

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 APPELLEE NANCY ANN PRINS

ORAL ARGUMENT REQUESTED

November 11, 2011

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STATEMENT OF JURISDICTION

Appellee accepts Appellant's statement of jurisdiction.

COUNTER STATEMENT OF QUESTION INVOLVED

A person, whose request for access to public records pursuant to the Freedom of Information Act has been denied, has 180 days from the date of denial to file an action in the circuit court to compel the public body to disclose the records. MCL 15.240(1)(b). Plaintiff-Appellee, Nancy Prins, filed her action within the 180 day period.

Does the Freedom of Information Act's 180 day statute-of-limitations begin to run with the public body's "issuing a written notice denying the request" rather than the date the public body generates the document?

Appellant's answer: NO

Appellee's answer: YES

Trial Court's answer: NO

Court of Appeal's answer: YES

STATEMENT OF FACTS

Appellee accepts Appellants statement of facts.

ARGUMENT

The Court should affirm the Court of Appeals decision and hold that a public body does not satisfy the notice requirements of the FOIA until it officially circulates its denial of the public record request to the requestor.

A. Standard of Review

Appellee accepts Appellant's statement concerning the standard of review.

B. Analysis

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. The people shall be informed so that they may fully participate in the democratic process. MCL 15.231(2).

There is no question that the FOIA was passed, in part, because the public's perception, sometimes well founded, of dishonest public body's withholding information that may be critical in private and public affairs. Access to full and complete information is another way of saying we need a "transparent" government.

Here we have the Michigan State Police saying, "the video tape you requested pursuant to your FOIA request was destroyed and we can not produce it. A denial letter was prepared on Saturday, July 26, but the date was omitted when the letter was printed. So after the letter was printed we dated it by using a rubber stamp. We then waited until Tuesday, July 29, to mail you the letter. We have no explanation for our actions but rest assured Ms. Prins, we did all this and still complied fully with your FOIA request".

The behavior displayed by the Michigan State Police makes a mockery of "access to full and complete information". Actions like those displayed in this case are the reason for legislation like the FOIA and the distrust the public has for government officials and employees. Now, the MSP want to take their actions to a new level and be given a green light to back date documents or sit on documents for days while the statute-of-limitations runs against the recipient member of the public!

The FOIA allows a person to may make a written request for access to records from a public body. MCL 15.235(1). The public body has 5 business days after receiving the request to act on it. One action the public body can take is to *deny the request by issuing a written notice to the requesting person*. MCL 15.235(2)(b). *A written notice denying a request for a public record is a public body's final determination*. MCL 15.235(4). The requesting party may commence an action in the circuit

court to compel disclosure within 180 days after a public body's final determination to deny the request. MCL 15.240(1)(b).

The intent of the FOIA legislation is to allow access to public records so that the requestor can be informed. The legislature intended public bodys to respond in a timely manner to requests for information and limited the response time to 5 business days after receiving the request. Five days is not a long period of time and the fact that the legislature chose 5 days indicates how important it was to have the public body respond in a timely manner. The legislature also included a failsafe provision that if the request is not responded to in five days it is automatically denied. MCL 15.235(3). Clearly the legislature wanted to hold the public body's accountable to public demands for information in a timely manner.

Once the public body issues a denial to the request, the requestor may file an action in the circuit court to compel discovery. The action must be filed within 180 days from when the denial was issued. Therefore, the pivotal question is what date did the legislature intend to start the 180 day statute-of-limitations. The date the notice document was created or the date the notice document was issued?

The answer is straight forward and has been confused by the Attorney General. We must first start with when the statute begins to run.

The requesting person may commence an action in the circuit court . . . within 180 days after a public body's *final determination*. MCL15.240(1)(b). Therefore, a requesting party whose FOIA request has been denied has 180 days from the final determination to file an action.

The next question is what constitutes a public body's final determination? A written notice *denying* a request for a public record . . . is a public body's final determination. . . MCL 15. 235(4). The statute of limitations begins with the final determination and the final determination is the written notice *denying* a request for public record.

When does a public body deny a request for a public record? MCL 15. 235(2)(b) states that a public body can respond by, . . . (b) issuing a written notice to the requesting person denying the request. Therefore, a public body may *deny* a request by *issuing a written notice*. In other words, the *only* way a public body can deny a request is to communicate the denial to the requesting party. A duty is placed on the responding public body to communicate the notice to the requesting party and only at such time as the notice is communicated is there a denial.

The MSP concentrate on the word "notice" alleging that notice can be a thing or an act but if concentration is placed on any word in this analysis the word must be *denial*. The statute does not concentrate on one word and as correctly stated by the Court of Appeals, "the statute

needs to be construed as a whole, harmonizing its provisions, to ascertain the intent of the legislature". The statute focuses on a process that the responding body must adhere too. Issuing a written notice to the requesting person denying a request is a process. The notice must contain certain items, must be in writing, and must be issued (communicated) to the requesting party. Without all three the public body has failed to comply with the notice requirements of the statute. When the public body has issued a written notice denying a request the date of final determination has been established.

It is interesting to note that the FOIA at MCL 15.235(4)(a-e) mandates the written notice contain:

- A. an explanation of the basis for the determination;
- B. a certificate that the record does not exist . . . if that is the reason;
- C. a description of information deleted, if applicable;
- D. a full explanation of the requesting person's rights to appeal or seek judicial review; and,
- E. a notice to receive attorney fees and damages,

however, the statute does not require that the notice contain a date.

Here a request for public record was received by the MSP and a notice was allegedly prepared on Saturday, July 26, 2008. The action of

preparing a document or notice did not satisfy the statute because preparation of the notice is not a denial. The MSP then mailed the notice on July 29, 2008 thereby communicating the denial to Ms. Prins and setting the date at which time the request was denied. The date the MSP denied the request is the date the body's final determination is effective and that date is July 29, 2008. Nancy Prins filed her action in the Circuit Court within 180 days of the public body's final determination.

The Attorney General's argument that public bodies would incur great expense by having to prove when thousands of denial notices were mailed is completely without merit. When the legislature drafted the FOIA they must have assumed that the various public body's, officials, and employees would act in a business like manner when carrying out the terms of the Act. In the normal course of business a time sensitive document is generated and mailed in the same day. It is ludicrous to believe that this Court or any court would generate a time sensitive order and let the document sit for a week or two before it was mailed to the receiving party. The various public body's need only act in a prudent business like manner to carry out the terms of the act and they will not end up in litigation like this.

CONCLUSION AND RELIEF REQUESTED

The Court of Appeals correctly ruled that the Freedom of Information Act needs to be construed as a whole and that the MSP needed to undertake an affirmative step reasonably calculated to bring the denial notice to the attention of the requesting party.

WHEREFORE, Plaintiff-Appellee prays that this Honorable Court uphold the decision rendered by the Court of Appeals.

A handwritten signature in cursive script, reading "Bruce A. Lincoln". The signature is written in black ink and is positioned above a horizontal line.

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