

**CIRCUIT COURT FOR THE STATE OF MICHIGAN
INGHAM COUNTY CIRCUIT COURT
THIRTIETH JUDICIAL DISTRICT**

BEN HANSEN,

Plaintiff

v.

**STATE OF MICHIGAN, DEPARTMENT OF
COMMUNITY HEALTH**

Defendant.

Case No. 06-1033 CZ

Hon. Beverley Nettles-Nickerson

**Freedom of Information Act
Complaint**

AG#2006021202

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**PLAINTIFF'S RESPONSE AND BRIEF IN OPPOSITION TO DEFENDANT'S MOTION
TO DISMISS**

Now comes, Plaintiff, Ben Hansen, and in responding in Opposition to Defendant's Motion to Dismiss states, as follows:

INTRODUCTION/FACTUAL BACKGROUND

Defendant's request for dismissal should be denied. There are a number of reasons for this. Two stand out. First, with regard to the statute of limitations issue the argument presented is

premised on an allegation which is, in fact, false. That is, that the Complaint was filed on August 30, 2006. The Complaint was actually filed on August 11. A copy of the docket sheet, verifying that the Complaint was filed on August 11, 2006, is attached. Exhibit A.

There are fundamental problems with the other arguments presented as well. The essence of Defendant’s argument is that its “denial determinations” are not subject to judicial review. This is not the case. Moreover, the governing statute specifically and in no uncertain terms, places the burden on the defendant to sustain the denials. This is ignored. MCLA § 15.240 (4) addresses both of these points. These arguments will be detailed below.

ARGUMENT

(I)

THERE HAS BEEN NO STATUTE OF LIMITATIONS VIOLATION

Defendant correctly points out that the time within which an action is to be filed is within 180 days of the public body’s final determination.

If a public body makes a final determination to deny all or a portion of a request the requests, 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. MCLA § 15.240 (emphasis added.) .

The “final” determination was made on February 23, 2006. Defendant’s Motion to Dismiss, Exhibit 3. The Complaint was filed on August 11, 2006, well within 180 days. Exhibit A.

It must be understood that the three (3) FOIA requests are related and tied together. For example, the second request, dated December 14, 2005, “is a follow-up request to (Plaintiff’s) previous request of November 14, 2005,”. Defendant’s Motion to Dismiss, Exhibit 2. The third

and last request similarly tied back to the original, when denials were premised on the fact that the

requested “reports were still in draft form.” The February 2, 2006 request sought, in part:

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. Defendant’s Motion to Dismiss, Exhibit 3. (emphasis added)

The point is that all three requests cover the same materials. The second and third requests were follow up efforts, geared to being more specific, in light of the responses to the original. Thus, the “public body’s final determination...” with regard to items sought in the original request did not occur until February 23, 2006. Defendant’s Motion to Dismiss, Exhibit 3. In any event, there can be no argument that the Complaint is timely with respect to its February 23, 2006 denial.

The request for dismissal based on a statute of limitations violation should be denied.

(2)

PLAINTIFF HAS PLEAD A VALID CAUSE OF ACTION

2 (a)

DEFENDANT IS IGNORING THE STATUTORY SCHEME WHICH SPELLS OUT HOW FOIA ACTIONS ARE TO BE DETERMINED

As a preliminary matter it is useful to keep in mind the public policy of the State of Michigan with regard to the Freedom of Information Act, which is,

(2) It is the public policy of this state that all persons, except those

persons incarcerated in state or local correctional facilities, are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees, consistent with this act. The people shall be informed so that they may fully participate in the democratic process. MCLA § 15.231.

The standard to be applied and the burden with respect to denials is quite clear:

The Court shall determine the matter de novo and the burden is on the public body to sustain its burden. The Court, on its own motion, may view the public record in controversy in private before reaching a decision. MCLA § 15.240 (4) (emphasis added)

Defendant's request for dismissal ignores those provisions and in effect argues that there is no right to judicial review. That is, Defendant argues "Plaintiff does not support his general allegation that statutory exemptions invoked by the MDCH do not apply to certain records." Defendant's Motion to Dismiss, p. 6. Obviously the records in question must be reviewed as is contemplated by the statute in order for such a determination to be made. However, as noted, it is not Plaintiff's burden to overcome the denials, rather, as the statute provides, it is Defendant's burden to sustain them while the Court is reviewing the requests de novo.

(b)

DEFENDANT HAS BEEN REASONABLY INFORMED ABOUT THE NATURE OF THE CLAIM

The Complaint filed is clear, concise and direct as required by MCR 2.111(A)(1). Moreover, it "reasonably" informs the Defendants of the "nature of the claims" MCR 2.111 (B)(1). Defendant knows very specifically what was requested, what was denied as well as the reasons for the denials. This is evident from the content of their Motion and their familiarity with the FOIA requests and denials. Defendant's Motion to Dismiss, Exhibits 1-3.

