

Volume 9, Issue 4

December 2002

Law Enforcement Action Forum NEWSLETTER



The Freedom of Information Act Privacy Rights vs. Disclosure

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INTRODUCTION

As the MML POOL and FUND Loss Control Consultant who coordinates the activities of the Law Enforcement Action Forum, I am responsible for responding to Member requests for information and for answering questions pertaining to Law Enforcement and Public Safety. Although recent requests have covered many topics, the Freedom of Information Act and privacy rights seem to be among the most requested. Therefore, this issue of the LEAF Newsletter will provide information on the Act and guidance on ensuring privacy rights. It is **important** to have a copy of **Public Act 442 of 1976; MCLA 15.243(13)(1)** available as you read this newsletter. You can obtain it on the WEB at www.michiganlegislature.org

FREEDOM OF INFORMATION ACT (FOIA)

FOIA (1976) is a good law the purpose of which is to require governmental disclosure of information concerning how it fulfills its statutory functions in doing what it does and how it does it. The FOIA provides citizens with broad rights to obtain public records limited only by the coverage of the statute and its exemptions (**Kent Co. Deputy Sheriff's Ass's v Kent Co Sheriff, 463 Mich 353, 362; 616 NW2nd 677 (2000)**).

Nothing in FOIA itself prevents a government from providing any information it is willing to disclose. However, several other acts -- the Crime Victim's Rights Act, the Family Educational Rights and Privacy Act of 1974, Employee Right to Know Act and, possibly, the Health Insurance Portability and Accountability Act (HIPAA) and good judgement restrict what information a governmental entity can or should disclose.

FOIA EXEMPTIONS and its administration to decide just what information is legitimate to release and what information is personal or private and FOIA in MCLA 15.243 (13) (1) lists a variety of allowable exemptions from disclosure. It then falls to the municipality serves no legitimate purpose if disclosed [See Section 13 (a),(b)(iii),(h),(m),(x)].

The Michigan Supreme Court in **Mager v Department of State Police, 460 Mich 134; 595 NW2d 142 (1999)** interpreted MCL 15.243(1)(a), the privacy exemption, to encompass two elements:

- 1) The information must be of a personal nature, and
- 2) The disclosure of the information must constitute a clearly unwarranted invasion of an individual's privacy.

Mager involved the release of personal information about individuals to whom the State Police had issued pistol safety certificates. Information is personal in nature if it reveals intimate or embarrassing details of an individual's private life in terms of the customs, mores, or ordinary views of the community. Examples of personal information are names, addresses, telephone numbers, dates of birth, social security numbers as well as medical and legal records that are of a personal or confidential nature or that privilege may protect. The Michigan Court of Appeals in **Midwestern Audit Services, Inc v Department of State Police, No218066, Unpublished** followed **Mager**. The Court said, "The core purpose of the FOIA is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct."

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WHAT DOES THIS MEAN?

Public files may contain personal data as a result of a citizen fulfilling his or her statutory or moral obligation to report information. The files may also contain personal information as a result of a legitimate police investigation or as a requirement of receiving police services. Therefore, municipalities must exercise care when releasing information that is not relevant to defining what the government is doing and how the government is doing it. Extra vigilance is necessary when school districts release confidential information to a law enforcement agency. School districts must comply with the Family Educational Rights and Privacy Act of 1974, (Title IV, Public Law 90-247, 20 U.S.C. 1232g). This Act restricts the release of student record information. If a Department is in receipt of this information, it must maintain confidentiality.

In addition, LEIN or Secretary of State information cannot be disclosed to a third party and must be excluded. Criminal sanctions may occur should a public entity release this information. Departments must be very careful with any information contained in documents that the department has not created. These documents are not the records of the department, and the department should not release them.

