

STATE OF MICHIGAN  
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March 19, 2007

Clerk of the Court  
Ingham County Circuit Court  
Veterans Memorial Courthouse  
313 W. Kalamazoo Street  
P.O. Box 40771  
Lansing, MI 48901

Dear Clerk:

Re: *Ben Hansen v State of Michigan, Department of Community Health*  
Ingham Circuit Court No. 06-1033-CZ  
A.G. No. 2006021202

Please find enclosed for filing, Defendant's Brief in Reply and Opposition to Plaintiff's Supplemental Brief in Response to Defendant's Motion to Dismiss, with Proof of Service attached.

Very truly yours,

Thomas Quasarano  
Assistant Attorney General  
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TQ:mr  
Enc.

c: Hon. Beverley Nettles-Nickerson  
Alan Kellman

STATE OF MICHIGAN  
CIRCUIT COURT FOR THE 30<sup>TH</sup> JUDICIAL CIRCUIT  
INGHAM COUNTY

BEN HANSEN,

Case No. 06-1033-CZ

Plaintiff,

v

HON. BEVERLEY NETTLES-NICKERSON

STATE OF MICHIGAN,  
DEPARTMENT OF COMMUNITY HEALTH,

Defendant.

AG#2006021202

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**DEFENDANT'S BRIEF IN REPLY AND OPPOSITION TO PLAINTIFF'S  
SUPPLEMENTAL BRIEF IN RESPONSE TO DEFENDANT'S MOTION TO DISMISS**

Defendant, Michigan Department of Community Health (MDCH), by its attorneys,  
Michael A. Cox, Attorney General of Michigan, and Thomas Quasarano, Assistant Attorney  
General, files its reply brief, in opposition to Plaintiff's supplemental brief, stating as follows:

**Counter-Statement of Facts**

In addition to the statement of facts presented in MDCH's brief and first reply brief filed in this action, MDCH states that the Court scheduled a November 1, 2006, hearing in this case commenced under the Freedom of Information Act (FOIA), MCL 15.231 *et seq.* At the hearing, the parties agreed, with the Court's approval (as set forth in the Court's November 6, 2007, Order), to attempt to resolve their differences. Accordingly, the hearing was adjourned. The MDCH, however, retained its defense that Plaintiff's claims are barred by the statute of limitations.

As provided for in the Court's Order, the parties' efforts were to include MDCH providing Plaintiff with copies of the final versions of existing nonexempt records (which did not exist in final form at the time of Plaintiff's request) falling within the scope of what Plaintiff described in his February 2, 2006, FOIA request as follows:

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 thru 12/2005; 4. (Monthly) Mich. Targeted Prescriber Change Report by Quality Indicator, 9/05 thru 12/2005; 5. (Monthly) Michigan Physician Specialty and Response Reports in 2005; and 6. (Quarterly) PQIP Monthly Mailing Logs in 2005.

The parties also agreed to, and did conduct, a teleconference to discuss:

1. Plaintiff's February 2, 2006, FOIA request for information that he described as: "[m]inutes and other records of any Pharmacy Quality Improvement Project (PQIP) Workgroup or Steering Committee meetings which took place in August, September, October or November 2005; and a PQIP committee meeting scheduled for December 15, 2005;" and, 2. MDCH's February 23, 2006, written notice issued in response to the February 2, 2006, FOIA request, which informed Plaintiff, among other things, that records falling under Plaintiff's description do not exist with MDCH.

Finally, as permitted under section 10(4) of the FOIA, MCL 15.240(4), the Court's Order provided that Plaintiff's attorney could conduct a restricted private review of the records withheld by MDCH under the Release of Information for Medical Research and Education Act, MCL 331.531 *et seq*, namely:

Comprehensive Neuroscience, Inc. reports deemed exempt from disclosure by statute or reasons of privacy per MCL 331.533 13(1)(a) and 13(1)(d) . . .

