

STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL



MIKE COX
ATTORNEY GENERAL

P.O. Box 30212
LANSING, MICHIGAN 48909

September 27, 2006

SEP 28 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 Motions to Dismiss Plaintiff's Complaint Under MCR 2.116, and For Costs, Expenses, and Attorney Fees Under MCR 2.114, Brief in Support; and Notice of Hearing. A check in the amount of \$20.00 representing the motion fee is also enclosed. 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
Fax No: (517) 241-3097

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)
Jacques Admiralty Law Firm, P.C.
Attorney for Plaintiff
645 Griswold, Suite 1370
Detroit, MI 48226-4116
(313) 961-1080

Thomas Quasarano (P27982)
Assistant Attorney General
Department of Attorney General
Attorney for Defendant
Opinions and Municipal Affairs Division
P.O. Box 30212
Lansing, MI 48909
(517) 373-9100

NOTICE OF HEARING

TO: CLERK OF THE COURT
ALAN KELLMAN

PLEASE TAKE NOTICE that Michael A. Cox, Attorney General of Michigan, and
Thomas Quasarano, Assistant Attorney General, will bring the attached Defendant's Motions To
Dismiss Plaintiff's Complaint Under MCR 2.116, And For Costs, Expenses, And Attorney Fees

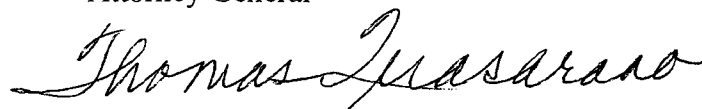
Under MCR 2.114, on for hearing in the above entitled cause on **Wednesday, November 1,**

2006 at 1:30 p.m. or as soon thereafter as parties may be heard, before the Honorable Beverley

Nettles-Nickerson, Circuit Judge.

Respectfully submitted

Michael A. Cox
Attorney General

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

Thomas Quasarano P27982
Assistant Attorney General
Opinions and Municipal Affairs Division
P.O. Box 30212
Lansing, Michigan 48909
(517) 373-9100

Dated: September 27, 2006

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.

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**DEFENDANT'S MOTIONS TO DISMISS PLAINTIFF'S COMPLAINT
UNDER MCR 2.116, AND FOR COSTS, EXPENSES,
AND ATTORNEY FEES UNDER MCR 2.114;
BRIEF IN SUPPORT**

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 motions, with brief in support:

MOTIONS

The MDCH brings its motions to dismiss Plaintiff's complaint brought under the Freedom of Information Act (FOIA), MCL 15.231 *et seq*, and for an award of the MDCH's costs, expenses, and attorney fees for the following reasons:

Under MCR 2.116(C)(7), Plaintiff's complaint should be dismissed with prejudice because Plaintiff did not plead his claims in a timely manner. A statute of limitations defense must be raised in a party's first responsive pleading or by motion filed not later than this responsive pleading. *Phinney v Perlmutter*, 222 Mich App 513, 544; 564 NW2d 532 (1997). Here, in response to Plaintiff's complaint, the MDCH brings the instant motion to dismiss Plaintiff's complaint showing that Plaintiff's claims are barred because the statutory period of limitations, set forth under section 10(1)(b), MCL 15.240(1)(b), of the FOIA, ran before Plaintiff commenced his action.

Plaintiff's complaints also should be dismissed with prejudice under MCR 2.116(C)(8) and (10), where Plaintiff has failed to state claims on which the Court can grant relief; and, where Plaintiff has not alleged genuine issues as to any material facts, thus leaving the MDCH with a right to judgment in its favor as a matter of law.

A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone (citations omitted) . . . [t]he motion should be granted only where the claim is so clearly unenforceable as a matter of law that no factual development could justify a right to recovery." *Lane v Kindercare Learning Centers, Inc.*, 231 Mich App 689, 692; 588 NW2d 715 (1998).

Under MCR 2.116(C)(10), a defendant's motion to dismiss should be granted if, "the pleadings show that a party is entitled to judgment as a matter of law, or if the affidavits or other

proofs show that there is no genuine issue of material fact . . ." *Residential Ratepayer*

Consortium v Public Service Commission, 168 Mich App 476, 480; 425 NW2d 98 (1987).

Because Plaintiff's action lacks merit, and has caused an unnecessary dissipation of judicial and agency resources, the MDCH is entitled to its costs, expenses, and attorney fees under MCR 2.114 and MCR 2.625(A)(2).

