

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

BEN HANSEN,

Plaintiff,

Case No. 06-1033-CZ

HON. BEVERLEY NETTLES-NICKERSON

v

STATE OF MICHIGAN,
DEPARTMENT OF COMMUNITY HEALTH,

Defendant.

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
Attorney for Defendant
P.O. Box 30212
Lansing, MI 48909
(517) 373-9100

**DEFENDANT'S MOTION TO SUPPLEMENT THE RECORD IN SUPPORT OF THE
COURT'S ORDER GRANTING DEFENDANT'S MOTION FOR COSTS, EXPENSES,
AND ATTORNEY FEES; MEMORANDUM OF LAW**

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 motion, with memorandum of law in support:

MOTION

To support the determination of the Court that Plaintiff is liable for the MDCH's costs, expenses, and attorney fees in the amount of \$3,500.00, the MDCH moves to supplement the record made in this action by filing the affidavit of defense counsel, bills of costs and expenses, and a statement of attorney fees in the forms appended under Attachment 1. In support of this motion, the MDCH provides the following memorandum of law:

MEMORANDUM OF LAW

Procedural History

For its first response to Plaintiff's complaint brought under the Freedom of Information Act (FOIA), MCL 15.231 *et seq*, the MDCH filed its motions to dismiss Plaintiff's complaint under MCR 2.116(C)(7), (8), and (10); and for an award of the MDCH's costs, expenses, and attorney fees under MCR 2.114 and MCR 2.625(A)(2).

On November 1, 2006, the Court held a hearing on the MDCH's motions; issued a November 6, 2006, Order for Private Review of Records; and scheduled an additional hearing for March 21, 2007, at which time the parties were provided an opportunity for further oral argument.

Based on its Findings of Fact and Conclusions of Law contained in its Opinion and Order issued on April 30, 2007, the Court granted the MDCH's motions to dismiss Plaintiff's complaint, and for an award of the MDCH's costs, expenses, and attorney fees in the amount of \$3,500.00.

On May 8, 2007, defense counsel corresponded with Plaintiff's counsel seeking Plaintiff's concurrence with the entry of a stipulated order in lieu of the MDCH having to file the instant motion. Plaintiff's counsel subsequently informed defense counsel by telephone that Plaintiff would not agree.

Legal Argument

In its aforementioned motions and supporting brief, the MDCH showed that, before Plaintiff filed his FOIA action against the MDCH, the MDCH provided Plaintiff with copies of existing, nonexempt records to which a person is entitled under the FOIA, and notified Plaintiff that he was denied access to records exempt from disclosure under section 3 of the Release of Information for Medical Research and Education Act,¹ which is incorporated into the FOIA under section 13(1)(d) the act.²

The MDCH also showed that the majority of Plaintiff's claims were barred because the statutory period of limitations, set forth under section 10(1)(b) of the FOIA, ran before Plaintiff commenced his action.³ Plaintiff knew or should have known that his claims were time-barred, particularly where he alleged in his complaint the dates of his FOIA requests and the dates of the MDCH's FOIA responses.⁴

The MDCH filed its motion for costs, expenses, and attorney fees as part of its first response to Plaintiff's complaint. In the prayer for relief in each of its motions and supporting briefs and responsive briefs filed and served in this action, the MDCH stated that because Plaintiff's action caused an unnecessary dissipation of judicial and agency resources, the MDCH's motion for an award of its costs, expenses, and attorney fees should be granted in an

¹ MCL 331.533 -- "[t]he 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.)

² MCL 15.243(1)(d) provides for the nondisclosure of "[r]ecords or information specifically described and exempted from disclosure by statute."

³ MCL 15.240(1)(b) -- "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.)

⁴ See Plaintiff's complaint, Counts I, II, and III.

amount to be determined by the Court.⁵ The total of the MDCH's costs, expenses, and attorney fees could not be known until the Court's final ruling on the MDCH's dispositive and related motions. The Court's final ruling was delayed by Plaintiff's requests to the Court for time to review records and to submit additional briefing.⁶ Plaintiff will not be prejudiced by the filing of the MDCH's supplemental documents. The supplemental documents show that the total amount of costs, expenses, and attorney fees incurred by the MDCH was greater than that allowed by the Court.⁷

In summary, the Court ruled that the MDCH complied with the FOIA in responding to Plaintiff's FOIA requests. The MDCH demonstrated to the Court that Plaintiff's FOIA action lacked merit and caused an unnecessary dissipation of judicial and MDCH resources. The Court agreed, and, under the Michigan Rules of Court, awarded the MDCH its costs, expenses, and attorney fees.⁸

⁵ See Defendant's Motions [and Brief in Support] to Dismiss Plaintiff's Complaint Under MCR 2.116, and for Costs, Expenses, and Attorney Fees Under MCR 2.114; Defendant's Brief in Reply to Plaintiff's Response and Brief in Opposition to Defendant's Dispositive and Related Motions; and Defendant's Brief in Reply and Opposition to Plaintiff's Supplemental Brief in Response to Defendant's Motion to Dismiss.

