

# EFFECTIVELY HANDLING FOIA REQUESTS



**MSBO Annual Conference**

May 4, 2017

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# FOIA – Basic Principles

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General Principle: Public bodies perform the public's business, and what those bodies do should generally be available for review by the public.

General rule: Public documents are available for review, inspection and copying by any members of the public who asks.

- general rule is subject to over 25 exceptions; some will be discussed later.

# Background/Key Definitions

- ❑ “**Public body**” generally means all state and local public offices, boards, councils, committees, authorities, and related public entities.
- ❑ “**Public record**” means a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function, from the time it is created.
- ❑ “**Writing**” means handwriting, typewriting, printing, photostating, photographing, photocopying, and every other means of recording, and includes letters, words, pictures, sounds or symbols. Includes emails, text messages and cell phone records.

# Background/Key Definitions

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What is not included in the key definitions:

“Public body” generally does not include individual employees; sets up question about whether a particular record belongs to the public body an employee works for or the employee himself.

“Public record” does not include documents of agents or contractors – unless document was prepared, owned or used by the public body.

# Initiating a FOIA Request

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Request must be in writing – to FOIA Coordinator.

No magic words necessary; request need not use “FOIA,” so long as it requests a public record.

Request must describe record requested “sufficiently to allow the public body to find the public record.”

# Response to FOIA Request

Within 5 business days after receipt of request, public body must either:

- 1) Grant the request;
- 2) Issue written notice denying request;
- 3) Grant request in part and issue written notice denying request in part; or
- 4) Issue a notice extending time to respond by 10 business days.

# Response to FOIA Request (cont'd)

Notice of denial of request must include:

1. Explanation of basis of denial – *i.e.*, exemption, if that is the reason; or
2. Certificate that the record doesn't exist.
3. If deletion/redaction is done, explanation of basis.
4. Explanation of requestor's right to appeal internally or appeal to court (can do both).
5. Explanation of right to attorneys' fees, damages, if court orders disclosure.

## Response to FOIA Request (cont'd)

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Notice of ten business day extension to respond should contain reason(s) for extension – can be fairly generic.

Notice should state the date by which response will be issued – calculate two additional weeks (if no holidays).

In calculating response date -- only official state holidays count; fact that district closed (Christmas vacation, winter break, etc.) does not matter.

# Production of Documents

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FOIA still does not include a deadline or time limit to actually produce the requested documents.

Drafts of 2015 legislation had deadlines; came out in final version (thankfully).

Use “reasonable” time – taking an “unreasonable” time could be construed by a court as a failure to produce – penalties, attorneys’ fees, etc.

# 2015 FOIA Amendments

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Major changes to charging of fees, procedures for objecting to fees.

Amendments limit fees, create a number of hoops public body has to jump through to recover costs.

Little in the way of substantive change; no change to basic FOIA procedure, or to exemptions.

## Changes to Calculating Fees

**Previously**, a public body could impose a fee for the labor (hourly wage plus benefits) and resources used in processing a FOIA request, including the costs associated with searching for documents and the examination and review of requested public records.

No process to appeal a calculated fee.

## Changes to Calculating Fees (cont'd)

Under Public Act 563, beginning July 1, 2015:

- Labor costs must continue to be calculated at the hourly rate of the lowest paid employee capable of retrieving and reviewing the requested public records, *regardless if that person is available or is the one that actually performs the labor.*
- Right to appeal fee calculation to the Circuit Court.

## Calculating Labor Costs under FOIA Amendments

- ❑ Labor costs must be estimated in increments of 15 minutes or more; rounded-down for partial increments.
- ❑ A public body may only include up to 50% of the fringe benefits of the “lowest paid employee” into the related labor cost. Overtime costs cannot be included without the consent of the FOIA requestor.
- ❑ Labor costs associated with contract services (attorneys, etc.) to separate exempt from non-exempt information may not exceed six times the state’s hourly minimum wage (2017 --  $\$8.90 \times 6 = \$53.40$ ).

## Calculating Copying/Postage Costs under FOIA Amendments

- ❑ Regardless of any preexisting policy or procedure, a public body's per page copy fee cannot exceed \$0.10 per page (8½ X 11 or 8½ x 14). The most economical means for making paper copies must be used (*i.e.*, double-siding, etc.).
- ❑ The provisions relating to the discounting of fees for indigent FOIA requestors is expanded through the inclusion of certain nonprofit organizations.
- ❑ If public records are mailed, the public body must charge for the least expensive form of postal delivery unless specifically asked by requestor.

# Requiring a Good Faith Deposit under the New FOIA

Under Public Act 563, beginning July 1, 2015:

- A public body is precluded from requiring a good faith deposit or imposing a fee without established procedures and guidelines.
- A public body may continue to require a good faith deposit of up to 50% of the estimated fee, but any request for a deposit must include a detailed itemization consistent with its procedures and guidelines.
- Still cannot require a good faith deposit unless estimated costs to respond exceed \$50.
- A public body may, under certain circumstances, require a 100% deposit from a requestor who has not previously paid for a fulfilled FOIA request.
- Requestor may appeal a proposed FOIA processing fee to Circuit Court.

# Procedures and Guidelines under FOIA Amendments

Under Public Act 563, beginning July 1, 2015:

- A public body **must** establish and adopt procedures and guidelines, and create a written summary explaining how to submit written FOIA requests and how to understand written responses, deposit requirements, fee calculations and appeal procedures.
- Procedures and guidelines must include a standard form to detail the itemization of any fee the public body estimates or charges under the FOIA (*i.e.*, labor costs, copying costs, postage costs, costs of any non-paper physical media).

## Publication of Procedures and Guidelines

A public body must **post** the required procedures, guidelines, and written summary on its website and provide free copies, upon request.

