**STATE OF MICHIGAN**
**IN THE SUPREME COURT**

**BEN HANSEN,**

**Plaintiff-Appellant,**

**v.**

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

**Defendant-Appellee.**
_____/

**Supreme Court No. _____**

**Appeal from C.A. No. 278074**

**Ingham County Circuit Court No. 06-1033 CZ**

**NOTICE OF FILING**

To all interested parties, please take notice that an Application for Leave to Appeal was overnighted to the Clerk of the Michigan Supreme Court for filing on April 23, 2008.

Respectfully submitted,

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Dated: April 22, 2008

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**CERTIFICATE OF SERVICE**

Tammy Bottorff, being first duly sworn, deposes and says that on the 22nd day of April, 2008 she served the *Notice of Hearing, Application for Leave to Appeal* , and this *Certificate of Service* in the above matter to the following via U.S. via UPS Overnight mail to the following:

Thomas Quasarano (P27982)
Assistant Attorney General
Department of Attorney General
525 W. Ottawa St.
Lansing, MI 48909

Tammy Bottorff
TAMMY BOTTORFF

**Subscribed and sworn to me this 22nd day of April, 2008.**

Eileen M. Chmielewski
**NOTARY PUBLIC**

EILEEN M. CHMIELEWSKI
NOTARY PUBLIC, STATE OF MICHIGAN
COUNTY OF WAYNE
MY COMMISSION EXPIRES JAN 31, 2011
ACTING IN COUNTY OF Wayne

**STATE OF MICHIGAN**
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**Ingham County Circuit Court No. 06-1033 CZ**

# PLAINTIFF-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

## CERTIFICATE OF SERVICE

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## STATEMENT OF JURISDICTION

Jurisdiction over the this appeal is conferred on the Supreme Court by Michigan Court Rule 7.301(A)(2).

## STATEMENT IDENTIFYING ORDER APPEALED FROM; RELIEF SOUGHT

This Application is seeking review of the March 13, 2008 per curiam decision of the Michigan Court of Appeals. *Ben Hansen v State of Michigan Department of Community Health*, Unpublished opinion per curiam of the Court of Appeals, issued March13, 2008 (Docket No. 278074) Exhibit A.

The relief sought is a reversal of the Court of Appeal's decision and reinstatement of Appellant-Plaintiff's Complaint which had been dismissed by the trial court. It is further requested that the sanctions order, entered pursuant to MCR 2.114 (E) and (F), be reversed.

## QUESTIONS PRESENTED FOR REVIEW

The following questions are presented for review:

1. Whether the Release of Information for Medical Research and Education Act, MCL §§331.531-533 (commonly referred to as the Peer Review Immunity Statute) provides exemptions to requests for documents sought by Appellant-Plaintiff under the Freedom of Information Act ("FOIA"), MCL §15.231, et. seq.?

   Appellant-Plaintiff states - No.

2. Whether the Appellate Court erred in determining and holding that the records in dispute are not "public records" because the Department of Community Health had not chosen to release or publish said records pursuant to MCL §331.533?

   Appellant-Plaintiff states - Yes.

3. Whether Appellant-Plaintiff was improperly denied a de novo review of the Department of Community Health's denial of his February 23, 2006 FOIA request?

   Appellant-Plaintiff states - Yes.

4. Whether sanctions ordered pursuant to MCR 2.114(E) and (F) were proper?

   Appellant-Plaintiff states - No.

## I. STATEMENT OF FACTS

### A. NATURE OF THE CASE

This matter involves a case brought pursuant to the Michigan Freedom of Information Act. MCL §15.231, et seq.

In late 2005 and early 2006, Plaintiff-Appellant submitted three Freedom of Information Act requests to Defendant-Appellee, the State of Michigan Department of Community Health ("Department"), in accordance with and pursuant to the Freedom of Information Act ("FOIA"). MCL §15.231, et. seq. These requests sought information, data and documents pertaining to a Department program entitled "Pharmacy Quality Improvement Project" ("PQIP"). (Copies are attached to the Department's Motion to Dismiss. Court of Appeals Docket No. 6).

The Department denied, in part, the third request dated February 23, 2006. A Complaint was then filed in the Ingham County Circuit Court on August 11, 2006. The Department responded by filing a motion to dismiss. Court of Appeals Docket No.6. The parties reached an accord with regard to certain but not all of the sought-after reports. Ultimately the Circuit Court granted the motion to dismiss, which decision was affirmed by the Court of Appeals. *Hansen, supra*, Exhibit A. This appeal only addresses the dismissal of Count III of the Complaint. The relevant details of what transpired leading up to the dismissal will be set forth.

## B. BACKGROUND

Ben Hansen, Plaintiff-Appellant, is a resident of Traverse City, Michigan. He is a "person" within the FOIA definition. MCL §15.232(c).[1]

PQIP arose out of a three-way agreement between the Department, Comprehensive Neuroscience (CNS) of New Jersey and Eli Lilly and Company. It is designed to be an educational program which analyzes the prescribing patterns of psychiatric drugs for Medicaid participants. Prescription and utilization action trends are reviewed. CNS' role was and is to receive, sort and analyze data. Eli Lilly's exclusive role was to "provide certain funding."[2] Court of Appeals Docket No.14. The money spent by the Department for the drugs, which are the subject of the sought-after reports, is taxpayer money paid through Medicaid.

It is undisputed, as noted by the Court of Appeals, that at no time did Mr. Hansen seek any names, addresses or personal data about program participants. Exhibit A, p. 3.

The Department responded to the Complaint with a Motion to Dismiss Complaint Under MCR 2.116, seeking Costs, Expenses and Attorney Fees Under MCR 2.114. Following Appellant's

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[1]At the time FOIA requests were submitted and when the civil action was filed Mr. Hansen was a member of the Michigan Department of Community Health Recipient Rights Advisory Committee.

[2]Eli Lilly is the subject of multiple lawsuits with regard to its marketing practices. For example, the State of Pennsylvania filed suit against Lilly (and other pharmaceutical houses) claiming they fraudently marketed antipsychotic drugs and owe the state for prescription costs and harm to patients. The State charged Lilly withheld the risks and exaggerated the benefits of the antipsychotic medication Zyprexa while persuading doctors to prescribe it for unapproved uses. This is the fifth claim of state medicaid fraud against Lilly. *Commonwealth v Eli Lilly Co.*, Case No. 00-2836, Feb. Term 2007, Court of Common Pleas, Philadelphia County, P.A. An Eli Lilly representative was present during Department meetings, raising further questions and concerns about their actual role in PQIP and what, if any, information was made available to them. Court of Appeals Docket No 14.

reply in opposition, the matter was scheduled for a hearing. The Parties met, stipulated to and the Court approved an "Order for Private Review of Records." Court of Appeals Docket No. 12. It provided for the Department to turn over certain documents and for time for the parties to seek to resolve these differences. This Order read, in part:

> Within the next 30 days, Defendant will provide Plaintiff with access to copies of the final versions of existing, nonexempt records falling within the scope of Plaintiff's description of records in his February 2, 2006 FOIA request, namely: 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 through 12/2005; 4. (Monthly) Michigan. Targeted Prescriber Change Report by Quality Indicator, 9/2005 thru 12/2005; 5. (Monthly) Michigan Physician Specialty and Response Reports in 2005; and 6. (Quarterly) PQIP Monthly Mailing Logs in 2005...
>
> Finally, as permitted under section 10(4) of the FOIA and the FOIA case of *Evening News Ass'n v City of Troy*, 417 Mich 481, 516; 339 NW2d 421 (1983), under court-approved special agreement set forth below, Plaintiff's attorney of record is permitted to undertake a restricted private review of certain contested records.

Hundreds of pages of documents were provided to Appellant pursuant thereto and subsequently filed FOIA requests, including:

1. Michigan Behavioral Pharmacy Reports;
2. Michigan Concurrent Drug Reports;
3. BPMS Mailing Summary Reports & PQIP Mailing Logs;
4. Michigan Physician Specialty and Response Reports;
5. Michigan Targeted Prescriber Change Reports;
6. PQIP Impact Analysis;
7. PQIP Summary Trend Charts;
8. Michigan Managed Care & Michigan Fee-for-Service Pharmacy Reports
9. Michigan Targeted Patient Change Reports;
10. Executive Management Reports.
    Court of Appeals Docket No. 14, Exhibit B.

An example of what was provided was the Michigan Behavioral Pharmacy Report for Children Under 5 for June 1, 2005-August 31, 2005 which provides details of the psychiatric/psychotropic drugs being administered to children under 5 years of age, including the

following data:

1. The class of drugs prescribed;
2. The number of patients for each class. (Three thousand sixty-four (3,064) children under 5 were administered some form of psychiatric drug during this three month period at a cost of $467,343.00);[3]
3. The number of prescribers for each class;
4. The number of claims for each class; and
5. How much state money was spent for each class of drug.

The "Michigan Concurrent Drug Use Report (For All Ages)," for the period of October 1, 2005 through December 31, 2005 is another example. It details the number of patients taking anywhere from 1 to 16 psychiatric/psychotropic drugs during the specified period (in excess of 75,000 people took more than one psychiatric drug; more than 21,000 took three (3); close to 9,000 took four (4); and more than 3,000 took five (5)). Court of Appeals Docket No.14.

What was not provided and what is the focus of the disagreement are the reports for:

1. Michigan Children Under 5 Years of Age Detail by Drugs and Quality Indicator.

2. Patients on 5 or More Concurrent Behavioral Drugs.

These were specifically requested in the third FOIA request which is the subject of Count III of the Complaint. Court of Appeals Docket No. 1, p. 4. Essentially, the names of the drugs are not being provided, which would in turn allow the manufacturers to be identified. (The significance of this

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[3]The listed side effects for these drugs is extensive. Two examples include, "anticonvulsants/mood stabilizers" - given to 875 children; side effects include but are not limited to liver damage, pancreatitis, anemia, psychosis, congenital neural tube defects, headaches, nausea and many more. http://www.accessdata.fda.gov/scripts/cder/drugsatfda/index.cfm. Certain of these drugs given for "any sympathomimetric/stimulants (given to 391 children under age 5) are listed by the Drug Enforcement Administration as Schedule II Controlled Substances which have effects "similar to cocaine." http://www.usdoj.gov/dea/pubs/abuse/5-STIM.htm. http://www.deadiversion.usdoj.gov/drugs_concern/methylphenidate.htm. Docket No. 14, p.3.

was addressed in the affidavit of Bertrand P. Karon, Professor of Clinical Psychology at Michigan State University and past president of the Psychoanalytical Division of the Psychological Association.) Court of Appeals Docket No. 14. (Why all of the above information was considered to be "public records" while the names of drugs are not has never been explained and was clearly an arbitrary decision by the Department having nothing to do with the purpose of FOIA or the Michigan Release of Information and Medical Research and Education Act, MCL §§331.531-533.)

