

HANDLING FOIA REQUESTS

Under Michigan's Freedom of
Information Act

(MCL 15.231 *et seq.*)

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Presentation for Michigan Association of Counties

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Public Policy and Effective Date of Act

- The Freedom of Information Act (“FOIA”) states that it is the public policy of the State of Michigan that all persons 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 Act became effective April 13, 1977. Substantial amendments were made to this Act regarding FOIA procedures and fees that may be charged for a request for public records. These amendments were adopted effective July 1, 2015, under Public Act 563 of 2014.

Rights of the Public

- Upon “written request” which describes the “public record” sufficiently to enable the “public body” to find the record, a “person” has a right to inspect, copy or receive copies of a public record of a public body, except as provided by Section 13 of FOIA.
- The definition of a “person” includes an individual, corporation, limited liability company, partnership, firm, organization, association, governmental entity, or other legal entity. A “person” does not include an individual serving a sentence of imprisonment in a state or county correctional facility in this state or any other state, or in a federal correctional facility.

Public Body

- The definition of "public body" is broad. It includes a county, city, township, village, intercounty or regional governing body, school district, municipal corporation, council, or a board, department, commission or agency thereof. Further, the definition of a public body includes any body which is created by State or local authority. The judiciary, including the office of county clerk and the employees thereof, when acting in the capacity of clerk to the circuit court, is *not* included in the definition of a public body.

What is a Public Record

- "Public record" is defined as a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function. "Public record" does not include computer software. Personal e-mails of public employees using publicly-owned computers are not "public records" subject to disclosure under FOIA. *Howell Ed Assn, MEA/NEA v Howell Bd of Ed*, 287 Mich App 228; 789 NW2d 495 (2010), *lv den* 488 Mich 1010 (2010).
 - "Writing" means handwriting, typewriting, printing, photostating, photographing, photocopying, and every other means of recording, and includes letters, words, pictures, sounds, or symbols, or combinations thereof, and papers, maps, magnetic or paper tapes, E-mail, photographic films or prints, microfilm, microfiche, magnetic or punched cards, discs, drums, or other means of recording or retaining meaningful content.

What is not a Public Record

- “Public record” does not include computer software. Personal e-mails of public employees using publicly-owned computers are not “public records” subject to disclosure under FOIA. *Howell Ed Assn, MEA/NEA v Howell Bd of Ed*, 287 Mich App 228; 789 NW2d 495 (2010), *lv den* 488 Mich 1010 (2010).
- Handwritten notes of a public official are not considered public records if taken for personal use, and are not possessed or used by the public body in the performance of a public function. *Hopkins v Duncan Twp*, 294 Mich App 401; 812 NW2d 27 (2011).

2 Classes of Public Records

- The Act separates public records into two classes
 - The first being those which are exempt from disclosure under Section 13 of FOIA, and
 - The second, all others which are subject to disclosure under the Act.

Requests

- A “written request” means a writing that asks for information, and includes a writing transmitted by facsimile, electronic mail, or other electronic means. The Act requires a request be made in writing for a written response, though the 2015 amendments also clarify that if an oral request is received and the public body’s FOIA coordinator is aware that the records are available online, an obligation exists to advise the requestor as to that online availability.
- A request must include the requesting person’s complete name, address (written in compliance with US Postal Services Standards) and contact information (telephone number or email address) MCL 15.233(1)

Inspection

- A public body is required to furnish a requesting person a reasonable opportunity for inspection and examination of its public records. It is further required to furnish reasonable facilities for making memoranda or abstracts from its public records during normal business hours. A public body is permitted to make reasonable rules necessary to protect its public records and to prevent excessive and unreasonable interference in the discharge of its function.

Compilations/summary not required

- The Act does not require a public body to make a compilation, summary or report of information except as provided in Section 11 of FOIA for a State agency. Further, the Act does not require a public body to create a new public record except as required in Section 11 of FOIA for a State agency.

Certified Copy

- Upon request, the custodian of the public records shall furnish a certified copy of the public record. If a requested record exists in an electronic format, the requester is entitled to an electronic copy. *Ellison v Department of State*, 320 Mich App 169 (2017); *Farrell v Detroit*, 209 Mich App 7, 14 (1995). MCL 15.234(1)(c).

