

STATE OF MICHIGAN JUDICIAL DISTRICT Court of Claims JUDICIAL CIRCUIT COUNTY PROBATE	SUMMONS	CASE NO. 21 - 000034 - MZ Cynthia D. Stephens
--	----------------	--

Court address Hall of Justice, 925 W. Ottawa St., P.O. Box 30022, Lansing, MI 48909-7522 **Court telephone no.** (517) 373-0807

Plaintiff's name(s), address(es), and telephone no(s).
 Charles LeDuff

v

Defendant's name(s), address(es), and telephone no(s).
 Michigan Department of Health and Human Services
 333 S. Grand Ave
 P.O. Box 30195
 Lansing, MI 48909

 (517) 241-3740

Plaintiff's attorney, bar no., address, and telephone no.
 Derk A. Wilcox (P66177)
 Mackinac Center Legal Foundation
 140 Main Street
 Midland, MI 48640
 (989) 631-0900

Instructions: Check the items below that apply to you and provide any required information. Submit this form to the court clerk along with your complaint and, if necessary, a case inventory addendum (form MC 21). The summons section will be completed by the court clerk.

Domestic Relations Case

- There are no pending or resolved cases within the jurisdiction of the family division of the circuit court involving the family or family members of the person(s) who are the subject of the complaint.
- There is one or more pending or resolved cases within the jurisdiction of the family division of the circuit court involving the family or family members of the person(s) who are the subject of the complaint. I have separately filed a completed confidential case inventory (form MC 21) listing those cases.
- It is unknown if there are pending or resolved cases within the jurisdiction of the family division of the circuit court involving the family or family members of the person(s) who are the subject of the complaint.

Civil Case

- This is a business case in which all or part of the action includes a business or commercial dispute under MCL 600.8035.
- MDHHS and a contracted health plan may have a right to recover expenses in this case. I certify that notice and a copy of the complaint will be provided to MDHHS and (if applicable) the contracted health plan in accordance with MCL 400.106(4).
- There is no other pending or resolved civil action arising out of the same transaction or occurrence as alleged in the complaint.
- A civil action between these parties or other parties arising out of the transaction or occurrence alleged in the complaint has

been previously filed in this court, _____ Court, where

it was given case number _____ and assigned to Judge _____.

The action remains is no longer pending.

Summons section completed by court clerk.

SUMMONS



NOTICE TO THE DEFENDANT: In the name of the people of the State of Michigan you are notified:

1. You are being sued.
2. **YOU HAVE 21 DAYS** after receiving this summons and a copy of the complaint to **file a written answer with the court** and serve a copy on the other party **or take other lawful action with the court** (28 days if you were served by mail or you were served outside this state).
3. If you do not answer or take other action within the time allowed, judgment may be entered against you for the relief demanded in the complaint.
4. If you require special accommodations to use the court because of a disability or if you require a foreign language interpreter to help you fully participate in court proceedings, please contact the court immediately to make arrangements.

Issue date March 9, 2021	Expiration date* June 8, 2021	Court clerk <i>Jerome W. Zimmer Jr.</i>
------------------------------------	---	--

*This summons is invalid unless served on or before its expiration date. This document must be sealed by the seal of the court.

RECEIVED by MCCOC 3/9/2021 2:04:25 PM

PROOF OF SERVICE

TO PROCESS SERVER: You are to serve the summons and complaint not later than 91 days from the date of filing or the date of expiration on the order for second summons. You must make and file your return with the court clerk. If you are unable to complete service you must return this original and all copies to the court clerk.

CERTIFICATE / AFFIDAVIT OF SERVICE / NONSERVICE

<input type="checkbox"/> OFFICER CERTIFICATE I certify that I am a sheriff, deputy sheriff, bailiff, appointed court officer, or attorney for a party (MCR 2.104[A][2]), and that: (notarization not required)	OR	<input type="checkbox"/> AFFIDAVIT OF PROCESS SERVER Being first duly sworn, I state that I am a legally competent adult, and I am not a party or an officer of a corporate party (MCR 2.103[A]), and that: (notarization required)
--	----	---

- I served personally a copy of the summons and complaint,
 I served by registered or certified mail (copy of return receipt attached) a copy of the summons and complaint,

together with _____
List all documents served with the summons and complaint

_____ on the defendant(s):

Defendant's name	Complete address(es) of service	Day, date, time

- I have personally attempted to serve the summons and complaint, together with any attachments, on the following defendant(s) and have been unable to complete service.