The reports in dispute were provided to counsel as the Order for Private Review of Records mandated. The reports (with patient names and identifying information redacted) were reviewed and returned. In fact, the Department allowed Plaintiff-Appellant, himself, to review and return these reports. The Parties, obviously, could not agree on whether or not these reports could or should be formally released. Thereafter argument on the original motion was scheduled and heard. The Court did not review the records in dispute. Tr. p. 14, March 21, 2007. The Court then issued its Order Granting Defendant's Motion to Dismiss, Exhibit B.

## C. THE TRIAL COURT'S DECISION

The trial court ruled, "Plaintiff failed to state a claim upon which relief can be granted and there are no genuine issues of material fact per MCR 2.116 (c)(10)." Exhibit B, p. 4. The decision was based on Defendant's written notices denying the FOIA requests being made "in compliance with the statutory notice requirement pursuant to section 5(4)(a), MCL 15.235(4)(a)." Specifically, the court held Defendant "timely provided Plaintiff a written explanation for the basis of the denials, including why the requested public record is exempt from disclosure and whether or not the public records exists." (The Affidavit of the Department's FOIA Coordinator was cited.) Ultimately, the

court "[b]ased on the reasons cited in this Opinion...," granted the Motion and declared "[t]his Court will not address any further issues." Exhibit B, p. 4.

There is nothing in the Record to demonstrate or even suggest that the court actually considered the merits of the case in reaching its conclusion and making the determination to dismiss.

With regard to attorney's fees and costs, the court went on to say it could not award punitive damages for a complaint clearly barred by the statute of limitations but that Defendant was entitled to costs and fees for "having to respond." The court thus ordered, "Defendant is awarded costs, expenses and attorney's fees pursuant to MCR 2.114 (E) and (F) and MCL 600.2591 in the sum of $3,500." Exhibit B, p. 4. The case was then closed. MCR 2.602 (A)(3). Exhibit B, p. 4.

No hearing was conducted and no evidence was offered with regard to the sanctions. There were no findings by the court that the suit was filed to harass, embarrass or injure the Department or that Plaintiff had no reasonable basis to believe the facts and that his legal position was void of arguable legal merit. No findings were made with regard to the civil action being frivolous. MCL § 600.2591 (1)(3)(i),(ii),(iii), MCR 2.114 (D). The Record did not contain any time records of the Department's counsel at the time of the award. Subsequent to the issuance of the award Defendant sought to supplement the record by placing Counsel's time records in the Record. Plaintiff opposed the motion and it was denied. Order Resolving Defendant's Motion to Supplement the Record and Plaintiff's Motions for Stay of Proceedings and Waiver of Stay Bond, June 27, 2006. Court of Appeals Docket No. 33. The Honorable Judge Thomas L. Brown heard this motion as Judge Nettles-Nickerson was no longer hearing cases at that time.

## D. THE COURT OF APPEALS' DECISION

The Court of Appeals issued its decision on March 13, 2008, affirming the dismissal and determining reversal of the sanctions was "unwarranted." Exhibit A, at p. 6. While finding certain of Appellants' arguments to be correct the court "instead of remanding the matter for resolution" decided to "directly address the issue for purposes of judicial expediency because as reflected in our analysis below, the issue ultimately constitutes a pure legal question." Exhibit A, p. 4.

The court's conclusions and opinions regarding the dismissal include:

1. We conclude that, because the record contains a complaint that was filed on August 11, 2006, and because an action is commenced with the filing of a complaint, the third count was timely, and the court erred in dismissing it pursuant to the statute of limitations. Exhibit A, p. 3.

2. Although the trial court did not reach the question whether the documents at issue were exempt, which constituted error on the court's part with respect to Count III, the issues that were determined by the court were certainly addressed and reviewed de novo. Exhibit A, p. 3.

3. Finally, prior to reaching its decision the Court noted that the "application of an exemption that involves a legal determination is reviewed de novo" and "[a]gain, the trial court failed to reach the issue of whether the materials were exempt . . ." Exhibit A, p. 4.

It was at this point that the court proceeded to decide that the records at issue were exempt because they are not "public records" because "defendant has not decided to release the materials." Exhibit A, p. 6.

## II. ARGUMENT

### A. THE COURT SHOULD GRANT LEAVE TO APPEAL TO ADDRESS THE ELIMINATION OF FOIA RESULTING FROM THE DECISION OF THE COURT OF APPEALS' MISAPPLICATION OF THE PEER REVIEW IMMUNITY STATUTE

Appellant is seeking leave for two reasons. First, the decision of the Court of Appeals renders FOIA meaningless in cases with similar facts and circumstances involving the Release of Information for Medical Research and Education Act, (most commonly referred to as the "Peer Review Immunity Statute") MCL §§331.531-533. The issues presented go directly to the viability of FOIA. Pursuant to the Court's decision the Department has unfettered discretion to decide if records which the Department deems to be within the scope of the Peer Review Statute are "public records" or not. MCL §§331.531-533.

The effect of the decision is to render void or meaningless the FOIA provision which allows for the filing of a circuit court action to have the Department's decision reviewed de novo. MCL §215.240.

If upheld, access to the "public records of public bodies" will now be based on a decision of a state employee. Accordingly, the issue has "significant public interest and the case is one against the state or one of its agencies." MCR 7.302(B)(2). It also follows that the issue involves "legal principles of major significance to the state's jurisprudence" as judicial review has been eliminated. MCR 7.302(B)(3).

This case is one of first impression. Research reveals that there are no reported cases within the State of Michigan which involve FOIA and the Peer Review Immunity Statute, other than the *Hansen* case. Exhibit A.

Multiple arguments will be presented. The order of presentation is not an indication of the significance or weight the Appellant believes each carries. Each is intended to stand on its own and in and of itself provide a basis for reversal.

## B. STANDARD OF REVIEW

Legal determinations are reviewed under a de novo standard. *Herald G. Inc. v Eastern Michigan Univ. Board of Regents*, 475 Mich 463, 719 NW2d 19 (2006).

## C. THE PEER REVIEW IMMUNITY STATUTE IS NOT A DEFENSE TO FOIA IN THIS CASE

The Court of Appeals erred in its interpretation and application of the Peer Review Immunity Statute to a FOIA request. A review of this statute and how the courts have dealt with and addressed issues which have arisen will demonstrate why this is so. Moreover, the FOIA exemption provision does not, in any event, encompass the Peer Review Immunity Statute at least for the purpose of this case.

This Court has pointed out, "[t]he purpose of statutory peer review immunity is to foster the free exchange of information in investigations of hospital practices and practitioners, and thereby reduce patient mortality and improve patient care within hospitals." *Feyz v Mercy Memorial Hosp.*, 475 Mich 663, 667; 719 NW2d 1, 4 (2006). The statute is set up to provide an apparatus whereby healthcare professionals are evaluated by a peer review entity in order to "reduce patient mortality and improve patient care within hospitals." *Id.*

The peer review process is disciplinary or investigative in nature. The statute speaks of peer review entities gathering "information or data relating to [1] the physical or psychological condition of a person, [2] the necessity, appropriateness, or quality of health care rendered to a person, or [3]

the qualifications, competence, or performance of a healthcare provider." MCL § 331.531(1). The entity reviewing the performance of a health care professional necessarily must seek out records, data, and knowledge from others with such information in order to proceed with their fact-finding mission. Those people giving such information to a peer review entity are protected from liability through immunity by the statute, hence the name "Peer Review Immunity Statute." MCL § 331.531(3).

A peer review entity collects all of the information pertinent to their investigation about the performance of a healthcare professional and keeps a record of its "reports, findings, and conclusions." *see* MCL § 331.533. These reports, findings, and conclusions by the reviewing entity about a healthcare professional's performance are confidential and can only be disclosed for approved purposes under the statute. *Id.*, MCL § 331.532. And, the peer review entity is also protected from liability through immunity under the statute as long as its disclosure of its proceedings, reports, findings, and conclusions are approved by the statute. MCL § 331.532. Again, this is why the statute is known as the "Peer Review Immunity Statute."

The entire Act centers around one unifying purpose–when a situation arises where an investigation or discipline may become necessary in a healthcare setting because a healthcare professional's performance, qualifications, or competence needs to be evaluated, protection from liability is provided to those people who give information to a reviewing entity, and the reviewing entity itself when it discloses information to others.

Every court that has ever looked at this Act and then written a decision discussing it, has always, only, ever ruled consistent with what has been described above–that this Act is about (1) protecting people who disclose information to a peer review entity about a healthcare professional's

competence or performance, and (2) about protecting review entities from liability for disclosing their reports, findings, and conclusions to others about a healthcare professional's misconduct or incompetence.[4]

Only one court has ever deviated from over twenty years of accepted interpretation and precedent regarding the Peer Review Immunity Statute; the Michigan Appeals Court in *Hansen, supra*, Exhibit A. History and precedent tell us, the Peer Review Immunity Statute has nothing to do with exempting from FOIA the information requested by the Plaintiff-Appellant.

The facts of the case at bar have nothing to do with anything that involves the peer review process as contemplated by the Peer Review Immunity Statute. There is no investigation or disciplinary proceeding where reports, findings, and conclusions of a peer review entity are sought by the Plaintiff-Appellant. MCL § 331.531(1). The Peer Review Immunity Statute cannot be a basis to provide the Defendant-Appellee with a defense to a FOIA request under the facts of this case. A plain reading of the Peer Review Immunity Statute necessitates that this is the only viable conclusion.