HIPAA (1996) is fairly recent legislation and, therefore, its full impact on the release of information is unknown at this time. However, HIPAA may also protect medical information that officers gather as they go about their duties and investigations. It is likely that the Act will have significant implications and requirements for agencies that the Act defines as Business Associates of a Covered Entity (For further information, go to www.hipaadvisory.com). The greatest impact will be on EMS agencies because they share information with hospitals, maintain their own records, release information, and may bill medical health providers by electronic means. HIPAA protects medical information and requires a court order, subpoena or a release of information from the patient before an agency can disclose it to another person. This does not include information that a law enforcement agency obtains as a result of a court action or order. However, it may include information the agency obtains that has no direct relevance or has no clearly identifiable link to the investigation. HIPAA will be discussed later in this Newsletter.

FOIA: REPORTS AND INVESTIGATIONS

Most departments understand the exemptions found in Section 13 of FOIA as they apply to active investigations. Once an investigation is complete, the FOIA may compel the department to release information. However, the department may redact (block out or remove) information that falls under the exemptions in (b). It is critical for departments to discuss what information it may release with the prosecuting attorney, including information that may affect the likelihood of a successful prosecution. Additionally, departments should scrutinize all reports and redact information that meets exemption (b)(v) "Disclose law enforcement investigative techniques or procedures". This is also where exemption (d), "Records or information specifically described and exempted from disclosure by statute", is relevant. Among the items that departments should redact are LEIN, privileged information, school, medical, and Victims' Rights information.

Municipalities should also consider what should happen when it, or one of its departments, receives a FOIA request for information that is necessary to an internal investigation. There have been several court cases that speak to the issue of the exemptions in Section 13(s). The subsection outlines the exemption to public records of a law enforcement agency. The Michigan Court of Appeals also addressed this issue in ***Sutton v City of Oak Park No.229640 (May 14, 2002)***. The Court ruled "internal investigation records of a law enforcement agency can fall within the meaning of "personnel records of a law enforcement" agency as used in the FOIA. First, the department must determine if the requested records are personnel records of a law enforcement agency. Then it must determine if the public interest in disclosure outweighs the public interest in nondisclosure *in the particular instance* [***Newark Morning Ledger co v Saginaw Co Sheriff, 204 Mich App 215, 223; 514 NW2nd 213 (1994)*** affirmed by the Michigan Supreme Court in ***Kent Co Deputy Sheriffs Ass'n v Kent CSheriff, 463 Mich 353, 365-367; 616 NW2d 677 (2000)***].

The Court felt the records in ***Sutton v City of Oak Park*** were exempt because Deputy Director Robert Bauer provided sufficient reasons for nondisclosure in his affidavit when he stated:

- "It is my experience that the process involved in conducting internal investigations is extremely

difficult since employees are reluctant to give statements about the conduct and actions of fellow employees.

- If such statements made during the course of internal investigations were made public, employees would likely refuse to give such statements, or would not be completely candid and forthcoming during such investigations.
- Further, if such statements were made public, the ability of the City's Public Safety Department to conduct such investigations would be destroyed or severely curtailed since information could not be obtained."

The Court felt the plaintiff did not show that the public interest in disclosure outweighed the public interest in nondisclosure.

The Court decides cases based on the proofs of the public interest *in the particular instance*. For example, the Michigan Court of Appeals, **Federated Publications v City of Lansing, No. 218331, Unpublished (November 14, 2000)**, ruled that the police department should release internal investigative files that the Lansing State Journal requested under the FOIA. The Court made this decision because several witnesses testified that "the public has an interest in disclosure of the files to restore the public's trust in the police department, and allow the public an opportunity to gain much-needed confidence in the police department's internal affairs investigatory process." The Plaintiff cited other high profile cases and maintained that community protests and the City's actions also demonstrated the erosion of public confidence in the police department and the need to release the records of the internal investigation for review. In this case, the Court ruled that the disclosure of the citizen complaints furthered the public interest in ensuring the efficacy, fairness and comprehensiveness of the police department's internal affairs investigations. "The public interest is not concerned so much with the infraction as how the department handles the investigations". The Court rejected the Defendant's position that the records were law enforcement personnel records and were, therefore, exempt and that disclosure would have a chilling effect on the ability of the police department to conduct internal investigations.