Defendant's name	Complete address(es) of service	Day, date, time

I declare under the penalties of perjury that this proof of service has been examined by me and that its contents are true to the best of my information, knowledge, and belief.

Service fee	Miles traveled	Fee	
\$		\$	
Incorrect address fee	Miles traveled	Fee	TOTAL FEE
\$		\$	\$

 Signature

 Name (type or print)

 Title

Subscribed and sworn to before me on _____, _____ County, Michigan.
Date

My commission expires: _____ Signature: _____
Date Deputy court clerk/Notary public

Notary public, State of Michigan, County of _____

ACKNOWLEDGMENT OF SERVICE

I acknowledge that I have received service of the summons and complaint, together with _____
Attachments

_____ on _____
Day, date, time

_____ on behalf of _____
 Signature

RECEIVED by MCCOC 3/9/2021 2:04:25 PM

STATE OF MICHIGAN
COURT OF CLAIMS

CHARLES LEDUFF,

Plaintiff,

Case No.: 21-000034-MZ

v.

Hon. Cynthia D. Stephens

THE MICHIGAN DEPARTMENT OF
HEALTH AND HUMAN SERVICES, a
state public body.

Complaint

Defendant.

Derk A. Wilcox (P66177)
Stephen A. Delie (P80209)
Patrick J. Wright (P54052)
Mackinac Center for Public Policy
Attorneys for Plaintiff
140 West Main Street
Midland, MI 48640
(989) 631-0900 – voice
(989) 631-0964 – fax
Wilcox@mackinac.org

COMPLAINT

There is no other pending or resolved civil action arising out of the same transaction or occurrence alleged in the complaint.

NOW COMES Plaintiff, Charles LeDuff, by and through his attorneys, The Mackinac Center Legal Foundation, and for his Complaint alleges and states as follows:

INTRODUCTION

The plaintiff, Charles LeDuff, is a Pulitzer Prize winning journalist and a resident of Michigan, who filed the FOIA request at issue in this case in order to obtain information relating to possibly preventable deaths related to the State's COVID-19 response. The Mackinac Center for Public Policy (the "Mackinac Center") is a nonprofit organization dedicated to improving the quality of life for all Michigan residents by promoting sound solutions to state and local policy questions. To that end, the Mackinac Center Legal Foundation routinely provides legal representation to individuals, like Plaintiff, who use the Freedom of Information Act ("FOIA") to obtain relevant documents from state and local governments.

This case deals with a matter of tremendous public importance, namely, the need for transparency in connection with the State of Michigan's COVID-19 response. To date, while the State has published certain statistical information relating to COVID-19 deaths in Michigan, it has repeatedly refused to provide the records and information used to formulate the statistical data being provided. The need for transparency in this particular area has already been established, in another state, thanks to recent revelations that New York Governor Andrew Cuomo's administration had intentionally withheld data from disclosure due to concerns about the resulting political fallout. Recognizing significant similarities between the policies adopted by Governors Cuomo and Whitmer, Plaintiff filed a FOIA request pursuant to MCL 15.231 *et seq.* to determine whether the data reported by the state of Michigan was similarly inaccurate.

Specifically, on January 27, 2021, Plaintiff submitted a FOIA request to the Michigan Department of Health and Human Services ("MDHHS" or "the Department") for the release of information relating to COVID-19 deaths in the month of December, 2020. MDHHS responded to Plaintiff's request by partially denying it a mere sixty-three minutes after transmission. MDHHS provided a link to its published COVID-19 data, and denied the remainder of Plaintiff's request on

the grounds that disclosure of additional information would constitute a clearly unwarranted invasion of personal privacy under MCL 15.243(1)(a).

After receiving the Department's response, Plaintiff clarified his request by phone on February 23, 2021, and in writing on February 24, 2021, in an attempt to obtain a response containing meaningful data not already published by the State. Plaintiff clarified that his request was intended to capture four pieces of information relating to deceased individuals: 1) the age of the deceased; 2) the date of their death; 3) the date when the death was added to the state's official tally of COVID-19 deaths; and 4) an indication of whether the deceased had contracted the disease at a long-term care facility.

MDHHS responded to Plaintiff's written clarification approximately three hours later by expanding upon its initial explanation for denial. In this additional correspondence, MDHHS denied Plaintiff's request for additional data on the basis that vital records and information contained therein are exempt from disclosure under MCL 333.2888(1), and that disclosure of additional information would lead to the unlawful disclosure of protected health information. This appeal follows, as neither the law, nor public policy supports MDHHS' withholding of public records.