1. (Monthly) Michigan Under 5 Detail by Drug and Quality Indicator in 2005;
2. (Monthly) Patients on 5 or More Concurrent Behavioral Drugs in 2005.

The Court's Order further provided that the records reviewed by Plaintiff's counsel shall be returned to defense counsel immediately upon the completion of the review. Plaintiff's counsel reviewed the records, but has not yet returned them to defense counsel.

After the review of the records by Plaintiff's counsel, Plaintiff still disputed MDCH's legal position that the records are exempt from public disclosure under section 3 of the Release of Information for Medical Research and Education Act, MCL 331.533.

Thus, the hearing on MDCH's motions to dismiss and for costs, expenses, and attorney fees was rescheduled for March 21, 2007.

### Counter-Argument

- I. **Nothing in Plaintiff's supplemental brief addresses, let alone counters, the established record that, under MCR 2.116(C)(7), (8), and (10), Plaintiff's complaint should be dismissed, where certain of Plaintiff's claims are barred because the statutory period of limitations ran before Plaintiff commenced his action; and, therefore, Plaintiff has failed to state claims, or show a genuine issue of fact, on which relief can be granted to him under the FOIA.**

As stated in Defendant's reply to Plaintiff's response brief, Plaintiff, at page 2 of his response brief, states that he filed his complaint on August 11, 2006. Plaintiff's claims based on MDCH's December 7, 2005, written notice granting Plaintiff's November 14, 2005, request, and on the January 11, 2006, written notice granting in part and denying in part Plaintiff's December

14, 2005, request originated, respectively, 247 days and 212 days prior to Plaintiff's claimed commencement of his FOIA action on August 11, 2006. (See Counts I and II of Plaintiff's complaint and copies of the FOIA requests and the FOIA responses appended, respectively, as Attachment A and Attachments 1 and 2 to MDCH's brief in support of dispositive motion.)

Plaintiff's claims, therefore, are barred by the statutory period of limitations set forth under section 10(1)(b) of the FOIA, MCL 15.240(1)(b):

If a public body makes a final determination to deny all or a portion of a request, the requesting person may . . . [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*. (Emphasis added.)

**II. Nothing in Plaintiff's supplemental brief addresses, let alone counters, the established record that, under MCR 2.116(C)(7), (8), and (10), Plaintiff's complaint should be dismissed, where certain of Plaintiff's claims are barred by the application of the Release of Information for Medical Research and Education Act, MCL 331.531 *et seq*; and, therefore, Plaintiff has failed to state claims, or show a genuine issue of fact, on which relief can be granted to him under the FOIA.**

Assuming, *arguendo*, that Plaintiff's claim based on MDCH's February 23, 2006, written notice granting in part and denying in part Plaintiff's February 2, 2006, request originated 169 days prior to Plaintiff's claimed commencement of his FOIA action on August 11, 2006, this claim, nevertheless, should be dismissed. Plaintiff fails to state a claim under the FOIA, and does not show the existence of a genuine issue of material fact for the following reasons. (See copies of request and notice, Attachment 3 appended to MDCH's brief in support of dispositive motion.)

The only matter at issue in this case deals with records exempt from disclosure by law, as described, *supra*: "(Monthly) Michigan Under 5 Detail by Drug and Quality Indicator in 2005; and (Monthly) Patients on 5 or More Concurrent Behavioral Drugs in 2005."

Under the FOIA (and Plaintiff's supplemental brief does not dispute this), except for the aforementioned records exempt from disclosure by law, Plaintiff received copies of all existing nonexempt records.

Section 3 of the Release of Information for Medical Research and Education Act, 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, 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.* (Emphasis added.)

Section 3 of the Release of Information for Medical Research and Education Act is incorporated into the FOIA under section 13(1)(d) the act, MCL 15.243(1)(d) – the nondisclosure of "[r]ecords or information specifically described and exempted from disclosure by statute."

