

Responding to Emily FOIA

There are a number of issues that need to be addressed by municipalities before responding to the FOIA request from the United Impact Group (aka Emily) or other groups seeking large amounts of election records.

MCL 15.233(1) provides that: “[A] person **has a right to** inspect, copy, or **receive copies** of the requested public record of the public body.”

Attorney General Opinion No. 7247, p. 134, May 13, 2010 (excerpt)

Voted ballots, which are not traceable to the individual voter, are public records subject to disclosure under the FOIA. The Secretary of State, in the role as the Chief Elections Officer, or the Director of Elections through the authority vested in that office, may exercise supervisory authority over local elections officials responding to a FOIA request for voted ballots by issuing directions for the review of the ballots in order to protect their physical integrity and the security of the voted ballots.

“You next ask whether a public body must only allow inspection and examination of the voted ballots, or **whether the public body must also provide copies of the voted ballots upon request and for a charge**. Under the FOIA, a person may ask to inspect, copy, or receive a copy of a public record that is subject to disclosure. MCL 15.233(1). **Thus, a person may ask to copy or receive copies** of voted ballots.”

Time to Respond

Given that this is a very large request, FOIA Coordinators should consider 2017 Mich. OAG No. 7300. A community should be guided by a public body’s “best efforts estimate” under subsection 4(8), MCL 15.234(8), as to the time it will take to fulfill a request for public records. The calculation contemplates the public body working diligently to fulfill its obligation to produce the records to the requestor. The estimate must be comparable to what a reasonable person in the same circumstances as the public body would provide for fulfilling a similar public records request. In addition, under subsection 4(8), MCL 15.234(8), the “best efforts estimate” must be made in “good faith,” that is, it must be made honestly and without the intention to defraud or delay the requestor.

In calculating its “best efforts estimate” for fulfilling a request for public records under MCL 15.234(8), a public body may take into consideration events or factors affecting its ability to produce requested records.

Fee Estimate

Prepare a fee estimate and ask for a deposit of half of the estimated fee—it stops the clock until the deposit is received by the city or township. The fee estimate should include all work that is required to ensure the security and proper handling of ballots in order to make copies.

Size of Ballot

One of the most significant technical issues is the physical size of the ballots. Many communities do not have the equipment to copy a document of that size. One method to respond would be to invite the requestor to the clerk’s office to inspect them. However, if the requestor wants an actual copy, the cost of taking the ballots to a copying facility or the cost of renting the larger copier should be included in the estimate for a deposit and the final invoice.

Privacy

On the privacy issue, it must be clear that **a person’s individual vote must not be disclosed**. The documents sought must be redacted so that this does not happen. *Michigan Federation of Teachers et al v University of Michigan*, 481 Mich 657 (2008)

might be of some guidance. In addition, the Michigan Attorney General's Office has suggested that *Magar v Michigan State Police*, 460 Mich 134 (1999), would be of assistance.

Record Retention

The 22-month retention period for ballots is up on September 28, 2018—22 months after the certification of the November 2016 election. If a FOIA request for the ballots has been received before that date, ballots may not be destroyed until after the request is fulfilled.

The Attorney General's Office suggested that the documents be preserved for at least 180 days after the request for the deposit has been sent. A sound policy is to retain the sought-after documents for at least a year pursuant to MCL 15.233(2).

Chain of Custody

Original voted ballots may not be turned over to the requestor (or anyone else) once the retention period has run out. The original ballots must be destroyed after the request has been fulfilled and the retention period has expired.

A third party may make copies after the retention period has elapsed, but local clerks must maintain control of the ballots—i.e., ballots may not be turned over to another offsite party. Municipal clerks are required to supervise the process to ensure no changes are made to the ballots during copying.

Legislative Changes as a Result of Emily FOIA requests

In late 2018, the Legislature made two significant changes to Michigan's FOIA in response to municipalities' challenges in responding to the widespread Emily request. The first prevents anonymous FOIA requests or requests from a person with only a first name and sparse contact information. The second prevents a municipality from being stuck waiting indefinitely for a response when it requests a deposit or final payment after it receives a deposit for a FOIA request; and, saves a municipality from storing records during that indefinite waiting period that could otherwise be destroyed under state law.

1) Name and Contact Information Changes

A requestor must include his/her complete name, address, and either a valid telephone number or email address; and, if a request is made by a person other than an individual, the complete name, address, and valid telephone number or email address of the person's agent (who is an individual). Addresses must comply with U.S. Postal Service addressing standards.

2) Deposit Changes/Notice Requirements

If a municipality requests a deposit and does not receive it within 45 days, and the requestor did not file an appeal of the amount, then the FOIA request is considered abandoned by the requestor. The municipality does not have to fulfill the request. In conjunction, the municipality must include a due date for when it must receive the deposit with the deposit letter. The deposit letter is considered received three days after it is sent, making the due date 48 days after the date the letter is sent.