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[4]*Feyz v Mercy Memorial Hosp.*, 475 Mich 663, 719 NW2d 1 (2006); *In re Petition of Attorney Gen.*, 422 Mich 157, 369 NW2d 826 (1985); *Dye v St. John Hosp. Med. Ctr.*, 230 Mich App 661, 584 NW2d 747 (1998); *Feyz v Mercy Memorial Hosp*, 264 Mich App 699; 692 NW2d 416 (2005); *Long v Chelsea Community Hosp.*, 219 Mich App 578, 557 NW2d 157 (1996); *Veldhuis v Allan*, 164 Mich App 131, 416 NW2d 347 (1987); *Regualos v Community Hosp.*, 140 Mich App 455, 364 NW2d 723 (1985); *Taylor v Flint Osteopathic Hosp., Inc.*, 561 F Supp 1152 (ED Mich 1983); *Savas v William Beaumont Hosp.*, 102 Fed Appx 447 (6th Cir 2004); *Savas v William Beaumont Hosp.*, 216 F Supp 2d 660 (ED Mich 2002); *Neuber v Tawas St. Joseph Hosp.*, 1991 U.S. App. LEXIS 21980 (6th Cir 1991); *Mathis v Controlled Temperature*, 2008 Mich App LEXIS 626 (2008); *Covin v Grand View Health Sys.*, 2007 Mich App LEXIS 532 (2007); *Ravikant v William Beaumont Hosp.*, 2003 Mich App LEXIS 2477 (2003); *Verma v Giancarlo*, 2000 Mich App LEXIS 1139 (2000); *Phillip M. Sorensen, M.D. & Advanced Pain Mgmt v Sparrow Hosp. Health Sys.*, 1997 Mich App LEXIS 2151 (1997); *Warner v Henry Ford Hosp.*, 1996 Mich App LEXIS 2078(1996); *Hadix v Caruso*, 2006 U.S. Dist. LEXIS 72967 (WD Mich 2006).

## D. PLAINTIFF IS ENTITLED TO JUDICIAL REVIEW OF THE DEPARTMENT'S DECISION

The Court of Appeals while recognizing the "trial court failed to reach the issue of whether the materials were exempt . . ." went on to rule it was, as noted above, not necessary to do so because the Department had not chosen to release the documents and thus they were not "public records." This decision stands for the proposition that when the Department says the records are not "public records" they are not "public records." The Court is thus, without putting it into these terms, applying the judicial nonreview doctrine. *Hoffman v Garden City Hospital Osteopathic*, 115 Mich App 773, 779; 321 NW2d 810 (1982). However, no supporting authority was provided and there is none for a case such as this.

The only authority cited is the *Dye* case, which in a footnote found that nothing within §§ 2 or 3 of the Peer Review Immunity Statute places a duty on a review entity to release information. Appellant has never argued that a duty arose under these provisions. The duty arises under FOIA. MCL §§ 15.231, et seq. Moreover, whether there is or is not a duty under §§ 2 and 3 is not controlling. It is the Department which has argued this as a defense.

The *Dye* case is, nevertheless, readily and easily distinguishable. *Dye* involved a medical malpractice case claim and actual peer review or credential committee issues, not a FOIA request seeking names of drugs purchased through the State's Medicaid program. In the *Dye* footnote, the court referenced this Court's decision in the *Bruce* case, which is also not on point. In *Bruce*, the staff privileges of a Dr. Cook were suspended for 6 months. The issue before the *Bruce* court was whether records requested by the Michigan Board of Medicine were privileged and confidential although they were not "public records." *Attorney General v Bruce and Berrien General Hospital*, 422 Mich 152, 369 NW2d 826 (1985). Like *Dye*, the *Bruce* case was not a FOIA case and does not

address the interplay between FOIA and the Peer Review Immunity Statute.

Even if the Peer Review Immunity Statute, through MCL § 15.243(1) (d) is applicable, it does not preempt FOIA in its entirety and thus remove one's right to have the Department's decision reviewed by the Circuit Court under the applicable standard of review. There is nothing in the Peer Review Immunity Statute or any case law cited by the Department which provides there is to be no judicial review. In other words, why wouldn't the circuit court review the Department's decision to ensure the records in question fall within the scope of the Peer Review Immunity Statute and also determine if the exceptions apply.

FOIA is specific on this point. A requesting person has the right to commence a circuit court action. MCL §15.240 (4). Indeed, the statute specifically contemplates the circuit court should review, de novo, the exemption issue:

> (4) The court shall determine the matter de novo and the burden is on the public body to sustain its denial. MCL § 15.240(4)

To allow the Department to be the decision maker, the judge and the jury, is not contemplated. The Department does not have unbridled discretion to do as it deems appropriate. To the contrary "claimed exemptions must be supported by substantiated justifications and explanation." *Booth Newspapers Inc. v Board of Regents of the University of Michigan*, 192 Mich App 574, 586; 481 NW2d 778, 784 (1992), reversed in part on other grounds 444 Mich 211; 507 NW2d 422 (1993).

Appellant-Plaintiff has been to court but he has yet to have a day in court where the merits of the dispute were considered.

## E. THE RECORDS IN DISPUTE ARE PUBLIC RECORDS

While not anticipating the Court will rule against the Plaintiff-Appellant on the above arguments, in the event it does do so this additional argument is presented.

The Court held "MCL §331.533 dictates that the records at issue here are not public as defendant has not decided to release the materials." Exhibit A, p. 6. MCL §331.533 does not provide a basis for the court's decision.

It provides, in part:

> Except as otherwise provided in Section 2, the record of any 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)

The language is clear. It states "[e]xcept as provided in Section 2 . . ." That is, the statute tells us that records which fall within the exceptions are "public." The "exception" language cannot be ignored or read out of the statute. It is unambiguous, clear and "plain." *G.C. Tremmes & Company v Guardian Glass Company*, 468 Mich 416, 435; 662 NW2d 710 (2003) and cases cited. Words are to be given their "common and approved usage." MCL 8.3a. The exception language removes the data, reports, etc. from the "non-public" category when the data, reports, etc. fall within § 331.532(a), (b) or (c). Section 2 deals with health research, education, maintaining professional standards and financial integrity. MCL § 331.532(a), (b), (c). Plaintiff-Appellant, through Dr. Karon's Affidavit has, at a minimum, put these exceptions at issue, further emphasizing the necessity for judicial review. Court of Appeals Docket, No. 14.

## F. THE DATA SOUGHT DOES NOT FALL WITHIN THE PEER REVIEW STATUTE CATEGORIES

FOIA allows for information to be exempted from disclosure when the requested information is "specifically described and exempted from disclosure by statute." MCL § 15.243(1)(d). The Peer Review Immunity Statute as discussed in detail above concerns itself with the care provided to persons and the competence of providers.

Subsection (1) of the Peer Review Immunity Statute reads:

> "A person, organization, or entity may provide to a review entity information or data relating to the physical or psychological condition of a person, the necessity, appropriateness, or quality of health care rendered to a person or the qualifications, competence or performance of a health care provider.

Simply, the data sought does not fit within any of these categories. What is sought is the names of drugs. Plaintiff-Appellant has at no time sought information about a particular "person" or the "qualifications, competence or performance of a health care provider." The information at issue does not fall within the categories covered by this Statute. Thus, MCL § 15.243 (1)(d) is not properly invoked.

## G. SANCTIONS ARE NOT WARRANTED, STANDARD OF REVIEW

The Standard of Review for a decision that an action is frivolous is clear error. *In re Attorney Fees & Costs*, 233 Mich App 694,701; 593 NW2d 589 (1999). To determine whether or not a claim is frivolous leads to a review of MCL 600.2591 (3) which defines "frivolous" to include that the primary purpose of the action was to harass, embarrass, or injure; that a party had no reasonable basis to believe that the facts underlying the parties legal position were true or that the parties legal position was devoid of arguable legal merit.

The sanctions were affirmed because, in part, the third count "was not sustainable under established case law issued in 1998, i.e. *Dye*, *supra* . . ." p. 6. The above argument and authority clearly demonstrates that sanctions pursuant to MCR 2.114(E) and (F) are not warranted. What is at stake here is a very significant matter which will affect FOIA requests into the future. There is nothing in the record to suggest that Plaintiff-Appellant was seeking to harass, or embarrass the Department, nor can it be objectively argued that the arguments presented are devoid of legal merit. The arguments and authority presented are very well grounded.

With regard to the untimeliness of the first two counts, they do not give rise to the level of awarding sanctions. Indeed the stipulation entered into early on resulted in hundreds of pages being provided, many of which were the subject of Counts I and II. In any event, if attorneys' fees or sanctions are warranted a hearing should be held to determine what would be appropriate fees for the work done on Counts I and II. Fees and sanctions for Count III should not be awarded.

## CONCLUSION

What was seemingly a very simple matter has turned into a case which has grown in significance. What the Court of Appeals has done is to severely limit and jeopardize FOIA and the role of the judiciary. Review and reversal of the decision are warranted.

Respectfully submitted,

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Dated: April 22, 2008

# STATE OF MICHIGAN

# COURT OF APPEALS

BEN HANSEN,

Plaintiff-Appellant,

v

DEPARTMENT OF COMMUNITY HEALTH,

Defendant-Appellee.

UNPUBLISHED
March 13, 2008

No. 278074
Ingham Circuit Court
LC No. 06-001033-CZ

Before: Saad, C.J., and Murphy and Donofrio, JJ.

PER CURIAM.

Plaintiff submitted three requests under the Freedom of Information Act (FOIA), MCL 15.231 *et seq.*, to defendant Michigan Department of Community Health (MDCH) in 2005 and early 2006. Defendant responded to plaintiff's requests on December 7, 2005, January 11, 2006, and February 23, 2006, respectively. Not satisfied with defendant's responses, plaintiff filed an action in the trial court, seeking copies of records that defendant stated were exempt from disclosure and more complete records on requests that had been granted. The three counts contained in the complaint correlated, chronologically, to the three FOIA requests. Defendant brought a motion for summary disposition, and it sought sanctions. The trial court granted defendant's motion for summary disposition, and the court awarded defendant costs, expenses, and attorney fees. Plaintiff appeals as of right. We affirm.

