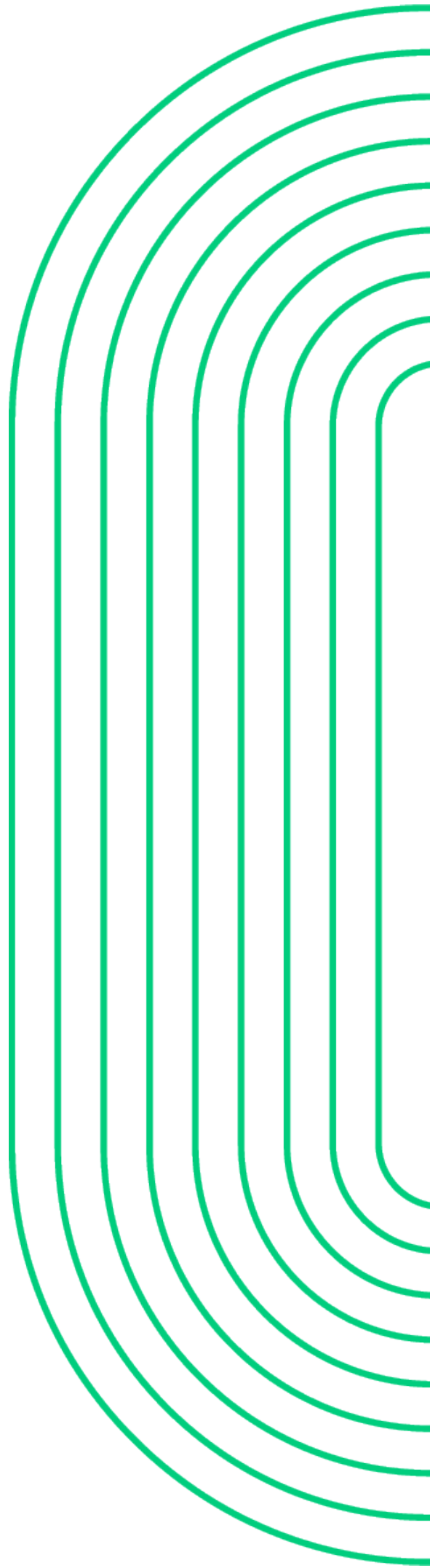


# EFFECTIVELY HANDLING FOIA REQUESTS

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# The Michigan Freedom of Information Act Learning Objectives

- Understand Policy and Disclosure For FOIA Compliance
- Understand Response Compliance
- Learn Allowable/Billable Expenditures When Responding to FOIA Requests
- Appeals



# Policy of FOIA



- Under the Michigan FOIA, MCL 15.231 (2) “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 consistent with the act.”
- “The people shall be informed so that they may fully participate in the democratic process.
- “As a result, except under certain specifically delineated exceptions, see MCL 15.243, a person who ‘provid[es] a public body’s FOIA coordinator with a written request that describes a public record sufficiently to enable a public body to find the public record’ is entitled “to inspect, copy, or receive copies of the requested public record of the public body.” *Amberg v Dearborn*, 497 Mic 28, 30 (2014), quoting MCL 15.233(1) (alteration in original).
- The Michigan FOIA is a pro-disclosure statute.

# FOIA – Key Definitions

- “Person” means an individual, corporation, limited liability company, partnership, firm, organization, association, governmental entity, or other legal entity. 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. MCL 15.232
- “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. Public record does not include computer software. MCL 15.232
- “”Writing” means handwriting, typewriting, printing, photostatic, 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, photographic films or prints, microfilm, microfiche, magnetic or punched cards, discs, drums, or other means of recording or retaining meaningful content. MCL 15.232

\*Includes emails, text messages and cell phone records.

# FOIA – Key Definitions

- “Written request” means a writing that asks for information, and includes a writing transmitted by facsimile, electronic mail, or other electronic means. MCL 15.232

NOTE to the extent Public Records may be stored on a personal computer or telephone, they are subject to FOIA.

