



michigan municipal league

Law Enforcement Action Forum Newsletter

October 2013 Edition



Volume 20, Issue 4

FOIA: Still Complicated & Potentially Costly!

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The Michigan Freedom of Information Act (FOIA or the Act), Public Act 442 of 1976; MCLA Sections 15.231 -15.246 was enacted in 1977 and has been a source of contention ever since. The purpose of FOIA is to allow citizens access to information about the decisions and priorities of their government. The FOIA supports full disclosure of certain public records, unless a statutory exemption allows an agency to deny disclosure. To facilitate the disclosure of these records, the Act outlines specific actions and timetables that public bodies must meet in order to stay in compliance. Failing to provide records that a citizen requests can prove costly in both time and court imposed sanctions and attorney fees.

This issue of the LEAF Newsletter will provide an overview of ways to avoid errors and give guidance on issues challenging the individual responsible for receiving and processing a public body's FOIA requests.

The Quagmire

Disagreements about the scope and application of FOIA arise due to the inherent conflict between the need to provide information to the public and the need to respect the privacy rights and personal information of citizen maintained by public bodies. Confidential information, such as dates of birth or home addresses, may be contained in otherwise public records raising privacy concerns. The issue

is further complicated because the exemptions of FOIA are not mandatory. A public body is then in the difficult position of conducting a record-by-record analysis to see whether the record is exempt and, if so, whether it can or should be disclosed.

A public body must know the Act and how to apply it appropriately. They need to be diligent in recognizing private or otherwise exempt material and ensuring compliance by redacting the information in a manner that provides information while protecting privacy. The following are examples of statutes mandating confidentiality and should be considered: Victim Rights, LEIN, Driver's Privacy Protection Act, Social Security Protection Act, HIPPA, Public and Mental Health Code and Genetic Nondiscrimination Information Act.

A discussion of the exemptions affecting law enforcement found in FOIA and the related court cases that influence a public body to exercise the discretion to invoke them can be found in the December 2002, issue of the LEAF Newsletter entitled *The Freedom of Information Act, Privacy Rights vs. Disclosure*. The July, 2010 issue, *The Michigan Court Of Appeals Brings The Freedom Of Information Act Into The 21st Century. Now What?* discusses the Michigan Court of Appeals ruling in *Howell Educ. Ass'n v Howell Bd. of Educ. (Mich. App. 2010)* concerning emails and FOIA. The MML

LEAF Newsletter archive of these and other Newsletters covering a variety of interesting topics can be found at:

www.MML.org\insurance\shared\risk_resources\leaf_newsletters.html

You Have To Know This, And Do It!

Audrey Forbush of Plunkett Cooney, LEAF's Legal Advisor, said aside from disagreements about the exemptions found in Section 13 of FOIA (MCL 15.243), the most common actions alleging FOIA violations involve failure by the public body's FOIA Coordinator to meet the Act's requirements for providing the basis for applying an exemption followed by giving notice and meeting time deadlines. She went on to say that, a public body must know their responsibilities under the Act and strive to meet them. She encourages the person responsible for administering the Act receives regular training in the law and any updates. She also felt a brief discussion of the relevant issues often cited as the source of dispute involving FOIA requests would be useful and offered the following:

Got To Have A FOIA Coordinator

Every public body needs to appoint a FOIA Coordinator, (MCL 15.236), who is trained in the law and understands what is necessary to meet the strict compliance requirements. Any person, except prisoners in state, county, or federal correctional facilities, is entitled to make written requests under FOIA. The request must describe the requested materials sufficiently to allow the public body to find the desired public record.

A Public Record

A Public record under MCL L §15.232(e) & (h) is currently defined as 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 records do include computerized data but not computer software. The Act separates public records into the following two classes: (i) Those that are exempt from disclosure under section 13, and, (ii) Those that are subject to disclosure under the Act. For a document to be a record, it must have been

stored or retained by the public body in the performance of an official act, which could include a private document depending on its use by the public body even if held on an officials or employees privately owned electronic device. Documents that are in the possession of a public body are not a record unless the use or retention of the document is in the performance of an official function. This is the ruling of the Michigan Court of Appeals in *Howell Educ. Ass'n v Howell Bd. of Educ.*, -- N.W.2d --, 2010 WL 290515 (Mich. App. 2010).

A Request and What to Do With It

When a public body receives a written request for records, no matter its form or whether it even mentions FOIA, (MCL 15.235) the request needs to be in the hands of the FOIA Coordinator or designee as soon as it is reasonably possible but no later than the day after receipt. The Coordinator must respond within five business days of the original request or, under the Act, the failure to respond is a denial of access to the record.

The Coordinator can notify the requester, in writing, that the municipal body, for specified reasons, is extending the deadline for an additional ten business days. The specific reasons can be to search for, collect, examine, or review a voluminous amount of separate and distinct public records, or to collect the records from numerous offices, facilities or establishments located apart from the Coordinator's office. This extends the deadline for response to fifteen days from the date the written request for the information was received. By the end of the extended period the requester must be notified, in writing, whether the request is granted, denied, granted in part or denied in part. Again, failure to respond by the deadlines is considered a denial.