This case arises out of plaintiff's attempt to obtain documents regarding the Pharmacy Quality Improvement Project (PQIP) that was designed and intended to be a program that analyzed the prescribing patterns of psychiatric drugs for Medicaid members. Eli Lilly and Company (Lilly), Comprehensive NeuroScience, Inc. (CNS), and MDCH entered into an agreement that set forth program initiatives. Under the agreement, Lilly was obligated to provide certain funding that would be paid to CNS to carry out the program's initiatives on behalf of Michigan Medicaid, which is operated by MDCH. The agreement further provided:

> A fundamental goal of Lilly's business is to promote excellence in patient healthcare. Similarly, Michigan Medicaid also believes in this goal. Lilly and Michigan Medicaid believe that the Program Initiatives should further this mutual goal by helping to ensure that patients obtain the most appropriate medicines that such patients may need based on the medical judgment of such patients' physicians. Therefore, this Agreement is being entered into solely for the purpose of attempting to further this aligned goal of the parties and has nothing to do with

nor is it intended to obligate Michigan Medicaid in any way to provide Lilly with any form of preferential treatment for any Lilly product.

The language in the agreement also indicated that medical cost reductions could result from the program.

The trial court granted summary disposition in favor of defendant pursuant to MCR 2.116(C)(7), (8), and (10). The court found that defendant, in denying requests, complied with the statutory notice requirements by timely providing plaintiff with appropriate written explanations for the denials in the form of claiming either an exemption or nonexistence.[1] This, however, did not answer the basic question whether the denials were proper under the law. But the trial court proceeded to award defendant costs, expenses, and attorney fees under MCR 2.114(E) and (F) and MCL 600.2591, indicating that plaintiff had filed "a complaint clearly barred by the statute of limitations." Considering this language with the fact that the order provided for summary dismissal, in part, under MCR 2.116(C)(7), we can presume that the court was also of the opinion that the statute of limitations supported dismissal of the entire action.

Defendant argued that plaintiff's claims were barred by the statute of limitations pursuant to MCR 2.116(C)(7). When a public body makes a final determination to deny all or a portion of a particular request, the requesting person may "[c]ommence 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." MCL 15.240(1)(b). Plaintiff's first two FOIA requests garnered final responses from defendant that were more than 180 days before plaintiff filed his complaint. In plaintiff's appellate brief, the failure of the first two counts in the complaint, which pertained to the first two FOIA requests, is essentially conceded because of the statute of limitations. Plaintiff focuses instead on count III. Plaintiff's third FOIA request, as addressed in count III, received a response from defendant on February 23, 2006, and plaintiff filed a complaint on August 11, 2006, which was within 180 days of defendant's response. See MCR 2.101(B)("A civil action is commenced by filing a complaint with a court"). However, the record is somewhat unclear regarding the filing of a complaint. As indicated, the record contains a complaint that is date stamped August 11, 2006, but that complaint is immediately followed in the record by another complaint, not titled an amended complaint, which is date stamped August 30, 2006. The complaints are identical, and the sole summons was issued August 30, 2006. Defendant, referencing the August 30, 2006, date, argues that all three counts were time-barred,

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[1] The trial court cited MCL 15.235 in its ruling. MCL 15.235(2) indicates that a public body must reply in some form to a FOIA request within 5 business days after receipt of the request. MCL 15.235(4) addresses full or partial denials of FOIA requests, and it requires the public body to send a written notice to the requesting individual that explains the basis for the denial, such as the record is exempt from disclosure or the requested record does not exist. Interestingly, a review of plaintiff's complaint reveals that plaintiff never even claimed that defendant had failed to timely submit a response to the requests, nor that defendant had failed to give an explanation why some requests were denied. Rather, plaintiff alleged that either documents were not fully provided despite the granting of a request, or that a denial predicated on a claimed exemption was improper.

and it is true that if August 30, 2006, is the point of demarcation, the complaint would be untimely (189 days). We note, however, that at the hearing on the summary disposition motion, counsel for defendant stated, "This third FOIA request[] was just under the wire, just within 169 days." But then this statement conflicts with defendant's own argument in its summary disposition brief that all three counts were time-barred based on a complaint filing date of August 30, 2006. We conclude that, because the record contains a complaint that was filed on August 11, 2006, and because an action is commenced with the filing of a complaint, the third count was timely, and the court erred in dismissing it pursuant to the statute of limitations.[2] The statute of limitations, however, dictated the dismissal of the first two counts. Accordingly, the remainder of this opinion will solely address count III.

Plaintiff has narrowed his demands relative to count III, seeking only PQIP documents pertaining to psychiatric drugs prescribed to Michigan children under the age of 5 years old and psychiatric drugs prescribed to patients who were using five or more of these drugs concurrently.[3] Plaintiff did not seek the names of the patients taking the drugs, acknowledging that such information would be properly redacted. Pursuant to an order for private review of records, plaintiff and plaintiff's counsel were given the opportunity to review the documents at issue, which were then returned to defendant. The parties do not agree, however, on whether the documents can or should be formally released.

Plaintiff first argues that the trial court failed to conduct a de novo review as required by the FOIA. "The court shall determine [whether a public record is exempt from disclosure] de novo and the burden is on the public body to sustain its denial." MCL 15.240(4). "The trial court's review of these records is to be a de novo review which connotes a strict standard of review." *The Evening News Ass'n v Troy*, 417 Mich 481, 501 n 17; 339 NW2d 421 (1983). Although the trial court did not reach the question whether the documents at issue were exempt, which constituted error on the court's part with respect to count III, the issues that were determined by the court were certainly addressed and reviewed de novo. We note that, in the judicial process of determining whether a FOIA request was properly denied by the public body on the basis of a claimed exemption, the court should receive information from the public body showing a complete particularized justification for the denial, or the court should conduct an *in camera* hearing to determine whether there was justification, or the court can allow a plaintiff's attorney to have access to contested documents *in camera*. *Id.* at 516. MCL 15.240(4) provides

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[2] We note that, to some extent, we are giving plaintiff the benefit of the doubt on this issue considering our final resolution in favor of defendant. We further note that, in general, a statute of limitations is tolled "[a]t the time the complaint is filed, if a copy of the summons and complaint are served on the defendant within the time set forth in the supreme court rules." MCL 600.5856(a). Here, the summons and complaint were served on defendant before the summons's expiration date. The summons does not differentiate between the two complaints.

[3] More specifically, plaintiff had requested: "1. (Monthly) Michigan Under 5 Detail by Drug and Quality Indicator in 2005; and 2. (Monthly) Patients on 5 or More Concurrent Behavioral Drugs in 2005." In response, defendant stated that the request had been reviewed "and it has been determined that the above records, in their entirety, are protected from disclosure pursuant to MCL 331.533."

that "[t]he court, on its own motion, may view the public record in controversy in private before reaching a decision." Here, plaintiff and plaintiff's counsel were permitted to review the requested documents. To the extent that plaintiff complains that the court did not personally review documents associated with plaintiff's third request, it was not required, nor necessary, and ultimately it has no bearing on proper resolution of this case.

Turning to the issue of whether the third request was properly denied and whether the requested documents were exempt, we first acknowledge our standards of review. In *Herald Co, Inc v Eastern Michigan Univ Bd of Regents*, 475 Mich 463, 471-472; 719 NW2d 19 (2006), our Supreme Court enunciated the various standards relative to FOIA actions:

> First, we continue to hold that legal determinations are reviewed under a de novo standard. Second, we also hold that the clear error standard of review is appropriate in FOIA cases where a party challenges the underlying facts that support the trial court's decision. In that case, the appellate court must defer to the trial court's view of the facts unless the appellate court is left with the definite and firm conviction that a mistake has been made by the trial court. Finally, when an appellate court reviews a decision committed to the trial court's discretion, such as the balancing test at issue in this case, we hold that the appellate court must review the discretionary determination for an abuse of discretion and cannot disturb the trial court's decision unless it falls outside the principled range of outcomes.

The application of an exemption that involves a legal determination is reviewed de novo. *Federated Publications, Inc v Lansing*, 467 Mich 98, 106; 649 NW2d 383 (2002), mod on other grounds in *Herald Co, supra.* Again, the trial court failed to reach the issue of whether the materials were exempt, but instead of remanding the matter for resolution, we shall directly address the issue for purposes of judicial expediency because, as reflected in our analysis below, the issue ultimately constitutes a pure legal question.

Defendant claims that the documents are exempt under MCL 331.531 *et seq.*, commonly referred to as Michigan's peer review immunity statute, while plaintiff maintains that the documents are subject to release under the same statutory scheme, although patient names must be redacted. Defendant specifically claimed that the documents were exempt under MCL 331.532 and MCL 331.533. The FOIA is a "prodisclosure statute," *Swickard v Wayne Co Medical Examiner,* 438 Mich 536, 558; 475 NW2d 304 (1991), under which a defendant bears the burden of establishing an exemption, MCL 15.240(4). In a circuit court action to compel a public body's disclosure of public records, "a court that determines a public record is not exempt from disclosure shall order the public body to cease withholding or to produce all or a portion of a public record wrongfully withheld, regardless of the location of the public record." MCL 15.240(4). The FOIA exempts from disclosure any documents that are "specifically described and exempted from disclosure by statute." MCL 15.243(1)(d). The exemptions, however, are to be "narrowly construed." *Swickard, supra* at 558.

MCL 331.531(1) provides:

> A person, organization, or entity may provide to a review entity information or data relating to the physical or psychological condition of a person,

the necessity, appropriateness, or quality of health care rendered to a person, or the qualifications, competence, or performance of a health care provider.

"A person, organization, or entity is not civilly or criminally liable" for providing information or data under the statute, or for, in general, releasing or publishing records and reports. MCL 331.531(3). A "review entity" includes "[a] state department or agency whose jurisdiction encompasses the information described in subsection (1)." MCL 331.531(2)(d). Both parties proceed on the basis that defendant is a "review entity" under the statute, and given the lack of any dispute on the matter and the nature of the PQIP and the MDCH, we shall treat defendant as a "review entity" for purposes of our analysis. Defendant argues that plaintiff is not a "review entity," and we agree with this assessment. Regardless, plaintiff makes no claim that he is a "review entity." MCL 331.533 provides:

> The identity of a person whose condition or treatment has been studied under this act is confidential and a review entity shall remove the person's name and address from the record before the review entity releases or publishes a record of its proceedings, or its reports, findings, and conclusions. Except as otherwise provided in section 2 [MCL 331.532], the 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.

Plaintiff cites MCL 331.532(a)-(c) as establishing the relevant exceptions in this case to MCL 331.533. MCL 331.532(a)-(c) provide:

> The release or publication of a record of the proceedings or of the reports, findings, and conclusions of a review entity shall be for 1 or more of the following purposes:
>
> (a) To advance health care research or health care education.
>
> (b) To maintain the standards of the health care professions.
>
> (c) To protect the financial integrity of any governmentally funded program.

