

Significant Changes to Michigan's FOIA Take Effect July 1st



By Steven D. Mann and Cassie J. Hare

Beginning July 1, 2015, significant new regulations take effect governing how public bodies administer and respond to requests under the Freedom of Information Act, PA 442 of 1976 (FOIA). The changes are the result of HB 4001, which was approved during the Legislature's final session day of 2014, and was signed into law by Governor Snyder on January 11, 2015 as PA 563 of 2014 (the "Amendment"). Changes of this magnitude are unprecedented in FOIA's nearly 40-year history. The changes impact nearly every area of FOIA, including local policies required for FOIA administration, fees categories and methods of calculation, good-faith deposits and fee waivers, records available on the public body's website, and the appeal process, including significant new penalties.

Newly Required Procedures and Guidelines

The most significant change made by the Amendment is that public bodies will be required to establish specific written Procedures and Guidelines (the "Procedures and Guidelines") to implement FOIA, including a standard fee itemization form, and separate written public summary. If the public body directly or indirectly administers or maintains an internet presence, the public body is required to post the Procedures and Guidelines on its website. A public body that has not established these Procedures and Guidelines or has not created a written public summary is prohibited from charging a fee for

providing public records. Free copies of the Procedures and Guidelines must be available at the public office.

The written public summary must be written "in a manner so as to be easily understood by the general public," and must inform the public "how to submit written requests to the public body and explaining how to understand a public body's written responses, deposit requirements, fee calculations, and avenues for challenge and appeal."

All responses to written FOIA requests must include the standard fee itemization form detailing any fee charged to the requestor. The form must clearly list and explain detailed and allowable charges for each of FOIA's new six fee components. In addition, a free copy of the Procedures and Guidelines must be included with the response, or a link to the website where the Procedures and Guidelines are available.

New Fee Categories and Methods for Calculations

Another significant area of change is the categories and manner in which fees may be charged. The Amendment establishes six fee components for which a public body may charge, generally requires labor costs to be charged in increments of fifteen minutes, permits a multiplier to be applied to cover part of all of the cost of fringe benefits, and in certain cases allows charges for contracted labor costs. The fee components are as follows:

1 Labor Costs—Search, Location, and Examination of Public Records¹

The labor costs that are directly associated with the necessary search, location, and examination of public records are limited to the hourly wage of the lowest-paid employee of the public body that is capable of performing the task in each particular instance, regardless of whether that employee is available to or actually performs the task. The public body may add up to 50 percent to the labor charge to cover the cost of fringe benefits, not to exceed the actual cost of the fringe benefits. This percentage multiplier used for fringe benefits must be noted on the itemization form. The public body may not charge for overtime unless it is specifically stipulated to by the requestor. The labor cost must be charged in increments of 15 minutes or more, and all partial time must be rounded down.

2 Labor Costs—Redaction

Similar to search, location, and examination, the labor costs associated with separating and redacting exempt information from non-exempt information are limited to the hourly wage of the lowest-paid employee of the public body that is capable of performing the task in each particular instance, regardless of whether that employee is available to or actually performs the task. The public body may add up to 50 percent to the labor charge to cover the cost of fringe benefits, not to exceed the actual cost of the fringe benefits. This percentage multiplier used for fringe include a completed detailed itemization of the good-benefits must be noted on the itemization form. The public body may not charge for overtime unless it is specifically stipulated to by the requestor. The labor cost must be charged in increments of 15 minutes or more, and all partial time and must be rounded down.

If the public body does not employ a person capable of redacting the records, as determined by the FOIA Coordinator, the public body may charge for contracted labor. The fee itemization form must list the name of the person or firm contracted and the hourly rate charged for contracted labor may not exceed six times the state minimum wage. The contracted labor costs must be charged in increments of 15 minutes or more, and all partial time must be rounded down.

In either case, if the public body knows or has reason to know that the requested public record has previously been redacted and the redacted version is still the public body's possession, in the public body may not charge for labor redaction costs.

3 Cost of Non-Paper Physical Media

The Amendment allows a requestor to require the public body to provide the records on non-paper physical media, by email, or otherwise by electronic means. The public body may charge the actual and most reasonably economical cost for the non-paper physical media used to provide the public records.

Non-paper physical media includes flash drives, computer discs, computer tapes, or other digital or similar media. These provisions do not apply if the public body does not have the technological capability necessary to provide records in the requested electronic format.

4 Cost of Paper Copies

The public body may charge for the actual incremental cost of duplicating the public records, not including labor costs. The fee charged for letter (8 ½" x 11") or legal (8 ½" x 14") size paper may not exceed \$0.10 per sheet. The public body may charge the actual cost for other types of paper. The fee itemization form must include both the cost per sheet and the number of sheets for each type of paper. The Amendment requires the public body to use the most economical means available when providing paper copies, including using double-sided printing if available and less costly.

