

IN THE MICHIGAN SUPREME COURT

**Appeal from the Michigan Court of Appeals
Judges Elizabeth L. Gleicher, Mark J. Cavanagh, and Joel P. Hoekstra**

**NANCY ANN PRINS,
Plaintiff-Appellee,**

Supreme Court Docket No. 142841

Court of Appeals Docket No. 293251

v

**MICHIGAN STATE POLICE,
Defendant-Appellant,**

**Ionia County Circuit Court
File No. 2009-026799-NZ**

and

**DAVID FEDEWA,
Defendant.**

**AMICUS CURIAE BRIEF
OF THE MICHIGAN MUNICIPAL LEAGUE**

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DESCRIPTION OF AMICUS CURIAE

The Michigan Municipal League is a non-profit Michigan corporation whose purpose is the improvement of municipal government and administration through cooperative effort. Its membership is comprised of 521 Michigan local governments of which 450 are also members of the Michigan Municipal League Legal Defense Fund. The Michigan Municipal League operates the Legal Defense Fund through a Board of Directors. The purpose of the Legal Defense Fund is to represent the member local governments in litigation of statewide significance. This brief was authorized by the Legal Defense Fund's Board of Directors, in response to the Supreme Court's order of June 29, 2011, in which the Michigan Municipal League was invited to file an amicus curiae brief. The appellee's brief was filed on November 14, 2011, so this amicus curiae brief is due within 21 days of that, or by December 5, 2011.

STATEMENT OF JURISDICTION

The statement of jurisdiction submitted by the Appellant Michigan State Police is correct.

STATEMENT OF QUESTION PRESENTED

DOES THE 180 DAY STATUTE OF LIMITATIONS IN MCL 15.240(1) BEGIN TO RUN ON THE DATE THE PUBLIC BODY PRODUCES ITS FINAL DETERMINATION TO DENY A REQUEST FOR A PUBLIC RECORD, OR ON THE DATE THE PUBLIC BODY SENDS OUT OR OFFICIALLY CIRCULATES ITS DENIAL?

APPELLANT STATE POLICE SAYS: the date the public body makes or produces its final determination to deny a request

APPELLEE PLAINTIFF PRINS SAYS: the date the public body sends out or circulates its denial

COURT OF APPEALS SAYS: the date the public body sends out or officially circulates its denial

AMICUS MML SAYS: the date the public body makes or produces its final determination to deny a request

ARGUMENT

THE 180 DAY STATUTE OF LIMITATIONS IN MCL 15.240(1)(b) BEGINS TO RUN ON THE DATE OF A PUBLIC BODY'S FINAL DETERMINATION TO DENY A REQUEST.

Standard of Review

The Supreme Court reviews de novo as a question of law issues of statutory interpretation. *State News v Michigan State University*, 481 Mich 692, 699-700; 753 NW2d 20 (2008). The Supreme Court reviews motions for summary disposition under MCR 2.116(C)(7) de novo. *Grimes v Dept of Transportation*, 475 Mich 72, 76; 715 NW2d 275 (2006). In the absence of disputed facts, the Supreme Court also reviews de novo

whether a cause of action is barred by the applicable statute of limitations. *Joliet v Pitoniak*, 475 Mich 30, 35; 715 NW2d 60 (2006).

The statute

The statutory provision of MCL 15.240(1)(b) is plain and unambiguous.

(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**.

The text of MCL 15.235(7) specifies the same action or event from which the statute of limitations begins to run.

(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:

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

The statute includes two examples of a public body's final determination to deny a request for a public record in MCL 15.235(3) and (4).

(3) **Failure to respond to a request** pursuant to subsection (2) **constitutes a public body's final determination to deny the request**.

(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.

If a public body makes a final determination to deny a request by failing to respond to the request, the 180 day statute of limitations begins to run upon the expiration of 5 business days after the date the public body receives the request. MCL 15.235(2). If a public body makes a final determination to deny a request by producing a written notice denying a request, the 180 day statute of limitations begins to run from the date the public body produces the written notice. The written notice is the public body's final determination to deny the request, as plainly stated in MCL 15.235(4), not the mailing of the written notice.