Both **Sutton v City of Oak Park** and **Federated Publications v City of Lansing** dealt with the same issue. However, the two totally different sets of facts resulted in different outcomes. If a department is in

the midst of a controversy and the community has lost confidence in its integrity or reliability, then the department should consider working with the FOIA requester on what information he or she may want to gather. The key to a successful resolution is evaluating the public interest in disclosure of the information. It may be justifiable to release information while still protecting the personal information of those involved in the investigation and any sensitive information contained in the reports.

If it becomes necessary to release information arising from an investigation, it is *essential* to:

- Redact any information that might endanger the life or physical safety of personnel, (b)(vi), or
- Provide secure and personal information about law enforcement officers, their relatives or informants (s)(i)(ii)(iii)(iv)(vii)(viii)(ix).

RELEASE OF POLICY, PROCEDURE, RULES, REGULATIONS AND PERSONNEL FILES

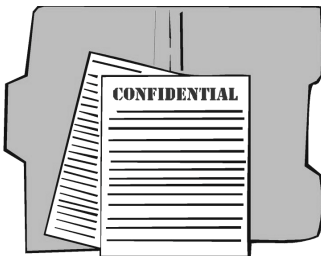
FOIA provides several exemptions from releasing department policies, procedures, rules, codes or tactics. Section (13)(n)(v)(vi) specifically addresses law enforcement and allows departments to exclude from disclosure any departmental codes, plans of deployment, operational instructions and the contents of staff manuals provided to law enforcement officers or agents that might impair a department's ability to protect public safety. In most circumstances, departments should not release this information. Once again, the public interest in disclosure must outweigh the public interest in nondisclosure *in the particular instance*. This is another situation in which the department, if embroiled in controversy or suffering from the erosion of community confidence, may need to negotiate with the person requesting the information.

Many attorneys try to use FOIA to get around discovery rules. Therefore, departments should not release policies, procedures, rules, regulations or department regulatory or employee advisory documents or information without first conferring with legal counsel. Many municipal attorneys have a tendency to release these documents and police personnel records thinking that releasing them will have no significant consequences. This information is specifically exempted under (13)(n)(v)(vi)(ix). Its non-release is further supported in **Bradley v Saranac Community Schools Bd of Education, 455 Mich 285, 565 NW2d 650 (Supreme Court 1997)**.

ACTION TO PREPARE FOR FOIA REQUESTS

- ④ Review FOIA and ensure that the municipality and its departments have a policy for handling the release of information and requests initiated under the FOIA.
- ④ Ask the municipality's legal counsel to review the FOIA policy in light of the **Mager** and **Midwestern Audit** cases, the Crime Victim's Rights Act, Bullard-Plawecki Employee Right to Know Act (PA 397, 1978) and HIPAA.
- ④ Provide training to employees who are responsible for receiving, processing, and then releasing information. Training should ensure that employees understand the municipality's philosophy toward and policy on FOIA requests as well the Act's provisions for exempting certain types of information from release.
- ④ Train all employees in the municipality's policy for releasing information (especially medical information) and identify to whom they should direct requests for information. This is very important for police, fire and EMS operations where a news release on an active incident is common.

HIPAA: WHAT IS THAT?



The purpose of the Health Insurance Portability and Accountability Act of 1996 is to establish the first comprehensive federal protection for the privacy of health information. The Act covers health providers, covered entities, health plans and clearinghouses that conduct certain financial and administrative transactions electronically. The final regulations cover all medical records and other individually identifiable health information that a covered entity holds or discloses in any form (electronically, on paper or orally). There are civil penalties and federal criminal sanctions associated with improper disclosure of personal health information by a covered entity or a business associate.

