

STATE OF MICHIGAN
IN THE SUPREME COURT

NANCY ANN PRINS,

Plaintiff-Appellee,

v

MICHIGAN STATE POLICE,

Defendant-Appellant,

and

DAVID FEDEWA

Defendant

Supreme Court No. 142841

Court of Appeals No. 293251

Ionia Circuit Court No.
2009-026799-NZ

BRIEF ON APPEAL OF APPELLANT MICHIGAN STATE POLICE

ORAL ARGUMENT REQUESTED

Bill Schuette
Attorney General

John J. Bursch (P57679)
Solicitor General
Counsel of Record

Richard A. Bandstra (P31928)
Chief Legal Counsel

Kevin Francart (P60431)
Assistant Attorney General
Attorneys for Defendant-Appellant
State Operation Division
PO Box 30754
Lansing, MI 48909
(517) 373-1162

Dated: August 24, 2011

TABLE OF CONTENTS

	<u>Page</u>
Table of Contents	i
Index of Authorities.....	ii
Statement of Jurisdiction.....	iii
Statement of Question Presented.....	iv
Statutes Involved	v
Introduction.....	1
Statement of Facts	2
Proceedings Below.....	3
Argument.....	3
I. The Court should affirm that the 180-day limitations period for filing a FOIA action begins to run on the date of the public body’s “final determination,” MCL 15.240(1), not the date that the public body mails its final determination.....	3
A. Standard of Review.....	3
B. Analysis.....	4
Conclusion and Relief Requested.....	12

INDEX OF AUTHORITIES

Cases

<i>Griffith v State Farm Mut Automobile Ins Co</i> , 472 Mich 521, 525-526; 697 NW2d 895 (2005).....	3
<i>People v Stone</i> , 463 Mich 558, 563; 621 NW2d 702 (2001)	7
<i>Trentadue v Buckler Lawn Sprinkler</i> , 479 Mich 378; 738 NW2d 664 (2007)..	5

Statutes

MCL 15.232(h).....	7
MCL 15.235	6
MCL 15.235(2)	8
MCL 15.235(2)(b).....	6
MCL 15.235(3)	4, 10
MCL 15.235(4)	vi, 4, 8, 9
MCL 15.235(6)	8
MCL 15.240(1)	vi, 3, 4
MCL 15.240(1)(b).....	passim
MCL 15.240(1)	1, 4
MCL 15.240(2)	6, 8
MCL 15.240(3)	4
MCL 8.3a	7
MCR 2.116(C)(7)	11
MCR 7.301(A)(2)	iv
MCR 7.309(B)(1)(a).....	1, 5

STATEMENT OF JURISDICTION

Defendant-Appellant Michigan Department of State Police (MSP), pursuant to MCR 7.301(A)(2), appeals the Michigan Court of Appeals' published opinion dated January 20, 2011, in *Prins v Michigan State Police*, ___ Mich App ___; ___ NW2d ___ (2011) (Docket No. 293251).

STATEMENT OF QUESTION PRESENTED

A requester that is denied records under the Freedom of Information Act has a 180-day statute-of-limitations period after the public body's "final determination" to file an action to compel the public body to disclose the records. MCL 15.240(1)(b). Appellee Nancy Prins failed to file her action within the 180-day period. The question presented is:

Does the Freedom of Information Act's 180-day statute of limitations begin to run upon the public body's "final determination," rather than the date that the public body mails its final determination?

Appellant's answer: Yes

Appellee's answer: No

Trial Court's answer: Yes

Court of Appeals' answer: No

STATUTES INVOLVED

MCL 15.235(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.

MCL 15.240(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:

* * *

(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.

INTRODUCTION

The question presented in this case is when does the 180-day statute-of-limitations period in the Freedom of Information Act (FOIA) begin to run. The Legislature has prescribed a 180-day limitations period for FOIA claims, and further specified that the period begins to run after a public body's "final determination" to deny a request. MCL 15.240(1)(b). Contrary to the plain language of the statute, the Court of Appeals held that the limitations period does not run from the date of "final determination," but instead from the date the public agency "mailed" its final determination. The Michigan State Police respectfully request that this Court clarify that the statutory language is controlling, and that the 180-day period runs from the date of "final determination" rather than the date of mailing.