In his attempt to establish the applicability of the exceptions, plaintiff relies on the affidavit of Bertram P. Karon, Ph.D., a professor of clinical psychology at Michigan State University, who averred that he fully supports plaintiff's document request as the documents "contain information of useful educational value to researchers . . . who are eager to study the changing prescribing patterns of psychiatric drugs to young children in our state's Medicaid system, as well as the changing prescribing patterns of psychiatric drug cocktails to patients of all ages." Karon further averred that '[t]here is no justifiable reason this information should remain secret from the citizens and taxpayers of our state." Finally, Karon stated that "[h]aving this data will not only advance healthcare research and thus . . . education[,] but help ensure that appropriate standards among healthcare providers are maintained." We note that plaintiff

alleged that he "sits as a member of the [MDCH] Recipient Rights Advisory Committee having been appointed by the Director of the Department."

Plaintiff misconstrues the interaction between MCL 331.532 and MCL 331.533. In *Dye v St John Hosp & Med Ctr*, 230 Mich App 661, 672 n 10; 584 NW2d 747 (1998), this Court observed:

> [W]e find nothing within §§ 2 [MCL 331.532] or 3 [MCL 331.533] that places a duty on a review entity to release information. Instead, § 3 provides confidentiality protection. That protection is subject to exceptions listed in § 2. Thus, a disclosure falling within one of [the] specified purposes of § 2 does not run afoul of the confidentiality provisions of § 3. Nothing within these sections, however, mandates the release of information within a category excepted from the confidentiality protection. It is one thing to exempt information from guaranteed confidentiality but quite another to require disclosure of that information.

Reading MCL 331.532 and MCL 331.533 together, it is evident that a review entity can release or publish reports if a proper purpose is established under § 2, and upon doing so, the provisions in § 3 that dictate that the records are confidential, are not public records, and are not discoverable become inoperable. Thus, plaintiff's claim that review entity reports are subject to release if plaintiff shows a proper purpose for him or others to have access to the documents under § 2 fails because it is defendant, i.e., the review entity, which must first decide whether to release or publish the reports under § 2. In other words, the documents remain confidential, not discoverable, and not public under § 3 until the review entity chooses to release the documents. Here, defendant has not chosen to release or publish the relevant documents under § 2; therefore, they remain confidential, not discoverable, and they are not public records. Therefore, taking into consideration the FOIA exemptions, the documents sought by plaintiff are "specifically described and exempted from disclosure by statute." MCL 15.243(1)(d). Moreover, the FOIA in general pertains to requests for "public records," MCL 15.233, and MCL 331.533 dictates that the records at issue here are not public as defendant has not decided to release the materials. Accordingly, the trial court did not err in dismissing plaintiff's complaint as to count III, albeit for the wrong reasons. *Taylor v Laban*, 241 Mich App 449, 458; 616 NW2d 229 (2000).

Finally, on the issue of sanctions pursuant to MCR 2.114(E) and (F), as well as MCL 600.2591, which concern frivolous complaints or pleadings not well grounded in fact nor warranted by existing law, our review is under the clearly erroneous standard. *Kitchen v Kitchen*, 465 Mich 654, 661-662; 641 NW2d 245 (2002); *Cvengros v Farm Bureau Ins*, 216 Mich App 261, 266; 548 NW2d 698 (1996). Given that the first two counts were clearly time-barred and that the third count was not sustainable under established case law issued in 1998, i.e., *Dye, supra*, reversal is unwarranted.

Affirmed.

/s/ Henry William Saad
/s/ William B. Murphy
/s/ Pat M. Donofrio

STATE OF MICHIGAN

IN THE 30TH CIRCUIT COURT FOR THE COUNTY OF INGHAM

MAY 03 2007

BEN HANSEN

Plaintiff,

v

STATE OF MICHIGAN, DEPARTMENT OF COMMUNITY HEALTH

Defendants.

/

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

DOCKET NO. 06-1033-CZ

HON. NETTLES-NICKERSON

**PRESENT: HONORABLE BEVERLEY NETTLES-NICKERSON**
**Circuit Court Judge**

This Court, having reviewed Defendant's Motion to Dismiss per MCR 2.116(C)(7), MCR 2.116(C)(8), and MCR. 2.116(C)(10); brief in support thereof; Plaintiff's Response and Brief in Opposition thereto; all supporting correspondence documentation; having heard oral argument March 21, 2007, and being fully apprised of the issues, states the following:

## FINDINGS OF FACT

Essentially, this case involves three requests submitted by Ben Hansen ("Plaintiff") to the Michigan Department of Community Health ("Defendant") pursuant to the Freedom of Information Act ("FOIA"), MCL 15.231 *et seq.*

Plaintiff's **first** FOIA Request to Defendant, submitted November 14, 2005, was granted on December 7, 2005. Plaintiff's **second** FOIA request, submitted December 14, 2005, was granted in part and denied in part by Defendant on January 11, 2006, accompanied by Defendant's explanation of the statutory reason for the partial denial. Plaintiff's **third** FOIA request, submitted February 2, 2006, was granted in part and denied in part on February 23, 2006, and Defendant again included the basis for the denial.

Defendant supports their Motion to Dismiss by arguing that Plaintiff's claims are barred by the statute of limitations, Section 10(1)(b), MCL 15.240(1)(b), and that Plaintiff has failed to state any claims upon which relief can be granted. Additionally, Defendant maintains that Plaintiff has failed to state genuine issues of material fact.

Plaintiff asserts that his claim is not time-barred because the 3 FOIA requests are related, and as such, Plaintiff's complaint filed on August 11, 2006, is within 180 days from Defendant's "final" determination of Plaintiff's third "related" FOIA request. Thus, Plaintiff contends that his complaint was filed timely and is not barred by the statute of limitations.

In addition, Plaintiff maintains that the FOIA requests and complaint are in accordance with MCR 2.111(A)(1), and it is Defendant's burden to prove that the partial denials of Plaintiff's FOIA requests for certain records are statutorily exempt. Finally, Plaintiff states that Defendant's replies to Plaintiff's FOIA requests have been incomplete, and that Plaintiff was entitled to receive the information that was not provided by Defendant.

## CONCLUSIONS OF LAW

MCR 2.116(C)(7) tests whether a claim is barred because of immunity granted by law and requires consideration of all documentary evidence filed or submitted by the parties. In determining whether a party is entitled to judgment as a matter of law under MCR 2.116(C)(7), a

court "must accept as true a plaintiff's well-pleaded factual allegations, affidavits, or other documentary evidence and construe them in plaintiff's favor." *Wilson v Alpena County Rd Comm'n,* 263 Mich App 141, 145 (2004).

A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint and permits dismissal of a claim if the opposing party has failed to state a claim on which relief can be granted. Only the pleadings are examined; documentary evidence is not considered. If the claim is clearly unenforceable as a matter of law and no factual development could lead to recovery, a motion under MCR 2.116(C)(8) should be granted *Rorke v Savoy Energy, LP*, 260 Mich App 251, 253 (2003).

A motion under MCR 2.116(C)(10) requires this Court to test the factual sufficiency of the complaint. The trial court must consider the affidavits, pleadings, depositions, admissions and other evidence submitted by the parties in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Nastal v Henderson & Associates Investigations, Inc*, 471 Mich 712, 721 (2005).

**OPINION**

This Court finds that Plaintiff has failed to state a claim upon which relief can be granted, and there are no genuine issues of material fact per MCR 2.116(C)(10).

In this Court's opinion, Defendant's written notices partially denying Plaintiff's FOIA requests, dated January 11 and February 23, 2006, are in compliance with the statutory notice requirements pursuant to section 5(4)(a), MCL 15.235(4)(a). This Court holds that Defendant timely provided Plaintiff a written explanation for the basis of the denials, including why the

requested public record is exempt from disclosure and whether or not the public record exists. (See Affidavit of Mary Greco, Defendant's Coordinator of FOIA Requests).

Therefore, based on the reasons stated in this Opinion, Defendant's Motion to Dismiss is granted. This Court will not address any further issues.

Further; per MCR 2.114(E) and (F) and MCL 600.2591, this Court may not award Defendant punitive damages for Plaintiff's filing a complaint clearly barred by the statute of limitations; however, Defendant is entitled to an award of costs, expenses, and attorney fees for having to respond.

**ORDER**

**NOW, THEREFORE** Defendant's Motion to Dismiss pursuant to MCR 2.116(C)(7), MCR 2.116(C)(8) and MCR 2.116(C)(10) is **GRANTED**.

**IT IS FURTHER ORDERED** that Defendant is awarded costs, expenses, and attorney fees pursuant to MCR 2.114(E) and (F) and MCL 600.2591 in the sum of $3,500.00.

**IT IS SO ORDERED.**

In compliance with MCR 2.602(A)(3), this Court finds that this decision resolves the last pending claim and closes the case.

Dated: 4/30/ 2007

Hon. Beverley Nettles-Nickerson
Circuit Court Judge

## PROOF OF SERVICE

I hereby certify that I served a copy of the above Order upon the attorneys/parties of record by placing said Order in an envelope addressed to each and placing same for mailing with the Untied States Mail at Lansing, Michigan, on May 1, 2007.

Trinidad Morales
Judicial Assistant

cc: Alan Kellman
Thomas Quasarano

1 of 14 DOCUMENTS



*** THIS DOCUMENT IS CURRENT THROUGH P.A. 72, 04/02/08 ***

CHAPTER 15 PUBLIC OFFICERS AND EMPLOYEES
FREEDOM OF INFORMATION ACT

**Go to the Michigan Code Archive Directory**

MCLS prec § 15.231 (2008)

MCL § 15.231

**Preceding § 15.231**

AN ACT to provide for public access to certain public records of public bodies; to permit certain fees; to prescribe the powers and duties of certain public officers and public bodies; to provide remedies and penalties; and to repeal certain acts and parts of acts.

## § 15.231. Short title; public policy.

Sec. 1. (1) This act shall be known and may be cited as the "freedom of information act".

(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.

**§ 15.232. Definitions.**

Sec. 2. As used in this act:

(a) "Field name" means the label or identification of an element of a computer data base that contains a specific item of information, and includes but is not limited to a subject heading such as a column header, data dictionary, or record layout.