HIPAA affects law enforcement when a department obtains medical information either through an investigation or incidental to participation with a covered entity or business associate. An example of incidental participation would be an officer reading or overhearing medical information about a person while having coffee at the local hospital emergency room, fire department, or ambulance service. Medical information is confidential. If the officer decides the information is interesting enough to share with others and sends it on as an MDT message or repeats it in the squad room, at a local restaurant, or even at home with their significant other, the officer has violated HIPAA. Without reasonable safeguards to control incidental disclosures of protected health information, the potential exists for the officer, the department, and the source of the information to be subject to an Office of Civil Rights complaint and to be sued in civil court. (For a better understanding go to Public Law 104-191, HIPAA, (164.512)(f) concerning disclosure of protected health information to law enforcement by a covered entity. Full text is available at www.hhs.gov/ocr/hipaa/).

To demonstrate the department's efforts to comply with the intent of HIPAA to protect health information, administrators should issue a memo or order that:

- Reminds officers that they must treat any protected health information that the department or its officers obtain in any form as confidential.
- Remind officers that when they are seeking medical information, they must demonstrate that there is a clear line connecting the investigation and the need for the information.
- Instruct officers to confirm that there is a clear line from the investigation that demonstrates the need for the disclosure of information to that person before releasing any protected health information to any person or entity.
- Remind officers to provide only the minimum amount of information required when it is necessary to release protected health information.
- Makes a strong disciplinary statement warning employees not to gossip or indiscriminately discuss the protected health information of any person that the department obtains.

CONCLUSION

Perhaps one of the most important issues that law enforcement agencies must confront when managing the disclosure of any kind of information is gossip or inappropriate discussion that leads to the release of information or records of the department. Law enforcement executives must ensure that all employees understand that such seemingly harmless disclosure is forbidden. Most departments have a section in the Rules and Regulations that speaks to this issue. It is advisable that departments review their current rules to make sure they are sufficiently stringent in light of HIPAA, LEIN and other privacy rights regulations. Unfortunately officers can be their own worst enemies when it comes to providing information in inappropriate situations.

Recent changes in the law governing law enforcement's handling of information suggest how indiscretions, no matter how slight, have caused serious restrictions and consequences to be placed upon officers and departments. Administrators must revisit the way they regularly handle information to ensure that the department meets the letter of the law. The department or its members must not to be the source for the release of personal, protected or embarrassing information.

The LEAF Committee of the Michigan Municipal League Liability and Property Pool and Workers' Compensation Fund 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 Risk Management Services at 734-669-6344 or MML Loss Control Services at 800-482-2726, for your risk reduction needs and suggestions.

While compliance with the loss prevention techniques suggested herein might 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.

IN THESE TOUGH ECONOMIC TIMES MUNICIPALITIES MUST STILL TRAIN!

Nobody needs to tell a police administrator that money is tight and that management is looking to reduce costs and expenses. Nevertheless, police administrators must continue to provide employees with training required by law or court decision. Police administrators must make management aware of the municipality's duty to provide resources for training employees in the correct performance of their critical job functions. It is up to the police administrator to identify those areas and to make governmental management aware of what is necessary. Chapter 19 of the MML LEAF Risk Reduction Manual outlines several of the core areas that require training.

Administrators must ensure employees are afforded opportunities to learn, develop and become further educated. To do so, departments should take advantage of area training consortiums to reduce costs. However, employees need not be sitting in a classroom to get training. Departments can provide training, in part, by reviewing and discussing the department's rules, policies, procedures, philosophy, and practices as well as current case law applicable to employees' performance. For example, departments may provide briefings, videos, periodicals, magazines, bulletins, newsletters, books or lectures. Training may also include discussion of current events, incident debriefing and public policy issues and performing mechanical and motor skills important to the job.

Departments must be vigilant to provide training that is designed to keep officers physically safe but also provides them with a defensible position should complaints or litigation be filed. The best advice is to register the training with MCOLES and make sure it meets the review criteria. Departments should register their training with MCOLES by filling out the TC-34 application form. Defensive tactics type training must meet the requirements of being medically, legally and tactically sound and teach the Michigan Subject Control Continuum. Administrators should evaluate vendors who offer training to ensure their product meets this standard.

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