# Initiation of A FOIA Request

- Request must be in writing to the FOIA Coordinator.
  - Public body is required to designate a FOIA Coordinator
  - The FOIA Coordinator should be knowledgeable about FOIA and involved in the process.
- No magic words necessary to submit a FOIA Request; request need not use “FOIA,” as long as it requests a public record.
- Request must describe the record requested “sufficiently to allow the public body to find the public record.”
  - The public body need not create a new document, or make a compilation , summary or report of information, except as required in Section 11.

# Responding To A FOIA Request



- Unless otherwise agreed to in writing by the person making the request, a public body shall respond to a request for a public record within 5 business days after receipt of the FOIA request, by doing 1 of the following:
  - 1) Grant the request (not expressly required to be in writing, but a good practice in most cases);
  - 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.
- If the FOIA request is received by fax or email, the FOIA request is deemed received on the next business day.

# Responding To A FOIA Request (Continued)

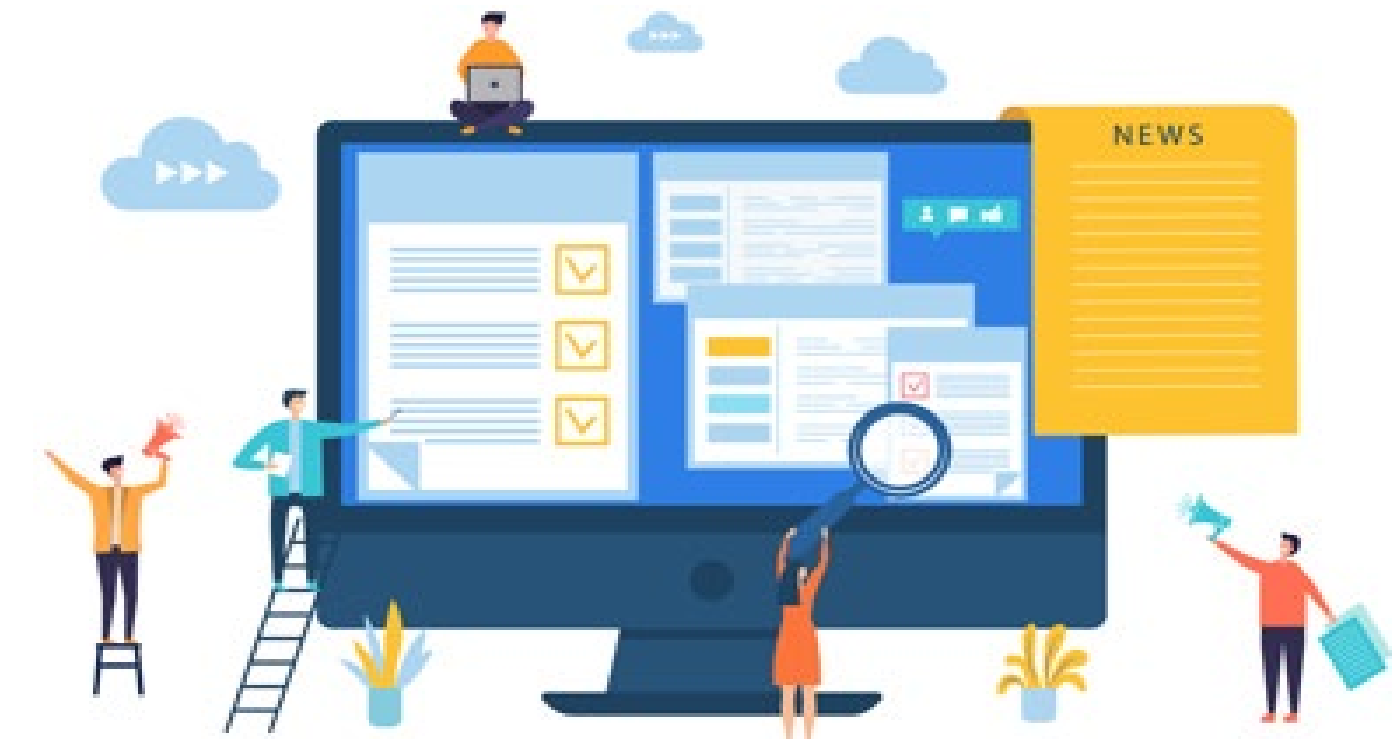
## Simple Request

- If the request is simple-only a few readily accessible pages, and/or a request for which the district will not be charging-little formality is required.
  - No written response is required if you are simply producing the requested documents within 5 business days although best practice is to include documents with enclosure letter listing the documents being provided.



