

STATE OF MICHIGAN
IN THE COURT OF APPEALS

BEN HANSEN

Court of Appeals No. 278074

Plaintiff-Appellant,

Ingham Circuit Court
No. 06-1033-CZ

v

DEPARTMENT OF COMMUNITY HEALTH

Defendant-Appellee.

DEFENDANT-APPELLEE'S BRIEF

ORAL ARGUMENT REQUESTED

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Table of Contents

	<u>Page</u>
Index of Authorities	ii
Statement of Basis of Jurisdiction of the Court of Appeals.....	iv
Counter-Statement of Questions Involved.....	v
Counter-Statement of Facts.....	1
Argument	2
I. The trial court properly dismissed Plaintiff-Appellant's complaint alleging jurisdiction solely under the FOIA.....	2
A. Standard of Review.....	2
B. Preservation of Issue.....	2
C. Analysis.....	2
1. Defendant's affirmative defenses filed with the trial court.....	2
2. The records at issue are exempt from public disclosure because they constitute Pharmacy Quality Improvement Project records.....	3
II. The trial court properly exercised its discretion in granting Defendant's motion for costs, expenses, and attorney fees.....	8
A. Standard of Review.....	8
B. Preservation of Issue	8
C. Analysis.....	8
Conclusion and Relief Sought	12

Index of Authorities

	<u>Page</u>
Cases	
<i>Clerical-Technical Union v Bd of Trustees of Michigan State Univ,</i> 190 Mich App 300, 303; 476 NW2d 373 (1991);.....	1
<i>Dressel v Ameribank,</i> 468 Mich 557, 561; 664 NW2d 151 (2003).....	2
<i>Evening News Ass'n v City of Troy,</i> 417 Mich 481, 502-503, 516; 339 NW2d 421 (1983).	7
<i>Evening News Ass'n,</i> 417 Mich at 516.	8
<i>Feyz v Mercy Memorial Hosp,</i> 475 Mich 663, 681-683; 719 NW2d 1 (2006).	7
<i>Maldonado v Ford Motor Company,</i> 476 Mich 372, 388; 719 NW2d 809 (2006).	8
<i>Mullin v Detroit Police Dep't,</i> 133 Mich App 46, 52-53; 348 NW2d 708 (1984).	1
<i>Phinney v Perlmutter,</i> 222 Mich App 513, 544; 564 NW2d 532 (1997).	2
<i>Riethmiller v Blue Cross and Blue Shield of Michigan,</i> 151 Mich App 188, 203; 390 NW2d 227 (1986).	8
<i>State Employees Ass'n v Dep't of Mgt and Budget,</i> 428 Mich 104, 121, 125-126; 405 NW2d 606 (1987)	1
Statutes	
Freedom of Information Act, 1976 PA 442, 10(1)(b); MCL 15.240(1)(b).....	v
MCL 15.232(e)(i).....	4
MCL 15.235(4)(a).....	3
MCL 15.235(4)(b).....	3
MCL 15.240(1)	1
MCL 15.240(1)(b).....	v, 2

MCL 15.240.....	10
MCL 15.243(1)(d).....	5, 6
MCL 331.531 <i>et seq.</i>	5, 6, 7, 8
MCL 331.532.....	5
MCL 331.533.....	4
MCL 600.2591.....	9
 Rules	
MCR 2.113(A).....	9
MCR 2.114(D)(1), (2), and (3)	9
MCR 2.114(E).....	9
MCR 2.114(F).....	9
MCR 2.625(A)(2)	9
MCR 7.203(A)(1).	iv

Statement of Basis of Jurisdiction of the Court of Appeals

Plaintiff-Appellant properly alleges jurisdiction under MCR 7.203(A)(1). Plaintiff-Appellant filed a Claim of Appeal showing a date of May 16, 2007, which falls within the 21-day deadline after the trial court's April 30, 2007 order granting Defendant-Appellee's motion to dismiss Plaintiff's complaint that resolved the last pending claim and closed the case.

