearly provides that the city manager is the "chief executive and the head of the administrative branch of the city government," and "shall exercise all executive and administrative matters connected therewith not imposed by this Charter upon some other official." Court of Appeals Slip Opinion, p. 10, footnote 1.

Concluding that a city manager in Michigan is part of the local legislative body is like concluding that the governor in Michigan is part of the state legislature. Both statements are incorrect as a matter of law, and clearly erroneous.

Moreover, the case upon which the Court of Appeals relied to come to this incorrect conclusion does not involve home rule cities and is clearly distinguishable on its facts. In Menominee Co Taxpayers Alliance v Menominee Co Clerk, 139 Mich App 814; 362 NW2d 871 (1984), the Menominee county clerk, prosecutor, and probate judge came together pursuant to MCL 168.209; MSA 6.1209 to make an appointment to fill a vacancy in the county treasurer's office. The question was whether those three officials acting together in that capacity were a "public body" under the OMA. Not incorrectly, the Court of Appeals in that case held that they constituted a "public body" when meeting together to discharge their function.

However, the difference between that case and this case is that in Menominee all three officials shared equally in the power of appointment under the statute. They each had equal standing. They were analogous to each member of the Bay City City Commission, i.e., the public officials who constituted the public body which had the authority to act. None of the three officials were analogous to the city manager, e.g., an official who held a separate and subordinate position to the body which had the authority to act. Thus, Menominee is clearly inapplicable and cannot be used as authority to create a major change in the relationship between a city commission and city manager for purposes of the OMA.

The other major case relied upon by the Court of Appeals is inapplicable as well. The Court of Appeals relied upon Booth Newspapers v University of Michigan Board of Regents, 444 Mich 211; 507 NW2d 422 (1993) to support its conclusion. However, in Booth it was clear that the committee conducting the presidential search at issue in that case had been delegated, or was in fact exercising, the authority of the public body (the Board of Regents). It was also clear the process had been specifically designed to avoid the OMA.

Here there is no such delegation of authority by the public body (the City Commission). Additionally, there is no such delegation by the City Charter. The City Charter only gives the city manager the authority to make a recommendation to the City Commission.[2] Furthermore, the process set forth in the Bay City

[2]Court of Appeals Slip Opinion, p. 10, fn. 3; citing Article VII, Section 1 Bay City Charter.

Charter was not established or designed to avoid the OMA. Finally, the city manager in this case was not exercising the authority of the City Commission.

It is one thing for the courts to invalidate a search process designed by a major university with the apparent intent of avoiding the OMA in searching for a new president. It is quite another for the courts to invalidate the traditional relationship between a city commission and city manager so as to come to the conclusion that the OMA had been violated during a search for a local fire chief, especially when there is no evidence of any intent to avoid the OMA and the process used was long-standing and consistent with the distinct and separate responsibilities of the different local public officials involved.

Although the Court of Appeals tried to limit the effect of its decision to the facts of the case,[3] that attempt will be ineffectual and the decisionwill result in great confusion and problems for local municipalities. Given the traditional roles of a city manager and city commission (city manager recommends and the city commission adopts), it is difficult to see how the Court of Appeals' decision can be limited to the facts of the case.

The Bay City City Charter provides that the city manager shall recommend to the city commission "for adoption such measures as he may deem necessary and expedient." (Court of Appeals Slip Opinion, p. 10, fn 1, quoting Article VI, § 4 of the Bay City City Charter.) Do all of the recommendations of the city manager to the city commission fall within this new rule of law established by the

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[3]Court of Appeals Slip Opinion, p. 7.

Court of Appeals? For example, if the city manager meets with the city treasurer and finance director to make a recommendation to the city commission that the city fund a public improvement by selling bonds, is that meeting subject to the OMA? If not, based on the Court of Appeals' decisions, why not? What is the distinction? Is the Court of Appeals' decision limited only to hiring situations (the context of the decision in Booth)? The court didn't say that.

To restore the statutorily mandated relationship between the a city commission and a city manager, the decision of the Court of Appeals must be reversed.

2. THE COURT OF APPEALS' DECISION IS DIRECTLY CONTRARY TO THE LEGISLATIVE INTENT AS DEMONSTRATED BY THE LEGISLATIVE HISTORY OF THE OMA.

The Court of Appeals' decision that an individual or a committee which makes only a recommendation to a public body is to be considered a public body subject to the OMA is directly contrary to the intent of the legislature in adopting the OMA as demonstrated by the legislative history of its adoption.