PARTIES, JURISDICTION, AND VENUE

1. Plaintiff, Charles LeDuff, is a natural person and resident and citizen of the State of Michigan, County of Wayne.
2. Defendant, the Michigan Department of Health and Human Service, is a subdivision of the state of Michigan's Executive Branch organized under Executive Reorganization Order 2015-01. Upon information and belief, Defendant is headquartered in Lansing, Ingham County, Michigan.
3. Venue is proper pursuant to MCL 15.240(1)(b).

4. Pursuant to MCL 15.240(5), this action should be “assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.”
5. Pursuant to MCL 600.6419(1)(a), the Court of Claims has jurisdiction over this claim.

FACTUAL BACKGROUND

6. The Plaintiff hereby incorporates the preceding paragraphs as if fully restated herein.
7. On January 27, 2021, Plaintiff submitted the following FOIA request to MDHHS:

To Whom It May Concern :

Under Michigan’s Freedom of Information Act, being MCL 15.231 et seq., I hereby request copies of records or portions of records or to inspect records pertaining to the following:

A listing of all Michigan COVID-19 deaths for the month of December 2020 that were identified in a vital records search.

A listing of all Michigan COVID-19 deaths for the month of December that occurred (sic) in December and were not part of a vital records search.

These lists should include the date of the actual death and the specific week in December each death was added to the state's official tally.

Each death should include age, race, and location of infection/death (e.g. Detroit, Nursing home, address, etc.)

If there is any fee for this information, please notify me before filling this request. I can be reached at [redacted] or [redacted].

However, since this is a matter of high public interest, I request that you wave (sic) any fee.

As you know, MCL 15.235 (2) grants an agency five days in which to respond to this request. I therefore look forward to your prompt reply.

Thank you for your attention to this matter.

Exhibit A, Plaintiff’s FOIA Request and Department’s Initial Response.¹

¹ Portions of Plaintiff’s exhibits include his personal cell phone number and e-mail address. Given the high-profile nature of this case, this identifying information has been redacted. Such information will be freely provided to the Court or opposing counsel upon request.

8. That same day, MDHHS responded to Plaintiff's request by partially granting and partially denying Plaintiff's request. Defendants response reads, in the relevant part, as follows:

Dear Mr. LeDuff,

This notice is issued in response to your request, legally received by the Michigan Department of Health and Human Services (Department) on January 28, 2021, requesting information under the Freedom of Information Act (FOIA), MCL 15.231 *et seq.*

Your request is partially granted and partially denied. Please visit www.michigan.gov/coronavirus and select the See Cumulative Data tab to access the responsive records.

As to the granted portion, the Department has identified and included the responsive information falling within the scope of your request. To the best of the Department's knowledge, information, and belief, these are all the records in the possession of the Department falling within the scope of your request. There is no fee for the request as search and retrieval were minimal, falling below the Department's threshold for processing fees.

As to the denied portion, information of a personal nature, the disclosure of which would constitute a clearly unwarranted invasion of an individual's privacy, are exempt from disclosure under the FOIA per MCL 15.243 §13(1)(a).

Id.

9. Plaintiff clarified his request via voicemail on February 23, 2021. In response, the Department sent Plaintiff the following e-mail:

Hi Charlie,

I got your voice mail. I'm on phone calls and in meetings until 3 p.m. Our FOIA Office provided the information that we are able to disclose.

Vital records are exempt from the Freedom of Information Act. And we cannot by law disclose information that could identify any individual as it relates to their protected health information. If we were to provide the age, location and date of a COVID-19 death, that could result in the individual being identified and the fact that they had COVID-19 being revealed, which we can't do.

Please email me back if you have other specific questions.

Exhibit B, Plaintiff's Clarification and MDHHS Response.

10. Plaintiff, in an attempt to assuage the Department's concerns, clarified his request via e-mail on February 24, 2021 by stating the following:

Good afternoob (sic) Bob.

I received your explanation regarding my FOIA request and there appears to be some confusion. Would you please consider this a clarification of my request, and send it through the proper channels to expedite the process?

You noted that vital records are exempt from FOIA by statute. Just to be clear, I am not asking for any vital records at this time. What I am looking for is the **data** for COVID deaths found through the state's vital record search since December 1, 2020 until now Feb. 24, 2021. In other words, I am looking for simply a list with 4 cells of health data, containing:

1. Age of the deceased
2. Date of death
3. Date when the case was added to official state death tally.
4. A demarcation of those within this group who contracted the disease at a long term (sic) care facility.