MCL 15.240(1)(b) works precisely like the court rule governing the filing of merits briefs in this Court. MCR 7.309(B)(1)(a) states that the appellant shall file 24 copies of a brief and appendix "within 56 days after leave to appeal is granted." No lower court would construe MCR 7.309(B)(1)(a) to say that an appellant must file a brief "within 56 days after the order granting leave to appeal has been *mailed*." Yet that is precisely the change the Court of Appeals has rendered in its interpretation of MCL 15.240(1)(b).

In addition to rewriting the unambiguous terms of a Michigan statute, the Court of Appeals' ruling has significant adverse practical consequences. Public bodies receive annually thousands of FOIA requests to which they must respond. Under the Court of Appeals' novel rule, public bodies will be required, at a great

expense, to respond to every FOIA request in a manner designed to prove when a written notice of denial was mailed, such as use of certified mail. That is not the statutory scheme the Legislature intended. Accordingly, this Court should reverse the Court of Appeals.

STATEMENT OF FACTS

On May 4, 2008, Plaintiff-Appellee Nancy Ann Prins (Prins) was stopped by a MSP trooper while driving her vehicle. (App 11a.) The trooper issued Prins' passenger a citation for not wearing a seat belt. (App 11a.)

On July 22, 2008, Prins made a FOIA request to the MSP, requesting a video tape of the May 4, 2008 traffic stop. (App 6a.)

On July 26, 2008, the MSP issued a written notice in response¹ to the FOIA request, postmarked July 29, 2008. In that response, a MSP employee mistakenly stated that the video Prins requested did not exist. (App 5a.) (The employee who made the mistake was disciplined and no longer works for the State of Michigan.) The employee's mistake is of no impact on the questions of law before this Court.

Prins became aware of the video's existence when it was produced at her passenger's hearing on October 28, 2008. (App 12a.) Prins did not immediately pursue this FOIA suit, but instead waited another three months before finally filing

¹ This exchange between Appellee and Appellant is confirmed by the affidavit of Michigan State Police FOIA coordinator, Lori M. Hinkley. (App 5a.) Copies of the affidavit were filed and served with Appellant's answer and affirmative defenses and with Appellant's motion to dismiss.

the circuit court action on January 26, 2009 (App 1a.), which was 184 days after the MSP made its “final determination” on July 26, 2008.

PROCEEDINGS BELOW

On July 9, 2009, the trial court found that the 180-day limitations period had run and granted MSP’s motion for summary disposition and dismissed Prins’ Complaint with prejudice. (Hearing Tr, p 17, App 8a.)

Prins appealed, and a panel of the Court of Appeals reversed. (App 11a.) The panel rejected the statute of limitations defense, holding that the 180-day limitations period did not begin to run on the date of “final determination,” as MCL 15.240(1)(b) specifies. Instead, the panel appeared to adopt a pseudo common-law discovery rule and said that the limitations period begins to run on the date of mailing. (App 13a.)

ARGUMENT

I. The Court should affirm that the 180-day limitations period for filing a FOIA action begins to run on the date of the public body’s “final determination,” MCL 15.240(1), not the date that the public body mails its final determination.

A. Standard of Review

Statutory interpretation presents questions of law that are reviewed *de novo*. *Griffith v State Farm Mut Automobile Ins Co*, 472 Mich 521, 525-526; 697 NW2d 895 (2005).

B. Analysis

When a FOIA requester seeks to challenge a public body's denial of a FOIA request, FOIA requires the requester to file that action in circuit court no more than 180 days after the public body makes its "final determination":

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:

* * *

(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. [MCL 15.240(1) (emphasis added).]

The FOIA provides three ways in which a public body may reach a "final determination": (1) by failing to respond within five days business days after receiving the written request, MCL 15.235(3); (2) by written notice denying a request in whole or in part, MCL 15.235(4); or (3) by failing to respond within ten days to a written appeal, MCL 15.240(3). When the public body responds in writing, as was the case here, then MCL 15.235(4) unambiguously provides that the writing is the public body's final determination: "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." MCL 15.235(4) (emphasis added).

