

GEORGE NORRIS HALL,
Plaintiff-Appellant,

DEPARTMENT OF CORRECTIONS,

Defendant-Appellee.

No. 53206
Application for
Leave to Appeal

-v--

TO: Judges
FROM: Allan Falk
DATE: January 29, 1981; for submission February 10, 1981

COMMISSIONER'S REPORT

FACTS:

Plaintiff seeks leave to appeal a July 31, 1980 order of the Marquette County Circuit Court, Honorable John E. McDonald presiding, granting the Attorney General, representing the Department of Corrections, a 60-day extension of time in which to respond to plaintiff's freedom of information act request.

By way of background, plaintiff is a career, violent criminal, having, prior to his present incarceration, been sentenced to prison sequentially for breaking and entering, statutory rape, robbery armed, attempted breaking and entering, robbery armed, and again robbery armed. Plaintiff is now serving the statutory sentence for five convictions of first-degree murder and additional life sentences for second-degree murder, assault with intent to murder, and assault with intent to rob while armed, based on jury convictions rendered in the Ingham County Circuit Court, Honorable Thomas Brown presiding, on May 1, 1975.

In early 1980 plaintiff was serving his sentence at the Riverside Correctional Facility in Ionia. He made a Michigan freedom of information act request to the records section at RCF demanding that he be provided with an opportunity to inspect "any and all files pertaining to my person", whether transferred from Jackson Prison to RCF or originating at RCF. Within two days, the supervisor of records responded in a written memorandum, stating:

"Due to the large number of requests and shortage of personnel in the records office, it could be at least one month before we can process your request."

Before these 30 days were up, however, plaintiff was transferred first to the Kinross Correctional Facility and then to Marquette Branch Prison; all plaintiff's files were, in accordance with standard Department of Corrections procedures, transferred with him. Nonetheless, on April 29, 1980 plaintiff filed his complaint in circuit court charging defendant with violation of the Michigan Freedom of Information Act. The complaint charges that, while at RCF, plaintiff was permitted to review only his health files and accordingly that defendant violated section 5(2)(d) of the Freedom of Information Act, MCL 15.235(2)(d); MSA 4.1801(5)(2)(d) which provides:

"When a public body receives a request for a public record it shall immediately, but not more than five business days after the day the request is received unless otherwise agreed to in writing by the person making the request, respond to the request by one of the following: . . .

"(d) Under unusual circumstances, issue a notice extending for not more than ten business days the period during which the public body shall respond to the request. A public body shall not issue more than one notice of extension for a particular request."

Service of process was by registered mail on the Attorney General; the Attorney General failed to respond within the 30 days permitted by court rule, GCR 1963, 108.1(2), and plaintiff filed an affidavit for entry of default. Thereafter, the circuit court, either on its own motion or that of the Attorney General, issued an order to show cause directing the Attorney General to produce plaintiff before the court on July 31 to answer plaintiff's complaint and show cause why the relief sought by plaintiff should not be granted. At that show cause hearing, the Attorney General indicated that plaintiff had failed to sufficiently specify the materials sought, inasmuch as some materials would be exempt, such as presentence reports, information provided by informants within the prison system, and some notes made by psychiatric personnel, physicians, and others for intra-agency use. The Attorney General also noted that the Department of Corrections in particular is inundated with FOIA requests, and requested a 60-day extension of time in which to respond to plaintiff's FOIA request. The circuit court granted this extension

of time, from which decision plaintiff appeals.

Plaintiff states the issue for review as follows:

"DID THE TRIAL JUDGE ABUSE HIS DISCRETION AND COMMIT ERROR IN GRANTING A 60-DAY POSTPONEMENT WHICH IN EFFECT SERVED AS A TIME EXPANSION TO DEFENDANT WITHIN WHICH TO FILE A RESPONSIVE PLEADING, WHEN DEFENDANT HAD NOT TIMELY MOVED FOR AN EXTENSION OF TIME, HAD NOT ANSWERED PLAINTIFF'S ORIGINAL COMPLAINT IN ANY MANNER, AND HAD NOT FILED A MOTION CLAIMING EXCUSABLE NEGLIGENCE, AND AFTER PLAINTIFF HAD MOVED FOR A DEFAULT?"