# Responding to A FOIA Request (Continued)

## Notice of A Denial of A FOIA Request



- The Notice of Denial of a FOIA Request must include:
  1. Explanation of basis of the denial-i.e. exemption under the FOIA and/or other applicable statute (cite all applicable bases or risk waiver); or
  2. “Certificate” (statement) that the record does not exist.
  3. If deletion/redaction of documents is done, provide an explanation of the basis for the deletion/redaction.
  4. Explanation of the requestor’s right to appeal internally to the Superintendent or Committee of the Board of Education, or appeal to circuit court (can do both), pursuant to Section 10 of the Act (MCL 15.240).
  5. Notice and explanation of the right to attorneys’ fees and damages, if the court orders disclosure of all or a portion of the public record(s) sought.

# Responding to A FOIA Request (Continued)

## Ten Business Day Extension/Written Notice Denying a FOIA Request, in Whole or in Part



- Notice of ten (10) business day extension to respond to the FOIA request should contain reason(s) for the extension-can be fairly generic.
  - “given the scope of the request, it will take more than 5 business days to identify the relevant documents.”
- The Notice should state the date by which the response will be issued to the requestor.
- In calculating response date only official state holidays do not count; fact that the district is closed (Christmas vacation, winter break, spring break, and the like) does not matter.
- A written notice denying a request for a public record, in whole or in part, is a public body’s final determination to deny the request or portion of the request as long as the written notice contains the requirement under the Act. [MCL 15.235(5)(a)-(e)]

# Exemptions Under The FOIA (Not Exhaustive List)



## MCL 15.243(1)(a)-(bb) and (2)

- A public body may exempt from disclosure as a public record under the act, the following
  - Information of a personal nature if public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy. Subsection (a)
  - Records or information specifically described and exempted from disclosure by statute. Subsection (d)
  - Information or records subject to attorney-client privilege. Subsection (g)
  - 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 conducted, until the deadline for submission of bids or proposals has expired. Subsection (i)
  - Appraisals of real property to be acquired by the public body until either of the following occurs:
    - An agreement is entered into.
    - Three (3) years have elapsed since the making of the appraisal, unless litigation relative to the acquisition has not yet terminated. Subsection (j)

# Exemptions Under The FOIA (Not Exhaustive List)



## MCL 15.243(2)

- FERPA-A district shall exempt from disclosure information that, if released, would prevent the district from complying with 20 USC 1232g “The Family Educational Rights and Privacy Act of 1974. [MCL 15.243(2)]
- “Directory information” is exempted from disclosure for the purpose of surveys, marketing, or solicitation unless the district determines that the use is consistent with the educational mission of the district and beneficial to the affected students.
- A district may take steps to ensure that the directory information disclosed under this subsection is not used, rented or sold for the purpose of surveys, marketing, or solicitation.
- Before disclosing this information, the district may require the requestor to execute an affidavit stating that the directory information will not be used, rented or sold for the purpose of surveys, marketing or solicitation.

# Production of Documents



## Deadline to Produce Documents

- The FOIA does not include a deadline or time limit to actually produce the requested documents.
  - Drafts of 2015 legislation had deadlines to produce; deadlines removed from the final version.
  - *Cramer v Village of Oakley*, 316 Mich App 60, 65-68 (2016) confirms that “respond” does not mean “fulfill.”
- If a public body issues a notice extending the period for a response to the request, the notice must specify the reasons for the extension and the date by which the public body will do 1 of the following:
  - Grant the request.
  - Issue a written notice to the requesting person denying the request.

# Production of Documents (Continued)

## Deadline to Produce Documents

- Grant the request in part and issue a written notice to the requesting person denying the request in part.
- Documents should be produced in a “reasonable” time period. Taking an “unreasonable” time to produce the requested documents could be construed by a court as a failure to produce with attendant attorneys’ fees, damages and penalties imposed. [*Cramer* case agrees]
  - 30 business days to produce documents may be considered “unreasonable” by court, unless the volume of documents requested is excessive.
  - 14-15 business days preferred (within the 5 business days plus the 10 business days request for extension).