Forbush recommends maintaining a FOIA log to track the progress of addressing the request to ensure compliance. The log should contain each step including all money transactions and any communications that may occur with the requester beyond the original request. All correspondence should be copied and kept with the FOIA request.

Request Is Clear and There Is A Record

Once the Coordinator determines if the request clearly describes a record, the record exists, and that it is not exempt and can be provided, the **Coordinator must notify the requester in writing that the public body will comply with the request.**

Prior to notifying the requester the record can be provided, the Coordinator must determine if the record contains information requiring redaction for privacy concerns or to exercise discretion under the exemptions of MCL 15.243, Sec 13. If the decision is to redact or deny, **the Coordinator must provide the requester with written documentation that the request is denied in part and describe the information that is separated, deleted or redacted,** usually using the language as described in Sec 13, Exemptions. The requester then can either view the redacted or non-exempt record, at facilities provided by the public body during normal designated business hours or ask for copies.

Because the public body is responsible for protecting the safety of the documents, it is a good practice to make a copy for inspection. This also allows for the redaction of privacy information or information that may fall under one of the exemptions. Consideration should be given to providing the records requested in an electronic form to reduce the time and expense necessary to produce them.

If the Coordinator cannot find a record that exists under the name given by the requester or by another name reasonably known to the public body, they must certify to the requester that the request is denied because the public record as described by the requester does not exist.

No Reports Necessary

A public body does not have to create a compilation, summary or report that does not already exist to comply with a FOIA request (MCL 15.233 (4)). The public body does, however, have to provide any records that contain the requested information in them unless they qualify for

exemption. The Coordinator can still redact any information that must be kept private. The Michigan Court of Appeals ruled in *Herald v City of Bay City*, 228 Mich App 268, 577 NW2d 696 (1998) that the public body may not avoid compliance because no single document contains the requested information. The public body has a duty to provide whatever documents do contain the information, and redact any information exempt as personal. If requested, the public body is required to provide a certified copy of a record.

Fees and a Receipt Detailing What Charges Are For

A public body may charge a fee for the information if not doing so would result in unreasonably high costs to the public body because of the nature of the request. The fee may not exceed the hourly wage of the lowest paid public body employee capable of retrieving the information plus the actual mailing costs and the actual incremental cost of duplication or publication. A fee may include the cost of the search, examination, review, and the separation and deletion of exempt from nonexempt information. MCL 15.234Sec 4 (3) requires that a public body shall establish and publish procedures and guidelines to implement these provisions. This means a public body must publish a fee schedule and provide it to the requester. The Coordinator must provide an estimate of the cost for fulfilling the request. The public body can require a deposit of one-half the fee if the cost is over \$50.00 before searching for documents. This must be accomplished within the time limits.

A public body may require that its fees be paid in full prior to actual delivery of the copies. However, a public body may not refuse to process a subsequent FOIA request because the requester failed to pay fees charged for a prior FOIA request. A public body may refuse to process a FOIA request if the requester fails to pay a good faith deposit properly requested by the public body. A person who is on governmental assistance or presents facts showing an inability to pay is exempt from paying the first twenty dollars of the fees. The Michigan Court of Appeals ruled in

Tallman v Cheboygan Area Schools, 183 Mich App 123; 454 NW2d 171 (1990) that MCL 15.234 specifies free photocopies, or a reduced charge, when the requester is on public assistance, or submits an affidavit showing an inability to pay, or where the request would benefit the general public.

Public bodies should always provide the requester with an itemized receipt of all charges.

Request Denied

Forbush emphasizes that once a request for records is made, a public body must either provide the record, certify the record does not exist, or deny the request in whole or in part. If the request is denied in any manner, including redaction or separation, **the public body must provide the requester with a written response stating the reason for the denial, including an explanation of the basis for any claimed exemption from disclosure.** MCL 15.235(4) (a); *Federated Publications, Inc. v. City of Lansing*, 467 Mich. 98, 102; 649 NW2d 383 (2002).

She cites Section 13 Exemptions -- (a) Invasion of a person's privacy, (b) Investigating records compiled for law enforcement purposes (i) through (vi), (o) Records of a law enforcement agency, codes and deployment and (t) Public Records of Law Enforcement (i) through (x) -- as commonly cited reasons for law enforcement to deny providing a record requested under FOIA.

Forbush points to *Evening News Association v City of Troy*, 417 Mich 481 (1983), reh den, as the case that set the guidelines that the public body must use to support using the Investigating Records exemption. In this case, the Michigan Supreme Court ruled that a public body seeking to claim the exemption must show how disclosure of the particular requested document would interfere with proceedings. To determine whether an agency has met its burden under the Freedom of Information Act, the following rules apply:

- a. The burden of proof is on the party claiming exemption from disclosure.