5 Labor Costs of Duplication and Publication

The public body is also authorized to charge for labor costs directly associated with the duplication and publication, including making paper copies, making digital copies, or transferring digital public records to be given to the requestor on non-paper physical media or through the internet or other electronic means stipulated by the requestor. The labor costs are limited to the hourly wage of the lowest-paid employee of the public body that is capable of performing the task in each particular instance, regardless of whether that employee is available to or actually performs the task. The public body may add up to 50 percent to the labor charge to cover the cost of fringe benefits, not to exceed the actual cost of the fringe benefits. This percentage multiplier used for fringe benefits must be noted on the itemization form. The public body may not charge for overtime unless it is specifically stipulated to by the requestor. Unlike the other labor costs, labor costs for duplication and publication may be charged in any time increment chosen by the public body and identified in its Procedures and Guidelines. All partial time is still required to be rounded down.

6 Cost of Mailing

The final component for which a public body may charge is the actual cost of mailing the documents in a "reasonably economical and justifiable manner." The public body may only charge for expedited shipping or insurance if it is stipulated by the requesting person. The public body is allowed to charge for the least expensive form of postal delivery confirmation.



Steven Mann explaining FOIA changes to Capital Conference attendees

Fee Waivers. Currently FOIA requires a public body to waive the first \$20 of a charge for completing a FOIA request for public records from a person who is indigent if that individual provides an affidavit stating the individual is receiving public assistance or stating facts showing inability to pay due to indigence. The Amendment places additional restrictions on this waiver requiring the affidavit to state that the individual is indigent and receiving specific public assistance, or stating facts showing the inability to pay due to indigency. The Amendment also limits an indigent individual to receiving two discounts from the public body per calendar year. The Amendments also provide that an indigent individual is ineligible for a discount if the request is made in conjunction with other parties who are offering remuneration.

The Amendment also provides for a fee waiver category for certain requests made by nonprofit organizations designated by the state to carry out activities under subtitle C of the developmental disabilities assistance and bill of rights act of 2000, Public Law 106-402, and the protection and advocacy for individuals with mental illness act, Public Law 99-319, or their successors. There are no annual limits for fee waivers for these nonprofit organizations.

The fee itemization form must note any waivers granted for the request.

Deposits. A public body may continue to require a good faith deposit, not to exceed one-half the total estimated fee, for request where the fee estimate exceeds \$50. However, requests for deposits are now required to faith fee calculation and a “non-binding” “best efforts estimate” of the time frame it will take the public body to provide the public records to the requestor once the deposit is received.

The Amendment now permits a public body to require a 100 percent deposit from an individual who has not paid a previous FOIA fee in full to the public body before the public body begins another search for that individual. This 100 percent deposit may only be required if (i) the prior final fee was not more than 105 percent of the estimated fee, (ii) the public records made available contained the information being sought in the prior request and are still in the public body’s possession, (iii) the public records were made available to the individual within the time frame originally estimated by the public body, (iv) 90 days have passed since written notifica-

tion that the records were available, (v) the individual is unable to show proof of prior payment, and (vi) the public body calculates a detailed itemization of the current request. The 100 percent deposit requirement is inapplicable if the individual is able to show proof of prior payment in full, the public body is subsequently paid in full, or 365 days have passed since the individual made the written request for which payment was not made.

All deposits required under FOIA are considered a fee and must be noted on the itemization form. Categorizing deposits as fees allows individuals certain appeal rights under FOIA with respect to the deposit.

Mandated Fee Reduction for Late Responses

The Amendment mandates that if public bodies fail to respond to requests in a timely manner as required by FOIA, they must reduce the charges for labor costs by 5 percent for each day the public body exceeded the time limit, up to a maximum of 50 percent reduction. This reduction must be noted in the fee itemization form. There are certain exceptions for requests which are not clearly identifiable as a FOIA request.

Information Available on the Public Body’s Website

If a written request is made for documents or information that is available on the public body’s website, the public body may not charge for those documents. Instead, if the public body’s FOIA Coordinator knows or has reason to know that all or a portion of the requested information is available on the website, he or she must notify the requesting person in the public body’s written response and must include, to the degree practicable, the specific webpage address. The fee itemization form must separate the information that is available on the website from that which is not and shall inform the requestor that there will be an additional charge to receive copies of public records that are available on its website. If the requestor then requests the information be provided, the public body may charge for providing the records and may use a fringe benefit multiplier that exceeds the standard 50 percent multiplier (not to exceed the actual fringe benefit cost).

