Briefly
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From the Chair of the Government Law Section

Thank you to our Members. We had unprecedented challenges advising our clients during the Coronavirus pandemic. During this crisis, our dedicated members had to advise and apply ever changing multi-layer governmental orders in conjunction with our home rule and enabling acts so that local government could continue to provide for the health, safety and welfare of our communities. We withstood the test of a global pandemic, for that I am grateful to our members.

Our members solved complex legal problems so our clients were able to provide the necessities such as clean water, police and fire protection, open government and education. Our remarkable members were often the unsung heroes who provided the calm analysis to accomplish the tasks while avoiding public praise.

The Government Law Section is further blessed with a 21-member board of directors of the finest attorneys I have ever had the pleasure to work on behalf. Our board consists of attorneys from small and large firms and "in-house" dedicated attorneys from diverse and prosperous communities.

Our volunteer board members meet monthly to discuss conducting two annual section seminars to educate our members, simply because it is the right thing to do. I am proud to say, our board members have always made it a priority to educate and provide ethical guidance to our members, all while remembering the importance of welcoming our families to participate in our annual meeting.

Next year we will celebrate our twentieth joint MAMA/GLS Summer Educational Conference on June 18-19, 2021 at the Grand Hotel on Mackinac Island.

It has truly been a pleasure to serve as Chair of the Government Section.

—Greg

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Bisio v the City of the Village of Clarkston: Supreme Court Clarifies Broad Scope of Municipal Documents Subject to FOIA Disclosure

By Caroline B. Giordano, Miller, Canfield, Paddock and Stone, P.L.C.

In *Bisio v the City of the Village of Clarkston*, the Supreme Court recently reviewed a FOIA lawsuit in which the plaintiff challenged Clarkston's denial of her FOIA request for correspondence between the city attorney and a consulting firm concerning a development project and vacant property in the City. *Bisio*, Dkt. No. 158240 (slip op.)(decided July 24, 2020). The city attorney was a private attorney who contracted with the city to act as its city attorney, and claimed that the requested records – which were not privileged, and had never been shared with Clarkston – were not "public records" as defined by FOIA, MCL 15.232(i). Clarkston denied the plaintiff's FOIA request, arguing that the city attorney was not a "public body," as defined by MCL 15.232(h), and that because the records were never in possession of the city, which was a public body, the records were not public records subject to FOIA. The trial court granted summary disposition in favor of Clarkston, and the Court of Appeals affirmed in an unpublished opinion on somewhat different grounds, reasoning that the city attorney was merely an agent of Clarkston and FOIA's definition of "public body" in MCL 15.232(h) did not encompass the public body's agents.

The Supreme Court granted the plaintiff's application for leave to appeal and directed the parties to brief the issues (1) whether the Court of Appeals erred in holding that the requested records were not within FOIA's definition of "public record" and (2) "whether the city's charter-appointed attorney was an agent of the city such that his correspondence with third parties, which were never shared with the city or in its possession, were public records subject to the FOIA." *Bisio*, slip op. at 4. After briefing and oral argument on these issues, the Court reversed the Court of Appeals, holding that the city attorney's records were indeed public records subject to disclosure under FOIA.

The Court's holding that the requested records were subject to FOIA did not squarely address the agency issues that the Court had asked the parties to brief. Instead, the Court focused primarily on a statutory argument supplied only in an amicus brief offered by Michigan Press Organization and other related press organizations – namely, that MCL 15.232(h) indicates that "a single *office* may also be considered a 'public body' for purposes of FOIA." *Bisio*, slip op. at 8 (emphasis in original). The Court noted, among other things, that because the "executive *office* of the governor and lieutenant governor" were expressly excluded from the definition of "public body" in MCL 15.232(h)(*i*) (providing that a "state officer, employee, agency, department, division, bureau, board, commission, council, authority, or *other body* in the executive branch of the state government" are public bodies), the Legislature would have logically included such "offices" as "other bodies" subject to FOIA under MCL 15.232(h)(*i*) had they not been expressly excluded. *Id*. at 9-10. Likewise, the Court noted, MCL 15.232(h)(*iv*)(providing that a public body includes any "other body that is created by state or local authority or is primarily funded by or through state or local authority") specifically excludes "the office of the county clerk." Given this statutory language, the Court reasoned that an "other body" in the statute's definition of "public body" includes an "office." *Id*. at 10-11.