FOIA Procedures

- With the 2015 amendments to the Act, all public bodies that are subject to FOIA must now establish procedures and guidelines to implement FOIA.
- The public body must also establish a written public summary of its FOIA procedures and guidelines. The summary should be written in a manner so it can be easily understood by the general public. These procedures and guidelines at a minimum must include how to make a FOIA request, how to understand the public body's written responses, what the fees are and how they are calculated, when deposits will be required, and the appeal and fee appeal process.

Standardized Fees

- The policies must also adopt a standardized fee calculation form to be utilized in providing detailed itemization of any fee amounts charged for copies of the public body's records.
- If a fee exceeds the amount permitted, the requesting person may appeal the fee to the head of the public body, if available, or commence an action in Circuit Court to challenge the amount of the fee. The public body may uphold the fee, reduce the fee, or waive the fee. A Court may uphold the fee or reduce the fee. MCL 15.240a

Forms

- The policies and procedures may also include the adoption of any other standardized forms to be used by the public body in responding to FOIAs, and any internal operational procedures of the public entity in handling FOIA requests.

Access to FOIA Procedures

- Copies of these procedures and guidelines, public summary, and forms are to be available for free at the public body's offices and must be included with every FOIA response unless a link to these documents is posted on the public body's website. If the public body administers or maintains an internet presence, then it is required to post the procedures and guidelines, written public summary and applicable forms on its website.

Fee Itemization

- The procedures and guidelines must include a standard form to detail itemization of any fee the public body estimates or charges under FOIA. The itemization must clearly list and explain each of the six (6) fee components authorized under the 2015 legislation.

Itemization of Fee Components

6 Fee Components
(1-3)

1. labor costs for searching, locating and examining public records;
2. labor costs for separating exempt from non-exempt information;
3. the actual and most reasonably economical cost of providing records on non-paper physical media, e.g., computer discs or electronic records, if requested in that form and the public body has the technological capability of providing it in that form;

Itemization of Fee Components

6 Fee Components
(4-6)

4. the actual total incremental cost of necessary duplication or publication of paper copies, not to exceed 10 cents per page for letter and legal size paper;
5. labor costs directly associated with duplication or publication of paper or electronic records; and
6. the actual cost of mailing at the least expensive form of postal delivery.

Labor Costs

(searching, separating, and copying)

- The public body shall not charge more than the hourly wage of its lowest-paid employee capable of performing that task in the particular instance, regardless of whether that person is available or who actually performs the labor.
- However, a public body may use contract labor for the separation and redaction of exempt materials, and charge its actual contract labor costs, not to exceed six times the minimum wage. This is only where the public body does not employ a person capable of separating exempt materials in the particular instance.

Labor Costs continued:

- Labor costs shall be itemized
 - hourly wage; and
 - the number of hours charged.
- The public body may also add up to 50% to the applicable labor charge amount to cover or partially cover the cost of fringe benefits
 - not to exceed actual fringe benefits costs
 - Invoice for these charges must clearly state the percentage multiplier used to account for benefits in the itemization.
- Labor costs for searching and separating must be estimated and charged in increments of 15 minutes or more, with all partial time increments rounded down.
- Labor costs for copying may be in any increments of the public body's choosing, but partial increments must be rounded down.
- A public body may not charge for redaction of documents that were already redacted in response to a previous FOIA request, if redacted copies remain in the public body's possession.

Fee Waiver/Reduction

- A public record shall be furnished without charge for the first \$20.00 of the fee for each request by an indigent person (on public assistance or stating facts showing an inability to pay) (current law) *and for requests from a non-profit organization designated by the state for the protection and advocacy of persons with mental illness.*
- If the requestor is eligible for a requested discount, the public body must note the discount on the detailed itemization.

Ineligibility for Fee Waiver

- An individual is ineligible for this fee reduction if:
 1. the individual has previously received discounted copies of public records from the same public body twice during that calendar year; or
 2. the individual requests the information in conjunction with outside parties who are offering or providing payment or other remuneration to the individual to make the request.
- A public body may require a statement by the requestor in an affidavit that the request is not being made in conjunction with outside parties in exchange for payment or other remuneration.

