STATE OF MICHIGAN
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BILL SCHUETTE
ATTORNEY GENERAL

March 28, 2011

Clerk of the Court
Michigan Supreme Court
Michigan Hall of Justice
925 W. Ottawa Street
Lansing, MI 48915

MAR 29 2011

Dear Clerk:

Re: *Ben Hansen, et al v Department of Community Health*;
Ingham Circuit Court No. 09-759-CZ
Court of Appeals No. 294415
Supreme Court No. 142692

Enclosed for filing in the above entitled matter, please find Defendant-Appellees' Brief in Opposition to Application for Leave to Appeal along with Proof of Service upon counsel of record.

Sincerely,

Kevin L. Francart
Assistant Attorney General
State Operations Division

KLF/llh
Enc.
c: Alan Kellman
SO/AC/Cases/2010/2009-0020415-C-L – clerk ltr

STATE OF MICHIGAN
IN THE SUPREME COURT

BEN HANSEN, INTERNATIONAL CENTER FOR THE STUDY OF PSYCHIATRY AND PSYCHOLOGY, INC., and LAW PROJECT FOR PSYCHIATRIC RIGHTS, INC.,

Plaintiffs-Appellants,

v

DEPARTMENT OF COMMUNITY HEALTH,

Defendant-Appellee.
_____/

Supreme Court No. 142692

Court of Appeals No. 294415

Ingham Circuit Court No. 09-759-CZ

STATE OF MICHIGAN)
) ss
COUNTY OF INGHAM)

PROOF OF SERVICE

The undersigned certifies that on March 28, 2011, she served a copy of Defendant-Appellee's Brief in Opposition to Application for Leave to Appeal via first class mail upon Plaintiffs-Appellant:

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BRIEF IN OPPOSITION TO APPLICATION FOR LEAVE TO APPEAL

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COUNTER-STATEMENT OF QUESTIONS

I. To protect confidentiality and to encourage participation in medical studies, "the record of a proceeding and the reports, findings, and conclusions of a review entity and data collected by or for a review entity" are "confidential," "not public records," and "not discoverable." MCL 331.533. In this FOIA action, Plaintiffs-Appellants seek documents and data generated by a review entity. Did the Court of Appeals correctly affirm the trial court's determination that the records Appellants seek are exempt from disclosure?

Appellants' answer: No

Appellee's answer: Yes

Trial Court's answer: Yes

Court of Appeals answer: Yes

II. When a plaintiff files a FOIA action, the trial court reviews the matter *de novo*, and may, if it chooses, "view the public record . . . before reaching a decision." MCL 15.240(4). Here, the trial court conducted a *de novo* review but decided that any need to review the contested records was unnecessary given the clear statutory language exempting the request documents from disclosure. Did the Court of Appeals err?

Appellants' answer: Yes

Appellee's answer: No

Trial Court's answer: No

Court of Appeals answer: No

REASONS FOR DENYING THE RELIEF REQUESTED

Plaintiffs-Appellants seek leave to appeal from the Court of Appeals' unpublished, per curiam opinion of January 20, 2011 ("Slip Op"), attached as Exhibit A. In that decision, the Court of Appeals held, unanimously, that Appellants' suit failed due to dispositive procedural and substantive defects.

There are numerous reasons why this Court should deny the Application for Leave:

- First, there is nothing jurisprudentially significant about this case. It represents the second time in three years that the Court of Appeals was forced to deny the exact same frivolous claims, by the exact same plaintiff, against the exact same defendant. Moreover, the result in the Court of Appeals was dictated by the unique facts and circumstances presented, and that result was set forth in unpublished opinions that have no binding effect in other actions. The Application for Leave thus raises issues of significance only to Appellants. *Contra* MCR 7.302(B).

- Second, there is nothing incorrect (much less "clearly erroneous") in the Court of Appeals' two, detailed opinions affirming dismissal of Appellants' claims. *Contra* 7.302(B)(5). The Court of Appeals applied the plain text of MCL 331.53, Michigan's peer-review immunity statute, which, on its face, denies the very relief Appellants seek. As the Court of Appeals observed, Appellants' "argument is contrary to the plain language of the statutes at issue." Slip Op at 5.

- Third, this is not a case that has engendered conflict or dissension among Court of Appeals panels. *Contra* MCR 7.302(B)(5). Quite the opposite, the two unpublished opinions represent the unanimous agreement of Michigan Court of Appeals judges Saad, Murphy, Donofrio, Meter, Fitzgerald, and M.J. Kelly. There is also no conflict with any decision of this Court. *Contra* MCR 7.302(B)(5).