# Charging for Production of Documents-In General



- Under the FOIA, 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.
- In order to be able to charge for the district's response to a FOIA request, a public body must have posted the required procedures, guidelines, and written summary on its website and provide free copies, upon request.
  - Itemization of Fees must be posted on the district's website in order to charge for fees.
- A district may require a good-faith deposit from a requestor before providing the public records if the entire fee estimate or charge exceeds \$50.00, based on a good-faith calculation of the total fee.

# Processing a FOIA Request Where District Charging

- Within 5 business days (or 15 business days with extension), the FOIA Coordinator must provide a written response that the FOIA request is granted (in whole or in part).
- Deposit of 50% of estimated cost will be required-costs to the requestor must be itemized, only an estimate.
- Advise that once the deposit is received, the task of identifying, redacting, copying etc. will begin. No need to start fulfilling FOIA request until the deposit is received.
- Once the deposit is received, the FOIA request should be processed.
- When the processing is complete, prepare new itemization of actual costs, advise of balance owed; advise that the documents will be released once balance is paid.
  - Use standard Fee Itemization form adopted as part of district procedures.



# Processing a FOIA Request (Continued)

## Beware-Recent Unpublished Michigan Court of Appeals Case Contrary



- In *Metcalf v Grand Ledge Public Schools* (unpublished February 24, 2022), a panel of the Michigan Court of Appeals interpreted the FOIA to require production of documents, within a reasonable period of time, once the requestor pays the 50% deposit.
- The district cannot wait until after the full amount of the fee is paid by the requestor to the district.
- We disagree with this unpublished Michigan Court of Appeals decision and maintain that the published Michigan Court of Appeals case is the current law in Michigan on this issue.

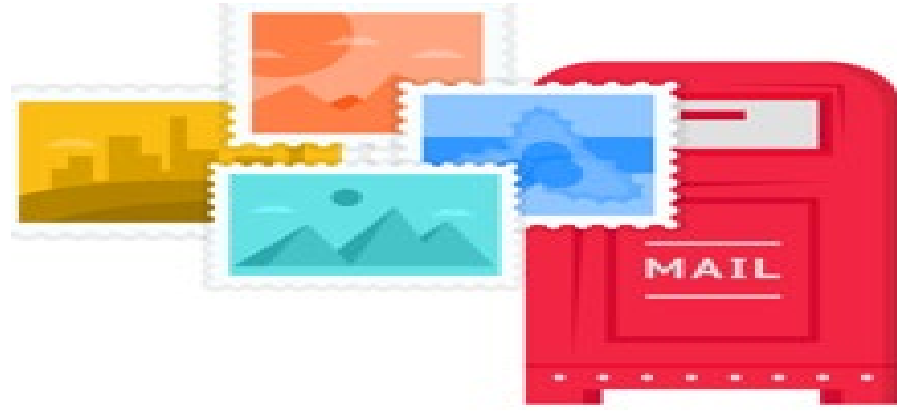
# Processing a FOIA Request (Continued)

## Additional Notes Regarding Timing of FOIA Response

- If a FOIA request is delivered to a spam or junk mail folder, the request is not received until 1 day after it is discovered by the district.
- **CAUTION:** If the district fails to respond to a written request in time (i.e. up to 15 business days with an extension), the calculated fee must be reduced by 5% for each day response is late, with a maximum 50% reduction if either of the following applies:
  - The late response was willful and intentional.
  - The written request included language or abbreviations within the first 250 words of the body of a written letter, email, fax, email attachment using the words or abbreviations “freedom of information”, “information”, “FOIA”, “copy” or similar, or the same in on the front of an envelope or in the subject line of an email, letter or fax.

# Processing A FOIA Request (Continued)

## How Records Are Provided



- 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.
- A district may inform the requestor that requested the documents that the documents are available at a specific place on its website, in lieu of providing the public records. The district can charge for labor costs and 100% of fringe benefits of the employee charged with searching for, locating and examining public records in conjunction with receiving and fulfilling a granted written request, if the requestor still insists upon receiving public records in paper or other format.