With the understanding that a "public body" under MCL 15.232(h) includes an "office," the Court noted that Clarkston's City Charter expressly recognized administrative officers, including the City Attorney, and also provided that these officers occupy "offices" within the City. *Bisio*, slip op. at 11. Because the Charter created an office of the city attorney, the Court concluded that the office was a public body in that it constituted an "other body" created by local authority under MCL 15.232(h)(*iv*). *Id*. at 12-13. And because there was no real dispute that the office of the city attorney retained the documents at issue in the performance of an official function, the documents were public records subject to disclosure under FOIA. *Id*. at 14.

In a concurring opinion, Chief Justice McCormack agreed that the documents at issue were public records but wrote separately to address the agency law issue that the Court granted leave to decide: whether common law agency principles apply to FOIA such that the records of a public body's agent while representing the public body in government affairs are subject to disclosure under FOIA. *Bisio*, Concurrence at 1. The Chief Justice answered this question in the affirmative, and would have decided that common law agency principles apply to FOIA because the common law applies to statute unless expressly abrogated by the Legislature, and there is no evidence in the FOIA statute that the Legislature intended to amend the common law of agency as applied to the statute. *Id*. at 3. In addition, by definition, a city can only ever act through its agents and employees – so if agency principles did not apply to FOIA, then no records would ever be subject to disclosure. *Id*. at 5. Thus, the Chief Justice would hold that the records the plaintiff requested from the city attorney were subject to disclosure as "public records" under common law agency principles applicable to FOIA. *Id*. at 5-6.

Justice Viviano strongly dissented from the majority opinion and disagreed with its adoption of a theory of the case that had not been litigated below but instead had been raised for the first time in an amicus brief. Bisio, Dissent at 12. Justice Viviano also disagreed with the majority's statutory analysis, writing that because the city attorney was not a collective entity, but an individual, the city attorney could not be a "public body" under FOIA. *Id*. at 9-12. The dissent opined that the majority's holding "has massively expanded the scope of FOIA" in a decision that "will have serious consequences far beyond this case," and will expose "many thousands of local officers" to increased scrutiny under FOIA. *Id*. at 10-13.

Bisio confirms the Court's determination to safeguard FOIA's central purpose of facilitating full participation in the democratic process by providing Michigan's people with full and complete access to information regarding the affairs of government, public officials, and public employees. This opinion signals to lower courts that the Supreme Court is increasingly inclined to interpret the statute in favor of disclosure in cases where a clearly delineated statutory exemption does not apply. Local governments considering denying FOIA requests on the grounds that the requested records are not "public records" under the statute should take care to ensure that a clear exemption applies – especially where the requested records are sought from an official whose designated "office" is created by local charter or ordinance. In practical terms, it remains to be seen whether – as the dissent predicts – this decision will open the door to a flood of new FOIA requests addressed to local officials whose records were previously assumed to lie outside the statute's reach.

About the Author

Caroline B. Giordano *is an Attorney at Miller, Canfield, Paddock and Stone, P.L.C., where she represents a wide variety of commercial and governmental clients in state and federal courts. Caroline has extensive experience working on multimillion-dollar cases representing governmental entities at both the trial and appellate level. Caroline is active in Miller Canfield's class action defense practice, and she has also worked on numerous matters involving business torts, physician reimbursement claims, breach of contract litigation, non-compete litigation, and trade secret disputes.*

Rafaeli, LLC, and Andre Ohanessian v. Oakland County and Andrew Meisner:

The Michigan Supreme Court Weighs in on Surplus Proceeds After Tax Foreclosure Sales

By Jeffrey S. Arnoff and Sean C. Rucker, Miller, Canfield, Paddock and Stone, P.L.C.

In *Rafaeli, LLC, and Andre Ohanessian v. Oakland County and Andrew Meisner*, the Michigan Supreme Court considered whether Oakland County's retention of surplus proceeds after a tax-foreclosure sale of Plaintiffs' properties constituted an impermissible governmental taking under both the federal and Michigan takings clauses. Following the Plaintiffs' property tax delinquencies of $285.81 and $6,000, Oakland County sought forfeiture, foreclosure and sale of the delinquent properties. Oakland County sold both properties at auction—Rafaeli's property was sold for $24,500, while Ohanessian's property was sold for $82,000. Oakland County retained the surplus proceeds exceeding Plaintiffs' tax debts. Plaintiffs filed their initial action in the Oakland Circuit Court, alleging that Oakland County, by keeping the surplus proceeds, committed an unconstitutional taking. The circuit court found that where a governmental unit completes the process of forfeiture and foreclosure of property pursuant to Michigan's General Property Tax Act ("GPTA"), there can be no taking. The GPTA, according to the lower court, properly divests delinquent owners of all interests in their properties. The Michigan Court of Appeals affirmed the Oakland Circuit Court's ruling based on federal civil-asset forfeiture jurisprudence. The Michigan Supreme Court granted leave to appeal the takings issue.