A public body shall respond to a request for a public record ... by ... issuing a written notice to the requesting person denying the request. MCL 15.235(2). The consequences faced by a public body for not issuing a written notice to the requesting person denying the request are spelled out in MCL 15.235(3), which do not include a tolling of the 180 day limitation period until the written notice is mailed or transmitted. The Court of Appeals misconstrued the requirement in MCL 15.235(2) of "issuing a written notice to the requesting party denying the request" as the definitive date on which a public body makes the written notice and its final determination to deny a request. This contradicts the plain language of MCL 15.235(4), which does not mention issuing or mailing the written notice.

“The individual designated in Section 6 [FOIA coordinator] as responsible for the denial of the request shall sign the written notice of denial.” MCL 15.235(6). Signing the written notice of denial could be the date the public body makes a final determination to deny a request, but that option was not explored or seriously considered by the Court of Appeals.

The parties disagree upon how to ascertain the date of a public body’s final determination to deny a request in order to begin the 180 day period of limitation on filing the claim. The date of the written notice may not be the same as the date the written notice is signed, or the date the written notice is issued, or the date the envelope is postmarked.

Plaintiff Appellee Prins argues that mailing the determination to deny a request is the event and date from which the 180 day period is measured. Defendant Appellant Michigan State Police argues that producing the written notice to deny the request is the event and date from which the 180 day period is measured. In this case the two methods of establishing the date of the final determination to deny a request produce starkly different results for the parties: 1) Plaintiff’s claim is timely if the period of limitations is measured from the postmark, and 2) Plaintiff’s claim is time barred if the period of limitation is measured from the date of the written notice by which the request was denied.

Both proposed methods of marking and measuring the 180 day period of limitation are focused on mechanisms by which the date of “a public body’s final determination to deny the request” can be determined with certainty. But this is not as easy as it might first appear to be, because the procedures for handling FOIA requests may vary widely among public bodies. If the Michigan State Police added another paragraph to its written notice denying a FOIA request, would the “postmark rule” of the Court of Appeals still control?

Effective July 26, 2008 this is the final determination of the Michigan State Police to deny your FOIA request of July 22, 2008 and you have 180 days from July 26, 2008 to commence an action in the circuit court to compel disclosure of the public records.

Or how about this statement added to the written notice?

This final determination of the Michigan State Police to deny your FOIA request of July 22, 2008, was produced, reviewed and signed on July 26, 2008, and mailed [or emailed, faxed, delivered] on July 29, 2008. You have 180 days from July 26, 2008 to commence an action in the circuit court to compel disclosure of the public records.

The interpretation of the statute expressed by the Court of Appeals looks more like a factual determination than an exercise in statutory construction.

There may be no bright line ruling that can anticipate all of the possible factual scenarios associated with the date that a public body makes its final determination to deny a request. This really is a factual issue of when a particular public body, the Michigan State Police, made a final determination to deny the FOIA request of Plaintiff Appellee Nancy Prins. Without strong proof that the final determination was made on

July 26, 2008, (which was a Saturday) and signed on July 26, 2008, the Court of Appeals selected the postmark date as the date the final determination was made. This was a default date based on the absence of clear proof that the final determination of the Michigan State Police was produced and made (printed and signed) on July 26, 2008. The Court of Appeals erroneously selected the postmarked date of July 29, 2008, as clear proof of when the written notice was issued and therefore made!

To follow the plain language of the statute, the 180 day period of limitation runs from the date a public body makes its final determination to deny a FOIA request. Without limiting the evidence a public body might present on the issue, the Supreme Court should leave this factual issue to be decided on a case by case basis. Certainly the date of the written notice, the date the written notice was signed, and the date the written notice was issued or transmitted would be relevant and probative in deciding when a final determination was made by a public body to deny a request. However, no single date or event in the process necessarily controls when a public body makes its final determination to deny a FOIA request.¹

Whether measured from *printing* a written notice denying a request for a public record, *dating* a written notice denying a request for a public record, *signing* a written notice denying a request for a public record, *mailing* a written notice denying a request for a public record, *faxing* a written notice denying a request for a public record, *emailing*

¹ Just as this case demonstrates, the date printed or stamped on a written notice denying a FOIA request may not coincide with the date the written notice was printed or signed.

a written notice denying a request for a public record, *shipping* a written notice denying a request for a public record, or hand *delivering* a written notice denying a request for a public record, an additional administrative step is necessary by which a public body certifies or verifies the date on which the action is taken. Local governmental agencies can comply with this type of requirement. It would be cost prohibitive and unduly burdensome for local units of government to use certified mail to verify the date a written notice denying a FOIA request is issued or transmitted.