Thus, under MCR 2.116(C)(7), (8) and (10), Plaintiff's complaint should be dismissed with prejudice; and, under MCR 2.114, the MDCH should be awarded its costs, expenses, and attorney fees.

BRIEF IN SUPPORT

Statement of Facts

Most of the facts alleged in Plaintiff's three-count complaint are not relevant to an action commenced under the FOIA. Plaintiff's alleged motivation, purpose, or reason for making the alleged FOIA requests is not relevant. *See State Employees Ass'n v Dep't of Mgt and Budget*, 428 Mich 104, 121, 125-126; 405 NW2d 606 (1987); *Clerical-Technical Union v Bd of Trustees of Michigan State Univ*, 190 Mich App 300, 303; 476 NW2d 373 (1991); *Mullin v Detroit Police Dep't*, 133 Mich App 46, 52-53; 348 NW2d 708 (1984). (A copy of Plaintiff's complaint, with summons, is appended as Attachment A.) The MDCH, therefore, sets forth the following pertinent facts that support the dismissal of Plaintiff's complaint:

1. The November 14, 2005 FOIA request /December 7, 2005 FOIA response.

On November 14, 2005, Plaintiff submitted a FOIA request to the MDCH. The MDCH took the statutory 10-business day extension of time to respond, after which it issued a December 7, 2005 written notice *granting Plaintiff's request*. (Count I of Plaintiff's complaint; copies of FOIA request and FOIA response appended as Attachment 1.)

2. The December 14, 2005 FOIA request/January 11, 2006 FOIA response.

On December 14, 2005, Plaintiff submitted a FOIA request to the MDCH. The MDCH took the statutory 10-business day extension of time to respond, after which it issued a January 11, 2006 written notice *granting in part and denying in part Plaintiff's request*, with an explanation of the statutory basis for the partial denial. (Count II of Plaintiff's complaint; copies of FOIA request and FOIA response appended as Attachment 2.)

3. The February 2, 2006 FOIA request/February 23, 2006 FOIA response.

On February 2, 2006, Plaintiff submitted a FOIA request to the MDCH. The MDCH took the statutory 10-business day extension of time to respond, after which it issued a February 23, 2006 written notice *granting in part and denying in part Plaintiff's request*, with an explanation of the statutory basis for the partial denial. (Count III of Plaintiff's complaint; copies of FOIA request and FOIA response appended as Attachment 3.)

As more fully discussed, *infra*, based on the dates of the three FOIA requests and FOIA responses alleged in Plaintiff's complaint, and evidenced by the attached copies of the FOIA requests and the MDCH's written notices issued in response, Plaintiff's complaint fails to state a claim under the FOIA on which relief can be granted, and fails to allege genuine issues as to material facts. For these reasons, Plaintiff's complaint is not warranted under the FOIA, and has caused unnecessary litigation.

Argument

I. Under MCR 2.116(C)(7) and (8), Plaintiff's complaint should be dismissed, where Plaintiff's claims are barred because the statutory period of limitations [section 10(1)(b), MCL 15.240(1)(b), of the FOIA] ran before Plaintiff filed his action; and, therefore, Plaintiff has failed to state a claim on which relief can be granted to him under the FOIA.

Section 10(1)(b), MCL 15.240(1)(b), of the FOIA provides:

If a public body makes a final determination to deny all or a portion of a request, the requesting person may . . . :

* * *

Commence 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.)

Plaintiff litigates FOIA requests, for which the MDCH issued its written notices of disclosure determinations on December 7, 2005, January 11, 2006, and February 23, 2006 - all *more than 180 days before* Plaintiff filed his complaint on August 30, 2006. (See copy of summons, Attachment A.)

For this reason alone, Plaintiff has failed to state any claims on which relief can be granted as to the MDCH's written notices issued in response to Plaintiff's FOIA requests. Accordingly, Plaintiff is not entitled to any relief as to these time-barred claims, and his complaint should be dismissed with prejudice under MCR 2.116(C)(7) and (8).

II. Assuming, *arguendo*, Plaintiff's claims were not time-barred, the MDCH's written notices issued in response to Plaintiff's FOIA requests complied with the FOIA's requirements; and Plaintiff has failed to state any claims, or show the existence of genuine issues of material fact, which dispute the fact that the MDCH complied with the FOIA.