If there is a debate over item number 4 — which I do not believe there should be — this should not preclude the department from providing items 1-3 as they are public records and data already compiled as part of the department's ordinary business.

Thanks for your consideration. Would you get back to me as quickly as possible, as this is a matter of great public interest?

Id. (emphasis original).

11. MDHHS responded to Plaintiff's clarification that same day, stating:

Charlie,

I consulted with our Legal Division.

As I mentioned below, there are two reasons your request was partially denied.

1. Vital records are exempt from FOIA. MCL 333.2888(1) says "Vital records and information or **any part of the information contained in a vital record is**

not subject to the provisions of the freedom of information act, 1976 PA 442, MCL 15.231 to 15.246.” We understand that you are not seeking the vital records themselves, but the statute exempts any information from the vital records.

2. We cannot by law disclose information that could identify any individual as it relates to their protected health information. If we were to provide the age, location and date of a COVID-19 death, that could result in the individual being identified and the fact that they had COVID-19 being revealed, which we can't do.

I hope this clarifies the reason for the partial denial of your request.

Id. (emphasis original)

COUNT I: VIOLATIONS OF THE FREEDOM OF INFORMATION ACT

A. The Department's Initial Response Incorrectly Applies the Privacy Exemption

12. The Plaintiff hereby incorporates the preceding paragraphs as if fully restated herein.

13. The Department's January 27th, 2021 denial cited a single exemption, MCL 15.243(1)(a) (the "privacy exemption"), as justifying the holding of all requested information not already published on the Department's website.

14. The Department's application of the privacy exemption is contrary to law.

15. MCL 15.231(2) states:

It is the public policy of this state that all persons, except those persons incarcerated in state or local correctional facilities, are entitled to fully and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees, consistent with this act. The people shall be informed so that they may participate in the democratic process.

16. The public body has the burden of proof in applying an exemption. MCL 15.235(5)(a)-(c); *MLive Media Group v City of Grand Rapids*, 321 Mich App 263, 271 (2017).

17. The FOIA is a pro-disclosure statute, and as a result, “exemptions to disclosure are to be narrowly construed.” *Swickard v Wayne County Medical Examiner*, 438 Mich 536, 544 (1991).
18. The privacy exemption states:
- (1) A public body may exempt from disclosure as a public record under the Act any of the following:
 - a. Information of a personal nature if public disclosure of the information would constitute a clearly unwarranted invasion of an individual’s privacy.
19. The Department bears the burden of demonstrating that its application of the privacy exemption is appropriate. *Herald Co v City of Bay City*, 463 Mich 111, 119 (2000).
20. When applying the privacy exemption, the courts apply a two-prong test. The first prong is whether the information sought contains “private or confidential information relating to a person” or “intimate or embarrassing” details about an individual’s personal life. *ESPN Inc v Michigan State University*, 311 Mich App 662, 665 (2015) citing *Mich Federation of Teachers v Univ of Mich*, 481 Mich 657, 675 (2008). The second prong is, if the information is found to be personal under prong one, whether disclosure of that information would be a clearly unwarranted invasion of individual privacy. *ESPN, Inc*, 311 Mich App at 669 (citation omitted). In evaluating the second prong, the court balances the public’s interest in disclosure against the individual’s interest in privacy. *Id*.
21. Plaintiff’s request did not seek any information that could be considered private, let alone a clearly unwarranted invasion of privacy. Plaintiff’s request sought only a listing of COVID-19 deaths in Michigan for the month of December, 2020. Plaintiff did not seek the names of the deceased. Instead, Plaintiff’s initial request sought a listing of deaths identified in a vital records search; a listing of deaths that were not identified through a vital records search; the date of death; the date that death was added to the state’s official

tally; the age and race of the deceased; and a general description of the location where infections and deaths occurred. **See, e.g., Exhibit A.**