The Supreme Court should refrain from adopting or approving a particular method of producing or transmitting “a written notice denying a request for a public record,” because of the potential unintended consequences whereby public agencies would be restricted to mailing a written notice and obtaining a postmark, rather than faxing, emailing, shipping, or hand delivering a written notice. Various alternative means of generating and transmitting a written notice should not be prohibited inadvertently by a ruling that requires public bodies to mail every written notice denying a FOIA request, and obtain a postmark to establish the date of every final determination to deny a FOIA request.

The amicus Michigan Municipal League supports and endorses the argument of the Michigan State Police. As a practical matter, local governmental agencies have to certify or otherwise prove the date on which a written notice denying a request for a public record was printed, signed or issued in order to establish the date after which the

180 day period of limitation begins to run. This certification could be developed and recorded in any number of ways. FOIA coordinators in local units of government are capable of recording and certifying that:

This written notice denying a request [by John Doe] for a public record was [printed and signed] on [December 5, 2011] and [mailed, emailed, faxed, delivered] on [December 6, 2011] by [Jane Doe, Deputy City Clerk] to [John Doe] at [241 Main Street].

Deputy City Clerk

The Legislature did not state that a written notice denying a request for a public record had to be mailed, issued, transmitted or received to trigger the 180 day period of limitation. Certainly the Legislature intended and expected a public body would issue its written notice “to the requesting person denying the request,” because MCL 15.235(2)(b) directs the public body to do that. The written notice denying the request must include “a full explanation of the requesting person’s right” to submit “a written appeal” or “seek judicial review of the denial under section 10,” which directs the requesting person to commence an action in circuit court “within 180 days after a public body’s final determination to deny a request.” MCL 15.235(4)(d) and MCL 15.240(1)(b).

The plain language of MCL 15.240(1)(b) should be given effect. The Supreme Court gives effect to the Legislature’s intent as expressed in the language of the statute by interpreting the words, phrases, and clauses according to their plain meaning. *Butkowski v Detroit*, 478 Mich 268, 273-274; 732 NW2d 75 (2007). The 180 day period of

limitation runs from “a public body’s final determination to deny a request,” not from the date a public body mails the final determination, and not from the date the envelope is postmarked.

Nevertheless, there is a need for certainty in how to apply MCL 15.240(b), which the Supreme Court can provide with a definitive ruling on how to establish the date of a public body’s final determination to deny a request, when that final determination is a written notice. Courts can look at the date of the written notice, the date the written notice was signed, the date the written notice was transmitted to the person requesting a public record, and the procedure by which a public body produces the written notice and certifies or verifies the accuracy of the dates. An undated written notice bearing a stamped and undated signature might direct a court to the date of mailing or a postmark date as the date the public body made its final decision to deny a FOIA request. This would not be attributable to statutory construction, as much as it would be attributable to the facts of the case. To the extent the trial court determined the date on the written notice was July 26, 2008, and that was the date of the final decision to deny the FOIA request, the Court of Appeals should have let that decision stand.

Because inaction of a public body constitutes a final determination to deny a request, MCL 15.235(3), the nondelivery of a public body’s written notice denying a request does not expand, extend, or toll the 180 day period of limitation. Therefore, the date from which the 180 day period of limitation begins to run should be the date the

written notice denying the request is produced or signed by the public body. When the written notice denying a request was typed, printed, dated, signed, mailed, faxed, emailed, delivered, postmarked or received will not necessarily be dispositive, but may confirm or contradict the assertion or certification by a public body of the date the written notice was produced and signed. The Supreme Court should not specify and declare a particular method of producing or issuing a written notice denying a request for a public record, when the Legislature did not. Many public bodies subject to the FOIA will refine their practice of producing and issuing a written notice after the Supreme Court decides this case, and various systems of certification or verification will be developed. The facts of this particular case should not produce an unduly strict definition of producing or issuing a written notice. If the written notice denying the request of Plaintiff-Appellee Prins was printed, signed, and mailed on July 26, 2008, and not postmarked until Tuesday, July 29th, 2008, because of no weekend postal service for the offices of the Michigan State Police, or the wrong date was entered in the postage meter, why should the date of the postmark control the date on which the period of limitation begins to run? The Court of Appeals accepted the postmarked date as the date of mailing, apparently because the Michigan State Police did not certify or verify that the date of mailing was July 26th, 27th, or 28th to the satisfaction of the Court of Appeals. The postmark indicates the date the post office stamped the envelope, which is not necessarily the date the written notice and envelope were mailed.²