- Finally, in addition to rejecting Appellants' claims on the merits, the Court of Appeals below held that Appellants' claims were barred by collateral estoppel. Slip Op at 6 n.7. Collateral estoppel is a separate and independent ground for affirmance, yet Appellants do not even mention this issue in their Application. There is no material injustice in letting the Court of Appeals' decision stand. MCR 7.302(B)(5).

For all these reasons, and those discussed below, the Department of Community Health (DCH) respectfully requests that the Court summarily deny the Application for Leave to Appeal.

INTRODUCTION

While presented as four questions, Appellants' Application for Leave to Appeal actually raises only two issues: (1) whether the records and data of a review board are subject to disclosure in response to a Freedom of Information Act (FOIA) request, and (2) whether a trial court's *de novo* review of a public body's denial of a FOIA request must include an all-inclusive review of the public record. Both questions are answered summarily by unambiguous Michigan statutes. With respect to review-board records and data, Michigan's Medical Research and Education Act (MCL 331.533) plainly states that such information is "confidential," "not public records," and "not discoverable." And regarding a trial court's FOIA review procedures, MCL 15.240(4) makes clear that a trial court "may," if it chooses, "view the public record . . . before reaching a decision"; there is no mandatory obligation.

Appellant Hansen previously appealed a nearly identical factual situation involving defendant the Department of Community Health in *Hansen v Department of Community Heath,* unpublished opinion per curiam, issued March 13, 2008 (Docket No. 278074), (Exhibit B) *(Hansen I)*, in which this Court denied the application for leave. *Hansen v Dep't of Cmty Health*, 482 Mich 1009; 761 NW2d 87 (2008). Nothing has changed that would warrant grant of Hansen's Application for Leave now. To the contrary, the fact that this is Hansen's second bite at the apple provides additional substantive and procedural reasons for denial.

COUNTER-STATEMENT OF PROCEEDINGS AND FACTS

1. Nature of the dispute

The Pharmacy Quality Improvement Project (PQIP) is a collaborative effort that involves Department of Community Health's (DCH) Mental Health and Substance Abuse Administration and its Medical Services Administration, and Comprehensive NeuroScience, Inc. Eli Lilly and Company provided funding in support of the independent program. As a three-year educational program, PQIP was established to analyze the prescribing of mental health medications for Medicaid members. When needed, physicians are provided with educational materials and client specific information as well as peer-to-peer consultation.

The PQIP process begins with a review by Comprehensive NeuroScience, Inc. of Medicaid patient pharmacy claims data to identify prescribing and utilization trends for mental health and psychotropic medications. Specific pharmacy claims are identified that may be inconsistent with evidence-based best practice guidelines. Once a specific patient's claims are identified, the prescriber is sent a letter addressing the concerns. This gives the prescriber an opportunity to verify the concern and address it with the identified patient. In summary, PQIP is an educational peer review activity with oversight from physicians.

DCH is a review entity[1] under the Release of Information for Medical Research and Education Act (MCL 331.531 *et seq.*) (RIMREA). DCH has determined that because PQIP records are covered by the confidentiality provisions of the RIMREA the PQIP records were exempt from disclosure under the Freedom of Information Act (FOIA). The RIMREA, MCL 331.533, provides:

[1] Section 1(2)(d) of the Release of Information for Medical Research and Education Act, MCL 331.531(2)(d), defines "review entity" to include a state department or agency whose jurisdiction encompasses the information described is subsection (1) of the Act, MCL 331.531(1).

> 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.

2. Appellant Ben Hansen's (Hansen) two FOIA requests.

On November 18, 2008, DCH received Appellant Hansen's November 17, 2008 FOIA request, and issued its December 10, 2008 written notice granting the request in part and denying it in part. On December 17, 2008, DCH received Appellant Hansen's December 16, 2008 FOIA request, which clarified the earlier request, and DCH issued its March 3, 2009 written notice granting the request in part and denying it in part.[2]

DCH granted the requests, where the requests provided sufficient descriptions of existing, nonexempt records within DCH's possession that were responsive to the requests. DCH denied the requests as to exempt records, and provided an explanation of the statutory basis for the exemptions.

