



StateBarWatch

Keeping An Eye On The State Bar of Michigan Since 2003

March 14, 2005

Head of the Department
Michigan Department of Attorney General
525 W. Ottawa
P.O. Box 30212
Lansing, MI 48909

Re: Appeal of February 17, 2005 Partial FOIA Denial

Dear Sir or Madam:

Please accept this letter as an appeal from your Freedom of Information Act Coordinator's February 17, 2005 partial denial of my request for records. My request pertains to an investigation that StateBarWatch is conducting, relating to Vice Chairman of the Michigan Attorney Discipline Board, William P. Hampton, and the allegations made by State Police Detective Sgt. Gary Muir that Mr. Hampton might have improperly influenced a criminal prosecution.

The partial denial begins by citing §13(1)(a) for your proposition that "records composed of individuals' names" are exempt. That position is illegitimate. I am unaware of any authority holding that a person's name is exempt. Ms. Dingee's citation of Mager v. Department of State Police, 460 Mich. 134; 595 N.W.2d 142 (1999), is not helpful because the Supreme Court in that case was merely reviewing whether the fact of *gun ownership* is "information of a personal nature." The Court concluded that *gun ownership* is information of a personal nature, and thus, denied the plaintiff's request for the names of gun owners, particularly since "knowledge that a household contains firearms may make that house a target of thieves, and thus endanger its occupants." Id. at 143. Mager does not support Ms. Dingee's overly expansive position that individuals' names are exempt.

Additionally, Ms. Dingee states that the "names of individuals" and other documents relating to applications for investigative subpoenas are exempt. However, MCL 767A.2(5) only exempts the applications themselves and nothing more ("An application under this section is confidential and shall not be available for public inspection or copying or divulged to any person except as otherwise provided in this chapter")(emphasis added). Therefore, any information relating to these records, with the exception of the applications, should have

been described in Ms. Dingee's letter and made available. Ms. Dingee also failed to generally describe the material exempted so that I could properly prepare this administrative appeal.

Ms. Dingee's response ambiguously labels certain documents "the work product" and "a written communication" without generally describing them. A public body must "describe where practicable the exempt material." Herald Co. v. Tax Tribunal, 258 Mich. App. 78, 86-76; 669 N.W.2d 862 (2003). By failing to provide a description, the merit to your position cannot be evaluated, resulting in the possibility of an unwarranted appeal of these issues.

The failure to generally describe the documents claimed to be privileged under an attorney-client or work-product theory, will obstruct the ability to seek judicial review. In McCartney v. Attorney General, 231 Mich. App. 722, 730-731; 587 N.W.2d 824 (1998), the Michigan Court of Appeals held that certain documents retained by your office were subject to an attorney-client privilege, and thus, were exempt. However, in McCartney, a general description of the documents was available ("The fourth letter was a draft letter written by the Governor's office, which was to be sent to the tribes' negotiators in order to outline the Governor's position on various issues related to the negotiations."). Simply stated, the ambiguity utilized by Ms. Dingee to describe the exempted records utterly fails in conforming with the requirements of the FOI Act.

Ms. Dingee lumps together documents that she claims are exempt pursuant to *either* "the attorney work product *or* attorney client privilege" (emphasis added). I respectfully request a description of the documents and a description of which specific privilege applies. I must also note that the FOI Act makes no mention of a "work-product" privilege and its application in discovery matters has been limited to "any notes, working papers, memoranda or similar materials, prepared by an attorney *in anticipation of litigation*." (emphasis added). Messenger v Ingham County Prosecutor, 232 Mich. App. 633, 636-637; 591 N.W.2d 393 (1998). Further, without an adequate description of the records, it is impossible to show that there is a substantial need for the documents and also establish the unavailability of the records by other means. See, generally, MCR 2.302(B)(3)(a).

Finally, Ms. Dingee cites §13(1)(d) for the proposition that information derived from investigative subpoenas is exempt. This section states that "Records or information specifically described and exempted from disclosure by statute" may be exempted from a FOIA request. The only statute cited by Ms. Dingee is MCL 767A.2(5), which as outlined above, only applies to "applications" for investigative subpoenas. This statute says nothing about *information derived* from an investigative subpoena.

I ask that you reconsider your position and delineate the records or portion thereof that are available for immediate disclosure and identify those subject to further appeal. I

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will, at that time, determine which records I intend to have copied. Thank you for your cooperation.

Sincerely,

Frank J. Lawrence, Jr.
Founder