Counter-Statement of Questions Involved

- I. **The Freedom of Information Act (FOIA), 1976 PA 442, 10(1)(b); MCL 15.240(1)(b), provides that an action to compel a public body's disclosure of must be commenced in the circuit court within 180 days after the public body's final determination to deny a request. The Plaintiff-Appellant failed to file his action to compel the disclosure of public records within the 180-day period, set forth in MCL 15.240(1)(b). Did the trial court properly dismiss Plaintiff-Appellant's complaint alleging jurisdiction solely under FOIA?**

Trial Court's answer: "Yes"

Appellant's answer: "No"

Appellee's answer: "Yes"

- II. **Did the trial court properly exercise its discretion in granting Defendant-Appellee's motion for costs, expenses, and attorney fees?**

Trial Court's answer: "Yes"

Appellant's answer: "No"

Appellee's answer: "Yes"

Counter-Statement of Facts

Most of the facts alleged in Plaintiff-Appellant's (Plaintiff) Statement of Facts are not relevant to an action commenced under the FOIA. Defendant-Appellee (Defendant), therefore, presents the following facts that support affirming the trial court's order dismissing Plaintiff's complaint and awarding Defendant its costs, expenses, and attorney fees.

In his Statement of Facts, Plaintiff alleges his motivation, purpose, or reason for making the alleged FOIA requests, which does not constitute a relevant consideration in a FOIA action.¹ Moreover, in his Statement of Facts, Plaintiff sets forth the dates of his alleged FOIA requests and the dates of Defendant's written responses. These dates show that Plaintiff failed to bring a timely FOIA action as to the three FOIA requests. Section 10(1) of the FOIA provides²:

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

(b) 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.

Plaintiff litigated FOIA requests with dates of November 18, 2005, December 14, 2005, and February 2, 2006, for which Defendant issued its written notices of final disclosure determinations on December 7, 2005, January 11, 2006, and February 23, 2006, respectively – all *more than 180 days before* the issuance of the summons on August 30, 2006.³ The trial court determined that Plaintiff filed "a complaint clearly barred by the statute of limitations."⁴

¹ *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).

² MCL 15.240(1); (emphasis added).

³ See Plaintiff's summons issued on August 30, 2006. Plaintiff argued that the August 11, 2006 date of his complaint, not the summons date, preserved his third FOIA request. See Trial Court's April 30, 2007 Opinion and Order Granting Defendant's Motion to Dismiss, p 2.

⁴ Trial Court's April 30, 2007 Opinion and Order Granting Defendant's Motion to Dismiss, p 4.

Argument

I. The trial court properly dismissed Plaintiff-Appellant's complaint alleging jurisdiction solely under the FOIA.

A. Standard of Review

The issue concerning the trial court's granting Defendant's dispositive motion involves questions of law reviewed by the Court *de novo*.⁵

B. Preservation of Issue

This issue was preserved in Defendant's Motion to Dismiss Plaintiff's Complaint, and in Defendant's supporting briefs.

C. Analysis

1. Defendant's affirmative defenses filed with the trial court.

A statute of limitations defense must be raised in a party's first responsive pleading or by motion filed not later than the deadline for filing the first responsive pleading.⁶ In response to Plaintiff's complaint, Defendant filed and served its motion to dismiss and brief in support in which Defendant presented evidence that Plaintiff's claim was barred by the applicable 180-day period of limitations under the FOIA.⁷ The trial court granted Defendant's motion to dismiss finding that Plaintiff filed "a complaint clearly barred by the statute of limitations."⁸

In the alternative, Defendant presented the trial court with a showing that, even if Plaintiff's claims were not time-barred, Defendant's written notices issued in response to Plaintiff's FOIA requests complied with the FOIA's requirements and Plaintiff failed to state any

⁵ *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003).

⁶ *Phinney v Perlmutter*, 222 Mich App 513, 544; 564 NW2d 532 (1997).

⁷ 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.)