A public body must include a free copy or a website link to the procedures, guidelines, and written summary in all FOIA responses.

## Changes to Processing

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Previously, the FOIA did not mandate how public records must be provided nor did it specify that proposed fees must be reduced if a public body fails to meet all requirements.

## Changes to Processing (cont'd)

Under Public Act 563, beginning July 1, 2015:

- A FOIA requestor may stipulate how the records are to be provided—non-paper, electronically mailed or otherwise electronically provided in lieu of paper copies.
- If a FOIA request is delivered to a spam or junk mail folder, the request is not received until one day after it is discovered by the public body.

## Changes to Processing (cont'd)

Under Public Act 563, beginning July 1, 2015:

- A public body may inform the requestor that requested information is available on its website, in lieu of providing public records, so long as the records were available on the website at time of the request. Must provide specific webpage address. Can charge for labor costs and 100% of fringe benefits if requestor still insists upon receiving public records in paper or other specified format.
- If a public body fails to respond to a written request in the time specified under the FOIA (*i.e.*, up to 15 business days with an extension), the calculated fee must be reduced by 5% for each day that exceeds the time permitted.

# Changes to Penalties Imposed

- ❑ **Previously**, a requestor may submit a written appeal of a FOIA denial to the head of the public body.
- ❑ The requestor may commence a civil action within 180 days of the public body's final denial determination to compel disclosure if he/she believes public records were wrongfully withheld.
- ❑ If the court determines that a public body has arbitrarily and capriciously violated the FOIA, punitive damages in the amount of \$500 may be assessed.

## Changes to Penalties Imposed (cont'd)

Under Public Act 563, effective July 1, 2015:

- Mandates a new civil fine of \$1,000 to the public body if a court determines a public body arbitrarily and capriciously violated the FOIA by refusing or delaying access to a public record.
- Increases punitive damages to \$1,000.
- As under prior FOIA, a Plaintiff may also receive attorney's fees, and costs of litigation.

## Changes to Penalties Imposed (cont'd)

A requestor may now commence a civil action in dispute of a fee proposed by a public body, *however, the requestor must first pursue the public body's internal appeal process, if one is adopted.*

If the requestor prevails in a civil action by receiving a reduction of 50% or more of the total fee, the court may award attorney's fees and costs.

## Changes to Penalties Imposed (cont'd)

A court shall also award the requestor punitive damages of \$500, and order the public body to pay a fine of \$500 in addition to any actual, compensatory or punitive damages, if it determines that the public body arbitrarily and capriciously violated the FOIA by charging an excessive fee.

- If a court determines that a public body has willfully and intentionally violated the FOIA, or otherwise acted in bad faith, an additional fine between \$2,500 and \$7,500 for each occurrence may be imposed.
- In determining the fine, the court will consider the budget of the public body and whether the public body has previously been assessed penalties for violating the FOIA.

# Exemptions Under FOIA

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General FOIA Principle – all public documents should be available to the public.

That is subject to 26 statutory exemptions; 25 are permissive – public body may claim exemption; 1 is mandatory.

Some of exemptions have no application to schools; will highlight 8 that do apply and come up regularly.

## Exemptions Under FOIA (cont'd)

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Exemptions are narrowly construed.

Burden is on public body to establish applicability of exemption.

Provide more than conclusory basis for claiming exemption – some explanation, short of legal brief.

If some requested material is exempt, rest is not – must disclose non-exempt, redact exempt, with explanation of basis.

# Key Exemptions Under FOIA

MCL §15.243 (1):

a. Privacy exemption: “Information of a personal nature if public disclosure would constitute a clearly unwarranted invasion of an individual’s privacy.”

Courts require two things to be shown:

- 1) information would reveal intimate, embarrassing, private, confidential details about a person; and
- 2) Release would be clearly unwarranted invasion of privacy – requires balancing of public vs. private interest.

## Key Exemptions Under FOIA (cont'd)

g. Documents protected by attorney-client privilege.

Communications to or from attorney for purpose of obtaining legal advice; cannot have been shared with persons outside attorney-client relationship (waiver).

h. Other statutory privileges. Physician-patient; accountant-client; priest-penitent; student-teacher; psychologist-patient; social worker-client.

## Key Exemptions Under FOIA (cont'd)

- j. Appraisals of property to be acquired by public body – valid until purchase agreement is signed, or 3 years after appraisal.
  
- u. Records of security methods, codes, etc. – just about anything whose disclosure might compromise security of your buildings, students, staff.
  - will be given some leeway, benefit of doubt.

## Key Exemptions Under FOIA (cont'd)

m. Frank communications exemption:

*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 communications between officials and employees of public bodies clearly outweighs the public interest in disclosure.*

## Key Exemptions Under FOIA (cont'd)

Frank communications exemption offers protection to communications between Board and administration that are preliminary to a decision.

- goal is to encourage honest communications without concerns about how things will look if FOIA'ed.

Note requirement that “public interest in encouraging frank communication between public officials and employees of public bodies clearly outweighs the public interest in disclosure.”

- hasn't really been tested, defined; response to FOIA ought to include this statement.

## Key Exemptions Under FOIA (cont'd)

v. Records relating to civil litigation in which the requesting party and public body are parties.

Idea is that production of documents, information, should be done under court rules regarding discovery, not FOIA.

Rendered mostly toothless by court opinions saying exemption inapplicable to requests by party's best friend or attorney – "party" strictly construed.

## Key Exemptions Under FOIA (cont'd)

### MCL §15.243(2):

A public body shall exempt information whose disclosure would cause the public body to violate FERPA.

Other exemptions are permissive; public bodies may disclose information even if exemption might apply.

- This one is mandatory; strong protection for schools.

# Conclusion

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FOIA contains lots of land mines – be careful where you step.

## Questions?

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