Oakland County completed the process of forfeiture, foreclosure, and the ultimate sale of Plaintiffs' property under the GPTA. The GPTA, in relevant part, prescribes a statutory scheme for the recovery of delinquent property taxes through foreclosure and sale proceedings. The GPTA provides that tax-delinquent properties are forfeited to county treasurers—forfeited properties may be foreclosed on after a judicial hearing on the matter, and owners of foreclosed properties may timely redeem said properties, with a failure to do so resulting in sale of the property at public auction. Notably, the GPTA provides that a county seeking foreclosure must file a corresponding petition in the presiding circuit court—that petition must "seek a judgment in favor of the foreclosing governmental unit for the forfeited unpaid delinquent taxes, interest, penalties, and fees listed against each parcel of property . . . [and] shall request that a judgment be entered vesting absolute title to each parcel of property in the foreclosing governmental unit, without right of redemption." The GPTA mandates that—following foreclosure and subsequent sale at public auction—the sale proceeds be deposited into an account designated "delinquent tax property sales proceeds for the year." Once in the account, the foreclosing governmental unit distributes the collective proceeds according to a statutorily mandated order of priority—notably, even surplus proceeds are deposited and distributed according to the statutory scheme—the GPTA does not provide for return of surplus proceeds to former property owners.

Reversing the Court of Appeals' decision on the takings issue, the Supreme Court first noted that the lower court had been incorrect in likening forfeiture under the GPTA to civil-asset forfeiture—forfeiture under the GPTA, according to the Supreme Court, does not divest property owners of all interests in their land. Further, the purpose of GPTA forfeiture is different than civil-asset

forfeiture; indeed, the Supreme Court noted that civil-asset forfeiture—at least in part—seeks to punish property owners, while the GPTA seeks only to ensure that properties retain their tax-generating status.

The Court next addressed the argument that no taking could have occurred because Plaintiffs were afforded due process under the GPTA's procedures. Noting that "a claim of an unconstitutional taking . . . is distinct from a claim of property deprivation without due process of law," the Supreme Court noted that the two constitutional provisions protect distinct rights and provide different remedies.

Moving next to the takings claim, the Supreme Court determined that Michigan's Takings Clause provides greater protections than its federal counterpart with respect to the government's power of eminent domain. Acknowledging that a takings claim requires the existence of a pre-existing, vested property right under state law, the Supreme Court analyzed past claims for surplus proceeds, coming to the conclusion that Michigan's common law provides property owners a vested property right to surplus proceeds gained through a tax-foreclosure sale. Specifically, the Supreme Court opined that Michigan common law is based on English common law, further finding that English common law—particularly the Magna Carta—protected property owners from uncompensated takings and also recognized that "tax collectors could only seize property to satisfy the value of the debt payable to the Crown, leaving the property owner with the excess." Drawing on the writings of Thomas Cooley, former Michigan Supreme Court Chief Justice, the Supreme Court noted that the "right to collect surplus proceeds was also firmly established in the early years of Michigan's statehood." The Supreme Court further noted that in 1867 it had recognized that "no law of the land authorizes the sale of property for any amount in excess of the tax it is legally called upon to bear," concluding now that "early in Michigan's statehood, it was commonly understood that the government could not collect more in taxes than what was owed, nor could it sell more land than necessary to collect unpaid taxes."

Additionally, the Supreme Court acknowledged that the power of eminent domain prohibits the government from taking more property than is necessary for the particular stated public use. Finally, citing *Dean v. Dep't of Natural Resources*, the Supreme Court opined that the right to surplus proceeds survived the ratification of the 1963 Constitution—in *Dean*, the Michigan Supreme Court reversed the circuit court, allowing the plaintiff to bring an unjust enrichment suit where the state sold her property in excess of the delinquency owed, keeping the surplus. Articulating this holding, the current Michigan Supreme Court concluded that "inherent in *Dean*'s holding is Michigan's protection under our common law of a property owner's right to collect the surplus proceeds that result from a tax-foreclosure sale."