Furthermore, section 2(e)(i) and (ii) of the FOIA, MCL 15.232(e)(i) and (ii), separates public records into two classes: "Those that are exempt from disclosure . . . [and those] that are not exempt from disclosure. . ." Section 3 of the Release of Information for Medical Research and Education Act goes farther, and provides that the records at issue in the instant action *are not public records at all.*

Plaintiff's supplemental brief does not, and cannot, demonstrate that he is an entitled recipient of information under the Release of Information for Medical Research and Education Act. Plaintiff is not a "review entity." Furthermore, release of information under section 2 of the act, MCL 331.532, is only to certain entities for limited, specific purposes; and not to the world at large under the FOIA. Indeed, if Plaintiff believed his status is that of a "review entity" he

would have invoked the Release of Information for Medical Research and Education Act, and not the FOIA, in requesting the confidential information.

MDCH's notice issued in response to Plaintiff's FOIA request informed Plaintiff of the statutory basis for the exemption. (See Greco affidavit, Attachment 1 to Defendant's first reply brief.) Plaintiff, nevertheless, filed this FOIA action against MDCH.

**III. Nothing in Plaintiff's supplemental brief addresses, let alone contravenes, the affidavit of MDCH FOIA coordinator, Mary Greco, who shows that MDCH complied with the FOIA. Accordingly, MDCH's motion under MCR 2.116(C)(7), (8), and (10) should be granted.**

The MDCH's motions and briefs are supported by the affidavit of MDCH FOIA coordinator, Mary Greco. Ms. Greco shows that MDCH granted in full Plaintiff's November 14, 2005, FOIA request, and granted in part and denied in part, with explanation, Plaintiff's December 14, 2005, FOIA request. (See Greco affidavit, Attachment 1 to Defendant's first reply brief.) In any event, as discussed above, these FOIA requests constitute claims that are time-barred.

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

**IV. The only apparent purpose of Plaintiff's supplemental brief is an attempt to insinuate into this case Plaintiff's alleged motivation, purpose, or reason for wanting the records that are exempt from disclosure by the Release of Information for Medical Research and Education Act. For this reason, the supplemental brief merely clutters the record, and further supports MDCH's pending motion for costs, expenses, and attorney fees.**

**A. Plaintiff's supplemental brief does not address the FOIA disclosure issue.**

As part of his supplemental brief, Plaintiff submits numerous pages of exhibits that do not address, let alone overcome, MDCH's showing that Plaintiff's FOIA claims are barred by the statute of limitations and by the Release of Information for Medical Research and Education Act.

For example, the affidavit attached to Plaintiff's supplemental brief as Exhibit D does not contravene Ms. Greco's affidavit, and does not counter the statutory prohibition of disclosure under the Release of Information for Medical Research and Education Act.

Plaintiff's affiant merely opines that the information should be made readily available to the public. Whether the Release of Information for Medical Research and Education Act should be amended, to permit disclosure of the currently protected information to the world at large under the FOIA, is a matter for the State legislature to address; not the courts.

The affidavit submitted by Plaintiff fails to comply with MCR 2.116(G)(4) and (6) for the following reasons: 1) the affidavit fails to contravene Ms. Greco's affidavit, and, thus, Plaintiff's response to MDCH's dispositive motion under MCR 2.116(C)(10) rests upon the mere allegations of his complaint; and, 2) the affidavit is not composed of content or substance that would be admissible as evidence in an action based solely on the FOIA. Accordingly, the affidavit filed by Plaintiff should be stricken under MCR 2.115(B).

Finally, the only apparent purpose of Plaintiff's supplemental brief is an attempt to insinuate into this case Plaintiff's alleged motivation, purpose, or reason for making the FOIA requests. None of this, however, is relevant to an action commenced under the FOIA. *See State*



*Employees Ass'n v Dep't of Mgt and Budget*, 428 Mich 104, 121, 125-126; 405 NW2d 606 (1987); *Clerical-Technical Union v Bd of Trustees of Michigan State Univ*, 190 Mich App 300, 303; 476 NW2d 373 (1991); *Mullin v Detroit Police Dep't*, 133 Mich App 46, 52-53; 348 NW2d 708 (1984) -- a person's purpose or reason for making a FOIA request is not a consideration in the making of a disclosure determination.