⁸ Trial Court's April 30, 2007 Opinion and Order Granting Defendant's Motion to Dismiss, p 4.

claims or show the existence of genuine issues of material fact, which dispute the fact that Defendant complied with the FOIA.⁹

Section 5(4)(a) of FOIA¹⁰ 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." Section 5(4)(b) of FOIA 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.¹¹ Defendant's written responses included, where applicable, notice of the statutory exemptions and of the non-existence of records.¹²

Plaintiff's complaint alleged, without merit in fact or law, that Defendant's FOIA responses "have been incomplete."¹³ Plaintiff merely speculated that certain unspecified documents should be "available" and he did not support his general allegation that statutory exemptions invoked by Defendant do not apply to certain records.¹⁴

2. The records at issue are exempt from public disclosure because they constitute Pharmacy Quality Improvement Project records.

Plaintiff's FOIA requests were granted as to existing, non-exempt records in the possession of Defendant falling within the scope of the requests. As explained in Defendant's

⁹ Defendant's Brief in Support of dispositive motion, pp 5-6.

¹⁰ MCL 15.235(4)(a).

¹¹ MCL 15.235(4)(b).

¹² See Attachments 2 and 3 appended to Defendant's Brief in Support of dispositive motion

¹³ See Plaintiff's complaint, paragraph 12.

¹⁴ See Plaintiff's complaint, paragraphs 15, 18, and 24.

FOIA response, Pharmacy Quality Improvement Project (PQIP) records are exempt from public disclosure.¹⁵

As explained in Defendant's brief in reply to Plaintiff's supplemental brief in response to Defendant's dispositive motion, PQIP is a collaborative effort that involves Defendant's Mental Health and Substance Abuse Administration and its Medical Services Administration, and Comprehensive NeuroScience, Inc. Eli Lilly and Company has 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.

While the FOIA generally provides for public disclosure of public records, section 2(e)(i) of the act¹⁶ provides that there is a class of public records "exempt from disclosure under section 13 [of the act]."¹⁷ Invoking the FOIA, Plaintiff sought records, which are identified in section 3 of the Release of Information for Medical Research and Education Act¹⁷ (Release of Information

¹⁵ See Attachments 2 and 3 appended to Defendant's Brief in Support of dispositive motion.

¹⁶ MCL 15.232(e)(i).

¹⁷ MCL 331.533.

Act), 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."¹⁸ This nondisclosure provision is incorporated in the FOIA at section 13(1)(d),¹⁹ which provides for the non-disclosure of "[r]ecords or information specifically described and exempted from disclosure by statute." Defendant's notice issued in response to Plaintiff's FOIA request seeking PQIP records informed Plaintiff of the statutory basis for exemption.²⁰

Plaintiff cannot demonstrate that he is an entitled recipient of information under the Release of Information Act.²¹ Plaintiff is not a "review entity." Furthermore, release of information under section 2 of the Release of Information Act²² is only to certain entities for limited, specific purposes and not to the world at large under the FOIA. Indeed, if Plaintiff believed his status was that of a "review entity," he could have invoked the Release of Information Act and not the FOIA to request access to the confidential information.

Defendant's dispositive motion and briefs are supported by the affidavit of Defendant's FOIA coordinator, Mary Greco. Ms. Greco testified that Defendant granted in full Plaintiff's November 14, 2005 FOIA request, and granted in part and denied in part, with explanation, Plaintiff's December 14, 2005 FOIA request.²³

¹⁸ *Id.*; emphasis added.

¹⁹ MCL 15.243(1)(d).

²⁰ See Attachments appended to Defendant's Brief in Support of dispositive motion, and Greco affidavit, Attachment 1 to Defendant's first reply brief.

²¹ MCL 331.531 *et seq.*

²² MCL 331.532.

²³ Greco affidavit, Attachment 1 to Defendant's first reply brief.