22. Deceased individuals have little, if any, privacy rights for purposes of the privacy exemption in Michigan. *Swickard v Wayne County Medical Examiner*, 438 Mich 536, 548 (1991), (holding that common-law privacy rights concerns are “virtually non-existent” in the context of autopsy results requested by FOIA).
23. As such, given that Plaintiff did not request information that could be considered “personal” to any individual, the privacy exemption is inapplicable.
24. Even if the information requested by Plaintiff could be considered of a “personal nature,” MDHHS’ application of the privacy exemption is improper, as the public interest in the disclosure of the requested information is of such a magnitude that it is practically impossible for the privacy interest of the deceased to clearly outweigh the public interest in disclosure.
25. The Governor’s response to COVID-19, and in particular her decision to require Michigan’s long-term care facilities to admit COVID-19 patients, has consistently been a subject of utmost importance to the public. The media has written extensively on this

subject,² Michigan's citizens have openly protested the Governor's actions,³ and the former President of the United States has specifically called for an investigation into Michigan's nursing home COVID-19 policies.⁴ Furthermore, the controversy surrounding New York Governor Andrew Cuomo's similar orders and the deaths resulting therefrom have become a matter of national controversy.⁵ An adequate understanding of Michigan's

² See, e.g., The Detroit News, *Editorial: Whitmer's Nursing Home Data Should Be Examined*, Detroit News (Mar 1, 2021), available at: <https://www.detroitnews.com/story/opinion/editorials/2021/03/02/editorial-whitmers-nursing-home-data-examine/6870364002/>; Bernstein, *Michigan GOP Calls for Investigation into Whitmer's COVID Nursing Home Policy*, National Review (March 1, 2021), available at: <https://www.nationalreview.com/news/michigan-gop-calls-for-investigation-into-whitmers-covid-nursing-home-policy/>; VanderWall, *Michigan Needs to Investigate its Own Nursing Home Tragedy*, Detroit Free Press (Feb 25, 2021), available at: <https://www.freep.com/story/opinion/contributors/2021/02/25/michigan-covid-nursing-homes-deaths-investigation/6812892002/>; Jones and Kamp, *Coronavirus Deaths Were Likely Missed in Michigan, Death Certificates Suggest*, Wall Street Journal (May 21, 2020), available at: <https://www.wsj.com/articles/coronavirus-deaths-were-likely-missed-in-michigan-death-certificates-suggest-11590073280> All last accessed March 8, 2021.

³ Dodge, *Steven Crowder, 1000-Plus Protestors Demand More Nursing Home Death Data at Michigan Capitol*, MLive (Oct 2, 2020), available at: <https://www.mlive.com/public-interest/2020/10/steven-crowder-1000-plus-protesters-demand-more-nursing-home-death-data-at-michigan-capitol.html>.

Last accessed March 8, 2021

⁴ Kamp, Gurman, and Mathews, *Trump Administration Seeks Data on Covid-19 Nursing Home Deaths in Four States*, Wall Street Journal (Aug 27, 2020), available at: <https://www.wsj.com/articles/trump-administration-seeks-data-on-covid-19-nursing-home-deaths-in-four-states-11598558780>. Last accessed March 8, 2021.

⁵ See, e.g. Warner, *Andrew Cuomo's Nursing Home Shield Means 'They Got Away With Killing Our Mom,'*, Newsweek (March 3, 2021), available at: <https://www.newsweek.com/andrew-cuomos-nursing-home-shield-means-they-got-away-killing-our-mom-1573307>; Hogan, Campanile, and Golding, *Cuomo Aide Melissa DeRosa Admits They Hid Nursing Home Data So Feds Wouldn't Find Out*, New York Post (Feb 11, 2021), available at: <https://nypost.com/2021/02/11/cuomo-aide-admits-they-hid-nursing-home-data-from-feds/>; Katersky, *New York Gov. Andrew Cuomo Under Investigation for Nursing Home Deaths*, ABC News (Feb 17, 2021), available at: <https://abcnews.go.com/Politics/york-gov-andrew-cuomo-investigation-nursing-home-deaths/story?id=75960261>.

All last accessed on March 8, 2021.

COVID-19 death data, and whether the government's policies have contributed to those deaths, is of paramount importance to not only Michigan's citizens, but the national public.

26. Thus, even if Plaintiff's request sought information of a personal nature, the public interest in that information renders the privacy exemption inapplicable.

