

STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL



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April 2, 2007

APR - 5 2007

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 Memorandum of Law. Certificate of Service is also enclosed.

Very truly yours,

A handwritten signature in black ink that reads "Thomas Quasarano".

Thomas Quasarano
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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,

v

Plaintiff,

Case No. 06-1033-CZ

HON. BEVERLEY NETTLES-NICKERSON

AG#2006021202

STATE OF MICHIGAN,
DEPARTMENT OF COMMUNITY HEALTH,


Defendant.

Alan Kellman (P15826)
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645 Griswold, Suite 1370
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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the attached Defendant's Memorandum of Law was served upon Plaintiff's counsel by mailing the same to him at his address, with proper postage fully prepaid thereon, on April 2, 2007.


MARILYN REED

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

BEN HANSEN,

v

Plaintiff,

Case No. 06-1033-CZ

HON. BEVERLEY NETTLES-NICKERSON

AG#2006021202

STATE OF MICHIGAN,
DEPARTMENT OF COMMUNITY HEALTH,

Defendant.

DEFENDANT'S MEMORANDUM OF LAW

The Freedom of Information Act (FOIA), MCL 15.231 *et seq*, provides for public disclosure of public records. Section 2(e)(i), however, provides that there is a class of public records "exempt from disclosure under section 13 [of the act]." Plaintiff invoked the FOIA for copies of records identified in section 3 of the Release of Information for Medical Research and Education Act (Release of Information Act), MCL 331.531 *et seq*, 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." Section 3 states that "[e]xcept as otherwise provided in section 2, [these 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." (Emphasis added; footnote omitted.) This nondisclosure provision is incorporated in the FOIA at section 13(1)(d): "Records or information specifically described and exempted from disclosure by statute."

Plaintiff raised jurisdiction only under the FOIA, yet at the March 21, 2007, hearing on Defendant's dispositive motion, he alleged entitlement to the records, citing section 2 of the Release of Information Act. Plaintiff failed to file *his own affidavit* to support this claim or to counter Defendant's affidavit. Plaintiff incorrectly asserted that Defendant denied his FOIA

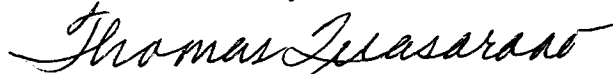
request only because Plaintiff is not a review entity. Under the FOIA, Defendant raised section 13(1)(d) because the information sought does not constitute "public records" and, therefore, is exempted from public disclosure by law. At oral argument, Defendant offered *Dye v St. John Hosp and Medical Cntr*, 230 Mich App 661; 584 NW2d 749 (1998), as an example of the non-application of section 2's limited exception to the nondisclosure provisions of the Release of Information Act. In *Feyz v Mercy Memorial Hosp* 475 Mich 663, 681-683; 719 NW2d 1 (2006), the Supreme Court determined that the Release of Information Act is part of a statutory process protecting the confidentiality of the class of records identified in the act.

Finally, Plaintiff concedes, at page 2 of his supplemental brief, "that the [Dye Court] notes that nothing in Sections 2 and 3 mandates disclosure," but he claims that this is not an issue in the instant case and has not been argued by Defendant. On the contrary, Defendant has raised the applicable legal bases for nondisclosure from the time it issued its partial denial determination under the FOIA through the filing of its motions and briefs.

In summary, where the FOIA provides for the exemption from disclosure of non-public records; where the information is excluded from disclosure under the Release of Information Act; where, as Plaintiff concedes, the section 2 limited exception under the Release of Information Act is not a mandatory provision; and where Plaintiff, in any event, does not fall within section 2, he has no entitlement to the information under the FOIA.

Respectfully submitted,

Mike Cox, Attorney General



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Dated: April 2, 2007