3. Appellant Law Project for Psychiatric Rights, Inc.'s (Law Project) FOIA request.

On January 2, 2009, DCH received the Appellant Law Project's December 29, 2008 FOIA request, under the signature of James B. Gottstein, and issued its January 12, 2009 written notice denying the request and explaining the statutory basis for the exemptions.[3]

[2] Copies of the requests and responses are appended as Attachment 2 to DCH's motion to dismiss and brief in support.

[3] Copies of the request and response are appended as Attachment 3 to DCH's motion to dismiss and brief in support.

4. Appellant International Center for the Study of Psychiatry and Psychology, Inc.'s (International Center) FOIA request.

On January 8, 2009, DCH received the Appellant International Center's January 7, 2009 FOIA request, under the signature of Dominick Riccio, and issued its January 12, 2009 written notice denying the request and explaining the statutory basis for the exemptions.[4]

As to all of Appellants' FOIA requests, DCH denied their request based on MCL 15.243 (1)(d) which provides that information is not subject to disclosure under FOIA if the information is statutorily exempted from disclosure. DCH pointed to MCL 331.533 as the basis for the exemption.

5. Hansen's first appeal

Although Appellant Hansen frames his Application for Leave as though this were the first time he has raised the issued presented on appeal, that is not the case. The Application essentially replicates a previous appeal that Hansen pursued against DCH in which the Court of Appeals likewise unanimously rejected Hansen's claims. *Hansen v Department of Community Heath,* unpublished opinion per curiam, issued March 13, 2008, (Docket No. 278074), (Ex B) *(Hansen I)* Moreover, this Court denied leave to Hansen in that case. *Hansen v Dep't of Cmty Health*, 482 Mich 1009; 761 NW2d 87 (2008). Accordingly, the procedural story of this case must start with *Hansen I.*

In *Hansen I,* Appellant Hansen similarly argued that PQIP documents were subject to disclosure. A unanimous Court of Appeals (Judges Saad, Murphy, and Donofrio) had no difficulty rejecting that position under RIMREA:

> Reading MCL 331.532 and MCL 331.533 together, it is evident that a review entity can release or publish reports if a proper purpose is established under § 2, and upon doing so, the provisions in § 3 that dictate that the records are confidential, are

[4] Copies of the request and response are appended as Attachment 4 to DCH's motion to dismiss and brief in support.

> not public records, and are not discoverable become inoperable. Thus, plaintiff's claim that review entity reports are subject to release if plaintiff shows a proper purpose for him or others to have access to the documents under § 2 fails because it is defendant, i.e., the review entity, which must first decide whether to release or publish the reports under § 2. In other words, the documents remain confidential, not discoverable, and not public under § 3 until the review entity chooses to release the documents. Here, defendant has not chosen to release or publish the relevant documents under § 2; therefore, they remain confidential, not discoverable, and they are not public records. Therefore, taking into consideration the FOIA exemptions, the documents sought by plaintiff are "specifically described and exempted from disclosure by statute." MCL 15.243(1)(d). Moreover, the FOIA in general pertains to requests for "public records," MCL 15.233, and MCL 331.533 dictates that the records at issue here are not public as defendant has not decided to release the materials. Accordingly, the trial court did not err in dismissing plaintiff's complaint as to count III. *[Hansen I,* at 6, Ex B]

The Court also had no difficulty rejecting Hansen's claim that the trial court had failed to conduct a *de novo* review of DCH's denial of Hansen's FOIA request:

> [T]he issues that wee determined by the [trial] court were certainly addressed and reviewed *de novo*. . . . To the extent that plaintiff complains that the [trial] court did not personally review documents associated with plaintiff's third request, it was not required, nor necessary, and ultimately it has no bearing on proper resolution of this case.

Id. at 3-4. Finally, the Court of Appeals affirmed the trial court's award of sanctions against Hansen for filing frivolous litigation:

> [O]n the issue of sanctions pursuant to MCR 2.114(E) and (F), as well as MCL 600.2591, which concern frivolous complaints or pleadings not well grounded in fact nor warranted by existing law, our review is under the clearly erroneous standard. . . . Given that . . . the third count was not sustainable under established case law issued in 1998, . . . reversal is unwarranted.

Id. at 6.

6. Hansen's second appeal

In this action, Hansen (joined by two additional plaintiffs) has filed the exact same frivolous lawsuit, against the exact same defendant. In response, DCH filed a motion for summary disposition arguing that the claims were barred by the law of the case doctrine. The trial court promptly granted that motion. *Hansen II,* Slip Op at 4 (Ex A). Hansen and his co-plaintiffs appealed, and the Court of Appeals unanimously affirmed, incorporating the reasons

set forth in *Hansen I*. *Id.* at 4-5.