Verbal Requests

While a requestor is required to provide a written request in order to receive a response from a public body regarding FOIA, the Amendment provides limited ability to make a verbal request. Under the Amendment, if a verbal request is made and the public body believes the information requested is available on the public body’s website, the public body employee is required, to the best of his or her knowledge, to inform the requestor about the website location of the requested information.

Requests Caught in Spam or Junk Folder

The Amendments provide new provisions for electronic requests delivered to the public body's spam or junk mail folder. Electronic requests are generally considered "received" one business day after the transmission is made. However, the Amendments provide that if a request is delivered to the public body's spam or junk mail folder, the request is not considered "received" until one day after the public body first becomes aware of the request. The public body is required to keep a log detailing when requests are delivered to the spam or junk mail folder and when the public body becomes aware of them. The public body's Procedures and Guidelines should require the FOIA coordinator to periodically check the spam and junk folders at reasonable intervals.

Appeals

Once the Amendments take effect, requestors will have two appeal options under FOIA. The first is for the appeal of a denial of a request for public records. The second is a new appeal process for an appeal of an excessive fee. FOIA did not previously provide a method for appealing an excessive fee and fee appeals therefore were generally brought as small claim or circuit court actions.

For both denial of records and excessive fee appeals, the Amendments require any civil action to be filed in the Circuit Court for the county in which the public record or an office of the public body is located, or if the claim is against a state public body, then in the Court of Claims. This is a welcomed change from the prior provisions which allowed requestors to file in jurisdictions where they lived or worked, and sometimes resulted in public bodies facing claims in courts geographically unrelated to their offices or the location of the public records.

The Amendments allow the public body to require (in its Procedures and Guidelines) that appeals for excessive fees must first be brought before the head of the public body, or in the absence of such a provision, directly in the Circuit Court.

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Fee appeals to the head of the public body must be responded to within 10 business days with a determination to either waive, reduce, or uphold the fee. In certain circumstances, the head of the public body may extend the response time by an additional 10 business days. Fee appeal determinations must be in writing and must indicate the specific basis that supports the fee amount, along with other certifications required by the Amendments. After a determination is made by the head of the public body, or if there is a failure to respond to the appeal, the requestor may file an action in the Circuit Court. If the court reduces the fee by 50 percent or more, it may award all or an appropriate portion of reasonable attorneys' fees, costs, and disbursements. If the court determines that the public body arbitrarily and capriciously violated FOIA by charging an excessive fee, the court shall order a civil fine of \$500, to be deposited in the general fund of the state treasury, and the court may also award actual or compensatory damages, and punitive damages of \$500 to the requestor. If the court finds the public body willfully and intentionally failed to comply with FOIA, or acted in bad faith, it must impose a civil fine in the amount of \$2,500-\$7,500 for each occurrence, such fine also being deposited in the general fund of the state treasury.

Visit mml.org for the League's One Pager *Plus Fact Sheet* with sample summary, policy and guidelines, and fee itemization form.



2015 LEAGUE EVENT


CHANGES TO THE **FREEDOM OF INFORMATION ACT**

The Public Act 563 of 2014 (HB 4001) makes significant changes to the Freedom of Information Act (FOIA). The changes concern fees charged by public bodies for public records, civil actions brought under the Act, and the receipt and denial of requests; and would add provisions allowing a person to appeal to a public body or bring a civil action if he or she believed that a fee was unreasonable. This is a must-attend webinar for all local government attorneys, clerks and other officials.

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Conclusion

The Amendment brings a wide range of changes to Michigan's FOIA. This article discussed the most significant changes to FOIA as a result of PA 563, but is not intended as a complete or comprehensive guide to all changes. Public bodies are encouraged to consult with their own legal counsel regarding the new requirements and policy implementations. Public bodies must adopt FOIA Procedures and Guidelines before July 1, 2015. 

Steven D. Mann is a principal at Miller, Canfield, Paddock and Stone, P.L.C. You may contact him at 313-496-7509 or mann@millercanfield.com.

Cassie J. Hare is an associate at Miller, Canfield, Paddock and Stone, P.L.C. You may contact her at 313-496-7909 or hare@millercanfield.com.

1. Labor costs for search, location, examination and redaction (fee categories 1 and 2) may not be charged unless the failure to charge a fee would result in unreasonably high costs to the public body because of the nature of the request in the particular instance, and the public body specifically identifies the nature of these unreasonably high costs. The Court of Appeals has interpreted this provision to require that the determination be made relative to the usual or typical costs incurred by the public body in responding to FOIA requests. The key factor in determining whether the costs are "unreasonably high" is the extent to which the particular request differs from the usual request. *Bloch v Davison Cmty Schools*, (Mich.App. Apr. 26, 2011), 2011 WL 1564645.



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