Section 5(4)(a), MCL 15.235(4)(a), of the FOIA provides that a public body's "written notice denying a request for a public record in whole or in part is a public body's final determination to deny the request or portion of that request [and the] written notice shall contain:

[a]n explanation of the basis under this act or other statute for the determination that the public record, or portion of that public record, is exempt from disclosure, if that is the reason for denying all or a portion of the request." And section 5(4)(b), MCL 15.235(4)(b), requires that a public body's written notice inform a requester if a public record does not exist, if that is the reason for denying the request or a portion of the request. The MDCH's written responses included, where applicable, notice of the statutory exemptions and of the non-existence of records. (See Attachments 2 and 3.)

Plaintiff's complaint alleges, without merit in fact or law, that the MDCH's FOIA responses "have been incomplete." (Plaintiff's complaint, paragraph 12, Attachment A.) Plaintiff merely speculates that certain unspecified documents should be "available." (Plaintiff's complaint, Counts I and II, paragraphs 15 and 18, Attachment A.) Finally, Plaintiff does not support his general allegation that statutory exemptions invoked by the MDCH do not apply to certain records. (Plaintiff's complaint, Count III, paragraph 24, Attachment A.)

The MDCH's written notices, appended as Attachments 1 through 3, which exhibits speak for themselves, set forth the statutory bases and reasons for the denial determinations as to certain information described in Plaintiff's FOIA requests.

III. Even if Plaintiff's claims were not time-barred, Plaintiff still would not be entitled to any relief under the FOIA. Instead, the MDCH is entitled to an award of its costs, expenses, and attorney fees, where Plaintiff's complaint has caused an unnecessary dissipation of judicial and agency resources.

A. Plaintiff is not entitled to any relief under the FOIA.

Section 10(6), MCL 15.240(6), of the FOIA states that "[i]f a person asserting the right to inspect, copy, or receive a copy of all or a portion of a public record prevails in an action commenced under this section, the court shall award reasonable attorneys' fees, costs, and disbursements." In *Walloon Lake Water Sys, Inc. v Melrose Twp*, 163 Mich App 726, 734; 415

NW2d 292 (1987), the court determined that a plaintiff "prevails" in a FOIA action, where a plaintiff is successful with respect to the central issue that the requested materials were subject to disclosure under the FOIA. *See, also, Wilson v City of Eaton Rapids*, 196 Mich App 671, 673; 493 NW2d 433 (1992), where the court determined that, in an action brought under the FOIA, a party is entitled to an award of costs and reasonable attorney fees only if the action was necessary to and had a substantial causative effect on delivery or access to the documents.

Plaintiff cannot "prevail" in this action, and he is not entitled to any relief under section 10(6) of the FOIA, because copies of existing, nonexempt records responsive to certain of Plaintiff's FOIA requests were provided, and Plaintiff was notified that certain records described by Plaintiff do not exist with the MDCH.

Although Plaintiff does not seek punitive damages under the FOIA, he, nevertheless, would not be entitled to such relief. Section 10(7), MCL 15.240(7), of the FOIA provides for an award of punitive damages of \$500.00 to a prevailing plaintiff in a FOIA action if the trial court determines that the public body has arbitrarily and capriciously violated the Act by refusal or delay in disclosing or providing copies of public records subject to disclosure. Thus, to receive punitive damages in this action, Plaintiff would have to show that the MDCH acted "arbitrarily and capriciously" in asserting its reasons for not granting certain portions of Plaintiff's FOIA requests; that the MDCH acted without an adequate determining principle or in an unreasoned and whimsical manner. *See Williams v Martimucci*, 88 Mich App 198, 201; 276 NW2d 876, (1979). The facts, however, show that the MDCH did not act in an arbitrary manner. And by conveying to Plaintiff, in writing, the basis for its disclosure determinations, the MDCH's responses were not capricious. (*See Attachments 1 through 3.*)

B. The MDCH is entitled to an award of its costs, expenses, and attorney fees.

Plaintiff's FOIA action has caused an unnecessary dissipation of judicial and agency resources, and the MDCH is entitled to an award of its costs, expenses, and attorney fees under the Michigan Rules of Court.

Plaintiff cannot show that he was unaware that his claims were time-barred, where he alleges in his complaint the dates of his FOIA requests and the MDCH's FOIA responses, and, where he knows that the issuance of the MDCH's FOIA responses occurred *more than 180 days before* Plaintiff commenced his action on August 30, 2006.

It is provided under MCR 2.113(A) that rules on the verifying of pleadings apply to all papers provided for by the court rules.

The signature of an attorney or party on a pleading is a certification by the signer that:

- (1) he or she has read the document;
- (2) to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the document is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law; and
- (3) the document is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.
[MCR 2.114(D)(1), (2), and (3).]