B. The Department's Application of the Vital Records Exemption Was Overly Broad

27. The Plaintiff hereby incorporates the preceding paragraphs as if fully restated herein.

28. After receiving the Department's January 27th response, Plaintiff clarified his request via telephone call in an effort to demonstrate that the requested information would not, in fact, result in the disclosure of any privacy interests. **See Exhibit B.**

29. The Department responded by e-mail on February 23, 2021. For the first time, MDHHS cited two additional FOIA exemptions. Specifically, the Department stated that vital records are exempt from the FOIA, and that disclosure of the age, location, and date of death of a COVID-19 death would identify individual's protected health information. *Id.*

30. Plaintiff further clarified his request via e-mail the following day. In this clarification, Plaintiff explained that he was seeking simply a list with 4 cells of data, containing: 1) age of the deceased; 2) date of death; 3) date when the case was added to the official state death tally; and 4) a demarcation of those within that group who contracted COVID-19 at a long-term care facility. Plaintiff further stated that, if the Department chose to withhold information relating to the fourth category of his request, it should nonetheless be able to provide a response to the first three categories. *Id.*

31. MDHHS responded a few hours later, and reiterated its position that disclosure of the requested information was exempt under the vital records exemption of MCL 333.2888(1)

and on the basis that disclosure of that information would reveal health information relating to the deceased that could be used to identify them. *Id.*

32. Neither of the exemptions applied by the Department in its responses to Plaintiff's clarifications are applicable.

33. The Department's final correspondence cited to MCL 333.2888(1) as justifying its withholding of information. This section states, in the relevant part:

To protect the integrity of vital records, to insure their proper use, and to insure the efficient and proper administration of the system of vital statistics, a person or governmental entity shall not permit inspection of, disclose information contained in vital records, or copy or issue a copy of all or part of a record except as authorized by this part, by rule, or by order of a court of competent jurisdiction. Vital records and information or any part of the information contained in a vital record is not subject to the provisions of the freedom of information act, 1976 PA 442, MCL 15.231 to 15.246. Procedures shall provide for adequate standards of security and confidentiality of vital records.

34. Upon information and belief, the Department cites MCL 333.2888(1) for the purposes of applying MCL 15.243(1)(d), which permits a public body to exempt from disclosure "[r]ecords of information specifically described and exempted from disclosure by statute."

35. The Department's application of MCL 15.243(1)(d) is incorrect, as it relies on an overly broad interpretation of the language of MCL 333.2888(1).

36. As clearly indicated by Plaintiff's clarification of February 24th, Plaintiff is neither seeking a vital record nor information drawn directly from vital records. Instead, Plaintiff is seeking aggregated data contained in records created and maintained by the Department itself.

37. To the extent that the Department has created the records requested by Plaintiff by utilizing information compiled from vital records, the Department has since abstracted that data to such an extent that it should no longer be considered to have been derived from a vital record.

38. Indeed, Plaintiff's clarification indicated that he was seeking nothing more than a portion of a spreadsheet which, upon information and belief, is created and maintained by MDHHS. To the extent that this spreadsheet contains any information originally contained by a vital record, it would be practically impossible to associate this aggregated and anonymized data with any particular vital record.
39. Plaintiff's position is further supported by the text of MCL 333.2888(1) itself, which acknowledges the purpose of the exemption as being related to "the security and confidentiality of vital records." Neither of those concerns would be implicated by the release of the data sought by Plaintiff.
40. The security of a vital record is not implicated by Plaintiff's request, as the request is seeking only aggregated information, not access to the underlying records or the sensitive information contained therein. At no point would either the vital record, or the sensitive information contained in a vital record be in Plaintiff's possession even if the Department were to release all information requested by Plaintiff.
41. Nor would the confidentiality of the vital records or vital record information be placed at risk by Plaintiff's request. Plaintiff is plainly not seeking information about any individual vital record. Given that Plaintiff's request is for abstracted data in the form of a spreadsheet, any confidentiality concerns are largely, if not entirely, moot.
42. Furthermore, the purpose of the vital records exemption cannot possibly be properly interpreted to be as broad as the Department asserts. The vital records at issue in this case are death certificates, which are publicly available pursuant to MCL 333.2891 and Mich Admin Code R 325.3232. In short, to the extent that vital records exemption is applicable

to death certificates, it clearly applies to a lesser extent than would be applicable to other, more sensitive vital records.