FINDINGS:

The application for leave to appeal should be denied.

Plaintiff does not actually argue the question of the propriety of permitting the Attorney General to appear and defend in this suit while technically under default; hence, that portion of the issue for review as stated by plaintiff should be deemed abandoned. Mitcham v City of Detroit, 359 Mich 188, 203 (1959).

Plaintiff claims that the time limit set forth in the above quoted portion of the Freedom of Information Act is mandatory, and that accordingly, not only was defendant's first response to his request, stating that 30 days would be needed to respond, in contravention of the act, but the circuit court had no authority to grant a 60-day extension of time in addition thereto. Of course, plaintiff seeks this information not for any material purpose other than in the hopes of obtaining an award of attorney fees pursuant to § 10(4) of the FOIA and/or of punitive damages of \$500 under § 10(5). Inmates throughout the state have been encouraged to institute FOIA suits ever since an Ingham County circuit judge awarded \$200 in attorney fees to an inmate who successfully prosecuted an FOIA suit. The number of such suits may soon diminish if this Court follows the lead of the federal Courts of Appeals and a district court in the Fourth Circuit which have held that attorney fees should not be awarded to prisoners representing themselves pro se in FOIA lawsuits because they have not been diverted from income producing activity, and the FOIA should not be used to "create a cottage industry for federal prisoners". Crooker v Department of Treasury, 49 LW 2359 (CA 2, 1980); Crooker v Department of Justice, 49 LW 2293 (CA 1, 1980);

Barrett v US Customs Service, 482 F Supp 779 (ED La, 1930); Contra: Cuneo v Rumsfeld, 553 F2d 1360 (CA DC, 1977).

The federal Freedom of Information Act contains a similar 10-day response requirement, as well as language identical to that appearing in §5(2)(d) of the Michigan FOIA allowing extensions of time only "under unusual circumstances". Federal appellate courts have unanimously held that the provision should be given a sane construction, and where the number of FOIA requests has burdened the responding agency, the courts will not in essence force the agency to reallocate its resources for the purpose of responding to such requests, nor will it force the agency to treat such requests on other than a first-in first-out basis, thereby giving preference to those persons who have filed FOIA lawsuits out of their proper order. Open America v Watergate Special Prosecution Force, 178 US App DC 308, 547 F2d 605, 38 ALR Fed 678 (1976); Cleaver v Kelley [Director, Federal Bureau of Investigation], 415 F Supp 174 (DC, 1976); Exner v Federal Bureau of Investigation, 542 F2d 1121 (CA 9, 1976); Contra: Hamlin v Kelley, 433 F Supp 180 (ND Ill, 1977); See generally 11 Ga L Rev 241 (1976). Thus, in the Open America, Cleaver, and Exner cases the courts, as the Marquette County Circuit Court in this case, granted extensions of time well beyond the statutory limits. There is no challenge to the claim in this case made by the Department of Corrections that it is in fact deluged with FOIA requests from present and former inmates, or that the department is doing its level best to respond to these requests on a first-in, first-out basis, absent a showing of emergency, using to the fullest the resources at the department's command. The legislature cannot have intended that the department drop all its other business in order to divert personnel to its various record sections so that FOIA requests could be processed within 15 days; the statutory time limit should be regarded as mandatory in ordinary cases but as precatory in unusual circumstances, which "unusual circumstances" include a torrent of FOIA requests which in effect swamp the personnel resources of the responding agency.

RECOMMENDATION:

The application for leave to appeal should be denied.
A proposed order has been prepared for the Court's consideration.

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