Holding that "the ratifiers would have commonly understood this common-law property right to be protected under Michigan's Takings Clause at the time of the ratification of the Michigan Constitution in 1963," the Supreme Court found that Oakland County's retention of the surplus proceeds pursuant to the GPTA was an unconstitutional taking. The Supreme Court further found that the GPTA is unconstitutional "as applied to former property owners whose properties were sold at a tax-foreclosure sale for more than the amount owed in unpaid taxes, interest, penalties, and fees related to the forfeiture, foreclosure, and sale of their properties." Indeed, although fee simple title had vested in Oakland County, the Plaintiffs retained a distinct property interest in any surplus proceeds. Finally, the Supreme Court held that just compensation in this context consists of "any proceeds from the tax-foreclosure sale in excess of the delinquent taxes, interest, penalties, and fees reasonably related to the foreclosure and sale of the property—no more, no less."

Moving forward, while the Supreme Court's legal analysis was clear, the practical implications of its decision introduce uncertainty into the property tax forfeiture-foreclosure-auction process under the GPTA. The procedures leading up to auction are set forth in great detail in the GPTA, particularly in light of the GPTA amendments enacted through Act 123 of 1999. In essence, the *Rafaeli* decision introduces an entirely new phase of the process that lacks any statutory guidance. With property owners entitled to receive surplus funds produced by the auction, there will need to be standards,

procedures, notice requirements and time periods for the delivery of those surplus funds. In the absence of such statutory guidance, property owners and foreclosing governmental units are left without a roadmap for disposition of those surplus funds in compliance with *Rafaeli*. It will be critical that the legislature act relatively quickly, as current property owners have already begun asserting claims for surplus funds associated with prior auction sales, a trend that is likely to grow.

About the Authors

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Sean Rucker *is an associate in Miller Canfield's Public Finance Group. He is a graduate of Wayne State University Law School and previously interned with the General Motors Student Corps and the Detroit Police Department Board of Commissioners. He also worked as a law clerk for the Honorable Victoria A. Roberts in the United States District Court for the Eastern District of Michigan.*

Don't forget to update your member record. In order to safeguard your member information, changes to your member record must be provided in one of the following ways:

- Login to SBM Member Area with your login name and password and make the changes online.
- Complete contact information change form and return by email, fax, or mail. Be sure to include your full name and P-number when submitting correspondence.
- Name Change Request Form—Supporting documentation is required

Results from Briefly Survey On COVID-19

In the July Edition of *Briefly,* readers were invited to submit an anonymous survey about how COVID-19 impacted their work environment and what tricks they learned to work effectively from home. Here are the results.

1) **Prior to stay at home orders, did your organization have a telecommuting policy?**

   This question received mixed results, with around one-half of all participants stating that their organization did have a telecommuting policy prior to the pandemic. Moving forward, it will be interesting to monitor whether the pandemic experience has normalized remote work, and the impact that has on legal services.

2) **Did your office shut down prior to stay at home orders going into effect?**

   This question received mixed results as well, with one-half of all participants stating that their office shut down prior to the stay at home orders going into effect.

3) **After the COVID-19 pandemic is over are you likely to utilize digital meeting platforms (e.g. zoom, Microsoft Teams, or skype) as a substitute for meeting with clients in person?**

   Virtual meetings appear overwhelmingly popular with participants with over seventy (70) percent of participants stating they would like to use digital platforms to meet with clients moving forward. With the popularity of electronic meetings, it will be interesting to monitor how this trend will impact Michigan statutes requiring in-person public meetings such as the Open Meetings Act.

4) **What did your firm or organization do to promote workforce camaraderie (e.g. Zoom Happy Hours) during the stay at home order?**

   Virtual meetings when employees worked from home were not purely business, as many participants of the survey stated that their organizations had virtual social hours. Some fun ideas that were shared include happy hours, trivia games, shaggiest beard competitions and au natural hair styles for women competitions.

5) **What did you like about working from home during the COVID-19 stay at home order?**

   Survey participants most common responses were eliminating commutes and more casual work attire. In addition, many participants enjoyed being able to set the pace of their day, taking small breaks to enjoy their surroundings.

6) **What did you dislike about working from home during the COVID-19 stay at home order?**

   This question prompted a variety of responses from participants. Some participants disliked the lack of structure from working from home and felt like it was difficult to establish and to stick to boundaries on work time. Others missed the lack of interpersonal connection with coworkers.