(b) "FOIA coordinator" means either of the following:

(i) An individual who is a public body.

(ii) An individual designated by a public body in accordance with section 6 to accept and process requests for public records under this act.

(c) "Person" means an individual, corporation, limited liability company, partnership, firm, organization, association, governmental entity, or other legal entity. Person does not include an individual serving a sentence of imprisonment in a state or county correctional facility in this state or any other state, or in a federal correctional facility.

(d) "Public body" means any of the following:

(i) A state officer, employee, agency, department, division, bureau, board, commission, council, authority, or other body in the executive branch of the state government, but does not include the governor or lieutenant governor, the executive office of the governor or lieutenant governor, or employees thereof.

(ii) An agency, board, commission, or council in the legislative branch of the state government.

(iii) A county, city, township, village, intercounty, intercity, or regional governing body, council, school district, special district, or municipal corporation, or a board, department, commission, council, or agency thereof.

(iv) Any other body which is created by state or local authority or which is primarily funded by or through state or local authority.

(v) The judiciary, including the office of the county clerk and employees thereof when acting in the capacity of clerk to the circuit court, is not included in the definition of public body.

(e) "Public record" means a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function, from the time it is created. Public record does not include computer software. This act separates public records into the following 2 classes:

(i) Those that are exempt from disclosure under section 13.

(ii) All public records that are not exempt from disclosure under section 13 and which are subject to disclosure under this act.

(f) "Software" means a set of statements or instructions that when incorporated in a machine usable medium is capable of causing a machine or device having information processing capabilities to indicate, perform, or achieve a particular function, task, or result. Software does not include computer-stored information or data, or a field name if disclosure of that field name does not violate a software license.

(g) "Unusual circumstances" means any 1 or a combination of the following, but only to the extent necessary for the proper processing of a request:

(i) The need to search for, collect, or appropriately examine or review a voluminous amount of separate and distinct public records pursuant to a single request.

(ii) The need to collect the requested public records from numerous field offices, facilities, or other establishments which are located apart from the particular office receiving or processing the request.

(h) "Writing" means handwriting, typewriting, printing, photostating, photographing, photocopying, and every other means of recording, and includes letters, words, pictures, sounds, or symbols, or combinations thereof, and papers, maps, magnetic or paper tapes, photographic films or prints, microfilm, microfiche, magnetic or punched cards, discs, drums, or other means of recording or retaining meaningful content.

(i) "Written request" means a writing that asks for information, and includes a writing transmitted by facsimile, electronic mail, or other electronic means.

**§ 15.233. Public records; right to inspect, copy, or receive; subscriptions; forwarding requests; file; inspection and examination; memoranda or abstracts; rules; compilation, summary, or report of information; creation of new public record; certified copies.**

Sec. 3. (1) Except as expressly provided in section 13, upon providing a public body's FOIA coordinator with a written request that describes a public record sufficiently to enable the public body to find the public record, a person has a right to inspect, copy, or receive copies of the requested public record of the public body. A person has a right to subscribe to future issuances of public records that are created, issued, or disseminated on a regular basis. A subscription shall be valid for up to 6 months, at the request of the subscriber, and shall be renewable. An employee of a public body who receives a request for a public record shall promptly forward that request to the freedom of information act coordinator.

(2) A freedom of information act coordinator shall keep a copy of all written requests for public records on file for no less than 1 year.

(3) A public body shall furnish a requesting person a reasonable opportunity for inspection and examination of its public records, and shall furnish reasonable facilities for making memoranda or

abstracts from its public records during the usual business hours. A public body may make reasonable rules necessary to protect its public records and to prevent excessive and unreasonable interference with the discharge of its functions. A public body shall protect public records from loss, unauthorized alteration, mutilation, or destruction.

(4) This act does not require a public body to make a compilation, summary, or report of information, except as required in section 11.

(5) This act does not require a public body to create a new public record, except as required in section 11, and to the extent required by this act for the furnishing of copies, or edited copies pursuant to section 14(1), of an already existing public record.

(6) The custodian of a public record shall, upon written request, furnish a requesting person a certified copy of a public record.

**§ 15.234. Fee; waiver or reduction; affidavit; deposit; calculation of costs; limitation; provisions inapplicable to certain public records.**

Sec. 4. (1) A public body may charge a fee for a public record search, the necessary copying of a public record for inspection, or for providing a copy of a public record. Subject to subsections (3) and (4), the fee shall be limited to actual mailing costs, and to the actual incremental cost of duplication or publication including labor, the cost of search, examination, review, and the deletion and separation of exempt from nonexempt information as provided in section 14. A search for a public record may be conducted or copies of public records may be furnished without charge or at a reduced charge if the public body determines that a waiver or reduction of the fee is in the public interest because searching for or furnishing copies of the public record can be considered as primarily benefiting the general public. A public record search shall be made and a copy of a public record

shall be furnished without charge for the first $20.00 of the fee for each request to an individual who is entitled to information under this act and who submits an affidavit stating that the individual is then receiving public assistance or, if not receiving public assistance, stating facts showing inability to pay the cost because of indigency.

(2) A public body may require at the time a request is made a good faith deposit from the person requesting the public record or series of public records, if the fee authorized under this section exceeds $50.00. The deposit shall not exceed 1/2 of the total fee.

(3) In calculating the cost of labor incurred in duplication and mailing and the cost of examination, review, separation, and deletion under subsection (1), a public body may not charge more than the hourly wage of the lowest paid public body employee capable of retrieving the information necessary to comply with a request under this act. Fees shall be uniform and not dependent upon the identity of the requesting person. A public body shall utilize the most economical means available for making copies of public records. A fee shall not be charged for the cost of search, examination, review, and the deletion and separation of exempt from nonexempt information as provided in section 14 unless failure to charge a fee would result in unreasonably high costs to the public body because of the nature of the request in the particular instance, and the public body specifically identifies the nature of these unreasonably high costs. A public body shall establish and publish procedures and guidelines to implement this subsection.

(4) This section does not apply to public records prepared under an act or statute specifically authorizing the sale of those public records to the public, or if the amount of the fee for providing a copy of the public record is otherwise specifically provided by an act or statute.

**§ 15.235. Request to inspect or receive copy of public record; response to request; failure to respond; damages; contents of notice denying request; signing notice of denial; notice extending period of response; action by requesting person.**

Sec. 5. (1) Except as provided in section 3, a person desiring to inspect or receive a copy of a public record shall make a written request for the public record to the FOIA coordinator of a public body. A written request made by facsimile, electronic mail, or other electronic transmission is not received by a public body's FOIA coordinator until 1 business day after the electronic transmission is made.

(2) Unless otherwise agreed to in writing by the person making the request, a public body shall respond to a request for a public record within 5 business days after the public body receives the request by doing 1 of the following:

(a) Granting the request.

(b) Issuing a written notice to the requesting person denying the request.

(c) Granting the request in part and issuing a written notice to the requesting person denying the request in part.

(d) Issuing a notice extending for not more than 10 business days the period during which the public body shall respond to the request. A public body shall not issue more than 1 notice of extension for a particular request.

(3) Failure to respond to a request pursuant to subsection (2) constitutes a public body's final determination to deny the request. In a circuit court action to compel a public body's disclosure of a public record under section 10, the circuit court shall assess damages against the public body pursuant to section 10(8) if the circuit court has done both of the following:

(a) Determined that the public body has not complied with subsection (2).

(b) Ordered the public body to disclose or provide copies of all or a portion of the public record.

(4) A 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. The written notice shall contain:

(a) An 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.

(b) A certificate that the public record does not exist under the name given by the requester or by another name reasonably known to the public body, if that is the reason for denying the request or a portion of the request.

(c) A description of a public record or information on a public record that is separated or deleted pursuant to section 14, if a separation or deletion is made.

(d) A full explanation of the requesting person's right to do either of the following:

(i) Submit to the head of the public body a written appeal that specifically states the word "appeal" and identifies the reason or reasons for reversal of the disclosure denial.

(ii) Seek judicial review of the denial under section 10.

(e) Notice of the right to receive attorneys' fees and damages as provided in section 10 if, after judicial review, the circuit court determines that the public body has not complied with this section and orders disclosure of all or a portion of a public record.

(5) The individual designated in section 6 as responsible for the denial of the request shall sign the written notice of denial.

(6) If a public body issues a notice extending the period for a response to the request, the notice shall specify the reasons for the extension and the date by which the public body will do 1 of the following:

(a) Grant the request.

(b) Issue a written notice to the requesting person denying the request.

(c) Grant the request in part and issue a written notice to the requesting person denying the request in part.

(7) If a public body makes a final determination to deny in whole or in part a request to inspect or receive a copy of a public record or portion of that public record, the requesting person may do either of the following:

(a) Appeal the denial to the head of the public body pursuant to section 10.

(b) Commence an action in circuit court, pursuant to section 10.

**§ 15.236. FOIA coordinator.**

Sec. 6. (1) A public body that is a city, village, township, county, or state department, or under the control of a city, village, township, county, or state department, shall designate an individual as the public body's FOIA coordinator. The FOIA coordinator shall be responsible for accepting and processing requests for the public body's public records under this act and shall be responsible for approving a denial under section 5(4) and (5). In a county not having an executive form of government, the chairperson of the county board of commissioners is designated the FOIA coordinator for that county.

(2) For all other public bodies, the chief administrative officer of the respective public body is designated the public body's FOIA coordinator.

(3) An FOIA coordinator may designate another individual to act on his or her behalf in accepting and processing requests for the public body's public records, and in approving a denial under section 5(4) and (5).

**§ 15.240. Options by requesting person; appeal; orders; venue; de novo proceeding; burden of proof; private view of public record; contempt; assignment of action or appeal for hearing, trial, or argument; attorneys' fees, costs, and disbursements; assessment of award; damages.**

Sec. 10. (1) If a public body makes a final determination to deny all or a portion of a request, the requesting person may do 1 of the following at his or her option:

(a) Submit to the head of the public body a written appeal that specifically states the word "appeal" and identifies the reason or reasons for reversal of the denial.

(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.

(2) Within 10 days after receiving a written appeal pursuant to subsection (1)(a), the head of a public body shall do 1 of the following:

(a) Reverse the disclosure denial.

(b) Issue a written notice to the requesting person upholding the disclosure denial.