C. The Department's Exemption of Data Pursuant to HIPPA was Overly Broad

43. The Plaintiff hereby incorporates the preceding paragraphs as if fully restated herein.
44. In its February 24th response, The Department also cited the need to prevent the release of protected health information ("PHI") as requiring it to withhold the records requested by Plaintiff. **See Exhibit B.** This justification is inapplicable.
45. Upon information and belief, the Department's reference to PHI is an attempt to apply MCL 15.243(1)(d), which permits a public body to exempt from disclosure "[r]ecords of information specifically described and exempted from disclosure by statute." Presumably, the Department's intent is to exempt PHI under the provisions of the Health Insurance Portability and Accountability Act of 1996 ("HIPPA") and related regulations. See, e.g., 42 USC §1320d *et seq.*
46. HIPPA is a federal law designed to prevent the release of protected health information by a health plan, health care clearinghouse, health care provider, and, under some circumstances, business associates ("covered entities"). 45 CFR §160.102.
47. HIPPA defines "health information" as information created or received by certain entities, including "public health authorit[ies]" that "relates to past, present, or future physical or mental health or condition of an individual." 45 CFR §160.103.
48. HIPPA defines PHI as individually identifiable health information that is transmitted or maintained in electronic format. *Id.*

49. HIPPA defines “individually identifiable health information” as health information that is created or received by a covered entity and that either identifies an individual or creates a reasonable basis to believe the information can be used to identify the individual. *Id.*
50. Assuming, arguendo, that MDHHS is subject to the requirements of HIPPA, the information sought by Plaintiff would not violate that statute.
51. As explained by Plaintiff’s February 24, 2021 clarification, Plaintiff is seeking information regarding the age, death dates, general location information, and an indication of whether the deceased contracted COVID-19 at a long-term care facility. Even taken as a whole, such information could not be used to identify an individual, thereby indicating it is not PHI per the definition as provided by HIPPA.
52. Furthermore, to the extent that aggregated information could reveal individually identifiable PHI in a particular instance, Plaintiff’s clarification indicated that he was requesting, in the alternative, only date of death, age of the deceased, and the date the case was added to the state’s death tally. Without location data, it would be practically impossible to identify a particular individual through the release of this information.
53. This is doubly true, if, as Plaintiff stated would be acceptable in his February 24th clarification, information about whether COVID-19 had been contracted at a long-term care facility were to be removed from responsive records.
54. Even if the information Plaintiff requested could be considered PHI, that information remains subject to disclosure upon de-identification. Under 45 CFR 164.541(a), de-identified health information may be released when there is no reasonable basis that the information can be used to identify an individual.

55. 45 CFR §164.514(b)(2)(i) provides a full listing of the information that must be redacted for PHI to be considered de-identified. The only information contained in this Section that would conceivably be captured by Plaintiff's request include age and date of death. Importantly, however this information cannot properly be classified as "identifiers of the individual," for purposes of 45 CFR §164.514(b)(2)(i), as age and date of death, without additional information, is insufficient to identify any individual deceased.
56. Further, to the extent that such information could be used to identify the deceased, it is the Department's duty to state its denial in relation to the specific piece of data being withheld. See *Herald Co, Inc v Ann Arbor Public Schools*, 224 Mich App 266, 275 (1997). The Department also bears the burden of separating exempt material from non-exempt material. *Id.* Thus, if the combination of information Plaintiff requested could be used to identify a particular individual, it is the Department's duty to redact the information relating to that specific individual, and to produce any remaining non-exempt material. *Id.*
57. The Department's attempted application of HIPPA as an exemption is also, on its face, both illogical and contrary to public policy. Under Michigan law, death certificates can be ordered by any member of the public. See MCL 333.2891 and Mich Admin Code R 325.3232. These certificates include the decedent's name, date of birth, date of death, location of death, residential address, birthplace, social security number, education, race, military service history, occupation, time of death, and place of death, among other information. **Exhibit C, Sample Michigan Death Certificate.** In short, these publicly available records already contain individually identifiable health information that is of greater specificity than the information Plaintiff seeks in aggregated form. It defies logic

that the release of specific and individually identifiable health information would be permitted under HIPPA, but the less specific data sought by Plaintiff would not.

D. Statutory Damages

58. The Plaintiff hereby incorporates the preceding paragraphs as if fully restated herein.

59. In light of the above, the Department's improper withholding of the requested records is arbitrary and capricious under MCL 15.240(7), thereby subjecting the Department to a civil fine of \$1,000.00 payable to the general treasury and a separate \$1,000.00 to Plaintiff.

60. The Department's inappropriate application of the aforementioned exemptions constitutes a willful and intentional failure to comply under MCL 15.240b, thereby subjecting it to a civil fine of \$2,500.00 to \$7,500.00 payable to the state treasury.