Ms. Greco also testified that Defendant granted in part and denied in part Plaintiff's February 2, 2006 FOIA request. Defendant's written notice informed Plaintiff that—save specifically described information that did not constitute Defendant's final records and records the public disclosure of which is prohibited by the Release of Information Act—Plaintiff was granted access to all existing, nonexempt records responsive to his description of records. Defendant also informed Plaintiff that certain information once finalized as a record of Defendant could be requested under the FOIA. Although Plaintiff did not pursue this avenue, he currently possesses the records.²⁴

As part of his supplemental brief, Plaintiff attached the affidavits of two individuals giving their opinions why Plaintiff should have access to PQIP records under the FOIA.²⁵ These affidavits, however, did not contravene Ms. Greco's testimony concerning the statutory prohibition of disclosure under the Release of Information Act.²⁶ Plaintiff's affiants merely opined that the information should be made readily available to the public.

At the March 21, 2007 hearing on Defendant's dispositive motion, Plaintiff alleged entitlement to the records as a "review entity."²⁷ Plaintiff, however, never filed his own affidavit to support this or other of his claims nor to counter Ms. Greco's affidavit.

Moreover, in responding to Plaintiff's FOIA request for PQIP records, Defendant raised section 13(1)(d) of the act²⁸ because the information sought by Plaintiff does not constitute

²⁴ In his supplemental brief filed in response to Defendant's dispositive motion, Plaintiff did not dispute that, except for PQIP records, Plaintiff received copies of all existing, nonexempt records described in his FOIA requests.

²⁵ See attachments to Plaintiff supplemental brief.

²⁶ MCL 331.531 *et seq.*

²⁷ March 21, 2007, Trial Court Tr, pp 9-10.

²⁸ MCL 15.243(1)(d) -- "records or information specifically described and exempted from disclosure by statute."

"public records" as determined by the Release of Information Act.²⁹ In *Feyz v Mercy Memorial Hosp.*, the Supreme Court stated that the Release of Information Act is part of a statutory process protecting the confidentiality of the class of records identified in the act.³⁰

In his appellate brief, Plaintiff alleges that Defendant provided to another FOIA requester copies of records denied to Plaintiff.³¹ Plaintiff's allegation is not true. On October 10, 2006, Defendant provided the other requester a FOIA notice granting the request only as to non-exempt records. The requester received a CD containing the following fields: Label Name, Approved Amount, Provider Name and License Number. Plaintiff's FOIA request, on the other hand, described information specific to the PQIP program and, thus, exempt from public disclosure under the act as explained in Defendant's FOIA notice issued to Plaintiff.³²

Finally, Plaintiff asserts that the trial court failed to conduct an *in camera* review of the PQIP records at issue.³³ This assertion is not correct. Where the non-disclosure is based on statutory prohibition of disclosure as in the instant case, a trial court generally resolves the disclosure issue by examining the particularized justification set forth by the statute.³⁴ In the instant case, the trial court determined that it would exceed this standard. The trial court permitted Plaintiff's counsel access to PQIP records expressly in accordance with *Evening News Ass'n v City of Troy*, where the Supreme Court determined that in resolving a disclosure dispute in a FOIA action a trial court should conduct an *in camera* hearing or "consider allowing plaintiff's counsel to have access to the contested documents *in camera* under special agreement

²⁹ MCL 331.531 *et seq.*

³⁰ *Feyz v Mercy Memorial Hosp.*, 475 Mich 663, 681-683; 719 NW2d 1 (2006).

³¹ Plaintiff's brief on appeal, p13, fn 3. Plaintiff states that this alleged matter came to Plaintiff's attention "subsequent to the notice of appeal being filed [by Plaintiff] in this case." Thus, there is no record on appeal as to this allegation.

³² See Attachments 2 and 3 appended to Defendant's Brief in Support of dispositive motion.

³³ Plaintiff's brief on appeal, pp 6, 9-10.

³⁴ See *Evening News Ass'n v City of Troy*, 417 Mich 481, 502-503, 516; 339 NW2d 421 (1983).

'whenever possible."³⁵ In the instant case, the trial court issued its November 6, 2006 Order permitting Plaintiff's counsel to review the PQIP records that Defendant withheld from public disclosure under the Release of Information Act.³⁶ The Order set forth restrictions agreed to by the parties, and postponed the trial court's hearing of Defendant's dispositive motion for 30 days to give Plaintiff's counsel time to complete his review.

