

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

BEN HANSEN, INTERNATIONAL CENTER
FOR THE STUDY OF PSYCHIATRY AND
PSYCHOLOGY, INC., and THE LAW PROJECT
FOR PSYCHIATRIC RIGHTS, INC.,

Plaintiffs,

v

STATE OF MICHIGAN, DEPARTMENT OF
COMMUNITY HEALTH,

Defendant.

OPINION AND ORDER

HON. ROSEMARIE E. AQUILINA

Docket No: 09-759-CZ

**At a session of said Court held in the City of
Lansing, County of Ingham, State of Michigan,
this 23rd day of September, 2009**

**PRESENT: The Honorable Rosemarie E. Aquilina
30th Judicial Circuit Court Judge**

This matter is before the Court on Defendant's *Motion for Summary Disposition* pursuant to MCR 2.116(C)(7), (8), and (10). Plaintiffs filed a complaint against the Michigan Department of Community Health ("MDCH") on May 29, 2009 under the Freedom of Information Act ("FOIA") seeking judicial review of MDCH's denial of certain requests for information related to the Pharmacy Quality Improvement Project ("PQIP"). MDCH, denied the request, in part, having determined that some of the information requested was non-public and confidential under the Peer Review Immunity Statute and, therefore, exempt from FOIA. Plaintiff Ben Hansen's previous case against MDCH regarding denial of the same requested information was dismissed

by this Court on April 30, 2007 pursuant to MCR 2.116(C)(7), (8), and (10) (Docket No. 06-1033-CZ). This Court's decision was affirmed by the Court of Appeals on March 13, 2008 in an unpublished opinion and an application for leave to appeal to the Michigan Supreme Court was denied on October 3, 2008.

When a challenge is raised pursuant to a FOIA denial, the burden is on the agency to prove its denial is lawful. MCL 15.240(4). The Court of Appeals reviewed this issue *de novo* in *Ben Hansen v Department of Community Health*, 2008 Mich App LEXIS 542 (2008), (the trial court never reached the merits of the case) and held that MDCH had met its burden to show the records were confidential, non-public, and exempt from FOIA.

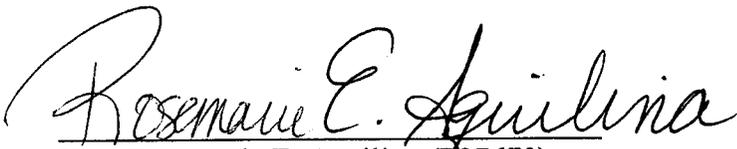
In its unpublished opinion, the Court of Appeals interpreted the interplay between Sections 2 and 3 of the Peer Review Immunity Statute and FOIA. *Ben Hansen v Department of Community Health*, 2008 Mich App LEXIS 542 (2008). It held that it is the review entity (MDCH) that "must first decide whether to release or publish the reports under § 2...In other words, the documents remain confidential, not discoverable, and they are not public under § 3 until the review entity chooses to release the documents." *Id.* at 15. While the Peer Review Immunity Statute *permits* release of information for educational or research purposes, it does not *mandate* that such information be released once such a purpose has been established. In *Dye v St John Hospital and Medical Center*, 230 Mich App 661 (1997), the statutes were interpreted similarly to mean the review entity was not obligated to disclose, but was protected from liability if it chose to disclose voluntarily. Under FOIA 13(1)(d), "records or information specifically described and exempted from disclosure by statute" are exempt from disclosure under FOIA. Therefore, §§ 2 and 3 of the Peer Review Immunity Statute exempt the requested records from disclosure under FOIA.

Although unpublished opinions are not binding on this Court, the issue of statutory interpretation at issue here was directly addressed by the Court of Appeals in the previous Ben Hansen case. The Michigan Supreme Court has also held the release of peer review records to be discretionary, not mandatory, when it upheld a Court of Appeals decision denying release of protected information to the Attorney General in a professional licensing investigation. *Attorney General v Bruce*, 422 Mich 157 (1985). The *Dye* and *Bruce* cases, cited in the Court of Appeals unpublished *Ben Hansen* opinion, support the interpretation that release of information falling within the Peer Review Immunity Statute is solely at the review entity's discretion; otherwise it remains confidential.

Having heard oral argument, and being fully apprised of the issues, this Court finds that MDCH has complied with the applicable statutes and its denial of information is within its discretion.

THEREFORE, IT IS ORDERED that Defendant's *Motion for Summary Disposition*, pursuant to MCR 2.116(C)(7), (8), and (10) is hereby **GRANTED**.

IT IS SO ORDERED.


Hon. Rosemarie E. Aquilina (P37670)
30th Circuit Court Judge

PROOF OF SERVICE

I hereby certify I served a copy of the above Order upon Plaintiff and Defendant by handing a copy to each party on September 23, 2009.


Luke A. Goodrich (P720909)
Law Clerk