The court rule further provides:

If a document is signed in violation of this rule, the court, on the motion of a party or on its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including reasonable attorney fees. The court may not assess punitive damages. [MCR 2.114(E).]

Under MCR 2.114(E) and (F), the MDCH is entitled to an award of its costs, expenses, and attorney fees, as well as to the remedies provided for under MCR 2.114(F) which, in

conjunction with MCR 2.625(A)(2), allows for costs, expenses, and attorney fees. *See, also,*

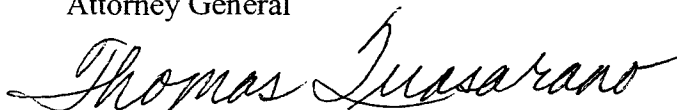
MCL 600.2591.

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

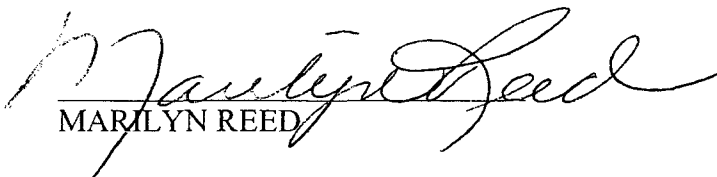


Thomas Quasarano
Assistant Attorney General
Department of Attorney General
Opinions and Municipal Affairs Division
P.O. Box 30212
Lansing, MI 48909
(517) 373-9100

Dated: September 27, 2006

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing document was served upon Plaintiff's counsel by mailing the same to him at his address, with proper postage fully prepaid thereon, on September 27, 2006.



MARILYN REED

STATE OF MICHIGAN
JUDICIAL DISTRICT
30th JUDICIAL CIRCUIT
COUNTY PROBATE

SUMMONS AND COMPLAINT

CASE NO.

06-1033-CZ

Court address 313 W. KALAMAZOO, LANSING, MI 48933

Court telephone no. 517-483-6500

Plaintiff name(s), address(es), and telephone no(s).
 BEN HANSEN
 926 E. STATE ST.
 TRAVERSE CITY, MI 49686

Plaintiff attorney, bar no., address, and telephone no.
 ALAN KELLMAN, ESQ.
 P15826
 645 GRISWOLD ST., SUITE 1370
 DETROIT, MI 48226

v

Defendant name(s), address(es), and telephone no(s).
 STATE OF MICHIGAN
 DEPARTMENT OF COMMUNITY HEALTH
 CAPITOL VIEW BUILDING
 201 TOWNSEND STREET
 LANSING, MI 48913

FILED
2006 AUG 30 10:09 AM

SUMMONS NOTICE TO THE DEFENDANT: In the name of the people of the State of Michigan you are notified:

1. You are being sued.
2. YOU HAVE 21 DAYS after receiving this summons to file an answer with the court and serve a copy on the other party or to take other lawful action (28 days if you were served by mail or you were served outside this state).
3. If you do not answer or take other action within the time allowed, judgment may be entered against you for the relief demanded in the complaint.

Issued August 30, 2006	This summons expires Nov. 30, 2006	Court clerk MIKE BRYANTON
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*This summons is invalid unless served on or before its expiration date.

COMPLAINT Instruction: The following is information that is required to be in the caption of every complaint and is to be completed by the plaintiff. Actual allegations and the claim for relief must be stated on additional complaint pages and attached to this form.

Family Division Cases

There is no other pending or resolved action within the jurisdiction of the family division of circuit court involving the family or family members of the parties.

An action within the jurisdiction of the family division of the circuit court involving the family or family members of the parties has been previously filed in _____ Court.

The action remains is no longer pending. The docket number and the judge assigned to the action are:

Docket no.	Judge	Bar no.
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General Civil Cases

There is no other pending or resolved civil action arising out of the same transaction or occurrence as alleged in the complaint/

A civil action between these parties or other parties arising out of the transaction or occurrence alleged in the complaint has been previously filed in _____ Court.

The action remains is no longer pending. The docket number and the judge assigned to the action are:

Docket no.	Judge	Bar no.
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VENUE

Plaintiff(s) residence (include city, township, or village) TRAVERSE CITY, LEELANAU COUNTY Place where action arose or business conducted LANSING	Defendant(s) residence (include city, township, or village) LANSING
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I declare that the complaint information above and attached is true to the best of my information, knowledge, and belief.

8/29/06 Date

Alan Kellman Signature of attorney/plaintiff