In response to Plaintiffs' assertion that *Hansen I* was wrongly decided, the Court of Appeals in *Hansen II* noted that Plaintiffs' legal argument "is contrary to the plain language of the statute at issue." *Id.* at 5. Accordingly, the Court held that the trial court did not err in granting DCH's motion. *Id.* at 6. The unanimous Court also concluded that the trial court conducted a proper *de novo* review:

> Contrary to defendant's implication, the trial court was not *required* to review the contested records. Indeed, the statute states that the court "*may* view the public record in controversy in private." *Id.* (emphasis added). We find that the [trial] court did indeed conduct a de novo review, by way of pleadings and oral arguments, before reaching its decision and did not act improperly in deciding that a review of the contested records was not necessary to resolve this case. *Id.* at 6.

Finally, the Court of Appeals held that Plaintiffs' claims were also "barred by collateral estoppel because the parties in this case and in *Hansen* [*I*] were identical, at least with regard to [Hansen's] particular claims." *Id.* at 6 n.7 (citation omitted). "Although Hansen made an additional FOIA request in the instant case, . . . the pivotal issue was essentially the same and involved the interplay of the same statutes." *Id.*

ARGUMENT

I. The documents requested by Appellants' constitute records or data under the Release of Information for Medical Research and Education Act, collected by or for the DCH. The Release of Information for Medical Research and Education Act provides that records collected under the act are confidential and are not public records. FOIA only applies to public records and provides an exemption from disclosure for records and information specifically described and exempted from disclosure by statute. Thus, the Court of Appeals correctly affirmed the trial court's dismissal of Appellants' complaint because the records described in the FOIA request are exempt from disclosure under the FOIA.

A. Standard of Review

This case concerns the interpretation of statutes, MCL 15.243(1)(d) and MCL 331.531 *et seq.*; it presents questions of law that are reviewed *de novo*. *Griffith v State Farm Mut Automobile Ins Co*, 472 Mich 521, 525-526; 697 NW2d 895 (2005).

B. Analysis

The Court of Appeals correctly determined (*Hansen I*, at 6 (Ex B)) that Appellants' requests under the Freedom of Information Act (FOIA) must fail because the Department of Community Health (DCH) properly invoked section 13(1)(d) of the FOIA, which provides for the exemption of public disclosure of "[r]ecords or information specifically described and exempted from disclosure by statute" MCL 15.243(1)(d). DCH's notices issued in response to Appellants' FOIA requests informed Appellants' that the exemption of Pharmacy Quality Improvement Project (PQIP) records is justified under the Release of Information for Medical Research and Education Act (RIMREA). MCL 331.531 *et seq*. Section 3, of the RIMREA (MCL 331.533) 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. [Emphasis added]

The parties do not dispute (*Hansen I*, at 4 (Ex B)) that PQIP records fall within section 3 of the RIMREA as "the record of a proceeding and the reports, findings, and conclusions of a review entity and data collected by or for a review entity." MCL 331.533. Appellant argues that the statutory scheme does not exempt the requested records from public disclosure under the FOIA. (*Hansen I*, at 4 (Ex B)) While the FOIA generally provides for public disclosure of a public body's public records, section 2(e)(i) of FOIA provides that there is a class of public records "exempt from disclosure under section 13 [of FOIA]." MCL 15.232(e)(i). Section 13(1)(d) of the FOIA provides an exemption from disclosure for "records or information specifically described and exempted from disclosure by statute." MCL 15.243(1)(d). Section 3 of the RIMREA provides that "[e]xcept as otherwise provided in section 2, [the records] **are confidential, are not public records**, and are not discoverable and shall not be used as evidence in a civil action or administrative proceeding." (MCL 331.533; emphasis added.) While this basic analysis would seemingly close this case, this is not the first time that the parties have been before this Court and the Court of Appeals on essentially the same issues.

The Court of Appeals properly began its analysis by examining the *Hansen I* decision that involved a "nearly identical factual situation and [a] similarity of parties" (*Hansen II*, Slip Op at 5 (Ex A)) The Court of Appeals then adopted the *Hansen I* reasoning as its own. *Id.*, at 6. The Court of Appeals also found that Appellant Hansen's claims were barred by collateral estoppel. *Id.*, at 6, n 7. Because the most recent Court of Appeals decision adopted *Hansen I's* reasoning as its own and found that *Hansen I* "accurately set forth the law and its application to the requested information" *Id.*, at 5 it is appropriate to review that decision.