(c) Reverse the disclosure denial in part and issue a written notice to the requesting person upholding the disclosure denial in part.

(d) Under unusual circumstances, Issue a notice extending for not more than 10 business days the period during which the head of the public body shall respond to the written appeal. The head of a public body shall not issue more than 1 notice of extension for a particular written appeal.

(3) A board or commission that is the head of a public body is not considered to have received a written appeal under subsection (2) until the first regularly scheduled meeting of that board or commission following submission of the written appeal under subsection (1)(a). If the head of the public body fails to respond to a written appeal pursuant to subsection (2), or if the head of the pub-

lic body upholds all or a portion of the disclosure denial that is the subject of the written appeal, the requesting person may seek judicial review of the nondisclosure by commencing an action in circuit court under subsection (1)(b).

(4) In an action commenced under subsection (1)(b), a court that determines a public record is not exempt from disclosure shall order the public body to cease withholding or to produce all or a portion of a public record wrongfully withheld, regardless of the location of the public record. The circuit court for the county in which the complainant resides or has his or her principal place of business, or the circuit court for the county in which the public record or an office of the public body is located has venue over the action. The court shall determine the matter de novo and the burden is on the public body to sustain its denial. The court, on its own motion, may view the public record in controversy in private before reaching a decision. Failure to comply with an order of the court may be punished as contempt of court.

(5) An action commenced under this section and an appeal from an action commenced under this section shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.

(6) If 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. If the person or public body prevails in part, the court may, in its discretion, award all or an appropriate portion of reasonable attorneys' fees, costs, and disbursements. The award shall be assessed against the public body liable for damages under subsection (7).

(7) If the circuit court determines in an action commenced under this section that the public body has arbitrarily and capriciously violated this act by refusal or delay in disclosing or providing copies of a public record, the court shall award, in addition to any actual or compensatory damages, puni-

tive damages in the amount of $500.00 to the person seeking the right to inspect or receive a copy of a public record. The damages shall not be assessed against an individual, but shall be assessed against the next succeeding public body that is not an individual and that kept or maintained the public record as part of its public function.

**§ 15.241. Publications to be disclosed by state agency; form; nonpublished material; effect; necessity for notice; exemptions; compliance; commencement of suit; attorneys' fees, costs, disbursements; jurisdiction; state agency, contested case, rules; defined.**

Sec. 11. (1) A state agency shall publish and make available to the public all of the following:

(a) Final orders or decisions in contested cases and the records on which they were made.

(b) Promulgated rules.

(c) Other written statements which implement or interpret laws, rules, or policy, including but not limited to guidelines, manuals, and forms with instructions, adopted or used by the agency in the discharge of its functions.

(2) Publications may be in pamphlet, looseleaf, or other appropriate form in printed, mimeographed, or other written matter.

(3) Except to the extent that a person has actual and timely notice of the terms thereof, a person shall not in any manner be required to resort to, or be adversely affected by, a matter required to be published and made available, if the matter is not so published and made available.

(4) This section does not apply to public records which are exempt from disclosure under section 13.

(5) A person may commence an action in the circuit court to compel a state agency to comply with this section. If the court determines that the state agency has failed to comply, the court shall

order the state agency to comply and shall award reasonable attorneys' fees, costs, and disbursements to the person commencing the action. The circuit court for the county in which the state agency is located shall have jurisdiction to issue the order.

(6) As used in this section, "state agency", "contested case", and "rules" shall have the same meanings as ascribed to those terms in Act No. 306 of the Public Acts of 1969, as amended, being sections 24.201 to 24.315 of the Michigan Compiled Laws.

**§ 15.243. Exemptions from disclosure; public body as school district or public school academy; withholding of information required by law or in possession of executive office.**

Sec. 13. (1) A public body may exempt from disclosure as a public record under this act any of the following:

(a) Information of a personal nature if public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy.

(b) Investigating records compiled for law enforcement purposes, but only to the extent that disclosure as a public record would do any of the following:

(i) Interfere with law enforcement proceedings.

(ii) Deprive a person of the right to a fair trial or impartial administrative adjudication.

(iii) Constitute an unwarranted invasion of personal privacy.

(iv) Disclose the identity of a confidential source, or if the record is compiled by a law enforcement agency in the course of a criminal investigation, disclose confidential information furnished only by a confidential source.

(v) Disclose law enforcement investigative techniques or procedures.

(vi) Endanger the life or physical safety of law enforcement personnel.

(c) A public record that if disclosed would prejudice a public body's ability to maintain the physical security of custodial or penal institutions occupied by persons arrested or convicted of a crime or admitted because of a mental disability, unless the public interest in disclosure under this act outweighs the public interest in nondisclosure.

(d) Records or information specifically described and exempted from disclosure by statute.

(e) A public record or information described in this section that is furnished by the public body originally compiling, preparing, or receiving the record or information to a public officer or public body in connection with the performance of the duties of that public officer or public body, if the considerations originally giving rise to the exempt nature of the public record remain applicable.

(f) Trade secrets or commercial or financial information voluntarily provided to an agency for use in developing governmental policy if:

(i) The information is submitted upon a promise of confidentiality by the public body.

(ii) The promise of confidentiality is authorized by the chief administrative officer of the public body or by an elected official at the time the promise is made.

(iii) A description of the information is recorded by the public body within a reasonable time after it has been submitted, maintained in a central place within the public body, and made available to a person upon request. This subdivision does not apply to information submitted as required by law or as a condition of receiving a governmental contract, license, or other benefit.

(g) Information or records subject to the attorney-client privilege.

(h) Information or records subject to the physician-patient privilege, the psychologist-patient privilege, the minister, priest, or Christian Science practitioner privilege, or other privilege recognized by statute or court rule.

(i) A bid or proposal by a person to enter into a contract or agreement, until the time for the public opening of bids or proposals, or if a public opening is not to be conducted, until the deadline for submission of bids or proposals has expired.

(j) Appraisals of real property to be acquired by the public body until either of the following occurs:

(i) An agreement is entered into.

(ii) Three years have elapsed since the making of the appraisal, unless litigation relative to the acquisition has not yet terminated.

(k) Test questions and answers, scoring keys, and other examination instruments or data used to administer a license, public employment, or academic examination, unless the public interest in disclosure under this act outweighs the public interest in nondisclosure.

(l) Medical, counseling, or psychological facts or evaluations concerning an individual if the individual's identity would be revealed by a disclosure of those facts or evaluation , including protected health information, as defined in 45 CFR 160.103 .

(m) Communications and notes within a public body or between public bodies of an advisory nature to the extent that they cover other than purely factual materials and are preliminary to a final agency determination of policy or action. This exemption does not apply unless the public body shows that in the particular instance the public interest in encouraging frank communication between officials and employees of public bodies clearly outweighs the public interest in disclosure. This exemption does not constitute an exemption under state law for purposes of section 8(h) of the open meetings act, 1976 PA 267, MCL 15.268. As used in this subdivision, "determination of policy or action" includes a determination relating to collective bargaining, unless the public record is otherwise required to be made available under 1947 PA 336, MCL 423.201 to 423.217.

(n) Records of law enforcement communication codes, or plans for deployment of law enforcement personnel, that if disclosed would prejudice a public body's ability to protect the public safety unless the public interest in disclosure under this act outweighs the public interest in nondisclosure in the particular instance.

(o) Information that would reveal the exact location of archaeological sites. The department of history, arts, and libraries may promulgate rules in accordance with the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328, to provide for the disclosure of the location of archaeological sites for purposes relating to the preservation or scientific examination of sites.

(p) Testing data developed by a public body in determining whether bidders' products meet the specifications for purchase of those products by the public body, if disclosure of the data would reveal that only 1 bidder has met the specifications. This subdivision does not apply after 1 year has elapsed from the time the public body completes the testing.

(q) Academic transcripts of an institution of higher education established under section 5, 6, or 7 of article VIII of the state constitution of 1963, if the transcript pertains to a student who is delinquent in the payment of financial obligations to the institution.

(r) Records of a campaign committee including a committee that receives money from a state campaign fund.

(s) Unless the public interest in disclosure outweighs the public interest in nondisclosure in the particular instance, public records of a law enforcement agency, the release of which would do any of the following:

(i) Identify or provide a means of identifying an informant.

(ii) Identify or provide a means of identifying a law enforcement undercover officer or agent or a plain clothes officer as a law enforcement officer or agent.

(iii) Disclose the personal address or telephone number of active or retired law enforcement officers or agents or a special skill that they may have.

(iv) Disclose the name, address, or telephone numbers of family members, relatives, children, or parents of active or retired law enforcement officers or agents.

(v) Disclose operational instructions for law enforcement officers or agents.

(vi) Reveal the contents of staff manuals provided for law enforcement officers or agents.

(vii) Endanger the life or safety of law enforcement officers or agents or their families, relatives, children, parents, or those who furnish information to law enforcement departments or agencies.

(viii) Identify or provide a means of identifying a person as a law enforcement officer, agent, or informant.

(ix) Disclose personnel records of law enforcement agencies.

(x) Identify or provide a means of identifying residences that law enforcement agencies are requested to check in the absence of their owners or tenants.

(t) Except as otherwise provided in this subdivision, records and information pertaining to an investigation or a compliance conference conducted by the department under article 15 of the public health code, 1978 PA 368, MCL 333.16101 to 333.18838, before a complaint is issued. This subdivision does not apply to records or information pertaining to 1 or more of the following:

(i) The fact that an allegation has been received and an investigation is being conducted, and the date the allegation was received.

(ii) The fact that an allegation was received by the department ; the fact that the department did not issue a complaint for the allegation; and the fact that the allegation was dismissed.

(u) Records of a public body's security measures, including security plans, security codes and combinations, passwords, passes, keys, and security procedures, to the extent that the records relate to the ongoing security of the public body.

(v) Records or information relating to a civil action in which the requesting party and the public body are parties.

(w) Information or records that would disclose the social security number of an individual.

(x) Except as otherwise provided in this subdivision, an application for the position of president of an institution of higher education established under section 4, 5, or 6 of article VIII of the state constitution of 1963, materials submitted with such an application, letters of recommendation or references concerning an applicant, and records or information relating to the process of searching for and selecting an individual for a position described in this subdivision, if the records or information could be used to identify a candidate for the position. However, after 1 or more individuals have been identified as finalists for a position described in this subdivision, this subdivision does not apply to a public record described in this subdivision, except a letter of recommendation or reference, to the extent that the public record relates to an individual identified as a finalist for the position.

