

STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL



MIKE COX
ATTORNEY GENERAL

P.O. Box 30212
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October 27, 2006

OCT 30 2006

Clerk of the Court
Ingham County Circuit Court
Veterans Memorial Courthouse
313 W. Kalamazoo Street
P.O. Box 40771
Lansing, MI 48901

Dear Clerk:

Re: *Ben Hansen v State of Michigan, Department of Community Health*
Ingham Circuit Court No. 06-1033-CZ
A.G. No. 2006021202

Please find enclosed for filing, Defendant's Brief in Reply to Plaintiff's Response and Brief in Opposition to Defendant's Dispositive and Related Motions. The "Judge's copy" is being sent under separate cover.

Very truly yours,

A handwritten signature in cursive script that reads "Thomas Quasarano".

Thomas Quasarano
Assistant Attorney General
Opinions and Municipal Affairs Division
Tel No: (517) 373-9100
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TQ:mr
Enc.

c: Hon. Beverley Nettles-Nickerson
Alan Kellman

STATE OF MICHIGAN
CIRCUIT COURT FOR THE 30TH JUDICIAL CIRCUIT
INGHAM COUNTY

BEN HANSEN,

Case No. 06-1033-CZ

Plaintiff,

v

HON. BEVERLEY NETTLES-NICKERSON

STATE OF MICHIGAN,
DEPARTMENT OF COMMUNITY HEALTH,

Defendant.

AG#2006021202

Alan Kellman (P15826)
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**DEFENDANT'S BRIEF IN REPLY TO PLAINTIFF'S RESPONSE
AND BRIEF IN OPPOSITION TO DEFENDANT'S DISPOSITIVE
AND RELATED MOTIONS**

Defendant, Michigan Department of Community Health (MDCH), by its attorneys,

Michael A. Cox, Attorney General of Michigan, and Thomas Quasarano, Assistant Attorney

General, files the following reply to Plaintiff's response brief:

COUNTER-ARGUMENT

I. Under MCR 2.116(C)(7) and (8), Plaintiff's complaint should be dismissed, where certain of Plaintiff's claims are barred because the statutory period of limitations ran before Plaintiff commenced his action; and, therefore, Plaintiff has failed to state claims on which relief can be granted to him under the Freedom of Information Act (FOIA), MCL 15.231 *et seq.*

At page 2 of his response brief, Plaintiff states that he filed his complaint on August 11, 2006. For reasons not explained by Plaintiff, he apparently did not cause a summons to issue until August 30, 2006. This information does not change the grounds for the MDCH's motion to dismiss certain of Plaintiff's claims under MCR 2.116(C)(7) and (8).

Plaintiff's claims based on the MDCH's December 7, 2005 written notice granting Plaintiff's November 14, 2005 request, and on the January 11, 2006 written notice granting in part and denying in part Plaintiff's December 14, 2005 request originated, respectively, 247 days and 212 days prior to Plaintiff's claimed commencement of his FOIA action on August 11, 2006. (See Counts I and II of Plaintiff's complaint; and copies of FOIA requests and FOIA responses appended to the MDCH's brief in support of dispositive motion as Attachments A, 1, and 2.)

Plaintiff's claims, therefore, are barred by the statutory period of limitations set forth under section 10(1)(b), MCL 15.240(1)(b), of the FOIA:

If a public body makes a final determination to deny all or a portion of a request, the requesting person may . . . [c]ommence an action in the circuit court to compel the public body's disclosure of the public records *within 180 days* after a public body's *final determination to deny a request*. (Emphasis added.)

Assuming, *arguendo*, that Plaintiff's claim based on the MDCH's February 23, 2006 written notice granting in part and denying in part Plaintiff's February 2, 2006 request originated 169 days prior to Plaintiff's claimed commencement of his FOIA action on August 11, 2006, this claim, as well as the aforementioned two claims, should be dismissed, where Plaintiff fails to

show the existence of a genuine issue of material fact, which contravenes the fact that the

MDCH complied with the FOIA in responding to all of the FOIA requests.