There is nothing difficult or ambiguous about MCL 15.240(1)(b)'s plain language. Once the public body creates its written notice denying a request, the limitations period runs 180 days from the date of that writing, i.e., the "final

determination.” Thus, in practice, MCL 15.240(1)(b)’s language operates just like the court rule governing the filing of merits briefs in this Court. MCR 7.309(B)(1)(a) provides that an appellant shall file its brief and appendix “within 56 days after leave to appeal is granted.” This command does not mean 56 days after this Court’s clerk mailed the order, or 56 days after the appellant’s receipt of the order. It means 56 days after the date marked on the order granting leave to appeal. So too does the 180-day period begin to run beginning on the date marked on the public body’s “final determination to deny a request.”

The Court of Appeals saw the logic in this plain-text analysis. “Read in isolation, MCL 15.240(1)(b) appears to suggest that the 180-day period commences with a ‘public body’s final determination to deny a request.’” (App 13a.) But instead of stopping there, the Court of Appeals continued, imputing a principle that looks similar to the disfavored common-law discovery rule, which ties claim accrual to notice. See generally *Trentadue v Buckler Lawn Sprinkler*, 479 Mich 378; 738 NW2d 664 (2007). Noting that the FOIA also requires the public body to “issue” its final determination, the Court of Appeals concluded that “a public body has not satisfied the statute’s notice requirement until it ‘sends out’ or officially circulates its denial of a public record request.” (App 13a.) That observation may be true, but it has nothing at all to do with the plain language of the limitations period. The 180-day limit in MCL 15.240(1)(b) is not tied to notice or issuance, but simply the “final determination,” just like MCR 7.309(B)(1)(a) is tied to this Court’s grant of leave to appeal.

The absence of the words “mail” or “receipt” in MCL 15.240(1)(b) is in stark contrast to the precise language the Legislature uses when it wants to draw such distinctions in the FOIA. For example, MCL 15.235 provides:

(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. . . . [Emphasis added.]

Similarly, MCL 15.240(2) provides:

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. . . . [Emphasis added.]

As these examples demonstrate, the Legislature knows how to start a time period based on mailing or receipt when it wants to do so. But the Legislature deliberately chose not to do that for purposes of the FOIA limitations period. Accordingly, the limitations accrual trigger is the date of the public body’s “final determination,” just as MCL 15.240(1)(b) says.

The analysis does not change simply because MCL 15.235(2)(b) requires the public body to “[i]ssu[e] a written notice to the requesting person.” The FOIA’s definition of a “writing” is:

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. [MCL 15.232(h).]

The FOIA does not define “notice,” so the word is given its ordinary, dictionary meaning. MCL 8.3a; *People v Stone*, 463 Mich 558, 563; 621 NW2d 702 (2001).

Black’s Law (8th Ed) provides three pertinent definitions of “notice”: (1) “[l]egal notification required by law or agreement, or imparted by operation of law as a result of some fact . . .”; (2) “[t]he condition of being so notified, whether or not actual awareness exists . . .”; and (3) “[a] written or printed announcement.”

Webster’s Unabridged Dictionary of the English Language (2001) defines “notice,” in relevant part, as: “an announcement or intimation of something pending[;] . . . a note, placard, or the like conveying information[;] . . . to give notice to. . .” These definitions make it plain that “notice” is either *the act* of conveying information or *the thing* that contains the information.

The Court of Appeals focused on the definition of the word “issue” in reaching its conclusion that the 180-day limitations period did not begin to run until the public body sends out or officially circulates its denial. (Op, p 3, App 13a.) The Court of Appeals defined “issue” or “issuing” to mean:

‘To be put forth officially ‘To send out or distribute officially.’ . . . ‘to let out; discharge[;]’ . . . to publish; put forth and circulate; give out publically or officially.” [Op, p 3, App 13a.]

To begin, the word issue does not appear in MCL 15.240(1)(b). In addition, from the Legislature’s careful placement of the terms “issuing,” “issue,” and “notice”

within the relevant sections of the FOIA, it becomes apparent that “written notice” cannot mean *the act* of conveying the denial:

MCL 15.235(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. [Emphasis added.]

MCL 15.235(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:*

* * *

- (e) *Notice of the right to receive attorneys’ . . .*

MCL 15.235(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.

MCL 15.240(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.

First, to conclude that “written notice” is or includes *the act* of conveying the final determination to the requester is contrary to the plain meaning of MCL 15.235(4), wherein the Legislature requires the “written notice” – *the thing* – to contain notice – *the act* of conveying information – of a right to receive attorneys’ fees. In other words, MCL 15.235(4) unambiguously refers to the document being created containing the information to be conveyed, not the conveyance of the information.