(y) Records or information of measures designed to protect the security or safety of persons or property, whether public or private, including, but not limited to, building, public works, and public water supply designs to the extent that those designs relate to the ongoing security measures of a public body, capabilities and plans for responding to a violation of the Michigan anti-terrorism act, chapter LXXXIII-A of the Michigan penal code, 1931 PA 328, MCL 750.543a to 750.543z, emergency response plans, risk planning documents, threat assessments, and domestic preparedness strategies, unless disclosure would not impair a public body's ability to protect the security or safety

of persons or property or unless the public interest in disclosure outweighs the public interest in nondisclosure in the particular instance.

(2) A public body shall exempt from disclosure information that, if released, would prevent the public body from complying with 20 USC 1232g, commonly referred to as the family educational rights and privacy act of 1974. A public body that is a local or intermediate school district or a public school academy shall exempt from disclosure directory information, as defined by 20 USC 1232g, commonly referred to as the family educational rights and privacy act of 1974, requested for the purpose of surveys, marketing, or solicitation, unless that public body determines that the use is consistent with the educational mission of the public body and beneficial to the affected students. A public body that is a local or intermediate school district or a public school academy may take steps to ensure that directory information disclosed under this subsection shall not be used, rented, or sold for the purpose of surveys, marketing, or solicitation. Before disclosing the directory information, a public body that is a local or intermediate school district or a public school academy may require the requester to execute an affidavit stating that directory information provided under this subsection shall not be used, rented, or sold for the purpose of surveys, marketing, or solicitation.

(3) This act does not authorize the withholding of information otherwise required by law to be made available to the public or to a party in a contested case under the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328.

(4) Except as otherwise exempt under subsection (1), this act does not authorize the withholding of a public record in the possession of the executive office of the governor or lieutenant governor, or an employee of either executive office, if the public record is transferred to the executive office of the governor or lieutenant governor, or an employee of either executive office, after a request for the public record has been received by a state officer, employee, agency, department, division, bu-

reau, board, commission, council, authority, or other body in the executive branch of government that is subject to this act.

**§ 15.243a. Availability of salary records of employee or official of institution of higher education, school district, intermediate school district or community college.**

Sec. 13a. Notwithstanding section 13, an institution of higher education established under section 5, 6, or 7 of article 8 of the state constitution of 1963; a school district as defined in section 6 of Act No. 451 of the Public Acts of 1976, being section 380.6 of the Michigan Compiled Laws; an intermediate school district as defined in section 4 of Act No. 451 of the Public Acts of 1976, being section 380.4 of the Michigan Compiled Laws; or a community college established under Act No. 331 of the Public Acts of 1966, as amended, being sections 389.1 to 389.195 of the Michigan Compiled Laws shall upon request make available to the public the salary records of an employee or other official of the institution of higher education, school district, intermediate school district, or community college.

**§ 15.244. Public record containing exempt and nonexempt material; separation; disclosure, description of material exempted.**

Sec. 14. (1) If a public record contains material which is not exempt under section 13, as well as material which is exempt from disclosure under section 13, the public body shall separate the exempt and nonexempt material and make the nonexempt material available for examination and copying.

(2) When designing a public record, a public body shall, to the extent practicable, facilitate a separation of exempt from nonexempt information. If the separation is readily apparent to a person

requesting to inspect or receive copies of the form, the public body shall generally describe the material exempted unless that description would reveal the contents of the exempt information and thus defeat the purpose of the exemption.

**§ 15.245. Repeal.**

Sec. 15. Sections 21, 22 and 23 of Act No. 306 of the Public Acts of 1969, as amended, being sections 24.221, 24.222 and 24.223 of the Michigan Compiled Laws, are repealed.

**§ 15.246. Effective date.**

Sec. 16. This act shall take effect 90 days after being signed by the governor.

1 of 4 DOCUMENTS



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CHAPTER 331 HOSPITALS
RELEASE OF INFORMATION FOR MEDICAL RESEARCH AND EDUCATION

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MCLS prec § 331.531 (2008)

MCL § 331.531

**Preceding § 331.531**

AN ACT to provide for the release of certain information or data relating to health care research or education, health care entities, practitioners, or professions, or certain governmentally funded programs; to limit the liability with respect to the release of certain information or data; and to safeguard the confidential character of certain information or data. (Amended by Pub Acts 1980, No. 3, imd eff February 11, 1980.)

**§ 331.531. Providing information or data to review entity regarding physical condition, psychological condition, health care of person, or qualifications of provider; "review entity" defined; liability; disciplinary actions to be reported to department of labor and economic growth.**

Sec. 1. (1) A person, organization, or entity may provide to a review entity information or data relating to the physical or psychological condition of a person, the necessity, appropriateness, or quality of health care rendered to a person, or the qualifications, competence, or performance of a health care provider.

(2) As used in this section, "review entity" means 1 of the following:

(a) A duly appointed peer review committee of 1 of the following:

(i) The state.

(ii) A state or county association of health care professionals.

(iii) A health facility or agency licensed under article 17 of the public health code, 1978 PA 368, MCL 333.20101 to 333.22260.

(iv) A health care association.

(v) A health care network, a health care organization, or a health care delivery system composed of health professionals licensed under article 15 of the public health code, 1978 PA 368, MCL 333.16101 to 333.18838, or composed of health facilities licensed under article 17 of the public health code, 1978 PA 368, MCL 333.20101 to 333.22260, or both.

(vi) A health plan qualified under the program for medical assistance administered by the department of community health under the social welfare act, 1939 PA 280, MCL 400.1 to 400.119b.

(b) A professional standards review organization qualified under federal or state law.

(c) A foundation or organization acting pursuant to the approval of a state or county association of health care professionals.

(d) A state department or agency whose jurisdiction encompasses the information described in subsection (1).

(e) An organization established by a state association of hospitals or physicians, or both, that collects and verifies the authenticity of documents and other data concerning the qualifications, competence, or performance of licensed health care professionals and that acts as a health facility's agent pursuant to the health care quality improvement act of 1986, title IV of Public Law 99-660, 42 USC 11101 to 11152 .

(f) A professional corporation, limited liability partnership, or partnership consisting of 10 or more allopathic physicians, osteopathic physicians, or podiatric physicians and surgeons licensed under article 15 of the public health code, 1978 PA 368, MCL 333.16101 to 333.18838, who regularly practice peer review consistent with the requirements of article 17 of the public health code, 1978 PA 368, MCL 333.20101 to 333.22260.

(g) An organization established by a state association of pharmacists, that collects and verifies the authenticity of documents and other data concerning the qualifications, competence, or performance of licensed pharmacists and pharmacies.

(3) A person, organization, or entity is not civilly or criminally liable:

(a) For providing information or data pursuant to subsection (1).

(b) For an act or communication within its scope as a review entity.

(c) For releasing or publishing a record of the proceedings, or of the reports, findings, or conclusions of a review entity, subject to sections 2 and 3.

(4) The immunity from liability provided under subsection (3) does not apply to a person, organization, or entity that acts with malice.

(5) An entity described in subsection (2)(a)(v) or (vi) that employs, contracts with, or grants privileges to a health professional licensed or registered under article 15 of the public health code, 1978 PA 368, MCL 333.16101 to 333.18838, shall report each of the following to the department of community health not more than 30 days after it occurs:

(a) Disciplinary action taken by the entity against a health professional licensed or registered under article 15 of the public health code, 1978 PA 368, MCL 333.16101 to 333.18838, based on the health professional's professional competence, disciplinary action that results in a change of the health professional's employment status, or disciplinary action based on conduct that adversely affects the health professional's clinical privileges for a period of more than 15 days. As used in this subdivision, "adversely affects" means the reduction, restriction, suspension, revocation, denial, or failure to renew the clinical privileges of a health professional by an entity described in subsection (2)(a)(v) or (vi).

(b) Restriction or acceptance of the surrender of the clinical privileges of a health professional under either of the following circumstances:

(i) The health professional is under investigation by the entity.

(ii) There is an agreement in which the entity agrees not to conduct an investigation into the health professional's alleged professional incompetence or improper professional conduct.

(c) A case in which a health professional resigns or terminates a contract or whose contract is not renewed instead of the entity taking disciplinary action against the health professional.

(6) Upon request by another entity described in subsection (2) seeking a reference for purposes of changing or granting staff privileges, credentials, or employment, an entity described in subsec-

tion (2) that employs, contracts with, or grants privileges to health professionals licensed or registered under article 15 of the public health code, 1978 PA 368, MCL 333.16101 to 333.18838, shall notify the requesting entity of any disciplinary or other action reportable under subsection (5) that it has taken against a health professional employed by, under contract to, or granted privileges by the entity.

(7) For the purpose of reporting disciplinary actions under subsection (5), an entity described in subsection (2)(a)(v) or (vi) shall include only the following in the information provided:

(a) The name of the health professional against whom disciplinary action has been taken.

(b) A description of the disciplinary action taken.

(c) The specific grounds for the disciplinary action taken.

(d) The date of the incident that is the basis for the disciplinary action.

(8) For the purpose of reporting disciplinary actions under subsection (6), an entity described in subsection (2) shall include in the report only the information described in subsection (7)(a) to (d).

**§ 331.532. Release or publication of proceedings, reports, findings, and conclusions of review entity; purposes.**

Sec. 2. The release or publication of a record of the proceedings or of the reports, findings, and conclusions of a review entity shall be for 1 or more of the following purposes:

(a) To advance health care research or health care education.

(b) To maintain the standards of the health care professions.

(c) To protect the financial integrity of any governmentally funded program.

(d) To provide evidence relating to the ethics or discipline of a health care provider, entity, or practitioner.

(e) To review the qualifications, competence, and performance of a health care professional with respect to the selection and appointment of the health care professional to the medical staff of a health facility.

(f) To comply with section 20175 of the public health code, Act No. 368 of the Public Acts of 1978, being section 333.20175 of the Michigan Compiled Laws.

**§ 331.533. Confidentiality.**

Sec. 3. The identity of a person whose condition or treatment has been studied under this act is confidential and a review entity shall remove the person's name and address from the record before the review entity releases or publishes a record of its proceedings, or its reports, findings, and conclusions. Except as otherwise provided in section 2, the 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.