- b. The exemptions must be interpreted narrowly.
- c. The agency shall separate the exempt and nonexempt material and make the nonexempt material available for examination and copying.
- d. Detailed affidavits describing the material withheld must be supplied by the agency.
- e. The justification for withholding must not be conclusory, i.e., a repetition of the statutory language.
- f. The mere showing of a direct relationship between the records sought and an investigation is inadequate.

Forbush said that once FOIA Coordinators decide that the information requested falls within the definition of the exemption, they must provide a sufficient explanation to support their conclusion. Rhonda Stowers, an Associate in the Plunkett, Cooney Governmental Law Section explained that what is considered a "sufficient" explanation varies with the exemption claimed. Those exemptions requiring the public interest in non-disclosure to outweigh the benefits of disclosure (such as MCL 15.243(1) (c), (n) and (s)), require more of an explanation than those where there is no balancing test.

She went on to say that, at a minimum, public bodies should cite the particular statutory exemption itself, quote its language, and provide a brief explanation, if necessary and/or possible, as to how the record fits within that exemption. For example:

- "Police reports have been located and are attached. They have been redacted to protect the disclosure of information which would constitute a clearly unwarranted invasion of an individual's privacy (MCL 15.243(1) (a)) including but not limited to the addresses and telephone numbers and other information of a personal nature of individuals."

- "Information detailing medical procedures and treatment has also been redacted, as that information is exempted from disclosure by statute; namely, the Public Health Code and the Health Insurance Portability and Accountability Act. (MCL 15.243(1) (d))."
- "The investigation is not complete and the release of these documents would interfere with law enforcement proceedings because it would hamper the City's ability to obtain additional statements from witnesses who are already reluctant to be identified, would further chill those who give statements during an internal investigation from speaking frankly and could be detrimental to the cohesiveness of the police force and to the employees making statements. (MCL 15.243(1) (b) (i), (ii), (iii))."

Stowers added that the Court of Appeals has looked favorably on a citation of the exemption with a brief explanation. Keep in mind that FOIA is a pro-disclosure statute, and the burden is on the municipality to justify non-disclosure. A public body should always provide as much information as possible without compromising the exempt information.

Forbush cautioned that included with the explanation of denial or redaction notice, the Coordinator also must provide, in writing, **a full explanation of the requester's right to file a written appeal to the head of the public body or to seek judicial review.** Along with the appeal rights, the requester must be notified that he or she has the **right to receive attorneys' fees and damages if the court determines the public body did not comply with the law and orders disclosure of all or part of the public record.**

I'll Be Darned!

Though it may seem obvious, Forbush felt it is important to note that the Michigan Court of Appeals in *Lepp v Cheboygan Area Schools*, 190

Mich App 726 (1991) ruled that the privacy exemption of the Freedom of Information Act does not apply when the requested information pertains to the party making the request.

When Redacting Information

Before releasing documents, Forbush recommends inspecting each page that is provided to ensure they are correct and properly redacted. Before redacting information it is essential to ensure the document being redacted is not the original. A copy should be so marked to differentiate it from the original. Every redaction needs to be inspected to ensure the removal is effective and complete. If the redaction is electronic and is sent electronically, ensure the redaction cannot be restored electronically.

Advice From The Front

Forbush wants to ensure that every public body understands that the Michigan Freedom of Information Act is not optional. Compliance is mandatory and the penalty is not in the nominal fine but in the cost of defending actions if it is ignored and the payment of attorney fees if the public body is found not in compliance. The law is specific and the courts have ruled clearly that the public is entitled to full and complete information regarding the affairs of government and the official acts of those who represent them.

She clearly expressed that a public body needs to establish a FOIA policy, appoint a Coordinator and then work to follow requirements of the law and apply the discretion afforded to protect privacy and critical tactical and operational information that may cause damage or injury to a person or their property. According to Forbush, a FOIA Coordinator should recognize that if the process of complying with a request for records creates more questions than answers, it is essential to consult the public body's legal counsel, experienced with FOIA, to help assure compliance with the Act.

LEAF continues to develop policies and resource documents designed to help Law Enforcement Executives manage their risk exposure. Do not hesitate to contact the Michigan Municipal League's, Loss Control Services at 800-482-2726, for your risk reduction needs and suggestions.

While compliance to the loss prevention techniques suggested herein may reduce the likelihood of a claim, it will not eliminate all exposure to such claims. Further, as always, our readers are encouraged to consult with their attorneys for specific legal advice.

LAW ENFORCEMENT ACTION FORUM (LEAF) is a group of Michigan law enforcement executives convened for the purpose of assisting loss control with the development of law enforcement model policy and procedure language for the Manual of Law Enforcement Risk Reduction. Members of the LEAF Committee include chiefs, sheriffs, and public safety directors from agencies of all sizes from around the State.

The LEAF Committee meets several times yearly to exchange information and ideas relating to law enforcement issues and, specifically, to address risk reduction efforts that affect losses from employee accidents and incidents resulting from officers' participation in high-risk police activities.

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