Finally, Plaintiff's argument (at page 3 of his response brief) that his three FOIA requests constitute some kind of identical or continuing request is without merit. Any such construction of the FOIA would turn the Act on its head and should be rejected by this Court.¹ Section 3(1), MCL 15.233(1), of the FOIA establishes the requirements for the making of a FOIA request; section 5(2), MCL 15.235(2), of the Act sets forth the public body's required response to a given FOIA request; and section 10(1), MCL 15.240(1), provides the remedial rights, where the public body makes a final determination to deny in full or part the given FOIA request.

The language of these sections is clear and unambiguous, and must be accorded its plain and ordinary meaning in the context of the sections. The Michigan Supreme Court has repeatedly stated that where the language of a statute is clear and unambiguous, it must be enforced as written to effectuate the Legislature's intent. *Lorenz v Ford Motor Co*, 439 Mich 370, 376; 483 NW2d 844 (1992).

II. Contrary to Plaintiff's assertions, a dispositive motion is an appropriate and common means of resolving an action commenced under the FOIA. Accordingly, the MDCH brings its motion under MCR 2.116(C)(7), (8), and (10).

The MDCH's filing of its dispositive motion as its first response to Plaintiff's complaint apparently is behind Plaintiff's unsupported and erroneous claim (page 2 of response brief) that the MDCH has argued that "[FOIA] denial determinations' are not subject to judicial review."

¹ While the MDCH recognizes that section 3(3), MCL 15.233(3), of the FOIA provides for "a right to subscribe to future issuances of public records that are created, issued, or disseminated on a regular basis," this is not the type of records involved in the instant case, and, in any event, Plaintiff did not invoke section 3(3) of the Act in his requests or raise the provision in his complaint.

A review of the MDCH's motions and briefs, as further supported by the affidavit of MDCH FOIA coordinator, Mary Greco, shows that the MDCH granted in full Plaintiff's November 14, 2005 FOIA request, and granted in part and denied in part, with explanation, Plaintiff's December 14, 2005 FOIA request. (Greco affidavit, Attachment 1.) In any event, as discussed above, these FOIA requests constitute claims that are time-barred.

Ms. Greco also testifies that the MDCH granted in part and denied in part Plaintiff's February 2, 2006 FOIA request. The MDCH's written notice informed Plaintiff that, save specifically described information that did not constitute final records of the MDCH and records the public disclosure of which is prohibited by law, Plaintiff was granted access to all existing, nonexempt records responsive to his description of records. The MDCH also informed Plaintiff that certain information once finalized as a record of the MDCH could be requested under the FOIA. Plaintiff did not pursue this availability. (*Id.*)

Relief Sought

WHEREFORE, the MDCH respectfully requests that this Honorable Court grant the MDCH's motions to dismiss Plaintiff's complaint, and for an award of the MDCH's costs, expenses, and attorney fees in an amount to be determined by the Court.

Respectfully submitted,

Michael A. Cox
Attorney General



Thomas Quasarano
Assistant Attorney General
Department of Attorney General
Opinions and Municipal Affairs Division
P.O. Box 30212
Lansing, MI 48909
(517) 373-9100

Dated: October 27, 2006

2. I make this affidavit in support of the MDCH's dispositive and related motions filed in this action. I am personally familiar with the facts stated in this affidavit, and, if sworn as a witness, I can testify competently to those facts.

3. I received and processed Plaintiff, Ben Hansen's three requests for information, which he submitted to the MDCH, under the Freedom of Information Act (FOIA), MCL 15.231 *et seq*, on November 14, 2005, December 14, 2005, and February 2, 2006. The MDCH issued written notices in response to those requests, respectively, on December 7, 2005, January 11, 2006, and February 23, 2006.

4. On December 7, 2005, the MDCH granted in full, and provided copies of the records responsive to, Mr. Hansen's November 14, 2005 FOIA request, which specifically sought what Mr. Hansen described as:

[M]inutes of Michigan Mental Health Advisory Committee or any other MDCH committee or subcommittee meetings in which PQIP was discussed;

[M]emos, reports and other working papers of the PQIP Workgroup;

[I]nter-agency memos, letters or similar correspondence pertaining to PQIP within and between MDCH entities such as the Mental Health and Substance Abuse Administration and the Medical Services Administration, to or from committee members, MDCH employees, representatives of Eli Lilly or representatives of Comprehensive Neuroscience Inc;

[C]ontracts or similar agreements with Eli Lilly or Comprehensive Neuroscience Inc.