Notice of Ineligibility for Fee Waiver or Reduction

If a requestor is ineligible for the discount, the public body must inform the requestor of the specific reason for ineligibility in the written response.

Public Records Online

- If the public body directly or indirectly administers or maintains an official internet presence, any public records available to the general public on that internet site at the time the request is made are exempt from any charges under FOIA.
- If the FOIA coordinator knows or has reason to know that all or a portion of the requested information is available on the website, the public body must notify the requestor in its written response that all or a portion of the requested information is available online.
- The written response must include a specific webpage address where the requested information is available.
- On the detailed itemization, the public body must separate the requested public records that are available on its website from those that are not available on the website, and must inform the requestor of the additional charge to receive copies of the public records that are available on its website.

Responding to Verbal Requests

- A public body may provide requested information available in public records without receipt of a written request.
- If a verbal request for information is for information that a public body believes is available on the public body's website, the public employee shall, where practicable and to the best of the public employee's knowledge, inform the requestor of the location of the material online (e.g. website address).

Good Faith Deposits = 50%

- A public body's demand for a good faith deposit (50% of the estimated fee) must also contain a "best efforts estimate" by the public body regarding the time frame it will take to provide the public records to the requestor.
 - the time frame estimate is nonbinding
 - but should be reasonably accurate
- The requesting person should be notified that if the deposit is not received by a date certain 48 days after the notice, then the request will be deemed abandoned, unless the fee is subject to a fee appeal. MCL 15.234(14)

Good Faith Deposits + 50%

- If a public body has not been paid in full for copies of public records previously requested by an individual, the public body may require a deposit of up to 100% of the estimated fee before it begins a full public record search for any subsequent FOIA request from that individual, but only upon meeting several narrow conditions.
 - a. The final fee for the prior written request was not more than 105% of the estimated fee.
 - b. The public records made available contained the information being sought in the prior written request and are still in the public body's possession.
 - c. The public records were made available to the individual, subject to payment, within the time frame estimate described under subsection (7).
 - d. Ninety days have passed since the public body notified the individual in writing that the public records were available for pickup or mailing.
 - e. The individual is unable to show proof of prior payment to the public body.
 - f. The public body calculates a detailed itemization, as required under subsection (4), that is the basis for the current written request's increased estimated fee deposit.

Discontinuation of Increased Deposit (they thought of everything)

- A public body shall no longer require an increased estimated fee deposit from an individual if any of the following apply:
 - a. The individual is able to show proof of prior payment in full to the public body.
 - b. The public body is subsequently paid in full for the applicable prior written request.
 - c. Three hundred sixty-five days have passed since the individual made the written request for which full payment was not remitted to the public body.

Time a FOIA Request is “Received”

- If a written request is sent by electronic mail and delivered to the public body’s spam or junk-mail folder, the request is not received until 1 day after the public body first becomes aware of the written request.
- The public body shall note in its records both the time a written request is delivered to its spam or junk-mail folder and the time the public body first becomes aware of that request.

Civil Fines

- The amount of a civil fine that may be imposed by a court on a public body for refusal or delay in disclosing or providing copies of a public record has been increased from \$500 to \$1,000.
- Further, if a court determines that a public body willfully and intentionally failed to comply with FOIA or otherwise acted in bad faith, the court may order the public body to pay a civil fine of not less than \$2,500 nor more than \$7,500 for each occurrence, taking into account the public body's budget and whether it was previously assessed penalties for FOIA violations.

Procedure after Written Request

- A FOIA request must be in writing, though the public body may respond to verbal requests, and if a verbal request is for information that a public body believes is available on the public body's website, the public employee shall, where practicable and to the best of the public employee's knowledge, inform the requestor about the public body's pertinent website address.

Identifying Request under FOIA

- A letter, facsimile, electronic mail, or electronic mail attachment is considered a “FOIA Request” if within its first 250 words it includes the words, characters, or abbreviations for “*freedom of information,*” “*information,*” “*FOIA,*” “*copy,*” or a recognizable misspelling of such, or appropriate legal code reference to the FOIA act, on the front of an envelope or in the subject line of an electronic mail, letter, or facsimile cover page.