The *Hansen I* decision began its analysis by examining the interaction between the FOIA and the RIMREA. Citing *Dye v St John Hosp & Medical Ctr*, 230 Mich App 661, 672, n 10; 584 NW2d 747 (1998) *Hansen I* determined that Hansen misconstrued the interaction between [sections 2 and 3 of the RIMREA.] Reading sections 2 and 3 together, the Court of Appeals in *Hansen I* stated:

> [I]t is evident that a review entity [DCH] can release or publish reports if a proper purpose is established under § 2, and upon doing so, the provisions in § 3 that dictate that the records are confidential, are not public records, and are not discoverable become inoperable . . . [However] the documents remain confidential, not discoverable, and they are not public under § 3 until the review entity [DCH] chooses to release the documents. [*Hansen I*, at 6.]

Properly invoking the exemption under section 13(1)(d) of the FOIA, MCL 15.243(1)(d), in responding to Hansen's FOIA request, DCH deemed the PQIP records to be confidential, non-public records, and declined to release the records under section 3 of the RIMREA. MCL 331.533. Recognizing the confidentiality provision of the RIMREA, this Court stated in *Feyz v Mercy Memorial Hosp,* 475 Mich 663, 681-683; 719 NW2d 1 (2006) that the act is part of a statutory process protecting the confidentiality of the class of records identified in the act. Additionally, the FOIA only applies to public records. MCL 15.233. The RIMREA expressly declares that the records sought are not public records:

> 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** . . . . [MCL 331.533 (emphasis added)]

Appellants fail to recognize the difference between: (1) the legislature's command in section 3 of the RIMREA's first sentence – that before releasing or publishing a record of its proceedings, reports, findings, and conclusions a review entity must remove the identity of the person whose condition or treatment was studied, and (2) the privacy protection in the second sentence that renders all records of a proceeding, reports, findings, and conclusions of a review

entity and any data collected by or for that review entity confidential, not public records, and not discoverable except when the review entity chooses to release or publish a record of the proceedings or reports, findings, and conclusions for one of the enumerated purposes in section 2. MCL 331.533. Accordingly, the *Hansen I* decision was correct when it determined that the "documents remain confidential, not discoverable, and they are not public under § 3 until the review entity [DCH] chooses to release the documents." And the Court of Appeals here was correct in adopting *Hansen I's* reasoning as its own.

II. FOIA requires a trial court to conduct a *de novo* review of a complaint based on a FOIA denial. The trial court properly conducted a *de novo* review when it received a complete particularized justification for the denial by way of pleadings and oral arguments before reaching its decision. Thus, the Court of Appeals correctly determined that the trial court reviewed Appellants' complaint *de novo*.

A. Standard of Review

This case concerns the interpretation of MCL 15.240(4) and presents a question of law that is reviewed *de novo*. *Griffith v State Farm Mut Automobile Ins Co*, 472 Mich 521, 525-526; 697 NW2d 895 (2005).

B. Analysis

The Court of Appeals reviewed Appellants' claim that the trial court failed to conduct a *de novo* review of the records at issue, and found the trial court was not required to personally review the contested records. *Hansen I* at 4. This Court set forth the three-step procedure trial courts should follow when reviewing a FOIA challenge in *Evening News Ass'n v Troy*, 417 Mich 481; 339 NW2d 421 (1983). The first step was satisfied by the trial court because the court received a complete particularized justification for the denial by way of pleadings and oral arguments. *Hansen II*, Slip Op at 6. As this Court noted, FOIA cases should normally be resolved under step 1 without the need to proceed to further review. Accordingly, the Court of

Appeals correctly found that the trial court conducted "a *de novo* review, by way of pleadings and oral argument, before reaching its decision. . ." *Id.*, at 6.

Thus, the Court of Appeals correctly affirmed the trial court's dismissal of Appellants' complaint, and DCH asks this Court to deny Appellants' Application for Leave to Appeal.

RELIEF SOUGHT

For the foregoing reasons, the Department of Community Health respectfully requests that this Honorable Court deny Appellants' application for leave to appeal.

Respectfully submitted,

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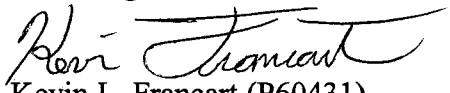

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Dated: March 28, 2011
AG# 2009-0020415-C Ben Hansen – Hansen Brief in Opp-v-3