To the best of my knowledge, information, and belief, at the time the MDCH issued its December 7, 2005 written notice in response to the request, there were no additional MDCH records falling within the scope of the request.

5. On January 11, 2006, the MDCH granted in part (providing copies of nonexempt records) and denied in part Mr. Hansen's December 14, 2005 FOIA request, which specifically sought what Mr. Hansen described as:

[M]inutes of all Michigan Mental Health Advisory Committee (MHAC) meetings after September 14, 2005;

Minutes and other records of all Pharmacy Quality Improvement Project (PQIP Workgroup) meetings after July 26, 2005;

Records of any discussions or correspondence with Ms. Molly Bodenschatz (Eli Lilly and Company) by any MHAC member or any PQIP Workgroup member after June 2005;

Any material related to PQIP which may have been omitted or overlooked by your office in response to my initial FOIA request of November 14, 2005.

As to the exempt records falling within the scope of Mr. Hansen's December 14, 2005 FOIA request, the MDCH's January 11, 2006 written notice provided an explanation of the basis under the FOIA and under the Release of Information for Medical Research and Education Act, MCL 331.531 *et seq*, for the determination that certain MDCH records, or portions of records, described by Mr. Hansen are exempt from public disclosure. MDCH's January 11, 2006 written notice informed Mr. Hansen of the applicable statutory exemptions for each record and class of records exempt from disclosure, including providing Mr. Hansen with a detailed document index.

The exemptions invoked by the MDCH in this matter are based on section 13(1)(a), (d), and (m) of the FOIA that, respectively, provide for the exemption of records or information: "of a personal nature if public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy;" "specifically described and exempted from disclosure by statute;" and "of an advisory nature to the extent that they cover other than purely factual materials and are preliminary to a final agency determination of policy or action [where] in the

particular instance the public interest in encouraging frank communication . . . clearly outweighs the public interest in disclosure."

The following MDCH records or information is exempt from public disclosure: 1) Medicaid patient identities and beneficiary information; and other patient and prescriber identifiers under privacy provisions of both the FOIA, section 13(1)(a), and section 3 of the Release of Information for Medical Research and Education Act, MCL 331.533 [incorporated in the FOIA via section 13(1)(d)]. MCL 331.533 requires the confidential treatment of personal identities, and the proceedings and reports of review entities, such as the quality review committees referred to by Mr. Hansen. 2) The memorandum composed of the opinions and other advisory notes of committee members, where the FOIA permits the nondisclosure of deliberative communications. The working documents of quality review committees, made preliminary to a final determination of policy or action, are protected in order to encourage frank communications in matters concerning peer and related review matters. In this particular instance, the public interest in encouraging frank and candid communications among committee members clearly outweighs a public interest in disclosure, where the review of professional standards related to health care call for informed recommendations, unfettered by third party interference in the deliberative process stage that would arise with the public disclosure of those records or portions of the records requiring confidentiality. Protecting the integrity of these frank and candid discussions benefits the public, where the final decision involves the general safety, health, and welfare of individuals. The public would be ill-served if committee members were discouraged or hindered in expressing their opinions and thoughts during the preliminary stages of the deliberative process.

To the best of my knowledge, information, and belief, at the time the MDCH issued its January 11, 2006 written notice in response to the request, there were no additional nonexempt MDCH records falling within the scope of the request.