II. The trial court properly exercised its discretion in granting Defendant's motion for costs, expenses, and attorney fees.

A. Standard of Review

The standard of review of the trial court's grant of Defendant's motion for costs, expenses, and attorney fees under a statute or court rule giving the trial court discretion to award a party costs, expenses, and attorney fees, is abuse of discretion.³⁷ The abuse of discretion standard of review acknowledges that there are circumstances in which there is no single correct result and when a trial court selects one of the principled outcomes, it has not abused its discretion and the appellate court should defer to its judgment.³⁸

B. Preservation of Issue

This issue was preserved in Defendant's Motion for an Award of Defendant's Costs, Expenses, and Attorney Fees, with Brief in Support.

C. Analysis

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

³⁵ *Evening News Ass'n*, 417 Mich at 516.

³⁶ MCL 331.531 *et seq.*

³⁷ *Riethmiller v Blue Cross and Blue Shield of Michigan*, 151 Mich App 188, 203; 390 NW2d 227 (1986).

³⁸ *Maldonado v Ford Motor Company*, 476 Mich 372, 388; 719 NW2d 809 (2006).

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

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 that³⁹:

- (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.

The court rule further provides⁴⁰:

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.

Under MCR 2.114(E), Defendant 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.⁴¹

³⁹ MCR 2.114(D)(1), (2), and (3).

⁴⁰ MCR 2.114(E).

⁴¹ See also MCL 600.2591.

Under the FOIA, Plaintiff received nonexempt records in Defendant's possession. Using his FOIA action to raise objections about the form or content of the records is a clear abuse of the FOIA, resulting in a frivolous action.

The frivolousness of Plaintiff's action is further evidenced under the sections of Plaintiff's supplemental brief entitled: "The Broader View;" "How the Information Can Be Used;" and "Additional Matters of Concerns and Interest." Here, Plaintiff merely enumerates his grievances concerning certain products and Eli Lilly's alleged policies and practices. None of this is related to Defendant's release of information under the FOIA.

Finally, at page 9 of his supplemental brief, Plaintiff alleged some sort of issue concerning "researchers" that Plaintiff has contacted, and alleged statements "of purposes" he has elicited from them. (Ironically, Plaintiff divulged in his supplemental brief that these "researchers" concede that there is information contained in the records that should be redacted.) The conclusory statements of purposes drawn by these "researchers" do not present any issues justifiable in the FOIA action, yet Plaintiff stated in his supplemental brief at pages 9-10 that he "would have no objection to the Court's order incorporating a statement of these purposes" in this case. Plaintiff, however, did not and cannot show how this alleged relief comes under the remedial provisions of section 10 of the FOIA.⁴²

In his appellate brief, Plaintiff states that "the [trial court's] decision to award \$3,500.00 in fees was not premised on any sort of detailed analysis of the work done."⁴³ Plaintiff, however, opposed Defendant's motion to file the affidavit of defense counsel, bills of costs and expenses, and a statement of attorney fees, which were attached to Defendant's filed and served motion to

⁴² MCL 15.240.

⁴³ Plaintiff's brief on appeal, p 16.

supplement the record. Defendant's motion was then heard by the trial court judge appointed to substitute for the assigned judge in this case.

The record shows that the trial court properly exercised its discretion to grant Defendant's motion for costs, expenses, and attorney fees, and award Defendant the amount of \$3,500.00, which was less than Defendant's incurred costs and attorney fees of \$8,138.00.⁴⁴

⁴⁴ Trial Court's April 30, 2007 Opinion and Order Granting Defendant's Motion to Dismiss, p 4.

Conclusion and Relief Sought

For the reasons stated in this brief, Defendant-Appellee requests that this Honorable Court affirm the trial court's April 30, 2007 Order that dismissed Plaintiff-Appellant's complaint and awarded Defendant-Appellee its costs, expenses, and attorney fees in the amount of \$3,500.00.

Respectfully submitted,

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