Time to Respond

- The public body, upon receipt of a written FOIA request for a public record, shall respond to the request not more than five (5) business days after the request is received. An employee who receives a written FOIA request should immediately turn over the request to the FOIA coordinator.
- The five business days for responding to a FOIA request includes all non-holiday weekdays Monday through Friday, regardless of whether the public body is itself open for business on those days. OAG, No. 7172 (March 17, 2005). Thus, if a governmental entity is open for business only three days per week, the two days that it is closed count toward the five business days for responding to a FOIA request.

When is the request “received”

- A written request made by facsimile, electronic mail or other electronic transmission is considered not received until one business day after the electronic transmission is sent. If an emailed request goes to a “spam” or “junk mail” folder, it is not considered as received until 1 day after the public body first becomes aware of the written request. The public body shall note in its records both the time a written request is delivered to its spam or junk-mail folder and the time the public body first becomes aware of that request.

Extensions

- There is a provision in FOIA allowing for an extension of the above-stated time limitation. (MCL 15.235(2)(d) This extension shall be for not more than ten (10) additional business days. The public body does not have to provide a reason for requiring the extension, but must issue the extension notice in writing. Therefore, the public body has a total of fifteen (15) business days to respond after receipt of the request, regardless of when the notice of extension is issued. *Key v Twp of Paw Paw*, 254 Mich App 508; 657 NW2d 546 (2002).

Type of Response

- The responses to FOIA requests shall be one of the following:
 - 1. Grant the request.
 - 2. Issue a written notice to the requesting party denying the request.
 - 3. Grant the request in part and issue a written notice to the requesting party denying the request in part.
 - 4. Issue a notice extending for not more than 10 business days the period during which the public body shall respond to the request. The public body is not permitted to issue more than one notice of extension for a particular request.

Failure to Respond

- Failure to respond to a request constitutes a public body's final determination to deny the request. Failure to respond to the request as provided above could result in an appeal or circuit court action. The court could order the public body to disclose and provide copies of the public record and shall assess damages against the public body as provided in Section 10(8) of FOIA, if the public body did not comply with the FOIA response requirements. Failure to timely respond will also result in the reduction of the level of fees that may be charged for records, as noted in Paragraph III, E, above.

Denials

- A written notice denying the request, in whole or in part, for a public record is required to contain the following:
 1. An explanation of the basis under the Act or other statute for the determination that the public record or portion of that public record is exempt from disclosure, if that is the reason for denying all or a portion of the request. Reasons for not disclosing information must be more than "conclusory." The mere repetition of statutory language is not sufficient. The justification must indicate factually how a particular document interferes with the interest protected by the exemption, i.e., how would it constitute a clearly unwarranted invasion of an individual's privacy, or how would it interfere with law enforcement proceedings, or how would it prejudice the physical security of a jail or prison, et cetera.
 2. A certificate that the public record does not exist under the name given by the requesting party or by another name reasonably known to the public body.

Denials Continued

3. A description of the public record or information on a public record that is separated or deleted as provided in Section 14 of FOIA, if a separation or deletion is made.

4. The public body is required to give a full explanation of the requesting person's right to either 1) submit to the head of the public body a written appeal that specifically states the word "appeal" and identifies the reason or reasons for reversal of the disclosure denial or 2) to seek judicial review under Section 10 of FOIA. Notification of the right to judicial review is also required to include notification of the right to receive attorney fees and damages as provided in Section 10.

Options after a denial

- If a public body makes a final determination to deny all or a portion of a request, the requesting person may do one of the following at his or her option:
 - 1. Submit to the head of the public body a written appeal that specifically states the word “appeal” and identifies the reason or reasons for reversal of the denial.
 - 2. 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.