# Itemization of Fees

## Fees for Which a District May Charge a FOIA Requestor-MCL 15.234(1)



- Subject to certain limitations under the FOIA, fees for which a district may charge a FOIA requestor are as follows:
  - Fees must be limited to actual mailing costs;
  - Actual incremental cost of duplication or publication including labor, the cost of search, examination and, review, and the deletion and separation of exempt from nonexempt information
  - A fee shall not be charged unless failure to charge a fee would result in “**unreasonably**” high costs to the district because of the nature of the request and the district specifically identifies the nature or the reasonably high costs. [MCL 15.234(3)].

# Itemization of Fees (Continued)

## Deposit Requested But Not Paid Within 45 Days-FOIA Request Considered Abandoned-MCL 15.234(14)



- If a deposit is required and is not received by the district within 45 days from receipt of the requesting person, and the requestor has not filed an appeal of the deposit amount, the request shall be considered abandoned by the requesting person and the district is no longer required to fulfill the request.
  - Notice of a deposit requirement is considered received 3 days after it is sent, regardless of the means of transmission.
  - Notice of a deposit requirement must include notice of the date by which the deposit must be received, which date, under the statute, is 48 days after the date the notice is sent.  
(45+3)=48

# Itemization of Fees (Continued)



## Fees for Which a District May Charge a FOIA Requestor-MCL 15.234(1)(a)

- if a district estimates or charges a fee under the Act, the total fee must not exceed the sum of the following components:
  - Portion of labor costs directly associated with the necessary searching for, locating and examining public records.
    - The district may not charge more than the hourly wage of its lowest-paid employee capable of searching for, locating and examining the public record regardless of whether that person is available or actually performs the labor.
    - Labor costs shall be estimated and charged in increments of 15 minutes or more, with all partial time increments rounded down.

# Itemization of Fees (Continued)

## Fees for Which a District May Charge a FOIA Requestor-MCL 15.234(1)(b)

- Portion of labor costs, including necessary review, directly associated with separating and deleting exempt information from nonexempt information.
  - The district may not charge more than the hourly of the lowest-paid employee capable of separating and deleting exempt information from non-exempt information, regardless of whether that person is available or actually performs the labor.
  - **Exception:** The FOIA Coordinator, on a case-by-case basis, may treat necessary contracted labor costs for separating and deleting exempt information from non-exempt information in the same manner as employee labor costs when calculating the charges for contracted labor if the itemization fee form clearly notes the name of the contracted person or firm on the itemization fee form. [MCL 15.234(1)(a)].

# Itemization of Fees (Continued)

## Fees for Which a District May Charge a FOIA Requestor-MCL 15.234(1)(b)

- Portion of labor costs, including necessary review, directly associated with separating and deleting exempt information from nonexempt information.
- The district may not charge more than the hourly of the lowest-paid employee capable of separating and deleting exempt information from non-exempt information, regardless of whether that person is available or actually performs the labor.
- **Contracted Labor**-Total contracted labor costs must not exceed an amount equal to 6 times the state minimum hourly wage rate determined under section 4 of the “Improved Workforce Opportunity Wage Act, MCL 408.934. [MCL 15.234(1)(b)].
- Labor costs shall be estimated and charged in increments of 15 minutes or more, with all partial time increments rounded down.
- A district shall not charge for labor directly associated with the redaction if it knows or has reason to know that it previously redacted the public record and the redacted version is still in the public body’s possession.



# Itemization of Fees (Continued)

## Fees for Which a District May Charge a FOIA Requestor-MCL 15.234(1)(c)

- Cost for Nonpaper Physical Media
  - Actual and most reasonably economical cost of nonpaper physical media.
  - The requestor may stipulate that the public record be provided on nonpaper physical media, electronically mailed, or otherwise electronically provided in lieu of paper copies.
    - Compliance with this request is not required if the district lacks the technological capability.

# Itemization of Fees (Continued)

## Fees for Which a District May Charge a FOIA Requestor-MCL 15.234(1)(d)

- Paper Copies-Duplication or Publication Not Including Labor
  - Total cost per sheet of paper and the number of sheets provided.
    - The fee must not exceed **10 cents per sheet of paper** for copies of public records made on 8-1/2-by 11 inch paper or 8-1/2-by 14-inch paper.
    - The district must utilize the most economical means available for making copies of public records, including using double-sided printing, if cost saving and available.