- B. Assuming, *arguendo*, that the supplemental brief filed by Plaintiff were composed of content relevant to this FOIA action, it would support MDCH, not Plaintiff.**

Plaintiff's supplemental brief is replete with statements both irrelevant to the instant FOIA action and misleading. For these reasons, MDCH is compelled to respond.

Generally, Plaintiff claims in his supplemental brief that he is concerned with the oversight of the Pharmacy Quality Improvement Project (PQIP). By way of background, PQIP is a collaborative effort that involves MDCH's Mental Health and Substance Abuse Administration and its Medical Services Administration, and Comprehensive NeuroScience, Inc. Eli Lilly and Company is providing funding in support of the independent program.

As a three-year educational program, PQIP is established to analyze the prescribing of mental health medications for Medicaid members. When needed, physicians are provided with educational materials and client specific information as well as peer-to-peer consultation.

The PQIP process begins with a review by Comprehensive NeuroScience, Inc. of Medicaid patient pharmacy claims data to identify prescribing and utilization trends for mental health and psychotropic medications. Specific pharmacy claims are identified that may be inconsistent with evidence-based best practice guidelines. Once a specific patient's claims are identified, the prescriber is sent a letter addressing the concerns. This gives the prescriber an opportunity to verify the concern and address it with the specifically identified patient.

In summary, PQIP is an educational peer review activity with oversight from physicians; an activity that flags cases thereby allowing the prescribing physician to review them further.

The advisory committee on which Plaintiff serves does not have oversight authority. Yet, Plaintiff's supplemental brief deals with PQIP oversight, which is not a FOIA issue. Plaintiff's supplemental brief does not deal with the statute of limitations issue and the mandatory non-disclosure provisions of the Release of Information for Medical Research and Education Act identified and discussed in MDCH's dispositive motion.

Moreover, Ms. Greco's affidavit shows that Plaintiff received copies of the existing nonexempt records to which he was entitled under the FOIA, including reports referred to at pages 2 and 3 of Plaintiff's supplemental brief and the list of the drugs mentioned at page 10 of the brief, all in the same form as the original records.

Other examples of alleged facts in Plaintiff's supplemental brief not relevant to Plaintiff's FOIA action include:

At page 2 of his supplemental brief, Plaintiff makes an allegation objecting to what Plaintiff describes as "Eli Lilly having the right to participate in any meetings, workshops or discussions with regard to PQIP or the data collected." On this matter, there is nothing that contractually precludes Eli Lilly from attending meetings to which it is invited. Furthermore, MDCH only has discussed information in a general manner in the presence of an Eli Lilly representative; no reports containing patient or provider specific information has been shared.

At page 3 of his supplemental brief, Plaintiff alleges a problem with year 2006 and the report related to children under 5 years of age. Plaintiff, however, was informed previously, as part of the parties' agreed upon attempt to resolve Plaintiff's alleged issues, that the "Impact Analysis" document shows that the product changed in February 2006. Plaintiff already was

informed that, with this change, MDCH no longer separates the data for children under 5 as a specific report. As Plaintiff further knows, a Quality Indicator appears on the subsequent summaries that address children under 6 years of age (the use of three or more psychotropics for 90 or more days.)

Also at page 3 of his supplemental brief, Plaintiff alleges another irrelevant, and misleading, matter. Plaintiff takes issue with a document in his possession that he describes as a concurrent drug use report for all ages. Plaintiff complains that this report received from MDCH does not give drug details that Plaintiff wants. The report is what it is; it cannot be altered to meet Plaintiff's alleged need for such information.