Written appeal to head of public body

- Within 10 days after receiving a written appeal, the head of a public body shall do one of the following:
 - 1. Reverse the disclosure denial.
 - 2. Issue a written notice to the requesting person upholding the disclosure denial.
 - 3. Reverse the disclosure denial in part and issue a written notice to the requesting person upholding the disclosure denial in part.
 - 4. Under unusual circumstances, issue a notice extending for not more than 10 business days the period during which the head of the public body shall respond to the written appeal. The head of a public body shall not issue more than one notice of extension for a particular written appeal.
- The requesting person may also seek an appeal of the FOIA fees being charged by the public body.
- A Board or Commission that is the head of the public body is not considered to have received the written appeal until its first regularly scheduled meeting following submission of the appeal. MCL 15.240(3)

Judicial Review

- If a court reviewing a FOIA Appeal determines a public record is not exempt from disclosure, it shall order the public body to cease withholding or to produce all or a portion of a public record wrongfully withheld. The circuit court for the county in which the complainant resides or has his or her principal place of business, or the circuit court for the county in which the public record or an office of the public body is located, has venue over the action. The public body has the burden to sustain its denial. The court, on its own motion, may view the public record in controversy in private before reaching a decision.

If the requestor prevails

- If a circuit court finds in favor of the person asserting the right to inspect, copy or review a copy of all or a portion of a public record, the court shall award reasonable attorney fees, costs and disbursements. If the person prevails in part, the court may, in its discretion, award all or an appropriate portion of the above. The award is assessed against the public body. If the circuit court determines the public body acted arbitrarily and capriciously by refusal or delay in disclosing, the court shall award in addition to actual or compensatory damages, punitive damages in the amount of \$1,000 against the public body, as well as punitive damages in the amount of \$500 against the public body that is found to have arbitrarily and capriciously violated the Act by charging an excessive fee. Further, if a court determines that a public body willfully and intentionally failed to comply with FOIA or otherwise acted in bad faith, the court may order the public body to pay a civil fine of not less than \$2,500 nor more than \$7,500 for each occurrence, taking into account the public body's budget and whether it was previously assessed penalties for FOIA violations.

Public Records Exempt from Disclosure (28 categories of exemptions, MCL 15.243 amended effective June 24, 2021)

- A public body may exempt from disclosure the following if the conditions stated in Paragraph IV of this outline are adhered to:
 - (a). Information of a personal nature where the public disclosure would constitute a clearly unwarranted invasion of an individual's privacy.

Exemptions continued

(b). Investigating records compiled for law enforcement purposes, but only to the extent that disclosure would:

- 1) Interfere with law enforcement proceedings;
- 2) Deprive a person of the right to a fair trial or impartial administrative adjudication;
- 3) Constitute an unwarranted invasion of personal privacy;
- 4) Disclose the identity of a confidential source, or if the record is compiled by a law enforcement agency in the course of a criminal investigation, disclose confidential information furnished only by a confidential source;
- 5) Disclose law enforcement investigative techniques or procedures;
- 6) Endanger the life or physical safety of law enforcement personnel.

Exemptions continued

- (c). A public record which, if disclosed, would prejudice a public body's ability to maintain the physical security of custodial or penal institutions occupied by persons arrested or convicted of a crime or admitted because of a mental disability, unless the public interest in disclosure outweighs the public interest in nondisclosure.
- (d). Records or information specifically described and exempted from disclosure by statute. (e.g. attorney/client privilege, closed session minutes)
- (e). A public record or information described in FOIA which is furnished by the public body originally compiling, preparing or receiving the record or information to a public officer or public body in connection with the performance of the duties of that officer or body, if the considerations originally giving rise to the exempt nature of the public record remain applicable.

Exemptions continued

- (f). Trade secrets or commercial or financial information voluntarily provided to an agency for use in developing governmental policy if:
 - 1) The information is submitted upon a promise of confidentiality by the public body;
 - 2) The promise of confidentiality is authorized by the chief administrative officer of the public body or by an elected official at the time the promise is made;
 - 3) A description of the information is recorded by the public body within a reasonable time after it has been submitted, maintained in a central place within the public body, and made available to a person upon request. This subdivision shall not apply to information submitted as required by law or as a condition of receiving a governmental contract, license, or other benefit.

Exemptions continued

- (g). Information or records subject to the attorney-client privilege.
- (h). Information or records subject to the physician-patient, psychologist-patient, minister, priest or Christian Science practitioner privilege, or other privilege recognized by statute or court rule.
- (i). A bid or proposal by a person to enter into a contract or agreement, until the time for the public opening of bids or proposals, or if a public opening is not to be conducted, until the deadline for submission of bids or proposals has expired.
- (j). Real estate appraisals of property to be acquired by the public body, until an agreement is entered into or 3 years elapsed.
- (k). Individually identifiable protected health information.