The case law in Michigan is quite clear and follows the language of the Michigan Court

Rules. The purpose of the complaint is to give notice of the nature of the claim which is sufficient to permit a defendant to respond. As long as this is accomplished the Complaint is not insufficient. City of Auburn v Brown, 60 Mich. App. 250,230 N.W. 2d 385 (975); Churchill v Palmer, 57 Mich. App. 210, 226 N.W. 60 (1974). This Complaint is not insufficient. The documents which are sought, contrary to what Defendant argues, are anything but unspecified. For example the documents which were denied by Defendant, include, “memos, reports, minutes, other working papers of the PQIP workgroup as well as letters and e-mails between Eli Lilly representatives and MDCH employees.”¹ Complaint, Count 1. Defendant fully understands this matter. Defendant’s Motion itself clearly shows they understand this dispute.

For each of these reasons the Motion to Dismiss should be denied.

(3)

DEFENDANT’S ARGUMENTS ABOUT ATTORNEY FEES AND PUNITIVE DAMAGES ARE UNTIMELY AND PREMATURE

Until such time as the Court addresses the merits of this matter any consideration of attorney fees and punitive damages is premature. MCLA 15.240 (6) and (7). These provisions address fees and damages and provide that they are to be considered by the Court after determinations are made.

CONCLUSION

Defendant argues that “[m]ost of the facts alleged “are not relevant as they go to Plaintiff’s alleged motivation, purpose, or reason. “State Employees Associates v Mich.Department

¹ Obviously because Plaintiff does not have the documents, his ability to be even more specific is limited. However, an example of what is expected in the way of a report would be the “Michigan Behavioral Pharmacy Report - All Ages” for the time period PQIP has been operating. Plaintiff did receive such a report for the period of 12/1/04 to 2/28/05 but not for the period the PQIP has been in operation.

of Management and Budget, 428 Mich. 104,121,125-126: 405 N.W2d 606 (1987). While, of course, the Court is not being asked to make a relevancy ruling, the “Factual Background” section does no more than briefly provide a context for this action. Plaintiff agrees his reason or motive for bringing this matter are not at issue. That does not mean that the Court, if it chooses to privately view the documents, must do so without an understanding of their context. Indeed, knowing the context will allow for a more informed judgment.

Wherefore, it is prayed that the Motion be Dismissed be denied and that attorney fees and costs, in an amount to be set by the Court, be awarded.

Respectfully submitted,



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Dated: October 18, 2006

Detail

INGHAM COUNTY 30TH CIRCUIT
313 W. Kalamazoo St.

LANSING, MICHIGAN 48933

<u>Case Number</u>	<u>Status</u>	<u>Judge</u>
06-001033-CZ-C30	OPEN	NETTLES NICKERSON, B

<u>In The Matter Of</u>	<u>Action</u>
HANSEN, BEN VS DEFENDANT: COMM HEALTH DEPT MI	COMPLAINT

<u>Party</u>	<u>Type</u>	<u>Attorneys</u>
HANSEN, BEN	PLNTF	KELLMAN, ALAN 1370 PENOBSCOT BLDG DETROIT, MI 48226

COMM HEALTH DEPT MI	DFNDT
320 S WALNUT ST	
LANSING, MI 48913	

<u>Opened</u>	<u>Judgment Date</u>	<u>Case Type</u>
08/11/2006		CZ - OTHER GENERAL CIVIL

Comments:

No.	Date of Filing	Operator	Pleadings and Actions	Original Amt Due/ Amt Dismissed	Balance Due
			Journal Book-Page-Nbr Ref Nbr		
1	08/11/06	EROBERTS ON	COMPLAINT FILED Attorney: KELLMAN, ALAN (15826) Date: 08/18/2006	150.00	0.00
2	08/30/06	TMORALES	SUMMONS ISSUED TO STATE OF MI DEPT FO COMMUNITY HEALTH , EXPIRES 113006	0.00	0.00
3	09/06/06	TMORALES	PROOF OF SERVICE	0.00	0.00
4	09/14/06	TMORALES	AFFIDAVIT OF SERVICE: SUMMONS & COMPLAINT UPON DF MDCH 091106	0.00	0.00
5	09/28/06	TMORALES	MOTION FEE Receipt: 163891 Date: 09/28/2006	20.00	0.00
6	09/28/06	TMORALES	DF'S MOTION TO DISMISS PL'S COMPLAINT , AND FOR COSTS, EXPENSES, AND ATTY FEES; BRIEF IN SUPPORT OF MOTION; NOTICE OF HRG 110106 @ 1:30 PM, W/PS UPON PL'S COUNSEL 092706	0.00	0.00

Totals By:	COURT COSTS	170.00	0.00
	INFORMATION	0.00	0.00