# Itemization of Fees (Continued)

## Fees for Which a District May Charge a FOIA Requestor-MCL 15.234(1)(e)

- Cost of Labor for Duplication/Publication
  - The district may not charge more than the hourly wage of its lowest-paid employee capable of necessary duplication or publication, regardless of whether that person is available or actually performs the labor.
  - Labor costs must be estimated and charged in time increments of the district's choosing; however, all partial time increments must be rounded down.

# Itemization of Fees (Continued)

## **Fees for Which a District May Charge a FOIA Requestor-MCL 15.234(1)(f)**

- Actual Cost of Mailing
  - A district shall not charge more for expedited shipping or insurance unless specifically stipulated by the requestor.
  - May charge for the least expensive form of postal delivery confirmation when mailing public records.

# Itemization of Fees (Continued)

## Fees for Which a District May Charge a FOIA Requestor-MCL 15.234(2)

- Calculating Labor Costs-Cost of Fringe Benefits
  - A district may add up to 50% to the applicable labor cost for fringe benefits.
  - Subject to the 50% limitation, a district shall not charge more than the actual cost of fringe benefits.
  - Overtime costs shall not be used in calculating the cost of fringe benefits.
  - Overtime wages shall not be included in the calculation of labor costs unless overtime is specifically stipulated by the requestor and clearly noted on the detailed fee itemization form.

# Itemization of Fees (Continued)

## Waiver or Reduction of Fees-Public Interest/Non-Profit-MCL 15.234 (2)

- Waiver of Fee in Public Interest
  - A district may waive or reduce its fees if the requested documents are in the public interest.
  - A public record search shall be made and a copy of the public record shall be furnished without charge for the first \$20.00 of the fee where:
    - An individual submits an affidavit stating that the individual is indigent and receiving specific public assistance, or if not receiving public assistance, stating facts showing indigency. (If the requestor is eligible for the discount, a district should note this on the fee itemization form).
  - A non-profit organization formally designated by the state to carry out activities under subtitle C of the “Developmental Disabilities Assistance and Bill of Rights of 2000, and the protection and advocacy for individuals with mental illness.

# Itemization of Fees (Continued)

## **MCL 15.234(10)-Exception for Fees**

- This section does not apply to public records prepared under an act or statute specifically authorizing the sale of public records to the public, or the amount of the fee for providing a copy of the public record is otherwise specifically provided by an act or statute.

# Appeals of FOIA Denials



## To the Head of Public Body/ Circuit Court or Both

- A requestor may submit a written appeal of a FOIA denial to the “head of the public body.”
  - In school districts, the “head of the public body” is the Board of Education.
- The head of a public body-the Board of Education-may delegate authority to hear the appeal to an agent, such as the Superintendent or a Board Committee.
  - *Michigan Open Carry, Inc v Department of State Police*, published Michigan Court of Appeals decision December 17, 2019.
- Alternatively, the requestor may commence a civil action within 180 days of the district’s final denial to compel disclosure if the requestor believes the public records were wrongfully withheld.
- May do both-The requestor may file an internal appeal, then appeal to the circuit court.
  - If there was an internal appeal, 180 days runs from the denial of the internal appeal.



# Appeals of FOIA Denials-Penalties



## “Prevailing Party”

- Person asserting right to inspect, copy or receive a copy of all or part of a public record prevails, the court **shall** award reasonable attorneys’ fees, costs, and disbursements.
- If the person or the district 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 the damages.

# Appeals of FOIA Denials-Penalties

## **“Arbitrary or Capricious”**

- If a court determines that the district has arbitrarily and capriciously violated this act by refusal or delay in disclosing or providing copies of a public record, the court shall order the public body (district) to pay a civil fine of \$1,000.00, which shall be deposited into the general fund of the state treasury.
- The court shall award, in addition to any actual or compensatory damages, punitive damages in the amount of \$1,000.00 to the person seeking the right to inspect or receive a copy of a public record.
- The damages shall not be assessed against an individual, but shall be assessed against the next succeeding public body that is not an individual and that kept or maintained the public record as part of its public function.