6. On February 23, 2006, the MDCH granted in part (providing copies of nonexempt records) and denied in part Mr. Hansen's February 2, 2006 FOIA request, which specifically sought what Mr. Hansen described as:

Minutes of any Mental Health Advisory Committee (MHAC) meetings which took place in the month of December 2005;

Minutes and other records of any Pharmacy Quality Improvement Project (PQIP) Workgroup or Steering Committee meetings which took place in August, September, October or November 2005; and a PQIP committee meeting scheduled for December 15, 2005;

Comprehensive Neuroscience, Inc. (CNS) reports deemed exempt because they were still in draft form when I made my original 2005 FOIA requests:

1. (Quarterly) Executive Management Reports in 2005;
2. (Monthly) Michigan Behavioral Pharmacy Reports in 2005;
3. (Monthly) Michigan Targeted Patient Change Report by Quality Indicator, 9/2005 thru 12/2005;
4. (Monthly) Mich. Targeted Prescriber Change Report by Quality Indicator, 9/05 thru 12/2005;
5. (Monthly) Michigan Physician Specialty and Response Reports in 2005; and
6. (Quarterly) PQIP Monthly Mailing Logs in 2005;

CNS reports deemed exempt from disclosure by statute or reasons of privacy per MCL 331.533 13(1)(a) and 13(1)(d). I request notice of an estimate for redacting the exempt information from these documents:

1. (Monthly) Michigan Under 5 Detail by Drug and Quality Indicator in 2005;
2. (Monthly) Patients on 5 or More Concurrent Behavioral Drugs in 2005.

The MDCH's February 23, 2006 written notice issued in response to Mr. Hansen's February 2, 2006 FOIA request provided Mr. Hansen with a copy of the December 5, 2005 minutes for the Mental Health Advisory Committee; informed him that no other meeting records exist because there were no other meetings in August through December 2005; and provided an explanation as to the exemption of preliminary deliberative documents under the FOIA's

deliberative process exemption (discussed *supra*); but offering to provide copies under a FOIA request when the documents were finalized. Mr. Hansen did not avail himself of these records.

The MDCH's February 23, 2006 written notice also addressed Mr. Hansen's expressed acknowledgment, in his February 2, 2006 FOIA request, of the privacy provisions under the FOIA and the Release of Information for Medical Research and Education Act. The MDCH's notice confirmed for Mr. Hansen that the information described in his February 2, 2006 FOIA request as "[monthly] Michigan Under 5 Detail by Drug and Quality Indicator in 2005 [and] Patients on 5 or More Concurrent Behavioral Drugs in 2005" is exempt from public disclosure. The MDCH's notice explained that section 3 of the Release of Information for Medical Research and Education Act provides:

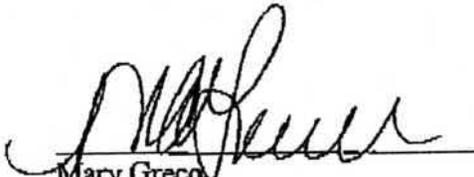
The identity of a person whose condition or treatment has been studied under this act is confidential and a review entity shall remove the person's name and address from the record before the review entity releases or publishes a record of its proceedings, or its reports, findings, and conclusions. Except as otherwise provided in section 2, the record of a proceeding and the reports, findings, and conclusions of a review entity and data collected by or for a review entity under this act are confidential, are not public records, and are not discoverable and shall not be used as evidence in a civil action or administrative proceeding.

The notice further informed Mr. Hansen that "[t]he requested records contain identifying information about individuals whose condition and treatment are being studied. Additionally, the requested records are reports, findings, and conclusions of a review entity, and contain data collected by or for a review entity under 1967 PA 270, MCL 3331.531 *et seq.*"

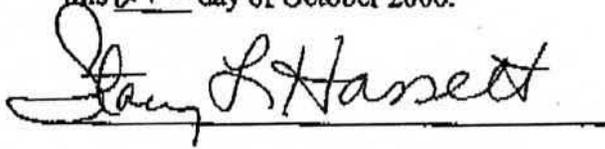
To the best of my knowledge, information, and belief, at the time the MDCH issued its

February 23, 2006 written notice in response to the request, there were no additional nonexempt

MDCH records falling within the scope of the request.


Mary Greco

Subscribed and sworn to before me
this 27th day of October 2006.



Notary public, State of Michigan, County of Calhoun
Acting in Ingham County

My commission expires: July 08, 2011

STACY L. HASSETT
NOTARY PUBLIC, STATE OF MI
COUNTY OF CALHOUN
MY COMMISSION EXPIRES Jul 8, 2011
ACTING IN COUNTY OF Ingham