The Attorney General, in Opinion No. 5183, 1977-78, reviewed the legislative history of the OMA:

> Senate Bill No. 920, the original form of the Open Meetings Act, would also have included within the definition of a public body, 'any . . . state or local governmental entity to make recommendations concerning the exercise of governmental authority. . . .' SB 920, section 2(a).
>
> It is apparent that the final version of the definition of 'public body' is less comprehensive than the definition originally offered. This reduction in the compass of the Act's definition was the very first amendment offered on the bill. Senate Journal 125, p 2400 (11/18/75). That the more inclusive definition was not a part of the final bill indicates that the

legislature specifically rejected such advisory being included within the meaning of the term 'decision'.

From the above history, the Attorney General concluded as follows regarding the legislature's intent in enacting the OMA:

> Based on the wording of the enacted version of the Act and the intent of the legislature as indicated by the changes from the original form, it is my opinion that the Act does not apply to committees and subcommittees of public bodies which are merely advisory or only capable of making 'recommendations concerning the exercise of governmental authority'. These bodies are not legally capable of rendering a 'final decision'. In other words, a subcommittee which can only make recommendations to the public body for final decision is not required to hold its committee meetings in public hearings.

OAG, 1977-1978, No 5183, pp 21, 40.

The courts will not give an interpretation to a statute which has been rejected by the legislature itself. See, People v Adamoski, 340 Mich 422, 429; 65 NW2d 753 (1954) ("When the legislature affirmatively rejected the statutory language which would have supported the State's present view, it thereby made its intention crystal clear. We should not, without a clear and cogent reason to the contrary, give a statute a construction which the legislature itself plainly refused to give"); and University Medical Affiliate v Wayne County, 142 Mich App 135, 141; 369 NW2d 277 (1985) ("Further, the legislative history of the statute may be considered and, where it can be shown that certain language was affirmatively rejected, a court should not, 'without a clear and cogent reason,' give a statute a construction which the Legislature plainly refused to give").

The conclusion reached by the Court of Appeals was specifically rejected by the legislature when it adopted the act and should be rejected by this court as well.

3. **THE DENIAL OF APPELLANT'S FREEDOM OF INFORMATION ACT REQUEST WAS CORRECT BECAUSE APPELLANT ASKED FOR INFORMATION, NOT A PUBLIC RECORD, AND FOIA DOES NOT REQUIRE A PUBLIC BODY TO CREATE OR COMPILE INFORMATION.**

The trial court was correct in holding that the denial of Appellant's FOIA request by the City was correct because Appellant did not request a public record under FOIA.

Appellant's FOIA request stated, in pertinent part, as follows:

> This is a request for information, made pursuant to the Michigan Freedom of Information Act, which is MCL 15.231, et seq; MSA 4.1801(1) et seq.
>
> We request the names, current job titles, cities of residence, and age of the seven final candidates for the job of Bay City fire chief and the nine final candidates for the job of Bay City police chief.

The Bay City Times Brief on Appeal, Exhibit E.

Appellant requested "information," not a public record. As such, the request did not trigger FOIA. It was therefore within the discretion of the City whether or not to compile and provide the "information."

The FOIA is clear. It does not require a public body to compile or make a report of "information" as requested by Appellant.

> This Act does not require a public body to make a compilation, summary, or report of information, except as required in Section 11.

MCL 15.233(4); MSA 4.1801(3)(4) (emphasis added).

FOIA specifically excludes what Appellant claims it was entitled to, a "report of information." While it is true the FOIA is to be interpreted broadly, it cannot be interpreted so broadly as to change an invalid request into a valid one, or to require a public body to do what the Act expressly says it need not do.

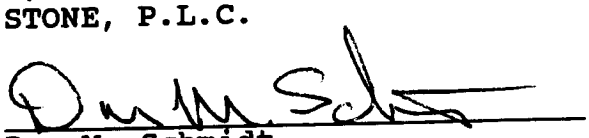
As a result, the Court of Appeals' decision should be reversed and the trial court affirmed.

RELIEF REQUESTED

For the reasons stated above, amicus curiae Michigan Municipal League Legal Defense Fund respectfully requests this Honorable Court to grant leave to appeal and upon considering the matter, to reverse the decision of the Court of Appeals and reinstate the Circuit Court's decision.

Respectfully submitted,
MILLER, CANFIELD, PADDOCK
AND STONE, P.L.C.

DATED: June 5, 1998

BY: 

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