² If the MSP has a postage meter, the date upon the envelope is the date selected and printed by the MSP, and no additional postmark is stamped on the envelope by the post office.

The ruling of the Court of Appeals tolls the 180 day period of limitation until a written notice denying a request is postmarked, without any indication that the Legislature intended this result, as if a penalty should be imposed on a public body for delayed mailing of its notice denying a FOIA request. However, the statute specifies the consequences of a late (or nonexistent) issuance of a written notice denying a request in MCL 15.235(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.

Tolling the 180 day limitation period until the postmarked date of a mailed written notice denying a request is not included in MCL 15.235(3) as a consequence of the delayed mailing of the written notice, and it was improper for the Court of Appeals to add it.

The Court of Appeals correctly found 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.” COA opinion, page 3. However, the Court of Appeals never fully explained its rationale for using the statute’s notice requirement to trigger the 180 day period of limitation. The Court of Appeals offered somewhat of an explanation by

stating, "This construction of the FOIA prevents a public body's inadvertent failure to timely mail a denial letter from unduly shortening the 180 day period of limitation." COA opinion, page 3. But mailing and not mailing a denial letter do not shorten the 180 day period of limitation in any event! On the facts of this case, the Michigan State Police had 5 business days from the date it received the request from Prins to grant the request, deny the request, or extend the time to respond. The request was dated July 22, 2008. Assuming for the sake of illustration that the request was received Wednesday, July 23, 2008, the Michigan State Police had 5 business days in which to respond, the final determination to deny the request would be made as of July 29, 2008, by *not* responding, and the 180 day period of limitation would begin to run on Wednesday, July 30, 2008. Printing the notice denying a request and inadvertently holding it does not shorten the 180 day period of limitation, it only shortens the actual notice of the period by about 3 days. That is not a defect that must be cured by rewriting MCL 15.235(4) and MCL 15.240(1)(b).

Whether measured from the date a written notice is printed on July 26, 2008, or signed on July 28, 2008, or mailed on July 29, 2008, the 180 day period of limitation remains 180 days. The delay in mailing the written notice does not "unduly shorten the 180 day period of limitation," because MCL 15.235(1) and (3) combine to trigger the start of the period of limitation on the 6th business day after a public body receives a request for information, but fails to issue a written notice denying the request. The contents of the written notice denying a FOIA request do not set or control the running

of the 180 day period of limitation. The date of the written notice, the signing of the written notice, and the transmittal of the written notice are indicia of when the public body made its final determination to deny a FOIA request. It might be nice to equate the mailing of a written notice that must be issued as described in MCL 15.235(2) with the start of the 180 day period of limitation described in MCL 15.240(1)(b), but there is no direction by the Legislature to do so.

Nothing suggests that Plaintiff Appellee Prins was misinformed or misled by the written notice of the Michigan State Police denying her FOIA request, other than the denial based on nonexistence of the requested record turned out to be wrong. She and her counsel calculated the 180 day limitation period from the postmarked date on the envelope, July 29, 2008, rather than the date of the written notice, July 26, 2008. By waiting 181 days after July 29, 2008, to file her claim, Plaintiff Appellee Prins ran the risk that the period of limitation might expire 180 days after July 26, 2008, and her case might be barred. That miscalculation does not warrant misinterpretation of the FOIA by the Court of Appeals.

CONCLUSION

The Court of Appeals erred by substituting the postmarked date on the envelope in which the written notice denying a FOIA request was mailed for the date the written notice was produced by the Michigan State Police. To the extent there remains a factual

issue over the date the written notice actually was produced, the case should be remanded to the trial court for additional factual findings.

Dated: December 1, 2011

A handwritten signature in cursive script that reads "Eric D. Williams". The signature is written in black ink and is positioned above a horizontal line.

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