Second, to conclude that “written notice” includes *the act* of conveying the final determination would render either the word “issuing” or “notice” surplusage or nugatory, as both would have the same essential meaning of “sending out” or “officially circulating.” Thus, for the purposes of the FOIA, “written notice” is “a written or printed announcement, a note, placard.” The “written notice” is the thing – the letter – not the action of notifying. Otherwise, the Legislature would have no need to direct the notice to be issued.

Accordingly, the requester’s claim accrues at the time the public body either fails to timely respond or the public body produces a written notice of the denial. The written notice is the written manifestation of the public body’s determination.

While the public body is required to issue the written notice to the requester once it has produced it, the subsequent mailing is not when the requester's right to commence the action accrues.

The Court of Appeals rationalized its construction of the FOIA as a way to "prevent a public body's inadvertent failure to timely mail a denial letter from unduly shortening the 180-day period of limitation." (App 13a.) But the FOIA itself prevents this scenario without the Court of Appeals' labored construction. The FOIA provides that "[f]ailure to respond to a request [within 5 business days after the public body receives the request] constitutes a public body's final determination to deny the request." MCL 15.235(3). If a public body made a final determination but "failed to respond" by inadvertently leaving the determination in a desk drawer, the FOIA's 180-day limitations period would commence immediately after the five-day response deadline. So there can be no prejudice caused by an inadvertent failure to mail.

Significantly, the Court of Appeals' misinterpretation of MCL 15.240(1)(b) is not just a matter of semantics, because "[t]he burden of proving that a claim is time-barred rests on the party asserting the defense." (Op, p 2, App 12a.) Under the Court of Appeals' rule, public bodies will be required, at a great expense, to respond to literally thousands of FOIA requests in a manner designed to prove when a written notice of denial was mailed, such as certified mail. Such a scheme would be a substantial administrative burden. More important, it is a burden the

Legislature chose not to impose by tying the 180-day limitations period to the date of the final determination itself, rather than the date of mailing or receipt.

The Court of Appeals' unpublished decision in *Loud v Lee Township*, No 269256, 2007 WL 258312 (Mich Ct App, Jan 30, 2007), is instructive in the matter of computing the FOIA's 180-day limitations period and completely contrary to the Court of Appeals decision in this case. *Loud* determined that a "public body's final determination is the 'written notice denying a request for a public record in whole or in part,'" and that the date of a public body's written notice precipitates the FOIA's 180-day limitations period:

[D]efendant's final determination to deny plaintiff's FOIA request occurred on February 2, 2005, when Moore informed plaintiff in writing that she was denying plaintiff's request. . . . [P]laintiff had 180 days *from February 2, 2005*, to commence an action in the trial court. . . . Plaintiff did not commence the present action until the middle of September 2005, more than one month after the 180-day statute of limitations had expired. Because plaintiff failed to commence the present action within the statute of limitations, the trial court did not err in granting summary disposition pursuant to MCR 2.116(C)(7).

2007 WL 258312, at *3 (emphasis added).

Accordingly, the Court of Appeals erred here when it reversed the trial court's grant of summary disposition based on Prins' failure to timely file her claim within the 180-day statute of limitations provided in the FOIA.

CONCLUSION AND RELIEF REQUESTED

The Court of Appeals has extended by judicial fiat the express limitations period that the Legislature proscribed for FOIA actions against public entities. The Court of Appeals' decision is clearly erroneous and will cause material injustice to the Michigan State Police. Had the Court of Appeals simply applied MCL 15.240(1)(b)'s plain language, this suit would have been dismissed and all potential liability of the State Police extinguished.

For the foregoing reasons, the Michigan State Police respectfully request that this Court reverse the Court of Appeals and reinstate the trial court's order granting summary disposition.

Respectfully submitted,

Bill Schuette
Attorney General

John J. Bursch (P57679)
Solicitor General
Counsel of Record

Richard A. Bandstra (P31928)
Chief Legal Counsel


Kevin Francart (P60431)
Assistant Attorney General
Attorneys for Defendant-Appellant
State Operations Division
PO Box 30754
Lansing, MI 48909
(517) 373-1162

Dated: August 24, 2011

S:\SO\AC\Cases\2009-2009-0006052-C Nancy Prins\Brief on Appeal v2.doc