⁶ Plaintiff moved for an *in camera*-type review of records and moved to file his supplemental briefing on the Release of Information for Medical Research and Education Act.

⁷ The Court's April 30, 2007, Order allowed the MDCH costs, expenses, and attorney fees in the amount of \$3,500.00, against what the MDCH herein shows as an actual total of \$8,138.00.

⁸ MCR 2.114 and MCR 2.625(A)(2); see, also, Court's April 30, 2007, Order, p 4.

Finally, it is incumbent on a party in a trial court action to be diligent in contributing to a clear record of what was litigated in order to help eliminate any necessity for concerning the appellate court with the matter.⁹ Thus, the Court has discretion to allow the record to be supplemented to support the Court's ordering Plaintiff to pay the MDCH's costs, expenses, and attorney fees.¹⁰ In support of the Court's determination that Plaintiff is liable to the MDCH in the amount of \$3,500.00, and to supplement the record, the MDCH attaches the affidavit of defense counsel, bills of costs and expenses, and a statement of attorney fees.

⁹ See, e.g., comment in *Michner Plating Co. v Davis Drilling, Co., Inc.*, 10 Mich App 358, 365; 159 NW2d 366 (1968).

¹⁰ See *Johnson v Patmon, Young & Kirk, P.C.*, 119 Mich App 362, 367-368; 326 NW2d 511 (1982), where the appeals court determined that a trial court should exercise its discretion to allow the amendment of a bill of particulars to supplement the record.

Relief Sought

The MDCH respectfully requests that this Honorable Court grant the MDCH's motion to supplement the record in support of the Court's April 30, 2007, Order, which granted the MDCH's motion for costs, expenses, and attorney in the amount of \$3,500.00; and allow the MDCH to file the affidavit of defense counsel, bills of costs and expenses, and a statement of attorney fees in the forms appended under Attachment 1.

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: May 23, 2007

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

BEN HANSEN,

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AFFIDAVIT OF THOMAS QUASARANO

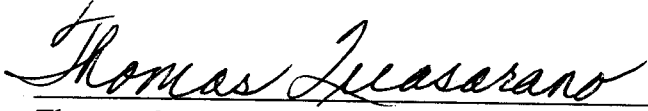
STATE OF MICHIGAN)
) ss
COUNTY OF INGHAM)

Thomas Quasarano, being duly sworn, states as follows:

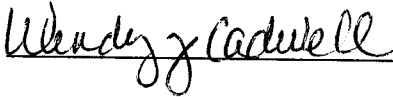
1. I am counsel for the Defendant, and make this affidavit in support of the Court-ordered award of Defendant's costs, expenses, and attorney fees, which were requested in Defendant's motion brought under MCR 2.114(E) and (F), MCR 2.625(A)(2), and MCL 600.2591.

2. I have tabulated the costs, expenses, and attorney fees incurred as a result of Defendant having to respond to Plaintiff's complaint and legal documents filed in the instant action, and I have attached bills of costs and expenses and a statement of attorney fees.

3. I have practiced law in the State of Michigan for over 29 years. Based on my experience and background, including possessing an LL.M. degree, I believe a rate of \$200.00 per hour is a reasonable attorney fee for a lawyer of comparable ability and experience. In other actions brought against State public bodies, in which I was defense counsel, the trial court judges in the various judicial circuits ordered the payment of the prevailing defendants' incurred attorney fees at rates up to \$200.00 per hour.


Thomas Quasarano

Subscribed and sworn to before me
this 23rd day of May 2007.



Notary Public, State of Michigan, County of Ingham
My commission expires:

WENDY J. CADWELL
NOTARY PUBLIC, STATE OF MI
COUNTY OF INGHAM
MY COMMISSION EXPIRES Dec 14, 2012
ACTING IN COUNTY OF Ingham