61. Pursuant to MCL 15.240(6), Plaintiff, if he prevails, is entitled to attorneys' fees and costs:

If a person asserting the right to inspect, copy, or receive a copy of all or a portion of a public record prevails in an action commenced under this section, the court shall award reasonable attorneys' fees, costs, and disbursements. If the person or public body prevails in part, the court may, in its discretion, award all or an appropriate portion of reasonable attorneys' fees, costs, and disbursements. The award shall be assessed against the public body liable for damages under subsection (7).

RELIEF REQUESTED

Plaintiff, Charles LeDuff, respectfully requests that this Court order Defendant, the Michigan Department of Health and Human Services, to provide all information sought in his FOIA request in unredacted form; apply the full penalties available under MCL 15.234(9), MCL 15.240(7), and MCL 15.240b; award attorneys' fees and costs under MCL 15.240(6); and award any other relief this Court determines to be just and equitable to remedy the Department's improper withholding of the requested information and causing the need to bring this suit.

Dated: March 9, 2021

Charles R. LeDuff
Page 17 of 18

Charles LeDuff

Subscribed and sworn to by Charles LeDuff before me on the 9th day of
March, 2021.

Signature: Yours S

Notary Public, State of Michigan

County of oakland

My Commission Expires 06-28-2024

Acting in the County of oakland



TEMPTEST BANKS
Notary Public, State of Michigan
County of Oakland
My Commission Expires Jun. 28, 2024
Acting in the County of oakland

Exhibit A

Delie, Steve

From: Delie, Steve
Sent: Thursday, March 4, 2021 1:47 PM
To: Delie, Steve
Subject: FW: FOIA Request

----- Forwarded message -----

From: **Wheaton, Bob (DHHS)** <WheatonB@michigan.gov>
Date: Mon, Feb 22, 2021 at 1:47 PM
Subject: RE: FOIA Request
To: Charlie LeDuff <[REDACTED]>

Hi Charlie,

You should have received a response from our FOIA Office on Jan. 27. The email is below.

Bob Wheaton, Public Information Officer

Michigan Department of Health & Human Services

Office of External Relations & Communications

517-281-1701



LET'S STAY SAFE TOGETHER



RECEIVED by MCCOC 3/9/2021 2:04:25 PM

MACKINAC CENTER LEGAL FOUNDATION

March 9, 2021

Clerk of the Court of Claims
Hall of Justice
925 W. Ottawa St.
Lansing, MI 48909


RE: Written Claim per MCL 600.6431 against the Michigan Department of Health and Human Services.

Dear Clerk:

This verified letter is to fulfill the requirements of MCL 600.6431(1) as a written notice against the Michigan Department of Health and Human Services by Charles LeDuff, by and through his attorneys, the Mackinac Center Legal Foundation. The nature of the claim is for delays and denials of a Freedom of Information Act ("FOIA") request which was filed by Mr. LeDuff on January 27, 2021.

Mr. LeDuff seeks complete fulfillment of this request, along with penalties, attorney fees, and other costs.

Sincerely,


Derk Wilcox

I declare that the statements above are true to the best of my information, knowledge, and belief.

Dated: March 9, 2021


Derk Wilcox, (P66177)

Subscribed and sworn to by Derk Wilcox before me on the 9th day of March, 2021.

Signature Stacey M Cappelli
Notary Public, State of Michigan
County of WASHTENAW
My Commission Expires OCTOBER 27, 2023
Acting in the County of WASHTENAW



STATE OF MICHIGAN
COURT OF CLAIMS

Bundle Cover Sheet

Lower Court:	L Ct No.:	COC No.: TEMP-D69Q2BVJ
Case Title: CHARLES LEDUFF v. MICHIGAN DEPARTMENT OF HEALTH AND HUMAN		
Priority: NONE	Filing Option: File Only	

Filer Information

Filer
Derk Wilcox
140 West Main Street
Midland, MI 48640

Attorney
Derk Wilcox, 66177(MI)
140 West Main Street
Midland, MI 48640

wilcox@mackinac.org

wilcox@mackinac.org

Filing Summary

Filing Type	Filing Name	Fee
Notice	2021 03 09 Notice Letter	\$0.00
Other	MC 01, Summons	\$0.00
Complaint	2021.03.09 MDHHS FOIA Complaint (Executed)	\$150.00
	eFiling System Fee:	\$25.00
	NON-REFUNDABLE Automated Payment Service Fee:	\$5.25
	Total:	\$180.25

Alternate Payment Reason: None

RECEIVED by MCOCC 3/9/2021 2:04:25 PM

The document(s) listed above were electronically filed with the Michigan Court of Claims.

TEMP-D69Q2BVJ-10540224