# Appeals of FOIA-Fee Reduction



## **Appeal Fee in Excess of Amount Permitted Under Procedures or Guidelines or MCL 15.234, under MCL 15.240a**

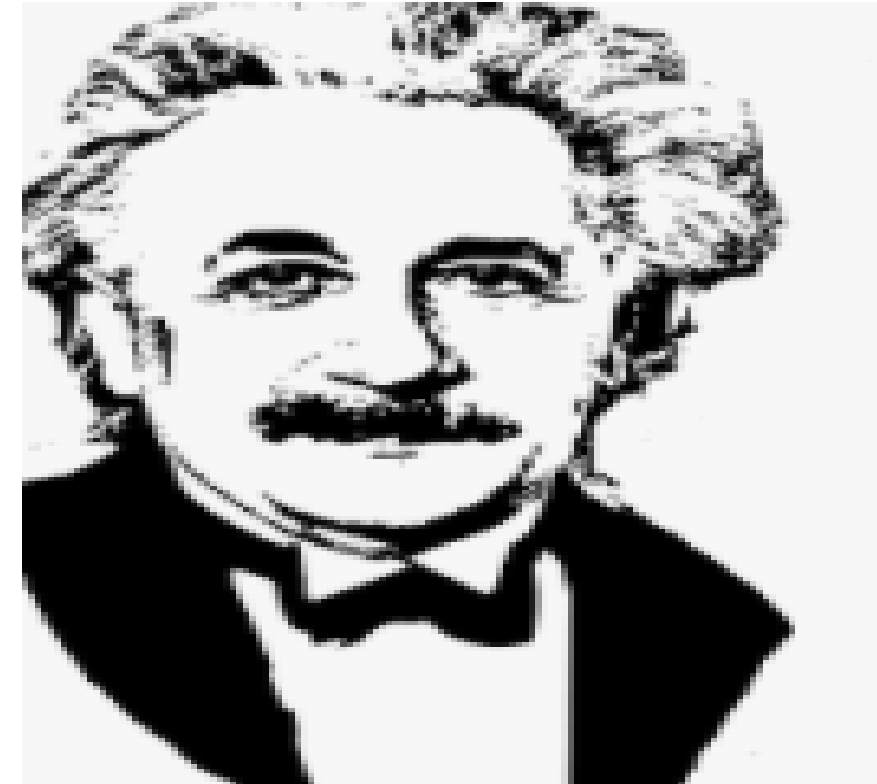
- If a district requires a fee that exceeds the amount permitted under its publicly available procedures and guidelines, the requestor may submit an appeal to the head of the public body a written appeal for a fee reduction.
  - The appeal must specifically state the word “appeal.”
  - The appeal must identify how the required fee exceeds the amount permitted under the district’s available procedures and guidelines. [MCL 15.240a(1)(a)]
- Commence a civil action in circuit court, or if the decision of a state public body is at issue, in the court of claims, for a fee reduction.
  - Action must be filed within 45 days after receiving the notice of a civil action is commenced against the district, the public body is not obligated to complete the processing of the written request for the public record at issue until the court resolves the fee dispute. [MCL 15.240a(b)]

# Appeals of FOIA-Fee Reduction

## Penalties- "Prevailing Party"/ "Arbitrary and Capricious"

- If the requesting person prevails in an action by receiving a reduction of 50% or more of the total fee, the court **may, in its discretion**, award all or an appropriate portion of reasonable attorneys' fees, costs, and disbursements.
- The award shall be against the public body liable for the damages.
- If the district arbitrarily and capriciously violated the act by charging an excessive fee, the court shall order the public body to pay a civil fine of \$500.00, which shall be deposited in the general fund of the state treasury.
- The court may also award, in addition to actual or compensatory damages, punitive damages in the amount of \$500.00 to the person seeking the fee reduction.
- The fine shall not be assessed against an individual, but rather the next succeeding public body that is not an individual and that kept or maintained the public record as part of its public function.

# Questions ?????





# Thank You

## **Legal Disclaimer**

This document is not intended to give legal advice. It is comprised of general information. Employers facing specific issues should seek the assistance of an attorney.