Plaintiff's allegation of two reports, referred to at page 4 of his supplemental brief, further demonstrates how Plaintiff's case is causing a dissipation of this Court's and MDCH's resources. The alleged "Michigan Under 5 Detail by Drugs and Quality Indicator" is not a title of any MDCH report. If Plaintiff means the "Michigan Behavioral Pharmacy Report, Children Under 5", he already received the document; and MDCH ceased producing that report on or about February 2006. If, on the other hand, Plaintiff is referring to the "Michigan Children Under 5 Detail by Drug Name," this document is exempt from public disclosure under the Release of Information for Medical Research and Education Act. Plaintiff was so informed by MDCH's February 23, 2006, written notice granting in part and denying in part Plaintiff's February 2, 2006, FOIA request. (See Attachment 3 appended to MDCH's brief in support of dispositive motion.)

The second report, "Patients on 5 or More Concurrent Behavioral Drugs," is exempt from public disclosure under the Release of Information for Medical Research and Education Act.

Again, Plaintiff was so informed by MDCH's February 23, 2006, written notice granting in part and denying in part Plaintiff's February 2, 2006, FOIA request. (*Id.*)

Under the FOIA, Plaintiff received nonexempt document as they exist with MDCH. Using his FOIA action to raise objections about the form or content of documents clearly is an abuse of the FOIA, resulting in a frivolous action.

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

Finally, at page 9 of his supplemental brief, Plaintiff alleges some sort of issue concerning "researchers" that Plaintiff has contacted, and alleged statements "of purposes" he has elicited from them. (Ironically, Plaintiff divulges in his supplemental brief that these "researchers" concede that there is information contained in the records that should be redacted.) The conclusory statements of purposes drawn by these "researchers" do not present any issues justiciable in this FOIA action, yet Plaintiff states that he "would have no objection to the Court's order incorporating a statement of these purposes" in this case. Plaintiff, however, has not, and cannot, show how this alleged relief comes under the remedial provisions of section 10 of the FOIA, MCL 15.240.

In summary, Plaintiff's supplemental brief, as well as his brief in response to MDCH's dispositive motion and related motions, fails to present any relevant, cogent arguments in contravention of MDCH's motions.

**Relief Sought**

WHEREFORE, for the reasons stated herein, and in MDCH's brief in support of motions and in its first reply brief, MDCH respectfully requests that this Honorable Court grant MDCH's motion to dismiss Plaintiff's complaint; and, because Plaintiff's action has caused an unnecessary dissipation of judicial and agency resources, MDCH's motion for an award of its costs, expenses, and attorney fees should be granted in an amount to be determined by the Court.

Respectfully submitted,

Michael A. Cox  
Attorney General

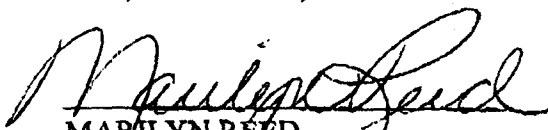


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Dated: March 19, 2007

**CERTIFICATE OF SERVICE**

The undersigned certifies that a copy of Defendant's Brief in Reply and Opposition to Plaintiff's Supplemental Brief in Response to Defendant's Motion to Dismiss was served upon Plaintiff's counsel by mailing the same to him at his address, with proper postage fully prepaid thereon, and by facsimile transmission to (313) 961-5275, on March 19, 2007.

  
MARILYN REED

STATE OF MICHIGAN  
DEPARTMENT OF ATTORNEY GENERAL



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## **FAX TRANSMITTAL**

**DATE: March 19, 2007**

**TO: Alan Kellman**

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**MESSAGE: Defendant's Brief in Reply and Opposition to Plaintiff's Supplemental Brief in Response to Defendant's Motion to Dismiss. Hard copy to follow in the mail.**

**TOTAL NUMBER OF PAGES, INCLUDING COVER SHEET: 14**