Exemptions continued

- See MCL (k) ;(n)-(bb) for more info.
- (m) Communications and notes within a public body or between public bodies of an advisory nature to the extent that they cover other than purely factual materials and are preliminary to a final agency determination of policy or action. This exemption does not apply unless the public body shows that in the particular instance the public interest in encouraging frank communication between officials and employees of public bodies clearly outweighs the public interest in disclosure. This exemption does not constitute an exemption under state law for purposes of section 8(h) of the open meetings act, 1976 PA 267, MCL 15.268. As used in this subdivision, "determination of policy or action" includes a determination relating to collective bargaining, unless the public record is otherwise required to be made available under 1947 PA 336, MCL 423.201 to 423.217.

Pro Disclosure

- The FOIA is a pro-disclosure statute, however, and its exemptions are narrowly construed. When deciding whether to refuse a request for disclosure of information on the basis of any of the above exemptions, a public body must follow the rules adopted by the Michigan Supreme Court in *Evening News Ass'n v City of Troy* case.

Evening News Ass'n v City of Troy

- 1. The burden of proof is on the public body claiming exemption from disclosure.
- 2. Exemptions are interpreted narrowly.
- 3. Detailed affidavits describing the material withheld must be provided to the party requesting it.
- 4. The party requesting the information must be provided with a written justification of the exemption. The justification must be more than "conclusory," i.e., simple repetition of statutory language. The justification must indicate factually how a particular document interferes with the interest protected by the exemption.

Separating Exempt Material

- Records which contain material exempt under Section 13, as well as materials not exempt from disclosure, are subject to disclosure after the separation of all exempt material.
- The public body must, to the extent practicable, separate the exempt from the non-exempt information. The public body shall describe in an affidavit the exempted material when furnishing copies of the non-exempt portion of the record, unless that description would reveal the contents of the exempt information and, thus, defeat the purpose of the exemption.

Interplay with other laws

- A public body may allow for a person's immediate access to specific public records for inspection, purchase or copying by digital means pursuant to the Enhanced Access to Public Records Act, MCL 15.441 *et seq.*, which is not part of the FOIA statute.
- The U.S. Department of Health and Human Services issued the Privacy Rule to implement the requirement of the Health Insurance Portability and Accountability Act of 1996 (HIPAA). The Privacy Rule standards address the use and disclosure of individuals' health information, called "protected health information," by organizations subject to the Privacy Rule, called "covered entities." Each public body must make a determination whether it is a "covered entity" under HIPAA.

Interplay with other laws

- The Bullard-Plawecki Employee Right to Know Act is applicable to all current and former employees of an employer and is not part of the FOIA statute. This Act provides various legal requirements pertaining to the personnel records of employees. This Act should be reviewed before disclosing information contained in personnel records of a former or current employee.

Last but not least

- On July 12, 2017, the Law Enforcement Body-Worn Camera Privacy Act was signed into law and becomes effective January 8, 2018. (2017 Public Act 85) This new law includes provisions that will control the disclosure of data obtained by a law enforcement officer "body-worn camera," being a device that is worn by a law enforcement officer that electronically records audio and video of the officer's activities.

Law Enforcement Body-Worn Camera Privacy Act

- Disclosure of video or audio recordings are subject to the protections provided for crime victims under the State's crime victim's rights laws, including exempting from disclosure under FOIA certain personally identifiable victim information, such as names and addresses, and visual representations such as the digitally stored recordings of a body-worn camera.
- Also exempt from disclosure would be audio or video recordings from a body-worn camera recorded in a "private place," being a place where an individual may reasonably expect to be safe from casual or hostile intrusion or surveillance. However, except for an audio and video recording exempted from disclosure under the statutory exemptions in Section 13 of FOIA, these recordings recorded in a private place may be released to (1) an individual who is the subject of the audio and video recording; (2) an individual whose property has been seized or damaged in relation to a crime to which the recording is related; and (3) a parent of, a legal guardian of, or an attorney for any of these individuals.

THE END

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